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

PROOF REPLY BRIEF OF THE PETITIONER

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GLOSSARY

CAA	Clean Air Act, 42 U.S.C. §§ 7401-7671q
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
JA	Joint Appendix
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
SIP	State Implementation Plan
TAR	Tribal Authority Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998) (codified 40 C.F.R. §§ 35.105, 35.205, 35.210, 35.215, 35.220, & §§ 49.1 through 49.11)
TAS	Treatment as a State
TIP	Tribal Implementation Plan

I. INTRODUCTION.

The briefs the Environmental Protection Agency ("EPA"), Tribal Intervenors, and *amicus curiae* submitted fail to rebut the Oklahoma Department of Environmental Quality's ("ODEQ") showing that EPA's final rule establishing a Federal Implementation Plan ("FIP") under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA"), setting forth New Source Review requirements for sources in Indian country ("NSR Rule"), 76 Fed. Reg. 38,748 (July 1, 2011), is not a valid exercise of EPA's authority to the extent the FIP purportedly applies to non-reservation areas over which Congress has not delegated CAA authority to tribes. EPA's FIP, as it pertains to non-reservation areas, must be vacated because EPA failed to make jurisdictional determinations which would allow EPA to confirm, as the CAA requires, that the non-reservation areas constitute "other areas within a tribe's jurisdiction." 42 U.S.C. § 7601(d). Rather, EPA and the Tribal Intervenors improperly conflate the term "Indian country" from 18 U.S.C. § 1151 with the language "other areas" from the CAA in an attempt to stretch EPA's federal program authority to cover lands for which it has not made statutorily required determinations of tribal jurisdiction.

This Reply demonstrates that EPA's efforts to avoid judicial review, contending ODEQ lacks standing, did not timely challenge an earlier rule, and did

not present its challenges to the agency, are unfounded. *See* Point II. This Court has jurisdiction over ODEQ's challenges to the NSR Rule.

With respect to the merits of ODEQ's petition, EPA, Tribal Intervenors, and *amici curiae* fail to demonstrate EPA's statutory authority to adopt a nationwide FIP in light of retained State jurisdiction, *see* Points III-IV, or that federal common law supports EPA's blanket assertion of jurisdiction. *See* Point V. Nor do they refute ODEQ's showing that, as exemplified by Oklahoma circumstances, a case-by-case analysis of tribal jurisdiction is necessary and, without that jurisdictional determination, EPA's FIP is unauthorized and unworkable. *See* Points VI-VII.

II. EPA'S JURISDICITIONAL CHALLEGES ARE UNFOUNDED.

A. ODEQ Has Demonstrated Standing.

As EPA's administrative record demonstrates, ODEQ's comments on the NSR Rule and EPA's responses to those comments as they pertain to Oklahoma make ODEQ's standing self-evident. *See* D.C. Cir. Rule 28(a)(7); *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002); *see generally* ODEQ's January 2007 Comments ("January Comments") and March 2007 Comments [JA ___-___]. ODEQ's comments demonstrated a substantial likelihood of injury in fact, caused by EPA's assertion of jurisdiction, to the exclusion of States, including Oklahoma, over non-reservation areas nationally, an injury redressable by vacating that portion of the NSR Rule. *Sierra Club*, 292 F.3d at 898. ODEQ is the state agency

with EPA-delegated authority to administer CAA air quality programs throughout Oklahoma. The uncontroverted record evidences the unique land ownership patterns Oklahoma presents: there are no "reservations" within Oklahoma in the traditional sense of the word, but there are thousands of non-contiguous, individually owned allotments covering over 1,000,000 acres, scattered throughout most of the State's 77 countries. January Comments 3, 4 [JA ___].

By its plain language, EPA's FIP divested ODEQ of its regulatory authority over sources within off-reservation "Indian country" lands. *See* EPA Responses to Comments 122-123 [JA ___] ("EPA Responses") (The FIP "will apply throughout Indian country, *including Indian country in Oklahoma*," (emphasis added) and States, such as Oklahoma, "lack authority under the CAA over air pollution sources, and the owners or operators of air pollution sources, throughout Indian country.").[1] EPA's FIP, promulgated without statutory authority, impermissibly divests ODEQ of regulatory authority over areas otherwise within ODEQ's purview, *i.e.*, within the entire geographic area comprising the State. Given this undisputed loss of jurisdiction resulting from EPA's FIP, ODEQ has standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

[1] EPA's assertion that ODEQ cannot demonstrate an injury because ODEQ "has not requested program authority within Indian country," Resp't Br. 1, ignores ODEQ's arguments that it has had program authority over all areas within the State under its approved SIP. *See Am. For Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2012) (in assessing standing, courts assume that the petitioner will prevail on the merits).

