

**DECISION DOCUMENT:**

**APPROVAL OF COEUR D'ALENE TRIBE  
APPLICATION FOR TREATMENT AS A STATE  
UNDER SECTIONS 303 AND 401 OF THE CLEAN WATER ACT**

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## **I. Introduction and Administrative Record**

**A. Purpose.** The purpose of this Decision Document is to provide the basis and supporting information for EPA's decision to approve the Coeur d'Alene Tribe of Idaho (the Tribe) as eligible for "treatment in the same manner as a state" (TAS) to administer Section 303(c) (Water Quality Standards program) and Section 401 (Water Quality Certifications) under the Clean Water Act (CWA), pursuant to Section 518(e) of the CWA. The approval applies to administration of the water quality standards program and conducting certifications for waters of Lake Coeur d'Alene and the St. Joe River lying within the current borders of the Coeur d'Alene Reservation, except for Heyburn State Park.<sup>1</sup> The following documents comprise a portion of the administrative record for this decision.

**B. Application.** The Tribe's Application for Treatment as a State under Sections 303 and 401 of the CWA consists of four documents:

1. The Tribe's Application, dated March 19, 1999;
2. The Tribe's supplemental information, dated November 1, 1999;
3. Letter to L. John Iani, EPA Regional Administrator, from Ernest Stensgar, Coeur d'Alene Tribe, requesting that EPA approve its application for TAS only for the lower one-third of Coeur d'Alene Lake and the St. Joe River within the boundaries of the Reservation, dated July 26, 2002.
4. Letter to Richard McAllister, EPA Office of Regional Counsel, from Ernest Stensgar, Coeur d'Alene Tribe, dated May 27, 2004, in support of the Coeur d'Alene Tribe's request for interim partial approval, which transmitted: 1) Resolution of the Coeur d'Alene Tribe *Authorizing Submission of Revised Water Quality Standards and Authorizing Additional Period of Public Comment*, 2) *Water Quality Standards for TAS Waters*, revised May 2004, 3) four maps of Coeur d'Alene Reservation waters covered by the TAS decision, and 4) a written description of how the maps were created.

### **C. Letters from EPA.**

1. Letter to Gov. Kitzhaber from EPA Regional Administrator offering an opportunity to comment on the Tribe's application, and enclosing a copy of the announcement that was published in local newspapers to notify interested parties of the request for comments, June 3, 1999.

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<sup>1</sup> The Park consists of three small lakes adjacent to the southern extreme of the Lake that were lawfully conveyed to the State in 1911. *U.S. v. Idaho*, 95 F. Supp.2d 1094, 1097 (D. Idaho 1998), *aff'd* 210 F.3d 1067 (9<sup>th</sup> Cir. 2000), *aff'd sub. nom. Idaho v. U.S.*, 533 U.S. 262 (2001).

2. Letter to Gov. Kempthorne from EPA Regional Administrator offering an opportunity to comment on the Tribe's application, and enclosing a copy of the announcement that was published in local newspapers to notify interested parties of the opportunity for comments, June 3, 1999.

3. Letter to Ernest Stensgar, Coeur d'Alene Tribe, from EPA Regional Administrator, describing EPA's plans for an additional comment period on Tribe's TAS application, June 12, 2003.

4. Letter to Gov. Kempthorne from EPA Regional Administrator offering an opportunity to comment on the Tribe's amended application, dated July 25, 2003, and enclosing a copy of the announcement that was published in local newspapers to notify interested parties of the opportunity for comments, and the EPA Fact Sheet about the amended application, dated July 2003.

5. Letter to Gov. Kempthorne from EPA Regional Administrator extending the period for an additional 30 days to comment on the Tribe's amended application, dated August 26, 2003, and enclosing a copy of the announcement

#### **D. Comments by the State of Idaho.**

1. By letter dated August 19, 1999, the Director of the Idaho Department of Environmental Quality submitted comments on the Tribe's Application.

2. By letter dated August 21, 2003, Clay R. Smith, Deputy Attorney General, requested that the period for the submission of comments be extended 30 days to September 24, 2003.

3. By letter dated August 22, 2003, C. Stephen Allred, the Director of the Idaho Department of Environmental Quality, requested that EPA extend the comment period for an additional 30 days.

4. By letter dated October 1, 2003, the Director of the Idaho Department of Environmental Quality submitted comments on the Tribe's Application.

**E. Capability Review.** In a memo dated July 18, 2005, Sally Brough, EPA Region 10's Water Quality Standards Coordinator, reviewed the capability of the Tribe to administer the water quality standards program.

#### **F. Statutory and Regulatory Provisions.**

1. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to

treat an Indian tribe in the same manner as a state if it meets specified eligibility criteria.

2. On December 12, 1991, EPA published "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," 56 Federal Register 64876, December 12, 1991, codified at 40 C.F.R. Part 131.

### **G. Policy Statements.**

1. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984, reaffirmed by Administrator Whitman on July 11, 2001.

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

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

### **H. Court Decisions.**

1. *U.S. v. Idaho*, 95 F. Supp.2d 1094 (D. Idaho 1998), *aff'd* 210 F.3d 1067 (9<sup>th</sup> Cir. 2000), *aff'd. sub. nom. Idaho v. U.S.*, 533 U.S. 262 (2001).

