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Tribal Authority under the Clean Air Act: How Is It Working?

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ABSTRACT

In managing their air resources, Native American tribes face two sets of challenges: regulating pollution sources within their jurisdiction and addressing transboundary air pollution from upwind jurisdictions. The 1990 Clean Air Act amendments and the Environmental Protection Agency's implementing regulations establish a legal framework for federally enforceable tribal regulation of sources within reservation boundaries, including sources on non-Indian-owned fee land. However, most tribes lack the resources needed to develop comprehensive air programs. EPA currently administers permits for most major sources in Indian Country, while hundreds of minor sources go unregulated. Transboundary air pollution threatens health and welfare and may simultaneously constrain economic development on many reservations. While states are increasingly trying to resolve transboundary problems through regional planning organizations, few tribes have the staff and resources required to actively participate in them.

I. INTRODUCTION

The Clean Air Act amendments of 1990 (CAA) authorized the U.S. Environmental Protection Agency (EPA) to "treat tribes as states" for purposes of developing, administering, and enforcing air quality regulations within reservation boundaries, irrespective of land ownership.[1] EPA promulgated the Tribal Authority Rule (TAR) in 1998 to implement the CAA's "treatment as a state" provisions.[2] Since then, tribes have demonstrated increasing interest in developing and administering their own air programs. As one illustration, the number of tribes receiving federal grants to initiate or operate air programs has

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1. Clean Air Act, 42 U.S.C. § 7601(d)(2)(B) (2000).
2. 63 Fed. Reg. 7254 (Feb. 12, 1998).

grown from about 20 in 1995 to more than 120 in 2002.[3] The latter number represents more than 20 percent of the 556 federally recognized tribes in the United States.[4]

Several factors motivate tribes to develop air quality programs. A few tribes have major air pollution sources on their reservations; many more have minor sources and are concerned about their cumulative impacts on local air quality. Many tribes have cultural resources they want to protect.[5] Tribes in several parts of the country are especially concerned about environmental and economic development impacts from off-reservation sources and want to build their air quality management capabilities so they can negotiate better with neighboring states, industries, and the federal government.[6]

This article examines tribal activities to protect their air resources under the Clean Air Act. Part II summarizes the principles of federal Indian law that form the backdrop for tribal regulatory authority. Part III describes federal policies that promote tribal control over air resources, including EPA's general tribal policy, the "tribes as states" provisions of the CAA, and the TAR. Part IV describes what tribes are doing to control air pollution sources within their reservations and discusses EPA's role in regulating sources in Indian Country[7] in the absence of tribal primacy. Part V reviews what tribes can do under the CAA to influence sources in upwind jurisdictions, including redesignation of tribal lands as Class I areas, the CAA's interstate transport petition process, and participation in regional planning organizations. Part VI describes the efforts that are underway to build technical capacity for tribal air programs.

As discussed below, by assuming regulatory authority under the CAA, tribes stand to benefit from both environmental improvements and increased control over their own economic development. Improved technical capabilities and data would also help tribes shape solutions to transboundary problems. At the same time, greater tribal participation would benefit regional air quality management efforts by helping to fill

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3. Telephone Interview with C. Darrel Harmon, Senior Indian Program Manager, EPA (Feb. 19, 2003).

4. The list of federally recognized tribes is published at 65 Fed. Reg. 13,298 (Mar. 13, 2000). It includes more than 200 Native villages in Alaska. The Bureau of Indian Affairs updates the list periodically in response to petitions from Indian groups that are not currently acknowledged.

5. Telephone Interview with Victor Masayesva, Director, Institute for Tribal Environmental Professionals (Feb. 21, 2003).

6. *Id.*

7. Indian Country is defined at 18 U.S.C. § 1151 (2000). It includes all land within the limits of any Indian reservation, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished.

information gaps and improving the coverage of pollution controls. Increased federal support is vital for achieving these outcomes because most tribes have insufficient resources to develop comprehensive air programs on their own.

II. BACKGROUND PRINCIPLES OF FEDERAL INDIAN LAW

The foundational principles of federal Indian law form a critical backdrop for examining tribal control over air resources.[8] The relationship between tribes, states, and the federal government is a central concern in this field. Conflicts in Indian law often arise over which government entity has jurisdiction over a particular actor or resource; air resources are no exception.[9]

Tribes generally retain inherent sovereign powers with respect to internal matters, subject to qualification by Congress. In federal Indian law, the concept of inherent sovereignty is traced to Chief Justice Marshall's opinion in *Worcester v. Georgia*.[10] Though tribal powers of self-government have been limited by statute, treaty, and implication,[11] they generally include the powers to adopt their own form of government, to determine tribal membership, to regulate the domestic and commercial relations and conduct of individuals under their jurisdiction, and to raise revenues through taxation.[12] A vital corollary to the principle that tribes have retained sovereignty is that absent express congressional authorization, states have no authority over tribes' internal affairs, lands, or resources.[13]

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8. These principles have their roots in a trio of opinions handed down by Chief Justice John Marshall early in the nineteenth century. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 63-72, 104-126 (4th ed. 1998).

9. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS xxi (2002).

10. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (holding invalid a Georgia law that required state licensing for non-Indians to reside on Cherokee land).

11. In recent Indian law decisions, the Supreme Court has circumscribed tribal authority, especially with respect to non-members. For analyses of this trend, see Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001), and David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

12. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS: A SOURCEBOOK ON FEDERAL-TRIBAL HISTORY, LAW, AND POLICY 36-39 (1988).

13. In *Worcester v. Georgia*, Justice Marshall wrote,

> The Cherokee nation, then, is a distinct community occupying its own territory...in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the

Congress has broad authority over tribes. However, under the trust doctrine, the federal government is held to a high standard in this relationship. The trust doctrine is essentially a judicially created doctrine that holds the government accountable for commitments made to Indian peoples, dating back to their treaty and executive order cessions of land.[14] The federal government owes a fiduciary duty to the tribe when it formally holds Indian property in trust.[15] The courts have used the fiduciary duty as a basis to award damages for the mismanagement of Indian resources when a federal agency has been assigned comprehensive responsibility to manage them for the benefit of tribes.[16]

> Cherokees themselves, or in conformity with treaties, and with the acts of Congress.

Worcester, 31 U.S. at 561. For a modern application of the principle that states generally lack civil regulatory authority in Indian Country, see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which upholds tribal gaming in contravention of state law. *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (state barred from imposing motor carrier license and use fuel taxes on non-Indian company engaged in timber production for the tribe on its reservation). Restrictions on state interference may also extend to off-reservation activities. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S 172 (1999) (Tribe's 1837 treaty rights to hunt, fish, and gather outside its reservation survived Minnesota statehood, so the state could regulate only as necessary for conservation).

14. As Professor Wood has described it,

> The vast cessions of land by the native peoples were premised on federal promises that the native peoples could continue their way of life on homelands of smaller size, free from the intrusions of the majority society. Most fundamentally, the modern form of the trust obligation is the federal government's duty to protect this separatism by protecting tribal lands, resources, and the native way of life.

Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1496. While Professor Wood argues for vigorous application of the trust doctrine to safeguard tribal autonomy, other commentators criticize it for its racist roots and sometimes paternalistic applications, which undermined tribal self-determination. *See, e.g.*, Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 FED. B. NEWS & J. 358 (1992). The doctrine has also been criticized as excessively malleable, making it susceptible to abuse or neglect as federal policies have changed over time. *See, e.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 129–34 (1983).

15. Wood, *supra* note 14, at 1513–15.

16. *Compare* United States v. Mitchell, 463 U.S. 206 (1983) (holding that the government was liable for mismanagement of timber on allotted lands when the relevant timber statutes and regulations required management for the Indians' benefit), *with* United States v. Navajo Nation, 537 U.S. 488 (2003) (dismissing the tribe's claim for damages against the Secretary of the Interior after he approved below-market royalties for coal mined on the Navajo reservation). In *Navajo Nation*, the Court reasoned that the governing statute was designed to give the tribe the lead in negotiating mining leases, while the Secretary's role in approving the negotiated agreements fell short of "'full responsibility to manage Indian resources....'" *Id.* at 507 (quoting United States v. Mitchell, 463 U.S. 206, 224 (1983)).

Geography, as defined by reservation boundaries, is a critical point of departure for analyzing jurisdiction in Indian law.[17] For many Indian reservations, jurisdictional questions are complicated by checkerboard land ownership patterns, which are a legacy of the General Allotment Act of 1887.[18] The policy of allotting tribal lands to individual members and opening "surplus" lands to non-members was ended in 1934, but by that time Indian landholdings had fallen from 138 million acres to 52 million acres.[19] As a consequence of the allotment policy, the boundaries of many reservations now encompass land held by non-members in fee simple in addition to tribally owned land held in trust by the federal government, land held in trust for individual members, and land owned in fee by tribe members.[20]

Under federal Indian law, tribes are held to have retained their inherent sovereign powers[21] unless Congress has expressly withdrawn them by statute or treaty or they have been impliedly divested.[22] While tribes retain significant power to regulate the conduct of their own members on the reservation, recent Supreme Court cases have held that tribes have only limited authority to regulate non-Indians, especially with respect to activities occurring on fee lands. In *Montana v. United States*, the Supreme Court held that the Crow Tribe lacked the power to regulate hunting and fishing by non-Indians on non-Indian owned fee

17. Professor Getches has noted that just like the boundaries of a state or foreign nation, tribal boundaries should be expected to "trigger...jurisdictional consequences for all who enter." Getches, *supra* note 11, at 297.

