

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION 5

DECISION DOCUMENT:

APPROVAL OF THE
Red Lake Band of Chippewa Indians
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

November 2021

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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 Application¹ from the Red Lake Band of Chippewa Indians (Red Lake Band or Tribe) for program eligibility for Clean Water Act (CWA) Section 303(c) Water Quality Standards (WQS) and Section 401 Water Quality Certifications, pursuant to Section 518 of the CWA and 40 C.F.R. Part 131. CWA Section 518 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 includes all lands within the exterior boundaries of the Red Lake reservation and tribally held trust lands, formally designated as reservation lands, that have been restored to the Tribe following earlier land cessions, as further described Section II. C 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 would be a separate, future Agency decision.

Section 303(c) of the CWA requires 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. *See* 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.

Section 518 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(c) and 401. The EPA 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 are relevant to this Agency decision. Appendix II contains a selected index of materials considered by the EPA for this decision.

¹ Letter from Joel Rohde, Water Resources Program Director, Red Lake Department of Natural Resources, to Tinka Hyde, Water Division Director EPA Region 5, November 14, 2013, with attachments (hereafter, Application). Letter from Darrell G. Seki, Sr., Tribal Chairman, Red Lake Band of Chippewa Indians, to Cathy Stepp, Regional Administrator, December 10, 2019, with attachments; and email from Shane Bowe, to David Horak, September 28, 2020, including amendment to Attachment T of the TAS Application (hereafter Application Supplement). The Application and Application Supplement are, hereafter, collectively referenced as Application unless otherwise noted.

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:

- Letter from Joel Rohde, Water Resources Program Director, Red Lake Department of Natural Resources, to Tinka Hyde, Water Division Director, EPA Region 5, November 14, 2013, enclosing Application.
- Letter from Darrel G. Seki, Sr., Chairman, to Cathy Stepp, Regional Administrator, enclosing Supplemental Application for TAS for Sections 303(c) and 401 of the CWA, December 10, 2019.
- Email from Shane Bowe, to David Horak, September 28, 2020, including amendment to Attachment T of the Application.

2. Comments Regarding Tribal Assertion of Authority

On March 26, 2021, Cheryl L. Newton, Acting Regional Administrator, U.S. EPA Region 5, notified appropriate governmental entities (AGEs) by letter 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 a 45-day period for submittal of comments on the Tribe's assertion of authority.

Consistent with Agency practice, the EPA also placed notices in area newspapers including the *Red Lake Nation News* and *The Bemidji Pioneer* and provided the public an opportunity to comment on the Tribe's assertion of authority. The EPA provided an opportunity for local governments (including Beltrami County, the Beltrami Soil and Water Conservation District, the City of Bemidji, and the Clearwater Soil and Conservation District) to review and comment on the assertion of authority in the Tribe's Application and posted the Application materials on its website. Additionally, the EPA published a Frequently Asked Questions summary document on its website, consistent with Region 5's practice. The Tribe separately held meetings with the State of Minnesota.

During the March 27, 2021 through May 11, 2021 comment period, EPA received two comments, both in support of the Application. Appendix I provides a list of the entities notified of the comment opportunity and a list of comments received.²

² EPA originally reviewed the Tribe's Application for completeness in 2013 and in 2014 provided notice to AGEs, in addition to providing public notice and comment, on the Tribe's assertion of authority in its Application. Minnesota Pollution Control Agency (MPCA) provided comments in support of the Application but requested clarification regarding the boundaries of trust parcels located outside the "Diminished Reservation," further explained in Section II. C below. MPCA also sought further clarification regarding the water bodies associated with these parcels. *See* Letter from Emily Johnson Piper, Acting General Counsel, MPCA, to Tinka G. Hyde, EPA, July 1, 2014. The Tribe addressed these comments in its December 10, 2019 Application Supplement and provided other relevant updates. The Tribe worked with MPCA to resolve questions regarding the location of water resources in relation to trust parcel boundaries. *See* Letter from Laura Bishop, MPCA Commissioner, to David Horak, April 7, 2021.

3. Statutory and Regulatory Provisions

The following statutory and regulatory provisions are 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. U.S. EPA, *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.

4. Policy Statements

The following are 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. Memorandum from Jonathan Cannon and Robert Perciasepe to Assistant Administrators and Regional Administrators, *Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations*, March 19, 1998.
- c. Memorandum from Marcus Peacock to Assistant Administrators and Regional Administrators, *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*, January 23, 2008.
- d. Memorandum from JoAnn K. Chase to Radhika Fox, and others, *Revision of EPA Review of Treatment as a State Applications*, March 1, 2021.

