



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 THE SHOSHONE-BANNOCK TRIBES
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 May 24, 2005, EPA notified the appropriate governmental entity, the State of Idaho, as to the substance and basis of the jurisdictional assertions in the Tribes' TAS Application. At the time of notification, EPA also published notices in local newspapers informing the public of the opportunity to comment through the State. On December 4, 2007, EPA transmitted to the appropriate governmental entity Proposed Findings of Fact regarding the impacts of nonmember activities within the Reservation on water quality and the Tribes; EPA requested comments on whether it should use those facts as the basis for its decision regarding the Tribes' authority over nonmember activities. EPA also published notices in local newspapers informing the public of the opportunity to comment on the Proposed Findings of Fact.

EPA regulations require EPA, after receiving a tribe's TAS application, to provide notification, including "information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters" "to appropriate governmental entities for comments." 40 C.F.R. § 131.8(c). Comments "shall be limited to the Tribe's assertion of authority." *Id.* EPA defines "appropriate governmental entities" to consist of "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. 64884. EPA's practice is to address all comments received during the comment period, including comments sent directly to EPA from non-governmental entities.

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

1. By letter dated June 30, 2005, the Director of the State of Idaho Department of Environmental Quality submitted comments on the Tribes' assertion of authority in its Application, and forwarded letters from several local governments.
2. By letter dated February 8, 2008, the Director of the State Idaho Department of Environmental Quality submitted comments on EPA's Proposed Findings of Fact and the Supplemental Submission to the TAS, and forwarded correspondence from several members of the public.

Comments on the Tribes' Application

1. Comment: The State's primary comment on the Application was to oppose the inclusion of the Snake River and Blackfoot River as "water resources" of the Fort Hall Reservation, which the State asserts do not flow within the Reservation boundaries. The State asserts ownership of the submerged lands below the high water marks of both Rivers, and asserts that the Reservation boundaries run along the banks of both Rivers on the Reservation side of the Rivers. The State's position is based on its reading of the 1868 Fort Bridger Treaty and the 1867 Executive Order that set aside lands for the Reservation. Specifically, the Executive Order describes the Reservation boundary as starting and ending on the "south bank of the Snake River", which is the Reservation side of the River. From the State's perspective, the Executive Order did not reserve any submerged lands in the Rivers. Furthermore, the State considers both the Snake and Blackfoot Rivers to be navigable. Therefore, the State's position is that ownership of submerged lands of the two Rivers is covered by the "Equal Footing Doctrine". Under the "Equal Footing Doctrine" all of the states admitted to the Union are entitled to the same sovereign rights as the original thirteen states. The sovereign right at issue here establishes that every state owns the submerged land beneath its navigable waterways. The public ownership of these waterways by the sovereign has been a long-standing common law tradition enabling the citizenry to use the waters for subsistence and navigation.

EPA Response: EPA has carefully analyzed the Reservation boundaries to identify accurately the water resources within the borders of the Reservation as provided by Sec. 518(e)(2) of the CWA and 40 C.F.R. § 131.8(a). Based on that review and as explained in the Decision Document, EPA finds that Reservation lands are located on both sides of portions of the Snake River and the Blackfoot River along specific portions of those Rivers. As discussed more fully below, EPA finds that the movement of the River channels has been the result of avulsive changes to the streambed locations, which did not change the Reservation boundary. Therefore, without resolving the question of where the original boundary would lie and questions about application of the "equal footing doctrine" to determine ownership of the beds and banks of navigable waterways, EPA has concluded that portions of the Rivers pass through Reservation lands and are water resources of the Reservation. The information that EPA reviewed is summarized in Appendix I Findings of Fact of this Decision Document.

