



October 4, 2021

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Mr. John Goodin
Director
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Jaime A. Pinkham
Acting Assistant Secretary of the Army for
Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Mr. Vance F. Stewart III
Acting Principal Deputy
Office of the Assistant Secretary of the
Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

**Comments of Pueblo of Jemez in Response to Request for Recommendations on Defining
“Waters of the United States”**

Docket No. EPA-HQ-OW-2021-03281

Dear Administrator Regan, Acting Assistant Secretary Pinkham, Director Goodin, and Acting Principal Deputy Stewart:

First, thank you for the opportunity to provide written comment through the tribal consultation process as your agencies (“the Agencies”) initiate regulatory action to revise the definition of the “waters of the United States” under the Clean Water Act.¹

As detailed below, the Pueblo was substantially harmed by the now-vacated Navigable Waters Protection Rule (“Navigable Waters Rule”), which stripped Clean Water Act (CWA) protections from most of the Pueblo’s waters, left the Pueblo exposed to upstream pollution, and did not

¹ Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 41,911, 41,913 (Aug. 4, 2021) [hereinafter Preproposal Notice].

Natural Resource Department
4471 Highway 4, PO Box 398
Jemez Pueblo, NM 87024

provide or address the gap created in the Pueblo's legal and resource capability to protect its waters.

In keeping with the Agencies' stated intention to initiate a two-step process, the Pueblo urges the Agencies' to first act promptly to restore and implement the regulatory framework in effect prior to the Navigable Waters Rule. (We refer to that pre-existing framework here as the pre-2015 regulations).

Second, after a straightforward restoration of the pre-2015 regulations, we urge the Agencies to promulgate a new definition of "waters of the United States" that is not only grounded in the Clean Water Act's language, structure, and purpose—as interpreted by the courts—but that also recognizes the unique trust duties that the Agencies owe to the Pueblo and other American Indian Tribes.

In support of these recommendations, the Pueblo offers comments below in response to several issues upon which the Agencies have solicited input. In particular the Pueblo provides comments:

- Identifying the ways in which the 2019 repeal of the Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule were unlawful, as detailed in a lawsuit filed by the Pueblo, including the ways in which the definition adopted in the Navigable Waters Rule was impermissible under statute and caselaw, and the ways in which the Agencies failed to adequately support the rule in the record, failed to respond to the Pueblo's comments, and breached their trust duty to the Pueblo;
- Identifying the ways in which the Pueblo was harmed by the Navigable Waters Rule, including by stripping CWA protections from a majority of its streams and exposing the Pueblo to upstream pollution;
- Responding to questions about the jurisdictionality of tributaries by making clear that the science prohibits a categorical exclusion of ephemeral streams under the significant nexus test, and urging the Agencies to ensure jurisdictionality of any stream that meets this test;
- Responding to questions about role of environmental justice considerations by making clear that the Navigable Waters Rule resulted in disparate harms to the Pueblo and other Southwestern Native American communities and that any future rule must actively consider and prevent such harms;
- Articulating the Agencies trust duty to meaningfully consult with the Pueblo and other American Indian tribes, consider how any proposed redefinition of the waters of the United States will affect tribal rights and resources, and that it also requires resolution of any statutory ambiguities in the statute in favor of protecting Tribal waters; and
- Providing input on issues related to climate change and regional approaches.

I. Background: The Pueblo of Jemez²

The Pueblo of Jemez is a federally recognized American Indian tribe with a government-to-government relationship with the United States.³ Unlike many other Indian tribes in the United States, the Pueblo was never removed from the land it has held since time immemorial and has retained property rights to the lands. The modern-day Pueblo of Jemez is located approximately 40 miles northwest of Albuquerque, New Mexico. The Pueblo of Jemez's reservation encompasses more than 89,000 acres.

