

Date Signed: April 25, 1989

MEMORANDUM

SUBJECT: Final Guidance on Implementing the Indian Primacy Rule
for the PWSS and UIC Programs

FROM: Robert J. Blanco, Director (signed)
State Programs Division

TO: Drinking Water Branch Chiefs
Regions I - II and IV - X

This memorandum transmits to you our final guidance document on Implementing the Indian Primacy Regulations for the PWSS and UIC programs. A copy of the final draft of this document was sent to you on February 23 along with a request for comments. We received comments from the Office of General Counsel and the Office of Water. In response to these, we have made some minor changes, for example, we have moved the discussion of Tribal Courts into the section on Capabilities. We also clarified our discussion on enforcement and added a Table of Contents.

I wish to thank all of you for your assistance in this project and I hope this document will be useful to you and your staff. Should you have any questions, please contact Betsy Devlin (FTS 382-2303) for the PWSS program and Don Olson (FTS 382-5558) for the UIC program.

Attachment

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INDIAN PRIMACY GUIDANCE

April 1989

I. INTRODUCTION

Section 1451 of the Safe Drinking Water Act (SDWA) authorizes the Administrator to treat Indian Tribes as States. Section 1451 states: "Such treatment shall be authorized 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 title and all applicable regulations."

On September 26, 1988, EPA published the final regulations for addressing primary enforcement responsibility (primacy) for Indian Tribes for the Public Water System Supervision (PWSS) and the Underground Injection Control (UIC) programs (53 FR 37396). The regulations envision a three-step process for Indian Tribes to be granted primary enforcement responsibility for administering a PWSS or a UIC program. The first is to be designated eligible for treatment as a State; the second, to apply for and receive Federal funding to develop program capability; and finally, to apply for and be granted primary enforcement responsibility using the same procedures and meeting the same requirements as States must meet.

The regulations also expand on the statutory criteria identified above by specifying various factors the Agency will evaluate in determining a given Tribe's eligibility for treatment as a State. Readers of this guidance are directed to the Preamble of the final rule (53 FR 37396) for a thorough discussion of the treatment as State requirements. The regulations may be found at 40 CFR 142.76 for the PWSS program and 40 CFR 145.56 for the UIC program.

It is important for all to be aware that Tribes may apply for treatment as a State under either the Safe Drinking Water Act or the Clean Water Act and that once so designated, a Tribe need only submit information unique to the specific program (e.g., PWSS or UIC) for which it is applying (rather than resubmitting all previous treatment as a State information). It is therefore critical that contacts be kept among all water programs.

After being designated eligible to be treated as a State, a Tribe may apply for a development grant. As has been done with the States, development grants will be handled on a case-by-case basis. Staff should work closely with Tribal applicants to identify both existing and needed program capabilities. Much of the information pertaining to existing program capabilities is likely to be part of the treatment as a State application. If the Tribe has applied for treatment as a State for the PWSS or the UIC program, the development grant application may reference the treatment as a State application and not repeat information already provided. If the Tribe has applied for treatment as a State under another program, then information on PWSS and/or UIC program capabilities will have to be prepared and submitted. This guidance package identifies goals to be achieved during the period of the development grant. The Regions may modify these suggested goals to fit the specific situation.

The third and final application is for primacy. Once a Tribe has completed the development phase and has demonstrated to the satisfaction of the Regional Administrator that it can effectively administer the program, the Tribe submits an application for primacy. The requirements and procedures for applying for primacy are specifically defined in 40 CFR Sections 142.10 through 142.13 for the PWSS program and in 40 CFR Part 145 for the UIC program. Tribes must meet these requirements in order to be granted primacy. (Note: the PWSS primacy regulations are undergoing revision. Indian Tribes applying for primacy will be subject to the new regulations which are expected to be promulgated in July 1989. When these are final, a copy will be circulated to all for their use.)

