



PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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June 20, 2017

Mr. Scott Pruitt, EPA Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (Mailcode 4502T)
Washington, DC 20460

RE: Pechanga Band of Luiseño Indians Comments on Executive Order 13778

Dear Mr. Pruitt:

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians (Tribe), a federally-recognized and sovereign Indian Nation. The Tribe was asked by the Environmental Protection Agency (EPA) to provide comment on Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States' Rule" (the E.O.). Specifically, tribes were asked how "interpreting the term 'navigable waters'" in a manner "consistent with Justice Scalia's opinion" on *Rapanos v. United States (2006)* would potentially impact tribes and tribal interests. Our comments below will address how such an interpretation would injure our interests as a sovereign nation, seeking to protect our water resources for present use and for our generations yet to come. Further, because of the potentially devastating impacts that this interpretation may have, the Tribe requests that the EPA initiate consultation on this issue forthwith.

Justice Scalia's opinion concluded the following: "1) The phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are describe in ordinary parlance as 'streams,' 'oceans, rivers, [and] lakes,...2) A wetland may not be considered 'adjacent to' remote 'waters of the Unites States' based on a mere hydrologic connection... Thus, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between the two, are 'adjacent' to such waters and covered by the Act." For purposes of these comments, the key phrases of concern to the Tribe in this opinion are "relatively permanent" and "continuous surface connection."

The purpose of this letter is to describe, in part, the detrimental effects of a literal reading of Justice Scalia's interpretation of the Clean Water Act, and the resulting limitation of the jurisdiction of the federal Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) on tribal interests. It is the objective of the Clean Water Act (CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Adopting a rule predicated on Justice Scalia's interpretation would undermine the clear objectives of the law.

The scope of "the Nation's waters" and thus the reach of the CWA, and the jurisdiction of the EPA and Corps has been, since 1988, interpreted to include traditionally navigable waters (TNW) as well as their tributaries (as determined through the "significant nexus" 40 CFR 230.3(o)(3)(v)). The reason tributaries

are protected is the very real phenomenon of upstream pollution contributing to downstream pollution; something that occurs even where there is a “mere hydrological connection.” Thus, protecting only TNW in absence of protection of their tributaries would fail to meet the objective of the CWA.

Under the current interpretation of the CWA, Pechanga Creek, the creek that runs through the length of the main portion of the Pechanga Indian Reservation (Reservation), as well as Pala Creek are jurisdictional waters (Figure 1). The allows for the Tribe to protect the water quality of Pechanga Creek through implementation of parts of the CWA, setting water quality standards (WQS) as well as setting tribal WQS (which protect traditional uses of water bodies), and providing a legal framework to object to off-Reservation and non-tribal users who may negatively impact water quality. However, the arid nature of the southwest does not allow Pechanga Creek or Pala Creek to meet the criteria of “relatively permanent” as outlined by Justice Scalia. Both Pechanga Creek and Pala Creek are a source of ecosystem services to the Tribe and to the surrounding non-tribal community. A reinterpretation of the CWA, as described in the E.O., would ensure Pechanga Creek and Pala Creek would no longer be considered jurisdictional and would prevent the Tribe from protecting this waterbody from off-Reservation actors, in addition to protecting other non-tribal users on the Reservation and in areas that border creek subject to contamination from uses upstream.

Waterbodies and tributaries within the U.S. are as vast and varied as the climates and ecosystems of the U.S. Ecological conditions are not homogenous, and should not be treated as such under the law. Justice Scalia’s interpretation of what a tributary of a TNW should be, and thus, what type of waterbody should be covered under the CWA, is biased by his lack of understanding of arid ecosystems; he was not a scientist. Ecologists understand that the vast majority of waterbodies in the arid southwest do not exhibit anything resembling “relatively permanent.” Their ability to flow are strongly dependent on seasonal precipitation, saturation of soils, and upstream storage and precipitation, which can vary tremendously from one year to the next. These creeks, streams, and rivers, however, are still classified as riparian ecosystems, are still tributaries to TNWs, and still need to be protected by the CWA in order to meet the objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

Background:

Water is the key to life; throughout time, water has been the greatest predictor of villages, farms, commerce, and other markers of human success. Since time immemorial, the Tribe has called the Temecula Valley home. “The beginning of *Noxáamunga* (“the world”), of all people and all things was at *‘Éxva Teméeku* (in the heart of Temecula Valley) (*‘atáaxum Pomtéela*: The People’s Story).” The heart of the Temecula Valley contains *Tatámay* (“Santa Margarita River”) which the first people, the Káamalam, followed to the ocean. Today, *Tatámay* is an important resource to the Tribe, and one that currently runs year round only due to artificial inputs of water from Metropolitan Water District under an agreement that acknowledges the great degree of pumping and upstream diversion that has taken place to foster and grow the non-tribal community in Temecula Valley. Pechanga Creek has been, and continues to be an important tributary to *Tatámay*. Thus, the protection of the water quality within Pechanga Creek, is an important part of protecting *Tatámay*.

