"The Thorny Gift: Analysis of The EPA's Intent to Empower Indian Tribal Governments With Clean Air Act Regulatory Authority Over Non-Tribal Lands and Immunize Tribal Governments From CAA Citizen Suits"

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I. Introduction

One of the many substantive changes to the Clean Air Act (CAA)[1] brought about by the 1990 amendments was a statutory mandate directing the Environmental Protection Agency (EPA) to promulgate regulations that would enable Indian tribal governments to assume primary regulatory jurisdiction of the CAA.[2] Eight years later, the EPA finally complied by publishing regulations to grant qualifying Indian tribes CAA regulatory authority similar to that exercised by state governments.[3] The new regulations are further testimony of Congress' objective to empower Native Americans with greater control over their natural environment, as witnessed with the grant of similar regulatory authority under the Clean Water Act[4] and Safe Drinking Water Act.[5] Unfortunately, because of the approach taken by the EPA, tribal CAA regulatory authority will prove a gift with thorns—generating considerable legal challenge and increasing tension between state and tribal governments.

The new regulations[6] will have two striking consequences. Qualifying Indian tribes[7] will receive CAA regulatory control over individuals and lands heretofore under the jurisdiction of

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[1] 42 U.S.C. §§ 7401-7671q.

[2] 42 U.S.C. § 7601(d)(2).

[3] 63 Fed. Reg. 7253 (1998).

[4] 33 U.S.C. §§ 1251-1387.

[5] 42 U.S.C. § 300f *et seq.*

[6] 40 C.F.R. §§ 9, 35, 49, 50 & 81.

[7] Defined at 42 U.S.C. § 7601(d)(2).

state governments,[8] and Indian regulatory authorities will be immune from the CAA citizen suit provisions,[9] leaving the regulated community without any realistic means to challenge tribal regulatory decisions.

The purpose of this paper is to explore the inevitable opposition of both state governments and affected individuals,[10] and to determine whether the EPA's new rules will withstand judicial challenge. This paper will address two major issues raised by the Agency's new regulations: (1) Whether the EPA has the statutory authority to grant tribal governments regulatory authority over non-tribal fee holdings situated within the accepted boundaries of a tribal reservation; and (2) Whether the EPA can exempt Indian tribal governments from CAA citizen suits.

II. Potential Reach of Self-Regulation

[8] In announcing the final rule, the EPA set forth its position as to the scope of tribal regulatory authority granted by the 1990 amendments to the CAA, an authority that includes the regulation of non-tribal communities situated within the traditional boarders of the reservation. 63 Fed. Reg. 7254 (1998).

[9] The new regulation reads:

> Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States
>
> > Tribes will not be treated as States with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:
> >
> > (o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the federal district courts against States in their capacity as States.

40 C.F.R. § 49.4

[10] A sense of forthcoming legal challenge can be gleaned from the comments addressed by the EPA in publishing the new regulations, indicating considerable disagreement with EPA's assertion of legal authority to grant tribal governments authority over all reservation lands, and to immunize tribal governments from private suit. 63 Fed. Reg. 7254 (1998).

Subsection 301(d)[11] of the CAA authorizes Indian tribes to stand on par with state governments in the regulation of air pollution. The Act offers the Native American community an opportunity to become an important regulatory force, especially in the southwestern portion of the United States. Although there are only 1.2 million Native Americans living in or near Indian reservations in the United States,[12] the territory contained in these reservations is substantial. Native American reservations are in excess of 55 million acres.[13] The land within the putative boarders of these reservations is a mix of ownership divided between the tribal collective, individual tribal members and individuals who are not members of the tribe.[14]

Within these expansive holdings exist the full spectrum of business activities. While the most common business inside the reservation is either agriculture or natural resource (oil, gas, timber and mineral) extraction activities, there are many other types of commercial and industrial enterprises within the reservations. Commercial ownership predominantly rests with the tribal collective or individual tribal members but many reservations include non-tribal business operating on land owned by non-members and leaseholds granted by the tribe.[15] In recent years, commercial expansion has been greatest in the entertainment and recreational industries, most

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[11] 42 U.S.C. § 7601(d).

[12] U.S. Department of the Interior, *Bureau of Indian Affairs Fact Sheet* (Apr. 2, 1998), which states that there are approximately 1,878,000 Native Americans in the United States, with 1.2 million living on or near reservations.

[13] U.S. Department of the Interior, *Lands Under Jurisdiction of the Bureau of Indian Affairs* (Dec. 31, 1996).

[14] See VINE DELORIN, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 8-24 (1984), in which the authors provide an account of the ever-changing federal policy on Indian reservations, resulting in mixed land ownership on many of the reservations.

[15] U.S. Department of the Interior, *Annual Report of Caseloads, Acreage Under BIA and Surface Leasing, Department of the Interior, Bureau of Indian Affairs, Branch of Real Property Management* (1998).

notably with the development of Indian casinos.[16] Although recreational enterprises are generally considered as "clean industries," the peripheral effects have an impact on the environment, mainly air pollution caused by increased vehicle travel to resort areas and increased electrical generation to service the resort and ancillary service industries.

Indian tribes and tribal members control a total 2.33 million acres in Utah, 1.23 million acres in Nevada, 7.5 million acres in New Mexico and 20.63 million acres in Arizona.[17] The size and location of tribal lands offers a real opportunity for commercial development a region where Indian land holdings are greatest. The latest U.S. census information reflects a population shift to the western and southwestern states [18] This western migration is primarily to the metropolitan centers of this region. For many southwestern metropolitan areas, the only real opportunity for large-scale industrial expansion is onto tribal lands. A case on point is Albuquerque, New Mexico, which has experienced a 33 percent growth between 1980 and 1997.[19] The Albuquerque metropolitan area rests in a river valley bordered on the east by the Cibola National Forest, by the Isleta Indian Reservation to the south, the Conocito Indian Reservation to the west, and the San Felipe, Zia and Santa Ana Indian Reservations to the north. With little room for growth, future commercial developers wanting to locate near this popular metropolitan center will likely need to look to neighboring Indian lands.

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[16] U.S. Department of the Interior, Bureau of Indian Affairs, *Factsheet on Indian Gaming* (Apr. 2, 1999), reporting there are 145 tribal-State Indian gaming compacts, involving 130 tribes in 24 States.

[17] U.S. Department of the Interior, *Lands Under the Jurisdiction of the Bureau of Indian Affairs.*

[18] U.S. Census Bureau, *Population Division Working Paper No. 27* (15 June 1998).

[19] Population figures for the metropolitan area provided by the Albuquerque Chamber of Commerce, showing the city growing from 485,000 (1980) to 688,000 (1997).

Even where western state metropolitan centers are not completely hemmed in by Indian reservations or federal lands, the western growth will surely result in greater competition for space, forcing commercial developers to look to neighboring Indian reservations with their huge holdings of undeveloped land and relatively small populations. Those companies choosing to operate on tribal lands would not be subject to a state CAA enforcement agency but instead fall within the tribe's regulatory authority. How tribes exercise this authority will directly effect commercial development.

III. Issue One: Tribal Regulation of Non-Tribal Lands

Of the two major issues raised by the regulations granting Indian tribes CAA enforcement authority, the more controversial will likely be EPA's intention to override existing state CAA regulation of non-tribal lands situated within the identified borders of Indian reservations, replacing this with Indian tribal regulatory authority.[20] The new 40 C.F.R. Part 49, *Tribal Clean Air Act Authority*, will effectively give Indian tribes CAA regulatory control over all land holdings situated within reservation borders.[21] This will include tribal common lands, the private holdings of individual tribal members, and private fee holdings of individuals who are not members of the reservation tribe. These non-tribal fee holdings have long been recognized as outside the general jurisdiction of Indian tribes, instead falling within the jurisdiction of state governments.[22] The EPA's stated purpose for granting Indian tribes blanket regulatory authority

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[20] *See* 63 Fed. Reg. 7256 (1998).

[21] *See* 40 C.F.R. § 49.2(b), defining Indian reservation as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."

[22] *See* Montana v. United States, 450 U.S. 544 (1981).

over all lands within the identified borders of reservations is to avoid "jurisdictional entanglements and checkerboarding."[23]

In defense of its intended course, the EPA contends that Indian tribes possess the inherent sovereignty authority to regulate both tribal and non-tribal areas of the reservation. The EPA also contends that if tribal inherent authority isn't sufficient to assume regulatory control over all lands within the tribal reservation, the CAA serves to expressly delegate sufficient authority to the tribes. While the author applauds the Agency's motive for seeking a single regulating entity to cover all areas within the reservation, he believes that neither federal common law nor the CAA provides the EPA the legal authority to simply declare all land situated within an Indian reservation as falling under tribal jurisdiction. This author believes that these non-tribal holdings will remain under state authority unless the EPA or tribal government can demonstrate the subject emission source "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[24]

A. Development of Reservation Sovereignty

In order to evaluate EPA's intended course, it's necessary to have some appreciation of the extent and limit of inherent tribal sovereignty, especially with respect to non-tribal individuals and their fee holdings. Indian tribes occupy a special niche in our federal system of government,

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[23] "The Agency believes that Congress, in the CAA, chose to adopt a territorial approach to the protection of air resources within reservations, an approach that will have the effect of minimizing jurisdictional entanglements and checkerboarding within reservations. EPA expects that the delegation approach will minimize the number of case-specific jurisdictional disputes that will arise and enhance the effectiveness of CAA implementation. " 63 Fed. Reg. 7258 (1998).

[24] Montana v. United States, 450 U.S. 544, 566.

that of "domestic dependent nation."[25] This designation serves to identify the relationship between Indian tribes, states and the federal government. Recognized Indian tribes are sovereign entities independent of the states in which their lands are located.[26] Tribes possess an inherent authority over their lands and members.[27] Tribal sovereignty, though, is subject to the absolute authority of Congress, an authority that includes the power to modify Indian rights,[28] divest tribes of their lands (with compensation)[29] and even abolish reservation status.[30]

Where Indian tribes once exercised near complete civil and criminal authority over their reservations, congressional policies of the past 100 years have converted reservations to a checkerboard of mixed jurisdictions divided between tribal, state and federal governments. Prior to 1887, federal Indian policy was to settle tribes on portions of their traditional lands and allow tribes near-total autonomy within reservation boundaries established by treaty. Federal policy was to act as guardian for the tribes, using the power of the U.S. Constitution to insulate tribes

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[25] The phrase was coined by Chief Justice Marshall in *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), embodying the singular legal status of tribal governments as independent sovereign entities under the absolute control of Congress.

[26] Williams v. Lee, 358 U.S. 217 (1959), in which the Court reaffirmed the long-standing rule that states have no inherent jurisdiction over tribal land or tribal members.

[27] *See, e.g.,* United States v. Wheeler, 435 U.S. 313 (1978).

[28] *See, e.g.,* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[29] *See, e.g.,* Talton v. Mayes, 163 U.S. 376 (1896).

[30] *See, e.g.,* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

from any attempt by state governments to assimilate tribal lands and members.[31] This policy changed with the passage of the General Allotment Act of 1887. [32]

The Allotment Act was an attempt to improve the plight of Native Americans by ending the reservation practice and assimilate Native Americans into the mainstream agrarian culture. The Act authorized the president to divide Indian reservations and apportion the land in fee simple among the individual tribal members. The remaining land was either sold off or reverted to the public domain. The program proved disastrous. Because of extended drought, economic depression or simple inexperience in agrarian economics, many of the fee holdings were eventually sold to non-tribal individuals when the Native American owners were unable to pay state taxes, cover mortgage payments or simply finance the necessary upkeep.[33]

Recognizing the failure of the allotment practice, in 1934 Congress passed the Indian Reorganization Act.[34] The 1934 Act reflected congressional concern that sizeable portions of what was once reservation land was being bought by non-Indians. The 1934 Act also represented a reversion in Congressional Indian policy, which once again promoted the reservation system

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[31] See John Fredricks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & Pol'y 347 (1997), providing an excellent overview of the fluctuating federal Indian policy.

[32] 25 U.S.C. §§ 331 *et seq.*, also known as the Dawes Act. The Act granted 160 acres to each family head, 80 acres to single adults and 40 acres to orphan minors. The land could not be alienated for 25 years. Alienated lands and owners became subject to State jurisdiction. The Act also authorized the Secretary of Interior to sell the remainder of the reservation land for non-Indian settlement.

[33] See Darby L. Hoggart, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgements and Protecting Tribal Sovereignty*, 30 Land & Water L.Rev. 531, 541 (1995), in which the author provides a good account of the substantial loss of Native American allotted holdings during the Allotment periods.

[34] 25 U.S.C. §§ 461 *et seq.*, also known as the Wheeler-Howard Act.

and the guardianship role of the federal government. Tribal reservations were reestablished within what remained of the original reservation lands. [35]

Beginning in the late 1940s, Congress again reversed direction. Having once again determined that reservations were counterproductive to Native American social and economic development, Congress adopted a policy of tribal termination and relocation. A succession of legislative actions terminated tribal status and federal guardianship of many recognized Indian tribes. Tribal communal lands were sold off to private parties. With the disestablishment of reservations, individual tribal members and their property became subject to state authority. Once again convinced that assimilation into mainstream American culture was the solution to improving the economic plight of Native Americans, Congress took steps to encourage Native Americans to relocate to metropolitan centers.[36]

Termination wasn't the only federal policy that served to reduce tribal sovereignty. In 1953 Congress passed Public Law 280,[37] giving six named states criminal[38] and civil[39] jurisdiction over all or most of the reservation lands within these states. [40] Public Law 280 also authorized other states to unilaterally assume jurisdiction over reservations.[41] This legislation

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[35] See *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgements and Protecting Tribal Sovereignty*, pages 541-542.

[36] See *America's First Nations*, 7 J.L. & Pol'y 347, at 377-379.

[37] 67 Stat. 588 (1953) (as amended by 18 U.S.C. §§ 1161-62; 25 U.S.C. §§ 1321-22; 28 U.S.C. § 1360)

[38] 18 U.S.C. § 1162.

[39] 28 U.S.C. § 1360.

[40] California, Wisconsin and Nebraska were granted jurisdiction over all Indian Country within each state; with Minnesota, Oregon and Alaska receiving jurisdiction other lands not explicitly excluded by the legislation; 18 U.S.C. §§ 1162(a), 1360(a).

[41] 25 U.S.C. §§ 1321-1322.

was enacted as a response to a growing perception that lawlessness reigned within Indian reservations.[42] With Public Law 280, Congress hoped to restore order by substituting ineffective tribal and federal authority with that of the state, giving designated states criminal jurisdiction to prosecute offenses committed within reservations by or against Native Americans.[43] Public Law 280 also allowed state courts to adjudicate civil disputes originating within Indian Country.[44] While Public Law 280 does empower states with criminal jurisdiction,[45] it does not give states jurisdiction to regulate reservation activities[46] nor to impose state taxes on tribal property.[47]

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[42] *See e.g.* Bryan v. Itasca County, 426 U.S. 373 (1976), which provides an overview of Congressional purpose and the effect of Public Law 280.

[43] 18 U.S.C. § 1162(a).

[44] Defined in 18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

While 18 U.S.C. § 1151 is a criminal statute, the U.S. Supreme Court has ruled that it generally applies to issues of civil jurisdiction. *See*, DeCoteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975)

[45] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), a case involving an attempt to apply state bingo laws on a reservation. The Court distinguished Public Law 280 authority, holding that states may enforce statutes that criminally prohibit activities but may not if state law only serves to regulate an otherwise permitted conduct, even if the means of regulatory enforcement is a criminal statute.

[46] *See* Menominee Tribe v. United States, 391 U.S. 404 (1968), ruling that Public Law 280 did not authorize states to regulate hunting and fishing on tribal land; Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1992), *cert. denied*, 503 U.S. 997 (1992), denying a state's attempt to enforce non-criminal provisions of its traffic code.

[47] *See* Bryan v. Itasca County, 426 U.S. 373 (1976), invalidating state personal property tax assessed against a mobile home parked within the Minnesota Chippewa Reservation; White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), striking down a tax imposed on non-tribal timber harvests on tribal lands; Ramah Navajo School

B. Tribal Sovereignty Today

The second cycle of reservation termination and assimilation effectively ended in 1968 with the passage of the Indian Civil Rights Act (ICRA).[48] Among the many changes brought by this legislation, was the requirement for tribal approval before a state could assume jurisdiction under Public Law 280.[49] The ICRA also allows states to retrocede jurisdiction obtain through Public Law 280.[50] Since the 1970s, Congress appears committed to promoting both preservation of the reservation system and enhancement of tribal sovereignty. Such policy is reflected in the passage of major legislation, such as the Indian Financing Act of 1974,[51] the Indian Self-Determination and Education Assistance Act,[52] Indian Child Welfare Act of 1978,[53] and Indian Forest Resources Act,[54] each serving to enhance or expand the role of tribal government.

While there has been a steady increase in civil authority tribal governments exercise over reservation civil affairs, tribal criminal jurisdiction has continued to erode. A significant curtailment of tribal criminal jurisdiction for all tribes is the Major Crimes Act,[55] with which the

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Board v. Bureau of Revenue, 458 U.S. 832, invalidating a gross receipts tax assessed against a non-Navajo contractor building a school on the reservation.

[48] 25 U.S.C. §§ 1301 *et seq.*

[49] 25 U.S.C. §§. 1321-22, 1326.

[50] 25 U.S.C. § 1323.

[51] 25 U.S.C. § 1451, *et seq.*, with which Congress established a revolving fund to provide loans for tribal development of reservation natural resources.

[52] 25 U.S.C. §§ 450a-450n, allowing tribal governments to assume administration of federal Indian programs.

[53] 25 U.S.C. §§ 1901-1963, granting deference to tribal views in adjudication of child custody issues.

[54] 25 U.S.C. §§ 3101-3120.

[55] 18 U.S.C. § 1153.

federal government assumed jurisdiction for fourteen enumerated crimes in Indian Country,[56] and the Indian Civil Rights Act, which also served to curtail tribal criminal authority, effectively limiting tribal jurisdiction to misdemeanor offenses.[57] In 1990, the U.S. Supreme Court further reduced tribal criminal jurisdiction by ruling that tribal governments lacked the inherent authority to prosecute Native Americans who were not members of the same tribe.[58] (Congress responded to this decision by taking a rare move of actually expanding tribal jurisdiction, amending federal law to effectively give tribes criminal jurisdiction over any Native American within the reservation.)[59] One area not affected by congressional policy is a tribe's authority to prosecute non-Indian criminals, as tribal sovereignty has never included the power to prosecute non-Native Americans—a rule recently reaffirmed by the U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe*.[60] Criminal jurisdiction over individuals who are not Native American is split between federal[61] and state governments.[62]

Although tribal governments have lost considerable authority over criminal issues, tribal power to regulate civil matters within the reservation is still relatively strong. As a general rule,

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[56] 18 U.S.C. § 1151:

[57] 18 U.S.C. § 1302(7), limiting tribal court sentence imposition to no more than one year confinement and $5,000 fine or both.

[58] Duro v. Reina, 495 U.S. 676 (1990).

[59] 25 U.S.C. §. 1301(4).

[60] 435 U.S. 191 (1978).

