UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

STATE OF IDAHO, *et al*

Plaintiffs

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*.,

Defendants,

NEZ PERCE TRIBE, *et al*.,

Intervenor Defendants

and

UTE INDIAN TRIBE IF THE UINTAH AND OURAY RESERVATION,

Intervenor Defendant.

Case No. 1:24-cv-00100

Hon. Daniel L. Hovland

TRIBES' MEMORANDUM IN SUPPORT OF THEIR COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Legislative History

Treaties

Constitutional Provisions

Other Authorities

INTRODUCTION

The Clean Water Act ("Act") provides a framework to protect our Nation's waters from pollution and to restore their chemical, physical, and biological integrity. 33 U.S.C. § 1251(a). Under the Act, the Environmental Protection Agency ("EPA") is responsible for overseeing water quality standards set by states[1] to ensure that those standards comply with the Act. *Id.* § 1313; *id*. § 1377(e). States have the primary responsibility for gathering information about how people use water within their jurisdictions, officially designating uses for water bodies, and establishing quantitative or qualitative limits on pollution to protect the designated uses. *Id.* § 1313. EPA is responsible for determining whether water quality standards comply with the Act. *Id*.

In their challenge to the Rule at issue, Plaintiff States argue that EPA's efforts to require consideration of long-standing tribal reserved rights to use and access water and aquatic natural resources are nothing more than pretense to override state authority and demand ever-stricter control over state waters. Mem. in Supp. of Pls.' Mot. for Summ. J. 1, 14 (Doc. No. 50-1). States' arguments exhibit a blindness to any interests but their own. Tribes, including Intervenor Defendant Tribes, also have rights to our Nation's waters—rights which are legally protectable under the plain language of the Clean Water Act. Most often, the rights involve using water to hunt, fish, and gather aquatic-dependent species. These uses are specifically enumerated for protection under the Act and its long-standing regulations.

[1] In 1987, Congress amended the Clean Water Act to include provisions for eligible tribes to seek "treatment as a state" for various purposes under the Act, including the development, implementation, and enforcement of water quality standards, dredged and fill permitting, and nonpoint source management. 33 U.S.C. § 1377. This brief, however, focuses mainly on the states' role in setting water quality standards.

The Rule at issue furthers the Act's goal of protecting and restoring water quality for all the ways people use water and for the fish and wildlife that depend on clean water. The Rule provides clear guidance for states and tribes when setting water quality standards where tribal members use certain water bodies pursuant to tribal reserved rights—guidance that was sorely lacking. Put simply, under the Rule, where a tribe has reserved rights to use a water body to fish, gather, conduct ceremonies, or otherwise use resources covered under the Act, it can formally notify the state about those uses in writing. The state then must consider that information—as it must consider all information about water uses—and set water quality criteria sufficient to protect designated uses of the waterbody that encompass those rights. EPA, in its oversight role, must review the state's process and standards for compliance with the Act and implementing regulations. The Rule thereby ensures that when it comes to protecting the health of the Nation's waters and its people, tribes and tribal members exercising tribal reserved rights are included.

Plaintiff States argue that not only are these rights not protected under the Act, but that EPA is prohibited from requiring states to even consider tribal reserved rights when establishing or revising water quality standards. Plaintiffs' arguments are not supported by the plain language of the Clean Water Act, the system of cooperative federalism Congress established in passing the Act, or any legal authority interpreting the Act or regulations.

The Rule falls squarely within the requirements of the Act, and therefore, Plaintiffs' request to vacate the Rule should be denied.

BACKGROUND

I. THE CLEAN WATER ACT

The Clean Water Act is the primary federal law governing water pollution in the United States. In response to states' failure to address ongoing pollution and degradation of waters throughout the country, Congress passed the Act in 1972 to restore and maintain the chemical,

physical, and biological integrity of the Nation's waters; to protect fish, shellfish, and wildlife; and to prohibit the discharge of toxic pollution. 33 U.S.C. § 1251(a); *see EPA v. Cal.*, 426 U.S. 200, 202-09 (1976); *Am. Paper Inst., Inc. v. EPA,* 890 F.2d 869, 870-71 (7th Cir. 1989); *Montgomery Env't Coal. v. Costle*, 646 F.2d 568, 574-575 (D.C. Cir. 1980); H.R. 11,896, 92nd Cong. (1971); and S. 2770, 92nd Cong. (1971). The Act represents a balance of state, tribal, and federal powers to promote the protection of our Nation's waters. *See* S. Rep. No. 92–414, 92nd Cong., 1st Sess. 7 (1971); *see also* H.R. 1, 100th Cong. (1987); H.R. 999, 106th Cong. (2000).

The Act directs states to set water quality standards for waters within their jurisdiction in order to "protect the public health or welfare, enhance the quality of water and serve the purposes of the [Act]." 40 C.F.R. § 131.2; 33 U.S.C. §§ 1313(c)(2)(A), 1377(e). To "[s]erve the purposes of the Act means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.2.

Water quality standards establish the water quality goals for a water body, and, as relevant here, consist of "designated uses" and water quality "criteria." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11. First, a state must identify all existing uses for the waters that fall under the Act and designate uses for the water body. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10; *see also id*. § 131.3(e). "Existing uses" are any uses "actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." *Id*. § 131.3(e). "Designated uses" establish the uses to

be achieved and protected in the water body—for example, fishing and recreation. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10.

Next, the state must set water quality criteria to protect the designated uses. 40 C.F.R. § 131.11(a); *see also* 33 U.S.C. § 1313(c)(2). "Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." 40 C.F.R. §§ 131.5, 131.11(a); *see also* 33 U.S.C. §§ 1313(c)(2), 1314(a).

Finally, the state must establish an antidegradation policy to protect existing uses. 40 C.F.R. § 131.12. "[S]tate water quality standards must include 'a statewide antidegradation policy' to ensure that '[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.'" *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 724 (1994) (quoting 40 C.F.R. § 131.12). "Where existing water quality standards specify designated uses less than those which are presently being attained, the [state] shall revise its standards to reflect the uses actually being attained," and the state may not remove a designated use if it is an "existing use[] . . . unless a use requiring more stringent criteria is added." 40 C.F.R. § 131.10(h)-(i).

The state then submits its water quality standards to EPA for approval. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.6. EPA reviews the standards to assess whether they fulfill the Act's requirements. *Id*. If EPA finds the state has failed to meet those requirements, it must specify the required changes, and if the state fails to adopt such changes, EPA must disapprove the standards and promulgate standards directly. 33 U.S.C. § 1313(c)(3), (4); *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1275-76 (5th Cir. 1980) (stating EPA has "final voice" on a

standard's adequacy); *see also Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) ("[T]he ultimate authority for the water quality standards lies with the federal EPA.").

