

**U. S. ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

**DECISION DOCUMENT**

**APPROVAL OF THE NORTHERN CHEYENNE TRIBE'S  
APPLICATION FOR TREATMENT IN A SIMILAR MANNER AS A STATE  
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

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## **I. INTRODUCTION, BACKGROUND AND SELECTED DOCUMENTS**

### **A. Introduction**

This Decision Document provides the basis and supporting information for the United States Environmental Protection Agency's (EPA or the Agency) decision to approve the application from the Northern Cheyenne Tribe (Tribe) of the Northern Cheyenne Reservation (Reservation) to be treated in a similar manner as a state (TAS) pursuant to Clean Water Act (CWA) § 518(e) for purposes of administering the CWA § 303(c) water quality standards and CWA § 401 water quality certification programs. As described in further detail below, this decision does not approve any water quality standards which may be submitted by the Tribe. Thus, a final decision on the Tribe's TAS application is not an approval or disapproval of the Tribe's water quality standards. EPA's review and approval or disapproval of the Tribe's water quality standards is a separate Agency action.

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

CWA § 518(e) authorizes EPA to treat tribes in a similar manner as states for the purposes of administering certain CWA programs, including the section 303(c) water quality standards and section 401 water quality certification programs. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering these CWA programs. (See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994), codified at 40 C.F.R. §§ 131.4(c), 131.8). CWA § 518(e)(2) authorizes EPA to approve an eligible tribe's TAS application where the functions to be exercised by the tribe pertain to the management and protection of water resources "within the borders of an Indian reservation." As discussed in detail below, EPA's decision to approve the Northern Cheyenne Tribe's TAS application for purposes of administering CWA §§ 303(c) and 401 applies to all surface waters within the borders of the Northern Cheyenne Reservation as established by Executive Orders dated November 26, 1884 and March 19, 1900.

## **B. Background**

On April 29, 2002, the Northern Cheyenne Tribe applied for TAS pursuant to CWA § 518(e) for purposes of administering the CWA § 303(c) water quality standards and § 401 water quality certification programs (2002 TAS Application). Among other things, the Tribe's 2002 TAS Application asserts that the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, ratifying the Tribe's water rights compact with the State of Montana, constituted a Congressional delegation of authority to the Tribe to establish and implement water quality standards for the entire Northern Cheyenne Reservation. On December 2, 2003, the Tribe supplemented its application to include an assertion of inherent Tribal authority to administer the CWA §§ 303(c) and 401 programs.

Consistent with EPA regulations, EPA notified "appropriate governmental entities"<sup>1</sup> and the public and provided an opportunity to comment on the Tribe's initial and supplemental assertions of authority. In response, EPA received comments from appropriate governmental entities, and other entities, as well as correspondence from members of Congress. The comments received reflected a range of views, including comments in support of the Tribe's application and assertions of authority and comments objecting to the Tribe's assertions of authority.

EPA Region 8 also prepared a Proposed Findings of Fact (PFOF) document, which set forth facts relevant to the Tribe's assertion of inherent Tribal authority over nonmember activities on the Reservation. Consistent with EPA practice, EPA notified appropriate governmental entities and the public of the opportunity to review and comment on the PFOF document. In response, EPA received comments from appropriate governmental entities and other entities, again reflecting a range of views. The final factual findings with regard to this TAS application are set forth in Appendix I and are part of the basis for EPA's decision to approve the Tribe's application.

A summary of the notice and comment process, comments received on the three documents and EPA's response to comments are included in the discussion below and in Appendix II, EPA's summary of and Response to Comments document.

This document constitutes EPA's final decision on the Northern Cheyenne Tribe's application to be treated in a similar manner as a state for purposes of administering the Clean Water Act § 303(c) water quality standards and § 401 certification programs. In reaching this decision, EPA has considered the Tribe's application materials and related documents; comments received from appropriate governmental entities and other entities; EPA's findings of fact; and the Agency's

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<sup>1</sup> EPA defines "appropriate governmental entities" as "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." 56 Fed. Reg. at 64884.

special expertise and practical experience regarding water quality impacts from various activities and their corresponding effects on human health and the environment.

### **C. Selected Documents**

This section identifies a portion of the materials and relevant documents that form the basis for EPA's decision.

#### **1. Application and Supporting Documents**

The Tribe's TAS application includes the following letters and related documents:

April 1, 2002 - Resolution (# DOI-113(2002)) of the Northern Cheyenne Tribal Council approving and directing submittal of the Tribe's TAS application to EPA.

April 9, 2002 - Letter from Geri Small, President of the Tribe, to the EPA Regional Administrator, notifying EPA that the Tribe was applying for TAS pursuant to CWA § 518(e) and 40 C.F.R. § 131.8.

April 29, 2002 - Letter from Jeanne S. Whiteing, Special Counsel to the Tribe, to Jack McGraw, Acting Regional Administrator, transmitting the Tribe's application.

*Attachment: The Northern Cheyenne Tribe's Application for Treatment as a State to Administer a Water Quality Standards Program under the Clean Water Act, 33 U.S.C. § 1377(e) and 40 CFR § 131.8, including a Statement Concerning the Basis of the Northern Cheyenne Tribe's Authority to Administer a Water Quality Standards Program within the Northern Cheyenne Indian Reservation (with attachments). The attachments to the application include: a map of the Northern Cheyenne Indian Reservation; copies of the Northern Cheyenne Tribe's Constitution and Bylaws; copies of the November 25, 1884 and March 19, 1900 Executive Orders; a copy of the Northern Cheyenne Tribe's Water Code; and a copy of the Northern Cheyenne-Montana Water Rights Compact.*

July 17, 2002 - Letter, Jeanne Whiteing to Robert E. Roberts stating the Tribe's application includes the 401 certification program.

June 3, 2003 - Fax, cover sheet, Jeanne Whiteing to Kimi Matsumoto, EPA with attachment "Serious and Substantial Impacts to the Health and Welfare of the People of the N. Cheyenne Reservation".

June 10, 2003 - Letter, Jeanne Whiteing to Kenneth von Schaumburg, EPA.

June 24, 2003 - Letter, Jeanne Whiteing to Robert Fabricant, EPA, regarding Northern Cheyenne Tribe's TAS Application.

June 30, 2003 - Letter, Geri Small to Robert E. Roberts, EPA Regional Administrator, regarding Northern Cheyenne Tribe's TAS Application.

December 2, 2003 - Letter, Jeanne Whiteing to Robert E. Roberts, transmitting Tribe's supplemental TAS application based on inherent Tribal authority;

Attachment: December 1, 2003, Document, "Supplemental Statement Regarding the Basis of the Northern Cheyenne Tribe's Authority to Administer a Water Quality Standards Program on the Northern Cheyenne Reservation";

Attachment: "Northern Cheyenne Tribe and Its Reservation 2002," a report to the United States Bureau of Land Management and Montana Dept. of Natural Resources and Conservation;

Attachment: Map, showing location of fee and trust lands on the Reservation.

January 16, 2004 - Letter, Jeanne Whiteing to Kimi Matsumoto, transmitting 1899 McLaughlin report, 1886 Withdrawal Order, and title page of "The Northern Cheyenne Indian Reservation 1877 - 1900" University Press of Colorado.

May 7, 2004 - Letter, Jeanne Whiteing to Robert E. Roberts, providing the Tribe's response to comments submitted with regard to the Tribe's supplemental assertion of inherent authority.

June 17, 2004 - Letter, Geri Small to Robbie Roberts regarding Northern Cheyenne Tribe's TAS Application.

June 18, 2004 - Letter, Geri Small to Ann Klee, EPA General Counsel regarding Northern Cheyenne Tribe's TAS Application.

October 8, 2004 - Letter, Jeanne Whiteing to Ann Klee regarding Northern Cheyenne Tribe's TAS Application.

August 31, 2005 - Letter, Jeanne Whiteing to Robert E. Roberts, transmitting the N. Cheyenne Tribe's response to comments submitted on EPA's Proposed Findings of Fact document.

