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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

October 16, 2026

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

PAWNEE NATION OF OKLAHOMA,

Petitioner,

v.

No. 25-9548

LEE ZELDIN, in his official capacity as
U.S. Environmental Protection Agency
Administrator; UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,

Respondents.

Appeal from the Environmental Protection Agency

Michael S. Freeman (Rachael Jaffe, with him on the briefs), Earthjustice, Denver, Colorado, for Petitioner.

Cameron Hinojos (Adam R.F. Gustafson, Principal Deputy Assistant Attorney General; Robert Stander, Deputy Assistant Attorney General; and Laura Brown, with him on the brief), Environment and Natural Resources Division, United States Department of Justice, Washington, District of Columbia, for Respondents.

Before **TYMKOVICH**, **BACHARACH**, and **FEDERICO**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Congress in 2005 approved a provision contained in a transportation funding bill that came to be known as the “Midnight Rider,” because it was added last minute

and without discussion. The Rider allowed Oklahoma to regulate environmental programs in Indian country upon approval by the Environmental Protection Agency. The provision lay dormant for fifteen years since Oklahoma never asked the EPA to use it. But after the Supreme Court in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), expanded the scope of Indian country to encompass almost the entirety of eastern Oklahoma, the State sought to invoke the Rider. The EPA ultimately granted Oklahoma's request in 2025, over the objection of several tribal nations, including the Pawnee Nation of Oklahoma.

In this action, Pawnee Nation petitions for judicial review of EPA's decision to approve Oklahoma's request to extend the State's administration of federal environmental programs to Indian country. Oklahoma first made its request in 2020 under the Rider: § 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA), Pub. L. No. 109-59, 119 Stat. 1144 (2005). The EPA initially granted Oklahoma's request that same year but later withdrew its decision to provide for a longer period of consultation with the affected tribal nations. In 2025, after reconsidering Oklahoma's request for more than three years, the EPA again approved the request.

Pawnee Nation challenges the 2025 approval, contending that the EPA's decision rests on several erroneous interpretations of § 10211(a) and was thus contrary to law under the APA. Pawnee Nation seeks an order vacating the decision because it says the agency's action pursuant to § 10211(a) was *ultra vires* given that the provision expired in 2009. Pawnee Nation also argues that even if the provision

is not expired, the EPA's decision-making process was inconsistent with § 10211(a)'s statutory requirements and we should therefore vacate the agency's decision and remand for further administrative proceedings on Oklahoma's request.

Exercising our exclusive jurisdiction under 33 U.S.C. § 1369(b)(1) to review Pawnee Nation's challenge, we **DENY** its petition and **AFFIRM** the EPA's interpretation of § 10211(a). We conclude § 10211(a)'s plain meaning unambiguously indicates that the provision remains active and did not expire in 2009. We also conclude that the EPA acted in accordance with the provision's requirements when granting Oklahoma's request.

I. Background

We first provide a review of the relevant regulatory framework and then turn to Pawnee Nation's APA challenges.

A. Regulatory Background

Congress has given the EPA the authority to delegate to the states the administration of a number of environmental regulatory programs. That way, states can step in the shoes of the EPA as the primary regulatory authority within their state. States typically submit a program application to the EPA, and if the program meets applicable statutory and regulatory requirements, the EPA can approve the state's request.

The EPA, however, retains oversight authority over the state's regulatory program to ensure it continues to comply with federal law. "EPA oversight of state

programs generally involves a number of interactions, including scheduled reviews of state programs, reviews of specific regulatory actions such as draft state permits, and consideration of compliance and enforcement issues.” R. at 937. Over the years, the EPA has allowed Oklahoma to administer at least twenty-six State regulatory programs under six different federal environmental statutes. *See* R. at 1140–41 (listing programs under the Resource Conservation Recovery Act; the Clean Air Act; the Clean Water Act; the Safe Drinking Water Act; the Federal Insecticide, Fungicide, and Rodenticide Act; and the Toxic Substances Control Act).

Usually, the EPA excludes Indian country from its delegations of administrative authority to states. Instead, the EPA “retain[s] responsibility for managing programs” in Indian country, “unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government[.]” R. at 2 (EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984)).

But some federal environmental statutes enable Indian tribal nations to apply for “treatment as a state” (TAS), and if approved by the EPA, a tribal nation can implement its own regulatory program on its tribal lands. *See, e.g.*, 40 C.F.R. § 130.16 (“Treatment of Indian tribes in a similar manner as states for purposes of the Clean Water Act”). For example, in November 2004, the EPA granted the Pawnee Nation of Oklahoma’s TAS application to administer regulatory programs on tribal trust lands under the Clean Water Act. *See* Letter from Richard E. Greene, Reg’l Adm’r to George Elton Howell, President, Pawnee Nation of Okla. (Nov. 4, 2004),

https://www.epa.gov/sites/default/files/2015-07/documents/pawnee_nation_approval-_and_maps.pdf.

In 2005, Congress passed a transportation funding bill that originated in the House of Representatives Committee on Transportation and Infrastructure. The bill, which became SAFETEA, primarily consisted of various spending authorizations for highway programs and other transportation-related projects. But it also contained other substantive provisions and amendments to the U.S. Code, many of which were unrelated to transportation programs.

One such provision in SAFETEA’s miscellaneous section was § 10211, titled “Environmental programs.”¹ Section 10211 requires EPA to permit Oklahoma to extend its administration of a State regulatory program to Indian country upon request if the State program conforms with federal law. The provision also imposed an additional requirement on tribal nations for them to receive TAS. It reads:

(a) OKLAHOMA.—Notwithstanding any other provision of law, if the Administrator of the Environmental Protection

¹ Oklahoma tribal nations have come to call § 10211 the “*Midnight Rider*” because then-Oklahoma Senator James Inhofe reportedly inserted the provision into SAFETEA the evening before the Act’s passage and “[a]fter the Senate and House of Representatives agreed on the final version of the bill, . . . unbeknownst to tribal leaders or, indeed, really anyone.” Kimberly Chen, *Towards Tribal Sovereignty: Environmental Regulation in Oklahoma After McGirt*, 121 Colum. L. Rev. F. 95, 103 (2021); see also Keith S. Porter, *Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships*, 16 Cornell J. L. & Pub. Pol’y 495, 530 (2007) (“Senator Inhofe did not inform EPA, any tribes, or the governor of Oklahoma that he was going to include this provision in the transportation legislation; only the Oklahoma Independent Petroleum Association knew that the Senator was going to insert it.”). Pawnee Nation claims “[i]t is likely that Senator Inhofe added Section 10211 in response to the EPA’s 2004 approval of Pawnee Nation for” TAS. R. at 898 n.5.

Agency (referred to in this section as the “Administrator”) *determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator **meets applicable requirements** of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator **shall approve** the State **to administer** the State program in the areas of the State that are **in Indian country**, without any further demonstration of authority by the State.*

(b) TREATMENT AS STATE.—Notwithstanding any other provision of law, the Administrator may treat an Indian tribe in the State of Oklahoma as a State under a law administered by the Administrator only if—

(1) the Indian tribe meets requirements under the law to be treated as a State; and

(2) the Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing, under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements.

Pub. L. No. 109-59, 119 Stat. 1144, 1937 (2005) (emphasis added).

The only mention of § 10211 in legislative proceedings comes from then-Senator John McCain’s colloquy on the Senate floor shortly before Congress voted on the bill:

Mr. McCain.

Mr. President, this is a remarkable piece of work. I want to . . . take a few minutes to talk about some of the interesting and egregious and remarkable aspects of this bill.

* * *

[Section 10211(a)] [e]xpands the authority of the State of Oklahoma in environmental matters to extend over ‘Indian country’ within that State.

I don’t know what that costs. But what in the world is it doing on a highway bill?

[Section 10211(b)] [r]equires for Treatment as a State under EPA regulations, an Indian Tribe in Oklahoma, and the State of Oklahoma, must enter a cooperative agreement to jointly plan and administer program requirements.

What is that all about? No one has ever brought it to my attention as chairman of the Indian Affairs Committee.

151 Cong. Rec. S9398-01 (2005). Congress subsequently passed SAFETEA and President Bush signed it into law on August 10, 2005.

B. Procedural Background

From SAFETEA’s passage in 2005 to July 2020, Oklahoma never sought to extend its State regulatory programs into Indian country under § 10211(a). But that changed after July 9, 2020 when the Supreme Court issued its decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), which greatly expanded the scope of Indian country in Oklahoma to encompass land that the state and federal governments had understood to be exclusively state territory.

Several weeks after *McGirt* was decided, Oklahoma submitted a request to the EPA under § 10211(a) to extend twenty-six State environmental regulatory programs to Indian country. Oklahoma sought to “reestablish the status quo regarding the scope of the State’s programs as they had been administered prior to the *McGirt* decision,” R. at 1135, “but not to expand that scope, . . . expressly exclud[ing] from

its request categories of land (*e.g.*, Indian allotments and tribal trust lands) that had been understood to constitute Indian country . . . prior to” *McGirt*, EPA Br. at 8.

The Muscogee (Creek) Nation requested tribal consultation with the EPA on July 24, 2020 regarding Oklahoma’s request. Over the next few months, the EPA met twice with the Creek Nation and discussed Oklahoma’s request with at least thirteen other federally recognized Oklahoma tribal nations. Pawnee Nation also requested a consultation, however, according to the EPA, “a suitable date and time could not be agreed upon before the end of the consultation period.” R. at 152.

On September 29, 2020, the EPA released a Summary Report of Tribal Consultation and Engagement and noted several “[k]ey themes that emerged from the tribal meetings and consultation letters,” including that: (1) “the length of the consultation period was too short,” *id.* at 153–54; (2) Oklahoma’s request “may be contrary to the principles contained within the [EPA’s 1984 Indian Policy]” in which the EPA “recognize[s] tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations,” *id.* at 154–55; and (3) the request conflicted with the federal government’s obligation to protect tribal sovereignty under its trust obligation and various treaties, *id.* at 155–57. “Many tribes” also “expressed concerns and asked questions about the implications and validity of section 10211,” including, its “legal status” and how it was “connected to a transportation bill.” *Id.* at 162.

The EPA responded that it “found no evidence, nor has any been provided by tribes, that indicates section 10211 has sunset and is therefore no longer valid.” *Id.* at

163. It also noted that although § 10211(b)—the cooperative-agreement provision—was “of concern to the tribal nations,” it was “not implicated by [Oklahoma’s] request and [was] therefore outside of the scope of this approval.” *Id.* The EPA did, however, state that § 10211(b)’s requirement “for a cooperative agreement remains a prerequisite for tribal assumption of regulatory programs,” and that “[t]o date, EPA has approved only one cooperative agreement under this provision: between the Citizen Potawatomi Nation and the State.” *Id.*

On October 1, 2020, the EPA issued a decision granting Oklahoma’s request. It determined that “Oklahoma’s July 2020 request seeks approval under SAFETEA to administer environmental regulatory programs submitted by the State that EPA [(1)] has determined meet applicable requirements of federal environmental law and [(2)] has approved outside of Indian country.” *Id.* at 209. “Because these basic statutory criteria are met” and because it had “no discretion to weigh additional factors in rendering its decision,” the EPA concluded it was “required to approve the State’s request to administer these previously approved regulatory programs” *Id.* at 209–10.

But after sixteen Oklahoma tribal nations (including Pawnee Nation) petitioned the EPA in March 2021 to revisit its October 2020 decision, the EPA—now operating under a different presidential administration—initiated a second tribal consultation process. On December 22, 2021, after the EPA completed its second consultation period, it issued a notice of proposed agency action regarding the October 2020 decision. The EPA found that its “expedited tribal consultation

meetings” before the October 2020 decision “(three weeks for 38 tribes in Oklahoma) was inadequate to allow meaningful engagement regarding impacts of the State’s request on tribes.” R. at 536–37. It thus “propos[ed] to withdraw and reconsider the October 2020 Decision [as] an appropriate first step to address the issues” raised by the tribal nations. *Id.* at 540. The EPA “invit[ed] comments to inform [its] reconsideration and decision making regarding the State’s request under SAFETEA,” but left Oklahoma’s program authority under the October 2020 decision “in place and unaffected” pending final agency action on the proposed withdrawal. *Id.* at 533–34.

