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Church Rock and Crownpoint) is tribal trust land or allotted land, and almost all of the people living in the community surrounding the HRI project are Navajo. HRI should not be allowed to circumvent federal jurisdiction based on one small quarter section of land.

Very truly yours,

NORDHAUS, HALTOM, TAYLOR,
TARADASH & FRYE, LLP

Jill E. Grant

Jill E. Grant

Attorneys for the Navajo Nation

cc: James R. Bellis
Asst. Attorney General, Navajo Nation

Bennie Cohoe
Executive Director, Navajo Nation EPA

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Phone #	Phone #	
Fax #	Fax #	

CHAPTER IMAGES: 1992 EDITION

DIVISION OF COMMUNITY DEVELOPMENT
The Navajo Nation
P. O. Box 1896
Window Rock, Arizona 86515

602/871-6810

Fall 1993

Compiled, Edited, and Prepared by:
LARRY RODGERS

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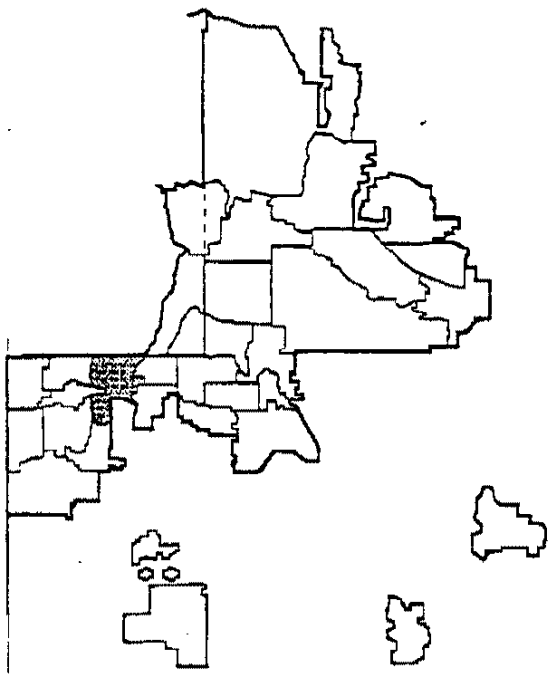

CHURCH ROCK CHAPTER

Navajo name: Kinłitsoh sinilí
Interpretation: Group of yellow houses
Population: 1980 Census: 1,622
1990 Census: 1,684
1993 Estimate: 1,742
Estimated land size: 52,719.15 Acres
Land Management District: 16

GOVERNMENT

Number of Chapter NTC delegate(s): 2
Delegate(s) shared with:
Bread Springs
Number of police officer(s): 1
Navajo Police district office covering Chapter:
Crownpoint District
Tribal offices that provide services within Chapter:
Dept. of Employment and Training
Child Development
Division of Social Services
Community Health Representative
Dept of Behavioral Health

MEDICAL

Hospital(s) and clinic(s) where most Chapter people go:

Hospital	Town
Gallup Indian Medical Center	Gallup, NM

Clinic	Town
Fort Wingate Dental Clinic	Ft. Wingate, NM

EDUCATION

Total enrollment by school (Fall 92):

School	Enrolled
Church Rock Elementary Sch.	294
Gallup High School	389
JFK Middle School	213
Wingate Elementary School	72
Wingate High School	72

No enrollment figures provided for the Church Rock Head start Center, Indian Village Head start Center and Church Rock Homebase.

COMMUNICATIONS

Regular TV reception; stations received:

Call Letters	Town
KOAT	Albuquerque, NM
KRQE	Albuquerque, NM
KOB	Albuquerque, NM
KNME	Albuquerque, NM

Clear AM radio stations received:

Call Letters	Town
KYVA	Gallup, NM
KGAK	Gallup, NM
KTNN	Window Rock, AZ

Clear FM radio stations received:

Call Letters	Town
KKOR	Gallup, NM
KQNM	Gallup, NM
KGLX	Gallup, NM

Newspaper received within the Chapter:

Name of Paper	Town
The Independent	Gallup, NM
Navajo Times	Window Rock, AZ

CIVIC

Churches:

Name of Church
Catholic Church
Christian Reform
Pentacostal
Church of God

Indigenous:
Traditional Navajo Religion
Native American Church

COMMERCIAL

Available establishments in the Chapter:

Gas Station	1
Convenient Stores	2
Restaurant	1
Trading Post	1
Laundromat	1

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CHURCH ROCK CHAPTER (Continued)

TRANSPORTATION

Paved roads through the chapter area:

Interstate 40
State of New Mexico Route 566
U. S. Historic 66

Distances to:

Agency: Crownpoint	47 miles
Window Rock	34 miles
Gallup, NM	10 miles

MAJOR EMPLOYERS

Indian Plaza	18
Thompson's Store	6
Benoboth Christian School	26
Thriftway	2
Red Rock State Park	17
Church Rock School	18
Church Rock Mine	2
Pre-Schools	13
Navajo Nation/Chaper Officials	21
Meridian Oil Co.	39
Hamilton Construction Co.	25

LOCAL NATURAL RESOURCES

Sand &. Gravel
Uranium
Coal
Scenery (tourism)

COMMUNITY/COOPERATIVE FARMING

None. *Estimated number of family farms:* 44

BRIEF OVERVIEW OF CHAPTER

The Church Rock Chapter House is located east of the Indian Village near the junction of State Route 566 and the old U. S. Route 66, generally five miles east of Gallup, New Mexico. The Indian Village Housing located in the Church Rock Community was once used to house employees from the Ft. Wingate Army Depot during World War II.

Church Rock Chapter has 10 units of low rent NHA housing east of the chapter house; 60 more units are located west of State Route 566. The chapter withdrew some land for a sub-division at the Sundance area.

Some of the remote areas of the community have archaeological significance such as ancient writings, kiva circles and remnants of Anasazi dwellings. and within the Church Rock Chapter consists of different ownership status, whereas other communities are totally trust lands. Being located adjacent to Red Rock State Park and the City of Gallup enables the chapter to generate revenues through various activities and provides some access to employment for chapter members.

A land use plan has been developed with technical assistance from Southwest Land Research, and development according to the plan is being promoted and pursued.

This Chapter information was updated by:

Name	Telephone No.
Charles Damon, II; CSC	505.488-5949

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

4/8

JUL 14 1997

OFFICE OF THE
REGIONAL ADMINISTRATOR

Mark E. Weidler, Secretary
New Mexico Environment Department
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502

Dear Mark:

Thank you for your response to my February 11, 1997 letter regarding the proposed in-situ uranium mining project of Hydro Resources, Inc. (HRI) at Church Rock, New Mexico. In this letter, I want to follow up on our conversation at the All-States Meeting, address the issues raised in your recent letters and talk about the next steps that we should take.

Before discussing your specific points, let me express my deep concern that NMED believes that EPA's actions are contrary to the intent of Congress and recent court decisions, and that EPA may be inappropriately interfering with NMED's issuance of a state permit pursuant to state law. I want to reassure you that EPA is as committed as NMED to following Congressional direction and applicable court decisions. Further, our focus over the last several years has been on the requirements of the federal Safe Drinking Water Act (SDWA). We have not questioned NMED's independent authority or obligations to issue a permit to HRI under state law.

What I believe we have is a basic disagreement about what Congress and the courts have said. As explained in the enclosure to this letter, EPA does not share NMED's interpretation of the federal case law. We believe the federal court decisions that NMED cites did not resolve the status of Sections 8 and 17 but rather have indicated that the Indian country status of land within the Executive Order 709/744 area is to be determined on a case by case basis. Accordingly, from our perspective, EPA's actions are fully consistent with federal law and Congressional intent.

You have also indicated that the Indian country status of Sections 8 and 17 was adjudicated in the context of NMED processing HRI's permit application for Section 17 and in a state court decision concerning water rights. As explained in the enclosure, it appears that the NMED hearing officer recognized that her opinion as to Section 17 pertained only to NMED's authority under state law and was not binding as to the federal SDWA. Further, the hearing did not address the status of Section 8. However, to the extent NMED interprets that decision as applying to EPA, under well established federal case law concerning Indian rights, neither the NMED permitting decision nor the state court water rights decision binds the federal government since it was not a party to the proceedings.

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For these reasons and those explained in my last letter, EPA's position remains that HRI must obtain its federal SDWA permit for Section 17 from EPA, not NMED. Although EPA believes that Section 17 clearly is Indian country, we have also cited a second basis for EPA permitting HRI's proposed project on Section 17 under the federal SDWA -- EPA's retained authority to issue permits on disputed lands. Our decision to treat the status of Section 17 as in dispute does not require NMED to concede jurisdiction, nor does it grant the Navajo Nation jurisdiction. Rather, EPA has determined only that there is a dispute such that EPA will issue the permit until the status of Section 17 is resolved.

Additionally, EPA has determined that a dispute exists regarding the Indian country status of Section 8, and, therefore, HRI must obtain its federal SDWA permit for Section 8 from EPA as well. As I indicated in my previous letter, EPA was not ready to conclude that a dispute existed based simply on the assertion of the Navajo Nation. However, after carefully reviewing the materials submitted by the Navajo Nation and NMED, EPA believes the Navajo Nation has presented substantial arguments to support its claim that Section 8 is within Indian country. (See the attachment for further analysis.) EPA would not be discharging EPA's trust responsibilities to the Navajo Nation if we were to ignore the information submitted by them. Consequently, given the different positions of NMED and the Navajo Nation, EPA is treating the status of Section 8 as in dispute. Clearly, it would have been much preferable if the Section 8 issue had been brought to EPA's attention prior to NMED issuing a permit. Nevertheless, that did not happen, and EPA has an obligation to examine the status of Section 8 when requested by the Navajo Nation. I want to emphasize, though, that EPA has not taken a final position on the Indian country status of Section 8, only that the status is in dispute.

