Tribal Air

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Prevailing approaches to addressing environmental justice in Indian Country are inadequate. The dual pursuits of distributive and procedural justice do not fully account for the unique factors that make Indigenous environmental justice distinct—namely, the sovereign status of tribal nations and the ongoing impacts of colonization.

This Article synthetizes interdisciplinary approaches to theorizing Indigenous environmental justice and proposes a framework to aid environmental law scholars and advocates. Specifically, by centering Indigenous environmental justice in terms of coloniality and self-determination, this framework can better critique and improve environmental governance regimes when it comes to pollution in Indian Country.

This Article tests that framework on air regulation in Indian Country. Although many consider the Clean Air Act a regulatory success story, air pollution still disproportionately harms American Indians and Alaska Natives. To that end, Tribal Air offers a comprehensive account of air regulation in Indian Country, including a more detailed analysis of tribal air quality laws. It then applies theories of settler colonialism and instruments of self-determination to the implementation of the Clean Air Act in Indian Country. Together these concepts aspire towards an anti-colonialist purpose and offer important ways to achieve Indigenous environmental justice.

> *We are thankful to the powers we know as the Four Winds. We hear their voices in the moving air as they refresh us and purify the air we breathe. They help to bring the change of seasons. From the four directions they come, bringing us messages and giving us strength. With one mind, we send our greetings and thanks to the Four Winds.*[1]

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1. ST. REGIS MOHAWK TRIBE, TRIBAL COUNCIL RESOLUTION, RESOLUTION 2002-59, at 76 (2004).

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INTRODUCTION

Just beyond the borders of the San Carlos Apache Reservation in southeastern Arizona are the two largest copper smelters in the United States (there are only three). Both of these smelters must meet hazardous emission standards designed by the U.S. Environmental Protection Agency ("EPA" or "the Agency"). In January 2022, however, EPA proposed finding that health risks from these standards are *unacceptable*.[2] Moreover, the Agency found that elevated cancer risks from copper smelter emissions disproportionately affect environmental justice communities, including "low-income residents, Native Americans, and Hispanics living near these facilities."[3] Indeed, Native American communities—who make up less than 1% of the U.S. population—make up 27% of the population with elevated cancer risks from copper smelter emissions.[4]

About 400 miles north in the Uinta Basin of Utah is the Uintah and Ouray Indian Reservation. The basin is a rich source of oil-and-gas resources but was designated an ozone nonattainment area by EPA in 2018—primarily due to oil-and-gas operations in the area. The majority of oil-and-gas wells in the basin are located within the Ute Indian Tribe's Reservation. The Tribe leases nearly 400,000 acres for development and brings in production revenue from roughly 45,000 barrels of oil a day.[5] This revenue provides essential government services to the Tribe's almost 4,000 citizens, including natural resource management, housing, education, and medical and public safety services.[6] The Tribe is committed to reducing air pollution but also advocates for responsible development of its natural resources.[7]

Finally, journeying 650 miles west to northern California is the ancestral homeland of the Karuk people. The Karuk Tribe is the second largest

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2. National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review, 87 Fed. Reg. 1616 (Jan. 11, 2022) (to be codified at 40 C.F.R. pt. 63).

3. *Id.*

4. Terry Rambler, Comment Letter on EPA's National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review (Apr. 4, 2022) (citing National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review, 87 Fed. Reg. at 1641), https://www.regulations.gov/comment/EPA-HQ-OAR-2020-0430-0139 [https://perma.cc/FW58-QAM6].

5. Ute Indian Tribe, Comment Letter on Federal Implementation Plan for Managing Emissions from Oil and Natural Gas Sources on Indian Country Lands Within the Uintah and Ouray Indian Reservation in Utah (Mar. 23, 2019), https://www.regulations.gov/comment/EPA-R08-OAR-2015-0709-0153 [https://perma.cc/RJ7F-APT4].

6. *Id.*

7. *Id.*

federally-recognized tribe in the state, but its treaties were never approved by Congress.[8] So the Tribe was never granted any reservation lands.[9] For the Karuk (and other tribes in northern California), setting deliberate, controlled burns across traditional lands is an essential cultural practice.[10] For millennia, cultural burns helped promote the growth of traditional food sources and basket-weaving materials.[11] The fires even support the life cycles of salmon.[12] But because cultural burns are intentionally set, federal and state air quality requirements restrict the practice—even as climate and fire experts recognize that cultural burning reduces the likelihood of catastrophic wildfires.[13]

* * *

For the first time, the International Panel on Climate Change (in its sixth and latest report) recognized that colonialism has exacerbated the effects of climate change.[14] Historic and ongoing colonialist systems and practices not only increased the vulnerability of certain people and places to the effects of climate change, but are the dominant causes of it.[15] Yet some climate-change strategies not only reinforce colonial institutions, they can be genocidal.[16]

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8. *Karuk Tribe Tribal Government Profile and Summary 2020*, KARUK TRIBE, https://www.karuk.us/images/docs/hr-files/Karuk-Tribal_Government_Fact_Sheet_2020.final.pdf [https://perma.cc/EBA2-VXD5].

9. *Id.*

10. Kat Kerlin, *Rethinking Wildfire: Cultural Burning and the Art of Not Fighting Fire*, U.C. DAVIS (Oct. 1, 2020), https://climatechange.ucdavis.edu/climate/news/rethinking-wildfire [https://perma.cc/234L-GECV].

11. Tony Marks-Block, Karuk and Yurok Prescribed Cultural Fire Revitalization in California's Klamath Basin: Socio-Ecological Dynamics and Political Ecology of Indigenous Burning and Resource Management 57 (June 2020) (Ph.D. dissertation, Stanford University), https://www.firescience.gov/projects/17-2-01-3/project/17-2-01-3_Marks-Block_CulturalFire_Dissertation-augmented.pdf [https://perma.cc/H3Y7-3WXJ].

12. Page Buono, *Quiet Fire: Indigenous Tribes in California and Other Parts of the U.S. Have Been Rekindling the Ancient Art of Controlled Burning*, THE NATURE CONSERVANCY (Nov. 2, 2020), https://www.nature.org/en-us/magazine/magazine-articles/indigenous-controlled-burns-california/ [https://perma.cc/8TUP-XEAG].

13. Jeanine Pfeiffer, *Forests in the American West Need More "Good Fire." Tribes Can Help.*, SLATE (July 27, 2022, 11:49 AM), https://slate.com/technology/2022/07/cultural-burning-california-wildfires-usfs.html [https://perma.cc/NS6W-ZMMT]; *Fire Works!*, KARUK CLIMATE CHANGE PROJECTS, https://karuktribeclimatechangeprojects.com/fire-works/ [https://perma.cc/893T-PH4R].

14. *See also* Gurminder K. Bhambra & Peter Newell, *More than a Metaphor: 'Climate Colonialism' in Perspective*, 20 GLOB. SOC. CHALLENGES J. 1 (2022).

15. Yessenia Funes, *Yes, Colonialism Caused Climate Change, IPCC Reports*, ATMOS (Apr. 4, 2022), https://atmos.earth/ipcc-report-colonialism-climate-change/ [https://perma.cc/USL7-9T4Q].

16. *E.g.*, Rebecca A. Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 COLO. L. REV. 1625, 1675 (2007) (discussing adaptation strategies and the projected removal of entire communities, which would "prove genocidal for many groups of

Transitioning away from fossil fuels, for instance, is urgently needed to stop the climate crisis.[17] Deploying renewable energy and mass-marketing electrified vehicles are critical steps for the energy transition—both of which will be aided by the Inflation Reduction Act of 2022 ("IRA").[18] Nonetheless, the Indigenous Environmental Network called the IRA a *distraction* and "NOT a climate bill."[19] "It does not adequately address the root cause of the climate crisis," they argue, "and ban extractive industries from exploiting the Earth."[20]

Accelerating the energy transition may even harm some Indigenous communities. Copper, for example, is required for most renewable energy systems and is a critical mineral for electric vehicles.[21] Incentivizing domestic production and smelting of copper, as the IRA may do, will cause more extraction of Native lands and more pollution impacting Indigenous Peoples' health.[22] At the same time, reducing our reliance on oil and gas could shock fossil-fuel dependent economies, like the Ute Indian Tribe.[23]

Even if we shift away from fossil fuels, climate change is already here. Wildfire seasons are longer, and catastrophic wildfires now happen

[I]ndigenous peoples"). On the other hand, some climate-change strategies strengthen tribal sovereignty. *See* Beth Rose Middleton Manning & Kaitlin Reed, *Returning the Yurok Forest to the Yurok Tribe: California's First Tribal Carbon Credit Project*, 39 STAN. ENV'T L.J. 71, 71 (2019) (describing the Yurok Tribe's re-acquisition of ancestral lands through California's forest carbon offset program).

17. UNITED NATIONS, THEME REPORT ON ENERGY TRANSITION: TOWARDS THE ACHIEVEMENT OF SDG 7 AND NET-ZERO EMISSIONS (2021), https://www.un.org/sites/un2.un.org/files/2021-twg_2-062321.pdf [https://perma.cc/6YNX-DTB7].

18. *Id.*

19. *The Inflation Reduction Act of 2022 Is NOT a Climate Bill*, INDIGENOUS ENV'T NETWORK, https://www.ienearth.org/the-inflation-reduction-act-of-2022-is-not-a-climate-bill/ [https://perma.cc/G6BX-QBCB].

20. *Id.*

21. Clifford Krauss, *A Copper Mine Could Advance Green Energy but Scar Sacred Land*, N.Y. TIMES (Jan. 27, 2023), https://www.nytimes.com/2023/01/27/business/energy-environment/copper-mine-arizona.html.

22. *See, e.g.*, LAUREN REDNISS, OAK FLAT: A FIGHT FOR SACRED LAND IN THE AMERICAN WEST (2020) (telling the story of proposed copper mine activities in Chí'chil Bildagoteel (known in English as Oak Flat), a cultural and religious site for many Indigenous Peoples, including the Apache); Debra Utacia Krol, *Oak Flat: A Place of Prayer Faces Obliteration by a Copper Mine*, ARIZ. REPUBLIC (Aug. 20, 2021, 2:47 PM), https://www.azcentral.com/in-depth/news/local/arizona/2021/08/18/oak-flat-apache-sacred-resolution-copper-mine/7903887002/ [https://perma.cc/5JV3-DGB6].

23. *See* Ute Indian Tribe, *supra* note 5.

throughout the year.[24] This narrows the window for intentionally set fires, frustrating efforts to embrace prescribed burns.[25] For the Karuk, a smaller or closed window for cultural burns erases traditional knowledge and erodes important aspects of tribal identity.[26]

Like climate change, other forms of pollution (air, water, waste) can also reveal colonialist consequences.[27] And yet our federal pollution control regimes may enact claims of dispossession, dominance, and erasure so familiar to colonialist structures. Perhaps then, suggests scholar Kyle Whyte (Citizen Potawatomi Nation),[28] settler-colonial theory offers important possibilities for environmental justice work.[29]

With this in mind, *Tribal Air* aspires to expand environmental justice scholarship by applying anti-colonial theory to environmental regulation. Critical environmental law scholarship has looked at colonialism in the natural resource management and public lands contexts, but this paper is the first to explore similar themes with air pollution control.[30] To that end, this

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24. Raymond Zhong, *Why Climate Change Makes It Harder To Fight Fire with Fire*, N.Y. TIMES (May 5, 2022), https://www.nytimes.com/2022/05/05/climate/wildfires-prescribed-burn.html.

25. *Id.*; *see also* BRITTANY WEST ET AL., AMENDING OREGON'S AIR QUALITY RULES TO ALLOW MORE PRESCRIBED FIRE, https://osu-wams-blogs-uploads.s3.amazonaws.com/blogs.dir/3786/files/2020/06/PolicyBrief_Final_Group4-1.pdf [https://perma.cc/GAA9-A7CE] (discussing one state's efforts to amend air quality rules to allow for more prescribed fire).

26. *See Chapter 2: "It's Illegal To Be a Karuk Indian in the 21st Century*,*"* KARUK CLIMATE CHANGE PROJECTS, https://karuktribeclimatechangeprojects.com/chapter-2-its-illegal-to-be-a-karuk-indian-in-the-21st-century/ [https://perma.cc/LV2X-UF7C].

27. *See generally* MAX LIBOIRON, POLLUTION IS COLONIALISM 5 (2021) (arguing that pollution can be a violent enactment of colonial land relations).

28. This Article lists an author's tribal affiliations (to the extent known) after the first mention of the name in parentheses. Sometimes other affiliations are included if the author has done so in their own work.

29. *See* KYLE POWYS WHYTE, INDIGENOUS EXPERIENCE, ENVIRONMENTAL JUSTICE AND SETTLER COLONIALISM § 12-5 (2016); *see, e.g.*, KYLE POWYS WHYTE, INDIGENOUS FOOD SYSTEMS, ENVIRONMENTAL JUSTICE, AND SETTLER-INDUSTRIAL STATES 17 (M. Rawlinson & C. Ward eds., 2015) (addressing disruptions of Indigenous food systems imposed by settler-industrial states); Irus Braverman, *Environmental Justice, Settler Colonialism, and More-than-Humans in the Occupied West Bank: An Introduction*, 4 ENV'T & PLAN. E: NATURE & SPACE 3, 4 (2021) (examining environmental injustices in the occupied West Bank against the backdrop of settler colonialism); Kerstin Reibold, *Settler Colonialism, Decolonization, and Climate Change*, 40 J. APPLIED PHIL. 624, 636–37 (2022) (calling for decolonization as a precondition for a just response to climate change).

30. *See, e.g.*, JULIA MILLER CANTZLER, ENVIRONMENTAL JUSTICE AS DECOLONIZATION: POLITICAL CONTENTION, INNOVATION AND RESISTANCE OVER INDIGENOUS FISHING RIGHTS IN AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES 48 (2021); JUDY PASTERNAK, YELLOW DIRT: A POISONED LAND AND THE BETRAYAL OF THE NAVAJOS (2011); JUSTICE AND NATURAL

Article focuses on the Clean Air Act ("CAA" or "the Act") and federal governance of Tribal Air. *Tribal Air* situates the anti-colonial critique in environmental justice scholarship and ties in concepts of self-determination to build a new framework for conceptualizing Indigenous environmental justice. Importantly, this framework is intended to supplement the goals of traditional environmental justice, not displace them.

Tribal Air unfolds in four parts. The Article starts with an assessment of air quality in Indian Country.[31] As it shows, Native Americans and Alaska Natives have been and continue to be disproportionately impacted by air pollution. Next, I discuss the concept of Indigenous environmental justice as a distinct model to address environmental injustices in Indian Country. This discussion synthetizes interdisciplinary approaches to theorizing Indigenous environmental justice and proposes an analytical framework centered on *coloniality* and *self-determination*. I then summarize the CAA and its consequences in Indian Country. While law students, practitioners, and a few legal scholars have discussed some aspects of CAA implementation in Indian Country, *Tribal Air* provides a more complete account of air regulation in Indian Country, including by way of tribal air quality laws.[32] Finally, I apply

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RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 321 (Kathryn M. Mutz et al. eds., 2002); MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS (1999).

31. *Indian Country* is a legal term of art that refers to designated lands, including: (a) 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, (b) 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 (c) 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.

32. Julie M. Reding, *Controlling Blue Skies in Indian County: Who Is the Air Quality Posse–Tribes or States? The Applicability of the Clean Air Act in Indian Country and on Oklahoma Tribal Lands*, 18 AM. INDIAN L. REV. 161, 161–62 (1993) (describing the checkerboard nature of reservations and the CAA's promotion of self-government); Joshua Epel & Martha Tierney, *Tribal Authority Over Air Pollution Sources on and off the Reservation*, 25 ENV'T L. REP. 10583, 10583 (1995) (discussing the CAA's provisions that can help regulate off-reservation sources); Steffani A. Cochran, *Treating Tribes as States Under the Federal Clean Air Act: Congressional Grant of Authority-Federal Preemption-Inherent Tribal Authority*, 26 N.M. L. REV. 323, 338 (1996) (noting that the CAA failed to address tribes initially, and argues that the treatment as a state program preempts state intrusion); William H. Gelles, *Tribal Regulatory Authority Under the Clean Air Act*, 3 ENV'T L. 363, 363 (1997) (summarizing treatment as a state under the CAA and the move toward tribal self-governance); Ann Juliano, *Redesignating Tribal Trust Land Under Section 164(c) of the Clean Air Act*, 35 TULSA L.J. 37, 38 (1999) (summarizes redesignations under the Prevention of Significant Deterioration program); Sandra D. Benischek, *Clean Air in Indian Country: Regulation and Environmental Justice*, 12 VILL. ENV'T L.J. 211, 232 (2001) (discussing cooperative management models for air regulation); Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is it Working?*, 43 NAT. RES. J. 213, 221, 235

the new framework to CAA implementation in Indian Country. And three case studies help operationalize it: regulatory barriers to cultural burning faced by the Karuk Tribe; deteriorating air quality from oil-and-gas development on the Uintah and Ouray Reservation; and toxic air pollution from copper smelters beyond the reach of the San Carlos Apache.

To be clear, *Tribal Air* is not a project in decolonization—or at least in an absolute sense.[33] Rather, this project acknowledges and critiques the colonialist structure embedded in a cornerstone environmental law. In doing so, we can acknowledge the limits of our environmental governance regimes but also improve them for those who live throughout Indian Country and breathe Tribal Air.

I. THE STATE OF TRIBAL AIR

The CAA addresses outdoor air quality impacts to public health and the environment, and it is one of the most detailed environmental laws in the world.[34] But at its inception in 1970, the Act failed to mention Indian

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(discussing the National Ambient Air Quality Standards program, transboundary pollution, and state/tribal cooperation); Vanessa Baehr-Jones & Christina Cheung, *An Exercise of Sovereignty: Attaining Attainment for Indian Tribes Under the Clean Air Act*, 34 U.C. DAVIS ENV'T L. & POL'Y J. 189, 224, 233 (2011) (addressing nonattainment designations and the Prevention of Significant Deterioration program); Sean J. Wright, *Elusive Goal, Enduring Benefits: Regulation of Air Quality in Indian Country as a Tool To Promote Small Business Development*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 25, 31 (2013) (discussing regulatory gaps for minor sources); Richard Duncan & Christiana Martenson, *I Can See Clearly Now: The EPA's Authority To Regulate Indian Country Under the Clean Air Act*, 41 WILLIAM MITCHELL L. REV. 488, 495 (2015) (focusing on EPA's New Source Review regulations and assessing the *Oklahoma v. EPA* case); Arnold W. Reitze, Jr., *The Control of Air Pollution on Indian Reservations*, 46 ENV'T L. 893, 894, 938 (2017) (providing an overview of different EPA regulations and then focusing on oil and gas issues in Utah). Scholar Elizabeth Ann Kronk Warner considers a few tribal air quality codes, which I will address in more detail below.

33. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 7 (2012) (arguing that "decolonization in the settler colonial context must involve the repatriation of land"). *But see* Kekek Jason Stark et al., *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397, 446 (2022) (noting critiques of the land back movement as missing the point of decolonization, because, for example, the simple transfer of legal title grounds the movement in colonial notions of land as property). Other scholars argue, however, that decolonization is a set of practices that do not necessarily require repossession. Paul Berne Burow et al., *Unsettling the Land: Indigeneity, Ontology, and Hybridity in Settler Colonialism*, 9 ENV'T & SOC'Y 57, 68 (2018).

