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# REDESIGNATING TRIBAL TRUST LAND UNDER SECTION 164(c) OF THE CLEAN AIR ACT

Ann Julianio\*

In 1887, Native American land holdings totaled approximately 135 million acres.<sup>1</sup> In the span of less than forty years, these holdings dropped by almost 90 million acres.<sup>2</sup> To stem the loss of lands, in 1934 Congress provided the Department of the Interior with the authority to accept lands in trust on behalf of tribes.<sup>3</sup> Today many Native American tribes seek to reestablish their tribal land base by acquiring land in trust.<sup>4</sup> Despite the statutory and administrative provisions providing for the authority to acquire land into trust, less than eight percent of the lands lost have been returned to tribal ownership.<sup>5</sup> When land is administratively acquired in trust, the land is generally not given a proclamation of formal reservation status.<sup>6</sup> This tribal trust land has historically had an uncertain status in the law.<sup>7</sup>

Jurisdictional boundaries between tribes, states and the federal government are dependent on whether the Indian land at issue is "Indian country."<sup>8</sup> Indian country is a jurisdictional concept and has been statutorily defined as including three distinct categories of Indian land: reservations, allotments and dependent Indian

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\*. Assistant Professor, Villanova University School of Law. This essay was originally presented as part of the Sovereignty Symposium XII, June 1999 in Tulsa, Oklahoma. As an attorney with the Department of Justice, I was one of the attorneys representing the United States in the *Arizona v. United States Environmental Protection Agency* litigation discussed in this essay. The views stated herein are entirely my own and do not necessarily represent the views of the Department of the Justice or the Environmental Protection Agency. I would like to thank my student research assistants Lawrence Gingrow and David Seidman.

1. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 138 (1982). See also Kirke Kickingbird, *The Sacred and the Profane: Second Annual Academic Symposium in the Honor of the First Americans and Indigenous Peoples Around the World: A Tour on the Prairies or Washington Irving and the "Horseless Headman,"* 9 ST. THOMAS L. REV. 125, 130 (1996); Elizabeth A.C. Thompson, *Babbitt v. Youpee: Allotment and the Continuing Loss of Native American Property and Rights to Devise*, 19 U. HAW. L. REV. 265, 268 n.24 (1997).

2. See COHEN, *supra* note 1; Kickingbird, *supra* note 1; Thompson, *supra* note 1.

3. 25 U.S.C. § 465 (1988).

4. See 25 C.F.R. pt. 151 (1999); 64 Fed. Reg. 17,574 (1999) (to be codified at 25 C.F.R. pt. 151) (proposing new trust regulations); See also COHEN, *supra* note 1 at 45 (two principal sources of tribal trust land are lands purchased for tribes pursuant to section 465 and individual allotments converted to tribal trust through purchase, gift, etc.).

5. See 64 Fed. Reg. 17,574 at 17,576 (1999) (citing COHEN, *supra* note 1; BIA ANN. REP. FOR INDIAN LANDS (1996)).

6. See 25 U.S.C. § 467 (1983); COHEN, *supra* note 1, at 42 ("in 1934 broad statutory authority to proclaim new reservations or add to existing ones was delegated to the Secretary of the Interior.").

7. COHEN, *supra* note 1, at 45 ("[T]he Indian country status of trust lands located outside reservation boundaries is uncertain.").

8. See COHEN, *supra* note 1, at 27 ("it is frequently important to determine whether a particular event occurred within [Indian country].").

communities.<sup>9</sup> Within the first category, lands may be tribal trust lands (lands owned by the United States for the benefit of a tribe), individual trust land, non-Indian fee land or a combination of all three.<sup>10</sup> Because Congress has not specifically provided for tribal trust land under many statutes, agencies and courts are often required to determine whether trust land falls within one of the statutorily created categories.<sup>11</sup>

Nowhere is the problem of tribal trust status more apparent than under federal environmental statutes.<sup>12</sup> Under statutes such as the Clean Water Act,<sup>13</sup> the Safe Drinking Water Act,<sup>14</sup> the Superfund law,<sup>15</sup> and the Clean Air Act,<sup>16</sup> the Environmental Protection Agency (EPA) must determine the status of tribal trust land in order to decide if the tribe may exercise authority under those statutes. This Essay focuses on one such provision – section 164(c) of the Clean Air Act, which explicitly provides tribal governments with certain authority.<sup>17</sup> Section 164(c) is a provision under the Clean Air Act's Prevention of Significant Deterioration (PSD) program.<sup>18</sup> Under this program, tribes may "redesignate" their lands in order to provide greater air quality protection.<sup>19</sup> Section 164(c) explicitly provides that lands within the "exterior boundaries of reservations of federally recognized Indian tribes may only be redesignated by the Indian governing body."<sup>20</sup> Although section 164(c) applies to "lands within the exterior boundaries of reservation,"<sup>21</sup> the Act does not define reservation.<sup>22</sup> Thus, the applicability of section 164(c) to tribal trust land is unresolved by the language of the statute.

The EPA implementation regulations define an Indian reservation as "any federally recognized reservation established by treaty, agreement, executive order, or Act of Congress."<sup>23</sup> On its face, this language excludes tribal trust lands not part of a formally declared reservation.<sup>24</sup> Nonetheless, in a redesignation request by the Yavapai-Apache Tribe of the Camp Verde Reservation, the EPA approved the request and included tribal trust land within the definition of reservation as

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9. 25 U.S.C. § 1151 (1983). Although section 1151 is part of the criminal code, the Supreme Court has stated that the definition of Indian country in section 1151 applies to questions of civil jurisdiction as well as criminal jurisdiction. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (citing *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975)).

10. *See* 25 U.S.C. § 1151 (1983).

11. *See* COHEN, *supra* note 1, at 28 ("[m]ost Indian lands are clearly designated either as reservations or as allotments, explicitly invoking the statutory terms. . . . A few situations present unresolved questions . . .").

12. *See* William H. Gelles, *Tribal Regulatory Authority Under the Clean Air Act*, 3 ENVTL. LAW. 363 (1997); Beverly Conerton, *Tribal "Treatment as a State" Under Federal Environmental Laws*, NAT'L ASS'N OF ATTYS' GEN. NAT'L ENV'T ENFORCEMENT J. (Nov. 1997).

13. 33 U.S.C. §§ 1251-1387 (1987).

14. 42 U.S.C. § 300f (1991).

15. 42 U.S.C. §§ 9601-9675 (1996).

16. 42 U.S.C. §§ 7401-7671q (1995).

17. 42 U.S.C. § 7464(c) (1995).

18. 42 U.S.C. § 7401 (1995).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

23. 40 C.F.R. § 52.21(b)(27) (1996).

24. *See id.*

contemplated by the Act.<sup>25</sup> On review of the EPA's approval, the Ninth Circuit rejected the EPA's interpretation.<sup>26</sup> Tribal trust lands are therefore, at best, in limbo for PSD purposes and, at worst, excluded from section 164(c). Because administrative trust acquisition remains the primary method of adding to tribal land, a failure to include trust land within section 164(c) would seriously impair tribes' ability to protect their tribal resources.