After more than three years of additional consultation with the tribal nations and receiving comments from other stakeholders, the EPA issued a new decision on January 13, 2025. The January 2025 decision withdrew the October 2020 decision but still approved Oklahoma’s § 10211(a) request. The EPA, however, also imposed a condition on its approval. It added a “State-Tribal Engagement Condition” that “required” Oklahoma to follow enumerated “Tribal Engagement Protocols.” R. at 928, 935. The Protocols outlined “a minimum set of procedures” applicable to “all final agency actions by the State under the program(s) covered by the SAFETEA decision,” including: “send[ing] a written notice to any Covered Tribe(s) . . . whose Indian country will be subject to, is the site of, or is within 50 miles of the site of the final agency action”; “inviting the affected Tribes to confer with the State regarding the action”; “provid[ing] sufficient documentary information for the Tribe(s) to make an informed decision about the action”; engaging in “[m]eaningful conferral” which “require[s] that efforts are aimed at achieving consensus between the State and the

affected Tribes”; “provid[ing] a written description of the tribal engagement process to the affected Tribes”; and “provid[ing] a yearly report to the EPA” and “all Covered Tribes” detailing all tribal engagements. R. at 939–45. The EPA explained that the Engagement Condition “establish[ed] a similar consultative relationship between the State and Tribes as exists between EPA and the Tribes and is narrowly tailored to provide procedural opportunities for Tribal input without disturbing the State’s ultimate regulatory decision-making authority.” *Id.* at 929.

But in April 2025 the EPA—after yet another change in presidential administrations—notified the Oklahoma tribal nations that it had erred in its January 2025 decision by interpreting § 10211(a) to authorize it to impose conditions on its approval, finding such authorization exceeded the statutory grant of power. The EPA met again with the tribal nations over the course of a month and on May 12, 2025, it issued another decision approving Oklahoma’s § 10211(a) request, but this time without the State-Tribal Engagement Condition.

Pawnee Nation then petitioned this court to review the EPA’s May 2025 decision.

II. Discussion

A. *Standard of Review*

When reviewing an agency’s final action under the APA, we must “hold unlawful and set aside [the] action” if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). An

agency action is arbitrary, capricious, and not in accordance with the law when the agency acts outside its statutory authority under an erroneous view of the law. *See Am. Wild Horse Campaign v. Raby*, 144 F.4th 1178, 1188–91 (10th Cir. 2025). We “must exercise [our] independent judgment in deciding whether an agency has acted within its statutory authority”; we do “not defer to an agency interpretation of the law simply because a statute is ambiguous.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–413 (2024).

Pawnee Nation argues that the EPA’s May 2025 decision is contrary to law under § 706 of the APA for three reasons. It contends: (1) Section 10211(a) expired in 2009 along with other parts of SAFETEA, so the EPA could not have acted under it; (2) the EPA rested on an erroneous interpretation of § 10211(a) when it concluded it had no authority to impose conditions on its approval of Oklahoma’s request; and (3) the EPA failed to make a contemporaneous determination that Oklahoma’s regulatory programs complied with federal law, as required by § 10211(a).

Before addressing the APA claims, we first address our subject matter jurisdiction.

B. Subject Matter Jurisdiction

Although both parties agree this court has proper jurisdiction to consider Pawnee Nation’s petition, we must independently ensure our subject matter jurisdiction over this matter. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (“Every federal appellate court has a special obligation to satisfy itself of its

own jurisdiction, even though the parties are prepared to concede it.” (citation modified)).

Section 10211 does not outline a judicial review procedure, nor does SAFETEA contain a general provision that governs review for the entire statute.² But under most of the substantive federal statutes that govern the regulatory programs at issue, we have exclusive jurisdiction to consider petitions for review of a final EPA action concerning state implementation plans. *See, e.g.*, 33 U.S.C. § 1369(b)(1) (“Review of the Administrator’s action . . . in making any determination as to a State permit program submitted under [the Clean Water Act] . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.”); 42 U.S.C. § 7607(b)(1) (similar for the Clean Air Act); *id.* § 300j-7(a)(2) (similar for the Safe Drinking Water Act); *id.* § 6976(b) (similar for the Resource Conservation and Recovery Act). Pawnee Nation resides within this circuit and challenges Oklahoma’s request to extend its State regulatory programs under those statutes to Indian country. We thus have exclusive jurisdiction to hear Pawnee Nation’s petition over those programs.

² Section 7123 of SAFETEA contains a judicial review provision, but it relates to Chapter 51 of Title 49 in the United States Code which deals with the transportation of hazardous materials. *See* Pub. L. No. 109-59, 119 Stat. 1144, 1907–08 (2005) (codified as 49 U.S.C. § 5127(a)). Pawnee Nation’s petition does not challenge any Department of Transportation action under Chapter 51 so that provision has no application here.

And although other statutes that govern the remaining regulatory programs in Oklahoma’s request do not require exclusive review by this court, Pawnee Nation’s challenge to the EPA’s decision on those programs is “inescapably intertwined” with the programs we have exclusive jurisdiction over because the EPA’s decision was made under the same provision, § 10211(a). *See Soul Quest Church of Mother Earth, Inc. v. U.S. Att’y Gen.*, 92 F.4th 953, 971 (11th Cir. 2023); *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 187–88 (D.C. Cir. 2017).

As a result, we conclude we have exclusive subject matter jurisdiction to consider Pawnee Nation’s petition for review.

C. APA Challenges

1. Section 10211’s Application

Pawnee Nation first argues that § 10211 expired on “September 30, 2009” because SAFETEA “was a time-limited spending act, most provisions of which applied only for fiscal years 2005 to 2009.” Ptr’s Br. at 11, 23 (internal quotation marks omitted). It claims that a presumption-against-permanence substantive canon of interpretation applies because § 10211 was “a rider in a time-limited spending act [that] change[d] substantive law,” which creates a ““very strong presumption”” that the provision was only active “for the fiscal years that [SAFETEA was] in effect.” *Id.* at 23 (quoting *Bldg. & Constr. Trades Dep’t, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992)). Pawnee Nation further contends § 10211 does not overcome this presumption because it does not contain “a clear statement of futurity,” nor does it otherwise make clear that Congress intended the provision to be permanent. *Id.* at

24–25 (quotation marks omitted). As a result, under Pawnee Nation’s interpretation, the EPA could not have lawfully approved Oklahoma’s request under an expired provision.

The EPA, however, argues the presumption against permanence does not apply because the canon only applies to *appropriations* bills that cover a single fiscal year, and SAFETEA was not one. “Although SAFETEA contains certain appropriations provisions, the statute is a broader authorization containing numerous substantive provisions with varying expiration dates specific to those particular provisions.” R. at 524. Because the presumption does not apply, and because § 10211 “does not contain any sunset or express expiration,” the EPA contends the provision is not expired. EPA Br. at 15.

We agree that the presumption-against-permanence canon does not apply here—but for a reason different than that advanced by the EPA. Instead, we conclude that the canon is an ambiguity-resolving interpretive aid. And because we read § 10211(a) to be unambiguously *unexpired*, the canon does not come into play, and we need not decide whether it applies to a statute like SAFETEA.

a. The Presumption Against Permanence

Although we have not yet addressed the so-called presumption-against-permanence substantive canon, other circuits that have applied the canon trace its origins to the Supreme Court’s decision in *Minis v. United States*, 40 U.S. (15 Pet.) 423 (1841) (Story, J.). See, e.g., *Atl. Fish Spotters Ass’n v. Evans*, 321 F.3d 220, 224

(1st Cir. 2003); *Tin Cup, LLC v. U.S. Army Corps of Eng’rs*, 904 F.3d 1068, 1073 (9th Cir. 2018).³

In *Minis*, the government sought to recover \$13,589.05 of commissions it paid to Doctor Minis, a surgeon in the army. Although the government had paid Minis the commissions from appropriations made for the years 1836 and 1837, the government argued that a provision from an appropriation law for the year 1835 was “permanent in its operation, and applicable to all future appropriations[.]” *Minis*, 40 U.S. at 445. The 1835 provision prohibited additional pay to army officers “for any service or duty,” which the government argued barred Minis from receiving the commissions. *Id.* at 442. The Supreme Court concluded that because the provision was attached to “a mere appropriation law of limited nature,” it was “limited exclusively to

³ Our predecessor circuit declined to apply the presumption against permanence in *United States v. Perry*, 50 F. 743 (8th Cir. 1892). And although the “decisions of our predecessor circuit are [not] controlling in this court,” they remain “persuasive” authority when relevant. *Iron Bar Holdings v. Cape*, 131 F.4th 1153, 1171 (10th Cir. 2025) (quotation marks omitted).

We also note that while we have not yet addressed the canon, we have concluded that under 31 U.S.C. § 1301, Congress must “expressly state[]” that a specific provision in an annual appropriation law is “permanent” for us to conclude the provision made a lasting change to substantive law. *Smithsfork Grazing Ass’n v. Salazar*, 564 F.3d 1210, 1216 (10th Cir. 2009). Section 1301 mandates that “[a]n appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation . . . expressly provides that it is available after the fiscal year covered by the law in which it appears.” 31 U.S.C. § 1301(c). Pawnee Nation, however, does not argue § 1301 affects our interpretation of § 10211—most likely because SAFETEA was *not* an annual appropriation law. We therefore do not consider § 1301 in our analysis.

appropriations made at the session of 1835” and therefore did not bar Minis’s commissions in 1836 and 1837. *Id.* at 445.

It would be somewhat unusual, to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.

Id.

The Supreme Court, however, has never since explicitly invoked a presumption-against-permanence canon. The Court has cited *Minis*, but it only did so when discussing a different substantive canon: the presumption against implied repeals. *See, e.g., United States v. Vulte*, 233 U.S. 509, 515 (1914); *Maine Cmty. Health Options v. United States*, 590 U.S. 296, 316 (2020). And while application of the presumption against implied repeals in the appropriations context might relate to *Minis*’s reasoning, that canon is nevertheless distinct from Pawnee Nation’s proffered presumption against permanence.

Yet multiple circuit courts have relied on the Court’s reasoning in *Minis* and invoked a presumption-against-permanence canon. For example, in *Tin Cup, LLC v. U.S. Army Corps of Engineers*, the Ninth Circuit stated:

There is [a] very strong presumption that if an appropriations act changes substantive law, it does so only for the fiscal year for which the bill was passed. . . . Absent a clear statement of futurity, a provision in an appropriations act is only in force for the fiscal year of the appropriation.

904 F.3d at 1073 (internal citations and quotation marks omitted). *See Bldg. & Constr. Trades Dep’t*, 961 F.2d at 273–74 (“[A] provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent.”); *Atl. Fish Spotters Ass’n*, 321 F.3d at 224–25 (“A provision in an annual appropriations bill presumptively applies only during the fiscal year to which the bill pertains.”).

But before we can address whether the presumption applies to a statute like SAFETEA, we must first determine *when* it would apply in our interpretive process. Pawnee Nation argues that the presumption against permanence applies to § 10211 at the start as a clear statement rule. Under that formulation, the presumption (if it applies) would “put a thumb on the scale from the very outset of our interpretative process—i.e., that it should factor not only into our resolution of any ambiguity we might ultimately find in [§ 10211(a)], but also into our assessment of whether the statute is ambiguous in the first place.” *Yale New Haven Hosp. v. Becerra*, 56 F.4th 9, 24 (2d Cir. 2022). *Cf. id.* (considering whether the presumption favoring judicial review of agency action is an ambiguity-resolving canon or a clear statement rule).

To be sure, some substantive canons are triggered at the beginning of a court’s interpretative process. These clear statement (or plain statement) rules “impl[y] a special substantive limit on the application of an otherwise unambiguous mandate.” *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 141 (2005) (plurality opinion). “[P]lain statement rules do not turn on a finding of clarity versus ambiguity; rather, they turn on whether the statute includes an express statement overcoming the default

rule against a certain reading.” Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2155 (2016). As a result, “presumptions framed as plain statement rules require something more: they demand language directly stating Congress’s intent to wade into the area encompassed by the plain statement rule.” *Id.*

“Typically, we find clear-statement rules appropriate when a statute implicates *historically or constitutionally grounded norms* that we would not expect Congress to unsettle lightly.” *Jones v. Hendrix*, 599 U.S. 465, 492 (2023) (emphasis added).

Presumptions that apply without an ambiguity trigger are thus normally “*constitutionally* inspired ‘clear statement rules,’ which insist that Congress speak with unusual clarity when it wishes to effect a result that, although constitutional, would disturb a *constitutionally* inspired value.” John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 407 (2010) (emphasis added); *see also id.* (listing “the federalism canon” and “the retroactivity canon” as examples of constitutionally inspired clear statement rules); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 415 (1993) (“Clear-statement rules, because they can radically bend documents away from their apparent meaning, are used sparingly. Their primary justification today is to guard against the erosion of constitutional structures that are difficult to protect by more direct forms of judicial review.”).

