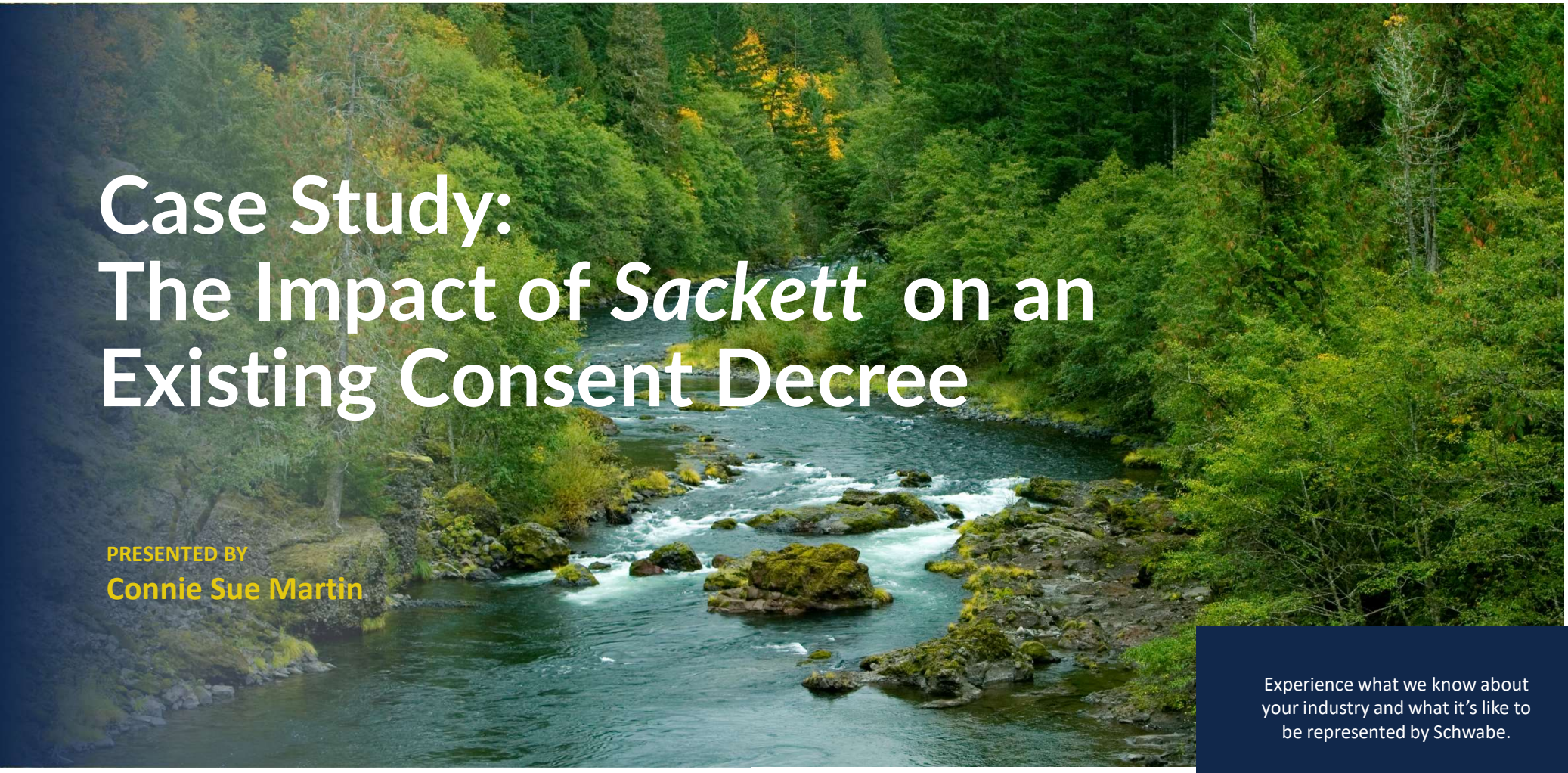

Case Study: The Impact of *Sackett* on an Existing Consent Decree

PRESENTED BY
Connie Sue Martin

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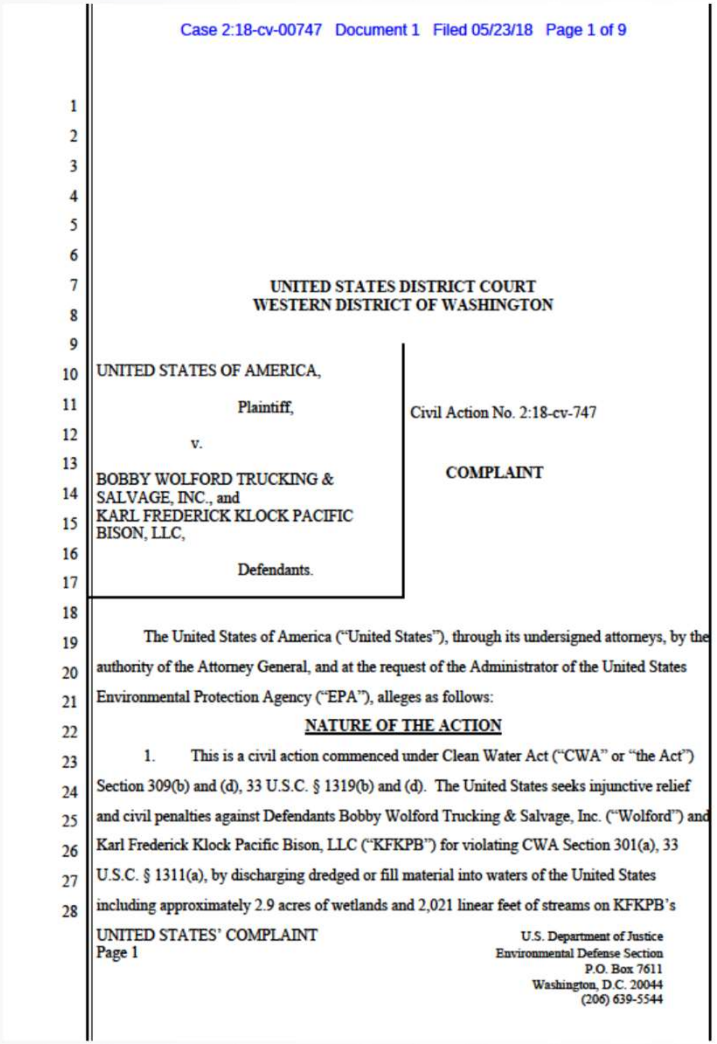
REPRESENTED BY
Schwabe

