Air Program Options for Tribes in the Pacific Northwest

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The Clean Air Act[2] (CAA or the Act) is an important cornerstone of the federal environmental statutes that protect the quality of the nation's air and waters. Indian tribal governments understandably wish to manage air quality within their reservations and to address air pollution that affects tribal health and welfare. Reservations in the Pacific Northwest have common problems with particulate matter air pollution from sources such as open burning and fugitive dust. This pollution can endanger people's health and safety, as well as cause other environmental impacts such as regional haze.[3] In addition to being able to use a tribe's sovereign authority, the 1990 amendments to the CAA expressly grant federally recognized Indian tribes the power to undertake and assume duties under federal authority. This article first reviews the authorities available to tribes and the U.S. Environmental Protection Agency (EPA) for managing air quality in

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[2] 42 U.S.C. §§ 7401–7671q (2006).

[3] For a description of the EPA's evaluation of the need for regulating sources on Pacific Northwest Indian reservations, see the Proposed Federal Implementation Plans for Indian Reservations in Idaho, Oregon, and Washington, 67 Fed. Reg. 11748, 11749 (Mar. 22, 2002).

Indian country,[4] then discusses the several approaches that a tribe can consider when deciding how to become involved in air quality issues. This article is primarily written from the EPA's perspective about implementation of the Act. It does not review the many ways that tribes are interested in air quality outside of Indian country, such as their desire to address climate change[5] or off-reservation air pollution that affects reservation air quality or a tribe's natural resources.[6]

I. Tribal Authority to Manage Air Quality

Indian tribes can undertake air quality programs either under the inherent power of a sovereign tribal government or pursuant to the Clean Air Act. Indian tribes were independent, self-governing societies long before they had contact with

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[4] "Indian country" is defined as: "(1) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151 (2006). Under the CAA, the EPA treats as reservations the off-reservation lands held by the United States in trust for a tribe even if those tribal trust lands have not been formally designated as a reservation. 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998). Indian country includes off-reservation lands held in trust of individual Indians and off-reservation lands where the title is held by an Indian tribe or an individual Indian subject to restriction by the United States against alienation. *See* United States v. McGowan, 302 U.S. 535 (1938); United States v. Pelican, 232 U.S. 442 (1914); United States v. Sandoval, 231 U.S. 28 (1913); *see also* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 528–31 (discussing codification in 18 U.S.C. § 1151 of doctrines of *Sandoval, Pelican,* and *McGowan*).

[5] Many tribes are very concerned about how climate change may affect their homelands and natural resources, and a number of efforts are being undertaken by individual tribes and tribal organizations to evaluate the potential effects of global warming, to plan how tribes can prepare for anticipated changes, and to implement strategies to address the sources of air pollutants that are affecting the climate. For example, one tribe in Alaska, the Native Village of Kivalina, has sued ExxonMobil Corp., eight other oil companies, fourteen power companies, and one coal company in a lawsuit filed in federal court in San Francisco for causing global warming and ultimately destroying the ground under their eroding village by emitting large quantities of greenhouse gases. Native Vill. of Kivalina v. ExxonMobil Corp., N. Dist. Cal., San Francisco Div., No. 08cv1138-SBA. *See also* Institute for Tribal Environmental Professionals, Northern Arizona University, Tribes & Climate Change, http://www4.nau.edu/Tribalclimatechange/index.asp (last visited Apr. 9, 2009).

[6] For example, a number of tribes have been evaluating the effects of air pollution in the Columbia River Gorge National Scenic Area. The four Columbia River Treaty Tribes (Nez Perce Tribe, Yakama Nation, Confederated Tribes of the Warm Springs Indian Reservation, and the Confederated Tribes of the Umatilla Indian Reservation) have been working with the EPA, the U.S. Forest Service, and state and local air agencies in Oregon and Washington to examine air pollution issues affecting the Tribes' invaluable cultural resources in the area.

European nations.[7] The United States recognizes tribes as "distinct, independent political communities" qualified to exercise powers of self-government by reason of their original tribal sovereignty.[8]

Under well-established principles of federal Indian law, a tribe retains attributes of sovereignty over both its lands and its members.[9] Further, tribes retain the "inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal power.[10] The United States Supreme Court has recently summarized these principles by recognizing that retained inherent tribal authority extends to managing tribal land.[11]

A tribe also retains its well-established traditional power to exclude nonmembers from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct."[12] On tribal trust lands, a tribe can regulate the conduct of persons over whom it could "assert a landowner's right to occupy and exclude."[13]

The Supreme Court, however, has erected some significant constraints on the ability of a tribe to exercise its inherent tribal authority over persons who are not members of the tribe. In *Montana v. United States,*[14] the Court found that absent a federal grant of authority, tribes generally lack jurisdiction over nonmember activities on nonmember fee land with two exceptions: first, when nonmembers enter into "consensual relationships with the tribe or its members,

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[7] For a discussion of inherent tribal authority, see Felix S. Cohen, Handbook of Federal Indian Law, at ch. 4 (LexisNexis, 5th ed. 2005) (1941).

[8] Worcester v. Georgia, 31 U.S. 515, 559 (1832).