I. TRIBAL RESERVED RIGHTS

Like all other citizens of a state, tribal members may use certain bodies of water for drinking, recreation, subsistence, or other purposes. In addition, many tribes hold rights to certain uses of water pursuant to treaties, Executive Orders, or other sources of federal law. *See Parravano v. Babbit*, 70 F.3d 539, 545 (9th Cir. 1995) (recognizing tribal reserved rights irrespective of whether derived from treaty, statute, or Executive Order). Tribes, who ceded millions of acres of their homelands to the United States, reserved to themselves for future generations certain rights, including rights related to natural resources on- and off-reservation such as the right to hunt, fish, and gather. *See, e.g.*, Treaty between the United States and the Yakama Nation of Indians, art. III, June 9, 1855, 12 Stat. 951; Treaty with the Chippewa, art. XI, Sept. 30, 1854, 10 Stat. 1109; *Wash. v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 (1979). Treaties, along with the Constitution and federal laws, are the supreme law of the land, and it is well-settled that tribes' reserved rights are protected against interference by federal, state, and private parties. *See* U.S. Const. art. VI, cl.2; *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 411 n.12 (1968); *U.S. v. Winans,* 198 U.S. 371, 381-82 (1905) ("And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.").

The exercise of tribal reserved rights remains critically important for the political, economic, physical, and cultural well-being of tribes today and for future generations. *See, e.g.*, Fairbanks Decl. ¶¶ 4, 7 (Doc. No. 19-11) ("Exercising the Tribe's treaty-reserved rights to fish, hunt, gather, pasture, and travel not only affirms our legal status as a sovereign nation, but it also affirms our identity and integrity as a people […] The value of wild rice to our Tribe and Tribal

people cannot be overstated. Much like our tribal relatives that depend on salmon, to us, rice serves not only nutritional, but spiritual, economic, cultural, and health and welfare purposes."); Witherspoon Decl. ¶ 13 (Doc. No. 19-10) ("Fish and fishing are not only part of our citizens' subsistence and livelihoods, but traditional fishing knowledge is part of our culture, passed from generation to generation, and fish are an important aspect of our ceremonies."); Seki Decl. ¶ 9 (Doc. No. 19-8) ("[W]ithout wild rice, we would struggle to feed our people. We would lose the nutritional balance in our diet, which would threaten us physically. Even more significantly, we would be unable to continue traditional cultural practices that we have maintained for thousands of years.").

Courts have recognized that at the time the rights were reserved, tribes understood they were reserving rights in perpetuity and in ways that would continue providing for their subsistence, cultural, and commercial needs forever. *See*, *e.g.*, *Wash. State Com.*, 443 U.S. at 678-79 ("Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a 'reservation' of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 653 F. Supp. 1420, 1435 (W.D. Wis. 1987) ("These rights today include rights to all the forms of animal life, fish, vegetation, and so on, . . . and use of all of the methods of harvesting employed in treaty times and those developed since."); *U.S. v. State of Mich.*, 471 F. Supp. 192, 213 (W.D. Mich. 1979) ("Thus, the Indians impliedly reserved the right to subsistence and commercial fishing because of this resource's importance to the Indian community at and before the time they entered into the treaty"). The tribal reserved rights are "not much less necessary to the existence of the Indians than the atmosphere they breath[e],"

and the water quality needed to support the exercise of these rights is of existential importance to Intervenor Defendant Tribes. *See, e.g.*, *Winans*, 198 U.S. at 381.

II. THE RULE

On May 4, 2024, EPA promulgated Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 89 Fed. Reg. 35717 (May 2, 2024) ("Rule"). The Rule does not change what is required under the Clean Water Act but rather provides a process to ensure that the Act's existing requirements for setting water quality standards are properly implemented. *See* 89 Fed. Reg. at 35738 ("[S]tates are already bound to comply with Tribal reserved rights codified in Federal law even absent a Federal position on such rights."); Complaint, Ex. 8, at 7 (Doc. No. 1-8) (comment from Wyoming's Department of Environmental Quality acknowledging that "states are already required to establish water quality standards that protect currently exercised tribal reserved rights"); Complaint, Ex. 9, at 2 (Doc. No. 1-9) (comment from South Dakota's Department of Agriculture and Natural Resources stating "there is already a legal requirement to protect treaty rights and downstream uses"); Complaint, Ex. 5 (Doc. No. 1-5) (comment from North Dakota's Department of Environmental Quality stating it already ensures protection of uses pursuant to tribal reserved rights if aware, and that it can set more stringent criteria to protect vulnerable populations). The Rule ensures that during the process of collecting information on uses, designating uses, and setting protective water quality criteria, states consider information tribes submit about their current and historic rights to use water bodies and water-dependent resources. *See generally* 89 Fed. Reg. at 35727-28, 35730-35.

EPA explained why such a Rule was sorely needed. Though certain tribal reserved rights are protected through treaties and other sources of federal law, impacts to these uses off-reservation have often not been considered in state regulatory schemes. 89 Fed. Reg. 35717, 35718. Moreover, tribes, states, and the federal government lacked specific guidance about their

responsibilities under the Clean Water Act regarding tribal rights to use waters where the waters are subject to state regulatory jurisdiction. *Id.* at 35718, 35725. The result of the lack of guidance has been inconsistency—some states have created processes for tribes to inform state regulators of their rights, other states believe they already do so in their general processes, yet other states recognize they have not done so or assert they cannot do so. *See, e.g.*, Complaint, Ex. 5 at 3 (Doc. No. 1-5) (comment from North Dakota stating that if it is aware of a tribal reserved right-based use, it ensures that use is protected, and if unaware the tribe may bring that use to the agency's attention); Nelson Decl. ¶ 8(ii) (Doc. No. 5-2) (Idaho declaration stating that current recreational uses do not account for specific tribal practices involving drinking or exposure to water); Complaint, Ex. 3 at 3 (Doc. No. 1-3) (comment from Idaho Department of Environmental Quality that consultation to update water quality standards is infeasible).

