IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF IDAHO, *et al*

Plaintiffs

v.

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

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; CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION; RED LAKE NATION; FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS; WHITE EARTH BAND OF THE MINNESOTA CHIPPEWA TRIBE; and PORT GAMBLE S'KLALLAM TRIBE

Applicant Intervenor Defendants

Case No. 1:24-cv-00100

Hon. Daniel L. Hovland

TRIBES' (PROPOSED) RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Applicant Intervenor Defendant Tribes are federally recognized Tribal Nations ("Tribes") party to treaties with the United States that reserve to them rights to hunt, fish, and gather, among other reserved rights, both on their respective reservations and in certain areas outside their reservation boundaries as they customarily have done for hundreds, if not thousands, of years. These are rights that have been ratified by Congress and were reserved in exchange for ceding vast territories of land to the federal government which allowed settlement and the creation of states—including many of the Plaintiff States.

The Tribes' rights are often water dependent. Fishing requires protection of water to ensure habitat conditions in which fish and shellfish can survive and thrive and free from bioaccumulative toxins that are harmful to human health. Harvesting aquatic-dependent plants requires a quality of water necessary for the propagation and human consumption of foods such as wild rice ("manoomin"), wild cranberries, or medicinal plants. Hunting requires protection of waters necessary to sustain wildlife such as waterfowl or beaver. It also means protecting human contact with the water to fish, hunt, and harvest foods and medicines. This is true for anyone who hunts, fishes, and gathers aquatic plants, including tribal members.

This case involves the Environmental Protection Agency's ("EPA") procedural rule that requires states carrying out their existing duties and rights under the Clean Water Act to acknowledge and consider tribes' existing uses of water within those states in a consistent manner. EPA's Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights rule, 89 Fed. Reg. 35,717 (May 2, 2024) (the "Rule"), provides guidance, direction, and detail to support states in developing water quality standards that protect all uses of water within their states, and all citizens of their states, including tribal members.

Since the passage of the Clean Water Act ("Act") more than 50 years ago in 1972, states have had the primary obligation and opportunity to designate uses and develop standards that protect uses of the waters within their jurisdiction. 33 U.S.C. § 1313(c). EPA, however, retains final authority to approve or reject state water quality regulations, allowing states autonomy, but also ensuring that there is a baseline level of water quality protection. *See, e.g.*, 33 U.S.C. §§ 1313(c)&(d), 1314, 1317(b), and 1342(a)&(b). EPA also retains authority to require a state to replace a standard if it does not meet the requirements of the Act. 33 U.S.C. § 1313(c)(3).

Plaintiffs allege that in promulgating this Rule, EPA exceeded its authority under the Act and that they will be irreparably harmed by its implementation. But, the Rule simply requires states to consider all uses of the waters within their jurisdictions and to protect those existing and basic uses—requirements that are specifically enumerated in the Clean Water Act. The Rule recognizes that where tribes and tribal members are using state waters pursuant to treaty rights, states have an obligation under the Act to develop water quality standards that protect those uses, and provides a process for states, tribes, and EPA to work together to protect the Nation's water resources. 40 C.F.R. §§ 131.9, 131.20.

There is nothing particularly unusual in the Rule; nothing that requires changes to the states' existing triennial review process for updating and revising water quality standards. The Rule simply requires states to set water quality regulations that protect tribal uses guaranteed by treaty or other source of federal law, the same way states protect uses for all citizens

The Tribes request that this Court deny the Plaintiff States' motion for preliminary injunction in its entirety.

BACKGROUND

I. LEGAL BACKGROUND

In passing the Clean Water Act, Congress directed that states set water quality standards necessary to achieve the statute's objectives, which include: restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters; protecting fish, shellfish, and wildlife; and prohibiting the discharge of toxic pollution. 33 U.S.C. §§ 1251(a) and 1313(c)(2)(A). "Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the [Act]." 40 C.F.R. § 131.3(i); 33 U.S.C. § 1313(c)(2)(A). Water quality standards define the desired condition of a water body and establish measures to attain that condition. Water quality standards consist of two required components: the designated uses of a state's navigable waters and water quality criteria necessary to protect those designated uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11(a)(1). Designated uses are the uses of a waterbody that must be protected, such as public water supplies, propagation of fish and wildlife, consumption of fish, and recreation. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(f). Part of that requirement is identifying *all existing* and designated uses and then developing criteria, narrative and/or numeric, that protect those existing and designated uses. *Id.*; 40 C.F.R. §§ 131.4, 131.6, 131.10-11.