[61] 18 U.S.C. § 1152, giving the federal government jurisdiction over non-Native Americans who commit crimes against tribal members or tribal interests.

[62] New York ex rel. Ray v. Martin, 326 U.S. 496 (1946), holding that states have jurisdiction over crimes committed in a reservation by non-Native American against another non-Native American.

tribal governments exercise full civil authority over tribal lands and tribal members.[63] Even those tribes subject to state civil jurisdiction under Public Law 280 still retain general civil authority over reservation land and people. State jurisdiction under Public Law 280 doesn't include the power to regulate nor tax tribal property or activities.[64]

A legacy of Congress' vacillating reservation policy is a checkerboard layout of land ownership within the recognized borders of many reservations. This consequence of failed policies seriously hampers uniform application of tribal civil authority within the reservation. Reservations, once exclusively belonging to the tribe or members of the tribe, now include considerable areas of non-tribal private holdings, either a direct result of past federal legislation that opened entire sections to non-tribal settlement, or through private acquisition of what once was Allotment land formally belonging to individual Native Americans. As a general rule, tribal governing bodies have regulatory authority over tribal common lands, tribal members and their private holdings,[65] with non-tribal lands and owners generally falling within state jurisdiction.[66]

C. Reservation Diminishment

Another limitation on tribal sovereignty is reservation "diminishment." Diminishment is a product of the General Allotment and Termination periods, when reservations were opened to non-tribal settlement, either as an intended result of federal legislation, or as a result of the

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[63] Williams v. Lee, 358 U.S. 217.

[64] *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Bryan v. Itasca County, 426 U.S. 373 (1979).

[65] McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

[66] Montana v. United States, 450 U.S. 544 (1981).

conveyance of allotted lands.[67] Although Indian reservation boundaries were originally set by treaty with the federal government, Congress has long been recognized as having the power to withdraw reservation land for non-tribal use.[68] Such action effectively reduces the size of the reservation, as the "diminished" lands are no longer Indian Country; and states, rather than the tribe, possess primary jurisdiction over the divested area.[69] But simply because a portion of a reservation no longer belongs to the tribe or a tribal member, doesn't mean that the area has lost its reservation status. The non-tribal ownership must be the result of Congress' intent to open the reservation to non-tribal settlement and end reservation status for that particular area of the reservation.[70] During the Allotment and Termination periods, this was accomplished through legislation, which may or may not have specifically declared congressional intent on the issue. When the effectuating legislation doesn't specifically state whether Congress intended to end reservation status, courts will glean legislative intent by considering three factors: statutory language, historic context of the legislation and who originally held the land as a consequence of the legislation.[71] Ambiguous statutory language is liberally construed in favor of Indian tribes.[72]

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[67] *See* Solem v. Bartlett, 465 U.S. 463, 466-475 (1984); describing the purposes and effect of the Allotment Act and reservation termination practices.

[68] Solem v. Bartlett, 465 U.S. 463, at 469.

[69] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998).

[70] Solem v. Bartlett, 465 U.S., 470-471; stating that "When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its open land, there is an almost insurmountable presumption that Congress meant for the tribes reservation to be diminished."

[71] Hagen v. Utah, 510 U.S. 399, 410-411 (1994):

> In determining whether a reservation has been diminished, 'our precedents in the area have established a fairly clean analytical structure,' directing us to look to three factors. The most probative evidence of diminishment is, of course, the statutory language used to open the Indian Lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, 'on a more pragmatic level, we have recognized that who actually

Determining which private land holdings in or around a reservation retain Indian Country status is difficult. The common practice is to reference the geographic extent of a reservation by the original treaty boundaries. But because land was often removed from the reservation during the Allotment period and then later restored or replaced during the Reorganization period, there's real uncertainty as to a reservation's jurisdictional boundaries.[73] The fact that an area is dominated by a non-tribal community isn't determinative of reservation status, only whether the non-tribal settlement is the result of congressional intention to diminish the reservation.[74] Ultimately, the status of non-tribal lands within the historic boundaries of reservations requires a judicial determination. Unfortunately, unless the determination is by the U.S. Supreme Court, the status of putative reservation boundary is always in question.[75]

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moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation.

[72]Hagen v. Utah, 510 U.S. 399 at 411.

[73] *See e.g.* Yankton Sioux Tribe v. Gaffey, 1999 U.S. App. LEXIS 20808, *60 (8th Cir. 1999), in where the court found it difficult to discern the exact extent or boundary of the Yankton Sioux Reservation:

> Efforts at oral argument to get precise Statements from the parties identifying what trust land remains were unsuccessful. At this time we hold only that the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under Section 1151(a), and we leave it to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust.

[74] *See* Solem v. Bartlett, 465 U.S. 463 at 479; in which the Court noted that the population in a disputed area of the reservation contained a nearly equal mix of tribal and non-tribal residents. While such fact may indicate Congress intended diminishment of the Cheyenne River Sioux Reservation, the language the Act opening the reservation to outside settlement did not support such conclusion; and Brendale v. Confederated Tribes and Bands of Yakima, 492 U.S. 408 (1989), where the justices split three ways on the question of whether large non-tribal settlements were still part of the reservation.

[75] *See* Yankton Sioux Tribe v. Gaffey, 1999 U.S. App. LEXUS 20808, 28-29, in which the court reflects on the uncertainty of tribal boundaries and reservation status: "Long after the Tenth Circuit held that the Unitah Valley Reservation had been neither disestablished nor diminished, *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), the Supreme Court decided in a different case that the reservation had been diminished, Hagen v. Utah, 510 U.S. 399, 127 L.Ed.2d 252, 114 S.Ct. 958 (1994)."

IV. CAA Subsection 301(d)(2)(B) & the Regulation of Non-Tribal Lands

The fact that not all the land within the identified boundaries of a particular reservation may not belong to the reservation tribe, nor even be Indian Country, doesn't appear to concern the EPA. The Agency intends to grant tribal governments blanket CAA authority over everything within a reservation's putative reservation borders.[76] Despite clear judicial authority to the contrary, the EPA insists that Indian tribes have the inherent authority to regulate non-tribal individuals and lands. As authority for its position, the EPA cites the 1975 U.S. Supreme Court case *United States v. Mazurie,*[77] which the Agency claims stands for the inherent authority of Indian tribes to regulate nonmembers. As an alternative argument, the EPA claims that CAA section 301(d)(2)(B)[78] is an express delegation of CAA regulatory authority which serves to expand tribal inherent authority to include the power to regulate non-tribal fee holdings within the presumed borders of a reservation.[79]

Contrary to the EPA's assertion, *United States v. Mazurie* does not stand for the proposition that Indian tribes have an inherent authority to regulate non-member conduct inside reservation borders. This particular case concerned the regulation of liquor sales to Native Americans—an area where Congress has historically exercised very broad regulatory authority

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[76] "This grant of authority by Congress enables eligible tribes to address conduct relating to air quality on all lands, including non-Indian-owned fee lands within the exterior boundaries of a reservation." 63 Fed. Reg. 7254 (1998).

[77] 419 U.S. 544 (1975)

[78] 42 U.S.C. §. 7601(d)(2)(B).

[79] 63 Fed. Reg. 7258 (1998).

both on and off reservation.[80] In *Mazurie*, the U.S. Supreme Court was asked to decide whether a particular federal statute[81] gave a tribe the authority to regulate a non-tribal merchant's sale of alcoholic beverages to Native Americans, where the sales occurred on the nonmembers fee land situated within the reservation.[82] In its decision, the Court reaffirmed Congress' general power to regulate alcohol sales to Native Americans. It also ruled that Congress had the power to delegate this authority to Indian governments.[83] Eight years after *Mazurie*, in *Rice v. Rehner*, [84] the U.S. Supreme Court clarified its earlier ruling, stating that the *Mazurie* decision did not serve to recognize a tribe's inherent authority to regulate alcohol sales and consumption, but only stood for the rule that Congress had the power to delegate its unique authority to Indian tribes.[85] The

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[80] *See* United States v. Forty-Three Gallons of Whiskey, etc., 93 U.S. 188 (1876). In addition to explaining the reason behind this long-standing rule of law, this case also reflects some of the historic bias that has served to develop the role of the federal government with respect to Native Americans:

> As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it; and why cannot Congress forbid its introduction into a place near by, which they would be likely to frequent? It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it; and that bad white men, knowing this, would carry on the traffic in adjoining localities, rather than venture upon forbidden ground.

[81] 18 U.S.C. § 1161.

[82] United States v. Mazurie, 419 U.S. 553.

[83] Mazurie at 553-558.

[84] 463 U.S. 713 (1983).

[85]

> Rehner's reliance on *Mazuri* as establishing tribal sovereignty in the area of liquor licensing and distribution is misplaced. In *Mazurie*, we held that 'independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of (Congress') own authority' to regulate commerce with the Indians. Ibid. (emphasis added). We expressly declined to base our holding on whether 'independent (tribal) authority is itself sufficient for the tribes to impose' their own liquor regulations. Ibid. (emphasis added). The reason that we declined is apparent in the light of the history of federal control of liquor in this context, which must be characterized as 'One of the most comprehensive (federal) activities in Indian affairs... *Cohen*, at 307.

Court noted that Congress had long divested Indian tribes of the sovereign right to regulate alcohol sales and consumption, and therefore could not act without the delegated authority.[86] The Court also reaffirmed the rule that states held concurrent authority with the federal government to regulate Indian liquor sales on state land.[87]

Mazurie does stand for the proposition that Congress can delegate its regulatory authority to tribal governments, even the authority to regulate non-tribal individuals situated within reservation borders. The question for this paper is whether CAA subsection 301(d)(2)(B)[88] delegates CAA regulatory authority to Indian tribes. If so, does this delegated authority extend to non-tribal lands and individuals?

A. Deference to EPA Interpretation

As stated above, the EPA interprets the language of subsection 301(d)(2)(B) as being an express congressional grant of regulatory authority over all reservation lands, including non-tribal fee lands, and any land outside the reservation that is either owned by the tribe, or held in federal trust for its benefit. Subsection 301(d)(2)(B) reads: "(T)he functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and..."

Rice, 463 U.S. at 722

[86] In fact, 18 U.S.C. §§ 1154 & 1156 (regulating alcohol sales and possession) limit the definition of "Indian country" to not include patent lands owned by non-Indians and rights-of-way.

[87] Rice, 463 U.S., 721-422.

[88] 42 U.S.C. § 7601(d)(2)(B).

Critics of EPA's interpretations, argue that this particular section of the CAA only allows Indian tribes to assume regulatory authority over those lands for which the tribe can demonstrate jurisdictional authority.[89] The EPA answers such criticism by insisting that under the well-established rules of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,*[90] its interpretation controls the issue.[91] The Agency is partially correct. If the EPA's interpretation of subsection 301(d)(2)(B) is reasonable, federal courts must uphold agency regulations based upon the interpretation.[92] But after a thorough analysis of the statute, legislative history and controlling law, the likely answer is that the Agency's interpretation is not reasonable.

Chevron v. NRDC[93] provides the EPA a mighty shield with which to defend its position. In *Chevron*, the U.S. Supreme Court established a judicial matrix by which courts evaluate the legitimacy of agency statutory interpretation and rule making. The analysis starts by looking at the enabling statute to determine whether it specifically speaks on the matter in question. If the statutory language reveals clear congressional intent, both the agency and the courts must abide

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[89] 63 Fed. Reg. 7255 (1998).

[90] 467 U.S. 837 (1984).

[91] 63 Fed. Reg. 7254 (1998):

> In light of the statutory language and the overall statutory scheme, EPA is exercising the rulemaking authority entrusted to it by Congress to implement the CAA provisions granting approved tribes authority over all air resources within the exterior boundaries of a reservation. See generally Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842,45 (1984). This interpretation of the CAA as generally delgating such authority to approved tribes is also supported by the legislative history, which provides additional evidence of Congressional intention regarding this issue.

[92] *See e.g.,* Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996), *cert. denied* 519 U.S. 1090 (1977).

[93] 467 U.S. 837.

by the plain language of the statute.[94] If congressional intent is not explicit, either because the statute is silent or it's ambiguous, a court must defer to the agency's interpretation—provided the interpretation is reasonable and not contrary to law.[95] In determining the reasonableness of an agency's interpretation, the court first considers whether the statute delegates to the agency the authority to clarify statutory provisions in its rule making process.[96] If so, the agency's interpretation of the statute controls, unless the agency's actions are arbitrary, capricious or manifestly contrary to the enabling statute or law.[97] Where the statute is silent and can be understood to implicitly delegate to an agency the authority to elucidate a specific statutory provision, the agency's construction controls, unless shown the interpretation is unreasonable or contrary to law.[98] This judicial doctrine recognizes both the quasi-legislative function of federal executive agencies, and it recognizes Congress's reliance upon the expertise of agencies needed to apply the broad policy and rules established by congressional action.[99]

Applying the *Chevron* analytical process to the issue at hand requires the following analysis:

1) Does CAA section 301(d)(2)(B) contain a clear congressional grant of authority for tribes to regulate both tribal lands and non-tribal fee holdings?

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[94] Chevron v. NRDC, 467 U.S. 837, 843, n9: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent... If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

[95] Chevron, 467 U.S. at 843.

[96] United States v. Hagger Apparel Co., 526 U.S. 380 (1999).

[97] National Federation of Federal Employees, Local 1309 v. Department of the Interior, 526 U.S. 86 (1999).

[98] Chevron at 844.

[99] *See e.g.* Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997); *cert. denied* 523 U.S. 1117 (1998).

2) If not, does the CAA expressly delegate EPA the authority to determine the scope of Indian tribe regulatory jurisdiction?

3) If Congress hasn't expressly delegated the authority, can the statute be fairly read as implicitly granting EPA the authority to determine the scope of tribal regulatory jurisdiction, and if so,

4) Is EPA's interpretation unreasonable or contrary to law?

Applying the Chevron analysis to this issue, we must first look to the statutory language to determine whether it contains a clear expression of congressional intent. The EPA argues that the language of section 301(d)(2)(B),[100] "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction," is a clear indication that Congress intended Indian tribes to regulate both tribal and non-tribal land holdings within a reservation.[101] A fair read of this provision does seem to argue congressional intent to empower tribal governments with regulatory authority within the reservation; and the antecedent phrase "or other areas..." can be read to extend tribal regulatory authority beyond the reservation boundaries. But the provision fails to state whether Congress intended "reservation" to mean only tribal lands, be synonymous with Indian Country, or that it intended tribal regulatory control everything situated within a reservation's putative borders, regardless of ownership or status.

The CAA doesn't contain a specific definition for "reservation." If we apply the appropriate rule of statutory interpretation, we should assume that without a specified statutory

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[100] 42 U.S.C. § 7601(d)(2)(B) reads: "(t)he functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and..."

[101] 63 Fed. Reg. 7254 (1998).

definition, Congress intended for the word to have its ordinary meaning:[102] "a tract of public land set aside for a particular purpose, as schools, forest or the use of Indians..."[103] But this definition seems to contemplate an area occupied solely by Native Americans and devoid of non-Indian private land holdings. Applying the ordinary meaning of the word argues for a conclusion that Congress only intended section 301(d)(2)(B) to apply to those Native American enclaves inhabited solely by members of that particular tribe. But this interpretation runs contrary to subsection 110(o)[104] of the Act, which makes tribal clean air implementation plans applicable to all areas within the boundaries of a reservation, regardless of private holdings or rights-of-way.[105] The language of subsection 110(o) appears to contemplate the possibility that not all the land within a reservation will belong to the resident tribe—a fact arguing against allowing the ordinary meaning of "reservation" to control.

B. What Do They Mean By Reservation?

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[102] North Dakota v. United States, 460 U.S. 300, 312 (1983):

> As with any case involving statutory interpretation, 'we State once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language.' *Dickerson v. New Banner Institute*, Inc., ante, at 110. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). 'Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[103] *Webster's Third New International Dictionary*, Merriam-Webster, Inc., Springfield, Mass., Principal Copyright 1961, Copyright 1993, page 1930.

[104] 42 U.S.C. § 7410(o).

[105] 42 USCA § 7610(o); reading in part:

> When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided other wise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

In *State of Montana v. William P. Clark*[106] the U.S. Court of Appeals for the District of Columbia was faced with the task of deciphering a statute in which the scope of its applicability turned on the interpretation of "reservation." The dispute concerned a challenge filed by the State of Montana to invalidate a regulation promulgated by the federal Office of Surface Mining. The OSM regulation established a process for apportioning Abandoned Mine Reclamation Funds. The regulation required funds collected from "Indian lands," whether on or off reservation, to be set aside for the respective tribe. Montana correctly observed that the statute from which the OSM regulation was derived, only authorized tribes to receive mining reclamation funds attributed to mining operations on "Indian reservations." Montana argued that OSM had abused its discretion by substituting the term "Indian land" for the statutory term "reservation."[107] The effect of the substitution, argued the state, was to extend tribal interests beyond that granted by the plain language of the enabling statute.[108] As a consequence of the agency's action, Montana argued, tribal governments were allowed to administer funds that should have gone to the state.

While the U.S. Court of Appeals agreed with Montana that OSM's language substitution served to broaden the scope of funds available to tribal governments, the court determined the substitution was based upon a reasonable construction of the enabling statutes. The court explained that it was bound by section 706(2) of the Administrative Procedures Act,[109] and as

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[106] 749 F.2d 740 (D.C. Cir. 1984), *cert. denied,* 474 U.S. 919 (1985).

[107] Montana v. Clark, 749 F.2d 740, 743-744.

[108] 30 U.S.C.A. § 1232(g)(2), which reads in part: "Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation..."

[109] 5 U.S.C. § 706(2)

tribal lands, unless the agency's interpretation was unreasonable or otherwise contrary to law.[110] The court agreed with Montana that absent a specific statutory definition, the rules of statutory interpretation required application of the literal meaning of a word or phrase--unless the literal meaning was contrary to statutory intent or other provisions of the statute.[111] But even after applying the interpretation sought by the state, the court determined that the statute could not be interpreted to show that Congress intended states to receive funds collected from off-reservation tribal lands. According to the court, the legislation only allowed a state to administer funds collected from operations on state land, defining state land to exclude any federal or Indian land. The court reasoned that if the State of Montana's interpretation was applied to the issue, Montana would receive the reclamation funds but would not have the authority to administer the money.[112]

Having determined that the statute was ambiguous with respect to the meaning of "Indian reservation," the court considered the statutory language and legislative history, finding that these supported the federal agency's interpretation.[113] Commenting on the legislative history, the court noted that Congress had been uncertain as to whether tribal governments had sufficient civil authority over off-reservation land to enforce collection of the funds. Pending a legal determination of tribal civil authority, Congress intended the federal government to collect and manage these funds for the tribe.[114] Ultimately, the court was most persuaded by the fact that the

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[110] Montana v. Clark, 749 F.2d 740, 745.

[111] "The literal words of the statute are presumptively conclusive of legislative intent, but that presumption may be defeated by contrary indications of intent also evident on the face of the statute." Montana v. Clark at 476.

[112] *Id.* at 746-749.

[113] *Id.* at 749-750.