March 26, 2006 - Letter, Eugene Little Coyote, Tribal President, to Ann Klee.

## **2. Letters and Related Documents from EPA**

June 21, 2002 - Letter from Robert E. Roberts, Regional Administrator, to Geri Small, Tribal President, noting that EPA had received the TAS application.

September 4, 2002 - Letter from Robert E. Roberts to Geri Small regarding notification that the TAS Application is complete.

September 4, 2002 - Letters from Robert E. Roberts to appropriate governmental entities advising those entities that they had 30 days to comment on the Tribe's assertion of authority; letters sent via certified mail to:

- Judy Martz, Governor of the State of Montana;
- Clifford Birdin Ground, Chairman of the Crow Indian Tribe;
- Tom Lonnie, Acting Director of the Montana State Office of the United States Bureau of Land Management; and
- Keith Beartusk, Regional Director of the Bureau of Indian Affairs

September 4, 2002 - Letter from Robert E. Roberts to Dennis Hemmer, Director of the Wyoming Department of Environmental Quality, informing him of the Tribe's TAS application, discussing the TAS process, and providing a copy of the Tribe's proposed water quality standards.

September 23, 2002 - Affidavit of Publication of Public Notice in the Billings Gazette.

July 18, 2003 - Letter, Max Dodson, EPA, to Geri Small, responding to President Small's letter of June 30, 2003.

December 12, 2003 - Letter, Robert E. Roberts to Geri Small, providing notification that the Tribe's TAS application, as supplemented, is complete.

December 12, 2003 - Letters from Robert E. Roberts to appropriate governmental entities advising those entities that they had 30 days to comment on the Tribe's supplemental assertion of authority; letters sent via certified mail to:

- Judy Martz, Governor of the State of Montana;
- Carl Venne, Crow Indian Tribe;
- Marty Ott, Director of the Montana State Office of the United States Bureau of Land Management; and
- Keith Beartusk, Regional Director of the Bureau of Indian Affairs

December 12, 2003 - Letter, Robert E. Roberts to John Corra, Director Wyoming DEQ, providing notification of the opportunity to comment on Tribe's supplemental assertion of authority through the Montana DEQ.

January 5, 2003 - Affidavit of Publication, Billings Gazette.

January 13, 2004 - E-mail, Max Dodson, EPA, to John North, approving the State's request for a comment period extension.

January 13, 2004 - Series of E-mails from EPA staff to appropriate governmental entities and Wyoming DEQ providing notification that the comment period had been extended to February 9, 2004.

January 28, 2004 - Affidavits of Publication, Billings Gazette, certifying publication of public notice of the initial comment period on December 19 and 27, 2003 and January 5, 2004, and of the extended comment period on January 15, 18 and 28, 2004.

May 5, 2005 - Letters from Robert E. Roberts to appropriate governmental entities advising those entities that they had 30 days to comment on EPA's Proposed Findings of Fact document; letters sent via certified mail to:

- Richard Opper, Montana DEQ;
- Carl Venne, Crow Indian Tribe;
- Martin Ott, Director of the Montana State Office of the United States Bureau of Land Management; and
- Keith Beartusk, Regional Director of the Bureau of Indian Affairs.

May 5, 2005 - Letter (certified mail), Robert E. Roberts to John Corra, Wyoming DEQ, providing notification of the opportunity to comment on EPA's PFOF document.

May 9, 2005 - Series of emails from EPA staff to appropriate governmental entities and other entities providing notification of the opportunity to comment on EPA's PFOF document and providing website access to the document.

Undated - Affidavit of Publication, Billings Gazette, certifying publication of the public notice for the PFOF on May 9, 15 and 23, 2005.

### **3. Comments of Appropriate Governmental Entities Regarding Tribal Authority and EPA's Proposed Findings of Fact**

EPA's water quality standards regulation requires that EPA notify appropriate governmental entities of their opportunity to review and comment on the "substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters." 40 C.F.R. § 131.8(c)(2). For purposes of this TAS application, appropriate governmental entities include the State of Montana, the Crow Nation, the United States Bureau of Indian Affairs, and the United States Bureau of Land Management.

On September 4, 2002, EPA notified appropriate governmental entities of their

opportunity to review and comment directly to EPA on the Tribe's initial assertion of Congressionally-delegated authority to administer the CWA water quality standards and certification programs on the Reservation. On December 12, 2003, EPA provided appropriate governmental entities with notice of, and opportunity to review and comment directly to EPA on, the Tribe's supplemental assertion of inherent Tribal authority. EPA regulations establish a 30-day time period for comments to be submitted to EPA. 40 C.F.R. § 131.8(c)(3). On January 13, 2004, EPA received a request from the State of Montana for a 30-day extension of the comment period, which EPA granted for the appropriate governmental entities and the public. Consistent with EPA's practice, EPA prepared a Proposed Findings of Fact document, which set forth the facts upon which the Agency may rely in analyzing the Tribe's assertion of inherent Tribal authority over nonmember activities on the Reservation. On May 5, 2005, EPA sent notification to appropriate governmental entities of their opportunity to review and comment on the PFOF document.

Appropriate governmental entities' comments related to the Northern Cheyenne Tribe's assertions of authority and EPA's Proposed Findings of Fact document include the following letters and related documents.

October 4, 2002 - Letter from Keith Beartusk, Regional Director of the Bureau of Indian Affairs, to EPA's Office of Ecosystems Protection and Remediation, commenting on the Tribe's assertion of authority.

October 15, 2002 - Letter from Jan Sensibaugh, Director of the Montana Department of Environmental Quality, to Robert E. Roberts, commenting on the Tribe's assertion of authority.

January 13, 2004 - E-mail, John North, Montana DEQ, to Kimi Matsumoto requesting an extension of time to comment on the Tribe's supplemental assertion of authority.

January 14, 2003 - Letter from Keith Beartusk, BIA, to Jim Luey, EPA (former chief of the Water Quality Unit), providing supplemental comments on the TAS application, with attachments.

Attachment - November 27, 2002: Draft letter, Regional Director BIA to EPA  
Attachment - December 3, 2002, Tribal Resolution Letter, N. Cheyenne Tribal Council to BIA

February 9, 2004 - Letter, Jan Sensibaugh, Director Montana DEQ, to Robert E. Roberts. The letter comments on the Tribe's supplemental application and includes attached comments from other entities (see below).

June 8, 2005 - Fax, Rick Stefanic, BIA Regional Director, to Robert E. Roberts commenting on EPA's PFOF.

June 8, 2005 - Letter, Richard Opper, Director Montana DEQ, to Robert E. Roberts commenting on EPA's PFOF.

#### **4. Comments of Other Entities Regarding Tribal Authority and EPA's Proposed Findings of Fact**

Although the State of Wyoming is not an "appropriate governmental entity" as defined by EPA for purposes of this TAS application, on the same dates that the appropriate governmental entities received notice, EPA also notified the State of Wyoming, by letter, of the opportunity to review and comment through the Montana Department of Environmental Quality on the Tribe's assertions of authority and EPA's Proposed Findings of Fact.

Consistent with Agency practice, EPA also provided an opportunity for public review and comment on the Tribe's initial and supplemental assertions of authority and on EPA's Proposed Findings of Fact document. With regard to each of these documents, EPA issued a series of public notices in the *Billings Gazette* informing the public of the opportunity to comment through the Montana Department of Environmental Quality.<sup>2</sup> Montana DEQ compiled and forwarded all comments it received to EPA.

Comments by entities other than appropriate governmental entities on the Northern Cheyenne Tribe's assertions of authority and EPA's Proposed Findings of Fact document include the following letters and related documents:

October 31, 2002 - Letter from Dennis Hemmer, Director of Wyoming Department of Environmental Quality, to Robbie Roberts.

March 25, 2003 - Fax, Bracewell & Patterson to Kenneth von Schaumburg, EPA.

May 6, 2003 - Unsigned Memorandum, Bracewell & Patterson, L.L.P. to Kenneth von Schaumburg.

June 10, 2003 - E-mail, Joshua Zive to Kenneth von Schaumburg, transmitting a memorandum.

