

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION 7

DECISION DOCUMENT

**APPROVAL OF THE WINNEBAGO TRIBE OF NEBRASKA
APPLICATION FOR TREATMENT IN A SIMILAR MANNER
AS A STATE FOR
CLEAN WATER ACT SECTIONS 303(c) WATER QUALITY STANDARDS
AND 401 CERTIFICATION PROGRAMS**

JANUARY 2021

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I. Introduction and Index to Decision

A. Introduction

This Decision Document provides the basis and supporting information for the U.S. Environmental Protection Agency's (EPA or agency) decision to approve the application from the Winnebago Tribe of Nebraska (the Tribe) for treatment in a similar manner as a state (TAS) eligibility for purposes of administering Clean Water Act (CWA) Section 303(c) water quality standards (WQS) and Section 401 water quality certification, pursuant to Section 518 of the CWA and part 131 in Title 40 of the Code of Federal Regulations (C.F.R.).

Under Section 303(c) of the CWA, 33 U.S.C. § 1313(c), states develop, review, and revise (as appropriate) WQS for surface waters of the United States. At a minimum, such standards are to include designated water uses, water quality criteria to protect such uses, and an antidegradation policy. See 40 C.F.R. § 131.6. In addition, under Section 401 of the CWA 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. See 33 U.S.C. § 1341.

Section 518 of the CWA authorizes EPA to treat an Indian tribe as a state to manage and protect water resources "within the borders of an Indian reservation," under certain CWA programs, including the Section 303(c) WQS and Section 401 certification programs. EPA regulations at 40 C.F.R. part 131 establish the process by which the agency implements that authority and determines whether to approve a tribal application for purposes of administering programs under Sections 303(c) and 401 of the CWA. See 56 Fed. Reg 64876 (Dec. 12, 1991), as amended by 59 Fed. Reg. 64339 (Dec. 14, 1994) (codified at 40 C.F.R. Part 131).

EPA's approval of the Tribe's application for TAS eligibility to administer CWA Section 303(c) WQS and Section 401 water quality certification applies to all surface waters that lie within the exterior boundaries of the Winnebago Reservation as depicted in the attached maps. See Appendix C, Winnebago Reservation and Waters Maps. The Reservation is located in the northern half of Thurston County and a small portion in southeastern Dixon County in northeastern Nebraska and in the southwestern corner of Woodbury County in northwestern Iowa. The Reservation covers approximately 113,000 acres in Nebraska and 1,800 acres in Iowa.

This decision does not constitute an approval of the Tribe's WQS. EPA's review and approval or disapproval of the Tribe's WQS is a separate action under the CWA. Development of such WQS would remain subject to all requirements of EPA's regulations (including requirements for notice/comment), and such standards would need to be submitted to EPA for review under Section 303(c) to ensure they meet applicable CWA and regulatory requirements. However, approval of the Tribe for TAS authorization to administer WQS and certification programs under CWA §§ 303(c) and 401 does immediately authorize the Tribe to issue certifications under CWA Section 401 (see 40 C.F.R. § 131.4(c)), provided the Tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e). In addition, tribes authorized to administer the CWA WQS program are also "affected states" as the term is used under CWA Section 402(b)(3) and (5) and 40 C.F.R. § 122.4(d). As "affected states," they receive notice and an opportunity to comment on certain permits issued under the CWA National Pollutant Discharge Elimination System program.

B. Index to Decision

The following are selected documents relevant to this agency decision, as detailed in Appendices A and C. All relevant materials are in EPA's official file and in electronic systems.

1. Application and Supporting Materials

The Tribe's application for TAS eligibility for administering the WQS and certification programs under CWA Sections 303(c) and 401 includes the application cover letter dated July 31, 2018, from the Winnebago Tribal Chairman to EPA Region 7, and the following appendices:

- Appendix 1. Federal Register notice of Federally Recognized Tribes, specifically the Winnebago Tribe of Nebraska
- Appendix 2. Tribal Code
- Appendix 3. Constitution and By-Laws

For convenience, this Decision Document refers collectively to the application and supporting materials including the supplemental information the Tribe submitted to EPA described below, as the "Application."

Supplemental Information

After an initial review of the July 31, 2018, materials, the agency asked the Tribe to confirm that the lands located within the exterior boundaries of the Winnebago Reservation, as described in the Application, also included the strip of land purchased for the Wisconsin Winnebagos, as described in the Tribe's Constitution. In addition, EPA requested the Tribe provide an additional map that would identify the major creeks within the exterior boundary of the Winnebago Reservation in order to clarify the watersheds the Tribe intended to cover in its Application.

In response to EPA's requests, the Tribe provided an additional map of the Reservation identifying the major creeks; see Application, Figure 4: Map of Major Creeks on Winnebago Reservation. EPA has included all maps contained within the Application, as supplemented, in Appendix C of this Decision Document. The Tribe also confirmed that Figure 2 within the Application contains the strip purchased in Nebraska for Wisconsin Winnebagos (18 Stat. 170, June 22, 1874) which is located within the exterior boundaries of the Reservation. See Application, Section 6, Tribal Legal Counsel Statement (40 C.F.R. 131.8(b)(3)(ii)), pages 5-6.

In March/April 2020, upon EPA's request, the Tribe submitted additional information. The agency requested this information in response to several comments received during the public comment period. For example, one comment noted that certain sections from the Winnebago Tribal Water Code, Section Title 8, Article 2, were not included with the Application. In a letter from the Tribal Attorney, Sheila D. Corbine, dated March 30, 2020, the Tribe provided EPA with a complete copy of the Code and noted that it is available on the Tribe's website.¹ In addition, the Tribe provided information that the omitted sections of the Tribe's Water Code Application pertain to the initial establishment of the Water Management Committee, its functions, and internal governance provisions and are no longer relevant to

¹ <http://www.winnebagotribe.com/index.php/government/tribal-constitution-bylaws>

the management of Tribal water resources. (e.g., deadlines in 1987 for compiling information for then-current water uses and existing water resource information, the initiation of a “new process” for establishing new water uses and prioritizing future water uses, as well as committee membership processes), but to date these provisions have not been implemented by the Tribe. The letter notes that the Tribe will likely develop new laws and regulations related to WQS and water management if EPA approves its TAS Application for CWA WQS and certification programs.

In addition, the March 30, 2020 letter from Tribal Attorney Corbine provided additional information about the possibility of a state and tribal compact for water quality programs. A compact was suggested by several commenters during the public comment period. The letter states that the Winnebago Tribe is not interested in compacting at this time with the States of Nebraska or Iowa regarding water management, water conservation, or water quality but may consider compact negotiations in the future. Currently, the Tribe is focusing its efforts on improving water quality on the Reservation through the TAS process.

2. Comments Regarding Tribal Authority

As provided at 40 C.F.R. § 131.8(c)(2) and noted in Appendix A, EPA by letters dated November 19, 2019, provided notice to appropriate governmental entities² and an opportunity to comment on the substance and basis of the Tribe’s assertion of authority in the Application to regulate under the CWA the quality of surface waters and issue certifications within the exterior boundaries of the Winnebago Indian Reservation. The letters were sent to Nebraska Governor Pete Ricketts, Iowa Governor Kim Reynolds, and the Omaha Tribe Chairman Isaac Sherman Jr. by regular mail. In response, EPA received one comment letter from the Governor of Nebraska.

Consistent with agency practice, EPA also provided the public notice and an opportunity to comment on the assertion of authority in the Application. A public notice was published in three newspapers—the Pender Times, the Winnebago News, and the Dakota County Star. The published notices identified EPA’s website on which the Tribe’s Application was posted and notified local governments and the public of the opportunity to review documents at the EPA Regional office in Lenexa, Kansas. The notices, published on November 28th and 29th, requested that any comments be submitted by December 30, 2019. EPA received 16 comments in response to these newspaper notices. EPA conducted additional notice of the Application to County Supervisors in the Counties of Thurston and Dixon in Nebraska and Woodbury in Iowa on November 26, 2019 via email.

In accordance with EPA’s implementing regulations at 40 C.F.R. 131.8(c)(3), the Regional Administrator provided 30 days for comments to be submitted on the Tribe’s Application.

In summary, EPA received 17 comments during the comment period, which included several comments addressing the Winnebago Tribe’s assertion of authority to regulate the waters of the Reservation. EPA has prepared a Response to Comments that provides EPA’s responses to all comments received. See Appendix B of this Decision Document.

² The EPA defines the term “appropriate governmental entities” as “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. 64876, 64884 (Dec. 12, 1991). Consistent with the EPA’s regulations, the EPA provided notice to all appropriate governmental entities. In this instance, the EPA provided notice to the States of Nebraska and Iowa, and to the Chairman of the Omaha Tribe.

3. Statutory and Regulatory Provisions

The following statutory and regulatory provisions govern this eligibility decision:

- Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes EPA to treat an Indian tribe in a similar manner as a state if it meets specified eligibility criteria
- 40 C.F.R. §§ 131.4(c) and 131.8 establish the regulatory requirements for a Tribe to obtain eligibility approval and the procedures for EPA to process a Tribe's eligibility application. See Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991); 59 Fed. Reg. 64,339 (Dec. 14, 1994); and 81 Fed. Reg. 30183 (May 16, 2016)

4. Policy Statements

The following policy statements and guidance are also relevant to this eligibility decision:

- *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (November 8, 1984)
- EPA Memorandum titled "EPA/State/Tribal Relations," by EPA Administrator Reilly (July 10, 1991)
- Memorandum titled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by EPA Assistant Administrator Robert Perciasepe and General Counsel Jonathan Cannon (March 19, 1998)
- Memorandum titled "Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs," by EPA Deputy Administrator Marcus Peacock (January 23, 2008)

II. Requirements for Approval and EPA Findings

Under CWA Section 518 and EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve an Indian tribe's TAS application for the WQS program under Section 303(c) and the certification program under Section 401. These requirements are that: (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 WQS 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 WQS program in a manner consistent with the terms and purposes of the CWA and applicable regulations.

The regulation at 40 C.F.R. § 131.8(b) identifies what must be included in a TAS application by an Indian tribe to administer the WQS program. The regulation further provides in § 131.8(b)(6) that where an Indian tribe has previously qualified for TAS under a different CWA or Safe Drinking Water Act program, the tribe need only provide the required information that has not been submitted in a previous application. Consistent with that provision, the Tribe's Application references information included in

its TAS applications for the Section 106 water pollution control grant program and the Section 319 nonpoint source grant program that EPA approved in 1989 and 2017 respectively. These references are discussed further in sections B and C below. Where relevant, this Decision Document references the Tribe's 2016 TAS application for the CWA Section 319 program and 2017 EPA-approval and decision.

Where EPA determines that an Indian tribe is eligible to the same extent as a state for purposes of WQS, the tribe likewise is eligible to the same extent as a state for purposes of certifications conducted under CWA section 401, see 40 C.F.R. § 131.4(c). To issue certifications, the tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e). Consistent with this provision, the Application designates the Tribe's certifying agency as the Tribe's Clean Water Act Section 106 Water Quality Planning and Management Program, Environmental Protection Department of the Physical Resources Department.