You have indicated that NMED believes that EPA's retention of permitting authority is inapplicable because NMED has the clear authority to regulate all UIC wells outside the formal boundaries of the Navajo Reservation. From our perspective, however, it is that very authority under the federal SDWA that is in dispute. Further, it is EPA's position that the UIC regulations do authorize EPA to retain permitting authority in cases like this. The regulations at issue, 40 CFR Part 147, subpart HHH, were specifically promulgated for Indian country and clearly stated EPA's intent that EPA would retain SDWA permitting authority over disputed lands. Unlike the type of dispute you referred to between two states and a private party (where EPA would not get involved), EPA has a direct and vital interest where Indian tribes and the federal SDWA are involved.

I would like to reiterate that EPA has never indicated that our authority under the SDWA would prevent NMED from issuing a permit to meet applicable state requirements. I remain willing to work closely with you to coordinate our permits and am a little puzzled by your perception that EPA is unwilling to do so. Given the overlapping technical and policy issues for the Church Rock, Crownpoint, and Unit 1 portions of HRI's proposed project, EPA has made several written and oral requests to arrange meetings with NMED, but your staff has not taken us up on our offers. I would like to start these discussions as soon as possible.

With respect to pursuing discussions on joint permitting, you asked me to clarify why EPA concluded that it did not make sense to pursue that path at this time. There are several reasons,

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which I am happy to review. First, you may remember that a major premise of pursuing a joint permitting approach was that there would be a three-way agreement between NMED, EPA, and the Navajo Nation, so that the three sovereigns would not devote substantial resources to an agreement only to have it challenged in court by one of the parties. As I stated in my previous letters, the Navajo Nation did not believe that it was in its interest to engage in this effort. Without the participation of the Navajo Nation, the joint permit approach would not achieve the goals we set out.

Second, as my staff has discussed with NMED staff on several occasions, EPA did not believe that joint permitting could provide the substantial benefits that NMED anticipated. Given the heightened level of concern that HRI's project has generated, we thought that it would be difficult to eliminate the potential for someone to challenge the permit in EPA and NMED appeal proceedings on both jurisdictional and technical grounds. If the agencies or courts reached different conclusions on the jurisdictional issue, we would be in the untenable position of having conflicting versions of the "same" permit. In addition, in order to implement the permit, it would be necessary to know which provisions were enforceable by EPA under the SDWA and which by NMED under state law. For these and other reasons, it seemed to us that joint permitting was not likely to reduce significantly jurisdictional conflicts.

Third, I have been pessimistic about the likelihood of our agreeing on a joint permitting approach to this problem. Despite a number of attempts, NMED and EPA had made little progress in this area. In addition, NMED staff seemed to believe that having HRI submit a permit application to EPA infringed on New Mexico's jurisdiction, even though it is the company, not the State, which would submit the application. Moreover, under any of the approaches that EPA and NMED have discussed, HRI must apply to EPA for a SDWA UIC permit. Given all of these factors, I thought that it would be best to begin the EPA permitting process now.

EPA, therefore, is informing HRI of the need to submit a SDWA permit application to EPA for its proposed project on Section 8 and, as previously requested, for Section 17. To the extent we can, we will use the information already submitted to NMED. However, some type of application is a legal prerequisite for federal law as it is for state law. Whether EPA and NMED proceeded under a joint or dual permitting approach, HRI would need, as a matter of law, to submit a SDWA permit application to EPA. This course of action does not preclude the possibility of an agreement later. If NMED is still interested, EPA is willing to engage in further legal discussions with NMED and the Navajo Nation concurrent with the start of our permitting process.

I realize that requiring a federal permit for Section 8 will be disruptive to some degree, especially since NMED and HRI have assumed until recently that the NMED-issued permit would be effective for the purposes of the federal SDWA. However, since HRI must still obtain a license and other approvals from the Nuclear Regulatory Commission, the Bureau of Indian Affairs, and the Bureau of Land Management before it can operate, I am optimistic that EPA can assure compliance with the SDWA and act in a timely manner, especially with your cooperation. Moreover, I will be asking HRI to meet with EPA to discuss the schedule for reviewing HRI's permit applications for Sections 8 and 17.

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HRI's proposed project involves a number of complex legal, policy and technical issues that cannot be resolved by a continuing exchange of letters. Whatever permitting scheme will be in place, all of the agencies will need to work together. I hope you will cooperate with me to make the transition to EPA SDWA permitting for Section 8 as smooth as possible to minimize the impact on HRI. To meet our mutual goal of maximizing environmental protection, our staffs (and the Navajo Nation EPA) need to start talking about the permits for HRI's proposed project. Apart from Church Rock, EPA is reviewing the permit application for Unit 1, and will need to coordinate with the Navajo Nation EPA and NMED. Therefore, I am again asking my staff to arrange a meeting between Region 9, NMED, and the Navajo Nation.

Please don't hesitate to call me if you would like to discuss this matter further. If your staff has any questions, please have them contact Jim Walker at (415) 744-1833 on technical issues, and Greg Lind at (415) 744-1376 for legal questions.

Yours,

Felicia

Felicia A. Marcus
Regional Administrator

Enclosure

cc: Bennie Cohoe
Executive Director
Navajo Nation EPA

James Bellis
Navajo Nation DOJ

Jerry Clifford
Acting Regional Administrator
EPA Region 6

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ANALYSIS OF JURISDICTIONAL ISSUES REGARDING HRI'S CHURCH ROCK PROJECT

Hydro Resources, Inc. (HRI) proposes to conduct in-situ uranium mining at three locations in northwest New Mexico near the boundary of the formal Navajo Reservation - Church Rock, Crownpoint, and "Unit 1" (also near Crownpoint). HRI's project requires an underground injection control (UIC) permit issued under the federal Safe Drinking Water Act (SDWA). The proposed mine site at Church Rock is located on the following contiguous sections within Township Sixteen North, Range Sixteen West, New Mexico Prime Meridian: Section 8 (the southeast quarter) and Section 17 (the north half).

In 1983, the State of New Mexico Environment Department (NMED) received primacy to administer the UIC program under the federal SDWA. NMED's primacy does not extend to Indian country. In October 1988, EPA promulgated supplemental federal UIC regulations (40 CFR Part 147, subpart HHH) that applied to all Indian country in New Mexico, as well as Navajo Indian country in Arizona and Utah. The preamble to the final rule establishing the federal UIC program for Navajo Indian country states that when there is a dispute regarding the Indian country status of an area, EPA retains permitting authority under the federal SDWA, and, "pending the resolution of jurisdictional disputes, EPA will implement the Federal UIC program for [the] disputed lands." 53 Fed. Reg. 43095, 43097 (October 25, 1988).

In 1989, NMED approved a Discharge Plan (UIC permit) for HRI's project on Section 8. HRI was also required to obtain a Temporary Aquifer Designation (TAD) from NMED because it planned to inject into an underground source of drinking water (USDW). Under the Memorandum of Agreement between U.S. EPA Region 6 and New Mexico, which set the responsibilities and procedures for administering the UIC program, EPA had to approve all TADs. EPA Region 6 approved the TAD for HRI's project on Section 8 on June 21, 1989.

In September 1992, HRI applied to NMED to amend the Discharge Plan for Section 8 to include the proposed operations on Section 17. In April 1993, NMED sought approval to extend the existing TAD into Section 17. However, because EPA determined that Section 17 is Indian country, EPA Region 6 did not approve the TAD extension, informing NMED and HRI that HRI should apply to EPA Region 9 for federal SDWA permits and any required aquifer exemptions. In August 1995, after a hearing on the proposed amendment to the Discharge Plan, NMED again asked EPA Region 6 to approve the extension of the Section 8 TAD to Section 17. Region 6 again informed NMED that because Section 17 is Indian country, HRI must obtain the permit and aquifer exemption for the purposes of the federal SDWA from EPA Region 9.

In October 1996, in the context of NMED's reviewing HRI's application to renew the original Discharge Plan for Section 8, the Navajo Nation objected to NMED's approval of HRI Discharge Plan for Section 8 because, according to the Navajo Nation, the land is within a dependent Indian community (therefore within Indian country) and outside the jurisdiction of NMED. The Navajo

Nation also requested that Region 9 process any permit applications for HRI's project under the federal SDWA.

In response to EPA's position on Section 17 and the Navajo Nation's claims regarding the status of Section 8, NMED has asserted that it believed that both Sections 8 and 17 have been determined not to be Indian country under the holdings in recent federal court case and pursuant to the rulings of a state court and a state administrative proceeding. The following discussion reflects EPA's analysis of the jurisdictional status of Sections 8 and 17 under the holdings of recent federal court decisions and the effect of the state court decision and the ruling in the administrative proceeding, respectively.

THE INDIAN COUNTRY STATUS OF CHURCH ROCK

The jurisdictional history of the land around Church Rock is complex. Originally this area was not part of the formal Navajo Reservation as established in the 1868 Treaty and subsequent Executive Orders (EO). In 1907, at the prompting of the Superintendent of the Navajo Agency, President Roosevelt issued EO 709, which withdrew from the public domain approximately 1.9 million acres "as an addition to the present Navajo Reservation." Executive Order 709 (1907). The area described in EO 709 was subsequently modified by EO 744, with the entire area referred to as the "EO 709/744 area."

The express purpose of adding the EO 709/744 area to the Navajo Reservation was to provide allotments to "landless" Navajo Indians living outside the formal Reservation and to protect these Navajos from the depredations of non-Indian settlers. Nonetheless, EOs 1000 (1908) and 1284 (1911) restored unalloted lands in the EO 709/744 area to the public domain. In a recent case, the U.S. Court of Appeals for the Tenth Circuit ruled that EOs 1000 and 1284, which were based on a Joint Resolution of Congress, disestablished (also referred to as "diminished", "terminated" and "canceled") the boundaries of the EO 709/744 area as an addition to the Navajo Reservation. Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), cert. denied, 498 U.S. 1012 (1990) (Pittsburg & Midway I).

