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I Can See Clearly Now: The EPA's Authority to Regulate Indian Country Under the Clean Air Act

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**I CAN SEE CLEARLY NOW:
THE EPA'S AUTHORITY TO REGULATE INDIAN
COUNTRY UNDER THE CLEAN AIR ACT**

Richard Duncan and Christiana Martenson[†]

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I. INTRODUCTION

Between 1998 and 2011, the skies over Indian country existed in a regulatory gap. This gap was not merely inadvertent, but was a foreseeable consequence of congressional intent to delegate regulatory authority under the Clean Air Act (CAA) to Indian tribes. In 1998, the U.S. Environmental Protection Agency (EPA) published the Tribal Authority Rule, which allowed—but did not require—Indian tribes to implement tribal programs under the CAA, including programs for issuing permits to new and modified sources of air emissions in areas under the tribe's jurisdiction.¹ At the same time, the CAA continued to mandate analogous state permitting programs for areas under state jurisdiction. The CAA is, however, perhaps the most technically ambitious environmental regulatory program for a state or tribal government to undertake. While Indian tribes have, with some frequency, undertaken regulation under the Clean Water Act, almost none have availed themselves of the opportunity under the CAA.² As a result, there was no clear mechanism for tribes and other entities to obtain permits for new and modified sources in most of Indian country.³

In particular, the regulatory gap affected entities seeking “synthetic minor” permits in Indian country. State permitting programs offer synthetic minor permits to potentially major sources that wish to voluntarily employ operating parameters to limit their emissions.⁴ That is, an entity seeking to construct or modify a source of air emissions in an area under state jurisdiction can “synthetically” limit that source's emissions by agreeing to certain conditions in a synthetic minor permit, thus avoiding costly,

1. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7259 (Feb. 12, 1998) (codified as amended at 40 C.F.R. pts. 9, 35, 49–50, 81 (2014)).

2. See Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748, 38,778 (July 1, 2011) (codified at 40 C.F.R. pts. 49, 51)); Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is It Working?*, 44 NAT. RESOURCES J. 213, 242 (2004) (“[F]ew tribes have the resources that are required to develop comprehensive air programs [under the CAA].”).

3. The EPA recognized this regulatory gap in its Tribal Authority Rule. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. at 7263.

4. 40 C.F.R. § 49.158. A stationary source is considered “major” if its potential to emit certain air pollutants exceeds a given threshold. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 112, 104 Stat. 2399, 2531 (codified as amended at 42 U.S.C. § 7412(a)(1) (2012)). A stationary source is considered “minor” if it does not exceed any thresholds. See *id.*

complex, and time-consuming major source permitting requirements. However, an entity seeking to construct or modify a source in an area of Indian country that was not regulated by a tribal permitting program could not obtain a synthetic minor permit from a state.⁵ Instead, in some cases, such an entity had to meet the more costly requirements for a major source permit, including obtaining a pre-construction permit that is not required for a synthetic minor source.⁶ As a result, entities seeking to construct or modify sources of air emissions in Indian country faced a serious economic disadvantage.⁷

In 2011, the EPA finally published its long-awaited “New Source Review” regulations to fill the regulatory gap in Indian country.⁸ These regulations—entitled “Review of New Sources and Modifications in Indian Country” (Indian Country NSR Rule)—provided a federal permitting program for areas of Indian country that are not subject to a tribal permitting program.⁹ Although this article argues that states never had regulatory authority in Indian country,¹⁰ the Indian Country NSR Rule clarified that in the absence of a tribal permitting program, the EPA—not the states—had authority to issue permits for construction and modification of

5. See *Review of New Sources and Modifications in Indian Country*, 76 Fed. Reg. 38,748, 38,750-01 (July 1, 2011) (codified at 40 C.F.R. pts. 49, 51); Memorandum from John S. Seitz, Dir., Office of Air Quality Planning & Standards, to Dir., Office of Ecosystem Prot., Region I et al. 2 (Mar. 7, 1999), available at <http://www.epa.gov/region7/air/title5/t5memos/indian6.pdf>.

6. Brief of Tribal Intervenors in Support of the U.S. EPA at 26, *Okla. Dep’t of Env’tl. Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014) (No. 11-1307), 2013 WL 3856517, at *26 [hereinafter *Brief of Tribal Intervenors*]; see also *Amicus Curiae State of Minnesota’s Brief and Addendum in Support in Part of the United States Environmental Protection Agency* at 4–5, *Okla. Dep’t of Env’tl. Quality*, 740 F.3d 185 (No. 11-1307), 2013 WL 3934353, at *5–6 [hereinafter *Amicus Curiae State of Minnesota’s Brief and Addendum*]. In 1999, the EPA issued a policy memorandum offering guidance for tribes wishing to obtain synthetic minor permits from the EPA, but the EPA expressly stated that the policy memorandum lacked binding force. See Memorandum from John S. Seitz, *supra* note 5, at 5; see also *infra* Part III.

7. Brief of Tribal Intervenors, *supra* note 6, at 26; see also *Amicus Curiae State of Minnesota’s Brief and Addendum*, *supra* note 6, at 4–5.

8. *Review of New Sources and Modifications in Indian Country*, 76 Fed. Reg. at 38,748.

9. *Id.*

10. See *infra* Part V.

sources of air emissions in Indian country.¹¹ The federal permitting program implemented through the Indian Country NSR Rule had immediate benefits for tribes and other entities engaging in development in Indian country, including those that sought synthetic minor permits.¹²

But the EPA's filling of the regulatory gap was short-lived. Shortly after the EPA published the Indian Country NSR Rule, the Oklahoma Department of Environmental Quality (ODEQ) challenged the rule with a petition filed in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).¹³ On January 17, 2014, the D.C. Circuit decided *Oklahoma Department of Environmental Quality v. Environmental Protection Agency*, which vacated the Indian Country NSR Rule with respect to non-reservation Indian country.¹⁴ Although the Indian Country NSR Rule remains in force for reservation lands, the D.C. Circuit's decision re-opened the regulatory gap with respect to non-reservation lands to the detriment of Indian tribes and other entities seeking development opportunities in Indian country.

This article gives an in-depth analysis of the D.C. Circuit's opinion and argues that the EPA has authority under the CAA to implement a federal permitting program for all of Indian country, including non-reservation lands. Part II provides background information about the unique status of tribal territory and the obligation of the United States to protect Indian property and interests.¹⁵ Part III describes the history of the Indian Country NSR Rule, including the EPA's rationale for promulgating the rule.¹⁶ Part IV explains the D.C. Circuit's analysis in *Oklahoma Department of Environmental Quality v. Environmental Protection Agency*.¹⁷ Finally, Part V contends that both law and policy run contrary to the D.C. Circuit's decision, which is a setback for tribal self-governance.¹⁸

11. Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. at 38,778.

12. Brief of Tribal Intervenors, *supra* note 6, at 27; *see also* Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. at 38,750.

13. Petition for Review, Okla. Dep't of Env'tl. Quality v. EPA, 740 F.3d 185 (D.C. Cir. 2014) (No. 11-1307).

14. *Okla. Dep't of Env'tl. Quality*, 740 F.3d at 195.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part V.

II. INDIAN COUNTRY AND THE UNITED STATES' TRUST RESPONSIBILITY

Federal law has recognized a distinct status and territory for Indian tribes since the founding of the United States.¹⁹ In 1831's *Cherokee Nation v. Georgia*, Chief Justice John Marshall described the Cherokee Nation as "a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself."²⁰ Chief Justice Marshall expressed a consistent view one year later, in *Worcester v. Georgia*, when he characterized Indian tribes as "distinct, independent political communities, retaining their original natural rights."²¹ Given tribes' separateness and independence, Chief Justice Marshall explained, Indian tribes exercise inherent self-governing power within their own territory, supervised by the federal government and free from state interference.²² Although federal law has subsequently departed from Chief Justice Marshall's bright-line view that state laws have no force on tribal land,²³ it remains true that state laws generally do not apply to Indian affairs in Indian country absent express authorization by Congress.²⁴

"Indian country" is a term of art used to identify tribal territory, specifically, lands on which tribal laws and customs—as well as federal laws relating to Indians—are applicable.²⁵ Congress has defined Indian country as including three types of land: "land within the limits of any Indian reservation," "dependent Indian communities," and "Indian allotments."²⁶ First, Indian reservations

19. *Worcester v. Georgia*, 31 U.S. 515, 559–60 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2][a] (Nell Jessup Newton ed., 2012), available at LEXIS.

