**Public Water System Supervision Program; Primary Enforcement Responsibility Approval for the Navajo Nation**

**AGENCY:** U.S. Environmental Protection Agency (EPA).

**ACTION:** Notice of decision and opportunity for hearing.

This public notice is issued pursuant to section 1413 of the Safe Drinking Water Act ("Act") and section 142.10 of the National Primary Drinking Water Regulation (40 CFR Part 142).

An application has been received from the Navajo Nation, through the Director, Navajo Nation Environmental Protection Agency, requesting that the Navajo Nation Environmental Protection Agency be granted primary enforcement responsibility for the public water systems within the Navajo Nation pursuant to section 1413 of the Act.

Section 1451 of the Act and 40 CFR 142.72 authorize EPA to delegate to Indian tribes primary enforcement responsibility for public water systems, pursuant to section 1413 of the Act, if the Indian tribe meets the following criteria:

> [A] the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
>
> [B] the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and
>
> [C] the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [the Act] and of all applicable regulations.

Section 1451(b)(1) of the Act, 42 U.S.C. 300j-11(b)(1), see also 40

CFR 142.72.

Pursuant to section 1451 of the Act and 40 CFR 142.72, EPA has determined that the Navajo Nation, through the Navajo Nation Environmental Protection Agency, is eligible to apply for primary enforcement responsibility for public water systems within the Navajo Nation. EPA has also determined that the Navajo Nation, through the Navajo Nation Environmental Protection Agency has met all conditions of the Act and regulations promulgated pursuant to the Act for the assumption of primary enforcement responsibility for public water systems within the Navajo Nation. Specifically the Navajo Nation:

[1] Has adopted drinking water regulations which are no less stringent than the National Primary Drinking Water Regulations;

[2] Has adopted and will implement adequate procedures for the enforcement of such regulations, including adequate monitoring, sanitary surveys, inspections, plan review, inventory of water systems, and adequate certified laboratory availability;

[3] Will keep such records and make such reports as required;

[4] If it permits variances or exemptions from the requirements of its regulations, will issue such variances and exemptions in accordance with the provisions of the National Primary Drinking Water Regulations; and

[5] Has adopted and can implement an adequate plan for the provision of safe drinking water under emergency conditions.

All interested parties are invited to submit written comments or to request a public hearing on EPA's determination. Written comments and/or requests for a public hearing must be submitted by **[insert date thirty (30) days from date of publication]** to the Regional Administrator at the address shown below.

Any request for a public hearing shall include the following information: [1] the name, address, and telephone number of the individual, organization, or other entity requesting a hearing; [2] a brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such hearing; and [3] the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of the responsible official of the organization or other entity.

Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. If a substantial request for public hearing is made by **[insert date thirty (30) days from date of publication]**, a public hearing will be held. The Regional Administrator will give further notice in the **FEDERAL REGISTER** and a newspaper or newspapers of general circulation within the Navajo Nation of any hearing to be held pursuant to a request submitted by an interested party, or on her own motion. Notice of the hearing shall be given not less than fifteen (15) days prior to the time scheduled for the hearing. Notice will be sent to the person

requesting the hearing and to the Navajo Nation. Notice of the hearing will include a statement of the purpose of the hearing, information regarding the time and location for the hearing, and the address and telephone number of an office at which interested persons may obtain further information concerning the hearing.

After receiving the record of the hearing, the Regional Administrator will issue an order affirming or rescinding the determination. If the determination is affirmed, it shall become effective as of the date of the order.

If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on her own motion, this determination shall become effective on **[insert date thirty (30) days from the date of publication]**.

Based on the language of section 1413 of the Act, EPA has long implemented the determination to approve a state, and now a tribal, application for primary enforcement responsibility for public water systems as an "adjudication" rather than a "rulemaking" under the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. The same is true of applications for state and tribal program revisions. For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq. Under the RFA, whenever a federal agency proposes or promulgates a rule under section 553 of the APA, after being

required by that section or any other law to publish a general notice of proposed rulemaking, the agency must prepare a regulatory flexibility analysis for the rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule.

Even if a state or tribal primary enforcement responsibility application or revision were a "rule" subject to the RFA, EPA would certify that the approval or revision of the state's or the tribe's program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve a primary enforcement responsibility application or revision merely recognizes a program that has already been enacted as a matter of state or tribal law. It would, therefore, impose no additional obligations upon those subject to the state's or tribe's program. Accordingly, the Regional Administrator would certify that the approval of primary enforcement responsibility of the Navajo Nation, if a "rule", would not have a significant economic impact on a substantial number of small entities.

**ADDRESSES:** All documents relating to this determination are available for inspection between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday, at the following offices: Navajo

Nation Environmental Protection Agency, Fairground Building No. W-008-042, Window Rock, Arizona 86515; and EPA, Region IX, Water Division, Drinking Water Office (WTR-6), 75 Hawthorne Street, San Francisco, California 94105.

**FURTHER INFORMATION:** To submit comments or request further information, contact Danny Collier, Region IX, at the San Francisco address given above; telephone (415) 744-1856.

[Sections 1413 and 1451 of the Safe Drinking Water Act, as amended, 42 U.S.C. 300g-2 and 311j-11; and 40 CFR 142.10 and 142.72]

Dated: 10/23/00

Felicia Marcus

Felicia Marcus

Regional Administrator

## APPENDIX

**Factual analysis of finding that operation of existing and future public water systems on nonmember-owned fee lands within the boundaries of the Navajo Reservation may have direct impacts on the health and welfare of the Navajo Nation and its members that are serious and substantial**

**Basis of Finding**

**A. Relationship of drinking water quality to the health and welfare of the Navajo Nation and its members**

By enacting the Safe Drinking Water Act (SDWA), Congress sought to ensure a healthy drinking water supply. The SDWA protects public health by requiring that owners and operators of public water systems throughout the country provide drinking water that is safe for human consumption. Pursuant to the SDWA, EPA has promulgated national primary drinking water regulations (NPDWRs) that identify contaminants that may have adverse effects on human health. The NPDWRs specify maximum contaminant levels (MCLs) or treatment techniques (drinking water standards) for these contaminants that are designed to protect the public, to the extent feasible, from any adverse health effects from consuming contaminated water. The NPDWRs also establish monitoring and reporting requirements to ensure compliance with MCLs and treatment techniques. The SDWA also created programs for wellhead and source water protection, among other things.

Failure to operate and maintain water systems properly may result in serious adverse public health impacts caused by human consumption of contaminated water. Regulation of public water systems, therefore, can provide protection of the health and welfare of the Navajo Nation in the following ways:

- Ensuring that human health will be directly protected from waterborne disease and from exposure to toxic materials at acute or chronic levels resulting from consumption of contaminated water. This protection is basic to the health and welfare of members of the Navajo Nation;

- Promulgating standards based upon health effects that occur in a population as a result of long-term exposure or short-term exposure which may affect more sensitive individuals within a group. The promulgation of standards ensures the health and well being of members of the Navajo Nation;

- Requiring proper operation and maintenance of public water systems (in order to comply with the standards and requirements of the SDWA) so that the public is not placed at increased risk of health problems as a result of contamination of drinking water supplies. Meeting the standards is essential to the health of members of the Navajo Nation; and

- Instituting wellhead and source water protection practices to eliminate activities within designated water supply recharge areas that could contribute to contamination of sources thereby preventing a water supply from complying with standards. These functions directly affect the health and welfare of members of the Navajo Nation.

**B. Relationship of public water systems on nonmember fee land to the Navajo Nation and its members**

The vast majority of land within the Navajo Reservation is tribal trust land. There is also a small number of individual trust allotments and some federal land (e.g. National Park Service) within the Reservation. Nonmember-owned fee lands constitute a very small percentage of the total land base in the Reservation and are scattered throughout the Reservation, usually completely surrounded by tribal trust land. Most nonmember fee lands are owned by churches, schools, hospitals, or other institutions whose mission is to serve the Navajo Nation and its members. A few businesses that serve the Navajo Nation and its members are on nonmember fee land.

Given the scattered nature of nonmember fee land within the Navajo Nation and the purposes of the institutions located on that fee land, public water systems located on fee lands generally provide drinking water to members of the Navajo Nation on a regular basis. Moreover, members of the Navajo Nation employed at the

businesses, schools, and other institutions on fee lands use public water systems located on fee land on a daily basis.

The following is information concerning specific public water systems owned or operated by nonmembers and located on nonmember fee land:

- Sage Memorial Hospital: The Sage Memorial Hospital, operated by the Navajo Nation Health Foundation, is located on fee lands in the Ganado (AZ) community near the center of the Navajo Reservation. According to staff at the Hospital, "[i]t is safe to say, at one time or another, every Navajo person who resides in our service area comes to this facility [the hospital] and either directly or indirectly uses our domestic drinking water supply." The Hospital's service area includes six Navajo Chapters and approximately 20,000 people, most of whom are Navajo. See Exhibit AA-1 of the March 17, 1997 Attorney General's Statement.

- St. Michael Indian School: The St. Michael Indian School, operated by the Sisters of the Blessed Sacrament, is located on fee land in the St. Michaels (AZ) community near Window Rock, the capitol of the Navajo Nation. A majority of students at both the elementary and the high school are Navajo. As of March 1996, 121 of 129 students enrolled at the high school were Navajo, and 216 of 237 students enrolled at the elementary school were Navajo. See Exhibit AA-2 of the March 17, 1997 Attorney General's Statement.

**C. Examples of contamination that may occur in public water systems located on fee lands and that may have serious and substantial impacts on the health and welfare of the Navajo Nation and its members**

In establishing MCLs and treatment techniques, EPA has assessed the effects of particular contaminants or contaminant groups on the general population and also on groups within the general population, such as infants, children, pregnant women, the elderly, individuals with a history of serious illness, or other subpopulations that are identified as likely to be at greater risk of adverse health effects from exposure to contaminants in drinking

water. While certain adverse health effects may generally occur in a population as a result of long-term exposure to contaminants in drinking water, individual variation within that population may mean that short-term exposure will affect more sensitive individuals within the group. In addition, certain chemical or radiological contaminants may produce subtle adverse effects early on in the exposure period that do not become grossly apparent until substantial damage has occurred.

1. Examples of particular health effects associated with certain contaminants regulated under the SDWA:

**Nitrate/Nitrite:** Nitrate and nitrite, which are used in fertilizers and found in sewage and wastes from humans and/or farm animals, are associated with an acute health effect (methemoglobinemia). Nitrate/nitrite contamination presents a potential health problem for the population and has caused serious illness and sometimes death in infants under six months of age because the contaminants interfere with the oxygen-carrying capacity of such children's blood. In such cases, symptoms can develop rapidly. (See 40 C.F.R. §§ 141.32(e)(20-21) and 141.62; 56 Fed. Reg. 3594 (January 30, 1991));

**Coliform:** The presence of fecal coliforms is strong evidence of recent sewage contamination and indicates that an urgent public health problem is likely to exist, since human pathogens often co-exist with fecal coliforms. Although not necessarily disease-causing themselves, fecal coliforms (as well as total coliforms) are indicators of bacteria and other organisms that cause gastroenteric infections, dysentery, hepatitis, typhoid fever, and cholera. Public water systems that contain fecal coliforms very likely represent a serious health risk (See 40 C.F.R. §§ 141.32(e)(10-12) and 141.63; 54 Fed. Reg. 27544 (June 29, 1989)).

**Lead and Copper:** The presence of lead and copper in drinking water results primarily from corrosion of materials located throughout the distribution system containing lead and copper and from lead and copper plumbing materials used in public and privately-owned structures connected to the distribution system. The amount of lead in drinking water attributable to corrosion by-products depends on a number of factors, including the amount and age of lead and copper-bearing

materials susceptible to corrosion, the length of time the water is in contact with the lead-containing surfaces, and the corrosivity of the water provided by a system.

Consumption of lead in water contributes to an increase in blood lead levels, thereby causing an increased risk of adverse effects for children, a sensitive sub-population. The following are some key findings concerning the relationship between lead and health effects: inhibited activity of enzymes involved in red blood cell metabolism; altered electrical brain wave activity; deficits in IQ and other measures of cognitive function, such as attention span; slowed peripheral nerve condition in children; deficits in mental indices in infants with maternal or umbilical cord lead levels; low birth weights and decreased gestational age, factors that may influence early neurological development, in infants associated with maternal lead; early childhood growth reductions; and small increases in blood pressure in adults.

Copper, while beneficial to human health at lower levels, is a health risk at elevated levels. Acute exposure to copper has resulted in gastrointestinal effects, such as nausea and diarrhea. High levels of copper can dissolve from pipes in areas with corrosive water. (See 40 C.F.R. §§ 141.32(e)(13-14) and 141.80; 56 Fed. Reg. 26460 (June 7, 1991)).

**Volatile Organic Chemicals (VOCs):** Exposure to very high levels of VOCs has been shown to result in a variety of acute and toxic effects in animals. VOCs such as benzene and 1,1,1-Trichloroethane, have been shown to have carcinogenic effects as well as non-carcinogenic effects such as liver and kidney damage or blood dyscrasia. Unprotected drinking water sources and groundwater contamination can result in VOCs entering drinking water supplies. (See 40 C.F.R. §§ 141.32(e) and 141.61; 56 Fed. Reg. 3526 (January 30, 1991)).

**Pesticides:** Because pesticides are specifically developed for their toxicity to certain organisms, the potential exists that they are toxic to humans. Consumption of water contaminated with pesticides may increase the risks of cancer and liver and kidney disease, and may affect the nervous system. (See 40 C.F.R. §§ 141.32(e) and 141.61; 56 Fed. Reg. 3526 (January 30, 1991)).

**Inorganic Chemicals:** Inorganic chemicals generally occur naturally in soils and rock formations and are, in some cases, by-products of metals used in various manufacturing processes. Ingestion of drinking water containing inorganic chemicals such as asbestos and cadmium may cause cancer. Other inorganic chemicals are categorized as potentially carcinogenic or can cause kidney damage, brain or liver damage, or altered blood levels. (See 40 C.F.R. §§ 141.32(e) and 141.61; 56 Fed. Reg. 3526 (January 30, 1991)).

**Radionuclides:** Radionuclide contamination in drinking water occurs in both natural and man-made forms. The naturally occurring forms are primarily alpha particle emitters with some beta particle activity. The most significant natural radionuclides are radium-226, radium-228, uranium and radon-222. The consumption of drinking water contaminated by radionuclides increases the risk of cancer, especially bone cancer. (See 40 C.F.R. §§ 141.15 and 141.16; 41 Fed. Reg. 28404 (July 9, 1976); see also 56 Fed. Reg. 33050 (July 18, 1991)).

2. Discussion of potential effects on the Navajo Nation and its members from contamination in drinking water systems located on nonmember fee land.

The potential public health consequences arising from contamination of drinking water supplies, examples of which are described above, are the same whether a public water system is located on nonmember fee land or other land within the Navajo Reservation. Therefore, contamination of drinking water systems located on nonmember fee land and used by members of the Navajo Nation presents the same potential impacts on the health and welfare of members of the Navajo Nation as the contamination of other drinking water systems located within the Navajo Reservation. Moreover, some potential health effects may be of particular concern to the Navajo Nation. For example, all of the naturally occurring forms of radionuclides have been detected in drinking water samples from various locations within the Navajo Reservation.

More importantly, the nature and function of the facilities that maintain public water systems on fee lands may present cases of particular concern. Public water systems at hospitals or schools, because they serve potentially more sensitive populations, are especially significant. For example, pregnant women and small

children treated at Sage Memorial Hospital would be at greater risk should the hospital's public water system become contaminated with nitrate or nitrite. Moreover, the health effects associated with fecal coliform increase the potential health consequences for patients with compromised immune systems, for elderly patients and for children (both at Sage Memorial Hospital and St. Michael Indian School). The elementary and high school students at St. Michael Indian School (as well as those who live or work there) are susceptible to the health effects of lead and copper contamination. Lead and copper contamination at the Sage Memorial Hospital would pose similar potential health problems. Because a majority of people served at both Sage Memorial Hospital and St. Michael Indian School are Navajo, the potential health impacts on the Navajo Nation and its members are serious and substantial.

**Finding**

EPA finds that, in general, public water systems owned or operated by nonmembers on nonmember-owned fee land within the boundaries of the Navajo Reservation may have direct impacts on the health and welfare of the Navajo Nation and its members that are serious and substantial. EPA specifically finds that the public water systems located at the Sage Memorial Hospital (PWSID# AZ0400320) and at St. Michael Indian School (PWSID# AZ0400380) may have direct impacts on the health and welfare of the Navajo Nation and its members that are serious and substantial. The regulation of the public water systems at Sage Memorial Hospital and at the St. Michael Indian School by the Navajo Nation will enable the Navajo Nation to protect against potential impacts to the health and welfare of its members.

DATE: 10/23/00

Felicia Marcus
Regional Administrator

# EPA DETERMINATION OF THE NAVAJO NATION'S ELIGIBILITY UNDER SECTION 1451 OF THE SAFE DRINKING WATER ACT

The Region IX Office of the Environmental Protection Agency has completed its review of the Navajo Nation's application under section 1451 of the Safe Drinking Water Act (SDWA)[1] for the purpose of obtaining primary enforcement authority (Primacy) for a Public Water System Supervision (PWSS) program. EPA's review of the Navajo Nation's application is based on the criteria established in section 1451 of the SDWA and in the regulations that implement section 1451--40 C.F.R. Part 142. Those regulations were included in a Final Rule published on September 26, 1988, as amended in the Final Rule published on December 14, 1994.[2]

Section 1451(b)(1) of the SDWA specifies that an Indian tribe is eligible to obtain Primacy only if "(A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers; (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and (C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations."[3] The implementing regulations, which reiterate the statutory requirements, are found at 40 C.F.R. § 142.72.

EPA has determined that the Navajo Nation has satisfied the requirements contained in section 1451 of the SDWA and 40 C.F.R. § 142.72, and, thereby, is eligible to obtain Primacy for its PWSS program, subject to the jurisdictional limitations set forth in this decision. Specifically, EPA has determined the following:

## I. Determination Regarding SDWA Section 1451(b)(1)(A) and (C)

EPA has previously determined that the Navajo Nation was eligible to assume a role similar to a state for the purposes of receiving grants under section 1443(a) (PWSS) and section 1443(b)

---

[1] 42 U.S.C. § 300j-11.

[2] 53 Fed. Reg. 37396 (September 26, 1988); 59 Fed. Reg. 64339 (December 14, 1994).

[3] 42 U.S.C. § 300j-11(b)(1).

(UIC) of the SDWA.[4] In those determinations under the SDWA, EPA found that the Navajo Nation met the requirements of section 1451(b)(1)(A) and (C) of the SDWA.[5] Copies of EPA's determinations are attached for reference as Attachments 1 and 2, respectively.

40 C.F.R. § 142.76(f) provides that:

> (f) If the Administrator has previously determined that a Tribe has met the prerequisites that make it eligible to assume a role similar to that of a state as provided by statute under the Safe Drinking Water, the Clean Water Act, or the Clean Air Act, then that Tribe need provide only that information unique to the Public Water System program (paragraphs (c), (d)(5) and (6) of this section [40 C.F.R. § 142.76]).

EPA has already made a determination regarding the Navajo Nation's capability to administer a PWSS program (40 C.F.R. § 142.72(d)) in the context of providing a grant to the Navajo Nation.[6] In addition, the Navajo Nation submitted a description of the Navajo Nation Environmental Protection Agency (NNEPA), which will assume Primacy, and of the relationship between NNEPA and the owners/operators of public water systems within the Navajo Nation's jurisdiction (40 C.F.R. § 142.76(d)(5)). Moreover, EPA has reviewed additional information regarding the technical and administrative capabilities submitted by the Navajo Nation under its PWSS grants and for the purposes of meeting the requirements of Primacy (40 C.F.R. § 142.76(d)(6)).[7]

---

[4] EPA has also made a similar determination for the Navajo Nation under section 518 of the Clean Water Act, 33 U.S.C. § 1377, for the purposes of a grant under section 106 of the Clean Water Act, 33 U.S.C. § 1256.

[5] In the previous determination for the PWSS grant under the SDWA, EPA also made a determination that the Navajo Nation had met the requirements of section 1451(b)(1)(B) and 40 C.F.R. § 142.72(c) concerning the Navajo Nation's jurisdiction. EPA is discussing the jurisdictional issue below at section II.

[6] See Attachment 1.

[7] In the context of simplifying the process for determining the eligibility of Indian tribes, EPA stated that "[o]rdinarily, the inquiry EPA will make into the capability of any applicant, tribal or state, for a grant or program approval [i.e. Primacy] will be sufficient to enable the Agency to determine whether a

Based on the information supplied by the Navajo Nation and on EPA's previous determinations, EPA has determined that the Navajo Nation has met the requirements of section 1451(b)(1)(A) and (C) of the SDWA and 40 C.F.R. § 142.72(a)(b) and (d).

