

# Clean Air Act Permitting and Compliance Issues in Indian Country

Presented by John Jacus

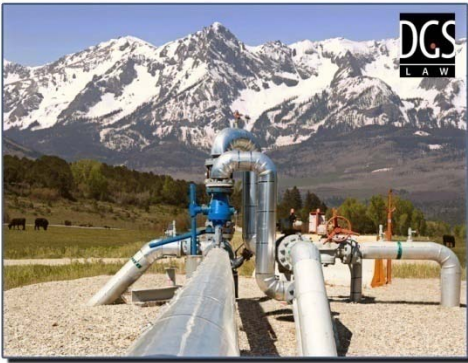
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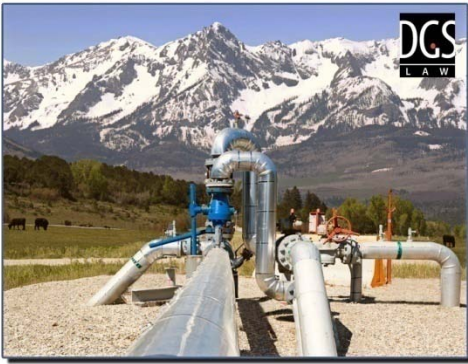


**Experience**  
Operating at Altitude<sup>SM</sup>



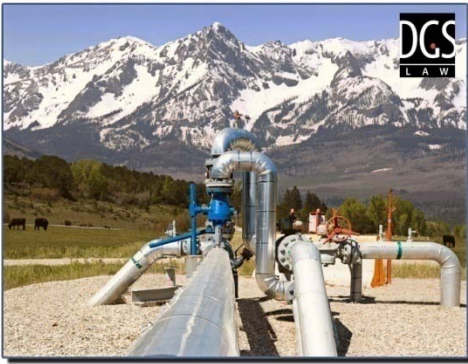
# Overview of Topics Covered

- Existing NSR Framework
- Indian Country defined
- SIPs, TIPs and FIPs
- Current CAA Permitting in Indian Country
- The FARR
- Proposed NSR Rules for Indian Country
- Enforcement in Indian Country



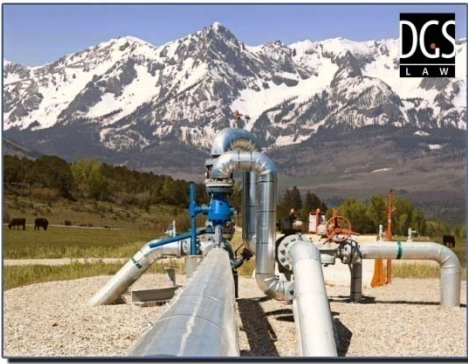
# Existing NSR Framework

- Preconstruction permit program to
  - Manage growth in a controlled manner
  - Protect public health and welfare as new pollution sources are built or existing sources are modified
- Major/Minor programs
  - Minor NSR: Clean Air Act § 110(a)(2)(C)
  - Major NSR
    - Attainment Areas: PSD, Part C
    - Nonattainment Areas: N/A NSR, Part D



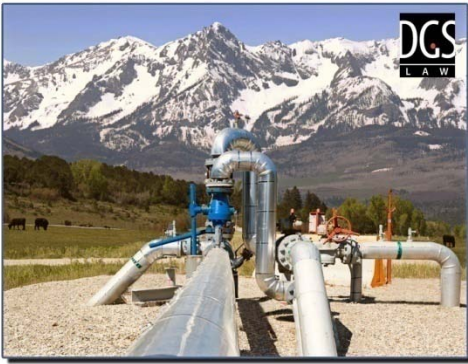
# What is Indian Country?

- Defined at 40 CFR 71.2
  - (1) all land within the limits of any Indian reservation under the jurisdiction of the United States government, ...including rights-of-way running through the reservation;
  - (2) all dependent Indian communities within the borders of the United States...; and
  - (3) all Indian allotments, the Indian titles to which have not been extinguished



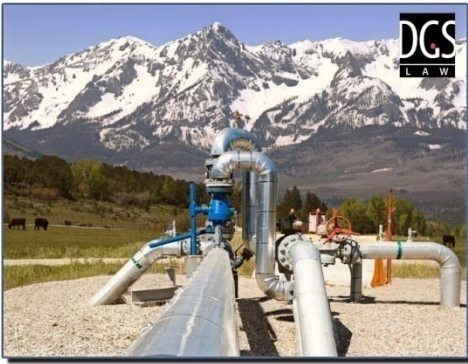
# What is Indian Country? (cont.)

