

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

DECISION DOCUMENT

APPROVAL OF APPLICATION SUBMITTED BY THE
EASTERN SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
FOR TREATMENT IN A SIMILAR MANNER AS A STATE
FOR PURPOSES OF CLEAN AIR ACT
SECTIONS 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A and 184

I. Introduction and Background

This Decision Document provides the basis and supporting information for the United States Environmental Protection Agency (EPA), Region 8's decision to approve the application submitted by the Northern Arapaho and Eastern Shoshone Tribes (Tribes) of the Wind River Indian Reservation (Reservation) for treatment in a similar manner as a state (TAS) pursuant to Clean Air Act (CAA or the Act) section 301(d) (42 U.S.C. § 7601(d)) and implementing regulations for purposes of CAA section 105 (42 U.S.C. § 7405) grant funding, section 505(a)(2) (42 U.S.C. § 7661d(a)(2)) affected state status, and the following other provisions of the CAA for which no separate tribal program is required: sections 107(d)(3) (42 U.S.C. § 7407(d)(3)); 112(r)(7)(B)(iii) (42 U.S.C. § 7412(r)(7)(B)(iii)); 126 (42 U.S.C. § 7426); 169B (42 U.S.C. § 7492); 176A (42 U.S.C. § 7506a); and 184 (42 U.S.C. § 7511c).

The Tribes' application does not request, nor by this decision is the EPA approving, Tribal authority to implement any CAA regulatory programs or to otherwise implement Tribal regulatory authority under the Act. The provisions included in the Tribes' CAA TAS application are generally summarized as follows. CAA § 105 provides that Indian tribes may seek grant funding to support, among other things, air pollution related planning activities. A tribe with CAA § 105 TAS approval may seek a reduced funding match for purposes of section 105 grants. Under CAA § 505(a)(2), an eligible tribe may be treated as an "affected state" for purposes of receiving notice of certain CAA permitting actions. CAA § 505(a)(2) requires a permitting authority to notify all states (or a tribe with "affected state" status) whose air quality may be affected and that are contiguous to the state in which the emission originates, or that are within 50 miles of the source, of certain permit applications or proposed permits. Any such state (or tribe with "affected state" status) has an opportunity to submit written recommendations regarding the issuance of the permit and its terms and conditions. If any part of those recommendations is not accepted by the permitting authority, such authority must notify the state (or tribe with "affected state" status) submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.¹ CAA § 107(d)(3) offers

¹ Several commenters raised concerns that EPA would approve a 50-mile "buffer zone" around the Reservation in which the Tribes would assert CAA regulatory authority. These comments appear related to the Tribes' application to be treated in a similar manner as an "affected state" under CAA section 505(a)(2). This function, however, does not entail the exercise of regulatory authority under the CAA. As noted above, this provision provides eligible Indian tribes with certain notice and comment opportunities on nearby permitting actions that may affect their air quality. Although the permitting authority must explain any failure to accept such recommendations, there is no requirement that the permitting authority modify its action in response to comments from an affected state or eligible tribe occupying that role. Following approval of the Tribes' "affected state" status, as documented in this decision, they will receive

eligible tribes the opportunity to receive certain notices and participate in EPA's determinations regarding the status of the tribes' areas with respect to attainment or nonattainment of the national ambient air quality standards promulgated by EPA. Tribal participation under CAA § 112(r)(7)(B)(iii) relates to risk management plans submitted by stationary sources in an eligible tribe's area and requires that such plans be submitted to the tribe, in addition to EPA. Under CAA § 126, eligible tribes would receive notices in the same manner as affected states of the construction of new or modified major stationary sources and of existing major stationary sources which may have certain cross-boundary impacts. CAA § 126 also includes an opportunity to petition EPA in certain circumstances. Eligibility for purposes of CAA §§ 169B, 176A and 184 relates to the establishment of and participation in interstate air pollution and visibility transport regions and commissions, including participation in the development and submission of recommendations to EPA to address interstate air pollution issues. None of the functions for which the Tribes are seeking TAS eligibility would entail the exercise by the Tribes of regulatory authority under the Act.

