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May 18, 2004

BY E-MAIL AND BY REGULAR MAIL

Ms. Lydia Wegman
U.S. Environmental Protection Agency
C504-01
USEPA Mailroom
Research Triangle Park, NC 27711

**Re: Nonattainment Designation for Moapa Indian Reservation (Clark County,
Nevada)**

Dear Ms. Wegman:

We are long-time general counsel to the Moapa Band of Paiutes (the "Tribe"). As you are aware, the Tribe's reservation, the Moapa Indian Reservation, is located in Clark County, Nevada, approximately 45 miles northeast of Las Vegas (the "Moapa Reservation" or the "Reservation"). The Reservation in its entirety is held in trust by the United States for the Tribe as an entity. The Reservation was designated as nonattainment for the 8-hour ozone standard on April 15, 2004. The Tribe believes that this designation was made in error without consideration of EPA's trust responsibility to the Tribe and the adverse effects the designation of the Reservation may have on the Tribe's chances to finally achieve significant economic development. The Tribe requests that EPA correct this mistake by considering the Tribe's concerns and revising the nonattainment boundary to exclude the tribal lands pursuant to the agency's authority under Clean Air Act § 110(k)(6). This letter outlines the Tribe's basis for concluding that the Moapa Reservation's nonattainment designation was erroneous.

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Tribal Background

The present-day 72,000-acre Moapa Reservation is in the heart of traditional Southern Paiute territory, which extended from the San Juan River in eastern Utah to the Chemehuevi areas west of the Colorado River in southern California. The Southern Paiute have occupied this area for at least the past 800 to 1,000 years. Kelly and Fowler, "Southern Paiute," in 11 *Handbook of North American Indians* 368-69, 386 (Smithsonian 1986). Moapa was home to the largest Southern Paiute band and was an important site for irrigated agriculture.

The Spanish entry into the Southwest, beginning in the 1540s, had little effect on the Southern Paiute for 250 years. When direct contact came, the results were devastating. Spanish slave trading led to raids and depredations by neighboring Utes and Navajos. The Southern Paiute, for the most part, were known for their peacefulness. The Mormon move into Utah territory in the 1840s ended slave raids but encroached on Southern Paiute territory and resources. Kelly and Fowler at 381, 386-87.

The Moapa Reservation was selected by Indian agents as a homeland for all of the Southern Paiute in a series of recommendations beginning in 1869. Kelly and Fowler at 387. The Moapa Reservation was created by an Executive Order signed by President Grant on March 12, 1873. On February 12, 1874, President Grant issued an executive order which expanded the Reservation to well over 2,000,000 acres, including the entire Moapa and Lower Virgin watersheds and extensive lands along the Colorado River. *See* I Kappler, *Indian Affairs, Laws and Treaties*, 2d. ed. (1904) 866-67.

Pressure from non-Indian settlers led Congress, in a rider to an appropriations bill, to drastically reduce the size of the Reservation to 1,000 acres "to be selected by the Secretary of the Interior, in such manner as not to include the claim of any settler or miner." 18 Stat. 475. The selection of 1,000 acres was made by Secretary of the Interior on July 3, 1875, and 99.5% of the Reservation was lost to the Tribe at the stroke of a pen. Kelly and Fowler at 388; *see also* S. Rep. No. 951, 96th Cong., 2d Sess. 2-3 (1980).

From the 1875 reduction until 1900, conditions at Moapa deteriorated until very few people remained. Corruption and mismanagement among agents of the Indian Service, including the seizure of disputed lands by dishonest agents and their partners, and actions by non-Indian landholders, resulted in virtual dispossession of the Moapa from much of the Reservation by the

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turn of the century. The entire Southern Paiute population decreased by about two-thirds from 1873 to 1930.¹ Kelly and Fowler at 388-89.