A. Federal Recognition

The first requirement for a tribal TAS application for WQS under Section 303(c) and certifications under CWA Section 401 is that a tribe is recognized by the Secretary of the Interior and meets the definitions in 40 C.F.R. §§ 131.3 (k) and (l), 40 C.F.R. § 131.8(a)(1). A tribe must include in its application a statement that the tribe is recognized by the Secretary of the Interior. See 40 C.F.R. § 131.8(b)(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." See CWA Section 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." See CWA Section 518(h)(1), 40 C.F.R. § 131.3(k). The Tribe – whose Reservation is located in the northern half of Thurston County in Nebraska, a small portion of southeastern Dixon County in northeastern Nebraska, and in the southwestern corner of Woodbury County in northwestern Iowa – is listed as *Winnebago Tribe of Nebraska* by the Secretary of the Interior and included in the Department of the Interior's current list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." See 85 Fed. Reg. 5462, 5466 (January 30, 2020).

EPA finds that the Winnebago Tribe of Nebraska is recognized by the Secretary of the Interior and meets the definition of "Indian Tribe" in 40 C.F.R. § 131.3(l) with governmental authority over a "Federal Indian Reservation" as defined in 40 C.F.R. § 131.3(k), and thus meets the requirements in 40 C.F.R. §§ 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers

The second requirement for a TAS application for WQS under CWA Section 303(c) and certifications under CWA Section 401 is that a tribe has a governing body carrying out substantial governmental duties and powers over a defined area. See 40 C.F.R. § 131.8(a)(2). To show that it has 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 tribe 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, such as those exercising police powers affecting or relating to the health, safety, and welfare of the affected population, taxation, and the exercise of eminent domain; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

A tribe that has previously shown that it meets the “governmental functions” requirement for purposes of another EPA program generally need not make that showing again. See 59 Fed. Reg. 64,339, 64,340 (Dec. 14, 1994) (Simplification Rule). Consistent with 40 C.F.R. § 131.8(b)(6) and the Simplification Rule, the Application refers to the governmental description in the Tribe’s 2016 CWA Section 319 program TAS application, which describes the Tribe’s form of government, the significant governmental functions the Tribe performs, and identifies the source of the Tribe’s authority to carry out its governmental functions. As noted above, the TAS application for the CWA Section 319 program was approved by EPA on February 27, 2017.

As described in the Tribe’s 2016 EPA-approved TAS application for the CWA Section 319 program, the Winnebago Tribe is a self-governing sovereign Indian Tribe organized pursuant to the Indian Reorganization Act, 25 U.S.C. Section 476. The governing document of the Tribe is the “Constitution and Bylaws of the Winnebago Tribe Winnebago Reservation in the State of Nebraska” (the Tribal Constitution), according to the Act of Congress, dated June 18, 1934 (48 Stat. 984). A copy of the Tribal Constitution is included with the Tribe’s current Application, Appendix 3. In accordance with the Tribal Constitution, the Tribe’s governing body is a nine-member Tribal Council that has authority to represent the Tribe in all matters pertaining to the business of the Tribe. More specifically, the Tribal Council is authorized under the Tribal Constitution, among other matters, to (i) protect and preserve the property, wildlife and natural resources of the Tribe, and (ii) regulate the use and disposition of property of members of the Tribe insofar as necessary to safeguard and promote the peace, safety, morals and general welfare of the Tribe.

In the exercise of its Constitutional powers, the Tribe has enacted a comprehensive set of laws, known as the Winnebago Tribal Code, see Application, Appendix 2: Winnebago Tribal Code Title 8 Article 2 Water Management; the entire Tribal Code was submitted with the Tribe’s 2016 TAS application for the CWA Section 319 program. The Tribe supplemented its CWA Sections 303(c) and 401 Application with a copy of the entire code upon EPA’s request. The Code provides for various authorities and responsibilities for water quality management.

The Tribal government has a highly developed organizational structure with regulatory bodies – see Application, Appendix 3 – as well as a Tribal Police Department and Tribal Court System. All of these manifestations of the Tribe’s sovereign authority illustrate the Tribe’s assumption of governmental duties and its exercise of governmental powers.

The Tribe administers a wide variety of environmental programs under the areas of land, water and natural resources. These programs serve not only the environment (land, water and air) but also ensure the welfare of the communities within the exterior boundaries of the Reservation. These programs often work closely with technical consultants, State and Federal agencies, non-Indian corporations, national advocacy organizations, municipalities, local communities, other Tribes and elected officials in all levels of government.

The Tribe’s Application relies on the information that the Winnebago previously provided to EPA in support of its 2016 TAS application for the CWA Section 319 program. The Tribe’s governance structure and its related governmental functions have not changed since then. EPA has determined that the Tribe satisfies the requirement for a governing body that carries out substantial duties and powers over a defined area in satisfaction of 40 C.F.R. §§ 131.8(a)(2) and (b)(2).

C. Jurisdiction over Waters within the Tribe's Reservation

The third requirement for TAS applications for WQS under CWA Section 303(c) and certifications under CWA Section 401 is that the WQS program to be administered by the tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation. See 40 C.F.R. § 131.8(a)(3). To address this requirement, under 40 C.F.R.

§ 131.8(b)(3), the Tribe is required to submit a statement of its authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the tribe asserts authority to regulate surface water quality; (ii) a statement by the tribe's legal counsel (or equivalent official) describing the basis for the tribe's assertion of authority, which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the tribe's assertion of authority; and (iii) an identification of the surface waters for which the tribe proposes to establish WQS. See 40 C.F.R. § 131.8(b)(3).

1. Map or Legal Description

The Tribe's Application includes a series of maps showing the area and waters within the exterior boundaries of the Tribe's Reservation over which the Tribe asserts authority. The Tribe's Application also includes maps that delineate the boundaries of the Reservation and the surface waters contained therein. See, Appendix C Maps of Winnebago Reservation and Waters; and Tribe's Application, Figures 3 and 4. The Application seeks TAS for the waters on the Tribe's Reservation lands only, approximately 113,000 acres in Nebraska and 1,800 acres in Iowa. As described in the Application, the Reservation is bordered by the Omaha Indian Reservation to the south and the Dakota-Thurston County line to the north. The western boundary parallels State Highway 16 about 2 miles to its east and is divided by the Missouri River. The closest large urban centers are Sioux City, Iowa located about 20 miles north and Omaha, Nebraska located about 80 miles to the south. See Application, Figure 1: Winnebago Tribe of Nebraska Vicinity Map.

Regarding a legal description of the Tribe's land, according to the historical information provided with the Tribe's CWA Section 106 grant program TAS application, the Tribe's reservation lands which are the subject of its Application, are described as follows:

The eastern, northern and western limits of the Winnebago Reservation were established by the original survey of the Omaha Reservation, made subsequent to the Secretary's approval in 1855 of the creation of the latter reservation. The Treaty of March 8, 1865, carved the Winnebago Reservation from the area within the boundaries described in the surveyor's Field Notes (Land Division--Ancient and Misc. Surveys, No, 16, Vol, 3): "The South East corner is known as the mouth of Woods Creek or the point where said creek empties in the Missouri river, thence turning due West six miles two hundred ninety eight (298) rods to the south branch of Blackbird Creek, said Creek is 15 feet wide and has a cotton wood sight tree on the East bank of 16 inches diameter, thence west six miles 160 rods to Middle Creek, said Creek is 25 feet wide, and runs to the south, thence West 16 miles 202 rods to the South West corner of the Reservation and known as a mound, two and one half feet in diameter and two feet high with the sod taken from the South Side and said mound is further described as being 16 rods South and 60 rods west of a small

branch creek, thence North 15 miles 260 rods to Middle Creek, said Creek is 24 feet wide and runs to South West, thence North 2 miles 60 rods to North West Corner and said Corner is known as a mound 3 feet in diameter and 2 feet 6 inches high, sod taken from the west, thence East 17 miles 252 rods to south branch of Omaha Creek, said Creek is 15 feet across, thence East three (3) miles 285 rods to the Missouri River, then down said river to place of beginning and containing 300,000 Acres of land, and said boundary line is further described by having mounds erected on the high ground from 80 rods to one mile apart, and so situated as to be visible from one to the other, and sod taken from the outside of said line as completed by me the 27th day of June A.D. 1855."The portion of this reservation set apart for the use of the Winnebago Tribe is described in Article 11 of the Treaty of March 8, 1865, defining the southern boundary of the subject reservation at that time;

"Commencing at a point on the Missouri River four miles due south from the north boundary line of said (Omaha) reservation; thence west ten miles; thence south four miles; thence west to the western boundary line of the reservation; thence north to the northern boundary line; thence east to the Missouri river; and thence south along the river to the place of beginning."

The alteration of the southern boundary line affected by the purchase under the Act of 1874, included the following lands as described in the deed:

"Beginning at a stake on the present boundary line between the Omaha and Winnebago reservations, where said boundary line touches the Missouri River in the North East corner of Lot Two(2) in Section Twenty-four (24) of Township Twenty-six (26) North of Range Nine (9) East, in said State of Nebraska, Thence West on the boundary line between the Omaha And Winnebago reservations, a distance of about ten (10) miles to the North West corner of said Omaha reservation, it being the North West corner of Lot Three(3) in Section Twenty-four (24) Township Twenty Six (26) North of Range Seven (7) East; Thence South on the West boundary line of the Omaha reservation, about two miles to the Section line between sections twenty five and thirty six, or to the South West corner of Lot seven (7) in Section twenty five and North West corner of lot one (1) in Section thirty six (36) in said Township Twenty six (26) North of Range Seven (7) East; Thence East about ten miles on the Section line between section twenty-five and thirty six in Township 26 North of Range Seven East, between sections 29 and 32, 28 and 33, 27 and 34, 26 and 35, and 25 and 36, in Township 26 North of Range 8 East, between Sections 30 and 31, 29 and 32, 28 and 33, 27 and 34, 26 and 35, and 25 and 36, to a point where said section line touches the Missouri River, or to the South East corner of Lot 4 in Section Twenty five, Township Twenty Six North of Range Nine (9) East, Thence in a Northerly direction on the East boundary of said Omaha reservation and along the Missouri River to the place of beginning, Containing in the aggregate, Twelve Thousand, Three Hundred and Forty Seven and fifty five [Hundredths] of an acre, (12,347 55/100) of land, be the same more or less, With this deed, the formation of the Winnebago Reservation boundaries was concluded, with no subsequent modifications."

EPA concludes that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing maps and a legal description of the area over which the Tribe asserts authority to regulate surface water quality under the CWA.

2. Statement Describing the Basis for the Tribe's Assertion of Authority

The Tribe's Application asserts authority to administer the CWA Sections 303(c) and 401 programs over all surface water resources on the Tribe's Reservation lands based on the express congressional delegation of authority to eligible Indian tribes to administer CWA regulatory programs over their reservations contained in Section 518 of the CWA. See 81 Fed. Reg. 30183 (May 16, 2016). In light of the congressional delegation of authority, the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes is identifying the geographic boundaries of the Indian reservation area over which the congressionally delegated authority would apply. *Id.* at 30194. As described in the previous section, the boundaries of the Reservation have been properly identified. The Tribe also asserts that there are no limitations or impediments, or special circumstances limiting the Tribe's ability to accept and effectuate the congressional delegation of authority under the CWA Section 518. See Appendix A, Application and Tribal Counsel Letter.

