



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200

DALLAS, TEXAS 75202 – 2733

July 20, 2015

The Honorable Lawrence Montoya
Governor
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, NM 87004

Dear Governor Montoya:

I am pleased to inform you that the U.S. Environmental Protection Agency (EPA) has completed its review under Clean Water Act (CWA) section 518 of the Pueblo of Santa Ana's application dated January 30, 2013, as amended, for treatment in a similar manner as a state (TAS) to administer the water quality standards and certifications programs under CWA sections 303(c) and 401, 33 U.S.C. sections 1313(c) and 1341. Based on that review, EPA is today approving the Pueblo of Santa Ana's application.

Approval of the TAS application means that the Pueblo of Santa Ana is eligible to administer the water quality standards program under CWA section 303(c) for waters within the Pueblo as identified in the application. Pursuant to the federal regulation at 40 CFR 131.4(c), the Pueblo of Santa Ana is likewise eligible for purposes of certification under CWA section 401. Per the Pueblo of Santa Ana's request, EPA has temporarily excluded from its decision today the area known as the "San Felipe Overlap" and will await further direction from the Pueblo on this area.

Documentation of our review can be found in the enclosure titled *Decision Document: Approval of the Pueblo of Santa Ana's Application for Treatment in a Similar Manner as a State for Clean Water Act Sections 303(c) Water Quality Standards and 401 Certification*. As part of the review, EPA solicited comments from appropriate governmental entities and other interested parties regarding the Pueblo of Santa Ana's assertion of authority to regulate water quality for the areas covered by the application. The Pueblo of San Felipe, the New Mexico Environment Department, the U.S. Forest Service and the Bureau of Indian Affairs provided comments. A response to comments is included as an appendix to the Decision Document.

The Pueblo of Santa Ana also submitted tribally-adopted water quality standards for EPA review and approval. EPA will provide separate review of the Pueblo of Santa Ana's water quality standards. If approved, those standards would apply under section 303(c) of the CWA to all surface waters covered by this approval of the Pueblo of Santa Ana's TAS application. The tribally-adopted water quality standards may be used for the Pueblo of Santa Ana's decisions under CWA section 401 to grant, deny, or condition a water quality certification, prior to EPA's action under CWA section 303(c).

EPA looks forward to working with the Pueblo of Santa Ana in implementing its water quality programs. If you have any questions or concerns, please contact me at (214) 665-7101 or contact Diane Evans of my staff at (214) 665-6677.

Sincerely,



William K. Honker, P.E.

Director

Water Quality Protection Division

Enclosure

cc: Alan Hatch, Director
Pueblo of Santa Ana
Department of Natural Resources

**U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 6**

DECISION DOCUMENT:

**APPROVAL OF THE PUEBLO OF SANTA ANA'S APPLICATION FOR
TREATMENT IN A SIMILAR MANNER AS A STATE FOR
CLEAN WATER ACT SECTIONS 303(c) WATER QUALITY STANDARDS
AND 401 CERTIFICATION**

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I. Introduction and Index to Decision

A. Introduction

This Decision Document provides the basis and supporting information for the U.S. Environmental Protection Agency's (EPA or Agency) decision to approve the Pueblo of Santa Ana's application for treatment in a similar manner as a state for Clean Water Act (CWA) section 303(c) water quality standards and section 401 water quality certification, pursuant to section 518(e) of the CWA and part 131 in Title 40 of the Code of Federal Regulations (CFR).

Section 518(e)(2) of the CWA authorizes EPA to treat an Indian tribe as a state (treatment in a similar manner as a state, or "TAS") for water resources "within the borders of an Indian reservation," for certain CWA programs, including sections 303 and 401. EPA regulations at 40 CFR part 131 establish the process by which the Agency implements that authority and determines whether to approve a tribal application for purposes of administering programs under sections 303(c) and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994) (codified at 40 CFR part 131). This approval applies to all surface waters that lie within the Pueblo of Santa Ana boundary and within certain additional lands held in trust by the United States for the benefit of the Pueblo of Santa Ana, as described in the application and identified herein. As described below, at the Pueblo of Santa Ana's request, this approval does not include or address the area known as the San Felipe Overlap.

This decision does not constitute an approval of the Pueblo of Santa Ana's water quality standards. EPA's review and approval or disapproval of the Pueblo of Santa Ana's water quality standards is a separate action under the CWA. Under section 303(c) of the CWA, states and authorized tribes develop, review and revise, as appropriate, water quality standards for surface waters of the United States. At a minimum, such standards must include designated uses of waters, criteria to protect such uses, and an antidegradation policy (40 CFR 131.6). In addition, CWA section 401 provides that states and authorized tribes may grant or deny "certification" for federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the state's or authorized tribe's determination regarding whether the proposed activity will comply with, among other things, water quality standards it has adopted under CWA section 303(c). If a state or authorized tribe denies certification, the federal permitting or licensing agency is prohibited from issuing a permit or license.

