Attorney General's Statement

TEXT[1]

POINT 2: State Requirement that no permit will be granted if underground injection will endanger drinking water sources.

The regulations of the Water Quality Control Commission prohibit the approval of a discharge plan if the underground injection will endanger drinking water sources. See Point 2, Table 2 of this statement. The Commission has the authority to "grant an individual variance from any regulation of the commission, whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity." § 74-6-4.G NMSA 1978. The Commission's flexibility has not been extended to grant a variance when the resulting activity will endanger drinking water sources because the Commission has consistently taken the view that to allow water pollution at a place of reasonsably foreseeable use as human drinking water is not reasonable, regardless of the economic burden on the discharger.

Under the Water Quality Act, §§ 74-6-1 et seq. NMSA 1978, the Commission's primary charge is to "adopt, promulgate and publish regulations to prevent or abate water pollution in the state . . . ."

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1 Numbering of Points in this Text corresponds to numbering given in Table 2 of references USEPA Model Attorney General's Statement, UIC Program, Groundwater Program Guidance #16 dated July 31, 1981.

[Emphasis added.] § 74-6-4.D NMSA 1978. In making its regulations, the Commission is to consider: "(1) character and degree of injury to or interference with helth, welfare and property[.]" § 74-6-4.D, supra. Water pollution is defined as "introducing . . . into water . . . one or more water contaminants . . . [that] may with reasonable probability injure human health . . . or . . . unreasonably interfere with the public welfare . . . ." § 74-6-2.B NMSA 1978. The Commission has consistently taken the veiw that burdens which a regulation places on the discharger are reasonable when the effect is to protect a current or potential source of drinking water from water pollution.

There has been a concern expressed by EPA representatives that Section 74-6-12 C NMSA 1978 might inhibit the Water Quality Control Commission's abili[illegible] to carry out the underground injection control program. That Section states:

> "The Water Quality Act does not authorize the Commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters." [Emphasis added.]

As a practical matter, this section would not inhibit implementation of the UIC program by the State. Consultation with technical experts indicates that there is no known situation in New Mexico where ground

water pollution and its effects would be confined entirely within the boundaries of property within which the water pollution occurs and the water does not combine with other waters.

POINT 4: Authority to issue permits or rule

EPA has questioned the stringency of the Commission's permitting requirements for in situ extraction wells. The three specific points delineated below are in response to EPA concerns.

1. Financial assurance requirements are contained in subsection 5-102.B.1.d(10), 5-102.B.2 and 5-210.B.17 of the Commission regulations. The purpose of these financial requirements is to insure that there are adequate funds available to the State to perform remedial action to protect groundwater if activities required under the regulations are not complied with by the party establishing the financial assurance arrangements. For example, if a bonded individual abandoned a construction site where a well was partially or fully completed, the State would take appropriate necessary measures to insure that the secured funds were appropriated for reclamation and other remedial action required to comply with the regulations. Such action could include initial court action to place the funds in an escrow account and subsequent court action to designate the money for the remedial work. If a bond is held by another responsible governmental agency, under the provisions of subsection 5-210.B.17 of the Commission regulations, the State will immediately notify that

agency upon default or non-compliance by the secured party and take all appropriate measures to insure that the bonding agency uses the money for appropriate remedial action. Such action by the State might include court action against the responsible agency if attempts at cooperation are unsuccessful.

2. If the State becomes aware of a significant threat to water quality during the construction phase of a project, the Director of the Environmental Improvement Division has authority, under Section 74-6-11, NMSA 1978, to order "immediate abatement of the water pollution creating an emergency condition". This authority may continue if the Director seeks court action within 48 hours. If a human health threatening emergency does not occur, but a situation which would impair the State's ability to grant an approved discharge plan for the project does occur, the State will notify the applicant of that situation. Under Section 3-104 of the Commission's Regulations:

> Unless otherwise provided by these regulations, no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge plan approved by the director. When a plan has been approved, discharges must be consistent with the terms and conditions of the plan.

The commingling of aquifers resulting from improper drilling practices or other causes is considered a discharge under the regulations. A prudent discharger would not begin any activity such as well drilling or injection of contaminants into ground water prior to approval of its discharge plan since discharge plans, may not and will

not be approved unless the application fully complies with the regulations. All prelicensing construction activities are at the applicatns own risk and notice to that effect will be given to the applicant as appropriate.

3. Under Section 5-102.B.4 and 3-108 of the regulations, there is substantial opportunity for public participation in the discharge plan review process. Any member of the public who is dissatisfied with the conduct of the reviewing agency, pursuant to these sections, may file an action in State court requesting relief. The State Mandamus Law, Section 44-2-1 et seq., NMSA 1978, allows the issuance of a Writ of Mandamus to compell "the performance of an Act which the law specifically enjoins as a duty resulting from an office, trust or station". Section 44-2-4 NMSA 1978. If the Commission or one of the Division's fails to perform a duty under the regulations a Writ of Mandamus could be requested.

POINT 5: Underground injection permits in New Mexico do not convey property rights.

Section 74-6-12.A NMSA 1978 specifically states:

> The Water Quality Act does not grant to the [Water Quality Control] commission or to any other entity the power to take away or modify property rights in water . . . .

