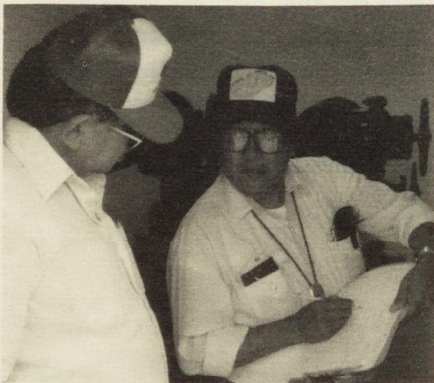


Drinking Water Primacy

The Safe Drinking Water Act (SDWA) provides the opportunity for **Indian Tribes** to take an active role in the enforcement of public drinking water supply regulations within Indian reservations.

1990



- **Whom Can I Contact for More Information?**

- **What Is Primacy?**

- **What Are the Advantages and Limitations of Primacy?**

- **When to Seek Primacy?**

- **When Not to Seek Primacy?**

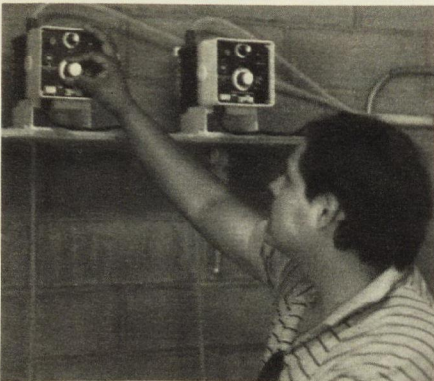
- **How Can A Tribe Attain Primacy?**

- **What Is "Treatment As A State"?**

- **What Is A Development Grant?**

- **How Much Money Is Available?**

- **What Are the Tribe's Responsibilities After Gaining Primacy?**



Drinking Water Primacy

Whom Can I Contact For Information?

This Primacy newsletter is designed to assist Indian Tribes in understanding what primacy involves under the Safe Drinking Water Act (SDWA) program of the Environmental Protection Agency (EPA). It describes some of the advantages and limitations of the primacy program. Tribes may want to take these into account as they consider applying for primacy.

This newsletter is funded by the Office of Drinking Water of the U.S. EPA. Another part of this project is to develop a Public Water System Supervision (PWSS) and Underground Injection Control (UIC) primacy procedures handbook for Indian Tribes and to conduct primacy workshops for Tribes. If you would like to attend an informational workshop regarding further details on the advantages and limitations of seeking primacy and the steps and procedures necessary to achieve primacy, contact your EPA Regional Drinking Water Section Chief. The addresses and phone numbers of the Regional Chiefs are listed on the last page of this newsletter.

What is Primacy?

Primacy is a provision of the Safe Drinking Water Act (SDWA). It allows Indian Tribes the opportunity to assume principal responsibility for the enforcement of federal drinking water supply and/or underground injection control (UIC) regulations in areas within the Indian Tribe's jurisdiction. Currently this enforcement is performed by the Regional Office of the U.S. EPA. A Tribe with primacy must have drinking water regulations which are at least as strict as EPA regulations, and must have an independent agency or organization within the Tribal government that has the power to enforce the Tribe's regulations.

Primacy has serious economic and political implications for Tribes. Deciding to seek or not to seek primacy requires that a Tribe review its environmental protection plans, evaluate its governmental/administrative organization, and consider its sources of revenue. The formation and administration of an independent Tribal enforcement agency to enforce Tribal drinking water codes and regulations can be very costly. EPA funds are available, but they are very limited and are not sufficient to cover all Tribal program costs.

Primacy can allow a Tribe to more fully exercise its sovereign powers by assuming the federal (EPA) program of establishing and enforcing drinking water and/or underground injection control rules and regulations for water utilities. This can afford a Tribe an increased role in regulation of the reservation environment.

What Are The Advantages and Limitations Of Primacy?

A Tribe considering primacy must carefully evaluate many issues. The major issues include:

1. Sovereignty and plans for self-determination
2. Tribal administrative and organizational capacities
3. Political/legal considerations
4. EPA capacity to provide assistance (technical assistance and funding/grant programs)
5. Reservation environmental protection concerns (environmental/resource inventories, water quality sampling, and protection and land use planning)
6. Regulatory enforcement
7. IHS programs
8. Continuing Tribal program responsibilities and costs after primacy is achieved.

