

# *Sackett v. EPA:* Potential Implications for Tribal Nations

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# Clean Water Act

- ▶ CWA passed in 1972
- ▶ The statutory objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters...”
- ▶ The CWA made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit is obtained.
  - ▶ National Pollutant Discharge Elimination System (NPDES) permits regulate point sources that discharge pollutants into waters of the U.S.



# Overview of the Clean Water Act

- ▶ EPA and Army Corps of Engineers jointly enforce the CWA
- ▶ Prohibits “the discharge of any pollutant” from a “point source” into “navigable waters.”
- ▶ “pollutant”- includes dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water
- ▶ CWA imposes both civil and criminal penalties for intentional and negligent discharge into WOTUS
  - ▶ Can include fines of over \$60k per day that the violation continues
  - ▶ Can include imprisonment
- ▶ EPA polices violations by issuing orders demanding compliance or by bringing civil actions; private parties may also sue to enforce provisions of the CWA



# Jurisdictional waters under the CWA

CWA prohibits “the discharge of any pollutant” from a “point source” into “navigable waters.”

**(7) The term “navigable waters” means the waters of the United States, including the territorial seas.**

Waters of the United States (“WOTUS”)

# Interpreting Meaning of “WOTUS”

EPA,  
ACE  
Regs

*Riverside  
Bayview*  
1985  
(adjacent  
wetlands  
WOTUS)

*SWANCC*  
2001  
(isolated  
ponds  
not  
WOTUS)

*Rapanos*  
2006  
(wetlands  
without  
surface  
connection  
not WOTUS)

1990

2000

2010

2015

2020



## Two tests that come from *Rapanos*

- Plurality Opinion: 4-1-4 decision which doesn't hold sway the way a majority does, Scalia wrote the plurality decision and Kennedy wrote a concurrence in judgment.
- Scalia test: WOTUS = relatively permanent, standing or continuously flowing bodies of water, OR wetlands with a continuous surface connection. WOTUS does not = ephemeral or intermittent streams.
- Kennedy test: WOTUS = waters with a significant nexus (i.e. affecting physical, biological, chemical integrity) to downstream waterway which had historically been considered navigable.

# *Sackett v. EPA* (2023)

► “Waters of the United States”  
defined as:

- Relatively permanent,  
standing or continuously  
flowing bodies of water,
- Forming a geographical  
feature,
- Ordinarily called streams,  
oceans, rivers and lakes,
- Connected to a traditional  
interstate navigable waters