The Pueblo's land includes lands held in fee with federal restrictions, thereby constituting federal trust lands, federal reservations held by the United States in trust for the Pueblo, and fee lands. These figures do not include Indian aboriginal title lands. The Pueblo of Jemez is historically linked to the Pueblo of Pecos, as they were legally merged into one Pueblo by an Act of Congress.⁴ The Pecos culture and traditions have been preserved and incorporated with the Jemez culture, as the Pueblo of Jemez recognizes the Governor of Pecos as their second Lieutenant Governor. The Pueblo of Jemez is home to more than 3,400 enrolled tribal members.

The Pueblo of Jemez is located within the Jemez River watershed, and the Jemez River flows through the Pueblo's lands and jurisdiction. The headwaters of the Jemez River start within the Valles Caldera National Preserve. The Jemez River is fed by San Antonio Creek and the East Fork River, and has many tributaries, such as the Rio Guadalupe.

There are 57.5 stream miles located within the Pueblo of Jemez's reservation, of which 80% are ephemeral streams and 7% intermittent streams. Additionally, there are 888.9 stream miles located outside the Pueblo's reservation lands that are part of the hydrologic systems that have supported Pueblo life for more than a millennium. These waters have a direct effect on the Pueblo and the waters within it.

The Pecos watershed is also culturally significant to the Pueblo as ancestral homelands and consists of 189,789 acres. The Pecos watershed consists of 309 stream miles.

The Pueblo of Jemez's Natural Resources Department (NRD) is the Tribal department charged with the responsibility to *protect, preserve and manage* the cultural and environmental resources of the Pueblo. NRD oversee the following: forestry, range, wildlife, farm services, cultural & environmental compliance, water & air quality monitoring, and the Pueblo's irrigation system. . NRD is made up of 22 full-time employees plus a tribal Youth Conservation Corps.

According to Jemez core beliefs, water is considered the key to life. Throughout time, water has been the greatest predictor of villages, farms, commerce, and other markers of human success.

² This information is largely reproduced from the complaint filed by the Pueblo *in Jemez v. Regan*, 21-cv-277-WJ-KK (D.N.M. Mar. 26, 2021), and by the Declarations of Tammy Belone and Christopher Toya filed in the same case. Both are attached to these comments.

³ Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021).

⁴ Act of June 19, 1936, Pub. L. No. 74-693, 49 Stat. 1528 (1936) (consolidating the Pueblos of Jemez and Pecos).

For the Pueblo, there is a significant connection between the Jemez River and the sustainability of the Pueblo's agriculture and way of life. Given this connection, members of the Jemez community directly consume and use water from the Jemez River and other streams on and off the reservation as part of daily life and ceremonial practices. Many Jemez people use the water from the Jemez River to farm, recreate, and for ceremonial purposes. Some people do not drink water from the Jemez River anymore, because they are worried about the water quality. These streams continue to have historic, spiritual, and cultural significance to the Pueblo, and Pueblo members continue to visit and use these waters for ceremonial and spiritual purposes, which require that a high level of water quality be maintained.

II. Pueblo's Challenge of the 2019 Repeal Rule and the 2020 Navigable Waters Protection Rule

The 2019 repeal of the Clean Water Rule ("Repeal Rule") and the 2020 promulgation of the Navigable Waters Protection Rule ("Navigable Waters Rule") by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers ("The Agencies") had the effect of stripping the Pueblo's waters of Clean Water Act protections without regard as to how this would affect the Pueblo or lead to pollution of downstream, traditionally navigable waters. The Pueblo, together with the Pueblo of Laguna, therefore challenged these actions in the U.S. District Court for the District of New Mexico in *Pueblo of Jemez v. Regan*.⁵

In its complaint, the Pueblo laid out the ways in which both the repeal of the 2015 Clean Water Rule and the promulgation of the 2019 Navigable Waters Rule were unlawful.⁶ In short:

- The 2020 Navigable Waters Rule adopted a definition of "the waters of the United States" that is unlawful under both the text of the CWA and under applicable case law, including under *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006).
- The promulgation of both the 2019 Repeal Rule and 2020 Navigable Waters Rule was unlawful under the Administrative Procedure Act because the actions were not adequately supported by the record. In particular, the Agencies failed to provide a detailed explanation of what science supported the Agencies' radical changes; did not acknowledge, assess, or consider how this reversal of policy would harm the Pueblos' longstanding reliance on federal CWA protections of their waterbodies; and also failed to abide by executive branch policies with regards to environmental justice, including with regards to tribes.
- The promulgation of the 2020 Navigable Waters Rule was unlawful because the Agencies did not meaningfully consider and address significant comments from the Pueblo. In particular the Agencies failed to address how the Pueblo was supposed to fill in gaps in enforcement created by the rule, how the rule satisfied the Agencies' trust responsibility to the Pueblo, and proposals that the Agencies maintain broader federal CWA jurisdiction for the Pueblo.

⁵ No. 1:21-cv-277-WJ-KK (D.N.M. Mar. 26, 2021).

⁶ See complaint in attachment.

- The promulgation of the 2020 Navigable Waters Rule was unlawful because it violated the federal government’s trust responsibilities for tribes. In particular, the Agencies breached their trust responsibility by failing to protect tribes and tribal resources, by not considering how their actions would affect tribal resources, and by failing to follow their own tribal consultation policies and therefore failing to conduct meaningful consultation.

The Navigable Waters Rule has now been vacated by two federal courts—the District of Arizona and the District of New Mexico—and the judge in the District of New Mexico hearing the Pueblo’s challenge recognized this vacatur in the case filed by the Pueblos.⁷

The Pueblo submits its complaint and its response in partial opposition to the Agencies’ motion for voluntary remand of the Navigable Water Rule without vacatur in *Jemez v. Regan* as appendices to this comment, as well as declarations filed in this case.

The Pueblo urges the Agencies to promptly enact a straightforward rescission of the Navigable Waters Rule, followed by a substantive revision of the rule that is consistent with the statute’s purpose and obligation of the Agencies to protect Pueblo water resources for all of the reasons summarized above and detailed in the attached complaint.

III. The NWPR harmed the Pueblo by exposing it to unregulated upstream pollution and leaving it without the means to protect itself from such pollution⁸

The EPA’s pre-proposal Notice solicits input on “co-regulator experiences with implementing various regulatory regimes,” and says that the Agencies “are committed to listening to specific tribal interests that should be considered in any revised definition” of the waters of the United States.⁹ The Pueblo here provides its experience with the Navigable Waters Rule. The 2019 Repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule harmed the Pueblo of Jemez by removing its authority to enforce federal water quality standards within waterbodies on and off Pueblo lands that are critical to Pueblo agriculture, culture, and religion. The repeal of the 2015 Clean Water Rule and the promulgation of the 2020 Navigable Waters Rule also harmed the Pueblo of Jemez by leaving the Pueblo without the capacity or resources to administer its own water quality standards and without the legal authority under the CWA to enforce water quality standards against upstream discharges. Because the 2020 Navigable Waters Rule categorically excluded ephemeral streams without regard to their impact to water quality, and because the Rule defined ephemeral streams broadly, the rule had the effect of stripping CWA coverage from most of the Pueblo’s waters. Fortunately, the NWPR was vacated for its shortcomings and is no longer in effect.

According to an analysis by the Pueblo’s Natural Resources Department (“Department”) based on data from the University of New Mexico’s New Mexico Resource Geographic Information

⁷ *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021) (vacating Navigable Waters Rule); *Navajo Nation v. Regan*, No. 20-CV-602-MV (D.N.M. Sept. 27, 2021) (vacating Navigable Waters Rule); *Jemez v. Regan*, 21-cv-277-WJ-KK (D.N.M. Mar. 26, 2021) (finding vacatur moot in light of *Pascua Yaqui Tribe*).

⁸ This information is largely reproduced from the Declaration of Tammy Belone in *Jemez v. Regan*, attached to these comments.

⁹ Preproposal Notice, 86 Fed. Reg. at 41,913.

