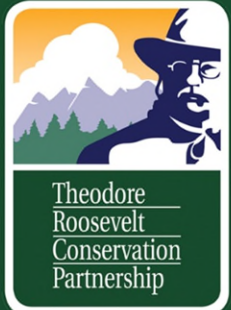




# Wetland and Stream Protection Post-Sackett

*Opportunities and Challenges for Colorado*



# Important Role of Wetlands/Streams

- ▶ Wetlands and headwater streams provide many socio-economic and environmental benefits:
  - ▶ Filter pollutants from water
  - ▶ Regulate water temperature (e.g., cooling)
  - ▶ Habitat for fish and wildlife
  - ▶ Reduce risks associated with flood, drought, wildfire
  - ▶ Maintain base flows for rivers
  - ▶ Store carbon
  - ▶ Regulate sedimentation



# The Clean Water Act

- ▶ Passed in 1972 – “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”
- ▶ Establishes a process for permitting activities that discharge pollutants into “navigable waters” to minimize impacts on water quality, habitat, recreation, and other uses
- ▶ Clean Water Act defines navigable waters as “the waters of the United States (WOTUS)”



# The Clean Water Act

- ▶ The Army Corps administers the Section 404 permitting process, focusing on “dredge and fill” activities and impacts to wetlands and streams
- ▶ Individual permit and general permits
- ▶ Exemptions and Exclusions
  - ▶ Normal farming, ranching, and silviculture
  - ▶ Construction and maintenance of irrigation ditches
  - ▶ Artificial lakes and ponds