18. 25 U.S.C. §§ 331–34, 339, 341–42, 348–49, 354, 381. Prior to 1887, most land within the boundaries of Indian reservations was owned by the tribe but held in trust by the federal government. After 1887, 27 million acres of land from 118 reservations were divided into parcels and allotted to individual tribe members, to be held in trust for them for 25 years with fee ownership conveyed after that. In addition, lands on 44 reservations were designated surplus and opened to settlement by non-Indians. ROYSTER & BLUMM, *supra* note 9, at 40–41.

19. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 20 (1987).

20. ROYSTER & BLUMM, *supra* note 9, at 41.

21. *See* United States v. Wheeler, 435 U.S. 313 (1978) (holding that successive prosecutions of Indians in tribal and federal courts are not barred by the Fifth Amendment, because tribal powers to administer justice are inherent and not derived from federal authority).

22. Chief Justice Marshall applied the theory of implied divestiture in two limited contexts. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), it was used as a basis for restricting Indians' interest in the land they occupied, and in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court denominated tribes as "domestic dependent nations" and said that they could not make treaties with foreign nations. In 1978, the Supreme Court resurrected this theory to hold that tribes cannot exercise criminal jurisdiction over non-Indians because it would be "inconsistent with their status." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (quoting Oliphant v. Schlie, 544 F. 2d 1770, 1009 (1976)).

lands within its reservation.[23] The Court ruled that tribes presumptively lack civil jurisdiction over non-Indians but allowed two possible exceptions. First, tribes might be able to regulate activities of non-Indians who enter consensual agreements with the tribe or its members.[24] Second, tribes might be able to regulate the activities of non-Indians on fee lands if their conduct threatened the political integrity, economic security, or health or welfare of the tribe.[25] Subsequent Supreme Court opinions, especially *Atkinson Trading Co. v. Shirley* and *Nevada v. Hicks*, indicate that the two *Montana* exceptions will be narrowly construed.[26] Environmental regulations may satisfy the second *Montana* exception, however, because the health or welfare of the tribe may be threatened. Based on that exception, the Ninth Circuit has upheld tribal authority to set water quality standards extending to reservation lands and surface waters owned in fee by non-members.[27]

In addition to possessing authority under the *Montana* exceptions, tribes may also assume regulatory authority over non-Indians if Congress delegates federal regulatory authority to them.[28]

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23. Montana v. United States, 450 U.S. 544 (1981).

24. *Id.* at 565.

25. *Id.* at 566.

26. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (Navajo Nation lacked authority to impose an occupancy tax on non-members staying at a hotel on non-Indian fee land within the Navajo Reservation); Nevada v. Hicks, 533 U.S. 353 (2001) (Fallon Tribal Court lacked jurisdiction over tribe member's tort and civil rights claims, which arose from the defendant state officers' execution of a search warrant on Indian-owned land within the tribe's reservation). *See also* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (tribes' zoning authority extended to non-Indian owned fee lands located in the closed portion of their reservation but not to lands in the open portion); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (tribes lacked jurisdiction over civil claim between non-Indians arising from a car accident on a state highway within the Fort Berthold Reservation).

27. Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998). In this case, the court upheld the EPA's finding that the Confederated Salish and Kootenai Tribes had the authority to set water quality standards applying to all pollution sources within the Flathead Reservation, regardless of land ownership. As the court recited, EPA had determined that the "activities of non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential." *Id.* at 1141. The second *Montana* exception was thereby satisfied.

28. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Court upheld congressional delegation of authority to tribes to regulate alcohol sales on fee lands owned by non-Indians in Indian Country. Article I, section 8 of the Constitution gives Congress the power to "regulate commerce with foreign Nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8. The Court in *Mazurie* found that the propriety of delegating this congressional power was strengthened in cases where the entity receiving delegated authority "possess[ed] independent authority over the subject matter." *Mazurie*, 419 U.S. at 557. Indian tribes, the court recognized, are "unique aggregations possessing attributes of sovereignty over both their members and their territory; they are 'a separate

Such delegations are uncommon. However, as discussed below, the "treatment as a state" provisions of the CAA have been upheld as a delegation of congressional legislative power. These CAA provisions are discussed in the next section, along with the regulations EPA has promulgated to implement them.

III. FEDERAL POLICIES PROMOTING TRIBAL CONTROL OVER AIR RESOURCES

The past 40 years have been an era of self-determination for tribes.[29] In the late 1960s, Congress began to enact laws to reverse post-World War II policies that had attempted to forcibly assimilate Indian people into mainstream society.[30] In 1970, President Nixon announced an executive branch policy of promoting tribal self-determination;[31] for the most part, his successors have continued this approach. Since 1970, Congress has enacted laws providing for tribal control of education, health care, environmental quality, and natural resources and for restoration of tribal lands.[32] Among the early laws promoting tribal control of environmental resources, the Clean Air Act amendments of 1977 allowed tribes to redesignate their reservations as Class I areas where enhanced air quality protections would apply.[33]

In 1984, the EPA became the first federal agency to adopt its own "Indian" policy, setting forth several principles that would govern its interactions with tribes.[34] The policy recognizes tribal governments as "sovereign entities with primary authority and responsibility for the reservation populace."[35] Accordingly, the policy recognizes tribal governments as having independent authority to set standards and manage environmental programs on their reservations.[36] The policy promises the tribes assistance in assuming regulatory responsibilities.

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people' possessing 'the power of regulating their internal and social relations.'" *Id.* (citations omitted).

29. GETCHES ET AL., *supra* note 8, at 224.

30. This policy led to termination of the federal-tribal relationship with more than 100 bands and tribes. *Id.* at 209.

31. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong. (2d. Sess. 1970).

32. GETCHES ET AL., *supra* note 8, at 228-33.

33. 42 U.S.C. § 7474(c) (2000).

34. EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984), *available at* http://www.epa.gov/indian/1984.htm (last visited Feb. 26, 2004). Administrator Christine Todd Whitman reaffirmed the policy in July 2001.

35. *Id.*

36. *Id.*

Until a tribe assumes primacy, EPA will retain responsibility for environmental regulations on its reservation unless a state is expressly authorized by Congress to assume delegated authority.[37] The policy also pledges to "assure that Tribal concerns and interests are considered" in agency decisions, "in keeping with the federal trust responsibility."[38]

Consistent with EPA's tribal policy and with similar provisions in other environmental statutes,[39] section 301(d) of the CAA authorized EPA to "treat tribes as states" for purposes of administering air programs.[40] The CAA lists three requirements for eligibility:

> (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.[41]

The CAA gives the Administrator discretion to identify statutory provisions for which treatment as states would not be appropriate.

To implement section 301(d), the EPA promulgated the TAR in 1998.[42] The rule specifies the provisions of the CAA for which federally recognized tribes (including Alaska Native Villages) can be treated as

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37. In *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985), the court upheld EPA's refusal to let the state regulate hazardous waste-related activities conducted by Indians on Indian reservations. While the Resource Conservation and Recovery Act (RCRA) is silent on the issue, the EPA interpreted the statute to require the federal government to retain regulatory authority for Indian reservations rather than transfer it to the states when they are given authorization to implement their own state programs. *Id.* at 1469. According to the court, EPA's interpretation of RCRA was supported by the "'backdrop' of tribal sovereignty" together with federal policies of encouraging Indian self-government. *Id.* at 1470.

38. EPA, *supra* note 34.

39. Safe Drinking Water Act Amendments of 1986, 42 U.S.C. §§ 300(f)-(j)(1) (2000) (allowing tribes to assume primary enforcement responsibility for public water systems and underground injection control programs); Water Quality Act of 1987, 33 U.S.C. § 1377 (2000) (amending the Clean Water Act to allow tribes to be treated as states for certain purposes, including setting water quality standards and issuing National Pollutant Discharge Elimination System Permits); ROYSTER & BLUMM, *supra* note 9, at 228-29.

40. 42 U.S.C. § 7601(d)(1)(A) (2000).

41. 42 U.S.C. § 7601(d)(2) (2000).