34. *See* RICHARD LATTANZIO, CONG. RSCH. SERV., RL 30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 10 (2022); BUREAU OF OCEAN ENERGY MGMT., THE CLEAN AIR ACT OF 1963 1, https://www.boem.gov/sites/default/files/documents//The%20Clean%20Air%20Act%20of%201

Country.[35] In fact, most environmental laws of the early 1970s ignored Indian Country, and it wasn't until 1977 that the CAA even acknowledged Indian lands.[36]

To fill the gap, EPA adopted the first federal agency policy governing its interactions with tribal governments and its considerations of tribal interests.[37] The policy (adopted in 1980 and reinstated in 1984) commits the Agency to working with federally-recognized tribes on a *government-to-government* basis in support of tribal *self-government*.[38]

Beginning in the late 1980s, EPA started studying air quality on Indian lands.[39] Specifically, the Agency compared existing Indian lands to counties designated as nonattainment (unhealthy) for six common air pollutants: coarse particulate matter (PM_{10}), sulfur dioxide, ozone, carbon monoxide, lead, and nitrogen oxides.[40]

The report, released in 1989, identified 323 federally-recognized Indian tribes and found that 40% of those tribes were located in nonattainment areas

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963.pdf#:~:text=The%20Clean%20Air%20Act%20of%201963%2C%2042%20U.S.C.,quality%20laws%20in%20the%20world [https://perma.cc/E38R-V5VN].

35. J. Kemper Will, *Indian Lands Environment—Who Should Protect It*, 18 NAT. RES. J. 465, 467 (1978). The CAA is often described as having been enacted in 1970. But these were actually amendments to the CAA of 1963. The first federal legislation involving air pollution was the Air Pollution Control Act of 1955, which provided funds for federal research. *Evolution of the Clean Air Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act [https://perma.cc/HVJ5-JLL2]. The 1963 Act was the first federal legislation regarding air pollution control. *Id.* The 1990 CAA Amendments, however, greatly expanded the role of the federal government and established many of the CAA's core programs and the cooperative framework for which the Act is known—hence why 1970 often is referred to as its inception date. *Id.*

36. Will, *supra* note 35, at 467–68; *see also* Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 VT. L. REV. 567, 567 (1999). Specifically, Congress allowed tribes to reclassify their air sheds in order to better protect tribal air from major polluting sources—whether on a reservation or just nearby. But Congress explicitly noted the amendments would not alter the relationships between states and tribes—leaving some reservations exposed to state regulatory jurisdiction. Will, *supra* note 35, at 467–68.

37. *Tribes and EPA: 50 Years of Environmental Partnership*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/tribal/tribes-and-epa-50-years-environmental-partnership [https://perma.cc/UM4E-8DUQ].

38. James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 192–93 (2006).

39. U.S. ENV'T PROT. AGENCY, COMPARISON OF INDIAN LANDS TO AIR QUALITY NONATTAINMENT AREAS (1989), https://nepis.epa.gov/Exe/ZyPDF.cgi/9100FL6G.PDF?Dockey=9100FL6G.PDF [https://perma.cc/N5R2-6SJW].

40. *Id.* at 2.

for one or more air quality standards.[41] Three pollutants—carbon monoxide, ozone, and PM_{10}—were the predominant drivers of unhealthy air in Indian Country.[42] Nevertheless, EPA believed the findings only represented the "worst case" scenario for Indian Country. Real-time air monitoring on Indian lands, however, was largely nonexistent.[43]

A lot has changed since 1989. First, there are now 562 federally-recognized tribes in the contiguous forty-eight states and Alaska.[44] Congress also tried to "improve the environmental quality of the air within [sic] Indian country"[45] by allowing EPA to "treat Indian tribes as States."[46] This change reflected the new "overall Federal position in support of Tribal self-government and the government-to-government relations."[47]

Tribal air monitoring, meanwhile, expanded across Indian Country. In 1999, the Tribal Air Monitoring Center was created as a partnership among tribes, the Northern Arizona University Institute for Tribal Environmental Professionals, and EPA.[48] The monitoring center is the first technical training center designed specifically for tribal air professionals and, to date, has trained over 1,900 tribal professionals representing 298 tribes.[49]

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41. *Id.*

42. Ninety-three tribes were in a carbon monoxide nonattainment area, eighty-one were in an ozone nonattainment area, and sixty-three were in a PM10 nonattainment area. *Id.* No tribes were located in a lead nonattainment area. *Id.*

43. The absence of monitoring, as time would reveal, may contribute to gaps in air pollution regulation. Maggie Li et al., *Air Pollution in American Indian Versus Non–American Indian Communities, 2000–2018*, 112 AM. J. PUB. HEALTH 4 (2022), https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2021.306650. For example, the San Carlos Tribe was excluded from the nearby lead nonattainment area even though there were no lead monitors on the reservation. *Id.*

44. EPA Region 10 saw the greatest increase from thirty-five tribes to 271 (due in large part to the addition of roughly 230 Alaska Native Villages). *See Tribal Programs in the Pacific Northwest and Alaska*, U.S. ENV'T PROT. AGENCY (Nov. 3, 2023), https://www.epa.gov/r10-tribal [https://perma.cc/4YVY-75T9]. Region 9 follows with 148 tribes (from 138). *See EPA Region 9 (Pacific Southwest)*, U.S. ENV'T PROT. AGENCY (Sept. 7, 2023), https://www.epa.gov/aboutepa/epa-region-9-pacific-southwest [https://perma.cc/T22Z-9EFA]. There are numerous "unrecognized" tribes. Matthew L.M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 491 (2006). This includes many state-recognized tribes. Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79, 81 (2008).

45. S. REP. NO. 101-228, at 79 (1989).

46. *Id.*

47. *Id.*

48. *About TAMS*, N. ARIZ. UNIV., https://www7.nau.edu/itep/main/tams/About/ [https://perma.cc/E6AZ-HA2M].

49. *Welcome to Tribal Air Monitoring Support Center*, N. ARIZ. UNIV., https://www7.nau.edu/itep/main/tams/ [https://perma.cc/8FA8-5VP5].

Air quality also improved generally across the United States. As of September 2010, for example, there are no more carbon monoxide nonattainment areas.[50] Similarly, there are no more nitrogen dioxide nonattainment areas.[51] And of the eighty-nine originally designated PM_{10} nonattainment areas, only twenty-one remain.[52]

On the other hand, EPA established two new fine particulate matter standards ($PM_{2.5}$) in 1997 (the 24-hour standard was last revised in 2006; the annual standard was last revised in 2012)[53] and recently lowered the ozone standard in 2015.[54] There are now eleven 2006 $PM_{2.5}$ nonattainment areas,[55] which impact twenty-two tribes,[56] five 2012 $PM_{2.5}$ nonattainment areas,[57]

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50. *Green Book Carbon Monoxide (1971) Area Information*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/green-book/green-book-carbon-monoxide-1971-area-information [https://perma.cc/7T77-69MC].

51. *Green Book Nitrogen Dioxide (1971) Area Information*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/green-book/green-book-nitrogen-dioxide-1971-area-information [https://perma.cc/TWN2-K8KG].

52. *PM-10 (1987) Maintenance Area (Redesignated from Nonattainment) Summary*, U.S. ENV'T PROT. AGENCY (Sept. 30, 2023), https://www3.epa.gov/airquality/greenbook/pmsum.html [https://perma.cc/P46G-CHG7] (sixty-eight areas have been "redesignated" as maintenance areas rather than nonattainment areas); *PM-10 (1987) Nonattainment Area Summary*, U.S. ENV'T PROT. AGENCY, https://www3.epa.gov/airquality/greenbook/pnsum.html [https://perma.cc/3F8C-BTX9] (twenty-one areas remain classified as nonattainment areas).

53. *Revised Air Quality Standards for Particle Pollution and Updates to the Air Quality Index (AQI)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/sites/default/files/2016-04/documents/2012_aqi_factsheet.pdf [https://perma.cc/BL8N-L4FB].

54. *Timeline of Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/pm-pollution/timeline-particulate-matter-pm-national-ambient-air-quality-standards-naaqs [https://perma.cc/Z7VJ-5JB9]. Although the EPA lowered the ozone standard in 2015, the 2008 ozone standard is still in effect. Under the 2008 standard, fifty-one tribes have been designated nonattainment along with surrounding state areas (either in whole or in part) and two tribes have been designated nonattainment separately from any surrounding state areas. *See* Arnold W. Reitze, Jr., *The Control of Air Pollution on Indian Reservations*, 46 ENV'T L. 893, 946, 950 tbl.2 (2016). EPA also recently proposed lowering the 2012 annual $PM_{2.5}$ standard. *EPA Proposes to Strengthen Air Quality Standards To Protect the Public from Harmful Effects of Soot*, U.S. ENV'T PROT. AGENCY (Jan. 6, 2023), https://www.epa.gov/newsreleases/epa-proposes-strengthen-air-quality-standards-protect-public-harmful-effects-soot [https://perma.cc/5AR4-EPSA].

55. *PM-2.5 (2006) Nonattainment Areas*, U.S. ENV'T PROT. AGENCY, https://www3.epa.gov/airquality/greenbook/rnc.html [https://perma.cc/89W2-QPAX].

56. *2006 24-Hour $PM_{2.5}$ Standards — Final Tribal Designations, October 2009*, U.S. ENV'T PROT. AGENCY, https://www3.epa.gov/airquality/particlepollution/designations/2006standards/tribal.htm [https://perma.cc/82RG-5ATY].

57. *PM-2.5 (2012) Nonattainment Areas*, U.S. ENV'T PROT. AGENCY (July 31, 2023), https://www3.epa.gov/airquality/greenbook/knc.html [https://perma.cc/DP8U-9TDH]; *see* Determination of Attainment by the Attainment Date, Clean Data Determination, and Proposed Approval of Base Year Emissions Inventory for the Imperial County, California Nonattainment

which impact twelve tribes,[58] and forty-seven 2015 ozone nonattainment areas,[59] which impact six tribes.[60] Overall, the National Tribal Air Association

Area for the 2012 Annual Fine Particulate Matter NAAQS, 87 Fed. Reg. 63751, 63751 (Oct. 20, 2022) (to be codified at 40 C.F.R. pts. 52, 81) (proposing to find that Imperial County attained by December 2021, which would affect two tribes if finalized).

58. *See PM-2.5 (2006) Nonattainment Areas*, *supra* note 55. Under the 2012 PM2.5 standard, eleven tribes are designated nonattainment along with surrounding state areas and one tribe was designated nonattainment separate from the surrounding state area. *See id.*

59. *8-Hour Ozone (2015) Nonattainment Areas*, U.S. ENV'T PROT. AGENCY, https://www3.epa.gov/airquality/greenbook/jnc.html [https://perma.cc/ZNG2-KT4A]; *see* Determination of Attainment by the Attainment Date but for International Emissions for the 2015 Ozone National Ambient Air Quality Standard; Imperial County, California, 87 Fed. Reg. 63701, 63702-03 (Oct. 20, 2022) (to be codified at 40 C.F.R. pts. 52, 81) (affecting two tribes); Determinations of Attainment by the Attainment Date, California Areas Classified as Serious for the 2008 Ozone National Ambient Air Quality Standards and Marginal for the 2015 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 63698, 63698 (Oct. 20, 2022) (to be codified at 40 C.F.R. pt. 52) (affecting Butte County (four tribes), Calaveras County (one tribe), and Tuolumne county (two tribes)).

60. *See 2015 Ozone Standards - Tribal Recommendations, EPA Responses, and Technical Support Documents*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/ozone-designations/2015-ozone-standards-tribal-recommendations-epa-responses-and-technical-support [https://perma.cc/6TTE-YGSY]. Under the 2015 ozone standard, sixty-four tribes were designated nonattainment along with surrounding state areas (six in AZ, fifty-six in CA, one in NY, and one in UT), and three tribes were designated nonattainment separate from the surrounding state area (Las Vegas Tribe of Paiute Indians, Morongo Band of Mission Indians, Pechanga Band of Luiseno Mission Indians). *See 2015 Ozone Standards - State Recommendations, EPA Responses, and Technical Support Documents*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/ozone-designations/2015-ozone-standards-state-recommendations-epa-responses-and-technical-support [https://perma.cc/FS2X-LTXN] (see technical support documents). On October 20, 2022, the EPA determined that six areas in California attained the 2015 ozone standard, which affects seven tribes. Determinations of Attainment by Attainment Date, California Areas Classified as Serious for the 2008 Ozone National Ambient Air Quality Standards and Marginal for the 2015 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 63698 (Oct. 20, 2022) (to be codified at 40 C.F.R. pt. 52). Imperial County, meanwhile, was also found to be in attainment but for emissions from Mexico. Determination of Attainment by the Attainment Date but for International Emissions for the 2015 Ozone National Ambient Air Quality Standard; Imperial County, California, 87 Fed. Reg. 63701, 63702 (Oct. 20, 2022) (to be codified at 40 C.F.R pts. 52, 81). While the area is still designated "nonattainment," it does not trigger more stringent requirements associated with a worse air quality classification. *Id.* The Quechan Tribe of the Fort Yuma Indian Reservation and the Torres Martinez Desert Cahuilla Indians are both affected by the Imperial County designation. *California Final Area Designations for the 2015 Ozone National Ambient Air Quality Standards Technical Support Document (TSD)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/sites/default/files/2018-05/documents/ca_tsd_combined_final_0.pdf [https://perma.cc/5LV9-JNT4].

(one of the largest tribal member-based organizations in the United States) identified 113 tribal non-attainment areas.[61]

Despite general improvements in air quality around the United States, air pollution on tribal land is worse than in other communities.[62] Data from 2000 to 2018 show that air quality trends on tribal land fell behind the monitored decline in other communities, exposing an increasing air pollution burden in Indian Country.[63]

Indeed, American Indians and Alaska Natives continue to be disproportionately impacted by air pollution. Indigenous adults and children have higher rates of asthma, and Indigenous adults suffer from higher rates of diabetes, heart disease, and chronic obstructive pulmonary disorder than other peoples.[64] This makes them more susceptible to adverse health outcomes caused by air pollution.[65] Hazardous air pollutants (including benzene, asbestos, mercury, and lead compounds) are particularly dangerous to many Indigenous communities who may be exposed through subsistence and traditional life ways.[66] Diesel exhaust from legacy vehicle fleets also produce high levels of air pollutants.[67] And wildfire smoke—which may be exempted under the CAA—is a growing concern in Indian Country, particularly as hotter and dryer conditions lead to more catastrophic wildfires on and near tribal lands.[68]

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61. NAT'L TRIBAL AIR ASS'N, 2022 STATUS OF TRIBAL AIR REPORT 77 (2022) [hereinafter NAT'L TRIBAL AIR ASS'N, 2022], https://www.ntaatribalair.org/wp-content/uploads/2022/11/2022-NTAA-Status-of-Tribal-Air-Report.pdf [https://perma.cc/XCH7-V627]; NAT'L TRIBAL AIR ASS'N, 2021 STATUS OF TRIBAL AIR REPORT 9 (2021), https://www7.nau.edu/itep/main/docs/publications/NTAA-Status-of-Tribal-Air-Report_2021.pdf [https://perma.cc/B5KL-555V] (noting it is the "second largest, national Tribal membership-based organization").

62. Maggie Li et al., *supra* note 43.

63. Linda Poon, *As Air Pollution Declined, Tribal Nations Got Left Out*, BLOOMBERG (Mar. 23, 2022, 1:41 PM), https://www.bloomberg.com/news/articles/2022-03-23/study-documents-air-pollution-burden-on-tribal-lands [https://perma.cc/K99H-B7AT]. For example, Andrew Jacobs of the Wampanoag Tribe of Gay Head (Aquinnah)—whose tribal lands are on Martha's Vineyard—explains that back in 1992, the air quality of all counties within Massachusetts were designated nonattainment areas. NAT'L TRIBAL AIR ASS'N, 2022 STATUS OF TRIBAL AIR REPORT, *supra* note 61, at 25. Over the years, with more stringent regulations and advancements in technologies, all Massachusetts counties have slowly been redesignated to nonattainment, but one: Dukes County, where the tribal lands of the Wampanoag people reside. As a result, the tribe's rural county "is afflicted with poor air quality caused by elevated ground level ozone, and as such, has always had nonattainment of its air quality." *Id.*

64. NAT'L TRIBAL AIR ASS'N, 2022, *supra* note 61, at 67.

65. *Id.* at 61.

66. *Id.* at 17.

67. *Id.* at 67.

68. *Id.* at 16.

Finally, oil-and-gas pollution overburdens Indigenous Peoples in particular.[69] American Indians and Alaska Natives may be up to forty-two times more likely—in the case of the Uintah & Ouray Indian Reservation—to live within half-a-mile of an oil-and-gas facility compared to residents in an encompassing state.[70] Living near such facilities causes cumulative acute health impacts (particularly within the half-mile threat radius).[71]

Air quality, to be sure, was and still is a concern—and in some cases is a growing concern—in Indian Country.

II. THEORIZING INDIGENOUS ENVIRONMENTAL JUSTICE

Decades of research have focused on the question of environmental justice, but much less attention has been paid to Indigenous Peoples.[72]

This section bridges scholarship from diverse fields and draws out common themes of Indigenous environmental justice that may be useful to the legal academy. It is mindful that "a distinct Indigenous environmental justice paradigm stems from [the] view that addressing environmental injustice in any meaningful way must originate from Indigenous [P]eoples themselves."[73] To that end, this section draws on expressions of Indigenous environmental justice proposed by self-identified Indigenous scholars.

A. Indigenous Peoples and the Traditional Environmental Justice Framework

The environmental justice movement's main purpose is to address the disproportionate burden some communities bear from pollution.[74]

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69. *See* CLEAN AIR TASK FORCE, TRIBAL COMMUNITIES AT RISK: THE DISPROPORTIONATE IMPACTS OF OIL AND GAS AIR POLLUTION ON TRIBAL AIR QUALITY, https://www.catf.us/wp-content/uploads/2018/05/Tribal_Communities_At_Risk.pdf [https://perma.cc/DD6X-XWBA]; UCLA INST. ENV'T & SUSTAINABILITY, IMPACTS OF OIL AND GAS DRILLING ON INDIGENOUS COMMUNITIES IN NEW MEXICO'S GREATER CHACO LANDSCAPE, https://www.ioes.ucla.edu/wp-content/uploads/2020/09/ucla-ioes-practicum-impacts-of-oil-and-gas-on-indigenous-communities-in-new-mexico-final-report-9-2020.pdf [https://perma.cc/D5HM-QTMT].

70. CLEAN AIR TASK FORCE, *supra* note 69.

71. *Id.*

72. Jamie Vickery & Lori M. Hunter, *Native Americans: Where in Environmental Justice Research?*, 29 SOC'Y & NAT. RES. 36, 36 (2016).

73. Deborah McGregor, *Indigenous Environmental Justice: Towards an Ethical and Sustainable Future*, *in* ROUTLEDGE HANDBOOK OF CRITICAL INDIGENOUS STUDIES 405, 409 (Brendan Hokowhitu et al. eds., 2020).

74. *See generally* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001).

