



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: ORC-158

APPENDIX II

**RESPONSE TO COMMENTS ON COEUR D'ALENE TRIBE
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE (TAS)
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

By letter dated July 25, 2003, the State of Idaho was offered the opportunity to review the Coeur d'Alene Tribe's assertion of authority in the Tribe's modified TAS application to establish water quality standards for the portions of Lake Coeur d'Alene and the St. Joe River within the boundaries of the Coeur d'Alene Reservation, except for the waters of Heyburn State Park, and to identify any competing jurisdictional claims. At the time the State was offered the comment opportunity EPA published notices in local newspapers informing the public of the State's comment opportunity. The following provides EPA's response to comments.

Comments were submitted to EPA by the State of Idaho as follows:

Comments by the Department of Environmental Quality on the Tribe's Application by letter dated October 1, 2003

1. **Comment:** The State asked EPA to identify with greater specificity the areas to be covered by the TAS application. Specifically, the Tribe's application now applies only to the lower one-third of Lake Coeur d'Alene and the St. Joe River within the Reservation, but not to Heyburn State Park. The State assumed that the lower portion of Black Lake, which is within the Reservation boundaries, is not included.

EPA Response: EPA is including with the final decision a set of four detailed maps which fully describe the borders of the lower one-third of Lake Coeur d'Alene and the St. Joe River within the Reservation, and which delineate the borders of Heyburn State Park.

The Tribe's application addresses all navigable waters of Lake Coeur d'Alene and the St. Joe River within the Coeur d'Alene Reservation, except those waters within Heyburn State Park. The State is correct that Black Lake is not included in this TAS decision.

2. **Comment:** The State noted questions were raised about whether Benewah Lake, Hepton Lake and Round Lake are encompassed by the Tribe's application.

EPA Response: Benewah Lake and Round Lake are encompassed by the Tribe's

Coeur d'Alene Tribe TAS
Response to Comments

application, but Hepton Lake is not. The determination as to Hepton Lake applies solely to the scope of the Tribe's application, and not for any other purposes.

Historically, the water levels of Lake Coeur d'Alene have varied as the result of seasonal fluctuations in water flow through the Coeur d'Alene Basin and to the Spokane River outlet. When non-Indian settlers moved onto the Reservation, some settlers claimed ownership to lands in the lake bed that were submerged for part of the year, but could be farmed or used for pasturage when the water level of the Lake receded during other 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 its regular high level throughout the year.

Maps of areas in the southern end of Lake Coeur d'Alene prepared by the Coeur d'Alene Tribe show areas known as Round Lake and Benewah Lake, as well as Chatcolet Lake, and Hidden Lake as part of Lake Coeur d'Alene. The waters of those areas are 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. There is no way to distinguish these former lake areas within the waterbody of Lake Coeur d'Alene from the rest of the Lake. They are, therefore, within the area covered by the Tribe's application. In addition, and for the limited purposes of the TAS eligibility decision, EPA is not treating the water body and area known as Hepton Lake as part of the navigable waters of the St. Joe River and Lake Coeur d'Alene.

3. Comment: The State also urged EPA to recognize that the jurisdictional boundary of the area in question is the ordinary high water mark of 2128 feet above mean sea level.

EPA Response: This approval, as already explained, covers waters of the Lake and River within the boundaries of the Reservation and excluding Heyburn State Park 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 as those boundaries are described by Act of March 3, 1891, 26 Stat. at 1027, and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur and the St. Joe River, but which excludes those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and submerged lands were not at issue in this litigation.

U.S. v. State of Idaho, 95 F.Supp. 2d 1094 (Dist. Idaho, 1998), aff'd 210 F.3d 1067 (9th Cir., 2000, affirmed sub nom. *Idaho v. U.S.*, 533 U.S. 262 (2001).

EPA acknowledges the State of Idaho's position that the jurisdictional boundary of these areas is the ordinary high water mark of 2128 feet above mean sea level. See *Erickson v. State of Idaho*, 132 Idaho 208, 970 P.2d 1 (1998).

4. **Comment:** The State commented that the water quality standards package that was submitted to EPA by the Tribe in 1999 created confusion as the jurisdictional boundaries of the TAS application. The State suggested that the Tribe's water quality standards package should be clear in delineating the TAS boundary.