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<sup>2</sup> EPA's regulation provides for direct comment to EPA from "appropriate governmental entities" only. Other entities can comment through an appropriate governmental entity, as determined for a specific TAS application. In this case, the Montana Department of Environmental Quality agreed to accept comments from other entities and transmit those comments to EPA. EPA's practice is to consider all relevant comments it receives, including comments sent directly to EPA from commenters other than appropriate governmental entities.

June 16, 2003 - Unsigned Memorandum, Bracewell & Patterson, L.L.P. to Kenneth von Schaumburg.

July 24, 2003 - Unsigned Memorandum, Bracewell & Patterson, L.L.P. to Kenneth von Schaumburg.

January 8, 2004 - Letter, Michael Caskey, Fidelity Exploration and Production Company, to Robert Roberts, requesting a 60-day comment period extension.

January 9, 2004 - Letter, John Corra, Wyoming DEQ, to Robbie Roberts; Attachment - January 9, 2004 Wyoming AG's letter.

February 9, 2004 - Other entities' comments on the Tribe's supplemental assertion of authority; comments forwarded to EPA with a January 9, 2004 letter from Jan Sensibaugh, MDEQ, to Robert Roberts (letter and attachments faxed to EPA on February 9, 2004; originals mailed and received by EPA on February 11, 2004). Attachments include:

- January 9, 2004, Jennifer Golden, Wyoming AG's Office, to MDEQ
- January 29, 2004, The Paiute Indian Tribe of Utah to MDEQ
- February 2, 2004, Turtle Mountain Band of Chippewa Indians to MDEQ
- February 2, 2004, Jennifer Golden, Wyoming AG's Office, to MDEQ
- February 2, 2004, National Congress of American Indians to MDEQ
- February 2, 2004, Confederated Salish and Kootenai Tribes of the Flathead Nation to MDEQ
- February 2, 2004, Blackfeet Nation to MDEQ
- February 2, 2004, Flandreau Santee Sioux Tribe to MDEQ
- February 2, 2004, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation to MDEQ
- February 3, 2004, Letter, Jon Metropoulos, of Gough, Shanahan, Johnson and Waterman, representing Fidelity Exploration and Production Company, to MDEQ; transmitting comments
- February 3, 2004, Northern Plains Resource Council to MDEQ
- February 3, 2004, Gros Ventre and Assiniboine Sioux Tribes of the Fort Belknap Indian Community to MDEQ.

February 16, 2004 - Letter, John Martin, Patton Boggs, LLP, representing Anadarko Petroleum Corporation, Devon Energy Corporation, Marathon Oil Corporation and Pennaco Energy, Inc. to Robert E. Roberts commenting on the Tribe's supplemental assertion of authority.

February 24, 2004 - Letter, Jennifer Golden, Wyoming AG's Office, to Robert Roberts and Tom Ellerhoff, Montana DEQ, commenting on the Tribe's supplemental assertion of authority.

March 16, 2004 - Letter, John C. Martin, of Patton Boggs, LLP, to Robert E. Roberts providing comments on the Tribe's supplemental assertion of authority.

June 2, 2005 - Letter, John Corra, Wyoming DEQ, to Tom Ellerhoff, Montana DEQ, commenting on EPA's PFOF.

June 8, 2005 - Letter, John C. Martin and Susan M. Mathiascheck, Patton Boggs, LLP, to Tom Ellerhoff, Montana DEQ, commenting on EPA's PFOF; Attachments.

June 8, 2005 - Letter, Jon Metropoulos, Gough, Shanahan, Johnson and Waterman Attorneys at Law, to Tom Ellerhoff, Montana DEQ, commenting on EPA's PFOF.

## **5. Selected Statutory and Regulatory Provisions**

- a. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian tribe in a similar manner as a state for purposes of, among other provisions, the CWA §§ 303(c) and 401 programs.
- 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. § 131), setting forth the requirements for a tribe to obtain TAS approval.

## **6. Policy Statements**

EPA's process for reviewing and making determinations on tribal TAS applications is informed by the following Agency policy and guidance documents:

- a. EPA Policy for Administration of Environmental Programs on Indian Reservations, November 11, 1984, as reaffirmed most recently by EPA Administrator Johnson on September 26, 2005.
- b. EPA Memorandum entitled "EPA/State/Tribal Relations," EPA Administrator Reilly, July 10, 1991.
- c. Memorandum entitled "Adoption of Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.

## **II. REQUIREMENTS FOR TAS APPROVAL**

Under CWA § 518(e) and EPA's implementing regulation at 40 C.F.R. § 131.8, the following four requirements must be satisfied before EPA can approve a tribe's application to administer the CWA § 303(c) water quality standards and § 401 certification programs.

- (1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in 40 C.F.R. §§ 131.3(k) and (l);
- (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 the Indian Tribe, held by the United States in trust for Indians, held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the 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.

It is important to note that a final decision on the Tribe's TAS application is not an approval or disapproval of the Tribe's water quality standards. EPA's review and approval or disapproval of the Tribe's water quality standards is a separate Agency action. The Tribe's TAS application must be approved in order for EPA to act on water quality standards submitted by the Tribe under CWA § 303(c). EPA's approval of the Tribe's TAS Application for purposes of administering a water quality standards program, however, does authorize the Tribe to issue certifications under CWA § 401, see 40 C.F.R. § 131.4(c), provided that the Tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e).

### **A. Federal Recognition**

EPA can approve a TAS application to administer CWA §§ 303(c) and 401 for an Indian tribe that meets the definitions set forth in CWA § 518(h) and 40 C.F.R. §§ 131.3(k) and (l). See 40 C.F.R. § 131.8(a)(l). 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 § 518(h)(2), 40 C.F.R. § 131.3(l). 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 § 518(h)(1), 40 C.F.R. § 131.3(k).

The Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana is included on the U.S. Secretary of the Interior’s list of “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs.” (70 Fed. Reg. 71194 (November 25, 2005)). Furthermore, as discussed below, the Tribe is exercising governmental authority over a Reservation within the meaning of the CWA. EPA, therefore, has determined that the Northern Cheyenne Tribe meets the requirements of 40 C.F.R. § 131.8(a)(1).

## **B. Substantial Governmental Duties and Powers**

EPA regulations require that in order to be eligible for TAS, a tribe must demonstrate 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). This provision 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.

The Northern Cheyenne Tribe's descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area is found in the Tribe’s 2002 TAS Application, pp. 2-4. The statement adequately: (1) describes the form of Tribal government; (2) describes the types of governmental functions currently performed by the Tribal governing body; and (3) identifies the source of the Tribal government's authority to carry out the governmental functions currently being performed.

Specifically, under the Constitution and By-Laws of the Northern Cheyenne Tribe, the governing body of the Tribe is the Tribal Council of the Northern Cheyenne, with administrative functions of the Tribe being the responsibility of the President of the Tribe. Under the Northern Cheyenne Constitution, the Tribal Council has authority to administer the CWA water quality standards and certifications programs, among other important functions. The Tribal Council has established six commissions for the purpose of regulating activities on the Reservation, including natural resource and Tribal health commissions. Pursuant to the Northern Cheyenne Constitution, the Tribe has adopted comprehensive ordinances governing Reservation land, resources, and activities on the Reservation. The Tribe operates under a separation-of-powers ordinance with separate Executive, Legislative and Judicial branches of government.

Furthermore, EPA previously approved the Tribe’s applications for TAS for purposes of CWA § 106 grants, on February 26, 1992, and Clean Air Act § 105 grants, on September 23, 1999, at which times the Agency made determinations that the Tribe has “a governing body carrying out substantial governmental duties and powers.” As

set forth in EPA regulations of December 14, 1994 (59 Fed. Reg. 64339), 40 C.F.R. § 131.8(b)(6) provides that where a tribe has “previously qualified for eligibility or ‘treatment as a state’ under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous application.”

Based on this record, EPA has determined that the Northern Cheyenne Tribe has a Tribal government carrying out substantial governmental duties and powers over a defined area and that the Tribe has met the requirements set forth in 40 C.F.R. § 131.8(a)(2).