## II. Determination Regarding SDWA Section 1451(b)(1)(B)

### A. Statutory and Regulatory Provisions Regarding Tribal Jurisdiction

Section 1451(b)(1)(B) of the SDWA authorizes EPA to approve tribal applications for Primacy in the same manner as state applications if:

> the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction.[8]

40 C.F.R. § 142.76(c) further specifies that to document its jurisdiction, a tribe shall provide EPA with:

(1) a map or legal description of the area over which the Tribe asserts jurisdiction;

(2) a statement by the Tribal Attorney General or an equivalent official which explains the legal basis for the Tribe's jurisdictional assertion;

(3) copies of all documents supporting the Tribe's jurisdictional claim; and

(4) a description of the locations of the public water systems that the Tribe proposes to regulate.

---

tribe meets the statutory capability requirement [i.e. section 1451(b)(1)(C) of the SDWA]." 59 Fed. Reg. 64339, 64341 (December 14, 1994). Thus, EPA's review of the Navajo Nation's eligibility has been supplemented by the Agency's determination that the Navajo Nation has demonstrated that it meets the requirements for Primacy for a PWSS program under the SDWA.

[8] 42 U.S.C. § 300j-11(b)(1)(B).

## B. The Navajo Nation's Jurisdictional Assertion

To satisfy the jurisdictional requirement set forth in section 1451(b)(1)(B) of the SDWA, the Navajo Nation has submitted several statements of the Attorney General of the Navajo Nation regarding the regulatory jurisdiction of the Navajo Nation. In particular, the Attorney General has submitted statements for the purposes of the PWSS program dated September 8, 1989, January 31, 1991, November 25, 1992, and March 6, 1997. In the context of other federal programs, the Attorney General has also submitted jurisdictional statements for the Underground Injection Control program under the SDWA (March 16, 1993) and the Water Pollution Control program under the Clean Water Act (March 5, 1993).[9] These statements were supplemented by maps and legal descriptions, documents supporting the Navajo Nation's claims, and descriptions of the locations of the public water systems that the Navajo Nation proposes to regulate.

The Attorney General has asserted that the Navajo Nation has the authority to regulate public water systems within the territorial jurisdiction of the Navajo Nation. In defining the "territorial jurisdiction" of the Navajo Nation, the Attorney General relies on the Navajo Tribal Code, which provides:

> The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians.[10]

With regard to the PWSS program, the Attorney General states that since the Navajo Nation Safe Drinking Water Act extends to all waters within the Navajo Nation's territorial jurisdiction, the Navajo Nation has subject matter jurisdiction to regulate all

---

[9] In this Determination, when a specific reference is made to any individual Statement of the Navajo Nation Attorney General, the citation will be to the date of the Statement (e.g. "March 16, 1993 Statement").

[10] 7 N.T.C. § 254.

public water systems within its territorial jurisdiction.[11]

The Attorney General's Statements have analyzed the Navajo Nation's regulatory authority with respect to public water systems within the exterior boundaries of the formal Navajo Reservation in Arizona, Utah and New Mexico, within the former "Bennett Freeze" area in the Arizona portion of the formal Reservation, and within the "Eastern Navajo Agency" but outside the boundaries of the formal Navajo Reservation in northwest New Mexico.

1. Public Water Systems Within the Boundaries of the Formal Navajo Reservation

With regard to the area within the boundaries of the formal Navajo Reservation, the Navajo Nation asserts that pursuant to the Navajo Tribal Code and federal Indian law it has jurisdiction over all public water systems within the Reservation as established by the Treaty of June 1, 1868 between the Navajo Nation and the United States, and as expanded by subsequent executive orders and statutes. In particular, the Navajo Nation asserts jurisdiction over public water systems owned or operated by nonmembers on nonmember-owned land (fee land) within the boundaries of the formal Navajo Reservation.

2. Public Water Systems Within the Former "Bennett Freeze" Area

The Navajo Nation asserts authority over public water systems within the area that is known as the former "Bennett Freeze" area. The Bennett Freeze is a part of the western portion of the formal Navajo Reservation that has been the subject of an ongoing dispute between the Navajo Nation and the Hopi Tribe. Beginning in the 1960s, a "freeze" on further development in the area was instituted until the dispute between the two tribes could be worked out.[12] In

---

[11] The preamble to EPA's regulations implementing section 1451 of the SDWA states that in order to meet the requirements of the statute a tribal government must possess both the subject matter jurisdiction and geographic jurisdiction necessary to administer a PWSS program. (See 53 Fed. Reg. 37396, 37399 (September 26, 1988)). In addition to the discussion in the statements of the Attorney General, the Navajo Nation has demonstrated that it possesses the requisite subject matter jurisdiction by meeting the requirements for obtaining Primacy.

[12] Commissioner of Indian Affairs Robert Bennett first instituted the development "freeze" administratively in 1966. In 1980, Congress codified the freeze. 25 U.S.C. § 640d-9(f). For

addition, the respective rights of each tribe are the subject of litigation in the case of Masayesva v. Zah.[13] Although the Navajo Nation believes that its jurisdiction (as well as that of the Hopi Tribe) has been settled, at this time the Navajo Nation does not wish to proceed with seeking Primacy for those public water systems in the Bennett Freeze (but within the jurisdiction of the Navajo Nation) in order to avoid the possibility of litigating the issues in two forums. Therefore, at this time, the Navajo Nation is not seeking Primacy for those public water systems within the Navajo Nation's portion of the Bennett Freeze.[14]

3. Public Water Systems Within the Eastern Navajo Agency

The Navajo Nation also asserts authority over public water systems on land outside the boundaries of the formal Navajo Reservation in New Mexico, commonly referred to as the "Eastern Navajo Agency." Many of these systems were excluded from the Navajo Nation's jurisdictional assertion for the purposes of developing a PWSS program because of uncertainty of the status of the land on which the systems are located. Subsequent to EPA's approval of the Navajo Nation's grant under section 1443 (a) of the SDWA, the Navajo Nation supplied information regarding the status of the land in the Eastern Navajo Agency. Therefore, the Navajo Nation is now claiming jurisdiction over public water systems in the Eastern Navajo Agency because those systems are within "Indian country", as defined under federal Indian law, and thus within the territorial jurisdiction of Navajo Nation.

According to the Attorney General, the Eastern Navajo Agency comprises approximately 2.8 million acres of land in northwest New Mexico. The Eastern Navajo Agency is an administrative unit of the Bureau of Indian Affairs (BIA) that covers the following areas: land within the exterior boundaries of the formal Navajo

---

more discussion of the history and location of the "Bennett Freeze", see the March 16, 1993 and the March 6, 1997 Attorney General's Statements.

[13] 816 F.Supp. 1387 (D. Ariz.1992), aff'd in part and remanded in part, 65 F.3d 1445 (9th Cir. 1995)(as amended on denial of rehearing and rehearing en banc, December 5, 1995), cert. denied sub nom. Secakuku v. Hale, 517 U.S. 1168, 116 S.Ct. 1569 (1996). This litigation was authorized by statute. 25 U.S.C. § 640d-7.

[14] These public water systems are identified in Exhibit H of the March 6, 1997 Attorney General's Statement.

Reservation; the three "Satellite" Navajo Reservations of Alamo, Ramah and Canoncito; and the area adjacent to (but outside) the formal Navajo Reservation that consists of tribal trust land, trust allotments, tribal fee land, federal land, state trust land, and private land.[15] According to the information supplied by the Navajo Nation, the boundaries of the Eastern Navajo Agency correspond to the boundaries of the Navajo Nation Chapters.[16] Because the portion of the BIA's Eastern Navajo Agency within the formal Reservation is discussed separately in this determination, for the purposes of this discussion, EPA will treat only the land outside the formal Reservation as the "Eastern Navajo Agency."[17]

The Attorney General asserts that pursuant to 7 N.T.C. § 254 and well-established principles of federal Indian law, the Navajo Nation has regulatory jurisdiction over Navajo Indian Country, which includes all of the Eastern Navajo Agency. The Attorney General notes that much of the Eastern Navajo Agency is Indian country by definition (pursuant to 18 U.S.C. § 1151(a) and (c)) because it is either tribal trust land or Indian allotments. The Attorney General also states that all of the Eastern Navajo Agency should be considered Indian country, either because it is a dependent Indian community as a whole, or because each of the constituent Chapters are dependent Indian communities. The Attorney General cites the following factors in support of this analysis:

- the vast majority of the land in the Eastern Navajo Agency is owned by, held in trust for, or dedicated to the exclusive

---

[15] The "Satellite Reservations" of Ramah, Canoncito, and Alamo are three areas of Navajo Indian country that are not contiguous to the rest of the Eastern Navajo Agency or the formal Navajo Reservation. See March 16, 1993 Attorney General's Statement, p. 23.

[16] "Chapters" are the political subdivisions of the Navajo Nation and correspond to specific geographic locations. Political representation, tribal services, and community affairs are tied to the chapters.

[17] The boundary of the formal Navajo Reservation in New Mexico includes the land set aside in the Executive Order dated January 6, 1880 (EO 1880) (as modified by the Executive Order dated May 7, 1884 and the Executive Order dated April 24, 1886). Land that lies within the exterior boundary of the formal Navajo Reservation as described in EO 1880 is within the jurisdiction of the Eastern Navajo Agency for the purposes of BIA administration.

use and occupancy of Navajo Indians or the Navajo Nation itself;

- almost all of the residents of the Eastern Navajo Agency are members of the Navajo Nation or federal or tribal government officials serving the Navajo people;

- the Navajo Nation and its constituent Chapters govern the entire Eastern Navajo Agency, and in that capacity, take necessary action to protect the health, welfare and safety of community members; and

- the Navajo Nation and its federal Trustee provide and fund (and have traditionally provided) almost all of the governmental services (including law enforcement services, the court system, health and educational services, road and real estate services, water development, and other social services) that are available to residents and others within the Eastern Navajo Agency.

In the alternative, the Attorney General asserts that even if EPA was to conduct a more specific analysis of Indian country status in the Eastern Navajo Agency, EPA should still reach the conclusion that virtually all of that land is properly characterized as Indian country, based on the same information discussed above.[18]

### C. EPA's Determination Regarding the Navajo Nation's Jurisdiction to Administer a Public Water System Supervision Program

The Navajo Nation's jurisdictional claim has two components: its jurisdiction with respect to public water systems within the boundaries of the formal Navajo Reservation (except those systems in the Bennett Freeze area) and its jurisdiction with respect to public water systems within the Eastern Navajo Agency. This determination addresses the substance of the Navajo Nation's jurisdictional assertion in light of the language contained in section 1451 of the SDWA and 40 C.F.R. § 142.72 and relevant principles of federal Indian law.

The statutory language in section 1451 of the SDWA establishes a relatively broad standard for tribal jurisdiction. Specifically, section 1451(b)(1)(B) of the SDWA provides that a tribe may

---

[18] A detailed discussion of the Eastern Navajo Agency is found in the November 25, 1992, March 5, 1993, and March 16, 1993 Attorney General's Statements.

exercise regulatory functions under the Act provided that such functions "are within the area of the Tribal Government's jurisdiction."[19] The federal regulations implementing this section of the SDWA, reiterating the broad statutory language, do not adopt a specific definition of what constitutes the "area of the Tribal Government's jurisdiction." The preamble to these regulations indicates that the extent of tribal jurisdiction must be examined on a case-by-case basis.[20]

The Attorney General argues that in accordance with well-established principles of federal Indian law, the Navajo Nation possesses regulatory authority over all land that is "Navajo Indian country."[21] 18 U.S.C. 1151 defines "Indian country" to mean:

> (a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[22]

---

[19] 42 U.S.C. § 300j-11(b)(1)(B).

[20] 53 Fed. Reg. 37396, 37399-37400 (September 26, 1988).

[21] The definition of "Navajo Indian Country" found at 7 N.T.C. § 254 appears to be broader than the definition of "Indian country" under federal Indian law. See Texaco, Inc. v. Zah, 5 F.3d 1374, 1376 and fn. 3 (10th Cir. 1993). However, since the Navajo Attorney General asserts that the definition of "Navajo Indian Country" is consistent with the federal definition of Indian country, EPA considers that any lands that meet the definition of "Navajo Indian Country" but fall outside the definition of Indian country are not part of the Navajo Nation's jurisdictional claim for the purposes of the SDWA.

[22] Although this definition of "Indian country" is found in the federal criminal code, the Supreme Court has held that it applies as well to civil jurisdiction. See DeCoteau v. District County Court, 420 U.S. 425 (1975); see also Texaco, Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993); Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995).

Also, land held in trust by the United States for the benefit of an Indian tribe is Indian country, even though not formally designated as a "reservation."[23]

EPA agrees that "Indian country" is the appropriate standard for determining the territorial extent of jurisdiction of the Navajo Nation for the purposes of section 1451 of the SDWA. Using the Indian country standard is consistent with federal Indian law, with the SDWA and federal regulations implementing the statute[24], as well as with EPA's Indian Policy.[25] Although EPA did not adopt "Indian country" as the specific standard to define tribal jurisdiction for the purposes of obtaining Primacy for PWSS, EPA did explicitly state that the Agency's action did not "preclude a Tribe from applying for [Primacy] with respect to any lands over which it believes it has jurisdiction."[26] Both the statute and the regulations, therefore, look to federal Indian law for determining the scope of a tribe's jurisdiction in regulating public water systems.

As stated above, the Navajo Nation is not seeking Primacy with respect to public water systems in the former "Bennett Freeze" area, and EPA is not making any determination regarding those

---

[23] Oklahoma Tax Comm'n v. Sac and Fox Nation, 498 U.S. 505, 113 S.Ct. 1985 (1993); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); United States v. John, 437 U.S. 634, 648 (1978); United States v. McGowan, 302 U.S. 535 (1938); HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000); Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665 (10th Cir. 1980).

[24] See, e.g., 40 C.F.R. § 144.3 (definition of "Indian lands"); 40 C.F.R. Part 147, subpart HHH (UIC program under SDWA for all Indian country in New Mexico, as well as Navajo Indian country in Arizona and Utah). See also Attachment 2. In addition, the Supreme Court has recently reiterated that "[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal government and the Indian tribe inhabiting it, and not with the States." Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 118 S.Ct. 948, n.1. (1998).

[25] "EPA Policy for the Administration of Environmental Programs on Indian Reservations" (November 8, 1984).

[26] 53 Fed. Reg. 37396, 37400 (September 26, 1988).

systems.[27] EPA's process for making determinations for the public water systems subject to the jurisdiction of the Navajo Nation within the Bennett Freeze is discussed below at section II.C.3.

1. The Jurisdiction of the Navajo Nation Within the Boundaries of the Formal Navajo Reservation

The majority of the public water systems for which the Navajo Nation asserts jurisdiction in order to obtain Primacy under section 1451 of the SDWA are located within the boundaries of the formal Navajo Reservation in Arizona, Utah, and New Mexico. As discussed below, EPA has determined that the Navajo Nation has met the requirements of section 1451(b)(1)(B) of the SDWA and 40 C.F.R. § 142.72(c) for public water systems located within the boundaries of the formal Navajo Reservation in Arizona (except as noted below), Utah, and New Mexico.

a. All Public water systems other than those owned or operated by nonmembers and located on fee land owned by nonmembers

With regard to public water systems other than those owned or operated by nonmembers and located on nonmember fee land, under well-established principles of federal Indian law, tribal civil jurisdiction extends "over both their members and their territory,"[28] and tribes have the inherent authority to regulate public water systems within their reservations. In general, therefore, (with the exception of systems located on nonmember fee land discussed below in section C.1.b.) the Navajo Nation has authority to regulate public water systems located within the boundaries of the Navajo Reservation.

The operators of two power plants, the Navajo Generating Station and the Four Corners Power Plant, have asserted that the Navajo Nation has waived its authority to regulate the public water

---

[27] EPA stated that where a tribe did not, or could not, demonstrate its authority over all areas, the Agency would still approve a tribe's program (i.e. grant Primacy), but limit that approval accordingly. See 53 Fed. Reg. 37396, 37402 (September 26, 1988); 59 Fed. Reg. 64339, 64340 (December 14, 1994).

[28] United States v. Mazurie, 419 U.S. 544, 557 (1975). See also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985).

systems at the plants.[29] Both power plants are located on tribal trust land that is leased to the operators by the Navajo Nation, and the plant operators have claimed that provisions in the leases waive the Navajo Nation's authority to regulate (including environmental regulation) activities at the two plants.[30] At this time, however, EPA does not have enough information to evaluate either the Navajo Nation's assertion of authority or the operators claims of waiver. Thus, EPA is not making a determination at this time regarding the authority of the Navajo Nation over the public water systems at the Four Corners Power Plant (PWSID# NM35000333) and the Navajo Generating Station (PWSID# AZ0400402). EPA will request that the Navajo Nation and the operators of the public water systems submit additional information concerning each system in the future. The process that EPA will use to make future determinations on jurisdiction is discussed at section II.C.3. below.

EPA has determined, therefore, that the Navajo Nation has adequately demonstrated its jurisdiction over the public water systems that are located within the boundaries of the formal Navajo Reservation (other than the two systems discussed above and those systems owned or operated by nonmembers and located on nonmember fee land discussed in section C.1.b. below). Accordingly, EPA finds that the Navajo Nation has satisfied the criterion in section 1451(b)(1)(B) of the SDWA and 40 C.F.R. § 142.72(c) with respect to all public water systems that lie within the boundaries of the formal Navajo Reservation in Arizona, Utah and New Mexico, except those systems in the Bennett Freeze, the systems located at the Navajo Generating Station and the Four Corners Power Plant, and those systems owned or operated by nonmembers located on nonmember

---

[29] The two public water systems are listed as #s 4 and 13 on Exhibit W of the March 6, 1997 Attorney General's Statement, respectively.

[30] See September 11, 1995 letter from Diane Evans, Staff Attorney, Salt River Project to Albert Hale, President, Navajo Nation; Kelsey Begay, Speaker, Navajo Nation Council; Herb Yazzie, Attorney General, Navajo Nation; September 11, 1995 letter from Jack Davis, Vice President, Arizona Public Service Company to Albert Hale, President, Navajo Nation; Kelsey Begay, Speaker, Navajo Nation Council; Herb Yazzie, Attorney General, Navajo Nation.

fee lands (discussed below).[31]

b. Public Water Systems owned or operated by nonmembers and located on fee land owned by nonmembers

The Navajo Nation's jurisdictional claims include all public water systems within the exterior boundaries of the formal Navajo Reservation that are owned or operated by nonmembers and that are located on nonmember-owned fee land. The Attorney General identified three such systems that are currently operating: i) Sage Memorial Hospital, PWSID# AZ0400320; ii) St. Michael Indian School, PWSID# AZ0400380; and iii) Speedy's Truck Stop, no PWSID#.[32]

**Legal Standard:** In 1981, in Montana v. United States, the Supreme Court set forth the rule governing the authority of Indian tribes over the activities of nonmembers, holding that although tribes generally lack jurisdiction over the activities of nonmembers, there are exceptions to this general rule.[33] The Supreme Court stated that:

> To be sure, Indian tribes retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, lease, or other arrangements. A tribe may also retain inherent power to exercise civil authority over conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[34]

---

[31] Lists of those systems that were operating within the formal Navajo Reservation as of March 1997 are contained in Exhibits AA and W of the March 6, 1997 Attorney General's Statement.

[32] Listed as #s 19 and 32 on Exhibit AA and #26 on Exhibit W to the March 6, 1997 Attorney General's Statement, respectively.

[33] 450 U.S. 544, 566 (1981).

[34] Ibid.

Since announcing the rule in Montana v. United States, the Supreme Court has reaffirmed the rule, most recently in 1997.[35]

In the preamble to the final rule establishing the procedures for tribal Primacy under the SDWA, EPA declined to create a rebuttable presumption that tribes have authority throughout their reservations because "[t]ribal authority may, in some cases, be in question."[36] Although not directly mentioned in the preamble, it was implicit in EPA's discussion that a tribe would need to analyze its authority over nonmember fee land pursuant to the rule in Montana v. United States.[37] However, subsequent to EPA's promulgation of the final rule for tribal programs under the SDWA in 1988, there was uncertainty as to the precise reach of tribal authority over the activities of nonmembers on nonmember fee land. In response to that uncertainty, in the context of tribal program approval under the federal Clean Water Act, EPA adopted an "interim operating rule" under which EPA evaluates whether "the potential impacts of regulated activities on the tribe are serious and substantial."[38] As noted above, the Supreme Court has reaffirmed the rule set forth in Montana v. United States, simply quoting the language of the Montana decision verbatim without addressing the need for a showing that the effect of activity on a tribe must be "serious" or "substantial." Although it appears that such a showing is not required, the Agency thought it would be prudent to analyze whether "serious and substantial" impacts existed in evaluating the Navajo Nation's authority under the Montana rule. Therefore, EPA requested that the Navajo Nation provide information regarding whether activities on nonmember fee lands regulated under

---

[35] South Dakota v. Bourland, 508 U.S. 679 (1992); Strate v. A-1 Contractors, 520 U.S. 438 (1997).

[36] 53 Fed. Reg. 37396, 37400 (September 26, 1988).

[37] See 56 Fed. Reg. 64876, 64878 (December 12, 1991).

