No. 00-746

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN CRUDEN
Acting Assistant Attorney General

CYNTHIA A. DREW
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency has reasonably interpreted the term "reservation" in Section 301(d)(2)(B) of the Clean Air Act (CAA), 42 U.S.C. 7601(d)(2)(B), to include trust lands validly set apart for the use of an Indian Tribe as well as formally designated reservations.

2. Whether Section 301(d)(2) of the CAA, 42 U.S.C. 7601(d), delegates to eligible Indian Tribes the authority to administer programs for the management of air resources in all areas within the exterior boundaries of their reservations, including lands owned in fee by non-Indians.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

In the Supreme Court of the United States

No. 00-746

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 211 F.3d 1280.

JURISDICTION

The judgment of the court of appeals (Pet. App. 139a) was entered on May 5, 2000. A petition for rehearing was denied on July 12, 2000. Pet. App. 135a-136a. On September 27, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 9, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, establishes an intergovernmental partnership to regulate air quality throughout the Nation. This case involves the proper interpretation of amendments to the Act enacted in 1990 in order to increase the role of Indian Tribes in that partnership.

a. The CAA gives the States primary responsibility for ensuring that ambient air meets federally established standards. See 42 U.S.C. 7407(a). The States discharge that responsibility by developing State Implementation Plans (SIPs) that "provide[] for implementation, maintenance, and enforcement" of those air quality standards. 42 U.S.C. 7410(a)(1). Once SIPs have been approved by the Environmental Protection Agency (EPA), they are federally enforceable. 42 U.S.C. 7509(a)(4).

The CAA also establishes several other programs designed to protect and enhance the quality of the Nation's air resources. For example, Part C of Title I of the CAA creates a program for the "prevention of significant deterioration" (PSD) of air quality in areas where the air is cleaner than required by federal standards. 42 U.S.C. 7470-7492. Areas subject to the PSD program receive one of three classifications (Class I, II, or III) that specify the maximum amount of air quality deterioration allowable in the areas. 42 U.S.C. 7472-7474. The least deterioration is permitted in Class I areas. 42 U.S.C. 7473. Section 164(a) of the CAA authorizes the States to redesignate areas under their jurisdiction as Class I. 42 U.S.C. 7474(a).

Section 116 of the CAA generally preserves the authority of the States to regulate air pollution under their own laws. 42 U.S.C. 7416. Those state regu-

lations, however, must be at least as stringent as applicable federal requirements. 42 U.S.C. 7416.

b. In 1990, Congress passed a compendium of amendments to the CAA, several of which addressed the role of Indian Tribes under the Act. Most significant for this case, the 1990 Amendments added Section 301(d), which grants EPA the "author[ity] to treat Indian tribes as States" under the Act, 42 U.S.C. 7601(d)(1), subject to the following requirements:

> (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
>
> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [the CAA] and all applicable regulations.

42 U.S.C. 7601(d)(2).

Section 301(d)(2) directs the EPA to promulgate regulations "specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States." 42 U.S.C. 7601(d)(2). "In any case in which the [EPA] determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the [EPA] may provide, by regulation, other means by which the Administrator will directly administer [the applicable provisions of the Act] so

as to achieve the appropriate purpose." 42 U.S.C. 7601(d)(4).

The 1990 Amendments also revised Section 110 of the Act, which governs SIPs, to address Tribal Implementation Plans (TIPs). 42 U.S.C. 7410(*o*). Tribes are not required to submit TIPs, but, if a Tribe submits a plan, the EPA reviews the plan in accordance with the provisions for review of state plans, except as the EPA has otherwise provided in the regulations promulgated under Section 301(d)(2). If the EPA approves a TIP, "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." 42 U.S.C. 7410(*o*).

Finally, the 1990 Amendments left in place Section 164(c), which was enacted in 1977. That Section provides, in relevant part, that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated [pursuant to the PSD program] only by the appropriate Indian governing body." 42 U.S.C. 7474(c).