20. *Cherokee Nation*, 30 U.S. at 16.

21. *Worcester*, 31 U.S. at 559.

22. *Id.*

23. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980).

24. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 6.01[2]; see also *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."); *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

25. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 3.04[1].

26. 18 U.S.C. § 1151 (2012). This definition is found in the criminal code, but it applies in the civil context as well. E.g., *Okla. Tax Comm'n v. Sac & Fox*

consist of lands, protected by the federal government, which have been reserved for tribal residence or use.²⁷ Second, dependent Indian communities include non-reservation lands that the federal government sets aside for Indian use and that are subject to federal superintendence.²⁸ Third, Indian allotments are lands owned by individual Indians, which are either held in trust by the United States or are subject to federal statutory restrictions on alienation.²⁹ Although Congress has the authority to terminate Indian country status, it must clearly express its intent to do so.³⁰

Federal power over Indian country and Indian affairs—to the exclusion of the states—derives from the U.S. Constitution.³¹ In *Worcester v. Georgia*, Chief Justice Marshall explained that the Constitution provides the federal government with authority to govern Indian affairs: “That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indian[s].”³² Over 150 years later, the Supreme Court confirmed that the Constitution—particularly the Commerce Clause and the Treaty Clause—is the source of Congress’ “broad general powers to legislate in respect to Indian tribes, powers that we have

Nation, 508 U.S. 114, 125 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), *as recognized in Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014); *see also* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 3.04[1].

27. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 3.04[2][c][ii]; *see also Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (discussing the distinction between tribal trust lands and reservations).

28. *Native Vill. of Venetie*, 522 U.S. at 527; *see also* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 3.04[2][c][iii]. The Supreme Court has found that lands are subject to federal superintendence when the federal government actively controls such lands, “effectively acting as a guardian for the Indians.” *Native Vill. of Venetie*, 522 U.S. at 533 (citations omitted).

29. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, §§ 3.04[2][c][iv], 16.03[1]; *see also United States v. Ramsey*, 271 U.S. 467, 470–71 (1926) (discussing the differences between trust and restricted allotments).

30. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *see also* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 3.04[3].

31. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 5.01[1].

32. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

consistently described as ‘plenary and exclusive.’”³³ In short, the federal government’s broad authority over Indian affairs is a matter of constitutional law.³⁴

Further, the United States has a special trust relationship with Indian tribes. Chief Justice Marshall’s characterization of Indian tribes in *Cherokee Nation v. Georgia*, as “domestic dependent nations” whose “relation to the United States resembles that of a ward to his guardian,”³⁵ helped form the modern trust doctrine, which has its roots in early treaties between the federal government and Indian tribes, as well as statutes and Supreme Court decisions.³⁶ Under the modern trust doctrine, federal interests in Indian country lands impose responsibilities on the federal government to protect the interests and property of both Indian tribes and individual Indians.³⁷ The federal government’s responsibilities toward Indians extend to agencies, including the EPA.³⁸ In 1984, the EPA officially

33. *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted); *see also* U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2.

34. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (“The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes.” (citations omitted)); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 169 (1973) (“The whole intercourse between the United States and [Indian tribes], is, by our Constitution and laws, vested in the government of the United States.” (quoting *Worcester*, 31 U.S. at 561)).

35. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Because the Cherokee Nation was not a foreign state, the Supreme Court held that it lacked original jurisdiction over the Cherokee Nation’s lawsuit against the State of Georgia. *Id.* at 19–20.

36. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 5.04[3][a]. *See generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495–506.

37. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (relying on “the undisputed existence of a general trust relationship between the United States and the Indian people”); *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) (explaining that the federal government’s “substantial trust responsibilities toward Native Americans” are “undeniable” and “grounded in the very nature of the government-Indian relationship”); *see also* *Parravano v. Babbitt*, 70 F.3d 539, 546–47 (9th Cir. 1995) (finding that the Commerce Secretary “did not act arbitrarily or capriciously” when he issued an emergency fishing regulation, but rather, fulfilled his federal trust obligations to Indians); *Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996) (finding that the U.S. Army Corps of Engineers fulfilled its federal trust obligation to Indians when it denied a corporation’s permit application); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 5.04[3][a].

38. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 (10th Cir. 2000) (“EPA, as an agency of the federal government, has an independent duty to protect Indian

acknowledged its trust responsibility in its Policy for the Administration of Environmental Programs on Indian Reservations (1984 Indian Policy Statement), stating:

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.³⁹

In sum, the federal government has set aside Indian country lands for Indian tribes and individual Indians, and it exercises authority over such lands, consistent with its trust responsibility, to the exclusion of the states.

III. THE CLEAN AIR ACT AND THE EPA'S NEW SOURCE REVIEW RULE FOR INDIAN COUNTRY

The CAA operates on a model of cooperative federalism, providing roles for the EPA, states, and Indian tribes.⁴⁰ Under this model, the EPA must establish National Ambient Air Quality Standards (NAAQS), and states must adopt plans to achieve these standards.⁴¹ Each state has "primary responsibility" for ensuring air quality in its own geographic region and must submit a state implementation plan (SIP) to the EPA for approval.⁴² Each SIP must provide for the "implementation, maintenance, and enforcement" of ambient air quality standards.⁴³ In so doing, each SIP must contain a permitting program—or new source review

interests . . .").

39. WILLIAM D. RUCKELSHAUS, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 3 (1984).

40. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 10.02; James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 198 (2006).

41. Clean Air Act, 42 U.S.C. §§ 7409, 7410(a) (2012); *see also* Grijalva, *supra* note 40, at 205. The EPA must set NAAQS for widespread pollutants from numerous and diverse sources that are harmful to public health and to the environment. *See* 42 U.S.C. § 7409(a), (b).

42. 42 U.S.C. §§ 7407(a), 7410(a)(1).

43. *Id.* § 7410(a)(1).

program—for construction and modification of air pollution sources.⁴⁴

A. *Involvement of Indian Tribes in Implementation of Clean Air Act Programs Prior to the Indian Country NSR Rule*

The CAA was initially silent with respect to the role of Indian tribes.⁴⁵ Despite this statutory silence, Indian tribes were involved in the implementation of Clean Air Act programs.⁴⁶ For example, Indian tribes implemented the EPA's program for preventing "significant deterioration" of air quality in regions that had already attained the EPA's national standards.⁴⁷ In light of congressional silence, "EPA implicitly assumed tribes possessed the authority EPA assumed states lacked"—that is, the authority to regulate air quality on reservation land.⁴⁸ In addition, the EPA established its 1984 Indian Policy Statement to "expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal 'self-government' and 'government-to-government' relations between Federal and Tribal Governments."⁴⁹ To this end, the EPA stated its intention to treat tribal governments as states under EPA programs, including the CAA: "Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments."⁵⁰

44. *Id.* § 7410(a)(2)(C). A new source review permit is a pre-construction permit, as opposed to an operating permit for an existing source of air pollution. See generally Bernard F. Hawkins Jr. & Mary Ellen Ternes, *The New Source Review Program*, in AM. BAR ASS'N, THE CLEAN AIR ACT HANDBOOK 125–85 (Julie R. Domike & Alec C. Zacaroli eds., 3d ed. 2011) (explaining new source review permits); Angela R. Morrison, *Overview of the Title V Operating Permit Program*, in AM. BAR ASS'N, THE CLEAN AIR ACT HANDBOOK, *supra*, at 557 (explaining operating permits).