[38] Ibid. See pages 64877-64879 for a discussion of the Agency's rationale for adopting its "interim operating rule." EPA noted in the preamble that "[t]he choice of the Agency's interim operating rule is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se." Ibid. at 64878. EPA's approach to determining tribal jurisdiction over the activities of nonmembers on nonmember fee land within reservation boundaries was recently upheld in Montana v. EPA, 941 F. Supp. 945 (D. Mont. 1996), aff'd, 137 F.3rd 1135 (9th Cir. 1998), cert. denied 525 U.S. 921 (1998).

the PWSS program of the SDWA presented potential impacts to the Navajo Nation and its members that are serious and substantial.

**Finding:** EPA finds that the Navajo Nation has demonstrated that the provision of water through public water systems on nonmember fee lands within the boundaries of the formal Navajo Reservation in Arizona, Utah, and New Mexico generally has potential direct impacts on the health and welfare of the Navajo Nation and its members that are serious and substantial. The facts upon which EPA has based this finding are set forth in the Appendix.

EPA believes that Congress established a strong federal interest in the protection of drinking water by enacting the SDWA. Under the SDWA, EPA's primary mandate is to promulgate "primary drinking water regulations" that apply to public water systems and that "specif[y] contaminants which, in the judgment of the Administrator, may have any adverse effect on the health of persons."[39] Moreover, the SDWA requires that the regulations specify "maximum contaminant levels" (MCLs) or "treatment techniques" for each such contaminant.[40] In turn, the SDWA requires that maximum contaminant levels be set "as close ... as is feasible" to the corresponding "maximum contaminant level goal," which is to be "set at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety."[41] In addition, treatment techniques, which are to be identified where maximum contaminant levels are "not economically or technologically feasible to ascertain," are defined to mean those "techniques which ... would prevent known or anticipated adverse effects on the health of persons to the extent feasible."[42] The SDWA requires that public water systems comply with the primary drinking water regulations, including comprehensive monitoring requirements, and that the systems notify the public of violations of MCLs, treatment techniques, and monitoring requirements, among other things.[43] In the 1996

---

[39] 42 U.S.C. § 300f(1)(A) and (B). The National Primary Drinking Water Regulations are found at 40 C.F.R. Part 141.

[40] 42 U.S.C. § 300f(1)(C).

[41] 42 U.S.C. § 300g-1(b)(4).

[42] 42 U.S.C. § 300g-1(b)(7)(A).

[43] See 42 U.S.C. §§ 300f, 300g-1, 300g-3 and 300j-4; see generally 40 C.F.R. Part 141.

Amendments to the SDWA, Congress reiterated its earlier findings that "safe drinking water is essential to the protection of public health."[44] In effect, therefore, the SDWA reflects a determination by Congress that the failure of public water systems to comply with SDWA standards may have serious and substantial impacts on public health.[45]

Further, tribal regulation of public water systems within Indian country also directly affects the political integrity and economic security of tribes and is crucial to tribal self-government. Proper management of public water systems serves the purpose of protecting public health and welfare, which is a core governmental function whose exercise is critical to self-government and the political integrity of tribes.[46] EPA has long noted the relationship between proper environmental management within Indian country and tribal self-government and self-sufficiency. More particularly, in the 1984 Indian Policy, EPA determined that as part of the "principle of Indian self-government," tribal governments are the "appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace," consistent with Agency standards and regulations.[47] Moreover, in enacting the SDWA, Congress expressly noted that ensuring an adequate supply of clean drinking water is crucial to economic development. Specifically, Congress determined

---

[44] The Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, Section 3(1), 110 Stat. 1613 (1996).

[45] See also H.R. Rep. No. 93-1185, 93rd Cong., 2nd Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6454; S.Rep. No. 99-56, 99th Cong., 2nd Sess. (1986), H. Conf. Rep. No. 99-575, 99th Cong., 2nd Sess. (1986) reprinted in 1986 U.S.C.C.A.N. 1566; H.R. Rep. No. 104-632, 104th Cong., 2nd Sess. (1996), H. Conf. Rep. No. 104-741, 104th Cong., 2nd Sess.(1996) reprinted in 1996 U.S.C.C.A.N. 1366.

[46] See 56 Fed. Reg. at 64879; Montana v. EPA, 137 F.3rd 1135, 1140-41 (9th Cir. 1998). The Supreme Court, in Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 1416 (1997), emphasized that the purpose of the exception to the Montana rule is to insure that tribes retain authority "necessary to protect tribal self-government."

[47] "EPA Policy for the Administration of Environmental Programs on Indian Reservations," Principle #2. (November 8, 1984).

that clean drinking water supplies have a direct relationship to travel and tourism, the productivity of employees, the ability of an area to attract workers, and the overall economic growth of an area.[48] Given the historically disadvantaged economic position of tribes, any potential for the unavailability of a safe drinking water supply may affect tribal economic growth more acutely than that of the rest of the country.[49]

Based on its special expertise and practical experience concerning the management of public water systems, EPA believes that the activities regulated under the SDWA generally have impacts on the health and welfare, as well as the political integrity and economic security, of the Navajo Nation and its members. Moreover, based on its expertise and experience, the Agency finds that ensuring the provision of clean drinking water to its members is fundamental to the survival and the self-government of the Navajo Nation.

These generalized findings supplement the information submitted by the Navajo Nation and the factual analysis in the Appendix. Therefore, EPA finds that the Navajo Nation has made a showing that there are public water systems on nonmember fee lands, subject to the requirements under the SDWA, that are used by the Navajo Nation and its members. EPA also finds that the Navajo Nation has shown that improper operation of these systems or failure by these systems to comply with SDWA standards would have a direct impact on the health and welfare of the Navajo Nation and its members that is serious and substantial.

Based on the information submitted by the Navajo Nation and EPA's general and factual findings, EPA believes that the Navajo Nation has demonstrated that the regulation of public water systems on nonmember fee lands within the Navajo Reservation would protect against serious and substantial impacts to the health and welfare of the Navajo Nation and its members. More specifically, EPA finds that the Navajo Nation has demonstrated its authority with respect to those public water systems located on nonmember fee land listed

---

[48] See H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6454, at 6461.

[49] See, e.g., "Drinking Water Infrastructure Needs Survey: First Report to Congress", January 1997, EPA/812-R-97-001; "Indian Drinking Water Supply Study", January 1988, EPA/570/9-88-001; "Estimates of the Total Benefits and Total Costs Associated with Implementation of the 1986 Amendments to the Safe Drinking Water Act", November 1989, PB90-196692.

on Attachment 3. Accordingly, EPA finds that the Navajo Nation has satisfied the criterion in section 1451(b)(1)(B) of the SDWA and 40 C.F.R. § 142.72(c) with respect to those public water systems that are owned or operated by nonmembers and located on nonmember fee land within the exterior boundaries of the formal Navajo Reservation and listed on Attachment 3.

At this time, EPA does not have sufficient information to make a determination with regard to the Navajo Nation's jurisdiction over the public water system at Speedy's Truck Stop (no PWSID #). EPA will request that the Navajo Nation submit additional information concerning this system in the future. EPA will make determinations for any other public water systems owned or operated by nonmembers and located on nonmember fee land within the boundaries of the formal Navajo Reservation when those systems are identified in the future. The process that EPA will use to make future determinations on jurisdiction is discussed at section II.C.3. below.

2. The Jurisdiction of the Navajo Nation in the Eastern Navajo Agency

As stated above, the Attorney General asserts that all of the Eastern Navajo Agency constitutes Indian country. Alternatively, the Attorney General claims that under a "site-specific" analysis, virtually all of the Eastern Navajo Agency would be characterized as Indian country. As a result, the Attorney General concludes that the Navajo Nation has sufficient jurisdiction over the Eastern Navajo Agency to support EPA's grant of PWSS Primacy to the Navajo Nation.

Much of the Eastern Navajo Agency is Indian country over which the Navajo Nation has jurisdiction.[50] Therefore, the Navajo Nation

---

[50] Much of the land in the Eastern Navajo Agency is within an area that at one time was part of the formal Navajo Reservation (referred to as the "EO 709/744 area"), but that was later "restored" to the public domain. Nonetheless, a large part of the Eastern Navajo Agency is Indian country because it is tribal trust land, Indian allotments, or within a dependent Indian community, and is, therefore, subject to the Navajo Nation's jurisdiction. See HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000); Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), cert. denied, 498 U.S. 1012 (1990), on remand, No. 86-1441-M Civil (D.N.M. June 11, 1993), reversed and remanded, Pittsburg & Midway Coal Mining Co. v. Watchman, 52

has the requisite authority to regulate public water systems within Indian country within the Eastern Navajo Agency. However, at this time, EPA cannot determine that all of the land within the Eastern Navajo Agency is Indian country; to do so would require detailed findings for which the Agency currently does not have adequate information. Moreover, at least some of the area that the Navajo Nation considers part of the Eastern Navajo Agency has been held not to be within Indian country.[51] Nonetheless, EPA has made the following specific determinations:

a. Public water systems on tribal trust land or Indian allotments or within the "Satellite" Reservations

Land held in trust for the benefit of the Navajo Nation (tribal trust land), Indian allotments, and land within the "Satellite" reservations of Ramah, Alamo, and Canoncito clearly are Indian country and subject to the jurisdiction of the Navajo Nation.[52] Therefore, EPA has determined that the Navajo Nation has demonstrated adequate authority over the public water systems on tribal trust land or Indian allotments in the Eastern Navajo Agency and over those public water systems within the three "Satellite" Reservations of Alamo, Ramah and Canoncito.[53] More specifically, EPA has determined that the Navajo Nation has demonstrated its authority over those public water systems listed on Attachment 4. Accordingly, EPA finds that the Navajo Nation has satisfied the criterion in section 1451(b)(1)(B) of the SDWA and 40 C.F.R. § 142.72(c) with respect to those public water systems that are located on tribal trust land or Indian allotments in the Eastern Navajo Agency and those public water systems within the three

---

F.3d 1531 (10th Cir. 1995); Texaco Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993); see also Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996).

[51] See Blatchford v. Sullivan 904 F.2d 542 (10th Cir. 1990)(tribal fee land north of Gallup, New Mexico within the Eastern Navajo Agency held not to be within Indian country).

[52] See footnotes 21 through 24 and accompanying text for discussion of the definition of Indian country.

[53] The Attorney General did not identify any public water systems that are located on nonmember fee land within the "Satellite" reservations. In fact, all of the public water systems identified by the Navajo Nation as within the three "Satellite" reservations are located on tribal trust land or Indian allotments.

Satellite Reservations.

b. Other public water systems within the Eastern Navajo Agency

The Attorney General also asserted jurisdiction over several other public water systems within the Eastern Navajo Agency. At this time, however, EPA believes that it does not have sufficient information regarding these additional systems to make a determination and that it is prudent to defer any determination until the Agency has collected additional information (with the assistance of the Navajo Nation) concerning these systems. In addition, EPA may want to confer with other federal agencies about the jurisdictional issues related to these systems. Therefore, EPA is not making a determination concerning the jurisdiction of the Navajo Nation over the systems listed on Attachment 5. The process that EPA will use to make future determinations on jurisdiction is discussed at section II.C.3. below.

3. Summary of jurisdictional determination; Process for public water systems for which EPA is not making a determination

In summary, EPA has determined that the Navajo Nation has satisfied the criterion in section 1451(b)(1)(B) of the SDWA and 40 C.F.R. § 142.72(c) with respect to: i) all public water systems that are within the boundaries of the formal Navajo Reservation in Arizona, Utah, and New Mexico (except for those in the Bennett Freeze and those owned or operated by nonmembers on nonmember fee land); ii) those public water systems owned or operated by nonmembers and located on nonmember fee land listed on Attachment 3; and iii) public water systems that are located in the Eastern Navajo Agency and listed on Attachment 4.[54]

EPA is not making determinations at this time regarding the jurisdiction of the Navajo Nation over those systems listed on Attachment 5. More specifically, EPA has not made a determination regarding the Navajo Nation's jurisdiction for public water systems within the Eastern Navajo Agency other than those systems listed on Attachment 4 or for those systems located within the Bennett Freeze. In addition, EPA has not made a determination regarding the authority of the Navajo Nation to regulate the public water systems located at the Navajo Generating Station or at the Four

[54] Accordingly, EPA also determines that the Navajo Nation has demonstrated its authority over the systems listed in the text for the purposes of section 1413 of the SDWA and 40 C.F.R. §142.10.

Corners Power Plant. Finally, EPA has not made a specific determination for any public water system owned or operated by nonmembers and located on nonmember fee land within the formal Navajo Reservation other than those systems listed on Attachment 3.

For the public water systems for which EPA is not making a determination at this time (including those listed on Attachment 5), EPA may request the Navajo Nation to submit additional information supporting its assertions. EPA will treat any subsequent determinations as revisions of the Primacy program under 40 C.F.R. § 142.12, subject to the public notice and hearing requirements of 40 C.F.R. § 142.13.

**III. Conclusion**

EPA has determined that the Navajo Nation has satisfied the statutory and regulatory requirements contained in section 1451 of the SDWA and 40 C.F.R. § 142.72, and therefore is eligible to obtain Primacy for its PWSS program, as set forth in this decision.

DATE: 10/23/00

Felicia Marcus
Regional Administrator

regional offices listed. Additional information on Project XL, including documents referenced in this notice, other EPA policy documents related to Project XL, Regional and Headquarters contacts, application information and descriptions of existing XL projects and proposals is available via the Internet at http://www.epa.gov/ProjectXL.

**SUPPLEMENTARY INFORMATION:** Final Project Agreements are voluntary agreements developed by project sponsors, stakeholders, the State in which the project is located and EPA. Project XL, announced in the **Federal Register** on May 23, 1995 (60 FR 27282) and November 1, 1995 (60 FR 55569) gives regulated sources the flexibility to develop alternative strategies that will replace or modify specific regulatory requirements on the condition that they produce greater environmental benefits.

EPA announced the availability and requested comments on the Metropolitan Water Reclamation District of Greater Chicago Draft FPA on July 24, 2000 (65 FR 45601) and on the Louisville and Jefferson County Metropolitan Sewer District Draft FPA on August 29, 2000 (65 FR 52427) in the **Federal Register**. Descriptions of the projects are contained in each of the **Federal Register** notices. Comments and responses to comments on these projects are available via the Internet at http://www.epa.gov/ProjectXL.

Dated: October 11, 2000.

**Elizabeth A. Shaw,**

*Director, Office of Environmental Policy Innovation.*

[FR Doc. 00–28417 Filed 11–3–00; 8:45 am]

BILLING CODE 6560–50–M

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–6897–3]**

### Proposed CERCLA Administrative Agreements; Cannons Engineering Corporation Superfund Sites

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice; request for public comment.

**SUMMARY:** In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of two proposed administrative agreements for recovery of past and projected future response costs at four Superfund sites. The agreements resolve claims of the Environmental Protection Agency ("EPA") against the settling parties under sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a), and section 7003 of the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. 6973. The settling parties are the United States Navy ("Navy") and the United States Coast Guard ("Coast Guard"). The four Superfund sites are the Cannons Engineering Corporation Site in Bridgewater, Massachusetts; the Cannons Engineering/Plymouth Harbor Site in Plymouth, Massachusetts; the Gilson Road Site in Nashua, New Hampshire; and the Tinkham's Garage Site in Londonderry, New Hampshire. The Commonwealth of Massachusetts and the State of New Hampshire are also parties to these agreements.

The Navy is a larger volume Potentially Responsible Party ("PRP"). Under the agreement with the Navy, the Navy will pay a total of approximately $2,850,000, of which $1,578,912 will be paid to the Hazardous Substance Superfund, $39,000 will be paid to the Commonwealth of Massachusetts, and $1,232,088 will be paid to the State of New Hampshire. The Navy will also pay interest on these amounts, accruing as of December 14, 1998. With respect to one of the four Sites, EPA retains its right to pursue its claims against the Navy at the Nashua Site if costs at that Site exceed a specified amount.

The Coast Guard is a *de minimis* PRP. Under this *de minimis* agreement with the Coast Guard, the Coast Guard will pay a total of approximately $207,562.82, of which $172,587.64 will be paid to the Hazardous Substance Superfund, $28,940.35 will be paid to the Commonwealth of Massachusetts, and $6,034.83 will be paid to the State of New Hampshire. The Coast Guard will also pay interest on these amounts, accruing as of November 24, 1999. Under this agreement, the Department of the Interior and the National Oceanic and Atmospheric Administration agree not to bring claims under CERCLA against the Coast Guard for natural resource damages with respect to these Sites.

For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to these two agreements. EPA will consider all comments received and may modify or withdraw its consent to these agreements if comments received disclose facts or considerations which indicate that the agreements are inappropriate, improper, or inadequate. EPA's response to any comments received will be available for public inspection at the EPA Records Center, 1 Congress Street, Boston, MA 02114–2023 (Telephone No. 617–918–1440). Commenters may request an opportunity for a public meeting in the affected areas in accordance with section 7003(d) of RCRA, 42 U.S.C. 6973(d).

**DATES:** Comments and requests for a public meeting in the affected areas must be submitted on or before December 6, 2000.

**ADDRESSES:** The proposed agreements are available for public inspection at the EPA Records Center, 1 Congress Street, Boston, MA 02114–2023 (Telephone No. 617–918–1440). A copy of the proposed agreements may be obtained from Audrey Zucker, U.S. Environmental Protection Agency, Region 1, One Congress Street, Suite 1100 (SES), Boston, MA 02114–2023, (617) 918–1788. Comments should reference the Cannons Engineering Corporation Superfund Sites and EPA Docket No. 1–2000–0033 (Settling Party: U.S. Navy) or EPA Docket No. 1–2000–0032 (Settling Party: U.S. Coast Guard), and should be addressed to Audrey Zucker, U.S. Environmental Protection Agency, Region 1, One Congress Street, Suite 1100 (SES), Boston, MA 02114–2023.

**FOR FURTHER INFORMATION CONTACT:** Audrey Zucker, U.S. Environmental Protection Agency, Region 1, One Congress Street, Suite 1100 (SES), Boston, MA 02114–2023, (617) 918–1788.

Dated: August 2, 2000.

**Patricia L. Meaney,**

*Director, Office of Site Remediation and Restoration, EPA-New England.*

[FR Doc. 00–28416 Filed 11–3–00; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–6896–5]**

### Public Water System Supervision Program; Primary Enforcement Responsibility Approval for the Navajo Nation

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of decision and opportunity for hearing.

This public notice is issued pursuant to section 1413 of the Safe Drinking Water Act ("Act") and section 142.10 of the National Primary Drinking Water Regulation (40 CFR part 142).

An application has been received from the Navajo Nation, through the Director, Navajo Nation Environmental Protection Agency, requesting that the Navajo Nation Environmental Protection

Agency be granted primary enforcement responsibility for the public water systems within the Navajo Nation pursuant to section 1413 of the Act.

Section 1451 of the Act and 40 CFR 142.72 authorize EPA to delegate to Indian tribes primary enforcement responsibility for public water systems, pursuant to section 1413 of the Act, if the Indian tribe meets the following criteria:

(A) The Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;

(B) The functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and

(C) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of (the Act) and of all applicable regulations.

Section 1451(b)(1) of the Act, 42 U.S.C. 300j–11(b)(1), see also 40 CFR 142.72.

Pursuant to section 1451 of the Act and 40 CFR 142.72, EPA has determined that the Navajo Nation, through the Navajo Nation Environmental Protection Agency, is eligible to apply for primary enforcement responsibility for public water systems within the Navajo Nation. EPA has also determined that the Navajo Nation, through the Navajo Nation Environmental Protection Agency has met all conditions of the Act and regulations promulgated pursuant to the Act for the assumption of primary enforcement responsibility for public water systems within the Navajo Nation. Specifically the Navajo Nation:

(1) Has adopted drinking water regulations which are no less stringent than the National Primary Drinking Water Regulations;

(2) Has adopted and will implement adequate procedures for the enforcement of such regulations, including adequate monitoring, sanitary surveys, inspections, plan review, inventory of water systems, and adequate certified laboratory availability;

(3) Will keep such records and make such reports as required;

(4) If it permits variances or exemptions from the requirements of its regulations, will issue such variances and exemptions in accordance with the provisions of the National Primary Drinking Water Regulations; and

(5) Has adopted and can implement an adequate plan for the provision of safe drinking water under emergency conditions.

All interested parties are invited to submit written comments or to request a public hearing on EPA's determination. Written comments and/or requests for a public hearing must be submitted by December 6, 2000 to the Regional Administrator at the address shown below.

Any request for a public hearing shall include the following information: (1) The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such hearing; and (3) the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of the responsible official of the organization or other entity.

Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. If a substantial request for public hearing is made by December 6, 2000, a public hearing will be held. The Regional Administrator will give further notice in the **Federal Register** and a newspaper or newspapers of general circulation within the Navajo Nation of any hearing to be held pursuant to a request submitted by an interested party, or on her own motion. Notice of the hearing shall be given not less than fifteen (15) days prior to the time scheduled for the hearing. Notice will be sent to the person requesting the hearing and to the Navajo Nation. Notice of the hearing will include a statement of the purpose of the hearing, information regarding the time and location for the hearing, and the address and telephone number of an office at which interested persons may obtain further information concerning the hearing.

After receiving the record of the hearing, the Regional Administrator will issue an order affirming or rescinding the determination. If the determination is affirmed, it shall become effective as of the date of the order.

If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on her own motion, this determination shall become effective on December 6, 2000.