System, there are 7 miles of perennial streams in the Pueblo's trust lands, 4.2 miles of intermittent streams in trust lands, and 46.3 miles of ephemeral streams in the trust lands. Moreover, there are 43.3 miles of perennial streams upstream outside of trust lands, 133.2 miles of intermittent streams outside trust lands, and 712.5 miles of ephemeral streams outside trust lands. Nearly all of these stream miles are upstream of the Pueblo. Based on this analysis, the Department believes that it is likely that over the entire Jemez River watershed, 94% of the streams were stripped of their jurisdictional status under the vacated Navigable Waters Rule. Within the boundaries of Jemez Pueblo's trust lands, 87% of the streams likely became unregulated. In contrast, it is the understanding of the Department that the majority of streams in the Jemez watershed, including intermittent and ephemeral streams, were jurisdictional under the pre-2015 Clean Water Rule regulations.

This outcome left the Pueblo exposed to water pollution, especially from upstream polluters. These harms were exacerbated by the fact that the Pueblo does not have the resources or capacity to implement its own water quality program, separate from the CWA, to protect the water quality of waters that are determined not to be "jurisdictional" under the CWA. The Pueblo relies on the federal Clean Water Act, in particular grants under Section 106, to protect the water quality of the Pueblo's waters. Moreover, the Pueblo is currently working with EPA to develop its own water quality standards under the Clean Water Act Section 303(d). The Pueblo would not have the resources or capacity to develop and implement standards for waters that were not jurisdictional under the Clean Water Act.

In sum, the promulgation of the 2019 Repeal Rule and the 2020 Navigable Waters Rule profoundly harmed the Pueblo by exposing it to unregulated upstream pollution and leaving the Pueblo unable to fill the gap in water quality protection.

IV. Intermittent and ephemeral waters must be jurisdictional when they affect the chemical, physical, and biological integrity of downstream waters

In their Preproposal Notice, the Agencies request comment on “the scope of jurisdictional tributaries,” including intermittent and ephemeral streams, and “exclusions from the definition” of the waters of the United States.¹⁰ The 2020 Navigable Waters Rule unlawfully and profoundly harmed the Pueblo in large part because it categorically exempted ephemeral streams from CWA jurisdiction and broadly defined such streams.¹¹ This despite ample evidence in the record that ephemeral streams often meet the required “significant nexus” that determines CWA jurisdictionality. In *Rapanos*—a 4-1-4 plurality opinion—Justice Kennedy held in his controlling concurrence that jurisdictionality under the Clean Water Act should be controlled by a determination of whether there was a physical, biological, and chemical linkage between the water in question and a traditionally navigable water.¹² After the decision, the agencies applied this “significant nexus” test to determine jurisdictionality of these streams on a case-by-case basis.¹³ Subsequent to *Rapanos*, multiple scientific reports and bodies demonstrated that in many cases, intermittent and ephemeral streams met the significant nexus test.¹⁴ Subsequently, the 2015 Clean Water Rule categorically included as “waters of the United States” intermittent and ephemeral tributaries that “have the presence of physical indicators of flow including a bed, bank, and ordinary high water mark” and “contribute[] flow ... to a traditional navigable water.”¹⁵ Ephemeral streams are defined by scientists as a “stream or portion of a stream which flows briefly in direct response to precipitation in the immediate vicinity, and whose channel is at all times above the ground-water reservoir.” An intermittent stream is “a stream where portions flow continuously only at certain times of the year, for example when it receives water from a spring, ground-water source or from a surface source, such as melting snow (i.e. seasonal).”¹⁶ In the arid West, ephemeral streams may be dry for much of the year. Nevertheless, these streams still perform critical ecological and hydrological functions by conveying water downstream after precipitation events, and may also convey subsurface water, down the watershed and into aquifers.¹⁷ Ephemeral waters “provide the same ecological and hydrological functions as perennial streams by moving water, nutrients, and sediment throughout the watershed.”¹⁸ Additionally, high temperatures, low humidity, and vegetation water demands during the day make streams in arid lands extremely dynamic, losing tremendous amounts of water during the

¹⁰ Preproposal Notice, 86 Fed. Reg. at 41,914.