After setting forth the statutory and regulatory background of the Clean Air Act and the Prevention of Significant Deterioration program in Part One, I discuss prior redesignations by tribes in Part Two. In Part Three, I explain the interpretation of 'reservation' under section 164(c) by Congress, the EPA and the Ninth Circuit. I argue that the EPA's interpretation of 'reservation' is contrary to the scope of its own regulations and that the Ninth Circuit rejected this interpretation. However, in Part Four, I find that in the absence of the EPA's constricting regulations, tribal trust lands should be included within the purview of section 164(c). In Part Five, I discuss two recent developments in Indian law – the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*<sup>27</sup> and the promulgation of the final Tribal Air Rule by the EPA<sup>28</sup> – and argue that these developments will provide further obstacles to the redesignation of Indian trust land in the absence of either a further amendment of the Act or the regulations. In Part Six, I conclude.

## I. STATUTORY AND REGULATORY BACKGROUND

### A. *The Basics of the Clean Air Act*

Congress passed the Clean Air Act (CAA) in 1963, establishing a comprehensive structure for "protect[ing] and enhancing the quality of the Nation's resources[.]"<sup>29</sup> The CAA directs the EPA to formulate national ambient air quality standards (NAAQS) to protect the public from targeted air pollutants.<sup>30</sup> Based on the NAAQS, the EPA classifies a particular area as either an "attainment area" or a "non-attainment area."<sup>31</sup> An attainment area is a geographic area that has attained

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25. 61 Fed. Reg. 56,461 (1996).

26. *Arizona v. EPA*, 170 F. 3d 870 (9<sup>th</sup> Cir. 1999).

27. 522 U.S. 520 (1998).

28. 63 Fed. Reg. 7254-01 (1998).

29. 42 U.S.C. § 7401(b)(1) (1995).

30. A few common air pollutants are found all over the United States, which the EPA has termed "criteria pollutants." Basically, criteria air pollutants are a group of very common air pollutants regulated by the EPA on the basis of scientific criteria (information on health and or environmental effects of pollution). Criteria air pollutants include Ozone (the principle component of smog), VOCs (volatile organic smog-forming compounds), Nitrogen Dioxide (one of the NO<sub>x</sub> smog forming chemicals), Carbon Monoxide (CO), Particulate Matter (PM-10: dust, smoke, soot), Sulfur Dioxide and Lead. *The Plain English Guide To the Clean Air Act* (last modified Jan. 20, 1999) <[http://www.epa.gov/oar/oaqps/peg\\_caa/pegcaa01.html](http://www.epa.gov/oar/oaqps/peg_caa/pegcaa01.html)>.

31. 42 U.S.C. §§ 7408-9 (1998). See *The Plain English Guide To the Clean Air Act*, *supra* note 30.

specific emission standards for a designated pollutant.<sup>32</sup> A non-attainment area is an area in which the level of criteria air pollutant is higher than the level allowed by federal standards.<sup>33</sup>

The states are primarily responsible for implementing the provisions of the Act.<sup>34</sup> Under the CAA, each state is responsible for designing State Implementation Plans (SIP) that provide for the attainment and maintenance<sup>35</sup> of NAAQS within that state.<sup>36</sup> Each SIP must meet EPA approval, and if a state's SIP is not approved,<sup>37</sup> the EPA may intervene by developing and enforcing a plan consistent with the NAAQS and other CAA provisions.<sup>38</sup> Where a state fails to make a required SIP submission, or the EPA finds that a submission is deficient, the EPA must correct the deficiency by promulgating a Federal Implementation Plan (FIP), to substitute in whole or in part for the SIP.<sup>39</sup> The EPA's regulation reflects this statutory scheme by providing that the "applicable plan" for a state includes an FIP provision promulgated by the EPA.<sup>40</sup> In addition to remedying deficient state plans, the EPA fills gaps arising from state jurisdictional limitations.<sup>41</sup>

### *B. Prevention of Significant Deterioration Program*

In 1977, Congress amended the Clean Air Act to provide for a Prevention of Significant Deterioration (PSD) program in order "to preserve, protect and enhance air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural recreational, scenic, or historic value."<sup>42</sup> The PSD program applies to areas which have met the NAAQS

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32. 42 U.S.C. §§ 7408-9 (1998). Attainment areas are defined using federal pollutant limits set by the EPA. An area may have an acceptable level of one criteria air pollutant, but may have unacceptable levels for others. Thus, an area could be both attainment and non-attainment at the same time. *The Plain English Guide To the Clean Air Act*, *supra* note 30.

33. 42 U.S.C. §§ 7408-9 (1998). It has been estimated that 60% of Americans live in non-attainment areas. *The Plain English Guide To the Clean Air Act*, *supra* note 30.

34. 42 U.S.C. §§ 7408-9 (1998). *See also The Plain English Guide To the Clean Air Act*, *supra* note 30. The U.S. Government, through the EPA, assists the states by providing scientific research, expert studies, engineering designs and money to support clean air programs. *Id.*

35. 42 U.S.C. § 7410 (1995). *See also The Plain English Guide To the Clean Air Act*, *supra* note 30. The EPA, state agencies and local agencies measure the types and amounts of pollutants in community air.

36. 42 U.S.C. § 7410 (1995). The states must involve the public, through hearings and opportunities to comment, in the development of each SIP.

37. 42 U.S.C. §§ 7408-9. *See also The Plain English Guide To the Clean Air Act*, *supra* note 30. States are not allowed to have weaker pollution controls than those set for the whole country.

38. 40 C.F.R. § 52.02(b) (1998).

39. 42 U.S.C. §§ 7410(c), 7602(y) (1995). For example, several states have failed to submit suitable Prevention of Significant Deterioration (PSD) programs. In those cases, the EPA has incorporated Federal PSD regulation into the states applicable plans. *See e.g.*, 40 C.F.R. § 52.2497 (1991).

40. *See e.g.*, 40 C.F.R. § 52.2497 (1991).

41. 42 U.S.C. §§ 7410(c), 7602(y) (1995).

42. 42 U.S.C. § 7470(2) (1995). The EPA adopted a Prevention of Significant Deterioration program in 1974 in response to a lawsuit. *See* 61 Fed. Reg. 56,461 (1996) (the EPA adopted PSD program in response to *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972)).

and are thus designated as “clean areas” (i.e. attained areas).<sup>43</sup>

Clean areas are categorized as either “Class I,” “Class II,” or “Class III.”<sup>44</sup> This classification determines the maximum allowable amount, or “increment,” of air quality deterioration allowed.<sup>45</sup> Class I areas have the smallest increments and thus allows the least deterioration of air quality.<sup>46</sup> Class III areas have the largest allowable increments and permit the greatest deterioration of air quality, allowing deterioration up to the national ambient air quality standards.<sup>47</sup>

Under the PSD program, “areas of special national or regional natural, recreational, scenic, or historic value” are given particular attention.<sup>48</sup> Accordingly, “Class I” status is mandatory for specified federal lands, including national parks greater than 6,000 acres in size and national wilderness areas greater than 5,000 acres in size.<sup>49</sup> All other clean areas are initially designated as Class II.<sup>50</sup> Section 164 gives states and tribes the ultimate authority to redesignate any lands within their borders as Class I or Class III.<sup>51</sup>

