No. 21-454

In The Supreme Court of the United States

MICHAEL SACKETT, *ET UX.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE IDAHO CONSERVATION LEAGUE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Idaho Conservation League ("ICL") maintains a statewide membership of over 11,000 individuals and has served as Idaho's leading conservation organization since 1973—just one year after the Clean Water Act was enacted. ICL has long been dedicated to working with fellow Idahoans toward pragmatic, enduring solutions to the state's biggest environmental challenges.[2] As such, the expert staff at ICL includes conservation biologists, geologists, and resource managers working out of four offices, including an office in Sandpoint, Idaho approximately 19 miles southeast of Priest Lake.[3]

ICL has first-hand knowledge of the aquatic resources adjacent to Priest Lake, including direct familiarity with the wetlands that were unlawfully filled on the Sackett property. Indeed, ICL has decades of involvement in conservation efforts throughout the Priest Lake area, an international fishing and boating destination known for prize-

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[1] Petitioners have granted the Idaho Conservation League consent to the filing of this brief pursuant to Rule 37, and Respondents have filed a letter with the Clerk indicating blanket consent to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund its preparation or submission.

[2] *See* Idaho Conservation League, *What We're About,* https://www.idahoconservation.org/who-we-are/ (last visited June 8, 2022).

[3] *See* Idaho Conservation League, *Our Staff,* https://www.idahoconservation.org/about/staff/ (last visited June 8, 2022).

winning cutthroat trout, lake trout, kokanee salmon and other game fish.

Amicus curiae ICL has had success in leveraging its local, biological expertise to conserve aquatic resources essential to the health of navigable waters. ICL operates a water quality monitoring program in nearby Lake Pend Oreille, where ICL staff and volunteers collect monthly samples to evaluate eleven different biological, chemical, and physical water quality parameters.[4] This data is shared with the Idaho Department of Environmental Quality and the U.S. Environmental Protection Agency as part of an effort to ensure compliance with water quality standards promulgated under the Clean Water Act.

ICL also routinely participates in Clean Water Act public comment opportunities. Within the last year, ICL provided input to the U.S. Army Corps of Engineers on a proposal to dredge and fill wetlands for a marina and residential complex at the mouth of Trestle Creek on Lake Pend Oreille.[5] ICL thus benefits from the § 404 permitting process, which has provided the organization's members and volunteers with the ability to highlight issues affecting water quality and aquatic ecosystems at an early and beneficial stage of project construction.

ICL successfully petitioned the U.S. Army Corps of Engineers to recognize the Salmon River as "navigable" under the Rivers and Harbors Act of

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[4] Becca Rodack, *ICL Launches North Idaho Lakes Advocacy Program,* https://www.idahoconservation.org/blog/icl-launches-north-idaho-lakes-advocacy-program/ (May 10, 2022).

[5] Becca Rodack, *Trestle Creek: A rare hideaway on Lake Pend Oreille*, https://www.idahoconservation.org/blog/trestle-creek-a-rare-hideaway-on-lake-pend-oreille/ (September 21, 2021).

1899. [6] ICL's projects have also included collaborative efforts with industry to promote riparian preservation work adjacent to the East Fork of the Salmon River, where "[c]hinook salmon, steelhead and bull trout spawn and rear their young."[7] Notably, ICL has partnered with the U.S. Forest Service and others to restore wetlands in the Priest Lake Basin to help recover bull trout populations in the watershed.[8]

In short, ICL's sustained efforts have helped make it a trusted voice on environmental health and conservation throughout Idaho and around Priest Lake, particularly when it comes to protecting the aquatic resources at issue in this case, which have long been understood to be covered by the federal Clean Water Act.

SUMMARY OF ARGUMENT

ICL has nearly half a century of involvement in conservation efforts throughout Idaho and files this brief as *amicus curiae* in support of Respondents to share the organization's first-hand expertise with the aquatic resources of Priest Lake.

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[6] Jonathan Oppenheimer, *New Protection for the Salmon River!*, (Jun. 3, 2016), https://www.idahoconservation.org/blog/new-protection-salmon-river/.

[7] Abby Urbanek, *Conservation Program Awards $150,000 for restoration projects in Upper Salmon Basin*, (May 3, 2022). https://www.idahoconservation.org/blog/conservation-program-awards-150000-for-restoration-projects-in-upper-salmon-basin/

[8] Western Native Trout Initiative, *Application for WNTI Funding* (Oct. 7, 2016), https://westernnativetrout.org/wp-content/uploads/2019/07/2017-hughes-aquatic-restoration-project.pdf.

Part I of ICL's argument highlights Priest Lake's prominence as the "Crown Jewel" of Idaho, one that remains an iconic and international tourist destination. It rests nestled in the heart of the Selkirk Mountain Range and is a featured stop on the International Selkirk Loop, connecting Idaho, Washington, and British Columbia. Pristine water quality is essential to the economic vitality of Priest Lake, as the waters are home to native westslope cutthroat trout, native bull trout, and support a tourism industry dependent on fishing, boating, swimming, and water skiing. Aquatic resources like Priest Lake—along with the channels, tributaries, wetlands, and streams that replenish it—are singled out for protection in the text of the Clean Water Act. 33 U.S.C. 1251(a)(2).

