



October 4, 2021

Via email

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Re: Notification of Tribal Consultation and Coordination on Revising the Definition of “Waters of the United States”; Docket ID No. EPA-HQ-OW-2021-0328; Comments and Request for Consultation of Pascua Yaqui Tribe, Tohono O’odham Nation, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, and Menominee Indian Tribe of Wisconsin

Dear Ms. Kwok and Ms. Jensen:

The Pascua Yaqui Tribe, Tohono O’odham Nation, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, and Menominee Indian Tribe of Wisconsin are federally-recognized Indian Tribes (“Tribes”). The Tribes submit these comments and request for consultation in response to U.S. Environmental Protection Agency (“EPA”) and the Department of the Army’s (the “Corps”) (collectively, the “Agencies”) August 4, 2021 solicitation of advice and counsel from federally-recognized tribes regarding the Agencies’ intent to revise the definition of “waters of the United States.”

After nearly half a century since the enactment of the Clean Water Act (“the Act”), many of the Act’s promises remain unfulfilled with particularly harmful results for waters on which the Tribes have relied since time immemorial. The Tribes generally support the Agencies’ stated commitment to engage in a rulemaking to “restore longstanding protections” guaranteed by the Clean Water Act and to “further refine[] and build[]” upon those protections.¹ Now that the unlawful and damaging “Navigable

¹ 86 Fed. Reg. 41911 (Aug. 4, 2021).

Waters Protection Rule” (“Navigable Waters Rule” or “the Rule”) has been vacated,² the Agencies should move forward promptly and with purpose to develop a new and robust rule that strengthens protections for all of our Nation’s waters and furthers the Clean Water Act’s goals. Because repeal of the Navigable Waters Rule is no longer necessary (and in fact would be unhelpful and a waste of resources) the Tribes concentrate their comments here on what moving forward with a new rule must include. In doing so, the Agencies must learn from the mistakes of the Navigable Waters Rule, listen fully to the voices of those for whom our waters are an inextricable part of their history, culture, and spiritual identity, and follow both law and science.

I. CONSULTATION WITH THE TRIBES MUST BE ROBUST AND MEANINGFUL.

Because of the significant impact on tribal resources that is affected by the definition of Waters of the United States, a critical principle for meaningful consultation with the Tribes is free, prior, and informed consent for the rulemaking under consideration here. The principle of free, prior, and informed consent is grounded in the right of self-determination and the fact that the Tribes are “separate sovereigns pre-existing the Constitution” with that inherent right to self-determination. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). See also United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) which the United States has endorsed. EPA has explicitly recognized that right to self-determination and the obligation to consult government-to-government and that EPA’s trust responsibility is to assure that tribal concerns and interests are considered whenever EPA actions may affect tribal resources.³ The current administration has reiterated, reinforced, and made a priority the Agencies’ obligations to the Tribes to engage in robust and meaningful consultation.⁴

Both the EPA and the Corps also have an obligation pursuant to Executive Order 13,175 to consult with tribes when they formulate policies that have tribal implications, as is the case with this rulemaking.⁵ The Corps also has made specific commitments to indigenous peoples through its U.S. Army Corps of Engineers Tribal Policy Principles,⁶ (noting that “[h]istory has shown that failure to include the voices of tribal officials in

² *Pascua Yaqui Tribe v. U.S. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, --- F. Supp. 3d --- (D. Ariz. Aug. 30, 2021).

³ *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 8, 1984.

⁴ Joseph R. Biden Jr., *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, THE WHITE HOUSE (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

⁵ Executive Order 13,175, *Consultation and Coordination With Indian Tribal Governments*, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000) (requiring that “[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications”).

⁶ *Tribal Nations*, U.S. ARMY CORPS OF ENGINEERS, <https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/>.

formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.”)

For meaningful consultation to occur, the Agencies must have a thorough understanding of the inherent rights and interests of the Tribes; rights set forth in the treaties, federal statutes, case law, and UNDRIP. The Agencies should clearly establish for all their participants that the primary goal of an ongoing consultation on the rulemaking is to achieve consensus or consent, a good-faith effort to reach common agreement with the Tribes on how to proceed, and what must be included in a rule. This must include processes for documenting the consultation, ensuring protection of culturally sensitive information, complying with the Tribes’ laws and protocols governing consultation, and a certification process upon completion for both parties to agree that meaningful consultation has occurred.

The process of meaningful consultation requires a two-way exchange of information, including from the Agencies to the Tribes, with Agencies’ internal reports and analysis as well as pre-decisional documents. It also requires the Agencies listening to and incorporating tribal knowledge and input. Tribes are vast resources of information regarding waters on which they rely, including waters outside the boundaries of a particular reservation. Tribes’ members have vast amounts of cultural, historical, and geographical knowledge of their ancestral territory and practices, including sacred sites. That information must be obtained, understood, and utilized by the Agencies in order to ensure meaningful consultation and to ensure that any negative impact to the Tribes is avoided. And again, actions and decisions by the Agencies that affect off-reservation resources can have significant impacts on the Tribes.⁷

Merely cataloguing tribal comments or concerns, or providing “opportunity to comment” with those comments disappearing into an agency void is *not* meaningful consultation. Where the Agencies do not fully address Tribes’ concerns in the rulemaking, the Agencies must clearly explain, in detail, their reasoning and how and why it does or does not conform to requirements for meaningful consultation.

Finally, timing is crucial. There are many demands made on the Tribes, particularly during the pandemic, and it is important for the Agencies to provide adequate advance notice to the Tribes of analyses, proposals, or for meetings in order to allow the time needed for the Tribes to fully and meaningfully participate in

⁷ The Tribes encourage the Agencies to also obtain information from various tribal fish and game organizations, for example, the Northwest Indian Fisheries Commission or the Great Lakes Indian Fish and Wildlife Commission, to further the Agencies’ understanding of how this rulemaking will affect tribal interests.

consultation.⁸ Further, agency follow-up on an initial notice (instead of just a single, general email) is important for the Agencies to ensure that opportunities are not missed and that the Agencies are making every effort to obtain the Tribes' input.

II. THE AGENCIES SHOULD PROPOSE A RULE THAT FOLLOWS THE LAW, IS BASED IN SCIENCE, PROTECTS THE INTERESTS OF TRIBES, AND ACCOUNTS FOR CLIMATE CHANGE.

On August 30, 2021, the Federal District Court for the District of Arizona vacated the Navigable Waters Rule, reinstating the pre-2015 regulatory scheme for determining the scope of the Clean Water Act's protections.⁹ The court held that the Navigable Waters Rule suffered from "fundamental, substantive flaws," including the Agencies' failure to "consider[] the [Clean Water Act's] statutory objective" and their unreasoned categorical exclusion of ephemeral waters from the Clean Water Act's reach. These serious errors could not "be cured without revising or replacing the [Navigable Waters Rule's] definition of 'waters of the United States.'"¹⁰

As a result of the vacatur, the Agencies can now, and must, move forward promptly to develop a new rule that will correct the grave mistakes of the Navigable Waters Rule that jeopardized so many of the Nation's waters and that has inflicted significant harm and risk of harm on tribes in particular. There is no need to expend precious agency and tribal resources on an extended repeal process.

A. The Navigable Waters Rule Resulted in Extensive and Irreversible Damage to the Environment and Communities.

The Navigable Waters Rule applied Justice Scalia's opinion in *Rapanos v. United States*, limiting the Clean Water Act to only those waters with "relatively permanent, standing or continuously flowing bodies of water."¹¹ The agencies cannot, however,

⁸ The Agencies are also obligated to exchange and share information with the Tribes in advance of any future consultation process. See U.S. Army Corps of Engineers' Tribal Consultation Policy 5(b)(5) ("USACE will share information that is not otherwise controlled or classified information"); *id.* 5(e)(3) ("USACE will support Tribal self-determination, self reliance and capacity building by . . . [s]haring appropriate information on USACE programs, policies and procedures, and public documents"); USACE Tribal Policy Principles ("Predecisional and Honest Consultation – [USACE] will reach out, through designated points of contact, to involve Tribes in collaborative processes designed to ensure information exchange, consideration of disparate viewpoints before and during decisionmaking. . ."); *id.* (the Corps will "ensure the timely exchange of information . . .").

⁹ See n.2, *supra*.

¹⁰ *Id.* at *5.

¹¹ *Rapanos v. United States*, 547 U.S. 715, 739, 742 (2006); see, e.g., 85 Fed. Reg. at 22, 259-60 (relying on Executive Order 13,778); *id.* at 22,273 (relying on *Rapanos*); *id.* at 22,309 (relying on *Rapanos*).

simply choose to follow Justice Scalia’s test to abdicate responsibilities under the Clean Water Act, when five justices rejected that test as “inconsistent with the Act’s text, structure, and purpose.”¹² Justice Kennedy concluded that “nothing in the statute suggests” that Congress drew a line excluding ephemeral streams and instead, Justice Kennedy found that Congress took “[q]uite the opposite” approach.¹³ The four-justice dissent likewise rejected the plurality’s requirement of relatively permanent flows, labeling it a “statutory invention” that creates an “arbitrary jurisdictional line” that is “without support in the language and purposes of the Act or in our cases interpreting it.”¹⁴ Five justices therefore rejected the “relatively permanent waters” test adopted by the Navigable Waters Rule, rendering that test an impermissible construction of the Clean Water Act.¹⁵

Examples of the Navigable Waters Rule’s deleterious impacts abound. Earlier this year, the Agencies, following the Navigable Waters Rule, revoked Clean Water Act protections over the waters on the Rosemont Mine site in the Santa Rita Mountains of southern Arizona. Once in operation, the copper mine would result in the discharge of dredge and fill material that will destroy almost 40 acres of washes—the equivalent of 18 miles of streams.¹⁶ The discharge would also cause secondary impacts that would “cause serious degradation or complete destruction of special and regionally unique aquatic resource areas downstream of the project” according to the EPA’s analysis.¹⁷ The Agencies’ reversal—fast-tracked by the Agencies without tribal consultation—threatens irreparable and unacceptable harm to the Tohono O’odham Nation and Pascua Yaqui Tribe, who have relied on the site’s life-giving waters for thousands of years.

¹² *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring); *see id.* at 800 (Stevens, J., dissenting).

¹³ *Id.* at 770.

¹⁴ *Rapanos*, 547 U.S. at 800–04 (quoting *id.* at 768 (Kennedy, J., concurring)).

¹⁵ *See United States v. Davis*, 825 F.3d 1014, 1024 (9th Cir. 2016) (en banc) (“[T]he Supreme Court ... [has] considered dissenting opinions when interpreting fragmented Supreme Court decisions.”).

¹⁶ Tony Davis, *Feds Remove Key Clean Water Act Permit Requirement for Rosemont Mine*, ARIZ. DAILY STAR (Mar. 25, 2021), https://tucson.com/news/local/feds-remove-key-clean-water-act-permit-requirement-for-rosemont-mine/article_122b66c8-2a4b-5056-98dd-fed234d7f7cd.html/.

¹⁷ Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Env’t Prot. Agency, to Edwin S. Townsley, Operations and Regulatory Div. Chief, S. Pac. Div., U.S. Army Corps of Eng’rs, Environmental Consequences of the Proposed Rosemont Copper Mine: Significant Degradation to Waters of the United States (Nov. 30, 2017).

Rosemont is far from the only example of the Agencies' removal of Clean Water Act protections under the Navigable Waters Rule. Earthjustice, in cooperation with Saint Mary's University of Minnesota, modeled the potential impact of the Navigable Waters Rule on eight watersheds.¹⁸ This modeling showed that nearly 94% of all wetlands and flowlines in Arizona's Upper San Pedro watershed would lose protection under the Rule.¹⁹

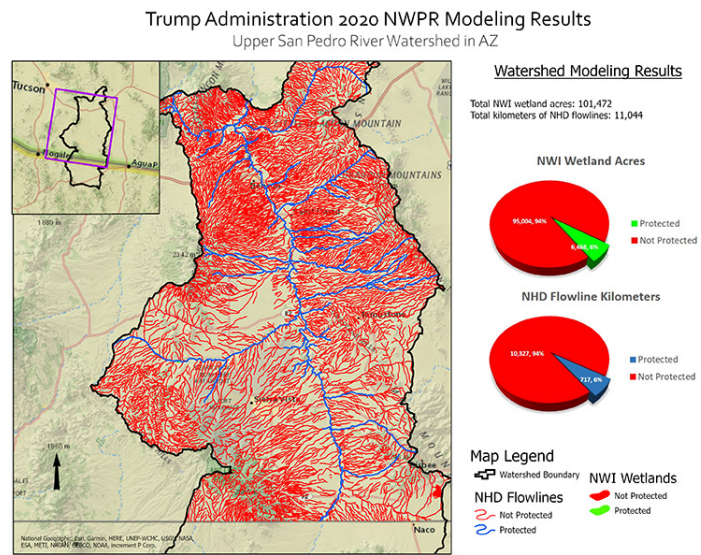


Fig. 1 - NWPR Modeling (Upper San Pedro River)

Similarly, more than 80% of all wetlands and nearly 25% of all flowlines within the Upper James River Watershed in South and North Dakota could have been classified as non-jurisdictional under the Rule.²⁰

Further, while a lesser percentage of waters in the St. Louis watershed would lose protections, the ones that would lie in headwater streams and wetlands. Threatened by mining, these waters are upstream of Fond du Lac and are on lands where tribes have treaty rights.²¹ These modeling results closely track jurisdictional determination data issued by the Agencies.

