



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

DEC 8 2005

Honorable Ruben Romero
Governor
Pueblo of Taos
P.O. Box 1846
Taos, NM 87571

Dear Governor Romero:

I am pleased to inform you that the U.S. Environmental Protection Agency Region 6 (EPA) has completed its review under Clean Water Act (CWA) §518 of the Pueblo of Taos' application for treatment in the same manner as a state under CWA §303(c) and §401, water quality standards and certification. The request for approval was received by EPA on June 10, 2003. Approval of the application for treatment in the same manner as a state means that the Tribe is eligible to administer the water quality standards program for waters within the areas covered by the application, and, pursuant to 40 CFR §131.4(c), is eligible to the same extent as a state for purposes of certifications under CWA §401.

EPA is approving the request for treatment in the same manner as a state for the waters within the Pueblo of Taos' Reservation covered by the application (including lands held by the United States in trust for the Pueblo of Taos identified on the maps submitted in the application as Tracts A and B and the Karavas Tract). There are nonmember-owned fee lands within the exterior boundaries of the Taos Reservation, including a portion of the Town of Taos. The Pueblo of Taos' application does not assert jurisdiction over the nonmember fee lands within the Taos Reservation for purposes of regulating water quality under the CWA, and EPA's approval is limited to the area included in the application.

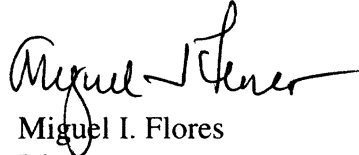
Complete documentation of our review of the request for treatment in the same manner as a state can be found in the enclosure titled *Decision Document: Approval of Pueblo of Taos Application for Treatment in the Same Manner as a State (TAS) Under §303 and §401 of the Clean Water Act*. In making this decision, EPA received comments under 40 CFR §131.8(c)(3) from appropriate governmental entities and other interested parties regarding the Tribe's assertion of authority to regulate water quality for the areas covered by this application. A response to comments is included in the docket for this decision.

The Pueblo of Taos also submitted tribally-adopted water quality standards for EPA review and approval along with its application for treatment in the same manner as a state for CWA §303(c) and §401. EPA cannot approve an Indian tribe's water quality standards before a tribe has been approved for treatment in the same manner as a state for the water quality standards and §401 certification programs. Following this approval of the Pueblo of Taos for treatment in the same manner as a state, EPA will provide timely review of the Pueblo of Taos'

water quality standards, and any future revisions that the Tribe may adopt and submit for EPA approval. If approved, those Tribal standards would apply under §303(c) of the CWA to all surface waters covered by this approval of the Pueblo of Taos' application for treatment in the same manner as a state.

EPA looks forward to working with the Pueblo of Taos in implementing its water quality programs. If you have any questions or concerns, please contact me at (214) 665-7101 or contact Melinda Nickason of my staff at (214) 665-8059.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Miguel I. Flores". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Miguel I. Flores
Director
Water Quality Protection Division

Enclosure

cc: Robert Gomez, Director - Taos Pueblo Environmental Office

DECISION DOCUMENT:

APPROVAL OF PUEBLO OF TAOS
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE
UNDER §518 OF THE CLEAN WATER ACT (CWA) FOR PURPOSES OF
ADMINISTERING CWA §303(c) AND §401

U.S. EPA REGION 6

December 2005

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I. Introduction

A. Purpose

The purpose of the Decision Document is to provide the basis and supporting information for the Environmental Protection Agency's (EPA) approval for treatment in the same manner as a state for the Pueblo of Taos ("the Pueblo" or "the Tribe") under §518(e) of the Clean Water Act (CWA) for purposes of administering the §303(c) water quality standards program. EPA's regulation found at 40 CFR §131.4(c) states:

Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.

EPA's approval applies to the administration of the water quality standards and §401 certification programs for waters on or adjacent to Tribal lands within the exterior borders of the Pueblo of Taos' reservation boundaries (including Tracts A and B and the Karavas Tract). Based on the scope of the Tribe's application, EPA's approval does not extend to waters on or adjacent to non-member fee lands within those boundaries, except where such waters are also adjacent to Tribal lands, in which case the approval extends to such waters to the midpoint between the Tribal lands and the nonmember fee lands. More information on the area covered by this decision is found below under Section II.C. "Waters within the Borders' of a Reservation" and in the appendices to this document.

B. Application

The Pueblo of Taos' application for treatment in the same manner as a state for CWA §303 and §401 consists of the following items:

- application for treatment in the same manner as a state for purposes of administering the CWA §303(c) and §401 programs, including a statement from the Tribal attorney regarding regulatory authority and jurisdiction, transmitted by letter from Allan Martinez, Governor, Pueblo of Taos, received by EPA on June 10, 2003; also including identification of waters where the Tribe proposes to establish standards;
- responses to EPA requests for clarification regarding non-Indian owned fee lands and boundary information; and,
- additional information to support documentation on technical capability to implement CWA §303 (c).

C. Chronology of Events

June 10, 2003 - Application for treatment in the same manner as a state for CWA §303 and §401 received by EPA.

April 20, 2004 - Letters to “appropriate governmental entities,” from Miguel I. Flores, EPA Water Quality Protection Division Director. A copy of the map and the table titled “*Taos Pueblo Trust and Fee Lands Within the Town and County of Taos Within the original Taos Pueblo Land Grant*” from the Pueblo of Taos’ application were enclosed with the letters sent to the following entities.

Bureau of Indian Affairs -Albuquerque Area Office	New Mexico Environment Department
Bureau of Indian Affairs - Northern Pueblos Agency	New Mexico State Engineer Office
Bureau of Land Management - New Mexico State Office	New Mexico State Land Office
Bureau of Land Management - Taos Field Office	U.S. Army Corps of Engineers
Bureau of Reclamation - Albuquerque Area Office	U.S. Department of Energy
Energy, Minerals, and Natural Resources Department	U.S. Forest Service - Regional Office
Indian Health Service - Albuquerque Area Office	U.S. Forest Service - Carson National Forest
National Park Service	

Public notices were published in the *Taos News* and the *Santa Fe New Mexican* on April 22, 2004, so that local governments and citizens could comment. Consistent with the preamble to EPA’s water quality standards regulation (see 56 *Federal Register* 64876-64896, December 12, 1991), the public notices requested that comments from local governments and citizens be submitted to the appropriate state agency. In this case, the New Mexico Environment Department (NMED) was the appropriate state agency to compile comments from local entities and the public. The notice requested comments by May 25, 2004. EPA mailed an announcement, the public notice, the map of the Pueblo of Taos Reservation lands, and the list titled “*Taos Pueblo Trust and Fee Lands Within the Town and County of Taos Within the original Taos Pueblo Land Grant*” to the following local offices and establishments: the Manager of Taos County, the Manager of the Town of Taos, the Public Utilities Director of the Town of Taos, the Mayor of the Village of Taos Ski Valley, and Molycorp, Inc.

April 28, 2004 - U.S. Department of Energy (Denver Regional Office) response from William S. Becker, Director.

May 3, 2004 - U.S. Army Corps of Engineers (Albuquerque District) response from Daniel Malanchuk, Chief, Regulatory Branch.

May 4, 2004 - U.S. Forest Service (Carson National Forest) response from Martin D. Chavez, Jr., Forest Supervisor.

May 19, 2004 - Electronic mail from Jay Lazarus on behalf of the Town of Taos (including previous messages between Mr. Lazarus and others) to Melinda Nickason, EPA, requesting an extension of the comment period on the Pueblo of Taos’ assertion of jurisdictional authority for CWA §303 and §401.

May 20, 2004 - Electronic mail from Melinda Nickason, EPA, to Stephen Greetham (attorney for Pueblo of Taos), Nordhaus, Haltom, Taylor, Tardash & Bladh, LLP, requesting confirmation that an extension of the comment period is acceptable to the Pueblo of Taos.

May 20, 2004 - Electronic mail from Stephen Greetham to Melinda Nickason explaining that the Pueblo of Taos has no objection to the extension of the comment period.

May 21, 2004 - Electronic mail from Marcy Leavitt, Surface Water Quality Bureau Chief, NMED, to Melinda Nickason explaining that NMED does not oppose the extension of the comment period.

June 4, 2004 - Letters to “appropriate governmental entities,” from Miguel I. Flores, EPA. Letters providing notification of the extension of the comment period were sent to the following entities (excluding those entities that previously responded).

Bureau of Indian Affairs-Albuquerque Area Office	Indian Health Service-Albuquerque Area Office
Bureau of Indian Affairs- Northern Pueblos Agency	National Park Service
Bureau of Land Management - New Mexico State Office	New Mexico Environment Department
Bureau of Land Management - Taos Field Office	New Mexico State Engineer Office
Bureau of Reclamation - Albuquerque Area Office	New Mexico State Land Office
Energy, Minerals, and Natural Resources Department	U.S. Forest Service- Regional Office

Public notices were published in the *Taos News* and the *Santa Fe New Mexican* on June 3, 2004, providing notification of the extension of the comment period for local governments and citizens. As discussed above, the public notices instructed that comments from local governments and citizens be submitted to NMED. The notices requested comments by July 26, 2004. EPA mailed notification of the extension of the comment period to the following local offices and establishments: the Manager of Taos County, the Manager of the Town of Taos, the Public Utilities Director of the Town of Taos, the Mayor of the Village of Taos Ski Valley, and Molycorp, Inc.

