



SOUTHERN UTE INDIAN TRIBE

November 28, 2016

Shaun McGrath, Regional Administrator
U.S Environmental Protection Agency - Region 8
80C-EISC
1595 Wynkoop Street
Denver, CO 80202-1129

Re: Supplement to the Southern Ute Indian Tribe's Treatment as a State Application under Clean Water Act Section 518(e) and 40 C.F.R. 131.8 for the Water Quality Standards and 401 Certification Programs

Dear Regional Administrator McGrath:

The Southern Ute Indian Tribe supplements its above-referenced Treatment as a State (TAS) application submitted on March 2, 2015. In addition to other sources of authority the Tribe relies upon in its TAS application, the Tribe also asserts authority based on Congress' Clean Water Act section 518 delegation of authority to Indian tribes to administer Clean Water Act regulatory programs over their entire reservations, subject to the eligibility requirements in section 518. The Tribe's supplemental reliance on Congress' delegation of authority, however, does not broaden the scope of the Tribe's TAS application. For its TAS application, and without conceding that its regulatory authority (whether delegated or inherent) does not extend to all Reservation water bodies, the Tribe's assertion of authority is still limited to Reservation surface waters on trust land which fall within the Clean Water Act's definition of "navigable waters."

Additionally, I am writing to clarify that the Tribe's application is for a determination of eligibility to set water quality standards and administer the 401 certification program for "navigable waters" that cross Southern Ute Indian Reservation land that is held in trust for the Tribe's benefit, including after-acquired trust lands. EPA has previously approved water quality standards that apply automatically to water bodies on after-acquired trust lands. *See e.g.*, EPA's approved Water Quality Standards of the Port Gamble S'Klallam Tribe, which define "Reservation" as "all lands and tidelands acquired for the use and benefit of the Port Gamble S'Klallam Tribe, as set forth by Secretary of Interior Proclamation on June 16, 1938 *and such other lands as are now or may be designated in the future as Port Gamble S'Klallam reservation land by the United States.*" Port Gamble S'Klallam Tribe Water Quality Standards for Surface Waters, 5, <https://www.epa.gov/sites/production/files/2014-12/documents/port-gamble-tribe-wqs.pdf> (Effective Sept. 27, 2005) (emphasis added); EPA's approved Water Quality Standards of the Bishop Paiute Tribe, which define "tribal land" as "all lands in trust for

the benefit of the Bishop Paiute Tribe or lands held in fee status owned by the Bishop Paiute Tribe, *including those lands obtained for or by the Tribe hereafter.*” Bishop Paiute Tribe Water Quality Control Plan, 63, <https://www.epa.gov/sites/production/files/2014-12/documents/bishop-tribes.pdf> (Effective Aug. 15, 2008) (emphasis added). We believe that is a sensible approach. The Tribe’s TAS application seeks authorization for a type of land, trust land, rather than specific parcels identified as trust land on a certain date. Given the checkerboard composition of the Southern Ute Indian Reservation and the unique circumstances of the Tribe, land parcels within reservation boundaries can transfer in and out of trust status. Having to submit a TAS application every time the status of a land parcel changes would be overly burdensome for the Tribe.

We understand the EPA’s concerns about providing public notice and an opportunity to comment on TAS authorization for newly acquired trust lands. However, the Bureau of Indian Affairs process for taking lands into trust includes a notice and comment period and an evaluation of the jurisdictional implications of taking particular land parcels into trust. *See* BIA’s fee to trust land acquisition regulations at 25 CFR Part 151 and, specifically 25 CFR § 151.10, under which the Secretary of the Interior notifies state or local governments having regulatory jurisdiction over the lands to be acquired and allows them to provide written comments “as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments.” Re-submitting a TAS application every time the Tribe acquires trust land would only recreate this process.

Finally, I would like to point out that the Tribe’s application has been pending with EPA for over a year and a half. We have been patiently waiting for EPA to process our application. Given that we have carefully crafted our application in consultation with EPA Region 8 and the State of Colorado to avoid any jurisdictional dispute, we find EPA’s processing delay particularly disturbing. We hope with this supplement and clarification, EPA will process the Tribe’s application posthaste. We look forward to EPA’s review and approval of the Tribe’s TAS application.

Sincerely,


Clement J. Frost, Chairman
Southern Ute Indian Tribal Council

cc: Martha Rudolph, CDPHE