



State of Utah

SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

Department of Natural Resources

JOEL FERRY
Executive Director

Public Lands Policy Coordinating Office

REDGE B. JOHNSON
Director

March 6, 2023

Submitted via Federal eRulemaking Portal: <https://www.regulations.gov>

Jennifer Brundage
Officer of Water, Standards and Health Protection Division
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights – Proposed Rule
RIN 2040-AG17, 40 CFR Part 131

Dear Ms. Brundage:

The State of Utah (“Utah” or the “State”) has reviewed the above referenced proposed rule (the “Proposed Rule”) that would clarify and prescribe how water quality standards (“WQS”) must protect aquatic and aquatic-dependent resources reserved to tribes through treaties, statutes, executive orders, or other sources of federal law.¹ The State appreciates the opportunity to submit comments on this Proposed Rule.

As an initial matter, the State values its relationship with the Tribes in Utah and will continue to support the Tribes as working partners. The State appreciates the federal government’s efforts to protect tribal health and tribal resources. While the State supports that goal, the State has concerns that the Proposed Rule as written is ambiguous. This ambiguity has the strong possibility to cause the rule to be applied overbroadly, despite the Environmental Protection Agency’s (“EPA”) indication that the Proposed Rule would primarily play a role in

¹ Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74361 (Dec. 5, 2022) (to be codified at 40 C.F.R. pt. 131).

**Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights –
Proposed Rule
RIN 2040-AG17, 40 CFR Part 131
March 6, 2023
Page 2**

only two instances.² Such application will inevitably lead to disputes between tribal and non-tribal parties instead of cooperation.

As indicated in the notice, numerous states that are responsible for administering or overseeing water quality programs may (and likely will) be affected by this rulemaking. Utah is no exception. As a result, the State will likely have to adjust its WQS. In doing so, the State will necessarily be required to interpret tribal treaties and federal law to ascertain “tribal reserved rights,” as well as making other complex determinations to comply with the Proposed Rule.

The Proposed Rule defines “tribal reserved rights” as “any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.”³ However, the Proposed Rule does not define “aquatic resources” or “aquatic-dependent resources” and does not examine which species those terms would include. All living things need water to survive and, therefore, could be considered “aquatic-dependent”.

Given the pivotal role that “aquatic resources” and “aquatic-dependent resources” play in determining appropriate WQS, they should be circumscribed by clear and complete definitions. Both terms are vague, broad, and subject to numerous interpretations. The slideshow presented by EPA at the public hearings for this Proposed Rule indicated that examples of aquatic and aquatic-dependent resources include fish and wild rice. However, these examples are not provided in the Proposed Rule or the notice thereof, nor do the two cited examples provide clear definitional guidance. Without clearly defining these terms, the State anticipates that the terms and their definitions will lead to disputes and unintended consequences given how broadly they can be interpreted.

Further, while the term “tribal reserved rights” is defined in the Proposed Rule, the definition is not specific. The notice for the Proposed Rule indicates that these rights “include but are not limited to the rights to fish; gather aquatic plants; and to hunt for aquatic-dependent animals.”⁴ However, the Proposed Rule does not specify whether these “tribal reserved rights” are tied to on or off-reservation activities (or both). Given that EPA acknowledges “it may be a

² “EPA anticipates that the circumstances where WQS may need to be adjusted to protect tribal reserved rights would fall primarily into two categories: [1] Human health criteria to protect fish consumers, where tribes with reserved fishing rights consume more fish and are therefore exposed to greater levels of contaminants in fish . . . [2] Where a reserved right is not already accounted for as a designated or presently attained use for a waterbody, but that waterbody could be reasonably expected to support that right in the future.” Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. at 74370.

³ 87 Fed. Reg. at 74378.

⁴ 87 Fed. Reg. at 74367.

Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights –

Proposed Rule

RIN 2040-AG17, 40 CFR Part 131

March 6, 2023

Page 3

complex inquiry to determine if tribal reserved rights apply in waters subject to state WQS,” these rights should be clearly defined in the Proposed Rule.⁵

In the notice for the Proposed Rule, EPA indicates that “tribal reserved rights” “generally do not address the quantification of *Winters* rights.”⁶ 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.”⁷ Indeed, any potential *ex parte* secretarial decisions regarding the quantification of *Winters* rights are clearly prohibited by the United States Supreme Court.⁸

The notice to the Proposed Rule also indicates that the “tribal reserved rights” definition does not apply to unratified treaties or reserved rights that were abrogated or otherwise superseded. It further indicates that legal agreements or compacts between states and tribes are not within the scope of the rulemaking. This is an important distinction and should be addressed in the Proposed Rule itself, not just in the federal notice. Otherwise, the Proposed Rule runs the risk of potentially restoring rights once terminated by Congress without obtaining Congressional approval.