CAA § 301(d) authorizes EPA to treat eligible Indian tribes in a similar manner as states and directs EPA to promulgate regulations specifying those provisions of the Act for which TAS is appropriate. Section 301(d)(2) of the Act states such treatment shall be authorized only if –

- (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
- (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
- (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

42 U.S.C. § 7601(d)(2).

Pursuant to this statutory directive, on February 12, 1998, EPA promulgated regulations specifying the provisions of the Act for which it is appropriate to treat

such notices and opportunities to provide comments. They would not, however, exercise any regulatory authority under the Act; nor would they implement any CAA function or program outside the exterior boundaries of the Reservation (or on the lands subject to Section 1 of the 1953 Act which, as explained below, was excluded from this TAS decision at the request of the Tribes).

eligible Indian tribes in a similar manner as states and establishing the procedures for tribes to apply for TAS eligibility and for EPA to review and act on such applications. "Indian Tribes: Air Quality Planning and Management; Final Rule" (Tribal Authority Rule or TAR), 63 Fed. Reg. 7254 (Feb. 12, 1998). Pursuant to the TAR, EPA determined that it was appropriate to treat eligible Indian tribes in a similar manner as states for all provisions of the CAA and implementing regulations, including those applied for by the Tribes, with the exception of a small number of enumerated provisions generally relating to program submission requirements and deadlines that were not appropriate to impose on tribes. 40 C.F.R. §§ 49.3, 49.4.²

Under the TAR, a tribe seeking TAS eligibility submits an application demonstrating that it meets the criteria set forth in CAA § 301(d)(2) and 40 C.F.R. § 49.6. These criteria are:

- (a) the applicant is an Indian tribe recognized by the Secretary of the Interior;
- (b) the Indian tribe has a governing body carrying out substantial governmental duties and functions;
- (c) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
- (d) the Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

40 C.F.R. § 49.6.

The Tribal Authority Rule also sets forth the application requirements for tribes seeking TAS eligibility under the CAA (40 C.F.R. § 49.7), as well as the procedures for EPA's review of a tribe's application. 40 C.F.R. § 49.9. Under the regulations, the EPA Regional Administrator shall decide the jurisdictional scope of the applicant tribe's

² In the TAR, EPA also set forth its interpretation that CAA § 301(d)(2)(B) includes a Congressional delegation of federal authority to tribes approved by EPA to administer CAA regulatory programs in a similar manner as states, over all air resources within the exterior boundaries of the applicant tribe's reservation. 63 Fed. Reg. at 7254-57. This interpretation was based on the language, structure and intent of the statute. EPA explained: "EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land." *Id.* at 7254.

program. 40 C.F.R. § 49.9(e). If the EPA Regional Administrator determines that a tribe meets the requirements of 40 C.F.R. § 49.6 for purposes of a particular CAA provision, the tribe is eligible for TAS with respect to that provision for all areas within the exterior boundaries of the tribe's reservation and any other areas the EPA Regional Administrator determines to be within the tribe's jurisdiction. 40 C.F.R. § 49.9(g).

II. Appropriate Governmental Entity and Public Review

On December 17, 2008, as supplemented on December 23, 2008, the Tribes submitted their *Application For Treatment In A Manner Similar To A State Under the Clean Air Act For Purposes Of Section 105 Grant Program, Affected State Status, And Other Provisions For Which No Separate Tribal Program Is Required*. This is the first TAS application submitted by the Tribes under the CAA.

Under the TAR, the EPA Regional Administrator notifies all appropriate governmental entities, which EPA defines as states, tribes, and other federal entities located contiguous to the tribe applying for eligibility. 40 C.F.R. § 49.9(b); 63 Fed. Reg. at 7267. In addition, EPA provides notice to the public. 65 Fed. Reg. 1322 (Jan. 10, 2000). For applications addressing air resources within the exterior boundaries of a reservation, such as that submitted by the Tribes, EPA's notification specifies the geographic boundaries of the reservation. 40 C.F.R. § 49.9(b)(1). Under the TAR, appropriate governmental entities and the public have 30 days to provide written comments regarding any dispute concerning the boundary of the reservation. 40 C.F.R. § 49.9(c).³ Where a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior. 40 C.F.R. § 49.9(d).