Water quality criteria define parameters or constituents necessary to protect and support the specified uses of a waterbody. Water quality criteria for waters with multiple use designations must support the most sensitive use. 40 C.F.R. § 131.5.[1] The enduring point of the water quality standards requirements of the Act is to ensure standards for the Nation's waters that protect all

[1] States always have the latitude to be more protective than the overall minimums established by EPA's rules. 33 U.S.C. § 1370; 40 C.F.R. § 131.4(a).

uses to which those waters are put: drinking, swimming, catching and eating fish and shellfish, watering livestock, agricultural uses, industrial uses, and other water-dependent subsistence uses such as rice or cranberries, whether cultivated or wild.

II. THE RULE

The Rule before the Court standardizes the procedures and considerations for carrying out these fundamental, 50-year-old concepts and requirements, as it relates to uses of waters by tribal members. EPA has long provided regulations (cited above) and guidance to states for the development of protective standards under the Act to assist states and to provide some level of consistency across state procedures and protections. For example, EPA provides recommendations for "water & organism" and "organism only" human health criteria for states and authorized tribes to consider when adopting criteria into their water quality standards.[2] These human health criteria are developed by EPA under Section 304(a) of the Act. 33 U.S.C. § 1314. In addition, EPA provides a Water Quality Standards Handbook including recommendations for states, authorized tribes, and territories in reviewing, revising, and implementing WQS to help ensure consistency across state water quality standards.[3]

Here, the Rule clarifies existing regulations and guidance to provide states and tribes nationwide a formal and consistent process for tribal participation in water quality standards development and revisions so that long-existing and treaty[4]-protected uses of water can be

[2] *National Recommended Water Quality Criteria – Human Health Criteria Table*, Env't Prot. Agency, https://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table

[3] *Water Quality Standards Handbook*, Env't Prot. Agency, https://www.epa.gov/wqs-tech/water-quality-standards-handbook.

[4] Tribal reserved rights are treated the same whether they derive from treaties, executive orders, statutes, or other instruments that established Indian reservations. We use "treaty" for simplicity to represent these rights.

considered as part of the rulemaking process. The Rule directs states, when developing, reviewing, or revising water quality standards, to evaluate information provided by a tribe regarding a tribe's reserved rights to and uses of waters in the state. 89 Fed. Reg. at 35,747-48; 40 C.F.R. §§ 131.9 and 131.20. The states do not need to determine treaty rights; rather a tribe must decide to alert the state to ongoing treaty-protected *uses* of the state's waters and provide information about those *uses* for the state's consideration. 89 Fed. Reg. at 35,747; 40 C.F.R. § 131.9.

When submitting a new or revised standard to EPA for review and approval, a state is required to share with the agency any information that enables it to determine that the state has complied with § 131.9 and any information that a tribe submitted to the state during the rulemaking process. *Id.,* and at § 131.6. These requirements are not dissimilar to existing requirements for states when developing or revising their water quality standards. Already, states must designate uses to be achieved and protected consistent with use of the waters, and then submit to EPA for review and approval of their use designations, methods, analyses, and information used as part of the standards development. 40 C.F.R. §§ 131.6, 131.9, 131.10, and 131.11. *See also*, 33 U.S.C. § 1313(c).

The Rule further provides that where a state has already designated a use, *e.g.* fishing or body contact, the state must consider and protect tribes' uses that fall within that designated use. 40 C.F.R. § 131.9(3); 89 Fed. Reg. at 35,748. For example, the Rule requires states to protect tribes' health relative to water quality, especially toxins that bioaccumulate in fish, in order to provide tribal members the same health protections from cancer risk that the overall populace enjoys. *Id.* As the Rule explains, where a state has already designated a fish consumption use and protects the general populace to a particular risk level, the state should also protect tribes to that risk level in recognition of the tribes' use of the waters for subsistence fishing—the very rights

tribes retained for themselves. *Id.* and at 35,732 and 35,734. The Rule makes plain that this requirement applies to ensure consistent protection across members of the population based on their actual use of state waters, and avoids establishing standards based on uses suppressed by poor water quality. 89 Fed. Reg. at 35,732, n.96. It is likely that many tribal-specific uses, such as ceremonial uses of water that require primary contact, will be fully protected by states' existing designated uses and water quality standards.

ARGUMENT

III. THE LEGAL STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF REQUIRES PLAINTIFF STATES TO DEMONSTRATE ALL FOUR FACTORS OF THE TEST FOR PRELIMINARY RELIEF.

