

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy  
October 7, 2022

## [Sackett's Back...Alright!](#)

SCOTUS opened up its new term on Monday with some familiar names and faces. In their second visit to the Supreme Court, the Idaho couple that has been fighting to avoid the lengthy and costly process of getting a CWA permit for so long that the lawsuit could be a [John Hughes movie](#) argued that the [lower courts' interpretations of "navigable waters" applied a test that doesn't reflect the text of the statute](#). The Sacketts' case is about their property near Priest Lake, but the Court's decision could determine the extent to which the federal government can regulate purely intrastate waters and adjacent wetlands all over the country. So [it's kind of a big deal](#).

While Harrah's Casino won't be taking wagers on the outcome, if it was, you might be surprised to find that the odds are pretty evenly split. That's because for those who [listened to the oral arguments](#) without any context of the saga of ambiguous judicial opinions and dueling legislation that preceded it (this category doesn't include any of you because TUWaterWays has graciously kept you updated on each minute development), they may have come away with the sense that the [Justices were more sympathetic to EPA's side](#). Even the most conservative justices seemed skeptical of the Sacketts' proposal to scrap every previous standard and instead go with the "continuous surface connection" test from Justice Scalia's plurality opinion in [Rapanos](#). On the other hand, the Court's choice to take the case in the first place likely had nothing to do with the Sacketts' property and instead strongly suggests a predetermined intent by the Court to revisit their decision in *Rapanos*. Justice Kavanaugh even said as much on Monday: "Let's put aside the facts of this case because this case is going to be important for wetlands throughout the country and we have to get it right."

With all that in mind, and the Court's current make-up and [recent decisions on agency authority over environmental regulation](#), it's difficult to expect anything other than a ruling that vastly restricts the scope of the CWA—and probably in some new and uniquely confusing way. So, get your WOTUS Standards bingo cards ready, because you may soon be able to check off another box.

And if you've loved seeing water in the litigation limelight and are now experiencing the post-oral argument blues—worry not! Just this week, the D.C. Circuit heard Arizona's [challenge to Biden's delay of Trump-era standards for lead and copper levels in drinking water](#) and the 7<sup>th</sup> Circuit [dismissed charges against former Michigan state officials](#) for their role in the Flint water crisis. Ok, so maybe worry—just not about lack of water suits. Because no matter how the Court decides *Sackett*, water conflicts [aren't going anywhere](#).

The **Tulane Institute on Water Resources Law and Policy** is a program of the Tulane University Law School.

The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and legal stewardship of water.

## Coming Up:

[Restore America's Estuaries, 2022 Coastal and Estuarine Summit](#); December 4-8; New Orleans, LA

## Water jobs:

[Project Manager, Louisiana Political Affairs](#); Environmental Defense Fund; Remote

[Restoration Programs Director](#); Coalition to Restore Coastal Louisiana; New Orleans, LA

[Regional Watershed Coordinator](#); Capitol Region Planning Commission; Baton Rouge, LA

[Water Quality Technician](#); Pontchartrain Conservancy; Metairie, LA

[Clinical Instructor](#); Tulane Environmental Law Clinic; New Orleans, LA

[Associate Attorney, Senior Attorney, and Paralegal](#); Earthjustice; Multiple Locations

6325 Freret Street, 1<sup>st</sup> Floor  
New Orleans, LA 70118  
504-865-5982

[tulanewater.org](http://tulanewater.org)

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## Every Drop Counts

When the Colorado River Compact was signed 100 years ago, the drafters based basin and state allocations on water levels from a particularly wet period. In other words, they [divvied up more river than they had](#). Well, we've come a long way from the days of rounding up on available water, as this week the federal government has decided it's time to have a serious discussion about how [evaporation levels in the Lower Basin are throwing off allocations](#). At first this may seem like accounting for the pennies lost in couch cushions in your annual budget—but imagine if your couch was holding 10% of all your money. Plus, as temperatures continue to rise, [evaporation levels are expected to increase](#), so now we're talking about nickels and dimes! To combat evaporation, some farmers are [changing irrigation methods, such as using lower-elevation sprinklers](#). Installing [solar panels over crops](#) has also proven to reduce evaporation, along with providing the co-benefits of clean energy. Ultimately, it's high time that all states start making decisions based on accurate accounting of the Colorado River, and this means the Lower Basin joining the Upper Basin in having to consider evaporation. Still—and maybe it's just the riparians in us—but something feels off about Nevada farmers worrying about evaporation levels when a single agricultural [county in California uses more Colorado River water than the entire states of Arizona and Nevada](#) combined. To their credit, California agencies proposed this week to [reduce state use by 1/10<sup>th</sup>](#)—but history has left us [wary of California's water conservation plans](#).

It may be that the Department of Interior is finally ready to discuss evaporation in the Lower Basin because they have [\\$8.3 billion from the Bipartisan Infrastructure Law and Inflation Reduction Act](#) coming their way to address Western drought and water projects. That's a big chunk of money but will only make a dent in the problems if accompanied by social and policy changes. At least most of that money will be going to states whose senators voted in favor of the bills (Wyoming and Utah aside). This stands in contrast to Florida Senators Rubio and Scott who, despite vigorously opposing both bills, are now looking for [federal aid in the wake of devastating Hurricane Ian](#). As [water continues to rise days after the storm has passed](#) (where's increased evaporation when you need it?) and [sewage and other pollutants spill into floodwaters](#)—not to mention other [less natural troubles that follow hurricanes](#)—one wonders what it will take for politicians to realize climate risks are not a partisan issue.

## Tulane Environmental and Energy Law Summit—[It's Baaaaack!](#) Mark Your Calendars, March 17 and 18, 2023

Spring was less spring-like since COVID-19 relegated America's favorite student-run environmental conference to being a mostly virtual affair. Those were still great and there is much to be said for doing things virtually but there is no substitute for doing some things in person. So, write it down and make plans to be at hand. More details to follow.