2. *Idaho v. U.S.*, 533 U.S. 262 (2001).

### **I. Additional Document.**

1. Coeur d'Alene Lake Management Plan, signed by the Coeur d'Alene Tribe, the Idaho Division of Environmental Quality, and the Clean Lakes Coordinating Council, with the last signature Sept. 19, 1996.

## **II. Requirements for TAS Approval.**

Under Sec. 518(e) of the CWA and EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe's application for TAS to administer a water quality standards program under Sec. 303(c). These four requirements are: (1) the Indian tribe is recognized by the Secretary of the Interior; (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 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 terms and purposes of the CWA and applicable regulations. EPA's regulations at 40 C.F.R. § 131.8(b) identify what should be included in an application by an Indian tribe for administration of a water quality standards program. Where EPA determines that an Indian tribe is eligible for TAS for the purpose of administering water quality standards, the tribe likewise is eligible for TAS for the purpose of providing certifications conducted under Sec. 401 of the CWA, pursuant to 40 C.F.R. § 131.4(c). For purposes of administering Sec. 401 of the CWA, the tribe operates pursuant to 40 C.F.R. Part 121, including the designation of a certifying person or agency pursuant to 40 C.F.R. § 121.1(e). The Tribe has not, however, submitted Water Quality Standards for EPA to approve under 40 C.F.R. § 131.21, and today's decision, therefore, does not constitute an approval of Tribal Water Quality Standards.

The following demonstrates that the Tribe meets statutory and regulatory criteria for TAS to administer Water Quality Standards:

A. **Federal Recognition.** The Coeur d'Alene Tribe of Idaho (the "Tribe") is a tribe recognized by the U.S. Department of Interior (68 Federal Register 68180, 68181, Dec. 5, 2003). The Application of the Tribe satisfied the requirements of 40 C.F.R. § 131(8)(b)(1); the Tribe meets the criteria of 40 C.F.R. § 131(8)(a)(1).

B. **Substantial governmental duties and powers.** To show that it has an active governing body, 40 C.F.R. § 131.8(b)(2) requires that the Tribe submit a statement, which should: (i) describe "the form of the Tribal Government"; (ii) describe the "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."

1. **Form of Tribal Government.** The Tribe's Application states that the Constitution and By Laws of the Coeur d'Alene Tribe were adopted by the members of the Tribe on June 5, 1947 and were approved by the Bureau of Indian Affairs on September 2, 1947. The last amendment to the Constitution occurred in 1984. (See Exhibit 6 of the Application.) The power of the Tribal government, outlined by the Tribe's Constitution and supported by laws, ordinances, regulations, and resolutions that have been enacted by the Tribal Council, is broad as described in the Application.

The Application states that the Coeur d'Alene Tribal Council is vested with all powers necessary to carry out the Tribe's governmental duties. The Council consists of seven persons elected by the general membership of the Tribe. The Tribal Chairman is elected by the Council and functions as its executive. The position of Tribal Chairman is a full-time, paid position within the Tribal government. Tribal business is conducted during regularly scheduled Tribal Council meetings held every Thursday, schedules permitting.

The Tribe has satisfied 40 C.F.R. § 131.8(b)(2)(i) by adequately describing the form of its Tribal government.

2. **Types of Governmental Functions.** The Tribe's Application also describes a broad range of governmental functions the Tribe currently performs. Key governmental functions of the Tribe include the following:

Law and Order. The Tribe maintains law and order on the Reservation through a Tribal Justice Center. The Justice Center includes Tribal Court Services, a Law and Order Administrator, a full-time public defender, full-time prosecutor, bailiff and several judges. It also includes a Tribal law enforcement branch with full coverage of the Reservation by Tribal law enforcement officers.

Social Services Department. The Tribe provides a variety of health, safety and welfare related programs, including the following programs: Child Quest, Family Healing Counseling, Food Distribution, Indian Child Welfare, Older Americans, Youth Activities, and a Youth Shelter.

The Benewah Medical Center is one of the leading rural community health services centers in the Northwest. In addition, the Tribe has recently completed a state-of-the-art Wellness Center—a 55,000-foot facility devoted to overall wellness, including fitness and extensive rehabilitation services.

Housing Authority. The Housing Authority is responsible for administering the Tribe's Housing Program, which includes 170 houses. The Housing Authority, together with the Planning and Development Department of the Tribe, is in the process of providing over 60 new homes within the Reservation.

Natural Resources Department. This Department is discussed in the Tribal Capability section of the application.

Department of Education. Included in this structure is a full-service program for youth and adult training and education. In addition, the Tribe built, operates and maintains a Tribal School. This facility is state-of-the-art and provides unparalleled services to children within the Reservation.

Other economic development entities. Those entities include the Benewah Market, the Benewah Auto Center, the Coeur d'Alene Tribal Bingo/Casino facility, and the Tribal Farm.

The Tribe has satisfied 40 C.F.R. § 131.8(b)(2)(ii) by adequately describing the "governmental functions currently performed by the Tribal governing body."

### **3. Source of Current Tribal Authority.**

The Tribe's Application describes its authority to perform its current governmental functions as derived from its inherent powers as a sovereign and from its Constitution. In its Application, the Tribe notes that the Tribe's Constitution approved by the U.S. Department of the Interior provides for jurisdiction of the Tribe over all lands and water areas within the Reservation. The Tribe has also shown that it has authority over the waters of Lake Coeur d'Alene and the St. Joe River within the boundaries of the Reservation, except for the waters of Heyburn State Park, which is not part of the area over which it is seeking to obtain TAS for water quality standards and water quality certifications. The district court, in an order dated August 14, 1998, found as follows:

The United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation.