Neither the Commission, nor any of its constituent agencies, can take away or modity property rights. A corollary is that neither can any of these entities grant or create property rights. Although the statute addresses itself specifically to property rights in water, it is clear

from the statutory scheme that a permit (or discharge plan) is not a property right. Permits are issued for a limited period of time, not to exceed five years. § 74-6-5.F NMSA 1978. A permit application may be denied, § 74-6-5.D, and, once granted, it may be modified or terminated. § 74-6-5.J Most importantly, the permittee is not relieved from complying with the Water Quality Act and applicable regulations. § 74-6-5.I. Had the legislature intended that a permit under the Water Quality Act would constitute some sort of property right, it would have so indicated. Instead, the contrary intent is indicated in § 74-6-12.A, supra. Moreover, to construe a permit as a property right would contradict the legislative intent of § 74-6-5.D, F, I, and J., supra. Permits issued pursuant to the Water Quality Act do not constitute property rights.

POINT 7: State authority to immediately restrain dangerous injections.

(a) The EID has the authority unfrt §§ 74-7-10 and 11 NMSA 1978 to immediately restrain any person from engaging in any unlawful activity which is endangering or causing damage to public health or the environment. § 74-6-11 NMSA 1978 states in part:

> [I]f any person is causing or contributing to water pollution of such characteristics and duration as to create an emergency which requires immediate action to protect human health, the director of the . . . [environmental improvement division] shall order the person to immediately abate the water pollution . . . .

If the director of the division wishes the order to continue beyond forty-eight hours, he may seek a temporary restraining order or injunction in district court. Id.

The OCD has authority to restrain by order or injunction any individual from engaging in any activities in violation of the Geothermal Resources Conservation Act. Section 71-5-20 of that Act provides in part:

> Whenever it shall appear that any person is violating, or threatening to violate, any statute of this State with respect to the conservation of geothermal resources, or any provision of the Geothermal Resources Conservation Act, or any rule, regulation or order made thereunder, the [Oil Conservation] Division through the Attorney General, shall bring suit against such person . . . . In such suit the Division may obtain injunction, prohibitory or mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant. . . ."

The MMD has authority to restrain by order any individual from engaging in any activities in violation of the Surface Mining Act which activities create imminent danger to public health or the environment. § 69-25A-25.A NMSA 1978. Failure to comply with a cessation order could result in an injunction under § 69-25A-25.E NMSA 1978.

Other authority from all the agencies is found in § 30-8-8 NMSA 1978, which allows a public officer to bring a civil action in the name of the state to abate a public nuisance. The type of civil action contemplated under this section includes an injunction. See, State ex rel Marron v. Compere, 44 N.M. 414, 103 P.2d 273 (1940). The knowing

and unlawful introduction of a substance into the groundwater "causing it to be offensive or dangerous for human or animal consumption or use" is a public nuisance. § 30-8-2 NMSA 1978. An unauthorized discharge which is endangering the environment would be within the purview of at least one of the statutes mentioned in this discussion.

(b) There is no requirement in the Water Quality Act the Geothermal Resources Conservation Act, the Surface Mining Act, or in the regulations promulgated pursuant to those acts, that a permit be revoked before a suit can be instituted to enjoin compliance with the permit or the regulations.

(c) The State can seek civil penalties of up to $5,000.00 per day for violations of § 74-6-5 NMSA 1978 of the Water Quality Act. See, § 74-6-5.Q. Under this statute, conditions may be imposed on permits. A violation of a condition of a permit would be considered a violation of § 74-6-5. For all wells covered under the Surface Mining Act (see Table 1 of this statement), the State can seek civil penalties of up to $5,000.00 per day for violations of a permit. § 69-25A-22.A NMSA 1978. Section 71-5-23 NMSA 1978 provides for a civil penalty for violation of the Geothermal Resources Act or the rules and regulation promulgate thereunder of not more than $2,500.00 per day for each violation.

Criminal penalties may be sought by the State under the pertinent acts. Section 74-6-5.P of the Water Quality Act authorizes the imposition of a criminal fine of up to $10,000.00 per day for a violation of a permit, as does § 69-25A-22.E of the Surface Mining Act.

Under the Geothermal Resrouces Conservation Act, any knowing and willful violation of a statute or regulation shall subject the violating party to the possibility of a criminal fine in the amount of $5,000.00 per day for each violation. This penalty is set forth in § 71-5-23.B and C.

(d) The civil penalties provided are flexible. Section 74-6-5.Q, of the Water Quality Act, states that the civil penalty imposed is not to exceed $5,000 per day. Similar wording is found in § 69-25A-22.A of the Surface Mining Act. As is the case with the other two acts, the Geothermal Resrouces Act, specifically, § 71-5-23, sets forth the maximum penalty and does not require that this maximum penalty be imposd. The State could request any civil penalty less than the statutory maximums and tailor its request so as to be appropriate to the violation. The court also has the discretion to adjust penalties as appropriate.

(e) Public participation in court enforcement actions is provided by means of Rule 24(a) of the Rules of Civil Procedure, NMSA 1978, which allows for intervention of right in civil actions in the state district courts. N.M.R. Civ. Pro. 24(a) is similar to Rule 24(a) of the Federal Rules of Civil Procedure.

None of the remedies specified in 40 CFR 123.9(a)(1), (2) and (3) would be obtained through administrative action. Nevertheless, the public may participate in administrative hearings on discharge plans, if the Water Quality Control Commission finds the hearing is affected

with a substantial public interest. § 74-6-5.M NMSA 1978. See, WQCC Reg. 3-112.

POINT 13: State jurisdiction over persons injecting on federal lands and over federal agencies injecting underground.

Under the Water Quality and the Geothermal Resources Acts, the State of New Mexico has jurisdiction over injections on federal lands, and over federal agencies. The Water Quality Control Commission's regulations define "person" as:

> the state or any agency, institution, commission, municipality, or other political subdivision thereof, federal agency, public or private corporation, individual, partnership, association or other entity and includes any officer or governing or managing body of any institution, political subdivision, agency or public or private corporation[.]