B. Index to Decision

The following documents constitute a portion of the full docket for this Agency decision. All relevant materials in the docket are located in EPA's official file and electronic systems.

1. Application and Supporting Materials

The Pueblo of Santa Ana's application for TAS for the water quality standards and certification programs under CWA section 303(c) and section 401 includes the following documents:

- Letter dated January 30, 2013, from Myron Armijo, Governor, Pueblo of Santa Ana, to Ron Curry, Regional Administrator, EPA Region 6, with an enclosure and supporting exhibits
 - The Pueblo of Santa Ana's Application for Authority to Establish and Implement Water Quality Standards and to Control Discharge Permitting Pursuant to Sections 303 and 401 of the Clean Water Act

- Exhibit A. Map or Legal Description of the Area over which the Pueblo Asserts Authority to Regulate Surface Water Quality
 - Exhibit B. Statement of Legal Counsel for the Pueblo of Santa Ana Describing the Pueblo's Authority to Regulate Water Quality within the Pueblo's Lands
 - Exhibit C. Title Documents for Trust Parcels Located in Section 25, Township 13N, Range 3E and Section 30, Township 13N, Range 4E, N.M.P.M.
- Letter dated February 3, 2014, from George Montoya, Governor, Pueblo of Santa Ana, to William Honker, Director, EPA Region 6 – Water Quality Protection Division, with two enclosures
 - Opinion of Counsel on Boundary and CWA Jurisdiction for the Eastern Angostura Border
 - Opinion of Counsel on CWA Jurisdiction in Former San Felipe Overlap
 - Letter dated September 4, 2014, from George Montoya, Governor, Pueblo of Santa Ana, to Ron Curry, Regional Administrator, EPA Region 6, requesting that EPA temporarily exclude the area known as the “San Felipe Overlap” from EPA’s decision on the Pueblo’s TAS application
 - Letter dated September 11, 2014, from Richard W. Hughes, Attorney at Law, with six enclosures
 - Exhibit A - map of overlap area and adjacent lands
 - Exhibit B - Notice of Filing of Plat of Survey, New Mexico. 79 Fed. Reg. 8205. (February 11, 2014)
 - Exhibit C - letter dated August 1, 2014, from Jesse Juen, State Director, Bureau of Land Management, to Timothy Humphrey, Sr., Stetson Law Offices, P.C.
 - Exhibit D – report dated June 19, 1897, from the United States Attorney, to the Attorney General
 - Exhibit E - map of parcels acquired by the Pueblo of Santa Ana from the Spaniards (previously used as an exhibit in the El Ranchito Case, before the Court of Private Land Claims)
 - Exhibit F - plat and patent of the El Ranchito Grant, dated October 18, 1909.
 - U.S. Department of the Interior Solicitor's Opinion (M-37027), dated June 7, 2013, titled “Boundary Dispute: Pueblo of Santa Ana Petition for Correction of the Survey of the South Boundary of the Pueblo of San Felipe Grant,” referenced in the Opinion of Counsel on CWA Jurisdiction in Former San Felipe Overlap
 - Excerpt from the Pueblo of Santa Ana’s FY2011 Quality Management Plan (EPA QTRAK #11-417), referenced in the Pueblo of Santa Ana’s application
 - Excerpt from the Pueblo of Santa Ana’s Quality Assurance Project Plan (EPA QTRAK #11-064) for the surface water quality monitoring program, referenced in the Pueblo of Santa Ana’s application

2. Letters from EPA

- Letter dated February 25, 2013, from Ron Curry, Regional Administrator, EPA Region, to Myron Armijo, Governor, Pueblo of Santa Ana, acknowledging receipt of the request for TAS approval for the CWA section 303(c) and section 401 programs.

- Letter dated June 2, 2014, from Ron Curry, Regional Administrator, EPA Region 6 to Joseph E. Sandoval, Governor, Pueblo of San Felipe, acknowledging receipt of comments on the Pueblo of Santa Ana’s TAS application.
- Letter dated July 14, 2014, from William K. Honker, Director, EPA Region 6 – Water Quality Protection Division, to Governor George Montoya, Pueblo of Santa Ana, transmitting comments received during the comment process.
- Letter dated October 29, 2014, from William K. Honker, Director, EPA Region 6 – Water Quality Protection Division, to George Montoya, Governor, Pueblo of Santa Ana, acknowledging receipt of the request to temporarily exclude the area known as the “San Felipe Overlap” located near the southeast corner of the Pueblo from EPA’s decision on the TAS application.

