



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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MAR 28 2010

REF: 8WP-CWQ

The Honorable Christine Sage, Chairman
Southern Ute Indian Tribe
P.O. Box 737
149 CR 517
Ignacio, Colorado 81137

Re: Approval of the Southern Ute Indian Tribe's Clean Water Act Section 518 Treatment as a State Application for the Water Quality Standards and Certification Programs

Dear Chairman Sage:

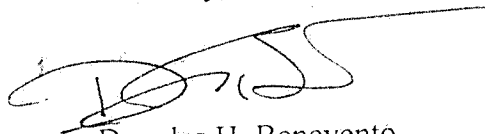
I am pleased to inform you that the U. S. Environmental Protection Agency (EPA) approves the Southern Ute Indian Tribe's (Tribe) application to be treated in a similar manner as a state (TAS) pursuant to Clean Water Act (CWA) Section 518 for purposes of the CWA Section 303(c) Water Quality Standards and Section 401 Water Quality Certification programs. A copy of the Decision Document is enclosed for your reference. The EPA has determined that the Tribe meets the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8, and therefore approves the Tribe's TAS application to administer the water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for purposes of certifications under CWA Section 401. This approval action includes all of the currently held trust lands identified within the Southern Ute Indian Reservation boundaries as well as the trust land parcel contiguous to the Reservation identified in the Tribe's application. Consistent with the scope of the application, this approval does not provide any CWA implementation authorities (e.g., permitting, enforcement) beyond the water quality standards and water quality certification programs.

The EPA looks forward to working with the Southern Ute Indian Tribe in the continued development, adoption and review of water quality standards for surface waters on Southern Ute Tribal trust lands. We commend the Tribe for its commitment to the environment that is demonstrated by its existing water quality program and your very capable Environmental Programs Division staff.

The EPA thanks the Southern Ute Indian Tribal Council and the Environmental Programs Division for their efforts in this matter. We recognize the significant work and dedication that was required to develop this application, and the environmental protection the water quality standards and certification programs are designed to provide.

Please contact me if you have any questions or concerns at (303) 312-6599. You can also contact the EPA's most knowledgeable person in this matter, George Parrish, who can be reached at (303) 312-7027, or parrish.george@epa.gov.

Sincerely,



Douglas H. Benevento
Regional Administrator

Enclosure

cc: Lorelyn Hall, Attorney, Southern Ute Indian Tribe
Sam Maynes, Attorney, Southern Ute Indian Tribe
Mark Hutson, Environmental Programs Director, Southern Ute Indian Tribe
John Hickenlooper, Governor, State of Colorado
Susana Martinez, Governor, State of New Mexico
Harold Cuthair, Chairman, Ute Mountain Ute Tribe
William Walker, Regional Director, Bureau of Indian Affairs
Ruth Welch, Director, Colorado State Office, Bureau of Land Management
Kara Chadwick, Supervisor, San Juan National Forest, U. S. Forest Service

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION 8

DECISION DOCUMENT:

APPROVAL OF
THE SOUTHERN UTE INDIAN TRIBE'S
APPLICATION FOR TREATMENT IN A SIMILAR
MANNER AS A STATE FOR THE CLEAN WATER ACT
SECTIONS 303(c) WATER QUALITY STANDARDS
AND 401 CERTIFICATION PROGRAMS

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I. Introduction and Index to the EPA Decision

A. Introduction

This Decision Document provides the basis and supporting information for the U.S. Environmental Protection Agency's (EPA or Agency) decision to approve the application from the Southern Ute Indian Tribe (Tribe) for program eligibility for Clean Water Act (CWA) Section 303(c) Water Quality Standards and Section 401 Water Quality Certification, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. CWA Section 518(e)(2) authorizes the EPA to treat a tribe as a state (treatment in a similar manner as a state, or TAS) for water resources "within the borders of an Indian reservation." The Tribe's TAS application included lands that are currently held in trust for the Tribe by the United States and a request to include those trust lands to be acquired by the Tribe in the future ("after-acquired" trust lands). The application identifies currently held trust lands within the boundaries of the Southern Ute Indian Reservation, and also identifies a parcel of currently held trust land contiguous with the Reservation border that the Tribe considers part of its Reservation for purposes of its application.¹ This approval action includes all of the currently held trust lands identified within the Southern Ute Indian Reservation boundaries as well as the trust land parcel contiguous to the Reservation identified in the Tribe's application.² This approval action does not include any land not currently held in trust for the Tribe. Hence this action does not include any "after-acquired" trust land as explained in Section II(C)(3) below. As described in Section III below, this decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of the Tribe's water quality standards is a separate Agency action.

Section 303(c) of the CWA requires the States to develop, review and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards must include designated uses of waters, criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that States may grant or deny "certification" for federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with, among other things, water quality standards it has adopted under CWA Section 303. If a State denies certification, the federal permitting or licensing agency is prohibited from issuing a permit or license.

¹ See the Southern Ute Indian Tribe's: *Application for a determination of eligibility to be treated in the same manner as a state under section 518(e) of the Clean Water Act and 40 C.F.R. 131.8 for purposes of the water quality standards and certification programs* (March 2, 2015), at p.7.

² For CWA purposes, Indian reservations include trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian Reservation. See 56 Fed. Reg. 64876, 64881 (December 12, 1991); see also, *Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1292-94 (D.C. Cir. 2000); 81 FR 30183, 30192 (May 16, 2016).

