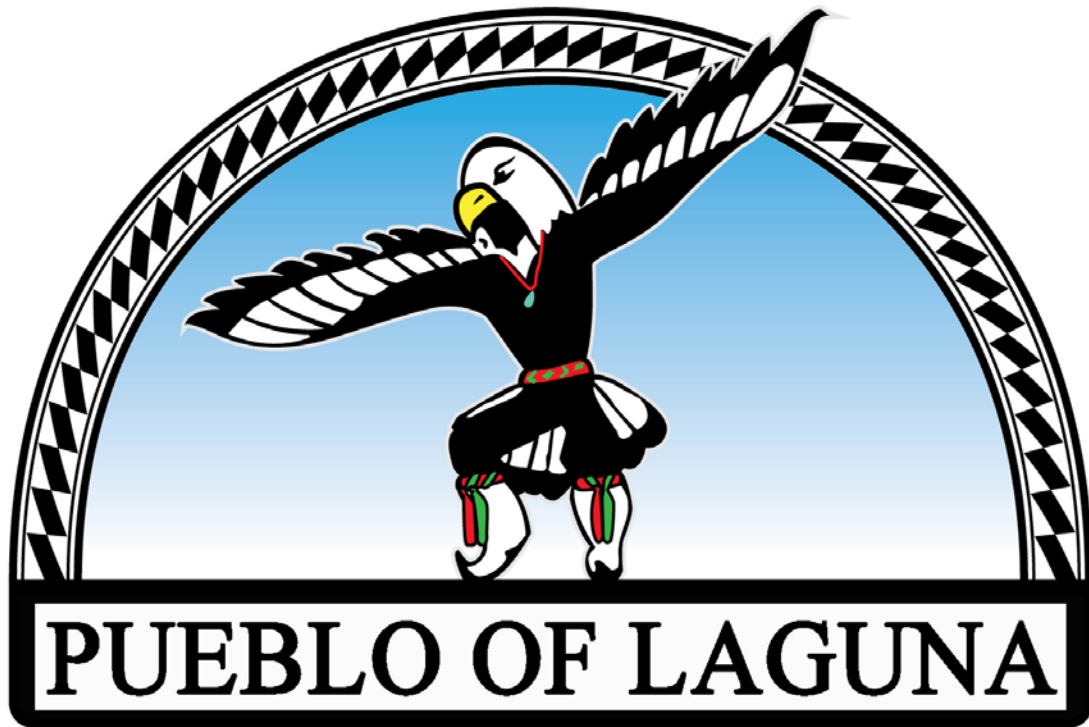


# U.S. Environmental Protection Agency



## Non-Point Source Management Program Plan April 2019

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## 1.0 OVERVIEW

The Pueblo of Laguna (Pueblo) intends to apply for § 319 non-point source (NPS) funding in the future. We have developed an assessment of the current NPS risks and will request Treatment in a similar manner as a State (TAS) for § 319 funding. As discussed in the Nonpoint Source Assessment, the largest challenge is collecting more data specific to non-point source pollution that will enable the Pueblo to make the most informed decisions possible. While we recognize that we have several factors that may contribute to or exacerbate non-point source pollution around the Pueblo these sources have not been tested for chemical components that would outline the extent of contamination. While many of the rivers and streams on the Pueblo suffer from severe sedimentation, high nutrient loads and loss of riparian vegetation the extent of these, and others, has not been fully examined.

As recommended in the guidelines, our proposed actions are organized by category, subcategory, goals, short and long term objectives, measurable outputs, and the Best Management Practices (BMPs) that will ultimately assist in reaching and maintaining our stated goals, and ultimately meeting all of our Water Quality Standards (WQS).

## 2.0 INTRODUCTION

The goal of the Pueblo's Non-Point Source (NPS) pollution program will be to assess the extent of the NPS pollution across the Pueblo in order to better prevent and control pollution to protect pristine waters and improve impaired waters. This will be done through extensive sampling and appropriate restoration efforts as funding is available. The Pueblo intends to accomplish these goals by carrying out the following:

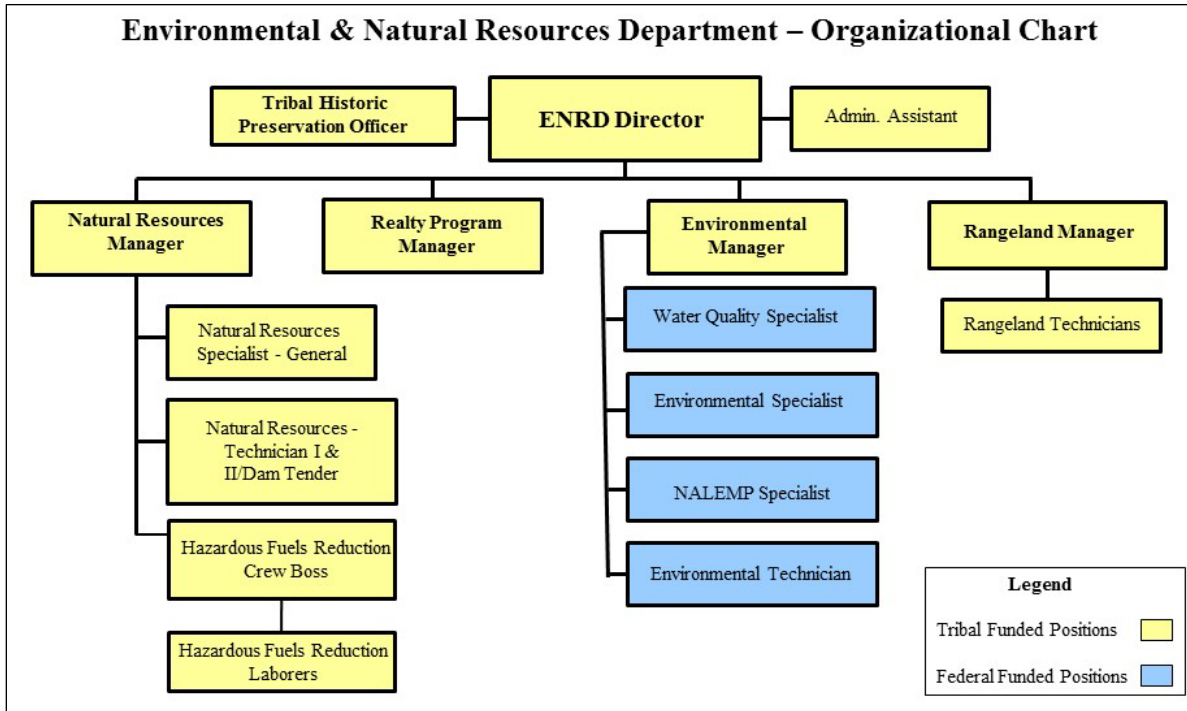
1. Regular and repeated sampling near suspected NPS pollution contribution points.
2. Implement watershed based BMPs and work towards a large scale watershed management plan to help restore and protect the Pueblo's water quality.
3. Develop instream and riparian restoration measures to remediate degraded areas.
4. Develop environmental protection policies and riparian buffer areas.
5. Expand sampling to include future suspected NPS pollution points as well as begin enforcement on these areas based on environmental protection policies and Tribal WQS.

## 3.0 SUMMARY OF TRIBAL MANAGEMENT PROGRAM

The Pueblo's Environmental and Natural Resource Department (ENRD) will house the NPS pollution program under the Environmental Program within the Water Quality Program. Programs within the ENRD include the Tribal Historic Preservation Office, Realty Program, Rangeland Management Program, Natural Resources Program, and Environmental Program. The Environmental Program includes the Clean Air Act (CAA) § 103 Grant, General Assistance Program (GAP), and a Water Quality Program that utilizes a Clean Water Act (CWA) § 106 Grant, and a Native American Land Environmental Mitigation Program (NALEMP). See Figure 1 below.

The Water Quality Program staff has access to individuals in charge of infrastructure planning and construction, conservation, and resource management within the Pueblo of Laguna. The primary nonpoint pollution management issue is the effect of down cutting, sedimentation and chemical contamination on the associated riparian and wildlife areas. The Pueblo currently has no structure or oversight for nonpoint pollution management. Deriving this structure and oversight would be the primary goal of the initial set up of a Nonpoint Source Pollution Management Program.

FIGURE 1: ENRD Organizational Chart



#### 4.0 MANAGEMENT PROGRAM DESCRIPTION

The Pueblo’s ultimate goal is to better ascertain where the current NPS pollution problems are, identify other potential sources, and develop plans on how to mitigate and control those impacts, while keeping our high quality waters clean and improving impaired waters to meet our Tribal WQS. This management plan must account for the following categories and subcategories:

##### 4.1 Potential BMPs, Programs, and Funding Support

TABLE 1: Categories and Subcategories

Category	Subcategory	Impairment Level
Uranium Mine Drainage		1
Agriculture	Grazing related, Streambank Erosion	1
Forestry	Streambank Erosion	1
Habitat Alteration	Channelization, Vegetated Buffer degradation	1
Roads, Highways, and Bridges	Contaminated runoff	2
Urban	Storm water	2
Other	Illegal Dumping	2

Level 1 – Confirmed impairment currently exists

Level 2 – Possible impairment: not yet confirmed by monitoring data

**TABLE 2: Overview of BMPs**

<b>NPS Category</b>	<b>BMP</b>	<b>Definition</b>	<b>Purpose</b>	<b>Applicable Conditions</b>	<b>Specification Guidelines</b>
Uranium mine drainage	Decontamination in congruence with drainage modification in and around mine sites	Subsurface diversion and other similar practices such as interception drains to prevent movement of mine waste throughout surface water sources	To prevent extensive surface water contamination and movement of contaminated water to downstream users	In areas where there are very high concentrations of Total Uranium and there is a likelihood of downstream contamination.	GEOCHEMICAL Geochemical and Mineralogical Characterization of Solids and Their Effected Waters in Metal Mining Environments ; Other USGS guides
Agriculture	Soil Stabilization on Rangelands	Stabilizing soils on rangelands in and around natural water sources such as streams, rivers and springs in an attempt to reduce soil erosion, control surface runoff and minimize surface water contamination.	To prevent soil and water loss and improve water quality	On rangeland or other lands grazed by livestock or wildlife	NRCS Field Office Technical Guides
Forestry	Riparian Area Management	Managing the riparian corridors to minimize streambank damage, groundwater recharge and surface water quality.	To prevent degradation of surface water quality from animal waste, to prevent streambank and channelized erosion, improve water quality and maintain habitat.	In areas where forestry occurs and overlaps with natural water systems	NRCS Field Office Technical Guides
Habitat Alteration	Riparian Area Stabilization	Using vegetation and planting native species of trees and grasses to stabilize and protect riparian habitat.	To maintain and repair damaged or lost riparian habitat	In areas where natural habitats are experiencing bank degradation or aggradation causing loss of habitat and species migration	NRCS Field Office Technical Guides
Roads, Highways, and Bridges	Road and Water Intersection Limitation	Managing roadway construction and upkeep in order to minimize negative effects to nearby water systems	Maintain and repair water systems impacted by the construction and upkeep of adjacent roads	Areas where roads, highways and bridges are in close proximity to surface waters contained in rivers, streams and springs	NRCS Field Office Technical Guides
Urban	Water Quality Protection in Urban Areas	Minimizing the transport of sediments, organic and volatile organic materials, pathogens, chemical compounds and other toxins to surface and groundwater from storm water runoff	To protect surface and groundwater from all contamination carried by storm water runoff	Urban Areas	NRCS Field Office Technical Guides

**TABLE 3: Potential BMPs and Potential Funding Sources**

<b>NPS Category</b>	<b>Nonpoint source</b>	<b>NRCS conservation practice standards</b>		<b>Partners</b>	<b>Potential Funding</b>
Uranium mine drainage	Operation of the Paguate-Jackpile mine from 1952-1982. Original reclamation was insufficient. Surface water exceeds 0.03 mg/L tribal WQS.	322	Channel vegetation	ENRD/NRCS/USEPA	CERCLA
		327	Conservation cover	ENRD/NRCS/USEPA	CERCLA
		332	Contour buffer strips	ENRD/NRCS/USEPA	CERCLA
		342	Critical planting area	ENRD/NRCS/USEPA	CERCLA
Agriculture	Grazing related streambank erosion	322	Channel vegetation	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal
		327	Conservation cover	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal
		342	Critical planting area	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal
		390	Riparian herbaceous cover	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal
		391	Riparian forest buffer	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal
		395	Stream habitat improvement and management	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal
		584	Channel bed stabilization	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal
382	Fence	ENRD/NRCS/USEPA	319, NCRS, BIA, Tribal		
Forestry	Streambank erosion	228	Prescribed burning	ENRD/NRCS/USEPA	319, BIA, Tribal
		315	Herbaceous weed control	ENRD/NRCS/USEPA	319, BIA, Tribal
		342	Critical area planting	ENRD/NRCS/USEPA	319, BIA, Tribal
		390	Riparian forest buffer	ENRD/NRCS/USEPA	319, BIA, Tribal
		391	Riparian herbaceous cover	ENRD/NRCS/USEPA	319, BIA, Tribal
		395	Stream habitat improvement and management	ENRD/NRCS/USEPA	319, BIA, Tribal
		410	Grade stabilization structure	ENRD/NRCS/USEPA	319, BIA, Tribal
		472	Access control	ENRD/NRCS/USEPA	319, BIA, Tribal
584	Channel bed stabilization	ENRD/NRCS/USEPA	319, BIA, Tribal		
Habitat Alteration	Channelization, vegetation buffer degradation	390	Riparian forest buffer	ENRD/NRCS/USEPA	319, Tribal
		391	Riparian herbaceous cover	ENRD/NRCS/USEPA	USACE, 319, Tribal
		395	Stream habitat improvement and management	ENRD/NRCS/USEPA	USACE, 319, Tribal
		584	Channel bed stabilization	ENRD/NRCS/USEPA	USACE, 319, Tribal
Roads, Highways, and Bridges	Contaminated runoff	570	Stormwater runoff control	ENRD/Laguna Public Works/NRCS/USEPA	NMDOT, BIA, 319, Tribal
Urban	Storm water	570	Stormwater runoff control	ENRD/Laguna Public Works/NRCS/USEPA	319, Tribal
Other	Illegal dumping			ENRD, Law Enforcement, Tribal members	GAP

## 4.2 Implementation Assistance

Program implementation can include, but is not limited to the following list:

**TABLE 4: Potential Implementation Assistance**

Participant	Role
Pueblo of Laguna Council	Lead participant, sets strategic policies, provides legal authorization, and final approval on large scale projects.
Pueblo of Laguna Villages (6)	Grant approval and supply assistance for projects within village jurisdiction.
Pueblo of Laguna Environmental & Natural Resources Department (ENRD)	Provides operational lead to surface water monitoring and pollution control activities. Conducts and oversees funding, implementation, and evaluation of monitoring programs and BMPs. Conducts and oversees educational/community outreach programs for pollution reduction.
Pueblo of Laguna Public Works Dept.	Provides operational lead for road construction, repair, and maintenance
Pueblo of Laguna Range Management Program	Provides operational lead for potential exclusion fencing around water resources.
Rio Puerco Management Committee	Interagency coordination and technical assistance.
USEPA Region 6 Project Officer	Provide funding and technical resources.
United States Army Corps of Engineers	Potential funding source and technical assistance
U.S. Department of Agricultural	Potential funding source and technical assistance
Bureau of Indian Affairs	Potential funding source and technical assistance
Bureau of Reclamation	Potential funding source and technical assistance
Bureau of Land Management	Potential funding source and technical assistance
U.S. Fish and Wildlife	Potential funding source and technical assistance

## 4.3 BMP Schedule and Measurable Output

The BMPs listed in Table 2 and Table 3 are intended to be implemented after more robust NPS dataset is created during the first three years of the program. In years four, implementation of BMPs will be initiated. In year five, implementation will continue follow by a reassessment of the NPS Management Plan to increase the effectiveness of future BMP implementation. Table 5 below outlines the Pueblo’s goals, objectives, and measurable outputs for the program. We will begin to develop a Watershed Based Plan for resources within tribal boundaries with the intention to partner the Rio Puerco Management Committee’s and their Rio Puerco Watershed-Based Plan which includes a large consortium of county, state, and adjacent private land constituents.

**TABLE 5: BMP Schedule and Measurable Outputs**

Category	Goal	Short Term Objective	Long Term Objective	Measurable Output
Uranium Mine Drainage	To greatly reduce contaminated runoff effecting our water systems	Gathered detailed data concerning the concentrations of mine waste in water systems surrounding the mine	Carry out mitigation and restoration efforts on effected areas in order to restore water quality as much as possible	Annual monitoring data results
				Regular meetings with EPA CERCLA project officer, responsible party conducting the Remedial Investigation and Feasibility Study, and university researchers
				Assist with organizing community outreach with all involved parties
Agriculture	To greatly reduce contaminated runoff effecting our water systems and prevent future damage	Gather data to analyze the extent of streambank erosion	Implement and enforce policy to ensure the protection of our waters from stream bank erosion caused by overgrazing	Annual monitoring data results from rangeland monitoring survey
				Outreach activities report
				Annual assessment report on BMP effectiveness
Forestry	Ensure that the cutting and gathering of trees and shrubs does not continue to degrade our water systems	Assess the current extent to which the streams and rivers are effected by forestry and forestry practices by conducting stream health and biological surveys	Create designated buffer zones around our rivers, streams and springs to ensure that the riparian areas directly correlated are not effected by forestry	Annual forest management report including wood harvesting permits issued, and the annual hazardous fuel reduction report
				Annual assessment report on BMP effectiveness
Habitat Alteration	Ensure that habitat is left intact and restored in important wildlife/riparian corridors	Determine the extent of lost habitat as well as pristine habitats by conducting stream health and biological surveys	Create designated buffer zones around our rivers, streams and springs to ensure that the riparian areas directly correlated are not effected as well as implementing strict protective policies	Annual monitoring report
				Outreach activities report
				Annual assessment report on BMP effectiveness
Roads, Highways, and Bridges	Limit the number of roads created in rural areas while mitigating the impact of already established roads	Map current roads, both primitive and established and determine where these roads may be effecting surface water	Road management plan to include stipulations as to where roads can and cannot be placed based on proximity to water resources	Annual monitoring report
				BMP training for road crew
				Annual assessment report on BMP effectiveness
Urban	Mitigate the impact of storm water and storm water runoff on natural water systems	Gather storm water data to assess it for NPS pollution constituents	Develop sampling and restoration practice guidelines to attempt to keep the impact of storm water on natural systems low.	Assessment of NPS stormwater runoff constituents



## 4.4 Certification of Tribal Authority

### LAGUNA REGARDING THE REGULATORY AUTHORITY AND JURISDICTION OF THE PUEBLO

#### I. Introduction

The Pueblo of Laguna (“Pueblo”) submits this jurisdictional statement as part of the Pueblo’s application for approval under Section 518(e) of the Clean Water Act (“CWA”), 33 U.S.C. § 1377(e), to administer water quality standards pursuant to CWA § 303, 33 U.S.C. § 1313 and for a determination of eligibility for a grant under CWA § 319(h), 33 U.S.C. § 1329(h), for the purpose of administering a Non-Point Source Management Program.

The Pueblo of Laguna covers approximately 530,000 acres in west-central New Mexico and is comprised of six villages located along the Rio San Jose and its tributaries and along the Rio Puerco.<sup>1</sup> Its capital, the Village of Laguna, is located off of Interstate-40 some 55 miles west of Albuquerque. The name “Laguna” comes from the Spanish word for lake, and the Spanish word “Pueblo” means a village or community. The Pueblo’s name in the Keresan language, Ka-Waika-Mah, similarly means people from or of the lake. So it is fitting that the Pueblo is seeking federal approval of its water quality standards.

The map attached as Exhibit A (“Jurisdictional Map”) shows the boundaries of the formal Laguna Indian Reservation and four parcels of Pueblo trust land located outside the formal Reservation boundaries (comprising the Speedway property). All the lands within the formal Reservation boundaries are trust land and Pueblo fee land except for a small checkerboard area in the southern portion of the reservation and a few private fee parcels in the northwest, as shown on the Jurisdictional Map.

The Pueblo asserts regulatory authority and jurisdiction to implement a water quality standards program for all water resources within the formal Laguna Indian Reservation and on tribal trust land outside the formal Reservation boundaries.

#### II. Jurisdiction

##### A. **The Pueblo of Laguna has Jurisdiction over Water Resources within the Boundaries of the Formal Laguna Indian Reservation**

The original Spanish land grant to the Pueblo dates from 1689 and centers around the village of Old Laguna. The federal Court of Private Land Claims confirmed the land grant in 1898, and it ultimately was patented to the Pueblo on November 15, 1909.<sup>2</sup> Other land grants, Acts of Congress, Executive Orders, and purchases by the Pueblo with conveyances in trust to the United States have brought the formal Laguna Indian Reservation to its current size, as shown on the Jurisdictional Map; the formal Reservation additionally includes within its boundaries a scattering of state trust land, Indian allotments, BLM land, and non-Indian-owned fee land.<sup>3</sup>

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<sup>1</sup> The six villages are Seama (the farthest western), Paguante, Encinal, Paraje, Laguna, and Mesita (the farthest east).

<sup>2</sup> The Court of Private Land Claims was established by Congress to resolve land claims guaranteed by the Treaty of Guadalupe Hidalgo; it operated from 1891-1904.

<sup>3</sup> The formal Laguna Indian Reservation includes six trust properties added to the Reservation after approval of the Pueblo’s CWA § 106 Application in 2002. All of these properties were officially proclaimed by the Secretary of the Interior to have formal reservation status and so they are included within the boundaries of the formal Reservation on the Jurisdictional Map. They are: the Grady Day and Bowlin South properties, described and proclaimed as reservation in 72 Fed. Reg. 16816 (April 5, 2007); Mount Taylor Ranch property, 73 Fed. Reg. 7582 (February 8, 2008); Shalit property, 74 Fed. Reg. 13454 (March 27, 2009); the Bowlin North property, 76 Fed. Reg. 41513 (July 14, 2011); and the Silver Dollar Ranch, 77 Fed. Reg. 49455 (August 16, 2012). EPA acknowledged the first five of these properties as part of the formal Reservation in its revised CAA § 505(a)(2) approval (Oct. 31, 2011), at 5 n.1. The Silver Dollar Ranch had not yet been formally declared reservation but had been taken into trust as of the date of the CAA Approval. See Appendix A to EPA’s Revised CAA § 505(a)(2) TAS Approval (including warranty deed dated Sept. 24, 2011 confirming the trust status of the Silver Dollar Ranch).

All water resources on these lands are “within the borders of an Indian reservation” under CWA § 518(e)(2), and so they are subject to the Pueblo’s jurisdiction for purposes of administering a water quality standards program under CWA § 303. CWA § 518(e) authorizes EPA to treat an Indian tribe as a state for purposes of CWA § 303, among other provisions of the Act, if:

the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

CWA § 518(h)(1), in turn, defines a “federal Indian reservation” as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.” The Pueblo of Laguna thus has regulatory authority and jurisdiction for purposes of a water quality standards program over all water resources within the formal Reservation, notwithstanding land status within the formal Reservation boundaries.

### **1. The Spanish land grant is “reservation”**

The Laguna Indian Reservation is considered a “reservation” even though it partially consists of a Spanish land grant. The Supreme Court has held that such Pueblo fee lands are Indian country, equivalent to reservations with regard to jurisdiction and the federal-tribal relationship. *See, e.g., United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

EPA itself has stated, in its final rule establishing requirements for “treatment as a state” (“TAS”) applications under CWA §§ 308, 309, 401, 402, and 405, that “the meaning of the term ‘reservation’ must, of course, be determined in light of statutory law and with reference to relevant case law.” 56 Fed. Reg. 64876, 64881 (Dec. 12, 1991) (“Final Rule”). Accordingly, EPA has granted TAS under the CWA for at least ten other Pueblos. Regarding the TAS applications for the Pueblos of Pojoaque and Isleta, which were two of the first Pueblo applications made, EPA’s Office of General Counsel explained that:

[A] pueblo and a reservation are identical in many important respects. Each is an area of land, formally recognized by the United States, over which the Tribe exercises jurisdiction. The type and extent of jurisdiction a Tribe exercises over a pueblo is equivalent to that it would exercise over a reservation. *U.S. v. Chavez*, 290 U.S. 357 (1933); *U.S. v. Sandoval*, 231 U.S. 28 (1913). The mere fact that Congress designates an Indian settlement by a term other than “reservation” does not establish that the settlement is legally distinct from a reservation. *U.S. v. McGowan*, 302 U.S. 535, 538-39 (1938). Further, the fact that the Tribe holds title to the pueblo in fee, rather than having title held in trust for the Tribe by the United States is not an obstacle to reservation status. *Indian Country, U.S.A. v. Oklahoma Tax Commission*, 829 F.2d 967, 975 (10th Cir. 1987). In our research on this issue, we were unable to identify any Court of Appeals decision holding or suggesting that a reservation is distinct from a pueblo for any purpose relevant to treatment as a State under the Clean Water Act. Consequently, the Agency concludes that, for purposes of Section 518(h)(2), a pueblo is functionally equivalent to a reservation. Thus the Pojoaque [Isleta] Pueblo is eligible for treatment as a State under the Clean Water Act.<sup>4</sup>

EPA also has specifically recognized Pueblos as “reservations” for purposes of the Clean Air Act. 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998) (Pueblos are “reservation” under CAA § 301(d)(2)(B)). Accordingly the Pueblo

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<sup>4</sup> Memorandum regarding Application of the Pojoaque Pueblo for Treatment as a State under Section 106 of the Clean Water Act (September 26, 1989), from Gerald H. Yamada, Acting General Counsel, to Rebecca Hammer, Acting Assistant Administrator for Water, at 3; Memorandum regarding Application of the Pueblo of Isleta for Treatment as a State under Section 106 of the Clean Water Act (May 3, 1990), from George R. Alexander, Jr., Regional Counsel, to Myron Knudson, Director, Water Management Division, at 3.

may assert regulatory authority and jurisdiction over the water resources found in the Spanish land grant portions of the Laguna Indian Reservation under CWA §§ 303 and 518(e).

**2. The parcels of state trust land, BLM land, and non-Indian-owned fee land within the formal Reservation boundaries also are “reservation”**

CWA § 518(h) specifically defines “reservation” to include “all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent and including rights-of-way” (emphasis added). *Accord* 18 U.S.C. § 1151(a) (definition of “Indian country”). *See also* 63 Fed. Reg. at 7258 (in approving TAS under the CAA, “EPA will consider lands held in fee by nonmembers within a Pueblo to be part of a ‘reservation’ under 40 CFR 49.6(c) and 49.7(a)(3).”). Thus, the few areas of state trust land, BLM land, and non-Indian-owned fee land within the boundaries of the formal Reservation, as shown on the Jurisdictional Map, are subject to Pueblo jurisdiction under CWA §§ 303 and 518(e).

**B. The Pueblo of Laguna has Jurisdiction over Water Resources on Trust Land outside the Boundaries of the Formal Laguna Indian Reservation**

The Speedway property is located outside the boundaries of the formal Reservation but consists entirely of tribal trust land.<sup>5</sup> The property consists of four parcels totaling approximately 1,270 acres and is located between the formal Reservation and the Tohajiilee (formerly Canoncito) Indian Reservation, north and west of the former Shalit property, as shown on the Jurisdictional Map.

These trust parcels are equivalent to “reservation” under 18 U.S.C. § 1151(a) and therefore are subject to Pueblo jurisdiction under CWA § 518(e). *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *United States v. John*, 437 U.S. 634, 648 (1978); *United States v. McGowan*, 302 U.S. 535 (1938); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 454-55 & n.8 (finding “tribal land” to include tribal trust land). As the Court explained in *Potawatomi*, 498 U.S. at 511:

In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated “trust land” or “reservation.” Rather, we ask whether the area has been “‘validly set apart for the use of the Indians as such, under the superintendence of the Government.’” *Id.*, at 648-649; *see also United States v. McGowan*, 302 U.S. 535, 539 (1938). . . . As in *John*, we find that this trust land is “validly set apart” and thus qualifies as a reservation for tribal immunity purposes. 437 U.S., at 649.

EPA relied on this case law when it stated in its TAS rule under CWA §§ 303 and 401 (“CWA TAS Rule”), 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991), that:

EPA considers trust lands formally set apart for the use of Indians to be “within a reservation” for purposes of section 518(e)(2), even if they have not been formally designated as “reservations.” [Citing *Potawatomi*.] This means it is the status and use of the land that determines if it is to be considered “within a reservation” rather than the label attached to it.

Thus, land held in trust for the Pueblo outside the formal Reservation boundaries (the Speedway property, as well as any other land that may be held in trust in the future) is also considered “reservation.”

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<sup>5</sup> The warranty deed for the Speedway property (dated March 15, 2011) confirming the trust status of the property was included in Appendix A to EPA’s Revised CAA § 505(a)(2) TAS Approval for the Pueblo (10/31/11).

**C. The Pueblo of Laguna has Jurisdiction over all Non-Indian Activities within the Reservation that May Impair Pueblo Waters**

EPA stated in its CWA TAS Rule, 56 Fed. Reg. at 64,879, that:

a tribal submission . . . will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, . . . and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this initial burden, EPA will . . . presume that there has been an adequate showing of tribal jurisdiction of fee lands.

The Pueblo of Laguna demonstrates below that it meets all three of these criteria.

**1. The Importance of Water Quality to the Pueblo of Laguna**

The Laguna people have always been farmers, livestock tenders, and caretakers of the land, and so are dependent on Pueblo waters and have a keen interest in protecting and maintaining the quality of those waters. Protection of water quality is all the more important because the Pueblo is located in a semi-arid climate zone and receives on average only 8.9 inches of precipitation per year across the majority of Pueblo lands; water is thus in limited supply. Moreover, drinking water by and large comes from shallow surficial aquifers and surface water springs (except for springs in the Encinal Canyon), and therefore is vulnerable to surface water contamination.

In addition to agricultural and livestock-watering uses, the Pueblo uses its waters for domestic water supply, recreation, wildlife watering, and groundwater recharge, and various fisheries also depend on Laguna waters. The Pueblo also uses some of its waters for cultural and traditional purposes, some of which depend on the water being as pristine as possible. Partly for that reason the Laguna Water Quality Standards (“LWQS”) designate certain waters as “Outstanding Tribal Resource Waters,” and these waters are held to drinking water standards – under the LWQS, that designated use means the waters must be pure enough to ingest without any treatment – and they are provided maximum protection.

**2. Pueblo Waters and Critical Habitat are Subject to Protection under the Clean Water Act**

The LWQS apply as a matter of tribal law to both surface water and groundwater within the Pueblo. LWQS § 11-2-3(A)(43) (definition of “Pueblo Waters”). For purposes of the Pueblo’s TAS Application and this Jurisdictional Statement, however, the Pueblo recognizes that the CWA applies largely to surface water and that EPA therefore may be authorized to approve TAS for the Pueblo’s surface water quality standards only. The definition of “Pueblo Waters” in the LWQS includes all surface waters covered by the CWA. *Id.* The Jurisdictional Map shows all the surface waters within the formal Laguna Indian Reservation and the two trust land properties discussed above that are subject to protection under the Clean Water Act.

**3. Impairment of Pueblo Waters by Non-Indian Activities Would Have a Serious and Substantial Effect on the Political Integrity, Economic Security, and Health and Welfare of the Pueblo and its Members**

Many activities conducted on the Pueblo impact Laguna water quality. The six Laguna villages contain homes, schools, stores, and restaurants, all of which have impacts on water quality, such as from septic tank operations. Gas stations on the reservation have the potential to significantly impair water resources, for example from spills from gasoline tank-filling and dispensing activities and leaks or other releases from underground or

aboveground gasoline storage tanks. Similarly, the El Paso Natural Gas and TransWestern compressor stations within the reservation, and associated portions of natural gas pipelines, pose the threat of spills and leaks into Laguna waters. A railway line crosses the Reservation, and spills from rail cars have the potential to threaten Laguna water quality. Activities leading to the loss of riparian habitat (particularly agriculture and increased development), grazing, and mining have already resulted in the elevation of water temperatures, the introduction of nutrients and pathogens (such as fecal coliform), eutrophication, and sedimentation. There also are two regulated point source dischargers within the Pueblo: the wastewater treatment facilities at the Dancing Eagle Casino, located on the Rio San Jose, and the Route 66 Casino on the Rio Puerco, respectively. These wastewater treatment facilities are operated by the Laguna Tribal Utility Authority.

There is no question that the Pueblo has jurisdiction, under its inherent sovereign authority, over all such activities conducted by tribal members. Non-Indians participate in these activities too, and the Pueblo's authority includes the authority to regulate such activities conducted by non-Indians. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 335 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-38 (1982). In certain circumstances, however, in order to regulate the activities of non-Indians, tribes must meet one of the two requirements first articulated in *Montana v. United States*, 450 U.S. 544, 565-66 (1981), known as the Montana test:

- (1) the non-Indians have entered into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or
- (2) the non-Indian conduct that the tribe seeks to regulate "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

EPA followed the Montana test in its CWA TAS Rule and clarified that, pursuant to the Court's opinion in *Brendale v. Confed. Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the effect of the conduct in question in the second Montana exception must be "serious and substantial." 56 Fed. Reg. at 64,878.<sup>6</sup> EPA then stated that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare" and indicated that the Clean Water Act itself constitutes a legislative determination that such activities have serious and substantial effects. *Id.* After all, as EPA noted:

the primary objective of the [Clean Water Act] "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" [CWA § 101(a)] and, to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants into the navigable waters of the U.S. and attaining a level of water quality which is fishable and swimmable [CWA § 101(a)(1)-(2)]. Thus the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts.

*Id.* See also *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government.").

