

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 14-73100, 14-73101, 14-73102

VINCENT HARRIS YAZZIE, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents, et al.,

GILA RIVER INDIAN COMMUNITY,
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT, et al.,
Respondents-Intervenors.

BRIEF OF RESPONDENT-INTERVENOR NAVAJO NATION

NAVAJO NATION DEPARTMENT
OF JUSTICE
Ethel B. Branch, Acting Atty General
Paul Spruhan, Assist. Atty General
Katherine Belzowski, Attorney
P.O. Box 2010
Window Rock, Arizona 86515
Tel: 928-871-6937

Attorneys for the Navajo Nation

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
ADDENDUM	1
STATEMENT OF THE CASE.....	2
A. Introduction.....	1
B. Statutes and Regulations	4
C. Factual Background	6
STANDARD OF REVIEW	9
ARGUMENT	9
I. THE TRIBAL AUTHORITY RULE WAS PROPERLY APPLIED WHEN THE EPA APPROVED THE FIP FOR NGS.....	9
A. The EPA has valid authority to promulgate a FIP for NGS	9
B. The EPA correctly adopted the alternative to BART proposed by the TWG.....	11
CONCLUSION	13
STATEMENT OF RELATED CASES	13

TABLE OF AUTHORITIES

I. CASES

Federal

<i>Arizona Pub. Serv. Co. v. U.S. E.P.A.</i> , 562 F.3d 1116 (10 th Cir. 2009).....	5, 11
<i>Boye v. United States</i> , 90 Fed. Cl. 392 (2009)	3
<i>Navajo Nation v. United States</i> , 46 Fed. Cl. 217 (2000)	3
<i>United States v. Mitchell</i> , 463 U.S. 206 (1983)	2
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	2

II. CONSTITUTION, TREATIES, AND STATUTES

Treaty between the United States of America and Navajo Tribe of Indians, 9 Stat. 974 (Sept. 9, 1850).....	2
Treaty between the United States of America and Navajo Tribe of Indians, 15 Stat. 667 (June 1, 1868)	2

Federal Statutes

42 U.S.C. § 7601(d)(2).....	4
42 U.S.C. § 7601(d)(4).....	5, 6, 10
42 U.S.C. § 7607(b)(1).....	1

III. REGULATIONS

40 C.F.R. § 49.1 – 49.11	5
40 C.F.R. § 49.4	6
40 C.F.R. § 49.11	5, 6, 9, 10, 11
40 C.F.R. § 49.11(a).....	6, 9, 10, 11
40 C.F.R. Part 51, Appendix V	6

IV. FEDERAL REGISTER

63 Fed. Reg. 7254 (Feb. 12, 1998)	5
63 Fed. Reg. 7265 (Feb. 12, 1998)	5
56 Fed. Reg. 50172 (Oct. 3, 1991).....	8
59 Fed. Reg. 43956 (Aug. 25, 1994).....	10
59 Fed. Reg. 43960 (Aug. 25, 1994).....	10
64 Fed. Reg. 48731 (Sept. 8, 1999)	8
71 Fed. Reg. 53631 (Sept. 12, 2006)	8
75 Fed. Reg. 10174 (Mar. 5, 2010).....	8
78 Fed. Reg. 8273 (Feb. 5, 2013)	8
78 Fed. Reg. 8274 (Feb. 5, 2013)	8

78 Fed. Reg. 16825 (Mar. 19, 2013).....	9
79 Fed. Reg. 46515 (Aug. 8, 2014).....	6
79 Fed. Reg. 46516 (Aug. 8, 2014).....	6
79 Fed. Reg. 46548 (Aug. 8, 2014).....	12
79 Fed. Reg. 46549 (Aug. 8, 2014).....	12

V. OTHER AUTHORITIES

Cohen’s Handbook of Federal Indian Law, § 5.04[4][a]	3
David Hurlbut, et al., <i>Navajo Generating Station and Air Visibility Regulations: Alternatives and Impacts</i> , (Ja. 18, 2012)	7
EPA, <i>EPA Policy for the Administration of Environmental Programs on Indian Reservations</i> , (Nov. 8, 1984)	3
EPA, <i>EPA Policy on Consultation and Coordination with Indian Tribes</i> , (May 4, 2011)	4
EPA Administrator Regina McCarthy, <i>Memorandum: Reaffirmation of the U.S. Environmental Protection Agency’s Indian Policy</i> (Jan. 9, 2014)	3
Navajo Nation Division of Economic Development, <i>Website: Facts at a Glance</i> , http://navajobusiness.com/fastFacts/Overview.htm	6
S. Rep. No. 101-228 (Dec. 20, 1989)	4
Tina Norris, Paula L. Vines, Elizabeth Hoeffel, <i>The American Indian and Alaska Native Population: 2010</i> , (2012)	2

