

An Exercise of Sovereignty: Attaining Attainment for Indian Tribes Under the Clean Air Act

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I. INTRODUCTION

In the centuries-long legal battle over American Indian tribal sovereignty¹ and environmental justice,² one regulatory area has emerged as a notable success for tribes – air quality control.³ Tribes have the power under the Clean Air Act (“CAA”) to obtain treatment-as-state status,⁴ create permitting programs for new or modified major stationary source polluters,⁵ design and carry out their own implementation plans for the CAA’s air quality standards,⁶ and even influence surrounding states’ air permitting decisions.⁷ Indian tribes have aggressively asserted these powers under the CAA and won major court battles advancing their regulatory authority in the face of strong state opposition.⁸

This article proposes yet another avenue for increased tribal sovereignty and environmental justice⁹ under the CAA, one that a handful of states have already pursued¹⁰ but no tribe has yet attempted. The CAA designates areas as either

¹ See generally HELEN HUNT JACKSON, *A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT DEALINGS WITH SOME OF THE INDIAN TRIBES* (1881) (detailing treaty violations, statutory violations, and other U.S. government action towards Indian tribes); Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47 (2002) (describing the impact of globalization on Indian nation-building); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981) (advocating for tribal self-determination and sovereignty); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

² Eric Jonathan Lacey, Note, *Manifest Destiny’s New Face: “Soft-Selling” Tribal Heritage Lands for Toxic Waste*, 92 GEO. L. J. 405, 428-29 (2004) (discussing how market pressures can lead tribes to devalue reservation land and permit pollution to the detriment of future generations).

³ See Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is It Working?*, 44 NAT. RESOURCES J. 213, 213-14 (2004) (“[T]ribes have demonstrated increasing interest in developing and administering their own air programs. As one illustration, the number of tribes receiving federal grants to initiate or operate air programs has grown from about 20 in 1995 to more than 120 in 2002.”).

⁴ 42 U.S.C. § 7601(d) (2006).

⁵ 42 U.S.C. § 7502(e)(5) (2006).

⁶ 42 U.S.C. § 7410 (2006).

⁷ See *infra* notes 18076-94 and accompanying text (describing the Prevention of Significant Deterioration program).

⁸ See *id.*

⁹ This article’s proposal fits within the larger movement of environmental justice for Indian tribes and other native, indigenous groups. The rampant industrialization and environmental degradation that defined American expansion onto native lands depleted the natural resources of Indian tribes to the detriment of the health of future generations of tribal members. See DONALD A. GRINDE & BRUCE E. JOHANSEN, *ECOCIDE OF NATIVE AMERICA: ENVIRONMENTAL DESTRUCTION OF INDIAN LANDS AND PEOPLES* 1-21 (1946); see also Lacey, *supra* note 2, at 413-14. Thus, in providing a potential avenue to influence and enhance environmental regulation on tribal lands, this proposal would not only contribute to tribal sovereignty but also to the broader movement for environmental justice in tribal communities.

¹⁰ See, e.g., *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004); *Greenbaum v. EPA*, 370 F.3d 527 (6th Cir. 2004); *Wall v. EPA*, 265 F.2d 426 (6th Cir. 2001); *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984 (6th Cir. 1998); *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106 (3d Cir. 1997); *Ohio v. Ruckelshaus*, 776 F.2d 1333 (6th Cir. 1985); *Ill. Chamber of Commerce v. EPA*, 775 F.2d 1141 (7th Cir. 1985).

“attainment,” “nonattainment,” or “unclassified,” depending on air quality.¹¹ Attainment areas have the most pristine air quality, whereas nonattainment areas have levels of pollutants that make air quality fall below national standards.¹² Due to these deficiencies, the CAA requirements impose more stringent technology requirements on nonattainment areas in order to bring those areas within the national standards over time.¹³ In a series of contested cases, several states have attempted to redesignate areas from nonattainment to attainment in order to implement stricter air quality standards and avoid the CAA’s more expensive technology requirements.¹⁴

This article uses a case study of the Indian tribes in the San Diego Mount Palomar area to demonstrate how the same claim for attainment status under the CAA could help Indian tribes achieve greater sovereignty over reservation air quality. These Southern California tribes sit within the County of San Diego Air Pollution Control District, which is in nonattainment for ozone (eight-hour) and particulate matter (PM₁₀ and PM_{2.5}).¹⁵ Even though they reside within the nonattainment area, several tribal territories lie just east and southeast of Mount Palomar – isolated from the low-quality air in the developed San Diego area.¹⁶ Though this paper does not present scientific research on the exact air quality on the reservations, it is assumed for the purpose of asserting the proposed claim that the air on the east and southeast sides of Mount Palomar is substantially cleaner than the air in San Diego, Orange County, and Los Angeles County.¹⁷ Thus, the Indian tribes with mostly undeveloped reservation land would have a successful claim that their air quality falls within attainment levels and should be designated as such for purposes of the CAA.

Once the Indian tribes receive attainment status, the tribes become eligible for the Prevention of Significant Deterioration (“PSD”) program.¹⁸ Under this program, Indian tribes can request that the Environmental Protection Agency (“EPA”) redesignate the area to Class I status.¹⁹ Class I status would allow the

¹¹ 42 U.S.C. § 7407(d) (2006); *see also* *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1096 (9th Cir. 2005) (describing the three classifications of air quality).

¹² *See Great Basin Mine Watch*, 401 F.3d at 1096.

¹³ 42 U.S.C. §§ 7501-7503 (2006); *see also Southwestern Pennsylvania Growth Alliance*, 144 F.3d at 988.

¹⁴ *See supra* note 10 (citing cases).

¹⁵ COUNTY OF SAN DIEGO AIR POLLUTION CONTROL DISTRICT, FACT SHEET: ATTAINMENT STATUS 1 (2010), <http://www.sdapcd.org/info/facts/attain.pdf>.

¹⁶ *See* Map of American Indian Reservations in San Diego County, <http://www.palomar.edu/americanindianstudies/images/MAP.GIF>.

¹⁷ This article invites scientific environmental research on the Mount Palomar area Indian reservations to test the air for ozone (eight-hour), and particulate matter (PM₁₀ and PM_{2.5}) to determine whether these pollutants meet attainment levels.

¹⁸ *See* 42 U.S.C. § 7474(a) (2006) (discussing authority of states to redesignate areas as Class I, II, or III).

¹⁹ *See* 40 C.F.R. § 52.21(a)(1) (2010).

Indian tribal council or governing body to have input in approving new major source polluters in surrounding areas, including San Diego.²⁰ In this way, the attainment redesignation would provide these Indian tribes with significant leverage in the permitting decisions of surrounding Southern California counties.²¹

As noted above, several states have attempted to redesignate local counties from nonattainment to attainment with varying degrees of success.²² In these cases, however, other neighboring counties sued to protect local control of industry development and to keep the less demanding environmental requirements in place.²³ This article is the first on the subject to suggest that this redesignation can also create opportunities to preserve attainment air quality through subsequent redesignation to Class I status. Thus, this proposal can also serve non-Indian areas with relatively clean air quality interested in restricting future major source polluters in surrounding areas.

This article proceeds as follows. Part II introduces the critical provisions of the CAA, which establish the attainment and nonattainment area standards and lay out the framework for state regulation of air quality. Part II also discusses previous state efforts to redesignate areas from nonattainment to attainment. Part III looks at existing tribal authority over air quality under the CAA, describes specific tribal redesignations from Class II to Class I under the PSD program, and discusses how these redesignations have increased tribal sovereignty over air quality. Finally, Part IV applies the process of redesignation from nonattainment to attainment to the case study of the San Diego Indian tribes, proposing a new regulatory strategy for the tribes. The article ends by responding to potential counterarguments. Part V concludes.

II. ATTAINMENT AND NONATTAINMENT UNDER THE CLEAN AIR ACT

The CAA²⁴ divides the United States into areas of “attainment,” “nonattainment,” or “unclassified” for the purpose of regulating air quality.²⁵ Attainment areas have relatively cleaner air, meeting the national standards for

²⁰ See 42 U.S.C. § 7475(d)(2)(C) (2006).

²¹ San Diego County, for instance, has thirty major source permits, while the South Coast Air Quality Management District, comprising Orange and Los Angeles Counties, has over five hundred. See *infra* note 317 and accompanying text (describing the effects of redesignation).

²² See *supra* note 10.

²³ *Id.*

²⁴ The CAA Amendments of 1970 built upon the Air Quality Act of 1967 and established an air pollution control program based on ambient air quality protection. See Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans - Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 211 (2004).

²⁵ 42 U.S.C. § 7407(d) (2006); see also *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1096 (9th Cir. 2005) (describing the three classifications of air quality).

certain pollutants,²⁶ whereas nonattainment areas have levels of pollutants in the air that fall below these standards.²⁷ If it is unclear whether the area is attainment or nonattainment, the area remains unclassified.²⁸ The purpose of the classification is to impose varying emission restrictions and require certain emissions-control equipment depending on an area's air quality.²⁹ This is done in order to reduce the levels of pollutants in nonattainment areas over time to the national levels while preserving the cleaner air in attainment areas.³⁰ In the most pristine portions of attainment areas, known as Class I areas, the PSD program further restricts air pollution.³¹

The differences between these various restrictions have resulted in lawsuits, in which counties in nonattainment areas have attempted to claim attainment status in order to protect their cleaner air quality.³² However, neighboring counties, standing to be at an economic disadvantage because facilities built within their geographic boundary would have to install more expensive control technology, have sued to prevent this redesignation.³³ Though attempts at redesignation to attainment have been rare and infrequently successful,³⁴ this article highlights redesignation as a potential regulatory strategy for Indian tribes, specifically the Indian tribes in the San Diego area. This article argues that Indian tribes can use redesignation to obtain those benefits sought by states when claiming attainment status. In order to fall under the PSD program, which allows Indian tribes to object to surrounding areas' development of major source polluters,³⁵ an Indian tribe must first be designated as attainment.³⁶ Only then

²⁶ These six criteria pollutants are particulate matter (PM₁₀ and PM_{2.5}), sulfur dioxide (SO₂), nitrogen dioxide (NO₂), carbon monoxide (CO), ozone, and lead. 40 C.F.R. pt. 50 (2010).

²⁷ Each area designated as "nonattainment" is further classified as marginal, moderate, serious, severe or extreme, depending on the degree to which the area exceeds the standards. 42 U.S.C. § 7511(a) (2006).

²⁸ 42 U.S.C. § 7407(d) (2006); *see also* *Great Basin Mine Watch*, 401 F.3d at 1096.

²⁹ *See* Brian H. Potts, *Trading Grandfathered Air – A New, Simpler Approach*, 31 HARV. ENVTL. L. REV. 115, 137 (2007) (giving an example of the ability of a company to consider technological feasibility and cost in an attainment area, but may not in a nonattainment area); Peter H. Harutunian, Comment, *Maximal Environmental Effects under the De Minimis Doctrine: Controversial Changes in Ozone Redesignation Policy*, 9 TUL. ENVTL. L.J. 89, 93 (1995). *See generally* Reitze, *supra* note 24.

³⁰ *Great Basin Mine Watch*, 401 F.3d at 1096.

³¹ *See infra* notes 86-91 and accompanying text.

³² *See supra* note 10.

³³ *See, e.g.,* *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106 (3rd Cir. 1997).

³⁴ *See* Harutunian, *supra* note 29, at 100-101 (describing how Congress addressed two Circuit cases that limited EPA's "statutory authority to make discretionary decisions on redesignation" in the 1990 Amendments).

³⁵ *See* Craig N. Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 HARV. ENVTL. L. REV. 313, 363 (1989) ("The only reason why a state might wish to reclassify an area as Class I would be to protect it against sources in another state; without a Class I designation, the affected state has no basis under the Act to object to proposed sources that would exceed the Class I increments in the area.").

can the tribe apply for redesignation to Class I status,³⁷ which triggers the limits of the PSD program.³⁸ The ultimate goal then, for Indian tribes pursuing attainment, would be to further establish tribal sovereignty over air quality control by attaining Class I status.

This part describes the complex national standards and zones created under the CAA and then discusses states' previous attempts to attain attainment under the Act. The next part demonstrates how Indian tribes in attainment areas can then successfully redesignate tribal territory as Class I for the purposes of the PSD program.

A. The Basics of the Clean Air Act

The Air Quality Act of 1967 established an air pollution control program aimed at protecting ambient air quality.³⁹ Under this Act, states had to create Air Quality Control Regions ("AQCRs"), adopt air quality standards for specific pollutants, and develop a state implementation plan outlining how the state planned to achieve the desired air quality standards.⁴⁰ In 1970, Congress passed the CAA Amendments⁴¹ to further refine these air quality standards into what are known today as the primary and secondary national ambient air quality standards ("NAAQS") for criteria pollutants. Congress gave the EPA authority to determine which criteria pollutants qualified as contributing to the nation's serious air pollution problems and endangering human health.⁴² Thus far, the EPA has designated particulate matter (PM₁₀ and PM_{2.5}), sulfur dioxide (SO₂), nitrogen dioxide (NO₂), carbon monoxide (CO), ozone, and lead as criteria pollutants.⁴³

Based on the levels of these six criteria pollutants and whether the levels exceed or meet the NAAQS, the CAA empowers states to determine the geographic boundaries of nonattainment and attainment areas.⁴⁴ Each state must submit a list of such designations to the EPA for final approval.⁴⁵ States also have the authority to create plans, called state implementation plans ("SIPs"),

³⁶ *Id.* Although it may be possible that a tribe may petition the EPA to redesignate itself from nonattainment to a Class I attainment area, the authors have not found any such examples.

³⁷ See *infra* note 195 and accompanying text.

³⁸ *Id.*

³⁹ Reitze, *supra* note 24, at 211.

