DECISION DOCUMENT:

APPROVAL OF THE SHOSHONE-BANNOCK TRIBESS APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT

Table of Contents

I. Introduction and Selected Documents 2

A. Introduction 2
B. Selected Documents 2
1. Application and Supporting Materials 2
2. Letters and Related Documents from EPA 3
3. Governmental Entity Comments Regarding Tribal Authority 3
4. Capability Review 4
5. Statutory and Regulatory Provisions 4
6. Policy Statements 4

II. Requirements for TAS Approval 4

A. Federal Recognition 5
B. Substantial Governmental Duties and Powers 5
C. Jurisdiction Over Waters "Within the Borders" of the Fort Hall Indian Reservation
1. Map or Legal Description 7
2. Identification of the Surface Waters for which the Tribes Propose to Establish Water Quality Standards 7
3. Statement Describing Basis for the Tribes' Authority Over Reservation waters 9
D. Capability 12

III. Conclusion 13

Appendix I Findings of Fact
Appendix II Response to Comments

I. Introduction and Selected Documents

A. Introduction

Section 303(c) of the Clean Water Act (CWA) requires the States to develop, review and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards must include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that States may grant, condition, or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with, among other things, water quality standards it has adopted under Section 303. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license.

Section 518(e) of the CWA authorizes EPA to treat an eligible tribe in the same manner as a state (TAS) for certain CWA programs, including Sections 303 and 401. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering Section 303(c) and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 12814 (March 23, 1994) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA's decision to approve a TAS eligibility application (the "Application") from the Shoshone-Bannock Tribes (or the "Tribes") for Section 303(c) and Section 401 of the CWA, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. CWA Section 518(e)(2) authorizes EPA to treat a tribe in the same manner as a state for water resources "within the borders of an Indian reservation." This Decision Document approving the Tribes as eligible for TAS applies to all surface waters identified by the Tribes that lie within the exterior borders of the Fort Hall Indian Reservation, as described in the Application. The Tribes assert they have the authority to manage and protect water quality within the boundaries of the Fort Hall Indian Reservation, as provided in the Fort Bridger Treaty of 1868, and as described in the Executive Order issued by President Grant on July 30, 1869.

B. Selected Documents

The following documents comprise a portion of the record for this decision.

1. Application and Supporting Materials

The Tribes' Application for TAS for purposes of the water quality standards and certification programs under Sections 303 and 401 of the CWA includes the following letters and related documents from the Tribes and their legal counsel:

By letter dated December 22, 2004, the Tribes submitted an Application for Treatment in the Same Manner as a State, with Exhibits 1-18 (Initial Application)(which together with the Supplemental Submission comprise the Application).

By letter dated June 27, 2007, the Tribes submitted a Response to Comments on the Tribes' Application for Treatment in the Same Manner as a State, with Attachment A and B (the Supplemental Submission).

2. Letters and Related Documents From EPA

By letter dated May 24, 2005, EPA wrote the Governor of Idaho to offer an opportunity to comment on the assertion of authority in the Tribes' TAS Application, pursuant to 40 C.F.R. § 131.8(c). At that time, EPA published notices in several local newspapers to announce the State's comment opportunity, and EPA placed copies of the Tribes' Application in several local libraries.

By letter dated Dec. 4, 2007, EPA wrote the Governor of Idaho to offer an opportunity to comment on EPA's Proposed Findings of Fact and the Supplemental Submission. At that time, EPA published notices in several local newspapers to announce the State's comment opportunity, and EPA placed copies of the Proposed Findings and the Tribes' Application in several local libraries.

3. Governmental Entity Comments Regarding Tribal Authority

By letter dated June 30, 2005, the State of Idaho submitted comments to EPA on the Tribes' assertion of authority in the Application. These comments are addressed in the Response to Comments, Appendix II.

By letter dated February 8, 2008, the State of Idaho submitted comments to EPA on its Proposed Findings of Fact. EPA's Findings of Fact document for this TAS decision is included as Appendix I to this Decision Document, and comments on the Proposed Findings are addressed in the Response to Comments, Appendix II.