Part II confirms that the Sackett wetlands must be understood as "adjacent" to the lake because groundwater from the wetlands flows into Priest Lake. Indeed, a geological survey in the mid-1990s measured groundwater flow from wetlands along Kalispell Bay Road, which were draining into the lake at a significant and sustained rate. *See* Kevin M. Freeman, *An evaluation of ground water nutrient loading to Priest Lake, Bonner County, Idaho* (May 1995), *infra* note 22. This groundwater connection is buttressed by a surface-water connection between the Kalispell Bay Fen and Priest Lake. Trout are swimming up Kalispell Creek until they reach the channelized tributary along Kalispell Road, and then continuing until they reach spawning habitat in the Kalispell Bay Fen. J.A. 28. Given the myriad connections between the Sackett wetlands and the lake, it is certain that dredging and filling would

have an adverse impact on downstream water quality.

Part III compares the Sackett property to the wetlands of *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985), which were farther from Lake St. Clair, Michigan than the Sackett wetlands are from Priest Lake, Idaho. In *Riverside Bayview Homes,* "the nearest water body [was] … more than 200 feet away, and that was a canal that ultimately flowed into Black Creek." Tr. of Oral Argument, at 34:2-4, *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985) (No. 84-701) (Oct. 16, 1985). Black Creek drained into Lake St. Clair, which was more distant still. True, the *Riverside Bayview Homes* Court wrestled with a "continuum" among aquatic features, 474 U.S. at 132, but that was not because of any difficulty in identifying the shoreline of Lake St. Clair, which stood hundreds of feet away. The Court's fundamental concern was with the functioning of "aquatic ecosystems." *Id.* at 132-33. The "continuum" was hydrological, not geographical.

Finally, Part IV laments that it did not have to be this way. Several § 404 permits have been issued in the Priest Lake Basin for strikingly similar residential projects. One such permit was requested on March 26, 2008, one month before the Sacketts filed their initial federal action. Pet. Br. 20. That permit was speedily granted on May 14, 2008. *See* U.S. Army Corps of Engineers Permit DA No. NWW-2008-00222-C01, *infra* note 36. Instead of adhering to the same rules as their neighbors, Petitioners have pursued this litigation for the last 14 years. Yet community-wide compliance with the § 404 program is essential to conserving Priest Lake and is what Congress intended when it authorized general

permits to ensure "only minimal *cumulative* adverse effect on the environment." 33 U.S.C. 1344(e)(1) (emphasis added).

ARGUMENT

I. Priest Lake is the "Crown Jewel" of Idaho, an International Tourist Destination, and Part of the "Waters of the United States."

Priest Lake is commonly known as "The Crown Jewel" of Idaho and considered the most pristine of the three great lakes of the Idaho Panhandle. Carved out of the land 10,000 years ago by receding glaciers, the lake served for thousands of years as the summer home and harvesting spot for the Kalispel Tribe, migratory indigenous people of the Pacific Northwest.[9] The lake was colonized during the mid-1800s, first by Jesuit missionaries and soon after by miners, settlers, and loggers.[10] Logging flourished into the 20th century, as white pines and western red cedars could be splashed into the lake, rounded up into booms, then sent down the Priest River to lumber mills.[11] The creeks, rivers, and lakes

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[9] Kevin J. Lyons, *Kalispel Ethnohistoric Uses of the Priest Lake Basin*, Kalispel Natural Resources Department (Feb. 2009). https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5072901.pdf.

[10] Kris Smith & Tom Weitz, *Wild Place: A History of Priest Lake, Idaho* 3, 17 (2015).

[11] *Id.* at 85.

served as the primary mode of transport for the lucrative timber industry from 1900-1948.[12]

Out-of-state vacationers began traveling to Priest Lake on horseback as early as the late 1800s. At the turn of the twentieth century, the Great Northern Railroad, which ran a line from Spokane to the town of Priest River, began advertising Priest Lake in its public relations campaigns, describing it as a place of "real adventure" and "man's-size thrills."[13] Hotels and cabin rentals popped up along the shore, and steamboat businesses came online to carry tourists to the remote upper reaches of the lake. Silent screen starlet Nell Shipman spent three years producing short films by the water. By the mid-twentieth century, tourism began to replace logging as the region's primary revenue driver.

More recently, the 23,000-acre lake has earned a reputation as an international tourist destination for fishing, boating, canoeing, and all manner of outdoor sports.[14] As described by one travel writer, "It's like a skinny Lake Tahoe—with a lot less people."[15] Priest Lake is particularly renowned for its mackinaw and cutthroat trout, which draw anglers

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[12] Mary Garrison, *The River Pigs of Logging*, Spokane Historical (2022) https://spokanehistorical.org/items/show/587.

[13] Advertisement, Oregonian, 9 Aug. 1917, at 19.

[14] *90 Years of Tradition: Elkins Resort on Priest Lake*, Priest Lake Visitors Guide 2022-2023, 32. https://priestlake.org/priest-lake-visitor-guide/.

[15] Eric Schmitt, *Pristine Priest Lake: High in Idaho's panhandle, boaters, campers and fishermen share the country with white-tailed deer, blue heron and caribou*. New York Times (Aug. 21, 1994).

year-round. Situated just eighteen miles south of the Canadian border, the lake marks a highlight along the International Selkirk Loop, North America's only multi-national scenic drive. And at two hours from Spokane, the lake offers an easy day trip for Washington travelers. In 2021, Idaho boasted one of the fastest tourism industry recoveries in the United States.[16] Priest Lake sits at the center of the five Panhandle counties that saw the largest tourism revenue increases in Idaho.