B. ODEQ's Challenges Are Timely Because the TAR Rule Was Not a Final Agency Action As to ODEQ's Challenges

EPA erroneously contends that adoption of the Tribal Authority Rule, 63 Fed. Reg. 7,254 (Feb. 12, 1998) ("TAR") and statements in the TAR Preamble finally decided both EPA's authority to promulgate a nationwide FIP and that previously approved State Implementation Plans ("SIPs") do not apply to non-reservation lands without express authorization from EPA.[2]

Neither the TAR Rule nor its Preamble statements represent the consummation of the EPA's decision-making with respect to either issue. Although this Court has jurisdiction only over final agency actions, *see Am. Petroleum Inst. v. EPA*, 684 F.3d 1342, 1354 (D.C. Cir. 2012), a final agency action must be one that "mark[s] the consummation of the agency's decision-making process. . . ." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). "Only if the EPA has rendered its last word on the matter in question, is its action 'final' and thus reviewable." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (citation omitted). Because the TAR Preamble's statements were either prospective and tentative or ambiguous as to whether they applied off-reservation, it was not final agency action from which ODEQ could appeal.

[2] Contrary to EPA's assertions, Resp't Br. 23-24, 31-32, ODEQ need not demonstrate that new grounds exist for review of the TAR or that the issues in the TAR were re-opened because the TAR did not address, finally or otherwise, ODEQ's current challenges to the NSR Rule.

The TAR provisions and Preamble language EPA cites to deflect review did not mark the consummation of EPA's decision-making on any issue ODEQ presents. EPA's mention of proposed nationwide regulations is prospective, described in non-definite terms, and does not identify the basis of the EPA's authority to promulgate a FIP, or the methods the EPA might employ to implement one. Indeed, in the TAR, EPA described such nationwide regulations as a future "option." 63 Fed. Reg. at 7,263. EPA reiterated that it had only "*started to explore* options for promulgating new measures to ensure that EPA has a full range of programs and Federal regulatory mechanisms to implement the CAA in Indian country." *Id.* These equivocal statements did not constitute final agency action.

EPA similarly inflates beyond recognition the TAR provision, 40 C.F.R. § 49.4(d), that "Tribes will not be treated the same as states" with respect to CAA Section 110(c)(1), 42 U.S.C. § 7410(c)(1), contending it finally resolved whether EPA must make a determination regarding the adequacy of a SIP before implementing a FIP. The text of Section 110(c)(1) and the TAR Preamble both reflect the change was intended to relieve tribes of the deadline imposed on States for plan submissions, not to broaden EPA's FIP authority. *See* 42 U.S.C. § 7410(c)(1) ("The Administrator shall promulgate a Federal implementation plan … within 2 years" after a State's failure); *and* 63 Fed. Reg. at 7,265 (given § 49.4(d), "there is no date certain submittal requirement imposed by the Act for tribes as

there is for states"). For FIP authority, by contrast, the TAR Preamble relied, *see id.*, upon the same "gap-filling" authority under CAA Section 301, 42 U.S.C. § 7601(a), this Court rejected in *Michigan v. EPA*, 268 F.3d 1075, 1084-85 (D.C. Cir. 2001) ("*Michigan II*"). The TAR simply did not do what EPA claims.

EPA's contention that ODEQ's challenge to EPA's current interpretation of the effect of prior SIP approvals is time-barred lacks merit because the TAR did not decide that issue. First, EPA relies on unrelated language in TAR Preamble Section A(1)(g), "Current and historical application of state laws on parts of reservations," which responded to comments asserting that States historically exercised CAA regulatory authority over non-members on fee lands *within reservations*, not regarding the authority in issue here, over non-reservation areas. In that context, EPA's position was that "unless a state has explicitly demonstrated its authority and been explicitly approved by EPA to implement CAA programs in Indian country, EPA is the appropriate entity to be implementing programs prior to tribal primacy." Resp't Br. 29 (quoting 63 Fed. Reg. at 7,258). EPA contends this language demonstrates "that it interpreted past SIP approvals as not applying in Indian country unless the relevant State had made an explicit demonstration of authority and unless EPA had expressly approved the SIP as applying in Indian country." Resp't Br. 30. Because Section A(1)(g), by its terms, pertained only to State jurisdiction over activities on *reservation* lands, not at issue in ODEQ's

challenge to the NSR Rule, the quoted language does not support EPA's argument that ODEQ should have challenged EPA's interpretation of SIP authority over *non-reservation* areas when the TAR was promulgated. The mere inclusion of the term "Indian country," which also describes reservation lands, did not unambiguously give notice of the scope EPA declares in the NSR Rule.

Conversely, TAR Preamble Section A(2) addresses "Authority in Non-Reservation Areas Within a Tribe's Jurisdiction." In that Section, EPA "finalized" its position that, under CAA section 301(d)(2)(B), an eligible tribe may "develop and implement tribal air quality programs *in non-reservation areas that are determined to be within the tribe's jurisdiction*." 63 Fed. Reg. at 7,258 (emphasis added). ODEQ agrees the "other areas within the tribe's jurisdiction" language of the regulation requires a tribe to demonstrate that "it has authority over such areas under general principles of federal Indian law." *Id.* at 7,259. EPA's TAR Preamble did not, however, state or imply that previously approved SIPs would not apply in "other areas" for which no tribal jurisdictional determination had been made. Rather, the TAR Preamble states 1) the CAA is not a delegation of authority to tribes with respect to "other areas within the tribe's jurisdiction;" and 2) a tribe must make the required jurisdictional showing before it can implement a CAA program on "other areas." *Id.* Far from a blanket jurisdictional declaration, the TAR Preamble acknowledged the inherent uncertainty in the "other areas"

standard, and the potential "controversy over whether a particular non-reservation area is within a tribe's jurisdiction." *Id.* Therefore, questions regarding regulatory authority over non-reservation areas "should be addressed on a case-by-case basis *in the context of particular tribal applications*." *Id.* (emphasis added).