The implications for Tribes from each of these issues must be fully explored as a Tribe decides whether or not to seek primacy. Each issue has both advantages/benefits and limitations/problems associated with it. Typical concerns that a Tribe should consider are listed on the following pages.



Primacy

1. Sovereignty and Self-Determination Considerations:

Advantages/Benefits

- Tribe establishes drinking water and/or underground injection control rules and regulations for Tribal lands.
- Tribe establishes procedures for regulations and enforcement.
- Smaller Tribes can band together to form a consortium of Tribes for self-determination goals (formation of inter-Tribal councils).
- Strengthening of Tribal government and ability of Tribes to express civil regulatory jurisdiction over the actions of non-Tribal members violating Tribal environmental protection laws and regulations.
- Development of a program limits state attempts to regulate and to influence resource development decisions on reservation.

Limitations/Problems

- Tribe must keep rules and regulations as strict as, or stricter than, the U.S. EPA rules and regulations.
- Tribe must establish an independent Tribal regulatory organization consisting of a professional staff that must enforce drinking water and/or underground injection control rules and regulations. It is costly to form and fund a separate Tribal agency for enforcement.
- Costs will vary depending on the type of organization established, the number of participating Tribes forming the consortium, and the amounts contributed by each. Consortium must be recognized as having enforcement capabilities on all member reservations.
- Tribe must establish an administrative procedure for civil enforcement against non-Indians. Likely opposition from state and county governments may lead to legal challenges regarding the Tribe's authority to regulate the behavior of non-Tribal members on lands held in trust for the Tribe.
- Conflicting environmental programs between states and tribes on adjacent land may pose practical administrative problems; the lack of uniformity of regulations and procedures may create conflict between states and Tribes (and possibly even between Tribes).

1. Sovereignty and Self-Determination Considerations (continued):

Advantages/Benefits

- This is an opportunity for government-to-government relations in developing uniform, comprehensive regulations (for example, Tribal-State cooperative agreements).

Limitations/Problems

- Most Tribes own and operate their public water systems. This could be a potential problem when applying for primacy, because the Tribe would be regulating itself. This potential conflict between the Tribe's water utility group and enforcement group must be resolved to EPA satisfaction, usually by establishing the regulatory program as an agency of the Tribal government which is independent of Tribal enterprises.

2. Tribal Administrative and Organizational Capacities:

- Strengthening of Tribal governments.

- Development and improvement of Tribal administrative procedures.

- Tribal governments would provide more direct services to Tribal members.

- Possible regulator-regulatee conflict.

- Development of additional administrative structures and programs may pose both organizational and monetary problems, especially for small Tribes.

- Total cost of program development may be too expensive for Tribal government.

Primacy

3. Political/Legal Considerations

Advantages/Benefits

- Enhancing/strengthening Tribal government and authority.
- Enhancing recognition of Tribal government by non-Indian interests and governments.
- Enhancing Tribal code through the development of Tribal environmental laws specifically designed to meet reservation needs.

Limitations/Problems

- Potential legal fees for ensuring jurisdictional authority, including costly court cases.
- Successful implementation of a program requires careful development of internal Tribal administrative capabilities.
- General lack of knowledge and information regarding environmental problems on a reservation may stall or delay program development unless a public education campaign is launched.

4. EPA Assistance Programs:

A. Technical Assistance

- Assistance in preparation of a development grant:

- (1) Development plan
- (2) Commitment to program and budget from Tribal Council

- Provision of technical assistance in the development of programs, conducting surveys, developing regulations, and organizing data-gathering and data-storage procedures.

- Limited EPA assistance is available to primacy Tribes, due to budget and resource limitations.

- There are time-consuming procedures that often require EPA approval.

- There are monetary considerations for hiring professional staffs and services to carry out these programs.

4. EPA Assistance Programs:

B. Funding/Grant Programs

Advantages/Benefits

■ Available funding for Tribes:

Public Water System Supervision:

FY 89—\$669,000

FY 90—\$786,000

Underground Injection Control:

FY 89—\$525,000

FY 90—\$558,000

Limitations/Problems

■ Tribes must provide at least 10% matching funds. (In-kind services may be used.) Costs can escalate and require a Tribe to spend a great deal to get its program started. In the future, the new SDWA regulations will increase the total funding requirement for everyone significantly. The amount of money available from the EPA will not be enough to cover Tribal program costs. Total available funding must be shared by participating Tribes.

5. Environmental Protection Concerns:

■ Development of data useful to long-term natural resource management decision-making.

■ Employment of Tribal membership in natural resource inventories, sampling and environmental protection.