⁴⁰ *Id.*

⁴¹ 42 U.S.C. § 7401 (2006).

⁴² 42 U.S.C. § 7408(a) (2006).

⁴³ 40 C.F.R. pt. 50 (2010).

⁴⁴ 42 U.S.C. § 7407 (2006) (designating to each state the responsibility of submitting a SIP); see also *Ill. Chamber of Commerce v. EPA*, 775 F.2d 1141, 1142 (7th Cir. 1985) (describing the CAA's history and the Act's delegation of authority to states and the EPA).

⁴⁵ 42 U.S.C. § 7407 (2006).

for regulating air quality in order to maintain or achieve the NAAQS.⁴⁶ The EPA rules establish the criteria for the approval of a SIP.⁴⁷ If a SIP meets the statutory requirements, then the EPA must approve the SIP and grant the state regulatory power over its air quality control.⁴⁸ However, if a state does not submit an adequate SIP or fails to revise the SIP when required to do so, the EPA is required to promulgate a federal implementation plan (“FIP”).⁴⁹

The CAA requires that each SIP regulate major new and modified stationary sources.⁵⁰ Congress defines a major stationary source as “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.”⁵¹ Since 1977, the CAA forbids the EPA from requiring SIPs to regulate indirect sources, but a state may voluntarily include regulation of such sources in its SIP.⁵² Indirect sources are sources that do not emit pollutants, but attract mobile sources of pollution.⁵³ Examples included in the CAA are parking lots, highways, and garages.⁵⁴

1. The Expense of Being in a Nonattainment Area

The significance of being in a nonattainment area is that facilities in these areas are generally at a significant economic disadvantage in comparison to those in attainment areas because of the increased costs for more stringent emission control equipment.⁵⁵ Under the 1990 CAA Amendments, nonattainment areas are subject to the more costly New Source Review (“NSR”) requirements under Part D of Title I.⁵⁶ Within Part D, subpart 1 sets forth the

⁴⁶ Reitze, *supra* note 24, at 211.

⁴⁷ See 40 C.F.R. pt. 51 (2010) (listing the EPA requirements for the Preparation, Adoption, and Submittal of Implementation Plans).

⁴⁸ 42 U.S.C. § 7410(a)(1), (a)(2)(A), (k)(1) (2006).

⁴⁹ 42 U.S.C. § 7410(c) (2006); *Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975).

⁵⁰ 42 U.S.C. § 7410(j) (2006) (requiring the SIPs to mandate new or modified stationary source owners to demonstrate to the permitting agency that they are in compliance with the CAA requirements).

⁵¹ 42 U.S.C. § 7602(j) (2006).

⁵² 42 U.S.C. § 7410(a)(5)(A) (2006) (stating that the Administrator may not require as a condition of approval of a SIP any indirect source review program, but the Administrator can approve and enforce an indirect source program if the State chooses to adopt and submit one as part of its SIP); see also Reitze, *supra* note 24, at 225. *But see* *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974) (finding EPA can regulate parking lots as indirect sources). See generally 42 U.S.C. § 7410(a)(5)(D) (defining an “indirect source review program” as a “facility-by-facility review of indirect sources of air pollution” to assure that a new or modified source does not “attract mobile sources of air pollution” resulting in an increase in emissions in excess of the allowance set by the relevant NAAQS).

⁵³ 42 U.S.C. § 7410(a)(5)(C) (2006) (defining “indirect source” as a “facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution”).

⁵⁴ *Id.*

⁵⁵ See Harutunian, *supra* note 29, at 93.

⁵⁶ 42 U.S.C. § 7501 (2006); see also *Southwestern Pennsylvania Growth Alliance v. Browner*,

basic requirements applicable to all nonattainment areas,⁵⁷ subpart 2 establishes additional requirements for ozone nonattainment areas,⁵⁸ subpart 3 contains specific requirements for carbon monoxide nonattainment areas,⁵⁹ and subpart 4 provides additional requirements for particulate matter nonattainment areas.⁶⁰ Congress revised subparts 2 through 4 in the 1990 CAA Amendments to restructure the NAAQS attainment deadlines for ozone, CO, and PM₁₀ nonattainment areas and to add new requirements.⁶¹ The specific requirements for ozone classify the nonattainment areas by levels of severity: marginal, moderate, serious, severe, and extreme.⁶² The localities with more severe air quality classifications have more time to meet the NAAQS and achieve attainment status.⁶³

Not only does the level of severity impact the amount of time the locality has to attain the NAAQS, but these different levels may require different technology standards from the general nonattainment emission control requirements. For example, serious air pollution areas for PM₁₀ must implement best available control measures within four years.⁶⁴ As discussed *infra*, the general nonattainment emission control regulations require that existing sources install the “reasonably achievable control technology” for that source⁶⁵ and that major new and modified stationary sources install the more expensive lowest achievable emission rate (“LAER”) technology.⁶⁶

A state must include several specific requirements in its SIP for a

144 F.3d 984, 988 (6th Cir. 1998).

⁵⁷ 42 U.S.C. § 7502 (2006).

⁵⁸ 42 U.S.C. § 7511 (2006) (classifying nonattainment areas for ozone). The designations as a marginal, moderate, serious, severe, or extreme area is based on the design value for the area, which is calculated according to the Administrator’s interpretation methodology. *Id.*

⁵⁹ 42 U.S.C. § 7512 (2006).

⁶⁰ 42 U.S.C. § 7513 (2006).

⁶¹ See Henry A. Waxman, Gregory S. Wetstone & Philip S. Barnett, *A Review of the Major Provisions: Roadmap to Title I of the Clean Air Act Amendments of 1990: Bringing Blue Skies to America’s Cities*, 21 ENVTL. L. 1843, 1850 (1991).

⁶² 42 U.S.C. § 7511 (2006); see also Waxman, *supra* note 61, at 1850.

⁶³ See, e.g., 42 U.S.C. § 7511(a)(1) (2006) (providing that extreme nonattainment areas for ozone become in attainment in twenty years and marginal nonattainment areas become in attainment in three).

⁶⁴ 42 U.S.C. § 7513a (2006).

⁶⁵ 42 U.S.C. § 7502(c) (2006); see, e.g., *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984, 988 (6th Cir. 1998) (explaining the economic injury-in-fact the Alliance and its members suffered as a result of the redesignation).

⁶⁶ 42 U.S.C. § 7503(a) (2006). The term “lowest achievable emission rate” is defined to mean the rate of emissions for any source which reflects either “the most stringent emission limitation which is contained in the [SIP] for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable,” or “the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.” 42 U.S.C. § 7501(3) (2006). See also William V. Luneburg, *Drawing Boundaries for Air Quality Control Under the Clean Air Act: The Importance of Not Being Nonattainment*, 1 PITT. J. ENVTL. L. & PUB. HEALTH L. 61, 66 (2006).

nonattainment area. The state must provide the EPA a comprehensive, accurate, and current inventory of actual emissions of the criteria pollutants and include periodic revisions.⁶⁷ The SIP also must require the nonattainment areas to achieve reasonable further progress (“RFP”).⁶⁸ To achieve progress towards attainment, existing sources must implement reasonably available control measures, which are obtained at a minimum through reasonably available control technology (“RACT”).⁶⁹ Further, the SIP must explicitly identify and quantify the emissions allowed from the construction and operation of major new or modified stationary sources.⁷⁰ These major new or modified stationary sources must have a permit to construct and a permit to operate,⁷¹ which must contain enforceable emission limitations and other control measures.⁷² The SIP must also include contingent measures if the state fails to make progress or attain the NAAQS.⁷³ An example of such a provision is the additional five percent emission reduction requirement for areas that miss their PM₁₀ deadline.⁷⁴ Finally, the SIP must include measures to notify the public each year of the days in which the NAAQS were exceeded and the associated health risks to such exposure.⁷⁵

2. The Prevention of Significant Deterioration Program for Attainment Areas

The PSD program governs sources located in regions that are in attainment or unclassified.⁷⁶ The PSD program divides attainment areas into Class I, II, or III areas.⁷⁷ In the 1977 CAA Amendments, Congress specifically mandated international parks, national wilderness areas, national memorial parks, and

⁶⁷ 42 U.S.C. § 7502(c)(3) (2006).

⁶⁸ 42 U.S.C. § 7502(c)(2) (2006). “Reasonable further progress” is defined as “annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date.” 42 U.S.C. § 7501(1) (2006).

⁶⁹ 42 U.S.C. § 7502(c)(1) (2006).

⁷⁰ 42 U.S.C. § 7502(c)(4) (2006).

⁷¹ 42 U.S.C. § 7502(c)(5) (2006); 40 C.F.R. pts. 70 & 71 (2004) (discussing title V operating permit program requirements). The permit program must be in accordance with 42 U.S.C. § 7503. *Id.* In order for the permitting agency to issue a permit, new or modified stationary sources are required to comply with the lowest achievable emission rate. 42 U.S.C. § 7503(a)(2) (2006). Further, before the permitting agency can allow the construction of certain types of new or modified sources of air pollution, the agency must ensure that any emission increases are offset by corresponding emission reductions. 42 U.S.C. § 7503(c) (2006).

⁷² 42 U.S.C. § 7502(c)(6) (2006).

⁷³ 42 U.S.C. § 7502(c)(9) (2006).

⁷⁴ 42 U.S.C. § 7513a(d) (2006).

⁷⁵ 42 U.S.C. § 7427 (2006).

⁷⁶ 42 U.S.C. § 7471 (2006).

⁷⁷ See 42 U.S.C. § 7474(a) (2006) (discussing authority of states to redesignate areas as Class I, II, or III).

national parks exceeding a certain acreage amount as Class I areas,⁷⁸ and all other attainment areas as Class II.⁷⁹ Additionally, states and tribes have the authority to redesignate areas as Class I or Class III so long as several statutory requirements are met.⁸⁰ Redesignation requires that the state or tribe hold public hearings and analyze the “health, environmental, economic, social, and energy effects of the proposed redesignation.”⁸¹ If these procedural requirements are met, the EPA has little discretion in denying a redesignation.⁸² Although a federal land manager may recommend redesignation, the state does not need to follow it.⁸³ Interestingly, there are no areas currently classified as Class III.⁸⁴ The reason for this inexorable zero is most likely that it is difficult for a state to meet the requirement that the redesignation “will not cause, or contribute to, concentrations of any air pollutant which exceed” the permissible ceilings under the classification of any other area.⁸⁵

Unlike nonattainment areas, there are no explicit statutory requirements for the SIPs covering attainment areas except to maintain the NAAQS.⁸⁶ In order to maintain the NAAQS, locations in attainment areas must comply with the statutory ambient air quality standards (“ceilings”) for sulfur dioxide, particulate matter, and nitrogen oxide.⁸⁷ Where the NAAQS are the baseline standard for the entire country, these ceilings apply only to the communities located in PSD areas.⁸⁸ Below are the nation’s current PSD increments and ceilings for particulate matter, sulfur dioxide, and nitrogen oxide:

⁷⁸ 42 U.S.C. § 7472(a) (2006).

⁷⁹ 42 U.S.C. § 7472(b) (2006).

⁸⁰ 42 U.S.C. § 7474 (2006).

⁸¹ 42 U.S.C. § 7474(b)(1)(A) (2006).

⁸² See *Arizona v. EPA*, 151 F.3d 1205, 1208 (9th Cir. 1998).

⁸³ For example, in *Kerr-McGee Chemical Corp. v. Dep’t of Interior*, the Ninth Circuit held that the DOI land manager for Death Valley National Monument properly considered the effects of redesignation in his recommendation that California redesignate Death Valley from Class II to Class I. 709 F.2d 597, 598 (9th Cir. 1983). *Kerr-McGee* sought declaratory judgment against the DOI and State of California because the company had a pending permit application to expand its chemical processing plant eighteen miles from Death Valley and did not want the State to redesignate the area to a more stringent class. *Id.* at 599-600. The Ninth Circuit held that California could act independently of and inconsistently with the DOI’s recommendation. *Id.* at 602.

⁸⁴ John-Mark Stensvaag, Preventing Significant Deterioration under the Clean Air Act: Area Classification, Initial Allocation, and Redesignation, 41 ENVTL. LAW REPORTER 10,008, 10,016-18 (2008).

⁸⁵ 42 U.S.C. § 7474(a)(2)(B) (2006).

⁸⁶ See 42 U.S.C. § 7471 (2006) (stating generally that each SIP must contain emission limitations as necessary to prevent significant deterioration of air quality in each region).

⁸⁷ Stensvaag, *supra* note 84, at 10,008.

⁸⁸ *Id.*

Table 1: CAA § 163(b)⁸⁹ & 40 C.F.R. § 52.21(c)

(micrograms per cubic meter [$\mu\text{g}/\text{m}^3$])

	PM ₁₀		SO ₂			NO ₂
	Annual Arithmetic Mean	24 Hour Max	Annual Arithmetic Mean	24 Hour Max	3 Hour Max	Annual Arithmetic Mean
Class I	4	8	2	5	25	2.5
Class II	17	30	20	91	512	25
Class III	34	60	40	192	700	50

Congress established these statutory ceilings to permit pollution levels in locations with excellent air quality to increase by only a small fraction of the NAAQS.⁹⁰ Whether or not a location is designated as a Class I, II, or III attainment area is significant to a new facility because each class determines how much room is left for new industrial growth. As evidenced in the above chart, Class I increments are the strictest and the Class III increments are the most generous, which means that permitting major sources is most difficult in Class I areas. A new major source cannot obtain a permit without first demonstrating that its construction will not increase ambient concentrations significantly and will not result in concentrations above the ceiling.⁹¹

Although it may be tougher for a facility to obtain a construction and operation permit in attainment areas, particularly Class I areas, the emission control technology is cheaper in an attainment area than in nonattainment areas.⁹² Existing sources that want to increase their emissions or new major stationary sources that want to build in an attainment area are only required to install best available control technology (“BACT”).⁹³ BACT controls tend to be less demanding and less expensive than the LAER and RACT requirements in nonattainment areas.⁹⁴

⁸⁹ 42 U.S.C. § 7473(b)(1) (2006).

