

APPENDIX II

RESPONSE TO COMMENTS ON THE NORTHERN CHEYENNE TRIBE'S APPLICATION FOR TREATMENT IN A SIMILAR MANNER AS A STATE (TAS) UNDER SECTION 518(e) OF THE CLEAN WATER ACT (CWA) FOR PURPOSES OF ADMINISTERING CWA SECTIONS 303(c) AND 401

On April 29, 2002, the Northern Cheyenne Tribe submitted an application to EPA to be treated in a similar manner as a state (TAS) under Clean Water Act (CWA) Section 518(e) for purposes of administering the CWA Section 303(c) water quality standards and Section 401 water quality certification programs. The Northern Cheyenne Tribe's 2002 TAS application asserted 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 water quality standards throughout the Northern Cheyenne Reservation. In December of 2003, the Tribe supplemented its application with an assertion of inherent Tribal authority to administer the CWA §§ 303(c) and 401 programs.

EPA's water quality standards regulation requires that EPA notify "appropriate governmental entities"¹ 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. Although the State of Wyoming is not an "appropriate governmental entity" for purposes of this TAS process under the regulations, on the same dates the appropriate governmental entities received notices, EPA also notified the State of Wyoming by letter, of the opportunity to review and comment through the Montana Department of Environmental Quality on all of the documents described below.

On September 4, 2002, EPA notified appropriate governmental entities of their opportunity to review and comment directly to EPA on the Tribe's 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 an opportunity to review and comment 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

¹ 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. 64876, 64884 (December 12, 1991).

a Proposed Findings of Fact (PFOF) 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 within the Reservation. On May 5, 2005, EPA sent notification to appropriate governmental entities of their opportunity to review and comment on the PFOF document.

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 PFOF 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. Montana DEQ compiled and forwarded all comments it received to EPA. EPA's practice is to address all comments received during the comment periods, including comments sent directly to EPA from commenters other than appropriate governmental entities. In this Response to Comments document, EPA addresses all relevant comments provided to the Agency regarding the Tribe's TAS application.

During the comment process on the Tribe's supplemental assertion of inherent Tribal authority, Montana DEQ, the State of Wyoming and several other entities raised objections to the Tribe's description of the Reservation boundaries within which the Tribe applied for TAS approval. The comments challenged the Tribe's assertion that the eastern boundary of the Reservation extends to the middle channel of the Tongue River as set forth in the 1900 Executive Order. As described in EPA's decision document, these comments are based on assertions that as a factual matter, upon Statehood in 1889, Montana assumed title to the beds and banks of the Tongue River under the Equal Footing Doctrine and that as a matter of law, once Montana took title to the beds and banks of the Tongue River, the federal government did not have the authority, in 1900, to establish the Reservation to the middle channel of the Tongue River. EPA's Decision Document goes on to state:

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. 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.

EPA's Decision Document, p. 17.

Section I of this Response to Comments document sets forth the Agency's specific responses to these comments, including the rationale in support of this statement. Section II of this document provides EPA's summary of and responses to comments raising issues or concerns other than the boundary issue addressed in Section I. This discussion separates and addresses comments raised on the three documents made available for review and comment: (1) the Tribe's original 2002 assertion of Congressionally-delegated authority; (2) the Tribe's supplemental

2003 assertion of inherent Tribal authority; and (3) EPA's Proposed Findings of Fact related to the Tribe's supplemental assertion of inherent Tribal authority.

I. Comments Objecting to the Tribe's Assertion that the Middle Channel of the Tongue River Forms the Eastern Boundary of the Northern Cheyenne Reservation As Set Forth in the 1900 Executive Order.

This section responds to comments objecting to the Tribe's assertion of authority to administer the Clean Water Act §§ 303(c) and 401 programs within the borders of the Northern Cheyenne Reservation as set forth in Executive Orders of 1884 and 1900. Specifically, these comments object to the Tribe's assertion that the middle channel of the Tongue River forms the eastern boundary of the Tribe's Reservation as set forth in the Executive Order of March 19, 1900. The State of Montana raised this objection in its comments to EPA. In addition, the same objection was raised by the State of Wyoming; Gough, Shanahan, Johnson and Waterman, Attorneys at Law representing Fidelity Exploration and Production Company; Patton Boggs, LLP, representing Anadarko Petroleum Corporation, Devon Energy Corporation, Marathon Oil Company and Pennaco Energy, Inc. and the law firm of Bracewell & Patterson, LLP.

The objections 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 are based upon 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;² 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 extend the Reservation to the middle channel of the Tongue River. These commenters contend that based upon this two-part argument, no portion of the Tongue River is properly included within the Tribe's Reservation, and thus the Tongue River is outside the scope of the TAS authority of CWA § 518(e). EPA believes it is not necessary to make the factually-specific determination of whether the State acquired title to the beds and banks of the Tongue River upon Statehood because even assuming, without deciding, that the State acquired title to the beds and banks upon Statehood in 1889, the federal government had the authority to, and did, include those lands and overlying waters as part of the Northern Cheyenne Indian Reservation in 1900.

Montana states that since the Tongue River is neither owned by the Tribe nor held in trust

² Whether the State of Montana acquired title to the beds and banks of the Tongue River upon Statehood pursuant to the Equal Footing Doctrine depends 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 intent. Neither of these issues has been judicially determined, although, as noted in the Decision Document, the United States District Court for the District of Montana has held the United States has colorable claim of title to the beds and banks of the Tongue River and, thus, has not waived its sovereign immunity from suit under the Quiet Title Act. That decision is on appeal.

by the federal government for the Tribe, the Tongue River is not “within the borders of an Indian reservation” as specified by CWA § 518(e) and thus cannot be included within EPA’s TAS approval. EPA disagrees with the assumption in Montana’s comment that State-owned lands cannot be “within the borders of an Indian reservation.” There are many examples of court-confirmed state ownership of land that is included within an Indian reservation boundary. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981) (the Big Horn River, with state-owned beds and banks, forms a portion of the western Crow Indian Reservation boundary to the middle channel of the River and then flows east into the Crow Indian Reservation); *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983) (state-owned lake beds located within the boundaries of the Lac Courte Oreilles Reservation), *United States v. Holt State Bank*, 270 U.S. 49 (1926) (holding that the State of Minnesota took title to the beds and banks of Mud Lake, which was included in the Red Lake Indian Reservation at the time of Statehood).