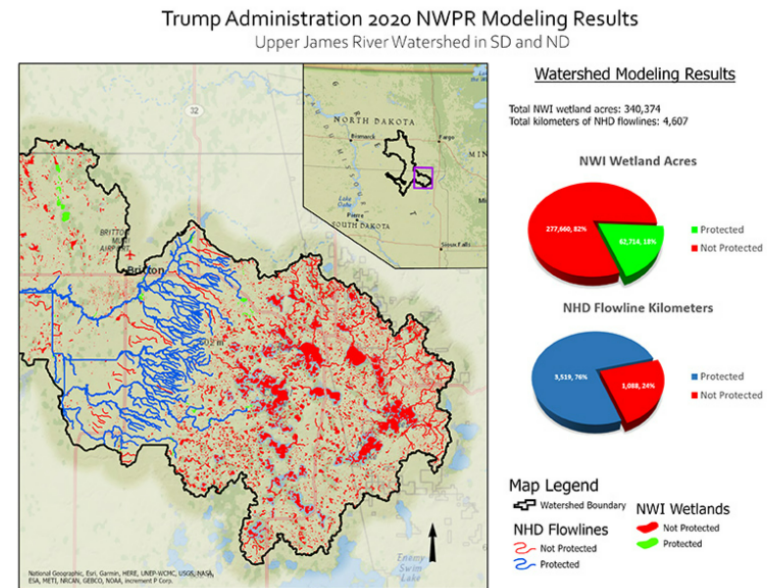


Fig. 2 - NWPR Modeling (Upper James River)

As acknowledged by the Agencies in a June 8, 2021 memorandum entitled "Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional

¹⁸ *Five Watersheds in Jeopardy from the Dirty Water Rule*, EARTHJUSTICE (June 22, 2020, updated September 2021), <https://earthjustice.org/features/maps-watersheds-dirty-water-rule/>.

¹⁹ *Id.*; see Fig. 2.

²⁰ *Id.*; see Fig. 3.

²¹ *Id.*

Determination Data to Assess Effects of the Navigable Waters Protection Rule,” the Agencies have seen an increase in determinations by the Corps that waters are non-jurisdictional, and an increase in projects for which Section 404 permits are no longer required. In fact, this memorandum highlights that non-jurisdictional determinations rose from 46% to 71% under the Rule—a change “more dramatic” than the deregulatory effects the Agencies identified in the Rule’s preamble. This has had a disproportionate effect on arid regions of the country: of more than 1,500 streams assessed in New Mexico and Arizona, *nearly every one has been stripped of Clean Water Act protections*. The Agencies also acknowledge that *at least 333 projects that would have been subject to Section 404 permitting requirements prior to the Rule’s promulgation no longer were*. In fact, that number is likely a significant underestimate that does not reflect the full universe of projects that have lost protections under the Rule, because many project proponents may not bother seeking a jurisdictional determination for newly excluded waters.²²

B. The Agencies Must Adopt a Rule that Broadly Protects all Waters Under the Clean Water Act.

1. *Congress Intended the Broadest Possible Interpretation of “Navigable Waters.”*

The Federal Water Pollution Control Act of 1972 (the “Clean Water Act” or “CWA”) was the culmination of years of failed efforts by Congress to get states to protect and clean up the Nation’s waters through the implementation of state-based water quality standards.²³ Because the situation had reached a critical stage, and because waters are national resources, Congress realized that a national strategy and system of requirements—a federal “floor”—would be necessary to ensure that waters would be cleaned up and protected.²⁴ Against this backdrop, Congress passed the Clean Water Act, wherein Congress’ stated purpose and intent was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁵

The legislative history repeatedly points to the breadth of both the term “navigable waters” and the overall statutory scheme to protect all waters. In a Senate floor debate in 1971, Senator Randolph called the bill “perhaps the most comprehensive

²² *Pascua Yaqui Tribe*, 2021 WL 3855977 at *4–5; see also Decl. of R. Fox ¶¶ 12–14, *Pascua Yaqui Tribe v. U.S. EPA*, No. 4:20-cv-00266-RM (D. Ariz. Jul. 16, 2021), ECF No. 83-1; Decl. of J. Pinkham ¶¶ 11–14, *Pascua Yaqui Tribe v. U.S. EPA*, No. 4:20-cv-00266-RM (D. Ariz. Jul. 16, 2021), ECF No. 83-2.

²³ S. Rep. No. 92-414 at 7 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3672; James Salzman & Barton H. Thompson, Jr., *Env’tl. L. and Policy* 141 (2d ed. 2007); see also Glicksman, Robert L. and Matthew R. Batzel, *Science, Politics, Law, and the Arc of the Clean Water Act*, 32 Wash. U. J. L. & Policy 099, 102-03 (2010).

²⁴ See Glicksman, *supra* n.23 at 102.

²⁵ 33 U.S.C. § 1251(a).

legislation ever developed in its field.”²⁶ In Senate debate on overriding President Nixon’s veto of the bill the next year, Senator Eagleton remarked: “If one word best describes the [CWA], it is the word ‘comprehensive.’”²⁷ As Justice Rehnquist later observed, “The most casual perusal of the legislative history demonstrates that these views on the comprehensive nature of the legislation were practically universal.”²⁸

With respect to the term “navigable waters” specifically, the Conference Report states: “the conferees fully intend that the term ‘navigable waters’ be given *the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.*”²⁹ Congress originally defined navigable waters to mean “the navigable waters of the United States,” but the word “navigable” was later deleted from this definition in an amendment intended to broaden the term.³⁰ During the course of the Clean Water Act’s passage, discussion centered on ensuring that the term navigable waters would not be defined or construed narrowly, as to do so would defeat the intent of the Clean Water Act.³¹ Congress recognized that to achieve its ambitious goal of restoring and protecting our Nation’s waters, it would be necessary to “control pollution at the source,” and not just rely on inadequately enforceable state-by-state standards.³² Indeed, the Senate Committee on Public Works, in considering the bill, “was reluctant to define” the term navigable waters “based on the fear that any interpretation would be read narrowly.”³³ After expressing this concern, the Committee then reiterated that it “fully intends that the term ‘navigable waters’ be given the broadest possible constitutional interpretation.”³⁴

During debate on the bill, Representative Dingell expounded further on Congress’ intended definition of the term “navigable waters,” stating it “means all ‘the waters of the United States’ in a geographical sense. It does not mean ‘navigable waters of the United States’ in the technical sense as we sometimes see in some laws.”³⁵ Congress explicitly rejected any interpretation of navigability that harkens back to a commerce-based navigability test. Congress made clear that in contrast to the old, pre-Clean Water

²⁶ A Legislative History of the Water Pollution Control Amendments of 1972 (Cong. Res. Serv. 1973) (“CWA Legislative History”), Sen. Debate on S.2270 at 1269 (Nov. 2, 1971).

²⁷ CWA Legislative History, Senate Debate on Overriding the President’s Veto of S. 2770 at 189, 218 (Oct. 17, 1972).

²⁸ *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 319, n.12 (1981).

²⁹ CWA Legislative History, Senate Consideration of the Rpt. of the Conference Committee, Oct. 4, 1972, at 178 (emphasis added).

³⁰ CWA Legislative History, Joint Explanatory Statement of the Committee of Conference at 327; *see also* H.R. Rep. No. 92-911; S. Rep. No. 92-1236 (Sept. 28, 1972).

³¹ H.R. Rep. No. 92-911 at 76–77 and S. Rep. No. 92-414 at 77; *see also* 118 Cong. Rec. 33,756–57 (Oct. 4, 1972).

³² S. Rep. No. 92-414 at 77.

³³ CWA Legislative History at 818.

³⁴ *Id.*

³⁵ CWA Legislative History, House Consideration of the Rpt. of the Conference Committee, Oct. 4, 1972, at 250 (remarks of Rep. Dingell).

Act legal definition of the term “navigable waters,” “this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes.”³⁶ Therefore, the Clean Water Act applies not just to navigable-in-fact waters and waters susceptible to being navigable-in-fact, but to the “waters of the United States, recognizing the science of waters being interconnected and the need to ensure that aquatic ecosystems—waters upstream of and within connections with “traditionally navigable” waters—be protected if the Clean Water Act’s purpose is to be fulfilled.” Congress recognized that “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”³⁷

To the end of Congress seeking to control water pollution at its source, the Clean Water Act regulates “any addition of any pollutant to navigable waters from any point source,”³⁸ and defines “navigable waters” to broadly encompass “waters of the United States, including the territorial seas.”³⁹ Controlling discharge of pollutants at their source necessarily means controlling discharges where they enter the aquatic system even if that is a small tributary upstream of a navigable-in-fact water.⁴⁰ This is especially critical for the Tribes where their interests may be in the culturally significant headwaters of streams and rivers and adjacent wetlands, as with the Back Forty Mine’s threats to Menominee historical and cultural resources, or where a reservation’s waters lie downstream of potential sources of pollution such as the case with Fond du Lac’s reservation lying downstream of a number of mining proposals, or Tohono O’odham’s interest in headwater streams affected by mining proposals.⁴¹

Finally, as part of the decision to allow states to be delegated the authority to do some permitting under § 404, Congress reserved navigable-in-fact waters, making it abundantly clear that Congress considered § 404 and the Clean Water Act to protect all

³⁶ CWA Legislative History, House Consideration of the Rpt. of the Conference Committee, Oct. 4, 1972, at 250 (remarks of Rep. Dingell).

³⁷ S. Rep. No. 92-414 at 77.

³⁸ 33 U.S.C. §§ 1362(12), 1311(a).

³⁹ *Id.* § 1362(7).

⁴⁰ *See, e.g., United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (“For the purposes of this Act to be effectively carried into realistic achievement,” the Clean Water Act must cover discharges into tributaries, “including normally dry arroyos.”); *United States v. HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1062 (C.D. Cal. 2018) (“It is evident that any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves.” (quoting *Orchard Hill Bldg. Co. v. Army Corps of Eng’rs*, 2017 WL 4150768, at *6 (N.D. Ill. 2017))).

⁴¹ The Tribes are providing the Agencies, again, with the declarations that were filed in the *Pascua Yaqui Tribe v. U.S. EPA* case as those declarations are a starting point for the Agencies to understand the Tribes’ interests in Waters of the United States and to demonstrate the breadth and importance of tribal interests here.

waters, not just those that are navigable-in-fact.⁴² The Clean Water Act's statutory scheme accordingly calls for broad protection of all waters.

2. *States are Still Not Attaining the Goals and Purposes of the Clean Water Act.*

States continue to struggle to implement (and many actively resist) their Clean Water Act responsibilities to set standards, assess water quality, and issue and enforce permits to limit pollutants, with the result that our waters still do not attain basic standards of cleanliness and protection.

First, states cannot fill the significant regulatory gap created by the Navigable Waters Rule. To the contrary, the Agencies have admitted that states have *weakened* their own clean water protections in response to the Navigable Waters Rule, further exacerbating the regulatory void created by the Navigable Waters Rule.⁴³ Twenty-nine states have laws that either require state regulations to parallel Clean Water Act regulations or require extra steps or findings before state regulations may protect waters beyond federal requirements.⁴⁴ Confirming that point, EPA identified specific projects proceeding “without any regulation or mitigation from federal, state, or tribal agencies.”⁴⁵ By way of example, Arizona's legislation (H.B. 2691) excludes ephemeral streams, except for a few reaches along the state's major rivers. H.R. 2691, 55th Leg., 1st Session (Ariz. 2021) at p. 23, lines 14-15.⁴⁶ The legislation highlights the regulatory void created by the Navigable Waters Rule for thousands of miles of ephemeral streams in Arizona—a regulatory loophole that, in eliminating so many waters from protections, undermines the Clean Water Act's fundamental objectives.

The states' continuing failures to deliver on the promise and requirements of the Clean Water Act is reflected in EPA's most recent National Aquatic Resource Survey where data shows that 70% of rivers and streams are not healthy based on their biological communities and 58% have excess nutrients, while 52% of wetland area is not

⁴² *Id.*

⁴³ See EPA & Corps, Mem. June 8, 2021.

⁴⁴ EPA & Corps, *Resource and Programmatic Assessment for the Navigable Waters Rule*, January 23, 2020, at 46.

⁴⁵ EPA & Corps, Mem. June 8, 2021, ¶ 18.

⁴⁶ The legislation is available through the Arizona State Legislature's webpage at <https://www.azleg.gov/legtext/55leg/1R/laws/0325.pdf>.

healthy based on biological communities.⁴⁷ Toxics are still discharged into our waters and agricultural discharges are almost wholly unregulated, accounting for almost half of the pollution entering waterways, and accounting for a significant portion of the waters that currently fail to meet basic standards of cleanliness (including the hypoxia problem in the Gulf and toxic algae blooms in lakes, including Lake Erie).⁴⁸ State and federal permitting of mines continues to threaten waters important to the Fond du Lac, Menominee, Pascua Yaqui, and Tohono O’odham tribes.

Wetlands continue to suffer and have been declining more rapidly in recent years. In 1989, the U.S. Fish and Wildlife Service (“USFWS”) informed Congress that since the 1700s, twenty-two states had lost more than 50% of their wetland acreage, ten states in the Midwest and coastal areas had lost more than 70%, and California had lost 91%, with attendant disastrous results for clean water.⁴⁹ Against this historical backdrop of substantial losses, we are currently witnessing even more rapid declines in our wetland acreage. In the last comprehensive report for wetlands published in 2011, USFWS reported that the rate of annual wetland loss increased between 2004 and 2009, reversing the decades-long trend of decreases in annual wetland loss, and representing a 140% increase in the wetland loss rate compared with the prior reporting period.⁵⁰ Even when wetland acres are not lost, they are often degraded, losing functions as wildlife habitat, flood control, and water quality control.

States’ reluctance and/or inability to protect waters can put tribes in an impossible position, especially tribes that do not yet have treatment as a state or EPA-approved water quality standards. And even where a state might not be reluctant or unable to protect waters, where those waters are outside reservation boundaries, it is

⁴⁷ *Explore National Water Quality*, EPA, <https://mywaterway.epa.gov/national>; see also EPA, National Rivers and Streams Assessment 2013-2014 at 19 (Dec. 2020), where EPA reports that, using the “fish indicator” as an example, only 26% of assessed perennial rivers and streams were of “good” quality (down approximately 8% from the 2008-2009 data), 22% were of “fair” quality, and 37% were of “poor” quality (up approximately 10% from the 2008-2009 data). The results were even more alarming for some other indicators. For example, 44% of assessed rivers and streams were of “poor” quality using the macroinvertebrate indicator, and 43% were “poor” using the nitrogen indicator. *Id.* at 20, 23. For many of the indicators, water quality worsened between the 2008/2009 survey and the 2013/2014 survey.

