CMA-16-64

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Arizona, at which a quorum was present and that same was passed by a vote of 63 in favor and 0 opposed this 4th day of March, 1964.

Nelson Harrison

Vice Chairman
Navajo Tribal Council

CN-59-59

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Crownpoint and Church Rock-Two Wells Land Acquisitions

WHEREAS:

1. It was proposed in Senate Bill 2307, introduced June 30, 1959, to transfer 81 acres more or less at Crownpoint, New Mexico to the Tribe in trust status, consisting of land upon which community facilities are located and a dormitory built by the Tribe.

2. A proposal of the Department of the Interior for land exchange between the Tribe and the United States Government entitled the Church Rock-Two Wells Land Exchange, heretofore approved by Council Resolution CM-36-56, contemplates transfer to the Tribe of approximately 250,000 acres by the United States Government in trust status and therefore tax free.

3. The Tribe has purchased the Sargent Ranch and other ranch properties in New Mexico and Arizona in fee simple and pays taxes thereon to the respective states and it would be in the best interest of the Tribe and the State and county government in which the aforesaid properties lie for the Tribe to invite the conveyance of the Crownpoint tract and the Church Rock-Two Wells lands from the United States to the Tribe in fee simple subject to taxes and not in trust.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribe will gladly accept fee simple title to the lands which are transferred to it at Crownpoint and under the Church Rock-Two Wells exchange and will pay the taxes lawfully levied thereon by the States in which said lands lie.

2. The Chairman be and he hereby is requested to convey a copy of this resolution to the appropriate committees of Congress with the request that appropriate legislation authorizing the foregoing transfer be enacted at the earliest practicable date.

CN-59-57

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Arizona, at which a quorum was present, and that same was passed by a vote of 61 in favor and 1 opposed, this 10th day of November, 1959.

Scott Preston
Vice - Chairman
Navajo Tribal Council

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Accepting Churchrock-Two Wells Land Grant in Fee Simple and Waiving Claim Therefor

WHEREAS:

1. The Council has heretofore approved by Council Resolution CM-36-56 on May 24, 1956 the exchange of lands with the Federal Government whereby approximately 17,000 acres of Tribal land in the Crownpoint area would be exchanged for approximately 250,000 acres of public lands of the United States in the Churchrock-Two Wells area, but there is now a possibility of receiving from the Federal Government a grant of said public lands without surrendering Tribal lands as contemplated by said Council resolution, providing the Tribe will accept these lands in fee simple and not include the area in Tribal Claims,

2. It is in the best interest of the Tribe to accept said proposal if tendered by Congress.

NOW THEREFORE BE IT RESOLVED THAT:

1. With the understanding that no Tribal lands are to be surrendered to the Federal Government, the Navajo Tribe will gladly accept fee simple title to the public lands as previously proposed in the Churchrock-Two Wells land exchange, will pay taxes lawfully levied thereon by the states in which the lands lie, and will waive claim for such area in the Tribal Claim pending before the Indian Claims Commission.

2. The Chairman be and he hereby is requested to convey a copy of this resolution to the appropriate committees of Congress with the request that appropriate legislation authorizing the foregoing transfer under the above conditions be enacted at the earliest practicable date.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting

CJA-5-60

at Window Rock, Arizona, at which a quorum was present and that same was passed by a vote of 60 in favor and 0 opposed, this 14th day of January, 1960.

Vice - Chairman
Navajo Tribal Council

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

Regarding the Proposed Church Rock-Two Wells Land Adjustment

WHEREAS:

1. The Council has heretofore approved the proposed Church Rock-Two Wells land adjustment by resolution of May 24, 1956 (CM-36-56) and, by resolution of May 8, 1957 (CM-45-57) reaffirmed its approval of said land adjustment but requested delay providing further study by the Tribe, and

2. The Bureau of Land Management has held up many applications for public lands to be involved in the exchange pending submission of legislation which the Bureau now proposes to submit to Congress and it is in the best interests of the Tribe to participate insofar as possible in drafting said legislation.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Chairman be and he hereby is authorized and instructed by and with the approval of the Advisory Committee, to suggest amendments and approve a form of bill (now being drafted by the Bureau of Land Management), for submission to this Congress, to complete the proposed Church Rock-Two Wells land adjustment as heretofore approved by this Council by Resolutions No. CM-36-56 and No. CM-45-57, subject to any other terms and conditions which the Chairman and the Advisory Committee may approve in the best interests of the Tribe and the Navajos affected thereby.

2. The Chairman be and he hereby is authorized, empowered and directed to do any and all things necessary, incidental and advisable to carry out the purposes of this resolution.

CF-6-58

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Arizona, at which a quorum was present, and that same was approved by a vote of 65 in favor and 5 opposed this 7th day of February, 1958.