Amicus curiae the National Association of Home Builders ("NAHB") incorrectly theorizes that even Priest Lake, with its impact on interstate (and even international) commerce, is not part of the "waters of the United States" protected by the Clean Water Act unless it "unites with other waters to form a continued highway over which interstate commerce is or may be carried on with other states or foreign countries." *See* Br. of *Amicus* NAHB 20, 34. This argument ignores the public's use of Priest Lake for fishing, boating, and other tourism-industry pursuits, all of which squarely places Priest Lake within the category of navigable-in-fact waters protected by the Clean Water Act. *See Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs,* 531 U.S. 159, 168 (2001) (*SWANCC*). The NAHB's argument also cannot be squared with the literal text of the Clean Water Act, which requires Respondents to "provide[] for the protection and

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[16] Madison Hardy, *Titans of Tourism*, Coeur d'Alene Press (March 12, 2021), https://cdapress.com/news/2021/mar/12/north-idaho-tourism/.

propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water…" 33 U.S.C. 1251(a).

If the only purpose of the Act was to ensure the safe passage of ships over "waters" that form "a highway 'over which commerce is or may be carried on with other States or foreign countries,'" Br. of *Amicus* NAHB 10, then references to fish, shellfish, and recreation would be meaningless. Indeed, in its first regulations following the passage of the Clean Water Act in 1972, the Environmental Protection Agency identified at least three categories of wholly *intrastate* navigable-in-fact waters that merited protection. *See* 38 Fed. Reg. 13,527, 13,529 (May 22, 1973).

It is useful to remember what America's waters looked like in the early 1970s, shortly before Congress passed the Clean Water Act with bipartisan majorities in both the House and the Senate. [17] One 1970 news report captured the urgency of the pollution problem: "The heat of summer is enveloping the nation's capital, and with it has come the annual resurgence of a problem residents have come increasingly to dread: A stomach-turning miasma rising from the Potomac River." [18] The story went on to cite a federal

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[17] *See* 118 Cong. Rec. 36879 (Senate vote of 52 to 12 to override veto of the 1972 bill); *id.* at 37060-61 (House vote of 247 to 23).

[18] Gladwin Hill, *The Polluted Potomac: Sewage and Politics Create Acute Capital Problem*, New York Times (July 12, 1970), https://www.nytimes.com/1970/07/12/archives/the-

government report that documented how "sludge deposits have blanketed fish spawning grounds," leading to "obnoxious odors when uncovered by ebb tide." *Id.*

Presidents Johnson and Nixon both made efforts at leveraging the Rivers and Harbors Act of 1899 to address this water contamination crisis, first through the Water Quality Act of 1965 and then via the Refuse Act of 1970. Neither proved successful. *See* William W. Sapp et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term "Navigable Waters,"* 36 Envtl. L. Rep. 10090, 10201 (2006).

Thus, the Clean Water Act deliberately broke with the Rivers and Harbors Act of 1899. When Senator Edmund Muskie introduced the Conference Report for the Clean Water Act in 1972, he framed the bill as a new "treatment" for the problem of water pollution "which will not respond to the kind of treatment that has been prescribed in the past." 118 Cong. Rec. 33,692 (1972) (statement of Sen. Muskie). A new threat demanded a broader jurisdictional purview, which is why the Senate Conference Report emphasized an expansive reach for the new legislative text: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have

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polluted-potomac-sewage-and-politics-create-acute-capital.html.

been made or may be made for administrative purposes." S. Rep. No. 92-1236, 144 (1972).

Simply put, Congress was explicit that the Clean Water Act would do far more than protect the interstate transport of goods via riverboat. 33 U.S.C. 1251(a). "One of the well-recognized aims of the Act is to ensure that the nation's waters are 'fishable and swimmable.'" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (Wilkinson, C.J., delivering the opinion for an *en banc* court). Protecting the "Crown Jewel" of Idaho unquestionably falls within the heartland of aquatic resources—*i.e.,* lakes, rivers, streams, wetlands and tributaries—covered by the Act.

II. The Sackett Wetlands Have Long Been Part of a Contiguous Aquatic Resource that is Adjacent to Priest Lake.

The controversy involving the Sackett wetlands began when Petitioners discharged sand and gravel (*i.e.,* fill material) into "wetlands adjacent to Priest Lake" to build up a "housing pad" on which they might construct a residence. J.A. 11-12. Of course, the only reason "fill material" was needed was because "there [was] water there." J.A. 10. Petitioners wanted to build a house—not a houseboat.

The Sackett property, 1604 Kalispell Bay Road, sits north of Kalispell Creek's inflow to the western shores of Priest Lake and is part of the broader Kalispell Bay Fen, which the U.S. Fish and Wildlife

Service has classified as a nontidal wetland.[19] Idahoans have long recognized that fens play an important role in "water quality improvement," filtering out "nutrients or pollutants such as fertilizers or pesticides" before they reach downstream waters. *Between Land & Water: The Wetlands of Idaho*, Idaho Dep't of Fish and Game, Nongame Wildlife Leaflet #9 (2nd Edition 2004).[20] Dredging and filling of a fen is no small matter, as fens "require thousands of years to develop and cannot easily be restored once destroyed."[21]

Of special relevance to this case is a geological survey documenting wetlands along Kalispell Bay Road that drain via groundwater *directly* into Priest Lake. Readings taken from "deep (existing) wells …

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[19] The Kalispell Bay Fen is predominantly classified as "PSS1C," meaning that "[s]urface water is present for extended periods especially early in the growing season…." Pockets of the wetland are designated as "PEM1F," meaning that "[s]urface water persists throughout the growing season in most years." *See* U.S. Fish and Wildlife Service, *Wetlands Code Interpreter*, fwsprimary.wim.usgs.gov/decoders/wetlands.aspx (last visited June 7, 2022); U.S. Fish and Wildlife Service, *National Wetlands Inventory: Wetlands Mapper,* www.fws.gov/program/national-wetlands-inventory/wetlands-mapper (last visited June 7, 2022).

