exterior boundaries of Indian reservations. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337-38, 340-41, 343-44 (1983), the Supreme Court held that the State of New Mexico's attempt to regulate the hunting activities of non-tribal members on a Tribe's reservation was preempted because federal law recognized the authority of the Tribe to regulate hunting and fishing and the State regulation of non-members would entangle and interfere with the federal promotion of tribal authority. In California v. Cabazon Band of Mission Indians, 107 S.Ct. 1083 (1987), the Court held that California and Riverside County could not assert jurisdiction over bingo and gambling activities conducted by Indians on Indian land, even though the primary customers for the activities were non-Indians. The Court found that neither Pub. L. No. 83-280 nor the Organized Crime Control Act of 1970 authorized the State or County to impose gambling laws or ordinances on the reservation. In McClanahan v. Arizona State Tax Comm., 411 U.S. 164 (1973), the Supreme Court held that it was unlawful for the State of Arizona to impose an income tax on a reservation Indian whose income was derived from reservation sources. In three of the four Supreme Court cases cited by WDNR to support its regulation of Indian country based on preemption analysis, the Court held that state regulation was preempted.

In *Rice* v. *Rehner*, 463 U.S. 713 (1983) the Supreme Court reversed a lower court's decision that State regulation of liquor on a reservation was preempted by Federal law. The Court's decision was based on its conclusion that "[i]n the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development'" (citation omitted) and that Congress authorized State regulation over Indian liquor transactions. Rice, 463 U.S. at 724, 726, 734–35. In notable contrast with liquor regulation and as elaborated below, the Act (and other environmental statutes) plainly provides for tribal and Federal programs to protect air quality within reservations. Further, as explained below, there is well-established Federal policy promoting collaborative tribal and Federal environmental management of reservations and treating Tribes, not States, as responsible for protection of the reservation environment.

WDNR cites two additional Supreme Court cases to support its comment that EPA has been overbroad in proposing to conclude that the State lacks authority over non-Indian owned lands within the exterior boundaries of an Indian reservation. WDNR comments that the determination of regulatory jurisdiction over such lands should be based on a specific case-by-case review.

The case law addressing a Tribe's authority over non-members on non-Indian owned fee lands within the exterior boundaries of a reservation must be viewed in light of the provisions of the Act providing for tribal and Federal protection of air quality within reservation boundaries and the reservationwide concerns presented by air pollution activities, discussed further below.

As noted, EPA's regulations implementing the title V program require specific evidence of legal authority. WDNR does not present Federal law, particularized facts, and a formal legal opinion that specifically and adequately support its broad claim of title V program jurisdiction over all reservations in Wisconsin. Adequate State authority is especially necessary in these circumstances where, as set out below, the Act and relevant Federal policies provide for Tribes and EPA to protect reservation air quality, Supreme Court case law recognizes inherent sovereign tribal authority to regulate activities on fee lands where the conduct may have a serious and substantial impact on tribal health or welfare, and EPA has proposed to interpret the Act tribal authority provisions as granting Tribes' authority over air pollution activities on fee lands within reservations.

For many years Congress has delegated to Indian governing bodies the authority to redesignate "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes' for the PSD program under the Act. See section 164(c) of the Act. In 1990, Congress broadly addressed tribal authority under the Act, adding sections 110(o) and 301(d) to the Act. Section 301(d)(2) of the Act authorizes EPA to issue regulations specifying those provisions of the Act for which it is appropriate "to treat Indian Tribes as States." Further, it addresses the potential jurisdictional scope of tribal Act programs, authorizing EPA to treat Tribes in the same manner as States for "the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." Act § 301(d)(2)(B). In addition, section 110(o) provides that tribal implementation plans under the Act "shall become applicable to all areas * * * located within the exterior boundaries of the reservation,

notwithstanding the issuance of any patent and including rights-of-way running through the reservation. Section 302(r) of the Act defines "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Section 302(b) of the Act includes "[a]n agency of an Indian tribe" in the definition of "air pollution control agency." See also sections 103 and 105 of the Act (authorizing Federal financial assistance to air pollution control agencies).

The EPA has proposed to interpret these and other provisions of the Act as granting Tribes—approved by EPA to administer Act programs in the same manner as States—authority over all air resources within the exterior boundaries of a reservation for such programs. The EPA has explained that "[t]his grant of authority by Congress would enable such Tribes to address conduct on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation." 59 FR 43956, 43958– 43960 (Aug. 25, 1994) (legal rationale).¹

The Supreme Court has indicated that a Tribe "may * * * retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the * * * health or welfare of the tribe." Montana, 450 U.S. at 566. A Tribe's inherent authority must be determined on a case-by-case basis, considering whether the conduct being regulated has a direct effect on the health or welfare of the Tribe substantial enough to support the Tribe's jurisdiction over non-Indians. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

Thus, EPA observed that even without the proposed grant of authority, Indian Tribes would very likely have inherent authority over all activities within reservation boundaries, including non-Indian owned activities on fee lands, that are subject to Act regulation. The high mobility of air pollutants, resulting area-wide effects and the seriousness of such impacts would all tend to support

¹EPA's proposed interpretation was informed in part by the significant regulatory entanglements and inefficiencies that could result if tribes have reservationwide jurisdiction over Act Tribal implementation plans (TIPs), as plainly provided in section 110(o) of the Act, but States are conferred jurisdiction within reservation boundaries over non-TIP programs, such as title V. See 59 FR 43959; see also New Mexico v. Mescalero Apache Tribe, 462 U.S. at 340–41.