⁴⁸ See, e.g., Michael Wines, *Behind Toledo’s Water Crisis, a Long-Troubled Lake Erie*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/us/lifting-ban-toledo-says-its-water-is-safe-to-drink-again.html> (discussing Toledo’s closure of water supply due to toxic algal blooms in 2014).

⁴⁹ See Dahl, T.E., *Wetland Losses Since the Revolution*, U.S. FISH AND WILDLIFE SERV., at 16–17 (1990), <https://www.fws.gov/wetlands/Documents%5CWetlands-Loss-Since-the-Revolution.pdf>.

⁵⁰ See Dahl, T.E., *Status and Trends of Wetlands in the Conterminous United States 2004 to 2009, Report to Congress*, U.S. Dep’t of Interior, U.S. FISH AND WILDLIFE SERV., at 45 (2011).

important to ensure that those waters are protected under federal minimum permitting and regulatory standards.

3. *Interstate Waters.*

In promulgating a new Waters of the U.S. rule, the Agencies must restore the longstanding protections for this jurisdictional category that existed until the Navigable Waters Rule abruptly and unjustifiably eliminated these protections. There was no support for the Agencies' removal of protections for interstate waters in the Navigable Waters Rule, and this elimination of protections has caused significant damage.

The removal of protections for interstate waters has resulted in the lowest common denominator driving down protections for waterbodies that cross state lines or that form a border between states, with the less-protective states controlling the regulation and protections, or lack thereof, for those waters. This is a formula for state-to-state conflicts and further degradation of waters, favoring less protection overall. This drive to favor the least protective conditions, even where a water is shared with a potentially more-protective state, ignores important national and federal considerations and the stated intent and purpose of the Clean Water Act to move away from the conditions where states competed to allow more pollution and degradation in an attempt to curry favor with business and development. Congress intended the Clean Water Act to eliminate (or at least very sharply curtail) that kind of state competition and race to the bottom and plainly, throughout the Clean Water Act, provided that the condition of waters should always move toward protection and increased cleanliness, not less. The Navigable Waters Rule turned that on its head, including by eliminating interstate waters as categorically protected. The Agencies must ensure interstate waters are protected in any new rule.

A prominent example of the need to protect interstate waters is the Menominee River and the potential damage to the river from the proposed Back Forty Mine. The Menominee River forms the border between the Upper Peninsula of Michigan and Wisconsin, flowing into Lake Michigan. The Menominee River is the place of origin of the Menominee people. They have lived there since time immemorial including in large communities along the river in the very location of the proposed Back Forty Mine. The mine would destroy and degrade many wetlands in the area that are connected to the Menominee River either through groundwater or small streams. Some of those streams are seasonal. That area of forest and wetlands along the river is still of great cultural and historical significance to the Menominee Indian Tribe of Wisconsin. In addition, the Menominee River has been the focus of targeted efforts by multiple state and federal agencies and private partners to restore and bolster unique habitat for lake sturgeon, a species listed as threatened by both Michigan and Wisconsin and of great cultural significance to the Menominee people. Interstate waters like the Menominee River are typically used and valued by multiple state, tribal, and local governments, demonstrating a greater need for these waters' protection.

C. The Agencies Must Follow the Science.

When the Agencies promulgated the 2015 Clean Water Rule, they relied on a report that included a comprehensive review of the scientific literature and advice from experts in biology, hydrology, geology, oceanography, and soil science.⁵¹ The report, titled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (hereinafter the “Connectivity Report”), EPA-HQ-OW-0880-20858,⁵² described the many vital connections between tributaries, wetlands, and downstream waters and found extensive evidence that tributaries and wetlands play critical roles in maintaining the physical, chemical, and biological integrity of downstream waters. The Agencies must follow the latest scientific data when developing any new Waters of the U.S. rule.

1. *Tributaries*

The Navigable Waters Rule severely restricted the protections of tributaries under the Clean Water Act by imposing a definition of “tributary” that was divorced from science and from the obligation to protect and preserve the chemical, physical, and biological integrity of the Nation’s waters. The narrowing of protections for tributaries in the Navigable Waters Rule contradicted Congress’ directive to protect all waters of the U.S. with the broadest possible interpretation of the term⁵³, entirely ignored the statutory obligation to protect the chemical and biological integrity of the Nation’s waters (33 U.S.C. § 1251(a)), and also violated the significant nexus test and accompanying science demonstrating the importance of ephemeral and more temporary streams to the health of downstream waters. The Agencies must ensure that any new rule contains broad protections for tributaries, as Congress intended.

Tributaries serve as the lifeblood and conduits for all of our Nation’s waters and the health of those waters. The Connectivity Report, previously developed by the Agencies, found unequivocal consensus evidence that all tributaries—including perennial, intermittent, and ephemeral streams—“exert a strong influence on the integrity of downstream waters,” and that all tributaries have a significant nexus to navigable-in-fact waters, interstate waters, and the territorial sea.⁵⁴

One reason tributaries are so important to downstream waters is that, to a large degree, tributaries determine the characters of the water downstream—physically, chemically, and biologically.⁵⁵ Tributaries supply initial flow to downstream waters like rivers, as well as the materials that form a river’s bed and banks, such as sediment, and the materials that fill it, such as water, nutrients, and organisms.⁵⁶ In some cases, they

⁵¹ 80 Fed. Reg. 37,054 (June 29, 2015).

⁵² Commenters incorporate the Connectivity Report in these comments by reference.

⁵³ See *supra* part II.A.1 of this letter.

⁵⁴ Connectivity Report at ES-2.

⁵⁵ *Id.* at 3-45 to 3-46.

⁵⁶ See, e.g., *id.* at 3-47 tbl.3-1, 4-40 tbl.4-3.

do this by filtering or settling out, or delaying the delivery of, other materials like contaminants or floodwaters.⁵⁷ Tributaries can also serve as nurseries or spawning areas during certain times of the year for species that then migrate downstream later in their life stages, for example, as part of migrating salmon lifecycles on both coasts.⁵⁸ In the arid and semiarid Southwest, where the majority of tributaries are seasonally dry,⁵⁹ flows from ephemeral tributaries are still a “major driver” of flows in downstream rivers, even despite their “ephemeral” nature (which simply means that they do not have *visible* surface water at all times. Visibility, however, is never considered a sole determinative factor in whether a water body is a water body and/or whether it has “flow”).⁶⁰ Ephemeral channels supply substantial amounts of surface water to rivers during infrequent, but very influential, flood events.⁶¹ For instance, during a high-intensity storm in New Mexico that dropped up to one-quarter of the area’s annual rainfall over the course of two days, flood flows from the Rio Puerco, an ephemeral tributary to the Rio Grande River, accounted for *76% of the flood flow downstream in the Rio Grande*.⁶² Those flows plainly physically affect downstream waters, but also play critical roles in replenishing sediments or nutrients or building aquatic habitat. Even when water in ephemeral tributaries sinks into the ground before reaching downstream rivers, it plays a critical role in replenishing shallow groundwater flows. These flows, in turn, are a vital source of surface water in the downstream rivers through springs or base flow.⁶³

The Agencies are well aware that the majority of streams in the country are ephemeral or intermittent. In EPA’s 2018 rulemaking docket for the Agencies’ proposed repeal of the 2015 Clean Water Rule, the Agencies included an EPA slide that calls ephemeral and intermittent streams the “workhorses of the watershed,” and shows that, nationwide, 59% of stream miles are either ephemeral or intermittent.⁶⁴ They have also observed, without quantification, that “[b]ecause ephemeral streams represent a larger percent of waters in the arid West, any change in jurisdiction related to ephemeral features may be greater there than in other portions of the country.”⁶⁵ In fact, widely available National Hydrology Dataset data reveals that “94%, 89%, 88%, and 79% of the streams in Arizona, Nevada, New Mexico, and Utah, respectively, are intermittent or

⁵⁷ *Id.* at 3-47 tbl.3-1, 4-40 tbl.4-3.

⁵⁸ *See, e.g., id.* at ES-5, ES-13, 1-9, 2-40, and 2-44.

⁵⁹ *Id.* at 2-29.

⁶⁰ *Id.* at B-59.

⁶¹ *Id.*

⁶² *Id.* at 3-7 to 3-8; Vivoni et al., *Analysis of a Monsoon Flood Event in an Ephemeral Tributary and its Downstream Hydrologic Effects*, Water Resources Research (2006).

⁶³ *Id.* at B-59, 5-8 (ephemeral tributaries supply roughly half of the San Pedro River’s “baseflow”), B-39 (most perennial and intermittent rivers in the Southwest are groundwater dependent).

⁶⁴ EPA, Materials Shared at Outreach Meetings for Docket EPA-HQ-OW-2017-0203, at 332.

⁶⁵ EPA and Dep’t of the Army, *Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States”* at 11.

ephemeral.”⁶⁶ The elimination of protections for ephemeral streams has brought catastrophic impacts for the health of our waters.

2. *Wetlands and Adjacency*

Wetlands naturally absorb flood waters, filter pollutants, and recharge groundwater reserves, as well as provide habitat for fish, amphibians, insects, birds, and mammals. Because they attract such a diverse array of species and provide many kinds of food, EPA has elsewhere called wetlands “biological supermarkets.”⁶⁷ Wetlands also are connected to other waters of the U.S. in a variety of ways. The Connectivity Report found clear evidence that wetlands and open waters in floodplains are “highly connected” to tributaries and rivers “through surface water, shallow groundwater, and biological connectivity.”⁶⁸ Relying on these findings, the Agencies previously concluded that all waters adjacent to foundational waters, impoundments, and tributaries have a significant nexus to foundational waters.

The connections between wetlands and other waters may not always be visibly obvious.⁶⁹ Wetlands both inside of and outside of floodplains can store floodwater, effectively acting like sponges on the landscape during floods.⁷⁰ Floods, even if infrequent, provide temporary connections and have significant, lasting, and beneficial impacts because they allow rivers and wetlands to exchange water and other materials in both directions.⁷¹ Sediment released from wetlands during a flood can help shape a river’s channel and therefore affect its physical integrity.⁷² Floodplain wetlands also reduce floods by storing water that overflows from rivers or that may flow from the landscape into a river, thereby helping to control and slow flooding downstream.⁷³ In addition, the subsurface or flood-stage flows connecting floodplain wetlands to rivers also convey chemicals.⁷⁴ One of the most important functions of floodplain wetlands is

⁶⁶ D.C. Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, *Journal of the American Water Resources Association*, 1-23 (2018).

⁶⁷ *Why Are Wetlands Important?*, EPA, <https://www.epa.gov/wetlands/why-are-wetlands-important/>.

⁶⁸ Connectivity Report at ES-2, and 4-1 *et seq.*, especially 4-39.

⁶⁹ For example, northern boreal patterned peatlands have been shown to have flow characteristics which are visible on the surface of the peatlands (even if the water flow itself is not always visible), and these peatlands are crucial to flood control, water quality and the chemical, physical, and biological integrity of waters of the U.S. *Minnesota Scientific and Natural Areas Patterned Peatlands*, MINN. DEP’T OF NAT. RES., <https://www.dnr.state.mn.us/snas/peatlands.html>.

⁷⁰ Connectivity Report at ES-3, 4-20, 4-38; *id.* at 4-1, 6-4.

⁷¹ *Id.* 4-1, 4-39.

⁷² *Id.* at 4-39.

⁷³ *Id.* at 4-1, 6-4.

⁷⁴ *Id.* at 4-11.

to intercept contaminants by filtering them through the roots of wetland plants. The plants absorb the contaminants and prevent them from reaching rivers.⁷⁵

Even when there is no surface-water connection between a river and a neighboring wetland, shallow groundwater flows may provide a connection.⁷⁶ Tributaries and rivers are not “pipes” that simply carry water from one place to another in discrete containers.⁷⁷ Rather, these waters are porous, and water from a river’s channel regularly enters the shallow subsurface, where it may mix with other subsurface water (including water from neighboring wetlands) before returning to the channel or even to other surface waters.⁷⁸ Floodplains are frequently composed of alluvium—a combination of silt, sand, or other matter deposited over time—that tends to be “highly permeable” and particularly well suited to conveying shallow groundwater flows.⁷⁹ These shallow subsurface flows can connect rivers to floodplain wetlands during both high-flow and low-flow periods.⁸⁰ Although the word “floodplain” may give the impression that these connections occur primarily during times of flooding, many important connections between rivers and floodplain wetlands persist at other times as well.⁸¹

Justice Kennedy noted that wetlands separated by land from another waterway can be vital to the waterway, for if such a wetland is destroyed, “floodwater, impurities, or runoff that would have been stored or contained in the wetlands” could instead “flow out to major waterways.”⁸² The very absence of a hydrological connection could thus make protection of the wetland critical.⁸³ Justice Kennedy acknowledged isolated wetlands may be protected by the Act, singly or in combination with similarly situated wetlands, as they can significantly affect other covered waters “more readily understood as ‘navigable,’” and the Corps may properly determine that proximity, volume of flow (annually or on average), or other relevant considerations may form the foundation for protecting a wetland under the Act.⁸⁴ The Connectivity Report similarly found that wetlands and open waters located outside of floodplains also provide numerous functions that benefit downstream water integrity.⁸⁵

⁷⁵ *Id.* at 4-11, 4-14.

⁷⁶ *Id.* at 4-39.

⁷⁷ *Id.* at 2-21.

⁷⁸ *Id.* at 2-12, 4-7.

⁷⁹ *Id.* at 2-12.

⁸⁰ *Id.* at 2-12, 4-7.

⁸¹ *Id.* at 4-39.

⁸² *Rapanos*, 547 U.S. at 775.

⁸³ *Id.*

⁸⁴ *Id.* at 780.

⁸⁵ *Id.* at ES-3, 4-20, 4-38.

3. *Post-2015 Scientific Studies*

Since 2015, scientific studies have reiterated the importance of upstream waters like ephemeral tributaries and wetlands to the integrity of larger, downstream waters. According to a 2017 peer-reviewed book entitled *Intermittent Rivers and Ephemeral Streams*, research into these non-perennial aquatic ecosystems has “burgeoned,” in part due to the threats to the extremely rich biodiversity represented in these waters and the increasing commonality of them due to climate change.⁸⁶ These recent hydrology publications reinforce and strengthen our knowledge of the importance of ephemeral and intermittent streams, “isolated” wetlands, headwaters, groundwater, and fragile features like prairie potholes and vernal pools. They also reveal that in the face of increasing effects from climate change, more streams are going dry part of the year, wetlands are drying, and pollutant loads to waters are increasing. The studies reiterate that intermittent and ephemeral streams, as well as seasonal and “isolated” wetlands, also provide critical habitat for a diverse array of species, including endangered and threatened species.

