

In The  
**Supreme Court of the United States**

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MICHAEL SACKETT; CHANTELL SACKETT,  
*Petitioners,*

v.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY;  
MICHAEL S. REGAN, Administrator,  
*Respondents.*

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

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**JOINT APPENDIX**

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Petition for Writ of Certiorari filed September 22, 2021  
Petition for Writ of Certiorari granted January 24, 2022

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**Chronological List of Relevant Docket Entries**

United States District Court  
for the District of Idaho  
*Sackett v. Johnson*  
Case No. 2:08-cv-00185-EJL

<b><u>Dkt.</u></b>	<b><u>Date</u></b>	<b><u>Description</u></b>
1	4/28/2008	Complaint for Declaratory and Injunctive Relief
14	5/16/2008	Motion to Dismiss for Lack of Jurisdiction
15	5/16/2008	Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction
19	5/30/2008	Response to Motion to Dismiss for Lack of Jurisdiction
20	6/6/2008	Reply to Response to Motion to Dismiss for Lack of Jurisdiction
21	8/7/2008	Memorandum Order granting Motion to Dismiss for Lack of Jurisdiction
22	8/7/2008	Judgment
23	8/20/2008	Motion to Clarify and Motion for Reconsideration

<u>Dkt.</u>	<u>Date</u>	<u>Description</u>
27	9/26/2008	Reply to Response to Motion to Clarify and Motion for Reconsideration
28	10/9/2008	Order denying Motion to Clarify and Motion for Reconsideration
29	10/16/2008	Notice of Appeal
48	5/3/2012	Order from Ninth Circuit reversing the District Court's grant of Defendant's motion to dismiss; matter is remanded for proceedings consistent with the Supreme Court's Opinion
49	5/3/2012	Mandate of the Ninth Circuit
59	11/21/2012	Answer to Complaint
62	1/15/2013	Administrative Record
70	4/5/2013	Plaintiffs' Motion to Strike the Administrative Record
73	5/10/2013	Response to Motion to Strike Administrative Record
76	5/30/2013	Plaintiffs' Request for Judicial Notice

<u>Dkt.</u>	<u>Date</u>	<u>Description</u>
84	5/30/2013	Reply to Response to Motion to Strike Administrative Record
88	3/26/2014	Plaintiffs' Motion to Supplement Complaint
90	4/8/2014	Response to Motion to Supplement Complaint
91	4/22/2014	Reply to Response to Motion to Supplement Complaint
94	4/21/2015	Memorandum Order granting Plaintiffs' Motion to Supplement Complaint
98	4/27/2015	Amended Complaint
101	5/29/2015	Answer to Amended Complaint
103	9/4/2015	Plaintiffs' Motion for Summary Judgment
105	11/20/2015	Defendant's Cross-Motion for Summary Judgment
109	12/22/2015	Plaintiffs' Combined Opposition to Cross-Motion for Summary Judgment and Reply in Support of Its Motion for Summary Judgment

<u>Dkt.</u>	<u>Date</u>	<u>Description</u>
112	2/8/2016	Defendant's Reply to Its Cross-Motion for Summary Judgment
	12/22/2017	Lodged Document on Disk re: Administrative Record
120	3/31/2019	Order denying Plaintiffs' Motion to Strike, granting Plaintiffs' Request for Judicial Notice, denying Plaintiffs' Motion for Summary Judgment, and granting Defendant's Motion for Summary Judgment
121	4/4/2019	Judgment dismissing case in its entirety
122	5/30/2019	Notice of Appeal

**Chronological List of Relevant Docket Entries**

United States Court of Appeals  
for the Ninth Circuit  
*Sackett v. U.S. Environmental Protection Agency*  
Case No. 08-35854

<b><u>Dkt.</u></b>	<b><u>Date</u></b>	<b><u>Description</u></b>
1	10/20/2008	Appeal docketed
7	11/28/2008	Opening Brief and Excerpts of Record filed
N/A	1/14/2009	Filed Answering Brief filed
N/A	1/30/2009	Filed Reply Brief filed
33	12/9/2009	Case argued and submitted
46	9/17/2010	Opinion
47	10/29/2010	Petition for Rehearing En Banc
49	11/29/2010	Order denying petition for rehearing en banc
52	6/28/2011	Notice from Supreme Court that petition for certiorari is granted

<u>Dkt.</u>	<u>Date</u>	<u>Description</u>
58	4/24/2012	Certified judgment from the Supreme Court; it is ordered and adjudged that the Ninth Circuit judgment is reversed with costs and the case is remanded to the Ninth Circuit
60	5/3/2012	Order filed for publication; reversed and remanded

**Chronological List of Relevant Docket Entries**

United States Court of Appeals  
for the Ninth Circuit  
*Sackett v. U.S. Environmental Protection Agency*  
Case No. 19-35469

<u>Dkt.</u>	<u>Date</u>	<u>Description</u>
1	5/30/2019	Appeal docketed
14	12/11/2019	Opening Brief
15	12/11/2019	Excerpts of Record
16	12/12/2019	Filed clerk order re: opening brief filed
22	4/1/2020	Appellees' Motion to Dismiss Case
23	4/9/2020	Appellants' response opposing motion to dismiss
24	4/16/2020	Appellees' reply to response to motion to dismiss
26	5/22/2020	Order denying motion to dismiss appeal
28	6/22/2020	Answering Brief
29	6/22/2020	Supplemental Excerpts of Record

<u>Dkt.</u>	<u>Date</u>	<u>Description</u>
30	6/24/2020	Order re: Answering Brief and Supplemental Excerpts of Record are filed
31	7/13/2020	Reply Brief
32	7/14/2020	Order re: Reply Brief is filed
43	11/19/2020	Case argued and submitted
50	3/8/2021	Order requesting supplemental briefing to address the relevance, if any, of the Navigable Waters Protection Rule: Definition of the “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020)
51	3/26/2021	Appellants’ Supplemental Brief
52	3/29/2021	Order re: Appellants’ Supplemental Brief is filed
54	4/9/2021	Appellees’ Supplemental Brief
55	4/9/2021	Order re: Appellees’ Supplemental Brief is filed