December 4, 2023

United States v. Bobby Wolfard Trucking & Salvage, Inc., USDC WAWD Case No. 2:18-cv-747



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

BOBBY WOLFORD TRUCKING & SALVAGE, INC., and KARL FREDERICK KLOCK PACIFIC BISON, LLC,

Defendants.

Civil Action No. 2:18-cv-747

COMPLAINT

The United States of America ("United States"), through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF THE ACTION

1. This is a civil action commenced under Clean Water Act ("CWA" or "the Act") Section 309(b) and (d), 33 U.S.C. § 1319(b) and (d). The United States seeks injunctive relief and civil penalties against Defendants Bobby Wolford Trucking & Salvage, Inc. ("Wolford") and Karl Frederick Klock Pacific Bison, LLC ("KFKPB") for violating CWA Section 301(a), 33 U.S.C. § 1311(a), by discharging dredged or fill material into waters of the United States including approximately 2.9 acres of wetlands and 2,021 linear feet of streams on KFKPB's

U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(206) 639-5544

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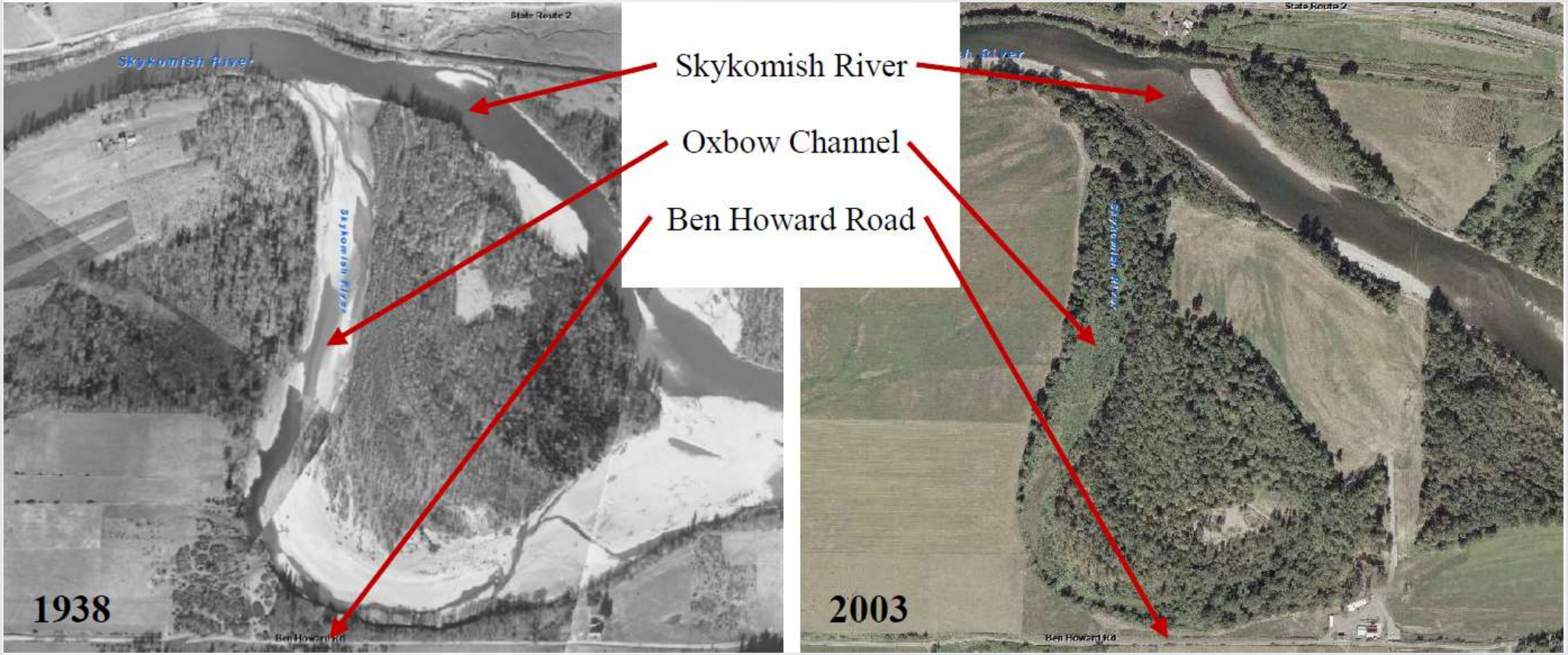
- The United States alleged that Bobby Wolfard Trucking & Salvage, Inc. (BWT) and the landowner had violated the Clean Water Act (CWA) by discharging dredge and/or fill into wetlands that are WOTUS without a permit (approximately 2.9 acres of wetlands and 2,021 linear feet of streams) between March 2011 and June 2012.
- The complaint sought civil penalties of $32,500 per day per violation (each day that the dredged or fill material remains in the streams and wetlands at the Site constituted a separate violation), an injunction requiring restoration to pre-fill conditions, and attorneys' fees and costs.