45. See Jill E. Grant, *Implementation of Clean Air Act Programs by American Indian Tribes*, in AM. BAR ASS'N, THE CLEAN AIR ACT HANDBOOK, *supra* note 44, at 675; see also Grijalva, *supra* note 40, at 202.

46. See generally Grijalva, *supra* note 40 (explaining how tribes were involved in Clean Air Act programs prior to 1990).

47. See *id.* at 205, 212–17.

48. *Id.* at 208.

49. RUCKELSHAUS, *supra* note 39, at 1.

50. *Id.* at 2; see also Grijalva, *supra* note 40, at 280–81.

In 1990, Congress amended the CAA to provide an express role for Indian tribes. Specifically, the 1990 amendments added section 301(d), which authorizes the EPA to “treat Indian tribes as States” under the CAA.⁵¹ Under this provision, an Indian tribe may develop and implement a tribal implementation plan (TIP) if the tribe meets three criteria: (1) the tribe must have a governing body with “substantial govern[ing] duties and powers,” (2) the TIP must provide for “the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction,” and (3) the tribe must be “reasonably expected to be capable” of carrying out the TIP.⁵² Legislative history of the 1990 amendments confirms that Congress intended for the EPA to maintain responsibility for enforcing the CAA in Indian country in the event that a tribal government chose not to assume primary enforcement responsibility under section 301(d).⁵³

The EPA implemented section 301(d) through the Tribal Authority Rule, promulgated in 1998.⁵⁴ The Tribal Authority Rule clarified section 301(d) in two significant ways. First, the Rule interpreted the geographic reach of a tribe’s jurisdiction under section 301(d). The EPA construed “reservation” to include formal reservations, pueblos, and tribal trust lands, and it construed “other areas within the Tribe’s jurisdiction” to mean “non-reservation areas of Indian country”—namely, dependent Indian communities and Indian allotments.⁵⁵ With respect to “reservations,” the CAA operates as a delegation of federal authority to tribes to administer

51. Clean Air Act, 42 U.S.C. § 7601(d)(1)(A) (2012).

52. *Id.* § 7601(d)(2)–(3).

53. S. REP. NO. 101-228, at 78 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3466 (“This provision also confirms the Agency’s obligation and responsibility to enforce the Act in Indian Country should a tribal government choose not to assume primary enforcement responsibility.”). When the amendments were passed in 1990, the proposed section 328 became section 301(d). *Compare id.*, with Clean Water Act Amendments of 1990, Pub. L. No. 101-549, § 107, 104 Stat. 2399, 2464–65 (codified as amended at 42 U.S.C. § 7410).

54. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7259 (Feb. 12, 1998) (codified as amended at 40 C.F.R. pts. 9, 35, 49, 50, 81 (2014)); *see* *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1284 (D.C. Cir. 2000) (upholding the EPA’s rule).

55. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. at 7258–59; *see also* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 10.03[3]. The EPA’s construction tracks the U.S. Criminal Code’s definition for the term “Indian country.” 18 U.S.C. § 1151.

programs regulating air resources within each tribe's reservation.⁵⁶ As such, a tribe seeking to implement a TIP is not required to demonstrate jurisdiction over its reservation lands.⁵⁷

In contrast, tribes must affirmatively establish their authority to regulate air resources in "non-reservation areas of Indian country."⁵⁸ Although a tribe may cite any basis for its assertion of authority, typically a tribe will rely on its inherent authority.⁵⁹ Indian tribes have inherent authority to govern tribal members, but this inherent authority does not extend to all activities of non-members, even when such activities take place in Indian country.⁶⁰ As a result, a tribe seeking to implement a TIP in a non-reservation area of Indian country must demonstrate that the non-member activities that the tribe seeks to regulate—for example, constructing or modifying a source of air pollution—directly affect the "political integrity, the economic security, or the health or welfare of the tribe."⁶¹ The Tribal Authority Rule indicates the EPA's intent to determine a tribe's jurisdiction over a particular non-reservation area on a case-by-case basis.⁶²

Second, the Tribal Authority Rule makes tribal development of CAA programs voluntary. In the EPA's view, tribes—in comparison to states—are generally "in the early stages of developing air planning and implementation expertise."⁶³ Consequently,

it would be infeasible and inappropriate to subject tribes to the mandatory submittal deadlines imposed by the Act on states, and to the related federal oversight mechanisms in the Act which are triggered when EPA makes a finding

56. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. at 7259; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 10.03[3].

57. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 10.03[3].

58. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. at 7255, 7259; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 10.03[3].

59. *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. at 7259; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 10.03[3].

60. *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

61. *Id.*; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, § 10.03[2]–[3].

62. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. at 7259.

63. *Id.* at 7265.

that states have failed to meet required deadlines or acts to disapprove a plan submittal.⁶⁴

Thus, although states must implement SIPs to regulate air quality, neither the CAA nor the Tribal Authority Rule compels tribes to develop and implement air quality programs.

At the same time, consistent with the federal government's trust responsibility, the Tribal Authority Rule states that the EPA maintains its obligation to "ensure the protection of air quality throughout the nation, including throughout Indian country."⁶⁵ In particular, the Rule announces the EPA's intention to promulgate national rules that will apply to the parts of Indian country where tribes do not develop and implement TIPs.⁶⁶ Moreover, the Tribal Authority Rule recognizes the existence of gaps in its regulations with respect to Indian country: "EPA has determined that the CAA provides the Agency with very broad statutory authority to regulate sources of pollution in Indian country, but there are instances in which EPA has not yet promulgated regulations to implement its statutory authority."⁶⁷ To remedy the gap in permitting programs in Indian country, the Rule declares the EPA's intention to promulgate "nationally applicable regulations for . . . minor and major source permitting programs"—that is, a new source review rule for construction and modifications of air pollution sources in Indian country in the absence of an applicable TIP.⁶⁸

The EPA, however, waited more than a decade to promulgate regulations to remedy the gap in Indian country pre-construction permitting programs under the Clean Air Act for new and modified sources.⁶⁹ One unexplained mystery of the EPA's

64. *Id.*

65. *Id.*

66. *Id.* ("[T]he Agency will promulgate a FIP to protect tribal air quality within a reasonable time if tribal efforts do not result in adoption and approval of tribal plans or programs.").

67. *Id.* at 7263.

68. *Id.*

69. In 1999, the EPA published a final rule establishing a federal operating permits program that applied to existing sources of air emissions in Indian country. *See* Federal Operating Permits Program, 64 Fed. Reg. 8247 (Feb. 19, 1999) (codified as amended at 40 C.F.R. pt. 71 (2014)). The rule did not address new source review permits for Indian country sources and did not provide a mechanism for obtaining synthetic minor permits in Indian country. *Id.* Further, the D.C. Circuit partially vacated the rule in *Michigan v. EPA*, 268 F.3d 1075, 1089 (D.C. Cir. 2001). *See infra* Part IV.

approach to air regulation in Indian country is: Why the long delay in promulgating the Indian Country NSR Rule? Lack of such a rule demonstrably retarded development in Indian country and created the potential for widespread noncompliance.⁷⁰ Perhaps the EPA sensed state resistance to any efforts to federally regulate in states with approved SIPs; however, many states were clear in recognizing the lack of state authority in Indian country.⁷¹

In the interim, the EPA issued a policy memorandum addressing concerns regarding synthetic minor source permitting in Indian country.⁷² In the memorandum, the EPA recognized that no federal mechanism allowed tribes and other entities to obtain synthetic minor permits to avoid triggering major source requirements in Indian country.⁷³ The EPA also asserted its view that “State or local permits . . . issued to sources in Indian country . . . are not effective . . . unless EPA ha[d] explicitly approved the State or local permitting program.”⁷⁴ Acknowledging the benefits of synthetic minor permits in Indian country, the policy memorandum provided a limited avenue for Indian country sources to obtain synthetic minor permits from the EPA.⁷⁵ However, the EPA expressly stated that the policy memorandum lacked binding force: “The policies set forth in this memorandum are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.”⁷⁶ Further, not all Indian country sources were able to take advantage of the policy outlined in the EPA’s 1999 memorandum.⁷⁷

B. *The EPA’s Indian Country NSR Rule*

In 2011, the EPA promulgated the regulations it promised over a decade earlier. The Indian Country NSR Rule provides for a federal implementation plan (FIP), including two new source review regulations for Indian country.⁷⁸ The first regulation applies

70. See Brief of Tribal Intervenors, *supra* note 6, at 26–30.

71. See, e.g., Amicus Curiae State of Minnesota’s Brief and Addendum, *supra* note 6, at 6.

72. Memorandum from John S. Seitz, *supra* note 5, at 1.

73. *Id.* at 2.