Chairman
Navajo Tribal Council

EXECUTIVE ORDER

[No. 2513]

It is hereby ordered that the following described lands situated in the State of New Mexico, which belong to or may hereafter be acquired by the United States, are hereby withdrawn from settlement and sale and are set apart for the use and occupancy of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon:

Township 15 N., Range 10 W.
S. 1/2, Sec. 1; W. 1/2 and SE. 1/4, Sec. 3; all of Sec. 11; E. 1/2, Sec. 15; N. 1/2 and SW. 1/4, Sec. 21; W. 1/2 and SE. 1/4, Sec. 31.

Township 16 N., Range 10 W.
W. 1/2, Sec. 7; N. 1/2 and SW. 1/4, Sec. 19.

Township 15 N., R. 11 W.
All of Sec. 5; W. 1/2 and SE. 1/4, Sec. 7; SW. 1/4, Sec. 15; all of Sec. 17; SW. 1/4, Sec. 23; all of Sec. 27; all of Sec. 35.

Township 16 N., Range 11 W.
E. 1/2 and SW. 1/4, Sec. 1; all of Sec. 5; all of Sec. 7; all of Sec. 9; all of Sec. 13; all of Sec. 15; all of Sec. 17; SW. 1/4, Sec. 19; N. 1/2, Sec. 21.

Township 17 N., Range 11 W.
All of Sec. 25.

Township 18 N., Range 11 W.
All of Sec. 17.

Township 15 N., Range 12 W.
All of Sec. 5; all of Sec. 7; all of Sec. 9; all of Sec. 19; all of Sec. 21; all of Sec. 25; all of Sec. 27; all of Sec. 29; all of Sec. 31.

Township 16 N., Range 12 W.
S. 1/2, Sec. 1; E. 1/2, Sec. 11; N. 1/2 and SE. 1/4, Sec. 13; W. 1/2 SE. 1/4, and E. 1/2 SW 1/4, Sec. 15; N. 1/2 NW. 1/4, Sec. 21; all of Sec. 31; NW. 1/4 and SW. 1/4, Sec. 35.

Township 17 N., Range 12 W.
S. 1/2, Sec. 21; all of Sec. 27; E. 1/2, Sec. 29; all of Sec. 33; NW. 1/4, Sec. 35.

Township 19 N., Range 12 W.
All of Sec. 25.

Township 15 N., Range 13 W.
All of Sec. 7; all of Sec. 15; all of Sec. 17; all of Sec. 23.

Township 17 N., Range 13 W.
NE. 1/4, Sec. 1; SE. 1/4, Sec. 7; all of Sec. 9; all of Sec. 11; W. 1/2 and SE. 1/4, Sec. 13; all of Sec.

15; all of Sec. 17; all of Sec. 21; all of Sec. 23; N. 1/2, Sec. 25; N. 1/2, Sec. 27; NE. 1/4, Sec. 29.

Township 19 N., Range 13 W.,

All of Sec. 5; all of Sec. 7; N. 1/2 and SW 1/4, Sec. 9; all of Sec. 17; N. 1/2, Sec. 23; N. 1/2 and SE. 1/4, Sec. 27; all of Sec. 31.

Township 15 N., Range 14 W.

All of Sec. 1; NE. 1/4, Sec. 7; all of Sec. 11; NW. 1/4, Sec. 19; Sec. 21; all of Sec. 23; N. 1/2, Sec. 31; N. 1/2, Sec. 33.

Township 16 N., Range 14 W.

S. 1/2, Sec. 15; E. 1/2, Sec. 31; SE. 1/4, Sec. 33.

Township 16 N., Range 15 W.

W. 1/2, Sec. 13; SW. 1/4, Sec. 17; NE. 1/4, Sec. 19; all of Sec. 25; E. 1/2 and SW. 1/4, Sec. 27.

Township 16 N., Range 16 W.

NE. 1/4 and SW. 1/4, Sec. 15; all of Sec. 23; SE. 1/4, Sec. 35.

Township 17 N., Range 16 W.

S. 1/2, Sec. 31.

Township 16 N., Range 17 W.

All of Sec. 5; all of Sec. 17; E. 1/2, SW. 1/4 and E. 1/2 NW. 1/4, Sec. 23; all of Sec. 25; all of Sec. 27; all of Sec. 29; W. 1/2, Sec. 33; all of Sec. 35.

Township 16 N., Range 18 W.

N. 1/2, Sec. 3; W. 1/2 and SE. 1/4, Sec. 17; NW. 1/4, Sec. 29.

Township 17 N., Range 18 W.

SE. 1/4, Sec. 33.

Township 16 N., Range 19 W.

W. 1/2 and SE. 1/4, Sec. 3; NE. 1/4, Sec. 25.

Woodrow Wilson

The White House
15 January, 1917.

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

UNITED NUCLEAR CORPORATION, Appellant,	)	
vs.	)	No. CV 92-72
ELUID L. MARTINEZ, NEW MEXICO STATE ENGINEER, Appellee.	)	
and	)	
THE NAVAJO NATION, Appellee.	)	

AFFIDAVIT OF SADIE HOSKIE

I, Sadie Hoskie, being first duly sworn, state that:

1. I am the Director of the Navajo Nation Environmental Protection Agency ("Navajo Nation EPA"), an agency within the executive branch of the Navajo Nation government.