4. Capability Review

By memorandum dated August 11, 2008, Sally Brough, EPA Region 10's Water Quality Standards Coordinator, reviewed the capability of the Tribes to administer the water quality standards and certification programs and, as explained below, determined that the Tribes have adequate capability.

5. Statutory and Regulatory Provisions

a. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian Tribe in the same manner as a state if it meets specified criteria.

b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," 56 Fed Reg. 64876 (December 12, 1991) (codified at 40 C.F.R. Part 131), establish the requirements for a Tribe to obtain TAS approval.

6. Policy Statements

a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984, as reaffirmed most recently by EPA Administrator Johnson on September 26, 2005.

b. EPA Memorandum entitled "EPA/State/Tribal relations", by EPA Administrator Reilly, July 10, 1991.

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

II. Requirements for TAS Approval

Under CWA Section 518(e) 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 TAS application for water quality standards under Section 303(c) and certification under Section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an application by an Indian tribe for TAS to administer a water quality standards program. EPA separately reviews tribal water quality standards under 40 C.F.R. § 131.21, and TAS approval under 40 C.F.R. § 131.8 does not constitute an approval of such standards. But approval of a tribe for TAS for purposes of water quality standards does authorize that tribe to issue certifications under Section 401 of the CWA, see 40 C.F.R. § 131.4(c), provided that the tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e).

A. Federal Recognition

EPA can approve a TAS application for water quality standards under Section 303 and certification under Section 401 only from an "Indian tribe" that meets the definitions set forth in CWA Section 518(h) and 40 C.F.R. § 131.3(k) and (l). See 40 C.F.R. § 131.8(a)(1). The term "Indian tribe" is defined as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." CWA § 518(h)(2), 40 C.F.R. § 131.3(l). The term "Federal Indian Reservation" means "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." CWA § 518(h)(l), 40 C.F.R. § 131.3(k).

The Shoshone-Bannock Tribes are included on the Secretary of the Interior's list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs". 73 Fed. Reg. 18553, 18556 (April 4, 2008). Furthermore, as discussed below, the Tribes are exercising governmental authority over a reservation within the meaning of the CWA. Thus, EPA has determined that the Tribes meet the requirements of 40 C.F.R. § 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers

To show that they have a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the Tribes submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

The Application describes in detail the governmental functions performed by the Tribes. The Shoshone and Bannock Tribes, collectively, are a single federally recognized Indian tribe, organized under a Constitution and Bylaws adopted pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.* The Tribal Constitution and By-Laws were adopted and approved by the Secretary of the Interior on April 30, 1936. A copy of the Constitution and Bylaws is attached to the Application. The Tribes are successors in interest to the signatories of the Fort Bridger Treaty with the Eastern Band of Shoshone and Bannock Indians. The Tribal membership also voted to charter Shoshone-Bannock Tribes, Inc., which established a federally chartered corporation under Section 17 of the Indian Reorganization Act on April 17, 1937, for the purpose of engaging in business and economic matters.

The Tribes' governing body is the Fort Hall Business Council, which is responsible for administering the general Tribal Government. The Fort Hall Business Council consists of a seven member council elected at-large by enrolled, resident Tribal members. Fort Hall Business Council officials each serve two-year terms. The seven

members of the Fort Hall Business Council elect a Chairperson and officers with specific responsibilities after each annual election from within the Council membership. The Fort Hall Business Council holds regular meetings on the second Tuesday of each month and special meetings as necessary to carry out its many duties and responsibilities. The Fort Hall Business Council exercises sovereign governmental powers as provided by Article VI of the Constitution and Bylaws. The Fort Hall Business Council serves as the legislative and executive branches of the Tribal government, by enacting laws, exercising regulatory authority, insuring the infrastructure is maintained, establishing budgets, making appropriations to Tribal departments, programs, and commissions, executing agreements and contracts, and carrying out the general governmental duties and powers of the Tribes.

