

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
1201 ELM STREET
DALLAS, TEXAS 75270

November 3, 1986
Mr. Craig J. Reece
Law Department
Arizona Public Service Company
2100 Valley Bank Center
Phoenix, Arizona 85073

Re: New Mexico NSPS/NESHAP Delegation

Dear Mr. Reece:

This letter is in response to your letter of September 12, 1986, requesting clarification to the questions that you have raised concerning implementation of New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) in the State of New Mexico, on Indian lands. Our letter of October 2, 1986, acknowledged receipt of your letter of September 12, 1986. We are now responding to your specific questions concerning the NSPS and NESHAP programs which were delegated to the State on March 15, 1985, and the notice published in the Federal Register on June 6, 1986.

The NSPS and NESHAP delegation agreement excepted Indian lands in the delegation to New Mexico for those programs. The June 6, 1986, notice restated the exception. The exception for Indian lands was based on principles of Federal Indian laws and on the EPA's regulatory approach to state assertions of jurisdiction. In delegable programs, a state must make a clear demonstration of its legal authority to regulate activities on Indian lands. See 40 CFR Sections 123.23(b), 145.24(b) and 271.7(b). The principles of Indian law also have resulted in a national policy regarding Federal Government approaches to Indian tribes.

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed that (1) the Federal Government will pursue the principle of Indian "self-government" and (2) it will work directly with Tribal Governments on a "government-to-government" basis. Therefore, the general policy of the Federal Government is that Indian tribes retain the maximum possible sovereignty over their lands. The Federal Government has established a formal Indian Policy which fosters in almost all respects a government-to-government relationship with Indian tribes. The EPA adopted this policy as an EPA policy in November, 1984.

The basic doctrine of Federal Indian law is that the Indian tribes exercise their sovereignty, to the exclusion of the State, unless there is a clear statement in treaties or Federal statutes that authorizes the State to exercise specific types of regulatory jurisdiction over the Indian lands in the State. The EPA must begin with the premise that the State must

demonstrate its authority to enforce State-adopted NSPS and NESHAP requirements on Indian lands. The State of New Mexico has not made a clear demonstration that it has been granted jurisdiction, under Federal law, to enforce State-adopted NSPS and NESHAP regulations on Indian lands. Consequently, the EPA did not delegate authority to the State for implementation and enforcement of the NSPS and NESHAPS programs on Indian lands.

We should mention, however, that the EPA does not consider this issue to be closed. The EPA, as a matter of policy, will consider and evaluate any new information on the Indian issue that the State submits to this Agency. At the present, EPA Region 6 retains authority to review applications, issue permits, and enforce the NSPS and NESHAPS programs on Indian-governed lands. Any inquiry or request, administrative or technical, concerning implementation of these programs on Indian lands should be submitted to the EPA Region 6 office in Dallas, Texas. The EPA's inability at the present time to delegate regulatory authority over Indian lands to the State of New Mexico does not alter or change any existing legal authority or understanding of the State vis-a-vis activities on Indian lands, under which it may be regulating sources.

Since your letter addresses other issues and questions concerning administration and implementation of the NSPS and NESHAP programs on Indian- governed lands that have national implications, we are forwarding your letter, along with a copy of this letter, to the EPA Headquarters for possible additional response.

I hope this letter has addressed your specific questions concerning administration and implementation of the NSPS and NESHAP programs on Indian- governed lands. If you have further questions concerning this matter, please contact me or Mr. J. Behnam of my staff at (214) 767-6672

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Sincerely yours,

(s) JACK S. DIVITA

William B. Hathaway
Director Air, Pesticides, and Toxics Division (6T)

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Jaron B. Norberg
Senior Vice President
and Corporate Counsel

September 12, 1986

Mr. William Hathaway, Director
Air, Pesticides & Toxics Division
Environmental Protection Agency
1201 Elm Street
Dallas, Texas 75270

Dear Mr. Hathaway:

The EPA recently partially delegated authority to the State of New Mexico to implement the New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP). 51 Fed. Reg. 20648 (June 6, 1986). This was a partial delegation because the State did not receive authority to implement these regulations on Indian lands. I would like to obtain clarification on this partial delegation and guidance as to whether federal or state air pollution law applies on Indian lands. As you may know, Arizona Public Service Company owns and operates the Four Corners Power Plant located on the Navajo reservation within the State of New Mexico.

In order to clarify our responsibilities with respect to air pollution laws at the Four Corners Plant, I would appreciate responses to the following questions:

1. What was the reason for withholding delegation of NSPS and NESHAP authority within Indian lands?
2. Did the EPA determine whether New Mexico had authority to enforce the NSPS and NESHAP regulations in particular, and other air pollution regulations in general, within Indian lands?
3. Should APS look exclusively to the EPA for regulatory guidance and other administrative matters relating to compliance with air pollution laws at Four Corners?

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LAW DEPARTMENT

William Hathaway
September 12, 1986
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Please provide any additional information you deem helpful in explaining the regulatory obligations of sources located on Indian lands. APS desires to ensure that it is complying with appropriate agencies. Let me thank you in advance for your efforts in responding to these questions.

Sincerely,

Craig J. Reece, Esq.

CJR:cr