Salt River
PIMA-MARICOPA INDIAN COMMUNITY
10005 E. OSBORN RD. / SCOTTSDALE, ARIZONA 85256-9722 / PHONE (480)

DATE	7-31-00		
ACTION (✓)		COPIED (✓)	
	RA		RA
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July 25, 2000

Felicia Marcus, Regional Administrator
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

Dear Ms. Marcus:

The Salt River Pima - Maricopa County Indian Community (the "Community") is in receipt of the draft document, "Guidance on 8-Hour Ozone Designations for Indian Tribes," dated June 15, 2000. This document directs interested Tribes to make recommendations for designating their lands as attainment, unclassifiable or nonattainment with the 8-hour ozone National Ambient Air Quality Standard (NAAQS) by July 31, 2000. This letter responds to that direction and recommends that the land within the exterior boundaries of the Community be designated as unclassifiable.

The Community is a federally recognized Indian tribe located in Maricopa County, Arizona. As with other federal agencies, the U.S. Environmental Protection Agency (EPA) has a federal trust responsibility to federally-recognized tribes, which requires that the Agency consult with and consider the interests of tribes when taking actions that may affect tribal rights or trust resources. This trust responsibility is separate and apart from the requirements of the Clean Air Act (CAA) § 107(d) designation process and has been consistently reaffirmed by the courts, executive orders and agency policy statements. Indeed, EPA's own 1984 Indian Policy consolidated and expanded on previously issued statements of policy that recognized the importance of tribal governments in regulatory activities that impact reservation environments. The keynote of this policy was "to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."

It is the Community's long-standing position that it was arbitrarily and erroneously included in the Maricopa Association of Governments (MAG) Urban Planning Area nonattainment areas in the past due to EPA's omission to adequately consult with the Community during the CAA § 107(d) designation process in accordance with the Agency's federal trust responsibility. Similarly, the Community believes that EPA is not meeting its trust responsibility during the current designation process for the new 8-hour ozone NAAQS. As recently explained by President Clinton's May 14, 1998 Executive Order, EPA has an obligation "to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." The Community does not

believe that EPA can satisfy this obligation by simply providing the Community with a draft guidance document and expecting the Community to respond with "meaningful and timely input" within the timeframe allowed (i.e., 45 days). Without formal notice, consultation, and a reasonable opportunity to provide meaningful comment, the current designation process provides the Community with merely an inconsequential role in the determination of a matter that substantially affects the Community's governmental responsibilities and cultural values. While the Community appreciates the sentiments expressed in the draft 8-hour ozone designation guidance, the fact that the Community has received no formal notice of the request to participate with only 10 days remaining prior to the recommendation deadline is sadly suggestive that the Community's interests will be overlooked once again. I hope that this will not be the case.

Notwithstanding the Community's serious reservations about the current designation process, the Community is formally recommending that it be designated as unclassifiable for the 8-hour ozone NAAQS. The Community believes that an unclassifiable designation is consistent with CAA § 107(d)(1) because no valid information exists to determine whether the area is meeting or not meeting the 8-hour ozone standard. The Community is currently in the process of developing a monitoring network as part of its efforts to assume regulatory responsibility over the Community's air resources. While the State has ozone-monitoring data that purportedly includes a seasonal monitor formerly located within the Community, neither the State obtained neither the Community's consent to locate nor its permission to operate this monitor. It is therefore the Community's position that the monitor was unlawfully placed, that any associated data is tainted, therefore unusable, and that use of such data would be inconsistent with federal trust responsibilities. Thus, until such time as the Community's monitoring network indicates that the 8-hour ozone standard is or is not being met, the Community should be designated as unclassifiable.

As recognized in the draft 8-hour ozone designation guidance, a State's request for a designation of an area that surrounds Tribal lands does not dictate the designation for Tribal lands. Because the Community is an independent sovereign, EPA may work directly with the Community on a government-to-government basis, rather than as a subdivision of other governments. As such, the Community believes that a MAG Urban Planning Area designation has no effect on the Community. Indeed, EPA recognized this distinction in the recent Federal Implementation Plan (FIP) for the Phoenix nonattainment area for particulate matter. EPA specifically excluded the Community from the requirements of the FIP.

Jurisdictional boundaries appear to weigh heavily against EPA's presumption that all areas located within a Metropolitan Statistical Area (MSA) should be similarly designated. For example, Maricopa County and Pinal County are both included in the Phoenix - Mesa MSA. However, these counties have separate and distinct designations, which can only be justified on the basis of their respective jurisdictional boundaries. Unlike the counties, which are mere political subdivisions, the Community is an independent sovereign and its boundaries should be entitled to heightened recognition in support of an unclassifiable designation independent of other areas within the Phoenix - Mesa MSA.

The 8-hour guidance document also suggests that areas previously designated as nonattainment for the 1-hour ozone standard should be designated as nonattainment for the 8-hour standard. As discussed above, the Community believes that its nonattainment designation for the 1-hour ozone standard is of questionable validity due to EPA's not meeting its trust responsibility. Nevertheless, there has not been a violation of the 1-hour standard in the last three years in the Phoenix-Mesa MSA. *See* 65 Fed. Reg 31,859 (May 19, 2000). Thus, any previous nonattainment designation for the 1-hour ozone standard should bear no relationship to the current designation for the 8-hour ozone standard.

In any event, the Community believes that the unclassifiable designation is appropriate because there are no significant sources within the Community that contribute to the ozone problems in Maricopa County. Rather, the Community is essentially a victim of ozone transport from the greater Phoenix airshed. Even if significant sources did exist, the Community, unlike the MAG Urban Planning Area does not contribute to ozone problems in surrounding communities due to existing transport patterns. An unclassifiable designation would obviate the need for the Community to consider seeking other remedies for the transport of pollution into the Community, such as possibly filing a petition pursuant to CAA § 126. It is bad enough that the Community and its members are the unwilling recipients of inadequately controlled development in other areas of Maricopa County. EPA should not compound this circumstance by burdening the Community with an inappropriate nonattainment designation.

The Community appreciates the opportunity to make this designation recommendation and looks forward to working with Region IX during the designation process. Questions and concerns may be directed to Mr. Steve Parker, Manager of Cultural & Environmental Services, at (480) 850-8045.

Sincerely,
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

Merna Lewis

Merna Lewis
Vice President