74. *Id.*

75. *Id.* at 1.

76. *Id.* at 5.

77. See Brief of Tribal Intervenors, *supra* note 6, at 15–16.

78. Review of New Sources and Modifications in Indian Country, 76 Fed.

to “new and modified minor stationary sources (minor sources), and to minor modifications at existing major stationary sources (major sources) throughout Indian country.”⁷⁹ This regulation includes a mechanism for obtaining synthetic minor source permits.⁸⁰ The second regulation applies to “new and modified major sources in areas of Indian country that are designated as not attaining the [NAAQS]” set by the EPA.⁸¹ As it did in 1998, the EPA stated its intention to “fill [the] regulatory gap” caused by the lack of a federal permitting program for minor sources in Indian country and for major sources in nonattainment areas of Indian country.⁸² In addition, the EPA recognized that “only a few Tribes have yet sought eligibility to administer a minor NSR program and no Tribe has yet sought eligibility for the nonattainment major NSR program.”⁸³ As such, the Indian Country NSR Rule applies in all parts of Indian country “where no EPA-approved minor NSR or nonattainment major NSR program is in place.”⁸⁴ If, however, the EPA subsequently approves a TIP for any specific area of Indian country, such plan would supersede the Indian Country NSR Rule.⁸⁵

The EPA’s Indian Country NSR Rule also explains the EPA’s view of its authority to regulate air quality in Indian country. According to the EPA, it has “authority under sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a) to promulgate FIPs in order to remedy an existing regulatory gap under the CAA with respect to Indian country.”⁸⁶ Section 301(a) authorizes the EPA to promulgate regulations under the CAA.⁸⁷ Section 301(d)(4) gives the EPA discretion in its application of section 301(d): “In any case in which the Administrator determines that the treatment of Indian

Reg. 38,748, 38,748 (July 1, 2011) (codified at 40 C.F.R. pts. 49, 51 (2014)).

79. *Id.*

80. *See id.* at 38,769–71.

81. *Id.* at 38,748.

82. *Id.* at 38,749–50. Nonattainment areas have air quality worse than the NAAQS set by the EPA. *See id.* at 38,751.

83. *Id.* at 38,778.

84. *Id.*

85. *Id.* at 38,752.

86. *Id.* at 38,778; *see* Air Quality Act of 1967, Pub. L. No. 90-148, § 2, 81 Stat. 485 (codified as amended at 42 U.S.C. § 7601(a) (2012)); 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)(4)); 40 C.F.R. § 49.11 (2014).

87. Air Quality Act § 2.

tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.”⁸⁸ The section of the 1998 Tribal Authority Rule codified at 40 CFR 49.11(a) gives the EPA authority to promulgate “such Federal implementation plan provisions as are necessary or appropriate to protect air quality” in areas lacking a tribal implementation plan.⁸⁹ In other words, in the EPA’s view, it has authority to implement a FIP for Indian country pursuant to Congress’ broad grant of authority to the EPA in the CAA.⁹⁰ In addition, the EPA stated its view that “states generally lack the authority to regulate air quality in Indian country.”⁹¹ Thus, the EPA—rather than the states—has authority to implement a federal permitting program in any area of Indian country where a tribe does not implement a TIP.

IV. THE D.C. CIRCUIT’S OPINION IN *OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY V. EPA*

Shortly after publication of the final Indian Country NSR Rule, ODEQ filed a Petition for Review with the D.C. Circuit, arguing that the EPA exceeded its authority under the CAA by promulgating the Rule.⁹² Specifically, ODEQ challenged the EPA’s

88. Clean Air Act Amendments of 1990 § 107(d)(4).

89. 40 C.F.R. § 49.11(a).

90. See Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. at 38,752.

91. *Id.* at 38,779. The EPA’s view is consistent with law establishing the federal government’s authority to govern Indian country and Indian affairs, largely to the exclusion of the states. See *supra* Part II.

92. Petition for Review, *supra* note 13. ODEQ claimed that the D.C. Circuit had jurisdiction to review the EPA’s Indian Country NSR Rule pursuant to CAA section 307(b)(1). Brief of the Petitioner at 2, *Okla. Dep’t of Envtl. Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014) (No. 11-1307), 2013 WL 1208575, at *2. CAA section 307(b)(1) reads in part: “A petition for review of . . . any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.” Clean Air Act, 42 U.S.C. § 7607(b)(1) (2012). The EPA agreed with ODEQ with respect to the D.C. Circuit’s jurisdiction. EPA’s Proof Merits Brief at 1, *Okla. Dep’t of Envtl. Quality*, 740 F.3d 185 (No. 11-1307), 2013 WL 3816981 at *1; see also Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. at 38,788 (“Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by August 30, 2011.”).

authority to implement a federal CAA program in non-reservation Indian country, including allotments and dependent Indian communities.⁹³ ODEQ did not argue that the Indian Country NSR Rule adversely affected a particular development project located in non-reservation Indian country within Oklahoma's boundaries, but rather opposed the Indian Country NSR Rule on its face, contending that the EPA violated the Administrative Procedure Act through arbitrary and capricious rulemaking.⁹⁴ In support of this argument, ODEQ first contended that the regulatory gap cited by the EPA does not exist with respect to non-reservation Indian country, because each state's SIP applies to all non-reservation Indian country where no Indian tribe has demonstrated its inherent jurisdiction.⁹⁵ ODEQ next maintained that the EPA failed to make required jurisdictional findings with respect to non-reservation areas of Indian country.⁹⁶ Notably, ODEQ did not challenge the Indian Country NSR Rule as it pertained to Indian reservations.⁹⁷ The Navajo Nation, the Shakopee Mdewakanton Sioux Community, the Red Lake Band of Chippewa,⁹⁸ and the United South and Eastern Tribes, Inc.⁹⁹ intervened in support of the EPA.¹⁰⁰

In an opinion written by Judge Douglas Ginsburg, the D.C. Circuit agreed with ODEQ and vacated the Indian Country NSR Rule with respect to non-reservation Indian country.¹⁰¹ This Part provides a close reading of the opinion, while Part V explains the court's errors.

93. Brief of the Petitioner, *supra* note 92, at 9–11.

94. *Id.* at 38; *see* Administrative Procedure Act, 5 U.S.C. § 706(2) (A).

95. Brief of the Petitioner, *supra* note 92, at 18–19.

96. *Id.* at 55–57.

97. *See id.* at 11.

98. Okla. Dep't of Env'tl. Quality v. EPA, No. 11-1307 (D.C. Cir. Dec. 27, 2012) (order granting motion for leave to intervene filed by the Shakopee Mdewakanton Sioux Community, the Red Lake Band of Chippewa, and the Navajo Nation).

99. Okla. Dep't of Env'tl. Quality v. EPA, No. 11-1307 (D.C. Cir. Dec. 28, 2012) (order granting motion for leave to intervene filed by the United States and the South and Eastern Tribes, Inc.).

100. Okla. Dep't of Env'tl. Quality v. EPA, 740 F.3d 185, 189 (D.C. Cir. 2014).

101. *Id.* at 187.