JURISDICTIONAL STATEMENT

Petitioners challenge the final action of the United States Environmental Protection Agency (EPA) promulgating the federal implementation plan (FIP) under the Clean Air Act (CAA) for the Navajo Generating Station (NGS) on the Navajo Nation (Nation). This Court has jurisdiction over the petitions under 42 U.S. C. § 7607(b)(1), which provides that the federal courts of appeals shall have jurisdiction over any final action of the EPA Administrator under the CAA. Each petition was timely filed within 60 days of the date the notice of EPA's final rule was published in the Federal Register.

STATEMENT OF ISSUES

The Navajo Nation adopts the statement of issues presented on pages 1-2 of the brief of the United States.

ADDENDUM

Except for the documents included in the Navajo Nation's Addendum (NN ADD), bound with this brief, all applicable statutes, etc., are contained in the brief or addendum of Petitioners and Respondent.

STATEMENT OF THE CASE

A. Introduction

The briefs of the other parties in this case set forth much of the background of this case. The Navajo Nation adds the additional following context for the Court.

The Navajo Nation is a sovereign Indian nation, with the largest population (332, 129)¹ and the largest reservation (27,425 sq. mi) of any Indian nation in the United States. It enjoys a government-to-government relationship with the United States as established in the Nation's treaties with the United States.² Under the Nation's 1850 Treaty, the United States explicitly assumed the responsibility to "secure the permanent prosperity and happiness" of the Navajo. 1850 Treaty, art. XI, 9 Stat. 974. In addition to the specific responsibility the United States has to the Nation, it also has a general trust responsibility to all Indian nations that the Nation benefits from. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) (emphasizing a distinct obligation of trust incumbent on the United States with respect to Indian nations). This general Indian trust responsibility and the Nation's

¹ Tina Norris, Paula L. Vines, Elizabeth Hoeffel, *The American Indian and Alaska Native Population: 2010*, at 4 (2012) available at <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf> (last visited on June 25, 2015).

² The first treaty was signed at Canyon de Chelly in 1849, and ratified by Congress in 1850. 9 Stat. 974. The second treaty was signed and ratified in 1868. 15 Stat. 667. *United States v. Wheeler*, 435 U.S. 313, 324 n.20 (1978).

treaties form the foundation of the “trust relationship” between the United States and the Navajo Nation. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 221 (2000). Based on this unique trust relationship between the United States and the Nation, the United States must act to protect the Nation’s self-determination and economic and social welfare. *See Boye v. United States*, 90 Fed. Cl. 392, 412 (2009); *see also* Cohen’s Handbook of Federal Indian Law, § 5.04[4][a].

The trust relationship between the United States and Indian tribes is acknowledged and reaffirmed in EPA’s Indian Policy, which recognizes that (1) the United States has a unique legal relationship with Indian tribal governments, (2) Indian tribes as sovereign governments have a right to self-determination, and (3) the federal government has a trust responsibility to Indian tribes. Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, at 3 (1984) (recognizing that the United States’ trust responsibility derives from the historical relationship between the federal government and Indian tribes and affirming that the EPA will protect the environmental interests of Indian tribes in keeping with the Indian trust responsibility), NN ADD2; *see also* EPA Administrator Regina McCarthy, *Memorandum: Reaffirmation of the U.S. Environmental Protection Agency’s Indian Policy* (2014), NN ADD1 (reiterating policy). The trust relationship is also recognized as one of EPA’s guiding principles in its Policy on Consultation and

Coordination with Indian Tribes, which notes that the federal government's trust responsibility derives from the unique historical relationship between the federal government and Indian tribes. Environmental Protection Agency, *EPA Policy on Consultation and Coordination with Indian Tribes*, at 3 (2011), NN ADD6. EPA's federal trust responsibility is reaffirmed in statutes and regulations, including the CAA and EPA's Tribal Clean Air Act Authority (generally referred to as the Tribal Authority Rule).