Section 518(e) of the CWA authorizes the EPA to treat an eligible tribe in a similar manner as a state for certain CWA programs, including Sections 303 and 401. The EPA Water Quality Standards Regulation at 40 C.F.R. § 131.8 establishes the process by which the Agency implements that authority and determines whether to approve a tribal application for program eligibility for purposes of administering Sections 303(c) and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994) (codified at 40 C.F.R. Part 131), and 81 Fed. Reg. 30183 (May 16, 2016).

B. Index to the EPA Decision

The following documents constitute a portion of the record for this Agency decision. Appendix I contains a partial index of selected materials considered by the EPA for this decision.

1. Application and Supporting Materials

The Tribe's application for program eligibility for water quality standards and certifications under Sections 303(c) and 401 of the CWA includes the following letters and related documents from the Tribe and its counsel:

March 2, 2015 Letter from Clement J. Frost, Chairman, Southern Ute Indian Tribe to Shaun McGrath, Regional Administrator, U.S. EPA Region 8, enclosing the Southern Ute Indian Tribe's *Application for a Determination of Eligibility to be Treated in the Same Manner as a State under Section 518(e) of the Clean Water Act and 40 C.F.R. 131.8 for Purposes of the Water Quality Standards and Certification Programs*.

June 13, 2016 Email from Sam W. Maynes, attorney for the Southern Ute Indian Tribe, to Kimberly Varilek, Associate Regional Counsel, U.S. EPA Region 8, regarding Tribal authority; source data for maps depicting trust lands; and requesting action on after-acquired trust land.

June 16, 2016 Letter from Sam W. Maynes, attorney for the Southern Ute Indian Tribe, to Kimberly Varilek, Associate Regional Counsel, U.S. EPA Region 8, regarding after-acquired trust lands.

July 26, 2016 Email from Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, to George Parrish, Environmental Scientist, U.S. EPA Region 8: forwarding email from Dale Vinton, Geodesist and PLSS Data Manager, Bureau of Land Management, U.S. Department of the Interior, regarding data for maps depicting Reservation and trust land boundaries.

November 28, 2016 Letter from Clement J. Frost, Chairman, Southern Ute Indian Tribe to Shaun McGrath, Regional Administrator, U.S. EPA Region 8, regarding

Tribal authority; application coverage; after-acquired trust lands; and request for expedited processing of application.

April 19, 2017 Three emails from Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, to George Parrish, Environmental Scientist, U.S. EPA Region 8, transmitting higher resolution maps.

2. Letters and Related Documents from the EPA

December 28, 2016 Letter from Shaun McGrath, Regional Administrator, U.S. EPA Region 8, to Clement J. Frost, Chairman, Southern Ute Indian Tribe, regarding TAS application completion; and upcoming comment opportunity.

March 16, 2017 Email from George Parrish, Environmental Scientist, U.S. EPA Region 8, to Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, transmitting comments received during the January 5 – February 3, 2017 comment period.

May 19, 2017 Letter from Debra H. Thomas, Acting Regional Administrator, U.S. EPA Region 8, to Clement J. Frost, Chairman, Southern Ute Indian Tribe, regarding receipt of maps, and upcoming comment opportunity.

July 24, 2017 Email from George Parrish, Environmental Scientist, U.S. EPA Region 8, to Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, transmitting comments received during the June 1 – 30, 2017 comment period.

3. Comments Regarding Tribal Assertion of Authority

On January 5, 2017, Darcy O'Connor, Assistant Regional Administrator, Office of Water Protection, U.S. EPA Region 8, sent a letter notifying appropriate governmental entities (AGEs)³ of the substance and basis of the Tribe's assertion of authority contained in its application as provided at 40 C.F.R. § 131.8(c)(2). The letter provided for comments to be submitted on the Tribe's assertion of authority, and also included a copy of all of the materials comprising the entire application. In addition, the EPA posted these same application materials on its website, and the letter provided a link to that site.

Consistent with Agency practice, the EPA also provided an opportunity for local governments and the public to review and comment on the assertion of authority in the Tribe's application. Legal notices were placed in local newspapers⁴ in Durango, Ignacio, and Bayfield, Colorado. The Tribe's application and all materials were made available on the EPA's website and paper copies were made available in the Tribe's Environmental

³ "Appropriate governmental entities" is defined as "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." *See* 56 Fed. Reg. at 64884.

⁴ The same notices were posted on the websites of the Durango Herald, The Drum, and the Pine River Times.

Programs Office and the Durango Public Library; newspaper and website notices were published with details on obtaining more information and how to submit comments; the EPA contacted local media outlets with press release materials that linked to the website materials; and 30 days were provided for comments to be submitted on the assertion of authority contained in the Tribe's application. Additionally, the EPA and the Tribe shared further outreach materials with local print and radio news media; the Tribe held meetings with the State of Colorado; the EPA responded to local newspaper information requests and questions; and the EPA published a Fact Sheet and Frequently Asked Questions on its website.

During the January 5 – February 3, 2017 comment opportunity, several commenters requested additional time to submit comments. Additionally, some commenters expressed concern that the maps provided in the Tribe's application lacked sufficient detail and resolution to clearly identify the location of all Tribal trust lands. In response, on April 19, 2017, the Tribe further supplemented its application with six higher resolution, more detailed maps of the trust lands and waters covered by the Tribe's application. Although EPA's TAS regulations do not require an extended comment opportunity, in response to these commenters' requests, the EPA afforded an additional 30-day comment opportunity from June 1 – 30, 2017.