A. *Disposal of the EPA's Threshold Objections*

The court began by rejecting the EPA's three threshold objections to ODEQ's challenge.¹⁰² The EPA argued that ODEQ lacked standing to challenge the Indian Country NSR Rule because ODEQ's alleged injury was self-inflicted.¹⁰³ Namely, the EPA argued that ODEQ could remedy its "injury" by applying to the EPA for SIP authority to regulate non-reservation lands under the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA).¹⁰⁴ The court rejected the EPA's standing argument on the basis that the EPA could interpret SAFETEA as authorizing the EPA to attach conditions to any "approval of Oklahoma's SIP as applied to Indian country."¹⁰⁵ Thus, the "remedy" proposed by the EPA would be uncertain, and "[t]he possibility of an alternative remedy, of uncertain availability and effect, does not render its injury self-inflicted."¹⁰⁶ Instead, the D.C. Circuit agreed with ODEQ's contention that ODEQ had standing to challenge the Indian Country NSR Rule, because the rule would divest ODEQ of its regulatory authority over non-reservation Indian country, an injury that the court could redress by vacating the rule with respect to non-reservation Indian country lands.¹⁰⁷

The EPA's second threshold objection was that ODEQ's challenge came too late.¹⁰⁸ Under section 307(b)(1) of the CAA, a party wishing to challenge a final rule issued by the EPA under the CAA must file a petition for review of that rule with the D.C. Circuit within sixty days of the EPA's publication of that rule in the Federal Register.¹⁰⁹ If the challenging party files its petition too late, the D.C. Circuit lacks jurisdiction to review the rule.¹¹⁰ Citing this

102. *Id.* at 189–92.

103. Supplemental Brief for Respondent at 9–10, *Okla. Dep't of Env'tl. Quality*, 740 F.3d 185 (No. 11-1307), 2013 WL 6185841, at *9–10.

104. *Id.* at 9. *See generally* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005). Congress added an Oklahoma-specific provision to this mammoth transportation bill to increase Oklahoma's ability to regulate in Indian Country under the CAA. *Id.* tit. X, subtitle B, § 10211.

105. *Okla. Dep't of Env'tl. Quality*, 740 F.3d at 190.

106. *Id.*

107. *Id.* at 189–90.

108. EPA's Proof Merits Brief, *supra* note 92, at 45.

109. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 307(b)(1), 104 Stat. 2682, 2682 (codified as amended at 42 U.S.C. § 7607(b)(1) (2012)).

110. *See id.*; *see also Okla. Dep't of Env'tl. Quality*, 740 F.3d at 191.

provision of the CAA, the EPA argued that the Tribal Authority Rule, issued in 1998, made it clear that the EPA “interpreted past SIP approvals as not applying in Indian country unless the relevant State had made an explicit demonstration of authority and unless EPA had expressly approved the SIP as applying in Indian country.”¹¹¹ As such, the EPA argued that ODEQ could not argue that Oklahoma’s SIP, rather than the EPA’s FIP, applied on non-reservation areas of Indian country, because ODEQ did not challenge that aspect of the Tribal Authority Rule in 1998.¹¹² The D.C. Circuit, however, disagreed and found that the Tribal Authority Rule did not clearly rescind prior state authority over non-reservation Indian country.¹¹³ According to the court, the Indian Country NSR Rule “says expressly what the 1998 Rule at most left uncertain: The EPA deems a SIP presumptively inapplicable in both reservation and non-reservation areas of Indian country because ‘states generally lack the authority to regulate air quality in Indian country.’”¹¹⁴ Thus, ODEQ’s challenge, which ODEQ initiated within sixty days of publication of the Indian Country NSR Rule, was timely.¹¹⁵

For its third threshold objection, the EPA argued that ODEQ forfeited its argument that Oklahoma’s SIP presumptively applies in non-reservation Indian country.¹¹⁶ A party wishing to challenge a rule promulgated by the EPA must present its argument to the EPA before seeking judicial review.¹¹⁷ According to the EPA, Oklahoma failed to raise its contention that section 107(a) of the CAA requires application of Oklahoma’s SIP in Indian country during the public comment period on the Indian Country NSR Rule and therefore forfeited its right to raise this argument before the D.C.

111. EPA’s Proof Merits Brief, *supra* note 92, at 30; *see Okla. Dep’t of Envtl. Quality*, 740 F.3d at 190–91.

112. *See* EPA’s Proof Merits Brief, *supra* note 92, at 45.

113. *Okla. Dep’t of Envtl. Quality*, 740 F.3d at 191.

114. *Id.* (quoting Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748, 38,779 (July 1, 2011) (codified at 40 C.F.R. pts. 49, 51 (2014))).

115. *Id.* The docket history for this case on Westlaw states that petitioner (ODEQ) filed for review on August 29, 2011. *See* Petition for Review, *supra* note 13. This filing came 59 days after the NSR rule was published on July 1, 2011. *See id.*

116. EPA’s Proof Merits Brief, *supra* note 92, at 44–46.

117. *Okla. Dep’t of Envtl. Quality*, 740 F.3d at 192 (citing *Vt. Dep’t of Pub. Serv. v. United States*, 684 F.3d 149, 158 (D.C. Cir. 2012); *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1150 (D.C. Cir. 1987)).

Circuit.¹¹⁸ Rejecting the EPA's argument, the court explained that although ODEQ's "argument might have been raised more clearly before the EPA," the argument was directed toward a "key assumption" underlying the Indian Country NSR Rule.¹¹⁹ The EPA had a duty to justify its assumption that a SIP presumptively does not apply in Indian country, even if no one objected to that assumption during the Indian Country NSR Rule's comment period.¹²⁰ The court concluded that the EPA failed to fully examine this assumption; therefore, the issue was not forfeited.¹²¹

B. *The Decision on the Merits*

After disposing of the EPA's threshold objections, the D.C. Circuit turned to the merits of the case. The court began by reviewing its decision in *Michigan v. EPA*, in which the court clarified the EPA's authority to implement federal CAA programs.¹²² In *Michigan*, the petitioners had challenged the EPA's Federal Operating Permits Program Rule,¹²³ particularly the EPA's proposal to administer a federal operating permit program for areas where it believed Indian country status was "in question."¹²⁴ The *Michigan* court explained that the EPA only has authority to implement a federal program when the EPA is standing in for a state or a tribe.¹²⁵ If a state fails to implement an approved state program, the EPA can implement a federal program in place of the state program.¹²⁶ If an Indian tribe does not promulgate a tribal program, the EPA can implement a federal program in place of a tribal program.¹²⁷ The EPA cannot, however, declare that certain lands are "in question" and then implement a federal program in

118. EPA's Proof Merits Brief, *supra* note 92, at 45.

119. *Okla. Dep't of Env'tl. Quality*, 740 F.3d at 192 (quoting *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998)).

120. *Id.* (citing *Appalachian Power Co.*, 135 F.3d at 818).

121. *Id.*

122. *Id.* at 193 (citing *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001)).

123. Federal Operating Permits Program, 64 Fed. Reg. 8247 (Feb. 19, 1999) (codified at 40 C.F.R. pt. 71 (2014)).

124. *Michigan*, 268 F.3d at 1077–78.

125. *Id.* at 1085.

126. *Id.* at 1083 (citing 42 U.S.C. § 7661a (2012)).

127. *Id.*

the absence of clear state or tribal authority.¹²⁸ In the words of the *Michigan* court,

There are no intermediate grounds on which EPA may indefinitely exercise jurisdiction—it is either acting in the shoes of a tribe or the shoes of the state. There is no residual authority granted by the CAA for the EPA to refuse to make a jurisdictional determination and operate a federal program under some general authority of its own.¹²⁹

According to the D.C. Circuit, “The principles we identified in *Michigan* control this case.”¹³⁰ Under the Tribal Authority Rule, the court explained, an Indian tribe may regulate its reservation lands without establishing jurisdiction over them, but an Indian tribe must affirmatively demonstrate jurisdiction over non-reservation lands it wishes to regulate.¹³¹ Further, under *Michigan*, jurisdiction to implement a CAA program is “binary”; it lies either “with [a] state or with [a] tribe—one or the other.”¹³² Therefore, when an Indian tribe has not demonstrated jurisdiction over non-reservation lands, the Indian tribe lacks jurisdiction, and jurisdiction necessarily lies with the state.¹³³ In other words, the D.C. Circuit analogized non-reservation lands to the “in question” lands at issue in *Michigan* and concluded that the EPA could not implement a CAA program regulating non-reservation lands, unless either the EPA or an Indian tribe demonstrated tribal authority over each non-reservation area subject to the EPA’s program.¹³⁴ This analogy, however, makes little sense, because non-reservation Indian lands are unquestionably Indian country.¹³⁵

128. *See id.* at 1086.