[9] *See*, *e.g.,* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987); United States v. Mazurie, 419 U.S. 544, 557 (1975).

[10] *See* Merrion v. Jicarilla Apache Tribes, 455 U.S. 130, 141–42 (1982); White Mountain Apache Tribes v. Bracker, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty).

[11] Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2723 (2008).

[12] Merrion, 455 U.S. at 144; *see also Plains Commerce,* 128 S.Ct. at 2723 ("persons are allowed to enter Indian land only 'with the assent of the [tribal members] themselves,'") (*quoting Worcester,* 31 U.S. at 561).

[13] Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651–52 (2001) (*quoting* State v. A-1 Contractors, 520 U.S. 438, 456 (1997)); *see also Plains Commerce*, 128 S. Ct. at 2723 (*quoting* South Dakota v. Bourland, 508 U.S. 679, 691 n.11 (1993) ("Regulatory authority goes hand in hand with the power to exclude.")).

[14] 450 U.S. 544 (1981).

through commercial dealing, contracts, leases, or other arrangements." A tribe also has jurisdiction when "[nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[15] The Court has reiterated that *Montana* remains the relevant standard when analyzing tribal assertions of inherent authority over nonmember activities on fee lands on Indian reservations.[16] 3

If a tribe wishes to establish civil requirements under tribal law that are enforceable against both members and nonmembers in tribal court, then the courts' limitations upon a tribe's inherent authority are important. The series of court decisions noted here present significant issues to Indian tribes whose reservations are populated in part by nonmembers who live on privately owned land within the reservation boundaries and interspersed with trust lands. Reservations that contain these lands are often described as being "checkerboarded."

The CAA offers a powerful alternative for tribes that want to become involved with air quality management but do not want to rely solely on exercising the tribe's inherent tribal authority. Under section 301(d) of the Act,[17] tribes may develop air programs covering their reservations and non-reservation areas within their jurisdiction for submission to the EPA for approval in the same manner as states (TAS). In 1998, the EPA published the Tribal Authority Rule (TAR). TAR established the method by which the EPA could approve tribal TAS eligibility applications to operate a modular CAA program under tribal law.[18] The EPA's position is that section 301(d) constitutes a statutory delegation of federal authority

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[15] *Id*. at 565-66.

[16] *See, e.g.,* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) (describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers"); *see also Plains Commerce,* 128 S. Ct. at 2726 ("*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian land."); Nevada v. Hicks, 533 U.S. 353, 358 (2001) ("Indian tribe's regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]."); *Atkinson Trading,* 532 U.S. at 645.

[17] 42 U.S.C. § 7601(d) (2006).

[18] The final rule entitled "Indian Tribes: Air Quality Planning and Management," 63 Fed. Reg. 7254, 7254–74, (Feb. 12, 1998), established the EPA's process for approving the TAS eligibility of tribes at 40 C.F.R. §§ 49.1–11 (2009). The U.S. Court of Appeals for the District of Columbia Circuit upheld the TAR in Ariz. Pub. Service Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied* 532 U.S. 970 (2001).

to eligible tribes over their reservations.[19] Therefore, pursuant to section 301(d) of the CAA, tribes can exercise tribal authority as approved by the EPA over both Indian and non-Indian sources within an Indian reservation. Section 110(o) of the Act[20] clarifies that after the EPA approves a Tribal Implementation Plan (TIP) adopted under the tribe's laws, the plan will apply to all sources within the exterior boundaries of the tribe's reservation regardless of land ownership.[21]

II. EPA Indian Policy and the Clean Air Act

The EPA continues to operate under a National Indian Policy it established in 1984,[22] which articulates several important principles:

- The Agency stands ready to work directly with Indian tribal governments on a one-to-one basis (the "government-to-government" relationship), rather than as subdivisions of other governments.
- The Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.
- Until tribal governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations.

The Indian policy directs how the EPA works with Indian tribal governments to provide environmental protection in Indian country. First, the federal government has a trust responsibility to and unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, federal statutes, Executive orders, and court decisions. The Indian

[19] 63 Fed. Reg. 7254, 7254–74, (Feb. 12, 1998).

[20] 42 U.S.C. § 7410(o) (2006).

[21] When a TIP becomes effective, "the plan 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." *Id.*

[22] EPA Policy for the Administration of Environmental Programs on Reservations, Nov. 8, 1984, http://epa.gov/superfund/community/relocation/policy.htm. The policy has been continually reasserted since 1984 to the present day.

Policy recognizes the trust relationship when it states that the EPA will consider tribal concerns and interests whenever its actions or decisions may affect a tribe. In addition, other federal policies on tribal consultation require the EPA to develop an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies and decisions that have tribal implications.[23] A second significant factor is that the EPA has responsibility to implement the federal programs in Indian country because states generally lack the authority under the CAA in those areas.[24] As a result, state programs are only effective within Indian country if a state program is approved to apply therein.