The Rule has three main components. First, a tribe must notify a state and EPA in writing about its rights to use resources protected under the Act. 40 C.F.R. § 131.9(a); 89 Fed. Reg. at 35726 (explaining the scope of resources covered). When the state is developing, reviewing, or revising designated uses, it must, to the extent supported by available data and information, take into consideration information provided by the tribe regarding tribal members' rights to use covered waters or the resources dependent on those waters. 89 Fed. Reg. at 35747-48; 40 C.F.R. §§ 131.9(a)(1), 131.20. The state also must consider the anticipated future exercise of the tribal reserved right unsuppressed by water quality when establishing relevant water quality standards. 40 C.F.R. § 131.9(a)(2). The requirement to consider unsuppressed use is intended to ensure that states or tribes do not solely consider current use patterns that have been limited due to contamination, such as a fishery population impaired by pollution, but instead can aim to set water quality standards that protect a tribe's reserved right and meet the

Act's purpose to "*restore* and maintain the … integrity of the Nation's waters" and protect public health and welfare. 33 U.S.C. § 1251(a) (emphasis added); *see also* 89 Fed. Reg. at 35732. *See, e.g.,* Howes Decl. ¶ 13 (Doc. No. 19-9) ("It is not safe to routinely fish many of our traditional areas. For example, the St. Louis River Estuary was once a prime walleye source, but due to industrial pollution the Estuary now is amongst the waterbodies with the highest mercury content in its fish. Although the Band could harvest walleye from there, Band member opinion is to forego harvest there due to potential negative health impacts from mercury.").

Second, in the process of setting water quality criteria to protect designated uses, a state must ensure that the criteria protect tribal members exercising their reserved rights where the designated use expressly incorporates protection of tribal reserved rights or otherwise encompasses such rights, such as fish consumption or human exposure. 40 C.F.R. § 131.9(3); 89 Fed. Reg. at 35748. This requirement ensures that the criteria set to support designated uses are sufficient to protect *all* users, including tribal members. 89 Fed. Reg. at 35735 (explaining that tribal members exercising reserved rights should be viewed as having average exposures and be protected as such, rather than categorized as a vulnerable subpopulation).

Third, when a state submits a new or revised standard to EPA for approval and provides its requisite designations, methods, analyses, and information relied upon for the development of the standards, the state must provide EPA information about its compliance with the first requirement and also provide information submitted by a tribe during the rulemaking process. 89 Fed. Reg. at 35747-48; 40 C.F.R. §§ 131.6, 131.20.

The Rule ensures that states are afforded flexibility and discretion when setting water quality standards. The Rule requires only that states consider relevant information—the same way they must consider other, non-tribal information—about how tribal members currently use

and historically have used water and aquatic or aquatic-dependent resources when exercising their reserved rights. For instance, upon consideration of the asserted tribal reserved right, a state may determine that the exercise of the right is already protected by a use designation such as fishing. 89 Fed. Reg. at 35730. As for setting water quality criteria to protect designated uses, states retain discretion to use risk levels within a "scientifically defensible" and "reasonable risk management range." *Id*. at 35736; 40 C.F.R. § 131.11.

In sum, pursuant to the Rule, a tribe can notify a state of water uses pursuant to the tribe's reserved rights and the state must then consider that information—but is not required to reach any specific outcomes—when undertaking its typical processes of developing or reviewing water quality standards (and EPA must review this information during its standards approval process). The Rule's requirements echo extant requirements to maintain and protect existing uses and water quality necessary to protect those uses based on relevant data and sound science, *see* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.11, 131.12(a)(1).

In May 2024, Plaintiff States challenged the Rule as unlawful and unconstitutional, alleging the Rule imposed novel requirements that "forc[e] immense and nearly immediate harm on states." *See* Complaint ¶ 4-14 (Doc. No. 1) (amended June 14, 2024, Doc. No. 4). In November, Plaintiffs moved for summary judgment, arguing that the Rule's clarifications to consider tribal reserved rights as part of their duty to consider all existing uses and to set criteria sufficiently protective of designated uses constituted agency overreach, was arbitrary and capricious, and unconstitutionally commandeered state authority. *See generally*, Pls.' Memo (Doc. No. 50-1).

Intervenor Defendant Tribes oppose Plaintiff States' motion for summary judgment and submit their own cross-motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). To prevail in a facial challenge to a rule like the one here, a plaintiff "must establish that no set of circumstances exists under which the [regulation] would be valid." *Reno v. Flores*, 507 U.S. 292, 301 (1993) (quoting *U.S. v. Salerno,* 481 U.S. 739, 745, (1987) (alteration in original)).

This Court's review is governed by Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2). An agency action may only be invalidated if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id*. § 706(2)(C); or "without observance of procedure required by law," *id*. § 706(2)(D). The agency action is entitled to a presumption of regularity. *Citizens to Pres. Overton Park*, *Inc. v. Volpe*, 401 U.S. 402, 415 (1971). A rule is arbitrary and capricious if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, explained its decision that is counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

The Rule lies firmly within the bounds of the Clean Water Act. The administrative record demonstrates EPA considered the requirements of the Act, weighed stakeholder input on the Rule, analyzed the effect on state processes, and came to a well-reasoned determination. Moreover, the Rule does not trigger the major questions doctrine or Tenth Amendment concerns. For these reasons, Plaintiff States' motion for summary judgment challenging the Rule should be

denied, and Intervenor Defendant Tribes' cross-motion for summary judgment should be granted.

I. THE RULE IS ENTIRELY WITHIN THE EXPRESS AND LONG-STANDING DIRECTION OF THE CLEAN WATER ACT

The Clean Water Act authorizes EPA to "prescribe such regulations as are necessary to carry out [its] functions." 33 U.S.C. § 1361. Pursuant to that authority, EPA routinely issues regulations and guidance to help states, agencies, and the public better understand and implement the requirements of the Act. For example, in 2015, EPA promulgated regulations that clarified the Act's requirements by adding more detail to the list of factors EPA considers when reviewing state standards and by specifying additional circumstances under which states would need to provide information supporting their decisions. *See* Water Quality Standards Regulatory Revisions, 80 Fed. Reg. 51020, 51047-49 (Aug. 21, 2015) (discussing revisions to 40 C.F.R. § 131.5 and § 131.20). EPA also issued a Water Quality Standards Handbook that includes recommendations for states, tribes approved for treatment as a state, and territories when reviewing, revising, and implementing standards. *Water Quality Standards Handbook*, EPA, https://www.epa.gov/wqs-tech/water-quality-standards-handbook.

The challenged Rule similarly establishes procedural requirements and provides guidance to states, tribes, and the public about what information must be considered during the standards-setting processes established by the Act. States have long been required to consider all existing uses and protect individuals pursuing uses that have been designated or attained. 40 C.F.R. §§ 131.3(e), 131.10(h)-(i). States are required to revise standards to reflect the uses actually occurring on the waters and to maintain those uses. *Id.* The Rule ensures that states understand, and have a clear process for, including and protecting all existing uses of waters where states exercise regulatory jurisdiction under the Act. *Id. See also,* Defs.' Resp. to Pls.' Mot. for Stay &

Prelim Inj., Ex. 2 at 72 (Doc. No. 18-2): "[I]f use of an aquatic or aquatic-dependent resource pursuant to a Tribal reserved right is presently being attained, the EPA's existing federal [water quality standards] regulation at § 131.10(i) requires states to revise their [water quality standards] to reflect that presently attained use." Therefore, Plaintiffs' claims that the Rule is novel, overreaching, or unduly burdensome fail.