While this Court has the discretion, under the Administrative Procedure Act, to issue preliminary injunctive relief, 5 U.S.C. § 705, the Plaintiff States must demonstrate to the Court all four factors necessary for the issuance of the extraordinary remedy of injunctive relief. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008); *Planned Parenthood of Minn., N.D., and S.D. v. Rounds*, 530 F.3d 724, 729 (8th Cir. 2008). Plaintiffs must demonstrate: (1) the threat of irreparable harm to themselves; (2) balancing this harm with injury an injunction would inflict on other parties; (3) a likelihood of success on the merits; and (4) the effect on the public interest. *Planned Parenthood*, 530 F.3d at 729-31. Further, the Eighth Circuit has made clear that where the challenge is to a government policy implemented by a regulation adopted through a reasoned process, the Rule is entitled to agency deference and should not lightly be enjoined. *Id.* at 732 (citing *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)).

Even if Plaintiffs show a likelihood of success on the merits—and they cannot—they must show a threat of irreparable injury that is both great and imminent. *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (citations omitted); *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). "Failure to show irreparable harm is an independently sufficient

ground upon which to deny a preliminary injunction." *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). Speculative harm, the mere possibility of irreparable harm, or a possibility of future risk or costs do not constitute imminent and irreparable harm sufficient to warrant a preliminary injunction. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F. 3d 771, 779 (8th Cir. 2012); *see also Winter*, 555 U.S. at 22. Here, Plaintiffs have not shown a likelihood of harm, much less harm that is imminent or likely to occur prior to a decision on the merits. Nor have they shown that they are likely to succeed on the merits or that the public interest requires an injunction.

IV. PLAINTIFF STATES ARE NOT LIKELY TO SUCCEED ON THE MERITS

To demonstrate that they are likely to succeed on the merits, Plaintiffs must show a fair chance of prevailing. *Planned Parenthood*, 530 F.3d at 732. While Plaintiffs allege that the Rule exceeds the scope of the Clean Water Act, violates the major questions doctrine, and violates the anti-commandeering doctrine, Plaintiffs' support for these arguments is exceedingly thin and they are unlikely to succeed on the merits.

The Court's review is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2). A court will invalidate an agency action that 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).

A. EPA Has Authority to Promulgate Regulations to Effectuate the Purpose of the Clean Water Act.

1. The Rule is well within the scope of EPA's authority under the Clean Water Act.

EPA has the duty to administer the Clean Water Act and the power to make regulations necessary to carry out its functions. 33 U.S.C. 1361(a), 89 Fed. Reg. at 35,723, n 54. Section 303(c) of the Act requires state water quality standards to consist of designated uses of navigable waters and water quality criteria for the waters as necessary to ensure those uses are protected. 33 U.S.C. § 1313(c)(2)(A). The standards must protect the public health or welfare, enhance the quality of water, and take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes. *Id.*

Thus, the Act sets up a cooperative federalism framework, where Congress created a type of "trust but verify" structure. EPA serves as a backstop and baseline-setter. *See, e.g., id*. §§ 1313(c), 1313(d), 1314, 1317(b), and 1342(a),(b). The states have some autonomy, but there also is a water quality floor—something that, despite decades of effort, had not been secured from the states by Congress voluntarily, leading to the passage of the Clean Water Act.[5] The Act provides EPA authority to regulate what states and tribes must consider in setting water quality standards, how often they must be considered, and final authority to approve or disapprove the standards. 33 U.S.C. §§ 1251(a)(2), 1313(c); *see* 40 C.F.R. §§ 131.5, 131.10-11, 131.15, and 131.20–22. Congress also gave EPA the authority to require a state to replace a standard or take such action

[5] Congress passed the Clean Water Act in 1972 to expand on and strengthen the laws protecting the Nation's waters because up to that time, the law was restricted to aiding states in an attempt to incentivize them to do the right thing and protect and clean up the water. *See also, EPA v. Cal.*, 426 U.S. 200, 202-09 (1976); *American 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) and H.R. 11,896, 92nd Cong. (1971) and S. 2770, 92nd Cong. (1971). The assistance and incentives-based system, dependent on states' willingness to act, had failed, necessitating comprehensive measures with a federal backstop. *Id.*

itself, if EPA determines a current standard does not meet the requirements of the Act. 33 U.S.C. §§ 1313(c)(3)-(4).

With the promulgation of this Rule, EPA recognizes that some uses include rights reserved to tribes, that the history of tribes attempting to exercise their rights off-reservation has been fraught and often resisted by states,[6] and provides a clear and consistent framework for all states to consider those uses. *See* 89 Fed. Reg. at 35,721. Tribes use and have used, since well before the Act, waters both on and off tribal reservations for drinking, fishing, travel and recreation, and for gathering foods and medicines such as wild rice. *See, e.g.,* Tribes' Decls., Doc. Nos. 19-2, ¶ 2; 19-3, ¶ 4; 19-4, ¶ 3; 19-5, ¶ 5; 19-6, ¶ 5; 19-7, ¶ 3; 19-8, ¶¶ 3-6, 12; 19-9, ¶¶ 5, 9, 11, 16, 18-19; 19-10, ¶¶ 3-4, 6-7, 12-14; 19-11, ¶¶ 2-5, 7-10; 19-12, ¶¶ 5-9. Tribes reserved these uses in treaties and have continued to make these uses of waters within the various states.