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 under Section 518 for purposes of administering 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 by the EPA under 40 C.F.R. § 131.8 does not constitute an approval of water quality standards. Where the EPA determines that a tribe is eligible to the same extent as a state for purposes of administering a water quality standards program, 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 Red Lake Band of Chippewa is a federally recognized tribe. It is included in the Department of the Interior’s current list of federally recognized tribes as “Red Lake Band of Chippewa Indians, Minnesota.”³ As discussed below, the Tribe is exercising governmental authority over its reservation as described 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 carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that a tribe submit a statement

³ U.S. Department of the Interior, *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 86 *Fed. Reg.* 7554, 7556 (January 29, 2021), <https://www.federalregister.gov/documents/2021/01/29/2021-01606/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of>, last visited June 22, 2021.

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 a 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 government, types of governmental functions performed, and the Tribe's authority to carry out the governmental functions being performed.⁴

(i) Form of the Tribal Government

The Tribe's government is organized into Executive, Legislative, and Judicial branches, defined through the Tribe's Constitution. The Tribe's executive branch governing body is its Council, which is comprised of "an elected Chairman, Secretary, and Treasurer, and eight elected Representatives, two each from four Reservation Districts. In addition, there is an Advisory Council of seven Hereditary Chiefs."⁵ Legislative branch functions, including approval of ordinances and tribal code provisions, are carried out by a Tribal Code Committee.⁶ The Tribal Code Committee is comprised of the Tribe's Legal Department, Tribal Council Members, Tribal Court practitioners, law enforcement, and relevant department managers.⁷ The Tribe's laws are embodied in its Codes, supplemented by ordinances and Council resolutions. The Tribe's judicial program, including civil, and judicial enforcement, is carried out through its Chief Judge and six judges, which include two associate judges. Judicial actions are governed by the Tribe's Judicial Code.⁸ The Application states that "the tribal government exercises substantial duties and powers including the provision of governmental services, regulation of public safety and the environment, and oversight of tribal and non-tribal business activities."⁹

(ii) Types of Government Functions Performed by the Tribe

Governmental functions performed by the Tribe include the following, which are described in the Application:

- Providing social and community services, including child, family and eldercare programs, health care services, homeless/shelter programs, food distribution and nutrition programs, library services, and grade school education.
- Implementing land management and land leasing programs.
- Operating and maintaining public works including road maintenance, sanitation services, and a solid waste transfer station.

⁴ Red Lake Band of Chippewa Indians received Treatment as a State for Section 106 (program grant) of the CWA in 1989, and for CWA Section 319 (non-point source program) in 2008. EPA notes that a tribe that has previously shown that it meets the "governmental functions" requirement for purposes of another EPA program generally need not make that showing again. *See 59 Fed. Reg.* 64339, 64340 (December 14, 1994); 40 C.F.R. § 131.8(b)(6). EPA reviewed the eligibility factors described in this Decision Document to ensure that all findings remain current.

⁵ Revised Constitution and Bylaws of the Red Lake Band of Chippewa Indians, Article IV, Sections 1 and 2; Application Supplement at 3; Legal Counsel's Certification in Support of the Red Lake Nation's Application to Administer a Water Quality Standards Program and a Water Quality Certification Program Pursuant to the Clean Water Act," December 9, 2019 [hereafter Legal Counsel's Statement] at 3-4.

⁶ Application Supplement at 3.

⁷ Legal Counsel's Statement at 4.

⁸ Application Supplement at 3-4; Legal Counsel's Statement at 4.

⁹ Application Supplement at 4.

- Providing for public safety, including police and fire protection, through the Tribe's Public Safety Department. The Tribe also has a Conservation Department that includes conservation officers that can assist with public safety issues.
- Regulation of natural resources through the Tribe's Department of Natural Resources (RL DNR), which employs 75 full time and seasonal employees. The RL DNR is responsible for regulation and implementation of reservation programs for air quality, Brownfields, fisheries, forestry, timber sales, fire prevention, water resources and wetlands, and wildlife management.
- The Tribe regulates businesses within the reservation and also maintains several tribally owned and operated businesses including gaming, fisheries, and native foods.¹⁰

(iii) Source of the Tribe's Governmental Authority

The Tribe's authority rests on several key sources, including the Tribe's inherent authority, treaties, and tribal legal codes and ordinances, including the Tribe's Constitution.¹¹ The Tribe asserts inherent sovereignty to exercise civil regulatory authority over both its members and within the geographic extent of its reservation borders.¹² The Tribe's government carries out authorities and programs to implement social services, education, land management, natural resource management, commercial businesses, permitting, and law enforcement through tribal ordinances and codes adopted by the Tribal Council.¹³

The above description of the bases of authority and of the functions carried out by the Tribe to regulate its members and activities within the reservation, control the disposition of property, and provide for the public health and environmental protection demonstrates that the Tribe has met the requirements of 40 C.F.R. §§ 131.8(a)(2) and (b)(2).