Montana and others also assert that upon Statehood in 1889, Montana acquired title to the beds and banks of the Tongue River, and, thus, the federal government did not have title to convey to the Northern Cheyenne Tribe in 1900. While as a general matter, once a state takes title to lands, such *title* would not thereafter be reserved or conveyed by the federal government, *Shively v. Bowlby*, 152 U.S. 1 (1894), the inclusion of state-owned lands within an Indian reservation does not necessarily reserve or convey title to those lands. Title may remain with the state notwithstanding the inclusion of those lands within an Indian reservation (see discussion above). The case Montana and other commenters cite in support of their Reservation boundary objection is *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983). *Aranson* involved a claim to quiet title to submerged lands in the eastern portion of the Colorado Riverbed and to recover damages on behalf of an Indian tribe for wrongful possession of such lands. The Ninth Circuit held that the United States did not convey *title* to the eastern half of the riverbed to the tribe when it established the reservation at issue. As this holding indicates, *Aranson* primarily addresses the issue of title to submerged lands. It does not address the federal government’s authority to include such lands within an Indian reservation or the federal government’s authority over waters overlying such lands.

The federal government’s authority to include previously-held state-owned land within an Indian reservation was addressed in *United States v. Thomas*, 151 U.S. 577 (1894). In *Thomas*, the defendant in a criminal case argued that upon Statehood in 1848, Wisconsin took title to the lands upon which the crime occurred and those lands could not subsequently, in 1859, be included within the borders of the Lac Courte Oreilles Indian Reservation; thus the federal courts lacked jurisdiction over the criminal case. Among other things, the Supreme Court held that “independently of any question of title, we think the court below [the Circuit Court for the Western District of Wisconsin] had jurisdiction of the case. The Indians of the country are considered as wards of the nation, and whenever the United States sets apart any land of their own as an Indian reservation, whether within a state or territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full

protection in their persons and property . . . ”³ See also, *Cardinal v. United States*, 954 F.2d 359 (6th Cir. 1992) (even assuming lands were owned by the State before the Reservation was established, the court relied on the definition of “Indian country” to support its holding that the lands were included within the Reservation);⁴ *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), cert. denied, 535 U.S. 1221 (2001) (upholding EPA’s TAS approval of Tribal authority to implement the federal water quality standards program on Rice Lake, as within the borders of the Mole Lake Indian Reservation, even assuming, without deciding, that the State took title to the beds and banks of the lake under the Equal Footing Doctrine prior to creation of the Reservation). Certain commenters assert that *Wisconsin* is distinguishable on its facts because the Mole Lake Band’s trust lands surround Rice Lake, whereas the Tongue River forms a Reservation boundary. However, EPA believes the legal premise applied in *Wisconsin* – that the federal government has authority to include state-owned lands within a post-statehood reservation – is unaffected by whether the state-owned lands are wholly within or form a boundary of an Indian reservation.

Commenters have also asserted that the federal government cannot legally divest a sovereign state of its control over navigable waterways. However, as determined by the United

³ The United States District Court for the W.D. Wisconsin interpreted this language as follows, “Of course, it was possible that the Court might have taken the view that unless title in fee resided in the United States when the reservation was created, the section 16 could not lawfully have been included in the reservation. But clearly it did not take that view. . . . ‘Independently of any question of title,’ 151 U.S. at 585, 14 S.Ct. at 429 (that is, presumably, even if the State had acquired title in fee unencumbered by any right of occupancy by the Chippewas), because of the special guardian-ward relationship between the national government and the Indians, it was within the power of the national government to assert the jurisdiction of its courts over certain acts by Indians committed within certain geographic areas described as ‘reservations.’” *United States v. Bouchard*, 464 F.Supp. 1316 at 1344, rev’d on other grounds, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341 (7th Cir. 1983).

⁴ The statutory definition of “Indian country” expressly acknowledges that Indian reservations may encompass lands owned by non-tribal entities. 18 U.S.C. § 1151 defines “Indian country” as: “Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter means (a) 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, . . . “ (emphasis provided). See *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962); *United States v. Grey Bear*, 636 F.Supp. 1551, 1557 (D.N.D. 1986). Although it appears in a criminal code, section 1151 has long been recognized as also defining “Indian country” for questions of civil and regulatory jurisdiction. See, e.g., *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 216 & n.18 (1987).

States Supreme Court, the federal government retains authority under the Commerce Clause to regulate navigable waters, including waters overlying state-owned beds and banks. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958). Specifically, the Supreme Court has held that even after a state takes title to the beds and banks of navigable waters pursuant to the Equal Footing Doctrine, the federal government retains the authority over those waters to reserve water rights for an Indian reservation or for the creation of a reservoir or water reclamation project. *Arizona v. California*, 373 U.S. 546, 597 (1963) (stating the Equal Footing Doctrine involves only the shores of and lands beneath navigable waters and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause, including the power to reserve water rights for Indian reservations and property); *Utah Division of State Lands v. United States*, 482 U.S. 193, 202 (1987) (reaffirming the federal government's authority to regulate navigable waters overlying state-owned beds and banks, specifically referencing the inclusion of those areas within an Indian reservation); *Wisconsin*, 266 F.3d at 747 (power of Congress to control navigable waters is not eroded by the Equal Footing Doctrine).

Further, federal authority over Indian affairs is well established. "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters."); U.S. Const. Art. I, § 8, cl. 3.

In conclusion, even assuming, without deciding, that the State of Montana acquired title to the beds and banks of the Tongue River upon Statehood in 1889, the federal government had the authority in 1900, to include those lands and waters within the exterior boundaries of the Northern Cheyenne Reservation.

II. Comments Raising Issues Other Than the Northern Cheyenne Reservation Boundary.

A. Comments Relating to the Tribe's Initial 2002 Assertion of Congressionally-Delegated Authority Based on the Water Rights Settlement Act.

Comments from Appropriate Governmental Entities

1. United States Department of the Interior, Bureau of Indian Affairs.
Keith Beartusk, Regional Director (Oct. 4, 2002 and Jan. 14, 2003)

Comments

BIA supports the Tribe's assertion of legal authority for TAS as requested as well as the Tribe's right to self determination. BIA raises a concern about potential ramifications on the Crow Tribe's economic development endeavors. (October 4, 2002). BIA also states it is confident that the

Tribe's staff is fully capable of administering the water quality standards program. (January 14, 2003).

EPA Response

Although, as described in EPA's Decision Document, EPA is not making a determination regarding the Tribe's assertion of Congressionally-delegated authority, EPA appreciates the comments and information provided by BIA. EPA notes that our approval of the Tribe's TAS application does not constitute an approval of Tribal water quality standards.

2. Montana Department of Environmental Quality.

Jan Sensibaugh, Director of the Montana Department of Environmental Quality, (October 15, 2002).

