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Congressional Grant of Authority - Federal Preemption - Inherent
Tribal Authority**

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TREATING TRIBES AS STATES UNDER THE FEDERAL CLEAN AIR ACT: CONGRESSIONAL GRANT OF AUTHORITY—FEDERAL PREEMPTION—INHERENT TRIBAL AUTHORITY

INTRODUCTION

When Congress amended the Clean Air Act (CAA or Act) in 1990, it added a new provision permitting the Environmental Protection Agency (EPA or Agency) to treat Indian tribes as States for purposes of regulating environmental air quality. The amendments broaden tribal regulatory authority over air resources within reservation boundaries and other areas under tribal jurisdiction.¹ Section 7601(d), in particular subsections (d)(1) and (d)(2), gives the EPA discretion to treat tribes as states for purposes of implementing the Act.² This section also requires the EPA to promulgate regulations providing for tribes “to assume responsibility for the development and implementation of CAA programs on lands within the exterior boundaries of their reservations or other areas within their jurisdiction.”³

Pursuant to the Administrative Procedure Act (APA), the EPA published a proposed rule implementing the amended section 7601(d) of the CAA on August 25, 1994.⁴ The Agency received a number of comments from tribal representatives, state agencies, and organizations representing utility companies. Commentary opposing the proposed rule challenged tribal authority to regulate environmental air quality through CAA programming. It also focused on the proposed territorial grant of jurisdiction suggested by the EPA’s language under the proposed rule. This Comment, however, contends that the tribal authority to regulate environmental air quality under the plan proposed by the EPA stems from two sources: (1) a valid federal delegation; and (2) inherent tribal authority to regulate conduct within territory under tribal jurisdiction.

Part I of this Comment briefly discusses the EPA’s policy statements and proposed implementation scheme of the CAA for tribal regulation

1. 42 U.S.C. § 7601(d) (1990).

2. *Id.* § 7601(d)(2), (3). The proposed rule provides a list of CAA provisions and implementing regulations that would not apply to tribes. See 59 Fed. Reg. 43,980 (1994). Included on the list are national ambient air quality standards (NAAQS) deadlines for submittal of plans or programs, mandatory sanctions for failing to submit CAA implementation plans, and program approval provisions that require a showing of criminal enforcement authority. Tribes would, however, be treated as States for failing to adequately implement or enforce approved tribal air programs. *Id.* at 43,959.

3. Indian tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956 (1994) (to be codified at 40 C.F.R. pts. 35, 49, 50, 51, 52, 70, 81) (proposed Aug. 25, 1994).

4. *Id.* The proposed rule has three primary provisions. The first outlines CAA provisions in which the EPA determined it is appropriate to treat tribes as states. The second provision establishes eligibility standards for tribes choosing to receive such treatment. The final provision extends existing federal financial assistance programs to qualified tribes involved in the implementation process. 59 Fed. Reg. at 43,961-43,968, 43,972-43,974.

of air resources within Indian country.⁵ Part II outlines the EPA's proposed framework of eligibility requirements for a tribe to be treated as a state in order to become qualified under a particular CAA program.⁶ Part III examines the EPA's interpretation of the CAA as a federal congressional delegation of regulatory authority to tribes.⁷ This part analyzes the relevant federal case law, statutes, legislative history, and other relevant CAA provisions that support the EPA's inference of a valid federal delegation of authority. Part IV discusses whether the proposed amendments act to preempt any subsequent attempts by states to regulate air resources within Indian country.⁸ Finally, Part V explores the role of inherent tribal authority over environmental regulatory programs and compares that authority with the EPA's proposed interpretation of tribal regulatory jurisdiction.⁹

I. EPA POLICY STATEMENTS AND THE PROPOSED IMPLEMENTATION SCHEME OF THE CLEAR AIR ACT BY TRIBES

The central premise of the EPA's Indian policy is to promote tribal self-determination.¹⁰ The EPA's expressed policy statement for reservation-based environmental programs takes affirmative steps to encourage and assist tribes to assume greater responsibility over such programs.¹¹ Pur-

5. See *infra* text accompanying notes 10-23.

The CAA uses the statutory definition for Indian country, which states that Indian country encompasses:

[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and . . . all Indian allotments, the Indian titles to which have not been extinguished.

18 U.S.C. § 1151 (1988).

6. See *infra* text accompanying notes 24-84.

7. See *infra* text accompanying notes 85-117.

8. See *infra* text accompanying notes 118-154.

9. See *infra* text accompanying notes 155-176.

10. See U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA MEMORANDUM ON FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS 1 (Nov. 10, 1991) [hereinafter 1991 EPA MEMORANDUM] (formalizing the EPA's "role in strengthening tribal governments' management of environmental programs on reservations"). As a principle, self-determination recognizes the paramount role tribal governments serve in setting the future for their own communal affairs. *Id.* See also Reagan Administration Indian Policy Initiatives, 19 WEEKLY COMP. PRES. DOC. 98, 99 (Jan. 24, 1983).

11. U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 1 (Nov. 8, 1984) [hereinafter 1984 EPA POLICY STATEMENT]. The 1984 EPA POLICY STATEMENT sets forth nine (9) principles. First, the Agency stands ready to work directly with tribes. Second, the EPA recognizes tribes as the leading environmental policy makers within Indian Country. Third, the EPA will help tribes assume implementation responsibilities and develop programs. Fourth, the EPA will remove legal and procedural barriers and constraints. Fifth, the Agency will assure consideration of tribal concerns and interests. Sixth, tribal and state cooperative agreements are encouraged by the Agency. Seventh, the EPA will work with other agencies to assist tribes in assuming responsibility for environmental programs. Eighth, the Agency will work with tribal governments to bring tribal enterprises into compliance; non-tribal enterprises not in compliance will become subject to EPA enforcement actions. Finally, the EPA will incorporate these policy principles into planning and management activities. *Id.*

suant to this statement, the EPA recognizes tribal governments as sovereign nations and has expressed its intent to work directly with tribal governments as the sole authorities over reservation affairs, not merely political subdivisions of the states.¹² The EPA's policy recognizes tribal sovereign authority, responsibility, and accountability over the environments of their communities and lands. The Agency's proposed interpretation of the CAA, as a valid delegation of congressional authority, furthers this explicit policy.

The EPA treats tribes as states for most environmental statutes both when expressly provided for by statute¹³ and where a fair interpretation of otherwise silent laws "permit[s] it to delegate program authority to native governments."¹⁴ Even without a finding of express congressional delegation, the EPA may interpret silent laws as a delegation when viewed in light of the Agency's stated policies.¹⁵

In keeping with the express policy statement promoting tribal self-government, the EPA's proposed implementation process of the CAA contains provisions that treat tribes as states. As will be shown throughout this Comment, this treatment is the center of controversy among those opposing the 1994 Amendments.

Currently, the CAA is implemented in regards to States governments in one of two basic ways. The first method occurs "through a cooperative partnership between the States and the EPA."¹⁶ Under this method, the EPA sets the national standards and requirements, and the States assume the responsibility for the implementation process.¹⁷ In order to implement a program, a state must first demonstrate that it has adequate legal authority and resources to meet the minimum federal requirements.¹⁸ If the state can demonstrate this, the EPA delegates to the state the authority to implement and enforce the Act's provisions.¹⁹ However, the EPA reserves the right to monitor enforcement and compliance, and the right to bring an enforcement action against suspected violators.²⁰

Under the second method of implementation, the EPA assumes primary responsibility for both setting the national standards and for program

12. *Id.* at 2. See also U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA MEMORANDUM ON EPA INDIAN POLICY (Mar. 14, 1994) (reaffirming EPA's 1984 formal policy statement on Indian tribes).

13. Treatment as State (TAS) provisions are statutorily proscribed in the Clean Air Act (CAA), 42 U.S.C. § 7601(d)(2)(1) (1990); the Clean Water Act (CWA), 33 U.S.C. § 1377(e) (1988), 40 C.F.R. § 131.8 (1994); and the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-11(b)(1) (1986). The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6986 (1994) is the only remaining major federal environmental statute that does not contain a TAS or similar provision.

14. Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 638 (1989) (discussing the delegation of environmental program authority to tribal governments).

15. See *id.* at 638 (citing *Nance v. Environmental Protection Agency*, 645 F.2d 701, 714 (9th Cir. 1981) (the *Nance* court found that the EPA's interpretation was permissible even though there was no express language in the CWA permitting the EPA's actions)).

16. 59 Fed. Reg. at 43,957.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

implementation.²¹ This method is reserved for programs that require a high degree of uniformity in the implementation phase, such as a program to phase out substances which deplete stratospheric ozone.²²

The EPA's proposal permits tribes to assume responsibility for developing and implementing the CAA mandates pursuant to the first method of implementation described above. The debate among public commentators centers on two separate issues: first, whether the CAA or relevant case law can be interpreted as a federal congressional grant of authority to tribes; second, the "extent and nature of tribal jurisdiction over environmental activities on [and off] reservations."²³ This debate asks the question, "If the CAA is a valid grant of congressional authority, is it of the nature proposed by the EPA?"

