Fighting for Air in Indian Country: Clean Air Act Jurisdiction in Off-Reservation Tribal Land

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Summary

Acting under its Clean Air Act (CAA) authority, the U.S. Environmental Protection Agency (EPA) has attempted to regulate air quality on behalf of Native American tribes. However, the D.C. Circuit—in reviewing EPA's tribal CAA rules—significantly cut back on these efforts, resulting in state encroachment on the environmental authority congressionally delegated to tribes. This undermines tribes' sovereignty, control over their natural resources, and opportunities for economic development. EPA thus should change its approach in future CAA rules for Indian country, by relying on preemption, rather than its nebulous gap-filling authority in the statute.

I. Introduction

Today, Native American tribes are in a powerful position to influence energy security through the development of energy resources in the United States. This presents both a tremendous economic opportunity for many tribes and a chance to expand energy accessibility for the American public. Present-day reservations and land trusts are the sites of 40% of the country's western coal reserves, 40% of American uranium deposits, and 4% of known natural gas and oil reserves.[1] Some estimates predict that if tribes decided to capitalize on all of their energy resource potential, including renewables development, it would mean approximately one trillion dollars in revenues.[2] However, this immense opportunity could stagnate, given the ongoing struggle for environmental regulatory authority in Indian country.

Any energy project, from extraction by mining to electricity generation, demands that a complex array of regulatory requirements be met—everything from local siting and zoning permits to reports on environmental impacts of the projects to permits for air emissions. Given the complexities and significant costs of regulatory compliance in energy development, jurisdictional uncertainty in Indian country often means that industry is reluctant to invest there, placing tribes at an economic disadvantage relative to the surrounding states.[3]

Without robust environmental regulation, communities in Indian country are among those in greatest need of support and change from an environmental justice perspective.[4] Environmental justice is commonly understood to mean that no single community or population should disproportionately bear the burdens of environmental degradation or benefit less from land and resource use.[5] The environmental justice movement originally focused on advocating for low-income communities and people of color, who were disproportionately suffering from pollution and connected health impacts.[6]

Although environmental justice in Indian country entails eradicating racial and economic discrimination, it requires more. First, because Indian tribes are sovereign, they additionally require recognition of their equal sta-

1. Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 Utah Envtl. L. Rev. 1, 1 (2012).
2. Elizabeth A. Kronk Warner, *Examining Tribal Environmental Law*, 39 Colum. J. Envtl. L. 42, 44 (2014).
3. Sandra D. Benischek, *Clean Air in Indian Country: Regulation and Environmental Justice*, 12 Vill. Envtl. L.J. 211, 214-15 (2001).
4. *See* Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 Envtl. & Energy L. & Pol'y J. 188, 211-12 (2009); Warner, *supra* note 2, at 51-52.
5. *See* Tsosie, *supra* note 4, at 210; *see also* Benischek, *supra* note 3, at 224.
6. *See, e.g.*, Tsosie, *supra* note 4, at 210; Dean B. Suagee, *Environmental Justice and Indian Country*, 30 Hum. Rts. 16, 16 (2003).

tus as governments and preservation of tribal autonomy.[7] Further, protection of natural resources is intrinsically linked to preservation of Indian culture and community because indigenous peoples' religion, traditions, and very existence are inextricably linked to the land.[8] As a result, adverse environmental impacts experienced by indigenous people set them apart from other communities, because for tribes, environmental damage can threaten extinction of an entire culture.[9]

However, even where congressional action explicitly establishes Indian authority under federal environmental statutes,[10] tribes often do not have the resources to implement rigorous resource regulation.[11] In the late 1980s and early 1990s, when the U.S. Congress finally created opportunities for tribal governments to utilize the core federal environmental legislation, those statutes had already been in effect for several decades.[12] Tribes were left struggling to identify and fill existing gaps in the national regulatory schemes; many continue to struggle with this today.[13] Finally, when tribes do take regulatory action, the regimes rarely if ever take effect without aggressive court challenges by states or industry contesting tribal jurisdiction over them or their actions.[14] Due to limited resources, delayed entry into the federal environmental regulation arena, and vigorous court challenges, many Indian communities have been victimized by the energy industry taking advantage of this "gray" regulatory area[15] or by states completely usurping their regulatory authority.[16]

This Article examines these trends through the lens of one recent U.S. Court of Appeals for the District of Columbia (D.C.) Circuit decision, *Oklahoma Department of Environmental Quality* (*ODEQ*) *v. EPA*.[17] The decision vacated a U.S. Environmental Protection Agency (EPA) rule that applied a federal permitting program under the Clean Air Act (CAA)[18] in areas of Indian country where tribes had yet to establish one.[19] The court held that regulatory jurisdiction under the CAA should default to the states in those areas.[20] *ODEQ* is an instructive case for examining the adverse impacts of federal environmental case law—including impediments to tribes' abilities to capitalize on energy resources and ensure safe and healthy communities on their lands—because the CAA plays a central regulatory role in the energy industry.

Part II of the Article sets the scene for the *ODEQ* dispute with a brief background on the CAA, the Act's 1990 Amendments, which incorporated a role for tribes, and EPA's approach to implementing these provisions. Part III examines the *ODEQ* decision in detail and questions the D.C. Circuit's legal reasoning used to reach its result. Finally, Part IV proposes a new approach for achieving robust air quality regulation in Indian country.

II. Air Quality Regulation in Indian Country

Air quality regulation is central to any aspect of energy development, from fossil fuel extraction to power generation, because many of these operations emit large amounts of air pollutants. The CAA is the primary means of air quality regulation in the United States and part of a wave of federal environmental legislation passed in response to growing public concern about pollution in the 1960s and 1970s.[21] The block of statutes was structured on the "cooperative federalism" model, in which the federal government sets national standards, and then requires that states develop plans for implementing the standards in order to bring the state into compliance.[22]

However, the cooperative federalism framework in the early environmental statutes did not explicitly address the role of tribal governments and regulation in Indian country.[23] In 1990, Congress expanded tribal involvement in air quality regulation[24] by amending the CAA