Case Study



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- The property had been an active farm as early as 1910, and farming activities were ongoing as late as 2010-2011 when the United States was investigating alleged unlawful fill activities: organic beans and Christmas trees, and cattle housed in forested pastureland.
- In November, 2006 heavy rains caused flooding along the Skykomish River to a stage 4 water level. The Klock Farm suffered major flooding and flood-related impacts, including a riverbank blowout, significant soil erosion on farm fields, damage to farm roads, fence damage, and the deposit of water-borne silt, sand, and woody debris on farm fields.

Case Study

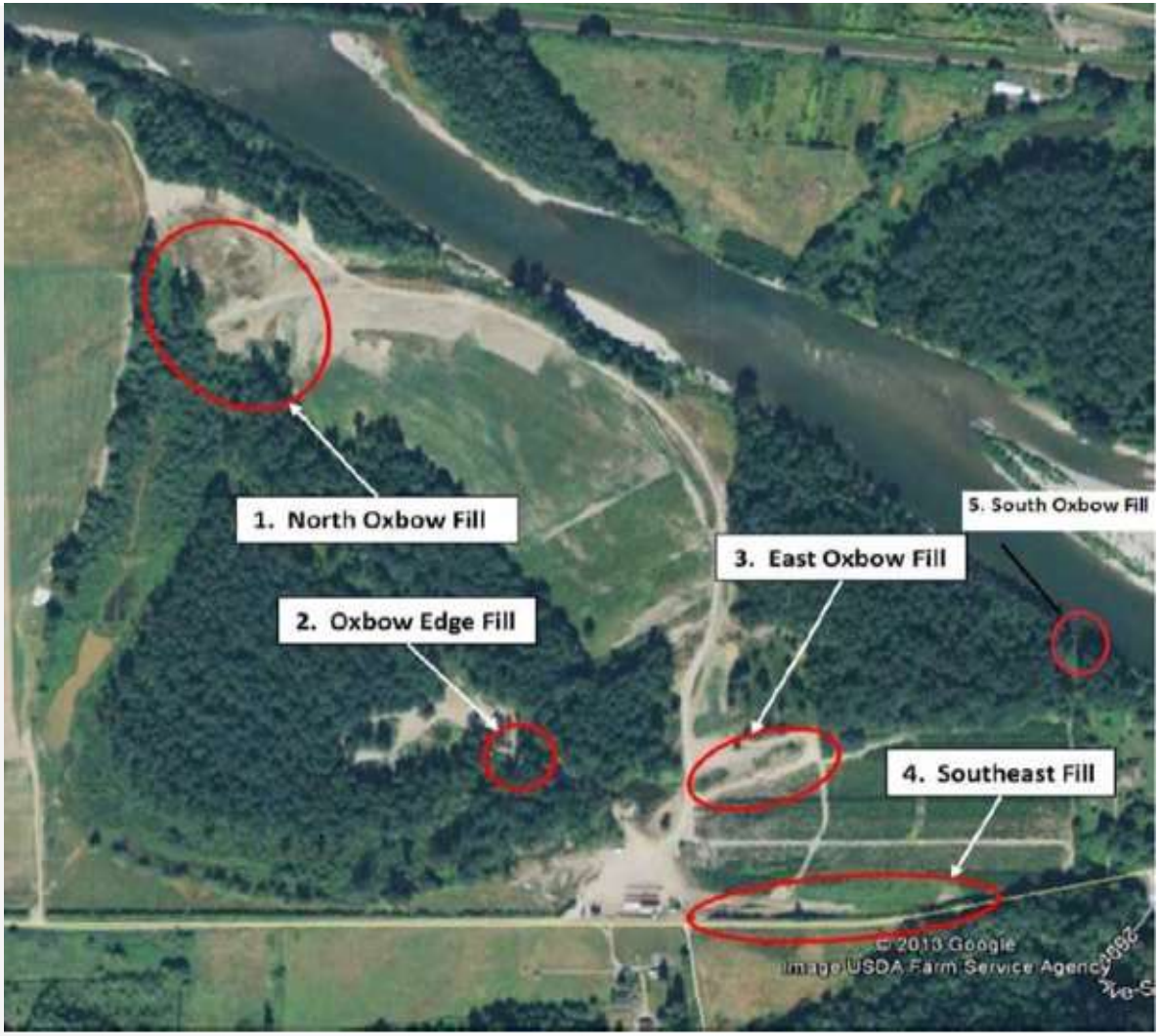
- Klock applied for and received disaster relief funding from the USDA for restoration. As part of his flood restoration efforts, Eric Klock worked with federal state, and county agencies and officials to plan and construct a riverbank restoration project, the Klock Farm Skykomish River Bioengineered Bank Stabilization project. Work lasted through the spring of 2008.
- BWT first began bringing fill material to the farm as part of the restoration project. The first fill dirt BWT hauled to the property was in June 2008.
- In November 2008 the Skykomish flooded again, causing additional significant damage to the Klock Farm and requiring additional restoration.

Case Study

- After the 2008 restoration work was completed, Klock Farm's owner continued to request as much fill dirt as BWT could source, to restore his farm fields, livestock pastures, farm roads, and irrigation and animal watering ponds.
- BWT continued to provide fill dirt to the farm until February, 2011. In March 2011 the United States served a search warrant on Klock Farm. BWT retrieved its equipment from the farm and did not return to working there.
- The matter initially was investigated as a criminal CWA case, but after the farm's owner died, was converted to a civil CWA case against BWT and the farmer's son, who inherited the farm.

