IN RE MILLE LACS WASTEWATER TREATMENT FACILITY

NPDES Appeal No. 03-08

ORDER DENYING PETITION FOR REVIEW

Decided April 6, 2004

Syllabus

On May 20, 2003, the U.S. Environmental Protection Agency, Region 5 ("Region") issued its decision to grant a National Pollution Discharge Elimination System ("NPDES") permit to ML Wastewater Management, Inc. and the Mille Lacs Band of Ojibwe Indians ("Band"), a federally recognized Indian tribe, authorizing discharges from the Mille Lacs Wastewater Treatment Facility (the "Facility"). The Region concluded that it has jurisdiction to issue the Permit under the authority of section 518 of the Clean Water Act ("CWA"), 33 U.S.C. § 1377, which authorizes Tribes to be treated as States for purposes of issuing NPDES permits for discharges to waters within an Indian reservation, and under 40 C.F.R. § 123.1(h), which authorizes EPA to administer the NPDES program on "Indian lands" "if a State (or Indian Tribe treated as a State) does not seek or have authority to regulate activities on Indian lands." The Region concluded that the Facility's location on land held in trust for the Tribe is within an Indian reservation, and thus on Indian lands as that term is used in 40 C.F.R. § 123.1(h).

On June 20, 2003, Robert Hoefert and Frank Courteau, on behalf of Mille Lacs County (hereinafter "Petitioners"), filed a petition requesting review of the Region's decision. Petitioners contend that the Region does not have jurisdiction to issue the Permit. Petitioners object to the Region's reference to the "trust" status of the Facility's location in reaching its conclusion that the Facility is located within an Indian reservation. They argue that the Region's decision is in conflict with the decision of the Eighth Circuit Court of Appeals in *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), which Petitioners contend held that trust land is not *per se* within the definition of "Indian country," which the parties agree has the same meaning as "Indian lands" for the purposes of this case. This challenge to the Region's jurisdiction is the only issue raised in the Petition.

Responses to the Petition were filed by the Region and the Band. In essence, the Region and the Band argue that, irrespective of any questions as to whether the Facility at issue is located on land that is part of a "formal" reservation, the Facility is located on land held in trust for the Band and, therefore, qualifies as a de facto or informal reservation under the relevant case law.

Held: Review of the Region's decision to issue the Permit is denied.

Petitioners have not satisfied their burden of showing that the Region's decision to issue the Permit is based on a finding of fact or conclusion of law that is clearly erroneous,

or an exercise of discretion or an important policy consideration that the Board determines, in its discretion, should be reviewed.

Three unanimous decisions by the U.S. Supreme Court (*Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *United States v. John*, 437 U.S. 634 (1978)) issued between 1978 and 1993 leave no doubt that the test for determining whether a particular location is de facto or informally "within a reservation" is whether the land has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." The Petitioners' reference to the Eighth Circuit's *Stands* decision fails to show clear error in the Region's decision to issue the Permit in that the *Stands* decision expressly states that in appropriate circumstances trust land may be reservation land. Moreover, the language Petitioners rely upon in *Stands* is dicta and, therefore, not dispositive of the issue in this case. The Region's decision in the present case must be measured by the Supreme Court's test.

The Region's decision that it has jurisdiction to issue the Permit was made in the context of a recent decision by the Department of the Interior to transfer the property on which the Facility is located into trust for the Band. This transfer of the land into trust and DOI's process for the transfer are particularly relevant to the question whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."

Under the DOI's regulations, a transfer of land into trust for a tribe may be made, among other reasons, when the DOI "determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. §§ 151.3(a)(3), .10(b). In making the decision to transfer the land at issue here into trust, the Regional Director of DOI's Bureau of Indian Affairs specifically found that the transfer was needed "to further promote the health, welfare, and social needs of the members of the Mille Lacs Band of Ojibwe Indians." The Board of Indian Appeals upheld the Regional Director's decision in an appeal filed by the County of Mille Lacs. *County of Mille Lacs v. BIA*, Dkt No. IBIA 02-1-A, 37 IBIA 169 (IBIA, Mar. 25, 2002). The transfer into trust for the Band was an express decision to set the land apart for the use of the Band under DOI's superintendence. Notably, the County of Mille Lacs did not seek judicial review of the Board of Indian Appeals decision to affirm the BIA Regional Director's decision. Thus, the Board accepts DOI's designation and factual findings as validly made.

Moreover, the Band's use of the land at issue would appear, if anything, to be more compelling than uses that were considered appropriate for "Indian country" designation in other cases. The Board finds the facts identified in the Region's statement of the basis for its decision show that the Petitioners' contention that "[s]pecific facts did not play any role in this permit process" is without merit. The Region did consider specific facts relevant to the applicable test and did not err in concluding, based on the record before it, that a basis for Federal jurisdiction was present. Moreover, Petitioners have not identified in their Petition any facts that are material to, or would even so much as cast doubt upon, the Region's determination that the Facility is located within a de facto or informal reservation. This failure to identify specific facts relevant to a de facto or informal reservation determination, or to refute the facts relied upon by the Region, is fatal to Petitioners' request that the Board review the Region's permitting decision.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

On May 20, 2003, the United States Environmental Protection Agency, Region 5 ("Region") issued its decision to grant a National Pollution Discharge Elimination System ("NPDES") permit, number MN-006467-1 ("Permit"), to ML Wastewater Management, Inc. and the Mille Lacs Band of Ojibwe Indians, a federally recognized Indian tribe (hereinafter collectively referred to as the "Band").[1] The Permit would authorize discharges[2] from a treatment facility, known as the Mille Lacs Wastewater Treatment Facility ("Facility"), to a wetland followed by an unnamed tributary which flows to Ogechie Lake in Mille Lacs County, Minnesota. The Permit states that the Facility is "located on the Mille Lacs Indian Reservation." Permit at I-1.