<u>Dkt.</u>	<u>Date</u>	<u>Description</u>
59	8/16/2021	Opinion

**Gregg Rayner wetlands determination,  
dated August 7, 1996 (AR 92-93)**

**FIELD INSPECTION REPORT**

\* \* \* \* \*

**REMARKS**

Mr. Marak showed me the lot he owns. He wants to place fill to provide a level pad for a mobile home and yard. Site contains wetlands. We discussed alternatives. Only lot he owns. Would not want to fill entire lot - just enough for house pad & yard. Would leave remainder as is. I informed him permit required. I advised about NW for single family housing. Gave him application and said I would send information on single family housing NW permit.

**SIGNATURE OF INSPECTOR**  
/s/ Gregg A. Rayner

**DATE**  
August 7, 1996

**Gregg Rayner determination that wetlands  
exist on site; permit required to fill,  
dated Aug. 9, 1996 (AR 94-95)**

DEPARTMENT OF THE ARMY  
WALLA WALLA DISTRICT, CORPS OF  
ENGINEERS  
COEUR d'ALENE REGULATORY OFFICE  
U.S. FOREST SERVICE BLDG.  
3815 SCHREIBER WAY  
COEUR d'ALENE, IDAHO 83814-8363

August 9, 1996

Operations Division

SUBJECT: NPW No. 961201150

Mr. Ron Marak  
HCR 5, Box 151-2A  
Priest River, Idaho 83856

Dear Mr. Marak:

This will confirm the information provided to you during our meeting on August 7, 1996, regarding the need for a Department of the Army permit for your proposed placement of fill for a housing pad, in wetlands adjacent to Priest Lake. Your project is located in Sec. 12, T.60N., R.5W., B.M., near Priest Lake, Bonner County, Idaho.

Section 404 of the Clean Water Act (33 U.S.C. 1344) requires a Department of the Army permit be issued for the discharge of dredged or fill material into waters of the United States, including wetlands. This

includes excavation activities which result in the discharge of dredged material and destroy or degrade waters of the United States.

The placement of fill material into wetlands adjacent to Priest Lake, as described by you, will require a Department of the Army Permit under the Clean Water Act. I provided you an application pamphlet entitled "General Information and Instructions for Completion of Joint Application for Permit" with permit application and drawing forms, during our meeting.

As discussed, your project may comply with the terms and conditions of Nationwide Permit 29 for Single Family Housing. I have enclosed a copy of this Nationwide Permit for your information. You will need to follow the "Pre-Construction Notification" instructions to apply for approval under this authorization.

You are advised that the discharge of dredged or fill material in waters of the United States, including wetlands, prior to obtaining the required Department of the Army permit is in violation of the provisions of the Clean Water Act.

If you have any questions, please contact me by writing to the above address or phone 208-765-7256 [208-765-7449].

Sincerely,  
/s/ Gregg A. Rayner  
Gregg A. Rayner  
Regulatory Project Manager

Enclosure

**Fax to Dean Hilliard from Chantell Sackett  
re project, dated May 23, 2007 (AR 166-167, 171)**

May 23, 2007

Chantell Sackett  
P.O. Box 425  
Nordman, ID 83848

RE: Property at 1604 Kalispell Bay Rd. Priest Lake,  
ID 83856. Time line of what has taken place.

April 30, 2007: Started clearing property at 1604  
Kalispell Bay Rd. for home and shop

May 3, 2007: 3 people from (EPA) showed up to 1604  
Kalispell Bay Rd., and asked the equipment operator  
to stop what he was doing. The operator was Chris  
Carstens, he was pushing pit run that was brought in  
to build up the site where the house and shop are to  
be built. Chris was asked for a permit to fill in  
wetlands and he said he had nothing at the site. These  
3 people went to the Sackett Office and spoke with  
Kim Holman. They asked if Chantell was available  
and Kim told them I was not. They asked if I had a  
permit to fill in wetlands. Kim said Chantell is not  
here and that I may have my files in my office but was  
not sure. They asked for any information on the  
project, if we had maps that show it is wetlands or  
anything? Kim asked them what authority they had  
to shut down a job site, when they don't have any  
supporting evidence that proves the property is  
wetlands. They answered that there is water there.  
One of the three people left a card, Carla Fromm. Kim

told them I would call them when I got back to the office.

May 4, 2007: I received a phone message from John Olsen [sic] from the EPA, he said that he had been to the Corps of Engineers and that they have no information on project. He will call this afternoon and is working on finding out if it is wetlands.

I called Sewell Eng., and spoke to Ray Henriksen, I explained what had happened and he gave me Tom Duebendorfer's number. I called Tom and asked him to take a look at the site to see if he could determine if it is wetlands. Tom asked me to send him some information on the site and he would get back to me the following week.

I called Carla Fromm and I asked her if she had received a complaint and she said yes. I asked if she would tell me who the person was and she said no. Carla said that it looked like we filled the whole site in and I said that we had not. I asked if she had jurisdiction over this area and Carla said that the site looked suspicious and that she is not sure if the EPA has jurisdiction over the site. Carla told me that our property was listed in the National Wetlands Inventory. I told Carla that I was going to have Tom Duebendorfer come to the property at 1604 Kalispell Bay Rd., to determine if this site is wetlands and that I would have him contact her. Carla was good with that.

May 10, 2007: I sent Tom a letter with a plat map, map of surrounding area and photos of the area.

May 21, 2007: Tom and I met at 1604 Kalispell Bay Road property. Tom did determine that the site is part of a wetland. That the site is not an isolated wetland and that it joins a wetland to the South and to the West across a road. Tom said that we should continue not to do any work to the site until we have had the US Army Corps evaluate the site on the best way to proceed.