On the other hand, presumptions that are *not* constitutionally inspired, but seek to further some other value or policy, “implicitly rest on an initial finding of

ambiguity.” Kavanaugh, *supra*, at 2155; *see also id.* at 2154–55 (listing the presumption against statutes applying extraterritorially and the presumption against implied repeals as examples of ambiguity-dependent presumptions). And “while the Court has in the past recognized certain clear statement rules that implement social rather than constitutional values, such authority seems not to have taken root on a generalized basis.” Manning, *supra*, at 426.

The presumption-against-permanence substantive canon falls into the latter category. It does not further any constitutional value. Rather, it appears the presumption is grounded in the House’s and Senate’s rules that prohibit the inclusion of general legislation in appropriations bills. *See Vulte*, 233 U.S. at 515 (“[*Minis*’s reasoning] follows naturally from the nature of appropriation bills, and the presumption hence arising is fortified by the rules of the Senate and House of Representatives.”); *United States v. Will*, 449 U.S. 200, 222 (1980) (“[T]he rules of both Houses limit the ability to change substantive law through appropriations measures.” (citing Senate Standing Rule XVI(4); House of Representatives Rule XXI(2))). Enforcing Congress’s policy on appropriations bills does not further a constitutional value because the Supreme Court has explicitly stated that despite those congressional rules, a provision attached to an appropriation bill *can* change substantive law. *See id.* (“[W]hen Congress desires to suspend or repeal a statute in force, ‘[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.’” (second alteration in original) (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940))); *see also* Amy

Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123–24 (2010) (“Substantive canons are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute. . . . Substantive canons are in significant tension with textualism, however, insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.”). Clear statement rules “impose a clarity tax on Congress by insisting that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some judicially identified constitutional value” Manning, *supra*, at 399.

We decline to categorize the presumption against permanence as a dice-loading clear statement rule and instead conclude that it only comes into play when a statute is ambiguous.⁴ See *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 143–47 (2d Cir. 2002) (analyzing the presumptions against permanence and implied repeals only *after* finding the statutory text was ambiguous); *Atl. Fish Spotters Ass’n*, 321 F.3d at 224 (“When the words of a statute neither create ambiguity nor lead to an entirely unreasonable interpretation, an inquiring court need not consult other aids to statutory construction.”). Applying the presumption as a clear statement rule would

⁴ Other circuits have found that similar presumption-framed substantive canons depend on a finding of ambiguity. See, e.g., *Vitrol, Inc. v. United States*, 30 F.4th 248, 253 (5th Cir. 2022) (declining to apply the “narrow construction of tax breaks” substantive canon because the statute was unambiguous); *Yale New Haven Hosp. v. Becerra*, 56 F.4th 9, 24–26 (2d Cir. 2022) (declining to apply the “presumption favoring judicial review of agency action” “as a tiebreaker” because it found the statute unambiguously precluded judicial review).

contravene our judicial role of “interpret[ing] the language of the statute enacted by Congress.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002); *see also Vitrol, Inc. v. United States*, 30 F.4th 248, 253 (5th Cir. 2022) (“[O]nly if we determine that a statute is ambiguous—that is, after plain meaning and application of the interpretive canons are found lacking—do the so-called substantive canons come into play.” (citation modified)). “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Barnhart*, 534 U.S. at 462 (quotation marks omitted).

Our predecessor circuit concluded the same in *United States v. Perry*, 50 F. 743 (8th Cir. 1892), when it rejected application of the presumption after finding the statute’s text was clear. In *Perry*, the provision at issue was attached to an annual appropriations bill. And because of that the appellee claimed it was temporary and applied only to the appropriations made in the act in which it was found. But the Eighth Circuit declined to apply the presumption against permanence and concluded the provision made a permanent change in the law.

[I]t is clear that congress intended by this proviso to change, and by apt and plain words has changed and diminished, the compensation fixed by [an earlier authorization statute]. That this law is found in an act making general appropriations will not authorize the courts to disregard or explain it away. For many years it has been a common practice of the congress to enact general provisions of law in the acts making appropriations, until there is now little, if any, presumption that such provisions are not intended to be permanent and general. . . . The proviso is plain and unambiguous.

Id. at 748. The Supreme Court referred to *Perry* in *United States v. Dickerson*, 310 U.S. 554 (1940), when it determined that a different provision attached to another annual appropriations bill was not limited to only funds appropriated in that bill but also suspended a prior congressional authorization. *See* 310 U.S. at 561–62.

At bottom, we conclude the presumption against permanence, “as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one.” *Callanan v. United States*, 364 U.S. 587, 596 (1961) (Frankfurter, J.). The canon “comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration” *Id.* If the plain meaning of a statute is unambiguous, then we have no need to resort to the presumption against permanence. *See Perry*, 50 F. at 748.

We must therefore first discern § 10211(a)’s plain meaning on the issue before we can turn to the canon’s potential application.

b. The Plain Meaning of § 10211(a)

We start by employing the “traditional tools of statutory construction” to find the “best reading” of § 10211(a). *Loper Bright*, 603 U.S. at 400–01; *see also id.* at 400 (“In the business of statutory interpretation, if it is not the best [reading of the statute], it is not permissible.”). Thus, our “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997). “The plainness or ambiguity of statutory language is determined by reference

to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Id.* at 341. We need only resort to the presumption against permanence “if, after seizing everything from which aid can be derived,” we are left with a “grievous ambiguity or uncertainty” such that we “can make no more than a guess as to what Congress intended.” *Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) (quotation marks omitted).

We start with the text. Section 10211 contains no sunset provision, nor does it say anything about the duration of its application. The text therefore indicates it is not expired.

Pawnee Nation, however, argues the provision likewise does not contain “words of futurity” to demonstrate its permanence. Ptr’s Br. at 28. It thus urges us to find the text is at least ambiguous as to whether it is expired because of its “silence” on the issue. *Id.* at 25.

But the provision is not ambiguously silent on the issue just because it does not contain words of futurity. The absence of such words is typical; statutes seldom say anything about their duration, and we usually only find a duly enacted provision of Congress is expired when it says so. *See Perry*, 50 F. at 748. And the presence of words of futurity is but one factor for a court to consider when determining whether a statute overcomes the presumption against permanence, *see, e.g., Tin Cup*, 904 F.3d at 1073, which we have already concluded is not yet in play. Finding the statute ambiguous because it does not contain such words would smuggle the ambiguity-

dependent presumption into our initial textual analysis to “beget” an ambiguity—not resolve one. *Callanan*, 364 U.S. at 596.

Next, we evaluate the context of § 10211 within the rest of the statute. Contextual clues from other parts of SAFETEA, such as its preamble, also indicate that the provision has not expired. *See* Antonin Scalia & Bryan Garner, *Reading Law* 217 (2012) (“A preamble, purpose clause, or recital is a permissible indicator of meaning.”). For instance, time-limited acts typically say in their preamble that the *entire statute* applies only for a specific timeframe. *See, e.g., Atl. Fish Spotters Ass’n*, 321 F.3d at 228 (Appropriations bill at issue stated, “No part of any appropriation contained in this Act shall remain available for obligation *beyond the current fiscal year* unless expressly so provided herein.” (emphasis added) (quoting Pub. L. No. 106–553, app. B § 602)); Pub. L. No. 102-377, 106 Stat. 1315 (1992) (Preamble of the “Energy and Water Development Appropriations Act of 1993” at issue in *Tin Cup, LLC v. U.S. Army Corps of Eng’rs*, 904 F.3d 1068 (9th Cir. 2018), stated its purpose was to “mak[e] appropriations for energy and water development for the *fiscal year ending September 30, 1993*[.]” (emphasis added)); Pub. L. No. 102-27, 105 Stat. 130 (1991) (Preamble of the “emergency supplemental appropriations” bill at issue in *Bldg. & Constr. Trades Dep’t, AFL-CIO v. Martin*, 961 F.2d 269 (D.C. Cir. 1992), stated its purpose was to “provide dire emergency supplemental appropriations *for the fiscal year ending September 30, 1991*[.]” (emphasis added)).

SAFETEA, however, contains no such overarching preamble or provision that states the entire statute is only in effect for certain fiscal years. *See* Pub. L. No. 109-59, 119 Stat. 1144 (2005) (Preamble for SAFETEA states it is “[a]n Act To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.”). Congress also included express sunset language in other SAFETEA provisions but did not include such language in § 10211. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (citation modified)).

And other provisions of SAFETEA that likewise did not contain sunsets, and that also were not codified in the U.S. Code,⁵ appear to remain active. For example, § 5305(h) of SAFETEA was never codified in the U.S. Code, however, in Public Law 117-286 (Dec. 27, 2022), Congress made technical amendments to § 5305(h). *See* Pub. L. No. 117-286, 136 Stat. 4196, 4325 (2022) (amending “Section 5305(h)(5) of SAFETEA-LU”); *see also id.* (amending “Section 5307(a)(4)(B) of SAFETEA-LU” which was also not codified in the U.S. Code).

As a result, we conclude § 10211’s plain meaning unambiguously demonstrates that it is not expired.

⁵ Pawnee Nation claims that § 10211’s absence from the U.S. Code supports its argument that the provision is expired. We, however, decline to look to post-enactment codification history to find ambiguity.

c. The EPA's Interpretation

Although we do not defer to an agency's interpretation of the statute it administers, we still afford "respect" to and "seek aid from [its] interpretations" to determine "the statute's meaning" when such interpretations were "issued contemporaneously with the statute at issue, and [have] remained consistent over time[.]" *Loper Bright*, 603 U.S. at 394, 399 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (R. Jackson, J.)). "[T]he agency's 'body of experience and informed judgment,' . . . has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'" *Id.* at 394 (quoting *Skidmore*, 323 U.S. at 140).

We afford *Skidmore*-respect to the EPA's longstanding and consistent interpretation of § 10211. Even though the EPA does not appear to have interpreted § 10211(a) before Oklahoma submitted its request in July 2020,⁶ it has since consistently maintained the provision is not expired. For example, the EPA stated in September 2020:

Section 10211 in particular is a substantive provision of law with no explicit expiration date that does not condition or limit appropriations and that is not otherwise topically related to the remainder of the statute. Among other things, the provision would not reasonably be viewed as connected to appropriations provisions elsewhere in the statute that

⁶ The EPA did argue that § 10211(a) was an active source of law during litigation of the D.C. Circuit case *Oklahoma Department of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014) (*Okla. DEQ*). Also, neither Oklahoma nor the D.C. Circuit appear to have considered the possibility that the provision had expired. *See Okla. DEQ*, 740 F.3d at 189–90.

may be subject to temporal limitations. . . . EPA does not believe that the provision would reasonably be viewed as having expired.

R. at 524.

And just as relevant but perhaps more convincing, the agency has long interpreted § 10211(a)’s companion provision, § 10211(b) (requiring a cooperation agreement with Oklahoma for a tribal nation to obtain TAS status), to remain active legislation. In fact, *everyone* appears to have treated that provision as still in force after September 30, 2009: the EPA, other tribal nations, and Oklahoma have all assumed § 10211(b) remains in effect.⁷

For example, on December 22, 2009, months past the end of the 2009 fiscal year and sunset of other SAFETEA provisions, the Potawatomi Nation of Oklahoma signed a cooperation agreement with Oklahoma pursuant to § 10211(b). The EPA approved of the cooperation agreement in January 2011, and in January 2015, the Potawatomi Nation applied for TAS for various Clean Water Act programs under § 10211(b). *See* Citizen Potawatomi Nation, Application for Treatment in a Similar

⁷ Various scholars have also treated § 10211(b) as unexpired. *See, e.g.,* Landen Logan, *The Law of Unintended Consequences: The Effects of McGirt and Castro-Huerta on Oklahoma’s Energy Landscape*, 48 Okla. City U. L. Rev. 49, 71–72 (2023) (“Oklahoma tribes are required to enter into a cooperative agreement with the State and its relevant agency. . . . Tribes in other states are not required to enter into these cooperative agreements. . . . This was settled law for fifteen years.”); Elizabeth 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, 376, 386 (2017) (quoting one Oklahoma tribal nation as stating that “currently Tribes in Oklahoma cannot regulate water pollution standards due to the infamous ‘Midnight Rider,’ . . . the State of Oklahoma must agree to any proposed provision, enacted under federal law (TAS status)”).

Manner as a State (July 29, 2015), https://www.epa.gov/sites/default/files/2016-11/documents/tas_application.pdf. But Oklahoma ultimately chose not to renew the cooperation agreement, which led to the EPA denying the Potawatomi Nation’s TAS application under § 10211(b). *See* R. at 163.