*U.S. v. Idaho*, 95 F. Supp.2d at 1117. The district court found that the Reservation's boundaries were described by Act of March 3, 1891, 26 Stat. at 1027, and the Act of August 15, 1894, 28 Stat. at 322, and included portions of Lake Coeur d'Alene and the St. Joe River, but excluded those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park. The U.S. Supreme Court affirmed that decision. *Idaho v. U.S.*, 533 U.S. 262.

The Tribe's application provides adequate information to demonstrate its current source of Tribal authority. The Tribe has satisfied 40 C.F.R. § 131.8(b)(2)(iii) by adequately describing the source of its authority to perform its current governmental functions.

**4. Conclusion.** Through its submissions in its Application, the Tribe has demonstrated that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. 40 C.F.R. § 131.8(a)(2).

#### **C. Jurisdiction over the portions of Lake Coeur D'Alene and St. Joe River that are "waters within the borders" of the Coeur d'Alene Reservation**

To show that the water quality standards program to be administered by the Tribe pertains to waters of a reservation and thus meets the criteria of 40 C.F.R. § 131.8(a)(3), the Tribe is required to submit a statement of authority, which should include: (i) a map or legal description of the area over which the Tribe asserts authority to regulate surface water quality; (ii) a statement by the Tribe's legal counsel (or equivalent official) describing 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 which support the Tribe's assertion of authority; and (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3). As noted above, the

Tribe is seeking TAS approval with respect to only those waters of Coeur d'Alene Lake and the St. Joe River within the exterior boundaries of the 1894 Coeur d'Alene Reservation, except for Heyburn State Park.

### **1. Map or Legal Description.**

The boundaries of the Coeur d'Alene Reservation were established on November 8, 1873 by Executive Order of President Ulysses S. Grant. The Coeur d'Alene Reservation boundaries were further defined by agreements between the Tribe and the United States, made in 1887, 1889 and 1894, respectively. Congressional authorization for or ratification of the agreements may be found at 26 Stat. 989, 1027, 27 Stat. 124, and 34 Stat. 325. The 1894 Coeur d'Alene Reservation consists of approximately 343,000 acres.

Although the Tribe's Application, dated March 19, 1999 (the 1999 Application), requested TAS eligibility for all surface waters within the Coeur d'Alene Reservation, the Tribe submitted a letter, dated July 26, 2002, in which it asked EPA to review its eligibility for TAS only for the waters of Lake Coeur d'Alene and the St. Joe River within the Reservation boundaries, except for Heyburn State Park. The Tribe also restated its request that EPA approve it for TAS for the entire Reservation and continue to review the rest of the Application. In a letter to EPA dated May 27, 2004, the Tribe submitted a copy of a Resolution by the Tribal Council that reiterates the Tribe's request for interim partial approval of TAS for the Lake Coeur d'Alene and St. Joe River waters of the Reservation. The Tribe provided four maps that show in detail the Reservation waters of Lake Coeur d'Alene and the St. Joe River to be covered by this TAS decision, as described below.

The 1999 Application specifically described a specific matter in litigation concerning ownership of the beds, banks, and waters of certain portions of Lake Coeur d'Alene and the St. Joe River. In *U.S. v. Idaho*, 95 F. Supp.2d 1094, the U.S. District Court ruled that the United States, as trustee, and the Coeur D'Alene Tribe, as the beneficially interested party of the trusteeship, have title to the beds and banks of Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Reservation, excluding Heyburn State Park, which was not specifically addressed by the litigation.

The 1999 Application included a map of the Reservation. In response to comments submitted by the State of Idaho dated October 1, 2003, the Tribe has submitted additional maps that detail the jurisdictional boundaries of Lake Coeur d'Alene, the St. Joe River, and Heyburn State Park that are addressed by this eligibility determination, and included in the administrative record for this decision. The first map covers a large portion of the Reservation that includes Lake Coeur d'Alene and the St. Joe River, and delineates the "Reservation waters" from the "Reservation TAS waters" in a large scale (1:116,378). The other three maps are more detailed (scale of 1:34,321), showing the Lake's northern Reservation boundaries, the Lake's Heyburn State Park boundaries, and the Reservation boundaries for the St. Joe River in and around the City of St. Maries. The Tribe, therefore, has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map or legal description of the area over which the Tribe asserts authority to regulate surface water

quality.

EPA has evaluated the boundaries of Lake Coeur d'Alene in light of the U.S. Supreme Court's decision in *Idaho v. U.S.*, 533 U.S. 262, and considered a decision by the Supreme Court of Idaho in *Erickson v. Idaho*, 132 Idaho 208 (1998)(addressing ordinary high water mark of Lake).

The Application covers the following two bodies of water:

**Lake Coeur d'Alene:**<sup>2</sup> Lake Coeur d'Alene is the major water resource of the Reservation. The Lake is the second largest in Idaho and has a total surface area of 30,177 acres. The Reservation's northern boundary runs across the Lake, and the United States holds title to submerged lands beneath the southern approximate one-third of the Lake within the Reservation's boundaries in trust for the Tribe.