B. Statutes and Regulations

In 1990 Congress amended the CAA to include section 301(d), entitled "Tribal Authority." This is known as the "Treatment as a State" (TAS) provision. It authorizes EPA to treat Indian tribes as states under the CAA for the purpose of improving the air quality in Indian country in a manner consistent with EPA's Indian Policy and "the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments." *See* S. Rep. No. 101-228, 101 Cong., 1st Sess. (Dec. 20, 1989). The recognition of the unique relationship between the federal government and tribes resulted in Congress granting EPA the flexibility to promulgate rules and regulations that would identify the provisions of the CAA applicable to Indian tribes on parity with states. 42 U.S.C. § 7601(d)(2). Congress acknowledged in the CAA that Indian tribes are in a different legal and historical position than states,

and accordingly created authority for EPA to issue specific tribal rules that might deviate from CAA rules applicable to states.

Additionally the CAA also recognized the federal government's responsibility to regulate air quality in Indian country, and thus empowered EPA to directly regulate air quality in Indian Country under certain circumstances. For example, "[i]n any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." 42 U.S.C. § 7601(d)(4). The CAA also identifies EPA as the appropriate administrator of the CAA in Indian country when a tribe fails to act as such. *Id.*

In fulfillment of the CAA TAS provisions, EPA promulgated the Tribal Authority Rule. 40 C.F.R. § 49.1- 49.11. *See also* 63 Fed. Reg. 7254 (Feb. 12 1998) (Suppl. ER 373). The Tribal Authority Rule establishes criteria that allow tribes to be treated as states. Nonetheless, based on the finding that tribes are generally in the early stages of developing air planning and implementation expertise,³ EPA found it appropriate to exclude tribes from certain provisions of the CAA such as mandatory program deadlines and accompanying sanctions for

³ 63 Fed. Reg. at 7265 (Suppl. ER 383-384); *see Arizona Pub. Serv. Co. v. U.S. E.P.A.*, 562 F.3d 1116, 1125 (10th Cir. 2009).

failure to meet those deadlines. 40 C.F.R. § 49.4. After receiving TAS status, a tribe can submit a tribal implementation plan for EPA approval.

In the event an Indian tribe does not request a tribal implementation plan or its plan is inadequate, the Tribal Authority Rule empowers EPA to develop a FIP to directly regulate air quality. Section 49.11(a) of the Tribal Authority Rule provides the Administrator the authority to promulgate a FIP that is “necessary or appropriate to protect air quality if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR Part 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.” EPA approved the FIP that governs the Navajo Generating Station (NGS) under these provisions. 79 Fed. Reg. 46515, 46516 (August 8, 2014) (stating EPA is exercising its authority and discretion under 42 U.S.C. § 7601(d)(4) and 40 C.F.R. § 49.11).

C. Factual Background

The current Navajo Nation unemployment rate of 42 percent is over 8 times that of the United States.⁴ Forty-three percent of the population on the Navajo Nation lives below the property rate.⁵ NGS is a rare beacon of economic opportunity on the Navajo Nation, both for the Navajo people and for the Nation itself. To wit, approximately 450 Native Americans are employed by NGS and

⁴ Navajo Nation Economic Development, <http://navajobusiness.com/fastFacts/Overview.htm> (last visited on June 25, 2014)

⁵ *Id.*

400 are employed at the Kayenta Mine, the sole source for the coal that fuels NGS.⁶ Not only do NGS and Kayenta Mine provide much-needed jobs to the Navajo people, but they also provide rare lucrative blue-collar jobs to the Navajo people. The total wages paid to the Native employees of the plant and mine are approximately \$100 million per year.⁷ NGS jobs include important benefits, such as healthcare and retirement, and are key contributors to—if not the backbone of—the Navajo economy.

As NGS is located on Navajo trust land pursuant to a lease with the Nation, and utilizes coal from Navajo lands, the owners of the plant pay royalties and taxes to the Navajo Nation. Those royalties and taxes play a critical role in providing important governmental services to the Navajo people, including courts, law enforcement, and social, health, and educational programs. The Kayenta Mine also makes annual payments of just over \$37 million per year to the Navajo Nation. *Id.* The Nation receives additional benefits from NGS in the form of scholarship funds, property taxes, and close to \$1 million a year in lease and air permit fees. *Id.* The Hopi Tribe also receives revenues and benefits from NGS's coal lease payments.

⁶ David Hurlbut, et al., *Navajo Generating Station and Air Visibility Regulations: Alternatives and Impacts*, at iv (2012) available at <http://www.nrel.gov/docs/fy12osti/53024.pdf> (last visited June 25, 2015)

⁷ *Id.* at v.