The EPA also published a final rule under the Clean Water Act in 2016 regarding TAS for tribal nations and explained in the Federal Register Notice that § 10211(b) remains active and “applies apart from, and in addition to, existing TAS eligibility criteria” such that the EPA’s new rule “has no effect on the separate requirement of section 10211(b) of SAFETEA.” Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act, 81 Fed. Reg. 65901, 65907 (Sep. 26, 2016). As a result, the EPA maintained that “the SAFETEA requirement must be satisfied for a tribe in Oklahoma to obtain TAS to regulate under an EPA statute[.]” *Id.* at 65908.

In sum, the EPA has long interpreted § 10211 to remain active and has remained consistent in that view. Its views reinforce our conclusion that the provision remains in force. And because we conclude § 10211, taken in context, unambiguously dictates that it has not expired, we need not determine whether the presumption-against-permanence ambiguity-dependent canon applies to SAFETEA.

d. The Presumption Against Implied Repeals

Pawnee Nation also claims that another substantive canon—the presumption against implied repeals—tips the interpretive scales in its favor and compels us to find § 10211 is expired. It argues the May 2025 decision “treated [§ 10211(a)] as an

implied partial repeal of multiple federal statutes, which is disfavored.” Ptr’s Br. at 20.

It is true that “repeals by implication are not favored and are a rarity.” *Maine Cmty. Health Options*, 590 U.S. at 315 (citation modified). Thus, when we are “[p]resented with two statutes,” we “regard each as effective—unless Congress’ intention to repeal is clear and manifest, or the two laws are irreconcilable.” *Id.* (citation modified). And this “aversion to implied repeals is especially strong in the appropriations context.” *Id.* (internal quotation marks omitted).

The presumption against implied repeals, however, only applies when the statute is ambiguous. *See* *Kavanaugh, supra*, at 2154–55 (listing the “presum[ption] that statutes do not effectuate implied repeals of other statutes” as a substantive canon that “implicitly rest[s] on an initial finding of ambiguity”); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 142 (2001) (“The rarity with which the Court has discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.” (citation modified)); *Scalia & Garner, supra*, at 327–33 (“Doubts about the law will arise whenever a statute that *directly contradicts* an earlier enactment is not held to repeal it.” (emphasis added)). Only when the statute is ambiguous should courts “interpret the statute . . . not to effectuate an implied repeal[.]” *Kavanaugh, supra*, at 2155.

But because we concluded § 10211(a) did not expire, the presumption against implied repeals does not apply and does not alter our conclusion.

e. The Indian Law Canon

Finally, Pawnee Nation contends we should apply the Indian law substantive canon of construction.⁸ That canon counsels that “[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Accordingly, “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

But like the other substantive canons we discussed, the Indian law canon has no application when the statutory text is unambiguous. *See* Cohen’s Handbook of Federal Indian Law § 3.01, at 162 (Nell Jessup Newton & Kevin K. Washburn et al. eds., 2024 ed.) (“Cohen’s Handbook”) (“As interpretive tools, the canons come into play only when ambiguity exists.”); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (“The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.”); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1141 (1990) (“The [Indian law]

⁸ The dissent objects to our framing of “a singular” Indian canon because there are many “Indian canons” of construction that might apply. Dissenting Op. at 1–2. We acknowledge that there appears to be several variations of this canon, but because scholars disagree on their number and scope (and for simplicity’s sake) we refer to “an Indian canon that includes several rules.” *See* Evan D. Bernick, *Canon Against Conquest*, 2025 U. Ill. L. Rev. 1169, 1174–75 (2025).

canons apply . . . only where congressional intent is unclear; clear congressional intent controls, no matter how harsh the result.”).

We recognize that an en banc panel of this circuit in *NLRB v. Pueblo of San Juan* said that “[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory.” 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc). In that case, this court considered whether the National Labor Relations Act (NLRA) preempted the ability of the San Juan Pueblo tribal council to enact right-to-work laws. We concluded that because the NLRA made no “mention of Indian tribes,” its “silence” did “not work a divestiture of tribal power.” *Id.* Section 10211(a), however, is expressly *about* Indian country and makes clear that Oklahoma’s regulatory programs *can* apply there. Congress was thus not silent about the provision’s application to the tribal nations, unlike our conclusion that it was silent on that issue in the NLRA. *Cf. EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (applying the Indian law canon when interpreting the Age Discrimination and Employment Act (ADEA) because it found the ADEA ambiguous since the Act neither expressly included nor excluded tribal nations from its coverage).

The dissent, however, argues that we have erred “by conflating and combining the Indian canons into a single, ambiguity-resolving tool.” Dissenting Op. at 6. As the dissent sees it, there are many versions of the Indian law canon,⁹ including a

⁹ The dissent concludes that the so-called “liberal construction” variant of the canon has no application here because § 10211(a) was not enacted “for the benefit”

“clear statement rule” rooted in the federal government’s “trust responsibility” that broadly “protects a tribe’s sovereign interests . . . from all but the most ‘unequivocal expression of contrary legislative intent’ by Congress.” *Id.* at 6–7 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)). The dissent maintains that this clear statement rule requires that when an interpretation of a statute might undermine a tribal nation’s sovereign interests, the statute’s text must “affirmatively, clearly, unequivocally, and precisely support[]” such an interpretation. *Id.* at 13.

We disagree with that understanding of the canon; none of the relevant or established variations of the canon apply to § 10211(a) absent an ambiguity trigger. *See* Cohen’s Handbook at 156 (“When a source of law is unambiguous, the canons of construction will not come into play.”); Restatement of the L. of Am. Indians § 8 cmts. a, b (Am. L. Inst. 2022) (“The canon of construction of Indian statutes . . . does not apply to statutes that are not ambiguous.”); *United States v. Hebert*, No. 24-7030, slip op. at 44–45 (10th Cir. Oct. 14, 2026) (en banc) (rejecting appellant’s argument to apply the canon to protect the “right of tribal self-government” because the statute was not “ambiguous in a way that would invoke the Indian canon” (quotation marks

of the tribal nations. *See* Dissenting Op. at 5. We agree with the dissent’s conclusion but disagree with its characterization that there is a *separate*, standalone liberal-construction version of the canon. The liberal-construction requirement is simply part of resolving an ambiguity: we “liberally construe” Indian-affairs statutes *by* resolving ambiguities in favor of the tribal nations. *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (“Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (citation modified)).

omitted))). We recognize that scholars have outlined several supposed versions of the canon, including one that resembles the dissent’s sovereignty rule. For instance, one Indian law scholar wrote that “[t]here are arguably five such canons”: (1) a “treaty interpretation canon,” (2) a “treaty abrogation canon,” (3) a “tribal sovereign immunity canon,” (4) a “tribal sovereignty canon,” and (5) an “Indian ambiguity canon.” Alex Tallchief Skibine, 55 U. Mich. J. L. Reform 267, 268–70 (2022). But while the Supreme Court has been “inclined to apply the first two treaty-related cannons [sic], as well as the tribal sovereign immunity canon, it has rarely applied, or even discussed, the canons of tribal sovereignty and Indian ambiguity.” *Id.* at 269.

Even accepting a broad framing of the canon, only the last two seldom-applied versions could be relevant here. And as we explained, the ambiguity canon has no application here to unambiguous text. So the tribal sovereignty canon is the only potentially relevant variant that might support the dissent’s clear statement rule. But the tribal sovereignty variant is *not* a clear statement rule that applies at the outset of a court’s interpretation; it too requires an ambiguity. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980) (“*Ambiguities* in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.” (emphasis added)); *Pueblo of San Juan*, 276 F.3d at 1194 (“*Doubtful or ambiguous expressions . . . are to be construed as leaving tribal sovereignty undisturbed.*” (emphasis added)); Skibine, *supra*, at 269, 271 (“[T]he abrogation of sovereign immunity requires ‘unequivocal expression of congressional intent’ while *the*

abrogation of tribal sovereignty requires only ‘clear’ indication of congressional intent. . . . The difference between ‘clear indication’ and ‘unequivocal expression’ may sound like a matter of semantics, but the fact remains that the tribal sovereign immunity canon is being applied while the tribal sovereignty canon is not.”

(emphasis added)); Cohen’s Handbook at 153–54 (“The basic Indian law canons of construction require . . . that tribal property rights and sovereignty are preserved *unless Congress’s intent to the contrary is clear and unambiguous.*” (emphasis added)).

The dissent nevertheless creates its own overarching clear statement rule by relying on precedents that involved variations of the canon that have no application here. For example, the dissent quotes *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), to support the proposition that “the clear statement rule protects a tribe’s sovereign interests . . . from all but the most ‘unequivocal expression of contrary legislative intent’ by Congress.” Dissenting Op. at 7 (quoting *Santa Clara Pueblo*, 436 U.S. at 59); *see also id.* at 6 (“[C]ourts will not lightly assume that Congress in fact intends to undermine Indian self-government.” (quoting *Bay Mills Indian Cmty.*, 572 U.S. at 790)).

But in both *Santa Clara Pueblo* and *Bay Mills Indian Cmty.*, the issue before the Supreme Court was whether a federal statute abrogated a tribal nation’s *sovereign immunity*. To resolve that issue, the Court relied on the “baseline position” that to abrogate “tribal immunity, . . . Congress must unequivocally express that purpose.” *Bay Mills Indian Cmty.*, 572 U.S. at 790 (citation modified); *see also Santa Clara*

Pueblo, 436 U.S. at 58 (“It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” (quotation marks omitted)). And as explained, the tribal sovereign immunity canon is distinct from the dissent’s free-floating sovereignty clear statement rule. *Cf.* Skibine, *supra*, at 271 (“‘[S]overeign immunity’ is a discrete and well-defined area while tribal sovereignty is not[.]”). The other cases the dissent relies on also do not support its broad application of the canon. *See Blackfeet Tribe of Indians*, 471 U.S. at 766 (applying the Indian ambiguity canon with the principle that “the States may tax Indians only when Congress has manifested clearly its consent to such taxation”), *Pueblo of San Juan*, 276 F.3d at 1196 (concluding a federal law of general applicability did not preempt “a tribe’s sovereign authority to enact and enforce laws”). Therefore, the Indian law canon—as relevant here—only applies when a statute’s text is ambiguous.¹⁰

In sum, because we conclude the provision is unambiguous (in that it has not expired) the Indian law canon does not apply. *See Negonsott v. Samuels*, 507 U.S.

¹⁰ Contrary to the dissent’s assertion, the origins of the Indian law canon likewise do not support its novel clear statement rule. “The first Indian canons were developed in connection with interpreting *treaties* between the United States and Indian nations.” Skibine, *supra*, at 273 (emphasis added). “These canons then ‘jumped without discussion from the interpretation of treaties to the interpretation of statutes’ in the 20th century.” *Navajo Nation*, 599 U.S. at 572 (Thomas, J., concurring) (quoting Coney Barrett, *supra*, at 152). It was in *Choate v. Trapp*, 224 U.S. 665 (1912) that the Supreme Court—“without considering the potential impact of the structural differences between statutes and treaties”—extended the canons to the interpretation of statutes that Congress enacted to benefit tribal nations. *See* Coney Barrett, *supra*, at 152; *see also id.* at 151–52 (arguing the Court in *Choate* “overstated the case when [it] described the canon as . . . ‘a rule of construction [that] has been recognized, without exception, for more than a hundred years.’” (second alteration in original) (quoting *Choate*, 224 U.S. at 675)).

99, 110 (1993) (“[W]e think that the Kansas Act quite unambiguously confers jurisdiction on the State over major offenses committed by or against Indians on Indian reservations, and we therefore have no occasion to resort to this canon of statutory construction.”).

2. *The EPA’s Authority to Impose Conditions*

Pawnee Nation next argues that even if § 10211(a) is not expired, we should nevertheless set aside the May 2025 decision because the EPA revoked the State-Tribal Engagement Condition under an erroneous interpretation of the law. Despite interpreting the provision to allow it to impose the Engagement Condition in its January 2025 decision, the EPA reversed course, explaining in its May 2025 decision that § 10211(a) “imposes a nondiscretionary duty for EPA to approve a proper request and reserves no authority for EPA to impose additional requirements or otherwise constrain the State’s administration of the subject environmental regulatory programs.” R. at 1135. Because the EPA concluded that the provision “squarely prohibit[s] precisely the type of additional requirements imposed by the” Engagement Condition, the agency explained it had “no discretion but to withdraw the January 2025 Decision and replace it with a new approval that is legally compliant with the strictures of SAFETEA.” *Id.* at 1136.

