No. 11-1307

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of a Final Rule
of the United States Environmental Protection Agency

BRIEF OF THE PETITIONER

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ORAL ARGUMENT REQUESTED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici: The parties, intervenors, and *amici* in this court are as follows:

The Petitioner is the Oklahoma Department of Environmental Quality.

The Respondent is the United States Environmental Protection Agency.

The Intervenors are (1) the Navajo Nation, and (2) the Tribal Intervenors Group, which consists of the Shakopee Mdewakanton Sioux Community, the Red Lake Band of Chippewa, and the United South & Eastern Tribes, Inc.

As of the date of this filing, no *amici curiae* have appeared in this case.

B. Rulings Under Review: This case concerns review of the United States Environmental Protection Agency's final rule entitled "Review of New Sources and Modifications in Indian County" published in the Federal Register on July 1, 2011, at 76 Fed. Reg. 38,748 (the "NSR Rule"). Administrative Record[1] EPA-HQ-OAR-2003-0076-0154.[2]

C. Related Cases: On August 30, 2011, the American Petroleum Institute and the Independent Petroleum Association of America filed their Petition

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[1] Pursuant to Fed R. App. P. 30 and D.C. Cir. Rule 30, the Parties will be filing a Joint Deferred Appendix. ODEQ thus submits 6 copies of this brief with citations to the original record. When ODEQ serves and files its brief in final form, ODEQ will insert references to the Appendix. *See* Fed. R. App. P. 30(c); D.C. Cir. Rule 31.

[2] Hereinafter, all references to the Final NSR Rule in this Brief identify the specific Federal Register citations.

for Review with this Court seeking review of the NSR Rule. That Petition was assigned Case No. 11-1309. On August 31, 2011, this Court entered its Order (Doc. 1327044) consolidating this case with Case No. 11-1309. Subsequently, on February 15, 2012, the Court entered its Order (Doc. 1358454) holding the consolidated cases in abeyance until further order of the Court. On December 27, 2012, the Court entered its Order (Doc. 1412194) terminating the consolidation of the two cases, restoring this case to the Court's active docket, and directing that Case No. 11-1309 remain held in abeyance pending further order of the Court.

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: */s/ Lynn H. Slade*
Lynn H. Slade

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GLOSSARY

CAA	Clean Air Act, 42 U.S.C. §§ 7401 – 7671q
EPA	United States Environmental Protection Agency
Final TAR	Tribal Authority Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998) (codified in 40 C.F.R. §§ 35.105, 35.205, 35.210, 35.215, 35.220, & 49.1 through 49.11)
FIP	Federal implementation plan
NAAQS	National ambient air quality standards
NSR Rule	"Review of New Sources and Modifications in Indian country," 76 Fed. Reg. 38, 748 (July 1, 2011)
ODEQ	Oklahoma Department of Environmental Quality
PSD	Prevention of significant deterioration
SIP	State implementation plan
TAS	Treatment as a State
TIP	Tribal implementation plan

STATEMENT OF JURISDICTION AND THE CASE

A. Statement of Jurisdiction

Respondent, the United States Environmental Protection Agency ("EPA"), promulgated the rule subject to review here, entitled "Review of New Sources and Modifications in Indian country" (the "NSR Rule"), pursuant to Sections 101, 110, 112, 114, 116, and 301 of the federal Clean Air Act (42 U.S.C. §§ 7401, 7410, 7412, 7414, 7416, & 7601). This Court has jurisdiction to review this rule-making pursuant to 42 U.S.C. § 7607(b):

> A petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 of this title, . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.

EPA published the NSR Rule in the Federal Register on July 1, 2011, at 76 Fed. Reg. 38,748. That publication recited that the NSR Rule "will be effective 60 days from the date of publication, *i.e.*, on August 30, 2011" and that "[u]nder section 307(b)(1) of the [Clean Air] Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by August 30, 2011." *Id.* at 38,788. Petitioner Oklahoma Department of Environmental Quality ("ODEQ") timely filed its Petition for Review with this Court on August 29, 2011.

B. Statement of the Case

1. State and federal roles under the federal Clean Air Act:

The Clean Air Act, 42 U.S.C. §§ 7401- 7671q ("CAA" or the "Act") as amended in 1970 and 1977, created "an intergovernmental partnership to regulate air quality in the United States." *Michigan v. Envtl. Prot. Agency*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) ("*Michigan II*"); *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990) (The CAA makes "the States and the Federal Government partners in the struggle against air pollution."). Among other things, the 1970 CAA Amendments directed that the EPA "publish proposed regulations describing national quality standards for the 'ambient air,' which is the statute's term for the outdoor air used by the general public. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 65 (1975). In the 1970 Amendments, Section 107 of the CAA imposed the responsibility for meeting national ambient air quality standards ("NAAQS") squarely upon the individual states:

> Each State shall have the primary responsibility for assuring air quality within ***the entire geographic area comprising such State*** by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a)(emphasis added); *see also Train,* 421 U.S. at 65 ("Within nine months after the Agency's promulgation of primary and secondary air quality

standards, each of the 50 states was required to submit to the Agency a plan designed to implement and maintain such standards within its boundaries."); *Michigan v. U.S. Envtl. Prot. Agency*, 213 F.3d 663, 671 (D.C. Cir. 2000) ("*Michigan I*") ("States have the primary responsibility to attain and maintain NAAQS within their borders.").

2. State vs. Federal implementation plans:

CAA Section 110, 42 U.S.C. § 7410, governs "the interplay between the states and EPA with respect to formulation and approval of" state implementation plans ("SIPs"). *Virginia v. Envtl. Prot. Agency*, 108 F.3d 1397, 1406 (D.C. Cir. 1997). Under Section 110, each SIP must be adopted by the State "after reasonable notice and public hearing." 42 U.S.C. § 7410(a)(2). SIPs must contain, among other elements, "enforceable emission limitations and other control measures" necessary to meet the applicable requirements of the CAA, a "program of enforcement" of those emission limitations and control measures, and "necessary assurances that the State . . . will have adequate personnel, funding, and authority under State (and as appropriate, local) law" to carry out the SIP. *Id.* § 7410(a)(2)(e)(i). Within 60 days of the EPA Administrator's receipt of a SIP, the Administrator must determine whether the SIP satisfies the minimum statutory criteria and is thus complete. Within twelve months after a completeness determination, EPA must either grant the SIP (i) full approval or disapproval based

on whether the SIP meets the applicable requirements of the CAA, (ii) partial approval (subject to full compliance), or (iii) conditional approval. *Id.* § 7410(k)(2)-(4).

The Act limits the situations under which EPA may issue a federal implementation plan ("FIP") in lieu of a SIP. Specifically, Section 110(c), 42 U.S.C. § 7410(c), directs that the EPA Administrator may issue a FIP in lieu of a SIP ***only*** after the Administrator

> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum [statutory] criteria . . . , or
>
> (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1); *see also Train*, 421 U.S. at 79 (EPA "may devise and promulgate a specific plan of its own ***only if*** a State fails to submit an implementation plan which satisfies" the statutory standards. (emphasis added)). The 1970 CAA amendments increased federal authority and broadened EPA's role, "but that overarching role is in setting standards, not in implementation." *Michigan II,* 268 F.3d at 1083. Thus, the 1970 amendments to the CAA expressly preserved the principle that "[e]ach State shall have the primary responsibility for

assuring air quality ***within the entire geographic area comprising such State***. . . ." 42 U.S.C. § 7407(a) (emphasis added); *see also Train*, 421 U.S. at 78 (EPA "is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emissions limitations which are necessary if the national standards it has set are to be met."); *Michigan II*, 268 F.3d at 1082 (EPA "agree[s] that under the regime Congress has created in the Clean Air Act, the states have primary responsibility for ensuring that ambient air meets federally-established standards.").

3. Tribal authority and tribal implementation plans:

The CAA's "model of cooperative federalism" "assigns air quality protection responsibilities between the federal government and the states, but it does not provide a role for American Indian tribes." Jill E. Grant, "Implementation of Clean Air Act Programs by American Indian Tribes," in THE CLEAN AIR ACT HANDBOOK 619 (Robert J. Martineau, Jr. & David P. Novello eds. 2004). In the 1990 amendments to the CAA, however, Congress first provided a role for tribes, authorizing the EPA Administrator to "treat Indian tribes as States" under the CAA. 42 U.S.C. § 7601(d)(1)(A). Under those amendments, the Administrator may treat a Tribe as a State **only** if:

> (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 [the Act] and all applicable regulations.

Id. § 7601(d)(2) (emphasis added). The 1990 amendments also addressed EPA's review of tribal implementation plans ("TIPs").

> If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title.

Id. § 7410(o) (emphasis added).

42 U.S.C. § 7601(d) authorizes EPA to delegate program authority to a Tribe outside reservation boundaries only if the applicant Tribe has demonstrated the non-reservation lands are "other areas within the tribe's jurisdiction," as required by Section 7601(d)(1)(B). *See also Ariz. Pub. Serv. Co. v. Envtl. Prot. Agency*, 211 F.3d 1280, 1294-95 (D.C. Cir. 2000) (approving EPA's interpretation that "***so long as a tribe demonstrates inherent jurisdiction over non-reservation areas***, it may issue redesignations and TIPs for those lands. In other words, although tribes do not have express delegated authority to issue redesignations and TIPs for non-

reservation areas, neither does the Act bar tribes from acting on a case-by-case basis ***pursuant to demonstrated inherent power***." (emphasis added)). Neither the term "Indian country," nor reference to 18 U.S.C. § 1151, appear in the CAA.