On December 2, 1980, Congress enacted Pub. L. 96-491 which restored 70,565 acres to the Reservation. The legislative history of that Act specifically contemplates industrial development of the Reservation. First, in support of the bill, the Tribe submitted testimony cataloging its intended uses of the lands to be returned:

The Bill before you petitions the return of 70,565.46 acres which will be used for farming (approximately 1,000 acres are immediately contiguous to existing farm fields), grazing, *industrial park sites*, economic/commercial development around two exits/interchanges on I-15 (the freeway between Las Vegas and Salt Lake), and home sites. We need these former lands because almost all available acreage on the reservation has been used and approximately 35 percent of our population is young people approaching the age of starting a family.²

In the House deliberations on the restoration bill, all Representatives who spoke indicated a clear intent to redress, at least in part, the Tribe's longstanding grievance about the loss of its Reservation, as well as an understanding that the lands were to be used for economic development, including *industrial uses*:

Mr. SANTINI: . . . The bill deals with the partial return of lands which were once part of the Moapa Indian Reservation in the 1870's, and which were subsequently taken from the tribe without any compensation. The purpose of this bill is to correct this historic injustice and return a small portion of the reservation to a most deserving people.

. . .

Additional land is badly needed by the Moapa Tribe for the following reasons:

¹ Even in 1980, the Southern Paiute population was still 25% below population levels in 1873, making them one of the few groups in the area that had not regained and exceeded 1873 levels. Leland, "Population," in 11 *Handbook of North American Indians* 612 (Smithsonian 1986).

²Letter from Tribal Chairman Preston Tom to Sen. Dale Bumpers, Chairman, Sen. Subcomm. on Public Lands (Oct. 12, 1979), *reprinted* in Hearing Before the Subcomm. on Parks, Recreation, and Renewable Resources, 96th Cong., 1st sess., Publication No. 96-82 (Oct. 15, 1979) at 122.

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First. The development the tribe has undertaken has used up almost all available existing land: the tribe is virtually landlocked;

Second. Sites will need to be developed for *industrial and commercial purposes in order to provide more jobs*;

Cong. Rec. – House (November 17, 1980) at H 10691 (emphasis added). The House thereupon passed the bill. *Id.* at H 10691-93.

Unfortunately, notwithstanding the explosive growth in the region, the economic development envisaged for the Tribe's lands by Congress and the Tribe has been difficult to achieve. The single business operation is a Tribal retail outlet at the Valley of Fire interchange off Interstate 15. Extensive efforts to achieve further development of the Tribe's restored lands have historically been unsuccessful. The lack of development on the Reservation has contributed to serious unemployment and underemployment problems. Few jobs are available for those living on the Reservation, and those few yield incomes well under the region's average. Official BIA statistics are available for the Reservation for 1995 and 1997, a boom period for most of the rest of Southern Nevada and the nation.

In 1995, 127 Tribal members were in the potential labor force (non-students, aged 16 to 64). Of these, 58 were unemployed, an unemployment rate of 46%. Of the 69 members who were employed, *only 9* earned \$9,048 or more. Only 6% of working-age Reservation members (9 of 140) thus received anything close to a decent wage.³ 1997 showed no overall improvement. 49% of the labor force remained unemployed.⁴ The disparity in economic conditions and public services and facilities between the Reservation and the rest of the region is a profound and troubling problem for the Moapa people, who have unmet basic needs for human and governmental services. These disparities are inconsistent with the expressed policies of Congress as expressed in the 1980 restoration bill.

Until recently, the single greatest impediment to the Tribe's ability to develop these lands has been the difficulty of providing a firm supply of good quality water. The Tribe recently

³See U.S. Department of the Interior, Bureau of Indian Affairs, "Indian Service Population and Labor Force Estimates, Table 3 [<http://www.doi.gov/bia/ifcons95.html>] (1995).

⁴See U.S. Department of the Interior, Bureau of Indian Affairs, "Local Estimates of Resident Indian Population and Labor Market Information, Male and Female Indians Living On-or-Near Reservation, Summary by Tribe or Reservation [<http://www.doi.gov/bia/Labor/97Labphx.PDF>] (1997).

concluded multi-party negotiations on a settlement of its federal water rights claims which the Tribe hopes will allow this obstacle to finally be overcome. It would be unfortunate, to say the least, if EPA's nonattainment designation erects a new impediment to economic development.