Based on the language of section 1413 of the Act, EPA has long implemented the determination to approve a state, and now a tribal, application for primary enforcement responsibility for public water systems as an "adjudication" rather than a "rulemaking" under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* The same is true of applications for state and tribal program revisions. For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Under the RFA, whenever a federal agency proposes or promulgates a rule under section 553 of the APA, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency must prepare a regulatory flexibility analysis for the rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule.

Even if a state or tribal primary enforcement responsibility application or revision were a "rule" subject to the RFA, EPA would certify that the approval or revision of the state's or the tribe's program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve a primary enforcement responsibility application or revision merely recognizes a program that has already been enacted as a matter of state or tribal law. It would, therefore, impose no additional obligations upon those subject to the state's or tribe's program. Accordingly, the Regional Administrator would certify that the approval of primary enforcement responsibility of the Navajo Nation, if a "rule," would not have a significant economic impact on a substantial number of small entities.

**ADDRESSES:** All documents relating to this determination are available for inspection between the hours of 8:30 a.m. and 4 p.m., Monday through Friday, at the following offices: Navajo Nation Environmental Protection Agency, Fairground Building No. W–008–042, Window Rock, Arizona 86515; and EPA, Region IX, Water Division, Drinking Water Office (WTR–6), 75 Hawthorne Street, San Francisco, California 94105.

**FOR FURTHER INFORMATION CONTACT:** To submit comments or request further information, contact Danny Collier, Region IX, at the San Francisco address given above; telephone (415) 744–1856.

(Sections 1413 and 1451 of the Safe Drinking Water Act, as amended, 42 U.S.C. 300g–2 and 311j–11; and 40 CFR 142.10 and 142.72)

Dated: October 23, 2000.
**Felicia Marcus,**
*Regional Administrator, Region 9.*
[FR Doc. 00–28418 Filed 11–3–00; 8:45 am]
BILLING CODE 6560–50–P

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission; Comments Requested

October 27, 2000.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Written comments should be submitted on or before January 5, 2001. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all comments to Les Smith, Federal Communications Commission, 445 12th Street, S.W., Room 1–A804, Washington, DC 20554 or via the Internet to *lesmith@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collections contact Les Smith at (202) 418–0217 or via the Internet at *lesmith@fcc.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Approval Number:* 3060-xxxx.
*Title:* Section 95.1303—Authorized Locations.
*Form No.:* N/A.
*Type of Review:* New.
*Respondents:* Business or other for-profit, not-for-profit institutions, Farms, State, Local or Tribal government.
*Number of Respondents:* 15.
*Estimated Time Per Response:* .25 hours.
*Total Annual Burden:* 3.75 hours.
*Total Annual Cost:* No annual cost burden on respondents from either capital or start-up costs.
*Needs and Uses:* The rule requires anyone intending to operate a Multi-Use Radio Service (MURS) unit in a manner that could cause radio interference to the Arecibo Observatory to notify the Observatory either in writing or electronically of the geographical coordinates of the unit 45 days prior to commencing operation of the unit. The rule is needed to protect the Observatory from harmful radio interference.

Federal Communications Commission.
**Magalie Roman Salas,**
*Secretary.*
[FR Doc. 00–28354 Filed 11–3–00; 8:45 am]
BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) being Submitted to OMB for Review and Approval.

October 26, 2000.

**SUMMARY:** The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Written comments should be submitted on or before December 6, 2000. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW, Washington, DC 20554 or via the Internet to *lesmith@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collections contact Les Smith at (202) 418–0217 or via the Internet at *lesmith@fcc.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0700.
*Title:* Open Video Systems Provisions.
*Form Number:* FCC 1275.
*Type of Review:* Extension of a currently approved collection.
*Respondents:* Business or other for-profit entities; and State, Local or Tribal Government.
*Number of Respondents:* 748.
*Estimated Time Per Response:* 0.25 to 20 hours.
*Frequency of Response:* Recordkeeping; On occasion reporting requirements; Third party disclosure.
*Total Annual Burden:* 3,910 hours.
*Total Annual Costs:* None.
*Needs and Uses:* Section 302 of the Telecommunications Act of 1996 provides for specific entry options for entities wishing to enter the video programming marketplace, one option being to provide cable service over an "Open Video System" ("OVS"). On April 15, 1997, the Commission released a Fourth Report and Order, FCC 97–130, which clarified various OVS rules and modified certain OVS filing procedures.

Federal Communications Commission.
**Magalie Roman Salas,**
*Secretary.*
[FR Doc. 00–28355 Filed 11–3–00; 8:45 am]
BILLING CODE 6712–01–U

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part

List of Documents attached to EPA Determination of the Navajo Nation's Eligibility under Section 1451 of the Safe Drinking Water Act

Appendix: Factual analysis of finding that operation of existing and future public water systems on nonmember-owned fee lands within the boundaries of the Navajo Reservation may have direct impacts on the health and welfare of the Navajo Nation and its members that are serious and substantial

Attachment 1: "EPA Approval of the Navajo Nation's Application for Treatment as a State under of the Safe Drinking Water Act", August 9, 1991

Attachment 2: "EPA Approval of the Navajo Nation's Application for Treatment as a State Under Section 1451 of the Safe Drinking Water Act", September 20, 1994

Attachment 3: List of public water systems owned or operated by nonmembers and located on fee land owned by nonmembers for which EPA has determined that the Navajo Nation has demonstrated jurisdiction

Attachment 4: List of public water systems within the Eastern Navajo Agency and the Satellite Reservations of Ramah, Alamo and Canoncito for which EPA has determined that the Navajo Nation has demonstrated its jurisdiction

Attachment 5: List of public water systems for which EPA is not making a determination regarding the jurisdiction of the Navajo Nation at this time

**ATTACHMENT 1**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, Ca. 94105

**ENCLOSURE A**

EPA Approval of the Navajo Nation's Application for Treatment as a State under the Safe Drinking Water Act

The Region IX Office of the Environmental Protection Agency has completed its review of the Navajo Nation's application for Treatment as a State (TAS) under section 1451 of the Safe Drinking Water Act (SDWA). The Navajo Nation has sought Treatment as a State for the purpose of administering a Public Water System Supervision (PWSS) program on Tribal lands. EPA's review of the Tribe's application is based on the criteria established for Treatment as a State in section 1451 of the Act, and in the regulations which implement the Indian provisions of the statute at 40 C.F.R. Part 142.

Section 1451(b)(1) of the Safe Drinking Water Act specifies that in order to qualify for Treatment as a State, an Indian Tribe must: (1) be recognized by the Secretary of the Interior; (2) have a governing body carrying out substantial governmental duties and powers; (3) have adequate jurisdiction to exercise the regulatory functions in question; and (4) have adequate capability to administer the regulatory program in a manner consistent with the Act and all applicable regulations. The regulations which implement the Indian provisions of the SDWA and the preamble to those regulations reiterate the statutory requirements, and provide additional information regarding the documentation that a Tribal applicant must submit to EPA in support of a TAS application.

Based on the application submitted by the Navajo Nation and the administrative record established in this case, EPA has determined that the Navajo Nation has satisfied the requirements for Treatment as a State under section 1451 of the SDWA and 40 C.F.R. Part 142, for the purpose of administering a PWSS program on Tribal lands. We therefore grant approval of the Navajo Treatment as a State application, subject to the jurisdictional limitations set forth in section III of this document. Specifically, EPA has concluded as follows:

I. Recognition of the Tribe by the Secretary of the Interior

The Navajo Tribe of Arizona, New Mexico and Utah is included on the Secretary of the Interior's list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." 53 Fed. Reg. 52831 (December 29, 1988). Furthermore, the Tribe's TAS application describes numerous other documents, including Federal Treaties, Executive Orders, Congressional appropriations, and Acts of Congress, through which the Federal government has demonstrated its recognition of the Navajo Tribe. Based on the information which the Navajo Nation has submitted to EPA, and the Secretary of the Interior's formal recognition of the Tribe, EPA has concluded that the Tribe has satisfied this requirement for Treatment as a State under the SDWA.

II. The Tribe has a Governing Body Carrying Out Substantial Governmental Duties and Powers

The preamble to the regulations which implement section 1451 of the Safe Drinking Water Act specifies that to meet this requirement, Indian Tribes must provide EPA with a narrative statement: (1) describing the form of Tribal government; (2) describing the types of substantial governmental functions currently performed; and (3) identifying the source of the authority to perform these functions (e.g., Tribal constitutions, codes, etc.). 53 Fed. Reg. at 37399.

EPA's review of the Navajo TAS application indicates that the Tribe has satisfied this criterion of the Act. The Tribe's application includes a narrative statement which adequately describes the form of government which the Tribe utilizes. The documentation which the Tribe has submitted to EPA in support of its application provides sufficient detail regarding the composition, organization and functions of the Tribal government, and thereby satisfies the requirement set forth at 40 C.F.R. Section 142.76(b)(1).

The narrative statement and attachments provided by the Navajo Nation also describe numerous governmental functions which the Tribe performs. These functions include the use of police powers to protect the health, safety and welfare of the Navajo people, eminent domain authority, criminal enforcement authority, taxation authority, and numerous other governmental functions which the Tribe performs. Based on the materials submitted by the Tribe, EPA has concluded that the discussion regarding this element is sufficient to satisfy the regulatory requirement set forth at 40 C.F.R. Section 142.76(b)(2).

Finally, the Navajo application also adequately describes the authorities under which the Tribe performs

the above-referenced governmental functions. These authorities include the provisions of the Navajo Tribal Code, and various resolutions of the Tribal Council and its Standing Committees. The information provided by the Tribe regarding this element is adequate to satisfy the requirement set forth at 40 C.F.R. Section 142.76(b)(3).

III. The Tribe has Adequate Jurisdiction to Exercise the Regulatory Functions in Question

The preamble to the September 26, 1988 regulations states that in order to qualify for Treatment as a State, a Tribal government must possess both the necessary subject matter jurisdiction and geographic jurisdiction to administer a Public Water System Supervision program. The regulations at 40 C.F.R. Section 142.76(c) further specify that to document its authority in this area, a Tribe must provide EPA with:

(1) a map or legal description of the area over which the Tribe asserts jurisdiction;

(2) a statement from the Tribal Attorney General or an equivalent official which explains the legal basis for the Tribe's regulatory jurisdiction to administer a PWSS program;

(3) copies of all documents supporting the Tribe's jurisdictional claim; and

(4) a description of the locations of the public water systems that the Tribe proposes to regulate.

A. The Navajo Nation's Jurisdictional Assertions

To satisfy this criterion, the Navajo Nation included in its original submittal a brief statement which asserted that the Navajo Tribe has jurisdiction over all lands within "Navajo Indian Country," as that term is defined in 7 Navajo Tribal Code Section 254.' The Tribe submitted a copy of the relevant code provision in support of its jurisdictional assertion. In addition, the Tribe included with its original TAS application several maps of the area over which the Navajo Nation has asserted regulatory jurisdiction. One of those maps identifies the specific locations of the public water systems that the Tribe has proposed to regulate.

In its original application, however, the Navajo Nation did not include a statement from its Attorney General or an equivalent official describing the basis for the Tribe's jurisdictional claim. Therefore, in May 1989, Region IX

requested that the Tribe supplement its application by providing the necessary jurisdictional statement to EPA as soon as possible.

In a letter dated September 8, 1989, the Attorney General for the Navajo Nation provided EPA with a formal statement concerning the Tribe's jurisdiction to administer a Public Water System Supervision program on Tribal lands. In essence, the Attorney General's letter states that the Navajo Tribal Code provides the basis for the Tribe's authority to manage and regulate a PWSS program "within the territorial jurisdiction of the Navajo Nation." The statement goes on to define the Tribe's "territorial jurisdiction" to include certain lands both within and outside the formal exterior boundaries of the Navajo Reservation.

The Attorney General's letter first states that the Tribe has exclusive authority over the lands within the exterior boundaries of the Navajo Reservation. In this regard, the letter indicates that while the Treaty of June 1, 1868 established the initial boundaries of the Navajo Reservation, subsequent Acts of Congress and Executive Orders have significantly expanded the Reservation boundaries since that time. Furthermore, the Attorney General's statement asserts that the Navajo Nation also has exclusive jurisdiction over certain lands which are located outside the formal boundaries of the Navajo Reservation, within the State of New Mexico. These lands include three "satellite" Navajo Reservations (Ramah, Alamo, and Canoncito), which consist of Indian trust land, and another area known as the "709/744 Reservation," which consists of State, Federal, privately-owned, and Tribally-owned lands, all of which were set apart for the Tribe's use in 1907 and 1908, pursuant to Executive Orders 709 and 744.

In analyzing the Tribe's authority over the lands outside the exterior boundaries of the Navajo Reservation, the Attorney General states that since much of this land consists of Tribal trust land, it is therefore more appropriately regulated by the Tribe than by the State. With regard to the Tribe's authority over the 709/744 lands, the jurisdictional statement relies primarily on the United States District Court's decision in Pittsburg & Midway Coal Mining Company v. Saunders (D.N.M. 1988). In that case, the District Court upheld the Navajo Nation's authority to tax persons who are doing business within the geographic area of the 709/744 Reservation.

Finally, as requested by EPA, the Navajo Attorney General's letter addresses the recent holding of the United States Supreme Court in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. ___, 109 S.Ct. 2994 (1989). The Attorney General concludes that the analy-

sis used by the Supreme Court in Brendale supports his conclusion that the Navajo Tribe should retain jurisdiction over the satellite Reservations and the 709/744 lands which lie within the State of New Mexico. In this regard, he argues that since the character, ownership and population of the land in question is predominantly Indian in nature, the application of the principles set forth in Brendale leads to the conclusion that the Tribe, rather than the State, should retain jurisdiction over those areas.

Furthermore, the Attorney General argues that the Brendale case does not affect the inherent power of the Navajo Nation to regulate conduct which threatens the health and welfare of the Tribe, as previously stated in Montana v. United States, 450 U.S. 544 (1981). In this regard, he notes that "[i]t is hard to conceive of a program more centrally related to the health and welfare of the Navajo Nation than the effort to prevent contamination of the public water systems within the...Nation." As a result, the jurisdictional statement concludes that the exclusive authority to regulate a PWSS program on all Navajo lands "falls squarely" upon the Tribe.

B. EPA Notification of Other Governmental Entities

To ensure that the jurisdictional standard set forth in section 1451 of the Act has been satisfied, EPA regulations require the Agency to notify "the appropriate governmental entities" of the "substance of and basis for the Tribe's jurisdictional assertions" within 30 days following the receipt of a Tribe's completed TAS application. 40 C.F.R. Section 142.78(b). Thereafter, each governmental entity so notified has 30 days to provide its comments to EPA on the Tribe's jurisdictional statement. If another governmental entity raises a "competing or conflicting claim" regarding a Tribe's jurisdictional assertions, EPA must consult with the Secretary of the Interior or his designee to determine the adequacy of the Tribe's jurisdiction to gain primacy for the PWSS program.

In this case, EPA Region IX received a completed TAS application from the Navajo Nation in September 1989. Thereafter, on November 16, 1989, EPA notified "the appropriate governmental entities" (including the States of Arizona, Utah, and New Mexico, and the Hopi and Zuni Indian Tribes) of EPA's receipt of the Navajo application. Pursuant to the above regulation, Region IX invited those governmental entities to submit comments to EPA regarding the jurisdictional statement contained in the Navajo application.

Thereafter, in September 1990, EPA learned that a new governmental entity, the San Juan Southern Paiute Tribe, had been formally recognized by the Department of the Interior,

effective March 12, 1990. Accordingly, Region IX provided notice of the Navajo TAS application to the San Juan Southern Paiute Tribe on October 15, 1990.

Altogether, four of the six governmental entities which Region IX notified regarding EPA's receipt of the Navajo TAS application objected to the jurisdictional assertions set forth in that application. The governments which raised these objections included the State of Utah, the State of New Mexico, the Hopi Tribe, and most recently, the San Juan Southern Paiute Tribe. The specific objections raised by each of these governmental entities, and EPA's determination regarding each such "competing or conflicting claim," are set forth below.

C. Jurisdictional Objections to the Navajo Treatment as a State Application

1. COMPETING OR CONFLICTING CLAIM RAISED BY THE STATE OF UTAH

In a letter to EPA dated December 15, 1989, the State of Utah objected to the jurisdictional assertions set forth in the Navajo TAS application. Specifically, the State asserted that the Navajo jurisdictional statement was "overbroad" when viewed in the context of the Brendale decision. The State further claimed that in light of the Brendale case, the Navajo Nation was required to submit additional information to EPA regarding the historical background and character of any non-trust lands which are located within the Utah portion of the Navajo Reservation.

In accordance with 40 C.F.R. Section 142.78(d), EPA consulted with the Department of the Interior on June 12, 1990 regarding the objections raised in the State's correspondence. Following that consultation, and based on the administrative record established in this case, Region IX has determined that the Navajo Tribe has adequately established its jurisdiction over all of the public water systems which are located within the Utah portion of the Reservation.

EPA's determination is based, in part, on factual information which Region IX became aware of during the consultation process. Specifically, Region IX learned that the only fee lands in the Utah portion of the Navajo Reservation are located in the Montezuma Creek area. Since the only public water system serving the Montezuma Creek area is owned and operated by the Navajo Tribal Utility Authority, Region IX determined that the Tribe has exclusive jurisdiction over that system. In addition, since the other nine water systems which are located in the Utah portion of the Reservation are located on trust lands, as opposed to fee lands, EPA has

concluded that the Brendale case in no way affects the Tribe's jurisdiction over those systems.

EPA's determination regarding this matter was first memorialized in a letter to the State dated September 24, 1990. Since that time, EPA has received no further objections or correspondence from the State of Utah concerning the Navajo PWSS application.

2. COMPETING OR CONFLICTING CLAIM RAISED BY THE STATE OF NEW MEXICO

On December 12, 1989, EPA received an initial letter from the Governor of New Mexico, which generally supported the Navajo Nation's application for Treatment as a State "as long as a strong viable...program can be implemented." However, in subsequent correspondence dated May 31, 1990, and June 13, 1990, the Attorney General and the Governor, respectively, informed EPA that the District Court decision in the Pittsburg case, which the Navajo Nation had relied upon as support for its jurisdictional claim over the 709/744 lands, had been reversed by the Tenth Circuit Court of Appeals in Denver.

In the appellate decision, Pittsburg v. Midway Coal Mining Company v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), cert. denied December 10, 1990, the Tenth Circuit held that, at least for the purposes of taxation, the lands commonly referred to as the "709/744 Executive Order" lands (which include approximately 1.9 million acres) should not be considered a part of the Navajo Reservation. In light of this appellate decision, both the Attorney General and the Governor of New Mexico requested that EPA re-examine the jurisdictional assertions set forth in the Navajo Nation's application for Treatment as a State.

Between June 1990 and January 1991, Region IX was involved in ongoing discussions with several Navajo Nation representatives regarding the impact of the Pittsburg case on the Tribe's jurisdictional claim. From those discussions, EPA learned that the Tenth Circuit had remanded the case to the District Court for a determination as to whether the disputed land area constitutes "Indian country" pursuant to 18 U.S.C. Section 1151. As a result, EPA became aware the ultimate resolution of the Pittsburg case is likely to take a considerable amount of time. In light of this delay, Region IX indicated to the Tribe that since the goal of the Indian provisions of the Act is to protect the health and welfare of the residents of Tribal lands, it would be inappropriate for EPA to defer a decision on the Navajo TAS application until the Pittsburg case has been fully resolved.

In response to EPA's concerns, Tribal representatives informed Region IX that the Navajo Nation was considering the possibility of modifying the jurisdictional statement contained in its TAS application, to delete the 709/744 lands which were in dispute. In a letter to EPA dated January 31, 1991, the Navajo Nation formally stated that, while the Tribe does not intend to waive or concede its jurisdiction over the disputed lands, it is "willing to modify its application for treatment as a state to exclude at this time those systems on the 709/744 lands," in order to expedite the approval of the Tribe's TAS application.

Since the Navajo Nation has agreed to delete all public water systems which are located on the 709/744 lands from the scope of its pending TAS application, EPA has determined that the factual basis for New Mexico's objections to the Navajo application no longer exists. Therefore, in accordance with the Navajo Nation's January 31 modification letter, EPA has concluded that the Tribe has demonstrated "the requisite jurisdiction" over the public water systems which are located in the New Mexico portion of the Navajo Reservation (as specified in Enclosure B), including the three Navajo satellite Reservations, but excluding the 709/744 Executive Order lands which have been withdrawn from the Tribe's application.

3. COMPETING OR CONFLICTING CLAIM RAISED BY THE HOPI TRIBE

In a letter to EPA dated December 27, 1989, the Hopi Tribe also objected to the jurisdictional assertions set forth in the Navajo Treatment as a State application. The Hopi letter voiced two major concerns regarding the Navajo application, as indicated below. In accordance with 40 C.F.R. Section 142.78(d), EPA consulted with the Department of the Interior on January 25, 1991 regarding the objections raised in the Hopi Tribe's correspondence. Following that consultation, and based on the administrative record established in this case, EPA has determined that the Navajo Nation has demonstrated "the requisite jurisdiction" over the public water systems which are located in the Arizona portion of the Navajo Reservation, subject to the jurisdictional limitation set forth in section (b) below.