Tom asked how much area had been filled in on the 27,410 sq ft., site? Approximately 20,436 sq ft. have been filled in and approximately 6,974 sq ft. have not been filled in. Approximately just under  $\frac{1}{2}$  acre has been filled in on .62 acre parcel.

May 22, 2007: I went to go see Beth Reinhart at the US Army Corps, she was going to be out of the office until next week and that Dean Hilliard was available to speak to. I spoke with Dean on the site at 1604 Kalispell Bay Road. I told him that I purchased the plot of land about 3 years ago. I told him there was nothing showing in my information that this was in a National Wetland Inventory. I purchased this to build a house and a shop on and that I had sold my house and was now ready to build here. I showed him a photo of the site that I had taken that day. I let him know that I had Tom Duebendorfer come to the site and that he did determine the site to be part of a wetland. Dean said that he was just filling in for Beth until she returned. Dean asked for some information about the site, I gave him a plot map, a CD of photos of the site that were taken that day and an approximate area that had been filled in. Dean said that we should not do anything until Beth has had a chance to look at the

information. Dean gave me an application to fill out for a permit.

May 23, 2007: I spoke with Dean Hilliard, he asked me to send him the facts on what had taken place, I agreed. Tom told me that he was not sure who had jurisdiction the EPA or the US Army Corps. Dean mentioned the Clean Water Act of Rappanose [sic] Canal? Is there a connection to the water (Priest Lake)?

I called Tom to see if he knew who had jurisdiction? Tom said that the site is not isolated wetlands and that is connected to the South and West with other wetlands. Tom said we need to look for culverts at each driveway from mine to Kalispell Creek to see if the water joins up with this Creek? I told Tom that I would go look today and take photos of each driveway to Kalispell Creek and send them to him.

Tom explained that the EPA deals with water quality issues and that he thought that wetlands are regulated by the Core [sic].

I asked Tom is he would get in touch with Carla Fromm from the EPA and let he [sic] know that he did determine the site to be part of a wetlands and he said he would.

May 23, 2007 2:50pm: called Dean Hilliard, let him know that I went and took photos of the surrounding areas. I told him that to the West, of my property, towards Kalispell Creek that there are 3 driveways in between my property and Old Schneider road and only one of the driveways had a culvert. There is no

drainage to the West of my property as the elevation is higher. The property to the East of my property is the same as mine, wetlands, but there is no drainage for that. There are no culverts under Kalispell Bay Road from the South side to the North side where there are wetlands. The Rudie Trust wetlands on the North side do drain West towards Kalispell Creek. There is a culvert under the Kinnikinnik road and it does drain into Kalispell Creek. If there is no drainage off my property into any water system, then it seems to me that my property would be considered isolated wetlands.

**Fromm inspection report re: Sackett site  
inspection on May 3, 2007, dated June 1, 2007  
(AR 187-188)**

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
REGION 10  
IDAHO OPERATIONS OFFICE  
1435 N. Orchard St.  
Boise, Idaho 83706**

MEMORANDUM

**SUBJECT:** Sackett Site Inspection Report

**FROM:** Carla H. Fromm  
Environmental Scientist

**TO:** File

**Date:** June 1, 2007

On May 3, 2007, at about 2:00pm, Barbara Benge (U.S. Army Corps of Engineers, "Corps"), John Olson (EPA) and I inspected the site of a complaint made to Barbara of wetland filling adjacent to Priest Lake. The site is located on Kalispell Bay Road, NE1/4 of Section 12, T60N, R5W (see attached topographic map excerpt and aerial photograph). When we arrived, a dump truck was delivering a load of fill and an excavator operator was pushing fill into excavated wetlands (photo 1). I asked the truck driver if she was in charge and she directed me to the excavator operator. I introduced myself and showed him my credentials. His name was Chris. He said the boss was

Mike Sackett, Sackett Construction and Excavating. Chris did not have a CWA Section 404 permit from the Corps with him, so he called the office to talk to Mike about our arrival and our request to see the permit. He was not able to reach Mike. I suggested he not proceed with filling of the lot until he heard back about the permit.

John paced off the area that was filled, and took some photographs of the site. The area filled was approximately 300 feet by 100 feet. Chris explained he had been told to fill the whole lot. Along both the east and west property boundaries, strips of excavated ground remained to be filled (photos 2, 3 and 7). These strips of excavated ground revealed wetland soils (photos 2 and 3). The vegetation on neighboring properties and on the south end of the Sackett lot consisted of the wetland species, including red osier dogwood (photo 15) and alder.

Chris suggested we go to the office to ask for the permit. When we arrived there, we talked with Kim, the receptionist or office administrator. She informed us that both Mike and his wife Chantell were in meetings, and we would need to talk with one of them about the permit.

We returned to the site to look for culverts connecting the wetland to either the wetland on the north side of Kalispell Bay Road or connecting the wetland to ditches or another waterway draining into Priest Lake to the south. We did not see culverts under either Kalispell Bay Road or Old Snyder Road which is between the wetland and Priest Lake. The wetland to the north of Kalispell Bay Road (photos 12

and 13) drains via what appeared to be a roadside ditch to Kalispell Creek which flows into Priest Lake.

Chris decided to leave early to start his weekend. He explained that a load of dirt had been placed at the entrance to the lot to keep people from driving in.

Prior to leaving the site at about 3:30pm, a neighbor spoke with John Olson, explaining that occasionally water comes over the road from the wetland to the north, flowing into the filled wetland. The neighbors to the east of the Sackett's lot told us the area filled had looked exactly like their backyard (photos 9 and 10).

\* \* \* \* \*



3) Same excavated area in photo 2, photographed from the south with the neighboring property of intact wetlands on the left, fill on the right.



5) Another view of the west side of lot.