In the absence of state approval, the EPA has the responsibility to implement the CAA and other federal environmental programs. In fact, the EPA has undertaken several efforts to implement the CAA in Indian country.[25] In order "to protect air quality throughout Indian country," the EPA seeks to directly implement the CAA's requirements where tribes have chosen not to develop or have not yet implemented a CAA program.[26] To effect direct implementation,

[23] *E.g.,* "Consultation and Coordination with Indian Tribal Governments," Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

[24] *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216, n.18 (1987).

[25] The EPA has for a long time been issuing pre-construction air quality permits to large facilities in Indian country under the authority of Section 165 of the CAA. In 1978, the EPA published Prevention of Significant Deterioration rules for Indian Reservations, 40 C.F.R. Pt. 52 (2009).

[26] While the authority for EPA to establish FIPs for Indian reservations comes primarily from Section 301(d) of the CAA, the Agency looks to all of the CAA authorities when establishing requirements that apply to both criteria and non-criteria pollutants. Section 110(a)(1) of the CAA is the basis for authority to establish implementation plan requirements that provide for the maintenance of a primary or secondary National Ambient Air Quality Standards (NAAQS). In addition, the CAA provides authority to establish requirements for pollutants where a NAAQS has not been established, e.g., the emergency power authority of Section 110(a)(2)(G) provides authority to establish requirements for pollutants where a pollution source or combination of sources is presenting an imminent and substantial endangerment to public health or welfare or the environment, without regard to whether a pollutant is regulated by a NAAQS. Under the authority of Section 110 and part C of the CAA, the EPA is authorized to establish requirements for regulated air pollutants for which the EPA has not promulgated standards under Section 109. Section 160(1) of the CAA, 42 U.S.C. § 7470(1) (2006), authorizes the EPA "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may be reasonably anticipated to occur from air pollution or from exposures to pollutants in other media . . . notwithstanding attainment and maintenance of all national ambient air quality standards." Section 161 of the CAA states that each applicable implementation plan will contain "emission limitations and such other measures

EPA relies upon its general rulemaking authority in section 301(a) of the CAA, together with the 1990 CAA amendments that added section 301(d)(4).[27] The EPA has used this authority to issue a number of Federal Implementation Plans (FIPs) to address air pollution concerns at specific facilities located in Indian country.[28] Finally, Section 301(d)(4) gives the EPA authority to manage operating permits under Title V of the CAA to major stationary sources located in Indian country.[29]

In April 2005 the EPA Administrator, at the urging of EPA Region 10, issued final rules that established FIPs under the Clean Air Act for thirty-nine Indian reservations in Idaho, Oregon, and Washington,[30] three of the four States located in EPA Region 10.[31] The requirements of the FIPs for the reservations are described in the Federal Air Rules for Reservations (FARR)."[32] For the first time,

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as may be necessary . . . to prevent significant deterioration of air quality" in attainment or unclassifiable areas. Section 110(a)(2)(D) states that each implementation plan should contain provisions prohibiting "any source or other type of emissions activity within the state from emitting any air pollutant in amounts" that will interfere with measures required under a part C implementation plan "to prevent significant deterioration of air quality or protect visibility." 70 Fed. Reg. 18,074, 18,077 (Apr. 8, 2005).

[27] "In any case in which the Administrator determines that the treatment of Indian tribes as identical to states is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." 42 U.S.C. § 7601(d)(4) (2006). Also, the TAR at 40 C.F.R. 49.11 states that the EPA may "promulgate without unreasonable delay such federal implementation plan provisions as are necessary or appropriate to protect air quality'" for these areas.

[28] *See* Federal Implementation Plan for Tri-Cities landfill, Salt River Pima-Maricopa Indian community, 40 C.F.R. 49.22 (2009); Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM10 Nonattainment Area, 40 C.F.R. § 49.10711 (2009); and Source-specific Federal Implementation Plan for Four Corners Power Plant, Navajo Nation, 40 C.F.R. § 49.23 (2009).

[29] 42 U.S.C. §§ 7661–7661f (2006); *see also* regulations at 40 C.F.R. Pt. 71 (2009).

[30] 70 Fed. Reg. 18074 (Apr. 8, 2005); 67 Fed. Reg. 11748–801, (Mar. 15, 2002); General Federal Implementation Plan Provisions at 40 C.F.R. Pt. 49, subpt. C (2009); Implementation plans for each reservation at 40 C.F.R. Pt. 49, subpt. M (2009).

[31] The EPA did not propose CAA rules for Indian country in Alaska, writing that it would continue to evaluate the need and appropriateness of air quality rules there in consultation with tribes in Alaska. 67 Fed. Reg. 11748 (Mar. 15, 2002).

