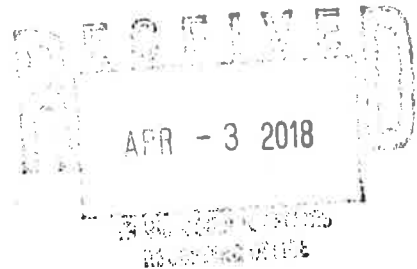




**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region08

MAR 28 2018



REF: 8WP-CWQ

The Honorable Christine Sage, Chairman
Southern Ute Indian Tribe
P.O. Box 737
149 CR 517
Ignacio, Colorado 81137

Re: Approval of the Southern Ute Indian Tribe's Clean Water Act Section 518 Treatment as a State Application for the Water Quality Standards and Certification Programs

Dear Chairman Sage:

I am pleased to inform you that the U. S. Environmental Protection Agency (EPA) approves the Southern Ute Indian Tribe's (Tribe) application to be treated in a similar manner as a state (TAS) pursuant to Clean Water Act (CWA) Section 518 for purposes of the CWA Section 303(c) Water Quality Standards and Section 401 Water Quality Certification programs. A copy of the Decision Document is enclosed for your reference. The EPA has determined that the Tribe meets the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8, and therefore approves the Tribe's TAS application to administer the water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for purposes of certifications under CWA Section 401. This approval action includes all of the currently held trust lands identified within the Southern Ute Indian Reservation boundaries as well as the trust land parcel contiguous to the Reservation identified in the Tribe's application. Consistent with the scope of the application, this approval does not provide any CWA implementation authorities (e.g., permitting, enforcement) beyond the water quality standards and water quality certification programs.

The EPA looks forward to working with the Southern Ute Indian Tribe in the continued development, adoption and review of water quality standards for surface waters on Southern Ute Tribal trust lands. We commend the Tribe for its commitment to the environment that is demonstrated by its existing water quality program and your very capable Environmental Programs Division staff.

The EPA thanks the Southern Ute Indian Tribal Council and the Environmental Programs Division for their efforts in this matter. We recognize the significant work and dedication that was required to develop this application, and the environmental protection the water quality standards and certification programs are designed to provide.

Please contact me if you have any questions or concerns at (303) 312-6599. You can also contact the EPA's most knowledgeable person in this matter, George Parrish, who can be reached at (303) 312-7027, or parrish.george@epa.gov.

Sincerely,



Douglas H. Benevento
Regional Administrator

Enclosure

cc: Lorelyn Hall, Attorney, Southern Ute Indian Tribe
Sam Maynes, Attorney, Southern Ute Indian Tribe
Mark Hutson, Environmental Programs Director, Southern Ute Indian Tribe
John Hickenlooper, Governor, State of Colorado
Susana Martinez, Governor, State of New Mexico
Harold Cuthair, Chairman, Ute Mountain Ute Tribe
William Walker, Regional Director, Bureau of Indian Affairs
Ruth Welch, Director, Colorado State Office, Bureau of Land Management
Kara Chadwick, Supervisor, San Juan National Forest, U. S. Forest Service

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION 8

DECISION DOCUMENT:

APPROVAL OF
THE SOUTHERN UTE INDIAN TRIBE'S
APPLICATION FOR TREATMENT IN A SIMILAR
MANNER AS A STATE FOR THE CLEAN WATER ACT
SECTIONS 303(c) WATER QUALITY STANDARDS
AND 401 CERTIFICATION PROGRAMS

TABLE OF CONTENTS

- I. INTRODUCTION AND INDEX TO THE EPA DECISION**
 - A. INTRODUCTION**
 - B. INDEX TO THE EPA DECISION**
 - 1. Application and Supporting Materials
 - 2. Letters and Related Documents from the EPA
 - 3. Comments Regarding Tribal Assertion of Authority
 - 4. Statutory and Regulatory Provisions
 - 5. Policy Statements
- II. REQUIREMENTS FOR PROGRAM ELIGIBILITY APPROVAL**
 - A. FEDERAL RECOGNITION**
 - B. SUBSTANTIAL GOVERNMENTAL DUTIES AND POWERS**
 - C. JURISDICTION OVER WATERS ON TRUST LANDS**
 - 1. Map or Legal Description
 - 2. Statement Describing Basis for the Tribe's Authority
 - 3. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards
 - 4. The EPA's Finding on the Tribe's Assertion of Jurisdiction
 - D. CAPABILITY**
- III. THE EPA'S TAS DETERMINATION IS A SEPRATE PROCESS FROM AN EPA DECISION ON A TRIBE'S SUBMITTAL OF WATER QUALITY STANDARDS**
- IV. CONCLUSION**
 - Appendix I: Index of Selected Materials Considered By the EPA
 - Appendix II: Response to Comments
 - Appendix III: Maps of the Reservation and Trust Land Surface Waters

I. Introduction and Index to the EPA 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 Southern Ute Indian Tribe (Tribe) for program eligibility for Clean Water Act (CWA) Section 303(c) Water Quality Standards and Section 401 Water Quality Certification, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. CWA Section 518(e)(2) authorizes the EPA to treat a tribe as a state (treatment in a similar manner as a state, or TAS) for water resources "within the borders of an Indian reservation." The Tribe's TAS application included lands that are currently held in trust for the Tribe by the United States and a request to include those trust lands to be acquired by the Tribe in the future ("after-acquired" trust lands). The application identifies currently held trust lands within the boundaries of the Southern Ute Indian Reservation, and also identifies a parcel of currently held trust land contiguous with the Reservation border that the Tribe considers part of its Reservation for purposes of its application.¹ This approval action includes all of the currently held trust lands identified within the Southern Ute Indian Reservation boundaries as well as the trust land parcel contiguous to the Reservation identified in the Tribe's application.² This approval action does not include any land not currently held in trust for the Tribe. Hence this action does not include any "after-acquired" trust land as explained in Section II(C)(3) below. As described in Section III below, this decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of the Tribe's water quality standards is a separate Agency action.

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

¹ See the Southern Ute Indian Tribe's: *Application for a determination of eligibility to be treated in the same manner as a state under section 518(e) of the Clean Water Act and 40 C.F.R. 131.8 for purposes of the water quality standards and certification programs* (March 2, 2015), at p.7.

² For CWA purposes, Indian reservations include trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian Reservation. *See* 56 Fed. Reg. 64876, 64881 (December 12, 1991); *see also, Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1292-94 (D.C. Cir. 2000); 81 FR 30183, 30192 (May 16, 2016).

Section 518(e) of the CWA authorizes the EPA to treat an eligible tribe in a similar manner as a state for certain CWA programs, including Sections 303 and 401. The EPA Water Quality Standards Regulation at 40 C.F.R. § 131.8 establishes the process by which the Agency implements that authority and determines whether to approve a tribal application for program eligibility for purposes of administering Sections 303(c) and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994) (codified at 40 C.F.R. Part 131), and 81 Fed. Reg. 30183 (May 16, 2016).

B. Index to the EPA Decision

The following documents constitute a portion of the record for this Agency decision. Appendix I contains a partial index of selected materials considered by the EPA for this decision.

1. Application and Supporting Materials

The Tribe's application for program eligibility for water quality standards and certifications under Sections 303(c) and 401 of the CWA includes the following letters and related documents from the Tribe and its counsel:

March 2, 2015 Letter from Clement J. Frost, Chairman, Southern Ute Indian Tribe to Shaun McGrath, Regional Administrator, U.S. EPA Region 8, enclosing the Southern Ute Indian Tribe's *Application for a Determination of Eligibility to be Treated in the Same Manner as a State under Section 518(e) of the Clean Water Act and 40 C.F.R. 131.8 for Purposes of the Water Quality Standards and Certification Programs*.

June 13, 2016 Email from Sam W. Maynes, attorney for the Southern Ute Indian Tribe, to Kimberly Varilek, Associate Regional Counsel, U.S. EPA Region 8, regarding Tribal authority; source data for maps depicting trust lands; and requesting action on after-acquired trust land.

June 16, 2016 Letter from Sam W. Maynes, attorney for the Southern Ute Indian Tribe, to Kimberly Varilek, Associate Regional Counsel, U.S. EPA Region 8, regarding after-acquired trust lands.

July 26, 2016 Email from Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, to George Parrish, Environmental Scientist, U.S. EPA Region 8: forwarding email from Dale Vinton, Geodesist and PLSS Data Manager, Bureau of Land Management, U.S. Department of the Interior, regarding data for maps depicting Reservation and trust land boundaries.

November 28, 2016 Letter from Clement J. Frost, Chairman, Southern Ute Indian Tribe to Shaun McGrath, Regional Administrator, U.S. EPA Region 8, regarding

Tribal authority; application coverage; after-acquired trust lands; and request for expedited processing of application.

April 19, 2017 Three emails from Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, to George Parrish, Environmental Scientist, U.S. EPA Region 8, transmitting higher resolution maps.

2. Letters and Related Documents from the EPA

December 28, 2016 Letter from Shaun McGrath, Regional Administrator, U.S. EPA Region 8, to Clement J. Frost, Chairman, Southern Ute Indian Tribe, regarding TAS application completion; and upcoming comment opportunity.
March 16, 2017 Email from George Parrish, Environmental Scientist, U.S. EPA Region 8, to Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, transmitting comments received during the January 5 – February 3, 2017 comment period.

May 19, 2017 Letter from Debra H. Thomas, Acting Regional Administrator, U.S. EPA Region 8, to Clement J. Frost, Chairman, Southern Ute Indian Tribe, regarding receipt of maps, and upcoming comment opportunity.

July 24, 2017 Email from George Parrish, Environmental Scientist, U.S. EPA Region 8, to Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, transmitting comments received during the June 1 – 30, 2017 comment period.

3. Comments Regarding Tribal Assertion of Authority

On January 5, 2017, Darcy O'Connor, Assistant Regional Administrator, Office of Water Protection, U.S. EPA Region 8, sent a letter notifying appropriate governmental entities (AGEs)³ of the substance and basis of the Tribe's assertion of authority contained in its application as provided at 40 C.F.R. § 131.8(c)(2). The letter provided for comments to be submitted on the Tribe's assertion of authority, and also included a copy of all of the materials comprising the entire application. In addition, the EPA posted these same application materials on its website, and the letter provided a link to that site.

Consistent with Agency practice, the EPA also provided an opportunity for local governments and the public to review and comment on the assertion of authority in the Tribe's application. Legal notices were placed in local newspapers⁴ in Durango, Ignacio, and Bayfield, Colorado. The Tribe's application and all materials were made available on the EPA's website and paper copies were made available in the Tribe's Environmental

³ "Appropriate governmental entities" is defined as "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." *See* 56 Fed. Reg. at 64884.

⁴ The same notices were posted on the websites of the Durango Herald, The Drum, and the Pine River Times.

Programs Office and the Durango Public Library; newspaper and website notices were published with details on obtaining more information and how to submit comments; the EPA contacted local media outlets with press release materials that linked to the website materials; and 30 days were provided for comments to be submitted on the assertion of authority contained in the Tribe's application. Additionally, the EPA and the Tribe shared further outreach materials with local print and radio news media; the Tribe held meetings with the State of Colorado; the EPA responded to local newspaper information requests and questions; and the EPA published a Fact Sheet and Frequently Asked Questions on its website.

During the January 5 – February 3, 2017 comment opportunity, several commenters requested additional time to submit comments. Additionally, some commenters expressed concern that the maps provided in the Tribe's application lacked sufficient detail and resolution to clearly identify the location of all Tribal trust lands. In response, on April 19, 2017, the Tribe further supplemented its application with six higher resolution, more detailed maps of the trust lands and waters covered by the Tribe's application. Although EPA's TAS regulations do not require an extended comment opportunity, in response to these commenters' requests, the EPA afforded an additional 30-day comment opportunity from June 1 – 30, 2017.

On June 1, 2017, Darcy O'Connor, Assistant Regional Administrator, Office of Water Protection, U.S. EPA Region 8, sent a letter notifying AGEs of an additional comment opportunity requested by some commenters, and the supplemental maps provided by the Tribe. The letter provided for an additional 30 days for comments to be submitted on the Tribe's assertion of authority, and also included a copy of all of the materials comprising the entire application, including the higher resolution maps. In addition, the EPA posted these same application materials on its website and the letter provided a link to that site.

The EPA also provided an additional 30-day opportunity for local governments and the public to review and comment on the assertion of authority in the Tribe's application. Legal notices were placed in local newspapers in Durango, Ignacio, and Bayfield, Colorado. The Tribe's application and all materials, including the higher resolution maps, were made available on EPA's website and paper copies were made available in the Tribe's Environmental Programs Office and the Durango Public Library; newspaper and website notices were published with details on obtaining more information and how to submit comments; the EPA contacted local media outlets with press release materials that linked to the website materials; and an additional 30 days were provided for comments to be submitted on the assertion of authority contained in the Tribe's application. Further, the EPA contacted all of the commenters from the previous comment opportunity, alerting them to the additional comment opportunity. Additionally, the EPA and the Tribe shared further outreach materials with local print and radio news media; the Tribe held meetings with the State of Colorado; the EPA responded to local newspaper information requests and questions; and the EPA published a Fact Sheet and Frequently Asked Questions on its website.

The tables below identify the stakeholders that were notified of the 30-day comment periods and the list of commenters who submitted comments to the EPA. None of the comments received raised any challenges to or concerns with the Tribe's assertion of authority to administer these CWA programs over trust lands identified in its application. Several of the commenters raised concerns that are outside the scope of this application regarding potential water quality standards conflicts that may arise among the States and the Southern Ute Indian Tribe. Please see Section III below for more information about these comments. Appendix II provides the complete set of comments received and the EPA's responses.

AGEs Notified via Letter/Email of Public Comment Opportunities
John Hickenlooper, Governor of Colorado
Susana Martinez, Governor of New Mexico
Harold Cuthair, Chairman, Ute Mountain Ute Tribe
William Walker, Regional Director, Southwest Regional Office, Bureau of Indian Affairs
Russ Bacon, Acting Forest Supervisor, San Juan National Forest, U.S. Forest Service
Ruth Welch, Director, Colorado State Office, Bureau of Land Management

Other Entities Notified via Letter/Email of Public Comment Opportunities
Senator Cory Gardner, State of Colorado
Senator Michael Bennett, State of Colorado
Representative Scott Tipton, State of Colorado
Senator Tom Udall, State of New Mexico
Senator Martin Heinrich, State of New Mexico
Representative Ben Lujan, State of New Mexico
Annette Quill, Office of the Attorney General, Colorado Department of Law
Dr. Larry Wolk, Executive Director and Chief Medical Officer, Colorado Department of Public Health and Environment
Hector Balderas, Attorney General, State of New Mexico
Cholla Khoury, Office of the Attorney General, State of New Mexico
Shelly Lemon, Surface Water Quality Group, New Mexico Environment Department
Kara Chadwick, Forest Supervisor, San Juan National Forest, U.S. Forest Service
Ruth Welch, Director, Colorado State Office, Bureau of Land Management
Scott Clow, Director, Environmental Programs Department, Ute Mountain Ute Tribe
Christopher Banet, Water Resources Branch Chief, Southwest Regional Office, Bureau of Indian Affairs, U.S. Department of the Interior
Kelly Palmer, Hydrologist, San Juan National Forest, U.S. Forest Service
Connie Clementson, Field Manager, Tres Rios Field Office, Bureau of Land Management
Tanner Nygren, Natural Resource Specialist, Tres Rios Field Office, Bureau of Land Management

AGEs Who Submitted Comments During the Comment Periods
Bruce Yurdin, Director, Water Protection Division, New Mexico Environment Department
Martha Rudolph, Director of Environmental Programs, Colorado Department of Public Health and Environment
William Walker, Regional Director, Southwest Regional Office, Bureau of Indian Affairs, U.S. Department of the Interior
Kara L. Chadwick, Forest Supervisor, San Juan National Forest, U.S. Forest Service

Other Entities Who Submitted Comments During the Comment Periods
Chris S. La May, Town Manager, Town of Bayfield, Colorado
Julie Westendorff, Gwen Lachelt and Brad Blake, La Plata County Colorado Board of County Commissioners
Nancy Agro, Attorney representing water conservancy districts and ditch companies
Geoffrey Craig, Attorney representing Edgemont Ranch and Forest Lakes Metropolitan Districts and ditch companies
Floyd L. Smith, Attorney representing South Durango and Loma Linda Sanitation Districts
Tom Atencio, Lawrence Bartley, Edward Box, Alison deKay, Sandra Maez, Dixie, Melton, Board of Trustees, Town of Ignacio, Colorado
Ron LeBlanc, City Manager, City of Durango, Colorado
Ryan Halonen, Member at Large, Florida River Estates Home Owners Association
Brice F. Lee, President, La Plata Water Conservancy District
Amy N. Huff, Attorney representing Pine River Irrigation District
Amy N. Huff, Attorney representing Citizens Animas Irrigation Company
Amy N. Huff, Attorney representing King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Thompson Epperson Ditch Company; and Pine River Canal Company
Wayne Semler, and Mae Morley, La Plata Archuleta Cattlemen's Association
Austin Rueschhcoff, Attorney representing San Juan Water Conservancy District
Todd Inglee, Colorado Cattlemen's Association
Lorene Bonds, La Plata River and Cherry Creek Ditch Company
Beth Van Vurst, Attorney representing Southwestern Water Conservation District

4. Statutory and Regulatory Provisions

The following are certain statutory and regulatory provisions relevant to the EPA's decision.