Comment

Montana DEQ does not agree with the Tribe's assertion that the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 effected a Congressional delegation of authority, but notes that the State has no objection to the Tribe's TAS status for purposes of adopting water quality standards under CWA § 303.

EPA's Response

EPA appreciates the comments sent by Montana DEQ. As described in EPA's Decision Document, EPA is not making a determination regarding the Tribe's assertion of Congressionally-delegated authority.

Comments from Other Entities

1. Wyoming Department of Environmental Quality

Dennis Hemmer, Director of Wyoming Department of Environmental Quality (October 31, 2002).

Comment

Wyoming defers to Montana to comment on the Tribe's TAS application from a jurisdictional standpoint since the Tribe is located in Montana. Wyoming provides comments on the Tribe's proposed water quality standards and suggests EPA should delay approval of Tribal standards pending the outcome of the State of Montana's water quality standards process and that opportunities for interstate/tribal coordination should be encouraged.

EPA's Response

The TAS process is a separate process from a tribe's decision to submit tribal water quality standards to EPA for approval. EPA must approve a tribe's TAS application before the Agency can act on standards submitted to EPA for approval.

Once EPA has approved a tribe's water quality standards, CWA § 518(e) provides a mechanism to resolve disputes that may arise between a state and Indian tribe as a result of differing 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 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, and after EPA has approved the state and tribal water quality standards.

2. Bracewell and Patterson, L.L.P.

A series of related Memoranda dated March 25, 2003, May 6, 2003, June 16, 2003 and July 24, 2003 from Bracewell & Patterson.

Comment

Bracewell & Patterson contends in various memoranda that prior court cases upholding EPA approval of tribal TAS applications, including approval of tribal inherent authority over nonmember activities, do not support approval of the Northern Cheyenne Tribe's jurisdiction over any portion of the Tongue River. The memoranda similarly contend that Supreme Court precedent interpreting the test relating to assertions of inherent tribal authority over nonmembers (the *Montana* Test) do not support any presumption that the impacts of nonmember activities on the Northern Cheyenne Tribe are sufficient to justify Tribal authority over nonmembers for the purpose of CWA programs. The memoranda cite various cases, including *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) and *Nevada v. Hicks*, 533 U.S. 353 (2001).

EPA's Response

EPA notes that the Bracewell & Patterson memoranda were provided to

EPA prior to submission of the Tribe's supplemental assertion of inherent authority, including inherent authority over the activities of nonmembers of the Tribe under the test enumerated in *Montana v. United States*, 450 U.S. 544 (1981). Thus, the memoranda did not have the opportunity to benefit from either: 1) the Tribe's assessment of its inherent authority (including authority over nonmembers based on the impacts of nonmember activities on the Tribe's health, welfare, economic security, and political integrity); or 2) EPA's PFOF document setting forth the facts upon which EPA may rely in analyzing inherent Tribal authority over nonmembers under *Montana*. As detailed in the Decision Document, EPA has carefully analyzed the Tribe's assertion of inherent authority over nonmember activities in light of the particular facts occurring on the Northern Cheyenne Reservation as well as prior case law involving TAS decisions and Supreme Court precedent. EPA believes that the Agency's decision to approve the Tribe's application is both consistent with, and supported by, such facts and precedents. EPA has evaluated the various types of nonmember activities that occur or may occur on the Tribe's Reservation; the types of impacts such activities may have on surface water quality; and the Tribe's significant interests in, and uses of, the Reservation waters, including the Tongue River. As detailed in the Decision Document, consistent with the rule set forth in *Montana* and applied in the other cases cited in the Bracewell & Patterson memoranda, EPA has determined that nonmember activities that occur or may occur on the Reservation threaten or have direct effects on the Tribe's political integrity, economic security, health and welfare that are serious and substantial, thus supporting the Agency's finding of inherent Tribal authority in this case.

B. Comments Relating to the Tribes's Supplemental 2003 Assertion of Inherent Tribal Authority.

Comments from Appropriate Governmental Entities

1. United States Department of the Interior, Bureau of Indian Affairs. Keith Beartusk, Regional Director, Rocky Mountain Region, BIA (December 6, 2004)

Comment

BIA's comment recites certain history of the Northern Cheyenne Reservation as created by Executive Orders of November 26, 1884 and March 19, 1900 and as recognized by Congressional action on June 3, 1926. BIA states that it is unaware of any controversy regarding the eastern boundary of the Reservation.

EPA's Response

EPA appreciates BIA's comments and recognizes that BIA, at the time, may have been unaware of the boundary issues raised in comments to EPA on the Tribe's TAS application. Those issues are discussed in detail in Section I of this document above and in EPA's Decision Document approving the Tribe's application.

2. United States Department of the Interior, Office of the Solicitor
Richard K. Aldrich, Field Solicitor, Rocky Mountain Region (Billings) to Keith Beartusk, Regional Director, Rocky Mountain Reservation, BIA (Dec. 22, 2004) (copied to EPA).

Comment

In response to Mr. Beartusk's Dec. 6, 2004, letter to EPA, Mr. Aldrich indicates that legal opinions, particularly those that may be related to issues pending in Federal Court, are appropriately made with the advice of the Solicitor's Office.

EPA's Response

EPA appreciates the Field Solicitor's clarification. EPA is aware of the legal issues pending before the court concerning ownership of the beds and banks of the Tongue River. As discussed in response to comments on the Tribe's application raising the ownership issue, EPA does not need to address or resolve the issue of title ownership of the beds and banks of the Tongue River in order to approve the Tribe's application within the borders of the Reservation as described in the 1900 Executive Order establishing the eastern boundary to the middle channel of the Tongue River.

3. Montana Department of Environmental Quality.
Jan Sensibaugh, Director of the Montana Department of Environmental Quality, (February 9, 2004).

Comment

The State's comments express several concerns with EPA's notice and comment process based on the amount of time provided for comment in light of the complexity of the issues, difficulties in obtaining historical documents relied upon by the Tribe, EPA's conclusion that the State of Wyoming is not an "appropriate governmental entity" for purposes of the Tribe's TAS application, and concerns over whether comments of non-appropriate governmental entities will be considered by EPA during the decision making process.

EPA's Response

EPA's regulations at 40 C.F.R. § 131.8(c)(2) establish the process for notice of tribal assertions of authority in TAS applications for CWA § 303(c) programs. Under the regulations, EPA provides notice to "appropriate governmental entities" – defined 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. 64876, 64884 (December 12, 1991)). Such notice shall include information on the substance and basis of the applicant tribe's assertion of authority to regulate the quality of reservation waters and shall provide 30 days for comments to be submitted on the tribe's assertion of authority.