42. 63 Fed. Reg. 7254 (Feb. 12, 1998).

states and establishes procedures for determining tribal eligibility.[43] Under the TAR, tribes may develop a comprehensive Tribal Implementation Plan (TIP) and seek full authority to monitor and enforce the National Ambient Air Quality Standards (NAAQS) within their reservation, but they are not required to do so. Tribes may alternatively assume primacy over a subset of regulatory functions and expand their authority gradually. EPA has the flexibility to alter deadlines for implementation plan submittal and other regulatory requirements.[44]

In the TAR, the EPA took the position that the CAA delegated authority to tribes to regulate air pollution sources on all land "within the exterior boundaries of their reservations," including non-Indian-owned fee lands.[45] The agency defined reservations as including Pueblos and trust lands that have been validly set apart for use of a tribe, even though they are not formally designated as reservations.[46] In contrast, before tribes can implement CAA programs outside of reservation boundaries, they must demonstrate regulatory authority over the affected areas under general principles of federal Indian law.[47] Lands owned by Alaska Native Village corporations represent an important category of non-trust lands that the EPA believes fall outside the Act's definition of a reservation, so that a demonstration of inherent authority would be required.[48] All tribal eligibility determinations require notice to governmental entities in surrounding areas and an opportunity for them to comment; the comment period may be extended in the case of non-reservation eligibility determinations.[49]

In *Arizona Public Service Co. v. EPA*,[50] the court upheld both the EPA's position on delegated authority over non-Indian owned fee lands

43. 40 C.F.R. §§ 49.3–49.4, 49.6 (2002).

44. 40 C.F.R. § 49.4 (2002).

45. In contrast, the EPA has interpreted the Clean Water Act as requiring tribes to show that they have inherent authority to regulate activities on non-Indian owned land within reservation boundaries. 56 Fed. Reg. 64,876 (Dec. 12, 1991). *See* Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998). *See also* Kathleen A. Kannler, *The Struggle Among the States, the Federal Government, and Federally Recognized Indian Tribes to Establish Water Quality Standards for Waters Located on Reservations*, 15 GEO. INT'L ENVTL. L. REV. 53, 56 (2002).

46. 63 Fed. Reg. 7258 (Feb. 12, 1998).

47. *Id.* at 7259.

48. *Id.* at 7258. The Supreme Court has held that lands owned in fee by Alaska Native corporations are not Indian Country, because they are not permanently set aside for the exclusive use of the tribe and are not subject to federal superintendence, as required by the definition of Indian Country in 18 U.S.C. § 1151(b) (2000). Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998). This holding affects about 44 million acres of land owned by Alaska Native corporations.

49. 40 C.F.R. § 49.9(b), (c) (2002).

50. 211 F.3d 1280 (D.C. Cir. 2000).

and its interpretation of what constitutes a reservation for purposes of the CAA. The *Arizona Public Service* court found congressional intent to delegate authority over non-Indian owned fee lands within reservation boundaries based on the statutory language that distinguished between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction."[51] The court also reasoned that without a delegation of authority over non-Indian-owned fee lands within reservation boundaries, tribes would only be able to impose "checkerboard" regulation, which would have been "inconsistent with the purpose and provisions of the Act."[52]

The TAR exempts tribes from *treatment as states* for purposes of CAA Section 304,[53] which authorizes any person who provides the required advance notice to bring certain civil actions in the federal district courts against states in their capacity as states, "to the extent permitted by the Eleventh Amendment to the Constitution."[54] In creating the exemption from treatment as a state under Section 304, EPA declined to take a position on the extent to which tribes are subject to the citizen suit provision.[55] The agency noted that this should ultimately be determined "based on established principles of tribal sovereign immunity and the provisions of the Clean Air Act."[56]

The TAR also exempts tribes from treatment as state status for Title V permit program provisions that require "judicial" review of a final permit action or failure to timely act on a permit "in state court."[57] In its background statement on this issue, the EPA states that it will require some "avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief," but that it

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51. *Id.* at 1288.

52. *Id.* The *Arizona Public Service* court noted,

> EPA suggests, not implausibly, that "inherent sovereign power" may apply to tribal regulation under the [Clean Air] Act...but the Agency does not press this argument on appeal. Rather, EPA contends that the 1990 Amendments constitute an express congressional delegation to the tribes of the authority to regulate air quality on fee lands located within the exterior boundaries of a reservation.

Id.

53. 40 C.F.R. § 49.4(o) (2002).

54. 42 U.S.C. § 7604 (2000). The Eleventh Amendment has been held to protect states from citizen suits in federal court unless the state consents. Hans v. Louisiana, 134 U.S. 1 (1890). By its terms, the Eleventh Amendment does not apply to tribes, but under federal Indian law, tribes can claim sovereign immunity unless the tribe or Congress has expressly waived it. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

55. 63 Fed. Reg. 7254, 7260 (Feb. 12, 1998).

56. *Id.* at 7261.

57. 40 C.F.R. § 49.4(p) (2002).

will consider alternative means of providing this review when tribes submit Title V programs for approval.[58]

IV. IMPLEMENTATION OF THE CLEAN AIR ACT WITHIN RESERVATION BOUNDARIES

Tribes, like states and their subdivisions, face two distinctly different (but interdependent) sets of challenges in managing their air resources. The first set of challenges involves regulation of sources located within the domain of their regulatory jurisdiction. The second set relates to transboundary air pollution that originates in areas outside their jurisdiction but affects air quality on the reservation. This section examines what tribes and EPA are doing to control air pollution originating in Indian Country. Efforts to address transboundary pollution are considered in part V.

A. Tribal Air Pollution Control Initiatives under the Clean Air Act

To date, 14 tribes have received eligibility to implement parts of the CAA.[59] In 1999, the Gila River Indian Community, located near Phoenix, became the first tribe to become eligible for "treatment as a state" status.[60] The Mohegan Tribe, located in southeast Connecticut, submitted a TIP to the EPA in fiscal year 2002, while the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Gila River Indian Community, Pequot Tribe, and St. Regis Mohawk Tribe have TIPs in progress.[61]

The U.S. portion of the St. Regis Mohawk reservation encompasses 14,600 acres and is located in New York, on the U.S.-Canada border. About 10,000 people live on the reservation, including approximately 5000 members of the St. Regis Mohawk Tribe. No large stationary sources are located on the reservation.[62] However, spurred on by an adjacent Superfund site and two nearby aluminum smelters, the tribe began developing its own environmental management capabilities in the 1980s. Beginning in September 2000, the tribe has demonstrated eligibility to administer several portions of the CAA.

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58. 63 Fed. Reg. 7254, 7262 (Feb. 12, 1998).

59. EPA, EPA FY 2002 ANNUAL REPORT, *available at* http://www.epa.gov/ocfo/finstatement/2002ar/2002ar.htm (last visited Feb. 4, 2004).

60. *Id.*

61. *Id.*; Telephone Interview with Deb Madison, Environmental Program Manager, Fort Peck Dept. of Envtl. Quality (Mar. 26, 2003).

62. Telephone Interview with Angela Benedict-Dunn, Air Quality Program Manager, St. Regis Mohawk Tribe (Mar. 13, 2003).

The St. Regis Mohawk Tribe submitted its TIP to EPA Region 2 in November 2002.[63] The Tribe's Air Quality Code, which constitutes the submitted TIP, includes tribal air standards for fluorides and six toxic metals that are of concern due to the off-reservation metals processing facilities.[64] The Code also includes, under CAA Section 505(a)(2), provisions for review of state permits for facilities located in contiguous jurisdictions.[65] The tribe operates an open burning permit program and plans to administer its own minor source permit program. According to Angela Benedict-Dunn, the tribe's Air Quality Program Manager, the St. Regis Mohawk developed their TIP as a proactive measure to protect the reservation's air resources from facilities that might want to locate there in the future.[66]

In March 2002, the tribal council of the Gila River Indian Community adopted ordinances comprising the first section of their TIP. The Gila River Indian Community has a population of 13,500, with a reservation encompassing 374,000 acres. Although the Community is currently included as part of the Phoenix nonattainment area for ozone, it has challenged this designation.[67] A number of industrial facilities are located on the reservation, including an aluminum processing facility and a medical waste incinerator.[68] The community's TIP includes permitting programs for synthetic minor sources,[69] small sources, and hazardous air pollutant sources, many of which have not previously been regulated.[70] The community is also developing a Title V operating permit program[71] and may develop its own Prevention of Significant Deterioration (PSD) pre-construction permit program.[72]

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63. *Id.*

64. ST. REGIS MOHAWK TRIBE, AIR QUALITY CODE REVISED (2d. ed. 2002), *available at* www.srmtenv.org/aqcrev.pdf (last visited Feb. 4, 2004).

65. *Id.* § 10.2 (authorized by 42 U.S.C. § 7661d(a)(2) (2000)).

66. Telephone Interview with Angela Benedict-Dunn, *supra* note 62.

67. Patricia Mariella, Address at the Meeting of the National Research Council Committee on Air Quality Management (Westminster, Co., July 18, 2001).

68. *Id.*

69. A synthetic minor source has the potential to emit above major source thresholds that would otherwise subject it to relatively onerous permit requirements but is constrained by federally enforceable permit limits to a lower level of emissions.

70. Mariella, *supra* note 67.

71. Title V of the 1990 Clean Air Act amendments requires states to issue and enforce operating permits for major sources and municipal solid waste incinerators. Under Title V, a "major source" is generally one that emits more than 100 tons per year of any criteria pollutant, more than 10 tons per year of any hazardous air pollutant, or more than 25 tons per year of a combination of hazardous air pollutants. 42 U.S.C. § 7661(2) (2000); 42 U.S.C. § 7661f(c)(2) (2000).