[32] The FIPs for each reservation include a number of basic provisions to establish the infrastructure of a CAA regulatory program and establish industrial requirements that would be included in Title V operating permits for major stationary sources. The basic FARR rules that promulgated for all thirty-nine reservations include § 49.122 Partial Delegation of Administrative Authority; § 49.123 General provisions; § 49.124 Rule for limiting visible emissions; § 49.125 Rule for limiting the emissions of particulate matter; § 49.126 Rule for limiting fugitive particulate matter emissions; § 49.129 Rule for limiting emissions of sulfur dioxide; § 49.130 Rule for limiting sulfur in fuels; § 49.131 General

an EPA regional office established federally-enforceable air quality regulations designed to fill a gap in air quality requirements on those reservations. These regulations are comparable to the air quality regulations that states and local air pollution agencies routinely have in place outside of Indian country. EPA Region 10 recognized that a number of tribes in the region are in the process of developing air quality management programs under the CAA; however, no tribe in Region 10 had submitted tribal regulations for EPA approval as a TIP. The EPA promulgated the FARR after it concluded that the rules were appropriate for protecting air quality on Indian reservations in the Pacific Northwest, where reservations had problems with particulate matter air pollution that posed a threat to people's health and safety.[33] In so doing, EPA Region 10 created an "even playing field" to fill the regulatory gap. Now, the FARR rules on reservations generally reflect the most relevant aspects of neighboring state and local rules within the Pacific Northwest and establish the same level of control as a typical air quality control program.[34]

The FARR is only in effect in Washington, Oregon, and Idaho. Nevertheless, tribes have new opportunities to become involved with air quality management on their reservations as EPA Region 10 implements and administers the FIPs. Consistent with the CAA and its Indian Policy, the EPA avers in the FARR that it encourages tribes to establish air programs and to work in concert with the EPA's regional offices to manage air quality on their reservations.[35] The EPA expects that many tribes will develop their own air-quality programs and that some of the tribes will adopt tribal rules for approval as TIPs to replace one or more of the rules that the EPA promulgated in the FIPs for their reservations.

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rule for open burning (also has authority for burn bans); § 49.135 Rule for emissions detrimental to public health or welfare; § 49.137 Rule for air pollution episodes; § 49.138 Rule for the registration of air pollution sources and the reporting of emissions; and § 49.139 Rule for non-Title V operating permits. For each reservation, a FIP has been promulgated that lists the FARR rules that are in effect on that reservation.

[33] Proposed Federal Implementation Plans for Indian Reservations in Idaho, Oregon, and Washington, 67 Fed. Reg. 11748, 11749 (Mar. 22, 2002).

[34] 70 Fed. Reg. 8074 (Feb. 17, 2005).

[35] *See* 70 Fed. Reg. 18,074, 18,080 (Apr. 8, 2005).

III. The Options for Managing Air Quality of Indian Country in the Pacific Northwest

When a tribe decides to select an air quality strategy, it should use EPA grants to evaluate the environmental issues it faces, to work with the EPA as it assesses air quality, and to build tribal technical capabilities.[36] Moreover, when a tribal government decides to directly manage air quality on its reservation, it has several approaches available from which to choose. As a sovereign governing a territory, a tribe can establish requirements under tribal laws that supplement federal environmental regulations, such as requirements to issue tribal open burning permits or manage solid waste. The Clean Air Act specifically provides authority for a tribe that is eligible for TAS to establish a tribal program for approval by the EPA. Whatever a tribe decides—and a tribe may choose not to assume any CAA programs—the EPA is responsible for the rest of the tasks of managing air quality in Indian country. Direct implementation of the Act offers a tribe an additional avenue for actively assisting the EPA to administer federal requirements.[37]

A significant obstacle that faces tribes and the EPA is the limited availability of federal funds to support the grants that are available to tribes. Although more tribes have expressed interest in evaluating air quality and establishing tribal air programs, the budgets sought by the prior administration and appropriated by Congress did not increase to reflect growing demand and inflation. Because budgets remained flat, fewer funds have been available to tribes, and the EPA's ability to fund new tribal programs has been consequently reduced. Although President Obama's budget proposal for 2010 seeks to increase EPA's budget, the reductions in resources have challenged and will continue to challenge the EPA's ability to meet the tribes' rising demand for funding to establish and

[36] The EPA provides financial assistance to tribes for conducting environmental assessments and developing environmental program management capacity. The EPA has prepared a document: "Revised Review of Authorities Available for Tribal Program Financial Assistance Awards," Elizabeth Craig, Deputy Assistant Administrator, Office of Air and Radiation, Nov. 20, 2006. This document describes a number of authorities for providing financial assistance, including Indian Environmental General Assistance Program or "GAP," 42 U.S.C. §4368(b) (2006); Clean Air Act Project funding, 42 U.S.C. § 7403(b) (2006); and Clean Air Act Program funding, 42 U.S.C. § 7405 (2006).

[37] For example, a tribe may obtain EPA Inspector Credentials to perform inspections as an authorized representative of the EPA or administer an EPA rule under a delegation agreement.

develop tribal air programs until more money is appropriated.