⁹⁰ See Stevensvaag, *supra* note 84, at 10,010.

⁹¹ 42 U.S.C. § 7503(a) (2006).

⁹² See Harutunian, *supra* note 29, at 93.

⁹³ 42 U.S.C. § 7475(a)(4) (2006). “Best available control technology” is defined as “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques for control of each such pollutant.” 42 U.S.C. § 7479(3) (2006).

⁹⁴ Luneburg, *supra* note 66, at 66-67; see also Potts, *supra* note 29, at 122 (discussing basic technological standards under the NSR program for attainment and nonattainment areas).

B. States' Attempts to Attain Attainment

States may ask the EPA to redesignate geographical areas from nonattainment to attainment for a particular pollutant once a NAAQS has been met.⁹⁵ The EPA must approve or deny a state's request to redesignate a county from nonattainment to attainment within eighteen months of receipt.⁹⁶ The EPA will approve of the redesignation if the following five requirements are met.⁹⁷ First, the area must have attained the applicable NAAQS.⁹⁸ Second, the area must have an EPA-approved SIP.⁹⁹ In its request, the state must submit a revised SIP for the redesignation to provide a maintenance plan for at least ten years to ensure that the area will remain in attainment. Such a plan may include changes to the construction permit program for new major sources and modifications of existing major sources.¹⁰⁰ Third, the improvement in the air quality must be permanent and enforceable.¹⁰¹ Fourth, the area must have an EPA-approved maintenance plan.¹⁰² A maintenance plan must outline how the state will continue to achieve the NAAQS over the next ten years,¹⁰³ and the plan must consider population growth pressures and changes to industrial base, such as the number of facilities operating in that area, that may render existing pollution-control measures inadequate in the future.¹⁰⁴ Finally, the area must meet all applicable requirements under section 110 and Part D of the CAA.¹⁰⁵

In cases where a state has been unsuccessful in petitioning the EPA to redesignate a county from nonattainment to attainment, it is generally because the state did not meet one of the five requirements above.¹⁰⁶ In *State of Ohio v. Ruckelshaus*, Ohio requested that Lorain County be redesignated from nonattainment status to attainment, but the EPA denied the change.¹⁰⁷ The Sixth Circuit held that the EPA did not act arbitrarily or capriciously because the

⁹⁵ 42 U.S.C. § 7407(d)(3)(E) (2006).

⁹⁶ 42 U.S.C. § 7407(d)(3)(D) (2006).

⁹⁷ 42 U.S.C. § 7407(d)(3)(E)(i)-(v) (2006).

⁹⁸ 42 U.S.C. § 7407(d)(3)(E)(i) (2006).

⁹⁹ 42 U.S.C. § 7407(d)(3)(E)(ii) (2006).

¹⁰⁰ See 42 U.S.C. § 7505a(a) (2006) (mandating that states accompany redesignation requests with a revised SIP and a ten-year maintenance plan); see also Reitze, *supra* note 24, at 224. One of the five requirements for redesignating an area from nonattainment to attainment is that the "area must meet all applicable requirements under section 110 and Part D of the CAA." 42 U.S.C. § 7407(d)(3)(E) (2006). One such requirement is found in 42 U.S.C. § 7502(c)(5), which explicitly states ("[s]uch [nonattainment] plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with 42 U.S.C. § 7503 (2006).").

¹⁰¹ 42 U.S.C. § 7407(d)(3)(E)(iii) (2006).

¹⁰² 42 U.S.C. § 7407(d)(3)(E)(iv) (2006).

¹⁰³ 42 U.S.C. § 7505a(a) (2006).

¹⁰⁴ *Sierra Club v. EPA*, 375 F.3d 537, 539 (7th Cir. 2004).

¹⁰⁵ *Id.*

¹⁰⁶ See *infra* notes 107-127 and accompanying text.

¹⁰⁷ 776 F.2d 1333, 1335 (6th Cir. 1985).

pollutant migrated to Cleveland and contributed to Cleveland's NAAQS violations, and because it failed the fifth requirement.¹⁰⁸ Although the air quality within the county met the required standard, the State admitted that the emissions from the county contributed to the ozone concentrations in the urban "nonattainment area."¹⁰⁹

In another case, *Southwestern Pennsylvania Growth Alliance v. Browner* ("SPGA I"), the SPGA and the State of Pennsylvania unsuccessfully argued that much of the ozone in the Pittsburgh-Beaver Valley area originated from outside sources and the EPA should have redesignated the area as an attainment area.¹¹⁰ The EPA argued that this was not factually true, and that even if it were the CAA required that the EPA maintain the nonattainment status because of the area's continued violations of ozone NAAQS.¹¹¹ The Third Circuit deferred to the EPA's technical and legal determinations. However, at least one judge did note the unfairness of saddling the Pittsburgh area with control requirements because of pollutants migrating in from out-of-state sources.¹¹² This fairness concern was subsequently addressed, and now the EPA does require out-of-state sources in attainment areas to put additional emission control equipment in place if those sources contribute to another area's nonattainment status.¹¹³

The EPA must be careful to follow a consistent policy in designating a nonattainment area's boundaries for the purposes of redesignation requirements. In *Illinois State Chamber of Commerce v. EPA*, Illinois had unsuccessfully petitioned the EPA to redesignate Kane and Du Page Counties, located near Chicago, as attainment for ozone.¹¹⁴ The EPA had approved Illinois's request to redesignate two other nearby counties just a few months prior to its request regarding Kane and Du Page Counties.¹¹⁵ The Seventh Circuit held that the EPA acted arbitrarily and capriciously in denying the redesignation, citing the EPA's inconsistent policy in approving the boundaries of Chicago's nonattainment area without sufficient explanation.¹¹⁶

In cases where a state has successfully petitioned the EPA to redesignate a county from nonattainment to attainment, a local industry group or a neighboring county has sued to challenge the redesignation because of economic interests. In *Southwestern Pennsylvania Growth Alliance v. Browner* ("SGPA

¹⁰⁸ *Id.* at 1339-40.

¹⁰⁹ *Id.*

¹¹⁰ 121 F.3d 106, 115-17 (3d Cir. 1997).

¹¹¹ *Id.* at 116-18.

¹¹² *Id.* at 124-25 (Becker, J., concurring).

¹¹³ See *infra* note 117 and accompanying text (SPGA II case).

¹¹⁴ 775 F.2d 1141, 1142 (7th Cir. 1985) (holding that the EPA acted arbitrarily and capriciously by not providing an adequate explanation for denying Illinois' request to reclassify Kane and Du Page County from nonattainment to attainment).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1147.

II”), SPGA unsuccessfully appealed the EPA’s decision to redesignate the Cleveland-Akron-Lorain, Ohio area as an attainment area for ozone.¹¹⁷ The SPGA argued that the EPA failed to take into account the “regional” effect of ozone pollution – in particular the effect of airborne transport of ozone from Ohio into Pennsylvania.¹¹⁸ SPGA alleged that Pittsburg continued to suffer downwind effects and was still under the more expensive nonattainment status. The Third Circuit took the EPA’s position that it could redesignate the Ohio area as in attainment.¹¹⁹ However, the EPA did require states upwind of Pennsylvania, including Ohio, to institute more stringent controls to reduce downwind ozone impacts.¹²⁰

In other cases where a state has successfully petitioned the EPA to redesignate a county from nonattainment to attainment, individuals sued challenging that the redesignation did not properly meet one of the five requirements. For example, in *Wall v. EPA*, the Sixth Circuit held that the EPA abused its discretion in redesignating the Cincinnati metropolitan area attainment status for ground-level ozone before Ohio had fully adopted all the RACT rules.¹²¹ In 1990, the EPA had designated the Cincinnati metropolitan area, covering counties in Kentucky and Ohio, as a moderate ozone nonattainment area.¹²² The Sixth Circuit also found that the EPA properly approved of Ohio’s applicable implementation plan and ten-year maintenance plan,¹²³ which are two issues that recur in other redesignation cases.¹²⁴

In another case, *Greenbaum v. EPA*, Ohio successfully petitioned the EPA to redesignate Cuyahoga County from nonattainment to attainment for particulate matter (PM₁₀) in December 2000.¹²⁵ In 1990, the EPA had redesignated Cleveland as a moderate nonattainment area.¹²⁶ The Sixth Circuit upheld EPA’s redesignation.¹²⁷ Greenbaum unsuccessfully argued that the redesignation was in violation of the CAA section 107(d)(3)(E) requirement that the EPA fully approve of the county’s implementation plan and that, at the time, Ohio’s SIP

¹¹⁷ 144 F.3d 984 (6th Cir. 1998).

¹¹⁸ *Id.* at 986-87. In 1991, the EPA designated the Cleveland-Akron-Lorain, Ohio area as a moderate ozone nonattainment area. On November 15, 1994, the Governor of Ohio submitted a request to the EPA to redesignate the area to attainment. On June 29, 1995, the EPA published a final rule determining that Cleveland, Toledo, Dayton, and Cincinnati-Hamilton areas had achieved attainment. *Id.*

¹¹⁹ *Id.* at 990.

¹²⁰ *Id.*

¹²¹ 265 F.3d 426, 442 (6th Cir. 2001).

¹²² *Id.* at 432.

¹²³ *Id.* at 435-37.

¹²⁴ *See, e.g., Greenbaum v. EPA*, 370 F.3d 527 (6th Cir. 2004).

¹²⁵ *Greenbaum*, 370 F.3d at 531-32.

¹²⁶ *Id.* at 531.

¹²⁷ *Id.* at 534-42.

did not contain a fully approved or approvable NSR program.¹²⁸ The Sixth Circuit disagreed and held that the EPA had approved of Ohio's NSR program in a 2003 rule.¹²⁹

Further, in 2003 the EPA redesignated the St. Louis metropolitan area (spanning the border between Missouri and Illinois and requiring consideration of multiple state plans) as attainment for ozone.¹³⁰ In *Sierra Club v. EPA*, Sierra Club asked the court to set aside the redesignation of the St. Louis metropolitan area to attainment for ozone, because St. Louis lacked a proper applicable implementation plan for the area under section 7410(k) and because the area's maintenance plan did not meet the requirements under section 7505.¹³¹ The court upheld the EPA's definition of the "applicable" implementation plan to be what is already in the plan and already implemented or due at the time of attainment.¹³² Sierra Club had unsuccessfully argued that the applicable plan was whatever should have been in the plan at the time of attainment.¹³³

In all of these cases, states attempted to change areas from nonattainment to attainment in order to benefit from the more stringent air quality protections under the CAA to preserve the pristine areas and to restrict pollutants in surrounding areas. These redesignations were often met with opposition from counties alleging that the newly redesignated area contributed to their own air pollution compliance problems, or from interested industry groups angered that businesses in the newly redesignated attainment areas would have a comparative advantage under the cheaper BACT requirements. Part III proposes the application of this new regulatory framework to Indian tribes in the San Diego area.

III. THE CLEAN AIR ACT'S GRANT OF AUTHORITY TO INDIAN TRIBES

Indian tribes have already exercised significant sovereignty over air quality control under the CAA.¹³⁴ Since Congress's amendments to the CAA in 1990, Indian tribes have been eligible to hold similar regulatory authority over air quality control as states, where the EPA deems this authority "appropriate."¹³⁵

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Determination of Attainment of Ozone Standard, St. Louis Area; Approval and Promulgation of Implementation Plans, and Redesignation of Areas for Air Quality Planning Purposes, State of Missouri 68 F.R. 25,430 (May 12, 2003), available at <http://www.federalregister.gov/articles/2003/05/12/03-11187/determination-of-attainment-of-ozone-standard-st-louis-area-approval-and-promulgation-of>.

¹³¹ 375 F.3d 537, 538-39 (7th Cir. 2004).

¹³² *Id.* at 541.

¹³³ *Id.*

¹³⁴ See generally Milford, *supra* note 3.

¹³⁵ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (current version at CAA §§ 101-618, 42 U.S.C. §§ 7401-7671q). CAA § 301(d)(2), 42 U.S.C. § 7601(d)(2), gave the

The amended sections allow the EPA discretion to give Indian tribes, who qualify for treatment as a state (“TAS”) status, control over the implementation and enforcement of the EPA’s national air quality standards and requirements under the CAA.¹³⁶ Under 42 U.S.C. § 7410, tribes also have the ability to create Tribal Implementation Plans (“TIPs”), the tribal equivalent of SIPs, for regulating air quality on the reservation and within the tribe’s jurisdiction.¹³⁷ Like SIPs, the tribal plans regulate the amount of emissions activity within the tribe’s territory in order to maintain the required levels of air pollution in the NAAQS.¹³⁸ TIPs must also ensure emissions do not interfere with the PSD or visibility protection programs in another state or tribal territory.¹³⁹

Indian tribes also have the same power as states to petition the EPA to enforce the CAA air quality requirements on surrounding states or tribes.¹⁴⁰ States distributing permits to new polluters must notify tribes that have TAS status as part of the approval process with the EPA.¹⁴¹ Any Indian tribe that borders the

EPA discretion to treat Indian tribes as states for purposes of implementing the CAA. Prior to the 1990 Amendments, the EPA had enacted policies providing Indian tribes varying levels of authority over air quality control. In the 1977 Amendments to the CAA, the EPA authorized Indian tribes to redesignate their reservations from Class II to Class I for purposes of the PSD program. The EPA also enacted a policy in 1984 to provide Indian tribes with some regulatory power over air quality. However, the authority under the 1984 policy did not provide the same autonomy as states had in implementing and enforcing the CAA. See ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 2 (Nov. 8, 1984).

