

No. 21-454

IN THE
Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF MENOMINEE INDIAN TRIBE OF
WISCONSIN AND 17 FEDERALLY
RECOGNIZED INDIAN TRIBES AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

STUART C. GILLESPIE
EARTHJUSTICE
633 17th St., Suite 1600
Denver, CO 80202

JILL E. GRANT
JILL GRANT &
ASSOCIATES, LLC
1319 F Street, NW
Washington DC 20004

JANETTE K. BRIMMER
Counsel of Record
EARTHJUSTICE
810 Third Ave., Suite 610
Seattle, WA 98104
(206) 504-3459
jbrimmer@earthjustice.org

Counsel for Amici Tribes

June 17, 2022

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTERESTS OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
I. Petitioners’ Narrow Interpretation Would Harm Tribes’ Unique Interests and Rights in the Nation’s Waters	4
A. The Fond du Lac Band and the St. Louis River.....	4
B. The Swinomish Indian Tribal Com- munity and the Skagit River	7
C. The Pueblo of Laguna and Its Reli- ance on Multiple Ephemeral and Intermittent Waters Upstream of and on Laguna Lands.....	9
D. The Shoshone-Bannock Tribes and the Waters of the Snake River Plain ..	11
E. The Tohono O’odham Nation, Pascua Yaqui Tribe, and Ciénega Creek.....	13
II. Without Clean Water Act Protection, Tribes Would Not Be Able To Prevent Harms To Their and Neighboring Waters	14
A. Tribes Rely on Implementation of the Clean Water Act to Protect Waters In Which They Have An Interest	15

TABLE OF CONTENTS—Continued

	Page
1. The Clean Water Act Provides Tribes With Important Tools To Protect Water Quality Uses and Standards	15
2. The Clean Water Act Also Provides Tribes With Tools To Protect Treaty Rights And Other Interests In Waters	16
B. Treatment as a State Status For Tribes Will Not Meaningfully Protect Tribal Waters In the Face of A Narrow Interpretation of Federal Clean Water Act Jurisdiction.....	19
C. States Cannot Fill These Regulatory Gaps	22
CONCLUSION	25
APPENDIX	
APPENDIX A: Pacific Northwest Region Tribal Lands and Watersheds	1a
APPENDIX B: Southwest Region Tribal Lands and Watersheds	2a
APPENDIX C: Seneca Nation Tribal Lands and Watersheds.....	3a
APPENDIX D: Midwest Region Tribal Lands and Watersheds	4a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Arkansas v. Oklahoma</i> , 503 U.S. 91 (1992).....	16
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976).....	18
<i>McClanahan v. State Tax Comm’n of Ariz.</i> , 411 U.S. 164 (1973).....	22
<i>Menominee Indian Tribe of Wis. v.</i> <i>Env’t Prot. Agency</i> , 947 F.3d 1065 (7th Cir. 2020).....	17, 22
<i>United States v. Adair</i> , 723 F.2d 1394 (9th Cir. 1983).....	18
<i>United States v. Washington</i> , 853 F.3d 946 (9th Cir. 2017), <i>aff’d by equally divided court</i> 138 S. Ct. 1832 (2018).....	8
<i>Washington v. Wash. State Com.</i> <i>Passenger Fishing Vessel Ass’n</i> , 443 U.S. 658 (1979).....	17
<i>Winters v. United States</i> , 207 U.S. 564 (1908).....	18
STATUTES AND REGULATIONS	
18 U.S.C. § 1151	20
33 U.S.C. § 1251(a).....	3, 24
33 U.S.C. § 1251(a)(2).....	24
33 U.S.C. § 1313(c)(2)(A).....	24
33 U.S.C. § 1341(a)(2).....	6, 7

TABLE OF AUTHORITIES—Continued

	Page(s)
33 U.S.C. § 1342	16, 21
33 U.S.C. § 1342(a)(1).....	16
33 U.S.C. § 1342(a)(2).....	16
33 U.S.C. § 1342(b)(3).....	16
33 U.S.C. § 1344	9
33 U.S.C. § 1344(a)	16
33 U.S.C. § 1369(b)	16
33 U.S.C. § 1377(e).....	19
33 U.S.C. § 1377(e)(2).....	20
54 U.S.C. § 302701	17
54 U.S.C. § 306102(b)(5)(B).....	17
54 U.S.C. § 306108	17
40 C.F.R. § 122.4(a)	16
40 C.F.R. § 122.4(d).....	16

TREATIES AND AGREEMENTS

Agreement with the Seneca, Seneca-U.S., ("Treaty of the Big Tree"), Sept. 15, 1797, 7 Stat. 601.....	17
Treaty with Ojibwe and Ottawa, Mar. 28, 1836.....	16
Treaty with the Chippewa, Chippewa-U.S., July 29, 1837, 7 Stat. 536.....	16
Treaty with the Chippewa, Chippewa-U.S., Oct. 4, 1842, 7 Stat. 591	16

TABLE OF AUTHORITIES—Continued

	Page(s)
Treaty with the Chippewa, Chippewa-U.S., Sept. 30, 1854, 10 Stat. 1109	16
Treaty with the Eastern Band Shoshoni and Bannock (“Fort Bridger Treaty of 1868”) art. 4, July 3, 1868, 15 Stat. 673	16-17
Treaty with the Navaho, Navajo-U.S., June 1, 1868, 15 Stat. 667.....	17
Treaty with the Senecas, Seneca-U.S., May 20, 1842, 7 Stat. 586.....	17
Treaty with the Six Nations (“Treaty of Canandaigua”), Nov. 11, 1794, 7 Stat. 44 ...	17

OTHER AUTHORITIES

Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991)	2
EPA letter to Florida Dep’t of Environmen- tal Protection, Jan. 31, 2022.....	23
Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022)	14
Jim McElfish, <i>State Protection of Non- Federal Waters: Turbidity Continues</i> , 52 Env’t L. Rep. (forthcoming Sept. 2022)....	23

