

Tribal Issues Regarding Assumable Waters

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Introduction

Section 518 of the Clean Water Act (CWA), enacted as part of the 1987 amendments to the statute, authorizes EPA to treat eligible Indian tribes with reservations in a manner similar to states (TAS) for a variety of purposes, including administering each of the principle CWA regulatory programs and receiving grants under several CWA authorities (81 FR at 30183). This includes CWA Section 404.

Below is a set of “Tribal Issues” that staff of the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (USACE), states, tribes and other interested parties should be aware of when considering assumption of Clean Water Act Section 404 under CWA Section 404(g)(1).

1) USACE Retains Tribal Aquatic Resources: Since a given tribe may wish to assume the CWA Section 404 program, the U.S. Army Corps of Engineers must retain all waters and wetlands within the external boundaries of all Indian Reservations and Tribal Trust Lands outside of the reservation, either indefinitely, or until such time the tribe chooses to assume the 404 program themselves. This retention should be outlined in any MOU between the Corps and the state when such state wishes to assume the 404 program.

2) Indian Reservation Boundaries: Tribal Indian Reservation boundaries are not static. As stated in the Indian Reorganization Act of 1934 “The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, that lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.” (25 U.S. Code § 467) and as provided by the Bureau of Indian Affairs regulations (25 CFR §§ 151.3, 151.10, and 151.11). In addition, there are two types of Indian Reservations – open and closed. Indian reservations that are closed are ones in which all lands within the external boundaries of the reservation are in trust status with the United States. Therefore, the tribal government has sole regulatory authority over all lands on the reservation. The reservation of the Red Lake Band of Chippewa Indians is this type of reservation. Open reservations are ones that were subject to the Dawes Act of 1887 (also known as the General Allotment Act or the Dawes Severalty Act of 1887), which allowed the President of the United States to survey Indian land and divide it into allotments for individual Indians. The result of this Act was mixed ownership of property within the reservation (including tribal, public and private ownership). The individual allotments were often fractionated through heirship and probate proceedings. Therefore, the tribal government

has sole regulatory authority over tribally owned lands and allotment lands, but limited regulatory authority over lands on the reservation not owned by the tribe or individual Indians. The reservation of the Fond du Lac Band of Lake Superior Chippewa is this type of reservation.

3) Tribal Regulation of Aquatic Resources: Tribes may have aquatic resource regulatory authority over non-Indians on private land within the external boundaries of the reservation using the “Montana Test,” which states “A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” [Underlining added] *Montana v United States* 450 US 544 (1981).

4) Definition of Tribe: Not all tribes use the name tribe. Bureau of Indian Affairs regulations state in 25 CFR § 151.2(b) “Tribe means any Indian Tribe, Band, Nation, Pueblo, Community, Rancheria, Colony, or other group of Indians...” However, EPA’s TAS rules only mention “reservations” and “Indian Pueblos” as lands which qualify as a reservation under 18 USC 1151(a).

5) Private Lands within a Reservation: Private lands owned by non-band members within reservation boundaries are assumable by the tribe (therefore, should be retained by the Corps if the tribe has not gone through the assumption process). However, those private lands are also still subject to state statutes, laws and regulations and therefore, the state’s wetland/waters regulation would still be applicable. In such a case, the property owner wishing to impact wetlands/waters on his/her property would then still need a federal permit (or a tribal one in the case of tribal assumption) and a state permit.

6) Lands Outside of the Reservation: Lands located outside the external boundaries of the reservation that are not contiguous to the reservation must be held in trust for the tribe in order for the tribe to assume the waters/wetlands within those lands. In CWA Section 518(e)(2) the phrase “...or otherwise within the borders of an Indian reservation.” is interpreted to modify each preceding category of land (i.e., “...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...”). (See Preamble to the Clean Water Act Treatment As a State – TAS rules at 56 FR 64881 and 58 FR 8177). (See also CWA Section 518(e)(2)).