7. Tsosie, *supra* note 4, at 211.
8. *See* Benischek, *supra* note 3, at 226; Warner, *supra* note 2, at 43 n.3; Tsosie, *supra* note 4, at 198.
9. *See, e.g.*, Tsosie, *supra* note 4, at 190-91 (explaining the undue burdens of climate change borne by the Inuit of Alaska: Due to rising sea levels from glacial melt, Inuit communities are facing an imminent threat to their entire way of life—from their means of gathering food and subsisting off the land to loss of entire ancestral villages).
10. Although tribes are sovereign nations, "Because federal power over Indian affairs is plenary, questions of the applicability of general federal legislation in Indian country depend upon the intention rather than the power of Congress." William C. Canby Jr., American Indian Law in a Nutshell 310 (5th ed. 2009).
11. Benischek, *supra* note 3, at 227 (commenting that since tribal governments often lack the resources to implement the Clean Air Act (CAA), for example, provisions enabling tribal regulation becomes yet "another unfunded mandate of the federal government," reducing them to "smoke and mirrors").
12. Suagee, *supra* note 6, at 16.
13. *Id.*
14. *Id.* at 16 (explaining that tribes' attempts to implement environmental regulatory regimes are significantly undermined by the U.S. Supreme Court's federal Indian jurisprudence).
15. Benischek, *supra* note 3, at 215 n.27 (citing the concerns articulated by the U.S. Environmental Protection Agency's Counselor to Administrator on Indian Affairs that "some unscrupulous parties have taken advantage of [the then-] current gap in coverage").
16. *See* Oklahoma Dep't Envt'l Quality (ODEQ) v. EPA, 740 F.3d 185, 195, 44 ELR 20013 (D.C. Cir. 2014) (finding that in off-reservation areas of Indian country where tribes had not asserted regulatory authority under the CAA, states would have default jurisdiction).
17. 740 F.3d 185 (D.C. Cir. 2014).
18. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
19. *ODEQ*, 740 F.3d at 195.
20. *Id.*
21. *See* Warner, *supra* note 2, at 59.
22. *Id.* at 61 & n.102.
23. *Id.* at 60.
24. Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1284, 30 ELR 20565 (D.C. Cir. 2000); *see* Benischek, *supra* note 3, at 213 (noting that EPA's goal in

to explicitly allow tribal management and control of air quality.[25] The amendment was part of the federal policy shift from fostering tribal dependency upon the federal government to embracing self-determination to help tribes take control of their own economic growth and development.[26] This part lays out the basic structure of the CAA, its amendments incorporating a role for tribes, and the subsequent evolution of air quality regulation in Indian country. It concludes by explaining EPA's most recent Indian country CAA rule, which was vacated in *ODEQ* in 2014.

A. The CAA

The CAA requires EPA to set threshold-allowable concentrations of air pollutants in ambient air, called national ambient air quality standards (NAAQS).[27] Once EPA has established NAAQS, states must submit a state implementation plan (SIP) for meeting NAAQS.[28] If a state fails to submit an SIP or EPA finds that the SIP is inadequate or incomplete, EPA must promulgate a federal implementation plan (FIP) until the state submits an acceptable plan.[29] In its SIP application, each state must demonstrate that it has legal authority to regulate air quality in its geographic territory.[30]

Although SIPs are very resource-intensive to develop, the threat of federal preemption is generally sufficient to incentivize states to prepare them.[31] States are very protective of their SIPs because they shape the business and environmental landscape for the state by distributing the state's pollution control burdens among regulated parties and industries.[32] Although EPA sets NAAQS, states have great latitude in determining which mix of emissions from which particular industries they will tolerate for compliance with NAAQS.[33] Thus, states have "tremendous flexibility" in making decisions about the design of the business and environmental plan for the state and in cherry-picking industry winners and losers.[34]

Further, SIPs generally glide through the EPA approval process. Since the requirements for CAA implementation plans are so complex, they require enormous resources to develop.[35] Additionally, EPA already faces immense backlogs in the SIP approval pipeline[36]; rejecting an SIP and requiring the agency to develop an FIP would entail an even more burdensome allocation of agency resources.[37] Thus, SIPs are a secure and efficient means for states to exercise economic control. Therein lies the motivation for a state to be particularly protective, even aggressive, in attempting to expand the geographic reach of the applicability of its SIP.

B. Self-Determination, the 1990 Amendments, and the Tribal Authority Rule

Inspired by a federal policy shift toward tribal self-governance, Congress created a role for tribes in the CAA's 1990 Amendments.[38] Therein, Congress granted EPA "authoriz[ation] to treat Indian tribes as States" for the purposes of the Act,[39] meaning that tribes could submit tribal implementation plans (TIPs) to regulate their air resources.[40] For a tribe to be treated as a state, the CAA requires the tribe to show that it has an acting governing body[41] and that it is "capable" of regulating air quality.[42] Additionally, the tribal provision of the CAA requires a tribe to demonstrate that its program will regulate air quality "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."[43] Finally, for parts of the Act where EPA deemed it was "inappropriate" or "infeasible" to treat tribes as states, Congress authorized the agency to directly regulate in the place of tribes.[44]

Interpreting these tribal provisions of the CAA, EPA promulgated the Tribal Authority Rule (TAR) in 1998.[45] The TAR provided that if tribes failed to submit a TIP within a "reasonable time," EPA would adopt an FIP rather than applying an already approved SIP.[46] Additionally, the TAR defined the geographic and jurisdictional terms "reservation" and "other areas within the tribe's jurisdiction."[47] EPA determined that "other areas" would track the definition of "Indian country" in the federal criminal code.[48] "Indian country" is any geographic area where "primary jurisdiction . . . rests with the Federal Government and the tribes inhabiting it, and not with

promulgating the Tribal Authority Rule (TAR) (discussed below) was independent tribal air quality regulation in Indian country).

25. 42 U.S.C. §7601(d).
26. Tsosie, *supra* note 4, at 208-11.
27. 42 U.S.C. §7408.
28. *Id.* §7410(a)(2)(A)-(K).
29. *Id.* §7410(c)(1).
30. *Id.* §7410(a)(2)(E) (requiring that states "provide necessary assurances that the State . . . will have . . . authority under State . . . law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof)"); 40 C.F.R. §§51.230, 52.231.
31. *See* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons From the Clean Air Act*, 23 Harv. Envtl. L. Rev. 203, 234 (1999).
32. *Id.* at 234; Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799, 817 (2008).
33. *See* Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 79, 5 ELR 20264 (1975) (stating that states are "at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation").
34. *See* Adler, *supra* note 31, at 234.
35. *Id.* at 241.
36. *Id.*
37. *Id.*
38. *See* 42 U.S.C. §7601(d).
39. *Id.*
40. *See* Michigan v. EPA, 268 F.3d 1075, 1078 (D.C. Cir. 2001) ("Congress recognized the unique legal status and circumstances of Indian tribes by allowing tribes to be treated as states, but not requiring them to apply to EPA to manage Clean Air Act programs.").
41. 42 U.S.C. §7601(d)(1)(A).
42. *Id.* §7601(d)(2)(C).
43. *Id.* §7601(d)(2)(B).
44. *Id.* §7601(d)(4).
45. Tribal Authority Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998) [hereinafter TAR].
46. *Id.* at 7263 (responding to state commentators' view that state programs should apply to areas without a CAA program).
47. *Id.* at 7256-58.
48. *Id.*; 18 U.S.C. §1151.

the States."[49] Reading the CAA's tribal authority provision to mirror "Indian country" in the federal criminal code meant that tribes could regulate air quality not only on reservation areas, but also in "dependent Indian communities" and "Indian allotments."[50]