July 16, 2004 - NMED response from Ron Curry, Secretary.

Undated (received August 6, 2004) - NMED transmittal from Marcy Leavitt of public comments, which consisted of a July 26, 2004, letter from the Town of Taos, Bobby F. Duran, Mayor.

March 17, 2005 - Letter to Governor Ruben Romero, Pueblo of Taos, from Miguel I. Flores, requesting clarification on nonmember fee lands within the Pueblo of Taos Indian Reservation and additional information on demonstrating the capability requirement in 40 CFR §131.8(a)(4).

April 7, 2005 - Response from Jill Grant, Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP to Miguel I. Flores, EPA.

May 11, 2005 - Response from Jeff Ogburn, Pueblo of Taos Water Quality Specialist to “Dianne Evans, Water Quality Standards Specialist”, EPA.

November 7, 2005- Letter with enclosures from Jill Grant, Nordhaus Law Firm to Richard Greene, Regional Administrator, EPA Region 6 regarding boundary waters.

II. Requirements for Treatment in the Same Manner as a State Under §518 of the Clean Water Act (CWA) for Purposes of Administering CWA §303(c) and §401

Under CWA §518(e) and EPA’s implementing regulation at 40 CFR §131.8, four requirements must be satisfied before EPA can approve a tribe’s application to be treated in the same manner as a state for purposes of the water quality standards and §401 certification programs. These are: (A) the Indian tribe is recognized by the Secretary of the Interior and meets the definitions in §131.3(k) and (l)¹; (B) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (C) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources which are held by the Indian tribe, held by the United States in trust for Indians, held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and, (D) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations.

A. Federal Recognition

The Pueblo of Taos is an Indian Tribe, located in Taos County, New Mexico, and is identified as a Recognized Tribe on the list of such tribes periodically published in the Federal Register by the Secretary of the Interior (see 68 *Federal Register* 68180-68184, December 5, 2003). EPA concludes, therefore, that the Pueblo of Taos meets the recognition requirement.

¹ 40 CFR §131.3(l) defines the term “Indian Tribe” as “any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.” 40 CFR §131.3(k) defines Federal Indian reservation as “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. Substantial Governmental Duties and Powers

The Pueblo of Taos has a governing body with substantial governmental duties and powers, as documented in the following excerpts from the Pueblo of Taos' application for the CWA §106 program (approved by EPA on September 28, 1990). See 50 *Federal Register* 64339, 64340 (December 14, 1994) ("the fact that a tribe has met the recognition or governmental functions requirement under either of the Water Acts or the Clean Air Act will establish that it meets those requirements under both [sic] statutes").

The Pueblo of Taos has a traditional governmental structure, in which all legislative powers are fully vested in a Tribal Council of 56 members. The Tribal Council has complete regulatory authority over all of the lands and persons within the Pueblo's exterior boundaries (except to the extent precluded by federal law), and it exercises that authority through regular meetings. The Council is composed of all former Governors and clan leaders. As the traditional Tribal leader, the Cacique presides over the Tribal Council. Subject to the directives of the Tribal Council, the Governor and War Chief oversee the administrative and executive functions of the Pueblo and represent the Pueblo in all dealings with outside entities. The Pueblo also has a Tribal Court, in which civil disputes and criminal matters involving Tribal members are heard.

The Pueblo has no constitution, but its governmental structure is long-standing and in fact is considerably older than the governmental system of the United States. The Pueblo has governed itself without significant change in its governmental structure since time immemorial...

In its capacity as governing body of the Pueblo, the Tribal Council has virtually complete civil regulatory power over the lands, people and affairs within the Pueblo's boundaries. Those powers include, but are not limited to, the following:

- a.) to enact laws to protect and promote the peace, safety, health and welfare of the Pueblo and its members, and of other persons present on Pueblo lands;*
- b.) to regulate business activities on Pueblo lands, both by creating business enterprises or by entering into leases and other agreements with outside businesses to enable them to operate on Pueblo lands, and by imposing land use, environmental and other regulatory restrictions on all businesses, public and private, on Pueblo lands;*
- c.) to raise revenues, by enacting taxes and other levies upon persons and entities within its jurisdictions, by entering into various forms of*

commercial enterprises itself, and by granting various forms of concessions to others for the use of Pueblo lands, minerals or other assets;

d.) to regulate, by the enactment of laws and by other means, the civil relationships among Pueblo members, and between the members and the tribal government;

e.) in furtherance of these and other powers, to enter into agreements with states, local governments, other Indian Tribes, and with the United States...

Although they are not independent executives in the American sense, the Governor and the War Chief of the Pueblo together are the chief executive officers of the Pueblo, and, subject to the guidance of the Tribal Council, oversee and administer all of the governmental programs of the Pueblo. They also supervise the 70 to 100 Tribal employees, and represent the Pueblo in official dealings with the outside world.

The Tribal Council has enacted codes of law for regulation of such matters as traffic, taxation, law and order, Tribal membership, and water quality. In addition, the Pueblo of Taos provides basic governmental programs on its lands including social services, education, and police and court functions. The Pueblo of Taos also has established a Community Planning and Development Division which includes the Housing Program, the Wilderness Program and the Departments of Realty, Agriculture and Range Management, Water Rights, and Environmental Protection.

Based on the foregoing information, EPA concludes that the Pueblo of Taos meets the requirement of carrying out substantial duties and powers.

C. “Waters within the Borders” of a Reservation

To show that the water quality standards program to be administered by the Pueblo of Taos pertains to waters of a reservation as required by CWA §518(e), 40 CFR §131.8(a)(3) requires the Tribe to submit a statement of authority which should include: (i) a map or legal description of the area over which the tribe asserts authority to regulate surface water quality; (ii) a statement by the Tribe’s legal counsel (or equivalent official) describing the basis for the tribe’s assertion of authority, which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe’s assertion of authority; and, (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards.

1. “Reservation” Lands

The Pueblo of Taos must show that it meets the requirement that it proposes to exercise functions which pertain to the management and protection of water resources within a “reservation.” CWA §518(e)(2). The term “Federal Indian reservation,” under CWA §518(h)(1), includes 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.”

The Pueblo of Taos has submitted a jurisdictional statement from its General Counsel and a map of the areas for which it seeks approval for treatment in the same manner as a state. Pueblos are inherently different from other tribes because their lands are held largely in fee, instead of title being held in trust by the United States. Pueblo lands, mostly aboriginal homeland, were the subject of land grants from Spain to the pueblos dating back to the late 1600’s. The original Spanish land grant to the Pueblo of Taos dates back to 1689, and consists of one league in each cardinal direction from the church in the old Pueblo of Taos. The Pueblo of Taos’ title to this tract of land was recognized during the period of Mexican rule from 1821-1848, and was subsequently recognized in the Treaty of Guadalupe Hidalgo², when the United States gained sovereignty of New Mexico. The United States Congress confirmed the Pueblo of Taos’ land claim in 1858 and, after a survey of the land in 1860, issued a quit-claim patent to the Pueblo of Taos on November 1, 1864. Additional grants and Acts of Congress have further expanded the Pueblo of Taos Indian Reservation, and the Pueblo of Taos has acquired some additional areas and placed them into trust, including Tracts A and B (on the map from the Pueblo of Taos’ application) and the Karavas Tract.³

² Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic, 9 Stat. 922.

³ This document uses the term “Pueblo of Taos Indian Reservation” to refer to the main body of the Tribe’s Reservation. The Pueblo of Taos views the Karavas Tract as lying entirely within the Pueblo of Taos Indian Reservation; further, because it is Tribal trust land, it would be considered “reservation” under the CWA in any event, as discussed below. This document uses the term “Reservation” to refer to the Pueblo of Taos Indian Reservation, Tracts A and B, and the Karavas Tract collectively. The Pueblo of Taos also is in the process of acquiring the Taos Pueblo Ranch, shown as the cross-hatched area on the map. The Pueblo of Taos has already purchased more than 4,000 acres of the ranch, and additional purchases are made each year, with the goal of eventually acquiring the entire ranch. When it has completed its purchase of the ranch, the Pueblo of Taos intends to have the land placed into trust, but until such time, the Pueblo of Taos is not seeking approval over the Taos Pueblo Ranch for water quality purposes.

EPA has consistently interpreted the term “reservation” under CWA §518 to include pueblo lands and trust lands. See, e.g., *City of Albuquerque v. Browner*, 97 F.3d 415 (affirming EPA decision to provide treatment in the same manner as a state to Pueblo of Isleta). See also 56 *Federal Register* at 64881 (WQS preamble stating that “EPA considers trust lands formally set apart for the use of Indians” as reservation lands, even if not formally labeled as reservations; the status and use of the land, rather than the label attached to it, determines whether it is “within a reservation.”). Additionally, EPA’s interpretation of “reservation” in the Clean Air Act to include pueblo lands and tribal trust lands has been upheld. See *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1294 (D.C. Cir. 2000). For a more detailed discussion on pueblo lands, see, e.g., *United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Candelaria*, 271 U.S. 432 (1926). EPA concludes that the Pueblo of Taos’ lands included in this application, including Tracts A and B and the Karavas Tract, are all either part of the main body of the Pueblo of Taos Indian Reservation or are on Tribal trust lands and, therefore, meet the test for being “within a reservation.”

