UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

STATE OF IDAHO, *et al*

Plaintiffs

v.

Case No. 1:24-cv-00100

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

Hon. Daniel L. Hovland

Defendants

and

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; and CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

Applicant Intervenor Defendants

TRIBES' MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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INTRODUCTION

Pursuant to its authority to promulgate rules implementing the Clean Water Act ("Act"), the United States Environmental Protection Agency ("EPA") amended 40 C.F.R. part 131 to establish and clarify the responsibilities of states and the federal government regarding Tribal reserved rights in the context of water quality standards. *See* Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 89 Fed. Reg. 35717 (May 2, 2024) ("Final Rule"). Plaintiffs challenge this rule update as unconstitutional, unlawful, arbitrary, and capricious, despite the fact that the Final Rule merely clarifies existing requirements and ensures uniform treatment of Tribal reserved rights essential to Tribal rights holders' subsistence, cultural, and spiritual practices.

Nez Perce Tribe, Quinault Indian Nation, Bay Mills Indian Community, Puyallup Tribe of Indians, Lac du Flambeau Band of Lake Superior Chippewa, Sokaogon Chippewa Community, and Confederated Salish & Kootenai Tribes of the Flathead Reservation (collectively the "Tribes") move to intervene in the above-listed action pursuant to Federal Rule of Civil Procedure 24 to defend the Final Rule from unfounded legal attack. Intervention as of right should be granted because the Tribes satisfy Rule 24(a). In the alternative, permissive intervention should be granted under Rule 24(b).

BACKGROUND

I. CONTEXT FOR WATER QUALITY STANDARDS UPDATES

The Clean Water Act ("Act") is the primary federal law governing water pollution in the United States. Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Pursuant to the Act, EPA promulgates implementing rules, directly administers point source pollution permits, and oversees state water quality standards processes and nonpoint source

pollution plans. 33 U.S.C. § 1361 (regulation authority), § 1311 (point source permits), § 1313 (water quality standards and implementation plans). EPA rules related to state water quality standards are found at 40 C.F.R. part 131.

States and tribes with delegated authority to set water quality standards adopt and revise their standards by identifying designated uses of the waters involved (*e.g.*, drinking, swimming, or fishing) and their related water quality criteria (*e.g.*, allowable levels of toxic pollutants, heat, or biological contaminants). 33 U.S.C. § 1313(c). In setting standards, a state or tribe must "tak[e] into consideration" the water body's use and value for a broad range of purposes, including for drinking water, propagation of fish and wildlife, recreation, agriculture, industry, navigation, "and other purposes." *Id.* EPA then must "scrutinize a state's water quality standards … [to] determine whether the standard is 'consistent with the [Act's] requirements." *El Dorado Chem. Co. v. United States Env't Prot. Agency*, 763 F.3d 950, 956 (8th Cir. 2014).

Despite the fact that the Act requires states and tribes to take into account the broad range of uses and values of a water body in order to formally designate uses and protective criteria, states often fail to consider Tribal uses in the water quality standards-setting process. *Id.*; *see also* 33 U.S.C. § 1313(c)(2)(A). EPA has expressly recognized that Tribal reserved rights have often been overlooked in this and other environmental regulatory schemes. *See* Final Rule at 35718. Accordingly, EPA has previously used its oversight authority to disapprove of state water quality standards that violated the Act's requirements because they were insufficiently protective of Tribal reserved rights. *See id.* at 35721.

To correct for the systemic neglect of Tribal reserved rights and to ensure that state and federal actions are consistent with federal law reflecting the reserved rights of Tribes, EPA issued the Final Rule that is the subject of this litigation. *See id.* at 35721, 35723, 35725. EPA

has explained that a rule update would ensure transparency, clarity, and uniformity in the consideration of Tribal reserved rights when designating or updating uses or water quality standards. *Id.* at 35718.