C. Jurisdiction Over Waters within the Borders of a Reservation

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).

The Tribe's Application contains a detailed geographic description of the Red Lake Reservation, its tribally held trust lands, and its water resources. The Tribe's Application also lists waterbodies for which the Tribe is seeking authority to establish water quality standards. The legal descriptions, identification of individual water bodies, and detailed maps provided by the

¹⁰ Application Supplement at 4-6, 8-9; Legal Counsel's Statement at 4 –6, 8.

¹¹ Application Supplement at 6-9; Legal Counsel's Statement at 7-8.

¹² Application Supplement at 8-9; Legal Counsel's Statement at 6 – 8; and Application Attachment S, Maps.

¹³ Application Supplement at 4-6; Legal Counsel's Statement at 3-4.

Tribe meet the requirement of demonstrating that the tribal government exercises the authority to manage and protect water resources of the reservation.

(i) Map or Legal Description

The Red Lake Band of Chippewa Indians' reservation occupies more than 836,000 acres in northwestern Minnesota, including portions of Beltrami, Clearwater, Koochiching, Lake of the Woods, Marshall, Pennington, Polk, Red Lake and Roseau counties.¹⁴

The Tribe's formal reservation was reserved by the Old Crossing Treaty, 13 Stat. § 689 (October 2, 1863; ratified March 1, 1864)¹⁵; later amended by the Treaty of 1864, 13 Stat. § 689 (April 12, 1864), by which the Tribe ceded some 11 million acres to the United States¹⁶ and resulted in a land base of approximately 3.2 million acres.¹⁷ By Treaty Agreement of 1889¹⁸ and Letter Agreement between the Tribe and the Secretary of the Interior of 1902, codified in 1904,¹⁹ the Tribe ceded some additional 2.4 million and 300,000 acres of land, respectively, to the United States.²⁰ This resulted in a reservation land base (that was never ceded) and encompasses some 650,000 acres, known as the "Diminished Reservation."²¹ Following the Indian Reorganization Act of 1934, which authorized the Secretary of the Interior to restore to tribal ownership certain lands that had been previously ceded by the Tribe in two areas, a total of some 186,112 acres of land were restored to the Tribe through a Department of the Interior Secretarial Order of February 22, 1945²² including lands that had not been sold out of federal holdings in two ceded areas.²³ These lands were subsequently converted from fee to trust status,

¹⁴ Application Supplement at 1, 6-7; Legal Counsel's Statement at 1-2, 6-7.

¹⁵ Application at Attachment E.

¹⁶ Legal Counsel's Statement at 2; *United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn., March 28, 1979).

¹⁷ 466 F. Supp. at 1384.

¹⁸ "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota," Act of January 14, 1889, 25 Stat. 642, cl. 24, Application at Attachment F. *See also* Legal Counsel's Statement at 5-6.

¹⁹ This agreement and others were codified in the Act of February 20, 1904, 33 Stat. § 46 (1904), Application at Attachment G.

²⁰ U.S. Department of the Interior, Solicitor's Opinion, "Legal Status of the Red Lake Band of Chippewa Indians' Restored Lands Assessed for Drainage Works by the State of Minnesota Under the Authority of the Volstead Act of 1908," M-37031, May 1, 2015, at 3.

²¹ Legal Counsel's Statement at 6; 82 *Fed. Reg.* 4407-4408. *See* Bureau of Indian Affairs, "Identifying Lands Subject to Secretarial Order of Restoration of February 22, 1945," 82 *Fed. Reg.* 4407 (January 3, 2017).

²² Legal Counsel's Statement at 1, 7. U.S. Department of the Interior, Office of the Secretary, *Red Lake Reservation, Minnesota, Order of Restoration*, 10 *Fed. Reg.* 2448 (March 2, 1945). The 1945 Order "Restored to tribal ownership all those lands of the Red Lake Indian Reservation which were ceded by the Indians under [the Nelson Act and the Act of February 20, 1904] and which were opened for sale or entry but for which the Indians have not been paid and which now are or hereafter may be classified as undisposed of." 10 *Fed. Reg.* at 2449. *See also* Act of December 4, 1942, ch. 673, 56 Stat. 1039 ("All right, title, and interest of the Minnesota Chippewa Tribe in and to the so-called Red Lake Indian ceded lands, including any administrative reserves, is hereby declared extinguished and title thereto vested in the Red Lake Band of Chippewa Indians.").