In this case, EPA followed its regulations and provided proper notice to all appropriate governmental entities as defined in the above-cited Federal Register notice. In addition, although not technically required under the regulations, EPA also followed its practice of providing notice of the Tribe's assertion of authority in a prominent local newspaper with an opportunity for others to comment. Consistent with this practice, such comments should be, and in this case generally were, directed to an appropriate governmental entity for transmission to EPA. EPA greatly appreciates the assistance of the Montana DEQ in compiling and transmitting such comments to EPA. Consistent with Agency practice, EPA has considered (and is addressing in this document) all comments received by the Agency, whether directly submitted on behalf of an appropriate governmental entity or otherwise.

EPA notes that the focus of this notice and comment process on "appropriate governmental entities" reflects the intention that the process should address issues specifically relating to an applicant tribe's assertion of authority. Those governmental entities located contiguous to the applicant tribe's reservation are most likely to have relevant information relating to the tribe's boundaries or other jurisdictional issues. Thus, in this case, the State of Wyoming, which is not located contiguous to the Northern Cheyenne Reservation, is not technically within the definition of appropriate governmental entities. Nonetheless, in recognition of the fact that Wyoming has an interest in activities on the Tongue River, EPA specifically provided notice of each of the relevant documents to the State of Wyoming and has, consistent with Agency practice, considered and addressed all comments from Wyoming (and from all other commenters) in the decision making process.

Finally, EPA recognizes that certain matters raised by commenters during the notice and comment process raised complex issues (particularly

regarding questions related to title ownership of the beds and banks of the Tongue River). EPA thus provided, upon request of the State of Montana, a 30-day extension of the comment period in order to ensure adequate time for thorough participation by commenters. EPA believes that this process was fair and effective.

Comment

Montana asserts that whatever the effect of the 1900 Executive Order, it could do no more than establish a boundary at the high water mark on the western bank of the Tongue River and that all lands below that mark belong to the State.

EPA's Response

As discussed above in Section I of this Response to Comments document, it is not necessary to resolve title ownership of the beds and banks of the Tongue River to conclude that the federal government had authority to include to the middle channel of the River within the Northern Cheyenne Reservation. Thus, EPA disagrees that State ownership of the beds and banks, even if such ownership were assumed, would limit the Reservation boundary to the western high water mark given a plain reading of the 1900 Executive Order. In addition, EPA notes that the Tribe asserts that even if the Tongue River were found to be navigable and the beds and banks owned by the State under the Equal Footing Doctrine, Tribal ownership would nonetheless extend to the low water mark of the River under Montana law (MCA 70-16-201). As stated above, in approving the Tribe's application, EPA does not need to make any finding regarding title ownership of the beds and banks of the Tongue River.

Comment

Montana comments that even if the middle channel of the Tongue River forms the eastern boundary of the Reservation, the Tribe has failed to demonstrate inherent authority to regulate the Tongue River under the *Montana* test or that its inherent power to regulate activities within the Reservation extends to activities of non-tribal members discharging to the Tongue outside the Reservation boundaries. Montana reasons that since the Tribe has said it does not intend to develop coalbed methane, Tribal water quality standards will primarily be used to regulate discharges from coal bed methane wells in Montana and Wyoming. Montana also asserts that since the State already has EPA-approved water quality standards, Tribal regulation is not necessary to protect the Tribe's health and welfare.

EPA's Response

As discussed above and as detailed in the Decision Document, EPA has

carefully analyzed the Tribe's inherent authority over activities on the Reservation, including the activities of nonmembers of the Tribe. (See EPA's Response to Comments of Bracewell & Patterson, L.L.P.) EPA has considered relevant cases involving prior TAS approvals and Supreme Court precedent, as well as the particular facts and conditions pertaining on the Northern Cheyenne Reservation, and has concluded that the Tribe has adequately demonstrated inherent authority over its members and territories, as well as the activities of nonmembers on the Reservation under the *Montana* test, for purposes of supporting TAS for the CWA §§ 303(c) and 401 programs. In addition, EPA disagrees that Montana's existing water quality standards preclude Tribal regulation of Reservation waters. Montana's water quality standards are not approved by EPA for waters of the Tribe's Reservation. Further, even if Montana's standards provided some degree of collateral protection to certain waters shared with the Northern Cheyenne Reservation, such standards would not necessarily address Tribal uses of the waters, nor would they divest the Tribe of its inherent authority, including authority over nonmember activities on the Reservation under the *Montana* test, to submit standards under the CWA for EPA review. *See Montana v. EPA*, 137 F.3d 1135, 1140-41 (9th Cir.) (challenge to EPA's approval of tribes' TAS status for purposes of CWA water quality standards; court rejects State of Montana's argument that nonconsensual tribal regulation of non-tribal entities is only permissible when all state or federal remedies to alleviate the threat to tribal welfare have been exhausted and proved fruitless; referring to Supreme Court precedent, court states that "...there is no suggestion that inherent authority exists only when no other government can act."), *cert. denied*, 525 U.S. 921 (1998). Finally, EPA notes that the Agency's approval of the Tribe's application is limited to waters located on the Reservation. EPA is not approving the Tribe to regulate any activities, whether of Tribal members or nonmembers, occurring outside the Tribe's Reservation. Under the CWA, activities outside of the Reservation may be affected by Tribal water quality standards because NPDES permits must assure compliance with downstream water quality standards applicable under the CWA. *Arkansas v. Oklahoma*, 503 U.S. 91, 105-107 (1992); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996); see CWA Section 401(a)(2).

Comment

Montana concludes that while it does not oppose the Tribe's TAS application to adopt water quality standards for waters that are "within the borders" of its Reservation, the State opposes the inclusion of the Tongue River as not "within the borders" of the Reservation.

EPA's Response

As detailed in Section I above in response to comments relating to the boundary issue, EPA believes that the federal government had authority to include to the middle channel of the Tongue River within the boundaries of the Northern Cheyenne Reservation, that the Executive Order of March 19, 1900 expressly did so, and that EPA's inclusion of that portion of the River in its approval of the Tribe's TAS application is consistent with prior acts and decisions of all three branches of the federal government.

4. Montana Department of Natural Resources and Conservation.
Tommy H. Butler, Chief Legal Counsel, Forestry and Trust Lands (Mar. 22, 2004).

Comment

The Montana DNRC comments that the Tongue River is navigable based on the actual use of the Tongue River in commerce at Montana Statehood in 1889. The letter attaches information from the Montana Navigable Water Study conducted by the State of Montana.