On June 1, 2017, Darcy O'Connor, Assistant Regional Administrator, Office of Water Protection, U.S. EPA Region 8, sent a letter notifying AGEs of an additional comment opportunity requested by some commenters, and the supplemental maps provided by the Tribe. The letter provided for an additional 30 days for comments to be submitted on the Tribe's assertion of authority, and also included a copy of all of the materials comprising the entire application, including the higher resolution maps. In addition, the EPA posted these same application materials on its website and the letter provided a link to that site.

The EPA also provided an additional 30-day opportunity for local governments and the public to review and comment on the assertion of authority in the Tribe's application. Legal notices were placed in local newspapers in Durango, Ignacio, and Bayfield, Colorado. The Tribe's application and all materials, including the higher resolution maps, were made available on EPA's website and paper copies were made available in the Tribe's Environmental Programs Office and the Durango Public Library; newspaper and website notices were published with details on obtaining more information and how to submit comments; the EPA contacted local media outlets with press release materials that linked to the website materials; and an additional 30 days were provided for comments to be submitted on the assertion of authority contained in the Tribe's application. Further, the EPA contacted all of the commenters from the previous comment opportunity, alerting them to the additional comment opportunity. Additionally, the EPA and the Tribe shared further outreach materials with local print and radio news media; the Tribe held meetings with the State of Colorado; the EPA responded to local newspaper information requests and questions; and the EPA published a Fact Sheet and Frequently Asked Questions on its website.

The tables below identify the stakeholders that were notified of the 30-day comment periods and the list of commenters who submitted comments to the EPA. None of the comments received raised any challenges to or concerns with the Tribe's assertion of authority to administer these CWA programs over trust lands identified in its application. Several of the commenters raised concerns that are outside the scope of this application regarding potential water quality standards conflicts that may arise among the States and the Southern Ute Indian Tribe. Please see Section III below for more information about these comments. Appendix II provides the complete set of comments received and the EPA's responses.

AGEs Notified via Letter/Email of Public Comment Opportunities
John Hickenlooper, Governor of Colorado
Susana Martinez, Governor of New Mexico
Harold Cuthair, Chairman, Ute Mountain Ute Tribe
William Walker, Regional Director, Southwest Regional Office, Bureau of Indian Affairs
Russ Bacon, Acting Forest Supervisor, San Juan National Forest, U.S. Forest Service
Ruth Welch, Director, Colorado State Office, Bureau of Land Management

Other Entities Notified via Letter/Email of Public Comment Opportunities
Senator Cory Gardner, State of Colorado
Senator Michael Bennett, State of Colorado
Representative Scott Tipton, State of Colorado
Senator Tom Udall, State of New Mexico
Senator Martin Heinrich, State of New Mexico
Representative Ben Lujan, State of New Mexico
Annette Quill, Office of the Attorney General, Colorado Department of Law
Dr. Larry Wolk, Executive Director and Chief Medical Officer, Colorado Department of Public Health and Environment
Hector Balderas, Attorney General, State of New Mexico
Cholla Khoury, Office of the Attorney General, State of New Mexico
Shelly Lemon, Surface Water Quality Group, New Mexico Environment Department
Kara Chadwick, Forest Supervisor, San Juan National Forest, U.S. Forest Service
Ruth Welch, Director, Colorado State Office, Bureau of Land Management
Scott Clow, Director, Environmental Programs Department, Ute Mountain Ute Tribe
Christopher Banet, Water Resources Branch Chief, Southwest Regional Office, Bureau of Indian Affairs, U.S. Department of the Interior
Kelly Palmer, Hydrologist, San Juan National Forest, U.S. Forest Service
Connie Clementson, Field Manager, Tres Rios Field Office, Bureau of Land Management
Tanner Nygren, Natural Resource Specialist, Tres Rios Field Office, Bureau of Land Management

AGEs Who Submitted Comments During the Comment Periods
Bruce Yurdin, Director, Water Protection Division, New Mexico Environment Department
Martha Rudolph, Director of Environmental Programs, Colorado Department of Public Health and Environment
William Walker, Regional Director, Southwest Regional Office, Bureau of Indian Affairs, U.S. Department of the Interior
Kara L. Chadwick, Forest Supervisor, San Juan National Forest, U.S. Forest Service

Other Entities Who Submitted Comments During the Comment Periods
Chris S. La May, Town Manager, Town of Bayfield, Colorado
Julie Westendorff, Gwen Lachelt and Brad Blake, La Plata County Colorado Board of County Commissioners
Nancy Agro, Attorney representing water conservancy districts and ditch companies
Geoffrey Craig, Attorney representing Edgemont Ranch and Forest Lakes Metropolitan Districts and ditch companies
Floyd L. Smith, Attorney representing South Durango and Loma Linda Sanitation Districts
Tom Atencio, Lawrence Bartley, Edward Box, Alison deKay, Sandra Maez, Dixie, Melton, Board of Trustees, Town of Ignacio, Colorado
Ron LeBlanc, City Manager, City of Durango, Colorado
Ryan Halonen, Member at Large, Florida River Estates Home Owners Association
Brice F. Lee, President, La Plata Water Conservancy District
Amy N. Huff, Attorney representing Pine River Irrigation District
Amy N. Huff, Attorney representing Citizens Animas Irrigation Company
Amy N. Huff, Attorney representing King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Thompson Epperson Ditch Company; and Pine River Canal Company
Wayne Semler, and Mae Morley, La Plata Archuleta Cattlemen's Association
Austin Rueschhoff, Attorney representing San Juan Water Conservancy District
Todd Inglee, Colorado Cattlemen's Association
Lorene Bonds, La Plata River and Cherry Creek Ditch Company
Beth Van Vurst, Attorney representing Southwestern Water Conservation District

4. Statutory and Regulatory Provisions

The following are certain statutory and regulatory provisions relevant to the EPA's decision.

