On March 6, the comment period closed for the Environmental Protection Agency's proposed rulemaking, Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (87 FR 74361). Several states submitted comments to the docket, including Alaska, California, Idaho, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wyoming.

The Western States generally expressed concerns about the Constitutional and statutory authority of EPA, the states, and the tribes to undertake this effort to determine and quantify tribal treaty rights, a process that usually involves the courts, and a complex legal endeavor which the water quality agencies are ill-suited to accomplish at all, much less within the short time allotted. They raised problems with EPA abdicating its trustee responsibilities, or shifting them to the states without clear definitions or the funding or other resources necessary to accomplish these new objectives. Several states noted that EPA's estimate of costs vastly underestimates the work at the state level that goes into developing or modifying water quality standards, much less the amount of effort that would be required to determine tribal treaty rights that may impact state water quality standards. Moreover, they noted that the anticipated costs and other burdens appear disproportionate to the limited potential benefits, particularly when state water quality standards already take into consideration the goal of fishable-swimmable water quality wherever attainable, and protective of everyone regardless of geographic location. The sequence of implementation, requiring considerable state efforts and resources to identify tribal reserved rights and modifications to water quality standards, followed by EPA-tribal consultation to assess whether those state efforts are sufficiently protective, and the potential for subsequent EPA-imposed water quality standards if the state's standards are deemed insufficient, raised concerns as well. The states also noted state-tribal relationships are a result of intricate sovereign-to-sovereign work over a period of many years, and are not well suited to regulatory mandates. Finally, the states noted that despite EPA's assertions to the contrary, the proposed rule most definitely implicates federalism concerns requiring meaningful consultation with co-regulator states.

The Alaska Department of Environmental Conservation (ADEC) said: "Ascertaining potentially applicable tribal reserved rights at an unsuppressed use, and crafting WQS to protect the health of right holders at the 90th percentile could be challenging for states in the Lower 48 having several federally recognized tribes. For Alaska – home to 227 federally recognized tribes – this task is unfathomable. EPA's notion that states may do this using the existing apparatus of their current WQS revision process – an already complicated and technical process – is unconscionable and naïve. [ADEC's] specialists and engineers are trained in, and skilled at, scientific and technical decision-making; they are not trained to divine unarticulated rights at a hypothetical usage rate by collecting historical-and cultural-practices data from tribes. EPA blissfully ignores the likelihood of disagreements between states and tribes, between tribes and tribes, between tribes and Alaska Native Corporations (both regional and village), between states and EPA, and between tribes and EPA; or the likelihood of conflicting or inconsistent data from different tribes or tribal members; or the likelihood that litigation will result. ADEC may not even have the authority to make these determinations in the first place. In short, EPA appears to be setting state agencies up to fail." ADEC also noted that EPA has failed to consider that the Alaska Native Claims Settlement Act (ANSCA) abolished all but one reservation in Alaska, expressly extinguishing any aboriginal hunting or fishing rights and removing the federal wardship or trustee relationship in order to promote tribal independence.

The California State Water Resources Control Board (SWRCB) said: "As a threshold issue, identification and interpretation of federal instruments that have the potential to create federal reserved rights is an uncertain exercise that requires expertise unrelated to water quality assessment. The proposed regulation carves a broad swath for identifying tribal reserved rights from treaties, statues, executive orders, or other sources of Federal law, noting that these rights may either be express or implied…. Not noted in this recitation is the long history of changes in federal policies and ensuing litigation that overlie interpretation of any one document. Take for example, a treaty (or in the case of California, an executive order) establishing a reservation. Given the multiple waves of federal policies reducing tribal rights, it cannot be clear on the face of the document whether the reservation was subject to allotment, whether the tribe later faced termination, whether the Indian Claims Commission made payments in lieu of fulfilling the original document's terms, or whether any of these actions was later reversed in one of the many individual or class action lawsuits challenging these federal actions. Thus, even if a scientist charged with establishing water quality standards can locate the appropriate historical instrument establishing a reservation, which itself requires specific