On February 5, 2013 EPA issued a proposed FIP requiring the NGS to reduce emissions of nitrogen oxides (NO_x) under the Best Available Retrofit Technology (BART) provision of the CAA.⁸ In the proposed FIP, EPA recognized “the importance of NGS to numerous Indian tribes located in Arizona” and that there may be other approaches that could result in equivalent or better visibility benefit. 78 Fed. Reg. 8273, 8274 (Feb. 5, 2013). EPA thus encouraged a robust public discussion of its proposed BART determination and other possible approaches and indicated it was prepared to issue a supplemental proposal if approaches other than the proposed BART were identified as satisfying the requirements of the CAA. *Id.* EPA articulated its commitment to continuing to engage with stakeholders to develop a final FIP that maintains benefits to tribes and the regional economy while improving visibility in many of the most treasured national parks and wilderness areas. *Id.*

In response to the proposed FIP the Navajo Nation and the other stakeholders submitted requests to extend the comment period to allow time for

⁸ EPA has previously promulgated federal implementation plans under the Tribal Authority Rule to regulate air pollutants emitted from NGS. *See* 56 FR 50172 (October 3, 1991). In 1999, EPA proposed a federal implementation plan for NGS to fill the regulatory gap that existed because Arizona State permits and state implementation rules are not applicable or enforceable in the Navajo Nation, and the Tribe had not sought approval of a tribal implementation plan covering the plant. 64 FR 48731 (September 8, 1999). EPA then re-proposed the federal implementation plan with some additional conditions in September 2006. 71 FR 53631 (September 12, 2006). EPA finalized that NGS FIP on March 5, 2010. 75 FR 10174.

interested parties to explore alternatives to BART. 78 Fed. Reg. 16825 (March 19, 2013). The Navajo Nation, at the request of the Salt River Project, participated in a stakeholder group known as the Technical Work Group (TWG) which submitted an agreement (TWG Agreement) that included a BART alternative (Appendix B to the TWG Agreement) on July 26, 2013. It was this BART alternative that was finalized by the EPA as the FIP for NGS as a “better than BART” alternative.

STANDARD OF REVIEW

The Navajo Nation adopts the discussion of the standard of review at pages 21-25 of the brief of the United States.

ARGUMENT

I. THE TRIBAL AUTHORITY RULE WAS PROPERLY APPLIED WHEN THE EPA APPROVED THE FIP FOR NGS.

A. The EPA has valid authority to promulgate a FIP for NGS.

Petitioners To’ Nizhoni Ani, et al. (TNA), and Vincent Yazzie argue that EPA lacked authority to issue the FIP for NGS based on the alleged inability of the Nation to secure TAS status. According to Petitioners, the Nation is ineligible for TAS because the Nation allegedly waived its regulatory authority in the NGS lease. TNA OB at 37-40; Yazzie OB at 45-48. Petitioners argue that a tribe must be “eligible” for TAS status for EPA’s FIP authority to apply under Section 49.11(a): “Under TAR, when an *eligible* tribe fails to submit a TIP or when EPA

disapproves a [tribal implementation plan], the agency has discretionary authority to promulgate [a FIP].” TNA OB at 38 (emphasis in original).

The word “eligible” appears nowhere in Section 49.11(a), and it is irrelevant whether the Nation did or did not waive its authority to issue a tribal implementation plan for NGS. This Court need not consider or rule on the waiver question in this case, as EPA’s authority to promulgate a FIP under the tribal authority rule is based solely on the lack of an approved tribal implementation plan. It is true that the Navajo Nation did not submit a tribal implementation plan for NGS. However, “Congress intended that EPA would . . . have broad legal authority in instances when Tribes choose not to develop a program, fail to adopt an adequate program or fail to adequately implement an air program authorized under section 301(d).” 59 Fed. Reg. 43956, 43960 (Aug. 25, 1994). Accordingly, EPA has direct and independent authority under 42 U.S.C. § 7601(d)(4) and 40 C.F.R. § 49.11 to adopt a FIP, as long as the Nation has not submitted a tribal implementation plan, regardless of the reason why the Nation did not do so. EPA’s authority is in no way contingent on a tribe’s “eligibility” for TAS status. EPA’s authority to issue a tribal implementation plan and a tribe’s “eligibility” for TAS are separate concepts under the CAA and the Tribal Authority Rule. Indeed, the Tribal Authority Rule specifically states EPA’s authority in CAA to issue a FIP exists “[n]otwithstanding any determination made on the basis of authorities

granted the Administrator under any other provision of this section.” 40 C.F.R. § 49.11. It was therefore proper for EPA to issue the FIP despite any real or alleged waiver of the Nation’s TAS status.

