

Connally

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Colorado Department
of Public Health
and Environment

October 18, 2005

Stephen Tuber
Assistant Regional Administrator
Office of Partnerships and Regulatory Assistance
EPA Region VIII
999 18th Street, Suite 200
Denver, CO 80202

RE: Southern Ute Water Quality Jurisdictional Issues

Dear Steve:

You have asked for the department's position concerning the regulation of water pollution sources owned by non-tribal members located on fee land within Southern Ute Indian Reservation (Reservation) boundaries. Specifically, you inquired as to the department's position on the Tribe's request that EPA issue National Pollutant Discharge Elimination System (NPDES) permits within reservation boundaries when the department has already issued the appropriate permits. The department believes that the State maintains the authority to regulate such sources, as explained below.

In 1974, EPA delegated authority to the Colorado Department of Health to administer the Clean Water Act's NPDES program in the State of Colorado. The department has interpreted this delegation of authority as extending across all parts of Colorado over which the State has jurisdiction.¹ See, e.g., "Memorandum of Agreement Between the State of Colorado Department of Health and the United States Environmental Protection Agency, Region VIII," December 1974, pp. 1 and 2. (referencing the Department of Health's broad authority to administer the program "in the State," with no enumerated exceptions). Based upon that delegation of authority, the department has issued Colorado Discharge Permit System ("CDPS") permits on fee lands within Reservation boundaries held by La Plata County Airport and Loma Linda Sanitation District. The department asserts that this delegation of authority by EPA, coupled with a federal statute, Public Law 98-290, 98 Stat. 201 (1984) ("Public Law 290"), which

¹ EPA's delegation regulations require submittal of a statement from the Attorney General of relevant legal authority. Colorado's statement (dated December 10, 1974) refers to the Department of Health's jurisdiction over discharges to "state waters," which was defined then as it is now to include "any and all surface and subsurface waters which are contained in or flow through this state." § 66-28-103(1)(p), C.R.S. (original version); § 25-8-103(19), C.R.S. (current version of the Colorado Water Quality Control Act).

reflects a specific jurisdictional agreement between the State of Colorado and the Southern Ute Tribe ("Tribe"), grant to the department the jurisdiction and authority required to issue such permits.

In 1984, the Tribe, the State of Colorado, and La Plata County (the "County") jointly petitioned the U.S. Congress to approve an agreement drawing Reservation boundaries and delineating jurisdictional authority between the State and the Southern Ute Tribe. The Tribe, the State, and the County all saw this boundary drawing and jurisdictional delineation as necessary to end long and costly battles between the State and the Tribe over land located in the vicinity of the Southern Ute Reservation. See 130 Cong. Rec. H10290 (April 30, 1984) (statement of Representative McNulty explaining purpose of Public Law 290).

The jurisdictional disputes between the State and the Tribe stemmed, in large measure, from checkerboard tribal and private land ownership patterns within the traditional boundaries of the Reservation. This pattern resulted from congressional action opening up large areas of the Reservation to settlement by private citizens. In addition to 307,000 acres of Indian trust and federally owned land, there are over 300,000 acres of land owned in fee by Colorado citizens within the traditional boundaries of the Reservation.

The State recognized that the Tribe generally would not have jurisdiction over State citizens located on this fee land, but was concerned the Tribe in certain circumstances might claim these citizens to be subject to the Tribe's jurisdiction. Accordingly, prior to agreeing to Public Law 290, the State had opposed including non-member-owned fee land within the recognized boundaries of the Reservation. The State contended that, by opening so much Reservation land to State citizens, Congress diminished the Reservation so as to redraw the Reservation boundaries and abrogate the Tribe's jurisdictional claims over non-tribal and tribal members located on fee lands outside of the redrawn boundaries. See 130 Cong. Rec. H10290 (statement of Representative McNulty discussing Colorado's potential claim that Congress "disestablished" the Reservation).

In order to avoid wasteful litigation over the State's and the Tribe's respective jurisdictional authority on fee lands within Reservation boundaries, over the location of those boundaries, and over whether those boundaries must be redrawn, the State and the Tribe agreed to the terms of Public Law 290. The Tribe agreed that the State would retain jurisdiction over non-tribal members on fee lands within the Reservation boundaries. The State agreed it would not seek to redraw the boundaries of the Reservation. The Tribe accordingly would retain civil authority over tribal members within the traditional boundaries of the Reservation, including civil authority over tribal members located on lands the State previously had considered diminished. On May 21, 1984, Public Law 290 was signed into federal law.

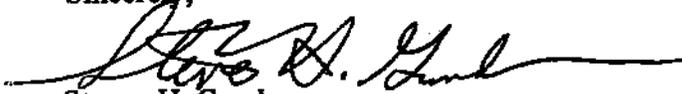
The department's authority to regulate on non-fee lands within tribal boundaries became an issue with respect to the Tribe's 1998 application to EPA for "Treatment as a State" under the federal Clean Air Act. In its comments on the Tribe's application, the department reiterated that the State has jurisdiction to regulate non-member owned air pollution sources on fee lands within Reservation boundaries. The department cited Section 4(a) of Public Law 290, which unambiguously limits the Tribe's jurisdiction to tribal members and activities on Indian trust land within Reservation boundaries by providing that "[s]uch territorial jurisdiction as the Southern Ute Indian Tribe has over persons other than Indians and the property of Indians shall be limited to Indian trust land within the reservation." Public Law 290 further acknowledges that the State has jurisdiction over non-members located on fee lands. See 130 Cong. Rec. H10290 (statement by Representative Young that, pursuant to Public Law 290, "[j]urisdiction over non-Indians and their property within the reservation would remain with the State").

To our knowledge, the Tribe has not applied to the EPA for "Treatment as a State" under the federal Clean Water Act. The department does not believe that in the absence of tribal jurisdiction that EPA may assert jurisdiction; but rather, as explained above, asserts that the department retains jurisdiction to issue such permits pursuant to its delegated and statutory authority. Absent an intergovernmental agreement applicable to water quality jurisdiction, the State has jurisdiction to administer the NPDES program over non-member activities on fee lands within the Reservation. Consequently, the two permits currently administered by the State on such lands are valid and should continue to be in force.

Furthermore, you mentioned a 1993 Water Quality Control Division policy, No. WQP-18 titled "Permits on Indian Lands," which states that the Division "will not pursue NPDES permits for discharge from facilities located on privately held lands within the Southern Ute Indian Reservation providing EPA has permitted such discharges or a permit application has been filed with EPA." The policy explicitly states that the Division does not intend to relinquish its legal authority to require a discharge permit on privately held lands within the Reservation, but that it simply elects to not exercise such authority to prevent dual permitting. The Division is, however, repealing that policy in order to prevent any confusion with respect to its legal position.

Please feel free to contact me if you have any questions.

Sincerely,



Steven H. Gunderson
Division Director
Water Quality Control Division

cc: Howard Roitman
Ann Hause
Dave Akers
Gary Beers
Annette Quill