- a. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes the EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified eligibility criteria.
- b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations" 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994) (codified at 40 C.F.R.

Part 131) (*see also* 81 Fed. Reg. 30183 (May 16, 2016)), establish the regulatory requirements for a tribe to administer water quality standards and certification programs.

5. Policy Statements

The following are certain guidance documents and policy statements relevant to the Agency's decision.

a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984.

b. EPA Memorandum entitled "EPA/State/Tribal Relations," by EPA Administrator Reilly, July 10, 1991.

c. EPA Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.

d. EPA Memorandum entitled "Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs," by Marcus Peacock, January 23, 2008.

II. Requirements for Program Eligibility Approval

Under CWA Section 518 and the EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before the EPA can approve a tribe's program eligibility application for water quality standards under Section 303(c) and certification under Section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that 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 (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

The EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an application by an Indian tribe for program eligibility to administer water quality standards. The EPA separately reviews tribal water quality standards under 40 C.F.R. §§ 131.6 and 131.21. A program eligibility approval under 40 C.F.R. § 131.8 does not constitute an approval of such standards. Where the EPA determines that a tribe is eligible to the same

extent as a state for purposes of water quality standards, the tribe likewise is eligible to the same extent as a state for purposes of certifications conducted under CWA Section 401. See 40 C.F.R. § 131.4(c). Tribes authorized to administer the CWA water quality standards program are also "affected states" under CWA Section 402(b)(3) and (5) and 40 C.F.R. § 122.4(d). As "affected states," they receive notice and an opportunity to comment on certain permits issued under the National Pollutant Discharge Elimination System program.

A. Federal Recognition

Under section 518 of the CWA and its implementing regulations, the EPA can approve a program eligibility application only from an "Indian tribe" that meets the definitions set forth in CWA Section 518(h) and 40 C.F.R. §§ 131.3(k), and (l). See 40 C.F.R. § 131.8(a)(1). 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." CWA Section 518(h)(2), 40 C.F.R. § 131.3(1). The term "Federal Indian reservation" means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." CWA Section 518(h)(1), 40 C.F.R. § 131.3(k).

The Southern Ute Indian Tribe's application includes a citation to the Department of the Interior Bureau of Indian Affairs listing of all federally recognized Indian Tribes in the United States. 80 Fed. Reg. 1942, 1946 (Jan. 14, 2015). (Exhibit 2 in the Tribe's application.) The Southern Ute Indian Tribe is included in the Department of the Interior's current published list of federally recognized tribes. See 82 Fed. Reg. 4915, 4918 (Jan. 17, 2017). Furthermore, as discussed below, the Tribe is exercising governmental authority over the trust lands included in the TAS application. Thus, the EPA finds that the Tribe meets the requirements of 40 C.F.R. §§ 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers

To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the Tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed. As explained below in more detail, the Tribe's application describes the form of its Tribal Government, types of governmental functions currently being performed, and the Tribe's authority to carry out governmental functions currently being performed.

(i) Form of the Tribal Government – Under the Tribe's Constitution, the governing body of the Tribe is the seven-member Southern Ute Indian Tribal Council, comprised of the chairman and six council members. (See Exhibit 3 to the Tribe's application, Constitution of the Southern Ute

Indian Tribe of the Southern Ute Indian Reservation, Colorado.⁵) The Chair and Council members are elected at large by the tribal membership. Elections are held each November, with two of the Council members elected to three-year staggered terms. The Chairman is elected every three years, and may be elected to that position for only three consecutive terms. The Chairman appoints a Vice Chairman, and the Council appoints a Treasurer, both from amongst the Council members. The Tribal Council serves the legislative functions for the Tribe. The Chairman is the chief executive of the Tribe, appoints non-elected personnel (including an Executive Officer), and supervises their employment. The Southern Ute Indian Tribal Court exercises judicial functions.

(ii) Types of Government Functions Performed by the Tribe – The Tribe exercises governmental functions (as enumerated in Article VII of the Tribe's Constitution) including authority over: land; natural resources; criminal law; domestic relations; creation of a tribal court system; management of financial assets; hunting and fishing; commercial activities; and taxation.⁶ The types of governmental powers currently exercised by the Tribe include:

Legislative Power – The Tribal Council enacted the Southern Ute Indian Tribal Code, which includes most of the civil and criminal law of the Tribe. The application cites Tribal Code Titles including: civil procedures; election; range; wildlife conservation; traffic; gaming; employment rights; animal control; land; severance tax; and professional boxing codes.