\* \* \* \* \*



12) Wetlands on the north side of Kalispell Bay Road looking east.

\* \* \* \* \*

**Sacketts' response letter to 308 request,  
dated July 5, 2007 (AR 227-229)**

IDAHO OPERATIONS OFFICE  
July 5 2007

U.S. Environmental Protection Agency,  
Region 10, Idaho Operations Office  
Attention: Carla Fromm  
1435 N. Orchard St.  
Boise, ID 83706

Mike & Chantell Sackett  
P.O. Box 425  
Nordman, ID 83848

Re: Request for Information Pursuant to Section 308  
of the Clean Water Act, 33 U.S.C. 1318, received  
June 13, 2007.

Answers to Questions on Enclosure 1 pages 3 – 4

1. Mike and Chantell Sackett
2. Yes, purpose of Site was to build a home. There are other homes next to this Site and Kalispell Bay Road (a County Road) is adjacent to my property.
3. The Site was cleared and dirt which was not suitable for sub-base or a foundation was excavated and loaded into a dump truck and hauled off-site. Material suitable for building a pad was imported into the Site. The Site is 100' x 274.01'. Approximately 1,010 cubic yards of dirt was removed from the Site. Approximately 1,714 cubic yards of material suitable for building a pad was imported. The Site is 27,410 sq

ft, approximately 20,436 sq ft have been filled in and approximately 6,974 sq ft. have not been filled in. Approximately just under a ½ acre of a .62 acre parcel has been filled in. Do not have any photographs of the Site before work started. Have included a diagram of area, exhibit 1 and 2.

4. See question 3

5. Yes

6. May 1, 2007 – May 2, 2007 the material was removed from the Site and deposited at Section 34, Township 61 North, Range 5, West, B.M., just West of where Kalispell Creek Road leaves State Route 57, at mile marker 34, this property is owned by Mike Sudnikovich. An excavator was used to load the material into a dump truck, and then taken to the off-site location [sic] owned by Mike Sudnikovich and dumped into an upland area. This property owned by Mike Sudnikovich was assessed by Tom Duebendorfer, a professional Wetland Scientist. Tom concluded this land is an upland area, not wet lands. A copy of his report was sent to Beth Reinhart of the US Army Corps of Engineers. Mike and Chantell Sackett own the equipment used for this removal. Approximately 1,010 cubic yards were deposited. Approximate 8,100 sq ft of area is covered. Mike Sackett deposited the material to the off-site location. The lot was purchased to build a home, the native material was removed and suitable material was imported for building a pad for a home.

7. The material imported into the Site is pit run and the pit run came from a gravel pit on Kalispell

Creek Road. This pit source is leased and operated by Mike and Chantell Sackett.

8. The material was imported to the Site on May 2, 2007 and May 3, 2007.

9. An excavator was used to spread the material on the Site. The equipment is owned by Mike and Chantell Sackett.

10. Mike and Chantell Sackett directed the Site to be cleared, unsuitable building material removed and suitable material imported and placed.

11. May 22, 2007 Chantell Sackett went to the US Army Corps office in Coeur D'Alene and spoke with Dean Hilliard. Dean let me know that he was filling in for Beth Reinhart and that she would be back next week. I told Dean that I had purchased the lot at 1604 Kalispell Bay Road about 3 years ago. I purchased it to build a home. I turned in my application for a building location permit from Bonner County on May 11, 2007. Bonner County Road and Bridge sign off on the building location permit that the driveway had been built to Bonner County specs on May 11, 2007. Kalispell Bay Sewer District signed off on the building location permit on May 2, 2007 and that the sewer hook up fee was paid for in full and we could hook up to the system. We started clearing the lot on May 1, 2007 and on May 3, 2007 we had 3 people from the EPA stop by our property and told us to stop what we were doing. They believed that we were filling in wetlands and wanted to see our permit. I told Dean that there was no documentation in any of my paperwork, Warranty Deed, Deed of Trust, Title Report from the Title Insurance Company, which

states this lot is a wetland. I told him one of the 3 EPA representatives that were at our property on May 3, 2007 was Carla Fromm and Carla had called and left me a message that this land was listed in a National Wetland Inventory. Dean asked for some information about our property and I gave him a plot map, CD of photos that were taken that day and an approximate area that had been filled in. Dean said that we should do nothing until Beth had a chance to look at the information. Dean gave me an application to fill out for a permit. On May 22, 2007 Bonner County approved my building location permit and it was ready to be picked up. May 23, 2007 I spoke with Dean and he had asked me to send him the facts on what had taken place.

12. No

13. No

14. Did not know that the lot purchased was a wetland, others have built on contiguous property and the County Road isolates this area. Bonner County issued a building location permit and nothing in any of my paperwork when we purchased the property, or since, indicted [sic] a wetlands designation.

15. I purchased the lot to build a home.

**Olson inspection report re: Sackett site  
inspection on May 15, 2008, dated July 1, 2008  
(AR 342-352, 357-362, 367)**

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
REGION 10  
IDAHO OPERATIONS OFFICE  
1435 N. Orchard St.  
Boise, Idaho 83706**

**MEMORANDUM**

DATE: July 1, 2008

SUBJECT: May 15, 2008 Site Inspection at Sackett  
Property

FROM: John M. Olson  
Wetland Ecologist

TO: File

1. Introduction

A. On May 15, 2008, I conducted an inspection of the area around the Chantell and Michael Sackett property located near Kalispell Creek and Priest Lake in NE¼ Section 12, T 60 N, R 5 W, B. M. in Bonner County, Idaho (Attachment 1). The purpose of this site inspection was to examine the hydrologic conditions of the site and the surrounding area and to evaluate connections with other waters.

