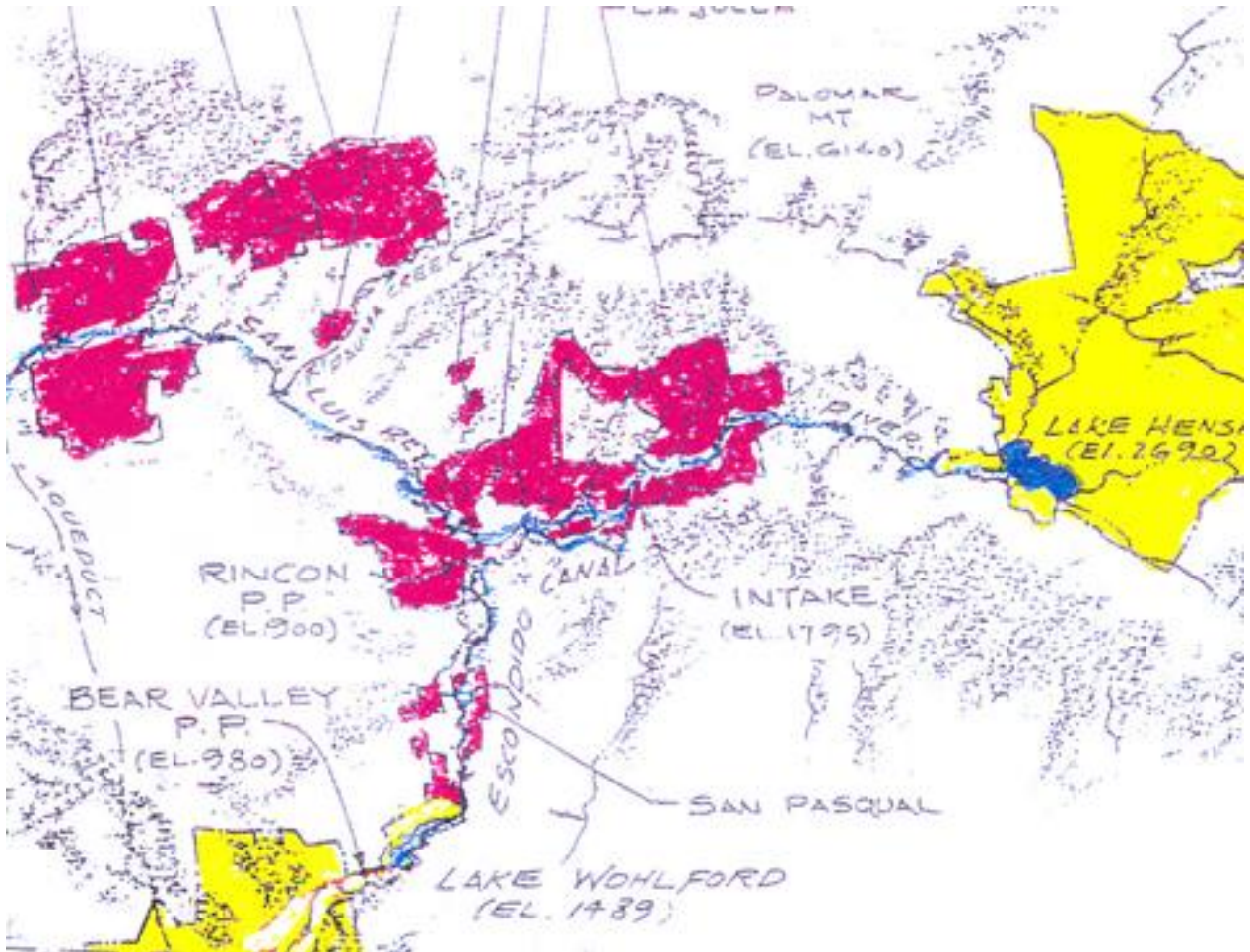


## THE SAN LUIS REY INDIAN WATER DISPUTE AND SETTLEMENT



The above is a copy of the Map used in oral argument before the United States Supreme Court in *Escondido Mutual Water Co., et al. v. La Jolla Band Mission Indians, et al.*, 466 U.S. 765 (1984)

My story today starts more than a century ago and involves a rich fabric of the history of north San Diego County. Even as the United States was forming Indian Reservations and giving them water rights to go along with the Reservations, it was giving the same water to local Non-Indian Residents by approving water and power projects that now serve the communities of Escondido and Vista. And while handwritten documents and remote Indian ranches have

now been replaced with the Internet and large casinos, the dispute lingers on and the people involved have come together with hope to bring a peaceful end to this long journey.