research skills unrelated to water quality, this document provides little insight regarding present day rights. Additionally, for tribal lands established outside of the treaty process – which is all tribal lands in California – the founding instruments themselves are often brief and un-illuminating, making the identification of the rights reserved a further complex exercise of interpretation, requiring expertise unrelated to establishment and assessment of water quality requirements." SWRCB also noted that they established new designated uses in 2017 for the explicit protection of California Native American tribes, regardless of whether those tribes are federally-recognized. "[SWRCB] developed the language of these tribal beneficial uses to include a full range of activities concerning tribal tradition, culture, and subsistence. The range of activities described by the tribal beneficial uses were informed by the uses made of waterbodies. California Native American tribes articulated these uses through resolutions adopted by tribes and submitted to [SWRCB], and as further articulated by tribal members, representatives, and interested parties during extensive public outreach over several years. Tellingly, the identification of the tribal uses made of waters and the relevant environment involved no inquiry whatsoever into tribal reserved rights."

The Idaho Department of Environmental Quality (IDEQ) said: "Requiring states to research, evaluate, and initiate consultation directly with all the tribes that claim reserved treaty rights in our state would significantly increase the workload to an already taxed staff. In Idaho, five tribal nations reside within the state, each claiming various fishing rights under divergent treaties and executive orders. Three of the five tribes have 'treatment of state' while two do not. The October 2021 Summary Report of Tribal Consultation for the Proposed Rule, several tribes responded with a similar concern stating, 'EPA cannot delegate its trust responsibility to consult with tribes and protect tribal reserved rights to states, noting that tribes' government-to-government relationship is with the federal government rather than states.'" This rule, as it's currently written, shifts the regulatory burden of implementing existing EPA responsibilities to states – likely to the detriment of tribe-state relationships. In addition, during the negotiated rule making process, if one of the five tribes chooses not to engage with the state, it is unclear how IDEQ would be able to submit the rule in confidence that it has met the full tribal consultation requirement…. In Idaho, as in several western states, tribal reserved rights for a particular water resource may span state boundaries and with conflicting information, gaps in science, or professional opinions as to how and to what level to protect the reserved right, it remains unclear how this conflict would be resolved."

Idaho also pointed to an MOU signed by 17 federal agencies in November 2021 to establish a searchable database of all treaties between the federal government and tribal nations. "The establishment of such a database would certainly make querying EPA on tribal reserved rights a much simpler and streamlined process. IDEQ supports, at a minimum, the fulfillment of this MOU obligation as a precursor to the finalization of the tribal reserved rights rule…. Indeed, many of the obligations set out in the MOU complement the goals of the tribal reserved rights rule; however, not enough time has elapsed since the signing of the MOU for many of these precursory obligations to be fulfilled at the federal level, which would establish a clearer path forward for the application of the proposed rule for the states." Further, IDEQ noted that the tribes are already included in the water quality program, which works to protect the health of all residents dependent on the state's aquatic resources. "Any new or ongoing state rulemaking, to include our triennial review process, is conducted through an open process in which the Tribes and EPA are included, and their contribution is valued. This revision proposes that during the Triennial review process that states 'provide an opportunity for tribal right holders to engage and provide information the state can use in this evaluation.' This is something IDEQ has historically done."

The North Dakota Department of Environmental Quality (NDDEQ) said: "NDDEQ and EPA are environmental experts, not Indian law experts. Treaty rights are socially, politically, and legally complex issues. EPA's overly simplistic directive that states should just ask the right holder ignores the reality that states may have no idea who possible right holders are, particularly for tribes that are no longer located in the state, and that there could be disagreement between parties over who holds which rights…. During the tribal consultation period, tribes also expressed concerns with the process of determining tribal reserved rights…. Neither EPA nor NDDEQ is the proper entity to make a determination in the event of a treaty dispute. Not only would the Proposed Rule require NDDEQ to undertake a task certain to fail, but it would also harm the relationship between the State of North Dakota and the tribes. NDDEQ strives to have a good working relationship with its tribal counterparts. Putting NDDEQ in the middle of possible treaty disputes would injure this relationship. The Proposed Rule will harm state-tribal relations." NDDEQ noted that it already determines the level of water quality necessary to protect aquatic life and users of the resource. "Like all states, NDDEQ conducts a triennial review of its WQS that includes the opportunity for public comment…. If NDDEQ is aware