A. The Rule Provides for Protection of Existing Uses in Compliance with the Express Direction of Congress.

The Supreme Court has recognized that "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). States are responsible for establishing, reviewing, and revising the designated uses and water quality criteria that together comprise water quality standards. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.4(a). For waters within their jurisdiction, states hold the "primary responsibilities and rights" to control water pollution, plan for development and use of their resources, report on water quality, and consult with the EPA. 33 U.S.C. §§ 1251(b), 1315(b).

EPA, in turn, has various regulatory, supervisory, guidance, and financial and technical assistance roles under the Act. EPA must review water quality standards and pollution control measures to ensure they meet the Act's requirements, and if they do not, EPA must notify the state so it can correct the defect. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.5. Ultimately, EPA must promulgate appropriate water quality standards if the state fails to do so, or in any case where a revised or new standard is necessary to meet the Act's requirements. 33 U.S.C. §§ 1313(c), 1314; 40 C.F.R. § 131.5; *see also Miss. Comm'n on Nat. Res.*, 625 F.2d at 1277 ("[T]he Act authorizes EPA to set standards whenever the Administrator determines that a revised standard is

necessary to meet the [Act's] requirements"); *N.W. Env't. Advoc. v. EPA*, 268 F. Supp. 2d 1255, 1260-61 (D. Or. 2003) ("EPA is under a nondiscretionary duty to promptly promulgate revised standards upon a state's failure to submit its own revisions within 90 days of the notice of disapproval . . . [and n]otwithstanding the absence of new or revised criteria, EPA enjoys the discretion to determine whether a new or revised standard is necessary").

EPA must also provide and periodically revise information related to the development of water quality standards, including the factors necessary to meet the Act's goals of protecting the integrity of the Nation's waters, factors necessary to protect and propagate wildlife, methodology to measure and classify water quality, publication of standards in effect under the Act or under state or tribal law, and guidelines for setting effluent limits and treatment methods. 33 U.S.C. § 1314; *see, e.g.*, *id.* § 1265 (other enumerated responsibilities and powers regarding identification and control of pollutants). EPA and states must provide for public participation in the development and revision of water quality standards, and engage in multi-jurisdiction cooperation for pollution control, including by providing for improvement and uniformity in state laws related to pollution prevention, reduction, and elimination. *Id.* §§ 1251(e), 1253(a).

Nothing in the Rule at issue changes the substantive requirements of the Act, the responsibilities of states to identify and protect existing uses, or the oversight and guidance roles of EPA. The Act recognizes the broad range of uses that a state should consider when promulgating water quality standards, including drinking water, propagation of fish and wildlife, recreation, agriculture, industry, navigation, and other purposes. 33 U.S.C. § 1313(c)(2). These uses of water, in most cases, encompass the very rights that tribes reserved: the use of waters for drinking, fishing, harvesting food and medicines, traveling and recreating, and conducting ceremonies. *See, e.g.*, Seki Decl. ¶ 6 (Doc. No. 19-8) ("[We] go out with our boats and harvest

[wild] rice with knocking sticks. We use that rice to get us through the hard winter months."); Sterud Decl. ¶ 9 (Doc. No. 19-5) ("The Tribe makes use of the Puyallup River and Commencement Bay for catching and eating fish and using fish for ceremonial purposes…."); Caldera Decl. ¶ 7 (Doc. No. 19-12) ("[The Tribe] conducts fisheries throughout its [usual and accustomed areas] to obtain fish for ceremonial use (including funerals, weddings, and honoring and gifting observances, as well as other practices), and subsistence harvests from the Tribe's [usual and accustomed areas] are a key element of the daily diet of many tribal members."); *see also* Tribes' Decls., Doc. Nos. 19-2 at ¶ 2; 19-3 at ¶ 4; 19-4 at ¶ 3; 19-6 at ¶ 5; 19-7 at ¶ 3; 19-9 at ¶¶ 5, 9, 11, 16, 18-19; 19-10 at ¶¶ 3-4, 6-7, 12-14; 19-11 at ¶¶ 2-5, 7-10.

Plaintiffs fundamentally misunderstand and overstate the role of the Rule and its relation to state and federal responsibilities under the Act. Plaintiffs claim that the Rule impermissibly requires "states to evaluate the extent and validity of vague tribal reserved rights" and expands EPA's authority under the Act by allowing or requiring it to interpret treaties to include rights to specific water quality. *See* Pls.' Memo.19, 21 (Doc. No. 50-1). The Rule does nothing of the sort. It is undisputed that many tribes have federally recognized rights, guaranteed through treaty or otherwise, that implicate specific uses of aquatic resources, such as fishing or harvesting other aquatic or aquatic-dependent species in certain areas, including areas where states exercise regulatory jurisdiction. The Rule does not require or even authorize states or EPA to interpret a specific level of water quality implied in treaties or other sources of tribes' rights. 89 Fed. Reg. at 35718. Instead, states must recognize that, necessarily, tribal members are using specific water bodies in specific ways in the exercise of their reserved rights. *Id.* at 35724 (focusing inquiry on whether a treaty reserves a right to an aquatic or aquatic-dependent resource covered by the Act). And in turn, the state must consider those uses—like any other existing uses of a

water body—when it designates uses and sets criteria to protect those uses. Plaintiff States argue they should not be required to do so, resisting the Act's requirement that they protect members of tribes equally with other state citizens. Pls.' Memo. 18 (Doc. No. 50-1).

The Clean Water Act does not except the exercise of tribal rights from consideration. Nowhere does the Act provide that a state must consider existing uses *except* for the exercise of tribal rights, or that standards must protect public health or welfare *except* for the health and welfare of tribal members. A finding for Plaintiffs would read such an exception into the Act. On the contrary, the Act expressly provides that it "shall not be construed as … affecting or impairing the provision of any treaty of the United States." 33 U.S.C. § 1371(a); 89 Fed. Reg. at 35723. The Rule clarifies what has unfortunately been overlooked or actively resisted in many instances: the exercise of tribal reserved rights may constitute *existing use* of waterbodies that must be considered and protected under the plain language of the statute.