Designation History

Neither the Moapa Reservation nor any other area within the State of Nevada were considered nonattainment for the 1-hour ozone standard. Similarly, neither the Moapa Reservation nor any other area within the State of Nevada were initially considered to be nonattainment areas for the 8-hour ozone standard. All areas within Nevada, including the Moapa Reservation were identified as in attainment with the 8-hour standard by EPA in December 2003. See attached letter from EPA to Honorable Kenny C. Guinn dated December 3, 2003. However, weeks before the April 15, 2004 signing of the designation rule, EPA reached the preliminary conclusion that the Las Vegas Metropolitan Statistical Area ("MSA") (which includes Clark, Nye and Mojave (Arizona) counties) was nonattainment for the ozone standard because the 3-year average of the annual 4th highest daily maximum 8-hour ozone concentrations for a single monitor in northwestern Las Vegas reached 86 ppb (the standard being 85 ppb). None of the other 15 monitors in Clark County indicated an 8-hour standard exceedance.

The Las Vegas MSA covers an enormous amount of territory. Clark County alone covers 8,060 square miles, Nye County covers 18,064 square miles and Mojave County covers 13,479, meaning the MSA covers an area roughly the size of the state of Kentucky. By contrast, the Las Vegas Valley covers only 516 square miles, or less than 0.05% of the total land within the Las Vegas MSA.

In mid to late March 2004, we understand that EPA contacted the States of Nevada and Arizona as well as Clark County, Nevada regarding the presumptive designation of the entire Las Vegas MSA as an 8-hour ozone nonattainment area. EPA's default position is to consider an entire MSA as nonattainment if a single monitor within the MSA indicates noncompliance. However, in order to avoid absurd results, EPA recognized a process for designating less than the entire MSA. The State of Nevada apparently did not contest Clark County being designated as a nonattainment area, but argued that Nye County should not be considered part of the nonattainment area due to factors including sparse population, 50 mile distance from Las Vegas, topographical features, and the unlikelihood, given meteorological data, that the violations in Las Vegas are affected by Nye County. See, Technical Support Document for 8-Hour Ozone Designations, page 3-190-191, April 2004. Similarly, the State of Arizona argued that because the county is separated from Las Vegas by undeveloped desert and the nearest monitors are monitoring attainment, Mojave County should be designated as attainment. See, Technical

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Support Document for 8-Hour Ozone Designations, page 3-12-13, April 2004. In both cases EPA considered the two counties as too removed from the affected area (Las Vegas Valley) to warrant being included in the nonattainment area. The Moapa Reservation is about the same distance from Las Vegas as the two counties, and has relevant physical and demographic characteristics similar to those of the two counties. While EPA has a trust responsibility to the Tribe, it has no such responsibility to the counties.

We understand that Clark County (which implements its own air program separate from the State of Nevada) did not believe that it had the resources to complete an 11 point analysis to exclude portions of Clark County outside the Las Vegas Valley from the nonattainment designation. We understand from the State that EPA provided the State and County one week in which to provide EPA an 11 point analysis narrowing the nonattainment designation from the MSA to a more specific area. Clark County, with its limited resources, did not believe that it could prepare an 11 point analysis in that short a time period. As a result, all areas of Clark County, including those outside the Las Vegas Valley, were designated as nonattainment. As the Tribe was not aware of this last minute change in the County's designation, the Tribe similarly did not prepare an 11 point analysis. Therefore, the Reservation was included in the Clark County nonattainment area by default. As this letter documents, we believe that this designation was inappropriate and had we been allowed the opportunity for meaningful participation in the designation process, this economically crippling outcome would have been avoided.

EPA's Trust Responsibility to the Tribe

EPA, like all federal agencies, is subject to the federal trust responsibility. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir.), cert. denied, 454 U.S. 1081 (1981). "The law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.'" *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (quoting *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987)). The trust relationship overlays EPA's statutory obligations which require EPA to consult with the Tribe and consider Tribal interests when taking actions that may affect the Reservation. See *Memorandum, Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (each executive agency "shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments"); EPA 1984 Indian Policy ("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").