- a. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes the EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified eligibility criteria.
- b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations" 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994) (codified at 40 C.F.R.

Part 131) (*see also* 81 Fed. Reg. 30183 (May 16, 2016)), establish the regulatory requirements for a tribe to administer water quality standards and certification programs.

5. Policy Statements

The following are certain guidance documents and policy statements relevant to the Agency's decision.

- a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984.
- b. EPA Memorandum entitled "EPA/State/Tribal Relations," by EPA Administrator Reilly, July 10, 1991.
- c. EPA Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.
- d. EPA Memorandum entitled "Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs," by Marcus Peacock, January 23, 2008.

II. Requirements for Program Eligibility Approval

Under CWA Section 518 and the EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before the EPA can approve a tribe's program eligibility application for water quality standards under Section 303(c) and certification under Section 401. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

The EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an application by an Indian tribe for program eligibility to administer water quality standards. The EPA separately reviews tribal water quality standards under 40 C.F.R. §§ 131.6 and 131.21. A program eligibility approval under 40 C.F.R. § 131.8 does not constitute an approval of such standards. Where the EPA determines that a tribe is eligible to the same

extent as a state for purposes of water quality standards, 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). Tribes authorized to administer the CWA water quality standards program are also “affected states” 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 National Pollutant Discharge Elimination System program.

A. Federal Recognition

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

The Southern Ute Indian Tribe's application includes a citation to the Department of the Interior Bureau of Indian Affairs listing of all federally recognized Indian Tribes in the United States. 80 Fed. Reg. 1942, 1946 (Jan. 14, 2015). (Exhibit 2 in the Tribe's application.) The Southern Ute Indian Tribe is included in the Department of the Interior's current published list of federally recognized tribes. See 82 Fed. Reg. 4915, 4918 (Jan. 17, 2017). Furthermore, as discussed below, the Tribe is exercising governmental authority over the trust lands included in the TAS application. Thus, the EPA finds that the Tribe meets the requirements of 40 C.F.R. §§ 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers

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; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed. As explained below in more detail, the Tribe's application describes the form of its Tribal Government, types of governmental functions currently being performed, and the Tribe's authority to carry out governmental functions currently being performed.

(i) Form of the Tribal Government – Under the Tribe's Constitution, the governing body of the Tribe is the seven-member Southern Ute Indian Tribal Council, comprised of the chairman and six council members. (See Exhibit 3 to the Tribe's application, Constitution of the Southern Ute

Indian Tribe of the Southern Ute Indian Reservation, Colorado.⁵) The Chair and Council members are elected at large by the tribal membership. Elections are held each November, with two of the Council members elected to three-year staggered terms. The Chairman is elected every three years, and may be elected to that position for only three consecutive terms. The Chairman appoints a Vice Chairman, and the Council appoints a Treasurer, both from amongst the Council members. The Tribal Council serves the legislative functions for the Tribe. The Chairman is the chief executive of the Tribe, appoints non-elected personnel (including an Executive Officer), and supervises their employment. The Southern Ute Indian Tribal Court exercises judicial functions.

(ii) Types of Government Functions Performed by the Tribe – The Tribe exercises governmental functions (as enumerated in Article VII of the Tribe’s Constitution) including authority over: land; natural resources; criminal law; domestic relations; creation of a tribal court system; management of financial assets; hunting and fishing; commercial activities; and taxation.⁶ The types of governmental powers currently exercised by the Tribe include:

Legislative Power – The Tribal Council enacted the Southern Ute Indian Tribal Code, which includes most of the civil and criminal law of the Tribe. The application cites Tribal Code Titles including: civil procedures; election; range; wildlife conservation; traffic; gaming; employment rights; animal control; land; severance tax; and professional boxing codes.

Police Powers – Through regulating the conduct of individuals within the Tribe’s jurisdiction, the application states that the Tribe exercises the same type of policing powers as other political entities such as federal and state governments. Examples include criminal law enforcement; regulating civil matters such as domestic relations, disposition of non-trust property, and administering justice through the Tribal Court; and implementing resource management, conservation, and development plans for the Tribe’s natural resources.

Administration of Justice – The Tribe maintains law and order within its jurisdiction. The Justice and Regulatory Department includes the Tribe’s police department, gaming division, natural resources enforcement division, and environmental programs division. The Tribe operates its own court system adjudicating civil and criminal matters within its jurisdiction, employs a tribal prosecutor and public defender, and operates its own detention center.

⁵ Exhibit 3, Constitution of the Southern Ute Indian Tribe of the Southern Ute Indian Reservation, Colorado, adopted by the Tribe and approved November 4, 1936 and amended October 1, 1975 and August 27, 1991. The Tribe’s Constitution generally outlines the rules of membership and governance of the Tribe.

⁶ Application, at p. 5-6, and Exhibit 3.

Taxation – The Tribe exercises the power to levy taxes, by imposing a severance tax on non-renewable energy minerals from tribal trust, tribally-owned fee, and allotted or restricted lands within its jurisdiction.

Intergovernmental Relations – The Tribe collaborates on a government-to-government basis with federal, state, and local government agencies for interests including natural resource development, roads and transportation, wildlife conservation, gaming, taxation, law enforcement and environmental protection.

Other Governmental Powers – The Tribe also cites providing social, health and elder care services, as well as operating a community and fitness center.

The application notes that the Tribe has previously been granted TAS status for: CWA Section 106 (Water Pollution Protection); CWA Section 314 (Clean Lakes); CWA Section 319 (Nonpoint Source Program); and for Clean Air Act (CAA) Section 105. The Tribe also implements the 40 C.F.R. Part 70 Operating Permit Program under the CAA, and the EPA delegated authority to the Southern Ute Indian Tribe to implement and enforce certain provisions of CAA Sections 111 and 112.

(iii) Source of the Tribe's Governmental Authority – The Tribe's application cites three sources for its authority to exercise governmental powers.⁷ The Tribe cites inherent power to govern its territory; the right to regulate hunting, fishing and gathering by tribal members in certain off-Reservation areas as a result of reserved treaty rights; and the authority to regulate as a result of federal statutes delegating authority to the Tribe. The Application also includes a statement by the Tribe's general legal counsel and the Tribe's Legal department describing the basis for the Tribe's assertion of authority over the waters covered by its application.⁸

The EPA finds that the Tribe meets the requirements of 40 C.F.R. §§ 131.8(a)(2) and (b)(2).

C. Jurisdiction Over Waters on Tribal Trust Lands

Under 40 C.F.R. § 131.8(b)(3), a tribe is required to submit a statement of authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the Tribe asserts authority over surface water quality; (ii) a statement by the Tribe's legal counsel (or equivalent official) that describes 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 that support the Tribe's assertion of authority; and (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

⁷ *Ibid* at p. 2 & 6, and Chairman Frost letter received December 9, 2016. The Tribe's government was organized under Section 16 (25 U.S.C. § 476) of the Indian Reorganization Act (codified at 25 U.S.C. §§ 461-479, as amended).

⁸ Application at Section VI pp. 10-13.

1. Map or Legal Description

The Tribe's application seeks TAS eligibility for purposes of administering water quality standards and certifications over lands held in trust for the Tribe and located within the exterior boundaries of the Southern Ute Indian Reservation. The application also identifies a parcel of land held in trust for the Tribe that is contiguous to the Reservation. The application and the maps included therewith describe with clarity and precision the exterior boundaries of the Reservation, as well as the precise boundaries of the currently held tribal trust lands within and contiguous to the Reservation that are covered by the TAS application.⁹ The application includes a legal description of the Reservation and a series of maps for reference purposes.¹⁰ The basis and accuracy of those maps – including the specific descriptions of the tribal trust lands covered by the application – were verified by the U.S. Department of the Interior, Bureau of Land Management.¹¹

The EPA has determined 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.

2. Statement Describing Basis for the Tribe's Authority

The Tribe's original TAS application for the CWA Section 303(c) and 401 programs included a Statement from the Tribal General Counsel that asserted the Tribe's inherent sovereign authority over all trust lands and resources on trust lands, including water resources, as the basis for the Tribe to regulate water quality under the CWA.¹² The Statement described the Tribe's exercise of authority through its Constitution, which established the Tribal Council, over all territory within its jurisdiction. The Tribe's application covered only lands held in trust by the United States for the Tribe. The Statement cites Federal Public Law 98-290, an act approved by Congress in 1984 which clarifies the Reservation boundaries and partially clarifies the exercise of jurisdiction within those boundaries as supporting the Tribe's exercise of inherent authority to regulate water quality in the trust land areas covered by the application.

In 2016, the EPA issued a final interpretive rule clarifying the authority of tribes to administer regulatory programs over their reservations pursuant to CWA Section 518. This clarification is

⁹ Indian reservations include trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian reservation. Many tribes have lands that the United States holds in trust for the tribes, but that have not been formally designated as reservations. Under EPA's longstanding approach, and consistent with relevant judicial precedent, such tribal trust lands are informal reservations and thus have the same status as formal reservations for purposes of the Agency's programs. *See* 56 FR at 64881; 81 FR at 30192; 63 FR at 7257–58; APS, 211 F.3d at 1292–94.

¹⁰ Application at Section IV at p. 7-8, and Section V at p. 8-9 (and Exhibit 1 Maps of Reservation Water Resources over Which the Tribe Asserts Authority), and supplemental maps provided April 19, 2017.

¹¹ *See* July 26, 2016 email from Dale Vinton, Geodesist, U.S. DOI, BLM, concurring the Tribe's maps depicting the external and trust lands boundaries are "based on the most recent and best available Public Land Survey System (PLSS) data".

¹² *See* Letter to Shaun McGrath, Regional Administrator, from Sam Maynes and Lorelyn Hall, dated March 2, 2015.

described in EPA's *Revised Interpretation of Clean Water Act Tribal Provision*¹³ ("Interpretive Rule"), which construes Section 518 as an express congressional delegation of civil regulatory authority to eligible tribes over their reservations. This reinterpretation of Section 518 eliminates the need for applicant tribes to demonstrate their inherent authority to regulate reservation waters under the CWA. Instead, tribes can rely on the congressional delegation of authority as the source of their authority to regulate reservation waters under the CWA.¹⁴ In light of the congressional delegation, 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.¹⁵ In the Interpretive Rule, the EPA also recognized that there may be rare instances where special circumstances limit or preclude a particular tribe's ability to accept or effectuate the congressional delegation of authority over its reservation.¹⁶ Such special circumstance could arise, for instance, under a separate federal statute establishing unique jurisdictional arrangements for a specific state or reservation, or under the provisions of particular treaties or tribal constitutions that may limit a tribe's ability to exercise relevant authority.¹⁷

By letter dated November 28, 2016, the Tribe supplemented its Application to rely on the congressional delegation of authority in CWA section 518 in addition to its inherent authority presented in its original Application. The EPA received no comments challenging this assertion of the Tribe's authority to regulate water quality for any of the trust land areas that are covered by the Application and is aware of no impediment limiting the Tribe's ability to effectuate the congressionally delegated authority over such trust lands. The EPA has concluded that the Tribe can rely on the congressional delegation of authority 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's descriptive statement of authority in its application for TAS approval should also identify the surface waters for which it proposes to establish water quality standards. See 40 C.F.R. § 131.8(b)(3)(iii).

In its Application, the Southern Ute Indian Tribe has identified the surface waters on currently held trust lands for which it is proposing to establish water quality standards and hence seek TAS approval. In particular, the Tribe asserts authority, and this decision approves the Tribe's TAS eligibility, over surface water resources located on lands that are currently held in trust by the United States for the benefit of the Tribe, to the extent those surface water resources constitute "navigable waters" under the Clean Water Act Section 502(7).¹⁸ The locations and boundaries of those tribal trust lands are depicted in the maps included in the Tribe's

¹³ 81 Fed. Reg. 30183 (May 16, 2016).

¹⁴ *Id.* at 30190, 30194.

¹⁵ *Id.* at 30194.

¹⁶ *Id.* at 30192-193.

¹⁷ *Id.*

¹⁸ Application at p. 8.

application. Some of the key waters identified by the maps included in this approval are the: La Plata; Animas; Los Pinos; Piedra; Navajo; and San Juan Rivers. The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

The Tribe also clarified by its November 28, 2016 supplemental letter to the EPA, that its application for TAS also included a request for TAS to apply to “after-acquired trust lands” (those to be acquired at a future date). The EPA appreciates the Tribe’s interest in expediency and efficiency in addressing program authority over the Southern Ute Indian Tribe’s trust lands (both present and future trust lands). However, because the TAS application must identify the specific area over which a tribe seeks program eligibility, the EPA does not have sufficient information to approve TAS authority for surface waters on trust lands not currently identified in this application. As required by the TAS regulation (40 C.F.R. § 131.8), any lands transferred into trust status for the benefit of the Tribe in the future would require a supplemental TAS application from the Tribe, and a separate Agency action for such lands, to be covered under the Tribe’s CWA regulatory authorities. The process for a supplemental application to include lands taken into trust for the Tribe at a future date would also include appropriate governmental and public notification and participation to help ensure that, in the unlikely event jurisdictional issues exist regarding such future trust lands, such issues are raised to the EPA for proper consideration and decision. Any public notification in the future would be limited to comments on the assertion of authority over the future acquired trust lands. While the Agency is required to consider all appropriate comments received during that process, the EPA does not at this time anticipate any jurisdictional issues arising in connection with a subsequent Tribal assertion of authority over clearly defined lands taken into trust at a future date.

4. The EPA’s Finding on the Tribe’s Assertion of Jurisdiction

Based on the information included in the Tribe’s Application as discussed above, the EPA finds that the Southern Ute Indian Tribe meets the requirements in 40 C.F.R. § 131.8(a)(3) and (b)(3) for surface waters on currently held trust lands.

D. Capability

To demonstrate that a tribe has the capability to administer an effective water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for

establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical capabilities. 40 C.F.R. § 131.8(b)(4)(i)-(v).

40 C.F.R. § 131.8(b)(4) *A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program.*

The Tribe's application includes a narrative statement describing the Tribe's capability consistent with the CWA water quality standards and certification programs for which they have applied, as described below in more detail.