The issue before the Tenth Circuit in Pittsburg & Midway I was whether the Pittsburg & Midway mine is within Indian country (and thus subject to the taxing power of the Navajo Nation) because it is within the EO 709/744 area. The Tenth Circuit held that EOs 1000 and 1284 had disestablished the reservation boundaries described in EOs 709 and 744 and none of the land in the EO 709/744 area is within Indian country simply by being within the boundaries of the EO 709/744 extension to the Navajo Reservation. At the same time, however, the Tenth Circuit held that much of the land in the EO 709/744 area meets the definition of Indian country, remanding the case back to the District Court to determine if the mine consists of allotments or is within a dependent Indian community. There is no land held in trust for the benefit of the Navajo Nation ("tribal trust land") at the Pittsburg & Midway mine.

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In a subsequent decision, Pittsburg & Midway Coal Mining Co. V. Watchman, 52 F.3d 1531 (10th Cir. 1995)(Pittsburg & Midway II), dismissed with prejudice, No. CIV 86-1442M (D.N.M. July 10, 1996), the Tenth Circuit held that approximately 47% of the mine is within Indian country because it is located on individual Indian allotments. The court also found that the entire mine might be within Indian country because it is within a dependent Indian community, even though approximately 40% was privately owned. The Tenth Circuit set out a four part test for determining the existence of a dependent Indian community and again remanded the case back to the District Court to make such a determination. The Tenth Circuit also expressly held that the private ownership of mineral rights on land that is otherwise Indian country does not change the Indian country status of that land. Id. at 1542.

Because HRI's entire project (Church Rock, Crownpoint, Unit 1) lies within the boundaries of the EO 709/744 area, the Indian country status of the project is affected by the Tenth Circuit's decisions in the Pittsburg & Midway case. Because the history of Sections 8 and 17 is different and because that history affects their status, the Indian country status of each Section is discussed separately below.

Section 17

In June 1929, the Santa Fe Pacific Railroad Company conveyed Section 17 by deed (in a total conveyance of approximately 42,000 acres) to the United States in trust for the benefit of the Navajo Nation. Santa Fe had owned Section 17 before the President had created the EO 709/744 area as an extension of the Navajo Reservation. In the deed, Santa Fe reserved the mineral rights and a surface easement to conduct any mining. In 1959, the Navajo Nation and Santa Fe executed a "Surface Owner's Agreement" that set out the terms and conditions on how Santa Fe would conduct mining operations on the land conveyed in the 1929 deed. HRI now owns the mineral rights for Section 17.

Most of the disagreement about the Indian country status of Section 17 stems from different understandings of what the Tenth Circuit meant in Pittsburg & Midway I when it held that the EO 709/744 area had been disestablished. The position of NMED seems to be that no land within the EO 709/744 area can be considered "reservation." EPA believes that this is not the holding of Pittsburg & Midway I or consistent with other Tenth Circuit and Supreme Court decisions.

The Supreme Court and the Tenth Circuit have long held that land held in trust for the benefit of Indian tribes (tribal trust land) is Indian country. Oklahoma Tax Commission v. Sac and Fox Nation, __ U.S.__, 113 S.Ct. 1985 (1993); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991); United State v. John, 437 U.S. 634 (1978); United State v. McGowan, 302 U.S. 535 (1938); Cheyenne-Arapaho Tribes v. Oklahoma, 617 F.2d 665 (10th cir. 1980). According to the Supreme Court, the key is not whether the land was formally designated a "reservation," but whether the land had been "validly set apart for the use of the Indians as such." Potawatomi, 498 U.S. at 511 (quoting John).

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Pittsburg & Midway I did not change the law regarding tribal trust land in the EO 709/744 area. In fact, the Tenth Circuit noted that a large amount of the land in the EO 709/744 area was Indian country, but not because it is within the boundaries of EO 709/744 since those boundaries had been disestablished in 1911. Instead, only land that had been "validly set apart" by other means -- other than simply being within the EO 709/744 area -- could be Indian country. The act of the United States taking Section 17 into trust for the benefit of the Navajo Nation (as shown in the 1929 Deed) establishes, prima facie, that the land has been "validly set apart" for the Navajo Nation.

NMED has correctly emphasized that Congressional intent is crucial in determining whether any parcel of land is Indian country. In Pittsburg & Midway I, the Court held that Congress intended to disestablish the EO 709/744 area as a reservation, returning surplus, unalloted lands to the public domain. In response to the Navajo Nation's argument that the EO 709/744 area remains predominantly Navajo, the Court stated that "it is not going to remake history and declare a defacto reservation in the face of clear congressional intent to the contrary." Pittsburg & Midway I, 909 F.2d at 1420. The "clear congressional intent" that the Court referred to was the intent of Congress in 1911, as exhibited in the Joint Resolution, to disestablish the area as an extension of the Navajo Reservation. The Tenth Circuit did not hold that tribal trust land within the former EO 709/744 area could not be Indian country; in fact, the issue of tribal trust land was not before the court. Instead, the Court held that no land within the EO 709/744 area could be Indian country merely because it falls within the boundaries of the EO 709/744 area.

For the purposes of the current status of Section 17, the relevant Congressional intent is found in the Second Deficiency Act of 1928, which appropriated funds for the purchase of "additional land and water rights for the use and benefit of Indians of the Navajo Tribe." (45 Stat. 883, 899-900, May 29, 1928)(the 1928 Act). The Act also directed that title "shall be taken in the name of the United States in trust for the Navajo Tribe," but allowed, "in the discretion of the Secretary of Interior," that the Secretary purchase the "surface" only. Correspondence dated prior to the enactment of the 1928 Act, as well as the legislative history of the Act, indicates clearly that Congress intended to set apart land for the use and benefit of the "Navajo Tribe" and that the Navajo Nation, the Department of Interior and Congress contemplated that Santa Fe land would be purchased with the funds appropriated under the 1928 Act. Correspondence dated subsequent to the enactment of the 1928 Act also demonstrates that under the authority of the 1928 Act the Secretary of Interior did, in fact, purchase the land described in the June 14, 1929 deed, including Section 17, from Santa Fe to be held in trust for the benefit of the Navajo Nation.

The 1929 deed, the 1928 Act and the correspondence concerning both the deed and the Act demonstrate that Section 17 is Indian country. Congress appropriated money with the intent to set apart land for the use and benefit of the Navajo Nation, and it is clear that the Secretary of Interior purchased Section 17 and the other land conveyed in the 1929 deed with the funds that Congress appropriated under the 1928 Act. The fact that Congress intended in 1911 to disestablish the EO 709/744 area does not affect the intent of Congress 17 years latter to create Indian country for the use and benefit of the Navajo Nation. Moreover, the fact that a private party reserved the mineral rights on Section 17 does not change the Indian country status of Section 17.

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Section 8

The jurisdictional status of Section 8 is less clear since HRI owns the land in fee simple. Section 8 is not within a formal reservation, nor is it tribal trust land or an allotment. It could be within Indian country, therefore, only if it is within a dependent Indian community. Determining whether a area is within a "dependent Indian community" is a detailed factual and legal inquiry.

When Congress codified the term in 1948, it did not define what it meant by "dependent Indian community." However, in Pittsburg & Midway II, the Tenth Circuit adopted the following test for determining whether an area was a dependent Indian community:

> (1) whether the United States has retained "title to the lands which it permits the Indian to occupy" and "authority to enact regulations and protective laws respecting this territory,"; (2) "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,"; (3) whether there is "an element of cohesiveness ... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,"; (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

Pittsburg & Midway II, 52 F.3rd at 1545. The court also stated that before evaluating these four factors, a court should determine the appropriate community of reference for the evaluation, focusing on the status of the area within the context of the surrounding area. A recent decision from the U.S. Court of Appeals of the Ninth Circuit stated that the "purpose of developing a multi-factored analysis" is to determine whether, in a broad sense, the federal government has set aside the area for Indians and provides "superintendence" over the area. Yukon Flats School Dist. v. Venetie Tribal Gov't, 101 F.3d 1287, 1293 (9th Cir. 1996).

EPA reviewed the information supplied by the Navajo Nation and NMED under the test set forth by the Tenth Circuit. While the Navajo Nation presented significant arguments in support of its claim that Section 8 is within a dependent Indian community, EPA does not have enough information to make a final determination on many of the factors in the Pittsburg & Midway test at this time. For example, although Section 8 is privately owned (by HRI), title to a majority of the land in the Church Rock area is held in trust by the U.S. for the Navajo Nation or members of the Tribe. Moreover, while the State of New Mexico provides some governmental services (roads, schools), the federal and Tribal governments provide most services to the people at Church Rock because they are Native Americans. And while the community is overwhelmingly Navajo, there are some non-Indian interests in the area also. Finally, it could be argued that the actions of the federal government over the last 90 years indicates that the area around HRI's proposed project at Church Rock has been set apart for the Navajo Indians. However, at this point it is unclear whether privately-owned land would be considered part of the Indian community or that the federal government's actions affected the private land's status. Therefore, EPA concluded that the Indian country status of Section 8 is in dispute.

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THE EFFECT OF THE STATE COURT DECISION AND NMED'S ADMINISTRATIVE DECISION

As an initial legal matter, because the federal government was not a party to the state court litigation or to the state administrative hearing, it cannot be bound by either decision. See Drumond v. United States, 324 U.S. 316 (1945). Federal courts have been especially vigilant in following this rule of law in the context of Indian rights and property. See United States v. State of Washington, 459 F.Supp. 1020, 1084 (W.D. Wash. 1978).

Moreover, EPA has an additional duty to review independently the status of Sections 8 and 17. The federal government, including EPA, has a trust obligation to the Navajo Nation to ensure that both the members and the resources of the Tribe are protected. The trust obligation requires a high standard of care on the part of the federal government, and EPA cannot delegate its trust obligation nor simply defer to the actions of others in carrying out its responsibilities. In fact, this is part of the rationale behind the legal doctrine that the federal government is not bound by decisions involving Indians where it is not a party. (See State of Washington, 459 F.Supp. at 1084.) In the case of HRI's proposed project, EPA must consider the factual and legal information submitted by the Navajo Nation, NMED, and HRI. As discussed above, EPA believes that the information clearly shows that Section 17 is Indian country and that the Indian country status of Section 8 is in dispute.

