Sac & Fox Tribe of the Mississippi in Iowa
Office of the Attorney General
349 Meskwaki Road, Tama, IA 52339-9629 (641) 484-4678 /FAX (641) 484-5425
"MESKWAKI NATION"

February 28, 2017

Ms. Heather Duncan
R7 Tribal 106 Coordinator
Environmental Protection Agency
11201 Renner Blvd
Lenexa, KS 66219

Re: Attorney Letter in Support of Application of the Sac & Fox Tribe of the Mississippi in Iowa for Treatment as State to administer a CWA section 303(c) and CWA section 401.

To All Concerned:

Representatives of the Sac & Fox Tribe of the Mississippi in Iowa[1] (the Tribe) have prepared an application for the purposes of obtaining a determination from the Environmental Protection Agency (EPA) that the Tribe is eligible for treatment in a similar manner as a state (TAS) under EPA regulatory status. Specifically, Tribal representatives have been working with EPA Region 7 administrators regarding the co-submitted application for Clean Water Act (CWA) section 303(c) water quality standards program and CWA section 401 water quality certification program. This letter is submitted along with other application materials to assist in establishing the Tribe's eligibility for program authorization under the CWA section 303(c) water quality standards program and CWA section 401 water quality certifications.

As is the duty of Tribal Attorney General (AG), it is pertinent for the AG to review Tribal documents and laws, and research the legal issues for purposed of making the representations set forth in this letter. The following such review and additional research regarding pertinent matters of law, I am of the knowledge that for the reasons set forth coming that the tribe meets the requisite statutory criteria for treatment similar to a state under various EPA regulatory statutes.

[1] The Tribe refers to itself by its traditional name: Meskwaki Nation

This letter is submitted in support of the Tribe's application dated 27 February 2017 for treatment as state.

Criteria for Treatment of a Tribe like a State

In 1987, Congress amended the Clean Water act, 33 U.S.C. Sec 1251, *et seq* (CWA) to authorize the EPA to treat Indian tribes as states under section 518 of the CWA. In order to obtain Treatment as a State (TAS) status, a tribe must meet the following requirements:

1. The Tribe must be recognized by the Secretary of the Interior and must exercise governmental authority over trust lands,
2. The Tribe must have a governing body capable of carrying out substantial governmental duties and powers,
3. The functions to be exercised by the Tribe must pertain to the management and protection of water resources, which are within the borders of the Indian reservation and held by the Tribe, held by the United States in trust for the tribe, or otherwise within the borders of a reservation.
4. The Tribe must be capable, in the reasonable judgment of the EPA Regional Administrator of carrying out the functions of the CWA and applicable regulations. See 33 U.S.C. Sections 1377(e)(1)-(3) and 40 C.F.R Sec. 131.8 (a).

The Sac & Fox Tribe of the Mississippi in Iowa is a Tribe that meets the above criteria and have included in this letter, the application narrative statements, and attached documents supporting such a proposition.

Tribal Recognition and Governance

The Tribe is recognized by the Secretary of the Interior (see listing of Dept. of Interior Notice, FE Reg. Vol. 81, No. 86, Wednesday, May 4, 2016, p. 26829, copy included with application) and exercises authority over its lands. The tribe is a self-governing sovereign Indian Tribe organized pursuant the Indian Reorganization Act. 25 U.S.C Sec. 476. The governing document of the Tribe is the "Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa" (the Tribal Constitution) which was adopted by its members and approved by the Secretary of the Interior on November 13, 1937. A copy of the Tribal Constitution is included in the application materials as Attachment B-Tribal Constitution.

In accordance with the Tribal Constitution, the Tribe's governing body is a seven member Tribal Council that has authority to represent the Tribe in all matters pertaining to the business of the Tribe. Tribal const. art III, sec. 2. More specifically, the Tribal Council is authorized under the Tribal Constitution, among other matters, to (i) protect and preserve the property and natural resources of

the Tribe, and (ii) regulate the use and disposition of property of members of the Tribe insofar as necessary to protect the peace, safety, and welfare of the Tribe. Tribal Const., Art X, sec. 1 (e) and (k).

