



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

June 18, 2004

MEMORANDUM

SUBJECT: The Eligibility of the Resighini Rancheria for Grants Under Section 106 of the Clean Water Act

FROM: Vali Frank, ORC-2 *Julie Walters*
Assistant Regional Counsel *for Vali Frank*

THROUGH: Nancy J. Marvel, ORC-1 *Nancy Marvel*
Regional Counsel *Info. J.*

TO: Alexis Strauss, WTR-1
Director, Water Division

Attached for your review and signature is a Determination of Eligibility of the Resighini Rancheria Under Section 106 of the Clean Water Act ("Determination"). The Determination summarizes the review by the Office of Regional Counsel ("ORC") of information submitted by the Resighini Rancheria ("Tribe") in connection with the Tribe's application for a grant under section 106 of the Clean Water Act ("CWA"), 42 U.S.C. § 1256. The attached Determination also incorporates by reference the primary review performed by the Water Division. Our review is based on the criteria established in section 518 of the CWA, 42 U.S.C. § 1377, and in 40 C.F.R. Parts 35 and 130.

Based on the information submitted by the Tribe, ORC has determined that the Tribe meets the jurisdictional requirements for eligibility to receive grant funds under section 106 of the CWA, and we recommend that you sign the attached Determination. If you have any questions regarding this matter, please call Vali Frank at 972-3916.

EPA DETERMINATION OF ELIGIBILITY OF
THE RESIGHINI RANCHERIA FOR A GRANT
UNDER SECTION 106 OF THE CLEAN WATER ACT

I. Introduction

The United States Environmental Protection Agency ("EPA") Region IX has completed its review of the information submitted by the Resighini Rancheria¹ ("Tribe") to determine the Tribe's eligibility for a grant under section 106 of the Clean Water Act ("CWA"), 33 U.S.C. § 1256. This Determination incorporates by reference the review performed by the Water Division and is based on the criteria established in section 518 of the CWA, 33 U.S.C. § 1377, and in the regulations that implement the Indian provisions of the statute that are found at 40 C.F.R. Parts 35 and 130.²

II. Requirements for Eligibility under Section 106

EPA must determine that an Indian Tribe meets the requirements set forth in 40 C.F.R. § 130.6(d)³ before funds available under section 106 of the CWA may be awarded to an Indian Tribe. 40 C.F.R. § 35.583. The regulations found at 40 C.F.R. § 130.6(d) specify that an Indian tribe is eligible for a grant under section 106 of the CWA⁴ if:

¹ The Tribe appears on the Secretary of Interior's list of federally recognized Tribes as the "Resighini Rancheria, California (formerly the Coast Indian Community of Yurok Indians of the Resighini Rancheria)."

² EPA published the regulations found in Part 35, Subparts A and H, and Part 130, in an Interim Final Rule, 54 Fed. Reg. 14354 (April 11, 1989), and modified such regulations in a Final Rule, 59 Fed. Reg. 13814 (March 23, 1994). EPA published new regulations at 66 Fed. Reg. 3781-3807 (January 16, 2001), which, inter alia, incorporated the administrative provisions for grants included in 40 C.F.R. Part 35, Subparts A and H, into a new Part 35, Subpart B ("Subpart B"). The Subpart B regulations went into effect on April 17, 2001.

³ The requirements of 40 C.F.R. § 130.6(d) are the same as those set forth in section 518(e) of the CWA.

⁴ The requirements of 40 C.F.R. § 130.6(d) are applicable to all CWA assistance programs administered under 40 C.F.R. Part 35, Subparts A, B and H.

- (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
- (2) 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; and
- (3) the Indian Tribe is reasonably expected to be capable, in EPA's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations.⁵

The term "Indian tribe" is defined as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." Section 518(h) of the CWA, 33 U.S.C. § 1377; 40 C.F.R. § 130.2(b).⁶

In addition, EPA must determine that an Indian Tribe has emergency authority comparable to the Administrator's powers under section 504 of the CWA and has adequate contingency plans to implement such authority before awarding funds under section 106. Section 106(e)(2) of the CWA, 33 U.S.C. § 1256(e)(2); 40 C.F.R. § 35.588(a)(2).

III. Determination of the Tribe's Eligibility

A. Definition of "Indian Tribe"

As a preliminary matter, only Indian tribes that meet the definition set forth in section 518(h) are potentially eligible for a grant under section 106 of the CWA. The Tribe is included on the Secretary of Interior's list of "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs."⁷ In addition, in formally recognizing the Resighini Rancheria, the Department of Interior, in effect, has affirmed that the Tribe exercises authority over its members. See, 40 C.F.R. § 83.7(c). Accordingly, based on the information that the Tribe has submitted to EPA, including maps and legal descriptions that depict exterior boundaries, and on the Secretary of the Interior's formal recognition of the Tribe, EPA has determined that the Resighini Rancheria meets the definition of "Indian tribe," as set forth in section 518(h) of the CWA.

⁵ While these regulations implementing Section 518 do not elaborate upon the statutory requirements, the preamble to the Interim Final Rule provides guidance for adequately demonstrating that a tribe meets the statutory criteria.

⁶ The Subpart B regulations applicable to grants awarded under Section 106 of the CWA define and use the term "Tribe," which has the same definition as "Indian tribe," found in Section 518(h). See, 40 C.F.R. § 35.582.