The list attached to these comments as Appendix A includes government reports, peer-reviewed hydrology studies, and related assessments that examine the state of our waters, predicted changes to waters due to climate change, connectivity between waters, or the critical ecological services provided by smaller and intermittent or ephemeral waters, all published between 2015 and 2019. The publications do not represent a comprehensive scientific literature review, but rather comprise a sampling of the kinds of readily available studies the Agencies must consider when formulating the new rule.

4. *Waste Treatment Exclusion*

The Agencies seek comment on categorical exclusions, including the so-called waste treatment exclusion. This exclusion, which allows waters of the U.S. that have been used for waste treatment systems to be excluded from any further protections of the Clean Water Act, is unlawful and harmful. In 1980, EPA limited the exclusion to “manmade bodies of water” that “neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.”⁸⁷ When industry objected, EPA suspended the language limiting the exclusion to manmade systems, without opportunity for public comment, explaining that the *suspension was temporary* and that EPA would “*promptly*” *amend the rule or “terminate the suspension.”*⁸⁸ It never did, and the Agencies now treat the suspension of the limiting language as a settled matter.

The Agencies have also developed an interpretation of the exclusion that authorizes new impoundments of natural waters, such as streams and wetlands, so that

⁸⁶ *Intermittent Rivers and Ephemeral Streams: Ecology and Management*, Eds. Thibault Datry, Núria Bonada, & Andrew Boulton, Academic Press (2017).

⁸⁷ 45 Fed. Reg. 33,290, 33,424 (May 19, 1980).

⁸⁸ 45 Fed. Reg. 48,620, 48,620 (July 21, 1980) (emphasis added).

they can be pressed into service as industrial waste dumps. In 1980, EPA explained that the Clean Water Act “was not intended to license dischargers to freely use waters of the United States as waste treatment systems,”⁸⁹ and that the exclusion was limited to manmade waters “to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.”⁹⁰ Then, when EPA suspended the language limiting the exclusion to manmade systems, the agency said it was responding to complaints that the limitation would otherwise cover “existing waste treatment systems . . . *which had been in existence for many years.*”⁹¹ It is now fully apparent that the act of “suspending” the original limiting language in the Waste Treatment System Exclusion was nothing more than a subterfuge; the Agencies abandoned all pretense that the suspension is temporary.

Congress spoke clearly: the Clean Water Act would apply to “the waters of the United States,”⁹² regardless of how those waters were used.⁹³ The law contains no exceptions to that rule, much less for natural water bodies artificially converted into repositories for industrial waste. Indeed, that is the very practice Congress meant for the Clean Water Act to end.⁹⁴ The Waste Treatment System Exclusion violates the plain language and intent of the Clean Water Act.⁹⁵

A number of tribes are suffering damage to their resources as a result of wetlands being pressed into service as waste ponds. For example, the Minntac tailings basin in Minnesota leaks pollutants downstream that have damaged wild rice beds in the Sandy River, beds where a number of Great Lakes Tribes exercise treaty rights. The proposed Back Forty Mine will create waste basins in areas that have wetlands in close proximity and in groundwater connection with the Menominee River, and in areas that are culturally and historically important to the Menominee people. The Waste Treatment Exclusion is a huge loophole that must be eliminated to protect the rights of tribes.

⁸⁹ 45 Fed. Reg. at 33,298.

⁹⁰ 45 Fed. Reg. at 48,620.

⁹¹ *Id.* (emphasis added). Over time, the Agencies implemented a new interpretation that allowed newly created waste impoundments in natural waters. See *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211–16 (4th Cir. 2009).

⁹² 33 U.S.C. § 1362(7).

⁹³ See *supra* part II.A.1 of this letter.

⁹⁴ See S. Rep. No. 92-414 at 7 (“The use of any river, lake, stream or ocean as a waste treatment system is unacceptable.”).

⁹⁵ Cf. *Nat’l Ass’n of Mfrs. v. Dep’t of Labor*, 159 F.3d 597, 600 (D.C. Cir. 1998) (“There is, of course, no such ‘except’ clause in the statute [at issue in that case], and we are without authority to insert one.”); *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (invalidating a rule on the basis that, under the Clean Water Act, EPA lacked discretion to exempt entire categories of point sources from certain permitting requirements).

D. The Agencies Must Further Environmental Justice.

In any new rule, the Agencies must not only consider, but prioritize, the furtherance of environmental justice and the protections of the Tribes' interests.

Executive Order 12,898 makes “each Federal agency” responsible for “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”⁹⁶

EPA's environmental justice plan “envision[s] an EPA that integrates environmental justice into everything” it does.⁹⁷ To accomplish this vision, EPA sets forth eight different priority areas, the first of which is “rulemaking.”⁹⁸ EPA aims to “[i]nstitutionalize environmental justice in rulemaking,” including performance of “rigorous assessments of environmental justice analyses in rules,” in order to “deepen environmental justice practice within EPA programs to improve the health and environment of overburdened communities.”⁹⁹ Recognizing that “[r]ulemaking is an important function used by the EPA to protect human health and the environment for all communities,” EPA aims to “ensure environmental justice is appropriately analyzed, considered, and addressed in EPA rules with potential environmental justice concerns, to the extent practicable and supported by relevant information and law.”¹⁰⁰ Thus, EPA has regularly and purposefully focused on the need for environmental justice assessments of its rulemaking.

EPA has provided guidance to its rule-writers on how to incorporate environmental justice, noting that “it is critical that EPA rule-writers consider environmental justice (EJ) when developing a regulation.”¹⁰¹ The Guidance defines an “environmental justice concern” as including “the actual or potential lack of fair treatment or meaningful involvement of minority populations, low-income populations, tribes, and indigenous peoples in the development ... of environmental ... regulations.”¹⁰² This can arise not only when a regulation would “[c]reate new disproportionate impacts,” but also when it would “exacerbate[e] existing disproportionate impacts.”¹⁰³ The assessment can include qualitative or quantitative

⁹⁶ 59 Fed. Reg. at 7629, § 1-101 (Feb. 16, 1994).

⁹⁷ EPA, *EJ 2020 Action Agenda, The U.S. EPA's Environmental Justice Strategic Plan for 2016-2020* at iii (Oct. 27, 2016).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 13.

¹⁰¹ EPA, *Guidance on Considering Environmental Justice During the Development of Regulatory Actions* at 1 (May 2015) (“EPA EJ Guidance”).

¹⁰² *Id.* at 9.

¹⁰³ *Id.* at 10.

elements.¹⁰⁴ The Guidance directs rule-writers to begin the assessment by “first understand[ing] what an action is accomplishing and why it is necessary.”¹⁰⁵

Undertaking a robust environmental justice review is especially critical given the Agencies’ previous failure to undertake this analysis for the Navigable Waters Rule.

E. The Agencies Must Account for Climate Change.

The Agencies must incorporate the effects of climate change in any new rule. Climate change has and will continue to substantially affect the flow conditions, pollution levels, and temperatures of waters in the United States, which will in turn affect the extent of adverse ecological and economic effects of any jurisdictional rule.

The effects of climate change render any rule based on stream flow volumes especially suspect. Scientists predict increasing numbers of perennial streams will become intermittent or ephemeral due to the effects of climate change.¹⁰⁶ This is especially concerning to the Tribes; for example, for the Quinault Nation, where salmon streams up and down the west coast are already suffering the effects of climate change and salmon more than ever need cold water refugia and adequate spawning habitat. At the same time, in the northeastern and midwestern U.S., precipitation levels are projected to rise.¹⁰⁷ These predicted changes to average annual precipitation are not insignificant; therefore, a jurisdictional definition of tributaries that relies on past precipitation averages will inevitably not reflect the current, on-the-ground circumstances and would result in jurisdictional determinations that can quickly become outdated and incorrect.

Finally, the Agencies must consider and address the additive adverse ecosystem effects caused by removing Clean Water Act protections for any waters at a time when waters are already facing grave threats due to climate change. These threats include increases in pollution loads, higher water temperatures, more frequent algal blooms, greater groundwater depletion rates, more frequent droughts, increases in irrigation needs, and other consequences of climate change.¹⁰⁸ Nearly half of the river and stream miles in this country are already biologically impaired,¹⁰⁹ and the effects of climate change will exacerbate these impairments unless greater protections are implemented.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Thibault Detry et al., *Challenges, Developments and Perspectives in Intermittent River Ecology*, *Freshwater Biology*, 1171-1180 (2016).

¹⁰⁷ Eleonora M.C. Demaria et al., *Regional Climate Change Projections of Streamflow Characteristics in the Northeast and Midwest U.S.*, *Journal of Hydrology: Regional Studies*, 309-323 (2016).

¹⁰⁸ U.S. Global Change Research Program, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, Ch. 3, at 146-157.

¹⁰⁹ EPA, *National Water Quality Inventory: Report to Congress* (2017).

Climate change dictates the broad protection of all waters, without categorical exclusions.

F. The Agencies Must Comply with the National Environmental Policy Act.

The Agencies must also comply with the requirements of the National Environmental Policy Act (“NEPA”). NEPA requires all federal agencies to prepare an environmental impact statement (“EIS”) for any “major Federal actions significantly affecting the quality of the human environment.”¹¹⁰ In fulfillment of its policy that “each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment,”¹¹¹ “NEPA establishes ‘action-forcing’ procedures that require agencies to take a ‘hard look’ at environmental consequences.”¹¹² NEPA also requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”¹¹³

Additionally, any NEPA analysis should be, to every extent possible, conducted in compliance with the Council on Environmental Quality’s 1978 NEPA regulations to ensure full consideration of environmental impacts and to provide the public opportunities for meaningful participation. The Council on Environmental Quality’s 2020 NEPA Rule¹¹⁴ sharply curtails public participation opportunities and unlawfully eliminates the requirement to consider cumulative and indirect impacts. Any NEPA process conducted under the 2020 NEPA Rule will necessarily fail its core goals of ensuring public participation and informed decision-making. Further, the viability of the 2020 NEPA Rule is uncertain because of a number of ongoing legal challenges. Multiple groups, including a coalition of organizations represented by Earthjustice, sued to vacate the 2020 NEPA Rule as arbitrary, capricious, contrary to law, and in excess of statutory authority in violation of the Administrative Procedure Act. Should a court vacate the 2020 NEPA Rule, the Agencies would be required to restart the entire EIS process to ensure compliance with the 1978 regulations.

¹¹⁰ 42 U.S.C.A. § 4332(C).

¹¹¹ 42 U.S.C.A. § 4331(c).

¹¹² *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (internal citations omitted).

¹¹³ 42 U.S.C.A. § 4332(E).

¹¹⁴ 85 Fed. Reg. 43,304 (July 16, 2020).

CONCLUSION

The Agencies must not repeat the mistakes of the Navigable Waters Rule and its extensive and irreversible effects on communities and the environment. The Tribes urge the Agencies to develop a new and robust rule, based on law and science that strengthens protections for all the Nation's waters.

Sincerely,



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Pascua Yaqui Tribe

Tohono O'odham Nation

Quinault Indian Nation

Fond du Lac Band of Lake Superior Chippewa

Menominee Indian Tribe of Wisconsin

encls: Declarations in *Pascua Yaqui Tribe v. U.S. EPA*

APPENDIX A

- **Fourth National Climate Assessment¹¹⁵**
- **Marsh Bird Response to Hydrologic Alteration and Restoration of Wetlands in the Boreal Hardwood Transition¹¹⁶**
- **Challenges, Developments and Perspectives in Intermittent River Ecology¹¹⁷**
- **Regional Climate Change Projections of Streamflow Characteristics in the Northeast and Midwest U.S.¹¹⁸**
- **Landscape Metrics as Predictors of Hydrologic Connectivity Between Coastal Plain Forested Wetlands and Streams¹¹⁹**
- **Dissolved Organic Matter Variations in Coastal Plain Wetland Watersheds: The Integrated Role of Hydrological Connectivity, Land Use, and Seasonality¹²⁰**
- **A Comparison of Biotic groups as Dry-Phase Indicators of Ecological Quality in Intermittent Rivers and Ephemeral Streams¹²¹**

¹¹⁵ U.S. Global Change Research Program, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, Ch. 3, at 146-157.

¹¹⁶ Michael J. Monfils & R. Gregory Corace, *Marsh Bird Response to Hydrologic Alteration and Restoration of Wetlands in the Boreal Hardwood Transition*, Michigan Natural Features Inventory (2018).

¹¹⁷ Thibault Datry et al., *Challenges, Developments and Perspectives in Intermittent River Ecology*, *Freshwater Biology*, 1171-1180 (2016).

¹¹⁸ Eleonora M.C. Demaria et al., *Regional Climate Change Projections of Streamflow Characteristics in the Northeast and Midwest U.S.*, *Journal of Hydrology: Regional Studies*, 309-323 (2016).

¹¹⁹ Steven M. Epting et al., *Landscape Metrics as Predictors of Hydrologic Connectivity between Coastal Plain Forested Wetlands and Streams*, *Hydrological Processes*, 516-532 (2017).

¹²⁰ Jacob D. Hosen et al., *Dissolved Organic Matter Variations in Coastal Plain Wetland Watersheds: The Integrated Role of Hydrological Connectivity, Land Use, and Seasonality*, *Hydrological Processes*, 1664-1681 (2018).

¹²¹ Rachel Stubbington et al., *A Comparison of Biotic Groups as Dry-Phase Indicators of Ecological Quality in Intermittent Rivers and Ephemeral Streams*, *Ecological Indicators*, 165-174 (2019).