- CFR definition parallels 18 USC 1151
- Applied widely by the federal courts
- Scope of Indian Country with respect to a specific reservation may be the subject of stipulations by tribes, EPA and affected/adjoining states



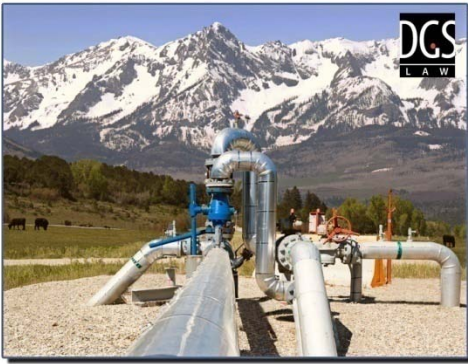
# SIPs, TIPs and FIPs

- **State Implementation Plan (SIP)** – plan that reflects each state’s particular needs and air quality issues, but that must meet certain federal standards. The EPA’s requirements for SIPs are laid out in 40 CFR part 51. If a state fails to submit an approvable SIP within the schedules provided in the CAA, sanctions are imposed on the state.



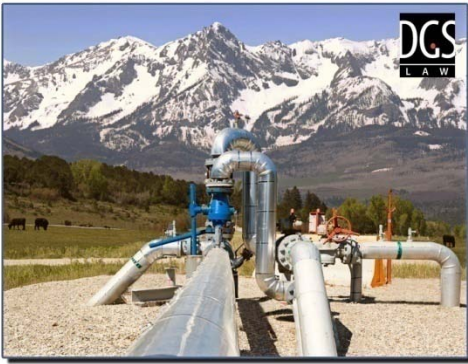
## SIPs, TIPs and FIPs (cont.)

- **Federal Implementation Plan (FIP)** – plan that assures that the NAAQS are attained and maintained when a state fails to or a tribe elects not to develop their implementation plan respectively. EPA has the responsibility under the CAA to ensure that public health and the environment are protected.



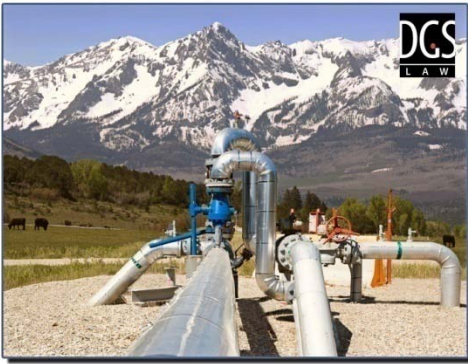
## SIPs, TIPs and FIPs (cont.)

- **Tribal Implementation Plan (TIP)** - a tribe's plan for improving or maintaining its air quality. TIPs can be designed to respond to a tribe's particular air quality goals and values, can be changed over time to reflect changing air quality concerns of the tribe.
- Section 301(d) of the CAA as implemented through the Tribal Air Rule (TAR), provides for tribal implementation of CAA programs.



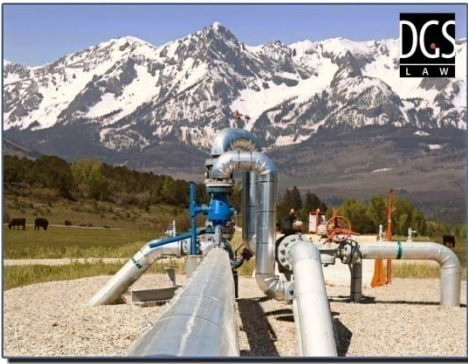
# Tribal Authority to Regulate Air Quality

- Dominion over natural resources an important attribute of sovereign states
- As sovereign entities, tribes have general, inherent authority to regulate matters affecting the health and welfare of tribal members
- Tribal authority, however, is subordinate to the Federal government; therefore, any tribal air program that conflicts with federal law would, presumably, be invalid.



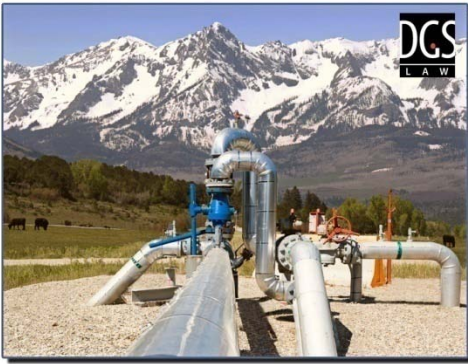
## Tribal Authority to Regulate Air Quality (cont.)