The State Court Decision

The state court decision that NMED has referenced -- United Nuclear Corporation v. Martinez et al. (No. CV 92-72)(NM Ct. App. 1996) -- involved an application of a private party, United Nuclear Corporation (UNC), concerning water rights that arose under New Mexico law. The New Mexico State Engineer denied UNC's application because UNC's declared water rights are insufficient to support the application. In the same proceeding, the Navajo Nation filed a Motion to Dismiss because the application concerned water rights located on Sections 17 and 8, and therefore, according to the Navajo Nation, within Indian country. State District Judge Rich upheld the State Engineer's denial of UNC's application because UNC's water rights were insufficient. Judge Rich also denied the Navajo Nation's Motion, holding that Sections 8 and 17 were not within the Navajo Reservation nor were not Indian country, and therefore, the State Engineer had the authority to act on UNC's application.

Although not binding on the federal government, the state court decision and the administrative hearing officer's ruling could provide guidance for reviewing the status of HRI's project. However, the court did not discuss why it found that Sections 8 and 17 are not Indian country, did not refer to any of the facts regarding the status of either section or to any case law, and did not analyze the Pittsburg & Midway (or any other) factors. Moreover, the decision as it relates to the Indian country status of Sections 8 and 17 may be moot: the petitioner lost on the merits at the trial level and voluntarily withdrew its appeal.

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NMED Administrative Decision

NMED has also asserted that the Hearing Officer in the administrative proceeding to amend HRI's Discharge Plan decided that Sections 8 and 17 were not within Indian country and that NMED had the authority to issue a permit for HRI's project. The Navajo Nation filed a Motion to Dismiss, asserting that NMED lacks authority to issue a permit under the SDWA and is preempted from issuing a permit under state law because Section 17 is Indian country. The Hearing Officer denied the Navajo Nation's Motion and determined that NMED had the authority to approve an amended Discharge Plan; the Secretary of NMED adopted the Hearing Officer's findings. The Navajo Nation appealed NMED's decision to the State of New Mexico Water Quality Control Commission, but the Commission denied the appeal and upheld the action of NMED.

Although not legally binding on the Agency, EPA has reviewed the Hearing Officer's rulings (and briefs of NMED and the Navajo Nation) to understand the issue better. The Hearing Officer did analyze the Indian country status of Section 17 (the status of Section 8 was not at issue), finding that Section 17 is not Indian country because Pittsburg & Midway I decision held that tribal trust land, including Section 17, in the EO 709/744 area was not Indian country; the mineral estate and surface easement on Section 17 were not Indian country because they are owned by a private, non-Indian company; and there was no evidence of Congressional intent to show that the "surface estate" was validly put into Indian country status. For the reasons stated above, EPA believes that the Hearing Officer's analysis does not adequately address the holding in Pittsburg & Midway or other relevant federal Indian law regarding the status of Section 17. In addition, it appears that the Hearing Officer did not have the relevant information regarding the intent of Congress concerning the purchase of Section 17 (i.e. the 1928 Act) when she made her rulings. Ultimately, the ruling does not answer the question of the Indian country status of Sections 8 and 17 for EPA.

Moreover, both Counsel for NMED and the Hearing Officer emphasized that the proceeding regarding the amended Discharge Plan was effective only for the purposes of the New Mexico Water Quality Act (NMWQA), not the federal SDWA. For example, in NMED's brief filed on January 27, 1995, Counsel of NMED argued that "[t]he authority of NMED to issue [the Discharge Plan] ... is in no manner controlled by or related to the SDWA or EPA." The New Mexico Environment's Department's Response to the Navajo Nation's Brief-In-Chief (January 27, 1995, p. 25). Similarly, the Hearing Officer, in holding that NMED had jurisdiction over Section 17 under the NMWQA and denying the Navajo Nation's Motion to Dismiss, stated that "[r]egardless of its effect on a Federal UIC program, an EPA determination [regarding Section 17] cannot divest NMED of its authority to regulate the privately owned mineral estate and surface use easement under State law." Decision: Motion to Dismiss For lack of Jurisdiction (May 10, 1994, p.10)(emphasis added). The Hearing Officer additionally stated that "[i]n any case, NMED has the authority to regulate the State UIC program on the 200 acres involved in [the] application [and that] NMED should exercise its jurisdiction to regulate this permit modification application, and to administer the State UIC program on the 200 acres." Id. (emphasis added.) Finally, both in the "Conclusions of Law" of the Decision on the Navajo Nation's Motion to Dismiss and in the "Recommended Conclusions of Law" of the Report of the Hearing Officer (adopted by the Secretary of NMED), the Hearing Officer found that

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NMED had authority under state law to act on HRI's application but made no finding regarding the effect of NMED's action for the purposes of the federal SDWA. Of course, EPA has never opined on the requirements or the reach of New Mexico law. Thus, on their face, the Hearing Officer's rulings do not address the requirements of the federal SDWA.

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JUN 20 1997

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ATTORNEY WORK PRODUCT/ATTORNEY-CLIENT MATERIAL DO NOT RELEASE

MEMORANDUM

FROM: Gregory Lind
Regional Indian Law Attorney

Through: Gail Cooper
Deputy Regional Counsel

TO: Felicia Marcus
Regional Administrator

RE: Jurisdictional Issue For Permitting of Hydro Resources Inc. (HRI) In-Situ Uranium Mining Project at Church Rock, NM

ISSUE PRESENTED

Should EPA Region 9, rather than the State of New Mexico, process the underground injection control (UIC) permit application under the Safe Drinking Water Act (SDWA) for HRI's proposed project on privately-owned land (Section 8) within the Church Rock Chapter but outside the boundaries of the formal Navajo Reservation?

SHORT ANSWER

Yes. Because the Indian country status of the Section 8 is in dispute, EPA should act as the permitting authority under the SDWA.

DISCUSSION

1. BACKGROUND

HRI proposes to conduct in-situ uranium mining at three separate locations near the Navajo Reservation in northwest New Mexico. The Church Rock portion of the project is located on two contiguous sections of land -- Sections 8 (the southeast quarter) and 17. Section 17 is held in trust by the U.S. for the benefit of the Navajo Nation. HRI owns Section 8. I have attached a map of the Church Rock portion of the project.

HRI's project involves the installation and operation of Class III UIC wells regulated under the SDWA. In 1989, HRI obtained a permit (called a "Discharge Plan") for Section 8 from NMED. EPA has granted NMED primacy under the SDWA to administer the UIC program for the non-Indian country areas in New Mexico. Pursuant

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to the Memorandum of Agreement for the grant of primacy, NMED received approval of a Temporary Aquifer Designation (TAD) from EPA Region 6, which was required because HRI proposed to inject into an underground source of drinking water. At that time, no party raised to EPA the issue of whether Section 8 was within Indian country.

NMED's approved program does not extend to Indian country (see definition below). In fact, EPA has promulgated a supplemental UIC program for all of Indian country in New Mexico (which also applies to all of Navajo Indian country in Arizona and Utah). (See 53 Fed. Reg. 43096 (October 25, 1988); codified at 40 C.F.R. Part 147, subpart HHH). In the preamble to the final rules establishing the Indian country UIC program, EPA stated that in order to provide adequate regulation of wells and minimize disruptions pending resolution of disputes, EPA would administer the federal UIC program where there was a dispute as to the Indian country status of the area where a regulated project is proposed. (See Id. at 43097

In August 1996, NMED issued a public notice that it was proposing to renew HRI's UIC permit for Section 8. In October 1996, the Navajo Nation submitted comments to NMED stating that it believed that NMED lacks authority to issue permits for any part of HRI's proposed project and specifically for Section 8. The Navajo Nation also submitted comments on the technical aspects of the permit. Concurrently, the Navajo Nation informed EPA Region 9 that it believed that HRI's project on Section 8 is within Indian country and therefore subject to EPA's authority under the SDWA rather than to the authority of NMED. The Navajo Nation provided some information regarding why it thought that Section 8 was within Indian country.

Subsequently, Region 9 forwarded the Navajo Nation's October letter to NMED and asked both NMED and the Navajo Nation to provide additional information regarding the status of Section 8. NMED has not addressed the arguments of the Navajo Nation directly but did state that it believed that the Navajo Nation's current position on Section 8 was inconsistent with the position taken by the Navajo Nation in previous cases and that Region 9 should not assume permitting authority for HRI's project on Section 8 for a variety of legal and policy reasons. On February 28, 1997, attorneys for the Navajo Nation supplemented the October 21 letter, discussing issues raised in NMED's response.

The following discussion is an analysis of the Indian country status of Section 8 based on the information that the Navajo Nation and NMED have submitted. However, the analysis is limited to determining whether there is a bona fide dispute regarding the Indian country status of Section 8, rather than deciding whether or

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not Section 8 is actually within Indian country. Given the complexity of the factual and legal issues, EPA would need to develop a much more detailed factual record before EPA could decide whether Section 8 was within Indian country. In addition, because of the legal and policy ramifications of such a determination, EPA would need to coordinate with a number of other federal agencies (Department of Interior and the Office of the U.S. Attorney) before deciding the status of Section 8. Finally, since EPA is still the permitting authority under the SDWA when there is simply a dispute regarding the status of Section 8, determining the status of Section 8 at this time is unnecessary.

2. INDIAN COUNTRY - LEGAL STANDARD

Although "Indian reservation" is a commonly used term, the legal term that describes the demarcation between federal (and tribal) and state jurisdiction is "Indian country." Since 1948, Indian country has been defined to include all land within any Indian reservation, all dependent Indian communities, and all Indian allotments.[1] Tribal trust land outside the boundaries of a reservation is also Indian country even though not formally designated a reservation. (See, e.g. Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).) Reservations, allotments, and tribal trust land are relatively easy to determine by reference to maps and deeds. Determining the existence of dependent Indian community, a term which is not statutorily defined, requires a detailed factual and legal review.

The U.S. Court of Appeals for the Tenth Circuit (the circuit that covers New Mexico) has adopted the following legal standard for determining whether an area is a dependent Indian community:

> (1) whether the United States has retained "title to the lands which it permits the Indian to occupy" and "authority to enact regulations and protective laws respecting this territory,"; (2) "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,"; (3) whether there is "an element of cohesiveness ... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,"; (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

[1] The definition is found in a criminal statute, 18 U.S.C. §1151, but applies to civil jurisdiction as well.