Non-reservation areas of Indian country are no less important to the tribes than reservation areas. The different designations of geographic regions where tribes have "primary jurisdiction"—reservations, dependent Indian communities, and allotted lands—arise from the complex history of the federal government's treatment of tribes.[51] "Dependent Indian communities" are lands that are under federal control and were set aside for tribes.[52] "Allotted land" is "owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation."[53] Regardless of these labels, the U.S. Supreme Court explained that "the intent of Congress, as elucidated by [the Court's] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments."[54]

Recognizing that Indian country, by definition, constitutes areas of tribal and federal jurisdiction, the TAR explained that "unless a state has explicitly demonstrated its authority and been expressly approved by EPA to implement CAA programs in Indian country," then SIPs would not apply there by default.[55] For areas of the country over which there was neither a TIP nor an SIP in effect, the TAR explained that "EPA is the appropriate entity to be implementing CAA programs prior to tribal primacy."[56] The agency added that "EPA will not and cannot 'grandfather' any state authority over to Indian country where no explicit demonstration and approval of such authority has been made."[57]

Although some states were supportive of tribal jurisdiction over air quality in Indian country, other states were hostile, fearing curtailment of their economic control via SIPs.[58] The 1990 CAA Amendments thus led to tension between those states and the tribes.[59] One such state was Oklahoma, where most of the state is former reservation land, and the state presumably feared that it might be entirely precluded from any CAA regulatory authority within its geographic borders.[60] Since congressional and EPA recognition of tribal sovereignty had exempted tribes from some enforcement provisions of the CAA, states like Oklahoma and some environmental justice advocates were concerned that tribes might underregulate, as compared to their neighboring states, in order to attract investment.[61]

However, even after the promulgation of the TAR, the allocation of air quality regulatory authority in Indian country remained ambiguous, and ambiguity ultimately meant a serious economic cost for tribes.[62] In lands where tribes and states both laid a claim to CAA jurisdiction, regulated industries lacked clarity about which government's standards would apply, and therefore they avoided developing in these areas.[63]

C. *The 2011 New Source Review Rule*

Among the programs mandated by the CAA, a state must include a new source review (NSR) permitting program in its SIP.[64] The purpose of NSR permitting is to regulate the modification and construction of new facilities, such as power plants, that would emit large volumes of pollutants regulated under the Act.[65] In areas that are not already in compliance with NAAQS, known as nonattainment areas, the NSR requirements for permitting are even more stringent than for NAAQS-compliant areas.[66] If a tribe was being treated as a state under the CAA, its TIP must also include an NSR permitting program.[67]

After EPA promulgated the TAR in 1998, tribes did not vigorously embrace the opportunity to submit their own TIPs, largely because these are very resource-intensive to develop and tribes are reluctant to expend their often limited resources on them.[68] In 2011, EPA responded to the slow trickle of tribal applications for TIPs and promulgated the Indian Country NSR Rule (NSR Rule).[69] In issuing this rule, EPA noted particularly that there was not a single approved tribal NSR for nonattainment areas.[70] The NSR Rule provided that if tribes had not implemented a tribal permitting program for new sources in Indian country, then EPA would formulate an FIP for permitting on that land.[71] EPA stated that "it would neither be practical nor administratively feasible for us to develop and implement a separate program for each area of Indian country."[72] Instead, EPA would adopt a "flexible FIP" that offers procedures for the relevant sources to show they will operate in compliance with NAAQS.[73]

EPA explained its basis for asserting authority in Indian country via the NSR Rule by referring to congressio-

49. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).
50. TAR, 63 Fed. Reg. 7245, 7256-58 (Feb. 12, 1998).
51. *See* Cohen's Handbook of Federal Indian Law §3.04 (Nell Jessup Newton ed., 2012) [hereinafter, Cohen's Handbook].
52. Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1285-86, 30 ELR 20565 (D.C. Cir. 2000) (*citing* Cohen's Handbook at 38, 40).
53. *Id.*
54. Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125 (1993); *see* United States v. John, 437 U.S. 634, 648-49 (1978).
55. TAR, 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998).
56. *Id.* at 7258.
57. *Id.*
58. *See* Benischek, *supra* note 3, at 214.
59. *Id.*
60. *Id.* at 213 n.15.
61. *Id.* at 221, 223-27.
62. *Id.* at 214-15.
63. *Id.* at 214.
64. 42 U.S.C. §7410(a)(2)(C).
65. *Id.*
66. *Id.* §§7502, 7503.
67. *Id.* §7410(a)(2)(C); *see* TAR, 63 Fed. Reg. 7254, 7263 (Feb. 12, 1998).
68. Benischek, *supra* note 3, at 227.
69. *See, e.g.*, Indian Country NSR Rule, 76 Fed. Reg. 38748, 38749, 38750 & 38753 (July 1, 2011) [hereinafter NSR Rule].
70. *Id.*
71. *Id.* at 38752.
72. *Id.* at 38753.
73. *Id.*

nal intent in amending the CAA and the basic statutory scheme of the Act.[74] EPA grounded its actions in congressional delegation of general authority in the Act, such as §301(a), which requires the Agency to ensure that the mandates are carried out.[75] Additionally, the Agency referred to the general statutory scheme of the CAA, which requires EPA to step in with an implementation plan where either states or tribes were failing to execute the CAA mandates themselves.[76] With respect to defining "Indian country" for the purposes of the NSR Rule, EPA referred back to the TAR, wherein it had established that "Indian country" tracks the definition laid out in the federal criminal code at 18 U.S.C. §1151.[77] Finally, the Agency explained that under the CAA, "states generally lack the authority to regulate air quality in Indian country as defined in 18 U.S.C. §1151."[78]

Prior to the NSR Rule, tribes not only suffered harm to their air resources from lack of regulation, they also experienced economic disadvantages compared to states because SIPs had special provisions for "synthetic minor sources."[79] Synthetic minor sources are cleaner new facilities because their projected emissions of regulated air pollutants are at significantly lower levels than most other facilities.[80] Most state NSR programs offer synthetic minor sources the chance to bypass the costly and intensive NSR permitting requirements in exchange for a commitment to limiting their emissions to lower than the federally allowable levels.[81] The synthetic minor source options were unavailable in Indian country since there was no NSR program, and as a result, tribes were at a significant disadvantage compared to states in attracting these newer, cleaner sources to their land.[82]

The NSR Rule included synthetic minor source programs for Indian country in order to help tribes attract these sources and "thereby promot[e] environmentally sound economic growth."[83] One EPA estimate stated that as of May 2013, 48 synthetic minor source applications had been filed for sources in Indian country.[84] The tribal intervenors in *ODEQ*, where the NSR Rule was challenged, argued that vacating this rule would be a "major blow to tribal environmental and economic development."[85]

III. Defining Tribal CAA Jurisdiction

This part first explains the *ODEQ* decision, then provides context by examining a series of D.C. Circuit cases that reviewed EPA actions implementing the CAA in Indian country. These cases, together with *ODEQ*, define the scope and extent of federal CAA authority in reservation and non-reservation areas of Indian country. This part questions the *ODEQ* court's reasoning and identifies the harmful implications of the outcome from the tribal perspective.

