§ 42.3 Basis for civil penalties and assessments.

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(Authority: 31 U.S.C. 3802)

[FR Doc. 96–28037 Filed 10–31–96; 8:45 am]

BILLING CODE 8320–01–P

POSTAL SERVICE

39 CFR Part 233

Civil Penalties for Violations of Postal Orders

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This rule is added to the Postal Service regulations on Inspection Service/Inspector General authority in order to implement civil penalties for violations of Postal Service Orders issued under 39 U.S.C. 3012, and to allow adjustments to civil monetary penalties administered by the Postal Service.

EFFECTIVE DATE: October 23, 1996.

FOR FURTHER INFORMATION CONTACT: Jennifer Y. Angelo, (202) 268–3081.

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104–134, section 31001(s), 110 Stat. 1321 (1996), requires agencies that assess civil monetary penalties to adjust their civil monetary penalties for inflation. The Postal Service may seek a civil penalty under 39 U.S.C. 3012 for violations of Postal Service Orders. The Postal Service is governed by 28 U.S.C. 2641 note, and accordingly, adds section 233.12, Civil Penalties, to 39 CFR part 233.

List of Subjects in 39 CFR Part 233

Administrative practice and procedure, Banks, Banking, Credit, Crime, Law enforcement, Postal Service, Privacy, Seizures and forfeitures.

For the reasons set out in this document, the Postal Service amends 39 CFR part 233 as follows:

PART 233—INSPECTION SERVICE/ INSPECTOR GENERAL AUTHORITY

1. The authority citation for 39 CFR part 233 continues to read as follows:

Authority: 39 U.S.C. 101, 401, 402, 403, 404, 406, 410, 411, 3005(e)(1); 12 U.S.C. 3401–4322; 18 U.S.C. 981, 1956, 1957, 2254, 3061; 21 U.S.C. 881; Inspector General Act of 1978, as amended (Pub. L. No. 95–452 as amended), 5 U.S.C. App. 3.

2. Section 233.12 is added to read as follows:

§ 233.12 Civil penalties.

False representation and lottery orders—

(a) *Issuance.* Pursuant to 39 U.S.C. 3005, the Judicial Officer of the Postal Service, acting upon a satisfactory evidentiary basis, may issue a mail return and/or a cease and desist order against anyone engaged in conducting a scheme or device for obtaining money or property through the mail by means of a false representation, including the mailing of matter which is nonmailable, or engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind.

(b) *Enforcement.* Pursuant to 39 U.S.C. 3012, any person:

(1) Who, through the use of the mail, evades or attempts to evade the effect of an order issued under 39 U.S.C. 3005(a)(1) or 3005(a)(2);

(2) Who fails to comply with an order issued under 39 U.S.C. 3005(a)(3); or

(3)Who (other than a publisher described by 39 U.S.C. 3007(b)) has actual knowledge of any such order, is in privity with any person described by paragraph (b) (1) or (2) of this section, and engages in conduct to assist any such person to evade, attempt to evade, or fail to comply with such order, as the case may be, through the use of the mail;

shall be liable to the United States for a civil penalty in an amount not to exceed $11,000 for each day that such person engages in conduct described by this paragraph (b). A separate penalty may be assessed under this paragraph (b) with respect to the conduct described by paragraphs (b) (1), (2), or (3) of this section.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 96–27347 Filed 10–31–96; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ 58–1–7131–b]
[FRL–5634–5]

Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; State of Arizona; Dispute Resolution

AGENCY: Environmental Protection Agency (EPA).

ACTION: Announcement of dispute resolution.

SUMMARY: The purpose of this action is to announce the EPA's resolution of an intergovernmental dispute over a request by the Yavapai-Apache Tribal Council to redesignate the Yavapai-Apache Reservation (''the Reservation'') as a non-Federal Class I area under the Clean Air Act program for prevention of significant deterioration of air quality. On August 22, 1994 the Governor of Arizona raised concerns about EPA's proposal to approve the request of the Yavapai-Apache Tribe to redesignate its Reservation as a Class I area and asked EPA to initiate the intergovernmental dispute resolution process provided for in section 164(e) of the Clean Air Act. The State and the Tribe were unable to reach an agreement concerning the redesignation. Section 164(e) of the Clean Air Act provides that EPA must therefore resolve the dispute. After fully considering the concerns raised by the State of Arizona, EPA declines in these particular circumstances to disapprove the Tribe's decision to limit the amount of air quality deterioration allowed within its Reservation. Therefore, as described in a final rulemaking notice also published in today's Federal Register, EPA is finalizing its proposed decision to redesignate the Yavapai-Apache Reservation as a non-Federal Class I area. The Class I designation will result in lowering the allowable increases in ambient concentrations of particulate matter, sulfur dioxide, and nitrogen dioxide within the Reservation.

EFFECTIVE DATE: December 2, 1996.

ADDRESSES: The public docket for this notice, which includes additional information related to this decision and relevant materials submitted to EPA, is available for public inspection and copying during normal business hours. Please contact the EPA official listed below at the given address. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Jessica Gaylord, Air and Toxics Division (A–5–1), U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901, (415) 744–1290. An electronic copy of this Federal Register notice and other pertinent information is available on the World Wide Web at this Internet address: http://www.epa.gov/region09/air/yavapai/

SUPPLEMENTARY INFORMATION:

I. Summary of Final Rule Approving Yavapai-Apache Tribe's Request for Redesignation

Elsewhere in today's Federal Register EPA has published a final rulemaking notice granting the Yavapai-Apache Tribe's request to redesignate its reservation as a Class I area under the Clean Air Act (CAA) program for the prevention of significant deterioration of

air quality (PSD). The final rulemaking notice contains a discussion of the following: (1) The PSD program and PSD area classifications; (2) the PSD redesignation requirements; (3) the PSD class I redesignation request submitted to EPA by the Tribe and the public process accompanying EPA's review of the request; (4) the statutory and regulatory limits on the scope of EPA's review; and (5) EPA's response to public comments on EPA's proposed approval of the request, including concerns about the potential impacts of the redesignation on areas outside the reservation. While some aspects of the final rulemaking notice are reiterated here, the reader is referred to the notice for a more detailed discussion.

As explained in EPA's final rulemaking notice approving the redesignation, section 164(b)(2) of the CAA provides that EPA may disapprove a State or Tribal redesignation request only if it finds, after notice and public hearing, that the redesignation does not conform with the applicable procedural requirements. *See also* 40 CFR 52.21(g)(5). However, section 164(e) of the CAA also calls for EPA to consider ''the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area'' in the narrow context where EPA is resolving intergovernmental disputes relating to a PSD area redesignation.

As explained in EPA's notice of final rulemaking, EPA's review of the Tribe's request in light of the public comments revealed no procedural error by the Tribe. In this notice, EPA examines the issues raised by the State of Arizona and the Tribe in their intergovernmental dispute, including the specific factors EPA is required to consider in resolving intergovernmental disputes relating to redesignations. For the reasons described below, EPA declines in these particular circumstances to disapprove the Tribe's decision to limit the amount of air quality deterioration allowed within its Reservation. Accordingly, in the notice of final rulemaking also published in today's Federal Register, EPA announces its approval of the Tribe's Class I redesignation request.

II. Statutory and Regulatory Background

A. Description of the PSD Program: PSD Area Classifications, Redesignations and Permit Requirements

The PSD program applies to areas designated ''attainment'' or ''unclassifiable'' under section 107 of the CAA relative to EPA's national ambient air quality standards (NAAQS). *See* section 161 of the CAA. Attainment areas are areas that meet the NAAQS and unclassifiable areas are areas that cannot be determined on the basis of available information as meeting or not meeting the NAAQS. *See* section 107(d)(1)(A) of the CAA. These areas are referred to as ''PSD areas.''

PSD areas are further categorized as Classes I, II or III. The classification of an area determines the amount or ''increment'' of air quality deterioration that is allowed over a baseline level. Class I areas have the smallest increments and therefore allow the least amount of air quality deterioration. Conversely, Class III areas have the largest air quality increments and allow the greatest degradation. EPA's PSD regulations establish the incremental amount of air quality deterioration that is allowed for particulate matter, sulfur dioxide and nitrogen dioxide in Class I, II and III areas. *See* 40 CFR 52.21(c). In all instances, the NAAQS represent the overarching ceiling that may not be exceeded in a PSD area, notwithstanding any increment.