3. Comments regarding Tribal authority

As provided at 40 CFR 131.8(c)(2), EPA provided notice to appropriate governmental entities¹ of the substance and basis of the Pueblo of Santa Ana’s assertion of authority, by letters dated March 24, 2014, along with Exhibit A from the application. The complete application and excerpts from the 1998 application for the CWA section 106 program were posted on an EPA Region 6 website during the comment period. EPA sent letters to the following entities:

- | | |
|---|--|
| • Pueblo of Cochiti | • U.S. Forest Service - Regional Office |
| • Pueblo of Isleta | • U.S. Forest Service - Santa Fe National Forest |
| • Pueblo of Jemez | • U.S. Department of Energy |
| • Pueblo of Sandia | • U.S. Geological Survey - Water Science Center |
| • New Mexico Environment Department | • Sandoval County |
| • New Mexico Indian Affairs Department | • Village of Jemez Springs |
| • New Mexico Energy, Minerals, and Natural Resources Department | • Jemez Valley Public Schools |
| • New Mexico Office of the State Engineer | • Town of Bernalillo |
| • New Mexico State Land Office | • City of Rio Rancho |
| • New Mexico Department of Transportation | • Coronado Soil and Water Conservation District |
| • Bureau of Indian Affairs - Albuquerque Area Office | • Ciudad Soil and Water Conservation District |
| • Bureau of Indian Affairs - Southern Pueblos Agency | • Middle Rio Grande Conservancy District |
| • Bureau of Land Management -State Office | |
| • Bureau of Reclamation | |
| • Federal Highway Administration | |
| • Indian Health Service | |
| • National Park Service | |
| • U.S. Army Corps of Engineers | |
| • U.S. Fish and Wildlife Service – Southwest Region | |
| • U.S. Fish and Wildlife Service – Ecological Services | |

¹ EPA defines the term “appropriate 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.” 56 Fed. Reg. 64876, 64884 (Dec. 12, 1991). Consistent with EPA’s regulations, EPA provided notice to all appropriate governmental entities in this case. EPA also exercised its discretion to provide direct notice to certain additional entities identified on the below list.

EPA received the following comments on the Pueblo of Santa Ana's application:

- U.S. Forest Service - Southwestern Region, letter dated April 8, 2014, from Calvin Joyner, Regional Forester
- New Mexico Environment Department, letter dated May 13, 2014, from Ryan Flynn, Secretary
- Bureau of Indian Affairs - Southwest Region, letter dated June 6, 2014, from William Walker, Regional Director

A Response to Comments is found in Appendix I of this document. Consistent with Agency practice, EPA also provided an opportunity for the public and entities not listed above, to review and comment on the assertion of authority in the Pueblo of Santa Ana's application. A public notice was published in the *Albuquerque Journal* on Sunday, March 23, 2014. The notice identified EPA's website with the Pueblo of Santa Ana's application and the opportunity to review documents at the Pueblo of Santa Ana's Department of Natural Resources (DNR) office. The notice also requested that comments be submitted to the New Mexico Environment Department by Wednesday, May 7, 2014, to be forwarded to EPA. Neither the New Mexico Environment Department, nor EPA, received any comments in response to the public notice.

4. Tribal Consultation and Comments regarding Tribal authority

By letters dated March 25, 2014, EPA offered the Pueblo of San Felipe, the Pueblo of Zia and the Pueblo of Santo Domingo, the opportunity to consult and comment on EPA's review of the application submitted by the Pueblo of Santa Ana. Each of these three Indian tribes shares a common border with the Pueblo of Santa Ana and is thus also an appropriate governmental entity for purposes of EPA's notice and comment regulation. Copies of the Pueblo of Santa Ana's application materials from January 2013 and February 2014 were provided with each letter.

The Pueblo of San Felipe requested consultation with EPA, and a conference call with the Pueblo of San Felipe was held on Tuesday, May 13, 2014. The Pueblo of San Felipe also submitted information as identified below:

- Letter dated April 24, 2014, from Joseph E. Sandoval, Governor, Pueblo of San Felipe to William K. Honker, Director, EPA Region 6 - Water Quality Protection Division
- Letter dated May 6, 2014, from Pinu'u Stout, Natural Resources Director, Pueblo of San Felipe to William K. Honker, Director, EPA Region 6 Water Quality Protection Division, with enclosed disk
- Email dated May 13, 2014, from Debra A. Haaland, Tribal Administrator, Pueblo of San Felipe, to Christina Kracher, EPA Region 6 - Office of Environmental Justice and Tribal Affairs, with attachment (document related to letter dated May 6, 2014).
- Letter dated May 15, 2014, from Joseph E. Sandoval, Governor, Pueblo of San Felipe to Ron Curry, Regional Administrator, EPA Region 6

5. Policy Statements

- *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (November 8, 1984).
- EPA Memorandum titled "EPA/State/Tribal Relations," by EPA Administrator Reilly (July 10, 1991)

- Memorandum titled “Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations,” by Robert Perciasepe and Jonathan Cannon (March 19, 1998)
- *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs* (January 23, 2008)

II. Requirements for Approval

Under CWA section 518(e) and the implementing regulation at 40 CFR 131.8(a), four requirements must be satisfied before EPA can approve an Indian tribe’s application for the water quality standards program under section 303(c) and water quality certification program under section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (4) 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.