**St. Joe River:**<sup>3</sup> The lower St. Joe River enters the Reservation within the City of St. Maries, and passes through a broad floodplain on its way to Lake Coeur d'Alene. Prior to entering the Lake, it passes through an extensive natural levee that spans four (4) linear miles. Two nonmember facilities discharge into the River. The City of St. Maries has a municipally-owned treatment facility that discharges effluents into the River through pipes located in waters above Tribally-owned submerged lands. The Potlatch lumber mill in St. Maries also discharges to the St. Joe

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<sup>2</sup>Included in the total acreage of Lake Coeur d'Alene are areas where four shallow lakes (Chatcolet, Round, Benewah, and Hidden Lakes) and surrounding lands used to exist in the southern end of Lake Coeur d'Alene. Historically, some settlers have claimed ownership to lands in the lake bed that were not submerged for part of the year, and could be farmed or used for pasturage when the water level of the Lake receded during parts of the year. When the waters of the Lake receded for part of the year, some surface water would be retained in areas that were referred to as "lakes" by the settlers. However, with the construction and operation of the Post Falls Dam on the Spokane River, the water level of the Lake has been regulated to remain at the ordinary high water mark throughout the year. Specifically, maps of areas in the southern end of Lake Coeur d'Alene prepared by the Tribe identify areas known as Round Lake, Benewah Lake, Chatcolet Lake, and Hidden Lake as part of Lake Coeur D'Alene. The navigable waters of all these areas are considered part of the navigable waters of Lake Coeur d'Alene because the bed and banks of those areas lie below the water level of the Lake. EPA notes that the areas known as Benewah Lake, Chatcolet Lake, and Hidden Lake lie within the boundaries of Heyburn State Park, and, therefore, are not encompassed by this TAS eligibility decision, leaving Round Lake as the only one of the four shallow lakes covered.

<sup>3</sup>One water body that flows into the St. Joe River but is not covered by this TAS decision is Hepton Lake, a large area separated from the St. Joe River by a dike that has been breached.

River, with the point of discharge located in waters above Tribally-owned submerged lands.

## **2. Statement describing basis for the Tribe's authority.**

The Tribe's Application, together with the several court decisions cited above in *Idaho v. U.S.*, 533 U.S. 262, and the earlier litigation, support the basis of the Tribe's assertion of authority to establish water quality standards for Lake Coeur d'Alene and the St. Joe River within the exterior boundaries of the Reservation, except for Heyburn State Park. Consistent with the scope of the Application, this eligibility decision addresses only the Tribe's authority to establish water quality standards for Lake Coeur d'Alene and the St. Joe River within the Reservation boundaries, except for the waters of Heyburn State Park. This decision does not address the authority of the Tribe elsewhere on the Reservation or any other claims of the Tribe.

The Clean Water Act authorizes TAS for a tribe to exercise functions that pertain to the management and protection of water resources within the borders of an Indian reservation. The Tribe has limited its Application to waters that are both above submerged lands held in trust for the Tribe by the United States and located within a reservation. EPA has authority to approve a tribal program covering part of a reservation. See 56 Federal Register 64876 (Dec. 12, 1991) (authorizing approval of area over which tribe shows jurisdiction). Upon approval of this Application, the Tribe will develop water quality standards for EPA's approval, and issue water quality certifications within the area covered by this approval, but EPA will continue to have responsibility for administering and enforcing the Clean Water Act, including issuing NPDES permits.

As already noted, the Act authorizes TAS for a tribe to carry out management and protection functions under the Clean Water Act for waters within a reservation. The Tribe's Application covers the two identified water bodies, both of which are within the Reservation and located above submerged Tribal trust lands, and identifies two nonmember facilities that discharge into the River from discharge points above submerged Tribal lands. The Tribe has authority to set water quality standards applicable to members and nonmembers for those waters for the following reasons:

### **i. Inherent Tribal Authority to Manage Tribal Lands and Resources**

The Supreme Court has recognized that the United States holds title, in trust for the Tribe, to the banks and beds beneath the waters of portions of the St. Joe River and Lake Coeur d'Alene within the Reservation, making the Tribe the beneficial owner. A tribe that owns lands within a reservation retains inherent sovereign authority to manage uses of those lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). The Court has recognized that tribes retain the "inherent power necessary to tribal self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (emphasis added). See also *id.* at 142 ("there is a significant territorial component to tribal power"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant

“geographic” component to tribal “sovereignty”). With tribally-owned land, a tribe’s “power to manage the use of its territory and resources” extends to “both members and nonmembers.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), citing *Merrion v. Jicarilla*, 455 U.S. at 137; *Bracker*, 448 U.S. at 151; *Montana v. U.S.*, 450 U.S. 544 (1981); and four federal statutes.

## ii. Tribal Authority under the *Montana* “impacts” test used by the Water Quality Standards Regulation

EPA believes the Tribe could show authority over the area covered by the Application under the “impacts” test established by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (*Montana* test). *Montana* held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over the activities of nonmembers on nonmember-owned fee lands. The Court also found, however, 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 Indian reservations, the 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*]”).<sup>4</sup>

The preamble to EPA’s 1991 water quality standards regulation noted that, in applying the *Montana* test to assess the impacts of nonmember activities on fee lands on an Indian tribe, EPA uses an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Federal Register 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 in the case. *Id.* at 64878. In addition, EPA has 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

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<sup>4</sup>EPA has not taken the position that it is necessary to analyze 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 the area covered by the Application under the *Montana* “impacts” test.