Beginning in about 1875, the United States set aside Indian Reservations for the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians along or in the vicinity of the San Luis Rey River.<sup>1</sup> Meanwhile, commencing in the 1890s, the City of Escondido's (Escondido) predecessors (the Escondido Irrigation District and the Escondido Mutual Water Company) began diverting San Luis Rey River water through the Escondido Canal (which traverses portions of the La Jolla, Rincon, and San Pasqual Indian Reservations) to a storage reservoir (Lake Wohlford) from which the water was then released for use in the Escondido service area.<sup>2</sup>

Since 1915, some of the water released from Lake Wohlford has generated electricity at the Bear Valley Power Plant. At about the same time, a portion of the flow in the Escondido Canal, usually not exceeding the first six cubic feet per second (“6 cfs”) of natural flow, began being delivered through the Rincon Power Plant for use on the Rincon Indian Reservation.

Commencing in 1922, Vista Irrigation District's (VID) predecessors (William G. Henshaw and the San Diego County Water Company) began impounding the water originating in the upper portion of the San Luis Rey River

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<sup>1</sup> See, e.g., *December 27, 1875 Executive Order* (La Jolla and Pala (small portion)); *March 3, 1881 Executive Order* (Rincon); *December 29, 1891 Executive Order pursuant to the Smiley Commission Report* (La Jolla, Pala (small portion), Pauma, Rincon, and San Pasqual.) In 1892 and 1893 Trust Patents were issued for the La Jolla, Rincon and Pala (small portion) Reservations. In 1910, the San Pasqual Reservation received its Trust Patent.

<sup>2</sup> In February 1891, Escondido's predecessor made its first water appropriation filing on the San Luis Rey River under state law.

watershed behind Henshaw Dam in Lake Henshaw. Lake Henshaw has been used by VID, Escondido, and their predecessors to store runoff from the watershed above Henshaw Dam for subsequent release into the San Luis Rey River for downstream diversion into the Escondido Canal. Since about 1926, a portion of the Henshaw water diverted through the Escondido Canal and the Bear Valley Power Plant has been delivered to both Escondido's and VID's service area.

The United States, by entering into and approving various contracts and permits with Escondido's and VID's predecessors facilitated the diversion and use of the waters of the San Luis Rey River by Escondido and VID and the use of tribal lands of the La Jolla, Rincon and San Pasqual Reservations and federal lands administered by the Bureau of Land Management for the conveyance of that water to Escondido and VID's service areas.<sup>3</sup>

In June 1924 the Federal Power Commission (now the Federal Energy Regulatory Commission (FERC) issued Escondido a 50-year license for Project No. 176 which included most of the facilities of the Local Water System and also authorized the use of federal and Indian lands.

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<sup>3</sup> See, e.g. *June 4, 1894 Contract between the Escondido Irrigation District and Potrero Band of Mission Indians* (Right of way for Escondido Canal granted across what is now the La Jolla Indian Reservation); *March 25, 1908 Permit issued by Department of the Interior* (Permit under Act of March 3, 1891 authorizing right of way for Escondido Canal across federal lands and Reservations); *February 2, 1914 Contract between the Escondido Mutual Water Company and the United States on behalf of the Rincon Indians* (Authorized use of Rincon Reservation for Rincon Powerplant and quantified Rincon water rights at six cubic feet per second (cfs) of flow of San Luis Rey River); *June 28, 1922 Contract between William G Henshaw and the United States on behalf of the Pala and Rincon Reservations* (Authorized the building of Henshaw Dam and the diversion of its stored flood waters out of the Basin subject to certain water guarantees for the Rincon and Pala Indians)

Along with Lake Henshaw, VID owns the Warner Ranch. Since the early 1950s, VID, in conjunction with Escondido, has pumped ground water from the Warner Basin underlying Warner Ranch and stored the pumped water in Lake Henshaw for release into the San Luis Rey River and diversion into the Escondido Canal for conveyance of that water to Escondido and VID's service areas.

In 1969 litigation involving the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Indians (Bands), the United States on behalf of the Bands, and Escondido and VID (Local Entities) was filed in the United States District Court for the Southern District of California to determine, among other things, the respective rights of the Bands, Escondido and VID to certain waters of the San Luis Rey River, and claims for trespass and breach of contract.<sup>4</sup> Related matters were also contested among the same parties before FERC.<sup>5</sup>

Over the next 15 years these cases generated much litigation and even one United States Supreme Court decision.<sup>6</sup> However, by 1985, with no final

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<sup>4</sup> *Rincon Band of Mission Indians, et al. v. Escondido Mutual Water Company, et al.*, U.S. Dist. Ct., S.D. Cal. No. 69-217-S; *Rincon Band of Mission Indians, et al., v. Vista Irrigation District*, U.S. Dist. Ct., S.D. Cal. No 72-276-S; and *United States of America, v. Escondido Mutual Water Company and Vista Irrigation District*, U.S. Dist. Ct., S.D. Cal. No 72-271-S.