In the exercise of its constitutional powers, the Tribe has enacted a comprehensive set of Tribal laws[2], has developed an organizational structure with regulatory bodies[3], and has its own Tribal Police department and Tribal Court System, with criminal and civil jurisdiction. All of these manifestations of the Tribe's sovereign authority illustrate the Tribe's assumption of governmental duties and its exercise of governmental powers. To summarize, the Tribe is federally recognized, exercises government authority over its lands, and has a governing body that carries out "Substantial governmental duties and powers" 40 C.F.R. 131.8(A)(2). Consequently, the Tribe meets criteria 1 and 2 above.

Jurisdiction

The Tribe exercises sole regulatory jurisdiction over the waters within the boundaries of the Settlement and over its fee lands that comprise "Indian Country." By its express terms, the Tribal Constitution applies to all territory of the Tribe, known as the Sac & Fox Settlement, jurisdiction of which was accepted by the United States by the Act of June 10, 1896 (29 Stat. 331), and to such other lands as may be added thereto by or for the Tribe. Tribal Const. Art. I, Sec 1. The Tribal Constitution includes a specific reference to the unique status of the Tribe's lands as follows: "It is hereby recognized that all the land within the Sac & Fox Reservation is Tribal Land, having been brought by the Tribe with its common funds, and is now held in trust for the Sac & Fox Tribe in Iowa by the Secretary of the Interior." Tribal Const. Art. XI, Sec. 1.

All lands comprising the Meskwaki Settlement are trust lands or fee lands owned by and held in the name of the Tribe. As the attached maps indicate, the vast majority of the Tribe's lands are in the Trust status, with the fee land holdings comprising a limited amount of acreage. Base on the legal status of the Tribe's lands, the Tribe has jurisdiction to regulate all activities on such fee lands, whether by members or non-members. The Settlement is equivalent to a "reservation," as described above, thus meeting the regulatory criterion set forth as 40 C.F.R sec. 131.8(a)(3) and described at item (3) in the criteria for TAS above.

Under the express terms of the Tribal constitution and the Tribe's property code, occupation of the Tribe's lands for residential and agricultural purposed is strictly regulated by the Tribe. Agricultural leases and assignments are permitted, but only for Tribal members who meet the requisite qualifications. All

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[2] The Code of the Sac & Fox Tribe of the Mississippi in Iowa, the "Tribal Code."
[3] See Organizational chart attachment M to the application.

land use for residential purposes is by assignment, is restricted to Tribal members, and is under the regulatory authority of the Tribe's Realty department and the Tribal Council. Accordingly, all persons who reside or farm on Tribal lands are persons over whom the Tribe exercises personal jurisdiction.

Although the State of Iowa exercises concurrent civil and criminal jurisdiction with respect to the Settlement lands[4] and persons, regulatory jurisdiction over its lands and the regulation of its natural resources is solely vested in the Tribe. Per Cal*ifornia v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987); 25 U.S.C. Sec. 1322[5], this even applies to those states that have assumed criminal and civil Indian trust water rights. State v. Lasley, 705 N.W.2d 481 (2005) (State of Iowa is bound by the criminal/prohibitory and civil/regulatory analysis under Public Law 280 even though Iowa's jurisdiction over criminal offenses derives from public law846). In addition, by virtue of federal Indian law, the Tribe exercises regulatory jurisdiction over contiguous parcels that have been acquired by the Tribe but have not yet been transferred to trust status. [See, df. Of Indian country. Federal Courts have determined that a tribe may enforce its Clean air and Clean water regulations on non-Indians with the reservation. *Confederated Slaish and Kootenai Tribes V. Namen*, 665 F2d 951; cert.den. 459 U.S. 977.]