129. *Id.* at 1085.

130. *Okla. Dep’t of Env’tl. Quality v. EPA*, 740 F.3d 185, 193 (D.C. Cir. 2014).

131. *Id.* at 194; *see also* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7255 (Feb. 12, 1998) (codified as amended at 40 C.F.R. pts. 9, 35, 49, 50, 81 (2014)).

132. *Okla. Dep’t of Env’tl. Quality*, 740 F.3d at 193 (quoting *Michigan*, 268 F.3d at 1086).

133. *See id.* at 194.

134. *Id.*

135. *See* 18 U.S.C. § 1151 (2012); *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530 (1998); *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *United States v. John*, 437 U.S. 634, 648 (1978).

C. *Rejection of the EPA's Counterarguments*

Finally, the D.C. Circuit turned to the EPA's counterarguments, repeatedly relying on its overly expansive interpretation of *Michigan* to reject them. The EPA first argued that Congress intended a different binary authority rule for Indian country—both reservation and non-reservation lands.¹³⁶ Whereas either a state or an Indian tribe has regulatory authority over non-Indian country lands and “in question” lands, either the EPA or an Indian tribe has regulatory authority over land designated as Indian country.¹³⁷ In support of this argument, the EPA cited section 301(d)(4) of the CAA, which provides the EPA with authority to “directly administer” CAA provisions in Indian country when the “EPA determines it to be inappropriate or administratively infeasible to treat Indian Tribes in the same manner as States.”¹³⁸ The court rejected this argument, explaining that either a state or an Indian tribe has regulatory authority over a given geographic area, regardless of the area's Indian country status.¹³⁹ Where an Indian tribe has no current regulatory authority, even over non-reservation land that is concededly Indian country, the state necessarily has authority.¹⁴⁰

Next, the EPA pointed out that *Michigan's* rule of binary jurisdiction applies to lands in which the Indian country status is in question—and that might not in fact be Indian country—but does not apply to lands designated as Indian country, where no Indian tribe has current regulatory authority.¹⁴¹ According to the EPA, *Michigan* actually supports the Indian Country NSR Rule, because *Michigan* never doubted the EPA's authority to implement a federal permitting program with respect to areas unquestionably designated as Indian country under federal law.¹⁴² The D.C. Circuit, however, rejected this argument as well, reiterating its position that either a state or an Indian tribe—and never the EPA—has jurisdiction over any given geographic area, regardless of its Indian country status.¹⁴³

136. EPA's Proof Merits Brief, *supra* note 92, at 49.

137. *Id.*

138. *Id.* (citing 42 U.S.C. § 7601(d)(4)).

139. *Okla. Dep't of Envtl. Quality*, 740 F.3d at 194.

140. *Id.*

141. See EPA's Proof Merits Brief, *supra* note 92, at 36.

142. *Id.*

143. *Okla. Dep't of Envtl. Quality*, 740 F.3d at 193–94.

The EPA also argued that the Tribal Authority Rule did not require the EPA to make the same jurisdictional findings that an Indian tribe would have to make in order to exercise regulatory authority on the Indian tribe's behalf.¹⁴⁴ In other words, in the EPA's view, the EPA need not determine, on a case-by-case basis, grounds for tribal authority over each area of non-reservation Indian country that the EPA seeks to regulate under a nationwide FIP.¹⁴⁵ Relatedly, the tribal interveners contended that the CAA grants the EPA residual authority over all Indian lands, even if the EPA lacks residual authority over non-Indian lands and "in question" lands.¹⁴⁶ The court dismissed these arguments based on its statement in *Michigan* that the EPA may only regulate "in the shoes" of an Indian tribe or "in the shoes" of a state.¹⁴⁷ Based on *Michigan*, the court reasoned that "the EPA is subject to the same limitations as the tribe itself."¹⁴⁸ As such, the EPA must demonstrate tribal jurisdiction before it may exercise CAA jurisdiction over non-reservation lands.¹⁴⁹

Lastly, the EPA argued that the D.C. Circuit should defer to the EPA's interpretation of past approvals of SIPs as not applying in Indian country.¹⁵⁰ Under the United States Supreme Court's unanimous decision in *Auer v. Robbins*, an agency's interpretation of its own regulation controls unless such interpretation is "plainly erroneous or inconsistent with the regulation."¹⁵¹ Thus, the EPA argued, the D.C. Circuit should uphold the EPA's interpretation of the EPA's past SIP approvals, which were published in the Federal Register, because the EPA's interpretation was not "plainly erroneous or inconsistent" with past SIP approvals.¹⁵² However, the D.C. Circuit rejected this argument on the basis that the EPA's interpretation was based on an incorrect assumption that "states generally lack the authority to regulate air quality in Indian country," including non-reservation lands where no Indian tribe

144. EPA's Proof Merits Brief, *supra* note 92, at 40.

145. *See id.* at 40–43.

146. *See* Brief of Tribal Intervenors, *supra* note 6, at 7.

147. *Okl. Dep't of Env'tl. Quality*, 740 F.3d at 195.

148. *Id.*

149. *Id.*

150. EPA's Proof Merits Brief, *supra* note 92, at 33.

151. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

152. EPA's Proof Merits Brief, *supra* note 92 at 34 (quoting *Auer*, 519 U.S. at 461).

has demonstrated jurisdiction.¹⁵³ As such, the court determined that the EPA's interpretation was "plainly erroneous" and therefore warranted no deference from the court.¹⁵⁴

Having rejected each of EPA's arguments, the D.C. Circuit declared its holding:

We hold a state has regulatory jurisdiction under the Clean Air Act over all land within its territory and outside the boundaries of an Indian reservation except insofar as an Indian tribe or the EPA has demonstrated a tribe has jurisdiction. Until such a demonstration has been made, neither a tribe nor the EPA standing in the shoes of a tribe may displace a state's implementation plan with respect to a non-reservation area of the state.¹⁵⁵

With this conclusion—and its problematic rationale—the court vacated the EPA's Indian Country NSR Rule with respect to non-reservation Indian country.¹⁵⁶

V. WHY OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY V. EPA WAS WRONGLY DECIDED

Both law and policy undermine the D.C. Circuit's decision. Indeed, for at least four reasons, the D.C. Circuit reached the wrong conclusion in this case.

A. *The Abstract Nature of ODEQ's Alleged Injury*

First, the D.C. Circuit overstepped the constitutional boundaries of its authority by deciding the validity of the Indian Country NSR Rule despite the absence of any particular, on-the-ground controversy caused by it. To establish standing pursuant to the U.S. Constitution, as the D.C. Circuit recognized, a plaintiff has the burden of establishing that it suffered a concrete and particularized injury that is actual or imminent.¹⁵⁷ In *Oklahoma*

153. *Okla. Dep't of Envtl. Quality*, 740 F.3d at 195 (quoting Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748-01, 38,752 (July 1, 2011) (codified at 40 C.F.R. pts. 49, 51) (2014)).

154. *Id.* (quoting *Auer*, 519 U.S. at 461).