Police Powers – Through regulating the conduct of individuals within the Tribe's jurisdiction, the application states that the Tribe exercises the same type of policing powers as other political entities such as federal and state governments. Examples include criminal law enforcement; regulating civil matters such as domestic relations, disposition of non-trust property, and administering justice through the Tribal Court; and implementing resource management, conservation, and development plans for the Tribe's natural resources.

Administration of Justice – The Tribe maintains law and order within its jurisdiction. The Justice and Regulatory Department includes the Tribe's police department, gaming division, natural resources enforcement division, and environmental programs division. The Tribe operates its own court system adjudicating civil and criminal matters within its jurisdiction, employs a tribal prosecutor and public defender, and operates its own detention center.

⁵ Exhibit 3, Constitution of the Southern Ute Indian Tribe of the Southern Ute Indian Reservation, Colorado, adopted by the Tribe and approved November 4, 1936 and amended October 1, 1975 and August 27, 1991. The Tribe's Constitution generally outlines the rules of membership and governance of the Tribe.

⁶ Application, at p. 5-6, and Exhibit 3.

Taxation – The Tribe exercises the power to levy taxes, by imposing a severance tax on non-renewable energy minerals from tribal trust, tribally-owned fee, and allotted or restricted lands within its jurisdiction.

Intergovernmental Relations – The Tribe collaborates on a government-to-government basis with federal, state, and local government agencies for interests including natural resource development, roads and transportation, wildlife conservation, gaming, taxation, law enforcement and environmental protection.

Other Governmental Powers – The Tribe also cites providing social, health and elder care services, as well as operating a community and fitness center.

The application notes that the Tribe has previously been granted TAS status for: CWA Section 106 (Water Pollution Protection); CWA Section 314 (Clean Lakes); CWA Section 319 (Nonpoint Source Program); and for Clean Air Act (CAA) Section 105. The Tribe also implements the 40 C.F.R. Part 70 Operating Permit Program under the CAA, and the EPA delegated authority to the Southern Ute Indian Tribe to implement and enforce certain provisions of CAA Sections 111 and 112.

(iii) Source of the Tribe's Governmental Authority – The Tribe's application cites three sources for its authority to exercise governmental powers.⁷ The Tribe cites inherent power to govern its territory; the right to regulate hunting, fishing and gathering by tribal members in certain off-Reservation areas as a result of reserved treaty rights; and the authority to regulate as a result of federal statutes delegating authority to the Tribe. The Application also includes a statement by the Tribe's general legal counsel and the Tribe's Legal department describing the basis for the Tribe's assertion of authority over the waters covered by its application.⁸

The EPA finds that the Tribe meets the requirements of 40 C.F.R. §§ 131.8(a)(2) and (b)(2).

C. Jurisdiction Over Waters on Tribal Trust Lands

Under 40 C.F.R. § 131.8(b)(3), a tribe is required to submit a statement of authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the Tribe asserts authority over surface water quality; (ii) a statement by the Tribe's legal counsel (or equivalent official) that describes the basis for the Tribe's assertion of authority, which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribe's assertion of authority; and (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

⁷ *Ibid* at p. 2 & 6, and Chairman Frost letter received December 9, 2016. The Tribe's government was organized under Section 16 (25 U.S.C. § 476) of the Indian Reorganization Act (codified at 25 U.S.C. §§ 461-479, as amended).

⁸ Application at Section VI pp. 10-13.

1. Map or Legal Description

The Tribe's application seeks TAS eligibility for purposes of administering water quality standards and certifications over lands held in trust for the Tribe and located within the exterior boundaries of the Southern Ute Indian Reservation. The application also identifies a parcel of land held in trust for the Tribe that is contiguous to the Reservation. The application and the maps included therewith describe with clarity and precision the exterior boundaries of the Reservation, as well as the precise boundaries of the currently held tribal trust lands within and contiguous to the Reservation that are covered by the TAS application.⁹ The application includes a legal description of the Reservation and a series of maps for reference purposes.¹⁰ The basis and accuracy of those maps – including the specific descriptions of the tribal trust lands covered by the application – were verified by the U.S. Department of the Interior, Bureau of Land Management.¹¹

The EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing maps and a legal description of the area over which the Tribe asserts authority to regulate surface water quality.

2. Statement Describing Basis for the Tribe's Authority

The Tribe's original TAS application for the CWA Section 303(c) and 401 programs included a Statement from the Tribal General Counsel that asserted the Tribe's inherent sovereign authority over all trust lands and resources on trust lands, including water resources, as the basis for the Tribe to regulate water quality under the CWA.¹² The Statement described the Tribe's exercise of authority through its Constitution, which established the Tribal Council, over all territory within its jurisdiction. The Tribe's application covered only lands held in trust by the United States for the Tribe. The Statement cites Federal Public Law 98-290, an act approved by Congress in 1984 which clarifies the Reservation boundaries and partially clarifies the exercise of jurisdiction within those boundaries as supporting the Tribe's exercise of inherent authority to regulate water quality in the trust land areas covered by the application.

In 2016, the EPA issued a final interpretive rule clarifying the authority of tribes to administer regulatory programs over their reservations pursuant to CWA Section 518. This clarification is

⁹ Indian reservations include trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian reservation. Many tribes have lands that the United States holds in trust for the tribes, but that have not been formally designated as reservations. Under EPA's longstanding approach, and consistent with relevant judicial precedent, such tribal trust lands are informal reservations and thus have the same status as formal reservations for purposes of the Agency's programs. *See* 56 FR at 64881; 81 FR at 30192; 63 FR at 7257–58; APS, 211 F.3d at 1292–94.