This application of jurisdiction is also supported by the May 16, 2016 *Revised Interpretation of Clean Water Act Tribal Provision*, 81 FR 30183. This revised interpretation by the EPA states, "The EPA concluded definitively that section 518 includes an express delegation of authority by (*the U.S.*) Congress to Indian tribes to administer regulatory programs over their reservations." Thus, eliminating the need for tribes to demonstrate inherent authority to regulate under the CWA, thus allowing the tribes to implement the congressional delegation of authority for water quality standards.

Tribal Capacity

In addition to the above-cited provisions in the Tribal Constitution and the Tribal Code, there are specific laws that the Tribal Council has adopted to support the exercise of the Tribe's jurisdiction over the waters and other natural resources within the boundaries of the Settlement and the fee lands of the Tribe. "Tribal Land" is defined in the duly enacted Code of the Sac & Fox Tribe of the Mississippi in Iowa (the "Tribal Code") as "as land or estate or interest therein owned by the Tribe, whether held in trust for the Tribe by the United States of America, subject to a restriction against alienation by the United States of

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[4] See Iowa Code Annotated section 1.12 (civil jurisdiction assumed by the State in PL-280); criminal jurisdiction granted by the federal government by virtue of Pub. Law 846 (act of June 1948, ch. 759, 62 stat1161).

[5] [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. Id at 208.

America, owned in fee simple by the Tribe, or otherwise." Sac & Fox Tr. Of Miss. In IA, code sec. 16-1104.

The Tribal Code also includes a comprehensive enactment governing the natural resources of the Tribe. See Title 14-Natural Resources department (the "Meskwaki Natural Resources department") as a subordinate agency of the Tribe, with the delegated powers, duties and responsibilities of the Tribal Council as expressed in Title 14. Sac & Fox Tr. Of Miss. In IA, code sec. 14-2201. The Meskwaki Natural Resources department is headed by its director, by express authority; the department is responsible for the management, protection and conservation of the forests and grasslands, energy, fish, wildlife, environment, land, water and all other natural resources of the Tribe. Sac & Fox Tr. Of Miss. In IA Code sec 14-2202 (a). "Conservation" is defined in Title 14 as the "Protection and management of natural resources in a manner intended to sustain such natural resources." Sac & Fox Tribe of Miss. In IA Code sec. 14-2101 (a). The powers, duties and responsibilities of the Natural Resources Department include the following pertinent tasks:

- Collection, classification, and preservation of all statistic, data and information tending to promote the objectives of the department and any law it administers;
- The Conduct of research in improved conservation methods;
- The preparation, maintenance and continuous updating of a comprehensive plan for the development and conservation of the natural resources of the tribe; and
- The Administration of any other laws it is charged with administering by the Tribal Council
  (Sac & Fox Tr. Of Miss. In IA Code sec 14-2202(b).)

The organizational structure of the department is such that the director of the Natural Resources (who is appointed by the Tribal Council), is the administrative head of the MNR department. By statute, the director is responsible, among other matters for all natural resources functions on the Settlement. In addition, the director has the authority to promulgate rules and regulations for the operation of the department, subject to final review and approval by the Tribal Council. (Sac& Fox Tr. Of Miss. In Iowa Code Sec 14-2205)

As to affirm the direction of the Tribal Council and for future Councils on this matter, the Council passed Resolution No. 33-2016 *Designate and Establish Tribal Water Quality Standards* for the Meskwaki Natural Resources Department to seek Tribal Water Quality Standards for the protection of the Sac and Fox Tribe of the Mississippi in Iowa waters. Attachment N.

Summary & Conclusion

Based on the constitution, laws and regulations of the Tribe, the status of the Tribe's lands, the Tribe's exercise of governmental power and jurisdiction over its lands and natural resources and the Tribe's capacity to carry out the functions of the CWA and applicable regulations, we respectfully request that the EPA make the determination set forth in paragraph one above, and conclude that the Tribe is capable of carrying out the functions of the Clean Water Act and applicable regulations, and grant the Tribe treatment similar to that of a State.

Sincerely yours,

Jay S. Finch
Attorney General
Sac & Fox Tribe of the Mississippi
In Iowa