Case Study

- The Site as it existed in 2013
- The areas where discharges occurred were (i) the north oxbow fill, (ii) the oxbow edge fill, (iii) the east oxbow fill, (iv) the southeast fill, and (v) the south oxbow fill.



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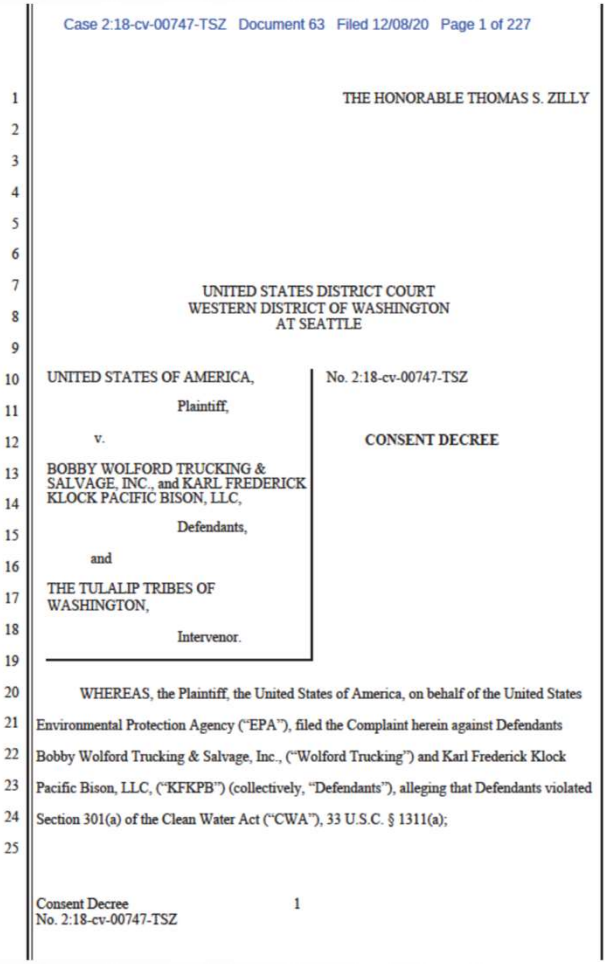
- A dominant feature of the property is an “oxbow channel” of the Skykomish River (the U-shaped meander of the river).
- The United States alleged that in 1938, the oxbow channel was still active, but by 2003, it had become wetland.
- The United States’s expert witnesses testified that the affected wetlands and streams on the property constitute navigable waters of the United States (WOTUS).
- On summary judgment, the Court found that the five affected areas were WOTUS wetlands, reserving the issue of liability for trial.

Consent Decree

December 8, 2020

- Following the summary judgment order, the parties reached an agreement to resolve the case through the entry of a Consent Decree.



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THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

BOBBY WOLFORD TRUCKING & SALVAGE, INC., and KARL FREDERICK KLOCK PACIFIC BISON, LLC,

Defendants,

and

THE TULALIP TRIBES OF WASHINGTON,

Intervenor.

No. 2:18-cv-00747-TSZ

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the Complaint herein against Defendants Bobby Wolford Trucking & Salvage, Inc., ("Wolford Trucking") and Karl Frederick Klock Pacific Bison, LLC, ("KFKPB") (collectively, "Defendants"), alleging that Defendants violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a);

Consent Decree
No. 2:18-cv-00747-TSZ

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Case Study

- The CD Required, among other things, the restoration of certain areas of the Site to pre-fill conditions:

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Case Studt

- Klock was required under the Consent Decree to survey the Farm property, adjust certain boundary lines, establish new tax parcels, and execute and record an Environmental Covenant in preparation for transferring a portion of the property to the Tulalip Tribes for conservation in perpetuity.
- The Environmenmtal Covenant and the transfer of the property ended more than 100 years of farming at the Site.

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Case Study

- BWT applied for a CWA § 401 Water Quality Certification from the Washington Department of Ecology on January 26, 2022. On December 7, 2022, Ecology notified BWT that the activities would require an individual § 401 Certification.
  - On December 28, 2022, Ecology sent BWT a letter requesting additional information, including a Phase I Environmental Site Assessment describing soil contamination on the Property. Ecology advised that if BWT did not provide the requested documentation by January 12, 2023, Ecology would deny without prejudice BWT's § 401 request.
  - BWT was unable to obtain a Phase I ESA on such short notice. On January 12, 2023, Ecology denied BWT's § 401 request without prejudice.