72. In addition to requiring operating permits for existing sources, the Clean Air Act requires construction permits for new sources or facilities undergoing significant

In 1999, when the Shoshone-Bannock Tribe applied for treatment as a state status, the world's largest elemental phosphorus processing facility operated on fee land within the tribe's 540,000-acre Fort Hall Reservation near Pocatello, Idaho. The Fort Hall Reservation was designated a non-attainment area for PM10,[73] due primarily to the phosphorus facility, which emitted more than 1400 tons per year of particulate matter.[74] In 1999, the owner of the phosphorus plant, FMC Corporation, entered into a $170 million consent agreement with the EPA for violations of the Resource Conservation and Recovery Act.[75] The facility was subsequently sold to Astaris-Idaho, LLC and then was closed at the end of 2001. The Shoshone-Bannock applied for eligibility in 1999 with the vision of developing a TIP and Title V permit programs to address air quality issues related to the FMC facility. Except for monitoring, the tribe's efforts to develop its air programs have slowed since the FMC facility closed. To date, the Tribe has requested eligibility only for air program grants under CAA sections 105 and 106, nonattainment area designations under section 107, and review of state permits for contiguous areas under section 505.[76]

The Assiniboine and Sioux Tribes of the Fort Peck reservation in northeastern Montana have a TIP in the draft stages.[77] The Fort Peck reservation covers more than two million acres and is home to about 6800 members.[78] The tribes redesignated the reservation as a Class I area

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modifications. In areas meeting the National Ambient Air Quality Standards (*i.e.*, attainment areas), this construction permit program is known as Prevention of Significant Deterioration (PSD). Sources in 28 specific categories that emit more than 100 tons per year of any criteria pollutant come under federal PSD requirements; otherwise, the PSD cutoff is 250 tons per year of any pollutant. PSD sources are subject to best available control technology (BACT) limits. Permit applicants must also ensure that the new emissions do not increase pollutant concentrations in the surrounding area by more than a specified amount. The allowable increment of pollution depends on the status of the affected area as Class I (most protected), Class II, or Class III (least protected). The analogous construction permit program for sources located in nonattainment areas is known as New Source Review (NSR).

73. PM10 stands for particulate matter less than 10 microns in aerodynamic diameter. It is one of two size classes of particulate matter regulated as a criteria pollutant under the Clean Air Act. 42 U.S.C. § 7602(t) (2000).

74. 65 Fed. Reg. 51,412 (Aug. 23, 2000).

75. The consent agreement included a $12 million fine and $64 million worth of controls and other projects to reduce particulate emissions. The Shoshone-Bannock declined to sign the EPA-FMC settlement. Stephen Stuebner, *Plant Pays Hefty Fine for Polluting the Air*, HIGH COUNTRY NEWS, Feb. 1, 1999, at 5.

76. E-mail from Farshid Farsi, Tribal Air Program, Shoshone-Bannock Tribes (Mar. 13, 2003) (on file with author).

77. Telephone Interview with Deb Madison, *supra* note 61.

78. Fort Peck Tribes, Tribal Website, *at* http://www.fortpecktribes.org/localarea.htm (last visited Feb. 12, 2004).

for PSD purposes in the early 1980s. The tribes' main motivation for developing a TIP is to adopt a federally enforceable minor source permitting program, because several synthetic minor sources are located on the reservation, including a large natural gas compressor station.[79] The tribes have also developed an emissions inventory and are monitoring the effects of fine particulate matter on visibility.[80]

The Navajo Nation passed its Air Pollution Prevention and Control Act in 1995, authorizing its Air Quality Control Program to develop and enforce pollution control regulations.[81] The Navajo Nation currently has eligibility for section 105 grants and is working on developing a Title V operating permits program.[82] Fourteen sources on the Navajo reservation are subject to Title V requirements, including the Navajo Generating Station and Four Corners Power Plant.[83] The Navajo Air Quality Program has seven staff members who work on program development, air quality monitoring, and compliance inspections for sources operating on the reservation under federal or, for some portable sources, state permits. The Navajo Nation currently operates four monitoring stations for PM10 and is adding another PM10 monitor and two monitors for gaseous pollutants.[84]

B. EPA's Regulatory Activity in the Absence of Tribal Primacy

Until a tribe assumes control of its own air pollution programs, the responsibility for implementing the CAA within reservation boundaries falls to the EPA.[85] The EPA currently administers a Title V operating permits program for major stationary sources located on reservations, along with a PSD pre-construction permit program for new major sources or source modifications in an attainment area. To fill current regulatory gaps, the EPA is working to develop a New Source Review (NSR) construction permit program for major sources on reservations that are located within nonattainment areas[86] and operating

79. *Id.*

80. Telephone Interview with Deb Madison, *supra* note 61.

81. Telephone Interview with Christopher Lee, Program Manager, Navajo Nation Environmental Protection Agency Air Quality Program (Mar. 28, 2003).

82. *Id.*

83. While the TAR would clearly authorize the Navajo Nation to regulate these facilities, the tribe's ability to do so is uncertain because of lease agreements with the facilities' non-Indian owners. The tribe and the power plant owners are discussing this issue.

84. Telephone Interview with Christopher Lee, *supra* note 81.

85. Protection of Environment, 40 C.F.R. § 49.11(a) (2002).

86. NSR generally applies to sources with a potential to emit 100 or more tons per year of any criteria pollutant. Smaller sources may be subject to NSR in ozone nonattainment

permit programs for minor sources and synthetic minor sources in both attainment and nonattainment areas.[87]

Under its Title V authority, the EPA has amended 40 C.F.R. part 71 to extend the federal operating permits program to Indian Country.[88] As of August 20, 2003, EPA had issued 58 of 98 needed operating permits.[89] Prior to issuance of these permits, some of the affected sources were permitted under EPA's PSD pre-construction permit program, some were operating under state permits, and others (with emissions that fell between the Title V and PSD thresholds) had gone unregulated.[90] According to Monica Morales of EPA Region 8, tribes are given advance notice and invited to comment when operating permits are issued for sources within their borders.[91]

NSR programs are required as part of state implementation plans for nonattainment areas and, hence, are normally implemented by states.[92] At present, there is no federal NSR program for nonattainment areas. If a prospective source in Indian Country needs an NSR permit, either the tribe must develop a TIP or the EPA must issue a Federal Implementation Plan (FIP). Either of these options is likely to entail substantial delay. In contrast to nonattainment area NSR, the CAA gives the EPA primary responsibility for the PSD program, which automatically applies in all attainment areas.[93] The EPA can consequently issue PSD permits without promulgating a FIP. Region 8, for example, has issued PSD permits for nine new sources or major

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areas, depending on the severity of the nonattainment problem. Sources permitted under NSR must comply with lowest achievable emission rates (LAER) for that source category and are required to secure emissions reductions from other sources in the area to more than offset the increased emissions expected from the new or modified facility.

87. Cynthia Yu-Robinson, *Fine Particles Do Not Make Fine Air Quality*, 2 TRIBAL AIR NEWS, Aug. 2002, at 1.

88. In 1999, EPA revised the Part 71 rule to extend the federal permitting program to sources in Indian Country and to sources located in areas where "EPA believes the Indian Country status is in question." 64 Fed. Reg. 8247, 8262 (Feb. 19, 1999). In October 2001, the D.C. Circuit held that EPA had exceeded its statutory authority by including areas of questionable status by default; rather, the agency had to delineate the limits of tribal jurisdiction before issuing a permit. Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001). EPA subsequently amended its regulation to eliminate the "in question" areas. 67 Fed. Reg. 38,328 (June 3, 2002).

89. EPA, *Air Permits, Part 71 Source in Indian Country, at* http://www.epa.gov/air/oaqps/permits/indsource.html (last visited Feb. 9, 2004).

90. Telephone Interview with Monica Morales, Environmental Engineer, EPA, Region 8 (Mar. 25, 2003).

91. Telephone Interview with Monica Morales, Environmental Engineer, EPA, Region 8 (Feb. 10, 2003).

92. 42 U.S.C. § 7502(c)(5) (2000); 42 U.S.C. § 7503(a) (2000).

93. EPA has delegated authority to issue PSD permits to many states.

modifications operating on tribal lands. The region actively solicits tribal comments on these permits because they are usually for new facilities.[94]

Hundreds of minor sources in Indian Country currently go unregulated, with potentially damaging consequences for human health and welfare.[95] The lack of tribal or federal minor source permitting programs also has consequences for economic development on reservations. States that have federally enforceable minor source permitting programs can grant "synthetic minor" status to sources with a potential to emit pollutants above major source threshold levels, through enforceable permit limits that cap their emissions below these thresholds. Synthetic minor status is currently not available to sources in Indian Country. As an interim measure, while EPA develops a federal minor source permitting program, the agency has adopted a policy of allowing sources in Indian Country to avoid major source operating permit requirements if they can show that their actual emissions are continuously less than half of the major source threshold for 12 months.[96]

To augment the EPA's national programs for regulating sources in Indian Country, EPA Region 10 has proposed a Tribal Air Rule for the 39 reservations located in Idaho, Oregon, and Washington.[97] The proposed rule would apply to facilities within reservation boundaries without regard to ownership and would include control requirements for wood waste burners; permit programs for open burning, agricultural, and forestry burning; and source registration and reporting requirements. Under the proposed rule, tribes can assume administrative authority while enforcement authority remains with the EPA. In contrast, if tribes assume authority under the TAR, they would have concurrent enforcement authority with the EPA.