WQCC Reg. 1-101.Q. Moreover, the Commission is charged with the duty of "promulgat[ing] . . . regulations to prevent or abate water pollution in the state . . . ." § 74-6-4.D NMSA 1978. There is no limitation in this statute excluding federal lands from the authority of the Commission.

Section 71-5-3(h) of the Geothermal Resources Act defines person so as to include within its terms persons conducting injection operations on federal lands, and federal agencies. That defition states:

> "Person" means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity of the United States or any agency or instrumentality thereof, the State of New Mexico or any political subdivision thereof.

The Mining and Minerals Division asserts jurisdiction over federal agencies pursuant to Executive Order 2380 which instructs all federal agencies to comply with state and local environmental provisions. The Division regulates coal surface mining and reclamation on federal lands in New Mexico under an agreement between the State of New Mexico and the Office of Surface Mining of the Department of the Interior. 45 Fed. Reg. 53.128 (Aug. 11, 1980). This agreement will be renewed. See, 46 Fed. Reg. 40,050 (Aug. 6, 1981).

State jurisdiction over injections conducted by federal agencies is not precluded by the federal Safe Drinking Water Act. The Act states:

> Each Federal agency . . . engaged in any activity resulting, or which may result in, underground injection which endangers drinking water . . . shall be subject to, and comply with all . . . State . . . requirements . . . . This subsection shall apply, not withstanding any immunity of such agencies, under any law or rule of law.

SDWA § 1447(a).

POINT 14: Jurisdiction over non-Indian activities on Indian land.

The EID asserts that the State of New Mexico has authority to regulate injection wells on lands within the State but also lying within Indian reservations or territories. In determining whether a state has jurisdiction over different activities on Indian lands, courts have used a two-pronged test. Under this test, the state is considered to have jurisdiction unless 1) jurisdiction over this type

of activity on Indian land has been pre-empted by the federal government, or 2) the assertion of jurisdiction by the state over this activity would interfere with tribal self-government. Organized Villages of Kake v. Egan, 369 U.S. 60 (1962); Willims v. Lee, 358 U.S. 217 (1959); Norvell v. Sangre de Cristo Development Co., 372 F. Supp. 348 (D.N.M. 1974), rev'd on other grounds, 519 F.2d 370 (10th Cir. 1975).

> [C]ongress has plenary powers over all Indian affairs and can, if it so desires, preclude state jurisdiction. Where federal statutes and regulations issued pursuant thereto entirely comprehend a subject, there can remain no room for state laws imposing additional burdens on that subject. In the absence of governing acts of Congress, the resolution of whether a given state action is permitted depends on whether it infringes upon the right of the Indians to make their own laws and be ruled by them.

Norvell, supra at 353-54. No argument can be made that state regulation of underground injections by non-Indians lessees on Indian lands would interfere with tribal self-government.[2] Without the express delegation of Congress, no Indian tribe has power beyond that necessary to protect its self-government or control internal relations. Montana v. United States, 101 S. Ct. 1245 (1981). The remaining question is whether the area has been pre-empted by federal statutes and regulations.

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[2] While the question might be more complicated if the Indians themselves were injecting, it is unlikely that Indians will be operating the types of wells relevant to the UIC program.

The United States Supreme Court clearly employed the test of federal pre-emption in Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965). In deciding that the State of Arizona could not levy a 2 per cent gross income tax on a federally licensed trading post located on an Indian reservation, the Court noted the pervasive federal regulation of Indian traders and reasoned that, in such circumstances, it was inappropriate for the state to regulate the same entity. The Court wrote:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on the traders.

Id. at 690. There are no federal statutes and regulations governing underground injections on Indian lands comparable to those in the Warren Trading Post case. Although the Federal Safe Drinking Water Act (SDWA), as amended, and EPA regulations adopted pursuant to it set up a federal scheme for regulating underground injections, the Act allows the states to assume primary enforcement responsibility and is silent on whether the states or the federal government should enforce such regulations on Indian lands. It is specifically stated that: "Nothing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian Lands or water rights . . ." § 1447(c)(1) of the SDWA. The SDWA and attendant regulations of EPA cannot be considered as evidence of federal

pre-emption. As there are no other federal acts and regulations which could be considered to pre-empt the regulation of underground injections on Indian Lands, the federal government has not pre-empted this area; and the State may regulate it.

The State has not renounced jurisdiction over Indian lands. This is so despite the disclaimer in the New Mexico Enabling Act, 36 Stat. 557 (Ch. 310), where the State disclaimed all right and title to, and the United States retained absolute jurisdiction and control over, lands held by the Indians. In Village of Kake, supra., the United States Supreme Court, interpreting a similar disclaimer found in the Alaska Statehood Act, concluded that absolute jurisdiction is not necessarily exclusive jurisdiction, and that such a disclaimer does not automatically preclude the exercise of state authority. Village of Kake, supra., is good authority for the proposition that the disclaimer in the New Mexico Enabling Act does not automatically prohibit state regulation of activities on Indian lands in the state.

Nor did the State renounce authority over Indian lands in Article XXI, § 2 of the Constitution of New Mexico which states in part:

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to . . . all lands lying within [the boundaries of the state] . . . owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States. . . .

The courts have interpreted this article as a disclaimer or proprietary interest, rather than of governmental control, by the state. Norvell, supra; Sangre de Cristo Development Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972).

