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Empowering Tribes - The District of Columbia Circuit Upholds Tribal Authority to Regulate Air Quality throughout Reservation Lands in Arizona Public Service Company v. Environmental Protection Agency

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EMPOWERING TRIBES—THE DISTRICT OF COLUMBIA CIRCUIT UPHOLDS TRIBAL AUTHORITY TO REGULATE AIR QUALITY THROUGHOUT RESERVATION LANDS IN ARIZONA PUBLIC SERVICE COMPANY V. ENVIRONMENTAL PROTECTION AGENCY

"Territory is the sine qua non of sovereignty"  

I. INTRODUCTION

Congress adopted the Clean Air Act (CAA) \(^2\) in 1963 to combat the serious decline of the nation’s ambient air quality. \(^3\) The stated goal of CAA was to "protect and enhance the quality of the Nation’s air resources." \(^4\) In 1990, Congress amended the statute to ensure that Native American nations (Tribes) could participate more fully in CAA programs. \(^5\) As a result of this amendment, tensions mounted between state and tribal authorities over environmental issues affecting Native American reservations. \(^6\) Currently, Native American Tribes are "actively pursuing opportunities to regulate all


5. See id. at 79, 80 (1989), reprinted in A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 8419-20 (discussing purpose of 1990 Amendments as improving environmental air quality within reservations in manner consistent with EPA Indian Policy and Federal position supporting tribal self-government as well as government to government relations between federal and tribal authorities); see also Joshua Epel & Martha Tierney, Tribal Authority Over Air Pollution Sources On and Off the Reservation, 25 ENVTL. L. REP. 10583, 10587 (Nov. 1995) (noting that “CAA added §7601(d) which enlarged tribal authority by authorizing EPA to promulgate regulations specifying those CAA provisions for which it is appropriate to treat Native American [T]ribes as States”).

6. See id. (1989) (noting increased tensions between state and tribal sovereignties over issues affecting Tribes and reservations, especially with regard to environmental protection).
environmental media.”

Thus, some of the most controversial and potentially far-reaching environmental developments of the last few years have derived from tribal sovereign governments located within the United States.

Because tribal reservation lands usually consist of “a jumble of tribal trust lands, Indian allotments, and non-Indian fee lands,” tribal attempts to regulate reservation resources often create jurisdictional disputes between Tribal authorities and individual States.

The Environmental Protection Agency (EPA) has recognized tribal primacy over non-member fee lands, generating considerable controversy. The United States Court of Appeals for the District of Columbia Circuit, for example, departed from common law precedent and followed EPA’s Final Tribal Authority Rule (Final Rule), holding CAA expressly delegated to Tribes the authority to implement and enforce air quality regulations.

7. William H. Gelles, Tribal Regulatory Authority Under the Clean Air Act, 3 EnvTL. LAW. 363, 365 (Feb. 1997) (acknowledging tribal efforts to regulate all environmental arenas, including land, water and air).

8. See id. at 365 (noting recent rise of tribal environmental law issues); see also Epel & Tierney, supra note 5, at 10584. “The federal government, individual states, and Native American tribes all assert interests in controlling air pollution on Native American reservations. The question of which entity should regulate in this area presents complex issues of federal law, Native American sovereignty, and state autonomy and sovereignty.” Id.

9. Gelles, supra note 7, at 367 (quoting Judith V. Royster, Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation, 1 KAN. J.L. & PUB. POL’Y 89, 90 (1991)) (finding jurisdictional conflicts arise between Tribes issuing environmental regulations pursuant to federal environmental statutes and states presuming they can exercise their jurisdiction over non-members living on fee lands within reservations). Often, reservation populations consist of both tribal members and non-members alike. See id. This mix of members and non-members co-existing on reservations results from a nineteenth century policy of allotment, imposing private land ownership on Tribes. See id.; see also General Allotment Act, ch. 19, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331 (1988)). The General Allotment Act divided tribal lands into discrete parcels. See Gelles, supra note 7, at 367. Under the Act, each household received a number of acres. See id. The Federal government sold the surplus parcels to white farmers. See id. As a result, many Native Americans lost their land parcels to estate tax foreclosure. See id. When the allotment era ended in 1934, tribal lands had fallen from 140 million acres to 50 million acres. See id.

10. See Epel & Tierney, supra note 5, at 10588; see also B. Kevin Gover & Jana L. Walker, Tribal Environmental Regulation, 36 FED. B. NEWS & J. 438, 438 (1989) (observing that “[a]s [T]ribes have begun developing natural resources and promoting economic development on tribal lands, questions of jurisdictional authority to administer environmental protection programs within Indian country have arisen.”).

This Note considers the D.C. Circuit case of Arizona Public Service Co. v. EPA. Section II summarizes the facts of Arizona Public. Section III provides a background of CAA and the 1990 Amendments. Section IV details the D.C. Circuit's holding and rationale, providing a critical analysis of the court's determination that 42 U.S.C. § 7601(d)(2)(B) expressly delegates to Tribes the authority to develop and implement air quality standards under CAA. Finally, section V discusses the impact and future effects of the Arizona Public holding.

II. FACTS

In 1990, Congress passed a series of amendments to CAA. Specifically, the 1990 Amendments granted EPA authority to treat Tribes as States for the purpose of implementing air quality regulations under CAA. The 1990 Amendments also directed EPA to promulgate regulations "specifying those provisions of [CAA] for which it is appropriate to treat Indian [T]ribes as States." On August 25, 1994, EPA proposed rules to implement the 1990 Amendments. After receiving and responding to public comments regarding the proposed rules, EPA issued its Final Rule.
Rule.21 Within the Final Rule, EPA interpreted the 1990 Amendments to constitute a federal grant of authority to Tribes to regulate air quality on all lands "within the exterior boundaries of the reservation or other areas within the [T]ribe’s jurisdiction."22 According to EPA, this "territorial approach . . . best advance[d] rational, sound, air quality management."23 Under the Final Rule, EPA delegated to Tribes the authority to regulate the activities of non-member fee owners.24


21. See 5 U.S.C. § 553 (1994). Title 5 U.S.C. § 553 sets out the administrative procedure for agency rulemaking. See id. The statute required EPA to post general notice of its Proposed Rule by publishing it in the Federal Register. See id. at § 553(b). The notice must include: (1) a statement of the time, place and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the Proposed Rule or a description of the subjects and issues involved. See id. at § 553(b)(1), (2), (3). The statute further required EPA to give interested persons an opportunity to participate in the rulemaking process through submission of written data, views or arguments. See id. at § 553(c); see also Epel & Tierney, supra note 5, at 10587-88 (observing that many States submitted comments to EPA contesting its conclusion that Supreme Court cases supported inherent tribal jurisdiction over fee lands in all cases, and predicting that judicial challenges to EPA’s tribal regulations are certain to occur as EPA begins to implement CAA’s tribal primacy provisions).

Additionally, the statute required EPA to incorporate the adopted rules into a concise general statement of their basis and purpose. See 5 U.S.C. § 553(c); see also Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7255 (Feb. 12, 1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, 81) [hereinafter Final Rule] (setting forth CAA provisions for which it is appropriate to treat Tribes as states by establishing requirements Tribes must meet if they choose to seek such treatment and providing for awards of federal financial assistance to Tribes to address air quality problems). Finally, the statute ordered EPA to give all interested persons the right to petition for the issuance, amendment or repeal of its rule. See 5 U.S.C. § 553(e) (1994).


23. Final Rule, 63 Fed. Reg. at 7255 (noting both commenters’ support for EPA’s interpretation of CAA as express congressional delegation of authority to Tribes to implement CAA programs over their entire reservation and commenters’ assertion that territorial delegation approach is consistent with federal Indian law and Congress’ intent as expressed in several CAA provisions); see also Gelles, supra note 7, at 385-86 (hypothesizing that EPA’s retention of territorial approach in Final Rule would render tribal authority to operate CAA programs nearly undefeatable by States challenges).

24. See Final Rule, 63 Fed. Reg. at 7257 (citing Proposed Rule) (stating “EPA believes that Tribes generally will have . . . authority over air pollution sources on fee lands.”).

Company challenged EPA’s grant of regulatory authority, allowing Tribes to implement and enforce air quality standards over all reservation lands, including privately owned non-member fee lands.\(^\text{26}\) In its suit against EPA, Arizona Public contended that “EPA . . . granted too much authority to Tribes.”\(^\text{27}\) Specifically, Arizona Public argued against EPA’s determination that CAA section 7601(d)(2)(B) expressly delegated to Tribes the authority to regulate air quality on non-member fee lands.\(^\text{28}\)

The D.C. Circuit held that EPA did not err in finding that CAA delegated authority to Tribes to regulate all land within reservations, including non-member fee lands.\(^\text{29}\) Thus, the D.C. Circuit ruled that EPA interpreted 42 U.S.C. § 7601(d) as an expression of “congressional intent to grant tribal jurisdiction over non-member owned fee land within a reservation without the need to determine, on a case-specific basis, whether a [T]ribe possesse[d] ‘inherent sovereign power.’”\(^\text{30}\)

III. BACKGROUND

Like most environmental regulations, Congress enacted CAA “to protect and enhance human health and environmental integrity.”\(^\text{31}\) CAA is a complex statute, causing unique tensions among

\(^{26}\) See Arizona Public, 211 F.3d at 1286. Although Arizona Public challenged EPA's Final Rule on various bases, the question of whether EPA properly interpreted CAA to grant Tribes authority to regulate air quality on all land within the reservation, including non-member fee lands, was the main issue disputed between the majority and dissenting opinions and is the primary focus of this Note. See id. For a further discussion of Arizona Public's additional contentions, see infra note 86 and accompanying text.

\(^{27}\) Id. at 1286.

\(^{28}\) See id. at 1286. Among its several challenges to EPA's Final Rule, Arizona Public primarily asserted that the 1990 Amendments could not be interpreted as an express delegation of authority to Tribes to regulate privately owned fee lands located within the exterior boundaries of their reservations. See id.

\(^{29}\) See id. at 1284 (upholding EPA's Final Rule); see also 42 U.S.C. § 7607(b)(1) (requiring petitions for review of regulations promulgated by EPA Administrator be filed in United States Court of Appeals for the District of Columbia). Under 42 U.S.C. § 7607(b)(1):

A petition for review of action of [EPA] Administrator [ ] promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under [CAA] may be filed only in the United States Court of Appeals for the District of Columbia.

Id. (emphasis added).

\(^{30}\) Arizona Public, 211 F.3d at 1288.

\(^{31}\) Julie M. Reding, Comment, Controlling Blue Skies in Indian Country: Who Is the Air Quality Posse - Tribes or States? The Applicability of the Clean Air Act in Indian
tribal nations, individual states and the federal government. In recent years, various federal court decisions have heightened tensions between Tribes and States, debating the scope of tribal regulatory authority under CAA. Congressional revisions of CAA, therefore, have attempted to balance the competing demands and countervailing interests of both Tribes and state leaders.

A. Development of CAA

In the early 1960s, Congress attempted to reduce the adverse effects of air pollutants by enacting CAA. In subsequent years, Congress amended the statute several times. The Air Quality

Country and on Oklahoma Tribal Lands, 18 AM. INDIAN L. REV. 161, 161 (Spring 1993) (relating purposes of 1990 CAA Amendments); see also 42 U.S.C. 7401(c) (revealing one purpose of CAA is to protect and enhance national air quality as to promote public health and welfare).