of a tribal reserved right, it will ensure that use is protected during its triennial review of its WQS. If there is a tribal reserved right that NDDEQ is unaware of, a right holder can bring that to NDDEQ's attention during the triennial review or by simply contacting NDDEQ. In its Proposed Rule, which requires that WQS must protect the health of the right holders to the same risk level as provided to the general population of the state, EPA gives the impression that it does not believe states develop WQS protective of everyone regardless of their geographic location…. This is inaccurate and disrespectful to state partners."

The Oklahoma Department of Environmental Quality said: "First and foremost, it does not appear that EPA has the authority to make a determination related to reserved rights, let alone the ability to delegate such authority to the States. Notwithstanding this lack of authority, prior to considering the role that Water Quality Standards play in protecting and preserving reserved rights (and definitely prior to determining that new and existing Water Quality Standards must affirmatively demonstrate that such reserved rights are adequately protected), the reserved rights should first be determined or adjudicated by a court of competent jurisdiction. As EPA recognized in the proposed rule, determining the nature and extent of a reserved right requires an incredibly complex analysis…. The sources of Federal law that establish reserved rights do not typically lay out the precise nature and extent of the reserved right, but instead require a determination of the nature and extent of the right necessary to satisfy the purpose of the reservation. Every element of the proposed definition requires an extremely complex analysis: 'any rights;' 'aquatic and/or aquatic-dependent resources;' 'reserved or held;' 'expressly or implicitly;' and 'through treaties, statues, executive orders, or other sources of Federal law.' To further complicate the determination, the proposed rule also provides that the States must determine what constitutes the unsuppressed use of any reserved resources (unsuppressed by water quality or availability), which requires the consideration of past, present, and future uses (which in turn requires taking 'into account factors that may have substantially altered a waterbody.')…. This type of determination is difficult anywhere (as evidenced by the enormous number of State and Federal court cases dealing with such adjudications) and would be especially challenging in Oklahoma considering that 39 federally recognized tribal nations are located within the State's exterior boundaries and that Indian country in Oklahoma ranges from reservations to over one hundred thousand acres of tribal trust land scattered across the State. Determining the nature and extent of the reserved rights applicable to each tribal nation would be especially difficult considering that any such reserved rights were likely created through separate and distinct treaties, statutes, executive orders, and/or other sources of Federal law…. [T]he sheer number of court cases involving the determination of reserved rights demonstrates the difficulty involved in making such determinations, as well as the likelihood that any such State determination would be vulnerable to an infinite number of potential challenges. If, as proposed, such a determination is considered by EPA to be a prerequisite to developing approvable Water Quality Standards, then the challenge of any such determination is all but guaranteed and would be a potential justification for EPA to disapprove any related standard developed by the State, which would likely result in the federalization of Water Quality Standards in Oklahoma…. Determining reserved rights is not typically a State environmental agency responsibility. Generally, State environment agencies do not have the expertise or personnel necessary to conduct the required complex reserved rights determinations. The creation of such a new and expansive responsibility would place a significant burden on already strained State resources. The potential impact on State resources from an unfunded federal mandate such as that required in the proposed rule cannot be overstated. In addition to the strain on State resources, the uncertainty related to determining the nature and extent of all reserved rights that must be protected in new and existing Water Quality Standards would result in a corresponding uncertainty to the adequacy of existing water quality discharge permits and the availability of new or modified discharge permits. This uncertainty would place a significant burden on the State water agencies and the regulated community."