### **C. Jurisdiction Over “Waters Within the Borders” of the Northern Cheyenne Reservation**

The Tribe’s TAS application includes a statement of the Tribe’s authority to regulate water quality within the borders of the Northern Cheyenne Reservation. Under 40 C.F.R. § 131.8(b)(3), the statement of authority 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.

#### **1. Map or Legal Description of the Area Over Which the Tribe Asserts Authority Over Surface Water Quality.**

##### **a. Map or Legal Description of the Reservation Submitted by the Tribe.**

The Northern Cheyenne Tribe has submitted a map and a legal description of the Northern Cheyenne Reservation. The Tribe’s application describes the Reservation to be comprised of approximately 444,775 acres with the following approximate allocation of land status: 98.7% of the lands are held by the United States in trust for the Tribe or Tribal members; 0.6% are Tribal member-owned fee lands; and 0.7% are nonmember-owned fee lands. The Tribe’s legal description of the Reservation boundaries, within which the Tribe asserts authority over surface water quality, includes all lands and waters within the Northern Cheyenne Reservation as established by Executive Orders in 1884 and 1900.

By Executive Order dated November 26, 1884, President Chester A. Arthur established a Reservation for the Northern Cheyenne Tribe. The eastern boundary of the 1884 Reservation was located 12 miles east of the Rosebud River and approximately 10 to 15 miles west of the Tongue River. By Executive Order of March

19, 1900, President William McKinley expressly extended the eastern boundary of the Northern Cheyenne Reservation to the middle channel of the Tongue River:

Beginning at the point in the middle of the channel of the Tongue River at its intersection with the southern forty-mile limits of the grant to the Northern Pacific Railroad Company; thence west on the said southern forty-mile limits to its intersection with the eastern boundary line of the Crow Indian Reservation; thence south on said boundary line to its intersection with the line dividing townships five and six south; thence east on said dividing line of townships five and six south to its intersection with the line dividing ranges forty and forty-one east on the line dividing townships four and five south; thence east on the line dividing townships four and five south to its intersection with Cook Creek; thence down Cook Creek to its confluence with the Tongue River; then down the middle of the channel of Tongue River to the place of beginning; . . . .

Exec. Order (March 19,1900), President William McKinley.

EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map and a legal description of the area over which the Tribe asserts authority to regulate surface water quality. Consistent with EPA regulations and TAS procedures, EPA provided appropriate governmental entities and the public an opportunity to review and comment on the Tribe's assertions of authority, including the Reservation boundary description submitted by the Tribe. EPA received comments objecting to the Tribe's description of the Northern Cheyenne Reservation boundary. Specifically, certain commenters objected to the Tribe's assertion that the middle channel of the Tongue River forms the eastern boundary of the Northern Cheyenne Reservation. EPA addresses the issues raised with regard to the Reservation boundary and the Agency's determination of the accuracy of the Tribe's legal description of the Reservation boundary below.

b. EPA's Determination of the Reservation Boundaries Within Which the Tribe Is Eligible to Administer the CWA Water Quality Standards and Certification Programs.

The Northern Cheyenne Tribe's TAS application asserts authority to implement the CWA water quality standards and certification programs within the borders of the Northern Cheyenne Reservation as established by Executive Orders issued on November 26, 1884 and March 19, 1900.<sup>3</sup> The 1900 Executive Order included the

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<sup>3</sup> Although the Tribe also states the Northern Cheyenne Reservation was validly set aside by the federal government in 1881, for purposes of this TAS Application, the Tribe does not assert authority over lands and waters included within the 1881 area that are not also included within the boundaries as described by the 1884 and 1900 Executive Orders. Thus, it is not necessary for EPA to make a determination on the

Reservation as established in the 1884 Executive Order and expressly extended the eastern boundary of the Reservation to the middle channel of the Tongue River.

Pursuant to EPA's TAS regulations and procedures, EPA provided appropriate governmental entities and the public with notice of, and an opportunity to comment on, the Tribe's assertions of authority. EPA received numerous comments in support of or objecting to the Tribe's assertions of authority to implement a water quality standards program based on inherent Tribal authority.<sup>4</sup> Several commenters objected to the Tribe's assertion that the middle channel of the Tongue River forms the eastern boundary of the Reservation as described in the 1900 Executive Order. The comments are based on a two-part argument: (1) upon Statehood in 1889, Montana assumed title to the beds and banks of the Tongue River under the Equal Footing Doctrine;<sup>5</sup> and

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effect of federal government actions in 1881.

<sup>4</sup> EPA received comments in support of the Northern Cheyenne Tribe's TAS application from: the National Congress of American Indians; Confederated Salish and Kootenai Tribes of the Flathead Nation; Flandreau Santee Sioux Tribe; Assiniboine and Sioux Tribes on the Fort Peck Indian Reservation; Blackfeet Nation; Paiute Indian Tribe of Utah; Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community; Turtle Mountain Band of Chippewa Indians; and the Northern Plains Resource Council. EPA received comments raising objections to the Tribe's assertion of authority from Montana Department of Environmental Quality; offices and agencies representing the State of Wyoming; Gough, Shanahan, Johnson and Waterman, Attorneys at Law representing Fidelity Exploration and Production Company; and Patton Boggs, LLP, representing Anadarko Petroleum Corporation, Devon Energy Corporation, Marathon Oil Company and Pennaco Energy, Inc. and Bracewell & Patterson, LLP.

<sup>5</sup> Whether the State of Montana assumed title to the beds and banks of the Tongue River upon Statehood in 1889 is a factually-specific determination. Under the Equal Footing Doctrine, prior to statehood, the United States holds title to the beds and banks of navigable waters in trust for a future state. Upon statehood, there is a strong presumption that title to the beds and banks of navigable waters passes to the state. *Idaho v. United States*, 523 U.S. 262 (2001); *Montana v. United States*, 450 U.S. 544 (1981). The presumption in favor of state title may, however, be overcome where Congress intended to include submerged lands within a federal reservation, and, if so, where Congress intended to defeat the future state's title to those lands. Where a reservation is created by the Executive branch, the two-part inquiry is satisfied when an Executive reservation clearly includes the submerged lands, and Congress recognizes that reservation in a way that demonstrates its intent to defeat state title. *Idaho v. United States*, 533 at 263. Thus, whether the State of Montana took title to the beds and banks of the Tongue River upon Statehood would depend on: (1) whether the Tongue River was navigable in fact at the time of Statehood, and if so; (2) whether the presumption in favor of State title was overcome by federal government actions and

(2) as a matter of law, once Montana took title to the beds and banks of the Tongue River in 1889, the federal government did not have the authority in 1900 to establish the Reservation to the middle channel of the Tongue River.

EPA believes it is not necessary to determine whether the State acquired title to the beds and banks of the Tongue River upon Statehood in order to approve the Tribe's application.<sup>6</sup> As explained below, this is because, even assuming, without deciding, that the State acquired title to the beds and banks upon Statehood in 1889, the federal government subsequently included those lands and overlying waters within the boundaries of the Northern Cheyenne Indian Reservation, and the Tribe has demonstrated authority over Reservation waters. See Appendix II, EPA's Response to Comments, pp. 2-6.

Under the Clean Water Act, EPA is authorized to approve an eligible tribe's TAS application for certain programs for the management and protection of resources within the borders of the tribe's reservation. CWA section 518(e) authorizes EPA to treat tribes in a similar manner as a state for purposes of administering the water quality standards and certification programs (among other CWA provisions), where the tribe has a governing body carrying out substantial governmental duties and powers; the Indian tribe is reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the CWA and regulations; and

the functions to be exercised by the Indian tribe pertain to the management and

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intent.