- Congress may expressly delegate federal authority to a tribe.
- Section 301(d) of the CAA authorizes EPA to treat Indian tribes as States under the Act so that a tribe may develop and implement CAA programs in the same manner as a State within areas subject to tribal jurisdiction.



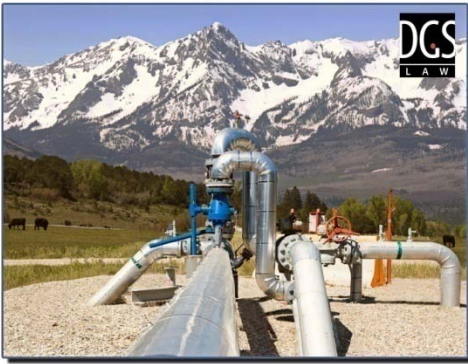
## Treatment as States (TAS)

- 1990 CAA Amendments required EPA to promulgate regulations specifying those CAA provisions “for which it is appropriate to treat Indian tribes as states.” EPA did so in the Tribal Authority Rule (“TAR”) located at 40 C.F.R. §§ 49.1-.11
- While a number of tribes have obtained TAS status, most have not.



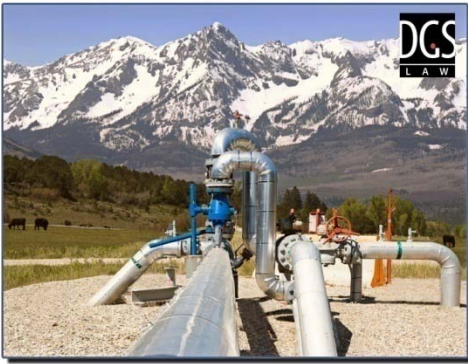
# EPA's CAA Role in Indian Country

- Because the TAR provides for program flexibility and partial authorization of preliminary CAA administration by Indian tribes, permitting and enforcement under the Clean Air Act in Indian Country can be more complex and less certain than in an EPA-authorized states with delegated CAA authority.



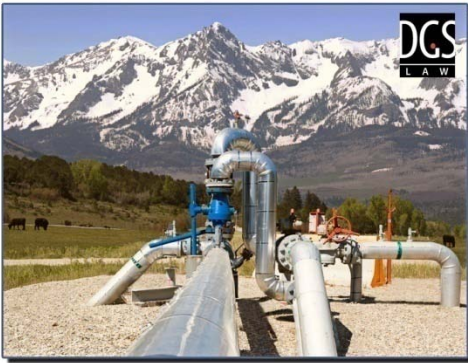
## EPA's CAA Role in Indian Country (cont.)

- Throughout most of Indian Country, EPA is directly involved in enforcing the Clean Air Act, issuing permits, and also working with tribes in furtherance of its trust responsibilities
- Owner and operator of a stationary source in Indian Country may look to EPA to finalize its permits, but by agreement, EPA may ask or allow the tribe to finish the permitting process.



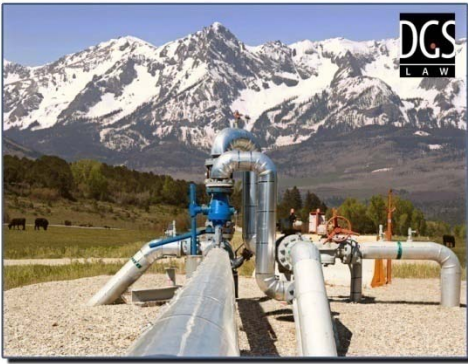
# Operator Familiarity with EPA's Tribal Policies

- Operators in Indian Country are encouraged to review EPA policies currently in place re: environmental protection in Indian Country, e.g., Region 8's Policy for Environmental Protection in Indian Country at: <http://www.epa.gov/regioneight/tribes/policy.html>;
- See *also* "Guidance for Compliance Monitoring, Compliance Assistance and Enforcement Procedures in Indian Country," (January 10, 2001)
- Also want to be familiar with tribal agency staff responsible for air quality, environmental protection



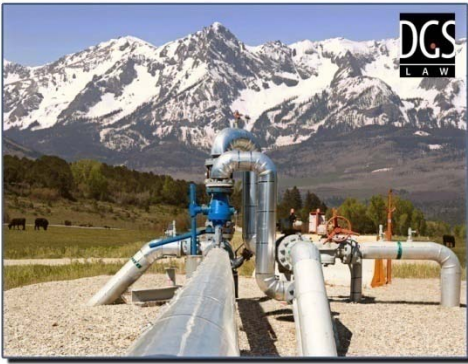
# Existing FIPs and TIPs in Indian Country