The State's failure to act under Public Law 280 to assert jurisdiction over Indian lands is irrelevant in considering whether it can act to regulate non-Indian activities which affect the health and welfare of citizens of New Mexico. The Court in Norvell, supra., while noting that New Mexico was not a Public Law 280 state, failed to ascribe any importance to this fact in determining that certain state laws, among them, the New Mexico Water Quality Act, applied to a non-Indian lessee developing and operating a housing development for non-Indians on Indian land. In reaching its decision, the Court noted that the laws which the state wished to apply were designed to protect and promote the health and welfare of the citizens of New Mexico, and that New Mexican citizens would be affected if the State's regulations were not implemented. This consideration is also relevant in the regulation of underground injections.

While the possibility exists that New Mexico's assumption of authority might be challenged in court, this possibility is not a sufficient reason for the EPA to deny EID's application to regulate underground injection on Indian lands. The uncertainty of the extent of state authority over Indian lands is not limited to New Mexico, but exists in all states having Indian lands within their boundaries.

The State of New Mexico has maintained, and continues to maintain, that under the two-prong test, it clearly has jurisdiction to regulate activities on Indian lands. (See the attached xeroxed copies of two Attorney General's Opinions.) This view has been endorsed in the federal district court in New Mexico. Norvell, supra. Acting on its assertion of jurisdiction, the state currently issues permits regulating various activities by non-Indians on Indian lands.

POINT 17: State authority to submit information to EPA upon request.

The EID has the authority under the Water Quality Act to turn over information it obtains from the dischargers to the EPA upon request. The Act requires all information obtaind by EID to be made available to the public, except information divulging methods or processes entitled to protection as trade secrets. § 74-6-12.B, NMSA 1978. That act contains no restriction on intergovernment exchange of information as long as the states confidentiality requirements are complied with.

CONCLUSION

The Water Quality Act, the Geothermal Resources Act, the Surface Mining Act, and the regulations adopted pursuant to these acts, provide adequate authority to the State of New Mexico to regulate the four classes of wells specified in 40 C.F.R. § 122.32 in conformance with

the federal requirements.

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The above Assistant and Deputy Attorneys General have full authority to represent the state in court on matters pertaining to the State Underground Injection Control Program.

TABLE 1--SUMMARY OF NEW MEXICO ACTS APPLICABLE TO AND ADMINISTRATIVE AGENCIES RESPONSIBLE FOR UNDERGROUND INJECTION CONTROL

	NM STATUTORY AUTHORITY				NM ADMINISTRATIVE AGENCY		
EPA UIC WELL CLASSIFICATION (40 CFR, PART 146.05)	WATER QUALITY ACT (74-6-1 through 74-6-13 NMSA 1978)	OIL AND GAS ACT (70-2-1 through 70-2-38 NMSA 1978)	GEOTHERMAL RESOURCES CONSERVATION ACT (71-5-1 through 71-5-24 NMSA 1978)	SURFACE MINING ACT (69-25A-1 through 69-25A-35 NMSA 1978)	EID[1] (ALL WQCC REGS)	OCD[1]	CSMB[1]
Class I	X	--	--	--	X	X[2] (WQCC REGS)	--
Class II	--	X	--	--	--	X (OIL & GAS RULES)	--
Class III	X	--	--	--	X	X[2] (WQCC REGS)	--
Class IV	X	--	--	--	X	X[2] (WQCC REGS)	--
Class V (1)	X[3]	--	--	--	X	--	--
(2)	X[3]	--	--	--	X	--	--
(3)	X	--	--	--	X	X[2] (WQCC REGS)	--
(4)	X	--	--	--	X	--	--
(5)	X	--	--	--	X	--	--
(6)	X	--	--	--	X	--	--
(7)	X	--	--	--	X	--	--
(8)	X[3]	--	--	--	X	--	--
(9)	X[3]	--	--	--	X	--	--
(10)	X	--	--	--	X	--	--
(11)	X	--	--	--	X	--	--
(12)	--	--	X	--	--	X (GEOTHERMAL RULES)	--
(13)	X	--	--	--	X	--	--
(14)	X	--	--	--	X	--	--
(15)	X	--	X	X	X	X (WQCC REGS OR GEOTHERMAL RULES)	X (SURFACE COAL MNG REGS)
(16)	X	--	--	X	X[4]	X[4] (WQCC REGS)	X (SURFACE COAL MNG REGS)

1. Abbreviations: CSMB - Coal Surface Mining Bureau of the Mining and Milling Division, Energy and Minerals Department
   EID - Environmental Improvement Division of Health and Environment Department
   OCD - Oil Conservation Division of the Energy and Minerals Department
   WQCC - Water Quality Control Commission
2. The OCD administers WQCC Regulations as they pertain to discharges at refineries and natural gas transmission lines, and solution mining of salt.
3. The WQCC Regulations cover all domestic septic and cesspool systems with capacity of 2,000 gallons per day or more (20 persons @ 100 gallons per day), and all non-domestic systems (any quantity).
4. No injection wells for lignite, tar sands or oil shale are currently in existence in New Mexico; oil shale wells will be regulated by the WQCC Regs, lignite wells by the CSMB, and tar sands by the EID.