Plaintiffs argue that in promulgating the Rule, EPA is taking upon itself "the power to adjudicate tribal rights" and to "require state regulators to adjudicate tribal rights." Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("States' Br.") at 6. This overstates the Rule's requirements and is incorrect. The question is not, as Plaintiffs pose, "whether the CWA requires states to set water quality standards that protect […] treaty rights," States' Br. at 7; the question is whether the Act requires states to consider uses of the waters within their jurisdictions and to protect those existing and basic uses. It does, and some of those uses are federally protected rights that Tribes have reserved to themselves through treaties and other sources of federal law by which EPA and the

[6] *See e.g.*, *U.S. v. Wash.,* 384 F. Supp. 312 (W.D. Wash. 1974) *aff'd* 443 U.S. 658 (1979); *Wash. v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673, 99 S. Ct. 3055, 3068, 61 L. Ed. 2d 823, *modified sub nom. Wash. v. U.S.*, 444 U.S. 816, 100 S. Ct. 34, 62 L. Ed. 2d 24 (1979); *Metlakatla Indian Cmty. v. Dunleavy*, 58 F.4th 1034 (9th Cir. 2023); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983); *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *U.S. v. Mich.*, 471 F.Supp. 192, W.D. Mich (1979).

states are bound. *Sohappy v. Smith*, 302 F.Supp. 899, 905 (D. Or. 1969), ("It hardly needs restatement that Indian treaties, like international treaties, entered into by the United States are part of the supreme law of the land which the states and their officials are bound to observe.") (citing *U.S. v. 43 Gallons of Whiskey*, 93 U.S. (3 Otto) 188 (1976); *Wash. v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695–96 (1979). The Rule simply recognizes tribes' existing and continuing uses of waters that fall within the uses described in § 303 and states' existing obligations for the development of water quality standards that are protective of those uses.

As to specific requirements for the process of setting standards for these uses, Plaintiffs are wrong that they must adjudicate treaty rights; the Rule itself makes no such demand or suggestion on its face or in its effect.[7] Rather, the Rule is quite narrow and requires only that, where a tribe asserts, in writing with supporting information, the existence of a federally protected right (*e.g.*, to fish or harvest wild rice in certain waters), that the state considers that information and the uses associated with the right in setting its water quality standards, just as it is required to consider all other credible information submitted by the public, industry, and others using those waters as part of its public comment process. 40 C.F.R. § 131.20.

Plaintiff States do not argue that tribes' actual uses are somehow outside of the uses that the Clean Water Act specifically requires states to consider, nor could they. Plaintiffs appear to argue that to consider tribal hunting, fishing, and gathering activities when setting water quality standards, the Act must have specifically included the words "rights reserved to tribes by treaty or other source of federal law." States' Br., 7-8. This argument belies common sense and is inconsistent with the Act, which clearly states that it does not abrogate treaties. 33 § U.S.C. 1371(a). Plaintiffs cite to no authority that would require this level of specificity when Congress

[7] Tribes agree that states have no authority to "adjudicate" or determine treaty rights.

clearly identified various uses to be protected, and tribal uses plainly fall within those identified categories.

The tribal rights most commonly at issue—fishing, gathering aquatic plants, primary contact with the water, and public health and welfare—are the very things the Clean Water Act already requires states to consider in setting water quality standards. Further, if there are tribal-specific uses in state waters that fall outside the enumerated considerations, the plain language of the Act also requires consideration of "other purposes," and does not limit what those "other purposes" might be. 33 U.S.C. § 1313(c)(2)(A). Accordingly, EPA is well within its authority to develop a Rule to guide, direct, and standardize state consideration and protection of tribal reserved rights that consist of uses of waters such as fishing and gathering aquatic species.

Additionally, while Plaintiffs portray the Rule as an "unprecedented intrusion into traditional state authority," States' Br. at 7, the reality is that state consideration and accommodation of tribal reserved rights is neither an intrusion nor unprecedented. First, as discussed above, the Act sets the framework for states to regulate their waters subject to EPA approval. EPA tells the states (or tribes) what to consider, and how often, but retains the authority to approve or disapprove of the standards. 33 U.S.C. §§ 1251(a)(2), 1313(c); 40 C.F.R. §§ 131.5, 131.10-11, 131.15, and 131.20–22.

Second, tribal treaty rights are not new. The states have, since their inception, been aware of tribes and tribal member activities within their borders. In many cases, it was the cession of tribal lands via treaty that allowed for the creation of the states that have brought this lawsuit. When ceding millions of acres of lands and waters to the U.S. for settlement, tribes reserved to themselves the right to continue to use some of the resources to ensure their survival. *See* Tribes' Decls., Doc. Nos. 19-2, ¶¶ 2,4; 19-3, ¶¶ 3, 4, 6-11; 19-4, ¶¶ 3-5, 9-10; 19-5, ¶ 5; 19-6, ¶¶ 5-12; 19-

7, ¶¶ 3-5; 19-8, ¶¶ 3-10; 19-9, ¶¶ 5, 11, 19; 19-10, ¶¶ 3-8; 19-11, ¶¶ 2-5; 19-12, ¶¶ 4-8. States are aware of and have often been involved with Tribes' long efforts to protect the rights and resources to which they are entitled. *See* Tribes' Decls., Doc. Nos. 19-2, ¶¶ 6-10; 19-3, ¶ 12; 19-4, ¶¶ 11-12; 19-5, ¶ 8; 19-6, ¶ 13; 19-7, ¶¶ 7, 9; 19-9, ¶¶ 10-11, 15,17; 19-10, ¶¶ 9-11. State management of natural resources, especially water resources, has long required cooperation with tribes that hold off-reservation usufructuary rights. *Id.; Lac Courte Oreilles Band of Lake Superior Ojibwe v. Wisc.*, 707 F.Supp. 1034 (W.D. WI 1989).

2. Congress need not intrude upon state rights in the Clean Water Act to require consideration of tribal uses.

Plaintiffs argue that for states to consider tribal rights in setting water quality standards, the Act must intrude upon state rights, States' Br. at 7-8, but Plaintiffs are wrong. *See Grand Portage Band v. EPA*, No. CV 22-1783 (JRT/LIB), 2024 WL 1345202 (D. Minn. Mar. 29, 2024) ("States and EPA must consider Tribal treaty rights to aquatic and aquatic-dependent resources to comply with the [Act] and implementing regulations"). No source of law prohibits states from recognizing the existence of tribal reserved rights, or any other federal law, and Plaintiffs have asserted none. Moreover, the Act does include a "clear and manifest statement" for states to consider existing uses of water. 33 U.S.C. § 1313(c). In addition, the Act plainly states that it should not be construed to affect or impair the provisions of any treaty of the United States. *Id.* at § 1371(a). *See also* 89 Fed. Reg. 35,723.

3. The Rule does not infringe on states' ability or authority over water allocation.

The Plaintiff States conflate and confuse regulation of water quality and water quantity allocation in their arguments against the Rule. First, the Rule is clear on its face that it does not apply to a state's authority over water allocation or implicate *Winters* doctrine matters. 89 Fed. Reg. at 35,724. States' role in that regard is expressly recognized in the Rule and preserved in the

Clean Water Act. 33 U.S.C. § 1251(g). Second, the Supreme Court has made clear that where water quantity affects water quality, water quality standards—for example, temperature standards necessary to protect temperature-sensitive species such as salmon and trout—may require a state to address quantity issues. 89 Fed. Reg. at 35,727; *PUD No. 1 of Jefferson Cnty* v. *Wash. Dep't of Ecology,* 511 U.S. 700, 720 (1994). But that does not unduly intrude upon states' ability to determine, adjudicate, and enforce the amount, priority, or shape of water quantity rights. *Id.* It is merely a consideration, among many a state makes, when exercising its authority in determining allocations. Plaintiffs are incorrect that the Rule supersedes their authority over water allocation.

B. The Rule Does Not Implicate the Major Questions Doctrine

There is no "major questions" issue with the Rule because the Act clearly gives EPA authority to engage in rulemaking (and EPA has plainly done so repeatedly in providing direction on the development of water quality standards, 40 C.F.R. Ch. 131). Further, the Act does not leave EPA unfettered; Congress clearly set forth the obligation to develop standards that protect all uses of water. 33 U.S.C. § 1313(c). The Rule lacks any of the indicators suggesting a "transformative" or paradigm-shifting expansion of the Agencies' authority. *W. Va. v. EPA*, 142 S. Ct. 2587, 2612 (2022) (calling EPA's enactment of the Clean Power Plan a fundamental shift from source-based pollution regulation to generation-shifting). Rather, the Rule is a procedural rule guiding state development of water quality standards where tribes identify protected uses of water. The states' development of water quality standards must simply consider those uses *just as the states must consider other uses of water when developing any set of water quality standards*, as they have done since 1972, and as plainly directed by Congress in the text of the law. Congress left no major questions regarding protecting uses of water unanswered and there is nothing transformative or expansive about the Rule that implicates the major questions doctrine.

C. The Rule Does Not Implicate the Anti-Commandeering Doctrine.

The Act allows states, at the state's option, to set water quality standards based on particular uses, as discussed above. This Rule only clarifies the uses states must consider when setting those standards. This is not unconstitutional anti-commandeering. The Rule does not "commandeer[] the state legislative process," *Murphy v. NCAA*, 584 U.S. 453, 477 (2018), it does not "direct[] the States either to enact or to refrain from enacting a regulation of activities occurring within their borders," *id.*, nor does it "command" a state actor "to administer or enforce a federal regulatory program," *Printz v. U.S.*, 521 U.S. 898, 935 (1997). In no way does the Rule impermissibly "regulate the States' sovereign authority to 'regulate their own citizens.'" 584 U.S. at 476. Instead, the Rule ensures that uses by all state citizens—including tribal citizens—are accounted for in state water quality standards.

Finally, the Supreme Court stated that the Act does not impinge on state authority and is a "program of cooperative federalism" that recognizes "Congress' power to offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *New York v. U.S.*, 505 U.S. 144, 167 (1992) (citing other constitutional environmental regulatory statutes). Plaintiffs offer no rationale why the Rule offends the anti-commandeering doctrine because no such rationale exists.

V. PLAINTIFF STATES HAVE FAILED TO DEMONSTRATE HARM, ESPECIALLY HARM THAT IS IMMINENT AND IRREPARABLE.

Plaintiffs have failed to meet their burden of showing that the Rule, if not stayed during the pendency of litigation, poses the threat of any harm, let alone imminent and irreparable harm. *See Dataphase Sys., Inc. v. C.L. Sys., Inc.,* 640 F.2d 109, 112–13 (8th Cir. 1981). Plaintiffs' litany of potential harms, including, in the case of Idaho, incurring tens of millions of dollars in costs and a halt to everything from logging and agriculture to transportation and park maintenance, and in the case of South Dakota, an immediate halt to its triennial review process, are not reasonably

based in what the Rule actually requires and do not support injunctive relief. *See, e.g.,* Pls.' Decls., Doc. Nos. 5-11, ¶ 14; 5-12, ¶¶ 30-32, 37; 5-13, ¶¶ 17, 20; 5-15, ¶¶ 12-14; 5-5, ¶¶ 18-19. Plaintiffs' declarations in support of their motion speculate on future potential harms related to basic tasks that are part and parcel of all water quality standards rulemakings: considering all uses of water by all residents of the state and protecting those uses whenever a state undertakes development or review of a water quality standard. But, to the extent that is harm at all—and it is not because it requires nothing more than has been required of states for 50 years—nothing about the potential harms requires injunctive relief prior to a full decision on the merits.

First, no harm is imminent. The language in the Rule makes clear that states aren't forced to do anything unless a tribe engages, and certainly not immediately. For the Rule to have any effect at all, the Rule imposes upon *tribes* the responsibility to assert any uses pursuant to reserved rights within a state's jurisdictional waters. 40 C.F.R. § 131.9(a); 89 Fed. Reg. at. 35,724 ("[T]his rule's requirements are aimed at ensuring that where Tribes wish to bring [reserved] rights to the state's attention, the state will consider the Tribe's assertion of the right in following the well-established standard setting process pursuant to the EPA's CWA section 303(c) implementing regulation at 40 CFR part 131.").

The process for revising state water quality standards requires triennial review, but states often do not revise water quality standards so frequently. There is no deadline for completion of a triennial review and no penalty for failing to meet the triennial timeline.[8] Accordingly, even if states encounter disagreements with tribes related to uses of state waters, no harm is imminent. Nothing in the Rule prevents the states from continuing to operate their water quality standards

[8] As evidenced by South Dakota's decision to simply halt its triennial review process, Doc. No. 5-5, ¶¶ 18-19.

programs in generally the same manner that they have (or should have) been for the foreseeable future and certainly for the length of this case.

It is not irreparable harm to provide specific direction for carrying out an obligation states have had for 50 years only because that obligation has been inconsistently complied with. Plaintiffs argue that suddenly, now, considering tribal uses for fishing or subsistence uses constitutes a loss of state sovereignty and frustrates core projects and missions of state agencies. But there is no support for this assertion in the language of the Rule itself or the Act, even if states, who failed to protect existing tribal uses of water in the past, must do so in a future rulemaking if and when requested to do so by a tribe. [9]

To assert a reserved right, tribal staff can use existing channels between tribal and state agencies to provide reliable information. Tribes have sophisticated natural resources and fisheries programs and longstanding relationships with state and federal agencies to manage shared waters and fisheries. *See* Tribes' Decls., Doc. Nos. 19-2, ¶¶ 6-8; 19-3, ¶ 12; 19-4, ¶¶ 6-8, 11; 19-5, ¶ 8; 19-6, ¶ 13; 19-7, ¶¶ 6-7, 9; 19-9, ¶¶ 4-5, 10, 14-17; 19-10, ¶¶ 10-11, 14; 19-11, ¶¶ 6, 8-9. As for the claims that states will be subjected to extended disputes, the claim of harm is entirely speculative, and not imminent. If there are disagreements between states and tribes, or between tribes within a state, EPA has made itself available to assist in the resolution of those differences. 40 C.F.R. § 131.9(b), (c).

Plaintiffs' primary concern appears to be that assertion of a tribal reserved right may result

[9] Plaintiffs refrain that financial resources committed to determining whether tribal uses are occurring in state waters are resources that cannot be used elsewhere is true of any funding decision and any function of state government. *See, e.g.*, Pls.' Decls., Doc. Nos. 5-10, ¶¶ 20-21; 5-3, ¶ 11; 5-8, ¶ 9.

in more protective water quality standards to ensure protection of waters for all uses and all citizens. States' Br. at 12–17. This is not harm to a state, imminent or otherwise. Cleaner water is generally regarded as a public good and an economic benefit for all citizens and is the point and purpose of the Clean Water Act's directives in section 303(c). Further, if a state's water quality standards are not currently protective of, *e.g.,* body contact for recreation or fishing the state is already likely non-compliant with the Act.

While Plaintiffs point out potential costs of any changes to water quality requirements, they make no mention of the benefits of clean water for public health, fisheries, or recreation and tourism dollars. This is particularly surprising for a state like Idaho, which boasts of its streams, rivers, lakes, and game fish species.[10] Salmon and steelhead figure prominently in Idaho's materials,[11] fish that are of crucial importance to the Nez Perce. Doc. No. 19-2, ¶¶ 5-6. Montana's Agency of Fish, Wildlife, and Parks touts Montana's many premier fishing destinations and world-class pristine rivers which include locations on and near Flathead Lake, the Flathead River, and the Clark's Fork River, surrounding or near the Confederated Salish and Kootenai Tribes' Flathead Reservation.[12] Similarly, North Dakota's Department of Tourism bills the state as a "world class" fishing destination, identifying some of its best rivers, lakes, and reservoirs at locations near or upstream of Indian Reservations.[13] Standards that are protective of all uses of the waters the Plaintiffs promote, as required by the Act, are not irreparably harmful to a state's interests.

Plaintiffs also repeatedly voice concerns about the costs of litigation regarding tribal

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[10] *Fishing*, Idaho Fish and Game, https://idfg.idaho.gov/fish

[11] *Wild Salmon and Steelhead*, Idaho Fish and Game, https://idfg.idaho.gov/fish/wild

[12] *River Recreation*, Mont. Fish, Wildlife, & Parks, https://fwp.mt.gov/activities/river-recreation; *FishMT—Explore*, Mont. Fish, Wildlife, & Parks, https://myfwp.mt.gov/fishMT/explore; and Mont. Fish, Wildlife, & Parks, https://fwp.mt.gov/

[13] *Fishing*, N. Dakota Tourism, https://www.ndtourism.com/fishing

reserved rights. *See*, *e.g.*, Pls.' Decls., Doc. Nos. 5-4, ¶ 10; 5-9, ¶ 12; 5-10, ¶ 6-7. This is pure speculation. Even if future litigation does occur, it is unlikely to be before the merits of this case are resolved. This assertion of harm is far-fetched—states can freely ensure consistency with treaty-reserved rights without litigation—and it fails to recognize that treaties are and have been repeatedly recognized as the supreme law of the land. *Lac Courte Oreilles*, 707 F.Supp. 1034; *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Metlakatla Indian Cmty. v. Dunleavy*, 58 F.4th 1034 (9th Cir. 2023). At the same time, the states seem to invite and insist upon litigation by also asserting that the only place for tribal rights to be recognized is through the courts – *i.e*, litigation. States' Br. at 17, 19. The Rule at issue, in this case, seeks to foster and guide cooperation between the states and tribes in the protection of shared water resources (as has been required all along), which should reduce litigation and increase compliance with federal law. 89 Fed. Reg. at 35,725; *Grand Portage Band*, 2024 WL 1345202.

VI. THE BALANCE OF HARMS TIPS SHARPLY AWAY FROM INJUNCTIVE RELIEF.

As set forth above, Plaintiffs have not met their burden of showing irreparable harm. In contrast, if states continue their ad hoc and inconsistent practices that are often under-protective of existing tribal uses, there are real harms to tribes and tribal members. *See* Tribes' Decls., Doc. Nos. 19-2, ¶¶ 11, 14-15; 19-3, ¶¶ 5, 14; 19-4, ¶¶ 15-16; 19-5, ¶¶ 9-11; 19-6, ¶¶ 16-17; 19-7, ¶¶ 11-12; 19-8, ¶¶ 13-15; 19-9 ¶¶ 20-23; 19-10, ¶¶ 9, 17-19; 19-11, ¶¶ 12-13; 19-12, ¶¶ 8-11. Per Plaintiffs' own declarations, their current standards may not protect existing tribal uses of waters that are critically important to tribes. *See, e.g.*, IDEQ Decl., Doc. No. 5-2 ¶¶ 9-10 ("The underlying intent of this Rule is to force States to adopt unnecessarily stringent criteria," and, "[t]his rule would create an additional burden to the agency to address any water bodies determined to not meet the tribal reserved right").

States do not always solicit tribes' input or conduct research regarding tribal uses in order to factor them into water quality standards. Wyoming's triennial review process "would be disrupted immediately and irreparably harmed if a Tribe asserts a reserved right under the Rule"). *See* WDEQ Decl., Doc. No. 5-6 ¶ 12(v). Plaintiffs view treaty rights as somehow opposed to states' interests and needing to be litigated before they will be accommodated by state regulatory regimes. States' Br. at 17. These positions demonstrate that existing tribal rights to aquatic resources are not adequately protected under the current ad hoc process of assessing tribal uses of water in rulemaking and that tribes will be harmed by enjoining the Rule—by continuing to be subjected to higher levels of toxins in fish than are protective of their consumption rates, by being exposed to pollutants while gathering and consuming rice or medicinal plants, and by polluted aquatic environments that decrease the productivity of foods like wild rice and salmon that they rely on. *See* Tribes' Decls., Doc. Nos. 19-2, ¶¶ 11, 19-15; 19-3, ¶¶ 14; 19-4, ¶¶ 9; 19-5, ¶ 10; 19-6, ¶¶ 9, 11; 19-7, ¶¶ 4, 7; 19-8, ¶¶ 9-15; 19-9 ¶¶ 9, 11-23; 19-10, ¶¶ 9, 12; 19-11, ¶¶ 7, 9-11; 19-12, ¶¶ 6, 10.

These are real harms that have been happening for generations, not some speculative budgetary harm years in the future. The balance shows that the Plaintiffs' harms are not imminent, are often speculative, and are related primarily to their desire to avoid the full application of the Act. The harms to Tribes go to their very existence and rights that they secured to themselves under federal law long ago. Further, Tribes' harms in the form of suppression of treaty-reserved uses, public health impacts, and loss of culture are irreparable. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wis.*, 749 F. Supp. 913, 922–23 (W.D. Wis. 1990) (Eleventh Amendment left plaintiff tribes with no means of recovering monetary damages from the state despite 130 years of violations of their treaty rights). Plaintiffs have not met this factor of the

preliminary injunction test.

VII. THE PUBLIC INTEREST WEIGHS AGAINST INJUNCTIVE RELIEF

Protecting tribal uses of water may result in cleaner water for fishing, recreation, water-dependent plants, and for public health; this is a clear public good and the intent of the Act. All citizens will benefit from tribal uses being fully protected by water quality standards. States will benefit from cleaner water as is evident from the value they claim to place on fish, wildlife, and tourism. It is contrary to the public interest for tribal citizens, who ceded lands and waters for use by states but retained their historic and long-standing rights to use those lands and waters for their survival, to receive lesser water quality protections for their health and welfare than other citizens. This is contrary to the foundations of the Act and principles of equity. The public interest plainly favors the protection of *all* uses by *all* citizens and weighs against an injunction.

CONCLUSION

Because Plaintiffs have failed to demonstrate the four factors necessary for this court to grant the extraordinary remedy of injunction relief, the Court should deny their motion.

Respectfully submitted this 12th day of July 2024.

/s/ Janette Brimmer
Janette Brimmer
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

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

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 Applicant 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 Applicant Intervenor Defendant Port Gamble S'Klallam Tribe

**Application for Admission Pending*

***Applications for Pro Hac Vice Forthcoming*