The Oregon Department of Environmental Quality focused on the need for clarity and a rule that is feasibly implementable by the states, tribes, and EPA. "The rule needs to clearly define unsuppressed rights and how those will be determined." Oregon DEQ also noted inconsistency between the rule and EPA's presentation to states on January 24, regarding protection of "the health of the right holders to at least the same risk level as provided to the general population of the state." The presentation appeared to require a higher standard to protect tribes at a higher level than the general population of the state due to the exercise of tribal reserved rights.

The South Dakota Department of Agriculture and Natural Resources (DANR) said: "In the proposed rule, the tribal reserved rights may be held either expressly or implicitly through treaties, statutes, executive orders, or other sources of Federal law. If a tribal reserved right is implicitly held, that determination must be made either by the states and the tribes together, perhaps with the assistance of the United States Bureau of Indian

Affairs or adjudicated in a court of law. EPA did not address time or money spent in litigation when considering the economic impacts of the rule, and added time and money to the water quality standards rule review process…. EPA does not have the authority to arbitrate how a tribal reserved right is exercised and the level of protection that may be necessary to protect that right." DANR noted that the Clean Water Act "already requires that water quality standards support downstream uses, which include protecting tribal reserved rights." It pointed to the examples in the preamble to the rule, where the reserved rights were determined and their use quantified as a preliminary step, apart from the water quality protection. Developing criteria and appropriate water quality standards to protect those rights were a final step. "The proposed rule inverts this process placing both the determination of rights and exercising those rights under oversight of the triennial review process."

The Texas Commission on Environmental Quality (TCEQ) said: "EPA's proposed revisions seem to delegate existing federal responsibilities to the states, by incorporating new requirements for states to consider and to protect treaty rights, rather than EPA, and circumvent established processes. Federal agencies (such as EPA) are required to consult with tribes on a government-government basis, pursuant to Executive Orders, Presidential memoranda, and other authorities, on policies that have tribal implications, including regulations or actions that have a substantial direct effect on one or more Indian tribes…. Alternately, in lieu of rulemaking, EPA should assume these responsibilities to implement proposed requirements as part of their responsibilities already authorized by the U.S. Constitution and CWA, and memorialized in federal policies; including the identification of all tribal reserved rights…. If finalized as proposed, states will be required to identify any tribal reserved rights and document the scope, nature, and current and past use of the tribal reserved rights as informed by the right holders, as well as ensure WQS adopted by states are protective of tribal reserved rights. Specific legal and technical expertise will be needed to comply with these requirements, and to facilitate engagement and coordination with tribal right holders. Such expertise is not readily available within existing and limited state resources…. Without direct consultation with tribes (which is the purview of EPA), states cannot know which specific aquatic and/or aquatic-dependent resources are important to specific tribes. Following EPA's tribal consultation, a list of specific resources should be developed and provided to states in a timely manner to facilitate implementation of the rule."