[20] The Idaho Department of Fish and Game's publication is available online at https://idfg.idaho.gov/old-web/docs/wildlife/nongame/leafletWetlands.PDF.

[21] Dave A. Weixelman & David J. Cooper, *Assessing Proper Functioning Condition for Fen Areas in the Sierra Nevada and Southern Cascade Ranges in California, A User Guide*, U.S. Dept. of Ag., ii (2009). https://www.researchgate.net/publication/289538937_Assessing_Proper_Functioning_Condition_for_Fen_Area_in_the_Sierra_Nevada_and_Southern_Cascade_Ranges_in_California.

indicate[d] *ground water flows to Priest Lake* from the deeper portion of the aquifer."[22] The impact on water levels in Priest Lake was sustained and significant: "Hydraulic data … demonstrate[d] ground water flow into Priest Lake, with flow rates from 9 to 13 [feet per day] in the Kalispell Bay area."[23]

Fig. 1: Water level elevation contour map for the deep portion of the aquifer, Kalispell Bay study area. [24]

[IMAGE ON FOLLOWING PAGE]

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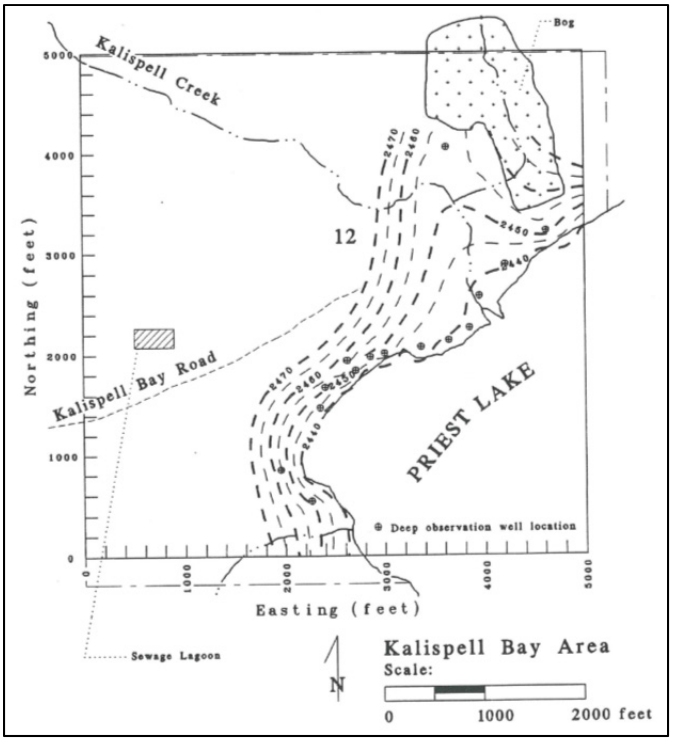
[22] Kevin M. Freeman, *An evaluation of ground water nutrient loading to Priest Lake, Bonner County, Idaho*, at 43 (May 1995) (M.S. Thesis, University of Idaho) (emphasis added), https://www.dropbox.com/s/218tuyk0qjrzg9n/Priest%20Lake%20Thesis_Freeman_1995-compressed.pdf?dl=0.

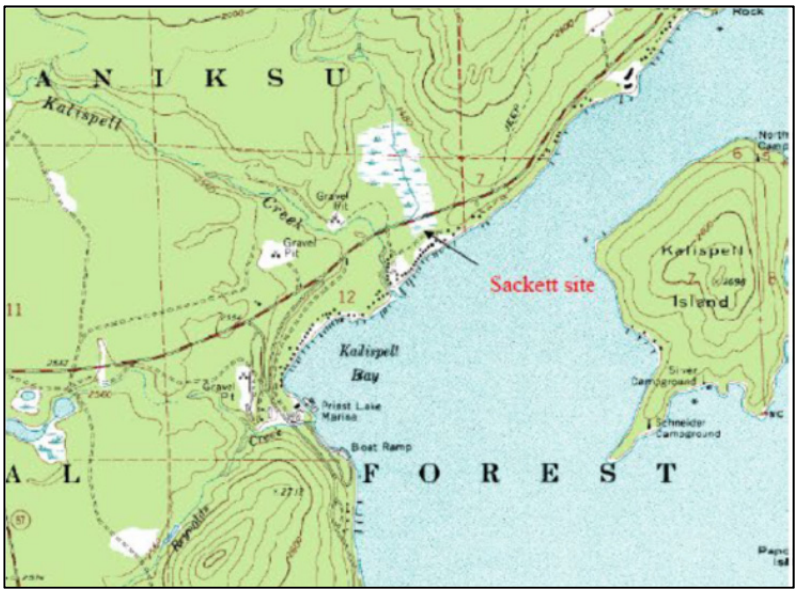
[23] Kevin M. Freeman, *An evaluation of ground water nutrient loading to Priest Lake, Bonner County, Idaho* (May 1995) (M.S. Thesis, University of Idaho), https://www.proquest.com/georef/docview/2360612690/FCC38DCF0EE433APQ/1?accountid=14678.

[24] Freeman, *supra* n. 22. *See also* Marie Kellner, *U.S. Supreme Court navigates tricky waters in Priest Lake wetlands case*, https://www.idahoconservation.org/blog/supreme-court-navigates-priest-lake/ (June 15, 2022) (including an embedded link to the Freeman thesis).