As the United States notes in its brief, if Petitioners were correct that EPA cannot act under the Tribal Authority Rule to promulgate a FIP for NGS, then no government would be able to apply the requirements of the CAA to NGS. US Brief at 32. This result is contrary to the desires of Petitioners, who specifically request the application of CAA requirements to NGS.

B. EPA correctly adopted the alternative to BART proposed by the TWG.

The adoption of the TWG alternative by EPA is consistent with the requirements of the CAA and the Tribal Authority Rule, as well as the federal government’s trust responsibility to the Navajo Nation and other affected tribes. Under the Tribal Authority Rule EPA may issue its own FIP with provisions “as are necessary or appropriate” to protect air quality. 40 C.F.R. § 49.11(a). Under that provision, EPA has clear discretionary authority to adopt a federal implementation plan that incorporates air quality protections consistent with its overarching responsibility to tribal nations, including, if appropriate, applying deadlines different from those applicable to state implementation plans. *See Arizona Pub. Serv. Co. v. U.S. E.P.A.*, 562 F.3d 1116, 1125 (10th Cir. 2009) (stating 40 C.F.R. § 49.11(a) provides EPA discretion to determine what

rulemaking is necessary or appropriate to protect air quality and requires the EPA to promulgate such rulemaking).

EPA correctly concluded that the final action in this matter would have significant tribal implications based on the direct relationship between NGS, the Navajo Nation, Hopi Tribe, and those tribes that rely on delivery of water powered by NGS. 79 Fed. Reg. at 46548. For the Nation, the potential closure or curtailment of production at NGS significantly affects the coal-related royalties, taxes, and employment of the Navajo Nation. Given the extent of tribal interests in NGS and the federal government's trust responsibility to Indian tribes, EPA had an Indian trust duty to address the concerns expressed by the Nation. 79 Fed. Reg. at 46549. EPA, in adopting the TWG Agreement, correctly considered the potential economic impacts to tribes to apply the flexibility recognized in the Tribal Authority Rule to adopt its FIP with different deadlines for overall haze reduction. *Id.* As discussed in detail in the US brief, the FIP meets EPA's framework for a "better than BART" alternative, by a greater overall reduction of NO_x emissions. It also addresses the concerns raised by the Nation and provides an extended timeframe to minimize potential impacts on the Nation and other affected tribes. As such it achieves the appropriate reductions while balancing the significant interests of the Indian Nations with whom EPA has a government-to-government relationship.

CONCLUSION

The Navajo Nation and other Indian nations rely heavily on revenues generated and services provided by NGS. EPA has a federal Indian trust responsibility to these nations as recognized in the EPA's own rules, regulations, policies, and (as is the case here) actions. Guided by this trust responsibility, EPA sought a balance between the public's need for haze reduction and the significant financial and water resource interests of the Indian nations to whom the United States has a unique trust obligation in setting NGS's "better than BART" alternative. EPA exercised this authority under independent and proper authority. This Court should accordingly affirm the validity of EPA's FIP as an appropriate balance properly made by the agency pursuant to the CAA statute, federal regulations and policies, and the federal Indian trust responsibility.

STATEMENT OF RELATED CASES

Respondent Navajo Nation is unaware of any related case pending in this Court.

RESPECTFULLY SUBMITTED this 26th day of June, 2015.

NAVAJO NATION DEPARTMENT OF
JUSTICE

/s/ Paul Spruhan

Ethel Billie Branch, Acting Atty General
Paul Spruhan, Assistant Attorney General
Katherine Belzowski, Attorney

Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515
Tel: 928-871-6937
Fax: 928-871-6177
pspruhan@nndoj.org

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Paul Spruhan

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief contains 2,955 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Paul Spruhan

NAVAJO NATION

ADDENDUM

NAVAJO NATION ADDENUM
TABLE OF CONTENTS

EPA Administrator Regina McCarthy, *Memorandum: Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy* (Jan. 9, 2014) NN ADD1

EPA, *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, (Nov. 8, 1984) NN ADD2

EPA, *EPA Policy on Consultation and Coordination with Indian Tribes*, (May 4, 2011) NN ADD6



THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JAN 09 2014

MEMORANDUM

SUBJECT: Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy

FROM: Gina McCarthy *[Signature]*

TO: All EPA Employees

The U.S. Environmental Protection Agency in 1984 became the first federal agency to adopt a formal Indian Policy. Today, I am proud to formally reaffirm that policy. By my action, the EPA reiterates its recognition that the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders and court decisions. The EPA recognizes the right of the tribes as sovereign governments to self-determination and acknowledges the federal government's trust responsibility to tribes. The EPA works with tribes on a government-to-government basis to protect the land, air and water in Indian Country.