(a) Navajo Jurisdiction Over Specific Water Systems

The Hopi letter indicated that three water supply systems which the Navajo Nation has asserted jurisdiction over in its TAS application appear to be located on Hopi Partitioned Lands. As a result, the Hopi Tribe has alleged that these three systems should be subject to its exclusive governmental authority.

Following EPA's receipt of the initial Hopi letter, Region IX initiated discussions with both Navajo and Hopi representatives concerning the precise location (and resulting jurisdiction) of the three water systems in question. In those discussions, EPA was able to confirm that one of the systems (the Coalmine Mesa system) is in fact located on Hopi Partitioned Lands. Therefore, the Navajo Nation has agreed to delete this system from its pending TAS application. However, additional information obtained by the Navajo Tribe indicates that the two other systems (the Black Mesa Mine and Hard Rocks Community systems) are located on Navajo lands, and are thus subject to Navajo authority.

In two subsequent letters, Region IX asked the Hopi Tribe to notify EPA promptly if the Tribe objected to the Navajo Nation's continued assertion of jurisdiction over the Black Mesa Mine and Hard Rocks Community systems. In a response dated November 19, 1990, the Hopi Tribe did not object to the Navajo Nation's continued jurisdictional claim over the two water systems in question. However, the letter did object to the Navajo's request that EPA "retain supervisory jurisdiction" over the Coalmine Mesa system, "[i]nsofar as the Navajo Nation requests the EPA to do anything more on the Hopi Reservation than the EPA would do in the absence of the Navajo Nation's 'request'."

Pursuant to the Safe Drinking Water Act, EPA may delegate responsibility for the enforcement of drinking water regulations to States and Indian Tribal governments which have satisfied the requirements for delegation under the Act. See 42 U.S.C. Sections 300g-2, 300g-3, and 300j-11. The statute further provides that EPA is to retain enforcement authority over public water systems both in cases where primary enforcement responsibility has been delegated to a State or Tribal government, and in cases where such delegation has not yet occurred. Based on this statutory language, Region IX believes that the Navajo Nation's request that EPA "retain supervisory jurisdiction" over the Coalmine Mesa system simply refers to the Agency's existing authority under the SDWA, and does not contemplate that EPA will take any additional action in connection with the Coalmine Mesa system.

(b) Navajo Authority Over the 1934 Act Reservation Lands

The Hopi letter further indicated that a judicial trial is presently underway to determine the ultimate authority of the Hopi Tribe and the Navajo Nation over certain lands, known as the 1934 Act Reservation lands, which have been jointly used and occupied by the two Tribes for a number of

years.[1] The 1934 Act Reservation was established by Congress pursuant to the Act of June 14, 1934, "for the benefit of the Navajo and such other Indians as may already be located thereon." However, the Act specifically provided that "nothing contained herein shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882." 48 Stat. 960, 961 (1934). EPA understands that the 1882 Act Reservation has been the subject of separate litigation in the United States District Court.

The Hopi letter also stated that in a portion of the 1934 Act Reservation (which is commonly referred to as the "Bennett Freeze" area), construction of public works and water lines has been restricted by Congress pursuant to 25 U.S.C. Section 640d-9(f). As a result of the pending litigation and the restriction placed on public works construction in the Bennett Freeze area, the Hopi Tribe concluded that "EPA needs to act carefully in responding to the Navajo Nation's request so as not to interfere with or prejudice rights of the Hopi Tribe."

Based on the language of the initial Hopi letter and EPA's preliminary discussions with Tribal representatives, it first appeared to Region IX that in raising this issue, the Hopi Tribe simply wanted to inform EPA of the pending litigation, and the potential effect of such litigation on the Navajo Nation's ultimate assumption of primacy under the SDWA. However, subsequent discussions and correspondence between EPA and the Hopi Tribe have confirmed that the Tribe intended to raise a "competing or conflicting claim" under EPA regulations in connection with the Navajo Nation's assertion of jurisdiction over the land and water resources located within the 1934 Act Reservation. In this regard, the Hopi Tribe's most recent letter to EPA, dated November 19, 1990, asserted that since a portion of the 1934 Act Reservation will be partitioned to the Hopi Tribe in the pending litigation, "EPA should set aside the Navajo Nation's request for treatment as a state with respect to the 1934 Act Reservation lands" until a decision is rendered by the District Court.

As stated above, the SDWA requires an Indian Tribe to demonstrate that the public water systems it proposes to regulate are within the area of its jurisdiction. While the preamble to the EPA regulations which implement the Act does not establish a rebuttable presumption concerning Tribal

---

1. The 1934 Act Reservation is also subject to the jurisdictional claims of the San Juan Southern Paiute Tribe, which has also occupied a portion of that land for many years, but has only recently been granted Federal recognition from the Department of the Interior.

jurisdiction on reservation lands, it does state that "there is substantial support for the general proposition that a Tribal government has jurisdiction to administer a Public Water System...program within the exterior boundaries of the Tribe's reservation." 53 Fed. Reg. at 37399. In this case, the Navajo TAS application asserts that the Navajo Tribe has authority over all lands which are physically located within the exterior boundaries of the Navajo Reservation, including the 1934 Act Reservation lands.[2]

Based on the general proposition stated above, EPA might normally expect that a Tribal government would have jurisdiction to administer a PWSS program on all lands within its reservation. In this instance, however, both the Hopi Tribe and the San Juan Southern Paiute Tribe have objected to the Navajo Nation's jurisdictional claim over all lands within the boundaries of its Reservation. The objecting Tribes have cited specific statutory provisions in support of their position that the Navajo Nation does not possess exclusive jurisdiction over all Reservation lands.

The statutory provisions which were cited in the Hopi Tribe's jurisdictional response are contained in Subchapter XXII of Title 25 of the United States Code. That Subchapter, entitled "Navajo and Hopi Tribes: Settlement of Rights and Interests," establishes certain legal rights, procedures, and requirements which are critical to the resolution of the matter now before EPA.[3] Portions of Subchapter XXII refer directly to the rights and interests of the respective Tribes in the 1934 Act Reservation lands.

Specifically, 25 U.S.C. Section 640d-7(a) authorizes either Tribal chairman to commence an action in the District Court against "the other tribe and any other tribe of Indians claiming any interest in or to" the 1934 Act Reservation lands (with the exclusion of the 1882 Executive Order Reservation), for the purpose of determining the legal rights and interests of the affected Tribes in and to such lands. Fur-

---

2. As indicated above, the Navajo TAS application also asserts jurisdiction over certain lands which are located outside the formal boundaries of the Navajo Reservation, within the State of New Mexico.

3. Although the title of Subchapter XXII refers only to the Navajo and Hopi Tribes, several provisions of the Subchapter specifically discuss the legal rights and status of the San Juan Southern Paiute Tribe. However, it should be noted that the provisions of Subchapter XXII were codified prior to the recognition of the San Juan Tribe by the Department of the Interior, and therefore, may not adequately reflect the rights and interests of that Tribe at the present time.

thermore, pursuant to 25 U.S.C. Section 640-7(b), based on the District Court's decision in such a case, the lands within the 1934 Act Reservation are to be partitioned and added to the Navajo or Hopi Reservations, respectively, in accordance with each Tribe's exclusive interest in such lands.[4] To the extent that the Tribes are found to have a joint or undivided interest in portions of the 1934 Act lands, the statute indicates that those lands are to be partitioned between the Tribes "on the basis of fairness and equity."

In addition, as indicated in the Hopi response, 25 U.S.C. Section 640d-9(f) requires that any development of certain lands which are in litigation pursuant to 25 U.S.C. Section 640d-7 can only be undertaken upon the written consent of each affected Tribe, except in the limited areas near Moenkopi (which is subject to exclusive Hopi jurisdiction) and Tuba City (which is subject to exclusive Navajo authority). The lands which are subject to this restriction on development include all lands within the Navajo Reservation which lie to the west of the 1882 Act Reservation, bounded on the north and south sides by westerly extensions of the northern and southern boundaries of the 1882 Act Reservation. As indicated above, this area is commonly referred to as the "Bennett Freeze" area. Section 640-9(f) also sets forth specific procedures which are to be utilized by a Tribal government when it seeks approval from another Tribe to develop or improve lands located within the Bennett Freeze area.[5]

Previous litigation, which was commenced by the Hopi Tribe under the above statutory provisions, has already established the legal right of the Hopi Tribe to a portion of the 1934 Act Reservation lands. See Sekaquaptewa v. MacDonald, 448 F.Supp. 1183 (D. Ariz. 1978), aff'd in part, rev'd in

---

4. Since the members of the San Juan Southern Paiute Tribe have also used and occupied the 1934 Act Reservation for many years, and that Tribe has now been formally recognized by the Department of the Interior, the pending District Court decision may also designate a portion of the 1934 Act lands for the exclusive use of the San Juan Tribe.

5. Under these procedures, a Tribe which seeks to initiate development must submit a written request to the other affected Tribes, to obtain their consent for the proposal. If the other Tribes object, or fail to respond to the proposal within a 30 day comment period, the Tribe seeking the improvement may ask the Secretary of the Interior to issue a formal determination as to whether the project in question is necessary for the health or safety of either Tribe, or one of its members.

part, 619 F.2d 801 (9th Cir. 1980). In the Sekaquaptewa case, the Ninth Circuit Court of Appeals concluded that the Hopi Tribe has an exclusive interest in all 1934 Act Reservation lands which Tribal members possessed, occupied, or used in 1934. The appellate court then remanded the case to the District Court for a factual determination as to which specific lands the Hopi Tribe "possessed, occupied, or used" in 1934. That matter is now pending before the United States District Court for the District of Arizona.

Since the Court of Appeals has already determined that the Hopi Tribe has a legal right to at least some portion of the 1934 Executive Order lands, EPA cannot conclude at this time that the Navajo Nation possesses exclusive authority over all lands which lie within the exterior boundaries of its Reservation. Conversely, however, there is no legal basis at the present time for EPA to conclude that the Navajo Nation lacks jurisdiction over all lands within the 1934 Act Reservation. Based on the holding in the Sekaquaptewa case, and the historic use of the 1934 Act lands by the Navajo Tribe, it appears that a significant portion of those lands may ultimately be partitioned to the Navajo Nation as a result of the pending litigation. Therefore, to exclude all of the 1934 Act lands from the Navajo Nation's application for Treatment as a State would, in essence, deny the validity of the Tribe's claim to any portion of that geographic area, based solely on the Hopi Tribe's allegation that the Navajo Nation cannot assert jurisdiction over any of the 1934 Act lands prior to the District Court's final determination regarding the partition of those lands.

If EPA agreed with the approach suggested by the Hopi Tribe, a significant portion of Indian land within the State of Arizona, including a very large portion of the existing Navajo Reservation, would be viewed as not being subject to Navajo jurisdiction. We do not believe that the court in Sekaquaptewa intended to withdraw such a large area of land from existing Navajo jurisdiction, and thus leave it essentially ungoverned, pending a final determination regarding the partition of the 1934 Act lands. Furthermore, we are not aware of any intention on the part of Congress to restrict the general authority of the Navajo Tribe over the 1934 Act lands prior to a jurisdictional determination by a District Court judge pursuant to the provisions of 25 U.S.C. Section 640d-7.

In previous correspondence with EPA, the Hopi Tribe itself has not asserted that the Navajo Nation will ultimately be found to lack jurisdiction over all lands within the 1934 Act Reservation. Rather, the Tribe has objected only to Navajo jurisdiction over those portions

of the Reservation "as to which conflicting claims exist" between the Tribes. While the Hopi correspondence has not identified specific parcels which are subject to such conflicting claims, it is EPA's understanding that the majority of such jurisdictional conflicts between the Tribes concern lands which are located within the Bennett Freeze area, which lies to the west of the 1882 Act Reservation.

As indicated above, the Bennett Freeze subarea of the 1934 Act Reservation is presently subject to a statutory restriction on development by any Tribe whose members are located within that area. Thus, pursuant to the explicit authority of 25 U.S.C. Section 640d-9(f), no Tribe currently possesses clear and exclusive authority to initiate new construction or improvement projects, including public works improvements, within the lands subject to the freeze. Instead, as specified in footnote 5, above, each Tribal government which seeks to initiate such development must first obtain the consent of the other affected Tribes.

Therefore, pursuant to the provisions of 25 U.S.C. Section 640d-9(f), we have concluded that no Tribe, including the Navajo Nation, can be said to possess exclusive authority over the Bennett Freeze area at the present time. In its jurisdictional statement, the Navajo Nation has not taken issue with the statutory restriction imposed on its activities in the Bennett Freeze area. Since Congress felt strongly enough about the competing jurisdictional concerns of the affected Tribes to enact the Bennett Freeze restriction, EPA has determined that it would be inappropriate and contrary to Congressional intention as expressed in the above-referenced statute for EPA to grant Treatment as a State to any Tribe, including the Navajo Nation, for program development related to the Bennett Freeze area at this time. Therefore, except for the limited area of Navajo jurisdiction in the vicinity of Tuba City, as specified in 25 U.S.C. Section 640d-9(f), EPA must, for the time being, exclude the public water systems which are located in the Bennett Freeze area (as specified in Enclosure C) from the approved portion of the pending Navajo application.

It should be noted, however, that EPA's decision to exclude the Bennett Freeze lands from the Navajo TAS application is based on the facts and circumstances which are known to Region IX at the present time. Therefore, our decision today will not affect the right or ability of the Navajo Nation or any other affected governmental entity to present additional facts or arguments to EPA in the future, based on new factual developments or the outcome of the pending litigation. In this regard, EPA may amend its approval of the Navajo TAS application in the future, as is necessary and appropriate based on the District Court's ultimate decision regarding the jurisdiction of the various Tribes. Moreover,

EPA's decision today will not affect the ability of the Navajo Nation to include the Bennett Freeze lands within the scope of any future application it may submit to EPA to obtain primacy for the PWSS program.

Finally, EPA's action in approving the pending application does not preclude any cooperative efforts which the affected Tribal governments may wish to engage in in order to resolve any remaining jurisdictional issues. In fact, EPA would strongly support such efforts. For example, EPA would be willing to host a meeting among the Tribes to discuss these issues in detail. As an alternative, EPA could utilize a submittal and comment procedure similar to that set forth in 25 U.S.C. Section 640d-9(f), to foster communication between the Tribes regarding their jurisdictional conflicts. EPA could subsequently modify its approval of the Navajo TAS application to incorporate any agreements reached as a result of these efforts.

4. COMPETING OR CONFLICTING CLAIM RAISED BY THE SAN JUAN SOUTHERN PAIUTE TRIBE

In a letter to EPA dated November 15, 1990, the San Juan Southern Paiute Tribe objected to the jurisdictional assertions set forth in the Navajo Treatment as a State application. Specifically, the San Juan Tribe indicated that the land and water rights of the Tribe are currently being litigated in the United Stated District Court for the District of Arizona, and in the Arizona Superior Court. The Tribe stated that as a result of this litigation, it would object to any assertion of jurisdiction by the Navajo Nation "over the lands, waters, and members of the San Juan Southern Paiutes" prior to the resolution of the litigation, or the execution of an agreement between the two Tribes regarding the land and water resources in dispute.[6] In addition to this general statement, the San Juan Tribe cited several statutory and regulatory provisions, including 25 U.S.C. Section 640d-9(f), in support of its argument that EPA should defer action on the pending Navajo TAS application.

In accordance with 40 C.F.R. Section 142.78(d), EPA consulted with the Department of the Interior on January 25, 1991 regarding the objections raised in the San Juan Southern Paiute Tribe's November 1990 correspondence. Following that consultation, and based on the administrative record esta-

---

6. In this regard, it should be noted that although the San Juan Southern Paiute Tribe recently gained recognition from the Department of the Interior, a land base for the Tribe has not yet been designated. As a result, it is difficult for EPA to determine at this time how the Navajo TAS application will specifically affect the rights and interests of the San Juan Tribe.

blished in this case, EPA has determined that the Navajo Nation has demonstrated "the requisite jurisdiction" over the public water systems which are located in the Arizona portion of the Navajo Reservation, subject to the jurisdictional limitation discussed in detail in section III.C.3, above.

In many respects, the "competing or conflicting claim" raised by the San Juan Southern Paiute Tribe parallels the objections raised by the Hopi Tribe regarding the Navajo TAS application. As indicated in the discussion above, EPA believes that it would be inappropriate to exclude from the Navajo application at this time all lands which are currently subject to litigation (i.e., the entire 1934 Act Reservation), simply because the Hopi and San Juan Tribes may be granted an exclusive interest in those lands (or a portion thereof) at the conclusion of the ongoing litigation. As previously stated, the withdrawal of the entire 1934 Act Reservation from current Navajo jurisdiction would leave a large area of land essentially ungoverned for an indefinite period, pending a final decision by the District Court in this case. Moreover, as indicated above, we see no evidence in the statutory scheme created by Congress in 25 U.S.C. Section 640d of a Congressional intention to restrict the authority of the Navajo Tribe over the general area of the 1934 Act lands prior to the time that a District Court judge makes a determination regarding the partition of those lands.

However, as also indicated above, EPA agrees with the objecting Tribes that the jurisdiction of the Navajo Nation in the Bennett Freeze subarea of the 1934 Act Reservation cannot be said to be clear and exclusive at this time, in light of the restrictions on development which have been imposed on all affected Tribes in that area pursuant to 25 U.S.C. Section 640d-9(f). Therefore, except for the limited area of Navajo jurisdiction in the vicinity of Tuba City, EPA must, for the time being, exclude the public water systems which are located within the Bennett Freeze area from the approved portion of the Navajo TAS application.

## IV. The Tribe has Adequate Capability to Administer a PWSS Program on Tribal Lands

In determining whether an Indian Tribe is capable of administering a Public Water System Supervision program, EPA is to consider six factors which are enumerated both in the preamble to the September 26, 1988 regulations, and in the regulations themselves at 40 C.F.R. Section 142.76(d). In reviewing the Navajo Nation's application for Treatment as a State, EPA has concluded that the Tribe has submitted sufficient information regarding each of the six factors specified in the regulations, and therefore, that the Navajo Nation has

adequately demonstrated its capability to administer a PWSS program on Tribal lands.

Specifically, the narrative statement and attachments contained in the Navajo application indicate that the Tribe:

(1) possesses adequate general management experience to qualify for Treatment as a State, based on its previous management of a number of Federal grants and contracts;

(2) has had extensive prior involvement in a variety of environmental and public health programs, including an air pollution control program; a pesticide enforcement program; a water resource management program; a Women, Infants and Children (WIC) Nutrition program; an emergency medical services program; and a variety of community health programs;

(3) has adopted adequate accounting and procurement systems, in accordance with general Federal requirements;

(4) has adequately described the governmental entities which exercise the executive, legislative, and judicial functions of the Tribal government;

(5) has provided sufficient detail regarding the Tribal Divisions which will administer (and assume primary enforcement responsibility for) the Navajo PWSS program, the preparations which those Divisions have made to date for the assumption of the program, and a description of the relationship between the Tribe and owners and operators of the PWSS systems to be regulated by the Tribe;

(6) has developed a plan to acquire additional administrative and technical staff with specific expertise, to enable the Tribe to administer an effective PWSS program. In this regard, the Navajo application also indicates that the Tribe presently employs some trained personnel (in its Water Management Department) who possess the technical capability to provide support services for the PWSS program.

## V. Conclusion

Based on the administrative record established in this case, EPA has determined that the Navajo Nation has satisfied the statutory and regulatory requirements contained in Section 1451 of the SDWA and 40 C.F.R. Part 142, and thereby

qualifies for Treatment as a State for the purpose of administering a PWSS program on Tribal lands. Therefore, Region IX hereby approves the Navajo Nation's application for Treatment as a State, subject to the jurisdictional limitations set forth in section III of this document.

**ATTACHMENT 2**

**ENCLOSURE A**

**EPA APPROVAL OF THE NAVAJO NATION'S APPLICATION FOR TREATMENT AS A STATE UNDER SECTION 1451 OF THE SAFE DRINKING WATER ACT**

The Region IX Office of the Environmental Protection Agency has completed its review of the Navajo Nation's application for Treatment as a State ("TAS") under section 1451 of the Safe Drinking Water Act ("SDWA")[1]. The Navajo Nation has sought TAS for the purpose of administering an Underground Injection Control ("UIC") program. EPA's review of the Navajo Nation's application is based on the criteria established for TAS in section 1451 of the SDWA and in the regulations which implement the Indian provisions of the statute at 40 C.F.R. Part 145. Those regulations were included in a Final Rule published by EPA on September 26, 1988.[2]

Section 1451(b)(1) of the SDWA specifies that in order to qualify for TAS, an Indian tribe must: (1) be recognized by the Secretary of the Interior; (2) have a governing body carrying out substantial governmental duties and powers; (3) have adequate jurisdiction to exercise the regulatory functions in question; and (4) have adequate capability to administer the regulatory program in a manner consistent with the Act and all applicable regulations.

The regulations which implement the Indian provisions of the SDWA and the preamble to those regulations reiterate the statutory requirements that a Tribe must meet in order to qualify for TAS. In addition, both the regulations and the preamble provide detailed guidance to Tribal applicants regarding the narrative statement and supporting documentation that should be included in Tribal TAS applications.