The Tribes have a comprehensive governmental structure and are currently administering numerous programs for the benefit of Tribal members and all residents of the Reservation. A copy of the Organizational Chart for the Tribes was attached as Attachment 6 to the Application. The Tribes have four administrative offices (Personnel, Finance, Administration, Executive Director), six major divisions (Natural Resources, Special Assistance, Education and Training, Construction, Law and Order, Health and Human Services), a number of departments and programs within each Division, and many commissions and committees established for a particular purpose (Water Resources Commission, Land Use Policy Commission, Cultural Advisory Committee, Credit Committee, Law and Order Commission, Personnel Advisory Board, Tribal Employment Rights Ordinance Commission, Health Board and Housing Commission). The various departments of the Tribal government employ over three hundred and fifty (350) people.

The Tribes, through a corporate charter under Section 17 of the Indian Reorganization Act, have numerous Tribal Enterprises including a full-service grocery store, a restaurant, a clothing store, a tobacco outlet, two truck stop fuel stations, two gaming operations, a Tribal newspaper, a Tribal museum, a buffalo herd of 350-400, and a construction company. These Tribal enterprises employ approximately three hundred (300) people.

The Tribes' principal department responsible for administering water quality standards is the Water Resources Department through its Water Quality Program. The Water Resources Department is responsible for the protection and preservation of water quantity and quality for surface and ground waters on the Reservation. The Water Resources Department is overseen by the Fort Hall Business Council, the Water Resources Commission, and the Executive Director.

In the TAS Application, the Tribes describe a number of laws that have been enacted to regulate activities on the Reservation as further evidence that the Tribes' exercise authority as a government under the Tribes' Constitution and By-Laws. In 1980, the Fort Hall Business Council enacted a comprehensive law and order code, which applies to all persons and activities on the Reservation. The following chapters are included in the Code: (1) General Rules of the Court; (2) Definitions of Legal Terms; (3) Civil Procedure; (4) Rules of Appellate Procedure; (5) Rules of Evidence; (6) Consumer Code; (7) Domestic Relations; (8) Parent-Child Relations; (9) Heirship and Probate; (10) Foreclosure or Mortgages; (11) Forcible Entry and Wrongful Detainer; (12) Health and Sanitation; (13) Detention of Mentally Ill Persons; (14) Sale, Distribution and

Taxation of Tobacco Products; (15) Expulsion and Exclusion of Certain Undesirable Non-Members from Tribal Land; (16) Criminal Code; (17) Fish and Game Code; (18) Traffic Code; (19) Juvenile Code; and (20) Rules of Criminal Procedure. The Tribes' Land Use Policy Ordinance has been approved by the Secretary of the Interior. In the environmental field, the Tribes have established requirements for air quality, groundwater, pesticides, and well construction, and a water code. The Tribes have established an 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. The APA seeks to provide meaningful public involvement, enhance public input, and promote careful consideration of interests and concerns of affected people.

EPA has determined that the Tribes' submissions in their Application and supplemental information adequately demonstrate that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. Thus, the Tribes meet the requirements in 40 C.F.R. §§ 131.8 (a)(2) and (b)(2).

C. Jurisdiction Over "Waters Within the Borders" of the Fort Hall Indian Reservation.

Under 40 C.F.R. § 131.8(b)(3), the Tribes are required to submit a statement of authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the Tribes assert authority over surface water quality; (ii) a statement by the Tribes' legal counsel (or equivalent official) that describes the basis for the Tribes' assertion of authority, which may include a copy of documents such as tribal Constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribes' assertion of authority; and (iii) an identification of the surface waters for which the Tribes propose to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

1. Map or Legal Description

In the Application, the Tribes submitted maps and a legal description of the Reservation. In addition, the Tribes' Supplemental Submission provided a number of plat maps prepared by the Cadastral Survey Idaho Office, Bureau of Land Management, U.S. Department of the Interior, showing the channel location of the Blackfoot River in relation to the existing Reservation boundaries. EPA has determined that the Tribes have satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map and legal description of the area over which the Shoshone-Bannock Tribes assert authority to regulate surface water quality.