¹¹ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,338 (Apr. 21, 2020).

¹² *Rapanos* at 766-767 (citing *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Riverside Bayview Homes, Inc.*, 474 U.S. at 121 (1985)).

¹³ EPA and Corps Memorandum, CWA Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* 3, 8 (Dec. 8, 2008).

¹⁴ See, e.g., THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST, ENVIRONMENTAL PROTECTION AGENCY (2008) https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf

¹⁵ 80 Fed. Reg. 37,053, 68, 75-76 (June 29, 2015) [Hereinafter EPA SOUTHWEST STREAMS REPORT].

¹⁶ EPA SOUTHWEST STREAMS REPORT at 6.

¹⁷ *Id.* at 3, 22.

¹⁸ *Id.* at iii.

day while resurging during the night when ecosystem water use is less.¹⁹ This dynamic nature of an arid landscape stream makes it hard to classify a stream as ephemeral because a stream may flow most of the time with breaks only at the hottest point of the afternoon. Even though ephemeral streams do not contribute surface water to larger waters year-round, they perform the same major functions as perennial streams including water, nutrient, and sediment transport.²⁰ In flood events, the sediment and nutrient load discharged from an ephemeral stream to a perennial stream can be tremendous, impacting the substrate, geochemistry, and biotic communities of waters far downstream, often into navigable waters.²¹

The American Southwest is impacted by the North American Monsoon season. In the North American monsoon season, ephemeral streams in the American Southwest periodically flood after heavy rain events and connect to perennial and intermittent water bodies.²² The extent of the impact monsoon floods have is uncertain, largely because of the brief opportunity to study an ephemeral stream flash flood after a monsoon event.²³ Still, limited analysis suggests that monsoon floods from ephemeral streams can have dramatic impacts on the hydrology of larger main stem and navigable rivers.²⁴ Categorically exempting ephemeral streams as Waters of the United States ignores the obvious—that ephemeral streams regularly provide connection to perennial waters, and that contaminants, nutrients, sediments, and surface flow from ephemeral stream beds feed into these perennial waters.

In the desert Southwest, over 80% of streams are intermittent or ephemeral.²⁵ Categorical exclusion of these streams removes protections for most of the water sources in the region. As noted above, the connection between ephemeral waters and perennial surface waters is significant. EPA must therefore immediately return to the case-by-case significant nexus analysis of intermittent and ephemeral streams that it conducted under the pre-2015 regulations, and in the longer term, develop a definition of the waters of the United States that reflects the scientific understanding of the significant physical, biological, and chemical linkages between these streams and perennial waters.

V. *The jurisdictional status of waters is an environmental justice issue*

In their Preproposal Notice, the Agencies solicit information about how the “jurisdictional status of waters affect communities that are overburdened with environmental pollution?”; “How is the implementation of NWPR impacting low-income communities, and other disadvantaged

¹⁹ *Id.* at 16.

²⁰ *Id.* at 26.

²¹ *Id.*

²² Enrique R. Vivoni, *Analysis of a monsoon flood event in an ephemeral tributary and its downstream hydrologic effects*, 42 WATER RESOURCES RESEARCH ISSUE 3 (March 7, 2006).

²³ *Id.*

²⁴ *Id.*

²⁵ Leibowitz et al., *Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework*, J. AMER. WATER RES. ASS'N, 304 (Apr. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6071435/> (citing to L. Levick et al., U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*. EPA/600/R-08/134, ARS/233046 (2008)).

communities?"; and "Can the jurisdictional status of waters be linked to environmental justice concerns, and, if so, what is the basis?"²⁶ According to the EPA, environmental justice means "equal access to the decision-making process to have a healthy environment in which to live, learn, and work."²⁷ This definition has a procedural and a substantive component. Procedurally, environmental justice means making sure marginalized communities have a seat at the table, an opportunity to meaningfully participate in decisions that affect their future. Substantively, environmental justice requires that policies are developed in conversation with affected communities to correct historic injustices and to affirmatively identify and prevent future injustices, including disparate impacts of pollution.