<sup>6</sup> EPA notes that issues related to title to the beds and banks of the Tongue River are currently being adjudicated under the Quiet Title Act, 28 U.S.C. § 2401, which provides the exclusive means for bringing a title claim against the federal government. *Block v. North Dakota*, 461 U.S. 273 (1983), *State of Alaska v. Babbitt*, 38 F.3d 1068 (9<sup>th</sup> Cir. 1994). On July 27, 2004, Fidelity Exploration & Production Company (Fidelity) filed a Quiet Title Act action against the federal government in the United States District Court for the District of Montana to quiet title to the beds and banks of the Tongue River. *Fidelity Exploration & Production Co. v. United States*, CV-04-100-BLG-RFC/RWA (D. Mont. filed July 27, 2004). On October 17, 2005, the United States Magistrate Judge recommended dismissal of the case, finding in favor of the federal government on two grounds: (1) the United States has at least a colorable claim that these lands are Indian lands and thus, the United States has not waived its sovereign immunity from suit under the Quiet Title Act with regard to these lands; and (2) the action is barred by the Quiet Title Act's 12-year statute of limitations. On January 23, 2006, the United States District Court for the District of Montana adopted the Magistrate Judge's recommendation and dismissed the case. On March 27, 2006, Fidelity appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit. The appeal is pending.

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. . . .**

33 U.S.C. § 1377(e)(2) (emphasis provided). In addition, the CWA specifically defines “Federal Indian reservation” to mean “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.” 33 U.S.C. § 1377(h)(1).<sup>7</sup>

Thus, the relevant inquiry with regard to the Northern Cheyenne Tribe’s TAS application is not ownership of the beds and banks of the Tongue River, but whether the middle channel of the Tongue River forms the eastern boundary of the Northern Cheyenne Reservation and is properly considered “within the borders” of the Reservation, and whether the Tribe has authority to set water quality standards for their Reservation waters.

As described in briefs recently filed by the United States in the Fidelity Quiet Title Act litigation (see above at fn. 6), the history of the Northern Cheyenne Reservation demonstrates recognition by the three branches of the federal government that the 1884 and 1900 Executive Orders established the Reservation boundaries. See Defendants’ Memorandum In Support of It’s Motion to Dismiss at 2-4; United States’ Response to Plaintiff’s Objections to Magistrate Findings and Recommendations (U.S. Response) at 2-5. In those briefs, the United States explained that the 1884 and 1900 Executive Orders established the Reservation boundaries. *Id.* As the United States stated: “Congress statutorily confirmed the Reservation boundaries by enacting the Northern Cheyenne Allotment Act of 1926, 44 Stat. 690” (June 3, 1926). U.S. Response at 5. Relevant language in that statute states: “[b]e it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Cheyenne Indian Reservation heretofore set

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<sup>7</sup> Several courts have upheld EPA actions approving tribal CWA TAS applications for Indian reservations that include, or may include, lands not owned by the applicant tribe or tribal members. See *State of Wisconsin v. EPA*, 266 F.3d 741, 747 (7<sup>th</sup> Cir. 2001) (finding that even assuming the State of Wisconsin owned the beds and banks of Rice Lake, State ownership would not preclude EPA approval of Tribal regulation of such waters within the borders of the Reservation; the CWA refers to waters within the borders of reservations and “does not even discuss ownership rights”), *cert. denied*, 535 U.S. 1121 (2002); *Montana v. EPA*, 137 F.3d 1135 (9<sup>th</sup> Cir.) (upholding EPA approval of CWA TAS application for Flathead Reservation, which includes lands owned in fee by nonmembers of the applicant Tribes), *cert. denied*, 525 U.S. 921 (1998); *Montana v. EPA*, 141 F.Supp.2d 1259 (D. Mont. 1998) (same, with regard to Fort Peck Indian Reservation).

apart by Executive Order dated the 19<sup>th</sup> day of March 1900, for the permanent use and occupation of the Northern Cheyenne Indians, in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.” The United States also cited the Supreme Court decision in *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976). U.S. Response at 5. In that case, the Supreme Court ruled that “The 1926 [Congressional Northern Cheyenne Allotment] Act, statutorily established the Northern Cheyenne Reservation . . . .” 425 U.S. at 650.

Consistent with the federal government’s position in the Quiet Title Act litigation and elsewhere,<sup>8</sup> EPA’s decision approves the Tribe’s application to the eastern boundary of the Northern Cheyenne Reservation at the middle channel of the Tongue River as set forth in the 1900 Executive Order.

## **2. Legal Statement Describing the Basis for the Tribe’s Authority.**

The Northern Cheyenne Tribe has identified the legal authorities pursuant to which the Tribe performs its governmental functions. These authorities include the Tribe’s Constitution and ByLaws, adopted in 1935, and Tribal codes and ordinances. The Northern Cheyenne Tribal Council has established six commissions for the purposes of regulating activities on the Reservation, including natural resource and Tribal health commissions. The Tribal Council has authority under the Tribe’s

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<sup>8</sup> *See also*, Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374 (Sept. 30, 1992), as amended, Pub. L. 103-263 (May 31, 1994) (“[t]he term ‘Reservation’ means the Northern Cheyenne Indian Reservation as established by Executive Orders of November 26, 1884 and March 19, 1900”), Act of May 31, 1900, 31 Stat. 221, 241, and Act of March 3, 1903, 32 Stat. 955, 1000, (funding authorizations). In addition to the 1884 and 1900 Executive Orders, other Executive branch actions recognizing the Reservation boundaries include the Water Rights Compact, Northern Cheyenne Tribe, State of Montana, United States of America, executed by the U.S. Department of the Interior (DOI) and the U.S. Department of Justice, which defines the Reservation as “the Northern Cheyenne Reservation as established by Executive Orders of November 26, 1884 and March 19, 1900”; DOI approval of the Northern Cheyenne Tribe’s Water Code (October 2001) which defines “Reservation lands” as “all lands within the limits or exterior bounds of the Reservation as delimited in the Executive Orders of November 26, 1884 and March 19, 1900 . . . .”; and DOI approval of the Constitution and Bylaws of the Northern Cheyenne Tribe of the Tongue River Reservation which states, “[t]he jurisdiction of the Northern Cheyenne Tribe under this Constitution and Bylaws shall extend to the territory within the confines of the Tongue River Reservation boundaries as established by Executive Order dated November 26, 1884, under the administration of Chester A. Arthur and extended March 19, 1900 under the administration of William McKinley . . . .”

Constitution to administer the CWA water quality standards and certifications programs.

a. The Northern Cheyenne Tribe's Assertion of Inherent Tribal Authority Over Reservation Waters.

CWA § 518(e)(2) authorizes EPA to treat a tribe in a similar manner as a state for water resources “within the borders of an Indian reservation.” EPA has interpreted this provision to require that a tribe show authority over the water resources for which it seeks TAS approval. 56 Fed. Reg. at 64880. The Northern Cheyenne Tribe’s supplemental assertion of authority is based upon inherent Tribal authority to establish water quality standards under CWA § 303(c) and to issue water quality certifications under CWA § 401 for all surface waters on the Northern Cheyenne Reservation, as established by the 1884 and 1900 Executive Orders. As explained below, EPA has determined that the Northern Cheyenne Tribe has shown inherent Tribal authority to administer the CWA water quality standards and water quality certification programs within the borders of the Reservation.<sup>9</sup>

The Tribe’s application asserts:

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<sup>9</sup> The initial statement of authority contained in the Tribe’s 2002 TAS Application asserts that the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374 (Sept. 30, 1992) (Water Rights Settlement Act) effects a Congressional delegation of authority to the Tribe to establish federal water quality standards throughout the Reservation. Specifically, the Tribe’s 2002 TAS Application states that pursuant to the Tribe’s Water Rights Compact, Article II. E., the Tribe is required to “adopt appropriate water quality regulations to ensure that use of the tribal water right is not wasteful and does not degrade water quality.” The Tribe asserts that Congressional approval, ratification and confirmation of the Water Rights Compact, which includes this directive as well as other pertinent language, constitutes an express delegation of Congressional authority to the Tribe to adopt and implement Tribal water quality standards for all Reservation waters. On September 4, 2002, EPA provided appropriate governmental entities and the public an opportunity to review and comment on the Tribe’s assertion of Congressionally-delegated authority pursuant to the Water Rights Settlement Act. EPA received several comments on this initial assertion of authority. Because, as discussed below in this Decision Document, EPA finds that the Tribe has demonstrated inherent authority to administer the CWA §§ 303(c) and 401 programs, it is not necessary for EPA to make a decision on the Tribe’s original assertion of Congressionally-delegated authority pursuant to the Water Rights Settlement Act. Additionally, the Tribe’s 2002 TAS Application also states that the Tribe has Congressionally-delegated authority to administer a water quality program on the Reservation pursuant to CWA § 518(e). The Tribe reserved the right to amend or supplement its application to assert this additional basis for approval but has not supplemented based on the CWA as a delegation of authority.