Nor did the TAR's promulgation of 40 C.F.R. § 49.4(d), exempting tribes from plan submittal deadlines, or § 49.11, stating EPA may promulgate FIPs in the absence of a satisfactory Tribal Implementation Plan ("TIP"), Resp't Br. 20-21, put States on notice that EPA determined it could adopt a national FIP without making any specific jurisdictional determinations regarding non-reservation lands. The Preamble contains no express reference to a FIP applying to all non-reservation lands; indeed, the TAR Preamble's only reference to 18 U.S.C. § 1151's definition of "Indian country" states the statute defines where a tribe "*may* have jurisdiction, including civil jurisdiction or regulatory jurisdiction" and that any controversy concerning non-reservation areas "should be addressed on a cases-by-case basis." 63 Fed. Reg. at 7,258, 7,259 (emphasis added). The TAR did not finally decide EPA's position on the application of previously approved SIPs to "other [off-reservation] areas."

The cases EPA relies on are unavailing. *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), Resp't Br. 21, which upheld the TAR, did not consider the TAR Preamble's FIP statements. *Medical Waste Institute & Energy*

Recovery Council v. EPA, 645 F.3d 420 (D.C. Cir. 2011), Resp't Br. 22, 23, is also inapposite, because, unlike in *Medical Waste*, EPA's TAR gave no indication that a FIP applying automatically to all non-reservation "Indian country" lands would ultimately be adopted. To the contrary, the TAR Preamble acknowledged tribal jurisdiction over non-reservation areas may be controversial and would be addressed on a case-by-case basis. In *National Mining Ass'n v. U.S. Department of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995), Resp't Br. 23, unlike here, the prior agency rulemaking addressed issues "identical to those now raised by appellants."

This Court has rejected EPA's argument that a preamble statement constitutes final agency action from which a party must appeal. *See*, *e.g.*, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803, 808-09 (D.C. Cir. 2012) ("*Clean Air Project*"), Resp't Br. 30, (statements in a preamble "do not mark the consummation of agency action, and they do not create obligations from which legal consequences will flow"); *Natural Res. Def. Council v. EPA*, 706 F.3d 428, 432 (D.C. Cir. 2013) ("*NRDC II*") (rejecting EPA's argument that a challenge was untimely because, as here, the preamble language was "plainly tentative" and "summarily" stated EPA's positions). In *NRDC II*, this Court explained: "We have observed that 'while preamble statements,' such as those just quoted, 'may in *some unique cases* constitute binding, final agency action susceptible to judicial

review, this is not the norm'." *Id.* (emphasis added) (quoting *Natural Res. Def. Council v. EPA*, 559 F.3d 561, 564 (D.C. Cir. 2009) ("*NRDC I*")).

In *NRDC I*, this Court held that "statements in the preamble [did not] amount[] to final agency action," 559 F.3d at 565, because EPA used "conditional" language, including that "certain events [were] to be evaluated 'on a case-to-case basis.'" *Id.* (quoting 72 Fed. Reg. 13,560, 13564-65 (Mar. 22, 2007)). The statements were "nonbinding and unreviewable," because they were "hypothetical and non-specific," and "NRDC ha[d] not demonstrated that any of the statements has immediate legal or practical consequences." *Id.*

Similarly, the TAR and its Preamble language did not "purport to detail how the [nationwide regulations it had begun to consider] should be implemented." *NRDC II*, 706 F.3d at 432. Moreover, EPA acknowledged that non-reservation jurisdictional issues would have to be addressed on a "case-by-case basis." 63 Fed. Reg. at 7,259. The TAR Preamble language only "suggests an indefinite, anticipated plan," *Clean Air Project*, 686 F.3d at 809, rather than the consummation of EPA's decision-making process. Thus, the TAR Preamble's prospective and anticipatory references to nationwide regulations to be proposed on unspecified dates did not constitute a final rule. Rather, the "final agency action" for purposes of this challenge is EPA's promulgation of the NSR Rule. ODEQ's appeal of the NSR Rule is timely. *See EME Homer City Generation, L.P.*

v. EPA, 696 F.3d 7, 12 n.1 (D.C. Cir. 2012), *cert. granted* (June 24, 2013) (States could not have raised challenges "until EPA, in the Transport Rule, simultaneously set the States' individual emissions budgets and issued FIPs"). ODEQ could not have presented the current challenge to EPA's interpretation upon promulgation of the TAR.

C. ODEQ's Comments Indisputably Alerted EPA to the General Substance of ODEQ's NSR Rule Challenges.

EPA's attempts to avoid judicial review by claiming ODEQ's NSR Rule comments did not challenge EPA's interpretation of past SIP approvals as not applying in non-reservation Indian country, Resp't Br. 33, is impeached by EPA's response to ODEQ's comments on that specific point. ODEQ specifically challenged EPA's authority to implement a nationwide FIP, including that EPA had not made required individualized jurisdictional determinations. *See* EPA Responses 120 [JA ___]; *see also* January Comments 1, 6-7, 9, 11-14 [JA ___]. In response, EPA stated its position regarding the applicability of prior SIP approvals in Indian country:

> absent an explicit demonstration of authority by a state to administer a CAA program in Indian country, and absent an explicit finding by EPA of such jurisdiction and explicit approval of the state in Indian country, state and local governments lack authority under the CAA over air pollution sources, and the owners and operators of air pollution sources, throughout Indian country.