TABLE 2--FEDERAL REQUIREMENTS AS REFERENCED IN EPA'S MODEL ATTORNEY GENERAL'S STATEMENT OF JULY 31, 1981, WITH THE EQUIVALENT SECTIONS OF NEW MEXICO ACTS AND REGULATIONS[1]

Federal Requirement	State Statute N.M.S.A., 1978	Regulation for effluent disposal wells and in situ extraction wells (Classes I, III and IV)	Regulation for injection wells (Class V)
1. Prohibition of Unauthorized Injection			
Federal law prohibits any underground injection unless authorized by permit or rule (Section 1421(b)(1)(A) of the Safe Drinking Water Act (SDWA) and 40 CFR 122.33).	74-6-2.G 74-6-4.I 74-6-5.A 71-5-8.L 69-25.A-11	1-201 5-101.B	1-201 3-104 5-300
2. Prohibition of Endangering Drinking Water Sources[2]			
a. State authority, which provides authorization of underground	74-6-4.D 74-6-5.I	5-101.A[3] 5-102	3-106.C 3-109.C

[1] All regulations on this chart are those of the New Mexico Water Quality Control Commission (WQCC). The Environmental Improvement Division and the Oil Conservation Division administer the WQCC Regulations with reference to the classes of wells set out in Table 1. Authority over Class II injection wells regulated by the Oil Conservation Division (OCD) is addressed in the primacy submission to EPA by the OCD under Section 1425 of the Safe Drinking Water Act. Please see Table 2 in the program description for additional cross-references between the Federal Regulations and N.M. provisions.

[2] See program description on equivalency of federal definition of "source of drinking water" and New Mexico's use of "water having 10,000 mg/l or less TDS"

[3] The burden of proving that the discharge plan complies with the requirements of the regulations is on the discharger, for all types of wells regulated under the regulations. Reg. 3-106.C; see Reg. 5-210.B. In addition, Regs. 5-203.B., 5-204.B., 5-205.A.1., 5-207 and 5-209.A place the burden of showing specific criteria are met on the discharger with respect to effluent disposal and in situ extraction wells. Reg. 5-102.A specifies the burden of showing that the discharge will be in compliance with the regulations must be met before the Director may approve a discharge plan for an effluent disposal well. Failure to include in situ extraction wells in this section does not obviate the requirement of burden of proof with respect to in situ extraction wells. The other regulations cited above applying to in situ extraction wells make it clear that the burden of proof required to obtain an approved discarge plan is on the discharger.

injection by permit, shall require the the applicant for a permit to inject must satisfy the State that the underground injection will not endanger drinking water sources (Section 1421(b)(1)(B)(i)).		3-109.C See text for discussion of variances.	
b. The SWDA requires that a State program, in the case of a program which provides for authorization by rule, include the prohibition that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources within the meaning of Section 1421(d)(2) (Section 1421(b)(1)(B)(ii)).	74-6-4.D	Not Applicable	3-106.C 3-109.C
3. Prohibition of Movement of Fluid into a USDW			
a. The Federal program at 40 CFR 122.34(a) requires State programs to prohibit any authorization of underground injection by permit or rule, that causes or allow movement of any contaminant into a USDW, if the presence of that contaminant may cause a violation of any primary drinking water regulation or may otherwise adversely effect the health of persons.	74-6-4.D	3-109.E 5-101.A 5-104 5-203.B 5-203.D	3-109.E
b. Corrective action must be imposed if any such movement is occurring from any Class I, II or III well. (40 CFR 122.34(b), and 122.44).	74-6-5.A	3-109.E 5-203.B 5-203.D	Not Applicable
4. Authority to Issue Permits or Rule			
The SDWA requires State authority to issue permits or promulgate rules for underground injection not less stringent than regulations of the Environmental Protection Agency [Section 1422(b)(1)(A)(i) and 40 CFR Parts 122, 123, 124 and 146].	74-6-5.A	5-101 5-102	3-104 3-109.C 3-109.D 3-109.G

5. Authority to Condition Authorized Injection Activities			
The SDWA requires State authority to condition permits in accordance with conditions applicable to all permits (40 CFR 123.7(a)(1) through (a)(17), §§ 122.41 and 122.42).[1]	74-6-5.G 74-6-5.J 74-6-12.A	3-107.A 5-101.H See Table 2 in program description for list of state regulations meeting the federal requirements of 40 CFR parts 122 and 124 as set out in 40 CFR 123.7(a)(1)-(a)(17).	3-107.A 5-101.H
6. Authority to Impose Compliance Evaluation Requirements			
a. The SDWA requires the State to have authority for entry in or onto a site or facility for the purpose of inspections (Section 1421(b)(1)(C) and 40 CFR 123.8(c)).	74-6-9.F	3-107.D	3-107.D
b. The SDWA requires State authority to conduct inspection of facilities and activities subject to the program, and authority to require permittees and persons subject to authorization by permit or rule to conduct facility monitoring and reporting requirements in the manner prescribed by the Director (Section 1421(b)(1)(C) and 40 CFR 146.13, 146.23, and 146.33).	74-6-5.G 74-6-9.F	5-206 5-207 5-208	3-107.A
c. The SDWA requires State authority to require permittees and persons subject to the underground injection control regulations to keep all records and make all reports required by the Director (Section 1421(b)(1)(C) and 40 CFR 122.7(j)(2), 122.41(b) and 123.8).	74-6-5.G 74-6-9.B	3-107.A.7 5-207 See also Memorandum of Agreement for compliance evaluation.	3-107.A.7

[1] See Memorandum of Agreement concerning program reporting by the Director and treatment of confidential information. Additional comments concerning property rights are found in the Text of this Statement.