155. *Id.*

156. *Id.*

157. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (explaining the three requirements of Article III standing: (1) injury, (2) causation, and (3) redressability); *see Okla. Dep't of Envtl. Quality*, 740 F.3d at 189;

Department of Environmental Quality v. EPA, ODEQ alleged only that the Indian Country NSR Rule injured ODEQ by stripping its existing jurisdiction over non-reservation Indian country under the CAA.¹⁵⁸ ODEQ did not point to a particular development project on non-reservation Indian country lands that ODEQ wished to regulate. To the contrary, Oklahoma's nationwide challenge to the Indian Country NSR Rule was exactly the sort of programmatic challenge that the courts for decades have barred environmental groups from launching against federal agencies.¹⁵⁹ The D.C. Circuit, however, did not even address the abstract nature of ODEQ's alleged injury; instead, it asserted without analysis: "Clearly, Oklahoma has alleged an injury . . ." ¹⁶⁰ Because ODEQ alleged no concrete and particularized injury, neither the D.C. Circuit nor the parties could assess the actual implications of the case or the effects that the court's decision would have on development in Indian country.¹⁶¹

B. *The D.C. Circuit's Misapplication of Michigan v. EPA*

Second, the D.C. Circuit's reliance on *Michigan* was misplaced. Non-reservation areas of Indian country—even when neither the EPA nor a tribe has affirmatively established jurisdiction over such non-reservation lands—are not the same as lands whose Indian country status is in question. The difference is, of course, that non-

see also U.S. CONST. art. III, § 2, cl. 1.

158. *Okla. Dep't of Env'tl. Quality*, 740 F.3d at 189.

159. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890–94 (1990); see also *Sierra Club v. EPA*, 292 F.3d 895, 898–902 (2002); *Lujan v. Defenders of Wildlife*, 504 U.S. at 567–67 (1992).

160. *Okla. Dep't of Env'tl. Quality*, 740 F.3d at 190.

161. It is also possible that ODEQ would have been forced to challenge the Indian Country NSR Rule in connection with a particular development project in the U.S. Court of Appeals for the Tenth Circuit, rather than in the D.C. Circuit. The CAA states that "[a] petition for review of the Administrator's action in approving or promulgating any implementation plan . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." Clean Air Act, 42 U.S.C. § 7607(b)(1) (2012). Arguably, the U.S. Court of Appeals for the Tenth Circuit, which is located in an area of the country with many Indian tribes, would have been a more favorable venue for the EPA. See, e.g., *HRI, Inc. v. EPA*, 198 F.3d 1224, 1254 (10th Cir. 2000) (concluding that the EPA was within its authority to find that "checkerboard" lands had Indian country status for purposes of the Safe Drinking Water Act).

reservation Indian country is still Indian country,¹⁶² whereas “in question” lands might not be Indian country at all.¹⁶³ Although the D.C. Circuit brushed this distinction aside with little discussion, “Indian country” status has real legal significance. Over one hundred years of jurisprudence has established the limited role of states on Indian lands.¹⁶⁴ Governance on Indian lands falls to tribal governments and the federal government, typically to the exclusion of state governments, and the federal government has a trust obligation toward Indian tribes and Indian lands.¹⁶⁵ Given the difference between the “in question” lands at issue in *Michigan* and the non-reservation Indian country lands at issue in *Oklahoma Department of Environmental Quality v. EPA*, the federal government ought to retain authority to regulate air quality in non-reservation areas of Indian country.

C. *Congress' Intent to Provide for Tribal or Federal Regulation of Indian Country—Not State Regulation*

Third, the D.C. Circuit's decision did not comport with Congress' intent when Congress amended the CAA to add section 301(d)'s authorization to treat Indian tribes as states. Although there is little discussion of the “Treatment as a State” (TAS) provision in the congressional record, there is no indication that Congress intended the states to have residual authority over non-reservation lands in the event that a tribe did not affirmatively demonstrate jurisdiction over such lands.¹⁶⁶ Rather, the Senate Report stressed cooperation between the *federal government* and tribal governments, explaining that the purpose of the TAS

162. Indian lands include non-reservation land. *See* 18 U.S.C. § 1151; *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *United States v. John*, 437 U.S. 634, 648 (1978).

163. *See* Final Brief for Respondent at 30–32, *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001) (Nos. 99-1151 to -1155), 2001 WL 36046990, at *30–32.

164. *See, e.g., Native Vill. of Venetie*, 522 U.S. at 527 n.1; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215–16, 221–22 (1987), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100–497, 102 Stat. 2467 (1988); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764–65 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980); *Williams v. Lee*, 358 U.S. 217, 220 n.4 (1959); *Worcester v. Georgia*, 31 U.S. 515, 558–60 (1832); *see also supra* Part II.

165. *See supra* Part II.

166. 132 CONG. REC. 6284-02 (1986).

provision is to “improve the environmental quality of the air [within] Indian country in a manner consistent with the EPA Indian Policy and ‘the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments.’”¹⁶⁷ In addition, the Senate Report emphasized the EPA’s duty—not merely authority—to implement CAA programs on all Indian lands in the absence of a tribal implementation program: “This provision also confirms the Agency’s obligation and responsibility to enforce the Act in Indian Country should a tribal government choose not to assume primary enforcement responsibility.”¹⁶⁸ Further, the Senate Report noted “the Federal government’s general authority in Indian Country.”¹⁶⁹ In short, the Senate Report suggests that Congress assumed that regulation of Indian lands would fall either to a tribe or to the federal government—not to a state.¹⁷⁰

Further, to the extent that there was ambiguity in Congress’ commands, the court should have deferred to the EPA’s interpretation of the CAA in the Indian Country NSR Rule. Under the United States Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a court reviewing an agency’s construction of a statute administered by that agency must defer to the agency’s construction of the statute unless Congress has clearly addressed the question at issue.¹⁷¹ Here, the D.C. Circuit should have deferred to the EPA’s reasonable construction of the CAA.¹⁷² Indeed, it may make sense for a tribe that seeks treatment as a state under the CAA to be required to establish its jurisdiction over the non-reservation Indian country that it seeks to regulate. However, until that occurs (which has been rare to date), there is neither reason nor need for the EPA to prove tribal jurisdiction

167. S. REP. NO. 101-228, at 78 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3465; RUCKELSHAUS, *supra* note 39, at 1.

168. S. REP. NO. 101-228, at 3466.

169. *Id.*

170. Likewise, the Senate Debate on the amendments adding a Treatment as a State provision to the Safe Drinking Water Act stressed federal-tribal governance without reference to state involvement. 132 CONG. REC. 6284-02 (“I think the United States has a trust responsibility to help the Indian people remedy [lack of access to clean water], and that was my primary interest in originally cosponsoring these amendments to the Safe Drinking Water Act.” (statement of Sen. Hart)).

171. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

172. *See id.*

over every piece of non-reservation Indian country in a FIP—it is all federally owned or regulated land, so implementing a federal regulatory place holder, pending future assertions of tribal jurisdiction, seems to be a permissible construction of congressional intent in the 1990 CAA amendments. Should a particularized, justiciable dispute arise over a permitted source in a particular locale, the issue of regulatory authority can be decided by the courts, not on the basis of the EPA's jurisdictional reach, but on whether there is some legitimate basis to contest the Indian country status of the locale at issue or the substance of the tribe's asserted jurisdiction. If not, a federal permit is required—a logical outcome on federally governed land.

Finally, federal common law has long established federal and tribal governance over Indian country and Indian affairs to the exclusion of states.¹⁷³ Courts should presume that Congress legislated with this broad, deep-seated principle in mind.¹⁷⁴ Because the CAA does not clearly grant regulatory authority over non-reservation Indian country to states, the D.C. Circuit erred in failing to consider Congress' awareness of federal primacy in Indian affairs.¹⁷⁵

D. *The Threat to Tribal Interests*

Fourth, the D.C. Circuit's decision will negatively impact tribes. The EPA is a better and more uniform advocate for the interests of Indian tribes than the states. The federal government has a legal duty to act in the best interests of tribes,¹⁷⁶ whereas the states have

173. See *supra* Part II.

174. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”).

175. See *id.* at 185 (“In the absence of affirmative evidence in the language or history of the statute, we are unwilling to assume that Congress was ignorant of [existing law].”).