Communities of color make up the majority of these overburdened communities, leading some advocates to highlight racism as the root of environmental injustice.[75] Many early environmental justice leaders even came from the civil rights movement.[76] Today, environmental justice commonly refers to the "fair treatment and meaningful involvement of all people . . . with respect to the development, implementation and enforcement of environmental laws, regulations and policies."[77] This definition operationalizes two dimensions of environmental justice: distributive and procedural justice.[78]

Pursuing environmental justice in Indian Country certainly reflects these concepts.[79] As demonstrated above, distributive injustices are an issue: American Indians and Alaska Natives, unquestionably, are disproportionately impacted by pollution.[80] And standards of procedural justice continue to play out in advocating for Indigenous Peoples—most notably by enhancing consultation and coordination with tribal governments and advocating for free, prior, and informed consent.[81]

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75. Beth Gardiner, *Unequal Impact: The Deep Links Between Racism and Climate Change*, YALE ENV'T 360 (June 9, 2020), https://e360.yale.edu/features/unequal-impact-the-deep-links-between-inequality-and-climate-change [https://perma.cc/98AT-KLD5].

76. Renee Skelton et al., *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Aug. 22, 2023), https://www.nrdc.org/stories/environmental-justice-movement [https://perma.cc/M33A-4APY].

77. *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY (Aug. 16, 2023), https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/4JZC-6WX5].

78. Jonathan Skinner-Thompson, *Procedural Environmental Justice*, 97 WASH. L. REV. 399, 457 n.355 (2022) (discussing Robert Kuehn's four dimensions of environmental justice—distributive, corrective, social, and procedural—as well as recognitional justice and structural justice).

79. It bears noting that some scholars resist the application of these concepts to Indian country. *See* Dean B. Suagee, *Environmental Justice and Indian Country*, 30 HUM. RTS. MAG. 16, 17 (2003) ("If environmental justice problems are characterized by disproportionate impacts on communities of color or low-income, then almost every environmental issue in Indian country is an environmental justice issue."); Jeanette Wolfley, *Tribal Environmental Programs: Providing Meaningful Involvement and Fair Treatment*, 29 J. ENV'T L. & LITIG. 389, 399 n.25 (2014) (citation omitted).

80. *See also* Kyle Powys Whyte, *The Recognition Dimensions of Environmental Justice in Indian Country*, 4 ENV'T JUST. 199, 200 (2011) (highlighting other environmental harms disproportionately impacting Indian country).

81. *See, e.g.*, Joseph Lee, *Why an Essential Part of Indigenous Rights and International Law Is Rarely Enforced*, GRIST (Apr. 27, 2022), https://grist.org/global-indigenous-affairs-desk/fpic-is-essential-indigenous-rights-what-is-it-why-isnt-it-followed/ [https://perma.cc/6BRS-J8TE]; *see also Free, Prior and Informed Consent: Pathways for a New Millennium*, UNIV. COLO. L. SCH. (Nov. 1, 2013),

But scholars Karen Jarratt-Snider (Choctaw descent) and Marianne Nielson identify three factors that make Indigenous environmental justice distinct.[82] First, Native American tribes are governments.[83] As sovereign entities, tribes' unique legal and political status is distinguishable from the link between the broader environmental justice movement and civil rights. Second, Native identity is often connected to traditional homelands.[84]

Separating (or excluding) Indigenous communities from traditional homelands disrupts spiritual and cultural relationships to land.[85] Finally, the dispossession of land, the loss of subsistence and fishing rights, and the impacts of federal policies that lead to environmental contamination of land and resources reinforces the continuing effects of colonialization.[86] To that end, scholars Meg Parsons (Ngāpuhi, Pākehā, Lebanese), Karen Fisher (Ngāti Maniapoto, Waikato-Tainui, Pākehā), and Roa Crease (Ngāti Maniapoto, Filipino, Pākehā) conclude that the traditional environmental justice framework fails Indigenous Peoples.[87]

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https://www.colorado.edu/law/sites/default/files/CombinedFile%20Agenda%2010.28.13.pdf [https://perma.cc/8TZC-8LCA]; Whyte, *supra* note 80, at 200.

82. INDIGENOUS ENVIRONMENTAL JUSTICE 9–10 (Karen Jarratt-Snider & Marianne Nielsen eds., 2020). Practitioners hold a similar view. *See, e.g.*, Jana L. Walker et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. FOR SOC. JUST. 379, 381 (2002) ("[E]nvironmental justice issues affecting Tribes must always be viewed against the backdrop of tribal sovereignty, the federal trust responsibility owed by the United States to Tribes, the government-to-government relationship, treaty rights, and the special jurisdictional rules applicable to Indian country."); Darren J. Ranco et al., *Environmental Justice, American Indians and the Cultural Dilemma: Developing Environmental Management for Tribal Health and Well-being*, 4 ENV'T JUST. 221, 221 (2011) ("Environmental justice in the tribal context cannot be contemplated apart from a recognition of American Indian tribes' unique historical, political, and legal circumstances."); Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens To Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343, 346 (2017); Suagee, *supra* note 36, at 569.

83. INDIGENOUS ENVIRONMENTAL JUSTICE, *supra* note 82, at 9.

84. *Id.* at 10.

85. *See, e.g.*, Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENV'T L.J. 313, 348–55 (2008) (explaining the effects of colonization on cultural, philosophical, and religious experience).

86. *Id.*

87. MEG PARSONS, DECOLONISING BLUE SPACES IN THE ANTHROPOCENE: FRESHWATER MANAGEMENT IN AOTEAROA NEW ZEALAND 62 (2021) (drawing on decolonial theory to articulate a view of Indigenous environmental justice that accounts for interactions between humans and nonhumans on a spiritual, cultural, and temporal level); *see also* JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY (2008) (explaining that western environmental law is unable to account for Indian visions of environmental justice that include physical, social, and spiritual relations); Walker et al., *supra* note 82, at 379 (stating Indigenous environmental views and concerns are often absent from the traditional environmental justice dialogue and literature).

Theorizing Indigenous environmental justice, accordingly, calls for a different model of justice—one that is not confined to distributive and procedural justice safeguards, nor on the racial/ethnic framework tied to the civil rights movement.[88] For Indian Country, Whyte turns to a recognition-based standard.[89] Distributive, procedural, and even corrective standards of justice, he argues, cannot be integrated into environmental laws and policies "*without* respect for tribal values and genuine acknowledgement of tribes' particular situations."[90] Recognition, meanwhile, offers a better standard to evaluate government-to-government relations, tribal institutions, and tribal funding programs.[91] And when combined with distributive and procedural justice, recognition establishes a framework that accounts for "both the political and ideological foundations of colonial oppression."[92]

B. Settler-Colonial Theory and Environmental Injustice

Several scholars offer visions for grounding Indigenous environmental justice in settler-colonial theory. Dina Gilio-Whitaker (Colville Confederated Tribes), for example, argues that environmental justice for Indigenous Peoples must be able to frame issues in terms of their colonial condition and affirm decolonization as a suitable framework for justice.[93] To that end,

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88. Dina Gilio-Whitaker, *Environmental Justice Is Only the Beginning*, HIGH COUNTRY NEWS (July 1, 2022), https://www.hcn.org/issues/54.7/indigenous-affairs-perspective-environmental-justice-is-only-the-beginning [https://perma.cc/V2VS-7BWK] ("This kind of race-based analysis, while useful when applied correctly, compels us to think in terms of racial justice among human populations relative to environmental issues. For American Indians, however, the legal concept of environmental racism is not broad enough.").

89. Whyte, *supra* note 80, at 200.

90. *Id.* Nonetheless, recognition justice must be dynamic and cannot rely on a "one size fits all" vision. *Id.* at 204 (discussing three challenges for recognition justice: (1) the high degree of uniqueness among federally-recognized tribes; (2) disagreements over what practices count as expressions of tribal values; and (3) tribal accountability metrics, particularly when tribal government policies clash with the views of environmental movements).

91. *Id.* at 200 (because it necessitates fair consideration and representation of cultures, values, and situations). *But see* Glen S. Coulthard, *Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada*, 6 CONTEMP. POL. THEORY 437, 439 (2007) (arguing that mere acknowledgement of societal and cultural difference "promises to reproduce the very configurations of colonial power that Indigenous [P]eoples' demands for recognition have historically sought to transcend"); GLEN S. COULTHARD, RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION 3–24 (2014).

92. JULIA CANTZLER, ENVIRONMENTAL JUSTICE AS DECOLONIZATION: POLITICAL CONTENTION, INNOVATION AND RESISTANCE OVER INDIGENOUS FISHING RIGHTS IN AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES 196 (2021).

93. DINA GILIO-WHITAKER, AS LONG AS GRASS GROWS: THE INDIGENOUS FIGHT FOR ENVIRONMENTAL JUSTICE, FROM COLONIZATION TO STANDING ROCK 25 (2019).

racism against Indigenous Peoples is not simply an "artifact of history or an extreme position," but is embedded in the ongoing colonial enterprise.[94]

"As a normative concept," Whyte explains, "settler colonialism refers to an arrangement of social institutions that support a structure of oppression."[95]

It differs from classic colonialism in its focus on the acquisition of land.[96] To that end, settler states pursued a "logic of elimination," which obscures the violent foundations of conquest and legitimizes settler domination.[97]

This logic is embedded in the economic and political systems of the settler state, leading scholars to refer to settler colonialism as a structure, not an event.[98]

Law itself is a key instrument of American settler colonialism. For instance, American property law helped fuse the making and taking of Indigenous land early in our colonial history.[99] By transforming land into a "thing" to be used and owned, settlers legitimized its dispossession from Indigenous Peoples.[100] This "classic view of property law," explain scholars Kristen Carpenter, Sonia Katyal, and Angela Riley (Citizen Potawatomi Nation), ignores the "more relational vision" that many Indigenous Peoples held.[101]

Likewise, wilderness preservation "went hand in hand with native dispossession."[102] Indian removal policies developed at Yosemite,

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94. *Id.* at 25–26 (quoting Anne Bonds & Joshua Inwood, *Beyond White Privilege: Geographies of White Supremacy and Settler Colonialism*, 40 PROGRESS HUM. GEOGRAPHY 715, 715 (2015)).

95. Whyte, *supra* note 29, at 14.

96. *See* Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOCIO. RACE & ETHNICITY 54, 57 (2015) (arguing that settler colonialism needs to be theorized separately from colonialism). According to Glenn, the object of settler colonialism is to acquire land, gain control of resources, and secure land for settlers (i.e., the transformation of land and resources into "things" that can be owned); *see also* ANIA LOOMBA, COLONIALISM/POSTCOLONIALISM 23–24 (3d ed. 2015) (distinguishing administrative colonialism from multiple variations of settler colonialism); LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 2–6 (2010).

97. *See* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 387–88 (2006).

98. *Id.* at 388.

99. ROBERT NICHOLS, THEFT IS PROPERTY! DISPOSSESSION AND CRITICAL THEORY 31 (2020); *see also* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 41–44 (2020); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1076–79 (2022).

100. NICHOLS, *supra* note 99, at 28.

101. Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1027 (2009).

102. SPENCE, *supra* note 30, at 13.

Yellowstone, and Glacier national parks, for instance, became models for excluding Indigenous Peoples from public lands across the United States.[103]

Wilderness is even defined by law as uninhabited land, "untrammeled by man;" decreed wilderness areas suddenly prohibited hunting and burning practiced by some Indigenous Peoples since time immemorial.[104] As scholar Sarah Krakoff puts it: federal Indian law (the body of law governing federal relations with tribal nations) clears the land, and natural resources law assures its occupation.[105]

Some of the injustices in Indian Country, accordingly, are best understood in the context of settler colonialism. Disrupting Indigenous land relationships, for instance, undermines Indigenous Peoples' resilience and self-determination: an example of environmental injustice that is not apparent under the traditional environmental justice framework.[106]

C. Self-Determination and Environmental Justice

"Self-determination is a core political and moral entitlement that calls for consent and free expression of the will of 'a people.'"[107] It lies at the heart of Indigenous Peoples' protection and helps guard their fundamental rights and the determination of their future.[108] Delegates of the First National People of Color Environmental Leadership Summit even identified self-determination as an original principle of environmental justice.[109]

Important as self-determination is for Indigenous Peoples, however, there are two ways to contextualizing it.

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103. *Id.* at 148–49.

104. The Wilderness Act, 16 U.S.C. §§ 1131–1136 (1964). Even landscape photography helped shape the view of wilderness areas as empty spaces. JARROD HORE, VISIONS OF NATURE: HOW LANDSCAPE PHOTOGRAPHY SHAPED SETTLER COLONIALISM (2022) (describing environmental histories in the Pacific Rim, including Australia and California).

105. Sarah Krakoff, *Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet*, 24 COLO. NAT. RES., ENERGY & ENV'T L. REV. 261, 262 (2013).

106. WHYTE, *supra* note 29, at 15; *see also* McGregor, *supra* note 73, at 409 (explaining that settler colonialism disrupts relationships); Kyle Whyte, *Settler Colonialism, Ecology, and Environmental Injustice*, 9 ENV'T & SOC'Y 125, 125 (2018); Carpenter, *supra* note 85, at 348–55.

107. S.J. ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE, PRIOR AND INFORMED CONSENT 71 (2014).

108. *Id.* at 72.

109. Delegates to the First Nat'l People of Color Env't Leadership Summit, *Principles of Environmental Justice* (Oct. 24–27, 1991), https://www.ejnet.org/ej/principles.pdf [https://perma.cc/A537-MDDZ].

One argument grounds Indigenous self-determination in sovereignty.[110] American Indians and Alaska Natives—as sovereign nations—have "inherent powers of self-government over their citizens and their territories."[111] Indeed, "a core tenet of federal Indian law has been a respect for tribes' inherent authority to define their own tribal laws and be governed by them."[112] At the same time, federal Indian law erodes sovereignty.[113]

Tribes are treated as "domestic dependent nations," over whom the U.S. government exercises federal trust responsibilities.[114] Tribal governments, moreover, are denied criminal jurisdiction over non-Indians, and their inherent civil jurisdiction over non-members is limited to conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[115] Nevertheless, sovereignty, Clint Carroll (Cherokee Nation) explains, acts "as a vehicle for self-determination and justice in the face of ongoing settler colonialism."[116]

Achieving Indigenous environmental justice, argues Whyte, necessitates contesting federal policies that impinge on sovereignty.[117]

But sovereignty also has varied meanings.[118] Tribal or political sovereignty, for example, may be understood in terms of federal recognition

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110. *Id.*

111. Ranco et al., *supra* note 82, at 221.

112. Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 82 (2022). Though inherent sovereignty is addressed under federal Indian law, tribal leaders have explained that it "is not defined by the United States." Billy Evans Horse & Luke E. Lassiter, *A Tribal Chair's Perspective on Inherent Sovereignty*, 10 ST. THOMAS L. REV. 79 (1997), *reprinted in* ROBERT ODAWI PORTER, SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER 30 (2005).

113. Achieving Indigenous environmental justice, Whyte argues, necessitates contesting federal policies that impinge on sovereignty. Whyte, *supra* note 80, at 199.

114. *See generally* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENV'T L.J. 239, 239 (2013).

115. JANE M. SMITH, CONG. RSCH. SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 1 (2013) (quoting Montana v. United States, 450 U.S. 544, 565–66 (1981)) (discussing Oliphant v. Suquamish, 435 U.S. 191 (1978)). *Montana* also recognizes that tribes may regulate non-Indians who enter consensual relationships with the tribe or its members. 450 U.S. at 565.

116. CLINT CARROLL, ROOTS OF OUR RENEWAL: ETHNOBOTANY AND CHEROKEE ENVIRONMENTAL GOVERNANCE 19 (2015).

117. Whyte, *supra* note 80, at 199.

118. *See*, *e.g.*, Rashwet Shrinkhal, *"Indigenous Sovereignty" and Right to Self-Determination in International Law: A Critical Appraisal*, 17 ALTERNATIVE: AN INT'L J. INDIGENOUS PEOPLES 71, 71 (2021) (recognizing varied meanings, "ranging from formulation of rights to reverse continuing experiences of colonialism as well as to carry local efforts at the redemption of ancestral lands, resources, self-governance and preservation of cultural knowledge

and the inherent sovereignty of tribal nations.[119] Critics, like scholar Vine Deloria Jr. (Standing Rock Sioux), reject this narrow expression of sovereignty—especially since it reinforces the dominion of federal Indian law.[120] Indigenous or cultural sovereignty, on the other hand, does not need nation-state recognition. Rather, it comes from the spiritual, cultural, linguistic, and socio-legal-political structures belonging to each Indigenous nation, tribe, first nation, and community. Indigenous sovereignty, according to the Indigenous Environmental Network, is embedded in "inherent relationships with lands, waters and all upon them."[121]

Another argument places Indigenous self-determination in the human-rights framework.[122] Under that frame, Indigenous Peoples have the right to determine their own political status and the freedom to pursue economic, social, and cultural development.[123] These norms, explain Carpenter and Riley, were deeply influential in the U.S. Indigenous rights movement and are embodied in the U.N. Declaration on the Rights of Indigenous Peoples—which itself has "significant normative weight."[124] The Declaration, for example, incorporates Indigenous rights to lands, territories, and resources that may not be recognized as a matter of sovereignty.[125] Further, the right of self-determination, grounded in the human rights framework, does not necessarily require a separate sovereign existence, explains scholar and former United Nations Special Rapporteur on the Rights of Indigenous

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and practices"); *see also* Tsosie, *supra* note 114, at 242 (distinguishing *political sovereignty* from *cultural sovereignty*).

119. *What Is: Indigenous Sovereignty and Tribal Sovereignty*, INDIGENOUS ENV'T NETWORK (June 17, 2020), https://www.ienearth.org/what-is-indigenous-sovereignty-and-tribal-sovereignty/ [https://perma.cc/8BHD-5GSL].

120. Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, 13 WÍČAZO ŠA REV. 25 (1998), *reprinted in* PORTER, SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER, *supra* note 112, at 55.

121. *What Is: Indigenous Sovereignty and Tribal Sovereignty*, *supra* note 119.

122. ROMBOUTS, *supra* note 107, at 72.

123. *Id.* at 208.

124. Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 849 (2019); *see also* Erich Steinman, *Settler Colonial Power and the American Indian Sovereignty Movement: Forms of Domination, Strategies of Transformation*, 117 AM. J. SOCIO. 1073, 1087 (2012) (citing Duane Champagne, *From First Nations to Self-Government: A Political Legacy of Indigenous Nations in the United States*, 51 AM. BEHAV. SCIENTIST 1672, 1681–86) (discussing the Indian Sovereignty Movement, or "self-determination movement").

125. *See* ROMBOUTS, *supra* note 107, at 71 (explaining that linking Indigenous control over natural resources to sovereignty is highly controversial in international law); *see also* Tsosie, *supra* note 16, at 1625 (finding that an Indigenous right to environmental self-determination should be based on human rights norms because *sovereignty* fails to protect traditional ways of life and the rich and unique cultural norms of Indigenous Peoples).

Peoples James Anaya.[126] Accordingly, although both arguments are important, the human-rights based approach may be more important and more effective for Indigenous Peoples.[127]

In fact, *self-determination* has defined U.S. Indian policy for over fifty years.[128] But it is limited here.[129] The U.S. State Department's endorsement of the Declaration, for instance, presumes that the Declaration conforms "with the norms of U.S. federal Indian law, recognizing the right of federally recognized Indian Nations to govern their lands and their members, subject to legal constraints imposed through federal statutory law and Supreme Court decisions."[130] This limitation, explains Cheryl Daytec (Kankanaey People of Northern Luzon), creates a disconnect between tribal self-governance in the United States and self-determination under international law.[131] Still, self-

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126. S. James Anaya, Keynote Address to the 52d Congress of Americanists: Why There Should Not Have to Be a Declaration on the Rights of Indigenous Peoples (July 2006), *in* S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 58, 60 (2009). Rather, "attributes of statehood" or sovereignty are at most instrumental to the realization of these values. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 80 (1996) [hereinafter ANAYA, INDIGENOUS PEOPLES]. Anaya goes on to explain that wedding self-determination to decolonization prescriptions is a mistake. *Id.* While such prescriptions may remedy deviations from the principle of self-determination, they "do not themselves embody the *substance* of the principle." *Id.*

127. ANAYA, INDIGENOUS PEOPLES, *supra* note 126, at 73; *see also* Carpenter & Riley, *supra* note 124, at 848 (arguing that *self-determination* is a better frame than *sovereignty* for addressing Indian land tenure); Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENV'T & ENERGY L. & POL'Y J. 188, 202–03 (2009) (arguing that the "domestic framework that governs tribal sovereignty over the reservation environment is currently inadequate" and should conform to the Declaration instead).