²³ *See also* U.S. Department of the Interior, Notice *Identifying lands Subject to the Secretarial Order of Restoration of February 22, 1945*, 66 *Fed. Reg.* 57,479 (Nov. 15, 2001); U.S. Department of the Interior, Office of the Solicitor, "Legal Status of the Red Lake Band of Chippewa Indians' Restored Lands Assessed for Drainage Works by the State of Minnesota Under the Authority of the Volstead Act of 1908," M-37031, May 1, 2015, <https://doi.opengov.ibmcloud.com/sites/doi.opengov.ibmcloud.com/files/uploads/M-37031.pdf> (last visited July 13, 2021), at 10-11.

with most of the restored lands having the status of declared reservation lands.²⁴ The Tribe and U.S. DOI continue to work to convert these lands from fee simple to federal trust status.²⁵

Accordingly, the Tribe's Application includes all those lands located within the Diminished Reservation and specifically-identified tribally held trust parcels located outside the Diminished Reservation.²⁶ The Tribe's Application includes detailed maps demonstrating that the reservation is currently comprised of approximately 649,082 acres comprising the "Diminished Reservation" and 188,773 acres in tribally held trust lands and declared reservation lands located outside the boundary of the Diminished reservation.²⁷ Other tribally held trust properties located outside the exterior boundaries of a formal Indian reservation, without being specifically declared reservation lands, are informal reservations and are eligible for inclusion in a Tribe's application for CWA program authority.²⁸

Based on the information described above, 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.

(ii) Statement Describing Basis for the Tribe's Authority

The Tribe's 2013 Application for TAS for the CWA sections 303(c) and 401 programs included a description of the Tribe's inherent sovereign authority over all reservation lands and resources as a basis for the Tribe's authority to regulate water quality under the CWA.²⁹ The Tribe's assertion of inherent authority cited relevant federal Indian law precedent that supports

²⁴ 10 *Fed. Reg.* 2448. Pursuant to the Order, restored lands were proclaimed as having the status of existing reservation lands and "subject to any existing valid rights." *Id.* at 2449. *See also* 466 F. Supp. at 1384. *See also*, Felix S. Cohen, U.S. Department of the Interior, Office of the Solicitor, "Status of Public and Indian Ceded Lands Drained by the State of Minnesota under the Volstead Act of May 20, 1908," M-30851 (May 20, 1908), 58 Interior Dec. 65 (1942). *See also* Application Supplement at 1.

²⁵The Tribe continues to engage in a mapping effort, together with the Department of the Interior, to further identify restored lands. Only restored lands held by the federal government in trust status for the Tribe are included in the Tribe's Application. Application at 8 and footnote 1.

²⁶ The Tribe's Supplemental Application specifically notes:

There are unresolved issues regarding the scope of lands that were restored by the February 22, 1945 Secretarial Order and that should have been restored under that Order or otherwise. All lands meeting the definition in that Order were restored as of that date. However, the United States failed to publish a definitive list of those restored lands. A project is underway to identify those lands restored in 1945. The Tribe includes on Attachments A and B only lands which were indisputably restored. As further lands are identified as having been restored, the Tribe will decide whether to assert water quality authority and seek amendment of the lands and waters covered by this application. Resolution of disputed boundary surveys, Section 2415 claims, and other land issues may also increase the waters over which the Band asserts jurisdiction.

Supplemental Application at 8 and note 1. *See also* Legal Counsel's Statement at 1. The Tribe's Application also notes that the Tribe is not seeking to include waters of the Lake of the Woods in this Application. Application at 7.

²⁷ Application at 8 and Attachment S, Maps.

²⁸ EPA, *Amendments to the Water Quality Standards Regulations that pertain to Standards on Indian Reservations*, 56 *Fed. Reg.* 64876, 64881 (December 12, 1991) (citing *Okla. Tax Comm'n v. Citizen Tribe Potawatomi Indian Tribe of Okla.*, 111 S. Ct. 905, 910 (1991)).