For purposes of setting water quality standards, including designation of uses, the Final Rule defines "Tribal reserved rights" as "any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or executive orders." *Id*. at 35718; 40 C.F.R. § 131.3(r). The rule update operates thus: first, a Tribe must assert a Tribal reserved right in writing to the state and EPA. *Id.* § 131.9(a). Then, in adopting or revising designated uses, the state must "take into consideration" the use and value of its waters for protecting the Tribal reserved right. *Id.* § 131.9(a)(1). And, in establishing relevant water quality standards, the state must "take into consideration" how a Tribe might exercise that right if water quality were not suppressed. *Id.* § 131.9(a)(2). Where the state has adopted designated uses that expressly incorporate or encompass the protection of the Tribal reserved right, the state must establish water quality criteria that protect the reserved right, which includes ensuring that the water quality criteria protect rights holders to the same extent as the general population. *Id.* § 131.9(a)(3). The rule update also requires EPA to assist states and rights holders, i.e., Tribes, in evaluating Tribal reserved rights and initiating Tribal consultation with right holders that have asserted their rights. *Id.* § 131.9(b), (c). The rule update includes additional procedural requirements, such as requiring documentation from the state about the information it received concerning Tribal reserved rights and how it considered that information, *Id*. § 131.6(g), listing factors that EPA considers in determining whether state standards are consistent with the above requirements, *id.* § 131.5(a)(9), and requiring states to review new information about reserved rights during triennial water quality standard review. *Id.* § 131.20(a).

II. PROPOSED INTERVENOR TRIBES

Proposed intervenors are federally recognized Indian Tribes that hold reserved treaty rights whose exercise depends on aquatic or aquatic-dependent resources.

The Nez Perce Tribe ("Nez Perce") is a federally recognized Indian Tribe. Wheeler Decl. ¶ 1. In an1855 treaty with the United States, the Tribe reserved sovereign rights, including the right to take fish at all usual and accustomed places, and the rights to hunt, gather, pasture, and travel throughout the Tribe's aboriginal territory, which includes parts of Idaho, Oregon, Washington, and Montana. *Id*. ¶ 2. Fish, and salmon in particular, are integral to Nez Perce identity and culture. *Id*. ¶ 6. The Tribe has been actively involved in fish recovery and restoration efforts throughout the region, and these efforts depend on clean and healthy water. *Id*. ¶¶ 6-10.

The Quinault Indian Nation ("Quinault") is a federally recognized Indian Tribe in Washington State. Capoeman Decl. ¶¶ 3-4. Quinault exercises Tribal reserved rights to harvest fish anywhere within its usual and accustomed fishing areas, along the Washington coastline within and outside of its reservation. *Id.* ¶ 4-5. Fish, shellfish, and marine mammals have supported the Quinault for centuries, with special importance placed on salmon. *Id.* ¶ 7-8. Today, fishing is not only a subsistence practice and a social centerpiece, but it also provides Quinault members employment in fishing, guiding, and processing jobs. *Id.* ¶ 11. Quinault has long been a careful steward of the aquatic and aquatic-dependent natural resources it depends upon, *id.* ¶ 9, and the Tribe continues to advocate for and fund restoration efforts. *Id.* ¶ 12.

The Bay Mills Indian Community ("Bay Mills") is a federally recognized Indian Tribe whose citizens rely on the Great Lakes ecosystem and the Straits of Mackinac for their livelihood. Gravelle Decl. ¶ 3. The Tribe holds reserved rights to hunt, fish, gather, and live in territory ceded to the United States under the 1836 Treaty of Washington. *Id.* Bay Mills citizens rely heavily on fish for subsistence and economic needs and cultural practices; pollution that

harms fish or renders them unsafe for consumption directly harms Bay Mills citizens. *Id.* ¶¶ 9-10. Additionally, wild rice holds great cultural and traditional importance to Bay Mills and the Tribe is actively working on wild rice restoration, which requires water quality improvement and careful environmental management. *Id.* ¶ 12. Bay Mills collaborates with other Tribal and governmental agencies to study water quality and contamination and plan for pollution reduction. *Id.* ¶¶ 6-8.

The Puyallup Tribes of Indians ("Puyallup") is a federally recognized Indian Tribe in Washington State. The Puyallup are known as the "spuyaləpabš" in the Lushootseed language, which translates to "people from the bend at the bottom of the river." Sterud Decl. ¶ 2. The Tribe exercises jurisdiction over seven miles of the Puyallup River within its reservation, but its treaty rights extend throughout the Puyallup River Watershed and Commencement Bay. *Id.* ¶ 3. Salmon are central to the Tribe's lifeways; members fish for subsistence and also hold cultural ceremonies centered around salmon. *Id.* ¶¶ 4-5, 7. Because of pressures related to infrastructure development and pollution, several salmon species are listed under the Endangered Species Act, which seriously affects Puyallup's ability to exercise its treaty rights. *See id.* ¶ 10. Tribal management and protection of salmon, and the water that supports these species, is of central concern to the Tribe. *Id.* ¶¶ 9-10.