This Comment suggests that the statutory language of the CAA, case law, and federal Indian policy all support tribes' authority to implement the CAA, as do states, and the EPA's interpretation of the extent of tribal regulatory authority. Nonetheless, the EPA's proposed interpretation of the jurisdictional grant under the treatment as a state process seems to open itself up to potential challenges by those who seek to preserve existing state authority over air resources outside of reservation boundaries but within the inherent jurisdiction of a tribe.

II. TRIBAL ELIGIBILITY FOR TREATMENT AS A STATE UNDER THE CLEAN AIR ACT

The CAA, as originally enacted, did not provide for tribally implemented clean air programs. The 1990 CAA amendments first established the tribes as states provisions.²⁴ The CAA's 1994 amendments propose to expand the jurisdictional base of tribal regulation over air resources to lands outside reservation boundaries but still within the tribes' jurisdiction.²⁵ Under the 1990 CAA amendments, to be eligible for treatment as a state, a tribe must first show that it is federally recognized pursuant to section 7602(r),²⁶ and then must meet the three eligibility criteria set

21. *Id.*

22. *Id.* For additional examples of programs administered under this process, see 42 U.S.C. §§ 7671-7671q (1990). Programs under this method will be largely unaffected by this proposed rule.

23. David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVTL. L. REP. 10,579, 10,585 (1993) (reviewing environmental laws and regulations, and EPA policies on the treatment of tribes as states for purposes of the Safe Drinking Water Act, the Clean Water Act, and the Clean Air Act).

24. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107(d), 104 Stat. 2399, 2464-65 (codified as amended at 42 U.S.C. § 7601(d) (1990)).

25. 42 U.S.C. § 7601(d)(2)(B).

26. Section 7602(r) defines the word "tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 42 U.S.C. § 7602(r).

Implementing regulations for the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) also require federal recognition as part of their TAS requirements. See 33 U.S.C. § 1377(h)(2) (1988) (accepting the Secretary of the Interior's recognition of a tribe and requiring documentation that the tribe is recognized by the Secretary); 42 U.S.C. § 300f(14) (1986) (defining a "tribe" as an entity with a federally recognized governing body).

forth in section 7601(d)(2).²⁷ Federal recognition and the three criteria combined are commonly known as the "treatment-as-a-state" process. The three eligibility criteria set forth in section 7601(d)(2) require that a tribe's governing body, (1) carry out substantial governmental duties and powers,²⁸ (2) have authority over the exterior boundaries of the reservation or other areas within tribal jurisdiction,²⁹ and (3) be capable of implementing the CAA requirements and applicable regulations.³⁰

The 1990 amendments streamline the treatment as a state eligibility process by permitting a tribe to undergo eligibility review at the same time that the tribe seeks approval for a particular program.³¹ Moreover, the proposed eligibility process would eliminate the need for duplicating TAS applications under several federal environmental programs, including the SDWA and CWA.³² Thus, tribes need only make one showing of federal recognition under the proposed rule.³³ This Part will now detail the three eligibility criteria required under the proposed section 7601(d)(2). The main source of contention for opponents to the proposed rule focuses on the EPA's proposed interpretation of tribal regulatory jurisdiction.

A. Tribal Demonstration of Substantial Governmental Duties and Powers

The first criteria under section 7601(d) requires a tribe to demonstrate that it "has a governing body carrying out substantial governmental duties and powers."³⁴ If a tribe has successfully shown under the Clean Water Act (CWA) or the Safe Drinking Water Act (SDWA) that it meets the governmental duties and powers requirement, it need not make the showing again under the CAA.³⁵ A tribe will still need to show, on a case-by-case basis, however, that it is capable of carrying out the program's

27. See 42 U.S.C. § 7601(d)(2). In general, the criteria are similar to those set forth in the CWA, 33 U.S.C. § 1377(e)(1) (1988), and the SDWA, 42 U.S.C. § 300j-11(b)(1) (1986).

28. 42 U.S.C. § 7601(d)(2)(A).

29. 42 U.S.C. § 7601(d)(2)(B).

30. 42 U.S.C. § 7601(d)(2)(C).

31. See 59 Fed. Reg. at 43,962.

32. The tribes that submitted comments to the proposed rule greatly support the proposed eligibility process as it will eliminate many of the administrative burdens of duplicative showings. See e.g., Letter from Kevin Gover, on behalf of the Campo EPA, the Pueblo of Pojaque, the Shoshone Tribe, and Pueblo of Sandia, to the EPA 3 (Nov. 22, 1994) (on file with the author) [hereinafter Campo Letter] (supporting the streamline of the CAA's TAS process); Letter from Nez Perce Tribal Executive Committee to EPA (Nov. 21, 1994) (on file with the author) [hereinafter Nez Perce Letter] (providing "wholehearted support for . . . the 'streamlined' process for eligibility."); Letter from St. Regis Mohawk Tribe to EPA (Nov. 21, 1994) (on file with the author) [hereinafter St. Regis Letter] (expressing support for EPA's streamlined procedures).

33. 59 Fed. Reg. at 43,962.

34. 42 U.S.C. § 7601(d)(2)(A).

35. 59 Fed. Reg. at 43,962. An additional requirement under the SDWA is that tribes must certify this criterion through a narrative statement "(1) [d]escribing the form of tribal government and the types of essential governmental functions currently performed, and (2) identifying the legal authorities for performing those functions." 59 Fed. Reg. 13,816 (1994) (to be codified at 40 C.F.R. pts. 35, 130).

functions,³⁶ and that it has the requisite regulatory authority.³⁷ The EPA's goal is to minimize the burden placed on tribes in making this initial showing of governmental power, and to reduce the time and expense tribes incur under duplicative submissions.³⁸

A tribe that has not made an initial demonstration of governmental power under section 7601(d)(2)(A) will meet this requirement if it is "currently performing governmental functions to promote the public health, safety, and welfare of its population within a defined area."³⁹ Examples of these functions include levying taxes, acquiring land by exercising the power of eminent domain, and providing and exercising police powers.⁴⁰ Finally, to satisfy this requirement, a tribe must submit a narrative statement "which describes: (1) the form of Tribal government, (2) the types of essential governmental functions currently performed, . . . and (3) the legal authorities for performing these functions."⁴¹

B. Tribal Regulatory Jurisdiction—The "Extent and Nature" of the Delegation of Authority to Tribes Over All Areas within the Tribe's Jurisdiction

1. Section 7601(d)(2)(B) delegates regulatory authority to tribes over lands outside of formal reservation boundaries.

Section 7601(d)(2)(B) requires that "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."⁴² Under this requirement, the tribe "must identify, with clarity and precision, the exterior boundaries of the reservation."⁴³ A tribe's submission must contain enough information to demonstrate to the EPA the location and limits of its reservation. Tribes will satisfy this requirement by including a map and a legal description of the area with the submission.⁴⁴

Unlike other major federal environmental programs, the EPA proposes an extended interpretation for the regulatory jurisdiction criterion for tribes under the CAA. This extended interpretation is the heart of controversy. Regulations interpret the amended statute as an express congressional delegation of authority to tribes to regulate air resources both

36. 42 U.S.C. § 7601(d)(2)(C). This appears to deviate from the Agency's requirements under the CWA process where tribes are required to make a showing of both regulatory jurisdiction and capability for each new CWA program.

37. 42 U.S.C. § 7601(d)(2)(B).

38. See Letter from Michael P. O'Connell, on behalf of the Puyallup Tribe, to EPA 9 (Nov. 18, 1994) (on file with the author) [hereinafter Puyallup Letter].

39. 59 Fed. Reg. at 43,962. The United States Supreme Court used similar language in *Montana v. United States*, 450 U.S. 544 (1980), to define the limits of retained inherent tribal authority over the conduct of non-Indians on reservation fee lands. *Id.* at 566.

40. See 59 Fed. Reg. at 43,962.

41. *Id.*

42. 42 U.S.C. § 7601(d)(2)(B) (1990).

43. 59 Fed. Reg. at 43,962.

44. *Id.* Similar requirements are found under the CWA, 33 U.S.C. § 1377, and the SDWA, 42 U.S.C. § 300j, and raised no real issue among the public comments to the proposed rule.

inside Indian country and outside technical reservation boundaries, assuming the tribe can make a particularized finding of authority over the off-reservation source.⁴⁵ The EPA proposes to determine the extent of the term "reservation" for each tribe on a case-by-case basis, taking into consideration whether the regulated conduct has a direct effect on the tribe's health or welfare substantial enough to support tribal jurisdiction over non-Indians.⁴⁶ In addition, "[t]he EPA will be guided by relevant case law in interpreting the scope of 'reservation' under the CAA."⁴⁷

The EPA relies on *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*⁴⁸ to include in its interpretation trust lands validly set aside for use by a tribe, but not formally labeled a reservation.⁴⁹ *Citizen Band Potawatomi* questioned whether a state may levy a tax over cigarette sales occurring on tribal trust lands.⁵⁰ The Oklahoma Tax Commission argued that since the sales did not occur on a formal reservation, the exercise of state taxing authority was valid.⁵¹ The Court rejected this argument stating that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather we ask whether the area has been 'validly set apart for the use of the Indians . . .'"⁵²

Thus, *Citizen Band Potawatomi* supports the EPA's interpretation of tribal regulatory authority over air resources located on trust lands outside *formal reservation boundaries*.⁵³ Opponents of the proposed rule attempt to limit *Citizen Band Potawatomi* as applying to only Oklahoma tribes. Nowhere in the opinion, however, does the Court purport to limit its holding to Oklahoma tribes.