B. Prior to visiting the site, I went to the U. S. Forest Service Priest Lake Ranger District and examined historic aerial photographs of the project area. I examined original black and white aerial photographs from 1932 (labeled 693K32 and 694K32). These photographs were taken prior to Kalispell Bay Road being constructed. In these photographs the wetlands on the Sackett property appear contiguous with the wetlands to the north and appear as a continuous wetland to Priest Lake. A primitive road or trail appears to exist near the lakefront and a shoreline beach appears to constrict the wetland toward the west near Priest Lake. Photocopies of these original photographs are included as Attachment 2.

C. I arrived at the site at approximately 12:30 pm. I was accompanied by Michael Doherty (U. S. Army Corps of Engineers, Walla Walla District, Regulatory Division, Coeur d'Alene Field Office). The weather during the site inspection was dry and sunny with temperatures in the 70s. There was no snow on the site, inundation and ponding were limited to wetland and other aquatic areas, and upland areas were dry. I stayed at the site and in the area until approximately 6:00 pm.

## 2. Observations

A. I observed that all portions of the Sackett property where native soil was removed but fill material had not been placed (*i.e.*, along the east, south, and west edges of the property) were inundated or ponded/saturated to the surface (Attachment 3, photographs 1 - 4). The water

surface levels along the east side of the fill appeared to be approximately 6 to 12 inches higher than the water surface level along the west side of the fill (*i.e.*, inundated along east side, ponded/saturated to the surface along west side).

B. The vegetation at the site was in the growing season as evidenced by previously dormant vegetation now greening up and leafing out.

C. I observed that the wetland north of Kalispell Bay Road was inundated with 1 to 2 feet of water (Attachment 3, photographs 5 - 7). There is a substantial flow (estimated approximately 5 to 10 cubic feet per second) of surface water flowing through the outlet stream along the north side of Kalispell Bay Road to Kalispell Creek (Attachment 3, photographs 8 - 12). Beaver have been active in the outlet stream as evidenced by vegetation cut and placed in the channel (Attachment 3, photograph 16). A relatively large trout (perhaps 14 inches) was observed near the upstream end of the outlet stream. The water surface elevation on the north side of Kalispell Bay Road was approximately 2 feet below the road surface elevation.

D. The water surface elevation south of Kalispell Bay Road along the Sackett property was approximately 3 feet below the road surface elevation. I found no culverts through Kalispell Bay Road in the project area. I did not observe any surface water flow from the north side of Kalispell Bay Road to the south side. I also did not observe any obvious signs of seepage on the south side of Kalispell Bay Road above the water surface

elevation. However, I believe it is likely there is shallow subsurface flow occurring below the water surface elevation between the northern wetland and the Sackett wetland as described below in Section 3.A.(4).

E. I observed that the area on the south side of the Sackett property along Old Schneider Road was inundated. There was no obvious surface flow from the Sackett property wetland to Priest Lake.

F. Priest Lake appeared to be approximately 2 feet below its normal high water elevation (Attachment 3, photographs 17 - 18). Along the lake shoreline immediately south of the Sackett property were 2 small drainage pipes (approximately 4 inch diameter) emerging from the shoreline (Attachment 3, photograph 19). One of the pipes had a discharge flow of approximately 2 to 3 gallons per minute going directly into Priest Lake (Attachment 3, photograph 20). These discharge pipes are located along the shoreline in front of the red-roofed house shown on the left side of photograph 21 (Attachment 3). It is approximately 300 linear feet from the southern edge of the Sackett wetland to the discharge pipes and Priest Lake. The water surface elevation in Priest Lake appeared to be approximately 8 to 10 feet below the elevation of the Sackett property wetlands (Attachment 3, photograph 21).

### 3. Ecology and hydrology of Sackett wetland

A. Michael Doherty is a biologist with the U. S. Army Corps of Engineers, Walla Walla District, Regulatory Division and works in the Coeur

d'Alene Field Office in Coeur d'Alene, Idaho. Mike has worked in that office since 1984 covering northern Idaho, including the Priest Lake area. Mike almost certainly has more experience than anyone else in wetland identification and assessment and in wetland hydrology observations/knowledge in this area. Based on our observations and training/experience in wetland ecology and hydrology, our understanding of the ecology and hydrology of the Sackett wetland and the surrounding area is as follows:

(1) The outlet stream leading from the wetland on the north side of Kalispell Bay Road to Kalispell Creek is a constructed channel and appears to be perennial based on the amount of flow and the channel size and form. This stream is also mapped as perennial on the USGS Priest Lake SW Quadrangle (Attachment 1).

(2) The Sackett property wetland was clearly part of one wetland system with the wetland north of Kalispell Bay Road prior to construction of Kalispell Bay Road due to its similar landscape position and similar vegetation community. Without Kalispell Bay Road and the artificially constructed channel on the north side of Kalispell Bay Road, the entire flow from the drainage area of the unnamed stream [approximately 1.36 square miles with an estimated mean annual flow of 1.81 cubic feet per second (USGS StreamStats, Ungaged Site Report)] would have flowed out of the south end of the

Sackett wetland to Priest Lake because that area had the lowest elevations leading to the lake.

(3) This wetland system is the Kalispell Bay Fen. Fens and bogs are peatland systems which are generally defined as wetlands with waterlogged substrates and at least 30 cm of peat accumulation. These peatlands contain species that are adapted to the unique set of conditions in these habitats (saturated, oxygen-free, nutrient-poor, and acidic conditions which limit microbial breakdown of plant tissue leading to the accumulation of peat). Peatlands are rare in northern Idaho and have great importance because of their rare flora and their role as carbon sinks. Peatlands are also very sensitive to subtle changes in water levels and nutrient inputs from adjacent lands<sup>1</sup>. The Kalispell Bay Fen is a shrub-dominated fen with a number of rare plant occurrences, including small cranberry (*Vaccinium oxycoccos*), arctic starflower (*Trientalis arctica*), poor sedge (*Carex paupercula*), and crested shield-fern (*Dryopteris cristatai*)<sup>2</sup>. The Kalispell Bay Fen was ranked number 55 of 200 wetlands

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<sup>1</sup> Bursik, RJ and RK Mosely. 1995. Ecosystem Conservation Strategy for Idaho Panhandle Peatlands. Conservation Data Center, Idaho Department of Fish and Game. 37 pp.