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As discussed above, one of Congress' key purposes in expanding the Moapa Reservation in 1980 was to provide the Tribe with land for industrial development. A nonattainment designation will make it even more difficult to fulfill this purpose, especially if ozone precursor offsets are required for major new sources. Despite the potentially dramatic effects on the Tribe's rights and interests under the 1980 legislation, it appears that EPA made no meaningful effort to notify or obtain feedback or information from the Tribe prior to designating the Reservation as nonattainment. We understand that a brief phone call was made to the Tribe. The Tribe advises that that brief call, in timing and in substance, provided no opportunity to the Tribe to understand, evaluate or comment on the proposed designation. Nor did it solicit any information from the Tribe about the consequences that a designation might have on the Tribe's interests or plans. Certainly the consultation required by the federal trust responsibility did not occur. In its haste to address the Las Vegas MSA designation before the deadline for signing the final rule, EPA failed to take the time to assure that Tribal concerns and interests were identified and considered.

Had the Tribe been afforded a meaningful opportunity to comment upon the impending ozone designation, it would have articulated arguments even stronger than those made in relation to Nye and Mojave Counties. This letter is intended to make that showing and afford EPA an opportunity to remedy matters by adequately taking into account the Tribe's interests in its decision making process. The Clean Air Act provides a clear path whereby EPA may expeditiously correct such errors. Based upon the showing below, we strongly urge EPA to utilize the provisions of Clean Air Act § 110(k)(6) to expeditiously redesignate the Moapa Reservation as attainment/unclassifiable. As Clean Air Act § 110(k)(6) allows an error to be corrected using the same procedural steps as the initial designation, EPA is authorized to issue the corrected designation without additional submittals and without going through public comment. Because timing is so critical to the Tribe, we urge EPA to correct this error immediately to avoid extreme economic harm to the Tribe.

The following analysis follows the format of EPA's March 28, 2000 and July 18, 2000, 11 point guidance on establishing boundaries for ozone nonattainment areas other than those matching the MSA.

Response To Eleven Mitigating Factors

1. Emissions and Air Quality in Adjacent Areas (including adjacent C/MSA's)

Clark County is divided into 12 Hydrographic Basin Areas (“HBA”) that comport with topographical features. These HBAs are used for purposes of air quality management because of their natural relationship to the contours of the area. The Moapa Reservation is located in Moapa Valley. Going in a southwest direction, the next valley is Apex Valley. If one continues going in a southwest direction, the next valley is Las Vegas Valley. To the northeast of Moapa Valley is Virgin Valley. For ease of reference, a map from the Clark County Air Quality Management Board regulations is attached showing the different HBAs. “MV” is Moapa Valley, “AV” is Apex Valley, “LV” is Las Vegas Valley and “VV” is Virgin Valley.

Air quality in the areas adjacent to the Moapa Valley is in attainment. As you are aware, a single monitor in northwest Las Vegas (the “Joe Neal” monitor) barely exceeded the 8-hour ozone standard with a design value of 86 based on the 2001 - 2003 period. A design value of 84 would constitute attainment of the standard. There are 10 ozone monitors in the greater Las Vegas area. None of the other 9 monitors monitored a design value of 85 or above. However, the Las Vegas Valley is not adjacent to the Moapa Valley. Apex Valley is adjacent to Moapa Valley. There is one monitor in Apex Valley. The three year average of the 4th high ozone concentrations from the Apex monitor document a design value of 78 --comfortably below the ozone standard. There is one monitor in the Virgin Valley (Mesquite). That monitor was installed in December 2001 and so there is not yet a full three years of data. However, we understand from EPA Region 9 that the data collected to date documents an average 4th-high ozone concentration of 71 ppb--well below the ozone standard. Therefore, air quality in the areas adjacent to the Moapa Valley is in attainment with the 8-hour ozone standard. There has never been an ozone monitor placed in the Moapa Valley, either on the Reservation or off of it, in large part because of the relative paucity of industrial development and the limited amount of area and mobile source emissions. Were a monitor to be placed in Moapa Valley, we believe the evidence (monitors on either side of the valley indicating compliance) strongly suggests that it would monitor attainment conditions.