32. See AM. ENTERPRISE, supra note 3, at 2; see also Reding, supra note 31, at 161 (1993) (observing when issue of controlling pollution on reservations arises, Tribes, individual States and federal government all assert governing interests).

33. See Royster, supra note 1, at 90 (finding that “[a]lthough Tribal governmental authority over Indians on Indian lands is unquestioned,” issue of tribal regulatory authority over non-member fee lands remains unsettled); see generally Montana v. United States, 450 U.S. 544 (1981) (asserting general rule that Tribes do not have inherent sovereign authority over non-members of Tribe within its reservation); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (maintaining that Tribes lack requisite authority to zone privately owned non-member fee land within reservation); South Dakota v. Bourland, 508 U.S. 679 (1993) (holding that Tribes may not regulate non-member fee lands absent express congressional delegation).

34. See AM. ENTERPRISE, supra note 3, at 1 (noting the serious debate surrounding revision of original CAA); see also David F. Coursen, Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations, 23 ENVTL. L. REP. 10579, 10579 (Oct. 1993) (stating “federal environmental laws put the federal government in a leadership role in environmental management, but preserve the concepts of state primacy and tribal sovereignty.”). For a further discussion of jurisdictional conflicts and countervailing state and tribal interests, see supra notes 8-10 and accompanying text.

35. See AM. ENTERPRISE, supra note 3, at 2 (characterizing original “barebones approach to cleaning up nation’s air.”). Congress enacted CAA in 1963. See id. Among other provisions, CAA, as originally enacted, authorized the Secretary of the Department of Health, Education and Welfare (“HEW”) to hold abatement conferences in order to deal with interstate and intrastate air pollution. See id. (citing Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988))). Where these conferences proved unsuccessful, the Secretary was authorized to file suits to abate serious pollution. See AM. ENTERPRISE, supra note 3, at 2. Finally, the 1963 CAA authorized research on specific problems of air pollution and required the Secretary to publish research findings on the effects of air pollution. See id.

Control Act of 1967 (AQCA), an early CAA amendment, shifted the focus of CAA and required the Secretary of the Department of Health, Education and Welfare to designate air quality control regions and set air quality standards. Additionally, AQCA required States to prepare implementation plans revealing their proposals to achieve the set standards. Though CAA’s earliest revisions shaped the evolution of CAA, the 1970 Amendments established the regulatory framework for air quality control that exists today.

Building on this foundation, the 1970 Amendments supplanted state standards and added provisions for the promulgation of nationally uniform primary and secondary air quality standards. Under the 1970 Amendments, EPA formulated national ambient air quality standards ("NAAQS") to protect the public from targeted air pollutants. NAAQS are defined as "air emission standards deemed acceptable by Congress." The 1970 Amendments also incorporated the idea of "attainment" into CAA. An "attainment" area is a "designated area which has attained specific emission standard." Additionally, the 1970 Amendments required EPA to publish proposed regulations describing NAAQS. After a ninety day period, EPA was instructed to promulgate the proposed NAAQS through regulations. Within three years, the federal government required States to submit proposals outlining their individual plans for the implementation and maintenance of NAAQS within state boundaries. Under the 1970 Amendments, state implementation plans [hereinafter SIPs] affecting each air quality region became subject to federal approval.

Notably, the 1970 CAA Amendments also marked the birth of EPA. President Richard Nixon’s 1970 Reorganization Act created EPA, making the EPA Administrator responsible for executing federal responsibilities.
upon that framework, Congress again amended CAA in 1977.\textsuperscript{41} While the 1977 Amendments authorized Tribes to "redesignate" their reservations for the purpose of preventing significant deterioration, the amendments failed to address whether Tribes had the authority to implement and enforce air quality regulations over reservation lands.\textsuperscript{42} Though the 1977 Amendments did little to strengthen tribal regulatory authority over reservation air quality, the amendments represented an important step toward tribal recognition and self-government in the environmental arena.\textsuperscript{43}

B. 1990 CAA Amendments

In 1990, Congress again amended CAA to ensure that Tribes participated more fully in planning, implementing and enforcing

\textsuperscript{41} See Clean Air Act Amendments of 1977, Pub. L. No. 95-95 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401-7626 (1995); see also Gelles, supra note 7, at 374 (noting that Congress first recognized Tribes in 1977 CAA Amendments). The 1977 CAA Amendments restricted state discretion in several ways. See Am. ENTERPRISE, supra note 3, at 3. The 1977 Amendments added new provisions to CAA in order to prevent the significant deterioration of air quality in areas already meeting NAAQS. See id. These amendments called for the protection of visibility in certain national parks and other federal areas from impairment by man-made pollutants. See id. Under the 1977 Amendments, CAA divided air control regions into three categories, specifying the maximum allowable pollution increases for each category. See id. Class I is characterized as the most stringent standard, protecting pristine air quality by permitting very little air quality deterioration. See Reding, supra note 31, at 165. While Class II permits some deterioration, Class III is considered the least stringent standard, allowing air quality deterioration to the NAAQS level. See 40 C.F.R. § 52.21(e)(3) (1996)

In addition to requiring that states devise plans to prevent significant deterioration of air quality within control regions, the 1977 Amendments also allowed Tribes to "redesignate" reservation lands under the Prevention of Significant Deterioration Plan [hereinafter PSD]. See also Am. ENTERPRISE, supra note 3, at 3. The 1977 CAA Amendments approved EPA's practice of allowing Tribes to redesignate their reservations from Class II to Class I lands. See id. (citing 40 C.F.R. § 52.21(c) (1975)). Interestingly, no CAA provision recognized Tribes prior to 1977. See Reding, supra note 31, at 166.

\textsuperscript{42} See S. REP. No. 101-228, at 79 (1989), reprinted in LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 8419 (noting that while Congress amended CAA in 1977 to authorize Tribes to redesignate their reservations for prevention of significant deterioration, it failed to address tribal authority regarding air quality planning or enforcement in amendments); see also Reding, supra note 31, at 162 (revealing Congress neglected to address issue of who was vested with authority to enforce air quality standards in 1977 Amendments); Gelles, supra note 7, at 376 (stating that ability to redesignate lands did not considerably strengthen tribal authority).

\textsuperscript{43} See id. (noting inherent weakness and marginal strengths in 1977 Amendments); see also Reding, supra note 31, at 161-62 (observing that until 1990 Amendments, it was unclear whether Tribes or States had jurisdictional authority to address air quality protection problems on tribal lands).
CAA programs. The Senate Report indicated that the 1990 Amendments were "intended to provide Indian [T]ribes the same opportunity to assume primary planning, implementation and enforcement responsibilities for [CAA] programs . . . as they [were] presently accorded under the Safe Drinking Water Act ('SDWA') and the Clean Water Act ('CWA'). SDWA and CWA delegated to Tribes the authority to administer and enforce their respective environmental programs within the reservation.

EPA thus deter-

44. See Arnold W. Reitza, JR., AIR POLLUTION LAW § 6-2(d) (1995) (noting that Congress enacted 1990 Amendments to ensure Tribes enjoyed same regulatory privileges under CAA as they did under SDWA and CWA); see also S. Rep. No. 101-228, supra note 42, at 8419 (maintaining that 1990 amendments are "necessary to ensure that [T]ribes will be allowed to participate fully in programs established by [CAA] as they take affirmative measures to manage, regulate and protect air quality.

45. See Federal Safe Drinking Water Act, 42 U.S.C. § 300j-11(b) (1991 & Supp. 2000). SDWA authorizes the EPA Administrator to treat Tribes as States for SDWA regulatory purposes. See id. at § 300j-11(a)(1). SDWA also permits the Administrator to delegate to Tribes primary enforcement responsibility for public water systems as well as underground injection control and provides approved Tribes with either grants or contract assistance to carry out SDWA regulatory programs. See id. at § 300j-11(b) (1991 & Supp. 2000). SDWA authorizes Tribes' treatment as States provided:

(A) the Indian tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
(B) the functions to be exercised by the Indian tribe are within the area of the Tribal government's jurisdiction;
(C) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [SDWA] and of all applicable regulations.

Id. at § 300j-11(b)(1)(A), (B), (C).

46. See Federal Clean Water Act, [hereinafter CWA] 33 U.S.C. § 1377(e) (Supp. 2000). CWA authorizes the EPA Administrator to treat Tribes as States for CWA regulatory purposes provided:

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

33 U.S.C. § 1377(e).


48. See Reding, supra note 31, at 167 (reporting that SDWA and CWA contained express congressional delegations); see also Royster, supra note 1, at 94 (revealing that amendments to SDWA, CWA and CAA generally provide for treating Tribes as states for most or all of programs authorized by acts); Beverly Conerton,
mined that the process for treating Tribes as States under SDWA and CWA applied to all regulatory programs available under the acts.\textsuperscript{49} In 1986, EPA determined that the purpose of the 1986 SDWA Amendments was to allow eligible Tribes an opportunity to participate in its regulatory programs.\textsuperscript{50} In 1991, EPA followed its SDWA rationale, finding that Congress also expressed a preference for tribal regulation of surface water quality on Indian reservations.\textsuperscript{51}

Essentially, the 1990 CAA Amendments require EPA to promulgate regulations, specifying CAA provisions for which it is appropriate to treat Tribes in the same manner as States.\textsuperscript{52} The 1990 Amendments require Tribes seeking treatment as States to submit an application for consideration to EPA.\textsuperscript{53} A Tribe’s treatment as a State, however, remains contingent upon the Tribe’s satisfying certain statutory requirements.\textsuperscript{54} If, after review, EPA determines that

\textsuperscript{49} See Reding, supra note 31, at 167 (noting that EPA modified SDWA’s and CWA’s treatment as states processes in 1994, applying processes to all regulatory programs under acts); see also Royster, supra note 1, at 94 (holding that “[a]mendments to SDWA, CWA in 1987 and CAA in 1990 generally provide for treating [T]ribes as States for most or all of the programs authorized by the acts”).

\textsuperscript{50} See generally Conerton, supra note 47 (citing 53 Fed. Reg. 37,396, 37,408 (1988)).

\textsuperscript{51} See id. (citing 59 Fed. Reg. 64,876, 64,878-79 (1991)).

\textsuperscript{52} See 42 U.S.C. § 7601(d) (2) (1995). Title 42 U.S.C. § 7601(d)(2) provides, “The Administrator shall promulgate regulations . . . specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States.” Id.; see also Epel & Tierney, supra note 5, at 10584 (characterizing 1990 Amendments as requiring EPA to issue regulations that govern tribal air quality management).

\textsuperscript{53} See Coursen, supra note 34, at 10582-83 (revealing that Tribes which submit applications to EPA and gain approval for treatment as States are eligible for program approval and subsequent grants provided that Tribes meet applicable requirements).