³ Consistent with 40 C.F.R. § 49.9(c), EPA's letters to Appropriate Governmental Entities and notices to the public invited comments specifically on the Reservation boundary description included in the Tribes' TAS application. EPA regulations also state, "[i]n all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases, and extent of any objections." 40 C.F.R. § 49.9(d). Thus, EPA's Decision and attached documents address relevant comments EPA received that are specific to the Reservation boundary description included in the Tribes' application.

Pursuant to these regulations, EPA provided notice of the Tribes' application specifying the geographic boundaries of the Reservation as asserted by the Tribes to the following appropriate governmental entities:⁴

- Governor of the State of Wyoming; with copies to the Wyoming Attorney General and the Wyoming Department of Environmental Quality: Letter dated April 7, 2009
- Indian Health Service, U.S. Department of Health and Human Services: Letter dated April 8, 2009
- U.S. Geological Survey: Letter dated April 8, 2009
- Superintendent, Wind River Agency, Bureau of Indian Affairs, U.S. Department of the Interior: Letter dated April 8, 2009
- Regional Director, Billings Area Office, Bureau of Indian Affairs, U.S. Department of the Interior: Letter dated April 8, 2009
- Acting Field Manager, Bureau of Land Management, U.S. Department of the Interior: Letter dated April 8, 2009
- Bureau of Reclamation, U.S. Department of the Interior: Letter dated April 8, 2009
- Rocky Mountain Region, U.S. Forest Service, U.S. Department of Agriculture: Letter dated April 8, 2009
- Lander Fish & Wildlife Conservation Office, U.S. Fish & Wildlife Service, U.S. Department of the Interior: Letter dated April 8, 2009
- U.S. Department of Housing and Urban Development: Letter dated April 8, 2009

On April 8, 2009, EPA also published similar notice of the application in the LANDER JOURNAL and the RANGER, and on April 9, 2009, in the WIND RIVER NEWS. Pursuant to the TAR, EPA provided a 30-day opportunity for appropriate governmental entities and the public to provide written comments on the Tribes' Reservation boundary assertion.

Prior to the close of the comment period, at the request of the State of Wyoming and others, EPA extended the comment period for an additional 30 days, until June 10,

⁴ EPA also exercised its discretion to provide direct notice of the Tribes' application to the United States Congressional Members from Wyoming.

2009. EPA provided notice of the extended comment period to the following appropriate governmental entities:⁵

- Director, Wyoming Department of Environmental Quality, with copies to the Wyoming Attorney General and the Chief of Staff of the Wyoming Governor's Office: Letter dated May 1, 2009
- Lander Fish & Wildlife Conservation Office, U.S. Fish & Wildlife Service, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- Bureau of Reclamation, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- Indian Health Service, U.S. Department of Health and Human Services: Facsimile transmission dated May 4, 2009
- Regional Director, Billings Area Office, Bureau of Indian Affairs, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- Superintendent, Wind River Agency, Bureau of Indian Affairs, U.S. Department of the Interior: Facsimile transmission dated May 4, 2009
- U.S. Geological Survey: E-mail message dated May 5, 2009
- U.S. Department of Housing and Urban Development: E-mail message dated May 5, 2009
- Rocky Mountain Region, U.S. Forest Service, U.S. Department of Agriculture: E-mail message dated May 5, 2009

EPA also published notice of the extended comment period on May 6, 2009, in the LANDER JOURNAL, the RANGER, and the CASPER STAR-TRIBUNE; and on May 7, 2009, in the THERMOPOLIS RECORD and the WIND RIVER NEWS.