¹³⁶ 42 U.S.C. § 7601(d)(1)(A) (2006); see also Steffani A. Cochran, Comment, *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, 325-26 (1996).

¹³⁷ 42 U.S.C. § 7410(o) (2006) (“Indian tribes. If an Indian tribe submits an implementation plan to the Administrator pursuant to section 301(d) [42 USCS § 7601(d)], the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 301(d)(2) [42 USCS § 7601(d)(2)]. When such plan becomes effective in accordance with the regulations promulgated under section 301(d) [42 USCS § 7601(d)], the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.”).

¹³⁸ See, e.g., 40 C.F.R. § 49 Subparts D-M (2010) (promulgating the Implementation Plans for Indian tribes in EPA Regions I-X). Indian tribes can also assist in implementing FIPs for large-source generators under Title V permitting. See 40 C.F.R. §§ 49.22-49.24 (2010) (Federal implementation plans for Tri-Cities landfill, Salt River Pima-Maricopa Indian Community, Four Corners Power Plant, Navajo Nation, Navajo Generating Station, Navajo Nation).

¹³⁹ 42 U.S.C. § 7410(a)(2)(D) (2006).

¹⁴⁰ States can petition the EPA to enforce the prohibitions on emissions under CAA § 126, 42 U.S.C. § 7426.

¹⁴¹ See 40 C.F.R. § 49.3 (2010) (stating “tribes shall be treated in the same manner as states with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in § 49.4 and the regulations that implement those provisions”). The exceptions provided in 40 C.F.R. § 49.4 include certain state deadline requirements, mandatory sanctions and criminal enforcements, interim approval of a Title V polluter, provisions requiring the establishment of a Compliance Advisory Panel, provisions concerning civil actions in state and federal courts, as well as other provisions. See 40 C.F.R. § 49.4(a)-(q) (2010).

state issuing the permit, is within fifty miles of the emission source, or will be impacted by the new air pollution, has the right to be notified, to make recommendations to the EPA concerning the permit, and to receive an explanation as to the EPA's final decision.¹⁴² As a result, Indian tribes with TAS status have some influence over potential air polluters in surrounding states.¹⁴³

In order to be eligible for TAS, the tribe must first show it is a federally recognized Indian tribe,¹⁴⁴ and must meet three criteria for eligibility. 42 U.S.C. § 7601(d)(2) requires that the tribe's governing body carry out substantial government duties and powers, have authority over the exterior boundaries of tribal jurisdiction, and be capable of implementing the CAA's regulations and requirements.¹⁴⁵

The D.C. Circuit has upheld the EPA rule granting Indian tribes TAS status, finding that Congress expressly delegated to Indian tribes the authority to develop and implement air quality standards under the CAA.¹⁴⁶ In *Arizona Public Service Company v. EPA*, an Arizona company challenged the EPA's final rule that granted Indian tribes regulatory authority to implement and enforce air quality standards on reservations.¹⁴⁷ The company argued specifically that this delegation did not extend to non-member fee lands on the reservation.¹⁴⁸ The D.C. Circuit, however, found that Congress had intended to provide Indian tribes jurisdiction over non-member fee lands under 42 U.S.C. § 7601(d), without requiring the EPA to determine on a case-specific basis whether the tribe "possessed 'inherent sovereign power.'"¹⁴⁹ In some cases, the Supreme Court has held that Indian tribes may not be able to hold regulatory authority over nonmember fee lands where Congress has not expressly delegated that power.¹⁵⁰ The D.C. Circuit decision in *Arizona* was, therefore, critical in

¹⁴² See 40 C.F.R. § 49.3 (2010).

¹⁴³ *Id.*

¹⁴⁴ 42 U.S.C. § 7602(r) (2006) (defining Indian tribe as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians").

¹⁴⁵ 42 U.S.C. § 7601(d)(2) (2006).

¹⁴⁶ See Kristina Marie Reader, *Casenote: Empowering Tribes: The District Of Columbia Circuit Upholds Tribal Authority To Regulate Air Quality Throughout Reservation Lands In Arizona Public Service Company v. Environmental Protection Agency*, 12 VILL. ENVTL. L.J. 295 (2001).

¹⁴⁷ 211 F.3d 1280, 1283-84 (D.C. Cir. 2000).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1288 ("[T]he statute's clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the [Tribe's] jurisdiction carried with it the implication that Congress considered the areas within the exterior boundaries of a [Tribe's] reservation to be per se within the [Tribe's] jurisdiction." (citing 42 U.S.C. § 7601(d)(2)(B) (2006))).

¹⁵⁰ See, e.g., *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Montana v. United States*, 450 U.S. 544, 564 (1981) ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and

ensuring that Indian tribes could exercise air quality regulatory authority over all reservation territory by interpreting the CAA as expressly delegating this power to Indian tribes.¹⁵¹

Since the 1990 Amendments, thirty-two tribes have received TAS eligibility determinations under the Tribal Authority Rule.¹⁵² Three tribes have received approval to implement TIPs to regulate and enforce air quality on their reservations: the Mohegan Tribe of Connecticut, the Saint Regis Mohawk Tribe, and the Gila River Indian Community.¹⁵³ Several other tribes are also developing TIPs in order to implement the CAA standards and requirements.¹⁵⁴ Finally, one tribe has received delegation under Clean Air Act Part 71 to implement a Title V operating permit program for its reservation.¹⁵⁵ This allows the tribe to issue permits to new large source polluters on the reservation,¹⁵⁶ providing the tribe with the opportunity to develop industry and stimulate the reservation's local economy.

A. Tribal Implementation Plans

Three tribes have successfully proposed and received approval for their own TIPs.¹⁵⁷ Similar to SIPs, the plans allow the tribes to regulate air quality by establishing permitting processes, and to meet or maintain the NAAQS.¹⁵⁸ Unlike SIPs, TIPs do not have to address each criteria pollutant under the

so cannot survive without express congressional delegation.”).

¹⁵¹ See Reader, *supra* note 146, at 317 (describing importance of the D.C. Circuit's decision in *Arizona* and noting that “environmental regulation is essential to any attempt by Tribes to protect tribal lands”).

¹⁵² BASIC INFORMATION, TRIBAL AIR, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/oar/tribal/backgrnd.html> (last visited Mar. 28, 2011).

¹⁵³ Press Release, US EPA Region 2, *EPA Approves First Ever Clean Air Act Plan for Reducing Air Pollution Developed by a Tribe* (October 30, 2007), http://yosemite.epa.gov/opa/admpress.nsf/names/r02_2007-10-30_Saint_Regis_Mohawk_Tribal_TIP; United States Environmental Protection Agency, Tribal Air News 3 (November 13, 2007), <http://www.epa.gov/air/tribal/pdfs/Nov%202007%20Publication.pdf>; EPA News Release, *EPA Approves Nation's Most Comprehensive Tribal Air Quality Plan* (January 19, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/0/A8A51A1313914FD78525781D0068721B>.

¹⁵⁴ BASIC INFORMATION, TRIBAL AIR, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/oar/tribal/backgrnd.html> (last visited Mar. 28, 2011).

¹⁵⁵ *Id.*

¹⁵⁶ See OPERATING PERMITS, ENVTL. PROT. AGENCY, <http://epa.gov/air/oaqps/permits/> (last visited March 21, 2011); see also PART 71 PERMITS, ENVTL. PROT. AGENCY, <http://www.epa.gov/oaqps001/permits/part71.html> (last visited Mar. 21, 2011).

¹⁵⁷ The EPA approved the Mohegan TIP in 2006, the Saint Regis Mohawk TIP in 2010, and the Gila River TIP in January, 2011. See *supra* note 153 and accompanying text.

¹⁵⁸ See 40 C.F.R. § 49.3 (2010) (“Tribes meeting the eligibility criteria of § 49.6 shall be treated in the same manner as States with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in § 49.4 and the regulations that implement those provisions.”).

NAAQS, only some criteria pollutants.¹⁵⁹ As long as the TIP's provisions remain severable and not "integrally related" to any other part of the CAA provisions, the tribe can create a partial implementation of the CAA's plan.¹⁶⁰ Indian tribes can also request that the EPA create a FIP to regulate air quality on the reservation, instead of creating a TIP.¹⁶¹

In 2001, the Mohegan Tribe submitted an application for TAS and a TIP.¹⁶² The EPA approved the Mohegan's TAS application in 2006, and in 2007 the TIP became effective.¹⁶³ The Saint Regis Mohawk Tribe and the Gila River TIPs are described in more detail below.

1. The Saint Regis Mohawk Tribe TIP

In 2003, the Saint Regis Mohawk Tribe received TAS status for the purpose of developing a TIP to help address tribal concerns about pollution from nearby industrial facilities.¹⁶⁴ The reservation is located in northern New York State along the New York-Canada border. Industrial development along the reservation border had resulted in elevated levels of fluoride and heavy metals in the reservation environment.¹⁶⁵ The Saint Regis Mohawk Tribe attempted to regulate five of the six NAAQS criteria pollutants, but also included ambient air quality standards for non-criteria pollutants including fluoride and the heavy metals beryllium, cadmium, chromium, lead, nickel, and zinc.¹⁶⁶ While the EPA approved portions of the TIP, the EPA rejected the ambient air quality standards the tribe proposed for pollutants not included as NAAQS criteria pollutants.¹⁶⁷ The EPA found that a tribe could not regulate pollutants for which the EPA has not otherwise established standards. The EPA did approve the TIP's proposed standards for sulfur dioxide, particulate matter, nitrogen oxides, and ozone – four criteria pollutants.¹⁶⁸

¹⁵⁹ See 40 C.F.R. § 49.7(c) (2010).

¹⁶⁰ *Id.*

¹⁶¹ Rebecca Battye, Darcie Smith & Stephanie J. Walsh, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEVELOPING A TRIBAL IMPLEMENTATION PLAN 12 (2002), available at <http://www.epa.gov/oar/tribal/tip2002/>.

¹⁶² ENVTL. PROT. AGENCY, MOHEGAN NATION, http://www.epa.gov/nea/govt/tribes/mohegan_nation.html (last visited Mar. 21, 2011).

¹⁶³ *Id.*

¹⁶⁴ 72 Fed. Reg. 45,397, 45,400 (Aug. 14, 2007); St. Regis Mohawk Tribe, Environmental Division, Clean Air Programs, <http://www.srmtenv.org/index.php?spec=vegetation> (last visited Mar. 28, 2011); Saint Regis Mohawk Tribe, Environmental Division, Air Quality, http://www.srmt-nsn.gov/pgm_10_01.htm (last visited Mar. 28, 2011).

¹⁶⁵ 72 Fed. Reg. 45,397 (Aug. 14, 2007).

¹⁶⁶ *Id.* at 45,401-02.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

2. The Gila River TIP

As the most comprehensive TIP in the nation,¹⁶⁹ the Gila River TIP provides an excellent example of a tribe's authority over air quality control under the CAA. The Gila River Indian Community Reservation encompasses both attainment and nonattainment areas,¹⁷⁰ making tribal industrial development especially challenging under the CAA regulations.¹⁷¹ The Gila River TIP provides an extensive framework for permitting of minor industrial development and includes mechanisms for administrative and tribal judicial review.¹⁷² The EPA approved the TIP on January 19, 2011, rendering the TIP federally enforceable.¹⁷³

The Gila River TIP created a minor source permitting program,¹⁷⁴ providing requirements for preconstruction review, stack height limitations, continuous source emissions monitoring requirements, requirements for confidentiality of information, and permit fee provisions.¹⁷⁵ Under the plan, the Gila River Indian Community can prevent construction where a new minor source will interfere with the maintenance of the NAAQS on the reservation or in a neighboring state.¹⁷⁶ The plan includes additional sections specifically detailing prohibitory rules for existing and new minor source polluters, which would meet CAA standards.¹⁷⁷ The plan also creates a framework for air monitoring and

¹⁶⁹ U.S. Environmental Protection Agency, Air Plan Actions, *August 3, 2010: Proposed Approval of the Gila River Indian Community Tribal Implementation Plan*, available at <http://www.epa.gov/region9/air/actions/gila-river.html>; EPA Region 9 Air Division, *Technical Support Document for the Gila River Indian Community Tribal Implementation Plan*, available at http://www.epa.gov/region9/air/actions/pdf/Gila_River_TSD.pdf (July 2010) [hereinafter *Gila River Technical Support Doc*].

¹⁷⁰ Approximately 92,000 acres of the Gila River reservation, along its northern boundary, lie within the Maricopa County (Phoenix Planning Area) serious particulate matter (PM₁₀) nonattainment area. *Gila River Technical Support Doc*, *supra* note 169.

¹⁷¹ U.S. Environmental Protection Agency, Gila River's Tribal Implementation Plan (TIP), available at <http://www.epa.gov/oar/tribal/tribetotribe/gilatip.htm>. The Gila River TIP, however, does not have to meet nonattainment requirements because the regulations function independently of the PM₁₀ nonattainment area requirements. *Gila River Technical Support Doc*, *supra* note 169.

¹⁷² U.S. Environmental Protection Agency, Gila River's Tribal Implementation Plan (TIP), available at <http://www.epa.gov/oar/tribal/tribetotribe/gilatip.htm>.

¹⁷³ EPA News Release, *EPA Approves Nation's Most Comprehensive Tribal Air Quality Plan* (Jan. 19, 2011), <http://yosemite.epa.gov/opa/advpress.nsf/0/A8A51A1313914FD78525781D0068721B>.

¹⁷⁴ This is the permitting requirement provided for minor source polluters under CAA § 110(a)(2)(C).