\textsuperscript{54} See 42 U.S.C. § 7601(d)(2). CAA authorizes the EPA Administrator to treat Tribes as states for CAA regulatory purposes provided:

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

Id. at § 7601(d)(2)(A), (B), (C).
a Tribe satisfies the statutory requirements for treatment as a State, the Tribe becomes eligible to seek applicable EPA grants and program approvals.\textsuperscript{55} Additionally, the 1990 CAA Amendments authorize the EPA Administrator to develop regulations establishing the required elements of tribal implementation plans (TIPs).\textsuperscript{56} In general terms, TIPs are the "tribal analogue of state implementation plans."\textsuperscript{57}

C. EPA's Proposed Rule

In accordance with the above-mentioned statutory requirement that the EPA Administrator promulgate regulations regarding Tribes' treatment as States, EPA published the Proposed Tribal Authority Rule (Proposed Rule) on August 25, 1994.\textsuperscript{58} In its Proposed Rule, EPA announced its finding that the 1990 CAA Amendments "grant[ed], to Tribes approved by EPA . . . [the] authority [to enforce CAA programs] over all air resources within the exterior

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  \item \textsuperscript{55} See Coursen, supra note 34, at 106 (observing that once Tribe meets regulatory requirements and obtains EPA approval for treatment as State, that Tribe becomes subject to state duties and privileges in its application for program responsibility).
  \item \textsuperscript{56} See 42 U.S.C. § 7601 (d)(3). Title 42 U.S.C. § 7601(d)(3) provides: "The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof." \textit{Id}.
  \item \textsuperscript{57} See Gelles, supra note 7, at 381 (finding that "because of specific language added to CAA [§ 7410(o)], Tribes regulate . . . air resources through the tribal analogue of state implementation plans"). Title 42 U.S.C. § 7410(o) provides:
  \begin{quote}
  If an Indian tribe submits an implementation plan to the Administrator pursuant to [§] 7601(d) . . . the plan shall be reviewed in accordance with the provisions for review set forth . . . for State plans, except as otherwise provided by regulation promulgated under [§] 7601(d) . . . the plan shall become applicable to all areas (except as provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.
  \end{quote}
  \textit{Id}.
  \item \textsuperscript{58} See generally Proposed Rule, 59 Fed. Reg. 43,956 (to be codified at 40 C.F.R. pts. 35, 49, 50 and 80) (August 25, 1994) (setting forth proposed CAA provisions for which it is appropriate to treat Tribes in same manner as States, establishing requirements for such treatment and providing for federal financial assistance to Tribes).
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boundaries of a reservation." In developing the Proposed Rule, EPA acted in compliance with the principles set forth in both the existing Federal Indian Policy and EPA's Indian Policy. Under its Indian policy, EPA vowed "to give special consideration to [t]ribal interests in making Agency policy, and to ensure the close involvement of [t]ribal [g]overnments in making decisions and managing environmental programs affecting reservation lands."

Upon these bases, EPA determined that the 1990 CAA Amendments expressly delegated to Tribes federal authority to implement and enforce air quality standards over reservation lands. EPA further noted that Congress' grant of authority permitted Tribes "to address conduct on all lands, including [non-member] owned fee lands, within the exterior boundaries of a reservation." EPA thus

59. See id. at 43,958 (emphasis added) (stating § 7601(d) required EPA to promulgate regulations that provide for Tribes' assumption of responsibility for development and implementation of CAA programs on lands within exterior boundaries of reservations or other areas within their jurisdiction); see also Gelles, supra note 7, at 383 (noting that finding congressional delegation of authority to Tribes would allow Tribes to address conduct on all lands within exterior boundaries of reservation, including non-Indian fee lands).

60. See Proposed Rule, 59 Fed. Reg. at 43,956. On January 24, 1983, President Ronald Reagan issued the Federal Indian Policy. See President's Indian Policy Statement, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 28, 1983). Building upon the federal format, EPA created its own Indian Policy. See EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984) (cited in Coursen, supra note 34, at 10588); see also Reding, supra note 31, at 171-72. The thrust of the Indian Policy stressed the Federal Government's commitment to tribal self-determination and committed the Federal Government to work directly with Tribal Governments on a government-to-government basis. See id.; see also Coursen, supra note 34, at 10588 (quoting EPA's Policy for Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984)).

61. Proposed Rule, 59 Fed. Reg. at 43,957 (quoting EPA Policy for Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984)). Under its Policy for the Administration of Environmental Programs on Indian Reservations, EPA, under the principles of the Federal Indian Policy, committed itself to recognizing Tribal Governments "as sovereign entities with primary authority over and responsibility for the reservation populace." Proposed Rule, 59 Fed. Reg. at 43,957. EPA further announced that it would "work directly with Tribal Governments as the independent authority for reservation affairs." Id. Under its Indian Policy, EPA committed itself to "encourage and assist [T]ribes in assuming regulatory and program management responsibilities for reservation lands." Gelles, supra note 7, at 365 (quoting Policy for Administration of Environmental Programs on Indian Reservations, U.S. Environmental Protection Agency (Nov. 8, 1984)). Under EPA's Indian Policy, EPA provides technical and financial assistance to Tribes interested in developing programs and assuming regulatory management over their reservations. See B. Kevin Gover & Jana L. Walker, Tribal Environmental Regulation, 36 Fed. B. News & J. 438, 443 (Nov. 1989).


63. Proposed Rule, 59 Fed. Reg. at 43,958 (noting that proposed EPA interpretation related to potential scope of regulatory jurisdiction approved Tribes held
took the position that Tribes "are the optimal governments to control and manage reservation lands and resources." 64

Following the publication of EPA’s Proposed Rule, several commentators argued that EPA’s rule conflicted with existing common law. 65 Prior to the 1990 Amendments, the United States Supreme Court in Montana v. United States 66 noted that Tribes retain only inherent power to determine tribal membership, to regulate domestic relations among members, to prescribe rules of inheritance for members and to punish tribal offenders. 67 In Montana, the Supreme Court adhered to its decision in United States v. Wheeler, 68 finding that "[t]he areas in which ... implicit divestiture of [tribal] sovereignty has been held to have occurred are those involving the relations between an Indian [T]ribe and non-members of the [T]ribe." 69 While Montana generally supported the proposition that Tribes’ inherent authority does not encompass the activities of non-members on fee lands within reservations, the Court maintained that a Tribe does "retain inherent power to exercise civil authority over the conduct of [non-members] 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 [T]ribe."\(^{70}\) *Montana* thus established a general test for determining tribal civil jurisdiction over non-member fee lands within the exterior boundaries of the reservation.\(^{71}\)

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,\(^{72}\) the Supreme Court further restricted tribal regulatory rights, granting county governments significant zoning power over reservation lands.\(^{73}\) The *Brendale* Court based its decision upon an analysis of the land's "essential character."\(^{74}\) While the *Brendale* decision, in effect, established a checkerboard pattern of jurisdiction within Indian reservations, it also affected principles of tribal sovereignty.\(^{75}\) Most recently, in *South Dakota v. Bourland*,\(^{76}\) the Supreme

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70. *Montana*, 450 U.S. at 566 (carving out exception to general proposition that Tribes lack jurisdiction over non-member fee lands within reservation). Fee lands are "lands that lie within the boundaries of a reservation ... that private entities own in fee." Epel & Tierney, *infra* note 5, at 69.

71. See *Montana*, 450 U.S. at 565-66 (illustrating test to determine tribal jurisdiction over non-member fee lands within exterior boundaries of reservation); see also Gelles, *supra* note 7, at 369 (noting that *Montana* announced general rule that Tribes lack inherent jurisdiction over non-member fee lands). For a further discussion of the *Montana* test, see infra note 99 and accompanying text.


73. See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989) (White, J., plurality) (stating that Tribes lacked authority to zone fee lands owned by non-members). The *Brendale* Court significantly reduced Tribes' ability to regulate and control lands within tribal territories. See id.; see also Royster, *supra* note 1, at 92. Ultimately, the *Brendale* plurality determined, "[w]here all or part of an Indian reservation has significant non-Indian ownership, the state or county has land use control over all non-Indian land." *Id.* According to *Montana* and *Brendale*, Tribes lose any former rights of absolute, exclusive use and occupation over fee lands conveyed to non-members. See *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). In order for a Tribe to exercise its regulatory powers over fee lands under the *Brendale* decision, non-member activities "must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe." *Brendale*, 492 U.S. at 431.

74. See *Brendale*, 492 U.S. at 447 (Stevens, J. concurring in part) (stating "line-drawing is inherent in the continuum that exists between those reservations that still maintain their status as distinct social structures and those that have become integrated in other local polities."). The *Brendale* plurality opinion, written by White, held that the primary issue before the Court was whether and to what extent a Tribe had a "protectable interest" in the disputed lands. See generally Conerton, *supra* note 48, at 3. According to the *Brendale* Court, a region largely occupied by non-members loses its "Indian" character and becomes "an integrated portion of the county [in which it sits]." See Royster, *supra* note 1, at 93 (quoting *Brendale*, 492 U.S. at 446). Through this type of analysis, the Supreme Court created a case by case approach to questions of tribal regulatory authority over non-member fee lands. See Cochran, *supra* note 63, at 336.

75. See Royster, *supra* note 1, at 92 (noting that States' regulation of non-member lands within reservations created tribal territories with checkerboard land ownership). "Checkerboard jurisdiction ... discourages long-range planning, hinders comprehensive resource management, and breeds conflict and distrust." *Id.* at 91.

76. 508 U.S. 679 (1993) (concluding that Congress clearly abrogated Tribes' pre-existing regulatory control over non-Indian hunting and fishing).
Court followed the *Montana* and *Brendale* rationales, holding tribal regulatory authority over non-member fee lands cannot exist without Congress' express delegation. While these cases did not address CAA particularly, opponents to the Proposed and Final Tribal Authority Rules nonetheless cite them to bolster their arguments against EPA's Final Rule.

D. EPA's Final Rule

Despite opposition, EPA found that CAA constituted a statutory grant of jurisdictional authority to Tribes over non-member fee lands. In its Final Rule, EPA argued that the language and legislative history of the 1990 CAA Amendments were consistent with a finding that the statute expressly delegated to Tribes the authority to implement and enforce air quality standards. EPA rooted its interpretation of the 1990 Amendments in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* Despite the lack of common law precedent from which to draw a clear conclusion, EPA ultimately inter-

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77. See id. at 694-95 (finding no evidence that Congress intended to allow Tribes power to assert regulatory jurisdiction over disputed lands pursuant to their inherent sovereignty or congressional delegation); see also *Coursen, supra* note 34, at 10586.


79. See id. at 7254 (observing that "[i]t is a settled point of law that Congress may, by statute, expressly delegate federal authority to a [T]ribe."); see also *Coursen, supra* note 34, at 109 (upholding that "Congress has broad authority over tribal affairs and may by statute delegate federal authority to a [T]ribe."). EPA thus based its Final Rule on the principle that "Congress has plenary power over Tribes that it can exercise either to enhance or to diminish tribal sovereignty." *Gelles, supra* note 7, at 368.

80. See *Final Rule*, 63 Fed. Reg. at 7258 (revealing "EPA's interpretation of CAA is based on the language, structure, and intent of the statute"); see also *Gelles, supra* note 7, at 384 n. 141 (stating that "legislative history of CAA supports EPA delegation interpretation."). EPA believed that Congress, in CAA, chose to adopt a "territorial approach" to the protection of air resources within reservations. See id. at 383-84. EPA expected its delegation approach to effectively minimize jurisdictional entanglements and checkerboarding within reservations. See id. at 383-85.