- **Ecological Research and Management of Intermittent Rivers: An Historical Review and Future Directions¹²²**
- **U.S. Environmental Protection Agency Report on the Environment, Stream Flows¹²³**
- **The National Rivers and Streams Assessment EPA Fact Sheet¹²⁴**
- **Modeling the Potential Impacts of Climate Change on the Water Table Level of Selected Forested Wetlands in the Southeastern United States¹²⁵**
- **An Evaluation of Agricultural Tile Drainage Exposure And Effects to Wetland Species And Habitat Within Madison Wetland Management District, South Dakota¹²⁶**
- **Geographically Isolated Wetlands: Rethinking a Misnomer¹²⁷**
- **Identification of Putative Geographically Isolated Wetlands of the Conterminous United States¹²⁸**
- **Geographically Isolated Wetlands are Part of the Hydrological Landscape¹²⁹**

¹²² Catherine Leigh et al., *Ecological Research and Management of Intermittent Rivers: An Historical Review and Future Directions*, *Freshwater Biology*, 1181-1199 (2016).

¹²³ EPA, *Report on the Environment, Stream Flows* (2018).

¹²⁴ EPA, *The National Rivers and Streams Assessment 2008/2009 Fact Sheet* (2016).

¹²⁵ Jie Zhu et al., *Modeling the Potential Impacts of Climate Change on the Water Table Level of Selected Forested Wetlands in the Southeastern United States*, *Hydrology and Earth System Sciences*, 1-17 (2017).

¹²⁶ USFWS Region 6, *An Evaluation of Agricultural Tile Drainage Exposure and Effects to Wetland Species and Habitat Within Madison Wetland Management District, South Dakota* (2018).

¹²⁷ David Mushet et al., *Geographically Isolated Wetlands: Rethinking a Misnomer*, *Wetlands*, 423-431 (2015).

¹²⁸ Charles R. Lane & Ellen D'Amico, *Identification of Putative Geographically Isolated Wetlands of the Conterminous United States*, *Journal of the American Water Resources Association*, 705-722 (2016).

¹²⁹ M.C. Rains et al., *Geographically Isolated Wetlands are Part of the Hydrological Landscape*, *Hydrological Processes*, 153-160 (2016).

- **Department of Defense Strategic Environmental Research and Development Program Reports¹³⁰**
- **Bidirectional Stream-Groundwater Flow in Response to Ephemeral and Intermittent Streamflow and Groundwater Seasonality¹³¹**
- **Montana Prairie Wetlands and Intermittent/Ephemeral Streams: Hydrologic Needs Assessment for Healthy Watersheds¹³²**
- **Delineation and Quantification of Wetland Depressions in the Prairie Pothole Region of North Dakota¹³³**
- **New Mapping Techniques to Estimate the Preferential Loss of Small Wetlands of Prairie Landscapes¹³⁴**
- **Midcontinent Prairie-Pothole Wetlands and Climate Change: An introduction to the Supplemental Issue¹³⁵**
- **Preparing for an Uncertain Future; Migrating Shorebird Response to Past Climate Fluctuations in the Prairie Potholes¹³⁶**

¹³⁰ David Cooper et al., *Watershed to Local Scale Characteristics and Function of Intermittent and Ephemeral Streams on Military Lands*, Department of Defense Strategic Environmental Research and Development Program (2015); Julian Olden & David Lytle, *Hydroecology of Intermittent and Ephemeral Streams: Will Landscape Connectivity Sustain Aquatic Organisms in a Changing Climate?*, Department of Defense Strategic Environmental Research and Development Program (2015); Juliet Stromberg et al., *Structure and Function of Ephemeral Streams in the Arid and Semiarid Southwest: Implications for Conservation and Management*, Department of Defense Strategic Environmental Research and Development Program (2015).

¹³¹ Margaret A. Zimmer & Brian L. McGlynn, *Bidirectional Stream-Groundwater Flow in Response to Ephemeral and Intermittent Streamflow and Groundwater Seasonality*, *Hydrological Processes*, 1-10 (2017).

¹³² RTI International, *Montana Prairie Wetlands and Intermittent/Ephemeral Streams: Hydrologic Needs Assessment for Healthy Watersheds* (July 2015).

¹³³ Qiusheng Wu & Charles R. Lane, *Delineation and Quantification of Wetland Depressions in the Prairie Pothole Region of North Dakota*, *Wetlands* (2016).

¹³⁴ J.N. Serran & I.F. Creed, *New Mapping Techniques to Estimate the Preferential Loss of Small Wetlands of Prairie Landscapes*, *Hydrological Processes* (2015).

¹³⁵ David M. Mushet, *Midcontinent Prairie-Pothole Wetlands and Climate Change: An Introduction to the Supplemental Issue*, *Wetlands*, S223-S228 (2016).

¹³⁶ Valerie Steen et al., *Preparing for an Uncertain Future: Migrating Shorebird Response to Past Climate Fluctuations in the Prairie Potholes*, *Ecosphere* (2018).

- **Interannual Water-level Fluctuations and the Vegetation of Prairie Potholes: Potential Impacts of Climate Change**¹³⁷
- **Abiotic Habitat Thresholds for Salmonid Over-Summer Survival in Intermittent Streams**¹³⁸
- **Clean Water Rule Spatial Analysis: A GIS-Based Scenario Model for Comparative Analysis of the Potential Spatial Extent of Jurisdictional and Non-Jurisdictional Wetlands**¹³⁹
- **An Ecohydrological Stream Type Classification of Intermittent and Ephemeral Streams in the Southwestern United States**¹⁴⁰
- **Characterizing the Dynamics of Surface Water-Groundwater Interactions in Intermittent and Ephemeral Streams Using Streambed Thermal Signatures**¹⁴¹
- **Southwestern Intermittent and Ephemeral Stream Connectivity**¹⁴²
- **Hydrologic Influences on Plant Community Structure in Vernal Pools of Northeastern California**¹⁴³

¹³⁷ Arnold G. van der Valk & David M. Mushet, *Interannual Water-Level Fluctuations and the Vegetation of Prairie Potholes: Potential Impacts of Climate Change*, *Wetlands*, 397-406 (2016).

¹³⁸ Cleo Woelfle-Erskine et al., *Abiotic Habitat Thresholds for Salmonid Over-Summer Survival in Intermittent Streams*, *Ecosphere* (2017).

¹³⁹ Roger Meyer & Andrew Robertson, *Clean Water Rule Spatial Analysis: A GIS-based Scenario Model for Comparative Analysis of the Potential Spatial Extent of Jurisdictional and Non-Jurisdictional Wetlands*, St. Mary's University of Minnesota (2019).

¹⁴⁰ Lainie Levick et al., *An Ecohydrological Stream Type Classification of Intermittent and Ephemeral Streams in the Southwestern United States*, *Journal of Arid Environments*, 16-35 (2018).

¹⁴¹ Gabriel C. Rau et al., *Characterizing the Dynamics of Surface Water-Groundwater Interactions in Intermittent and Ephemeral Streams Using Streambed Thermal Signatures*, *Advances in Water Resources* (2017).

¹⁴² D.C. Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, *Journal of the American Water Resources Association*, 1-23 (2018).

¹⁴³ Meredith C. Gosejohan et al., *Hydrologic Influences on Plant Community Structure in Vernal Pools of Northeastern California*, *Wetlands* (2017).

- **Headwater Streams and Wetlands are Critical for Sustaining Fish, Fisheries, and Ecosystem Services¹⁴⁴**
- **Mapping of Non-Perennial and Ephemeral Streams in the Santa Ana Region¹⁴⁵**
- **Connectivity and Nitrate Uptake Potential of Intermittent Streams in the Northeast USA¹⁴⁶**

¹⁴⁴ Susan A.R. Colvin et al., *Headwater Streams and Wetlands are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, American Fisheries Society (2018).

¹⁴⁵ Marcus Beck et al., *Mapping of Non-Perennial and Ephemeral Streams in the Santa Ana Region*, Southern California Coastal Water Research Project (Dec. 2017).

¹⁴⁶ Kelly Addy et al., *Connectivity and Nitrate Uptake Potential of Intermittent Streams in the Northeast USA*, 7 *Front. Ecol. Evol.* 1, 1 (Jun. 2019), <https://www.frontiersin.org/articles/10.3389/fevo.2019.00225/full>.

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA AT TUCSON

3 PASCUA YAQUI TRIBE, *et al.*,
4 Plaintiffs,
5 v.
6 UNITED STATES ENVIRONMENTAL
7 PROTECTION AGENCY, *et al.*,
8 Defendants.

Case No. 4:20-cv-00266-RM

Assigned Judge: Rosemary Márquez

DECLARATION OF AUSTIN NUNEZ

9 I, Austin G. Nunez, declare as follows:

10 1. The facts set forth in this declaration are based on my personal knowledge
11 and, if called as a witness, I could and would competently testify thereto under oath.

12 2. I am a member of the San Xavier District, Tohono O’odham Nation
13 (“Nation”) and have served as Chairman of the San Xavier District for the past 34 years.
14 In that role, I handle everything that affects the community, much like the mayor of a
15 small town. I am grateful for the opportunity to represent my community.

16 3. I organize and participate in the cultural and spiritual ceremonies that form
17 our traditional way of life. Several years ago, the men of our community in collaboration
18 with our elders, reinitiated our Eagle Ceremony, which has been part of the Tribes’
19 heritage and has been passed down from generation to generation. I learned from one of
20 our elders about this ceremony and how to heal our people using eagle feathers. I have
21 participated in the ceremony twice, most recently in 2017. The ceremony involves four
22 days of fasting and prayers. Each year, I participate in our Community Cleansing, Rain,
23 Eagle Ceremonies (supporting new initiates) and various other blessing ceremonies. I
24 also participate in and conduct sweat lodge ceremonies, cleansing and healing mind, body
25 and spirit. I am also a member of the Native American Church of Southern Arizona,
26 participating in the ceremony on most weekends, both in state and throughout the United
27 States.
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1 pumping. I fear that with the loss of Clean Water Act protections for most of the San
2 Pedro's tributaries, the river will never recover.

3 12. This also holds true for the Santa Cruz River that has its headwaters in
4 Southern Arizona then heads south into Mexico and re-enters the United States at
5 Nogales, AZ. This river heads northward on our ancestral lands to my current day
6 community of San Xavier Indian Reservation, and then northward through the City of
7 Tucson and drains into the Casa Grande, AZ flatlands. When the Santa Cruz River
8 flowed prior to the arrival of non-O'odham settlers, the river course met up with the Gila
9 River and flowed westward to the Colorado River, but that is no longer the case due to
10 excessive groundwater pumping. I fear the river could lose protections under the new
11 Trump Rules, including the tributaries that support this river.

12 13. Another river that could be affected is the Sabino wash that has headwaters
13 at the southern base of Mt. Lemmon adjacent and north of Tucson. This tributary meets
14 up with the Rillito River and then flows into the Santa Cruz River. Canado del Oro in
15 Oro Valley, AZ could also be affected as well. These rivers supplied our Hohokam
16 ancestors and our O'odham forefathers the ability to farm in a desert environment, and
17 they must be afforded protections under the Clean Water Act.

18 14. I have also visited Sonoita Creek a number of times near Patagonia,
19 Arizona, along Highway 82. Our family used to go there for picnics, and I plan to visit
20 Sonoita Creek with my grandchildren in the near future. When I visit the Creek, I give
21 thanks for this sacred source of life in the arid desert. The creek is fed by surface and
22 underground springs, which in turn are nourished by underground aquifers. The creek
23 basin also supports numerous washes. I am concerned that under the new Rules, critical
24 portions of the Sonoita Creek watershed will lose Clean Water Act protections.

25 15. In the eastern part of the Tohono O'odham Nation are two major washes:
26 Vamori Wash and San Simon Wash. As ephemeral streams, I fear that both washes will

1 lose Clean Water Act protections under the new Rules. These washes also feed the Rio
2 Sonoita. The washes on the Tohono O’odham Nation need to be protected so that
3 wildlife who depend on the annual rainwaters flowing through them can thrive free from
4 any potential pollutants that may come from wildcat dumping by outsiders. These
5 streams also ensure that plants will thrive and sustain the native wildlife, and that the
6 mesquite trees will continue to provide beans for our O’odham.

7 **Irreparable Harm to Waters at the Proposed Rosemont Mine Site.**

8 16. The proposed Rosemont Mine will severely and irreversibly impact the
9 waters at the mine site and downstream. In order to construct the mine pit, waste rock
10 piles, industrial facilities, and infrastructure, Rosemont needs to fill the network of
11 ephemeral streams on the mine site, as well as multiple intermittent streams that are fed
12 by seeps and springs.

13 17. Destruction of ephemeral and intermittent streams on the site for the
14 planned excavations and construction activities will harm me and the other members of
15 the Nation. These washes are sources of life-giving water and the veins of Mother Earth.
16 They sustain this extraordinary cultural and biologically diverse landscape, contributing
17 to the power of the place, and remind us of our ancestors who built their villages
18 alongside these drainages because they supported life in this desert environment, as they
19 do to this day.

20 18. The mine will severely and irreversibly impact our future generations. The
21 mine will gouge a half-mile-deep pit into the land, puncturing the aquifer. Groundwater
22 studies show that the mine pit will reverse groundwater flows into perpetuity, drying up
23 streams, springs, and seeps in the region for the next thousand years. The mine will also
24 create a toxic pit lake that threatens the groundwater supply for Tucson, Arizona. None
25 of these impacts have been adequately mitigated, and they all impact the future
26 generations I seek to protect.

1 that portion of Mother Earth to remain in its natural state for our generation and those yet
2 to come.

3 23. The Environmental Protection Agency (EPA) concluded that granting a
4 Water Act Section 404 Permit for the mine would cause significant and unacceptable
5 impacts to this aquatic ecosystem, which contains some of the highest quality streams and
6 wetland ecosystems in Arizona. I have attached as Exhibit A to this declaration a true
7 and accurate copy of EPA's comprehensive analysis of the proposed mine's impacts.

8 24. The Corps' Los Angeles District refused to grant a 404 Permit because the
9 mine would cause significant degradation of washes, violate state water quality standards,
10 and seriously harm tribal cultural resources, among other things. That denial was
11 referred to the Corps' South Pacific Division.