B. The States' Statutory Authority Arguments Find No Traction in Either the Language of the Act or the Rule.

The Rule is an appropriate exercise of EPA's authority to promulgate rules that ensure adherence to the Act's requirements and to promote consistency across states regarding the factors they consider when setting standards. 33 U.S.C. §§ 1314, 1361; *cf.* Pls.' Memo. 8 (Doc. No. 50-1). For this inquiry, Plaintiff States and Intervenor Defendant Tribes agree that the first place to start when determining the meaning of a statute is its plain language. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see* Pls.' Memo. 8 (Doc. No. 50-1). The plain language of the Act and its implementing regulations require consideration of all uses and users, efforts to protect water bodies and the health of their users, and does not exclude from consideration tribal members' uses of aquatic and aquatic-dependent resources pursuant to their reserved rights.

The Clean Water Act requires the establishment of water quality standards "to protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]." 33 U.S.C. § 1313(c)(2)(A). "Standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes," as well as navigation and subsequently "shall adopt criteria" to prevent interference with designated uses. *Id.* § 1313(c)(2). The Rule clarifies that the exercise of tribal reserved rights related to water and aquatic-dependent resources clearly falls within this non-exhaustive list of uses that states must take into consideration, and where designated, those uses should be protected by adequate water quality criteria. 40 C.F.R. §§ 131.9, 131.20.

Plaintiffs make every effort to evade the plain language of the statute, even going so far as to argue that a new Clean Water Act would be required to carry out the purposes of the Rule. Pls.' Memo. 1 (Doc. No. 50-1). Plaintiffs further argue that EPA is required to point to specific treaties containing explicit language about water quality and demonstrate a specific obligation "to promote a requisite level of water quality on the basis on tribal reserved rights." *Id*. at 17-18. However, EPA's authority to promulgate this Rule under the Act is explicit and requires no specific interpretation of any one treaty. The Rule establishes a procedure for states and tribes to address, on a case-by-case basis that allows for state discretion, any number of issues related to existing and designated uses of water and resolve those issues in accordance with the Act's requirements. *See*, 89 Fed. Reg. at 35723-24. Plaintiffs' statutory arguments that the Rule violates the text of the Clean Water Act must fail.

1. Consideration of Tribal Uses of Water is Required Under the Act

Plaintiffs misunderstand the Rule by claiming that "rights" are not "uses." *See* Pls.' Memo. 11 (Doc. No. 50-1). But many tribes have usufructuary, or "use" rights. *See, e.g., Mille*

Lacs Band of Chippewa Indians v. State of Minn., 124 F. 3d 904 (8th Cir. 1997), *aff'd sub nom. Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (affirming continued existence of off-reservation usufructuary rights in ceded territory). This very misunderstanding evinces the necessity of the challenged Rule: tribal members use water bodies in specific ways in the *exercise* of their reserved rights, and it is the *exercise* of those rights that should be "considered," just as other citizens' uses of the state waters are considered. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.12(a)(1), (2).

If a tribe has reserved rights to fish in a certain water body and offers information regarding the origin and historic and current exercise of those rights by its members, then the Act requires the state to consider the pertinent information that "fishing" is one existing use of that water body. Nothing in the Rule mandates the creation of a new category of uses applicable solely to tribes and tribal members or requires that states make final or binding determinations as to the scope or existence of tribal reserved rights. Recognizing tribal use rights, or usufructuary rights, to waters water-dependent resources and setting criteria to protect designated uses encompassing those use rights is essential to the overarching purpose of the Act to protect public health and restore the Nation's waters. *See* 89 Fed. Reg. at 35723 ("[T]hese regulatory changes are designed to ensure that [water quality standards] will in fact 'protect the public health and welfare … and otherwise serve the purposes of the Act."). *See also* 40 C.F.R. § 131.12(a)(3).

The Clean Water Act includes tribal uses of aquatic and aquatic-dependent resources pursuant to reserved rights both within its enumerated list of possible uses as well as its catchall "other purposes." Plaintiffs somehow fail to recognize that the tribal reserved rights at issue fall within enumerated uses under the Act. And their attempt to limit the universe of possible uses finds no support in the text of the Act, long-standing regulations, caselaw, or even some of the

Plaintiff States' own practices. *See* Comments of Wyoming, North Dakota, and South Dakota in *supra*, Part II.

Tribal members' uses are spelled out in the statute: water for drinking, fishing, harvesting aquatic species, body contact (for instance, where a tribal member is fishing, shell-fishing, gathering, or conducting ceremonies in the water), and agriculture including food gathering. It is ironic indeed that Plaintiff States, based on arguments of novelty, wish to ignore the fact that tribal members have been using these waters for the same purposes for millennia. *See, e.g.,* Wheeler Decl. ¶¶ 2, 4 (Doc. No. 19-2) ("The Nez Perce people, the Nimíipuu, have occupied a vast territory encompassing millions of acres of what now includes parts of Idaho, Oregon, Washington, and Montana since time immemorial. I and other Nimíipuu, like hundreds of generations of Nimíipuu before me, have fished, hunted, and gathered throughout our homelands."); *see also* Tribes' Decls., Doc. Nos. 19-2 at ¶ 4; 19-3 at ¶¶ 7, 9; 19-4 at ¶ 3; 19-5 at ¶¶ 2, 4, 7; 19-6 at ¶¶ 4, 9, 10; 19-8 at ¶ 6, 13; 19-9 at ¶ 18; 19-12 at ¶ 10. The Rule recognizes that tribal members use water in specific—sometimes unique—ways pursuant to rights guaranteed in treaties and other federal authorities. Those specific uses neatly fall within the broad use categories spelled out by statute, and to the extent they were occurring on or after November 28, 1975, they constitute existing uses which, therefore, must be considered and protected. 40 C.F.R. §§ 131.3(e); 131.10(h); 131.12(a).

Even if some uses might not fall under the broad enumerated categories, Congress provided for "other purposes." Plaintiffs seek to limit the meaning of "other purposes" by claiming that, by being placed next to "agricultural" and "industrial" purposes, the term "other purposes" necessarily connotes an economic purpose. Pls.' Memo. 10 (Doc. No. 50-1). Plaintiffs claim the canons of *noscitur a sociis* and *ejusdem generis* require such a conclusion but

offer no support as to why the common thread between agriculture and industry is necessarily economic. Perhaps it is simply the need to subsist. Moreover, even if "other purposes" were limited to economic purposes, many tribal economies and tribal members' incomes rely on the exercise of tribal reserved rights. Indeed, many tribes' reserved rights include commercial harvests of aquatic or aquatic-dependent resources, such as wild rice, fish, and shellfish, and the exercise of such rights would clearly fall within an economic purposes parameter. *See, e.g.,* Witherspoon Decl. ¶ 12 (Doc. No. 19-10) ("Our tribe and tribal citizens have relied on fishing for subsistence and economic needs since time immemorial."); *see also* Tribes' Decls., Doc. Nos. 19-3 at ¶ 11; 19-4 at ¶ 9; 19-7 at ¶ 4; 19-8 at ¶ 15; 19-11 at ¶ 3.