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Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3rd 1531, 1545 (10th Cir. 1995) (citations omitted). The Court also stated that before evaluating these four factors, a court should determine the appropriate community of reference for the evaluation, focusing on the status of the area within the context of the surrounding area.

Several of the Pittsburg & Midway factors overlap. For example, determining the appropriate "community of reference" will involve reviewing the same information for analyzing the "nature of the area in question" or whether there is "an element of cohesiveness" of the community. A recent decision from the U.S. Court of Appeals of the Ninth Circuit recognized the overlapping character of the factors, stating that the "purpose of developing a multi-factored analysis" is to determine whether, in a broad sense, the federal government has set aside the area for Indians and provides "superintendence" over the area. Yukon Flats School Dist. v. Venetie Tribal Gov't, 101 F.3d 1287, 1293 (9th Cir. 1996).

3. THE STATUS OF SECTION 8

Section 8 is within an area of northwest New Mexico that was added to the formal Navajo Reservation. In 1911, however, this added area was "disestablished," no longer within the boundaries of a formal reservation. Nonetheless, much of the land in the "disestablished" reservation remains Indian country because it is either tribal trust land, individual trust allotments, or within a dependent Indian community. Because Section 8 is privately owned, it would be within Indian country only if it is within a dependent Indian community.

a. Community of Reference:

The Navajo Nation argues that the Church Rock Chapter is the appropriate community of reference for evaluating whether Section 8 is within a dependent community.[2] A court may agree, but may disregard chapter boundaries all together. However, the court could also decide that a larger area (the Church Rock Chapter and an adjacent chapter) or a smaller area (the area immediately around Section 8) is the appropriate community of reference. It is highly unlikely that a court would look solely at Section 8 (the proposed mine site); except for activities related to the proposed mine and livestock grazing, Section 8 is unoccupied. In addition, in Pittsburg & Midway, the Tenth Circuit found that the mine site (a coal mine covering several square miles) was not an appropriate

[2] "Chapters" are the political subdivisions of the Navajo Nation and correspond to specific geographic locations. Political representation and tribal services are tied to the chapters.

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"community of reference." Pittsburg & Midway, 52 F.2d 1531, 1545. For the purposes of determining whether there is a dispute regarding the Indian country status of Section 8, resolving the "community of reference" issue is probably not significant; in any alternative, the evaluation of the four factors listed below would remain substantially the same.

b. Title to land\ Power to enact laws:

A majority of the land immediately surrounding Section 8, as well as a majority of land within the Church Rock Chapter (and adjacent chapters), is either held in trust for the Navajo Nation or members of the Tribe or owned by the federal government and leased to the Navajo Nation or its members. The federal government has retained authority to enact laws and regulations (e.g. the federal UIC program) respecting tribal trust and allotted land. The federal government has also retained authority to regulate land and resources in addition to trust land. For example, under the Surface Mining and Reclamation Act, 30 U.S.C. §1201 et seq. , the Office of Surface Mining regulates mining activities on land that has any tribal or individual Indian interest, whether held in trust or in fee simple.

Since Section 8 is privately owned, title to the land is not retained by the U.S. Nor has the federal government specifically retained authority to enact laws relating to Section 8 that are any different from laws affecting private land outside Indian country. Of course, the analysis is somewhat circular since federal laws enacted for Indian country would apply if Section 8 is within Indian country.

Although the title to any particular parcel of land is important, nothing in the law regarding dependent Indian communities indicates that privately-owned land could not be part of a dependent Indian community. The leading treatise on Federal Indian Law states that private land could be within a dependent Indian community, depending on the facts of each specific situation. (See Felix S. Cohen's Handbook of Federal Indian Law (1982 Ed.) at 39.) In addition, in the Pittsburg & Midway case, although the area in question was approximately 40% privately owned, the Court of Appeals remanded the case back to the District Court in order to make the dependent Indian community determination, indicating that private land is not categorically excluded from dependent Indian communities.

c. Relationship of Inhabitants to Tribal and Federal Government; Provision of Governmental Services:

Over 90% of the population in the area surrounding Section 8, in the Church Rock Chapter and in surrounding chapters, is Navajo.

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Most of the remaining population works for the Navajo Nation or the federal agencies serving Native Americans (BIA, IHS). Thus, there is a special relationship between the federal government and an overwhelming portion of the population in the area because the population is Navajo. Likewise, there is a special relationship between the Navajo tribal government and an overwhelming portion of the population in the area because the population is Navajo.

Either the Navajo Nation or the federal government (through the BIA, IHS, EPA and other federal agencies) provide many of the governmental services to the inhabitants of the area. The State of New Mexico maintains most of the paved roads in the area, including the only paved road that exists near Section 8. In addition, most of the children in the area attend schools administered by the state.

d. Cohesiveness of Community:

The majority of the population around Section 8 and within the Church Rock Chapter is Navajo. Many of the people are involved in ranching, farming, or other traditional economic pursuits, although some are employed in or near Gallup, New Mexico. Because most of the population is Navajo, almost all social, cultural, religious and political life is centered on the Chapter or, more generally, on the Navajo Nation. Some of the Navajo who live within this area live in traditional dwellings at least part of the year. Finally, a majority of the non-Navajo population that live in the area are employed by either the tribal or federal governments to provide services to the Navajo residents.

e. Purpose of Establishing Community:

The purpose of the community in the area surrounding Section 8 seems to be a direct outgrowth of the creation of the extension of the Navajo Reservation. Although now disestablished, the extension was created primarily to provide homes and land for Navajos who lived outside the formal boundaries of the Reservation. In fact, some, if not most, of the individual allotments were granted during the period that the area was part of the Reservation or soon thereafter. In addition, since the extension was disestablished, the Navajo Nation has purchased a large part of the area (in the Church Rock Chapter, as well as in adjacent Chapters), which the U.S. holds in trust for the Tribe. The express purpose of the federal legislation authorizing the purchase was to provide homes and land for members of the Navajo Nation living in the area. In addition, the Church Rock Chapter was established, with the support of the federal government, to assist both tribal and federal officials in offering services to the local Navajo population. The Chapter, it seems, now provides a sense of community, both politically and socially, to the local population.

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No other purpose for establishing the community around Section 8 has been identified.

f. The Position of NMED

NMED had not supplied any information directly related the Pittsburg & Midway factors. However, it is clear that NMED disputes that Section 8 is within Indian country. NMED seems to have two arguments. First, NMED has historically regulated private land outside the formal Navajo Reservation boundaries but within the area of Church Rock. Second, NMED states that the Indian country status of Section 8 was adjudicated in a state administrative proceeding and in state court.

NMED's regulation of private land within the Church Rock area does not by itself affect the status of Section 8. Although a factor in determining the status of a particular area, the provision of state services within that area does not necessarily change the Indian country status of the area. Federal courts have held that the exercise of state authority (even in the absence of federal authority) does not, by itself, terminate the Indian country character of an area. See, e.g. United States v. John, 437 U.S. 634, 652 (1978).

Although it appears to be problematic, the fact that a state court ruled that Section 8 is not Indian country does not answer the question of the status of Section 8 for EPA. Because the federal government was not a party to the litigation, it cannot be bound by the decision. See Drumond v. United States, 324 U.S. 316 (1945). Federal courts have been especially vigilant in following this rule of law in the context of Indian rights and property. See United States v. State of Washington, 459 F. Supp. 1020, 1084 (W.D. Wash. 1978). In addition, the determination of Section 8's Indian country status does not seem to be crucial to the court's jurisdiction over the substance of the litigation (water rights), and, therefore, may be simply the dicta of the court.

Even though not binding on the federal government, the state court decision could provide guidance for reviewing the status of Section 8. However, the decision did not discuss how the court had reached its determination and did not analyze the Pittsburg & Midway (or any other) factors. Moreover, according to the Navajo Nation, the decision as it relates to the Indian country status of Sections 8 and 17 may be moot: the petitioner lost on the merits at the trial level and voluntarily withdrew its appeal. Ultimately, the state court decision does not answer the question but underscores the existence of a dispute regarding Section 8, at least from NMED's point of view.

NMED has also referred to the state administrative proceeding

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over the amended Discharge Plan for support of its position that Section 8 is not within Indian country. However, the status of Section 8 was not at issue in that administrative proceeding; none of the briefs filed in the proceeding nor the decision of NMED dealt with the status of Section 8. It was not until October 1996 that the Navajo Nation raised the issue regarding the status of Section 8 to EPA.

4. CONCLUSION

There is a bona fide dispute regarding the Indian country status of Section 8. It is likely that Section 8 would be held to be within a dependent Indian community. Whatever community of reference is used, the existing evidence for each of the factors discussed in Pittsburg & Midway weighs towards finding that Section 8 is within a dependent Indian community: most of the land is held by the U.S. in trust for the benefit of the Navajo Nation or its members and was expressly set aside to provide homes and livelihoods for Navajo Indians; the community is overwhelmingly Navajo and as such is under the supervision of the federal (and tribal) government because the population is Indian; beyond the minimal commercial pursuits of non-Indians, the nature and purpose of the community relates solely to members of the Navajo Nation. On the other hand, NMED argues that Section 8 is not within Indian country because the land is outside the formal boundaries of the Navajo Reservation, NMED has historically regulated Section 8, and a state court ruled that Section 8 was not part of Indian country. Currently, therefore, the Indian country status of Section 8 is in dispute, and EPA should act as the permitting authority under the SDWA.