2. The Navajo Nation EPA is responsible for protecting and preserving the quality of the Navajo Nation environment and for protecting the public health and welfare of the residents of the Navajo Nation. The Navajo EPA is subdivided into several programs, many of which involve water resources and riparian areas.

3. One program is the Public Water Systems Supervision Program ("PWSS"), which enforces the Public Water Systems Supervision Code and regulations. The Code and regulations were enacted to ensure that public water system owners and operators provide clean, high quality drinking water to residents of the Navajo Nation. The PWSS Program obtained "treatment as a state"

status under the federal Safe Drinking Water Act in 1991. The PWSS Program is funded by the United States Environmental Protection Agency ("USEPA") and the Navajo Nation. The PWSS Program's budget for the current fiscal year is $266,820, with the USEPA providing $200,000 and the Nation providing $66,820. In addition, the PWSS Program receives technical assistance from the U.S. Indian Health Service.

4. Another Navajo Nation EPA program is the Groundwater Pollution Control Program ("GPCP"). The GPCP's primary purpose is to ensure that underground sources of drinking water are protected from contamination caused by drilling, construction, and operation of injection wells and by surface discharge, disposal, or storage of contaminants. It regulates all classes of injection wells, monitors the closure of unlined pits used for the discharge of oil and gas waste, and performs related groundwater protection activities. The records of this program reveal that there are approximately 650 Class II injection wells and about 1000 unlined pits on Navajo lands. The GPCP staff works closely with the USEPA, which retains enforcement authority under the federal Safe Drinking Water Act over Navajo Indian lands, to ensure that federal and tribal requirements are met by conducting site inspections, witnessing mechanical integrity testing, plugging and abandonment of Class II injection wells, monitoring pit closure activities, and assisting the USEPA in federal enforcement actions. The GPCP is in the process of applying to the USEPA for "treatment as a state" status under the Safe Drinking Water Act, and plans to apply in the

future for primary enforcement authority of the Act on the Navajo Nation. The GPCP is funded by the USEPA and the Navajo Nation. The total budget for the current fiscal year is $177,422, with $168,061 provided by USEPA and $9,361 provided by the Nation.

5. The Navajo EPA also has a Water Quality Program, which is responsible for collecting surface water quality data and developing tribal water quality standards which meet the requirements of the federal Clean Water Act. This program is entirely funded by the USEPA through a grant under §106 of the Clean Water Act, which equals $170,000 in the current fiscal year. The Nation obtained "treatment as a state" status for §106 purposes for all lands within the formal reservation boundaries, as well as for all Navajo tribal trust lands located outside the formal reservation, from USEPA in 1993.

6. Another Navajo EPA Program, the National Pollutant Discharge Elimination System (NPDES) Program, is in the process of applying to the USEPA for both "treatment as a state" status and program authority for NPDES and sludge management pursuant to the federal Clean Water Act. The NPDES portion of the Clean Water Act regulates the discharge of pollutants into surface waters from point sources (i.e. specific, identifiable polluters) and the application and disposal of sewage sludge. The tribal NPDES Program is federally funded through a grant from the USEPA which totals $135,747 in the current fiscal year, and which will increase to $269,126 in federal FY 1995.

7. In addition to providing federal funding, the USEPA has assisted the Navajo EPA through training of tribal staff, "loaning" federal employees to the Nation to assist with drafting codes and regulations, program operation, and other related activities.

8. I know the above facts on my personal knowledge and they are true to the best of my knowledge, information, and belief.

SADIE HOSKIE

STATE OF ARIZONA }
} ss
COUNTY OF APACHE }

SUBSCRIBED AND SWORN TO before me this 19th day of August, 1994.

Notary Public

My Commission Expires:
My Commission Expires June 28, 1997

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

UNITED NUCLEAR CORPORATION, Appellant,	)	
vs.	)	No. CV 92-72
ELUID L. MARTINEZ, NEW MEXICO STATE ENGINEER, Appellee.	)	
and	)	
THE NAVAJO NATION, Appellee.	)	

Affidavit of Johnnie D. Francis

I, Johnnie D. Francis, being first duly sworn, state that:

1. I am the Director of the Water Development and Maintenance Department, an agency of the executive branch of the Navajo Nation government.

2. The Water Development and Maintenance Department is responsible for constructing, operating, and maintaining wells, windmills, dams, catchments, stock ponds, water storage tanks, and similar structures for livestock, irrigated agriculture, and some domestic water uses. It provides engineering and geohydrologic feasibility reports, engineering designs, and related costs estimates for proposed water development projects. The Department also operates and maintains all tribal irrigation projects, and is responsible for the rehabilitation of 12 major and many other minor dams.

3. To carry out its functions, the Department employs professional, technical, and support staff organized into four branches: the Technical Support Services Branch, the Construction Support Services Branch, the Operations and Maintenance Branch, and the Safety of Dams Program. Each is further subdivided into sections and agency offices. A copy of the current organizational chart is attached as "Attachment A."