¹⁷⁵ *Gila River Technical Support Doc*, *supra* note 169, at 3; see also Letter dated June 22, 2009, from Margaret Cook, Executive Director, GRIC DEQ, to Laura Yoshii, Acting Regional Administrator, EPA Region 9, "Re: Technical Corrections to the GRIC Air Quality Management Plan," enclosure entitled "Minor New Source Review Demonstration."

¹⁷⁶ *Gila River Technical Support Doc*, *supra* note 169, at 4.

¹⁷⁷ The new rules govern visible emissions, volatile organic compound storage, usage, and handling, and degreasing and solvent metal cleaning. *Id.* at 8-11.

emissions inventory.¹⁷⁸ Finally, the TIP included opportunities for comment and established the Gila River Indian Community Department of Environmental Quality (“DEQ”) as the administrative agency responsible for implementing the plan’s regulations.¹⁷⁹

The Gila River TIP establishes a comprehensive regulatory framework for administering and implementing the CAA regulations on the reservation and demonstrates the amount of tribal sovereignty that tribes can exercise by obtaining TAS status.

B. Tribal Redesignation to Class I Status

One method Indian tribes have used to prevent air quality deterioration on their reservations is to seek class redesignation under the PSD program for attainment areas. In six instances, Indian tribes have successfully requested redesignation from Class II to Class I status under the CAA’s PSD program.¹⁸⁰

The EPA first promulgated PSD regulations in 1975 in order to ensure that the air quality in areas cleaner than required by the national secondary air quality standards would not significantly deteriorate.¹⁸¹ As described in Part II, the CAA’s PSD program places certain requirements on permitting for new major source polluters¹⁸² in attainment areas, requiring installation of BACT, an air quality analysis, an additional impacts analysis, and public involvement.¹⁸³ The PSD program ensures public participation in any permit decision that will result in increased air pollution.¹⁸⁴ Part of the program’s purpose is to preserve and protect the air quality in special places with natural, recreational, scenic, or historic value.¹⁸⁵ The permitting program also aims to prevent emissions originating in one state from significantly deteriorating the air quality of any other state.¹⁸⁶

By moving from Class II to Class I, Indian tribes can effectively limit PSD

¹⁷⁸ EPA News Release, *EPA Approves Nation’s Most Comprehensive Tribal Air Quality Plan* (January 19, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/0/A8A51A1313914FD78525781D0068721B>.

¹⁷⁹ *Gila River Technical Support Doc*, *supra* note 169, at 4.

¹⁸⁰ See National Tribal Air Association, Prevention of Significant Deterioration (PSD), Overview, http://www.ntatribalair.org/index.php?option=com_content&view=article&id=26&Itemid=50 (last visited Mar. 28, 2011); see also U.S. EPA, PREVENTION OF SIGNIFICANT DETERIORATION (PSD) BASIC INFORMATION, <http://www.epa.gov/NSR/psd.html> (last visited Mar. 28, 2011).

¹⁸¹ See generally 40 C.F.R. § 52.21 (2010).

¹⁸² *Id.*

¹⁸³ U.S. EPA, PREVENTION OF SIGNIFICANT DETERIORATION (PSD) BASIC INFORMATION, <http://www.epa.gov/NSR/psd.html> (last visited Mar. 28, 2011).

¹⁸⁴ 42 U.S.C. § 7470 (2006).

¹⁸⁵ 42 U.S.C. § 7470(2) (2006) (describing Congress’s purpose in creating the PSD program).

¹⁸⁶ 42 U.S.C. § 7470(4) (2006).

permitting for new major source polluters in their surrounding areas.¹⁸⁷ Under the PSD program requirements, if the Administrator or Governor of an adjacent Class I area files a notice alleging the new major emitting facility will change the air quality of their area, the polluter must demonstrate that the new facility will not “cause or contribute to concentrations which exceed the maximum allowable increases for a Class I area.”¹⁸⁸ Otherwise, the permit will not be approved.¹⁸⁹ Even if the polluter can show no change in the concentrations of pollutants in the air, the permitting agency still will not issue the permit if the new facility may adversely impact “air quality-related values.”¹⁹⁰ This includes such intangible things as visibility.¹⁹¹ Obtaining Class I status, therefore, provides the Administrator or Governor of a tribal area significant power to stall and prevent permits for new major source polluters in surrounding areas.¹⁹²

This redesignation is only possible within attainment or unclassified areas under the NAAQS.¹⁹³ Thus, the San Diego region tribes located in the non-attainment area of Southern California would not be able to use this method of limiting new polluters in surrounding areas until first attaining attainment status.

Six Indian reservations – Northern Cheyenne, Fort Peck, Flathead, Spokane, Yavapai-Apache, and the Forest County Potawatomi Community – sought and obtained redesignation under the PSD program, each in markedly different circumstances. This section describes the history and effects of each of these redesignations and explores the limits of this method for controlling surrounding area air polluters.

1. Northern Cheyenne

The Northern Cheyenne was the first Indian tribe to pursue this method of limiting new major source polluters in surrounding areas.¹⁹⁴ In 1977, the CAA Amendments formalized the EPA’s practice of allowing Indian tribes to redesignate their reservations from Class II to Class I under the PSD program.¹⁹⁵

¹⁸⁷ 40 C.F.R. § 52.21(g) (1975) (providing specific procedures by which an Indian Tribe governing body could redesignate its reservation from Class II to either Class I or III).

¹⁸⁸ 42 U.S.C. § 7475(d)(2)(C)(i) (2006).

¹⁸⁹ *Id.*

¹⁹⁰ 42 U.S.C. § 7475(d)(2)(C)(ii) (2006).

¹⁹¹ *Id.*

¹⁹² See *infra* notes 194-208 and accompanying text for an example.

¹⁹³ Class I is a designation only within attainment areas. See 42 U.S.C. § 7472(a)-(b) (2006) (defining Class I areas as “(1) international parks, (2) national wilderness areas which exceed 5,000 acres in size, (3) national memorial parks which exceed 5,000 acres in size, and (4) national parks which exceed six thousand acres in size” and Class II areas as “[a]ll areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I”).

¹⁹⁴ ARNOLD W. REITZE, STATIONARY SOURCE AIR POLLUTION LAW 80 (2005) (detailing the history of Indian tribe redesignations).

¹⁹⁵ William H. Gelles, *Tribal Regulatory Authority Under the Clean Air Act*, 3 ENVTL. L. 363,

That same year, the Northern Cheyenne obtained redesignation of the reservation to Class I.¹⁹⁶ Interestingly, the Northern Cheyenne accomplished the redesignation prior to the 1990 CAA Amendments that first provided Indian tribes with the ability to obtain TAS status under the CAA. Thus, the redesignation provided an early and effective means for the Northern Cheyenne to have some power over air quality decisions of the State of Montana.

The redesignation had an almost immediate impact on the construction of proposed power plants near the reservation in Montana. In 1978, the Northern Cheyenne tried to block the construction of a power plant in Colstrip, a town thirteen miles from the reservation.¹⁹⁷ The conflict resulted in litigation between the tribe, the State of Montana, and a neighboring Indian tribe – the Crow Tribe.¹⁹⁸ The petitioners argued that the EPA had abused its discretion in approving the redesignation by not considering the impact this would have on strip-mining.¹⁹⁹ In *Nance v. EPA*, the Ninth Circuit found that the EPA and the tribe had considered the impact the redesignation would have on surrounding strip-mines during the redesignation process, and had determined that under the current CAA regulations the strip-mining would not be impacted.²⁰⁰ However, the 1977 CAA Amendments following the Northern Cheyenne redesignation changed the sources covered in the preconstruction review under the PSD program. After the 1977 Amendments, any source emitting in excess of 250 tons of any pollutant per year would be included in the preconstruction permitting review.²⁰¹ The Amendments also created a new PSD permitting process, requiring BACT and emissions monitoring.²⁰² It was, therefore, possible this would include strip-mining in the PSD review process.²⁰³ The Northern Cheyenne nevertheless won the suit and the redesignation remained in place.²⁰⁴

As the petitioners had predicted, in 1978 the EPA did not approve permits for two uncompleted Montana Power Company coal strip units based on the Northern Cheyenne's Class I status.²⁰⁵ The new units would have violated Class

375 n.79 (1997) (citing 40 C.F.R. § 52.21(c) (1975)).

¹⁹⁶ See 42 Fed. Reg. 40,695 (1977) (publishing the approval of the redesignation).

¹⁹⁷ See REITZE, *supra* note 194, at 234 (citing Les Gapay, *Fighting to Keep Montana's Skies Blue - Northern Cheyenne are Using Clean Air Laws to Block Power Plant Construction*, WASH. POST, Mar. 30, 1978, at A2 and David F. Salsbury, *Montana Utility, Tribe Make Peace on New Power Facility*, CHRISTIAN SCI. MONITOR, June 23, 1980, at 8).

¹⁹⁸ See *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981). The Crow Tribe intervened in the challenge to the EPA's approval of Northern Cheyenne's redesignation.

¹⁹⁹ *Id.* at 706.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² 42 U.S.C. § 7475(a) (1995).

²⁰³ *Nance*, 645 F.2d at 707.

²⁰⁴ *Id.* at 704.

²⁰⁵ See *Montana Power Co. v. EPA*, 608 F.2d 334, 343 (9th Cir. 1979).

I sulfur dioxide limits as established in the 1977 CAA amendments.²⁰⁶ The Montana Power Company challenged the new permitting requirements, but the Ninth Circuit again upheld the tribe's Class I status and enforced the standards.²⁰⁷ The new coal strip units were ultimately constructed, but were required to meet the Class I requirements.²⁰⁸ Thus, the tribe's redesignation served an important function by giving the Northern Cheyenne power to control surrounding polluters and maintain the air quality of the reservation.

2. Fort Peck

The EPA approved the Fort Peck Class I redesignation in 1984, significantly limiting the levels of NAAQS pollutants permissible on the reservation.²⁰⁹ The Sioux and Assiniboine tribes that reside on the Fort Peck Reservation sought to redesignate the area in the face of planned developments by both a Canadian coal-fired electrical project and local fuel plants, which would have greatly increased sulfur dioxide and nitrogen oxide levels in the air.²¹⁰ Despite the large impact the redesignation could potentially have on the state, unlike in other redesignation cases, the EPA did not receive any objections from the surrounding areas.²¹¹ There were also no procedural objections to the tribe's proposed redesignation.²¹²

The redesignation did, in fact, directly impact local coal production.²¹³ The redesignation decreased the amount of coal being produced in the area and, as a result, shifted local energy needs.²¹⁴ About half of the two million acres of the Fort Peck Reservation lie within the Fort Union Coal Formation, and the reservation also has large natural gas reserves.²¹⁵ The redesignation limited allowable emissions, thereby reducing coal production in the area.²¹⁶ This enabled the Sioux and the Assiniboine to develop a natural gas industry in order to meet the demand for alternate sources of power.²¹⁷ Thus, the tribes had authority after the redesignation to exercise their sovereignty and shape the

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Joseph Kreye, Note, *The Forest County Potawatomi Request Redesignation Under the Clean Air Act*, 4 WIS. ENVTL. L.J. 87, 93 (1997).

²⁰⁹ 49 Fed. Reg. 4734, 4735 (1984) (codified at 40 C.F.R. pt. 52).

²¹⁰ Patrick Smith & Jerry D. Guenther, Note, *Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds*, 9 AM. IND. L. REV. 83, 86 (1981).

²¹¹ 49 Fed. Reg. 4734, 4735 (1984) (codified at 40 C.F.R. pt. 52).

²¹² *Id.*

²¹³ Kreye, *supra* note 208, at 93-94.

²¹⁴ *Id.* at 93.

²¹⁵ *Id.*

²¹⁶ *Id.* at 94-95.

²¹⁷ *Id.* at 94.

development and economic exploitation of tribal energy resources.

3. Flathead

In 1982, the EPA approved the Flathead redesignation from Class II to Class I after a one-year period of comment and review.²¹⁸ The Flathead Reservation includes the Confederated Salish and Kootenai Tribes and is located on 1.3 million acres of land in northwest Montana.²¹⁹ The Governor of Montana did not object to the request for redesignation, nor did any of the submitted comments pose objections.²²⁰ The Department of the Interior (“DOI”) requested an additional two-week period for comment, which the EPA granted, but ultimately the DOI did not submit a comment on nor an objection to the redesignation.²²¹ The tribes did not request the redesignation in the face of any new major developments in the surrounding areas, although the reservation territory itself had lumber and hydroelectric “riches.”²²² As a result, the redesignation process occurred uneventfully and quickly compared to other tribal redesignations.²²³ Under Class I status, any future development of the reservation resources remains strictly limited.²²⁴

4. Spokane

The EPA approved the Spokane Tribal Council’s request for redesignation in 1991, following a three-year review and comment period.²²⁵ The Spokane Reservation encompasses 157,376 acres in Washington – 108,874 of which is forestland.²²⁶ The tribe was committed to preserving the natural resources of the area and the redesignation provided the tribe with additional power to prevent construction of major source polluters.²²⁷ Specifically, the tribe had fought the operating practices of a uranium mining and mill operation located on the reservation, known as the Midnite Mine, before the mine suspended activity in

²¹⁸ 47 Fed. Reg. 23,927, 23,928 (1982) (codified at 40 C.F.R. pt. 52).

²¹⁹ CONFEDERATE SALISH AND KOOTENAI TRIBES, <http://www.cskt.org/> (last visited Mar. 21, 2011).

²²⁰ 47 Fed. Reg. 23,927, 23,928 (1982).

²²¹ *Id.*

²²² Kreye, *supra* note 208, at 95.