EPA studies have shown that polluters are more likely to operate in communities of color, making race a greater indicator of pollution exposure than poverty.²⁸ Race, not socioeconomic status, is the determinative factor.²⁹ When race increases someone's chances of exposure more than socioeconomic status, the cause must be race based, not a mere concentration of people of color in poverty. This means that the government grants permits for high-pollution industries in communities of color far more often than in low-income—but predominately white—communities. "[A]lmost anywhere researchers look," they find deep racial disparities in who is exposed to environmental hazards.³⁰ An environmental justice focus is necessary because, in the words of EPA's own study, "a focus on poverty to the exclusion of race may be insufficient to meet the needs of all burdened populations."³¹

In New Mexico, Native American communities have been subject to significant environmental injustice. This includes a history of disregarding Pueblo claims and rights to ancestral territories,³² a history of disparate pollution related to uranium mining,³³ and other examples.³⁴ The Navigable Waters Rule stripped nearly all of the Pueblo's waters of CWA protections and exposed the Pueblo to unregulated pollution. This was consistent with the impact of the Navigable Waters Rule on the arid Southwest as a whole. As the Agencies have noted, the Navigable Waters Rule disproportionately stripped CWA protections from waters in the region in comparison to the rest

²⁶ Preproposal Notice, 86 Fed. Reg. at 41,913.

²⁷ EPA, Environmental Justice (Last accessed 9/24/21) <https://www.epa.gov/environmentaljustice>

²⁸ Mikati, et al. *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AMER. J. PUB. HEALTH 480 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844406/>

²⁹ Id.

³⁰ Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, The Atlantic (Feb. 28, 2018), ("results at national, state and county scales all indicate that non-Whites tend to be burdened disproportionately to Whites.") <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>

³¹ Mikati, et al. *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AMER. J. PUB. HEALTH 480 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844406/>

³² See e.g., *Pueblo of Jemez v. United States*, 430 F. Supp. 3d 943, 953 (D.N.M. 2019), *amended on reconsideration*, 483 F. Supp. 3d 1024 (D.N.M. 2020) (Pueblo of Jemez seeking to validate aboriginal title to ancestral lands in Valles Caldera)

³³ See Eric Jantz, *Environmental Racism with a Faint Green Glow*, 68 NAT. RESOURCES J. 247, 251-252 (2017).

³⁴ See generally, ATRI, FINAL REPORT: A REPORT ON ENVIRONMENTAL JUSTICE IN NEW MEXICO (2004); CLIFFORD J. VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 302 (3rd Ed. 2020).

of the country, particularly in the Arizona and New Mexico.³⁵ New Mexico and Arizona both also have some of the highest per-capita percentages of Native American residents. New Mexico ranks third in Native Americans as a percentage of all residents, and Arizona ranks seventh.³⁶ The combination of these factors—desert hydrology and the geographic location of Native communities—means that the Navigable Waters Rule had the effect of disparately stripping Clean Water Act protections from areas with higher Native populations. This means that the Rule disproportionately harmed Native American communities. This discriminatory impact violates the principles of environmental justice. It also violates the directive in Exec. Order 12,898, which directs every federal agency to “conduct its programs, policies, and activities ... in a manner that ensures that such programs, policies, and activities do not have the effect of ... denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities because of their race, color, or national origin.”³⁷ The Pueblo believes that there are additional legal bases for prohibiting such discrimination, and intends to provide additional information on these bases in future communications.

³⁵ See Declaration of Rhadika Fox, ECF No. 28-1, *Jemez v. Regan*. “In New Mexico and Arizona ... of over 1,500 streams assessed ... under the [Navigable Waters Rule], *nearly every one* has been found to be a non-jurisdictional ephemeral resource, which is very different from the status of the streams as assessed under both the Clean Water Rule and the pre-2015 regulatory regime.”