The Utah Department of Natural Resources (UDNR) expressed concerns about the ambiguity of such terms as "aquatic resources" and "aquatic-dependent resources," and which species would be included. "This ambiguity has the strong possibility to cause the rule to be applied overbroadly…. Such application will inevitably lead to disputes between tribal and non-tribal parties instead of cooperation…. All living things need water to survive and, therefore, could be considered 'aquatic-dependent'. Given the pivotal role that [these terms] play in determining appropriate WQS, they should be circumscribed by clear and complete definitions. Both terms are vague, broad, and subject to numerous interpretations…" UDNR noted that EPA "will initiate tribal consultation with the [tribal] right holders...in determining whether present State water quality standards protect applicable tribal reserved rights." UDNR said: "As the Proposed Rule is written, it does not appear that the individual states will be a part of this consultation process. Given that the individual states will be preparing (or already have prepared) the WQS to be examined, it is the State's opinion that the individual states should be involved in that initial consultation period." UDNR also observed that the rule applies broad regulations to relatively narrow issues. "For example, the Proposed Rule does not explicitly differentiate between Great Lakes/Pacific Northwest Tribes, who historically depended on waterbodies as a significant source of food taken directly from the water, compared with Southwestern Tribes, who relied more on terrestrial animals and vegetation. The Proposed Rule instead applies a broad standard to all tribes and all states. Further, the Proposed Rule requires a water standard for 'tribal reserved rights' that could potentially go well beyond current water quality standards necessary to irrigate contemporary crops. Generally, water quality negatively impacts aquatic plants and animals before impacting terrestrial plants, such as crops. As such, the Proposed Rule potentially could require states to significantly improve water quality in a source supplying 'tribal reserved rights' well beyond what is currently required for other water right holders…. These diverse water uses by the many tribes within the United States render a single water quality standard practically unworkable, particularly with this ambiguous Proposed Rule that treats the various tribes' needs as one. In conclusion, the State values its relationship with the eight tribal nations within Utah's borders and will continue to work with them as valued partners. The State also emphasizes that the cultural needs of the Tribes, their health, and their economic prosperity should continue to be prioritized by both federal and state governments. The State's concern with this Proposed Rule is that it lacks specific definitions and is overbroad; its vagueness and general application to all tribes has the possibility to create ambiguity and will lead to disagreement as to interpretation instead of cooperation among stakeholders. Essentially, this Proposed Rule uses a sledgehammer to tackle issues that are more properly resolved by using a scalpel."

The Wyoming Department of Environmental Quality (WDEQ) said: "Among WDEQ's primary concerns with the revisions is the fact that many of the potentially applicable tribal reserved rights have not yet been identified, quantified, defined, agreed to by states, tribes, and the Federal government, or otherwise fully determined by a court of competent jurisdiction…. [I]ncorporating tribal reserved rights into state water quality standards will inevitably entangle the already complex standards revision process in arenas far outside its scope…. As acknowledged by EPA, tribal reserved rights are complicated and often require considerable deliberation, negotiation, or litigation. Rights may have been included in a treaty, treaties may not have been ratified, and rights may have been modified or not discussed in subsequent treaties. Rights may have been granted or limited in an Executive Order. Rights may have been granted or expressly abrogated by Congress. Reserved rights may be constrained by factors that both can and cannot be remedied. Rights may be implicit, vague, and ambiguous. Tribes may wish to exercise their reserved rights or not to exercise their reserved rights. Wyoming, like much of the United States, was historically home to a number of tribes that were party to treaties with the United States government. And while some of these treaties may reserve rights implicitly or otherwise, the nature and extent of many of these rights is currently unknown…. The CWA surface water quality standards revision process is not an appropriate means to determine the nature and extent of these rights. The Wyoming Environmental Quality Act (EQA)…does not authorize WDEQ to determine the nature and extent of reserved rights, nor does it authorize WDEQ to relinquish responsibility for establishing water quality standards to EPA. Therefore, because tribal reserved rights associated with state waters in Wyoming have not been clearly defined and identified, the revisions attempt to force WDEQ into a situation where it has no authority to comply with the proposed revisions…. [Further,] the CWA does not authorize EPA to determine the nature and extent of tribal reserved rights; arbitrate, negotiate, or litigate reserved rights; or determine how a tribe may or may not exercise a reserved right. Determination of tribal reserved rights is governed directly by tribal-state negotiations, specific lines of authority found in U.S. Supreme Court case law, state-specific water adjudications, and other specifically binding sources of legal authority, not indirectly through unilateral agency rulemaking…. This process is extremely complex, resource-intensive, and likely must be carefully negotiated, or litigated, between states, tribes, and the Federal government. The surface water quality standards revision process is already complicated, resource-intensive, and subject to delays. EPA already often fails to meet statutory deadlines, even without the complexity of addressing tribal reserved rights."