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.

EPA also notes that Tribal authority over water quality under the *Montana* test would not depend solely on the effects of the two existing dischargers. EPA's analysis of the impacts of nonmember activities considers both actual and potential impacts of nonmember activities, in light of the importance of water quality to a tribe. *See, e.g., Montana v. EPA*, 141 F. Supp.2d 1259 (D. Mont. 1998). The analysis 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." *Id.*, at 1262, quoting *Montana v. EPA*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135 (9<sup>th</sup> Cir. 1998), *cert. den.*, 525 U.S. 921 (1998).

#### **(A) The Tribe's Application**

The Tribe's 1999 Application and supplemental information to the Application provides a great deal of information about the Tribe's special interest in Lake Coeur d'Alene and the St. Joe River, the waters being considered by EPA in this TAS eligibility determination. Additional information about water quality in the Lake and sources of pollution is provided in the Lake Management Plan (LMP), included in the docket and further described below. The LMP is a long-term, comprehensive plan initiated in 1991 by the Tribe, the State of Idaho, local governments, and federal government entities to achieve water quality goals throughout the Lake.

The Application also attached the lower court decision by U.S. District Judge Lodge in the U.S. District Court for Idaho, *U.S. v. Idaho*, 95 F. Supp.2d 1094, which made a large number of significant findings of fact that were not contested on appeal. The court extensively discussed the significance of Coeur d'Alene Lake and its natural resources and of other Reservation waterways to the Tribe. *Id.* EPA has fully considered all pertinent information in the trial court decision, including the Findings of Fact and Conclusions of Law.

#### **(B) Clean Water Act Water Quality Standards Functions**

The Clean Water Act, as noted, authorizes a tribe to function as a state in carrying out water quality standards functions pertaining to the management and protection of tribal water resources within a reservation. The Act provides for the maintenance and restoration of the physical, chemical and biological integrity of waters of the United States. Water quality standards consist of designated uses, water quality criteria to protect those uses, an antidegradation policy and other general policies that affect the implementation of the standards, such as mixing zone and variance policies. Water quality standards serve the dual functions of establishing water quality goals for specific water bodies and serving as the regulatory basis for water quality-based treatment controls and strategies. The objective of the Act, 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 tribes.

Tribal water quality standards are intended to protect the beneficial uses and water quality of reservation lakes, streams, rivers, and associated tributaries. 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 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.

### **(C) Importance of Water Quality Standards to the Tribe**

The district court, as noted, made a number of unchallenged "Findings of Fact" that document the historic importance of the waters to many aspects of Tribal life. The court summarized its findings as follows:

To summarize, the majority of the Tribe's population lived in villages located next to the Lake and rivers. The Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alene's survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual, religious and social life centered around the Lake and rivers.

*U.S. v. Idaho*, 95 F. Supp.2d at 1101. The Supreme Court recognized, and its decision relied on, the district court's findings that "explained how the submerged lands and related water rights had been continuously important to the Tribe" before the Reservation's establishment. *Idaho v. U.S.*, 533 U.S. at 275.

The Tribal Council has expressly recognized the "economic and social benefits" the Reservation's natural resources provide the Tribe in Council Resolution CDA 88(94), a vision statement for the Tribal Natural Resources Department, which reads:

The Coeur d'Alene Tribal Natural Resources Department is dedicated to the management of all natural resources within the historical and cultural territories of the Coeur d'Alene Tribe to provide economic and social benefits, while providing for the protection and enhancement of water quality.

Permits issued under Chapter 44 of the Tribe's civil code, governing encroachments onto Tribal waters, identify other ways the waters are important to the Tribe by reciting as follows: "The Tribal and public health, safety and welfare requires that any allowed use of an encroachment upon these waters and submerged lands be regulated to protect water quality and

quantity, navigation, fish and wildlife habitat, aquatic life, aesthetic beauty and Tribal values.”<sup>5</sup>

### **(1) Importance to Tribal Political Integrity**

Water quality management is necessary to protect the political integrity of the Tribe. The strongest basis for that conclusion is the close connection the district court found between the waters of Lake Coeur d’Alene and the St. Joe River and the Tribe’s historic spiritual, religious, and social life. More generally, EPA has recognized that water quality management protects public health and safety, which is a core governmental function critical to self-government. 56 Federal Register at 64879. The authority to carry out such a function for Tribal lands is critical to the Tribe’s ability to “to make [its] own laws and be governed by them.” *Nevada v. Hicks*, 533 U.S. at 361, citing *Williams v. Lee*, 358 U.S. 217, 220 (1959). See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333, 335 (recognizing a tribe’s “power to manage the use of its territory and resources by both members and nonmembers”). Thus, the Ninth Circuit has recognized “the threat [to a tribe] inherent in impairment of the quality of the principal [tribal] water source.” *Montana v. EPA*, 137 F.3d at 1141.

### **(2) Importance to Tribe’s Economic Security, Health, and**

#### **Welfare**

#### **(i) Fish and Wildlife**

The Application describes why water quality management is critical in supporting the Reservation’s diverse populations of species. The Tribe’s Application identifies species that all are dependent on the waters within the Reservation, and describes how the welfare of these species is dependent on protecting water quality.