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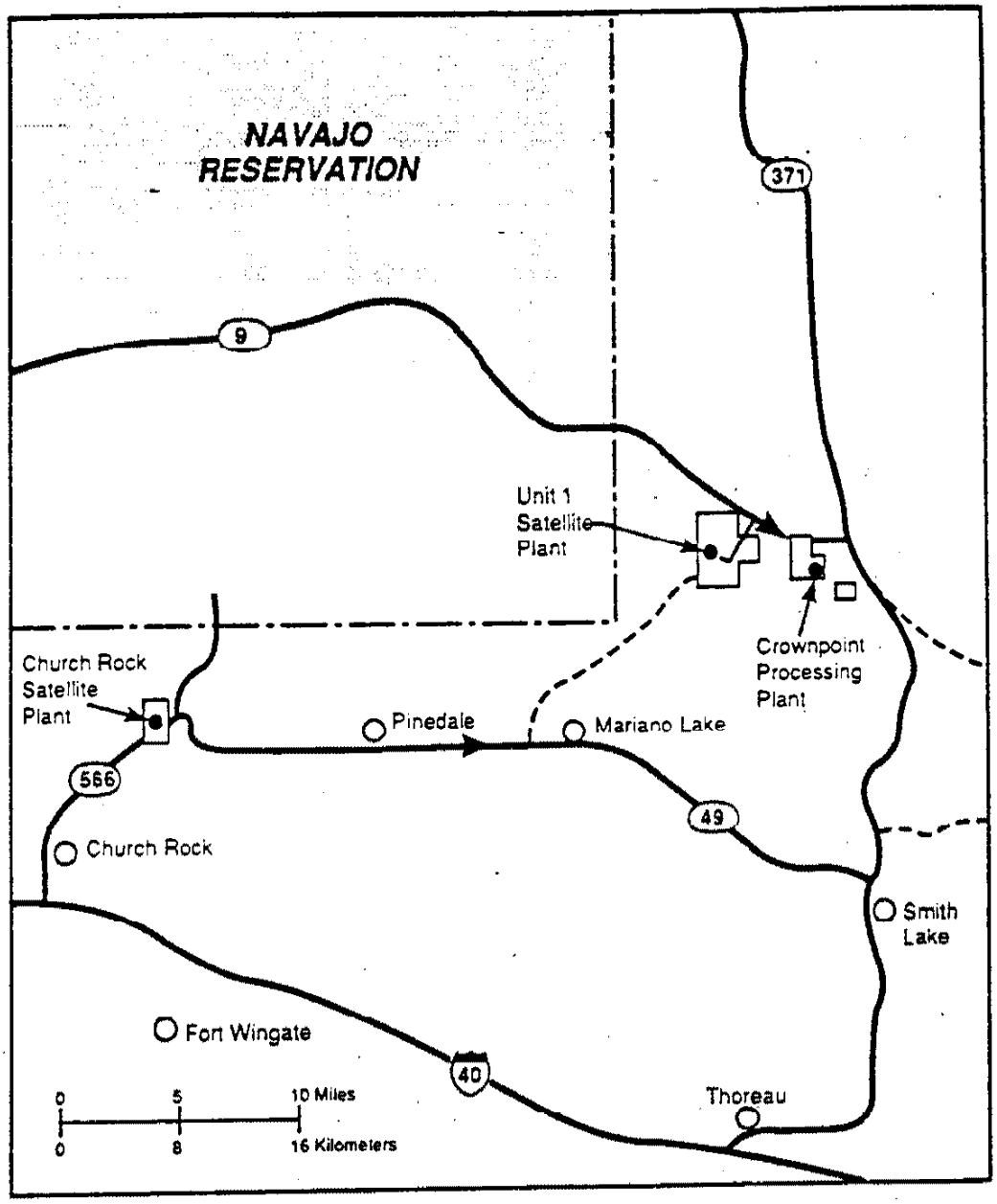

Figure 2.6. Haul routes for yellowcake slurry from satellite plants to the Crownpoint plant.

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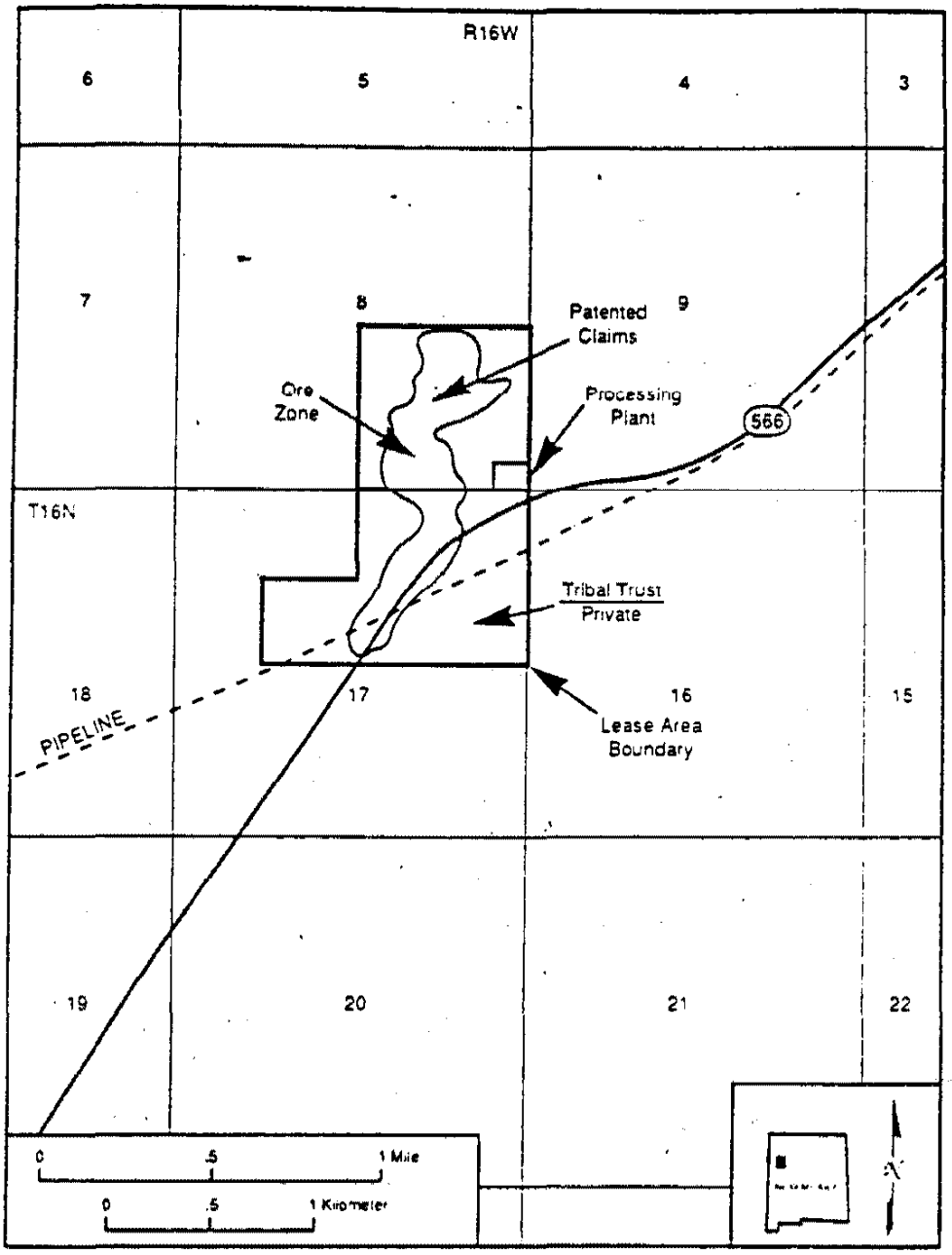

Figure 2.8. Church Rock lease areas showing surface ownership above minerals ownership, if different.

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BEFORE THE STATE ENGINEER
STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION
OF UNITED NUCLEAR CORPORATION
FOR PERMIT TO SUPPLEMENT POINTS
OF DIVERSION AND PLACES AND
PURPOSES OF USE OF UNDERGROUND WATER
OF THE STATE OF NEW MEXICO

#G-190-SUPPLEMENTAL

PROTESTANT NAVAJO NATION'S POST HEARING BRIEF IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

NAVAJO NATION DEPARTMENT OF JUSTICE

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January 17, 1992

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I. INTRODUCTION

United Nuclear Corporation (UNC) applied for a permit to supplement points of diversion and places and purposes of use of underground waters from the Gallup Underground Water Basin's Westwater Canyon aquifer. Applicant's Exhibit 2, (hereinafter cites to Applicant's Exhibits will be referenced as App. Exh. ___); Hearing Examiner's Exhibit 1 (hereinafter cites to Hearing Examiner's Exhibits will be referenced as H.E. Exh. ___).

UNC seeks the diversion of water to conduct an in-situ uranium mining operation on the NE 1/4 of Section 17, Township 16 North, Range 16 West, N.M.P.M. (hereinafter Section 17) and the SE 1/4 of Section 8, Township 16 North, Range 16 West, N.M.P.M. (hereinafter Section 8). UNC proposes to drill 750 wells on land located throughout Sections 8 and 17.

Section 17 is Navajo Nation tribal trust land, held in trust by the United States for the Navajo Nation since 1929. The mineral interest in section 17 is owned by Cerrillos Land Co. and Hydro Resources, Inc. (HRI), in turn, owns the leasehold interest to the mineral estate. Stipulation of Applicant UNC and Protestant Navajo Nation (hereinafter Stipulation). HRI owns the SE 1/4 of Section 8. Stipulation.

Both Section 8 and Section 17 are within the Navajo Churchrock community. All of the lands which would be impacted by the proposed drilling are within dependent Indian communities, 18 U.S.C. § 1151(b), or the 1880 Navajo reservation boundaries. These lands are Navajo Indian country. The Navajo Nation has enacted comprehensive legislation governing the use of water within its jurisdictional territories. The State Engineer does not have jurisdiction over water use within these dependent Indian communities, on tribal trust land or within the 1880 reservation boundaries.

The Navajo Nation also has a vested interest in the waters UNC seeks to pump. The State Engineer must dismiss UNC's application for lack of subject matter jurisdiction. The State Engineer does not have jurisdiction to adjudicate any interest in the reserved Indian waters which UNC seeks to pump.

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II. THE HEARING OFFICER MUST CONSIDER THE EVIDENCE SUBMITTED HEREIN TO SUPPORT THE CHALLENGE TO THE STATE ENGINEER'S JURISDICTION.