- The Federal Air Rules for Reservations (FARR) in Region 10
- There are 3 TIPs that have been approved nationally:
  - EPA Region 1 – Mohegan Tribe (Connecticut)
  - EPA Region 2 – St. Regis Mohawk Tribe (New York)
  - EPA Region 9 – Gila River (Arizona)
- A number of tribes have Title V programs



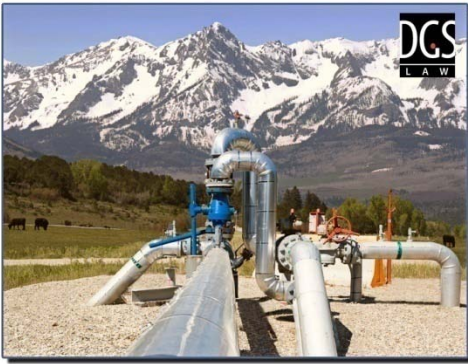
# Tribal Implementation Plans (TIPs)

- Purpose: ensure that NAAQS are being met
  - Including minor source permits
  - Modular approach
- Requires “treatment as state” eligibility under TAR
  - Federal recognition
  - Governing body with substantial governmental duties and powers
  - Regulating air resources within exterior boundaries of reservation
  - Reasonably capable of carrying out functions in TIP



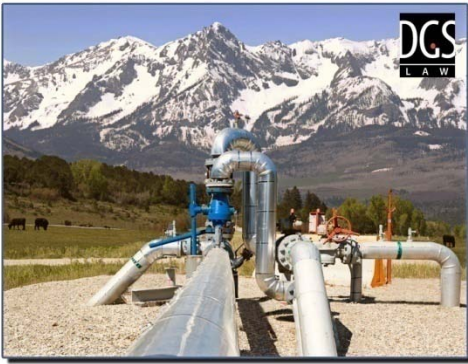
# Tribal Implementation Plans (cont.)

- Administrative & enforcement elements also req.
- Three TIPs submitted or approved to date
  - St. Regis Mohawk,
  - Gila River Indian Community,
  - Mohegan Tribe of Indians
- Some tribes have delegated authority for major source operating permit programs (40 CFR Pt. 71)
  - Navajo Nation EPA
  - So. Ute Indian Tribe expected soon



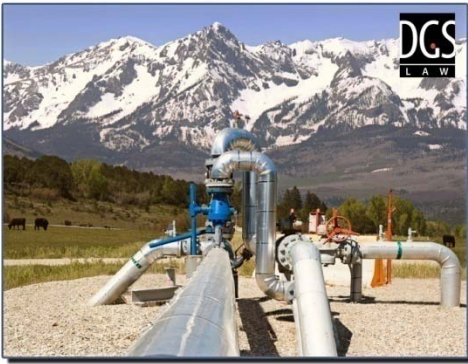
# Federal Implementation Plans (FIPs)

- Rules adopted and implemented by EPA
- Tribal delegation is an option
- Federally-enforceable requirements
- Better option for tribes that want the advantage of federal enforceability, but may not have the ability to accept delegation at this point?



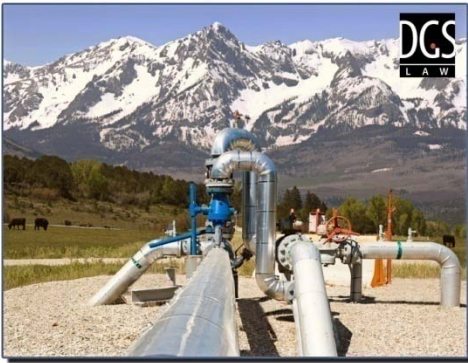
# The Federal Air Rules for Reservations (FARR)

- Applies to 39 tribes in Oregon, Idaho & Washington; administered by EPA, two tribes requested delegation (Nez Perce, Umatilla)
- Developed over a period of years to address concerns about “open burning”
- Involved significant stakeholder and tribal input, detailed review by the U.S. Office of Management & Budget, etc.
- Process begun in 1999, rules final in 2005



# Clean Air Act Permitting

- EPA has CAA jurisdiction in Indian Country
- EPA has proposed (2006), but not yet promulgated a minor source permit program for Indian Country outside the reservations covered by the FARR—it is now expected very soon
- Absence of minor source program has greatly affected permitting and enforcement in the last 8-10 years



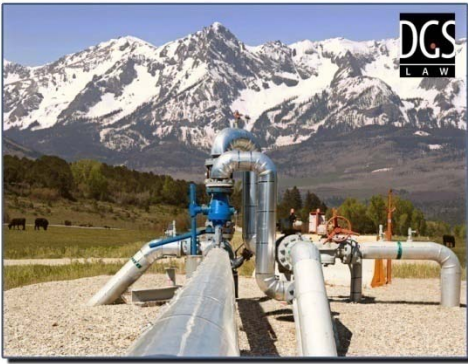
## Clean Air Act Permitting (cont.)