The 1977 Amendment mandates that a state’s SIP must include a PSD program to ensure that areas within its jurisdiction maintain national ambient air quality standards.<sup>52</sup> Controls under the PSD program apply only to “major stationary sources”<sup>53</sup> and such sources must obtain a PSD permit before constructing a new facility or making major modification to an existing one.<sup>54</sup> Issuance of the permit is conditioned, in part, on the assent of a Tribe (or state) occupying an adjoining Class I area.<sup>55</sup> The EPA is charged with providing notice of a permit application to the tribe or state whose Class I area may be affected by emissions from the proposed facility.<sup>56</sup> The Tribe or state is authorized under the statute to object to the proposed permit, thereby stalling its issuance by the permit granting authority (typically the state) in the Class II area.<sup>57</sup> If the Tribe and permit grantor cannot reach a settlement

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43. 42 U.S.C. § 7471 (1995). The PSD program also applies to areas which there is insufficient information to reach a conclusion about their status (unclassifiable areas). *Id.* See also Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling versus Site-Shifting*, 74 IOWA L. REV. 1 (Oct. 1998) (discussing PSD program’s goals and flaws).

44. 42 U.S.C. § 7472 (1995).

45. 61 Fed. Reg. 56,461 (1996).

46. See *id.*

47. See *id.*

48. 42 U.S.C. § 7470(2) (1995).

49. 42 U.S.C. § 7472(a) (1995).

50. 42 U.S.C. § 7472(b) (1995).

51. “[A] State may redesignate such areas as it deems appropriate as [C]lass I areas.” 42 U.S.C. § 7474 (1995). Additionally, the CAA gives “the appropriate Indian governing body” similar authority to redesignate “lands within the exterior boundaries of the reservation.” *Id.*

52. 42 U.S.C. §§ 7410(a)(2)(C), (J) (1995).

53. 40 C.F.R. § 52.21(b) (1996). Major stationary sources are defined as large industrial sources which emit, or have the potential to emit over 250 tons per year of a regulated air pollutant (100 tons per year if the source falls in one of the 28 specified categories).

54. 42 U.S.C. §§ 7475(a)(3),(4), 7479(3) (1995); 40 C.F.R. § 52.21(j) (1996). To obtain a PSD permit, a major stationary source must install the “best available control technology” (BACT) to control emissions and demonstrate that the source will not contribute to a violation of the NAAQS or applicable PSD increments.

55. 42 U.S.C. § 7474(b) (1995).

56. *Id.*

57. 42 U.S.C. § 7474(e) (1995).

on issuance of the permit, the EPA is charged with resolving the dispute.<sup>58</sup> Thus, the PSD program provides the state or tribe with a measure of control over sources located outside the state or tribe's jurisdiction.<sup>59</sup>

### C. Redesignation Of Tribal Lands Under The Clean Air Act

Since the PSD program's inception, tribes have had the authority to redesignate the PSD classification of lands within their reservations.<sup>60</sup> To achieve redesignation under the CAA, the Indian governing body must meet specific procedural requirements.<sup>61</sup> Congress gave the EPA the authority to disapprove a redesignation "only if [the EPA] finds, after notice and opportunity for public hearing," that the applicable "procedural requirements" of section 164 have not been met.<sup>62</sup> Congress intended to limit the EPA's rule to ensuring that a state or tribe adheres to the procedural requirements of section 163(b)(2).<sup>63</sup>

58. *Id.*; See Joshua Epel & Martha Tierney, *Tribal Authority over Air Pollution Sources On and Off the Reservation*, 25 ENV'T L. REP. 10,583 (Nov. 1995) ("because the decision to find a violation and enforce a remedy ultimately rests with EPA," the tribe is denied the full measure of effectiveness under the PSD program).

59. See Epel & Tierney, *supra* note 58. ("In theory, redesignation provides tribes with the authority to set stricter standards for air quality on their reservations and thus indirectly control emissions from nearby sources by exposing those sources to EPA enforcement actions if they violate the reservation's standards.").

60. *Id.* See also William H. Rogers, 1 Environmental Law § 3.22 (1986) ("[section 164(c)] is important to the tribes, acknowledging as it does their power to control many of the clean air regions of the West where the reservations are found, and it will inspire the opposition that often attends attempts by the tribes to exercise regulatory authority."); Epel & Tierney, *supra* note 58 (prior to the 1990 Amendments, PSD program was the only method by which tribes could affect air quality on their reservations); Julie M. Reding, *Controlling Blue Skies in Indian Country: Who is the Air Quality Posse – Tribes or States? The Applicability of the Clean Air Act in Indian Country and on Oklahoma Tribal Lands*, 162 AM. INDIAN L. REV. 118, 162 (1993) (noting that the 1977 amendments to the Clean Air Act contained the first delegation under the Act to tribes).

61. In order to achieve redesignation, the appropriate Indian governing body must meet the following procedural requirements:

(1) Announce its intention to the appropriate EPA regional office. (2) Hold at least one public hearing in accordance with procedures outlined in 40 C.F.R. § 51.102. (3) Notify other States, Indian Governing Bodies and Federal Land Managers whose lands may be affected by the re-designation at least 30 days prior to the public hearing. (4) Prepare a report discussing the reasons or the proposed redesignation including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation. (5) Make the report available for public inspection at least thirty days prior to the public hearing, and notify the public of the availability of such report. (6) Give written notice to the Federal Land Manager where a proposed redesignation would include Federal Lands and afford the Federal Land Manager an adequate opportunity to submit written comments and recommendations. (7) Consult with the State or States in which the reservation is located and the States, which border the reservation. (8) Submit the proposal to redesignate to the EPA Administrator through the appropriate regional office

42 U.S.C. § 7474(b) (1995); see also 40 C.F.R. § 52.21 (1996).

62. 42 U.S.C. § 7474(b)(2) (1995).

63. As the House Report accompanying the 1977 CAA indicated:

The intended purpose of the [congressional PSD program is] ... to delete the [pre-existing] EPA regulations and to substitute a system which gives a greater role to the States and local governments and which restricts the Federal Government . . . by eliminating the authority which the Administrator has under current EPA regulation to override a State's classification of any area on the ground that the State improperly weighed energy, environment, and other factors.

See H.R. Rep. No. 95-294, at 7-8 (1977), reprinted in 1977 CAA Legislative history vol. 4, at 2,474-75 (emphasis added). Although this language refers to states, the CAA and legislative history make clear that the discussion applies equally to tribal redesignation. See e.g., S. Rep. No. 95-127, at 9 (1977), reprinted in 1977 CAA Legislative history vol.3, at 1381.