In addition, EPA noted that "clean water, including critical habitat . . . , is absolutely crucial to the survival of many Indian reservations," and that

Because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairments on non-Indian fee land within a reservation

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<sup>6</sup> EPA confirmed the continued applicability of the Montana test in guidance issued to both EPA Headquarters and EPA Regional Offices. Memorandum dated March 19, 1998 from Robert Perciasepe, Assistant Administrator for the National Indian Program, and Jonathan Z. Cannon, General Counsel, to Assistant Regional Administrators, at 5 and Attachment C; Memorandum dated January 23, 2008 from Marcus Peacock, Deputy Administrator, to Assistant and Regional Administrators, Attachment C. See also *Montana v. EPA*, 941 F. Supp. 945 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir. 1998) (upholding EPA's reliance on the Montana test in its approval of the application of the Confederated Salish and Kootenai Tribes for eligibility under CWA § 303).

with those on tribal portions. . . . This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality.

*Id.*

Making a distinction between water quality on Indian and non-Indian land would be especially difficult here, where, as discussed in Part II.A and as shown on the Jurisdictional Map, there are only a few areas of non-Indian fee land within the reservation and they are either totally surrounded by Pueblo land or checkerboarded with Pueblo land. As a result, impairment of water quality by non-Indian activities on non-Indian fee land cannot help but impair the water quality of neighboring Pueblo lands inhabited by Pueblo members. For example, the upper Rio Paguete passes through the Seboyetta Land Grant, where cattle-ranching takes place and may impair the river's water quality, but the river then continues back onto Pueblo land. Similarly, the Rio San Jose passes along the Highland Meadows/Correo residential area, which is subject to livestock, agricultural, residential, and small business uses, but then continues its flow on Pueblo land. The Rio Puerco (livestock uses) and Rio Salado (livestock and possibly mining) both form boundaries between the reservation and non-Indian land, thereby affecting Indians and non-Indians alike. This interrelationship between waters on Pueblo lands and on non-Indian lands within the reservation means that the Pueblo must be able to regulate water quality on those non-Indian lands in order to exercise self-governance, allow for economic development requiring clean water (such as the casinos, hotels, and restaurants on the reservation) and so promote economic security, and ensure that Pueblo members and other residents of the Pueblo will have the clean water necessary to their health and welfare.

In *Montana*, the Court required the tribe to meet the Montana test with regard only to non-Indian fee land within the reservation, *see* 137 F.3d at 1141, and the Pueblo maintains that this is the only situation where the Montana test applies. Thus EPA should determine that the second Montana exception has been sufficiently met for purposes of the Pueblo's assertion of regulatory authority and jurisdiction under CWA § 518(e).

Moreover, even if EPA requires the Pueblo to demonstrate that non-Indian activities on tribal lands also meet the Montana test, due to an expansive reading of *Nevada v. Hicks*, 533 U.S. 353 (2001),<sup>7</sup> the Pueblo has already demonstrated above that non-Indian activities within the reservation have a sufficient effect on the health, welfare, political integrity and economic security of the Pueblo and its members to meet the second prong of the Montana test, regardless of the status of land on which the activities impairing water quality first occur. Further, to the extent that non-Indian activities take place on Pueblo trust or fee lands, it is likely that those activities would take place pursuant to a lease with the Pueblo or other consensual arrangement, thus meeting the first Montana exception set forth above.<sup>8</sup>

### **III. Conclusion**

The Pueblo of Laguna has demonstrated that the activities which it intends to conduct to administer a water quality standards program pursuant to CWA § 303 “pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian

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<sup>7</sup> In *Hicks*, the Court applied the Montana test to an incident involving state law enforcement officers that occurred on tribal trust land. *But see Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001) (“this case does not involve any question of the Tribe’s ability to restrict activities of state law enforcement authorities on the reservation, when those officials are investigating off-reservation crimes, and thus the rule of *Hicks* . . . is not implicated); *Hicks*, 533 U.S. at 358 n.2 (“We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”).

<sup>8</sup> The Supreme Court’s decision in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008), should not affect this Montana analysis because in *Plains Commerce* the Court found that the bank’s sale of non-Indian fee land was not “conduct” under *Montana*, so that the Montana test did not apply. *See, e.g., id.* at 333-36. Hence, any discussion of the second prong of *Montana* was merely *dicta*.

reservation,” CWA § 518(e)(2), and that non-Indian activities taking place within the reservation and affecting water quality on the Pueblo may threaten or have a direct effect on the political integrity, economic security, or the health or welfare of the Pueblo and its members. The Pueblo therefore satisfies the jurisdictional requirements of CWA § 518(e) for purposes of administering water quality standards program under CWA § 303 for the formal Laguna Indian Reservation and Pueblo trust land outside the formal Reservation boundaries.

Respectfully submitted,

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## 6.0 ACRONYMS and ABBREVIATIONS LIST

BIA – Bureau of Indian Affairs

BMP – Best Management Practices

CAA – Clean Air Act

CERCLA – Comprehensive Environmental Response, Compensation and Liability Act - Superfund

CWA – Clean Water Act

ENRD – Environmental & Natural Resources Department

EPA – Environmental Protection Agency

GAP – General Assistance Program

NALEMP – Native American Land Environmental Mitigation Program

NRCS – Natural Resources Conservation Service

NMDOT – New Mexico Department of Transportation

NPS – Non-Point Source

Pueblo – Pueblo of Laguna

USACE – United State Army Corp of Engineers

WQS – Water Quality Standards