At the November 25, 1991 hearing, the Navajo Nation attempted to submit evidence to establish the factual predicates for the Navajo Nation's position that the State Engineer is without jurisdiction to hear this matter. Hearing Transcript Volume I, page 26 (hereinafter cites to the Transcript will be Tr. I, at ___). The Hearing Examiner did not allow the Navajo Nation to present the evidence at the hearing. Instead, the Navajo Nation was instructed to submit documentary evidence regarding jurisdiction with the post-hearing briefs; the admission of which was to be taken under advisement.

On December 20, 1991, the Hearing Examiner issued a ruling to allow the admission of Protestants' exhibits 3, 4, and 5. The Hearing Examiner did not rule on the admissibility of evidence which the Navajo Nation was instructed to supply with the post-hearing brief. In addition, Protestants' exhibits 3, 4, and 5 (hereinafter cites to Protestants' Exhibits will be referenced as P. Exh. ___) constitute only the foundation of evidence which the State Engineer must consider in ruling on his jurisdiction. The Navajo Nation was precluded from presenting this evidence at the hearing and now submits it with this brief as exhibits A through J, attached hereto. (Hereinafter cites to Post-hearing Brief exhibits will be referenced as Brief Exh. _____.)

The Hearing Officer must consider this jurisdictional evidence because 1) procedural due process mandates the consideration of all relevant evidence submitted in administrative proceedings; 2) a challenge to the jurisdiction of a tribunal may be raised at any time, and the evidence to support the discussion of jurisdiction must be considered; and 3) much of the evidence may be officially noticed in an administrative hearing.

A. Procedural Due Process Mandates Consideration of Evidence on Jurisdiction Which Is An Issue Properly Before The Hearing Examiner

The jurisdiction of the State Engineer to hear and rule on UNC's Permit Application is an issue before this tribunal. Indeed, the hearing examiner is required to discuss his jurisdiction over the matter in the findings of fact and conclusions of law. See Continental

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STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

AFFIDAVIT OF MELVIN F. BAUTISTA

I, Melvin F. Bautista, state and affirm:

1. I am the Director of the Office of Navajo Land Administration ("ONLA"), a government agency of the Navajo Nation, and a registered land surveyor in the State of New Mexico with public land surveyor number 7437.

2. ONLA is the Office of the Navajo Nation with responsibility for the custody and maintenance of records relating to lands within the Navajo Nation, including lands within the Church Rock and Pinedale Chapters.

3. The records are maintained as official government records of the Navajo Nation. All the information in this affidavit is contained in the public land records maintained by the Navajo Nation.

4. The attached maps entitled "Status Ownership and Acreages, Church Rock Chapter" and "Status Ownership and Acreages, Pinedale Chapter" (hereinafter Church Rock map and Pinedale map), were prepared under my supervision as Director of the ONLA. With the changes noted below, they accurately reflect ownership of land within the Church Rock and Pinedale Chapters.

5. The exact boundaries of the Church Rock and Pinedale Chapters are described in Exhibit 1, attached hereto.

6. The northern most limits of the Church Rock and Pinedale Chapters border the 1880 reservation boundaries of the Navajo Nation.

7. There are approximately 55,481.51 acres of land within the Church Rock Chapter. The ownership of these lands is categorized as follows:

Ownership	Acreage
Navajo Tribal Trust Lands	30,560.44
Indian Allotment Lands	15,533.84
Bureau of Land Management	5,230.70
State Lands	1,854.57
State Lands Leased by the Navajo Tribe	630.12
Private	1,671.84

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8. The ownership status and acreage figures for Navajo Tribal Trust Lands and land owned by the federal Bureau of Land Management (BLM) in the Church Rock Chapter set forth on the Church Rock map do not reflect status changes which were the result of the December 1991 Tri-Party Land Exchange Agreement between the Navajo Nation, the BLM and the State of New Mexico, attached hereto as Exhibit 2. The Church Rock map also inadvertently categorized certain privately owned land as BLM land. The status changes and acreage are as follows:

Location	Former Ownership and Acreage	Current Ownership and Acreage
T.15N., R.17W., Section 14, Lots 2, 3, 4 and 6	BLM, 155.34 acres	Navajo Tribal Trust Lands, 155.34 acres
T.16N., R.17W., Section 14, N.W.¼	BLM, 160.00 acres	Navajo Tribal Trust Lands, 160.00 acres
T.16N., R.16W., Section 8, S.E.¼	BLM, 160.00 acres	Private, 160.00 acres

As a result of these corrections, the total acreage of land owned in the Church Rock Chapter by the BLM is 5,230.70 acres, not 5,706.04 acres. The total acreage of privately-owned land is 1,671.84 acres, not 1,511.84 acres.

9. These are approximately 43,536.10 acres of land within the Pinedale Chapter. The ownership of these lands is characterized as follows:

Ownership	Acreage
Navajo Tribal Trust Lands	23,929.85
Indian Allotment Lands	9,323.62
Bureau of Land Management	5,232.37
State Lands	2,510.68
State Lands Leased by the Navajo Tribe	2,193.58
Private Lands	346.00

10. The ownership status and acreage figures for Navajo Tribal Trust Lands and land owned by the Bureau of Land Management in the Pinedale Chapter set forth on the Pinedale Chapter map do not reflect status changes which were the result of the December 1991 Tri-Party Land Exchange Agreement between the Navajo Nation, the Bureau of Land Management and the State of New Mexico. The status changes and acreage are as follows:

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Location	Former Ownership and Acreage	Current Ownership and Acreage
T.16N., R.15W., Section 14, S.W.¼	BLM, 160.00 acres	Navajo Tribal Trust Lands, 160.00

11. With the exception of tribal trust land acquired pursuant to the 1991 Tri-Party Land Exchange Agreement and the El Malpais Land Exchange (see Pinedale map), all Navajo tribal trust lands in the Church Rock and Pinedale Chapters were acquired pursuant to the Act of February 14, 1920, 41 Stat. 408.

12. In summary, over 84% (46,724.40 acres out of 55,481.51 acres) of the land in the Church Rock Chapter is held in trust for the Navajo Nation or its members or used exclusively by the Navajo Nation. In the Pinedale Chapter, over 81% (35,447.05 acres out of 43,536.10 acres) of the land is held in trust for the Navajo Nation or its members or used exclusively by the Navajo Nation.

13. I know the above facts on my personal knowledge and they are correct to the best of my knowledge, information and belief.

Further affiant sayeth not.

MELVIN F. BAUTISTA

SUBSCRIBED AND SWORN TO before me this 16 day of January, 1992, by MELVIN F. BAUTISTA.

Notary Public

My Commission Expires:

My Commission Expires Sept. 9, 1993

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Church Rock Chapter Boundary Description

Commence at the GLO 22 Mile Post Marker situated on the second addition to the Navajo Treaty Reservation by the Executive Order of January 6, 1880 (E.O. 1880);

Thence west along the E.O. 1880 Boundary line intersects the range line between Range 17 and 18 west to west quarter corner of Section 31, Township 17 north, Range 17 west;

Thence south along said range line one half mile to southwest corner of the Section 31, Township 17 north, Range 17 west;

Thence east along township line between Township 17 and 16 north to northeast corner of north quarter of Section 1, Township 16 north, Range 18 west;

Thence south along said range line between Range 18 and 17 west seven miles to the southeast corner of southeast quarter of Section 1, Township 15 north, Range 18 west;

Thence west along said section line between Section 1 and 12 one half mile to northwest corner of northwest quarter of Section 12 Township 15 north, Range 18 west;

Thence south through center section line one mile to southeast corner of the southwest quarter of Section 12, Township 15 north, Range 18 west;

Thence east along said section line between section 18 and 7 one mile to southwest corner of the southwest quarter of Section 7, Township 15 north, Range 17 west;

Thence south along center section line to center of Section 18, Township 15 north, Range 17 north;

Thence east along center section line to southeast corner of the northeast quarter of Section 18, Township 15 north, Range 17 west;

Thence north along section line between Section 18 and 17 one and one half mile to northwest corner of northwest quarter of Section 8, Township 15 north, Range 17 west;

Thence east along section line between Section 8 and 5, one mile to northeast corner of northeast quarter of Section 8, Township 15 north, Range 17 west;

Thence south along section line between Section 8 and 9, one half mile to southeast corner of northeast quarter of Section 8, township 15 north, Range 17 west;

Thence west through center line of Section 8 one half mile to center of Section 8, Township 15 north, Range 17 west;

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Thence south through center line of Section one half mile to the southwest corner of southeast quarter of Section 8, Township 15 north, Range 17 west;

Thence east one and one half mile to northeast corner of northeast quarter of Section 16, Township 15 north, range 17 west;

Thence south along said section line between Section 16 and 15 one mile to southeast corner of southeast quarter of Section 16, Township 15 north, Range 17 west;

Thence west along said section line between Section 15 and 21 one mile to northwest corner of northwest of quarter of Section 21, Township 15 north, Range 17 west;

Thence south along said section line between Section 21 and 20, one half mile to the west quarter corner of Section 21, Township 15 north, Range 17 west;

Thence west through the center section line of Section 20, to west quarter corner of Section 20, Township 15 north, Range 17 west;

Thence north long said section line between Section 20 and 19, one half mile to northeast corner of northeast quarter of Section 19, Township 15 north, Range 17 west;

Thence west along said section line between Section 19 and 18, one mile to northwest corner of Section 19, Township 15 north, Range 17 west;

Thence south along range line between Range 18 and 17 west, three miles to southwest corner of southwest quarter of Section 31, Township 15 north, Range 17 west;

Thence east along township line between Township 15 and 14 north, four and one half miles to intersect west line of Fort Wingate Army Depot Boundary line;

Thence north along said Fort Wingate Army Depot boundary line, four and three quarter miles to intersect north right-of-way line of Atchison Topeka and Santa Fe Railroad;

Thence east along said north right-of-way line of Atchison Topeka and Santa Fe Railroad intersect section line of Section 20;

Thence north along said section line between Section 5 and 4, three and one half miles to northwest corner of northwest quarter of Section 4, Township 15 north, Range 16 west;

Thence east along township line between Township 16 and 15 north, one mile to southeast corner of Section 33, Township 16 north, Range 16 west;

Thence north along said section line between to Section 4 and 3, six miles to northeast corner of northeast quarter of Section 4, Township 16 north, Range 16 north;

Thence west along said section line to southeast corner of Southeast quarter of Section 33, Township 17 north, Range 16 west;

Thence northwest along section line between Section 3 and 34 one half mile to intersect south boundary line of E.O. 1880;

Thence west along the E.O. 1880 Boundary line, seven miles to the point of beginning.