4. The Department coordinates with and works closely with federal agencies such as the United States Bureau of Reclamation and the Bureau of Indian Affairs in carrying out its duties to ensure uniform tribal/federal development of the Navajo Nation's water resources.

5. The Bureau of Reclamation and the Bureau of Indian Affairs have provided and continue to provide considerable financial assistance to the Navajo Nation for development and maintenance of water projects. In addition, both agencies have provided nonfinancial technical assistance and training to tribal staff.

6. The total budget for the Department of Water Development and Maintenance for the current tribal fiscal year (FY 1995) is $5,265,777.00. Of this amount, $720,093.00 was provided by the Bureau of Indian Affairs pursuant to a contract authorized by the Public Law 93-638, the Indian Self-Determination and Education Act of 1975. $237,908.00 was provided by the U.S. Department of Health and Human Services in community development block grant funds pursuant to Public Law 97-35, and $144,000 was

provided by the U.S. Bureau of Reclamation for the rehabilitation of the Shiprock Irrigation Projects. In all, the United States has provided $1,102,001.00 to the Department in the current fiscal year.

7. I know the above facts on my personal knowledge and they are true and accurate to the best of my knowledge, information, and belief.

Johnnie D. Francis
JOHNNIE D. FRANCIS

STATE OF ARIZONA }
} ss
COUNTY OF APACHE }

SUBSCRIBED AND SWORN TO before me this 22nd day of August, 1994.

Betty A. Tullis
Notary Public

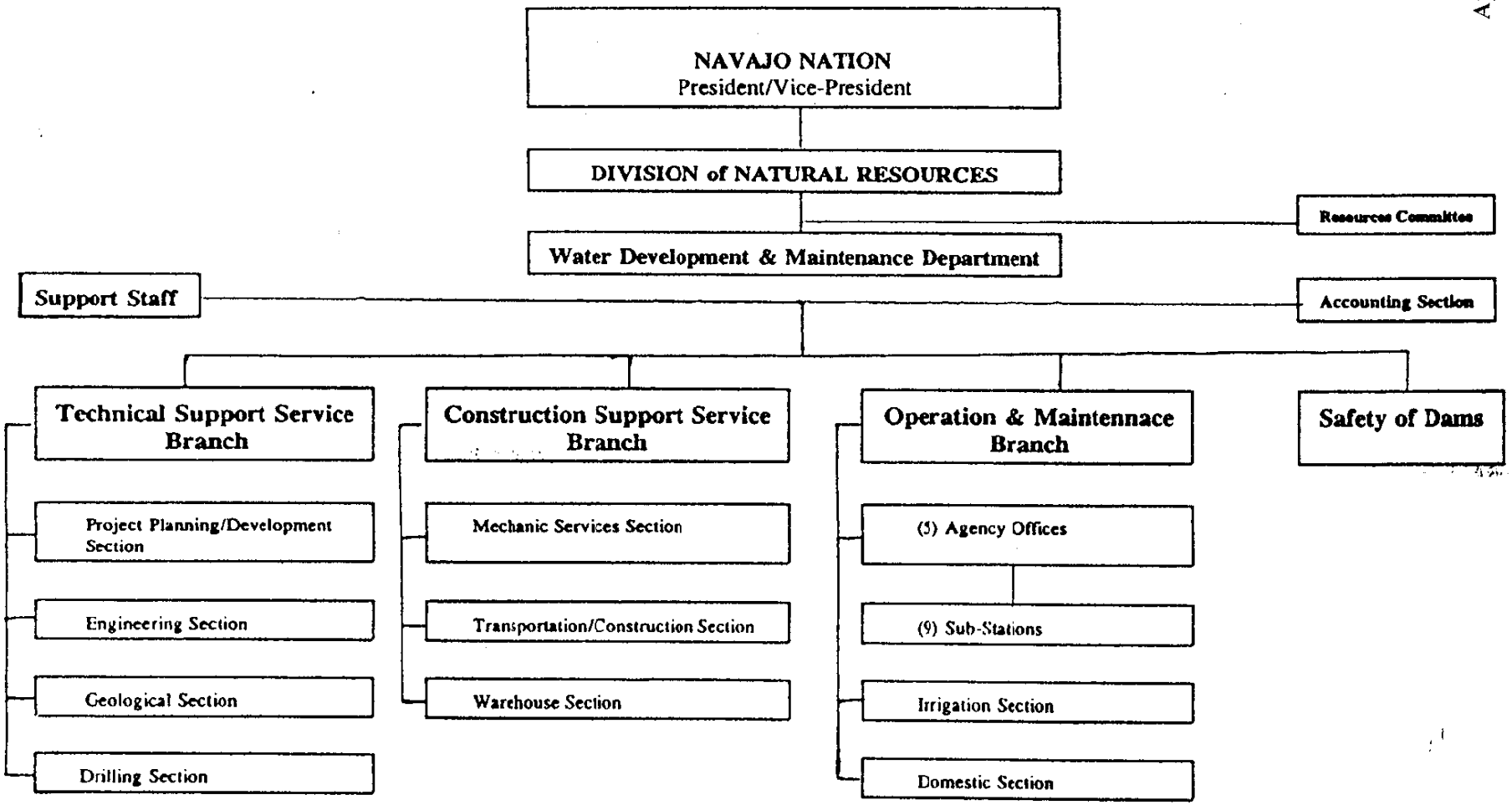
My Commission Expires:

June 24, 1997

OMB.303.95
Executive/Natural Resources
BRANCH/DIVISION

NAVAJO NATION
Organizational Chart

Exhibit "A"



ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

UNITED NUCLEAR CORPORATION,

Appellant,

vs. No. CV 92-72

ELUID L. MARTINEZ, NEW MEXICO
STATE ENGINEER,

Appellee,

THE NAVAJO NATION,

Appellee.

AFFIDAVIT OF MARK LEUTBECKER

I, Mark Leutbecker, being duly sworn, depose and state:

1. I am the historical researcher working for the Navajo Nation in the above-entitled cause of action. This affidavit supplements the affidavit I executed on April 4, 1995, which I understand was submitted as exhibit 1 to the Navajo Nation's Supplemental Authority.

2. As I stated in my earlier affidavit, section 17 of township 16 north, range 16 west, N.M.P.M., was acquired by the United States in trust for the Navajo Tribe under the Act of May 29, 1928, ch. 853, 45 Stat. 883, 899-900 (the "1928 Act"). The purpose of this affidavit is to present the factual context for the 1928 Act.

3. In the early 1900s, non-Indian, non-resident livestock growers were using what is now the Eastern Navajo Agency for seasonal forage, decimating the range and damaging the water holes. The Indian Service sought to protect the resident Navajos, who

had lived in the area for decades. On September 14, 1907, Navajo Superintendent William Harrison wrote to the Commissioner of Indian Affairs, recommending the addition of a tract of land which includes the section 17 land to the Navajo reservation in light of the "many springs and valuable watering places" there. On November 6, 1907, the Commissioner recommended to the Secretary of the Interior that such an addition be made, referencing Harrison's letter and stating that "[s]ince the advent of the railroad in this vicinity white and Mexican sheep and cattle men are appropriating all the available watering places that have been used by these Indians for generations . . .." On November 8, 1907, the Secretary recommended the addition to President Theodore Roosevelt, relying on Harrison's and the Commissioner's letters. Executive Order 709 (Nov. 9, 1907) resulted. See also Annual Report of the Commissioner of Indian Affairs (1908) at 94; Annual Report of the Commissioner of Indian Affairs (1909) at 70-71; Memorandum dated May 1, 1908 from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, at 1.

4. In section 25 of the Act of May 29, 1908, ch. 216, 35 Stat. 444, 457, Congress authorized allotments to be made in the area. The allotment process was thought to be one way to protect the Indians and the allotting agents attempted to grant allotments where water resources existed. Problems developed, however, because many of the springs and water holes were located on lands claimed by the Santa Fe Railroad. Letter dated February 13, 1917 from Commissioner of Indian Affairs to Secretary, at 3-4. The Railroad had sought to exchange lands in the area for others elsewhere under a 1904 act of Congress, but the exchange had not been consummated. Thus, allotting agents were

given instructions to determine the priority of the Indians' and the Railroad's claimed rights to odd-numbered sections where the Railroad asserted ownership. See letter dated April 29, 1908 from Acting Commissioner of Indian Affairs to William M. Peterson, Special Allotting Agent.

5. The allotting agents had trouble with these instructions. See letter dated February 24, 1909 from C.F. Hauke, Land Division, to Joseph G. Kent, Special Allotting Agent, at 2; letter dated May 24, 1909 from C.F. Hauke to Joseph G. Kent; letter dated October 17, 1909 from Joseph G. Kent to Commissioner of Indian Affairs; letter dated July 7, 1910 from C.F. Hauke to Joseph G. Kent.

6. The non-resident stockmen sought to lease the "railroad land," and the Indian Service was concerned that the allotments that had been approved on the adjacent lands would be "practically worthless if the Indians cannot control the range adjoining them." Letter dated February 21, 1910 from Superintendent S.F. Stacher to Commissioner of Indian Affairs, at 2 (emphasis deleted). The leasing of the railroad land to non-Indians was recognized to pose a serious problem for the Navajos. See letter dated December 12, 1910 from Senator Charles Curtis to the Commissioner of Indian Affairs; Letter dated August 8, 1916 from Superintendent Stacher to Commissioner of Indian Affairs.

7. The First Assistant Secretary received on March 23, 1910 a schedule of 226 allotments on railroad land and a letter from Hauke recommending that the General Land Office pursue exchanges with the Railroad under the 1904 Act. This recommendation was approved by the First Assistant Secretary that day.