The EPA's tribal program has evolved since the Indian Policy's adoption. Recent significant milestones include publishing new guidance for the Indian Environmental General Assistance Program and requiring annual training, "Working Effectively with Tribal Governments," to ensure all EPA employees are informed about our important work with tribes. I also have announced "Launching a New Era of State, Tribal and Local Partnerships" as a key, guiding theme for the EPA in the coming months and years. These activities and priorities are directly influenced by the principles contained within the EPA Indian Policy, which is attached.

The reaffirmation of the Indian Policy articulates the importance of our tribal programs and our relationship with tribal governments. Our work in Indian Country is crosscutting and affects all aspects of the EPA's day-to-day functions. The environmental challenges we face are many. We must protect our precious water resources and address chemical safety. And we must continue taking common-sense steps to reduce the harmful carbon pollution that fuels climate change. Only through continued partnership with tribes can we truly achieve a cleaner, healthier and more prosperous America today and for future generations.

It is an important time in our partnership with tribes as the EPA builds on past successes and strives to meet current and future environmental challenges in Indian Country. Please join me in advancing our strong partnership with tribal governments to protect human health and to safeguard the environment in Indian Country.

Attachment

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be 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. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP). RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgement, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

EPA POLICY

ON

CONSULTATION AND COORDINATION

WITH

INDIAN TRIBES

May 4, 2011



Table of Contents

I. Policy Statement	1
II. Background	2
III. Definitions	3
IV. Guiding Principles	3
V. Consultation	4
A. The Consultation Process	4
B. What Activities May Involve Consultation	5
C. When Consultation Occurs	7
D. How Consultation Occurs	7
VI. Managing the Consultation Process	7
A. Roles and Responsibilities	7
B. National Consultation Meeting	8
C. Reporting	8
D. EPA Senior Management Review	8

I. Policy Statement

EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Consultation is a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this Policy, the continuing dialogue between EPA and tribal governments, and program and regional office consultation procedures and plans.

This Policy establishes national guidelines and institutional controls for consultation across EPA. EPA program and regional offices have the primary responsibility for consulting with tribes. All program and regional office consultation plans and practices must be in accord with this Policy. This Policy seeks to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability and allowing for, and encouraging, the tailoring of consultation approaches to reflect the circumstances of each consultation situation and to accommodate the preferences of tribal governments. The consultation process is further detailed in Section V of this document.

II. Background

To put into effect the policy statement above, EPA has developed this proposed *EPA Policy on Consultation and Coordination with Indian Tribes* (Policy). The Policy complies with the Presidential Memorandum (Memorandum) issued November 5, 2009, directing agencies to develop a plan to implement fully Executive Order 13175 (Executive Order). The Executive Order specifies that each Agency must have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

This Policy reflects the principles expressed in the *1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations* (1984 Policy) for interacting with tribes. The 1984 Policy remains the cornerstone for EPA's Indian program and "assure[s] that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect" tribes (1984 Policy, p. 3, principle no. 5).

One of the primary goals of this Policy is to fully implement both the Executive Order and the 1984 Indian Policy, with the ultimate goal of strengthening the consultation, coordination, and partnership between tribal governments and EPA.

The most basic result of this full implementation is that EPA takes an expansive view of the need for consultation in line with the 1984 Policy's directive to consider tribal interests whenever EPA takes an action that "may affect" tribal interests.

The Policy is intended to be implemented using existing EPA structures to the extent possible. The use of current EPA business processes, such as the Action Development Process, National and Regional Tribal Operations Committees, and tribal partnership groups is purposeful so that consultation with tribal governments becomes a standard EPA practice and not an additional requirement.

The issuance of this Policy supports and guides the development and use of program and regional office consultation plans and practices consistent with this Policy.