81. 467 U.S. 837 (1984). The *Chevron* Court established a two part test for reviewing Agency interpretations of Agency administered statutes. See id. at 842. First, the court considers whether Congress has directly spoken to the precise question at issue. See id. If Congress has specifically addressed the issue in question, the reviewing court must follow Congress' intent. See id. at 842-43. Where congressional intent is ambiguous, a reviewing court must determine whether the agency's statutory interpretation is reasonable. See *Arizona Public*, 211 F.3d at 1287. Thus, a court reviewing an Agency's interpretation of a statute need only consider whether the agency reasonably filled the gap Congress left in the statute. See id.
interpreted the 1990 Amendments as expressly delegating to Tribes regulatory control over all reservation air resources.82

IV. ANALYSIS

A. Narrative Analysis

1. Majority Decision

The D.C. Circuit, in Arizona Public, began its analysis of petitioner’s claim by reviewing the statutory background of CAA.83 Examining the effects of the 1990 Amendments, the Arizona Public court noted that the 1990 Amendments added specific language to CAA, granting EPA the authority to treat Tribes as States for the purpose of regulating air quality on reservation lands.84 The D.C. Circuit in Arizona Public also observed that under the 1990 Amendments, EPA was to promulgate regulations outlining those provisions of CAA for which it was appropriate to treat Tribes as States.85 The D.C. Circuit thus weighed the petitioner’s several challenges to EPA’s Final Rule against the directives of the 1990 Amendments.86

82. See Final Rule, 63 Fed. Reg. 7254; see also Arizona Public, 211 F.3d at 1290 (noting that only few cases previously addressed and upheld express congressional delegation to Tribes generally); United States v. Mazurie, 419 U.S. 544, 556-57 (1975) (concluding that 18 U.S.C. § 1161 was express delegation to Tribes of authority to regulate alcohol transactions); Rice v. Rehner, 463 U.S. 713, 728-29 (1983) (reaffirming Mazurie).

83. See Arizona Public, 211 F.3d at 1284 (characterizing CAA as establishing “framework for a federal-state partnership to regulate air quality.”). Ultimately, the D.C. Circuit interpreted the 1990 Amendments as Congress’ attempt to increase the role of Tribes in that partnership. See id.

84. See id. at 1285 (quoting 42 U.S.C. § 7601(d)(1)(A) (1995) (reporting that CAA authorized EPA Administrator to treat Indian tribes as States)); see also supra note 18 and accompanying text.

85. See Arizona Public, 211 F.3d at 1285 (quoting 42 U.S.C. § 7601(d)(2)). For a further discussion of § 7601(d)(2), see supra notes 52-54 and accompanying text.

86. See id. at 1286. In addition to Arizona Public’s primary contention that EPA’s interpretation of the 1990 Amendments as an express delegation of authority to Tribes to regulate non-member fee lands within a reservation is incorrect, Arizona Public raised several other challenges to EPA’s Final Rule. See id. Arizona Public argued that EPA impermissibly interpreted “reservation” to include lands held in trust and Pueblos. See id. Arizona Public also contended that EPA wrongly interpreted CAA to permit Tribes to issue tribal implementation plans (“TIPs”) and redesignations for land outside reservation boundaries. See id. Additionally, Arizona Public asserted that EPA failed to allow comment on tribal applications to issue regulations under CAA. See id. Arizona Public further alleged that EPA’s interpretation of the 1990 Amendments effectively abrogated preexisting agreements between Tribes and regulated industry. See id. Finally, Arizona Public contended that EPA’s Final Rule regarding judicial review procedures for Title V programs rested on an impermissible interpretation of CAA and that EPA promulgated its Final Rule regarding such procedures with insufficient notice to affected parties. See id. The D.C. Circuit ultimately found Arizona Public’s challenges to EPA’s Final Rule “mostly meritless.” See id. at 1284. In addition to its determina-
In analyzing EPA's interpretation of CAA, the majority first turned to *Chevron.* In *Arizona Public,* the majority found that *Chevron* stood for the principle that "where congressional intent is ambiguous, . . . an agency's interpretation of a statute entrusted to its administration is entitled to deference, so long as it is reasonable." The D.C. Circuit noted that its primary concern under the *Chevron* analysis was to ensure that EPA acted within the bounds of congressional delegation. Employing the *Chevron* analysis, the *Arizona Public* court observed that a reviewing court must first exhaust the traditional tools of statutory construction to determine whether an act admits a plain meaning.

Turning its attention to petitioner's principal argument, the majority analyzed whether EPA misconstrued the 1990 Amendments to CAA as an express congressional delegation which authorized Tribes to regulate air quality over non-member fee lands within reservations. The court stated that it is an undisputed fact that EPA did not err in finding CAA delegated authority to Tribes to regulate member lands as well as non-member fee lands within reservations, the *Arizona Public* court upheld EPA's construction of "reservation" to include trust lands and Pueblos. See id. The Court regarded *Arizona Public's* complaint as to the adequacy of public comment on tribal applications as moot. See id. Additionally, the court rejected *Arizona Public's* challenge to EPA's decision to exempt Tribes from certain judicial requirements under CAA and determined that *Arizona Public's* claim that EPA abrogated preexisting agreements between Tribes and regulated industry was unripe for review. See id. This Note primarily focuses on *Arizona Public's* principal contention that EPA granted Tribes too much authority in its Final Rule and whether Congress expressly delegated to Tribes the authority to regulate air quality on all land within reservations, including non-member fee lands. See id.

87. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984) (outlining two-step test for reviewing agency's construction of agency-administered statutes); see also *Arizona Public,* 211 F.3d at 1287. If, after exhausting the traditional tools of statutory construction, a reviewing court determines that congressional intent is nonetheless ambiguous, the reviewing court is to employ the second step of the *Chevron* analysis by upholding an agency's interpretation only where it is reasonable. See id. For a further discussion of the *Chevron* two part test, see supra note 81 and accompanying text.

88. *Arizona Public,* 211 F.3d at 1287 (quoting *Shell Oil Co. v. EPA,* 950 F.2d 741, 747 (D.C. Cir. 1991) (per curiam) (citing *Chevron,* 467 U.S. at 842-43)).

89. See *Arizona Public,* 211 F.3d at 1286 (quoting *Arent v. Shalala,* 70 F.3d 610, 615 (D.C. Cir. 1995)) (stating "[a]s long as the agency stays within [Congress'] delegation, it is free to make policy choices in interpreting [a] statute, and such interpretations are entitled to deference.").

90. See *Arizona Public,* 211 F.3d at 1287 (citing *Bell Atlantic Tel. Cos. v. FCC,* 131 F.3d 1044, 1047 (D.C. Cir. 1997)). The *Arizona Public* court stated that "[i]f, in light of its text, legislative history, structure, and purpose, a statute is found to be plain in its meaning, 'then Congress has expressed its intention as to the question, and deference is not appropriate.'" *Arizona Public,* 211 F.3d at 1287 (quoting *Bell Atlantic Tel. Cos.,* 131 F.3d at 1047 (D.C. Cir. 1997)).

91. See id. (highlighting principal issue disputed).
that Tribes retain a significant sovereign power.92 Though the D.C. Circuit admitted that "[t]here are few examples of congressional delegation of authority to [T]ribes,"93 it nonetheless embarked upon a review of EPA's interpretation of CAA according to the traditional principles of statutory interpretation.94 Ultimately, the Arizona Public court determined that its review of CAA indicated that EPA's interpretation of the statute comported with congressional intent.95

The D.C. Circuit Court found section 7601(d) of CAA authorized EPA to treat eligible Tribes as States if "the functions to be exercised by the [Tribe] pertain[ed] to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the [Tribe's] jurisdiction."96 According to the D.C. Circuit, "[t]he statute's clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the [Tribe's] jurisdiction' carrie[d] with it the implication that Congress considered the areas within the exterior boundaries of a [Tribe's] reservation to be per se within the [Tribe's] jurisdiction."97 Rooting its holding in both the textual and structural make-up of CAA, the Arizona Public court upheld EPA's interpretation of section 7601(d)(2)(B) as an expression of congressional intent to grant Tribes jurisdiction over non-member fee lands within the borders of a reservation.98

92. See id. (stating that "[Tribes] have inherent power to determine forms of tribal government, to determine tribal membership, to make substantive criminal and civil laws governing internal matters, to administer tribal judicial systems, to exclude others from tribal lands, and, to some extent, to exercise civil jurisdiction over non-members, including non-Indians.").

93. Id. at 1288 (quoting Felix S. Cohen, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231, 253 (1982)).

94. See Arizona Public, 211 F.3d at 1288. The D.C. Circuit sought to determine through traditional sources of interpretation whether, in fact, Congress intended to delegate to Tribes the authority to administer CAA programs over non-member fee lands within reservations. See id. To make this determination, the D.C. Circuit examined CAA's text, structure, purpose and legislative history. See id.

95. See id. (affirming EPA's interpretation of CAA as express congressional delegation of authority to Tribes to enforce air quality standards on fee lands).

96. Id. (quoting 42 U.S.C. § 7601(d)(2)(B)).

97. Arizona Public, 211 F.3d at 1288.

98. See id. (finding that EPA correctly interpreted § 7601(d) as express grant of Tribal jurisdiction over non-member fee lands within reservation borders without requiring case-by-case determination of whether the Tribe, in fact, possesses inherent sovereign power). The Supreme Court, in Montana v. United States, held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of [Tribes], and so cannot survive without express congressional delegation." Id. at 1287 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)). The Montana ruling permitted Tribes to exercise jurisdiction over non-members on fee lands within reservation borders within Congress's express delegation of authority to Tribes. See id.
The D.C. Circuit further noted that the primary purpose of CAA is to ensure "effective enforcement of clean air standards." It therefore determined that denying Tribes' jurisdiction over non-member fee lands contradicted the purpose of CAA, resulting in a "checkerboard" pattern of air quality regulation within reservation boundaries.

Furthermore, the Arizona Public court found that the legislative history of the 1990 Amendments supported EPA's interpretation of CAA. The D.C. Circuit's review revealed that the language of CAA section 7601(d)(2)(B), as originally introduced, differed in large part from the language of the statute as enacted. The Arizona Public majority determined that this textual alteration strongly

lands only in the event that the non-members' behavior within the reservation "threaten[ed] or [had] some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe." See id. at 566. The Supreme Court decision, in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, heightened the Montana standard. See Brendale, 492 U.S. 408, 431 (1989) (White, J., plurality). To satisfy this heightened standard, a Tribe must be capable of showing, on a "case-by-case basis," that the non-member activity constituted a "demonstrably serious" impact that "imperil[ed] the political integrity, the economic security, or the health and welfare of the [T]ribe." Brendale at 431. The Arizona Public court's finding removed these requirements with regard to tribal jurisdiction and the regulation of air quality under the 1990 Amendments to CAA. See Arizona Public, 211 F.3d at 1288.

99. Id. (noting that neither Arizona Public Service nor EPA disputed idea of effective enforcement of clean air standards as primary purpose of CAA). The Arizona Public court also acknowledged that CAA goals would be satisfied best if Tribes and States established uniform standards within state and tribal boundaries. See id.


101. See Arizona Public, 211 F.3d at 1289 (noting differences between § 7601(d) as originally introduced to Congress and § 7601(d) as enacted). For a discussion of the differences between the bill as introduced and the statute as enacted, see infra notes 102-104 and accompanying text.