Regional staff should work with the Tribes in their Region to fully explain the rule and its potential impact on the Tribes. An important item which must be dealt with early on is the economic aspects of assuming a PWSS or UIC primacy program. The grant regulations state that a Tribe must match federal funding at 25% unless the Tribe can demonstrate that it does not have adequate funds, including federal funds authorized by the statute, to be used for matching purposes. In that case, the Tribal match could be lowered to 10%. The key point which must be communicated is that the level of funding available for a given fiscal year is fixed, and consequently, an applicant may not receive the entire level of funding requested. Those funds required, but not provided by the federal government, will have to come from Tribal sources. An analysis of State PWSS programs indicated that, although the States are required to match federal funds at 25%, in reality they are matching 50 to 60 % because the Agency is unable to provide any additional resources. It is quite likely that Tribes assuming primacy will face similar situations.

In addition, in these early discussions, the limitations of the primacy programs must be pointed out. For example, the SDWA does not provide funds for construction and/or maintenance of drinking water facilities nor can facilities be upgraded using SDWA funds. It is important that these be understood at the beginning of the process.

This guidance document is meant to serve two primary purposes. First, it is designed to familiarize all staff with the Indian primacy rule and its requirements. Secondly, it should give Regional staff the assistance they need to discuss the rules with Tribes and to evaluate Tribal submissions. Finally, please note that this guidance does not provide a detailed discussion of the requirements for primacy. These are handled in other materials and staff should consult these for additional details.

II. TREATMENT AS A STATE

A. Required Information

Tribes must submit information which demonstrates the following:

- (1) Federal Recognition - The Secretary of the Interior publishes in the Federal Register a list of Federally recognized Tribes. The applicant may submit a copy of this list to establish the fact that it has federal recognition. In the event that the Tribe has been recently "recognized" but does not yet appear on the list in the Federal Register, the Tribe should provide copies of the appropriate paperwork it has received from the Secretary of the Interior. If a Tribe has other documentation which shows Federal recognition, it may submit this in lieu of a copy of the Federal Register notice.
- (2) "Governing body carrying out substantial duties and powers" - The regulations require that a Tribe submit a narrative statement which shows that a Tribe is performing these duties in providing for the health, safety, and welfare of its Tribal members. Examples of the duties include, but are not limited to, the power to tax, the power of eminent domain, and the power to adopt civil regulations. The regulations also require documentation to support the information provided in the narrative. Rather than have Tribes provide what could be a great deal of extraneous information, Regions should have applicants focus the material as appropriate. For example, some Tribal constitutions are very lengthy and incorporate all Tribal codes. It would be very time consuming for the Tribe to make copies of this material and also for Regional staff to review it. The Tribe could simply provide a copy of the ratification page, a table of contents, and the appropriate codes.

Most Indian Tribal governments perform essential government functions traditionally

performed by sovereign governments; however, the degree to which these functions are developed and exercised can vary widely among the Tribes. Consequently, the Region must evaluate each application on a case-by-case basis to determine if the Tribe exercises the necessary duties and powers to promote the health, safety, and welfare of the residents.

The narrative statements required by the regulations [142.76(b) for the PWSS program and 145.56(b) for the UIC program] must include, at a minimum, the following:

- (a) An identification of the sources of the Tribal government's authority to carry out the governmental functions currently being performed (e.g., Tribal constitution);
 - (b) A description of the organizational structure of the Tribe. This must include a description of the powers exercised by each governmental entity; for example, police powers and taxation. It must also include a description of how governmental members are elected or appointed and the length of the terms served; and
 - (c) A description of the programs that the Tribe has instituted to promote the health, safety, and welfare of its Tribal members. This must include a description of the responsible Tribal entities for enforcing the programs and the enforcement mechanism.
- (3) "Functions to be exercised...are within the Tribal government's jurisdiction" - In order to assume responsibility for an environmental regulatory program within the exterior boundaries of a reservation, the Tribe must have regulatory authority over the geographic area in question. A Tribe's authority over the area may appear clouded by the existence of fee lands, federal lands, and non-Indian or federally owned water systems within the reservation boundaries. (These complications, however, should not significantly affect the Tribe's application for treatment as a State.)