TABLE OF AUTHORITIES—Continued

	Page(s)
Jim Morrison, <i>An Ancient People With a Modern Climate Plan</i> , Wash. Post (Nov. 24, 2020), available at https://wapo.st/3PgyhJa	8
Letter from EPA to Fond du Lac Band under 33 U.S.C. § 1341(a)(2) dated June 4, 2021, available at https://www.epa.gov/sites/default/files/2021-06/documents/fond-du-lac-polymet-section-401a2-letter-20210604-2pp.pdf . (last visited June 10, 2022).....	7
Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Env'tl. Prot. Agency, to Edwin S. Townsley, Operations & Regul. 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)	14
<i>Resource and Programmatic Assessment for the Navigable Waters Protection Rule</i> , U.S. Env't Prot. Agency & Dep't of the Army (Jan. 23, 2020), available at https://www.epa.gov/sites/default/files/2020-01/documents/rpa_-_nwpr_.pdf	23
<i>State Constraints: State-imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act</i> , Env't Law Inst. (May 2013), available at https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf	23

TABLE OF AUTHORITIES—Continued

	Page(s)
Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act, 81 Fed. Reg. 65,901 (Sept. 26, 2016)	20
<i>Tribes Approved for Treatment as a State (TAS)</i> , Env't Prot. Agency, https://www.epa.gov/tribal/tribes-approved-treatment-state-tas (last visited June 8, 2022)	20, 21

INTERESTS OF *AMICI CURIAE*

The *Amicus* Parties to this brief are federally recognized Indian Tribes from across the United States (the “Tribes”).¹

In the Midwest, the Menominee Indian Tribe of Wisconsin, the Bay Mills Tribal Community, and the Bad River, Fond du Lac, and Grand Portage Bands of Lake Superior Chippewa count thousands of lakes, wetlands, streams, and the Great Lakes as an integral part of their homes, critical to their cultural and subsistence resources.²

In the Southwest, the Tohono O’odham Nation, the Pascua Yaqui Tribe, the Navajo Nation, and the Pueblo of Laguna rely on ephemeral and intermittent streams and rivers with flows that rely on significant storms to water their crops, sustain their homes, and serve as cultural touchstones.

On the West Coast, the Swinomish Indian Tribal Community, the Quinault Indian Nation, the Yurok Tribe, the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, and the Puyallup Tribe of Indians are people of the salmon, dependent upon healthy rivers and tributary streams flowing from the mountains to estuary wetlands at the coast for their traditional foods, subsistence economies, cultural resources, and lifeways.

¹ The parties have consented to the filing of this brief. Under Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

² Maps showing the locations of the Tribes’ reservations and some rivers referenced in this brief are included in the Appendix.

In the eastern Plains, the Iowa Tribe of Oklahoma has settled in eastern Oklahoma, having a woodland heritage, but adopting plains ways over their history. Their landscape is dotted with wetlands and small streams, many intermittent, within the larger watershed of the Cimarron River.

In Idaho, the Fort Hall Reservation of the Shoshone-Bannock Tribes includes the Fort Hall Bottoms, one of the largest wetland waterfowl habitats and premier waterfowl hunting locations in the western U.S. Surface water in the Bottoms area is used by the Tribes' bison herd, which provides subsistence and has cultural significance to the Shoshone-Bannock people.

In the eastern forests, the Seneca Nation and the Rappahannock Tribe live alongside rivers and creeks, including the river that bears the Rappahannock name, and have depended upon these waters and their tributaries and riparian areas for transportation, sustenance, medicines, and spiritual needs throughout time.

For all of these Tribes, clean water and wetlands and the habitat and resources they support are crucial to their physical and cultural survival. *See* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64, 878 (Dec. 12, 1991) (Environmental Protection Agency's Clean Water Act tribal eligibility rule).

INTRODUCTION AND SUMMARY OF ARGUMENT

As sovereign nations, the indigenous tribes of North America rely on the Clean Water Act and have a distinct perspective on the need to protect our nation's waters. Each of the amici Tribes has a unique cultural, religious, and physical connection to water that is integral to who that Tribe is and how the Tribe's people have lived their lives since time immemorial. These waters already face threats that would only be exacerbated by a narrowing of Clean Water Act jurisdiction.

Tribes depend on the Clean Water Act and federal implementation of its provisions to protect waters within their reservation boundaries and on lands on which they retain treaty rights. Excluding entire categories of waters from Clean Water Act protections—as petitioners propose—would undercut tribes' ability to protect against cross-border pollution, including destruction of upstream wetlands that protect tribal waters, and harm treaty protections. Moreover, eliminating federal jurisdiction and permitting requirements would strip away other federal protections like those under the National Historic Preservation Act, a law that is integral to the protection of important tribal historic sites.

Tribes have always known what science fully demonstrates: Waters of the United States, including wetlands, are connected, and the Clean Water Act must comprehensively cover waters to protect and restore the chemical, physical, and biological integrity of the nation's waters, consistent with Congress's purpose and direction, 33 U.S.C. § 1251(a). Interpreting the Act in line with Congress's stated purpose also avoids harming tribal rights, resources, and culture.

ARGUMENT

I. Petitioners' Narrow Interpretation Would Harm Tribes' Unique Interests and Rights in the Nation's Waters.

Under petitioners' interpretation of waters of the United States, thousands of miles of streams and wetlands—many critical to the Tribes—would lose longstanding Clean Water Act protections. Petitioners would confine the Act's protections for wetlands to a narrow subset of those waters: (1) wetlands with a visible and continuous surface water connection to a stream, ocean, river, or lake, and (2) only when that stream, ocean, river, or lake is itself navigable in either interstate commerce or as a navigable intrastate link between waters that are navigable and used in interstate commerce. *See* Petrs. Br. on the Merits 23-25, 36, 42-43. Under that interpretation, degradation or destruction of countless wetlands could proceed unchecked. And if extended to upstream headwaters and ephemeral water bodies, the damage would be even greater. Tribes will deeply experience those consequences, given their cultural connections to, and dependence on, now-protected waters, as the following examples demonstrate.

A. The Fond du Lac Band and the St. Louis River.

The Fond du Lac Band of Lake Superior Chippewa resides in what is now the State of Minnesota. The Band has deep ties to the St. Louis River, which arises in northern Minnesota wetland bogs and ultimately flows along the northern and eastern bounds of the Fond du Lac Reservation to Lake Superior. The Band (along with other Lake Superior Chippewa Bands such as Bad River and Grand Portage) retains treaty rights

to fish, hunt, and gather on lands throughout Minnesota and Wisconsin that include countless headwater streams, tributaries, and wetlands.