#### D. Tribal Authority under the Clean Air Act

Prior to the 1990 amendments, section 164(c) provided the only express delegation of authority to tribes under the Clean Air Act. The 1990 amendments to the CAA enlarged tribal authority by authorizing the EPA to promulgate regulations specifying those CAA provisions for which it is appropriate to treat tribes as states.<sup>64</sup> This express authorization brought the Clean Air Act in line with other statutes providing for treatment of tribes as states.<sup>65</sup> Under the 1990 amendments, tribes that have satisfied specific requirements for receiving treatment as a state have the opportunity to assume responsibility for air quality planning and enforcement on reservations including control over stationary permitting procedures.<sup>66</sup> A permitting program enables a tribe to have considerably more control over stationary sources and air quality on the reservation.<sup>67</sup>

The final piece of the statutory and regulatory scheme is the Tribal Air Rule.<sup>68</sup> The 1990 Amendments directed the "Administrator [to] promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States."<sup>69</sup> The EPA, missing the statutory deadline by over six years,<sup>70</sup> issued its proposed tribal authority rule in 1994.<sup>71</sup> In the proposed rule, the EPA issued its interpretation that the Clean Air Act "grants, to tribes . . . authority over all air resources within the exterior boundaries of the reservation."<sup>72</sup> The EPA made clear that this proposal would encompass non-Indian owned fee lands on a reservation.<sup>73</sup> The EPA reiterated its position that the term "reservation" would be construed to include "trust land that has been validly set apart for use by a Tribe, even though that land has not been formally designated as a 'reservation.'"<sup>74</sup> In addition, the EPA proposed its interpretation that the statutory phrase "other areas within the tribe's jurisdiction" encompasses areas outside the exterior boundaries of a reservation (and therefore outside tribal trust land validly set apart).<sup>75</sup> For these areas, a tribe must make a fact-based showing of its inherent authority over such lands.<sup>76</sup>

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64. 42 U.S.C. § 7601(d)(2) (1995). See 34 NAT. RESOURCES J. 231, 236-37 (1994) ("the 1990 Amendments left the legal structure of the PSD [ . . . ] program intact but made minor changes in the programs that effect visibility.").

65. See e.g., 33 U.S.C. §§ 1251-1387 (1987); 42 U.S.C. § 300f (1991); 42 U.S.C. §§ 9601-75 (1996).

66. 42 U.S.C. § 7601(d)(2) (1995). Under the CAA, for a tribe to be eligible for treatment like a state, it must be federally recognized and meet three additional criteria: (1) it must have an adequate governing body; (2) the governing body must be capable of implementing the particular requirements of the CAA and applicable regulations for which the tribe is seeking program approval; and (3) the governing body must be able to implement these requirements within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction.

67. See Epel & Tierney, *supra* note 58; 42 U.S.C. §§ 7661a-f (1995).

68. 63 Fed. Reg. 7254-01 (1998).

69. 42 U.S.C. § 7601(d)(2) (1995).

70. 63 Fed. Reg. 7254-01 (1998).

71. 59 Fed. Reg. 43,956 (1994).

72. *Id.* at 43,958.

73. *Id.*

74. *Id.* at 43,960.

75. *Id.*

76. *Id.*



After receiving 69 comments, the EPA issued its final rule on February 12, 1998.<sup>77</sup> The rule finalized the EPA's proposed interpretations from 1994.<sup>78</sup> Under the Tribal Authority Rule, the EPA interprets the Clean Air Act as a broad delegation of authority to tribes over lands within a reservation (whether Indian owned or non-Indian owned)<sup>79</sup> that also allows for the exercise of tribal jurisdiction outside of reservation boundaries, provided the tribe demonstrates its inherent authority to regulate such land.<sup>80</sup>

## II. PRIOR REDESIGNATIONS

To date, six tribes have requested redesignation under section 164(c). Of the six redesignation requests by tribes, only one has involved tribal trust land not part of a formally declared reservation.<sup>81</sup>

In 1977, the Northern Cheyenne Tribe submitted the first redesignation request.<sup>82</sup> The Cheyenne sought to redesignate the entirety of its reservation.<sup>83</sup> Located in Montana, the Northern Cheyenne reservation was established by treaty in 1868.<sup>84</sup> Thus, no issue of "reservation" status arose in the Northern Cheyenne's request.

At the time of the Cheyenne's request, Congress had not yet amended the Clean

77. 63 Fed. Reg. 7254-01 (1998).

78. *Id.*

79. Tribes have the jurisdiction to regulate their lands by one of two methods: inherent sovereignty or Congressional delegation (or both). See Gelles, *supra* note 12 at 374. The EPA's interpretation of section 301 of the Clean Air Act as an express delegation of authority differs from the interpretation of the Clean Water Act and Safe Drinking Water Act treatment as states provisions. Under the Clean Water Act and Safe Drinking Water Act, the EPA interpreted the "tribes as states" provision as authorizing treatment as a state for management of water resources only if the tribe could show it had "inherent authority" over all water resources in the reservation, including non-Indian-owned resources. See 63 Fed. Reg. 7255 (1998); 56 Fed. Reg. 64,879; Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15, 16 (1998). See also Jane Marx et al., *Tribal Jurisdiction over Reservation Water Quality and Quantity*, 43 S.D.L. REV. 315 (1998); John S. Harbison, *The Downstream People: Treating Indian Tribes as States Under the Clean Water Act*, 71 N.D.L. REV. 473 (1995); Charlotte Uram & Mary J. Decker, *Jurisdiction over Water Quality on Native American Land*, 8 J. NAT. RESOURCES & ENV'T L.L. 1 (1992/1993); Mark A. Bilut, *Albuquerque v. Browner, Native American Tribal Authority Under the Clean Water Act: Raging like a River Out of Control*, 45 SYRACUSE L. REV. 887 (1994).

80. "In its . . . rule, the EPA has interpreted the CAA as an express congressional delegation of authority to Indian tribes over all lands within the boundaries of an Indian reservation." 63 Fed. Reg. 7254 (1998). See Steffani A. Cochran, *Treating Tribes as States Under the Federal Clean Air Act: Congressional Grant of Authority - Federal Preemption - Inherent Tribal Authority*, 26 N.M. L. REV. 323 (1996).

81. See 62 Fed. Reg. 27,158-01 (1997) (noting that although the redesignation program provides tribes and states without authority to redesignate, "over the past twenty years, only federally-recognized Tribes have sought redesignation under this authority"); Epel & Tierney, *supra* note 58 ("Few tribes have opted to redesignate although the number is growing."). See also Joseph Kreye, *The Forest County Potawatomi Request Redesignation Under the Clean Air Act*, 4 Wis. Env'tl. L.J. 87 (1997) (discussing the six different tribal redesignation requests).

82. See Nance v. EPA, 645 F.2d 701 (9<sup>th</sup> Cir. 1981); 62 Fed. Reg. 27,158 (1997); see also Patrick Smith & Jerry D. Guenther, *Environmental Law: Protecting Clean Air: the Authority of Indian Governments to Regulate Reservation Airsheds*, 9 AM. IND. L. REV. 83, 86 (1983); Kreye, *supra* note 81 at 90.

83. See Nance v. EPA, 645 F.2d 701 (9<sup>th</sup> Cir. 1981); 62 Fed. Reg. 27,158 (1997); see also Smith & Guenther, *supra* note 82 at 86; Kreye, *supra* note 81 at 90.