2. Commentary opposing tribal regulation of areas outside formal reservation boundaries.

A central reason for the EPA's reliance on *Citizen Band Potawatomi* is that the Supreme Court's determination of Indian country is much broader than a tribe's original reservation boundaries, as opponents of the proposed rule claim. The EPA, consistent with existing legal precedent,

45. See 59 Fed. Reg. at 43,958 n.2, 43,960, 43,962-43,963.

46. 59 Fed. Reg. 43,958 (citing *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)).

47. 59 Fed. Reg. at 43,960.

48. 498 U.S. 505 (1991).

49. See 59 Fed. Reg. at 43,960.

50. *Citizen Band Potawatomi*, 498 U.S. at 505.

51. *Id.* at 511.

52. *Id.* (quoting *United States v. John*, 437 U.S. 634, 648-49 (1979)).

53. In its comments to the proposed rule, the State of Oklahoma took great issue with the EPA's interpretation of a "reservation." Letter from Department of Env'tl. Quality, State of Oklahoma, to EPA (Nov. 23, 1994) (on file with the author) [hereinafter *Oklahoma Letter*]. The State claims that the EPA's interpretation of the term "reservation," if taken literally, would deem almost the entire State of Oklahoma an Indian reservation, and thus, would subject the entire State to tribal regulation under the CAA. *Id.* at 2. Oklahoma suggests the EPA "should limit the term to include ONLY tribal trust lands." *Id.*

has stated the *status* and *use* of the land will determine if it is to be included within the interpretation of the term reservation.⁵⁴

Opponents nonetheless contend that formal reservation boundaries should be the exclusive basis for defining the geographical area of a tribe's regulatory authority.⁵⁵ They reason that: (1) the plain language of section 7601(d)(2) contravenes existing language of the CAA; (2) the proposed amendments open the door to potential jurisdictional conflicts; (3) the amendments create uncertainty for the regulated community; and (4) the amendments impermissibly extend greater authority to tribes than states with regard to interstate pollution.⁵⁶ The focus of these concerns is the prospect of a tribal government regulating non-Indian businesses and individuals located outside the external geographic boundaries of reservations.⁵⁷ Opponents fear that these businesses and individuals may not be afforded the right to participate in tribal rulemaking and legislative processes.⁵⁸ To remedy this perceived inequity, commentators suggest the EPA should require tribes to submit a description of tribal administrative procedures that will be afforded to all reservation residents, as part of the Agency's review process.⁵⁹ These four concerns will be discussed immediately below.

First, the purported contravening language is found in 42 U.S.C. § 7410(o) which addresses Tribal Implementation Plans (TIPs). Section 7410(o) provides that TIPs "shall become applicable to all areas . . . located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation."⁶⁰ Opponents claim that this language prohibits the amended grant of authority to tribes over off-reservation areas described in section 7601(d)(2)(B). The EPA, however, believes that the two pro-

54. See Treatment of tribes as states for purposes of §§ 308, 309, 401, 402, and 405 of the CWA, 58 Fed. Reg. 67,966, 67,976 (1993) (to be codified at 40 C.F.R. pts. 122, 123, 124, and 501).

55. Letter from El Paso Natural Gas Co. to EPA 1 (Nov. 23, 1994) (on file with author).

56. See Letter from Richard Hayslip, Salt River Project Manager, to EPA 4 (Nov. 21, 1994) (on file with author) [hereinafter SRP Letter]. See also Letter from Susan M. McMichael, Asst. General Counsel, New Mexico Environment Department to EPA 4 (Nov. 22, 1994) (on file with author) [hereinafter New Mexico Letter]; Letter from the Utility Air Regulatory Group to EPA (Nov. 23, 1994) (on file with author) [hereinafter UARG Letter]. UARG is a voluntary, non-profit organization of electric utilities and various associations who represent the utility industry.

57. There is also concern for non-Indian businesses and individuals within the exterior boundaries of a reservation. The Environment Department for the State of New Mexico expressed reservation about recognizing tribal jurisdiction over "non-Indian owned lands . . . in the form of villages and municipalities which may be surrounded by the exterior boundaries of a Pueblo grant." New Mexico Letter, *supra* note 56, at 2 (emphasis added).

58. See SRP Letter, *supra* note 56, at 3.

59. There are some distinct advantages to tribes that decide to develop a mechanism for public participation throughout the process. See Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 78-79 (1994) ("[T]o the extent that tribes involve non-Indians in the process of . . . the exercise of tribal regulatory authority over nonmembers, the courts may be more inclined to sustain such exercises of tribal authority. To the extent that nonmembers feel that tribal regulatory authority programs if they so desire, many such cases may be resolved without recourse to the federal courts.').

60. 42 U.S.C. § 7410(o) (emphasis added).

visions may be fairly interpreted as supporting a grant of regulatory authority over all resources within the tribe's jurisdiction without nullifying either statutory provision.⁶¹

Second, opponents claim that the proposed amendments open the door to potential jurisdictional conflicts. The non-Indian petitioners in *Nance v. Environmental Protection Agency*⁶² claimed that if the court construed the CAA to delegate redesignation authority to tribes, both the Act and its regulations would comprise an unconstitutional delegation of authority in violation of due process.⁶³ The court stated that "[t]his argument is seriously flawed. . . . [I]t hinges on the view that while Indian tribes possess attributes of sovereignty within the reservation, they are mere 'private voluntary organizations' with respect to any effects outside the reservation."⁶⁴ To the contrary, tribes possess inherent "attributes of sovereignty over both their members and their territory."⁶⁵

While the EPA recognizes that jurisdictional disputes may raise a difficult problem, it nonetheless remains firm that such disputes will not overcome the Agency's ultimate responsibility of protecting the environment.⁶⁶ As such, the Agency will leave issues of tribal jurisdiction over areas outside of original reservation boundaries within the tribe's jurisdiction to a case-by-case determination.⁶⁷

Third, opponents contend that the proposed rules create uncertainty for the regulated community. However, the uncertainty of the regulated community will in no way be eliminated by a narrow interpretation of jurisdiction limited to geographic boundaries. The exercise of tribal sovereignty, like the exercise of state sovereignty, as it relates to the regulation of air quality will inevitably have extraterritorial effects on neighboring communities.⁶⁸ The CAA currently has three provisions which specifically address interstate air resource activities and should provide one mechanism for addressing uncertainty in the regulated community.⁶⁹ The proposed jurisdictional grant of authority to tribes in no way alters the pre-existing schemes, but, in fact, serves to support those provisions.

Finally, opponents suggest the proposed rule extends greater authority to tribes than states with regard to interstate pollution where states have

61. See 59 Fed. Reg. at 43,959.

62. 645 F.2d 701 (9th Cir.), cert. denied sub. nom., *Crow Tribe v. E.P.A.*, 454 U.S. 1081 (1981).

63. *Id.* at 714 ("namely that such a delegation gives Indian tribes authority to affect land use by non-Indians outside the reservation area.").

64. *Id.* *Nance* addressed a constitutional challenge to the delegation of redesignation authority to Indian tribes. *Id.*

65. *Id.* (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

66. See *id.* at 715.

67. See 59 Fed. Reg. 43,960; 58 Fed. Reg. at 67,976 (1993).

68. See generally *Nance*, 645 F.2d at 715.

69. See 42 U.S.C. §§ 7410, 7426, and 7474 (1990). The proposed rule specifically states that the provisions of 42 U.S.C. § 7426 will "apply to tribes in the same fashion that they apply to states so that a tribe or state may take such action to remedy pollution [from an extraterritorial source]." 59 Fed. Reg. at 43,977.

no regulatory authority beyond their geographic borders.⁷⁰ The CAA contains interstate air pollution provisions that address air pollution coming from other jurisdictions.⁷¹ In addition, the EPA proposes to apply with equal force the CAA protection against interstate pollutant transport.⁷² This concern leads directly into future jurisdictional disputes the EPA will be called upon to settle. The proposed rule raises the potential for increased litigation over either asserted or existing tribal jurisdictional boundaries in an effort to assert state regulatory authority. Opponents expressed great concern with the fifteen day comment period suggested under the proposed rule. States would have fifteen days to comment on a tribe's assertion of jurisdiction over air resources located both off and on the reservation. Opponents suggest fifteen days is an insufficient amount of time in which a state may dispute the tribe's jurisdiction, because the evaluation of reservation boundaries, a complex and potentially lengthy issue, will be likely to involve much more than glancing at a map or legal description.⁷³ The fifteen day comment period applies as a single boundary decision; thus the EPA could rely on the initial boundary determination in subsequent considerations for tribal administration of other EPA programs. The proposed rule has a fifteen day extension provision where a tribe includes detailed jurisdictional statements in its application.