Clear data showing that groundwater replenishes Priest Lake is not surprising, given that the total distance from the Kalispell Bay Fen to the lake is remarkably short: "It is approximately 300 linear feet from the southern edge of the Sackett wetland to the discharge pipes and Priest Lake." J.A. 29. Prior to the construction of roads in the area, the Kalispell Bay Fen was one, contiguous wetland flowing all the way to the shore of Priest Lake. J.A. 30-31. U.S. Geological Survey maps demarcate the fen as such.

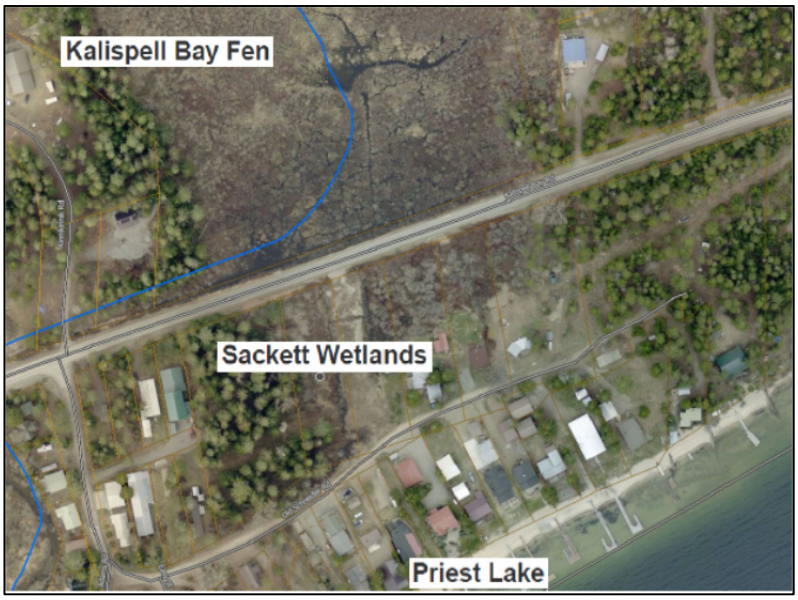
Fig. 2: Topographic map – USGS Priest Lake SW, Idaho.[25]



Geographic Information Systems ("GIS") data from the local government in Bonner County, Idaho also show contiguous wetlands and surface water (appearing brownish in color) along with the unnamed, channelized tributary and Kalispell Creek (highlighted in blue). Surface water is often present in Kalispell Bay Fen.

[25] J.A. 45.

Fig. 3: Aerial View, Kalispell Bay Fen, Priest Lake.[26]



In addition to a significant, groundwater connection to Priest Lake, the wetland also drains into the unnamed, channelized tributary which feeds into Kalispell Creek and flows into Priest Lake. *Sackett v. EPA,* 8 F.4th 1075, 1093 (9th Cir. 2021). Kalispell Creek is a major tributary to Priest Lake that supports native westslope cutthroat trout.[27] A

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[26] Bonner County Interactive Map, cloudgisapps.bonnercountyid.gov/public/ (last visited June 7, 2022) (altered to add labels for "Kalispell Bay Fen," "Sackett Wetlands," and "Priest Lake"). *See also* Bonner County, Geographic Information Systems (GIS), www.bonnercountyid.gov/departments/GIS (last visited June 13, 2022).

[27] Idaho Dep't of Fish and Game, Fisheries Bureau, *Management Plan for the Conservation of Westslope Cutthroat*

wetland ecologist with the Environmental Protection Agency confirmed the presence in the Kalispell Bay Fen of a "relatively large trout (perhaps 14 inches) … near the upstream end of the outlet stream." J.A. 28. The same report explains that the "outlet stream" leads "from the wetland on the north side of Kalispell Bay Road to Kalispell Creek," *i.e.,* above the Sackett wetlands as water drains southward to Priest Lake. J.A. 30. In layperson's terms, trout are swimming up Kalispell Creek until they reach the channelized tributary adjacent to Kalispell Road, and then continuing until they reach spawning habitat in the Kalispell Bay Fen.

Evidence that trout are breeding in the fen is consistent with observations by the U.S. Forest Service, which has studied fish habitat fragmentation along Kalispell Creek due to the construction of roads. "While a handful of these 'road-stream' intersections are easily negotiated by individual fish desiring to move upstream or downstream within a stream to access important spawning or rearing habitat, several are not."[28] The Forest Service further identified wetlands and a tributary just north of Kalispell Creek that function as fish-bearing waters (*i.e.,* Riparian Habitat

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Trout in Idaho, at 25, Table 4 (Nov. 2013), https://idfg.idaho.gov/old-web/docs/fish/planWestslopeCutthroat.pdf.

[28] U.S. Dep't of Agriculture, U.S. Forest Service, Northern Region, *Draft Environmental Impact Statement: Lakeview-Reeder Fuels Reduction Project*, at 3-292 (Jan. 2009), https://www.fs.usda.gov/project/?project=6258.

Conservation Areas or "RHCA").[29] These aquatic resources are explicitly protected in the text of the Clean Water Act. 33 U.S.C. 1344(c) (requiring a permit for the discharge of dredged or fill material to avoid "an unacceptable adverse effect on … fishery areas (including spawning and breeding areas), wildlife, or recreational areas.").

Petitioners concede that even an overly restrictive interpretation of "navigable waters" from the Rivers and Harbors Act of 1899 would cover "activities not in the waters … but nonetheless affecting them," Pet. Br. 35, (citing *United States v. Esso Standard Oil Co. of Puerto Rico,* 375 F.2d 621 (3d Cir. 1967)). Esso had argued that "the remoteness of its activities from the shoreline isolate[d] it from liability under the Act," but the Third Circuit found that the law did "reach 'indirect' deposits of refuse in navigable water." 375 F.2d at 623.