84. Treaty between the United States and the Northern Cheyenne and Arapahoe Tribes, 15 Stat. 655 (May 10, 1868). See also 25 U.S.C. § 1776 (1998) (settling boundary dispute between Northern Cheyenne and Crow tribes).

Air Act to provide for explicit redesignation authority to tribes. The EPA approved the request after determining that the Tribe met the procedural requirements of the PSD regulations.<sup>85</sup> The court upheld the EPA's regulations as valid and determined that those regulations granted Indian tribes the same autonomy to determine their air quality as that granted to the states.<sup>86</sup>

In 1977, subsequent to Northern Cheyenne's redesignation request, Congress amended the Clean Air Act to provide the current version of section 164(c).<sup>87</sup> Armed with explicit authority, five tribes have filed redesignation requests since 1977. In 1981, the Confederated Salish and Kootenai Tribal Council requested redesignation of the Flathead Reservation.<sup>88</sup> The Flathead Reservation is a "federally recognized" reservation established in 1885 by treaty.<sup>89</sup> As such, no question of the applicability of the EPA's definition of reservation arose in this request. The EPA approved the request and such approval went unchallenged.<sup>90</sup>

In 1983, the Fort Peck Tribal Council requested redesignation of its reservation.<sup>91</sup> The Fort Peck Reservation was created by treaty and thus, an interpretation of "reservation" did not arise in that request.<sup>92</sup> The EPA approved the request and that approval was not challenged in court.<sup>93</sup>

Next, the Spokane Tribal Council requested the redesignation of its reservation in 1988.<sup>94</sup> The Spokane Indian Reservation is a "federally recognized" reservation established by executive order.<sup>95</sup> Again there was no question of whether the tribal land sought to be redesignated fell within the purview of section 164(c) and the EPA's regulations.<sup>96</sup> The EPA approved the request in 1991 and such approval was not challenged.<sup>97</sup>

In 1995, the Forest County Potawatomi Tribe requested redesignation of lands within its reservation.<sup>98</sup> The Tribe requested redesignation of 80 acres within its reservation held in trust for the Tribe.<sup>99</sup> The reservation was established by an act of

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85. *Nance*, 645 F.2d at 704. The Tribe prepared a report discussing the economic effects of redesignation, distributed the report to various interested parties, and held a public hearing. In March 1977, the Tribe submitted a formal proposal for redesignation, and on August 5, 1977, the EPA Administrator approved the redesignation. *Id.*

86. *Id.* at 714. Although recognizing the redesignation's potential extraterritorial effect, the court stated that: [A]nother element must be considered, namely the effect of the land use outside the reservation on the reservation itself .... Just as a tribe has the authority to prevent the entrance of non-members onto the reservation, a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation.

*Id.*

87. See e.g. 42 U.S.C. § 7410 (1995); 42 U.S.C. § 7474 (1995).

88. 47 Fed. Reg. 3138 (1982).

89. Treaty of Hellgate, July 16, 1885, 12 Stat. 975.

90. 47 Fed. Reg. 3138 (1982).

91. 48 Fed. Reg. 34,976, 34,977 (1983); see also *Kreye*, *supra* note 81; *Smith & Guenther*, *supra* note 82.

92. See *Smith & Guenther*, *supra* note 82.

93. 49 Fed. Reg. 4734 (1984).

94. 54 Fed. Reg. 1954 (1989).

95. See Exec. Order of Rutherford B. Hayes, Jan. 18, 1881.

96. See *id.*

97. 56 Fed. Reg. 14,861 (1991).

98. 60 Fed. Reg. 33,779 (1995).

99. *Id.*; 60 Fed. Reg. 40,139 (1995); 62 Fed. Reg. 37,007 (1997).

Congress and therefore clearly falls within the EPA's definition of "reservation."<sup>100</sup>

In 1993, the Yavapai-Apache Tribe sought to redesignate its reservation, initially established in 1871 by Executive Order. In 1875, President Grant returned the lands to the public domain and the Tribe was forced to leave.<sup>101</sup> The tribe returned to its land in 1909 when the United States purchased 55 acres known as the Lower Verde parcel. In 1914, Congress appropriated \$20,000 for the purchase of lands to be held in trust for the tribe.<sup>102</sup> This purchase came to be known as the Middle Verde parcel. Three other parcels were acquired in trust pursuant to section 465 without a formal declaration of reservation status.<sup>103</sup> The reservation now consists of five non-contiguous parcels totaling 635 acres.<sup>104</sup> Thus, the Yavapai-Apache reservation is the first tribal redesignation request to raise the issue of the status of tribal trust lands not part of a formally declared reservation.

### III. THE INTERPRETATION OF RESERVATION UNDER SECTION 164(C)

The EPA's approval of the Yavapai-Apache's request provides the most extensive interpretation of "reservation" to date in redesignation statutory provisions or regulations. As noted above, the Clean Air Act states that lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body but provides no definition of "reservation."<sup>105</sup> The EPA's implementing regulations expands upon the language of the Clean Air Act by defining an Indian Reservation as "any federally recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress."<sup>106</sup> The first discussion of the status of tribal trust land under section 164(c) came in the EPA's proposed approval of the Yavapai-Apache Tribe's request.

#### A. *The EPA's Interpretation of "Reservation"*

In approving the Yavapai-Apache's redesignation request, the EPA first set forth the regulatory definition of "reservation."<sup>107</sup> Then, in a two sentence explanation, the EPA concluded:

In addition to lands formally designated as "reservations," the EPA considers trust land validly set apart for use of a tribe to be an "Indian Reservation." See *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *United States v. John*, 437 U.S. 634, 648-

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100. See 59 Fed. Reg. 43,956 (1994).

101. Exec. Order No. 04-23-1875 (1875).

102. See 38 Stat. 588 (1914).

103. *Id.*

104. *Id.* The five parcels of land are as follows: the Clarkdale parcel, the Middle Verde parcel, the Lower Verde parcel, the Montezuma Interchange parcel, and the Rimrock parcel.

105. 42 U.S.C. § 7474(c) (1995).

106. 40 C.F.R. § 52.21(b)(27) (1996).

107. 61 Fed. Reg. at 56,463 (1996).