EPA has no additional information of any impediment limiting the Tribe's ability to effectuate the congressionally delegated authority.

EPA therefore concludes that the Tribe has properly asserted authority to regulate surface water quality over its Reservation and has satisfied the application requirement of 40 C.F.R. § 131.8(b)(3)(ii).

3. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards

A tribe must also identify in its application for TAS approval the surface waters for which it proposes to establish WQS. See 40 C.F.R. § 131.8(b)(3)(iii). The Tribe's Application asserts authority over all surface waters within the areas covered by the Application, i.e. the Tribe's Reservation. See Application, Figures 3 and 4, and Appendix C of this decision.

The surface waters for which the Tribe proposes to establish WQS are those surface waters on the Winnebago Reservation described in the Application, Figure 3: Map of Winnebago Reservation Surface Waters. These include waterbodies that lie within the Missouri River Basin and Elkhorn River Basin. The Missouri River Basin contains the Blackbird-Soldier Watershed (HUC: 10230001) along the eastern side of the Reservation and the Elkhorn River Basin contains the Logan Watershed (HUC: 10220004) along the west side. The major waterbodies contained in the Blackbird-Soldier Watershed include the Missouri River, Cow Creek, North Omaha Creek, Omaha Creek, North Blackbird Creek, Big Bear Creek, Turtle Creek, Morgan Creek, Kelly Pond, Ross Pond and H-Lake. The major waterbodies contained in the Logan Watershed include Logan Creek and Middle Creek. See the Application Figure 4: Map of Major Creeks on Winnebago Reservation demonstrates location of major surface waterbodies within the Blackbird-Soldier Watershed and Logan Watershed.

EPA concludes that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish WQS.

4. Conclusion Regarding Authority

Based on the above discussion, EPA concludes that the Tribe meets the requirements in 40 C.F.R. §§ 131.8(a)(3) and (b)(3).

D. Capability

The fourth and final requirement for a TAS application for WQS under Section 303(c) and certifications under Section 401 of the CWA is that a tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective WQS program in a manner consistent with the terms and purposes of the CWA and applicable regulations. See 40 C.F.R. § 131.8(a)(4). To demonstrate that a tribe has the capability to administer an effective WQS 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; (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 WQS; and, (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective WQS program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. See 40 C.F.R. §§ 131.8(b)(4)(i)–(v).

1. A Description of the Tribe's Previous Management Experience.

The Environmental Protection Department (EPD) of the Physical Resources Department, the agency responsible for implementation of the WQS and certification programs as discussed more fully below, has worked cooperatively with EPA and the U.S. Geological Survey and other area agencies to create the baseline understanding of surface water quality within the Winnebago Reservation.

Since 2001, with the assistance of funding from the EPA Indian General Assistance Program, the Tribe has developed a fully staffed Environmental Office implementing a variety of environmental and natural resource projects and maintaining the administrative capabilities to effectively operate these programs.

Also, since 2001, the Tribe's Global Positioning System/Geographical Information System Program functions have included the collection of accurate spatial data and production of maps that can be used for or in support of other environmental projects. The program also creates files from spatial information that is stored and can be used for future production of high-quality maps visualizing that spatial information.

Since 2001, the Solid Waste Management/Recycling Program has served the Tribe by reducing the quantity of recyclable materials entering the solid waste stream in order to reduce trash hauling costs and to make the Winnebago Reservation community healthier and livable. The program also educates and engages the community to recycle and changes behaviors to increase recycling and prevent open dumping on the Reservation.

Since 2002, the Clean Air Act Section 103: Ambient Air Quality Program has studied and investigated the causes and prevention of air pollution. The program operates and maintains a Meteorological Station, which measures daily wind speed, direction and gusts, air temperature, relative humidity and barometric pressure.

Since 2007, the CERCLA 128(a) Tribal Response/Brownfields Program has responded to the emergency or negligent releases of hazardous materials. The program also identifies and oversees assessment and cleanup activities of brownfield sites, (i.e., property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant).

From 2009-2018, the Pesticide Circuit Rider Program had in place a Memorandum of Agreement between the Winnebago Tribe of Nebraska and the Omaha Nation of Nebraska and Iowa. This program promoted the protection of human health and the environment from unreasonable adverse effects resulting from pesticide use. The program ensured that pesticides and alternatives are available and safe for use within the boundaries of both reservations by means of education and outreach efforts with community members and various other organizations.

Other programs include, but are not limited to, Environmental Health, Police and Fire Department and Health Department.

2. A List of Existing Environmental and Public Health Programs Administered by the Tribal Governing Body and Copies of Related Tribal Laws, Policies, and Regulations.

The Physical Resources Department is the overarching entity for many of the programs and services dealing with land, water and natural resources. These programs and services include Facilities, Tribal Roads, Tribal Housing, Tribal Transit/Transportation, Construction Management, Animal Control, Wildlife and Parks, Tribal Land Corporation and the EPD.

As noted directly above, the EPD currently administers several programs including the Indian General Assistance Program; Clean Air Act Section 103: Ambient Air Quality; Clean Water Act Section 106: Water Pollution Control Grant Program identified by the Tribe as Water Quality Planning and Management; Clean Water Act Section 319: Non-point Source Reduction Program (see paragraph 5 below); GPS/GIS Program; Solid Waste Management/Recycling Program and CERCLA 128(a) Tribal Response/Brownfields.

3. A Description of the Entity (or Entities) that Exercise the Executive, Legislative, and Judicial Functions of the Tribal Government.

The Tribal Legal Counsel letter highlights the following: “The Tribe's Constitution in Articles III and IV provides for a governing body, the Tribal Council with certain powers. The Tribal Council has the following pertinent authority, as stated in Article IV” (not all provisions from this section are provided below):

- To negotiate with the federal, state and local governments on behalf of the Tribe, and to advise and consult with the representatives of the Interior Department on all activities of

the Department that may affect the Winnebago Reservation. "Reservation", as used herein, shall include the Winnebago Reservation and all other Indian Country subject to the jurisdiction of the Tribe.

- To safeguard and promote the peace, safety, morals and general welfare of the Tribe.
- To protect and preserve the property, wildlife and natural resources of the Tribe.
- To promulgate and enforce statutes governing the conduct of persons located within or passing through the Reservation and providing for maintenance of law and order and the administration of justice.

In exercising their powers, the Tribe has passed a water management law in order to promote the protection and use of the waters of the reservation in a manner consistent with Tribal goals and policies. Further, the water management law is also designed to assert the inherent powers of self-government and sovereign authority of the Winnebago Tribe of Nebraska over all actions taken within the reservation that may affect the use or quality of reservation waters.

Under the Water Management law, Title 8, Article 2 of the Winnebago Tribal Code, the Tribe seeks:

- To promote the protection and use of the waters of the reservation in a manner consistent with Tribal goals and policies;
- To protect the health, welfare, economic strength, and cultural heritage of the Tribe and its members;
- To maintain water quality, free-flowing streams, and a healthy environment associated with waters of the reservation;
- To assert the inherent powers of self-government and sovereign authority of the Winnebago Tribe of Nebraska over all actions taken within the reservation that may affect the use or quality of reservation waters;
- To provide for effective and coordinated management of regional water supplies with Tribal, state, federal and local governments; and
- To initiate an integrated approach by the Tribe to managing the waters, forests, wildlife, land, and other natural resources of the reservation. [TCR 87-82]

In addition, the Tribe's Constitution provides for the tribe's judicial system, Art. X, Winnebago Constitution. The Winnebago Tribal Court's webpage provides information about their judicial system at <http://www.winnebagotribe.com/index.php/government/tribal-court>.

4. 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 the Water Quality Certifications.

The Tribe's Application for purposes of CWA Sections 303(c) WQS and 401 certification, and EPA's 2017 approval of the TAS for the CWA Section 319 nonpoint source management program, document that the Tribe is reasonably expected to be capable of carrying out the functions of the WQS and certification programs in a manner consistent with the terms and purposes of the CWA and applicable regulations. The implementation of the water quality and certification programs will be under the EPD and will be conducted by experienced staff. The EPD will assume the primary responsibility for

establishing, reviewing, implementing, and revising WQS. In addition to the Director, staff are already on board and trained to administer the WQS and certification programs. The Tribal entity that will be responsible for conducting water quality certifications under CWA Section 401 is the Clean Water Act Section 106 Water Quality Planning and Management Program.

Currently, an experienced Water Quality Specialist is already employed in the Water Quality Planning and Management Program, Environmental Protection Department of the Physical Resources Department and trained to administer the WQS and certification programs.

5. 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.

The Water Quality Specialist has performed much of the work activities described in past EPA program approvals; the EPA Region 7 monitoring team also assists the Tribe with monitoring and assessment of surface waters and biological data on the reservation. The Water Quality Specialist has conducted the day-to-day technical and administrative activities of the WQS program; served as a liaison between various State and Federal Agencies and private citizens and the Tribe; attended several workshops and certified training sessions on environmental issues;³ served as the EPA Region 7 Tribal Representative on the National Tribal Water Council; assisted other tribes with water quality monitoring and training; prepared approved work plans and budgets to ensure viability of the program; prepared four approved Quality Assurance Project Plans and all related Standard Operating Procedures; developed an accepted Water Quality Monitoring Strategy; prepared several Water Quality Assessment Reports; prepared an approved CWA Section 319 Nonpoint Source Assessment Report, a Nonpoint Source Management Program Plan and Nonpoint Source TAS application and conducted extensive physical, chemical and biological monitoring of surface water and fish tissue and ground water monitoring activities on the Reservation.

6. Conclusion Regarding Capability

Based on the information provided by the Tribe that describes its capability to administer effective WQS and certification programs under the CWA, EPA concludes that the Tribe has met the requirements at 40 C.F.R. §§ 131.8(a)(4) and (b)(4).

³ Stream Functions Pyramid Workshop (2018); Regulatory TAS Training at Meskwaki (2018); Climate Change Adaptation Planning (2016); Tribal-Focused Environmental Risk and Sustainability Tool Workshop (2014); Riparian Proper Functioning Condition Stream Assessment Training (2014); Tribal Water Quality Data Management and Assessment Training (2011); Water Quality Standards Academy-Basic Workshop for Tribes (2011); Tribal Water Quality Data Management and Assessment Training (2011); US EPA Watershed Academy Webcasts: Monitoring and Assessment Under the CWA (2010); Water Quality Program Training (2009); Section 106 Grants Training-Assistant Trainer (2009); Water Quality Program Training (2009); CWA Section 106 Assessment Report Training (2008); Quality Assurance Training for Tribes (2007); Water Quality Monitoring: Basics (2007); Tribal Grants Training (2006); NETI: Basic Inspector Course: Classroom (2003); Introduction to Data Assessment (2002).

III. Conclusion

EPA has reviewed the Tribe’s TAS application for purposes of administering CWA Sections 303(c) and 401, as well as prior decisions approving the Tribe’s TAS applications for purposes of CWA Sections 106 and 319. EPA has assessed whether the Application from the Tribe meets the eligibility criteria established by CWA Section 518 and the applicable regulations. Based upon this review, EPA concludes that the Tribe has made the required demonstration to meet the eligibility and application requirements at 40 C.F.R. §§ 131.8(a)(1)-(4) and (b)(1)-(4) to administer the WQS program for surface waters on the Tribe’s Reservation. Pursuant to 40 C.F.R. 131.4(c), the Tribe is also eligible to the same extent as a state for purposes of the water quality certification program under CWA Section 401. By virtue of these decisions, the Tribe will also be an “affected state” within the meaning of CWA Sections 402(b)(3) and (5) and its implementing regulations at 40 C.F.R. § 122.4(d).