When Congress enacted a statutory PSD program in the 1977 amendments to the Clean Air Act it provided that specified Federal lands, including certain national parks and wilderness areas, must be designated as Class I areas and may not be redesignated to another classification. *See* section 162(a) of the CAA. These areas are called mandatory Federal Class I areas. The statute also carried forward as Class I areas any areas redesignated as Class I under EPA's pre-1977 PSD regulations. The Northern Cheyenne reservation was a redesignated Class I area affected by this provision. *See Nance* v. *EPA,* 645 F.2d 701 (9th Cir. 1981), *cert. denied, Crow Tribe of Indians* v. *EPA,* 454 U.S. 1081 (1981).

In the 1977 amendments to the Clean Air Act, Congress provided that all other PSD areas of the country would be designated as Class II areas. *See* section 162(b) of the CAA. At the same time, Congress gave States and Indian Tribes broad authority to redesignate Class II areas as Class I. *See* section 164 of the CAA.

Section 164(c) of the CAA expressly provides for PSD area redesignations by Federally recognized Indian Tribes:

> Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body.

The Department of the Interior periodically publishes a list of Tribes officially recognized by the Federal government. *See* 60 FR 9250 (February 16, 1995) (identifying Yavapai-Apache Nation of the Camp Verde Reservation, Arizona).

The Clean Air Act establishes a narrow role for EPA in reviewing State and Tribal PSD redesignations, providing for EPA disapproval of redesignation requests only if EPA finds that the procedural requirements applicable to redesignations have not been met. *See* section 164(b)(2) of the CAA. Accordingly, EPA's implementing regulations provide that EPA ''shall disapprove, within 90 days of submission, a proposed redesignation of any area only if [it] finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of [40 CFR 52.21(g)].'' *See* 40 CFR 52.21(g)(5). EPA's final rulemaking notice approving the Tribe's redesignation request published elsewhere in today's Federal Register examines in detail the procedural requirements, EPA's review role and related issues.

The EPA has previously approved Class I redesignation requests for the Northern Cheyenne Indian Reservation, the Flathead Indian Reservation, the Fort Peck Indian Reservation and the Spokane Indian Reservation. *See* 40 CFR 52.1382(c) and 52.2497.

The PSD program is implemented through a preconstruction review permit program. The permit program applies only to major stationary sources located in PSD areas. In general, a major stationary source is a large stationary source that has the potential to emit 250 tons per year of a regulated air pollutant or, for a certain set of specifically listed source categories (e.g., iron and steel mill plants, etc.), 100 tons per year of a regulated air pollutant. *See* 40 CFR 52.21(b)(1).

In broad overview, the PSD program calls for the owners and operators of proposed major stationary sources locating in PSD areas to submit a permit application containing an analysis of their air quality impacts and to install ''best available control technology.'' *See* sections 165(a) and 169(3) of the CAA. The air quality analysis, performed using air quality modeling, must show that the proposed source will not cause or contribute to an exceedance of an applicable PSD increment, over a baseline concentration, or a NAAQS. *See* 40 CFR 52.21(c) and (d). The permitting authority reviews the permit application and determines whether in its informed judgment, after notice and public hearing, the PSD permit requirements have been met.

B. Yavapai-Apache Tribe Request To Redesignate Its Reservation From Class II to Class I

On December 17, 1993, the Yavapai-Apache Tribal Council (''the Tribal Council'' or ''the Tribe'') submitted to EPA a request to redesignate the Yavapai-Apache Reservation from Class II to Class I. The Tribe's submittal explains that its redesignation request is to protect its air quality for its citizens:

> The Yavapai-Apache Tribe desires to maintain high quality air standards for its citizens by redesignating Reservation lands as a Class I Clean Air area.

See Yavapai-Apache Tribe Air Quality Redesignation Plan, Sept. 1993 at p. 1.

The Yavapai-Apache Reservation is located in the Verde Valley, in the State of Arizona. The Reservation is comprised of five land parcels which total approximately 635 acres. The Tribe's redesignation request includes its entire Reservation. Maps of the Reservation are included as appendices to the Tribe's September 1993 Air Quality Redesignation Plan, which is available as part of the public docket identified at the beginning of this notice.

The Reservation is approximately 90 miles north of Phoenix in the Verde Valley of central Arizona. The Verde Valley is situated near the ''red rock'' country of Sedona and Oak Creek Canyon. Nearby national forests include the Coconino National Forest, the Kaibab National Forest and the Prescott National Forest. The Montezuma Castle, Montezuma Well and Tuzigoot National Monuments are located within the Verde Valley in the vicinity of the Reservation. In addition, the Sycamore Canyon Wilderness Area, designated a mandatory Federal Class I area under the CAA, is located a few miles north of the Town of Clarkdale. *See* 40 CFR 81.403.

EPA reviewed the Tribe's redesignation request and preliminarily determined that it met the applicable procedural requirements of 40 CFR 52.21(g)(4). On April 18, 1994, EPA published a notice of proposed rulemaking in the Federal Register proposing to approve the request and announced a 30-day period to receive public comments. *See* 59 FR 18346.

At the request of the Town of Clarkdale, located near the Clarkdale parcel of the Reservation, EPA held a public hearing on the proposed redesignation on June 22, 1994. EPA's public hearing notice indicated that EPA would allow until July 6, 1994 for the submittal of written comments. In order to facilitate public understanding about EPA's proposed action, EPA began the public hearing with an explanation of the Class I redesignation process and the PSD program.

Following the public hearing, the Town of Clarkdale requested an extension of the public comment period. On July 20, 1994, EPA published a Federal Register notice announcing an extension of the public comment period, providing the public until August 22, 1994 to submit written comments. *See* 59 FR 37018–19.

At the conclusion of the extended comment period, the Governor of Arizona submitted an August 22, 1994 letter to EPA requesting EPA to initiate dispute resolution pursuant to section 164(e) of the CAA. *See* Letter from Fife Symington, Governor of Arizona, to Carol M. Browner, EPA Administrator.

III. The Intergovernmental Dispute

A. Background

In broad overview, section 164(e) of the CAA provides a mechanism for States and Tribes to resolve intergovernmental disagreements about a PSD area redesignation or proposed permit. Specifically, section 164(e) provides in relation to PSD redesignations that if a State affected by the redesignation of an area by an Indian tribe or an Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation, the Governor or Indian ruling body may request EPA to enter into negotiations with the governments involved to resolve the dispute. The statute calls for EPA to resolve the dispute if the governments involved do not reach agreement. Further, section 164(e) provides that in resolving disputes related to an area redesignation, EPA must ''consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.'' *See also* 40 CFR 52.21(t).

B. Concerns Raised by State and Tribe

In the discussion below, EPA has summarized the concerns that have been raised by the State and Tribe. Because the State was raising objections to the Tribe's redesignation request and because EPA has ultimately decided to approve the request, the summary below particularly focuses on the concerns raised by the State. Additional information about EPA meetings with State and Tribal representatives is contained in the public docket identified at the beginning of this notice.

The Governor of Arizona's August 22, 1994 letter indicated that he was concerned that ''[t]he effects of the proposed redesignation are not apparent to all of the stakeholders, and confusion exists about the potential impacts of the Agency's proposed action.'' The Governor indicated that he was requesting EPA to initiate the dispute resolution process so that ''the effects of the proposed action can be better understood and outstanding concerns addressed for the benefit of all stakeholders.'' *See* Letter from Fife Symington, Governor of Arizona, to Carol M. Browner, EPA Administrator.

In an October 6, 1994 letter EPA asked the State to elaborate the bases for its dispute, to help EPA facilitate resolution of the disagreement. *See* Letter from John C. Wise, EPA Deputy Regional Administrator, to Fife Symington, Governor of Arizona. In the letter, EPA also offered to meet with the State to discuss options for additional public outreach to address the State's concern that the effects of the proposed redesignation were not understood by all of the stakeholders.

The Governor's December 5, 1994 reply indicated that ''[t]he purpose of invoking the dispute resolution is to raise the issues of whether the Yavapai-Apache Reservation is of sufficient size to allow effective air quality management or have air quality-related values.'' *See* Letter from Fife Symington, Governor of Arizona, to Felicia Marcus, EPA Regional Administrator. The State's reply also referred to October 20, 1993 comments submitted by a State official during the Tribe's public comment period. The October 20, 1993 letter raised the following concerns:

> The proposed [Yavapai-Apache Tribe Air Quality Redesignation] Plan points out that the Reservation is comprised of five small, scattered land parcels totaling 635 acres in the Verde Valley, ranging in size from almost four to 458 acres, and located over a range of approximately 30 miles. Reservation lands are separated by relatively long distances and a variety of land ownership as well as development patterns.
>
> Considering the size and dispersed nature of the Reservation lands, the [Arizona] Department [of Environmental Quality] has concluded that redesignation of the Reservation to Class I status would not necessarily result in effective air quality management. Section 165 of the CAA prescribes the type of analysis which must be conducted prior to the issuance of permits for Prevention of Significant Deterioration in Class I areas. The Department has concluded that it would be neither realistic nor practicable to apply those requirements to all Reservation lands while distinguishing those lands from surrounding Class II areas, which would be subject to different air quality limitations.