Wetlands make up over 50% of the Band's reservation, which also contains 24 lakes and numerous streams, some of which cross reservation boundaries. The Band has developed federally approved water quality standards to protect their waters and the fish the Band rely on.

Waters on the Fond du Lac reservation, as well as many other waters in which the Band has treaty rights, support manoomin, or wild rice, an aquatic plant from which the Band and other Midwestern tribes have harvested for centuries. Manoomin is central to many tribes' sustenance, identities, and economies. It is a required component of certain annual ceremonial feasts. Manoomin is unique to the Northern Great Lakes region; it grows nowhere else in the world. This important plant is highly sensitive to damage by flooding or washout if upstream wetlands that help absorb flows are damaged or destroyed. Manoomin is also adversely affected by pollution, particularly sulfates released from mining activities.

Petitioners' interpretation would put many waters, including wetlands and headwater streams in the Upper Midwest, at risk of losing the protection that the Clean Water Act has provided for 50 years. Mines throughout the Upper Midwest exemplify these risks of that lost protection. The proposed location of the NorthMet open-pit sulfide mine is in the headwater bogs and wetlands that feed into the Partridge River, the start of the St. Louis River. NorthMet would excavate headwater bogs and wetlands to construct its mine pit, while also burying additional wetlands under stories-high piles of waste rock and tailings

generated by the mine. Cumulatively, the U.S. Army Corps of Engineers calculated that NorthMet would likely degrade or destroy a total of 7,694 acres of wetlands in the headwaters of the Partridge and ultimately St. Louis Rivers.³

The NorthMet mine, the type of mine that produces acid mine drainage, will introduce mercury and sulfates into the watershed. Mercury accumulates and magnifies up the food chain, including in the fish that the Band consumes. Sulfates released from mining can devastate manoomin if present in even low quantities. The disposal of waste rock will destroy wetlands that now replenish and control flows in headwater streams that in turn flow into the Partridge River and that now filter other pollutants that would otherwise reach the St. Louis River.

As required by the Clean Water Act, 33 U.S.C. § 1341(a)(2), the Environmental Protection Agency notified the Band of the draft permits for the NorthMet mine. The Band objected to the draft permits because pollutants from the mine would violate the Band's downstream water quality standards for mercury and specific conductance.⁴ As the Act requires, the Corps

³ For perspective, Seneca Lake in New York (the largest of the Finger Lakes) is 3,550 acres, less than half the amount of waterbody that will be degraded or destroyed by the NorthMet Mine. Deep Creek Lake in Maryland is 3,900 acres, about half the amount of waterbody that will be degraded or destroyed by the NorthMet Mine. Raystown Lake in the Poconos of Pennsylvania is 8,000 acres, only slightly larger than the amount of waterbody that will be degraded or destroyed by the NorthMet Mine.

⁴ Specific conductance is a measure of dissolved salts and other inorganic chemicals, often a problem associated with discharges

held a hearing on the Band's objections after EPA confirmed that the NorthMet mine may affect the Band's downstream water quality standards.⁵ The Act's regulatory process allows the Band the ability to ensure that its waters will be protected through modification of permit conditions or the project if conditions cannot protect the Tribe's water quality standards.

A narrow interpretation of the Clean Water Act that forecloses this regulatory process could leave the Band with no way to protect itself and its food sources from violations of its water quality standards from mines like NorthMet.

B. The Swinomish Indian Tribal Community and the Skagit River.

The Swinomish Indian Tribal Community is located on the southeastern side of Fidalgo Island in the Salish Sea, in what is now Washington State. The Swinomish are Coast Salish people who have resided and fished in the region since time immemorial.

The Skagit River arises from small streams, many intermittent, high in the Cascade Mountains in Canada, and empties into the Salish Sea at Skagit Bay just off the southern end of the Swinomish Reservation. The Reservation is within the large coastal estuary of the Skagit River.

from mining operations. Increased salinity from these pollutants can be detrimental to many aquatic resources, including wild rice.

⁵ Letter from EPA to Fond du Lac Band under 33 U.S.C. § 1341(a)(2) dated June 4, 2021, *available at* <https://www.epa.gov/sites/default/files/2021-06/documents/fond-du-lac-polymet-section-401a2-letter-20210604-2pp.pdf> (last visited June 10, 2022).

Today the Skagit River is the second largest salmon-producing river on the West Coast and the only river in the lower 48 states with all six species of wild Pacific salmon. Salmon spawn in its upper reaches and along its many smaller tributaries. Early in their lifecycle, as fry (months old) and smolts (a few years old), salmon rear in the Skagit River's freshwater tributaries and wetlands. Swinomish has studied and identified sloughs and channels along the river that provide critical habitat for juvenile salmon, even though these waters run dry during low river flows. As they make the transformation to becoming saltwater adults, smolts seek the relative safety of the river's lower side streams and especially the estuary wetlands that provide food and cover from predators.

As with many Pacific Coast tribes, Swinomish relies on salmon for its cultural and physical existence.⁶ The Swinomish people call themselves People of the Salmon. In the 1855 Treaty of Point Elliott, a number of tribes in the Pacific Northwest including Swinomish retained the right to take fish in their usual and accustomed fishing places, including the Skagit River.⁷

But degradation of the river and its side channels, sloughs, and tributaries has greatly diminished its salmon population, contributing to Chinook salmon being listed as threatened under the Endangered Species Act. In particular, the draining of estuary wetland habitat lands for intensive agricultural use

⁶ See Jim Morrison, *An Ancient People With a Modern Climate Plan*, Wash. Post (Nov. 24, 2020), available at <https://wapo.st/3PgyhJa>.

⁷ This treaty right includes preventing a state from creating conditions that eliminate fish. See, e.g., *United States v. Washington*, 853 F.3d 946, 962-66 (9th Cir. 2017), *aff'd by equally divided court* 138 S. Ct. 1832 (2018).

has altered the river delta, eliminating habitat important to juvenile salmon and contributing significantly to the reductions of Chinook salmon. Swinomish is actively engaged in restoring estuary habitat on its reservation, but its ability to address the many threats to salmon outside the reservation and throughout the watershed is limited. The Tribe has sometimes been forced to import salmon from Alaska to feed its members and continue its cultural practices and religious ceremonies.