The Regional Administrator, EPA Region 7, hereby approves the Application and finds the Winnebago Tribe of Nebraska is eligible for treatment in a similar manner as a state to implement the CWA Sections 303(c) WQS and 401 certification programs.

APPROVED BY:

**JAMES
GULLIFORD** Digitally signed by JAMES
GULLIFORD
Date: 2021.01.19
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James B. Gulliford
Regional Administrator
U.S. Environmental Protection Agency Region 7

1/19/2021

Date

Appendix A: Supporting Information

The following selected documents are relevant to this agency decision. All relevant materials are located in EPA’s official file and in electronic systems.

	Date
I. Application and Supporting Materials	
Email with attached documents from Winnebago Environmental Department (EPD), to Ann Lavaty, EPA Region 7	August 1, 2018
<ul style="list-style-type: none"> • Application for Treatment as a State to Administer a Water Quality Standards Program and the 401 Certification Program <ul style="list-style-type: none"> ○ Appendix 1: Federal Register BIA list of Federally Recognized Tribes ○ Appendix 2: Winnebago Tribal Code Title 8 Article 2 ○ Appendix 3: Winnebago Constitution and By-Laws • Application clarifications submittal and new Figure 4: Map of Major Creeks on Winnebago Reservation, email from Denise Jensen, Winnebago Tribe EPD to Jane Kloeckner, R7 EPA • Letter from Winnebago Tribal Counsel • Cover letter from Tribal Council Chairman 	August 8, 2019 May 1, 2018 July 31, 2018
II. Letters and related documents from EPA	
Letters from Jim Gulliford, Regional Administrator, EPA Region 7 to appropriate governmental entities providing notice of an opportunity to comment on the substance and basis of the Winnebago Tribe’s assertion of authority to the Honorable Governor Ricketts, State of Nebraska, the Honorable Governor Reynolds, State of Iowa, and Chairman Isaac Sherman Jr., Omaha Tribe	November 19, 2019
Outreach emails to the local governmental entities from EPA Region 7, Amy Shields, PhD, Branch Chief, WQS Branch, Water Division	November 26, 2019
Public notices providing an opportunity to comment on the substance and basis of the Winnebago Tribe’s assertion of authority, published in the Pender Times, the Winnebago News, and the Dakota County Star newspapers	Date of publications November 27 and 28, 2019
Screen capture documenting materials posted for public comment period	November 27, 2019
III. Letters and related documents from the Tribe	
Tribal Counsel response to public comments	March 30, 2020
Tribal Code Title 8, Article 2, Water Management	February 17, 2020
Water Quality Staff	May 13, 2020

Description (signature, addressee, subject)			Date
Water Quality Specialist Training/Education			May 15, 2020
IV. Docket for Winnebago 303(c) TAS Public Comments Received by EPA			
#	Date	Name	Email or Hard copy sent through USPS
1	12/26/19	Connie Bruns, Bruns Feedlot LLC	Email
2	12/19/19	Denise Olson	Email
3	12/26/19	Fredrick Sebade	Hard copy
4	12/20/19	Pete Ricketts, Governor of Nebraska	Email
5	12/28/19	Herbert & Judy Barelman	Hard copy
6	12/30/19	Janice Cooney, Cooney Fertilizer Inc.	Email
7	12/22/19	Jerry Alleman	Email
8	12/28/19	Joel Lamplot	Email
9	12/21/19	Lisa Albrecht	Email
10	12/26/19	Michael Sousek, Lower Elkhorn Natural Resources District	Hard Copy
11	12/30/19	Marie Sunderland with 10 pages of signatures (some not legible)	Email
12	12/27/19	Richard Albrecht	Email
13	12/29/19	Roger Gustafson	Email
14	12/26/19	Scott Albrecht	Email
15	12/20/19	Joni Albrecht, Nebraska State Senator	Email
16	12/26/19	Steve Nelson, President, Nebraska Farm Bureau Federation Scott Merritt, Executive Director, Nebraska Agribusiness Assoc. Ken Herz, President, Nebraska Cattleman	Email
17	12/27/19	Tammy Maul-Bodak, Thurston County Attorney	Email

Appendix B: Response to Comments

This Appendix contains EPA’s responses to comments received on the Application of the Winnebago Tribe of Nebraska (Tribe) to be found eligible for treatment in a similar manner as a state (TAS) for purposes of administering Clean Water Act (CWA) Section 303(c) water quality standards (WQS) and Section 401 water quality certification, pursuant to Section 518 of the CWA and part 131 in Title 40 of the Code of Federal Regulations (C.F.R.).

Commenters can find their comments, which are identified by number, in the index provided in Appendix A, Section IV. In some cases, more than one commenter provided identical or similar comments. For convenience of the reader, the agency has summarized the comments.

A. The Equal Footing Doctrine as applied to the Nebraska Statehood Acts

A comment indicates that the State of Nebraska was admitted to the Union upon an equal footing with the original states, in all respects whatsoever. The comment points to Section 2 of the Nebraska Admission Act of 1864,⁴ which declares certain entitlements, conditions and restrictions on admission to the Union. The comment asserts that there are no “conditions and restrictions” pertaining to Indian reservations, Indian country, or Indian lands in the Nebraska Admission Act or the Nebraska Enabling Act of 1867.⁵ The comment asserts that the absence of any conditions and restrictions pertaining to Indian reservations, Indian country or Indian lands in these Acts, indicates that the Equal Footing Doctrine provides Nebraska with unencumbered authority within its state boundaries after statehood “in all respects whatsoever.” [Commenter #8]

Response

EPA acknowledges and appreciates this comment. Under the federal Equal Footing Doctrine, or EFD, new states, upon their admission to the Union, generally acquire the same sovereign title to the lands underlying navigable waters as the original thirteen states.⁶ At the same time, the United States retains and exercises plenary power over the navigable waters under the Commerce Clause of the Constitution.⁷ In addition, under the Constitution “Congress has plenary authority to legislate for the Indian Tribes in all matters.”⁸ Congress has exercised these authorities in enacting section 518 of the CWA, which expressly authorizes EPA to treat eligible tribes in a similar manner to states for a variety of purposes, including administering CWA Sections 303(c) and 401 WQS and certification programs over reservation waters.

⁴ See CHAP. XXXVI. - *An Act for the Admission of the State of Nebraska into the Union*, THIRTY-NINTH CONGRESS. SESS. II. CH. 32, 34, 36. 1867 (Feb. 9, 1867). There is the typical provision in this statehood act for Nebraska to be “admitted into the Union upon an equal footing with the original States in all respects whatsoever.”

⁵ See CHAP. LIX.-- *An Act to enable the People of Nebraska to form a Constitution and State Government, and for the Admission of such State into the Union on an equal Footing with the original States*. THIRTY-EIGHTH CONGRESS. SESS. I, 58, 59. 1864 (April 19, 1864).

⁶ *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977).

⁷ See *Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002) (citing *Coyle v. Smith*, 221, U.S. 559, 573 (1911) (hereinafter *Wisconsin v. EPA*)).

⁸ U.S. Const., Art. I, sec. 8, cl. 3; see also, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985).

In *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002), the Seventh Circuit Court of Appeals upheld EPA’s decision to grant TAS eligibility for CWA Sections 303(c) and 401 to the Sokaogon Chippewa (Mole Lake) Band. In that case, the court considered the relevance of potential state ownership of the beds and banks of the covered waters under the Equal Footing Doctrine and found that “[i]t was reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water.”⁹ In upholding EPA’s decision to approve the tribe’s TAS application, the Seventh Circuit recognized the plenary powers of Congress to regulate commerce over the navigable waters and its plenary powers over Indian Tribes.

To the extent the comments assert that the EFD and Nebraska statehood acts give Nebraska authority over Indian country waters generally, or the waters of the Winnebago Indian Reservation in particular, EPA respectfully disagrees. The well-established Constitutional legal principles underlying congressional powers over navigable waters and Indian tribes, along with Congress’ express legislation in the area as embodied, inter alia, in CWA section 518 and the cases upholding prior EPA CWA TAS decisions, provide clear support for EPA’s decision to approve the Winnebago Tribe’s Application. EPA concludes that nothing in the Nebraska statehood acts or the EFD precludes the agency from approving this Application.

B. Waters regulated by the State of Nebraska

A related comment suggests that some of the Reservation “waters are directly regulated by the State of Nebraska and all are claimed by the State pursuant to Article 15, Section 5 of the Nebraska Constitution.” [Commenter #10]

Response

EPA acknowledges and appreciates the comment. The comment is related to Article 15, Section 5 of the Nebraska Constitution, which provides:

XV-5. Use of water dedicated to people. The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section [6, which deals with water appropriation].¹⁰

To the extent the comment asserts that the State of Nebraska is authorized or approved to administer CWA regulatory programs on the Winnebago Indian Reservation, EPA respectfully disagrees. To date, the State of Nebraska has not sought authority to implement CWA regulatory programs within Indian reservations, and EPA has not approved the State to administer such programs on any reservation.¹¹ The cited provision, which relates to the State’s public trust, does not limit the Winnebago Tribe’s ability to apply for TAS to regulate its reservation waters as expressly provided for by Congress in CWA section 518.

⁹ *Id.* at 747.

¹⁰ Nebraska Constitution, Article 15, Sections 5 and 6.

¹¹ See, e.g., *In re: Circle T Feedlot, Inc., et al (Thurston County, NE)*, 14 E.A.D. 653, 667-68 (EAB 2010) (addressing jurisdiction to administer CWA discharge permitting on the Winnebago and Omaha Reservations in Nebraska and finding, among other things, that the State has not asserted authority for such permitting over reservation sources); Neb. Op. Att’y Gen. 01026 (July 23, 2001).

C. Nebraska state boundary expansion

A commenter states that when Congress extended the northern boundary of the State of Nebraska in 1882, provisions were included to ensure that all Indian title was to be extinguished before jurisdiction of those lands would be ceded to the State of Nebraska and subject to all the conditions and restrictions provided in the act of Congress admitting Nebraska into the Union. President Benjamin Harrison proclaimed the extinguishment of Indian title on October 23, 1890. [Commenter #8]

Response

EPA acknowledges and appreciates these comments. To the extent the comments assert that the 1882 change to the State of Nebraska's northern boundary, or the 1890 proclamation regarding Indian title in the area subject to that change, affect the boundaries of the Winnebago Indian Reservation, EPA respectfully disagrees. The changes in the State's northern boundary reflected in the 1882 and 1890 actions did not include any part of this Reservation. The expansion area is more than 50 miles northwest of the Winnebago Indian Reservation. The 1882 Expansion Act and the 1890 Proclamation of President Benjamin Harrison did not mention the Winnebago Indian Reservation and dealt with lands that are separate and distinct from the Winnebago Indian Reservation.¹² The 1882 Expansion Act and the 1890 Proclamation have no provisions, terms or conditions that affect the Indian lands already in existence within the State of Nebraska at the time it was formed in the Statehood Acts of 1864 and 1867.