See Letter from Edward Z. Fox, Director of the Arizona Department of Environmental Quality, to Theodore

Smith, Sr., Chairman of the Yavapai-Apache Tribe.

The Tribe responded to the State's comments regarding the size of the Reservation in the December 7, 1993 letter to EPA requesting redesignation to Class I, as follows:

> However, no where does the writer cite a law or regulation which requires Class I areas to be a certain size, but rather the regulations merely call for the EPA Administrator to consider the extent to which the lands involved are of sufficient size. The U.S. Congress, in passing the Clean Air Act, could not have intended that only larger areas could receive clean air designations while smaller areas must suffer from a lack of clean air. This is especially true since Congress included in the Clean Air Act an explicit provision for Indian Tribes to request redesignations and since Congress knew that Indian Reservations would clearly vary in size.

See Letter from Theodore Smith, Sr., Chairman of the Yavapai-Apache Tribe, to Matt Haber, EPA Region 9.

On January 12, 1995, EPA held a series of meetings in the Phoenix area with representatives of the State and Tribe to facilitate resolution of the dispute. EPA first met separately with representatives of the State and Tribe, to allow each to express its concerns in a non-adversarial setting, and then the two parties met without EPA officials. Subsequently, EPA officials held a joint meeting with representatives of the State and Tribe. In the joint meeting, which was transcribed, representatives of both parties described their concerns, summarized below.

Representatives of the State expressed concern about impacts outside of the reservation:

> The impact of the redesignation is significant with regard to areas outside of the Indian territory, Indian lands. And because of that, it has an impact which certainly was unforeseen or unanticipated by the non-Indian residents of the Verde Valley.
>
> The redesignation will have significant impacts on future growth and growth trends, business trends, job opportunities in the Verde Valley, and in a way which may or may not impact the ability to manage the area for air quality values or to effectively manage the area for air quality purposes. It is because of this what I consider to be [the] extraterritorial effect of the redesignation from the Tribe onto state and county and local lands that we believe the redesignation to be inappropriate.

See January 12, 1995 EPA Dispute Resolution Proceedings, Transcript at p. 7 (hereafter ''Transcript'').[1]

The State also described its belief that in addressing the dispute EPA is required to consider ''whether the area can be effectively managed for air quality values, meaning the redesignated area, which is the Tribal lands, or whether there are air quality related values on the Reservation that need to be protected.'' See Trans. at ps. 7–8. The State indicated that it believed the answer to both questions to be no and therefore it is inappropriate for the Tribe unilaterally to seek the redesignation:

> It is our opinion that in both of those situations the answer is no. And because of that, we believe that the health and effect of the—All the residents of the Verde Valley, Tribal or non-Tribal need to be protected, but be protected holistically, not one side dictating to the other. And we believe that this redesignation is indeed a dictation from one side to the other.

See Trans. at p. 8.

The State also raised concerns that the reservation consists of separate parcels and that in the State's view it was untenable and unworkable to manage air quality off of the disperse land parcels:

> It is a Reservation that is made up of five individual parcels spread out through the—five or six individual parcels throughout the Verde Valley. * * *
>
> * * * * * *
>
> * * * [G]iven what I believe to be a very untenable and unworkable arrangement with regard to trying to manage air quality off of these dispersed pieces of Indian land, we think the designation is not appropriate.

See Trans. at ps. 7 & 9.

The State also objected to the redesignation because the redesignation would not address the Tribe's concern about existing health and welfare problems:

> And so to the extent that there are current problems with the health and welfare of the Tribal members, those issues don't get resolved in this process anyway and they will have to be resolved otherwise in some other form.

See Trans. at p. 8.

The Tribe stated that it had followed and met all of the procedural requirements that apply to a Tribal class I redesignation. *See* Trans. at p. 9. The Tribe indicated that it was concerned about the health and welfare of its members:

> While the Tribe respects the views of everyone, the Tribe holds the health and welfare of its members at a premium.

See Trans. at p. 13.

Further, the Tribe suggested that the concerns about off reservation impacts were based on misinformation and that the redesignation would not preclude economic development off the reservation:

> Some people have said that the Class I status would affect automobile emission standards or affect their ability to burn wood in their fireplaces, others have said that the Class I status would, quote, affect all development in the Verde Valley. Statements like these have no basis in fact. Economic development can still happen.

See Trans. at p. 13.

The Tribe recounted the process its redesignation has been subject to, as follows: (1) On September 11, 1993 the Tribal Council unanimously approved the air quality redesignation request and the description and analysis of its effects; (2) on October 21, 1993, the Tribe held a public hearing on the Reservation at which 43 people including 37 non-Indians voiced support for the redesignation and no one opposed it; (3) in December 1993 the Tribe submitted its redesignation request to EPA; (4) on April 18, 1994 EPA published a Federal Register notice proposing to approve the redesignation; (5) on May 18, 1994 the public comment period ended; (6) on May 20, 1994, EPA reopened the process and decided to hold an EPA sponsored public hearing in Arizona; (7) on June 22, 1994, EPA conducted a second public hearing on the reservation—at which 40 people provided comments, including at least 20 non-Indians, in support of the Tribe's request and five people opposed the request—and extended the public comment period for an additional two weeks; (8) on July 6, 1994 the extended public comment period concluded; (9) on July 20, 1994 EPA published another Federal Register notice extending the public comment period again; and (10) on August 22, 1994 the public comment period ended and that same day the Governor of Arizona sent a letter to EPA requesting this dispute resolution process. See Trans. at ps. 9–11.

The Tribe expressed concern about the length of time that had passed in arranging a meeting with the State to explore a resolution of the dispute:

> For over four months now, the Tribe has been patiently waiting for the State to agree to even attend the dispute resolution proceedings.

See Trans. at p. 11.

The Tribe expressed concern about the length of time that elapsed before the State provided a list of reasons for disagreeing with the redesignation:

> On October 6th, 1994, the EPA formally requested from the Governor a list or outline of his reasons for disagreeing with the Tribe's proposal. That request was made to produce the document within one week. Two months later, on December 5th, 1994, the Governor finally responded with a one-page letter simply stating that the issue was whether the Yavapai-Apache Reservation was of

[1] A copy of the transcript is included in the public docket for this action, identified at the beginning of this notice.

sufficient size to allow effective air quality management [or have air quality related values].

See Trans. at p. 11

After hearing the concerns expressed by the State and Tribe, EPA attempted to explore whether there was common ground for a resolution. *See* Trans. at p. 13. EPA adjourned the meeting when neither party expressed an interest in further discussion. *See* Trans. at p. 15. EPA subsequently encouraged the Tribe and the State to jointly meet again to further explore possible resolution of the dispute. The parties, however, declined.

IV. EPA's Resolution of the Intergovernmental Dispute

A. Introduction

Because the State and Tribe were unable to reach agreement, section 164(e) of the CAA calls for EPA to resolve the dispute. As noted, section 164(b)(2) of the CAA provides that EPA may disapprove a redesignation request submitted by a State or Tribe only if EPA finds, after notice and public hearing, that the redesignation does not meet the applicable procedural requirements. *See also* 40 CFR 52.21(g)(5). As explained below, these statutory and regulatory provisions and their associated legislative and administrative history indicate that so long as the prescribed procedures for public input and involvement are followed, EPA is to give States and Tribes broad latitude in deciding what PSD classification is appropriate for lands within their respective jurisdictions.

1. Statutory and Regulatory Background

EPA's pre-1977 PSD regulations authorized EPA to disapprove an area redesignation request if EPA determined that the State or Tribe proffering the request acted arbitrarily and capriciously in considering certain factors. *See* 39 FR 42510, 42515 (Dec. 5, 1974). In the 1977 Clean Air Act amendments Congress adopted major changes to the CAA, including a PSD regime to supplant EPA's pre-1977 administrative program. EPA's current regulations implement section 164(b)(2) of the CAA, adopted with the 1977 Clean Air Act amendments, by providing for disapproval of a State or Tribal redesignation only if EPA finds, after notice and opportunity for public hearing, that the request does not meet the applicable procedural requirements. EPA's regulations also reflect the limited EPA review role by calling for EPA to make this determination within 90 days of submission of a redesignation request. *See* 40 CFR 52.21(g)(5).