EPA received several comments from appropriate governmental entities and the public concerning the Tribes' assertion regarding the boundaries of the Reservation. Comments were received from the following:

- State of Wyoming Attorney General, June 9, 2009. Supplemental information submitted by Sr. Asst. Attorney General, August 6, 2009, October 16, 2009 and May 27, 2010⁶

⁵ EPA also exercised its discretion to provide direct notice of the extension of the comment period to the United States Congressional Members from Wyoming, as well as to certain other individuals who had expressed an interest in the application.

- Deputy Fremont County & Prosecuting Attorney, June 10, 2009
- Fremont County Commissioners, April 21, 2009
- Mayor, City of Riverton, Wyoming, June 10, 2009
- Member, Wyoming House of Representatives, April 17, 2009
- Member, Wyoming Senate, May 29, 2009
- Executive Director, Wyoming Ag-Business Association, May 11, 2009
- Executive Vice President, Wyoming Farm Bureau Federation, May 8, 2009
- Individual commenter, April 13, 2009
- Individual commenter, April 20, 2009
- Individual commenter, April 27, 2009
- Individual commenter, April 30, 2009
- Individual commenter, May 2, 2009
- Individual commenter, May 4, 2009
- Individual commenter, May 7, 2009

EPA also received the following correspondence from U.S. Senators representing Wyoming:⁷

- U.S. Senator Michael B. Enzi: Letter dated November 13, 2008, transmitting inquiry from Chairman of the Fremont County Commissioners
- U.S. Senator John Barrasso's staff: E-mail dated December 19, 2008, transmitting inquiry from Chairman of the Fremont County Commissioners
- U.S. Senator Michael B. Enzi: Letter dated March 4, 2009, transmitting letter from Fremont County Commissioners to EPA
- U.S. Senator Michael B. Enzi: Letter dated May 4, 2009, transmitting comments from individual commenter

⁶ The State of Wyoming Attorney General's supplements transmit judicial opinions decided subsequent to the close of the extended comment period. Although these supplements were submitted subsequent to the available comment period, EPA has exercised its discretion and accepted the supplemental information for consideration.

⁷ Although certain correspondence from U.S. Senators transmitting inquiries from their constituents was submitted outside of the comment period, EPA has exercised its discretion to consider such correspondence and inquiries in connection with the Agency's action on the Tribes' application.

- U.S. Senator Michael B. Enzi: Letter dated May 5, 2009, transmitting comments from Chairman, Fremont County Commissioners
- U.S. Senator Michael B. Enzi: Letter dated May 6, 2009, transmitting comments from individual commenter
- U.S. Senator Michael B. Enzi: Letter dated May 6, 2009, transmitting comments from individual commenter
- U.S. Senator Michael B. Enzi: Letter dated June, 26, 2009, transmitting comments from Executive Vice President, Wyoming Farm Bureau Federation

Several of the commenters, including the State of Wyoming, disagreed with the Tribes' Reservation boundary description, asserting that a 1905 Congressional Act, 33 Stat. 1016 (1905) (1905 Act) altered and diminished the Reservation boundary. Consistent with established EPA procedures, by letter dated June 23, 2009, EPA informed the Tribes of the comments received in connection with their TAS application. On May 21, 2010, the Tribes submitted detailed responses to the comments. In October 2010, EPA posted on the EPA Region 8 website, relevant portions of the Tribes' TAS application, all public comments received by EPA on the Tribes' Reservation boundary description, as well as the Tribes' response to those comments.

In addition, because EPA was aware of existing disagreements regarding the Reservation boundary, EPA exercised its discretion to consult with the U.S. Department of the Interior (DOI), which has expertise on Indian country issues. By letter dated April 13, 2009, EPA requested an opinion from the DOI Solicitor regarding the Reservation boundary. On October 26, 2011, the Solicitor provided its written opinion concluding that the 1905 Act did not diminish the Wind River Indian Reservation.