D. Other Acts of Congress

A commenter asserts that "other Acts of Congress ... removed lands from [the Tribe's] original territory through opening lands for settlement by non-tribal members." [Commenter #8]

Response

EPA acknowledges and appreciates the comment. The concern expressed is similar to issues considered by the U.S. EPA Environmental Appeals Board (EAB or the Board) in the *Circle T Feedlot* case (*In re: Circle T Feedlot, Inc., et al (Thurston County, NE)*, 14 E.A.D. 653, 667-68 (EAB 2010)), which was a challenge to EPA issuance of CWA permits on the Winnebago Reservation. In an Order Denying Review of NPDES Appeal Nos. 09-02 and 09-03, the EAB considered the question of whether the Winnebago Reservation had been disestablished through implied repeal through various Acts of Congress. Comment #8 appears to be asserting the same disestablishment theory.

In *Circle T Feedlot*, the EAB thoroughly reviewed multiple acts of Congress including, among others, the Nebraska Statehood Acts described above; the Winnebago Treaty of 1865; the General Allotment Act of 1887, Ch. 119, 24 Stat. 388 as applied to the Winnebago Reservation; and the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (see additional comment on Public Law 280 and EPA's response,

¹² See Act of Congress, 18 Stat. 62, Chapt. 52, An act to extend the northern boundary of the State of Nebraska (47th Cong. Sess. I, CH. 52, 1882); Benjamin Harrison, Proclamation 298 – *Extinguishing Indian Title to Certain Lands* (October 23, 1890); see also Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/205230> (last visited June 9, 2020).

below). *Circle T Feedlot* at 683-84. The EAB found that nothing in these various statutes suggests that the Winnebago Reservation was disestablished.¹³

In view of the EAB's careful and comprehensive analysis and the conclusions underlying its holding affirming the continued integrity of the Winnebago Reservation and EPA's permitting authority thereon, the agency concludes that nothing in the statehood acts or these "other acts of Congress" have altered the exterior boundaries of the Reservation or affect the Tribe's CWA TAS eligibility to regulate the surface waters of the Reservation.

E. Public Law 280 and the Nebraska Retrocession of 1970

One commenter asserts that Public Law 280 and the Nebraska Retrocession of 1970 allow the Tribe authority to "self-govern" their own members. The commenter states that "[t]ribal sovereignty was always limited to sovereignty over declared tribal members, not over non tribal (sic) members ..." Thus, the commenter asserts that EPA's approval of the Application "would expand the scope of the tribe's sovereignty beyond its legal limits." [Commenter #14].

Response

The agency acknowledges and appreciates the comment that the Tribe has authority to self-govern tribal members within the Reservation. However, nothing in Public Law 280 or the Nebraska Retrocession of 1970 limit the Tribe's eligibility to administer CWA WQS and certification programs throughout the Reservation. EPA's approval of the Application recognizes such tribal eligibility as expressly provided for by Congress in the CWA and does not expand the scope of the Tribe's sovereignty beyond its legal limits. Public Law 280, which effected an immediate cession of federal criminal and civil jurisdiction over Indian country in five states, including Nebraska, was enacted by Congress in 1953 in part to deal with the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."¹⁴ The U.S. Supreme Court determined in *Bryan v. Itaska*, 426 U.S. 373 (1976), that the cession of jurisdiction in Public Law 280 did not give states civil regulatory authority in Indian country. The Court interpreted Public Law 280, to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority, which means for purposes of this Application that the Tribe is the proper authority to administer these CWA programs for the waters of the reservation.¹⁵ In addition, 22 years later, the

¹³ In addition, the EAB held that Petitioners' theory that the "Winnebago Reservation had been extinguished prior to, or as a result of, Nebraska statehood completely lack merit." *Circle T Feedlot* at 683. "Petitioners' next set of contentions, that several treaties and acts of Congress stating that land assignments for Winnebago tribal members could be made via land patents, via allotments, or in severalty somehow demonstrate that the Winnebago Reservation was disestablished, similarly illustrates Petitioners' confusion between individual parcel status within the Winnebago Reservation and the status of the Reservation itself and are likewise unconvincing." See *Circle T Feedlot*, at 686.

¹⁴ *Tyndall v. Gunter*, 840 F.2d 617, 645 (8th Cir. 1988) citing to *Bryan v. Itaska County*, 426 U.S. 373, 379 (1976); H.R.Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953).

¹⁵ *Bryan v. Itaska County*, 426 U.S. 373, 385, and 388-390; see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court); see also, *Wisconsin v. EPA*, 266 F.3d at 747 ("in the absence of tribal TAS status, the EPA and not the state of Wisconsin might well be the proper authority to administer

Court held again that general civil regulatory jurisdiction in Indian country lies generally with the federal government and the relevant tribe, not with states. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Also, nothing in the Nebraska Retrocession of 1970, which allowed the State to retrocede authority under Public Law 280 back to the United States, affected the civil regulatory authority of the Winnebago Tribe because such authority was never transferred to the state.¹⁶

EPA concludes that the Tribe has the requisite authority to implement the CWA Sections 303(c) and 401 WQS and certification programs, and nothing in EPA's decision expands the scope of tribal authority.

F. Jurisdiction over ground water and water rights

Multiple commenters assert that the Tribe's Application is seeking EPA's approval for the Tribe to "take over" jurisdiction to regulate all waters within the county including ground water and water quantity. Specifically, these commenters assert that the Winnebago Tribal Code, Title 8, Article 2, states that the Tribe has authority over "all water that lies, flows, arises, or otherwise occurs on or under the reservation." The commenters are concerned that EPA's approval of the Application would cause residents to lose their control over water above and below ground. Also, Commenter #8 expresses a concern about state authority over water quantity. [Commenter #s 2, 8, 10, 12, 13, and 14]

Response

The agency acknowledges and appreciates the commenters' concerns about the water resources on the Tribe's Reservation. However, EPA's approval of the Application would not affect residents' control over water resources above and below the ground. The CWA regulates surface water quality and does not alter landowners' water rights. See Comment G herein. In addition, the CWA does not authorize EPA to approve WQS for groundwater, as groundwater is not a water of the United States to which CWA section 303(c) and 401 apply.

To the extent the comment is about groundwater, it misinterprets the Application. Although groundwaters are included in the Tribal Code within the definition of "waters of the Reservation" and "reservation waters,"¹⁷ the Tribe has not requested TAS to establish ground WQS nor would the CWA authorize EPA to approve WQS for groundwater. The Tribe's Application includes only surface waters located within the Winnebago Reservation and delineated on the Maps attached to the Application. The TAS Application explicitly states that:

Clean Water Act programs for the reservation, because state laws may usually be applied to Indians on their reservations only if Congress so expressly provides." (citing to *California v. Cabazon Band of Mission Indians*)).

¹⁶ *Tyndall v. Gunter*, 840 F.2d 617 (8th Cir. 1988) (providing a brief history of the Nebraska Retrocession). Shortly after Nebraska retroceded authority back to the United States, the federal courts held that the retrocession was in fact valid and effective, so as to give the United States exclusive jurisdiction for offenses committed after October 25, 1970. See *Omaha Tribe of Nebraska v. Village of Walthill*, 334 F. Supp. 823 (D.Neb.1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107, 93 S. Ct. 898, 34 L. Ed. 2d 687 (1973); *United States v. Brown*, 334 F. Supp. 536 (D.Neb.1971).

¹⁷ See TAS Application, Appendix 2: Winnebago Tribal Code, Title 8, Article 2.

“[t]he surface waters for which the Tribe proposes to establish WQS are those surface waters that occur on the Winnebago Reservation areas described in Figure 3: Map of Winnebago Reservation Surface Waters.” TAS Application, Section 5, p. 4.

G. Section 101(g) of the Clean Water Act

A commenter notes that Section 101(g) of the CWA directs EPA to cooperate with State and local agencies. The Commenter also notes that CWA Section 518(a) provides that Indian tribes shall be treated as States for purposes of Section 101(g). [Commenter #8]

Response

EPA acknowledges and appreciates the comment. EPA notes that the primary purpose of CWA Section 101(g)¹⁸ is to recognize the rights of states and tribes to regulate water quantity and that the CWA does not interfere with such state and tribal water rights. Section 518(a)¹⁹ reaffirms applicability of Section 101(g) in the tribal context and states that Indian tribes shall be treated as states for purposes of Section 101(g). The fact that tribes may be eligible for approval to administer the CWA Section 303(c) WQS program does not contradict or conflict with the reserved rights of tribes or state water resource management authorities.

H. Non-member fee lands subject to state taxation

Several comments assert that non-member fee lands are subject to state taxation, solely to state jurisdiction, and are not subject to federal or tribal jurisdiction, and are not part of the Winnebago Reservation. In addition, these comments say that when Congress opened the reservation to non-members for settlement and to obtain patents for fee lands, these acts of Congress removed these lands from the Winnebago Indian Reservation. The comments assert that the Tribe does not possess “territorial jurisdiction” over fee lands. [Commenter #s 6, 8, and 12]

Response

EPA acknowledges and appreciates the comment. The agency respectfully disagrees with the assertion that non-member fee lands are not subject to federal or tribal jurisdiction because Section 518 of the CWA provides an express congressional delegation of authority to eligible tribes to administer CWA programs over reservation lands. See the response to Comment I below for more details. The balance of these comments are similar to issues considered by the EAB in a challenge to EPA issuance of permits on the Winnebago Reservation. The EAB declined to review the permits, finding that, “[t]he plain

¹⁸ CWA Section 101(g) states: “It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate the right to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources..” 33 U.S.C. 1251(g).

¹⁹ CWA Section 518(a) states: “Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.” 33 U.S.C. 1377(a).

language of the statutes and regulations and the caselaw discussing that language, all demonstrate that the mere fact that a parcel of land is in fee patent status is not determinative of whether it is within Indian country, contrary to [petitioner's] assertion." See *Circle T Feedlot* at 672-73. Similarly, the Board was "unpersuaded by the argument that, because the non-Indian owners of the 'fee patent' properties pay state taxes, these properties cannot be part of Indian country."²⁰

In addition, the EAB found that the opening of the Winnebago Indian Reservation to non-Indian settlement and subsequently, the land titles held via fee patents by non-Indians, does not remove these lands from the exterior boundaries of the Winnebago Reservation – that is, "the fee patent status is not determinative."²¹ The agency has no information and these commenters have provided no information that questions the accuracy of the Reservation maps showing the boundaries of the Winnebago Indian Reservation and the location of surface waters within the Reservation.

I. Sovereign authority of the State of Nebraska

Several comments assert that EPA does not have the authority to supersede or abrogate the sovereign authority of the State of Nebraska to manage her water resources, nor does EPA have authority to delegate tribal authority over non-member Nebraska citizens. In addition, the comments say that the State of Nebraska has authority to regulate all surface waters in the State and is already effectively implementing water pollution control. [Commenter #s2, 3, 6, 10, 11, and 17]

Response

EPA acknowledges and appreciates the comment. EPA has authority to approve tribal government eligibility applications for CWA programs. Section 518 of the CWA authorizes EPA to treat eligible Indian tribes with reservations in a similar manner as states for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA authorities. CWA Section 518 includes an express delegation of civil regulatory authority by Congress to eligible Indian tribes to administer CWA regulatory programs over their entire reservations, including over reservation lands held in fee simple by non-members. Section 518(e) provides for TAS over areas "within the borders of an Indian reservation"; and Section 518(h)(1)'s definition of Indian reservations includes "all lands within the limits of any Indian reservation notwithstanding the issuance of any patent, and including rights-of-way running through the reservation," which has no reference to, or limitation based on, ownership of the reservation land.