<sup>2</sup> Jankovsky-Jones, M. 1997. Conservation Strategy for Northern Idaho Wetlands. Conservation Data Center, Idaho Department of Fish and Game. 35 pp.

throughout Idaho identified as priority wetlands for conservation<sup>3</sup>.

(4) Even with Kalispell Bay Road affecting surface flow between the wetlands on the north and south sides of the road, it is evident that shallow subsurface flow is occurring between these wetlands based on the following:

(a) The wetland plant community persists south of Kalispell Bay Road and appears to be the same plant community type (dominated by willow, dogwood, and spirea) that occurs in the wetland on the north side of Kalispell Bay Road.

(b) The area draining into the Sackett wetland does not appear to be sufficient by itself (*i.e.*, without flow from the area north of Kalispell Bay Road) to provide the amount of water necessary to account for the extent of observed wetland hydrology (hill slope to east of Sackett wetland only provides several acres of drainage to the Sackett wetland).

(c) Underlying sands and gravel from granitic outwash typically underlie the

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<sup>3</sup> Hahn, L, C Murphy, A Schmdit, T Fields. 2005. Idaho Wetland Conservation Prioritization Plan. Conservation Data Center, Idaho Department of Fish and Game. 17 pp.

stream valleys around Priest Lake<sup>4</sup>. The high permeability of these soils can provide substantial shallow subsurface flow.

(5) The Sackett wetland is adjacent to, but does not abut, the unnamed tributary to Kalispell Creek. The Sackett wetland is separated from the unnamed tributary to Kalispell Creek by Kalispell Bay Road, a man-made barrier. Kalispell Bay Road consists of a paved road surface on top of a road fill measuring approximately 30 feet wide at its base and approximately 3 to 4 feet above the ground elevation of the wetlands on both the north and south sides of the road. This road fill appears to consist of typical road fill material for the area, including gravels, sands, and fine soil material. This road fill acts a barrier to prevent surface water flow from the northern wetland to the Sackett wetland on the south side of the road and to divert that surface water into the unnamed tributary leading to Kalispell Creek. The unnamed tributary to Kalispell Creek is most likely a perennial stream as described above and it is certainly a relatively permanent tributary based on USGS mapping and its flow and channel size and form. Kalispell Creek (Attachment 3, photographs 13 - 15) is a perennial stream based on USGS mapping, its flow (summer base flow at the mouth of

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<sup>4</sup> Idaho Department of Environmental Quality. 2001. Priest River Subbasin Assessment and Total Maximum Daily Load. 229 pp.

Kalispell Creek is estimated at 15 - 20 cfs<sup>5</sup>), its channel size and form, and Mike's personal knowledge of the stream. To evaluate the significant nexus of the Sackett wetland to the nearest downstream traditional navigable water (Joint Corps of Engineers and EPA Memorandum "Clean Water Act Jurisdiction Following the U. S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States" dated June 5, 2007) requires an evaluation of the relevant reach of the tributary and all wetlands adjacent to that stream reach. The relevant reach of the unnamed tributary near the Sackett wetland is from the upstream location where two first order streams join to form the second order stream downstream to the junction of this second order stream with Kalispell Creek (approximately 3500 linear feet).

(6) The nearest downstream traditional navigable water (TNW) is Priest Lake. Kalispell Creek enters Priest Lake approximately 1,000 linear feet downstream of where the unnamed tributary enters Kalispell Creek. Priest Lake is a large lake [62 miles of shoreline, surface area of 23,360 acres (36.5 square miles), and a maximum depth of 369 feet<sup>6</sup>] which is navigable in fact<sup>7</sup>

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<sup>5</sup> Idaho Department of Environmental Quality. 2001. Priest River Subbasin Assessment and Total Maximum Daily Load. 229 pp.

<sup>6</sup> Idaho Department of Fish and Game. 2007. Fisheries Management Plan 2007 – 2012. 373 pp.

<sup>7</sup> <http://www.priestlake.org/recreation/boating.html>

and which supports substantial commerce, including boat rentals<sup>8</sup>, fishing guides<sup>9</sup> <sup>10</sup>, public campgrounds and boat ramps<sup>11</sup>, and private marinas<sup>12</sup> <sup>13</sup>. Previous Jurisdictional Determinations performed by the Corps of Engineers around Priest Lake have determined that Priest Lake is a TNW.

(7) An evaluation of the ecological functions that the wetlands adjacent to the relevant reach of the unnamed tributary provide to Priest Lake shows the following:

(a) Water quality benefits to Kalispell Creek and Priest Lake through sediment retention. Kalispell Creek is listed as impaired for cold water beneficial use due to sediment<sup>14</sup>. Fish sampling data have suggested an impaired salmonid fishery due to excessive stream bedload of sand which has filled aquatic habitats, including pools and spawning gravels. Historically, adfluvial cutthroat trout populations spawned in Kalispell Creek. Excessive sediment, along with

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<sup>8</sup> <http://www.cavanaughbayresort.com/pages/Rentals>

<sup>9</sup> <http://www.fishingidaho.com/>

<sup>10</sup> <http://www.wildernesscharters.com/charters.php>

<sup>11</sup> <http://www.priestlake.org/campground.html>

<sup>12</sup> <http://www.bluediamondmarina.com/>

<sup>13</sup> <http://www.cavanaughbayresort.com/>

<sup>14</sup> Idaho Department of Environmental Quality. 2001. Priest River Subbasin Assessment and Total Maximum Daily Load. 229 pp.