Before the *Sackett* decision



Traditional  
Navigable  
Waters



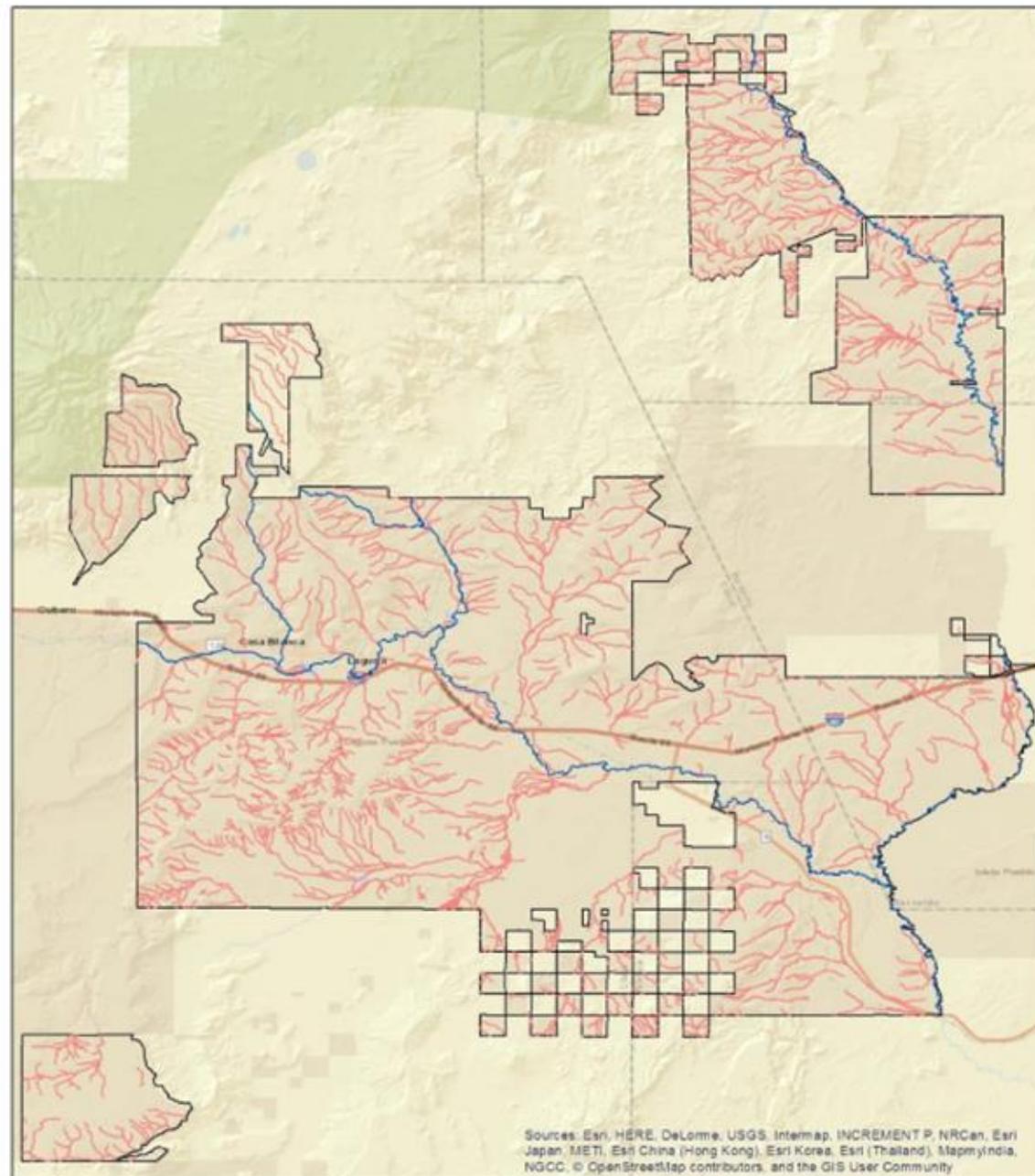
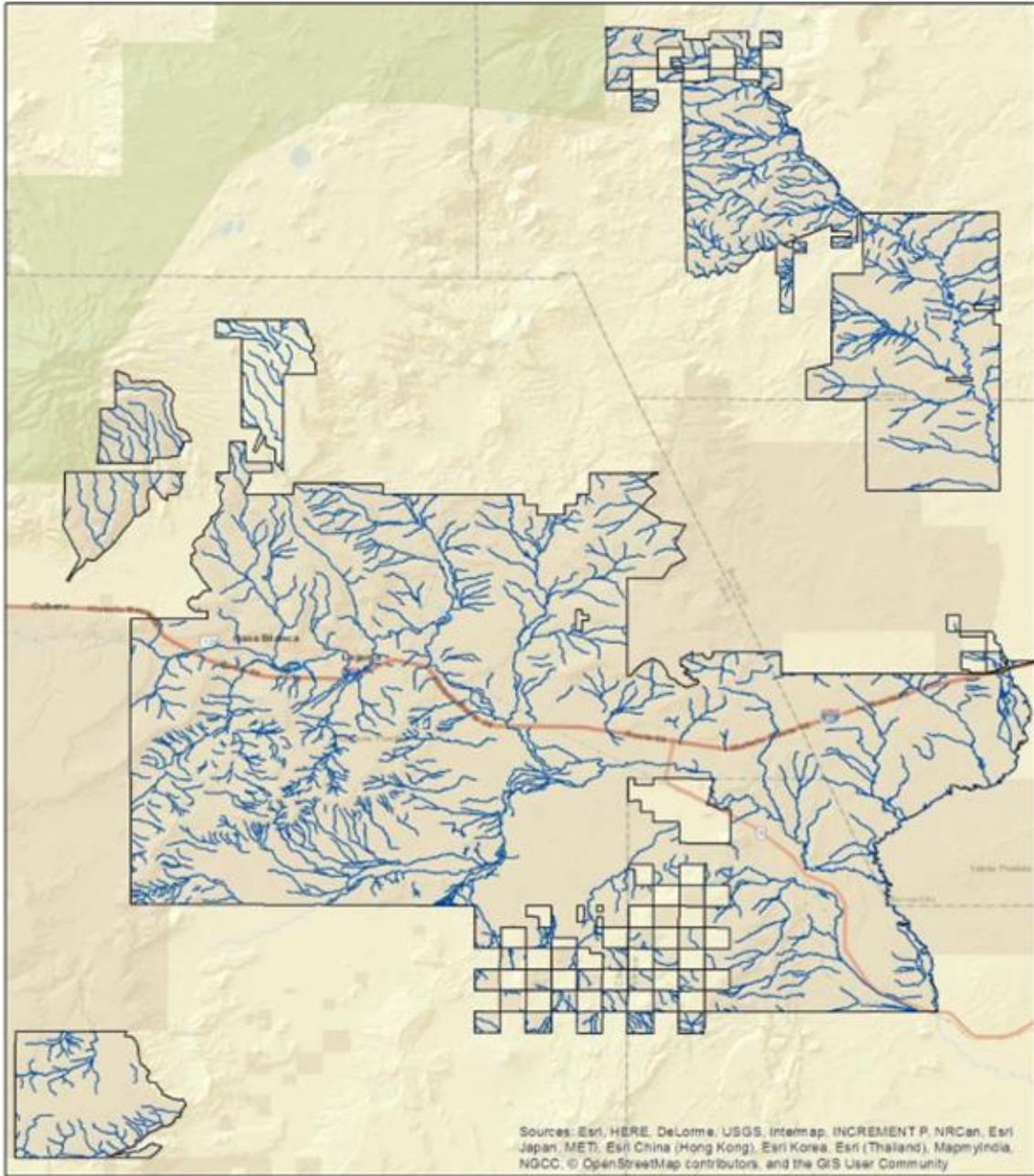
Many  
Wetlands