The legislative history associated with Congress's adoption of the 1977 PSD program indicates that Congress deliberately intended to curtail EPA's authority to disapprove a redesignation request under its pre-1977 regulations, giving States and Tribes greater discretion in this area:

> The intended purpose of [the congressional PSD program] are * * * (3) to delete the current EPA regulations and to substitute a system which gives a greater role to the States[, Tribal [2],] and local governments and which restricts the Federal Government in the following ways: * * * (b) By eliminating the authority which the Administrator has under current EPA regulations to override a State's [or Tribe's] classification of an area on the ground that the State [or Tribe] improperly weighed energy, environment, and other factors.

See H.R. Rep. No. 294, 95th Cong., 1st Sess. 7–8 (1977) *reprinted in* Senate Comm. on the Environment and Public Works, 95th Cong., 2d Sess., A Legislative History of the Clean Air Act Amendments of 1977, vol. 4 at 2474–75 (1978) (hereafter ''1977 CAAA Legislative History''); *see also* 1977 CAAA Legislative History, vol. 3 at 373 (colloquy between Senators Garn and Muskie, during the Senate's consideration of the Conference report, about the types of procedural error that might trigger a disapproval).

Thus, Congress adopted the statutory provisions governing EPA's review of State and Tribal redesignation requests to limit the scope of Federal review. Under the current provisions, EPA's role is to determine whether the requesting State or Tribe followed specific procedural requirements, to ensure that the local decisionmaking process provides ample opportunity for interested parties to express their views. While EPA must ensure procedural rigor, it is generally inappropriate for EPA to interpose superseding Federal views on the merits of the resulting State or Tribal decisions. *See, e.g.,* H.R. Rep. No. 294 at 146–47 (1977) *reprinted in* 1977 CAAA Legislative History, vol. 4 at 2613–14. The limited Federal review applies to both State and Tribal redesignation requests and therefore would apply to EPA's review of objections to a State's redesignation request.

In this instance, EPA examined the Yavapai-Apache Tribe's decision to limit the amount of air quality deterioration within its Reservation in light of significant comments and concluded that the redesignation request is the product of a decision-making process that comports with procedural requirements. The reader is referred to the notice approving the Tribe's redesignation request, also published in today's Federal Register. The notice contains a detailed discussion of these issues.

At the same time that section 164(b)(2) provides that EPA may disapprove a redesignation request only if it determines that the requesting State or Tribe has committed a procedural error, section 164(e) of the CAA calls for EPA to consider ''the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area'' in resolving intergovernmental disputes about a PSD area redesignation. EPA's regulations implementing section 164(e) simply repeat this language and do not provide additional regulatory guidance. *See* 40 CFR 52.21(t).

However, the legislative history accompanying the adoption of section 164(e) is pertinent, specifically indicating that the intergovernmental dispute resolution provision was not intended to encroach on Indian sovereignty. During the House of Representatives' consideration of the Conference Committee report, Congressman Rogers, Chairman of the House Subcommittee on Health and the Environment and one of the conferees, admonished that EPA's review of Tribal redesignations in resolving intergovernmental disputes should be exercised with utmost caution and that EPA should reverse a Tribal determination only under the most serious circumstances:

> The conference bill provides that both States and Indian tribes will continue to have the power they now have to redesignate their lands to a new air quality classification. In cases where another State may object to such classification, and when the two jurisdictions cannot amicably come to agreement, the Administrator is granted the power to review the redesignation. But it is intended that the Administrator's review of such determinations by tribal governments be exercised with utmost caution to avoid unnecessarily substituting his judgment for that of the tribe. The concept of Indian sovereignty over reservation lands is a critical one, not only to native Americans, but to the Government of the United States. A fundamental incident of that sovereignty is control over the use of their air resources. Some statutes, I imagine, have encroached upon Indian sovereignty, eroding treaty rights negotiated at an earlier time. This is not such a bill, for the Administrator should reverse the determination made by an Indian

[2] The statute and the legislative history make it clear that the references to State redesignation authority in the legislative history apply equally to redesignations by Tribes. *See, e.g.,* S. Rep. No. 127, 95th Cong., 1st Sess. 9 (1977) *reprinted in* 1977 CAAA Legislative History, vol. 3 at 1383.

governing body to reclassify its land, only under the most serious circumstances.

See 1977 CAAA Legislative History, vol. 3 at 326.

Federal and Agency Tribal policies direct EPA to respect Tribal sovereignty. For example, on January 24, 1983, President Reagan issued a Federal Indian Policy, reaffirming and calling for implementation of President Nixon's 1970 national policy of self-determination for Indian Tribes as well as the ensuing 1975 Indian Self-Determination and Education Assistance Act. The Policy Statement issued by President Reagan stressed two related themes: (1) that the Federal government will pursue the principle of Indian ''self-government'' and (2) that it will work directly with Tribal governments on a ''government-to-government'' basis. An April 29, 1994 Presidential Memorandum issued by President Clinton reiterated that the rights of sovereign Tribal governments must be fully respected. *See* 59 FR 22951 (May 4, 1994). EPA's Tribal policies implement these principles, including recognizing Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. *See* November 8, 1984 ''EPA Policy for the Administration of Environmental Programs on Indian Reservations''; Policy Reaffirmed by Administrator Carol M. Browner in a Memorandum issued on March 14, 1994. *See also Washington Department of Ecology*, 752 F.2d 1465, 1471–72 and n.5 (9th Cir. 1985). The United States also has a unique fiduciary relationship with Tribes. *See, e.g., Nance* v. *EPA*, 645 F.2d 701, 710–11 (9th Cir.), *cert. denied*, *Crow Tribe of Indians* v. *EPA*, 454 U.S. 1081 (1981).

Finally, a central purpose of the CAA is ''to protect and enhance the quality'' of air resources ''to promote the public health and welfare.'' *See* section 101(b)(1) of the CAA; *see also Sierra Club* v. *Ruckleshaus*, 344 F. Supp 253 (D.D.C. 1972), *aff'd per curiam*, 4 Env't Rep. Cases 1815 (D.C. Cir. 1972), *aff'd by an equally divided court, sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973). The specific purposes of the PSD program include: (1) protecting the public health and welfare from any actual or potential adverse effect from air pollution, notwithstanding attainment and maintenance of the NAAQS; (2) insuring that economic growth will occur in a manner consistent with the preservation of existing clean air resources; and (3) assuring that emissions from any source in one jurisdiction will not interfere with the prevention of significant deterioration in any other jurisdiction. *See* section 160(1), (3), and (4) of the CAA.

2. Overview of Dispute Resolution

To disapprove the Tribe's Class I redesignation would wholly and summarily deprive the Tribe of any air quality protection on its Reservation that may be afforded by a more stringent classification. The intergovernmental dispute resolution provisions of section 164(e) provide a more narrowly tailored mechanism for addressing any disputes that actually result from the Class I redesignation in the context of a specific permit proceeding.

EPA would be the permitting authority for any proposed source locating within the boundaries of the Indian Reservation and EPA, in consultation with the Tribe, would implement the new Class I increment within the Reservation. However, the State is the permitting authority for PSD sources proposing to locate in the Verde Valley outside the Reservation boundaries. If, in the context where the State is the permitting authority, the governing body of the Tribe determines that a proposed source locating outside the Reservation would cause or contribute to an excess change in air quality within the Reservation, section 164(e) provides that the Tribe may request that EPA enter into negotiations with the State and Tribe to resolve the dispute. If the parties do not reach agreement, EPA would be required to resolve the dispute.

Thus, the Tribe may pursue specific concerns about a proposed source's impact on possible violations of air quality standards within the redesignated Class I area through EPA and the section 164(e) dispute resolution process. Section 164(e) similarly authorizes an affected State to invoke the dispute resolution process because of the impacts of a proposed PSD source on the State's air quality.

The Tribe's authority to protect the non-Federal Class I area within its jurisdiction is notably different from the authority of Federal Land Managers under section 165(d) of the CAA to protect Federal Class I areas. Federal Land Managers must directly certify that a proposed source causing or contributing to a violation of the Class I increment in a Federal Class I area will not adversely impact the area, before permitting may proceed. *See, e.g.,* section 165(d)(2)(C)(iii) of the CAA.

In the specific circumstances at issue, EPA believes that fully examining any State or Tribal concerns raised in the context of a particular permit proceeding where the Tribe has actually determined that a proposed source will cause or contribute to a violation of the allowable increment within the Reservation pursuant to section 164(e) is a more measured alternative to summarily disapproving the Tribe's request for several reasons. First, a central concern raised by the State (as well as public commenters) is the potential off-Reservation impacts of the redesignation. As explained below and in the Federal Register notice approving the redesignation request, EPA does not expect that the Class I redesignation will have major off-Reservation impacts. Further, if there are any actual permit controversies that result from the Class I redesignation, at that juncture there will be concrete facts and particularized, focused issues that are better fit for resolution than more general allegations and objections. EPA is committed to working with the State and Tribe to resolve any intergovernmental permit disputes that actually arise as a result of the Class I redesignation.