EPA's Response

EPA appreciates the comments from the Montana DNRC regarding the issue of navigability of the Tongue River and recognizes that the outcome of this issue, which has not been adjudicated, may be relevant to whether the State assumed title to the beds and banks of the River under the Equal Footing Doctrine. EPA also notes that in its response to comments on the Tribe's supplemental assertion of authority, the Tribe (Jeanne Whiteing, Whiteing & Smith (May 7, 2004)) provides certain information published by the Montana DNRC on its web site indicating that the Tongue River may be navigable only commencing at a point north of the northern boundary of the Tribe's Reservation. In any event, as discussed in Section I of this document, EPA is not addressing the title ownership issue in its determination to approve the Tribe's TAS application.

Comments from Other Entities

1. Wyoming Department of Environmental Quality
John Corra, Director (Jan. 9, 2004) with a letter from the Wyoming Office of the Attorney General attached (Jan. 9, 2004).

Comment

The Director of Wyoming DEQ thanks EPA for keeping him informed of events concerning the Tribe's TAS application. The letter notifies EPA that Wyoming is sending comments on the Tribe's supplemental assertion

of authority to EPA's Montana office. The cover letter attaches comments from the Wyoming Office of the Attorney General (described below).

EPA's Response

EPA appreciates the comments of the Wyoming DEQ.

2. *Wyoming Office of the Attorney General*

Jennifer Golden, Deputy Attorney General, Natural Resources Division
(Jan. 9, 2004, Feb. 2, 2004, Feb. 24, 2004).

Comment

The State of Wyoming should have received official notice and opportunity to comment on the Tribe's TAS application as it has an interest in the Tribe's application insofar as it relates to the asserted authority to implement water quality standards for the Tongue River, which has its headwaters in Wyoming. The State disagrees with any regulatory definition of "appropriate governmental entity" that would not include a state in Wyoming's position and requests EPA notify Wyoming in writing of EPA's decision on the TAS application.

EPA's Response

As described above in Section II.B.3 of this document responding to comments submitted by the State of Montana, EPA's regulations regarding notice and comment in connection with tribal TAS applications for purposes of CWA § 303(c) water quality standards programs are intended to address issues relating to the applicant tribe's assertion of authority and thus focus on comments from "appropriate governmental entities" (as defined at 56 Fed. Reg. 64876, 64884 (December 12, 1991)) because they are the entities most likely to have relevant information on this issue or to raise a competing claim of authority. EPA has followed this regulatory process on all tribal TAS applications for the CWA § 303(c) program. Because Wyoming is not located contiguous to the Northern Cheyenne Reservation, it is not technically an "appropriate governmental entity" under the regulations for purposes of this application. However, EPA's practice is to provide notice of tribal assertions of authority in prominent local newspapers and to consider relevant comments received by the Agency, whether from appropriate governmental entities or otherwise. In connection with the Northern Cheyenne TAS application, EPA also provided Wyoming with specific notice of each document provided for comment to the appropriate governmental entities in this case and has considered and addressed all comments received from Wyoming.

Comment

Wyoming agrees with the State of Montana's comment that even if the

Tongue River is within the boundaries of the Reservation, the Tribe does not retain inherent authority to regulate the Tongue River.

EPA's Response

EPA has addressed the issue of Tribal inherent authority in detail in the Decision Document and above in this document in response to comments from the State of Montana and from Bracewell & Patterson, L.L.P. EPA refers the commenters to those discussions.

Comment

The Wyoming OAG's Feb. 24, 2004 letter says EPA should not grant TAS status while unresolved legal issues exist and any grant of TAS status should exclude the Tongue River.

EPA's Response

As discussed in Section I of this document, EPA does not need to resolve issues relating to ownership of the beds and banks of the Tongue River in order to approve the Tribe's application within the borders of the Reservation as described in the 1900 Executive Order establishing the eastern boundary to the middle channel of the Tongue River. All other issues regarding Tribal authority over the portions of the Tongue River within the Reservation as well as over nonmember activities on the Reservation that may affect the Tongue River are addressed in detail in EPA's Decision Document and elsewhere in this Response to Comments document.

Wyoming Office of the Governor

Dave Freudenthal, Governor (Feb. 27, 2004).

Comment

Governor Freudenthal requests then-EPA Administrator Leavitt's attention to the Northern Cheyenne Tribe's TAS application. The Governor notes Montana and Wyoming have filed objections and supports moving the TAS decision from the EPA Regional Office to EPA's Washington, D.C. Office.

EPA's Response

EPA appreciates Governor Freudenthal's correspondence on this matter. Consistent with Agency practice, EPA Region 8 has coordinated its decision approving the Tribe's application with EPA Headquarters offices. The Regional Administrators have been delegated authority to make TAS decisions.

4. The Paiute Indian Tribe of Utah
(January 29, 2004).

Comment

The Tribe supports the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application and states the Northern Cheyenne Tribe has a right to be consulted on all levels of decisionmaking.

EPA's Response

EPA appreciates the comments sent by the Paiute Indian Tribe.

5. Turtle Mountain Band of Chippewa Indians
(February 2, 2004).

Comment

The Tribe supports the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application.

EPA's Response

EPA appreciates the comments sent by the Turtle Mountain Band of Chippewa Indians.

6. National Congress of American Indians
President, Tex G. Hall (February 2, 2004).

Comment

NCAI supports the Northern Cheyenne Tribe's TAS application and the Tribe's inherent right and authority to regulate surface waters within the boundaries of the Reservation. NCAI states that TAS status would permit the Tribe to guarantee the continued health and welfare of Tribal members through sound environmental management.

EPA's Response

EPA appreciates the comments sent by the National Congress of American Indians.

7. Confederated Salish and Kootenai Tribes of the Flathead Nation
(February 2, 2004).

Comment

The Tribes support the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application. The Tribes' comment that the CWA, EPA regulations, and relevant case law upholding prior EPA decisions approving tribal TAS applications speak clearly with regard to

the inherent authority of tribes to administer water quality programs in Indian country, regardless of the fact that certain reservation waters may originate and terminate outside of a reservation.

EPA's Response

EPA appreciates the comments sent by the Confederated Salish and Kootenai Tribes.

8. **Blackfeet Nation**
(February 2, 2004).

Comment

The Tribe supports the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application and describes the goal of many tribes to build the capacity to establish, administer and protect their own water quality for their reservations and residents.

EPA's Response

EPA appreciates the comments sent by the Blackfeet Nation.

9. **Flandreau Santee Sioux Tribe**
(February 2, 2004).