7. Authority for Enforcement Requirements	See text.	See text.	See text.
8. Authority for Public Participation in Permit Processing			
The Federal program requires State authority to allow for adequate public involvement and participation in permit processing, including draft permits (if applicable), public comment, public hearing (if applicable), and response to comments on the final permit (§ 123.7(a)(18) through (21).	74-6-5.E	3-108 5-102.B.4 5-101.F.5 See also Table 3 of program description, discussions under 40 CFR 124.17.	3-108
9. Authority to Apply Technical Criteria and Standards for the Control of Underground Injection not less Stringent than 40 CFR Part 146 (Section 1421(a)(1) and (b)(1)).	74-7-4.D	Part 5	Not applicable
10. Classification of Injection Wells			
a. The State must have the authority to regulate all classes and types of wells as required for an underground injection control program (Section 1421(a)(1) and (b)(1), and 40 CFR 122.32).	See Table 1 of this Statement	See Table 1 of this Statement	See Table 1 of this Statement
b. If the State program is not applicable to one or more classes of injection wells because there are no such wells within the State, the State:	Not applicable because State has authority to regulate all classes of injection wells. See Table 1.		
(1) must have the authority explicitly banning new injections for that class (classes) not covered by the State program, or certify that such new injections cannot legally occur until the State has developed an approved program for that class (classes) (40 CFR 123.51(d), and			
(2) must demonstrate that there are no underground injections for those one or more classes of wells within the State.			

11. Elimination of Certain Class IV Wells			
a. The State must prohibit the construction of any Class IV well for the injection of hazardous waste directly into an underground source of drinking water (USDW) (40 CFR 122.36(a)(1).	74-6-5.A 74-6-5.D	5-101.A 5-102.A	Not applicable
b. The State must prohibit the injection of a hazardous waste directly into a USDW through a Class IV well that was not in operation prior to July 24, 1980 (effective date of Part 146 pg. (42472) (40 CFR 122.36(a)(2)).	74-6-5.A 74-6-5.D	5-101.A	Not applicable
c. The State must prohibit any increase in the amount of hazardous waste or change in the type of hazardous waste injected into a well injecting hazardous waste directly into a USDW (40 CFR 122.36(a)(3)).	74-6-5.A 74-6-5.D	Not applicable	Not applicable
d. The State must prohibit the operation operation of any Class IV well injecting hazardous waste directly into a USDW after six (6) months following approval of any UIC program for the State (40 CFR 123.7(c)(5), 122.36(a)(4), and 122.45).	74-6-5.A 74-6-5.D	5-101	Not applicable
e. The State must require the owners or operators of hazardous waste management facilities and all generators of hazardous waste to comply with the requirements of Section 122.45 (40 CFR 122.45).	74-6-5.A 74-6-5.D	5-101	Not applicable
12. Authority to Identify Aquifers that are Underground Sources of Drinking Water (USDW) and to Exempt Certain Aquifers (40 CFR 123.7(c)(4), 122.35, 122.3, and 123.4(g)(8) and (9)).	74-6-4.B 74-6-4.D	3-101.A 5-103 5-101.C	3-101.A
13. Authority Over Federal Agencies and Persons Operating on Federally Owned or Leased Property	See text.	See text.	See text.

14. State Authority over Indian Lands	See text.	See text.	See text.
15. Authority to Revise State Underground Injection Control Programs (Section 1422(b)(1)(B) and 40 CFR 123.13).	74-6-4.B 74-6-4.D		
16. Authority to make and keep Records and make Reports on its Program Activities, all as prescribed by the Environmental Protection Agency Section 1422(b)(1)(A)(ii), 40 CFR 123.6(b)(3), 123.10, and 122.18).	74-6-9.B	See Memorandum of Agreement	
17. The State must have authority to make available to EPA upon request, without restriction, any information obtained or used in the administration of the State program, including information claimed by permit applicants as confidential (40 CFR 123.10).	See text.	See text.	See text.

Attorney General Opinion
No. 70-5

January 22, 1970

OPINION
OF
JAMES A. MALONEY
Attorney General

By: Richard J. Smith
Assistant Attorney General

To: The Honorable Joseph M. Montoya
United States Senator
United States Senate
Washington, D.C.

QUESTION:

Do the provisions of New Mexico's Air and Water Quality Acts, respectively Sections 12-14-1 through 12-14-13 and 75-39-1 through 75-39-12, N.M.S.A., 1953 Compilation, apply to problems of pollution created by privately-owned industries located on Indian land?

CONCLUSION:

Yes.

ANALYSIS:

A similar question was addressed by this office in Attorney General Opinion No. 65-25, issued February 9, 1965. That opinion announced a conclusion identical with this one, but several important court decisions handed down since its issue have greatly clarified the relationship between state and federal responsibilities in the area of Indian affairs.

The fundamental nature of the relationship between state governments and Indian reservations was described more than one hundred years ago. In Worcester v. Georgia, 31 U.S. 518 (1832), Chief Justice Marshall declared that Indian reservations possess many of the attributes of sovereignty, and that general application of state laws within reservation boundaries is improper. Though on its face an absolute prohibition against state regulation of reservation matters, the Worcester rule yielded to modification and closer analysis when confronted with varying specific problems. When basic facets of tribal life, customs, and self-government were not at issue, the Supreme Court began to alter the Worcester doctrine to permit a measure of accommodation between Indian sovereignty and state law. Langford v. Monteith, 102 U.S. 145 (1880); United States v. McBratney, 104 U.S. 621 (1881); Utah & N.R. Co. v. Fisher, 116 U.S. 28 (1885).