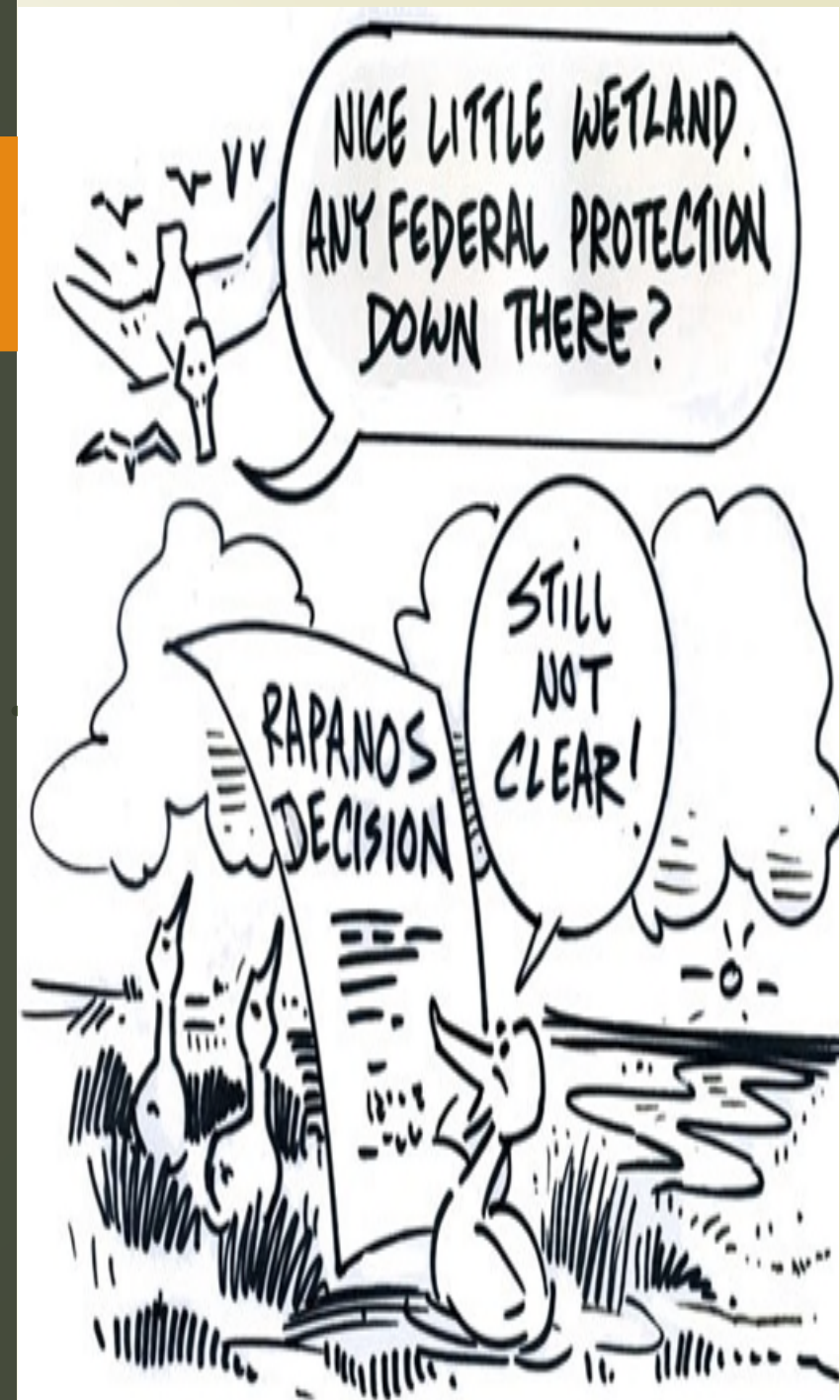
# Defining WOTUS

- ▶ **1985 – *Riverside Bayview***: U.S Supreme Court (SCOTUS) rules that the Clean Water Act extends to wetlands adjacent to navigable waters
- ▶ **1986/1988** - Under the Reagan Administration, EPA and Army Corps issued rules defining WOTUS which includes intrastate lakes, rivers, streams, wetlands, and wet meadows the destruction of which could affect interstate commerce (pre-2015 regulatory regime)
- ▶ **2001 – *SWANCC*** – SCOTUS rules that CWA does not extend to isolated, non-navigable constructed ponds