12 25. The Corps' South Pacific Division abruptly reversed course on March 8,
13 2019, granting the 404 Permit for the mine. The Nation, alongside the Pascua Yaqui
14 Tribe and Hopi Tribe, challenged that decision in *Tohono O'odham Nation, et al. v.*
15 *Helmlinger, et al.*, Case No. 4:19-cv-00205-JAS (D. Ariz.).


16 26. The Nation subsequently learned that Rosemont asked the Corp to revoke
17 its Clean Water jurisdiction over the Rosemont mine site based on the new Navigable
18 Waters Protection Rule. Over the Nation's objections, and without conducting formal
19 government-to-government consultation with the Nation, the Corp revoked jurisdiction
20 on March 24, 2021. I have attached true and accurate copies of the Nation's objection to
21 revocation, the Corps' initial offer to consult, the Corps' rescission of its offer to consult,
22 and the Corps' revocation of jurisdiction as Exhibits B, C, D, and E to this declaration.

23 27. The Corps relied on the Trump Administration's Rules when it revoked
24 Clean Water Act jurisdiction, clearing the way for the destruction of the sacred site and
25 adverse effects to the streams, seeps, and springs located on the site.

1 28. An order from the Court vacating the Rules would restore Clean Water Act
2 protections to many of the sacred waters that are of vital importance to the Nation,
3 thereby protecting, in part or whole, this special place, my connection to this place, and
4 the Nation's cultural identity.

5 Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the
6 foregoing is true and correct.

7 Executed this 27th day of April 2021 in Tucson, Arizona.

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11 AUSTIN G. NUNEZ
12 Chairman, San Xavier District, Tohono O'odham Nation
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1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA AT TUCSON

3 PASCUA YAQUI TRIBE, *et al.*,

4 Plaintiffs,

v.

5 UNITED STATES ENVIRONMENTAL
6 PROTECTION AGENCY, *et al.*,

7 Defendants.

Case No. 4:20-cv-00266-RM

Assigned Judge: Rosemary Márquez

**DECLARATION OF THOMAS
ETHAN HOWES**

8 I, Thomas Ethan Howes, declare as follows:

9 1. The facts set forth in this declaration are based on my personal knowledge
10 and if called as a witness, I could and would competently testify thereto under oath.

11 2. I am an enrolled member of the Fond du Lac Band of Lake Superior
12 Chippewa (“Fond du Lac” or the “Band”), one of six constituent bands of the Minnesota
13 Chippewa Tribe. “Chippewa” is an anglicized mispronunciation of the correct name for
14 my people which is Ojibwe. For the purpose of this declaration, I will refer to myself,
15 my people and our culture by the correct name of Ojibwe.

16 3. I live in Duluth, Minnesota along the St. Louis River, the largest tributary
17 to Lake Superior. The portion of Duluth that I reside in is called “Fond du Lac” which is
18 a reference to the site of an Ojibwe settlement and trading post in the 1800s. Aside from
19 a period of time during two years of undergraduate study, I have always resided within 25
20 miles of the Fond du Lac reservation at Cloquet, Minnesota.

21 4. For the last 21 years through the present, I have worked for the Fond du
22 Lac Band’s Resource Management Division, the Band’s Environmental and Natural
23 Resource Management agency. In that time, I served as the Watershed Specialist for the
24 Environmental Program’s Office of Water Protection for seven years until transitioning
25 to serve as the Natural Resources Program Manager for the past fourteen years. I hold a
26 Bachelor of Arts degree in American Indian Studies as well as a Master of Tribal

1 Resource and Environmental Stewardship degree, both from the University of
2 Minnesota-Duluth.

3 5. The Fond du Lac Band's Resource Management Division is charged with
4 caring for the natural resource interests of the Band both on the Fond du Lac Reservation
5 and in the territories ceded to the United States by Treaty in 1837, 1842, and 1854. These
6 ceded territories cover portions of Michigan, Wisconsin, and Minnesota. In the Treaties
7 of 1837, 1842, and 1854 the Ojibwe signatory Bands retained harvest rights on the lands
8 ceded to the United States which include hunting, fishing, and gathering. Therefore, my
9 interests and the Band's interests in the natural environment and its protection extend
10 well beyond the reservation boundaries.

11 6. The Ojibwe of the Great Lakes region have gone to great lengths over the
12 past 30 years to successfully have our treaty guaranteed harvest rights acknowledged and
13 protected. In all instances this has required litigation in federal court, in some instances
14 all the way to the U.S. Supreme Court. With the affirmation of these rights comes the
15 responsibility to ensure the biological sustainability of our harvest as well as the
16 responsibility to work and advocate for environmental protection.

17 7. The Fond du Lac Reservation is located near Cloquet, Minnesota and is
18 bordered by the St. Louis River on its northern and eastern sides. The headwaters of the
19 St. Louis River arise in bogs and wetlands to the north and west of the reservation in
20 northern St. Louis County, Minnesota. The St. Louis River has many smaller tributaries,
21 themselves arising in numerous bogs and wetlands.

22 8. The Reservation landscape contains 24 lakes and numerous streams as well
23 as being comprised of over fifty percent wetlands of various types. The surrounding
24 landscape also contains numerous wetlands, lakes, and streams, many of which are
25 connected to or flow into or through the waters on the Fond du Lac reservation.

1 basins that threaten wetland health and existence. The PolyMet mine proposes to destroy
2 thousands of acres of northern bog and other type wetlands as well as potentially pollute
3 the headwater streams of the St Louis River. Mining of both kinds release pollutants such
4 as mercury and sulfates into water. Mercury accumulates in fish tissue and is a threat to
5 the Band's health. Sulfates are deadly to Manoomin. These mines also destroy or
6 significantly degrade wetlands, many in the headwaters of the St. Louis River and its
7 tributaries. Destruction or degradation of wetlands negatively affects downstream waters
8 by altering or eliminating habitat for many plants and animals on which the Band relies,
9 and by removing a natural pollutant filter and sponge from the landscape.

10 12. Redefinition of wetland protections through changes in definitions of
11 connectivity or adjacency to "waters of the United States," narrowing what waters and
12 wetlands will be protected from pollution, impairment, or destruction, will diminish and
13 degrade natural resources guaranteed by treaty as well as degrade the water quality
14 flowing into our permanent homelands in violation of our federally approved water
15 quality standards.

16 13. As part of my professional responsibilities, I coordinate the Fond du Lac
17 Band's participation in a multi-agency effort to reintroduce wild rice to the St. Louis
18 River Estuary. The St. Louis River Estuary is within the 1842 and 1854 treaties ceded
19 territories and is the final 22 miles of riverine habitat prior to the confluence of the river
20 with Lake Superior. Once home to hundreds of acres of wild rice, the Estuary has been
21 severely affected by industrialization of the riverfront, dredging to facilitate shipping
22 vessels, and human development of the shoreline. As part of an ongoing effort to remove
23 the St. Louis River from the list of 43 Areas of Concern (AOC) across the Great Lakes
24 region, an intensive wild rice restoration program has been developed. This restoration
25 program fulfills a key habitat restoration component of the AOC delisting process
26 targeted for completion by 2025. As an annual plant, wild rice is sensitive and vulnerable

1 to water level fluctuations and climate extremes during critical phases of its development.
2 With the ongoing climate change impacts to weather patterns, wild rice is further
3 threatened by degradation of the aquatic systems (wetlands, groundwater, and surface
4 waters) that support it. Therefore, it is important to preserve and protect its habitat
5 wherever that occurs throughout the ceded territories.

6 14. Wild rice is both culturally and ecologically significant. As stated
7 previously, wild rice is central to Ojibwe identity, but it is also *only* found in the Great
8 Lakes region and *nowhere else in the world*. Deregulation of waters important to wild
9 rice—either directly or upstream of Manoomin beds, under the “waters of the United
10 States” rules, poses a threat to our most sacred food as well as a unique regional plant
11 species.

12 15. The Fond du Lac Band began a lake sturgeon (*Acipenser fulvescens*)
13 reintroduction in 1998 in the portion of the St. Louis River that borders the Reservation.
14 Like in many portions of the Great Lakes region, lake sturgeon were nearly extirpated
15 due to habitat degradation, overfishing, and the segmentation of the St. Louis River by
16 the construction of numerous hydroelectric dams that block natural sturgeon movement
17 for various aspects of its life cycle. Annual stocking of juvenile lake sturgeon is done to
18 rebuild a genetically diverse lake sturgeon population in the St. Louis River. The goal of
19 this reintroduction program is a self-sustaining fishery for our grandchildren. Lake
20 sturgeon were once a key component of our annual fish harvest activities. Degradation of
21 water quality and exclusion of wetlands from protection in our water rich environment is
22 problematic for our lake sturgeon rehabilitation efforts and violates our federally
23 approved water quality standards. Again, these headwater streams and wetlands provide
24 critical water quality and habitat benefits throughout the watershed.

25 16. Aquatic plants found in wetlands in this region are routinely utilized by the
26 Ojibwe people as part of our traditional medicinal practices and diet. Destruction of

1 wetlands caused by removal of regulation threatens our ability to gather and use wetland
2 plants as we have for centuries. As an example of this I am a member of the eagle clan
3 and our traditional medicine society. As such, I have specific plants I rely upon to
4 maintain my health as well as the health of my community. One of my eagle clan
5 medicines is partially made up of a wetland tree, the tamarack (*Larix laricina*).
6 Commonly found in bog wetlands, this tree and its supporting habitat is threatened by the
7 relaxation of wetland protections in the redefinition of “waters of the United States” as
8 many bogs display no direct, navigable, or observable surface connection to nearby
9 waterbodies. This is just one of hundreds of wetland plant species utilized in our
10 traditional medicines.

11 17. The Ojibwe understand the natural world to be a web of interconnectedness
12 and therefore destruction of wetlands and waterbodies will negatively affect the overall
13 health of the natural system that supports wild rice, sturgeon and the many plants and fish
14 on which I and my Band members rely. Deregulation of ephemeral waters, intermittent
15 streams, and “non-adjacent” wetlands is not only unwise from a regulatory and
16 environmental perspective, it actually threatens natural resources guaranteed to the
17 Ojibwe by treaties which have been interpreted by the U.S. Supreme Court as the
18 “supreme law of the land”.

19 18. My life experience has provided me with a deep understanding and
20 appreciation for the natural world from an Ojibwe perspective. I make a conscious effort
21 to attempt to maintain and revitalize when necessary the traditional culture of my people
22 both in my personal and professional life. I am a fisherman, deer and moose hunter, wild
23 rice harvester, syrup maker, plant medicine gatherer, and craftsman of traditional material
24 objects such as cradleboards, wild rice knockers, lacrosse sticks, wild rice harvesting
25 pushpoles, and traditional burial markers. For all of these activities I visit and rely on,
26 every season of every year, the many waters and wetlands throughout the Fond du Lac

1 reservation and the ceded territories that are essential to these practices, indeed to our
2 survival as people and a culture.

3 19. I and the Fond du Lac Band will be and are being harmed by ephemeral
4 streams and wetlands, non-adjacent wetlands, and potentially some intermittent bodies of
5 water begin cut out of the protections of the Clean Water Act. I and the Band are thereby
6 deprived of the ability to ensure the highest, best regulation of activities that will harm
7 our way of life. I have no doubt that sturgeon, Manoomin and many aquatic plants and
8 other fish will be destroyed or degraded through the failure to regulate damaging
9 upstream activities such as mining and development. This Court can help address those
10 harms by ruling in the tribes' favor and vacating the damaging Navigable Waters
11 Protection Rule that is the subject of this lawsuit.

12 Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the
13 foregoing is true and correct.

14 Executed this 28 th day of April 2021 in Duluth, Minnesota.



16 THOMAS ETHAN HOWES
17 Director, Department of Language and Culture, Pascua Yaqui Tribe

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1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA AT TUCSON

3 PASCUA YAQUI TRIBE, *et al.*,
4 Plaintiffs,
5 v.
6 UNITED STATES ENVIRONMENTAL
7 PROTECTION AGENCY, *et al.*,
8 Defendants.

Case No. 4:20-cv-00266-RM

Assigned Judge: Rosemary Márquez

**DECLARATION OF JUSTINE
JAMES**

9 I, Justine James, declare as follows:

10 1. The facts set forth in this declaration are based on my personal knowledge
11 and if called as a witness, I could and would competently testify to them under oath.

12 2. I am a member of the Quinault Indian Nation (“Quinault” or the “Tribe”) in
13 Washington State. My training and education include forestry, fisheries, environmental
14 sciences, and cultural areas. I serve the Quinault as a Cultural Resource Specialist,
15 Timber Fish and Wildlife (“TFW”) Biologist, and Quinault Tribal Elder.

16 3. I currently reside in Aberdeen, Washington, but I have lived the majority of
17 my life on the Quinault Reservation in Taholah, Washington. The Quinault Reservation
18 is located on the coast of Washington along the Quinault River and the Pacific Ocean.
19 Since time immemorial, the Quinault people lived, hunted, and fished over a much wider
20 region which included the present areas of the reservation and also areas of the Chehalis
21 River Basin and Grays/Gray’s Harbor, Washington where the Chehalis River empties
22 into the Pacific. In my capacity with the TFW program, I spent significant time with
23 restoration and enhancement of fish and riparian habitat in addition to water quality
24 protection throughout this area. The Tribe has treaty rights to fish within the usual and
25 accustomed area of the Chehalis River and its tributaries.

26 4. For the Quinault people, there is a spiritual as well as health and economic
27 connection to salmon and to fish generally. We Quinault are salmon people. The
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1 Quinault People view salmon as a critical element of their culture, that is tied to
2 traditional beliefs, ceremonial traditions, food preparation, identity, keystone foods, and
3 an instrument of passing on traditional knowledge, practices, and values. The Quinault
4 belief systems view salmon as a primary component of individual health, community
5 well-being, and spiritual health because it has been a large component of our lifeways for
6 generations. Nutrition studies show that salmon is one of the most nutritious and energy
7 rich foods on the planet. Cold water fish are high in vitamin D, and their omega-3 fatty
8 acids are essential to our survival and assist in feeding our large nervous systems and
9 human brain. Micronutrients contain building blocks for the immune systems and
10 support mental health, specifically in fighting against seasonal affective disorder, and are
11 found in the sacred body of the Salmon People. Due to the climate of the Pacific
12 Northwest, we are often Vitamin D deficient; our ancestors never had this problem
13 because they understood the significance of the salmon, as the medicine. We are salmon
14 people because it has been a mainstay in our diets for our entire life and history. We
15 especially the elders, become distressed both mentally and physically when salmon are
16 jeopardized and unavailable or harmed.