The Tribe must demonstrate its legal authority over the area in question. The Tribal Attorney General, or an equivalent officer, must submit a statement certifying that the Tribe possesses sufficient authority to regulate and enforce the PWSS or UIC program in the appropriate area. This statement must be supported by attaching copies (or portions thereof) of appropriate treaties, Tribal constitutions, codes, or resolutions documenting this authority. Where possible, specific language maintaining the assertion should be highlighted or excerpted so as to provide the strongest and most logical

arguments for Tribal authority.

In addition to the legal documentation, the Tribe must submit a legal description of the area over which it asserts Tribal authority and a map showing the location of this area. Finally, the Tribe should submit information identifying specific public water systems or injection wells over which they assert Tribal authority. Map scales are left to the applicant's discretion; however, they should clearly delineate the reservation boundary and public water supply facilities and/or underground injection wells which they consider to be within their legal authority.

Finally, the Tribe must have jurisdiction over the persons (i.e., the owners/operators of the public water systems and/or injection wells). This is dealt with in the section on Tribal court systems.

- (4) "Reasonably expected to be capable" - The regulatory language requires Tribes to submit a narrative statement that addresses the six criteria related to capability identified in 40 CFR 142.76(d) for the PWSS program and in 40 CFR 145.56(d) for the UIC program. Each of the six criteria is listed in this section along with an explanation of the information which must be provided.
- (a) Previous management experience - [142.76(d)(1) and 145.56(d)(1)] The Tribe's managerial skills will be evaluated on the basis of its experience in administering contracts and grants awarded under such authorities as the Indian Self-Determination Act, the Indian Mineral Development Act, or the Indian Sanitation Facility Construction Activity Act. The narrative should state each of the contracts and/or grants that the Tribe administers or has administered, and provide a copy of any evaluations by the awarding Agencies. EPA will consider such factors as the variety and length of the managerial experiences and will consider the evaluations of Tribal performance in administering programs performed by the awarding Agencies.
- (b) Existing environmental or public health programs administered by the Tribal government body and a copy of related Tribal laws, regulations, and policies - [142.76(d)(2) and 145.56(d)(2)] The Tribe should describe each of the programs specified above and submit the appropriate documentation specifying the authority for implementing the program. The description should include the responsible Tribal entity for administering the program. EPA will consider such factors as number of programs the Tribe implements and its record of progress in enforcing the provisions of each

program. (If this information has been provided in the discussion of "governing body carrying out substantial duties and powers," then the material may be referenced and not repeated here.)

(c) Accounting and Procurement system - [142.76(d)(3) and 145.56(d)(3)] The Tribe must provide a description of its accounting and procurement system. EPA will review the Tribe's system to ensure that it meets established federal guidelines (e.g., 25 CFR 271.46).

(d) Entities which exercise the executive, legislative, and judicial functions of Tribal government - [142.76(d)(4) and 145.56(d)(4)] The submission required under the "substantial governmental duties and powers" is likely to provide the necessary information as to the executive and legislative functions of Tribal government and may be referenced by the Tribe in its application. The information will be reviewed according to the criteria in that section. Information on Tribal judicial functions is discussed below. Please note that this information may also be submitted under the "substantial governmental duties" section or with jurisdiction. If it has been submitted there, it may be referenced and not repeated.

Tribal court systems may vary in make-up from non-Indian courts. In order for EPA to evaluate a Tribe's judicial system, specific knowledge of the court organization and procedures is required. A second issue is the question of how a non-Indian receives "due process" in a Tribal court. Both of these issues are central to determining whether a Tribe satisfies the criteria for treatment as a State. However, EPA does not intend to prescribe general criteria for what it considers "good" tribal court systems due to the fact that there are a variety of systems which could meet the objective stated above. Further, the effectiveness of Tribal courts is, at least to some extent, Tribally and culturally dependent. This guidance is therefore confined to the types of information that must be submitted to determine a Tribe's eligibility to be treated as a State.

