



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

September 13, 2021

Sent via Electronic Mail

Michael Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

RE: POTENTIAL REVISIONS TO THE FEDERAL WATER QUALITY STANDARDS REGULATIONS
TO PROTECT TRIBAL RESERVED RIGHTS

Dear Administrator Regan:

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation's ("Yakama Nation") Department of Natural Resources in response to the Environmental Protection Agency's ("EPA") proposal to revise its Clean Water Act water quality standards regulations to protect tribal reserved rights. The Yakama Nation supports the EPA's proposal because it expressly recognizes that state water quality standards are subject to the reserved rights of Native Nations.

Since time immemorial, the original, free, and independent Native Nations that later confederated as the Yakama Nation have depended on aquatic resources for cultural, spiritual, and economic wellbeing. In Article III of the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951 ("Treaty of 1855"), the Yakama Nation expressly reserved the right to fish at "usual and accustomed places." The Yakama Nation's Treaty negotiators knew that securing this right was crucial to guaranteeing the vitality of their people. For the Yakama Nation people, the exercise of fishing rights was "not much less necessary...than the atmosphere they breathed."¹

The Yakama Nation's Treaty-reserved rights must be "understood as bearing the meaning that the Yakamas understood [them] to have in 1855."² Rather than securing a mere "equal opportunity" to catch fish, the Treaty of 1855 guarantees to the Yakama Nation a portion of the harvest.³ This guarantee is "worthless without harvestable

¹ *U.S. v. Winans*, 198 U.S. 371, 381 (1905).

² *Wash. State Dept. of Licensing v. Cougar Den, Inc.* 139 S. Ct. 1000, 1011 (2019).

³ *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 681-82 (1979).

fish.”⁴ To that end, the Treaty of 1855 also reserved a right to protection of the habitat necessary to sustain the fish resource.⁵

The federal government, including the EPA, has a fiduciary trust obligation to the Yakama Nation.⁶ The federal government’s trust obligation is distinct from but related to its responsibilities stemming from the Treaty of 1855. Where a Native Nation has reserved treaty rights, the federal government has a duty to protect those rights.⁷ Therefore, “in carrying out its fiduciary duty, it is the [federal government’s]... responsibility to ensure that Indian rights are given full effect.”⁸

The EPA’s proposal is entirely consistent with these dual responsibilities. Per the EPA’s June 11, 2021 notice to tribal leaders, the EPA is considering revising its Clean Water Act (“CWA”) regulations to require that “states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating [water quality standards.]” Furthermore, the proposed revisions would require “that if reserved rights exist in the geographic area where a given set of [water quality standards] will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection.”⁹

In other words, states and the EPA may not adopt water quality standards that would allow impairment of tribal reserved rights. Water quality standards applicable to an area where a Native Nation possesses reserved rights must be sufficiently stringent to protect those rights. These requirements are not novel in concept. Rather, they are already embodied Treaty of 1855’s guarantee to a portion of harvestable fish and the EPA’s trust responsibility to protect and give “full effect” to that guarantee.

Nevertheless, state governments do not always act consistently with these requirements. The Yakama Nation unequivocally opposed the state of Washington’s attempt to adopt human health criteria in its water quality standards that would jeopardize the wellbeing of tribal members exercising their Treaty-reserved rights. The EPA’s proposal would help to prevent this type of scenario by reminding state governments that their water quality standards are subject to tribal reserved rights. Accordingly, the Yakama Nation supports the EPA’s proposal, which, based on the information available, is an example of the EPA properly fulfilling its duty as a trustee.

⁴ See *United States v. Washington*, 827 F.3d 836, 852 (9th Cir. 2016) (*aff’d by an equally divided court, Washington v. United States*, 138 S. Ct. 1832 (2018)).

⁵ See *id.* at 865.

⁶ See *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983).

⁷ *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995) (“[T]he Tribes’ federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.”)

⁸ *Northwest Sea Farms v. United States Army Corps of Eng’rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996). (citing *Seminole Nation*, 316 U.S. 286, 296-97 (1942)).

⁹ EPA, NOTIFICATION OF CONSULTATION AND COORDINATION ON POTENTIAL REVISIONS TO THE FEDERAL WATER QUALITY STANDARDS REGULATIONS TO PROTECT TRIBAL RESERVED RIGHTS (2021), 3.

The Yakama Nation appreciates the opportunity to provide feedback on the EPA's proposal and we look forward to further engagement with your agency regarding this matter. If you have any questions regarding this letter, please contact me at (509) 865-5121, ext. 4655, or phil_rigdon@yakama.com.¹⁰

Sincerely,



PHIL RIGDON, SUPERINTENDENT
YAKAMA NATION DEPARTMENT OF NATURAL RESOURCES

¹⁰ In submitting this comment, the Yakama Nation does not waive its sovereign immunity from suit, nor does it waive, alter, or otherwise diminish its sovereign rights, privileges, or remedies guaranteed by the Treaty of 1855. Furthermore, submission of this comment does not substitute for formal government-to-government consultation on this matter.