The regulation at 40 CFR 131.8(b) identifies what must be included in an application by an Indian tribe to administer the water quality standards program. Consistent with the regulation at 40 CFR 131.8(b)(6), where an Indian tribe has previously qualified for TAS under a different CWA program, the tribe need only provide the required information which has not been submitted in a previous application. Where EPA determines that an Indian 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 CWA section 401, see 40 CFR 131.4(c). Tribes authorized to administer the CWA water quality standards program are also “affected states” under CWA section 402(b)(3) and (5) and 40 CFR 122.4(d). As “affected states,” they receive notice and an opportunity to comment on certain permits issued under the National Pollutant Discharge Elimination System program.

A. Federal Recognition

Under CWA section 518(e) and its implementing regulation, EPA can approve an application from an “Indian tribe” that meets the definitions set forth in CWA section 518(h) and 40 CFR 131.3(k) and (l). See 40 CFR 131.8(a)(1). The term “Indian tribe” is defined as “any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.” CWA section 518(h)(2), 40 CFR 131.3(l). The term “Federal Indian reservation” means “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.” CWA section 518(h)(1), 40 CFR 131.3(k).

Consistent with 40 CFR 131.8(b)(6), the Pueblo of Santa Ana’s application references the 1998 application for the CWA section 106 program, which included a citation to a Secretary of the Interior listing of all federally recognized Indian tribes in the United States at 62 Fed. Reg. 55270 (October 23, 1997). The Pueblo of Santa Ana is included in the Department of the Interior’s current list of federally recognized tribes. See 80 Fed. Reg. 1942 (January 14, 2015). Furthermore, as discussed below, the Tribe is exercising governmental authority over a reservation within the

meaning of the CWA. Thus, EPA has determined that the Pueblo of Santa Ana meets the requirements of 40 CFR 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers

To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 CFR section 131.8(b)(2) requires that the Indian tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

Consistent with 40 CFR 131.8(b)(6), the Pueblo of Santa Ana's application refers to the governmental description in its application for the CWA section 106 program, which describes the Pueblo's form of government and the significant governmental functions it performs. In sum, the governing body consists of a Traditional Religious Council and a Traditional Tribal Council. Legislative power is vested in the Traditional Tribal Council, which 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). The Governor, Lieutenant Governor and Tribal Administrator handle external affairs subject to the directives of the Tribal Council and oversee the administrative and executive functions of the Pueblo. The Pueblo of Santa Ana has both a traditional tribal court system, with the Lieutenant Governor serving as chief judge, and a contemporary court.

The Pueblo of Santa Ana describes its inherent sovereign authority to regulate its citizens, lands and waters and to regulate nonmember activities within the Pueblo, which may impact the Pueblo's water resources. The Tribal Council, the Pueblo of Santa Ana's legislative body which is presided over by the Governor, is the duly recognized decision and policy making body for the Pueblo. The application describes that the Tribal Council exercises complete regulatory authority over all lands, waters and persons within the exterior boundaries of the Pueblo, except to the extent precluded by federal law. All uses of Pueblo land must be presented to and approved by the Tribal Council. Such approvals are set forth in Tribal Council resolutions which include language authorizing and directing the Governor of the Pueblo to execute documents (*e.g.*, lease, permit, license, right of way, or other form of agreement) on behalf of the Pueblo and, upon execution, require such documents to be transmitted to the Southern Pueblos Agency, Bureau of Indian Affairs, for approval in accordance with federal law. The Pueblo of Santa Ana exercises its authority over lessees, permittees, or licensees by conducting inspections, issuing citations and orders to correct deficiencies or otherwise come into compliance with agreement provisions or tribal regulation or risk enforcement or loss of legal right to continue with the activity subject to the agreement.

In furtherance of this authority, the Tribal Council has enacted numerous ordinances which regulate water usage and other water related matters within the Pueblo. The Tribal Council exercises its governmental powers by enacting ordinances, providing basic governmental services, and administering Tribal programs. The Tribal Council established the DNR in 1996 to manage environmental and natural resource programs, including CWA monitoring programs. The DNR is headed by a Director, and currently employs a staff of approximately 25 people.

On November 26, 2013, the Pueblo of Santa Ana adopted water quality standards by Tribal Council resolution. The Pueblo of Santa Ana has also adopted a Wildlife Conservation Code and Solid Waste Code, both of which include provisions for protection of water quality. Following approval of the TAS application, the Pueblo of Santa Ana intends to adopt a water quality code for implementation of water quality standards and enforcement under tribal law. In exercise of its governmental powers

generally, the Tribal Council has enacted several ordinances pertaining to such matters as business regulation, taxation, zoning, tribal investment accounts, gaming, gaming regulation and liquor. In addition, the Pueblo of Santa Ana provides numerous basic governmental services such as law enforcement, social services, and education.

The Pueblo of Santa Ana's submissions in its application and supplemental information, including the prior applications for the CWA section 106 and 319(h) programs and EPA approvals, adequately demonstrate that the Tribe's governing body is currently carrying out substantial governmental duties and powers over a defined area. Thus, EPA concludes that the Pueblo of Santa Ana meets the requirements in 40 CFR 131.8(a)(2) and (b)(2).