4. The NSR Rule:

The NSR Rule establishes a FIP, effective August 30, 2011, containing two sets of regulations applicable to any land the federal criminal code defines as "Indian country." "The first rule applies to new and modified minor stationary sources (minor sources) and to minor modifications at existing major stationary sources (major sources) throughout Indian country." 76 Fed. Reg. at 38,748. The second rule, the nonattainment major NSR rule, "applies to new and modified major sources in areas of Indian country that are designated as not attaining the National Ambient Air Quality Standards. . . ." *Id.* EPA asserts that the FIP applies to reservation lands, as well as to non-reservation lands, despite not having made any jurisdictional determinations as to tribal authority over those non-reservation lands.

In the Federal Register notice adopting the NSR Rule, EPA asserted it had authority to implement the FIP on all non-reservation lands nationally that may qualify as "Indian country" under 18 U.S.C. § 1151.[3] EPA did not determine any

[3] 18 U.S.C. § 1151 defines "Indian country" as

SIP to be inadequate and made no factual determinations regarding the character of any non-reservation lands. EPA justified that jurisdictional claim by avering that the CAA "provides us with broad authority to protect air resources throughout the Nation, including air resources in Indian country." 76 Fed. Reg. at 38,752.

> [S]ection 301(a) of the Act provides us broad authority to issue such regulations as are necessary to carry out the mandates of the Act. Several provisions of the Act call for Federal implementation of a program where, for example, a state or in this case a Tribe, fails to adopt a program or adopts an inadequate program.

Id. at 38,752. EPA also stated that it "believe[s] that in the context of programs under the Act, states generally lack the authority to regulate air quality in Indian country as defined in 18 U.S.C. 1151." *Id.* at 38,752 n.9. The Preamble indicates its conclusions apply to non-reservation "Indian country" lands, as well as reservation lands.

The CAA, does not employ the phrase "Indian country." Instead, the Act references tribal authority only in authorizing tribal redesignations under the

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> (a) all lands 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 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.

prevention of significant deterioration ("PSD") program limited to "[l]ands within the exterior boundaries of reservations," *see* 42 U.S.C. § 7474(c), and in authorizing TAS delegations to tribes only as to air resources (1) "within the exterior boundaries of the reservation," or (2) "other areas within the tribe's jurisdiction," *id.* § 7601(d)(2)(B). No other CAA statutory provisions address the allocation of delegated authority between States and Tribes.

Addressing the NRS Rules' effect on SIPs approved before the CAA specifically addressed tribal program authority, the Preamble stated:

> We interpret past approvals and delegations of NSR programs as not extending to Indian country unless the state has made an explicit demonstration of jurisdiction over Indian country and we have explicitly approved or delegated the state's program for such area. . . . In state NSR program approvals and delegations, we generally were not faced with state assertion of authority to regulate sources in Indian country. However, to the extent states or others may have interpreted our past approvals or delegations that were not based on explicit demonstrations of adequate authority and did not explicitly grant approval in Indian country as approvals to operate NSR programs in Indian country, we wish to clarify any such misunderstanding.

76 Fed. Reg. at 38,752 n.9. The NSR Rulemaking does not identify statutory language expressly or impliedly excluding non-reservation Indian country lands from the geographic scope of approved SIPs or vesting program authority over such lands in Tribes or EPA.

5. Oklahoma's Challenge:

Oklahoma is a State in which there are no remaining Indian reservations, yet thousands of "allotments" scattered across the State are held in trust by the United States for individual Indians or held in fee by individual Indians subject to federal restrictions on alienation. *See Osage Nation v. Irby,* 597 F.3d 1117, 1120, 1124-25 (10th Cir. 2010), *cert. denied,* ___ U.S. ___, 131 S. Ct. 3506 (2011). Accordingly, ODEQ challenges the NSR Rule only as it pertains to non-reservation "Indian country" lands, including allotments and dependent Indian communities, but not as to non-reservation tribal trust lands. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 511 (1991). By way of example, Oklahoma's SIP was approved no later than February, 1980. *See* 40 C.F.R. § 52.1922 (2012) ("With the exceptions set forth in this subpart, the Administrator approves Oklahoma's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below.").

The NSR Rule's implementation of a FIP covering all non-reservation Indian country lands presents the questions whether EPA committed legal error in concluding that SIPs approved under the 1970 and 1977 CAA amendments

somehow did not encompass such lands and whether EPA failed to make determinations required by law to implement a FIP as to such lands.

STATUTES AND REGULATIONS

In accordance with Rule 28 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, pertinent statutes and regulations are set forth in an addendum.

ISSUES PRESENTED FOR REVIEW

Whether, given that Congress has authorized tribal or federal regulation only for "air resources within the exterior boundaries of the reservation or other areas within the Tribe's jurisdiction," and as exemplified by application of the NSR Rule to Oklahoma,

1. EPA's determination that States lack program authority under approved SIPs over non-reservation "Indian country" lands is not in accordance with law;
2. EPA's adoption of a blanket federal implementation plan subjecting all lands defined as "Indian country" by 18 U.S.C. § 1151, including individual Indian allotments outside reservation boundaries, to federal regulation exceeds EPA's statutory jurisdiction, authority, or other limitations under the Clean Air Act, because Congress has not authorized a FIP over such lands;

3. EPA's adoption of a blanket federal implementation plan for all lands defined as "Indian country" by 18 U.S.C. § 1151, including individual Indian allotments outside reservation boundaries, without making determinations that specific State programs are inadequate, was done without observance of procedure required by the Clean Air Act?

SUMMARY OF ARGUMENT

The Clean Air Act, as amended in 1970, contemplated comprehensive, nationwide maintenance of national ambient air quality standards through State Implementation Plans administered by the fifty States. Each State would have primary responsibility for meeting the standards "within the entire geographic area comprising such State" 42 U.S.C. §7407(a). Congress mandated specific prerequisites for EPA's supplanting a State's SIP program with a federal program under a federal implementation plan. Not until 1977 did the Clean Air Act even mention Tribes. In Congress' only authorization for EPA to delegate program responsibilities to Tribes, it did so only with respect to lands within" reservations or "other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2).

Notwithstanding these limited authorities, the Rule challenged here, without making the Congressionally required determinations, divests States of SIP authority, and assumes FIP authority, over all lands characterized as "Indian country" under 18 U.S.C. §1151, including all such lands outside reservation

boundaries. There are no Indian reservations within Oklahoma; consequently, Oklahoma challenges the Rule only as applied to non-reservation lands.

The NSR Rule misinterprets the CAA and its own prior approval actions in contending that its approvals of State implementation plans, such as its approval of Oklahoma's SIP in 1980, did not cover non-reservation "Indian country" lands. Its contention that federal common law, and 18 U.S.C. § 1151, divest States of jurisdiction over such lands and recognize Tribal jurisdiction is unsupportable. *See Montana v. United States*, 45 U.S. 544, 565 (1982); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001). Consequently, EPA's premise that a "gap" existed requiring filling by CAA program implementation is unfounded.

Even if, however, a gap may exist, EPA failed to make the findings the CAA requires prerequisite to adoption of a federal program. *See* 42 U.S.C. § 7410(c). If it contends its statements in footnote 9 of the NFR Rule constitute such findings, they are legally erroneous and procedurally insufficient. *See Michigan II*, 268 F.3d at 1078. EPA's attempt to bypass the CAA's required state-by-state, or tribe-by-tribe, disapproval of implementation plans and directly implement a national FIP exceeds its authority under the Act. *See* 42 U.S.C. § 7410(c). As evidenced by the practical impossibility of EPA's administering a federal program on thousands of allotments of individually-owned tribal member allotments scattered across Oklahoma, best administered as part of a state-wide SIP program, the NSR Rule

exceeds EPA's authority under the Act, is arbitrary, capricious, and not in accordance with law.

STANDING

ODEQ is a state environmental regulatory agency with delegation of program authority from EPA to administer air quality programs in Oklahoma under the CAA. *See* 40 C.F.R. §§ 52.1920 to 52.1960. Under the CAA, Oklahoma has "primary responsibility for assuring air quality within the entire geographic area comprising" the State. 42 U.S.C. § 7407(a). ODEQ participated in the agency proceedings below, including submitting timely comments to EPA concerning the proposed rule on January 19, 2007 and March 20, 2007. *See* Administrative Record Case No. 11-1307, EPA-HQ-OAR-2003-0076-0046; EPA-HQ-OAR-2003-0076-0100.

For over 30 years, ODEQ has implemented and administered air quality programs throughout the State. EPA's NSR Rule will interfere with ODEQ's comprehensive administration of air quality programs throughout the State of Oklahoma because the NSR Rule will lead to inconsistent and checkerboarded regulatory authority over areas that EPA has not demonstrated fall outside State authority. The interests ODEQ seeks to protect are thus within the zone of interests protected by the CAA. Because the NSR Rule has a "substantial probability" of injuring it, ODEQ has standing to seek judicial review of that rule.