Plaintiffs' argument also ignores the broad range of uses that have been designated even where those are not expressly enumerated in the Act—for instance, "fish consumption," "aesthetic enjoyment," or "primary contact ceremonial use." *See, e.g.*, *Fla. Wildlife Fed'n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1145 (N.D. Fla. 2012); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 224 (D.D.C. 2011); *City of Albuquerque v. Browner*, 97 F.3d 415, 427-28 (10th Cir. 1996). The provision of "other purposes" indicates a non-exhaustive list wherein "Congress did not set forth a mandatory list of factors," but "merely provided EPA with list of factors to consider in setting designated uses." *Upper Missouri Waterkeeper v. EPA*, 377 F. Supp. 3d 1156, 1164-65 (D. Mont. 2019), *aff'd in part, rev'd in part and remanded sub nom. Upper Missouri Waterkeeper v. EPA*, 15 F.4th 966 (9th Cir. 2021) ("Congress's use of the phrase 'other purposes' as a mandated consideration constitutes an implicit delegation to EPA to fill in a gap."). The only expressly disallowed use is waste transport or waste assimilation because doing so would be in contravention of the purposes of the Act. *See* 40 C.F.R. § 131.10.

The Rule additionally promotes the goals of the Act by requiring states to take into consideration unsuppressed tribal uses of aquatic and aquatic-dependent resources. *Id.* § 131.9(a)(2). This requirement reflects long-standing statutory and regulatory mandates to protect the most sensitive uses of and to restore and maintain the Nation's waters. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11(a); *see also* 33 U.S.C. §§ 1313(c)(2), 1314(a); 89 Fed. Reg. at 35719 n.6, 35737. Considering how tribes would exercise their rights but for excess water contamination is an essential step in achieving the Act's goals of promoting public and environmental welfare.

Plaintiffs argue that such a requirement is unsupported because there are no "commonalities among 'agriculture,' 'industry,' and 'the anticipated future exercise of the Tribal reserved right unsuppressed by water quality.'" Pls.' Memo. 11 (Doc. No. 50-1). This argument creates a straw man. The Rule does not require states to consider a novel category of uses but instead requires states to consider how tribal members use water and water-dependent resources. EPA does not claim the anticipated future exercise of tribal reserved rights is a use or "other purpose." Instead, considering unsuppressed use ensures there is no "downward spiral" that allows for continued degradation of water quality where current usage is curtailed due to contamination. *See* 89 Fed. Reg. at 35731. In this way, states can analyze information about where standards may or may not be sufficiently protective of all uses and use that information to attempt to restore the Nation's waters, as contemplated by the Act.

2. The Rule Does Not Implicate Water Quantity Issues

The Rule makes no mention of water quantity. The preamble's discussion of water quantity as it affects water quality is in response to comments, and its response is thoroughly supported by the Clean Water Act and Supreme Court case law. *See* 89 Fed. Reg. at 35727 n.76. Plaintiffs assert that the Rule impermissibly tramples on state rights to allocate water quantities.

Pls.' Memo. 14-16 (Doc. No. 50-1). Not so: where the preamble mentions water quantity, it is solely in the context of circumstances where water quantity influences water quality and thereby affects the goals of the Act. The Act recognizes that a diminishment of water quantity can constitute water pollution. *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 719-20. "In many cases, water quantity is closely related to water quality," the Supreme Court explained, such as where "a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses." *Id.* at 719. EPA's guidance that state water quantity decisions must protect designated uses is a matter of course, pursuant to the Act's "broad conception of pollution" that "refutes . . . a sharp distinction between the regulation of water 'quantity' and water 'quality.'" 89 Fed. Reg. at 35727; *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 719. Plaintiffs' use of legislative history merely confirms this conclusion—while the Act seeks to ensure that "State allocation systems are not subverted" and that individual rights are affected only for legitimate and necessary water quality considerations, ensuring sufficient water quantity to protect designated uses promotes the purposes of the Act and neither subverts state allocation nor impermissibly affects individual rights. *See* Pls.' Memo. 15 (Doc. No. 50-1) (citing 3 Legislative History of the Clean Water Act of 1977, 532 (1978)); *see also* 89 Fed. Reg. at 35,727 n.76; *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 720.

3. The Rule Does Not Implicate the Major Questions Doctrine

For much the same reasons discussed at length above, the Rule does not implicate the major questions doctrine. None of the five factors Plaintiff States list as triggers are involved. *See* Pls.' Memo. 19 (Doc. No. 50-1) (citing *W. Virginia v. EPA*, 597 U.S. 697 (2022) and listing intrusion into a domain of state law, historical precedent, breadth of asserted authority, political significance, and economic significance).

There is no intrusion into state authority beyond what is clearly and unambiguously required by the Act: states must consider all existing uses when setting water quality standards. *BFP v. Resol. Tr. Corp.,* 511 U.S. 531, 544 (1994); 33 U.S.C. §§ 1251(a), 1313(c)(2)(A); 40 C.F.R. §§ 131.10(h)-(i), 131.20(a). The Rule does not change the division of roles between states and the federal government. While setting water quality standards is, in the first instance, the responsibility of states, the Act specifically provided for EPA oversight because it was necessary to ensure progress toward controlling water pollution successfully. *See Miss. Comm'n on Nat. Res.*, 625 F.2d at 1275 ("Despite this primary allocation of power, the states are not given unreviewable discretion to set water quality standards. . .EPA is given the final voice on the standard's adequacy.").

EPA recognized that environmental regulatory schemes have often failed to recognize or protect tribal rights to natural resources, but it did not determine that the Act intended to except tribal uses from consideration. 89 Fed. Reg. at 35718. In promulgating this Rule, EPA is not claiming authority to adjudicate or enforce treaties. Instead, it is using its authority to promulgate rules to correct for deficiencies and inconsistencies in how states and the federal government have implemented the requirements of the Act.

EPA does not purport to use the Rule to arrogate additional authority, whether to enforce treaties with tribes, to require states to adopt any and all designated uses EPA chooses, or to rectify treaty violations. The Rule merely requires that tribal members' uses be considered and protected in accordance with the Act.[2] Tribes make use of waters to harvest nutritious and culturally significant species, like wild rice, fish, shellfish, and aquatic-dependent mammals, and

[2] Plaintiff States misleadingly claim that the Rule's discussion of "other purposes" opens the door to uses such as "protecting the climate" or "advancing racial equity." Pls.' Memo. 11 (Doc. No. 50-1). Those purposes are simply not analogous to the uses at issue in this Rule.

to conduct ceremonies where they come into contact with water, among other uses. These fall within the enumerated purposes of the Act or cognizable "other purposes" that states must consider for designation and protection.