8. Around this time, the Department of the Interior completed an irrigation project at Seven Lakes, within the Eastern Navajo Agency. Annual Report of the Commissioner of Indian Affairs (1910) at 2-3. From 1919 to 1927, Congress appropriated funds for water development in the Pueblo Bonito (now Eastern Navajo) Agency in New Mexico.

9. Unallotted lands in the Executive Order 709 area were restored to the public domain in 1908 and 1911 by Executive Orders 1000 and 1284. This caused uncertainty with respect to the legality of consummating the exchanges with the railroad under the 1904 Act, which contemplated exchanges of lands within existing Indian reservations. Initially, the First Assistant Secretary took the position that the land exchanges could be consummated under the 1904 Act, notwithstanding the restoration orders. Letter dated February 16, 1911 from First Assistant Secretary to Commissioner of the General Land Office. Ultimately, however, the Acting Secretary of the Interior recommended the promulgation of an executive order re-reserving certain odd-numbered sections "to obviate any question as to the legality" of the exchanges. Letter dated February 16, 1912 from Acting Secretary to the President. Executive Order No. 1483 (Feb. 17, 1912) was thereupon promulgated. See also Decision dated Feb. 24, 1912 of First Assistant Secretary entitled "Appeal from the General Land Office" (reversing decision of GLO rejecting exchange application); letter dated March 1, 1912 from Commissioner of GLO to Register and Receiver.

10. Similarly, the 226 allotments on railroad land that were the subject of the March 23, 1910 instructions referred to above had not been patented in 1916 due to

conflicts with railroad claims. Again, the initial determination was that exchanges for these lands could be consummated under the 1904 Act, notwithstanding the restoration orders in 1908 and 1911. Letter dated May 20, 1916 from Commissioner of Indian Affairs to Secretary of the Interior. The legality of so doing was under consideration in August of that year. Letter dated August 17, 1916 from C.F. Hauke to Superintendent Stacher. The May 20, 1916 letter continued to guide the Assistant Commissioner of Indian Affairs. Letter dated November 6, 1916 from Assistant Commissioner to Secretary. Ultimately, the Secretary recommended to President Wilson that another executive order be promulgated. Letter dated January 12, 1917 from Secretary of the Interior to the President. Executive Order No. 2513 (Jan. 15, 1917) resulted.

11. Even after the promulgation of Executive Order Nos. 1483 and 2513, the problems with the allotments and railroad claims persisted. Letter dated February 13, 1917 from Commissioner of Indian Affairs to Secretary of the Interior, at 7-11.

12. A more general solution was sought. As a result, Congress passed the act of March 3, 1921, ch. 119, 41 Stat. 1225, 1239, authorizing exchanges of land in McKinley, Valencia and San Juan Counties, New Mexico. See generally Letter dated July 10, 1929 from Superintendent Stacher to Commissioner of Indian Affairs. Finally, for purposes of the section 17 acquisition, Congress authorized the purchase of these lands in trust for the Navajo Tribe using tribal funds. Letter dated July 10, 1929 from Stacher to Commissioner; Memorandum dated August 12, 1931 from J.M. Stewart, Land Division, to Commissioner, at 2-3.

13. Copies of the documents referred to in this affidavit are attached hereto in chronological order. They are true and correct copies of documents located in the National Archives, or in other repositories of Government documents.

14. I know the above facts on my personal knowledge and they are true to the best of my information and belief.

Mark Leutbecker
MARK LEUTBECKER

SUBSCRIBED AND SWORN TO before me this 27th day of April, 1995.

Notary Public

My Commission Expires:
10-25-97

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

UNITED NUCLEAR CORPORATION, Appellant,	)	
vs.	)	No. CV 92-72
ELUID L. MARTINEZ, NEW MEXICO STATE ENGINEER, Appellee.	)	
and	)	
THE NAVAJO NATION, Appellee.	)	

AFFIDAVIT OF GENEVIEVE DENETSONE

I, Genevieve Denetsone, being first duly sworn, state that:

1. I am the Area Realty Officer, Navajo Area Office, Bureau of Indian Affairs, United States Department of the Interior.

2. In my official capacity, I maintain official records of the Bureau of Indian Affairs concerning the use of all land and resources owned in trust by the United States for the Navajo Nation or its members, including lands located in the Eastern Navajo Agency. I am also responsible for overseeing all permitting, leasing, licensing, and other procedures allowing the use of trust land and resources, to ensure compliance with federal laws and to ensure that the federal trust responsibility over Navajo Nation property is fulfilled.

3. 25 U.S.C. §177 prohibits the acquisition of any interest in tribal trust lands without the express authorization of

Congress. Specific authorizations are set forth in Title 25 of the United States Code. The regulations implementing this title are found in Volume 25 of the Code of Federal Regulations. It is not possible to obtain any interest in trust land or resources except in compliance with the procedures provided in the federal laws and regulations.

4. The provisions in Title 25 of the United States Code and Volume 25 of the Code of Federal Regulations concerning the acquistion of interests in trust property apply equally to all tribal trust land regardless of their location.