See Sierra Club v. Envtl. Prot. Agency, 292 F.3d 895, 898-99 (D.C. Cir. 2002); *Bennett v. Spear*, 520 U.S. 154, 168-70 (1997).

ARGUMENT

I. Standard of Review.

The Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D) ("APA"), and CAA Section 307(d)(9), 42 U.S.C. § 7607(d)(9), govern the review of EPA's adoption of the NSR Rule. Under the APA, the Court determines whether EPA's promulgation of the NSR Rule is invalid as arbitrary, capricious, or an abuse of discretion, 5 U.S.C. § 706(2)(A), in excess of legislative authority, *id.* § 706(2)(C), or procedurally defective, *id.* § 706(2)(D). Under CAA Section 307(d)(9), 42 U.S.C. § 7607(d)(9), the Court may reverse any action found to be

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

Accord Am. Petroleum Inst. v. U.S. Envtl. Prot. Agency, 52 F.3d 1113, 1119 (D.C. Cir. 1995). With regard to "arbitrary and capricious" review, the Court decides whether there has been a clear error of judgment by the agency and whether the agency action was based on a consideration of relevant factors. *Citizens to*

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("*Overton Park*"), *abrogated in part by Califano v. Sanders*, 430 U.S. 99 (1977) (abrogating *Overton Park* to the extent it recognized the APA as an independent grant of subject matter jurisdiction).

"If EPA lacks authority under the [CAA], then its action is plainly contrary to law." *Michigan II*, 268 F.3d at 1081. To determine whether the agency's action is contrary to law, the Court must first determine whether Congress has directly spoken to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If, on the other hand, the Court determines that Congress has not directly addressed the precise question, then the agency's statutory interpretation is entitled to deference only so long as the agency has reasonably interpreted an express or implied congressional delegation of authority. *Id.* at 843-44. When "Congress has not delegated authority to the agency to act beyond [the] statutory parameters, [a court] will not defer to [the agency's] interpretation of the Act." *Michigan II*, 268 F.3d at 1082.

II. EPA Exceeded Its Statutory Authority and Acted Contrary to Law in Decreeing that All Existing and Approved SIPs Do Not Cover Non-reservation "Indian country" Lands.

Contrary to both Congress' express direction that States "shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State," 42 U.S.C. § 7407(a), and the history of the CAA's authorizations for delegations to States and Tribes, the EPA's NSR Rule declares that EPA possesses blanket regulatory authority over air resources in any area that may fit 18 U.S.C. § 1151's definition of "Indian country." In the Preamble to the NSR Rule, EPA proclaims, in a footnote, that all existing and approved SIPs do not cover "Indian country" lands nationally, including all non-reservation Indian country lands. 76 Fed. Reg. at 38,752 n.9. As rationale for this usurpation of SIP authority, EPA posits that (1) "states generally lack the authority to regulate air quality in Indian country as defined by 18 U.S.C. § 1151," 76 Fed. Reg. at 38,752 n.9; (2) "the Act call[s] for Federal implementation of a program where, for example, a state ***or in this case a Tribe***, fails to adopt a program or adopts an inadequate program," *id.* at 38,752 (emphasis added); and (3) CAA "section 301(d)(4) authorized us to implement the Act in non-reservation areas of Indian country to fill any gap in program coverage . . . ." *Id.* at 38,753.

Whether or not parts of this syllogism may hold within reservation boundaries, EPA is wrong as a matter of law that States presumptively lack, and

Tribes presumptively have, jurisdiction over non-reservation Indian country lands, including the thousands of allotments scattered across Oklahoma. There is no "gap" in program coverage regarding non-reservation lands because SIPs generally include all areas within the geographic boundaries of the State, because a State presumptively has jurisdiction over non-reservation Indian country lands under federal common law, and because the CAA fails to reflect any intent to divest all States of air quality jurisdiction over non-reservation lands within the geographic boundaries of a SIP.

A. EPA Lacks Statutory Authority to Divest States of Regulatory Authority Over Geographic Areas They Regulate Under Approved SIPs.

Over thirty years ago, Congress enacted CAA Section 107, part of the 1970 CAA amendments, which imposed upon States the responsibility to develop, secure approval of, and implement SIPs appropriate for meeting NAAQS "within ***the entire geographic area comprising such State.***" 42 U.S.C. § 7407(a) (emphasis added). Each State was required to submit an implementation plan specifying the manner in which the NAAQS would be achieved and maintained within each air quality control region in such State. *Id.*; *Michigan I,* 213 F.3d at 671 ("States have the primary responsibility to attain and maintain NAAQS within their borders."). States submitted and secured approval of SIPs pursuant to that authority beginning in the early 1970s. Not until 1977 did the CAA even separately mention any Indian lands, and then only "reservation" lands and

redesignation of air quality for PSD purposes. *See infra* at p. 22. Thus, the CAA's statutory presumption was that a State had jurisdiction within its boundaries except with respect to redesignation of reservation lands by the governing tribal body.

It was not until the 1990 CAA amendments, twenty years after Congress authorized States to regulate throughout their boundaries, that Congress authorized EPA to delegate any sort of regulation on non-reservation Indian lands to Tribes. In the TAS provisions, Congress authorized a delegation to a Tribe over "other [non-reservation] lands ***within the tribe's jurisdiction***," provided the tribe can show inherent authority to regulate those lands. *See Ariz. Pub. Serv. Co.*, 211 F.3d at 1294-95. Nonetheless, the NSR Rule now advises that "[w]e interpret past approvals and delegations of NSR programs as not extending to Indian country unless the state has made an explicit demonstration of jurisdiction over Indian country and we have explicitly approved or delegated the state's program for such areas." 76 Fed. Reg. 38752 n.9. This interpretation is contrary to the statutory language and to the CAA's presumption of State jurisdiction.

EPA lacks statutory authority to restrict the geographic scope of existing SIPs through an *ex post facto* footnote in a rulemaking. In CAA Section 107, Congress unambiguously expressed its intent that SIPs cover all lands within a State's boundaries. The CAA requires a State to demonstrate its "authority under State (and as appropriate, local) law . . . ." 42 U.S.C. § 7410(a)(2)(E)(i). EPA

points to neither statutory text nor regulatory guidance requiring a specific demonstration of State authority over non-reservation "Indian country" lands. Under the Act, when EPA approved State-wide SIPs, the approval covered such lands unless EPA took affirmative steps specified in CAA Section 110(c), 42 U.S.C. § 7410(c). *See infra* Point III.

The legislative history of the 1970 Amendments demonstrates Congress' intent, not only to maintain State primacy in enforcing the standards set by EPA, but also to give each State authority within its boundaries to ensure contiguous national coverage. In the 1970 amendments, Congress was concerned that: "[u]nder present [prior] law, the Secretary is directed to establish air quality control regions but only a few such regions have been established . . . . Additionally, the proposed regions are not contiguous and, therefore, do not cover the entire United States." H.R. Rep. No. 91-1146, at 2 (1970). To accomplish its goal of "dividing the entire United States into contiguous air quality regions," *id.*, Congress specifically authorized each State to regulate "air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a).

Congress' supplanting of federal with State regulation over a majority of federal lands under the CAA's PSD provisions, enacted in 1977, further reflects Congress' intent that States regulate air quality to the full extent of their boundaries, authorizing States to redesignate certain federal lands within their

boundaries. 42 U.S.C. § 7474. Although the CAA designates certain federal lands as Class I areas, and those areas cannot be redesignated, all other federal areas are designated as Class II areas, unless they are redesignated by the State in which they are located. *See* 42 U.S.C. § 7472.

This legislative history underscores Congress' intent that States exercise regulatory authority over all areas within their boundaries, even over federal reservations, unless Congress expressly limits the delegation. The legislation established "a program in which State and local governments (not Federal agencies)" determine whether to redesignate based upon the State's evaluation of "multiple objectives" including "minimizing air pollution increases in clean air regions and permitting stable, long-term commercial, industrial, and energy developments." *See* H.R. Rep. No. 95-294, at 146 (1977), *reprinted in* Comm. on Env't and Pub. Works, 95th Cong., 4 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 2613 (U.S. Gov't Printing Office 1979).

The 1977 amendments to the CAA also addressed Indian lands, but only within reservation boundaries: "Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." Pub. L. 95-95, 91 Stat. 733, 735 (codified at 42 U.S.C. § 7474(c)). This provision thus confirms that a State's redesignation authority extends to all lands within its boundaries, including federal lands, unless

(1) the land is designated as a Class I area and cannot be redesiganted, or (2) the land is within the exterior boundaries of a Tribe's recognized reservation; the airshed over non-reservation lands, whether or not classifiable as "Indian country," could only be redesignated by the State. This limitation is reinforced by 42 U.S.C. § 7474(e), which governs resolution of disputes between States and tribes, and is limited to air quality effects "within the affected State or tribal reservation."