The Tribes submitted supplemental information by letter dated June 25, 2007, which clearly asserts that both Rivers flow through the Reservation for several reasons. Citing the recent surveys of the Blackfoot and Snake Rivers by the Cadastral Survey, Bureau of Land Management, U.S. Dept. of the Interior, the Tribes presented plats of the surveys showing that along numerous portions of both the Blackfoot and Snake Rivers, there are Reservation lands located on both sides of Rivers. This is the same information that EPA is relying on. The Tribes also point out that the Cadastral Survey marks the Reservation boundary as extending to the mid-channel of the Snake and Blackfoot Rivers. The Tribes also have submitted information that supports their view that the Tribes always intended for the Reservation to include the Snake and

Blackfoot Rivers, pointing to long-standing traditions and continuous dependence on riparian resources. Finally, the Tribes challenge Idaho's position that the Rivers are navigable along the Reservation boundary, and the Tribes point out that Idaho did not provide any evidence of navigability.

EPA is not today resolving the question of how the "Equal Footing Doctrine" applies to determine ownership of the beds and banks of navigable waters, because its resolution is not necessary to EPA's decision. Arguments that the waters of the State are held in public trust or that title to the beds, submerged lands, and/or navigable waters inheres in the State, do not preclude a showing of tribal regulatory authority for purposes of Section 518 of the CWA, where the waters are "within" the boundaries of a federally-recognized Indian tribe's reservation and, as here, the Tribes have demonstrated regulatory jurisdiction over those waters. *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001)(upholding EPA's decision to grant TAS eligibility for CWA Sections 303 and 401 to the Sokaogon Chippewa (Mole Lake) Band over objections made by the State on Equal Footing grounds), *cert. denied*, 535 U.S. 1121 (2002). EPA has determined that portions of the Snake River and the Blackfoot River run through and are considered water resources of the Reservation and that the Tribes may establish water quality standards for those portions of the Rivers.

2. Comment: The State did not oppose the Tribes' assertion that it has the inherent authority to regulate the activities of nonmembers that could affect water quality. The State wrote that any issues raised by others about the Tribes' authority should be resolved through appropriate challenges at the time the Tribes' attempt to enforce their standards.

EPA Response: Consistent with the Clean Water Act and applicable case law, EPA fully analyzed the Tribes' inherent authority to regulate the activities of nonmembers on the Reservation for purposes of the Clean Water Act water quality standards program. The Tribes submitted an Application and supplemental materials showing serious and substantial impacts that take place or may take place as the result of nonmember activities within each of the major watersheds of the Reservation. The Tribes have shown facts that there are surface waters within the Reservation used by the Tribes or its members (and thus that the Tribes or its members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters of the Reservation are resources subject to protection under the CWA. The Tribes have further shown that impairment of water bodies in each watershed by the activities of nonmembers on lands within the Reservation has or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial. EPA has determined that the information provided by the Tribes adequately demonstrates the Tribes' inherent authority to establish water quality standards for all water bodies within the Reservation.

Comments on the EPA's Proposed Findings of Fact

1. Comment: The Idaho Department of Environmental Quality addressed EPA's proposed findings that the Snake and Blackfoot Rivers flow through the Reservation based on the recent Cadastral Survey work, which assumes that the changes to channel location are the result of avulsive events. Idaho wrote that under Idaho law, the presumption, "absent clear evidence to the contrary," is that alteration in streambed locations derives from accretive activity. If the channel movement is the result of accretion, the boundary moves with the channel. Idaho asserts that EPA must provide justification that the changes in streambeds were the result of avulsion and did not change the Reservation boundaries.

EPA Response: EPA agrees that the question of whether the Reservation river boundaries have remained the same or have changed as the river channels move as the result of avulsion generally is a question of State law. The critical question is whether the channel change is the result of "avulsion" or "accretion", since if the channel changes course as the result of an avulsive event, there is no change in the property boundary. "Avulsion" is considered a "sudden" change. In *Nesbit v. Wolfkiel*, 100 Idaho 396, 598 P.2d 1046 (1979), the Idaho Supreme Court found avulsion "because the evidence showed that the river literally cut a new channel to the north over approximately a 50 year period."