significantly suppressed cutthroat populations in Priest Lake and the competitive advantage of the introduced brook trout over native salmonids in sediment impaired waters, have reduced the quality of Kalispell Creek to native salmonids. Although Priest Lake still maintains high water quality, excessive sediment load from tributary streams can impact the biological, physical, and chemical conditions of Priest Lake through modifying the inputs from these tributaries. Because of their location in the landscape (near the bottom of a drainage area) and their topographic relief (flat), the subject wetlands have a high opportunity and function for capturing sediment within the wetland before it enters Kalispell Creek and Priest Lake. Along with retaining sediment, the wetlands adjacent to the relevant reach of the unnamed tributary also have a high opportunity and function for capturing excessive nutrients and other water-borne pollutants from the watershed. Retaining sediments and nutrients in the wetland is especially important so that these materials do not enter Kalispell Creek and cause further impairment to the creek and its aquatic resources, including salmonids. Furthermore, although the water quality in Priest Lake is currently very good, the retention of sediments and nutrients in

tributary wetlands plays a very important role in maintaining this water quality and the biological integrity of the lake. Good water quality is the foundation of the lake's ecosystem. The public uses of the lake, especially the water-based recreation including fishing, are dependent on good water quality and the aquatic resources it supports. For example, maintaining this good water quality is a critical component in the efforts to restore the westslope cutthroat trout fishery in the lake.

(b) Contribute base flow to Kalispell Creek with fisheries benefits to Kalispell Creek and Priest Lake. Kalispell Creek has a peak runoff in spring from snowmelt and spring rains estimated at 130 - 150 cubic feet per second (cfs). Summer base flow at the mouth of Kalispell Creek is estimated at 15 - 20 cfs<sup>15</sup>. The wetlands adjacent to the relevant reach of the unnamed tributary include the Kalispell Bay Fen as described above. This peatland has waterlogged substrates and extensive amounts of organic material. These characteristics allow the peatland to hold large amounts of water as peak runoff occurs in the drainage area of the

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<sup>15</sup> Idaho Department of Environmental Quality. 2001. Priest River Subbasin Assessment and Total Maximum Daily Load. 229 pp.

unnamed tributary. Although the drainage area (1.36 square miles) is a relatively small component of the Kalispell Creek watershed (39.4 square miles), the large area of the Kalispell Bay Fen wetland (approximately 30 - 35 acres) provides a significant amount of water storage within the drainage area of the unnamed tributary. This reservoir of water held in the wetland during peak runoff provides a more stable and continuous flow (base flow augmentation) to downstream waters through both the unnamed tributary surface flow to Kalispell Creek and the shallow subsurface connection to Priest Lake.

(c) Flow attenuation. In addition to base flow augmentation, the storage of water in the wetland during peak runoff reduces high flow discharges from the unnamed tributary into Kalispell Creek. This reduced flow carries less sediment into Kalispell Creek than higher flows and also reduces the instantaneous flow in Kalispell Creek. Both of these functions help to reduce the sediment load in Kalispell Creek. Reducing sediment load in the creek and to Priest Lake is one of the identified strategies

for maintaining the biological integrity of these waters<sup>16</sup>.

(d) Provide aquatic food base support through invertebrate production. Aquatic invertebrate production in the wetlands adjacent to the relevant reach of the unnamed tributary is expected to be substantial because of the amount of inundation over the large Kalispell Bay Fen wetland. Such production of invertebrates supports fish and wildlife species that occur within the wetlands and the unnamed tributary (*e.g.*, brook trout, yellow warbler, and waterfowl) and that also occur in or near Priest Lake. In addition, due to hydrologic connectivity, species in downstream waters can be affected if either the species (*e.g.*, salmonids) or their prey (*e.g.*, benthic macroinvertebrates) are affected by food web support in upstream waters. This ecological connectivity can be especially important in headwater stream systems<sup>17</sup> such as the relevant reach of the unnamed tributary.

(e) Fish movement from/to Priest Lake. The direct surface connectivity between

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<sup>16</sup> Idaho Department of Environmental Quality. 2001. Priest River Subbasin Assessment and Total Maximum Daily Load. 229 pp.

<sup>17</sup> Freeman, MC, CM Pringle, and CR Jackson. 2007. Hydrologic Connectivity and the Contribution of Stream Headwaters to Ecological Integrity at Regional Scales. *Journal of the American Water Resources Association* (JAWRA) 43(1):5-14.

the unnamed tributary and Priest Lake allow fish the opportunity to move back and forth between these habitats. Historical populations of cutthroat trout and bull trout in Priest Lake were adfluvial, residing in the lake and entering tributaries to spawn. These populations are substantially depressed. Cutthroat trout continue to persist as resident populations in tributary streams. Brook trout have become the dominant salmonid in many tributary streams<sup>18</sup>. Maintaining the hydrologic connectivity between Priest Lake and the unnamed tributary provides the ecological connectivity for fish life stages in the Priest Lake basin. These connections can be especially important for protecting the bull trout and cutthroat trout fishery in Priest Lake. Idaho Department of Fish and Game has identified improving habitat conditions in tributary streams as one of their programs to protect these fish<sup>19</sup>.

(8) Specific hydrologic connections of the Sackett wetland to other waters are as follows:

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<sup>18</sup> Idaho Department of Environmental Quality. 2001. Priest River Subbasin Assessment and Total Maximum Daily Load. 229 pp.

<sup>19</sup> Idaho Department of Fish and Game. 2007. Fisheries Management Plan 2007 - 2012. 373 pp.

(a) Shallow subsurface flow to Priest Lake due to elevation gradient from the wetland down to Priest Lake, the underlying soils, and the flow gradient from north of Kalispell Bay Road following the historic flow route to Priest Lake (per 1932 USFS aerial photographs). The drainage pipes providing flow to Priest Lake (see 2.F. above) could also be an indication of shallow subsurface flow between the wetland and Priest Lake. Such drainage pipes are typically used to provide drainage for development with high ground water conditions. High ground water conditions would be expected in areas where a wetland has a shallow subsurface connection between the wetland and discharge to a down gradient waterbody. The high ground water at the Sackett wetland, the down gradient slope to Priest Lake, and the drainage pipes between the Sackett wetland and Priest Lake are strong indications of this shallow subsurface flow.