Id. at 121-122 [JA ___]; *see also* 76 Fed. Reg. at 38,778 ("[C]ommenters believed that in general Congress placed the primary responsibility of preventing air pollution on *states* and thus *states have the responsibility to adopt or enforce any emission standards in Indian country*. . . ." (Emphasis added.)). EPA cannot credibly contend it lacked notice of this challenge.

CAA Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), only requires an objection be raised with reasonable specificity during the comment period as a prerequisite to judicial review. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998). Commenters are allowed "some leeway in developing their argument before this court," and comments must provide the agency "adequate notification of the general substance of the complaint." *Natural Res. Def. Council v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009) (citation omitted). This Court has cautioned against reading the word "reasonable" out of the CAA "in favor of a hair-splitting approach." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817 (D.C. Cir. 1998). ODEQ's comments and EPA's Responses demonstrate conclusively that ODEQ adequately notified EPA of the general substance of ODEQ's challenge.

III. EPA AND INTERVENORS FAIL TO REBUT THAT CAA SECTION 107(a) CONTEMPLATES PRESUMPTIVE STATE JURISDICTION OVER NON-RESERVATION AREAS.

ODEQ established that both the plain language of CAA Section 107(a), 42 U.S.C. § 7407(a), and its history and structure dictate that States with approved SIPs presumptively have CAA regulatory authority over all non-reservation areas unless and until a tribe, or EPA in a tribe's "shoes," demonstrates that a tribe has authority to regulate air resources over specifically designated non-reservation lands. *See* Pet'r Br. 18-24. Neither EPA, the Tribal Intervenors, nor *amicus* Osage Nation rebut ODEQ's showing.

EPA's revisionist contention that States with approved SIPs have never had authority over "Indian country" sources now covered by the NSR Rule is legally unsupportable and historically false. EPA's assertion that "[h]ad Congress intended that SIPs automatically apply in Indian country, it would have used language expressly referring to Indian country, and not the general language 'within the entire geographic area comprising such State,'" Resp't Br. 46-47, disregards Congress' intent for comprehensive air quality regulation. *See* Pet'r Br. 21. The phrase "entire geographic area comprising such state" is unambiguous, and Congress has never used the phrase "Indian country" anywhere in the CAA. The CAA did not refer to Indian lands at all until 1977, and it never indicated the Indian character of lands could affect program authority until it authorized TAS

delegations in 1990. *See* Pet'r Br. 21-24. EPA simply ignores that, except for "prevention of significant deterioration" authority, the CAA provided no other means than SIP regulation of "Indian country" lands. As Congress intended, Oklahoma and other states have been the only regulators over the sources subject to the NSR Rule at all times prior to its issuance. EPA fails to demonstrate authority for restructuring the foundation of federalism underlying the CAA.

Arizona Public Service undermines EPA's argument. That case explains that the CAA 1990 amendments added two provisions addressing tribal authority: Section 301(d), 42 U.S.C. § 7601(d), authorizing EPA to treat tribes as states if 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 Section 110(o), 42 U.S.C. § 7410(o), authorizing tribal implementation plans "applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation . . . ." This Court held the 1990 Amendment's "clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction,'" *Ariz. Public Service*, 211 F.3d at 1288 (citation omitted), reflects that "Congress intended to expressly delegate only with respect to areas within the boundaries of a reservation." *Id*. at 1290. As to non-reservation areas, the Court agreed with EPA that tribes could receive a delegation on a case-

by-case basis only by showing inherent authority to regulate air resources within specific non-reservation lands. *Id.* at 1294-95. Under the 1990 amendments and the TAR, State jurisdiction remains in place unless displaced in one of those two ways.

EPA contends that Section 107(a), 42 U.S.C. § 7407(a), must be "harmonized" with Section 301(d), 42 U.S.C. § 7601(d), which authorized TAS delegations to tribes. Resp't Br. 47. But, EPA advances no language of Section 301(d) evincing an intent to affect state authority under a SIP, except, potentially, as to reservation lands and non-reservation lands demonstrated to be within a tribe's jurisdiction. Nor does supposed tension between Sections 107(a) and Section 301(d)(2)(B) create "ambiguity." Resp't Br. 49. Off-reservation, Section 301(d) only authorizes, unambiguously, EPA to shift regulatory jurisdiction from States to tribes upon the required jurisdictional showing by the tribe or, possibly, EPA in a tribe's shoes. Because Congress did not make an express delegation as to non-reservation lands, but instead required a showing of tribal jurisdiction over them, the presumption of State air quality jurisdiction over such lands under Section 107(a) remains unaffected. *See*, *e.g.*, 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction*, § 22.30 (7th ed.) ("[A]mendatory acts do not change existing law further than is expressly declared or necessarily implied.").