40 C.F.R. § 131.8(b)(4)(i) *A description of the Indian Tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a).*

The application provides information describing the Tribe's previous administrative and management experience with federal programs and specific environmental programs. The application notes many years of experience managing and implementing multiple tribal and federal programs, including programs contracted under the Indian Self-Determination and Education Assistance Act (25 U.S.C. §450 et seq.).¹⁹ The Executive, Legislative and Judicial branches of Tribal Government responsible for administering and implementing these programs are outlined in the application. The Tribe's application cites experience managing programs for social services, law enforcement and detention facilities, tribal courts, highway planning, Indian child welfare, education assistance, housing assistance, water and sewer improvements, emergency preparedness and response, dam safety, agricultural and range management, water resources management, forestry, wildlife management, Ute language preservation, and preventive and rehabilitative health services. Environmental programs administered and managed by the Tribe include: water quality, air quality, a General Assistance Program, and Environmental Compliance / Brownfields.

40 C.F.R. § 131.8(b)(4)(ii) *A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations.*

The application provides information on the Tribe's environmental programs, focusing on those managed by the Environmental Programs Division, the tribal governing body that will be

¹⁹ *Ibid*, Section VII at p. 14-20.

responsible for administering the CWA water quality standards and certification programs. The application highlights four programs within the Environmental Programs Division.²⁰

Water Quality Program – The Tribe’s Water Quality Program was established in 1990. It is primarily funded through CWA Section 106 Water Pollution Protection, Section 104(b)(3) Research and Training, and Section 319 Nonpoint Source Pollution Management grants. The Tribe’s CWA Section 106 Water Pollution Protection grant has been in place since 1992, along with the infrastructure and technical expertise for Reservation-wide water quality monitoring, assessment, inspection, and analysis. The CWA Section 319 Nonpoint Source Pollution Management grant has been funded since 1998, and was used to develop nonpoint source pollution control strategies and practices, and for specific restoration projects. The Tribe received a CWA Section 104(b)(3) grant from 2003-2007, used to develop a wetlands monitoring, assessment and analysis program. Notable accomplishments by the Water Quality Program include the 1996 Tribal Council-adoption of the Tribe’s water quality standards; nutrient and sediment loading assessments from agricultural activities, leading to studies on nutrient enrichment and draft water quality standards for nutrients; implementation of agricultural irrigation improvement projects; stream restoration projects; operating a National Environmental Information Exchange Network known as the Ambient Water Quality Management System (AWQMS) for all EPA Region 8 tribes; residential drinking well water testing for tribal members; and numerous presentations and outreach activities.

Air Quality Program – The Tribe receives EPA Clean Air Act Sections 103 and 105 grants, which fund operating two air monitoring stations. The Air Quality Program implements an intergovernmental agreement between the Tribe and the State of Colorado (via the Southern Ute Indian Tribe / State of Colorado Environmental Commission), and a Reservation Air Code that includes the regulations of the Part 70 operating permit program.

General Assistance Program – The Tribe’s GAP program helps build capacity and management capability for environmental programs through recycling, pollution prevention activities, radon monitoring and other indoor air quality issues, hazardous waste collection and disposal, and other outreach activities.

Environmental Compliance / Brownfields Program – The Tribal Response Program was developed in 2002 to assist monitoring oil and gas activities, and to ensure compliance with environmental laws. This includes a Brownfields program working to clean up dump sites and hazardous waste sites.

The Tribe’s application also describes a number of public health programs administered by the Tribe, and experience managing tribally-funded programs and business enterprises. The Southern Ute Health Services Division provides a number of services to the tribal community, including in-home care of elderly and handicapped tribal members, and health care transportation services. The Tribe also manages the Southern Ute Indian Health Clinic, and a health benefits program. The Tribe also cites years of experience managing tribally-funded programs and on and off-Reservation business enterprises. This includes the Tribe’s Energy

²⁰ Application at Section VII, pp. 14-20.

Department overseeing gas exploration, development and production. The Lands Division maintains records concerning surface use, land ownership, and lease agreements.

131.8(b)(4)(iii) *A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government.*

As discussed above, the application describes the Southern Ute Indian Tribe's governmental structure, with specific information on the executive, legislative, and judicial branches of the Tribal government.

131.8(b)(4)(iv) *A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards.*

The application's description of the tribal government system includes specific information on the Environmental Programs Division, the existing tribal government agency that will be responsible for administering the water quality standards and certification programs.²¹ The Tribe's application includes Exhibit 5, a Tribal Council resolution²² identifying the Environmental Programs Division as the responsible governmental entity for preparing and revising CWA Section 303(c) water quality standards, for review and approval by the Tribal Council, and then for reviewing and implementing the Tribal Council-approved water quality standards. The Environmental Programs Division is further identified as the responsible governmental entity for conducting CWA Section 401 water quality certifications. Within the Environmental Programs Division, the Water Quality Program will be primarily responsible for the Water Quality Standards and Certification Programs routine functions.

131.8(b)(4)(v) *A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.*

The application provides a description of the technical and administrative capabilities of the Environmental Programs Division staff to administer and manage effective water quality standards and certification programs. The Water Quality Program, within the Tribe's Environmental Programs Division, will be responsible for establishing, reviewing, implementing and revising the Tribe's CWA Section 303(c) water quality standards, subject to the approval of the Southern Ute Indian Tribal Council; and will be responsible for conducting water quality certifications under CWA Section 401 pursuant to procedures established by the Southern Ute Indian Tribal Council. The Environmental Programs

²¹ *Ibid*, Section VII, E., at p. 18-19.

²² Application, Exhibit 5, Tribal Resolution No. 2015-15, Resolution of the Council of the Southern Ute Indian Tribe, February, 17, 2015.

Division was formed in 1991 to administer environmental protection programs, and has been staffed and operational since that date.

In addition to providing detailed information of the overall experience, education and general qualifications of the Environmental Programs Division staff, the application includes resumes for the staff,²³ which are relevant to EPA's assessment of technical capability and experience. Further, the Environmental Programs Division staff worked with numerous tribal government departments, and neighboring jurisdictions (i.e., the States of Colorado and New Mexico, and the Ute Mountain Ute Tribe) to revise and update its water quality standards. The Environmental Programs Division currently administers and manages those tribally-adopted water quality standards, working with a variety of tribal departments, stakeholders and interested parties.

Based on the information provided by the Tribe that describes its capability to administer an effective water quality standards and certification program, the EPA finds that the Southern Ute Indian Tribe meets the requirements in 40 C.F.R. § 131.8(a)(4) and (b)(4).

III. EPA'S TAS Determination is a Separate Process from an EPA Decision on a Tribe's Submittal of Water Quality Standards

As described above, under EPA's TAS regulations, the EPA provides certain notices and an opportunity to comment on an applicant tribe's assertion of authority to regulate reservation water quality. Any comments addressing the substance of actual water quality standards that an eligible tribe may develop and submit to the EPA in the future for review under CWA section 303(c) are beyond the scope of the TAS process. However, the EPA notes that several commenters have raised concerns about potential water quality standards conflicts that may arise among the States of Colorado and New Mexico and the Southern Ute Indian Tribe. The EPA reiterates here that this TAS decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of new or revised water quality standards is a separate Agency action under the CWA, distinct from the EPA's decision on the Tribe's TAS application for eligibility to administer CWA Sections 303(c) and 401 program authority on trust lands. Under the CWA, a tribe must first be approved for TAS before the EPA can review a tribe's submitted water quality standards and take action under CWA Section 303(c). If the EPA approves a tribe's water quality standards, those standards then become federally-applicable water quality standards for CWA purposes over the waters within the scope of the TAS approval. The EPA notes that any water quality standards adopted by the Tribe and submitted to the EPA for action under the CWA would need to satisfy all CWA and regulatory requirements, including requirements for public involvement in the adoption process. These requirements will ensure an appropriate opportunity for interested entities to provide input on the Tribe's proposed water quality standards, and any concerns regarding the standards being proposed by the Tribe would be appropriately raised and addressed as part of that process.

The EPA also notes that Section 518(e) of the CWA addresses the possibility that disputes may arise between a state and an eligible Indian tribe as a result of differing federally-approved water quality standards on shared water bodies. This provision directs the EPA to promulgate

²³ *Ibid*, Exhibit 6, Resumes of Water Quality Staff.

regulations providing a mechanism for resolving any unreasonable consequences that may arise as a result of differing state and tribal water quality standards. This mechanism must provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. EPA has promulgated such regulations at 40 C.F.R. § 131.7, which authorize the Regional Administrator to attempt to resolve (and provide a detailed process for resolving) such disputes between a state and a tribe with TAS approval in certain circumstances.²⁴

It is the EPA's understanding that the Tribe has participated in discussions with the State of Colorado regarding the adoption of water quality standards. The Region supports these efforts and encourages the continuation of Tribal discussions with Colorado as well as other interested stakeholders. The EPA encourages an inclusive discussion among all concerned entities in the area to help promote cooperative approaches to implementation of CWA programs.

IV. Conclusion

The EPA determines that the Southern Ute Indian Tribe of the Southern Ute Indian Reservation in Colorado meets the requirements of CWA Section 518(e) and 40 C.F.R. § 131.8, and therefore approves the Tribe's application for program eligibility to administer the water quality standards program pursuant to CWA Sections 518(e) and 303(c). Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of issuing certifications under CWA Section 401.

This approval includes all of the currently held trust lands identified within the Southern Ute Indian Reservation boundaries as well as the trust land parcel contiguous to the Reservation identified in the Tribe's application. This approval does not include any land not currently held in trust for the Tribe. Hence this approval does not include any "after-acquired" trust land as explained in Section II(C)(3) above. Further, as described in Section III above, this decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of the Tribe's water quality standards is a separate Agency action.



Douglas H. Benevento
Regional Administrator

March 28, 2018
Date

²⁴ Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the Regional Administrator shall attempt to resolve such disputes where: (1) the difference in water quality standards results in unreasonable consequences; (2) the dispute is between a State and a Tribe with TAS approval; (3) a reasonable effort to resolve the dispute without EPA involvement has been made; (4) the requested relief is consistent with the provisions of the CWA and other relevant law; (5) the differing State and Tribal water quality standards have been adopted by the State and Tribe and approved by EPA; and (6) a valid written request has been submitted by either the Tribe or the State. 40 C.F.R. § 131.7.

**Appendix I: INDEX OF SELECTED MATERIALS
CONSIDERED BY THE EPA**

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

1. Application and Supporting Materials

March 2, 2015 Letter from Clement J. Frost, Chairman, Southern Ute Indian Tribe to Shaun McGrath, Regional Administrator, U.S. EPA Region 8, enclosing the Southern Ute Indian Tribe's *Application for a Determination of Eligibility to be Treated in the Same Manner as a State under Section 518(e) of the Clean Water Act and 40 C.F.R. 131.8 for Purposes of the Water Quality Standards and Certification Programs*. The enclosure included the Application above, and the following:

- Exhibit 1. Maps of Reservation and Water Resources over which Tribe Asserts Authority;
- Exhibit 2. Department of the Interior List of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs – 80 Fed. Reg. 1942, 1946 (January 14, 2015);
- Exhibit 3. Constitution of the Southern Ute Indian Tribe of the Southern Ute Indian Reservation;
- Exhibit 4. Act of May 21, 1984, Pub.L. No. 98-290, 98 Stat. 201, 202;
- Exhibit 5. RESOLUTION NO. 2015-15 February 17, 2015;
- Exhibit 6. Resumes of Water Quality Program Staff.

June 13, 2016 Email from Sam W. Maynes, attorney for the Southern Ute Indian Tribe, to Kimberly Varilek, Associate Regional Counsel, U.S. EPA Region 8, regarding Tribal authority; maps depicting trust lands; and requesting action on after-acquired trust lands.

June 16, 2016 Letter from Sam W. Maynes, attorney for the Southern Ute Indian Tribe, to Kimberly Varilek, Associate Regional Counsel, U.S. EPA Region 8, regarding after-acquired trust lands.

July 26, 2016 Email from Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, to George Parrish, Environmental Scientist, U.S. EPA Region 8: forwarding email from Dale Vinton, Geodesist and PLSS Data Manager, Bureau of Land Management, U.S. Department of the Interior, regarding data for maps depicting Reservation and trust land boundaries.

November 28, 2016 Letter from Clement J. Frost, Chairman, Southern Ute Indian Tribe to Shaun McGrath, Regional Administrator, U.S. EPA Region 8, regarding Tribal authority; application coverage; after-acquired trust lands; and request for expedited processing of application.

April 19, 2017 Three emails from Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, to George Parrish, Environmental Scientist, U.S. EPA Region 8, transmitting higher resolution maps.

2. Letters and Related Documents from the EPA

December 28, 2016 Letter from Shaun McGrath, Regional Administrator, U.S. EPA Region 8, to Clement J. Frost, Chairman, Southern Ute Indian Tribe, regarding TAS application completion; and upcoming comment opportunity.

March 16, 2017 Email from George Parrish, Environmental Scientist, U.S. EPA Region 8, to Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, transmitting comments received during the January 5 – February 3, 2017 comment opportunity.

May 19, 2017 Letter from Debra H. Thomas, Acting Regional Administrator, U.S. EPA Region 8, to Clement J. Frost, Chairman, Southern Ute Indian Tribe, regarding receipt of maps, and upcoming comment opportunity.

July 24, 2017 Email from George Parrish, Environmental Scientist, U.S. EPA Region 8, to Curtis Hartenstine, Water Quality Program Manager, Southern Ute Indian Tribe, transmitting comments received during the June 1 – 30, 2017 comment period.

3. Comments Process Regarding Tribal Authority

On January 5, 2017, Darcy O'Connor, Assistant Regional Administrator, Office of Water Protection, U.S. EPA Region 8, sent a letter notifying appropriate governmental entities (AGEs)¹ of the substance and basis of the Tribe's assertion of authority contained in its application as provided at 40 C.F.R. § 131.8(c)(2). It was sent to:

- John Hickenlooper, Governor of Colorado, 136 State Capitol Building, Denver, CO 80203
- Susana Martinez, Governor of New Mexico, 490 Old Santa Fe Trail, Room 400, Santa Fe, NM 87501
- Harold Cuthair, Chairman, Ute Mountain Ute Tribe, P.O. Box 248, Towaoc, CO 81334
- William Walker, Regional Director, Southwest Regional Office, Bureau of Indian Affairs, 1001 Indian School Road NW, Albuquerque, NM 87104
- Russ Bacon, Acting Forest Supervisor, San Juan National Forest, U.S. Forest Service, 15 Burnett Court, Durango, CO 81301
- Ruth Welch, Director, Colorado State Office, Bureau of Land Management, 2859 Youngfield Street, Lakewood, CO 80215

Courtesy copies of the letter were sent to:

- Annette Quill, Office of the Attorney General, Colorado Department of Law, Ralph L. Carr Judicial Building, 1300 Broadway, 10th Floor, Denver, CO 80203
- Dr. Larry Wolk, Executive Director and Chief Medical Officer, Colorado Department of Public Health and Environment, 4300 Cherry Creek Drive South, Denver, CO 80246
- Hector Balderas, Attorney General, P.O. Drawer 1508, Santa Fe, NM 87504-1508

¹ "Appropriate governmental entities" is defined as "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." See 56 Fed. Reg. at 64884.

- Shelly Lemon, Surface Water Quality Group, New Mexico Environment Department, Harold Runnels Building, Room 2050, 1190 Saint Francis Drive, Santa Fe, NM 87505
- Scott Clow, Director, Environmental Programs Department, P.O. Box 448, Towaoc, CO 81334
- Christopher Banet, Water Resources Branch Chief, Southwest Regional Office, 1001 Indian School Road, NW, Albuquerque, NM 87104
- Kelly Palmer, Hydrologist, San Juan National Forest, U.S. Forest Service, 15 Burnett Court, Durango, CO 81301
- Connie Clementson, Field Manager, Tres Rios Field Office, 29211 Highway 184, Dolores, CO 81323
- Tanner Nygren, Natural Resource Specialist, Tres Rios Field Office, 29211 Highway 184, Dolores, CO 81323

Additionally, courtesy copies of the letter were sent to:

- Senator Cory Gardner, State of Colorado
- Senator Michael Bennett, State of Colorado
- Representative Scott Tipton, State of Colorado
- Senator Tom Udall, State of New Mexico
- Senator. Martin Heinrich, State of New Mexico
- Representative Ben Lujan, State of New Mexico

On June 1, 2017, Darcy O'Connor, Assistant Regional Administrator, Office of Water Protection, U.S. EPA Region 8, sent a letter notifying AGEs of an additional comment opportunity and the supplemental maps provided by the Tribe. The letters were sent to the same addressee² and courtesy copy lists noted above.