Opponents have a strong concern regarding the EPA's proposed scope of authority in determining a tribe's jurisdictional limits. One commentator noted that "[d]etermining the geographic scope of an Indian Reservation or an Indian Tribe's jurisdiction is beyond any authority granted to EPA under the Act"⁷⁴ Resolution of this issue would likely turn on the EPA's reliance on the expertise of the Department of the Interior and following established principles of federal Indian law.

While existing legal precedent or the EPA itself addresses many of these issues, some will require clarification. The tribal regulatory capability requirement, albeit less controversial, also raised some general criticisms from the impacted communities. This requirement also presents some real opportunities for tribes and states alike to move forward in the pursuit of "[s]ound environmental planning and management [through] the cooperation and mutual consideration of [tribal and state governments]."⁷⁵

70. 42 U.S.C. § 7407(a) of the CAA provides that "[e]ach State shall have the primary responsibility for assuring air quality *within the entire geographic area comprising such State*" *Id.* (emphasis added).

71. See 42 U.S.C. § 7410.

72. See 59 Fed. Reg. at 43,964.

73. See New Mexico Letter, *supra* note 56, at 6 (describing the comment period as "unduly burdensome" and recommending a 60 day period); Oklahoma Letter, *supra* note 53, cmt. 7 (stating the 15 day comment period is "totally inadequate" to cover disputes over off-reservation areas); Letter from Mary A. Throne, Wyoming Department of Environmental Quality and Wyoming Assistant Attorney General, to EPA 2 (Nov. 23, 1994) (on file with author) [hereinafter Wyoming Letter].

74. SRP Letter, *supra* note 56, at 2.

75. 1991 EPA MEMORANDUM, *supra* note 10, at 12.

C. Tribal Regulatory Capability Requirement

Under section 7601(d)(2)(C), an EPA regional administrator must determine whether a tribe is capable of carrying out the functions to be exercised in a manner consistent with the terms and purpose of the Act.⁷⁶ Currently, tribes must undertake a program-specific inquiry for each program. If a tribe presently lacks the necessary administrative or technical skills to regulate a program, it may present to the EPA a plan showing how it will acquire the needed skills.⁷⁷ In either instance, the tribe "must submit a fully effective program that meets all the applicable statutory and regulatory requirements associated with the program."⁷⁸

The proposed rule sets forth the details for the capability requirement and the factors to which the EPA may look when evaluating a tribe's demonstration of capability.⁷⁹ Among the factors the EPA may consider, and of particular importance for this discussion, is the relationship between regulated entities and the tribal administrative agency that will be charged with the program.⁸⁰ Other facts the EPA will consider are the relationship between the existing or proposed tribal agency responsible for implementation and the potentially regulated tribal entities, and tribal government mechanisms for carrying out executive, legislative, and judicial functions.⁸¹ These three factors raise a host of issues regarding tribal authority over nonmembers, and tribal authority over tribally-run enterprises. With regard to the latter, the EPA warns of potential conflicts of interest, and recommends that tribes create independent organizations to regulate tribal entities subject to CAA requirements.⁸² Tribes should be able to use any existing mechanisms that further this goal, such as tribal consortia⁸³ and the modular approach,⁸⁴ but may also want to consider establishing an independent agency or department to administer the Act's programs.

Much of the commentary opposing the proposed rule challenges the authority of tribes to regulate activities impacting environmental air quality

76. See 42 U.S.C. § 7601(d)(2)(C) (1990).

77. The proposed rule clearly states that a tribe will not fail to demonstrate capability due to a lack of experience as it creates a "dilemma of being denied the opportunity to develop the requisite capability because [it] lack[s] such capability." 59 Fed. Reg. at 43,963.

78. *Id.* at 43,963-43,964.

79. See *id.* at 43,963.

80. See *id.*

81. *Id.* The EPA proposes three other specific factors to be used in the determination: (1) the tribe's previous management experience; (2) existing environmental/public health programs currently administered by the tribe; and (3) technical/administrative capabilities of staff to administer/manage the program. *Id.*

82. 59 Fed. Reg. at 43,963-43,964.

83. Tribes may form "tribal consortia" under the proposed rule. The collective technical expertise and resources of the consortium may be used by the individual tribe to meet the capability requirement. 59 Fed. Reg. at 43,964. The collective expertise and resources may only be used to indicate that a tribe is "reasonably expected" to be capable of carrying out the regulatory functions whereas the individual tribe remains responsible should the consortium efforts fail. *Id.* The tribal commentators to the proposed rule spoke favorably of this provision. See St. Regis Letter, *supra* note 32, at 16.

84. See 59 Fed. Reg. at 43,968-43,969. See also Campo Letter, *supra* note 32, at 5; Puyallup Letter, *supra* note 38, at 9.

on reservations or other areas within the tribe's jurisdiction under TAS provisions. Part IV will now address the sources of and challenges to tribal authority to regulate air quality through the CAA.

III. THE CAA AS A FEDERAL DELEGATION OF AUTHORITY TO TRIBES

The implementation of federal environmental statutes' TAS provisions is based on tribal jurisdiction. Congress is the source of power for the CAA. Under existing Supreme Court precedent, Congress has broad authority to delegate legislative powers to Indian tribes as governing entities with sovereign authority over their lands and members.⁸⁵ If a tribe plans to regulate the activities of nonmembers on non-Indian fee lands, even if it does not meet the test of *Montana v. United States*,⁸⁶ it may still obtain the authority through congressional delegation. The following discussion centers on the EPA's finding of a direct grant of federal congressional authority within the exterior reservation boundaries (the "territorial approach") for all air resources covered under the CAA. The center of controversy among opponents to the proposed rule is the EPA's extension of civil regulatory authority over air resources located outside of original reservation boundaries.

A. Federal Case Law Supports a Delegation of Authority to Tribes

The EPA interprets the 1990 CAA amendments as a federal grant of authority, for approved tribes, over all air resources "within the exterior boundaries of the reservation."⁸⁷ The EPA interprets the CAA as follows:

It is EPA's proposed interpretation of the CAA that the Act grants, to Tribes approved by EPA to administer CAA programs in the same manner as States, authority over all air resources within the exterior boundaries of a reservation for such programs . . . enabl[ing] such Tribes to address conduct on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation.⁸⁸

The Agency acknowledges that tribes generally maintain inherent sovereign authority over air resources within the exterior boundaries of the tribe's reservation.⁸⁹

85. See *United States v. Mazurie*, 419 U.S. 544 (1975) (holding that Congress possessed authority to regulate the introduction and distribution of alcohol and properly delegated that authority to tribes). See also *Montana v. United States*, 450 U.S. 544 (1981); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (stating that tribes, as separate sovereign entities, possess "the power of regulating their internal and social relations").

86. 450 U.S. 544 (1981).

87. 59 Fed. Reg. at 43,959.

88. 59 Fed. Reg. at 43,958.

89. See *id.* at 43,958 ("[T]he sovereign authority of Indian Tribes extends 'over both their members and their territory.'" *Mazurie*, 419 U.S. at 557). The *Mazurie* Court upheld the federal delegation of regulatory authority to the Wind River Tribes over lands within the Wind River Reservation including those held in fee by non-members and non-Indians. *Mazurie*, 419 U.S. at 554.

The EPA further recognizes inherent tribal authority through the Supreme Court's holding in *Montana*.⁹⁰ In *Montana*, the Crow Tribe prohibited hunting and fishing within reservation boundaries by nonmembers.⁹¹ The State asserted authority to regulate hunting and fishing by non-Indians within the reservation.⁹² The United States and the Tribe sought a declaratory judgment to quiet title to the riverbed of the Big Horn River asserting sole authority to regulate all hunting and fishing activity within the reservation boundaries. The Supreme Court set forth a two part test for determining whether a tribe retains inherent authority over the conduct of nonmembers acting within the reservation or on non-Indian fee land:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.⁹³

The Supreme Court modified the standard for this test in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*.⁹⁴ In *Brendale*, the Court addressed whether a tribe has exclusive jurisdiction to zone all land within its reservation including any fee lands owned by non-Indians. The reservation of the Yakima Nation consisted of two areas: one known as the *closed area* and the other known as the *open area*.⁹⁵ The closed area comprised two thirds of the reservation, was primarily forested, and public access to it was restricted.⁹⁶ The open area comprised the remaining one third of the reservation and was used for agricultural and residential purposes.⁹⁷ Fee lands made up one half of the open area.⁹⁸ Both the Yakima Nation and Yakima County maintained zoning ordinances covering the fee lands within the reservation.⁹⁹ The dispute in *Brendale* involved two individual zoning applications, one in each of the areas, whereby the parties received building permits under the County's zoning ordinances. The proposed developments were prohibited under the Tribe's zoning ordinance.¹⁰⁰

The Yakima Nation filed for a declaratory judgment in federal court challenging Yakima County's authority to zone fee lands within the

90. See 59 Fed. Reg. at 43,958.

91. *Montana*, 450 U.S. at 547.

92. *Id.* at 549.

93. *Id.* at 565-66 (commonly referred to as the *Montana* exceptions).