In addition, as explained further below, EPA will continue to provide public education about the potential impacts of the Class I redesignation. Further, EPA's technical staff do not expect that the additional Class I area, comprised of five separate parcels, will present substantial air quality management obstacles. EPA will work with the State to overcome any particular air quality management difficulties it encounters as a result of the Class I redesignation.

In the discussion below, EPA addresses the issues and concerns raised by the State, including the specific factors EPA is directed to consider pursuant to section 164(e) of the CAA. Ultimately, EPA declines in these specific circumstances to disapprove the Tribe's decision to limit the amount of air quality deterioration within its Reservation. Thus, the Class I redesignation for the Reservation will become part of the applicable implementation plan for the Yavapai-Apache Tribe, as provided in the final rulemaking notice published elsewhere in today's Federal Register.

B. Public Understanding of Redesignation Implications and Off-Reservation Impacts

The August 22, 1994 letter from the Governor of Arizona stated that the Governor was requesting EPA to initiate the dispute resolution process so that the effects of EPA's proposal to approve the redesignation can be better understood and outstanding concerns addressed for the benefit of all

stakeholders. *See* Letter from Fife Symington, Governor of Arizona, to Carol M. Browner, EPA Administrator.

At the January 12, 1995 meeting with EPA and Tribal representatives, a State representative expressed concern that the redesignation would have impacts outside of the Reservation that were unanticipated by the non-Indian residents of the Verde Valley, including significant impacts on future growth and growth trends, business trends, and job opportunities in the Verde Valley. The State representative objected to the redesignation because of this ''extraterritorial effect.'' *See* Trans. at p. 7.

The Tribe's redesignation request has been subject to a fairly extensive public review process to provide an opportunity for public input and to facilitate public understanding. The Tribe held a public hearing during its development of the redesignation request. A number of local citizens who are not Tribal members attended the Tribe's public hearing and expressed support for the Class I redesignation.

To enhance public understanding, EPA's Federal Register notice proposing to approve the redesignation request described the PSD program and the implications of a Class I redesignation. *See* 59 FR 18346 (April 18, 1994). EPA held a public hearing on its proposed approval of the redesignation request, to be responsive to a request from the Town of Clarkdale, a town located near one of the Reservation parcels. As indicated in the public notice announcing the public hearing, EPA began the public hearing ''with an informational discussion of the Class I redesignation process and an overview of the air quality permitting program that is related to the Class I redesignation'' to help the public understand the potential implications of the proposed redesignation. See *Red Rock News* and *Verde Independent,* both May 20, 1994. EPA also extended the public comment period on its proposal to August 22, 1994, in response to a request from the Town of Clarkdale. *See* 59 FR 37018 (July 20, 1994).

After receiving the Governor's August 22, 1994 letter expressing concerns about the stakeholder's understanding, EPA wrote to the Governor indicating that EPA ''would be pleased to meet with you to discuss options for additional outreach and dissemination of information.'' *See* Letter from John C. Wise, EPA Deputy Regional Administrator, to Fife Symington, Governor of Arizona (October 6, 1994). The State's reply did not further pursue this issue. *See* Letter from Fife Symington, Governor of Arizona, to Felicia Marcus, EPA Regional Administrator (December 5, 1994).

In this notice and the final rulemaking notice approving the Tribe's redesignation published elsewhere in today's Federal Register, EPA has endeavored to explain the PSD program and the potential effects of the Class I redesignation on areas outside the Reservation. The final rulemaking notice contains a detailed discussion that addresses concerns and misimpressions about potential economic and regulatory impacts, in response to questions and comments raised by the Towns of Camp Verde and Clarkdale and a mining company. This discussion was included in the final rulemaking notice to promote public understanding.

In the final rulemaking notice, EPA addressed, among other concerns, misconceptions about the CAA requirements associated with a PSD Class I redesignation. As explained, a PSD Class I redesignation does not impose vehicle inspection and maintenance (i.e., motor vehicle ''smog check'') in the surrounding area or establish requirements for controls on residential woodstoves in the surrounding area. EPA also indicated that it does not expect the redesignation of the non-Federal Class I area to adversely impact economic growth in the Verde Valley. For example, Tucson, which is located in southern Arizona, is bordered on its east and west by two separate parcels of a Federal Class I area, the Saguaro National Monument, Tucson has a population size and economic activity level that far exceeds that presently found in the Verde Valley. The reader is referred to that notice for further discussion of these issues.

Also, as explained in part II.A, the PSD preconstruction review permit requirements only apply to major stationary sources in a PSD area. The permit requirements apply to major stationary sources proposing to locate in a PSD area or to major modifications at existing major stationary sources. Major stationary sources are large sources that have the potential to emit 250 tons per year of regulated air pollutant or, for certain listed source categories, 100 tons per year of regulated air pollutant. *See* 40 CFR 51.166(b)(1) and 52.21(b)(1). In general terms, a major modification is a physical or operational change at a major stationary source that would result in a significant net emissions increase of a regulated air pollutant. *See* 40 CFR 51.166(b)(2) and 52.21(b)(2).

The area in the Verde Valley outside the Reservation boundaries is designated a Class II area under the PSD provisions. The owner/operator of a proposed major stationary source or proposed major modification to an existing major stationary source in this area would have to implement ''best available control technology'' irrespective of the PSD classification of the Reservation. *See* 40 CFR 51.166(b)(12) & 51.166(j). In addition, the owner or operator would have to demonstrate that emissions increases from the proposed source would not cause or contribute to a violation of a NAAQS or increment. *See* 40 CFR 51.166(k). The Class I designation may influence this analysis because in addition to assessing its air quality impact relative to the Class II increment in effect where the source is located, the source may have to assess its impact relative to the Class I increment applicable on the Reservation. The Class I designation may also trigger PSD review (including best available control technology and air quality analyses) for a new major stationary source or major modification which would construct within 10 kilometers of the Class I boundary and whose emissions rate or net emissions increase would have an impact of 1 microgram per cubic meter (24-hour average) on the Class I area.

As noted, the intergovernmental dispute resolution provisions of section 164(e) apply to permit disputes. If the Tribal governing body determines that a proposed source locating outside the Reservation would cause or contribute to an excess change in air quality within the Reservation, the Tribe may request that EPA enter into negotiations with the State to resolve the dispute. If the parties do not reach agreement, EPA would be required to resolve the dispute:

> In the event a dispute occurs over any development or activity in an adjacent State, the Governor of the affected State [or the Indian governing body of an affected Tribe] may request the Administrator to enter into negotiations. If this is not successful, the Administrator shall then resolve the dispute.

See 1977 CAAA Legislative History, vol. 3 at 530.

Thus, a Tribe or State with a non-Federal Class I area may pursue their concerns about a proposed source's impact on excess air quality deterioration within the area through the section 164(e) dispute resolution process. This is in contrast with the broad authority conferred on Federal Land Managers to protect Federal Class I areas. For example, Federal Land Managers must directly certify that a proposed source causing or contributing to a violation of a Class I increment in a Federal Class I area nevertheless will

not adversely impact the area, before a permit may be issued. *See, e.g.*, section 165(d)(2)(C)(iii) of the CAA.

There is a dilemma that is created by virtue of the interjurisdictional issues presented. The State has objected to the Tribe's redesignation because of potential off-Reservation impacts on economic development. However, to disapprove the Tribe's redesignation because it may have impacts on activity outside the Reservation would wholly deprive the Tribe of its decision to provide additional air quality protection within the Reservation and allow the State to effectively dictate the air quality increment appropriate for the Reservation and its populace.

Congress, by the adoption of the permit dispute provisions of section 164(e), has established a useful and reasonable mechanism to address this dilemma—providing for consideration and resolution of the reciprocal interjurisdictional concerns in particular permit proceedings. In these circumstances, EPA elects to rely on this statutory mechanism instead of disapproving the redesignation. For the reasons outlined above and in the final notice approving the redesignation, EPA does not expect the redesignation to have major off-Reservation impacts. Further, resolving conflicts in any permit controversy that actually does arise as a result of the Class I redesignation is more narrowly tailored than the sweeping decision of wholly disapproving the Tribe's request. At the same time, any unresolvable State and Tribal concerns actually raised as a result of the Class I redesignation may be considered in addressing the permit dispute. In any actual permit controversy the parties would also be resolving a dispute where the facts and issues are more concrete and therefore more fit for resolution than disputes involving general concerns and allegations. EPA is committed to working with the State and Tribe to resolve any intergovernmental permit disputes that actually arise as a result of the Class I redesignation.