² The June 1, 2017 letter sent to the U.S. Forest Service was addressed to Kara Chadwick, the new Forest Supervisor for the San Juan National Forest.

The tables below identify the list of commenters who submitted comments to the EPA.

AGEs Who Submitted Comments During the Comment Periods
Bruce Yurdin, Director, Water Protection Division, New Mexico Environment Department
Martha Rudolph, Director of Environmental Programs, Colorado Department of Public Health and Environment
William Walker, Regional Director, Southwest Regional Office, Bureau of Indian Affairs, U.S. Department of the Interior
Kara L. Chadwick, Forest Supervisor, San Juan National Forest, U.S. Forest Service

Other Entities Who Submitted Comments During the Comment Periods
Chris S. La May, Town Manager, Town of Bayfield, Colorado
Julie Westendorff, Gwen Lachelt and Brad Blake, La Plata County Colorado Board of County Commissioners
Nancy Agro, Attorney representing water conservancy districts and ditch companies
Geoffrey Craig, Attorney representing Edgemont Ranch and Forest Lakes Metropolitan Districts and ditch companies
Floyd L. Smith, Attorney representing South Durango and Loma Linda Sanitation Districts
Tom Atencio, Lawrence Bartley, Edward Box, Alison deKay, Sandra Maez, Dixie, Melton, Board of Trustees, Town of Ignacio, Colorado
Ron LeBlanc, City Manager, City of Durango, Colorado
Ryan Halonen, Member at Large, Florida River Estates Home Owners Association
Brice F. Lee, President, La Plata Water Conservancy District
Amy N. Huff, Attorney representing Pine River Irrigation District
Amy N. Huff, Attorney representing Citizens Animas Irrigation Company
Amy N. Huff, Attorney representing King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Thompson Epperson Ditch Company; and Pine River Canal Company
Wayne Semler, and Mae Morley, La Plata Archuleta Cattlemen's Association
Austin Rueschhcoff, Attorney representing San Juan Water Conservancy District
Todd Inglee, Colorado Cattlemen's Association
Lorene Bonds, La Plata River and Cherry Creek Ditch Company
Beth Van Vurst, Attorney representing Southwestern Water Conservation District

4. Statutory and Regulatory Provisions

The following are certain statutory and regulatory provisions relevant to the EPA's decision.

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

"Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations" 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59

Fed. Reg. 64339 (December 14, 1994) (codified at 40 C.F.R. Part 131) (*see also* 81 Fed. Reg. 30183 (May 16, 2016)), establish the regulatory requirements for a tribe to administer water quality standards and certification programs.

5. Policy Statements

The following are certain guidance documents and policy statements relevant to the Agency's decision.

- a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984.
- b. EPA Memorandum entitled "EPA/State/Tribal Relations," by EPA Administrator Reilly, July 10, 1991.
- c. EPA Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," by Robert Perciasepe and Jonathan Cannon, March 19, 1998.
- d. EPA Memorandum entitled "Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs," by Marcus Peacock, January 23, 2008.

Appendix II: Response to Comments

APPROVAL OF THE SOUTHERN UTE INDIAN TRIBE'S APPLICATION FOR TREATMENT IN A SIMILAR MANNER AS A STATE FOR THE CLEAN WATER ACT SECTIONS 303(c) WATER QUALITY STANDARDS AND 401 CERTIFICATION PROGRAMS

Introduction

On March 2, 2015, the Southern Ute Indian Tribe (SUIT, or Tribe) applied for program eligibility, or Treatment in a similar manner As a State (TAS) under § 518 of the Clean Water Act (CWA), to administer water quality standards and water quality certification programs under the CWA §§ 303(c) and 401. In accordance with U.S. Environmental Protection Agency (EPA or Agency) regulations at 40 C.F.R. § 131.8(c)(2), (3), the Agency notified appropriate governmental entities¹ of the Tribe's application and provided an opportunity to comment on "the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters." Consistent with Agency practice, the EPA also provided an opportunity for local governments and the public to review and comment on the assertion of authority in the Tribe's application. Two separate 30-day comment opportunities were provided during January 5 – February 3, 2017, and June 1 – 30, 2017. This document provides the EPA's responses to all comments received by the Agency during the comment periods on the Southern Ute Indian Tribe's application. The brief synopses of comments in this document are provided for the convenience of the reader and are not meant to replace the full set of comments. In developing responses, the EPA considered all comments received.

¹ The EPA defines "appropriate governmental entities" as "States, tribes, and 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).

Comments Received During the January 5 – February 3, 2017 Comment Opportunity:

Author Name: Martha Rudolph, Director of Environmental Programs

Organization/ Representing: State of Colorado, Department of Public Health and Environment

1) It is CDPHE's [Colorado Department of Public Health and Environment's] understanding that the Tribe has limited its application to surface water resources located on the Reservation lands that are held in trust by the United States for the benefit of the Tribe and Tribal members [i.e., limited to trust lands only, and excluding all other Reservation lands]. Based on that understanding of the scope of the application, CDPHE does not object to the SUIT application.

Response: The EPA notes and appreciates the comment from the State of Colorado that it does not object to the Tribe's application given the scope of the application being limited to reservation lands that are held in trust by the United States for the benefit of the Tribe. The Agency notes that its approval is limited to currently held trust lands identified within the boundaries of the SUIT Reservation as well as the trust land parcel contiguous to the Reservation identified in the Tribe's application. (See Application at p. 8.)

2) CDPHE did not verify the maps and legal descriptions identifying the lands and waters located on trust lands but is assuming that these descriptions are correct.

Response: The EPA appreciates the State of Colorado's comment assuming that the maps and land descriptions in the Tribe's application correctly depict the external Reservation boundaries and trust lands boundaries, and overlay of Reservation surface water resources. The application includes both a legal description and maps (see Application at pp. 9-10, and Exhibit 1), and the Tribe supplemented its application with higher resolution maps before the onset of the second 30-day comment opportunity. The EPA notes that no comments or information were received that dispute the boundaries depicted in the Tribe's application.

Before making the Tribe's application available for comment, the EPA confirmed the accuracy of these boundaries with available information and sources. The U.S. Department of the Interior, Bureau of Land Management verified that the maps and legal descriptions provided in the application are based on the Department of the Interior's most up-to-date database of Southern Ute Indian Reservation lands.

"After review of the maps supplied by the Southern Ute Indian Tribe, depicting Trust Land Status for SUIT TAS Application 2015, I concur that the data used for the exterior boundaries and trust boundaries, is based on the most recent and best available Public Land Survey System (PLSS) data available to the United States Department of the Interior, Bureau of Land Management." (July 26, 2016 email from Dale Vinton, Geodesist, Public Land Survey System Data Manager, US DOI Bureau of Land Management, Cadastral Survey Branch)

The legal descriptions of the exterior boundaries of the Southern Ute Indian Reservation provided in the application are consistent with the legal description provided in Public Law 98-290 and the US DOI PLSS data. (See Application, Exhibit 1 and Exhibit 4: *Act of May 21, 1984, Pub. L. 98-290, 98 Stat. 201,*

202.) The EPA considers the maps and legal descriptions provided by the Tribe as the most up-to-date and accurate descriptions available of the Reservation external boundaries and trust lands boundaries.

3) Although we have no objections to the Tribe's application, we want to make clear that by not opposing the application the State is not ceding jurisdiction over any lands that are not held in trust, nor waiving its claims regarding jurisdiction over non-Tribal member's activities on fee lands under the State's reading of Public Law 98-290.

[Same comment also provided by the La Plata River and Cherry Creek Ditch Company.]

Response: The EPA notes and appreciates the State of Colorado's clarification of its reading of Public Law 98-290. Because the Tribe's application is limited to authority over surface water resources located on trust lands, there is no current Agency action or decision over CWA §§ 303(c) and 401 program authority for waters located on lands not held in trust or non-Tribal members' activities on fee lands. Therefore, this comment is outside the scope of the EPA's review of the application submitted by the Tribe.

4) CDPHE intends to continue working collaboratively with the Tribe on water quality standards and [CWA §] 401 certifications for waters that cross both tribal trust land and fee land, and continues to believe this will be very important moving forward.

Response: The EPA notes and appreciates the State of Colorado's comment that it intends to continue working collaboratively with the Tribe on CWA water quality issues and programs.

Author Name: Bruce Yurdin, Director, Water Protection Division

Organization/ Representing: State of New Mexico, Environment Department

5) The application does not include Bureau of Land Management, state, allotment or other private lands located within the Reservation boundaries. NMED [New Mexico Environment Department] has reviewed the application and supports the assertion of authority to regulate the quality of waters within the application boundaries.

Response: The EPA appreciates the State of New Mexico's comment supporting the Tribe's assertion of authority as set forth in the TAS application.

6) Because of the migratory nature of pollutants and waters, and the need to protect designated uses for surface waters in and outside of political boundaries, NMED supports the application and efforts to protect waters in and outside of the Southern Ute Indian Reservation.

Response: The EPA acknowledges and appreciates NMED's statement regarding the migratory nature of pollutants in surface waters, and that pollutants can and do readily migrate across jurisdictional boundaries. Further, the EPA acknowledges the need to protect sometimes differing designated uses on waters that are shared by, or form the boundaries between, state and tribal jurisdictions.

Author Name: William Walker, Regional Director

Organization/ Representing: U.S. Department of the Interior, Bureau of Indian Affairs, Southwest Regional Office

7) After reviewing the Tribe's application we recommend approval of the application.

Response: The EPA notes and appreciates that the Bureau of Indian Affairs, Southwest Regional Office (BIA) recommends approval of the SUIT TAS application.

8) We have worked with the tribe for many years, and are familiar with their governmental apparatus. They are well equipped to perform the functions required for TAS.

Response: The EPA acknowledges that the BIA has worked with the SUIT for many years, and that due to its role with the Tribe the BIA has experience across a broad range of tribal governmental functions and with multiple SUIT offices, including the Environmental Programs Department. The EPA also acknowledges and appreciates the comment that the BIA considers the SUIT to be well equipped to perform the regulatory functions of the CWA §§ 303(c) and 401 programs.

9) Believe it promotes self-determination for the SUIT, the pursuit of which BIA continues to promote.

Response: The EPA notes the BIA's belief that approval for CWA §§ 303(c) and 401 program authorities will promote SUIT self-determination.

Author Name: Ron LeBlanc, City Manager

Organization/ Representing: City of Durango [Colorado]

10) The City of Durango (City) manages, co-manages and operates permitted discharges immediately upstream of, and within the Southern Ute Indian Reservation. The City recognizes that the current application seeks only the authority to receive treatment similar to that of a state and does not grant any authority to adopt or impose water quality standards or to directly issue or decline permits for uses of any kind. The City may have concerns about the application as current and future operations may be impacted by the SUIT TAS. The grant of authority and the terms and conditions stated as part of that grant of authority may have significant long term implications for the City and other individuals and entities located upstream of the Reservation.

[Same comment also provided by: Florida Water Conservancy District; Florida Consolidated Ditch Company; Animas Consolidated Ditch Company; Animas Water Company; King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Spring Creek Extension Ditch Company; and La Plata Archuleta County Cattlemen's Association.]

Response: The EPA appreciates the City of Durango, Colorado's comment that the City operates permitted discharges upstream of, and within, the Southern Ute Indian Reservation, and that the City may have concerns about impacts to any such existing, or potential future, operations and permitted discharges. The EPA notes that the comment does not address the assertion of authority to manage and protect reservation water resources contained in the Tribe's TAS application, and is thus outside the scope of the TAS comment process. Instead, the commenter's concern appears to relate to potential

impacts of tribal water quality regulation on the commenter's upstream permitted activities. Although such issues are beyond the scope of the current process, EPA notes that the Agency's current decision is limited to approving the Tribe's TAS eligibility. The decision does not review or approve any actual water quality standards under Section 303(c) of the CWA. Any such approval (or disapproval) of standards would occur in a separate EPA decision following submission of standards by the Tribe for EPA's review. Further, the EPA notes that the TAS application is limited to the Tribe's eligibility to administer the CWA §§ 303(c) and 401 programs on trust lands. The Tribe's eligibility to administer a CWA permitting program is not addressed in this TAS decision, nor is the Tribe's eligibility to administer water quality standards or certifications on any lands owned by the City. The EPA also notes that any water quality standards adopted by the Tribe and submitted to EPA for approval under the CWA would need to satisfy all CWA and regulatory requirements, including requirements for public involvement in the water quality standards adoption process. These requirements will ensure an appropriate opportunity for interested entities, such as the City, to provide input on the Tribe's adoption of its water quality standards. Similarly, any CWA permit issued in connection with the City's discharging operations would undergo public involvement that would afford an appropriate venue to raise any concerns the City may have. Finally, the EPA notes that EPA's regulations at 40 C.F.R. § 131.7 provide a mechanism for states and tribes to resolve disputes relating to differing water quality standards on shared water bodies.

11) The application states that the Tribe does not intend to waive or concede that its regulatory authority does not extend to all water bodies within the boundaries of the Reservation. The City of Durango is concerned that any grant of authority be specific as to the future rule making authority of the Tribe as it relates to after acquired trust lands and as to activities outside of tribal trust lands.

Response: The EPA notes the concern expressed by the City of Durango (see Comment 3 and Response above). The Tribe's application does specify that limiting the scope of its assertion of authority to trust lands does not waive or concede that its regulatory authority does not extend to all Reservation water bodies. (See Application Section IV, p. 8.) However, the geographic scope of the Tribe's assertion of authority in its application is specifically limited to "surface waters located on trust lands". Hence, the Tribe's assertion of authority, and EPA's TAS decision, do not address CWA §§ 303(c) and 401 jurisdiction over any Southern Ute Indian Reservation non-trust lands (e.g., Reservation fee lands). Such lands are outside the scope of the Agency's action on the Tribe's application.

The EPA's current action on the SUIT TAS application applies only to those lands identified in the Tribe's application as currently held in trust. A TAS application must identify the specific area over which a tribe seeks program eligibility. Therefore, the EPA does not have sufficient information to approve TAS authority for surface waters on trust lands not currently identified in this application. As required by the TAS regulation (40 C.F.R § 131.8), any lands transferred into trust status for the benefit of the Tribe in the future (after-acquired, or future trust lands) would require a supplemental TAS application from the Tribe, and a separate Agency action for such lands, to be covered under the Tribe's CWA regulatory authorities. The process for a supplemental application to include lands taken into trust for the Tribe at a future date would also include appropriate governmental and public notification and participation to help ensure that, in the unlikely event jurisdictional issues exist regarding such future trust lands, such issues are raised to the EPA for proper consideration and decision.

Pursuant to the EPA's TAS regulation for the CWA § 303(c) water quality standards program (see 40 C.F.R. 131.8), the EPA is charged with determining whether an applicant tribe meets the applicable TAS criteria, including that the tribe has demonstrated appropriate authority to regulate water quality on the reservation lands covered by the TAS application. As part of this regulatory process, the EPA provides notice to appropriate governmental entities – states, tribes and federal entities located contiguous to the reservation of an applicant tribe – and provides an opportunity for these entities to comment on the applicant tribe's assertion of authority (including any jurisdictional boundaries). As a matter of established Agency practice, the EPA also makes such notice broad enough that other potentially interested entities (e.g., local governments and the public) can participate in the process.

12) Concern over exposure to potentially conflicting or inconsistent water quality regulations.

[Same comment also provided by: South Durango Sanitation District; Loma Linda Sanitation District; Southwestern Water Conservation District; and San Juan Water Conservancy District.]