The reservation lands set aside as the Northern Cheyenne Reservation by Executive Orders in 1884 and 1900 are within the 'exclusive control' of the Tribe." See *Williams v. Lee*, 358 U.S. 217, 221-222 (1959). In such circumstances, there is a presumption of tribal jurisdiction. *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. District Court*, 400 U.S. 423 (1971). As stated in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982), tribes 'are unique aggregations possessing attributes of sovereignty over both their members and their territory,' citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

Of the 444,775 acres of land on the Northern Cheyenne Reservation, over 99% of the land is held by the Tribe and tribal members. As such, these lands and their associated waters constitute the territory within the exclusive jurisdiction of the Tribe. The Tribe has full authority to regulate such lands and waters for water quality purposes in order to protect tribal and individual tribal member property, and the resources and environment of the Reservation. *Montana v. United States*, 450 U.S. 554, 566 (1981) (tribes may regulate on lands held by the Tribe or held by the United States in trust for the tribe). See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)."

2003 Supplemental Assertion of Authority, p. 2.

EPA recognizes that under well-established principles of federal Indian law, a tribe retains attributes of sovereignty over both its lands and its members. See e.g. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Tribes retain the "inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal authority. *Merrion*, 455 U.S. at 141-142. See also, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty). Tribes also retain well-established authority to exclude non-members from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. Thus, a tribe can regulate the conduct of persons over whom it could "assert a landowner's right to occupy and exclude." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-652 (2001), quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997).

EPA generally analyzes a tribe's assertion of inherent tribal authority over nonmember activities on nonmember-owned fee lands pursuant to the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana test*). In *Montana*, the Supreme Court held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land. However, the Court also found that Indian tribes retain inherent sovereign power to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where: (i) nonmembers enter into "consensual relationships with the tribe

or its members, through commercial dealing, contracts, leases, or other arrangements”; or (ii) “. . . [nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 565-66. In analyzing tribal assertions of inherent authority over nonmember activities on fee lands on Indian reservations, the Supreme Court has reiterated that the *Montana* test remains the relevant standard. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (describing *Montana* as “the pathmarking case concerning tribal civil authority over nonmembers”); *see also Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (“Indian tribes’ regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]”).

In the preamble to EPA’s 1991 water quality standards regulation, the Agency noted that, in applying the *Montana* test and assessing the impacts of nonmember activities on nonmember fee lands on an Indian tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented by the tribe’s application. *Id.* at 64878. In addition, in that rulemaking, EPA noted as a general matter, “that activities which affect surface water and critical habitat quality may have serious and substantial impacts” and that, “because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations . . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands.” *Id.* EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id.* at 64879.

The Clean Water Act addresses the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States, including tribal waters, by providing that tribes treated in the same manner as states, act to “prevent, reduce, and eliminate pollution.” CWA § 101(b). CWA § 518 authorizes tribes to carry out CWA functions that “pertain to the management and protection” of reservation water resources. The *Montana* test analyzes whether the tribe is proposing to regulate activity that “threatens” or “has some direct effect” on tribal political integrity, economic security, or health or welfare. That test does not require a tribe to demonstrate to EPA that nonmember activity “is actually polluting tribal waters,” if the tribe shows “a potential for such pollution in the future.” *Montana v. EPA*, 141 F.Supp.2d 1249, 1262 (D. Mont. 1998), quoting *Montana v. EPA*, 941 F.Supp. 945, 952 (D. Mont. 1996), *aff’d* 137 F.3d 1135 (9th Cir. 1998), *cert. denied* 525 U.S. 921 (1998). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean

Water Act.<sup>10</sup>

In evaluating the Tribe's assertion of inherent Tribal authority to regulate the activities of nonmembers for purposes of CWA water quality standards and water quality certification programs, EPA has relied on facts presented in the Tribe's application, supplemental application materials and related documents submitted by the Tribe; EPA's findings of fact document; and comments received on the Tribe's assertion of authority and on EPA's proposed findings of fact. EPA also bases its findings and conclusions on its special expertise and practical experience regarding impacts to water quality and the importance of water quality management, recognizing that clean water may be crucial to the survival of the Tribe and its members.

The Clean Water Act addresses the maintenance and restoration of the physical, chemical and biological integrity of waters of the United States. Water quality standards are provisions of state or tribal law that consist of designated uses, water quality criteria to protect those uses, and an antidegradation policy. Water quality standards serve the dual function of establishing water quality goals for specific waterbodies and serving as the regulatory basis for water quality-based treatment controls and strategies. The objective of the CWA, maintenance and restoration of the integrity of the nation's waters, is directly related to water quality standards that are intended to ensure the full protection of all existing uses and designated uses identified by states and eligible tribes. Designated beneficial uses typically include, but are not restricted to, domestic water supply, agriculture, recreation, fish and aquatic life, wildlife, industrial and navigational uses.

In addition to designated uses and criteria, water quality standards include antidegradation provisions that protect all existing uses of surface waters regardless of whether such uses are actually designated in water quality standards. Antidegradation requirements also serve to maintain and protect high quality waters (unless the state or eligible tribe finds that allowing lower quality of water quality is necessary to accommodate important economic or social development in the area in which the waters are located) and waters that constitute an outstanding national resource. Further, antidegradation requirements can be utilized by tribes and states to maintain and protect the quality of surface waters that provide unique cultural or ceremonial uses.

The Tribe asserts that water is the most significant resource necessary for the

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<sup>10</sup> EPA has not resolved whether it is necessary to analyze under the *Montana* test the impacts of nonmember activities on tribal/trust lands, such as those covered in this application, to find that a tribe has inherent authority to set water quality standards for such areas. EPA believes, however, that, as explained in this Decision Document, the Tribe could show authority over nonmember activities on Tribal/trust lands covered by the application under the *Montana* "impacts" test.

survival of the Northern Cheyenne Tribe and its members, and that the water resources on the Reservation are essential to the health and welfare, cultural, political and economic survival of the Tribe and its members, and to the pristine setting and natural beauty of the Reservation. The Tribe's application makes the following statements about the importance of Tribal water quality to the Northern Cheyenne Tribe:

. . . [T]he water resources of the Reservation are essential to the cultural, political and economic survival of the Tribe and its members, and to the pristine setting and natural beauty of the Reservation. Water is the most significant resource necessary for the survival of the Northern Cheyenne Tribe and its members. Good water quality is essential for domestic and municipal water supplies, for the cultural activities and beliefs of the Tribe and to the vitality of the Reservation economy which depends heavily on stock raising and agriculture. . . . The very livelihood of the Tribe and its members, as well as their cultural survival, is dependent on the continuing availability of good quality water for these purposes. See Chapter 6.II and 6.III, NCT Report.

Northern Cheyenne Tribe's Supplemental Assertion of Authority, p. 9.

The direct links between water quality and important Tribal interests are also described in the Northern Cheyenne Tribal Water Code:

The management and protection of water is a central attribute of tribal sovereignty and is vital to the health and welfare of the Reservation residents and to the vitality of the Reservation economy and environment, and

The water resource has cultural, spiritual, social, environmental and economic values that require protection and must guide the appropriate use and management of all resources in the watershed and drainage basins of the Reservation.

Northern Cheyenne Water Code, Ch. 1(B)(1) & (2).