Concurrently with these judicial developments, the United States Congress and the New Mexico courts began to explore other specific areas in which state laws could be made applicable to Indian reservations. In 1929, Congress authorized the states to enforce health and sanitation laws on Indian lands, and to enforce compulsory school attendance by Indian children. 25 U.S.C. §231. Since 1934, federal policy has permitted a gradual assumption by the states of other types of civil and criminal jurisdiction over reservation matters. 18 U.S.C. §1162; 28 U.S.C. §1360. New Mexico courts have determined that while principal jurisdiction over reservation affairs lies with the United States and the Indians themselves, this jurisdiction is not and was never intended to be exclusive. State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958); Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965). In affirming the right of the Indian people of New Mexico to participate in this State's elections, Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962), our Supreme Court emphasized that reservations are not completely separate entities existing outside the political and governmental jurisdiction of the State. In a recent case, the New Mexico Court of Appeals upheld the extension of the State's taxing power to the incomes of Indians living and working on Indian land. Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969).

The Batchelor and Ghahate cases, and the decision reached by the United States Supreme Court in Organized Village of Kake v. Egan, 369 U.S. 60 (1962) provide excellent analyses of the present limits of state authority over Indian reservations. In reviewing its own decisions on the matter, the Court declared in Kake:

> "In the latest decision, Williams v. Lee, 358 U.S. 217 (1959) . . . we held that Arizona had no jurisdiction over a civil action brought by a non-Indian against an Indian for the price of goods sold the latter on the Navajo reservation. The applicability of state law, we there said, depends upon 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,' 358 U.S., at 220. Another recent statement of the governing principle was made in a decision reaffirming the authority of a State to punish crimes committed by non-Indians against non-Indians on reservations: '(I)n the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries,' New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).
>
> "These decisions indicate that even on reservations state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

The two criteria which the courts of this state will employ in assessing the validity of state regulation of reservation affairs appear in the Ghahate and Batchelor cases, cited above. The first requirement to be met is the compatibility between the operation of the state law and the proprietary rights of the Indians in their lands. In the Batchelor case, the New Mexico Supreme Court observed:

> "Civil jurisdiction over a suit on a promissory note against an Indian who does not live on a reservation is clearly a governmental and not a proprietary interest, and it follows that Article XXI, Section 2 of the New Mexico Constitution does not deny jurisdiction to the state court under the facts of the instant case."
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> * * * *
>
> "A similar disclaimer clause in the Alaska Statehood Act was construed by the Supreme Court of the United States . . . to be only a disclaimer of proprietary, rather than of governmental interest. We followed the . . . construction . . . in construing our disclaimer clause."

The second criterion in the application of state law is the effect such application would have on tribal self-government. The language of the Batchelor decision is again instructive:

> "As to matters not within the prohibition of the constitutional provisions supra, the test of state court jurisdiction is whether the state action infringes on the right of reservation Indians to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217 (1959)."

Thus, the application of state anti-pollution laws to industries located on Indian land is valid, provided that the operation of those laws neither impairs the proprietary interest of the Indian people in their lands nor limits the right of the tribe or pueblo to govern matters of tribal relations. It is clear that the regulation of industrial discharges is not a matter fundamental to tribal relations, and that the state supervision of environment pollution will not limit, in any meaningful manner, the right of the several Indian peoples to govern themselves. Similarly, the extension of pollution controls to

industries located on Indian land will not affect the ownership or control of the land, and will at most impose certain limitations on the operation of facilities erected on the land. Since no attempt directly to limit or control land use is contemplated, no interference with Indians' proprietary rights is foreseen.

Since the extension of New Mexico's anti-pollution laws cannot reasonably be said to violate either of the principles heretofore discussed, it is clear that the State of New Mexico may enforce its Air and Water Quality Acts on Indian lands.

Attorney General Opinion
No. 70-76

September 9, 1970

OPINION
OF
JAMES A. MALONEY
Attorney General

By: Gary O'Dowd
Deputy Attorney General

To: Elmer L. Kaemper
Executive Director
Construction Industries Commission
1302 Osage Avenue
Santa Fe, New Mexico 87501

QUESTIONS:

(1) Does the Construction Industries Commission have the duty to seek compliance with the Construction Industries Licensing Act and the construction codes of this state in cases where Indian pueblos or tribes lease land to private companies for the purpose of constructing buildings or other structures thereon?

(2) Does this make the private company subject to compliance with the Construction Industries Licensing Act and also give the State Inspectors the right of entry on Indian lands so leased to private companies for inspection purposes under the Construction Industries Licensing Act?

CONCLUSIONS:

(1) Yes.

(2) Yes.

ANALYSIS:

The above questions arise out of the proposed development by Great Western Cities on the Cochiti Pueblo Indian lands in Sandoval County, New Mexico. Cochiti Pueblo has leased certain of its lands to Great Western Cities under a 99 year lease. Great Western Cities proposes to subdivide this land and to sublease tracts to individuals who will build either homes or businesses as provided in their particular sublease agreement.

As we understand the facts, Great Western Cities has a master plan of development which has been approved by Cochiti Pueblo as well as by the Secretary of Interior. Sublessees must follow the approved architectural design and specifications when building. In certain situations, Great Western Cities will act as a general contractor in building businesses and homes. Sublessees may either hire a New Mexico contractor to build a home complying with the architectural design and specifications approved by Great Western, Cochiti Pueblo and the Secretary of Interior or they may have Great Western Cities build their home or business establishment meeting these already approved architectural design and specifications.

The question presented by the above facts is whether the state has jurisdiction over the construction of houses or other buildings on these Indian lands leased for 99 years to non-Cochiti Pueblo Indian lessees.