A. Tribal Law

Given an Indian tribe's limited sovereign powers, the tribes may establish requirements under tribal laws that apply within its reservation and to other lands under its jurisdiction. With information a tribe has gathered and evaluated about air quality within those areas, it can decide whether to proceed with adopting laws and ordinances that would regulate specific activities impacting air quality. A tribe clearly retains authority to govern the commercial activities of the tribe and its members within its territory, and many tribes already have requirements that prohibit open burning on reservation trust lands without obtaining a permit.[38] Many tribes, moreover, manage the disposal of solid waste generated by members and their businesses and coordinate the collection of waste materials for off-reservation disposal.[39]

A tribal government may also assist members, businesses, and nonmember residents by providing information about environmental requirements and procedures in effect and opportunities available to reduce air pollution. By creating outreach efforts to educate and provide technical assistance, tribes ensure their members and their commercial activities do not violate applicable tribal, federal, or local laws. By sharing information with the EPA, state environmental agencies, and local governments, a tribal government can effectively learn about further pollution-reducing opportunities available to the reservation's residents and businesses. For example, a tribe can get directly involved with the EPA and other partner agencies to offer a voluntary woodstove change-out program that provides an economical way to replace older residential woodstoves with newer, more efficient models.[40]

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[38] For an example of burn prohibitions on reservation park lands, see Confederated Tribes of the Colville Reservation, Parks & Recreation Program, (Apr. 11, 2008), http://www.colvilletribes.com/pdfs/2008%20REGULATION%20BOOKLET.pdf.

[39] For example, the Tribal Solid Waste Advisory Network (TSWAN) is a non-profit alliance of Native American Tribes from throughout the Pacific Northwest and Alaska focusing on improving the way solid waste is managed and controlled on Native American lands, http://www.tswan.org/main/main.asp (last visited Apr. 1, 2009).

[40] For a description of such a program, see U.S. Envtl. Prot. Agency, Cleaner Burning Wood Stoves and Fireplaces, http://www.epa.gov/woodstoves/partner.html (last visited Apr. 1, 2009).

Limited resources and resistance by nonmembers are the primary constraints on a tribe's ability to address air quality. Not only are federal funds inadequate, but tribal governments face a wide range of other crucial issues such as housing, education, and economic development. Compounding the problem, there are in reality few ways for a tribe to raise revenue. Furthermore, many tribes have relatively few staff members actually enlisted in environmental regulation, and tribes must prioritize which environmental programs to pursue. In addition, tribes whose reservations include nonmembers residing on privately owned fee lands must also answer challenges to the tribe's authority, fueled by sympathetic court decisions limiting tribal civil regulatory authority over nonmembers. While a tribe may clearly have jurisdiction to regulate its members and activities on trust land, nonmembers' failure to comply with tribal ordinances may negate the effectiveness of tribal members' compliance.

A final important consideration is that compliance with tribal law does not exempt compliance with federal requirements unless the tribal program has been explicitly approved by the EPA under federal law.[41] Therefore, a tribal program must be as stringent as its federal counterpart to meet federal requirements. For example, if a tribally-owned facility emits a significant amount of air pollutants, a tribal air permit may not be sufficient to comply with the EPA's rules requiring a preconstruction permit or operating permit. For tribes in Washington, Oregon, and Idaho that issue tribal open burning permits, the permits must ensure that the burning will comply with the EPA's FARR rule for open burning at 40 C.F.R. § 49,131.[42]

B. Treatment in the Same Manner as a State

Tribes who are eligible for TAS may exercise tribal authority as approved by the EPA over both Indian and non-Indian sources within an Indian reservation.[43]

[41] For discussion about the effect of unapproved state law in the final FARR rulemaking, see 70 Fed. Reg. 18,074, 18,076 (Apr. 8, 2005).

[42] *Id.*

[43] Many of the federal environmental laws were designed with the expectation that the purposes of the statutes would actually be implemented by the states. Since the environmental statutes initially defined only federal and state roles, starting in the mid-1980s through the 1990s there was a concerted effort to accord Indian tribes the same authorities under federal environmental laws as have been exercised by states. Congress accomplished this by amending several statutes that authorize

Further, the EPA interprets the Clean Air Act as a delegation of federal authority to tribes to govern all emission sources within a reservation. This interpretation significantly simplifies TAS under the CAA for reservation tribes.[44] The EPA's regulations require a tribe to qualify as TAS-eligible for every section of the CAA that it wishes to implement. TAR regulations[45] implementing the statutory TAS requirements[46] establish that, in order to be eligible for TAS, a tribe must show the following:-

- It is federally recognized, which means it is included on the list of tribes that is published annually by the Department of the Interior pursuant to the 1994 Federally Recognized Tribes List Act of 1994;[47]
- It has a governing body carrying out substantial duties and powers;[48]
- It has a federal Indian reservation (which includes off-reservation tribal trust lands), meaning it must identify with clarity and precision the exterior boundaries of the reservation, or it must describe the basis for its jurisdiction and authority over an off-reservation area and the activities to be regulated;[49] and
- It is capable of carrying out the activities necessary to administer the program.[50]

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the EPA to approve an Indian tribe as eligible for "treatment as a State." Clean Water Act, 33 U.S.C. § 1377(e) (2006); Safe Drinking Water Act (also referred to as the Public Health Service Act) § 1451, 42 U.S.C. § 300j-11 (2006); and Comprehensive Environmental Response, Compensation, and Liability Act § 126, 42 U.S.C. § 9626 (2006). The last statute to incorporate a TAS provision was in the 1990 amendments to the CAA, which added Section 301(d), 42 U.S.C. § 7601(d) (2006). These federal environmental laws comprise a unique body of federal legislation in which Congress specifically recognized the sovereign authority of Indian tribes to manage environmental programs within their reservations and other areas under their jurisdiction.