EPA Response: The Tribe, working with EPA and IDEQ, is revising its water quality standards package to apply only to Reservation waters within the area covered by this TAS approval. The 1999 tribal water quality standards, which the Tribe made available for public comment and public hearing, were for all waters of the Reservation, while the revised standards apply only to a portion of the Reservation waters: Lake Coeur d'Alene and the St. Joe River within the Reservation, except for Heyburn State Park.

5. **Comment:** The State noted concerns that any future attempt by the Tribe to expand the scope of the TAS status beyond the present application would be problematic. Pointing to public comments submitted to the State that were forwarded to EPA, the State wrote that non-Tribal members have significant concerns with how they may be affected by the Tribe's water quality standards.

EPA Response: EPA recognizes the concerns that have been identified and will continue to work with the Tribe, the State, local governments and stakeholders to effectively implement the Clean Water Act on the Reservation.

6. **Comment:** The State wrote that it is important to describe the availability of the administrative processes and remedies for nonmembers wishing to participate in the development of Tribal water quality standards.

EPA Response: The processes for developing and approving the Tribe's water quality standards include public participation provided by the Tribe and review by EPA Region 10. The Tribe will provide for public participation as it develops the standards that it submits to EPA for approval under the CWA. EPA's action in approving or disapproving the Tribe's standards would be subject to federal court review

As noted above, the Tribe is revising its water quality standards package to make clear that, if approved, the standards would apply to the Reservation waters of Lake Coeur d'Alene and the St. Joe River covered by this TAS approval. The standards are also being updated to reflect new criteria recommendations developed by EPA over the last five years. In the effort to revise its standards, the Tribe has been working closely with EPA in the development of its standards, and has sought the input of the Idaho Department of Environmental Quality.

In addition, the Tribe has made a commitment to provide for additional public participation on the Tribal water quality standards before the revised standards are adopted and submitted to EPA for action. In a Resolution by the Coeur d'Alene Tribal Council dated May 27, 2004, the Tribe committed to conducting another public comment period on those standards once EPA approves the Tribe's TAS application.

7. **Comment:** The State identified a concern with how the TAS application or the Tribe's water quality standards would affect access to the Lake, the River, and appurtenant lands.

EPA Response: By making this TAS eligibility determination, EPA is not making any decision or finding with regard to access to the Lake, the River, and appurtenant lands.

8. **Comment:** The State asked that EPA ensure that the Tribe's water quality standards are compatible with Idaho's, which the State believes is especially important for waters that are shared by the two jurisdictions. Specifically, the State noted that the potential effect of differences such as temperature or Outstanding Resources Water designations are significant from environmental and economic perspectives.

EPA Response: EPA is committed to working with the Tribe and the State to ensure effective implementation of the Clean Water Act within the Reservation. To help achieve that goal, EPA has been working with both the Tribe and the Idaho Department of Environmental Quality to develop strong, long-term working relationships.

EPA notes that the Tribe, the State, and local governments have been working together for some time under the Coeur d'Alene Lake Management Plan designed to address mining and mill contamination in the Lake and the Spokane River outside of the Superfund process and using separate legal authorities. The Tribe believes that granting it TAS and approving Tribal water quality standards would provide the Tribe with another regulatory tool for addressing water quality in the Lake. Approving the Tribe for TAS and approving its standards will establish Tribal water quality standards under the Clean Water Act for the portion of the Lake within the Reservation boundary as counterparts to the State water quality standards in effect outside of the Reservation.

The Clean Water Act allows either a Tribe or a State to adopt water quality standards more stringent than those recommended by EPA under section 304(a) of the Act. CWA section 518 directs EPA to promulgate regulations to:

“ . . . provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.” 33 U.S.C. § 1377(e)

On December 12, 1991, EPA published regulations describing the “Dispute Resolution Mechanism,” at 40 C.F.R. § 131.7 (56 FR 64894).

EPA agrees that it is in the interests of EPA, the Tribe, and the State to work together so as to minimize the potential for such disputes that would be referred to EPA for resolution. EPA encourages the development of agreements that explicitly describe how the Tribe, State, and EPA will coordinate and communicate in the management of water quality issues to more efficiently and effectively implement the Clean Water Act. EPA believes that the Tribe and State will work cooperatively concerning co-management responsibilities in those waterbodies

where both have an interest.