Response: The EPA notes and appreciates that the City of Durango is concerned about potentially conflicting or inconsistent water quality regulations. However, this comment does not address the Tribe's assertion of authority to manage and protect reservation water resources contained in the Tribe's application and is thus outside the scope of the TAS comment process. Concerns regarding potentially conflicting or inconsistent water quality regulations should be addressed through the appropriate opportunity for comment when water quality regulations are proposed for adoption in the future. The EPA also notes that differences between applicable water quality standards of separate regulating entities can exist in many contexts – e.g., across state-state boundaries – and that EPA's regulations at 40 C.F.R. § 131.7 provide a mechanism for states and tribes to resolve disputes relating to differing water quality standards on shared water bodies. The EPA encourages the Tribe and its neighboring jurisdictions to work collaboratively to develop and implement water quality standards.

13) Concern over adequate notice and transparency in SUIT TAS application review process; similar concern for any water quality standards development and adoption by the Tribe; and uncertainty about who would develop and implement SUIT water quality standards.

[Same comment also provided by: King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Thompson Epperson Ditch Company; and Pine River Canal Company.]

Response: The EPA appreciates the comment and shares the desire that CWA TAS applications and adoption of CWA § 303(c) water quality standards undergo robust notice and comment opportunities that broadly reach interested parties consistent with EPA regulations.

The EPA's TAS regulations for the CWA §§ 303(c) water quality standards and 401 certification programs (see 40 C.F.R. § 131.8 (c) *Procedure for processing an Indian Tribe's application*) include a process for notice to appropriate governmental entities – states, tribes and federal entities located contiguous to the reservation of an applicant tribe. Section 131.8(c)(2) - (3) affords these entities notice and 30 days to submit comments on the applicant tribe's assertion of authority. As a matter of Agency

policy,² the EPA also makes such notice (e.g., via newspaper and website publications) broad enough that other potentially interested entities, such as local governments and the public, can participate in the process. The EPA notified appropriate governmental entities and provided a 30-day comment opportunity on the substance and basis of the Tribe's assertion of authority in its application from January 5 – February 3, 2017. Legal notices were placed in local newspapers³ in Durango, Ignacio, and Bayfield, Colorado. The Tribe's application and all materials were made available on the EPA's website and paper copies were made available in the Tribe's Environmental Programs Office and the Durango Public Library; newspaper and website notices were published with details on obtaining more information and how to submit comments; and the EPA contacted local media outlets with press release materials that linked to the website materials. Additionally, the EPA and the Tribe shared further outreach materials with local print and radio news media; the Tribe held meetings with the State of Colorado; the EPA responded to local newspaper information requests and questions; and the EPA published a Fact Sheet and Frequently Asked Questions on its website. Several commenters requested additional time to submit comments. Although not required by the regulations, in response to these requests the EPA repeated these outreach activities and afforded a second 30-day comment opportunity from June 1 – 30, 2017.

The EPA notes that the Agency's review of actual water quality standards involves a separate CWA action from review of the Tribe's TAS application. To the extent it addresses the process for adoption of water quality standards, the comment does not address the assertion of authority to manage and protect reservation water resources contained in the Tribe's TAS application, and is thus outside the scope of the TAS comment process. The EPA notes, however, that 40 C.F.R. Part 25 establishes public notification and outreach requirements for the water quality standards adoption process. All states, eligible tribes and U.S. territories adopting water quality standards must meet the minimum requirements for public participation in 40 C.F.R. Parts 25 and 131 in order for the EPA to approve their water quality standards. Hence, the same level of public notice and review are required to be conducted for adoptions of new or revised tribal, state, U.S. territory or federal water quality standards.

The application (see Application at p. 18-19 and Exhibit 5) clearly identifies the Tribe's Environmental Programs Department as the Tribal governmental office responsible for developing, reviewing and implementing water quality standards that are adopted by the Southern Ute Indian Tribal Council.

14) Any grant of SUIT TAS authority should not interfere with the State of Colorado's authority to administer the CWA NPDES [National Pollutant Discharge Elimination System] permit process. The City asserts that the authority to administer the NPDES permits on fee lands within the [Southern Ute Indian] Reservation has been previously delegated by the EPA to the State under the authority of Public Law 98-290, and any extension of direct or indirect authority to the Tribe that could in any way impact, limit or alter that previously delegated authority to the State would be unlawful.

[Same comment also provided by South Durango Sanitation District and Loma Linda Sanitation District.]

² See EPA's outreach and policy recommendations in *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*, at p. 6-7 and Attachments (<https://www.epa.gov/sites/production/files/2014-10/documents/strategy-for-reviewing-applications-for-tas.pdf>).

³ The same notices were posted on the websites of the Durango Herald, The Drum, and the Pine River Times.

Response: The EPA appreciates the comment and notes that the City of Durango asserts that the State of Colorado has been delegated CWA § 402 NPDES program authority by the EPA for permits discharging to waters on Southern Ute Indian Reservation fee lands under the authority of Public Law 98-290; and that any grant of CWA §§ 303(c) and 401 program authority should not interfere with any CWA NPDES permitting authority delegated to the State of Colorado. This comment does not address the assertion of authority contained in the Tribe's TAS application to manage and protect reservation water resources by administering water quality standards and certifications, and is thus outside the scope of the TAS comment process. Further, the EPA notes that the Tribe's TAS application addresses only the Tribe's eligibility to administer the water quality standards and certification programs, and only on trust lands. The application does not seek eligibility to administer CWA programs on non-trust lands and does not seek eligibility to administer CWA discharge permitting on any lands. Nothing in the Tribe's application or EPA's TAS decision affects the State of Colorado's authority to administer its EPA-approved NPDES permit program. The EPA also notes that EPA is the entity currently administering CWA NPDES permitting on the Southern Ute Indian Reservation.

15) The maps provided with the Tribe's TAS application are not adequate to allow the City to determine which properties within the Reservation are Trust lands. The City requests that adequate notice of the specific areas to be subject to jurisdiction of the Tribe be given and an opportunity for further comments be allowed prior to any final review of the Tribal TAS application.

Response: The EPA notes and appreciates the City of Durango's comment about the adequacy of the maps provided in the Tribe's application (see Comment 2 and Response above). This comment was shared with the Tribe, and subsequently the Tribe supplied higher resolution, more detailed maps depicting the trust lands covered by its application. Those higher resolution maps were made available during a second (June 1 – 30, 2017) comment opportunity on the Tribe's application. Before making the Tribe's application available for comment, the EPA worked to confirm the accuracy of these boundaries with available information and sources. The U.S. Department of the Interior, Bureau of Land Management verified that the maps and legal descriptions provided in the application are based on the Department of the Interior's most up-to-date database of Southern Ute Indian Reservation lands.

"After review of the maps supplied by the Southern Ute Indian Tribe, depicting Trust Land Status for SUIT TAS Application 2015, I concur that the data used for the exterior boundaries and trust boundaries, is based on the most recent and best available Public Land Survey System (PLSS) data available to the United States Department of the Interior, Bureau of Land Management." (July 26, 2017 email from Dale Vinton, Geodesist, Public Land Survey System Data Manager, US DOI Bureau of Land Management, Cadastral Survey Branch)

The EPA notes that the City did not offer any further comments or any conflicting data or information regarding the trust lands boundaries depicted in the Tribe's application as supplemented by the additional higher resolution maps.

16) The City desires to enter into a cooperative process to assure that reasonable water quality standards be recognized to protect the environment of the entire four corners region.

Response: The EPA appreciates this comment and the City of Durango's desire to work cooperatively towards water quality standards protective of the environment. Because this comment does not address

the assertion of authority contained in the Tribe's TAS application to manage and protect reservation water resources by administering water quality standards and certifications, it is outside the scope of the TAS comment process. The EPA also notes that adoption of new and revised water quality standards is a separate action under the CWA, distinct from the EPA's decision on the Tribe's TAS application for eligibility to administer the CWA §§ 303(c) and 401 program authority on trust lands. However, the EPA also notes that development and adoption of water quality standards are subject to the public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131. These procedures help ensure an appropriate opportunity for interested entities, such as the City, to provide input to, and to work cooperatively with, the Tribe during adoption of water quality standards.

Author Name: Julie Westendorff, Gwen Lachelt and Brad Blake, La Plata County Board of County Commissioners

Organization/ Representing: La Plata County, Colorado

17) The La Plata County Board of Commissioners reviewed the Southern Ute Indian Tribe's (SUIT) application; appreciates the opportunity to comment; and commends the SUIT for its ongoing commitment to improve the air and water quality for the benefit of the health and welfare of its residents and environment. La Plata County recognizes and acknowledges the SUIT's authority to regulate water resources located on trust lands within the boundaries of the SUIT's reservation.

Response: The EPA appreciates La Plata County's review and comments on the Tribe's application; and its recognition of the Tribe's ongoing commitment to air and water quality. The EPA notes and appreciates La Plata County's recognition of the Tribe's authority to regulate water resources located on trust lands.

18) The County further agrees and acknowledges that the SUIT's prior exercise of police powers; management experience; existing environmental and public health programs; and technical staff render it capable of administering an effective water quality standards program.

Response: The EPA appreciates the comment and acknowledges that La Plata County has worked with the SUIT for many years, and has experience across a broad range of tribal governmental functions and with multiple SUIT offices, including the Environmental Programs Department. The EPA also acknowledges that La Plata County considers the SUIT to be capable of administering an effective water quality standards program.

19) The County's primary concern respecting the SUIT's application is promoting awareness of this regulatory change and the potential for new, more stringent, water quality standards among County residents or entities who hold, or may seek, NPDES permits for point sources upstream from the waters the SUIT proposes to regulate.

Response: The EPA appreciates the comment but notes that concerns over the stringency of water quality standards and any potential effects to NPDES permits are outside the scope of the Agency's review of the Tribe's TAS application (please see Comment 10 and Response above). The comment does not address the assertion of authority to manage and protect reservation water resources contained in the Tribe's TAS application, and is thus outside the scope of the TAS comment process. However, the EPA notes that the Agency shares the County's desire that CWA TAS applications and adoption of

CWA § 303(c) water quality standards undergo robust notice and comment opportunities that broadly reach interested parties consistent with EPA regulations (please see Comment 13 and Response above).

20) The County expresses concern about the sufficiency of identification of waters for which the SUIIT proposes to establish [water quality] standards. The maps submitted lack the detail necessary to identify all waters (including tributaries, floodplains, ponds, lakes, impoundments and other features), and thus all abutting or upstream facilities, which may be subject to such standards, and whether County residents could be impacted in pursuing NPDES permits.

[Same comment also provided by the Town of Ignacio.]

Response: The EPA notes and appreciates La Plata County's comment about the sufficiency of identification of waters identified in the Tribe's application. The EPA notes that the Application asserts authority over all surface water resources on trust lands. (Please see Comments 2 and 15, and Responses above.) In response to certain comments received by EPA, the Tribe provided higher resolution, more detailed maps depicting the trust lands covered by its application. Those maps were made available during a second (June 1 – 30, 2017) comment opportunity on the Tribe's application. The EPA also notes the concern over whether County residents could be impacted in pursuing NPDES permits. However, this comment is outside the scope of the Agency's review of the Tribe's TAS application (please see Comment 10 and Response above).

21) Notice to impacted permittees – the County requests affirmative notice to upstream permittees of the SUIIT's pending promulgation of new water quality standards [to] promote a predictable and effective transition to tribal jurisdiction over water quality on trust lands. The County requests that potentially impacted permittees be notified if EPA approves the SUIIT's TAS application.

[Same comment also provided by: Town of Ignacio; Florida Water Conservancy District; Florida Consolidated Ditch Company; Animas Consolidated Ditch Company; Animas Water Company; King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Spring Creek Extension Ditch Company; Pine River Irrigation District; Citizen's Animas Irrigation Company; Edgemont Ranch Metropolitan District; Forest Lakes Metropolitan District; Los Pinos Ditch Company; Sullivan Ditch Company; Thompson Epperson Ditch Company; Schroder Ditch Company; Animas Valley Ditch and Water Company; El Rancho Florida Metropolitan District; South Durango Sanitation District; Loma Linda Sanitation District; Pine River Canal Company; San Juan Water Conservancy District; and La Plata Archuleta County Cattlemen's Association.]

Response: The EPA appreciates the comment regarding direct notice to potentially affected NPDES permit holders upstream of waters on trust lands. However, this comment is outside the scope of the Agency's review of the Tribe's TAS application (please see Comment 13 and Response above). Pursuant to 40 C.F.R. § 131.8(c)(2) - (3), the Agency is required to notify appropriate governmental entities of, and provide them an opportunity to comment on "the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters." Consistent with Agency policy,⁴ the EPA also makes such notice broad enough that other potentially interested entities (e.g., local governments and the public) can participate in the process. (Please see Comment 13 and Response

⁴ For further discussion on EPA policies and procedures for public outreach and notification during TAS application review please see EPA's *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*.

above for a description of the notice and comment process in this case.) EPA's regulation at 40 C.F.R. § 131.8(c)(5) also requires written notice to the Tribe of EPA's decision to approve the Tribe's TAS application. While the comment is outside the scope of the TAS application review process, the EPA notes that the Agency maintains a list of approved tribal water quality standards and water quality standards TAS applications on its website.⁵ Concerns regarding actual water quality standards – as opposed to TAS eligibility – should be addressed through the appropriate opportunity for comment when water quality regulations are proposed for adoption in the future. The Agency notes that all states, eligible tribes and U.S. territories adopting water quality standards must meet the public participation requirements in 40 C.F.R. Parts 25 and 131.

22) La Plata County encourages a public process for establishing water quality standards. The County hopes that the SUIT, EPA, and other participating agencies will provide robust, comprehensive, and (ideally) individualized notice to affected permittees and land users about those [water quality standards] public hearings, to enhance public participation and awareness.

[Same comment also provided by: Town of Ignacio.]

Response: The EPA appreciates the comment but notes that the Agency's review of actual water quality standards involves a separate CWA action from review of the Tribe's TAS application. The comment does not address the assertion of authority to manage and protect reservation water resources contained in the Tribe's TAS application, and is thus outside the scope of the TAS comment process. However, the EPA shares the desire that adoption of CWA § 303(c) water quality standards undergo robust notice and comment opportunities that broadly reach interested parties (please see Comment 13 and Response above). The Agency notes that all states, eligible tribes and U.S. territories adopting water quality standards must meet the public participation requirements in 40 C.F.R. Parts 25 and 131, ensuring a public process when SUIT water quality standards are adopted.

Author Name: Tom Atencio, Lawrence Bartley, Edward Box, Alison deKay, Sandra Maez, Dixie Melton, Ignacio Town Board of Trustees

Organization/ Representing: Town of Ignacio, Colorado

23) The Town of Ignacio is on non-trust land, within the exterior boundaries of the [Southern Ute Indian] reservation. Public Law 98-290 (at Sections 4 and 5) define Jurisdiction Over Reservation, and Jurisdiction Over Incorporated Municipalities within the Reservation. These Sections include language imposing certain jurisdictional protections, which should be considered during this review process. The Town's primary concern is promoting awareness of this regulatory change and the potential for more stringent water quality standards that may affect residents or entities with NPDES permits.

Response: The EPA notes and appreciates the comment, and acknowledges the geographic location of the Town of Ignacio within the exterior boundaries of the Southern Ute Indian Reservation, and that the Tribe's TAS application does not depict the Town of Ignacio to be located on any of the trust lands covered in the application. The Tribe's application is limited to surface waters on trust lands and does not request CWA §§ 303(c) and 401 program authority over other Reservation lands. Thus, the issues identified by the commenter regarding Public Law 98-290 are not raised by the application or EPA's decision. The EPA shares the Town of Ignacio's desire for robust notice and comment opportunities on the Tribe's application (please see Comment 13 and Response above). With regard to the stringency of

⁵ See the EPA website at: <https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards-and-contacts>.

water quality standards and any potential affects to NPDES permit holders on non-trust land, EPA notes that such issues are outside the scope of the Agency's review of the Tribe's TAS application (please see Comment 10 and Response above).