The Lake is habitat for westslope cutthroat and bull trout, and a significant habitat component for bald eagles. The St. Joe River provides habitat for westslope cutthroat trout, and a migratory corridor for bull trout overwintering in Lake Coeur d’Alene and returning to natal spawning grounds in the upper St Joe River. The surrounding wetlands provide migratory waterfowl habitat and hunting opportunities. Some areas of the floodplain immediately upstream from the Reservation support remnants of the original camas meadows, which were also a major Tribal food resource within the St. Joe corridor. Conversion to pasture and hydrologic alteration have nearly extirpated these camas communities from the floodplain. The Lake, in conjunction with its tributaries, also supports a variety of wetlands in its bays. These wetlands provide migratory waterfowl habitat and hunting, fish rearing habitat, and habitat for upland game and

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<sup>5</sup>Today’s decision does not address the Tribe’s authority to regulate access to use the Lake or St. Joe River, such as access by water to waterfront properties or to Heyburn State Park, or for boating, swimming, and fishing. Specifically, it provides no authority, under the CWA, for the Tribe to enforce encroachment permits.

non-game species alike.

The traditional diet of the Coeur d'Alenes is heavily based on salmonid fishes, whose requirements for cool and clean water and hydrologically intact stream and lake systems are well known and extensively documented. Two other major food sources for Tribal members (camas and water potato) are wetland plants that can be affected by hydrologic manipulation and chemical and nutrient pollution. Several species that are targets of Tribal hunters, including elk, deer, rabbits, and grouse all depend to some degree on aquatic habitats that are continuous and free of chemical pollution and physical disturbance. Tribal members, more than the general population, consume wild game and native plants for subsistence, dietary supplementation, medicinal, and cultural practices.

Impairment of water quality threatens the Tribe by harming fish and wildlife that live in Tribal waters and use or depend on them as a source of water, food, or habitat. Fish and wildlife, and, as noted, plant species, currently provide, or historically have provided a source of food for Tribal members. Game animals, birds and fish bioaccumulate toxins from water and the food chain, and vegetation bioaccumulates toxins from water and soils. Impairment of water quality can directly harm the health and welfare of Tribal members who ingest the fish, wildlife, or plants, causing the toxins to bioaccumulate in Tribal members. It can also harm the Tribe and its members by depriving them of a food source when toxins accumulate in the fish, wildlife, or plants and reduce their abundance. And water quality impairment that adversely affects edible life forms can also harm the Tribe economically because edible life forms have economic value when used as food sources for Tribal members, and as sources of revenue from hunters or fishers.

Conversely, the full protection of fish and other aquatic life helps ensure that aquatic ecosystems will function properly to cycle chemicals (through oxygen production), to aid in the detoxification of contaminants and to provide diversity and productivity of life within Tribal waters. Such full protection also helps ensure that birds, mammals, reptiles, and amphibians that use and depend upon Tribal waters as a source of water, food, or habitat will maintain the species diversity and productivity that Tribal lands and waters are capable of supporting. The protection functions also can advance Tribal aesthetic, educational/scientific, recreational, and food goals. Further, as suggested above, those protection functions also directly enhance the Tribe's health and welfare by reducing toxins in the fish, and help ensure the economic well-being of the Tribe and its members by increasing opportunities to harvest fish and other aquatic life and protecting wildlife and fish-based recreation businesses. Thus, the ability to protect water quality that affects fish and wildlife is important to the Tribe's economic security and health and welfare.

## **(ii) Recreation and Related Activities**

Both the Lake and the St. Joe River are significant recreational, aesthetic, and development resources. The main recreational uses are pleasure boating and sport fishing, with other uses including swimming and wading. Impairments to the quality of either the Lake's or the River's waters will reduce the value of those waters as recreational resources, and members may

be exposed to water pollutants during recreational activities. Thus, the full protection of recreation in and on the water helps ensure that Tribal members and nonmembers are allowed the recreational use of waters for body contact during play and sport without undue threat of disease or loss of aesthetic pleasure.

The attractiveness of the River has spurred expansion of the St. Maries urban area for residential housing onto the floodplain. The Lake is an outstanding aesthetic resource, and a major component of the residential attractiveness for the Reservation and general surrounding area. Land around the Lake, consisting primarily of non-Indian fee land, has very high land values because of the presence and attractiveness of the Lake, and lakefront property has high development potential for the same reasons. Water quality management protects both the value of properties that depend on proximity to the water and its aesthetic and recreational amenities and the economic activity that high land values can generate. It also protects the value of the waters themselves as recreational resources for the Tribe, and the ability of the waters to generate recreation-based revenues for the Tribe.

In sum, degradation of the Lake's or River's water quality could threaten Tribal economic security and health or welfare by harming Tribal members who use the waters for recreation and by reducing recreation, tourism, and property values.

### **(iii) Cultural and Ceremonial Uses**

The Application describes how water resources of the Reservation have been, and continue to be, an integral part of Coeur d'Alene Tribal culture. The Tribe also submitted as supplemental information to the Application a report prepared by Roderick Sprague entitled "An Anthropological Summary of the Dependence of the Coeur d'Alene Tribe upon Coeur d'Alene Lake," August 31, 1999. That document describes the historic importance of Lake Coeur d'Alene's waters to the Tribe. The Tribe asserts that preservation of water quality and ecological function of Reservation water resources is essential to supporting traditional fishing, hunting, and plant gathering activities, and preserving the quality of life on the Reservation for all residents.