2. Area Where Tribe Seeks Approval

The application includes a map of areas for which the Pueblo of Taos seeks approval. Those areas include the main body of the Reservation; the Tribal trust land area known as the Karavas Tract; plus two separate tracts of Tribal trust land, to the west and southwest (Tracts A and B). There are nonmember-owned fee lands within the exterior boundaries of the Pueblo of Taos Indian Reservation, including a portion of the Town of Taos.⁴ The Pueblo of Taos does not seek approval for treatment in the same manner as a state over waters on or adjacent to those fee lands which are identified by the blue-shaded area on the map, for purposes of regulating water quality under the CWA. There are, however, certain parcels of Tribal lands interspersed with the nonmember-owned fee lands within the exterior boundaries of the Pueblo of Taos Indian Reservation, and the Pueblo of Taos is seeking treatment in the same manner as a state approval for waters on or adjacent to those Tribal lands. Where there are

⁴ A November 7, 2005, letter from the Pueblo of Taos to EPA included in Appendix I states that the only way nonmembers obtained title to lands within the original Pueblo of Taos land grant was by adverse possession, as confirmed by the Pueblo Lands Act, 43 Stat. 636 (June 7, 1924) (“PLA”). The PLA required a claimant to prove exclusive use, and the Pueblo of Taos has used the surface waters identified in the Tribe’s application as a communal source of drinking water, and for ceremonial and other traditional purposes for over 1000 years. No claimant, therefore, could have obtained title by adverse possession to the beds and banks underlying the waters covered by the Pueblo of Taos application for treatment in the same manner as a state.

waters that are adjacent both to Tribal lands and to nonmember-owned fee lands, the Tribe is seeking treatment in the same manner as a state approval for such waters to the midpoint of the waters between the Tribal lands and the nonmember-owned fee lands. Tribal lands interspersed with nonmember-owned fee lands are depicted on the map as red-outlined rectangles within the blue-shaded area of the map and are also described in the table titled “*Taos Pueblo Trust and Fee Lands Within the Town and County of Taos Within the original Taos Pueblo Land Grant*” (see Appendix II to this document). As stated above, these Tribal lands satisfy the definition of reservation as land held in trust for the Pueblo of Taos or as part of the main body of the Pueblo of Taos Indian Reservation.

As stated in Section II.B., in its capacity as governing body of the Pueblo of Taos, the Tribal Council asserts that it has general civil and regulatory authority over the lands, people and affairs within the Reservation’s exterior boundaries (except to the extent precluded by federal law). In a Tribal Council Resolution adopted on August 13, 2002, the Tribal Council authorized and adopted the Pueblo Water Quality Code and authorized the Taos Pueblo Office of Environmental Protection to administer the water quality program for waters within the exterior boundaries of the Reservation including the watersheds of the Rio Pueblo de Taos and its tributary, the Rio Lucero, as well as the Rio Grande.

The Pueblo of Taos’ Reservation lands that are included in the areas covered by the application for treatment in the same manner as a state under the CWA are listed below:

- Main body of the Pueblo of Taos Indian Reservation as shown in the map included in the Pueblo of Taos’ application, which is generally bounded on the north by Wheeler Park Wilderness National Forest and on the south by Carson National Forest, with the eastern boundary forming a portion of the western boundary for Colfax County, New Mexico, and the western boundary following State Highway 150 for several miles and extending south toward the towns of Ranchito and Taos. The application includes all waters on or adjacent to Tribal lands within the Pueblo of Taos Indian Reservation. It does not include portions of waters on or adjacent to non-member fee lands; however, where there are waters that are adjacent both to Tribal lands and to nonmember-owned fee lands, the Tribe is seeking treatment in the same manner as a state approval for such waters to the midpoint of the waters between the Tribal lands and the nonmember-owned fee lands.
- The Karavas Tract, a small portion of Tribal trust land that juts out from the southwest corner of the main body of the Pueblo of Taos

Indian Reservation. The application includes all waters within the Tract;

- Tract A, an area of Tribal trust land that is located to the west of the main body of the Pueblo of Taos Indian Reservation, and whose western and southern boundaries extend to the middle of the Rio Grande River and to the middle of the Rio Pueblo de Taos, respectively. The application includes all waters within the Tract, including to the middle of the Rio Grande River and to the middle of the Rio Pueblo de Taos where they form boundaries; and
- Tract B, an area of Tribal trust land that is located west-northwest of the main body of the Pueblo of Taos Indian Reservation and lies between Tract A and the Pueblo of Taos Indian Reservation. The application includes all waters within the Tract.

Further description of the waters covered by this application is included in Section III.B.2. below and in Appendix III.

EPA concludes that the Pueblo of Taos has satisfied 40 CFR §131.8(b)(3)(i) by providing a map or legal description of the area over which the Tribe asserts authority to regulate surface water quality. EPA, moreover, has authority to approve a tribal program covering a portion of a reservation. See *56 Federal Register* at 64881.

Based on the information above, EPA concludes that the Pueblo of Taos has shown that it is proposing to carry out water quality management activities for an area that constitutes a reservation.

D. Capability

The Pueblo of Taos is required to demonstrate that it is reasonably capable of establishing and implementing a water quality standards program and §401 certification program in a manner consistent with the terms and purposes of the CWA and applicable regulations. In determining whether the Pueblo of Taos has the capability to establish and implement adequate water quality standards and §401 certification programs, EPA considered that the Pueblo of Taos:

1. Has established and staffed the Taos Pueblo Environmental Office (TPEO) to carry out the mission of programs such as water quality standards. In the Pueblo of Taos' application for CWA §303 and §401 program authorization, the TPEO is described in the following way:

The Taos Pueblo Environmental Office (“TPEO”) will assume primary responsibility for establishing, reviewing, implementing

and revising water quality standards and certifying permits, although final water quality standards are required to be approved by the Tribal Council. The TPEO is an office within the Pueblo's Community Planning and Development program, subject to oversight by the Tribal Programs Administrator and ultimately by the Taos Pueblo Warchief and the Taos Pueblo Governor.

2. Has developed and adopted water quality standards following completion of a public participation process. EPA is currently reviewing the Pueblo of Taos' water quality standards.
3. Has developed a water quality monitoring program, including EPA-approved Quality Management Plans and Quality Assurance Project Plans, for evaluation of physical, chemical, and biological parameters.
4. Has demonstrated administrative capability with cooperative agreements under CWA §106 and the General Assistance Program.

EPA concludes, therefore, that the Pueblo of Taos meets the capability requirement.

III. Analysis of Tribal Authority

As already noted, the CWA allows EPA to authorize an eligible Indian tribe to carry out management and protection functions under the CWA for waters within a reservation. The Pueblo of Taos' application covers only waters within its Reservation that are on or adjacent to Tribal lands. The Pueblo of Taos has authority to set water quality standards applicable to members and nonmembers for those waters for the following reasons:

A. Inherent Tribal Authority over Tribal Lands and Resources

A tribe that owns lands within a reservation retains inherent sovereign authority to manage uses of those lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The U.S. Supreme Court has recognized that tribes retain the "inherent power necessary to tribal self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (emphasis added). See also *id.* at 142 ("there is a significant territorial component to tribal power"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant "geographic" component to tribal "sovereignty"). With tribally-owned land, a tribe's "power to manage the use of its territory and resources" extends to "both members and nonmembers." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), citing *Merrion*, 455 U.S. at 137; *Bracker*, 448 U.S. at 151; *Montana v. United States*, 450 U.S. 544 (1981); and four federal statutes.

The Supreme Court has also recognized that “[n]onmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them,” and that “power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct.” *Merrion*, 455 U.S. at 144. “When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.” *Id.* But even after a tribe allows entry, it retains power to “place other conditions on the non-Indian’s conduct or continued presence on the reservation.” *Id.* The Court has subsequently reaffirmed that tribes have inherent authority over nonmembers in circumstances where a tribe could “assert a landowner’s right to occupy and exclude.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-652 (2001), quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997).

B. Tribal Authority Under the *Montana* “Impacts” Test Used by the Water Quality Standards Regulation

EPA believes the Pueblo of Taos could show authority over the Tribal lands covered by the application under the test established by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (*Montana* test). *Montana* held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over the activities of nonmembers on nonmember-owned fee lands. The Court also found, however, that Indian tribes retain inherent sovereign power to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where (i) nonmembers enter into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or (ii) “. . . [nonmember] conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.” *Id.* at 565-66. In analyzing tribal assertions of inherent authority over nonmember activities on Indian reservations, the Court has reiterated that the *Montana* test remains the relevant standard. See, e.g., *Strate* 520 U.S. at 445 (describing *Montana* as “the pathmarking case concerning tribal civil authority over nonmembers”); see also *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (“Indian tribes’ regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]”).⁵

The preamble to EPA’s 1991 water quality standards regulation noted that, in applying the *Montana* test to assess the impacts of nonmember activities on fee

⁵ EPA has not taken the position that it is necessary to analyze the impacts of nonmember activities on tribal lands, such as those covered in this application, to find that a tribe has inherent authority to set water quality standards for such areas. EPA believes, however, that, as explained in this decision document, the Tribe could show authority over the area covered by the application under the *Montana* “impacts” test.

lands on an Indian tribe, EPA uses an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 *Federal Register* at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented in the case. *Id.* at 64878. In addition, EPA has noted as a general matter “that activities which affect surface water and critical habitat quality may have serious and substantial impacts” and that, “because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations. . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands.” *Id.* EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id.* at 64879.