The Northern Cheyenne Tribe's supplemental assertion of authority and related materials also describe how actual and potential nonmember activities on the Reservation have, or may have, serious and substantial impacts on the political integrity, economic security, and health and welfare of the Tribe. As described below and supported by factual findings in Appendix I, EPA has determined that the Northern Cheyenne Tribe has demonstrated that it has inherent authority to regulate nonmember activities within the borders of the Northern Cheyenne Reservation for purposes of the CWA water quality standards and water quality certification programs.

Various types of human activities occur or may occur on the Northern Cheyenne Reservation and adversely affect surface water quality. Although Tribal member activities would presumably have similar impacts on water quality as nonmember activities of the same nature, for purposes of determining the Tribe's assertion of inherent authority under the *Montana* test, the focus of this section is on nonmember activities. The nonmember activities that occur or may occur on the Reservation include:

- agricultural activities, including the use of herbicides and pesticides;
- irrigation activities, including a nonmember irrigation ditch which runs through the Reservation for two miles;
- livestock grazing activities;
- homesite use;
- septic system operations;
- water diversion and construction activities, including the examples specified below;
- operations of small businesses, including a grocery store, eating establishment and small convenience store, churches and schools, including the St. Labre Indian School located adjacent to the Tongue River;
- timber activities, including road construction, timber sales, logging and operation of a Tribal sawmill on trust lands by outside contractors; and
- energy resource development of existing natural resources located on fee and trust lands, including potential development of subsurface mineral rights within the Tongue River watershed.

EPA also relies on specific examples of nonmember activities from commercial businesses on the Reservation that have resulted in actual impacts to the water quality and health and welfare of Tribal members. One example occurred during the summer of 2000, when a nonmember construction firm began construction of a gabion wall structure adjacent to Rosebud Creek. The company's diversion and dewatering activities caused increased turbidity to Rosebud Creek for a period of 6-7 months and resulted in an enforcement action by EPA. The increased turbidity impaired the Tribe's use of Rosebud Creek as a main source of water supply, and for irrigation and stock watering for the western part of the Reservation. The dewatering affected the fishery resources and aquatic habitat of the stream. Another example occurred during the spring and summer of 2003 when a diversion dam associated with a nonmember irrigation ditch on the Tongue River failed, flooding the surrounding trust lands and affecting water quality in connection with the irrigation and stockraising activities taking place on those lands. The failure of the ditch caused significant turbidity and erosion affecting the surrounding lands. Approximately 45 feet of the bank of trust property caved in on one side of the diversion, and as much as 70-80 feet of the bank caved in on the trust property on the other side of the diversion. The heavy equipment that was operated in the River to repair the diversion caused additional turbidity and disturbances to the surrounding trust lands and the habitat in the area.

The nonmember activities of the type described above occur or may occur across the Reservation. Approximately 0.7% of the Reservation lands are nonmember owned fee lands and are primarily interspersed with Tribal trust lands along Rosebud Creek and its tributaries Lame Deer Creek and Muddy Creek, and along the Tongue River. Nonmember activities on these nonmember-owned fee lands may impact adjoining Tribal lands and/or Reservation waters.<sup>11</sup>

EPA also finds that degraded water quality from these activities may threaten or have some direct serious and substantial effect on the political integrity, the economic security, or the health or welfare of the Tribe. The Tribal uses of and interests in these waters are described more fully in Appendix I and include the following:

- domestic and municipal water supplies used for drinking water, cooking and bathing, including several community water systems and over 200 drinking water wells, nearly half of which are in an unconsolidated alluvial aquifer proximal to major drainages on the Reservation;
- agriculture, which is a significant industry on the Northern Cheyenne Reservation;
- livestock watering for ranching, another significant industry on this Reservation;
- forestry, including timber activities in a riparian hardwood forest on the Reservation;
- recreational interests that are reliant on good water quality and/or may include bodily contact with or inadvertent human consumption of Reservation waters; including fishing, hunting, swimming, wading, hiking, camping, plant and berry gathering, water immersion in recreational areas such as the Crazy Head Springs which consists of four spring-fed ponds; aesthetics;
- Tribal traditional, subsistence, and cultural uses, including spiritual beliefs and activities involving Reservation waters; traditional uses and religious practices involving direct contact with surface water, Tribal member use of sweat lodges and other Tribal ceremonies involving water, growth of plants used for medicinal and food purposes and the

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<sup>11</sup> Many of the nonmember activities on the Reservation, including timber harvesting, livestock grazing, use of the Tribal water right and energy development are subject to Tribal laws authorizing Tribal issuances of permits, leases, contracts, ordinances or management plans. With regard to these activities, nonmembers may have “consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements” pursuant to the first exception of the *Montana* test. It is not necessary for EPA to make a decision on this basis, however, because EPA finds that the Tribe has inherent authority to administer the CWA §§ 303(c) and 401 programs based on the second exception of the *Montana* test.

- cultural importance of wildlife.
- wildlife and fisheries, animals which are consumed by Tribal members and are important to Tribal economic interests in tourism, hunting and fishing;
- Tribal water rights in Rosebud Creek, the Tongue River and all of their tributaries on the Reservation. The Tribe has an interest in protecting water quality pursuant to the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (Pub. L. 102-374, 106 Stat. 1186, as amended, Pub. L. 103-263 (May 31, 1994)). The Tribe also has economically valuable marketing rights with respect to their water rights interests on the Tongue River and Rosebud Creek.

The significance of Reservation waters to the Tribe is illustrated by the many Tribal uses of the Tongue River. The Tongue River is the primary water source for the eastern portion of the Northern Cheyenne Reservation. All of the Tribal uses of and interests in, Reservation waters described above apply to the Tongue River. The Tribe has an allocation of 32,500 acre-feet per year of water rights in the Tongue River Basin, including a direct flow right of 12,500 acre-feet and a right of 20,000 acre-feet per year from a combination of water stored in the Tongue River Reservoir and exchange water. In addition, the Tongue River region of the Reservation has important cultural significance for the Tribe as a sanctuary and homeland. Important ceremonial and religious activities such as fasts, sweats, Sun Dances, food and cloth offerings, collection of medicinal and ceremonial plants, church meetings and other ceremonies of religious significance are held in the Tongue River Valley. All of the nonmember activities and associated impacts to water quality described above occur or may occur throughout the Reservation, including on and adjacent to the Tongue River and its tributaries.

In conclusion, EPA finds that nonmember activities throughout the Northern Cheyenne Reservation could result in adverse impacts to surface water quality and that degraded water quality may impair Tribal uses of and interests in the waters as described above. EPA also finds that the Tribal uses of and interests in the waters are crucial to the livelihood, cultural survival and governmental functions of the Northern Cheyenne Tribe and its members. Based on these findings, as well as additional findings and information described more fully in Appendix I, EPA concludes that existing and potential nonmember activities on the Northern Cheyenne Reservation may threaten or have direct serious and substantial effects on the Northern Cheyenne Tribe's political integrity, economic security, health and welfare.

The Agency has determined that the Northern Cheyenne Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(ii) by providing a statement by the Tribe's legal counsel that describes the basis for the Tribe's assertion of authority over surface waters within the borders of the Northern Cheyenne Reservation.

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

The Tribe's application asserts authority over all surface waters on the Northern Cheyenne Reservation as established in the 1884 and 1900 Executive Orders. Appendix III contains a List of Tribal Waters. There are two primary watersheds on the Northern Cheyenne Reservation: the Tongue River drainage on the east and the Rosebud drainage on the west. There are many perennial, intermittent and ephemeral streams on the Reservation that are tributaries to these two main water bodies. Attached to the Tribe's application is a map showing the extensive nature of the tributaries and the Rosebud Creek and Tongue River watersheds throughout the Reservation. A small portion of the Sarpy Creek drainage is located in the northwest corner of the Reservation, flowing north.