2. Population density and degree of urbanization including commercial development (e.g., shows a significant difference from surrounding areas)

Two valleys away from Moapa Valley lies the City of Las Vegas. The Las Vegas MSA as a whole is reported to have had 83% population growth from the 1990 census to the 2000 census. At the same time, the local median household income has risen from \$30,746 to

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\$45,607. The Las Vegas Valley is estimated to be home to roughly 1.7 million people and some have estimated that it could grow to 2 million people by the end of 2005. This explosive growth in population and affluence that has occurred in the Las Vegas Valley has resulted in an increase in air pollution within that valley.

The increase in population and affluence seen in Las Vegas Valley has not extended to the Moapa Valley. The Moapa Reservation is roughly 72,000 acres and is inhabited by approximately 425 residents. Approximately 460 acres are cultivated with alfalfa being the major crop. The majority of Tribal members work for the Tribe, and a very small number of Tribal members work at the Nevada Power Company power plant near the Moapa Reservation. Unemployment runs as high as 50 percent.

The Moapa Reservation is in stark contrast to the Las Vegas Valley in terms of both urbanization and commercial development. The Las Vegas Valley is highly urbanized and includes substantial commercial development. The Moapa Reservation is entirely rural, has no industrial development, and has only small scale commercial development (the Tribal store at the Valley of Fire exit). The Tribe has expended precious resources in extended negotiations for two industrial projects - a gas-fired power plant (Calpine Corporation) and a Portland cement plant (Ash Grove Cement Company). Agreements in principle for these projects have been reached or are near at-hand. If achieved, these projects for the first time would provide significant revenues and well-paying, quality jobs to the Tribe, its members and their families. The Tribe fears that the ozone attainment designation for the Reservation may impede one or both of the projects and deprive the Tribe of sorely needed economic development. EPA's trust responsibility to the Tribe demanded that such potential adverse consequences be considered in consultation with the Tribe in determining whether the Reservation should have been included within the nonattainment area.

Metropolitan Statistical Areas, according to OMB reports, are core areas containing a large population nucleus, together with adjacent communities having a high degree of economic and social integration with that core. In other words, MSAs are generally urban cores and their suburbs. Indian communities are stark exceptions to the presumption of social and economic integration that may seem logical due to physical closeness. One of the most significant economic challenges for tribes is the lack of economic integration with surrounding cities. In general, tribes have had few ways to benefit from the growth of surrounding cities. Tribes do not receive revenue sharing from state or other local taxes. Because tribes are not political subdivisions of the state, they generally provide most governmental services on the reservation. Tribes generally have few retail establishments. A number of reports over the past decade have demonstrated that the already limited amount of tribal dollars flow off of reservations because of

the lack of retail stores on tribal land (and tribal members pay city and state retail taxes as a result). This is certainly the case on the Moapa Reservation. Very few people commute from the Las Vegas Valley to work on the Reservation. Similarly, few Tribal members commute off the Reservation to work within the Las Vegas Valley. Many Tribal members who work in the Las Vegas Valley have simply moved into that valley.

3. Monitoring data representing ozone concentrations in local areas and larger areas (i.e., urban or regional scale)

The Tribe has no ozone monitoring data from the Reservation. As noted, monitors in the adjoining two valleys (Apex to the west and Virgin to the east) have documented those areas as being in attainment with the 8-hour ozone standard. In its June 27, 2003 report, the Clark County Department of Air Quality Management reported that the 4th high 8-hour rolling average for the Apex Valley monitor was 0.078 ppm. The Mesquite monitor has not operated for three years (it was installed in December 2001) and so it was not included in the report. However, EPA Region 9 informed us that based on data collected through 2003, the average 4th high 8-hour rolling ozone concentration was 0.071 ppm. Therefore, actual monitoring data in adjoining areas documents that the air in the Moapa Valley should be comfortably in attainment.

4. Location of Emissions Sources

Currently, the only sources of VOC and NO_x within the Moapa Reservation are area and mobile sources. Given the size of the Reservation and the size of the resident population, the ozone precursor inventory is negligible.