C. Jurisdiction over Waters within the Borders of the Pueblo of Santa Ana

1. Map or Legal Description

The Pueblo of Santa Ana's application includes, as Exhibit A, a map describing the area covered by the TAS application. Overall, the application covers an area of approximately 78,000 acres. Pueblos are inherently different from other tribes because their lands were often the subject of land grants from Spain dating back to the 1600s and are held largely in fee. The area covered by the Pueblo of Santa Ana's TAS application consists of Pueblo fee lands and lands which are held in trust by the United States for the Pueblo.² The application does not include any lands owned by non-members of the Pueblo.³

The Pueblo of Santa Ana boundaries covered by the current TAS application, as depicted in the map in Exhibit A of the application, are made up of the grants and purchases listed below.

- Original Spanish Land Grant - dates back to the 1600s and includes 15,400 acres. Was a square extending one league from each of the corners of the Mission Santa Ana. The Spanish land grant was confirmed by President Lincoln in 1864, ratified by Congress in 1869, and patented in 1883.
- The El Ranchito Grant - approved by the Court of Private Land Claims on December 7, 1900, and patented on October 18, 1934.⁴
- Claims confirmed by the Pueblo Lands Board - 20.197 acres within the El Ranchito Grant and 29.69 acres within the Felipe Gutierrez or Bernalillo Grant.⁵
- "550 tracts" (2001 trust properties):
 - Parcel No.1: 14.8767 acres - Lot 9 in Block A of the Unit 20 Industrial Park; Sec 25, T13N, R3E, City of Rio Rancho, Sandoval County.

² For purposes of its programs, EPA treats as reservations Pueblos and trust lands validly set aside for the use of a tribe even if the lands have not been formally designated as a reservation. *See, e.g.*, 56 Fed. Reg. at 64881; 63 Fed. Reg. 7254, 7258 (February 12, 1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *United States v. John*, 437 U.S. 634, 649 (1978); *Arizona Public Service Company v. Environmental Protection Agency*, 211 F.3d 1280, 1292-1294 (D.C. Cir. 2000), *cert. denied sub nom., Michigan v. EPA*, 532 U.S. 970 (2001); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000).

³ In its application, the Pueblo states that certain properties which the Pueblo Lands Board determined were validly held by non-Indians are not a part of the Pueblo for purposes of the application. Thus, Exhibit A does not include these lands or any other non-member owned fee lands. *See also*, CWA 106 TAS application, Exhibit 3.

⁴ A portion of this grant includes an area known as the "San Felipe Overlap." As noted below, the Pueblo of Santa Ana requested that EPA not act at this time on the portion of its TAS application covering the San Felipe Overlap.

⁵ *See* CWA 106 TAS application, Appendix 5 in Exhibit 3.

- Parcel No.2: 2.4707 acres – portion of Lot 23 within the NW 1/4 SW 1/4 NW 1/4 SW 1/4 of Section 30, T13N, R4E; located southwest of and adjacent to the southwest right of way line of U.S. Highway 550, Sandoval County.
- Parcel No.3: 1.1208 acres - portion of lot 22 within the NE 1/4 SW 1/4 NW 1/4 SW 1/4 of Section 30, T13 N, R4E; located southwest of and adjacent to the southwest right-of-way line of U.S. Highway 550, Sandoval County.
- Parcel No.4: 0.7661 acres – portion of Lot 16 within the SW 1/4 NW 1/4 NW 1/4 SW 1/4 of Section 30, T 13 N, Range 4 E; located southwest of and adjacent to the southwest right-of-way line of U.S. Highway 550, Sandoval County.
- Parcel No.5: 3.7976 acres - Tract lettered “A,” in Block lettered “A,” in Unit 20, Industrial Park, a subdivision in Section 25, T13N, R3E, City of Rio Rancho, Sandoval County.

By letter dated September 4, 2014, and until further notice by the Pueblo of Santa Ana, the Governor requested that EPA temporarily exclude the area known as the “San Felipe Overlap” located near the southeast corner of the Pueblo from EPA’s decision on the Pueblo of Santa Ana’s TAS application. The Pueblo of San Felipe has submitted comments to EPA asserting a competing claim to the San Felipe Overlap area, and that area is currently the subject of ongoing appeals relating to a Bureau of Land Management resurvey. The Pueblo of Santa Ana has reserved its option to request that EPA act on its TAS application with regard to the San Felipe Overlap once these appeals are final.⁶

EPA provided notice to appropriate governmental entities and the public of the lands over which the Pueblo of Santa Ana asserts jurisdiction as part of the review process for the application for the CWA section 303(c) and section 401 programs. No “competing or conflicting claim” to the boundaries identified was made, with the exception of the San Felipe Overlap, which is not being addressed in this decision.

EPA concludes that the Pueblo of Santa Ana has satisfied 40 CFR 131.8(b)(3)(i) by providing a map and a legal description of the area over which the Pueblo asserts authority to regulate surface water quality.