WDEQ also noted that the rule does not require EPA to consult with tribes and provide feedback to Wyoming until after the water quality standards revision process has been completed. While WDEQ could reach out to tribes, not all tribes have a clearly defined governance structure to enable a formal consultation process, and some tribes prefer to only engage with the federal government. "Therefore, by the time of formal consultation, WDEQ would have already invested significant resources to develop, revise, and adopt water quality standards. Partner agencies and stakeholders would have also invested significant resources into the process-the standards would have been through scoping and multiple public notices. The standards would have been reviewed by legal counsel and our Water and Water Advisory Board, adopted by the Environmental Quality Council, and approved by the governor. As such, the proposed process does not provide critical information early enough in the rule revision process, nor does it sufficiently recognize the resources Wyoming expends in revising water quality standards or the resources that Wyoming would need to expend if water quality standards are disapproved. WDEQ's previous efforts to engage EPA early in the rule revision have not prevented disapprovals, as EPA has not always been forthcoming about which revisions they view as problematic." WDEQ also expressed significant federalism and co-regulator concerns. "Given that states have the primary responsibility for developing surface water quality standards, WDEQ/WQD is alarmed by EPA's lack of engagement with states during development of the proposed revisions. The fact that the proposed revisions impose new, significant, and far-reaching requirements on states that may conflict with other state laws and authorities emphasizes that engagement with states is critical. ACWA and the Environmental Council of States are important national organizations that represent states. However, these organization do not represent all states, and engagement with these organizations should be in addition to, not instead of, engagement with individual states. WDEQ recommends EPA initiate a meaningful collaborative cooperative federalism and nation-to-nation consultation process with states and tribes collectively."

Quality-Quantity Nexus

Some states expressed additional water quality-quantity concerns, which could implicate Winters reserved water rights outside the authority of the Clean Water Act.

California SWRCB said: "Even after determining whether a tribal reserved right exists, determining the level of protection required for a right depends on the right's priority, which adds significant additional and

unnecessary complication. For example, if a reservation was established in the early 1900's and was intended to provide for fishing, but upstream diversions prior to that date reduced flows and increased temperatures on the reservation lands to an extent that limits the ability to fish, the tribe's federal reserved right may be junior to the right of the existing diverter, unless the tribe could establish a "time immemorial" priority date. Determining the water right priority of a federal reserved right, and its situation as compared to other water users, is a complex task. Where the federal reserved rights are not unquestionably among the most senior in a system, as will often be the case in California, a basin-wide assessment of senior demands is required to determine the scope and priority of a reserved right vis-à-vis other demands in the basin. Most states, including California, have not comprehensively adjudicated their waters. Absent such an existing adjudication, determining the extent to which a federal reserved right can be fulfilled, and what actions are available to fulfill it, is not straightforward; it involves expertise in water rights law that is distinct from the questions regarding the level of water quality required to support beneficial uses. Water right adjudications are for good reason considered one of the most complex analyses, often requiring decades of litigation." SWRCB also said: "USEPA should clarify the extent to which a state would be required to revise or adopt water quality standards to protect tribal reserved rights unsuppressed by water quality or availability of the aquatic resource for a tribal activity that has neither occurred nor where the water quality has not been achieved to support the activity since November 28, 1975, and where the activity is not feasible pursuant to the use attainability factors at 40 C.F.R. section 131.10(g). For example, if tribal navigation is no longer available in a waterbody because a dam or other type of hydrologic modification constructed prior to November 28, 1975, precludes navigation, it is unclear whether states would be obligated to protect that activity."

IDEQ said: "Additionally, the proposed rule, which is based on the premise that Tribal treaties imply reserved rights to water quality in state waters outside reservations, could have significant and concerning implications for water quantity by suggesting that treaties give Tribes an implied reservation to water rights outside the Reservation. Although such broad claims were raised in the Snake River Basin Adjudication by the United States, they were soundly rejected by Idaho courts. This proposed rule would now embolden similar claims to be raised again throughout the state of Idaho, putting vested water rights at major risk." IDEQ also said: "The proposal explains that the unsuppressed analysis "should balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody" but provides very little detail on how 'reasonably achievable' would be determined. Waterways within Idaho are impacted by over 1,178 dams, both within and downstream of state borders, that produce a substantial amount of power and have altered the ecosystem to the point it would not be economically feasible to restore the ecosystem to pre-altered pre-dam conditions."