Finally, Plaintiffs argue that it is too expensive or time-consuming to consider the uses that some members of its citizenry make of waters or to protect those uses. But they point to no additional costs beyond what they would already incur by complying with the Act.[3] Moreover, States can request technical and financial assistance from the federal government when carrying out their duties under the Act. 40 C.F.R. § 131.9(b); *see also* 89 Fed. Reg. at 35726, 35728-29, 35733. The mere fact that pollution control might cost time and effort does not trigger the major questions doctrine. States are required to periodically review their standards and they, along with the federal government, are responsible for ensuring public participation when reviewing standards 33 U.S.C. § 1251(e).[4] They necessarily expend resources to properly engage in the

[3] The costs that the States do point to in their brief bear no relationship to the Clean Water Act or the Rule. First, the States point to a declaration from an engineer with the Idaho Transportation Department, which is not the Idaho agency to set water quality standards and extrapolates from delay in a past highway project (prior to this Rule) to estimate the costs of delaying future highway projects (where such delays would be far attenuated, or entirely unrelated to, this Rule). *See* Pls.' Memo. 24 (Doc. No. 50-1) (citing Pls.' Mot. for Stay & Prelim. Inj., Kuisti Decl. ¶ 30 (Doc. No. 5-12)). In contrast, in comments on this Rule, the Idaho Department of Environmental Quality, which *is* the Idaho agency to set water quality standards, said, of the proposed rule's requirement that states "provide an opportunity for tribal right holders to engage and provide information the state can use" during the triennial review process: "[t]his is something IDEQ has historically done." Complaint, Ex. 3 (Doc. No. 1-3); *see also* Complaint, Ex. 5 (Doc. No. 1-5) (North Dakota comments). Second, the States suggest that they will incur litigation costs following the Rule, but do not – and cannot – suggest these litigation costs would be of such "significance" that the Court contemplated in *W. Virginia v. EPA*. 597 U.S. at 721; *see also id*. at 716 (noting the action at issue concerned "billions"); *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("[T]he expense and annoyance of litigation is part of the social burden of living under government." (citations omitted)).

[4] Where a standard is updated, it does not require reconsideration of every water permit in the state, contrary to the suggestion of the mining and farming industry amici. The Act requires a triennial review of water quality standards and permits are based on the standards in place at the time they are issued.

standards-setting process. Their prior lack of expenditure to consider uses that should have been addressed long ago under the plain language of the Act does not make course-correction a major question.

II. THE RULE IS A WELL-SUPPORTED AND REASONED CLARIFICATION, AND THEREFORE NEITHER ARBITRARY NOR CAPRICIOUS

For the same reasons that Plaintiffs' statutory arguments fail, their arguments that the Rule is arbitrary and capricious fail. The Rule is based on the requirements of 33 U.S.C. § 1313 and has been the law for half a century. EPA's efforts to clarify the requirements of the Act for state, tribal, and federal authorities are well-supported and well-reasoned.

Faced with an ongoing problem in the application or implementation of the law, EPA has exercised its authority to ensure that the goals of the Act are met. 89 Fed. Reg. at 35721-22. In this instance, the EPA has flagged a long-standing concern about existing tribal uses not being considered during standards-setting, which puts tribal members "at disproportionate risk." *Id.* at 35718. The agency clarifies that tribal rights to use resources protected under the Act, when appropriately documented and properly submitted to a state, must be considered when designating water uses, and that such rights, if they constitute an existing use or are encompassed within designated uses, must be protected. 40 C.F.R. § 131.12; *see also id.* § 131.10(h)-(i). Plaintiffs do not point to how the guidance offered by the Rule "fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

To the extent that any change in position can be discerned, EPA is permitted to change its position on specific requirements, so long as it explains its decision and the decision is well-supported. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *see also, e.g.*, *Fla.*

Wildlife Fed'n, Inc., 853 F. Supp. 2d at 1157 (holding that EPA's requirement for states to issue numeric criteria after long-standing failure of narrative criteria to address nutrient pollution was not arbitrary or capricious). Indeed, agencies must have the ability to course-correct and determine appropriate methods to implement the requirements of statutes they are responsible for overseeing. "If EPA were bound by its prior approvals," its power to review standards for compliance with the Act "would be meaningless." *Miss. Comm'n on Nat. Res.*, 625 F.2d at 1277.

The Rule was promulgated after a thorough notice-and-comment process. Yet Plaintiffs claim that the Rule is arbitrary and capricious as a "*sub silentio* departure" from an EPA guidance document from 2000 that recommends specific cancer risk rates and fish consumption rates. *See* Pls.' Memo. 29 (Doc. No. 50-1). First, a guidance document is not a binding rule, unlike the Rule at issue. Further, the 2000 guidance document relates to highly technical aspects of setting just one type of criteria – human health criteria – not the multitude of other criteria that must be developed under the Act. And Plaintiffs' argument is undermined by their own reference to cases in which EPA has disapproved of state standards that are insufficiently protective of subsistence fishing uses. *See id*. at 29-30. More importantly, the Rule underwent a notice-and-comment rulemaking process wherein stakeholders had the opportunity to participate. Far from an attempt to slip in requirements under the cover of night, EPA undertook a thorough, public process to clarify existing statutory requirements and provide guidance to states and tribes that ensures consistent treatment when it comes to water quality standards. *See* 89 Fed. Reg. at 35725, (". . . in practice the application of specific Tribal reserved rights in the [water quality standards] context has lacked consistency and transparent national expectations.").

EPA's prior treatment of water quality standards and treaty rights are not at odds with the current Rule. Plaintiff States argue the Rule is arbitrary and capricious when compared with EPA statements in water quality approvals from 2019. Pls.' Memo. 30 (Doc. No. 50-1). However, the legal basis for those statements is distinguishable from the Rule at hand, which is implemented pursuant to EPA's rulemaking authority under Section 303(c) of the Act. *See* 89 Fed. Reg. at 35722-23. Further, the Act expressly provides that it shall not be construed as limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter […] or affecting or impairing the provisions of any treaty of the United States. 33 U.S.C. § 1371. It is neither arbitrary nor capricious for EPA to provide a process for states to consider whether to designate uses for water bodies such as for fishing, gathering, or body contact, and require them to establish criteria that are protective of such designated uses. The Rule does not obligate or even authorize states or EPA to make a binding determination of the validity, meaning, or extent of tribal reserved rights, nor could it. Instead, the Rule ensures states are indeed considering *all existing uses* of waters, including tribal uses, to fulfill the requirements of the Act in a way that is consistent with federal law and avoids affecting or impairing tribal members' ability to exercise their reserved rights.