The Tongue River is the primary water source for the eastern portion of the Reservation. The headwaters of the Tongue River are located in the Bighorn Mountains of Wyoming. The River flows north into Montana for approximately 265 miles eventually flowing into the Yellowstone River near Miles City, Montana and ultimately into the Missouri River. Rosebud Creek serves as the primary water source for the western side of the Reservation where some of the best lands for irrigation are located. The headwaters for Rosebud Creek are located on the Crow Indian Reservation, to the west of the Northern Cheyenne Indian Reservation. Rosebud Creek flows easterly off the Crow Indian Reservation, turns north onto the Northern Cheyenne Indian Reservation, then continues north, emptying into the Yellowstone River east of Forsyth. Rosebud Creek drains the western part of the Reservation and receives flow from surface water runoff and groundwater input, mostly from within the Reservation.

Wetlands are identified along the entire stretch of the Tongue River as it borders the Reservation and many are included in the U.S. Fish and Wildlife Service's National Inventory of Wetlands. There are also a number of ox-bow areas, which often contain standing flood waters within the abandoned river channel along the Tongue River. The Reservation contains approximately 20,000 acres of wetlands, which support 70% of the wildlife. The Tribe finalized a Wetlands Conservation Plan which was approved and adopted by the Tribal Council as the *Tribal Aquatic Lands Protection Ordinance* in October of 2002.

The Agency has determined that 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.<sup>12</sup>

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<sup>12</sup> EPA's decision approving the Tribe's TAS application does not determine whether any particular surface waters of the Reservation are "waters of the United States" for purposes of the CWA.

In conclusion, EPA finds that the Northern Cheyenne Tribe has met the three requirements set forth at 40 C.F.R. § 131.8(b)(3). Thus, the Tribe has adequately demonstrated inherent Tribal authority to administer the CWA water quality standards and certification programs within the borders of the Northern Cheyenne Reservation.

#### **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 expertise. 40 C.F.R. § 131.8(b)(4)(i)-(v).

The Northern Cheyenne Tribe's narrative statement of the Tribe's capability is found in the Tribe's 2002 TAS application, pp. 7-8. The Northern Cheyenne Tribe manages water quality through the Water Quality Program in the Tribe's Environmental Protection Department (Department). The Tribe has had a water quality program for over 25 years, and since 1992, the Tribe has managed Clean Water Act Section 106 grant funds to support water quality monitoring on the Reservation. The Tribe has received EPA approval for its Quality Assurance and Quality Control (QA/QC) program under the Tribe's Quality Assurance Project Plan (QAPP).

The Tribe's Water Quality Coordinator has been with the Environmental Protection Department since 1993. The Director of the Environmental Protection Department has been with the Tribe since 1998. In addition to holding either a Bachelor's or Master's degree, these key water quality staff have received training from: the Environmental Protection Agency; the Institute for Tribal Environmental Professionals; Montana Riparian and Wetlands Association; the Natural Resources Conservation Service; and the Bureau of Indian Affairs.

Further, following EPA-recommended approaches and drawing on its surface water monitoring information, the Department staff prepared a set of proposed water quality standards for consideration by the public and the Tribal Council. On January 24, 2002, the Department held a public hearing and invited public comments on its

initial standards package. In response to comments, the Department made a number of changes to the proposed standards, and on June 4, 2002, the Northern Cheyenne Tribal Council adopted the final version of the standards as a Tribal rule with an effective date of July 15, 2002 (D.O.I. Ordinance #016).<sup>13</sup> The Tribe's standards include, among other things, beneficial use classifications including eight aquatic life categories, numeric criteria generally based on EPA's recommended criteria values, an antidegradation policy and implementation procedure, and a mixing zone policy. Throughout the development of this initial set of Tribal standards, the Department staff have demonstrated a clear understanding of the technical and programmatic issues needed to develop and implement a water quality standards program. The development of water quality standards thus speaks directly to the Tribe's capability to administer a standards program, and the Department has continued to work on its standards rule, making a number of improvements and updating certain elements. The Department held a public hearing on the updated water quality standards on April 21, 2005, and the Department is currently preparing a final, updated standards package for consideration by the Tribal Council.

Based on this record, EPA has determined that the Tribe is "reasonably expected to be capable . . . 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" and that the Tribe has met the requirements set forth in 40 C.F.R. § 131.8(b)(4).

### **III. EPA'S TAS DETERMINATION IS A SEPARATE PROCESS FROM AN EPA DECISION ON A TRIBE'S SUBMITTAL OF WATER QUALITY STANDARDS.**

Since several commenters have raised concerns about potential water quality standards conflicts that may arise among the States of Montana and Wyoming and the Northern Cheyenne Tribe, EPA would like to clarify that this TAS decision does not constitute an approval of the Tribe's water quality standards. Under the CWA, a tribe must be approved for TAS in order for EPA to take action on water quality standards submitted by the tribe. If EPA approves the tribe's water quality standards, those standards then become federally-applicable water quality standards for CWA purposes.

Section 518(e) of the CWA provides a mechanism to resolve disputes that may arise between a state and Indian tribe as a result of differing federally-approved water quality standards on shared water bodies. This provision directs EPA to promulgate regulations providing a mechanism for resolving any unreasonable consequences that may arise as a result of differing state and tribal water quality standards. This

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<sup>13</sup> These Tribally-adopted standards, however, will not be federally applicable under the CWA unless and until the Tribe submits and EPA formally approves the standards in a separate action following this TAS approval.

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 such disputes between a state and a tribe with TAS approval in certain circumstances.<sup>14</sup>

It is EPA's understanding that the Tribe has been participating in discussions with the Montana Department of Environmental Quality regarding standards for the Tongue River where it forms the boundary between the Reservation and Montana. The goal of these discussions, as we understand it, is to share scientific information underlying the development of both the Tribe's and State's standards for the River and to explore the possibility of making adjustments, where warranted, promoting compatibility. The State of Wyoming and certain stakeholders have raised concerns regarding the potential impacts of both Montana's and the Tribe's water quality standards on upstream activities. The State of Wyoming has specifically requested that EPA mediate issues relating to the potentially conflicting standards.

Given the various comments received, there is clear value in having protective, compatible water quality standards on shared water bodies, notably the Tongue River. Standards setting involves science-policy and risk-management decisions that can differ among jurisdictions. EPA is committed to working with all interested stakeholders in an effort to address issues relating to compatibility of water quality standards, including any unreasonable social or economic consequences. It is EPA's view that compatible standards, consonant with the environmental protection goals of Tribal and both State jurisdictions, will facilitate implementation of those standards. Thus, EPA stands ready to play a proactive role in bringing together and facilitating discussions among all interested stakeholders, including Montana and Wyoming. EPA's strong preference is for the water quality standards to be implemented through a cooperative process that results in a comprehensive resolution of water quality standards issues with the input of all interested stakeholders. EPA intends to make achieving such a resolution a priority and to devote adequate resources and attention toward realizing this goal.

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<sup>14</sup> 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 WQS 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 WQS 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.

With regard to implementation of water quality standards on the Tongue River, we understand the Tribe is also participating with Montana, Wyoming, the Crow Nation and other interested stakeholders, in the Tongue River Total Maximum Daily Load (TMDL) discussions currently underway. These discussions are focused on identifying and resolving key implementation questions. A final TMDL will be an important tool for implementing water quality standards on this shared water body. The Region supports these efforts and encourages the continuation of Tribal discussions with the States. EPA encourages an inclusive discussion among all concerned entities in the area to help promote cooperative approaches to implementation of CWA programs. EPA is prepared to help facilitate such discussions, including through formal mediation or similar procedures.

#### IV. CONCLUSION

EPA has determined that the Northern Cheyenne Tribe of the Northern Cheyenne Reservation has met the requirements of CWA § 518(e) and 40 C.F.R. § 131.8 and is therefore eligible to be treated in a similar manner as a state for purposes of administering the CWA § 303(c) water quality standards program. Thus, EPA approves the Tribe's *Application for Treatment as a State to Administer a Water Quality Standards Program under the Clean Water Act, 33 U.S.C. § 1377(e) and 40 CFR § 131.8* (as supplemented on December 2, 2003). As provided in 40 C.F.R. § 131.4(c), EPA's determination that the Tribe is eligible for the CWA § 303(c) water quality standards program means the Tribe is eligible for the CWA Section 401 certification program as well.



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