While the Pechanga Reservation is not the original home of the Tribe, as our ancestors were forcibly evicted from their lands in 1875, the name Pechanga comes from the word for water. Pechanga is from *pechaq*—“water is dripping” and *-anga*—a suffix meaning “place.” Thus the Tribe is known as the people who live at *Pechaa’ang*, the Pechanga Band of Luiseño Indians (*‘atáaxum Pomtéela*: The People’s Story).

Water is the source of life and is an inextricable part of the Tribe’s origin and continued persistence in Temecula Valley, their current and aboriginal lands.

Early maps of the area, such as this USGS topographic map of “Penjango Creek” (i.e. “Pechanga Creek”) not only name it a creek, but also identify it as a creek on the map. It is clearly drawn as a blue water body with a variable width and as a tributary to the Santa Margarita River (Figure 2). It, tellingly, is not identified as a dry wash, or by any other name that would indicate it is hydrologically inactive. Yet, Pechanga Creek flowed as much (or as little) in 1947 as it does today. There have been no significant changes to rainfall or flow—no dams, diversions, impediments, upstream pumping—that would indicate that the character of Pechanga Creek is different today from when it was labeled as creek in 1947.

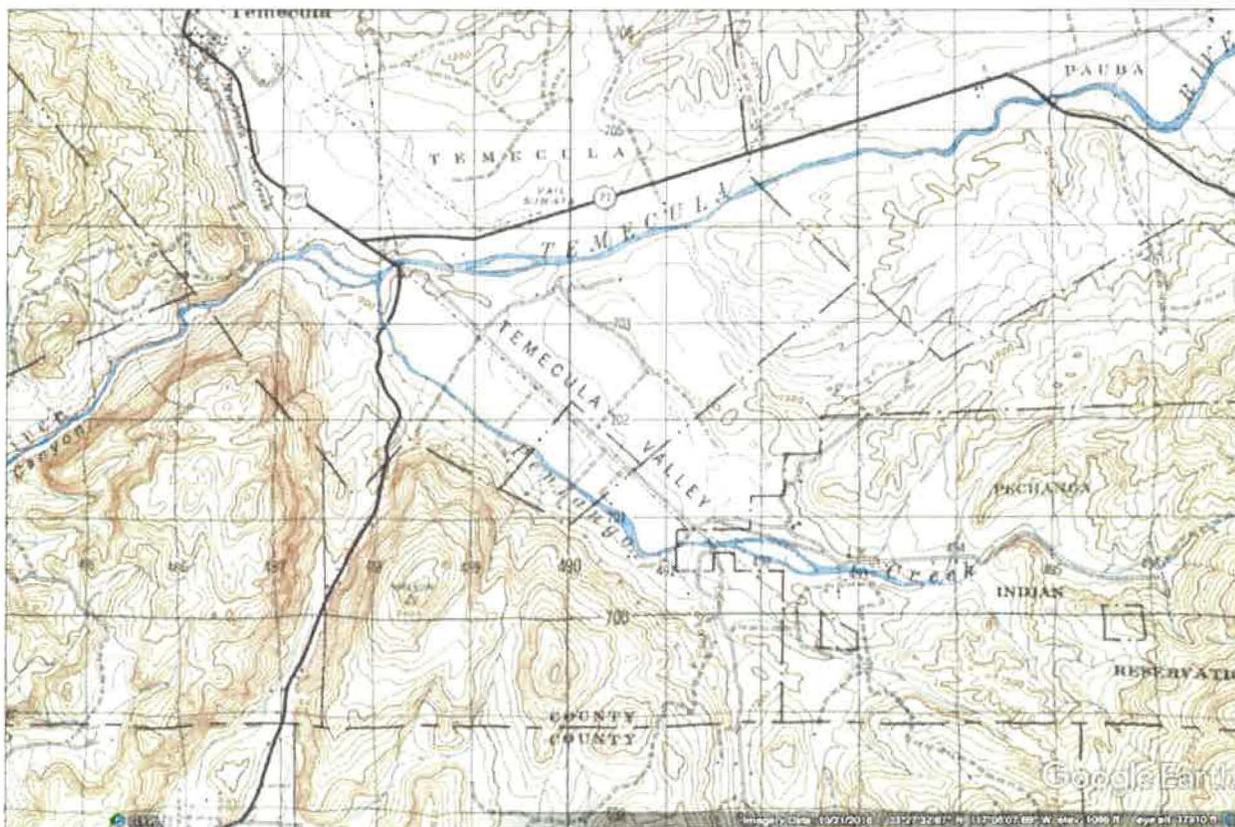


Figure 2. Pechanga Creek (identified as “Penjango Creek”) as mapped by USGS in 1947

The Clean Water Act:

After a several attempts to legislate away tribal authority, with devastating consequences for all tribal nations, the federal government and the EPA have begun to support and recognize tribal sovereignty with respect to managing their natural resources. Largely following the issuance of the 1984 Indian Policy, self-determination became the policy direction of the federal government, and federal laws and policies changed to allow, at least in part, tribes to determine how they would care for and sustain natural resources on their lands and Reservations. With the advent of a status for tribes—Treatment as State, later Treatment in the Same Manner as State (TAS)—that allowed them to fully implement and participate in

environmental regulation, the protection of natural resources on tribal lands and Reservations began to change.