2. Identification of Surface Waters for which the Tribes Propose to Establish Water Quality Standards.

The Tribes' Application states that the Tribes' water quality standards will apply to all waters within the existing boundaries of the Reservation, and specifically identifies the following water bodies that are wholly or partially within the Reservation boundaries.

Bannock Creek Watershed

Bannock Creek (Upper)	Midnight Creek	Right Fork Creek
Birch Creek	Moonshine Creek	Squaw Creek
Keogh Creek	Porcupine Creek	Starlight Creek
Michaud Creek	Rattlesnake Creek	West Fork Bannock Creek

Portneuf River Watershed

Big Jimmy Creek	Jeff Cabin Creek	Portneuf River*
Chesterfield Reservoir*	Little Toponce Creek	Rass Creek
Fourth of July Creek	North Fork Toponce Creek	Trail Creek

Blackfoot River Watershed

Beaver Creek	Deer Creek	Short Creek
Blackfoot River*	Garden Creek	Supon Creek
Cold Creek	Lincoln Creek	Wood Creek
Deadman Creek	Red Rock Creek	

Ross Fork Watershed

Barclay Creek	Mill Creek	Sawmill Creek
Farmer Creek	North Fork Ross Fork	South Fork Ross Fork
Indian Creek	Ross Fork	Thirty Day Creek
Mareet Creek		

Snake River Plain Watershed

American Falls Reservoir*	Gibson Creek	Snake River*
Big Jimmy Creek	Jeff Cabin Creek	Spring Creek
Blackfoot River (Below Equalizing Dam)	Jimmy Drinks Creek	Two and a Half Mile Creek
Blind Spring Creek	Kinney Creek	Tyhee Wasteway
Clear Creek	Mud Slough	Wide Creek
Diggie Creek		

EPA has determined that the Tribes have satisfied 40 C.F.R § 131.8(b)(3)(iii) by identifying the surface waters over which they propose to establish water quality standards.

3. Statement describing basis for the Tribes' authority over Reservation Waters

The Tribes have identified the legal authorities pursuant to which the Tribes perform governmental functions. The Application and Supplemental Submission include statements by the Tribes' legal counsel describing the basis of the Shoshone-Bannock Tribes' authority. As noted above, the Tribes are organized pursuant to a Constitution and By-Laws originally approved in 1936. The Constitution provides specific powers for the Tribes to exercise civil regulatory authority over ground and surface water pollution on the Reservation.

CWA Section 518(e)(2) authorizes EPA to treat a tribe in the same manner as a state for water resources "within the borders of an Indian reservation". EPA has interpreted this provision to require that a tribe show authority over the water resources for which it seeks TAS approval. 56 Fed. Reg. at 64880. The Tribes have asserted the authority to set water quality standards and issue certifications for all surface waters, including those that they have identified, that are within the Reservation boundaries as described in the Application. As explained in the analysis below, which also considers the information contained in the Findings of Fact of Appendix I to this Decision Document, EPA is determining that the Shoshone-Bannock Tribes have inherent authority over nonmember activities for purposes of the water quality standards and water quality certification programs under the Clean Water Act.

EPA analyzes a tribe's water quality authority under the CWA over activities of nonmembers on nonmember-owned fee lands under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana test*). In *Montana*, the Supreme Court held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land. However, the Court also found that Indian tribes retain inherent sovereign powers to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where (i) nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (ii) "...[nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. In analyzing tribal assertions of inherent authority over nonmember activities on fee lands on Indian reservations, the Supreme Court has reiterated that the *Montana* test remains the relevant standard. *See, e.g., State v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers"); see also *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S.___, 128 S.Ct. 2709, 2726 (2008)("*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian land"); *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) ("Indian Tribe's regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]"); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the *Montana* test and assessing the impacts of nonmember activities on fee lands on an Indian tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878 (noting that in *Brendale v. Confederated Tribes & Bands of the Yakama Indian Nation*, 492 U.S. 408, 431 (1989) (opinion of White, J.), several justices argued that for a tribe to have a "protectible interest" in a nonmember activity under *Montana*'s second exception, the activity's effect should be "demonstrably serious"); see also *Atkinson Trading Co.*, 532 U.S. at 659. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented by the tribe's application. 56 Fed. Reg. at 64878. In addition, in that rulemaking, EPA noted as a general matter "that activities which affect surface water and critical habitat quality may have serious and substantial impacts" and that, "because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments of other water bodies on reservations. . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands." *Id.* EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id.* at 64879.