²⁹ Application at 8-9.

the Tribe's exercise of inherent authority to regulate water quality for its reservation and those restored trust lands covered by its Application.³⁰

While the Tribe's Application was pending, EPA issued a final interpretive rule clarifying the authority of tribes to administer regulatory programs over their entire reservations pursuant to CWA section 518. This clarification is described in EPA's *Revised Interpretation of Clean Water Act Tribal Provision*, 81 *Fed. Reg.* 30183 (May 16, 2016) (*Interpretive Rule*), which explains that Section 518 includes an express congressional delegation of civil regulatory authority to eligible tribes for purposes of administering CWA programs over their entire reservations. Pursuant to this congressional delegation, applicant tribes do not need to demonstrate their inherent authority over reservation water in order to obtain TAS eligibility 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. *Id.* at 30190, 30194.

Accordingly, the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes is to identify the geographic boundaries of the Indian reservation area over which the delegated authority would apply. *Id.* at 30194. In the *Interpretive Rule*, 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. *Id.* at 30192-193. 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. *Id.*

In its Application Supplement and Legal Counsel's Statement, the Tribe clarified that the Tribe's primary basis of regulatory authority over surface waters on the Reservation and for restored tribal trust lands is the congressional delegation of authority in CWA Section 518. The Tribe also states that there is no limitation or impediment to its ability to accept and effectuate this congressional delegation of authority.³¹ Moreover, EPA is not aware of any impediment limiting the Tribe's ability to effectuate the congressionally delegated authority for its formal reservation and those tribal trust lands identified in its Application. The EPA, therefore, concludes that the Tribe has properly asserted the congressional delegation of authority and has satisfied the application requirement of 40 C.F.R. § 131.8(b)(3)(ii).

(iii) 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).

The Tribe's Application identifies the formal reservation lands and trust parcels for which the Tribe seeks to administer the subject program authorities.³² The Tribe's Application materials

³⁰ *Id.*, also citing list of threats to water quality at 14-16; Legal Counsel's Statement at 7-8.

³¹ Legal Counsel Statement at 10-11.

³² Application at 1 and 8.

include descriptions and maps showing the water resources associated with the formal Reservation and the restored tribal trust lands.³³ The Application contains a description of waters located within the Diminished Reservation.³⁴ The Application contains a list of those watersheds transecting Minnesota lands and restored trust lands.³⁵ The Tribe's Application also includes a list of the Water Resources of the Reservation and restored trust land holdings.³⁶ The legal descriptions of parcels, identification of water bodies, and detailed maps provided by the Tribe satisfy 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which the Tribe proposes to establish water quality standards. Thus, the EPA finds that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying surface waters over which it proposes to establish water quality standards.

(iv) 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 Tribe has met the requirements set forth at 40 C.F.R. §§ 131.8(a)(3) and (b)(3).

D. Capability

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*

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 a 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) requirements are addressed in more detail below.

(i) 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*

³³ Application at 8; Application Supplement at 9-14; and Attachment S (Updated TAS Maps by County).

³⁴ Application at 14.

³⁵ Application at Attachments B and C.

³⁶ Application at 9-14.

Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a).

See Discussion in Section II.B above. Additionally, the Tribe's Application describes its general accounting and procurement practices.³⁷ In addition to the Application materials, Region 5 staff gathered information on the Tribe's grant performance from regional tribal program managers and determined that the Tribe has a sound history of successful grants management.³⁸

(ii) 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.

In addition to the description of governmental functions discussed in Section II.B above, the Tribe's Application contains a description of the RL DNR, which employs 75 full-time and seasonal employees. The RL DNR implements water quality (wetlands and non-point source pollution control), air quality monitoring, and brownfields programs, in addition to the Tribe's forestry, fishery and wildlife management programs.³⁹ Conservation wardens enforce the Tribe's hunting, fishing, and natural resource management regulations.⁴⁰ The Tribe's public safety programs include a 23-officer force, in addition to five conservation officers. Public safety programs also include fire protection and community safety.⁴¹

(iii) 40 C.F.R. 131.8(b)(4)(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the tribal government.

See discussion in Section II.B above.

(iv) 40 C.F.R. 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 Tribe's Application states that the Tribal entity that will be responsible for conducting water quality certifications under CWA section 401 is the Director of its Department of Natural Resources.⁴² The Tribe's DNR will establish, review, implement and revise water quality standards and manage the Tribe's 401 certification program. The Tribe's Application included resumes, the RL DNR organizational chart, and a description of the programs implemented by the RL DNR, which are further described in Section II.D(v) below.

(v) 40 C.F.R. 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

³⁷ Application at 18.

³⁸ Staff reviews are identified in Appendix II.