The Tribe has used the Clean Water Act's regulatory structures, to address, in part, some of these threats to the Skagit River. For example, public notice and comment is required for permits the Corps issues for structures that drain or affect wetlands within the basin, *see* 33 U.S.C. § 1344. Through the permitting process and requirements, the Tribe has previously secured permit requirements that require restoration of wetlands necessary for juvenile salmon development. Shrinking the scope of the Act such that fewer wetland-damaging activities require Section 404 permits would leave more wetlands in the Skagit unprotected and would eliminate one of the few procedures by which Swinomish can engage with its Trustees to protect and restore off reservation habitat that is critical to salmon.

C. The Pueblo of Laguna and Its Reliance on Multiple Ephemeral and Intermittent Waters Upstream of and on Laguna Lands.

The Pueblo of Laguna is located in the K'awaika homeland between the Sandia Mountains, Magdalena Mountains, and Mt. Taylor, near where the Rio San Jose meets the Rio Puerco in arid, west-central New Mexico. Approximately 4,800 tribal members live

within the Pueblo's boundaries, which includes approximately 500,000 acres of tribal trust land in Cibola, Valencia, Bernalillo, and Sandoval Counties.

In this arid region, clean water is essential to the Pueblo and its members' daily lives, spiritual beliefs, and cultural and ceremonial practices. Members of the Pueblo consume water directly from surface waters and apply it topically as part of ceremonial practices. They use surface waters for drinking, domestic supply, recreation, irrigation, livestock, and maintaining riparian habitat.

The Pueblo relies on a vast network of ephemeral and intermittent streams connected to the Rio Puerco, which is one of the largest tributaries to the middle Rio Grande. The Rio Puerco drains 7,000 square miles (only slightly smaller than the State of New Jersey), contributing roughly 30,000 acre-feet of water to the Rio Grande each year. Of the 1,416 stream miles within the Pueblo's boundaries and upon which the Pueblo relies, 79% are ephemeral, 18% are intermittent, and only 3% are perennial.

Many of these waters are threatened by upstream mining and other activities that could pollute or destroy the Pueblo's scarce waters in the absence of the Clean Water Act. Existing and potential upstream uranium mines and an upstream coal mine discharge water into ephemeral streams that carry contamination downstream to Pueblo waters. The Pueblo actively uses the tools and regulatory structure of the Clean Water Act to protect its diminishing rivers and streams from these discharges.

The Pueblo estimates that a narrow interpretation of Waters of the United States could strip Clean Water Act protections from 79 to 97% of its waters. That

would limit the Pueblo's ability to ensure that upstream dischargers comply with the Pueblo's water quality standards, resulting in harms to the Pueblo's waters, including waters used for drinking.

D. The Shoshone-Bannock Tribes and the Waters of the Snake River Plain.

The Shoshone-Bannock Tribes are located in what is now the state of Idaho. The Tribes' traditional homelands include the Snake River plain, which is filled with examples of interconnected surface and groundwater that are a critical part of Shoshone-Bannock culture.

The Snake River plain and its surrounding waters occur in a lava geology that is porous, conducting snowmelt into streams and ultimately rivers, but those streams do not all flow year round or are not always visible on the surface. Along the northern boundary three distinct river systems, the Lost River, Little Lost River, and Birch Creek all wind their way through montane river valleys until they 'disappear' or are 'lost' beneath the lava flows. The rivers and creek waters re-emerge in cold, fresh-water springs along the Snake River, including in the Thousand Springs reach of the Snake, which had been one of the most prolific spawning areas in the Snake River basin for fall Chinook salmon, sturgeon, and steelhead. The area is now one of the richest aquaculture regions in the country because of the abundance of clear, pathogen-free spring water, and hatcheries there grow millions of pounds of fish for use in a variety of applications, including conservation hatcheries for steelhead and sturgeon.

One of these downstream spring-fed water-recharging areas, known as the Fort Hall Bottoms, is located

within the Shoshone-Bannock Tribes' Fort Hall Reservation. Groundwater from the "disappearing" rivers and streams of the Snake River plain and Portneuf River watershed rises up and forms several large springs, creeks, and hundreds of smaller order springheads. The springs and creeks have long been important cultural sites for the Shoshone-Bannock. The area is also one of the nation's largest wetland waterfowl habitats and is a premier waterfowl hunting location. The Shoshone-Bannock also use these waters for the Tribes' bison herd, which provides subsistence and has cultural significance.

Old phosphate mines and processing facilities on and upstream of the Fort Hall Reservation have already contaminated tribal waters with phosphorous, arsenic, sulfate, selenium, and radioactive constituents. The phosphate mines have engaged in what they refer to as cross valley fill, the permanent dumping of mine waste in a valley or drainage that typically contains an intermittent or ephemeral stream. That waste releases pollutants, contaminating downstream waters through the ephemeral and intermittent channels. The phosphate mines demonstrate the long-term harms that come to downstream tribes from poorly regulated, or unregulated, discharges of pollutants and fill.

If upstream rivers and ephemeral and intermittent streams are unprotected, then the Shoshone-Bannock Tribes' downstream resources will be jeopardized, either by pollution that is not regulated or by destruction of recharge of springs due to dredging and filling in resource waters.

E. The Tohono O'odham Nation, Pascua Yaqui Tribe, and Ciénega Creek.

The Tohono O'odham Nation and Pascua Yaqui Tribe inhabited large areas of what is now the southwestern United States and northern Mexico. Their ancestors lived, hunted, and sought refuge in the Santa Rita Mountains, which rise as "sky islands" above the desert south of Tucson, Arizona.

The Santa Rita Mountains support a network of ephemeral and intermittent streams, which are of great importance to the O'odham and Yaqui people. Their ancestors depended on these water sources to survive in the harsh desert environment. To this day, the Tribes continue to offer blessings and prayers to these waters, including the seeps and springs throughout the mountains, for sustaining human, plant, and animal life.

A proposed mine in the Santa Rita Mountains shows the adverse effects of stripping these waters of Clean Water Act protection. The Rosemont Copper Company proposes to construct a mile-wide by half-mile deep open-pit copper mine, accompanied by towering waste dumps, industrial processing facilities, and utility corridors. Construction of the mine would fill 18 miles of waters in Barrel Canyon and degrade hundreds of additional acres of streams and wetlands in Davidson Canyon and Ciénega Creek, both of which contain some of the highest-quality stream and wetland ecosystems in Arizona. Heavy-metal runoff would further contaminate the water that reaches these downstream waters, including Tucson's drinking water supply. The EPA concluded that these adverse

impacts would be substantial, unacceptable, and contrary to goals of the Clean Water Act.⁸

If the Clean Water Act does not reach intermittent and ephemeral streams that feed downstream waters, such as those threatened by the Rosemont Mine, the filling in of these upstream waters will adversely affect downstream waters, including all who depend on them for physical, spiritual, and religious needs.