The EPA has proposed federal implementation plans for a handful of particularly significant sources, including two on the Navajo reservation: the 2250 MW Navajo Generating Station (NGS) located near Page, Arizona,[98] and the 2040 MW Four Corners Power Plant located near Farmington, New Mexico.[99] Both sources are owned by non-Indian

94. Telephone Interview with Monica Morales, *supra* note 91.

95. Yu-Robinson, *supra* note 87, at 1.

96. Memorandum from John Seitz, Director, Office of Air Quality Planning & Standards, EPA, and Eric Schaeffer, Director, Office of Regulatory Enforcement, EPA (Mar. 7, 1999), *available at* www.epa.gov/ttn/oarpg/t5/memoranda/indian6.pdf (last visited Feb. 10, 2004).

97. 67 Fed. Reg. 11748 (Mar. 15, 2002); EPA, Region 10: The Pacific Northwest, *Tribal Air Quality Main Page, at* http://yosemite.epa.gov/R10/AIRPAGE.NSF/webpage/Tribal+Air+Program+Main+Page#Overview (last visited Feb. 12, 2004).

98. 64 Fed. Reg. 48,725 (Sept. 8, 1999).

99. *Id.*

consortia and are located on the Navajo reservation through lease agreements with the Navajo Nation.[100] The power plants have been operating in compliance with state-issued permits, despite the fact that states are normally precluded from enforcing civil regulatory programs on tribal lands.[101] The proposed FIPs federalize the existing state requirements.[102] In its proposed FIPs, the EPA indicated that it would support the Navajo Nation's eventual assumption of authority to regulate sources on its reservation.[103] The EPA later issued a correction to the proposals to clarify the fact that it had not yet determined whether the Navajo Nation *had* the authority to regulate the NGS or FCPP.[104] The owners of the two facilities assert that their lease covenants "prevent the Navajo Nation from regulating either of the facilities under the CAA."[105]

V. ADDRESSING TRANSBOUNDARY AIR POLLUTION

The transboundary nature of air pollution greatly complicates tribes' efforts to protect their air resources. The CAA and EPA's implementing regulations provide three primary means to address transboundary air pollution problems. First, under the PSD provisions of the CAA, tribes and states can redesignate areas that are already meeting the NAAQS, imposing stricter air quality requirements that are meant to constrain upwind emissions, as well as emissions within the redesignated area.[106] Second, tribes and states or their political subdivisions can petition the EPA Administrator to regulate upwind sources that are significantly contributing to their nonattainment problems or interfering with maintenance of the standards or with PSD measures.[107] Third, the CAA and EPA regulations encourage cooperative planning efforts among states and tribes to address regional-scale pollution problems.[108]

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100. *Id.*

101. *See supra* note 13.

102. For the NGS, these requirements include annual PSD limits on SO_2 to protect visibility in the Grand Canyon National Park, "state" SIP and operating permit requirements for particulate matter, opacity and SO_2 and NO_x limits and SO_2 allowance requirements under the Acid Rain provisions of the CAA. 64 Fed. Reg. 48,727 (Sept. 8, 1999). The FCPP is subject to state SIP standards for SO_2 and PM and NO_x limits under the Acid Rain program. 64 Fed. Reg. 48,733 (Sept. 8, 1999).

103. 64 Fed. Reg. 48,726-27 (Sept. 8, 1999); 64 Fed. Reg. 48,732-33 (Sept. 8, 1999).

104. 65 Fed. Reg. 4244 (Jan. 26, 2000).

105. 65 Fed. Reg. 4245 (Jan. 26, 2000).

106. 42 U.S.C. § 7474(a), (c) (2000).

107. 42 U.S.C. § 7426(b)-(c) (2000).

108. *See, e.g.*, 42 U.S.C. § 7511c(a)(2000); 42 U.S.C. § 7492(f)(2000).

A. Redesignating Tribal Lands as Class I Areas

Using the PSD provisions of the CAA, the Northern Cheyenne Tribe has been working for almost 30 years to protect the air resources on its 450,000-acre reservation. The EPA initially promulgated the PSD program as a regulation in 1974.[109] The program classifies attainment areas according to the amount of additional pollution (air quality increment) that will be allowed. Class I areas, which include national parks and wilderness areas, have the smallest allowable air quality increments, giving them the most protection.[110] Class II is the default designation for all other attainment areas and confers intermediate protection.[111] Air quality in Class III areas is allowed to deteriorate to the greatest degree.[112] EPA's regulations allowed states and tribes to request redesignation from Class II to either Class I or Class III status.[113] Air quality in all attainment areas is protected through construction permits for specified new sources and source modifications, as described above.[114] While most states now have delegated authority to issue PSD permits, the EPA still administers the PSD construction permit program on tribal lands.[115]

In March 1977, the Northern Cheyenne requested Class I status for their reservation, which is located in a coal-rich region in southeastern Montana. The EPA administrator approved the redesignation on August 5, 1977.[116] Two days later, President Carter signed the 1977 Clean Air Act amendments into law, codifying the PSD program with some modifications and providing that any areas redesignated Class I prior to enactment would retain that status. The 1977 amendments expressly allowed federally recognized tribes to redesignate "lands within the exterior boundaries of reservations."[117]

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109. Protection of Environment, 40 C.F.R. § 52.21 (2003). The regulations were promulgated pursuant to an injunction issued in *Sierra Club v. Ruckleshaus*, 344 F. Supp. 253 (D.C. Cir. 1972). In that case, the court held that the EPA administrator was required to establish a regulatory scheme to protect air quality that was already cleaner than required by the NAAQS in order to effectuate the purpose of the Clean Air Act to "protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Ruckleshaus*, 344 F. Supp. at 255; 42 U.S.C. § 7401(b)(1) (2000).

110. 42 U.S.C. §§ 7472(a), 7473(b)(1) (2000).

111. 42 U.S.C. §§ 7472(b), 7473(b)(2).

112. 42 U.S.C. § 7473(b)(3).

113. 40 C.F.R. § 52.21(g)(ii) (2002).

114. *See supra* note 72.

115. Telephone Interview with Monica Morales, *supra* note 90.

116. 40 C.F.R. § 52.1382(c)(2) (2002).

117. 42 U.S.C. § 7474(c) (2000). Similarly, under the Clean Water Act, tribes can set water quality standards that are stricter than those of surrounding states. In *Albuquerque v.*

In addition to the Northern Cheyenne, four other tribes have redesignated their reservations as Class I areas.[118] The Assiniboine and Sioux Tribes on the Fort Peck Reservation in northeast Montana and the Confederated Salish and Kootenai Tribes on the Flathead Reservation in northwest Montana redesignated their lands in the early 1980s.[119] The Spokane Indian Reservation in eastern Washington was redesignated in 1991.[120] The Yavapai-Apache Reservation in central Arizona was approved for redesignation in 1996.[121] All other reservations in attainment areas are designated Class II, as are all state attainment areas. A request for redesignation has been made by the Forest County Potawatomi Tribe in northeastern Wisconsin; this request is currently awaiting final approval by the EPA.[122]

Class I status allows tribes to impose relatively stringent control requirements on nearby sources that significantly affect air quality on the reservation. For instance, the Northern Cheyenne's redesignation led to the installation of wet scrubbers on two units of the 2000 MW Colstrip power plant, which is located 15 miles from their reservation.[123] Air quality modeling showed that scrubbers were needed to avoid violations of the Northern Cheyenne's PSD increment for sulfur dioxide.[124] The Northern Cheyenne also demonstrated that the Colstrip project would degrade visibility on their reservation, triggering the CAA's state-tribal

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Browner, 97 F.3d 415 (10th Cir. 1996), the court upheld EPA's approval of water quality standards set by the Isleta Pueblo for Rio Grande water flowing through the reservation, despite the fact that they were stricter than New Mexico's standards. The court accepted EPA's argument that the right to set water quality standards stricter than federal standards was "in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423. Further, the court found that once a tribe has set such standards, the EPA is authorized by the Clean Water Act to require upstream dischargers (such as the City of Albuquerque) to comply with them. *Id.* at 424.

118. Joseph Kreye, *The Forest County Potawatomi Request Redesignation Under the Clean Air Act*, 4 WIS. ENVTL. L.J. 87, 93 (1997).

119. *See* 40 C.F.R. § 52.1382(c)(3) (2003) (redesignation of the Flathead Reservation); 40 C.F.R. § 52.1382(c)(4) (2002) (redesignation of the Fort Peck Reservation).

120. 40 C.F.R. § 52.2497(c) (2002).

121. 40 C.F.R. § 52.150(a), (b) (2002).