As noted above, the Tribe is hoping that Calpine Corporation will build a power plant on the Reservation. Worst case emissions from that facility would be 248 tons per year of NO_x and 79 tons per year of VOC. Modeling that was performed as part of the Calpine application reviewed and approved by EPA Region 9, documents worst case NO₂ impacts attributable to the project of 1.5 µg/m³. However, this modeling was based upon a 3 ppm emission limit which has been revised to 2 ppm. We would expect impacts to decrease by a similar percentage. In other words, we anticipate that impacts would be at or below the significance level at the worst case receptor. The worst case receptor was directly north of the facility (Las Vegas is to the southwest) and wholly within the Moapa Reservation. While the modeling was of NO_x impacts, not ozone formation, it is demonstrative of the limited impacts and the location of the impacts anticipated from the Calpine project.

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The Tribe is also in advanced negotiations with Ash Grove Cement Company about locating a plant on the Reservation. We anticipate that the facility will be a major source of NO_x and VOC with worst case potential emissions of approximately 1,700 tons per year of NO_x and less than 100 tons per year of VOC (VOC is highly dependent upon organic content of the raw materials and the required assays are not yet complete so Ash Grove has been unable to tell us how much lower). Emissions from the proposed facility have been modeled and the worst case NO₂ impacts attributable to the source are predicted to be 1.47 µg/m³. As with the Calpine facility, the worst case receptor is directly north of the facility and wholly within the Moapa Reservation. We understand that these modeling results are preliminary and that final results could well be lower.

Meteorological data is collected both in Apex Valley as well as at the McCarran International Airport in Las Vegas. Both meteorological stations document that the predominant wind patterns in both valleys are out of the south/southeast and towards the north/northeast. A report discussing these data sets and providing wind roses is included with this letter for your review. You will see from this report that emissions from sources on the Moapa Reservation are extremely unlikely to have a measurable impact on air quality in the Las Vegas Valley.

There are three significant stationary sources within the Moapa Valley that are located off the Reservation. The primary source of NO_x is the Reid Gardner power plant, owned and operated by the Nevada Power Company. This plant has NO_x emissions of approximately 29,000 tons per year and VOC emissions of approximately 50 tons per year. Emissions from these sources are outside the control and jurisdiction of the Tribe as they are on state land. Emissions from these plants do not materially impact the Las Vegas Valley or the Reservation as the wind direction and topographical features will result in emissions moving to the north and northeast of those sources.

5. Traffic and Commuting Patterns

The Moapa Reservation is traversed by approximately 10 miles of Interstate 15. This highway is a major thoroughfare that is a source of ozone precursors. However, it is not a commuting road and is not prone to traffic slowdowns or engine idling. It is a "long haul" road with only two exits within the Reservation confines. Therefore, we would not expect significant impacts from I-15. It is also worth noting that because I-15 is an interstate highway, the Tribe has effectively no jurisdiction over it.

As noted above, there is little in the way of commuting in and out of Moapa Valley. Most of the Reservation residents work on the Reservation and few people commute from

outside the Reservation onto it. Other than the Tribal store at the Valley of Fire exit adjacent to the southern boundary of the Reservation, there is little to attract traffic onto the Reservation. Due to its small population and economic deprivation, the Reservation makes an insignificant contribution to regional traffic patterns.

6. Expected Growth (including extent, pattern and rate of growth)

The population on the Moapa Reservation is not expected to increase beyond natural growth within this century. There is very little in-migration, limited to Tribal members who may have moved off the Reservation usually to attend school or for work. The Tribe's residential community and headquarters are concentrated in the northeast corner of the Reservation, considerably separated from off-Reservation communities.

In comparison, the Las Vegas Valley expects growth through in-migration to continue to increase substantially over the next decade. According to the census, population growth in Clark County between 1990 and 2000 was approximately 83%, making it one of the fastest growing counties in the country. However, none of that growth is occurring on the Moapa Reservation, it is occurring almost exclusively in the Las Vegas Valley.