South Dakota DANR said: "The proposed rule states '[t]ribal reserved rights as defined in this proposed rulemaking generally do not address the quantification of Winters rights.' By using the word 'generally,' EPA is not excluding the possibility that Winters rights may be considered as part of a tribal reserved right. This rulemaking should not be a backdoor approach in determining water quantification or used in a manner that sets precedence for which reserved rights exist. EPA does not have the legal authority to determine if a reserved right exists, and therefore, should not create a rule where EPA determines if that alleged right is protected as a part of water quality standards approval.

TCEQ said: "The definition of, and requirements to protect, tribal reserved rights needs clarification regarding their scope of applicability to water quality and water availability (quantity). For example, does the definition of 'tribal reserved rights' in proposed 40 CFR §131.3®, as well as the proposed requirements to protect tribal reserved rights in 40 CFR §131.9, include sufficient water quantity to access and use fishing resources? Is water availability to access and use such resources within the scope of this regulation, if allocation of rights to state surface water is authorized and adjudicated within a state's legal framework? (1) If water availability is not explicitly included in the definition and protection of 'tribal reserved rights,' the language should be revised to clearly allow for, and explain, the limits of the exclusion. (2) If water availability is intended to be included in the definition and protection of 'tribal reserved rights,' how is this new regulation consistent with Section 101(g) of the CWA, which clearly recognizes state primacy in allocation of state surface water? Including water availability has the potential to undermine Texas' authority to allocate and manage its surface water resources."

UDNR said: "In the notice for the Proposed Rule, EPA indicates that 'tribal reserved rights' 'generally do not address the quantification of Winters rights.' It should be explicitly stated in this, or any, Proposed Rule that Winters rights are not affected by, nor defined by the Proposed Rule. Quantification of Winters rights is a matter that is 'left for judicial determination.' Indeed, any potential ex parte secretarial decisions regarding the quantification of Winters rights are clearly prohibited by the United States Supreme Court."

“WDEQ is concerned with EPA's unwillingness to definitively say that the proposed revisions will not interfere with the allocation of Winters rights, despite (1) the fact that most of the reserved rights contemplated under the proposed revisions are likely to be associated with off-reservation waters and (2) both the CWA and the federal regulations include explicit statements that water quality standards are not to supersede or abrogate rights to quantities of water. Since the topic of water rights extends well beyond WDEQ's, EPA's, and CWA authorities, discussions regarding water quality protections associated with tribal reserved rights must explicitly exclude any determination, quantification, or definition of federal reserved water rights.”

The Wyoming State Engineer’s Office (SEO) said: “Due in part to the widely variable nature of tribal reserved rights, the proposed rule is so vague and ambiguous that it is impossible to predict the full extent of its impact on Wyoming's exclusive authority to allocate and administer quantities of water within its jurisdiction. EPA acknowledges the complexity of determining the nature and geographic scope of tribal reserved rights, and whether they even apply in water subject to state water quality standards. At the same time, EPA offers no helpful guidance about making those determinations other than requiring engagement with potential right holders. Those potential right holders, and EPA itself, have no authority to determine the nature or geographic scope of tribal reserved rights outside of established and legally binding methods of review, as laid out in a multitude of court decisions. Further, no consideration is given to the holders of other lawful rights that may be impacted by the rule's application. In fact, EPA acknowledges its uncertainty regarding the outcome of the proposed rule's application. The proposed rule establishes newly created, potentially far-reaching consequences and concepts which are undefined and subject to agency discretion. The rule threatens to impair—not recognize, preserve, and protect – Wyoming's ability to plan for the use of its limited water resources, and to allocate its waters for those uses according to state law.