It was not until the 1990 amendments that Congress provided that a Tribe could be treated as a State for purposes of the CAA. Even then, Congress authorized EPA to delegate program authority to a Tribe outside reservation boundaries only if the applicant Tribe has demonstrated the non-reservation lands are "other areas within the tribe's jurisdiction," as required by CAA Section 501(d)(2)(B), 42 U.S.C. § 7601(d)(2)(B). *See Ariz. Pub. Serv. Co.*, 211 F.3d at 1294-95 (approving EPA's interpretation that "***so long as a tribe demonstrates inherent jurisdiction over non-reservation areas***, it may issue redesignations and TIPs for those lands. In other words, although tribes do not have express delegated authority to issue redesignations and TIPs for nonreservation areas, neither does the Act bar tribes from acting on a case-by-case basis ***pursuant to demonstrated inherent sovereign power***." (emphasis added)). Significantly, when Congress amended the CAA in 1990 and added the TAS provisions, Congress did not amend CAA Section 107(a), 42 U.S.C. § 7407(a). Instead, Congress preserved the

direction that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ." *Id.*

In the NSR Rule, EPA has ignored both clear Congressional intent and the history of the CAA by simply declaring that it, and not the States, possesses air quality regulatory jurisdiction over off-reservation lands that may fit the definition of 18 U.S.C. § 1151.

B. Federal Common Law Refutes EPA's Premise That States Presumptively Lack Jurisdiction Over Non-Reservation "Indian country" Lands.

The fundamental premise underlying the NSR Rule's usurpation of State regulatory authority over non-reservation "Indian country lands" is EPA's declared presumption that States lack regulatory authority over all such lands. Because the Act contains no provisions supporting any intent to divest States automatically of non-reservation authority, EPA's conclusion may only be supported if compelled by federal common law defining the jurisdiction of States and Tribes over such lands. Under federal common law, the EPA's presumption is unsupportable as applied to non-reservation Indian country lands as demonstrated by (1) the Supreme Court's cases allocating jurisdiction between States and Tribes; and (2) the Court's rejection of the premise that federal criminal law, 18 U.S.C. § 1151, vests primary jurisdiction in Tribes and the federal government.

1. Federal Common Law Does Not Support EPA's Premise That State's Lack, and Tribes Have Jurisdiction Over Non-Reservation "Indian country" Lands.

Far from establishing an ouster of State jurisdiction, Supreme Court precedent makes clear that EPA abused its discretion in erecting a presumption that non-reservation individual allotments are not subject to State jurisdiction, but are "other areas within the tribe's jurisdiction" for purposes of the CAA. 42 U.S.C. § 7601(d)(2)(B). To the contrary, the Supreme Court's seminal decision in *Montana v. United States*, 450 U.S. 544, 565 (1981), established a "general rule" that, "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation," much less in off-reservation Indian country. *Strate v. A-1 Contractors*, 520 U.S. 438, 445–46 (1997). The Supreme Court has rejected tribal jurisdiction in four cases applying *Montana* to ***on-reservation conduct***; those case authoritatively rebut EPA's contention that tribes, and not States, presumptively have jurisdiction over ***non-reservation*** air pollution, where tribal authority under federal common law is far more attenuated.

In *Strate*, the Court ruled that a tribal court lacked jurisdiction over an automobile accident between a tribal member and a non-member within the exterior boundaries of a reservation. Applying *Montana*'s, "general rule," the *Strate* Court held that the tribal court lacked jurisdiction over the non-member

unless one of the two exceptions to *Montana*'s "general rule" precluding tribal jurisdiction was demonstrated. Those exceptions are: first, that "[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;" and second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 520 U.S. at 446. The Court found that the tribe had "retained no gatekeeping right" as to the site of the highway accident and thus could not "assert a landowner's right to occupy and exclude," *id.* at 456, which, in turn, implied the loss of regulatory jurisdiction over the use of the land by others. Hence, the tribal court plaintiff "may pursue her case . . . in the state forum open to all who sustain injuries on North Dakota's highways." *Id.* at 460. Similarly, the non-reservation allotted lands at issue here, which EPA has failed to identify, are under the control of the individual Indian owners, not the applicable Tribe, and the Tribe retains no landowner's right to occupy or exclude.

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001), reinforces the breadth of the *Montana* presumption and directly refutes EPA's contention that tribes may be presumed to have regulatory jurisdiction throughout "Indian country," as

defined by 18 U.S.C. § 1151. The Court held that the Navajo Nation lacked jurisdiction to impose a hotel occupancy tax upon non-members staying in a hotel located on fee lands within the Nation's reservation, *i.e.*, land undisputedly within "Indian country" under 18 U.S.C. § 1151. Tribal inherent sovereignty is "limited to 'their members and their territory.'" *Atkinson Trading Co.,* 532 U.S. at 650. Explaining that an "Indian tribe's sovereign power to tax . . . reaches no further than tribal land," *id.* at 653, the *Atkinson* Court ruled that the tribe lacked authority to impose its tax on activity occurring on fee land located within the reservation. *Id.* at 659. As ODEQ develops under Point II.B.2, below, the *Atkinson* Court also expressly rejected the Navajo Nation's contention, similar to EPA's rationale for the NSR Rule, *see* 76 Fed. Reg. 38,752 n.9, that it had requisite jurisdiction because the reservation lands were unquestionably "Indian country" under Section 1151. *Atkinson*, 532 U.S. at 653 n.5.

Nevada v. Hicks, 533 U.S. 353 (2001), and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), further broadened the *Montana* presumption of State jurisdiction. *Hicks* rejected tribal court jurisdiction over a tribal member's tort claims arising from a state game warden's service of a warrant at the tribal member's home on trust land on a reservation. 533 U.S. at 355-58. Under *Hicks,* "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Id.* at 360. Plainly, then, individual

ownership of a non-reservation allotment by a tribal member outside reservation boundaries does not divest State authority or support assertion of tribal regulatory jurisdiction. Similarly, *Plains Commerce Bank* rejected tribal jurisdiction over non-members doing business on a reservation, observing that the "sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the ***land held by the tribe*** and on ***tribal members within the reservation***." *Id.* at 327 (emphasis added) (internal quotation marks and citation omitted).

Directly negating EPA's attempted blanket divestiture of State jurisdiction is *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). The Court's multiple opinions affirmed State authority to zone in an open area of the reservation, which was predominately populated by non-members, while limiting tribal zoning to the "closed" portion of the reservation. *Compare* 492 U.S. at 443, *with* 492 U.S. at 447 (Stevens, J., plurality opinion). *Brendale*'s dispositive opinions relied substantially on whether the Tribes retained a power to exclude, a power generally, if not universally, absent in non-reservation areas. Moreover, *Brendale*'s recognition of the necessity of the case-by-case analysis of jurisdiction, even as to activities on a recognized reservation, underscores that federal common law does not countenance EPA's categorical presumption that States lack, and tribes have, authority over all non-reservation "Indian country"

lands. While non-reservation "Indian country" lands often are Indian-owned, regulatory jurisdiction, to be effective, must extend to non-members.

The Court also has recognized a broad State regulatory role in Indian country. Even with respect to on-reservation lands, the Court has affirmed State taxation of production from on-reservation oil and gas leases of tribal lands. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (federal law "does not preempt New Mexico's oil and gas severance taxes"); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.").

State jurisdiction over non-members, even within reservation boundaries, is not *per se* ousted by a Tribe's jurisdiction; instead, when a State asserts jurisdiction over non-member conduct on-reservation, the Court has directed that a reviewing court consider "the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Here, Congress has been willing to infer that a Tribe has regulatory jurisdiction over reservation lands, but has required a Tribe to show that non-reservation lands over which it seeks a delegation are "other areas within

the tribe's jurisdiction." 42 § 7601(d)(2). Whether the "other areas" are "within the tribe's jurisdiction" as opposed to the State's jurisdiction can only be determined after the inquiry required by *Montana* and *Bracker*, an inquiry that EPA failed to undertake.

The principles outlined above, concerning State regulation of on-reservation conduct, have greater force when applied to regulation of off-reservation conduct. As the Supreme Court has held: "State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation." *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). In *Kake*, the Court upheld the State of Alaska's regulatory authority over Indian communities' use of fish-traps in off-reservation waters, recognizing that "off-reservation hunting and fishing rights have been held subject to state regulation." *Id.* at 75. The Court in *Mescalero Apache Tribe*, 411 U.S. at 148-49, read its prior precedent, including *Kake*, as holding: "Absent express federal law to the contrary, Indian going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." In reaching its conclusion that the State of New Mexico could impose certain taxes on the Tribe's ski resort, which was operated on off-reservation lands, the Court reiterated that "off-reservation activities are within the reach of state law." *Id.* at 153. Similarly, this Court recently relied on both *Kake* and *Mescalero Apache*, among other cases, to

conclude that the National Labor Relations Act governed employment at an on-reservation casino that employed non-Indians. *San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Bd.*, 475 F.3d 1306, 1308 (D.C. Cir. 2007).

This precedent establishes the presumption that States regulating under approved SIPs, generally, and Oklahoma specifically, exercise regulatory jurisdiction over air emission sources on the non-reservation individual allotments scattered throughout the State, and not the Tribes to which the non-reservation allotments pertain. Although Tribes may, under isolated circumstances, own fractional interests in allotments, individual allotments are presumptively owned by individual "allottees," and not the applicable Tribe. *See Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 375 (1968) (allottee has power to sue for damages to allotted interests); 25 U.S.C. § 396 (oil and gas leasing of allotted lands by allotted owners); 25 C.F.R. § 169.3(b) (rights-of-way granted with consent of individual allotted owners). The Tribe ordinarily holds no landowner's right to occupy and exclude on such allotments.