EPA also notes that tribal authority over water quality under the *Montana* test would not depend solely on the effects of existing activities. EPA’s analysis of the impacts of nonmember activities considers both actual and potential impacts of nonmember activities, in light of the importance of water quality to a tribe. See, e.g., *Montana v. EPA*, 141 F. Supp.2d 1259 (D. Mont. 1998). The analysis does not require a tribe to demonstrate to EPA that nonmember activity “is actually polluting tribal waters” if the tribe shows “a potential for such pollution in the future.” *Id.*, at 1262, quoting *Montana v. EPA*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff’d* 137 F.3d 1135 (9th Cir. 1998), *cert. den.*, 525 U.S. 921 (1998).

1. Clean Water Act Water Quality Standards Functions the Tribe is Proposing to Perform

The CWA provides for the maintenance and restoration of the physical, chemical and biological integrity of waters of the United States. The CWA authorizes a state, or, by extension, a tribe that is eligible to the same extent as a state, to carry out water quality standards functions “that pertain to the management and protection” of tribal water resources.

Water quality standards consist of designated uses, water quality criteria to protect those uses, an antidegradation policy and other general policies that affect the implementation of the standards, such as mixing zone and variance policies. Water quality standards serve the dual functions of establishing water quality goals for specific water bodies and serving as the regulatory basis for water quality-based treatment controls and strategies. The objective of the CWA, maintenance and restoration of the integrity of the nation’s waters, is directly related to water quality standards that are intended to ensure the full protection of all existing uses and designated uses identified by states and tribes.

Tribal water quality standards are intended to protect the beneficial uses and water quality of reservation lakes, streams, rivers, and associated tributaries. In addition to designated uses and criteria, water quality standards include antidegradation provisions that protect all existing uses of surface waters regardless of whether such uses are actually designated in water quality standards. Antidegradation requirements also serve to maintain and protect high quality waters and waters that constitute an outstanding national resource. Further, antidegradation requirements can be utilized by tribes and states to maintain and protect the quality of surface waters that provide unique cultural or ceremonial uses.

2. Importance of Water Quality Standards to the Tribe

The Pueblo of Taos' application contains information about the importance of the quality of the waters covered by this application to the Tribe. The mid-point of the Rio Grande River forms a boundary water for part of the Reservation, and the Reservation contains two watersheds, the Rio Pueblo de Taos and the Rio Lucero, that drain a total of 72 square miles. Both watersheds originate at high alpine lakes on the Reservation that have spiritual significance to the Pueblo of Taos. The two rivers merge within the Reservation, forming the Buffalo Pasture, a wetland with spiritual significance to the Pueblo of Taos.

The Pueblo of Taos' water quality standards designate all the mountain lakes, springs, and streams within the Reservation as "outstanding tribal resource waters." The Pueblo of Taos' water quality standards designate all Reservation waters for primary human contact and ceremonial use. Mountain lakes, streams, and springs, as well as Rio Lucero, El Salto Creek, irrigation ditches and wetlands, are also designated for drinking water use.

The Rio Pueblo de Taos (which has provided Tribal members with a source of drinking water for roughly 1000 years) and the Rio Lucero provide drinking and domestic water for 94% of the Tribe. The Tribe also uses the waters for fishing, with the upper Rio Lucero being one of the last habitats for the native Rio Grande cutthroat trout. The waters are, in addition, used for livestock and wildlife watering as well as irrigation. The wetland where the two rivers merge, Buffalo Pasture, is home to several plants and animals of traditional importance to the Pueblo of Taos and is used as a learning area for teaching Tribal members important life lessons. Water-dependent plants growing along the rivers are also used for traditional purposes.

Finally, Tribal Council Resolution # 2002-07, which adopted the Tribal Water Quality Code, includes the following explanation of the importance of water quality to the Pueblo of Taos:

[T]he Pueblo considers the watersheds of the Rio Pueblo de Taos and its tributary, the Rio Lucero, to be sacred and critical to the sustainment of its homelands and way of life since time immemorial...[T]he Pueblo finds that maintenance and protection of water quality within the exterior boundaries of the Pueblo is essential to protect the health, welfare, culture, traditions, environment, and political integrity of the Pueblo.

3. Impact of Water Quality Management on the Tribe's Political Integrity, Economic Security, Health, and Welfare

a. Effects on Political Integrity

The central role the waters play in Tribal life, and the importance the Tribal Council has attached to water quality management generally reflect the importance of water quality management to the Pueblo of Taos' well-being, and, thus, to the Tribe's political integrity. As the preamble to EPA's 1991 water quality standards regulation explains, water quality management protects public health and safety, which is a core governmental function critical to self-government. 56 *Federal Register* at 64879. Performing such functions is critical to the Tribe's ability "to make [its] own laws and be governed by them." *Hicks*, 533 U.S. 361, citing *Williams v. Lee*, 358 U.S. 217, 220 (1959). See also *Mescalero Apache Tribe*, 462 U.S. at 333, 335 (recognizing a tribe's "power to manage the use of its territory and resources by both members and nonmembers"). The Ninth Circuit has recognized "the threat [to a tribe] inherent in impairment of the quality of the principal [tribal] water source." *Montana v. EPA*, 137 F.3d at 1141.

b. Effects on Economic Security, Health and Welfare

The Pueblo of Taos' reliance on the Reservation waters as a source of drinking and domestic water for 94% of its members provides the strongest evidence of the importance of protecting water quality to Tribal health and welfare. Activities that degrade the quality of drinking water can seriously harm the health and welfare of members who drink such water, potentially exposing them to disease or other harmful effects from contaminated or degraded water. Water quality degradation can also significantly affect persons using the water for such other domestic purposes as bathing, cleaning, or cooking or washing food. Fully protecting domestic water sources is also important to the Pueblo of Taos' economic security because domestic water sources have economic value, and if an existing source becomes unusable, the Tribe and/or

its members must incur the expense of securing a replacement source.

As stated previously, the Pueblo of Taos water quality standards designate all Reservation waters for the Primary Human Contact/Ceremonial Use. This designation includes recreational uses. The Rio Grande to mid-river forms the western boundary of Tract A of the Reservation. This portion of the river is used for rafting, and a permit fee is charged. A portion of this fee is paid to the Pueblo of Taos, providing a source of revenue to the Pueblo of Taos' government and giving the Pueblo of Taos an additional interest in the river's water quality.

Activities that impair the quality of Reservation waters will reduce the value of those waters as recreational resources, by making the waters less safe and less appealing to use for those purposes. Full protection of recreational uses, in and on the waters, helps ensure that recreational users can utilize waters for body contact during play and sport without undue threat of disease or loss of aesthetic pleasure. Such protection also ensures the continuing ability to generate recreation-based revenues, like those from the rafting permit fees.

Protecting the Reservation waters is also important to the Pueblo of Taos' culture and religion. Both the headwaters of the two rivers and the Buffalo Pasture wetland have spiritual significance to the Tribe. Water quality is critical to the waters' suitability for such uses. Some ceremonial uses may require that water be of a certain purity. In other cases, water quality is important to ensure that the uses are safe and feasible.

Protecting Reservation waters is also important to the Pueblo of Taos' interest in fish, wildlife, and vegetation that live in Tribal waters and use or depend on those waters as a source of water, food, or habitat. Without such protection, unregulated water uses may result in introduction or accumulation of toxins in the waters and soil. Such toxins may then enter the food chain and harm various life forms, including fish and wildlife. Some of these toxins may bioaccumulate in vegetation, fish, birds and game animals. The toxins could harm the health and welfare of Tribal members who ingest the fish, wildlife, or plants that contain toxins. Water-based toxins may also harm the Tribe and its members by reducing the abundance of life forms in the food chain, including plants, fish, or wildlife that directly or indirectly provide food sources for Tribal members. That can harm the Tribe

and its members economically, because edible life forms have economic value when they provide food sources for Tribal members, or when they generate revenue, for example from recreational hunting and fishing.

Water quality management protects fish and other aquatic life, including plant life, and ensures the health and safety of Tribal members who use the fish or plants as a food source. It protects the Tribe's economic well-being to the extent that the fish and aquatic life are tribal resources.

Water quality management also protects and enhances the value of fish and other aquatic life by helping to ensure that aquatic ecosystems can function normally to sustain the life forms that depend on them. An ecosystem that is functioning properly cycles chemicals, purifies water, and provides diversity and productivity of life within Tribal waters. By sustaining fish and other life forms, the system protects the Pueblo of Taos' ability to use and rely on those life forms to achieve the Tribe's food, aesthetic and educational/scientific goals. Fully protecting aquatic life also helps ensure the economic well-being of the Pueblo of Taos and its members through harvest of fish and other aquatic life and encouragement of water-based recreation businesses.