2. Statement Describing Basis for the Tribe’s Authority

The Pueblo of Santa Ana’s TAS application includes a Statement of the Legal Counsel (“Statement”) of the Pueblo, which adequately describes the legal basis for the Pueblo’s inherent sovereign authority over all lands and resources, including water resources, within the Pueblo. (See Application, Exhibit B). The Statement describes the Pueblo of Santa Ana’s exercise of authority through the Tribal Council, which is presided over by the Pueblo’s Governor, over all lands, waters and persons within the Pueblo boundaries. The Statement cites relevant federal Indian law precedent supporting the Pueblo of Santa Ana’s exercise of inherent jurisdiction over the Pueblo’s membership and territories.

Eligibility for TAS for CWA sections 303(c) and 401 is limited to activities pertaining to waters within the Pueblo of Santa Ana and lands held in trust for the benefit of the Pueblo. The Pueblo’s TAS application states that there are no non-member owned fee lands within the Pueblo boundaries. The Statement does, however, include a description of certain non-member activities occurring on the Pueblo’s lands and describes the various consensual relationships through which such non-members are able to use Pueblo lands. The Statement also describes the importance of the Pueblo of Santa Ana’s waters and the potential impacts of non-member activities on the waters. The legal counsel

⁶ See letter from George Montoya, Governor, Pueblo of Santa Ana, to Ron Curry, Regional Administrator, EPA - Region 6 (September 4, 2014).

cites legal precedent demonstrating that the Pueblo could show authority over such non-member activities if needed.

EPA concludes that the Pueblo of Santa Ana has satisfied 40 CFR 131.8(b)(3)(ii).

3. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards

The Pueblo of Santa Ana's TAS application asserts authority over all surface waters within the exterior boundaries of the Pueblo as described in Exhibit A to the application. The Pueblo has established water quality standards under tribal law for all surface waters within such exterior boundaries. The map included as Exhibit A of the application includes a depiction of the surface waters within the Pueblo. As detailed in the tribally-adopted water quality standards and the EPA-approved Nonpoint Source Assessment Report (see TAS application for CWA 319(h)), the major water bodies on the Pueblo include the Rio Grande, the Rio Jemez and wetlands associated with both water bodies. Other water bodies within the Pueblo boundaries include tribal irrigation ditches, and ditches operated by the Middle Rio Grande Conservancy District (Albuquerque Main Canal and Riverside Drain), unnamed ponds, arroyos, ephemeral streams and springs. Both the Nonpoint Source Assessment Report and the Nonpoint Source Management Plan further characterize and detail the hydrology and waters within the Pueblo, and highlight the importance of these water bodies to the Pueblo of Santa Ana.

EPA concludes that the Pueblo of Santa Ana has satisfied 40 CFR 131.8(b)(3)(iii).

4. Authority over Reservation Waters

CWA section 518(e)(2) authorizes EPA to treat a tribe in a similar manner as a state for water resources "within the borders of an Indian reservation." EPA has interpreted this provision to require that a tribe show authority over the water resources for which it seeks TAS approval. 56 Fed. Reg. at 64880. The Pueblo of Santa Ana has asserted that it has inherent authority to set water quality standards and issue certifications for all surface waters within the Pueblo boundaries as described in the application and supplemental information. As stated above, all of the lands covered by the TAS application are Pueblo fee lands or lands held in trust for the Pueblo of Santa Ana.

Under well-established principles of federal Indian law, a tribe retains attributes of sovereignty over both its lands and its members. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). Further, tribes retain the "inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal power. *Merrion v. Jicarilla Apache Tribe*, 450 U.S. 130, 141-142. *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty). These principles support the Pueblo of Santa Ana's assertion of inherent authority over its members and territories.

In addition, in situations where non-member activities take place on lands held by a tribe or tribal members, the case law confirms that a tribe retains significant authority over non-member activity. *See Merrion*, 455 U.S. at 141 (tribes retain the "inherent power necessary to tribal self-government and territorial management"), 144 (a tribe also retains its well-established traditional power to exclude nonmembers from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct."); *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (stating that "[w]e 'can readily agree,' in accord with *Montana*, 450 U.S. at 557, that tribes retain

considerable control over nonmember conduct on tribal land”); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 335 (1983) (noting that “[a] tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established” and “tribes have the power to manage the use of its territory and resources by both members and nonmembers”). *See also Plains Commerce Bank*, 128 S.Ct. at 2723 (“persons are allowed to enter Indian land only ‘with the assent of the [tribal members] themselves,’” quoting *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)). Thus a tribe can regulate the conduct of persons over whom it could “assert a landowner’s right to occupy and exclude.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-652 (2001), quoting *Strate*, 520 U.S. at 456. *See also Plains Commerce Bank*, 128 S.Ct. at 2723, quoting *South Dakota v. Bourland*, 508 U.S. 679, 691 n. 11 (1993) (“Regulatory authority goes hand in hand with the power to exclude”).