94. 492 U.S. 408 (1989) (plurality opinion).

95. *Id.* at 415-16.

96. *Id.*

97. *Id.*

98. *Id.* at 416.

99. *Id.*

100. *Brendale*, 492 U.S. at 418.

reservation's exterior boundaries. The Supreme Court found that the Tribe was implicitly divested of zoning authority over fee lands in the open area,¹⁰¹ and that it had authority to zone all property in the closed area.¹⁰² Justice White heightened the standard under the second *Montana* exception. He stated that "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe."¹⁰³ The plurality reasoned that this standard would sufficiently protect tribal interests while avoiding interference with state sovereignty and providing certainty in zoning regulations to property owners.¹⁰⁴

The EPA, citing *Brendale*, notes that "a Tribe's inherent authority must be determined on a case-by-case basis, considering whether the conduct being regulated has a direct effect . . . substantial enough to support the Tribe's jurisdiction over non-Indians."¹⁰⁵ The Agency, however, found that "such a determination is not necessary with a direct grant of statutory authority."¹⁰⁶ Thus, the EPA does not interpret *Brendale* as prohibiting the Agency from recognizing tribes as states for purpose of CAA regulatory authority on fee lands within the reservation.¹⁰⁷

As the Agency stated, "[e]ven without this proposed direct grant of authority, Indian tribes would very likely have inherent authority over all activities within reservation boundaries that are subject to CAA regulation."¹⁰⁸ The Agency noted that the "high mobility of air pollutants, resulting area-wide effects, and the seriousness of such impacts would all tend to support Tribal inherent authority" over air resources.¹⁰⁹ What the EPA seems to infer is that, notwithstanding the stringent language of the *Brendale* analysis, the high mobility of air pollutants and potential for wide-spread adverse impacts is sufficient to fulfill the second *Montana* exception. As stated in *Montana*, "Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."¹¹⁰

B. Other CAA Statutory Language Supports Congressional Intent for a Delegation of Authority to Tribes

As noted by the preamble to the proposed rule, the CAA contains two other provisions expressing congressional intent to provide for a

101. *Id.* at 432.

102. *Id.* at 444. Justice White delivered the Court's opinion regarding the open area joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Justices Stevens and O'Connor concurred. Justices Stevens and O'Connor provided the judgment of the Court regarding the closed area joined by Justices Brennan, Marshall, and Blackmun.

103. *Id.* at 431.

104. *See id.*

105. 59 Fed. Reg. 43,958 (1994).

106. *Id.*

107. *See* 56 Fed. Reg. 64,876, 64,877 (1991) (discussing the EPA's position on whether tribes can "demonstrate authority to regulate water quality within the boundaries of their reservations").

108. 59 Fed. Reg. at 43,958 n.5.

109. *Id.*

110. *Montana*, 450 U.S. at 565-66 (citations omitted).

territorial grant of authority without distinguishing among categories of reservation lands. Section 7474(c) provides that, “[l]ands within the exterior boundaries of reservations of federally recognized Indian Tribes may be redesignated only by the appropriate Indian governing body.”¹¹¹ In addition, section 7410(o) provides that Tribal Implementation Plans (TIPs) “shall become applicable to all areas . . . located within the exterior boundaries of the reservation”¹¹² The Agency recognizes the inherent regulatory inefficiency and deadlock that would occur if tribes maintain jurisdiction over TIPs, but lack the requisite jurisdictional recognition over non-TIPs.¹¹³

Some commentators suggest that sections 7474(c) and 7410(o) strengthen a narrow reading of CAA’s congressional intent, and that the EPA’s discretion in authorizing tribes to implement CAA programs extends only to areas within the exterior boundaries of a reservation. The inference from this is that Congress further intended to preserve states’ authority to implement CAA programs in all other areas of the state.¹¹⁴ As the EPA points out, however, the argument’s logical conclusion “would nullify or render meaningless [other] statutory provision[s].”¹¹⁵ The EPA’s proposed interpretation is a permissible construction of the Act. The commentators’ argument also overlooks the basic canons of statutory construction of federal Indian law which state that statutes affecting Indian tribes should be read keeping in mind the federal government’s trust relationship with the tribes, and ambiguous phrases should be interpreted liberally in favor of preserving tribal rights.¹¹⁶

The plain language of the CAA, federal case law, and other provisions of the Act support the EPA’s interpretation that the CAA grants tribes regulatory authority over air resources within Indian Country. Given this interpretation, Congress becomes the source of tribal regulatory authority over air resources. As discussed in the next section, the EPA, on a secondary level, is the source which directly delegates to tribes regulatory authority over air resources. Congress created a broad environmental

111. 42 U.S.C. § 7474(c) (1990).

112. 42 U.S.C. § 7410(o) (1990).

113. See additional comments and examples under the EPA’s discussion in the proposed rules, 59 Fed. Reg. at 43,959.

114. The distinction is made based on the language of § 107(a) which provides that “[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State” 42 U.S.C. § 7407(a) (1990). As one commentator noted, this provision, when read together with 42 U.S.C. § 7410, would require an extraterritorial source to meet State Implementation Plan (SIP) requirements “to assure attainment and maintenance of ambient air quality standards since the TIP is applicable only to lands ‘within the exterior boundaries of the reservation’” and create an unmanageable regulatory scheme. UARG Letter, *supra* note 56, at 6-7.

115. 59 Fed. Reg. at 43,959.

116. See *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). See also *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (providing that courts are to interpret federal laws in manner that minimizes infringement on inherent tribal authority by “tread[ing] lightly in the absence of clear indications of legislative intent”); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 230-32 (3d ed. 1991) (providing an overview of canons of statutory construction).

scheme, and the EPA, under its administrative authority, properly established a regulatory scheme permissible under this authority.¹¹⁷

IV. FEDERAL ENVIRONMENTAL REGULATORY POLICY PREEMPTS STATE INTRUSION INTO REGULATORY AUTHORITY WITHIN INDIAN COUNTRY

Environmental regulatory jurisdiction within Indian country currently is allotted among tribal, federal, and state governments each with a different basis for regulatory authority.¹¹⁸ Federal regulatory power derives from "Congress' asserted right of plenary power over native nations"¹¹⁹ and a judicial doctrine subjecting tribes to federal laws of general applicability.¹²⁰ The prevalence of asserted state regulatory authority in Indian country arises from a "refusal of the states to perceive Indian country as extraterritorial to state borders."¹²¹

Should a court determine there is no express federal delegation of authority to tribes, a secondary argument could be made for federal preemption.¹²² There is a strong argument that the CAA, as a paramount federal environmental statute, and the resulting comprehensive EPA regulatory scheme preempt the regulatory field of air resources within Indian country.¹²³ This argument is particularly important, because if a court

117. See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984) (setting forth judicial principles providing administrative agencies with the authority to formulate policy that fills gaps left in federal statutes, and granting deference to the agency's construction and interpretation of a statutory scheme unless "arbitrary, capricious, or manifestly contrary to the statute").

118. *Royster & Fausett*, *supra* note 14, at 584-85.

119. *Id.* at 587.

120. *Id.* at 587-91 (discussing the *Tuscarora* Rule first articulated in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (holding that laws of general applicability shall apply to Indian nations and Indian people absent a treaty or federal statute to the contrary)). See also *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (interpreting the Occupational Safety and Health Act (OSHA)); *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982) (discussing the federal excise tax), *cert. denied*, 460 U.S. 1040 (1983); *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir.) (National Labor Relations Act), *cert. denied*, 366 U.S. 928 (1961).

121. *Royster & Fausett*, *supra* note 14, at 600.

122. Some commentators have presented the argument that based on the EPA's interpretation of RCRA and the need for unitary management programs, as viewed against the tribal sovereignty backdrop, courts would not need to employ a balancing test in the tribal environmental law arena. See Richard A. DuBey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 468-69 (1988). The CAA seems to have even greater weight behind it to support a similar conclusion, but given the courts' recent reluctance to uphold assertions of tribal jurisdiction in many areas, a balancing test may be required nonetheless.

123. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding state regulatory gaming laws inapplicable where Federal grants and approval of tribal gaming pervade the area); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 885 (1986); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding New Mexico's hunting and fishing laws to be preempted by federal law where tribal regulations were developed in close relation with the federal government); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (holding New Mexico's effort to impose a gross receipts tax on non-Indian contractor doing business with the tribe preempted by federal law); *Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); DuBey et al., *supra* note 122, at 468-69 (discussing the TAS processes of the CWA, SDWA,

should find a state's assertion of regulatory jurisdiction over air resources under tribal jurisdiction is preempted by federal laws, there would be no need to go through the *Montana* test or to meet the *Brendale* standards.