2. In 1998, the EPA promulgated the Tribal Authority Rule (TAR), 40 C.F.R. Pt. 49, which implements the directive in Section 301(d)(2) of the CAA that the EPA promulgate regulations addressing how Tribes may be treated as States under the Act. See Pet. App. 50a-134a. Under the TAR, a Tribe may be treated in the same manner as a State for all of the core CAA programs, including the establishment of TIPs and redesignations under the PSD program. As provided in Section 301(d)(2)(B), a Tribe may implement a CAA program only "within the exterior boundaries of the reservation" or "other areas within the tribe's juris-

diction." 40 C.F.R. 49.6(c). The EPA determined that Section 301(d)(2), viewed in the context of the CAA as a whole, "is a delegation of federal authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation." Pet. App. 53a-54a. That grant of authority, the EPA concluded, embodies "a territorial view of tribal jurisdiction" and does not "distinguish[] among various categories of on-reservation land" but allows eligible Tribes "to address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a reservation." *Id.* at 54a. The EPA reasoned that its interpretation of the scope of tribal authority is supported by the language and legislative history of Section 301(d)(2)(B), *id.* at 54a-62a, and that a "territorial approach to air quality regulation best advances rational, sound air quality management" because of the "high mobility" and "areawide effects" of air pollutants (59 Fed. Reg. 43,956, 43,959 (1994)).

The EPA also concluded that the term "reservation" in Section 301(d)(2)(B) includes Pueblos and "trust land that has been validly set apart for use by a tribe, even though that land has not been formally designated as a 'reservation.'" Pet. App. 66a. In reaching the conclusion that the term "reservation" includes trustlands, the EPA relied on the meaning given to "reservation" in cases interpreting 18 U.S.C. 1151, the Indian country statute, because the CAA does not define the term. Pet. App. 66a-67a (citing *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991)).

Finally, the EPA determined that Section 301(d)(2)(B)'s reference to "other areas within the tribe's jurisdiction" authorizes Tribes to implement

CAA programs in non-reservation areas over which they can demonstrate jurisdiction under general principles of federal Indian law. Pet. App. 70a. The EPA explained that disputes about a Tribe's jurisdiction over particular non-reservation areas would be addressed "on a case-by-case basis in the context of particular tribal applications." *Id.* at 71a.

3. Petitioners and others sought review of the TAR in the United States Court of Appeals for the District of Columbia Circuit. As relevant to the claims before this Court, the court of appeals denied the petitions for review. Pet. App. 1a-49a.[1]

The court of appeals first upheld the EPA's conclusion that the CAA delegates authority to eligible Tribes to regulate air resources on all land within reservations, including fee land owned by non-Indians. Pet. App. 11a-21a. The court noted that the "EPA suggests, not implausibly," that Tribes might have "inherent sovereign power" to regulate air pollution on non-Indian-owned fee lands within reservation boundaries under the principle, recognized in *Montana* v. *United States*, 450 U.S. 544, 564 (1981), that Tribes may exercise authority over non-Indians on fee lands if their behavior "has some direct effect on * * * the health or welfare of the tribe." Pet. App. 11a-12a. The court did not address that question, however, because it upheld the EPA's conclusion that the CAA contains a delegation of authority. The court explained that the "statute's clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction' carries with it the implication that Congress considered the areas within

[1] The court of appeals also dismissed other challenges on other grounds, but petitioners do not renew those claims in this Court.

the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction." *Id.* at 13a. The court noted that this approach furthers the CAA's purpose "to ensure *effective* enforcement of clean air standards" by avoiding a "'checkerboard' pattern of regulation within a reservation's boundaries," which would be problematic because of the high mobility and area-wide effects of air pollutants. *Id.* at 13a-14a. The court also found support for the EPA's conclusion in the drafting history of Section 301(d), because the phrase "within the exterior boundaries of the reservation" was substituted for the language in the bill as originally introduced—"within the area of the tribal government's jurisdiction." *Id.* at 14a-15a. Finally, the court noted that the EPA's conclusion is consistent with cases in which this Court has found congressional delegations of authority to Tribes over non-Indian lands within reservation boundaries. *Id.* at 17a-19a (citing *United States* v. *Mazurie*, 419 U.S. 544 (1975), and *Rice* v. *Rehner*, 463 U.S. 713 (1983)).[2]

The court of appeals also upheld as reasonable the EPA's construction of "reservation" to include trust lands and Pueblos as well as formally designated reservations. Pet. App. 21a-26a. The court explained that "the Act nowhere defines 'reservation.'" *Id.* at

---

[2] Judge Ginsburg dissented from this portion of the court's opinion. Pet. App. 38a-49a. He concluded that Section 301(d)(2) is not an express delegation of authority for Indian Tribes to regulate the conduct of non-Indians on fee land within reservation boundaries. *Id.* at 49a. He further concluded, however, that Section 110(*o*) *is* such an express delegation, although the authority it provides extends only to the promulgation of TIPs and not to other powers under the CAA. *Id.* at 42a. He also explained that Tribes might, under *Montana*, have inherent authority to exercise those other powers. *Id.* at 49a.

22a. The court concluded that the interpretation given the term by the EPA is consistent with its dictionary definition, its use in various federal statutes, the legislative history, and judicial precedent. *Id.* at 23a-25a. Finally, the court of appeals held that the EPA reasonably concluded that Tribes may propose TIPs and make redesignations under the PSD program with respect to non-reservation lands over which the Tribes demonstrate that they possess authority under ordinary principles of federal Indian law. *Id.* at 26a-28a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. This Court's review is therefore not warranted.

1. a. Contrary to petitioner's contention (Pet. 14-21), the court of appeals correctly concluded that the EPA reasonably interpreted "reservation" to include trust lands "validly set apart for use by a tribe, even though that land has not been formally designated as a 'reservation'" (Pet. App. 66a). See *id.* at 22a-26a (applying *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

As the court of appeals explained (Pet. App. 22a-25a), the CAA does not define "reservation," and that term is ambiguous. Although "reservation" is sometimes used to refer to formally-designated reservations, it is also frequently used in the broader sense adopted by the EPA. In still other instances, the term "reservation" refers to even broader classes of Indian lands. See, *e.g.*, 25 U.S.C. 3202 (includes lands held by Alaska Native Corporations under the Alaska Native Claims Settlement Act). As the court further noted, the dictionary definition of the term and its use in various federal

statutes comports with the EPA's interpretation. See Pet. App. 23a-24a (citing *inter alia Webster's Third New International Dictionary* 1930 (1993); 7 U.S.C. 1985(e)(1)(A)(ii) (1994 & Supp. V 1999); 7 U.S.C. 2012(j); 25 U.S.C. 1452(d); 25 U.S.C. 1903(10)). Statements in the Senate Committee report referring to tribal authority to administer and enforce the CAA "in Indian lands" and in "Indian country" also support EPA's interpretation. See S. Rep. No. 228, 101st Cong., 1st Sess. 79, 80 (1989); 18 U.S.C. 1151 (defining "Indian country" to include more than just formally designated reservations). As the court of appeals concluded (Pet. App. 25a), given the ambiguity of the term "reservation," the EPA reasonably interpreted that term, as this Court and the courts of appeals have interpreted it in related contexts, to include both formal and informal reservations, the latter including trust lands outside of formal reservations. See *ibid.* (citing *Oklahoma Tax Comm'n*, 498 U.S. at 511; *United States* v. *John*, 437 U.S. 634, 649 (1978); *United States* v. *Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *United States* v. *Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986)). See also *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993).

Petitioners err in contending (Pet. 16) that the court of appeals relied solely on the absence of an express definition in the Act and the dictionary to determine the scope of the term "reservation." As we have described, the court of appeals concluded that the EPA reasonably interpreted the term "reservation" only after reviewing the use of the term in a variety of other federal statutes, as well as the text of the Act and the term's "ordinary or natural meaning," *Smith* v. *United States*, 508 U.S. 223, 228 (1993). See Pet. App. 22a-24a. The court correctly concluded that the varying defini-

tions of "reservation" in the U.S. Code "lay to waste petitioners' argument" that the term is susceptible of only one meaning. *Id.* at 24a. Further, noting the many statutory provisions in which Congress has expressly defined the term "reservation," the court of appeals properly reasoned that Congress could have limited the term as petitioners suggest, but did not do so. *Ibid.*

Petitioners' argument (Pet. 17) that "reservation" must be given the meaning that the EPA had previously given the term under the PSD program is also off the mark. Petitioners argue that Congress was presumably aware of the definition used under that program and implicitly adopted that definition by not expressly rejecting it. That argument stands Congress's decision not to define "reservation" on its head. If Congress had wanted to mandate a particular definition of reservation, it could have done so; instead, Congress chose to entrust the EPA with that task. Moreover, to the extent Congress should be presumed to have been aware of the definition that the EPA had given "reservation" under the PSD program, Congress also should be presumed to have been aware of the broader definition that Congress and the courts had given the term in a variety of contexts, see pp. 8-9, *supra*. There is no reason to assume that Congress by its silence intended to adopt the narrower definition rather than the broader one.

Petitioners are also mistaken in asserting (Pet. 17-18) that the court of appeals' holding regarding the meaning of "reservation" must be rejected because it is "tantamount" to a conclusion that Congress gave the EPA discretion to decide what lands Tribes could redesignate. Congress, not the EPA, endowed both States and Tribes with the redesignation power, which Tribes can exercise for reservations and for other areas

over which they can show jurisdiction. See, *e.g.*, 42 U.S.C. 7474(c), 7601(d). To the extent that petitioners quarrel with the "authority that the CAA grants to states and tribes to redesignate clean air areas within their respective jurisdictions" (Pet. 14-15), their quarrel is not with the EPA but with Congress.[3]

Petitioners' contention that the EPA's interpretation of "reservation" has "stripped from the states the authority they previously possessed to redesignate [trust] lands" (Pet. 13) is also incorrect. As the court of appeals recognized (Pet. App. 25a), trust lands are Indian country, and federal law generally prohibits States from exercising regulatory authority in Indian country unless Congress has specifically authorized such action, *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 216 & n.18 (1987). Thus, even if Tribes could not redesignate trust lands, States generally would not have the authority to do so.[4] See 42 U.S.C. 7601(d)(4) (EPA may directly administer provisions of the Act for which it determines that Indian Tribes should not be treated as identical to

---

[3] Petitioners' related assertion (Pet. 15) that the EPA's interpretation gives "tribal governments unbridled ability to impose Class I standards affecting vast areas of a sovereign state" is likewise misdirected. Air pollution regulation necessarily has extraterritorial effects. Just as actions by Tribes may affect adjacent States, actions by States may affect both adjacent tribal lands and other States. Congress recognized those facts and expressly provided a process under which the EPA would resolve disputes between Tribes and States over proposed redesignations. 42 U.S.C. 7474(e).

[4] Indeed, petitioners acknowledge that "the Act has never been understood as granting to states regulatory authority over sources within their boundaries that states could not otherwise regulate under state law." Pet. 23.

States). Moreover, because trust lands ordinarily are subject to tribal jurisdiction under general principles of federal Indian law, they would be "other areas within the tribe's jurisdiction" under Section 301(d)(2)(B) if they were not "reservation[s]." Consequently, eligible Tribes would have authority to administer the Act in trust lands even if petitioners were correct that trust lands are not properly considered "reservation[s]."[5]

Finally, petitioners erroneously argue (Pet. 18-19) that the court of appeals should not have accorded *Chevron* deference to the EPA's interpretation of "reservation" because the interpretation raises constitutional problems. That argument is based on petitioners' mistaken assertion that the Secretary of the Interior has "unreviewable discretion" to take lands into trust. As an initial matter, any constitutional problem that might be raised by the Secretary's authority to take land into trust has no bearing on the wholly separate question whether the EPA has properly interpreted "reservation" in the CAA. In any event, there is no constitutional problem, because the Secretary does not have "unreviewable discretion" to take

---

[5] Petitioners label as "inexplicable" (Pet. 18 n.13) the court of appeals' conclusion that Tribes are authorized by Section 301(d)(2)(B) to administer the Act with respect to lands under their jurisdiction that are located outside reservation boundaries. Section 301(d)(2)(B), however, plainly provides that Tribes may be treated as States with respect to both lands "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction." 42 U.S.C. 7601(d)(2)(B). As the court of appeals explained (Pet. App. 26a-28a), and petitioners now appear to acknowledge (Pet. 18 n.13), Section 164(c), 42 U.S.C. 7474(c), does not provide otherwise. Petitioners' current argument, which relies on Section 164(a), 42 U.S.C. 7474(a), is also misplaced, because it rests on the incorrect premise that States have general authority over Indian lands.

land into trust. The Secretary's discretion is constrained by constitutionally adequate standards. See *United States* v. *Roberts*, 185 F.3d 1125, 1136-1137 (10th Cir. 1999), cert. denied, 120 S. Ct. 1960 (2000).[6] And Interior Department regulations expressly "permit[] judicial review [of the Secretary's decision] before transfer of title to the United States." 61 Fed. Reg. 18,082 (1996); see 25 C.F.R. 151.12. See also *McAlpine* v. *United States*, 112 F.3d 1429, 1432-1435 (10th Cir.) (Secretary's decision to take land into trust is subject to judicial review under the Administrative Procedure Act (APA) because the standards set out in 25 C.F.R. 151.10 provide adequate law to apply), cert. denied, 522 U.S. 984 (1997).[7]

b. Petitioners also err in contending (Pet. 21-22) that the holding of the court of appeals conflicts with the

---

[6] Petitioners rely (Pet. 16) on *South Dakota* v. *Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), which held Section 5 of the Indian Reorganization Act unconstitutional under the nondelegation doctrine. That decision, however, was vacated by this Court and remanded to the Secretary in light of the regulations cited in the text following this note. See *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996).

[7] In *Florida Department of Business Regulation* v. *Department of the Interior*, 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986), the Eleventh Circuit held that the Secretary's decision to take land into trust was not reviewable under the APA, but that decision predates the current regulatory scheme, which (as we have explained above) provides additional standards to guide the Secretary's discretion and expressly notes that there is judicial review of the Secretary's decision. The regulatory framework is currently in the process of further refinement: The Department of the Interior has issued a proposed rule to revise 25 C.F.R. Part 151 to clarify further the process and standards that the Secretary applies in implementing her authority to accept title to land in trust. See 64 Fed. Reg. 17,574 (1999).

decision of the Ninth Circuit in *Arizona* v. *EPA*, 151 F.3d 1205 (1998), as amended, 170 F.3d 870 (1999). The *Arizona* case did not address either the validity of the TAR or the proper interpretation of Section 301(d). Nor did the court of appeals in *Arizona* hold that tribal trust lands could not constitute "reservation[s]" under the CAA. The court held only that there was insufficient evidence in the record to determine whether certain parcels of land had been "declared to be reservations by Act of Congress or that these parcels ha[d] been added to the Middle Verde reservation by proclamation of the Secretary of the Interior pursuant to the Indian Reorganization Act." 151 F.3d at 1210-1211. The court said nothing about whether those parcels might otherwise be reservations and, indeed, "remand[ed] to EPA, without prejudice to the parties, to determine whether the parcels are reservations for purposes of 42 U.S.C. § 7474(c)." 170 F.3d at 870.

2. a. Contrary to petitioners' further contention (Pet. 22-26), the court of appeals correctly determined that Section 301(d)(2) delegates authority to eligible Tribes to administer the CAA on fee lands within reservation boundaries.

This Court has made clear that Congress may, by statute, delegate federal authority to a Tribe. *Mazurie*, 419 U.S. at 554. The first clause of the second sentence of Section 301(d)(2) (which authorizes the EPA to treat eligible Tribes as States), together with Section 301(d)(2)(B) (which establishes Tribal authority over air resources on all lands within the exterior boundaries of a reservation), make clear the meaning of Section 301(d)(2): The EPA is authorized to treat an otherwise eligible Indian Tribe as a State for programs governing *any* air resources within the exterior boundaries of a reservation, *without the need for further inquiry by*

EPA into the Tribe's inherent authority over those resources. See 42 U.S.C. 7601(d). As the court of appeals explained (Pet. App. 13a), the "statute's clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction' carries 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."

As the court of appeals also noted (Pet. App. 13a-14a), this interpretation furthers the CAA's purpose "to ensure *effective* enforcement of clean air standards" by avoiding a "'checkerboard' pattern of regulation within a reservation's boundaries," which would be problematic because of the high mobility and area-wide effects of air pollutants. See also 59 Fed. Reg. at 43,959. The court of appeals' conclusion is further supported by the drafting history of Section 301(d), because the phrase "within the exterior boundaries of the reservation" was substituted for the language in the bill as originally introduced—"within the area of the tribal government's jurisdiction." See Pet. App. 14a-15a.

In reaching its conclusion, the court of appeals correctly relied on this Court's decisions in *Mazurie*, 419 U.S. at 556-557, and *Rehner*, 463 U.S. at 728-729, in which this Court "found an express delegation despite the absence of any 'we hereby delegate' language in the statute." Pet. App. 18a. In *Mazurie* and *Rehner*, this Court "did not find any precise language of delegation in the disputed statute, but, rather, rested on the implication inherent in recognizing the power of tribes to adopt an ordinance pertinent to liquor transactions on Indian country." *Ibid.* Similarly, in reliance on those cases, the court of appeals here properly found in the CAA "an express congressional delegation from the

implication inherent in the distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction.'" *Ibid.* The contrary reading advanced by petitioners would render this careful formulation superfluous. Had Congress intended that Tribes have jurisdiction only where they could demonstrate inherent jurisdiction, Congress could easily have so provided, without resort to the more complex either/or formulation employed in Section 301(d). Indeed, as we have noted, that formulation was substituted for one based on "the tribal government's jurisdiction" that was in an earlier version of the bill.

Petitioners incorrectly contend (Pet. 22-23, 26) that CAA Section 116, 42 U.S.C. 7416, precludes Section 301(d)(2) from constituting a delegation to eligible Tribes of authority over fee lands within reservation boundaries.[8] Section 116 preserves the ability of States to adopt and enforce under state law air pollution standards that are more stringent than those required under the CAA. Section 116 thus serves the dual purpose of preserving state police power to protect public health and welfare and ensuring that state exercise of that power is consistent with otherwise

---

[8] 42 U.S.C. 7416 provides, in relevant part, that "nothing in this chapter shall preclude or deny the right of any State * * * to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State * * * may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

applicable federal law.[9] Section 116, however, does not grant States authority to regulate air pollution activity in Indian country, which includes fee lands within reservation boundaries.

Section 116 is silent on the question of geographical jurisdiction. Thus, Section 116 assumes and is subject to the same geographic jurisdictional limitations on state authority that apply to other provisions of the Act. Nothing in the Act gives States authority over lands within Indian country. And, as we have explained, absent delegation by Congress, States do not generally have comprehensive authority over such lands. See *Cabazon*, 480 U.S. at 207, 216 n.18; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); p. 11, *supra*. In situations in which a Tribe does not have EPA approval to implement the Act, the EPA—not the State—generally implements the CAA in Indian country. See, *e.g.*, 42 U.S.C. 7601(d)(4).[10]

b. Finally, petitioners argue (Pet. 24) that the Ninth Circuit has, in their view, "embraced an approach" to delegation questions that "conflicts with the approach" taken by the court of appeals in this case. Petitioners assert (Pet. 25) that, if the Ninth Circuit were faced

---

[9] See 136 Cong. Rec. 36,077 (1990) ("Consistent with the general provisions of section 116 of the Clean Air Act, the conferees understand that a State may establish additional more stringent permitting requirements, but a State may not establish permit requirements that are inconsistent with the national permitting requirements of this act, including this title.") (discussing Section 506(a), an analogous provision within the Title V operating permit program added by the 1990 Amendments).

[10] We recognize that, in some situations, States may exercise regulatory authority in Indian country under state law. If a State has such authority, Section 116 preserves the State's ability to implement more stringent air pollution controls.

with the question whether Section 301(d)(2) constitutes a delegation to Tribes, the Ninth Circuit "would disagree" with the conclusion by the D.C. Circuit that it does.

The Ninth Circuit, however, has granted rehearing en banc in the case on which petitioners rely, *Bugenig* v. *Hoopa Valley Tribe*, 229 F.3d 1210 (2000), rehearing en banc granted (Feb. 28, 2001). In any event, that case concerns the question whether the Hoopa-Yurok Settlement Act of 1988 granted the Hoopa Valley Tribe authority over a particular parcel of reservation land that was owned in fee by a non-Indian. The question whether CAA Section 301(d)(2) constitutes a delegation to Tribes is not before the Ninth Circuit. Indeed, as petitioners themselves point out (Pet. 12 n.9), the Section 301(d)(2) question could not come before the Ninth Circuit. See 42 U.S.C. 7607(b)(1). Thus, there is no present conflict of decisions, and the Ninth Circuit's resolution of *Bugenig*, whatever its result, will not create a conflict that warrants this Court's review. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

JOHN CRUDEN
Acting Assistant Attorney General

CYNTHIA A. DREW
Attorney

MARCH 2001