Under the express congressional delegation of authority, the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes is identifying the geographic boundaries of the Indian reservation area over which the congressionally delegated authority would apply. See 81 Fed. Reg. 30183, 30194 (May 16, 2016). As described in this Decision Document, Part II.C. and Appendix C, all of the Tribe's lands included in the Application are reservation lands where the Tribe is eligible to regulate water quality under the CWA. The Tribe asserts in its Application that there are no limitations

²⁰ "The same acts of Congress that authorized the issuance of patents in fee for these parcels also authorized the state to tax them following issuance of the patents. See, e.g., 25 U.S.C. § 349. Thus, the same principles articulated by the Supreme Court in *Seymour*, *Solem*, and *Mattz* with respect to the fee patent status of a parcel must apply with equal force to the parcel's state taxation status; otherwise, the holdings in these cases would be rendered moot by the fact that the owners of the properties pay state taxes." See *Circle T Feedlot* at 673.

²¹ *Id.*

or impediments to its ability to accept and effectuate this congressional delegation of authority under the CWA. EPA is not otherwise aware of any impediment limiting the Winnebago Tribe's ability to effectuate such congressional delegated authority.

In addition, this decision does not affect, supersede, or abrogate the State of Nebraska's authority to regulate State waters under its jurisdiction under the CWA. Nebraska has not sought authority to implement a CWA regulatory program to manage surface water quality within the Winnebago Reservation. EPA has not authorized Nebraska to regulate water quality within the Reservation. Indeed, in the *Circle T Feedlot* case, the EAB found that "the State of Nebraska does not currently have the authority to issue NPDES permits within the exterior boundaries of any reservations in Nebraska; including the Omaha and Winnebago Reservations."²² In addition, as described in paragraph E above, generally, civil regulatory jurisdiction in Indian country lies with the federal government and the relevant Indian tribe, not with the states.²³ Therefore, in the absence of an express demonstration of authority by a state for such areas and an EPA finding of such state authority, EPA has generally excluded Indian country from its approvals of state regulatory programs under the CWA.

The Winnebago Reservation extends into the state of Iowa and EPA provided the notice of this Application to the Governor of Iowa, as an appropriate governmental entity in accordance with the CWA regulations at 40 C.F.R. 131.8(c)(2)(ii). Like Nebraska, the State of Iowa does not exercise authority over water quality within the Winnebago Reservation. EPA received no comments from the State of Iowa or any entities in Iowa, and none of the comments received raised any concerns about Iowa even though part of the Reservation is located in Iowa. EPA is clarifying here that the Decision Document covers the entire Winnebago Reservation, including those portions in Iowa.

J. Properties tied to Indian title

One commenter asserts that Congress intended Tribes to administer CWA programs only on properties tied to Indian title and not all land "otherwise within the borders of the Indian reservation." This comment concludes that the term "reservation" would only be land held in fee by a tribal member or land added to the reservation by a tribal purchase. [Commenter # 8].

Response

EPA acknowledges and appreciates the comment. The comment's assertion is inconsistent, however, with the plain language of CWA Section 518 and EPA's implementing regulations, which provide that tribes can seek eligibility to administer CWA regulatory programs over their entire reservations.²⁴ The CWA regulation at 40 C.F.R. 131.3(k) provides that tribes may seek TAS with respect to water resources pertaining to any type of reservation land, including, for example, reservation land held in

²² *Circle T Feedlot* at 668,

²³ See, e.g., *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.).

²⁴ The Clean Water Act states that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which 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." See 33 USC 1377(e)(2). The CWA and EPA's implementing regulation define the term "reservation" to include "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." See 33 U.S.C. 1377(h)(1); 40 C.F.R. 131.3 (k).

trust by the United States for a tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned in fee simple by non-tribal members. Conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country land or any other type of non-reservation land. The CWA and EPA's implementing regulations do not limit tribes to administration of CWA programs only on properties tied to Indian title.

In addition to the maps included in its Application, the Winnebago Tribe provided a legal description of the Winnebago Indian Reservation. It consists of the 1865 Treaty establishing the exterior boundaries of the Reservation and an alteration of the southern boundary line affected by the purchase under the Act of 1874. EPA has determined upon reviewing the Application, that the surface waters on the lands encompassed within the exterior boundaries of the Winnebago Reservation are eligible for inclusion in the Tribe's Application, irrespective of land ownership.

K. Conflicting water quality standards

Several comments assert that authorizing the Winnebago Tribe will result in conflicts or inconsistencies between Nebraska's water quality standards and the Tribe's WQS. In addition, the comments state that it may be expensive for farmers and ranchers, whether on or off the Reservation, to comply with the Tribe's WQS program. [Commenter #s 2, 3, 4, 7, 10, 11, 12, and 17]

Response

EPA acknowledges and appreciates the concerns expressed about potentially conflicting or inconsistent sets of WQS between the State of Nebraska and the authorized Winnebago Tribe. The agency reiterates here that the approval of the Tribe's TAS application does not also approve any tribal WQS for the Winnebago Reservation. Any such EPA approval (or disapproval) of WQS would occur in a separate EPA decision following submission of WQS adopted by the Tribe for EPA's review pursuant to CWA Section 303(c) and EPA's implementing regulations at 40 C.F.R. Part 131.

EPA understands that the Tribe is developing WQS for its reservation. EPA will not review proposed Tribal standards until the Winnebago Tribe has completed their development, provided the public with an opportunity to review and comment on the standards, finalized and adopted the standards, and submitted the standards to EPA for review and action in accordance with the CWA regulations found at 40 C.F.R., Subpart C, §§ 131.20 and 131.21. EPA encourages the Winnebago Tribe, the State of Nebraska, the State of Iowa and the Omaha Tribe to work cooperatively as the Winnebago Tribe develops its standards.

The concerns regarding potentially conflicting or inconsistent water quality regulations can be raised and addressed through the appropriate opportunity for comment when tribal water quality regulations are proposed for adoption in the future. Tribes adopting CWA WQS are subject to public participation requirements as described in CWA Section 303 and 40 C.F.R. Parts 25 and 131, that require states and authorized tribes to hold widely-publicized public hearings and to solicit, consider, and respond to comments from interested and potentially affected parties and the public.²⁵

²⁵ Authorized tribes must comply with EPA's public participation requirements when administering water quality standards (WQS) programs under the Clean Water Act. 40 C.F.R. § 131.20(b). This means that tribes must hold well publicized public

The EPA also notes that tribal WQS should be developed considering the quality and uses of waters entering and leaving reservations. EPA's regulations at 40 C.F.R. § 131.10 require that a state or authorized tribe ensure that its WQS provide for the attainment and maintenance of the WQS of downstream waters. Thus, it is important that neighboring states (including authorized tribes) consider adjacent state or tribal WQS even though there is no requirement for the standards to be identical. A state or authorized tribe can consider previously federally approved adjacent WQS, as well as EPA's Model WQS Template, as a starting point for developing WQS. In considering previously approved WQS, however, WQS developers should coordinate with the appropriate EPA Regional Office to determine whether the WQS are up to date with federal requirements and the latest scientific information.

To the extent that differences do arise between an authorized tribe's and a state's WQS, EPA encourages the tribe and state to resolve their differences without EPA involvement, ideally before either one begins the standards adoption process. EPA routinely provides technical assistance to states and tribes in the development of WQS. Should differences in the application of standards arise between an authorized tribe and state, there is a dispute resolution mechanism available under 40 C.F.R. § 131.7 that sets out a process for resolving differences. EPA's role is to mediate such disputes. Costs of such mediation would be borne by the government entities involved in the mediation; not by local landowners or businesses. For more information see:

<https://www.epa.gov/sites/production/files/2017-07/documents/tribal-state-wqs-dispute-resolution.pdf>
(last checked June 12, 2020).

In addition, EPA acknowledges and appreciates the comments regarding potential financial burdens on farmers and ranchers. As noted elsewhere, any adoption of CWA WQS by the Tribe would need to comply with applicable public participation requirements, which would provide an opportunity to raise such concerns regarding proposed WQS. EPA notes that WQS under the CWA are not self-implementing and do not themselves impose enforceable conditions on any party. They do, however, provide a basis for some CWA regulatory programs that are enforceable, such as water quality-based effluent limits contained in Section 402 NPDES permits for point source discharges. Therefore, any potential effects of future EPA-approved Winnebago WQS on nearby farming and ranching operations would occur only if the operations are subject to such CWA regulatory programs.

The Winnebago Tribe has not sought TAS for any CWA regulatory program other than Sections 303(c) and 401. Until the Tribe applies for and is approved to do so, EPA maintains the authority to implement those other programs. For example, at this time EPA Region 7 issues NPDES permits for all of Indian country in Nebraska and Iowa.

hearings when adopting their initial water quality standards and invite comments. 40 C.F.R. § 25.5(b). They must also do so when reviewing their water quality standards at least once every three years and when revising standards. 40 C.F.R. § 131.20(b). They must maintain lists of persons and organizations that have expressed an interest or could be affected by the standards, including adjacent states, tribes, local dischargers, and interest groups. 40 C.F.R. §§ 25.4(b)(5), 25.3(a). They must notify those listed and the general public at least 45 days before WQS hearings, must invite comments on the current standards, must highlight significant issues and consequences of proposed actions, and must provide full documents and summaries at least 30 days before the hearing. 40 C.F.R. § 25.5(b). Finally, for final actions they must prepare a responsiveness summary that summarizes public comments and sets forth the agency's responses for the appropriate tribal decision-making official and the public. 40 C.F.R. § 25.8.

L. Tribal/State compact

Several comments assert that the Tribe and State should enter a compact to be approved by Congress prior to EPA's approval of the Tribe's Application and that such a compact may address competing state and tribal authorities. [Commenter #s 3, 7, 10, and 11]

Response

EPA acknowledges and appreciates the comment. EPA notes, however, that the CWA has no requirement for such a tribal/state compact – whether in the context of tribal applications for TAS eligibility, or in the context of EPA decisions on authorized tribal or state WQS submitted to EPA for review under Section 303(c) – and no such compact or further congressional action is needed to approve a tribe's TAS eligibility under the express authority of CWA Section 518. The Tribe and State are sovereign governments and may enter into agreements on their own accord. EPA notes that the agency also inquired of the Tribe regarding its interest in a tribal/state compact. In a letter dated, March 30, 2020, the tribal attorney stated that while the Tribe may consider a compact with the State of Nebraska in the future, the Tribe is not interested in a compact at this time and is currently focusing its efforts on improving water quality on the Reservation through the TAS process.