Regulation of air quality on scattered, off-reservation allotments cannot be presumed to vest regulatory jurisdiction in Tribes under the "second exception," to *Montana*'s main rule. In *Strate*, the Supreme Court cautioned that, if "[r]ead in isolation," *Montana*'s second exception "can be misperceived." 520 U.S. at 458. To qualify, even on reservation, the impact must be "demonstrably serious and

must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Brendale*, 492 U.S. at 431. In *Plains Commerce Bank*, the Court stated the second exception applies only when "necessary to avert catastrophic consequences." 554 U.S. at 341.

EPA did not develop a factual record to support its presumption as to non-reservation lands. However, the records in cases addressing non-reservation Indian country landholdings and demographics reflect such areas will predominately be populated by nonmembers of the applicable Tribe, and landholdings will be predominately nonmember. *See, e.g., Hagen v. Utah,* 510 U.S. 399, 421 (1994) (population of non-reservation area 85% non-Indian); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-57 (1998) (less that 10% of lands "are in Indian hands" and "non-Indians constitute over two-thirds of the population" in the relevant area); *Osage Nation*, 597 F.3d at 1127 (approximately 231,000 out of 1.4 million acres remained in restricted ownership; tribal members comprise approximately 3.5% of population of former reservation area). Given the expected demographics in non-reservation areas that include "Indian country" lands, and given that many pollution sources can be predicted to be operated by nonmembers, air emitting activities on the likely scattered allotments probably will consist of nonmember activities primarily impacting neighboring nonmember landowners.

The Supreme Court has declared that when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. . . ." *Hicks*, 533 U.S. at 362. The State's interest carries even greater weight where the activities are occurring on scattered, individually-owned non-reservation allotments, and its interest in managing and maintaining a coherent, comprehensive air quality program across the State is compelling. Accordingly, the NSR Rule's presumption that States lack, and tribes have, regulatory jurisdiction over air emission sources on individual non-reservation allotments is arbitrary, capricious and not in accordance with law and must be set aside.

2. EPA's Premise that 18 U.S.C. § 1151 Establishes Tribal Primacy and Ousts State Regulation Disregards Contradictory, and Controlling, Authority.

In rejecting tribal taxation over on-reservation commercial activity, the Supreme Court in *Atkinson* expressly rejected the Navajo Nation's contention, that it had requisite jurisdiction because the reservation lands were unquestionably "Indian country" under 18 U.S.C. 18 U.S.C. § 1151 ("Section 1151"). *Atkinson*, 532 U.S. at 653 n.5. Section 1151 "is concerned, on its face, only with criminal jurisdiction," although earlier cases had "recognized that it generally applies as well to questions of civil jurisdiction." *Id.* (quoting *DeCoteau v. Dist. Cnty. Ct.*,

420 U.S. 425, 427 n.2 (1975)).[4] However, the statute did not support Navajo Nation jurisdiction because "we do not here deal with a claim of statutorily conferred power. Section 1151 simply does not address an Indian Tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson*, 532 U.S. at 635 n.5. *Id.* The same rationale would apply to non-reservation lands, described by Section 1151 as "Indian country," including non-reservation allotments. Section 1151 neither divests States of jurisdiction over non-reservation Indian country nor vests such jurisdiction in Tribes. EPA committed substantial legal error in premising its claims to regulatory jurisdiction under the NSR Rule on Section 1151, in the total absence of statutory direction to that effect.

Given federal common law and the Supreme Court's guidance in *Atkinson*, EPA erred in premising its divestiture of State SIP regulatory authority on the definition of "Indian country" contained in Section 1151. In contrast to other statutes, such as 18 U.S.C. § 1161, which expressly delegated liquor-regulatory

[4] The *Atkinson* Court cited earlier cases that had declined to uphold tribal jurisdiction; hence the statements arguably are *dictum*. The Preamble to the NSR Rule cites *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), and *DeCoteau*, 420 U.S. at 427 n.2, but fails to cite *Atkinson*'s holding on this crucial point. Similarly discredited is EPA's reliance on *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224 (10th Cir. 2000). In the *HRI* litigation, EPA made a fact-specific determination that the non-reservation lands were "Indian county." *See Hydro Resources, Inc. v. Envtl. Prot. Agency*, 562 F.3d 1249, 1258 (10th Cir. 2009), not the categorical, nationwide determination here. That determination, however, was set aside as incorrect by the *en banc* Tenth Circuit. *Hydro Resources, Inc. v. Envtl. Prot. Agency*, 608 F.3d 1131, 1166 (10th Cir. 2010) (*en banc*), vacating EPA's final land status determination.

authority to tribes within Indian country, *see Rice v. Rehner*, 463 U.S. 713, 728-29 (1983), the CAA neither expressly confers nor recognizes authority of tribes over non-reservation "Indian country" lands and activities. Neither federal common law nor Section 1151 address whether any Tribe has inherent or retained sovereign authority to regulate air emission sources located on non-reservation individual allotments or any other non-reservation area. EPA committed plain legal error in concluding it supported the NSR Rule.

C. The NSR Rule Conflicts with Prior EPA and Judicial Interpretations of CAA's Indian Lands Provisions.

The NSR Rule conflicts with repeated EPA conclusions and judicial decisions that recognize the 1990 Amendments to the CAA do not recognize tribal authority over non-reservation Indian country lands. EPA's statements regarding the Tribal Authority Rule repeatedly acknowledged that the CAA does not presumptively shift regulatory authority over non-reservation "Indian country" lands or sources from States to Tribes. *See, e.g.*, 63 Fed. Reg. 7,254, 7,259 (Feb. 12, 1998) ("Final TAR") ("Congress has not delegated authority to otherwise eligible tribes to implement CAA programs over non-reservation areas as it has done for reservation areas."); 59 Fed. Reg. 43,955, 43,960 (Aug. 25, 1994) ("Proposed TAR") ("EPA is proposing to interpret the CAA as providing no blanket grant of Federal authority for such areas."). Instead, EPA has recognized that "a tribe seeking to implement a CAA program over non-reservation areas may

do so only if it has authority over such areas under general principles of federal Indian law." 63 Fed. Reg. at 7,259.

More specifically, EPA

> will require a Tribe to demonstrate its inherent authority over any areas outside of the exterior boundaries of the reservation before EPA will approve a Tribal program covering such areas. Where a Tribe seeks to develop and administer an air program on off-reservation lands, the Tribal submittal must be ***accompanied by appropriate legal and factual information which supports its inherent authority*** to regulate emission sources located on such lands.

59 Fed. Reg. 43,956, 43,962-63 (Aug. 25, 1994) (emphasis added); *see also* 63 Fed. Reg. 7,254, 7,259 (Feb. 12, 1998) ("the CAA authorizes a tribe to implement a program in non-reservations areas only if it can demonstrate authority over such areas under federal Indian law."). EPA's recognition that it may not grant TAS air quality program authorization over non-reservation individual allotments unless the applicant Tribe demonstrates that it has inherent jurisdiction over such lands is consistent with controlling federal law and unambiguously impeaches EPA's current assertion that the CAA vests it with authority to make the same determination nationally.

EPA's statements to this Court, and the Court's opinion in *Arizona Public Service Company,* further demonstrate the error in EPA's current position. In *Arizona Public Service Company*, this Court upheld EPA's interpretation in the

Final TAR that the CAA provided a "delegation of federal authority to regulate air quality" to tribes "within the boundaries of reservations, regardless of whether the land is owned by the tribes," but that tribes would only be allowed to regulate in non-reservation areas if the Tribe could demonstrate inherent authority to regulate such land. 211 F.3d at 1285, 1294-95. This principle stands in stark contrast to EPA's unsupported assertion that EPA, purportedly standing in a Tribe's shoes, *see* 76 Fed. Reg. at 38,752 (EPA can implement a federal program when "a state ***or in this case a Tribe***, fails to adopt a program or adopts an inadequate program," (emphasis added)), can assert jurisdiction over allotted lands without any demonstration of inherent tribal jurisdiction over those areas.

Neither the August 21, 2006 notice of proposed rulemaking, 71 Fed. Reg. 48,696, nor the NSR Rule provides any evidence that any specific Tribe has (much less that all Tribes have) demonstrated inherent authority to regulate all areas of non-reservation "Indian country." Here, just as under the Final TAR, such a finding must be made on a case-by-case basis. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1294-95 ("Although tribes do not have express delegated authority to issue redesignations and TIPs for non-reservation areas, neither does the Act bar tribes from acting on a case-by-case basis pursuant to demonstrated inherent sovereign power.").

The premise underlying the NSR Rule's divestiture of State jurisdiction over non-reservation Indian country lands, that States lack, and Tribes have, authority over such lands misreads the scope of SIPs under the CAA, misinterprets federal common law, and conflicts with EPA's and this Court's prior conclusions regarding jurisdiction over such lands. EPA's conclusion to that effect is arbitrary, capricious, and not in accordance with law.

III. EPA's Adoption of a Nationwide Federal Implementation Plan as to Non-Reservation Lands Without Following Statutorily Required Procedures Exceeds its Authority Under the CAA.