Pawnee Nation contends the agency incorrectly read § 10211(a) to foreclose its ability to impose conditions on an approval of Oklahoma’s request.¹¹ It claims

¹¹ Of course, even if Pawnee Nation were correct that § 10211(a) affords the EPA discretion to impose conditions, the EPA could nonetheless exercise that

that nothing in § 10211(a) precludes the EPA from imposing conditions, so the agency may do so if another source of law authorizes the condition. Pawnee Nation also contends that the D.C. Circuit’s opinion in *Oklahoma Department of Environmental Quality v. EPA* supports its position because that court interpreted § 10211(a) to allow the agency to impose conditions. *See* 740 F.3d 185, 190 (D.C. Cir. 2014) (*Okla. DEQ*).

We are not persuaded. The text of the provision forecloses Pawnee Nation’s proffered interpretation in three ways and *Okla. DEQ* is not persuasive.

First, § 10211(a) commands that the EPA “*shall approve*” Oklahoma’s request to administer its programs in Indian country when the preceding statutory requirements are met. Congress’s “use of a mandatory ‘shall’ in” statutes directing agency action “impose[s] [a] directionless obligation[]” upon the agency. *Lopez v. Davis*, 531 U.S. 230, 241 (2001); Scalia & Garner, *supra*, at 114 (“[W]hen the word *shall* can reasonably be read as mandatory, it ought to be so read.”). The EPA therefore does not possess the discretion to approve Oklahoma’s request *only if* the State meets some *other* condition that the agency picks to impose. *See Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) (“Administrative agencies do not possess the discretion to avoid discharging duties that Congress intended them to

discretion to *not* impose any conditions. But because the EPA did not withdraw the Engagement Condition based on its (alleged) discretion to do so, we must determine whether its proffered reason for revoking the Condition—that it was without statutory authority to impose it in the first place—is in accordance with § 10211(a). *See Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (“EPA must ground its reasons for action or inaction in the statute.”).

perform.”). Under § 10211(a), the only conditions Oklahoma must satisfy are the statutorily enumerated ones preceding the shall-approve clause. Any other reading would nullify the mandatory term Congress included. Congress’s command that the EPA “shall approve” a valid request does not authorize the agency to shrink that approval by attaching a condition to it.

Second, if Oklahoma’s submitted regulatory program satisfies the enumerated statutory conditions, § 10211(a) requires the EPA to approve Oklahoma’s request “[n]otwithstanding any other provision of law” and “without any further demonstration of authority by the State.” Section 10211(a) (emphasis added). The notwithstanding clause means that even if some other source of law might allow, or even require, the EPA to take some action (*e.g.*, consult with the tribal nations under the agency’s 1984 Policy), § 10211(a)’s mandatory “shall approve” command overrides it. *See NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) (“A ‘notwithstanding’ clause . . . shows which of two or more provisions prevails in the event of a conflict.”); *Dickerson*, 310 U.S. at 555. As a result, the other sources of law Pawnee Nation cites that allegedly authorized the January 2025 Engagement Condition, *see* Ptr’s Br. at 40–44, are irrelevant—§ 10211(a) supersedes those extratextual sources of law, *see* Scalia & Garner, *supra*, at 127 (“[T]he catch-all *notwithstanding* is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail.”).

Third, § 10211(a)’s final shall-approve clause states, “the [EPA] shall approve [Oklahoma] to administer *the State program* in the areas of the State that are in

Indian country, without any further demonstration of authority by the State.”

Section 10211(a) (emphasis added). That clause’s use of the definite article “the” before “State program” indicates that the EPA must approve *the same State program* that the text of the provision previously introduced—*i.e.*, the State program that the EPA approved Oklahoma to administer in state territory.¹² *See* Scalia & Garner, *supra*, at 140 (“Words are to be given the meaning that proper grammar and usage would assign them.”). Under this definite-article grammatical principle, when a text uses a definite article for a term (*e.g.*, “the [noun]”), courts ordinarily presume it refers back to the same previously introduced term, regardless of whether the previous term followed a definite or indefinite article (*e.g.*, “a [noun]”). *See Nielsen v. Preap*, 586 U.S. 392, 408 (2019) (“[G]rammar and usage establish that ‘the’ is ‘a function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context.’” (second alteration in original) (quoting Merriam-Webster’s Collegiate Dictionary 1294 (11th ed. 2005))); *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008) (“The subsequent use of definite articles ‘the’ or ‘said’ in a claim [refers] back to the same claim term”); *GreenLatinos v. Suncor Energy*, 184 F.4th 1171, 1187 (10th Cir. 2026)

¹² The dissent disputes the definite-article principle since it is “an argument not made by EPA[.]” Dissenting Op. at 17. But we are not bound by a party’s failure to make a statutory interpretation argument. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”).

(“‘The’ is a definite article, and definite articles usually refer to something already specifically provided for.” (citation modified)). For example, suppose a statute states, “Motorists shall not drive *a six-wheeled (or more) vehicle* in the left lane, unless *the vehicle* is passing another vehicle.” Under this principle (and common sense), “the vehicle” in the second clause refers to the “six-wheeled (or more) vehicle” introduced in the first clause, such that the statute is talking about the same vehicle.

Applying this principle of grammar here reveals that § 10211(a)’s meets-applicable-requirements clause introduces *a State program* (“a regulatory program submitted by the State”), and the next clause, the previous-state-approval requirement, refers to that same State program (“*the State program*”). Section 10211(a) (emphasis added). Then, the final clause of the provision states the agency “shall approve [Oklahoma] to administer *the State program*” in Indian country if Oklahoma’s program satisfies the previous requirements. *Id.* (emphasis added). Because the EPA must approve Oklahoma to administer “the State program” in Indian country, the definite-article principle indicates the approved program must be *the same State program* that the provision introduced in the two previous clauses: the State program the agency approved in state territory and the same State program it found met applicable requirements of the law. The EPA thus cannot impose a new condition on the program it approves for Indian country or else it would not be the *same* State program.

The dissent argues that our discussion of the definite-article principle is off the mark because “the follow-on sameness inquiry does its most muscular work when there is *something else* that Congress could have been referring to.” Dissenting Op. at 18. And according to the dissent, “there is nothing else that the Congress could have been referring to, for as long as the program is administered by Oklahoma and remains an environmental program, it is the same as the one already referred to in the rider.” *Id.* But there is something else Congress could have referred to had it *not* used a definite article in the final shall-approve clause: a State program that contains an *additional extra-legal requirement (i.e., a condition)*. As we explained, “*the* State program” the EPA approves must be the same State program (“*a* regulatory program submitted by the State”) the EPA had determined met applicable requirements of the law. So if the EPA could impose another requirement—one not *already* required under the law—the resulting program would no longer be *the* (same) State program; it would be *a* (different) State program since it now contains a new, *extra-legal* requirement. Section 10211(a), however, forecloses such an interpretation because it requires the agency to approve *the* State program it determined met *all* applicable legal requirements.

Pawnee Nation nonetheless contends the D.C. Circuit “recogniz[ed] that EPA could attach conditions to approval of a SAFETEA request” in *Okla. DEQ*. Ptr’s Reply at 25. But Pawnee Nation overstates the relevance of that case because the D.C. Circuit in fact made no such interpretation. In *Okla. DEQ*, Oklahoma challenged an EPA rule that established a federal Clean Air Act implementation plan

in non-reservation Indian country. The EPA argued Oklahoma lacked Article III standing to challenge the rule because any injury the State suffered was of its own making since Oklahoma could have obtained regulatory authority over the relevant Indian country under SAFETEA § 10211(a).¹³ The D.C. Circuit rejected the EPA’s argument by *hypothetically* stating the provision *might* authorize the EPA to impose conditions on delegations of authority, and so “relief under the SAFETEA [was not] so certain or complete as to render Oklahoma’s injury self-inflicted.” *Okla. DEQ*, 740 F.3d at 190. *See also id.* (“As the State points out, the EPA *might* attach a condition to its approval . . . [a]nd *if* the EPA does interpret the SAFETEA as authorizing it to attach conditions, then the agency *might* well be entitled to judicial deference under [*Chevron*].” (emphasis added)). The D.C. Circuit, however, did not purport to interpret § 10211(a)’s language when raising its uncertain hypothetical. Accordingly, *Okla. DEQ* is not persuasive authority on the issue and does not displace § 10211(a)’s plain meaning.

Finally, Pawnee Nation again asserts that the Indian law canon should tip the scales in its favor. It argues that “EPA’s attempt to disclaim its authority [to impose conditions] not only misreads the text of the SAFETEA Rider but also ignores the established principle that ‘statutes are to be construed liberally in favor of the

¹³ It is unclear whether the EPA advanced a position in *Okla. DEQ* on whether it could impose conditions on an approval. But in any event, we do not afford the agency *Skidmore*-respect for its current interpretation that § 10211(a) does not grant it authority to impose conditions because the EPA has been inconsistent on the issue. *See Loper Bright*, 603 U.S. at 394.

Indians,’ and to minimize infringements on tribal sovereignty.” Ptr’s Br. at 38 (citations omitted) (quoting *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1108 (10th Cir. 2017)).

But as we explained, the Indian canon (or any of its relevant variants) only applies when a statute is ambiguous. *See supra* Section II.C.1.e. And as the dissent even acknowledges, “silence does not render the statute ambiguous” in the context of an ambiguity-dependent interpretive canon. Dissenting Op. at 13–14 (quoting *Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189, 1201 (10th Cir. 2019)). We conclude the provision is unambiguous on this issue, so the canon does not apply.

But even if we were to apply the dissent’s purported clear-statement rule, § 10211(a) is *not* silent on the issue because its text unequivocally supports our interpretation. As the dissent correctly concludes, the provision “is a clear statement by Congress to generally subvert tribal sovereignty to that of the State of Oklahoma.” Dissenting Op. at 14. That clear statement by itself is adequate to shield against any further application of the Indian canon. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387–88, 394 (2023) (recognizing a “clear-statement rule” protecting “tribal sovereign immunity,” but stating “[t]he rule is not a magic-words requirement The clear-statement question is simply whether, upon applying traditional tools of statutory interpretation, Congress’s abrogation of tribal sovereign immunity is clearly discernable from the statute itself. . . . As long as Congress speaks unequivocally, it passes the clear-statement

test—regardless of whether it articulated its intent in the *most* straightforward way.” (citation modified)).

We conclude § 10211(a) requires the EPA to approve Oklahoma’s submitted State program—without any conditions—when the program satisfies the provision’s enumerated requirements.

3. Section 10211’s Approval Requirements

Finally, Pawnee Nation argues the EPA misread the statutory requirements of § 10211(a) for approval of Oklahoma’s request. Pawnee Nation claims the EPA was required under the meets-applicable-requirements clause to make a *contemporaneous* determination (*i.e.*, at the time of Oklahoma’s § 10211(a) request) that Oklahoma’s programs comply with the law. In other words, it was not enough that the agency may have *previously* determined Oklahoma’s programs complied with federal law (*e.g.*, when the State originally submitted the programs for approval in state territory). Rather, the EPA must evaluate Oklahoma’s programs against federal law at the time of the State’s request to extend them to Indian country.

As applied to the issue in this petition, Pawnee Nation’s interpretation would require the EPA to determine that each of the twenty-six State programs that Oklahoma seeks to extend to Indian country meet applicable requirements under their relevant environmental statutes—even though the agency already made those determinations when it originally approved the State to administer the programs in state territory.

Pawnee Nation’s primary argument proceeds in two steps. First, it claims § 10211(a) lays out two requirements: (1) the agency must determine the State program “meets applicable requirements of the law,” *and* (2) the agency must approve Oklahoma to administer the program in state territory. And second, because the EPA necessarily determined that the State program complied with applicable law when it approved of it in state territory, Pawnee Nation argues § 10211(a)’s meets-applicable-requirements clause must then refer to a *different* determination, otherwise the clause would be rendered superfluous by the previous-state-approval clause.

We start our assessment of § 10211(a)’s plain meaning with “plain old grade school grammar[.]” *United States v. Rentz*, 777 F.3d 1105, 1110 (10th Cir. 2015) (en banc). We agree with Pawnee Nation that the provision contains two distinct requirements: the two independent clauses (meets-applicable-requirements and previous-state-approval) that precede the final shall-approve clause are separated by a comma and a coordinating conjunction (“and”). *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241–42 (1989) (finding the first clause in a statute was “distinct” and not “joined to the following clause” because the two clauses were “set aside by commas” and “the conjunctive words ‘*and any*’” (emphasis added)); Scalia & Garner, *supra*, at 141 (explaining the grammar canon dictates that a comma followed by “the conjunction *and*” is “equivalent to *together with*” which creates two “independent” clauses). But just because the two clauses are independent requirements does not tell us *when* the EPA must complete those requirements. For

instance, the EPA contends it is sufficient if both requirements were completed when the agency approved Oklahoma to administer the programs in state territory.