At a minimum, a Tribe must submit a narrative statement describing the following aspects of its judicial system:

(a) Overview: A general overview of the judicial system and the source of authority (e.g., Tribal constitution);

(b) Lower Court - Include information on the court structure and court rules. If two or more Tribes seek to share program responsibilities, the relationship

between the respective Tribal courts must be specified;

(c) Appellate Court - Information similar to that provided for the lower court system is necessary for the Agency's understanding of the appellate court. A description of the court structure and rule should be provided and the appeals process described. If two or more Tribes wish to share program responsibility, the relationship between the appellate courts and each of the Tribes should be addressed;

(d) Penalty System - The system used to levy fines or penalties should be described, including the statutory authority for assessing penalties, and any minimum or maximum penalties. If available, a schedule of penalty amounts should also be included; and

(e) Judge Selection - The process used for selecting court judges (including minimum qualifications) should be specified. If judges are shared through a "circuit rider" system, details of that system and background of court officials should be provided.

In addition, the legal process, appeals procedures, and any other legal remedies available to Indians and non-Indians should be specified. This information is necessary to evaluate the legal rights of non-Indians in the Tribal court system.

(f) Existing or proposed agency of the Indian Tribe which will assume primary enforcement responsibility - [142.76(d)(5) and 145.56(d)(5)] The Tribe will be required to describe the Agency of the Tribe which will assume primary enforcement responsibility. The Tribe will be required to submit supporting documentation which establishes the Agency and provides a description of the authorities that the Agency is given. An organization chart which shows the relationship of this Agency to other Tribal Agencies will be required. This Agency must have the authority to implement a primacy program and a statement from the Tribal Attorney General or attorney representing the Tribe must be provided as noted previously. EPA will determine it its review if any potential conflict of interest exists between the regulating Agency and the owner/operator of the public water systems or underground injection wells (See information on this under Development Grants).

(g) Technical and administrative capabilities of the staff to administer and

manage a public water system supervision and/or an underground injection control program - [142.76(d)(6) and 145.56(d)(6)]. The Tribe must provide a description of the technical and administrative capabilities of the staff that will fill the positions in the proposed Agency. Position descriptions will be acceptable for describing the expected capabilities. At a minimum, the Tribe should employ individuals knowledgeable in the areas of public health and environmental engineering and/or science.

The Indian Health Service (IHS) presently provides varying levels of assistance to Tribes. Many of the areas in which IHS provides this assistance are areas a Tribe would have to take over if it is to be granted primacy. For example, IHS currently provides plan and specification review for Tribes and conducts sanitary surveys at Tribal facilities. Regional Offices should recognize these IHS/Tribal agreements; however, these agreements will need to clearly define the responsibilities of IHS and the Tribe. The Tribe should commit to assume full responsibility for these functions.

B. EPA Review of Treatment as a State Applications

EPA staff will review and evaluate Tribal submissions based on the regulations and this guidance. If a Tribe's application is found to be lacking some needed materials, it should be returned for amendment by the Tribe. A checklist of required elements is provided in Attachment A to assist Regional staff in their review.

- (1) Federal Recognition - Regional staff should obtain and keep on file the most recent Department of the Interior Bureau of Indian Affairs (BIA) Federal Register Notification of Federally Recognized Tribes. In the event a Tribe has been formally recognized, but has not been included on the most recent BIA Federal Register list, Regional staff should review the relevant correspondence that the Tribe has received from BIA. Staff may also contact appropriate IHS and BIA offices for confirmation of a Tribe's status.
- (2) "Governing body carrying out substantial duties and powers" - The Region should insure that the narrative statement and supporting documentation show that the Tribe has an organized governmental body which exercises legislative, executive, and judicial powers. The records should show an established record of orderly government transitions and also that the government exercises and has exercised substantial governmental duties and powers in implementing programs to promote the health, safety, and welfare of its residence.

- (3) "Functions to be exercised...are within the Tribal government's jurisdiction" - Review of the material on jurisdiction should be agreed upon by the Office of Regional Counsel. It is important to recognize that the legislative history supports Tribal jurisdiction within exterior boundaries of reservations relative to Tribal health and welfare. Possible competing claims of jurisdiction may arise in checkerboard areas where States feel they have jurisdiction over non-Indian communities that have been incorporated under State statute within the exterior boundaries of the reservation. Regional Offices should facilitate State/Tribal meetings to resolve these situations as soon as possible. Much of the information provided in item #2 will be applicable here.