5. The Bureau of Indian Affairs (BIA) actively oversees and regulates the acquistion of interests in and the use of the trust property described as Section 17, T16N, R16W, N.M.P.M., as required by federal law. The BIA provides the same federal oversight and applies the same statutory and regulatory requirements concerning the acquistion of interests in Section 17 as it does to analogous land within the formal 1880 reservation boundaries.

6. I have reviewed the records of the BIA and my review reveals that the BIA has approved the following leases, rights of way, permits, and other agreements concerning Section 17: three leases for electrical powerline purposes (one of which serves the United Nuclear Corporation mine) to the Public Service Company of New Mexico; one lease to the United States Public Health Service, Indian Health Service, for facilities associated with the Church Rock public water supply system; one easement for right of way for

a natural gas pipeline to the Transwestern Pipeline Company; one easement for right of way for a telephone and telegraph line to the Mountain States Telephone and Telegraph Company; one surface use agreement with the Santa Fe Pacific Railroad Company concerning use of the surface for mining purposes; and four grazing permits to 20 Navajo Indian individuals.

7. I know the above facts on my personal knowledge and they are true and accurate to the best of my knowledge, information, and belief.

Genevieve Denetsone
GENEVIEVE DENETSONE

STATE OF ARIZONA }
} ss
COUNTY OF APACHE }

SUBSCRIBED AND SWORN TO before me this 19th day of August, 1994.

Katherine J. Perkins
Notary Public

My Commission Expires:
December 31, 1994

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

UNITED NUCLEAR CORPORATION, Appellant,	)	
vs.	)	No. CV 92-72
ELUID L. MARTINEZ, NEW MEXICO STATE ENGINEER, Appellee.	)	
and	)	
THE NAVAJO NATION, Appellee.	)	

AFFIDAVIT OF TERESA SHOWA

I, Teresa Showa, being first duly sworn, state that:

1. I am the Director of the Department of Water Resources Management, an agency of the executive branch of the Navajo Nation government.

2. The Department of Water Resources Management employs a staff of approximately 40 employees, consisting of hydrologists, engineers, a climatologist, computer specialists, administrators, technicians, tribal rangers, and support staff.

3. The budget of the Department of Water Resources Management for the current tribal fiscal year (FY 1995) totals $2,369,470. Of that amount, $1,519,834 is provided by the Bureau of Indian Affairs through two contracts entered pursuant to Public Law 93-638, the Indian Self-Determination and Education Act of 1975, 25 U.S.C. §§ 450a-450n. The two federal contracts fund the Department to conduct a water monitoring and inventory program and

to supply technical support for the Navajo Nation's water rights claims in the Little Colorado River water rights adjudication now pending in Arizona state district court.

4. As part of its duties, the Department is responsible for implementing the Navajo Nation Water Code, 22 N.T.C. §§ 1101 et seq. The Department contains a Water Code Section comprised of an administrator, a hydrologist, an engineer, technicians, tribal rangers, and support staff, which is primarily responsible for Water Code administration and enforcement. In the last tribal fiscal year, which ended on March 31, 1994, the Department processed 239 water use permit applications and 117 well drilling permit applications. Processing water use permit applications involves an initial administrative review to make sure the filing fee has been paid and the application is complete. The application then undergoes a technical review to determine whether sufficient water exists to supply the proposed use, to assess the impacts of the proposed water use on existing uses, on water quality, and on environmental quality, and to determine whether the proposed use is compatible with tribal law and policy. As a result of its review, the Water Code Section recommends either approval or denial to me. A Department of Justice attorney and the Director of the Division of Natural Resources review and make recommendations on the application as well. The Department of Water Resources Management either approves or denies the application.

5. The Department is also responsible for enforcing the requirements of the Water Code through judicial or other means. For

example, one enforcement action is currently pending in the Navajo Nation district court, while another was settled without court action in 1993.

6. In addition to the duties imposed by the Water Code, the Department is responsible for, among other things, quantifying the surface and ground water resources of the Navajo Nation through stream gaging and groundwater monitoring, conducting a hydrographic survey of existing and historic water uses in the portion of the Little Colorado River basin within the Nation, inventorying and computerizing information concerning all municipal water supply systems on the Nation, providing technical support for the Nation's and the City of Gallup's cooperative effort to develop the Gallup-Navajo Pipeline, maintaining the Nation's network of climate stations, precipitation gages and snow survey stations and incorporating the data obtained into a computerized climate data base, developing watershed restoration plans, maintaining a water resources library, providing technical assistance and information to other tribal, state, and federal agencies as requested, and entering as much information as possible concerning water resources on the Navajo Nation into a computerized data base and where appropriate, into Geographic Information System form (including selected information from the water use permits issued pursuant to the Water Code).

7. In carrying out its duties, the Department of Water Resources Management coordinates with federal agencies such as the Bureau of Indian Affairs, the Geological Survey, the Soil

Conservation Service, the Bureau of Reclamation, and others as needed.