There is no merit to EPA's assertion that the Court should defer to EPA's construction of Section 107(a) under the Indian canon and the *Chevron* doctrine. Resp't Br. 49-50. EPA identifies no authority that CAA Section 107(a), 42 U.S.C. § 7407(a), was "'passed for the benefit of Indian tribes'" and thus the Indian canon is inapplicable. *Cobell v. Norton*, 240 F.3d 1081, 1103 (D.C. Cir. 2001) (quoting *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976)), cited Resp't Br. 50; *cf. Ariz. Pub. Serv.*, 211 F.3d at 1294 (noting the canon applies to the CAA amendments *specifically* addressing tribal authority). Nor can the mere invocation of *Chevron* require deference where the CAA's "clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction,'" *Ariz. Pub. Serv.*, 211 F.3d at 1288 (citation omitted), reflects Congress's unambiguous intention that non-reservation areas require a case-by-case determination. *See AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 755 (D.C. Cir. 2012) (rejecting argument *Chevron* applied where statute not ambiguous).

IV. NEITHER EPA NOR INTERVENORS DEMONSTRATE STATUTORY AUTHORITY TO IMPLEMENT A NATIONWIDE FIP.

EPA and Intervenors fail to explain how the CAA vests EPA with discretion to assume regulatory authority over all non-reservation "Indian country" land without making the statutorily prescribed showing of tribal jurisdiction over such "other areas." In the FIP Preamble, EPA concedes that "Indian country" simply

describes lands "over which a Tribe *may potentially receive approval* of programs under the [CAA]." 76 Fed. Reg. at 38,753 (emphasis added). EPA did not determine that any particular tribe has authority over any specific non-reservation land or show that all tribes have such jurisdiction. EPA's articulated policy preferences, to fill a regulatory gap it now asserts, or to address the lack of tribal requests to assume jurisdiction, do not establish the statutorily required jurisdictional showing. This Court invalidated a similar "blank check to expand its own jurisdiction by not deciding jurisdictional questions" in *Michigan II*, 268 F.3d at 1084. EPA lacks statutory authority for the challenged rule.

Neither CAA Section 301, 42 U.S.C. § 7601, nor 40 C.F.R. § 49.11(a), *see* Resp't Br. 48-49, relieve EPA of its obligation to make required jurisdictional determinations. First, CAA Section 301(a), provides only general authority to make rules necessary to carry out the Act. That section does not make EPA a "roving commission" with discretionary authority to regulate wherever and however it desires. *Michigan II,* 268 F.3d at 1084; *see also Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

Second, Section 301(d)(2), 42 U.S.C. § 7601(d)(2), draws a "clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction.'" *Ariz. Pub. Serv.*, 211 F.3d at 1288. Both this Court and EPA have acknowledged that Congress did not automatically

delegate authority to tribes as to "other areas." Instead, tribes must demonstrate authority to regulate activities on specified non-reservation lands. *Id*. at 1294; 63 Fed. Reg. at 7,259 ("[T]he CAA authorizes a tribe to implement a program in non-reservation areas only if it can demonstrate authority over such areas under federal Indian law."). EPA cites no statutory authority for ignoring this prerequisite.

Third, Section 301(d)(4), 42 U.S.C. § 7601(d)(4), authorizes EPA to provide, by regulation, other means by which it may directly administer "provisions" of the CAA "for which it is appropriate to treat tribes as states," and where EPA finds it is "inappropriate or administratively infeasible to treat tribes in the same manner as states." However, as Section 301(d)(2)(B) mandates, such treatment is appropriate as to off-reservation areas only if "within the tribe's jurisdiction." *See also* 40 C.F.R. § 49.9(g) (Eligibilty for an approved TIP "will extend to all areas within a tribe's reservation . . . , and any other areas the EPA Regional Administrator has determined to be within the tribe's jurisdiction."). Nothing in Section 301(d)(4) arguably broadens the categories of lands that may be subject to a program under Section 301 or eliminates the jurisdictional requirements regarding non-reservation lands. 40 C.F.R. § 49.11(a) does not authorize EPA to assert regulatory authority nationally over unspecified non-reservation land. Like CAA Section 110(c)(1), 42 U.S.C. § 7410(c)(1), and 42 U.S.C. § 7661a (at issue in *Michigan II*), 40 C.F.R. § 49.11(a) is conditional,

declaring only "if a tribe does not submit a [qualifying] tribal implementation plan . . . or does not receive EPA approval of a submitted tribal implementation plan," shall EPA promulgate "such federal implementation plan provisions as are necessary or appropriate to protect air quality. . . ." Under that language, EPA can only act in the "shoes of a tribe," *Michigan II*, 268 F.3d at 1085. A federal program may apply only to non-reservation lands over which a tribe has jurisdiction.