The Tribe is required to submit a legal description and map showing the geographic area over which it claims jurisdiction and also the location of the water systems and/or injection wells over which it claims regulatory authority. The Region should review the map submitted carefully along with the supporting documentation (treaties, etc.).

The Attorney General for the Tribe or an attorney representing the Tribe is required to submit a statement that the governmental powers and duties exercised by the Tribe are within the authority of the Tribe. The statement must include citations to the specific Tribal statutes, codes, resolutions, and where appropriate, judicial decisions which demonstrate adequate authority.

- (4) "Reasonably expected to be capable" - Regional staff should remember that the decision to treat a Tribe as a State is made very early in the process of developing Tribal programs. The standard for the capability determination is whether the Tribe is "reasonably expected to be capable" of administering the program.

C. Time Frame for Processing Treatment as a State Application

Within thirty (30) days of receipt of a Tribe's completed treatment as a State application, the Regional Administrator must notify the appropriate governmental entities (as discussed below). Notice is to include information on the substance of, and basis for, the Tribe's jurisdiction assertions. Each governmental entity so notified by the Administrator shall have 30 days to comment upon the Tribe's assertion of jurisdiction. Comments by governmental entities are limited to the Tribe's assertion of jurisdiction (40 CFR 142.78 and 145.58).

It is suggested that the Regional Offices contact the State primacy agency and any Federal governmental entities such as the National Park Service, Department of Defense, and the Department of Energy as appropriate. The State primacy agency may wish to contact any non-Indian communities

that may be incorporated under State statute and located with the exterior boundaries of the applicant's reservation. Regional staff should request review by the Office of Regional Counsel and by other water program staff (as affect other water programs). The Regional Indian Affairs Coordinator may be involved as appropriate.

If no competing claim of jurisdiction is received, the Regional Office should complete processing the application within thirty days. In the event there is a competing claim of jurisdiction, the regulations require the Administrator to consult with the Secretary of the Interior (or his designee) and to consider any other comments that have been received prior to making the determination as to whether the applicant meets the treatment as a State criteria. The Region should attempt to resolve such situations as expeditiously as possible.

III. DEVELOPMENT GRANTS

A. Required Information

Once a Tribe has been determined to be eligible to be treated as a State, it may apply for federal funding to develop its program. Regional staff have to work closely with their respective Tribes to clearly identify the various primacy program needs of each individual applicant and the costs. As noted earlier, a Tribe must match federal funding at 25% unless it can show it does not have adequate funds or in-kind contributions to meet this requirement. In that case, the Tribe may be allowed to match only 10%. A Region's decision to allow only a 10% match should be made very carefully as financial capability on the part of a Tribe is extremely important if they are to assume primacy. As stated earlier, Tribes can use certain federal funds and/or "in-kind" contributions to meet the match requirements.

In addition to the Tribal-specific needs the following issues must be addressed by the Tribe in its grant application:

- (1) Regulator/Regulatee conflicts must be resolved. In order to evaluate any potential conflict of interest created by the Tribe as both the regulator and the regulatee, the Tribe must submit an inventory of all public water systems and/or underground injection wells to be regulated by the Tribe. The inventory must also identify the owner of the water system and/or the injection well. If not included as part of the treatment as a State application, the Tribe must also identify the existing or proposed Tribal organization that will be implementing the primacy program. The relationship between the primacy organization and the organization that owns/operates the public water system(s) and/or the underground injection wells must be defined and clearly explained. If there is a conflict of interest, a plan should be included or developed to resolve this

conflict.

- (2) Laboratory Analyses associated with the PWSS Program - States seeking to obtain PWSS primacy are required to establish and maintain a State program for the certification of laboratories conducting analytical measurements of drinking water contaminants. The regulations at 142.10(b)(3)(ii) state that: "Upon a showing by an Indian Tribe of an intergovernmental or other agreement to have all analytical tests performed by a certified laboratory, the Administrator may waive this requirement."

It is the responsibility of the owner/operator of the public water system to insure that samples are analyzed by a certified laboratory. In some cases, the Tribe may be the owner/operator of the system. In other cases, the Tribe may choose to take on the responsibility of sample analysis for the public water system as is the case in some States. In all cases, it is necessary for the Tribe to have access to a certified laboratory to insure that special sampling and analysis can be conducted.