176. See *supra* Part II; see also *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935); *Cobell v. Norton*, 240 F.3d 1081, 1086, 1099 (D.C. Cir. 2001); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000); *Exec. Order No. 13,175*, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000) (“The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish

no such obligation. Further, the United States government has affirmatively declared its policy of encouraging tribal self-governance. In 2000, President Clinton issued Executive Order 13,175, which stated, "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."¹⁷⁷ Executive Order 13,175 requires federal agencies—including the EPA—to act in the best interests of Indian tribes when formulating and implementing policies that may affect Indian tribes.¹⁷⁸ Namely, agencies must honor tribal rights, grant administrative discretion to tribal governments, and involve tribes in the formulation and implementation of policies that have tribal implications.¹⁷⁹

In 2009, President Obama directed agencies to submit a detailed plan of action for implementing the directives of Executive Order 13,175, stating, "My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications"¹⁸⁰ In response, the EPA submitted its *Plan to Develop a Tribal Consultation and*

and define a trust relationship with Indian tribes.").

177. Exec. Order No. 13,175, 65 Fed. Reg. at 67,249. Another example of the federal government's policy of facilitating tribal self-governance is the Tribal Law and Order Act of 2010, which increases tribal control over law enforcement in Indian country. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261-301. The Tribal Law and Order Act of 2010 acknowledges that "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country." *Id.* at 2262. Further, it states that one purpose of the Tribal Law and Order Act of 2010 is to "empower tribal governments with the authority . . . necessary to safely and effectively provide public safety in Indian country." *Id.* at 2263. The Supreme Court, too, has recognized the importance of tribal self-governance. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) ("[Tribal sovereign] immunity, we have explained is 'a necessary corollary to Indian sovereignty and self-governance.'" (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986))); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983))), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

178. Exec. Order No. 13,175, 65 Fed. Reg. at 67,249-50.

179. *Id.*

180. Tribal Consultation Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881, 57881 (Nov. 5, 2009).

Coordination Policy Implementing Executive Order 13,175.¹⁸¹ The plan stressed the importance of tribal sovereignty and tribal-federal cooperation.¹⁸² Subsequently, the EPA released its *Policy on Consultation and Coordination with Indian Tribes*.¹⁸³ The policy stated the EPA's intention to "consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes."¹⁸⁴ In short, the policy reflects the EPA's commitment to partner with tribes and to use a nationwide approach to such partnership in order to encourage "consistency and predictability" for the purpose of encouraging tribal self-governance, as well as environmental protection.¹⁸⁵ Due to this commitment, the EPA, rather than the states, is more likely to promote tribal interests on non-reservation Indian lands. Consequently, the D.C. Circuit's decision¹⁸⁶ is a setback for tribal sovereignty and self-governance.

In addition, the D.C. Circuit's partial vacatur of the Indian Country NSR Rule may deter development in Indian country. To illustrate the potential confusion that the D.C. Circuit's decision creates, imagine an entity that wishes to construct or modify a source of air emissions in an area of Indian country where no TIP applies. The entity must first determine if the land it wishes to

181. EPA, PLAN TO DEVELOP A TRIBAL CONSULTATION AND COORDINATION POLICY IMPLEMENTING EXECUTIVE ORDER 13175; *see also* *Consultation: Introduction*, EPA, <http://www.epa.gov/tribalportal/consultation/> (last visited Jan. 31, 2015).

182. *See* *Consultation: Introduction*, *supra* note 181.

183. EPA, POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 1 (2011) [hereinafter *POLICY ON CONSULTATION*]. The EPA published its proposed policy in the Federal Register. *See* Proposed Final Policy on Consultation and Coordination with Indian Tribes, 75 Fed. Reg. 78,198, 78,198–202 (proposed Dec. 15, 2010) (to be codified at 40 C.F.R. ch. I). The EPA did not publish the final policy in the Federal Register, but rather provides access to the policy online. *See* *EPA Consultation and Coordination Policy: Final Policy for Consultation and Coordination with Indian Tribes*, EPA, <http://www.epa.gov/tribalportal/consultation/consult-policy.htm> (last visited Feb. 7, 2015) [hereinafter *Final Policy for Consultation*]. The EPA also responded to comments received on the Proposed Final Policy. EPA, RESPONSES TO TRIBAL COMMENTS ON PROPOSED EPA CONSULTATION POLICY. *See generally* *Final Policy for Consultation*, *supra*.

184. *POLICY ON CONSULTATION*, *supra* note 183, at 1.

185. *Id.*

186. *Okla. Dep't of Env'tl. Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014).

develop is reservation or non-reservation Indian country. If the land is non-reservation Indian country, the entity must seek a permit from the state within which boundaries such land is located.¹⁸⁷ Unlike Oklahoma, another state might be reluctant to issue permits in a geographic area that it did not previously regulate, or it might be hesitant to issue permits in Indian country, where Indian tribes and the federal government typically exercise law enforcement responsibilities.¹⁸⁸ If the land is reservation Indian country, then the entity must seek a permit from the EPA,¹⁸⁹ whose requirements could differ from the state's requirements for the same type of permit for non-reservation Indian country lands adjacent to the reservation lands and occupied by the same tribe. In contrast to this scenario, if the D.C. Circuit had left the Indian Country NSR Rule fully intact, the entity wishing to develop in Indian country would simply seek a permit from a nationwide program operated by the EPA, an agency that has repeatedly acknowledged its duty to further tribal interests and tribal self-governance.

VI. CONCLUSION

In light of decades of jurisprudence establishing the federal government's primacy over Indian affairs, the EPA does and should have authority to implement a nationwide federal permitting

187. A tribe, if it had the necessary resources and could meet the requirements of the CAA, could implement a TIP for its non-reservation Indian Country lands and thereby displace the applicable SIP. See *Okla. Dep't of Envtl. Quality*, 740 F.3d at 193–94 (“A state has ‘primary responsibility,’ i.e., jurisdiction, ‘within the entire geographic area comprising such State,’ . . . except insofar as the EPA has authorized the treatment of ‘Indian tribes as States’ pursuant to [section 301(d) of the CAA].” (citations omitted)). Thereafter, the tribe could issue itself a permit pursuant to the TIP.

188. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 19, §§ 7.02–.04 (explaining tribal, state, and federal jurisdiction over civil matters in Indian country); *id.* § 9.03[1] (explaining that states generally lack criminal jurisdiction in Indian country). For information about the CAA's criminal enforcement provisions, see generally Robert Brager, Laura McAfee & Heidi Knight, *Criminal Enforcement*, in AM. BAR ASS'N, THE CLEAN AIR ACT HANDBOOK, *supra* note 44, at 665.

189. ODEQ only challenged—and the D.C. Circuit only vacated—the Indian Country NSR Rule with respect to non-reservation Indian country, so the FIP provided by the rule still applies to reservation Indian country where no TIP currently exists. See *Okla. Dep't of Envtl. Quality*, 740 F.3d at 195.

program for all of Indian country, including non-reservation lands. The D.C. Circuit's contrary conclusion in *Oklahoma Department of Environmental Quality v. EPA* reintroduces the regulatory gap that the EPA intended to fill through the Indian Country NSR Rule¹⁹⁰ and thereby reintroduces confusion to development in Indian country.¹⁹¹ Further, the D.C. Circuit's decision defies a bedrock principle of Indian law—that state laws generally do not apply to Indian affairs in Indian country absent express authorization by Congress.¹⁹² Although the Clean Air Act makes no such authorization, the D.C. Circuit held that states have default regulatory authority over non-reservation areas of Indian country.¹⁹³ Because the federal government actively encourages tribal self-governance—while states do not necessarily do the same—the D.C. Circuit's decision undermines tribal sovereignty and invites further state regulatory encroachment in Indian country.

190. See *supra* Part V.C.

191. See *supra* note 187 and accompanying text. See generally *Okla. Dep't of Envtl. Quality*, 740 F.3d 185.

192. See *supra* notes 24–25 and accompanying text.

193. *Okla. Dep't of Envtl. Quality*, 740 F.3d at 195.