[44] 63 Fed. Reg. 7254–74, (Feb. 12, 1998).

[45] 40 C.F.R. § 49.7

[46] 42 U.S.C. § 7601(d)(2) (2006).

[47] 25 U.S.C. § 479a (2006). Number of federally recognized tribes in EPA Region 10: 229 in Alaska; 9 in Oregon; 5 in Idaho; and 29 in Washington.

[48] 42 U.S.C. § 7601(d)(2)(A) (2006).

[49] 42 U.S.C. § 7601(d)(2)(B) (2006).

[50] 42 U.S.C. § 7601(d)(2)(C) (2006).

After the EPA receives a complete TAS application from a tribe, it will offer the adjacent state and any "appropriate governmental entity" a chance to comment on the tribe's reservation description and its assertion of jurisdiction.[51] The EPA will then publish notices in local and state-wide newspapers to provide opportunity for further comment.[52]

Indian tribes can establish tribal programs to accomplish their air quality goals. One objective may be to regulate pollution sources within a reservation, such as by controlling open burning. Another approach may be to seek eligibility to act as an "affected state" under section 505(a)(2) of the CAA,[53] which provides that the tribe will have an opportunity to review draft operating permits that a contiguous state is developing for major stationary sources located in another state within fifty miles of the reservation's border.[54] In 2007, the EPA approved the TIPs of two tribes who were eligible for TAS under this framework.[55]

These hopeful developments aside, there are several important things for a tribe to consider when it seeks TAS. Certainly, many tribal advocates object to the term "treatment as a state," noting that an Indian tribe is a sovereign

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[51] 40 C.F.R. § 49.9(b) (2009).

[52] The EPA initially published notice of TAS applications for the public, yet only considered comments that "appropriate governmental entities" submitted. 63 Fed. Reg. 7254, 7266–67 (Feb. 12, 1998). Later, the EPA clarified that it recognized private citizens may at times possess information relevant to jurisdictional determinations, and that when a member of the public has submitted relevant information on a tribe's jurisdictional claims directly to the EPA, the EPA will consider those comments in making its final determination. Consequently, for purposes of the TAR, on those occasions when a member of the public may have relevant information on a tribe's jurisdictional claim, the EPA indicated that information may be submitted directly to the appropriate EPA regional office. The EPA also suggested that the commenter send a copy of its comments to that appropriate governmental entity, and pointed out that the EPA will treat information submitted by the public in the same way it treats all information received during the process. 64 Fed. Reg. 1322–23 (Jan. 10, 2000).

[53] 42 U.S.C. § 7661d(a)(2).

[54] An Indian Tribe has a separate authority under the Clean Air Act to redesignate its reservation airshed as a Class I area, as provided by Section 164 of the CAA, 42 U.S.C. § 7474 (2006), which does not require the tribe to first qualify for TAS. A Class I airshed, as defined by Section 162 of the CAA, 42 U.S.C. § 7472 (2006), receives the greatest protections from air pollution both within the area and from sources outside of the area which may affect the area's air quality. See for example the decision by EPA Region 5 on April 18, 2008, to approve a request by the Forest County Potawatomi Community to redesignate its reservation to a Class I PSD area. *EPA Approves Air Redesignation for Forest County Potawatomi* (Apr. 2008), *available at* http://www.epa.gov/nsr/documents/20080418FS.pdf.

[55] Mohegan Tribe of Indians of Connecticut, 72 Fed. Reg. 63988 (Nov. 14, 2007); Saint Regis Mohawk Tribe, 72 Fed. Reg. 69618 (Dec. 10, 2007).

government and is fundamentally different than a state.[56] Also, the EPA has recognized that the TAS prequalification process is burdensome, time-consuming, and offensive to tribes, and has consequently fashioned ways to streamline the process.[57] Yet inefficiencies remain; for example, the TAS eligibility process established by section 301(d) of the CAA requires the EPA to consider factors that are not required of states, such as the borders of reservations and the capability to run air management programs. And the EPA's procedures for seeking comments from the state and the public on reservation boundaries may raise long-standing or unresolved issues of reservation boundaries and prompt challenges to tribal authority.[58]

Adding to the process, after the EPA finds a tribe is eligible for TAS, the tribe must provide for public participation as it establishes tribal air requirements that will be submitted to the EPA for approval as a TIP. Section 110[59] requires the tribe undertake public participation before adopting the Tribal rules, and generally the EPA will expect a tribe to publish notice and hold a public hearing open to both tribal members and nonmembers.[60] Finally, as noted above, a tribe must devote a portion of its limited staff and resources in order to administer a CAA program. And, commonly, the tribe must contribute some matching share of the program costs that are otherwise funded by EPA grants.