II. Without Clean Water Act Protection, Tribes Would Not Be Able To Prevent Harms To Their and Neighboring Waters.

There are 574 federally recognized sovereign Indian Tribes within the contiguous United States and Alaska.⁹ Tribes are sovereign entities within the United States, as well as within the states. With only a few exceptions, tribes' reservations and lands are downstream of non-tribal lands and often share waterbodies with neighboring states, creating multiple shared waters. This creates significant cross-boundary pollution issues: activities in waterbodies outside reservation boundaries can threaten tribes' waters both on reservation and in other areas in which they have treaty rights, religious interests, or are working to restore important species.

⁸ Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Env'tl. Prot. Agency, to Edwin S. Townsley, Operations & Regul. 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 34 (Nov. 30, 2017).

⁹ See Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022).

The Clean Water Act's protections for all waters, including wetlands, is necessary to protect Tribes and our nation's waters alike. Protection of tribal waters, water-dependent treaty rights, and important tribal cultural resources depends on Clean Water Act jurisdiction and the regulatory protections and processes that come with it. If that jurisdiction is narrowed, neither tribes nor states will be able to prevent the degradation of our nation's waters.

A. Tribes Rely on Implementation of the Clean Water Act to Protect Waters In Which They Have An Interest.

Protection of waters important to tribes occurs almost exclusively through application of the Clean Water Act. Eliminating federal jurisdiction over a wide array of wetlands and, possibly, streams would deprive tribes of important tools for protecting their water quality standards on reservation. It will also impair tribes' ability to enforce treaty rights and protect sacred waters off reservation.

1. The Clean Water Act Provides Tribes With Important Tools To Protect Water Quality Uses and Standards.

Tribes rely on the Clean Water Act's procedures to protect their water quality standards and water quality generally both on their reservations, and waters off their reservations in which they have an interest. Before a permit may issue, the Act requires a permitting authority (the federal government or authorized state government) to provide public notice and opportunity for written comment and a hearing, and specifically requires procedures to ensure that downstream governments, like the Tribes, can enforce their own federally approved water quality standards. *See*

33 U.S.C. §§ 1342(a)(1), (2), and (b)(3), 1344(a), 1369(b). Tribes rely on these procedures to ensure that upstream pollution does not harm downstream reservation water quality standards and uses those standards are meant to protect such as catching and eating fish.

Permits must ensure that activities authorized will not cause or contribute to a violation of downstream water quality standards. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992); *see also* 40 C.F.R. § 122.4(a), (d). Thus, if the State of Minnesota issues a Section 402 (33 U.S.C. § 1342) permit for the discharge of pollution into a tributary of the St. Louis River, the Fond du Lac Band has both a procedural mechanism to enforce its federally approved water quality standards and a substantive guarantee that those standards will not be exceeded because of the permitted activity.

2. The Clean Water Act Also Provides Tribes With Tools To Protect Treaty Rights And Other Interests In Waters.

Tribes also rely on the Act's application to trigger consultation requirements and procedures to protect waters in which they have a treaty, cultural, or other interest.

Federal jurisdiction provides protections for off-reservation treaty rights to hunt, fish, and gather, which often depend on clean water or waters that flow freely.¹⁰ These treaties with the federal government

¹⁰ *See, e.g.*, Treaty with the Chippewa, Chippewa-U.S., July 29, 1837, 7 Stat. 536, Treaty with the Chippewa, Chippewa-U.S., Oct. 4, 1842, 7 Stat. 591, Treaty with the Chippewa, Chippewa-U.S., Sept. 30, 1854, 10 Stat. 1109 (hunt, fish, and gather, for example wild rice or cranberries); Treaty with Ojibwe and Ottawa, Mar. 28, 1836 (hunt, fish and gather); Treaty with the Eastern Band Shoshoni and Bannock ("Fort Bridger Treaty of 1868") art. 4, July

establish property rights that require federal protection. See *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). The federal government thus has an obligation to consult with tribes before acting in a way that may affect a tribe's rights, such as by granting a Clean Water Act permit that would impair, degrade, or eliminate waters in which a Tribe has treaty rights.

Additionally, tribes have strong cultural and historic ties to waters outside their reservations. The National Historic Preservation Act (NHPA) recognizes the importance of indigenous historic sites such as the Santa Rita Mountains and waters for the Tohono O'odham Nation and Pascua Yaqui Tribe, or the Sixty Islands and surrounding forest and wetlands of the Menominee River for the Menominee People. The NHPA requires federal permitting agencies to consult with affected tribes before approving actions that may harm or otherwise negatively affect indigenous historic sites. See 54 U.S.C. § 306108; see also *id.* §§ 302701, 306102(b)(5)(B). But importantly, these obligations attach only to a federal permitting action; if a water is unprotected by the Clean Water Act, so too are tribes' interests in those waters. See *Menominee Indian Tribe of Wis. v. Env't Prot. Agency*, 947 F.3d 1065, 1073-74 (7th Cir. 2020).

3, 1868, 15 Stat. 673 (Shoshone-Bannock rights to hunt, fish and gather); Treaty with the Six Nations ("Treaty of Canandaigua"), Nov. 11, 1794, 7 Stat. 44; Agreement with the Seneca, Seneca-U.S., ("Treaty of the Big Tree"), Sept. 15, 1797, 7 Stat. 601, Treaty with the Senecas, Seneca-U.S., May 20, 1842, 7 Stat. 586 (Seneca Nation treaties upholding rights to hunt and fish); and Treaty with the Navaho, Navajo-U.S., June 1, 1868, 15 Stat. 667 (Navajo Nation treaty right to hunt).