The Pueblo of Santa Ana’s TAS application describes certain non-member activities on the Pueblo that have the potential to impact water quality. Specifically, the Statement notes the existence of, among other things, oil and gas utility companies and a gravel mining operation on the Pueblo’s lands. The Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over non-member activities on non-member fee lands, with two exceptions. The first *Montana* exception states that a tribe may have inherent sovereign authority over “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” *Montana*, 450 U.S. at 565. The second *Montana* exception states that Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-member activities on fee lands within the reservation where non-member “conduct threatens or has some direct effect on the political integrity, the economic security, or 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*]”).

The Statement describes the various consensual relationships, including right-of-way agreements and leases, through which non-members are able to operate on the Pueblo’s lands. The Statement also describes the importance of water to the Pueblo of Santa Ana and its members and the various uses – including irrigation, livestock watering, fishing, ceremonial and religious purposes, and domestic uses – made of the scarce water resources on the Pueblo’s lands. The Statement asserts that regulation of water quality is crucial to ensure continuation of the Pueblo’s culture and lifestyle. Therefore, EPA believes that the Pueblo of Santa Ana could show that it has inherent sovereign authority over non-member activities that have the potential to affect the surface waters on the Pueblo’s lands under both *Montana* exceptions.⁷

5. Conclusion Regarding Jurisdiction

Based on the above discussion, EPA concludes that the Pueblo of Santa Ana meets the requirements in 40 CFR 131.8(a)(3) and (b)(3).

⁷ EPA has not taken the position that it is necessary to analyze non-member 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 document, the Pueblo of Santa Ana could show authority over the area covered by the application under the *Montana* test.

D. Capability

To demonstrate that a tribe has the capability to administer an effective water quality standards program, 40 CFR 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and, (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical capabilities.

The Pueblo of Santa Ana's application, along with activities completed under related projects, documents that it is reasonably expected to be capable of carrying out the functions of the water quality standards and certification programs in a manner consistent with the terms and purposes of the CWA and applicable regulations. The TAS application states that the Tribal Council established the DNR in 1996 "to manage environmental and natural resource programs." EPA approved the Pueblo of Santa Ana's TAS application under CWA section 518(e) for funding under the CWA section 106 water pollution control program in May 1998. EPA also approved the Pueblo of Santa Ana's application under the CWA section 319(h) program in September 2014. In addition, the Pueblo of Santa Ana has successfully implemented cooperative agreements under CWA section 104(b)(3), as well as under the General Assistance Program. The application notes that the Pueblo of Santa Ana has managed grants from U.S. Department of Housing and Urban Development and the Administration for Native Americans, along with Indian Self-Determination contracts and grants.

The DNR includes a staff of approximately 25 individuals and is organized into the following divisions: Water Resources, Range and Wildlife, Geographic Information Systems, and Restoration. The Manager of each division reports to the Director of the DNR, who reports to the Tribal Administration. The Pueblo of Santa Ana's Quality Management Plan includes a summary of the position descriptions for the DNR Director and Division Managers. Qualifications include a four-year degree and relevant work experience for DNR management positions, with similar requirements for staff in the Water Resources Division.

The Pueblo of Santa Ana has implemented a water quality monitoring program since 1998. Under the current program, DNR staff conducts ambient monitoring in surface waters for the following parameters: dissolved oxygen, pH, specific conductivity, temperature, turbidity, *Escherichia coli*, and several nitrogen and phosphorus compounds. The Pueblo of Santa Ana uploads monitoring data to EPA's Water Quality Exchange (WQX) and uses this information to prepare assessment reports. The Pueblo of Santa Ana also developed a Nonpoint Source Assessment and a Nonpoint Source Management Plan, which were approved by EPA in July 2014.

Following EPA-recommended approaches and drawing on its surface water monitoring information and experience, the DNR staff developed a set of draft water quality standards for consideration by Tribal leadership. Based on input from the Tribal Council and administration, the DNR prepared water quality standards for public review and initiated a public participation process to obtain input

on the proposed standards from neighboring Indian tribes, state agencies, federal agencies, local entities and the surrounding community. The Pueblo of Santa Ana held a public hearing on its proposed water quality standards on November 6, 2013; made appropriate revisions in response to comments received; and presented the standards to the Tribal Council for adoption on November 26, 2013. The water quality standards contain a complete set of designated uses, narrative and numeric criteria generally based on EPA's recommended criteria values, an antidegradation policy and general policies for implementation of standards. Throughout the development of the standards, the DNR staff demonstrated a clear understanding of the technical and programmatic issues needed to develop, maintain and implement a water quality standards program. Finally, the Pueblo of Santa Ana's application states that the Governor's office will be responsible for final actions for water quality certifications under CWA section 401, based on review of requests for certification by the DNR staff.

Based on the information provided by the Pueblo of Santa Ana that describes its capability to administer effective water quality standards and certification programs and the work completed by the DNR over the past 15 years, EPA concludes that the Pueblo of Santa Ana has met the requirements at 40 CFR 131.8(a)(4) and (b)(4).