A. ODEQ

In 2013, the Oklahoma Department of Environmental Quality contested the NSR Rule as it applied to non-reservation lands, alleging that it was arbitrary and capricious under the Administrative Procedure Act.[86] The D.C. Circuit, in *ODEQ*, vacated the NSR Rule.[87] In an opinion by Judge Douglas Ginsburg, the court found that EPA had improperly "arrogat[ed] jurisdiction to itself" by promulgating the NSR Rule, since jurisdiction under the CAA was binary, meaning that it "must lie either with the state or with the tribe—one or the other."[88]

Narrowly, the dispute here was whether EPA, acting on behalf of the tribes, or the states have CAA jurisdiction over non-reservation Indian country where tribes had not "demonstrated [ ] jurisdiction" with an approved TIP.[89] Oklahoma argued that there was no "regulatory gap" requiring an FIP, as EPA asserted, since SIPs apply by default to all non-reservation Indian lands.[90] The state did not contest inherent tribal CAA jurisdiction over reservation land.[91] Further, the parties agreed that states have no CAA authority over areas where a tribe has "demonstrated its jurisdiction" with a TIP.[92]

Before reaching the merits of the case, the court considered the threshold issues of standing, timeliness, and forfeiture.[93] First, it found that Oklahoma had alleged an injury adequate for constitutional standing because it was "divest[ed]" of regulatory authority over non-reservation Indian country."[94] This conclusion is unobjectionable. On the remaining issues of timeliness and forfeiture, however, the *ODEQ* court offered strained reasoning, suggesting that it was eager to reach the merits of the nature of air quality regulation in off-reservation Indian country.

With respect to timeliness, EPA argued with some force that Oklahoma's suit was not timely because it came "more than a decade too late."[95] Oklahoma had not objected during the notice-and-comment period for the NSR Rule, nor for the earlier TAR, which established that an FIP rather than an SIP would apply by default in Indian coun-

74. *Id.* at 38752-38753.
75. 42 U.S.C. §7601(a); NSR Rule, 76 Fed. Reg. at 38752.
76. NSR Rule, 76 Fed. Reg. at 38752.
77. *Id.*
78. *Id.* at 38752 n.9.
79. *Id.* at 38750.
80. *See id.* at 38750.
81. *Id.*.
82. *Id.*
83. *Id.*
84. Brief of Tribal Intervenors at 27, Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185 (D.C. Cir. 2014) (No. 11-1307), 2013 WL 5469867 (citing a Personal Communication from Mike Koerber at EPA).
85. *Id.* at 26-27.
86. Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185, 189, 44 ELR 20013 (D.C. Cir. 2014); 5 U.S.C. §706(A)(2).
87. 740 F.3d at 195.
88. *Id.* at 193 (quoting the court's earlier decision in *Michigan v. EPA*, 268 F.3d 1075, 1086 (D.C. Cir. 2001)).
89. *Id.* at 194.
90. *Id.* at 189.
91. *Id.*
92. Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185, 189, 44 ELR 20013 (D.C. Cir. 2014).
93. *Id.*
94. *Id.*
95. *Id.* at 190-91.

try where no TIP has been approved.[96] The *ODEQ* court reasoned that this action was timely nevertheless because EPA's discussion of "Indian country" in the TAR left open the possibility of an SIP presumptively applying on non-reservation areas.[97]

Last, regarding forfeiture, the D.C. Circuit held that although Oklahoma did not object during notice-and-comment for the NSR Rule, thereby failing to "exhaust its administrative remedies," it had not forfeited its right to file the action.[98] Judge Ginsburg explained that since EPA had made a "key assumption" that an SIP is not the default regulatory scheme, the Agency was still bound by a "preexisting duty to examine key assumptions as part of its affirmative burden . . . [to] explain a non-arbitrary, non-capricious rule."[99] Therefore, "even if no one objects during the comment period," the D.C. Circuit required EPA to justify these "key assumptions" before the court.[100]

Moving to the merits of the case, the court found that EPA had improperly divested the states' regulatory authority, since jurisdiction under the CAA had to reside either with the states or tribes.[101] Congress had not reserved any "residual" CAA jurisdiction for the federal government.[102] Thus, the court held that states have CAA jurisdiction over all land "within its territory and outside the boundaries of an Indian reservation," unless EPA or a tribe has shown that it rightly has authority.[103] EPA could not step in and implement its own federal plan on behalf of the tribe by alleging that the land was "unquestionably" Indian country.[104] Without such proof, the court concluded, EPA was prohibited from "displac[ing]" a state's regulatory plan over non-reservation land.[105]

Finally, the *ODEQ* court declined to give deference to the NSR Rule, which was EPA's interpretation of its own earlier regulation—the TAR.[106] Under *Auer v. Robbins*,[107] agencies are entitled to deference in their interpretations of their own regulations.[108] However, the *ODEQ* court did not give EPA *Auer* deference here because the Agency's "interpretation violates the very statute the agency administers."[109] Judge Ginsburg explained that EPA's assumption that "states generally lack the authority to regulate air quality in Indian country" was "incorrect as a matter of law."[110] To support this conclusion, he cited the court's earlier decision in *Michigan v. EPA*, where it had found that the 1990 CAA Amendments "unambiguously confer[ ] no inherent or underlying EPA authority."[111]

B. Legal Background: Scope of Tribal CAA Authority

In the early 1800s, the Supreme Court established that the Indian Commerce Clause of the U.S. Constitution requires that "all intercourse with [tribes] shall be carried on exclusively by the government of the union."[112] Since then, the Supreme Court has long upheld a presumption of federal, not state, authority in Indian country.[113] However, the 2014 *ODEQ* decision falls in line with the D.C. Circuit's CAA case law, which continues to wear away at the bedrock principle of defaulting to federal—rather than state—jurisdiction on tribal lands.