7. Meteorology (weather/ transport patterns)

As explained in the attached report from Trinity Consultants, weather/transport patterns within the Apex and Las Vegas valleys are amazingly consistent year round. Wind is persistently out of the south and southwest and blowing towards the north and northeast. Winds blowing to the north will carry ozone precursors generated in the Las Vegas metropolitan area further up into the Las Vegas Valley such that the Apex and Moapa Valleys will not be affected. This transport pattern is consistent with the monitoring results which show the highest ozone levels on the northwest side of the city. Winds blowing to the northeast could potentially carry ozone formed in the Las Vegas Valley into the Apex Valley, although such movement would be hindered by the topography and dispersion would occur before material amounts of ozone reached the Moapa Valley (i.e., the next valley beyond Apex Valley). During periods of stagnation, the topography hampers ozone or ozone precursors from entering Apex Valley and then subsequently being transported into Moapa Valley.

We also understand that ozone formation requires a minimum amount of humidity in order to form. As golf course, lawns, swimming pools and fountains have flourished in the Las Vegas Valley, ambient humidity has risen and ozone formation has increased. Such amenities

are absent in the arid Apex and Moapa Valleys and so ozone is significantly less likely to form from ozone precursors that do reach those areas.

The consistent transport patterns ensure that the minimal emissions that do occur on the Moapa Reservation have no material effect on the Las Vegas Valley. This is also borne out by the modeling that has been done to date related to the potential Moapa Reservation sources. The minimal “worst case” receptors are consistently located due north of the discharge point.

8. Geography/Topography (e.g., mountain ranges or other air basin ranges)

The Moapa Reservation has several topographic features that minimize the potential for air pollution emissions from the Las Vegas Valley impacting the Reservation. The Reservation is situated in the Moapa Valley, two valleys over from the Las Vegas Valley. The topographic features that define these valleys minimize the transport of Las Vegas Valley emissions to Apex Valley and then on to the Reservation. Specifically, the Arrow Canyon Range and the Dry Lake Range have 3,000+ foot peaks that nearly converge on either side of I-15, forming the western side of the Moapa Valley. These mountains substantially impede air movement from the Las Vegas Valley to Apex Valley and then further into Moapa Valley. Likewise, the western edge of the Apex Valley (i.e., the eastern edge of the Las Vegas Valley) is similarly defined by the Las Vegas Range, Sunrise Mountain (3,364 feet) and Frenchman Mountain (4,052 feet). This is documented by the Apex monitoring data which show 4th high 8-hour rolling averages comfortably below the 8-hour standard. Given the winds, the topography and the relative absence of water as one moves from the Apex Valley to the Moapa Valley and then on to the Reservation, there is little potential for material ozone impacts on the Reservation. If such impacts were occurring from long range transport, the ozone levels at the Apex and Mesquite monitors would be elevated as well--which they are not.

9. Jurisdictional Boundaries

The Tribe believes that defining the jurisdictional boundaries of the Reservation as an attainment/unclassifiable area is consistent with the jurisdictional boundaries established by the Clean Air Act. The county and state have no jurisdictional authority over the Reservation lands, all of which are held in trust for the Tribe. As EPA pointed out when deciding to split the PM₁₀ nonattainment area for Power and Bannock Counties in Idaho, there are strong reasons for separating tribal lands from state lands when defining nonattainment areas. Specifically, the state’s jurisdiction and Clean Air Act planning responsibilities extend only to the portion of the nonattainment area on state lands, while the Tribe and EPA are authorized to exercise planning responsibility for those lands within the Reservation boundaries. The Tribe expresses no opinion

as to whether and what part of the state lands should or should not be considered nonattainment. However, where there is no evidence of any actual or potential exceedances of the 8-hour ozone standard within the jurisdictional boundaries of the Moapa Reservation, or in the valley to either side of it, EPA should honor the Tribe's sovereignty and the trust responsibility and recognize that the Tribe's lands should not be treated as nonattainment solely because of the state's/county's choice to forego discussing more specific boundaries.