On the other hand, once a TIP is approved by the EPA, the tribal laws and regulations of the TIP are enforceable both by the tribe in tribal court and

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[56] Indian nations have been recognized by the United States as sovereigns who are fundamentally different than states. *See, e.g.,* U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause grants the Federal Government exclusive power to regulate commerce with Indian tribes); Cherokee Nation v. Georgia, 30 U.S. 1 (1837) (classifying tribes as "domestic dependent nations"); and Morton v. Mancari, 417 U.S. 535, 555 (1974) (recognizing Congress' "unique obligation toward the Indian,"). *See generally* Carole Goldberg et al., Cohens's Handbook of Federal Indian Law, at ch. 14 (LexisNexis 2005).

[57] TAS Simplification and Streamlining rule, 59 Fed. Reg. 64339–45 (Dec. 14, 1994).

[58] For example, when the Coeur d'Alene Tribe of Idaho applied to EPA Region 10 for TAS in order to receive a grant under Section 105 of the CAA, the State of Idaho submitted a comment that Heyburn State Park, located at the southern end of Lake Coeur d'Alene and wholly within the exterior boundaries of the Coeur d'Alene Reservation, is not part of the Reservation, citing historical federal legislation that transferred the land to the State of Idaho.

[59] 42 U.S.C. § 7410 (2006).

[60] *See* EPA public participation requirements for Clean Air Act actions at 40 C.F.R. § 51.102 (2009) (Public Hearings).

by the EPA in federal court. Moreover, as the CAA is a statutory delegation of authority to eligible tribes, approval of a tribe for TAS and approval of a tribe's air ordinances as a TIP means that the tribe's laws would apply to both Indian and non-Indian sources under tribal law and under federal law. In sum, compliance with an EPA-approved TIP means compliance with the CAA.

To review the burdens and benefits of the program, the Government Accountability Office (GAO) issued an evaluation of the TAS programs administered by the EPA.[61] The GAO found that the EPA followed its processes in most respects for approving tribal requests for TAS status and program authorization for the twenty cases the GAO reviewed, but found lengthy delays in the processes.[62] The GAO recommended that "EPA . . . develop a written strategy, including estimated time frames, for reviewing tribes' TAS applications for program authority and updating the tribes on the review status."[63]

Responding to the evaluation, the EPA issued a new TAS strategy in January 2008 with the goal of improving the EPA's review of tribal applications for TAS to administer environmental regulatory programs. The strategy, outlined in a memorandum signed by then-EPA Deputy Administrator Marcus Peacock, was designed to improve both the TAS review process and ongoing communications with tribal TAS applicants.[64] Two attachments to the TAS Strategy specifically address the CAA eligibility process. Attachment F describes the "Procedural Steps for Processing Tribal Applications for TAS Eligibility for Regulatory Programs under the Clean Air Act," and Attachment G lists the regulatory provisions governing TAS eligibility under the CAA, providing examples of documentation for addressing those provisions. These attachments provide an easily accessible description of the TAS process and its requirements to help tribes decide how to proceed; nevertheless, it would be premature to assess the long-term benefits of the

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[61] U.S. Gov't Accountability Office, Indian Tribes: EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs (Oct. 2005), a*vailable at* http://www.gao.gov/new.items/d0695.pdf.

[62] *Id*. at 5.

[63] *Id*. at 28.

[64] U.S. Envtl. Prot. Agency, Marcus Peacock, Memorandum on Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs (Jan. 23, 2008), available at http://www.epa.gov/tribal/pdf/strategy-for-reviewing-applications-for-tas-01-23-08.pdf.

Strategy.

C. A Tribal Air Program to Assist the EPA

Another option for tribal governments is to assist the EPA in direct implementation of federal air quality programs in Indian country. By assisting the EPA with direct implementation, tribal staff will gain experience in implementing a complex environmental program and improve staff's technical capabilities. In addition, the tribe will also benefit because it will be more informed about the EPA's activities on the reservation. Participation aside the EPA in environmental protection may also serve to bolster tribal authority by providing useful services designed to protect the health and welfare of everyone. Finally, cooperating with the EPA to implement federal laws and rules may help to dispel fears by non-Indians who may otherwise oppose the tribe's programs established under tribal authority.

The EPA has established mechanisms to delegate authority to a tribe to assist EPA's administration of a specific federal air rule. As already described, in EPA Region 10, the FARR establishes how the EPA and a tribe can enter into a delegation agreement for the tribe to assist the EPA to administer one or more rules that are part of the FIP for the tribe's reservation while the EPA retains responsibility for enforcement.[65] The EPA also has specifically promulgated rules that authorize the EPA to delegate authority to a tribe to administer a federal operating permits program under Title V of the CAA.[66] For example, the Navajo Nation, which has fourteen Title V sources on the Navajo Reservation, sought delegation of the Federal Part 71 program as a first step before applying for TAS and approval of tribal operating permits program under 40 C.F.R. Part 70. EPA Region 9, which works with tribes in California, Nevada, and Arizona, signed a Delegation Agreement with the Navajo Nation in October 2004,[67] and signed a

[65] 40 C.F.R. § 49.122 (2009).

[66] 40 C.F.R. §§ 71.4(j), 71.10 (2009). *See also,* 42 USC § 7661(1)-(2) (2006).