We agree with the EPA that the clauses outline a simple two-step procedure: the EPA must *first* determine whether the State program complies with the law, and *then* it must approve Oklahoma to administer the same program in state territory. If those requirements are met—no matter when the agency completed them—then the EPA must approve a request to administer that same State program in Indian country. This interpretation is reinforced by our previous discussion regarding the definite-article grammatical principle. *See supra* Section II.C.2. The meets-applicable-requirements clause introduces “a” State regulatory program that the EPA must determine complies with the law. The second clause then requires that the agency approve “*the* State program” in state territory. The principle indicates that “the State program” in the second clause is the same State program introduced in the first, *see Nielsen*, 586 U.S. at 408, so the first clause must precede the second in time.

Pawnee Nation is right that this two-step procedure makes the meets-applicable-requirements clause redundant in some circumstances, but that is not true in all applications. For example, our interpretation does not render the first clause superfluous for State programs that the agency has not yet approved Oklahoma to administer in state territory. In such cases, the EPA would need to *first* determine the newly submitted program complies with the law and *then* approve Oklahoma to administer the program in state territory before it could approve Oklahoma’s § 10211(a) request to extend the program to Indian country. And given that Congress

enacted the provision in 2005, it makes sense that its language contemplated yet-to-be enacted environmental laws and State programs seeking to implement them.

The first clause also does other work. The meets-applicable-requirements clause and the previous-state-approval clause are both framed in the present tense, which suggests that the EPA could deny Oklahoma’s request to administer a regulatory program in Indian country when the program is *not currently* approved in state territory, even if it was in the past. For example, if the EPA revoked Oklahoma’s authority to administer a program in state territory through its normal oversight process, it could deny a § 10211(a) request for that revoked program in Indian country: The EPA’s most recent determination about the State program would be that it does *not* meet applicable requirements of the law, even if it had previously determined otherwise when it originally approved of the program in state territory. The fact that the State’s submitted program must be subject to a *current* EPA approval resolves some of Pawnee Nation’s concerns about the potential lack of agency oversight over Oklahoma’s programs in Indian country. *See* Ptr’s Br. at 47–52.

And as the EPA itself acknowledged in the May 2025 decision, the agency retains its normal obligations and oversight authority under the substantive environmental statutes. *See* R. at 1137 (“Although SAFETEA mandates approval in the first instance, EPA notes that the Agency’s ordinary statutory and regulatory authorities to oversee and review state programs will continue to apply as the programs are implemented going forward.”). So even though the EPA is not required

in this situation to make new determinations on the State programs' compliance with federal law under § 10211(a), the agency will still make those determinations on an ongoing basis through its normal oversight process.

Pawnee Nation also argues that the meets-applicable-requirements clause's present verb tense supports its interpretation that the EPA must make a contemporaneous determination that the State programs comply with the law. *See* Section 10211(a) ("if [the EPA] *determines* that [a State program] submitted by [Oklahoma] for approval . . . *meets* applicable requirements of the law" (emphasis added)).

But the first clause also contains a verb phrased in the past tense: "a regulatory program *submitted* by [Oklahoma] for approval" *Id.* (emphasis added). This at least suggests that the State could have submitted the program before its § 10211(a) request. Further debunking the significance of the provision's verb tense is the fact that the second clause (the previous-state-approval requirement) is also framed in the present tense. *See id.* ("and [the EPA] *approves* the State to administer the State program [in state territory]" (emphasis added)). But no one is suggesting that the agency must contemporaneously reapprove of Oklahoma's program in state territory because the agency's prior state approval was in the past and thus ineffectual under § 10211(a).

And as we explained previously, our conclusion that the clauses set out a simple two-step process aligns with Congress's choice to phrase the clauses in the present tense. For example, if Oklahoma wanted to administer a regulatory program

in Indian country under § 10211(a) that the EPA had not yet approved of in state territory, the steps would occur in order. But that does not mean that past determinations and approvals do not also satisfy the provision. While verb tense may sometimes be useful to decipher the best reading of a statute, we conclude that it does not point strongly in either direction for this issue. And because the plain meaning is clear, we do not apply the Indian law canon. *See Catawba Indian Tribe, Inc.*, 476 U.S. at 506.

We therefore conclude the EPA correctly determined Oklahoma's programs satisfied § 10211(a)'s meets-applicable-requirements clause when the agency previously approved the State to administer those programs in state territory.

III. Conclusion

For these reasons, we deny Pawnee Nation's petition and affirm the EPA's interpretation of § 10211(a).

25-9548, *Pawnee Nation of Oklahoma v. Zeldin, et al.*

TYMKOVICH, Circuit Judge, concurring.

I write separately to clarify that the presumption against permanence does not apply to SAFETEA, even if we were to reach the canon because of a textual ambiguity. No court has ever applied the presumption to a statute beyond a single-year appropriations act. SAFETEA was no such act: it was an authorization act that primarily established and funded various transportation-related projects, *some* of which lasted for only five years. I would not expand the scope of this ahistorical and not-constitutionally based substantive canon by applying it to a general provision in a multi-year authorization act. *See Jones v. Hendrix*, 599 U.S. 465, 492 (2023).

As we explained, the courts that have applied the canon trace its origins to the Supreme Court’s decision in *Minis v. United States*, 40 U.S. (15 Pet.) 423 (1841). *See* Majority Op., *supra* Section II.C.1.a. The provision at issue in *Minis* was located within “an act making certain additional appropriations for the Delaware Breakwater, and for certain harbors, and removing obstructions in and at the mouth of certain rivers, *for the year 1835*.” 40 U.S. at 445 (emphasis added). Justice Story described the statute as “an act making special and temporary appropriations,” or as he also put it, “a mere appropriation law of a limited nature[.]” *Id.*

Each circuit that has since applied a presumption against permanence was also considering a provision in a *single-year appropriations bill*. *See, e.g., Atl. Fish Spotters Ass’n v. Evans*, 321 F.3d 220, 228 (1st Cir. 2003) (Appropriations bill at issue stated, “No part of any appropriation contained in this Act shall remain

available for obligation beyond the *current fiscal year* unless expressly so provided herein.” (emphasis added) (quoting Pub. L. No. 106–553, app. B § 602)); *see also Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 141, 146–47 (2d Cir. 2002) (finding a provision in “the 1999 Veteran Affairs and HUD Appropriations Act (‘the 1999 Appropriations Act’)” did not affect a permanent change in substantive law (internal citation omitted)); Pub. L. No. 105-276, 112 Stat. 2461 (1998) (preamble to the 1999 Appropriations Act at issue in *Martinez* stated, “An Act making appropriations for the Departments of Veterans Affairs and Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices *for the fiscal year ending September 30, 1999*[.]” (emphasis added)).

For example, the D.C. Circuit applied the presumption to a provision in a single year “emergency supplemental appropriations bill” and found the provision expired because it “used no words of futurity or permanency.” *Bldg. & Constr. Trades Dep’t, AFL-CIO v. Martin*, 961 F.2d 269, 273–74 (D.C. Cir. 1992). The appropriations bill at issue stated in its preamble that its purpose was to “provide dire emergency supplemental appropriations *for the fiscal year ending September 30, 1991*[.]” Pub. L. No. 102-27, 105 Stat. 130 (1991) (emphasis added). The D.C. Circuit stated, “While appropriation acts are Acts of Congress which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for *one fiscal year*.” *Bldg. & Constr. Trades Dep’t*, 961 F.2d at 273 (emphasis added) (citation modified) (citing

Minis, 40 U.S. at 443). It thus made sense for the D.C. Circuit to presume *all* provisions in that statute were limited to the 1991 fiscal year.

And in *Tin Cup, LLC v. United States Army Corps of Engineers*, the Ninth Circuit applied the presumption to a substantive provision in “the Energy and Water Development Appropriations Act of 1993.” 904 F.3d 1068, 1071 (9th Cir. 2018). The preamble to that Act stated its purpose was to “mak[e] appropriations for energy and water development *for the fiscal year ending September 30, 1993[.]*” Pub. L. No. 102-377, 106 Stat. 1315 (1992) (emphasis added). Citing *Minis*, the Ninth Circuit explained, “There is . . . a very strong presumption that if an appropriations act changes substantive law, it does so only for the fiscal year for which the bill was passed.” *Tin Cup*, 904 F.3d at 1073 (internal quotation marks omitted). The Ninth Circuit thus applied the presumption and found the provision at issue expired because it did “not contain a clear statement of futurity.” *Id.*

Restricting the presumption against permanence to apply only to annual appropriations acts makes sense given that the canon is grounded in Congress’s standing rules against including general legislation in *appropriations bills*. See *United States v. Vulte*, 233 U.S. 509, 515 (1914) (“[*Minis*’s reasoning] follows naturally from the nature of appropriation bills, and the presumption hence arising is fortified by the rules of the Senate and House of Representatives.”); *United States v. Will*, 449 U.S. 200, 222 (1980) (“[T]he rules of both Houses limit the ability to change substantive law through appropriations measures.” (citing Senate Standing

Rule XVI(4); House of Representatives Rule XXI(2))). There is, of course, no such rule against including general legislation in authorization bills.

Congress also seems to have codified the presumption-against-permanence substantive canon into law as applying to *appropriations* acts. Section 1301 of Title 31 to the U.S. Code states, “An appropriation in a regular, *annual appropriation law* may be construed to be permanent or available continuously only if the appropriation . . . expressly provides that it is available after *the fiscal year covered by the law* in which it appears.” 31 U.S.C. § 1301(c) (emphasis added). See Majority Op., *supra* Section II.C.1.a., at n.3 (explaining we held in *Smithsfork Grazing Ass’n v. Salazar*, 564 F.3d 1210 (10th Cir. 2009) that under 31 U.S.C. § 1301 Congress must clearly state a provision in an annual appropriations act is permanent for us to construe it as such). But Pawnee Nation did not raise this statute on appeal because § 1301 makes clear the presumption only applies to an *annual appropriations act*.

Despite the fact that no court has ever applied the presumption to a statute outside of an annual appropriations act, Pawnee Nation contends that other authorities say the canon can also apply to authorization acts. But the authorities Pawnee Nation cites that say as much still only discuss statutes enacted for a *single fiscal year*. See, e.g., Ptr’s Reply at 12 (quoting Security Clearances at DOE, Comptroller Gen., B-248926, 1992 WL 130552, at *3 (May 29, 1992) (“A general rule regarding construction of *annual* authorization and appropriations acts is that, absent a clear expression of permanence, material contained therein . . . is effective only for *one year*.” (emphasis added))); *id.* (quoting Peter Raven-Hansen, et al.,

Pulling the Purse Strings of the Commander in Chief, 80 Va. L. Rev. 833, 876 (1994) (“[M]ost appropriation and many authorization acts that may restrict appropriations are *single-year* legislation. Thus, substantive provisions contained in *annual* legislation are presumed effective only *for the fiscal year*.” (emphasis added)); see also U.S. Gov’t Accountability Off., GAO-16-464SP, Principles of Federal Appropriations Law 2-86 (4th ed. 2016), [https://www.gao.gov/assets/2019-11/675709.pdf](https://www.gao.gov/assets/2019/11/675709.pdf) (hereinafter “GAO Redbook”) (“Since an appropriation act is made for *a particular fiscal year*, the starting presumption is that everything contained in the act is effective only for *the fiscal year covered*. Thus, the rule is: A provision contained in an *annual* appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent.” (emphasis added)).

For all these reasons, I have no trouble concluding that the so-called presumption-against-permanence substantive canon applies only to appropriations acts covering a single fiscal year. And with that determination in hand, the fact that the canon does not apply to § 10211 is a foregone conclusion.

One must not forget that SAFETEA was not an appropriations act; it was an authorization act that, among many other things, authorized and funded various transportation programs for multiple fiscal years. The preamble for SAFETEA states it is “[a]n Act To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.” Pub. L. No. 109-59, 119 Stat. 1144 (2005). Unlike the statutes at issue in the cases I discussed above that

applied the canon, SAFETEA was not titled as an appropriations act, nor did it state in its preamble that it was only in effect for a single fiscal year.

And to the extent that the difference between a five-year spending act and a single-year appropriations act does not seem significant, SAFETEA was not *solely* a five-year spending act, it contained a variety of provisions. Although many parts of SAFETEA were only in effect for fiscal years 2005 to 2009, other provisions had no sunset date—just like § 10211. For instance, if the Act instead stated in its preamble that its purpose was “To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes [*for the fiscal years 2005 to 2009*]” then perhaps I could envision applying the canon to a multi-year statute like SAFETEA to presume Congress did not intend § 10211 to endure past September 30, 2009. *See* Pub. L. No. 109-59, 119 Stat. 1144 (2005).