On December 4, 2013, the Tribes sent EPA a letter requesting that EPA not address at this time the lands described in Section 1 of a statute enacted in 1953, 67 Stat. 592 (1953) (1953 Act), and stating that the Tribes would notify EPA in writing if and when they decide to request an EPA decision with respect to those lands.

In reaching its decision, EPA carefully considered the Tribes' TAS application, the comments received from appropriate governmental entities and the public and the Tribes' responses to those comments, the opinion of the Solicitor of the Department of

the Interior, as well as other materials, relevant case law, applicable statutory and regulatory provisions, and relevant EPA guidance.

III. Requirements for TAS Approval

As described above, a tribe seeking TAS eligibility must demonstrate that it meets the criteria set forth in CAA § 301(d)(2) and 40 C.F.R. § 49.6. In particular, a tribe must: (1) be an Indian tribe recognized by the Secretary of the Interior; (2) have a governing body carrying out substantial governmental duties and powers; (3) propose to manage and protect air resources within the exterior boundaries of its reservation or other areas within the tribe's jurisdiction; and (4) be reasonably expected, in the EPA Regional Administrator's judgment, to have the capability to exercise such functions in a manner consistent with the terms and purposes of the CAA and applicable regulations.

A. Federal Recognition

Under 40 C.F.R. §§ 49.6(a) and 49.7(a)(1), applicant tribes must demonstrate that they are federally recognized by the Secretary of the Interior. In their CAA TAS application, the Tribes cite to their respective inclusion on the list of federally recognized Indian tribes maintained by the Secretary of the Interior and published periodically in the Federal Register. The Northern Arapaho Tribe and the Eastern Shoshone Tribe are separate federally recognized Tribes as reflected in the current published version of this list. *See* 78 Fed. Reg. 26384, 26385, 26387 (May 6, 2013). The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(1) and the TAS eligibility criterion of 40 C.F.R. § 49.6(a).

B. Substantial Governmental Duties and Powers

Under 40 C.F.R. §§ 49.6(b) and 49.7(a)(2), applicant tribes must demonstrate that they are currently carrying out substantial governmental duties and powers over a defined area. To meet this requirement, tribes may include statements describing the form of the tribal government, the types of governmental functions currently performed by the tribal governing body, and the source of the tribal government's authority to carry out the governmental functions.

The Tribes' TAS application includes a detailed statement describing their governing bodies as well as the governmental duties and powers they currently carry out over a defined area. In particular, the Tribes have described the form of their respective Tribal governments. The governing body of the Northern Arapaho Tribe is

the Northern Arapaho Business Council, which exercises executive and legislative authority, in consultation with the General Council of the Northern Arapaho Tribe, and which has a Chair selected by the Business Council's members. The supreme governing body of the Eastern Shoshone Tribe is its General Council, which has delegated authority to carry out the Shoshone Tribe's business to the Shoshone Business Council, and which has a Chairman selected by the Business Council's members. The Tribes describe that their respective Business Councils meet collectively on management and administration of certain joint matters in joint sessions as the Joint Business Council. The Joint Business Council has enacted laws and established programs to perform activities and deliver services of common benefit to both Tribes and to Reservation residents. Joint programs include: the Wind River Environmental Quality Commission, Tribal Water Engineer, Fish and Game, Tribal Minerals Department, the Wind River Tax Commission, the Tribal Court, the Tribal Employment Rights Office, and the Division of Transportation. The Joint Business Council has also enacted a law and order code that, among other things, establishes a Tribal Court system exercising civil and criminal jurisdiction on the Reservation. The Tribal Court includes a chief judge and three associate judges appointed by the Joint Business Council. In addition, a Tribal Court of Appeals consists of a three-judge panel of the Tribal Court.