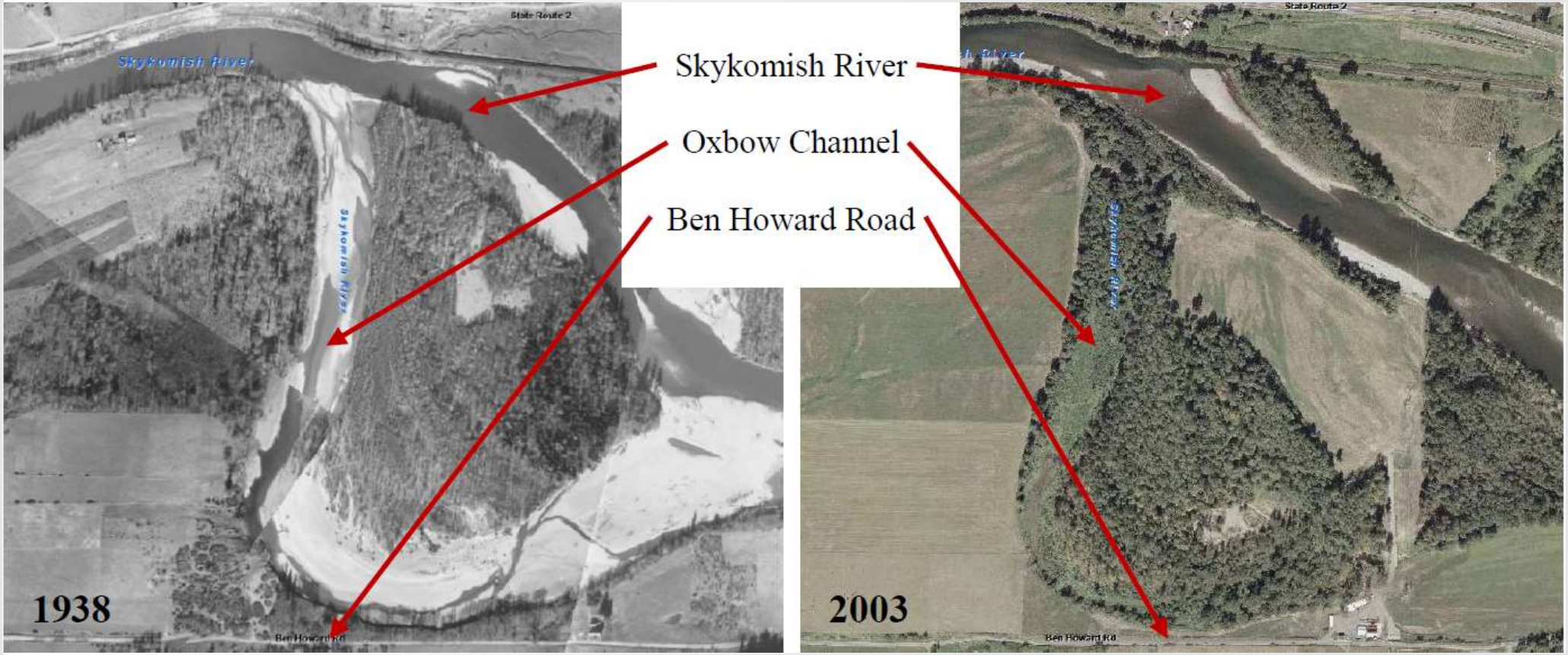
Case Study

- Klock complied with its obligations under the CD except for completing the transfer of the property to the Tulalip Tribes (which was to occur after restoration).
- By March, 2023 BWT had applied for and received the majority of the permits and authorizations required to conduct the restoration required under the CD.
  - Still needed the CWA § 401 certification from Ecology and a Flood Hazard Permit from the County.
  - The County permit would have required removal of fill off-site – an activity that was inconsistent with the scope of the work negotiated under the CD – leading to further complications and delay.

Case Study

- On May 25, 2023 the United States Supreme Court issued its decision in *Sackett*.
- The Court set out a two-part test of CWA jurisdiction over wetlands: it must (1) be adjacent to a WOTUS, and (2) have a continuous surface connection with that WOTUS.
- There is no evidence in this case that the oxbow on the Klock property is a traditionally navigable waterway.
- The oxbow has not been continuously connected to the Skykomish River for decades, except on very rare occasions during extreme precipitation flooding events.

Case Study



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Case Study

9/25/2011

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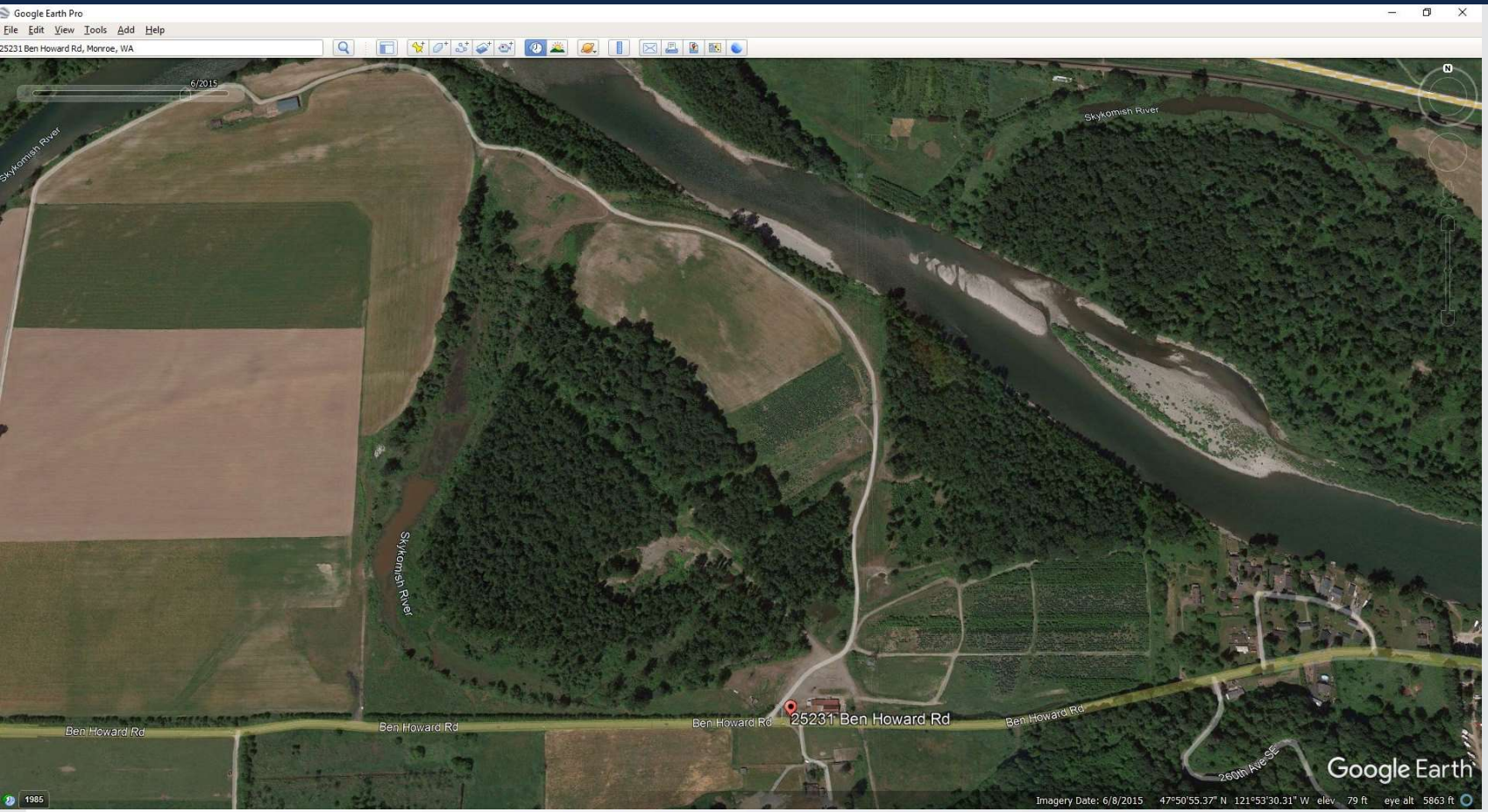
Case Study