Congress has clearly identified the only circumstances under which EPA has authority to depart from its "standard setting" duty and take on a direct regulatory role. *See Chevron,* 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") Those circumstances are not present here. As a federal agency, EPA "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan II,* 268 F.3d at 1081. In CAA Section 110(c), 42 U.S.C. § 7410(c), Congress articulated the only bases upon which EPA may promulgate a FIP: EPA may do so if, and only if, the Administrator (1) "finds that a State has failed to make a required submission" of an implementation plan, or (2) "finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria

established" under the CAA, or (3) "disapproves a State implementation plan submission in whole or in part." 42 U.S.C. § 7410(c)(1); *see also Train*, 421 U.S. at 79 (EPA "may devise and promulgate a specific plan of its own ***only if*** a State fails to submit an implementation plan which satisfies those standards." (emphasis added)). EPA has not made these required findings. Because a SIP covers all areas within the geographic boundaries of a State, 42 U.S.C. § 7407(a), and because States presumptively have authority across all areas of non-reservation Indian country, EPA's failure to make these findings requires that the NSR Rule be vacated.

A. EPA Is Not Entitled to Deference Because CAA Section 110(c) Expressly Limits Its Discretion to Promulgate a FIP.

Because none of CAA Section 110(c)'s prerequisites to implementation of a FIP are present, the NSR Rule's imposition of a FIP on all non-reservation Indian country lands exceeds EPA's authority under the Act. Neither the August 21, 2006 notice of proposed rulemaking, 71 Fed. Reg. 48,696, nor the final NSR Rule contains any finding by the Administrator (i) that any specific State or Tribe has failed to submit an implementation plan, (ii) that any specific state or tribal implementation plan fails to satisfy the minimum criteria established under 42 U.S.C. § 7410(k)(1)(A), or (iii) that any specific state or tribal implementation plan has been disapproved, in whole or in part. EPA has thus failed to satisfy any of the specific statutory prerequisites for the promulgation of a FIP.

EPA's generic assertion in footnote 9 of the preamble to the NSR Rule, 76 Fed. Reg. 38,752 n.9, that it now interprets "past approvals and delegations of NSR programs [to states] as not extending to Indian country," is erroneous, at least as to non-reservation lands. It misunderstands the scope of delegations to States with approved SIPs under CAA § 107(a), 42 U.S.C. § 7407(a), and misinterprets the federal common law governing jurisdiction in Indian country, *see* Point II.B, *infra*, and is not a disapproval of any specific implementation plan, either in whole or in part. EPA forgot this Court's guidance that it must make specific jurisdictional determinations and cannot claim jurisdiction for itself simply by referencing Section 1151's definition of "Indian country," a definition Congress declined to employ in the Act. *See Michigan II*, 268 F.3d at 1084.

This Court's decision in *Michigan II* compels invalidation of the NSR Rule as to non-reservation lands. In that case, the Court vacated EPA's regulations, which purported to authorize the agency to administer a federal operating permit program on lands as to which the "Indian country" status was "in question." The Court rejected EPA's nearly identical argument that, unless a State demonstrates "adequate authority" under 42 U.S.C. § 7661a(d)(1), EPA has the authority to implement a Title V program without first determining whether the disputed area is within the jurisdiction of a State or Tribe. *See Michigan II*, 268 F.3d at 1084. The Court focused on 42 U.S.C. §§ 7601(d) and 7661a granted EPA

> authority to 'promulgate, administer and enforce a [federal operating permit] program' for a state or tribe ***if, and only if,*** (1) the state or tribe fails to submit an operating program or (2) the operating program is disapproved by EPA or (3) EPA determines the state or tribe is not adequately administering and enforcing a program.

Michigan II, 268 F.3d at 1082 (emphasis in original). Accordingly, the Court ruled that, because "Congress has not delegated authority to the agency to act beyond these statutory parameters, we will not defer to EPA's interpretation of the Act as giving it the broader power to indefinitely run a federal operating permit program in the absence of the conditions set out" by the CAA. *Id.*

Because Congress did not expressly or impliedly delegate authority to EPA to implement a FIP except pursuant to the determinations required by CAA Section 110(c), 42 U.S.C. § 7410(c), this Court need not defer to EPA's present interpretation of the scope of its authority. The CAA gives EPA no residual authority to issue a FIP by claiming "broad authority to protect air resources throughout the Nation, including air resources in Indian country." *See* 76 Fed. Reg. at 38,752. This Court's decision in *Michigan II* is controlling and makes clear that EPA's NSR Rule is beyond EPA's statutory authority and thus contrary to law.

The *Michigan II* Court rejected EPA's argument that it should defer to EPA's decision under step two of *Chevron* "as a rule reasonably filling the gap left

by Congress." 268 F.3d at 1084-85. The Court also specifically rejected EPA's claim to "some overarching jurisdiction to implement federal programs" based upon "vague statements that the Act is 'national in scope,' that it is to 'protect and enhance the quality of the ***Nation's*** air resources' or that EPA has the authority to issue regulations necessary to implement the Act." *Id.* at 1083-84 (emphasis in original). The Court further clarified that EPA's "implementation role" is limited to either acting in the shoes of the State, in the absence of an approved state plan, or in the shoes of a Tribe (following 1990), but "[t]here are no intermediate grounds upon which EPA may indefinitely exercise jurisdiction." *Id.* at 1085. While the CAA "intended to create an overarching federal role in air pollution control policy," that "overarching role is in setting standards, not in implementation." *Id.* at 1083-84.

EPA "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area." *Id.* (quoting *Am. Petroleum Inst.*, 52 F.3d at 1119); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (no matter how serious the problem a federal agency seeks to address, "it may not exercise its authority in a manner inconsistent with the administrative structure that Congress enacted into law") (internal quotation marks and citation omitted). Here, as in *Michigan II*, the Court has "before had occasion

to remind EPA that its mission is not a roving commission to achieve pure air or any other laudable goal. . . . Commendable though these goals may be, they are not within EPA's portfolio unless the states and tribes fail to" act and the specific conditions of the CAA are therefore met. 268 F.3d at 1084. EPA's Preamble to its NSR Rule fares no better.

Numerous cases reflect this rule. *See Am. Petroleum Inst.*, 52 F.3d at 1119 ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area;" and "the general grant of rulemaking power to EPA cannot trump specific portions of the CAA and that EPA cannot use the general rulemaking authority under section 7601(a)(1) as justification for adding new factors to a list of statutorily specified ones."); *Ethyl Corp. v. Envtl. Prot. Agency*, 51 F.3d 1053, 1060 n.9 (D.C. Cir. 1995) (rejecting EPA's claimed CAA's authority to consider factors not enumerated in CAA Section 211(f)(4): EPA "may not simply disregard the specific scheme Congress has created for the regulation of fuels in order to follow a broad purpose statement"). EPA's ability to promulgate and implement a FIP is limited to the conditions set out in 42 U.S.C. § 7410(c). EPA has not made the findings the CAA requires, and any such finding it might make as to the lands at issue here would be erroneous as a matter of law.

B. EPA Acted Contrary To Law By Concluding Categorically That All States Lack, and All Tribes or EPA Have, Authority Over Non-Reservation "Indian country" Lands.

To the extent the NSR Rule purports to authorize EPA to regulate sources on non-reservation lands, the rule must be set aside and remanded for the additional reason that EPA failed to make required jurisdictional determinations regarding non-reservation Indian country lands. EPA's sweeping jurisdictional grab in the NSR Rule is simply a variation on EPA's attempt to assert FIP jurisdiction over lands where Indian country status was "in question," a theory this Court declared contrary to law in *Michigan II*. Like the petitioners in *Michigan II*, ODEQ does not here contest the generalization that EPA may exercise jurisdiction, acting for a Tribe, over reservations. Indeed, just like the petitioners in *Michigan II*, ODEQ "not only concede[s] that EPA may undertake initial jurisdictional line drawing, subject to judicial review, they insist, correctly, that EPA ***must*** make jurisdictional determinations." 268 F.3d at 1084 (emphasis in original). Here, as in *Michigan II*, EPA has improperly expanded its own jurisdiction by failing to decide jurisdictional questions necessarily predicate to implementing a FIP. *Id.*

In rejecting EPA's claim to overarching regulatory authority, this Court in *Michigan II* made clear that EPA cannot regulate in the abstract, holding: "There are no intermediate grounds on which EPA may indefinitely exercise jurisdiction—it … act[s] in the shoes of a tribe or the shoes of the state." *Id.* at

1085. For purposes of the CAA, "***[j]urisdiction as between states and tribes is binary, it must either lie with the state or the tribe – one or the other – and EPA does not have a third option of not deciding***." *Id.* at 1086 (emphasis added). As a consequence, "EPA ***must*** make jurisdictional determinations." *Id.* at 1084 (emphasis in original). EPA cannot "simply grab jurisdiction for itself" under a claim of residual authority. *Id.* at 1086.

As in *Michigan II*, *id.* at 1084-85, EPA has created a false "gap in program coverage" by making the unsupported assertion that State SIPs do not cover non-reservation "Indian country" lands and failing to make jurisdictional determinations regarding tribal jurisdiction over off-reservation Indian country lands. There is no general "gap," and EPA lacks statutory authority to simply claim jurisdiction for itself by promulgating the NSR Rule.