Based on the application submitted by the Navajo Nation and the administrative record established in this case, EPA has determined that the Navajo Nation has satisfied the requirements contained in section 1451 of the SDWA and 40 C.F.R. Part 145, and thereby qualifies for TAS for the purpose of administering an UIC program. EPA therefore grants approval of the Navajo Nation's UIC TAS application, subject to the jurisdictional limitations set forth in section III of this decision. Specifically, EPA has concluded as follows:

---

[1] 42 U.S.C. §300j-11.

[2] 53 Fed. Reg. 37396 (September 26, 1988).

## I. Recognition of the Tribe by the Secretary of the Interior

The Navajo Tribe of Arizona, New Mexico and Utah is included on the Secretary of the Interior's list of "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs."[3] In addition, the Navajo Nation has provided EPA with a narrative statement that describes several other ways in which the Federal government has demonstrated its recognition of the Navajo Nation. Such recognition includes references to the Navajo Nation in Federal Treaties, Executive Orders, Congressional appropriations, and numerous Acts of Congress that have authorized the conveyance of land to the Navajo Nation. Based on the information that the Navajo Nation has submitted to EPA and the Secretary of the Interior's formal recognition of the Tribe, Region IX has concluded that the Navajo Nation has satisfied the recognition requirement set forth in section 1451(b)(1)(A) of the SDWA.

## II. The Tribe Has a Governing Body Carrying Out Substantial Governmental Duties and Powers

The regulations which implement section 1451 of the SDWA and the preamble to those regulations specify that to meet the requirement that a tribe has a governing body carrying out substantial governmental duties and powers, an Indian Tribe must provide EPA with a narrative statement that: (1) describes the form of Tribal government; (2) describes the types of essential governmental functions currently performed; and (3) identifies the sources of authorities to perform these functions (e.g., Tribal constitutions, codes, etc.).[4]

Our review of the Navajo Nation's UIC TAS application indicates that the Nation has satisfied this criterion of the Act. The UIC TAS application includes a narrative statement that adequately describes the form of government that the Navajo Nation utilizes. According to that statement, the Navajo Nation has a large and elaborate tripartite government, with executive, legislative and judicial branches. The application also describes numerous governmental functions that the Navajo Nation performs. One of the primary functions specified by the Navajo Nation is the use of its police powers to protect the health, safety and welfare of the Navajo people. The application also indicates that the

---

[3] 58 Fed. Reg. 54364 (October 21, 1993). Although the list published in the Federal Register refers to it as the "Navajo Tribe", in this determination EPA uses the term "Navajo Nation", since this term is preferred by the Navajo Nation.

[4] 40 C.F.R. §145.56(b); 53 Fed. Reg. 37399 (September 26, 1988).

Navajo Nation possesses eminent domain authority, criminal enforcement authority, and the power to tax both individuals and corporations.

Finally, the application identifies the legal authorities under which the Navajo Nation performs its governmental functions. These authorities include various provisions of the Navajo Tribal Code and a number of resolutions that have been enacted by the Tribal Council and its Standing Committees. With regard to this criterion, it should be noted that the governing power of the Navajo Nation is not based on a Tribal Constitution, as is true with many other Tribes, but is based instead on the authority of the Navajo Tribal Council and the "Rules for the Navajo Council," which were adopted by the Navajo Nation and approved by the Secretary of the Interior in 1938.

Based on the materials contained in the Navajo Nation's UIC TAS application and other supporting documentation that was provided to EPA as part of two previous TAS applications,[5] EPA has determined that the Navajo Nation has satisfied the "governing body" requirement set forth in section 1451(b)(1)(A) of the SDWA and 40 C.F.R. §145.56(b).

## III. The Tribe Has Adequate Jurisdiction to Exercise the Regulatory Functions in Question

### A. Statutory and Regulatory Provisions Regarding Tribal Jurisdiction

Section 1451(b)(1)(B) of the SDWA authorizes EPA to treat an Indian tribe as a State only if:

> the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction.

The preamble to EPA's regulations implementing this section of the SDWA states that in order to qualify for TAS, a Tribal government must possess both the subject matter jurisdiction and geographic jurisdiction necessary to administer an UIC program. The regulations further specify that to document its authority in this area, a Tribe must provide EPA with:

> (1) a map or legal description of the area over which the Tribe asserts jurisdiction;

---

[5] The Navajo Nation has previously been granted TAS under both section 1451 of the SDWA (for the purpose of developing a Public Water Systems Supervision program) and section 106 of the Clean Water Act.

(2) a statement by the Tribal Attorney General or an equivalent official which explains the legal basis for the Tribe's jurisdictional assertion;

(3) copies of all documents supporting the Tribe's jurisdictional claim; and

(4) a description of the locations of the underground injection wells that the Tribe proposes to regulate.[6]

The regulations also set forth specific procedures that EPA must follow in notifying certain governmental entities regarding the Agency's receipt of Tribal TAS applications under the SDWA. Specifically, within 30 days following its receipt of a completed TAS application from a Tribal government, EPA is required to notify all "appropriate governmental entities" [7] of the "substance and base for the Tribe's jurisdictional assertions." Thereafter, each of the notified governmental entities has 30 days to provide comments to the Agency on the Tribe's Attorney General statement. Finally, if one of the governmental entities notified by EPA raises a "competing or conflicting claim" regarding the Tribe's jurisdictional assertions, EPA must consult with the Secretary of the Interior or the Secretary's designee prior to determining the adequacy of the Tribe's jurisdiction to gain primacy for the UIC program.[8]

B. The Navajo Nation's Jurisdictional Assertion

To satisfy the jurisdictional requirement set forth in section 1451(b)(1)(B) of the SDWA, the Navajo Nation has included in its UIC TAS application a "Statement of the Attorney General of the Navajo Nation on the Regulatory Authority and Jurisdiction of the Navajo Nation over Underground Injection Wells on Its Lands" (dated March 16, 1993, the "Attorney General's Statement"). The Navajo Nation has also provided EPA with 38 separately bound exhibits in support of its jurisdictional assertion.

The Navajo Attorney General attests that the Navajo Nation "has the authority to regulate and enforce the protection of drinking water sources by controlling underground injection wells within the territorial jurisdiction of the Navajo Nation." The

---

[6] 40 C.F.R. §145.56(c).

[7] EPA has subsequently defined the term "appropriate governmental entities" to include contiguous States, other Tribes, and Federal land agencies that are responsible for the management of lands contiguous to a reservation. See 56 Fed. Reg. 64884 (December 12, 1991).

[8] 40 C.F.R. §145.58(b - d).

Attorney General's Statement further states that the Navajo Nation's territorial jurisdiction "includes the entire reservation, the Eastern Agency, and the former Bennett Freeze area." In defining the "territorial jurisdiction" of the Navajo Nation, the Attorney General relies upon a key provision of the Navajo Tribal Code, 7 N.T.C. §254. According to that provision:

> The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians.

With regard to the development of a UIC program, the Attorney General's Statement provides that "[t]he Navajo Nation's authority to manage and regulate its waters is set forth in the Nation's Water Code." The Attorney General further states that since the Navajo Water Code "extends to all waters within the territorial jurisdiction of the Navajo Nation," the Navajo Nation has authority to regulate "all actions affecting waters on and under the lands subject to [Navajo] territorial jurisdiction."

The Attorney General's Statement analyzes the Navajo Nation's regulatory authority with respect to the following three categories of land:

> (1) over 17 million acres of land that lie within the exterior boundaries of the formal Navajo Reservation;
>
> (2) approximately 2.8 million acres of land that lie within the Eastern Navajo Agency in northwest New Mexico; and
>
> (3) the lands that lie within the former "Bennett Freeze" area, which is located within the exterior boundaries of the Reservation in northeast Arizona.[9]

---

[9] The "17 million acres" referenced in paragraph (1) include the "Bennett Freeze" area, although this area is discussed separately in the Attorney General's Statement. However, the "17 million acres" does not seem to include the land that is within both the exterior boundaries of the formal Navajo Reservation and the jurisdiction of the Eastern Navajo Agency. See the discussion at footnote 27, infra.

The Nation's assertions relating to each of these areas are summarized below.

1. Lands Within the Exterior Boundaries of the Navajo Reservation

With regard to the lands that lie within the exterior boundaries of the formal Navajo Reservation, the Attorney General states: "[t]here is no question that the Navajo Nation has jurisdiction over the 17,585,494 acres within its reservation boundaries as established by the Treaty of June 1, 1868 . . . and expanded by subsequent executive orders." The Attorney General's Statement is supplemented by the information and exhibits that the Navajo Nation previously provided to EPA in connection with the Navajo Nation's TAS applications under section 1451 of the SDWA (for the purpose of administering a public water systems supervision ("PWSS") program) and under section 106 of the Clean Water Act ("CWA").[10]

In particular, in its previous PWSS TAS application, the Navajo Nation had enclosed a copy of the treaty that established the formal boundaries of the Navajo Reservation, and had also referenced several executive orders which had subsequently expanded the geographic boundaries of the formal Navajo Reservation. Moreover, in its Attorney General statement for the PWSS application, the Navajo Nation cited and relied upon the United States Supreme Court's holding in Montana v. United States[11] as support for its assertion that the Navajo Nation has inherent authority to regulate conduct within its jurisdiction where such conduct may threaten the health or welfare of the Navajo Nation.

2. Lands Within the Eastern Navajo Agency

The majority of the discussion in the Attorney General's Statement and its supporting exhibits relates to the Nation's assertion of jurisdiction over the area known as the "Eastern Navajo Agency." According to the Attorney General, the Eastern Navajo Agency extends to approximately 2.8 million acres of land in northwest New Mexico. As discussed in the Attorney General's Statement, this area includes:[12]

---

[10] 33 U.S.C. §1256.

[11] 450 U.S. 544 (1981).

[12] Although described differently, these four areas correspond to the six "site-specific" areas discussed in the Attorney General's Statement at pages 18-25. See also pp. 9-10 of the text, infra.

- 184,700 acres of land within the recognized exterior boundaries of the formal Navajo Reservation;

- the two "satellite" Navajo Reservations of Alamo and Canoncito;

- the New Mexico portion of the Executive Order 709/744 Reservation, which consists of a large area of land (approximately 1.9 million acres) that was originally set apart for the Navajo Nation's use in 1907 and 1908, pursuant to Federal Executive Orders 709 and 744; and

- other land that lies adjacent to the formal Reservation within the State of New Mexico.

The Attorney General asserts that pursuant to 7 N.T.C. §254 and well-established principles of federal Indian law, the Navajo Nation has regulatory jurisdiction over "Navajo Indian country." He further states that:

> [t]he entire Eastern Navajo Agency is properly characterized as Indian country, either because it, as a whole, is a dependent Indian community or because its constituent Chapters are also distinct communities of Navajo Indians dependent . . . primarily on federal and tribal services and protection.
>
> Indeed . . . most of the area is Indian country by definition under 18 U.S.C. §1151(a) and (c).[13]

---

[13] Attorney General's Statement, pp. 2-3. 18 U.S.C. §1151 provides that "Indian country" means:

> (a) 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, (b) all dependent Indian communities with the boarders [sic] of the United States whether within the original of subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

While section 1151 defines "Indian country" in the specific context of federal criminal jurisdiction, the Supreme Court has stated that this classification applies to matters involving both civil and criminal jurisdiction on Indian lands. See DeCoteau v. District County Court, 420 U.S. 425 (1975).

In Section III of the Attorney General's Statement, the Attorney General cites a number of factors (relating to land status, demographics and government services) in support of the conclusion that "virtually all" of the Eastern Navajo Agency is properly characterized as Indian country. These factors include the following:

- the vast majority of the land in the Eastern Navajo Agency is owned by, held in trust for, or dedicated to the exclusive use and occupancy of Navajo Indians or the Navajo Nation itself;[14]

- almost all of the residents of the Eastern Navajo Agency are members of the Navajo Nation or Federal or Tribal government officials serving the Navajo people;

- the Navajo Nation and its constituent Chapters govern the entire Eastern Navajo Agency, and in that capacity, take necessary action to protect the health, welfare and safety of community members;[15] and

- the Navajo Nation and its federal Trustee provide and fund (and have traditionally provided) almost all of the governmental services (including law enforcement services, the court system, health and educational services, road and real estate services, water development, and other social services) that are available to residents and others within the Eastern

---

[14] However, the Attorney General's Statement acknowledges that "about 20% of the land in Eastern Navajo Agency is not dedicated to exclusive Navajo use and occupancy." Attorney General's Statement, p. 5.

[15] The Attorney General's Statement includes a detailed discussion of the origin and role of the Navajo Chapters. According to that statement, the Chapters are dependent Indian communities which function as the local units of Tribal government. As discussed in detail in the Attorney General's Statement, the Chapter system was originally created by the United States Government in 1927, and was supported by the United States through the mid-1940s, when the Chapters became the "centers of resistance" to a Federally-initiated livestock reduction program. From the mid- 1950's to the present time, the Chapters have also been recognized and supported by the Navajo Tribal Council, and in the Navajo Tribal Code, as "the foundation of the Navajo Nation Government." (Attorney General's Statement, p. 11) The Chapters presently function as the principal units of local government, with particular responsibility for planning and community development activities, protecting the health and welfare of local residents, land use matters, water regulation, schools, and other matters of importance to the local community.

Navajo Agency.

This portion of the Attorney General's Statement concludes that "[b]ecause of the 'dominance of the Navajo Nation over life in the 709/744 area' . . . and because the Navajo Nation extends these same services throughout all areas of the Eastern Navajo Agency, '[t]he conclusion is inescapable that the tribe exercises civil governmental powers over the lands [of the Eastern Navajo Agency].'"[16] The Attorney General further notes that Federal law requires that the Navajo Nation's determination of its own jurisdiction be given "some deference."

Alternatively, the Attorney General asserts that even if EPA was to conduct a site-specific analysis of the Navajo Nation's jurisdiction in the Eastern Navajo Agency, Region IX should still reach the conclusion that virtually all of that land is properly characterized as Indian country. In support of this assertion, the Attorney General's Statement identifies six different categories of land within the Eastern Navajo Agency, and outlines the rationale for concluding that each of those types of land comes within the definition of Indian country. These six types of Eastern Navajo Agency land include: (a) Navajo Tribal trust lands; (b) other lands that have been withdrawn by Congress and the Federal Executive Branch for the exclusive use of Navajo Indians; (c) Navajo Tribal fee lands (which have been purchased by the Tribe and are held by the Tribe in fee); (d) approximately 5,000 trust allotments in the Eastern Navajo Agency that have been granted to individual Navajo Indians; (e) the three "satellite" Navajo Reservations (Ramah, Canoncito and Alamo), all of which are held in trust by the United States for the benefit of Navajo Indians;[17] and (f) other lands that are located within the Eastern Navajo Agency (primarily fee lands and state trust lands), which the Navajo Nation believes constitute dependent Indian communities under 18 U.S.C. §1151(b).

3. Lands Within the Former "Bennett Freeze" Area

The Attorney General's Statement also addresses the Navajo Nation's authority over the portion of the Reservation that is known as the former "Bennett Freeze" or statutory freeze area. The

---

[16] Attorney General's Statement, page 17.

[17] In the discussion of the various types of land that lie within the Eastern Navajo Agency, the Attorney General did not refer to the Ramah Reservation, the third Navajo satellite Reservation, since the Ramah Reservation is not within the jurisdiction of the Eastern Navajo Agency. However, the Navajo Nation is seeking TAS with respect to the Ramah Reservation, as well as Alamo, Canoncito, and other Eastern Navajo Agency lands. See Attorney General's Statement, pp. 23-25, fn. 14.

Attorney General's Statement begins by providing the statutory and administrative background for this issue. Specifically, the Act of June 14, 1934 ("1934 Act"), which defined the exterior boundaries of the Navajo Reservation in Arizona, conveyed an equitable interest in "vacant, unreserved, and unappropriated public lands" within the Reservation "for the benefit of the Navajo and such other Indians as may already be located thereon."[18]

The Attorney General's Statement further indicates that in 1966, in response to the Hopi Tribe's claims that the Hopis were the "other Indians" referred to in the 1934 Act, then-Commissioner of Indian Affairs Robert Bennett imposed an administrative freeze on a specified portion of the 1934 Act Reservation. The freeze was to cover:

> that portion of the Navajo Reservation lying west of the Executive Order Reservation of 1882 and bounded on the north and south by westerly extensions, to the reservation line, of the northern and southern boundaries of the said Executive Order Reservation.

The order issued by Commissioner Bennett further required that both the Navajo Nation and the Hopi Tribe approve any new development, use, or occupancy plans within the delineated area pending resolution of the jurisdiction and ownership issues related to the 1934 Act Reservation.

In 1974, Congress enacted the Navajo-Hopi Settlement Act to facilitate the resolution of the ongoing dispute between the Tribes. As noted by Attorney General Yazzie, section 8 of that Act authorized either Tribe to commence or defend an action against the other Tribe (or any other Tribe of Indians), in order to determine the respective rights and interests of the Tribes in the lands of the 1934 Act Reservation (with the exception of the 1882 Executive Order Reservation lands).[19] Moreover, 25 U.S.C. §640d-7(b) specifies that based on the District Court's decision in such a case, the lands within the 1934 Act Reservation are to be partitioned and added to the Navajo or Hopi Reservations, respectively, in accordance with each Tribe's exclusive interest in such lands, as determined by the court.

Attorney General Yazzie states that based on the language

---

[18] However, as stated in EPA's prior decision regarding the Navajo TAS application to develop a PWSS program, the 1934 Act specifically provided that "nothing contained herein shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882." 48 Stat. 960, 961 (1934).

[19] 25 U.S.C §640d-7(a).

contained in 25 U.S.C. §640d-7(a), the Hopi Tribal Chairman filed an action against the Navajo Tribal Chairman in 1974 to determine the rights and interests of the Hopi Tribe in the 1934 Act Reservation lands. The Attorney General further indicates that this lawsuit, Masayesva v. Zah, was not resolved until September 1992, when the United States District Court for the District of Arizona issued a final judgment (which was thereafter amended in December 1992), settling the rights of the respective parties with respect to the 1934 Act Reservation.

In 1980, with the ownership of the land unresolved and the Hopi lawsuit pending, Congress enacted a statutory freeze on the area in question. The law that imposed the freeze specified that no development could occur on any lands that were involved in litigation between the Tribes, unless each affected Tribe provided written consent authorizing the proposed activity.[20] Based on this statutory provision, EPA previously concluded (in its TAS determination for the PWSS program) that except for the limited area subject to the jurisdiction of the Navajo Nation in the vicinity of Tuba City, "no Tribe, including the Navajo Nation, can be said to possess exclusive authority over the Bennett Freeze area at the present time." Therefore, based on the facts and circumstances that existed at the time of EPA's PWSS TAS approval (prior to the issuance of Masayesva v. Zah), Region IX excluded from the approved portion of the Navajo Nation's application the public water systems that were located within the Bennett Freeze area.

However, in both the present TAS application and the Navajo Nation's recent CWA section 106 TAS application, the Navajo Nation has discussed in detail the outcome of the Masayesva v. Zah case. In this regard, the Attorney General states that the District Court's final judgment, as amended in December 1992, "confirmed that all of the 1934 reservation, except approximately 60,000 acres partitioned to the Hopi Tribe, is subject to the jurisdiction of the Navajo Nation." Furthermore, the Attorney General states that the District Court's ruling, in effect, "lifted the freeze on most of the former freeze area."

The Attorney General notes, however, that in response to the Hopi Tribe's motion for a partial stay pending that Tribe's appeal, the District Court's December 1992 order "stayed the freeze lift" on certain specified lands, which had been awarded to the Navajo Nation but were further designated as joint use lands, pursuant to the court's September 1992 order. Specifically, the December 1992 order placed certain restrictions on the activities of non-resident Navajos within the delineated joint use area. With regard to this area, Attorney General Yazzie concludes that "[a]lthough there are still development restrictions in [the] area, these lands are now

---

[20] 25 U.S.C. §640d-9(f).

under the exclusive jurisdiction of the Navajo Nation." Finally, the Attorney General's Statement acknowledges that the Hopi Tribe filed an appeal of the District Court's ruling in Masayesva v. Zah on January 5, 1993.

C. EPA Notification of "Appropriate Governmental Entities"

As indicated above, EPA's regulations require the Agency to notify all "appropriate governmental entities" regarding the "substance and base for" the jurisdictional assertions contained in a Tribe's application for TAS to administer a UIC program under section 1451 of the SDWA.[21] Moreover, if another governmental entity raises a "competing or conflicting claim" regarding a Tribe's jurisdictional statement, EPA must consult with the Secretary of the Interior or the Secretary's designee prior to determining the adequacy of the Tribe's jurisdiction to gain primacy for the UIC program.

In this case, EPA Region IX received a completed UIC TAS application from the Navajo Nation in late March 1993. On April 8, 1993, EPA notified the "appropriate governmental entities" of EPA's receipt of the Navajo Nation's application.[22] In accordance with 40 C.F.R. §145.58(b) and (c), EPA provided those governments with a copy of the Attorney General's Statement and its exhibits, and invited them to submit comments to EPA regarding the Navajo Nation's jurisdictional assertions.