³⁶ See *Native Americans and the US Census: How the count has changed*, USAFacts.org <https://usafacts.org/articles/native-americans-and-us-census-how-count-has-changed/> (last visited Oct. 1, 2021).

³⁷ Exec. Order , Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at Sec. 2-2 (Feb. 16, 1994).

VI. The definition of the waters of the United States must reflect the Agencies trust responsibilities to the Pueblo and other American Indian Tribes

The United States trust responsibility is one of the oldest and most foundational doctrines of federal Indian law.³⁸ The United States trust responsibility entails recognizing and protecting tribal lands, assets, and resources, including the water that flows over and through tribal lands, and the natural resources that depend on that water.³⁹ In 1913, the United States Supreme Court held that Pueblos are tribes for purposes of federal jurisdiction, and Congress holds the power to “enact laws for the benefit and protection of [Pueblo] Indians as a dependent people.”⁴⁰ As dependent Indian communities, Pueblos are considered Indian Country for which the United States has a “duty of exercising a fostering care and protection.”⁴¹

The United States has recognized its trust responsibility to protect Pueblo water resources in the recent settlement involving the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque.⁴² In addition, Congress recognized and preserved the priority of Pueblos’ water rights in Section 9 of the Pueblo Lands Act of 1933.⁴³ Under executive branch policies relating to the trust duty, executive agencies have a duty to meaningfully consult with tribes, consider how agency actions affect tribal rights and resources, and respect tribal self-governance and sovereignty when taking actions that have tribal implications.⁴⁴ These high standards of conduct apply to all executive departments, not just agencies with a “special statutory responsibilit[y],” such as the Bureau of

³⁸ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831) (describing Indigenous tribes as “domestic dependent nations”); see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (rejecting the State of Georgia’s claim of jurisdiction over the Cherokee Nation and re-affirming the federal government’s responsibility to protect the tribes); *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (“[T]he legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes . . .”).

³⁹ See *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (relying on “the undisputed existence of a general trust relationship between the United States and the Indian people.”). The Supreme Court reasoned in *Mitchell*, a case involving the Bureau of Indian Affairs’ control over a tribe’s timber resources, that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.” *Id.* at 225 ; cf. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990) (the Department of the Interior’s express recognition that “Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”).

⁴⁰ *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

⁴¹ *Id.* at 46; see also 18 U.S.C. § 1151.

⁴² See Claims Resolution Act of 2010, Aamodt Litigation Settlement Act, Pub. L. No. 111-291, § 613(c), 124 Stat. 3064, 3141–42 (2010).

⁴³ 48 Stat. 108.

⁴⁴ Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 9, 2000); Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (“executive departments and agencies (agencies) [sic] are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications”); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021) (President Biden recognizing the policy announced in Executive Order 13,175 and continuing commitment to “honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities.”).

Indian Affairs.⁴⁵ The federal government’s trust duty and the policies of the Agencies relating to the trust duty require that the Agencies consider how their rulemakings impact tribal rights and resources.⁴⁶ The federal trust duty also alters the standard deference afforded to federal lawmaking, in that statutes are to be constructed in a way that favors protecting and advancing tribal interests.⁴⁷ The Tenth Circuit has also held the trust duty and the Indian law canons of construction to be extended to executive agency actions.⁴⁸ The canons of construction regarding federal Indian law apply even when an executive official is implementing a statute of general applicability.⁴⁹

In short, the Agencies have a trust duty to protect the Pueblo’s waters, and this trust duty requires meaningfully consulting with the Pueblo and other American Indian tribes and considering how any proposed redefinition of the waters of the United States will affect tribal rights and resources. Under the Indian canons of construction, it also requires that the Agencies resolve any ambiguities in the statute in favor of protecting Tribal waters.