■ Enhancement of Tribal self-determination and its link to environmental protection; enhancement of Tribal government's role in regional environmental management decisions.

■ Cost of sampling, data acquisition, data management and reporting above the level of EPA grant assistance.

■ Cost of technical expertise and staff development.

■ Possible litigation through the assertion of Tribal jurisdictional authority over land and water resources.

6. Regulatory Enforcement:

■ Tribal agency will be responsible for regulating and enforcing compliance violations by water utilities and owner/operators of underground injection wells.

■ EPA will require the Tribal agency to perform regulating and enforcing duties. If the Tribe does not perform its enforcement duties, the EPA must rescind primacy and conduct enforcement actions.

Primacy

7. IHS Programs

Advantages/Benefits

- IHS technical assistance can be utilized to help develop primacy applications and programs.
- IHS may be able to assist the Tribe in seeking matching funds for a Tribal regulatory/enforcement agency.
- IHS will continue to provide technical assistance and funding for water system improvements after a Tribe obtains primacy.

Limitations/Problems

- The availability of IHS technical capability and assistance may not satisfy primacy requirements for in-house staff expertise.
- IHS funds **cannot** be used to support a Tribal regulatory/enforcement agency.
- If the Tribe adopts standards tougher than EPA standards, the scope of IHS services may drop because of increased construction costs to meet the higher standards. Also, IHS may no longer be able to perform some of the activities that would now be deemed regulatory, such as plan reviews and sanitary surveys.

The Indian Health Service (IHS) is a service agency and not a regulatory agency. IHS has construction funds for water systems on Indian reservations, but most of these funds can only be used to serve new housing. These funds cannot be used to support the operation/maintenance of Tribal water systems or support Tribal regulatory programs. However, subject to the availability of IHS staff, IHS will provide technical assistance to all Tribes regarding most environmental health matters.

When to Seek Primacy

A Tribe should seek primacy only if it has carefully considered all of the issues regarding seeking and attaining primacy and has determined that attaining primacy is in the best interests of the Tribe and its future generations. Important considerations include the desire and ability to enhance Tribal autonomy and self-determination, to strengthen Tribal government, and to play a stronger role in the protection of the public health and environment on Tribal lands. The decision to seek primacy is a proper strategy if a Tribe is willing to develop and maintain the necessary components of successful primacy:

- 1) organizational structures and programs,
- 2) technical expertise, and
- 3) financial resources.



When Not to Seek Primacy

A Tribe may decide not to seek primacy after it has carefully considered all the ramifications of seeking and attaining primacy. The costs and resources required to achieve and maintain a regulatory program may far exceed the benefits from achieving primacy.

A major consideration for many Tribes is the availability of financial resources to develop and maintain a regulatory and enforcement program. The establishment and staffing of an effective, independent enforcement/regulatory agency could have a seriously adverse impact on Tribal funds, and possibly divert funds from other essential Tribal programs. The costs of operating a primacy program are always greater than the grant funds available from the EPA. **If the Tribe is experiencing difficulties providing adequate funding for the Tribal water utility, then primacy would definitely be very difficult for a Tribe to attain. Primacy is not an opportunity to obtain additional EPA funds to construct, operate and maintain a Tribal water utility or underground injection control facilities or equipment.**

The decision to not seek primacy could depend on where a Tribe is located and the level of public health and environmental protection offered by existing agencies. If this level is deemed adequate to protect the drinking water delivered to Tribal consumers, ensure the groundwater quality, and protect the overall reservation environment, then the Tribe could save money under the existing regulatory arrangement.

Primacy

How Can A Tribe Attain Primacy?

There are three steps. First, an Indian Tribe needs to achieve "treatment-as-a-state" designation. Then the Tribe will spend up to three or four years developing its program. Finally, a Tribe will apply for primacy when its program is developed. When an Indian Tribe demonstrates that it has the ability to protect the public health by regulating public water supplies and/or groundwater, the EPA may assign enforcement authority to that Tribe. When this occurs, the Tribe is granted primacy: the role of primary or main enforcer of the Tribal regulations (as strict as federal) concerning safe drinking water and/or protection of reservation groundwater.

Primacy brings regulatory control closer to home in the sense that a Tribe is closer than the EPA to the systems being regulated. At the same time, however, the Tribe is still required to adopt and enforce Tribal safe drinking water regulations and codes which are at least as strict as EPA regulations. The Tribe's regulatory actions will still be closely monitored by the EPA via semi-annual and annual program reviews.