8. As part of the official records of the Navajo Nation, the Department of Water Resources Management maintains computerized records of tribal wells and public water supply systems. My review of these records reveals that there are 14 tribally-owned wells in the Church Rock Chapter, not including Navajo Tribal Utilities Authority (NTUA) wells. In addition, the records show there is one public water supply system operated by the NTUA in the Church Rock Chapter, which diverts water from 6 wells, and 21 NTUA public water supply systems utilizing 37 wells in the Eastern Navajo Agency outside the formal reservation boundary established by the Executive Order of 1880.

9. I know the above facts on my personal knowledge and they are true and accurate to the best of my knowledge, information, and belief.

Teresa Showa
TERESA SHOWA

STATE OF ARIZONA }
} ss
COUNTY OF APACHE }

SUBSCRIBED AND SWORN TO before me this 19th day of August, 1994.

Shelly M. Jackson
Notary Public

My Commission Expires:
My Commission Expires Oct. 5, 1994

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

112

SEP 20 1994

OFFICE OF THE
REGIONAL ADMINISTRATOR

Mr. Peterson Zah
President
The Navajo Nation
P.O. Box 308
Window Rock, Arizona 86515

Dear Mr. Zah:

This letter is to formally announce our Agency's approval of the Navajo Nation's application for Treatment as a State with respect to the Underground Injection Control Program under Section 1451 of the Safe Drinking Water Act. Our approval extends to all lands located within the exterior boundaries of the Navajo Reservation (including the portion of the former "Bennett Freeze" area that was partitioned to the Navajo Nation), all lands within the three "satellite" reservations of Ramah, Canoncito, and Alamo, and the following lands located outside the boundaries of the formal Navajo Reservation within the Eastern Navajo Agency: all Navajo tribal trust lands, all Navajo allotments, and all tribal fee lands and federal lands that have been previously determined to be part of "Indian Country." However, EPA has determined that at this time the Navajo Nation has not demonstrated the requisite jurisdiction for other lands outside the exterior boundaries of the Navajo Reservation within the Eastern Navajo Agency. Please refer to Enclosure A for a discussion of the jurisdictional limitations of our approval.

As you may be aware, the approval of your Tribe's application constitutes the first Treatment as a State approval for the Underground Injection Control Program which has occurred within our Region. Your staff is to be commended for their very fine effort in developing a thorough Treatment as a State application.

Our approval makes the Tribe (Navajo EPA) eligible for four (4) years of developmental funds. These cooperative agreements are to be used to develop the regulatory program necessary to meet the minimum requirements for EPA to delegate primary enforcement responsibility (primacy) to the Tribe. Concurrently with this letter, a workplan approval letter and award offer are being sent to the Director of the Navajo Environmental Protection Agency. The Tribe will be eligible for additional annual grants once it has met the program requirements and EPA has granted primacy. We are looking forward to the Tribe assuming program responsibility and will be working with your staff to assist in the development of program capabilities.

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I would be pleased to speak with you and your staff regarding EPA's partnership with the Navajo Nation. Please contact me or Laura Loux (415) 744-1004 of my staff to coordinate arrangements for such a meeting. We welcome the opportunity to celebrate this achievement with you, and look forward to working with you to protect groundwater for the Navajo Nation.

Yours,

Felicia Marcus
Regional Administrator

Enclosure

cc: See Enclosed List

Treatment as a State for
THE NAVAJO NATION

List of Courtesy Copy Recipients

Sadie Hoskie, Director
Navajo Environmental Protection Administration

Lorenda Joe, Assistant Director
Navajo Environmental Protection Administration

Herb Yazzie, Attorney General
Navajo Department of Justice

Peg Rogers
Navajo Department of Justice

Honorable Ferrell H. Secakuku
Chairman of the Hopi Tribe

Honorable Evelyn James
The San Juan Southern Paiute Tribe

Honorable Bruce King
Governor of the State of New Mexico

Honorable Robert Lewis
Governor of the Pueblo of Zuni

Honorable Harry D. Early
Governor of the Pueblo of Laguna

Honorable Fife Symington
Governor of the State of Arizona

Honorable Mike Leavitt
Governor of the State of Utah

Honorable Judy Knight-Frank
Chairperson, Ute Mountain Ute Tribe

Honorable Roy Romer
Governor of the State of Colorado

Honorable Leonard Atole
President, Jicarilla Apache Tribal Council

Kathleen M. Sisneros, Director
New Mexico Department of the Environment

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:

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[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

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[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;

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[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

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[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]

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[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 <u>not</u> seem to include the land that is within both the exterior boundaries of the formal Navajo Reservation <u>and</u> the jurisdiction of the Eastern Navajo Agency. <u>See</u> the discussion at footnote 27, <u>infra</u>.

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]

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[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]

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[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

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[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

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[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 <u>both</u> 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

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[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 unde 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

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[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

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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

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[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. <u>The Jurisdiction of the Tribe in the Eastern Navajo Agency</u>

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

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[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. <u>See</u> footnote 27, <u>supra</u>.