Because program authority as between States and Tribes under the CAA is "binary," *Michigan II*, 268 F.3d at 1086, as to sources on non-reservation lands, jurisdiction presumptively resides with the State until a Tribe makes a showing that the specific lands are "otherwise within its jurisdiction." The record here is devoid of a showing by any Tribe or EPA that States lack, and any specific Tribe has (or that Tribes generally have), CAA jurisdiction over any individual allotment or other "Indian country" area outside of reservation boundaries. Until such a showing is made, the individual States, and specifically Oklahoma, possess

regulatory authority over those sources. *See* 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality ***within the entire geographic area comprising such State***. . . .") (emphasis added).[5]

C. EPA's Failure to Make Individualized Jurisdictional Determinations Required by the CAA Invalidates the NSR Rule as to Non-Reservation Lands.

EPA 's promulgation of a national FIP renders the NSR Rule invalid for failure to make specific determinations regarding specific implementation plans. First, the administrative record lacks any showing by EPA or any Tribe that any non-reservation land is within a Tribe's jurisdiction, including for example, maps or other indicia of tribal jurisdiction. Second, EPA erred by adopting a national FIP, rather than, as required by the CAA, addressing individual SIPs and FIPs on a jurisdiction-by-jurisdiction basis. These errors are addressed in turn.

1. EPA Failed to Properly Determine a Gap Existed As to Non-reservation "Indian country" Lands Before Imposing a FIP.

FIPs may only be promulgated to fill gaps where a State or Tribe has failed to submit an implementation plan or where the implementation plan does not satisfy minimum criteria under the CAA. *See Adm', State of Ariz. v. Envtl. Prot. Agency*, 151 F.3d 1205, 1212 (9th Cir. 1998) ("FIPs are specifically meant to fill in

[5] *Nance v. Envtl. Prot. Agency*, 645 F.2d 701 (9th Cir. 1981), is not to the contrary. In that case, the court simply confirmed tribal authority over lands within the exterior boundaries of a reservation. That case does not address regulatory authority over non-reservation lands.

the gaps where a State has failed to submit an SIP or where the State's SIP does not satisfy minimum criteria under the CAA. *See* 42 U.S.C. § 7410(c)(1). Indeed, the CAA defines a FIP as "a plan (or portion thereof) promulgated by the Administrator ***to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy*** in a State implementation plan . . . ." *Id.* § 7602(y) (emphasis added). Unambiguously, gaps or deficiencies to be filled or corrected by a FIP must be those enumerated in 42 U.S.C. § 7410(c).

Because a FIP is authorized only to take the place of a state implementation plan or, if applicable after 1998, a tribal implementation plan, a FIP can operate exclusively within the geographic area that would properly have been subject to a missing or inadequate SIP or, if applicable, TIP. The CAA and its implementing regulations mandate that a jurisdictional determination be made prior to the adoption of a SIP or a TIP. Under 42 U.S.C. § 7410, each State must, "after reasonable notice and public hearings," adopt an implementation plan which provides for the "implementation, maintenance, and enforcement of" the NAAQS "within such State." 42 U.S.C. § 7410(a)(1). "The CAA contemplates a State will have ". . . the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation for such State. . . ." CAA Section 107(a), 42 U.S.C. § 7407(a). The CAA contains no

language suggesting an approved SIP will not include non-reservation "Indian country" lands.

42 U.S.C. § 7410(a)(2)(E) directs that each implementation plan must include a demonstration that the State will have authority "under State . . . law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof)." *See also id.* § 7410(o) (if a "tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans . . ."). Appendix V to 40 C.F.R. Part 51 requires a TIP submittal to include, among other things, evidence that the Tribe has "the necessary legal authority" to adopt and implement the plan. 40 C.F.R. pt. 51, appx. V, 2.1(c). EPA's August 21, 2006, notice of proposed rulemaking for the NSR Rule conceded as much, recognizing "Congress' requirement that we approve State and tribal programs only where there is a demonstration of adequate authority." 71 Fed. Reg. at 48,720 n.9.

Such a showing necessarily requires a description or demarcation of the precise lands over which the State or Tribe claims jurisdiction. Thus, for example, 40 C.F.R. § 49.7(a)(3) requires a Tribe seeking TAS status under the CAA to provide the following information:

> For applications covering areas within the exterior boundaries of the applicant's reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area. For tribal applications covering areas outside the boundaries of a reservation the statement should include: (i) A map or legal description of the area over which the application asserts authority . . . .

Neither the August 21, 2006 notice of proposed rulemaking, 71 Fed. Reg. 48,696 (Aug. 21, 2006), nor the final NSR Rule, however, provides any map, legal description or other delineation of the specific lands EPA purports to regulate as "Indian country."

In adopting the NSR Rule, EPA made no determination that any specific SIP was inadequate or otherwise subject to federal usurpation under CAA Section 110(c). Instead, the notice of proposed rulemaking merely advanced the unsupported assertion that "it would be neither practical nor administratively feasible . . . to develop and implement a separate program for each area of Indian country." 71 Fed. Reg. at 48,720.[6] Similarly, the preamble to the NSR Rule

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[6] EPA's claim of practical and administrative infeasibility is belied by EPA Region X's 2002 development of FIPs for 39 separate reservations in Oregon, Idaho and Washington. *See* 67 Fed. Reg. 11,748 (March 15, 2002). In the notice of proposed rulemaking concerning those FIPS, EPA Region X explained that it had "been working with the Tribes to identify the primary sources of air pollution emissions" on each of the 39 reservations. *Id.* at 11,748. EPA promulgated final version of those 39 FIPs on April 8, 2005. *See* 70 Fed. Reg. 18,074. Those FIPs apply "only to sources located within the boundaries of the specified Indian reservations . . . ." *Id.* at 18,076.

provides no specific jurisdictional determination but instead makes the sweeping assertion it has the power to promulgate a national FIP because 1) States allegedly lack jurisdiction over all "Indian country," and 2) the CAA "authorizes us to protect air quality throughout Indian country." 76 Fed. Reg. at 38,752. Neither EPA's legally unsupportable characterization of State authority, nor its claim of administrative infeasibility, nor its unfounded assertion of overarching regulatory authority provides a basis for the agency to sidestep its legal obligation to make specific jurisdictional determinations. If it is EPA's contention that States lack authority over Indian country lands, *Id.* at 38,752 n.9, that determination is unsupportable as a Section 110(c) determination: it is erroneous as a matter of federal common law and statutory interpretation, and EPA failed to allow any State the opportunity to correct the alleged deficiency "before EPA promulgates the Federal implementation plan." *See* 42 U.S.C. § 7410(c).

EPA's failure to make the required jurisdictional determinations renders the NSR Rule invalid. In *Michigan II*, this Court admonished EPA that it must make jurisdictional determinations.

> EPA argues that it is the state's burden under 42 U.S.C. § 7661a(d)(1) to make a showing of "adequate authority" (and thus state jurisdiction) to carry out a SOP, and that unless a state can demonstrate authority to regulate an area, then EPA must provide for effective implementation of Title V programs. EPA contends it need not determine whether the disputed area is within the jurisdiction of a state or a tribe, and that by operating

> a federal program over "in question" areas it avoids jurisdictional disputes. . . . What EPA fails to appreciate is that its actions ***create*** a jurisdictional dispute.

268 F.3d at 1084 (emphasis in original). In this case, EPA's dispute-engendering action is promulgation of the NSR Rule, seeking to divest States of authority over areas plainly within their authority under the CAA and federal common law. The NSR Rule steps beyond congressional authorization, by-passing required individualized State and tribal jurisdictional determinations.

Moreover, EPA's issuance of the FIP runs afoul of the principles of federalism reflected in the CAA. As the court in *Michigan II* explained, jurisdiction initially lies either with the states or the tribes. For non-reservation lands within a State, jurisdiction presumptively resides with the State until EPA or a Tribe makes an affirmative showing that a Tribe has inherent authority to regulate specific lands. EPA cannot avoid the mandate that a State's plan be rejected or, if applicable, a Tribe's jurisdiction be established, before EPA may extend a FIP over non-reservation lands. The rulemaking admits that Congress requires EPA to "approve state ***and tribal*** programs only where there is a demonstration of adequate authority." 71 Fed. Reg. at 48,720 n.9 (citing CAA §§ 110(a)(2)(E), 110(o) and 301(d)) (emphasis added). The administrative record lacks any showing by EPA or any Tribe that any non-reservation land is not

subject to State jurisdiction or within any Tribe's jurisdiction. Until the required jurisdictional determination is made, EPA cannot step in.

2. The NSR Rule is Invalid Because a FIP May Only Be Adopted on a Jurisdiction-by-Jurisdiction Basis, Not Nationally.

42 U.S.C. § 7410(c) only authorizes EPA to adopt a FIP for each individual State or Tribe, not on a national basis. The plain language of that section authorizes the Administrator to promulgate a FIP if "a State" has failed to make a required submission, if the plan submitted by "the State" does not satisfy the CAA's minimum requirements, or if the Administrator "disapproves a State" plan in whole or in part. The use of the singular throughout Section 7410(c) evidences Congress' intent that a FIP may only be implemented on a state-by-state basis premised upon individualized findings regarding specific state or tribal plans; the CAA does not authorize a FIP to be promulgated nationally in blanket fashion. EPA is "required to review the SIPs and to disapprove any that failed to meet the requirements of the Act . . . ." *Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 221-22 (9th Cir. 1992). Only If EPA disapproves a SIP, is EPA authorized to adopt a FIP, which must be one "that would meet the requirements of the Act and take the place of the disapproved SIP." *Id.* at 222.