[114] *Id.* at 751-752.

federal agency's interpretation was consistent with the competing jurisdictional authority of the two parties. The court noted that Montana civil authority did not extend to off-reservation tribal lands, and as such would be unable to enforce collection of reclamation funds. On the other hand, both the tribe and federal government clearly had such authority.[115]

Applying the logic of *Montana v. Clark,* it's clear that a federal court could not apply the literal interpretation of section 301(d)(2)(B), if the literal interpretation ran contrary to congressional intent. Given the literal meaning of "reservation," the provision could be interpreted to reflect at least three different congressional intentions: (1) granting CAA authority only to tribes living in homogeneous Native American communities; (2) limiting tribal CAA authority to the portion of a reservation occupied by tribal members; or (3) granting a tribe authority over all lands within the reservation—the interpretation for which EPA advocates. The first interpretation runs contrary to the underlying Congressional purpose of promoting tribal control over Native American lands. A consequence of past federal policy is that few reservation boundaries enclose land belonging solely to a tribe. Being patently inconsistent with the statutory purpose, this interpretation must be rejected. Leaving two alternative interpretations.

In that there are at least two possible interpretations of this portion of the statute, it is fair to say congressional intent is ambiguous. Because of this ambiguity, the *Chevron* analysis requires granting deference to EPA's interpretation—provided this interpretation is reasonable and not contrary to law. But if, as stated in *Montana v. Clark*, an agency's interpretation is reasonable when it comports with recognized jurisdictional limits, then correspondingly, the interpretation

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[115] "But there is not (sic) doubt that the Senate envisioned no role for the States on Indian lands. To be eligible to receive reclamation funds a State must have jurisdiction over "lands within such State," S. 425, 93d Cong., 2d Sess. Sect. 204(1)(1973), a phrase defined to 'insure that the States, through their State programs, will not assert any additional authority over *** Indian lands.' Senate Report at 75." *Id.* at 751.

would be unreasonable if it ran contrary to recognized jurisdictional limitations. The EPA's statutory interpretation of CAA section 301(d)(2)(B) would give Indian tribes regulatory jurisdiction over all areas within the putative reservation boarders, including non-tribal fee holdings and land no longer Indian Country. Because EPA's interpretation of the statute can only be effected through the application of a regulatory process for which tribal governments have no inherent jurisdictional authority, the Agency's interpretation can not be seen as reasonable and in conformity with law.

C. The Supreme Court's Take on the Issue: *Montana v. U.S.*

In 1981, in the case of *Montana v. United States,*[116] the U.S Supreme Court established limits of tribal civil authority over non-members residing within a reservation. The Court ruled that tribal governments lack civil authority over the lands or activities of individuals who were not members of the tribe, even though the individuals and land were situated within the

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[116] Montana v. United States, 450 U.S. 544 (1981). The controversy involved an attempt by the Crow Tribe of Montana to regulate hunting and fishing on land situated within the reservation but held in fee by individuals who were not members of the tribe. Representing the Crow tribe, the federal government provided a three-part argument. (1) That the original treaty between the U.S. granted the Crow tribe exclusive occupancy of the reservation, with the authority to exclude non-tribal individuals, and the right to exclude necessarily gave the tribe the right to regulate activities within the reservation. (2) Federal trespass statutes served to augment tribal authority over non-tribal fee lands. (3) Tribal inherent sovereignty includes the right to regulate activities occurring on non-tribal fee lands situated within the reservation.

In response to the first argument, the Court ruled that while the treaty granted the tribe undisturbed use and occupancy of the reservation, Congress' subsequent acts to alienate portions of the reservation reflect congressional intent to divest the tribe of the right of exclusive occupation and control of the alienated lands. Montana at 558-559. As to the government's second argument, the Court held that in as the federal trespass statute applied only to "Indian land," it did not augment tribal regulatory authority, as the fee holdings in question were not Indian land. Montana at 560-562. Finally, the Court rejected the argument that tribal inherent authority empowered the tribe to regulate non-member fee holdings, stating that the regulation of nonmembers had no relationship to tribal self-government or protection of internal relations. *[Id* at 563-564].

reservation boundaries.[117] The Court explained that while Indian tribes retain that sovereign authority not lost as a result of their dependent status, such power extended only so far as necessary for tribal self governance and the protection of internal tribal relations.[118] The Court ruled that absent an expressed delegation of authority by Congress,[119] tribal governments could only exercise authority over nonmembers under two excepted conditions. First, the tribe had the right to impose taxes, require licenses and otherwise set conditions on those individuals who entered into consensual relations with the tribe or tribal members.[120] Second, tribal governments can regulate nonmember conduct within reservation boundaries whenever such conduct threatens or harms the political integrity, economic security, health or welfare of the tribe.[121]

Eight years after the *Montana* ruling, the U.S. Supreme Court revisited the issue of tribal civil authority over non-tribal lands in *Brendale v. Confederated Tribes and Bands of Yakima*,[122] a decision which seemed to obscure the issue rather than provide additional clarification.[123] In

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[117] "Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05 (regulation of hunting and fishing on non-member fee lands)." Montana at 564.

[118] Montana at 564.

[119] "(E)xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Montana at 564.

[120] "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana at 565.

[121] Montana at 566.

[122]Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989).

[123] The reader is recommended to James S. Warren, *Comment: State in-Decisis: Have Recent Supreme Court Decisions Encouraged Litigation Between Tribes and States*, 53 U. Miami L.Rev. 241 (October 1998), in which he discusses the potential impact of the seemingly inconsistent result of the *Brendale* plurality with previous Court rulings on the same issue.

Brendale, the Court handed down a three-part decision—none of which were fully supported by a majority.[124] The trilateral *Brendale* decision reflected very different views as to the source of any tribal authority over nonmembers, and reflected differing opinions as to why tribal sovereignty does or does not extend to non-tribal individuals and their land.

1. *Brendale*: The Three-Way Split

In *Brendale* the Court was asked to rule on a dispute between the Yakima Indian Nation and the Yakima County zoning authority. The tribe sought to halt the county's attempt to regulate land use of nonmember fee holdings situated within two separate portions of the Yakima Indian Nation Reservation. One section of the reservation was closed to general public entry. There did exist private land holdings in this section, but this consisted of only about one percent of the total area. The second section of the reservation was known as the open area. Here, nearly half the land was owned by individuals who were not members of the tribe and even contained three townships.[125]

Justice White, joined by Chief Justice Renquist, Justice Scalia and Justice Kennedy, wrote the first of three opinions delivered by the Court.[126] Justice White's analysis reflects a theory of Indian tribal regulatory authority derived from two events. The first is the right of tribes to exclude nonmembers from tribal lands (a right conferred by federal treaty). The second is the

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[124] The three opinions were written by Justices White, Stevens and Blackmun. Justice White was joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy. Justice Stevens, joined by O'Connor, concurred and dissented in part with Justice White. Justice Blackmun, joined by Brennan and Marshall, dissented on the opinion by Justice White. Brenadale v. Yakima, 492 U.S. 408.

[125] Brendale at 414-421.

[126] Brendale at 414-433.

tribe's inherent authority as a sovereign nation.[127] Justice White stated that when a tribe loses land ownership, as a result of either congressional divestiture or because tribal members sold their allotted fee holdings, tribes implicitly lose the right to exclude nonmembers from the divested areas of the reservation.[128] While Justice White acknowledged that tribal governments possessed the inherent authority to regulate activities within a reservation, he found this inherent authority extends only as far as necessary to protect internal tribal affairs; concluding that a tribe's interest doesn't extend to nonmember activities on nonmember land.[129]

The second Yakima opinion, written by Justice Stevens, with Justice O'Connor concurring, sided in part with Justice White. Justice Stevens agreed that tribal authority did not extend to those nonmember fee holdings situated within the reservation open area, but concluded the

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[127] Brendale at 425:

> An Indian tribe's treaty power to exclude nonmembers of the tribe from its lands is not the only source of Indian regulatory authority. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), the Court held that tribes have inherent sovereignty independent of that authority arising from their power to exclude. Prior to the European settlement of the New World, Indian tribes were 'self-governing sovereign political communities,' *United States v. Wheeler*, 435 U.S. 313, 322-323, and they still retain some 'elements of quasi-sovereign authority after ceding lands to the United States and announcing their dependence on the Federal Government,' *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). Thus, an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its internal affairs.

[128] Brendale at 424:

> (T)he Yakima Nation no longer has the power to exclude fee owners from its land within the boundaries of the reservation, as Justice Stevens concedes. Post, at 3011. Therefore, that power can no longer serve as the basis for tribal exercise of the lesser included power, a result which is surely not 'inconceivable,' ibid., but rather which is perfectly straightforward. It is irrelevant that the Tribe had declared the closed area off limits before Brendale obtained title to his property. Once Brendale obtained title to his land that land was no longer off limits to him; the tribal authority to exclude was necessarily overcome by, as Justice Stevens puts it, an 'implici[t] grant' of access to the land.

[129] Brendale at 425-426:

> A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.' *Wheeler*, 435 U.S., at 326, 98 S.Ct., at 1087. [FN9] Those cases in which the Court has found a tribe's sovereignty divested generally are those; involving the relations between an Indian tribe and nonmembers of the tribe.

Yakima tribe had the authority to regulate nonmember fee holdings in the closed section.[130] Instead of focussing solely on the right of exclusion as the primary source of tribal regulatory authority, Justice Stevens' opinion applied a secondary evaluation based upon a weighing of competing interests. Justice Stevens noted that tribal governments have long been recognized as having the inherent right to regulate activities directly affecting tribal interests. He reasoned that where only a small portion of a reservation was held in fee by nonmembers, tribal interest in preserving the character of the reservation outweighed private ownership interests.[131] Continuing this line, Justice Stevens reasoned that tribal interests in an area largely held in fee by nonmembers wasn't sufficiently significant to warrant tribal regulation.[132]

Justice Blackmun, joined by Justices Brennan and Marshall, wrote the third *Brendale* opinion.[133] In this he criticized the Court's adherence to a presumption against tribal civil authority over nonmembers,[134] pointing out such a presumption runs counter to decisions both

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[130] Brendale at 433-448.

[131] Brendale at 441:

> In my opinion, just as Congress could not possibly have intended in enacting the Dawes Act that tribes would maintain the power to exclude bona fide purchasers of reservation land from that property, it could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of land.

[132] Brendale at 444-445:

> Although the Tribe originally had the power to exclude non-Indians from the entire reservation, the 'subsequent alienation' of about half of the property in the open area has produced an integrated community that is not economically or culturally delimited by reservation boundaries. Because the Tribe no longer has the power to exclude nonmembers from a large portion of this area, it also lacks the power to define the essential character of the territory.

[133] Brendale at 448-468.

[134] Brendale at 455:

> With respect to *Montana's* 'general principle' creating a presumption against tribal civil jurisdiction over non-Indians absent express congressional delegation, I find it evident that the Court simply missed its usual

preceding and subsequent to *Montana*, where the Court recognized the right of tribes to exercise civil authority over the activities and lands of nonmembers situated within the reservation.[135] Justice Blackmun maintained that that a proper application of the *Montana* principals required the Court to conclude that a tribe's inherent authority to regulate the reservation wasn't lost simply because ownership had been transferred.[136]

The focus of Justice Blackmun's criticism of Justice White's and Stevens' *Brendale* decisions appears to be based upon his belief that the majority of the Court were inconsistently applying the rules set forth in *Montana.* Justice Blackmun noted that in post-*Montana* decisions

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way. Although the Court's opinion reads as a restatement, not as a revision, of existing doctrine, it contains language flatly inconsistent with its prior decisions defining the scope of inherent tribal jurisdiction, e.g., *Coleville* [*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)]

[135] Brendale at 454-455:

> Our civil jurisdiction cases subsequent to Montana have reaffirmed this view: we have held without equivocation that tribal civil jurisdiction over non-Indians on reservation lands is not an aspect of tribal sovereignty necessarily divested by reason of the tribes' incorporation within the dominant society. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (9182), we upheld a tribe's inherent authority to impose a severance tax on non-Indian mining on the reservation. This taxing authority, even over non-Indians, we wrote, is an 'inherent power necessary to tribal self-government and territorial management.' Id., at 141, 102 S.Ct., at 903. And in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 1207 S.Ct. 971, 94 L.Ed.2d 10 (1987), we noted: 'Tribal authority over such activities of non-Indians on reservation lands is an important part of tribal sovereignty.... Civil Jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.' Id., at 18, 107 S.Ct., at 978 (citations omitted). [FN5] These cases, like their predecessors, clearly recognize that tribal civil jurisdiction over non-Indians on reservation lands is consistent with the dependent status of the tribes.

[136] Brendale at 456:

> *Montana* explicitly recognizes that tribes 'retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.' 450 U.S., at 565, 101 S.Ct., at 1258. Specifically, *Montana* holds that tribes have civil jurisdiction over non-Indians who enter 'contracts, leases or other arrangements' with the tribe, ibid., and over non-Indian conduct which 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' even if that conduct occurs on fee lands. Id., at 566, 101 S.Ct., at 1258. Thus, despite *Montana*'s reversal of the usual presumption in favor of inherent sovereignty over reservation activity, the decision reasonably may be read, and in my view, should be read, to recognize that tribes may regulate the on-reservation conduct of non-Indians whenever a significant tribal interest is threatened or directly affected. So construed, *Montana* fits with relative ease into the constellation of this Court's sovereignty jurisprudence.

preceding *Brendale—Merrion v. Jicarilla Apache Tribe*[137] and *Iowa Mutual Insurance Company v. LaPlante*[138]—the Court had determined that Indian tribes did possess some degree of sovereign authority over the activities of non-tribal individuals within the reservation.[139]

While correct in his recollection of the conclusion reached in these two decisions, Justice Blackman either failed or refused to recognize the factual and legal distinctions with *Brendale.* In *Merrion v. Jicarilla Apache Tribe* the Court was asked to consider whether a tribal government could impose a severance tax on a private company for oil and gas extracted from leased tribal lands.[140] The Court upheld the severance tax, ruling that taxation of activities occurring on tribal lands was a necessary element of government, and within the inherent sovereign authority of the tribe.[141] In *Iowa Mutual Insurance Company v. LaPlante*, the Court was asked to decide whether a federal court could intervene in a civil dispute already before a tribal judicial tribunal. The case concerned a personal injury claim filed by LaPlante against his employer's insurance company for an injury he received while working on his employer's ranch. Although the ranch was within the Blackfeet Reservation, the owner was not a member of the tribe. The U.S. Supreme Court stated that tribal courts are vital to tribal self-government, and its

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[137] 455 U.S. 130 (1981)

[138] 480 U.S. 9 (1987)

[139] Brendale at 455.

[140] Merrion v. Jicarilla Apache Tribe, 455 U.S. at 133-136.

[141] Merrion at 138:

> As we observed in *Colville* [*Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)], supra, the tribe's interest in levying taxes on nonmembers to raise 'revenues for essential governmental programs... is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services'... Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands is conditioned by the limitations the Tribe may choose to impose.

jurisdiction extends to activities within the reservation, absent a treaty or federal statute curtailing the court's authority. The U.S. Supreme Court ruled that tribal courts are presumed to have civil authority over all events within the reservation, even those occurring on non-tribal lands—to include determination that it lacks jurisdiction over a particular issue.[142]

2. Bourland: Eliminating the Confusion

Any consternation caused by the trilateral *Brendale* decision and the seemingly inconsistent holdings in *Merrion* and *Iowa Mutual* was put to rest in 1993 with the Supreme Court decision in *South Dakota v. Bourland.* *Bourland* pertained to a dispute between the Cheyenne River Sioux Tribe and the State of South Dakota over whether the tribal government had the authority to regulate hunting and fishing on federal land situated within recognized reservation borders. As part of a 1954 flood control program, Congress purchased 104,420 acres of land previously held in trust for the Cheyenne River Sioux Tribe on which the federal government constructed a dam and created a lake. The purchase did not divest the tribe of all real property interests in this section of the reservation. Congress allowed the tribe to retain mineral rights, the right to harvest timber, the right to graze stock and the right to hunt and fish within the reservoir area. For thirty years the tribe and South Dakota jointly regulated hunting and fishing in the reservoir area. In 1988 the tribe declared that those wishing to hunt or fish within the reservoir region needed a special tribal permit. South Dakota challenged the tribe's actions.[143]

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[142] Iowa Mutual Insurance Co., 480 U.S. at 17-18.

[143] 508 U.S. at 682-688.

In writing for the majority,[144] Justice Thomas noted that in purchasing the land, Congress had divested the tribe of the right to exclude nonmembers from the lake region. Justice Thomas' opinion reaffirmed the general principles of the *Montana* holding, that tribal government authority is derived from the right to exclude entry onto tribal lands.[145] The tribe attempted to distinguish *Montana* and argued that unlike the Allotment Act in which Congress intended to divest tribal rights, Congress acquired the Cheyenne River land only for the purpose of flood control and not to divest the tribe of its other rights, including the right to exclude nonmembers. The Court rejected this argument, stating:

> To focus on purpose is to misread *Montana*. In *Montana*, the Court did refer to the purpose of the Allotment Acts and discussed the legislative debates surrounding the allotment policy, as well as Congress' eventual repudiation of the policy in 1934 by the Indian Reorganization Act, 45 Stat. 984, 25 U.S.C. Sect. 461, 450 U.S. at 559-560, n.9. However, at the end of this discussion, the Court unequivocally stated that 'what is relevant...is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.' 450 U.S. at 560, n.9. Thus, regardless of whether land is conveyed pursuant to an Act of Congress for homesteading

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[144] Justice Thomas was joined by Chief Justice Rehnquist, Justices White, Stevens, O'Connor, Scalia and Kennedy. Justices Blackmun and Souter dissented. Bourland, 508 U.S., at 681.

[145] Bourland at 689:

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others. In taking tribal trust lands and other reservation lands for the Oahe Dam and Reservoir Project, and broadly opening up those lands for public use, Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.

or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control. [146]

Contrary to Justice Blackmun's assertion in *Brendale,*[147] the Courts decisions in *Montana*, *Brendale* and *Bourland* are consistent. *Bourland* serves to affirm the general rule that, absent the Montana exceptional conditions, [148] Indian tribes have no power to regulate nonmembers or nonmember fee lands. Both *Montana* and *Bourland* dealt with situations where a tribe had lost ownership of the land at issue. What these cases don't answer is whether the loss of a lesser degree of property interest could affect tribal civil authority. The answer to this issue was provided in *Strate v. A-1 Contractors.*[149]

Strate began with an automobile accident on a stretch of state-owned highway running through the Fort Berthold Indian Reservation—land held in trust for the Three Affiliated Tribes. The plaintiff, Gisela Fredericks, filed suit in tribal court for her injuries and was joined by her five children suing for loss of consortium. Neither Fredericks nor the defendant A-1 Contractors were members of the Three Affiliated Tribes. But because Ms Fredericks' deceased husband was

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[146] Bourland at 692-693.

[147] Brendale at 454-455.

[148] Bourland at 695:

> Montana discussed two exceptions to 'the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' Id. at 565. First, a tribe may license or otherwise regulate activities of nonmembers who enter 'consensual relationships' with the tribe or its members through contracts, leases, or other commercial dealings. Ibid. Second, a 'tribe may .. retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.' Id. at 566.