- Industrial sources in Indian Country are assumed to operate without emission controls, even when they do.
- This is because use of such controls is not deemed federally enforceable in the absence of a minor source permit program
- Note PTE Guidance



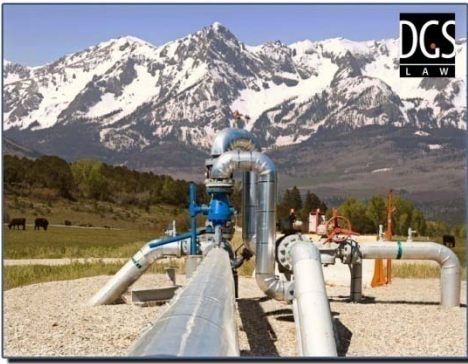
# Minor Sources as Major Sources

- Ignoring the much lower actual emissions from minor sources operating in Indian Country forces them to be regulated like much larger “major stationary sources.”
- This means more lengthy and detailed permitting of sources in Indian Country, arguably with no real difference in their subsequent emissions.



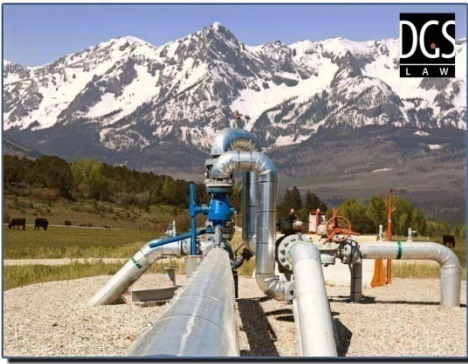
# Options for Bridging the Regulatory Gap

- National rules (*e.g.*, minor source permitting in Indian Country)
- Tribal Implementation Plan
- Federal Implementation Plan for individual tribe/reservation



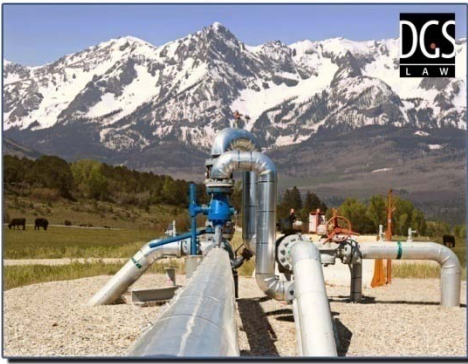
# Policy and Proposed Rules to Fill the Gap in Indian Country

- PTE Transition Policy for Pt. 71 in Indian Country
  - Under the Policy, EPA treats a source as nonmajor for the purposes of the Federal Operating Permits Program (part 71) if its actual emissions are and remain below 50 percent of the PTE thresholds for major source status (100 tons per year), for every consecutive 12-month period starting a year before the policy and maintains adequate records to show actual emissions are kept below these levels
- EPA proposed new Federal Minor NSR Program (Notice of Proposed Rulemaking, 71 FR 48696 (Aug. 21, 2006))



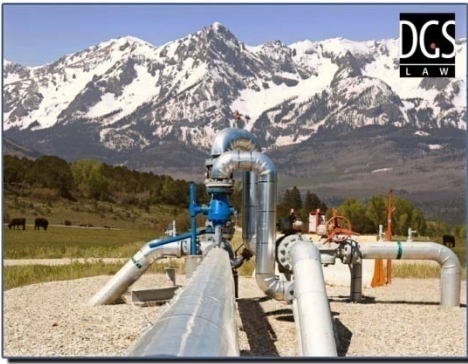
# Which Sources in Indian Country will be Affected?