Finally, § 49.11, referring to submission by "a tribe" of a plan, plainly contemplates consideration of plans on a tribe-by-tribe basis. The regulation refers to submission by "a tribe" of a plan "meeting the completeness criteria of 40 CFR Part 51 Appendix V." The "minimum [completeness] criteria" under Appendix V include, among other elements, "identification of the locations of affected sources" including the attainment/nonattainment description of those locations. App. V. Subpart 2.2(b). While promulgation of a national plan may be defensible as it pertains to reservation lands subject to express Congressional delegation, and ODEQ does not challenge such application, non-reservation lands present considerations requiring the tribe-specific and land-specific approach § 49.11 implies. Due to the variability of jurisdictional considerations pertaining to non-reservation lands, addressing off-reservation jurisdiction requires specific, case-by-case analysis and determination of an applicable tribe's jurisdiction over such

"other [non-reservation] areas." EPA's authority under Section 301(d)(4), 42 U.S.C. § 7601(d)(4), and 40 C.F.R. § 49.11 are subject to the jurisdictional requirements of Section 301(d)(2)(b). EPA lacks authority to subject lands to a federal program over which it has not determined a tribe has jurisdiction.

V. EPA AND INTERVENORS FAIL TO ESTABLISH THAT TRIBES HAVE JURISDICTION OVER ALL "INDIAN COUNTRY" LANDS.

EPA' brief, and that of Intervenors, fail to defend EPA's determination that, with respect to all tribes, all off-reservation "Indian country" lands pertaining to each tribe are "other areas within the tribe's jurisdiction," as required by CAA Section 301(d)(2)(b), 42 U.S.C. § 7601(d). But Congress' power to expressly delegate authority is not in issue: ODEQ does not dispute Congress could authorize the program challenged here. Congress simply has not.

EPA and Intervenors misperceive the central federal common law issue the NSR Rule presents, incorrectly striving to disprove presumptive State jurisdiction, rather than establish what CAA Section 301(d) requires: tribal jurisdiction. *See*, *e.g.*, Resp't Br. 57 ("Thus, none of ODEQ's cases establish a presumption in favor of state authority in Indian country, whether reservation or not."); Tribes' Br. 12 (ODEQ's reliance on *Montana* cases "is misplaced, because the *Montana* cases do not address . . . the federal government's authority over Indian country. Rather, they address the scope of *tribal* jurisdiction."). Congress delegated federal authority to States under approved SIPs. However, EPA's promulgation of a

nationwide FIP without evidentiary support could be authorized only if EPA demonstrated that federal common law establishes *tribal jurisdiction* over all off-reservation allotments and dependent Indian communities. *See* Pet's. Br. 25. EPA fails to supply a reasoned basis for that proposition.

A. EPA Fails to Support Nationwide Tribal Jurisdiction over Off-Reservation "Indian country" Lands.

EPA's argument relies primarily on inapposite cases, none of which support a presumption of tribal jurisdiction over off-reservation lands. Illustrative is EPA's central and repeated reliance on a single footnote in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n.1 (1998), *see* Resp't Br. 4, 27, 51, 60, 76, which states: "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." But *Venetie*'s only supporting citation for this comment is *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), in which the Court explained that "States acquired primary jurisdiction over unallotted opened lands" when a reservation was diminished; it contains neither language nor analysis suggesting the broader rule on which EPA relies. *Id.* Neither *Venetie* nor *Yankton Sioux* contain a holding supporting a presumption of tribal jurisdiction over all off-reservation "Indian country" lands.

Even if *Venetie* held as EPA states, such holding did not survive *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). If *Venetie*'s footnote were intended

to propose primary tribal jurisdiction over off-reservation "Indian country," it is rejected by *Atkinson*'s holdings that the "Indian country" statutes does not control civil jurisdiction absent an express delegation using the term, *id.* at 635 n.5, and a tribe is presumed to lack taxing jurisdiction over non-members within a reservation, undisputedly in "Indian country," unless the tribe demonstrates that one of the two *Montana* exceptions apply. *Atkinson,* 532 U.S. at 659. EPA's central authority is inapposite.

EPA exaggerates the meaning of this Court's discussion of *Venetie* in *Michigan II*, 268 F.3d at 1079, Resp't Br. 36. While *Michigan II* cited *Venetie*'s footnote, quoted above, it was in support of an observation that "[d]etermining tribal jurisdiction is far from straightforward and involves delicate questions involving state and tribal sovereignty" and "the jurisdictional boundaries of Indian tribes are not always clearly delineated, and often are determined through adjudication or other administrative means." *Michigan II,* 268 F.3d at 1079. EPA's suggestion that *Michigan II* held tribes "have jurisdiction over *Indian country*," Resp't Br. 36, omits indicating the parties conceded that point, 286 F.3d at 1084. The *Michigan II* Court made no such holding.

Similarly unsupportive is EPA's citation to *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 427 n.2 (1975). Resp't. Br. 51-52. In confirming state jurisdiction, *DeCoteau* "assum[ed]" that Indian country

status under Section 1151 was dispositive over the civil and criminal matters before it; it did not so hold. *DeCouteau* is not binding authority for the proposition that tribes presumptively have jurisdiction over off-reservation Indian country lands. *See United Food & Commercial Workers Union v. Albertson's, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000) ("[F]or a decision to be given *stare decisis* effect with respect to a particular issue, that issue must have been actually decided by the court." (citations omitted)).