²²³ In comparison, the redesignation of Northern Cheyenne sparked four years of litigation, the redesignation of Yavapai-Apache took three years to receive approval and spawned another three years of litigation, and the redesignation of Forest County Potawatomi Community took over a decade of dispute resolution and compromise before receiving EPA approval.

²²⁴ *See supra* notes 76-91 and accompanying text (describing the PSD program requirements).

²²⁵ Approval and Promulgation of State Implementation Plans, 56 Fed. Reg. 14,861, 14,862 (Apr. 12, 1991) (codified at 40 C.F.R. pt. 52).

²²⁶ SPOKANE TRIBE OF INDIANS, <http://www.spokanetribe.com/reservation> (last visited Mar. 21, 2011).

²²⁷ *See supra* notes 76-91 and accompanying text (describing how the PSD program prevents permitting for new major source polluters).

1981.²²⁸ The tribe's Class I status would have placed some limits on any of the Midnite Mine's future mining activity by limiting air pollutant concentrations.²²⁹

The process for the Spokane tribe received few comments and did not result in dispute resolution or litigation.²³⁰ The only objections to the project came from the owner and operator of the uranium mining and mill operations, who argued the Tribal Council's proposed redesignation did not include a sufficient discussion and analysis of the effects of the redesignation on the uranium mining.²³¹ The EPA rejected this argument, noting the mining operations were inactive and, therefore, a more detailed analysis would be speculative.²³²

5. Yavapai-Apache

In 1993, the Yavapai-Apache²³³ submitted a request to be redesignated from Class II to Class I under the CAA PSD program.²³⁴ The tribe was motivated in part by the Phoenix Cement Plant's plan to incinerate used tires near the reservation.²³⁵ The tribe hoped the redesignation would effectively prevent this potential air pollution in the vicinity of the Class I area.²³⁶ The State of Arizona disputed the reclassification and argued it would be impracticable to apply Class I air quality standards to the separate parcels of the Yavapai-Apache Reservation.²³⁷ The EPA allowed for additional time for the state and the tribe to conduct dispute resolution, but neither party wished to further discuss the issues at the EPA-conducted meeting.²³⁸ The EPA issued a final rule approving

²²⁸ See *United States v. Newmont USA Ltd.*, 2008 U.S. Dist. LEXIS 82922 (E.D. Wash. Oct. 17, 2008). In 1981, the U.S. Geological Survey shut down the mine based largely on information submitted by the Spokane tribe.

²²⁹ 56 Fed. Reg. 14,861 (1991).

²³⁰ *Id.*

²³¹ *Id.* at 14,862.

²³² *Id.* Since the redesignation, the abandoned uranium mine, known as the Midnite Mine, has been designated a superfund site. In 2008, a U.S. District Court in Spokane ordered the Newmont Mining Corporation to share the cost of cleaning up the site. See *Newmont USA Ltd.*, 2008 U.S. Dist. LEXIS 82,922. Most recently, in 2009, the Agency for Toxic Substances and Disease Registry determined the mine was a public health hazard. See ATSDR Seeks Public Comments on Public Health Assessment for the Midnite Mine site (June 12, 2009), available at <http://www.atsdr.cdc.gov/news/displaynews.asp?PRid=2435>.

²³³ The Yavapai-Apache reservation comprises five parcels of land in central Arizona totaling 635 acres. See 40 C.F.R. § 52.150 (2010); 59 Fed. Reg. 18,346, 18,347 (1994).

²³⁴ 59 Fed. Reg. 18,346, 18,347 (1994).

²³⁵ See Sarah B. Van De Wetering & Matthew McKinney, *The Role of Mandatory Dispute Resolution in Federal Environmental Law: Lessons from the Clean Air Act*, 21 J. ENVTL. L. & LITIG. 1, 13 (2006).

²³⁶ *Id.*

²³⁷ *Administrator v. United States EPA*, 1998 U.S. App. LEXIS 35314, at *2 (9th Cir. Feb. 24, 1999).

²³⁸ Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. 56,450, 56,452 (Nov. 1, 1996); see also Wetering & McKinney, *supra* note 235, at 16 (discussing the EPA's efforts to encourage negotiation and dispute resolution between the

the redesignation on November 1, 1996.²³⁹

Arizona appealed the EPA's rule, arguing the approval of the redesignation was an abuse of discretion. First, Arizona submitted that the EPA had abused its discretion in approving the tribe's request for redesignation for all five parcels.²⁴⁰ Second, the State argued that the EPA's determination that the tribe had adequately described and analyzed the effects of its proposed redesignation was an abuse of discretion.²⁴¹ The Ninth Circuit found that at least three of the parcels were reservation territory under the definition in 42 U.S.C. § 7474(c), which specified which areas an Indian tribe can redesignate, and remanded the matter to the EPA for a determination on the remaining two parcels.²⁴² The court then found against Arizona's claim that the tribe had not adequately described and analyzed the possible health, environmental, economic, social, and energy effects of redesignation.²⁴³ The court held that the tribe had, in fact, considered all the factors required by the PSD provisions.²⁴⁴ Thus, the Ninth Circuit upheld Yavapai-Apache's redesignation²⁴⁵ just as it had the Northern Cheyenne's redesignation in *Nance*.

6. Forest County Potawatomi Community

In 2008, the EPA approved the redesignation of the Forest County Potawatomi Community Reservation to a Class I area following over a decade of dispute and mediation over the redesignation.²⁴⁶ The reservation encompasses nearly 12,000 acres within Forest County, Wisconsin, and the redesignation stood to impact the allowable levels of pollutants from any new major sources or from any major modifications to existing major stationary sources in the surrounding areas of Wisconsin and Michigan.²⁴⁷ Similar to the Yavapai-Apache's redesignation in the face of the planned Phoenix cement plant, the Forest County redesignation arose partially in the face of concern about a proposed Exxon zinc and copper mine, and also during plans to expand a local paper mill.²⁴⁸ The redesignation would allow the tribe to seek review of

tribe and Arizona).

²³⁹ 61 Fed. Reg. 56,461 (1996). The EPA also published a ruling resolving the dispute resolution between the tribe and Arizona in favor of the tribe.

²⁴⁰ Administrator v. EPA, 1998 U.S. App. at *2.

²⁴¹ *Id.* at *3.

²⁴² *Id.* at *14.

²⁴³ *Id.*

²⁴⁴ *Id.* at *17-18.

²⁴⁵ 61 Fed. Reg. 56,461 (1996); 61 Fed. Reg. 56,450 (1996).

²⁴⁶ See 73 Fed. Reg. 23,111 (Apr. 29, 2008).

²⁴⁷ Ann Juliano, *Symposium: Native American Sovereignty Issues: Redesignating Tribal Trust Land Under Section 164(c) of the Clean Air Act*, 35 TULSA L.J. 37, 41 (1999); Kreye, *supra* note 208, at 100.

²⁴⁸ See Jeff Mayers & Nathan Seppa, *Thompson Vexed by Tribe's Move*, WIS. ST. J., Dec. 13, 1994, at 1A; Jeff Mayers, *Businesses Concerned About Tribe's Air Request*, WIS. ST. J., July 25,

new permits for major source polluters within a 60-mile radius of the reservation, and result in lowering the allowable increases in ambient concentrations of particulate matter, sulfur dioxide, and nitrogen oxides in the vicinity of the reservation.²⁴⁹

The tribe first proposed the redesignation in 1995, but faced significant opposition from surrounding states. The State of Wisconsin immediately objected to the redesignation,²⁵⁰ and both the Wisconsin and Michigan governors argued the redesignation would allow the tribe to regulate air quality within each state's borders, thereby devastating economic development.²⁵¹ The EPA suspended the deadline for public comment indefinitely, while the parties pursued mediation as provided for in CAA section 164(e).²⁵² The mediation occurred independently of the EPA and the agency – as required under section 164(e) – remained neutral on any disputed facts.²⁵³

After two years of mediation, the tribes and the two states still had not reached an agreement. The EPA then issued notice that it would close the comment period and begin review of the redesignation.²⁵⁴ Wisconsin again requested mediation though, and the EPA began another round of dispute resolution in 1998.²⁵⁵ The parties ultimately agreed to resolve six issues during mediation:

- (1) Whether the lands proposed for redesignation are of sufficient size to allow for effective air quality management;
- (2) the extent to which the lands proposed for redesignation have sufficient size to have air quality related values;
- (3) the off-reservation impacts of redesignation as discussed in the Technical Support Document;
- (4) the Tribe's choice of mercury deposition as an air quality related value;
- (5) the Tribe's choice of air quality related values; and
- (6) the roles and responsibilities of the respective parties in the dispute resolution discussion on September 2, 1998.²⁵⁶

The parties met three times over the following year with private mediators in order to work towards a resolution.²⁵⁷ The parties then met with the EPA and

1995, at 1B.

²⁴⁹ 60 Fed. Reg. 33,779 (1995).

²⁵⁰ *Id.* at 33,780.

²⁵¹ Kreye, *supra* note 208, at 87-88.

²⁵² 60 Fed. Reg. 40,139 (1995).

²⁵³ *See* Kreye, *supra* note 208, at 103-04 (describing the mediation process).

²⁵⁴ 73 Fed. Reg. 23,113 (2008).

²⁵⁵ *Id.*

²⁵⁶ *Id.* (citing Letter from Stephen Rothblatt, Acting Director, Air and Radiation Division, Region 5, to George E. Meyer, Secretary WDNR, and Joseph Young, attorney for FCP (November 6, 1998) (cc to Denis Drake, MDEQ)).

²⁵⁷ Michigan ultimately withdrew from the negotiations and resolved its dispute with the tribe separately. *See* 73 Fed. Reg. 23,113 (2008).

drafted a final agreement in June 1999.²⁵⁸ The tribe and Wisconsin signed a memorandum of agreement, which resolved the dispute and provided a framework for the tribe's redesignation to Class I.²⁵⁹

As a result of this memorandum, however, the EPA had to delay the final promulgation of the redesignation until Wisconsin modified its SIP in order to implement the agreed-upon terms.²⁶⁰ Specifically, any major source emitter within a 10-mile radius of the tribal land would now have to perform an increment analysis and meet consumption requirements applicable to a Class I area.²⁶¹ Outside of the 10-mile radius, the major sources would have to meet the requirements for a Class II area.²⁶² Finally, all major sources within sixty-two miles would be subject to an analysis to determine whether their air quality-related values would have an adverse impact on tribal land.²⁶³ Because the Wisconsin SIP did not include these requirements, the state had to modify the SIP before the final promulgation of the tribe's redesignation in 2008.²⁶⁴

The mediation and dispute resolution process worked successfully in the case of the Forest County Potawatomi Community by providing the tribe a mechanism to change Wisconsin's SIP to prevent air deterioration on the reservation. The PSD redesignation program shifted the power balance and provided the tribe with a powerful negotiating tool, where the tribe would otherwise have had no voice in decisions for permitting of major source polluters in the surrounding areas. This demonstrates how Indian tribes can use methods of redesignation as negotiating tools, even where the ultimate redesignation results in a compromise.

7. The Confines of Class I Status

The Indian tribes' redesignations from Class II to Class I present a marked success for tribal sovereignty, and specifically for expanded tribal authority over air quality. The tribes' successful redesignations also demonstrate how tribes have been able to use authority under the CAA to limit air polluters in surrounding areas. This paper proposes Indian tribes in the Mount Palomar area take similar steps through redesignation from nonattainment to attainment Class I status in order to similarly limit air polluters in the San Diego area.

While the PSD redesignation does serve as an example of Indian tribes using CAA authority to limit surrounding polluters, it is important to note the limits of the PSD program. As discussed above, Class I status allows Class I

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ 71 Fed. Reg. 75,694, 75,696 (Dec. 18, 2006).

²⁶² *Id.* at 75,694.

²⁶³ *Id.*

²⁶⁴ *Id.*

Administrators to oppose major source permitting in surrounding areas that could impact air quality within the Class I area.²⁶⁵ However, the PSD program exempts a large number of polluters from the restrictions, including major source polluters that were constructed prior to the 1977 Amendments and were grandfathered in,²⁶⁶ as well as sources that do not qualify as “major” sources of air pollution.²⁶⁷ This has the effect of significantly limiting the number of surrounding polluters impacted by the redesignation.²⁶⁸

The EPA regulations also do not provide Indian tribes with enforcement power and instead leave the enforcement power with the EPA.²⁶⁹ As a result, Indian tribes have had to rely on the EPA to step in and enforce the requirements of Class I status on surrounding polluters.

Finally, the redesignation under the PSD program is only available in attainment or unclassified areas under the NAAQS.²⁷⁰ Therefore, Indian tribes in nonattainment areas do not have the opportunity to pursue this redesignation program, even if the reservation air quality is significantly less polluted than surrounding areas. As a result of this limitation, this article proposes that Indian tribes in Southern California’s Mount Palomar area first pursue redesignation to attainment status – a strategy that several tribes have successfully achieved under the CAA – and then redesignation as a Class I attainment area. The next part outlines this proposal in detail.

IV. CREATING A CLAIM FOR ATTAINMENT STATUS

This article proposes that the Indian tribes of San Diego County seek attainment Class I status in order to prevent the surrounding areas of San Diego County, Orange County, and Los Angeles County, including Long Beach City, from granting new major source permits without obtaining tribal approval. The ability for tribes to challenge industrial growth in Los Angeles County is significant because smog from Los Angeles is routinely a key factor when San Diego exceeds its clean air standards.²⁷¹ Several Indian tribes in San Diego

²⁶⁵ 42 U.S.C. § 7475(d)(2)(C)(i) (2006).

²⁶⁶ CAA § 169(1), 42 U.S.C. § 7479(1) (defining major sources).