In light of the more expansive definition of "navigable waters" used in the Clean Water Act, *supra* p. 10, the presence of trout above the Sackett property in the Kalispell Bay Fen, J.A. 28, and the confirmation of groundwater flowing from Kalispell Bay Road to Priest Lake[30] are critically important details. Together, they confirm a significant, gravity-fed, hydrological connection between the Sackett wetlands and Priest Lake. That connection is vital,

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[29] *Id.* at 3-302, Figure 3-48.

[30] Kevin M. Freeman, *An evaluation of ground water nutrient loading to Priest Lake, Bonner County, Idaho, supra* note 22.

as a "healthy wetland can actually catch and hold pollutants and other runoff materials before they reach a lake, river, or ocean."[31] Together, these facts dispel any question as to whether upstream discharges at the Sackett Property adversely impact Priest Lake.

III. The Sackett Wetlands are Jurisdictional per *Riverside Bayview Homes* and its Progeny.

This Court's foundational precedent on § 404 jurisdiction, *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985), compels a finding that the Sackett wetlands are jurisdictional aquatic resources and included as "waters of the United States" under the Clean Water Act. Indeed, the similarities between the Sackett wetlands and the *Riverside Bayview Homes* wetlands are astounding. Given these similarities, it would be impossible to find the Sackett property outside the purview of Clean Water Act conservation without overruling *Riverside Bayview Homes.*

Petitioners fail to appreciate their conflict with *Riverside Bayview Homes* because they misconstrue the underlying details of that case, erroneously describing the *Riverside Bayview Homes* wetlands as "immediately adjacent to navigable-in-fact water."

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[31] National Park Service, *Wetland and Watershed Restoration*, https://www.nps.gov/subjects/oceans/wetland-watershed.htm, (last visited Jun 15, 2022). *See also* A. K. Knox et al., *Efficacy of Natural Wetlands to Retain Nutrient, Sediment and Microbial Pollutants*, 37 J. of Env't Quality 1837 (2008) ("Wetlands can provide important benefits to water quality by retaining or transforming pollutants such as nutrients, sediments, pathogens, pesticides, and trace metals").

Pet. Br. 13. That is incorrect. In fact, "the nearest water body" to the wetlands was "more than 200 feet away, and that was a canal that ultimately flowed into Black Creek." Tr. of Oral Argument, at 34:2-4, *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985) (No. 84-701) (Oct. 16, 1985). Lake St. Clair was farther away still.

Counsel to respondents in *Riverside Bayview Homes* was asked, "[A]s far as adjacency is concerned, would you say this is neighboring?" He responded, "I would say it is not far away," provoking laughter in the courtroom. *Id.* at 42:8-13. The *Riverside Bayview Homes* Court's summary of facts referenced the property as "80 acres of low-lying, marshy land *near* the shores of Lake St. Clair," rather than "on" or "abutting" the lake. 474 U.S. at 124 (emphasis added). Thus, one commenter at the time explained:

> Riverside's property was not connected in any visible way to the streams feeding into Lake St. Clair. Surface flooding seldom occurred. The landbridge [sic] between the property and the streams was as much as 200 feet wide in places.

Guy V. Manning, *The Extent of Groundwater Jurisdiction Under the Clean Water Act After* Riverside Bayview Homes, 47. La. L. Rev. 859, 872-73 (1987) (footnote omitted).

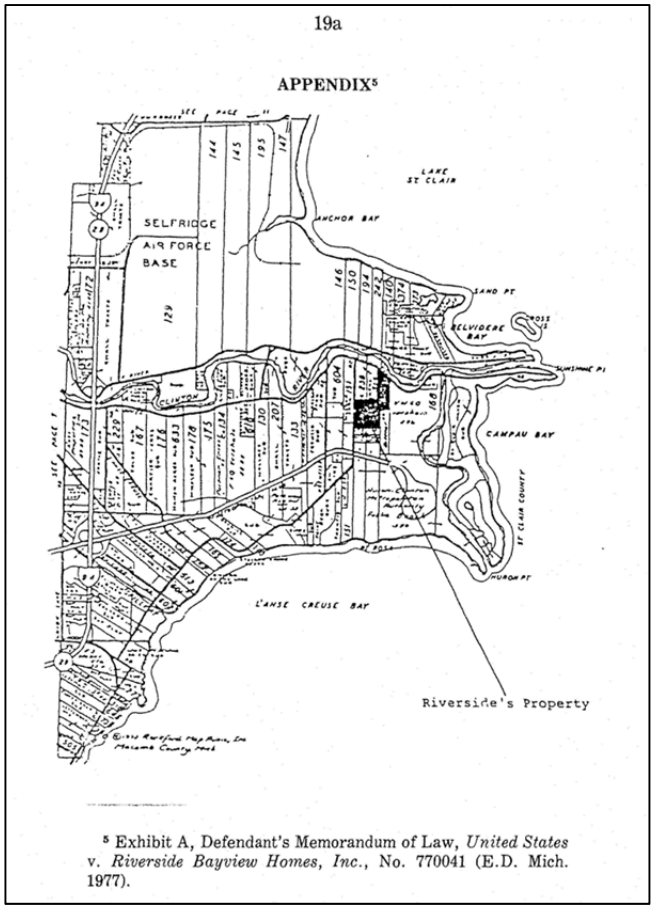
In comparison, the Sackett wetlands have a far stronger claim to adjacency. As noted above, they sit only 300 feet from Priest Lake, or roughly the width of the Supreme Court Building. *The Court Building*, www.supremecourt.gov/about/courtbuilding.pdf, (last