Tribes also have federally reserved water rights that protect quantities of water for their use, an especially important right in the arid West. *Winters v. United States*, 207 U.S. 564 (1908). These water rights apply to all reservations and federal Indian water law does not distinguish whether the waters to which these rights attach are perennial, ephemeral, intermittent, or connected to navigable waters. *See Cappaert v. United States*, 426 U.S. 128, 138-39 (1976). Reserved rights are not limited to waters within reservation boundaries, especially when a tribe has off-reservation treaty rights, *United States v. Adair*, 723 F.2d 1394, 1417-18 (9th Cir. 1983). Clean Water Act jurisdiction and the regulatory processes that come with it are a vital tool to ensuring harm does not come to the waters in which a tribe has these reserved rights.

A number of examples demonstrate how Tribes have used the Clean Water Act's permit requirements and processes to protect the rights described above. The Swinomish Tribe, for example, has obtained mitigation requirements for estuary wetland habitat negatively affected by drainage for agriculture. The Pascua Yaqui Tribe and Tohono O'odham Nation are engaged in the permitting process to prevent adverse effects from the Rosemont Mine to waters and sacred sites in the Santa Rita Mountains. The Quinault Indian Nation has raised objections to proposed Section 404 permitting of a new salmon-blocking dam in the upper watershed of the Chehalis River where the Nation has treaty-protected fishing rights. The Seneca Nation is meeting with the Corps and neighboring New York State to discuss conditions to an upstream permit to protect the Nation's treaty fishing rights and other tribal resources. These Tribes' actions to protect waters important to them were possible only because the Clean Water Act

applied to the activities that have the potential to harm the Tribes' standards, treaty rights, and other interests.

Under petitioners' narrow interpretation of the Clean Water Act, many wetlands and even streams would no longer be covered by the Act's provisions. As a result, tribes would lose the accompanying protections provided by Clean Water Act permitting requirements connected with those waters.

B. Treatment as a State Status For Tribes Will Not Meaningfully Protect Tribal Waters In the Face of A Narrow Interpretation of Federal Clean Water Act Jurisdiction.

Tribes cannot redress the harms from petitioners' narrow interpretation through the Clean Water Act's treatment-as-a-state (TAS) provision. The Clean Water Act authorizes EPA to treat tribes in the same manner as states for purposes of implementing the Act, provided the tribes meet certain jurisdiction and capability requirements. 33 U.S.C. § 1377(e). For example, a tribe may apply for TAS to develop water quality standards and, if approved, the tribe may develop its own water quality standards and submit them for federal approval. But TAS status, even if obtained, cannot remedy a restrictive interpretation of Clean Water Act jurisdiction that removes federal protection from important waters.

First, EPA generally requires that waters subject to TAS must be within or share a boundary with reservations, meaning TAS status does not protect off-reservation waters in which tribes have treaty

rights.¹¹ Further, TAS authority extends only as far as the Clean Water Act’s jurisdictional reach. EPA will approve water quality standards only for waters of the United States, so even if a tribe’s laws extend to a broader scope of waters, it cannot invoke its TAS authority to protect waters not deemed waters of the United States.

Second, many tribes simply do not have the resources to obtain, or fully carry out, TAS status. Only 78 tribes have acquired TAS status for developing their own water quality standards and some of these tribes have not yet obtained federal approval of these standards.¹² And, as explained, even when a tribe has set its own water quality standards for waters on its reservation, if those waters are

¹¹ TAS authority extends over “water resources which are held by an Indian tribe, held by the U. S. in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.” 33 U.S.C. § 1377(e)(2). Though the language does not expressly limit TAS to reservations, and there are other types of Indian country where tribes have jurisdiction, *see* 18 U.S.C. § 1151, EPA has interpreted it in that limited way. *E.g.*, Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act, 81 Fed. Reg. 65,901, 65,902 (Sept. 26, 2016).

¹² *Tribes Approved for Treatment as a State (TAS)*, Env’t Prot. Agency, <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas> (last visited June 8, 2022). Of the Tribal amici, Bad River, Fond du Lac, Grand Portage, Navajo, Laguna, Quinault, Seneca, Shoshone-Bannock, Swinomish, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw, and Puyallup have TAS for water quality standards. Of these, all but Seneca, Confederated Tribes of Coos, Lower Umpqua and Siuslaw, and Shoshone-Bannock have federally approved standards; these three Tribes are still in the process of obtaining federal approval of standards, which could take several more years.

downstream from waters that have been stripped of Clean Water Act jurisdiction, they will face increased risk of harm from upstream dredging and pollution.

Third, though a tribe may also obtain TAS authority to issue permits under Sections 402 and 404 of the Act, no tribes currently have approval to issue either type of permit.¹³ This void stems largely from the significant structural and financial conditions EPA rightly requires for developing and implementing permit programs. Tribes instead rely on the federal government to carry out and enforce these permitting programs and to protect tribal waters even within reservation boundaries as well as on other tribal lands.

Narrowing the scope of the Clean Water Act will leave many such waters unprotected. If, for example, through the narrow interpretation of waters of the U.S. advanced by petitioners a wild rice-supporting wetland on Fond du Lac's reservation or an ephemeral stream within the Navajo Nation (where the vast majority of streams are ephemeral or intermittent, even reaches of the Little Colorado River) is stripped of Clean Water Act jurisdiction and permit requirements, no other entity could step in and regulate discharges of pollutants or dredge and fill activities in those waters, leaving them unprotected.¹⁴

¹³ *Id.*

¹⁴ Although conceivably, to protect waters on a reservation a tribe could engage in the process to secure TAS permitting status or develop an entire code and regulatory structure of their own, either option is unlikely given the fact that no tribes have to date been able to develop and secure TAS for permitting.

C. States Cannot Fill These Regulatory Gaps.

The risks and harms discussed above that would result from a narrow interpretation of Waters of the United States also cannot be addressed through state regulation.

First, states lack jurisdiction to regulate waters within reservation boundaries.¹⁵ If the Clean Water Act does not extend to those waters, and if tribes lack the resources to enforce tribal permitting requirements, as many do, the waters will be completely unprotected.

Second, states do not have the same obligations to tribes as the federal government. The relationship between tribes and the federal government imposes an obligation on the United States to consult with tribes where an action of the United States, like a Clean Water Act permit, may harm tribal interests and rights. States simply do not have the same consultation obligation. Although some states voluntarily consult with tribes, the meaning of consultation and the willingness of states to do so varies widely. Even states that have statutory directives to consult apply it inconsistently and that duty is a creature of legislation, not a treaty or trust obligation. Similarly, states have no obligation to consult with tribes under the National Historic Preservation Act. *Menominee Indian Tribe of Wis.*, 947 F.3d at 1073-74. The consultation obligation under the National Historic Preservation Act applies only to federal actions. *Id.*

¹⁵ States lack jurisdiction to regulate within reservation boundaries, absent express Congressional authorization. See *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973).