With regard to the Blackfoot River, the Findings of Fact describes how in 1964 the Army Corps of Engineers (ACE) completed a local flood protection project on the Blackfoot River authorized under section 204 of the Flood Control Act of 1950. For the project, the ACE built levees, replaced irrigation diversion structures, replaced bridges, and realigned the channel of the Blackfoot River. The channel realignment moved segments of the Blackfoot River's "bed and banks". Therefore, in the case of the Blackfoot River, the channel realignment by the Corps of Engineers was an avulsive event because it caused dramatic changes in the channel locations in a short amount of time, moving segments of the submerged lands. The survey plats prepared by the Cadastral Survey show the location of the Blackfoot River channel prior to the channel realignment as well as the location of the channel as the Blackfoot River flows today. Therefore, the Reservation boundary along the northern border was not changed as the result of the channel realignment, and the Reservation boundary continues to follow the channel of the Blackfoot River as it flowed at the time the Reservation was established.

To evaluate the State's comment with respect to the Snake River, EPA found the Bureau of Reclamation, U.S. Dept. of the Interior, completed a bank erosion study of the Snake River at Fort Hall in February 2002, which provides an evaluation of Snake River channel changes identified between 1936 and 2001. The bank erosion study along the Snake River as it borders the Reservation shows a number of secondary channels have been formed that flow away from the main channel and then return to the main channel, which are considered to be "anabranches." In a number of places, the anabranches move east of the channel into the Reservation area, and the study points to a number of events which caused those secondary channels to form. For

example, when the Teton Dam failed in 1976, the resultant flood changed the channel alignment in a number of places. The bank erosion study demonstrates that the channels have shifted a number of times in a manner that indicates, consistent with Idaho case law, that these new channels were the result of avulsive events. The survey plats prepared by the Cadastral Survey show the former location of the main channel of the Snake River and the current channels. Based on the bank erosion study, which documents a number of avulsive events, the historic Reservation boundary along the Snake River was not changed as the result of the events that caused new channels to flow eastward into the Reservation.

2. Comment: Idaho wrote that EPA's discussion assumes that the reference to the "Snake River" in the Executive Order does not include the secondary channels, or "anabranches", along the River.

EPA Response: EPA relies upon the Cadastral Survey of the Bureau of Land Management as the United States' expert agency on the boundaries of the Fort Hall Reservation. The recent surveys of the Reservation boundary along the Snake River, as finalized by the Cadastral Survey, and specifically cited in the Findings of Fact, generally describe where the main channel of the Snake River flows. In addition, the Findings of Fact cite the bank erosion study of the Snake River at Fort Hall prepared by the Bureau of Reclamation, U.S. Dept. of the Interior, February 2002, which evaluates of Snake River channel changes identified between 1936 and 2001. As noted above, the bank erosion study identifies a number of instances when secondary channels have formed as the result of specific avulsive events, and those secondary channels then return to the main channel as "anabranches." The survey plats prepared by the Cadastral Survey show a number of secondary channels or anabranches which move east from the main channel and cut through lands of the Reservation before returning to the main channel. EPA is relying upon the surveys and studies by the Department of the Interior to find that the portions of the Snake River now flow through Reservation lands and are considered water resources of the Reservation.

Comments on the Tribes' Application forwarded by the State

Several local governments submitted comments in response to a public notice that EPA published in local newspapers to notify interested parties that Idaho had been offered an opportunity to comment on the Tribe's Application. Consistent with its practice, EPA is summarizing and responding to the comments received by Idaho that it forwarded to EPA.

1. Public Comment: Several county governments wrote their understanding that a TAS approval would provide authority for the Tribes to permit and enforce Federal standards under the Clean Water Act, which would complicate the permitting process and disrupt the ongoing regulation of discharges that are currently managed by the Idaho Department of Environmental Quality, the U.S. Department of Agriculture, and EPA.

Response: The decision to grant the Tribes' Application for the CWA 303 and 401 programs enables the Tribe to promulgate WQS for Reservation waters. EPA will continue to implement, including enforce, the NPDES permitting program on the Reservation. Accordingly, our approval of the Tribes' TAS Application does not include enforcement authority. With regard to the comment that Idaho is already regulating discharges, EPA notes that 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 to establish water quality standards within the Fort Hall Reservation.