The Lac du Flambeau Band of Lake Superior Chippewa Indians ("Lac du Flambeau Band") is a federally recognized Indian Tribe that relies on the Great Lakes ecosystem in Wisconsin for its livelihood. Johnson Decl. ¶¶ 2, 4. The Lac du Flambeau Band holds Tribal reserved rights to hunt, fish, gather, and live in territory ceded by treaty, which occupies approximately 15 million acres of land and over 650,000 acres of inland waters. *Id.* ¶¶ 5-6. Members of the Lac du Flambeau Band rely on the wildlife, fish, and plants that live and grow in

or near freshwater within its reservation and the surrounding territory, such as wild rice. *Id.* ¶ 7, 9, 11. These resources are part of subsistence and cultural practices passed on through generations that play an important role in the lives of Lac du Flambeau Band members. *Id.* ¶ 12.

The Sokaogon Chippewa Community ("Sokaogon") is a federally recognized Indian Tribe in Wisconsin. VanZile Decl. ¶¶ 2-3. Sokaogon holds Tribal reserved rights to hunt, fish, gather, and live in territory ceded by treaty. The Tribe exercises jurisdiction over the waters within its reservation, but its treaty rights extend throughout the ceded territory. *Id.* ¶¶ 6-7. Gathering wild rice (*manoomin*, or "the food that grows on water") is a critical part of the Tribe's lifeway. *Id.* ¶ 4. Wild rice is important for members' subsistence, economic security, and cultural traditions. *Id.* ¶ 4.

The Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT") are a federally recognized tribe located in northwestern Montana. Through the 1855 "Treaty with the Flatheads, Etc." 12 Stat.975 ("Hellgate Treaty") the CSKT reserved for themselves a homeland and the right to continue taking fish from all usual and accustomed places both on the Flathead Indian Reservation and throughout their aboriginal homeland. Hellgate Treaty of 1855, Art. III. For CSKT Tribal members to fully exercise their treaty-reserved right to harvest fish there must be water quality sufficient to support sustainable fisheries, and fish that are safe for human consumption.

The CSKT also has an interest in ensuring that water that flows from locations under the water quality jurisdiction of the state of Montana not harm treaty-protected resources within the Flathead Indian Reservation, such as fish and wildlife that rely on Flathead Lake, the largest natural freshwater lake west of the Mississippi River. The northern half of Flathead Lake is under the jurisdiction of Montana, while the southern half of the lake is located within the

reservation and under the jurisdiction of the CSKT. The CSKT commented in support of the challenged rule inasmuch as it would allow for greater input from the CSKT in setting water quality standards that would directly impact CSKT Tribal members and treaty resources located within the aboriginal territory of the CSKT and reserved through the 1855 Hellgate Treaty.

ARGUMENT

I. THE TRIBES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Rule 24(a)(2) requires this Court to permit anyone to intervene who (1) files a timely motion to intervene; (2) claims an interest relating to the subject matter of the action; (3) is situated so that disposing of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and (4) is not adequately represented by the existing parties. *Nat'l Parks Conservation Ass'n v. United States Env't Prot. Agency*, 759 F.3d 969, 975 (8th Cir. 2014) (quoting Fed. R. Civ. P. 24(a)(2)). This Circuit has held that "Rule 24 should be construed liberally, with all 'doubts resolved in favor of the proposed intervenor.'" *Id.* (quoting *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999)). "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). The Tribes meet all four requirements for intervention.

Pursuant to the Supreme Court decision in *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 440 (2017), this Court has held that a Rule 24 intervenor does not need to separately establish standing where they do not seek relief that differs from an existing party. *West Virginia v. U.S. Env't Prot. Agency*, No. 3:23-CV-32, 2023 WL 3624685, at *2, n.2 (D.N.D. Mar. 31, 2023). Because Tribes seek the same remedy as EPA, they do not need to establish standing to intervene as defendants. If this Court determines otherwise, however, Tribes meet the

requirements for standing because their interests, as discussed further in the text below, will be harmed by the remedy Plaintiffs seek in this case, and this Court has the ability to redress the harm. Additionally, "Tribes, like states, are afforded 'special solicitude in [a court's] standing analysis.'" *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) (quoting *Massachusetts v. United States Env't Prot. Agency*, 549 U.S. 497, 520 (2007)).

A. The Tribes' Motion for Intervention is Timely

The Tribes timely file this motion just two weeks after Plaintiffs filed their amended complaint and motion for preliminary injunction. This Court analyzes the timeliness of a motion to intervene "based on all of the circumstances," with special consideration given to "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011). The question of prejudice turns on whether existing parties may be prejudiced by any delay in moving to intervene, "not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995).