[149] 520 U.S. 438 (1997)

a tribal member, her five children were deemed tribal members. The defendant responded by filing an action in federal district court seeking a declaratory judgement on the question of tribal jurisdiction. The district court determined that the tribal court had jurisdiction to decide the tort action but was reversed by the U.S. Court of Appeals for the Eighth Circuit.[150]

It its review of the appellate court's decision, a unanimous U.S. Supreme Court began its opinion by declaring that a tribe's adjudicative jurisdiction can not exceed its regulatory jurisdiction.[151] The Court recognized that tribal regulatory authority extend to nonmember conduct when the conduct occurs on land owned by or held in trust for the tribe.[152] The Court, though, noted that the accident at issue occurred on a highway traversing an easement granted by Congress to North Dakota. The Court ruled that this grant meant the tribe no longer had the right to exclude nonmembers from the state highway. As a result of losing the right to exclude nonmembers from the roadway, the Court ruled the tribe was without authority to control nonmember activity on the road. The Court held that having no regulatory authority over roadway activities, the tribe court lack authority to adjudicate issues relating to the accident.[153]

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[150] Strate v. A-1 Contractors, 520 U.S. at 442-445.

[151] "Regarding activity on non-Indian fee land within a reservation, Montana delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.' As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Strate at 453.

[152] Strate at 454.

[153] Strate at 455-456:

> Forming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's control. The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. They have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude. Cf. *Bourland*, 508 U.S. at 689 (regarding reservation land acquired by the United States for operation of a dam and a reservoir, Tribe's loss of 'right of absolute and exclusive use and occupation... implies the loss of regulatory jurisdiction over the use of the land by others'). We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in Montana, accordingly, governs this case.

3. *Montana, Bourland, Strate* v. EPA Position

With *Oliphant* and the *Montana* line of cases, the U.S. Supreme Court established clear lines for when tribal governments exercise criminal and civil authority over nonmembers. Tribal governments have no criminal authority over nonmembers. Tribal government civil authority doesn't extend to nonmembers, unless expressly delegated by Congress, or if the *Montana* excepted circumstances warrant tribal regulation of nonmembers. Having a better understanding of the extent and limitations of tribal inherent sovereign authority, it is possible to evaluate the EPA's argument and determine whether the Agency's interpretation of CAA section 301(d)(2)(B) as delegation of broad jurisdictional authority is reasonable.

Montana makes it clear that as a general rule, tribal governments haven't the inherent jurisdiction to simply assume full regulatory authority over non-tribal fee holdings situated within the putative boundaries of an Indian reservation. This fact defeats the EPA's assertion that Indian tribes have the inherent authority to regulate non-tribal lands. The *Montana* line of cases makes it clear that unless conditions on the reservation meet one of the *Montana* exceptions, that without an expressed congressional delegation of authority, tribal governments have no authority to oversee regulation of the CAA on non-tribal lands. Therefore, EPA can only undertake its intended course if the CAA contains an expressed delegation. Such delegation would fulfill what could be considered the third *Montana* exception.[154]

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[154] *Montana* established three circumstances or conditions upon which tribal governments could exercise civil authority over nonmembers. The first pertained to nonmembers entering consensual relations with the tribe. The second event is when nonmember activities threaten the political integrity, economic security, or health or welfare. The third event is when Congress expressly grants tribal authority over nonmembers. Montana 450 U.S. at 563-564.

The EPA insists section 301(d)(2)(B) can reasonably be interpreted as an express grant of congressional authority, empowering Indian tribes to administer the CAA over all activities within reservation borders—whether the activities occurring on tribal or non-tribal fee lands—and even to areas outside the reservation.[155] As additional support for its position, the Agency offers the language of CAA sections 110(o)[156] and 164(c).[157] The EPA argues that these provisions, when read in context with the congressional record, clearly show that with subsection 301(d)(2)(B) Congress intended to grant tribal governments broad regulatory powers over all areas within the assumed boarders of a reservation.[158] While a quick scan of these portions of the Act seems to support the EPA's position, a more careful study of the proffered statutes and congressional record leads the careful reader to conclude the CAA does not expressly delegate a broad regulatory authority claimed by the EPA.

Section 301(d)(2)(B) reads, "(T)he functions to be exercised by the Indian tribe pertain to the management and protection of air resource within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." The EPA argues that this passage specifically empowers tribal governments with regulatory authority over two distinct areas. The first area is the entire reservation. The second is land owned by or held in trust for a tribe situated outside recognized reservation borders.[159] Critics of the EPA's position argue that the "or any other

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[155] 63 Fed. Reg. 7255 (1998).

[156] 42 U.S.C. § 7410(o).

[157] 42 U.S.C. § 7474(c).

[158] 63 Fed. Reg. 7255 (1998).

[159] 63 Fed. Reg. 7255 (1998):

> The most plausible reading of the phrase 'within* * * the reservation or other areas within the tribe's jurisdiction' is that Congress intended to grant to an eligible tribe jurisdiction over its reservation without

area" passage of this CAA provision serves to modify the "within the exterior boundaries," only allowing tribes to regulate areas of a reservation where the tribal government can demonstrate jurisdiction.[160]

If we apply the rule of statutory construction of antecedent clauses,[161] the EPA's interpretation is correct, and the provision serves to identify two distinct areas where Indian tribes are authorized to assume CAA regulatory authority. While the EPA is correct on this point, it's incorrect in interpreting the language as decreeing expansive regulatory authority. If this section is read in proper context with other provisions pertinent to tribal CAA management, it's clear that this passage is actually one of several prerequisites that Indian tribes must meet before they can be treated as states for the purpose of receiving CAA regulatory authority. A more correct reading of this section of the act begins with section 301(d)(2),[162] which reads: "The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only (emphasis added) if—" This initial passage is followed by CAA section 301(d)(2), listing three general prerequisites that must be met in order for an Indian tribe to qualify for CAA regulatory authority. The first requirement is that the tribe must have a functioning governing body.[163] The second prerequisite is that tribal CAA

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requiring the tribe to demonstrate its own jurisdiction, but to require a tribe to demonstrate jurisdiction over any other areas, i.e., non-reservation areas, over which it seeks to implement a CAA program.

[160] 63 Fed. Reg. 7255 (1998).

[161] *See* Commonwealth of Virginia v. Browner, 80 F.3d 869, 877: "An elementary principal of statutory construction is the 'last antecedent' rule, which holds that ordinarily a clause modifies only its nearest antecedent."

[162] 42 U.S.C. § 7601(d)(2).

[163] 42 U.S.C. § 7601(d)(2)(A), which reads: "the Indian tribe has a governing body carrying out substantial governmental duties and powers..."

management must pertain to air resources within the borders of the reservation or other areas within the tribe's jurisdiction.[164] The third requirement is for the EPA to certify that the tribe has the ability to properly manage the CAA.[165] When these sections are properly read in context, they reveal congressional concern with whether tribal governments have the resources and government infrastructure necessary to manage a CAA regulatory program—a likely consequence of Congress' appreciation that many Indian tribes have small populations. Given this obvious concern for a tribe's capability, it seems strange that Congress would want to increase a tribe's regulatory burden by making it responsible for areas that would normally fall within state regulatory jurisdiction.

Contrary to the EPA's interpretation, the section 301(d)(2)(B) phrase "or other areas" doesn't serve to expand tribal jurisdiction, but rather serves to include additional Native American communities in the statutory scheme. Without the phrase "or other areas" contained in section 301(d)(2)(B), this provision would only apply to tribes living in federally recognized reservations, thus excluding many Native American groups from receiving CAA regulatory authority for their community. What the EPA fails to appreciate is that the CAA defines "Indian tribe" to include "...Indian tribe, band, nation, other organized group or community, including any Alaska Native village..."[166] This definition clearly shows that Congress was aware that not all

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[164] 42 U.S.C. § 7601(d)(2)(B), which reads: "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction..."

[165] 42 U.S.C. § 7601(d)(2)(C), which reads: "the Indian tribe is reasonably expected to be capable, in the judgement of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations."

[166] 42 U.S.C. § 7602(r).

Native American groups resided on federally-recognized reservations. For example, many Alaskan Native Americans live in communities overseen by state-chartered native corporations, which are neither reservations nor considered "Indian Country."[167] Contrary to EPA's assertion, the more reasonable interpretation of the phrase "or other areas" contained in section 301(d)(2)(B) is that it allows non-reservation Native American communities the same regulatory opportunity as those groups residing on federally-recognized Indian reservations.

The language of CAA section 110(o)[168] also fails to carry the EPA's argument. This section of the Act serves to establish another prerequisite tribes must meet in order to qualify for CAA regulatory authority. Section 110(o) requires tribal governments to prepare a tribal implementation plan (TIP), a plan that must account for all emission activities within the reservation boundaries "notwithstanding the issuance of any patent and including rights-of-way running through the reservation."[169] The EPA apparently interprets this phrase as further proof that Congress intended tribes to exercise authority over everything within the reservation boundaries, irrespective of ownership. But a more reasonable interpretation for this provision is that it places a similar burden upon tribes as section 110(a)(2)(D),[170] which requires states to

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[167] For background on how the status Alaska Native American groups differs from that of those living in recognized reservations, the reader is recommended to consider *Native Village of Steven v. Alaska Management and Planning* 757 P2d 32 (Alaska 1988), an interesting case that provides a fair overview of the Alaska Native Claims Settlement Act (ANCSA), with which Congress abolished nearly all Alaskan reservations and ended the federal guardianship role. As a result, Alaskan native groups no longer have the recognized sovereign rights of "dependant domestic nations." The reader may also review *Alaska v. Native Village of Venetie Tribal Government*, 522 US 520 (1998), in which the Supreme Court ruled that Native American lands transferred to state-chartered native corporations as a result of ANCSA, were no longer "Indian Country" as defined by 18 USC Sect. 1151.

[168] 42 U.S.C. § 7410(o)

[169] 42 U.S.C. § 7410(o).

[170] 42 U.S.C. § 7410(o)(2)(D)(i)(II), requiring each state implementation plan to prohibit a source from "interfer(ing) with measures required to be included in the applicable implementation plan for any other State..."

develop CAA implementation plans (SIP). A fair read of the second sentence of section 110(o) contradicts the EPA's assertions:

> When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas **(except as expressly provided otherwise in the plan)** located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation. (emphasis added)[171]

If Congress intended qualified Indian tribes to manage all areas within the reservation borders, the phrase "except as expressly provided otherwise in the plan" is superfluous. That this phrase was included indicates that Congress contemplated that there would be areas within an Indian reservation that would not come under tribal regulatory jurisdiction. Based on this, it seems the drafters were well aware of the limits to tribal civil jurisdiction with respect to nonmembers and their property.

As additional support for its position, the EPA offers CAA section 164(c),[172] which states, "Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respects to the provisions of subsection (e) of this section." This provision does seem to support EPA's position. The use of the term "lands" to identify the area affected by this provision can certainly be interpreted as indicating the drafters' acknowledgement that Indian

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[171] 42 U.S.C. § 7410(o).

[172] 42 U.S.C. § 7474(c).

reservations contain land of differing ownership. The authority granted tribal governments by this subsection of the Act lends to the argument that Congress intended Indian tribes to regulate both tribal and non-tribal areas within the reservation. Another possible interpretation, though, is that Congress' intention with CAA sections 110(o) and 164(c) was to give tribal interests priority within the reservation, and not blanket regulatory authority over all lands. Section 164(e),[173] entitled "Resolution of disputes between State and Indian tribes," serves to enforce this latter interpretation. With section 164(e), Congress provides a process for resolving disputes between states and tribal governments over tribal air quality designations or issued permits.

If Congress intended Indian tribes to act as the sole authority for all areas within the reservation, section 164(e) is a superfluous provision. With section 301(d)(1),[174] qualifying tribes already have the authority to assume the same regulatory role as state governments. This would include subsection 164(a),[175] giving states (and presumably an Indian tribe) the authority to redesignate areas within their jurisdiction. With section 164(b)[176] the EPA is required to review state redesignation plans, and is given the authority to disapprove redesignation plans adversely affecting another state's ability to meet its own air quality standards. The only possible reason for including subsection 164(e), is to provide for a different condition not covered by the more general provisions. That condition would be competing jurisdictions operating within the same geographic region. A more appropriate interpretation is that with section 110(o), Congress

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[173] 42 U.S.C. § 7474(e).

[174] 42 U.S.C. § 7601(d)(1)(A).

[175] 42 U.S.C. § 7474(a).

[176] 42 U.S.C. § 7474(b).

intends priority be given to tribal interests within reservation borders. With section 164(e), Congress provides states the means to challenge tribal designations affecting non-tribal lands falling outside tribal jurisdiction.

One federal court has actually looked at section 164(c) and reached a conclusion contrary to EPA's assertions. In *Arizona v. Environmental Protection Agency*,[177] the U.S. Court of Appeals for the Ninth Circuit was asked to consider the scope of tribal authority granted under section 164(c). The EPA had approved air quality redesignation for five separate parcels of land belonging to the Yavapai-Apache Tribe. Arizona argued that in as only one of the parcels was a recognized reservation, the EPA lacked authority to approve redesignation of the other four parcels. The court agreed with the state, concluding that absent clear evidence showing the four tribal parcels were federally-recognized reservation land, EPA had abused its discretion in authorizing their redesignation.[178]

The *Arizona* decision would seem to limit the applicability of section 164(c) to only Indian land on a federally recognized reservation. The decision also contradicts the EPA's assertion that section 164(c) serves to prove that section 301(d)(2)(B) represents a clear expression of congressional intent for tribes to have regulatory authority over tribal and non-tribal holdings situated within reservation boarders.

D. The Legislative History of Subsection 301(d)

[177] Arizona v. Environmental Protection Agency, 151 F.3d 1205 (9th Cir. 1998).

[178] Arizona v. EPA, 151 F.3d at 1210-1211.

In defense of its interpretation of the enabling statute, the EPA repeatedly points to the Senate Report on the proposed 1990 CAA amendments,[179] claiming the report clearly demonstrates Congress intended tribal governments to exercise authority over all land within the putative reservation boarders.[180] But instead of strengthening its case, the Senate report contradicts the EPA's position. What the Senate report really shows is that Congress intended to grant CAA regulatory authority only to those tribes that could meet specific preconditions, and that the delegated authority would be limited in scope:

> Tribes may be treated as States only if the tribe is recognized by the Secretary of Interior and has a governing body capable of carrying out substantial government duties; **the functions under the Act to be carried out by the tribe are within the tribal government's jurisdiction** (emphasis added); and the tribe is, in the Administrator's judgement, capable of carrying out the functions it is authorized to exercise.[181]

The Senate report was published well after the *Oliphant* and *Montana* decisions. It is reasonable to presume that Congress was aware of the limitations these cases imposed upon Indian tribe criminal and civil jurisdiction.[182] Contrary to EPA's assertions, the Senate report clearly shows that Congress not only understood the limitations of tribal civil jurisdiction but also intended that the scope of tribal CAA regulatory authority would not extend beyond these

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[179] U.S. Code Cong. & Admin. News at 3464, 3465.

[180] 63 Fed. Reg. 7256 (1998).

[181] U.S. Code Cong. & Admin. News at 3464.

[182] The Senate report specifically cites *Brendale v. Confederate Yakima Indian Nation*, a decision which discusses at length the *Montana* decision and the limitations of inherent tribal authority. U.S. Code Cong. & Admin. News at 3465.

recognized limitations. In as the Senate was presumably aware of the *Montana* ruling, it presumably was also familiar with the U.S. Supreme Court's attestation that tribal authority could be expanded with an expressed delegation. If, as the EPA asserts, Congress intended to expand tribal civil authority to include regulation of non-tribal individuals and land, it would seem that the legislative record would better reflect its intent to overcome the limitations expressed in the *Montana* decision.

One passage in the legislative history does seem to argue that Congress did plan to extend tribal authority over nonmember residents:

> Thus, new section 328(a) of the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands, as Indian tribes were delegated the power to administer and enforce the Safe Drinking Water Act and Clean Water Act. See *Brendale v. Confederated Yakima Indian Nation*, U.S., 109 S.Ct. 2994, 3006-3007 (1989).[183]

The reference to the *Brendale* decision, arguably indicates the Senate did in fact want this particular CAA amendment to serve as the expressed delegation of regulatory authority required by the *Montana* decision. In the section of *Brendale* referenced in the report,[184] Justice White reaffirmed the general rule that, absent an express congressional delegation, Indian tribes lack regulatory authority over nonmembers and their fee holdings. But in this same portion of the *Brendale* decision, Justice White also reaffirmed the two other *Montana* exceptions: tribal

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[183] U.S. Code Cong. & Admin News at 3465.

[184] 109 S.Ct. 3006-3007

regulation of nonmembers who enter into consensual arrangements with tribes, and where non-tribal conduct threatens or has a direct effect on the political integrity, economic security, health or welfare of the tribe. [185] That the report effective references all three events by which a tribe can regulate nonmembers, the report is ambiguous as to the Senate's real intention.

What is clear from the legislative history, is that the Senate intended tribal CAA regulatory authority to be on par with that previously granted Indian tribes under the Clean Water Act (CWA).[186] Among the 1987 amendments to the CWA, Congress included section 518(e),[187] authorizing the EPA to treat Indian tribes as states for the purpose of administering specified provisions of the FWPCA.[188] The Court of Appeals for the Ninth Circuit, when asked to decide the scope of tribal regulatory jurisdiction granted by CWA section 518(e), ruled that the statute did not serve as a general grant of regulatory authority over non-tribal individuals and their land.[189]

E. *Montana v. EPA*: A Hint Found in the Clean Water Act

In *Montana v. Environmental Protection Agency*,[190] the Ninth Circuit rejected EPA's interpretation of CWA section 518(e)(2) as granting Indian tribes broad regulatory authority over

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[185] Brendale, 492 US at 426-429.

[186] 33 U.S.C. §§ 1251 to 1387.

[187] 33 U.S.C. § 1377(e).

[188] FWPCA Subchapter II and Sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342 and 1344.

[189] Montana v. EPA, 137 F.3d 1135 (9th Cir 1997), *cert. denied* 119 S.Ct. 275, 142 L.Ed.2d 227 (1998).

[190] Montana v. EPA, 137 F.3d 1135

In *Montana v. Environmental Protection Agency*,[190] the Ninth Circuit rejected EPA's interpretation of CWA section 518(e)(2) as granting Indian tribes broad regulatory authority over all areas within a reservation. The dispute began with EPA's decision to allow the Confederated Salish and Kootenai Tribes the authority to establish water quality standards for Flathead Lake, located within the reservation. The land around the lake was a mix of tribal and non-tribal ownership. In allowing the tribe to assume regulatory authority over the entire lake, EPA had effectively voided permits the State of Montana had issued to non-tribal owners (individuals, commercial and municipal) situated on the lakeshore.[191] The state challenged EPA's action, arguing that the process it used to authorize the tribes to assume CWA authority over the non-tribal fee lands violated Agency regulations.[192] As a result, the state argued, the tribal government received greater regulatory authority than was necessary for self-governance.[193]

In determining whether to grant the tribe CWA authority over the Flathead Lake, and effectively over all activities around the lake, the EPA applied a two-part evaluation process. The first step of the evaluation served to establish whether the tribes had a government structured capable of regulating CWA authority—as required by section 518(e) of the CWA.[194] Once the Agency determined the tribes did have the requisite government structure, the EPA then applied

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[190] Montana v. EPA, 137 F.3d 1135

[191] Montana v. EPA at 1139.