III. Definitions

A. “Indian tribe” or “tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a.

B. “Tribal official” means an elected, appointed, or designated official or employee of a tribe.

C. “Indian country” means:

1. All land within limits of any Indian reservation¹ under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

2. All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

3. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

IV. Guiding Principles

To understand both the purpose and scope of the Policy as well as the integration of the Policy, Memorandum, and Executive Order, it is helpful to list principles found in EPA’s January 2010 *Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175*:

EPA’s fundamental objective in carrying out its responsibilities in Indian country is to protect human health and the environment.

EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s land and membership, and not as political subdivisions of states or other governmental units.

EPA recognizes the federal government’s trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law.

¹ EPA’s definition of “reservation” encompasses both formal reservations and “informal” reservations, i.e., trust lands set aside for Indian tribes. *See for example* Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993); 56 Fed. Reg. 64876, 64881 (1991); or 63 Fed. Reg. 7254, 7258 (1998).

EPA ensures the close involvement of tribal governments and gives special consideration to their interests whenever EPA's actions may affect Indian country or other tribal interests.

When EPA issues involve other federal agencies, EPA carries out its consultation responsibilities jointly with those other agencies, where appropriate.

In addition, it is helpful to note the distinction between this Policy, federal environmental laws pertaining to public involvement, and Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. Under this Policy, EPA consults with federally recognized tribal governments when Agency actions and decisions may affect tribal interests. EPA also recognizes its obligations to involve the public as required by federal environmental laws. Finally, EPA recognizes the need to be responsive to the environmental justice concerns of non-federally recognized tribes, individual tribal members, tribal community-based/grassroots organizations and other indigenous stakeholders.

V. Consultation

A. The Consultation Process. To the fullest extent possible, EPA plans to use existing EPA business operations to put this Policy into effect.

Tribal officials may request consultation in addition to EPA's ability to determine what requires consultation. EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

Consultation at EPA consists of four phases: Identification, Notification, Input, and Follow-up:

1. **Identification Phase:** EPA identifies activities that *may be* appropriate for consultation, using the mechanisms described in section B.2, below. The identification phase should include a determination of the complexity of the activity, its potential implications for tribes, and any time and/or resource constraints relevant to the consultation process. This phase should also include an initial identification of the potentially affected tribe(s).

2. **Notification Phase:** EPA notifies the tribes of activities that may be appropriate for consultation.

Notification can occur in a number of ways depending on the nature of the activity and the number of tribes potentially affected. For example, EPA may send out a mass mailing to all tribes, may contact the tribal governments by telephone, or provide notice through other agreed upon means. EPA normally honors tribal preferences regarding the specific mode of contact.

Notification includes sufficient information for tribal officials to make an informed decision about the desire to continue with consultation and sufficient information to understand how to provide informed input.

Notification should occur sufficiently early in the process to allow for meaningful input by the tribe(s).

3. **Input Phase:** Tribes provide input to EPA on the consultation matter. This phase may include a range of interactions including written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved. EPA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. During this phase, EPA considers the input regarding the activity in question. EPA may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.

4. **Follow-up Phase:** EPA provides feedback to the tribes(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation.

B. *What Activities May Involve Consultation?*

1. **General Categories of Activities Appropriate for Consultation:** The broad scope of consultation contemplated by this Policy creates a large number of actions that *may* be appropriate for consultation.

The following list of EPA activity categories provides a general framework from which to begin the determination of whether any particular action or decision is appropriate for consultation. The final decision on consultation is normally made after examining the complexity of the activity, its implications for tribes, time and/or resource constraints, an initial identification of the potentially affected tribe(s), application of the mechanisms for identifying matters for consultation, described below, and interaction with tribal partnership groups and tribal governments.

The following, non-exclusive list of EPA activity categories are normally appropriate for consultation if they may affect a tribe(s):

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments²
- Permits

² Legislative comments are a special case where, due to short legislative timeframes, consultation in advance of comment submission may not always be possible. Nevertheless, EPA will strive to inform tribes when it submits legislative comments on activities that may affect Indian country or other tribal governmental interests.

- Civil enforcement and compliance monitoring actions³
- Response actions and emergency preparedness⁴
- State or tribal authorizations or delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement.

2. **EPA's Mechanisms for Identifying Matters for Consultation:** The mechanisms EPA uses for identifying matters appropriate for consultation are as follows:

a. **Tribal Government-Requested Consultation.** Tribal officials may request consultation in addition to EPA's ability to determine what requires consultation. EPA attempts to honor the tribal government's request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

b. **Action Development Process (ADP).** Early in the process, the lead program office assesses whether consultation is appropriate for the subject action. Its determination is available to tribes in the semiannual Regulatory Agenda as well as in the subset of rules on the Regulatory Gateway accessed through the EPA website.