128. Carpenter & Riley, *supra* note 124, at 849–50.

129. Cheryl Daytec, *Fraternal Twins with Different Mothers: Explaining Differences Between Self-Determination and Self Government Using the Indian Tribal Sovereignty Model as Context*, 22 MINN. J. INT'L. L. 25, 69 (2013) (arguing that self-determination has been reduced to policies of self-governance in the United States).

130. Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure*, 15 LEWIS & CLARK L. REV. 923, 936 (2011); *see also* Gerald Torres, *Decolonization: Treaties, Resource Use, and Environmental Conservation*, 81 U. COLO. L. REV. 709, 709 (2020) ("Since the 1970s, Indian policy has been guided by a federal commitment to tribal self-governance.").

131. Matthew L. M. Fletcher, *New Scholarship on Explaining the Difference Between Self-Determination and Self-Government*, TURTLE TALK (Sept. 26, 2013), https://turtletalk.blog/2013/09/26/new-scholarship-on-explaining-the-difference-between-self-determination-and-self-government [https://perma.cc/NX2N-W7QK] (excerpting an abstract from Cheryl Daytec's *Fraternal Twins with Different Mothers: Explaining Differences Between Self-Determination and Self Government Using the Indian Tribal Sovereignty Model as Context*).

governance helps foster self-determination.[132] But it satisfies only the political aspect of the right.[133]

Nonetheless, the human-rights based frame provides a stronger path to protecting Indigenous culture and traditions as well as land and resource relationships that have been disrupted by settler colonialism. The principle of sovereignty over natural resources, for instance, may not extend to Indigenous Peoples without statehood. But the Declaration provides clear rights to traditional lands and resources that are integral to Indigenous self-determination regardless of state-recognition.[134] Similarly, the right to free, prior, and informed consent is enshrined in the Declaration even if traditional approaches to "meaningful participation" do not require consent from federally-recognized tribes.

D. A New Analytical Framework: Coloniality and Self-Determination

As described above, there are a few common principles of Indigenous environmental justice oriented around *coloniality* and *self-determination*.

Coloniality refers to "long-standing patterns of power that emerged as a result of colonialism" but that define culture, relations, and knowledge "beyond the strict limits of colonial administration."[135] Conceptualizing Indigenous environmental injustice in terms of *coloniality* helps expose the governance systems that enable the control and exploitation of Indigenous lands and resources (e.g., the transformation of traditional hunting areas into empty *wilderness*).

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132. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples at art. 4 (Oct. 2, 2007).

133. Daytec, *supra* note 129, at 30. It "does not . . . translate into control over non-political aspects of a *people*'s existence." *Id.* at 62 (referring to S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 354 (1993)).

134. *See* Ricardo Pereira & Orla Gough, *Permanent Sovereignty Over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law*, 14 MELB. J. INT'L L. 451, 451 (2013) (arguing for an inclusive view of permanent sovereignty over natural resources); Shawkat Alam & Abdullah Al Faruque, *From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources Management*, 32 GEO. ENV'T L. REV. 59, 59 (2019) (arguing same).

135. William A. Geiger, *From the Logic of Elimination to the Logic of the Gift: Towards a Decolonial Theory of Tlingit Language Revitalization*, 3 OPEN LINGUISTICS 219, 224 (2017) (quoting Nelson Maldonado-Torres, *On the Coloniality of Being, Contributions to the Development of a Concept*, 21 CULTURAL STUD. 240 (2007)).

Self-determination, meanwhile, moves beyond mere identification of injustice and towards promotion of Indigenous environmental justice. For legal scholars Krakoff, Suagee, and Tsosie, self-governance (a path towards self-determination) is a key principle of Indigenous environmental justice.[136]

"Environmental justice for tribes," explains Krakoff, "must be consistent with the promotion of tribal self-governance."[137] To that end, efforts to build technical capacity or fund tribal environmental programs strengthen tribal self-governance.

But the human-rights approach to self-determination also pushes environmental decision-makers to recognize the importance of culture and traditions to Indigenous Peoples, particularly as they relate to traditional lands and resources. To that end, empowering traditional practices vis-à-vis the land and resources strengthens Indigenous self-determination.

To be clear, not every limitation of self-determination or act of dispossession is an environmental injustice. At times, only the combination of environmental degradation with the undermining of self-governance creates an environmental justice issue.[138] But sometimes just the disruption of land-relationships is an environmental justice concern.[139]

Finally, and importantly, this analytical framework does not propose any normative weighting of *coloniality* or *self-determination*—it merely offers a path to defining Indigenous environmental justice.

So how does the CAA—one of our most successful public health laws—impact Indigenous self-determination? Or, more provocatively, how does it colonize Tribal Air? To that, we turn soon. But first, an overview of CAA regulation in Indian Country.

III. THE CLEAN AIR ACT AND TRIBAL AIR

This section provides an overview of CAA regulation in Indian Country, including EPA regulations, intergovernmental agreements, and tribal air quality laws.

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136. Tsosie, *supra* note 16, at 1631–32 (citing Suagee, *supra* note 36, at 572); Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 161, 163 (Kathryn Mutz et al. eds., 2002).

137. Krakoff, *supra* note 136, at 163.

138. *See id.* at 178 (concluding that an attack on tribal sovereignty alone is not an environmental justice issue).

139. KYLE POWYS WHYTE, INDIGENOUS FOOD SYSTEMS, ENVIRONMENTAL JUSTICE, AND SETTLER-INDUSTRIAL STATES 15 (M. Rawlinson & C. Ward eds., 2015); *see also* McGregor, *supra* note 73, at 409.

A. CAA Regulation in Indian Country

There are 574 federally-recognized tribes and Alaska Natives with a population of approximately 1.9 million American Indian and Alaska Natives.[140] But only about 300 of those tribes have Indian lands.[141]

And only fifty-five tribes are treated like states (discussed below) to receive air pollution planning and control grants.[142] A mere seven have regulatory authority under a Tribal Implementation Plan ("Tribal Plan").[143]

And just two have EPA-approved ambient air monitoring programs.[144] The vast majority of tribes, accordingly, rely on EPA to implement the CAA in Indian Country.[145]

By and large, there are two approaches to CAA regulation: those premised on cooperative federalism (like the National Ambient Air Quality Standards ("NAAQS") and the Title V operating permits programs) and those directly implemented by EPA (like New Source Performance Standards and National

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140. *About Us*, U.S. DEP'T OF INTERIOR: INDIAN AFFS., https://www.bia.gov/about-us [https://perma.cc/K6Y4-HDG9]. More than 200 tribes do not have federal recognition (although many may be state-recognized). Eilis O'Neill, *Unrecognized Tribes Struggle Without Federal Aid During Pandemic*, NAT'L PUB. RADIO (Apr. 17, 2021), https://www.npr.org/2021/04/17/988123599/unrecognized-tribes-struggle-without-federal-aide-during-pandemic [https://perma.cc/6SJW-3TAZ]. That number may be as high as 400, according to a 2012 GAO report. *See Indian Issues: Federal Funding for Non-Federally Recognized Tribes*, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 12, 2012), https://www.gao.gov/products/gao-12-348 [https://perma.cc/B5MV-ZWJA].

141. James M. Grijalva, *Ending the Interminable Gap in Indian Country Water Quality Protection*, 45 HARV. ENV'T L. REV. 2, 20 (2021) (referring to the Supreme Court's decision in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), which held that Alaska Native lands generally do not qualify as Indian Country).

142. *See Tribes Approved for Treatment as a State (TAS)*, U.S. ENV'T PROT. AGENCY (Apr. 19, 2023), https://www.epa.gov/tribal/tribes-approved-treatment-state-tas [https://perma.cc/TQY6-4VAU].

143. EPA's website identifies eight tribes with approved Tribal Plans. *See id.* However, the Morongo Band of Mission Indians has not submitted a Tribal Plan. *See* email from Roberto Gutierrez, EPA Air Project Officer Region 9, to author (Oct. 4, 2022, 10:53 PDT) (on file with author).

144. The two approved Tribes are the Morongo Band of Mission Indians and the Santee Sioux Nation, as indicated by CAA section 319 administrative functions. *See Tribes Approved for Treatment as a State (TAS)*, *supra* note 142.

145. Elizabeth Ann Kronk Warner, *Returning to the Tribal Environmental "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country*, 6 MICH. J. ENV'T & ADMIN. L. 341, 388 (2017); *see also* Hillary M. Hoffman, *Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism*, 97 OR. L. REV. 353, 388 (2019).

Emission Standards for Hazardous Air Pollutants).[146] Under the first approach, EPA has an exclusive role in identifying, for example, the safe concentrations of an air pollutant, but states will have the primary role in regulating pollution sources.[147] EPA can only step in when a state's regulation is inadequate or otherwise missing.[148] Under the second approach, EPA directly regulates pollution sources, with or without state action.[149]

In Indian Country, tribes do not have default regulatory authority under the CAA.[150] They must receive EPA approval to be treated like states.[151] The Act authorizes EPA to "treat Indian tribes as States" only if the tribe: (1) "has a governing body carrying out substantial governmental duties and powers;" (2) is exercising functions that "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 (3) is expected to be "capable" of carrying out the functions to be exercised consistent with the terms and purposes of the CAA.[152] Once a tribe is treated like a state, it can submit a Tribal Plan or be delegated authority to run an EPA-administered program like the New Source Performance Standards (or other EPA-adopted rules).[153] EPA's rule governing the treatment like a state process is called the Tribal Authority Rule.[154]

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146. *See, e.g.*, Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43956, 43957 (Aug. 25, 1994) (to be codified at 40 C.F.R. pt. 49) (describing the "two basic ways" the CAA is implemented).

147. S*ee id.* EPA still has oversight authority over state programs, and state programs must be approved by EPA before they are federally enforceable.

148. *See id.*

149. *See id.* In practice, EPA often delegates some of its regulatory authority to qualifying states and tribes. *See, e.g.*, *Delegations of Authority for NSPS and NESHAP Standards to States and Tribes in Region 8*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/air-quality-implementation-plans/delegations-authority-nsps-and-neshap-standards-states-and-tribes [https://perma.cc/BH4H-TCWP].

150. *See* 42 U.S.C. § 7601(a)(1). Tribes, of course, can and do administer tribal environmental laws. Like state laws, tribal environmental laws may or may not be relied upon for administering CAA programs. This paper only addresses laws and regulations that implement the CAA.

151. 42 U.S.C. § 7601(d)(1)(A).

152. *Id.* § 7601(d)(2)(A–C).

153. *See Tribal Authority Rule (TAR) Under the Clean Air Act*, U.S. ENV'T PROT. AGENCY (Mar. 29, 2023), https://www.epa.gov/tribal-air/tribal-authority-rule-tar-under-clean-air-act [https://perma.cc/ZM5M-3WYD]; *see also* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998).

154. *See Tribal Authority Rule (TAR) Under the Clean Air Act*, *supra* note 153.

Tribal Plans, like State Implementation Plans ("State Plans"), are approved by EPA to implement the NAAQS program.[155] Under the NAAQS program, EPA identifies *criteria* pollutants (e.g., ozone and $PM_{2.5}$) and establishes a *primary* and *secondary* standard for each pollutant.[156] The standards reflect EPA's scientific determinations (e.g., the safe levels of a pollutant in the ambient air) and must be met throughout the United States. Although states must submit State Plans to attain and maintain each standard, tribes are not obligated to submit anything at all. EPA is supposed to ensure that all areas of Indian Country have clean air.[157]

There are several EPA-regulations governing air quality in Indian Country. These regulations include: a Federal Plan for New Sources and Modifications in Indian Country (the Indian Country NSR Rule);[158] extension of the Federal Operating Permits Program to Indian Country (the Indian Country Part 71 Rule);[159] a Federal Plan for True Minor Oil and Natural Gas sources in Indian Country (the National O&NG Federal Plan);[160] a Federal

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155. *See Basic Information About Air Quality TIPs*, U.S. ENV'T PROT. AGENCY (June 30, 2023), https://www.epa.gov/air-quality-implementation-plans/basic-information-about-air-quality-tips [https://perma.cc/XM8H-2VX7]; *see also* U.S. ENV'T PROT. AGENCY, DEVELOPING A TRIBAL IMPLEMENTATION PLAN 20 (2018), https://www.epa.gov/sites/default/files/2018-09/documents/developing_a_tribal_implementation_plan_sept._2018_1.pdf. [https://perma.cc/UA3F-VH8U]. Because tribes do not have criminal jurisdiction over non-Indians, EPA and the tribes must agree to coordinate on criminal cases. *See, e.g.*, Memorandum of Agreement Between St. Regis Mohawk Tribe and US EPA Region II, Pursuant to 40 CFR § 49.8 (Nov. 20, 2003), https://www3.epa.gov/region02/air/sip/pdf/tr_moa_04.pdf [https://perma.cc/6SE6-Y33D].

156. *See Criteria Air Pollutants*, U.S. ENV'T PROT. AGENCY (July 20, 2023), https://www.epa.gov/criteria-air-pollutants [https://perma.cc/R4V7-CC7M]; *see also Process of Reviewing the National Ambient Air Quality Standards*, U.S. ENV'T PROT. AGENCY (Oct. 26, 2022), https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards [https://perma.cc/KVB2-VFXL].

157. *See Compliance & Enforcement in Indian Country*, U.S. ENV'T PROT. AGENCY (May 25, 2023), https://www.epa.gov/tribal/compliance-enforcement-indian-country [https://perma.cc/SY82-ZVVT].

158. *See* Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38748 (July 1, 2011) (to be codified at 40 C.F.R. pts. 49, 51) (covering new minor sources/minor modifications of major sources throughout Indian Country and new and modified major sources in nonattainment areas of Indian Country).

159. *See* Federal Operating Permits Program, 64 Fed. Reg. 8247, 8248 (Feb. 19, 1999) (to be codified at 40 C.F.R. pt. 71) (expressly implementing EPA's existing Title V operating permits program—also called the part 71 permit program—in Indian Country). Four tribes have delegated authority to implement the part 71 permit program. *See Tribes Approved for Treatment as a State (TAS)*, *supra* note 142.

160. *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35824 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60) (covering true minor oil and natural gas sources in attainment areas); *see also* Amendments to Federal

Plan for Indian Reservations in Idaho, Oregon, and Washington (the FARR);[161] and a few Reservation-specific or source-specific Federal Plans.[162]

There are also eight EPA-approved Tribal Plans. These plans are for: the Gila River Indian Community of the Gila River Indian Reservation, the Mashantucket Pequot Indian Tribe, the Mohegan Tribe of Indians of Connecticut, the Morongo Band of Mission Indians, the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, the Saint Regis Mohawk Tribe, and the Swinomish Indian Tribal Community.[163]

Though few tribes have EPA-approved Tribal Plans, several tribes are treated like states for CAA notification and petition rights.[164] With these rights, downwind tribes must be notified of potential air quality impacts from upwind pollution sources and tribes can petition EPA to address air quality impacts from neighboring states.[165] Together, these rights allow tribes to influence air permitting and other regulatory decisions for pollution originating outside of their jurisdiction (e.g., outside the reservation).[166]

Tribes also can request more stringent classifications of their air quality under the CAA's Prevention of Significant Deterioration ("PSD")

Implementation Plan, 84 Fed. Reg. 21240 (May 14, 2019) (to be codified at 40 C.F.R. pt. 49) (extending the true minor oil and natural gas sources rule to the Indian Country portion of the Uinta Basin Ozone Nonattainment Area).

161. *See* 70 Fed. Reg. 18074 (Apr. 8, 2005) (to be codified at 40 C.F.R. pts. 9, 49) (covering Reservations in EPA Region 10); *see also Federal Air Rules for Indian Reservations (FARR) in Idaho, Oregon and Washington*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/farr [https://perma.cc/N7AK-WPDF].

162. For example, EPA Region 8's Federal Plan for Oil and Natural Gas Well Production Facilities in the Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nations) (*see* 78 Fed. Reg. 17836 (Mar. 30, 2015) (to be codified at 40 C.F.R. pt. 49)); EPA Region 8's Federal Plan for Oil and Natural Gas Sources on the Uintah and Ouray Indian Reservation, (*see* 87 Fed. Reg. 75334 (Dec. 8, 2022) (to be codified at 40 C.F.R. pt. 49)); EPA Region 9's Federal Plan for the Four Corners Power Plant in the Navajo Nation, (*see* 72 Fed. Reg. 25698 (May 7, 2007) (to be codified at 40 C.F.R. pt. 49)). For further discussion about most of EPA's Federal Plans, see Reitze, *supra* note 32.

163. *Tribes Approved for Treatment as a State (TAS), supra* note 142.

164. Specifically, nineteen tribes are treated as states under section 126, and forty tribes are treated as states under section 505. *Id.*; *see also* Memorandum from Janet G. McCabe, Acting Assistant Adm'r, U.S. Env't Prot. Agency to Reg'l Air Div. Dirs., Regions 1-10 (Sept. 8, 2016), https://www.epa.gov/sites/default/files/2018-02/documents/signed_memo_to_regional_air_division_directors_re_tas_decisions_for_caa_.pdf [https://perma.cc/MLP6-FH57] (clarifying that tribes treated as states under section 126 are eligible to seek treatment as a state for purposes of CAA section 110(a)(2)(D)(i) without a separate approval).

165. Memorandum from Janet G. McCabe, *supra* note 164.

166. Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories*,*"* 86 U. COLO. L. REV. 789, 806–07 (2015).

program.[167] Importantly, tribes do not need to be treated like states to do so, and the redesignation may apply to both formal and informal (i.e., trust lands) reservations.[168] Only seven tribes, however, have redesignated Class I areas.[169]

In addition to the regulations discussed above, EPA issues air quality grants to qualifying tribes.[170] There are two primary grant programs.[171] One grant supports short-term research projects for studying the causes, effects, extent, prevention, and control of air pollution.[172] The other supports longer-term implementation activities, including establishing and administering air

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167. The PSD program is designed to balance the preservation of existing clean air resources (i.e., NAAQS attainment areas) with economic growth. *See Prevention of Significant Deterioration Basic Information*, U.S. ENV'T PROT. AGENCY (Jan. 24, 2023), https://www.epa.gov/nsr/prevention-significant-deterioration-basic-information [https://perma.cc/9G5C-ZX59]. New major sources of pollution (or major modifications of existing sources) proposed for construction in an attainment area must apply the best available control technology and demonstrate that new emissions will not cause or contribute to a violation of any applicable NAAQS or PSD increment. *Id.* A PSD increment is the amount of pollution an area is allowed to increase above an historic baseline. *Id.* Where the NAAQS functions as the absolute ceiling of allowable pollution, a PSD increment is a more restrictive limit that is tied to an area's classification. *Id.* In 1977, when the PSD program was established, the entire country was designated as Class II, while 158 national parks and wilderness areas were designated as mandatory Class I areas. *See Class I Redesignation*, U.S. ENV'T PROT. AGENCY (Jan. 17, 2023), https://www.epa.gov/tribal-air/class-i-redesignation [https://perma.cc/VY3R-RPM2]. States and tribes have the ability to redesignate their areas from Class II to Class I status. Class I areas have the most stringent PSD increments and, accordingly, allow for better protections of air quality. *Id.*

168. U.S. ENV'T PROT. AGENCY, GUIDANCE FOR INDIAN TRIBES SEEKING CLASS I REDESIGNATION OF INDIAN COUNTRY 8 (2013), https://www.epa.gov/sites/default/files/2016-08/documents/guidancetribesclassiredesignationcaa.pdf [https://perma.cc/VQB9-692G]; *see* Juliano, *supra* note 32, at 43 (arguing for the extension of section 164(c) to tribal trust lands).