visited June 6, 2022) (noting the width as "304 feet from north to south"). Even closer is the unnamed channelized tributary that feeds into Priest Lake. It flows just 30 feet from Petitioners' property, Resp. Br. 3, or markedly less than the length of the friezes inside the Supreme Court courtroom. *Courtroom Friezes: South and North Walls*, www.supremecourt.gov/about/northandsouthwalls.pdf (last visited June 14, 2022) (listing dimensions of 40 feet by 7 feet, 2 inches for each frieze). A comparison of overhead depictions of the Sackett wetlands, *supra* Figure 3, p. 15, and the *Riverside Bayview Homes* wetlands further cements the parallels between these cases.

Fig. 4: Riverside's Property (center) and Lake St. Clair (right).[32]

[IMAGE ON FOLLOWING PAGE]

[32] Pet. Br. 19a, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (No. 84-701).



[5] Exhibit A, Defendant's Memorandum of Law, *United States* v. *Riverside Bayview Homes, Inc.*, No. 770041 (E.D. Mich. 1977).

Relying on an improper understanding of *Riverside Bayview Homes'* factual history, Petitioners go on to misstate the legal question undergirding this Court's analysis. The Court did, of course, list several aquatic features—"shallows, marshes, mudflats, swamps, bogs"—and remark, "Where on this continuum to find the limit of 'waters' is far from obvious." 474 U.S. at 132. From this observation, Petitioners wrongly present *Riverside Bayview Homes* as a case about a "line-drawing ambiguity raised by the Act's regulation of

'waters'," as if there had been some confusion about where to mark the shoreline of Lake St. Clair in Detroit. Pet. Br. 14. There was no such confusion.

The jurisdictional wetlands in that case: (1) stood at least 200 feet away from a canal; (2) relied on the canal to drain into Black Creek; and (3) relied on Black Creek flowing into Lake St. Clair. There was absolutely no trouble distinguishing the wetlands from Black Creek or the lake.

The Court's fundamental concern was with the role that wetlands play in water quality protection. The "continuum" the Court discussed was hydrological, not geographical. Because management of those wetlands was "inseparably bound up" with water quality in the lake, they were found to be protected by the Clean Water Act as an integral part of the "waters of the United States." *Riverside Bayview Homes,* 474 U.S. at 134.

Thus, the *Riverside Bayview Homes* Court focused its analysis on the problem of pollution conveyance between wetlands and navigable waters. Relying on the Act's text and legislative history, the Court endorsed the Corps' "broad, systemic view of the goal of maintaining and improving water quality," and took special note of the "congressional concern for protection of water quality and aquatic ecosystems…." 474 U.S. at 132-33.

The takeaway here is that the *Riverside Bayview Homes* Court took a practical view of § 404, focusing on what happens downstream of jurisdictional wetlands. This real-world concern provides a

throughline for understanding all the Court's major Clean Water Act cases. In *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court unambiguously connected the "inseparably bound" analysis from *Riverside Bayview Homes* to the "significant nexus" test:

> We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "*inseparably bound up* with the 'waters' of the United States."
>
> It was the *significant nexus* between the wetlands and "navigable waters" that informed our reading of the CWA in Riverside Bayview Homes.

531 U.S. at 167 (internal citation omitted) (emphasis added).

Justice Kennedy's opinion in *Rapanos v. United States,* 547 U.S. 715, 769 (2006), also relied on a practical application of the text to reaffirm a significant nexus test, noting that a "permanent standing water or continuous flow" test would make "little practical sense in a statute concerned with downstream water quality." And in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462, 1470 (2020), this Court rejected calls to adopt a "bright-line test" that would "have consequences that are inconsistent with major congressional objectives, as

revealed by the statute's language, structure, and purposes." 140 S.Ct. at 1470, 1477.[33] The Court approvingly cited EPA's practice of applying "the permitting provision to some (but not to all) discharges through groundwater for over 30 years." *Id.* at 1477.

Thus, for nearly four decades, this Court's Clean Water Act jurisprudence has emphasized the pragmatic: a strong, science-based focus on what happens downstream.

IV. Several § 404 Permits Have Been Issued in the Priest Lake Basin for Projects Similar to the Sacketts Without Impeding Development.

Petitioners argue that they "set out to build a modest family home" above the shores of Priest Lake when their plans were derailed by Clean Water Act permitting requirements. Pet. Br. 4. Yet this claim ignores similarly situated property owners, who sought *and received* § 404 permits on the way to successfully completing their construction projects.[34]

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[33] *County of Maui*, of course, considered a distinct question based on the meaning of "point source" in 33 U.S.C. 1362(12)(A).

[34] The argument that permitting would be "time-consuming and expensive," Pet. Br. 10, mistakenly relies on this Court's decision in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590 (2016), which involved the effort by three different companies to extract commercially valuable peat from "a 530–acre tract near their existing mining operations." 578 U.S. at 595-96, a far more intensive operation that understandably incurred higher permitting costs.