[192] 40 C.F.R. § 131.8(a).

[193] Montana v. EPA, 137 F.3d, at 1138; Appellants citing as authority the holdings in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) and Montana v. United States, 450 U.S. 544 (1981).

[194] 42 U.S.C. § 1377(e)(1)&(2).

a set of generalized findings. These effectively presumed the tribe had inherent authority over all fee lands within the reservation, unless an objecting party proved otherwise.[195]

The court agreed with the EPA in the application of inherent tribal authority as the proper standard for determining the scope of tribal CWA regulatory authority. The court, though, refused to abide by the EPA's delineation of the scope of that authority, ruling that such a determination was a question of law, outside the agency's expertise, and therefore not due the deference normally afforded agency decisions.[196] The court applied the facts of the dispute to *Montana* rule,[197] and determined that the activities of nonmembers residing within the reservation did pose a substantial threat to tribal health and welfare, thereby meeting *Montana's* second exception.[198]

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[195] Montana v. EPA at 1139; quoting the EPA's announcement of its final rule (56 Fed.Reg. 64,876, 64,878) for granting tribes regulatory authority:

> The EPA believes that tribes will normally be able to demonstrate that the impacts of regulated activities are serious and substantial due to 'generalized findings' on the relationship between water quality and human health and welfare. See id. Nonetheless, under the Final Rule EPA will make a case-specific determination on the scope of each tribal applicant's authority. See id. Because EPA's generalized findings will be incorporated into the analysis of tribal authority, the factual showing required under Section 131.8 is limited to the tribe's assertion that (1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under CWA, and (3) impairment of waters would have a serious and substantial effect on the health and welfare of the tribe.

[196] Montana v. EPA at 1140:

> We agree with appellants insofar as they contend that the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. EPA's decision to adopt inherent tribal authority as the standard intended by Congress may well be viewed in a deferential light because the statute's language and legislative history were not entirely clear. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). EPA's delineation of the scope of that standard, however, has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute committed to its regulation. Therefor, EPA's delineation of the scope of tribal inherent authority is not entitled to deference.

[197] Montana v. EPA at 1140.

[198] Montana v. EPA at 1141:

While the court ultimately upheld the EPA's actions, its ruling is pertinent to the issue at hand. The court's declaration that the EPA could not simply grant the tribe authority over nonmember areas without first determining that the *Montana* exceptions existed (allowing the tribe to assert civil authority over the non-tribal lands), is very persuasive. Considering that the scope of authority granted tribes under CWA Subsection 518(e) is nearly identical to that granted in CAA Subsection 301(d)(2),[199] this decision appears to contradict the EPA's assertion that section 301(d)(2) represents the express grant necessary for tribal governments to assert regulatory authority over non-tribal areas within a reservation.

Interpreting the Legislative History:

> We have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. 'A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when their conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribe's water rights.' *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (1981).

[199] The requirements of Section 518(e) of the CWA [33 U.S.C. § 1377(e)] read:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Whereas the requirements of Subsection 301(d)(2) of the CAA [42 U.S.C. Subsection 7601(d)(2)] read:

> (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

The problem with the EPA's evaluation of CAA legislative intent, is that the Agency fails to appreciate the terms used in the Senate report. The report states that the proposed amendments to the CAA "constitute an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in *Indian lands* (emphasis added)."[200] In addition to addressing the role of Indian tribes, the legislative report goes on to identify a second regulatory activity, one to be undertaken by the EPA should tribal governments refuse to administer or fail to qualify for CAA regulatory authority. Under such conditions, the EPA assumes regulatory authority over "Indian Country."[201] The use of two separate terms is significant, for what the report describes is two separate regulatory activities, each having a different jurisdictional scope.

Unlike the generic term "Indian lands," the phrase "Indian Country"[202] is recognized a term of art. Indian Country includes not only Indian lands within a reservations[203] but also dependent Indian communities,[204] lands held in trust by the federal government for the benefit of Native Americans, and can even include non-native communities situated within a reservation.[205] The

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[200] "...(T)he Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands..." S. Rep. No. 101-228, at 78 (1989).

[201] The legislative history contains two references: "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." and "Criminal sanctions against violators are to be sought by the Agency itself, consistent with the Federal government's general authority in Indian Country." S. Rep. No. 101-228, at 80.

[202] The use of upper case letters for "Indian Country" and not "Indian lands," is a strong indication that those who prepared the report were aware of the legal distinction given this phrase.

[203] 18 U.S.C. § 1151(a).

[204] 18 U.S.C. § 1151(b).

[205] 18 U.S.C. § 1151(c).

legal significance of these differing terms was aptly illustrated by the U.S. Supreme Court in *Montana v. U.S.*[206]

In addition to deciding whether tribal inherent authority extended to nonmembers residing within the reservation, in *Montana v. United States* the U.S. Supreme Court was asked to rule on whether a federal trespass statute served to extend tribal authority over nonmember lands. After considering the language of the statute,[207] Justice Stewart found the statute insufficient to augment tribal civil authority. He noted that the statute only applied to trespass on land belonging to a tribe, a tribal member, or held in trust for the benefit of an Indian tribe: "If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in Section 1165 the definition of "Indian country" in 18 U.S.C. Section 1151..."[208]

If, as the EPA maintains, the language of the Senate report reflects congressional purpose, then the intended purpose is for tribal governments to regulate "Indian lands." According to the Senate report, it is the EPA who assumes regulatory responsibility for "Indian Country" should a tribe be unwilling or unable to administer the CAA. This design reflects a clear understanding of the jurisdictional range and limits of these two authorities. Where tribal inherent authority extends only to tribal members and tribal lands, the EPA's general CAA authority extends the full length of federal jurisdiction, to include non-tribal lands within the reservation.[209]

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[206] 450 U.S. 544

[207] 18 U.S.C. § 1165.

[208] Montana 450 U.S. at 561-562.

[209] 18 U.S.C. § 1151;

F. Applying the Rule of Indian Statutory Interpretation

Perhaps aware that its interpretation of the scope of tribal CAA authority won't receive the usual deference afforded agency decisions, the EPA insists that a legal canon of Indian statutory and treaty interpretation requires federal courts to find section 301(d)(2)(B) as granting tribal governments the Agency's envisioned broad regulatory authority.[210] The EPA is correct with regard to the legal rule federal courts apply to Indian statute interpretation. Treaties and statutes affecting the rights of Indian tribes are liberally interpreted in favor of Indian tribes.[211] This rule of judicial construction is rooted in the recognition of the historic disadvantaged position of tribes entering treaties with the federal government, and the federal government's role of trustee for Indian tribes.[212] The rule is most commonly applied in judicial disputes involving questions of reservation diminishment,[213] in challenges against states attempting to impose taxes on Indian assets[214] or activities,[215]and when states attempt to regulate tribal activities. Applying

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"Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned..."

[210] 63 Fed. Reg. 7255, Note 1.

[211] Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

[212] County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985).

[213] Solem v. Bartlett, 465 U.S. 463 (1984); holding that a State lacked criminal jurisdiction within an opening area of a reservation. The Court found that past federal legislation had opened the reservation to non-Indian settlement. But after its obligatory liberal interpretation of the statutory language, the Court determined that the legislation failed to clearly show Congress intended to diminish the reservation.

[214] Bryan v. Itasca County, 426 U.S. 373 (1978); in which the Court held that although Public Law 280 granted Minnesota civil authority over tribal lands, this legislation did not contain a clear grant of authority to tax Indian land or assets.

this rule of liberal interpretation, courts will uphold congressional intent to diminish or eradicate Indian tribal rights, but such intent must be expressed in the statute.[216] In situations where the statutory language is ambiguous, federal courts will consider the legislative history[217] and historic context of the treaty or statute[218] to determine congressional intent.

However, whenever deciding whether a federal statute serves to expand tribal authority over nonmembers and their private holdings, federal courts appear to apply a modified version of the liberal interpretation rule. In this context, federal courts appear to begin their examination of the issue by first determining the status of the land in question. In the initial phase of the analysis, past treaties and congressional action is scrutinized in favor of the Indian tribe to determine whether Congress has actually reduced or extinguished tribal interest in the land in question. If the court determines the Indian tribe no longer has sovereign authority over the area at issue, the practice of the court is to set aside the liberal interpretation rule. The court then places the burden on the tribe, or federal agency representing the tribe, to show that Congress intended the

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[215] Montana v. Blackfeet, 471 U.S. 759 (1985); in which the Court considered whether the State of Montana could tax oil and gas extracted from tribal lands within the State. A 1924 Act authorized states to tax mineral leases on Indian lands. In 1938 Congress enacted subsequent legislation establishing uniform rules for Indian mineral leasing that didn't contain a provision for state taxation. The 1938 Act specifically repealed those sections of the 1924 Act inconsistent with the new mining law. Montana argued that because the 1938 Act was silent on the issue of taxing Indian mineral leases, that portion of the 1924 Act survived. The Court disagreed. Applying the requisite rule of construction to the issue, the Court ruled that although the 1938 Act did not specifically repeal taxation of Indian mineral leases, the general repeal language of the 1938 Act and the absence of Congress' intent to continue taxation of Indian leases, meant the state was without authority to tax mineral leases on Indian land.

[216] Bryan, 426 U.S., at 373.

[217] Montana , 450 U.S., at 562-563, in which the Court ruled that the legislative history contradicted the assertion that a federal trespass served to extend tribal jurisdiction over nonmember fee holdings.

[218] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); ruling that an 1894 congressional act served to diminish the Yankton reservation. The Court noted that at the time when Congress enacted the legislation, the prevailing view held tribal sovereignty inextricably linked to ownership of the land, and that Congress could not have intended for the tribe to retain sovereign authority over the divested land.

tribe to have the claimed authority over the nonmembers. Examples of this analytical process can be seen in recent U.S. Supreme Court decisions addressing this issue:

In addition to being asked to rule on the question of inherent tribal authority over nonmember residents of the reservation, in *Montana v. United States* the U.S. Supreme Court was asked recognize that a federal trespass statute augmented the tribe's inherent jurisdiction, giving it authority over nonmembers.[219] The Court began its evaluation by applying the rules of liberal interpretation in its review of the original treaty and past congressional action to determine whether the Crow Tribe retained sovereign authority over privately owned areas of the reservation. After careful consideration of the treaty and subsequent congressional acts, the Court determined the Crow Tribe no longer owned the riverbed of the Big Horn River,[220] nor did the tribe retain sovereign authority over the nonmember held fee lands.[221] Having determined the tribe no longer held sovereign authority over the area at issue, the Court then considered whether the federal trespass statute extended tribal authority into the non-tribal area and allow it to regulate hunting and fishing on the nonmember fee lands.[222] The Court's analysis reflected its unwillingness to apply the rule of liberal interpretation to the federal trespass statute. The Court did agree that the federal statute granted Indian tribes the right to exclude nonmembers from tribal lands, effectively giving tribes the right to condition entry and regulate activity. The Court, though, noted that the statute only applied to "Indian lands," and not the broader "Indian

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[219] Montana, 450 U.S. 544.

[220] Montana at 556-557.

[221] Montana at 560.

[222] Montana at 560-562.

Country."[223] While the Court did agree that the statute was ambiguous, it refused to allow the broader application sought by the Crow Tribe, absent a showing that Congress clearly intended the regulation to apply to all lands within a reservation.[224]

Twelve years later, in *Bourland*[225] the Court was again asked to find that federal regulations served to augment tribal inherent authority and allow it to regulate non-tribal conduct. As in *Montana*, the Court first considered whether the tribe still held sovereign rights over land that had been acquired by Congress to create the Oahe water project. Even after applying the liberal rules of interpretation in its scrutiny of the legislation used to acquire the tribal land for the water project, the Court determined that the legislation clearly demonstrated congressional intent to divest the tribe of its sovereign authority over the region.[226] Having ruled the tribe no longer had jurisdiction over activities within the dispute area, the Court was then asked to decide whether Army Corps of Engineers regulations gave the tribe the right to regulate hunting and fishing in the project region.[227] The tribe emphasized that the federal regulations at issue[228] required the Corps to apply local hunting and fishing regulations in its management of the water project region, and that the Corps management could not be inconsistent with Indian rights.[229] The tribe argued that these two obligations served to establish the primacy of tribal regulations

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[223] Montana at 562-563.

[224] Montana at 561-562.

[225] 508 U.S. 679.

[226] Bourland at 687-690.

[227] Bourland at 696.

[228] 36 C.F.R. § 327.26.

[229] 36 C.F.R. § 327.1(f).

within the project region.[230] The Court simply rejected this argument without providing a detailed analysis or reason,[231] a move criticized in the minority decision.[232]

Neither *Montana* nor *Bourland* specify why the U.S. Supreme Court refused to interpret the respective federal statutes in favor of the two tribes. Either statute could have been interpreted to allow the tribes to assume the requested regulatory authority, especially with respect to the federal trespass statute. A likely explanation for why the Court determined a liberal interpretation wasn't warranted can be gleaned from the Court's recent holding in *South Dakota v. Yankton Sioux Tribe.*[233]

G. Tribal Authority After *South Dakota v. Yankton Sioux*

South Dakota v. Yankton Sioux involved a jurisdictional dispute pitting South Dakota and the Southern Missouri Waste Management District (SMWMD) on one side, and the EPA and the Yankton Sioux Tribe on the other. At issue was the question of which competing jurisdiction had the authority to establish conditions for a Resource Conservation and Recovery Act permit s

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[230] Bourland at 696.

[231] Bourland at 697:

> Section 327.1(f) provides that the regulations in part 327 apply 'to the extent that [they] are not inconsistent with... treaties and Federal laws and regulations.' This is simply to say that the regulations do not purport to abrogate treaty rights—not a starting position. This regulation says nothing about whether the Flood Control Act or Cheyenne River Act has already terminated those rights.

[232] Bourland at 702-703:

> The majority offers no explanation why concurrent jurisdiction suddenly becomes untenable when the local authority is an Indian tribe. To the extent that such a system proves unworkable, the regulations themselves provide that tribal prevail, for part 327 applies to 'lands and waters which are subject to treaties and Federal laws and regulations concerning the rights of Indian Nations" only to the extent that part 327 is 'not inconsistent with such treaties and Federal laws and regulations.' 327.1(f).

[233] 522 U.S. 329 (1998).

needed to site a municipal landfill on non-tribal land within the Yankton Sioux Reservation. The Yankton Tribe opposed the landfill design. It argued that in as South Dakota lacked jurisdiction over the land, the SMWMD landfill had to follow federal design requirements.[234]

Prior to this event, EPA had granted South Dakota authority to issue and administer municipal solid waste permits in the state, but had specifically excluded this authority over "existing or former" lands of the Yankton reservation. Shortly after the state granted SMWMD its permit, the EPA regional administrator issued a letter ruling, stating that because the landfill was located within the Yankton Reservation border, federal regulations controlled permit requirements.[235]

The Yankton Tribe brought action in the U.S. District Court of South Dakota, seeking an order to compel SMWMD to follow EPA regulations.[236] The district court first focused on the question of whether the planned site for the landfill was actually Indian Country. Applying the rule of liberal interpretation to the original treaty and subsequent congressional acts serving to open the reservation to non-tribal settlement, the court determined that the Yankton Reservation had not been diminished.[237] The court then considered whether the tribe had regulatory authority over the non-tribal land, applying the *Montana* rule. The court ruled the *Montana* exceptions had not been met, noting that Congress had not expressly authorized the tribe civil jurisdiction over nonmember land holdings within the reservation, nor had the tribe shown that other *Montana*

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[234] South Dakota v. Yankton, 522 U.S. at 340-342.

[235] See Yankton Sioux Tribe v. Southern Missouri Waste Management District , 890 F.Supp. 878 (S.D.S.D 1995), which provides a more detailed account of the circumstances bringing about this conflict.

[236] Yankton, 890 F.Supp. 878.

[237] Yankton, 890 F.Supp. at 888.

exceptions applied. Having determined that the area in question was still Indian Country, the court ruled that the landfill was under federal jurisdiction and had to comply with EPA requirements.[238]

The SMWMD appealed the district court's decision to the U.S Court of Appeals for the Eighth Circuit,[239] challenging the district court's ruling that the area in question was still Indian Country. The Eighth Circuit undertook an exhaustive review of the original treaty and subsequent congressional action. After applying the standards set forth in *Solem,*[240] the appellate court found that that the reservation had not been diminished, and the area was still Indian Country.[241] The state appealed this decision to the U.S. Supreme Court.

In *South Dakota v. Yankton Sioux Tribe*[242] the U.S. Supreme Court began its review of the SMWMD issue by applying the principles of liberal interpretation to its very thorough review of the original treaty and subsequent congressional action.[243] The unanimous Court determined that in opening the reservation to non-tribal settlement, Congress had intended to diminish the reservation.[244] As a consequence, the Court ruled the area in question was no longer Indian

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[238] Id. at 888.

[239] Yankton Sioux Tribe v. Southern Missouri Waste Management District, 99 F.3d 1439 (8th Cir. 1996)

[240] Solem v. Bartlett, 465 U.S. at 463.

[241] Yankton v. SMWMD, 99 F.3d, at 1457.

[242] 522 U.S. 329 (1998)

[243] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333-340.

[244] South Dakota v. Yankton, 522 U.S. at 344-345:

> Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing 'the present and total surrender of all tribal interests,' and a provision for a fixed –sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land,' a 'nearly

Country.[245] The Court then ruled that because the area was no longer Indian Country, South Dakota, and not the federal government nor tribe, had primary jurisdiction over the landfill.[246]

South Dakota v. Yankton provides the necessary clue to understand why the U.S. Supreme Court didn't apply the liberal interpretation rule to its review of the federal trespass statute in *Montana*, nor to its interpretation of the Army Corps of Engineers regulations in *Bourland.* The purpose of the rule of liberal interpretation is to protect legitimate tribal interest. But, as *South Dakota v. Yankton* clearly shows, Indian tribes no longer have any legitimate government interest in areas within the putative borders of a reservation where Congress has extinguished tribal sovereign rights

In *Montana, Bourland* and *South Dakota v. Yankton*, the U.S. Supreme Court followed a very consistent approach in determining what, if any civil authority a tribe exercised over nonmember areas of a reservation. In each of the three cases, the threshold question was whether the tribe still retained some sovereign right over the nonmember area. At this juncture of the analysis, the Court undertakes an exacting review of the original treaty and any statutes that may have affected original tribal rights, liberally construing any ambiguous terms in the tribe's favor. If the Court finds the reservation has been diminished and the area in question is not Indian Country, the Court then concludes that the tribe lacks any governing interest in the region and correspondingly civil jurisdiction. As a corollary, if the Court's review determines that the

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conclusive,' or almost insurmountable' presumption of diminishment arises. *Solem*, supra, at 470; see also *Hagen*, 510 U.S. at 411.