169. The seven areas include: the Northern Cheyenne Indian Reservation, the Flathead Indian Reservation, the Fort Peck Indian Reservation, the Spokane Indian Reservation, the Forest County Potawatomi Reservation, the Kalispell Indian Reservation, and the Yavapai-Apache Indian Reservation (partially reversed in Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998)). *See Class I for Tribes*, FOREST COUNTY POTAWATOMI (citing Joseph Drey, *The Forest County Potawatomi Request Redesignation Under the Clean Air Act*, 4 WIS. ENV'T L.J. 87, 87 (1997)), https://lnr.fcpotawatomi.com/air-resource-program/class-i-redesignation/class-i-for-tribes/ [https://perma.cc/5VD9-BNCR]; *see also Class I Areas on Native American Tribal Lands*, U.S. NAT'L PARK SERV. (Dec. 11, 2018), https://www.nps.gov/subjects/air/tribalclass1.htm [https://perma.cc/E9US-V6S8]; *Class I Redesignation*, FOREST COUNTY POTAWATOMI, https://lnr.fcpotawatomi.com/air-resource-program/class-i-redesignation/ [https://perma.cc/DS4W-TXPU].

170. U.S. ENV'T PROT. AGENCY, PROTECTING TRIBAL AIR QUALITY 10 (2015), https://www.epa.gov/sites/default/files/2016-11/documents/tribalairguidance-protectingtribalairqualitydec2015.pdf [https://perma.cc/PEN9-CC6J].

171. *Id.*

172. 42 U.S.C. § 7403(a)(1); U.S. ENV'T PROT. AGENCY, *supra* note 170.

pollution control agencies.[173] In fiscal year 2021, forty-seven tribes received these grants from EPA, and 22% of tribes received some level of CAA funding.[174]

Finally, EPA provides technical assistance to tribes—both directly and through its work with the Northern Arizona University's Institute for Tribal Professionals.[175] The institute (established in 1992) acts "as a catalyst among tribal governments, research and technical resources at [the university], various federal, state and local governments, and the private sector, in support of environmental protection of Native American natural resources."[176]

B. State/Tribe Intergovernmental Agreements

Sometimes, state and tribal governments co-manage air quality on a reservation. This is particularly true when there are disputes about a tribe's jurisdictional authority. In 1999, for example, the Southern Ute Indian Tribe and the State of Colorado signed an Intergovernmental Agreement to co-regulate air quality on the Southern Ute Indian Reservation.[177] Colorado believed federal law granted it exclusive jurisdiction over non-Indian air pollution sources on fee land within the boundaries of the reservation.[178]

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173. 42 U.S.C. § 7405(a)(1)(A); U.S. ENV'T PROT. AGENCY, *supra* note 170. Specifically, the EPA Administrator may provide tribes up to 95% of the cost of implementing air quality programs for two years (thereafter, the federal government's share drops to 90%). 40 C.F.R. § 49.11(b). If a tribe can demonstrate undue hardship, the federal government may cover the full cost of running a tribal air program. *Id.* States, by contrast, are responsible for at least 40% of approved air program costs and cannot use fees generated under the CAA's operating permit program to meet the requirement. 40 C.F.R. § 35.145.

174. NAT'L TRIBAL AIR ASS'N, STATUS OF TRIBAL AIR REPORT 15, 77 (2022).

175. *Environmental Programs and Technical Assistance on Tribal Lands*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/tribal-air/environmental-programs-and-technical-assistance-tribal-lands [https://perma.cc/VRB8-FMKW].

176. *About Us: Institute for Tribal Environmental Professionals (ITEP)*, N. ARIZ. UNIV., https://www7.nau.edu/itep/main/About/ [https://perma.cc/F396-VZ2L]. The institute began with an air quality program and has expanded to other environmental media and issues (including water quality, student education, and climate change). North. Ariz. Univ., *Celebrating 30 Years of the NAU Institute for Tribal Environmental Professionals*, VIMEO, https://vimeo.com/749651099/8e7bed2106 [https://perma.cc/D2FX-J8MV].

177. *Intergovernmental Agreement Between the Southern Ute Indian Tribe and the State of Colorado Concerning Air Quality Control on the Southern Ute Indian Reservation*, § I, para. 1 (Dec. 13, 1999) [hereinafter *Intergovernmental Agreement*], https://www.southernute-nsn.gov/wp-content/uploads/sites/15/2018/04/Intergovernmental-Agreement_IGA.pdf [https://perma.cc/X4EQ-QJXT].

178. *Id.* § II, para. 4. Specifically, the 1984 law that defined the boundaries of the Southern Ute Indian Reservation. *See* Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201.

Rather than litigate the issue, the two governments created the Tribal/State Environmental Commission that was empowered to establish rules and regulations for the reservation.[179] The agreement allows the Tribe's environmental division to manage day-to-day administration and enforcement of the Reservation Air Program (the state's environmental division, meanwhile, advises and consults the Tribe).[180]

EPA endorsed the agreement and Colorado's senators sponsored legislation to codify it under federal law.[181] A 2020 periodic review confirmed the agreement continues to work well.[182] In fact, the agreement paved the way for a successful transfer of EPA's permitting authority to the Tribe, making it "the first in the nation to operate an EPA-approved [CAA] program for large sources of air emissions."[183]

C. Tribal Air Quality Laws

Tribes (like states) can also make their own air quality laws.[184] And some of these laws are submitted to and approved by EPA as Tribal Plans—making them federally enforceable under the CAA.[185] The rest govern in parallel to the CAA, just like state laws.[186]

The Cherokee Nation, for example, enacted the Cherokee Nation Air Quality Act of 2004 (also known as the Cherokee Nation Clean Air Act) to ensure that the Nation would have authority in place "to obtain treatment as [a] state for air programs."[187] The act provides "the means to achieve and

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179. *Intergovernmental Agreement*, *supra* note 177, § VII, para. 1.

180. *Id.* § VIII, para. 2.

181. That effort resulted in the Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004. *See generally* Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004, Pub. L. No. 108-336, 118 Stat. 1354.

182. Periodic Review of the Intergovernmental Agreement Between the Southern Ute Indian Tribe and the State of Colorado Concerning Air Quality Control on the Southern Ute Indian Reservation (May 2020), https://www.southernute-nsn.gov/wp-content/uploads/sites/15/2021/04/200924-FINAL-Signed-IGA-Periodic-Review-Form.pdf [https://perma.cc/W3AJ-UZ74].

183. Press Release, EPA Approves Southern Ute Indian Tribe's Air Permitting Program (Mar. 6, 2012), https://www.southernute-nsn.gov/wp-content/uploads/sites/15/2018/04/SUteFinalDraft1.pdf [https://perma.cc/7HKU-XEFZ].

184. *See generally* Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMPAR. L. 29 (2008).

185. *See Tribal Authority Rule (TAR) Under the Clean Air Act*, *supra* note 153.

186. *See generally* 42 U.S.C. § 7416 (addressing retention of State authority).

187. Cherokee Nation Air Quality Act of 2004, Legis. Act 42–04, § 2 https://www.cherokee.org/media/f3genc52/24356air-quality-code-la_42-04.pdf [https://perma.cc/2KWR-DN8T].

maintain atmospheric purity necessary for the protection and enjoyment of human, plant or animal life and property" in the Cherokee Nation and authorizes the Nation's Environmental Protection Commission to implement and enforce the act.[188] The Nation has not, however, submitted a Tribal Plan to EPA.[189]

Similarly, the Morongo Band of Mission Indians—which is treated like a state but does not have a Tribal Plan—adopted an air quality protection code in 2010 "pursuant to Tribal custom and tradition . . . in the exercise of its inherent sovereign powers."[190] The code recognizes that protecting air quality is "essential to the health, welfare, comfort, and environment of the public and residents of the Reservation and therefore is a matter of concern to the Tribe."[191] Even though the Tribe acknowledges that EPA exercises jurisdiction over air quality issues on the reservation, "due to its responsibilities for other areas the federal government has not always assigned the highest priority to air quality permitting on the Morongo Indian Reservation."[192] Accordingly, the code allows the tribe to exercise "its own inherent sovereignty" to protect and improve the air quality of the reservation.[193]

The Yurok Tribe, as a third example, adopted an air quality ordinance in 2005.[194] The principal provisions prohibit the setting of forest or open fires within the reservation without a valid burn permit.[195] "Fires set to improve cultural or ceremonial resources of the Tribe," for instance, must comply with the burn permit process but are not charged fees.[196] Notably, the term "pollutant" excludes "air emissions from outdoor fires ignited pursuant to a burn permit" or emissions otherwise exempted from burn permit requirements (such as "cultural, ceremonial, religious fires recognized by the Tribe" that are "of a nonspreading variety less than three feet in diameter").[197]

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188. *Id.* at §§ 2, 5.

189. *See Tribes Approved for Treatment as a State (TAS)*, *supra* note 142.

190. Morongo Band of Mission Indians, Environmental Protection Ordinance: Air Quality Protection Code (2010).

191. *Id.*

192. *Id.*

193. *Id.*

194. YUROK TRIBAL CODE, § 21.05.010 (2023), https://yurok.tribal.codes/YTC/21.05.010 [https://perma.cc/MVM9-R47E].

195. *Id.* § 21.05.050.

196. *Id.*

197. *Id.*; *id.* § 21.05.040.

These tribal air quality laws show that some tribal governments have (and do) act on air pollution issues even without an EPA-approved Tribal Plan.[198]

IV. APPLYING INDIGENOUS ENVIRONMENTAL JUSTICE TO THE CLEAN AIR ACT

A. Coloniality as Indigenous Environmental Injustice

Settler colonialism both erases Indigenous People and legitimizes the dispossession of Indigenous land and resources. This paradigm, that first appeared in American property law, also appeared in the making of U.S. national parks and wilderness areas. The Wilderness Act of 1964, for example, assumes the absence of human activity.[199] Indians either did not exist in *wilderness*, or equally problematic, were "children of Nature" and themselves "wild."[200] Ultimately the creation of public lands—to provide for their *protection* and *preservation*—"necessarily entailed the exclusion or removal of native peoples."[201] Confronting this history drew calls for decolonizing our national parks.[202]

This section recognizes that Indigenous environmental justice cannot be theorized apart from the dispossession of Indigenous land and resources. It

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198. Other examples include the Navajo Nation's Air Pollution Prevention and Control Act, adopted in 2004, as discussed in Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENV'T L. 42, 75–81 (2014).

199. The Wilderness Act of 1964, Pub. L. No. 88-577 (codified at 16 U.S.C. § 1131–36).

200. MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 16, 25 (1999); *see also* Adam Crepelle, *The Time Trap: Addressing the Stereotypes That Undermine Tribal Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 189, 193–95 (2021) (discussing the "noble savage" trope and its influence on the "guardian-ward" trust relationship in American Indian law).

201. SPENCE, *supra* note 200, at 14.

202. Erica Gies, *How To Decolonize Conservation*, RESILIENCE (Apr. 29, 2022), https://www.resilience.org/stories/2022-04-29/how-to-decolonize-conservation/ [https://perma.cc/C57H-66M5]; Patrick Bassett, Decolonizing the National Park Service: A Proposal To Incorporate Indigenous Perspectives into National Park Narratives (May 2022) (M.A. Thesis, Texas State University), https://digital.library.txstate.edu/bitstream/handle/10877/15750/BASSETT-THESIS-2022.pdf [https://perma.cc/S6UV-ZS8V]; Kekek Jason Stark et al., *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397, 446 (2022) (noting critiques of the #Landback movement as missing the point of decolonization); *see also* Vanessa Racehorse & Anna Hohag, *Achieving Climate Justice Through Land Back: An Overview of Tribal Dispossession, Land Return Efforts, and Practical Mechanisms for #LandBack*, 34 COLO. ENV'T L.J. 175 (2023) (discussing the importance of Land Back for addressing climate change).

argues that both in purpose and in practice, the CAA is entangled with *coloniality*.

1. Dispossessing Tribal Air

Tribes did not consent to the passage of the CAA. Nor were they consulted in its development. Yet, because of the Act, Indigenous Peoples cannot exercise complete autonomy over Tribal Air. EPA, instead, can regulate air quality throughout Indian Country, and tribes are given a subsidiary role.[203] But how did this come to be?

When Congress passed the CAA of 1963, Congress declared air to be *the Nation's* most important natural resource.[204] Polluted air was not only costly to the economy, but it was also a hazard to public health and welfare. It needed to be *protected*.[205] "The Nation's air resources," it was later said, "cannot be looked at as a limitless gift of nature which can be relied upon for the dilution, dispersion, and degradation of our wastes."[206] At the same time, the Act allows use of "our air resource to the maximum extent possible without exceeding ambient air quality."[207] New power plants, for instance, should be built outside urban areas,[208] whose clean air was already exhausted by development and motor vehicles.[209]

As a "general statute," the CAA applies to "Indians and their property interests" without their input or consent.[210] To be sure, Congress invokes its so-called plenary power to impose federal law on Indigenous Peoples and their lands in numerous environmental laws.[211] But its basis "sends an unmistakable message that federal oversight of sovereign Indigenous nations is acceptable under modern legal standards."[212] By ignoring tribes at the start,

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203. *See Clean Air in Indian Country*, U.S. ENV'T PROT. AGENCY (May 9, 2016), https://19january2017snapshot.epa.gov/tribal/clean-air-indian-country_.html [https://perma.cc/8TL8-AYT3].

204. S. REP. NO. 88-638, at 3 (1963) (explaining a need for legislation because "[a]ir is probably the most important of all our natural resources").

205. Clean Air Act, Pub. L. No. 88-206, § 1, 77 Stat. 392, 393 (1963).

206. S. REP. NO. 90-403, at 10 (1967).

207. *Id.* at 28.

208. *Id.*

209. Clean Air Act § 77 Stat. at 392–93.

210. Sunshine Act Meetings, 59 Fed. Reg. 43960 (Farm Credit Admin. Aug. 25, 1994) (quoting Phillips Petroleum Co. v. EPA, 803 F.2d 545, 556 (10th Cir. 1986)).

211. Hoffman, *supra* note 145, at 355 (citing Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 587 (1989)).

212. *Id.* at 357.

argues scholar James Grijalva, the Act left a gap in air quality protection throughout Indian Country.[213]

To fill that gap, EPA relies on its federal trust responsibility. This trust *responsibility* defines the federal government's unique relationship with federally-recognized tribes. It informs, for instance, when and how EPA acts to protect tribal health and environments. To that end, EPA promises to consult with tribes on actions that *may affect* federally recognized tribes or their resources.[214] The Agency also promises to ensure that its actions will

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213. James M. Grijalva, *Self-Determining Environmental Justice for Native America*, 4 ENV'T JUST. 187, 188 (2011). But EPA's regulatory authority is not plenary. The CAA, which is implemented by-and-large through cooperative federalism, neither allows EPA to regulate all air pollution problems nor all sources of pollution. States, frequently, have the first right to regulate before EPA can step in. For Indian Country, courts have taken a binary view of CAA jurisdiction: either a state has jurisdiction or a tribe does. *See* Michigan v. EPA, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (vacating EPA's treatment of "in question" areas of Indian Country); *see also* Okla. Dep't of Env't Quality v. EPA, 740 F.3d 185, 187 (D.C. Cir. 2014) (vacating an EPA rule that applied automatically to "non-reservation lands"); *see also* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, A Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RES. J. 90 (2002). That is, a state has jurisdiction "within the entire geographic area comprising such State," except where "EPA has authorized the treatment of 'Indian tribes as States.'" *Okla. Dep't of Env't Quality*, 740 F.3d at 194 (quoting 42 U.S.C. §§ 7407(a) & 7601(d)(1)(A)). For reservation areas, the Tribal Authority Rule assumes tribal jurisdiction without any special demonstrations. For non-reservation areas, tribes must demonstrate jurisdiction. Thus, until such a demonstration is made, neither a tribe nor EPA may displace state jurisdiction over non-reservation areas of the state.

214. U.S. ENV'T PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 1 (May 4, 2011), https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf [https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf]. As the policy explains, "[t]here is no single formula for what constitutes appropriate consultation," and the specific context may dictate different procedures. *Id.* at 7. For example, when EPA began developing a proposed Federal Plan for the Uintah and Ouray Reservation, the Ute Indian Tribe asked EPA to share pre-publication drafts of the Federal Plan as part of EPA's consultation efforts. *See* Letter from Luke J. Duncan, Bus. Comm. Chairman, Ute Indian Tribe of the Uintah & Ouray Rsrv., to Douglas H. Benevento, Reg'l Adm'r, Env't Prot. Agency (Apr. 16, 2018), https://www.regulations.gov/document/EPA-R08-OAR-2015-0709-0021 [https://perma.cc/FC9S-J4HT]. According to EPA, the agency works with federally recognized tribes on a government-to-government basis in fulfillment of its federal trust responsibility works with all other Indigenous Peoples (e.g., state recognized tribes, non-recognized tribes, indigenous organizations, Native Hawaiians, and Pacific Islanders) as communities, organizations, and individuals. U.S. Env't Prot. Agency, Highlighting the National Tribal Air Association and Environmental Justice Webinar, 4 (Mar. 11, 2021) (PowerPoint slides), https://www.epa.gov/sites/default/files/2021-04/documents/epa_tribal_partnership_groups_highlighting_the_national_tribal_air_association_and_environmental_justice.pdf [https://perma.cc/3XE2-ABJR]. Despite a right to consultation, critics have argued that effective consultation is not occurring. *See* Elizabeth Ann Kronk Warner et al., *Changing Consultation*, 54 U.C. DAVIS L. REV. 1127, 1133 (2020); Michael Eitner,

protect tribal rights arising from treaties, statutes, and executive orders.[215] Yet, none of EPA's statutes or regulations have been interpreted to create any specific duties, leaving the Agency to define its obligations.[216]

For air quality, EPA takes the position that it may regulate in Indian County as necessary and appropriate.[217] As some tribes indicate, however, air quality in Indian Country is not "always assigned the highest priority."[218] And with over 370 major sources in Indian Country, EPA's enforcement efforts have fallen behind.[219] Further, without free, prior, and informed consent, tribes cannot veto federal regulation or compel it. They can only consult EPA (assuming they are even asked).

Meaningful Consultation with Tribal Governments: A Uniform Standard To Guarantee that Federal Agencies Properly Consider Their Concerns, 85 U. COLO. L. REV. 867, 873 (2014); Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlighted Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 23 (1999); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 448–49 (2013).

215. *See, e.g.*, U.S. ENV'T PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES: GUIDANCE FOR DISCUSSING TRIBAL TREATY RIGHTS 1 (Feb. 2016), https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf [https://perma.cc/L2R4-8N6W].