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TRI-PARTY
COOPERATIVE AGREEMENT
FOR THE

Navajo occupancy resolution and land consolidation program objectives, by the Navajo Tribe, Bureau of Indian Affairs and Bureau of Land Management.

A. INTRODUCTION

For a number of generations, the Navajo people have used the public lands within the Checkerboard Area for grazing, homesites and other purposes. Numerous attempts have been made in the past by the Federal Government to legitimize unauthorized Navajo Land uses. Since the signing of Executive Order 709 on November 9, 1907, which extended the boundaries of the Navajo Indian Reservation, a number of legislative and administrative actions relating to land withdrawals, corrections, additions, deletions, revisions, amendments, partial revocations, total revocations, etc., have added to the complexity of land use administration in the Checkerboard Area. See Attachment A.

The signatory agencies recognize the longstanding Navajo occupancies on public land within the Checkerboard Area. Signatory agencies further agree to do any and all things necessary to legitimize where possible unauthorized homesites that occurred prior to the 1974 inventory and to continue to support land exchanges and other land actions directed toward consolidation of Navajo and non-Navajo use areas.

B. PURPOSES AND OBJECTIVES

The purposes and objectives of the program are as follows:

1. Define the extent of Navajo occupancy and use of public lands in northern New Mexico.

2. Clearly define the role of the BLM and BIA in carrying out the trust responsibility of the Secretary of the Interior in light of existing laws, regulations, and the multiple-use management responsibilities of the BLM; educate BLM, BIA, and Navajo Tribal personnel, and the general public about the requirements and limitations of this role.

3. Using the authority of the Indian Land Consolidation Acts of 1921, 1983 and 1984, and the Federal Land Policy and Management Act, the Indian Reorganization Act of 1934, and the Indian Education Assistance and Self-Determination Act of 1975, complete a plan for Secretarial approval which will guide transfers of lands from Federal to Navajo ownership, and vice versa; in conformity with the general framework of the Farmington Resource Management Plan; identify any withdrawals and legislation necessary to complete such transfers; and review existing withdrawals in the Checkerboard Area.

4. Authorize existing Navajo occupancies, that were established prior to 1974, through land patents (or residential leases) unless it is determined that the lands are needed for public uses (including

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mineral development) inconsistent with residential use; develop an impact and resettlement policy to accommodate situations where a patent (or lease) cannot be granted.

5. Where it can be shown that lands are needed for residential use in the future and it is determined that such use is the highest and best use of the land, residential use can ususally be authorized through patents providing the use is consistent with approved land use plans.

6. Increase public awareness about the need for the BLM to implement the above, in order to provide for orderly resource development (e.g. mineral and grazing) and for optimum public use and enjoyment of the land.

7. Make a complete review of any relinquished Indian allotments that are due for lieu selections or exchanges for the purposes of completing the realty actions. Review and adjust land withdrawals that were made in aid of legislation to adjust Navajo lands, including a review of the mineral estate.

8. The parties agree to establish working groups which will meet at least quarterly to address problems of (1) occupancy resolution, (2) administration and interpretation of relevant public land orders and executive orders, and (3) a framework for land exchanges and consolidations. The parties further agree to establish an oversight group consisting of the Chairman or Vice Chairman of the Navajo Tribal Council, the Area Director for the Navajo Area Office of the BIA, and the State Director for the New Mexico State Office of BLM, to which the working groups will report at least quarterly. The oversight group will review the reports and recommendations of the various working groups and take appropriate actions in a timely fashion.

9. The BLM shall not recommend modifications or cancellations in whole or in part, of an Indian use land withdrawal without written consultation with the Navajo Area Director, BIA, except in cases of an emergency modification or disposal for national security reasons. The Navajo Area Director shall not grant consent without also consulting with the Navajo Tribe.

C. SIGNATORY AGENCIES GENERAL RESPONSIBILITIES AND AGREEMENTS

1. From the date of approval of this Agreement, the signatory agencies will meet twice annually to review, update, or make changes in this Agreement. Subjects of review will include but will not be limited to, land withdrawals, land consolidations, land exchanges, and Resource Management Plans.

2. Modification or Cancellation

This Agreement shall remain in effect until modified by mutual agreement of all parties. The Agreement may be cancelled by any party with 30 days notification to all parties.

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CERTIFICATION

Chairman, The Navajo Nation — 9-15-87 Date

Area Director, Navajo Area
Bureau of Indian Affairs — 9-15-87 Date

State Director, Bureau of Land Management — 9-15-87 Date

for Assistant Secretary,
Indian Affairs — 9-15-87 Date

Assistant Secretary,
Land and Minerals Management — 9/15/87 Date

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Attachment A

Legislative and Administrative Actions
Affecting Land Use Administration in the Checkerboard Area

E.O. 709 of 11/09/1907. . . withdrew lands for Indian use (Navajo Reservation).
E.O. 711 of 11/11/1907. . . . withdrew lands for Indian use (Jicarilla Reservation.)
E.O. 743 of 01/28/1908. . . . amended land description of E.O. 711.
E.O. 744 of 01/28/1908. . . . amended land description of E.O. 709.
E.O. 1000 of 12/30/1908 . . . withdrew certain unallotted lands for Indian use.
E.O. 1284 of 01/16/1911 . . . restored to Public Domain, Lands not allotted to or otherwise reserved.
E.O. 1359 of 05/24/1911 . . . reserved lands restored to PD by EO 1284, for Indian use.
E.O. 1483 of 02/17/1912 . . . restored certain lands to status existing before 1/16/11.
E.O. 1700 of 02/10/1913 . . . withdrew lands for Indian use.
E.O. 1744 of 05/06/1913 . . . reserved lands for Indian use.
E.O. 1864 of 12/01/1913 . . . Indian Schools and administration purposes.
E.O. 2513 of 01/15/1917 . . . withdrew lands for Indian use.
Act of 03/03/1921 . . . . . authority for Indian Land Consolidation.
(41 Stat. 1239)
E.O. 4093 of 10/24/1924 . . . temporarily withdrew lands for Indian use.
Act of 03/03/1925 . . . . . permanently withdrew lands of E.O. 4093 for Indian use.
(43 Stat. 1114)
D.O. of 07/08/1931. . . . . withdrew lands for Indian use.
E.O. 7975 of 09/16/1938 . . . transferred administrative jurisdiction over certain lands to DOI.
D.O. of 12/23/1938. . . . . temporarily withdrew lands, transferred administrative jurisdiction to DOI.
D.O. of 05/31/1939. . . . . withdrew lands for Indian use.
D.O. of 07/01/1939. . . . . withdrew lands for Indian use.
E.O. 8472 of 07/08/1940 . . . amended E.O. 7975, administrative jurisdiction transferred to DOI on additional lands.
D.O. of 08/19/1942. . . . . revoked certain land withdrawals of D.O. 7/8/31
D.O. of 05/07/1943. . . . . revoked certain land withdrawals of D.O. 7/8/31.
D.O. of 02/03/1945. . . . . excluded certain land withdrawals of D.O. 7/1/39.
P.L. 567 of 6/20/1950 . . . . transferred administrative jurisdiction over certain Lands, to DOI (Ft. Wingate Military Res.).
P.L.O. 964 of 5/13/1954 . . . for DOE Domestic Uranium Program.
D.O. of 08/08/1955. . . . . partially revoked land withdrawal of D.O. 7/1/39.
D.O. of 03/22/1956. . . . . partially revoked land withdrawal of D.O. 7/1/39.
D.O. of 09/08/1956. . . . . partially revoked land withdrawal of D.O. 7/1/39.
P.L.O. 2198 of 8/26/1960. . . revoked land withdrawals of D.O. 7/8/31, D.O. 5/31/39. D.O. 7/1/39 and withdrew certain lands for Indian use.
P.L.O. 4157 of 2/13/1967. . . partially revoked land withdrawal of PLO 2198.
P.L.O. 4206 of 4/24/1967. . . partially revoked land withdrawal of PLO 2198.
P.L.O. 4593 of 4/10/1969. . . partially revoked land withdrawal of PLO 2198.
P.L.O. 5444 of 11/4/1974. . . revoked land withdrawals of EO 1359, 5/24/11.
P.L. 94-579 of 10/21/1976 . . Federal Land Policy and Management Act
P.L. 97-287 of 10/06/1982 . . authority for El Malpais Land Exchange.
P.L. 97-459 of 1/12/1983. . . authority for Indian land consolidation.
P.L.O. 6527 of 3/8/1984 . . . correction to PLO 5444 of 11/04/74.
P.L.O. 5721 of 5/2/1984 . . . exchanged lands between BLM and NT.
P.L.O. 203, 3329, 3679, 3790, 4124, 964, 1295, 1794, 2138 and 2970 withdrew land for Indian schools and administration

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S.O. (unnumbered) of 8/25/1934 for Indian school and administration purposes.
Farmington RMP 1987 . . . . . establishes framework to more effectively manage checkerboard area.

Bibliography: "Navajo Indian Status Study of Northwestern New Mexico," compiled by the Bureau of Land Management, State Land Office, 9/16/73.
"Declaration of Certain Lands Withdrawn by Various Executive Orders (1907-1912)" As Being Part of the Navajo Res. in New Mexico compiled by Bureau of Indian Affairs, Eastern Navajo Agency, 1/5/82.
"Anatomy of the Navajo Indian Reservation" compiled by the Navajo Nation, 1978.

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