III. Conclusion

EPA has reviewed the Pueblo of Santa Ana's TAS application for purposes of CWA section 303(c) and section 401, as well as prior decisions approving the Pueblo of Santa Ana's TAS applications for purposes of CWA section 106 and section 319(h). EPA has assessed whether the application from the Pueblo of Santa Ana meets the eligibility criteria established by CWA section 518(e) and the applicable regulation. Based upon this review, EPA concludes that the Pueblo of Santa Ana has made the required demonstration to meet the eligibility and application requirements at 40 CFR 131.8(a)(1)-(4) and (b)(1)-(4) to administer the water quality standards program. Pursuant to 40 CFR 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of the water quality certification program under CWA section 401.



William K. Honker, P.E.

Director

EPA Region 6 – Water Quality Protection Division



Date

Appendix I: Response to Comments

Pueblo of Santa Ana's Application for Treatment in a Similar Manner as a State for the Clean Water Act Section 303(c) Water Quality Standards and Section 401 Certification Programs

The Pueblo of Santa Ana submitted an application for treatment in a similar manner as a state for purposes of administering the water quality standards and water quality certification programs under Clean Water Act (CWA) sections 303(c) and 401.

In accordance with U.S. Environmental Protection Agency (EPA or Agency) practice and pursuant to 40 CFR 131.8(c), the Agency notified appropriate governmental entities of, and provided them an opportunity to comment on, "the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters." In addition, EPA offered the Pueblo of San Felipe, the Pueblo of Zia and the Pueblo of Santo Domingo the opportunity to consult and provide their views on EPA's review of the application submitted by the Pueblo of Santa Ana. Consistent with the Agency's policy and practice, EPA provided the Pueblo of Santa Ana an opportunity to respond to all comments received.

EPA received the following comments:

- Letter dated April 8, 2014, from Calvin Joyner, Regional Forester, U.S. Department of Agriculture Forest Service – Southwestern Region
- Letter dated April 24, 2014, from Joseph E. Sandoval, Governor, Pueblo of San Felipe
- Letter dated May 6, 2014, from Pinu'u Stout, Natural Resources Director, Pueblo of San Felipe, with enclosed disk
- Email dated May 13, 2014, from Debra A. Haaland, Tribal Administrator, Pueblo of San Felipe, with attachment (document related to letter dated May 6, 2014)
- Letter dated May 13, 2014, from Ryan Flynn, Secretary, New Mexico Environment Department
- Letter dated May 15, 2014, from Joseph E. Sandoval, Governor, Pueblo of San Felipe
- Letter dated June 6, 2014, from William Walker, Regional Director, Bureau of Indian Affairs – Southwest Region⁸

Summary of Comments and EPA's Responses

Comment: The New Mexico Environment Department and the U.S. Forest Service expressed support for approval of the Pueblo of Santa Ana's application. The New Mexico Environment Department also noted several recent projects for the protection of water quality undertaken by the State and the Pueblo of Santa Ana.

Response: EPA appreciates the support of the New Mexico Environment Department and the U.S. Forest Service. EPA recognizes the New Mexico Environment Department's cooperative efforts with the Pueblo of Santa Ana and the surface water quality programs of other Indian tribes. EPA supports continued cooperative efforts between the State and the Tribe.

⁸ Although this letter was submitted subsequent to the available comment period, EPA has exercised its discretion to include and consider the letter as part of our decision making.

Comment: The Pueblo of San Felipe expressed support for approval of the Pueblo of Santa Ana's application, for the lands that it recognizes as Pueblo of Santa Ana having conclusive jurisdiction. The Pueblo of San Felipe commented that approval of the area identified in the application as the "San Felipe Overlap" or the "El Ranchito Tract" would be premature during the Pueblo of San Felipe's administrative appeal to the Bureau of Land Management.

Response: By letter dated September 4, 2014, and until further notice by the Pueblo of Santa Ana, the Governor requested that EPA temporarily exclude the area known as the "San Felipe Overlap" located near the southeast corner of the Pueblo from EPA's decision on the Pueblo's TAS application. EPA's decision, therefore, does not include or address the San Felipe Overlap. EPA appreciates the support of the Pueblo of Felipe regarding approval of Pueblo of Santa Ana's TAS application as it applies to other areas.

Comment: The Bureau of Indian Affairs expressed support for approval of the Pueblo of Santa Ana's application, but noted that the Pueblo of Santa Ana's authority over the "San Felipe Overlap" is not effective, during the Pueblo of San Felipe's administrative protest to the Bureau of Land Management. The Bureau of Indian Affairs also noted that the Pueblo of San Felipe may appeal a decision from the Bureau of Land Management to the Interior Board of Land Appeals.

Response: As noted above, the Pueblo of Santa Ana requested that EPA temporarily exclude the area known as the "San Felipe Overlap" from the decision on the TAS application. EPA's decision, therefore, does not include or address the San Felipe Overlap. EPA appreciates the support of the Bureau of Indian Affairs regarding approval of Pueblo of Santa Ana's TAS application as it applies to other areas.