The Tribe's Application documents that the Lake is a very important traditional resource for the Tribe and that the health of the Lake is critical to the Tribe's cultural integrity. Tribal villages were placed at the Lake's shore to take advantage of fishing, aquatic plant foods, and transportation. Bull trout, Cutthroat trout, and Whitefish were significant food sources provided by the Lake to the Tribe. Tribal fishers set traps near the mouth of the Coeur d'Alene River to harvest cutthroat trout and whitefish migrating out of the Lake, and took over 40,000 cutthroat each year. The resident trout fishery has declined significantly since non-Indian settlement, with Tribal cutthroat harvest falling to 3,329 fish by 1967, due primarily to agricultural erosion, destruction of riparian habitat along Lake tributaries, and introduction of non-native fish species. The Application also describes how the St. Joe River corridor contains many Tribal cultural and religious sites, both on and off the Reservation.

Tribal religious practice is based on the sweat house where steam is used to induce contemplation and prayer. Reservation surface waters are the traditional sources for generating steam in the sweat house, and Tribal reverence for the practice mandates that these waters be free from toxic and objectionable substances.

The full protection of traditional and cultural uses protects the Tribe's health and welfare by protecting Tribal culture. The CWA allows states and tribes to set water quality standards to protect any beneficial uses they deem appropriate. Water quality standards that protect traditional and cultural beneficial uses may be adopted by a tribe.

#### **(iv) Domestic Water Uses**

The Lake provides a source of domestic water, and is the sole source of drinking water for many lakefront homes and private community water systems. The full protection of domestic water supplies helps ensure that human health will be directly protected from disease and from exposure to toxic materials as a result of exposure through drinking the water. It also protects humans from the effects of exposure from other domestic uses, including cooking and bathing. To the extent that Tribal members rely on those waters for domestic water supplies, the Tribe's ability to set water quality standards will directly affect the health and welfare of Tribal members. Impairment of water quality in domestic water sources can threaten the health and welfare of the Tribe and its members.

### **(3) Current Nonmember Activities in the Area Covered by the Application**

As already noted, there are currently two nonmember sources of pollution to the St. Joe River, both located within the City of St. Maries, that will become subject to Tribal water quality standards upon EPA approval of such standards. The City operates a publicly-owned treatment works (POTW) for treating wastewater, with the point of discharge for the treated effluent above submerged Tribal lands under the St. Joe River. The Potlatch Corporation St. Maries Lumber Mill also discharges to the Tribal area of the St. Joe River, with the point of discharge in waters above submerged Tribal lands.<sup>6</sup> Untreated or inadequately treated discharges from those facilities

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<sup>6</sup> EPA also has identified one off-reservation facility that does not discharge directly into Tribal waters but that could be affected by Tribal water quality standards. Within the Reservation, the City of Plummer operates a small POTW that discharges to a stream that leads to the Lake. The limits in that facility's NPDES permit will need to ensure compliance with Tribal standards. Two other POTWs, the Santa-Fernwood and Clarkia Water Sewer Districts, discharge into the St. Joe River, respectively, 20 and 30 miles upstream of the Reservation border, and are unlikely to impact water quality within the Reservation. Also along the St. Joe River is a former wood treatment site that is being investigated under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act

may harm Tribal health or welfare by interfering with the Tribe's ability to use the waters covered by this Application.

#### **(4) Conclusion**

In sum, for all the reasons just stated, the Tribe would be able to meet the *Montana* test by showing that it needs to regulate nonmember activities affecting the waters covered by this application to protect Tribal political integrity, economic security, and health or welfare. Such activities, if unregulated by the Tribe, would have direct effects on the Tribal interests discussed at length above that are serious and substantial.

#### **(5) Effects of Tribal water quality standards on adjacent lands**

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(CERCLA). After conducting a removal action in 1999 to address a "sheen," EPA proposed adding the "St. Maries Creosote Site" to the National Priorities List, pursuant to Sec. 105 of CERCLA. The remedy for this site is still being developed by EPA, using a Remedial Investigation/Feasibility Study (RI/FS) that is being prepared by the City of St. Maries and Carney Products Ltd. under the terms of an CERCLA Administrative Order on Consent issued by EPA.

EPA also is fully familiar with efforts that are taking place in the Coeur d'Alene Basin to address contamination and water quality issues, including significant efforts by the Tribe, the State, local governments, and federal entities (collectively the Governments) to establish and implement a LMP. In 2003, EPA issued a CERCLA Record of Decision for cleanup in the Basin, which deferred any remedial decision for Lake Coeur d'Alene, relying on the Governments' efforts under the LMP to address contamination threats in the Lake. As noted above, the Governments initiated development of the LMP in 1991, and adopted it in 1996. Since then, various aspects of the plan have been implemented and additional measures have been identified. The LMP is in the process of being revised and updated, and there are many actions that the Governments anticipate taking to address water quality issues both inside and outside the Reservation so that the Lake can be deleted from the Coeur d'Alene Basin Superfund Site. Implementation of the LMP, using the various authorities of the Governments, is expected to achieve the Tribe's and State's water quality standards, which will serve as benchmarks for how activities that affect those waters can maintain acceptable water quality. Currently, the LMP broadly covers the entire Lake, and it has components to address water quality in the southern portion of the Lake within the Reservation boundaries. For example, the Governments are planning to develop an inventory of shoreline residential septic systems as a first step in deciding what action may be needed. Historically, the Panhandle Health District has regulated nonmember residential septic systems around the Lake, including those within the Reservation, working in cooperation with the Tribe and IDEQ. EPA supports the efforts by the Governments, which may take more than 30 years to implement so that contamination in the Lake does not pose unacceptable risks to human health and the environment.