Author Name: Brice Lee, President

Organization/ Representing: La Plata Water Conservancy District

24) The La Plata Water Conservancy District (LPWCD) water users are located within and upgradient to the external boundary of the Southern Ute Indian Tribe (SUIT) Reservation, and are concerned that approval of the Tribe's request to establish and regulate its own water quality standards may have significant repercussions on the LPWCD and its constituents. The LPWCD water users farm and ranch these lands and are committed to maintaining these activities without undue regulation and interference.

Response: The EPA notes and appreciates the comment from the LPWCD that some of its water users operate farming and ranching activities within and upstream of the Reservation; and that LPWCD is concerned over undue regulation and interference with such activities. The EPA's TAS regulation for the CWA § 303(c) water quality standards program (see 40 C.F.R. § 131.8) provides an opportunity for comments on the applicant tribe's assertion of authority. However, concern over undue regulation and interference with farming and ranching activities is outside the scope of the Agency's review of the Tribe's application.

25) The LPWCD is concerned by the lack of notice it received of the Tribe's application, and only learned of the comment opportunity about one week before the February 3, 2017 deadline.

Response: The EPA notes and appreciates the comment regarding adequate and direct notification of the LPWCD and its water users (please see Comment 13 and Response regarding public notice). The EPA's notification requirements for TAS applications are found in 40 C.F.R. § 131.8(c)(2) - (3).⁶ The EPA notes that the LPWCD was directly notified during the second (June 1-30, 2017) comment opportunity on the Tribe's application, and no additional comments or concerns were provided by the LPWCD. The EPA notes that the adoption and review of CWA water quality standards involve separate CWA actions from review of the Tribe's TAS application and are outside the scope of EPA's TAS decision. Any adoption of water quality standards by the Tribe would be subject to public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131.

26) The LPWCD understands the Clean Water Act exempts farming and ranching activities but remains concerned that the SUIT may assert their waters are being impacted by agricultural activities, and that members may receive inquiries from SUIT personnel pertaining to such activities and perceived impacts.

[Same comment also provided by: La Plata River and Cherry Creek Ditch Company.]

Response: The EPA notes and appreciates the comment from the LPWCD regarding agricultural activities and impacts to water quality. However, concerns over future contacts regarding waters that

⁶ For further discussion on EPA policies and procedures for public outreach and notification during TAS application review please see EPA's *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*.

may be impacted by agricultural activities are outside of the scope of the EPA's review of the assertion of authority in the Tribe's TAS application. Opportunity for public involvement regarding water quality standards adopted by the Tribe will be available in accordance with 40 C.F.R. Parts 25 and 131, including the opportunity to raise concerns regarding agricultural activities. In addition, the EPA clarifies here that the CWA exempts certain farming and ranching activities from compliance with some but not all CWA requirements.

27) SUIT may develop water quality standards more stringent than those set by Colorado, placing an undue burden on LPWCD constituents, and potentially impacting permitting for LPWCD activities and projects.

[Same comment also provided by: La Plata River and Cherry Creek Ditch Company.]

Response: The EPA notes and appreciates the comment from the LPWCD. However, the stringency of water quality standards and potential impacts to NPDES permits are outside of the scope of the Agency's review of the Tribe's TAS application (please see Comments 10 and 12, and Responses above). The EPA notes that EPA's regulations at 40 C.F.R. § 131.7 provide a mechanism for states and tribes to resolve disputes relating to differing water quality standards on shared water bodies.

28) The LPWCD requests a 120-day extension of the comment period beyond Feb 3, 2017.

Response: The EPA notes and appreciates the LPWCD's comment. (Please see Comment 13 and Response above.) The EPA notes that several commenters requested additional time to submit comments on the assertion of authority in the Tribe's application. In response to these requests the EPA afforded a second 30-day comment opportunity from June 1 – 30, 2017, even though not required by 40 C.F.R. § 131.8(c). The LPWCD was contacted regarding the second comment period, but provided no additional comments or concerns on the Tribe's TAS application.

Author Name: Nancy Agro, Attorney

Organization/ Representing: Florida Water Conservancy District; Florida Consolidated Ditch Company; Animas Consolidated Ditch Company; Animas Water Company; King Consolidated Ditch Company; Morrison Consolidated Ditch Company; and Spring Creek Extension Ditch Company

29) My clients do not oppose the Southern Ute Indian Tribe's request for Treatment as a State.

Response: The EPA notes and appreciates that the clients represented in this letter do not oppose the Tribe's TAS request for CWA §§ 303(c) and 401 program authority.

30) The CWA exempts regular farming and ranching activities from regulation (CWA 404(f)). Clients request EPA confirm that the Tribe has no authority to regulate agricultural activities under the CWA. Further, if the Tribe attempts to regulate in an area unregulated by, or exempt from, the CWA, we request notification and an opportunity to comment.

[Same comment also provided by: Pine River Irrigation District; Citizen's Animas Irrigation Company; Edgemont Ranch Metropolitan District; Forest Lakes Metropolitan District; Los Pinos Ditch Company; Sullivan Ditch Company; Thompson Epperson Ditch Company; Schroder Ditch Company; Animas

Valley Ditch and Water Company; El Rancho Florida Metropolitan District; and Pine River Canal Company.]

Response: The EPA notes and appreciates the comment regarding CWA regulation of farming and ranching activities and the request for direct notification and comment opportunity for any future attempts to regulate agricultural activities. However, concerns over whether the CWA regulates farming and ranching activities, and requests for notification and comment regarding any future CWA regulation of farming and ranching activities are outside the scope of the EPA's review of the assertion of authority in the Tribe's TAS application (please see Comment 26 and Response above).

The EPA clarifies here that the CWA exempts certain farming and ranching activities from compliance with some but not all CWA requirements. The EPA also notes that any approval of the Tribe's TAS application only authorizes implementation of the CWA §§ 303(c) and 401 programs for those lands and waters identified in the Tribe's application.

31) Clients may be conducting activities upstream of tribal lands that are not regulated by SUIT water quality standards under the CWA, but may require a CWA Section 401 Certification. Concern that if the Tribe adopts water quality standards more stringent than the State of Colorado then CWA Sections 401 and 402 may become more cumbersome and potentially inaccessible for essential projects.

[Same comment also provided by: Pine River Irrigation District and Citizen's Animas Irrigation Company.]

Response: The EPA notes and appreciates the comment concerning the stringency of water quality standards and potential impacts to CWA § 401 certifications and § 402 NPDES permits. However, the stringency of water quality standards and potential impacts to NPDES permits are outside the scope of the Agency's review of the Tribe's TAS application (please see Comments 10 and 12, and Responses above). Also, the EPA notes that some CWA § 402 NPDES permits and other activities require certification (under CWA § 401) that such discharge will not exceed water quality standards in the immediate or downstream receiving waters. Adoption of CWA water quality standards are subject to public participation requirements as described in CWA Section 303 and 40 C.F.R. Parts 25 and 131, providing opportunities for consideration of such comments.

32) Clients request notice and an opportunity to comment on any future applications of the Tribe for TAS status and promulgation of water quality standards.

[Same comment also provided by: Pine River Irrigation District and Citizen's Animas Irrigation Company.]

Response: The EPA notes and appreciates the comment regarding adequate and direct notification regarding future CWA TAS applications and adoptions of new or revised water quality standards (please see Comment 13 and Response regarding public notice). Adoption of CWA water quality standards are subject to public participation requirements as described in CWA Section 303 and 40 C.F.R. Parts 25 and 131.

33) Clients suggest that the Tribe coordinate with the State of Colorado setting water quality standards that are consistent with and not stricter than the State standards.

Response: The EPA appreciates this comment and supports states and tribes cooperatively working towards water quality standards protective of the environment. However, the consistency and stringency of water quality standards is outside the scope of EPA's review of the Tribe's TAS application (please see Comment 12 and Response above). Adoption of CWA water quality standards are subject to public participation requirements as described in CWA Section 303 and 40 C.F.R. Parts 25 and 131, providing opportunities for consideration of such comments.

Author Name: Amy Huff, Attorney

Organization/ Representing: Pine River Irrigation District

34) The Pine River Irrigation District (PRID) operates Vallecito Reservoir, providing water to ditch companies, municipal water suppliers, corporations, and individuals. While PRID does not object to the Southern Ute Indian Tribe's desire to administer the Water Quality Standards Program on tribal lands exclusively, PRID does have concerns about the Tribe's authority to establish classifications and standards for streams and rivers within the Pine River Drainage that traverse tribal lands.

[Same comment also provided by: King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Thompson Epperson Ditch Company; and Pine River Canal Company.]

Response: The EPA notes and appreciates the PRID's comment that it does not object to SUIT's desire to apply to administer the CWA §§ 303(c) Water Quality Standards and 401 Certification programs on tribal lands exclusively; and that the PRID has concerns about the Tribe's authority to establish classifications and [water quality] standards within the Pine River watershed. The EPA notes that there are Southern Ute Indian trust lands within the Pine River drainage, and those trust lands are included in the Tribe's TAS application. (See Application at Exhibit 1, map 4, and note that the Tribe refers to this as the Los Pinos River watershed.) To the extent surface waters within the Pine River drainage are located on tribal trust lands, the Tribe has (as explained in EPA's decision document approving the Tribe's application) demonstrated appropriate authority to administer the water quality standards and certification programs over such waters. The comment does not provide any information that would question the substance and basis for the Tribe's assertion of authority over such trust land waters. The TAS application is, however, limited to trust lands, and therefore any concerns over standards for streams and rivers within the Pine River Drainage that are not on trust lands are outside the scope of this application and the Agency's review.

Author Name: Amy Huff, Attorney

Organization/ Representing: Citizens Animas Irrigation Company

35) The Citizens Animas Irrigation Company is a nonprofit mutual ditch company supplying water from the Animas River. While the Citizens Animas Irrigation Company does not object to the Southern Ute Indian Tribe's desire to administer the Water Quality Standards Program on tribal lands exclusively, it does have concerns about the Tribe's authority to establish classifications and standards for streams and rivers within the Animas River Drainage that traverse tribal lands.

Response: The EPA notes and appreciates the Citizens Animas Irrigation Company's comment that it does not object to SUIT's desire to apply to administer the CWA §§ 303(c) Water Quality Standards and

401 Certification programs on tribal lands exclusively; and that it has concerns about the Tribe's authority to establish classifications and [water quality] standards within the Animas River watershed. The EPA notes that there are Southern Ute Indian trust lands within the Animas River drainage, and those trust lands are included in the Tribe's TAS application. (See Application at Exhibit 1, map 3.) To the extent surface waters within the Animas River drainage are located on tribal trust lands, the Tribe has (as explained in EPA's decision document approving the Tribe's application) demonstrated appropriate authority to administer the water quality standards and certification programs over such waters. The comment does not provide any information that would question the substance and basis for the Tribe's assertion of authority over such trust land waters. The TAS application is, however, limited to trust lands, and therefore any concerns over standards for streams and rivers within the Animas River Drainage that are not on trust lands are outside the scope of this application and the Agency's review.

Author Name: Ryan Halonen, Member at Large

Organization/ Representing: Florida River Estates Home Owners Association

36) As a small community upstream of Southern Ute Indian Tribal Land, we are concerned about the potential administrative and financial burdens of adhering to multiple and changing water regulations due to an additional regulatory authority.

Response: The EPA notes and appreciates the Florida River Estates Home Owners Association's comment regarding potential administrative and financial burdens. However, this comment addresses issues relating to compliance with actual CWA water quality standards and is outside the scope of the Agency's review of the Southern Ute Indian Tribe's TAS application. As noted elsewhere, any adoption of CWA water quality standards by the Tribe would need to comply with applicable public participation requirements, which would provide an opportunity to raise concerns regarding the water quality standards.

Author Name: Chris La May, Town Manager

Organization/ Representing: Town of Bayfield, Colorado

37) The Town of Bayfield recognizes and acknowledges the Southern Ute Indian Tribe's authority to regulate water resources located on trust lands within the boundaries of the SUIT's reservation, and acknowledges that the SUIT is capable of administering an effective water quality standards program.

Response: The EPA notes and appreciates the Town of Bayfield's comments on the Tribe's application; its recognition of the Tribe's authority to regulate water resources located on trust lands; and the Tribe's capability to administer an effective water quality standards program.

38) It is the Town's understanding that the Tribe is only requesting TAS authority for surface water resources (limited to "navigable waters") located on Reservation trust lands [i.e., limited to "navigable waters" on trust lands only, and excluding all other Reservation lands].

[Same comment also provided by: Edgemont Ranch Metropolitan District; Forest Lakes Metropolitan District; Los Pinos Ditch Company; Sullivan Ditch Company; Thompson Epperson Ditch Company; Schroder Ditch Company; Animas Valley Ditch and Water Company; and El Rancho Florida Metropolitan District.]

Response: The EPA notes and appreciates the Town of Bayfield's comment regarding the geographic scope of the Tribe's application (as described in the Application - see pp. 9-10). (See Comment 2 and Response above.)

39) The Town of Bayfield discharges treated wastewater into the Pine River upstream of the Reservation. The Town understands that its discharge upstream of tribal lands is not regulated by SUIT water quality standards under the CWA, but may require a CWA Section 401 Certification. The Town of Bayfield is concerned that if the Tribe adopts water quality standards more stringent than the State of Colorado then CWA § 401 certifications and its § 402 permits may become more cumbersome and potentially create the need for costly facility improvements.

Response: The EPA notes and appreciates the comment concerning the stringency of water quality standards and potential impacts to CWA § 401 certifications and § 402 NPDES permits. However, the stringency of water quality standards and potential impacts to NPDES permits is outside the scope of the Agency's review of the Tribe's TAS application. (Please see Comments 10 and 12, and Responses above.) Development of CWA water quality standards are subject to public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131, providing opportunities for consideration of such comments.

Author Name: Geoffrey Craig, Attorney

Organization/ Representing: Edgemont Ranch Metropolitan District; Forest Lakes Metropolitan District; Los Pinos Ditch Company; Sullivan Ditch Company; Thompson Epperson Ditch Company; Schroder Ditch Company; Animas Valley Ditch and Water Company; and El Rancho Florida Metropolitan District

40) My clients divert water from the Pine, Animas and Florida River basins; discharge treated wastewater into the Pine and Florida River basins; and have irrigation return flows into the Pine and Animas River basins. My clients do not oppose the Southern Ute Indian Tribe's request for TAS. However, there are some uncertainties as to the extent of the Tribe's authority once it establishes water quality standards and particularly for discharge permits that occur off reservation or on private land within the reservation.

Response: The EPA notes and appreciates that the clients represented in this letter conduct activities upstream of, and within, the Reservation; do not oppose the Tribe's request for TAS; and have concerns about potential impacts to their discharge permits. The concern regarding uncertainties over future water quality standards and any potential impacts to NPDES permit holders is outside the scope of the Agency's review of the Tribe's TAS application (please see Comment 10 and Response above). Adoption of CWA water quality standards are subject to public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131, providing opportunities for consideration of such comments. The EPA also notes that the Tribe's TAS application is limited to eligibility to administer CWA water quality standards and certifications. The Tribe has not applied to administer CWA discharge permitting and the EPA is the entity currently administering CWA § 402 NPDES permitting on the Southern Ute Indian Reservation.

41) The Metropolitan District clients discharge treated wastewater into the Pine and Florida River basins upstream of the Reservation. These clients understand that discharges upstream of tribal lands are not

regulated by SUIT water quality standards under the CWA, but may require a CWA § 401 Certification. These clients are concerned that if the Tribe adopts water quality standards more stringent than the State of Colorado then their CWA § 401 certifications and their § 402 permits may become more cumbersome and potentially inaccessible for essential projects. All of the clients request notice and opportunity to comment on any future CWA TAS applications and for adoption of any new or revised water quality standards.