¹⁰ Application at Section IV at p. 7-8, and Section V at p. 8-9 (and Exhibit 1 Maps of Reservation Water Resources over Which the Tribe Asserts Authority), and supplemental maps provided April 19, 2017.

¹¹ *See* July 26, 2016 email from Dale Vinton, Geodesist, U.S. DOI, BLM, concurring the Tribe's maps depicting the external and trust lands boundaries are "based on the most recent and best available Public Land Survey System (PLSS) data".

¹² *See* Letter to Shaun McGrath, Regional Administrator, from Sam Maynes and Lorelyn Hall, dated March 2, 2015.

described in EPA's *Revised Interpretation of Clean Water Act Tribal Provision*¹³ ("Interpretive Rule"), which construes Section 518 as an express congressional delegation of civil regulatory authority to eligible tribes over their reservations. This reinterpretation of Section 518 eliminates the need for applicant tribes to demonstrate their inherent authority to regulate reservation waters under the CWA. Instead, tribes can rely on the congressional delegation of authority as the source of their authority to regulate reservation waters under the CWA.¹⁴ In light of the congressional delegation, the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes is identifying the geographic boundaries of the Indian reservation area over which the congressionally delegated authority would apply.¹⁵ In the Interpretive Rule, the EPA also recognized that there may be rare instances where special circumstances limit or preclude a particular tribe's ability to accept or effectuate the congressional delegation of authority over its reservation.¹⁶ Such special circumstance could arise, for instance, under a separate federal statute establishing unique jurisdictional arrangements for a specific state or reservation, or under the provisions of particular treaties or tribal constitutions that may limit a tribe's ability to exercise relevant authority.¹⁷

By letter dated November 28, 2016, the Tribe supplemented its Application to rely on the congressional delegation of authority in CWA section 518 in addition to its inherent authority presented in its original Application. The EPA received no comments challenging this assertion of the Tribe's authority to regulate water quality for any of the trust land areas that are covered by the Application and is aware of no impediment limiting the Tribe's ability to effectuate the congressionally delegated authority over such trust lands. The EPA has concluded that the Tribe can rely on the congressional delegation of authority and has satisfied the application requirement of 40 C.F.R. § 131.8(b)(3)(ii).

3. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards

A tribe's descriptive statement of authority in its application for TAS approval should also identify the surface waters for which it proposes to establish water quality standards. See 40 C.F.R. § 131.8(b)(3)(iii).

In its Application, the Southern Ute Indian Tribe has identified the surface waters on currently held trust lands for which it is proposing to establish water quality standards and hence seek TAS approval. In particular, the Tribe asserts authority, and this decision approves the Tribe's TAS eligibility, over surface water resources located on lands that are currently held in trust by the United States for the benefit of the Tribe, to the extent those surface water resources constitute "navigable waters" under the Clean Water Act Section 502(7).¹⁸ The locations and boundaries of those tribal trust lands are depicted in the maps included in the Tribe's

¹³ 81 Fed. Reg. 30183 (May 16, 2016).

¹⁴ *Id.* at 30190, 30194.

¹⁵ *Id.* at 30194.

¹⁶ *Id.* at 30192-193.

¹⁷ *Id.*

¹⁸ Application at p. 8.

application. Some of the key waters identified by the maps included in this approval are the: La Plata; Animas; Los Pinos; Piedra; Navajo; and San Juan Rivers. The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

The Tribe also clarified by its November 28, 2016 supplemental letter to the EPA, that its application for TAS also included a request for TAS to apply to “after-acquired trust lands” (those to be acquired at a future date). The EPA appreciates the Tribe’s interest in expediency and efficiency in addressing program authority over the Southern Ute Indian Tribe’s trust lands (both present and future trust lands). However, because the TAS application must identify the specific area over which a tribe seeks program eligibility, the EPA does not have sufficient information to approve TAS authority for surface waters on trust lands not currently identified in this application. As required by the TAS regulation (40 C.F.R. § 131.8), any lands transferred into trust status for the benefit of the Tribe in the future would require a supplemental TAS application from the Tribe, and a separate Agency action for such lands, to be covered under the Tribe’s CWA regulatory authorities. The process for a supplemental application to include lands taken into trust for the Tribe at a future date would also include appropriate governmental and public notification and participation to help ensure that, in the unlikely event jurisdictional issues exist regarding such future trust lands, such issues are raised to the EPA for proper consideration and decision. Any public notification in the future would be limited to comments on the assertion of authority over the future acquired trust lands. While the Agency is required to consider all appropriate comments received during that process, the EPA does not at this time anticipate any jurisdictional issues arising in connection with a subsequent Tribal assertion of authority over clearly defined lands taken into trust at a future date.

4. The EPA’s Finding on the Tribe’s Assertion of Jurisdiction

Based on the information included in the Tribe’s Application as discussed above, the EPA finds that the Southern Ute Indian Tribe meets the requirements in 40 C.F.R. § 131.8(a)(3) and (b)(3) for surface waters on currently held trust lands.

D. Capability

To demonstrate that a tribe has the capability to administer an effective water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for

establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical capabilities. 40 C.F.R. § 131.8(b)(4)(i)-(v).