³⁹ Application at 4-5.

⁴⁰ Application at 17-18.

⁴¹ Application at 4-5.

⁴² Application at 8; Legal Counsel's Statement at 11.

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 Tribe's Water Resources Program within the RL DNR is staffed by eight full-time employees in addition to seasonal staff. Activities include lake, stream, and biological monitoring, data collection and analysis, reporting, and public outreach and education.⁴³ The Tribe has successfully carried out program and project plans using CWA section 106 and 319 funds.⁴⁴ The Application states that the Tribe has been an active participant in numerous partnerships with state and local governments, including:

- The Beltrami Soil and Water Conservation District, on which the Tribe holds one of the Supervisory positions;
- The Red River Basin Water Quality Team;
- The Red River Basin Monitoring Advisory Committee;
- The International Lake of the Woods Multi-Agency Agreement;
- The Lake of the Woods Total Maximum Load Study;
- The Minnesota Pollution Control Agency.⁴⁵

Water Resources Program Staff have attended EPA's Water Quality Standards Academy and other training programs.⁴⁶

Based on the information provided by the Tribe that describes its capability to administer an effective water quality standards and certification program and based on EPA's experience in working with the Tribe on water quality programs to date, including the administration of the Tribe's CWA section 106 and 319 grants, the EPA finds that Red Lake 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

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 decision 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 programs. Under the CWA, a tribe must be approved for TAS for EPA to act on its submitted water quality standards 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 those waters of the United States that are within the scope of the TAS approval.

⁴³ Application at 19.

⁴⁴ See Application at Attachment Q, Position descriptions of Water Resources Staff; Attachment J, Tribal Organization Flowchart; Attachment M, Water quality and quantity reports for Reservation waters; and Attachment N, Integrated Resource Management Plan.

⁴⁵ Application at 19.

⁴⁶ Application at 19 and Attachment Q.

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. For example, before adopting final standards, the Tribe must hold a public hearing, notify the public and affected parties and provide copies of relevant materials in advance, and for final rulemaking provide a responsiveness summary to the Tribal decision-maker and the public. See 40 C.F.R. § 131.20(b) and 40 C.F.R. Part 25. 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.

It is the EPA's understanding that the Tribe has participated in discussions with the State of Minnesota regarding the adoption of water quality standards.⁴⁷ The Region supports these efforts and encourages the Red Lake Band and Minnesota to continue these discussions, including discussions with other interested stakeholders as appropriate. 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

Recommendation

Based on the foregoing analysis of the Application and supporting documentation, EPA Region 5 Office of Regional Counsel (ORC), Tribal and Multi-media Office (TMPO), and Water Division (WD) conclude that the Red Lake Band meets the requirements of CWA Section 518 and 40 C.F.R. Section 131.8 to be treated in the same manner as a state for purposes of administering the water quality standards and certification programs under CWA Section 303(c) and Section 401. EPA Region 5 ORC, TMPO and WD recommend that the Regional Administrator concur with these conclusions and approve the Tribe's TAS Application for purposes of administering the water quality standards and certification programs, pursuant to CWA Section 518 and 40 C.F.R. Section 131.8.

Robert A. Kaplan
Office of Regional Counsel

Date

Alan Walts, Director
Tribal and Multi-media Office

Date

Tera L. Fong, Director
Water Division

Date

⁴⁷ See Letter from Katrina Kessler, Assistant Commissioner, MPCA, to David Horak, EPA, November 15, 2019; and Letter from Laura Bishop, MPCA Commissioner, to David Horak, April 7, 2021.

Decision

Based on documentation provided by the Red Lake Band of Chippewa Indians, and the above analysis, I have determined that the Tribe meets the requirements of CWA Section 518 and 40 C.F.R. § 131.8, and, therefore, approve the Tribe's Application for eligibility to administer the water quality standards program of CWA Section 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. By virtue of these decisions, the Tribe will also be an “affected state” within the meaning of CWA Sections 402(b)(3) and (5) and its implementing regulation at 40 C.F.R. § 122.4(d).