122. Telephone Interview with Dan deRoeck, Environmental Engineer, Information Transfer and Program Integration Division (MD-12), Office of Air Quality Planning and Standards, EPA (Jan. 27, 2003).

123. Colstrip Units 1 and 2 were built before the PSD requirements came into play and hence are not subject to them. In *Montana Power Co. v. EPA*, 608 F.2d 334, 357 (9th Cir. 1979), the court held that Colstrip units 3 and 4 had not "commenced construction" prior to the cutoff date for exemption from the PSD program and were, accordingly, subject to BACT, along with SO_2 increment and visibility protection requirements imposed due to the Class I status of the Northern Cheyenne reservation.

124. *Montana Power Co.*, 608 F.2d at 343.

dispute resolution provisions.[125] This process resulted in an agreement for Montana Power to fund visibility monitoring on the reservation and to apply retrofit nitrogen oxide (NO_x) controls. The Northern Cheyenne continue to monitor the impacts of the Colstrip power plant on reservation air quality.

Because Class I designation can impose relatively stringent control requirements on nearby sources, tribes seeking redesignation may be at odds with neighboring states and industries. Montana energy companies and the Crow Indian Tribe challenged the Northern Cheyenne redesignation.[126] Arizona opposed the redesignation of the Yavapai-Apache Reservation.[127] After the EPA proposed to approve the Forest County Potawatomi redesignation in June 29, 1995, the governors of Michigan and Wisconsin protested and requested formal dispute resolution, claiming the redesignation would infringe on their states' ability to manage resources within their jurisdiction.[128]

The effect of a Class I redesignation on off-reservation sources is limited, however, because sources are not subject to additional control requirements unless they contribute "significantly" to consumption of a PSD increment.[129] The effects of sources that are individually held to be insignificant may thus combine to consume increment limits. In addition, while the PSD program recognizes visibility in Class I areas as an "air quality related value," the CAA's mandatory visibility protections apply only to mandatory federal Class I areas like national parks and wilderness areas.[130] Non-mandatory Class I areas are not covered except through the statute's dispute resolution process.[131]

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125. 42 U.S.C. § 7474(e) (2000).

126. In *Nance v. EPA*, 645 F.2d 701, 714 (9th Cir. 1981), the court recognized the 1977 amendments and associated legislative history as indicating "Congress' view that such Indian authority to redesignate their lands is appropriate." The court also found that the "extraterritorial" effect of redesignation was not an unconstitutional extension of tribal authority beyond the limits of their reservation. "Just as a tribe has the authority to prevent the entrance of non-members onto the reservation a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation." *Id.* at 715 (citations omitted).

127. Kreye, *supra* note 118, at 99.

128. *Id.* at 103.

129. Joshua Epel & Martha Tierney, *Tribal Authority over Air Pollution Sources On and Off the Reservation*, 25 ENVTL. L. REP. 10,583, 10,584-85 (1995).

130. 42 U.S.C. § 7475(d) (2000).

131. 42 U.S.C. § 7474(e) (2000). The Northern Cheyenne Tribe recently requested dispute resolution with the state of Montana to address the effects of existing and proposed off-reservation sources consuming the SO_2 increment and degrading visibility on their reservation. Telephone Interview with Monica Morales, *supra* note 90. The Montana Department of Environmental Quality (MTDEQ) recently issued a final construction permit for a new 780 MW mine-mouth coal-fired power plant to be located about 80 miles

Class I redesignation can be a double-edged sword that can constrain tribal development efforts as well as off-reservation sources. At the time the Fort Peck reservation was redesignated in the early 1980s, the Assiniboine and Sioux Tribes were especially concerned about emissions from a coal-fired generating station located across the border, in Canada. Now the tribe is investigating how much of its Class I increment remains available for its own ventures on the reservation.[132]

B. Interjurisdictional Problems in Nonattainment Areas

The National Tribal Environmental Council (NTEC) estimates that 80 Indian reservations are located within or partly within nonattainment areas for the 1-h average ozone standard and that the number is likely to be higher with the new 8-h ozone standard.[133] This statistic raises two concerns for tribes. First, their members may suffer poor air quality due to sources beyond their control. Additionally, inclusion in a nonattainment area may constrain their economic development opportunities.

Tribes have expressed concern about pending nonattainment designations for ozone, given that EPA presumptively bases designations on Metropolitan Statistical Area (MSA) or Consolidated Metropolitan Statistical Area (CMSA) boundaries.[134] These default designations are often made without any air quality monitoring data for the affected reservation and ignore the political divisions between tribes and states. Tribes are concerned that they will face the burdens of nonattainment designation, including offset requirements, even though they have historically borne little responsibility for air quality problems (or derived little economic benefit from the air pollution sources) in the

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northwest of the Northern Cheyenne reservation. The construction permit was issued despite the fact that modeling showed that the Northern Cheyenne's SO_2 increment was already violated by existing air pollution sources, because, in isolation, the Roundup plant's contribution was judged to be "insignificant." The SO_2 increment violations were primarily attributed to the Colstrip facility. MONT. DEP'T OF ENVTL QUALITY, ROUNDUP POWER PROJECT DRAFT ENVIRONMENTAL IMPACT STATEMENT, at 4-102 (Nov. 2002). In its response to comments about the SO_2 levels, the MTDEQ said that it had no authority to require offsets from the Colstrip facility. MONT. DEP'T OF ENVTL. QUALITY, ROUNDUP POWER PROJECT DRAFT ENVIRONMENTAL IMPACT STATEMENT, at 4-5 (Jan. 2003). Modeling done for the Roundup plant by the National Park Service also indicated that its emissions would adversely affect visual air quality on the Northern Cheyenne reservation. *Id.* at 5-6.

132. Telephone Interview with Deb Madison, *supra* note 61.

133. NAT'L TRIBAL ENVTL. COUNCIL, COMMENTS SUBMITTED ON BEHALF OF THE NATIONAL TRIBAL AIR ASSOCIATION RE THE PROPOSED SETTLEMENT OF LITIGATION OVER 8-HOUR OZONE DESIGNATIONS (2002), *available at* http://www.ntec.org/NTAC/ozsettle.html (last visited Mar. 3, 2004).

134. *Id.*

adjacent metropolitan areas. Similar issues are likely to arise with respect to designations for PM2.5.[135] The EPA has invited tribes to contest these designations,[136] as the Gila River Indian Community is doing, but the exemption policy requires detailed analysis that may tax the resources of many tribes.

The CAA provides three possible means for requiring controls on upwind sources in states or on tribal lands where transboundary air pollution is contributing to monitored violations of the NAAQS. First, section 110(a)(2)(D)(i) requires states to include provisions in their SIPs that prohibit emissions within the state from significantly contributing to nonattainment or interfering with maintenance of the NAAQS, PSD, or visibility protection measures of other states or eligible tribes. Section 126 requires that written notice of major new sources or modifications be given to nearby states or eligible tribes[137] and authorizes a state or eligible tribe to petition the EPA to require these sources to comply with section 110(a)(2)(D).[138] However, the EPA is only required to impose control requirements in an upwind area under section 126 if its sources "contribute significantly" to a violation of the NAAQS in the downwind area. This condition has proved to be a difficult hurdle for petitioners.[139] Second, section 505 requires that notice and an opportunity for comment be extended to contiguous states or eligible tribes before Title V operating permits are issued. Section 505(b)(2) then allows "any person" to petition EPA with objections to a Title V operating permit, as long as the objections were raised to the permitting authority during the public comment period.[140] Under this provision, the petitioner must demonstrate that the permit does not meet the requirements of the CAA, *i.e.*, that the source significantly contributes to degradation of the downwind area's air quality. Finally, tribes (or any person) can file a civil action in district court under section 304, but only when a source is allegedly constructed or operating in violation of the CAA or a permit issued under the statute.

The difficulty of obtaining relief under the CAA's interstate transport provisions is demonstrated by the fact that, until 2000, the EPA

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135. PM2.5 stands for particulate matter less than 2.5 μm in aerodynamic diameter. A National Ambient Air Quality Standard for PM2.5 was promulgated in 1998.

136. EPA, GUIDANCE ON 8-HOUR OZONE DESIGNATIONS FOR INDIAN TRIBES (2000), *available at* http://www.epa.gov/ttn/oarpg (last visited Feb. 27, 2004).

137. 42 U.S.C. § 7426(a)(1) (2000).

138. 42 U.S.C. § 7426(b), (c).

139. *See, e.g.*, Air Pollution Control Jefferson County, Ky. v. EPA, 739 F.2d 1071, 1093 (6th Cir. 1984); New York v. EPA, 852 F.2d 574, 580 (D.C. Cir. 1988).