M. Federal licenses or permits

A group of commenters assert in a joint letter that approving the application for the Tribe to implement the CWA 401 Water Certification program will cause non-tribally owned land to be subject to Winnebago Tribal authority for issuance of such certifications for federal licenses or permits. [Comment #16]

Response

EPA acknowledges and appreciates the comment and agrees that with EPA's approval of the Tribe's TAS Application, federal licenses or permits for activities with discharges to non-tribally owned land within the Winnebago Reservation may be subject to water quality certifications by the Tribe under CWA Section 401. Previously, EPA was the certifying authority for any such permits.

The CWA regulation at 40 C.F.R. 131.4(c) expressly states that where EPA determines that a tribe is eligible for TAS for purposes of WQS, the tribe is likewise eligible to the same extent as a state for purposes of CWA Section 401 certifications. Thus, any tribe interested in TAS authorization for purposes of CWA Section 401 certifications may apply for TAS under 40 C.F.R. §131.8 for authorization to administer the WQS program and, upon approval, is eligible to grant, condition, deny, or waive 401 certifications.

EPA's approval of the Application in this matter is limited to the Winnebago Tribe's administration of WQS and certification programs. For example, the Tribe can only certify federal licenses and permits, not state or local licenses or permits. Within the above framework, EPA encourages the Winnebago Tribe and its state and local neighbors to coordinate and collaborate in implementing EPA-approved tribal WQS and certification programs toward achieving common water quality goals.

N. Waters of the United States

Several comments assert that the recent EPA waters of the United States rulemaking makes approving this application premature [Commenter #s 3, 10, and 11]

Response

The agency acknowledges and appreciates the comments on the recent CWA rulemakings that define the waters of the United States. However, EPA respectfully disagrees with the assertion that the new Navigable Waters Protection Rule²⁶ creates uncertainty or renders action on the Tribe's TAS application premature. EPA's approval of the Tribe's authority to administer Sections 303 and 401 necessarily applies only to waters of the United States, however, the scope of federal jurisdiction over tribal waters is not determined during the TAS review and approval process. Instead, as indicated in the Decision Document, EPA has determined that the Tribe has satisfied EPA's CWA regulations at 40 C.F.R. § 131.8(b)(3)(iii), which provides that a tribe's application should include "[a]n identification of the surface waters for which the Tribe proposes to establish WQS." The identification requirement in 40 C.F.R. § 131.8(b)(3)(iii) and the other TAS eligibility criteria, described above, do not require the Tribe to demonstrate or EPA to determine if the identified waters are waters of the United States.

O. Lack of representation and Constitutional Rights under the 14th Amendment

Several comments assert that EPA should not approve the Application because non-members of the Tribe lack representation within Tribal Government and lack representation in Tribe's rulemaking process. [Commenter #s 1, 2, 5, 9, 13, 14, 15, 16, and 17]. Similarly, other comments assert that approval of the application would violate non-members' rights to equal protection and due process under the 14th amendment because the non-members lack an opportunity to vote in tribal elections. [Commenter #s 1, 3, 6, 8, 9, 12, and 14]

Response

EPA acknowledges and appreciates the comments. The agency notes, however, that Congress has expressly provided for tribal regulation of reservation surface water quality in CWA Section 518 and has established the specific criteria that tribes must demonstrate for eligibility. EPA's CWA regulations governing the TAS application process reflect those statutory criteria and establish application requirements for interested tribes to demonstrate that they meet the criteria and for EPA to process such applications. It would be inappropriate for EPA to impose additional requirements not provided by Congress or any applicable regulation. The agency also notes that constitutional rights of both Indians and non-Indians exist without need for further EPA action, either in the Federal regulations governing the TAS process or in an EPA TAS Decision Document. See, e.g., 56 Fed. Reg. 64,876, 64885 (Dec. 12, 1991). The issues raised by these comments are beyond the purview of EPA in applying its regulations and implementing the express authority provided by Congress.

²⁶ See Navigable Waters Protection Rule, 85 Fed. Reg. 22,250, 22,251 (April 21, 2020).

P. Nondiscrimination

One comment states that “Granting the Winnebago Tribe to be “Treated as State” will violate Executive Order 12250 section 1-2 (d)... Due to my lack of Indian blood, I will be denied participation in, denied the benefits of, and also be regulated by an entity that I cannot have representation in.” [Commenter #8]

Response

EPA acknowledges and appreciates the comment. The comment asserts that EPA approval of the TAS Application will violate Executive Order 12250, *Leadership and Coordination of Nondiscrimination Laws*, issued on November 2, 1980, (the “EO”), in particular Section 1-2, (d) of the EO.²⁷ As a general matter, the EO instructs the federal agencies, via the Attorney General, to issue appropriate implementing directives prohibiting discriminatory practices in programs receiving federal financial assistance in a manner consistent with the applicable federal civil rights laws. The agency has complied with its obligations under the EO.

In the instant matter, the agency’s approval of the Tribe’s Application is not subject to the EO, because the Order applies to the programs and activities of recipients of federal financial assistance, not the activities of federal agencies.

Q. Tribal capability

Several comments assert that the Tribal Government lacks capability to implement a CWA tribal program to establish and maintain WQS and a 401 Certification program. [Commenter #s 4, 6, and 8].

Response

EPA acknowledges and appreciates the comments that express concerns and ask questions regarding the Tribe’s capability to carry out WQS and certifications programs. EPA's regulations at 40 C.F.R. § 131.8(b)(4) specify that in addressing 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 entity or entities of the tribe which exercise executive, legislative and judicial functions, 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 or a plan which proposes how the tribe will acquire additional administrative and technical expertise, as well as (pursuant to 40 C.F.R. § 131.8(b)(5)) any additional information EPA might require.

²⁷ EO 12250, Section 1-2. Coordination of Nondiscrimination Provisions. 1-201. The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws: (d) Any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. See <https://www.justice.gov/crt/executive-order-12250> (last visited June 18, 2020).

Tribe has demonstrated its capability to implement the authority it is seeking for CWA sections 303(c) and 401. A brief summary of capability information the Winnebago Tribe has provided is as follows:

- The Tribe administers a wide variety of programs under the areas of land, water and natural resources. These programs serve not only the environment (land, water and air) but also ensure the welfare of the communities within the exterior boundaries of the Reservation. These programs often work closely with technical consultants, State and Federal agencies, non-Indian corporations, national advocacy organizations, municipalities, local communities, other Tribes and elected officials in all levels of government.
- The Water Quality Specialist employed by the Winnebago Tribe has conducted the day-to-day administrative activities of the Tribe's water programs; served as a liaison between various State and Federal Agencies and private citizens and the Tribe; served as the Region 7 Tribal Representative on the National Tribal Water Council; assisted other tribes with water quality monitoring and training; prepared approved work plans and budgets to ensure viability of the program; prepared four approved Quality Assurance Project Plans and all related Standard Operating Procedures; developed an accepted Water Quality Monitoring Strategy; prepared several Water Quality Assessment Reports; prepared an approved Clean Water Act Section 319 Nonpoint Source Assessment Report, a Nonpoint Source Management Program Plan, and conducted extensive physical, chemical and biological monitoring of surface water and fish tissue monitoring activities and ground water monitoring activities.
- The Tribe's Water Quality Specialist is a skilled professional with multiple certifications, and water quality trainings, see Decision Document, Appendix A, Supporting Information, for example:
 - Stream Functions Pyramid Workshop (July 24-27, 2018)
 - Regulatory TAS Training at Meskwaki (April 2018)
 - Climate Change Adaptation Planning (September 13-15, 2016)
 - Tribal-Focused Environmental Risk and Sustainability Tool Workshop (October 7-9, 2014)
 - Riparian Proper Functioning Condition Stream Assessment Training (October 6 and 8, 2014)
 - Water Quality Standards Academy-Basic Workshop for Tribes (June 13-17, 2011)
 - Tribal Water Quality Data Management and Assessment Training (March 15-17, 2011)
- On an as needed basis, the Tribe may expand its staff in the Environmental Department to administer the WQS program.

In addition, EPA notes that one comment (Commenter #8) describes prior criminal proceedings against certain former Tribal Council members. EPA understands from the Tribe that the individuals referenced in the comment no longer hold positions in the Tribal government.

EPA has carefully assessed the information provided by the Winnebago Tribe regarding its capability to administer the WQS and certification programs and has considered its long working relationship with the Tribe on environmental matters, including work funded by EPA under CWA authorities, and has

concluded that the Winnebago Tribe meets the TAS requirements for capability. In sum, EPA based its finding concerning the Tribe's capability on the extensive information available about the administration of the Tribal Environmental Program and the accomplishments and expertise of the tribal environmental staff working on water quality matters.

R. Conflict of interest

A comment asserts that EPA should not approve the Application because authorization would cause an inherent conflict of interest for the Tribal Government. The Tribe would need to regulate its own businesses for compliance with the WQS and Certification programs. [Commenter #14]

Response

EPA acknowledges and appreciates the comment. EPA understands that the Tribe is an owner or operator of facilities or lands that may be subject to federally issued water discharge permits. EPA further acknowledges that the Tribal WQS and Certification programs may result in revised permit conditions and limitations in the future. However, EPA disagrees that such ownership or operation by the Winnebago Tribe or its business enterprises causes an inherent conflict of interest. The CWA applies to facilities and lands owned by state, federal, local, and tribal governments. The Act contains provisions for governments to ensure their own compliance with the law.²⁸ It is not uncommon for state governments to issue CWA permits to their own facilities. Federal facilities and tribal facilities also must comply with the CWA.

S. Precedent for future decisions

A comment states that because this is a precedent setting decision, it will affect EPA's future decisions for other Tribes in Nebraska that may submit eligibility applications for CWA programs [Commenter #17].

Response

The agency acknowledges and appreciates the commenter's concerns. EPA disagrees that a decision to approve one tribe's eligibility application for CWA programs is precedent-setting for other tribes in the same state or any other state. Each tribe that seeks authorization to implement a CWA program must submit its own TAS application and each tribe is unique. The four critical elements of a TAS application will be unique to each tribe, i.e., federal recognition, tribal governing body, authority to regulate the surface waters of the reservation, and capability to implement the program. As such, the approval of this Application is unique to the Winnebago Tribe and will not affect EPA's future decisions for other Tribes in Nebraska or Iowa.

T. Letters of notice

A comment states that it is unfortunate that EPA's notice to the Thurston County Board of Supervisors was not sent to all seven members of the Board instead of only two members. Also, the

²⁸ See CWA Sections 309, Enforcement and 502, Definitions (4) and (5).

comment notes that other states, tribes and entities may have been notified but none of them would be impacted more directly than the citizens of Thurston County, Nebraska. [Commenter #17]

Response

EPA acknowledges and appreciates the comment and understands that the commenter suggests that individual notices could have been sent to all the members of the Thurston County Board of Supervisors. The agency sent notice letters to appropriate governmental entities, which included the Governors of Iowa and Nebraska and the Chairman of the Omaha Tribe. In addition, on November 26, 2019, EPA also sent an email message to two Thurston County Supervisors, Davin French and Glen Meyer. See Appendix A, Supporting Information, Section II, of this Decision Document.