The Clean Water Act addresses the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States, including tribal waters, by providing that tribes treated in the same manner as states, act to "prevent, reduce, and eliminate pollution." CWA Section 101(b). CWA Section 518(e) authorizes tribes to carry out CWA functions that "pertain to the management and protection" of reservation water resources. The *Montana* test analyzes whether the tribe is proposing to regulate activity that "threatens" or "has some direct effect" on tribal political integrity, economic security, or health or welfare. That test does not require a tribe to demonstrate to EPA that nonmember activity "is actually polluting tribal waters," if the tribe shows "a potential for such pollution in the future," *Montana v. EPA*, 141 F. Supp. 2d 1249, 1262 (D. Mont. 1998), quoting *Montana v. EPA*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135, 1140-41 (9th Cir. 1998)(citing "the threat inherent in impairment of the quality" of a source of reservation water), *cert. denied* 525 U.S. 921 (1988). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.

With regard to activities that affect water quality on reservation land other than nonmember-owned fee land, EPA recognizes that under well-established principles of federal Indian law, a tribe retains attributes of sovereignty over both its lands and its members. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202,207 (1987); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). Further, tribes retain the 'inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal power. *Merrion .v Jicarilla Apache Tribes*, 450 U.S. 130, 141-142. See also *White Mountain Apache Tribes v. Bracker*, 448 U.S. 136, 151 (1980)(significant geographic component to tribal sovereignty). The Court has recently summarized these principles by recognizing that retained inherent tribal authority extends "to managing tribal land." *Plains Commerce Bank*, 128 S.Ct. at 2723.

A tribe also retains its well-established traditional power to exclude nonmembers from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. See also *Plains Commerce Bank*, 128 S.Ct. at 2723 ("persons are allowed to enter Indian land only 'with the assent of the [tribal members] themselves,'" quoting *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)). Thus, a tribe can regulate the conduct of persons over whom it could "assert a landowner's right to occupy and exclude." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-652 (2001), quoting *Strate*, 520 U.S. at 456. See also *Plains Commerce Bank*, 128 S.Ct. at 2723, quoting *South Dakota v. Bourland*, 508 U.S. 679, 691 n. 11 (1993)("Regulatory authority goes hand in hand with the power to exclude"). Regulated activities can, if not properly managed, threaten water quality regardless of whether they are carried out by tribal members or nonmembers. The harmful effects of such activities on tribes and their members implicate a tribe's inherent sovereign authority either to exclude nonmembers from tribal/trust land or, as a lesser included power, to condition entry for the purpose of conducting such activities on consent to proper regulatory control.[1]

The Application describes in detail the importance of surface water quality to the Fort Hall Reservation and the many ways the Tribes and their members use surface waters. Maps provided by the Tribes show all the waters within the Reservation. Uses of the water by the Tribes and their members that the Tribes seek to protect include the exercise of treaty rights to fish and hunt, and to gather roots and plants; habitat for wildlife and plants; ceremonial uses; agricultural and grazing uses; and industrial uses. The Tribes have asserted that impairment of such water on the Reservation would have a serious and substantial effect on the political integrity, economic security, or health or welfare of the Tribes and their members.

As explained more fully below and described in Appendix I, the Tribes supported their claims with information about how they and their members use the waters and with information showing how current and potential nonmember activities on the Reservation have or may have serious and substantial direct effects on the Tribes' political integrity, economic security, and health and welfare.