10. Levels of Control of Emissions Sources

As noted above, the Reservation lacks any stationary sources of air emissions with the only sources being area and mobile sources. Because any new development on the Reservation would have to undergo new source review, any source would be required to install Best Available Control Technology ("BACT") based upon the area being designated attainment/unclassifiable. For the Calpine project, this has resulted in state-of-the-art controls being proposed that will dramatically reduce NOx and VOC emissions and will result in emissions per megawatt-hour that are orders of magnitude below older, state permitted generation facilities. Specifically, the Calpine project is being required to meet a 2.0 ppm NOx limitation, which we understand is the most restrictive limit for this type of power plant being achieved anywhere in the country. Any other proposed industrial facility would also be required to install BACT and conduct an air quality modeling analysis which will ensure maintenance of the NAAQS and compliance with PSD increments.

11. Regional Emission Reductions Impacts

Emissions of ozone precursors from all sources located within the Reservation, both current and potential, are so small that they do not impact the NAAQS on either a local or a regional basis. Meteorology and topography conspire to make it so that emissions from the Reservation cannot impact the Las Vegas Valley in any material way. Likewise, the Tribe believes those same factors minimize the possibility of the Las Vegas Valley impacting the Reservation in a material way. As a result of these features, what the Tribe decides to do on the Reservation has no impact upon the planning taking place in the Las Vegas Valley and the complete elimination of all sources, current or potential, would provide no relief to the Las Vegas Valley. Conversely, allowing the Tribe to engage in responsible development as an attainment/unclassifiable area is not going to impact the attainment status of the Las Vegas Valley or any other area on or off the Reservation. Given those facts, there is no basis for the Reservation to be designated as nonattainment.

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Conclusions

The Moapa Band of Paiutes urges EPA to recognize that it acted in error by designating the Moapa Reservation as part of the Clark County nonattainment area. The Tribe is greatly concerned by the agency's approach that assumes that Tribal lands are nonattainment simply because they are located within an enormous MSA that has a single monitor documenting borderline noncompliance. While we appreciate the opportunity to document that this is inappropriate in our particular circumstances using the 11 criteria, this approach still places the Tribe in the position of having to carry the burden of demonstrating why it should not be classified as nonattainment. We believe that the assumption should be that the Tribal lands, as a separate jurisdiction, are in attainment unless there is concrete evidence to the contrary. In the Tribe's situation, because of political subdivisions (counties) that do not relate to Tribal boundaries or jurisdiction, EPA assumes that the Reservation will now and forever be nonattainment only because of problems in a distant area urban area. This is particularly chilling when it is considered that the urban area has largely grown off of the exploitation of resources that historically were the Tribe's. It would be particularly painful to the Tribe to lose its prospects for development and betterment because its Reservation was classified as nonattainment due to growth and development limited to the Las Vegas Valley.

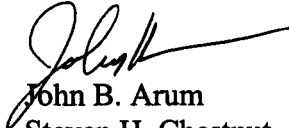
We appreciate the tremendous effort that EPA put in to complete the 8-hour classifications. We understand that the Las Vegas Valley data were only fully understood weeks prior to the deadline for designating the nonattainment areas. This appears to have resulted in EPA accidentally foregoing meaningful consultation with the Tribe. We believe that this oversight can now be corrected expeditiously through EPA's use of its §110(k)(6) authority under the Clean Air Act. To be blunt, the Tribe cannot afford to wait a year or more for a more drawn out regulatory process to redesignate the Reservation. We require prompt action to prevent substantial harm to the Reservation through the loss of potential development that it has spent years in bringing to fruition. It could be many years, if ever, before the Tribe faces such an opportunity again. Therefore, we respectfully request that EPA commit to immediate consultation and expeditious response to minimize the likelihood of this damage to the Tribe.

Thank you for your consideration of our comments.

Ms. Lydia Wegman
May 18, 2004
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Very truly yours,

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM



John B. Arum
Steven H. Chestnut

cc: Robin Dunkins (EPA OAQPS)
Philbert Swain, Tribal Chairman, Moapa Band of Paiutes
Tom Wood and Eileen Flink, Ash Grove Attorneys

Attachments:

1. Letter from EPA to Honorable Kenny C. Guinn dated December 3, 2003
2. Clark County map of 12 Hydrographic Basin Areas
3. Trinity Report on McCarran and Apex Wind Roses