First, in *Arizona Public Service Co. v. EPA*, when the extent of tribal regulatory authority defined in the TAR was before the D.C. Circuit, the court found that Indian tribes had express delegation from Congress, via the 1990 CAA Amendments, to regulate all land within reservation borders regardless of ownership.[114] In this action, an Arizona electric utility company and the state of Michigan alleged that EPA had improperly interpreted the 1990 CAA Amendments by allowing tribal air quality regulation of all reservation land—particularly by including privately owned fee land within the reservation.[115] EPA contended that Congress, by distinguishing between "exterior boundaries of the reservation," and "other areas within the tribe's jurisdiction," established that all reservation land was "per se within the tribe's jurisdiction."[116] The D.C. Circuit agreed with EPA, finding that the 1990 Amendments constituted an express congressional delegation of authority to the tribes "only . . . within the boundaries of a reservation."[117]

Although this outcome favored tribes, the *Arizona Public Service* court's construction of the CAA amendments nonetheless undermined tribes' opportunities to regulate their own lands and natural resources. The D.C. Circuit in that case relied on a distinction between "other areas" and "reservation," finding that Congress intended to protect inherent tribal sovereignty in one and not the other.[118] This is an excessively narrow construction of legislation enacted with the purpose of advancing tribal self-governance. The explicit mention of "reservation" and "other areas within the tribe's jurisdiction" in the statute could just as reasonably have been construed as congressional intent to ensure that tribal regulatory authority was not unduly limited to

96. *Id.* at 189; 5 U.S.C. §706(A)(2).
97. *ODEQ*, 740 F.3d at 191.
98. *Id.* at 192 (explaining that an "argument not presented to the agency is forfeit before the court").
99. *Id.*
100. *Id.*
101. *Id.* at 193 (quoting the court's earlier decision in *Michigan v. EPA*, 268 F.3d 1075, 1086 (D.C. Cir. 2001)).
102. 740 F.3d at 193.
103. *Id.* at 195.
104. *Id.* at 194.
105. *Id.* at 195.
106. *Id.*
107. Auer v. Robbins, 519 U.S. 452 (1997).
108. *Id.* at 461-62.
109. *ODEQ*, 740 F.3d at 194.
110. *Id.* at 195.
111. *Id.* (*citing* Michigan v. EPA, 268 F.3d 1075, 1083 (D.C. Cir. 2001)).
112. U.S. Const. art. I, §8, cl. 3; Worcester v. Georgia, 31 U.S. 515, 558-60 (1832).
113. *See, e.g.*, Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 128 (1993) (stating that "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country").
114. 211 F.3d 1280, 1288, 30 ELR 20565 (D.C. Cir. 2000).
115. *Id.* at 1286.
116. *Id.* at 1288; 42 U.S.C. §7601(d)(2)(B).
117. *Arizona Pub. Service*, 211 F.3d at 1290.
118. *Id.* at 1284.

reservation lands only. Instead, the *Arizona Public Service* court's reading of the tribal CAA provisions created a problematic implication that tribes do not have inherent regulatory authority in non-reservation Indian country. Indeed, this decision perhaps presaged the outcome in *ODEQ*, which took the *Arizona Public Service* presumption against tribal jurisdiction in non-reservation Indian country and transformed it into binding law.[119]

Just one year after the *Arizona Public Service* decision, the issue of CAA jurisdiction in non-reservation Indian country was before the D.C. Circuit in *Michigan*.[120] In *Michigan*, the court vacated an EPA rule implementing a federal permitting program over areas where the status of land as Indian country was "in question."[121] EPA explained that if there was no approved SIP or TIP governing an area, then neither tribes nor states had demonstrated jurisdiction and the status of the area as Indian country was "in question."[122] The D.C. Circuit held that air quality regulatory authority could lie either with the tribes or with the states, and that there was no "intermediate" federal authority in "other areas within the tribe's jurisdiction."[123]

EPA argued that the decision to apply a default FIP in Indian country was grounded in both congressional intent and principles of statutory interpretation.[124] The Agency's proposed approach to "in question" lands was providing "effective" implementation of the CAA with an FIP until either states or tribes submitted a plan.[125] Additionally, the Agency emphasized that the purpose of the CAA to safeguard air quality is "national in scope"; therefore, it required EPA to step in where regulation was absent or lagging.[126] Finally, applying an FIP to "in question" areas followed the "bedrock canon of statutory interpretation in American Indian jurisprudence" of reading ambiguous statutes in favor of tribes.[127]

However, the *Michigan* court determined that by instituting a default FIP over "in question" lands, EPA was not exerting its authority to advance tribal interests.[128] Instead, the court held that EPA was improperly acting in the interest of the federal government only by establishing "independent federal jurisdiction" over these disputed areas.[129] The court ruled that the proper approach to emissions permitting on "in question" lands would require EPA to first make jurisdictional decisions in reviewing state and tribal plans and reject the plans if they had not adequately demonstrated lawful authority over an area.[130] The Agency could not simply decline to decide the jurisdictional issues on these lands and implement an FIP there instead.[131]

Finally, the D.C. Circuit found that Congress had "clearly spoken" in the CAA by requiring EPA to make Indian country determinations through notice-and-comment rulemaking rather than in case-by-case adjudications.[132] However, the *Michigan* court did not go so far as to decide whether it was permissible for EPA to run a permitting program until there was a formal determination of the land as Indian country.[133] Responding to the *Michigan* outcome, EPA removed the "in question" language from its regulation.[134]

C. *Analysis and Implications of* ODEQ

The *ODEQ* court relied largely on *Michigan*, but the D.C. Circuit's reasoning in *ODEQ* was an improper and overly broad application of *Michigan*.[135] Additionally, the court's holding that SIPs presumptively apply in non-reservation Indian country conflicts directly with congressional intent in passing the tribal provisions of the 1990 CAA Amendments. Finally, the most troubling consequence of this decision is that the *ODEQ* court created a mechanism for a legal injury in instances where states might wrongly assert jurisdiction in an area that is properly designated Indian country. This injury, "usurp[ation]" of regulatory authority from the tribes, is the very injury upon which the state agency petitioners in *ODEQ* built their case—an injury that could have been avoided by upholding the EPA rule at issue.

First, the *ODEQ* court held that "EPA's treatment of non-reservation Indian country in the . . . NSR Rule today [implementing an FIP in the absence of a TIP] is *identical* to its treatment of in question lands" in *Michigan*.[136] The court explained that since "a tribe must demonstrate tribal jurisdiction before it may exercise CAA jurisdiction over non-reservation Indian country, so too must the EPA."[137] However, as EPA had argued in *Michigan*, this logic is limited in that the CAA requires that states must also demonstrate their legitimate regulatory authority before implementing an SIP in an area.[138] Notably, the *Michigan* court did acknowledge that states had a similar burden, explaining that the CAA requires a "state [to] demonstrate that it has 'adequate authority,' including jurisdiction, to regulate [ ] emission sources."[139] The court continued that "[t]his same requirement" applies to tribes, and EPA had to

119. *See* Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185, 195, 44 ELR 20013 (D.C. Cir. 2014).
120. Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001).
121. *Id.* at 1080.
122. *See* Federal Operating Program, 64 Fed. Reg. 8247, 8254 (Feb. 19, 1999) [hereinafter FOP Rule].
123. Michigan v. EPA, 268 F.3d 1075, 1085-86 (D.C. Cir. 2001).
124. *Id.* at 1083, 1085.
125. *Id.* at 1084.
126. *Id.* at 1083.
127. *Id.* at 1083, 1085 (*citing* Cobell v. Norton, 240 F.3d 1081, 31 ELR 20502 (D.C. Cir. 2001) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit")).
128. Michigan v. EPA, 268 F.3d 1075, 1085 (D.C. Cir. 2001).
129. *Id.*
130. *Id.* at 1086, 1088.
131. *Id.* at 1087.
132. *Id.* at 1087-88.
133. *See id.* at 1087.
134. 67 Fed Reg. 38328 (June 3, 2002).
135. Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185, 193, 195, 44 ELR 20013 (D.C. Cir. 2014).
136. *Id.* at 194 (emphasis added).
137. *Id.*
138. 42 U.S.C. §§7410(a)(2)(E), 7601(d)(2)(B); Michigan v. EPA, 268 F.3d 1075, 1084 (D.C. Cir. 2001).
139. *Michigan*, 268 F.3d at 1078.