(b) Possible hydrologic connection to the outlet channel north of Kalispell Bay Road if the flow and water level north of Kalispell Bay Road is so low (such as through a persistent drought) that the outlet channel would act to carry flow from wetlands both north and south of

Kalispell Bay Road through shallow subsurface flows.

(9) Influence of Sackett wetland to Priest Lake through shallow subsurface flow directly to Priest Lake is as follows:

(a) Water quality improvement (runoff to wetland from adjoining areas is improved through sediment retention and nutrient uptake before moving through the shallow subsurface and entering Priest Lake).

(b) Flow attenuation (retains runoff and upstream shallow groundwater flow during higher flows and releases it slowly to Priest Lake).

B. Mike stated that there are relatively few of these types of wetlands around the entirety of Priest Lake. U. S. Fish and Wildlife Service National Wetland Inventory mapping<sup>20</sup> shows only approximately four other wetlands along the 62 mile Priest Lake shoreline that are at least as large in size and in similar landscape position as the subject wetlands along Kalispell Bay Road. These wetlands provide important benefits to Priest Lake including water quality improvement through sediment reduction and nutrient retention and uptake, fish and wildlife benefits through habitat and food base support, and

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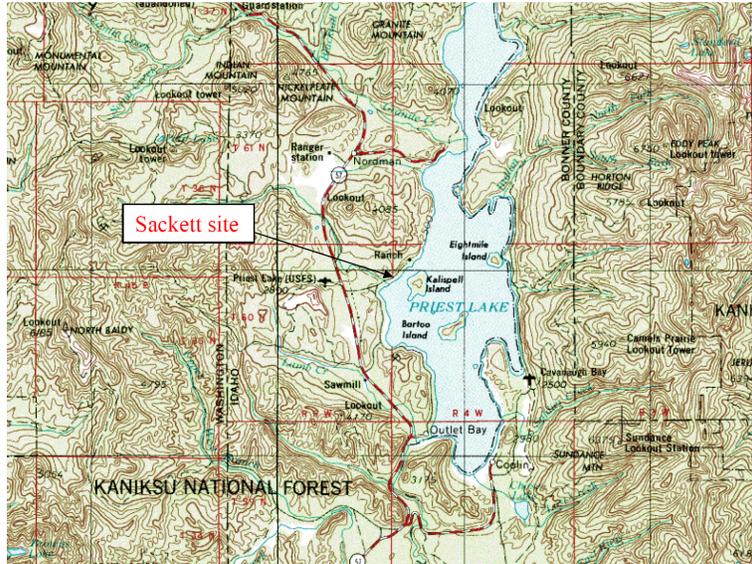
<sup>20</sup> Jankovsky-Jones, M. 1997. Conservation Strategy for Northern Idaho Wetlands. Conservation Data Center, Idaho Department of Fish and Game. 35 pp.

hydrologic benefits through flow attenuation and base flow augmentation. With such limited amounts of wetlands on the lake, the functions performed by these wetlands are especially important in maintaining the high quality of Priest Lake's water, fish, and wildlife.

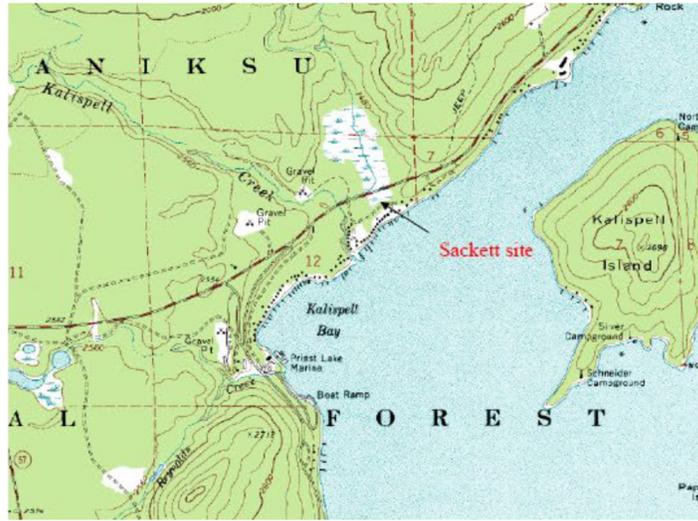
ATTACHMENT 1 – SITE LOCATION

Chantell and Michael Sackett,  
1604 Kalispell Bay Road  
NE ¼ Section 12, T 60 N, R 5 W, B. M.  
in Bonner County, Idaho

General location map



Topographic map – USGS Priest Lake SW, Idaho



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ATTACHMENT 3 – SITE PHOTOGRAPHS

Chantell and Michael Sackett,  
1604 Kalispell Bay Road  
NE ¼ Section 12, T 60 N, R 5 W, B. M.  
in Bonner County, Idaho

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Photograph 3 - View north from Old Schneiders [sic]  
Road of south and east edges of Sackett property

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Photograph 5 - View from Kalispell Bay Road of wetland on north side of Kalispell Bay Road



Photograph 6 - View from Kalispell Bay Road of wetland on north side of Kalispell Bay Road

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Photograph 8 - View of outlet channel on north side of Kalispell Bay Road flowing west toward Kalispell Creek

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Photograph 10 - View of outlet channel on north side of Kalispell Bay Road flowing west toward Kalispell Creek



Photograph 11 - View of outlet channel on north side of Kalispell Bay Road flowing west toward Kalispell Creek

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Photograph 21 - View south to Priest Lake from Old Schneiders [sic] Road on south edge of Sackett property. Priest Lake is approximately 300 linear feet from south edge of Sackett property.

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