Therefore, as a part of a development program, the Tribe must submit an explanation of the type of sampling it intends to do. the Tribe must also submit a copy of a contract with a certified laboratory which specifies the type of analyses to be performed. Multiple contracts are acceptable where one laboratory cannot perform all required analyses. EPA will review the contracts to ensure that the laboratory is certified by either the State or EPA and that analyses for all regulated contaminants can be conducted.

- (3) Criminal enforcement authority (UIC Program) - Tribes are not required to have criminal enforcement capability to qualify for treatment as a State [SDWA Section 1451(b)(2)]. This is not a major concern in the PWSS program as the only criminal violation is tampering with public water systems (See SDWA Section 1432). The UIC program, however, has authority under SDWA Section 1423 to bring criminal actions for willful violations. The UIC primary enforcement responsibility regulations at 145.13(e) state that to the extent that a Tribe does not have or is precluded from asserting criminal enforcement authority, the Administrator will assume primary enforcement responsibility for criminal violations. Further, 145.13 requires that the Memorandum of Agreement (a requirement for primary enforcement responsibility described in 145.25) spell out provisions for referring criminal violations to EPA. [For additional details and a further discussion of enforcement activities in general, see the next section on enforcement Activities.]

The Tribal authority to pursue criminal actions is complicated. Tribes have

criminal authority over Tribal members but their criminal authority over Indians who are not members of their Tribe is not always clear. Tribal criminal authority over non-Indians is precluded by the Supreme Court's decision in 1978 in the Oliphant v. Suquamish Indian Tribe case. Therefore, the Regions must be sufficiently flexible on this issue to accommodate different procedures for criminal actions against Tribal members, non-Tribal Indians, and non-Indians.

- (4) Enforcement activities (both PWSS and UIC programs) - The Tribe must develop a compliance and enforcement strategy and an enforcement agreement with EPA which spells out its response to violations of the SDWA, of the National Primary Drinking Water Regulations, or of its own regulations. The compliance/enforcement strategy should also discuss the anticipated use of penalties and other sanctions to address violations, and the approach used to calculate civil penalties should be defined. [Note: EPA expects a reasonable effort to calculate the economic benefit of noncompliance and to remove that benefit by assessing a penalty.] The compliance strategy should be consistent with EPA's PWSS and UIC Compliance Strategies (4/1/87) and other EPA enforcement policies. EPA will review the documents to ensure this. Regional staff should consult with their PWSS or UIC Enforcement Coordinators to ensure consistency in enforcement policies and approaches.

The Tribe must also have (or develop) the mechanisms to restrain immediately and effectively any person engaging in any unauthorized activity or operation which is endangering or causing damage to public health or the environment (as related to the PWSS or UIC program requirements). The Tribal agency administering the program must also have the means to sue in courts of competent jurisdiction to prohibit any threatened or continuing violation of any program requirements and to assess or recover civil penalties as required by 142.10 for the PWSS program and 145.13 for the UIC program. The compliance/enforcement strategy should explain these mechanisms also.

The Tribe is responsible for ensuring that the tribal counsel, Tribal Attorney-General, or appropriate Tribal officers/staff are properly notified and consulted about planned enforcement actions at the Tribal or Federal level. The compliance strategy (or Memorandum Agreement) should lay out this process.

Federal Facilities will be treated in the same manner as non-Federal facilities. The Regional Water Division Director should be notified on a case-by-case basis of each proposed enforcement action against a Federal facility.

As noted in the previous section, criminal actions may be

appropriate in certain circumstances. In the PWSS program, SDWA Section 1432 allows for the filing of criminal charges for tampering or attempting to tamper with a public water system. In the UIC program, SDWA Section 1423 allows for the filing of criminal charges for willful violations of any requirement of an applicable UIC program. In both programs, deliberately making false statements to the Federal government is a criminal offense. In the compliance strategy, enforcement agreement, or Memorandum of Agreement (UIC Program), the Tribe should set forth its criminal authority over Tribal members and over non-Tribal members. In those instances where the Tribe lacks criminal authority, the Tribe must commit to referring the case to the appropriate Regional office within a reasonable time. This requires submission to the Water Division Director of all pertinent information and continued coordination with EPA and the submission of additional information as it becomes available. Specific procedures for the handling of criminal cases should be developed. As noted earlier, these procedures must be in the Memorandum of Agreement for the UIC program; for the PWSS program, they can be in any document.