make a jurisdictional determination *before* implementing a regulatory plan under the CAA.[140]

The *ODEQ* court did not explain why there is no equivalent burden on a state, as there is for tribes or EPA on behalf of tribes, in order to effect a presumptive application of its SIP. Although defaulting to an FIP may resemble EPA's regulating without making a jurisdictional determination, expressly forbidden by *Michigan*,[141] defaulting to an SIP instead does not avoid the problem that the *Michigan* court identified. Presumptive implementation of *any* plan on non-reservation Indian country is an implicit declaration of jurisdiction. Under the CAA, if a governmental body is regulating an area, it has necessarily already demonstrated its authority in an implementation plan to EPA.[142] Thus, if a state plan is implemented in non-reservation Indian country, the state is regulating without any preliminary jurisdictional finding by EPA. Both the CAA and *Michigan* specifically prohibit such regulatory action without demonstration of lawful authority.[143] An even more troubling consequence of the *ODEQ* decision's sweeping default to state regulation is that it denies the existence of per se tribal regulatory authority in non-reservation Indian country.

Alternatively, a default to an FIP, as the NSR Rule proposed, fits with the statutory scheme of the CAA and avoids unnecessary legal injury. Under the express terms of the CAA, an FIP goes into effect in any area, state land, or tribal land where there is no approved implementation plan.[144] Therefore, the regulatory framework of the Act indicates that a default to federal authority is also the appropriate solution for non-reservation Indian country. Adopting a default FIP safeguards against the legal injury that would result in land that is definitively Indian country, but where a tribe has yet to claim CAA jurisdiction. If such an area defaults to an SIP and is later found to be properly designated Indian country, then the state has been "arrogating jurisdiction to itself" to the detriment of tribes. Courts should respect the long-established, "deeply rooted" national "policy of leaving Indians free from state jurisdiction and control."[145] The D.C. Circuit in *ODEQ* established that such divestment of regulatory authority was a sufficient legal injury for constitutional standing.[146] An FIP is treated as a temporary stand-in under the CAA, both for states and tribes, until these governments offer their own EPA-approved plans.[147] Implementing an FIP by default thereby avoids any encroachment of CAA jurisdiction.

Finally, a default to federal jurisdiction until there is a TIP in place, or until a state can claim otherwise, honors the tribal self-determination objectives behind the 1990 Amendments.[148] Oklahoma had argued in *ODEQ* that the guiding principle here should be the 1970s congressional policy declaring in CAA §107(a) that "primary responsibility" for air quality regulation lies with the states.[149] However, the 1990 CAA Amendments are a more recent expression of congressional intent. The amendments—with the inclusion of the tribal provision in an effort to preserve and expand tribal self-governance—changed that presumption of a primary state role and recognized a regulatory role for tribes as equal sub-national sovereigns.[150] This legislative act upended the state-centric approach to air quality regulation in Indian country.

In conclusion, the *ODEQ* decision is in line with the D.C. Circuit's general trend toward restricting tribal air quality authority at every opportunity. This decision departs from the most logical interpretation of the statute and sensible applications of the *Arizona Public Service* and *Michigan* cases. Instead, the *ODEQ* court distorted the holdings of those prior cases to further erode tribes' already fragile environmental regulatory authority.

IV. Looking Ahead: Preemption and Retaining FIPs in Indian Country

Despite congressional intent to promote tribal regulatory authority under the CAA, opinions like *ODEQ* demonstrate the challenge of preserving a meaningful role for tribes in off-reservation environmental regulation. This Article proposes that EPA reframe its legal approach to air quality regulation, from "gap-filling" in areas of Indian country lacking CAA programs to preempting state programs under §110(c) of the Act.

Although the D.C. Circuit's Indian country CAA cases treat "other areas of Indian country" as less deserving of protection from state encroachment, tribes and the federal government have "primary jurisdiction" there, and these geographic areas are no less historically, culturally, or economically significant to tribes than reservations.[151] Thus, in reviewing EPA action in Indian country, the D.C. Circuit should recognize the substantial tribal and federal interest in achieving tribes' economic and environmental plans in Indian country, on reservations and off. Regarding air quality regulation, tribes have repeatedly supported federal CAA plans in Indian country until they can develop their own.[152] Therefore, in order to realize tribal preference for federal air quality regulation in Indian country, EPA must formulate a new approach to promulgating Indian country FIPs that can withstand judicial scrutiny at the D.C. Circuit.

140. *Id.* at 1085.
141. *See id.* at 1087.
142. *See* 42 U.S.C. §§7410(a)(2)(E), 7601(d)(2)(B).
143. *Michigan*, 268 F.3d at 1088.
144. 42 U.S.C. §7410(c)(1).
145. Rice v. Olson, 324 U.S. 786, 789 (1945).
146. *See* Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185, 193, 44 ELR 20013 (D.C. Cir. 2014).
147. *See* 42 U.S.C. §7410(c)(1); NSR Rule, 76 Fed. Reg. at 38748, 38753 (July 1, 2011).
148. Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1284, 30 ELR 20565 (D.C. Cir. 2000).
149. *See* 42 U.S.C. §7407(a).
150. *See id.*
151. *See* discussion at I.B., *supra*.
152. *See, e.g.*, Brief of Tribal Intervenors, at 26-31, Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185 (D.C. Cir. 2014) (No. 11-1307), 2013 WL 5469867 (supporting NSR Rule in Indian country); TAR, 63 Fed. Reg. 7254, 7263 (Feb. 12, 1998) (supporting federal programs until tribes are developing their own).

In the past, EPA has relied on its "gap-filling" authority under the CAA, issuing Indian country FIPs where tribes are not regulating, and this approach has been invalidated by the D.C. Circuit with respect to off-reservation lands. Rather than relying on nebulous "gap-filling" authority, EPA should ground its regulations in the Agency's explicit preemption authority under CAA §110(c). This approach is particularly promising in light of a recent Supreme Court opinion, *EPA v. EME Homer City Generation, L.P.*,[153] which enhanced EPA power under §110(c). Further, EPA regulation through preemption would be bolstered by long-established Indian law doctrine that favors a strong federal role in Indian country.

This part will first offer a more in-depth picture of EPA's legal approach to Indian country CAA regulation and detail how the D.C. Circuit has reviewed these efforts. Second, this part will demonstrate how using preemption in Indian country would be a stronger approach, particularly in light of the *Homer City* opinion. Finally, this part will explain the Indian law principles that make preemption a robust approach for federal environmental regulation in Indian country.