Further, water quality management protects wildlife, by helping ensure that birds, mammals, reptiles, and amphibians that use and depend upon Tribal waters as a source of water, food, or habitat will maintain the species diversity and productivity that Tribal lands and waters are capable of supporting. Game animals, birds, and fish, bioaccumulate toxins from water and the food chain, and vegetation bioaccumulates toxins from water and soils. Thus, protection of water quality to protect the wildlife use protects the health of Tribal members who eat fish or plants from toxins that can accumulate in wildlife; preventing such bioaccumulation is particularly important because tribal members may consume more wild game and native plants than the general public, for subsistence, dietary supplementation, and medicinal and cultural practices. Finally, protection of the wildlife use helps ensure the Pueblo of Taos' economic well-being to the extent that wildlife is an economic resource for the Tribe.

The Reservation is also potentially capable of supporting other activities that, when undertaken by either members or nonmembers, could have significant impacts on water quality. The Pueblo of Taos' application asserts that agriculture, grazing,

construction, and increased development are nonmember activities that could potentially occur on Tribal lands. Those activities could have impacts that would support Tribal jurisdiction.

Agricultural, grazing, and construction practices can increase water turbidity and sediment deposition by disturbing topsoil and increasing erosion through runoff or other processes. Turbidity and fine sediments can affect aquatic life in Tribal waters by reducing photosynthesis of plant life, by interfering with sight feeding of fish, by smothering fish eggs and insect life, and by reducing the habitat available for food organisms and fish reproduction. Livestock grazing practices can degrade water quality by increasing soil erosion, altering stream banks and surrounding habitat, destroying native vegetation and riparian areas, raising water temperature and increasing turbidity, sediment levels and fecal contamination of surface waters.

Improper use of herbicides and pesticides in agriculture or other activities can cause increased loadings of toxic contaminants in runoff as a result of irrigation or precipitation or both. Depending on the concentrations, these loadings may cause direct mortality or reduce growth and reproduction in fish and invertebrates. Such loadings may also increase health risks to Tribal members by increasing their exposure to herbicides and pesticides present in fish flesh or drinking water taken from Tribal water bodies or from ingestion of wildlife that feed upon aquatic plants or animals in Tribal water bodies.

The impacts from nonmember activities could be particularly severe in the upstream areas of the Reservation, where the waters currently retain their pristine qualities.

4. Summary

For all the reasons presented above, EPA concludes that the Pueblo of Taos possesses adequate inherent authority to meet the requirements for approval for treatment in the same manner as a state. The record also shows that the Pueblo of Taos could meet the jurisdictional test in *Montana* by showing that nonmember activities on Tribal lands, if unregulated by the Pueblo of Taos, would have direct effects on Tribal political integrity, economic security, and health and welfare, and could meet EPA's operating rule for water quality standards authority by showing that the effects are serious and substantial.

IV. Conclusion

EPA has determined that the Pueblo of Taos has met the requirements of 40 CFR §131.8 and CWA §518 and, thus, is authorized to implement the CWA §303(c) and §401 programs for Tribal waters identified in Section II.C.2. and the appendices of this document.⁶

⁶ Having approved the Tribe's application, EPA will follow applicable procedures in considering, and, if appropriate, approving any new or revised water quality standards adopted by the Pueblo of Taos for CWA purposes. EPA will continue to have responsibility for administering and enforcing other provisions of the CWA, including the National Pollutant Discharge Elimination System, in Indian country in New Mexico. Also, the U.S. Army Corps of Engineers will continue to issue and enforce permits under CWA §404 and the Rivers and Harbors Act for Indian country in New Mexico.

Appendix I

November 7, 2005, Letter from the Pueblo of Taos to EPA Regarding Boundary Waters

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November 7, 2005

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Re: Pueblo of Taos Clean Water Act § 303 Application – Additional information regarding boundary waters

Dear Mr. Greene:

The U.S. Environmental Protection Agency (“EPA”) has informed the Pueblo of Taos (“Pueblo”) that in order for EPA to complete its review of the Pueblo’s application for eligibility to establish and administer water quality standards, it needs more information regarding two issues:

- 1) whether the Pueblo land comprising Tract A on the map submitted with the Pueblo’s March 2003 application extends to mid-stream of the boundary waters of Tract A, namely, the Rio Grande (on the west) and the Rio Pueblo de Taos (on the south);
- 2) whether the Pueblo owns the stream beds of the portions of the Rio Pueblo and Rio Lucero that are within the original Pueblo land grant and that have Pueblo land on one side and non-Indian fee land on the other.

This letter explains that the Pueblo’s land extends to mid-stream of the Tract A boundary waters, and that the Pueblo owns the stream beds of all waters within the original Pueblo land grant, regardless of the nature of the bordering lands. The Pueblo therefore has jurisdiction to set water quality standards for these water bodies.

- 1) The Pueblo’s Land Extends to Mid-Stream of the Segments of the Rio Grande and Rio Pueblo de Taos that Comprise the Western and Southern Boundaries of Tract A.

Tract A was acquired for the Pueblo in 1941 through a condemnation proceeding, conducted in accordance with federal legislation authorizing the acquisition of certain land by the Department of the Interior and the placing of that land in trust for the Pueblo. *United States v. The Watson Land*

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Co., No. 129-Civil (D. NM). A metes and bounds description of Tract A is included as an attachment to the Declaration of Taking in that proceeding, and is also enclosed with this letter. The description explicitly states (at page 1) that the south boundary of Tract A is formed in part by “the meanders of the right or north bank of the Rio Don Fernando Creek . . . (the center of the said creek being intended as the true boundary of . . . this tract).”¹ In addition, the description states (at page 2) that the west boundary proceeds “along the meander line of the left or east bank of the Rio Grande River . . . (the true West boundary of . . . this tract being intended as the middle of the said Rio Grande River).” Tract A therefore extends to mid-stream of the two boundary waters.

2) The Pueblo Owns the Stream Beds of All Waters within the Original Pueblo Land Grant

In the Pueblo’s jurisdictional statement, submitted with its eligibility application in March 2003, the Pueblo asserted jurisdiction over only the Pueblo fee and trust lands within the checkerboard area in the southwest portion of the Taos Pueblo Indian Reservation. This area includes a part of the Town of Taos. The Pueblo explained that although the non-Indian fee land in this area is also subject to Pueblo jurisdiction, by virtue of being within the Reservation, the Pueblo was not asserting jurisdiction at this time over the non-Indian fee lands in order to avoid what was likely to be a contentious issue that already was the subject of litigation. (Jurisdictional statement at 6-7.)

Although the Pueblo thus excluded any non-Indian fee land from its application, there are portions of the Rio Pueblo de Taos and the Rio Lucero that pass through the checkerboard area and have Pueblo land on one side and non-Indian fee land on the other. The Pueblo maintains that it has jurisdiction to set water quality standards for these stream segments because the Pueblo owns the stream beds, as explained further below.

The checkerboard area in question lies within the original Spanish land grant to the Pueblo, made in 1689. As explained in the Pueblo’s jurisdictional statement (at 2), the Pueblo’s title to this area was recognized by the government of Mexico during the period of Mexican rule, from 1821-1848, and subsequently was recognized by the United States in the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848), *see* Art. IX, when the United States gained sovereignty over New Mexico. Congress officially confirmed Pueblo land grant title by the Confirmation Act of 1858, 11 Stat. 374 (Dec. 22, 1858), and Taos Pueblo received a federal quit claim patent for its original land grant on November 1, 1864. *See generally Pueblo of Taos v. U.S.*, 33 Ind. Cl. Comm. 82, 90-94 (1974)

¹ The water body referred to as the “Rio Don Fernando Creek” is currently referred to as the Rio Pueblo de Taos. The Rio Fernando de Taos joins with the Rio Pueblo de Taos just east of Tract A, and downstream from the confluence the water body is now called the Rio Pueblo.

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(containing a history of the Taos Pueblo Spanish land grant). Federal law thus confirmed that the Pueblo owned *all* of the land within the original Spanish land grant (which would necessarily include lands adjacent to and underlying the stream segments at issue). In addition, the state of New Mexico has expressly disclaimed any right to these Pueblo lands. New Mexico Enabling Act, 36 Stat. 557 (June 20, 1910), § 2; New Mexico Constitution, art. XXI, § 8.²

Despite Pueblo ownership of all lands within the original Spanish land grant, non-Pueblo trespass on Pueblo grants in general — including on Taos Pueblo's land grant — was a recurring problem under successive Spanish, Mexican, and United States administrations. *See generally* Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 384 (1942, reprinted 1988).³ The problem was exacerbated over a nearly 40-year period during which the Supreme Court essentially prevented the federal government from protecting Pueblo lands. *See United States v. Joseph*, 94 U.S. (4 Otto) 614 (1876), *reversed United States v. Sandoval*, 231 U.S. 28 (1913). During that period, title to land within many of the Pueblo grants was called into question, *see generally* Cohen, and the problems of uncertain title caused Congress to intervene with the enactment of the Pueblo Lands Act of 1924 ("the PLA"), 43 Stat. 636 (June 7, 1924).