The Tribes have described the types of governmental functions currently carried out by the Tribal government. In particular, the Tribes cite to and provide copies of relevant provisions of their jointly-enacted Law and Order Code, which includes provisions pertaining to water, environment, fish and wildlife, zoning, cultural resources management, building codes, taxation, housing, and employment rights. The Tribes also note their establishment of Joint Programs to manage a variety of governmental services and regulatory oversight, including federal programs delegated to the Tribes under section 638 of the Indian Self-Determination Act. The Tribes provide several examples of joint tribal agencies, including: the Wind River Environmental Quality Commission (WREQC), established in 1988, with authority to develop environmental regulations, administer a pollution permit system, assess fees and penalties, and conduct hearings; the Tribal Water Engineer, which administers the Tribes' reserved water rights; the Tribes' Fish and Game Department, which manages hunting, fishing, and gathering on the Reservation; the Wind River Tax Commission, which administers and enforces a severance tax system governing the extraction of Tribal oil and gas resources and other minerals; and the Tribal Court, which administers and enforces the Law and Order Code. The Tribes also note that the Joint Business Council administers a Head Start program, a Division of Transportation which constructs and maintains Reservation roads, a program to distribute federal funds to local school districts, and a Tribal Employment Rights Office, which implements and enforces the Tribes' employment rights ordinance.

The Tribes describe their authority to carry out governmental functions as deriving from each of the Tribe's inherent sovereignty over their members and Reservation lands and waters as recognized, among other sources, in the 1868 Treaty establishing the Reservation.

EPA has reviewed the information provided by the Tribes, which details the form of the Tribal government, the functions their government carries out, and the source of their governmental authority for such functions, and finds that the Tribes have a governing body carrying out substantial duties and powers. The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(2) and the TAS eligibility criterion of 40 C.F.R. § 49.6(b).

C. Functions Pertaining to Air Resources Within the Exterior Boundaries of the Reservation

Under 40 C.F.R. §§ 49.6(c) and 49.7(a)(3), applicant tribes must demonstrate that the functions they will exercise pertain to the management and protection of air resources within the exterior boundaries of their reservations or other areas within their jurisdiction. The Northern Arapaho and Eastern Shoshone Tribes seek TAS eligibility over their Reservation only. Thus, under the TAR, the application must identify with clarity and precision the exterior boundaries of the Reservation, including, for example, a map or a legal description of the area.

The Tribes' application describes the Wind River Indian Reservation as located in Fremont County in west-central Wyoming. Specifically, the application describes the Reservation as including lands and waters reserved under the 1868 Treaty of Fort Bridger, less those areas conveyed by the Tribes under the 1874 Lander Purchase Act and the 1897 Thermopolis Purchase Act, and including certain lands located outside and adjacent to the original boundaries that were added to the Reservation under subsequent legislation in 1940. The Tribes' application describes the Reservation as encompassing approximately 2.2 million acres, of which approximately 1.8 million acres are owned by the Tribes and their members. The Tribes' 2008 submittal included a map depicting the Reservation's boundaries, as well as a detailed statement of legal counsel setting forth the legal basis supporting the Tribes' Reservation boundary assertion. On December 4, 2013, the Tribes sent EPA a letter requesting that EPA not address at this time the lands described in Section 1 of the 1953 Act, and stating that the Tribes would notify EPA in writing if and when they decide to request an EPA decision with respect to those lands.

Several commenters disagreed with the Tribes' Reservation boundary description, asserting that the 1905 Act altered and diminished the Reservation boundaries.⁸ EPA has carefully reviewed the Tribes' application materials, comments received, and other information pertinent to the Tribes' Reservation boundary assertion. As noted above, because EPA was aware of existing disagreements regarding the Reservation boundary, EPA exercised its discretion to consult with the Department of the Interior, which has expertise on Indian country issues. The DOI Solicitor's Opinion, dated October 26, 2011, analyzes the exterior boundaries of the Wind River Indian Reservation, including a detailed analysis of the 1905 Act, and concludes that the Act did not diminish the Wind River Indian Reservation. Based on all pertinent information, including the 2011 DOI Solicitor's Opinion, EPA has prepared a thorough legal analysis of the exterior boundaries of the Wind River Indian Reservation and concludes that the 1905 Act, which opened certain Reservation lands to homesteading, did not diminish the boundaries of the Reservation (Attachment 1). This legal analysis incorporates EPA's responses to comments received pertinent to the 1905 Act's effect on the exterior boundaries of the Reservation.