Third, many states will not step in and regulate pollution or degradation from dredging and filling in waters upstream of tribes that are not waters of the U.S. A significant number of states ban or erect substantial barriers to regulating more stringently than federal law provides.¹⁶ Currently, 24 out of the 50 states' regulations are dependent upon the federal definition of waters of the U.S., meaning that the reach of the state is limited.¹⁷ Florida, one of the three states with Section 404 permitting authority, has refused to regulate any waterbody that does not meet the very narrow jurisdictional test of the Navigable Waters Protection Rule, even after the rule was vacated.¹⁸ Many other states (for example Alaska) do not have a state structure or laws for regulating the dredging or filling of waters, relying entirely on the federal laws.

In sum, the states cannot protect waters on which tribes rely, in which they have treaty rights, or that are culturally and historically important.

* * *

Congress directed that the Clean Water Act be applied to restore and maintain the chemical,

¹⁶ See *Resource and Programmatic Assessment for the Navigable Waters Protection Rule*, U.S. Env't Prot. Agency & Dep't of the Army 45-46 (Jan. 23, 2020), available at https://www.epa.gov/sites/default/files/2020-01/documents/rpa_-_nwpr_.pdf; *State Constraints: State-imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, Env't Law Inst. (May 2013), available at <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>.

¹⁷ Jim McElfish, *State Protection of Non-Federal Waters: Turbidity Continues*, 52 Env't L. Rep. (forthcoming Sept. 2022).

¹⁸ EPA letter to Florida Dep't of Environmental Protection, Jan. 31, 2022.

physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Congress further instructed that water quality be protected for public water supplies; propagation of fish, shellfish, and wildlife; use for recreation, agriculture, and industry; and navigation. *Id.* §§ 1251(a)(2), 1313(c)(2)(A). To fulfill the broad purpose and reach of the Act, the proper jurisdictional test cannot exclude most wetlands and potentially also intermittent and ephemeral streams. Instead, it must acknowledge the connections between waters and the consensus science that demonstrates that those connections affect the chemical, physical, and biological integrity of the nation's waters.

Tribes will be especially harmed by a narrow interpretation that leaves waters of this nation unregulated under federal law, thereby allowing significant sources of pollution and degradation of water quality to proceed unchecked both on and upstream of their lands and triggering a diminution in tribal rights and the legal processes available to protect those rights.

CONCLUSION

This Court should affirm.

Respectfully submitted,

JILL E. GRANT
JILL GRANT & ASSOCIATES, LLC
1319 F Street, NW
Washington DC 20004

*Counsel for the Navajo Nation,
Seneca Nation, and Shoshone-
Bannock Tribes*

JANETTE K. BRIMMER
Counsel of Record
EARTHJUSTICE
810 Third Ave., Suite 610
Seattle, WA 98104
(206) 504-3459
jbrimmer@earthjustice.org

STUART C. GILLESPIE
EARTHJUSTICE
633 17th St., Suite 1600
Denver, CO 80202

*Counsel for Menominee
Indian Tribe of Wisconsin,
Bad River Band of Lake
Superior Chippewa, Bay
Mills Tribal Community,
Confederated Tribes of Coos,
Umpqua and Siuslaw
Indians, Fond du Lac Band of
Lake Superior Chippewa,
Grand Portage Band of Lake
Superior Chippewa, Iowa
Tribe of Oklahoma, Pascua
Yaqui Tribe, Pueblo of
Laguna, Puyallup Tribe,
Quinault Indian Nation,
Rappahannock Tribe,
Swinomish Indian Tribal
Community, Tohono O'odham
Nation, and Yurok Tribe*