The Clean Water Act, as noted, authorizes tribal “management and protection of water resources \* \* \* within the borders of an Indian reservation.” The Tribe’s application covers only submerged lands below areas of Lake Coeur d’Alene and the St. Joe River within the Reservation, excluding Heyburn State Park. The Tribe is the beneficial owner of those lands, but they are submerged and, therefore, uninhabited. Many of the lands adjacent to those Tribal submerged lands are on the Reservation and owned in fee by nonmembers. Such lands are beyond the geographic scope of this approval but activities on those lands, like activities outside of the Reservation, may be affected by Tribal water quality standards, because effluent limitations in 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 (10<sup>th</sup> Cir. 1996); see CWA Section 401(a)(2).<sup>7</sup>

**3. Copies of all documents such as Tribal Constitutions, by-laws, charters, executive order, codes, ordinances, and/or resolutions which support the Tribe’s assertion of authority.**

The Tribe has provided copies of its Tribal Constitution and By-Laws, and the court opinions cited. By providing these documents which support the Tribe’s assertion of authority, the Tribe have satisfied 40 C.F.R. § 131.8(b)(3)(ii).

**4. Identification of the Surface Waters for which the Tribe proposes to establish water quality standards.**

The Tribe has identified the boundaries of Lake Coeur d’Alene and the St. Joe River within the Reservation, except for the waters of Heyburn State Park, over which it proposes to establish water quality standards. For purposes of this approval, EPA is finding the Coeur d’Alene Tribe is eligible to administer its water quality standards pursuant to sec. 303(c) of the CWA and to issue certifications pursuant to sec. 401 of the CWA for the waters of Lake Coeur d’Alene and the St. Joe River within the borders of the Coeur d’Alene Indian Reservation, except for the waters of Heyburn State Park.

The information provided by the Tribe demonstrates that for purposes of administering water quality standards under the Clean Water Act, the Tribe has authority over these Reservation waters. The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by providing the description and the

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<sup>7</sup> The Tribal segment of the Joe River flows into the Tribal portion of the Lake (roughly the southern third). Lake water moves north into Idaho, and then into the Spokane River, in turn flowing into Washington. Thus, effluent limitations for discharges upstream from the Tribe’s segment of the River must protect the Tribal standards, and limitations for discharges into Tribal waters must protect downstream Idaho standards. Limitations in permits to discharge into the upper Spokane River, in turn, must protect downstream Washington standards.

maps identifying the surface waters over which it proposes to establish water quality standards.

**D. Capability.**

The Tribe's Application shows that it is reasonably expected to be capable of carrying out the functions of an effective WQS program in a manner consistent with the terms and purposes of the Act and applicable regulations. Attached is a review of the capability of the Tribe to administer the water quality standards program that was prepared by Sally Brough, EPA Region 10's Water Quality Standards Coordinator, by memorandum dated July 18, 2005. Ms. Brough concluded that the Tribe has demonstrated the capability to administer an effective water quality standards program after reviewing the Application, her direct experience working with staff of the Tribe, and her knowledge of the Tribe's efforts to develop water quality standards and a cooperative relationship with the Idaho DEQ. The Application demonstrates the Tribe's wide range of experience administering natural resource programs, and includes a full description of how the Tribal government is organized to carry out those functions.

The Tribe has satisfied the requirements of 40 C.F.R. § 131.8(b)(4) by showing it is capable of administering an effective water quality standards program, and has met the requirements of 40 C.F.R. § 131.8(a)(4).

**III. Conclusion.**

The Agency is satisfied that the Coeur d'Alene Tribe has adequate jurisdiction to set water quality standards for waters within the exterior boundaries of the Reservation on approximately the southern third of Coeur d'Alene Lake as well as those portions of the beds and banks of the St. Joe river located within the 1873 Coeur d'Alene Indian Reservation. *U.S. v. Idaho*, 95 F. Supp.2d 1094. The Tribe has adequately demonstrated that it meets the requirements imposed by 40 C.F.R. § 131.8(a)(3). Based on the information provided by the Tribe, the Tribal water quality standards, if approved by EPA under the Clean Water Act, would apply to these waters of Lake Coeur d'Alene and the portions of the St. Joe River, excluding Heyburn State Park, that are within the exterior boundaries of the Reservation.

EPA Region 10 has determined that the Coeur d'Alene Tribe has met the requirements of 40 C.F.R. § 131.8 and is eligible to be treated as a state for purposes of Section 303(c) of the CWA. Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of certifications under Section 401 of the CWA.

  
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Ronald A. Kreizenbeck  
Acting Regional Administrator

*Aug. 5, 2005*  
Date