Intermittent  
and  
Ephemeral  
Streams

► After the *Sackett*  
decision (potentially)







# Direct Effects

## What appears to qualify as WOTUS

- Riparian wetlands indistinguishable from the navigable water

## What appears not to qualify as WOTUS

- Wetlands separated from the navigable water by a natural berm or constructed levee
- Ephemeral streams that flow only in response to precipitation (though streams not addressed)
- Prairie potholes, playa lakes, fens, and other wetlands that do not adjoin WOTUS
- Sheet flow of water that does not form a geographic feature

## What remains unclear

- Intermittent streams (seasonal) flowing into WOTUS
- What is connected enough to be considered adjoining



# State & Tribal Authority Under the CWA

- States can issue NPDES permits, tribes with TAS can as well
- CWA authorizes states to set water quality standards that the EPA can enforce against upstream polluters.
- 1987- Amendments to allow tribes authority to implement provisions of the CWA, similar to state authority
- Tribes can apply for Treatment as a State (TAS) designation



# Gaining TAS Status

To qualify as a state under the Act, an Indian tribe must submit an application that includes:

- a statement of federal recognition;
- a descriptive statement demonstrating that the tribal governing body is currently carrying out substantial government functions over a defined area;
- a description of the tribe's authority to regulate water quality over certain waters;
- a description of the tribe's capability to administer an effective water quality standards program
- other documentation as requested

40 C.F.R. Section 131.8(a)



# *City of Albuquerque v. Carol Browner* (10<sup>th</sup> Cir. 1996)

- Abq operates a waste treatment facility that discharges into the Rio Grande
- This requires a National Pollution Discharge Elimination System (NPDES) permit
- Abq's waste treatment facility is 5 miles upstream from POI
- Isleta TAS in 1992; WQS approved by EPA 1992
- EPA sets discharge limits so they meet state WQS
- POI's standards are more stringent than state of NM
- EPA was revising Abq's NPDES permit to meet Isleta's WQS



# Albuquerque's Challenges to EPA's Approval of POI's WQS

1. Whether the district court's opinion/order should be vacated because the case is mooted by an agreement negotiated by the parties
2. Whether EPA reasonably interpreted section 1377 of the CWA at providing POI authority to adopt WQS which are more stringent than required by statute and whether those standards can be applied to upstream permit users
3. Whether EPA complied with APA's notice and comment requirements in approving POI's WQS under the CWA
4. Whether EPA's approval was supported by a rational basis
5. Whether EPA's adoption of regs providing for mediation or arbitration to resolve disputes over unreasonable consequences of a tribe's WQS is a reasonable interpretation of Section 1377(e)
6. Whether EPA's approval of POI's "ceremonial use designation" violates the Establishment Clause of the First Amendment
7. Whether the POI's WQS are so vague as to deprive Albuquerque of due process



## Issue 6: Whether EPA's approval of POI's "ceremonial use designation" violates the Establishment Clause of the First Amendment

First Amendment:

"Congress shall make no law respecting an establishment of religion..."

Pueblo of Isleta's Primary Contact Ceremonial Use

"the use of a stream, reach, lake, or impoundment for religious or traditional purposes by members of the Pueblo of Isleta; such use involves immersion and intentional or incidental ingestion of water."

# Is the Pueblo's ceremonial use standard constitutional?

In *Albuquerque v. Browner*, the Court used the following test to determine constitutionality. The law is constitutional, if:

**(1) the law has a secular purpose (not relating to religion)**

- Here, advancement of the goals of the CWA
- Secular purpose does not mean that the government action must be unrelated to religion, “callous indifference to religious groups..”

**(2) does not have the principal or primary effect of advancing or inhibiting religion**

- EPA is not advancing religion through its actions; not promoting POI's religion

**(3) does not foster an excessive entanglement with religion**

- “no genuine nexus” between EPA's approval and establishment of religion
- “incidental benefit” to POI
- Does not require EPA to be involved in POI's religious practices

# Post- *Albuquerque v. Browner*





# Sackett Implications for Tribal Nations

- The CWA provided powerful tools to protect against upstream pollution
- Now, it is likely fewer waters are protected
  - Probably no ephemeral streams
  - Possible few or no intermittent streams
  - Only wetlands with a continuous surface connection to a traditionally navigable water
- The CWA provided funding, but was connected to jurisdictional waters
  - What happens to that funding when there is a reduction in jurisdictional waters?
  - What happens if a tribe that relied on this funding no longer has jurisdictional waters?

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# Strategies for Tribes to Explore

- ▶ Set Water Quality Standards for all tribal waters
  - Treatment in a manner similar states status for waters of the United States
  - Tribal sovereign authority for all other waters
- ▶ Advocate for federal funding and protections
  - Both through the Act and the federal government's trust duty
- ▶ Advocate for state recognition and protection of tribal downstream waters
  - New Mexico recently allocated funding to develop a surface water protection program



Thank you!