[245] South Dakota at 358.

[246] "In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act. " South Dakota v. Yankton, 522 U.S. at 358.

nonmember land has retained its status as Indian Country, the Court would then apply the *Montana* principals to determine whether Congress has granted tribes the right to regulate nonmembers. Based on this demonstrated approach, it is unlikely a federal court would conclude that the liberally interpretative rule added any weight to the EPA's interpretation of section 301(d)(2)(B). Instead, a federal court would more likely conclude that the ambiguous language of section 301(d)(2)(B) is not sufficient to constitute the clear delegation of congressional authority necessary to meet the *Montana* standard.

V. Changes to 40 CFR Part 71: The EPA's End Run on the Issue

A more recent action by the EPA, seems to indicate the Agency has already concluded that its interpretation of section 301(d)(2)(B) probably won't receive the judicial deference necessary to support its planned course to simply grant tribal governments regulatory control of both tribal and non-tribal lands within the reservation. On March 22,1999 the EPA issued new rules amending 40 C.F.R. Part 71,[247] a move that suspiciously appears to be an end run of this issue and an effort to avoid direct showdown between state and tribal governments on the question of CAA regulatory authority. According to the EPA, the purpose of the new additions to 40 C.F.R. Part 71 are to allow the EPA to manage Title V programs within Indian Country (to include non-tribal fee holdings within reservation boarders) until such time as the tribes are able to manage their own CAA regulatory program.[248]

[247] 64 Fed. Reg. 8247-8263 (1999).

[248] 64 Fed. Reg. 8249-8250.

The EPA acknowledges that the new additions to Part 71 will effectively void state regulatory actions within the putative boarders of an Indian reservation.[249] This includes state-issued operating permits and any determinations of conditionally exempted facilities. The EPA states it will run the program until the respective Indian tribes demonstrates it is capable of managing their own CAA program; at time which time the EPA will simply transfer its operation to the Indian tribe.[250] The consequences of EPA's planned action are readily apparent. Facilities located within the putative borders of a reservation will need new permits, an expensive process if they are required to complete new emission inventories. Existing facilities may be required to meet new emission standards, and conditionally exempted facilities would have to be reevaluated.[251] Facilities will have to pay new permit fees, and seek refunds of permit fees already paid to state or local governments.[252]

The EPA claims that CAA section 301(d)(4)[253] authorizes it to substitute existing state permitting authority with one administered by the Agency,[254] offering an absurd analysis in support of this contention. The Agency asserts that because state governments have no inherent jurisdiction over any reservation land,[255] states can only administer the CAA on a reservation if the state has explicit EPA approval, which the EPA says it hasn't granted.[256] The EPA then

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[249] 64 Fed. Reg. 8253.

[250] 64 Fed. Reg. 8253.

[251] 64 Fed. Reg. 8254.

[252] 64 Fed. Reg. 8258.

[253] 42 U.S.C. § 7601(d)(4).

[254] 64 Fed. Reg. 8251.

[255] 64 Fed. Reg. 8253.

declares that Indian tribal governments are the only political entity authorized to administer the CAA within a reservation, but no tribe has an approved Title V program.[257] The EPA rounds out its position by declaring that as Indian tribes are not exercising the authority granted to them by the CAA, the Act requires the Agency to step in and implement a federal program.[258] For those who might appreciate the imperfection of this argument, the EPA has a ready response: it doesn't care. The agency announced it "will implement the Part 71 program even in areas of Indian country where a State may be able to demonstrate jurisdiction."[259]

If section 301(d)(4)[260] is read in the proper context, it's clear that any authority the EPA could assume under this provision is that granted to Indian tribes by Section 301(d)(2).[261] In claiming that it has the authority to abolish state regulatory authority in areas of a reservation where states can demonstrate jurisdictional authority, the EPA is essentially claiming that these two statutory provisions somehow transmogrify into a special congressional authority greater than their individual parts.

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[256] 64 Fed. Reg. 8254. The EPA's assertion is a gross misstatement of the law. Only Congress has the authority to grant States regulatory authority over tribal lands. *See* Williams v. Lee, 358 U.S. 217 (1959). Nowhere within the CAA does such a delegation exist.

[257] 64 Fed. Reg. 8254.

[258] 64 Fed. Reg. 8251.

[259] 64 Fed. Reg. 8252:

> Accordingly, even if a State could demonstrate authority over non-Indian sources on fee lands, EPA believes that the CAA generally provides the Agency the discretion to federally implement the CAA over all reservation sources in order to ensure an efficient and effective transition to Tribal CAA programs and to avoid the administrative undesirable checkerboarding of reservations based on land ownership.

[260] 42 U.S.C. § 7601(d)(2)(B)

[261] 42 U.S.C. § 7601(d)(4)

The Agency is correct that state governments lack authority to administer the CAA on Indian lands. As demonstrated earlier in analysis, absent an expressed congressional grant of authority, state governments have no regulatory jurisdiction over Native Americans or their lands.[262] This same general rule applies even to states that have been granted jurisdiction to resolve civil disputes on reservation lands under Public Law 280.[263] But the agency is wrong in its claim that states are completely without regulatory authority within the assumed borders of an Indian reservation. As the U.S. Supreme Court made clear in *South Dakota v. Yankton Sioux Tribe*,[264] states have primary civil and regulatory jurisdiction over areas where congressional action has ended Indian Country status. For nonmember holdings in areas still retaining Indian Country status, the U.S. Supreme Court made it equally clear that it is the state and not the tribe who is presumed to have regulatory authority over nonmembers and their land.[265]

A. *Chevron* Deference v. Presumption Against Preemption

The effect of the EPA's planned course of action will be the eradication of state regulatory authority over areas falling within the state's civil jurisdiction. While neither section 301(d)(2)(B) nor 301(d)(4) contain language expressly authorizing the EPA to invalidate state management of the CAA, the EPA stubbornly insists these provisions grant it this authority. The Agency's position is based upon an interpretation which it argues is supported by the regulatory

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[262] *See e.g.* Montana v. Blackfeet Indian Tribe, 471 U.S. 759 (1985); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[263] *See e.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976).

[264] 522 U.S. 329

[265] Montana v. United States, 450 U.S. at 563-564.

scheme of the CAA and its legislative history.[266] The Agency also argues that in as its interpretation is reasonable, it should receive the judicial deference required by *Chevron v. NRDC.*[267]

The EPA is correct in asserting that its interpretation of the CAA is due considerable deference. But this interpretation has the affect of preempting the authority state governments possess under the CAA. The judicial deference sought by the EPA would have to be measured against another rule of judicial interpretation, a rule that requires a presumption that federal statutes do not preempt state regulatory authority.[268]

The Supremacy Clause of the Constitution[269] serves to invalidate or nullify any state law that interferes or is inconsistent with federal law.[270] But absent a clear showing of congressional intent to supercede state law, it's presumed that federal regulations do not override traditional state police powers.[271] Even when federal statutes do expressly preempt state authority, the language is narrowly interpreted as to the degree of preemption.[272] Where the statute is either silent or ambiguous on the matter of preemption, a court can find that state law is superceded

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[266] 64 Fed. Reg. 8251.

[267] 467 U.S. 837.

[268] The reader is recommended to the excellent article by Damien J. Marshall, *The application of Chevron Deference in Regulatory Preemption Cases*, 87 Geo. L.J. 263 (1998), in which he provides a very good overview of the competing judicial principals of deferring to the statutory interpretations made by regulatory agency, against the presumption that federal statutes do not preempt State police powers.

[269] Article VI, Clause 2

[270] Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985).

[271] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[272] Cipollone v. Liggett Group, Inc. , 505 U.S. 504 (1992).

based upon a reasonable inference of congressional intent.[273] Congressional intent to override state authority can reasonably be inferred when the federal regulatory scheme is so pervasive that it doesn't leave room for state regulation;[274] where the regulations concern an area of federal interest that is so dominant that the federal system precludes states from enforcing laws on the same subject;[275] or in situations where application of federal and state regulations produce inconsistent results.[276]

If a court determines that Congress intended a federal statute to preempt state law, the court must still determine the scope of congressional preemption.[277] The scope of regulatory preemption is based upon a narrow interpretation of congressional purpose, discerned through the legislative history and the statutory framework.[278] The agency responsible for implementing a statute will be given deference for its reasonable interpretation of the scope of preemption,[279] but the interpretation must be read in light of a strong judicial presumption that Congress intended to preempt only that measure of state policing power necessary to affect the purpose of the federal statute.[280]

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[273] Rice, 331 U.S. 218, 230.

[274] Pennsylvania Railroad Company v. Public Service Commission, 250 U.S. 566 (1919).

[275] Hines v. Davidowitz , 312 U.S. 52 (1941).

[276] Hill v. Florida, 325 U.S. 538 (1945).

[277] Medtronic, Inc., v. Lohr, 518 U.S. 470, 484 (1996).

[278] Cipollone v. Liggett, 505 U.S. 504, 516-518.

[279] Medtronic, Inc., v. Lohr, 518 U.S. 470, 485, Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985).

[280] Commonwealth of Massachusetts v. U.S. Department of Transportation, 93 F.3d 890 (D.C. Cir. 1996); rejecting the DOT's assertion that the Hazardous Materials Transportation Act preempted State regulations requiring carriers to post bonds before they could collect or deliver hazardous waste. In analyzing application of the rule of

The EPA's interpretation of the CAA (as giving it the authority to simply void existing state CAA authority within the assumed borders of an Indian reservation)[281] is unreasonable and contradictory to congressional design and the plain language of the statute. The CAA is a practical application of modern federalism, with states and the federal government sharing authority and responsibility for reducing air pollution.[282] This shared responsibility begins with the federal government establishing minimum control standards applicable to all states and U.S. territories.[283] The state government then develop plans demonstrating how it intends to achieve the requirements of the CAA, complete with a regulatory system providing oversight and enforcement.[284] Once a state demonstrates it is capable of meeting federal standards, the Act shifts primary regulatory authority and responsibility from the federal government to the state.[285] The CAA also gives state governments the authority to impose additional or more stringent requirements.[286] The federal government then assumes the role of overall program manager, stepping in only when states fail to carry out their obligations and to resolve disputes between regulating authorities.[287]

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presumption against preemption, the court likened it to the presumptive rule against agency interpretations affecting Native American rights.

[281] 64 Fed. Reg. 8251-8255.

[282] General Motors Corporation v. United States, 496 U.S. 530, 532 (1990); Engine Manufactures Association v. United States Environmental Protection Agency, 88 F.3d 1075 (D.C. Cir. 1996).

[283] 40 U.S.C. §§ 7401; 7402; 7408.

[284] 42 U.S.C. § 7410.

[285] Engine Manufacturers v. EPA, 88 F.3d 1075, 1075.

[286] 42 U.S.C. § 7416.

[287] Commonwealth of Virginia V. Browner, 80 F.3d 869, 874.

The statutory design of the CAA reflects congressional intent to shift CAA authority from the federal government to state control. The design of the Act also indicates congress intended that once responsibility has pass to a state, state authority would only be rescinded under certain conditions and after following specific procedures. CAA section 502(i)[288] authorizes the EPA to withdraw a state's permitting authority whenever the Agency determines that the state has failed to adequately enforce or administer its CAA program. Before the Agency can take this step, it must first give the state notice of the deficiency and eighteen months to cure.[289] If, after two years of given the initial notice, the state isn't properly administering its program, the EPA may establish a federal implementation program.[290] The EPA also has review and veto authority over all state-issued permits.[291] The Agency can also terminate individual permits for cause, but only after the EPA provides the state permitting authority notice and ninety days to cure the permit deficiency.[292] Perhaps the Agency's ultimate authority is its ability to direct states to revise, or "call," a state implementation plan (SIP) if the EPA determines the SIP fails to meet the requirements of the CAA.[293]

As its authority for the new additions to 40 C.F.R. Part 71, the EPA points to CAA sections 301(d)(2) and (4). Given the practical effect of the new regulations, the EPA apparently believes that sections 301(d)(2) and (4) give the Agency special power to bypass the Act's

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[288] 42 U.S.C. § 7661a(i).

[289] 42 U.S.C. §§ 7661a(i)(1) and 7661a(i&(2).

[290] 42 U.S.C. § 7661a(i)(4).

[291] 42 U.S.C. § 7661d(b).

[292] 42 U.S.C. § 7661d(e).

[293] 42 U.S.C. § 7410(a)(2)(H).

prescribed procedures for overriding state regulatory authority and simply void state regulatory authority over those areas of a reservation where the state has civil jurisdiction. The EPA's interpretation, though, won't survive legal scrutiny.

B. *Massachusetts v. DOT*: Deference Won't Overcome the Presumption

The EPA's intended course causes a collision of two legal rules—the deference given federal agency interpretation of enabling statutes, and the presumption against preemption of state authority. Which legal canon prevails and why is best illustrated in *Massachusetts v. United States Department of Transportation.* [294] The case involved a dispute between the Department of Transportation (DOT) and State of Massachusetts. The DOT claimed that the general preemption provision of the Hazardous Materials Transportation Act (HMTA)[295] served to invalidate portions of the Massachusetts licensing regulation. State law required all transporters to post a $10,000 bond before being allowed to collect or deliver hazardous waste. The district court had decided in favor of the DOT, ruling the state requirement was contrary to the general congressional goal of uniform hazardous waste transportation regulations, and therefore preempted.[296]

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[294] 93 F.3d 890 (D.C. Cir. 1996)

[295] 49 U.S.C. § 5125:

> (a) General—Except as provided in subsection (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision or a State, or Indian tribe is preempted if—
>
> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

[296] Massachusetts v. DOT, 93 F.3d 890 at 892.

The U.S. Court of Appeals for the District of Columbia thought differently. The court agreed that the HMTA did reflect Congress' intent for a uniform regulation for hazardous waste transportation, but noted that the Act was silent on the issue of state bonding requirements. The court agreed that *Chevron*[297] required the court to uphold the agency's interpretation of the enabling statute, unless this interpretation ran counter to clear congressional intent or was unreasonable. But the court disagreed that the second half of the *Chevron* analysis was totally independent of the first inquiry. [298] The court stated that the range of agency interpretation was limited to the extent of the ambiguity, and the agency's interpretation could not diverge from a realistic understanding of the meaning and purpose of the statute:

> Of course, what may be thought ambiguous in the first step of *Chevron* (and thus may define a reasonable interpretation in step two) depends on the issue in question...In such cases, traditional presumption about the parties or questions in dispute may limit the breadth of ambiguity and thus affect both first and second steps of *Chevron*.[299]

The court noted that while the agency correctly determined that the HWTA was silent or ambiguous on the question of state power to impose bonding requirements, the agency failed to evaluate its own interpretation against the presumption that Congress did not intend to preempt state authority.[300] In addition, the court also found the agency's interpretation ran counter to specific provisions of the Act:

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[297] Chevron v. NRDC 467 U.S. 837

[298] Massachusetts, 93 F.3d, at 892 to 894.

[299] Massachusetts at 893.

[300] Massachusetts at 896.

Finally, even if we afford to the Department the deference it claims, and if we then pass the first step of *Chevron*, we would still not hold the Department's interpretation reasonable. In light of the powerful and well-established presumption against extending a preemption provision, such as the one of Section 5125[301] offered by DOT, that would even preclude a rule that only affects those parties who wish to load or unload such waste within a particular State, and may sweepingly preclude State rules in many areas of hazardous-waste regulation within that State. We are particularly reluctant to accept such a reading of such a provision when its implications would render superfluous at least two other segments of that provision's statutory scheme—in this case, the list of expressly preempted provisions in Section 5125(b)(1)[302] and the framework established for making State rules consistent in Section 5119(c).[303] [304]

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[301] 49 U.S.C. § 5125.

[302] 49 USC 5125(b):

> Substantive differences.—(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:
>
> (A) the designation, description, and classification of hazardous material.
>
> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
>
> (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents
>
> (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.
>
> (E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

[303] 49 USC 5119(c):

> Regulations on recommendations—(1) The Secretary shall prescribe regulations to carry out the recommendations contained in the report submitted under subsection (b) of this section with which the Secretary agrees. The regulations shall be prescribed by the later of the last day of the 3-year period beginning on the date the working group submitted its report or the last day of the 90-day period beginning on the date on

The EPA argues that CAA sections 301(d)(2) and (4) give it the power to rescind state regulatory authority over non-tribal areas situated within an Indian reservation. The usual application of Chevron would require giving the Agency's interpretation considerable deference. But as the court reasoned in *Massachusetts v. DOT*, an agency's interpretation is deserving of deference only when the interpretation is reasonable. An agency's interpretation is not reasonable if it is contrary to the strong presumption that Congress did not intend to preempt state authority. To paraphrase the Court of Appeals for the District of Columbia, EPA's interpretation that section 301(d) empowers it to summarily invalidate legitimate state authority within a reservation is reasonable, if it overcomes the strong presumption that Congress did not intend to preempt state regulatory authority. This, the EPA cannot accomplish. As was the case with the HMTA in *Massachusetts v. DOT*, Section 301(d) is silent with regard to abolishing state authority. As was also the case in *Massachusetts,* the CAA provides specific terms and procedures by which the Agency may override or rescind state regulatory authority. The CAA clearly states that the EPA cannot invalidate state authority absent a determination that the state has failed to fulfill its obligations, and then only after following specific procedures. For these reasons, a court would likely invalidate EPA's additions to 40 CFR Part 71.

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which at least 26 States adopt all of the recommendations of the report. A regulation prescribed under this subsection may not define or limit the amount of a fee a State may impose or collect.

(2) A regulation prescribed under this subsection takes effect one year after it is prescribed. the Secretary may extend the on-year period for an additional year for good cause. After a regulation is effective, a State may establish, maintain, or enforce a requirement related to the same subject matter only if the requirement is the same as the regulation.

(3) In consultation with the working group, the Secretary shall develop a procedure to eliminate differences in how States carry out a regulation prescribed under this subsection.

[304] Massachusetts 93 F.3d at 896.

C. Conclusion: No Authority to Simply Cancel State Regulation

The EPA hasn't the legal authority to simply declare that tribal governments have regulatory authority over all non-tribal areas of a reservation. Nor does the EPA have the authority to simply pass an edict abolishing all state regulatory authority over these same areas. Instead, the EPA will need to undertake a *Montana* analysis to determine whether tribal civil authority can extend a non-tribal activity. If the non-tribal activity has entered some consensual relationship with the tribe, such as a leasehold of tribal property, the non-tribal activity would fall within the tribe's civil and regulatory jurisdiction. If not, the EPA would have to determine whether local conditions met the second *Montana* exception. As a preliminary step, the Agency would need to establish whether the non-tribal activity was located within Indian Country. This would require the EPA to thoroughly evaluate original treaty rights and subsequent congressional action to determine whether the area in question had been divested of its Indian Country status. If still deemed Indian Country, the EPA would then need to conclude that the non-tribal emission source "threatens or has a direct effect on the political integrity, the economic security or the health and safety o the tribe."[305] And finally, the EPA will also need to conclude that the tribe has the political infrastructure and government resources necessary to administer the CAA on the reservation.[306] But what if the non-tribal activity already holds a permit issued by a state regulatory agency with the authority to administer the CAA?