The Indian preemption test bars "[s]tate jurisdiction . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."¹²⁴ The Supreme Court has determined the justification for state intrusion sufficient only in limited contexts. For example, in *Puyallup Tribe v. Washington Game Department*,¹²⁵ the Court held that Washington could regulate the hunting and fishing rights of Indians within the Puyallup Reservation where necessary to conserve fish and game.¹²⁶ The Court's ruling, however, was based on years of protracted litigation and the fact that the Tribe had no existing form of tribal conservation regulations. As noted by the Court, if the Tribe had effective regulations, they would invariably preempt state regulation.¹²⁷ Further, as a matter of general Indian law, state agencies have no civil judicial or regulatory authority over activities in Indian country absent an express congressional authorization.¹²⁸

Arguably, the CAA constitutes federal law which will preempt any assertions of state jurisdiction over air resources as states probably lack sufficient interests to support jurisdiction.¹²⁹ This is particularly true within the exterior boundaries of reservations. It is less clear, however, whether courts would view the CAA as preempting state authority over the *other*

and CERCLA and acknowledging that by enacting such statutes "Congress expressly preempted state regulation of the reservation environment. . . . Even if a court . . . applie[s] the balancing test analysis . . . federal and tribal interests are strong enough to overcome any asserted state interest in regulating the reservation environment." As this article was written prior to the CAA Amendments, the authors do not specifically address the CAA, but their discussion is relevant to this discussion.).

124. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983)). See also Royster & Fausett, *supra* note 14, at 602 n.76. Indian sovereignty, self-government, self-sufficiency, and economic development are to pervade the avenue of inquiry. *Id.*

125. 433 U.S. 165 (1977).

126. *Id.* at 173-77.

127. *Id.* at 178. The Court also found that state authority may be asserted where adverse off-reservation effects necessitate state intervention. *Rice v. Rehner*, 463 U.S. 713, 724 (1983).

128. See *id.* (citing *Mescalero Apache Tribe*, 462 U.S. at 332). See also *Williams v. Lee*, 358 U.S. 217, 220 (1959) (resolving that absent contrary federal authority, a state may not exercise regulatory authority over a tribe or its land that infringes upon tribal self-government); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding the laws of Georgia to have no force and effect on the Cherokee Nation's lands). Even those Public Law 280 states having a limited, delegated form of civil adjudicatory authority over tribes, have no regulatory authority over Indian reservations. See *Cabazon*, 480 U.S. at 208 (using the Court's reasoning in *Bryan* and adopting a dichotomy between the extent of state civil regulatory and criminal prohibitory authority over reservation affairs); *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976) ("[I]f Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so."); *Kennerly v. District Court*, 400 U.S. 423 (1971) (finding Montana court lacked jurisdiction over non-Indian creditor's claim against a tribal member for a debt incurred on the Blackfeet Reservation).

129. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (holding that where the federal government undertakes comprehensive regulation in the harvesting and sale of timber and where existing federal policy will be undermined by asserted state authority, the exercise of state authority is impermissible). *But see Rice*, 463 U.S. at 726.

areas within the tribe's jurisdiction mentioned in the proposed rule. Although the EPA proposes that this "territorial view" will require tribes to make "a fact based showing of [its] inherent authority over sources located on such lands,"¹³⁰ this view of Tribal jurisdiction may require a court to further examine the extent or scope of the EPA's authority to make such a determination in light of federal preemption. The EPA's territorial view is supported under both a traditional preemption analysis and Indian preemption analysis.¹³¹ However, courts will only apply a traditional preemption analysis to a case involving a tribal government where the state action occurs outside Indian country.¹³² The CAA provides for tribal regulatory authority over reservation boundaries and all other areas within the tribe's jurisdiction. This Comment, therefore, will now examine the CAA under an Indian preemption analysis.

A. Tribal Sovereignty as a Backdrop to Preemption

The Indian preemption analysis begins with an inquiry into "broad-based concepts of self-government"¹³³ and existing federal policies to promote tribal self-government, self-sufficiency, and economic development.¹³⁴ "The Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read."¹³⁵ Although the backdrop of tribal sovereignty presents no conclusive finding as to jurisdictional issues, it is important to tribal interests as it protects tribal sovereignty against attempts of state encroachment and creates a presumption of federal preemption against asserted state regulatory jurisdiction.

Federal environmental policies are to be interpreted in light of self-determination and self-government.¹³⁶ The EPA's policy for administering environmental programs on reservations recognizes the sovereign status of tribal governments, the independent tribal authority over reservation affairs, and the underlying tribal responsibility for environmental programs.¹³⁷ Tribes maintain sovereignty over their citizens and territory, the

130. 59 Fed. Reg. at 43,960.

131. See Royster & Fausett, *supra* note 14, at 624-28 (presenting the argument that some federal pollution control laws directly preempt state law under both the traditional federal preemption analysis and Indian preemption analysis).

132. See e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Blue Lake Forest Prod., Inc. v. Hongkong and Shanghai Banking Corp.*, 30 F.3d 1138, 1141 n.6 (9th Cir.), *cert. denied*, 115 S. Ct. 670 (1994).

133. Royster & Fausett, *supra* note 14, at 603.

134. *Id.* at 645.

135. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

136. See Administrator Browner, Memorandum on EPA Indian Policy (Mar. 14, 1994) (on file with author); 1991 EPA MEMORANDUM, *supra* note 10. See also 1984 EPA POLICY STATEMENT, *supra* note 11; Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994); Reagan Administration's Indian Policy Initiative, 19 WEEKLY COMP. PRES. DOCS. 98, 99 (Jan. 24, 1983) (providing President Reagan's statement on Federal Indian Policy which emphasizes (1) that the federal government will pursue the principle of Indian 'self-government' and (2) that it will work directly with tribal governments on a 'government-to-government' basis).

137. See 1984 EPA POLICY STATEMENT, *supra* note 11, at 15.

right to control the tribe's natural resources through tribal laws and customs, and the right to protect the health and welfare of their citizens. These are all indicia of tribal sovereignty, which are further supported when tribes establish and maintain tribal environmental agencies, environmental programs, and enter into cooperative agreements with other sovereigns to assist in the regulation of their environment.¹³⁸ Moreover, the CAA provides clear congressional recognition of these attributes in the Act's language that tribes can be, and in fact should be, responsible for fulfilling the Act's mandates.

B. A Balance of Tribal, Federal, and State Interests

In considering the relevant treaties and statutes in light of the tradition of tribal sovereignty, a court will look to balance the relevant tribal, federal, and state interests involved. Under this balancing test, a court would examine the nature of each interest at stake to determine whether in a particularized context the state interest is sufficient to support the exercise of state authority.¹³⁹

The federal government and Indian nations each have strong interests in protecting the environments of tribal lands and reservations. The comprehensive nature of the CAA statute, like many other federal environmental statutes, is one indicia of the strong federal interest.¹⁴⁰ Tribes themselves have important interests in fully exercising sovereign authority over their citizens and territory: the right to control the tribes' natural resources through tribal laws and customs, and the right to protect the health and welfare of their citizens.¹⁴¹ The federal and tribal governments share an interest in protecting tribal sovereignty.¹⁴² To allow states reg-

138. See e.g., Puyallup Tribal Council Resolution 281093-C (1993) (setting forth Tribal Air Quality Regulations I, II, and III passed in accordance with a Settlement Agreement between the Tribe, Washington, and surrounding local governments) cited in Letter from Michael P. O'Connell to EPA Air Docket Office 1 (Nov. 18, 1994) (on file with author).

139. See e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

140. Other comprehensive federal environmental statutes that contain TAS provisions, or similar provisions, include the CWA, 33 U.S.C. §§ 1251-1387 (1988); SDWA, 42 U.S.C. § 300(f)-(j) (1986); FIFRA, 7 U.S.C. § 136 (1988); CERCLA, 42 U.S.C. §§ 9601-9657 (1990). See also DuBey et al., *supra* note 122, at 469-70 (describing, in general, some of the federal interests in protecting tribal lands from an environmental prospective).

141. See DuBey et al., *supra* note 122, for a succinct description of the various federal and tribal interests served by excluding state control. Although discussed primarily in support of RCRA regulatory authority, the interests apply equally as well to authority over air resources. The authors include, among others, a strengthening of tribal governments' infrastructure, promotion of tribal economic priorities, and an increase of business investment potential. DuBey et al., *supra* note 122, at 470-71. See also Douglas A. Brockman, Note, *Congressional Delegation of Environmental Regulatory Jurisdiction: Native American Control of the Reservation Environment*, 41 WASH. U. J. URB. & CONTEMP. L 133, 139 (1992).

142. The federal government has an interest in circumventing state intrusion as an aspect of protecting tribal sovereignty. This federal interest stems, in part, from the trust relationship between the federal government and tribes. See, e.g. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886). Many courts have considered the trust relationship between tribal and federal governments with regard to tribal lands and resources. See, e.g. *United States v. Mitchell*, 445 U.S. 535 (1980); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252

ulatory authority over air resources within the exterior boundaries of Indian reservations or other areas under tribal jurisdiction would greatly threaten the overriding federal objectives of tribal self-government and self-determination.¹⁴³ To this end, Congress expressly designated that the EPA is to treat tribes as states under the CAA as the sovereign entities responsible for Indian environments.