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Case Study

7/23/2018

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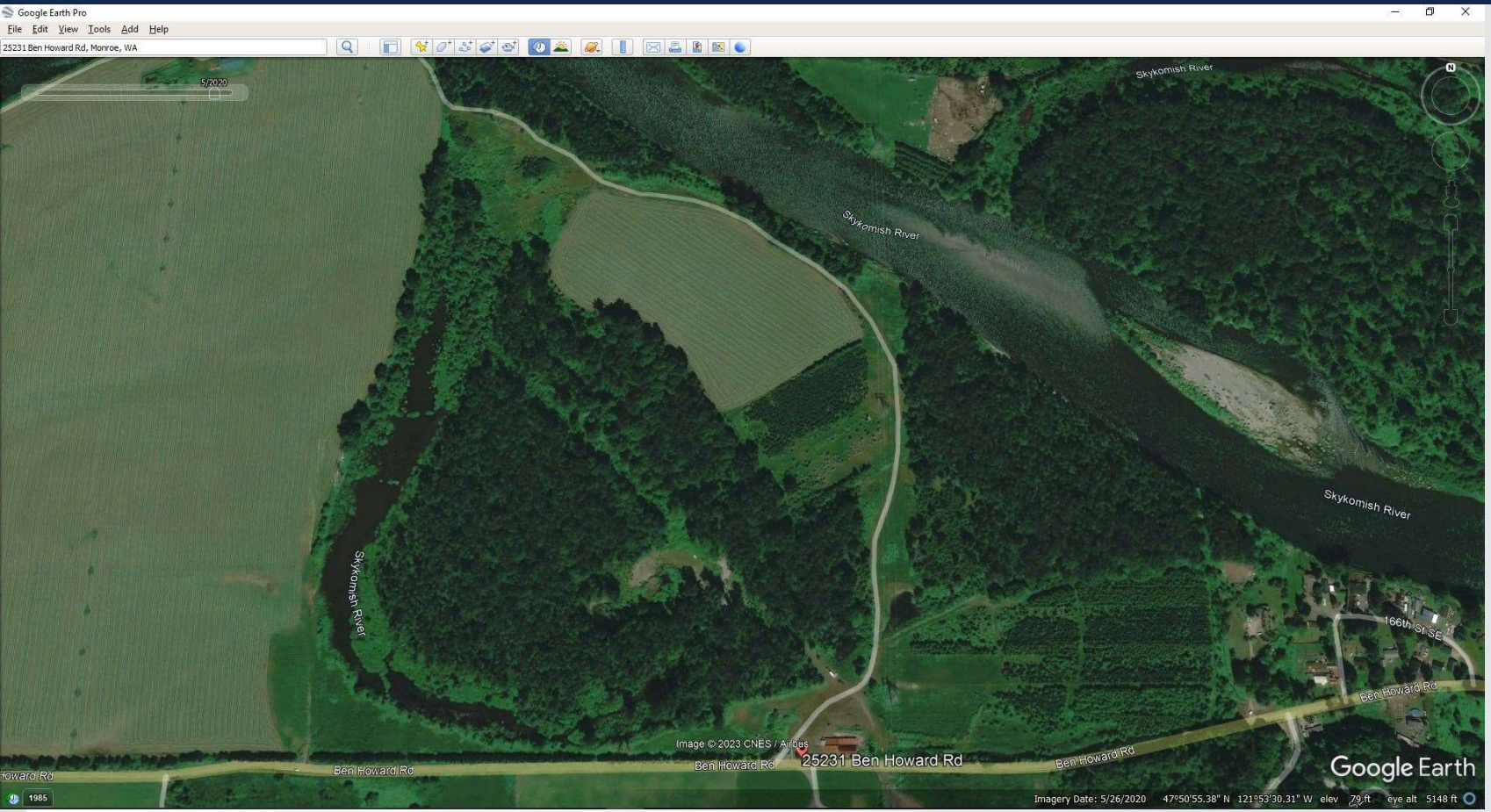
Case Study