Comment

The Tribe supports the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application and states that tribes, as sovereign nations, have the inherent right to adopt their own environmental regulatory standards to protect their water resources, which are essential to the survival of the tribe.

EPA's Response

EPA appreciates the comments sent by the Flandreau Santee Sioux Tribe.

10. **Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation**
(February 2, 2004).

Comment

The Tribes support the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application. The Tribes state that Indian tribes are the most uniquely qualified to establish water quality standards for reservation waters because they interact daily with reservation residents and are responsive to issues directly affecting people on the reservation. Waters are not only "used" by tribes but are especially intrinsic to the religious and cultural practices of the Northern Cheyenne, as it is to most

tribes.

EPA's Response

EPA appreciates the comments sent by the Assiniboine and Sioux Tribes.

11. Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community
(February 3, 2004).

Comment

The Tribe supports the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application and states that tribes are committed to establishing, implementing and managing their own environmental programs and protection of their water quality.

EPA's Response

EPA appreciates the comments sent by the Fort Belknap Indian Community.

12. Northern Plains Resource Council
(February 3, 2004).

Comment

The Northern Plains Resource Council supports the Northern Cheyenne Tribe's assertion of authority and approval of the TAS application.

EPA's Response

EPA appreciates the comments sent by the Northern Plains Resource Council.

13. Fidelity Exploration and Production Company represented by Gough, Shanahan, Johnson and Waterman, Attorneys at Law
Jon Metropoulos, Attorney at Law (Feb.3, 2004).

Comment

Fidelity strongly objects to EPA's procedure and time line imposed for commenting on the Tribe's supplemental statement.

EPA's Response

EPA has discussed the regulatory provisions and Agency practice relating to notice and comment on Tribal TAS applications for purposes of CWA § 303(c) water quality standards programs above in response to comments submitted by the Montana Department of Environmental Quality and Wyoming Office of the Attorney General. EPA notes that it has received

and thoroughly considered all of Fidelity's comments in the context of the decision making process on the Tribe's TAS application.

Comment

Fidelity supports TAS designation for tribes within the scope of their inherent sovereign authority as a general matter and specifically in this instance. Fidelity does not oppose the Northern Cheyenne Tribe's request for TAS within the scope of its retained inherent authority over its people and its lands - understanding that this does not include, for the Tribe's sovereign purposes, the Tongue River. Fidelity does not oppose the Tribe's request for TAS status up to the western high water mark of the Tongue River, assuming all other requirements are met.

EPA's Response

EPA appreciates Fidelity's general support for tribal TAS approvals, and for approval of the Northern Cheyenne TAS application in particular, within the scope of inherent tribal sovereign authority. As discussed in detail in Section I of this document and in EPA's Decision Document, EPA disagrees that the Tribe's inherent authority does not extend to the middle channel of the Tongue River. Rather, EPA has determined that pursuant to the express language of the March 19, 1900 Executive Order, the middle channel of the River forms the eastern boundary of the Reservation, and the Tribe has demonstrated inherent authority, including inherent authority over the activities of nonmembers on the Reservation, pursuant to the *Montana* test.

Comment

Under the *Montana* test, the Tribe would lack retained inherent sovereign authority over the Tongue River even if it was within the Reservation. The second *Montana* test exception extends tribal authority to nonmembers only if a tribe can show impairment of waters to such a degree that the integrity of the tribe is imperiled. Recent decisions by the U.S. Supreme Court have further defined, and in so doing narrowed, the scope of the second *Montana* exception, effectively eviscerating the presumption upon which the EPA finds inherent tribal authority. As the Court held in *Atkinson Trading Company v. Shirley*, 532 U.S. 645 at 657 (2001), the nonmember conduct at issue must "actually" imperil the political integrity of the tribe. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court held that tribes lack inherent authority to regulate reservation activity on non-Indian land.

EPA's Response

As discussed in detail in the Decision Document and elsewhere in this Response to Comments document, EPA recognizes the general rule

enumerated in *Montana*, and the exceptions thereto, as the relevant framework for analyzing the Tribe's inherent authority over the activities of non-Tribal members. 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*]”). Consistent with that test, as interpreted and applied by the Supreme Court in subsequent precedents, EPA has carefully analyzed the impacts and potential impacts of nonmember activities on the Tribe's political integrity, economic security, and health and welfare. EPA has made specific findings regarding the nature of nonmember activities that occur, or may occur, on the Reservation (including in the Reservation's Tongue River watershed) and the impacts such activities may have on surface water quality. EPA has also considered the significant Tribal uses of, and interests in, the waters of the Tongue River and the serious and substantial impacts that impairment of that River would have on the Tribe. In light of all of these factors, and based upon the Agency's unique experience and expertise in assessing issues and impacts relating to surface water quality impairment, EPA has determined that the Tribe satisfies the *Montana* test's second exception for purposes of establishing inherent authority over the activities of non-Tribal members throughout the Reservation, including in connection with the Tongue River.

Comment

Constitutional limits, in particular the Fifth Amendment's due process guarantees, bar a federal entity from facilitating the extension of tribal sovereign authority, which is not bound by the Constitution, over non-tribal members off-Reservation.

EPA's Response

EPA reiterates that, as described elsewhere in this document, the Agency's approval of the Tribe's TAS application does not include approval of Tribal inherent authority over activities, whether of members or nonmembers of the Tribe, outside of the Reservation. EPA disagrees that approval of the Tribe's application raises Constitutional issues. To the extent the commenter's concern is based on a potential need for upstream discharges into shared surface waters to meet Tribal water quality standards at the Reservation boundary, EPA notes that approval of the TAS application does not constitute approval of Tribal water quality standards. Upon EPA's approval of this TAS application, the Tribe may

then decide to submit its water quality standards for EPA approval, which EPA will consider pursuant to a separate statutory and regulatory CWA process. In addition, any need to ensure consistency with such subsequent Tribal standards as may be approved would arise by operation of the federal CWA scheme applicable to all water bodies – whether shared as between states, tribes, or states and tribes – and not by virtue of any exercise of inherent Tribal authority outside of the Reservation.

14. Anadarko Petroleum Corporation, Devon Energy Corporation, Marathon Oil Company and Pennaco Energy, Inc. represented by Patton Boggs, LLP
John Martin, Attorney at Law, (Feb.16, 2004 and March 16, 2004).

Comment

The timing of EPA's limited comment period was inadequate and did not provide sufficient opportunity for Montana or other parties to investigate or comment fully on the proposal.