The PLA established, in § 4, a statutory adverse possession mechanism by which non-Indians could obtain title to parcels within Pueblo grants. *Accord Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 244 (1985) (summarizing the adverse possession requirements in the PLA). As a result of this procedure, Taos Pueblo lost significant acreage in the southwest corner of its grant, where the Town of Taos is now located. *See generally* Cohen; *Pueblo of Taos*, 33 Ind. Cl. Comm. at 128. Critically, however, the PLA required the claimant to prove, among other factors, exclusive use of the land; accordingly, Pueblo title to lands used communally — *e.g.*, lands underlying the Town of Taos plaza or several miles of roads within the original townsite, *cf.* Agreement between Taos Pueblo and the Town of Taos on Rights-of-Way for Certain Streets (Dec. 19, 1995) — was not extinguished. *Cf. United States v. Arrieta*, CR No. 00-411JC at 5 (D. NM

² The Enabling Act specifically "disclaim[s] all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty." § 2, clause 2. The Constitution includes in its definition of "Indian country" in Art. XXI, § 8 all lands held by the Pueblo as of June 20, 1910, which necessarily includes all Pueblo grant lands, since no grant title was lawfully extinguished until after the Pueblo Lands Act was passed in 1924.

³ The 1982 edition of the Cohen treatise omits the chapter in the original edition discussing Pueblo legal history, and one must refer to the original treatise for the relevant discussion.

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April 1, 2004) (memorandum opinion) (ruling that title to lands underlying public road running between non-Pueblo PLA parcels within Pueblo land grant remained with the Pueblo).

The same situation applies with respect to stream beds within Taos Pueblo's congressionally confirmed grant. Claimants would not have been able to claim exclusive use of the stream beds, especially since both the Rio Pueblo and the Rio Lucero have been used by the Pueblo for drinking water and for ceremonial and other traditional purposes for over 1,000 years, as discussed in the Pueblo's jurisdictional statement.⁴ The PLA has been Congress's only authorization for the extinguishment of Pueblo grant title and, as discussed above, the act authorized the extinguishment of title only for those lands to which a non-Indian claimant could establish *exclusive* use. The Pueblo therefore retains ownership over the stream beds of the segments in question of the Rio Pueblo and the Rio Lucero.

I hope the information in this letter assists in your approval of the Pueblo's eligibility application. The Pueblo is eagerly awaiting that approval.

Very truly yours,

NORDHAUS LAW FIRM, LLP



Jill Elise Grant

General Counsel for the Pueblo of Taos

cc: Robert Gomez, Director, Taos Pueblo Environmental Office
Donovan Gomez, Tribal Administrator
Miguel Flores, Director, Water Quality Protection Division, EPA Region 6
Ben Harrison, Office of Regional Counsel, EPA Region 6
David Coursen, Office of General Counsel, EPA

⁴ Moreover, the portions of the Rio Pueblo and Rio Lucero within the original Spanish land grant create a wetlands area known as the Buffalo Pasture, which is an area of spiritual significance to the Pueblo and is used by the Pueblo for training and traditional purposes. Further, should any issue arise as to the stream banks, water-loving plants growing along the stream banks also are used by the Pueblo for traditional purposes.

Appendix II

“Taos Pueblo Trust and Fee Lands Within the Town and County of Taos Within the original Taos Pueblo Land Grant”

**Taos Pueblo Trust and Fee Lands
Within the Town and County of Taos
Within the original Taos Pueblo Land Grant**

Private Claim	Acreage	Location	Map Description	Notes
PC 1 P.1	38.97		Section 30, T26N, R13E, NMPM, TPLG	
PC 2 P.1	22.503	West of Old State Road 3 (Ambrose Lane)	Within Section 31 & 32, T26N, R13E, NMPM, TPLG	Alberto Field and Orchard
PC 46 P.2	0.063	Archuleta Lane – Town of Taos	NE1/4 of Section 8, T25N, R13E, NMPM, TPLG	Retracement survey completed 11/09/00 by AGS Land Surveying, Job #749
PC 50 P.1	16.457		Section 5, T25N, R13E, NMPM, TPLG	
PC 51 P.2	0.152 0.153 after resurvey 11/09/00	Archuleta Lane – Town of Taos	NE1/4 of Section 8, T25N, R13E, NMPM, TPLG	Retracement survey completed 11/09/00 by AGS Land Surveying, Job #749
PC 75 P.2	6.706		NE1/4 of Section 6, T25N, R13E, NMPM, TPLG	
PC 110 P1	19.561 (0.448 acres located east of Carabajal Road)	Within Town of Taos - surrounded by Upper Ranchitos Road, Camino del Ranchito Arriba, Carabajal Road	Within Section 18, T25N, R13E, NMPM, TPLG	Majority of parcel shown on Page 20A, General Land Office Plats, Taos Pueblo Grant, Supplemental approved June 7, 1934. 0.448 acres described in survey completed 10/09/00 by Paisano Surveying Company, Dwg. No. TSBS-0032
PC 137 P.2	4.260		NE1/4 of Section 8, T25N, R13E, NMPM, TPLG	
PC 142 P.1	34.660		Section 31, T26N, R13E and Section 5 & 6, T25N, R13E, NMPM, TPLG	
PC 144 P.1	5.647	North of Lucero Road – El Prado area	Section 5, T25N, R13E, NMPM, TPLG	Page 8A, GLO Plats, Taos Pueblo Grant, Supplemental approved July 7, 1934. Indian by decree Case #1934, May 20, 1930
PC 145 P.2	5.449		NE1/4 of Section 6, T25N, R13E, NMPM, TPLG	
PC 156 P.1	142.899	Part of Karavas Tract	Section 6, 7, 8, T25N, R13E, NMPM, TPLG	Pgs. 7A, 12A, 13A GLO Plats, Approved 1924, 1932, 1934
Part of PC 162 P.1	36.00	Field #2	Section 6, 7, 8, T25N, R13E, NMPM, TPLG	Indian by Decree, May 21, 1930, Case #1934; Pgs. 7A and 11B, GLO Plats, Approved 1924, 1932, 1934

**Taos Pueblo Trust and Fee Lands
Within the Town and County of Taos
Within the original Taos Pueblo Land Grant**

Private Claim	Acreage	Location	Map Description	Notes
PC 165 P.1	18.934	Field #1	Section 5, 6, 8, T25N, R13E, NMPM, TPLG	Indian by Decree, May 21, 1930, Case #1934; Pgs. 7A, 8A, 11B, GLO Plats, Approved 1924, 1932, 1934
PC 167 P.1	12.086	Part of Karavas Tract	Section 7, T25N, R13E, NMPM, TPLG	Pg 13A, GLO Plats, Approved April 7, 1932
PC 175 P.1	27.00	Part of Karavas Tract	Section 7, 8, T25N, R13E, NMPM, TPLG	Pg 13A, GLO Plats, Approved April 7, 1932
PC 192 P.1	0.673	East of Stiercoles Road – El Prado Area		Retracement survey completed 07/07/00 by Paisano Surveying Company, Dwg. No. TSTL-0011
PC 194 P.2	0.139	Exchange with Mabel Dodge Luhan Estate	SW1/4 of Section 9, T25N, R13E, NMPM, TPLG	Deed on file
PC 256 P.1	39.151		SW1/4 of Section 9, T25N, R13E, NMPM, TPLG	See Exhibit B, Pueblo Lands Board
PC 16 P.1	1.725	Along the west boundary of the Taos Pueblo Land Grant	Within Section 31, T26N, R13E, NMPM, TPLG	Retracement Survey completed 10/04/00 by Paisano Surveying Company, Dwg. No. TSBS-0031
La Tuatah Property	Tract A – 0.355 Tract B – 0.166	Within Town of Taos Tract A – South of Placitas Road Tract B – South of Ojitos Road	NE ¼ of Section 17, T25N, R13E, NMPM, TPLG	Retracement survey completed 06/21/00 by AGS Land Surveying, Job #725

- All lands within the Taos Pueblo Land Grant between the private claims which includes streets, alleyways, and land exchanges as indicated in the Pueblo Lands Board Report (dated March 17, 1927 and certified May 17, 1929) and as shown on Exhibit B, C, D of this report and the Department of Interior General Land Office Plats of the Taos Pueblo Land Grant approved between 1932 and 1934.
- Taos Pueblo lands described in the following leases: #NPA-85-TA-39 and #NPA-87-TA-12.

Information gathered by Taos Pueblo Realty Property Management Office from files and maps on file.

Appendix III

List of Tribal Waters Covered by the Pueblo of Taos Application for Treatment in the Same Manner as State under §518 of the Clean Water Act (CWA)

The water bodies listed below are located within the area covered by the Pueblo of Taos' application for treatment in the same manner as a state under §518 of the Clean Water Act (CWA) for purposes of administering CWA §303(c) and §401 (see Section II.C.2. of the decision document).

Rio Pueblo de Taos
Rio Lucero
Rio Grande
El Salto Creek
Blue Lake
Star Lake
Waterbird Lake
Bear Lake

In addition, mountain lakes and springs, streams (perennial, intermittent and ephemeral), irrigation ditches, and wetlands located within the Pueblo of Taos Indian Reservation are also included as waters covered by this application.