In the present case, this motion for intervention is timely. Litigation is at its earliest stages; Plaintiffs filed their amended complaint, Doc. No. 4, and motion for preliminary injunction, Doc. No. 5, on June 14, 2024. *Cf. Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 999 (8th Cir. 1993) (finding intervention timely where "legal proceedings were still at a preliminary stage" despite occurring 18 months after suit had commenced). Moreover, participation by the Tribes will not cause delay that would prejudice existing parties. Answers to the complaint are due June 28, and responses to the preliminary injunction are due July 12. Doc. Nos. 9, 10. The Tribes file a proposed answer with this motion to intervene and are

prepared to file a timely response to Plaintiff States' motion for preliminary injunction.[1] The Tribes' motion to intervene has been made at the earliest possible opportunity and will not cause delay—and thus poses no prejudice to existing parties.

B. The Tribes Have Protectable Interests in This Action

Rule 24(a)(2) requires the applicant for intervention to have a recognized interest in the subject of the action. *Mausolf v. Babbitt,* 85 F.3d 1295, 1299 (8th Cir. 1996). The Tribes have unique sovereign rights and conservation interests that warrant intervention.

The Tribes are sovereign nations with unique rights reserved through treaty, executive order, statute, or other federal actions that set aside Tribal reservations. At the heart of this case is consideration of these Tribal reserved rights during state processes to designate uses of water bodies and promulgate water quality standards. The Tribes hold reserved rights to aquatic and aquatic-dependent resources, and therefore governmental processes that have the effect of harming or protecting these resources directly concern Tribal sovereign interests.

Furthermore, the Tribes as *parens patriae* have a quasi-sovereign interest in protecting the reserved rights of their members. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (describing *parens patriae* interests as the quasi-sovereign interest of a government body in the health and wellbeing of its residents); *see also Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009); *Miccosukee Tribe of Indians of Fla. v. United States*, 680 F. Supp. 2d 1308, 1314 (S.D. Fla. 2010) (Tribal exercise of *parens patriae* power). Tribal reserved rights can include the use of water for various purposes, such as fishing, gathering, ceremonial, domestic, irrigation, and municipal uses. Ensuring sufficient water quality for those uses is essential for the health and wellbeing of Tribal

[1] Tribes will file a proposed response by the deadline set for Defendants if this Court has not yet ruled on the Tribes' motion to intervene by the deadline.

members. *See, e.g.*, Wheeler Decl. ¶ 9 (noting how important water quality is to Nez Perce members, who exercise a treaty-reserved right to catch and consume fish, and who consume fish at a higher rate than the general population); *see also* Capoeman Decl. ¶ 7; Johnson Decl. ¶ 11; Gravelle Decl. ¶¶ 5, 9-10; Sterud Decl. ¶¶ 4-5; VanZile Decl. ¶ 4. A Tribe's "interest in its ability to preserve its culture and way of life is a paradigmatic example of an interest that goes beyond a proprietary or private interest, and affects the general well-being of a sufficiently substantial segment of Tribe members." *Miccosukee Tribe*, 680 F. Supp. 2d at 1315. To protect the rights of their members to use aquatic and aquatic-dependent resources, the Tribes have an interest in protecting the water quality that supports the exercise of those rights.

The Tribes also have environmental conservation interests in the promulgation of water quality standards. Because treaty rights interweave Tribal culture and natural resources, the Tribes have a clear interest in the quality of waters where they hold usufructuary or "use" rights and the aquatic resources that depend on these waters. *See, e.g.*, Wheeler Decl. ¶ 5; Gravelle Decl. ¶¶ 5, 12-13; Sterud Decl. ¶ 5; Capoeman Decl. ¶ 13; Johnson Decl. ¶ 8; VanZile Decl. ¶¶ 3-5. Federal courts have recognized environmental conservation interests as sufficient for intervention, *see South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024-25 (8th Cir. 2003) (finding interest prong satisfied where proposed intervenors had an interest in water, including effects of downstream flow on wildlife), particularly where an intervening party has "consistently demonstrated its interest" and has "worked hard over the years, in various proceedings, to protect that interest." *Mausolf*, 85 F.3d at 1302. The Tribes have for many years sought to ensure

reserved rights are respected by states, *see, e.g.*, Wheeler Decl. ¶ 9; Gravelle Decl. ¶ 11, VanZile Decl. ¶ 7, and the Tribes participated in the rule update's public comment period.[2]