At this point, a short discussion on the status of New Mexico Indian pueblos may be helpful for understanding certain terms used in this opinion. When speaking of an Indian pueblo in New Mexico the term "public corporation" is perhaps the more appropriate characterization of their legal status. See Cohen, Federal Indian Law, p. 400. Unlike the case of reservation Indians holding their lands by virtue of a treaty with the United States, pueblo lands are held by virtue of title dating back to land grants from the Government of Spain. The pueblo Indians hold their lands by a right superior to the United States in that they have fee simple title to their lands. See United States v. Sandoval, 231 U.S. 28 (1913). Although there may be some distinguishing characteristics between pueblos and and other Indian tribes, this opinion is not limited to pueblos, but rather includes all Indian country including Indian reservations.

Although some state jurisdiction on Indian lands was almost nonexistent at one time, the law has changed in later years. When confronted with various specific problems the courts have generally refused to find Indian sovereignty when basic facets of tribal life, customs and self-government were not at issue. In these instances the courts have held state law applicable. Langford v. Monteith, 102 U.S. 145 (1880); United States v. McBratney, 104 U.S. 621 (1881).

In a landmark Alaska case, Organized Village of Kake v. Egan, 396 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562 (1962), the United States Supreme Court held that state laws may be applied on reservations or other tribal lands unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. In Organized Village of Kake v. Egan, *supra*, the court noted that in its latest decision, Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959) it had said that:

> "The applicability of the state law . . . depends upon 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' 358 U.S. at 221."

The court went on to point out that:

> "Another recent statement of the governing principle was made in a decision reaffirming the authority of a State to punish crimes committed by

non-Indians against non-Indians on reservations: '(I)n in the absence of limiting treaty obligation or Congressional enactment each state has a right to exercise jurisdiction over Indian reservations within its boundaries,' New York ex rel. Ray v. Martin, 326 U.S. 496 (1946)."

The Supreme Court in Organized Village of Kake v. Egan, supra, concluded that:

"These decisions indicate that even on a reservation state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

To determine whether the State of New Mexico has jurisdiction under its Construction Industries Act, we must therefore inquire whether the application of this law would interfere with tribal self-government or impair a right granted or reserved by federal law.

It is clear that state jurisdiction over the construction of buildings or other structures described in the facts above cannot in any way interfere with tribal self-government or infringe on the right of the Indians to govern themselves. This is essentially a non-Indian development in that the buildings constructed on the leased lands will be occupied by non-Indians. The New Mexico Construction Industries Act, and building codes issued thereunder, is designed:

to promote the general welfare of the people of New Mexico by providing for the protection of their lives, property and economic well-being against substandard or hazardous construction . . . work. Section 67-35-4, N.M.S.A., 1953 Compilation.

The public interest demands that the buildings in this state comply with established standards of construction to protect the people of this state. We must conclude that the application of the Construction Industries Act in no way interferes with reservation self-government and further that the State of New Mexico has a strong public interest in enforcing the provisions of this Act to protect the people of New Mexico.

The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction, especially where the parties involved are not Indians and the subject matter of the transaction is not of federal concern. Thus, it has been held that the murder of a non-Indian by a non-Indian on a reservation, in the absence of express federal legislation to the contrary, is a matter of exclusive state jurisdiction. U.S. v. McBratney, 104 U.S. 621 (1881); Draper v. U.S., 164 U.S. 240 (1896). Likewise, the validity of state taxation of personalty of a non-Indian within Indian country has been sustained. Thomas v. Gay, 169 U.S. 240 (1896).

Having concluded that state inspection of buildings constructed by New Mexico contractors on Indian lands leased to private individuals under a 99 year lease does not interfere with reservation self-government we must turn to the question of whether it impairs a right granted or reserved by federal law. In Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), the Supreme Court of the United States held that states could not impose proceeds of sales tax or gross income tax on sales to reservation Indians by a licensed Indian trader. The reason for this holding was that the federal government preempted state government from imposing such a tax by regulating the prices charged Indians by Indian traders.

In the Warren Trading Post case, the Supreme Court pointed out that the Commissioner of Indian Affairs had "the sole power and authority to appoint traders to the Indian tribes and to specify the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." The court concluded that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon the traders." We find no federal law which possibly could be considered to have preempted the state from its duty to inspect buildings constructed on Indian lands and therefore must conclude the state has jurisdiction to inspect under the provisions of the Construction Industries Act.

There may be some argument that since these buildings will be owned by the Cochiti Pueblo Indians under the terms of the master lease, the buildings belong to the Indians and therefore state regulation is somehow proscribed. In Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp. 279 (S.D. Cal. 1969), it was held that a possessory interest in a leasehold of 99 years is tantamount to an estate in fee for assessment purposes. We believe this general principle applies equally in the present case. As pointed out above, this is essentially a non-Indian development and the public interest demands that the 99 year leased buildings comply with established standards of construction to protect the people of this state.

Article XXI, Section 2 of the New Mexico Constitution* is a disclaimer of a proprietary rather than a governmental interest by the state and therefore is inapplicable in this case. See Ghahate v. Bureau of Revenue, 80 N.M. 98, 101, 451 P.2d 1002 (1969) and Organized Village of Kake v. Egan, supra at 580.

It follows from the foregoing that pursuant to Section 67-35-50, N.M.S.A., 1953 Compilation of the Construction Industries Licensing Act, State Inspectors have the right of entry on Indian lands to carry out the necessary inspections of the type of construction set forth in this opinion request.

We have not been asked, and therefore do not at this time answer the question of jurisdiction over the construction by Indians of such structures as pueblos, hogans and kivas on Indian country for the use or occupancy by Indians. The construction of such structures may well involve basic facets of tribal life and customs, and if so, state jurisdiction in this area would interfere with tribal self-government.

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*The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any Act of Congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe.