U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

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Stephen B. Waller
Miller Stratvert Law Offices
500 Marquette N.W., Suite 1100
Albuquerque, NM 87102

2011-03A
ERISA SEC.
206(d)(3)

Dear Mr. Waller:

This is in response to your letter on behalf of PNM Resources, Inc., requesting guidance regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). In particular, you ask whether a domestic relations order issued under tribal law by a Family Court of the Navajo Nation, a federally-recognized Native American tribe, would be a "judgment, decree, or order . . . made pursuant to a State domestic relations law" within the meaning of section 206(d)(3)(B)(ii) of ERISA.

You represent that PNM Resources, Inc., its affiliates and subsidiaries (collectively "PNM") sponsor and administer various employee pension benefit plans (Plans) for their employees. The Plans have formal procedures in place to determine the qualified status of domestic relations orders. Employees of PNM who participate in the Plans reside throughout the State of New Mexico. New Mexico residents include members of twenty-two federally-recognized Native American tribes. Some of PNM's employees are people who are part of the Navajo Nation.

PNM received multiple draft domestic relations orders issued by the Family Court of the Navajo Nation. The Family Court of the Navajo Nation is a "tribal court" for the peoples comprising the Navajo Nation. PNM has determined that the draft orders, other than having been issued by a tribal court, are in compliance with the procedures adopted by the PNM Plans for determining the qualified status of domestic relations orders issued pursuant to State domestic relations laws.

Section 206(d)(1) of ERISA generally requires that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a domestic relations order, unless the order is determined to be a "qualified domestic relations order" (QDRO). Section 206(d)(3)(A) further provides that pension plans must provide for the payment of benefits in accordance with the applicable requirements of any QDRO.[1]

[1] Section 514(a) of ERISA generally preempts all State laws insofar as they relate to employee benefit plans covered by Title I of ERISA. However, section 514(b)(7) states that preemption under section 514(a) does not apply to QDROs within the meaning of ERISA section 206(d)(3)(B)(i).

Section 206(d)(3)(B)(i) of ERISA defines the term QDRO for purposes of section 206(d)(3) as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and which meets the requirements of section 206(d)(3)(C) and (D).

The term "domestic relations order" is defined in section 206(d)(3)(B)(ii) as "any judgment, decree, or order (including approval of a property settlement agreement) which – (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law)."

Section 3(10) of ERISA provides that "[t]he term 'State' includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone."

Section 206(d)(3)(G) of ERISA requires the plan administrator to determine whether a domestic relations order received by the plan is qualified, and to administer distributions under such qualified orders, pursuant to reasonable procedures established by the plan. When a pension plan receives an order requiring that all or part of the benefits payable with respect to a participant be distributed to an alternate payee, the plan administrator must determine that the judgment, decree, or order is a domestic relations order within the meaning of section 206(d)(3)(B)(ii) of ERISA - i.e., that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of the participant, and that it is made pursuant to a State domestic relations law by a State authority with jurisdiction over such matters.

A principal purpose of ERISA section 206(d)(3) is to permit the division of marital property on divorce in accordance with the directions of the State authority with jurisdiction to achieve an appropriate disposition of property upon the dissolution of a marriage, as defined under State law. Nothing in ERISA section 206(d)(3) requires that a domestic relations order be issued by a State court. Rather, the Department has previously concluded that a division of marital property in accordance with the proper final order of any State authority recognized within the State's jurisdiction as being empowered to achieve such a division of property pursuant to State domestic relations law (including community property law) would be considered a "judgment, decree, or order" for purposes of ERISA section 206(d)(3)(B)(ii). *See also* EBSA Frequently Asked Questions About Qualified Domestic Relations Orders (available at www.dol.gov/ebsa/faqs/faq_qdro.html).

Federal law, however, does not generally treat Indian tribes as States, or as agencies or instrumentalities of States. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002). *See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2nd Cir. 1996) ("[T]ribes are not States under OSHA"). The definition of "State" at section 3(10) of ERISA does not include Indian tribes.[2] In addition, although the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et. seq.*, grants Indian tribes jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, no such federal statute exists with respect to the recognition of domestic relations orders of tribal courts involving divorce and the division of marital property on divorce.

We note, nonetheless, that some States have adopted laws to address tribal court jurisdictional issues relating to domestic relations orders. *E.g.,* Oregon Revised Statutes 24.115(4). In the Department's view, a tribal court order may constitute a "judgment, decree or order . . . made pursuant to State domestic relations law" for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

We are unable to conclude that the instant orders, which involve individuals residing in New Mexico, are "domestic relations orders" within the meaning of ERISA section 206(d)(3)(B)(ii). Neither your submission nor our review of New Mexico law indicates that New Mexico recognizes or treats orders of the Family Court of the Navajo Nation as orders issued pursuant to New Mexico state domestic relations law.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

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[2] Congress recently amended the definition of "governmental plan" at ERISA section 3(32) to expressly include certain plans maintained by Indian tribal governments. Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006). Before this amendment, the term "governmental plan" was limited to plans established or maintained by the "Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."