C. The Tribes' Interests May Be Impaired as a Result of This Litigation

This litigation threatens to impair the Tribes' sovereign and conservation interests. Rule 24(a) requires only that the interest "*may* as a practical matter be impaired by the present litigation." *See Union Elec. Co.*, 64 F.3d at 1167 (emphasis added). Certainty of impairment is not required, *Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304, 1307-08 (8th Cir. 1995), and the Eighth Circuit has urged that courts "should be mindful that 'the "interest" test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Union Elec. Co.*, 64 F.3d at 1162 (quoting *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 949 (8th Cir. 1983). Indeed, even when there is some attenuation between how the litigation might affect the intervenor's interest, intervention is regularly granted. *Id.*; *see also Flight Transp. Corp.*, 699 F.2d at 948 (noting that in *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861 (8th Cir. 1977), where three events would have to occur after an adverse ruling but before impairment, the interest was not overly contingent).

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[2] *See* Comment submitted by Nez Perce (Mar. 6, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0305; Comment submitted by Quinault, Bay Mills, et al. (Mar. 6, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0263; Comment submitted by Bay Mills (Mar. 6, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0237; Comment submitted by Puyallup (Mar. 5, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0179; Comment submitted by the Great Lakes Indian Fish and Wildlife Commission on behalf of Lac du Flambeau, Sokaogon, et al. (Mar. 6, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0281; Comment submitted by Lac du Flambeau (Mar. 6, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0271; Comment submitted by Sokaogon (Mar. 6, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0303; Comment submitted by CSKT (March 6, 2023), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0791-0290.

The Tribes depend on proper implementation of the Act to protect water quality that supports beneficial uses, including some uses that may be specific to Tribes. The Tribes' sovereign interests, and the interest of their members, would be harmed if Plaintiffs succeeded in enjoining and vacating the rule update. Without express guidance, the Act may continue to be inconsistently and ineffectively applied to the detriment of Tribes and Tribal communities. *See* Wheeler Decl. ¶¶ 11, 14; Gravelle Decl. ¶ 16; Capoeman Decl. ¶ 14; Johnson Decl. ¶¶ 16-17; Sterud Decl. ¶ 9; VanZile Decl. ¶ 11. The arguments advanced by Plaintiff States willfully ignore Tribal reserved rights, shrug off EPA's critical role in Clean Water Act implementation, and mischaracterize the challenged Final Rule as a sea change when it merely clarifies and renders uniform existing requirements. A ruling in Plaintiffs' favor would embolden states to promulgate water quality standards that ignore Tribal rights, prejudice the Tribes' ability to protect their members' health and economic and cultural practices, and potentially harm the aquatic resources upon which Tribal uses depend. Further, a ruling enjoining the Final Rule may result in a substantial delay in the protection of Tribal reserved rights if Tribes are forced to seek protection of these rights through the EPA water quality standard review process and not through the earlier states' standards-setting process. This would leave the Tribal reserved rights unprotected for a longer time and could expose Tribal communities to additional health and welfare risks.

D. The Existing Parties Do Not Adequately Represent the Tribes' Interests

Neither Federal Defendants nor Plaintiff States adequately represent the Tribes' unique and significant sovereign and conservation interests. The final requirement for intervention as of right is a showing that the existing parties to the litigation "may" not adequately represent a proposed intervenor's interests. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *Mausolf*, 85 F.3d at 1303. The Supreme Court recognizes that courts should not discourage Tribes from participating in litigation "critical to their welfare." *Arizona v.*

California, 460 U.S. 605, 615 (1983), *decision supplemented*, 466 U.S. 144 (1984). Tribes have a "unique and complex" relationship with the federal government that this Court recently held sufficed to overcome the presumption of adequate representation by the federal government. *West Virginia*, 2023 WL 3624685, at *3-4 (holding that EPA did not adequately represent Tribal interests in state challenge to the Clean Water Act rule defining "Waters of the United States" that impacted Tribal treaty rights). Indeed, where, as here, the proposed intervenors' interests diverge from "the public at large," *Chiglo v. City of Preston*, 104 F.3d 185, 187-88 (8th Cir. 1997), or where the proposed intervenor holds "more narrow and 'parochial'" interests than the federal government, *Union Elec. Co.*, 64 F.3d at 1169 (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986)), the presumption does not hold. *See Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774, 780 (8th Cir. 2004) (explaining that a movant "may show that its interests are distinct and cannot be subsumed within the public interest represented by the government entity")."