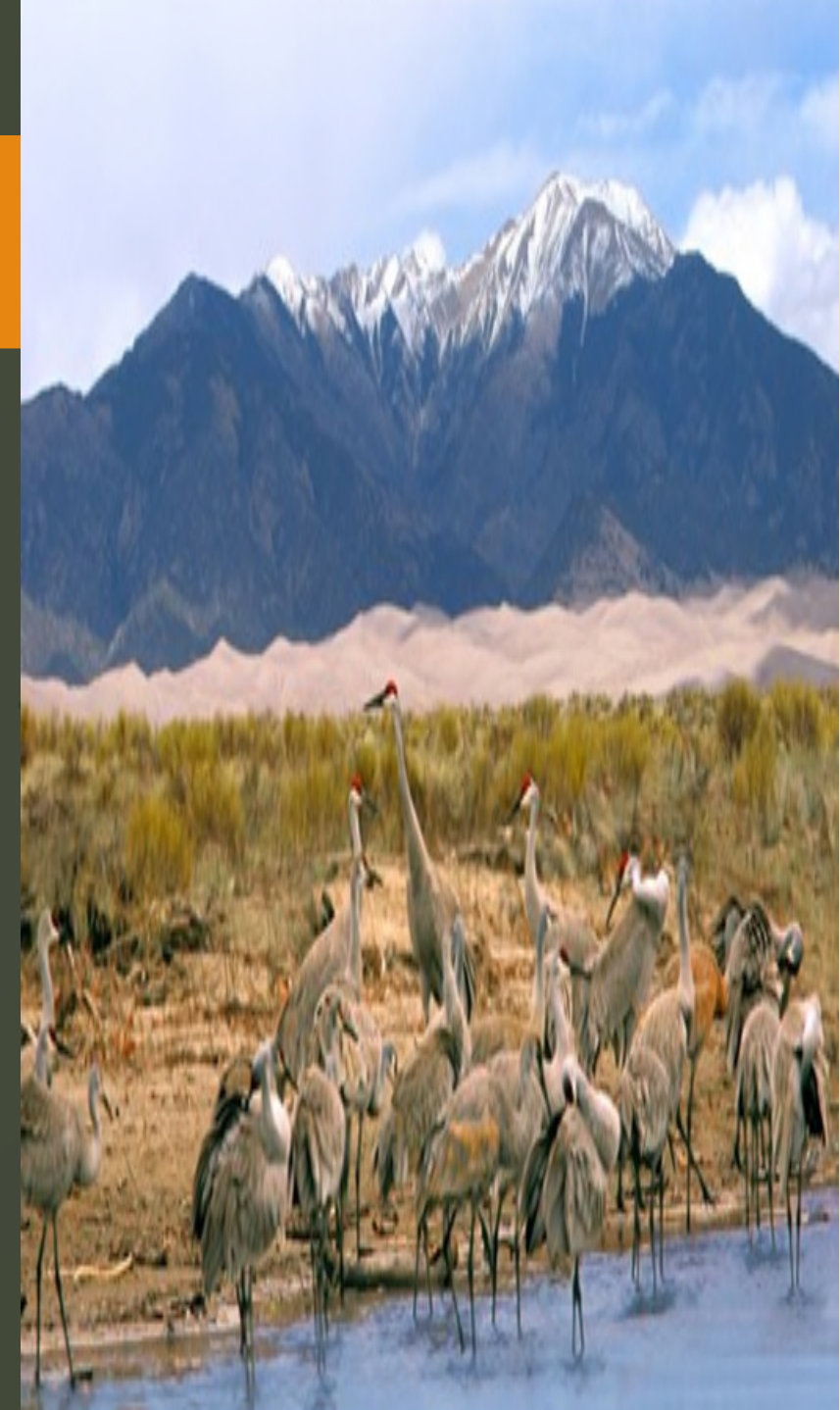
# Rapanos

- ▶ Supreme Court case in 2006 determining scope of the Clean Water Act
- ▶ No majority opinion
- ▶ Two tests put forward:
  - ▶ Justice Scalia = relatively permanent waters and wetlands with a “continuous surface connection”
  - ▶ Justice Kennedy = significant nexus test



# Post-Rapanos

- ▶ **2015** – Clean Water Rule
- ▶ **2020** – Navigable Waters Protection Rule
- ▶ **2023** – Biden Administration Rule



# Sackett

- ▶ Issue of whether landowners in Idaho required a 404 “dredge and fill” permit for construction within a wetland
- ▶ **Majority opinion** – “We hold that the CWA extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States...”
- ▶ **Majority opinion** - two-part approach for adjacent wetlands
  - ▶ Adjacent body of water is a relatively permanent body of water connected to traditional interstate waters
  - ▶ The wetland has a “continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins





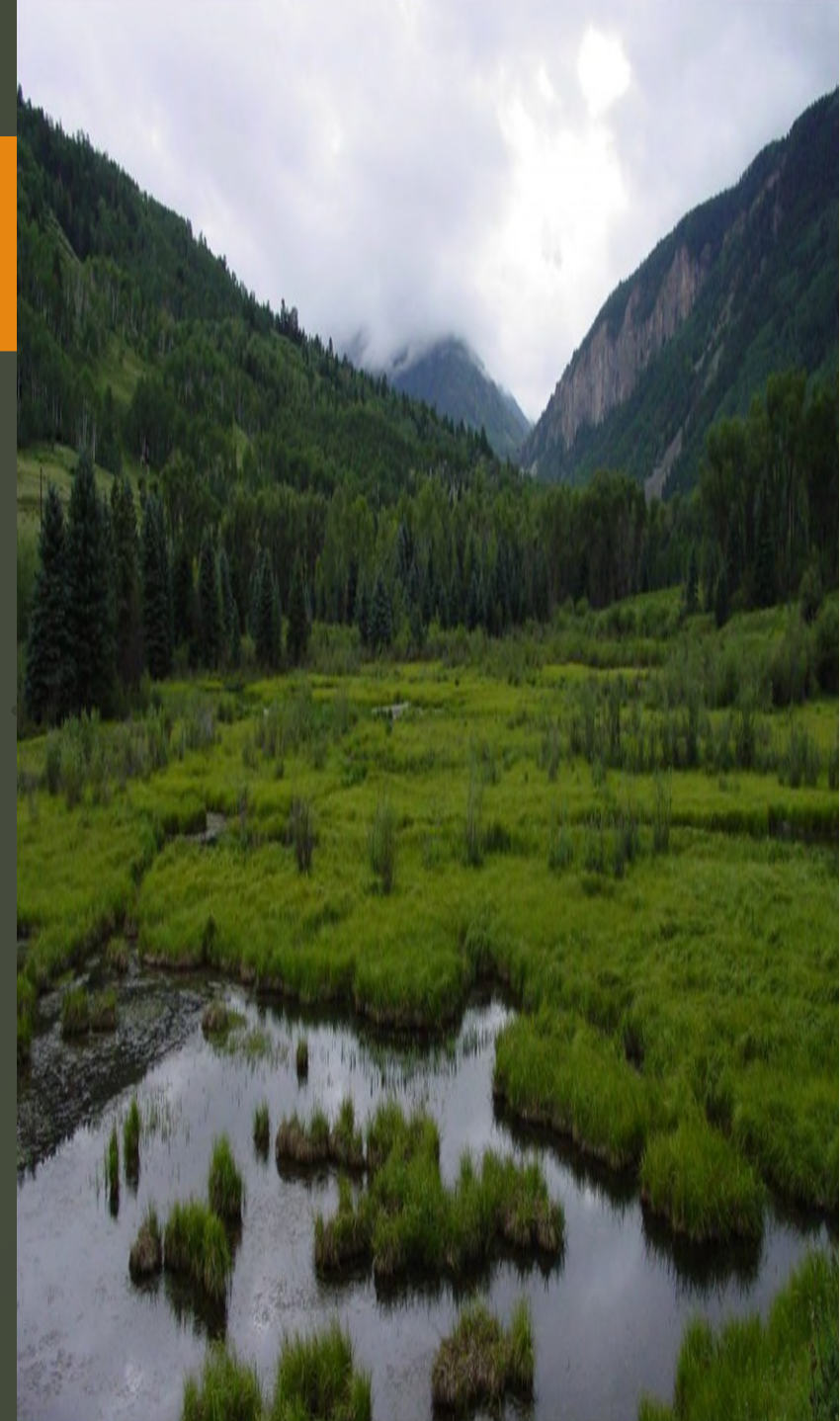
# Sackett

- ▶ Very narrow interpretation of “adjacent” to mean adjoining; ignores subsurface connections
- ▶ Wetlands separated from traditional, interstate navigable waters and relatively permanent tributaries by human/natural features are not protected
- ▶ Focused on wetlands, but the decision likely affects the jurisdictional status of all waters (e.g., headwater streams)
- ▶ Effect on CWA section 401 and other federal environmental laws (e.g., NEPA, ESA)



# Sackett

- ▶ Strong dissenting opinion from Justice Kavanaugh – the new test “will leave long-regulated adjacent wetlands no longer covered by the CWA, with **significant repercussions for water quality and flood control throughout the United States**”
- ▶ Decision based on “major questions/rules doctrine” which first appeared in 2022, largely ignores Congressional intent and agency discretion
- ▶ Decision ignores the science and factual record developed by the EPA and Army Corps; experience in applying the significant nexus test



# Impact

- ▶ Effect is immediate
- ▶ Early estimates of more than 50% of the nation's wetlands no longer have protection (e.g., up to 50-60 million acres of wetlands)
- ▶ What lost federal protection?
  - ▶ Wet meadows
  - ▶ Fens
  - ▶ Playa lakes
  - ▶ Ephemeral streams and associated riparian wetlands?
- ▶ EPA and Army Corps have signaled that they will develop a rule to amend the 2023 rule in light of *Sackett*
- ▶ Army Corps has paused completing approved jurisdictional determinations pending guidance