On June 20, 2003, Robert Hoefert and Frank Courteau, on behalf of Mille Lacs County (hereinafter "Petitioners"),[3] filed a petition requesting that the Environmental Appeals Board review the Region's decision to issue the Permit. *See* Notice of Appeal and Petition for Review (June 19, 2003) ("Petition"). Petitioners contend that the Region's decision to issue the Permit is premised on a clearly erroneous legal conclusion that the Region has jurisdiction over permitting in this matter because the Facility is located on an Indian Reservation. Petitioners submit that the Facility is not in fact located within the boundaries of an Indian Reservation. Petition at 3. This challenge to the Region's jurisdiction is the only issue raised in the Petition. Indeed, the comment letter submitted by Mr. Courteau during the first public comment period (described in the factual background below)

---

[1] ML Wastewater Management, Inc. is a non-profit corporation wholly owned and operated by the Mille Lacs Band of Ojibwe Indians.

[2] Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States, except if the discharge is made in compliance with, among other things, an NPDES permit issued under CWA § 402, 33 U.S.C. § 1342.

[3] Messrs. Hoefert and Courteau stated that they are filing the Petition "individually and on behalf of Mille Lacs County." Petition at 1. Pursuant to the regulations governing this proceeding, 40 C.F.R. § 124.19(a), only persons who have filed comments during the public comment period have standing to file a petition for review raising issues that were ascertainable during the public comment period. Neither Mr. Hoefert nor Mr. Courteau submitted comments on the draft permit during the relevant (i.e., second) public comment period. Since the issues raised in the Petition were ascertainable during that public comment period, neither Mr. Hoefert nor Mr. Courteau have standing in their individual capacity, and their Petition is denied to the extent that they file it individually. However, another person, Mr. Roger Neske, Vice-chairman of the Board of Commissioners for Mille Lacs County, submitted comments on behalf of the County during the relevant public comment period. Accordingly, Mille Lacs County has standing to file a petition for review, and we consider the Petition to the extent that it is filed on behalf of the County.

expressly stated "I believe the [Facility] is necessary in order to protect the water quality of a resource we all agree is precious" and did not set forth any objections to the specific conditions of the draft permit. Letter from Frank Courteau, Mille Lacs County Commissioner, to John A. Colletti, U.S. EPA Region 5 (May 23, 2000).

Responses to the Petition have been filed by the Region and the Band. *See* Response to Petition for Review (July 24, 2003) ("Region's Response"); Memorandum of Mille Lacs Band of Ojibwe Indians and ML Wastewater Management, Inc. in Support of Motion for Expedited Consideration and in Opposition to Petition for Review (July 28, 2003) ("Band's Opposition"). In essence, the Region and the Band argue that, irrespective of any questions as to whether the Facility at issue is located on land that is part of a "formal" reservation, it is located on land held in trust for the Band and, therefore, qualifies as a de facto or informal reservation under the relevant caselaw. *See, e.g.,* Region's Response at 11;[4] Band's Opposition at 25. Petitioners subsequently filed a reply to the Region's Response and the Band's Opposition, dated August 11, 2003 ("Petitioners' Reply"). The Region thereafter, on August 21, 2003, filed a surreply to the Petitioner's Reply ("Region's Surreply").

For the following reasons, we conclude that the Petitioners have failed to show that the Region's decision to issue the Permit was based on a clearly erroneous conclusion of fact or law or important policy consideration that warrants review.

I. *BACKGROUND*

The Permit at issue in this matter has been the subject of prior proceedings before the Environmental Appeals Board, and we have issued two previous orders addressing petitions challenging an earlier permitting decision. *See In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons*, NPDES Appeal Nos. 01-17, 01-19 through 01-23 (EAB, Apr. 25, 2002) (hereinafter "April 2002 Order");[5] *In re Mille Lacs Wastewater Treatment Fac., & Vineland Sewage Lagoons*, NPDES Appeal No. 01-16 (EAB, Sept. 3, 2002) (hereinafter "Remand

---

[4] The Region argues, in the alternative, that the Facility is part of a "formal" reservation - the Mille Lacs Indian Reservation established by the treaty of 1855 between the Mille Lacs Band of the Chippewa Indians and the United States of America. Region's Response at 16 n.17. Petitioners maintain, on the other hand, that the formal Mille Lacs Indian Reservation has been either diminished or disestablished. *E.g.,* Petitioners' Reply at 8. As explained below in note 24, we do not reach this question.

[5] This order is available for viewing on the Board's internet page at the following location: http://www.epa.gov/eab/orders/vineland1.pdf (Order Denying Petitions for Review).

Order").[6]

Briefly, the procedural background is as follows. The Band submitted an application for an NPDES discharge permit for the Facility on April 22, 1999. The application identified the Facility as a new wastewater treatment facility. In the Spring of 2000, the Region issued a draft permit and provided notice to the public and an opportunity for the public to comment on the draft permit (the "First Public Comment Period"). During the First Public Comment Period, Mr. Courteau filed comments on behalf of the Mille Lacs County. In his written comments, Mr. Courteau stated:

> the property in question is off reservation (see *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 503 (1913)). Clearly the opinion of the United States Supreme Court controls over any offered by BIA [Bureau of Indian Affairs] or EPA on any question concerning reservation status, a criteria considered important when evaluating fee to trust applications. BIA and EPA have both previously failed to even mention the [C]ourt's decision in the aforementioned case while concluding the former 61,000 acre Mille Lacs Indian Reservation as established by the Treaty of 1855, continues to exist today as originally established. It does not.

Remand Order at 4. Mr. Courteau's testimony at the public hearing held on May 24, 2000 echoed his written comments. *Id.*

The Region responded to the public comments and issued a final permit on May 31, 2001 (the "2001 Permit Decision"). When it made the 2001 Permit Decision, the Region responded to Mr. Courteau's comment as follows:

> EPA is the designated permitting authority for the facility because the facility and discharge are located on the Reservation. Federal determinations regarding Tribal Reservation boundaries are made by the U.S. Department of the Interior. * * * In the case of the Mille Lacs Band, the Office of the Solicitor, U.S. Department of the Interior, made a specific determination in a letter dated February 28, 1991, that, in terms of the Mille Lacs Band, "the boundaries established by the 1855 treaty remain intact and that the reservation has not been diminished."

---

[6] This order is available for viewing on the Board's internet page at the following location: http://www.epa.gov/eab/orders/vineland2.pdf (Order Denying Review in Part and Remanding in Part).

> With regard to [*United States v. Mille Lacs Band of Chippewa Indians*]. That case did not address the precise issue of whether the Nelson Act disestablished the boundaries of the Mille Lacs Reservation.