- **New**
  - Minor sources
  - Major sources locating in nonattainment areas of Indian Country
- **Existing**
  - Minor sources making modifications
  - Major sources in nonattainment areas making minor or major modifications
- **Synthetic minor (true major) sources seeking to limit their PTE**



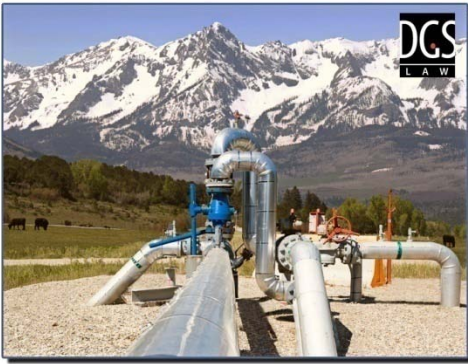
# Specifics of the Minor NSR rule

- The minor NSR rule applies to:
  - **New minor sources**
    - Sources with PTE equal to or above the minor NSR thresholds.
  - **Modifications at existing minor/major sources**
    - When there is a physical or operational change at an existing source that is not subject to major NSR.
      - Emissions increase will be calculated based on allowable emissions
  - **Synthetic minor sources**, including Hazardous Air Pollutants (HAP) sources
    - Major sources seeking to limit potential to emit below the major source threshold



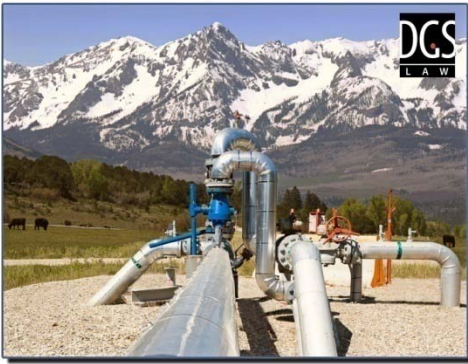
# Minor NSR Rule Requirements

- Main requirements are:
  - Case-by-case control technology review
  - Air Quality Impact Analysis (AQIA) in rare cases
  - Monitoring, recordkeeping, and reporting as needed to assure compliance
  - Public participation, administrative and judicial review
- Tribes may request delegation



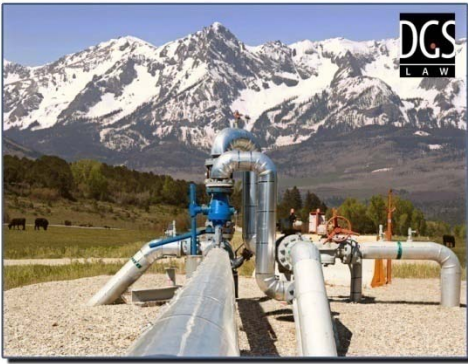
## Minor NSR permits

- Typical/common type of permit – individual emissions units are issued enforceable allowable emissions limits (tpy)
- Source-wide permit – a Plantwide Applicability Limitation (PAL) is issued for the entire source,
- General permit - a standard permit created by the permitting agency for common source categories, i.e. gas stations, dry cleaners, etc.
- Synthetic minor source permits – major sources seeking to limit potential to emit to become synthetic minor sources



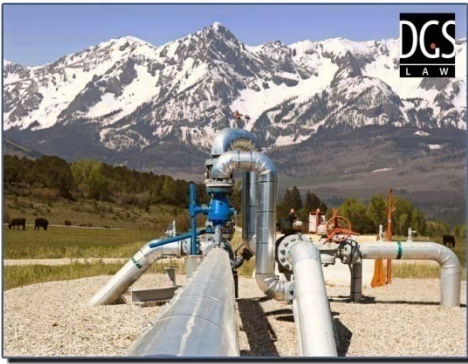
# What would the major NSR rule apply to?

- Major sources subject to the existing nonattainment major NSR rules for areas lacking an approved Part D plan – 40 CFR part 51, Appendix S
- Applies to:
  - **New major sources** with PTE equal to or above the major NSR thresholds
  - **Major modifications** - any physical or operational change at a source that would result in a significant net emission increase of any regulated NSR pollutant



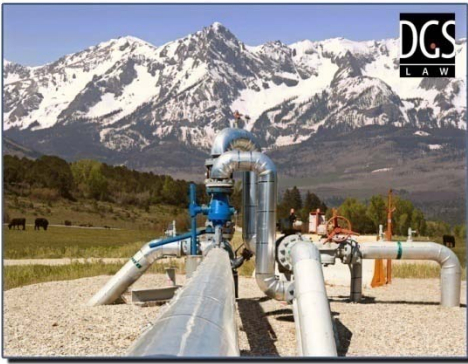
# What does the nonattainment major NSR rule require?