In sum, we would be extending the narrow presumption against permanence well beyond its previous application if we applied it to § 10211. Doing so would cause us to reach back over twenty years to impose a post-hoc clarity tax on Congress—requiring it to have used words of futurity on a *multi-year non-* appropriations bill. But because no court had ever applied the presumption to such a bill and no congressional rule prohibited inclusion of general legislation in authorization acts, Congress could not have legislated with such a requirement in mind, and we should not presume it did.

Even if we were to apply the presumption, § 10211(a) overcomes it because its text clearly indicates it is not expired.

Pawnee Nation claims that § 10211's absence from the U.S. Code supports its argument that the provision is expired. But while "formal codification of a provision is 'relevant' in considering permanence, . . . it is 'not controlling.'" Kieran O'Neil, *In the Room Where It Happens: How Federal Appropriations Law Can Enforce Tribal Consultation Policies and Protect Native Subsistence Rights in Alaska*, 98 Wash. L. Rev. 659, 717 (2023) (quoting GAO Redbook at 2-90). "The GAO Principles require us to look to Congress's reasoning for not codifying as evidence of non-permanence, but '*failure to include a provision in the Code would appear to be of no significance*' in determining Congress's intent regarding permanence." *Id.* at 717–18 (emphasis added) (quoting GAO Redbook at 2-90).

Additionally, the fact that § 10211's subject matter is completely unrelated to the funding portions of SAFETEA strongly displaces the presumption. The U.S. Government Accountability Office's Redbook states, "The presumption [against permanence] can be overcome if the provision uses language indicating futurity *or if the provision is of a general character bearing no relation to the object of the appropriation.*" GAO Redbook at 2-86 (emphasis added). "If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence." *Id.* at 2-92. The Supreme Court in *Minis* likewise suggested that a remote degree of relationship indicates permanence: "A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some *distinct and independent enactment.*" 40 U.S. at 445–46 (emphasis added); *see also Atl. Fish Spotters Ass'n*, 321 F.3d at 225 (considering the degree of relationship when

determining whether Congress intended a provision in an appropriations bill to be permanent).

The degree of relationship between the subject matter of the provision and the surrounding text of the appropriations law bears strongly on permanent intent. . . . [T]he more general and distant a provision is from the subject matter of an appropriations law, the more likely a court will view it as permanent legislation. For instance, the 1984 Comptroller General of the United States, Milton J. Socolar, analyzed a provision relating to energy tax credits embedded within a miscellaneous section of the Supplemental Appropriations Act of 1983. The surrounding text did not include appropriations related to taxes or energy. Finding the provision in question “include[d] no such reference limiting its effect to the life of an appropriation” and “[stood] in marked contrast” to the other provisions in the section, Comptroller Socolar concluded that the provision was intended to be permanent legislation.

O’Neil, *supra*, at 719–20 (second and third alterations in original) (quoting Sen. Hatfield, U.S. Comm. on Appropriations, B-214058 (Comp. Gen. Feb. 1, 1984)).

Like the tax provision in the Supplemental Appropriations Act of 1983, § 10211 is in a miscellaneous section of SAFETEA and sharply diverges from the transportation-related funding provisions that sunset in 2009. The weak relationship between § 10211 and the rest of SAFETEA provides strong evidence that Congress intended it to be permanent legislation.

So in addition to our determination that the presumption against permanence does not apply because it is only an ambiguity-resolving canon, I would also conclude that it does not apply to a multi-year authorization act like SAFETEA, and that even if it were to apply, § 10211(a)’s text clearly overcomes the presumption.

No. 25-9548, *Pawnee Nation of Oklahoma v. Zeldin*
FEDERICO, Circuit Judge, dissenting.

I part company with the majority opinion because it makes two fundamental errors. First, it too narrowly construes the Indian canons – that is, canons plural, not a singular canon as the majority interprets it – and then, once narrowed, misapplies the canons to the language of the statutory rider inserted into SAFETEA as § 10211(a) (rider).

The Indian canons rest upon a foundation of respect for tribal sovereignty and the federal government’s general trust responsibility to the tribes. Here, however, EPA relies on the rider – an uncodified, last-minute addition to a 2005 transportation funding bill – to lay down a vast upheaval of environmental and Indian policy in Oklahoma. Through the rider, EPA authorized the State of Oklahoma to administer its environmental programs in Indian country, rather than EPA or the tribes themselves. Although the rider permits this upheaval, it does not also require the Pawnee Nation and other tribes to be completely cut out of the deal. This court should not so readily acquiesce to the total displacement of the tribes as the first sovereigns of their land absent a clear statement from Congress to the contrary.

A proper application of the canons renders a conclusion that when applying the mandate of the rider, EPA does have the discretion and authority to impose at least some tribal-protective conditions on Oklahoma’s regulatory

jurisdiction and administration of environmental programs in Indian country. Because EPA concluded otherwise, I would grant Pawnee Nation’s petition and remand back to EPA to reconsider its agency decision. Relying upon first principles in Indian law, I respectfully dissent.

I

The majority engages in a hypertextual analysis to find the rider is unambiguous and thus the Indian law canon “has no application.” Majority at 32. I cannot square this holding with the Supreme Court’s pronouncement “that the standard principles of statutory construction do not have their usual force in cases involving Indian law,” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), or with a recognition by this court, sitting en banc, that “[i]n the context of Indian law, appeals to ‘plain language’ or ‘plain meaning’ must give way to canons of statutory construction peculiar to Indian law.” *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc).

As a starting point, there is no such thing as “the” Indian canon – there are many. As summarized by a respected treatise:

The basic Indian law canons of construction require: first, that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians; second, that all ambiguities are to be resolved in their favor; third that treaties and agreements are to be construed as the Indians would have understood them; and fourth, that tribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.

Felix Cohen, Handbook of Federal Indian Law § 3.01[1], 153–54 (2024 ed.) (hereinafter Cohen’s Handbook); *see also HRI, Inc. v. EPA*, 198 F.3d 1224, 1244-45 (10th Cir. 2000) (discussing Indian canons of statutory construction, “derived from the trust relationship, requiring construction of statutes liberally in favor of Indians *and* resolution of ambiguities in their favor.”) (emphasis added).

This collection of rules dates to before the Founding, when the Law of Nations governed the relationship between the tribes and the crowns of Europe. *See, e.g., Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 584 (1823) (Marshall, C.J.) (tracing the suzerainty of the federal government over the Indians to inherited principles of customary international law that “all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others”). By custom and treaty-making, certain conventions emerged between the United States and the tribes to regulate their relationships, and the Indian canons are vestiges of these practices. *Cf. Arizona v. Navajo Nation*, 599 U.S. 555, 572 (2023) (Thomas, J., concurring); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 151-52 (2010).

The link between the Indian canons and the old principles of international law has eroded over time. *See* Act of Mar. 3, 1871, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71) (ending treaty-making with the

Indians). *But see United States v. Lara*, 541 U.S. 193, 201 (2004); *id.* at 218 (Thomas, J., concurring) (Act of Mar. 3, 1871 is “constitutionally suspect”). And although the Indian canons share a theoretical and historical source, practical limitations distinguish them.

Consider, for example, the liberal construction canon. The Supreme Court has “consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be ‘construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.’” *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982) (alterations in original) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)). As this court has explained, “normal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue.” *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989). The principle of liberal construction may sometimes require that we indulge an otherwise unnatural reading of the statute, even at the expense of “plain meaning,” to vindicate the background rule against which Congress legislates – tribal sovereignty. *Pueblo of San Juan*, 276 F.3d at 1196.

But in the Supreme Court’s caselaw, there is an important limit on the canon of liberal construction – it applies only to “statutes passed for the benefit of dependent Indian tribes or communities.” *Alaska Pac. Fisheries Co. v.*

United States, 248 U.S. 78, 89 (1918). The Supreme Court has suggested that this language is not mere rhetoric, but in fact a substantive limit on the application of this canon of liberal construction. *See, e.g., Negonsott v. Samuels*, 507 U.S. 99, 110 (1993). That limit sensibly reconciles the liberal construction canon with a broader justification that we generally read legal texts in context, including their object and purpose. *See Gundy v. United States*, 588 U.S. 128, 141 (2019) (Kagan, J., plurality). Where a statute is enacted “for the benefit” of the tribe, it makes sense to liberally construe its provisions in favor of the Indians, preferring even an otherwise less natural reading of the text because the context-based purpose points in that direction. *Negonsott*, 507 U.S. at 110 (quoting *Bryan*, 426 U.S. at 392). However, where a statute is not so enacted, the justification for liberal construction dissipates.

That distinction matters when considering this rider. Indeed, the obvious purpose of the rider was to prioritize Oklahoma’s sovereignty over that of the tribes in Indian country. So, were it only a matter of the liberal construction canon (or the resolving ambiguities canon, as the majority applies), the Indian canons of construction may not aide the Pawnee Nation.

But compare the liberal construction canon with the clear statement rule. “That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.”

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014). “We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so.” *Pueblo of San Juan*, 276 F.3d at 1195. “The correct presumption is that silence does not work a divestiture of tribal power.” *Id.* at 1196.

The majority side-steps the clear statement rule by conflating and combining the Indian canons into a single, ambiguity-resolving tool. However, the trigger point for the clear statement rule and its primary limiting principle is the tribe’s sovereign interests, when a tribal interest rooted in sovereignty can be identified. *See, e.g., Pueblo of San Juan*, 276 F.3d at 1198–99 (A Tribe’s “[p]roprietary interests and sovereign interests are separate: One can own land without having the power to govern it by policy determinations as a sovereign, and a government may exercise sovereign authority over land it does not own.”); *id.* at 1192–93.

A tribe’s sovereign interests range widely, from its interest in being free from suits without its consent, *see, e.g., Bay Mills*, 572 U.S. at 788, to its interest in the welfare of its children, *see, e.g., 25 U.S.C. § 1901(3)*, to its interest in exercising “civil authority” over affairs pertaining to “the political integrity, the economic security, or the health or welfare of the tribe,” *Montana v. United States*, 450 U.S. 544, 566 (1981). Sometimes these interests may not align with the interests of individual members of the tribe. *See, e.g., Santa*

Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (Tribe’s sovereign immunity from suit barred access to federal forum for tribe member in intratribal dispute). Even so, the clear statement rule protects a tribe’s sovereign interests, even against the interests of its members, from all but the most “unequivocal expression of contrary legislative intent” by Congress.¹ *Id.*

The canons collectively support a larger principle that forms the bedrock of federal Indian law: the trust responsibility. At its most general, the trust responsibility reflects the custom born of consistent practice that has arisen between the tribes and the United States. The Supreme Court “has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). The Government’s “conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.” *Id.* at 297; *see also United States v. Mitchell*, 463 U.S. 206, 225 (1983) (referring to

¹ The majority argues the clear statement rule, as discussed here, is unsupported by caselaw and attempts to distinguish the cited cases on the basis that a tribe’s sovereign immunity is different from a tribe’s sovereignty. Majority Op. 35–37. And that while the clear statement rule may apply when a statute seeks to destroy a tribe’s sovereign immunity, it does not equally apply when dealing with a tribe’s sovereignty interest. But this court, in *Pueblo of San Juan*, required a clear statement by Congress to divest a tribe’s sovereignty interest, without any application or analysis into a tribe’s sovereign immunity. 276 F.3d at 1194–98. Thus, the distinction parsed by the majority does not persuade.

“undisputed existence of a general trust relationship between the United States and the Indian people” as a “principle [that] has long dominated the Government’s dealings with Indians”).

Thus, the Indian canons have a common source – the inherent sovereignty of the tribes. They share a common end as well – the continued sovereignty of the tribes, a concept bound up in the Government’s trust responsibility to ensure the welfare of the tribes.

For more than forty years, these principles have also been embedded in EPA policy. Although EPA had “previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments,” EPA precipitated a need in 1984 to “consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal ‘self-government’ and ‘government-to-government’ relations between Federal and Tribal Governments.” EPA Policy for the Administration of Environmental Programs on Indian Reservations 1 (Nov. 8, 1984) (R. I at 1, hereinafter 1984 EPA Policy). EPA distilled several specific administrative planks by which it would implement this policy. As relevant here:

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as

EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

Id. at 2. Moreover, EPA took the position that “[u]ntil Tribal Governments are willing and able to assume full responsibility for delegable programs the Agency [and not the states] will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government).” *Id.* So, for nearly as long as there have been environmental laws to administer, EPA policy has put respect for tribal sovereignty at the forefront. *Id.*; *see also Wash. Dep’t. of Ecology v. EPA*, 752 F.2d 1465, 1470 (9th Cir. 1985) (“Respect for the long tradition of tribal sovereignty and self-government . . . underlies the rule that state jurisdiction over Indians in Indian country will not be easily implied.”); *Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm’n*, 829 F.2d 967, 976 (10th Cir. 1987).