<sup>5</sup> *Escondido Mutual Water Company Project No 176* (Escondido's application for a new License); *Secretary of the Interior Acting his Capacity of Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido*, Docket No. E-7562 (Claims for breach of License v. Escondido); and *Vista Irrigation District*, Docket No. E- 7655 (Investigation of VID to determine if its use of the Project facilities to transport water was valid.)

<sup>6</sup> See, e.g., *Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F.2d 1082 (9th Cir. 1972) (Upheld trial court's denial of Indian demand that United States represent the Indians in the suit v. Mutual); *Escondido Mutual Water Co., et al., Project No. 176*, 6 FERC ¶ 61,189 (Commission Opinion No. 36 issuing New Licenses, 1979) (FERC issues Escondido and VID a new License for Project 176); *Escondido Mutual Water Co., et al., Project No. 176*, 9 FERC ¶ 61,241 (Commission Opinion No. 36A, Order on Rehearing, 1979); *Escondido Mutual Water*

decision having been reached, all the Parties determined that they should attempt to reach a settlement.

In 1988, with the aid of local Congressman, Ron Packard, the Parties were successful in obtaining enactment of the *San Luis Rey Indian Water Rights Settlement Act* to provide for the resolution of the disputes that were the subject of the above-referenced federal district court litigation and the related FERC proceedings.<sup>7</sup>

Recognizing that the waters of the San Luis Rey River were insufficient to supply both the needs of the Bands and the Local Entities and that the United States had in effect twice committed the approximately 16,000 acre foot annual yield of the upper San Luis Rey River watershed, once to the Indians when they had created their Reservations and a second time to the Local Entities when they had approved their contracts, permits and licenses, the Act agreed to arrange to supply the Settlement Parties with a supplemental water supply of 16,000 acre feet per year and also to pay the Bands \$30,000,000 in lieu of any damages.

The “arranging” of the source of supply for the 16,000 acre feet of “Supplemental Water” took more than a decade to accomplish. Finally in 2000,

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*Co. v. Federal Energy Regulatory Commission*, 692 F.2d 1223 (9th Cir. 1982) (Ninth Circuit reverses FERC order issuing new License); *Escondido Mutual Water Co. v. Federal Energy Regulatory Commission*, 701 F.2d 826 (9th Cir. 1983) (Order on Rehearing); *Escondido Mutual Water Co., et al. v. La Jolla Band Mission Indians, et al.*, 466 U.S. 765, 104 S. Ct. 2105 (1984) (Affirming in part and reversing in part Ninth Circuit decision); *Escondido Mutual Water Co. v. Federal Energy Regulatory Commission*, 743 F.2d 1321 (9th Cir. 1984 ) (Remanding case back to FERC)

<sup>7</sup> Title I of Public Law 100-675, enacted on November 17, 1988, 102 Stat. 4000 (Sections 101-111). Title II (Sections 201-209) authorized the All- American Canal Lining.

again with the aid of Congressman Ron Packard, the “Packard Amendment” was enacted which directed the Secretary of the Interior to furnish the Settlement Parties with: (1) 16,000 acre feet of water conserved by lining certain unlined portions of the All-American Canal (AAC) and its Coachella Branch; and (2) a permanent supply of power capacity and energy at no cost and at no further expense to the United States and the Settlement Parties in an amount sufficient to convey the Supplemental Water from Lake Havasu through the Colorado River Aqueduct to the places of use on the Bands' Reservations and to the service areas of Escondido and VID.<sup>8</sup>

Thereafter, the Parties entered into several contracts to permit the conserved water to reach the service areas of the Parties.<sup>9</sup> However, almost

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<sup>8</sup> Section 211 of the Act of October 27, 2000, Public Law 106-377 Appendix B, 114 Stat. 1441A-70.

<sup>9</sup> *January 18, 2001 Implementation Agreement Among the United States, the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians, the City of Escondido, and the Vista Irrigation District* (Secretary of the Interior, acting through the Commissioner of Reclamation, agreed to permanently furnish annually 16,000 acre-feet of the water conserved by AAC lining project to the Indian Water Authority (for the benefit of the Indian Bands), Escondido, and VID); *October 10, 2003, Allocation Agreement among the United States, The Metropolitan Water District of Southern California, Coachella Valley Water District, Imperial Irrigation District, San Diego County Water Authority, the La Jolla, Pala, Pauma, Rincon And San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Water Authority, the City Of Escondido, and Vista Irrigation District* (Part of Quantification Settlement Agreement (QSA) and allocated 16,000 acre-feet of the water conserved by AAC lining project to the Indian Water Authority (for the benefit of the Indian Bands), Escondido, and VID); *October 10, 2003 Agreement relating to Supplemental Water among The Metropolitan Water District of Southern California (MWD, the San Luis Rey Settlement Parties (the La Jolla, Pala, Pauma, Rincon And San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Water Authority, the City Of Escondido, and Vista Irrigation District) and the United States* (Part of QSA, and provided for the exchange/transportation of the 16,000 acre-feet of the water conserved by AAC lining project through MWD’s facilities.); *October 10, 2003 Agreement for the Conveyance of Water among The San Diego County Water Authority (SDCWA), the San Luis Rey Settlement Parties, and the United States* (Part of (QSA, and provided for the transportation of the 16,000 acre-feet of the water conserved by AAC lining project through SDCWA’s facilities to the Bands’ Reservations and the service areas of Escondido and VID).