- Main requirements include:
  - LAER – the lowest emissions rate contained in the implementation plan and/or practically achievable for that type of source
  - Offset waivers
  - Public participation, administrative and judicial review
- Tribes may request delegation



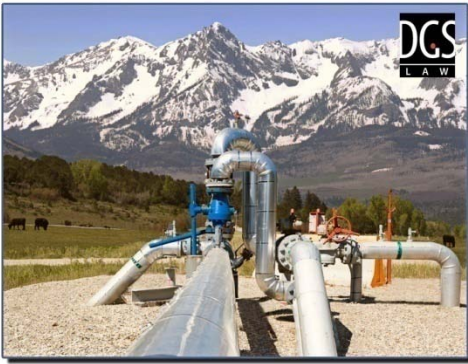
## Delegation, Public Participation, & Administrative and Judicial Review for Both Proposed Rules

- Tribes may request delegation of authority to assist EPA with administration of both rules
- Draft permit, application, and justification for permit issuance/denial available for inspection
- Public notice with 30-day public comment period
- Opportunity for a public hearing, if sufficient interest



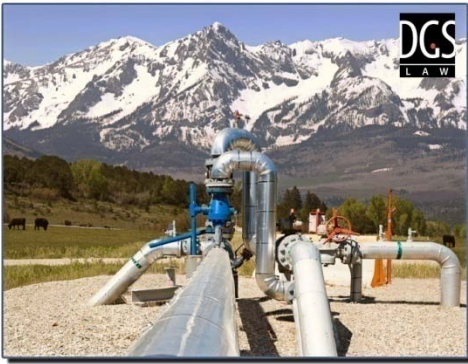
# Administrative and judicial review

- You may appeal the final permit if:
  - You commented on the draft permit; or
  - The grounds for appeal occurred after the public comment period ended
- Two options presented for comment
  - Appeal to EPA's Environmental Appeals Board (EAB) and if denied by EAB, you may appeal to Federal Court
  - Appeal to Federal Court



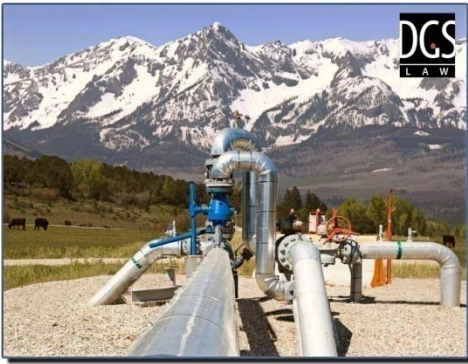
# Tribal Comment on Minor NSR Rule

- Desire a minor source preconstruction permit program comparable to most states.
- Will create a more level regulatory playing field for operators.
- Most agreed with proposed definitions of “minor source” and “modification,” but want more exemptions for insignificant sources.



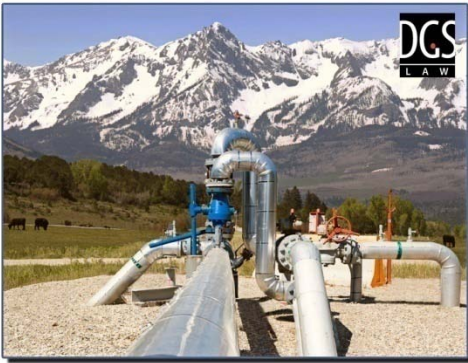
# Minor Source NSR Thresholds

- Setting thresholds is necessary
- Proposed thresholds well below those in most adjacent states.
- Absence of common exemptions subjects many insignificant sources to preconstruction permitting requirements in Indian Country.
- Need more categories of excluded units and activities, like for most states.



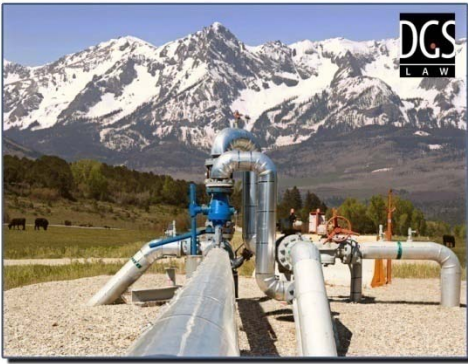
# Permit Application Requirements

- As proposed, with few exemptions and low thresholds, many insignificant sources will be “affected emission units.”
- Inclusion of fugitive emissions in calculation of allowable emissions is more stringent, burdensome, and unnecessary.



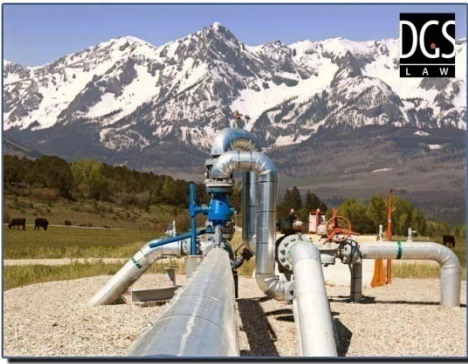
# Control Technology Review

- Proposed case-by-case review for all manner of minor sources.
- Far more restrictive than state minor source permitting requirements.
- Raise serious questions about EPA resources to engage in such detailed review of numerous minor sources.
- Use of presumptive BACT encouraged for large groups of like sources.