102. See id. at 1289. The D.C. Circuit observed that § 7601(d)(2)(B) originally authorized the treatment of Tribes as States if "the functions to be exercised by the Indian [T]ribe are within the area of the [T]ribal government's jurisdiction." S. 1630, 101st Cong. § 113(a) (1990), reprinted in Senate Comm. on Env't and Pub. Works, 103d Cong., Legislative History of the Clean Air Act Amendments of 1990, at 4283 (1993) (emphasis added) [hereinafter 1990 Legislative History]; see also H.R. 2323, 101st Cong. § 604 (1989), reprinted in LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 4283 (1993). The statute, as finally enacted, however, treated Tribes and States as equivalent under CAA provisions where Tribes act
suggested that Congress viewed all areas within the exterior boundaries of a reservation to be within a Tribe's jurisdiction. According to the Arizona Public court, the textual change "indicated that Congress knew how to draft the 1990 Amendments to support petitioner's interpretation," but chose language consistent with EPA's interpretation. The majority further advanced this argument through a comparison of CAA with CWA. For the majority, "there [was] no doubt that Congress may delegate authority to [T]ribes even though the lands [are] held in fee by [non-members], and even though the persons regulated are [non-members]."

2. Circuit Judge Ginsburg's Dissenting Opinion

Writing the sole dissenting opinion in Arizona Public, Circuit Judge Ginsburg disagreed with the majority's determination that 42 U.S.C. § 7601(d)(2)(B).

"within the exterior boundaries of the reservation or other areas within the [T]ribe's jurisdiction." See Arizona Public, 211 F.3d at 1289 (asserting that Congress' move from generally authorizing tribal regulation over areas "within the tribal government's jurisdiction" to more specific, bifurcated classification of all areas "within the exterior boundaries of the reservation" and "other areas within Tribe's jurisdiction" demonstrates congressional intent to grant Tribes regulatory authority over member lands and non-member fee lands alike).

EPA could not expand or limit tribal authority beyond that inherent in the Tribe. See Arizona Public, 211 F.3d at 1291 at 1291 (citing Amendments to Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (1991) (codified at 40 C.F.R. pt. 131)). Conversely, the legislative history of the 1990 CAA Amendments is not "ambiguous or inconclusive," but plainly supports EPA's finding of an express congressional delegation. See Arizona Public, 211 F.3d at 1289 (holding CAA and CWA language similar, but not identical). Therefore, Congress did not need to take as cautious a view of CAA as with CWA. See id. The Arizona Public court also found it significant that CAA was never subject to judicial review regarding the existence of an express congressional delegation to Tribes to regulate fee lands within reservations. See id. at 1292 (noting dicta in Montana v. EPA, 941 F. Supp. 945, 951 (1996)). The Arizona Public court also found that "statutory language [in CWA] seem[ed] to indicate plainly that Congress did intend to delegate . . . authority to [T]ribes." Arizona Public, 211 F.3d at 1292 (emphasis added).

Arizona Public, 211 F.3d at 1291 (quoting United States v. Mazurie, 419 U.S. 544, 544 (1975)) (finding Arizona Public's argument that Tribes may not promulgate regulations covering lands held in fee by persons other than tribal members meritless). The majority found Arizona Public's argument flawed because it failed to recognize that the relationship between Tribes and fee holders is different from the relationship between Tribes and States. See Arizona Public, 211 F.3d at 1291 (quoting Mazurie, 419 U.S. at 544) (maintaining that "Indian [T]ribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.").
U.S.C. § 7601(d)(2)(B) expressly delegated to Tribes the authority to enforce the provisions of CAA over non-member fee lands within a reservation.\textsuperscript{107} Ginsburg cited the \textit{Montana} decision to support the proposition that absent inherent Tribal authority or the threat of adverse effects, tribal regulation of non-member fee lands within reservations required an express congressional delegation of such authority.\textsuperscript{108} Following the \textit{Montana} rationale, Ginsburg maintained that, unless the 1990 CAA Amendments expressly delegated to Tribes the authority to regulate air quality over non-member fee lands and rights-of-way within reservations, EPA’s Final Rule must be set aside.\textsuperscript{109} While Ginsburg identified the existence of an express congressional delegation in CAA section 7410(o), he could not agree that section 7601(d)(2)(B) contained a similar provision.\textsuperscript{110}

\textsuperscript{107} See \textit{Arizona Public}, 211 F.3d at 1300 (Ginsburg, C.J., dissenting in part) (holding “[w]ith certain exceptions, [T]ribes lack inherent authority to regulate non-member fee lands within reservation boundaries.”). Ginsburg determined that tribal regulation of fee lands within a reservation requires an express congressional delegation of authority to regulate fee lands. \textit{See id.} Though Ginsburg noted that Tribes may demonstrate their inherent authority over such lands pursuant to the \textit{Montana} rule and its exceptions, he ultimately concluded that § 7601(d)(2)(B) did not contain an express delegation of authority to Tribes to regulate the conduct and/or activities of non-members on fee lands within the exterior boundaries of the reservation. \textit{See id.} at 1305. Thus, Ginsburg dissented in part from the opinion of the majority. \textit{See id.} at 1300.

\textsuperscript{108} See \textit{id.} (citing \textit{Montana v. United States}, 450 U.S. 544 (1981)) (holding Tribes generally lack authority to regulate non-member fee lands, but noting “[a] [T]ribes 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 [T]ribes.”).

\textsuperscript{109} See \textit{Arizona Public}, 211 F.3d at 1301 (observing that 1990 Amendments added two provisions to CAA relevant to question of whether Tribes have authority to enforce CAA on non-member fee lands). Ginsburg cited §§ 7410(o) and 7601(d)(2)(B) as CAA sections relevant to the issue of express congressional authority. \textit{See id.} For a further discussion of § 7410(o), \textit{see supra} note 57 and accompanying text. For a discussion of § 7601(d)(2)(B), \textit{see supra} note 54 and accompanying text.

\textsuperscript{110} See \textit{Arizona Public}, 211 F.3d at 1301 (Ginsburg, C.J., dissenting in part) (maintaining that § 7410(o) is “self-evidently an express congressional delegation of authority to enforce TIPs on fee lands . . . within a reservation.”). Since § 7410(o) addresses the enforcement of TIPs only, Ginsburg determined that it was necessary that EPA demonstrate that § 7601(d)(2)(B) likewise contained an express congressional delegation to support its position. \textit{See id.} Finding that § 7601(d)(2)(B) did not contain an express delegation similar to § 7410(o), Ginsburg disagreed with EPA’s Final Rule insofar as it contradicted the \textit{Montana} rule and permitted Tribes to regulate fee lands without first demonstrating their inherent authority over such lands or establishing their authority pursuant to \textit{Montana}’s exceptions. \textit{See id.} For Ginsburg, the focal point in reviewing EPA’s Final Rule regulations and rationale was not EPA’s interpretation of the statute, but the text of the statute itself. \textit{See id.} Ginsburg argued that EPA’s interpretation could not prevail by a mere showing that it’s reading of § 7601(d)(2)(B) was reasonable;
Ginsburg looked first to the "notwithstanding" proviso to support this position. Additionally, Ginsburg cited the omission of a literal delegation provision from the enacted statute as it appeared in CAA's introductory bill as evidence that Congress did not intend to create an express delegation within section 7601(d)(2)(B). Ginsburg further noted that the majority "misapprehend[ed] the significance of the phrase 'within exterior boundaries of the reservation or other areas within the [T]ribes jurisdiction.'"

EPA's reading must be correct. See Arizona Public, 211 F.3d at 1301-04. Consequently, Ginsburg focused his analysis on the statute's plain language. See id.

111. See id. at 1302-03 (revealing that notwithstanding proviso was featured in United States v. Mazurie, 419 U.S. 544 (1975) and Rice v. Rehner, 463 U.S. 715, 715 n.1 (1983)). Prior to Arizona Public, Mazurie and Rice were the only two cases in which the Supreme Court found express congressional delegations of authority. See Arizona Public, 211 F.3d at 1290. The "notwithstanding" proviso, as it appears in § 7410(o), provides in pertinent part, "the [TIP] shall become applicable to all areas... located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. § 7410(o) (emphasis added). For Ginsburg, the omission of the Court-tested "notwithstanding" proviso from § 7601(d)(2)(B), as it was used in § 7410(o), indicated that Congress did not intend § 7601(d)(2)(B) as an express congressional delegation. See Arizona Public, 211 F.3d at 1302. Because the two sections were enacted at the same time in the same section of the same bill, Ginsburg could not agree that the difference in phrasing was a mere "artifact of legislative haphazardry." See id.; see also Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 428 (1989) (citing 18 U.S.C. §§ 1151 and 1161 together as express congressional delegations of authority over fee lands).

112. See Arizona Public, 211 F.3d at 1303. The original bill, introducing the 1990 Amendments to CAA and, by extension, § 7601(d)(2)(B) to the House of Representatives and the Senate, contained a provision, stating that "the Administrator... may delegate to [ ] [T]ribes primary responsibility for assuring air quality and enforcement of air pollution." H.R. 2323, 101st Cong. § 604, reprinted in 2 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 4053, 4101 (1993). The Senate passed a similar bill, S. 1630, with the literal delegation intact. See S. 1630, 101st Cong. §111, reprinted in 5 1990 LEGISLATIVE HISTORY 9050, 9145. In conference, the House and Senate passed S. 1630 as amended by substituting H.R. 3030, omitting the literal delegation provision. See H.R. 3030, 2 1990 LEGISLATIVE HISTORY, 1809, 1972-73. The House version thus prevailed in conference. See Arizona Public, 211 F.3d at 1303 (tracking legislative progress of 1990 Amendments). Thus, the 1990 Amendments were enacted into law absent the literal delegation provision. See id. (revealing that 1990 Amendments as enacted into law did not contain literal delegation provision). Ginsburg believed that Congress' direct rejection of specific language favorable to EPA's position was evidence that the legislature did not intend to create an express delegation of authority in § 7601(d)(2)(B). See id.

113. Arizona Public, 211 F.3d at 1304. Ginsburg determined that H.R. 3030, as originally enacted, referred only to air resources "within the exterior boundaries of the reservation." Id. (citing H.R. 2323). However, the House Committee on Energy and Commerce, without comment, added the phrase "or other areas within the [T]ribes jurisdiction" during conference. Id. (citing H.R. 3030). Ultimately, the amended House version prevailed at conference. See id. Ginsburg observed that the legislative record is silent on the meaning or intention of the added phrase. See id. According to Ginsburg, "[t]he most straightforward interpretation of the addition is that the Committee wanted to ensure that the treatment of
Ginsburg disagreed with the majority's proposition that a "checkerboard" regulation, inconsistent with the purpose and provisions of CAA, would result from a failure to read section 7601(d)(2)(B) as expressly delegating to Tribes the authority to regulate air quality on all lands within their reservations.\textsuperscript{114} Consequently, Ginsburg found fault with the majority's finding that Tribes possess regulatory authority over non-member fee lands under CAA section 7601(d)(2)(B).\textsuperscript{115}

B. Critical Analysis

Recognizing that environmental regulation is essential to any attempt by Tribes to protect tribal lands, the Arizona Public court aptly concluded that CAA section 7601(d)(2)(B) delegates to a Tribe's regulatory authority over all lands within the exterior bounds of the reservation.\textsuperscript{116} Rooting its decision in the principles [T]ribes as [S]tates extended beyond the reservation to non-contiguous areas of [t]ribal authority, such as dependent Indian communities." \textit{Id.} For Ginsburg, the likelihood that the House Committee intended the phrase as a delegation of authority over non-member fee lands was doubtful. \textit{See id.} \textsuperscript{114} See \textit{id.} (finding it is not clear that "checkerboard" pattern of regulation, inconsistent with purpose and provisions of CAA, would result because Tribes remained free to exert their inherent authority over any activity of non-member fee lands that threaten health and welfare of tribal land under \textit{Montana} rule). Ginsburg also maintained that tribal authority over less than all lands within the borders of the reservation was the logical result of the Tribes' "diminished status as sovereigns." \textit{See id.} (quoting \textit{Montana,} 450 U.S. at 565).