Finally, Plaintiffs claim the Rule grants EPA the authority to recharacterize a state's designated uses or arrogate additional authority in a departure from prior agency practice. Pls.' Memo. 32 (Doc. No. 50-1). Again, Plaintiffs misunderstand the Rule. As discussed at length above, the Rule requires a state to consider information about tribal reserved rights when designating uses and to ensure that water quality criteria are protective of those uses. Plaintiffs admit as much, arguing that "the Final Rule does not explicitly command the states to set designated uses" but nonetheless functions as a command because it enables states to conclude

that a designated use encompasses a similar Tribal use. *Id.* Plaintiffs ignore that there is discretion available to states in designating uses under the Rule and appear to promote the idea that they should be allowed to simply ignore information provided to them during the water quality standards-setting process if it contains information about tribal usufructuary rights.

III. ANTI-COMMANDEERING

A. The Final Rule Does Not Violate the Tenth Amendment

The challenged Rule clarifies and elaborates upon factors necessary to meet the purposes of the Act: protection of the chemical, physical, and biological integrity of the Nation's waters, protection and propagation of wildlife, and for measurement and classification of water quality. 33 U.S.C. § 1314(a); 40 C.F.R. § 131.5(a). The Rule does not alter the roles and responsibilities of states and the federal government regarding water pollution. States must do what they have always been required to under the Act: obtain information about water uses, designate uses, and establish criteria to protect designated uses. 33 U.S.C. § 1313. The requirement to consider all existing uses is not EPA's "policy preference," but rather a long-standing requirement under the statute and implementing regulations. S*upra.* Plaintiffs' arguments about commandeering could extend to *anything* they are required to do under the Act, which defeats their argument that this Rule poses a novel issue.

The Clean Water Act and its associated regulations are part of a scheme of balanced federalism between state, tribal, and federal governments that aims to protect the water resources of the country for the benefit of all its citizens. Under the Act, states may choose to exercise delegated authority to set water quality standards. On this point, Plaintiffs exaggerate the burden of the Rule's requirements, which require "consideration" of information that states should have been considering all along. *See FERC v. Mississippi*, 456 U.S. 742, 764 (1982) (discussing statute's requirement for states to "consider" federal standards). If EPA disapproves of a

standard, a state does not "lose[] part of its sovereign authority"—it simply must correct the defect. Only where a state refuses to regulate pursuant to the Act or adequately meet its requirements will EPA step in to promulgate standards that protect the people, fish, and wildlife of waters of the United States. 33 U.S.C. § 1313(c)(3)-(4). In that instance, states are not reduced to puppets of a ventriloquist. *See Printz v. U.S.*, 521 U.S. 898, 928 (1997) (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)). Instead, where a state chooses not to submit a water quality standard that complies with the requirements of the Act's regulations, the federal government regulates in its stead. 33 U.S.C. § 1313(c)(3)-(4); *see also N.Y. v. U.S.*, 505 U.S. 144, 161 (1992) (citing *Hodel v. VA Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)); *see also N.Y.*, 505 U.S. at 162 ("Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States.").

Plaintiffs' complaint about the Rule is ultimately a complaint about the regulatory structure that forms the basis of the Clean Water Act itself, which the Court has found to be a constitutional exercise of the federal government's commerce power. *Id.* at 167. Plaintiffs' citation to *New York v. U.S.* supports EPA's Rule and, more broadly, the structure of the Act. In *New York*, the Supreme Court struck down a federal requirement for states to take title to radioactive waste if the state is unable or unwilling to provide for the disposal of such waste. *Id.* at 144, 153-54. The central problem was that states did not have the option to decline to administer the program. *Id.* at 176-77. But otherwise, the Court explained, it was well-accepted that the federal government could provide incentives to states to regulate and, where they did not, the federal government could take on the full regulatory burden, like the EPA with the Clean Water Act. *Id.* at 161, 167.

Neither is *Sebelius* on point here. In relevant part, that case concerned the constitutionality of a provision of the Affordable Care Act, wherein states that did not comply with the statute's new coverage requirements would lose all federal Medicaid funding, not simply the funding intended to expand coverage. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575 (2012). The Supreme Court in *Sebelius* found that while the federal government could use its spending power to incentivize state regulation and policy to provide for the general welfare, the federal government could not condition those funds in ways that threaten other, independent grants. *Id.* at 580. The case at hand does not implicate federal funding; it focuses squarely on the process for setting water quality standards that comply with the federal statute.

Plaintiffs' position that the Rule commandeers state governance is unsupported and inconsistent with the cooperative federalism framework Congress established under the Clean Water Act.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion, grant Intervenor Defendant Tribes' motion, and enter final judgment in Intervenor Tribes' favor.[5]

Respectfully submitted this 17th day of January 2025.

/s/ Gussie Lord
Gussie Lord*
EARTHJUSTICE
1001 G St. NW, Ste. 1000
Washington, D.C. 20001
Phone: (202) 667-4500
Fax: (202) 667-2356
E-mail: glord@earthjustice.org

Janette Brimmer

[5] Should the Court rule in favor of Plaintiffs, Intervenor-Defendant Tribes respectfully request separate briefing on remedy.

Noelia Gravotta*
EARTHJUSTICE
810 3rd Avenue, Suite 610
Seattle, WA 98104-1711
Phone: (206) 343-7340
Fax: (206) 343-1526
Email: jbrimmer@earthjustice.org
ngravotta@earthjustice.org

Mary Rock*
EARTHJUSTICE
311 S. Wacker, Suite 1400
Chicago, IL 60606
Phone: (312) 500-2200
Fax: (312) 667-8961
E-mail: mrock@earthjustice.org

Daniel Cordalis
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Ave
Boulder, CO 80302
Phone: (303) 447-8760
Fax: (303) 443-7776
E-mail: cordalis@narf.org

Counsel for Intervenor Defendants Nez Perce Tribe, Quinault Indian Nation, Bay Mills Indian Community, Puyallup Tribe of Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community, Confederated Salish & Kootenai Tribes of the Flathead Reservation, Red Lake Band of Chippewa Indians, Fond du Lac Band of Lake Superior Chippewa, Grand Traverse Band of Ottawa and Chippewa Indians, White Earth Band of the Minnesota Chippewa Tribe

Jane Steadman
KANJI & KATZEN, P.L.L.C.
811 1st Ave., Suite 630
Seattle, WA 98104-1426
Phone: (206) 344-8100
Fax: (866) 283-0178
Email: jsteadman@kanjikatzen.com

Counsel for Intervenor Defendant
Port Gamble S'Klallam Tribe

**Admitted Pro Hac Vice*