The agency sent similar notices to supervisors in Dixon and Woodbury Counties in addition to the Thurston County Supervisors. The messages provided information about the opportunity to comment on the substance and basis of the Winnebago Tribe's assertion of authority, explained the content of the Application, and provided a point of contact at EPA, Amy Shields, Branch Chief, WQS Branch, for the local officials to call if they had any questions. EPA followed the regulations and national guidance by publishing notice of the review and comment period in several local newspapers. EPA's notices were effective. The Board considered this information at its December 23, 2019 meeting. https://thurstoncountynebraska.us/posting_files/pdfs/board/minutes/2019/20191223_133925_board_minutes.pdf (last visited June 18, 2020).

EPA appreciates the concerns about notice to local governments. However, in this case, the agency carefully followed the guidance and regulations in conducting outreach and provided ample opportunities for local leaders to be informed, contact EPA with questions, and submit timely comments.

U. Additional sections of Tribal Code

A Commenter requested the Tribe submit additional sections from the Tribal Water Code that was referenced in the Application, but not copied in its entirety within the Application. [Commenter #8]

Response

The agency acknowledges and appreciates the comment. The commenter is correct that the Application did not include certain sections of the Tribal Water Code. In response to the comment, and pursuant to EPA's procedures for reviewing eligibility applications, EPA requested the additional sections from the Tribe. In a letter dated, March 30, 2020, the Tribal Attorney explained that certain sections of the Winnebago Tribal Water Code were omitted from the Application because they are no longer relevant to the management of Tribal water resources. As explained in section I.B.1 of this Decision Document, these sections contain older administrative procedures that have not been implemented by the Tribe. The Tribe intends to develop new procedures.

The Attorney further indicated that the Tribe's entire Code is available to the public to read free of charge on the Tribe's website²⁹ and provided a copy to EPA. EPA reviewed the sections and agrees that they are not relevant to the Application review.

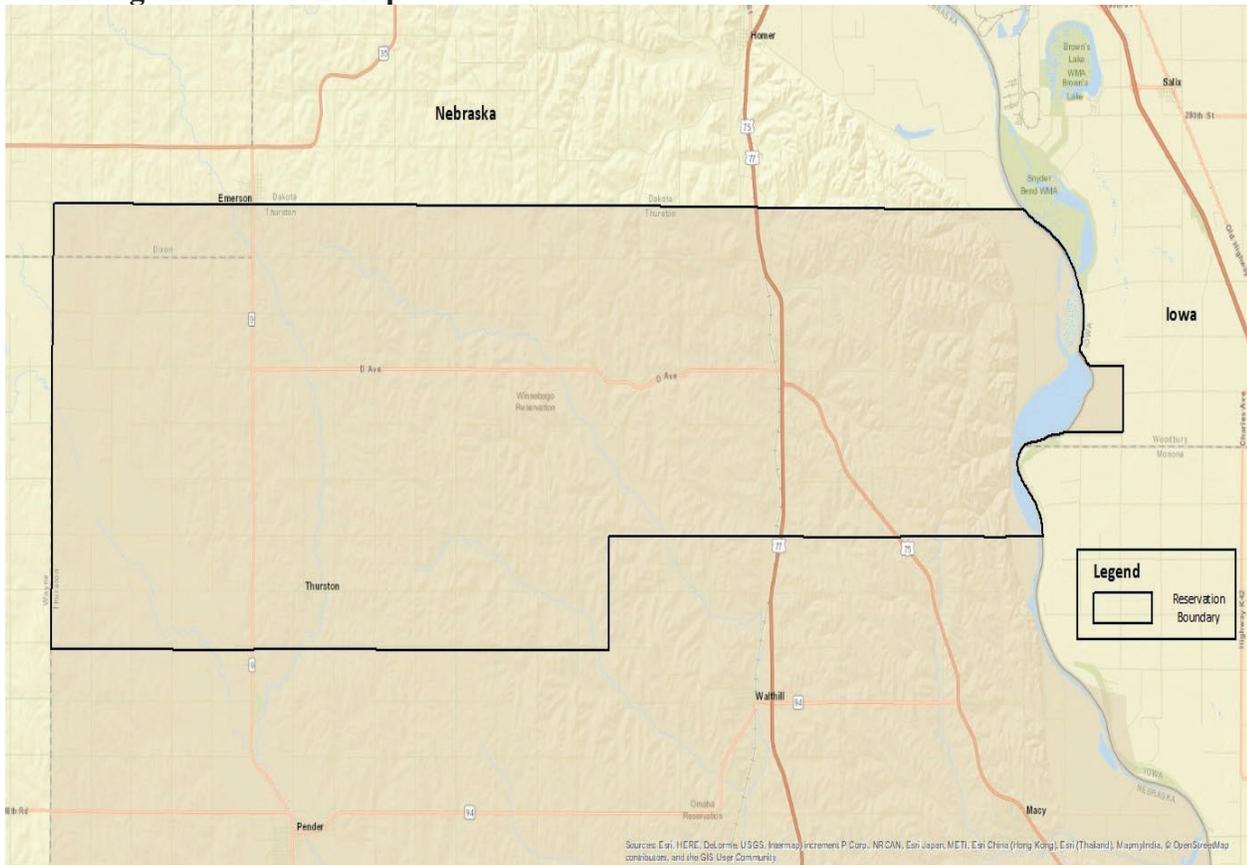
²⁹ <http://www.winnebago-tribe.com/index.php/government/tribal-constitution-bylaws>

Appendix C: Maps of the Winnebago Reservation and Water

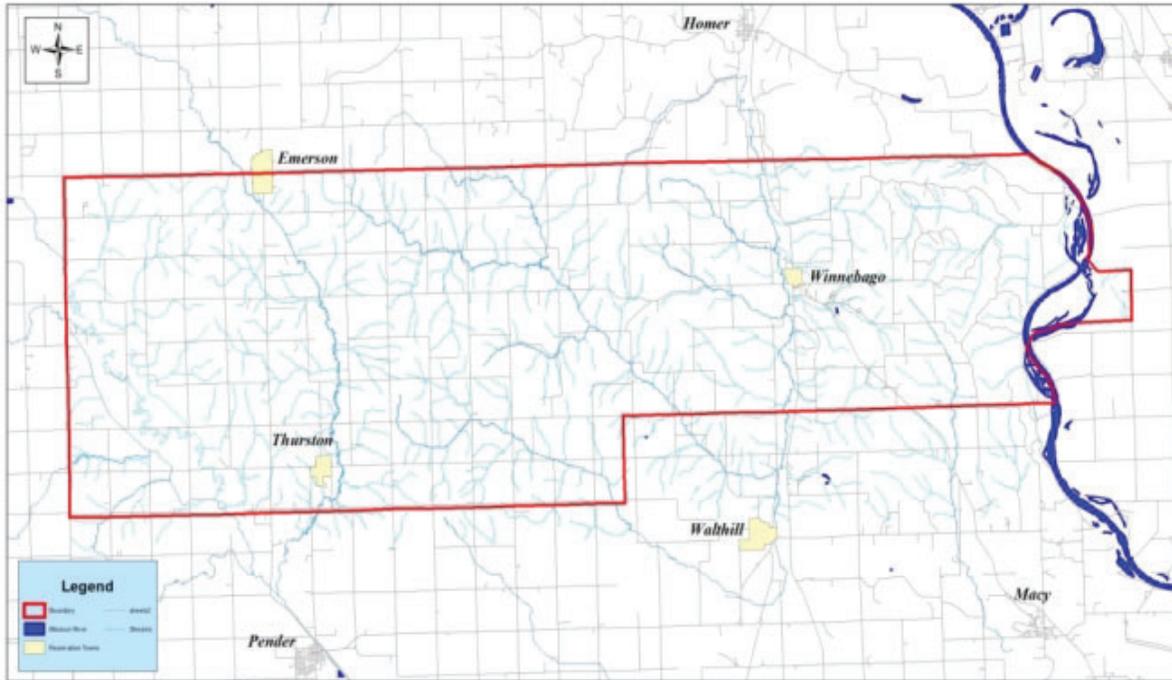
Winnebago Tribe of Nebraska Vicinity Map



Winnebago Reservation Map



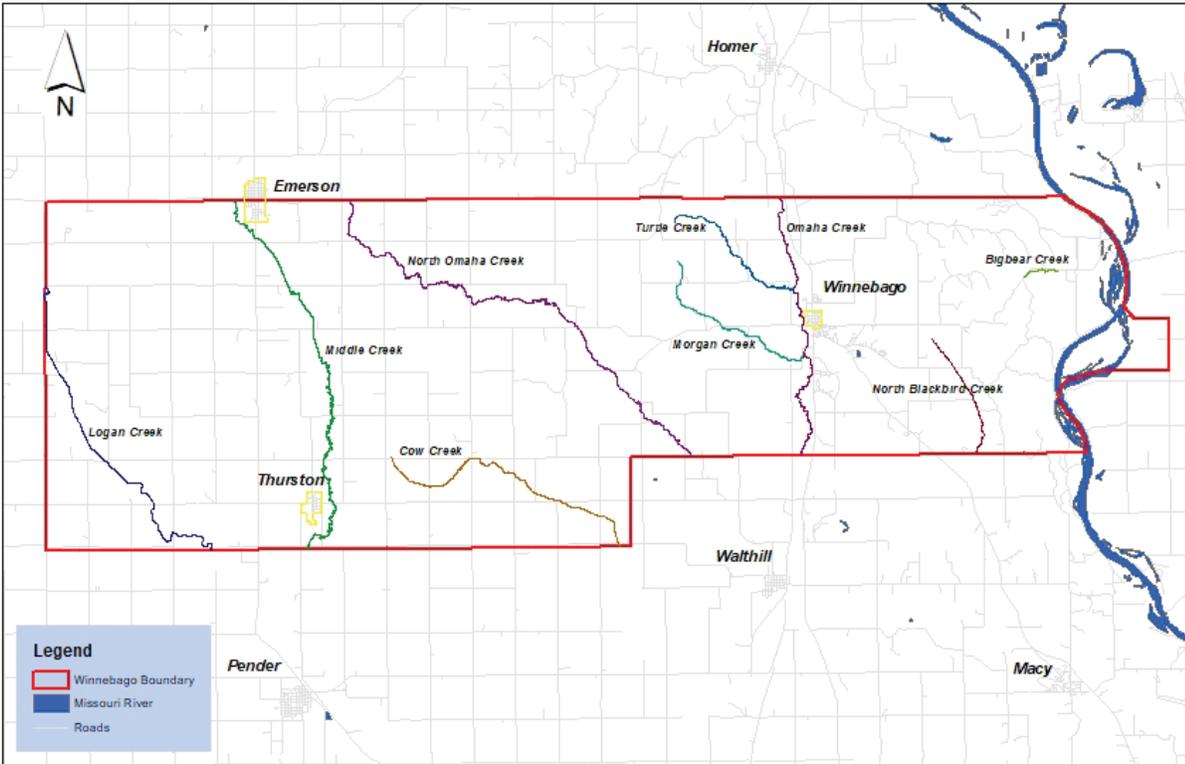
Winnebago Tribe of Nebraska Water Resources



Winnebago Tribe of Nebraska Environmental Protection Department

Prepared by Byron Walker GIS/GPS Specialist For The
Winnebago Tribe of Nebraska, June 15, 2016

Winnebago Tribe of Nebraska Water Resources



Winnebago Tribe of Nebraska Environmental Protection Department

Prepared by Byron Walker GIS / GPS Specialist For The
Winnebago Tribe of Nebraska, August 7, 2019