140. 42 U.S.C. § 7661d(b)(2) (2000).

had never granted a section 126 petition.[141] That year, the EPA granted petitions filed by Connecticut, Massachusetts, New York, and Pennsylvania.[142] In doing so, the agency agreed that stationary source NO_x emissions in 12 eastern states and the District of Columbia significantly contributed to ozone nonattainment in the petitioning states.[143] The EPA based its decision to grant the petitions on the following factors: (1) the collective contribution of emissions from the upwind states to the petitioners' ozone problems, (2) evidence that the petitioning states would still violate the ozone standard after implementing all of the control measures explicitly required under the CAA, (3) the petitioning states had already imposed stricter controls than the upwind states, and (4) a finding that controls in upwind states would be cost-effective.[144] Significantly, as EPA itself noted, its response followed a major research and planning effort conducted over more than ten years to analyze the ozone transport problem in the Northeast.[145]

C. State and Tribal Cooperation on Regional Air Quality Problems

In the 1990 amendments to the CAA, Congress recognized two particular transboundary air pollution problems that would require interjurisdictional cooperation. The amendments mandated the creation of two interstate commissions: the Ozone Transport Commission (OTC), to address ozone pollution in the Northeast,[146] and the Grand Canyon Visibility Transport Commission (GCVTC), to deal with fine-particle haze that impaired visual air quality in Grand Canyon National Park.[147] The purpose of both commissions was to develop consensus recommendations on control measures to address these regional-scale problems.

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141. For a discussion of the history of this section through the mid-1990s, see Vickie L. Patton, *The New Air Quality Standards, Regional Haze, and Interstate Air Pollution Transport*, 28 ENVTL. L. REP. 10,155 (1998).

142. 40 C.F.R. § 52.34 (c), (e), (g), (h) (2002).

143. Nitrogen oxides react with volatile organic compounds and sunlight in the atmosphere to produce ozone.

144. 40 C.F.R. § 52.34 (2002).

145. 64 Fed. Reg. 28,253 (May 25, 1999).

146. 42 U.S.C. § 7511c(a) (2000).

147. 42 U.S.C. § 7492(f) (2000). EPA established the GCVTC in 1991 with voting representatives from eight western states and four tribes: the Pueblo of Acoma, the Hopi Tribe, the Hualapai Tribe, and the Navajo Nation. The Columbia River Inter-Tribal Fish Commission was also represented.

The OTC, comprised of the governors of 13 states in the Northeast,[148] forwarded a single recommendation to the EPA, calling for enhanced motor vehicle emissions standards.[149] Augmenting the work of the OTC, the EPA and 31 eastern states established the Ozone Transport Assessment Group (OTAG) in 1995. This organization included participants from state air agencies as well as industry and environmental groups and focused primarily on cooperative technical and policy analysis. While constituted at a lower level of authority than the OTC, OTAG's work was important in spurring EPA's 22-state "SIP-call" for new NO_x reductions under section 110(a)(2)(D)(i) and in convincing the agency to grant the section 126 petitions discussed above.[150]

In June 1996, the GCVTC reported to the EPA its final recommendations for managing emissions and protecting visibility in the western United States.[151] Among its primary recommendations, the GCVTC suggested that a regional target be set for sulfur dioxide emissions to protect visibility in the Colorado Plateau area. If the target were not met through facility retirements or control requirements that were already pending, the GCVTC recommended using a cap-and-trade program to obtain additional emissions reductions. The EPA incorporated this recommendation into the Regional Haze Rule that it issued on July 1, 1999, which established a nationwide program to restore 156 national parks and wilderness areas to "natural" visibility conditions by 2065.[152]

The Western Regional Air Partnership (WRAP) is the successor to the GCVTC, though with expanded membership and modified

148. While the OTC had no tribal representation, it warrants mention here as a pioneering effort at inter-jurisdictional cooperation in air quality management. The Mid-Atlantic/Northeast Visibility Union (MANE-VU), which now coordinates regional haze planning for the same region, includes two tribes along with 11 states as voting members: the Penobscot Indian Nation and the St. Regis Mohawk Tribe.

149. 59 Fed. Reg. 21,720 (Apr. 26, 1994).

150. EPA, OZONE TRANSPORT ASSESSMENT GROUP, *at* http://www.epa.gov/ttn/naaqs/ozone/rto/otag/ (last visited Feb. 7, 2004). The SIP call required these states to revise their state implementation plans to include retrofit NO_x controls for specified sources.

151. GRAND CANYON VISIBILITY TRANSP. COMM'N, RECOMMENDATIONS FOR IMPROVING WESTERN VISTAS (1996), *available at* http://www.wrapair.org/WRAP/reports/GCVTC Final.PDF (last visited Feb. 7, 2004).

152. 64 Fed. Reg. 35,714 (July 1, 1999). Implementation of the Regional Haze Rule is staged, with deadlines specified for installing Best Achievable Retrofit Technology (BART) on certain existing sources and for achieving emissions reduction milestones. While it covers more than just the GCVTC region, the Regional Haze Rule includes separate provisions and deadlines for the western states and tribes to pursue the GCVTC's recommendations. *Id.*

authority.[153] Eleven western tribes are listed as WRAP members, along with 13 states and four federal agencies.[154] In September 2000, the WRAP submitted an annex to the 1996 GCVTC report, proposing measures to implement the GCVTC recommendations and meet the requirements of the Regional Haze Rule.[155] The annex addresses the period through 2018 and features a shrinking emissions cap and trading program for sulfur dioxide emissions in the GCVTC region.[156] The EPA proposed to approve the annex on May 6, 2002.[157] States were required to declare in 2003 whether they will follow the annex or the alternative nationwide requirements of the Regional Haze Rule. Tribes can opt in later.[158]

The nine-state region covered by the annex is home to more than 200 federally recognized tribes.[159] As of 1999, four of these tribes had major SO_2 sources within their reservation boundaries that would fall under the annex.[160] Beyond allocating emissions rights for these sources, the annex reserves for tribes 20,000 tons per year of new SO_2 emissions, about four percent of the total to be allowed in 2018, in the event that the trading program is triggered. The 20,000-ton set-aside is "intended to help ensure equitable treatment for tribal economies and prevent barriers to economic development."[161] According to the annex, the reserved emissions rights could be allocated to new sources on tribal lands or retired to secure improved air quality, at the tribes' discretion. Because the trading program cannot be triggered before 2009, EPA proposed to

153. The EPA has encouraged the formation of other regional planning organizations by allowing participating states extra time for control strategy planning under the Regional Haze Rule. There are now five such organizations covering the contiguous United States. All of them are actively recruiting tribal participation. Telephone Interview with Sarah Kelly, Tribal Environmental Resource Center Manager, Inst. for Tribal Envtl. Professionals (Feb. 21, 2003).

154. WESTERN REGIONAL AIR PARTNERSHIP, FACTS ABOUT THE WRAP, *at* http://www.wrapair.org/facts/index.html (last visited Feb. 7, 2004).

155. WESTERN REGIONAL AIR PARTNERSHIP, ANNEX TO THE REPORT OF THE GRAND CANYON VISIBILITY TRANSPORT COMMISSION TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY (Sept. 29, 2000).

156. The WRAP expects the emissions cap to be met through voluntary measures, so the trading program serves as a "backstop" in case the voluntary measures are not sufficient. The program is expected to reduce regional SO_2 emissions from sources emitting more than 100 tons per year from 682,000–720,000 tons in 2003 to 480,000–510,000 tons in 2018.

157. Proposed Revisions to Regional Haze Rule, 67 Fed. Reg. 30,418 (May 6, 2002).

158. Regional Haze Regulations, 64 Fed. Reg. 35,759 (July 1, 1999).

159. Proposed Revisions to Regional Haze Rule, 67 Fed. Reg. 30,438 (May 6, 2002).

160. The four tribes and affected sources are the Navajo Nation (Four Corners Power Plant and Navajo Generating Station), the Shoshone-Bannock Tribe of the Fort Hall Reservation (Astaris-Idaho phosphorus plant, now closed), the Wind River Reservation (Snyder Oil and Koch Sulfur Products facilities), and the Ute Indian Tribe of the Uintah and Ouray Reservation (Bonanza Power Plant). *Id.*

161. *Id.*

defer determining how the 20,000 tons would be allocated among the western tribes until a later date.[162]

The OTC and GCTVC and their successor planning organizations have proven effective at advancing solutions to transboundary air pollution problems and thus influencing EPA's regulatory efforts. The EPA appears to be committed to working with these organizations. Conversely, the agency has shown considerable reluctance to impose control requirements on upwind states in the absence of cooperative research and planning efforts.[163] Participation in regional planning organizations thus seems critical for tribes that want to influence how transboundary pollution problems are managed. However, sustained participation poses a stiff challenge for tribes whose environmental staffs are already stretched thin. Tribes with active environmental programs may have only one person working on air issues.[164]

VI. BUILDING CAPACITY FOR TRIBAL AIR PROGRAMS

As noted in the introduction, many tribes are working to develop air quality management programs, with assistance from EPA and congressionally authorized grant support.[165] Based on a telephone survey of 156 of the 237 federally recognized tribes in the Western Regional Air Partnership (WRAP) region, 60 tribes in this region have some form of air quality program.[166] The scope of activities ranges from education and outreach to monitoring, emissions inventory development, and source permitting. Twenty-eight of the surveyed tribes had an emissions inventory and 51 tribes performed some air quality or meteorological monitoring.[167] The survey suggested that, if resources were available, the level of activity could double in the next few years. For example, 62 of the surveyed tribes indicated an interest in starting air monitoring programs in the next few years.[168]

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162. *Id.*

163. Patton, *supra* note 141.

164. Telephone Interview with Sarah Kelly, *supra* note 153.

165. In addition to administering grants to support tribal capacity building, the EPA has provided assistance to tribes in the form of one-to-one consultations and written guidance on air program development.