EPA also relies on unhelpful cases addressing on-reservation activity and State authority. Resp't Br. 46. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 205-206 (1987) (on-reservation gaming); *Indian Country U.S.A., Inc. v. Okla. Tax Comm'n*, 829 F.2d 967, 976 (10th Cir. 1987) (tribal treaty lands equivalent of reservation). EPA's repeated citation to *Oklahoma Tax Commission v. Sac & Fox Tribe*, 508 U.S. 114 (1993), cited, *e.g.*, Resp't Br. 43, 53, misses the mark: it addresses only state, not tribal, jurisdiction over tribal members. *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1183 (N.D. Okla. 2009), Resp't Br. 64, also is inapposite: the court there ruled only that the Tribe had *parens patriae* standing to pursue state law claims for damage to allotted lands, a ruling impeached by the court's reliance on the pre-*Strate* authority of *Mustang Production,* and *Sac & Fox*, 653 F. Supp. 2d at 1181, which concerned State, not tribal, authority.

EPA and Tribal Intervenors fail to recognize that *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), address the significance of reservation boundaries, not jurisdictional absolutes. Reservation boundaries imply an historic Congressional recognition of tribal authority across the reservation area. *See Seymour v. Superintendent Wash. State Penitentiary*, 368 U.S. 351, 357-58 (1962). Conversely, the disestablishment of reservations and allotment of parcels to individual tribal members that characterizes off-reservation areas, resulted in allotted lands existing within state and local communities. *See Montana v. United States*, 450 U.S. 544, 559 n.9 (1981). These federal common law concepts give context to the CAA's different treatment of reservations and "other areas."

B. *Montana* Compels a Presumption Against Tribal Jurisdiction.

EPA and Tribal Intervenors do not grasp the import of the Supreme Court's rule in *Montana*, 450 U.S. at 565-66, on the NSR Rule. EPA does not explain how EPA may administratively presume tribal jurisdiction over "other areas" and by-pass a fact-specific determination under *Montana* for each area. Addressing *Strate*, *Atkinson*, and *Hicks*, EPA does not contradict ODEQ's showing that *Montana* and its progeny erect a presumption *against* tribal jurisdiction over *all* lands, not just non-member fee lands. *See Nevada v. Hicks*, 533 U.S. 353, 360 (2001). EPA also accepts that "[a]t most, the cases ODEQ cites stand for the proposition that the

existence of such [tribal] authority *will depend upon the specific facts at issue*, which is a principle already embodied in the *Montana* test." Resp't Br. 64 (emphasis added). EPA concedes that CAA Section 301(d)(2)(b), 42 U.S.C. § 7601(d)(2)(b), is not a "congressional delegation of CAA regulatory authority to eligible Tribes for non-reservation areas of Indian country. Rather, Tribes may exercise CAA regulatory jurisdiction over such areas *on a case-by-case basis pursuant to demonstrated inherent authority*." Resp't. *Br.* 69 (emphasis added, citation omitted). However, EPA does not point to where such tribal authority has been sufficiently "demonstrated" in the record to support a nationwide FIP rule.

EPA fails to recognize the teaching of *Montana*'s progeny. Those cases have repeatedly expanded *Montana*'s "main rule," that tribes lack jurisdiction over nonmembers unless a *Montana* "exception" applies, to encompass court jurisdiction, *see, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 457-59 (1997) (state courts may address on-reservation torts); *Hicks*, 533 U.S. at 367 (tribal courts are not courts of general jurisdiction); and taxation, *see Atkinson*, 532 U.S. at 654 (tribe lacks taxing authority over on-reservation business). *Hicks* unqualifiedly extends the *Montana* rule to on-reservation trust land. *Hicks*, 533 U.S. at 360 ("[T]he ownership status of land is . . . only one factor . . . ."); *see also Attorney's Process & Investigation Servs. v. Sac & Fox Tribe of Miss.,* 609 F.3d 927, 936 (8th Cir. 2010) ("*Montana*'s analytic framework now sets the outer limits of tribal civil

jurisdiction—both regulatory and adjudicatory—over nonmember activities *on tribal and nonmember land*."); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1069-70 (10th Cir. 2007) ("The notion that *Montana*'s applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in *Hicks*."). The *Montana* rule applies to the "Indian country" lands subject to the NSR Rule.

Tribal Intervenors are wrong that *Hicks*' statements regarding the broad application of the *Montana* rule pertain only to suits by state officials, *see* Tribes' Br. 13; however, even if they were correct, ODEQ, a state regulator, falls within that class of officials who may require authority on trust or restricted lands to protect fee lands activities and non-member interests. Given the *Montana* presumption that a tribe lacks jurisdiction over nonmembers of the tribe unless it establishes one of the two *Montana* exceptions, EPA's opposite presumption is unsupportable.[3]

The administrative record is devoid of evidence that emission sources anywhere in "other [non-reservation] areas" threaten or "ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the

[3] EPA's failure to acknowledge the import of the *Montana* cases leads it to rely on inapplicable earlier decisions. For example, EPA cites *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), Resp't Br. 63, which held a tribe can tax oil and gas production from allotments without considering the *Montana* exceptions, a proposition that *Atkinson* squarely rejects.

tribe." *Strate,* 520 U.S. at 446 (quoting *Montana*, 450 U.S. at 565-66). Lacking such evidence, EPA cites only *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998), Res'pt. Br. 61, 66, 68, in which the Ninth Circuit pointed to specific record evidence of facilities having the ability to "impair water quality and beneficial use of tribal waters." *Montana v. EPA*, 137 F.3d at 1139. Equally unsupportive of an administrative presumption is *Montana v. EPA*, 141 F. Supp. 2d 1259, 1262 (D. Mont. 1998), which relied on a detailed administrative record establishing that it was "very likely that activities on nonmember owned fee lands either cause or contribute to many of these current water quality problems" to affirm a TAS delegation to a tribe. Here, neither EPA's record nor the authority it advances supports a presumption of tribal authority.