\textsuperscript{115} See Arizona Public, 211 F.3d at 1305 (dissenting from majority's conclusion that § 7601(d)(2)(B) delegated to Tribes authority to regulate non-member fee lands). The majority responded to Ginsburg's arguments, determining that Congress' omission of the "notwithstanding" proviso from § 7601(d)(2)(B) was ineffectual. \textit{See id.} at 1289 (noting CAA's use of new formulation was not determinative factor in deciding whether § 7601(d)(2)(B) constituted express congressional delegation of authority to Tribes). The majority also found Ginsburg's assertion that Congress' failure to insert a literal delegation of authority to Tribes negated the existence of an express congressional delegation was unconvincing. \textit{See id.} at 1290 (admitting literal delegation present in original bill but holding omission of such language from final enactment did not compel conclusion that Congress specifically rejected language and, by extension, EPA's position that statute contained express congressional delegation). According to the majority, Congress may have omitted the original language, finding it redundant or confusing. \textit{See id.} (holding original language can be read as applying to all areas within or without reservation whereas Congress intended express delegation to apply to all areas within reservation only). The D.C. Circuit ultimately weighed the language adopted in § 7601(d)(2)(B) more heavily than the language omitted. \textit{See id.} (finding omitted language hardly constituted literal delegation).

\textsuperscript{116} See Gover & Walker, \textit{supra} note 61, at 438 (noting importance of tribal regulatory authority within reservations); see also Cochran, \textit{supra} note 63, at 323) (stating "[w]hen Congress amended [CAA] in 1990, it added a new provision permitting [EPA] to treat Indian [T]ribes as States for purposes of regulating environmental air quality.").
of *Chevron*, the D.C. Circuit correctly determined that EPA’s interpretation of the statute comported with both the statute’s plain language and Congress’ legislative intent.\textsuperscript{117} Despite the lack of common law precedent regarding express congressional delegations to Tribes under CAA, the *Arizona Public* majority appropriately fashioned its conclusion upon the principle that statutes should be construed to comply with “tribal sovereignty and the federal policy of encouraging tribal independence.”\textsuperscript{118} Overall, the *Arizona Public* decision best complies with CAA’s enunciated goals.\textsuperscript{119}

Conversely, Circuit Judge Ginsburg’s dissenting opinion misconstrued the language of section 7601(d)(2)(B).\textsuperscript{120} In contending that section 7410(o), not section 7601(d)(2)(B), constituted an express congressional delegation of authority, Ginsburg interpreted CAA too narrowly.\textsuperscript{121} Ginsburg’s dissent therefore contravenes Congress’ plan to “broaden tribal regulatory authority over air resources within reservation boundaries and other areas under tribal jurisdiction.”\textsuperscript{122}

1. **Majority Decision**

   a. **Plain Language of 1990 CAA Amendments**

   Like EPA, the *Arizona Public* court based its interpretation of the 1990 CAA Amendments on the language, structure and frame-
work of the statute. Explicitly, CAA authorizes EPA to treat Tribes as States for the purpose of regulating air quality "within the exterior boundaries of the reservation or other areas within the [T]ribe’s jurisdiction." The statute draws no distinction between tribal lands and non-member fee lands. The Arizona Public court therefore upheld EPA’s claim that CAA’s language and framework "manifest[ ] an intent for a territorial approach to tribal jurisdiction and allow[ ] a tribal role for all air resources within a reservation’s exterior boundaries without distinguishing among types of on-reservation land." Thus, the D.C. Circuit properly upheld EPA’s interpretation of section 7601(d), inferring from CAA’s language that Congress intended all areas within a Tribe’s reservation to be per se within a Tribe’s jurisdiction.

b. Legislative History of 1990 CAA Amendments

"Congress is the source of the power for the CAA." Congress passed the 1990 CAA Amendments to ensure that Tribes fully participate in the management, regulation and protection of air

123. See Arizona Public, 211 F.3d at 1288 (revealing Arizona Public majority began its analysis of EPA’s interpretation with "traditional sources of statutory interpretation, including the statute’s text, structure, purpose, and legislative history"); see also Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984) (maintaining that scope of statute is determined from its express language as well as its structure, statutory scheme, objectives and legislative history).

124. 42 U.S.C. § 7601(d) (2) (B); see also Gelles, supra note 7, at 383 (reporting EPA found its interpretation of 1990 CAA Amendments consistent with statute’s language). “The statutory language [of the 1990 Amendments] implies that it will be appropriate for a Tribe to regulate air resources within the exterior boundaries of the reservation or other areas within the Tribe’s jurisdiction.” Id. at 380-81.

125. See Final Rule, 63 Fed. Reg. at 7255 (stating “[i]f Congress intended to require [T]ribes to demonstrate jurisdiction over reservations, Congress would have simply stated that EPA may approve a tribal program only for air resources over which the Tribe can demonstrate jurisdiction.”).

126. Gelles, supra note 7, at 383 (revealing that EPA based its delegation interpretation on CAA’s structure and framework); see also Cochran, supra note 63, at 338 (stating “[t]he plain language of the CAA . . . support[s] the EPA’s interpretation that the CAA grants [T]ribes regulatory authority over air resources within [reservations].”).

127. See Arizona Public, 211 F.3d at 1288 (holding EPA correctly interpreted § 7601(d) to express congressional intent to grant Tribes jurisdiction over non-member fee land within reservations).

128. Cochran, supra note 63, at 334 (revealing that Congress has broad authority to delegate legislative powers to Tribes as governing entities with sovereign authority over their lands and members). While Congress is the source of tribal regulatory authority over air resources, EPA is the secondary source of that authority. See id. at 334-36. “Congress created a broad environmental scheme, and the EPA, under its administrative authority, properly established a regulatory scheme permissible under this authority.” Id. at 338-39.
quality standards within reservations.\textsuperscript{129} The \textit{Arizona Public} court accurately noted that the legislative history of the 1990 CAA Amendments supports EPA's finding that the statute contains an express congressional delegation of authority to Tribes to regulate air quality over all reservation lands.\textsuperscript{130} The D.C. Circuit properly focused on the difference between the language of the CAA bill, as it was originally introduced to Congress, and the language of CAA as it was finally enacted.\textsuperscript{131} While the language of the introductory bill restricted tribal regulatory authority specifically to lands within tribal jurisdiction, the enacted statute admitted a broader grant of regulatory authority to Tribes.\textsuperscript{132} Considering this textual alteration in conjunction with the federal government's overall policy of promoting tribal self-determination, the D.C. Circuit accurately determined that CAA section 7601(d)(2)(B) expressly delegated to Tribes the authority to regulate air quality standards over all lands within the reservation, including non-member fee lands.\textsuperscript{133} Congress intended the 1990 Amendments to expand tribal authority under CAA beyond redesignation, authorizing Tribes' development of plans for implementing, maintaining and enforcing air quality standards.\textsuperscript{134} CAA's legislative history reveals, "[t]he purpose of [the 1990 Amendments] is to improve the environmental quality of the air within [sic] Indian country in a manner consistent with the EPA's Indian Policy and 'the overall Federal position in support of Tribal self-government and the government-to-government rela-

\textsuperscript{129} See S. Rep. No. 101-228, at 79 (1989), \textit{reprinted in Legislative History of the Clean Air Act Amendments of 1990}, at 8419 (announcing that 1990 Amendments are "necessary to ensure that [T]ribes will be allowed to participate fully in programs established by [CAA] as they take affirmative measures to manage, regulate, and protect air quality"); \textit{see also} Reding, \textit{supra} note 31, at 174 (noting that "Congress amended the CAA in 1990 with the idea of supporting [t]ribal self-government").

\textsuperscript{130} See \textit{Arizona Public}, 211 F.3d at 1289 (determining that CAA's legislative history reveals Congress' deliberate choice to grant Tribes regulatory authority over all reservation lands).

\textsuperscript{131} See id. (noting that CAA § 7601(d) as it was originally introduced differed significantly from final adopted version of statute).

\textsuperscript{132} For a further discussion of the textual differences between the bill as introduced and the bill as passed, \textit{see supra} notes 101-106 and accompanying text.

\textsuperscript{133} See \textit{Arizona Public}, 211 F.3d at 1289 (holding that bifurcated classification of all areas within "the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" comports with EPA's determination that tribal regulatory authority extends to all reservation lands); \textit{see also} Royster, \textit{supra} note 1, at 89 (noting Congress' overall path of promoting and encouraging Tribes' economic development and self-sufficiency).

\textsuperscript{134} See id. at 94 (stating that amendments to SDWA, Superfund, CWA and CAA have all generally provided that Tribes be treated as States).
tions between Federal and Tribal Governments." It is, therefore, logical to assume that CAA authority would permit a Tribe to regulate a proposed activity on non-member fee lands within the bounds of the reservation that would "cause a deterioration of air quality" below the permitted standard.

Consequently, Circuit Judge Ginsburg's argument that Congress' omission of a literal delegation negated the existence of an express congressional delegation within section 7601(d)(2)(B) seems misplaced. The lack of a "literal delegation" of tribal regulatory authority is unimportant; "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." Because Congress clearly declared that its purpose in enacting the 1990 CAA Amendments was to empower Tribes with regulatory authority over all reservation lands, the absence of specific language literally delegating that power to Tribes is inconsequential. Overall, CAA's legislative history indicates that the 1990 Amendments "constitute[ ] an express delegation of power to Indian [T]ribes to administer and enforce the [CAA] in Indian lands."

135. S. REP. No. 101-228, at 79, 80 (1993), reprinted in A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 8419-20; see also Final Rule, 63 Fed. Reg. at 7256 (stating "read as a whole, the Senate Report supports EPA's interpretation that the CAA is a delegation.").

136. See Royster, supra note 1, at 94 (observing that express congressional delegation would seem to grant Tribes regulatory authority over member and non-member lands given Congress' purpose in enacting 1990 CAA Amendments); see also Reding, supra note 31, at 174 (observing that "Congress expressly delegated to tribal governments the administrative and enforcement power of regulating ambient air quality and standards on tribal lands" notwithstanding ownership).

137. See Arizona Public, 211 F.3d at 1303. For a further discussion of Ginsburg's position regarding the omission of an express congressional delegation, see supra notes 112-113 and accompanying text.


139. See Gover & Walker, supra note 61, at 443 (noting that "[t]he effect of the regulations was to grant the Indian [T]ribes the same degree of autonomy to determine the quality of their air as was granted to the States" and stating, "we [cannot] say that the [CAA] constitutes a clear expression of congressional intent to subordinate the [T]ribes to [S]tate decision making."); see also Final Rule, 63 Fed. Reg. at 7255 (observing "nothing in [CAA] or legislative history suggests that Congress intended to limit so severely the universe of [T]ribes eligible for CAA programs."); Coursen, supra note 34, at 10597 (reporting that "[t]he legislative history of the CAA . . . contains language that appears to reflect Congress' intent to effect a statutory delegation of authority.").