⁷ 63 Fed. Reg. 71941, 71943 (December 30, 1998).

B. The Tribe Has a Governing Body Carrying Out Substantial Government Duties and Powers

The preamble to the regulations implementing section 518 of the CWA specified that to meet the requirement that a tribe have a governing body carrying out substantial government duties and powers, a tribe must provide EPA with a narrative statement that describes the following: (1) the form of tribal government; (2) the types of essential governmental functions currently performed; and (3) the sources of authorities to perform these functions (e.g., tribal constitutions, codes, etc.).⁸

Based on our review of the information submitted by the Tribe, EPA has determined that the Resighini Rancheria has satisfied this requirement of the Act. Specifically, the Tribe submitted a narrative statement, a statement from its attorney, a copy of the Tribe's Constitution, and a copy of its water quality ordinance. These documents adequately describe the form of government that the Tribe utilizes, a number of functions that the Tribe performs, and the sources of the Tribe's authority to perform these functions.

According to the Tribe's constitution and supporting information, the Tribe has jurisdiction over all territory included within the Rancheria. In addition, the Tribe's constitution provides that the Tribe is governed by the Business Council which is authorized to govern all people, resources, land and water reserved to the Tribe. The powers of the Business Council, as enumerated in Article V of the Tribe's constitution, include the following: to enact laws, negotiate contracts with federal, state and local governments, manage tribal assets, employ legal counsel, and manage, develop, protect and regulate the use of tribal property, wildlife, water, minerals and all other natural resources within tribal jurisdiction. The Business Council also is authorized to enact laws and codes, to establish Tribal Courts and administrative bodies, and to take all actions necessary and proper for the exercise of powers delegated to it.

C. The Tribe Has Adequate Authority over the Water Resources Located Within the Borders of the Reservation

Section 518(e)(2) of the CWA authorizes EPA to treat an Indian tribe as a State only 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[.]

The preambles to EPA's April 11, 1989 and March 23, 1994 regulations state that to document its authority in this area, a tribe should provide EPA with a statement from its Attorney General or an equivalent official "explaining the legal basis for the tribe's regulatory authority over its water resources."

⁸ 67 Fed. Reg. 46328 (July 12, 2002).

To satisfy the requirement set forth in section 518(e)(2) of the Act, the Tribe submitted a letter from Stephanie Dolan that affirms that the Tribe exercises jurisdiction over the lands and waters of the Reservation. Although not the Attorney General of the Tribe, Ms. Dolan is authorized to submit the memorandum for the Tribe, and therefore is an "equivalent official" as specified in EPA's regulations.

According to Ms. Dolan's letter, dated January 28, 2004, the Tribe's jurisdiction over the lands and waters of the Reservation is based on the Tribe's Constitution, the Tribe's federally reserved water rights, and general principles of tribal sovereignty, as set forth in federal case law and statutes. The Tribe also submitted a number of maps that establish the boundaries of the Resighini Rancheria and confirm that the water resources in question are located within the exterior boundaries of the Reservation. Based on the information supplied by the Tribe, EPA has concluded that the Tribe has adequately demonstrated jurisdiction over the water resources within the exterior boundaries of the Reservation.⁹

D. The Tribe has Adequate Capacity to Administer the Water Resource Management and Protection Program in Question

In determining whether an Indian tribe is capable of administering an effective resource management and protection program, the Regional Administrator may consider (but is not limited to) several factors which are enumerated in the preamble to the April 11, 1989 regulations. In reviewing the information submitted by the Resighini Rancheria, EPA has concluded that the Tribe has provided adequate information regarding the factors specified in the preamble, and therefore has demonstrated its capability to administer a section 106 program for the Reservation. More specifically, EPA concluded that the Tribe has demonstrated the following:

- (1) the Tribe has adequate general managerial experience;
- (2) the Tribe has adequate experience in the administration of environmental and public health programs on the Reservation;
- (3) the Tribe employs personnel who possess the capability to develop and to administer an effective water management and protection program, and has made a commitment to acquire additional staff and capacity to develop further the Tribe's capability to manage its environmental programs;
- (4) the Tribe has adopted adequate accounting and procurement systems; and
- (5) the Tribe has a governmental structure that enables that Tribe to carry out necessary governmental functions effectively and efficiently.

⁹ The Resighini Rancheria is located within the exterior boundaries of the Yurok Reservation in Northern California. The Resighini Rancheria was established in 1975 as a federally recognized Tribe, thirteen years before the formation of the Yurok Reservation.

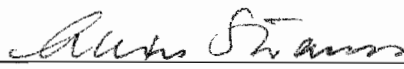
E. Emergency Powers

Finally, as required by section 106(e) of the CWA, information supplied by the Tribe demonstrates that the Tribe possesses emergency powers that are comparable to the Administrator's powers under section 504 of the CWA and that it has adequate contingency plans to implement such authority. (See Attorney's letter dated January 28, 2004, referenced above.)

IV. Conclusion

Based on the foregoing discussion, EPA has determined that the Resighini Rancheria is eligible for a grant pursuant to sections 106 and 518 of the CWA and 40 C.F.R. Parts 35 and 130.

Date: 1 July 2004



Alexis Strauss
Director, Water Division
U.S. Environmental Protection Agency, Region IX