States too have interests in regulatory control over environmental protection issues within their borders.¹⁴⁴ In a legal sense, the strongest state interest involved in the EPA's proposed territorial jurisdictional grant of authority to tribes seems to rest primarily with the interests of state citizens who are nonmembers of the tribes, but who would nonetheless be subject to off-reservation tribal jurisdiction.¹⁴⁵ Another asserted State interest is in maintaining a comprehensive and unified regulatory scheme within the State's territorial borders, such that a single set of standards applies to those regulated.¹⁴⁶ In the absence of a unified scheme, the state would face piecemeal areas of jurisdiction and would thus have difficulty in administering an otherwise strong and effective program. Finally, the state regulatory interest at stake also can be substantial "if the State can point to off-reservation effects that necessitate State intervention."¹⁴⁷

(D.C. 1972); Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461, 488-89 (1994); Mark Allen, Comment, *Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination*, 16 B.C. ENVTL. AFF. L. REV. 857 (1989); Brockman, *supra* note 141, at 139.

143. See cases and materials cited *supra* note 136 and accompanying text.

144. See generally Jeffrey W. Walbridge, *State Minimum Environmental Standards on the Native American Reservation*, 68 S. CAL. L. REV. 1075, 1083-86 (1995) (presenting the following state interests in the regulation of hazardous waste activities on reservations: prevention of hazardous waste accidents that have adverse impacts upon the state, the need for uniform pollution control programs and regulatory schemes, and resolution of jurisdictional disputes in setting land use regulation standards). See also Leslie Allen, Note, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond Washington Department of Ecology v. EPA*, 14 ECOLOGY L.Q. 69 (1987); Charles F. Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 UCLA J. ENVTL. L. & POL'Y 145 (1982).

145. The Department of Environmental Quality for the State of Oklahoma submitted some interesting comments in response to the proposed rule. It seems, in essence, that Oklahoma challenged the scope of applicability with regard to the EPA's recommendation that a tribe may rely on 15 U.S.C. § 1151 (1988) as a basis for regulatory jurisdiction beyond established reservation boundaries. In particular the State of Oklahoma took issue with use of the word "reservation" as is defined in 25 U.S.C. § 1425. See Oklahoma Letter, *supra* note 53, at 2. The State encouraged the EPA to limit use of the term to "include ONLY tribal trust lands in Oklahoma." *Id.* Oklahoma's argument apparently is misplaced and seems to resurrect an issue already resolved by the Supreme Court in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

146. See Letter from El Paso Natural Gas Co. to EPA 1 (Nov. 22, 1994) (on file with author) (suggesting the proposed territorial approach to jurisdiction will create a "highly fragmented" system that "is not conducive to effective air quality management"); New Mexico Letter, *supra* note 56, at 4 (declaring the proposed rule will create "uncertainty as to whom is the proper regulatory authority and is not in the best interests of public health"); Letter from New Mexico Municipal League to EPA pt. IV (Dec. 22, 1994) (stating that the "proposed 'system' is a nightmare in the making . . . creat[ed] by a web of overlapping and conflicting regulations . . ."). Cf. Allen, *supra* note 144, at 72-73 (discussing the State of Washington's interests in regulating hazardous waste activities occurring on reservation lands).

147. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

As they pertain to tribal jurisdiction within reservation boundaries, some of these state interests have been addressed under existing Supreme Court precedent.¹⁴⁸ The task is much more difficult under the EPA's proposed language of *other areas within their jurisdiction*. The EPA has addressed tribal jurisdiction outside of reservation boundaries under the CWA's TAS provisions.¹⁴⁹ In response to a commentator concerned with potential jurisdictional disputes between tribes and states, the EPA responded that the Agency's primary responsibility is the protection of the nation's environment.¹⁵⁰ Undoubtedly environmental problems cross boundaries and invoke interdependence by various jurisdictions.¹⁵¹ As such, the Agency recommends that sovereign entities affected by jurisdictional issues work cooperatively with the goal of environmental protection for all. If these comments reflect the response commentators can expect from the CAA proposed rule, the issue is likely to be left to judicial resolution in those instances where the affected tribe and state do not maintain a cooperative relationship in the environmental regulatory field.

The EPA also provides some guidance in that it will interpret the term *other areas within their jurisdiction* up to the limits of "Indian country" as defined in 18 U.S.C. § 1151, provided the tribe can show inherent authority over such area under general principles of Indian law.¹⁵² Such an interpretation is beneficial to some tribes in that it will cover Indian lands that are not otherwise formally defined as reservations. The net effect should be that all federally recognized tribes with a tribal land base, as included under the definition for Indian country, will be able to apply for TAS status under the Act. Second, the expansive interpretation "preserves exclusive tribal and federal jurisdiction . . . [and] policies of tribal self-government."¹⁵³ Fortunately, courts have been willing to exercise deference with respect to a reasonable EPA interpretation of statutes the Agency is responsible for administering.¹⁵⁴ Although this

148. For example, if the federal government already maintains a comprehensive regulatory scheme on Native lands, the state interest in a unified scheme could nonetheless be preempted as in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Bracker*, the Supreme Court found the federal government's regulatory scheme for the harvesting of timber on reservation lands to be comprehensive and pervasive and thus preemptive of state tax laws. *Id.* at 152-53. In *Mescalero Apache Tribe*, the Supreme Court held the existing federal laws creating a joint and comprehensive regulatory scheme over hunting and fishing on the reservation to preempt the state's asserted jurisdiction. 462 U.S. 324.

Tribal governments also have an explicit interest in a unified regulatory scheme comprised of consistent standards and unabridged authority over all areas of Indian Country. Brockman, *supra* note 141, at 139. In fact, a complete recognition of this interest would eliminate the emergence of regulatory jurisdictional quagmires similar to those that emerged in other criminal and civil contexts.

149. See generally *Treatment of Indian Tribes as States for Purposes of the Clean Water Act*, 58 Fed. Reg. 67,966, 67,976-67,977 (Dec. 22, 1993).

150. See 58 Fed. Reg. at 67,976.

151. See *id.*

152. 59 Fed. Reg. at 43,960.

153. CLINTON ET AL., *supra* note 116, at 111.

154. See *Chevron, U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 843 (1984); *Washington Dep't of Ecology v. United States EPA*, 752 F.2d 1465, 1466 (9th Cir. 1985).

analysis further supports a finding of federal preemption, it still leaves open the instance where the asserted tribal jurisdiction covers non-native activities occurring within the "other areas under the tribe's jurisdiction," an issue to be most readily challenged. Tribes will have to show an inherent source of tribal authority over these activities on a case-by-case basis.

V. INHERENT TRIBAL AUTHORITY TO REGULATE ENVIRONMENTAL RESOURCES OVER INDIAN LANDS AND OTHER AREAS WITHIN THE TRIBE'S JURISDICTION

The final argument in support of the EPA's proposed territorial view is that inherent tribal regulatory jurisdiction exists over air resources. Inherent tribal authority as a basis for tribal regulatory jurisdiction is less than certain under existing federal legal precedent and "is viewed with suspicion by the non-Indian community"¹⁵⁵ Under general principles of federal Indian law, an analysis of asserted tribal authority begins by determining whether the tribe maintains inherent authority over the particular conduct or area at issue. With regard to the reservation environment, some commentators suggest that indeed "[t]ribal authority to regulate in Indian country arises from the inherent sovereign powers of the native nations."¹⁵⁶ The argument is based on an understanding that tribes retain all inherent sovereign authority not otherwise "ceded by treaty, excised by federal legislation, or divested by the courts."¹⁵⁷

The EPA's interpretation of inherent tribal authority, notwithstanding Supreme Court precedent, should be taken one step further. Even without a direct grant of federal authority, tribes generally *have inherent authority over reservation activities*.¹⁵⁸ Nothing in the language of the CAA purports to diminish tribal regulatory authority over environmental matters. In fact, the language specifically affirms inherent tribal authority over "air resources within the exterior boundaries of the reservation." An argument could be made that the 1990 CAA Amendments recognizing inherent tribal authority over air quality regulations is a congressional affirmation of a tribe's *existing* inherent regulatory authority despite the Supreme Court plurality's language in *Brendale*. Under this argument, the EPA would not need to find an express delegation of authority for tribes, and a simple federal preemption analysis would apply. Furthermore, the argument is consistent with the opinions of Justices Blackman, Brennan, and Marshall who concurred in part and dissented in part to the *Brendale* decision. According to Justice Blackman,

155. Suagee & Stearns, *supra* note 59, at 76.

156. Royster & Fausett, *supra* note 14, at 593.

157. *Id.* at 594 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323.

158. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (recognizing exclusive tribal authority over tribal members and territory).

to recognize that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty . . . is not to excise the decision. . . . Despite the *reversed presumption*, . . . *Montana* itself expressly preserves substantial tribal authority over non-Indian activity on reservations, including fee lands¹⁵⁹

If a court were not to uphold the EPA's interpretation of the delegation and inquire as to the tribal authority to regulate within the context of the CAA, this line of argument remains important. The courts may not uphold the EPA's interpretation, and there still remains the need for some basis of Tribal regulatory authority. Admittedly, this is a very difficult argument to make, but it should not be overlooked as a secondary source of authority to support tribal authority. Additionally, there are members of the Supreme Court who criticize the Court's seeming indifference to inherent tribal sovereignty,¹⁶⁰ and the Court has yet to specifically address "whether tribal authority could be premised on the consent of non-members."¹⁶¹

Inherent regulatory jurisdiction is consistent with the inherent civil authority of tribes affirmed under existing legal precedent and may include authority over non-Indians sufficient to include the EPA's proposed interpretation for regulatory jurisdiction.¹⁶² Justice Stewart, writing for the majority in *Montana*, stated:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members¹⁶³

Despite the contrary language of the plurality in *Brendale*, lower courts continue to use *Montana* as the leading federal precedent on tribal civil jurisdiction.¹⁶⁴ The EPA's proposed rule generally recognizes the inherent sovereign authority of tribes over those air resources within the exterior boundaries of a reservation without distinguishing among the various classifications of reservation land.¹⁶⁵ This interpretation is consistent with existing precedent regarding the inherent nature of tribes' sovereign status

159. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 462 (1989) (Blackman, Brennan, Marshall, JJ., dissenting in part, concurring in part) (emphasis in original).

160. See, e.g., *South Dakota v. Bourland*, 113 S. Ct. 2309, 2321 (1993) (Blackmun, J., dissenting) (sharply criticizing the majority's "bare nod" to the Cheyenne River Tribe's inherent authority to regulate hunting and fishing and acknowledging that tribes possess inherent authority which extends "over both their members and their territory").

161. CLINTON ET AL., *supra* note 116, at 111 (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 438 n.243 (1993)).

162. See *United States v. Montana*, 450 U.S. 544, 565 (1981).

163. *Id.* (emphasis added).

164. See, e.g., *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1404 (1991).

165. 59 Fed. Reg. at 43,958-43,959.

as governmental entities. One author, analyzing *Washington Department of Ecology v. EPA*, has suggested that, at least in the field of hazardous waste management, tribes are probably more concerned with sovereignty than with health or the environment.¹⁶⁶ Unquestionably, tribes have many important interests at stake with regard to environmental litigation, one of which is sovereignty. This interest, however, is not unique to tribal governments.¹⁶⁷ The author supports this argument by finding that tribes view states "as adversaries who try to take from tribes what power they still retain."¹⁶⁸ The author concludes by finding that the legal significance of the tribal interest in sovereignty is uncertain under the Supreme Court's decision in *Rice v. Rehner*.¹⁶⁹ The Court, in *Rice*, addressed the issue of whether California could require a federally licensed business owner, operating a liquor store on a reservation, to obtain a state liquor license. In conducting a federal preemption analysis, the Court includes as part of the analysis whether Indian tribes historically exercised regulatory authority over liquor sales.¹⁷⁰

The Court's decision in *Rice* has little weight in the environmental arena. Unlike the liquor license laws at issue in *Rice*, the environmental

166. See Allen, *supra* note 144, at 104. Another author has gone as far as to recommend federal legislation which would authorize the Secretary of the Interior to "waive tribal sovereignty and allow states to enforce their regulations when necessary to reduce pollution of the state's environment." Roger Romulus Martella, Note, "Not in My State's Indian Reservation"—A Legislative Fix to Close an Environmental Law Loophole, 47 VAND. L. REV. 1863, 1889 (1994). This recommendation comes about in light of the fact that the judicial system would require the state to show an "exceptional circumstance" sufficient to permit the assertion of state authority over the regulated area. *Id.* To circumvent this, the author suggests a legislative model that would waive tribal sovereign immunity where state regulations "would improve the environment" and where state regulations are more stringent than existing tribal regulations. *Id.* at 1891. While the author's general concern for the environment is commendable, such a solution only serves to highlight the approach taken by some to preserve state authority (sovereignty) over their citizens and lands. It fails to recognize the sovereign status of tribes and instead reduces tribal sovereignty to something which is "waiveable" to protect state interests. At no point does this author suggest that tribal statutes apply extraterritorially to state activities where they are damaging, or threaten to damage, the tribes' environment. *Id.* at 1890. With these types of inequitable "fixes" to environmental issues and the blatant disregard for the sovereign responsibilities tribes have over their lands and peoples, it is no wonder tribes are forced into defensive postures regarding their sovereign status as Indian nations.

167. See e.g., Oklahoma Letter, *supra* note 53, at cmts. 1-6 ("[U]nder EPA's definition, almost all of the State of Oklahoma would be a reservation In Oklahoma, tribal trust land is surrounded by the State of Oklahoma and any tribal air programs should be compatible with the Oklahoma program."); UARG Letter, *supra* note 56, at 13-16 (providing a constitutional analysis of the EPA's proposed interpretation of regulatory jurisdiction and stating, "a state has no authority to regulate directly activity that takes place exclusively inside the boundaries of another state, because the Constitution does nothing to alter the basic principle that each state is sovereign within its own territory." *Id.* at 15 (citations omitted)).

168. Allen, *supra* note 144, at 105. See also VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 52 (1983) (discussing some of the difficulties that arise in tribal/state relations and noting how hostility emerges when the two compete economically).

169. 463 U.S. 713 (1983) (looking to the tribe's historical exercise of tribal regulatory authority over liquor sales as part of the preemption analysis conducted by the Court).

170. The Court's "historical" analysis as explained by Justice O'Connor, writing for the majority, is "[u]nlike the authority to tax certain transactions on reservations that we have characterized as 'a fundamental attribute of sovereignty which the tribes retain' . . . tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." *Id.* at 722 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980)).

regulatory authority of tribes has been explicitly recognized by Congress in most major federal environmental statutes.¹⁷¹ This line of reasoning is also not supported by the Court's decision in *California v. Cabazon Band of Mission Indians*¹⁷² which held that the state's regulatory gaming laws could not be applied to Indian gaming activities where federal and tribal laws pervade the regulated area.¹⁷³ The Court did not apply the "historical" analysis of *Rice* in reaching this conclusion. Furthermore, unlike the regulated area in *Rice* and RCRA, there are existing TAS regulatory schemes established under the CAA, CWA, and SDWA to which the Court can look. A significant issue which arises under an analysis based on inherent authority is how to include those tribes unable to make such a showing. Undeniably, there would be many tribes unable to show inherent authority, and perhaps this is where the safer EPA analysis serves its most useful purpose. Certainly, the EPA believes a tribe-by-tribe basis must be found regarding the extent of tribal jurisdiction over fee lands and leaves the final decision of a firm, express congressional delegation under the CAA to judicial and congressional authorities.

In sum, the argument for inherent tribal authority, even with the legal obstacles and difficulties, is important for the reason that "[i]n every instance where tribes, with inherent powers to act, act instead under a delegation of federal authority, the perception of inherent tribal authority is diminished."¹⁷⁴ The history of federal Indian law is replete with examples highlighting such a result. The argument is also relevant because it is analogous to tribal inherent authority to tax¹⁷⁵ and distinguishable from areas of criminal law, which primarily depend upon express delegation. Furthermore, the EPA provides that if a tribe seeks jurisdiction over *other areas within the tribes jurisdiction* it may need to make such a showing.

CONCLUSION

This Comment focused on the proposed implementation scheme of the CAA by tribes. The Comment examined the EPA's position and interpretation of the CAA as a federal congressional delegation of authority

171. See *supra* note 26 and accompanying text. See also Martella, *supra* note 166 at 1883-86 (applying the preemption test to the imposition of state environmental regulations in Indian country and finding "states face significant—and perhaps insurmountable—obstacles" depending on the nature of the regulated activity).

172. 480 U.S. 202 (1987).

173. *Id.* at 216 (noting that "state jurisdiction is pre-empted . . . if it interferes with or is incompatible with federal and tribal interests . . . unless the state interests at stake are sufficient to justify the assertion of state authority").

174. Royster & Fausett, *supra* note 14, at 597. As long as states continue to use non-Indians or the status of the land as the trump cards leading the Supreme Court into further obscurity with regard to sovereignty issues. See also Allen, *supra* note 144, at 105 ("Because cases addressing jurisdiction over Native American reservations draw from all types of regulatory situations, there is the distinct possibility that the assertion of state authority in an area that benefits Native American tribes may be used as precedent for a less beneficial regulatory arrangement in the future.').

175. See *Colville*, 447 U.S. at 152 (recognizing the authority to tax as a fundamental attribute of sovereignty exercised by tribes).

to tribes. The Agency sets forth federal case law, statutory interpretation, legislative history, and other CAA provisions that support an inference of a valid federal delegation of authority. Nevertheless, the Agency falls short of fully supporting its interpretation of the "extent and nature" of the delegation that is contained in the Act's language of "or other areas within the tribe's jurisdiction." Supreme Court decisions and principles of federal Indian law nonetheless support the Agency's position. Additional support for a valid delegation of authority is found within EPA's policy statements regarding the administration of environmental programs and regulations within Indian environments. If a court would find no express delegation under the Act, the EPA's interpretation of the statute should be supported under a general federal preemption analysis, including the *Bracker* balancing analysis. Furthermore, there remains a valid argument that tribes maintain inherent sovereign authority over their environments. Given all the relevant considerations, the CAA may be said to contain a sustainable grant of regulatory jurisdiction to treat tribes as states under the Act's provisions.

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