C. Federal Common Law Rejects EPA's Categorical Analysis of Tribal Jurisdiction.

EPA's struggle to support a categorical nationwide presumption of tribal authority leads it to advance a broad rule that is not grounded in precedent. EPA quotes from a series of cases that applied, not a general rule, but a particularized pre-emption analysis first prescribed in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973). These cases, however, did not apply the "platonic notions of Indian sovereignty" upon which EPA relies—indeed, *McClanahan* rejected the same. *Id.* The cases looked "instead at the applicable treaties and statutes" to assess whether federal law preempted state power. *See*,

e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980), cited Resp't Br. 52. Those cases did *not* find the "crucial backdrop" of sovereignty EPA proposes dispositive of preemption issues:

> This [preemption] inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the federal, state, and tribal interests involved at stake . . . .

Bracker, 448 U.S. at 145. EPA disregards that the applicable treaties and state, federal, and tribal interests are far from uniform with respect to the great variety of "other areas" to which the FIP will apply across Indian country.[4]

EPA also misunderstands the import of *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). *See* Resp't Br. 70. ODEQ does not contend *Brendale* holds a tribe cannot establish jurisdiction over off-reservation "Indian country," but, rather, that it compels the fact-specific determination that EPA by-passed here. *Brendale* directly addressed the tension between State and tribal regulatory jurisdiction and held jurisdiction depended on fact- and demographic-specific considerations. *Brendale* unqualifiedly refutes

[4] EPA ignores other applicable statutes, including 25 U.S.C. § 231 (authorizing state inspection of health and sanitation conditions under BIA regulation), and 43 U.S.C. § 666 (authorizing state court adjudication of suits to determine federal and tribal water rights).

EPA's attempt to promulgate administratively a single jurisdictional presumption for all "Indian country."

VI. OKLAHOMA DEMONSTRATES THE NEED FOR PARTICULARIZED DETERMINATIONS OF TRIBAL JURISDICTION.

EPA, Intervenors, and their *amici* misinterpret ODEQ's arguments regarding its unique history and circumstances. Oklahoma is not the issue. Rather, air regulation in Oklahoma provides a striking example why the NSR Rule is unworkable nationally, and the State epitomizes why the jurisdictional presumption underlying the Rule is unsupportable. The opposing briefs do not contradict that Oklahoma presents a highly diverse set of Native American communities with unique landholding patterns that may affect whether specific "Indian country" lands are "other *areas* within the tribe's jurisdiction." Reflecting the other State or area-specific factors the national rule omits, there are Oklahoma-specific statutes recognizing the applicability of Oklahoma law to allotments that would be pertinent in fact-specific pre-emption analyses. *See*, *e.g.*, 25 U.S.C. § 355 (state court partition of allotments under Oklahoma law); 25 U.S.C. §§ 375, 375a (Oklahoma law affects heirship determinations). Such considerations should be part of the particularized analysis addressing jurisdiction over "other areas," in Oklahoma and elsewhere.

VII. *AMICI* DO NOT DEMONSTRATE A FEDERAL PROGRAM WILL BE WORKABLE.

Amicus State of Minnesota contends the NSR Rule facilitates environmental regulation in "Indian country." Minnesota's view that the Rule is working there, however, supports neither the need for the present Rule nor EPA's statutory implementation authority. Nothing prevents EPA and a State from addressing local conditions by stipulated amendment to or interpretation of a State's SIP and stipulating to EPA's regulation under a FIP. *See* 42 U.S.C. § 7410. The Osage Nation's attempt to explain how regulated entities or persons might take steps to determine "Indian country" land ownership does not contradict that such steps, even if as workable as the Osage Nation asserts, are an additional burden on the regulated community or that different regulatory burdens on adjacent properties makes little sense.[5]

VIII. CONCLUSION.

For the foregoing reasons, the Court should vacate the NSR Rule and remand the Rule to EPA for further proceedings.

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[5] Contrary to *Amicus* Osage Nation's assertion, the entirety of Osage County, Oklahoma is not an "informal reservation." As the Nation concedes, the Tenth Circuit held that the Osage reservation was disestablished over a century ago. *Osage Nation v. Kirby*, 597 F.3d 1117, 1127 (10th Cir. 2010). Today, less than 1% of Osage County's surface estate is held in trust for the Osage Nation and less than 10% of the land is held as individual allotments. *See* Osage Nation Br. 7. The Nation's assertions, however, highlight the regulatory uncertainty and jurisdictional disputes EPA's blanket assertion of jurisdiction over all non-reservation "Indian country" lands will engender.

Dated this 12th day of September, 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 **Proof Reply Brief of the Petitioner** is proportionally spaced and contains 6,983 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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of September, 2013, a copy of the foregoing Petitioner Oklahoma Department of Environmental Quality's Proof Reply Brief 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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