²⁶⁷ Joshua Epel & Martha Tierney, *Tribal Authority over Air Pollution Sources On and Off the Reservation*, 25 ENVTL. L. REP. (ENVTL. L. INST.) 10,583, 10,589 (1995) (discussing the definition of major air pollutant in CAA § 169(1), 42 U.S.C. § 7479(1) (1994)).

²⁶⁸ In fact, a study the U.S. General Accounting Office conducted found that the PSD program required only one percent of the stationary sources operating within one hundred kilometers of five Class I areas to have a permit. U.S. GEN. ACCOUNTING OFFICE, AIR POLLUTION: PROTECTING PARKS AND WILDERNESS AREAS FROM NEARBY POLLUTION SOURCES 16 [GAO/RCED-90-10] (1990).

²⁶⁹ Gelles, *supra* note 195, at 376 n.82 (citing CAA Amendments of 1977, Pub. L. No. 95-95, § 127(a), 91 Stat. at 740 (current version codified at CAA § 167, 42 U.S.C. § 7477 (1994))).

²⁷⁰ U.S. EPA, PREVENTION OF SIGNIFICANT DETERIORATION (PSD) BASIC INFORMATION, <http://www.epa.gov/NSR/psd.html> (last visited Mar. 28, 2011).

²⁷¹ FREQUENTLY ASKED QUESTIONS, SAN DIEGO AIR POLLUTION CONTROL DIST. 1 (2010),

County are uniquely positioned east and southeast of Mount Palomar.²⁷² The mountain serves as a natural barrier between the industrialized and urban areas of greater San Diego, Orange County, and Los Angeles County and the undeveloped area of the reservations.²⁷³ This article assumes for the purposes of the proposed claim that this barrier blocks emissions from polluters, creating a zone of attainment level air quality within the tribal territory.²⁷⁴ Under this proposal, the Indian tribes would first apply for attainment status and demonstrate to the EPA that the reservations meet attainment requirements.²⁷⁵ After receiving approval for redesignation to attainment, the tribes would then seek redesignation to Class I status.²⁷⁶ As the tribes' redesignations in Part III demonstrate, Class I status would enable the tribes to use the PSD program to influence and even block San Diego and other surrounding areas from permitting for new major source polluters.²⁷⁷

Although this article applies the proposed claim to this specific and unique landscape, in theory the proposed claim would allow other areas benefiting from significantly cleaner air quality to bring similar redesignation claims in order to achieve attainment Class I status. Thus, this proposal could become a more widely implemented strategy for counties and tribes interested in preserving air quality.

A. The Unique Environmental Position of the San Diego Area Indian Tribes

San Diego County has more Indian reservations than any other county in the United States.²⁷⁸ There are twenty reservations altogether with cumulative land holdings of just over 124,000 acres, or 193 square miles of the 4205 square miles in San Diego County.²⁷⁹ There are four tribal groups that make up the indigenous Indians of San Diego County: the Kumeyaay/Diegueño, the Luiseño, the Cupeño, and the Cahuilla.²⁸⁰

available at <http://www.sdapcd.org/info/facts/faqs.pdf> (discussing affects of Los Angeles smog on San Diego exceedances in 1990).

²⁷² See *infra* notes 289-293 and accompanying text and map.

²⁷³ *Id.* This is an assumption made by the authors for the purposes of this proposal.

²⁷⁴ In order to meet attainment level air quality, the reservation areas would have to meet the NAAQS levels for Ozone and Particulate Matter. See *infra* notes 281-288 and accompanying text (describing San Diego air quality).

²⁷⁵ See *supra* notes 55-75 and accompanying text (describing the requirements for attaining attainment).

²⁷⁶ 40 C.F.R. § 52.21(g) (2010) (detailing the process for Indian tribes to obtain Class I status).

²⁷⁷ See *infra* notes 187-192 and accompanying text (describing the benefits of the proposed redesignation to attainment Class I status).

²⁷⁸ *Indian Reservations in San Diego County*, UNIV. OF SAN DIEGO, <http://www.sandiego.edu/nativeamerican/reservations.html> (last visited Mar. 28, 2011).

²⁷⁹ *Id.*

²⁸⁰ *The Indians of San Diego County and Baja California*, SAN DIEGO STATE UNIV., <http://info.dome.sdsu.edu/research/guides/calindians/insdcty.shtml> (last visited Mar. 28, 2011).

Table 2: INDIAN RESERVATIONS IN SAN DIEGO²⁸¹

Reservation	Tribe on Reservation	Population	Acreage
Barona	Diegueño	536	5664
Campo (atop Laguna mountains)	Diegueño	351	15,336
Capitan Grande	Diegueño	33	15,615
Cuyapaipe	Diegueño	None	4156
Inaja & Cosmit	Diegueño	None	846
Jamul	Diegueño	60	6
La Jolla (Southern Slopes of Palomar)	Luisseño	390	8798
La Posta	Diegueño	18	3471
Los Coyotes	Cahuilla /Cupeño	70	24,762
Manzanita	Diegueño	69	3563
Mesa Grande	Diegueño	75	1820
Pala	Luisseño/Cupeño	918	12,273 ²⁸²
Pauma and Yuima (foothills of Mt. Palomar)	Luisseño	186	5826
Rincon	Luisseño	1495	3918
San Pasqual	Diegueño	752	1412
Santa Ysabel	Diegueño	250	15,270
Sycuan Rancheria	Diegueño	33	632
Viejas	Diegueño	394	1572

San Diego County is a nonattainment area for ozone (eight-hour) and particulate matter (PM₁₀ and PM_{2.5}), but is an attainment area for carbon monoxide, nitrogen dioxide, sulfur dioxide, and lead.²⁸³ Two climate features contribute to air pollution in San Diego County. First, strong subsidence inversions during the summer months trap pollutants at elevations between one thousand and three thousand feet.²⁸⁴ As a result, the highest pollution levels are often found in the western mountain slope communities.²⁸⁵ Second, the Santa

²⁸¹ *Indian Reservations in San Diego County*, UNIV. OF SAN DIEGO, <http://www.sandiego.edu/nativeamerican/reservations.html> (last visited Mar. 28, 2011).

²⁸² *Pala Band of Mission Indians*, PALA TRIBE (2006), <http://www.palatribe.com/about> (last visited Mar. 21, 2011).

²⁸³ AIR POLLUTION CONTROL DISTRICT OF COUNTY OF SAN DIEGO, FACT SHEET: ATTAINMENT STATUS 1 (2010), <http://www.sdapcd.org/info/facts/attain.pdf>.

²⁸⁴ TIERRA ENVTL. SERV., ENVIRONMENTAL ASSESSMENT FOR THE PALA TRIBAL WASTEWATER SYSTEM REHABILITATION PROJECT 15 (2007), <http://www.epa.gov/region9/nepa/pala/Pala-Wastewater-EA-October-1107.pdf>.

²⁸⁵ *Id.*

Ana wind condition affects the travel patterns of pollutants in Southern California. For example, a strong Santa Ana wind can produce clear days because offshore winds will blow the pollutants out to the ocean.²⁸⁶ A weak Santa Ana wind means that air pollutants from Los Angeles and Orange Counties will blow towards the sea but then southward to San Diego County's shores.²⁸⁷ As a result, there are higher pollutant concentrations in the coastal communities.²⁸⁸

Several San Diego area tribes are located on the eastern and southeastern sides of Mount Palomar.²⁸⁹ The mountain reaches 6140 feet (1871 meters)²⁹⁰ and sits along State Route 76, shielding the reservations of the Los Coyotes and La Jolla from the coast.²⁹¹ The mountain also separates the tribal territories of San Diego County from Orange County and the industrialized area of Long Beach.²⁹² This article hypothesizes that this natural barrier blocks some of the air pollutants from the more industrialized surrounding areas, creating a pocket of significantly cleaner air on the reservations. This article also invites scientific environmental research into the air quality on San Diego County Indian reservations. Research demonstrating that significantly cleaner air exists on reservations with less ozone and particulate matter would assist these tribes in petitioning for redesignation to attainment Class I status.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 15-16.

²⁸⁸ TIERRA ENVTL SERV., DRAFT TRIBAL ENVIRONMENTAL IMPACT REPORT FOR THE PALA CASINO AND SPA EXPANSION PROJECT 29 (2006), www.palatribe.com/programs/PalaTIER/at_download/file.

²⁸⁹ *Indian Reservations in San Diego County*, UNIV. OF SAN DIEGO, <http://www.sandiego.edu/nativeamerican/reservations.html> (last visited Mar. 28, 2011).

²⁹⁰ *The NGS Data Sheet*, NAT'L GEODETIC SURVEY, http://www.ngs.noaa.gov/cgi-bin/ds_mark.prl?PidBox=DX5064 (last visited Mar. 28, 2011).

²⁹¹ See *infra* Map of San Diego County Indian reservations, available at <http://www.palomar.edu/americanindianstudies/images/MAP.GIF>.

²⁹² *Id.*



X marks Mount Palomar.²⁹³

B. Bringing a Claim for Attainment Status

This article proposes that the Mount Palomar area Indian tribes first apply with the EPA for attainment status under the CAA. There are two avenues the tribes can follow to achieve attainment status. First, as discussed *supra* in Part III, the tribes can apply for TAS and submit their own TIPs. In the TIP, the Indian tribes must show the reservations meet the requirements for attainment as discussed *supra* in Part II. The process of attaining TAS and TIP approval often takes years as noted in Part III. The second alternative to achieve attainment status is for the tribes to petition the Governor of California to redesignate their territories as attainment areas. As noted in Part II, such redesignation from nonattainment to attainment status can take years before the EPA approves a state's request.²⁹⁴ While neither option is quick, the tribes save some time under the second option by not having to prepare a TIP.²⁹⁵

After achieving attainment status, the Indian tribes should seek Class I status under 40 C.F.R. § 52.21(g). This regulation provides specific procedures by

²⁹³ Map of American Indian Reservations in San Diego County, <http://www.palomar.edu/americanindianstudies/images/MAP.GIF> (last visited March 30, 2011).

²⁹⁴ See *supra* notes 181-193 and accompanying text.

²⁹⁵ See *supra* note 163 and accompanying text.

which an Indian Tribe governing body can redesignate its reservation from Class II to Class I. The tribe can submit a proposal to the EPA to redesignate the area after holding at least one public hearing, notifying the States, Indian Governing Bodies, and Federal Land Managers in areas that might be affected, describing the reasons for the redesignation,²⁹⁶ providing an opportunity for comment and recommendations, and consulting the elected leadership of local governments in the area.²⁹⁷ The EPA then has ninety days to disapprove or approve the proposed redesignation.²⁹⁸ However, in practice, the redesignation can take years, while the surrounding areas and the tribe undertake mediation and negotiation to determine new requirements for air quality regulation under the tribe's Class I status.²⁹⁹

C. The Benefits of Class I Attainment Status

Once Indian tribes in the San Diego area attain attainment Class I status, all of the strict notification and approval requirements of the PSD program would apply to the surrounding areas. These areas would include San Diego County and could even impact development in Orange County, Los Angeles, and Long Beach. By attaining Class I status, Indian tribes can limit permitting for new major source polluters in surrounding areas.³⁰⁰ If the tribal council in a Class I area files a notice alleging the new major emitting facility will change the air quality of their area, the polluter must demonstrate that the new facility will not "cause or contribute to concentrations which exceed the maximum allowable increases for a class I area."³⁰¹ If the new major source polluter cannot demonstrate this, the permit will not be approved.³⁰² Class I status can also limit less tangible pollution effects, such as visibility.³⁰³ Even if the polluter can show a new major source will not change the concentrations in the air, the polluter still will not receive a permit if the new facility will adversely impact "air quality-related values."³⁰⁴ Attaining Class I status, therefore, provides the

²⁹⁶ 40 C.F.R. § 52.21(g)(2)(iii) (2010) ("A discussion of the reasons for the proposed redesignation, including a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion.").

²⁹⁷ 40 C.F.R. § 52.21(g)(2)(i)-(v) (2010); 40 C.F.R. § 52.21(g)(4) (2010).

²⁹⁸ 40 C.F.R. § 52.21(g)(5) (2010).

²⁹⁹ For example, the Forest County Potawatomi Community redesignation to Class I took over a decade due to the lengthy mediation process between the tribes and the states of Wisconsin and Michigan. *See supra* notes 246-264 and accompanying text.

³⁰⁰ *See supra* notes 76-91 and accompanying text (describing the PSD program). *See generally* 40 C.F.R. § 52.21 (2010).

³⁰¹ 42 U.S.C. § 7475(d)(2)(C)(i) (2006).

³⁰² *Id.*

³⁰³ 42 U.S.C. § 7475(d)(2)(C)(ii) (2006).

³⁰⁴ *Id.*

tribal council significant power to obstruct permitting for new major source polluters in surrounding areas.³⁰⁵

In the context of the San Diego tribes, the regions surrounding Mount Palomar include San Diego, Orange, and Los Angeles Counties. Hypothetically, these regions could all be impacted by tribal redesignation to attainment Class I status. Although the CAA provisions restricting permitting to new major source polluters upon notice from a Class I Administrator do not specify a specific geographic radius within which the tribes could dispute permitting,³⁰⁶ the Forest County Potawatomi Community negotiated a 62-mile radius within which new major sources would be subject to an analysis to determine whether their “air quality related values” – including visibility, or specific scenic, cultural, physical, geologic, biological, ecological, or recreational resources – would be adversely impacted.³⁰⁷ Because San Diego County, Orange County, and parts of Los Angeles County – including Long Beach City – fall within a 150-mile radius of the Mount Palomar area reservations,³⁰⁸ new major source permitting in all of these areas could be impacted if the tribes attain redesignation to Class I. The tribes could potentially have the authority to oppose permits for new major source polluters that would impact the air quality-related values of the reservations. The South Coast Air Quality Management District, which includes Orange County, Los Angeles, and Long Beach, has over five hundred major source polluters, with a significant number of facilities seeking Title V permits and renewals each year.³⁰⁹ Thus, Class I status would potentially provide tremendous amounts of negotiating power to Indian tribes in the Mount Palomar area over a large number of major source permitting decisions in Southern California.