A. Current EPA Approach

In setting forth its legal authority in the TAR and NSR Rule, EPA cited its "gap-filling" authority in CAA §§301(a), 301(d)(4), and 110(c).[154] Section 301(a) grants EPA authority to "prescribe such regulations as are necessary" to execute its duties under the Act.[155] Section 301(d)(4) allows EPA to "directly administer" provisions of the Act when it finds that tribal regulation is either "inappropriate or administratively infeasible."[156] Finally, §110(c) requires EPA to promulgate an FIP whenever a tribe or state fails to submit an adequate plan.[157] EPA interpreted these provisions together as congressional delegation of "broad authority" to ensure the Act's purpose of protecting national air quality was achieved.[158]

Interpreting the TAR for the permitting programs in the NSR Rule, EPA found that for areas where there was no approved TIP, it was "remedy[ing] an existing regulatory gap under the CAA with respect to Indian country."[159] After Congress added the tribal provision to the CAA, EPA's position has consistently been that its prior SIP approvals did not apply to Indian country.[160] EPA had never approved any state or local programs for "any area of Indian country" that lacked a TIP.[161] Consequently, if a geographic area was not governed by an approved TIP or SIP, EPA found a regulatory gap and promulgated an FIP for those places, citing its "broad authority" to ensure the Act's ends were achieved.[162]

However, grounding FIPs for Indian country in these "gap-filling" provisions proved a shaky strategy for EPA because the D.C. Circuit twice held—first in *Michigan* and over a decade later in *ODEQ*—that the Agency could not just use "vague statements" as a basis for default EPA authority.[163] The *Michigan* court was clear that "EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area."[164] Although the general purpose of the CAA is "to protect and enhance the quality of the Nation's air resources," "none of th[is] implies that EPA has some default authority to operate an implementation plan."[165]

The *ODEQ* court relied on this reasoning to find that states have CAA jurisdiction within their geographic boundaries, "except where a tribe has a reservation or has demonstrated its jurisdiction."[166] The *ODEQ* court further explained that EPA could not act under §110(c) to preempt an SIP with an FIP in non-reservation Indian country without a showing of tribal jurisdiction there.[167]

B. Enhanced Federal Preemption Under the CAA

In CAA §110(c), the conditional preemption provision, Congress gave EPA authority to promulgate FIPs in the absence of an SIP or if an SIP submission was deficient.[168] Therefore, contrary to the *ODEQ* court's framing of the CAA as a "binary" between tribes and states, both of these semi-independent sovereigns regulate air quality against the background threat of federal preemption.[169] Section 110(c) is an explicit congressional delegation that allows EPA to regulate alongside or in place of tribes and states.

Recently, §110(c) gained even more force in *Homer City*, where the Supreme Court tuned the provision's language to broaden the scope of EPA's powers.[170] The Court held that under §110(c), EPA could issue new air quality control obligations for states and promulgate an FIP *simultaneously*.[171] The Agency did not need to provide states an opportunity to propose a new SIP that would comply with newly defined emissions responsibilities, and it could find that SIPs were retroactively inadequate.[172] Further, the Court explained that §110(c) rises to the level of a "statu-

153. 134 S. Ct. 1584, 44 ELR 20094 (2014).
154. NSR Rule, 76 Fed. Reg. at 38752-53; TAR, 63 Fed. Reg. 7254, 7262 (Feb. 12, 1998).
155. 42 U.S.C. §7601(c).
156. *Id.* §7601(d)(4).
157. *Id.* §7610.
158. NSR Rule, 76 Fed. Reg. at 38752.
159. *Id.* at 38778.
160. TAR, 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998); NSR Rule, 76 Fed. Reg. 38748, 38778 (July 1, 2001).
161. NSR Rule, 76 Fed. Reg. at 38778.
162. *Id.*
163. *See* Michigan v. EPA, 268 F.3d 1075, 1083-84 (D.C. Cir. 2001); Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185, 193, 44 ELR 20013 (D.C. Cir. 2014) (reaffirming the *Michigan* court's rejection of "overarching" EPA authority).
164. *Michigan*, 268, F.3d at 1084.
165. *Id.* at 1083-84.
166. *ODEQ*, 740 F.3d at 193-94.
167. *Id.* at 195.
168. 42 U.S.C. §7610.
169. *ODEQ*, 740 F.3d at 193.
170. *See* EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1600-1601, 44 ELR 20094 (2014).
171. *Id.*
172. *Id.*

tory duty" for EPA, requiring the Agency to promulgate an FIP anytime it finds state regulation insufficient to meet obligations under the Act.[173]

The *Homer City* reading of §110(c) has powerful implications for using preemption to secure FIPs in Indian country. First, if an SIP program was in effect in off-reservation Indian country, EPA could make a finding that the SIP is inadequate for wrongly asserting authority "contrary to Federal law."[174] Recall that §110(a) requires that in an SIP, a state must "provide necessary assurances" that it has legal authority to act and "is not prohibited under any provision of Federal or State law from carrying out such implementation plan."[175] Since the tribal provisions of the CAA are federal law that reserves authority in a "reservation" and "other areas within the tribe's jurisdiction" to tribes (or to EPA acting on behalf of tribes), asserting an SIP in Indian country is contrary to federal law. Thus, an SIP in Indian country is inadequate in that it does not comply with the legal requirements in §110(a).[176] Next, because tribes have failed to submit a TIP, the Supreme Court explained that §110(c) places a statutory duty upon EPA to issue an FIP for these areas.[177] Finally, since the *Homer City* Court held that EPA can promulgate an FIP simultaneously with identifying a deficiency in an SIP, the Agency could finalize an FIP contemporaneously with its finding that any SIP in non-reservation Indian country is contrary to federal law.[178]

Although EPA did cite §110(c) to ground its legal authority to promulgate FIPs in the NSR Rule, it framed the provision as a broad, nebulous mandate to "ensure protection of air quality throughout the nation."[179] However, the *Homer City* opinion indicates that §110(c) is not a loose, generalized grant of authority from Congress to EPA, but instead is a hard, substantive mandate, a "statutory duty," requiring EPA to regulate in instances where SIPs are deficient.[180] Looking ahead, EPA should reframe its reliance on §110(c) to reflect the *Homer City* reading of it as a firm congressional mandate. Doing so should satisfy the D.C. Circuit's requirement in *Michigan* that EPA regulate with a "specific statutory directive."[181]

C. *Federal Indian Law Preemption Doctrine*

Beyond acting under CAA §110(c) to displace SIPs in Indian country, EPA should lay a foundation for its legal authority in principles of Indian law, which strongly favor federal regulation in Indian country.