Additionally, the Proposed Rule indicates that under 40 CFR 131.9(b), “the EPA will initiate tribal consultation with the [tribal] right holders . . . in determining whether present State water quality standards protect applicable tribal reserved rights.”⁹ 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.

The Proposed Rule requires any relevant WQS to protect the “exercise of tribal reserved rights *unsuppressed* by water quality or availability of the aquatic or aquatic-dependent resource” (emphasis added).¹⁰ While the notice to the Proposed Rule indicates that the “unsuppressed” level should balance heritage use of a resource with what is currently reasonably achievable for a given waterbody, it does not indicate who, or what authority, ultimately makes this determination.

⁵ *Ibid.*

⁶ 87 Fed. Reg. at 74363.

⁷ *United States v. Adair*, 723 F.2d 1394, 1406 (9th Circ. 1983).

⁸ *Arizona v. California (Arizona II)*, 460 U.S. 605, 636-38 (1983).

⁹ 87 Fed. Reg. at 74378.

¹⁰ *Ibid.*

Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights –

Proposed Rule

RIN 2040-AG17, 40 CFR Part 131

March 6, 2023

Page 4

What happens where there is great tension between heritage use and what is reasonably achievable? Which factor takes precedence?

The Proposed Rule also indicates that the “unsuppressed” level should account for situations where restoration efforts for certain bodies of water are planned or underway. Restoration efforts are unfortunately not an exact science. This Proposed Rule would essentially require the states to have a crystal ball in predicting the extent of success, as well as the timing of success, for restoration projects when determining the level of unsuppressed use. The Proposed Rule should provide a specific definition of an “unsuppressed level” of use. Given that water quality must be maintained at this level, an understanding of the definition is critical.

After introducing this broad Proposed Rule, EPA indicates that WQS would likely need to be adjusted mainly in two categories:

[1] Human health criteria to protect fish consumers, where tribes with reserved fishing rights consume more fish and are therefore exposed to greater levels of contaminants in fish. This is because there is a differential health risk between right holders and the general population of the state because right holders are more highly exposed to the resource. [2] Where a reserved right is not already accounted for as a designated or presently attained use for a waterbody, but that waterbody could be reasonably expected to support that right in the future (*e.g.*, if restoration efforts are underway). EPA anticipates that this could arise with uses to protect aquatic life, aquatic-dependent wildlife, and users of the resources, where those uses are not already designated or presently attained.

Given the two listed scenarios where EPA anticipates that WQS may need to be changed, the Proposed Rule is applying 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.¹¹ As such, the Proposed Rule potentially could

¹¹ “Generally, criteria developed for human health and aquatic life will be sufficiently stringent to protect agricultural and industrial designated uses because those uses are generally less sensitive than human health and aquatic life

**Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights –
Proposed Rule
RIN 2040-AG17, 40 CFR Part 131
March 6, 2023
Page 5**

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.

The EPA estimates that if the Proposed Rule moves forward, states will face an additional yearly compliance burden of approximately 265 to 1,325 labor hours and will incur additional spending of between \$19,782 and \$98,911 per year.¹² This is a significant burden and only assumes one year of compliance. This is a particularly high burden for an arid state such as Utah, which must also utilize its already stretched-thin water departments, resources, and budgets to combat major issues on the Great Salt Lake, Utah Lake, and the Colorado River (just to name a few).

Further, not every tribe across the United States traditionally used water resources for subsistence in same manner and to the same extent. Some tribes relied heavily on wild aquatic animals and aquatic vegetation for subsistence, trading, and prosperity. Others relied more on wild terrestrial animals and terrestrial vegetation. Still others relied on water primarily for irrigating domesticated crops as a major food source. 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.

designated uses.” United States Environmental Protection Agency, Water Quality Standards Handbook, Chapter 3: Water Quality Criteria, p. 26 (2017), <https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter3.pdf>.

¹² 87 Fed. Reg. at 74374.

**Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights –
Proposed Rule
RIN 2040-AG17, 40 CFR Part 131
March 6, 2023
Page 6**

Thank you for the opportunity to provide comments. Please direct any written correspondence to the Public Lands Policy Coordinating Office at the address below or call to discuss any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Redge B. Johnson', written over a horizontal line.

Redge B. Johnson
Director