Notably, the discussion section of CAA’s legislative history compares the delegation of authority in CAA to similar delegations in SDWA and CWA. The SDWA provides for Tribes’ treatment as States where “the functions to be exercised by the Indian Tribe are within the area of the tribal government’s jurisdiction.” Similarly, CWA allows Tribes’ treatment as States where:

the functions to be exercised by the Indian [T]ribe pertain to the management and protection of water resources which are held by an Indian [T]ribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction in alienation, or otherwise within the borders of an Indian reservation.

CAA, however, is more precise in delineating the scope of tribal regulatory authority under its programs. While SDWA grants Tribes’ regulatory power only over lands within their jurisdiction, CWA is more ambiguous in its grant of authority. Conversely, the language and legislative history of CAA is neither ambiguous nor inconclusive. Nothing in CAA nor its legislative history suggests that Congress intended to limit so severely the universe of tri-

141. See id. (noting that CAA § 7601(d)(2) incorporates language from SDWA tribal amendments regarding which provisions Tribes’ treatment as States is appropriate).
143. 33 U.S.C. § 1377(e)(2) (Supp. 2000). The Arizona Public majority admits that CWA and CAA language are similar, but not identical. See Arizona Public, 211 F.3d at 1292. CAA illustrates a clear distinction between areas “within the exterior boundaries of the reservation” and “other areas within the [T]ribe’s jurisdiction.” See id. While CWA has not yet been subject to judicial review on the exact issue of whether or not the statute contained an express congressional delegation of regulatory authority to Tribes, in dicta, the district court in Montana v. EPA observed that “the statutory language [in CWA] seems to indicate plainly that Congress did intend to delegate . . . authority to [T]ribes.” Montana v. EPA, 941 F. Supp. 945, 951 (D. Mont. 1996). For a further discussion of CWA, see supra note 46 and accompanying text.
144. See 42 U.S.C. § 7601(d)(2)(B) (authorizing Tribes to regulate air quality standards over all areas within exterior boundaries of reservation as well as other areas deemed within Tribes’ jurisdiction).
145. Compare SDWA, 42 U.S.C. § 300j-11(b)(1)(B) (limiting tribal regulatory authority to lands within tribal government’s jurisdiction), with CWA, 33 U.S.C. § 1377(e) (listing array of lands over which Tribes may exercise regulatory authority without conclusively defining scope of that authority). For a further discussion of SDWA and CWA, see supra notes 45-46 and accompanying text.
146. See Arizona Public, 211 F.3d at 1292 (holding CAA’s clear distinction between areas “within the exterior boundaries of the reservation” and “other areas within the [T]ribe’s jurisdiction” indicates Congress’ intent to define areas within exterior boundaries of Tribes’ reservations to be per se within Tribes’ jurisdiction).
bal regulatory powers to only those lands under tribal jurisdiction.147

c. Chevron Application

The Arizona Public majority properly rooted its analysis of EPA’s interpretation of CAA in the familiar principles of Chevron v. Natural Resources Defense Council.148 Applying the Chevron test, the Arizona Public court correctly determined that EPA acted within the bounds of congressional delegation.149 Following the Chevron mandate to examine CAA’s plain meaning, the Arizona Public court determined that the 1990 CAA Amendments plainly delegated to Tribes the authority to regulate all reservation lands, including non-member fee lands.150 The Chevron Court clearly stated that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the Administrator of an agency.”151 Under the Chevron principle, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”152 Thus, under Chevron, the Arizona Public court’s determination that section 7601(d) constitutes an express congressional delegation of authority to Tribes is valid as law.153

d. Tribal Sovereignty

Currently, environmental regulatory jurisdiction within Indian reservations is divided among federal, tribal and state govern-

147. See Final Rule, 63 Fed. Reg. at 7255 (observing that it was not Congress’ intent to restrict tribal regulatory authority and exclude non-member fee lands within reservation borders).


149. See Arizona Public, 211 F.3d at 1287 (explaining that D.C. Circuit’s primary concern under Chevron was to ensure that EPA acted within bounds of congressional delegation).

150. See Chevron, 467 U.S. at 842-43 (1984) (stating that court’s examination of statute’s plain meaning is first prong of Chevron two part test). Because the D.C. Circuit determined that the 1990 CAA Amendments admitted a plain meaning, it was not required to examine the reasonableness of EPA’s interpretation. See Arizona Public, 211 F.3d at 1288.

151. Chevron, 467 U.S. at 844 (reasoning that administrative agencies have specialized knowledge allowing them to interpret statutory provisions).

152. Id. at 843 n.9; see also Gelles, supra note 7, at 385 (remarking that courts do not often overrule EPA when it invokes Chevron to determine applicability of laws to Tribes).

153. See Chevron, 467 U.S. at 843 (holding that “[t]he judiciary is the final authority on issues of statutory construction.”).
ments. Tribes derive their regulatory powers from either their inherent authority or, where such authority is lacking, valid congressional delegations. Finding that Tribes' regulatory authority over non-member fee lands fell outside the ambit of its inherent powers, EPA appropriately determined that the 1990 CAA Amendments expressly granted to Tribes the authority to implement and enforce air quality standards over all reservation lands.

EPA premised its Indian policy on promoting tribal self-determination. Assuming that Tribes generally lack inherent authority within boundaries of reservation. Federal, tribal and state governments each assert different bases for their regulatory authority. The federal government derives its regulatory authority from both Congress' plenary power over Tribes and the judicial doctrine subjecting Tribes to federal laws of general applicability. States' asserted rights stem from the states' refusal to perceive reservations as extraterritorial to state borders. Tribes derive their regulatory authority either from their inherent sovereign powers or from express congressional delegations. EPA premised its Indian policy on promoting tribal self-determination. Assuming that Tribes generally lack inherent authority in a position consistent with and complimentary to the framework of federal Indian policy goals and federal Indian law; see also Cochran, supra note 63, at 324 (reporting that EPA's policy for "reservation-based environmental programs" takes affirmative steps to encourage and assist Tribes in assuming greater regulatory responsibilities). Additional support for a valid delegation of authority is found within EPA's policy statements regarding the administration of environmental programs and regulations within Indian environments. EPA's Indian Policy recognizes tribal governments as sovereign nations. EPA's Indian Policy set forth nine principles, outlining EPA-Tribal relations. Fourth, EPA agreed to remove legal and procedural constraints facing Tribes. Fifth, EPA assured consideration of tribal concerns and interests in EPA policy decisions. Sixth, EPA encouraged Tribal and State cooperative agreements. Seventh, EPA promised to work with other agencies to assist Tribes in assuming responsibility for environmental programs. Eighth, EPA stated it would work with tribal governments to bring tribal enterprises into compliance with its policy; "non-tribal enterprises not in compliance will become subject to EPA enforcement actions." Finally, EPA promised to "incorporate these policy principles into planning and management.
ity to regulate air quality over non-member fee lands within the reservation, EPA's finding that CAA constituted an express congressional delegation of authority to Tribes furthers EPA's policy toward advancing tribal sovereign authority over the environmental condition of reservation lands.\(^*\)\(^{158}\) Denying Tribes the ability to control and regulate reservation resources, in effect, denies tribal sovereignty and self-determination.\(^*\)\(^{159}\)

"Territory is the sine qua non of sovereignty."\(^*\)\(^{160}\) Consequently, extending the Montana and Brendale decisions to prohibit tribal regulation of fee land air quality poses serious threats to tribal sovereignty.\(^*\)\(^{161}\) These decisions fail to recognize the inherent logic in encouraging tribal management of reservation air quality.\(^*\)\(^{162}\) Essentially, "[a]ctive tribal participation in environmental protection programs [...] enable[s] tribal members to develop technical and administrative expertise complementary to the current policy of tribal self-government."\(^*\)\(^{163}\) Thus, the D.C. Circuit's determination in Arizona Public that CAA section 7601(d)(2)(B) constituted an express delegation of regulatory authority to Tribes to implement and enforce air quality standards best comports with principles of tribal sovereignty, thereby encouraging tribal participation in environmental affairs.\(^*\)\(^{164}\)

\(^*\)\(^{158}\) See Final Rule, 63 Fed. Reg. at 7255 (highlighting tribal commenters' assertion that CAA language and federal Indian Law principles compel EPA's delegation approach); see also Cochran, supra note 63, at 325 (revealing EPA's stance on [t]ribal sovereignty issues and environmental regulatory authority).

\(^*\)\(^{159}\) See Royster, supra note 1, at 89 (observing "a government that has lost the authority . . . to control [reservation resources] has lost as well the full capability to control environmentally harmful [activities].").

\(^*\)\(^{160}\) Id. (declaring tribal sovereignty revolves around Tribe's ability to govern its land).

\(^*\)\(^{161}\) See id. at 93 (noting that Brendale Court's extension of Montana test represents serious threat to tribal sovereignty for most Tribes). For a further discussion of Montana and Brendale, see supra notes 65-75 and accompanying text.

\(^*\)\(^{162}\) See Reding, supra note 31, at 175 (asserting that government "at the tribal level is potentially more hospitable to unique tribal situations and solutions and takes more fully into account tribal interests.").

\(^*\)\(^{163}\) Id. at 174 (maintaining that more informed tribal input in tribal air quality regulations facilitates CAA compliance, executing CAA's purpose); see also Royster, supra note 1, at 95 (concluding that environmental regulatory authority returns to Tribes some measure of decision-making as to uses made of their territories).

\(^*\)\(^{164}\) See generally United States v. Mazurie, 419 U.S. 544, 557 (1975) (recognizing that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . [T]hey are 'a separate people' possessing the power of regulating their internal and social relations.").
Checkerboard jurisdiction within tribal reservations derives from the early allotment era. The patchwork of tribal, state and federal authorities co-existing within reservations often creates serious jurisdictional disputes among the several autonomous entities. Past Supreme Court decisions have attempted to resolve these disputes by exempting privately owned fee lands from tribal jurisdiction, thus creating an intricate pattern of checkerboard regulation within reservation lands. In Montana, the Supreme Court denied an Indian Tribe regulatory authority over non-member fishing and hunting on non-member reservation fee lands. In Brendale, the Court upheld its Montana decision, finding that the Yakima Nation lacked zoning authority over non-member fee lands within their reservation.

However, in Brendale, Justice Blackmun stated in his concurring opinion that denying Tribes the power to make “rational and comprehensive” environmental decisions for its reservation “would guarantee that adjoining reservation lands would be subject to in-

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165. See Royster, supra note 1, at 89-90 (documenting governmental curtailment of territorial extent of Tribal sovereign powers). Checkerboard patterns result when fee lands remain subject to state or federal authority rather than tribal authority. See Arizona Public, 211 F.3d at 1304. The era of allotment created a patchwork of tribal trust lands, Indian allotments and non-Indian fee lands within some reservations. See Royster, supra note 1, at 90. This checkerboard pattern of competing authorities often creates jurisdictional disputes among Tribes, States and the Federal Government. See id. For a further discussion of the allotment era and the resulting curtailment of tribal regulatory authority, see supra note 9 and accompanying text.

166. See Royster, supra note 1, at 90 (noting frequency of conflicts within patchwork reservation).

167. See Montana v. United States, 450 U.S. 540, 560 n.9 (1981) (concluding that “[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.”). The Supreme Court, in Montana, established a general rule denying Tribes authority to regulate non-member fee lands absent an express congressional delegation unless the non-member conduct adversely affected the political, social and economic well-being of the reservation. See id. at 563-67. The Supreme Court subsequently upheld this ruling in Brendale, finding that tribal governments lacked zoning authority over non-member fee lands. See generally Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

168. See Montana, 450 U.S. at 566 (finding Tribes generally lacked regulatory authority over non-member fee lands absent threats upon Tribes’ political, economic or social well-being).