Debra Shore, Regional Administrator
& Great Lakes National Program Manager
US EPA Region 5

Date

Appendix I: Table of Entities Receiving Notice and Providing Comments

Appropriate Government Entities (AGEs) Notified
State of Minnesota, Governor's Office
Minnesota Pollution Control Agency, Commissioner
Minnesota Attorney General
Local Governments Notified
Beltrami County Administrator
Beltrami Soil and Water Conservation District
City of Bemidji
Clearwater Soil & Conservation District
Red Lake Tribal Court
Red Lake Tribal Council
AGE Comments Received
MPCA (Letter of Support), November 15, 2019
MPCA (Letter of Support), April 7, 2021
Public Comments Received
WaterLegacy (Letter in support)

Appendix II

Administrative Record – Selected Documents

EPA Decision Approving Red Lake Band of Chippewa Indians, Application for “Treatment in the Similar Manner” as a State (TAS) under Clean Water Act (CWA) Sections 303(c), 401, and 518

Date	Author	Addressee (or first if multiple)	Document Name or Location	Description	Number of Pages
2013 Application and 2019 Application Supplement					
11/14/2013	Floyd Jourdain, Jr., Tribal Chairman, Red Lake Band of Chippewa Indians	Susan Hedman, Regional Administrator, U.S EPA (EPA), Region 5	Administrative Record	Enclosing Red Lake Band of Chippewa Indians CWA Section 303(c) and 401 Programs Eligibility Application for Treatment in the Same Manner as a State (TAS).	2 + Attachments below
11/14/2013	Joel Rohde, Red Lake Department of Natural Resources, Program Director	Tinka Hyde, Water Division Director, EPA, Region 5	Administrative Record		
			Attachment A	Waters Currently Included in Red Lake WQS	1
			Attachment B	HUC 12 Watersheds within Trust Lands	1
			Attachment C	List of Watersheds	4
			Attachment D	78 <i>Fed. Reg.</i> 26384 (May 6, 2013)	6
			Attachment E	Old Crossing Treaty, 13 Stat. § 689 (October 2, 1863; ratified March 1, 1864)	25

Date	Author	Addressee (or first if multiple)	Document Name or Location	Description	Number of Pages
			Attachment F	Treaty Agreement of 1889, and associated documents	12
			Attachment G	Letter Agreement between the Tribe and the Secretary of the Interior of 1902, and associated documents	31
			Attachment H	Constitution of the Red Lake Band of Chippewa	11
			Attachment I	Red Lake Department of Natural Resources Flow Chart	1
			Attachment J	Red Lake Governmental Structure	1
			Attachment K	Legal Counsel Letter, October 14, 2013	1
			Attachment L	Letter from Lynn Buhl, Regional Administrator, to Floyd Jourdain, October 2, 2008, regarding CWA Section 319 TAS Approval	1
			Attachment M - 1	Red Lake Reservation – Individual 10-year Stream Site Assessments	42
			Attachment M- 2	Red Lake Reservation – Individual 10-year Lake Assessments	87
			Attachment M- 3	Red Lake Band of Chippewa, Surface Water Data Summary 10/30/2013	36
			Attachment N	Red Lake Band of Chippewa, Integrated Resource Management Plan, 2011 Interim Draft	210
			Attachment O	Red Lake Band of Chippewa, governing resolutions	48
			Attachment P	Copy of Tribal Chairman Application cover letter	2
			Attachment Q	Red Lake DNR Position Descriptions	9
			Attachment R	Red Lake Band Resolution No. 99-13	1
			Enclosure	TAS Narrative	20

Date	Author	Addressee (or first if multiple)	Document Name or Location	Description	Number of Pages
December 10, 2019	Darrel G. Seki Sr., Chairman, Red Lake Band of Chippewa	Cathy Stepp, Regional Administrator		Enclosing Red Lake Band of Chippewa Indians CWA Section 303(c) and 401 Programs Eligibility Application Supplement for Treatment in the Same Manner as a State (TAS).	2 + Attachments below
			Attachment D	83 <i>Fed. Reg.</i> 34863 (July 23, 2018)	6
			Attachment S	Updated Maps by County, including: Beltrami, Clearwater, Koochiching, Lake of the Woods, Marshall, Pennington, Polk, Red Lake County, and Roseau	
			Attachment R	Red Lake Band Resolution No. 99-13	1
			Enclosure	Legal counsel certification in support of the Red Lake Band's TAS Application	11
			Enclosure	Updated TAS Narrative	21
9/28/20	Email from Shane Bowe, Water Resources Program Director, Red Lake Band of Chippewa Indians	David Horak	Enclosure T	83 <i>Fed. Reg.</i> 34863 (July 23, 2018)	6 pp
Other Documents					
2013	Various	David Horak, Tribal Program Manager, State and Tribal Programs Branch (STPB), EPA, Region 5	Administrative Record	Capacity Statement emails in support of the Tribe receiving 303 Program Authority	8
5/22/2014 - 6/20/2014	R5 TAS Team	Public Notice published in 2 newspapers	Administrative Record	<i>Bemidji Pioneer and Red Lake Nation News</i>	1
5/14/2014	Susan Hedman, Regional Administrator, R5	Rebecca Flood, Assistant Commissioner,	Administrative Record	Notice to Affected Governmental Entities	2