2. Public Comment: Several county governments commented that while they are aware that other water quality management agencies have demonstrated the capability to enforce water quality standards and work with the community, they question whether the Tribes have the staff and resources to manage water quality.

EPA Response: EPA's regulations at 40 C.F.R. § 131.8(b)(4) specify that in determining capability, a tribe should provide a description of its previous management experience, a list of existing public health and environmental programs managed by the tribe, a description of the existing or proposed agency of the tribe that will administer the WQS program, a description of the technical and administrative capabilities of the tribe's staff, as well as any additional information the Agency might request. The record includes the information the Tribes submitted to fulfill these requirements, and EPA's Decision Document provides a detailed discussion of how the Tribes have demonstrated the capability to implement CWA sections 303 and 401.

3. Public Comment: The counties expressed concern that non-Tribal members residing on fee land within the Reservation lack judicial recourse except through the Tribal court, which is problematic because few attorneys are allowed to practice law before the Tribal court.

EPA Response: The Tribes provide for both administrative and judicial review of water quality decisions that are made by the Tribes. The Tribes have established a law known as the Administrative Procedures Act (APA), which requires all Tribal environmental agencies, including the Tribal Water Resources Department, to provide fundamental fairness, justice and common sense in proposing regulations and standards. Any interested person may petition the Tribal Water Resources Department for a ruling with respect to the application of the Tribes' water quality standards to the person, property or particular factual situation. If there is disagreement about the agency's ruling, the interested person and Tribal agency may ask the Tribal Environmental Administrative Board to review and issue a judgment on the water quality standards. The parties have the right to request an appeal of the Environmental Administrative Board decision to the Shoshone-Bannock Tribal Court. The Tribal Court operates under a set of rules that apply equally to all persons, without regard to whether the person is a member of the Tribe. The Tribal Court may reverse, modify or suspend the Tribal agency action, in whole or in part and may send the case back to the Tribal agency for further proceedings. In addition, a final

agency action by EPA to approve the Tribes' water quality standards is subject to challenge in the appropriate U.S. District Court and review under the federal Administrative Procedure Act.

Comments on the Proposed Findings of Fact forwarded by the State

In response to a public notice that EPA published in local newspapers to notify interested parties that Idaho was offered an opportunity to comment on EPA's Proposed Findings of Fact, comments were submitted to Idaho from six outside parties representing local cities (American Falls, Blackfoot, Pocatello, Soda Springs), counties (Bannock, Power, Bingham, Caribou), and businesses (FMC, Great Western Malting Co, Green Works Inc., Pacific Steel & Recycling, Rowland's, Idaho Mining Association). Consistent with its practice, EPA is summarizing and responding to the comments received.

1. Public Comment: Several commenters asserted that tribal authority over nonmembers is unnecessary because the State already has authority to manage water quality, and there is no evidence that the existing Idaho water quality standards are inadequate to protect water uses.

EPA Response: As noted above, EPA has not approved the State of Idaho to establish water quality standards within the Reservation. The TAS decision EPA is issuing finds that the Tribes are eligible to promulgate water quality standards and issue water quality certifications under the CWA for waters of the Fort Hall Reservation, as authorized by Congress.

2. Public Comment: Several commenters argued that EPA should not approve the Tribe for TAS because the Tribe lacks the resources, capability and authority to administer a water quality standards program. The commenters complained that the Proposed Findings of Fact provided no information about the Tribes' capability to administer the CWA programs. The commenters assert that the Judicial courts are inadequately staffed, which would cause delays in the review of challenges to decisions by the Tribes. The comments also complain that the Tribes failed to demonstrate the financial capability to establish and administer a water quality program.

EPA Response: See above response to Comment 2 on the Application. EPA notes that the purpose of the Proposed Findings of Fact document is to summarize information relevant to whether the Tribes can demonstrate inherent authority over nonmember activities on the Reservation affecting water quality. The Proposed Findings of Fact do not review a tribe's capability to administer the program; the Decision Document provides EPA's evaluation of the Tribes' capability.

