

action are under the authority of the Federal Clean Air Act to approve revisions to the SIP so that those SIP provisions will be Federally enforceable under the CAA. Before EPA can approve a SIP or SIP revision as applying to a source, the State must demonstrate that it has adequate legal authority to implement and enforce the SIP under the Clean Air Act. See CAA sections 110(a)(2)(A), 110(a)(2)(E)(i) and 172(c)(6) of the Act. It is EPA's position that unless EPA has explicitly approved a program as applying in Indian country, State or local regulations are not effective within the boundaries of that Indian country land for purposes of complying with the CAA. See Federal Operating Permits Program Final Rule, 64 FR 8247, 8254 (February 19, 1999). EPA does not believe it would be appropriate for EPA to approve State CAA programs as applying in Indian country where there has not been an explicit demonstration of adequate jurisdiction. 64 FR 8253. Moreover, EPA interprets the Clean Air Act as favoring a territorial approach for implementing the CAA throughout Indian reservations either under tribal authority as delegated by Congress or by EPA implementation. 64 FR 8252. EPA believes it has the authority under the CAA to regulate all reservation sources in order to ensure an efficient and effective transition to Tribal administration of CAA programs and to avoid the administratively undesirable checkerboarding of reservations based on land ownership. *Id.* EPA notes that nowhere in the State's SIP submittal did IDEQ attempt to demonstrate that it has the authority to implement and enforce its State laws under the authority of the Clean Air Act in Indian country in Idaho, and EPA has not evaluated these State law authorities outside of the context of the CAA. EPA's proposed approval and this final action do not take a position on whether State laws regulating air resources have effect in Indian country outside of the context of the Clean Air Act.

**Comment 6:** IDEQ commented that disagreement exists over the continued existence of the Nez Perce Reservation as described in Article 2 of the 1863 Treaty with the Nez Percés, 14 Stat. 647 (1863). IDEQ believes that a cession agreement between the United States and the Tribe ratified by Congress in 1894, 28 Stat. 326 (1894), has

diminished the Reservation's land base substantially and that the Reservation now encompasses only those lands retained presently in trust pursuant to the terms of the cession agreement, citing to *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001). IDEQ asserted that EPA and IDEQ acknowledged this controversy in a December 2000 memorandum of understanding (MOU) concerning implementation of title V of the CAA. In view of the decision in *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001), IDEQ continued, EPA should make clear its rationale for excluding the entirety of the 1863 Reservation from the scope of the proposed action.

**Response 6:** As discussed above, unless EPA has explicitly approved a program as applying in Indian country, it is EPA's position that State or local regulation is not effective within the boundaries of that Indian country land for purposes of complying with the CAA. EPA is excluding from this SIP approval the Nez Perce Reservation, as described in the 1863 Nez Perce Treaty, because the Federal government has long maintained that the Nez Perce Reservation, as described in that treaty, constitutes Indian country, as defined in 18 U.S.C. 1151.

*Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001) does not apply to this SIP action. That case dealt with the issue of whether EPA has authority to require a facility to apply to EPA for a Federal operating permit under title V of the Clean Air Act in cases where EPA had not determined whether the facility was in Indian country. This SIP approval is an action under title I of the CAA. Moreover, EPA's position, and that of the United States, is that the exterior boundary of the Nez Perce Reservation that exists today is described in the 1863 Nez Perce Treaty<sup>4</sup> and that the Nez Perce Reservation, as so described, is Indian country. In its comment, the State cites *U.S. v. Webb*, Case No. CR98-80-N-EJL (9th Cir., Jan. 12, 1999), as showing there is a controversy about the Reservation boundaries. However, the United States' position in that case, as well as other cases raising the issue, was that the Nez Perce Reservation is still as described in the 1863 Treaty. *Michigan v. EPA* is therefore not relevant to the issues in this SIP approval.

EPA remains fully committed to the spirit and intent of the December 2000 MOU referenced in the IDEQ comment. The purpose of the MOU, however, was to address the implementation of the operating permits program under title V of the CAA on the Nez Perce Reservation and it does not address the issue of whether IDEQ has established that it has authority under the Clean Air Act to implement and enforce its State regulations approved under title I of the Act against sources located within the boundaries of the Nez Perce Reservation as established by the 1863 Nez Perce Treaty. Moreover, nothing in the MOU constituted an admission by the United States that the Nez Perce Reservation has been diminished or is otherwise in question.

**Comment 7:** Simplot requested reconsideration of EPA's position that EPA approval of Idaho's "Rules for Control of Sulfur Oxide from Sulfuric Acid Plants" does not alter previous EPA disapproval of the Idaho SIP regarding the Eastern Idaho Intrastate Air Quality Control Strategy, nor the source-specific Federal regulations at 40 CFR 52.675. According to Simplot, EPA's position does not recognize relevant and significant history related to the Eastern Idaho Intrastate Air Quality Control Strategy, which has been in attainment for 20 years. Accordingly, Simplot requested that portions of the Federal regulations imposed upon Simplot to adequately prevent violations of the NAAQS for SO<sub>2</sub>, which Simplot contends are obsolete, be revisited and deleted from this portion of the Idaho control strategy.

**Response 7:** This comment does not address aspects of the SIP request submitted by the State of Idaho and on which EPA proposed to take action. Thus, EPA views this comment as a request to conduct rulemaking to revise the existing Federal implementation plan as it pertains to Simplot.

As EPA has previously notified IDEQ and Simplot, EPA does not have the authority to repeal these FIP requirements in the absence of other Federally-enforceable limits on SO<sub>2</sub> emissions from the Simplot sulfuric acid plants approved as part of a SIP or promulgated as part of other Federal requirements and a demonstration that these limits do not interfere with attainment or maintenance of the NAAQS for SO<sub>2</sub>, violate any prevention of significant deterioration (PSD) increment, or result in visibility impairment. To date, EPA has not received from IDEQ or Simplot a demonstration that the Federally-enforceable limits in place at the

acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." Under this definition, EPA treats as reservation lands trust lands that have not been formally designated as a reservation.

<sup>4</sup> IDEQ recognized EPA's position in the MOU referenced in IDEQ's comment. The sixth "Whereas" clause of memorandum states: "Whereas, the United States position, both in judicial proceedings and in administrative, civil and criminal contexts is that the present boundaries of the Nez Perce Reservation are as described in the 1863 Nez Perce Treaty."