2005 Response to Comments on Pueblo of Taos Application for Treatment in the Same Manner as a State under §518 of the Clean Water Act (CWA) for Purposes of Administering CWA §303(c) and §401

The water quality standards regulation found at 40 CFR §131.8 requires the Environmental Protection Agency (EPA) to notify “appropriate governmental entities” to allow comment on an Indian tribe’s assertion of authority to implement the water quality standards and §401 certification programs. The preamble to the regulation (56 Fed. Reg. 64876-64896) defines governmental entities as “States, Tribes and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State.” By letter dated April 20, 2005, EPA requested comments from governmental entities on the Pueblo of Taos’ assertion of authority to implement the water quality standards and §401 certification programs for the areas covered by the Tribe’s application: the main Reservation and the areas of Tribal trust lands identified as Tracts A and B and the Karavas Tract.¹

The preamble to the water quality standards regulation (56 Fed. Reg. 64876-64896) also states that EPA will make an effort to provide local governments and others an opportunity to comment. EPA placed public notices in the *Taos News* and the *Santa Fe New Mexican* on April 22, 2004, to notify local governments and citizens of the Pueblo of Taos’ request for treatment in the same manner as a state for Clean Water Act (CWA) §303 and §401. EPA and the Pueblo of Taos also identified local entities that could be affected by the Tribal water quality standards. At the same time, EPA mailed an announcement, the public notice, the map of the Pueblo of Taos reservation lands, and the list titled “*Taos Pueblo Trust and Fee Lands Within the original Taos Pueblo Land Grant*” to the following local offices and establishments: the Manager of Taos County, the Manager of the Town of Taos, the Public Utilities Director of the Town of Taos, the Mayor of the Village of Taos Ski Valley, and Molycorp, Inc.

The Town of Taos requested an extension to the comment period, which was granted by EPA following coordination with the Pueblo of Taos. By letter dated June 4, 2005, EPA notified governmental entities of the extension to the public comment period. On June 8, 2005, EPA also mailed a copy of the public notice announcing the extension to the local offices and establishments previously mentioned. EPA received five responses during the comment period, including the letter from the Town of Taos forwarded by the New Mexico Environment Department (NMED). All comments were evaluated by EPA’s Water Quality Protection Division and Office of Regional Counsel.

- U.S. Department of Energy (Denver Regional Office) from William S. Becker, Director;
- U.S. Army Corps of Engineers (Albuquerque District) from Daniel Malanchuk, Chief, Regulatory Branch;
- U.S. Forest Service (Carson National Forest) from Martin D. Chavez, Jr., Forest Supervisor;

¹This document uses the term “Reservation” to include the entire area covered by the Tribe’s application: the main Reservation, Tracts A and B, and the Karavas Tract.

- NMED from Ron Curry, Secretary; and,
- NMED transmittal of public comments from Marcy Leavitt, Surface Water Quality Bureau Chief that included the following:

Town of Taos letter from Bobby F. Duran, Mayor.

All comments were considered in making a determination on the application for treatment in the same manner as a state for CWA §303(c) and §401. Comments are summarized below with EPA's responses. It should be noted that 40 CFR §131.8(c)(3) specifically states that “[c]omments shall be limited to the Tribe's assertion of authority.” We are responding to all comments even though some of these comments do not directly relate to the Pueblo of Taos' assertion of authority. Some of the comments relate to the Tribe's adopted water quality standards. EPA's responses regarding the Tribe's standards themselves represent the Agency's general or preliminary views, and are not intended to predetermine the results of EPA's review of those standards under CWA §303(c).

Comment 1: The U.S. Department of Energy sent a letter providing “no comment” regarding the Pueblo of Taos' request for treatment in the same manner as a state under CWA §518 for CWA §303 and §401. The U.S. Army Corps of Engineers sent a letter stating that “We have no objection to the U.S. Environmental Protection Agency approving the Pueblo of Taos' request for Section 303 and Section 401 program authority.”

Response 1: EPA appreciates the responses from the U.S. Department of Energy and the U.S. Army Corps of Engineers.

Comment 2: The U.S. Forest Service and the NMED each sent a letter in support of approving the application. In a separate letter transmitting comments from the Town of Taos, the NMED noted that its support of the Pueblo of Taos' application had not changed based on the Town of Taos' comments.

Response 2: EPA appreciates the response from the U.S. Forest Service and the NMED on CWA programs.

Comment 3: The Town of Taos cited §518 of the CWA which directs EPA to promulgate regulations and reads:

“...promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this Act. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of waters. Such mechanism shall provide for explicit consideration of relevant factors including but not limited to, the effects of differing water quality permits requirements on

upstream and downstream dischargers, economic impacts and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective this Act.”

The Town requested assurance that EPA “adequately addresses resolution of issues as required by this section,” and claimed it “has not received any information how Taos Pueblo and EPA propose to resolve unreasonable consequences,” from differing water quality standards. The Town of Taos also stated that it “does not dispute the Pueblo’s ability to administer the program.”

Response 3: EPA has promulgated regulations implementing CWA §518 at 40 CFR §131.7 and §131.8. 40 CFR §131.7 establishes the dispute resolution mechanism. The process established under that regulation can be initiated by states or Indian tribes where one government believes another government’s water quality standards would lead to unreasonable consequences for the other government. A municipality or industry cannot initiate the dispute resolution mechanism, but can request that a state or Indian tribe do so on its behalf.

Comment 4: The Town of Taos stated that the Pueblo of Taos water quality standards will usurp the jurisdiction of the State of New Mexico and override the State’s water quality standards.

Response 4: EPA has not approved the State of New Mexico’s water quality standards under the CWA for the areas that are covered by the decision document. Thus, if water quality standards are adopted by the Pueblo of Taos and approved by EPA for the area covered by the decision document they will not duplicate any CWA standards that currently exist for these waters. This approval, moreover, does not extend beyond water quality standards and §401 certification, and EPA retains authority for implementing other CWA functions, such as issuance and enforcement of permits, in Indian country in New Mexico. Permits must contain any limits necessary to ensure consistency with downstream standards in effect under the CWA. *See City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir.1996)(cert. denied 522 U.S. 965 (1997)). As noted above, the NMED has expressed its support for approval of the Pueblo of Taos’ application.

Comment 5: The Town of Taos requested that approval of the Pueblo of Taos application for CWA §303 and §401 authority be delayed until completion of the report by the General Accountability Office (GAO) requested by Senator James Inhofe in a letter to the Comptroller General of the United States dated June 1, 2004. The Town of Taos supported that request by quoting language from Senator Inhofe’s letter that focused on non-contiguous trust lands in Oklahoma, which is in EPA Region 6. The Town also stated that the Pueblo of Taos had requested CWA authority over noncontiguous trust lands in New Mexico, which is also located in EPA Region 6.

Response 5: The Pueblo of Taos' application for CWA §303 and §401 authority was submitted in 2003. EPA is aware of Senator Inhofe's request to GAO. However, EPA has reviewed the GAO's report and does not believe it provides any basis for delaying EPA's decision or disapproving this application for treatment in the same manner as a state. For further discussion on the Pueblo of Taos lands included in EPA's approval for treatment in the same manner as a state, see Section II.C. of the decision document.

Comment 6: The Town of Taos commented that an analysis of potential economic impacts is required by the CWA before approval of an application for treatment in the same manner as a state or water quality standards, particularly where tribal standards are more stringent than federal requirements. The comments also suggested that a cost/benefit analyses must be conducted prior to approval of the Tribal water quality standards or the application for treatment in the same manner as a state. The Town also asserted that the Tribal water quality standards are subject to the federal Unfunded Mandates Reform Act, and funding must be provided to municipalities required to meet such standards. The Town also requested that the Pueblo and EPA provide funding for whatever mitigation plans may be required to meet the standards. Finally, the Town of Taos cited a policy on "Tribal Water Standards" adopted by the New Mexico Municipal League which acknowledges the authority of Indian tribes to adopt water quality standards and recommends that justification such as cost-benefit analyses be required from federal agencies where tribal standards are more stringent than federal requirements. The Municipal League's policy also states that municipalities and state governments should be allowed to participate in the rule-making process.

Response 6: CWA §518, the provision governing treatment in the same manner as a state, does not require that EPA analyze the economic impact of tribal standards before approving a tribe for treatment in the same manner as a state. The CWA also does not require that a tribe undertake such an analysis as a prerequisite for treatment in the same manner as a state approval. As already noted, §518 of the CWA requires that a tribe make the following demonstration: that "the Indian tribe has a governing body carrying out substantial duties and powers," that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources * * * within the borders of an Indian reservation," and that the "tribe is reasonably expected to be capable * * * of carrying out the functions to be exercised in a manner consistent with the terms and purposes of" the CWA and "of all applicable regulations." Whether any particular set of water quality standards that a tribe adopts is consistent with the CWA is an issue that EPA will address when it approves or disapproves those particular new or revised water quality standards. States and tribes may, at their discretion consider economic impacts in developing and revising water quality standards. See 40 CFR §131.10(g)(6) and EPA's *Water Quality Standards Handbook*² (see Chapter 2 and Appendix M).