5/26/2020

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Case Study

4/28/2023

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Case Study

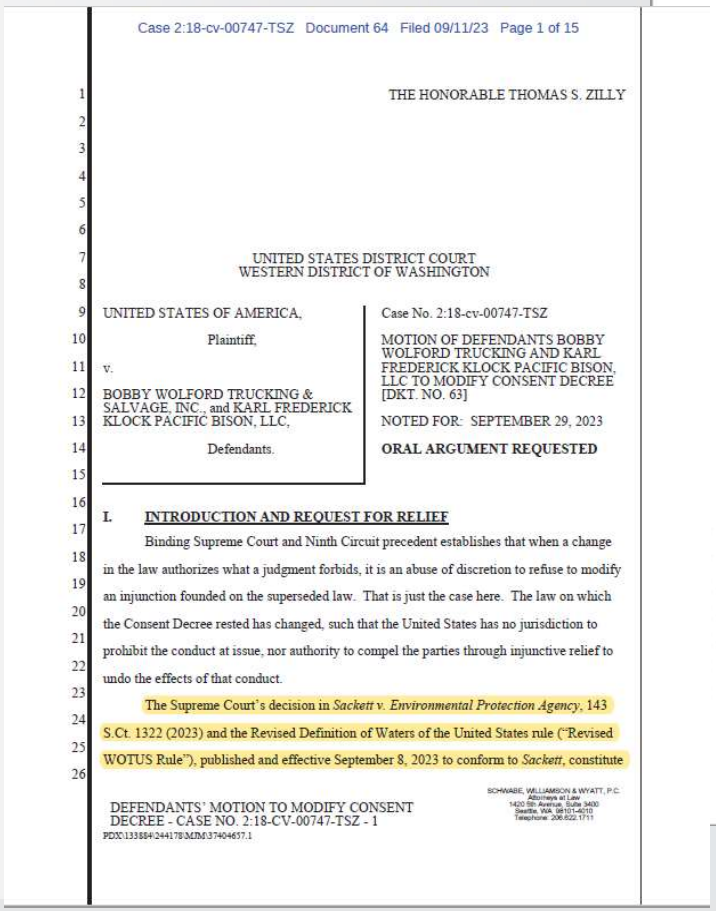
- Klock and BWT notified the United States on June 27, 2023 that in light of *Sackett*, it was their position that the EPA had no jurisdiction to pursue an enforcement action in the first place in the absence of evidence that the oxbow on the Klock property is a traditionally navigable waterway, or the adjacent wetlands are continuously connected to the Skykomish River.
  - Under these facts, and in light of *Sackett*, the oxbow is not a water of the United States, and the United States lacks jurisdiction now for the further enforcement of the Consent Decree.
- The United States disagreed.

Case Study

- On September 11, 2023 BWT and Klock jointly filed a motion seeking to modify the CD to relieve the defendants from any further obligations under the CD, including any obligations of Klock Farm to maintain an environmental covenant or restrictions on the lawful use of the subject real property.
- The basis of the motion was (1) the Court's continuing jurisdiction under the CD to enforce or modify the decree consistent with applicable law, and (2) an unbroken line of Supreme Court decisions starting in 1855 that hold when the law underlying a judgment has been modified by the competent authority so that the enjoined conduct is no longer unlawful, then the decree of the court cannot be enforced.

Case Study

- The change in the law, of course, was *Sackett*.



Case 2:18-cv-00747-TSZ Document 64 Filed 09/11/23 Page 1 of 15

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. BOBBY WOLFORD TRUCKING & SALVAGE, INC., and KARL FREDERICK KLOCK PACIFIC BISON, LLC, Defendants.	Case No. 2:18-cv-00747-TSZ MOTION OF DEFENDANTS BOBBY WOLFORD TRUCKING AND KARL FREDERICK KLOCK PACIFIC BISON, LLC TO MODIFY CONSENT DECREE [DKT. NO. 63] NOTED FOR: SEPTEMBER 29, 2023 **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION AND REQUEST FOR RELIEF

Binding Supreme Court and Ninth Circuit precedent establishes that when a change in the law authorizes what a judgment forbids, it is an abuse of discretion to refuse to modify an injunction founded on the superseded law. That is just the case here. The law on which the Consent Decree rested has changed, such that the United States has no jurisdiction to prohibit the conduct at issue, nor authority to compel the parties through injunctive relief to undo the effects of that conduct.

The Supreme Court's decision in *Sackett v. Environmental Protection Agency*, 143 S.Ct. 1322 (2023) and the Revised Definition of Waters of the United States rule ("Revised WOTUS Rule"), published and effective September 8, 2023 to conform to *Sackett*, constitute

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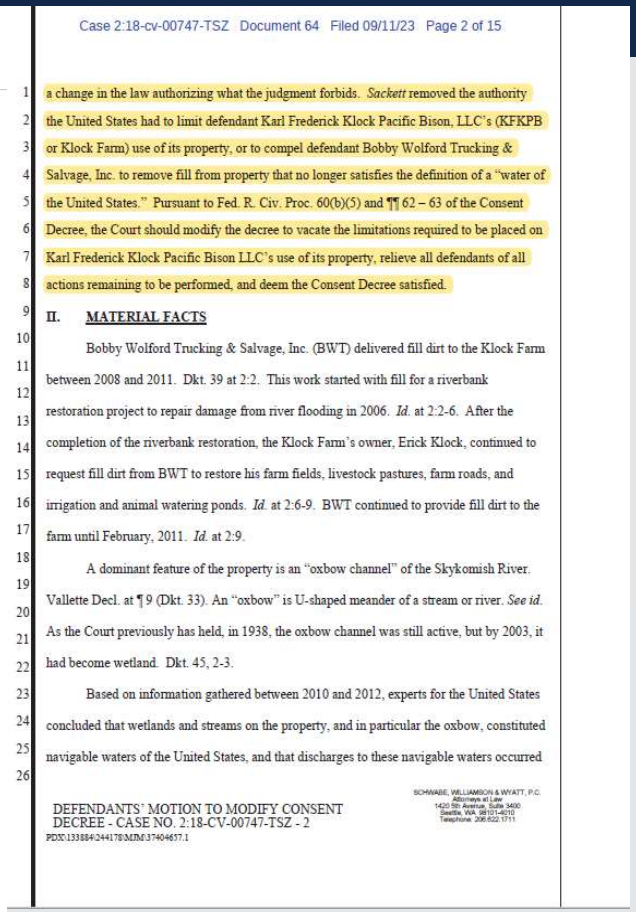