Only three of the ten governmental entities that EPA notified regarding the Navajo Nation's application subsequently contacted Region IX in connection with the Navajo Nation's jurisdictional statement. Two of those governments, the State of Arizona and the State of Utah, did not raise "competing or conflicting claims" with respect to the Navajo Nation's UIC TAS application.[23] However, the

---

[21] 40 C.F.R §145.58(b).

[22] The "appropriate governmental entities" identified by EPA in this case included the States of Arizona, New Mexico, Utah and Colorado, and six Tribal governments, including the Hopi Tribe, the San Juan Southern Paiute Tribe, the Jicarilla Apache Tribe, the Ute Mountain Ute Tribe, the Pueblo of Zuni, and the Pueblo of Laguna.

[23] In a letter to EPA dated May 10, 1993, the Governor of Arizona stated that "[w]e find no reason to comment on the [Navajo] jurisdictional statement." The State of Utah similarly did not raise an objection regarding the Attorney General's Statement. However, in a letter to EPA dated May 21, 1993, Utah did request "that any EPA approval specify that it does not include off-reservation underground injection control in Utah." EPA does not view this request as giving rise to a "competing or conflicting claim," since to our knowledge, the Navajo Nation has not asserted

State of New Mexico did raise a jurisdictional objection to the application.

The State of New Mexico first contacted EPA by telephone during the week of April 19, 1993, and informed EPA at that time that the Attorney General's Statement appeared to have been inadvertently omitted from EPA's notification package. In light of this claim, EPA sent a separate copy of the Navajo statement to New Mexico officials via express mail on April 22, 1993. EPA's April 22 correspondence confirmed that any jurisdictional objections from the State of New Mexico must be provided to Region IX by May 24, 1993.

New Mexico did file a response with EPA Region IX on May 24, 1993. New Mexico's response cited and relied in part upon a new United States Supreme Court decision, Oklahoma Tax Commission v. Sac and Fox Nation[24], which was issued by the Court on May 17, 1993, over two months after the Navajo Nation had submitted the Attorney General's Statement to EPA. In light of the State's partial reliance on the Sac and Fox case, the Navajo Nation subsequently requested an opportunity to respond in writing to the State's comments, and to provide EPA with its own interpretation of Sac and Fox. Given the unusual circumstances, EPA agreed to provide the Navajo Nation an additional opportunity for comment in this case.

The cover letter transmitting New Mexico's response, which was submitted by the New Mexico Environment Department ("NMED"), indicates that NMED "does not oppose the application of the Navajo Nation for treatment as a state" under the SDWA. However, despite this initial statement, the State's formal response to the Navajo jurisdictional assertion constitutes a "competing or conflicting claim" pursuant to 40 C.F.R. §145.58(d). New Mexico's response sets forth three separate arguments in support of its conclusion that the Navajo Nation's broad jurisdictional assertions "are legally unsupportable and inconsistent with the Safe Drinking Water Act." In particular, the NMED response takes issue with the Navajo Nation's assertion of jurisdiction "over non-Indian UIC wells located on non-Indian owned lands outside the reservation boundaries."

First, New Mexico asserts that "[t]here is no legal support for the Navajo Nation's assertion that it has jurisdiction over non-Indian activities located within Indian country." While the

---

UIC jurisdiction over any off-reservation lands that lie within the State of Utah. Moreover, it should be noted that the State's response was not provided to EPA within the 30 day comment period specified in 40 C.F.R. §145.58(c).

[24] ___ U.S. ___, 113 S.Ct. 1985 (1993).

State acknowledges that the regulations governing UIC operations define the term "Indian lands" as those that meet the definition of "Indian country,"[25] NMED believes that there is no legal authority to support the Navajo Nation's regulation of non-Indian activities on off-reservation "Indian country" lands. In its discussion of the Sac and Fox case in particular, NMED concludes that "there is no language in the opinion supportive of the Nation's position that civil jurisdiction in 'Indian country' . . . encompasses jurisdiction over non-Indian activities." Second, New Mexico's response also specifically challenges the Navajo Nation's jurisdiction over all UIC wells that are located on individually owned fee lands and/or state trust lands within the Eastern Navajo Agency. Finally, the New Mexico response asserts that the Navajo Nation's jurisdictional assertion "is inconsistent with the SDWA and directly infringes upon the State's historical regulation of non-Indian operators on non-Indian owned lands outside the Reservation."

As indicated above, EPA agreed to provide the Navajo Nation with an opportunity to submit additional comments to the Agency in this case, due to New Mexico's partial reliance on the Supreme Court's decision in the Sac and Fox case. The Navajo Nation submitted its response to EPA on July 30, 1993. The Navajo Nation's response is composed of three separate arguments, which are summarized below.

First, the Navajo Nation asserts that contrary to NMED's interpretation, the Supreme Court's decision in the Sac and Fox case "upheld longstanding precedent that 'Indian country' is the proper standard for delineating tribal, state, and federal jurisdiction." The Navajo Nation notes that despite the precedent established by the Supreme Court regarding the significance of the "Indian country" standard, "NMED persists in drawing jurisdictional lines along formal reservation boundaries." Second, the Navajo Nation asserts that the Sac and Fox case does not support a "jurisdictional distinction based on race [as] urged by NMED" and that the case should not be viewed as limiting Tribal civil authority over non-Indians as a matter of Federal common law, where a Federal statute that authorizes a Tribal program broadly defines the areas over which a Tribe may exercise regulatory authority. Moreover, the Navajo Nation's response states that enactment of the Indian amendments to the SDWA evidenced Congress's intent to acknowledge Tribal governments as the appropriate regulatory bodies to ensure the protection of public health and welfare in Indian country. And, according to the Navajo Nation, pursuant to the decision in Montana v. United States[26], the regulation of underground injection in the Eastern Navajo Agency is clearly

---

[25] See 40 C.F.R. §144.3; 40 C.F.R. Part 147, subpart HHH.

[26] 450 U.S. 544 (1981).

within the jurisdiction of the Navajo Nation since "[i]t is difficult to imagine any activity with a greater potential to affect public health and welfare than underground injection." Finally, the Navajo Nation's response reiterates the conclusion reached in the Attorney General's Statement that because the entire Eastern Navajo Agency is "Indian country," the Navajo Nation has jurisdiction to regulate underground injection wells throughout the Eastern Navajo Agency, regardless of land ownership or of the racial status of the well operators.

After reviewing the information provided by New Mexico and the Navajo Nation, in accordance with 40 C.F.R. §145.58(d), EPA consulted with the Department of the Interior ("DOI") regarding the jurisdictional objections raised in the State of New Mexico's correspondence. The required EPA - DOI consultation on this matter was completed on September 16, 1993. Based on the results of that consultation and the administrative record established in this case, EPA has concluded that the Navajo Nation has demonstrated the requisite jurisdiction over the New Mexico portion of the Navajo Reservation and the Eastern Navajo Agency, subject to the jurisdictional limitations set forth in section III.D.2 of this decision.

## D. EPA's Determination Regarding the Navajo Nation's Jurisdiction to Administer an Underground Injection Control Program

The Attorney General's Statement has three components: the Nation's jurisdiction over the lands and waters within the exterior boundaries of the formal Navajo Reservation; its authority over the lands and waters within the Eastern Navajo Agency; and its jurisdiction in the former "Bennett Freeze" area. For ease of reference, EPA's determination regarding the Navajo Nation's jurisdiction to administer an UIC program will generally follow the format set forth in the Attorney General's Statement. This determination will address the substance of the Navajo Nation's jurisdictional assertion in light of:

(1) the TAS language contained in section 1451 of the SDWA, and the regulations which implement the UIC provisions of the statute;

(2) the "competing or conflicting claim" that was filed by the State of New Mexico regarding the Navajo Nation's jurisdictional statement; and

(3) relevant principles of federal Indian law.

### 1. The Jurisdiction of the Navajo Nation Within the Exterior Boundaries of the Navajo Reservation

The vast majority of the land area for which the Navajo Nation seeks TAS under section 1451 of the SDWA is composed of land that lies within the exterior boundaries of the formal Navajo Reservation.[27] This trust land, which has been formally set apart for the use of the Navajo Nation, includes all of the Navajo Reservation in Arizona (with the exception of the Bennett Freeze area, which will be discussed separately below), all of the land for which the Navajo Nation seeks UIC TAS in Utah, and the portion of the formal Reservation that lies within New Mexico. The Navajo Attorney General has stated that approximately 17,585,494 acres of land lie within the exterior boundaries of the Navajo Reservation.

Although the State of New Mexico has filed a "competing or conflicting claim" with respect to the pending UIC TAS application, New Mexico has not contested the Navajo Nation's jurisdiction over any of the lands that lie within the exterior boundaries of the formal Navajo Reservation, as established by the Treaty of June 1, 1868, and expanded by subsequent executive orders. Therefore, based on the Navajo Nation's narrative statement, the Attorney General's Statement, and related exhibits, and in accordance with the general principles of federal Indian law, EPA has determined that the Navajo Nation has adequately demonstrated its jurisdiction over all of the lands and waters that are located within the exterior boundaries of the formal Navajo Reservation.[28] Accordingly, EPA hereby finds that the Navajo Nation has satisfied the third criterion for TAS under section 1451(b)(1)(B) of the SDWA with respect to all lands that lie within the boundaries of the formal Navajo Reservation.[29]

2. The Jurisdiction of the Tribe in the Eastern Navajo Agency

In this case, EPA must determine whether to treat the Navajo Nation as a State pursuant to the specific provisions of the SDWA with respect to certain lands outside the exterior boundaries of the formal Navajo Reservation. The statutory language in section 1451 of the SDWA establishes a relatively broad standard for Tribal

---

[27] The boundary of the Navajo Reservation includes the land described in the Executive Order dated January 6, 1880 (E.O. 1880) (as modified by the Executive Order dated May 7, 1884 and the Executive Order dated April 24, 1886). Although the E.O. 1880 land appears to be within the jurisdiction of the Eastern Navajo Agency, it is clear from the text of the executive order that this land lies within the exterior boundary of the formal Navajo Reservation.

[28] As noted above, however, the jurisdiction of the Navajo Nation in the "Bennett Freeze" area is addressed separately in section III.D.3.

[29] This area includes the land described in E.O. 1880. See footnote 27, supra.

jurisdiction. Specifically, section 1451(b)(1)(B) of the SDWA provides that a Tribe may exercise regulatory functions under the Act provided that such functions "are within the area of the Tribal Government's jurisdiction." However, the SDWA does not provide further specific guidance regarding the types of land that may be considered to be within the area of a Tribal Government's jurisdiction. The federal regulations implementing this section of the SDWA, reiterating the broad statutory language, do not adopt a specific definition of what constitutes the "area of the Tribal Government's jurisdiction." The preamble to these regulations indicates that the extent of tribal jurisdiction must be examined on a case-by-case basis.[30]

As indicated above, much of the discussion in the Attorney General's Statement relates to the Navajo Nation's assertion of authority over land within the Eastern Navajo Agency. The Attorney General argues that in accordance with well-established principles of federal Indian law, the Navajo Nation possesses both civil regulatory authority and criminal authority over the Eastern Navajo Agency lands because this land constitutes "Indian country." As a result, he concludes that the Navajo Nation has sufficient jurisdiction over the Eastern Navajo Agency to support an EPA determination to treat the Navajo Nation as a State with respect to all of those lands pursuant to section 1451 of the SDWA.

In making the argument that the Navajo Nation's jurisdiction extends over all of Navajo Indian country, Attorney General Yazzie cites several instances in which EPA has previously adopted or utilized the Indian country definition to outline either the extent of federal authority or the limits of state jurisdiction with respect to environmental regulation. In particular, the Attorney General cites regulatory language that EPA uses to implement the provisions of the SDWA on Indian lands.[31] The Attorney General also cited the jurisdictional arguments that EPA successfully made in Washington Dep't of Ecology v. EPA[32], which involved the regulation of hazardous waste under the Resource Conservation and Recovery Act ("RCRA").[33] In both cases, EPA adopted the Indian country definition as an appropriate benchmark for determining the scope of federal and state jurisdiction over environmental matters on Indian lands.

In this case, EPA agrees that "Indian country" is the appropriate criterion for determining the extent of jurisdiction of

---

[30] See 53 Fed. Reg. 37396, 37399-37400 (September 26, 1988).

[31] 40 C.F.R. §144.3.

[32] 752 F.2d 1465 (9th Cir. 1985).

[33] 42 U.S.C. §6901 et seq.

the Navajo Nation for the purposes of section 1451 of the SDWA.[34] Using the "Indian country" criterion is consistent with the SDWA and federal regulations implementing the statute. "Indian country" is the jurisdictional dividing line between federal and state authority under the SDWA in New Mexico: the UIC program for Indian country in New Mexico is administered by U.S. EPA[35], and the State of New Mexico's approved UIC program does not include Indian country.[36] However, the SDWA clearly envisions that the control of underground injection, to the extent possible, should be primarily a matter of local (tribal or state) regulation, and EPA's Indian Policy recognizes that tribal governments are the appropriate "non-Federal parties" for environmental regulation concerning a tribe's territory and members.[37] Although EPA did not adopt "Indian country" as the specific criterion to define tribal jurisdiction for the purposes of the SDWA, EPA did explicitly state that the Agency's action did not "preclude a Tribe from applying for 'treatment as a State' with respect to any lands over which it believes it has jurisdiction."[38] Both the statute and the regulations, therefore, look to federal Indian law for determining the scope of a tribe's jurisdiction in regulating underground injection. Under federal Indian law, tribal civil jurisdiction

---

[34] It is important to note that EPA agrees that the federal Indian law definition of "Indian country" is the appropriate criterion for determining the jurisdiction of the Navajo Nation. The definition of "Navajo Indian Country" found at 7 N.T.C. §254 may be broader than the definition of "Indian country" under federal Indian law. See Texaco, Inc. v. Zah, 5 F.3rd 1374, 1376 and fn. 3 (10th Cir. 1993). However, since the Navajo Attorney General asserts that the definition of Navajo Indian Country is consistent with the federal definition of Indian country, EPA considers that any lands that meet the definition of Navajo Indian Country but fall outside the definition of Indian country under federal Indian law are not part of the Navajo Nation's jurisdictional claim for the purposes of the SDWA.

[35] See 40 C.F.R. Part 147, subpart HHH.

[36] See 40 C.F.R. Part 147, subpart GG.

[37] "EPA Policy for the Administration of Environmental Programs on Indian Reservations" (November 8, 1984).

[38] 53 Fed. Reg. 37396, 37400 (September 26, 1988). In the preamble to the Final Rule, EPA declined to establish a presumption in favor of tribal jurisdiction for "Indian country" because there are cases where tribes would not or could not seek jurisdiction over all of "Indian country." See id. at 37399-37400. In this case, the Navajo Nation is seeking jurisdiction over all of "Indian country" in the Eastern Navajo Agency.

includes Indian country (as defined by statute and related case law[39]), and without question tribes' jurisdiction extends "over both their members and their territory."[40] In addition, tribes have jurisdiction over the activities of non-members on non-Indian owned land within Indian country where such activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[41]

Although EPA agrees that Indian country is the proper measure of the Navajo Nation's jurisdiction, EPA must further determine what parts of the Eastern Navajo Agency meet the definition of "Indian country." The Attorney General's Statement asserts that all of the Eastern Navajo Agency constitutes Indian country. Alternatively, the Attorney General's Statement claims that if a "site-specific" analysis of land in the Eastern Navajo Agency were conducted, virtually all of the Eastern Navajo Agency would be characterized as Indian country. The definition of "Indian country" found at 18 U.S.C. §1151 includes land within the limits of any Indian reservation, dependent Indian communities, and Indian allotments (where the Indian title has not been extinguished).[42] Also, land held in trust by the United States for the benefit of an Indian tribe is Indian country, even though not formally designated as a "reservation."[43]

At this time EPA cannot determine that all of the lands within the Eastern Navajo Agency are Indian country. Federal courts have held that some land that is in the Eastern Navajo Agency is not Indian country.[44] More importantly, as described in more detail below, EPA does not have sufficient information to make a determination that all of the land in the Eastern Navajo Agency is

---

[39] See footnote 13, supra. See also Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073 (10th Cir. 1993); Texaco, Inc. v. Zah 5 F.3d 1374 (10th Cir. 1993).

[40] United States v. Mazurie, 419 U.S. 544, 557 (1975). See also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985).

[41] Montana v. United States, 450 U.S. 544, 566 (1981).

[42] See footnote 13, supra.

[43] United States v. John, 437 U.S. 634, 648 (1978)(quoting United States v. Pelican, 232 U.S. 442 (1914); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). Oklahoma Tax Comm'n v. Sac and Fox Nation, ___ U.S. ___, 113 S.Ct. 1985 (1993). See also, United States v. McGowan, 302 U.S. 535 (1938).

[44] See Blatchford v. Sullivan, 904 F.2d 542 (10th Cir. 1990).

Indian country and therefore within the jurisdiction of the Navajo Nation. Some types of land (i.e. tribal trust land and Indian allotments) clearly are Indian country. For certain types of land (i.e. private fee land within the Eastern Navajo Agency), however, EPA would need to find that the land is part of a dependent Indian community. Before EPA could make such a finding for any specific parcel of land, EPA would need to know the following: the general nature of the area surrounding the parcel, the relationship of the inhabitants to the Navajo Nation and the United States Government, and "the established practice of government agencies toward the area."[45]

Therefore, for the Navajo Nation's assertion of jurisdiction pursuant to section 1451 of the SDWA over lands in the Eastern Navajo Agency outside the exterior boundaries of the formal Navajo Reservation, EPA is evaluating specific categories of land status[46] to determine whether the lands in these categories are within Indian country. It is important to note what determination EPA is and is not making in this case at this time. For those categories of lands for which EPA cannot determine whether the Navajo Nation has jurisdiction, EPA is simply stating that the Navajo Nation has not adequately shown that it does have jurisdiction. However, EPA is not determining that the Navajo Nation does not have jurisdiction. Neither is EPA determining whether or not such lands are "Indian lands" for the purposes of EPA's UIC program in New Mexico.[47] Finally, EPA is making a determination only for the purposes of the SDWA and is not addressing the full extent of the Navajo Nation's sovereign authority over civil matters in Indian country.

a. Navajo Tribal Trust Land

A significant portion of the land within the Eastern Navajo Agency over which the Navajo Nation is asserting jurisdiction is land held by the United States Government in trust for the Navajo Nation ("tribal trust lands"). The Supreme Court has long held

---

[45] United States v. Martine, 442 F.2d 1022, 1023 (10th Cir. 1971).

[46] The Attorney General's Statement refers to this analysis as "site-specific." However, it is more accurate to describe it as "category-specific" since EPA must evaluate types of land status rather than specific parcels or "sites."

[47] See 40 C.F.R. Part 147, subpart HHH; 40 C.F.R. §143.3.

that such tribal trust land is Indian country.[48] Therefore, EPA has determined that the Navajo Nation has demonstrated that it has jurisdiction over all Navajo tribal trust lands described in section IV.A. of the Attorney General's Statement.[49]

b. Navajo Trust Allotments

In addition to Navajo tribal trust land, the Navajo Nation asserts jurisdiction over all trust allotments granted to Navajo Indians in the Eastern Navajo Agency. Although the Attorney General's Statement does not identify all of these allotments, by definition, pursuant to 18 U.S.C. §1151(c), Indian allotments (the Indian title to which has not been extinguished) are Indian country. EPA has, therefore, determined that the Navajo Nation has demonstrated that it has jurisdiction over the Navajo allotments described in section IV.B. of the Attorney General's Statement.[50]

c. Ramah, Alamo, and Canoncito Reservations

The Navajo Nation also claims jurisdiction over the three "satellite" reservations of Ramah, Alamo, and Canoncito. Consisting of tribal trust land and Indian allotments, these reservation are clearly Indian country.[51] EPA has determined,

---

[48] See footnote 43, supra, and accompanying text.

[49] Although the Navajo Attorney General did not identify all of the Navajo trust lands, based on the status of the land the Navajo Nation has demonstrated its authority over Navajo tribal trust lands. The tribal trust lands in the three "satellite" reservations would also be included in this determination. However, to avoid confusion, EPA discussed the "satellite" reservations separately. See the discussion at section III.D.2.c.

[50] As with EPA's determination regarding tribal trust lands, allotments in the three "satellite" reservations would be included in the determination regarding allotments in the remainder of the Eastern Navajo Agency. The "satellite" reservations are discussed separately to avoid confusion. See the discussion at section III.D.2.c.