Remand Order at 4-5. Thereafter, eight petitions for review of the Region's May 31, 2001 decision were filed with the Board, one of which was subsequently withdrawn. We denied six of the other seven petitions by the April 2002 Order.

The remaining petition had been filed by Mr. Courteau, on behalf of Mille Lacs County. On May 8, 2002, while Mr. Courteau's petition was pending before the Board, the United States Department of the Interior's Bureau of Indian Affairs ("DOI") transferred the land on which the Facility is to be located into "trust" for the Band. Thereafter, the Region argued to the Board that the new "trust" status of the Facility's location provided another rationale for the Region's conclusion that the Facility is located on an Indian Reservation, namely, that pursuant to its trust designation, the Facility should, at the very minimum, be regarded as a de facto or informal reservation. Because this new rationale was not reflected in the administrative record for the Permit, we denied Mr. Courteau's petition in part and remanded the Permit to the Region for further proceedings regarding the question whether the Region has authority to issue the Permit. Remand Order at 11. We explained:

> While the issue of whether the [F]acility * * * is in 'Indian Country' has been present throughout this proceeding, and while we recognize that DOI's recent action may be highly relevant to this question, to resolve the question based on the theory the Region is now advancing would require us to entertain a basis for the Region's jurisdiction that was not before the permit-issuer at the time of the permit decision. To do so would, in effect, allow the Region to amend during the pendency of an appeal the very decision that is the subject of appeal.

Remand Order at 11.

On remand, the Region prepared a new Fact Sheet & Statement of Basis for the Issuance of an NPDES Permit, dated December 2002 ("Second Fact Sheet"). The Region also provided public notice that it was considering reissuing the permit "on the basis that EPA is the appropriate NPDES permitting authority for the trust parcel upon which the wastewater treatment plant is to be built and upon which the discharge from this wastewater treatment plant will be located." Public Notice of Draft NPDES Permit to Discharge Into Waters of the United States (Dec. 18, 2002) ("Notice of the Second Comment Period").

During the second public comment period, which ended on January 22, 2003 ("Second Public Comment Period"), Mr. Roger Neske submitted comments, on behalf of Mille Lacs County, arguing that 1) the State of Minnesota has the primary NPDES permitting authority for all areas and lands within its jurisdiction; 2) section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), makes clear that tribal authority - and EPA authority - only extends to areas *within* Indian reservations; 3) the discharge location at issue in this case is not within an Indian reservation; and 4) the Eighth Circuit has explained that "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of an Indian reservation is ordinarily not Indian country," citing *United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997). Letter from Roger Neske, Vice-Chairman Mille Lacs County Board of Commissioners, to John Colletti, Permit Writer, U.S. EPA Region 5 (Jan. 21, 2003) (the "Comment Letter"). Mr. Neske also stated that the County's position regarding the "diminished" status of the reservation's boundaries was set forth in documents attached to his comment letter.

On May 16, 2003, the Region reissued the Permit and issued a response to the comments that were submitted in the Second Public Comment Period. *See* Response to Comments (May 2003) ("Second Response to Comments"). In its response to comments, the Region rejected Mr. Neske's contention that the Region lacked authority to issue the Permit. The Region explained as follows:

> It remains the position of the United States that the wastewater treatment plant discharge is within the exterior boundaries of the formally proclaimed Mille Lacs Indian Reservation. EPA has issued the NPDES permit for the plant on the new, alternative basis that EPA has jurisdiction because the discharge is on land held in trust by the United States for the tribe, regardless of whether the discharge is within the formally proclaimed reservation. The Supreme Court has held in a variety of contexts that tribal trust lands are reservations whether or not they are part of a formally proclaimed reservation. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *United States v. John*, 437 U.S. 634, 649 (1978) (finding "no apparent reason" why lands held in trust should not be considered reservations.).

Second Response to Comments at 3. The Region also explained that the language Petitioners quote from the *Stands* case was dicta and that *Stands* recognized that "'[i]n some circumstances, off-reservation tribal trust land could be considered Indian country.'" *Id.* at 4 (quoting *Stands*, 105 F.3d at 1572 n.3). Thereafter, Petitioners filed their petition for review of the Region's decision.

II. *DISCUSSION*

Pursuant to the regulations governing this proceeding, the Board will not grant review unless the petition shows that the permitting decision is based on a finding of fact or conclusion of law that is clearly erroneous, or an exercise of discretion or an important policy consideration that we conclude, in our discretion, should be reviewed. 40 C.F.R. § 124.19(a) (2003). The petition must demonstrate that "the issue to be reviewed on appeal was specifically raised during the public comment period." *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1999);[7] *see also* 40 C.F.R. §§ 124.13, .19(a) (2003); *In re Keystone Cogeneration Sys., Inc.*, 3 E.A.D. 766 (Adm'r 1992); *In re Spokane Reg'l Waste-to-Energy*, 2 E.A.D. 809, 816 (Adm'r 1989) (the Agency's opportunity to respond to significant comments is meaningless unless interested parties clearly state their positions during public comment period). Petitioners bear the burden of showing that review is warranted. *E.g., In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 283 (EAB 1997). We have frequently noted that the "power of review should be only sparingly exercised" and that "most permit conditions should be finally determined at the Regional level." *E.g., Ashland*, 9 E.A.D. at 667; *In re Envtl. Waste Control, Inc.*, 5 E.A.D. 264, 266 (EAB 1994); *accord* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980).

In the present matter, Petitioners argue that the Region's decision to issue the Permit is premised on a clearly erroneous legal conclusion. Petition at 4, 9. Petitioners object to what they characterize as the Region's conclusion that "trust status can always be equated to 'Indian country' or 'reservation' status." Petition at 5. Petitioners state further that "the determination of 'Indian country' status is [a] site- and fact-specific determination." Petitioners' Reply at 4. They argue that the Region's decision is in conflict with the decision of the Eighth Circuit Court of Appeals in *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), which Petitioners contend held that "trust land *per se* is not within the definition of 'Indian country.'" Petition at 6.