169. See Brendale, 492 U.S. at 425 (upholding Montana’s general rule denying tribal regulatory authority absent an express congressional delegation vesting Tribes with regulatory powers).
consistent and potentially incompatible ... policies.”170 Judith Roy-
ster, in Environmental Protection and Native American Rights: 
Controlling Land Use Through Environmental Regulation, supported 
Justice Blackmun’s observation, stating that “[t]he resultant patch-
work of governmental authority [within reservations] not only un-
dermines the territorial sovereignty of the [T]ribes, but is unwieldy 
and ultimately unworkable.”171 The Arizona Public court recognized 
the inherent disabilities of checkerboard regulation and properly 
found that a checkerboard pattern of regulation within reservation 
boundaries is inconsistent with the purpose and provisions of the 
1990 CAA Amendments.172

2. Dissenting Opinion

Circuit Judge Ginsburg’s proposal that section 7410(o) is the 
true and only manifestation of an express congressional delegation 
is inaccurate and incomplete.173 Sections 7410(o) and 7601(d) 
have two distinct functions.174 It is undisputed that section 7410(o) 
expressly delegates to Tribes the authority to create and submit to

170. Brendale, 492 U.S. at 449 (Blackmun, J., concurring) (noting that plurality 
failed to recognize significant tribal interest in regulating reservation lands).
“Such a holding would guarantee that adjoining reservation lands would be subject 
to inconsistent and potentially incompatible zoning policies, and for all practical 
purposes would strip Tribes of the power to protect the integrity of trust lands over 
which they enjoy unquestioned and exclusive authority.” Id.

171. Royster, supra note 1, at 91 (noting that “[c]heckerboard jurisdic-
tion . . . discourages long range planning, hinders comprehensive resource man-
agement, and breeds conflict and distrust.”); see also Arizona Public, 211 F.3d at 
1288 (observing that high mobility of air pollutants renders any checkerboard pat-
ttern of regulation ineffective). The Arizona Public court observed that “[t]he high 
mobility of air pollutants, resulting areawide effects and the seriousness of such 
impacts, underscores the undesirability of fragmented air quality management 

172. See Arizona Public 211 F.3d at 1288 (noting that CAA checkerboard juris-
diction is “inconsistent with the purpose and provisions of the Act.”).

173. See Arizona Public, 211 F.3d at 1289 (stating that “Congress’ failure to use 
the same language in § 7601(d) [that it used in § 7410(o)] does not at all imply 
that it meant to avoid delegation [of regulatory authority] to the Tribes”); see also 
Final Rule, 63 Fed. Reg. at 7255 (noting that § 7601(d) is vehicle by which TIPs, 
submitted pursuant to § 7410(o) guidelines, become effective).

174. Compare 42 U.S.C. § 7601(d)(2) (outlining CAA’s treatment as States 
provision), with 42 U.S.C. § 7410(o) (outlining elements of TIPs and process by 
which Tribes submit TIPs); see also Cochran, supra note 63, at 323 (finding that 
§ 7601(d)(2) gives EPA authority to treat Tribes as States for purpose of imple-
menting CAA and requires EPA to promulgate regulations disclosing those provi-
sions for which it is appropriate to treat Tribes as States). “Tribal authority to 
regulate environmental air quality under the plan proposed by the EPA stems from 
two sources: (1) a valid federal delegation; and (2) inherent tribal authority to 
regulate conduct within territory under tribal jurisdiction.” Id.
EPA a plan for implementing air quality standards.\(^{175}\) It is, however, incorrect to use the delegation set forth in section 7410(o) to negate a similar delegation in section 7601(d)(2)(B).\(^{176}\) Limiting tribal authority under section 7601(d)(2)(B) to lands within a Tribe's jurisdiction not only contradicts the plain language of section 7601(d)(2)(B), but also renders the Tribe's regulatory power ineffective and useless.\(^{177}\) Proscribing Tribes' authority to implement, enforce and maintain air quality standards on all reservation lands, including non-member fee lands, contradicts tribal self-determination and creates a patchwork of varying regulations within Tribal reservations.\(^{178}\) Thus, Ginsburg's theory regarding the absence of the "notwithstanding" proviso is ill-conceived.\(^{179}\) To empower Tribes to create TIPs, but simultaneously deny Tribes the general regulatory power to implement, enforce and maintain TIPs throughout reservation lands, runs contrary to the enunciated purpose of the 1990 CAA Amendments.\(^{180}\)

V. IMPACT

"Pollution neither knows nor respects sovereign borders."\(^{181}\) Although the preservation of natural resources is the ultimate goal of Tribes, States and EPA, jurisdictional disputes over the regulation of reservation lands functionally impede the realization of these environmental goals.\(^{182}\) Currently, the process of treating

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175. *See* 42 U.S.C. § 7410(o) (providing that TIPs "shall become applicable to all areas . . . located within the exterior boundaries of the reservation . . .").

176. *See* Cochran, *supra* note 63, at 337 (marking CAA §§ 7410(o) and 7474(c) as also containing express congressional delegations *in addition to* delegation in § 7601(d)(2)(B)) (emphasis added).

177. *See* Arizona Public, 211 F.3d at 1290 (finding § 7601(d)(2)(B) is intentionally broad).

178. Royster, *supra* note 1, at 89 (announcing "[e]nvironmental regulatory authority *should* permit Indian nations to re-instate tribal environmental goals and values into . . . Indian Country.").

179. *See* Arizona Public, 211 F.3d at 1289 (holding dissent's argument that absence of "notwithstanding" proviso from § 7601(d)(2)(B) negates existence of express congressional delegation unpersuasive). "The dissent's argument resting on Congress' omission of a 'literal delegation' is seductive, but, ultimately, also unconvincing." *Id.* For a further discussion of the "notwithstanding" proviso, *see supra* notes 111 and 115 and accompanying text.

180. For a further discussion of CAA's purpose, *see supra* notes 128-136 and accompanying text.


182. *See generally* Conerton, *supra* note 48, at 3 (examining effects of jurisdictional disputes on achieving clean air standards); *see also* Reding, *supra* note 31, at 171 (observing that Tribes and States claim vital interests in ensuring reservation...
Tribes as States creates several conflicts between state and tribal governments. Given the high mobility of air pollutants and the interdependence of state and tribal jurisdiction, it is imperative for Tribes and States to come together and work cooperatively for environmental protection. Tribes and States could avert jurisdictional disputes by entering into cooperative agreements to jointly administer federal environmental programs, like CAA, within reservation boundaries. Collaborative implementation of federal environmental programs allows Tribes and States to define the manner in which they will accomplish their environmental goals, bringing together state and tribal resources to creatively address environmental issues.

Yet, the possibility of a tribal-state collaborative effort is daunting. Accordingly, the Arizona Public court properly determined that CAA section 7601(d) constitutes an express congressional delegation of authority to Tribes to regulate reservation air quality. In effect, the D.C. Circuit's holding promotes tribal self-governance and self-determination by granting Tribes greater regulatory

pollution sources are properly regulated and managed, but they differ on how to achieve such regulation).

183. See generally Conerton, supra note 48 (noting that current treatment as state process fosters tribal-state jurisdictional conflicts). "In view of the mobility of environmental problems and interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection, rather than engage in confrontations over jurisdiction." Id.

184. See id. (observing that CAA goals would be better accomplished by state-tribal collaborative effort); see also Arizona Public, 211 F.3d at 1288 (noting that effective enforcement of CAA standards is best accomplished by allowing Tribes and States to establish uniform standards within their boundaries).

185. See generally Conerton, supra note 48 (noting beneficial effects of cooperative agreements). Cooperative agreements would operate to resolve state-tribal disagreements without involving EPA. See id. "In an era where 'partnership' is the theme between EPA and States and between EPA and Indian [T]ribes, cooperative state/tribal programs would be one step in building stronger state-tribal-EPA partnerships." Id.

186. See id. (illustrating advantages of cooperative agreements such as shared goals, problems, resources and promoting relationships beyond environmental arena).

187. See Reding, supra note 31, at 185 (revealing that coerced concurrent jurisdiction is problematic insofar as it nullifies tribal and state sovereign efforts to form collaborative agreements). "Such concurrent jurisdiction would provide the means to set competing public policies and goals on a collision course should the standards be adverse to each other." Id.

188. See Arizona Public, 211 F.3d at 1284 (holding EPA did not err in finding § 7601(d)(2)(B) delegated authority to Tribes to regulate all land within reservation, including non-member owned fee lands).
power over reservation lands.189 A contrary holding, in the spirit of Circuit Judge Ginsburg’s dissenting opinion, would limit tribal regulatory powers and frustrate Congress’ intent in enacting the 1990 CAA Amendments.190

The complex nature of air pollution regulation fosters conflict between tribal and state authorities.191 Absent judicial rulings resolving these conflicts, a continued checkerboard pattern of regulation is likely to result.192 Although the Arizona Public court correctly found that section 7601(d)(2)(B) expressly delegates to Tribes the authority to regulate all reservation lands, other courts may rule differently upon this issue in the future.193 If the courts do not uniformly enforce EPA’s Final Rule, inconsistencies mandating Supreme Court review are likely to result.194 Without a definitive court resolution delineating the scope of tribal regulatory authority, Tribes will continue to develop air quality programs under uncertain terms.195 These results appear inconsistent with the purpose and provisions of CAA.196 Therefore, a bright line rule defining the extent of Tribes’ authority to implement, enforce and maintain air quality standards over all lands within a Tribe’s reservation is necessary to effectively enforce federal clean air standards.197

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189. See Royster, supra note 1, at 96 (declaring “environmental regulatory authority will . . . at least in some instances . . . return to [T]ribes some measure of decision-making as to the uses made of their territories.”).

190. For a further discussion of congressional intent, see supra notes 128-147 and accompanying text.

191. For a further discussion of jurisdictional conflicts, see supra notes 8-10 and accompanying text.

192. See Epel & Tierney, supra note 5, at 10592 (indicating that judicial determinations of state and tribal primacy will likely continue to promote a checkerboard pattern of regulation despite EPA’s proposed system); see also Cochran, supra note 63, at 345 (observing that express congressional delegation is appropriate basis for Tribes’ regulatory authority).

193. See id. at 345 (remarking that courts may not uphold EPA’s Final Rule uniformly and noting need for some basis establishing tribal regulatory authority).

194. See Final Rule, 63 Fed. Reg. at 7255 (observing that even though Tribes have inherent authority over all resources within exterior boundaries of reservations, EPA should finalize delegation approach to avoid case-by-case litigation).

195. See Epel & Tierney, supra note 5, at 10592 (hypothesizing that until courts resolve arguable conflict between EPA’s proposed rule and contrary common law precedent, Tribes will be forced to exercise their authority unsure of how far their authority extends).

196. See 42 U.S.C. § 7401(b) (marking CAA’s primary purpose as protecting and enhancing national air quality).

197. See Epel & Tierney, supra note 5, at 10592 (stating that questions regarding extent of tribal regulatory authority will undoubtedly arise until courts finalize issues surrounding EPA’s interpretation of § 7601(d)).