B. EPA Review

Regional Staff should conduct a careful review of all materials submitted with a development grant application. In addition, previous years' performance in meeting commitments should be carefully considered before another year's funding is awarded. The following guidance is provided to help the Regions in their review.

- (1) Regulator/Regulatee conflicts - In the event a Tribal application does not adequately identify a resolution of a regulator/regulatee conflict, Regional staff may suggest the following possible actions to minimize potential conflicts.

If the Tribe needs to establish an agency or department to implement the program, the Tribe should not place this agency within the same division/organization as any Tribal agency responsible for operating public water systems or underground injection wells. Where a responsible agency already exists in the same division/organization, the Tribe should consider moving it, or the Tribe should submit a description of the enforcement procedure to be followed when a potential or actual conflict exists.

- (2) Laboratory Analyses - Regional Staff should obtain a copy of the contract or agreement ensuring access to a State or EPA certified laboratory or laboratories.
- (3) Criminal Enforcement - Regional staff from both the Office of Regional Counsel and the

Water Division will be involved from the beginning in developing the necessary Memorandum of Agreement; hence, the review process will be continual.

- (4) Compliance Strategies - Regional staff will be involved in the development of these over the course of the grant and so review will be continual.

In addition to the specific issues, the checklists in Attachment C provide models as to development grant goals and timeframes. Regional staff may modify these as appropriate to specific situations; however, what is important is that all the elements of a primacy program be developed by the end of the development period.

Once a development grant has been awarded, the Tribe has three years in the PWSS program and four years in the UIC program to assume primacy. During this developmental stage, EPA staff need to work closely with Tribes to ensure that commitments are being met and the program is developing properly.

IV. PRIMACY

A. Required Information

The requirements for primacy are specified in 40 CFR Part 142 for the PWSS program and in 40 CFR Part 145 for the UIC program. Tribes applying for primacy must meet these requirements and must follow the same procedures as States. [Note: as stated earlier, the PWSS primacy regulations are currently being revised. It is anticipated that a final regulation will be published in July 19889. Tribes applying for primacy after that date will be required to comply with the new regulation.]

B. EPA Review

The majority of the review and negotiations with the Tribe will be performed by the project officer in the Regional Drinking Water Branch. After a preliminary determination that the Tribe has met all of the requirements, the Drinking Water Branch should forward the application to the Office of Regional Counsel and to Grants Administration for review. (The Region should follow established Regional procedures in this matter. Other offices may be involved as the Region feels is appropriate.)

When the Region believes that the application is final, they should send it to Headquarters for final review and approval.

TREATMENT AS A STATE CHECKLIST

<u>Treatment as a State Criteria</u>	<u>Material to be Submitted</u>	<u>Acceptable</u> (see comments)	<u>Unacceptable</u> (see comments)	<u>Not Submitted</u> (see comments)
1. Federal Recognition	Copy of the appropriate BIA <u>Federal Register</u> notification (or other documentation showing Federal recognition)			
2. Possesses and exercises substantial government duties and powers.	(a) Sources of governmental authority identified. (b) Description of the organizational structure of the Tribe including the powers exercised by each governmental entity -- executive, legislative, and judicial. (c) Description of the programs that the Tribe has instituted to promote the health, safety, and welfare of the Tribal members.			

TREATMENT AS A STATE, (cont'd.)