The Application, including the Supplemental Submission, describes the leasing of trust lands within the Reservation to nonmembers, primarily for agricultural purposes. Those activities generally have similar or greater effects on the Tribes and their members when carried out on trust lands that they have when carried out on nonmember fee lands. For the most part, nonmember activities on trust lands within the Reservation are authorized by the Tribes or a member of the Tribes through lease arrangements governed by 25 U.S.C. § 415 and BIA regulations at 25 C.F.R. Part 131. The leases specifically incorporate federal regulations at 25 C.F.R. Part 162 by reference. The presence of nonmembers on such lands within the Reservation is usually only by permission from the

[1] As explained in this Decision Document, the Tribes, if necessary, also could show authority over nonmember activities on tribal/trust lands covered by the Application under the *Montana* "impacts" test.

Tribes or a Tribal member, and the Tribes or Tribal member may exclude nonmembers from lands to which the Tribes or their members hold the fee or beneficial title.

The facts upon which EPA has relied in reviewing and making findings regarding the Tribes' assertion of authority to regulate the activities of nonmembers on the Reservation are presented in the Application, including the Supplemental Submission, and Appendix I to this Decision Document. EPA also bases its findings and conclusions on its special expertise and practical experience regarding impacts to water quality and the importance of water quality management, recognizing that the importance of water to all people, and particularly to the Tribes and their members, makes clean water crucial to the survival of the Tribes and their members. Based on the information summarized in Appendix I, EPA makes several findings, as described below.

EPA finds that the Tribes have shown the Tribes and their members make use of the Reservation waters for a number of purposes, including fishing, wildlife habitat, recreation in and on the water, domestic uses, and subsistence, ceremonial, and cultural uses. We find that each of those uses is important to the Tribes and the subsistence of the tribal community, and that regulating water quality is important to protecting those uses. EPA further finds that the Reservation's characteristics are such that various human activities occur or may occur on the Reservation that if not properly regulated, can seriously impair the quality of water resources within or surrounding the Reservation that the Tribes and their members use and rely upon for a variety of purposes, thereby seriously affecting the Tribes, their members and the Tribal community.

Based on the preceding findings, and additional findings and information described more fully in Appendix I, EPA concludes that existing and potential future nonmember activities within the Reservation have or may have direct effects on the political integrity, economic security and health or welfare of the Tribes that are serious and substantial.

Thus, the Agency has determined that the Tribes satisfy 40 C.F.R. § 131.8(b)(3)(ii) by providing a statement by the Tribes' legal counsel that describes the basis for the Tribes' assertion of authority over surface waters within the borders of the Reservation. Based on that determination and the previously stated findings, EPA finds that the Tribes have met the requirement set forth at 40 C.F.R. § 131.8(a)(3) and (b)(3).

D. Capability.

To demonstrate that a tribe has the capability to administer an effective water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and

copies of related tribal laws, policies and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. 40 C.F.R. § 131.8(b)(4)(i)-(v).

The Tribes' Application shows that it is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations. A memo prepared by Sally Brough, the Tribal Water Quality Standards Coordinator for Reg. 10, dated August 11, 2008, explains a number of reasons for finding that the Tribes are capable of administering a water quality standards program and a water quality certification program. Ms. Brough based her conclusion on her review of the TAS Application, including the Supplemental Submission, and her work over the last two years with the Tribes' staff and the Idaho Department of Environmental Quality in the development of the Tribes' draft water quality standards. Ms. Brough reviewed in detail the environmental and public health programs administered by the Tribes, and described in detail the Tribes' Water Resources Department and her working knowledge of the Tribes' staff working on water quality matters. In summary, Ms. Brough believes that the extensive experience of the Tribes demonstrates they are capable of implementing a water quality standards program and issue water quality certification pursuant to Section 401 of the CWA.

The Tribes have satisfied the requirements to 40 C.F.R. § 131.8(b)(4) by providing information that describes their capability to administer an effective water quality standards and certification program, and EPA has determined that the Tribes have met the requirements of 40 C.F.R. § 131.8(a)(4).

III. Conclusion

EPA finds that the Shoshone-Bannock Tribes have met the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8 and, therefore, EPA approves the Tribes' Application for TAS to administer the water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribes are also eligible to the same extent as a state for the purpose of certification under CWA Section 401.

Elin D. Miller
Regional Administrator

9/5/08
Date