VII. Other Input: Climate Change, Regional Approaches.

The Agencies request input on whether there are “particular types of waters that are especially important in protecting the nation’s waters in the face of a changing climate.” The best science available makes clear that water in the southwest is likely to become less available due to climate change. For example, both snowpack and flows in rivers is expected to continue to decline.⁵⁰ In this climate-impacted future, the state’s need for clean water will put additional strains on water

⁴⁵ *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (quoting Felix S. Cohen, Handbook of Federal Indian Law 225 (1982 ed.)).

⁴⁶ See *Nw. Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996) (stating that the federal trust obligation imposes a fiduciary duty on “any government action” relating to Indian tribes) (citing *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981)); *HRI, Inc.*, 198 F.3d at 1245.

⁴⁷ *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (“the standard principles of statutory construction do not have their usual force in cases involving Indian law.”); *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”).

⁴⁸ *HRI*, 198 F.3d at 1245 (“Considering this duty . . . we conclude that it is reasonable for EPA to adopt an interpretation of its regulations requiring, when lands are in dispute, presumptions in favor of Indian country status and resulting federal jurisdiction.”); see also *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935) (holding that the federal executive is held to a strict fiduciary standard in relations with Indian tribes and is to take “all appropriate measures for protecting and advancing” those tribes’ interests).


⁴⁹ *HRI*, 198 F.3d at 1246–47 (stating that an EPA decision “made within the framework of administering the [Safe Drinking Water Act], implicates the core federal trust responsibilities of administering—and safeguarding—Indian lands.”). In reaching its holding, the Tenth Circuit relied on Felix Cohen’s articulation of this trust responsibility as it applies to executive agencies: “[T]he federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies—unless, of course, Congress has expressly authorized a deviation from these standards in exercise of its “plenary” power. Since the trust obligations are binding on the United States, these standards of conduct would seem to govern all executive departments that may deal with Indians, not just those such as the Bureau of Indian Affairs which have special statutory responsibilities for Indian affairs. Moreover, in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies.” *Id.* at 1245 (quoting Cohen, Handbook at 225).

⁵⁰ GREG GARFINN ET AL., ASSESSMENT OF CLIMATE CHANGE IN THE SOUTHWEST UNITED STATES 6 (2009).

resources.⁵¹As a result, in developing a new definition of the waters of the United States, the agencies must take into account the increased importance of protecting the water quality resources in the Southwest, particularly given the unique hydrology of the region and the project impacts of climate change on water resources. The Agencies also request input on whether “there are certain waters that could be addressed by regionalized approaches.”⁵² The Pueblo notes that because of the Agencies’ trust duty to American Indian tribes, because of the environmental justice concerns about disparate harms to the Tribal communities, and because of the unique hydrology and scarcity of water in the arid Southwest, it may be valuable for the Agencies to consider heightened protections for regions and watersheds where the Pueblo and similarly situated tribes are present.

VIII. Conclusion

The Pueblo thanks the Agencies for the opportunity to offer preproposal written comments as a component of tribal consultation. Because of the harms that the now-vacated Navigable Waters Rule inflicted on the Pueblo, the Pueblo urges the Agencies to promptly restore and implement the pre-2015 regulations as the first step of the revision of the definition of the “waters of the United States.” Second, after a straightforward restoration of the pre-2015 regulations, we urge the Agencies to promulgate a new definition of “waters of the United States” that is not only grounded in the Clean Water Act’s language, structure, and purpose—as interpreted by the courts—but that also recognizes the unique trust duties that the Agencies owe to the Pueblo and other American Indian Tribes.



Interim Director

Prepared with the assistance of clinical law students Jeffrey Hoagland and Stuart Wilkins, working under the supervision of Prof. Gabriel Pacyniak, University of New Mexico Natural Resources and Environmental Law Clinic.

⁵¹ See Letter of James Kenney, N.M. Env’t Dep’t, Comments on Proposed Navigable Waters Protection Rule 5 (Apr.15, 2019)

⁵² Preproposal Notice, 86 Fed. Reg. at 41,913.