This Policy is not intended to subject additional Agency actions to the ADP process for the sole purpose of a consultation analysis. Non-ADP actions are subject to consultation analysis through other mechanisms identified within the Policy.

c. **National Program Offices and Regional Offices.** For those actions and decisions not in the ADP process, program and regional offices also determine if consultation is appropriate under this Policy. EPA's Tribal Consultation Advisors, described below, provide assistance with that determination. Such determination includes coordination with national and/or regional tribal partnership groups.

d. **National and Regional Tribal Partnership Groups.** EPA meets regularly with a number of national and regional tribal partnership groups. These groups assist in the identification of matters that may be appropriate for consultation.

³ Primary guidance on civil enforcement matters involving tribes can be found in "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy," and "Questions and Answers on the Tribal Enforcement Process." This guidance is intended to work with the Tribal Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement matters.

⁴ The term "response" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removals and remedial actions.

C. *When Consultation Occurs.* Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.

D. *How Consultation Occurs.* There is no single formula for what constitutes appropriate consultation, and the analysis, planning, and implementation of consultation should consider all aspects of the action under consideration. In the case of national rulemaking, a series of meetings in geographically diverse areas may be appropriate. For more routine operational matters, a less formal process may be sufficient.

VI. Managing the Consultation Process

A. Roles and Responsibilities

The following roles and responsibilities have been defined to allow EPA to effectively implement this Policy. These roles and responsibilities reflect the fact that, while oversight and coordination of consultation occurs at EPA headquarters, as a practical matter, much of the actual consultation activity occurs in EPA's program and regional offices. The responsibility for initially analyzing the need for consultation and then subsequently carrying it out, resides with these offices.

1. **Designated Consultation Official:** In addition to being the EPA's National Program Manager for the EPA Tribal Program, EPA's Assistant Administrator for the Office of International and Tribal Affairs (OITA) is the EPA-Designated Consultation Official under the Executive Order. These responsibilities include coordination and implementation of tribal consultation in accordance with this Policy and Agency compliance with the 1984 Indian Policy.

The Designated Consultation Official has the authority for: (1) defining EPA actions appropriate for consultation, (2) evaluating the adequacy of that consultation, and (3) ensuring that EPA program and regional office consultation practices are consistent with this Policy.

Per the Memorandum, the Designated Consultation Official reports annually to OMB on the implementation of the Executive Order.⁵ Further, the Designated Consultation Official certifies compliance with the Executive Order for applicable EPA activities. The American Indian Environmental Office (AIEO) is located within OITA and coordinates the operational details of the Policy and compiles consultation-related information for the Designated Consultation Official.

2. **Assistant Administrators:** Assistant Administrators oversee the consultation process in their respective offices including analysis for potential

⁵ Report is filed annually by August 3rd.

consultation and the consultation process. Each program office is directed to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The program offices provide this information to AIEO for reporting to OMB. Each office is directed to designate a Tribal Consultation Advisor.

3. **Regional Administrators:** Regional Administrators oversee the consultation process in their respective offices including analysis for potential consultation and the consultation process. Each region is directed to prepare a semi-annual agenda of matters appropriate for consultation and a brief summary of consultation that has occurred. The regions provide this information to AIEO for reporting to OMB. Each region is directed to designate a Tribal Consultation Advisor.

4. **Tribal Consultation Advisors:** Tribal Consultation Advisors (TCAs) assist in identifying matters appropriate for consultation and prepare summary information on consultation activities and provide it to AIEO. TCAs receive and provide advice within their respective program offices and regions on what actions may be appropriate for consultation. TCAs also serve as a point-of-contact for EPA staff, tribal governments, and other parties interested in the consultation process. TCAs are the in-office subject matter experts to assist staff and management in the implementation of the Policy.

B. National Consultation Meeting

OITA/AIEO may convene a periodic National Consultation Meeting to be chaired by the Designated Consultation Official to review the consultation process across the Agency.

C. Reporting

Pursuant to the Memorandum, EPA submits annual progress reports to OMB on the status of the consultation process and actions and provides any updates to this Policy.

D. EPA Senior Management Review

The Designated Consultation Official communicates regularly with the Assistant and Regional Administrators to review the consultation system, to consider any matters requiring senior management attention, and to make adjustments necessary to improve the Policy or its implementation.

EPA plans to receive ongoing feedback on the Policy from all parties to assess its effectiveness and implement improvements.