40 C.F.R. § 131.8(b)(4) *A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program.*

The Tribe's application includes a narrative statement describing the Tribe's capability consistent with the CWA water quality standards and certification programs for which they have applied, as described below in more detail.

40 C.F.R. § 131.8(b)(4)(i) *A description of the Indian Tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a).*

The application provides information describing the Tribe's previous administrative and management experience with federal programs and specific environmental programs. The application notes many years of experience managing and implementing multiple tribal and federal programs, including programs contracted under the Indian Self-Determination and Education Assistance Act (25 U.S.C. §450 et seq.).¹⁹ The Executive, Legislative and Judicial branches of Tribal Government responsible for administering and implementing these programs are outlined in the application. The Tribe's application cites experience managing programs for social services, law enforcement and detention facilities, tribal courts, highway planning, Indian child welfare, education assistance, housing assistance, water and sewer improvements, emergency preparedness and response, dam safety, agricultural and range management, water resources management, forestry, wildlife management, Ute language preservation, and preventive and rehabilitative health services. Environmental programs administered and managed by the Tribe include: water quality, air quality, a General Assistance Program, and Environmental Compliance / Brownfields.

40 C.F.R. § 131.8(b)(4)(ii) *A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations.*

The application provides information on the Tribe's environmental programs, focusing on those managed by the Environmental Programs Division, the tribal governing body that will be

¹⁹ *Ibid*, Section VII at p. 14-20.

responsible for administering the CWA water quality standards and certification programs. The application highlights four programs within the Environmental Programs Division.²⁰

Water Quality Program – The Tribe’s Water Quality Program was established in 1990. It is primarily funded through CWA Section 106 Water Pollution Protection, Section 104(b)(3) Research and Training, and Section 319 Nonpoint Source Pollution Management grants. The Tribe’s CWA Section 106 Water Pollution Protection grant has been in place since 1992, along with the infrastructure and technical expertise for Reservation-wide water quality monitoring, assessment, inspection, and analysis. The CWA Section 319 Nonpoint Source Pollution Management grant has been funded since 1998, and was used to develop nonpoint source pollution control strategies and practices, and for specific restoration projects. The Tribe received a CWA Section 104(b)(3) grant from 2003-2007, used to develop a wetlands monitoring, assessment and analysis program. Notable accomplishments by the Water Quality Program include the 1996 Tribal Council-adoption of the Tribe’s water quality standards; nutrient and sediment loading assessments from agricultural activities, leading to studies on nutrient enrichment and draft water quality standards for nutrients; implementation of agricultural irrigation improvement projects; stream restoration projects; operating a National Environmental Information Exchange Network known as the Ambient Water Quality Management System (AWQMS) for all EPA Region 8 tribes; residential drinking well water testing for tribal members; and numerous presentations and outreach activities.

Air Quality Program – The Tribe receives EPA Clean Air Act Sections 103 and 105 grants, which fund operating two air monitoring stations. The Air Quality Program implements an intergovernmental agreement between the Tribe and the State of Colorado (via the Southern Ute Indian Tribe / State of Colorado Environmental Commission), and a Reservation Air Code that includes the regulations of the Part 70 operating permit program.

General Assistance Program – The Tribe’s GAP program helps build capacity and management capability for environmental programs through recycling, pollution prevention activities, radon monitoring and other indoor air quality issues, hazardous waste collection and disposal, and other outreach activities.

Environmental Compliance / Brownfields Program – The Tribal Response Program was developed in 2002 to assist monitoring oil and gas activities, and to ensure compliance with environmental laws. This includes a Brownfields program working to clean up dump sites and hazardous waste sites.

The Tribe’s application also describes a number of public health programs administered by the Tribe, and experience managing tribally-funded programs and business enterprises. The Southern Ute Health Services Division provides a number of services to the tribal community, including in-home care of elderly and handicapped tribal members, and health care transportation services. The Tribe also manages the Southern Ute Indian Health Clinic, and a health benefits program. The Tribe also cites years of experience managing tribally-funded programs and on and off-Reservation business enterprises. This includes the Tribe’s Energy

²⁰ Application at Section VII, pp. 14-20.

Department overseeing gas exploration, development and production. The Lands Division maintains records concerning surface use, land ownership, and lease agreements.

131.8(b)(4)(iii) *A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government.*

As discussed above, the application describes the Southern Ute Indian Tribe's governmental structure, with specific information on the executive, legislative, and judicial branches of the Tribal government.

131.8(b)(4)(iv) *A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards.*

The application's description of the tribal government system includes specific information on the Environmental Programs Division, the existing tribal government agency that will be responsible for administering the water quality standards and certification programs.²¹ The Tribe's application includes Exhibit 5, a Tribal Council resolution²² identifying the Environmental Programs Division as the responsible governmental entity for preparing and revising CWA Section 303(c) water quality standards, for review and approval by the Tribal Council, and then for reviewing and implementing the Tribal Council-approved water quality standards. The Environmental Programs Division is further identified as the responsible governmental entity for conducting CWA Section 401 water quality certifications. Within the Environmental Programs Division, the Water Quality Program will be primarily responsible for the Water Quality Standards and Certification Programs routine functions.