Finally, by no means does EPA view the need to advance the public's understanding of the Tribal Class I redesignation as ending with EPA's approval of the Tribe's Class I redesignation request. EPA will continue to help clarify any confusion or misunderstanding. Among other efforts, EPA will continue to make staff available to answer any public inquiries about the Class I designation and its potential effects. Public inquiries should be directed to the EPA contact identified at the beginning of this notice. Further, in conjunction with today's decision, EPA is communicating with the Governor's office to reiterate EPA's willingness to meet with State officials to plan and conduct additional public outreach efforts.

C. Sufficient Size to Allow Effective Air Quality Management.

The State expressed concern that the redesignation of the Reservation would not necessarily result in effective air quality management. The State is concerned that the approximately 635 acre Reservation is comprised of five land parcels ranging in size from almost four to 458 acres, separated by different land uses and located over a large area. The State is therefore concerned that ''it would be neither realistic nor practicable'' to distinguish the Class I and II areas in applying the PSD permitting requirements. *See* Letter from Edward Z. Fox, Director of the Arizona Department of Environmental Quality, to Theodore Smith, Sr., Chairman of the Yavapai-Apache Tribe (Oct. 20, 1993). During the January 12, 1995 meeting with EPA and the Tribe, the State representative reiterated that he objected to ''a very untenable and unworkable arrangement with regard to trying to manage air quality off of these dispersed pieces of Indian land.'' *See* Trans. at p. 9.

As noted, in disputes resolving area redesignations, section 164(e) calls for EPA to consider ''the extent to which the lands involved are of sufficient size to allow effective air quality management.'' *See also* 40 CFR 52.21(t). Neither the statute nor EPA's implementing regulations elaborate on EPA's consideration of this factor.

The legislative history suggests that Congress intended to give States and Tribes broad discretion regarding the size and boundaries of areas redesignated. The report of the House Committee on Interstate and Foreign Commerce provides that if a State or Tribe ''wished to designate some parts class I and retain some class II areas, it may draw classification boundaries in any way it chooses—by entire air quality control regions, along county lines, or even along smaller subcounty lines.'' *See* H.R. Rep. No. 294 at 147 (1977) *reprinted in* 1977 CAAA Legislative History, vol. 4 at 2614. Further, a colloquy between Senators Garn and Muskie during the Senate's consideration of the Conference report indicates that it would be permissible to redesignate a single mine. *See* 1977 CAAA Legislative History, vol. 3 at 371.

The State did not specify why the Class I designation for the Reservation parcels would create difficulty in distinguishing between the Class I and II areas in implementing PSD permitting requirements, rendering implementation of the PSD program ''untenable and unworkable.'' EPA is uncertain what particular underlying concerns or obstacles informed the State's objection.

Over the years, air quality management tools, techniques and policies have become increasingly sophisticated and refined. Currently, air quality planning and management strategies apply to a variety of area sizes and configurations. For example, EPA, in coordination with States, has established nonattainment areas in States for the purpose of implementing nonattainment planning requirements for the lead NAAQS that encompass areas of only a few square kilometers. *See, e.g.,* 40 CFR 81.310 (lead nonattainment area in Florida that consists of ''[t]he area encompassed within a radius of (5) kilometers centered at UTM coordinates: 364.0 East, 3093.5 North, zone 17 (in city of Tampa)'') and 40 CFR 81.311 (lead nonattainment area in Georgia that consists of ''[t]hat portion of [Muscogee] county which includes a circle with a radius of 2.3 kilometers with the GNB, Inc., lead smelting and battery production facility in the center''). Conversely, there is an ozone transport region under the CAA for the purpose of ozone nonattainment planning that spans from Maine to northern Virginia. *See* section 184(a) of the CAA.

As noted in parts II.A and IV.B, a PSD permit applicant for a source proposing to locate outside the Reservation may have to demonstrate that the proposed source does not cause or contribute to a violation of the applicable increment in either the Class II area in which it is proposing to locate or within the Tribe's Class I area. Thus, applicants may need to include additional receptor points in their Class II area air quality modeling analyses to assess the effect of potential emissions on the Class I area parcels. As the permitting authority, the State would review the analyses to determine whether in the State's informed judgment the demonstration is sound.

EPA's technical staff examined whether it would be difficult to perform a PSD air quality modeling analysis that assessed the impacts of a proposed source on the Class II area in which it was located as well as the five separate, disperse Class I parcels. EPA staff concluded that based on existing modeling tools it would be relatively simple and practicable for a proposed source to project its impact on the Class I area parcels and relatively straightforward for the reviewing permitting authority to evaluate the analyses. Further, such Class I area analyses may

already be required for a source locating in the area based on the source's proximity to the Sycamore Canyon Wilderness Area, a Federal Class I area. This analysis is included in the EPA's Technical Support Document, which is available for public review in the docket identified at the beginning of this notice.

EPA is the permitting authority for new major stationary sources that propose to locate within the boundaries of the Yavapai-Apache Reservation. EPA does not believe that its ability or the State's ability to effectively administer the PSD program within or outside the Yavapai-Apache Reservation will be significantly affected by the designation of the five separate parcels as Class I areas.

EPA, States and local governments routinely manage air quality management situations that are of greater complexity than the consideration of additional Class I areas within an area that is exclusively subject to PSD, containing no overlapping nonattainment areas and associated nonattainment planning requirements.

The State of Arizona contains a number of areas with complex air quality situations. Phoenix, for example, has one set of boundaries for ozone and carbon monoxide nonattainment planning purposes, another set of boundaries for particulate matter nonattainment planning purposes and overlapping portions of the City that are subject to PSD for other pollutants that are attainment or unclassifiable with respect to the NAAQS. *See* 40 CFR 81.303.

Arizona also has a number of Federal Class I areas. *See* 40 CFR 81.403. The City of Tucson contains a carbon monoxide nonattainment area with a specific set of boundaries. The metropolitan area is subject to PSD for other pollutants and is generally a Class II area. In addition, the City is bordered on its eastern and western boundaries by two separate parcels of the Saguaro National Monument, a Federal Class I area. Thus, in the Tucson area, it may be necessary to manage source impacts on the carbon monoxide nonattainment area, Class II increments and the two separate Class I area parcels.

In the Verde Valley, the State manages a PSD program that encompasses the Sycamore Canyon Wilderness Area, which is a mandatory Federal Class I area. Therefore, under current circumstances, the State may have to ensure that a major stationary source or major modification proposing to locate in the area demonstrate whether emissions would cause or contribute to violations of the Class I and II increments.

Thus, while the redesignation of the Yavapai-Apache Reservation as a non-Federal Class I area may increase the number of Class I increment analyses that the State would need to review, consideration of the consumption of Class I increment in addition to the consumption of Class II increment would not preclude the State from effectively implementing the PSD program. The PSD program frequently applies in areas that are comprised of disparate classifications and land uses. In addition, EPA will make technical staff and resources available to the State in the event the State encounters obstacles to effective air quality management as a result of the Class I redesignation.

In the circumstances at issue, the Tribe has requested that its entire Reservation be redesignated as a Class I area. EPA is reluctant to establish rigid requirements regarding the geographic size, geographic orientation, or population size of a Reservation, that would disqualify certain Tribes as a threshold matter from exercising the authority conferred under section 164(c) to redesignate lands within Reservation boundaries.

EPA would be inclined to a different outcome regarding the consideration of air quality management issues if EPA was faced with a specious redesignation request. For example, EPA would be disinclined to resolve an intergovernmental dispute by approving a Class I redesignation for a very small portion of a State or Reservation where the purpose of the request is not to provide air quality benefit for the requesting jurisdiction but to interpose effects and accompanying air quality management burdens outside of the jurisdiction.

Here, however, the Tribe's redesignation request indicates that protecting the health and welfare of the Reservation population is a primary concern. *See* Yavapai-Apache Tribe Air Quality Redesignation Plan, Sept. 1993. Moreover, the Tribe has requested that its entire Reservation be redesignated as a Class I area. That historical events have diminished the size of the Tribe's Reservation should not disqualify the Tribe from obtaining additional health and welfare protection for its Reservation populace.

D. Air Quality Related Values

The State also questioned whether the Reservation ''is of sufficient size to * * * have air quality-related values.'' *See* Letter from Fife Symington, Governor of Arizona, to Felicia Marcus, EPA Regional Administrator (Dec. 5, 1994). The State averred that in addressing a redesignation dispute under section 164(e) EPA is required to consider ''whether the area can be effectively managed for air quality values, meaning the redesignated area, which is the Tribal lands, or whether there are air quality related values on the Reservation that need to be protected.'' *See* Trans. at ps. 7–8. The State further contended that the redesignation is inappropriate because the answer to both questions is no. *See* Trans. at p. 8.

The State's concern that the Reservation is of insufficient size to have air quality related values was not clearly explained. The State's December 5, 1994 letter raising this concern referred to a previous October 20, 1993 correspondence between the State and the Tribe as having specifically raised this issue. However, the October 20, 1993 correspondence does not mention air quality related values. *See* Letter from Edward Z. Fox, Director Arizona Department of Environmental Quality, to Theodore Smith, Sr., Yavapai-Apache Tribal Chairman.

Section 164(e) provides that in resolving disputes about area redesignations EPA shall consider ''the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.'' The State appears to have combined the two criteria into one, objecting that the redesignation should be denied because ''air quality values'' cannot be effectively managed on a Reservation of this size. In part IV.C, EPA addressed the State's concerns about whether the Reservation lands are of sufficient size to allow for effective air quality management. In this discussion, EPA addresses the separate consideration of ''air quality related values'' (AQRVs), including the State's assertion that the Tribe's redesignation is not warranted because there are no AQRVs on the Reservation that need to be protected.

Section 164(e) does not make identification of AQRVs that need to be protected a necessary condition of a redesignation. The final sentence of section 164(e) provides that in resolving redesignation disputes EPA must consider the extent to which the lands involved have AQRVs. A preceding sentence in section 164(e) explicates the meaning of this passage by calling for EPA to ''protect the air quality related values of the lands involved'' in resolving intergovernmental disputes over proposed PSD permits and redesignations. Thus, under section 164(e) EPA is to consider the AQRVs of

the lands involved in a redesignation, ensuring that any AQRVs are adequately protected in resolving intergovernmental disputes.

The provisions of section 164(e) do not, by contrast, require EPA to disapprove a decision by a State or Tribe to redesignate lands because a disagreeing State or Tribe believes the area does not have attributes that need to be protected. In addition to disputes over Class I redesignations, the terms of section 164(e) apply to intergovernmental disputes over a decision by a State or Tribe to give their Class II lands less air quality protection by redesignating them as Class III. The State's interpretation of section 164(e) that a redesignation is inappropriate if the area does not have AQRVs that need to be protected would not make sense in the context of a dispute over a Class III redesignation. It would be illogical for EPA to disapprove a redesignation to allow less air quality protection in an area because the requesting State or Tribe has failed to demonstrate that the lands involved have AQRVs that need to be protected.

Further, section 164(b) of the CAA and EPA's implementing regulations governing redesignation requirements do not require that a Tribe or State requesting a redesignation demonstrate or establish that the affected lands have AQRVs. *See* 40 CFR 52.21(g)(4). In addition, the legislative history accompanying the adoption of the PSD provisions, discussed in part IV.A, indicates that Congress intended to give States and Tribes broad discretion in redesignating areas and to restrict EPA's authority to override or disapprove their judgment.

AQRVs are given special protection under section 164(e) at least in significant part because of this local decisionmaking discretion. The PSD program adopted by Congress in 1977 modified EPA's pre-1977 administrative program to provide greater local discretion in redesignation decisions by ''removing the Federal land manager's authority to control classification of Federal lands.'' *See* H.R. Rep. No. 294 at 7–8 *reprinted in* 1977 CAAA Legislative History, vol. 4 at 2474–75.

Congress specified certain mandatory Federal Class I areas that may not be redesignated. *See* section 162(a) of the CAA. Congress also called for the Federal Land Managers to review certain Federal Class II areas—national monuments, primitive areas, and national preserves—and recommend to the affected States any appropriate areas for redesignation as Class I ''where air quality related values are important attributes of the area.'' *See* section 164(d) of the CAA. However, as indicated, Congress ultimately left it to the judgment of States, not the Federal Land Managers, to decide whether to redesignate these Class II Federal lands as Class I areas. Thus, by calling for EPA to protect any identified AQRVs in resolving intergovernmental disputes, section 164(e) ensures AQRV protection when a State has accepted the Federal Land Manager's recommendation under section 164(d) to request a Class I redesignation for Class II Federal lands where AQRVs are important attributes. *See generally* H.R. Rep. No. 294 at 148–49 *reprinted in* 1977 CAAA Legislative History, vol. 4 at 2615–16; *see also* section 160(2) of the CAA.

The term ''air quality related values'' is not defined in the CAA. The term ''air quality related values (including visibility)'' is used in conjunction with Federal Class I areas. *See generally* section 165(d) of the CAA. For Federal lands, the legislative history indicates that the term AQRVs includes: ''the fundamental purposes for which such lands have been established and preserved by Congress and the responsible Federal agency. * * * [U]nder the 1916 Organic Act to establish the National Park Service * * * the purpose of such national park lands 'is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.''' *See* S. Rep. No. 197, 95th Cong., 1st Sess. at 36 *reprinted in* 1977 CAAA Legislative History, vol. 3 at 1410. Federal Land Managers have identified, for example, values such as visibility, sensitive streams and watershed, and park vegetation as AQRVs for particular resources and impaired visibility, stream acidification and foliar injury as potential adverse impacts. *See, e.g.,* 55 FR 38403 (Sept. 18, 1990).

The Tribe's redesignation request addresses the Tribe's desire to ensure a clean and safe environment by maintaining high air quality standards for its citizens including, in particular, the elderly and young, to ensure that air quality within the Reservation is not adversely impacted by harmful industrial development, and to ensure that its resources are protected for future generations. The Tribe's request recounts the history of the Reservation and the special religious and cultural value it holds for Tribal members. The submittal describes the importance of the Class I redesignation in protecting vegetation, wildlife and water resources, and visual air quality, and expresses the Tribe's concern about adverse impacts on these resources. The Tribe's submittal describes the unique natural resources in the area where the Reservation is located, including: the Montezuma Castle, Montezuma Well and Tuzigoot National Monuments; the Prescott, Coconino and Kaibab National Forests; the Sycamore Canyon Wilderness Area, which is a Federal Class I area; and the ''red rock'' country near Sedona. *See* Yavapai-Apache Tribe Air Quality Redesignation Plan, Sept. 1993.

There may be a number of reasons for a State or Tribe to propose redesignation of its lands as Class I, including its judgment that decreasing the amount of allowable air quality deterioration is in the interests of the health and welfare of its community, independent of AQRVs. The purposes of the PSD program are broad and include: protection of health and welfare from actual or potential adverse effects, notwithstanding attainment of the national ambient air quality standards; and assuring that economic growth will occur in a manner consistent with the preservation of existing clean air resources. *See* section 160 (1) and (3) of the CAA.

The Yavapai-Apache Tribe has offered many reasons why it is requesting a Class I redesignation. The Clean Air Act generally calls for EPA to defer to such judgments. EPA declines to disapprove the Tribe's redesignation request because of the State's concern that the Tribe has not identified AQRVs that need to be protected.

E. Redesignation Does Not Resolve Current Air Quality Problems

The State's objection to the proposed redesignation because it does not address the Tribe's concern about ''current problems with the health and welfare of Tribal members'' and because such concerns ''will have to be resolved otherwise in some other form'' is problematic. *See* Trans. at p. 8.

If no steps were taken to protect current air quality until all pre-existing air quality problems were addressed, new air quality problems would be created in the interim that in turn require remedial action. This would be at odds with the purpose of the CAA to ''protect and enhance'' the quality of air resources. *See* section 101(b)(1). Further, the PSD program is fundamentally premised upon the efficacy of, at least, preventing existing air quality from significantly deteriorating.

Moreover, as noted, Federal law and policy provide that the Tribe as a sovereign government may decide whether requesting a Class I

redesignation for its Reservation is in the interests of Tribal health and welfare. The Tribe summarized its decision to request a Class I designation as follows:

> All people need a clean environment. The Yavapai-Apache Tribe desires to maintain high quality air standards for its citizens by redesignating Reservation lands as a Class I Clean Air area.
>
> * * * The Clean Air Act specifically provides a mechanism for any Indian tribe to promote and maintain clean air by redesignating reservation lands as Class I areas. Considering the uncertainty of ''safe levels'' of air pollution, the Yavapai-Apache Tribe seeks additional protection by redesignating its lands to Class I air quality under the Clean Air Act.
>
> Presently, Reservation lands are designated Class II allowing for increases in industrial pollution. A redesignation to Class I would reduce the permissible levels of pollution to ensure a clean and safe environment.

See Yavapai-Apache Tribe Air Quality Redesignation Plan, September 1993 at p. 1. EPA declines to disapprove the Tribe's decision to provide prospective air quality protection because of the State's concern that the redesignation will not remedy extant air quality problems.

F. Additional Concern Regarding Potential Future Redesignations

Governor Symington expressed the following additional concern in a letter to U.S. EPA Administrator Browner dated October 3, 1995:

> * * * approval of this redesignation may have effects far beyond the Verde Valley area. Twenty-one reservations are located, in whole or in part, in Arizona. A proliferation of redesignation requests and approvals for other reservations could have far-reaching consequences for the future of the State and its economic well-being.