With TAS, under the CWA, the Tribe has the ability to “implement the permit programs under section 402 and 404 of this Act” and to receive funding—as States do—to support these endeavors (40 CFR 101.7(b)). However, these tools only apply to waters protected under the CWA, that is, waters of the U.S. By adopting Justice Scalia’s rigid and unscientific interpretation of tributaries and streams, the Tribe would lose all the tools they have gained to assert their sovereignty over their waters on their Reservation. Additionally, the inability to protect the integrity of the waters in Pechanga Creek and its tributaries will have irreparable harm to non-Indian users.

Pechanga Creek, if declared to be no longer a water of the U.S., would be vulnerable to the negative actions of off-Reservation polluters. The Tribe would also lose the CWA funding promised by law to “support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution(40 CFR 101.7(b)).” The consequences of this would be devastating to the Tribe and our surrounding communities.

Consequences:

- Pechanga Creek would no longer be considered a jurisdictional water and would no longer be protected under the Clean Water Act;
- Pechanga would no longer receive funding for CWA programs as there would be no jurisdictional waters on the Reservation;
- Pechanga Creek would no longer be protected from pollution, affecting the Reservation and surrounding non-Indian communities;
- Resulting pollution and negative consequences cannot be repaired for generations and will be the legacy for our youth.

Request for Consultation

While the Tribe hopes that this initial request for comments on the E.O. and its potential impacts to tribal interests is but the first step in much larger conversation, the Tribe requests that the EPA immediately initiate meaningful consultation with tribes on how such an interpretation would hurt tribal communities.

As the EPA knows, there exist consultation mandates issued by both Presidents Bush and Obama regarding consultation with tribes. The purpose of Executive Order 13175 is “to establish regular and meaningful consultation with tribal officials in the development of Federal policies that have tribal implications, [and] to strengthen the United States government-to-government relationships with tribes...” The Order defines “Policies that have tribal implications” as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” (Emphasis Added, Section 1 (a)). In this instance, implementing Justice Scalia’s interpretation as described in the E.O. implicates all three concerns: 1) this action potentially effects all 567 federally-recognized tribes as each nation presumably has water resources that may be impacted by the proposed interpretation, and also those tribes that receive funding under the CWA will be affected; 2) such an interpretation would affect

the relationship between the Federal government and tribes by hurting tribal sovereignty, ignoring the federal trust responsibility to protect the interests of tribes, and to defund existing tribal CWA programs that have been in place for years; and 3) could be seen as a unilateral decision due to the lack of consultation, thus creating an imbalance in the distribution of power between the Federal Government and tribes. President Obama's Memorandum on Tribal Consultation (November 5, 2009) reaffirms the policy in Executive Order 13175.

As such, we respectfully request that the EPA initiate consultation on any proposed changes to the interpretation in what qualify as "Waters of the U.S." Not only is consultation mandated by the above Executive Orders, it is also mandated by the federal government's obligations to Tribes under the trust responsibility.

Conclusion:

The EPA has asked Tribes to comment on the potential consequences of reinterpreting the Waters of the U.S. rule to be consistent with Justice Scalia's opinion. The consequences of such a radical change in interpretation will be devastating. Justice Scalia, while a recognized brilliant legal mind was not a scientist and his opinion cannot replace decades of reasoned, scientifically supported evidence of the damaging effects of pollution, and the positive effects of sound stewardship principals. Further, tribes are responsible for maintaining their water and other natural resources for the generations to come. We cannot protect our waters from off-Reservation pollutants if there is no federal regulation of actors outside our sovereign control. This result would not only affront tribal sovereignty over our lands, but would be a violation of the federal trust responsibility owed by the federal government to Indian tribes.

Given the profound and negative impacts that such a change in interpretation would have on tribes and their natural resources, we request that the EPA initiate formal, government-to-government consultation on this issue. Asking tribes to provide written comments in reaction to an Executive Order cannot replace the meaningful consultation mandated by federal law and policy, and the trust responsibility. We look forward to hearing from the EPA to schedule our consultation.

On Behalf of the Pechanga Band,



Mark Macarro
Tribal Chairman

Cc Pechanga Office of the General Counsel
Pechanga Environmental Department
Karen Gude, Office of Water Tribal Program Coordinator

Enclosures:

Attachment A. Figure 1. Hydrological Map of Pechanga Reservation

The Pechanga have submitted a confidential map to the agencies as part of their tribal consultation comment letter.