3. Public Comment: Several commenters wrote that the Tribes have not demonstrated authority to establish a water quality standards program or to set water quality standards. The commenters argue that the Tribal laws that the Tribes cite do not include laws that are fully effective and applicable to nonmembers, and that there is no evidence that the Tribes have obtained approval by the Secretary of the Interior. The commenters also complain that the

Tribes did not include the Tribal Water Code in the Application, and the Tribes did not demonstrate that the Tribal Water Code is in effect and has been approved by the Secretary of the Interior.

EPA Response: In reviewing a tribe's authority to establish a water quality standards program, EPA expects a tribe to provide information which supports the tribe's assertion of authority. The Tribes have identified the legal authorities pursuant to which the Tribes perform governmental functions by providing copies of the Fort Bridger Treaty and the Tribes' Constitution, which provides specific powers for the Tribes to exercise civil regulatory authority over ground and surface water pollution on the Reservation. These documents clearly demonstrate that the Tribes' governing body has the authority to establish its Water Resource Department and to promulgate ordinances and regulations under the laws of the Tribes to address water quality. There is no requirement that the Tribes provide copies of their water code or any other implementing laws and ordinances for a tribal water quality program in order to be eligible for TAS. The TAS decision does not approve or disapprove the Tribes' WQS.

4. Public Comment: Several commenters asserted that the Tribes' Administrative Procedures Act (APA) does not apply to water quality matters.

EPA Response: By Resolution, the Fort Hall Business Council, which is the governing body of the Shoshone-Bannock Tribes, has taken formal action to apply the Tribes' APA to the Water Resources Department and any water quality standards or regulations it may develop.

5. Public Comment: Several commenters asserted that the Tribes lack jurisdiction over nonmembers on fee lands within the Reservation. The commenters wrote that EPA's interpretation of the standard established by *Montana v. U.S.*, 450 U.S. 544 (1981), is inconsistent with caselaw, and that the Tribes application does not provide specific, detailed information supporting the Tribes' assertion of authority over nonmembers.

EPA Response: The Decision Document fully discusses EPA's approach to analyzing assertions of tribal inherent authority over nonmember activities under the *Montana* test for purposes of regulating water quality on reservations under the CWA. It explains that the *Montana* test remains the relevant standard and that, to meet EPA's formulation of the *Montana* "impacts" test, a tribe needs to show that the actual or potential impacts of nonmember activities on the tribe are "serious and substantial." Moreover, the *Montana*-test discussion notes EPA's long-standing view that "water quality management serves the purpose of protecting public [including tribal member] health and safety, which is a core governmental function critical to self-government." 56 Fed. Reg. at 64879. EPA's approach to tribal inherent authority under CWA Section 518(e) for purposes of the WQS program has been upheld by the courts. *E.g.*, *Montana v. U.S. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002). The Decision Document, including the Findings of Fact, explains the basis for EPA's

conclusion that the Tribe has adequately demonstrated its inherent authority over nonmember activities under the *Montana* “impacts” test for purposes of establishing WQS under the CWA.

6. Public Comment: A commenter wrote that EPA should not approve the Tribes for TAS because nonmembers have a limited voice in tribal government because they 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 Tribes’ Application, based on its determination that the Tribe meets these statutory eligibility requirements.

7. Public Comment: The City of Pocatello wrote about the Pocatello Regional Airport, which is located on over 3,100 acres of fee land within the exterior boundaries of the Reservation. The City recited the history of the Airport and how it has been established under federal and state laws, and asserts that the Tribes should not be able to regulate the Pocatello Airport land and uses on it.

EPA Response: As noted in the Findings of Fact, the Tribes’ Supplemental Submission clarified that the Tribes are not asserting authority over the Pocatello Airport for purposes of this TAS Application. The Tribal water quality standards that would be in effect for surface water resources of the Reservation would not apply at the Airport because no surface water exists on, or flows through the Airport property. Storm water that is generated at the Airport is retained there, and there is no overland connection to the Reservation’s surface water. Moreover, there is no evidence of a direct hydrological connection between ground water at the Airport that may be contaminated by Airport activities and the Reservation’s surface waters.

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