[51] In order to avoid any confusion, EPA has treated the three "satellite" reservations separately. However, the tribal trust lands and allotments in these reservations are also Indian country under the analysis contained in parts III.D.2.(a and b) of the text. In addition, tribal fee lands within the Ramah Reservation are also Indian country. See the discussion at section III.D.2.e in the text.

therefore, that the Navajo Nation has demonstrated that it has jurisdiction over the three "satellite" reservations of Ramah, Alamo, and Canoncito, as described in section IV.E. of the Attorney General's Statement.

d. Land Withdrawn for Exclusive Navajo Use

The Navajo Nation also asserts jurisdiction over lands in the Eastern Navajo Agency that the Navajo Attorney General describes as lands that "have been withdrawn for the exclusive use of Navajo Indians by Congress and the Executive Branch."[52] Federal land that has been set aside for the exclusive use, occupancy, and/or benefit of Indians would most probably be considered part of a dependent Indian community.[53] Nonetheless, to make a determination that federal land in the Eastern Navajo Agency is Indian country, for any given parcel of land, EPA would still need information concerning, among other things, the nature of the Navajo Nation's interest in the parcel, the duration of that interest, and the supervision of the federal government over that parcel. Because this information was not provided in the Attorney General's Statement, EPA cannot make a categorical determination that federal land in the Eastern Navajo Agency is part of Indian country.[54] Therefore, at this time EPA cannot determine that the Navajo Nation has jurisdiction for the purposes of section 1451 of the SDWA over the federal lands described in section IV.B. of the Attorney General's Statement.

e. Navajo Tribal Fee Land

In section IV.C. of the Attorney General's Statement, the Navajo Nation also claims jurisdiction over tribal fee lands in the Eastern Navajo Agency, citing two federal court decisions that have

---

[52] Attorney General's Statement, p. 21.

[53] See footnote 45 and accompanying text, supra.

[54] It appears that some of the land over which the Navajo Nation is claiming jurisdiction in this section of the Attorney General's Statement has already been (or will soon be) transferred to the Navajo Nation as tribal trust land, which is subject to the determination under section III.D.2.a in the text. According to the Attorney General's Statement, the status of some of the federal land over which the Navajo Nation is asserting jurisdiction is still subject to a dispute which is being resolved by agreement between the Navajo Nation and the federal agencies involved. That agreement seems to provide that the Navajo Nation will obtain the disputed land as tribal trust land. See Exhibit 32, Attorney General's Statement.

held that certain tribal fee land is part of a dependent Indian community.[55] Although much of the tribal fee land in the Eastern Navajo Agency may be part of particular dependent Indian communities, without more information EPA cannot determine whether all tribal fee land is part of Indian country.[56] Moreover, to make the determination that any specific parcel of tribal fee land is part of a dependent community, EPA would need to know the following: the nature of the area surrounding the land, how the land was acquired, the nature of federal supervision over the land, and its relationship to the Navajo Nation. None of this information was provided for specific parcels of land. Therefore, except for that tribal fee land that has been held to be part of Indian country[57], at this time EPA cannot determine that the Navajo Nation has jurisdiction for the purposes of section 1451 of the SDWA over tribal fee land in the Eastern Navajo Agency as described in section IV.C. of the Attorney General's Statement.

f. Other Lands in the Eastern Navajo Agency

Finally, the Navajo Nation asserts jurisdiction over all privately owned fee land and New Mexico state trust land within the Eastern Navajo Agency because virtually all of this land "falls

---

[55] United States v. Martine, 442 F.2d 1022 (10th Cir. 1971); United States v. Calladitto, No. CR 91-356, 19 Ind. L. Rep. 3057 (D.N.M. Dec. 5, 1991). The Attorney General's Statement also cites two administrative decisions under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §1201 et seq., which held that tribal fee lands were "Indian lands" under section 701(9) of SMCRA, 30 U.S.C. §1291(9). However, because the definition of "Indian lands" under SMCRA does not correspond exactly to the definition of "Indian country" and because there is no indication that the administrative decisions held that the tribal fee land was part of Indian country, EPA cannot determine that the tribal fee land in question is part of a dependent Indian community, and therefore part of Indian country.

[56] It should be noted that the mere fact of tribal ownership of fee lands does not by itself place that land within the definition of Indian country. See Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1076 (10th Cir. 1993)(holding that there must be some form of "federal government action indicating that the land is designated for use by Indians."). See also "Underground Injection Control Program for Certain Indian Lands; Final Rule" 53 Fed. Reg. 43096, 43098 (October 25, 1988)("purchase of land by Indians or Indian tribes is not alone sufficient to make the land 'Indian country'").

[57] See footnote 55, supra.

within dependent Navajo Communities."[58] For such land to be considered Indian country it must be within a "dependent Indian community."[59] Although the Attorney General's Statement contained a significant amount of general information about population, government services, and other activity within the Eastern Navajo Agency, the Statement did not provide information concerning any specific parcel of private fee land or state trust land. Before it could determine if a parcel of land is part of a dependent Indian community (and therefore is Indian country), EPA would need more information about that particular parcel of land.[60] Therefore, at this time EPA cannot determine that the Navajo Nation has demonstrated that it has jurisdiction over all of the privately owned fee land and New Mexico state trust land within the Eastern Navajo Agency as described in section IV.F. of the Attorney General's Statement.[61]

---

[58] Attorney General's Statement, p. 24.

[59] See footnote 45 and accompanying text, supra.

[60] EPA is aware that in other contexts courts have reviewed the status of particular non-Indian owned lands in the Eastern Navajo Agency. See Blatchford v. Sullivan, 904 F.2d 542 (10th Cir. 1990); Sandoval v. Tinian, Inc., 5 Nav. Rep. 215 (Window Rock D. Ct. 1986). Nonetheless, given that these decisions did not arise in the context of tribal regulatory jurisdiction, for the reasons stated in the text, EPA cannot make a determination regarding that status of these specific parcels of land for the purposes of the SDWA. See also footnote 61, infra.

[61] It is important to note that in order to establish jurisdiction for the purposes of the SDWA over non-Indian owned lands that do lie within "Indian country" in the Eastern Navajo Agency, the Navajo Nation would also need to demonstrate that underground injection by non-Indians on non-Indian owned lands would have a serious and substantial effect on the Navajo Nation and its members. See Montana v. United States, 450 U.S. 544 (1981). Citing the nature of land use and ownership in the area, the fact that the vast majority of the population in the area is Navajo, and the specific purpose of the SDWA, the Navajo Nation has asserted that underground injection on non-Indian owned lands within the Eastern Navajo Agency does have a serious and substantial effect on the health and welfare of the Navajo Nation and its members. Nonetheless, because EPA is not able to determine what private fee lands and state trust lands are within "Indian country", EPA is not determining whether or not the Navajo Nation has made the requisite showing to establish jurisdiction over non-Indian activities on non-Indian owned lands that are part of Indian country within the Eastern Navajo Agency but outside the exterior boundaries of the formal Navajo Reservation.

g. Summary

EPA has determined that the Navajo Nation has demonstrated that it has jurisdiction over much of the land in the Eastern Navajo Agency. Specifically, based on the Navajo Nation's narrative statement, the Attorney General's Statement and related exhibits, and in accordance with the general principles of federal Indian law, EPA has determined that the Navajo Nation has satisfied the third criterion for TAS under section 1451 of the SDWA with respect to all Navajo tribal trust lands, all Navajo allotments within the Eastern Navajo Agency, the three "satellite" reservations of Ramah, Canoncito, and Alamo, and tribal fee lands and federal lands that have been previously determined to be part of "Indian country." However, as described above, EPA has determined that at this time the Navajo Nation has not demonstrated that it has jurisdiction for other lands in the Eastern Navajo Agency. Particularly, at this time EPA believes that the Navajo Nation has not satisfied the third criterion for TAS under section 1451 of the SDWA for federal land and tribal fee lands (except for the lands in these categories that have already been determined to be part of "Indian country"), private fee lands, and New Mexico state trust lands within the Eastern Navajo Agency.

3. The Jurisdiction of the Navajo Nation in the Former Bennett Freeze Area

As indicated above, the Attorney General's Statement included a detailed summary of the statutory and administrative background regarding the imposition of the Bennett Freeze. In addition, the Navajo Nation has provided EPA with copies of the recent District Court opinion in Masayesva v. Zah (and related documents) as exhibits to its TAS jurisdictional assertion.

Based on the provisions of the 1974 federal statute that was enacted to limit development in the Bennett Freeze area, EPA had previously excluded the statutory freeze area from the approved portion of the Navajo Nation's TAS application to develop a PWSS program on Tribal lands. As indicated above, EPA's PWSS TAS determination concluded that since no tribe could be said to possess exclusive authority over the Bennett Freeze area:

> it would be inappropriate and contrary to Congressional intention as expressed in [25 U.S.C. §640d-9(f)] for EPA to grant Treatment as a State to any Tribe, including the Navajo Nation, for program development related to the Bennett Freeze area at this time.

Since the time of EPA's previous TAS determination, however, the United States District Court issued its opinion in Masayesva v.

Zah[62], as referenced above. That case was decided on September 25, 1992, and subsequently amended, in part, by a District Court Order dated December 18, 1992. In its pending UIC TAS application, the Navajo Nation has relied extensively on the holding in the Masayesva decision. Specifically, Attorney General Yazzie asserts that in Masayesva v. Zah, the District Court lifted the freeze with regard to the vast majority of the Bennett Freeze area, and that as a result, most of that area is now subject to the exclusive jurisdiction of the Navajo Nation. Overall, the Attorney General concludes that the Navajo Nation presently has exclusive jurisdiction over all of the former Bennett Freeze lands, with the exception of approximately 60,000 acres that were partitioned to the Hopi Tribe in the recent litigation.

Based on the information contained in the Attorney General's Statement and the District Court's opinion in Masayesva v. Zah, EPA has verified that the District Court ruling explicitly lifted the statutory freeze that was previously imposed on the Bennett Freeze lands pursuant to 25 U.S.C. §640d-9(f).[63] Since the statutory freeze is no longer generally in effect in the Bennett Freeze area, EPA's present task is to identify the specific lands within the former freeze area that are now subject to the Navajo Nation's jurisdiction for the purposes of the SDWA. EPA's determination on this issue is necessarily based on the District Court's opinion regarding the partitioning of the surface and subsurface lands of the 1934 Act Reservation between the Navajo Nation and the Hopi Tribe.

In its resolution of the Navajo-Hopi land dispute, the District Court identified specific lands that are to be partitioned to the Navajo Nation and the Hopi Tribe. The lands to be partitioned to each Tribe were discussed in Section IV of the District Court's ruling, and the partition line was identified in Appendix A to that opinion. In its ruling, the court further concluded that all of the lands that were partitioned to each Tribe were to be held in trust by the United States exclusively for that Tribe, within its designated reservation. The court further held that all of the lands that were partitioned to each Tribe pursuant to its opinion (including allotments held for individual Tribal members) "shall be subject to the jurisdiction of [that Tribe], to the same extent as is applicable to other portions of its reservation," pursuant to 25 U.S.C. §640-9(e) (emphasis added).

Based on the District Court's ruling in Masayesva v. Zah (affirming the Navajo Nation's jurisdiction over its partitioned lands), EPA has concluded that the Navajo Nation possesses adequate authority over its partitioned lands in order to be treated as a

---

[62] CIV 74 - 842 PCT EHC (D. Ariz. 1992).

[63] See page 75 of the District Court's decision.

State under section 1451 of the SDWA.[64]

Finally, it should be noted that EPA is aware of the Hopi Tribe's October 16, 1992 Motion for Partial Stay Pending Appeal, in which the Tribe argued that "the provision of the [September 25, 1992] judgment lifting the 'Bennett Freeze' restriction on construction and development within the 1934 Reservation" should be stayed pending the Hopi Tribe's appeal in this case. EPA is also aware of the District Court's December 18, 1992 Order, which partially granted the Hopi Tribe's Motion for a Stay with respect to Navajo Indians who are not presently living within the joint use area specified in that Order.

Although the December 1992 District Court Order granted the Hopi Tribe's Motion in part, EPA notes that Order was limited in scope, to prohibit new construction in the specified joint use area by non-resident Navajos only. Moreover, the Order did not otherwise attempt to limit general jurisdiction of the Navajo Nation in the areas that were partitioned to the Navajo Nation in the court's September 1992 decision, including the area covered by the partial stay. Finally, the December 1992 Order specified that the Navajo Nation "may complete any improvements within the area partitioned to it," including "facilities for electrical or water services."

Based on the limited scope of the restrictions placed on the joint use area by the December 1992 Order, EPA does not believe that Order provides a basis for EPA to exclude the specified area from the scope of the pending UIC TAS application. Furthermore, with regard to the "irreparable injury" argument set forth in the Hopi Tribe's Motion for Partial Stay, EPA does not believe that any action that might be taken by the Navajo Nation to develop an UIC program would result in serious irreparable harm to the interests of the Hopi Tribe with respect to the lands in question. In this regard, it should be noted that EPA's approval of the pending UIC TAS application will enable the Navajo Nation to obtain grant funding for the development of an UIC program. However, this approval will not authorize the Navajo Nation to assume primary enforcement or regulatory responsibility with respect to the water resources or underground injection wells that are located on Reservation lands.

Finally, as stated in EPA's previous TAS determination, the decision to grant TAS to the Navajo Nation for the above-referenced lands is based on the facts and circumstances that are known to Region IX at the present time. Therefore, EPA's decision today

---

[64] For a precise description of the lands that are to be included in the approved portion of the Navajo UIC application, see Section IV and Appendix A of the District Court's September 25, 1992 ruling.

will not affect the right or ability of the Navajo Nation or any other governmental entity, including the Hopi Tribe, to present additional facts or arguments to EPA in the future, based on new factual developments or the outcome of the pending litigation. In this regard, EPA may amend its approval of the Navajo Nation's UIC TAS application in the future as is necessary and appropriate, based on the courts' ultimate decision regarding the jurisdiction of the various Tribes with regard to the joint use area.

## IV. The Tribe Has Adequate Capability to Administer an Underground Injection Control Program on Tribal Lands

In determining whether an Indian tribe is capable of administering an effective UIC program, EPA is to consider six factors which are enumerated both in the preamble to the regulations and in the regulations themselves at 40 C.F.R. §145.56(d). Based on our review of the Navajo Nation's application for TAS under section 1451 of the SDWA, EPA has concluded that the Tribe has submitted sufficient information regarding each of the factors specified in the regulations, and therefore, that the Navajo Nation has demonstrated its capability to administer a UIC program.

Specifically, the narrative statement and attachments included in the UIC TAS application indicate that the Navajo Nation:

(1) possesses adequate general management experience to qualify for TAS, based on its previous management of a number of Federal grants and contracts;

(2) has had extensive prior involvement in a variety of environmental and public health programs, including: an air pollution control program; a pesticide enforcement program; a PWSS program; an indoor radon program; solid and hazardous waste management programs; a Superfund program; an underground storage tanks program; a water resource management program; a Women, Infants and Children (WIC) nutrition program; an emergency medical services program; and a variety of community health programs;

(3) has adopted an adequate accounting system, in accordance with general Federal requirements, and is now in the process of enacting a revised procurement code, to replace an earlier Tribal purchasing manual;

(4) has adequately described the governmental entities which exercise the executive, legislative and judicial functions of the Tribal government;

(5) has provided sufficient detail regarding the Tribal

division which will administer (and assume primary enforcement responsibility for) the Navajo Nation's UIC program, the preparations which that office has made to date for the assumption of the program, and a description of the relationship between the Navajo Nation and the owners and operators of the underground injection wells to be regulated by the Navajo Nation; and

(6) currently employs trained personnel who possess the capability to develop and administer an effective UIC program, and has developed a plan to acquire additional administrative and technical staff as needed in the future, to support the Navajo Nation's ongoing effort to administer an effective UIC program.

## V. Conclusion

Based on the administrative record established in this case, EPA has determined that the Navajo Nation has satisfied the statutory and regulatory requirements contained in section 1451 of the SDWA and 40 C.F.R. Part 145, and thereby qualifies for Treatment as a State for the purpose of administering an UIC program. Therefore, EPA Region IX hereby approves the Navajo Nation's application for TAS, subject to the jurisdictional limitations set forth in section III of this decision.

**ATTACHMENT 3**

**List of public water systems owned or operated by nonmembers and located on fee land owned by nonmembers for which EPA has determined that the Navajo Nation has demonstrated jurisdiction.**

| | Name of PWS | PWS ID # |
|---|---|---|
| 1. | Sage Memorial Hospital | AZ0400320 |
| 2. | St. Michael School | AZ0400380 |

**ATTACHMENT 4**

**List of public water systems within the Eastern Navajo Agency and the Satellite Reservations of Ramah, Alamo and Canoncito for which EPA has determined that the Navajo Nation has demonstrated its jurisdiction**

| | Name of PWS | PWS ID # |
|---|---|---|
| ---Eastern Navajo Agency--- | | |
| 1. | Smith Lake/Mariano Lake/Pinedale Comm. | NM3500211 |
| 2. | Whitehorse Lake Chapter House | NM3500238 |
| 3. | Haystack Comm./Baca | NM3500254 |
| 4. | Casamero Lake Comm. | NM3500256 |
| 5. | Iyanbito Comm. | NM3500258 |
| 6. | Church Rock Comm. | NM3500260 |
| 7. | Lake Valley Comm. | NM3500269 |
| 8. | Spencer Valley/Defiance Comm. | NM3500277 |
| 9. | Tsayahtoh Comm. | NM3500278 |
| 10. | Bread Springs/Chichiltah Comms. | NM3500292 |
| 11. | Manuelito Chapter House | NM3500295 |
| 12. | Nageezi Comm. | NM3500296 |
| 13. | Red Rock Chapter | NM3500300 |
| 14. | Thoreau West Comm./John Wiley Camp | NM3500303 |
| 15. | Whitehorse Lake Preschool | NM3500304 |
| 16. | Red Rock Comm. | NM3500335 |
| 17. | Crownpoint/Little Water/Three Mile Point | NM3503039 |
| 18. | Mulholland Well | NM3503040 |
| 19. | Ojo Encino North Comm. | NM3503041 |
| 20. | Keyah #1/NAPI Comm. | NM3503054 |
| 21. | Casmero Cup Comm. | NM3503060 |
| 22. | Carson/Huerfano Comm. | NM3503063 |
| 23. | Twin Buttes Headstart Preschool | NM3508450 |
| 24. | Mariano Lake BIA Boarding School | NM3534012 |
| 25. | Pueblo Pintado BIA Boarding School | NM3534015 |
| 26. | Crownpoint BIA Boarding School | NM3534023 |
| 27. | Dzilth-Na-O-Dith-Hle | NM3503045 |
| ---Ramah Reservation--- | | |
| 28. | Pinehill School/Pinehill Comm. | NM3500250 |
| 29. | Ramah Rural Comm. | NM3500251 |
| 30. | Sunset/Ramah Valley Comm. | NM3500279 |
| 31. | Mountain View Comm. | NM3500280 |

---Alamo Reservation---

| | | |
|---|---|---|
| 32. | Alamo Navajo School | NM3500284 |
| 33. | Alamo Comm. | NM3500285 |
| 34. | Alamo Springs Comm. | NM3500286 |
| 35. | Chavez Springs Comm. | NM3500329 |

---Canoncito Reservation---

| | | |
|---|---|---|
| 36. | Canoncito Comm. | NM3500287 |
| 37. | Canoncito BIA Boarding School | NM3534025 |

## ATTACHMENT 5

**List of public water systems for which EPA is not making a determination regarding the jurisdiction of the Navajo Nation at this time**

| | Name of PWS | PWS ID # |
|---|---|---|
| | **Within the "Bennett Freeze"** | |
| 1. | Tuba City Comm. | AZ0400206 |
| 2. | Van Zee Comm. | AZ0403007 |
| 3. | Moenave Comm. | AZ0403008 |
| 4. | Gap/Cedar Ridge/Bittersprings Comms. | AZ0403009 |
| 5. | Cameron Comm. | AZ0403010 |
| 6. | Black Mesa Pipeline/Grey Mountain | AZ0403051 |
| 7. | Western Nav. Agency BIA HQ/Tuba City BIA School | AZ0433001 |
| 8. | Cameron Elementary School | AZ0403011 |
| 9. | Cameron Trading Post | No ID # |
| | **Within the Eastern Navajo Agency** | |
| 1. | Rock Springs Comm. | NM3500302 |
| 2. | Baca Comm. | NM3500331 |
| 3. | Prewitt Comm./Baca | NM3503036 |
| 4. | Torreon/Ojo Encino Comm. | NM3503042 |
| 5. | La Vida Mission | NM3503076 |
| 6. | Eastern Navajo Agency BIA Headquarters | NM3534001 |
| 7. | Baca BIA Comm. School | NM3534002 |
| 8. | Borrego Pass BIA Day School | NM3534003 |
| 9. | Bread Springs BIA Day School | NM3534004 |
| 10. | Chichiltah BIA Day School | NM3534005 |
| 11. | Huerfano BIA Dormitory School | NM3534006 |
| 12. | Lake Valley BIA Boarding School | NM3534010 |
| 13. | Ojo Encino BIA Day School | NM3534013 |
| 14. | Thoreau BIA Boarding School | NM3534017 |
| 15. | Torreon BIA Boarding School | NM3534018 |
| 16. | Fort Wingate BIA Elementary School | NM3534020 |
| 17. | Fort Wingate BIA High School | NM3534021 |
| 18. | Dzilhnaoditl BIA Boarding School | NM3534024 |
| | **Within the formal Navajo Reservation** | |
| 1. | Speedy's Truck Stop | No ID # |
| 2. | Navajo Generating Station | AZ0400402 |
| 3. | Four Corners Power Plant | NM3500333 |