131.8(b)(4)(v) *A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.*

The application provides a description of the technical and administrative capabilities of the Environmental Programs Division staff to administer and manage effective water quality standards and certification programs. The Water Quality Program, within the Tribe's Environmental Programs Division, will be responsible for establishing, reviewing, implementing and revising the Tribe's CWA Section 303(c) water quality standards, subject to the approval of the Southern Ute Indian Tribal Council; and will be responsible for conducting water quality certifications under CWA Section 401 pursuant to procedures established by the Southern Ute Indian Tribal Council. The Environmental Programs

²¹ *Ibid*, Section VII, E., at p. 18-19.

²² Application, Exhibit 5, Tribal Resolution No. 2015-15, Resolution of the Council of the Southern Ute Indian Tribe, February, 17, 2015.

Division was formed in 1991 to administer environmental protection programs, and has been staffed and operational since that date.

In addition to providing detailed information of the overall experience, education and general qualifications of the Environmental Programs Division staff, the application includes resumes for the staff,²³ which are relevant to EPA's assessment of technical capability and experience. Further, the Environmental Programs Division staff worked with numerous tribal government departments, and neighboring jurisdictions (i.e., the States of Colorado and New Mexico, and the Ute Mountain Ute Tribe) to revise and update its water quality standards. The Environmental Programs Division currently administers and manages those tribally-adopted water quality standards, working with a variety of tribal departments, stakeholders and interested parties.

Based on the information provided by the Tribe that describes its capability to administer an effective water quality standards and certification program, the EPA finds that the Southern Ute Indian Tribe meets the requirements in 40 C.F.R. § 131.8(a)(4) and (b)(4).

III. EPA'S TAS Determination is a Separate Process from an EPA Decision on a Tribe's Submittal of Water Quality Standards

As described above, under EPA's TAS regulations, the EPA provides certain notices and an opportunity to comment on an applicant tribe's assertion of authority to regulate reservation water quality. Any comments addressing the substance of actual water quality standards that an eligible tribe may develop and submit to the EPA in the future for review under CWA section 303(c) are beyond the scope of the TAS process. However, the EPA notes that several commenters have raised concerns about potential water quality standards conflicts that may arise among the States of Colorado and New Mexico and the Southern Ute Indian Tribe. The EPA reiterates here that this TAS decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of new or revised water quality standards is a separate Agency action under the CWA, distinct from the EPA's decision on the Tribe's TAS application for eligibility to administer CWA Sections 303(c) and 401 program authority on trust lands. Under the CWA, a tribe must first be approved for TAS before the EPA can review a tribe's submitted water quality standards and take action under CWA Section 303(c). If the EPA approves a tribe's water quality standards, those standards then become federally-applicable water quality standards for CWA purposes over the waters within the scope of the TAS approval. The EPA notes that any water quality standards adopted by the Tribe and submitted to the EPA for action under the CWA would need to satisfy all CWA and regulatory requirements, including requirements for public involvement in the adoption process. These requirements will ensure an appropriate opportunity for interested entities to provide input on the Tribe's proposed water quality standards, and any concerns regarding the standards being proposed by the Tribe would be appropriately raised and addressed as part of that process.

The EPA also notes that Section 518(e) of the CWA addresses the possibility that disputes may arise between a state and an eligible Indian tribe as a result of differing federally-approved water quality standards on shared water bodies. This provision directs the EPA to promulgate

²³ *Ibid*, Exhibit 6, Resumes of Water Quality Staff.

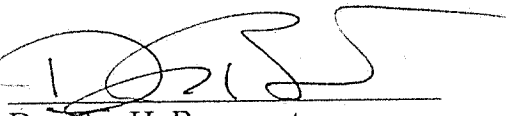
regulations providing a mechanism for resolving any unreasonable consequences that may arise as a result of differing state and tribal water quality standards. This mechanism must provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. EPA has promulgated such regulations at 40 C.F.R. § 131.7, which authorize the Regional Administrator to attempt to resolve (and provide a detailed process for resolving) such disputes between a state and a tribe with TAS approval in certain circumstances.²⁴

It is the EPA's understanding that the Tribe has participated in discussions with the State of Colorado regarding the adoption of water quality standards. The Region supports these efforts and encourages the continuation of Tribal discussions with Colorado as well as other interested stakeholders. The EPA encourages an inclusive discussion among all concerned entities in the area to help promote cooperative approaches to implementation of CWA programs.

IV. Conclusion

The EPA determines that the Southern Ute Indian Tribe of the Southern Ute Indian Reservation in Colorado meets the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8, and therefore approves the Tribe's application for program eligibility to administer the water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of issuing certifications under CWA Section 401.

This approval includes all of the currently held trust lands identified within the Southern Ute Indian Reservation boundaries as well as the trust land parcel contiguous to the Reservation identified in the Tribe's application. This approval does not include any land not currently held in trust for the Tribe. Hence this approval does not include any "after-acquired" trust land as explained in Section II(C)(3) above. Further, as described in Section III above, this decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of the Tribe's water quality standards is a separate Agency action.


Douglas H. Benevento
Regional Administrator

March 28, 2018
Date

²⁴ Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the Regional Administrator shall attempt to resolve such disputes where: (1) the difference in water quality standards results in unreasonable consequences; (2) the dispute is between a State and a Tribe with TAS approval; (3) a reasonable effort to resolve the dispute without EPA involvement has been made; (4) the requested relief is consistent with the provisions of the CWA and other relevant law; (5) the differing State and Tribal water quality standards have been adopted by the State and Tribe and approved by EPA; and (6) a valid written request has been submitted by either the Tribe or the State. 40 C.F.R. § 131.7.