How Does A Tribe Demonstrate It Is Ready For Primacy?

A. Public Water System Supervision (PWSS) Program

To be granted primacy for the public water system supervision (PWSS) program, a Tribe must demonstrate to the EPA that it meets five basic requirements:

1. The Tribe has adopted drinking water regulations at least as stringent as EPA drinking water regulations under the SDWA.
2. The Tribe has adopted and implemented procedures to enforce these regulations.
3. The Tribe has established a record-keeping system and will provide the reports required by law.
4. The Tribe can demonstrate that if it might grant variances or exemptions from drinking water standards, it will do so in a manner that protects public health.
5. The Tribe can demonstrate that it has adopted and implemented a plan to provide safe drinking water in emergency circumstances.

B. Underground Injection Control (UIC) Program

The underground injection control (UIC) program is essential to protect underground sources of drinking water (USDW) from contaminants and hazardous wastes that are injected underground. Specific examples that a UIC program may control include: regulating underground injection by petroleum companies on Tribal lands; controlling septic tank subsurface leaching wells; and the locating and plugging of abandoned injection wells. Under no circumstances are injected fluids to cause USDW to exceed drinking water maximum contaminant levels (MCLs) in groundwater.

To be granted primacy for the underground injection control (UIC) program, a Tribe must demonstrate to the EPA that its program contains the following provisions:

1. Prohibition of unauthorized injections
2. Prohibition of endangering drinking water sources
3. Prohibition of movement of fluid into a USDW (Underground Source of Drinking Water)
4. Authority to issue permits or rules
5. Authority to impose conditions on authorized injection activities
6. Authority to impose compliance evaluation requirements
7. Authority to take enforcement actions
8. Authority for public participation in permit processing
9. Authority to apply technical criteria and standards for the control of underground injection
10. Classification of injection wells
11. Elimination of Class IV wells (wells used to dispose of hazardous and radioactive wastes)
12. Authority to identify aquifers that are underground sources of drinking water (USDW) and to exempt certain aquifers
13. Authority over federal agencies and persons operating on federally owned or leased property
14. Authority to revise underground injection control programs
15. Authority to make and keep records and make reports on its program activities as prescribed by the EPA
16. Authority to make available to the EPA upon request, without restriction, any information obtained or used in the administration of the program, including information claimed by permit applicants as confidential.

Primacy

What Is "Treatment-As- A State"?

If an Indian Tribe wishes to gain primacy, it must first apply for and obtain "treatment-as-a-state" status. With this status, the Tribe can apply for a development grant to develop its primacy program.

Whenever the federal government gives a state authority to enforce a federal law, administer a program, or in some way act on behalf of the federal government, it requires the state to have certain legal and political structures in place that enable the governing body to promote and protect the health, safety and welfare of its citizens.

Unlike states, Tribal governmental structures vary widely among Tribes. The duties and powers exercised by these governments also vary widely. Therefore, before assigning enforcement powers, or primacy, to a Tribe, it is necessary for each Tribe to present evidence that it:

1. Is a federally recognized Tribe,
2. Does promote and protect the health, safety and welfare of its citizens,
3. Has legal jurisdiction over a certain population and area, and
4. Has or could develop the ability to carry out the program it is asking for authority to administer on behalf of the federal government.

When a Tribe demonstrates all of this, it receives EPA recognition and is eligible for "treatment-as-a-state".

In simpler terms, "treatment-as-a-state" status means the federal government (through the EPA) agrees that the Tribe has the same right as any state to apply for enforcement authority in the Public Water System Supervision Program and the Underground Injection Control Program.

What Will The EPA Expect In A "Treatment-As- A-State" Application?

In presenting an application, the EPA requires that a Tribe submit various kinds of "core" information. The Tribe is asked to provide copies of documents, Tribal organization charts with lines of authority, and maps defining the Tribal lands. In many cases a Tribe may also be asked to provide written explanations or descriptions of how the Tribe operates. The EPA allows fairly wide flexibility in the format of the presentation, and will consider Tribal applications on a case-by-case basis.

(continued)

What Will EPA Expect In A "Treatment-As-A-State" Application? (continued)

The four criteria that a Tribe must meet to qualify for "treatment-as-a-state" are:

1. The Tribe is recognized by the Secretary of the Interior.
2. The Tribe has a governing body carrying out substantial governmental duties and powers over a defined area.
3. The Tribe has jurisdiction to perform the functions necessary to regulate the public water supplies and/or injection wells which are the subject of its application.
4. The Tribe is "reasonably expected to be capable" of administering the federal drinking water regulations and providing an effective Public Water System Supervision (PWSS) program and/or Underground Injection Control (UIC) program.