216. *See, e.g.*, *id.*; *see also* U.S. Env't Prot. Agency, *Working Effectively with Tribal Governments*, https://www.epa.gov/sites/default/files/2016-09/documents/working_effectively_with_tribal_governments_training_webinar.pdf [https://perma.cc/QB4R-QK7R] (detailing an EPA employee training on how to work with tribal governments).

217. *See* Sunshine Act Meetings, 59 Fed. Reg. at 43960. When EPA proposed the Tribal Authority Rule, it explained that the CAA authorized the agency to regulate air quality in Indian Country and then promised "to remedy and prevents gaps in CAA protection for Tribal air resources." *Id.* EPA found this authority in the "general purposes of the Act, which is national in scope." *Id.* Indeed, the act refers to the "*Nation's* air resources" and "*its* population." *Id.* ("Nation's" is italicized in the original, but "its" has been emphasized instead of "population."). The proposal then outlines numerous steps towards that end and promised a formal Plan for Reservation Air Program Implementation. *Id.* at 43961. The agency appeared to abandon that effort when it finalized the Tribal Authority Rule, since it leaves EPA with considerable discretion on when and how to exercise its CAA authorities in Indian Country.

218. Morongo Band of Mission Indians, Environmental Protection Ordinance: Air Quality Protection Code (2010).

219. *See* NAT'L TRIBAL AIR ASS'N, STATUS OF TRIBAL AIR REPORT 77 (2022), https://www.ntaatribalair.org/wp-content/uploads/2022/11/2022-NTAA-Status-of-Tribal-Air-Report.pdf [https://perma.cc/E45N-CX9V].

When viewed through *coloniality*, the federal trust doctrine is transformed into a paternalistic instrument of settler colonialism.[220] The doctrine assumes, for instance, that tribes are not competent to govern themselves.[221]

Though some tribes may invite EPA to manage their air resources, the Act's claim over Tribal Air is discursively suspect. But is it an Indigenous environmental justice issue?

Because the CAA generally allows pollution up to the limit of the NAAQS (even encouraging sources to move away from urban centers and potentially closer to reservations),[222] the Act legitimizes the degradation of Tribal Air. The Forest County Potawatomi Community, for example, reported significant impacts from aerial deposition outside the reservation. Emitted sulfur compounds contributed to mercury methylization in an on-reservation lake, even though the lake is in a sulfur dioxide attainment area.[223] Spoiled by pollution, the lake could not be used by the Community's members for traditional activities—disrupting the members' traditional lifestyle and belief system.[224] That disruption, according to Whyte, is an environmental injustice.[225]

The object of settler colonialism is to acquire land and gain control of resources—sometimes by transforming them into "things" to be owned or by putting them to "productive use."[226] The CAA does both. It claims Tribal Air as the Nation's air and allows it to be used to the maximum extent possible,

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220. Robert B. Porter, *A Proposal to the* Hanodaganyas *To Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 905–20 n.277 (1998) (critiquing the Marshall Trilogy of federal Indian law: Johnson v. M'Intosh, 21 U.S. 543, 574 (1823) (the doctrine of discovery); Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831) (creation of domestic dependent nations and the guardian-ward relationship); and Worcester v. Georgia, 31 U.S. 515, 560 (1832) (solidifying federal supremacy)). Nevertheless, as originally conceived by Marshall, the doctrine arguably was intended to enable Tribes to govern themselves (at least within their territories). Later, the doctrine was twisted against Tribes to denigrate and undermine tribal governance. Still, it is a limited shield against state encroachment.

221. Crepelle, *supra* note 200, at 193 (collecting scholarship critical of the "guardian-ward relationship" now referred to as the trust relationship). For similar critiques of the guardian-ward relationship, see W.E.B. Du Bois, *The Freedmen's Bureau*, ATLANTIC (Mar. 1901), https://www.theatlantic.com/magazine/archive/1901/03/the-freedmens-bureau/308772/ [https://perma.cc/4J2S-GD6J] (discussing the transformation of emancipated Blacks into "ward[s] of the nation").

222. *See generally* CONG. RSCH. SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS (2022).

223. FOREST CNTY. POTAWATOMI CMTY., 2007 UPDATES TO THE TECHNICAL REPORT 6 (2007), https://lnr.fcpotawatomi.com/wp-content/uploads/2015/01/2007-updates-to-Technical-Report.pdf [https://perma.cc/XU98-DLP7].

224. *Id.*

225. Whyte, *supra* note 106, at 125.

226. Glenn, *supra* note 96, at 57.

legitimizing the degradation of Tribal Air and potential disruption of traditional relationships with the land.[227] Still, the Act allows tribes to reclaim some control over their air; to that we turn next.[228]

2. Hierarchy of Federal Power

Many federal environmental laws allow tribes to be treated like states to reclaim regulatory control.[229] The CAA, Clean Water Act, and Safe Drinking Water Act expressly do.[230] Other laws, like the Toxic Substances Control Act and the Emergency Planning and Community Right-to-Know Act are silent, but EPA has interpreted them to authorize tribal participation.[231]

To be treated like a state, tribes must: (1) be federally recognized, (2) have a governing body carrying out substantial governmental duties and powers, (3) have appropriate authority, and (4) be capable of carrying out functions of the relevant environmental program.[232] Under the CAA, tribal jurisdiction reaches throughout "the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."[233]

Before 1990, when treatment like a state was codified, state authority over Indian lands varied across the country.[234] One state, for instance, exercised jurisdiction over Indian lands and was upset that EPA might "take authority away from the States to regulate air pollution over Indian lands."[235]

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227. *See* Alyssa Kreikemeier, Aerial Empire: Contested Sovereignties and the American West 21 (2018) (Ph.D. dissertation, Boston University) (on file with the author) ("Turning air into a natural resource extended settler governance . . . ."); *see also* ANDREW CURLEY, CARBON SOVEREIGNTY: COAL, DEVELOPMENT, AND ENERGY TRANSITION IN THE NAVAJO NATION 61 (2023) ("The idea of resources is a colonial concept. The land, sky, water, air . . . are not meant to be transformed into commodities.").

228. Kreikemeier, *supra* note 227, at 21 (environmental laws that turned air into a natural resource also "created new mechanisms for Native nations to exercise environmental sovereignty . . . , destabilizing federal claims").

229. *Tribal Assumption of Federal Laws - Treatment as a State (TAS)*, U.S. ENV'T PROT. AGENCY (Aug. 14, 2023), https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas [https://perma.cc/SP7N-M2VJ]. *But see* Backcountry Against Dumps v. EPA, 100 F.3d 147, 148 (D.C. Cir. 1996) ("The [Resource Conservation and Recovery] Act defines Indian tribes as municipalities, not states, and says nothing about municipalities submitting permitting plans for the agency's review.").

230. *Tribal Assumption of Federal Laws - Treatment as a State (TAS)*, *supra* note 229.

231. *Id.*

232. *Id.*

233. 42 U.S.C. § 7601(d)(2)(B).

234. 122 CONG. REC. H10079, H10118 (daily ed. Sept. 15, 1976) (statement of Mr. Paul Rogers, Chairman, Subcommittee on Health and the Environment); *see also* Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42510, 42513 (Dec. 5, 1974).

235. Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. at 42513.

The Chairman of the House Subcommittee on Health and the Environment even acknowledged that the 1977 PSD amendments would not "alter either existing Indian-State relationships or existing EPA regulations with respect to . . . Indian lands."[236]

The 1990 CAA Amendments and EPA's Tribal Authority Rule changed that. The rule identifies provisions for which it is appropriate for tribes to be treated like states and establishes requirements that tribes must meet if they choose to seek such treatment.[237]

The Tribal Authority Rule, however, is premised on a delegation of federal authority to tribes.[238] Delegation, EPA explains, allows tribes to regulate air quality throughout Indian Country regardless of title ownership.[239] Delegation implies, however, that tribes have limited inherent authority to regulate air quality.

Treating the CAA as a grant of authority nonetheless marked a shift from EPA's then-existing approach under the Clean Water Act. Under the Clean Water Act, EPA followed "a cautious approach" that required tribes to demonstrate inherent authority to regulate water pollution throughout their lands.[240] Although tribes retained inherent powers over non-Indians on their reservations, the inherent authority test (from the U.S. Supreme Court's decision in *Montana v. United States*) limits tribal power over non-Indians on non-Indian owned fee lands to two situations: first, where non-Indians enter into "consensual relationships with the tribe or its members,"[241] and second, where conduct by a non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[242]

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236. 122 CONG. REC. H10079, H10118 (daily ed. Sept. 15, 1976).

237. *Tribal Authority Rule (TAR) Under the Clean Air Act*, *supra* note 153; Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7269 (Feb. 12, 1998). Generally, tribes may be treated like states for nearly all CAA programs but will not be subject to sanctions or deadlines. 40 C.F.R. §§ 49.3–.4 (2023).

238. *Tribal Authority Rule (TAR) Under the Clean Air Act*, *supra* note 153*; see also* Kimberly Chen, Comment, *Toward Tribal Sovereignty: Environmental Regulation in Oklahoma After* McGirt, 121 COLUM. L. REV. F. 95, 97 (2021) (describing the two sources of tribal authority to enact environmental regulations: inherent sovereignty or delegation of federal authority).

239. *Tribal Authority Rule (TAR) Under the Clean Air Act*, *supra* note 153.

240. *Revised Interpretation of the Clean Water Act Tribal Provision*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wqs-tech/revised-interpretation-clean-water-act-tribal-provision [https://perma.cc/C6KY-D59E].

241. Montana v. United States, 450 U.S. 544, 565 (1981).

242. *Id.* at 566.

According to tribes, the *Montana* test "constituted the single greatest administrative burden" of the treatment as a state process.[243] And, according to EPA, it "provides no information necessary for EPA's oversight of the regulatory program."[244] In short, the test is "challenging, time consuming . . . [,] costly," and of little value.[245]

The delegation approach, on the other hand, better supports air quality regulation and, ultimately, tribal authority.[246] Air pollutants disperse readily in the atmosphere, sometimes over several miles or even hundreds of miles from their origin.[247] Yet land on reservations may be owned by Indians or non-Indians, resulting in a checkerboard pattern of jurisdiction.[248] Together, these features "underscore[] the undesirability of fragmented air quality management within reservations."[249] Delegating the federal government's authority, therefore, avoids litigation over a tribe's inherent authority to regulate each parcel of land and source of pollution.[250]

But to gain delegated power, tribes must first conform to the political and scientific structures imposed by the CAA.[251] Tribes must show, for instance, that they have the *capability* (and adequate funding) to administer the CAA.[252] Yet that depends in significant part on federal support.

243. Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30183, 30189 (May 16, 2016).

244. *Id.*

245. *See id.* As a result, EPA revisited its interpretation in 2016 and found that the Clean Water Act "includes an express delegation of authority . . . to Indian tribes to administer regulatory programs over their entire reservations." *Id.* at 30183.

246. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43956, 43959 (Aug. 25, 1994) (to be codified at 40 C.F.R. pts. 35, 49, 50, 81).

247. *Id.*

248. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7255 (Feb. 12, 1998) (to be codified at 40 C.F.R pts. 9, 35, 49, 50, 81).

249. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. at 43959.

250. *Id.* at 43958.

251. *See* Eve Darrian-Smith, *Environmental Law and Native American Law*, 6 ANN. REV. L. & SOC. SCI. 359, 375 (2010) (explaining that native peoples must "speak according to dominant forms of legal and scientific discourse"). *See generally* Whyte, *supra* note 225, at 125. That said, the turn to Indigenous knowledge or traditional ecological knowledge can also risk essentializing the "Indian view." MELISSA NELSON & DAN SHILLING, TRADITIONAL ECOLOGICAL KNOWLEDGE: LEARNING FROM INDIGENOUS PRACTICES FOR ENVIRONMENTAL SUSTAINABILITY 111 (2018).

252. 40 C.F.R. § 49.7(a)(4)(v) (2023). This may require a description of previous management experience, a list of other environmental or public health programs (and provide related tribal laws, policies, and regulations), and a description of technical and administrative capabilities. *Id.* § 49.7(a)(4)(i)–(v).

Federal funding is crucial to tribes' ability to operate and maintain air quality programs on tribal lands.[253] It helps tribes "become highly-skilled, autonomous, and culturally-led natural resource stewards and co-managers."[254] And it supports EPA's objective of tribal primacy.[255]

Since 1998, however, CAA funding for tribes has stagnated.[256] Initial funding levels started at $11 million in 1998, but stalled at $12.43 million since 2021.[257] This scenario is "untenable," warns the National Tribal Air Association.[258] According to the Association, tribes need at least $64.2 million to manage CAA programs alone.[259] The shortage strains tribes with air quality staff and leaves other tribes without any air quality program support.[260] Insufficient funds even impact tribes' "capacity to prevent adverse health impacts, such as asthma, allergies, lung, and heart disease."[261] It impairs, moreover, tribes' "ability to address the ecological impact of air pollution on their Treaty-Protected Natural and Cultural Resources," and "assert and exercise their sovereignty and . . . government-to-governmental relationships."[262]

Disentangling the CAA's *coloniality* does not necessarily require the total repossession of Tribal Air, nor does it require EPA to revert to an inherent sovereignty view of treatment like a state.[263] Scholar Kevin Bruyneel argues, for instance, that tribal nations invoke a "third space of sovereignty" that allows Indigenous Peoples to claim difference and autonomy without secession and that holds the settler state accountable toward tribal nations without accepting its paternalism.[264] This allows tribal nations to claim the

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253. NAT'L TRIBAL AIR ASS'N, TRIBAL AIR QUALITY PRIORITIES AND THE RESOURCES TO ADDRESS THOSE PRIORITIES: A NATIONAL BASELINE NEEDS ASSESSMENT AMONG AMERICAN INDIAN AND ALASKA NATIVE COMMUNITIES 56 (2022).

254. *Id.*

255. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. at 43961.

256. NAT'L TRIBAL AIR ASS'N, STATUS OF TRIBAL AIR REPORT 11 (2022).

257. *Id.*

258. *Id.* The Bureau of Indian Affairs provided more than $395 million in tribal natural resource funding. *Id.* at 15–16. By contrast, total average CAA funding (for section 103 and 105 grants) is at $13.54 million. NAT'L TRIBAL AIR ASS'N, *supra* note 253, at 57.

259. NAT'L TRIBAL AIR ASS'N, *supra* note 256, at 14.

260. *Id.* at 16.

261. NAT'L TRIBAL AIR ASS'N, *supra* note 253, at 5.

262. *Id.* Tribes have turned to other funding sources to supplement their budgets—for example, the Indian Environmental General Assistance Program ("GAP"), Diesel Emissions Reduction Act ("DERA"), State and Tribal Indoor Radon Grants ("SIRG") Program, and Climate Resiliency grants—but such grants are often project specific and cannot contribute to the overall funding needed to run an adequate air program. NAT'L TRIBAL AIR ASS'N, *supra* note 256, at 12.

263. *See generally* Burow et al., *supra* note 33, at 69.

264. KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY 217 (2007).

benefits of the CAA—e.g., by receiving technical training and grant funding—without ceding interests in Tribal Air.[265]

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Recognizing that the CAA dispossess and sometimes exploits Tribal Air exposes the coloniality embedded in the Act. Most air quality issues in Indian Country, moreover, are managed by EPA.[266] But the Agency also fails to pay

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265. To that end, the National Indian Justice Center (with funds from EPA) developed a model tribal air quality code ordinance that asserts: tribes "possess[] inherent sovereign authority to regulate on-Reservation air quality that affects fundamental Tribal interests and public health and safety, including when such activities are conducted by non-members of the Tribe on privately owned land within the Reservation." NAT'L INDIAN JUST. CTR., MODEL TRIBAL AIR QUALITY ORDINANCE 3, https://www.nijc.org/pdfs/AIR.PDF [https://perma.cc/VQ2P-TMY5]. When EPA proposed the Tribal Authority Rule, the Agency noted that tribes "very likely have inherent authority over all activities within reservation boundaries that are subject to CAA regulation." Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43956, 43958 n.5 (Aug. 25, 1994) (to be codified at 40 C.F.R. pts. 35, 49, 50, 81) (the statement was not included in the final rule). By claiming inherent sovereignty while using delegated federal authority as a shield, tribes can both protect Tribal Air and reject perceived limitations on their jurisdictional authority. *See* Hillary M. Hoffmann, *Congressional Plenary Power*, 97 OR. L. REV. 353, 356 (2019); *see also* Samuel Lazerwitz, *Sovereignty-Affirming Subdelegations: Recognizing the Executive's Ability To Delegate Authority and Affirm Inherent Tribal Powers*, 72 STAN. L. REV. 1041, 1094 (2020) (concluding that agency "subdelegations represent an interchange of tribal and federal authority that both eases previous restraints on tribal authority and includes tribal governments in the exercise of federal authority"). Tribes are still vulnerable to reservation diminishment challenges, however. *See, e.g.*, Wyoming v. EPA, 875 F.3d 505, 509–10, 522 (10th Cir. 2017) (finding that Congress diminished the Wind River Reservation, jointly inhabited by the Eastern Shoshone and Northern Arapaho Tribes).

But even with adequate support, some scholars argue, tribes will remain subordinate to the federal government—downgraded from nations to states. Whyte, *supra* note 80, at 199; *see also* Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 534 (2010). Any of the federal government's "marginal losses of control," according to Taiaiake Alfred (Kanienkehaka (Mohawk)), "are the trade-off for the ultimate preservation of the framework of dominance." TAIAIAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 47 (1999). Indeed, the rules for treatment like a state evidence a "de jure colonization." Porter, *supra* note 220, at 984. But for some tribes, the treatment like a state process can be consistent with tribal values: the Navajo Nation, for example, allows tribal law to incorporate other laws. *See, e.g.*, *In re* Estate of Kindle, No. SC-CV-40-05, 2006 WL 6168972, at *755 (Navajo May 18, 2006) (state law can be applied in the absence of Indian law or custom). They create technocrats and absorb tribal nations into the federal government's administrative infrastructure. Porter, *supra* note 220, at 984–85. Tying tribal sovereignty to federal power, moreover, erodes full autonomy and independence. *See* Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?*, 19 J. NAT. RES. & ENV'T L. 35, 35 (2004). Working within this process, accordingly, could entrench the underlying colonial hierarchy. Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U.L. REV. 1, 7 (2014).

266. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. at 43956.

adequate attention to air quality issues in Indian Country and underfunding tribal air quality programs prevents tribes from reclaiming control over Tribal Air. Together, this transforms the Act from just another example of colonial law to an example of environmental injustice in Indian Country.

B. Self-Determination as Indigenous Environmental Justice

Self-determination supports Indigenous Peoples' pursuit of "economic, social, and cultural development and is directly related to land, resource, and territory management," preservation of cultural traditions, self-governance, and all aspects of Indigenous life.[267] Self-determination also is a first principle of environmental justice. Grounding it in the human-rights framework, moreover, both affirms self-governance and empowers cultural customs and traditions relating to the air.

1. Affirming Self-Governance

Treating tribes like states, as discussed above, reduces the legal risks with tribal air regulation. Challenges to a tribe's inherent sovereignty are moot when tribal authority rests on federal delegation. And treatment like a state opens up federal funding and other benefits.[268] To that end, tribes are not forced to devote energy and resources to defending their sovereignty and can focus on governing instead.[269]

Assume though that tribal power throughout the reservation is absolute: tribes truly are like states. Still, states generally do not have the power to project legislation beyond their borders.[270] Consider then a large coal mine that is located outside of a state—or now a tribe's—borders. The owners of the mine plan to build a power plant to burn the mined coal. As long as the power plant is on state land, the plant will not trigger tribal regulations. Under the common law, emissions from the plant might cause some damage to tribal members and they could sue for relief. But if the plant operates lawfully,

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267. Kathryn Reinders, *A Rights-Based Approach to Indigenous Sovereignty, Self-Determination and Self-Government in Canada*, 11 STUDS. BY UNDERGRADUATE RESEARCHERS GUELPH 1, 4 (2019).

268. Tsosie, *supra* note 114, at 248.

269. *See, e.g.*, CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 122 (1987).

270. *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) ("New York . . . may not 'project its legislation into [other States] . . . .'" (quoting Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 521 (1935))). *But see* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, U.C. DAVIS L. REV. 1389, 1389 (2020) (finding that "many states have rejected presumptions against extraterritoriality" under state law).

courts might be reluctant to require the plant to do anything more: the aggrieved tribal members, notwithstanding.

The CAA offers an opportunity to project tribal interests beyond Indian Country.[271] Under the Act, tribes (like states) can assert notification rights and other substantive protections against upwind pollution.[272] Tribes can also reclassify their airsheds to demand stricter pollution control.[273]

The Northern Cheyenne Tribe was the first tribe to reclassify its air shed—and the tribe did it before the CAA expressly authorized tribes to do so.[274] Northern Cheyenne citizens, Grijalva documents, suffered an unusually high rate of respiratory disease, and the proposed construction of a 760-megawatt coal-fired power plant just north of the reservation posed physical, cultural, and economic threats to the Tribe.[275] The redesignation, accordingly, would help protect the Tribe's public health and welfare.[276] It was the first example, explains Grijalva, that addressed tribal implementation of environmental law and helped inspire Congress to codify tribes' rights to reclassify their air.[277]

Although the CAA generally allows pollution up to the limits of the NAAQS, the 1977 PSD program lowers the limit for a few pollutants in Class I areas.[278] The Forest County Potawatomi Community, discussed in the previous section, submitted a Class I redesignation request because the status quo "[did] not provide the level of protection the Tribe wishes to give their air, which they want to maintain as very pristine."[279] *Purity*, both natural and spiritual, is essential to the Potawatomi belief system.[280] But acid deposition from sulfur compounds had polluted significant water resources, including

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271. Milford, *supra* note 32, at 234 (discussing "three possible means" to require controls on upwind sources).

272. *Id.*

273. 42 U.S.C. § 7474.

274. Grijalva, s*upra* note 87, at 19 n.121. The reclassification predated the 1977 PSD amendments, but it was upheld in *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981).

275. *See* Grijalva, *supra* note 87, at 24.

276. *Id.* Several parties challenged the redesignation but failed. *Nance*, 645 F.2d at 704.

277. *See* Grijalva, *supra* note 87, at 23–24.

278. *See* FOREST CNTY. POTAWATOMI CMTY., PSD CLASS I AREA REDESIGNATION TECHNICAL REPORT 4–5 (1994), https://lnr.fcpotawatomi.com/wp-content/uploads/2015/01/FCPC-Class-I-Technical-Document-1994.pdf [https://perma.cc/7JPE-BRUC].

279. *Id.* at 1.

280. FOREST CNTY. POTAWATOMI CMTY., *supra* note 223, at 7.

Devils Lake (a critical source of pure natural resources).[281] Over the objection of state and industry, EPA approved the request in 2008.[282]

Nevertheless, all Class I areas trigger the same protective increments.[283] Thus, while unique cultural values might be relevant in seeking Class I redesignation, those values do not translate into culturally unique standards.[284] Still, nearly all the tribal Class I redesignation requests targeted off-reservation pollution.[285]

Finally, tribes seeking treatment like a state can choose which CAA programs to implement, allowing tribes to decide for themselves their

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281. *Id.* at 5–6. While many Indigenous sacred sites were renamed to denote hellish connections by settler colonialists, see, e.g., J. W. Barlament, *The Devil, the Indigenous God and the Colonizer in American Place Names*, MEDIUM (Apr. 21, 2022), https://jwbarlament.medium.com/the-devil-the-indigenous-god-and-the-colonizer-in-american-place-names-75239f86adda [https://perma.cc/XHY6-2752], the Forest County Potawatomi Community explains that Devils Lake is connected to the underworld creatures that live there. *See* FOREST CNTY. POTAWATOMI CMTY, COMMENTS ON PROPOSED NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS; AND, IN THE ALTERNATIVE, PROPOSED STANDARDS OF PERFORMANCE FOR NEW AND EXISTING STATIONARY SOURCES 8 (2002), https://www3.epa.gov/airtoxics/utility/pro/2_fcpc_comments_camr.pdf [https://perma.cc/UTX4-69XX].

282. Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area, 73 Fed. Reg. 23086, 23093 (Apr. 29, 2008) (to be codified at 40 C.F.R. pt. 52) (explaining that it is "inappropriate for EPA to impose superseding Federal views on the merits of . . . Tribal decisions, so long as procedural rigor is assured" and finding that the Community's redesignation request was procedurally valid). Michigan's challenge to EPA's approval was denied in *Michigan v. EPA*, 581 F.3d 524 (7th Cir. 2009).

283. The PSD program also protects air quality related values ("AQRVs") in Class I areas. Rebecca M. Mitchell, *People of the Outside: The Environmental Impact of Federal Recognition of American Indian Nations*, 42 B.C. ENV'T AFFS. L. REV. 507, 525 (2015) (discussing the Forest County Potawatomi Community's adoption of AQRVs, including for water quality, aquatic systems, visibility impacts, and vegetation). AQRVs are resources that may be impacted by changes in air quality, including visibility or scenic, cultural, physical, biological, ecological, or recreational resources. *Air Quality Related Values in National Parks*, NAT'L PARK SERV. (Apr. 2, 2018), https://www.nps.gov/articles/aqrv-assessment.htm [https://perma.cc/CE9U-F3VR]. The National Park Service's AQRVs, for example, include visibility vegetation, water quality, soils, and fish and wildlife. *Id.* But buildings and stone monuments can also be valued—particularly those that may be damaged by acid rain, for example. *Class I Redesignation*, FOREST CNTY. POTAWATOMI, https://lnr.fcpotawatomi.com/air-resource-program/class-i-redesignation/ [https://perma.cc/KYF4-DN3Q]. If a pollution source will impact AQRVs in a Class I area, permits can be denied, even where PSD increments would not be exceeded. *See Prevention of Significant Deterioration Basic Information*, *supra* note 167.

284. By contrast, the Clean Water Act allows tribes to obtain federally enforceable water quality standards that are more stringent than minimum federal criteria. Sibyl Diver et al., *Engaging Colonial Entanglements: "Treatment as a State" Policy for Indigenous Water Co-Governance*, 19 GLOB. ENV'T POLS. 33, 34 (2019).

285. *See Class I for Tribes*, *supra* note 169.

governance priorities. The Tribal Authority Rule also allows tribes to coordinate enforcement efforts with EPA to overcome federal Indian law's limitation on tribal criminal jurisdiction. Thus, the CAA affirms tribal self-governance by expanding territorial influence, by affording tribes governance flexibility, and by strengthening tribal jurisdiction: all in support of Indigenous self-determination.

2. Empowering Cultural Customs and Traditions

The CAA not only supports tribal self-governance, but also empowers cultural customs and traditions. Indian tribes, argues scholar Elizabeth Ann Kronk Warner (Sault Ste. Marie Tribe of Chippewa Indians), are uniquely situated to innovate within the field of environmental law.[286] But when she surveyed tribes in four states—including the two largest federally-recognized tribes—Kronk Warner found only six tribes with tribal air code provisions and none "depart[ed] in any significant respect" from federal law.[287] She concluded that tribal air quality regulation was not an area of innovation or creativity.[288] Tribal environmental codes, others have concluded, often look very much like equivalent state and federal laws.[289] "[D]istinct Indian norms and sensibilities towards the environment," according to Cooter and Fikentscher, "express themselves in decisions more than in laws."[290]

For the code provisions that Kronk Warner examined, her findings appear true: tribes (like states) uniformly adopt EPA's air quality standards even though they could be tougher under tribal law. For other regulatory programs, such as Title V permitting, tribes (like states) must satisfy strict procedural and technical requirements to make them federally enforceable. It would be rare to see much innovation here.

But some tribal air quality code provisions are innovative and creative. First, because tribes primarily rely on EPA to manage air quality, tribes get to decide which programs to take on. To the extent that they are inclined to implement an air quality program, some tribes create regulatory schemes that are unique and culturally relevant. Four of the seven EPA-approved Tribal

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286. Warner, *supra* note 166, at 789.

287. *Id.* at 816–17; *see also* Warner, *supra* note 198, at 75–81 (surveying federally recognized tribes in Arizona, Montana, New York, and Oklahoma and finding air quality laws in the Cherokee Nation of Oklahoma, the Gila River Indian Community, the Navajo Nation, and the St. Regis Mohawk Tribe).

288. Warner, *supra* note 166, at 817.

289. Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 48 (2008).

290. *Id.*

Plans, for instance, specifically address cultural/religious fire (in slightly different ways, moreover) as part of their open burning requirements. And they are federally enforceable.

a. St. Regis Mohawk Tribe

The St. Regis Mohawk Reserve is located in northern New York, ten miles east of Massena, New York.[291] It is divided by the international border between the United States and Canada. The U.S. portion of the reservation consists of 14,600 acres (primarily agricultural land and wetlands). Over the years, industrial emissions and pollution caused a decline in agricultural activities and contaminated fish, "to the point that government warnings have been limiting the consumption of fish."[292] As the "Aboriginal owners and guardians of their lands and waters," the Tribe adopted a "Tribal Implementation Plan" in October 2002.

The Tribal Burn Regulations, adopted by Tribal Council Resolution 2002-59 and excerpted at the beginning of this Article, opens with recognition of the Four Winds—the air—and their powers of purification and refreshment. "Clean air," the regulation explains, "is an important resource to the community of Akwesasne," and is "appreciated by the many Tribal members suffering from asthma and other respiratory illness."[293] Uncontrolled burning threatens community health, and, accordingly, "the regulation of open burning is necessary to preserve the enjoyment of property by all and to assure that Tribal health, safety and welfare are protected."[294]

The regulations generally prohibit open burning without a permit issued by the tribe.[295] Permits are not required, however, for cooking, providing warmth, recreational fires, or fires "for religious or ceremonial purposes," among a few other exceptions.[296] Non-compliance with the regulations could result in education and awareness training (for the first violation), at least four hours of community service (second violation), and $150 fines (third violation).[297] Violations that result in uncontrollable fires trigger additional penalties and fines.[298]

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291. SRMT ENV'T DIV., AIR QUALITY PROGRAM, ST. REGIS MOHAWK TRIBE TRIBAL IMPLEMENTATION PLAN 10 (2004) (on file with author).

292. *Id.*

293. *Id.* at 76.

294. *Id.*

295. *Id.* at 78–79.

296. *Id.* at 80.

297. *Id.* at 85.

298. *Id.*

b. Northern Cheyenne

The Northern Cheyenne Clean Air Act, enacted in December 2016, protects "the health and wellbeing of the Tribe's members and other Reservation residents, the economic security of the Tribe, and the traditional way-of-life that the Tribe's members have practiced since time immemorial."[299] It reflects the Tribe's view that air quality on reservation must be "maintained and enhanced" and "ensure[s] that off-Reservation sources of air pollutants do not adversely affect air quality on the Northern Cheyenne Reservation."[300] (Recall that the Tribe was the first to reclassify its airshed.) The act was passed pursuant to the Tribe's "inherent sovereignty to exercise civil authority and jurisdiction over the conduct of Tribal members and all other persons on all Reservation lands."[301]

Like the St. Regis Mohawk Tribal Plan, the Northern Cheyenne Clean Air Act generally prohibits open burning without a permit.[302] Small fires are exempt from the prohibition as is "burning by a member of the Tribe for cultural, traditional, or spiritual purposes."[303]

c. Gila River Indian Community

"The Gila River Indian Community has jurisdiction over more than 375,000 acres and has inherent authority to control the use of natural resources and protect the life, health, safety, property, welfare and environment of residents."[304] The Community recognizes that EPA imposes "federal, rather than tribal air quality control measures," and explains that those federal measures "are not as flexible or sensitive to local values and needs."[305] Accordingly, in 2006, the Community adopted an Air Quality Management Plan that protects "outdoor air within the boundaries of the Community" and allows the Community "to exercise its sovereignty over air quality."[306] As with the other tribes, the Gila River Indian Community requires a permit for open burning unless the fires are "used for cultural,

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299. Northern Cheyenne Clean Air Act, § 1.2(1) (2016), https://www.cheyennenation.com/nct/epd/Northern%20Cheyenne%20Clean%20Air%20Act%20(final%2012-5-16).pdf [https://perma.cc/3YXM-Q67N].

300. *Id.* § 1.2(2).

301. *Id.* § 1.4(2).

302. *Id.* § 5.1

303. *Id.* §§ 5.2(1)–(2).

304. Gila River Indian Community, Ordinance GR-06-06 (Dec. 6, 2023) (on file with author).

305. *Id.*

306. *Id.*

religious or ceremonial purposes,"[307] defined as "a fire associated with a Native American ceremony or ritual."[308]

d. Swinomish

The last Tribal Plan concerns the Swinomish Indian Tribal Community. The Swinomish are descended from and are a successor to tribes that inhabited the Skagit Valley and Puget Sound islands for thousands of years before non-Indian settlement.[309] The Swinomish Reservation, established in 1855 by the Treaty of Point Elliott, is home to a community of Coast Salish peoples that descended from tribes and bands that originally lived in the Skagit Valley and Samish River Valley, the coastal areas surrounding Skagit, Padilla, and Fidalgo bays, Saratoga Passage, and numerous islands including Fidalgo, Camano, Whidbey, and the San Juan Islands.[310] The reservation is located on Fidalgo Island in Western Washington State.[311]

The Swinomish Clean Air Act contains two regulatory programs: an operating permit program and an open burning program.[312] Just the open burning program was submitted to EPA as a Tribal Plan.[313]

The Tribal Plan, like the others above, prohibits open burning "except for an open burn conducted for tribally recognized cultural or spiritual purposes."[314] The Swinomish Clean Air Act provides for penalties of at least $100.00 per day per violation and up to $10,000.00 per day per violation.[315]

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These Tribal Plans reveal a limited but notable innovation in air quality regulation. They also advance tribal values and preserve cultural and religious practices from regulatory control. In this way, the open burning provisions exhibit innovation and creativity in tribal air quality regulation even within the fabric of federal law. Because the Tribal Plans are federally

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307. *Id.*

308. *Id.*

309. *The Swinomish Reservation*, SWINOMISH INDIAN TRIBAL CMTY., https://swinomish-nsn.gov/government/the-swinomish-reservation.aspx [https://perma.cc/AN6R-6T46].

310. *Id.*

311. *Id.*

312. SWINOMISH TRIBAL CODE §§ 19-02.050 to .160 (2020), https://swinomish-nsn.gov/media/4938/1902_cleanair.pdf [https://perma.cc/74SX-5GKW].

313. Approval and Promulgation of Implementation Plans; Swinomish Indian Tribal Community; Tribal Implementation Plan, 79 Fed. Reg. 25049, 25053 (May 2, 2014).

314. SWINOMISH TRIBAL CODE § 19-02.080.

315. *Id.* § 19-02.200(A). The EPA clarifies, however, that "enforcement of the [Tribal Plan's] requirements brought by the EPA would proceed under the EPA's independent authorities under the Clean Air Act provisions." Approval and Promulgation of Implementation Plans, 79 Fed. Reg. at 25053.

enforceable, the CAA helps empower the "laws, customs, and traditions" of Indigenous Peoples and "advance[s] a decolonizing agenda," which is critical to Indigenous environmental justice.[316]

C. Case Studies

This final discussion revisits the three scenarios that introduced the Article.

1. Cultural Fire and EPA's Exceptional Events Rule

In 2005, Congress amended the CAA to address air quality monitoring data influenced by so-called "exceptional events."[317] In doing so, Congress sanctioned the long-standing agency practice that allowed states to exclude air quality data believed to be connected to natural and other exceptional events.[318] Congress' definition stipulated that an exceptional event is "caused by human activity that is unlikely to recur at a particular location or a natural event."[319] Congress then directed EPA to develop new regulations to address such events.[320]

EPA's original rulemaking was completed in 2007.[321] That rule defined natural events to include wildfires and "naturally-ignited" fires used to accomplish resource management objectives.[322] But it excluded prescribed fires, explaining that they are too connected to human causality.[323] Yet the view that humans exist separate from the natural world ignores the deep ecological relationship between people and the land—particularly when connected by fire.

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316. *Cf.* Angela Riley & Kristen Carpenter, *Decolonizing Indigenous Migration*, 109 CALIF. L. REV. 63, 106 (2021) (discussing the implementation of Indigenous "laws, customs, and traditions" through the UN Declaration on Human Rights to advance decolonization).

317. Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. 68216, 68219 (Oct. 3, 2016) (to be codified at 40 C.F.R. pts. 50, 51).

318. *See id.*

319. 42 U.S.C. § 7619(b)(1)(a)(iii).

320. *See* Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. at 68219.

321. Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13559 (Mar. 22, 2007) (to be codified at 40 CFR pts. 50, 51).

322. *Id.* at 13566.

323. *Id.*

Indigenous People have been practicing controlled, deliberate burns in North America for millennia.[324] Indeed, many landscapes in North America were shaped by fire, and many ecological systems evolved to depend on Indigenous burning (such as lodge-pole pine forests, which required more frequent burnings than can be explained by lightning ignition alone).[325] The Karuk and Yurok people, in particular, set fires to limit Douglas fir encroachment on oak woodlands and prairies to maintain "ecological heterogeneity."[326] They also use fire to encourage growth of California hazelnut shrubs, which produce valued resources for basketry materials.[327] In carrying out these activities, the Karuk and Yurok fire-setters help reduce surface fuel loads and reduce the potential intensity and spread of an unplanned fire.[328] But anti-fire policies of the early twentieth century not only extinguished unplanned fires, they also specifically suppressed Indigenous fire.[329]

With climate change, forest land managers are reconsidering the role of fire—and prescribed burns in particular—on our landscapes and ecological systems. In northwestern California, the Karuk, Yurok, and Hoopa Valley Tribes "are leading efforts to re-introduce cultural burning" in partnership with land and fire agencies.[330] EPA also is studying the important role prescribed fires can play in mitigating health impacts associated with catastrophic wildfires.[331] In 2016, EPA even revised its rules to partially

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324. OMER STEWART, FORGOTTEN FIRES: NATIVE AMERICANS AND THE TRANSIENT WILDERNESS 9, 48 (Henry T. Lewis & M. Kat Anderson eds., 1908); Gerald W. Williams, *References on the American Indian Use of Fire in Ecosystems*, U.S.D.A. FOREST SERV. (June 12, 2003), https://www.itcnet.org/file_download/5d76d377-8025-4780-8511-4dc8d0596e45 [https://perma.cc/AQ53-SAY2].

325. STEWART, *supra* note 324, at 9, 48.

326. Tony Marks-Block et al., *Revitalized Karuk and Yurok Cultural Burning To Enhance California Hazelnut for Basketweaving in Northwestern California, USA*, 17 FIRE ECOLOGY 1, 10, 14 (2021).

327. *Id.* at 14.

328. *Id.* at 2.