[67] Delegation of Authority to Administer a Part 71 Operating Permits Program: Delegation Agreement between U.S. Environmental Protection Agency Region IX and Navajo Nation Environmental Protection Agency, *available at* http://www.epa.gov/region09/air/permit/pdf/navajodeleg.pdf (last visited Apr. 1, 2009).

Supplemental Delegation Agreement in March 2006.[68] Because the federal permit program was fully delegated to the Navajo Nation, the EPA waived collection of federal Title V fees and allowed the Navajo Nation to collect the fees in order to mitigate its permit program costs.

To increase its presence in the field and more effectively implement the CAA, the EPA has established a process for awarding EPA Inspector Credentials to tribal employees.[69] The CAA provides, "the Administrator or his authorized representative, upon presentation of his credentials, shall have a right of entry to, upon, or through any premises . . . and may at reasonable times have access to and copy any records, inspect any monitoring equipment . . . and sample any emissions which such person is required to sample."[70]

However, the EPA must first determine that issuing an inspector credential is appropriate. If the EPA issues credentials, the tribe's employees may only use the credentials to conduct inspections as authorized by the EPA. Appointing trained tribal staff to serve as authorized representatives of the EPA for purposes of conducting inspections and responding to complaints likely increases environmental protection on a reservation. A trained inspector working on the reservation can provide better coverage of regulated entities and can more quickly respond to emergencies or complaints, especially in remote areas. The EPA can also enforce more effectively when a trained inspector with EPA credentials prepares an investigative report and is available to testify in an enforcement proceeding. The tribal government also benefits when its staff receives training on the technical aspects of inspection and the legal aspects of enforcement investigation. As a result, the credential program builds the tribe's environmental management capability and provides for direct participation in the EPA's activities

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[68] Supplemental Delegation of Authority to Administer a Port 71 Operating Permits Program: Delegation Agreement between U.S. Environmental Protection Agency Region IX and Navajo Nation Environmental Protection Agency, *available at* http://www.epa.gov/region09/air/permit/pdf/navajo-nation-part-71-delegation-amendment.pdf.

[69] U.S. Envtl. Prot. Agency, Michael M. Stahl, Memorandum on Guidance for Issuing Federal EPA Inspector Credentials to Authorize Employees of State/Tribal Governments to Conduct Inspections on Behalf of EPA (Sept. 30, 2004), *available at* http://www.epa.gov/compliance/resources/policies/monitoring/inspection/statetribalcredentials.pdf.

[70] 42 U.S.C. § 7414(a)(2) (2006).

on the reservation.[71]

In 2001, new legislation authorized the EPA to award tribes a Direct Implementation Tribal Cooperative Agreement (DITCA),[72] which helps tribes finance the FARR and other federal environmental programs.[73] This statutory authority enables the EPA to award DITCAs to federally recognized tribes and eligible intertribal consortia. The tribes will then carry out mutually agreed upon activities to assist the EPA with implementation of federal environmental programs in the absence of an acceptable tribal program. A significant flaw of this legislation is that no funds have been specifically appropriated for DITCAs. Therefore, the EPA must use funds appropriated for the purpose of directly implementing the particular federal program covered by the cooperative agreement, or use other federal funds that have been allocated to support tribal programs.[74] The advantage of a DITCA is that it allows the EPA to use a grant to fund the tribe's regulatory work that assists the EPA, while avoiding the often onerous requirements of a federal contract. Once again, a tribe may benefit from cooperation with the EPA as it implements a federal program for the same reason is benefits under a TIP—the experience builds the tribe's environmental management capability and provides for direct participation in the EPA's activities on the reservation.

IV. Conclusion

The purpose of this article is to provide a broad description of the options Indian tribal governments may consider to address the air quality on their reservations and other Indian country areas within their jurisdiction, with particular emphasis on options available to tribes in the Pacific Northwest.

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[71] EPA Region 10 has issued Inspector Credentials to employees of several tribes for different media. For example, the Nez Perce Tribe has two employees to conduct air quality inspections for purposes of enforcing the FARR, and one employee under the Underground Storage Tank program, 42 U.S.C. § 6991 (2006); a Coeur d'Alene Tribe employee has inspector credentials to conduct inspections under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (2006).

[72] In FY2001,the EPA was granted the authority to issue DITCAs under Pub. L. No. 106-377, 114 Stat. 1441, 1441A–44 (2000) (also in subsequent years).

[73] *See* U.S. Envtl. Prot. Agency, Benjamin H. Grumbles, Memorandum on Guidelines for Direct Implementation Tribal Cooperative Agreements (DITCAs) (Nov. 24, 2004), *available at* http://www.epa.gov/indian/pdfs/ditca-guidance-2004.pdf.

[74] State and Tribal Assistance Grant (STAG) appropriations, for example.

Readers may refer to the primary source materials noted here for more detailed information. Air quality management in Indian country is still a relatively young program; Congress authorized tribes to take on CAA programs in 1990, and the EPA established the TAR only in 1998. As air quality and climate change become more prominent, and as tribes continue to develop their environmental programs and regulatory capacity, the Clean Air Act offers opportunities for tribes to exercise in concert with the EPA their sovereign authority to improve environmental quality.