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[305] Montana 450 U.S. at 566

[306] 42 U.S.C. § 301(d)

Arguably, a state-issued CAA permit could defeat any effort to extend tribal authority over a non-tribal source. After all, the EPA has already determined that the state-issued permit is sufficient to protect the health and safety of those residing on the reservation. Before the state received authority to administer its CAA program, the EPA had to review and approve the state's SIP, which included a review and approval of state permitting standards.[307] Prior to the non-tribal activity receiving its permit, the EPA also had the opportunity to review and challenge the particular permit.[308] The fact that the non-tribal activity had a permit, argues that the EPA found the operating conditions sufficient to protect health and safety. The EPA, of course, has the authority to take subsequent action should the Agency determine the permitted activity has violated permit condition,[309] or when the Agency believes the state is not adequately enforcing its standards.[310] But the EPA can take such action only after it provides the state notice and gives the state an opportunity to cure the deficiency.[311] While this argument has merit, the judicial take on this issue indicates that EPA would not be relegated to the above procedure.

In *Montana v. EPA*,[312] the U.S. Court of Appeals for the Eighth Circuit spoke on this exact issue. The court ruled that EPA did not have to determine the state authority was ineffectively regulating non-tribal activities on the reservation. All that was necessary, ruled the court, was for

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[307] 42 U.S.C. § 7410

[308] 42 U.S.C. § 7661d

[309] 42 U.S.C. § 7661a(e)

[310] 42 U.S.C. § 7661a(i)

[311] 42 U.S.C. § 7661a(i)

[312] 137 F.3d 1135

the EPA to determine that events met the *Montana*[313] excepted conditions for tribal jurisdiction.[314] Of course, this opinion relates to EPA authority under the CWA, but given the significant similarities between the CWA and the CAA, *Montana v. EPA* will likely prove very persuasive on this issue.

The analysis will likely be less favorable for the tribal regulatory authority if the land at issue has lost its Indian Country status. In light of the rather draconian line of tribal-state jurisdiction drawn by the U.S. Supreme Court in *Yankton Sioux*, a tribe would have no more jurisdictional claim to such area than it would have over a distant section of a neighboring state.[315] A determination that certain areas or regions within the reservation had lost Indian Country status could result in tribal boarders looking much like a slice of Swiss cheese or a bagel, with the holes belonging to state jurisdiction. But even if such were the case, the tribal government would be able to influence non-tribal activities situated in the reservation "holes." CAA section 110(a)(2)(D)[316] prohibits a state from establishing standards that adversely affect another state's air quality standards; section 301(d)[317] allows tribes to stand on par with state governments. With CAA section 164(e),[318] tribal governments can challenge state air quality redesignation or permits that impact reservation air quality standards. Arguably, these sections of the CAA would

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[313] 450 U.S. at 566.

[314] "Moreover, in Justices Stevens' and White's opinions, upon which Montana relies, there is no suggestion that inherent authority exists only when no other government can act." Montana v. EPA at 1141.

[315] This exact conclusion was reached by the U.S. Court of Appeals for the Eighth Circuit in Yankton Sioux v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), in which the court ruled that the effect of diminishment was to place the area under the primary jurisdiction of the state.

[316] 42 U.S.C. § 7410(a)(2)(D)

[317] 42 U.S.C. § 7601(d)

[318] 42 U.S.C. § 7474(e)

allow a tribe to adopt standards more restrictive than that of a neighboring state, which the EPA could enforce against a neighboring state. The opinion set out in *City of Albuquerque v. Browner*[319] would seem to support this as a legitimate exercise of tribal and EPA authority.

The dispute in *Albuquerque v. Bowner* involved a challenge of the EPA's authority to enforce tribal water quality standards. The City of Albuquerque had submitted an application to the EPA for a revised National Pollution Discharge Elimination System (NPDES) permit. The revision was necessary to meet new, more restrictive water quality standards New Mexico has set for the Rio Grande River. Shortly after receiving the city's application, the EPA formally recognized the Pueblo of Isleta as a state for Clean Water Act (CWA) regulatory authority, and approved the Pueblo's water quality standards for that section of the Rio Grande River running through Pueblo boarders—standards more restrictive than those required by the state. Because this section of the Rio Grande River is situated downstream of Albuquerque, the EPA insisted that the city's NPDES permit conform with the Pueblo's more stringent standards.[320]

Among the many challenges raised by the city was that in allowing the Pueblo to establish water quality standards more stringent that federal standards, the EPA had exceeded its authority under the CWA. The court ruled that CWA section 510[321] gave qualified Indian tribes the authority to establish more stringent standards for a shared water body.[322] The court also ruled

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[319] 97 F.3d 415 (10th Cir. 1996), *cert. denied* 522 U.S. 965 (1997).

[320] 97 F.3d 415, 418-420.

[321] 33 U.S.C. § 1370, authorizing states to establish standards more stringent than required by the federal government.

[322] 97 F.3d at 421-423

that following the U.S. Supreme Court decision in Arkansas v. Oklahoma,[323] the EPA had the authority to enforce such standard on an upstream activity having the potential to impair the downstream water quality standards.

As stated earlier, the CWA and CAA treatment of tribal government regulatory authority is nearly identical. For this reason, the analysis and conclusion of *Albuquerque v. Browner* is arguably pertinent to the question of the extra-territorial effect of tribal air standards. Similar in effect to CWA section 510, CAA section 116[324] authorizes a state to set air quality standards more stringent than that of the federal government, and CAA section 164(a)[325] prohibits neighboring states from revising their SIP or issue permits that could adversely affect standards set under CAA section 116. Rounding out the parallel, CAA section 164(b)[326] authorizes the EPA to disapprove any permit or SIP revision that could adversely affect a neighboring tribe's air quality standards. This analysis would indicate that CAA section 110(o)[327] allows qualifying tribal governments the authority to establish air quality standards that would effectively be applicable to all areas within the reservation, even those no longer deemed Indian Country. [328]

Whether or not a tribal government can directly regulate non-tribal air emission sources situated within the reservation boarders, it's clear that qualifying tribal governments will be able to exert considerable influence on all sources within the reservation. But the issue of whether

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[323] Arkansas v. Oklahoma, 503 U.S. 91 (1992).

[324] 42 U.S.C. § 7416

[325] 42 U.S.C. § 7474(a)

[326] 42 U.S.C. § 7474(b)

[327] 42 U.S.C. § 7410(o)

[328] The decision in Arizona v. EPA, 141 F.3d 1205, would seem to contradict such an assertion, allowing tribal designation of only those areas recognized as belonging to the Indian reservation.

tribes or states have regulatory authority is more than a potential conflict between competing sovereignties. The issue of regulatory authority will determine whether or not the regulated entity will have the right to challenge the decisions and actions of the regulating agency.

VI. Nonapplicability of CAA Citizen Suits: The Second Thorny Issue

Those activities for which a tribal government will exercise CAA regulatory authority, both tribal and non-tribal individuals, will discover a significant difference in what right they hold in comparison to regions regulated by either the EPA or states. Individuals affected by the decisions or actions of either a federal or state agency with authority to administer the CAA, have a right to challenge such decisions or actions under CAA section 304,[329] the citizen suit provision. Those individuals who fall under a tribal government's CAA jurisdiction will not have this right. This is because 40 C.F.R. subpart 49.4(o) specifically excludes tribal governments from the applicability of CAA citizen suits.[330] The EPA did so after determining that the CAA does not contain the requisite waiver of tribal government sovereign immunity. Unlike its interpretation of CAA section 301(d), on this issue the EPA is right.

The ever-increasing complexity of our government system has forced state and federal legislative bodies to look to a professional bureaucracy not only to administer legislative dictates, but also to serve as pseudo-legislators who write the regulations for practical application of legislative policies. With the citizenry no longer able to hold elected officials accountable for much of what modern government undertakes, there's a real need for some alternative means of

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[329] 42 U.S.C. § 7604

[330] 63 Fed. Reg. 7260-62.

rectification for the private citizen. By waiving sovereign immunity and allowing citizens a right to sue government agencies, citizens have a means to restrain and control what would otherwise be an unaccountable governing body. This is especially true when dealing with agencies wielding the substantial power of federal environmental legislation.[331]

Recognizing the considerable authority the CAA transfers to a regulatory agency, Congress provided for citizen suits as a means to check agency actions. Section 304 of the CAA grants private parties the right to judicially challenge the decisions and interpretations of a regulating agency, and gives individuals the right to force a CAA regulating agency to comply with the CAA rules and requirements.[332] Section 304 citizen suits are authorized against three classes of defendants: any person, to include a federal or state agency (to the extent permitted by the Eleventh Amendment to the Constitution) who is in violation of an emission standard or limitation or order issued by the EPA or state regulatory agency;[333] the EPA for failing to perform any nondiscretionary act or duty required by the CAA;[334] and any person who plans to construct or operate a new or modified major emitting facility without the required permit, or is

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[331]The reader is recommended to Dean R. Nicypen's *Attorneys' Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens From Challenging Administrative Agencies*, 33 Am. U. L. Rev 775, (19850, with which the author makes a good case in support of the premise that CAA citizen suits proved a real social benefit. He argues that because of the complex agenda of even small State legislatures, without the check of citizen suits, there would be no timely correction of erroneous agency action.

[332] The reader is referred to the very excellent article by David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 Envtl.L 2233 (1991) providing a good overview of the purpose and effect of the citizen suit provisions within the Clean Air Act.

[333] See *Citizen Association of Georgetown v. Washington*, 535 F.2d 1318 (DC Cir 1976), where the court held that Section 304 was designed to provide a procedure permitting any citizen the authority to bring an action directly against polluters violating the performance standards and emission restrictions imposed by law.

[334] *See e.g.,* Citizens for a Better Environment v. Costle, 610 F. Supp. 106 (ND Ill 85), holding that Section 304 gives private parties the power to sue the EPA and force the Agency to perform non-discretionary duties.

in violation of an existing permit.[335] For nearly thirty years, individuals and groups have exercised the rights conferred by the CAA, and successfully challenged both federal and state agencies on such matters as failing to enforce state implementation plans,[336] failing to undertake required emission control measures,[337] failing to implement transportation contingency plans,[338] and violating emission standards.[339] But those in the future who might want to employ the rights conferred by CAA section 304 will discover it useless against the solid barrier of tribal government immunity.

A. The EPA Justification

In explaining its reasons for excluding tribal governments from the applicability of section 304 citizen suits, the EPA stated that the Act does not specifically subject tribal governments to private suit, nor does it list Indian tribes in the class of defendants subject to CAA citizen suits.[340] The Agency states that it believes this statutory omission reflects congressional intent to exclude tribal governments from CAA citizen suits.[341] It's possible the EPA's position on this issue was influenced somewhat by the Agency's determination to assist tribal governments to undertake a greater role in the environmental regulation of Native

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[335] *See e.g.,* Illinois v. Commonwealth Edison Co., 490 F. Supp. 1145 (ED Ill 1980), where the court held that permit requirements are enforceable under the Clean Air Act citizen suit provisions.

[336] *See e.g.,* Friends of the Earth v. Carey, 535 F.2d 165 (2nd Cir. 1976).

[337] See e.g., Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3rd 1991).

[338] *See e.g.*, Citizens for a Better Environment v. Metropolitan Transportation Commission, 731 F. Supp. 1448 (N.D. Calf. 1990).

[339] *See e.g.*, Oregon Environmental Council v. Oregon Department of Environmental Quality, 775 F. Supp. 353 (D. Oregon 1991).

[340] 63 Fed. Reg. 7260-7261.

[341] 63 Fed. Reg. 7261.

American lands.[342] Whatever the reason, the Agency's conclusion is correct. As stated earlier in this analysis, Indian tribes are domestic dependent nations, with inherent sovereignty over their lands and people.[343] As with states and the federal government, tribal governing bodies also enjoy common law immunity from private suit.[344] Tribes are also immune from suit by state governments,[345] but are not immune from civil action undertaken by the federal government.[346] The status of "domestic dependent nations," means that Congress has the power to reduce and even remove tribal sovereign authority, to include tribal sovereign immunity.[347] But a tribe's sovereign authority, including sovereign immunity, can only be curtailed through a clear and unambiguous act of Congress.[348] An example of the rigidity of this judicial-enforced rule is perhaps best found in the 1978 U.S. Supreme Court decision *Santa Clara Pueblo v. Martinez.*[349]

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[342] *EPA Policy for the Administration of Environmental Programs on Indian Reservations*. Director's memorandum dated Nov. 8, 1984, on the EPA website at *HTTP://www.epa.gov/indian/1984.htm.*

[343] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), together with Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483, within which Chief Justice John Marshall's opinions served to define the special legal status held by Indian tribal governments; stating that tribes were legal entities separate and apart from the States in which tribal lands were physically located, with sovereign powers subservient only to the authority of Congress and federal agencies working with Congressional authority.

[344] *See e.g.,* National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985).

[345] *See e.g.*, Chemehuezi Indian Tribe v. California State Board of Equalization , 757 F.2d 1047 (9th Cir. 1985).

[346] *See e.g.*, United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380 (8th Cir. 1987), cert. denied 485 U.S. 935 (1988); and United States v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986).

[347] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), in which the Court states that "Indian tribes are proscribed from exercising both those powers of autonomous States that are expressly terminated by Congress and those powers inconsistent with their status."

[348] *See* Antoine v. Washington, 420 U.S. 194 (1975).

[349] 436 U.S. 49 (1978).

B. *Santa Clara Pueblo*: A Rigidly-Applied Rule

Santa Clara Pueblo v. Martinez began with a civil action brought against the Santa Clara Pueblo, alleging a violation of the Equal Protection Clause of the Indian Civil Rights Act.[350] A female member of the New Mexico Pueblo challenged the tribal government's creation of an ordinance that denied tribal membership to children of women who married outside the Pueblo, yet recognized tribal membership for those children born of men who married outside the Pueblo.[351] The U.S. Supreme Court ruled against the plaintiff, stating that her claim was barred by sovereign immunity. The Court explained that the ICRA did not contain an express waiver of tribal sovereign immunity, and such waiver could not simply be inferred from the general language of a statute: "In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit." [352]

The *Santa Clara* decision demonstrates the inequitable results that can occur through the strict application of the immunity bar—a point even the U.S. Supreme Court has recognized. Recently, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*,[353] the Court was asked to reverse a state court decision and enforce a purchase agreement the Kiowa tribal government had entered into with private citizens. Tribal officials had agreed to buy a quantity of private common stock, formalizing the agreement by signing a promissory note for $285,000 plus

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[350] 25 U.S.C. § 1302: "No Indian tribe in exercising powers of self-government shall—(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law..."

[351] Santa Clara Pueblo v. Martinez , 436 U.S. 49, 52-56.

[352] Santa Clara Pueblo at 59.

[353] 523 U.S. 751 (1998)

interest. Officials of the Kiowa tribe delivered the signed note to the off-reservation private company. Later the tribe refused to honor the conditions of the contract.[354]

The Supreme Court ruled that neither the fact that the tribe was engaging in a purely commercial enterprise, nor that the activity took place off the reservation, served to subject the tribal government to suite.[355] Absent a clear statement from Congress that would subject the Kiowa tribe to private suit, the Court ruled the tribe was immune from any civil action, even though the strict application of sovereign immunity resulted in an unfair outcome:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians... In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We

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[354] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751, 753.

[355] Kiowa 523 U.S., 755-756.

decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgement.[356]

In general, whenever an individual or group has sought legal action to challenge the activities of a tribal government, the outcome has been both consistent and, in hindsight, predictable. Generally, the ruling turned on whether the federal statute at issue contained an unequivocal congressional waiver of tribal immunity.[357] In the field of environmental regulation, federal appellate courts have found such waivers in the Hazardous Materials Transportation Act (49 U.S.C. 1901-1819)[358] and in the Resource Conservation and Recovery Act.[359]

An examination of the CAA, both the general provisions and the provisions specific to tribal regulation of the Act, corroborates the EPA's position that Congress did include tribal governments within the class of entities subject to section 304 citizen suits. Section 304 authorizes private suit against "any person (including (i) the United States, and (ii) any other

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[356] Kiowa at 758.

[357] *See e.g.,* Florida Paraplegic Association, Inc v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (11th Cir. 1999), ruling that although the Americans With Disabilities Act (42 U.S.C. § 12181 et seq.) applied to a tribal commercial activity, because the Act, nor a parallel section of the Civil Rights Act, specifically authorized suit against tribal governments, the plaintiff's ADA suit was barred; Equal Employment Opportunity Commission v. The Cherokee Nation , 871 F.2d 937 (10th Cir. 1989), ruling that a plaintiff was barred from filing suit against a tribal government for violating the Age Discrimination in Employment Act (29 U.S.C. §§ 621-34), as the statute did not contain a specific waiver of tribal immunity; Donovan v. Navajo Forest Products, 692 F.2d 709 (10th Cir. 1982), ruling that while Congress intended the general applicability of the Occupation Health and Safety Act to include Indian tribes, the Act does not specifically subject Indian tribes to civil action.

[358] Northern States Power Company v. The Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993), ruling that Section 1811 of HMTA allowed tribal governments to be sued to enforce the Acts preemptive rules.

[359] Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1989 (8th Cir. 1989), which ruled that the Resource Conservation and Recovery Act subjected municipalities to the Act's citizen suit provisions, and that the statutory definition of "municipality" included Indian tribe—serving as a clear statement of congressional intent to waive tribal immunity.

government instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who..." The definition of "person" is found in CAA section 302(e),[360] which includes "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." Section 302(d)[361] defines "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands." "Municipality" is defined as "a city, town, borough, county, parish, district, or other public body created by or pursuant to State law."[362] As for "other government instrumentality," the antecedent phrase "to the extent permitted by the Eleventh Amendment to the Constitution," indicates congressional intend. The Eleventh Amendment bars federal courts from considering private party suits brought against a state without state consent.[363] But this prohibition doesn't pertain to Native Americans or Indian tribes,[364] which indicates Congress intended this section of the CAA to only apply to state government activities. Even if this ambiguous phrase were intended to include tribal governments among the entities subject to citizen suits, the language in

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[360] 42 U.S.C. § 7602(e).

[361] 42 U.S.C. § 7602(d).

[362] 42 U.S.C. § 7602(f).

[363] *See e.g.,* Ford Motor Company v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945); Georgia Rail Road and Banking Co. v. Redwine, 342 U.S. 299 (1952).

[364] *See e.g.*, Red Lake Band of Chippewas v. City of Baudette, 730 F.Supp. 972 (Minn. D.C. 1990); Marty Indian School v. South Dakota, 592 F.Supp. 1236 (S.D.D.C. 1980); and Aquilar v. Kleppe, 424 F. Supp. 433 (Alaska D.C. 1976).

the Act is not the "unequivocal" declaration of congressional intent necessary to waive tribal sovereign immunity.[365]

A review of federal common law on this subject shows the EPA has made the right call with respect to the nonapplicability of section 304 to Indian tribes. Without a clear and unequivocal congressional waiver of tribal sovereign immunity, the EPA hasn't the authority to subject tribal governments to CAA citizen suits. What may seem a boon for those tribes who receive CAA regulatory authority, will likely prove a bane.