In *Michigan*, the D.C. Circuit explained that Congress "recognized the unique legal status and circumstances of Indian tribes by *allowing* tribes to be treated as states, but *not requiring* them to apply to EPA to manage Clean Air Act programs."[182] This indicates that in creating a role for tribes under the CAA, Congress maintained tribes' elevated position, compared to states, as semi-independent sovereigns. Because Congress distinguished between tribes and states under the CAA, the Act cannot be read to confer Indian country jurisdiction to states with a default SIP in off-reservation areas, although the D.C. Circuit reached this conclusion in *ODEQ*.[183] In passing the tribal authority provision of the CAA, Congress legislated against a background of "deeply rooted" Indian law policy to "leav[e] Indians free of state jurisdiction and control."[184] In Indian country, "primary jurisdiction rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."[185]

Limits on state power in Indian country are rooted in the Constitution. The Commerce Clause vests plenary power over Indian affairs in Congress, granting the power to regulate commerce "with the Indian tribes."[186] Accordingly, Congress has primacy in Indian affairs, and when there are conflicts between states and tribes over regulating activities in Indian country, generally federal law prevails.[187] As one treatise puts it: "Federal supremacy is a bedrock principle of Indian law."[188]

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," the Supreme Court noted in *Rice v. Olson*.[189] The principle was first articulated by the Court nearly 200 years ago in *Worcester v. Georgia*, where it stated that the Georgia Legislature's attempt to enact statutes directed at the Cherokee nation were "repugnant to the constitution, laws and treaties of the United States."[190] The Court still largely upholds this principle today, but tribal sovereignty doctrine has evolved "to take account of the State's legitimate interests in regulating the affairs of non-Indians," as it noted in *McClanahan v. Arizona State Tax Commission*.[191] In that decision, the Court established the modern test for whether states can assert jurisdiction over tribes and their lands:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them . . . . [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the

173. *Id.* at 1600.
174. *See* 42 U.S.C. §7410(a)(2)(E).
175. *Id.*
176. *See id.* (requiring "assurances" that the SIP is not in violation of federal law).
177. *See* EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1600, 44 ELR 20094 (2014).
178. *See id.* at 1600-01.
179. *See* NSR Rule, 76 Fed. Reg. 38748, 38752-53 (July 1, 2011).
180. *See Homer City*, 134 S. Ct. at 1600.
181. Michigan v. EPA, 268 F.3d 1075, 1084 (D.C. Cir. 2001).
182. *Id.* at 1078.
183. Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185, 195, 44 ELR 20013 (D.C. Cir. 2014).
184. *See* Rice v. Olson, 324 U.S. 786, 789 (1945).
185. *See* Michigan v. EPA, 268 F.3d 1075, 1079 (D.C. Cir. 2001) (*quoting* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998)).
186. U.S. Const. art. I, §8, cl. 3.
187. Cohen's Handbook, *supra* note 51, §2.01.
188. *Id.* §2.01[2].
189. Rice v. Olson, 324 U.S. 786, 789 (1945).
190. Worcester v. Georgia, 31 U.S. 515, 561 (1832).
191. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973).

applicable treaties and statutes which define the limits of state power.[192]

Federal preemption of state law to protect tribes from state encroachment "has persisted as a major doctrine in the Supreme Court's modern Indian law jurisprudence."[193] In 1983, Justice Thurgood Marshall, writing for a unanimous Court in *New Mexico v. Mescalero Apache Tribe*, laid out the Indian country preemption analysis: "State jurisdiction is preempted by the operation of federal law 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."[194]

Indian law preemption analysis is different than in other areas of law. The normal presumption is that state law is valid unless Congress expresses an opposite intent[195]; in Indian law, the presumption is that state law is invalid because of strong federal policy of protecting tribes from state jurisdiction and control.[196] State laws are analyzed against the "backdrop" of tribal sovereignty,[197] and the presumption is that state law does not apply in Indian country.[198]

Applying these principles to air quality regulation, the inquiry is whether the CAA, "the applicable statute,"[199] preempts state authority in Indian country. First, Congress provided for tribal CAA authority in "reservations" and "other areas within the tribe's jurisdiction."[200] Additionally, Congress expressly limited the reach of states' jurisdiction by requiring SIPs to demonstrate that states have legal authority in areas and do not conflict with existing federal law.[201] "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law," the Court said in *Mescalero Apache Tribe*.[202] Therefore, SIPs that attempt to regulate geographic areas specifically set aside for tribal governance conflict directly with federal law and can be preempted by FIPs.

To overcome this presumption of federal regulation, states must demonstrate that they have weighty interests that sufficiently justify state regulation on tribal lands.[203] In *ODEQ*, Oklahoma only alleged that allowing an FIP in non-reservation Indian country would "inject counterproductive uncertainty" and impede economic development because determining what is off-reservation Indian country is "fact-dependent" and "frequently controversial."[204] The state's argument invoked merely commercial and industrial interests, not a sovereign state interest. By contrast, tribes have an enormous interest in protecting their opportunities for economic development, their cultural and natural resources, and their status as sovereign nations. The strong presumption favoring federal regulation in Indian country cannot be defeated by a state's interest in providing regulatory certainty to industry players and developers.

In sum, Indian law doctrines favor federal regulation in Indian country and there is a strong presumption against validity of state laws as applied to these areas. Future EPA regulations that attempt to displace SIPs with FIPs in Indian country should also cite these long-established Indian law principles to further support preemption of state law.

V. Conclusion

To protect tribal communities, their resources, and their ways of life, tribes must be empowered with more rigorous environmental regulation, free from state interference. Since the late 1980s, congressional action has paved the way for tribes to exert meaningful environmental control in Indian country. However, whatever progress the legislature has made toward tribal self-governance, the federal judiciary has largely undermined its efforts. In the air quality context, decisions like the D.C. Circuit's *ODEQ* opinion not only erode tribal autonomy, but also impede the prospect of developing energy resources in Indian country, stifling opportunity for tribes' economic growth and independence. As states such as Oklahoma persist in attempting to divest tribes of jurisdiction over their natural resources, and the D.C. Circuit responds by trimming back tribal jurisdiction, EPA must creatively identify more robust approaches for developing and retaining federal environmental regulation in Indian country.

192. *Id.* at 171-72 (*citing* Williams v. Lee, 358 U.S. 217, 219-20 (1959)).
193. Cohen's Handbook, *supra* note 51, §2.01.
194. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).
195. Cohen's Handbook, *supra* note 51, §6.03.
196. *Id.*
197. *Id.* §6.03[2] (*citing* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973)).
198. *See, e.g.*, Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 884, 893 (1986); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).
199. *McClanahan*, 411 U.S. at 172.
200. 42 U.S.C. §7601(d)(2).
201. *Id.* §7410(a)(2)(E).
202. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).
203. *Id.*
204. Brief of Petitioner at 54, Oklahoma Dep't of Envt'l Quality v. EPA, 740 F.3d 185 (D.C. Cir. 2014) (No. 11-1307), 2013 WL 5587893.