329. Tony Marks-Block, Karuk and Yurok Prescribed Cultural Fire Revitalization in California's Klamath Basin: Socio-Ecological Dynamics and Political Ecology of Indigenous Burning and Resource Management 12–13 (June 2020) (Ph.D. dissertation, Stanford University), https://www.firescience.gov/projects/17-2-01-3/project/17-2-01-3_Marks-Block_CulturalFire_Dissertation-augmented.pdf [https://perma.cc/4WJY-CKEM] (quoting one Forest Service ranger, who said in 1918, that "[t]he only sure way [to control the fire problem] is to kill off [the renegade Indians]").

330. Marks-Block et al., *supra* note 326, at 3.

331. *EPA Releases Report Comparing Air Quality and Public Health Impacts from Prescribed Fire and Wildfire Smoke*, U.S. ENV'T PROT. AGENCY (Sept. 30, 2021), https://www.epa.gov/newsreleases/epa-releases-report-comparing-air-quality-and-public-health-impacts-prescribed-fire [https://perma.cc/7F6W-FZRU].

accommodate prescribed fires.[332] Still, the Agency failed to consider the practice, under any circumstances, natural.[333]

Under EPA's revised regulations, tribes or states seeking a CAA exemption for intentional burns must prepare a detailed demonstration that shows a particular burn is (1) unlikely to recur at a particular location and (2) that the emissions from the burn were not reasonably controllable or preventable.[334] To do so, states or tribes must compare the frequency of an intentional burn "with 'an assessment of the natural fire return interval or the prescribed fire frequency needed to establish, restore and/or maintain a sustainable and resilient wildland ecosystem contained in a multi-year land or resource management plan.'"[335] But in practice, the cost and difficulty of preparing an acceptable demonstration makes the process "inviable for many Tribes."[336] As a result, states regularly count the emissions from intentional burns, including cultural burns, against their CAA compliance obligations.[337] In response, experts advised tribes to "encourage the EPA to recharacterize intentional fire as a 'natural event' where it is consistent with historic Tribal practices."[338]

If certain prescribed fires are considered *natural* (instead of *unlikely to recur in a particular location*), it not only better accommodates cultural burning but corrects the misguided view that humans play no role in natural ecological systems.

There's even precedent to do so. Recognizing that some cultural practices should be presumptively excludable follows EPA's treatment of certain fireworks displays.[339] In 2007, EPA created a regulatory exemption for fireworks associated with "national and/or cultural traditions, such as July 4th Independence Day and the Chinese New Year."[340] The Agency explained that "Congress did not intend to require EPA to consider air quality violations associated with such cultural traditions in regulatory determinations."[341]

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332. Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. 68216, 68218 (Oct. 3, 2016) (to be codified at 40 C.F.R. pts. 50, 51).

333. *Id.* at 68231.

334. SARA A. CLARK ET AL., GOOD FIRE: CURRENT BARRIERS TO THE EXPANSION OF CULTURAL BURNING AND PRESCRIBED FIRE IN CALIFORNIA AND RECOMMENDED SOLUTIONS 10 (2022).

335. *Id.*

336. *Id.*

337. *See id.* at 11.

338. *Id.* at 13.

339. Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13560, 13577 (Mar. 22, 2007) (to be codified at 40 C.F.R. pts. 50, 51).

340. *Id.*

341. *Id.*

Where it can be shown fireworks are "significantly integral to traditional national, ethnic, or other cultural events," EPA could exclude data from regulatory determinations.[342]

Treating cultural fires as presumptively excludable *natural events* removes a notable restriction limiting Karuk and Yurok cultural practices—potentially restoring their relationship to the land—and helps manage fire risks that are increasingly dangerous with climate change. For the Karuk—who have limited governable territory—empowering cultural and traditional practices is important to fulfilling their rights of self-determination.[343]

The example of cultural burning highlights the importance of mapping the Indigenous environmental justice framework onto the traditional framework. EPA's traditional approach, for example, overlooks the repression of cultural burning as an environmental injustice: there is no disproportionate environmental impact and public participation is required for all exceptional events demonstrations. But if the new analytical framework is applied: (1) regulatory barriers to cultural burning disrupt traditional practices, which are an environmental injustice; and (2) removing those regulatory barriers helps empower traditional practices, thus supporting Indigenous self-determination and promoting Indigenous environmental justice. Further, the human-rights based approach to self-determination is particularly important for the Karuk, who have limited self-governance possibilities under the CAA because they lack Reservation lands.

2. Ozone Nonattainment in the Uintah & Ouray Reservation

When EPA designated portions of the Uintah & Ouray Reservation as an ozone nonattainment area, the action triggered obligations to clean the air.[344] That responsibility fell on the EPA.

The Agency identified three steps to address ozone pollution. The first was to extend the attainment area oil-and-gas Federal Plan to the nonattainment area in the Uintah & Ouray Reservation.[345] This would enable oil-and-gas sources on the reservation to continue operating, despite worsening air

342. *Id.*

343. *Karuk Tribe Tribal Government Profile and Summary 2020*, *supra* note 8.

344. Federal Implementation Plan for Managing Emissions from Oil and Natural Gas Sources on Indian Country Lands Within the Uintah and Ouray Indian Reservation in Utah, 87 Fed. Reg. 75334, 75335 (Dec. 8, 2022) (to be codified at 40 C.F.R. pt. 49).

345. *See* Amendments to Federal Implementation Plan for Managing Air Emissions from True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector, 83 Fed. Reg. 20775 (proposed May 8, 2018).

quality.[346] The second and third steps included a reservation-specific banking program for all sources of ozone precursors and a reservation-specific regulation for oil-and-gas sources.[347]

While the Ute Indian Tribe supported EPA's efforts, the tribe was adamant that EPA "level [the] playing field" without creating regulatory disparities on tribal lands as compared to state lands.[348] Stalling or severely restricting oil-and-gas development would impair the Tribe's ability to provide essential government services to its members and intrude on its sovereignty.[349] Frequent delays, moreover, frustrated the Tribe—to the point that they asked EPA to stop work on the banking rule: especially since the Agency failed to consult with the Tribe before floating the rule and similar regulations were not proposed for state lands.[350] Absent "free, prior, and informed consent on these issues," the Tribe asserted, any program administered directly by EPA without direct tribal input would be "paternalistic."[351]

EPA seemed to take those critiques to heart. The Agency ultimately consulted with the Tribe on the reservation-specific oil-and-gas regulation. Between 2015 and 2020, the Agency held nine tribal consultations with the Ute Business Committee and numerous meetings with tribal representatives, including a public hearing on the reservation in Fort Duchesne, Utah.[352]

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346. *Id.* at 20780. Environmental groups initially opposed this effort, arguing that it would damage health and the environment. But after discussions with the Tribe, the groups withdrew their adverse comments. Letter from Dan Grossman, Nat'l Dir. of State Programs, Energy, Env't Defense Fund to Bill Wehrum, Assistant Adm'r, Office of Air and Radiation, EPA (Feb. 12, 2019), https://www.regulations.gov/document/EPA-HQ-OAR-2014-0606-0124 [https://perma.cc/X8NK-N6YU] (acknowledging that "air quality in the Basin is a tribal sovereignty issue").

347. *See* Federal Implementation Plan To Establish a Bank for Ozone Precursor Emission Reduction Credits from Existing Sources on Indian Country Lands Within the Uinta Basin Ozone Nonattainment Area, 84 Fed. Reg. 24064, 24064 (May 24, 2019) (Advanced Notice of Proposed Rulemaking); Federal Implementation Plan for Managing Emissions from Oil and Natural Gas Sources on Indian Country Lands Within the Uintah and Ouray Indian Reservations in Utah, 85 Fed. Reg. 3492 (proposed Jan. 21, 2020).

348. *See* Ute Indian Tribe, *supra* note 5, at 2.

349. *See id.* at 1.

350. Ute Indian Tribe, Comment Letter on Federal Implementation Plan to Establish a Bank for the Ozone Precursor Emission Reduction Credits from Existing Sources on Indian Country Lands Within the Unita Basin Ozone Nonattainment Area 1–2 (Aug. 2, 2019), https://www.regulations.gov/comment/EPA-R08-OAR-2019-0002-0010 [https://perma.cc/44EK-LL5E].

351. *See id.* at 2.

352. Memorandum from Debra. H Thomas, Acting Reg'l Adm'r, to Jane Nishida, Principal Deputy Assistant Adm'r, Office of Int'l and Tribal Affs., and Joseph Goffman, Acting Assistant Adm'r, Office of Air and Radiation, https://www.regulations.gov/document/EPA-R08-OAR-2015-0709-0233 [https://perma.cc/XKW9-MU9T].

Initially, EPA refused to provide the Tribe with a preview of regulatory text.[353] The Agency rebuffed the Tribe's request, citing "laws and policies related to the federal rulemaking process."[354] The Tribe countered that "nothing in the [CAA], the Administrative Procedure Act, or the Freedom of Information Act prevents disclosure" to the Tribe prior to the public comment period.[355] Waiting until publication, explained the Tribe, fell short of meaningful consultation.[356] After all, the Tribe had a "unique position as co-regulator and sovereign government" that set it apart from other members of the public.[357]

EPA ultimately changed course. In February 2019, the Agency transmitted draft regulatory text of the proposed rule to the Ute Indian Tribe in anticipation of a consultation discussion.[358] Before the rule was finalized, EPA again shared draft regulatory language (and a summary of changes between the proposed and final versions of the rule).[359] Offering previews of regulatory text, the Agency has acknowledged, enables meaningful and timely input from affected Tribes and produces "received valuable suggestions for improvements to the rule itself."[360]

Under the traditional environmental justice framework, the EPA's initial outreach practices arguably satisfy the meaningful participation requirements guaranteed to all peoples. If viewed through the principles of self-determination, however, granting tribes the right to review regulatory text before it is available to the public becomes an important step towards free, prior, and informed consent—better protecting tribal self-determination.[361]

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353. *See* Letter from Douglas H. Benevento, Reg'l Adm'r, U.S. EPA Region Eight, to Luke J. Duncan, Bus. Comm. Chairman, Ute Indian Tribe of the Uintah & Ouray Rsrv. (Apr. 12, 2018), https://www.regulations.gov/document/EPA-R08-OAR-2015-0709-0021 [https://perma.cc/TD5X-75TR]; Letter from Luke J, Duncan, Bus. Comm. Chairman, Ute Indian Tribe of the Uintah & Ouray Rsrv., to Douglas H. Benevento, Reg'l Adm'r, U.S. EPA Region Eight (Apr. 16, 2018), https://www.regulations.gov/document/EPA-R08-OAR-2015-0709-0021 [https://perma.cc/36X8-R744].

354. *See* Letter from Douglas H. Benevento to Luke J. Duncan, *supra* note 353.

355. Letter from Luke J. Duncan to Douglas H. Benevento, *supra* note 353.

356. *Id.*

357. *Id.*

358. Email from Kimberly Varilek, Senior Tribal Advisor EPA Region 8, to Chairman Luke Duncan (Feb. 21, 2019) (on file with author).

359. Email from Michael Boydston, Senior Assistant Regional Counsel EPA Region 8, to Jeremy Patterson, Counsel to the Tribe (June 16, 2022), https://www.regulations.gov/document/EPA-R08-OAR-2015-0709-0254 [https://perma.cc/FZQ7-RZHN].

360. 87 Fed. Reg. 61891 (Oct. 12, 2022).

361. *See* Warner et al., *supra* note 214 (recognizing that consultation may fulfil moral duties of consent, but identifying numerous ways to improve the consultation process).

3. Pollution Sources Beyond the Reach of the San Carlos Apache

In January 2022, EPA proposed a long overdue review of its Primary Copper Smelting hazardous air pollution rule.[362] In its proposal, EPA found that emissions from the only three smelting facilities in the United States—the largest two in Arizona and a smaller one in Utah—disproportionately affect communities with environmental justice concerns, including Native Americans.[363] In fact, despite being a mere 0.7% of the total U.S. population, Native Americans accounted for 27% of the U.S. population with a cancer risk at or above one-in-one million caused by primary copper smelting.[364] The new standards, EPA claimed, would reduce those risks "to an acceptable level."[365]

Nevertheless, EPA initially concluded that the rulemaking "does not have tribal implications" and, accordingly, did not trigger consultation or coordination with Tribal governments.[366] The National Tribal Air Association and the San Carlos Apache Tribe objected: "It is disingenuous," the Association explained, "given the proximity to the reservation and its impact on nearby Tribal populations, the environment, and potential treaty right to not have proactively reached out and offered consultation to the impacted Tribes in Hayden and surrounding Gila Counties."[367]

The San Carlos Apache made the case more concrete.[368] Of the three primary copper smelters in operation, "the two largest are both located less

362. National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual Risk and Technology Review and Primary Copper Smelting Area Source Technology Review, 87 Fed. Reg. 1616, 1616 (proposed Jan. 11, 2022) (to be codified at C.F.R. pt. 63). The original rule was issued in June 2002 and should have been reviewed in 2010. *Id.* at 1619–21. Nevertheless, twenty years after the first rule went into effect, the agency is moving forward.

363. *Id.* at 1620–41.

364. *Id.* at 1641 tbl.3.

365. *Id.* at 1616.

366. *Id.* at 1653.

367. Letter from Syndi Smallwood, Chairwoman, National Tribal Air Assoc., to Tonisha Dawson, U.S. EPA (Feb. 25, 2022), https://www.ntaatribalair.org/wp-content/uploads/2022/08/NTAA-Comment-Letter-on-EPA-RTR-Copper-Smelters.pdf [https://perma.cc/CLM2-S77A]; *see also* Letter from Terry Rambler, Chairman, San Carlos Apache Tribe, to Tomás Carbonell, Deputy Assistant Adm'r for Stationary Sources, U.S. EPA (Apr. 4, 2022), https://downloads.regulations.gov/EPA-HQ-OAR-2020-0430-0139/attachment_2.pdf [https://perma.cc/9RC5-5CWP].

368. Of course, it is not just air pollution that threatens the San Carlos Apache. Electric vehicle demand for copper also could destroy some of the people's most sacred land. Chi'chil Bildagoteel is apparently "the most promising new source of copper in the country." Maddie Oatman, *EVs' Demand for Copper Escalates Threat Against Apache's Oak Flat*, HIGH COUNTRY NEWS (Apr. 20, 2022), https://www.hcn.org/articles/mining-evs-demand-for-copper-escalates-threat-against-apaches-oak-flat [https://perma.cc/4NW2-NPBG]. The anticipated mining site

than ten miles from the San Carlos Apache Reservation."[369] Over decades, lead, arsenic, and dioxins have fallen on the reservation and "have built up in soil, water, wildlife."[370] EPA's original rule, the Tribe explained, reduced pollution by less than 25%.[371] And the new proposal "would be a reduction of less than twenty percent" despite EPA's acknowledgment "that greater reductions could be achieved."[372] Because the smelters are not located on the reservation, the San Carlos Apache must rely on EPA for more protective controls. Consultation, accordingly, helps "ensure tribal rights are acknowledged and protected."[373]

But the CAA offers the Tribe another tool: air shed reclassification.[374] Under the PSD program, as discussed above, the San Carlos Apache could reclassify its air resources to try and influence permitting decisions beyond the reservation.375 This is not, of course, a complete remedy. But it extends the Tribe's territorial influence; something that likely might not be attainable if the Tribe were treated as a foreign country. And that is only possible because of the CAA.

V. CONCLUSION

On the CAA's fiftieth anniversary, EPA reported that emissions of six common air pollutants dropped 27%, and the Agency touted a 285% growth in the economy between 1970 and 2019, "proving that clean air policies and

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would span two miles and be "as deep as the Eiffel Tower." *Id.* Attempts to block the mine have so far been unsuccessful. Debra Utacia Krol, *Federal Appeals Court Denies Apache Stronghold's Bid To Stop a Copper Mine at Oak Flat*, AZ CENT. (Apr. 26, 2023), https://www.azcentral.com/story/news/local/arizona/2022/06/28/9th-circuit-court-denies-appeal-stop-copper-mine-oak-flat/7750393001/ [https://perma.cc/4A67-LEX8].

369. Letter from Terry Rambler to Tomás Carbonell, *supra* note 367.

370. *Id.*

371. *Id.*

372. *Id.*

373. *See id.*

374. The CAA allows the EPA Administrator to compel states to reduce pollution that "endanger public health or welfare in a foreign country," but only if that country "has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country" as is given by the United States." 42 U.S.C.A. § 7415 (West).

375. *See id.* The provision has rarely been invoked. *See* MICHAEL BURGER ET AL., COMBATING CLIMATE CHANGE WITH SECTION 115 OF THE CLEAN AIR ACT 9 (2020), https://climate.law.columbia.edu/sites/default/files/content/Combatting%20Climate%20Change%20With%20Section%20115_Summary.2020_0.pdf [https://perma.cc/2AFW-9MNM] (noting that Section 115 laid largely dormant from 1977 until 2008). To take advantage of this provision, accordingly, tribes would probably need to develop more complex air quality codes and divert resources towards a more robust air quality program.

a robust economy can go hand in hand."[376] Adjusting for another few years of data, EPA announced in June 2022 that those same pollutants dropped another percent while the economy grew stronger still.[377]

In fact, every year EPA released an air quality trends report—regardless of the political administration in power—the Agency highlights improvements in overall air quality and dramatic growth in the U.S. economy.[378] The leading purpose of the CAA, after all, is the protection and enhancement of the Nation's air resources "so as to promote the public health and welfare and the productive capacity of its population."[379] It is by many accounts a regulatory success story.[380]

Yet air quality is still a concern for parts of Indian Country. Indeed, American Indian and Alaska Natives are disproportionately impacted by air pollution, and it may be getting worse.[381] But the predominant frame of environmental justice misses distinct aspects of injustice in Indian Country. This Article, accordingly, provides a new analytical framework—grounded in concepts of *coloniality* and *self-determination*—to supplement the traditional framework for Indigenous Peoples.

This paper acknowledges that despite overall public health and economic benefits, environmental governance can mask ongoing colonial implications. It does not argue for a return to a pre-colonial society but instead attempts to grapple with the colonial systems we support. It cautions that our environmental governance system can be normalized by its overall success, potentially trapping us within its structure. Recognizing colonialist structures, however, helps us move forward as a society—and allows us to draw inspiration from diverse societies while becoming more self-aware.

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376. *Fiftieth Anniversary of the Clean Air Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/clean-air-act-overview/50th-anniversary-clean-air-act [https://perma.cc/J7T4-7URC].

377. *EPA Releases Annual Air Report, Highlighting Trends Through 2021*, U.S. ENV'T PROT. AGENCY (June 1, 2022), https://www.epa.gov/newsreleases/epa-releases-annual-air-report-highlighting-trends-through-2021 [https://perma.cc/SYY3-RL8J].

378. *See id.*

379. Air Quality Act of 1967, Pub. L. No. 90-148, sec. 101, § (b)(3), 81 Stat. 485 (1967) (codified as amended at 42 U.S.C. § 7401).

380. *A Success Story, with Many Chapters Still To Come*, EARTHJUSTICE (Feb. 2, 2011), https://earthjustice.org/features/campaigns/a-success-story-with-many-chapters-still-to-come [https://perma.cc/V2UU-E6G2].

381. Janet L. Gamble et al., *Ch. 9: Populations of Concern*, *in* THE IMPACTS OF CLIMATE CHANGE ON HUMAN HEALTH IN THE UNITED STATES: A SCIENTIFIC ASSESSMENT 247, 254 (2016).