Comments forwarded by the State

A number of citizens, organizations, and local governments submitted comments on the Tribe's modified TAS application. Those comments were submitted to the State, which forwarded them to EPA. Some comments were brief and made a single point, most often that the commenter opposed approval of the Tribe's TAS application. Others were more detailed, and, in some cases, raised more than one point. None of the comments raised any significant legal issues about the Tribe's jurisdiction, and many of them did not address jurisdiction at all. Consistent with its practice, EPA is summarizing and responding all comments received.

9. **Comment:** Two commenters supported the Tribe's application and recommended that EPA approve it.

EPA Response: EPA has approved the Tribe's application.

10. **Comment:** Many commenters argued that EPA should not approve the Tribe for TAS because nonmembers have a limited voice in tribal governance, and generally cannot vote in tribal elections.

EPA Response: CWA section 518 authorizes EPA to treat an eligible Indian tribe in the same manner as a State for purposes of carrying out water quality standards management functions for reservation waters within tribal jurisdiction. The statute directs that EPA base its decision on whether the tribe demonstrates as follows: that "the Indian tribe has a governing body carrying out substantial duties and powers," that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources * * * within the borders of an Indian reservation," and that the "tribe is reasonably expected to be capable * * * of carrying out the functions to be exercised in a manner consistent with the terms and purposes of" the Clean Water Act and "of all applicable regulations." CWA §§ 518(e)(1)-(3). *See generally* 56 FR 64876, 64885 (December 12, 1991)(Preamble to EPA water quality standards regulation noting inappropriateness of considering factors not listed in statute). EPA has approved the Tribe's application, based on its determination that the Tribe meets those statutory requirements.

11. **Comment:** Several comments asserted that a tribal role in water quality management is unnecessary and duplicative because states are already managing water quality.

EPA Response: The Clean Water Act expressly authorizes EPA to approve eligible tribes to manage water quality for reservation water resources. EPA has not approved the State of Idaho's water quality standards within the Coeur d'Alene Reservation.

12. **Comment:** Several commenters asserted that EPA should not approve the Tribe for TAS because it will not do a good job of managing water quality, or is incapable of doing so.

EPA Response: EPA believes that the Tribe has the capability to set water quality standards and issue water quality certifications under the Clean Water Act. Neither the Clean Water Act nor the Water Quality Standards regulations authorize EPA to approve a tribe for TAS unless EPA determines that the tribe is “reasonably expected to be capable . . . of carrying out the functions to be exercised in a manner consistent with the term and purposes of [the Act] and of all applicable regulations.” CWA § 518(e)(3); 40 C.F.R. § 131.8(a)(4). As explained in the Decision Document approving the Coeur d’Alene application, EPA has determined that the Tribe has adequate capability.

13. Comment: Some commenters wrote that having the Tribe set water quality standards will hurt the area economy.

EPA Response: In reviewing state or tribal water quality standards for approval under the Clean Water Act, EPA considers whether the standards are consistent with the requirements of the Act and its implementing regulations. At their discretion, States and Tribes may consider economic impacts in developing and revising designated uses in their water quality standards. See 40 C.F.R. 131.10(g)(6) and EPA’s Water Quality Standards Handbook, at 2-9.

14. Comment: Some commenters asserted that the Tribe should not be approved for TAS for the Lake because it does not own any of the lands around the lake; a related comment was that the Tribe lacks authority over lands it does not own, and should not have authority over fee lands.

EPA Response: The Clean Water Act authorizes eligible tribes to set water quality standards for waters within their reservation, without regard to who owns the lands adjacent to those waters. Further, the area covered by this approval includes only the waters above the beds and banks of navigable waters of Lake Coeur d’Alene and the St. Joe River, not including Heyburn State Park, and the Tribe does own those beds and banks (with the United States holding title in trust for the Tribe).

15. Comment: Some commenters expressed concern that the TAS application is part of an attempt to expand tribal power, and stated that the Tribe should not be allowed to set water quality standards until there has been more consideration of the potential implications of this approval.

EPA Response: As already noted, the statute provides for eligible tribes to be treated in the same manner as states. Under the Clean Water Act eligible tribes may only exercise authority over reservation activities within their authority. Further, this approval covers only the Tribe’s authority for water quality standards and certifications, not any other functions.

16. Comment: Several commenters objected to permit fees they assert that the Tribe is charging for docks on the Lake.

EPA Response: Any permit fees the Tribe is charging for access to the Lake are under tribal authority independent of the Clean Water Act and EPA's approval of the TAS application.