The Tribes' 2008 submittal included a map of the Reservation, cited the relevant formative treaty and statutes establishing and delineating the Reservation boundaries, and provided their detailed legal analysis supporting the current status and location of those boundaries. EPA has reviewed and considered the Tribes' Reservation boundary description, the map submitted with their application, their legal statement and other supporting information.⁹ These materials are sufficient to satisfy EPA's regulatory

⁸ Certain commenters appear to assert that EPA lacks authority to determine the Reservation's boundaries and that questions regarding the boundary are reserved solely to the courts. EPA disagrees. The CAA TAS regulations expressly require EPA to determine the scope of the applicant tribe's eligibility and, where a TAS application covers a reservation, specifically refer to EPA determinations concerning the reservation's boundaries. *See* 40 C.F.R. §§ 49.9(e), (f), (g). These requirements flow from the CAA's TAS eligibility criterion requiring that the functions to be exercised by the applicant tribe pertain to the management and protection of air resources "within the exterior boundaries of the reservation..." CAA Section 301(d)(2)(B). EPA's implementation of this requirement does not affect the jurisdiction of federal courts to adjudicate issues properly raised for their consideration.

⁹ One commenter asserted that the Tribes failed to provide an adequate description of the exterior boundaries of the Reservation as required by 40 C.F.R. § 49.7, which would allow for meaningful and specific comment on the boundaries. Notably, the commenter did not identify any specific deficiency in the Tribes' Reservation boundary assertion that would affect its ability to comment; and it is also significant that the commenter did, in fact, submit detailed comments addressing the Reservation boundary. Although not necessary to meet the TAS application requirements set forth in the TAR, the Tribes nevertheless responded to this comment and provided additional information and legal descriptions of the lands included within their asserted Reservation boundaries. Tribes' Response to Comments, May 21, 2010, at 92-94.

application requirements and provided a meaningful basis for other parties to comment. The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(3) and the TAS eligibility criterion of 40 C.F.R. § 49.6(c).¹⁰

EPA has concluded (as detailed in Attachment 1 to this Decision Document) that the boundaries of the Reservation encompass and include, subject to the proviso below concerning the 1953 Act, the area set forth in the 1868 Treaty of Fort Bridger, 15 Stat. 673 (1868), less those areas conveyed by the Tribes under the 1874 Lander Purchase Act, 18 Stat. 291 (1874), and the 1897 Thermopolis Purchase Act, 30 Stat. 93 (1897), and including certain lands located outside the original boundaries that were added to the Reservation under subsequent legislation in 1940, 54 Stat. 628 (1940). With regard to the lands subject to Section 1 of the 1953 Act, 67 Stat. 592 (1953), consistent with the Tribes' request that EPA's TAS decision not address the lands described in the 1953 Act at this time, the lands are not included in the geographic scope of approval for this decision. EPA's TAS decision therefore does not address the 1953 Act area.

D. Capability

Under 40 C.F.R. §§ 49.6(d) and 49.7(a)(4), applicant tribes must demonstrate that they are reasonably expected to be capable, in the EPA Regional Administrator's judgment, to carry out the functions they seek to exercise in a manner consistent with the terms and purposes of the CAA and all applicable regulations. To meet this requirement, tribes may include statements describing their previous management experience, the existing environmental or public health programs they administer, the entity(ies) exercising executive, legislative, and judicial functions of the tribal government, the existing or proposed agency that will assume primary responsibility for administering the CAA functions relevant to the application, and the technical and administrative capabilities of the staff to effectively administer the CAA functions at issue.