EPA cannot rely upon Section 301(a)(1), 42 U.S.C. § 7601(a)(1), as a basis for issuing the nationwide FIP. That section authorizes the Administrator to "prescribe such regulations as are necessary to carry out his functions under this

chapter." *Id.* As this Court pointed out in *American Petroleum Institute*, "EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area." 52 F.3d at 1119. Here, CAA Section 110(c), 42 U.S.C. § 7410(c), provides a "specific statutory directive" which "defines the relevant functions of EPA' in promulgating and implementing a FIP.

Similarly, EPA cannot rely upon 40 C.F.R. § 49.11 as a basis for issuing a nationwide FIP. That section provides that the Administrator

> shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of [CAA] sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

Like 42 U.S.C. §7410(c), this regulation is phrased in the singular evidencing an intent that a FIP may only be developed on a tribe-by-tribe basis.

Nothing in the CAA or the implementing regulations authorizes EPA to adopt a nationwide FIP. The FIP thus lacks a statutory or regulatory basis and should be vacated.

IV. The NSR Rule Injects Counterproductive Uncertainty Into Regulation and Economic Development in Non-Reservation Areas.

EPA's NSR Rule ignores completely the practical implications of the Rule for air regulation in non-reservation Indian country. As pertinent here, EPA purports to assume program implementation for non-reservation (1) individually owned trust or "restricted" allotments and (2) "dependent Indian communities." Allotments are individual parcels of land that may be evidenced by a patent in trust by the United States or a deed in fee subject to federal restrictions on alienation. In non-reservation areas, allotments likely are interspersed within surrounding non-Indian fee lands, federal lands, and even State-owned lands. Difficult title and historical information may be required to determine whether once allotted lands remain in trust or restricted status.

Dependent Indian communities include lands that are "set aside" by the federal government to be "occupied by an Indian community" and are under "federal superintendence," such that "the Indians involved, rather than the State, are to exercise primary jurisdiction over the land in question." *See Venetie*, 522 U.S. at 530-31. Determining whether these factors are present in non-reservation areas invariably is fact-dependent and frequently controversial. *See Hydro Resources, Inc.*, 608 F.3d at 1166 (divided opinion reversing EPA's determination that lands were within a dependent Indian community).

The EPA did not attempt to address the practical implications of leaving all air program implementation in non-reservation areas for unscheduled future determinations as to land status. However, if there is concern for "gaps" in regulatory coverage, that concern arises from the uncertainty the NSR Rule will engender as to whether a State or EPA (or a Tribe in the few instances where Tribes have secured delegation) has primacy, not from State program implementation under a long-approved SIP. The Rule creates yet a further uncertainty as to "what the law is" that impedes economic development in Indian country.

V. Oklahoma Provides a Striking Example Why, as a Practical Matter, the Nationwide FIP Is Unworkable.

While not limited to Oklahoma, the application of the NSR Rule to Oklahoma provides a striking illustration of the NSR's invalidity. There are over 1,000,000 acres of individual allotment land in Oklahoma and less than 97,000 acres of tribal trust land. Individual allotments thus represent the great majority of Indian lands in Oklahoma. Due to Congressional and executive actions in the late 19th and early 20th centuries, "there are no Indian reservations in Oklahoma." *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER 757 (1984). Oklahoma individual allotments thus cannot be located "within the limits of any Indian reservation." Rather, there are thousands of non-contiguous parcels of individual allotment land

scattered about the state, all located outside tribal trust land areas of the 38 Oklahoma tribes.

Individual allotments in Oklahoma and elsewhere are generally not owned by a tribe but instead are held in trust or subject to federal restrictions on alienation for individual Indians. The Tribe thus holds no landowner's right to occupy and exclude on such allotments. Regulation of air quality on scattered and frequently isolated allotments is not connected to the rights of Indians to make their own laws and be governed by them. Indeed, air emitting activities on the small, scattered allotments are far more likely to impact the surrounding non-Indian landowners. The Supreme Court has declared that when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. . . ." *Hicks*, 533 U.S. at 362; *see also United States v. Anderson,* 736 F.2d 1358, 1366 (9th Cir. 1984) (holding that the State of Washington's interest in developing a comprehensive water program weighed in favor of the State's exercise of regulatory authority over on-reservation water users). The State's interest in managing and maintaining a coherent, comprehensive air quality program across the state is a compelling interest.

EPA has recognized the unique situation Oklahoma presents. In its unofficial, unpublished Advanced Notice of Public Rulemaking of November,

2003, entitled "Proposed Core Federal Water Quality Standards for Indian country," EPA stated,

> [I]n some areas, allotments comprise the bulk of Indian country. For example, it is EPA's understanding that off-reservation allotments or Tribal trust lands outside of formal reservations comprise almost all of the Indian country for Tribes in Oklahoma . . . Of these off-reservation lands, it is EPA's understanding that approximately 90 – 95 percent are comprised of off-reservation allotments, and 5 – 10 percent of these lands are Tribal trust lands.

Neither the August 21, 2006 notice of proposed rulemaking nor the NSR Rule provide a map or legal description of the lands the FIP purports to cover. Such a map or legal description would be a required element of an application for a delegation of CAA program authority. *See* 40 C.F.R. § 49.7(a)(3). In the absence of a map or legal description and supporting jurisdictional determinations, states, tribes and members of the regulated community will have no clear understanding whether a given source is located in "Indian country." In Oklahoma, the land tenure pattern, involving over 1,000,000 acres of individual allotments scattered across 77 counties, will result in needless regulatory confusion, jurisdictional entanglements and litigation in the absence of a specific identification of lands purportedly governed by the FIP.

State exercise of regulatory authority over air emission sources on individual, scattered allotments is consistent with the history concerning the

termination of reservations, leading to the allotment of lands. Contemporaneous understandings were that allotment acts generally divested Oklahoma tribes of both title and jurisdiction through the land transfers authorized in those acts and that State law would apply to all civil matters occurring on the former reservation lands. *See Montana,* 450 U.S. at 559 n. 9 ("Allotment of Indian land was consistently equated with dissolution of tribal affairs and jurisdiction."). Indeed, in a series of acts from 1890 through 1906, Congress repeatedly extended State law over lands in the Oklahoma and Indian Territories. *See* Oklahoma Organic Act, 26 Stat. 81, §31 (extending laws of Arkansas over the Indian Territory); Indian Appropriations Act of 1897, 30 Stat. 83 (declaring the laws of Arkansas apply to all persons in Indian Territory "irrespective of race"); Act of April 28, 1904, 33 Stat. 573 (declaring that the laws of Arkansas apply to all persons in Indian Territory "whether Indian, freedmen, or otherwise"); Oklahoma Enabling Act, 34 Stat. 267, §13 (the "laws in force in the Territory of Oklahoma, so far as applicable, shall extend over and apply to said State until changed by the legislature thereof."). Consequently, Congress repeatedly declared its intention to subject all residents, regardless of race or ethnicity, to the same courts and to make them subject to the same laws.

The Supreme Court has recognized the continuing importance of this history. In upholding the application of State estate taxes to restricted allotment

property, the Court in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), explained that, while it had previously "held that a State might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status," that condition "has not existed for many years in the State of Oklahoma." *Id.* at 602. "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy" and they "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Id.* at 603; *see also McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973) (describing *Oklahoma Tax Commission* as presenting a situation "where Indians have left the reservation and become assimilated into the general community."). Similarly, in *United States v. Okla. Gas & Elec. Co.*, 127 F.2d 349, 353 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943), the court observed that it is "common knowledge that lands allotted in severalty to Indians in Oklahoma are essentially a part of the [non-Indian] community in which they are situated . . . ." The federal courts continue to recognize the significance of Oklahoma's unique history. *See Osage Nation,* 597 F.3d at 1120, 1124-25. The NSR Rule is unauthorized and unworkable in Oklahoma and elsewhere.

VI. Conclusion

The Court should vacate that portion of the NSR Rule purporting to authorize EPA to implement a FIP over lands for which a jurisdictional determination of Indian country status has not been made and remand the matter to the EPA for further proceedings.

Dated this 25th day of March, 2013.

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this **Brief of the Petitioner** is proportionally spaced and contains 13,757 words, exclusive of the items identified in Fed. R. App. At P. 32(A)(7)(B)(iii) as not counting toward the type-volume limitation. This figure was calculated through use of the word count function of Microsoft Word 2010, which was used to prepare the brief.

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of March, 2013, a copy of the foregoing Petitioner Oklahoma Department of Environmental Quality's Brief of The Petitioner was served upon the following by filing a copy of the same with this Court's Electronic Case Filing (ECF) system, which will provide electronic service on all counsel of record in this case, as allowed by the Federal Rules of Appellate Procedure, D.C. Cir. Rule 25 (c), and this Court's May 15, 2009 Administrative Order ECF-2(D):

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