166. INST. FOR TRIBAL ENVTL. PROF'LS, AN ASSESSMENT OF TRIBAL AIR QUALITY DATA AND PROGRAMS IN THE WESTERN UNITED STATES (Aug. 2001), *available at* http://www.wrapair.org/forums/tddwg/documents/WGA-FINAL_Data_Gathering_Report.pdf (last visited Feb. 7, 2004).

167. *Id.*

168. *Id.*

Tribes, like states, are eligible under the CAA for federal grants to support air quality monitoring and management efforts.[169] The TAR provides that tribes establishing eligibility may receive federal grants in an amount up to 95 percent of the approved cost of developing or maintaining an air pollution control program for two years and 90 percent thereafter.[170] The cap on the federal share of assistance to tribes that have not demonstrated eligibility is 60 percent.[171] The EPA began actively seeking tribal participation in its grants program in 1995, providing grants to about 20 tribes. In 2002, 121 tribes received air program grants.[172] The tribal share of EPA-administered state and Tribal Assistance Grants (STAG) for air has been flat at about $11 million since 1999, while tribal interest in developing air programs has been increasing.[173] Tribes seeking first-time grants are currently being turned away in Regions 9 and 10. The agency estimates that roughly 50 more tribes would participate in its air grants program if money were available.[174]

In addition to direct grants to tribes, STAG funding supports the Institute for Tribal Environmental Professionals (ITEP) at Northern Arizona University.[175] This organization offers about 20 technical workshops each year for tribal environmental staff on monitoring, permitting, and other air quality management topics and also serves as a forum for interaction and information exchange between tribes and with

169. Section 103 provides grants for training and for development of emissions inventories and monitoring capabilities. Section 105 supports air pollution control program implementation. Most grants to tribes are section 103 grants. Telephone Interview with Sarah Kelly, *supra* note 153.

170. 40 C.F.R. § 35.575(a) (2002).

171. 40 C.F.R. § 35.575(b) (2002). The distinction between tribes that have demonstrated eligibility and those that have not may not be important as long as demand for federal grants outstrips supply. For example, while the TAR authorizes a federal contribution of 90 percent or more, the Gila River Indian Community obtains about two-thirds of the funds it needs to run its air program from the EPA, with the tribe contributing the remainder. Mariella, *supra* note 67.

172. Telephone Interview with C. Darrel Harmon, *supra* note 3.

173. EPA's FY 2004 budget request includes $11,050,000 for tribal grants and $228,550,000 for state and local assistance grants. EPA FY 2004 Budget Summary, A-4, *available at* http://www.epa.gov/ocfo/budget/2004/2004bib.pdf (last visited Feb. 7, 2004).

174. Telephone Interview with C. Darrel Harmon, *supra* note 3. Additional support for tribal environmental programs is available through EPA's multimedia Indian Environmental General Assistance Program (GAP) for which almost $63 million was included in the agency's 2004 budget request. EPA FY 2004 Budget Summary, *supra* note 173. GAP funding covers all environmental media, not just air, however, and is used primarily for environmental infrastructure development, capacity building, education, and outreach and cannot be used to operate environmental management programs.

175. Additional information about the Institute for Tribal Environmental Professionals is available at http://www4.nau.edu/itep/ (last visited Feb. 7, 2004).

the EPA. Since the institute was founded in 1992, representatives of more than 360 tribes have attended ITEP workshops.[176] In partnership with ITEP, the EPA also supports the Tribal Air Monitoring (TAM) Support Center at the EPA Radiation and Indoor Environments Laboratory to provide air monitoring training and technical support to the tribes. Representatives of 118 tribes have been through TAM training.[177]

VII. CONCLUSION

Tribes have three choices for regulating air pollution sources within their reservations. First, at least for member- or tribally-owned sources on tribal trust lands, tribes may regulate air pollution sources on their own authority. As with states, the TAR preserves tribes' authority to independently establish and enforce air quality standards and control requirements that are more stringent than federal requirements,[178] except as explicitly preempted by the CAA.[179] Tribes may also assume partial delegation of authority for some federal regulatory programs. Finally, they may take full delegation to the extent allowed under the TAR. As with the states, regulations developed by a tribe under delegated authority are enforceable by both the tribe and the federal government.

Air quality management implicates both economic development interests and environmental concerns. The tension between them is especially pronounced for tribes that want to maintain pristine air quality while simultaneously pursuing economic development ventures. While these interests apparently conflict, tribes who assume responsibility for pre-construction and operating permit programs may benefit on both fronts. By developing their own permit programs, tribes could bring unregulated sources under control and tighten up on enforcement. They could simultaneously promote economic development by speeding up the process of issuing permits. And while tribes could regulate some sources on their own authority, developing permit programs under the CAA adds federal enforcement to back the tribes' enforcement options. Development of federally enforceable minor source permitting programs would enable sources in Indian Country to take full advantage of synthetic minor limits on their operations to avoid Title V permit requirements.

176. Telephone Interview with Victor Masayesva, *supra* note 5.

177. *Id.*

178. Air Quality and Emission Limitations, Retention of State Authority, 42 U.S.C. § 7416 (2000).

179. For example, the Clean Air Act limits states' authority to adopt emissions standards for new motor vehicles that are more stringent than federal standards. 42 U.S.C. § 7543 (2000).

On the other hand, developing a permit program from scratch is a tremendous challenge, especially when tribes have small air program staffs and limited resources.[180] Consequently, the EPA must continue to act on its trust commitments by assisting tribes in developing their programs and by expeditiously developing NSR and minor source permitting programs for Indian Country.

Once a tribe receives eligibility to administer the relevant parts of the CAA, the statute's interstate transport provisions apply to the tribe as they do to states. Several of the tribes that have moved quickly to claim eligibility have done so with respect to section 505, requiring neighboring states to give them notice and a chance to comment on pending Title V permits. On the other hand, the petition-driven mechanisms the CAA provides for dealing with transboundary air pollution are of limited use, because they impose high evidentiary burdens on petitioners and focus only on major sources. With respect to regional-scale air pollution problems such as ozone and regional haze, tribes are most likely to succeed in influencing remedies if they actively participate in regional planning organizations like the WRAP (as some tribes already have). Efforts to develop tribal capacity are important to the states and the EPA as well as to tribes, because emissions inventories and air quality monitoring data for tribal lands are important for understanding and addressing these regional-scale problems.[181]

Reservations located in nonattainment areas may be saddled with regulatory constraints on economic development, including the need to offset emissions from new sources, even though they contribute little to existing problems. Reservations located in attainment areas may similarly see PSD increments consumed by off-reservation sources. Both situations illustrate the problem that the CAA generally vests existing sources with pollution rights, to the detriment of new development. Given the history of suppressed economic development in Indian Country, these policies need to be changed as a matter of equity. Where tribes have historically contributed little to nonattainment problems, they should not be burdened with full emissions offset requirements. Likewise, PSD increments should be reallocated to allow for tribal development by imposing additional control requirements on off-reservation sources where necessary. On a larger scale, where region-

180. This point was emphasized by Christopher Lee, Telephone Interview with Christopher Lee, *supra* note 81. In comparison, states have developed their permit programs in stages, over more than 30 years, with more resources and significantly larger staffs.

181. EPA has cited this as a key reason for encouraging tribal participation in regional planning organizations. Regional Haze Regulations, 64 Fed. Reg. 35,759 (July 1, 1999).

wide cap and trade programs are adopted,[182] an ample portion of the emissions budget should be set aside for tribes to use as they see fit, with allocations to other sources reduced accordingly.

Tribes' sovereign status and federal policy expressed in the CAA support tribes' control over their own air resources.[183] The TAR establishes a sound legal framework that allows tribes to move forward to assume primacy, while relying on the EPA to implement the CAA until they can do so. As they assume greater responsibility for permitting and enforcement, tribes may provide more responsive and effective control over sources within their reservations than the EPA can offer, given its competing priorities. However, few tribes have the resources that are required to develop comprehensive air programs. Increased federal support is needed to enable tribes to participate more fully in the national air quality management system.

182. As discussed above, a cap and trade program for sulfur dioxide emissions was proposed in the WRAP Annex. Additionally, cap and trade schemes are being used to reduce sulfur dioxide and nitrogen oxides emissions under Title IV of the Clean Air Act, and in the NO_x SIP call and the EPA's response to section 126 petitions in the Northeast. The current White House and congressional proposals for revising the CAA also rely heavily on this approach.

183. Environmental justice concerns may also be viewed as requiring movement in this direction. Professor Krakoff has argued that, as it pertains to tribes, the concept of environmental justice should be defined as "the achievement of tribal authority to control and improve the reservation environment." Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 161, 164 (Kathryn M. Mutz et al. eds., 2001).