EPA's Response

EPA has discussed the regulatory provisions and Agency practice relating to notice and comment on Tribal TAS applications for purposes of CWA § 303(c) water quality standards programs above in response to comments submitted by the Montana Department of Environmental Quality and Wyoming Office of the Attorney General. EPA notes that, in response to a request from the State of Montana, the comment period on the Tribe's supplemental assertion of inherent authority was extended by an additional 30 days. EPA also notes that it has received and thoroughly considered all of the comments submitted by Patton Boggs, LLP on behalf of its clients in the context of the decision making process on the Tribe's TAS application.

Comment

Even if the Tongue River were held by the Tribe or within the Reservation, the Tribe could not satisfy the elements of the *Montana* test. The Tribe cannot show that conduct potentially affecting the water quality of the Tongue River threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe as set forth in *Montana*. A Tribe must show that the integrity of the Tribe is imperiled, or that the authority in question is necessary to protect tribal self-government or to control internal relations,

EPA's Response

EPA has addressed comments relating to the Tribe's demonstration of inherent authority, including inherent authority over the activities of nonmembers of the Tribe under the *Montana* test, in detail in the Decision

Document and elsewhere in this document in response to comments submitted by Bracewell & Patterson, L.L.P, the Montana Department of Environmental Quality, and Fidelity Exploration and Production Company. EPA refers the commenter to those discussions.

C. Comments on EPA's Proposed Findings of Fact.

Comments from Appropriate Governmental Entities

1. United States Department of the Interior, Bureau of Indian Affairs.
Faxed by Rick Stefanic of BIA, signature block for Regional Director's signature is blank (June 8, 2005).

Comment

BIA perceives the Proposed Findings of Fact document to be accurate with respect to the activities and interests related to the quality of surface water on the Northern Cheyenne Reservation.

EPA's Response

EPA appreciates the comments sent by the BIA.

2. Montana Department of Environmental Quality.
Richard Opper, Director, Montana DEQ, (June 8, 2005 and July 25, 2005), Tom Ellerhoff, Environmental Program Manager (June 15, 2005).

Comment

On June 8, 2005, the State said it does not object to EPA's approval of the Tribe's TAS application for waters "wholly within" the boundaries of the Reservation. However, at this time, the State declines to withdraw its objection to EPA's approval of the Tribe's TAS application as it pertains to the Tongue River. The State requests that EPA delay taking any action on the portion of the Tribe's TAS application that includes the Tongue River while the State continues discussions with the Tribe over the appropriate water quality standards for the River.

EPA's Response

The TAS process is a separate process from a tribe's decision to submit Tribal water quality standards to EPA for approval. EPA must first approve a tribe's TAS application before EPA can approve a tribe's water quality standards under the CWA. There are specific statutory and regulatory criteria for approving a tribe's TAS application. Resolution of water quality standards conflicts is not among the criteria. Thus, it would be inappropriate for EPA to delay a TAS decision for the purpose of resolving potential water quality standards disputes. The criteria EPA

considers in determining whether to approve a tribe's TAS application are:

- (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 within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and 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 term and purposes of the Act and applicable regulations.

CWA § 518(e), 40 C.F.R. § 131.8.

Once EPA has approved a tribe's TAS application and its water quality standards, the Clean Water Act § 518(e) provides a mechanism to resolve disputes that may arise between a state or Indian tribe as a result of differing 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 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 authorizes the Regional Administrator to attempt to resolve such disputes between a state and a tribe with TAS approval in certain circumstances, and after EPA has approved the state and tribal water quality standards. As noted in the Decision Document, EPA believes that there is clear value in having protective, compatible water quality standards on shared water bodies and that where agreement can be reached for the Tongue River, compatible standards, consonant with the environmental protection goals of Tribal and State jurisdictions, will facilitate implementation of those standards. EPA encourages an inclusive discussion among all concerned entities in the area to help promote cooperative approaches to implementation of CWA

programs and intends to help facilitate such discussions, including through formal mediation or similar procedures.

Comment

On July 26, 2005, EPA received a copy of a letter from Richard H. Opper to Eugene Little Coyote, President of the Northern Cheyenne Tribe clarifying the State's June 8, 2005 comment letter, saying the State of Montana has no interest at this time in participating in any litigation regarding ownership of the bed of the Tongue River. This letter reiterated Montana's support for the TAS status for all waters wholly within the Reservation boundaries, and looks forward to a time when the State can also support TAS status for the Tongue River, which is not wholly within the Reservation boundary. The State indicates its desire to resume discussions among technical experts to attempt to minimize the discrepancies between the two sets of standards.

EPA's Response

EPA appreciates Montana DEQ's clarification of its earlier comments and as a general matter, supports the discussions between the Tribe and the State with regard to their respective water quality standards.

Comments from Other Parties

1. Wyoming Department of Environmental Quality, submitted on behalf of the Wyoming Governor's Office.
John Corra, Director, Wyoming DEQ (June 2, 2005).

Comment

EPA acknowledges that Montana and others assert the Tongue River is not within the Reservation boundaries but nevertheless invites comment on the Proposed Findings of Fact for the geographic area covered by the Tribe's assertion of authority. These proposed findings are based on an underlying assumption that has not yet been adjudicated. EPA should not issue the document based on a mere "assertion of authority" which calls the proposed findings of fact into question. Wyoming requests the document be withdrawn and not reissued until the Reservation boundary is determined by a court of competent jurisdiction.

EPA's Response:

As detailed in Section I above in response to comments relating to the boundary issue, EPA believes that the federal government had authority to include to the middle channel of the Tongue River within the Northern Cheyenne Reservation, that the Executive Order of March 19, 1900 expressly did so, and that EPA's inclusion of that portion of the River in

its approval of the Tribe's TAS application is consistent with prior acts and decisions of all three branches of the federal government.

2. Fidelity Exploration and Production Company, represented by Gough, Shanahan, Johnson and Waterman, Attorneys at Law
Jon Metropoulos, Attorney at Law (June 8, 2005)

Comment

The document appears to provide, if finalized unamended, findings constituting the preconditions for concluding the Tribe possesses inherent sovereign power, and therefore legal jurisdiction, over the Tongue River. If this is the intent of the agency, the document lacks candor toward the affected public and does not provide a meaningful opportunity to comment. Additionally, such a conclusion would be legally insupportable for reasons generally stated in the attached comments (attaching and incorporating the law firm's Feb. 3, 2004 comments on the supplemental assertion of authority).