Date	Author	Addressee (or first if multiple)	Document Name or Location	Description	Number of Pages
		Minnesota Pollution Control Agency (MPCA)			
5/14/14	Susan Hedman,	Floyd Jourdain, Jr.	Administrative Record	Letter notifying Tribe of Application completeness and notice to Affected Governmental Entities	2
5/14/14	Susan Hedman	Mark Dayton, Governor of Minnesota	Administrative Record	Notice to Affected Governmental Entities	2
5/20/14	David Horak	Kay Mack, Beltrami County Administrator	Administrative Record	Letter of outreach to local governments to review application	1
5/20/2014	David Horak	Red Lake Tribal Council	Administrative Record	Letter of outreach to local governments to review application	1
5/20/2014	David Horak	Red Lake Tribal Court	Administrative Record	Letter of outreach to local governments to review application	1
7/01/2014	Emily Johnson Piper, Acting General Counsel, MPCA	Tinka G. Hyde	Administrative Record	MPCA comments regarding Red Lake Band of Chippewa Indians' Application	14
11/15/2019	Katrina Kessler, Assistant Commissioner, MPCA	David Horak	Administrative Record	Letter in support of Red Lake Band Application	1
9/15/2020-9/28/2020	R5 staff	David Horak	Administrative Record	Capacity Statement emails in support of the Tribe receiving TAS approval	3
3/26/2021	Cheryl Newton Acting Regional Administrator, EPA, R5	Darrel G. Seki	Administrative Record	Letter notifying Tribe of Application completeness and notice to Affected Governmental Entities	2
3/26/2021	Cheryl Newton	Governor Tim Walz Office of the Governor	Administrative Record	Notice to Affected Governmental Entities	2

Date	Author	Addressee (or first if multiple)	Document Name or Location	Description	Number of Pages
3/26/2021	Cheryl Newton	Laura Bishop, Commissioner, MPCA	Administrative Record	Notice to Affected Governmental Entities	2
3/26/2021	David Horak	Thomas H. Barry, Beltrami County Administrator	Administrative Record	Letter of outreach to local governments to review application	2
3/26/2021	David Horak	Mayor Jorge Prince, City of Bemidji	Administrative Record	Letter of outreach to local governments to review application	2
3/26/2021	David Horak	Chairman Darrell Seki, Red Lake Tribal Council	Administrative Record	Letter of outreach to local governments to review application	2
3/26/2021	David Horak	Jason Defoe, Court Administrator, Red Lake Tribal Court	Administrative Record	Letter of outreach to local governments to review application	2
3/26/2021	David Horak	Lori Buell - District Manager, Clearwater Soil & Water Conservation District	Administrative Record	Letter of outreach to local governments to review application	2
3/26/2021	David Horak	Brent Rud - District Manager, Beltrami Soil &	Administrative Record	Letter of outreach to local governments to review application	2

Date	Author	Addressee (or first if multiple)	Document Name or Location	Description	Number of Pages
		Water Conservation District			
3/27/2021	R5 TAS Team	Public Notice published in 2 newspapers	Administrative Record	<i>Bemidji Pioneer</i> and <i>Red Lake Nation News</i> Mach 27, 2021- May 11, 2021	1
4/7/2021	Laura Bishop Commissioner, MPCA	David Horak	Administrative Record	Letter in support of Red Lake Band TAS Application	2
5/7/2021	Paula Maccabee, WaterLegacy Advocacy Director and Counsel	David Horak	Administrative Record	Letter in support of Red Lake Band TAS Application	2
6/24/21	Tera Fong, Director Water Division	Darrell Seki, Chairman Red Lake Band of Chippewa Indians	Administrative Record	Letter to Chairman of completed Public Notice period, Mach 27, 2021- May 11, 2021	1
	Debra Shore, Regional Administrator, EPA, R5	Darrell Seki, Chairman Red Lake Band of Chippewa Indians	Administrative Record	Letter Notification of TAS approval	2
	Tera Fong, Director, Water Division; Robert A. Kaplan, Regional Counsel, Office of Regional Counsel; Alan Walts, Director Tribal and Multi-media Programs Office	Debra Shore	Administrative Record	Red Lake TAS Decision Document	25 with AR attached