17 5. My family has always been fishermen and hunters. The Eagle is our family
18 crest because the Eagle is a hunter and fisher. All the generations leading up to my
19 generation lived entirely on the gifts from the forest and rivers. As a youngster, my
20 father lived on the river and I called him "Old-Timer" because of that lifestyle. He
21 ensured that we always had food on the table: fish, claims, deer, and elk. We seldom ate
22 beef. Salmon continues to be a large part of my diet.

23 6. I realized that we needed tribal members educated in the science fields to
24 protect and enhance the natural resources that are so important to us, so I worked on my
25 education, going to college twice to ensure that I had the education that was required to
26 be effective for my tribe. As a high school intern, I worked at the U.S. Fish and Wildlife

1 Quinault National Fish Hatchery which later qualified me for an interim full-time
2 employee position. I dabbled a bit in commercial gillnet fisheries in the Columbia River.
3 I then moved to the Colville Indian Reservation to begin working in various forestry jobs.
4 From there I attended Grays Harbor Community College for an A.S. in Forestry studies.
5 In 1991, I started a Fisheries Technician position with the Timber, Fish and Wildlife in
6 the Environmental Protection program within the Quinault Department of Natural
7 Resources (“QDNR”). While there, I realized that I needed to expand my education so I
8 entered an Environment Studies B.A. program at The Evergreen State College where my
9 professor encouraged me to focus my studies on the TFW arena. At The Evergreen State
10 College I also minored in Native American history. This degree elevated me to a TFW
11 Section Manager. With my work experiences and developments in the TFW arena, I
12 realized that I needed to again expand my educational pursuits to Cultural Resource
13 Protection and Management. In 1997, I added the Cultural Resource Specialist title to
14 my work duties and responsibilities. My work and my personal pursuits are to make sure
15 that Quinault people have salmon on the tables as an economic endeavor and to protect
16 our cultural and spiritual vitality.

17 7. As part of my job, I hiked throughout the Chehalis River watershed (and
18 some additional watersheds within the Quinault’s ancestral lands). Staff from Quinault
19 and me have hiked miles and miles of streams in Southwest Washington searching for
20 fish presence to ensure that streams were properly recorded as fish-bearing, or fish
21 habitat, or seasonal refuge and habitat so that we and the State of Washington could then
22 properly protect those streams, nearby wetlands, and their riparian habitat with water
23 quality standards and regulatory actions, including and perhaps most importantly, under
24 the Clean Water Act. As part of that work, we added over 3,300 miles of streams that
25 otherwise would not have received protective measures from damaging forestry and
26 development practices. As part of my current work, I do not walk the landscape to the

1 same extent, but I use that information and review all proposals for new development, for
2 timber and forestry, or for things like roads and dams, for potential negative impacts to
3 the land, the streams, the wetlands, and the habitat for fish. This is important to me both
4 professionally and personally as well as culturally for my tribe.

5 8. I am not a lawyer, but as part of my work, I understand that the Navigable
6 Waters Protection Rule that was finalized in 2020 says that so-called “ephemeral” waters
7 or waters that do not flow all the time or almost all the time or that dry out will no longer
8 be protected under the Clean Water Act. Some “intermittent” waters might also not be
9 protected. I also understand that “non-adjacent” wetlands that do not have a connection
10 on the surface to other larger, more continuous waterbodies will also not be protected
11 under the Clean Water Act. I understand that the rule indicates that waters that are
12 “only” fed by rain and that dry up may not be protected. As part of the stream and
13 wetland survey work that I describe above, I can say that I have observed numerous
14 waters in Southwest Washington, in the Chehalis River watershed and in other
15 watersheds that are part of Quinault ancestral lands, that may or will be affected by the
16 Navigable Waters Protection Rule. I can also say that salmon streams and rivers that
17 provide the fish so critical to my life and to the way of life of the Quinault are
18 downstream of those waterbodies that will no longer be protected, posing significant
19 harm to me and Quinault and the fish and fish habitat that we rely on economically,
20 culturally, and spiritually. I provide some specific examples below.

21 9. In the Satsop River watershed, a tributary of the Chehalis River, I was with
22 a fisheries biologist in either the Decker or Dry Creek area. We were at a stream that is a
23 prime producer of salmon. During the fall and winter season the stream runs at full
24 capacity allowing the salmon to push upstream to spawning grounds. However, during
25 the summer months this stream goes dry, possibly going subterranean/underground losing
26 the surface connection to downstream larger streams. When I observed it during the

1 surveys it was just a rock and pebble surface. The stream starts to lose water in the
2 spring. The stream does not have a continuous surface flow to larger bodies of water but
3 it is an important producer of salmon that my tribe and I rely on. These kinds of streams
4 are common in the lower reaches of all the watersheds in which the Quinault work and
5 hold treaty rights, and I particularly remember seeing those conditions also in the Lake
6 Creek area of the South Fork Chehalis.

7 10. Similarly, in certain areas of the Upper Chehalis River watershed, there are
8 sometimes isolated wetlands and smaller streams where the streamflow slows to a trickle
9 or the channel becomes completely dry. Salmon use these streams as over-wintering
10 areas and then migrate to the main stem in the spring when flows connect the small
11 streams to the main channels.

12 11. During the summer season in the main stem in the parts of the Chehalis
13 River that have now been mostly converted to farmlands and other agricultural uses, the
14 river waters become slow moving or stagnant as the water recedes and in some places can
15 pond with gaps in the flow. Depending on rainfall these areas may dry up completely.
16 These areas can produce wetland environments that provide cattails and other materials to
17 the Tribe for weaving. I know from my 30 plus years of experience that these areas,
18 especially the smaller streams and wetlands, are often the most in jeopardy for
19 development.

20 12. Isolated wetlands are also found within the Chehalis River watershed in a
21 few of the heavily-forested areas of the watershed. They are depressions in the forest,
22 potentially left by glaciers. I recall one on an unnamed small tributary of the Wynoochee
23 River, itself a tributary to the Chehalis.

24 13. In fact, overall, Washington's climate, its ecosystems, and the role that
25 waters play in those ecosystems is often very dependent on and interconnected with rain
26 patterns. Heavy rainfall events—common in the fall and winter---cause ponding in

1 lowlands and filling of depressional wetlands and can fill small streambeds. These areas
2 may later dry out but they are no less important waters for the entire water ecosystem.
3 These types of areas are used by smolts (salmonids that are going through the transition
4 from fresh to salt water), fry (young fish) and other fishes as resting places and protection
5 areas from the high energy mainstem waters. Even though they may be connected and/or
6 wet only certain times of the year or in certain very wet years, they are still very much a
7 connected and integral part of the overall waters of Washington and the Chehalis Basin,
8 they are important to salmon, and salmon are important to me.


9 14. During my surveys where I observed these many streams and wetlands I
10 would see how fish struggle to find the necessary habitat. I recall a stream with a
11 drainage ditch alongside a road and the ditch branches off into a forested area and then
12 into a wetland. This was a seasonal or “ephemeral” wetland in that it did not exist all the
13 time. The wetland supplied water to the ditch but primarily when it rained (the wetland
14 was depressional and was “wet” primarily during rain although may have had a spring
15 connection). Adult coho salmon were swimming up the ditch into the forested area in
16 search of spawning habitat. I continued into the ponded wetland where I and the
17 coworker I was with found adult cutthroat trout. This area is dry every year in the summer
18 after the rain stops. Nonetheless, it was important seasonal habitat for the cutthroat and
19 the coho in the fall and winter.

20 15. As can be seen from these examples, many waters that are important for the
21 fish species on which the Tribe and I depend for our way of life, are threatened by the
22 narrowed definition of water bodies that are to be protected under the Clean Water Act.
23 Stripping these waters—waters that are isolated or ephemeral or intermittent or fed
24 primarily by rain--of Clean Water Act protection harms me and my Tribe by threatening
25 the habitat for these fish. I am harmed when my ability to ensure the highest best
26 regulation of activities that will harm our way of life (such as intensive logging or

1 development or pollution dumping) is taken away or weakened by the lack of federal
2 regulation and protections for waters that are critical to our way of life. From my
3 observations of salmon and other fish in Quinault's ancestral lands, it makes no sense to
4 exclude waterbodies because they are small or fed mostly by rain or not connected on the
5 surface to bigger waters or because they go dry. They are still waters serving all the
6 functions to the ecosystem and to Quinault life and culture that must be protected. This
7 Court can help address those harms by ruling in the tribes' favor and vacating the
8 damaging Navigable Waters Protection Rule that is the subject of this lawsuit.

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10 Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the
11 foregoing is true and correct.

12 Executed this 27th day of April, 2021 in Taholah, Washington.

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14 JUSTINE JAMES
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1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA AT TUCSON

3 PASCUA YAQUI TRIBE, *et al.*,

4 Plaintiffs,

v.

5 UNITED STATES ENVIRONMENTAL
6 PROTECTION AGENCY, *et al.*,

7 Defendants.

Case No. 4:20-cv-00266-RM

Assigned Judge: Rosemary Márquez

DECLARATION OF GUY REITER

8 I, Guy Reiter, declare as follows:

9 1. The facts set forth in this declaration are based on my personal knowledge
10 and if called as a witness, I could and would competently testify thereto under oath.

11 2. I am an enrolled tribal member of the Menominee Indian Tribe of
12 Wisconsin (“Menominee” or the “Tribe”).

13 3. I live on the Menominee Reservation in Keshena, Wisconsin. The
14 Menominee Reservation is located in Menominee County, Wisconsin along the Wolf
15 River. Originally, since time immemorial, the Menominee people lived, hunted, fished,
16 and farmed in a much wider region covering parts of the states of Michigan, Wisconsin,
17 and Illinois. Our place of origin is at Menekaunee Harbor near the mouth of the
18 Menominee River where it enters Green Bay in Lake Michigan and there are many sites
19 along the River that are culturally, historically, and spiritually important to the Tribe.
20 The Menominee River forms the present-day border between the States of Michigan and
21 Wisconsin. Important ceremonial, cultural, and historic sites on or near the Menominee
22 River, including burial mounds, ancient agricultural sites, dwelling sites, and cultural
23 sites such as dance rings, are still present along the River on both the Wisconsin and
24 Michigan banks and extending into the surrounding forested and wetland areas. As a
25 result of treaties in 1831, 1832, 1836, 1848, and 1854, the Menominee people were
26 moved to the present location of the reservation.

1 4. The Menominee Reservation and surrounding region, in addition to the
2 Wolf River, is rich in lakes, streams, and wetlands, and those waters are the source of
3 many important foods, materials, and resources for cultural and spiritual practices. I live
4 on one of those lakes.

5 5. I am actively involved in protecting our Tribe's natural, cultural and
6 historic resources. I also engage in many activities that are water-dependent. Those
7 activities include kayaking, fishing, gathering food, trapping, gathering materials from
8 wetlands and waters for medicine and making things like baskets. Water is also critical
9 to my and my Tribe's spiritual well-being. I can give several specific examples of ways
10 that I and the Menominee people use our water resources.

11 6. Each year I gather wild rice near the headwaters of the Wolf River near
12 Crandon, Wisconsin. The headwaters of the Wolf River where we go ricing are
13 populated by bogs, many of which are not obviously connected on the surface to a larger
14 waterbody. Wild rice grows under very specific flow conditions and requires very clean
15 water. It can be wiped out by pollutants like those generated from mining or from excess
16 sediment or changes in water levels. For example, wild rice can be flooded or washed
17 out if wetlands are damaged or eliminated that help absorb high flows.

18 7. Wisconsin has recently lifted its mining moratorium and exploration is
19 going on around the region that is our ancestral territory. Mining is particularly
20 destructive to waters.

21 8. I have also been reengaging with the area of the Menominee River often
22 referred to as the Sixty Islands area. That part of the river and area wetlands are
23 threatened by the proposed Back Forty Mine on the Michigan side of the river, a sulfide
24 minerals open pit mine that will destroy many wetlands, will lower the groundwater table
25 (adversely affecting more wetlands), poses a pollution threat to the Menominee River and
26 the mine will damage and destroy Menominee cultural and historic sites and resources.

1 The spiritual and cultural meaning and benefit of the area for me will be damaged beyond
2 repair by the mine and effects from the mine (for example, the outright destruction but
3 also trying to conduct spiritual practices near a 10-story waste rock pile). The
4 Menominee people resided in the immediate area of the mine for many years and burial
5 mounds, agricultural sites and dance rings have been discovered. I have reconnected
6 with the area spiritually and other Menominee people have as well. I visit the area
7 regularly. The Menominee Tribe has also regained some land at that location on the
8 River in an effort to re-establish our physical, as well as spiritual and cultural connections
9 to the River at the Sixty Islands location. The forest and wetlands in the area are part of a
10 connected whole that was a Menominee dwelling place and landscape for millennia.
11 That includes the area wetlands that are an integral part of the landscape and would have
12 served as a source of food and materials.

13 9. The Menominee people have also worked to re-establish wild rice beds at
14 Menekaunee Harbor near the mouth of the Menominee River where it empties into Green
15 Bay, our place of origin. Wild rice is harmed by pollutants coming downriver, especially
16 the types of pollutants from mining.

17 10. I also fish and trap, primarily beaver, throughout the reservation and other
18 waters in the region. I also gather medicinal plants in area wetlands such as marsh
19 marigold and skunk cabbage. I gather black ash in wetlands that is used to make baskets.
20 Because of the impact of the invasive emerald ash borer we are losing our ash and it has
21 become even more critically important to protect and keep healthy the wetland habitats
22 where the trees do remain. All of these activities occur in the natural world and they are
23 all interconnected for me and the Menominee people.