49 (1978); 59 FR 43956, 43960 (Aug. 25, 1994); 56 FR 64876, 64881 (Dec. 12, 1991). The EPA has indicated that it will be guided by relevant case law in interpreting the scope of "reservation" under the Clean Air Act. See 59 FR 43960.<sup>108</sup>

In making the decision to include tribal trust land within the definition of reservation, the EPA relied upon the proposed tribal authority rule under the Clean Air Act,<sup>109</sup> a tribes as states decision under the Clean Water Act and two Supreme Court cases. The Supreme Court decisions each interpreted the definition of "reservation" as a category of "Indian country." These case are discussed in detail below. The Bureau of Indian Affairs (BIA) certified in a letter to the EPA dated May 13, 1994, that the five parcels for which the Yavapai-Apache Reservation sought redesignation are lands held in trust by the U.S. Government for the benefit of the Tribe. Therefore, the EPA concluded that the five parcels of land were properly classified as land within the Tribe's reservation.<sup>110</sup>

#### B. *The Ninth Circuit's Decision in Arizona v. EPA*

The State of Arizona challenged the EPA's approval on a number of grounds, one of which involved the inclusion of tribal trust land within the definition of reservation.<sup>111</sup> Arizona argued that the EPA's interpretation of reservation was not supported by the decisions in *John* and *Citizen Band* because those cases involved interpretations of "Indian country" whereas section 164(c) uses the narrower category of "reservation."<sup>112</sup> Further, Arizona argued that the EPA ignored its own regulations defining "Indian reservation."<sup>113</sup>

At oral argument, Arizona stipulated that one of the five parcels of tribal trust land (the Middle Verde parcel) is a reservation within the meaning of section 164(c).<sup>114</sup> Therefore the Ninth Circuit held that the EPA did not abuse its discretion in approving the redesignation of that parcel.<sup>115</sup> With regard to the remaining four parcels, the Court held

there is insufficient evidence in the record to support a finding that these parcels have been declared to be reservation by Act of Congress or that these parcels have been added to the Middle Verde reservation by proclamation of the Secretary of

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108. *Id.* at 56,464.

109. See 63 Fed. Reg. 7254-01 (1998).

110. 61 Fed. Reg. 56,461, 56,264 (1996).

111. The Arizona Chamber of Commerce and the Town of Clarkdale also challenged the decision. The Ninth Circuit found that the Chamber of Commerce lacked standing due to its lack of participation in the EPA redesignation proceedings or dispute resolution proceedings. *Arizona v. EPA*, 151 F.3d 1205, 1210 (9<sup>th</sup> Cir. 1998) *opinion withdrawn on other grounds*, 170 F.3d 870 (9<sup>th</sup> Cir. 1999).

112. Brief for State of Arizona, *Arizona v. EPA*.

113. *Id.*

114. *Arizona*, 151 F.3d at 1210. The Middle Verde parcel was purchased pursuant to a 1914 federal appropriations act allocating \$20,000 for the purchase of lands to be held in trust for the Tribe.

115. *Id.*

the Interior pursuant to the Indian Reorganization Act.<sup>116</sup>

Despite this finding, the court determined that approval of Class I redesignation for the Middle Verde effectively achieves redesignation for the surrounding four parcels and that this finding absolved the court of the need to “definitively decide whether these four parcels are reservation lands for purposes of the Clean Air Act.”<sup>117</sup>

The concurrence, authored by Judge Ferguson, adopted the EPA’s interpretation of “reservation.”<sup>118</sup> The concurrence noted that in light of the lack of a definition of reservation in the statute and the inconsistent interpretations by courts, the term itself is ambiguous.<sup>119</sup> In light of this ambiguity, Judge Ferguson held that the EPA’s interpretation should be upheld if based upon a permissible construction of the statute.<sup>120</sup> He further noted that in statutes affecting Indian tribes, a canon of construction requires ambiguities to be resolved in favor of Indians.<sup>121</sup> Judge Ferguson found indicia of federal recognition of reservation status from Department of the Interior maps labeling the lands as reservation lands and a letter from the Department of the Interior listing the lands under the heading of “reservation.”<sup>122</sup> Finally, the concurrence stated “[b]oth the Supreme Court and the Ninth Circuit have noted that trust lands set apart for the use of Indian tribes may be considered to be part of a reservation.”<sup>123</sup>

Subsequent to the issuance of this opinion, the Ninth Circuit issued a clarification to explain that the decision did not effect a redesignation of all the parcels. The Court finally withdrew that clarification and modified its original opinion.

We therefore remand to [the] EPA, without prejudice to the parties, to determine whether the parcels are reservations for purposes of 42 U.S.C. S 7474(c), if [the] EPA re-promulgates its redesignation ruling in accordance with section V of this opinion. We note, however, that at least two of the four disputed parcels, Lower Verde and Montezuma Interchange, are adequately protected by virtue of their proximity to the Middle Verde parcel.<sup>124</sup>

#### IV. SECTION 164(C) SHOULD INCLUDE TRIBAL TRUST LANDS.

The Ninth Circuit’s decision (and subsequent modification) rejects the EPA’s interpretation of “reservation” as including trust land.<sup>125</sup> Indeed, the court holds the

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116. *Id.* at 1210-1211.

117. *Id.* at 1211.

118. *Arizona*, 151 F.3d at 1213 (Ferguson J. concurring).

119. *Id.* at 1214 (*citing* *Tooisgah v. United States*, 186 F.2d 93 (10<sup>th</sup> Cir. 1950)).

120. *Id.* (*citing* *Chevron v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984)).

121. *Id.* at 1214 (*citing* *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9<sup>th</sup> Cir. 1975)).

122. *Arizona*, 151 F.3d at 1214 (Ferguson J. concurring).

123. *Id.* at 1214 (*citing* *John and United States v. Sohapp*, 770 F.2d 816 (9<sup>th</sup> Cir. 1985)).

124. *Arizona v. EPA*, 170 F.3d 870 (9<sup>th</sup> Cir. 1999).

125. *See id.*

EPA to the language of its regulations (defining reservation as one established by Act of Congress, treaty, agreement or Executive Order).<sup>126</sup> The court's finding of a lack of evidence specifically tracks the language of the EPA definition: "there is insufficient evidence in the record to support a finding that these parcels have been declared to be reservation by Act of Congress or that these parcels have been added to the Middle Verde reservation by proclamation of the Secretary of the Interior pursuant to the Indian Reorganization Act."<sup>127</sup> In this manner, the court sought to fit the acquisition of the Yavapai-Apache parcels into one of the four options for creation of a reservation.<sup>128</sup> When the parcels did not fit within the regulatory definition, the court found that the parcels were not reservations.<sup>129</sup> Had the Ninth Circuit accepted the EPA's inclusion of trust land, the BIA's certification of trust status would provide the necessary evidence of "reservation" status. Thus, it was the EPA's narrow definition of "reservation" in its regulations which led to the court's rejection of reservation status.

If the regulatory definition is amended,<sup>130</sup> the question remains whether the statute would support an inclusion of trust land within the term "reservation." In light of Supreme Court precedent interpreting the term reservation, section 164(c) supports an inclusion of tribal trust land.

First, the EPA's construction of section 164(c) must be viewed under the well-established *Chevron* doctrine.<sup>131</sup> A court must determine whether Congress has directly spoken to the precise issue and if not, the court must give deference to the administering agency's permissible interpretation of the statute.<sup>132</sup> The EPA's interpretation in this case is premised upon Supreme Court precedent.<sup>133</sup> Further, courts have found that the EPA is entitled to deference regarding its determinations of how environmental programs are best administered in Indian reservations.<sup>134</sup>

The question then rests upon the Supreme Court's consideration of tribal trust land. In its approval of the Yavapai-Apache's request, the EPA cited two Supreme Court decisions.<sup>135</sup> Both of these decisions included tribal trust land within the

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126. *See id.*

127. *Arizona*, 151 F.3d at 1210-11. *Cf.* 40 C.F.R. § 52.21(b)(27) (1996).