The Tribes have included in their application a detailed statement of their resources and capabilities relevant to the particular CAA functions they seek to carry out under their application and have addressed each of the factors identified in 40 C.F.R. § 49.7(a)(4)(i)-(v). EPA also notes that the Tribes have previously been approved for TAS for the purpose of grant funding under section 106 (33 U.S.C. § 1256) of the Clean Water Act. The EPA Region 8 Air and Tribal Programs have carefully reviewed

¹⁰ EPA considers this decision a locally applicable final action under CAA § 307(b), 42 U.S.C. § 7607(b). Thus, any petition regarding EPA's TAS decision, including EPA's determination of the Reservation boundary, must be brought in the United States Court of Appeals for the Tenth Circuit.

the Tribes' application and considered EPA's prior experience with the Tribes and have recommended in a Memorandum that the Tribes are reasonably expected to be capable of carrying out the functions they seek to administer. (Attachment 2). In consideration of this Memorandum and the Tribes' application, EPA finds that the Tribes have satisfied this requirement. This analysis and conclusion regarding Tribal capability does not apply to CAA regulatory programs, but applies only to the current TAS eligibility determination, as EPA evaluates capability on a program-by-program basis.¹¹ See 59 Fed. Reg. 43956, 43963 (Aug. 25, 1994). The Tribes have met the application requirements of 40 C.F.R. § 49.7(a)(4) and the TAS eligibility criterion of 40 C.F.R. § 49.6(d).

IV. Conclusion

EPA has determined that the Northern Arapaho and Eastern Shoshone Tribes have met the requirements of CAA § 301(d)(2) and 40 C.F.R. § 49.6 and are therefore approved, effective today, to be treated in a similar manner as a state for purposes of CAA §§ 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A, and 184. EPA's decision also concludes that the boundaries of the Reservation encompass and include, subject to the proviso below concerning the 1953 Act, the area set forth in the 1868 Treaty of Fort Bridger, 15 Stat. 673 (1868), less those areas conveyed by the Tribes under the 1874 Lander Purchase Act, 18 Stat. 291 (1874), and the 1897 Thermopolis Purchase Act, 30 Stat. 93 (1897), and including certain lands located outside the original boundaries that were added to the Reservation under subsequent legislation in 1940, 54 Stat. 628 (1940). With regard to the lands subject to Section 1 of the 1953 Act, 67 Stat. 592 (1953), consistent with the Tribes' request that EPA's TAS decision not address the

¹¹ EPA received comments questioning the Tribes' demonstration that they meet the capability criterion for TAS eligibility. Such comments do not address the Tribes' jurisdictional assertion (*i.e.*, their Reservation boundary description) and thus exceed the scope of permissible comment under the TAR. See 40 C.F.R. §§ 49.9(b)(1), (c), (d). However, EPA notes that several of the comments appear to be based on the mistaken premise that a tribe seeking TAS eligibility under the CAA must demonstrate its capability to perform all functions pertaining to the management of reservation air resources, including the capability to regulate activities affecting such resources. This is not accurate. Applicant tribes need only demonstrate that they meet the TAS eligibility criteria in the CAA and EPA's implementing regulations – including the capability criterion – for those functions for which they are seeking TAS approval in a particular application. See, e.g., 40 C.F.R. § 49.7(a)(4) (applicant tribe's statement of capability addresses the "program for which the tribe is seeking approval"); 59 Fed. Reg. 43956, 43963 (August 25, 1994) (capability involves a "program-by-program inquiry"). In this case, the Tribes seek eligibility for the purposes of CAA grant funding and certain other functions for which no separate tribal program is required. None of the functions for which the Tribes seek TAS entails the exercise of Tribal regulatory authority under the CAA, and it would be inappropriate for EPA to require a demonstration of capability for regulatory functions at this time.

lands described in the 1953 Act at this time, the lands are not included in the geographic scope of approval for this decision. EPA's TAS decision therefore does not address the 1953 Act area. Thus, EPA approves the Tribes' *Application for Treatment in a Manner Similar to a State Under the Clean Air Act for Purposes of Section 105 Grant Program, Affected State Status and Other Provisions for Which No Separate Tribal Program is Required.*

APPROVED



Shaun L. McGrath
Regional Administrator
EPA Region 8

12/6/13

Date