immediately various parties brought suits in both federal and state court challenging the AAC Lining Project and the validity of the Allocation Agreement and other agreements comprising the Quantification Settlement Agreement (QSA). Even with supporting federal legislation,<sup>10</sup> this additional litigation took over a decade to be resolved.<sup>11</sup>

In the meantime, the Bands and the Local Entities continued to negotiate on a final settlement of their various claims. Finally in December 2014, the Bands and the Local Entities entered into an Agreement which would settle their claims and govern their future water delivery and land responsibilities viz-a-viz each other.<sup>12</sup> In January 2015, the Bands, the Local Entities and the United States signed a formal Settlement Agreement.<sup>13</sup> Although the Secretary of the Interior, Sally Jewell, and Assistant Attorney General, John C. Cruden, signed

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<sup>10</sup> *Health Care Act of 2006*, Pub. L. 109-432, §395(a), 120 Stat. 2922 (2006 Act) (Mandated carrying out of AAC lining project).

<sup>11</sup> See, e.g., *Consejo De Desarrollo Economico De Mexicali, A.C. v. United States*, 482 F.3d 1157 (9th Cir. 2007) (After the 2006 Act, the Court dismissed federal claims challenging the AAC Lining Project); *In re Quantification Settlement Agreement Cases*, 201 Cal.App.4th 758, 134 Cal.Rptr.3d 274 (Cal. App. Dist.3 2011) (Court reversed and remanded trial court ruling that the QSA contracts were invalid); and *In re Quantification Settlement Agreement Cases*, 237 Cal.App.4th 72 (Cal. App. Dist.3 2015) (Court affirmed trial court ruling denying state environmental challenges to QSA).

<sup>12</sup> *December 5, 2014 Implementing Agreement among the City of Escondido, on its own behalf and as successor to the Escondido Mutual Water Company, the Vista Irrigation District, the San Luis Rey River Indian Water Authority, the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians pursuant to the San Luis Rey Indian Water Rights Settlement Act, Public Law 100-675 as amended* (Settlement Agreement among the Indian Bands and the Local Entities).

<sup>13</sup> *January 30, 2015 Settlement Agreement Between the United States and the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians and the San Luis Rey Indian Water Authority and the City of Escondido and Vista Irrigation District* (Settlement Agreement among all the Parties)

on behalf of the United States, both signatures were made contingent on Congress enacting additional ratifying legislation.

On March 4, 2015, HR 1296 “*To amend the San Luis Rey Indian Water Rights Settlement Act to clarify certain settlement terms, and for other purposes*” was introduced by Congressman Duncan Hunter to approve and ratify all provisions of the Settlement Agreement. After Hearings before the House Natural Resources Subcommittee on Water, Power and Oceans on October 28, 2015, HR 1296 was scheduled for House floor action in early March 2016.

Unfortunately, prior to proceeding to the House floor every bill must be “scored” by the Congressional Budget Office (CBO). Despite the fact that the \$30 million had been appropriated and “scored” in connection with the original San Luis Rey Settlement Act, a *March 24, 2016 CBO Report on HR 1296* indicated that since enacting HR 1296 would mean that the money previously held in a trust fund could be released, that “would increase net direct spending by \$18 million over the 2017-2026 period; therefor pay-as- you- go procedures apply.” The Parties are currently trying to find a solution to this latest issue.<sup>14</sup>

Once the CBO issue is resolved, companion legislation will be introduced in the Senate with the hope of obtaining final passage of HR 1296 prior to the end of the current Administration. Meanwhile, the Parties are also preparing documents and other materials necessary to obtain final dismissal of all federal court and FERC proceedings<sup>15</sup> so that this case which has lasted almost 50 years can finally be resolved.

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<sup>14</sup> Last week the Bands agreed to limit their access to the San Luis Rey Tribal Development Fund to no more than \$3.7 million per year in order to secure a \$0 score from CBO.

<sup>15</sup> FERC has already issued a *Conditional Order Granting [Escondido and VID] Exemption from Licensing (Conduit) Accepting Surrender of License and Dismissing Relicense Application*, 140 FERC ¶ 62,226 (2012). This order will become effective once the Settlement is finalized.