128. The EPA argued to the Ninth Circuit that the parcels should be considered reservations established by an Act of Congress in that they were taken into trust pursuant to section 465. *See* Brief for EPA, *Arizona v. EPA*, No. 96-71083. In that the court did not discuss this part of the definition of reservation, the Ninth Circuit implicitly rejected the EPA's argument.

129. *See Arizona v. EPA*, 170 F.3d 870 (9<sup>th</sup> Cir. 1999).

130. In 1996, as part of an overall review of the PSD regulations, the EPA proposed amending the definition of Indian reservation to read as follows: "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 61 Fed. Reg. 38,250, 38,295 (1996). To date, this proposal has not been finalized.

131. *Chevron*, 467 U.S. at 842-43 (1984).

132. *See id.*

133. *See Chevron*, 467 U.S. 837 (1984) (Although the court owe no deference to agency interpretations of judicial precedent, if correct, the EPA's reliance on precedent demonstrates that its interpretation of the statute is permissible.)

134. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469 (9<sup>th</sup> Cir. 1985) (deferring to the EPA's determination that RCRA does not grant state jurisdiction to regulate the activities of Indians on Indian lands); *Nance*, 645 F.2d (deferring to the EPA's delegation of redesignation authority on Indian reservation to tribe under CAA where statute was silent with respect to tribal authority); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10<sup>th</sup> Cir. 1986).

135. *United States v. John*, 437 U.S. 634 (1978); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

definition of "reservation."<sup>136</sup> In *United States v. John*, the Court was faced with the question of whether the state or federal government had criminal jurisdiction over a crime committed on certain land.<sup>137</sup> The determination of jurisdiction turned upon the question of whether tribal trust land was included within Indian country. Under the relevant federal statute,<sup>138</sup> the federal government has criminal jurisdiction over crimes committed in Indian country. Indian country includes three categories of land: reservations, dependent Indian communities,<sup>139</sup> and Indian allotments.<sup>140</sup> In *John*, the Court specifically considered whether tribal trust land fell within the "reservation" category under section 1151(a).

The Court, relying upon earlier precedent, held that lands "validly set apart for the use of the Indians as such, under the superintendence of the government" should be included within the definition of "reservation."<sup>141</sup> The court noted that the lands at issue in *John* were held in trust by the federal government for the benefit of the tribe.<sup>142</sup> The Court explicitly found that these trust lands had the same status as a reservation.<sup>143</sup> "There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a 'reservation,' at least for the purpose of federal criminal jurisdiction at that particular time."<sup>144</sup> Further, the court rejected a requirement of formal proclamation of reservation status: "if there were any doubt about the matter . . . the situation was completely clarified by the proclamation . . . of a reservation."<sup>145</sup> It is this language on which the EPA relies for its treatment of tribal trust land as reservation.

Although the Court in *John* did treat tribal trust land as a reservation, it did so specifically within the context of federal criminal jurisdiction and thus, *John*, standing alone does not support the EPA's inclusion of tribal trust land. However, the Court expanded on its decision in *John* thirteen years later in *Citizen Band*.<sup>146</sup> There, the tribe sought an injunction against Oklahoma's assessment of taxes on cigarette sales occurring on tribal trust land.<sup>147</sup> Oklahoma argued that it had the jurisdiction to tax cigarette sales because the sales were taking place on tribal trust land, rather than on a formally declared reservation.<sup>148</sup> The Court rejected the state's argument: "[N]o precedent of this Court has ever drawn the distinction between tribal trust land and

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136. 18 U.S.C. § 1151(a) (1984).

137. See *John*, 437 U.S. at 648-49.

138. Major Crimes Act, 18 U.S.C. § 1153 (1994) (federal government has jurisdiction over certain crimes committed in Indian country.)

139. See *infra* for a discussion of the Supreme Court's most recent holding on dependent Indian communities.

140. 18 U.S.C. § 1151 (1984).

141. *John*, 437 U.S. at 648-49. The court applied the test set forth in *United States v. Pelican*, 232 U.S. 442 (1914), wherein the Court held that a reservation was Indian country "simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government." The court then applied the same test to determine that certain allotments should also be treated as Indian country. See also *United States v. McGowan*, 302 U.S. 535 (1938).

142. See *John*, 437 U.S. 648-49.

143. See *id.*

144. *John*, 437 U.S. at 649.

145. *Id.*

146. *Citizen Band*, 498 U.S. at 505.

147. See *id.*

148. See *id.*

reservations that Oklahoma urges.”<sup>149</sup>

The Court cited *John* and reiterated that the test to determine whether a state has jurisdiction over tribal land is “whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government.”<sup>150</sup> The *Citizen Band* court noted the land of the Citizen Band is held by the Federal Government in trust for the benefit of the tribe and therefore qualified as a “reservation for tribal immunity purposes.”<sup>151</sup>

Lower courts have reached similar decisions, applying the *John* test and finding that tribal trust land should be treated as a reservation.<sup>152</sup> Even in cases in which a lower court has differentiated tribal trust land from “reservation,” that court also cited authority for the proposition that tribal trust land could be considered a de facto reservation.<sup>153</sup>

Therefore, under *John*, *Citizen Band* and lower court applications of those decisions, section 164(c)’s use of “Indian reservation” may reasonably be construed as including tribal trust land. A few obstacles remain, however, to the inclusion of trust land under section 164(c).

## V. POTENTIAL OBSTACLES IN INCLUDING TRIBAL TRUST LAND IN SECTION 164(C)

### A. The 1990 Amendments

The 1990 Amendments left untouched the explicit delegation in section 164(c). However, the treatment as a state provisions in the Amendments must be considered when interpreting the term “reservation” under section 164(c). The 1990 Amendments to the Act provide an argument that Congress intended “reservation” not include tribal trust land. Congress directed that the regulations were to treat tribes as states for the “management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction.”<sup>154</sup> Specifically, the Amendments provided for tribal treatment as a state only if “the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction.”<sup>155</sup> The use of the term “reservation” in conjunction with an acknowledgment of “other areas” within the tribe’s jurisdiction could suggest that

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149. *Id.* The court rejected the state’s interpretation of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *Mescalero*, the Court held that tribal activity occurring “off-reservation” could be regulated by the state. The land at issue in *Mescalero* was federal land held by the United States Forest Service and leased by the tribe.

150. *Citizen Band*, 498 U.S. at 511.

151. *Id.*

152. *Sohappy*, 770 F.2d 816 (9<sup>th</sup> Cir. 1985) (holding trust lands to be “reservation” lands for purposes of section 1151(a)); *see also* *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10<sup>th</sup> Cir. 1980).

153. *United States v. Stands*, 105 F.3d 1565, 1572 n.3 (8<sup>th</sup> Cir. 1997) (*citing* *United States v. Azure*, 801 F.2d 336, 338-39 (8<sup>th</sup> Cir. 1986)).

154. 42 U.S.C. § 7601(d)(2)(B) (1988).

155. 42 U.S.C. § 7601(d)(2)(B) (1988).