See Letter from Governor Fife Symington to Administrator Carol Browner. In separate communication, Governor Symington posed whether Tribes whose reservations were located in proximity to large urban areas may redesignate to Class I. As discussed at length in both this notice and the accompanying notice granting the Yavapai-Apache Tribe's request, the Clean Air Act provides that federally recognized tribes may redesignate their reservation lands as they deem appropriate. Each such request must be individually evaluated as set forth in Section 164 of the Act and the implementing regulations at 40 CFR 52.21(g). EPA's action today redesignating the Yavapai-Apache Reservation is based on consideration of the specific factors relevant to this redesignation request. EPA does not believe that speculation concerning potential future requests for redesignation by other tribes is an appropriate consideration in granting or denying the request at hand.

Similarly, it would be difficult to speculate at this time about the general impact, economic or otherwise, if such a request for redesignation in proximity to an urban area were approved. We have explained in the Federal Register notice for the Yavapai-Apache Redesignation that a Class I designation creates requirements only for the construction or modification of major sources of air pollution. Smaller sources of air pollution would not be affected by a Class I designation, and permit applications for ''major sources'' are generally infrequent. On the other hand, the Class I area would be afforded greater air quality protections if one or more major sources were proposed for construction. Specifically, the Class I designation establishes a more stringent air quality standard that allows less emissions growth than in surrounding Class II areas over a certain baseline. A Class I designation would generally only affect those sources emitting pollutants for which an urban metropolitan area is designated attainment. In contrast, emissions of those pollutants for which the urban area is designated nonattainment would be mitigated by emissions offsets and more stringent control technology requirements. In addition, Tribes whose requests for redesignation have been approved would be able to invoke the dispute resolution provisions in section 164(e) to contest the permitting of any major source emitting criteria pollutants—whether under PSD or nonattainment new source review—with visibility impairment or other air quality related values serving as a basis for the dispute.

With respect to the review of PSD permit applications for major sources proposing to locate near tribal class I areas, EPA will publish shortly an advance notice of proposed rulemaking (ANPR) that will address issues related to non-federal class I areas. The decision to develop an ANPR follows a June 4, 1996, meeting among Mary Nichols, EPA's Assistant Administrator for Air and Radiation and representatives for the state environmental agencies of Michigan and Wisconsin. The state representatives expressed concern about the lack of specific procedures governing the review of PSD permit applications for major sources locating on state lands near tribal class I areas. In that meeting, Assistant Administrator Nichols agreed that rules specifically addressing the PSD permit review process for sources potentially affecting non-federal class I areas might be useful in clarifying the roles and responsibilities of the affected parties. The ANPR is intended to raise specific issues and solicit input from all interested parties. *See* Letters from Carol M. Browner, EPA Administrator, to Michigan Governor John Engler and Wisconsin Governor Tommy G. Thompson, both July 16, 1996.

While it is likely that issues and disputes will arise from time to time regarding impacts on reservations which have been redesignated to Class I, we do not expect such disputes to be frequent or insurmountable. As we have noted, there are many Class I areas located adjacent to communities that are Class II areas. We have mentioned Tucson's proximity to the Saguaro National Monument, a Federal Class I area. Economic growth is not inconsistent with the management of the more stringent air quality standard of the Class I area, as economic development in Tucson has not been hindered by its close proximity to the Saguaro National Monument Class I area. In addition, there are seven Class I areas either within or adjacent to the Los Angeles metropolitan area.

V. Administrative Review

A. Executive Order 12866

The Office of Management and Budget has exempted this action from centralized regulatory review pursuant to section 6 of Executive Order 12866.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. Section 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. *See* 5 U.S.C. sections 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises and government entities with jurisdiction over populations of less than 50,000. The decision announced in this notice is not a rule within the meaning of the Regulatory Flexibility Act. In any event, EPA's resolution of the intergovernmental dispute and the final rulemaking action to approve the Tribe's PSD redesignation request, published elsewhere in today's Federal Register, do not impose new requirements on small entities, may only potentially have an impact on major stationary sources, as defined by 40 CFR 52.21, and therefore will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if EPA publishes with the final rule an explanation why that alternative was not adopted.

The decision announced in this notice is not a regulation or rule within the meaning of the UMRA. In any event, EPA's resolution of the intergovernmental dispute announced in this notice and the final rulemaking action to approve the Tribe's PSD redesignation request, published elsewhere in today's Federal Register, are not subject to the requirements of sections 202 and 205 of the UMRA because they do not contain Federal mandates that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year.

Authority: 42 U.S.C. 7401–7671q.

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: October 2, 1996.

Felicia Marcus,

Regional Administrator.

[FR Doc. 96–27848 Filed 10–31–96; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 52

[AZ 58–1–7131–a; FRL–5634–4]

Arizona Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The purpose of this action is to approve the request by the Yavapai-Apache Tribal Council to redesignate the Yavapai-Apache Reservation (''the Reservation'') as a non-Federal Class I area under the Clean Air Act program for prevention of significant deterioration of air quality. The Class I designation will result in lowering the allowable increases in ambient concentrations of particulate matter, sulfur dioxide, and nitrogen dioxide on the Reservation.

EFFECTIVE DATE: December 2, 1996.

ADDRESSES: The public docket for this rulemaking, which includes additional information related to the final rule and materials submitted to EPA, is available for public inspection and copying during normal business hours. Please contact the EPA official listed below at the given address. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Jessica Gaylord, Air and Toxics Division (A–5–1), U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901, (415) 744–1290. An electronic copy of this Federal Register notice and other pertinent information is available on the World Wide Web at this Internet address: http://www.epa.gov/region09/air/yavapai/

SUPPLEMENTARY INFORMATION:

I. The Clean Air Act's Program to Prevent Significant Deterioration of Air Quality (PSD)

A. Background

The genesis of the PSD program under the Clean Air Act (CAA) was a lawsuit brought by the Sierra Club to enjoin EPA's approval of state implementation plans that allowed air quality degradation in areas having air quality better than the national ambient air quality standards. *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253 (D.D.C. 1972), *aff'd per curiam,* 4 Env't Rep. Cases 1815 (D.C. Cir. 1972), *aff'd by an equally divided court, sub. nom. Fri* v. *Sierra Club,* 412 U.S. 541 (1973). The district court granted the injunction reasoning that the stated purpose of the Clean Air Act in section 101(b)(1) to ''protect and enhance'' the quality of the nation's air embodied a non-degradation policy. *Sierra Club* at 255–56.

In response to the *Sierra Club* decision EPA adopted a PSD program. *See* 39 FR 42510 (Dec. 5, 1974). The administrative program was superseded by a congressionally-crafted program in the 1977 amendments to the Clean Air Act. Pub. L. No. 95–95, 91 Stat. 685; *see generally Alabama Power* v. *Costle,* 636 F.2d 323, 346–52 (D.C. Cir. 1979) (recounting history of PSD program preceding and including the adoption of the 1977 amendments). EPA presently has two sets of regulations implementing the 1977 statutory PSD program: (1) 40 CFR 51.166 establishes the requirements for state-administered PSD programs, and (2) 40 CFR 52.21 provides for Federal implementation of PSD requirements to address programmatic gaps.[1]

B. PSD Areas and Classifications

EPA establishes national ambient air quality standards (NAAQS) under the CAA. *See* 40 CFR Part 50. Areas nationwide are ''designated'' under section 107 of the CAA based on their air quality status relative to the NAAQS. The PSD program applies to areas designated ''attainment'' and ''unclassifiable'' under section 107 of the CAA—areas that meet the NAAQS, or areas that cannot be determined on the basis of available information as meeting or not meeting the NAAQS. These areas are often referred to as ''PSD areas.''

PSD areas are further categorized as Classes I, II or III. The classification of an area determines the amount or ''increment'' of air quality deterioration that is allowed over a baseline level. Class I areas have the smallest increments and therefore allow the least amount of air quality deterioration. Conversely, Class III areas have the largest air quality increments and allow the greatest deterioration. In all instances, the NAAQS represent the overarching ceiling that may not be exceeded in a PSD area, notwithstanding any increment.

There are PSD increments for particulate matter, sulfur dioxide and nitrogen dioxide. EPA's PSD regulations establish the incremental amount of air quality deterioration of these pollutants that is allowed in Class I, II and III areas. *See* 40 CFR 52.21(c).

When Congress enacted the PSD program in 1977 it provided that specified Federal lands, including

[1] The regulations have not been revised to conform with changes made in the 1990 Clean Air Act amendments. Pub. L. No. 101–549, 104 Stat. 2399.