Case 2:18-cv-00747-TSZ Document 64 Filed 09/11/23 Page 2 of 15

a change in the law authorizing what the judgment forbids. *Sackett* removed the authority the United States had to limit defendant Karl Frederick Klock Pacific Bison, LLC's (KFKPB or Klock Farm) use of its property, or to compel defendant Bobby Wolford Trucking & Salvage, Inc. to remove fill from property that no longer satisfies the definition of a "water of the United States." Pursuant to Fed. R. Civ. Proc. 60(b)(5) and ¶¶ 62 – 63 of the Consent Decree, the Court should modify the decree to vacate the limitations required to be placed on Karl Frederick Klock Pacific Bison LLC's use of its property, relieve all defendants of all actions remaining to be performed, and deem the Consent Decree satisfied.

II. MATERIAL FACTS

Bobby Wolford Trucking & Salvage, Inc. (BWT) delivered fill dirt to the Klock Farm between 2008 and 2011. Dkt. 39 at 2:2. This work started with fill for a riverbank restoration project to repair damage from river flooding in 2006. *Id.* at 2:2-6. After the completion of the riverbank restoration, the Klock Farm's owner, Erick Klock, continued to request fill dirt from BWT to restore his farm fields, livestock pastures, farm roads, and irrigation and animal watering ponds. *Id.* at 2:6-9. BWT continued to provide fill dirt to the farm until February, 2011. *Id.* at 2:9.

A dominant feature of the property is an "oxbow channel" of the Skykomish River. Vallette Decl. at ¶ 9 (Dkt. 33). An "oxbow" is U-shaped meander of a stream or river. *See id.* As the Court previously has held, in 1938, the oxbow channel was still active, but by 2003, it had become wetland. Dkt. 45, 2-3.

Based on information gathered between 2010 and 2012, experts for the United States concluded that wetlands and streams on the property, and in particular the oxbow, constituted navigable waters of the United States, and that discharges to these navigable waters occurred

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Case Study

- The United States and the Tulalip Tribes opposed the BWT and Klock motion.
- Briefing closed on November 22, 2023.
- The motion was noted for November 24, 2023.
- The defendamts requested oral argument, but so far the Court has not scheduled it.
- Stay tuned. . .

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Connie Sue Martin

Shareholder

I help Indian tribes and companies of all sizes address environmental contamination and restore injured natural resources. With over 25 years of experience representing tribes, I am recognized as one of the country's most experienced practitioners of environmental Native American law.

My environmental practice focuses primarily on hazardous substance contamination and Clean Water Act matters. **Spills happen, and when they do, I guide clients through emergency spill responses, investigations, remediation, regulatory compliance and reporting, enforcement actions, and citizen suits.** I also help clients prevent or reduce environmental liabilities through environmental due diligence, contractual allocations of liability, and negotiated or litigated resolutions.

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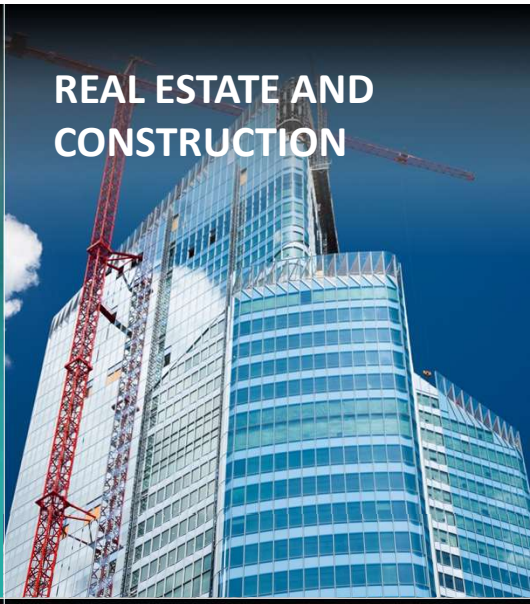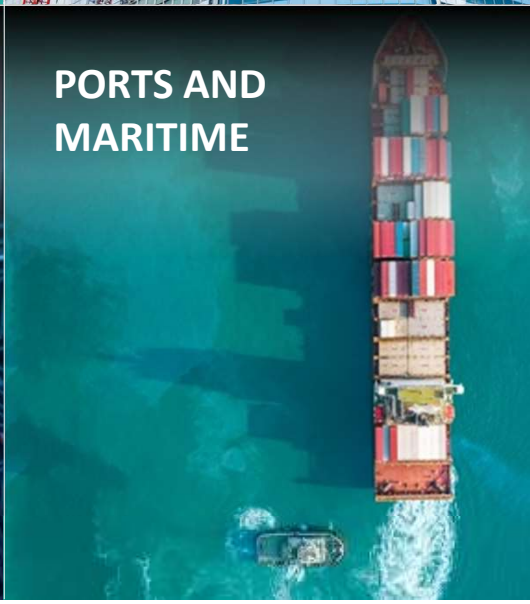
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