Congress intended the term "reservation" to have a narrow definition.<sup>156</sup>

In the Tribal Authority Rule, the EPA interpreted "reservation" within the meaning of section 7601(d) "in light of Supreme Court case law, including *Oklahoma Tax Comm'n*, in which the Supreme Court held that a 'reservation,' in addition to the common understanding of the term, also includes trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation."<sup>157</sup> The agency noted that two categories of land fall within this class of non-formally recognized reservations (Pueblos and tribal trust lands) and all other lands will be considered on a case-by-case basis.<sup>158</sup>

In response to a suggestion that the EPA amend its regulatory definition of "reservation," the agency stated:

The Agency does not believe that additional, more specific language should be added to the regulatory definition of 'reservation,' because the Agency's interpretation of the term 'reservation' will depend on the particular status of the land in question and on the interpretation of relevant Supreme Court precedent.<sup>159</sup>

Thus, the EPA has consistently interpreted "reservation" as including tribal trust land.

The EPA interpreted "other lands within a tribe's jurisdiction" as "non-reservation areas" over which a tribe can demonstrate authority.<sup>160</sup> In other words, a tribe may exercise authority under the treatment as states provision for "all non-reservation areas of Indian country."<sup>161</sup> The EPA explicitly adopted section 1151 as the "general parameters" of the areas over which a tribe may have authority. The EPA recognized the potential for controversy as to whether non-reservation Indian land fits within the definition of Indian country but determined to resolve such controversies on a case-by-case basis.<sup>162</sup>

Even if a court were to reject the EPA's interpretation and hold that the language of 7601(d) requires an exclusion of tribal trust land from "reservation," all is not lost. As an alternative, the EPA could adopt an interpretation of section 164(c) not, as states have argued, that Indian governing bodies may redesignate only formal reservations but rather that formal reservations may be redesignated only by Indian governing bodies (as opposed to the state). Tribal trust land not part of formal reservation could then be redesignated pursuant to the provisions of the Tribal

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156. See Brief for State of Arizona, *supra* note 112.

157. 63 Fed. Reg. 7257 (1998).

158. *Id.*

159. *Id.* The EPA did provide the following definition of reservation: "for purposes of the Clean Water Act or the Clean Air Act, all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." *Id.* at 7270. However, there is no indication that the EPA's definition (40 C.F.R. § 52.21(b)(27)) has been altered.

160. Gelles, *supra* note 12 at 367.

161. 63 Fed. Reg. 7257 at 7259 (1998).

162. The question remains whether the EPA should get any deference for interpretation of Indian country as opposed to interpretation of statute. See Brief of Arizona, *supra* note 112; Remarks of Professor Royster, Sovereignty Symposium. See also Skibine, *supra* note 80 (discussing the role of the liberal Indian canon of construction in the EPA's interpretation of tribes as states provisions).

Authority Rule which allow for treatment as a state upon a showing of inherent authority.<sup>163</sup> Because the *John* and *Citizen Band* decisions establish, at the very least, that tribal trust land is Indian country, a showing of inherent authority will not be difficult to meet. Thus, tribal trust land may be redesignated under sections 164(c) and 301(d)(2).

### B. The *Venetie* decision

In *Alaska v. Native Village of Venetie Tribal Government*,<sup>164</sup> the Court considered the interpretation of “dependent Indian communities” as used in section 1151(b).<sup>165</sup> The court held that the statutory category of dependent Indian communities refers to lands that have been set aside by the federal government for “use of Indians as Indian land and . . . are under federal superintendence.”<sup>166</sup> Although the decision focuses on section 1151(b), as opposed to section 1151(a)’s use of reservation, the *Venetie* decision contains language which suggests that tribal trust land does not fall within the category of “reservation.”<sup>167</sup>

First, recall that the *John* and *Potawatomi* courts used the “lands validly set apart” test to determine if trust lands could be considered a reservation. This test originated in 1914 in the *Pelican* decision.<sup>168</sup> In *Venetie*, the Court described its decision in *Pelican* as “[holding] that Indian lands that were not reservation could be Indian country.”<sup>169</sup> Second, the Court summarized its cases decided prior to the enactment of section 1151 as requiring a federal set aside and federal superintendence and then stated “[s]ection 1151 does not purport to alter this definition of Indian country but merely lists the three different categories of Indian country mentioned in our prior cases.”<sup>170</sup>

This language, it could be argued, demonstrates that the Court intended the three categories of Indian country to be read narrowly. In other words, land must fit cleanly into (a), (b) or (c), or it is not Indian country. Second, the Court describes the test used in *John* as the relevant test for Indian country generally (or dependent Indian communities particularly). Thus, one could read *Venetie* as requiring a rejection of the EPA’s interpretation because the EPA relied on a test intended for the broader category of Indian country rather than the narrower category of reservation.<sup>171</sup>

*Venetie*, I believe, does not compel such a result. First, the Court did not even discuss the holdings of *John* and *Potawatomi*, much less reject them. Further, if the Court intended the validly set apart test to be the test for “dependent Indian

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163. Gelles, *supra* note 12 at 398 (“some off-reservation lands are . . . potentially open to tribal regulation under the CAA, such as lands that Indian nations have purchased and subsequently petitioned the Secretary of the Interior to take into trust . . .”).

164. 522 U.S. 520 (1998).

165. *See id.*

166. *Id.* at 522.

167. *Id.* at 520.

168. *United States v. Pelican*, 232 U.S. 442 (1914).

169. *Venetie*, 522 U.S. at 527.

170. *Id.* at 528.

171. *See* Brief for State of Arizona, *supra* note 112 (making this argument - the EPA relied on cases discussing Indian country rather than “reservation”).

communities” only, not only did the Court decline to state such a restriction but it also failed to provide the appropriate definition of “reservation” under section 1151(a).<sup>172</sup> It is therefore reasonable for the EPA to rely on *John* and *Potawatomi* to determine that tribal trust land should be treated as a “reservation” for the purposes of section 164(c).

## VI. CONCLUSION

In order to secure the ability of Indian tribes to redesignate all their lands, the EPA should amend the regulatory definition of “Indian reservation.” Unless and until this happens, tribes seeking redesignation must consider options to bring their land within the current definition. For current and future trust acquisitions pursuant to section 465, tribes should begin to request, as a matter of routine, a section 467 proclamation of reservation status. For land that has already been accepted into trust, tribe should consider requesting a section 467 proclamation.

If the regulatory definition is amended, the Clean Air Act will support the inclusion of tribal trust land within section 164(c). The Supreme Court has treated tribal trust land as a “reservation” under a number of different situations. The Tribal Authority Rule provides further indication of the EPA’s consistent treatment of tribal trust land as a “reservation.” The *Venetie* decision, although giving one pause, does not mandate a rejection of the EPA’s expansive interpretation of reservation. In the end, then, tribes should have the authority to redesignate “all of their lands” – whether or not those lands are formally declared a reservation.

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172. Cf. *Malabed v. North Slope Borough*, available in 1999 WL 221563 at \*6 (D. Alaska 1999) (“A reservation is, in effect, simply a more formal or officially recognized variant of dependent Indian community.”).