² U.S. EPA. 1988. *Water Quality Standards Handbook: Second Edition*. Office of Water. EPA-823-B-94-005a. Washington, D.C. Available from: <http://www.epa.gov/waterscience/library/wqstandards/handbook.pdf> and <http://www.epa.gov/waterscience/library/wqstandards/handbookappx.pdf>.

The Unfunded Mandates Reform Act (UMRA) does not apply to EPA's treatment in the same manner as a state approval, because the relevant sections of UMRA, sections 201-205, apply only to rulemakings. EPA's approval for treatment in the same manner as a state is not a rulemaking, but rather is an informal adjudication. Further, the approval for treatment in the same manner as a state does not impose any enforceable requirements on any entities. Any such requirements would be the result of future EPA actions and the requirements of the CWA.

In the 1986 amendments to the CWA, Congress replaced the Wastewater Treatment Construction Grants Program with the State Revolving Loan Fund (SRF). The SRF program provides low interest loans to publically-owned wastewater treatment systems to address wastewater infrastructure needs. The fund has been capitalized since 1988 by annual EPA grants to the NMED. To date, EPA has provided \$100 million to the New Mexico SRF program. In addition to the EPA funds, federal funds are made available through other federal agencies such as the Department of Agriculture, the Economic Development Administration and the Department of Housing and Urban Development to assist communities with wastewater infrastructure needs.

EPA notes that the Pueblo of Taos provided public notice on its proposed standards on March 1, 2001, conducted a public hearing on April 18, 2001, and allowed comments to be submitted until April 27, 2001. In addition, during the week of March 23, 2001, the Pueblo of Taos also sent notification of the proposed standards and public hearing through the mail to state, county, and local officials. The Town of Taos provided written comments during this process, which were considered by the Pueblo of Taos and included in its Response to Comments. EPA does not conduct a public participation process when reviewing state or tribal water quality standards.

Comment 7: The Town of Taos noted that the Pueblo of Taos has not detected all of the substances included in its water quality standards in water bodies and requested that instream monitoring, human health risk assessments, Use Attainability Analyses (UAA), and additional public participation be completed prior to approval of the water quality standards and the application for treatment in the same manner as a state.

Response 7: The federal water quality standard regulation requires that a UAA be conducted only in the limited circumstances where a state or Indian tribe adopts designated uses for a water body that do not meet the goals of CWA §101(a)(2), or where the state or tribe is removing certain designated uses. States and Indian tribes, at their discretion, may conduct UAAs when designating uses consistent with CWA §101(a)(2). There is no requirement that a UAA, or other type of site-specific evaluation, be conducted for each use in water quality standards, except in the limited circumstances described above.

There are two general approaches that may be used by states and Indian tribes to select numeric criteria for protection of designated uses. The first option is to adopt criteria for all substances for which EPA has developed a numeric recommendation. The second option is to adopt criteria for priority toxic pollutants that may reasonably be expected to interfere with attaining designated

uses, and for other substances that may be found in waters. The State of New Mexico now uses the first approach and the Pueblo of Taos has chosen to use the second approach. Most Indian tribes and states, including the Pueblo of Taos and State of New Mexico, use EPA's recommended values for numeric criteria. Finally, most states or tribes do not routinely monitor for all substances in water quality standards.

Comment 8: The Town of Taos correctly noted that for a particular reach of the Rio Pueblo de Taos, the Tribal water quality standards include a Domestic Water Supply use (which incorporates groundwater recharge), but the State standards do not include this designated use. The Town of Taos also questioned whether the Pueblo's criteria are functionally equivalent to the State's human health criteria and commented that several of the Tribal criteria are more stringent.

Response 8: EPA acknowledges that water quality standards adopted by an Indian tribe may differ from those adopted by an adjacent state, just as two states may have different standards for the same water body. As noted above, state and tribal standards must be as protective as the minimum requirements of the CWA and the implementing regulation. State and tribal standards must also consider the downstream uses of neighboring jurisdictions, but do not have to be identical (see 40 CFR §131.10(b)). Thus, if the State of New Mexico has adopted a water quality standard that is more stringent than federal requirements, the Pueblo of Taos must take into consideration New Mexico's standard and ensure that the Tribal standard provides for the attainment and maintenance of the standard applicable to the downstream State waters and otherwise meets the minimum federal requirements even if it would be less stringent than the State standard.

The criteria under the Domestic Water Supply use in the Pueblo of Taos water quality standards are generally based on EPA's Maximum Contaminant Levels to protect human consumption of water, while the State's human health criteria are intended to protect human consumption of fish. EPA notes that for several parameters listed in the Town of Taos' comment, both the State water quality standards and the Pueblo of Taos standards include aquatic life criteria which are more stringent than either the State's human health criteria or the Pueblo's criteria under the Domestic Water Supply use. Also, a series of calculations are used to develop effluent limitations in National Pollutant Discharge Elimination System (NPDES) permits and the most stringent criterion may not result in the most stringent permit limit for a particular substance.

Comment 9: The Town of Taos noted that some water quality criteria in the Pueblo of Taos water quality standards and the New Mexico water quality standards are lower than what is routinely measured by analytical laboratories and questioned whether the units of micrograms per liter ($\mu\text{g/l}$) for specific substances should be milligrams per liter (mg/l).

Response 9: The criteria in the Pueblo of Taos water quality standards for DDT and polychlorinated biphenyls are measured in micrograms per liter. EPA's recommended values for CWA criteria are based on aquatic toxicology or human health impacts and do not consider

detection limits. Many state and tribal standards contain numeric criteria which are smaller than detection limits of the analytical methods required to be used by NPDES discharges. EPA Region 6 will calculate the numerical limitation dictated by the State or Tribal water quality standards to establish the water quality-based effluent limit (WQBEL). To address situations where WQBELs are below the sensitivity of available approved analytical techniques, EPA Region 6 has established a procedure based on achieving minimum quantification levels (MQLs). MQLs are the lowest concentration at which a particular substance can be quantitatively measured. In cases where WQBELs are smaller than the MQL, the permittee is considered to be in compliance with effluent limits established in a permit when measurements are less than the MQL established for that pollutant.

Comment 10: The Town of Taos commented that the Pueblo of Taos' acute aquatic life criterion for aluminum (748 µg/l) is more stringent than the State's aluminum acute criterion of 750 µg/l.

Response 10: EPA's recommended acute aquatic life criterion for aluminum is 748 µg/l.³ Due to rounding, this value is often published as 750 µg/l which has been adopted by several states and Indian tribes. It is unlikely that the difference of 2 µg/l in the acute criteria would affect wastewater treatment levels for a wastewater facility. EPA notes that the State standards include a chronic aquatic life criterion of 87 µg/l, which was not adopted by the Pueblo of Taos. Therefore, for aluminum aquatic life criteria, the New Mexico State standards are more stringent than the Pueblo of Taos water quality standards.

Comment 11: The Town of Taos correctly noted that the Pueblo of Taos has adopted a criterion for chlorine of 3 µg/l for coldwater fisheries, while the New Mexico State standards include a chronic criterion of 11 µg/l to protect aquatic life.

Response 11: EPA's recommendation for an aquatic life chronic criterion is 11 µg/l. The value of 3 µg/l is based on a recommendation from the U.S. Fish and Wildlife Service. Both the New Mexico State standards and the Pueblo of Taos water quality standards meet the requirements of the CWA and federal water quality standards regulation. The most recent NPDES application submitted by the Town of Taos indicates that the facility uses ultraviolet disinfection. However, some facilities with ultraviolet disinfection may temporarily use chlorine disinfection while maintenance or repair activities are performed. As discussed above under Response 9, a series of calculations are used to derive effluent limitations. The Pueblo of Taos water quality standards include a provision to consider dilution in calculating effluent limitations based on aquatic life

³ U.S. EPA. 1988. *Ambient Water Quality Criteria for Aluminum - 1988*. Office of Water Regulations and Standards. EPA 440/5-86-008. Washington, D.C. Available from: http://cfpub.epa.gov/npdes/pubs.cfm?program_id=0 (search for "aluminum" under keyword option)

criteria. Also, MQLs are considered in establishing reporting limits as discussed in Response 10. The MQL for total residual chlorine currently used in the NPDES program is 11 µg/l.

Comment 12: The Town of Taos commented that the Pueblo of Taos has adopted criteria for *E. coli* bacteria, while the State's water quality standards include only criteria for fecal coliform bacteria. The Town of Taos also correctly noted that the Pueblo's water quality standards include criteria for iron, but the State standards do not have criteria for this parameter.

Response 12: EPA's recommended criteria for protection of contact recreation uses have been for *E. coli* bacteria. Although the EPA-recommended values were published in 1986, states have historically used criteria for fecal coliform bacteria to protect recreational contact in surface waters. Most states have adopted criteria for *E. coli* in recent years. The State of New Mexico adopted criteria for *E. coli* in its 2005 triennial revision of its water quality standards. The iron criteria under the Drinking Water and Aquatic Life uses in the Pueblo of Taos water quality standards are based on EPA-recommended values. As discussed above, states and Indian tribes must consider the standards of downstream jurisdictions but the water quality standards do not have to be identical.