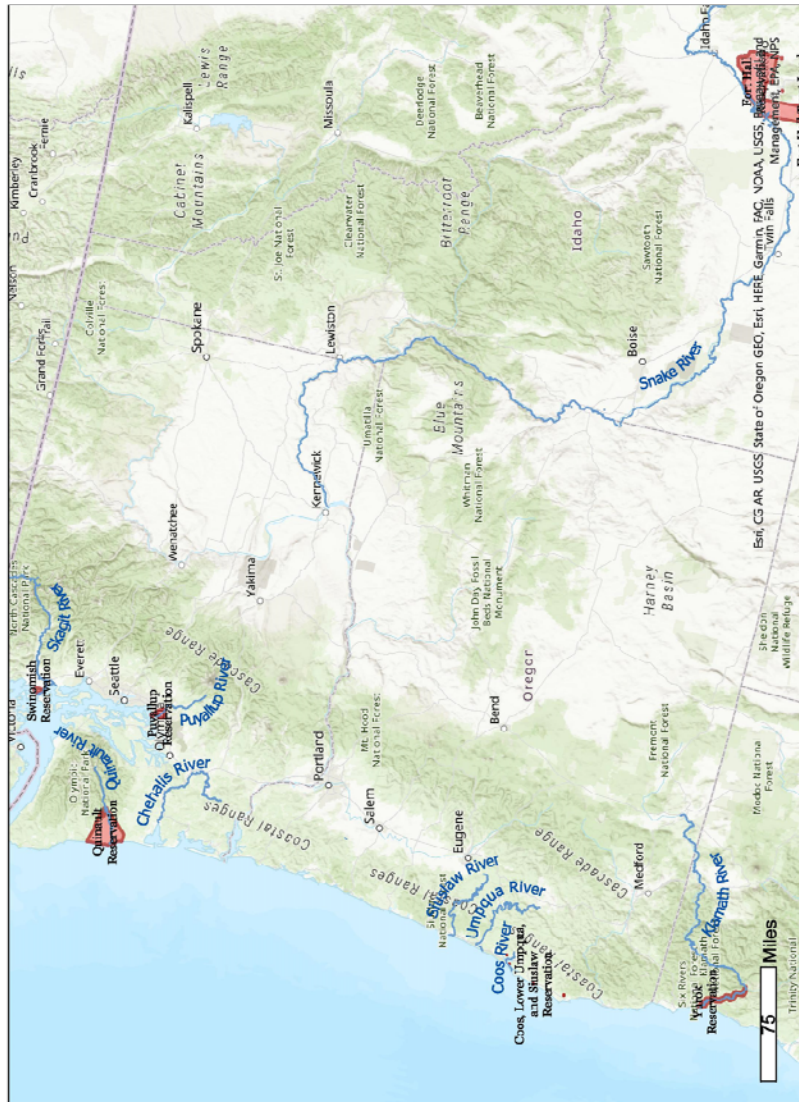
June 17, 2022

APPENDIX

1a

APPENDIX A

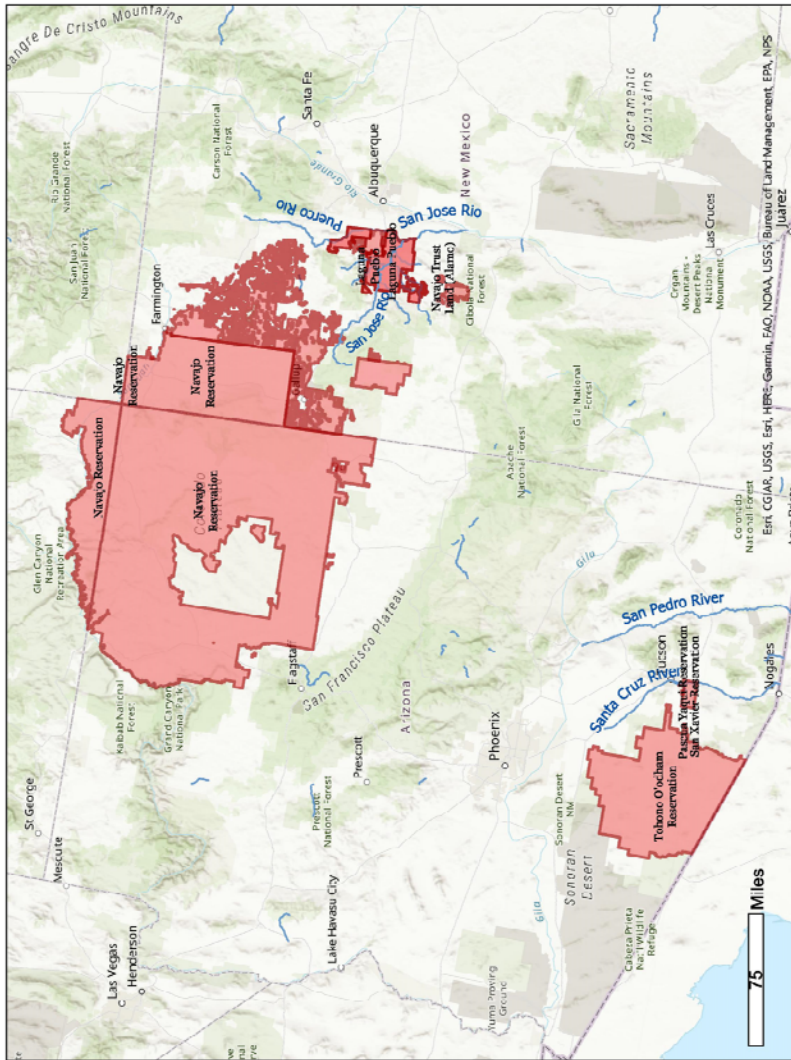
Pacific Northwest Region Tribal Lands and Watersheds



2a

APPENDIX B

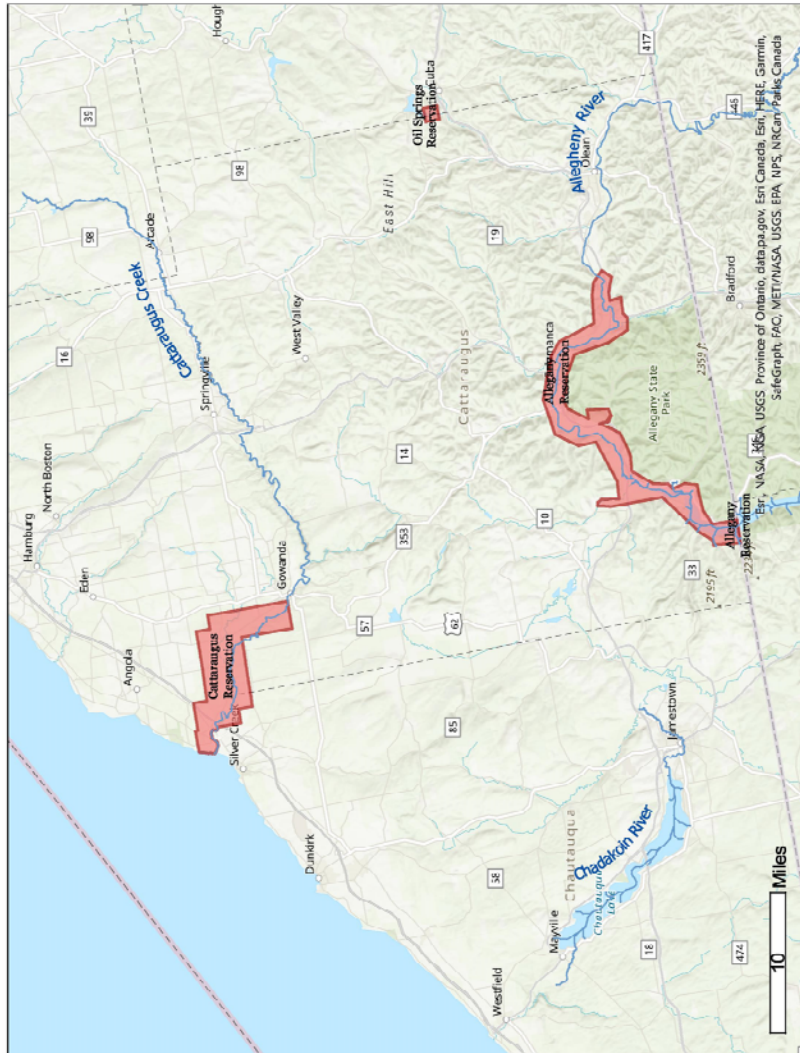
Southwest Region Tribal Lands and Watersheds



3a

APPENDIX C

Seneca Nation Tribal Lands and Watersheds



4a

APPENDIX D

Midwest Region Tribal Lands and Watersheds