24 11. I and members of my family also visit springs that are on the reservation for
25 therapeutic, medicinal, and spiritual reasons. We use water from these springs and have
26 protected them through generations. These springs are very small, isolated, and hard to

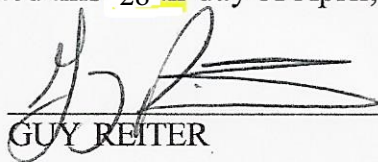
1 find. They come up out of the ground, being connected to other waters through
2 groundwater. One of them that I regularly visit is accessed through a surrounding
3 wetland that dries out more in the spring making access easier. These springs are an
4 important part of Menominee life and I learned of them and their important properties
5 from my grandfather.

6 12. My entire life experience is intertwined with the natural world, especially
7 water. I try throughout every aspect of my life to maintain and practice the traditional
8 culture of my people.

9 13. I and the Menominee People will be and are being harmed by ephemeral
10 streams and wetlands, non-adjacent wetlands, and potentially some intermittent bodies of
11 water being cut out of the protections of the Clean Water Act. I and the Menominee
12 Tribe are harmed when our ability to ensure the highest best regulation of activities that
13 will harm our way of life is taken away or weakened by the lack of federal regulation and
14 protections for waters that are critical to our way of life. It is inconceivable to me that we
15 would consider some waters and wetlands insignificant or not worthy of protection
16 simply because they were small or not obviously connected on the surface to bigger
17 waters or because they are dry in certain seasons or for some years. In fact, some area
18 wetlands do dry out more in some times of the year which is what makes them accessible
19 for me to gather the unique plants that grow there or to access springs. The destruction of
20 wetlands and headwater streams without proper federal regulation will damage my way
21 of life in ways that cannot be repaired. I am concerned that wild rice, sturgeon, springs,
22 cultural and spiritual sites and many other wetland resources will be destroyed or
23 degraded through the failure to regulate damaging upstream activities such as mining and
24 development. This Court can help address those harms by ruling in the tribes' favor and
25 vacating the damaging Navigable Waters Protection Rule that is the subject of this
26 lawsuit.

1 Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the
2 foregoing is true and correct.

3 Executed this 28th day of April, 2021 in Keshena, Wisconsin.

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6 GUY REITER

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA AT TUCSON

3 PASCUA YAQUI TRIBE, *et al.*,
4 Plaintiffs,
5 v.
6 UNITED STATES ENVIRONMENTAL
7 PROTECTION AGENCY, *et al.*,
8 Defendants.

Case No. 4:20-cv-00266-RM
Assigned Judge: Rosemary Márquez
DECLARATION OF DANIEL VEGA

8 **DECLARATION OF DANIEL VEGA**

9 I, Daniel Vega, declare as follows:

10 1. The facts set forth in this declaration are based on my personal knowledge
11 and if called as a witness, I could and would competently testify thereto under oath.

12 2. I am a member of the Pascua Yaqui Tribe of Arizona (“Tribe”), which is
13 located near Tucson, in Pima County, Arizona. For the past ten years, I have served as
14 the Director of the Department of Language and Culture. In that role, I oversee the
15 Tribe’s program to protect and perpetuate our ancestral language, cultural history, and
16 traditional practices. I seek to preserve that which makes us Yaqui.

17 3. Yaquis are a spiritual people with a deep connection to the natural world.
18 There is a belief that the first Yaqui people lived in Huya Ania or the Wilderness World,
19 a very special place where plants, animals and rocks are all one and communicate. To
20 this day, we approach the Huya Ania through prayer and ceremony. Our ceremonies are
21 closely tied to the Wilderness World and we see this through the iconic symbol of the
22 deer and the Deer Dancer, who represents the beauty and gifts of the natural world, a
23 spiritual world. The Deer Dance thanks and honors the deer for coming from its home,
24 the flower world (Sea Ania), and letting itself be sacrificed so that my people may live.

25 4. Water has always been part of the Tribe’s subsistence, culture, and identity.
26 Water not only represents a resource for the Tribe’s subsistence, it is also part of the
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1 worldview that supports the Tribe’s culture. In Yaqui culture all water has value.

2 5. The Yaqui community maintains a historical relationship with water. The
3 Tribe celebrates life, culture, and spiritual connection with water. For example, the
4 Yaqui people have long had a deep cultural and spiritual connection to the Yaqui river,
5 traditionally known as the “*Hiak Vatwe*.” These traditions, spiritual connections, and
6 cultural identities are carried with the Yaqui people wherever they go. Today the Tribe
7 continues to honor and revere the blessings that water has bestowed upon them since time
8 immemorial.

9 6. It is the Yaqui belief that water calls water. The river calls the rain and the
10 plants attract the rain. It is also believed that when the nutrients in the soil have drained
11 away, with them goes the strength of our earth. The Yaqui people know when you
12 irresponsibly or disrespectfully take the water from our land or contaminate the water, the
13 blessings of this life giving element from nature leaves us.

14 7. My work and personal observations have helped me to better understand
15 the relationship between activities that take place in a watershed and water quality
16 downstream. I understand that waters in an ecosystem are connected and that what
17 happens in one affects the whole. I understand that activities that pollute the waters in
18 any of the small ephemeral streams in the watershed also harm downstream waters.
19 Ephemeral streams flow in response to precipitation, often in intense gushes.¹ I believe
20 that to protect water quality for wildlife, habitat, and people, we need to protect all of the
21 tributaries, wetlands, and headwaters upstream.

22 8. Based on what I have read and seen, the new Navigable Waters Rule
23 restricts the categories of waterways protected by the federal Clean Water Act. The Rule
24 categorically excludes ephemeral streams, eliminating protections for the vast majority of

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26 ¹ The following video from Walnut Gulch—a tributary to the San Pedro River in
27 Arizona—depicts the intense, but typical, flows in ephemeral streams in the Southwest:
http://www.tucson.ars.ag.gov/unit/Movies/Aug_1_1990_with_animation.wmv.

1 the waterways in Arizona. The Rule also eliminates protections for many tributaries,
2 wetlands, and headwaters across the Southwest and the nation. The U.S. Army Corps of
3 Engineers recently relied on the Rule to categorically eliminate longstanding protections
4 for the ecologically and culturally significant waters at the Rosemont mine site in the
5 Santa Rita Mountains.

6 9. By removing protection for all ephemeral streams and some tributaries,
7 wetlands, and headwaters of a watershed, the Rules will result in the neglect and
8 degradation of ephemeral and other waters on the Pascua Pueblo Yaqui Reservation and
9 throughout the desert Southwest.

10 **Irreparable Harm to Waters on Tribal Lands**

11 10. The Pascua Yaqui Reservation sits above a major wash known as Black
12 Wash, which connects with another ephemeral stream in the middle of the Reservation.
13 Black Wash is an ephemeral stream that has running water at 100,000 cubic feet per
14 second and the adjoining wash runs at a rate of over 2,000 cubic feet per second. These
15 waters often originate in wetlands and ephemeral streams upstream of the Reservation.

16 11. The Rule will, however, eliminate Clean Water Act protections for these
17 ephemeral streams, including the network of streams and wetlands above the reservation
18 that contribute significant fractions of the flows in Black Wash that cross the Reservation.

19 12. The revised definition will also harm public drinking water systems.
20 Ephemeral portions of headwater stream systems sustain surface waters that contribute to
21 downstream drinking water supplies. A 2009 report by the EPA highlights of the
22 357,403 total miles of streams supplying public drinking water systems, 58% are
23 intermittent, ephemeral, or headwater streams. These intermittent, ephemeral, and
24 headwater stream systems supply water for tribes, including the Yaqui.

25 13. Some who may visit our home in the southwest may see the Huya Ania and
26 see a vast arid desert, however for those who live here, each day we see the life that exist
27 in abundance and how all living things respond to the availability and cycles of water that
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1 bless our place. Without protection of this life giving element and system, we truly will
2 see the disharmony and resulting destruction created by the inability to protect Mother
3 Earth and her vascular system which feeds life to all parts of her being. As caretakers
4 and stewards of the land here, we are especially and highly concerned with the protection
5 of the waterways and systems of the place we call home. The tributaries and arroyos that
6 create places like Black Wash, the Santa Cruz River, the San Pedro River, Davidson
7 Canyon, and Gardener Canyon are all special places that are imperative to our traditional
8 lifeways, and our spiritual harmony. From our vantage point, without specific protection
9 for these places we see plans to ignore the responsible and respectful stewardship of the
10 all life inhabiting Southern Arizona. If groups, corporations and business are not
11 required to guide themselves in the best practices of stewardship, we will see
12 inconsistency of levels of care and foresight that will further disrupt the cycle and
13 harmony of these natural places.

14 **Irreparable Harm to Waters at Proposed Rosemont Mine Site in the Santa Rita**
15 **Mountains**

16 14. The Santa Rita Mountains, including the site of the proposed Rosemont
17 Mine, are sacred to our people and are vitally important to our cultural life. Our
18 ancestors lived, travelled, hunted and sought protection in these mountains. They likely
19 lived with the early Hohokam people and may be buried alongside them at the Rosemont
20 site. The Santa Rita Mountains are also home to animals such as the deer, mountain lion,
21 and spotted jaguar, all of whom we consider sacred.

22 15. The seeps and springs that exist in the Santa Rita Mountains provide a vital
23 source of water and sustain human, plant and animal life. We offer them prayers and
24 blessings. These mountains recharge the underground aquifer, which supports these
25 water sources throughout the year. Our ancestors depended on these water sources to
26 survive in this harsh environment; we continue to rely on these water sources to these
27 days.

1 16. I have personally visited the Santa Rita Mountains, including the area
2 around the proposed Rosemont Mine, to explore and search for traditional materials and
3 herbs. In early 2018, I visited the proposed mine site with two staff members from our
4 History and Culture Program and three tribal elders. We approached the Rosemont site
5 from Interstate 83 on the East, toured the site, traversed the Santa Rita Mountains, and
6 exited the mountains on the west at Continental, Arizona. During our visit, we explored
7 the hillsides and found medicinal plants and herbs traditionally used by the Yaqui. Upon
8 our visit, we offered thanks to Itom Achai O'ola, our Creator, for the gifts of the
9 Wilderness World and the mountains and acknowledged our ancestors' spirits who reside
10 there to this day.

11 17. I plan to return to the mine site with our tribal elders to carefully document
12 the exact location of the ancestral villages, trails, and encampments of the Yaqui. I plan
13 to use this information to create a larger map of the area documenting our cultural and
14 spiritual connection, both so that we can preserve this information and pass it on to future
15 generations. I would like to gather traditional materials for cultural uses from this site on
16 future visits.

17 18. The government has long recognized its authority and obligation to protect
18 the ephemeral and intermittent streams, as well as the seeps and springs, found
19 throughout the Santa Rita Mountains. These streams and the water within them are a
20 precious life-giving force in the desert, which have helped sustain life in the mountains
21 for thousands of years. The Yaqui value this water and feel that is a blessing. When we
22 are blessed with water, it transforms the world. It is a conduit of life for everything.

23 19. Hudbay Minerals Inc., however, proposes to construct a mile wide by half-
24 mile deep open-pit copper mine in the Santa Rita Mountains, known as the Rosemont
25 mine. The proposed mine would also include towering waste dumps, industrial
26 processing facilities, and extensive utility corridors cutting across the landscape. To
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1 construct the mine, Hudbay would fill the network of ephemeral and intermittent streams
2 that weave throughout the project site like capillaries through tissue.

3 20. Harming the streams on the mine site irreparably damages everything that
4 exists. Once Hudbay fills the streams, they would exist no more; there would be no way
5 to recreate these water sources once the mine is constructed. When the streams are
6 destroyed, so too is the spiritual power of the place. In our belief system, if we do not
7 show care and gratitude through our stewardship for natural elements, and water in
8 particular, we will suffer severe consequences. Where once water was a blessing to the
9 hillsides in the form of springs, creeks, and arroyos, life will cease to exist.

10 21. The proposed mine will severely and irreversibly impact my use and
11 enjoyment of the area. It will gouge a half-mile-deep pit into the aquifer that will reverse
12 groundwater flows, desiccating sacred seeps, springs, and streams throughout the region,
13 which I have enjoyed. I am concerned that the mine will reduce or maybe even eliminate
14 surface and groundwater flows at the confluence Davidson Canyon and Cienega Creek,
15 thereby killing the riparian habitat that I visit in this area. I am also concerned that runoff
16 from the mine will pollute Davidson Canyon and Cienega Creek, further impacting these
17 outstanding areas that I know and visit. I am concerned that the toxic mine pit will
18 poison the groundwater supply for the greater Tucson area, where I live, and leave an
19 everlasting scar on the landscape.

20 22. Destroying the streams at the mine site and degrading the entire watershed
21 will also severely and irreversibly impact my cultural and religious beliefs. The harms to
22 sacred waters will impact animals and wildlife that inhabit the landscape, including the
23 Jaguar. Their habitat would be destroyed and they would no longer be able to find the
24 scarce water they need to survive in this place. The destruction of the streams and
25 necessary abandonment of this area by wildlife would irreparably impact my ability to
26 enjoy the site's natural beauty and wildness.

1 23. If Rosemont were to build the mine, gone would be the critical stormwater
2 flows that maintain this living and breathing landscape. Instead, these sources of life
3 would become sources of toxic runoff, forever degrading this special place. I fear there
4 will be nothing but destruction to pass along to the next generation.

5 24. I have learned that, based on the new Rules, the Corp revoked its Clean
6 Water jurisdiction over the mine site on March 24, 2021 without ever consulting with the
7 Pascua Yaqui Tribe on such a striking and impactful decision. By revoking jurisdiction,
8 the Corp has stripped the waters at the Rosemont site of protections under the Clean
9 Water Act, allowing for the pollution and the filling of the culturally and ecologically
10 significant streams, seeps, and springs on the site.

11 25. This Court could prevent these irreversible harms by vacating the Rules.
12 As a result of such an order, waters of cultural importance to the Tribe will regain
13 protections under the Clean Water Act, thereby protecting, in part or whole, my
14 connection to these waters, and the Tribe's cultural identity.

15 Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the
16 foregoing is true and correct.

17 Executed this 6th day of May 2021 in Tucson, Arizona.

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20 _____
21 DANIEL VEGA
22 Director, Department of Language and Culture, Pascua Yaqui Tribe
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