<u>Treatment as a State Criteria</u>	<u>Material to be Submitted</u>	<u>Acceptable</u> (see comments)	<u>Unacceptable</u> (see comments)	<u>Not Submitted</u> (see comments)
3. Tribal Capability	<p>Note: You need not repeat information already provided in 2(b).</p> <p>(a) Description of existing managerial capabilities emphasizing successful managerial performance of public health programs:</p> <ul style="list-style-type: none"> (1) Summaries of grants/contracts and associated evaluations. (2) Summary of each environmental health program managed and the entity that manages it. (3) Description of accounting and procurement systems. (4) Description of Tribal agency that will assume primacy, including discussion of regulator/ regulatee conflict <p>(b) Description of Tribal court system</p>			

TREATMENT AS A STATE, (cont'd.)

<u>Treatment as a State Criteria</u>	<u>Material to be Submitted</u>	<u>Acceptable</u> (see comments)	<u>Unacceptable</u> (see comments)	<u>Not Submitted</u> (see comments)
4. Tribal Jurisdiction	<p>(a) A map defining exterior boundaries of the reservation. (For SDWA programs include location of public water systems and underground injection wells).</p> <p>(b) Signed statement from the Tribal Attorney General (or the corresponding official) that the governmental duties and powers exercised by the Tribe are within the authority of the Tribe.</p>			
<p><u>Regional Comments:</u></p>				

TREATMENT AS A STATE APPLICATION PROCESS

Tribe Submits Treatment as a State
Application

within 30 days 142.76 (PWSS)
145.58 (UIC)

Regional Administrator notifies
"appropriate governmental entities."

within 30 days 142.76 (PWSS)
145.58 (UIC)

Appropriate governmental entities
submit comments (to be limited
to program specific jurisdiction).

"in a timely manner" 142.76 (PWSS)
145.58 (UIC)

Regional Administrator notifies Tribe of
eligibility to apply for grants.

Attachment C

Suggested Development Grant Goals for the PWSS and UIC Primacy Programs

Tribal applicants must commit to assuming primacy enforcement responsibility within the designated 3-year period for PWS and/or 4-year period for UIC. The commitments in the development grant agreements will also have to be negotiated on a case-by-case basis for each Tribe; however, the following goals and time frames are suggested for Regional use in discussions with their Tribes.

Public Water System Supervision ProgramYear #1 Goals

- Signed Drinking Water Statute addressing at least the public water system program;
- Codified regulations (Tribal codes) at least as stringent as Federal regulations;
- Regulations (Tribal Codes) developed to ensure public participation;
- Public notification procedures developed;
- Hire technical staff as needed;
- Resolve any regulator/regulatee conflict;
- Sanitary survey protocols/procedures developed;
- Data processing/recordkeeping procedures established;

Year #2 Goals

- Evaluate previous year's performance;
- Memorandum of Understanding* (including referral of criminal matters as necessary);
- Analytical requirements addressed;
- Quality assurance plan developed and approved;
- Compliance tracking system developed;
- Variance and exemption policies defined;
- Compliance and enforcement strategy developed.

- * Final guidance on the development of the necessary Memorandum of Understanding is still being developed.

Year #3 Goals

- Evaluate previous year's performance;
- Demonstrate capability to administer the program effectively.

Underground Injection Control ProgramYear #1 Goals

- Signed Drinking Water statute addressing at least underground injection control;
- Codified regulations (Tribal Codes) for protection of underground sources of drinking water (USDWs) at least as stringent as Federal regulations;
- Inventory of UIC wells;
- Develop regulations (Tribal codes) to insure public participation;
- Hire technical staff as needed;
- Establish data handling/record keeping procedures.

Year #2 Goals

- Evaluate previous year's performance;
- Complete adoption of necessary statute and regulatory requirements;
- Develop compliance tracking procedures;
- Develop compliance and enforcement strategy;
- Train inspectors as needed;
- Draft program description;
- Update inventory.

Year #3 Goals

- Evaluate previous year's performance;
- Complete program description;
- Memorandum of Understanding* (including referral of criminal matters as necessary);
- Submit copies of all pertinent UIC statutes and regulations;
- Gain experience running portions of the UIC program;
- Update inventory.

- * Final guidance on the development of the necessary Memorandum of Understanding is still being developed.

Year #4 Goals

- Evaluate previous year's performance;
- Submit formal request for program approval;
- Tribe continues to gain experience running portion of program;
- Update inventory;
- Demonstrate capability to administer program effectively.