The Tribes here are not adequately represented by any existing party, and they overcome the presumption of adequate representation by the federal government for several reasons. First, federal courts have recognized that Tribes, as distinct sovereign entities, hold interests that often are not adequately represented by the federal government. *See Union Elec. Co.*, 64 F.3d at 1169 (citing *Arizona*, 460 U.S. at 614-15 and recognizing that case held the United States was "not [an] adequate representative of interests of five Indian Tribes concerning water rights 'critical to their welfare,' because Tribes are entitled 'to take their place as independent qualified members of the modern body politic'"). In this case, the Tribes hold unique and distinct reserved treaty rights that they seek to protect through the consideration of their particularized subsistence, economic, cultural, and spiritual uses of aquatic and aquatic-dependent resources. Their interest

in achieving water quality standards that protect uses associated with Tribal reserved rights differs from the public's general interest in water quality for drinking, swimming, or other uses. *Cf. Mille Lacs Band*, 989 F.2d at 1001 (recognizing that presumption of adequate representation was overcome because applicants for intervention sought to "protect local and individual interests not shared by the general citizenry" of the state). Indeed, EPA recognized as much in the challenged rule, explaining that "[e]nvironmental regulatory schemes have often failed to recognize or protect" Tribal reserved rights, placing Tribal members "at disproportionate risk." Final Rule at 35718. EPA itself has previously failed to protect Tribal reserved rights in state water quality standards-setting as recently as 2019, *see id.* at 35722, further supporting the argument that the Tribes should be involved in this case to ensure the robust, consistent, and informed defense of their reserved rights.

Second, intervenors asserting environmental interests hold more specific interests than the broader public, which courts often hold are not adequately represented by government parties. *See Ubbelohde*, 330 F.3d at 1025; *Mausolf*, 85 F.3d at 1303-04; *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003); *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996); *Conservation L. Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992); *cf. North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 922 (8th Cir. 2015) (determining environmental groups had not rebutted the presumption of representation because their unique environmental interests were not germane to the *title* issues in the litigation, and proposed environmental intervenors had not shown the United States would fail to vigorously defend its ownership claims). The Tribes here, holding

interests in the environmental values associated with their Tribal reserved rights, have distinct interests from the public at large that the federal government cannot adequately represent.

EPA defends the case as the rule maker that must consider the interests of all citizens, which includes weighing competing interests against each other. *See Ubbelohde,* 330 F.3d at 1025. The Tribes' interests are more particularized, given the unique treaty rights reserved for different Tribes and the specific interests in the waters of the state each Tribe occupies. *See supra* Background Section II. The Tribes' unique interests are evident from the public comment process for the Final Rule. The Tribes submitted letters supporting some of EPA's changes, but certain Tribes also advocated for the rule update to go further, requesting a greater federal role in determining Tribal uses pursuant to reserved rights, more protection for Tribal usage information-sharing, clarification on the enforcement of water quality standards, stringent requirements for de-designating a use, and so forth. *See, e.g.*, *supra* 10 n.2 (listing comment letters submitted by the Tribes). The Tribes' position, therefore, is that the Final Rule does not go far enough to protect treaty rights that are connected to aquatic or aquatic-dependent resources, but acknowledges the Final Rule is an essential step forward to ensure these rights are recognized and protected in Clean Water Act processes. Because the Tribes' view of the challenged rule differs from that of EPA, the Tribes' arguments as Defendant-Intervenors may differ from EPA's.

II. ALTERNATIVELY, THE TRIBES SATISFY THE STANDARDS FOR PERMISSIVE INTERVENTION

The Tribes meet the four-part intervention test but, in the alternative, this Court should grant permissive intervention to defend the Final Rule because the Tribes have "a claim or defense that shares with the main action a common question of law or fact" and the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ.

Proc. 24(b)(1), (3). The Tribes seek to defend the Final Rule and prevent injunction and vacatur, in order to ensure the consideration of Tribal reserved rights that are essential in the cultural, spiritual, and economic life of the Tribes and their members. Intervention is timely and will not prejudice any of the existing parties or delay the proceedings. *See discussion supra* Argument Section I.A.

CONCLUSION

For the reasons set forth above, this Court should GRANT the Tribes' motion to intervene as defendants in this litigation as a matter of right or, in the alternative, to intervene permissively.

Respectfully submitted this 28th day of June 2024.

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***Applications for Pro Hac Vice Forthcoming*