D. Counterarguments and Responses

This article addresses three counterarguments weighing against the proposed claim. First, the PSD program itself is limited – it restricts only new major source polluters and does not impact minor sources.³¹⁰ Second, the CAA already includes provisions that attempt to prevent polluted air from flowing from one region to a nonattainment area.³¹¹ Therefore, Indian tribes might be able to more easily rely on these provisions to prevent against pollution from the

³⁰⁵ See *supra* notes 187-192 and accompanying text.

³⁰⁶ See 42 U.S.C. § 7475(d)(2)(C)(i)-(iv) (2006).

³⁰⁷ See *supra* note 263 and accompanying text.

³⁰⁸ See *Map of California*, GOOGLE MAPS, <http://maps.google.com/maps?hl=en&tab=wl> (last visited Jan. 24, 2011).

³⁰⁹ TITLE V PERMIT STATUS AND SUMMARY - INITIAL AND RENEWAL, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, <http://www.aqmd.gov/titlev/finalperm.html> (last visited Mar. 28, 2011).

³¹⁰ See *supra* notes 265-270 and accompanying text (describing the limits of the PSD program).

³¹¹ See 42 U.S.C. § 7426 (2006).

surrounding San Diego area, rather than pursuing administratively cumbersome and time-consuming redesignation. Finally, this article's proposal may be unrealistic for Indian tribes in Southern California. The process of seeking two steps of redesignation under the CAA may be impractical and Indian tribes in particular may not have the resources to pursue years of administrative review. This section elaborates on these counterarguments and provides a response to each.

1. The Limits of the PSD Program

As discussed previously in Part III, the PSD program is limited in that it only applies to new major source permitting.³¹² Thus, Indian tribes have not been able to restrict or prevent against grandfathered-in major source polluters, which continue to emit pollutants within surrounding areas.³¹³ The program also does not catch minor sources, which can be a significant source of emissions.³¹⁴

Despite its merits in other places, this counterargument has little application in the areas of San Diego, Orange, and Los Angeles Counties. San Diego County has thirty major source Title V major source polluters,³¹⁵ while Orange County, Los Angeles, and Long Beach have over five hundred Title V polluters.³¹⁶ This suggests that many major source polluters will continue to apply for new and renewed Title V permits in San Diego and the surrounding areas. If the Indian tribes in the county attain Class I attainment status, this would place tremendous obstacles in the way of construction of any new major source polluters.³¹⁷ The tribes would have significant power leverage to force surrounding counties to negotiate over any new major source developments.

Thus, while the PSD program remains limited, the effects in the San Diego County area would still be significant and provide Indian tribes with increased amounts of sovereignty and influence over air quality.

2. Nonattainment Areas Can Already Impose Requirements on Surrounding Areas

Several provisions in the CAA already allow for nonattainment areas to exert influence on emissions in surrounding areas. CAA sections 107(e)(2), 110, and

³¹² 42 U.S.C. § 7479(1) (2006) (defining major sources).

³¹³ See 42 U.S.C. § 7475(a) (2006).

³¹⁴ *Id.*

³¹⁵ U.S. EPA, Region 9, SAN DIEGO COUNTY AIR POLLUTION CONTROL DISTRICT TITLE V OPERATING PERMIT PROGRAM EVALUATION vi (2008), http://www.sdapcd.org/permits/Title-V/EPA_Title_V_Audit_Report.pdf.

³¹⁶ *Title V Permit Status and Summary - Initial and Renewal*, SOUTH COAST AIR QUALITY MGMT. DIST., <http://www.aqmd.gov/titlev/finalperm.html> (last visited Mar. 28, 2011).

³¹⁷ For example, the Indian tribes could argue that any new major source negatively affects the reservations' air quality-related values, such as visibility, and deny approval of the permit. See 42 U.S.C. § 7475(d)(2)(C) (2006).

126 all direct the EPA to address out-of-state pollution contributing to a state's failure to achieve attainment of the NAAQS.³¹⁸ One counterargument to this article's proposal, then, is that Indian tribes should rely on these provisions instead of attempting time-consuming and administratively cumbersome redesignations from nonattainment to attainment Class I status. However, it should be noted that the tribes can only invoke these CAA provisions after attaining TAS status, and thus, the tribes would have to wait several years to receive EPA approval before relying on any of these options.

First, section 107(d) already allows tribes to challenge the EPA to expand the boundaries of a tribe's nonattainment area to include nearby sources contributing to its ozone and particulate matter violations.³¹⁹ The statute mandates the EPA to include entire metropolitan statistical areas ("MSAs"), which do not have to be in the same state, and consolidated metropolitan statistical areas ("CMSAs"), containing the identified NAAQS violations in the boundaries for a single nonattainment area.³²⁰ The burden is then on the nearby area to demonstrate that the sources within its location do not contribute significantly to the NAAQS violations.³²¹

However, as discussed above, surrounding areas – including Orange County, Los Angeles, and Long Beach - are already designated as nonattainment areas for ozone and particulate matter. Thus, the tribes cannot rely on CAA section 107 to improve reservation air quality. Further, even if these surrounding areas were in attainment and the tribes could petition the EPA under CAA section 107, the EPA most likely would not redraw the boundary unless the monitored ambient air quality proves the tribes' claims.³²² If the EPA declines the tribes' petition, the tribes will not be successful in appealing the EPA's decision because courts are typically deferential to the EPA's determinations of nonattainment area boundaries.³²³

³¹⁸ 42 U.S.C. § 7407 (2006).

³¹⁹ See 42 U.S.C. § 7407(d) (2006).

³²⁰ For example, Philadelphia (PA)-Camden (NJ)-Wilmington (DE) is one nonattainment MSA area with regard to ozone and carbon monoxide. See Luneburg, *supra* note 66, at 71.

³²¹ 42 U.S.C. § 7407(d)(4)(A)(v) (2006).

³²² See William B. Johnson, Annotation, *Environmental Protection Agency's Classifications of Air Quality Control Regions under § 107(d)(2) of the Clean Air Act*, 75 A.L.R. FED. 328 (1985).

³²³ In one example, Pennsylvania and Delaware lost their challenge to the EPA's determination of nonattainment boundaries for its 1997 eight-hour ozone standard. *Pennsylvania Dep't of Env'tl. Prot. v. EPA*, 429 F.3d 1125 (D.C. Cir. 2005). The EPA had placed one New Jersey county and one Maryland county in the Philadelphia nonattainment area because of alleged downwind pollutant effects. *Id.* The D.C. Circuit did not disturb the EPA's determination to include these counties in the Philadelphia nonattainment area because it was consistent with its ozone boundary guidance. *Id.* at 1129. Further, the D.C. Circuit also rejected Delaware's assertion that the EPA should have created one region-wide nonattainment area including both mid-Atlantic and northeastern states with emissions that impacted the other's ability to be in attainment. See also *Western Oil & Gas Ass'n v. EPA*, 767 F.2d 603, 604 (9th Cir. 1985) (upholding EPA's criterion allowing states to consider the location of significant air pollution sources in forming nonattainment area boundaries).

Second, the tribes can rely on CAA section 110 to petition the EPA to mandate a neighboring state, with emissions contributing significantly to the tribes' nonattainment status, to revise its SIP to include extra control measures to mitigate those emissions.³²⁴ Section 110(2)(D)(i) requires that a SIP prohibit emission activities within the state that will "contribute significantly" to another state's nonattainment status. Section 110(k)(5) allows tribes to petition EPA without requiring the impacted state to name specific sources responsible for the pollution.³²⁵ The EPA can then mandate the state to revise its SIP, or the EPA may promulgate a FIP to fill the gap.³²⁶

This provision has been particularly successful for the states that have relied on it. In 2001, the EPA made final findings in *Appalachian Power v. Environmental Protection Agency*³²⁷ that stationary sources of NO_x emissions in twelve upwind states and the District of Columbia contributed significantly to ozone nonattainment in Connecticut, Massachusetts, Pennsylvania, and New York.³²⁸ Because of this finding, the EPA required each jurisdiction to promulgate a new SIP to reduce NO_x emissions.³²⁹ This "'NO_x SIP call' required states to reduce NO_x emissions by the amount existing emission controls could reduce emissions at a cost of \$2,000 or less per ton."³³⁰

Third, CAA section 126(b) permits tribes to petition the EPA to find that a major source being constructed in another state is contributing significantly to its nonattainment status.³³¹ If the EPA finds that a source's emissions interfere with a tribe's air quality goals, the EPA may impose additional emission control requirements on individual sources pursuant to section 126(c).³³² SGPA II, discussed *supra* in Part II, illustrates an example in which the EPA mandated Ohio to institute controls to protect Pennsylvania from ozone pollution.³³³

While the above provisions do provide some power to influence surrounding areas, the impact of the rules falls well short of the requirements of the PSD program. Specifically, the PSD program requires consultation and gives the

³²⁴ 42 U.S.C. § 7410(a) (2006). For an example of the additional emissions limitations the EPA may require, in 1998, the EPA called for SIP revisions of twenty-two eastern states and the District of Columbia to reduce NO_x emissions by approximately one million tons a year in the aggregate. Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998).

³²⁵ 42 U.S.C. § 7410(k)(5) (2006).

³²⁶ *Id.*

³²⁷ 249 F.3d 1032 (D.C. Cir. 2001).

³²⁸ *Appalachian Power*, 249 F.3d at 1036-37.

³²⁹ *Id.* at 1037. Reducing NO_x reduces ozone because under certain conditions, NO_x combines with hydrocarbons in the atmosphere to create ozone or smog. *Id.* at 1036.

³³⁰ *Id.* at 1038.

³³¹ 42 U.S.C. § 7426(b) (2006).

³³² 42 U.S.C. § 7426(c) (2006).

³³³ *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984, 987-90 (6th Cir. 1998).

power to the Indian tribal council to block permitting for new major source emitters before construction can begin. Further, the PSD program has much more stringent ceilings to prevent deterioration of air quality, and the EPA has less discretion to permit additional industrial growth.³³⁴ Therefore, while the existing provisions mitigate some flow of pollutants to nonattainment areas, the PSD program provides the greatest decision-making control to Indian tribes and reserves the power to approve new major sources to the tribal governing authorities.

3. Redesignation is Impractical

As demonstrated from the few and infrequently successful cases of states attempting to attain attainment,³³⁵ redesignation to attainment status is difficult and time-consuming. It would take years for tribes to either seek TAS and develop and receive approval for TIPs – a process only three Indian tribes have successfully completed³³⁶ – or to successfully petition the Governor of California to redesignate the tribal areas from nonattainment to attainment.³³⁷ Further, redesignation to Class I status upon attaining attainment would also create administrative burdens for the Mount Palomar Indian tribes. Thus, the last counterargument to our proposal is that redesignation presents an impractical strategy for the tribes, one that would eat up years of tribal legal and administrative resources while providing limited gains.

This counterargument, however, ignores the dispute resolution procedures available within the redesignation processes.³³⁸ Once an area seeks redesignation, the EPA can provide for dispute resolution between the parties should surrounding areas object to the redesignation.³³⁹ Thus, as soon as the Indian tribes initiate the redesignation request, the tribes are able to begin negotiations with surrounding areas. This is exactly what occurred in the case of the Forest County Potawatomi Community's redesignation to Class I status. The immediate objections of Wisconsin and Michigan led to years of mediation, which ultimately resulted in the surrounding states compromising on air pollution emissions affecting the tribal territory.³⁴⁰ The negotiations themselves,

³³⁴ See *supra* notes 86-88 and accompanying text (explaining PSD ceilings).

³³⁵ See *supra* notes 106-133 and accompanying text.

³³⁶ See *supra* note 153 and accompanying text.

³³⁷ 42 U.S.C. § 7407(d)(3)(D) (2006).

³³⁸ See 40 C.F.R. § 52.21(t) (providing dispute resolution between the State and the Indian Governing Body in disagreements over redesignation of an area or the issuance of a construction permit to a new major emitting facility that will cause or contribute to a cumulative change in air quality in excess of the NAAQS).

³³⁹ The Forest County Potawatomi Community and the States of Wisconsin and Michigan pursued this method of mediation. See *supra* notes 246-264 and accompanying text.

³⁴⁰ Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area; Dispute Resolution With the State of Wisconsin, Federal Register, Vol. 73, No. 83 (April 29,

then, can provide the tribes with significant power in determining future air quality decisions of the other parties. Thus, as soon as the process of redesignation begins, the tribes have already ensured a shift in the power balance between the tribes and the surrounding counties or states. Therefore, while the process of redesignation may take years, the positive effects of this proposed strategy can increase tribes' bargaining power immediately.

V. CONCLUSION

The CAA explicitly provides tribes with the authority to exercise sovereignty over polluters within their boundaries and surrounding states. By gaining TAS status, tribes can enact their own set of air pollution regulations under TIPS. Indian tribes have also successfully petitioned for Class I status under the PSD program. This article proposes that tribes in nonattainment areas seek redesignation to attainment status to take advantage of the CAA's dispute resolution provision and the PSD program's stronger limitations on industrial development. As discussed, tribes in the PSD program must be notified before a new major source facility can be built in surrounding areas, and can even block its construction if the emissions are too high. This article invites additional scientific research to test the theory that the San Diego Mount Palomar area Indian tribes, in particular those located on the eastern side, have better air quality than surrounding southern California counties. If so, these tribes could follow the strategy set forth in this article to gain maximum control over reservation air quality and set an example for similarly situated tribes across the nation to follow.