It may be that Petitioners were familiar with at least some of these projects, given their expertise and experience in the construction industry.[35]

Speedy approvals have been routinely granted for residential projects, in large part because the U.S. Army Corps of Engineers' Nationwide Permit 29 ("NWP 29") allows for "[d]ischarges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence…." Final Rule, U.S. Army Corps of Eng'rs, *Reissuance and Modification of Nationwide Permits,* 86 Fed. Reg. 2744, 2861 (Jan. 13, 2021). NWP 29 specifies that the Corps will "authorize[] the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development." *Id.*

The Sackett's single-family residence would have faced a far easier path to permitting than they suggest, given that "just under ½ acre ha[d] been filled" and NWP 29 streamlines permitting if a discharge does not "cause the loss of greater than ½-acre of non-tidal waters of the United States." J.A. 15; 86 Fed. Reg. at 2861.

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[35] *See* Mike Sackett Inc. DBA: Sackett Contracting & Excavating, *Greater Sandpoint Chamber of Commerce,* at http://members.sandpointchamber.org/list/member/mike-sackett-inc-dba-sackett-contracting-excavating-priest-lake-601 (listing expertise in "[e]xcavating, water and sewer systems, subdivisions") (last visited June 5, 2022).

A review of records on file with the U.S. Army Corps of Engineers, Walla Walla District, confirms that several projects have been greenlighted under NWP 29 in the Priest Lake Basin.[36] These include:

- Authorizing the crossing of a marsh area to access a home site (DA No. NWW-2008-00454-C01);
- Discharging material to construct a road and a sewer main through wetlands (DA No. NWW-2008-00222-C01);
- Discharging 400 cubic yards of rock into wetlands adjacent to Priest River for the purpose of constructing a new residential driveway (DA No. NWW-2021-00421);
- Filling one-tenth of an acre of wetlands to complete an access road and build an RV pad (DA No. NWW-2015-00409);
- Obtaining pre-application guidance for a permanent structure in possible wetlands (DA No. NWW-2010-00587-C03).

The timeline for receiving each of these NWP 29 permits was usually a matter of just a few weeks or months:

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[36] *Amicus curiae* ICL obtained a spreadsheet of § 404 permits issued in the Priest Lake Basin from the U.S. Army Corps of Engineers, Walla Walla District, via public records request, https://www.dropbox.com/s/3ut5j2tkrl1a8xi/Copy%20of%20ACOE%20permits%20by%20huc%208%2017010215.xlsx?dl=0. *See also* Marie Kellner, *U.S. Supreme Court navigates tricky waters in Priest Lake wetlands case*, https://www.idahoconservation.org/blog/supreme-court-navigates-priest-lake/ (June 15, 2022) (including an embedded link to the spreadsheet of § 404 permits).

- DA No. NWW-2008-00454-C01: Beginning Date of June 17, 2008; Ending Date of June 24, 2008;
- DA No. NWW-2008-00222-C01: Beginning Date of March 26, 2008; Ending Date of May 14, 2008;
- DA No. NWW-2021-00421: Beginning Date of August 9; Ending Date of October 29, 2021;
- DA No. NWW-2015-00409: Beginning Date of August 21, 2015; Ending Date of September 29, 2015;
- DA No. NWW-2010-00587-C03: Beginning Date of November 5, 2010; Ending Date of November 29, 2010.

Even after the Sacketts unlawfully dumped sand and gravel into aquatic resources, a permit under NWP 29 might *still* have been readily available. *See, e.g.,* DA No. NWW-2012-00293-C03 (U.S. Army Corps of Engineers permit issued in the Priest Lake Basin for unauthorized fill of wetlands) (Beginning Date of Aug. 28, 2012; Ending Date of Sept. 21, 2012).

Petitioners were simply asked to adhere to the same rules that their neighbors had already followed to ensure that the iconic waters of Priest Lake remain protected for all of them to enjoy. *See* 33 U.S.C. 1251(a)(2). Community-wide compliance is vital to ensuring the ecological health and economic vitality of the Priest Lake area. It is also what Congress envisioned when it authorized the issuance of general permits to ensure "only minimal

cumulative adverse effect on the environment." 33 U.S.C. 1344(e)(1) (emphasis added).

Parts of Priest Lake have already faced public health advisories due to toxic, blue-green algal blooms.[37] Such blooms have been linked to the kind of stormwater, wastewater, and nutrient pollution problems that § 404 seeks to prevent.[38] Concern about these pollution problems is especially warranted here, given that the aquatic resources on the Sackett property are inextricably intertwined with the health of Priest Lake. There is: (1) groundwater flow into Priest Lake from the Kalispell Bay Fen, which includes the Sackett wetlands; (2) a surface-water connection for much of the year between Priest Lake and the Kalispell Bay Fen; and (3) the presence of trout in wetlands above the Sackett property. All these facts support Respondents' finding of a "significant nexus" between the wetlands and Priest Lake.

CONCLUSION

Amicus curiae ICL has a significant interest in the conservation of Priest Lake and has worked since the earliest days of the Clean Water Act on

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[37] Matthew Kincannon, *Toxic blue-green algae found at Priest Lake Outlet and Chuck Slough,* KXLY Broadcast Group (Aug. 27, 2021), https://www.kxly.com/toxic-algae-found-at-priest-lake-outlet-and-chuck-slough/.

[38] Joseph S. Smith, *et al., The seasonality of nutrients and sediment in residential stormwater runoff: Implications for nutrient-sensitive water*s, J. of Envtl. Management, Vol. 276 (Dec. 15, 2020), at 111248, https://www.sciencedirect.com/science/article/pii/S0301479720311725.

water quality protection throughout the state of Idaho. In defense of these interests, *amicus curiae* asks the Court to affirm Respondents' well-documented finding that the Sackett wetlands are protected as part of the "waters of the United States," 33 U.S.C. 1362(7).

Respectfully submitted,

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