C. The Consequences of Regulatory Immunity

Where the practice of federal and state governments has been to grant private citizens ever increasing rights to sue government administrative agencies, tribal governments have stubbornly held onto their sovereign protections, often to their own detriment.[366] The reason tribes insist on this course is partly because of the historic struggle Indian tribes have waged against state government encroachment, unscrupulous merchants, and simply to reaffirm that tribal sovereign status is only subservient to the federal government.[367] Then too, with most

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[365] Santa Clara Pueblo, 436 U.S. at 59.

[366] In the insightful article by Mr. Brian C. Lake, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: an Idea Whose Time Has Gone*, 1996 Colum. Bus. L. Rev. 87, Mr. Lake constructs a convincing argument for lifting tribal civil immunity. Mr. Lake notes that the immunity has and does bar private companies from seeking legal action to enforce contractual agreements with tribal governments both on and off the reservation. This inability to enforce tribal governments to fulfill their obligation or challenge tribal governments that change the rules, he argues, has resulted in many companies and individuals opting not to do business with tribes. It also has seriously hindered tribes from obtaining the necessary capital for internal development programs.

[367] From the early days of this republic, Indian tribes have been subjected to attempts by State governments to impose State control over tribal lands and members. One such occasion is described in the landmark Supreme Court decision Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), in which the Court invalidated Georgia's attempt to legislate control over the Cherokee people and lands situated within that State. Ironically, Georgia was

tribal governments there's less need to provide a judicial check to the administrative government. With the exception of the Navaho and Cherokee Nations, most Indian tribes have a population of less than 50,000 and correspondingly small governing body. [368] The smaller size of most tribal reservations makes them comparable to townships, which usually have more simplistic government structures than large cities. In a smaller governing system each citizen represents a greater proportion of the electorate, and the electorate has closer proximity to its elected officials, factors that should make the governing organization more responsive to the individual citizen.

There's also a very practical reason for a tribal government to retain sovereign immunity in its administration of the CAA, and that's money. The small population of the average Indian reservation makes it difficult, if not impossible, to support the same sophisticated legal defense system employed by state or local governments. If forced to defend against Section 304 lawsuits, tribal governments would not only have to concern itself with financing its own legal defense but would have the threat of being forced to pay the plaintiff's legal fees.[369]

For whatever reasons tribal governments insist on maintaining their sovereign immunity, Congress has repeatedly spoken of its commitment to promote Indian tribal sovereignty and continue the protection that sovereign immunity affords tribal governments.[370] Based upon

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able to achieve its aim when the federal government forcefully moved the Cherokee and other Indian nations west of the Mississippi in what history refers to as the Trail of Tears.

[368] *Indian Service Population and Labor Force Estimates*, U.S. Department of the Interior, Bureau of Indian Affairs, 1995.

[369] See Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, 478 U.S. 546 (1986), in which the Court confirmed that Sect 304(d) of the Clean Air Act authorizes courts to award successful plaintiffs legal fees in both judicial actions and administrative proceedings.

[370] See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 at 511 (1991), where the Court Stated, "Congress has consistently reiterated its approval of the immunity doctrine. See e.g. Indian Financing Act of 1974, 88 Stat. 77, 25 USC Sect. 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat., 2203, 25 USC Sect. 450 et seq. These Acts reflect Congress' desire to promote the goal of Indian self

recent statements from the current presidential administration, the executive branch also appears equally committed to promoting tribal sovereignty.[371] Regardless of the judicial branch's opinion on whether modern tribal governments actually need immunity, federal courts recognize that only Congress has the authority to lift the immunity bar.[372]

The EPA, aware that tribal government immunity will act to exclude legitimate citizen suits under the CAA, advises citizens to seek an alternative course to section 304 suits. In announcing the new regulations, the EPA suggested that aggrieved citizens could sue individual tribal officials rather than attempt suits against the tribal government or agencies.[373] Given the legal history of such suits, the EPA is probably overly optimistic in considering this as a viable means of circumventing the immunity bar to civil suit.

As a general rule, sovereign immunity doesn't extend to exempt individual tribal members from suit.[374] Because of this, aggrieved parties may seek declaratory and injunctive relief against tribal officials, at least in actions arising under the Indian Civil Rights Act.[375] But

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government, including its overriding goal of encouraging tribal self-sufficiency and economic development." As additional support for this premise, the author also refers the reader to the American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); and also 33 USC § 1377(a) and 42 USC Sect. 7601(d) in which Congress states that Indian tribes are to be treated on par with states for purposes of regulation and delegation of authority under the Clean Water and Clean Air Acts.

[371] Executive commitment is reflected in President Clinton's 29 Apr 1994 memorandum "Government-to-Government Relations with Native American Tribal Governments," and Executive Order 13084, 14 May 1998, "Consultation with Indian Tribal Governments."

[372] *See e.g.,* Kiowa Tribe v. Manufacturing Technologies, Inc, 523 U.S. 751, 753.

[373] 63 Fed. Reg. 7260-7261.

[374] Puyallup Tribe, Inc. v Department of Game of Washington, 433 U.S. 165 (1977).

[375] *See e.g.,* Santa Clara Pueblo, 436 U.S. at 59, ruling that tribal immunity did not extend to a suit seeking declaratory and injunctive relief against a tribal official alleged to have violated individual rights granted under Title I of the Indian Civil Rights Act. The Court dismissed the action after ruling the ICRA did not provide a private remedy (Santa Clara at 71-72); and TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999), in which the court likened tribal sovereign immunity to the common law immunity of State governments; and cited Ex Parte

tribal government officials who are acting within the authority granted their official position do fall under the umbrella of tribal sovereign immunity.[376] Considering the deference courts will allow tribal government interpretation and execution of tribal CAA implementation plans, this umbrella of protection afforded tribal officials will likely serve as a general bar to private actions against individual tribal regulatory officials.[377] The exception would be the rare occasion where a decision was so egregious that a court would have to find it an obvious abuse of legal authority.[378]

D. The Thorns

Private citizens, unable to penetrate the tribal immunity shield, will likely seek help from the federal government, which is not barred by tribal sovereign immunity.[379] With enough pressure applied through the political process, the federal government would have to act, most probably directing the EPA to take action against the tribe. Instead of carrying out its envisioned

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Young, 209 U.S. 123 (1908), for the judicial rule that state sovereign immunity doesn't bar declaratory or injunctive relief against a state office.

[376] *See e.g.*, Tamiami Partners, Ltc., v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999); Fletcher v. United States, 116 F.3d 1315 (10th Cir. 1997); Imperial Granite Co. v. Pala Tribe of Mission Indians, 940 F.2d 1269 (9th Cir. 1991); Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985); Anderson v. Las Vegas Tribe of Paiute Indians, 103 F.3d 137 (9th Cir. 1997), *cert. denied,* 1997 U.S. LEXIS 2278 (1997).

[377] *See* Navistar International Transportation Corp. v. EPA, 858 F.2d 282 (6th Cir. 1988), *cert. denied* 490 U.S. 1039, 109 S.Ct. 1943, 104 L.Ed.2d 413 (1989); University of Cincinnati v. Heckler, 733 F.2d 1171, 1173-1174 (6th Cir. 1984).

[378] *See* The Chemehuezi Indian Tribe v. California Board of Equalization, 757 F.2d 1047 (9th Cir. 1985); and Babbit Ford v. Navajo Indian Tribe, 519 F. Supp. 418 (D.Arz. 1981).

[379] United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380 (8th Cir. 1987), *cert. denied* 485 U.S. 935 (1988).

role of mentor for fledgling tribal environmental regulatory agencies,[380] the EPA could instead become the tribes' disciplinarian. The EPA's recommended solution[381] is for tribal governments to waive tribal immunity sufficient to allow effected individuals a right to challenge tribal air permitting decisions.[382]

The practice of allowing private citizens the right to challenge government agency decisions (especially environmental enforcement decisions) is so prevalent, that it is seen as a fundamental right. If tribes adamantly insist on barring any private challenge of its regulatory authority, this will assuredly fuel a heated debate on whether Congress was wise to grant tribal governments such power. An event with the right sort of sympathetic plaintiff could generate enough public outcry could force Congress to either rescind tribal authority or curtail tribal sovereign immunity. Rescinding regulatory authority could be used as ammunition by those opposed to the expansion of Indian tribal sovereignty and self-government. Should Congress waive immunity and subject tribal governments to section 304 suits, Indian tribal governments would not only be susceptible to legitimate challenge but also nuisance suits, which would quickly overtax limited tribal resources. An overburdened tribal government could find itself forced to either abandon the regulatory program, or simply capitulate whenever its decisions or actions are challenged. Should either event occur, the critics of tribal sovereignty would likely see the result as evidence that Indian tribes are not capable of performing the more complex tasks required of a modern governing body. Even if a future cry of injustice doesn't bring an end to

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[380] *See EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov. 8, 1984, which conveys how the EPA sees its role with respect to environmental regulation within tribal lands.

[381] 63 Fed. Reg. 7261.

[382] *See* Big Springs v. U.S. Bureau of Indian Affairs, 767 F.2d 614 (9th Cir. 1985) in which the court held that a tribe may consent to civil action without the expressed authority of Congress.

tribal CAA regulatory authority, the inability of private parties to challenge tribal regulatory actions would make reservations less attractive prospects for commercial development.

E. Pruning the Thorns

The EPA has made one sound recommendation. It suggests tribal governments consider employing some alternative process to litigation.[383] In both the private and public sector, there's a growing movement to use alternatives to the court system to resolve disputes.[384] Why alternative dispute resolution is growing in popularity is apparent. Using an alternative forum is much cheaper than taking a dispute to court. Because of the considerable delay experienced with formal litigation, alternative forums provide a more timely resolution. Alternatives also allow for a compromised end, with both parties usually receiving some satisfaction in the result--unlike the win-lose outcome of lawsuits. Incorporating modern dispute resolution practices would provide tribal governments a manageable system for allowing reservation residents the opportunity to challenge regulatory decisions, yet not formally relinquish any portion of tribal sovereign immunity. An effective means to challenge tribal decisions would also help eliminate, or at least substantially reduce, the commercial world's real fear of having an operation held hostage to the whims of the tribal regulators, and serve to make commercial development within

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[383] 63 Fed. Reg. 7262.

[384] Recommend Mike Jay Garcia, *Key Trends in the Legal Profession*, 71 May Fla. B.J. 16 (1997), in which Mr. Garcia describes the growing popularity of using alternatives to judicial action. Mr. Garcia notes that not only are private citizens employing alternative forums but also government agencies at all levels, using these as a means to lighten the load of overburdened judicial systems. Proponents of alternative forums find theses save time, money and often bring more satisfying results.

reservations more attractive.[385] Incorporating modern alternative mechanisms into tribal CAA regulatory programs would also show tribal governments are competent and progressive.

There are a number of alternative practices from which tribal governments could choose, such as mediation or binding arbitration. Tribes could use existing tribal forums as a dispute resolution system. They could establish a special body to oversee the dispute process, or even hire outside mediators and arbitrators. Tribal governments could establish some form of administrative appeals procedure, similar to that employed by State and federal agencies--having a progressively elevating level of review. A system incorporating these non-judicial processes would serve as a fair substitute and accomplish the CAA citizen suit objective. As an ultimate check on agency conduct, the system could allow a final appeal to an individual or group from the tribal elected body. Adopting such a simple and common appeal model would make the tribal system familiar to any with some experience with federal agency practice.

Another alternative tribal governments could consider would be to use contracts as a regulatory vehicle. Tribal air operating permits would be an intrinsic part of any contract for the lease of tribal land or any other commercial arrangement with the tribe. The permit-contract would specify operating conditions, equipment requirements, technological requirements and emission limitations. The contract would specify the particular forum for dispute resolution, such as mediation or binding arbitration, without formally waiving tribal sovereign immunity.[386]

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[385] See Amelia A. Fogleman *Sovereign Immunity of Indian Tribes: a Proposal for Statutory Waiver for Tribal Businesses*, 79 Va. L. Rev. 1345 (September 1993), in which Ms Fogleman argues that by invoking sovereign immunity to bar actions of those seeking to enforce contract obligations and escape tort liability, tribal governments have created an environment hostile to commercial development, resulting in both businesses and consumers reluctant to deal with tribal governments and tribal business activities.

[386] *See e.g.*, Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030 (11th Cir. 1995) stating that a tribe's agreement to submit to arbitration for dispute resolution was not sufficient a waiver of immunity to subject the tribe to civil litigation.

The contract could also provide a very limited waiver of sovereign immunity, allowing civil action to resolve a particular issue,[387] such as the right to challenge a tribe's interpretation of new EPA regulations or standards. As the means of policing commercial activities, tribal governments could use a contract penalty clause, specifying the cost to the company for each type of permit violation. The contract could also specify under what condition or series of events the company would lose its permit. This alternative would be very attractive to any company hesitant to develop within tribal lands, and conceivably make operating within reservations more attractive than outside, where there exists the ever-present threat of regulations judicially enforced.

One concern with regulating through contract is that tribes might, in their eagerness to encourage outside developers, water down emission requirements. But there are safeguards to prevent this becoming a practice on reservations. If tribes misused their regulatory authority, the EPA could step in and withdraw it.[388] Also, the bureaucracy of the Bureau of Indian Affairs would work as a check. Any commercial undertaking on a reservation would likely entail some lease of tribal land, and all such leases must be approved by the Bureau of Indian Affairs.[389] The BIA would have the authority to reject any lease arrangements that doesn't conform to a reservation's Tribal Implementation Plan (TIP).

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[387] *See e.g.,* Babbitt Ford v. Navajo Tribes, 710 F.2d 587 (9th Cir. 1983), where the court held that a tribe can stipulate the limit of its immunity waiver; and Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992), holding that a tribe can contract for the waiver of some portion of its immunity.

[388] Conceivably, even though the permits were being granted in the form of a contract, the EPA would still have review and veto authority under 42 U.S.C. § 7661d.

[389] 25 U.S.C. § 415, Lease, Sale, or Surrender of Allotted or Unallotted Lands.

F. Colorado's Approach

The State of Colorado and Southern Ute Tribe are undertaking a course that will likely eliminate CAA jurisdictional disputes and the negative consequence of tribal sovereign immunity. The Southern Ute reservation is textbook example of post-Reorganization mixed jurisdictions, consisting of more than 670,000 acres within an area of mixed state-tribal jurisdictions resembling a patchwork quilt. Both state and tribal officials recognized the legal and practical difficulties of attempting to administer the CAA within the reservation. As a solution, the two jurisdictions are undergoing a process of establishing joint administration of the CAA.[390]

As planned, all lands within the recognized borders of the Southern Ute reservation, both tribal and non-tribal, will be regulated by a single commission.[391] This regulatory commission will be independent of both state and tribal governments.[392] The commission will consist of three members appointed by the Southern Ute Tribe and three appointed by the state governor. Commission decisions will require a majority vote. Commission authority includes the power to promulgate rules and regulations, establish rule-making procedures, approve air quality planning for the regulated region, conduct public hearings, approve and adopt fees, review emission

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[390] The information was derived in an interview with Mr. Dave Ouimette of the Colorado Air Pollution Control Division, (303) 692-3178. Mr Ouimette explained that the state has already passed the necessary legislation for joint CAA management (Colo. Rev. Stat. § 24-62-101) and establishment of the regulatory commission (Colo. Rev. Stat. § 25-7-1301-1309) and all that is needed to finalize the program is for EPA to grant the tribe CAA regulatory authority.

[391] Colo. Rev. Stat. § 25-7-1301 (2000)

[392] Colo. Rev. Stat. § 24-62-101, Art. VII

inventories and review enforcement actions.[393] The Southern Ute Tribe will be responsible for routine administration and civil enforcement of the commission's air quality program, exercising this authority over both tribal and non-tribal areas. The EPA will undertake any criminal enforcement action.[394]

The agreement specifically recognizes the Southern Ute Tribe's sovereignty and the tribe's immunity from civil action.[395] Yet the agreement provides a means for affected private citizens to challenge regulatory action and decisions. As provided in the agreement, all final commission decisions are subject to review in federal district court. All tribal civil enforcement actions require commission review and approval.[396] This process neatly allows private individuals the right to challenge regulatory policy and practice, without the Southern Ute Tribe having to waive its sovereign immunity.

G. Conclusion: A Need to Re-Think the Intended Course

For the last half of this century, the federal government has demonstrated its commitment to support Indian tribal self-determination and advancement. But tribes will need the resources to undertake the function expected of modern governments. Outside commercial development could provide the needed capital. The location and vast amount of undeveloped tribal land should serve tribes in attracting commercial development preferential to reservation. But the

[393] Colo. Rev. Stat. § 25-7-1304 (2000)

[394] Colo. Rev. Stat. § 24-62-101, Art. X

[395] Colo. Rev. Stat. § 24-62-101, Art. IV

[396] Colo. Rev. Stat. § 24-62-101, Art. X

uncertainty of regulatory authority and rigid application of sovereign immunity will only discourage such development.[397] The commercial world seeks certainty or at least predictability, and commerce achieves certainty with an established system of rules enforced justly. The need for certainty is especially true with regard to environmental compliance. Modern commercial undertakings are greatly affected by environmental requirements, especially those of the CAA, which can mandate the use of specific (and often expensive) equipment and procedures to meet regional air emission standards. The private sector isn't likely to consider making expensive investments in a region where regulatory jurisdiction is uncertain and hotly contested, and where it has no recourse to challenge mistaken or capricious regulatory decisions.

Based on the level of opposition already generated by EPA's intended course, both the Agency and tribal governments can expect considerable resistance to their attempt to apply the new CAA regulations. Unless the EPA changes it's position and follows a course conforming with the *Montana* principals, both the Agency and tribes will be embroiled in unnecessary jurisdictional challenges they are not likely to win.

While the EPA is correct in its assessment that CAA citizen suits are not applicable to tribal regulatory agencies, tribal governments should consider departing from their usual practice of asserting immunity at every indication of challenge. With Congress willing to allow the Native American community increased self-determination, tribal governments would be wise to carefully consider how they use their new authority. If the past has taught Native Americans

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[397] See Brian C. Lake's *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, Colum. Bus. L. Rev. 87 (1996). His focus is on the immunity afforded tribal-owned companies, which have the same immunity as does the actual tribal government. He concludes that the application of the immunity bar has resulted in off-reservation companies being very hesitant to either engage in activities with or invest in reservation ventures. He believes this is one of the primary reasons reservations have not experienced level of economic development on par with their neighbors.

anything, it's the uncertainty of congressional support—and Congress goes the way of public opinion. Public opinion will be fashioned by how tribal governments exercise their environmental regulatory authority. A way to ensure favorable public opinion is for tribes to avoid indefensible jurisdictional disputes over land that has long lost its tribal character, and to exercise their new authority in a manner consistent with national expectations of fair play and due process.

The Colorado approach offers an appealing solution, one that relatively simple and very workable, and having the added attraction of not requiring a compromise of sovereign claim or relinquishment of sovereign protection. Perhaps more important, Colorado's planned course of action conveys political sophistication and an appreciation for the obligation to judiciously apply the powers of government. Hopefully, this joint effort will convince Congress to continue its policy of granting ever-increasing control over their people and lands.