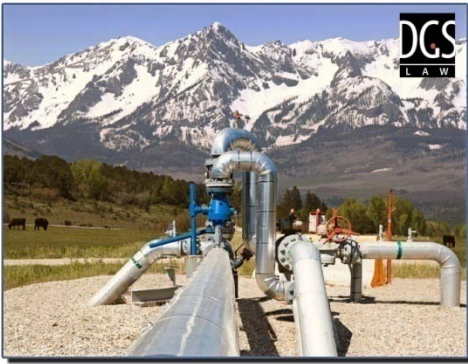
# EPA's Proposed Minor Source Permit Program for Indian Country

- EPA has recognized this regulatory gap and the need to fill it for minor sources
- Many tribes and other stakeholders commented on the proposed rule, including the Ute Tribe
- Because the proposed rule tries to fill the gap for almost all tribes, it could take years to finalize, and is not ideal for the Ute Tribe



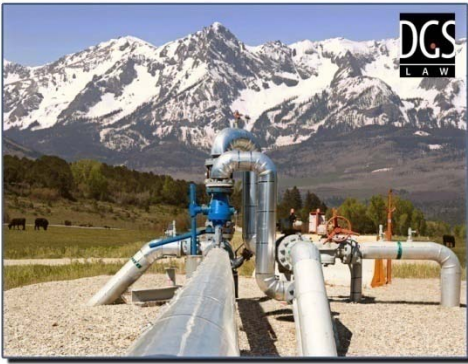
# CAA Enforcement in Indian Country

- EPA announced a Clean Air Act (“CAA”) enforcement initiative for petroleum refineries in the mid-1990s (“Petroleum Refinery Initiative”)
- Signaled the collision of some of the most widely dispersed and complex industrial facilities with what the most complex and specialized of federal environmental laws.



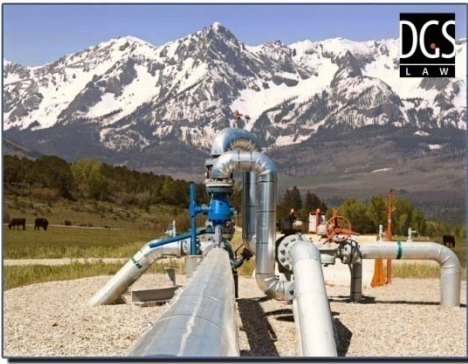
# CAA Enforcement in Indian Country (cont.)

- Under the Petroleum Refinery Initiative Since its Inception in the Mid-1990s:
  - 76 refineries in 25 states are now covered by consent decrees;
  - This represents refining capacity of 11.6 mm barrels per day (“BDP”); and
  - Emission reductions of 69,500 tpy of NO<sub>x</sub> and 194,000 tpy of SO<sub>2</sub>;
  - EPA’s Petroleum Refinery Initiative Fact Sheet  
[http://www.epa.gov/compliance/resources/cases/civil/caa/petroleum\\_refinery-fcshet.htm1](http://www.epa.gov/compliance/resources/cases/civil/caa/petroleum_refinery-fcshet.htm1).
- Refinery CAA Consent Decrees Upstream



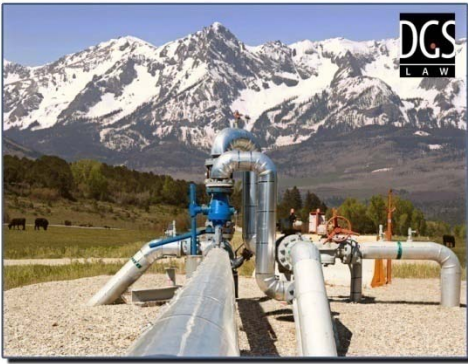
## Enforcement in Indian Country (cont.)

- EPA enforcement of CAA within air shed around reservations, by stipulation;
- Tribal environmental staff involved, may have lead/delegated authority in whole or in part;
- Absence of Minor Source program makes alleged violations more serious.



## Enforcement in Indian Country (cont.)

- Need to scrutinize PTE, use prior MACT, NSPS compliance, which is self-implementing, to avoid other major source triggers where possible;
- Use Transition Policy where possible for Part 71 operating permits;
- Consider use of consent decrees to establish federally enforceable requirements for Minor Sources, *i.e.*, synthetic minors via CD.



# Questions?

## Contact:

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