In sum, the Indian canons do significant work in how this court interprets the rider. Concluding the rider is not ambiguous, the majority cast aside the canons and conclude “the Indian law canon does not apply.” Majority at 37. The majority continues that even if it were to apply, the rider’s clear statement subverting tribal sovereignty “shield[s] against any further application of the Indian canon.” *Id.* at 45.

But the majority misses a critical distinction. Even under the majority's interpretation that the canon applies only if a statute is ambiguous, it misses that the rider is ambiguous because it is silent as to the precise issue that Pawnee Nation raises. That is, the rider is silent as to whether approving Oklahoma to administer EPA programs in Indian country allows EPA to place some additional conditions on its approval. The principle that courts must not construe statutes to abrogate tribal sovereignty absent a clear statement of congressional intent to do so creates the very ambiguity that the majority finds lacking.

On the one hand, the rider unambiguously limits and diminishes tribal sovereignty by allowing Oklahoma to assume administrative control over environmental programs on tribal land. On the other hand, the rider is silent as to whether allowing Oklahoma to administer EPA programs also permits EPA to impose additional conditions in delegating its administrative powers. This silence requires the court to apply the Indian canons to resolve the resultant ambiguity. In other words, congressional silence in this context, where tribal sovereignty and state sovereignty collide, means the rider should not be construed to turn the EPA into a rubber stamp. This error became evident when the majority considered whether EPA has discretion under the rider to impose tribal consultation conditions upon Oklahoma, which is where I next turn.

II

In January 2025, EPA approved, by a letter to Governor Stitt, Oklahoma’s request to administer environmental programs in Indian country. R. XV at 1. The letter also explained that, “[t]ypically, EPA excludes Indian country from its approvals of state environmental regulatory programs,” *id.* at 2, but EPA relied upon the rider to grant Oklahoma’s request to administer its programs in Indian country. The approval included a condition that the State must consult with the tribes. *Id.* at 6. EPA anticipated “that this condition will not prove unduly burdensome, will help ensure that views of the affected sovereign Tribes are appropriately incorporated into environmental decision making in their areas of Indian country, and will thereby avoid unnecessary potential conflicts and improve environmental regulation in the covered areas.” *Id.* at 1–2. Also, and salient to this issue before this court, EPA, referring to the rider, concluded “[t]he statute does not preclude such a condition[.]” *Id.* at 6.

Four months later, in May 2025, EPA withdrew the January decision and entered the final agency decision that led to this litigation. The May letter explained EPA’s current view that the rider “provides EPA no discretion to incorporate additional factors or requirements in rendering its approval.” R. XVIII at 16 n.4. So, although the language of the rider did not change between January and May 2025, it was read differently by EPA after a change in

presidential administrations. This wedge between the two EPA letters – and EPA’s differing conclusion on whether the rider gives it discretion to impose a tribal consultation condition on Oklahoma – is the same wedge between the majority’s opinion for the court and this dissent.

Pawnee Nation argues that EPA’s decision eliminating the tribal engagement condition should be set aside because the rider does not preclude agency discretion to impose tribe-protective conditions on Oklahoma’s regulatory jurisdiction in Indian country. Pawnee Nation is correct. Their sovereign interests are deeply affected by EPA’s decision, so EPA must point to clear language in the statute that overrides its trust responsibility to safeguard tribal sovereignty. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). The rider contains no such language.

Pawnee Nation retains a sovereign interest in administering environmental programs in Indian country. EPA’s 1984 Policy recognizes as much. EPA 1984 Policy at 2. And Congress’ repeated authorization for EPA to treat tribes as states for the purposes of federal environmental law manifests legislative recognition, accompanied by long-standing executive practice, that tribes have a substantial sovereign interest in environmental affairs. *See Washington Dep’t of Ecology v. EPA*, 752 F.2d 1465, 1471 (9th Cir. 1985) (“The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several

environmental statutes that give Indian tribes a measure of control over policymaking or program administration or both.”); *Wisconsin v. EPA*, 266 F.3d 741, 750 (7th Cir. 2001). There is no question the rider implicates this interest; though it acts on tribes indirectly through EPA, its purpose and effect are unquestionably targeted at the tribes’ sovereign interests. Thus, the clear statement rule is triggered, and this Indian canon of construction aides the interpretation of this rider.

The majority endorses the EPA’s first line defense, that the rider is not ambiguous, and so “the canon” is inapplicable. Majority at 32; Resp. Br. at 55. But for reasons previously canvassed, both the majority and EPA overlook how congressional silence creates ambiguity in the statutory language and requires application of the clear statement canon.

“Ambiguity canons merely instruct courts on how to ‘choos[e] between equally plausible interpretations of ambiguous text,’ and are thus weaker than clear-statement rules.” *West Virginia v. EPA*, 597 U.S. 697, 742 n.3 (2022) (Gorsuch, J., concurring) (alteration in original) (quoting Barrett, *Substantive Canons and Faithful Agency*, at 109). Here, the issue is not solely whether the statute is ambiguous, but whether the statutory rider affirmatively, clearly, unequivocally, and precisely supports EPA’s interpretation that it has no discretion under the rider but to approve, or not, Oklahoma’s request. In the former context, this court has said that “silence does not render the statute

ambiguous.” *Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189, 1201 (10th Cir. 2019). But in the latter, the clear statement rule context, silence is insufficient to impinge tribal sovereign interests. “Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (alterations in original) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)); see also *Pueblo of San Juan*, 276 F.3d at 1195. Here, the expounded principles collide and create a situation in which congressional silence itself creates the very ambiguity the canons are to resolve. Although silence alone may not typically give rise to an ambiguity, it can do so when, as here, the rider prioritizes Oklahoma and divests the tribe’s sovereignty but does not dictate all the contours of that delegation.

Even so, in applying the clear statement rule, I am also clear-eyed about what the rider *does* obviously do – it requires EPA to treat Oklahoma, not the tribes, as the primary non-federal party in Indian country environmental programming, and it prevents the EPA from treating a tribe as a state for the purposes of federal environmental law without Oklahoma’s consent. So, I agree with the majority that the rider is a clear statement by Congress to generally subvert tribal sovereignty to that of the State of Oklahoma.

However, contrary to the majority’s assertion, this does not end the inquiry, nor does it require that the canons be set to the side as inapplicable. The statutory text of the rider does not address the precise issue that Pawnee Nation raises – whether EPA has the authority to impose at least *some* tribe-protective conditions on Oklahoma’s regulatory jurisdiction. At best, the statute is silent as to this specific issue. Therein lies the ambiguity.

Most illustratively, the rider expressly subjects Oklahoma to “applicable requirements of the [federal environmental] law.” SAFETEA § 10211(a). And it has been EPA’s longstanding position that among the applicable requirements of substantive environmental law is that state programming cannot diminish tribal sovereignty. *See Washington Dep’t of Ecology*, 752 F.2d at 1472. While EPA has often protected tribal sovereignty over the environment by outright prohibiting state programming in Indian country, “the power to do the greater necessarily carries with it the right to do the lesser” in administrative law. *McClellan v. Chipman*, 164 U.S. 347, 360 (1896). And while Congress addressed two of EPA’s principal, greater powers, it did not address any lesser powers, like limited conditioning of state environmental regulatory jurisdiction for the purpose of vindicating tribal sovereignty. Therefore, the rider is ambiguous as to whether EPA can place conditions when it allows a state to administer EPA programs in Indian country due to congressional silence as to the extent EPA must delegate its trust

responsibility to Oklahoma. This ambiguity triggers the application of the canons.

The majority solely performs a textual analysis of the rider to conclude that it does not permit EPA any discretion to impose tribe-protective conditions. But this analysis is insufficient to overcome the clear statement rule. Adopting EPA's primary argument, the majority points to the statute's use of the phrase "shall approve" to argue that EPA lacked any discretion to approve conditionally. Majority at 39. The error here, however, is in viewing mandatory requirements as necessarily and mutually exclusive of discretion in the carrying out of that requirement. Congress often imposes mandatory requirements to exercise discretion in particular ways or tolerates certain degrees of discretion in the execution of mandatory requirements, so long as the requirement is fulfilled. *See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 671 (2007); *see also id.* at 692 (Stevens, J., dissenting).

Other provisions of the rider do not assist EPA. First, the prefatory phrase "[n]otwithstanding any other provision of law" does not bar EPA from relying on independent sources of authority because, later in the same sentence, the statute incorporates those independent sources by reference to the "applicable requirements" of the federal environmental law under which Oklahoma seeks regulatory jurisdiction. SAFETEA § 10211(a). As explained,

EPA has consistently rooted respect for tribal sovereignty as an underlying principle of substantive federal environmental law.

Second, the phrase “without any further demonstration of authority” is not a clear statement to divest EPA of authority to impose conditions. *Id.* The best reading of “demonstration of authority” is that it refers to the default framework for adjudicating disputes between state and tribal civil regulatory jurisdiction, known as *Bracker* balancing. *See Bracker*, 448 U.S. at 143–45; *Montana v. United States*, 450 U.S. 544, 565–66 (1981); *see also* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64878 (Dec. 12, 1991) (suggesting EPA will use this framework to adjudicate state-tribal conflicts). In any event, a requirement to consult with the tribes, as imposed by EPA in its now-vacated January 2025 Decision, is not a “further demonstration of authority,” and EPA does not argue that it is. Perhaps more substantive requirements might violate this language in the rider, but the January 2025 EPA decision to require engagement and consultation does not.

The majority’s next textual point (an argument not made by EPA) is that construing the rider to reserve to the agency the authority to condition Oklahoma’s programming would somehow transform Oklahoma’s program such that it would cease to be “*the same State program*” as the one previously submitted. Majority at 40–42 (emphasis in original). Of course, the rider does

not use the word “same,” and if EPA puts conditions on Oklahoma’s state program, it does not cease to be the same state program under environmental law. It cannot be otherwise, or else EPA has certainly violated the terms of rider because the programs it approved in May 2025 cannot be the *exact* same as the Oklahoma programs previously submitted and which EPA determined, at some long-ago time, met applicable requirements.

What the majority misses in its discussion of “the definite-article grammatical principle” is that the follow-on sameness inquiry does its most muscular work when there is *something else* that Congress could have been referring to. By use of the definite article, Congress makes plain that it is referring to an already-provided-for object with more precision. Here, there is nothing else that the Congress could have been referring to, for as long as the program is administered by Oklahoma and remains an environmental program, it is the same as the one already referred to in the rider. Had EPA allowed Oklahoma to administer a program in Indian country the state had never previously submitted, that would be a more obvious problem, but no changes to the terms or conditions of a program so fundamentally transform it such that it is no longer an Oklahoma environmental program.

The bottom line is the clear statement rule applies because the tribes, including Pawnee Nation, have a sovereign interest in the administration of environmental programs in Indian country, and the rider is ambiguous as to

whether any sort of conditions may be implemented in favor of their sovereignty. And here, the clear statement rule carries added force because the EPA bears a deeply rooted administrative duty to safeguard the tribes' sovereign interest. To override both the tribes' inherent sovereignty and EPA's administrative authority would represent a stark and major departure from prior practice, with significant consequences for the health, welfare, and sovereign integrity of the Pawnee Nation. We usually apply the Indian canons and other substantive canons "to protect against 'unintentional, oblique, or otherwise unlikely' intrusions on these interests." *West Virginia v. EPA*, 597 U.S. at 742 (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring)); *see also* Cohen's Handbook § 9.04(3)(c), 668–69 (2024 ed.). Under such circumstances, Congress shouldered the burden to speak with unmistakable precision. I would hold that Congress did not speak clearly enough to support EPA's underlying decision.

III

Our duty is to "hold unlawful and set aside" EPA's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Diné Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1029 (10th Cir. 2023). Because EPA concluded that it has no discretion to impose a tribal consultation requirement on Oklahoma, EPA rendered a final decision that was "not in accordance with the law."

The majority may well be correct that EPA could exercise its discretion to not impose any conditions. Majority at 38 n.11. But EPA must “ground its reasons for action or inaction in the statute,” *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007), so this court should remand to the EPA to take another look at it. Given that the majority does not reach this same conclusion, I respectfully dissent.