EPA's Response

The PFOF document clearly stated its purpose of providing the public with EPA's proposed factual findings with regard to the entire area covered by the Tribe's application. To provide anything less would have deprived the public with the opportunity to review and comment on an area which EPA was considering for TAS approval. The PFOF is not a decision document and was, therefore, not the appropriate venue for EPA's decision on the boundary dispute. EPA clearly explained in that document that, by including information within the area applied for by the Tribe, EPA was preserving all possible options for a later decision on the boundary issue. EPA's determination on the Reservation boundary is contained in EPA's Decision Document. In addition, EPA notes that there is no regulatory requirement for a PFOF or opportunity for public review and comment on the document. EPA's practice, however, is to voluntarily invite public review and comment on the PFOF.

Comment

EPA's CWA TAS regulations were out of step with controlling Supreme Court precedent when promulgated ten years ago and are now completely wrong. While in the intervening years, the Supreme Court has not overruled the *Montana* test, it has on numerous occasions clarified and refined it such that in virtually no situation does an Indian tribe have jurisdiction over a water body, let alone a navigable interstate river, not within its reservation.

EPA's Response

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*]”). EPA has carefully analyzed the impacts and potential impacts of nonmember activities on the Tribe’s political integrity, economic security, and health and welfare. EPA has made specific findings regarding the nature of nonmember activities that occur, or may occur, on the Reservation (including in the Reservation’s Tongue River watershed) and the impacts such activities may have on surface water quality. EPA has also considered the significant Tribal uses of, and interests in, the waters of the Tongue River and the serious and substantial impacts that impairment of that River would have on the Tribe. In light of all of these factors, and based upon the Agency’s unique experience and expertise in assessing issues and impacts relating to surface water quality impairment, EPA has determined that the Tribe satisfies the *Montana* test’s second exception for purposes of establishing inherent authority over the activities of non-Tribal members throughout the Reservation. EPA’s approval of the Tribe’s application is limited to waters located on the Reservation.

Anadarko Petroleum Corporation, Devon Energy Corporation, Marathon Oil Company, Pennaco Energy, Inc., and Pinnacle Gas Resources, Inc represented by Patton Boggs LLP.

John C. Martin and Susan M. Mathiascheck, Attorneys at Law (June 8, 2005).

Comment

EPA explains that any proposed factual findings relating to the Tongue River may ultimately not be relevant to EPA’s decision on the TAS application. EPA thus recognizes that, if the relevant portion of the Tongue River is held by Montana, rather than by the Tribe, the Tribe’s application cannot be granted irrespective of any factual findings EPA may make.

EPA's Response

As stated in EPA’s Decision Document and discussed in detail in Section I of this Response to Comments, even assuming, without deciding, that the State acquired title to the beds and banks upon Statehood in 1889, the

federal government had the authority to, and did, include those lands and overlying waters as part of the Northern Cheyenne Indian Reservation in 1900, and the Tribe has demonstrated authority over Reservation waters.

Comment

EPA's proposed findings do not identify with any specificity the facts relating to water quality impacts bearing on an analysis of the Tribe's application under the Montana test. EPA's proposed findings contain only the most general, conclusory statements about potential water quality impacts arising from non-Tribal member activities. The proposed findings also do not provide any specificity of any potential impacts to the tribe. Thus, the document fails to demonstrate that nonmember activities may result in degradation of surface water quality and are not sufficient to support any finding that such activities could "threaten or have some direct effect on the political integrity, economic security, health or welfare of the tribe."

EPA's Response

EPA has carefully analyzed the Tribe's assertion of inherent authority over nonmember activities in light of the particular facts occurring on the Northern Cheyenne Reservation as well as prior TAS case law and Supreme Court precedent. EPA believes that the Agency's decision to approve the Tribe's application is both consistent with, and supported by, such facts and precedents. As detailed in Appendix I (Final Findings of Fact) of the Decision Document, EPA has evaluated the various types of nonmember activities that occur or may occur on the Tribe's Reservation; the types of impacts such activities may have on surface water quality; and the Tribe's significant interests in, and uses of, the Reservation waters, including the Tongue River. As explained in the Decision Document, consistent with the rule set forth in *Montana*, EPA has determined that nonmember activities that occur or may occur on the Reservation threaten or have direct effects on the Tribe's political integrity, economic security, health and welfare that are serious and substantial, thus supporting the Agency's finding of inherent Tribal authority in this case.

Comment

EPA indicates that the document focuses on nonmember activities for purposes of the *Montana* test analysis and states that "EPA does not intend to imply that these types of water quality impacts are limited to nonmember activities." To the extent that EPA may be suggesting that additional facts not identified in this document may be relevant to a future EPA determination, additional opportunity to comment should be provided with respect to any such proposed factual findings.

EPA's Response

EPA did not intend that statement to indicate that there may be additional facts not identified in the PFOF that may be relevant to the Agency's decision on this application. The statement was intended to acknowledge that while activities of the same nature engaged in by Tribal members or nonmembers would presumably have similar water quality impacts, for purposes of determining the Tribe's assertion of inherent authority under the *Montana* test, the focus of the PFOF document was on nonmember activities.

Comment

EPA does not identify with any specificity: particular past, present or future activities in the relevant area; any particular measurable, quantifiable, or otherwise identifiable existing or predicted water quality impacts linked to any such activities; or any defined links between any such activities or resultant impacts and any particular threat or effect on the Tribe. EPA identifies no supporting studies, no expert opinions, no academic resources in support of its broad claims of harm.

EPA's Response

As set forth in the Decision Document and in greater detail in Appendix I, the Final Findings of Fact, EPA has carefully analyzed the Tribe's assertion of inherent authority over nonmember activities in light of the particular facts occurring on the Northern Cheyenne Reservation as well as prior TAS case law and Supreme Court precedent. EPA has evaluated the various types of nonmember activities that occur or may occur on the Tribe's Reservation; the types of impacts such activities may have on surface water quality; and the Tribe's significant interests in, and uses of, the Reservation waters. EPA also bases its findings and conclusion on its special expertise and practical experience regarding impacts to water quality from various activities, the impacts degraded water quality may have on human health and the environment, and on the importance of water quality management in the context of the Tribe's governmental functions.

Comment

With regard to Tribal interests, each of the categories contain many speculative references to possible future activities or concerns, without any effort to identify the likelihood of their occurrence or specific links between anticipated water quality impacts and specific effects or injuries that the Tribe may suffer.

EPA's Response

CWA § 518 authorizes EPA to grant TAS to eligible tribes to carry out

certain CWA functions that “pertain to the management and protection” of reservation water resources. The analysis under the *Montana* test is 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 that threaten or may have effects on the political integrity, economic security, health or welfare of the tribe that are serious and substantial, in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.