



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
Regarding**

**WATER QUALITY STANDARDS, PROTECTING TRIBAL RESERVED RIGHTS, and FEDERAL
BASELINE WATER QUALITY STANDARDS FOR INDIAN RESERVATIONS**

**Reno, Nevada
May 24, 2023**

WHEREAS, the mission of the Western States Water Council is to ensure that the West has an adequate, sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future; and

WHEREAS, states are co-regulators under the Clean Water Act, which does expressly “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources....” CWA § 101(b); and

WHEREAS, water quality standards are central to achieving the goals of the Clean Water Act on both state lands and tribal reservation lands; and

WHEREAS, the state water quality agencies have long-established water quality standards to protect and maintain existing designated uses, with water quality criteria designed to protect aquatic life and human health regardless of geographic location, and under the Clean Water Act these water quality standards are subject to triennial review with the opportunity for public comment; and

WHEREAS, the arid Western States include numerous federally-recognized tribes with diverse historical and cultural uses of water; and

WHEREAS, the Environmental Protection Agency (EPA) is proposing to establish Federal water quality standards for Indian reservation waters that currently do not have water quality standards in effect under the Clean Water Act; and

WHEREAS, many states and tribes put considerable time, effort, and resources into developing constructive relationships and coordinating cross-jurisdictional efforts while seeking to respect one another’s sovereignty; and

WHEREAS, the cultural needs of tribes, their health, and their economic prosperity are an important priority for tribal, federal, and state governments; and

WHEREAS, the identification and interpretation of federal instruments (treaties, statutes, executive orders, and other sources of federal law), with the potential to create express or implied federal reserved rights, is a complex exercise – often involving consultation, research, analysis, and extensive court proceedings – that requires expertise unrelated to water quality assessment; and

WHEREAS, in November 2021, the Department of the Interior, the EPA, and 15 other federal agencies signed a *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the*

Protection of Tribal Treaty Rights and Reserved Rights, committing to protect such rights and implement federal treaty obligations: (1) through early consultation and consideration of those rights in decision-making and rulemaking; (2) by creating a searchable and indexed database of all treaties; (3) by developing tools and resources to identify, understand, and analyze tribal treaty and reserved rights; and (4) by providing a means of dispute resolution regarding tribal complaints of the sufficiency and timing of federal consultation; and

WHEREAS, western water laws provide a complex system of allocating and administering water, including the determination of the quantity and priority of water rights, with their sources of water, points of diversion, and places of beneficial use, and this system includes the necessary quantification and priority dates of tribal reserved water rights as implied under the *Winters* doctrine, as well as any additional state-based water rights for tribes or tribal members; and

WHEREAS, states have the exclusive authority to allocate and administer quantities of water within their respective jurisdictions; and

WHEREAS, water quality agencies generally lack the means and authority to determine the full nature and geographic extent of tribal reserved rights to natural resources that may require specific quantities or quality of water to satisfy the purposes of the reservations; and

WHEREAS, historical waterbodies have been extensively modified in the arid West with federal, state, tribal, and local infrastructure to capture, store, divert, and convey water for diverse and often competing uses of water; and

WHEREAS, any efforts to fulfill the federal trust responsibility to protect tribal reserved rights related to water resources, using a regulatory framework to be implemented by states, have clear federalism implications as contemplated by Executive Order 13132; and

WHEREAS, promulgation of nationwide baseline water quality standards for tribes has the potential to create a more complicated regulatory environment for state water quality and water resources managers and users, and at this time may raise more questions and conflicts than they will resolve, particularly in western states where a complex mix of state and tribal lands may be present.

NOW, THEREFORE, BE IT RESOLVED that the Westerns States Water Council supports the establishment of a searchable database of all tribal treaties and tools for analysis as described in the 17-agency MOU.

BE IT FURTHER RESOLVED that the Western States Water Council opposes shifting federal trustee responsibilities to the states by imposing the burden of determining the nature and extent of tribal reserved rights over to states.

BE IT FURTHER RESOLVED that the Western States Water Council supports timing any tribal-federal consultation process to determine water quality needs for tribal reserved rights to take place prior to the subsequent triennial review of state water quality standards, in order to better inform the state process in a timely and efficient manner.

BE IT FURTHER RESOLVED that federal regulations intended to protect tribal reserved rights should not harm state-tribal relations or place states in the middle of tribal treaty disputes that may not be appropriate for States to attempt to resolve.

BE IT FURTHER RESOLVED that steps must be taken to ensure that any tribal reserved rights that require specific quantities of water in Western States have a corresponding water right.

BE IT FURTHER RESOLVED that the Western States Water Council urges EPA to fully consider legal and administrative issues associated with promulgating nationwide tribal baseline water quality standards, including addressing (1) how EPA would implement such a rule and under what authorities, particularly with regard to non-jurisdictional waters and unquantified reserved water rights; (2) how the baseline WQS would impact existing state jurisdictions and water quality programs, particularly where the outer reservation boundaries do not reflect current regulatory jurisdictions and/or non-tribal lands within reservation boundaries; and (3) how EPA would resolve any differences between states and tribal standards, as well as states' standards and EPA's baseline standards for tribes without treatment as states (TAS) authority.

BE IT FURTHER RESOLVED that the Western States Water Council supports meaningful and substantive consultation with States as co-regulators, seeking input from states beyond mere information-sharing, prior to publication of any proposed or final rules with federalism implications.