Response: The EPA notes and appreciates the comment concerning the stringency of water quality standards and potential impacts to CWA § 401 certifications and § 402 NPDES permits. However, the stringency of water quality standards and potential impacts to NPDES permits is outside the scope of the Agency's review of the Tribe's TAS application (please see Comments 10 and 12, and Responses above). Development of CWA water quality standards are subject to public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131, providing opportunities for consideration of such comments.

Author Name: Floyd Smith, Attorney

Organization/ Representing: South Durango Sanitation District and Loma Linda Sanitation District

42) The South Durango and Loma Linda Sanitation Districts (Districts) are small political subdivisions operating wastewater treatment plants which have undergone improvements to meet increasingly higher [more stringent] [water quality] standards. The water quality standards used to determine discharge permit requirements for these facilities are important to their continued viability.

Response: The EPA notes and appreciates the comment on behalf of the South Durango and Loma Linda Sanitation Districts and their concerns about potential impacts to NPDES permits for those facilities. However, this comment is outside the scope of the substance and basis of the Tribe's assertion of authority to manage and protect water resources on trust lands. (Please see Comment 10 and Response above.)

Comments Received During the June 1 – June 30, 2017 Comment Period:

During the January 5 – February 3, 2017 comment period, several commenters requested additional time to submit comments. Although EPA's TAS regulations do not require an extended comment period, in response to these requests the EPA afforded a second 30-day comment opportunity from June 1 – 30, 2017.

Author Name: Kara Chadwick, Forest Supervisor

Organization/ Representing: San Juan National Forest, Forest Service, U.S. Department of Agriculture

43) The Forest Service has reviewed the Southern Ute Indian Tribe application for TAS for administering a water quality standards program; and expresses support for approval of their application.

Response: The EPA notes and appreciates the Forest Service's comment supporting approval of the Tribe's application.

44) The Tribe has a demonstrated commitment to, and capacity for, stewardship of water resources on tribal lands. The grant of TAS status would complement its existing water quality monitoring and nonpoint source management programs, and provide for a holistic approach for protection and management of surface water resources on tribal lands.

Response: The EPA appreciates the Forest Service comment recognizing the Tribe's commitment to, and capacity for, water resources stewardship.

Author Name: Lorene Bonds, Secretary/Treasurer

Organization/ Representing: La Plata River and Cherry Creek Ditch Company

45) The La Plata River and Cherry Creek Ditch Company opposes granting the Southern Ute Indian Tribe's CWA §§ 303(c) and 401 program authority. The Southern Ute Reservation is a checker board reservation and references to the Ute Line or Northern Reservation line does not designate or include or imply that any non-trust lands are included in this reservation or that they are under jurisdiction of the Southern Ute Tribe. Granting SUIT regulation and control over trust lands water quality must be limited to these lands and not non-trust lands.

Response: The EPA appreciates and notes the comment in opposition of the Tribe's application and statements that there are no non-trust lands in the Reservation or that any non-trust lands are under the Tribe's jurisdiction. The Tribe's TAS application and EPA's decision are expressly limited to trust lands. Any issues regarding jurisdiction over non-trust lands are thus outside the scope of the Agency's review and decision regarding the Tribe's TAS application for authority over surface waters on trust lands.

Author Name: Beth Van Vurst, General Counsel

Organization/ Representing: Southwestern Water Conservation District

46) The Southwestern Water Conservation District (SWCD) takes no position on the Southern Ute Indian Tribe's assertion of authority over "navigable waters" on Reservation trust lands for purposes of administering water quality standards and Section 401 certification programs.

Response: The EPA notes that the SWCD takes no position on the Tribe's assertion of authority in its application.

47) The SWCD believes it is essential that the public, and in particular those who currently hold or may apply for federal permits or licenses, understand the effects of Tribal water quality standards. The SWCD encourages the Tribe to engage in considerable outreach including: individual notification of federal permit or license holders; and public meetings or workshops throughout the San Juan River Basin regarding potential impacts to those owning fee lands within the Reservation, and landowners upstream of the Reservation. Additionally, the Tribe should distribute a written document that answers "Frequently Asked Questions" about any Tribal water quality standards.

Response: The EPA notes and appreciates SWCD's comment regarding impacts to those holding federal permits or licenses; and its recommendations regarding public outreach and participation for the adoption of Tribal water quality standards. However, these comments are outside the scope of the Agency's review of the Tribe's application (please see Comment 13 and Response above regarding public notice and participation in the adoption of new and revised water quality standards). The EPA notes that review of a Tribe's CWA TAS application is a separate and distinct action from development and adoption of new and revised water quality standards. Adoption of CWA water quality standards is subject to public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131, ensuring public outreach and participation. This was discussed in the EPA's Frequently Asked Questions published in the EPA's website during its review of the Tribe's CWA TAS application.

Author Name: Amy Huff, Attorney

Organization/ Representing: King Consolidated Ditch Company; Morrison Consolidated Ditch Company; Thompson Epperson Ditch Company; and Pine River Canal Company

All comments reiterating previous comments (see Comments 13, 21, 30 and 34 and Responses.)

Author Name: Austin Rueschhoff, Attorney

Organization/ Representing: San Juan Water Conservancy District

48) The San Juan Water Conservancy District (SJWCD) appropriates and maintains water rights, sponsors water resource projects, and develops water storage projects to address future water supply needs in Archuleta County [Colorado]. SJWCD intends to take part in Watershed Management Plan for the Upper San Juan River Basin, and is concerned that the Tribe's application could harm its ability to adequately create a Watershed Management Plan that protects the San Juan River Basin above the SUIT lands.

Response: The EPA notes and appreciates the comment from the SJWCD regarding its efforts to participate in developing a Watershed Management Plan for the Upper San Juan River Basin. These comments, however, are outside the scope of the Agency's review of the Tribe's assertion of authority contained in its TAS application.

49) The SJWCD is concerned that approval of the Tribe's application will impair its ability to fully develop and divert its water rights associated with an off-channel reservoir project.

Response: The EPA notes and appreciates the SJWCD's comment regarding perceived impacts to its ability to fully develop and divert water rights. However, this comment is outside the scope of the EPA's review of the Tribe's assertion of authority contained in its application.

50) The SJWCD is concerned that approval of the Tribe's application will confuse property owners on which [water quality] standards to follow and hamper or impair local water protection efforts.

Response: The EPA notes and appreciates the SJWCD's comment regarding perceived impacts to local water protection efforts and confusion over applicable water quality standards. However, this comment is outside the scope of the EPA's review of the Tribe's assertion of authority contained in its CWA TAS application (please see Comment 12 and Response above for a discussion of conflicting or inconsistent water quality standards in waters with shared jurisdiction). The EPA notes that the trust lands covered by EPA's TAS decision are clearly identified in the Tribe's TAS application.

Author Name: Wayne Semler, President, and Mae Morley, Secretary

Organization/ Representing: La Plata Archuleta County Cattlemen's Association

51) The La Plata Archuleta County Cattlemen's Association represents livestock ranchers in La Plata and Archuleta Counties. Its members can be adversely impacted by establishing water quality standards other than those adopted by the Colorado Water Quality Control Commission.

[Same comment also provided by the Colorado Cattlemen's Association.]

Response: The EPA notes and appreciates the La Plata Archuleta County Cattlemen's Association comments regarding potential adverse impacts from establishing water quality standards other than those adopted by the Colorado Water Quality Control Commission. The comment does not address the assertion of authority to manage and protect reservation water resources contained in the Tribe's TAS application, and is thus outside the scope of the TAS comment process. The EPA's approval of the Tribe's TAS application does not review or approve any actual water quality standards under § 303(c) of the CWA. Any such approval (or disapproval) of water quality standards would occur in a separate EPA decision following submission of standards adopted by the Tribe for EPA's review. The Agency notes that the Water Quality Control Commission – the entity responsible for adopting water quality standards for the State of Colorado - has not been authorized to adopt water quality standards on the Southern Ute Indian Reservation. Adoption of CWA water quality standards are also subject to public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131, providing opportunities for consideration of such comments. As noted elsewhere, EPA's regulations at 40 C.F.R. § 131.7 also provide a mechanism for states and tribes to resolve disputes relating to differing water quality standards on shared water bodies.

52) The La Plata Archuleta County Cattlemen's Association notes that the Tribe's application is limited to "navigable waters" on Reservation trust lands, but the Tribe's application also notes that the Tribe may affect more lands (396,000 acres) than the lands held in trust by the United States.

Response: The EPA notes and appreciates the La Plata Archuleta County Cattlemen's Association comment that more lands than the trust lands covered in the Tribe's application may be affected by the Tribe. The Tribe's TAS application and EPA's TAS decision are expressly limited to trust lands. Any issues regarding jurisdiction over non-trust lands are thus outside the scope of the Agency's review of the Tribe's application.

53) The La Plata Archuleta Cattlemen's Association is concerned that the Tribe may develop water quality standards that are more stringent than those set by the State of Colorado, which would place an undue burden on its members. The non-Indian entities will have no input into water quality standards established by the Tribe.

Response: The EPA appreciates the Cattlemen's Association comment regarding the stringency of water quality standards and potential burdens on its members, but notes that concerns over the stringency of water quality standards are outside the scope of the Agency's review of the Tribe's TAS application (please see Comment 10 and Response above). The EPA shares the Cattlemen's Association's desire that adoption of CWA § 303(c) water quality standards undergo a robust notice and comment opportunity that broadly reaches interested parties consistent with EPA regulations (please see Comment 13 and Response above). The concern over the stringency of water quality standards is outside the scope of the Agency's review of the Tribe's assertion of authority contained in its TAS application (please see Comment 10 and Response above). The EPA notes again, however, that adoption of CWA water quality standards is subject to public participation requirements as described in CWA § 303 and 40 C.F.R. Parts 25 and 131, providing opportunities for consideration of comments from all interested parties.

Author Name: Todd Inglee, President

Organization/ Representing: Colorado Cattlemen's Association

54) The Colorado Cattlemen's Association (CCA) sees significant legal conflicts in the Southern Ute Tribe's assertion of authority over the surface water resources that they hold in trust. While the Tribe is limiting its assertion of authority, for purposes of this application, to those waters on land held in trust, this application and subsequent jurisdictional claims may well extend to waters within tribal boundaries that affect water quality per the Clean Water Act. The CCA requests that the EPA respect and uphold the delegation under the Clean Water Act for these lands to the Colorado Department of Public Health and Environment.

Response: The EPA notes and appreciates the Colorado Cattlemen's Association comments regarding potential impacts to lands within the Reservation beyond those trust lands identified in the Application and its request that the EPA respect and uphold the delegation of CWA authority to the Colorado Department of Public Health and Environment. The Application and EPA's TAS decision are expressly limited to trust lands. Any issues regarding jurisdiction over any other Reservation lands are thus outside the scope of the application and the Agency's review. The Agency also notes that EPA's decision does not involve any aspect of the State of Colorado's authority to administer water quality standards over areas within its jurisdiction, and that the State of Colorado has not asserted a competing claim of jurisdiction over the area covered by the Tribe's TAS application. The EPA reiterates that the State of Colorado has not been authorized to adopt water quality standards on the Southern Ute Indian Reservation.

**Appendix III: Maps of the Reservation
and Trust Land Surface Waters**

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

A. Introduction

The Southern Ute Indian Tribe of the Southern Ute Indian Reservation (Reservation) in Colorado applied for program eligibility, or Treatment in a similar manner As a State (TAS), to administer the Clean Water Act Sections 303(c) water quality standards and 401 water quality certification programs. The Tribe's application asserts authority over the surface water resources located on lands that are held in trust by the United States for the benefit of the Tribe. The locations and boundaries of those currently held trust lands are depicted in the maps included in the Tribe's application. This approval action includes all trust lands within the Southern Ute Indian Reservation boundaries as well as those off-Reservation trust lands identified in the Tribe's application.

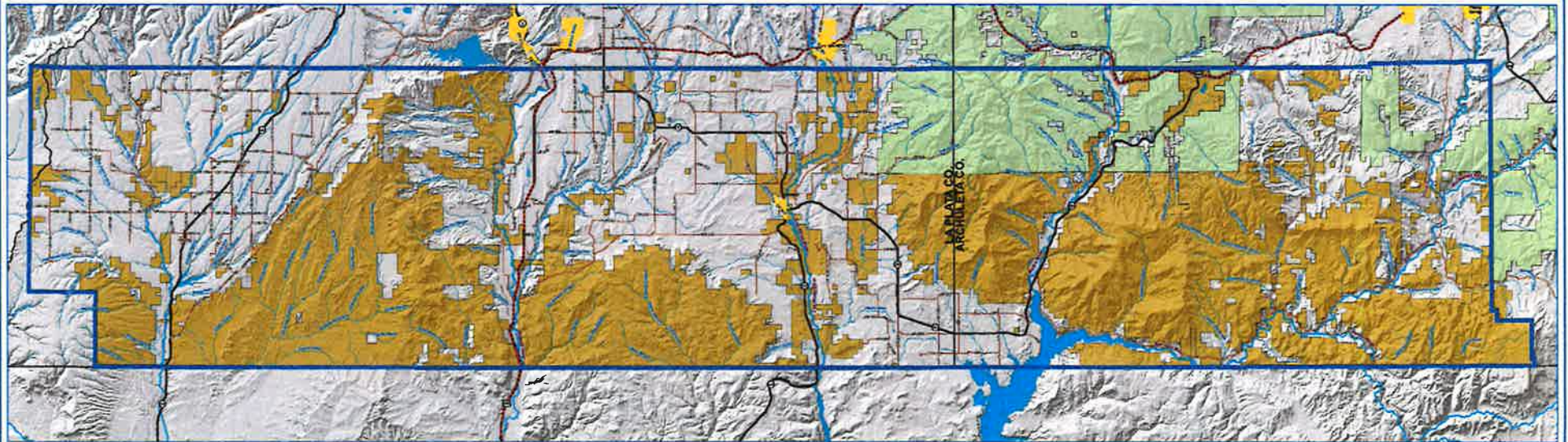
B. Maps of the Reservation and Trust Lands

The Southern Ute Indian Reservation surface water resources are depicted in a series of 6 maps. Map 1 is a general map of the entire Reservation, while Maps 2 through 6 show the trust lands and surface waters in individual watersheds. The tribal trust lands are shown in brown.