Another very important factor is to document the Tribe's fiscal procedures and status. This can be done by submitting procurement and accounting procedures, audit reports, or results of audits.

What Is A Development Grant?

In order for a Tribe to receive development grant funds, it first must obtain "treatment-as-a-state" designation. A Tribe is then expected to make a commitment to achieve primacy within three years of the application for development grant funds for the PWSS program and within four years of the application for the UIC program.

The commitment to achieve primacy takes the form of a development plan. In its plan, a Tribe must determine what it needs to do to meet the primacy requirements, and then indicate how and when each step will be accomplished. After developing its plan, the Tribe should have a reasonably good understanding of what the cost of achieving primacy will be, and at that point the Tribe would apply for a grant.

A development grant application should contain a reasonably complete description of what the Tribe hopes to accomplish during each of the years of the development period. Each application will be different, because no two Tribes start out with the same set of circumstances. Each Tribe needs to study the primacy requirements, compare them with its present capabilities, and then prepare a plan to develop a primacy program. Remember: be realistic. Each year EPA will evaluate the Tribe's progress in meeting its objectives and make a determination of whether to continue funding support for the next year. These evaluations are performance-based and are both intensive and extensive, covering a broad variety of areas in considerable depth.

Primacy

What Are The Uses/Restrictions of Grant Funds?

Development grant funds may be used for expenses directly related to developing a primacy program. They **may be** used for:

- hiring an attorney to review drinking water statutes or codes developed by a Tribe in order to qualify for primacy
- consultants' fees to help set up a record-keeping system
- office expenses such as telephone charges for calls to get assistance from EPA, IHS, etc.
- expendable office supplies: paper, copier supplies, postage used in preparing for primacy
- travel expenses to consult with EPA or other agencies about PWSS or UIC matters
- training costs to develop needed technical expertise.

Development funds **may not** be used for such things as:

- expansion of a public water supply system
- purchase of new equipment
- salaries of operators
- ongoing operating and maintenance expenses
- funding a Tribal utility authority.



How Much Money is Available?

EPA funds are extremely limited. Current funding levels are listed below.

Funding for Tribes	FY 89	FY 90
PWSS	\$669,000	\$786,000
UIC	\$525,000	\$558,000

EPA will allocate these funds for Tribal primacy development grants and for Tribal primacy program grants. A Tribe could receive an annual primacy program grant from EPA to maintain its primacy program, but states currently receive less than 50% of their primacy program funding from the EPA. The total amount of funds available from the EPA is not expected to increase significantly in the future. This means that available funds from the EPA will not be enough to cover Tribal program costs. New regulations are currently being developed by the EPA that will significantly add to the costs of administering a Tribal primacy program in the future. Also, the SDWA regulations are becoming more comprehensive and strict, and will require a greater effort for a Tribe to develop regulations at least as stringent as EPA regulations. In addition, the number of Tribes competing for funding for development grants and for primacy program grants is going to increase. This means that Tribes may receive smaller and smaller amounts of funds from the EPA at the same time that the demands for stricter levels of compliance will come into effect.

What Are The Responsibilities After Gaining Primacy?

Continuation of primacy for a Tribe, as in the case of all states, is dependent upon: maintaining an adequate program that complies with new and revised EPA rules; system oversight; and also supervision and enforcement of violations of the requirements. The EPA now regulates 30 contaminants, and is scheduled to regulate 53 more over the next two to three years. In addition, the EPA has been mandated by Congress to add 25 additional contaminants to the list every three years. Within five years the list will contain over one hundred regulated contaminants. A Tribe with primacy will be responsible for monitoring all regulated contaminants. If a Tribe does not fulfill its primacy obligations, the EPA will be forced to revoke a Tribe's primacy status and take over the program's supervision and enforcement responsibilities. This means a high standard of performance will be placed on Tribes who are granted primacy. This is the same standard that is applied to states.

It is the Tribe's responsibility to assure that sufficient funds are available to maintain a primacy program, regardless of EPA's year-to-year funding. This could be a serious drain on a Tribe's financial resources.

When a Tribe attains primacy, it should consider this to be a permanent status. A Tribe should not consider applying for primacy on a "trial" status. It should be 100% certain that it is willing to, and capable of, running the program indefinitely.

Primacy



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