As explained below, we conclude that Petitioners have not satisfied their burden of showing that the Region's decision to issue the Permit is based on a finding of fact or conclusion of law that is clearly erroneous, or an exercise of discretion or an important policy consideration that we determine, in our discretion, should be reviewed. We conclude that Petitioners' reference to the Eighth Circuit's *Stands* decision fails to show clear error in the Region's decision to issue the Permit in that the *Stands* decision expressly states that in appropriate circumstances trust land may be reservation land. Moreover, the language Petitioners

---

[7] Issues that were not ascertainable during the public comment period, however, may be included in a petition for review.

rely upon in *Stands* is dicta and, therefore, not dispositive of the issue in this case. We also conclude that the Petitioners have failed to show any clear error in the factual basis identified by the Region for its decision. Indeed, as we explain below, Petitioners have failed to sustain their burden of showing that they brought to the Region's attention any specific facts that are material to, or would even so much as cast doubt upon, the Region's determination that the Facility is located within a de facto or informal reservation. We begin our analysis with the statutory text and applicable regulations promulgated under the statute.

A. *Applicable Law Governing Federal Jurisdiction*

1. *Statutory and Regulatory Framework*

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States, except if the discharge is made in compliance with, among other things, an NPDES permit issued under CWA § 402, 33 U.S.C. § 1342. Section 402(b) provides that States, upon meeting prescribed qualifications as determined by EPA, are entitled to administer their own NPDES permit programs. CWA § 402(b), 33 U.S.C. § 1342(b). In February 1987, Congress amended the CWA by adding a new section 518, providing that Indian tribes may qualify as "States" for purposes of, among others, the section 402 NPDES permitting program. *See* CWA § 518, 33 U.S.C. § 1377. This amendment authorized EPA to treat an Indian tribe as a State only if certain criteria are satisfied. Among those criteria is the requirement that:

> the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation[.]

CWA § 518(e), 33 U.S.C. § 1377(e).[8] Petitioners' request for review in the present matter is based on the contention that the Region did not properly determine

[8] Because it is uncontested that at the time of the permit decision the land in question had become "trust land," and it is likewise uncontested that the Region based its exercise of permitting jurisdiction primarily on the trust status of the land, the passage in the statute referring to land "held in trust by the United States for Indians" might at first blush appear to be dispositive on the question of federal jurisdiction. Indeed, if this passage is read to mean that all land held by the United States in trust for Indians is subject to federal jurisdiction, *whether or not it falls within the borders of a formal reservation*, then surely it would be dispositive. Based on our review of the Agency's interpretive statements relating to this passage, however, it appears that the Agency may have interpreted the trust
Continued

that the location of the Facility is "within the borders of an Indian reservation."[9]

In 1993, EPA issued regulations implementing section 518 as part of the NPDES permitting program. *See* Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act (CWA), 58 Fed. Reg. 67,966 (Dec. 22, 1993) (hereinafter "1993 preamble" or "1993 rulemaking").[10] Among other things, the 1993 rulemaking amended the NPDES regulations to incorporate key elements of the statutory text. For example, the 1993 rulemaking added a new section 123.31 prescribing the requirements for Indian Tribes to be treated as States. 58 Fed. Reg. at 67,981-82 (codified at 40 C.F.R. § 123.31). This new regulatory section mirrors the requirements of CWA § 518(e) by requiring that "[t]he functions to be exercised by the Indian Tribe [must] pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for the Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation." *Id.*[11] The 1993 rulemaking also revised section 123.23 to clarify the process by which a State that is not an Indian Tribe may seek authority over activities on "Indian lands."[12] 58 Fed. Reg. at 67,981 (codified at 40 C.F.R. § 123.23(b)). It also amended section 123.1(h) to clarify that EPA will administer the NPDES program on "Indian lands" "if a State (or Indian Tribe treated as a State) does not seek or have author-

---

(continued)
passage as limited by the concluding clause, "or otherwise within the borders of an Indian reservation." In particular, the Agency has explained that it "has consistently read the phrase 'or otherwise within * * * ' as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation." Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991).

[9] During the public comment period, Mr. Neske, on behalf of the county, argued that "tribal authority - and EPA - authority only extends to areas *within* Indian reservations." Comment Letter at 2. In their Petition, Petitioners argue that "trust land *per se* is not within the definition of 'Indian country.'" Petition at 6.

[10] The Agency also issued an earlier rulemaking in 1991 implementing CWA § 518 by amending the Agency's regulations governing the section 303 program for establishing water quality standards. *See* Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991). This 1991 rulemaking is often pointed to as an early statement of EPA's interpretation of CWA § 518.

[11] The 1993 rulemaking also amended the regulatory definitions in section 122.2 to add definitions of "Federal Indian Reservation" and "Indian Tribe" that mirror the statutory definitions of these terms in CWA § 518(h). 58 Fed. Reg. at 67,980-81 (codified at 40 C.F.R. § 122.2).

[12] On June 30, 1974, EPA approved the State of Minnesota's application for approval of its NPDES permitting program. The State of Minnesota, however, has not applied, under the amended section 123.23(b), for authority to issue NPDES permits on "Indian lands."

ity to regulate activities on Indian lands." 58 Fed. Reg. at 67,981 (codified at 40 C.F.R. § 123.1(h)).

Since this matter involves the Region's authority to issue the Permit, it arises under section 123.1(h), rather than section 123.31, which would govern a request by the Band for treatment as a State. *Compare* 40 C.F.R. § 123.1(h) *with id.* § 123.31. This distinction is noteworthy because, unlike section 123.31, which expressly refers to "Indian reservation," the section 123.1(h) authority refers to the administration of the NPDES program on "Indian lands." Although the term "Indian lands" is used in a number of places in the 1993 rulemaking, neither the regulatory text nor the 1993 preamble's interpretive guidance define the term. In its appellate brief, the Region states that EPA interprets the term "Indian lands" to be synonymous with the term "Indian country," a defined term. Region's Response at 1 n.2; *see also id.* at 7 & n.9. Petitioners appear to accept this proposition. *See, e.g.*, Petition at 6 (arguing that the Facility is not within Indian country).[13]

The term "Indian country" is defined by the NPDES regulations at 40 C.F.R. § 122.2.[14] This regulatory definition mirrors exactly the statutory definition of "In-

---

[13] Although the Band also appears to accept the proposition that EPA interprets "Indian lands" as synonymous with "Indian country," Band's Opposition at 24, nevertheless, the Band also notes that, in a variety of contexts, Congress has defined "Indian lands" to specifically encompass lands held in trust for Indians (which is the central issue in the instant case). Band's Opposition at 26 (citing 25 U.S.C. § 81(a)(1) (defining "Indian lands" to mean "lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.")); *see also* 16 U.S.C. § 470bb(4) (defining "Indian lands" to mean "lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual."). We recognize that these authorities might serve as an independent basis for concluding that the ordinary meaning of "Indian lands" includes trust property. However, since the Region did not base its decision on this rationale, we decline to rely upon it in our decision today.

[14] The regulatory definition is as follows:

Indian country means:

> (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
>
> (2) All dependent Indian communities with the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
>
> (3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Continued

dian country" found in 18 U.S.C. § 1151, applicable to certain criminal statutes under Title 18.[15] *See* National Pollutant Discharge Elimination System Permit Application Requirements for Publicly Owned Treatment Works and Other Treatment Works Treating Domestic Sewage, 64 Fed. Reg. 42,434, 42,443 (Aug. 4, 1999) (hereinafter "1999 rulemaking") (stating that the regulatory definition "incorporates" the statutory definition).[16]

It bears noting that this definition of "Indian country," and hence EPA's authority under 40 U.S.C. § 123.1(h), is broader than the definition of "Indian reservation" applicable to treatment of Tribes as States under 40 C.F.R. § 123.31. *See* 64 Fed. Reg. at 42,443 ("The term 'Indian country' encompasses more area than the term 'Federal Indian Reservation' * * * ."). However, for present purposes, there is no practical distinction between "Indian country" and "Federal Indian Reservation" since the parties have focused on the meaning of the subsidiary term "Indian reservation" as it appears in the definition of "Indian country." The first part of the three-part regulatory definition states that "Indian country" includes, for example, "[a]ll land within the limits of any *Indian reservation* under the jurisdiction of the United States Government * * * ." 40 C.F.R. § 122.2 (emphasis added).[17] Likewise, both the statute and regulations provide that the functions to be exercised by the tribe must pertain to water resources "otherwise within the borders of an *Indian reservation*." CWA § 518(e), 33 U.S.C. § 1377(e) (emphasis added); *see also* 40 C.F.R. § 123.31.

Neither the statute, nor the regulations, define the term "Indian reservation."[18] The Agency, however, explained its interpretation of this term in the 1993 preamble. There, the Agency explained:

(continued)
40 C.F.R. § 122.2; *see also* 18 U.S.C. § 1151. This definition was not added to the regulations by the 1993 rulemaking; instead, it was added by amendments made in 1999. *See* National Pollutant Discharge Elimination System Permit Application Requirements for Publicly Owned Treatment Works and Other Treatment Works Treating Domestic Sewage, 64 Fed. Reg. 42,434, 42,443 (Aug. 4, 1999).

[15] For a brief history of the statutory definition of "Indian country," see *United States v. John*, 437 U.S. 634, 648 (1978).

[16] The 1999 rulemaking, among other things, amended section 122.2 to add this definition of the term "Indian country."

[17] The definition of Indian country contains two additional parts, which expressly include "dependent Indian communities" and "Indian allotments." *See* note 14 above.

[18] Section 518 defines the terms "Indian tribe" and "Federal Indian reservation" as follows:

> (1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

Continued

> [T]he meaning of the term "reservation" must be determined in light of statutory law and with reference to relevant case law. EPA considers trust land formally set apart for the use of Indians to be "within a reservation" for the purposes of section 518(e)(2), even if they have not been formally designated as "reservations." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905, 910 (1991). This means it is the status and use of the land that determines if it is to be considered "within a reservation" rather than the label attached to it. EPA will take the status of the land into consideration on a case-by-case basis when evaluating a Tribe's application for Treatment in the Same Manner as a State.

58 Fed. Reg. at 67,976; *see also id.* at 67,970. The Agency stated further:

> As discussed previously, the status and use of the land are intimately tied to the specific land being evaluated. EPA, therefore, does not believe that it would be practical to attempt to define the term "Federal Indian reservation" further within the scope of this rule. Whether specific land is considered within the boundaries of a reservation must be a factual determination made on a case-by-case basis at the time of application under section 518 based on applicable law at the time. EPA believes it is appropriate for the regulatory language to reflect the statutory definition, but will interpret that language in light of all appropriate case law.

58 Fed. Reg. at 67,976-77. Indeed, both prior and subsequent to the 1993 rulemaking, EPA has consistently articulated its interpretation that EPA considers trust land formally set apart for the use of Indians to be "within a reservation" for the purposes of section 518(e)(2), even if the trust land has not been formally designated as a "reservation." *E.g.*, Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,012, 46,014 (Aug. 23, 1999); Clean Water Act; Section 404 Tribal Regulations, 58 Fed. Reg. 8172, 8177 (Feb. 11, 1993); Amendments to the Water Quality Standards Regulations that Pertain

---

(continued)

> (2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

CWA § 518(h), 33 U.S.C. § 1377(h).

to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991).

One of Petitioners' central contentions is that the legal standard requires a "site- and fact-specific determination." Petitioners' Reply at 4. The Region has responded to this argument in part by suggesting that the Agency has interpreted "the term 'reservation' under the Clean Water Act and Clean Air Act" to include trust land formally set aside for the use of Indians, and that this interpretation has survived challenge. Region's Surreply at 5 (citing *Ariz. Pub. Serv. Co. v. U.S. EPA*, 211 F.3d 1280 (D.C. Cir. 2000)). There would appear to be some merit to this contention. Certainly, a regulatory preamble is the Agency's authoritative interpretation. *See HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13(10th Cir. 2000) (citing *Wyo. Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir.1999)); *see also Vermont v. Thomas*, 850 F.2d 99, 103 (2d Cir. 1988). Moreover, the D.C. Circuit has held that "[i]n light of the ample precedent treating trust lands as reservation land in other contexts, and the canon of statutory interpretation calling for statutes to be interpreted favorably towards Native American nations, we cannot condemn as unreasonable EPA's interpretation of 'reservation' to include Pueblos and tribal trust land." *Ariz. Pub. Serv.*, 211 F.3d at 1294. Nevertheless, in the present matter, our decision need not rest solely on the Agency interpretation announced in the Federal Register notices discussed above[19] — instead, as discussed below, we conclude that the record reflects a site- and fact-specific determination, which Petitioners have not shown was based on clear error.

---

[19] The Agency has announced a consistent interpretation of "Indian reservation" in the Federal Register notices issued under both the Clean Air Act and Clean Water Act between 1991 and the present. *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998); 58 Fed. Reg. at 67,976; *see also* Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,012, 46,014 (Aug. 23, 1999); Clean Water Act Section 404 Tribal Regulations, 58 Fed. Reg. 8172, 8177 (Feb. 11, 1993);Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991). The Clean Air Act notice, which is the Agency's most recent expression of the idea, perhaps expresses it most clearly:

> It is the Agency's position that the term "reservation" in CAA section 301(d)(2)(B) should be interpreted in light of Supreme Court case law, including *Oklahoma Tax Comm'n*, in which the Supreme Court held that a "reservation," in addition to the common understanding of the term, also includes trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation. * * * *EPA will consider on a case-by-case basis whether other types of lands other than Pueblos and tribal trust lands may be considered* "*reservations*" under federal Indian law even though they are not formally designated as such.

63 Fed. Reg. at 7258 (emphasis added).

2. *Relevant Caselaw*

The Agency's interpretation of "reservation," as set forth in the 1993 preamble, expressly contemplated that consideration of questions of tribal jurisdiction would be guided by "all appropriate case law." 58 Fed. Reg. at 67,976-77. The "appropriate case law" necessarily includes precedents of the U.S. Supreme Court and the Eighth Circuit Court of Appeals - the controlling Federal Circuit Court of Appeals for the matter at hand. Fortunately, there is a rich foundation of Supreme Court jurisprudence on the question before us, including the Supreme Court's decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991), which the 1993 preamble cited in support of the Agency's interpretation. 58 Fed. Reg. at 67,976. In that case, a unanimous Supreme Court held that the relevant circumstances to be considered in determining whether particular land is "within a reservation" are as follows:

> [No] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges * * * . [T]he test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."

Potawatomi, 498 U.S. at 511[20] (quoting *United States v. John*, 437 U.S. 634, 648-49 (1978)). The Court went on to conclude that "the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. * * * [W]e find that this trust land is 'validly set apart' and thus qualifies as a reservation * * * ." *Id.*

In the *John* case, which the Supreme Court cited in support of its holding in *Potawatomi*, the Court, also in a unanimous decision, explained as follows:

> The Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands * * * did not become a "reservation," at least for the purposes of [the definition of "Indian country" in 18 U.S.C. § 1151] at that particular time.

---

[20] Chief Justice Rehnquist delivered the opinion for a unanimous Court, with a concurring opinion filed by Justice Stevens.

John, 437 U.S. at 649. Subsequently, in 1993, the Supreme Court again considered the meaning of "reservation" as used in 18 U.S.C. § 1151. *See Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). In another unanimous decision, the Court held that "a tribal member need not live on a formal reservation * * * it is enough that the member live in 'Indian country.' Congress has defined Indian country broadly to include formal and informal reservations * * * ." *Id.* at 123 (citing 18 U.S.C. § 1151).[21]

The three unanimous decisions by the Supreme Court in *John*, *Potawatomi*, and *Sac and Fox Nation* issued between 1978 and 1993 leave no doubt that the test applied by the Supreme Court for determining whether a particular location is de facto or informally "within a reservation" as used in the definition of "Indian country" is whether the land has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Potawatomi*, 498 U.S. at 511 (citing *John*, 437 U.S. at 648-49); *Sac and Fox Nation*, 508 U.S. at 123. These decisions also leave no doubt that the Supreme Court finds the trust status of particular land to be relevant to the question whether the land has been validly set apart under the superintendence of the Government. *Potawatomi*, 498 U.S. at 511 (citing *John*, 437 U.S. at 648-49); *Sac and Fox Nation*, 508 U.S. at 123.

Numerous other appellate court cases have reached a similar conclusion that trust land may be within a de facto or informal reservation. *See Ariz. Pub. Serv. Co., v. EPA*, 211 F.3d 1280, 1292-94 (D.C. Cir. 2000) (upholding EPA's interpretation under the CAA that tribal trust land is within a reservation); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000) (tribal trust land is Indian country under 18 U.S.C. § 1151(a) and may qualify under § 1151(b) as well); *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) ("official 'reservation' status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian country pursuant to 18 U. S.C. § 1151"); *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) (lands held in trust by the federal government for a tribe are Indian country); *United States v. Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985) (tribal trust land is "reservation" land under § 1151(a)); *Cheyenne-Arapaho Tribe of Okla. v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980) ("lands held in trust by the United States for the Tribes are Indian country within the meaning of § 1151(a)"); *Santa Rosa Band of Indians v. Kings County*, 532, F.2d 655, 666 (9th Cir. 1975) (tribal trust lands held to be Indian country).

---

[21] In the *Sac and Fox Nation* case, the state of Oklahoma argued that the reservation at issue had been "disestablished." 508 U.S. at 124. The Supreme Court stated that this was "precisely the same argument" that the Court rejected in the *Potawatomi* case, which involved "a tribal convenience store located outside the reservation on land held in trust for the Potawatomi." *Id.* at 126.

Petitioners argue that, in *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), the Eighth Circuit Court of Appeals held that "trust land *per se* is not within the definition of 'Indian country,'" Petition at 6, and that "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country," *Stands*, 105 F.3d at 1572. Petitioners argue that this is binding precedent and that, based on it, the Region's decision to assert permitting jurisdiction over the Tribal trust lands in question was clearly erroneous. Petition at 7-8. What Petitioners fail to take into account, however, is that the Eighth Circuit recognized that Tribal trust lands may be considered "Indian country" in an appropriate case.

Indeed, in *Stands* itself, the court specifically explained that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country." *Stands*, 105 F.3d at 1571 n.3. As support for this statement, the Eighth Circuit cited its earlier case of *United States v. Azure*, 801 F.2d 336, 338-39 (8th Cir. 1986), which held that the Tribal trust lands located outside the boundaries of the Turtle Mountain Indian Reservation were de facto reservation lands and Indian country under 18 U.S.C. § 1151(a).[22] Moreover, the *Stands* court's comments regarding Tribal trust land were clearly dicta, since the central issue in the case was whether the land in question was "allotted" land, which the court noted was a legal category distinct from Tribal trust land. *Stands*, 105 F.3d at 1572 ("We now turn to the sufficiency of the evidence to establish that the assault occurred on allotted land * * * .").

Thus, the Eighth Circuit accepts the premise that Tribal trust land may, in appropriate circumstances, be "Indian country," and the Supreme Court has spoken clearly to what those circumstances are: when land is "validly set apart for the use of the Indians as such, under the superintendence of the government." *Potawatomi*, 498 U.S. at 511 (citing *John*, 437 U.S. at 648-49); *Sac and Fox Nation*, 508 U.S. at 123. It is against this standard that the Region's decision in the present case must be measured.

B. *Did the Region Err, Based on the Record Before It, in Treating the Trust Lands as Part of a De Facto or Informal Reservation?*

The Region's decision that it has authority to issue the Permit in this case is based on the Region's conclusion that the Facility is located within a de facto or informal reservation. The Region made this decision in the context of a recent decision by DOI to transfer the property on which the Facility is located into trust for the Band. This transfer of the land into trust for the Band and DOI's process for the transfer are particularly relevant to the question whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of

---

[22] The *Azure* Court also noted that the trust lands at issue in that case could be considered a dependent Indian community under 18 U.S.C. § 1151(b).

the Government," *Potawatomi*, 498 U.S. at 511, which as we have explained is the applicable standard governing whether particular land is within a de facto or informal reservation.

Under DOI's regulations, a transfer of land into trust for a tribe may be made, among other reasons, when DOI "determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. §§ 151.3(a)(3), .10(b). In making the decision to transfer the land at issue here into trust, the Regional Director of DOI's Bureau of Indian Affairs specifically found that the transfer was needed "to further promote the health, welfare, and social needs of the members of the Mille Lacs Band of Ojibwe Indians." Decision on Appeal of Trust Acquisition - Keller Property, by Larry Morrin, Regional Director Midwest Regional Office, Bureau of Indian Affairs, DOI at 3 (Aug. 24, 2001), *aff'd, County of Mille Lacs v. BIA*, Dkt No. IBIA 02-1-A, 37 IBIA 169 (IBIA, Mar. 25, 2002). The Regional Director explained further:

> The Band's application indicates that there is a need for additional housing for their members. Currently they have approximately 403 units providing shelter to individuals and families. Many of the existing housing units are in sub-standard condition. The Band has identified the need to provide at least an additional 391 units in order to meet the demand of the community and its development. There are many Band members and their families who wish to live and work on the Reservation, and in the Band's businesses, but are not able to do so because of the limited housing supply. In many instances Band members who are currently living on the Reservation are residing with extended families, or in substandard structures, until their housing needs can be met. The towns surrounding the Mille Lacs Reservation are small in size and also have limited availability of housing. We concur with the Band's position that there is a need for an additional 391 housing units.
>
> However, development of more tribal housing would result in generation of additional waste water and the Band's existing waste water system is already nearing capacity. The fact that the existing waste water plant is nearing its capacity also constrains the efforts by the Band to develop additional businesses in the vicinity to create needed jobs and generate tribal revenues needed by the Band to provide governmental services to its members.

Id. The Regional Director also specifically found, "The subject parcel will be utilized exclusively for Tribal Government purposes, including Tribal housing, construction and operation of a wastewater treatment facility; and a Tribal motor pool." *Id.* at 4. The Regional Director concluded, "The purpose for which the subject property will be used clearly benefits the welfare and social needs of the tribal members living in the area, and as such it enhances Tribal self-government and self-determination. Acquisition of trust land for tribal governance and infrastructure and housing falls squarely within the land acquisition policy set forth in 25 C.F.R. § 151.3(a)(3)." *Id.* at 5. He also concluded that "this trust acquisition is essential to enhance the Band's objectives of tribal self-determination and self-government and is within federal policy guiding the acquisition of land in trust for Indians." *Id.* at 8. The Interior Board of Indian Appeals upheld the Regional Director's decision in an appeal filed by the County of Mille Lacs. *County of Mille Lacs v. BIA,* Docket No. IBIA 02-1-A, 37 IBIA 169 (IBIA, Mar. 25, 2002).

EPA Region 5's statement of basis for exercising permitting jurisdiction, as set forth in the Second Fact Sheet for the Permit, expressly referred to this decision to transfer the land into trust. Second Fact Sheet at 4-5. The Second Fact Sheet stated that "the U.S. Department of Interior in an unrelated parallel proceeding, transferred from fee status to federal trust status the land upon which the proposed waste water treatment plant is being built." Second Fact Sheet at 4. Both the Second Fact Sheet and the notice of the Second Public Comment Period stated:

> The land which has been placed into trust status land is an L-shaped tract * * * . The procedural steps taken by the Bureau of Indian Affairs which resulted in the conveyance into trust of the land are part of the record for this permit. These steps conformed with the regulations governing land acquisition in trust for Indian tribes as set forth in 25 C.F.R. Part 151.

Public Notice of Draft NPDES Permit to Discharge Into Waters of the United States (Dec. 2002); Second Fact Sheet at 5. The Second Fact Sheet also reflects that the Region made its own independent finding concerning the Band's use of the land. The Region's statement of basis for the Permit specifically identified facts showing that the Facility will be used by the Band - it identified the Band as an applicant. Second Fact Sheet at 1. It also stated that "[t]he new discharge will allow the applicant to provide additional housing to tribal members" and that "[t]he additional housing units will allow additional tribal members to live on the reservation." *Id.* at 3.

We find no error in the Region's decision to give weight to these facts in making its decision. The standards governing DOI's decision to transfer the prop-

erty into trust under 25 C.F.R. § 151.3(a)(3) ("the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing") and DOI's finding of the specific facts supporting its decision are relevant to the question whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Potawatomi*, 498 U.S. at 511. The transfer into trust for the Band was an express decision to set the land apart for the use of the Band under DOI's superintendence. Notably, Mille Lacs County did not seek judicial review of the Interior Board of Indian Appeals decision to affirm the BIA Regional Director's decision. Thus, we accept DOI's designation and factual findings as validly made.[23]

Moreover, we note that the Band's use of the land at issue would appear, if anything, to be more compelling than uses that were considered appropriate for "Indian country" designation in other cases. Indeed, the Band's use of the trust land at issue here and the benefit obtained (enabling more Band members to live on the reservation) would appear to be of greater significance to the Band than the use noted by the Supreme Court in *Potawatomi*, which involved a convenience store located on trust land. *Potawatomi*, 498 U.S. at 506. The use in the present case would also appear to be more central to the Band's functioning as a Tribal government than the use noted by the Eighth Circuit in the *Azure* case, where the court merely noted, without further explanation, that the trust land located outside of the formal reservation boundaries was leased by the Tribe to Indians. *Azure*, 801 F.2d at 338. Thus, we find that the facts identified in the Region's statement of the basis for its decision show that Petitioners' contention that "[s]pecific facts did not play any role in this permit process" is without merit. The Region did consider specific facts relevant to the applicable test and in our view did not err in concluding, based on the record before it, that a basis for federal jurisdiction was present.

At this juncture we must note that Petitioners have not identified in their Petition any facts that are material to, or would even so much as cast doubt upon, the Region's determination that the Facility is located within a de facto or informal reservation.[24] More specifically, Petitioners have failed to show that any com-

---

[23] This is clearly not an appropriate forum for seeking further review of DOI's decision.

[24] Because we are upholding the Region's decision based on the existence of a de facto or informal reservation, we do not need to address in this decision the Region's conclusion, made in the alternative, that "It remains the position of the United States that the wastewater treatment plant discharge is within the exterior boundaries of the formally proclaimed Mille Lacs Indian Reservation." Second Response to Comments at 3; *accord* Decision on Appeal of Trust Acquisition - Keller Property, by Larry Morrin, Regional Director Midwest Regional Office, Bureau of Indian Affairs, DOI at 3 (Aug. 24, 2001) (holding that "We believe that the Mille Lacs Indian Reservation continues to exist today and its boundaries encompass the territory described in the Treaty of 1855 which was not diminished by the Treaty of 1864 or the Nelson Act."), *aff'd, County of Mille Lacs v. BIA*, Dkt No. IBIA 02-1-A, 37 IBIA 169 (IBIA, Mar. 25, 2002).

ments submitted during the Second Public Comment Period identified specific facts that the Region should have taken into account when considering whether the Facility is within a de facto or informal reservation under the Supreme Court's *Potawatomi* test of whether the land has been validly set apart for the use of Indians as such, under the superintendence of the Government. This failure to identify specific facts relevant to a de facto or informal reservation determination, or to refute the facts relied upon by the Region, is fatal to Petitioners' request that we review the Region's permitting decision.

We have frequently explained, "[t]he effective, efficient and predictable administration of the permitting process, demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999). "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994). In particular, the petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period. *E.g.*, *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 545 (EAB 1999). "At a minimum, commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issue raised. Absent such specificity, the permit issuer cannot meaningfully respond to comments." *Id.* at 547-48 (citing *In re Spokane Reg'l Waste-to-Energy*, 2 E.A.D. 809, 816 (Adm'r 1989) ("Just as 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public,' so too is the agency's opportunity to respond to those comments meaningless unless the interested party clearly states its position." quoting *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1520 (D.C. Cir. 1988) (internal citations omitted)); *see also In re Westborough*, 10 E.A.D. 297, 304-05 (EAB 2002); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 229-30 (EAB 2000); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998); *In re Ecoelectrica, L.P.*, 7 E.A.D. 56 (EAB 1997).

Here, during the Second Public Comment Period, Mr. Neske on behalf of Mille Lacs County submitted a short, less than two-page letter objecting to the Region's tentative decision to issue the Permit based on the "trust" status of the Facility's location. The substance of Mr. Neske's comments appears to be set forth in one paragraph, as follows:

> The County's position is that lands described in the Notice are not within an Indian reservation, and thus neither the Mille Lacs Band nor the EPA have authority under the CWA to issue the proposed permit. The controlling legal authority in this circuit relative to that issue is *United*

> *States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997). There the Court of Appeals explained that "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of an Indian reservation is ordinarily not Indian country." * * * The County's position relative to the proper application of *Stands* and the diminished status of the Reservation's boundaries is set forth in the Complaint and briefs that are submitted with this letter and incorporated herein by the reference.

Letter from Roger Neske, Vice-Chairman of the Board, Mille Lacs County to Mr. John Colletti, Permit Writer, U.S. EPA Region 5, at 2 (Jan. 21, 2003).[25] Although Mr. Neske made reference to "the Complaint and briefs" submitted with his letter, he did not bring to the Region's attention any facts alleged in those documents that might be relevant to the Region's determination as to whether the Facility was located within a de facto or informal reservation, and more importantly, the Petitioners have not identified in the Petition any such facts that Petitioners believe the Region should have considered. Due to this failure to identify in the Petition any facts that would show that the Facility is not a de facto or informal reservation, the Petitioners have failed to bear their burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(1), (2); *In re City of Moscow, Idaho*, 10 E.A.D. 135, 140-41 (EAB 2001); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re Hawaii Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998). Accordingly, we uphold the Region's conclusion that it has jurisdiction to issue the Permit based on the existence of a de facto or informal reservation, and we deny review of the Petition.

---

[25] Mr. Neske also stated that the question whether "the involved lands are within the Mille Lacs Reservation is currently pending before the United States District Court for the District of Minnesota, Fifth Division, in the action entitled *Mille Lacs County et. al v. Benjamin, et. al*, Civ No. 02-407 JMR/RLE (D. Minn.)." Letter from Roger Neske, Vice-Chairman of the Board, Mille Lacs County to Mr. John Colletti, Permit Writer, U.S. EPA Region 5, at 2 (Jan. 21, 2003). This case, which sought a judicial declaration as to the status of the reservation established by the 1855 treaty, was dismissed on two alternative grounds: the court concluded that the Mille Lacs County lacked standing and that the issues presented were not ripe for adjudication. *Mille Lacs County v. Benjamin*, 262 F. Supp. 2d 990 (D. Minn. 2003), *aff'd, County of Mille Lacs v. First National Bank of Milaca*, Dkt No. 03-2527 (8th Cir. Mar. 9, 2004). Petitioners have not argued that this case has any bearing upon whether the trust land at issue in the present matter is within a de facto or informal reservation.

III. *CONCLUSION*

For the foregoing reasons the Petition for Review filed by Messrs. Hoefert and Courteau is denied.

So ordered.