Southern Ute Indian Reservation

Trust Land Status for SUIT TAS Application 2015

Map 1 of 6



0 5 10 Miles

• Major Towns	City Limits	Lakes and Reservoirs
County	County Boundary	River
STATE	Tribal Trust	Stream
US	USFS	

Trust Land Status for SLIT TAS Application 2015

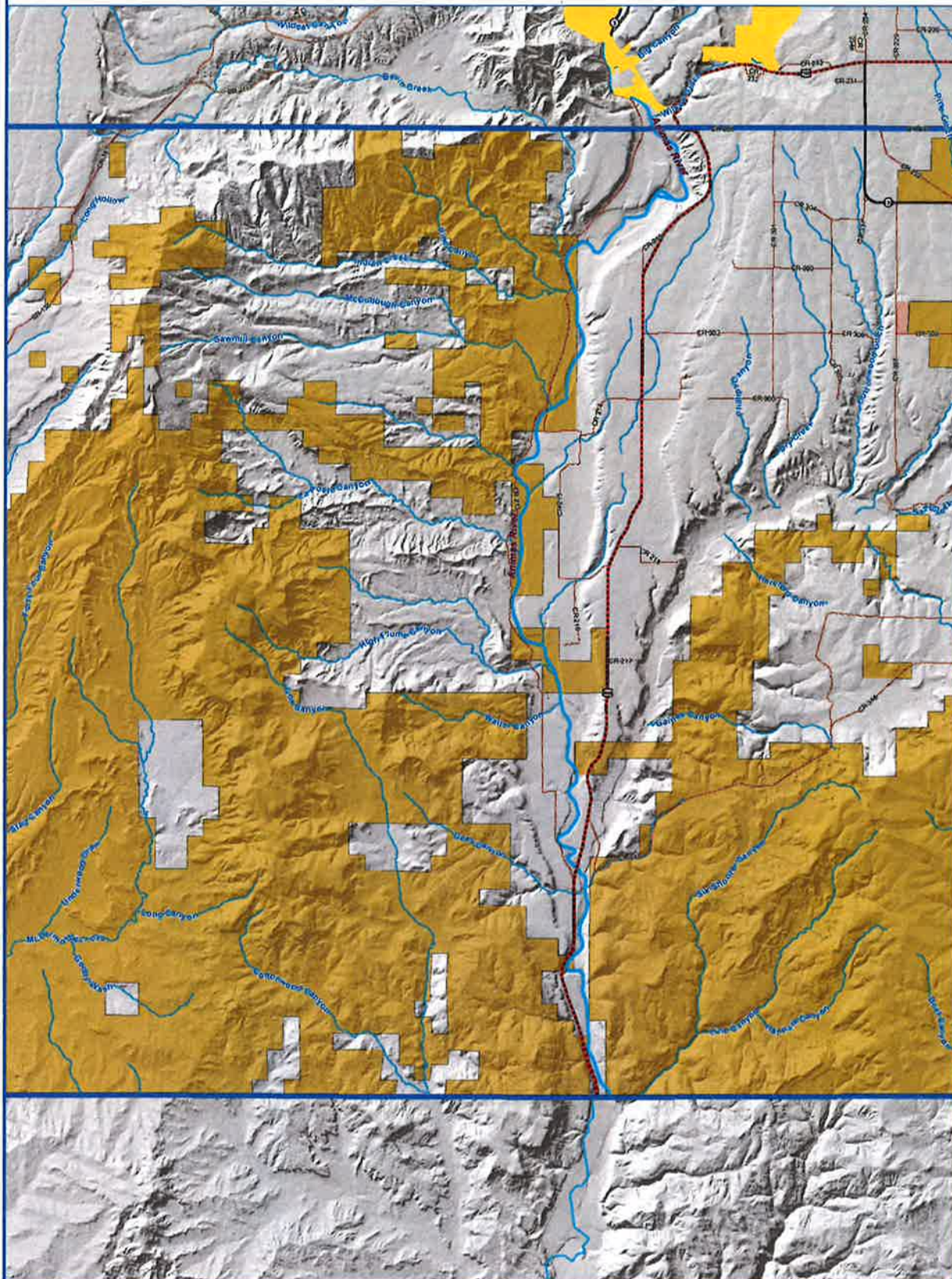
This topographic map depicts the Fort Huachuca region in Arizona, highlighting the Colorado River and its tributaries. The map is overlaid with a grid of Cultural Resource (CR) and Geological Resource (GR) sites. Key features include the Colorado River, La Plata River, Chino Canyon, and various smaller canyons and gulches. The map also shows the location of Fort Huachuca and the Colorado River National Monument. The map is labeled with 'COLORADO' and 'Fort Huachuca'.



Southern Ute Indian Reservation

Trust Land Status for SUIT TAS Application 2015

Map 3 of 6



0 0.375 0.75 1.5 Miles

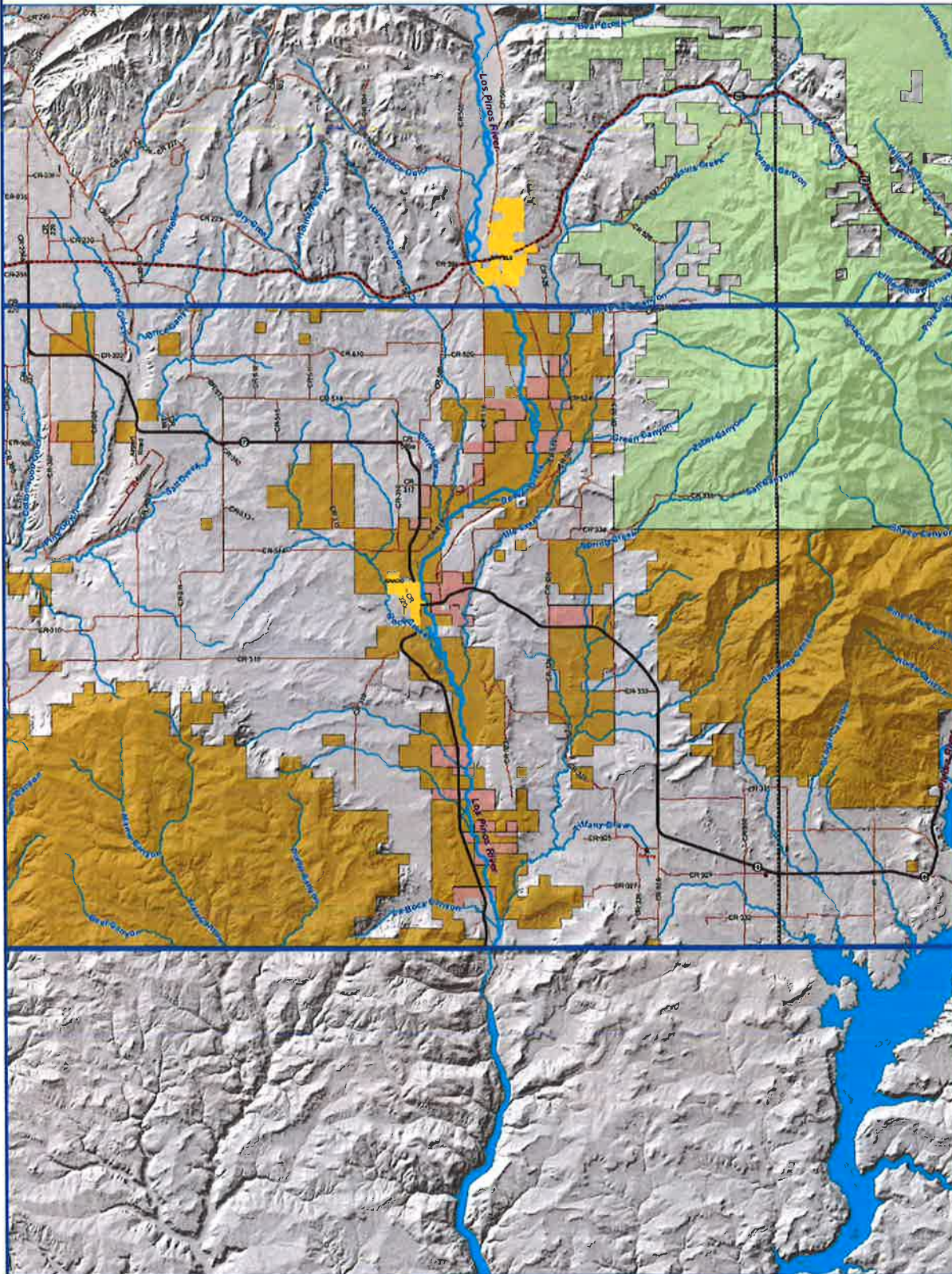


- City Limits
- Tribal Trust
- SUIT Boundary
- County
- STATE
- US
- River
- Stream

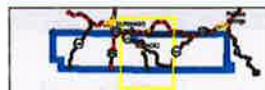
Southern Ute Indian Reservation

Trust Land Status for SUIT TAS Application 2015

Map 4 of 6



0 0.5 1 2 Miles

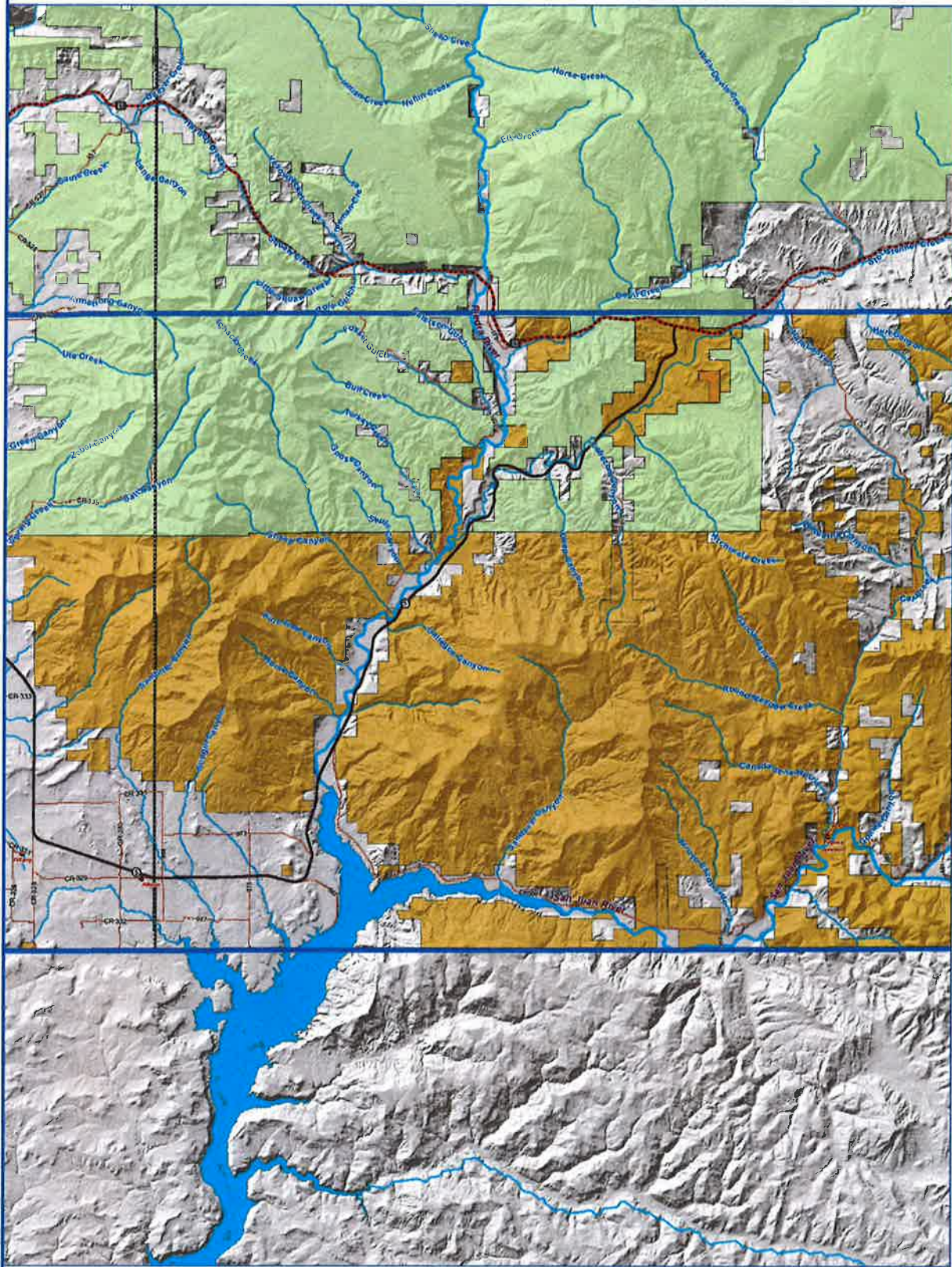


- City Limits
- Tribal Trust
- SUIT Boundary
- County
- STATE
- US
- River
- Stream

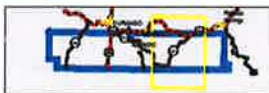
Southern Ute Indian Reservation

Trust Land Status for SUIT TAS Application 2015

Map 5 of 6

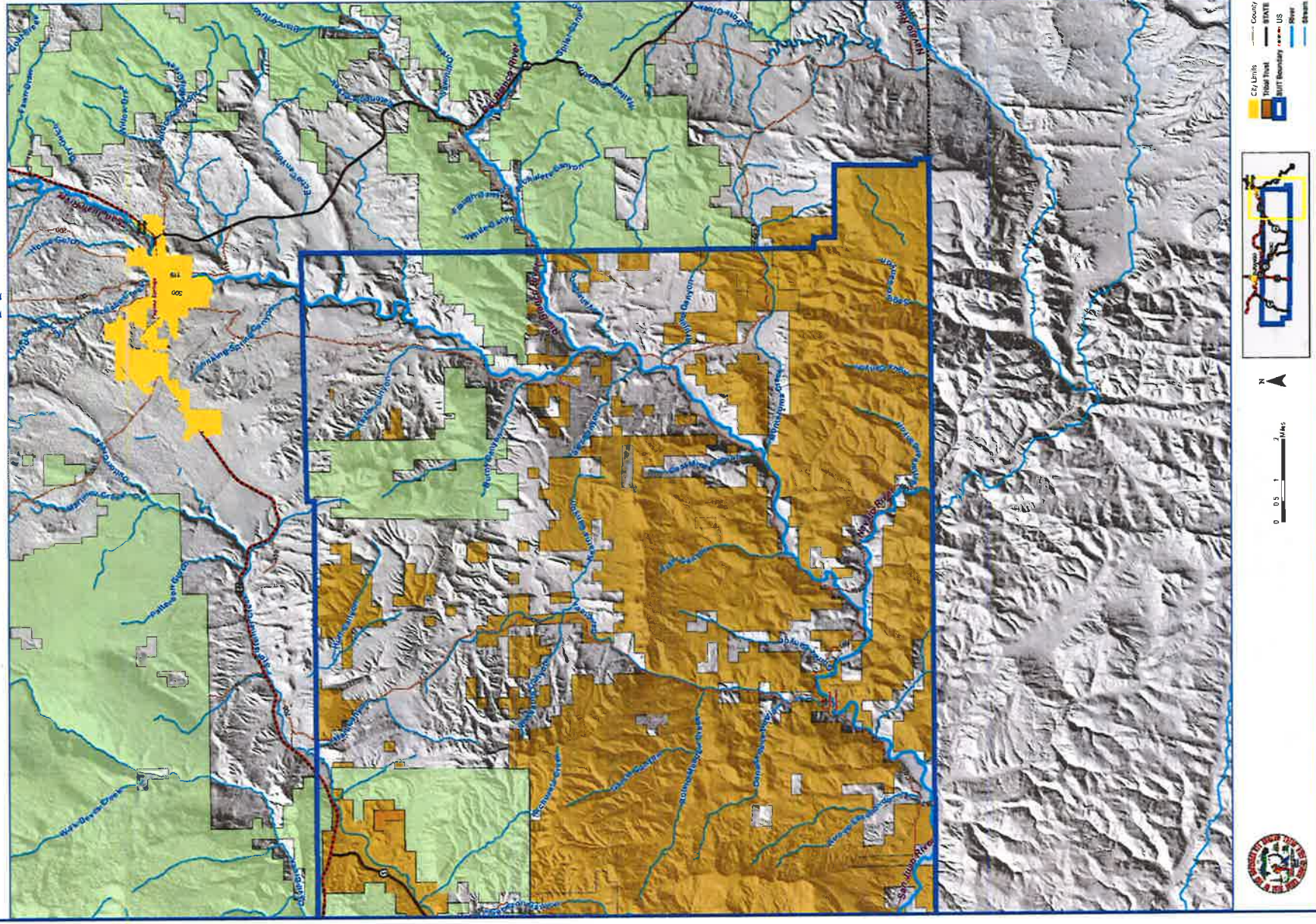


0 0.5 1 2 Miles



- City Limits
- Tribal Trust
- SUIT Boundary
- County
- STATE
- US
- River
- Stream

Map 6 of 6



Office of the Chairman
Routing & Transmittal Slip

To: (Name, Office or Agency)

1. Mark Hutson - EPD
2. Curtis Hartenstine - Water quality
3. _____
4. _____
5. _____

	NAME	COPY	SCAN
✓	Chairman		
✓	Vice Chair		
	Tribal Council Members		
	Executive Officer		
✓	Legal Department		

	Action Item		Invitation
	High Importance		NAGPRA
	Thank-You		Prepare Reply
	Circulate		Requesting Comment
	Consultation	✓	Review Document
	Update		Upcoming Meeting
	For your File		Training/Conference
✓	FYI		Donation Request

Notes:

Forwarded by: Tribal Council Affairs Office Manager
Ext. 2319

2/2/12