



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET – ROOM 1640
SACRAMENTO, CA 95814

CESPK-RD

25 September 2023

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the “Revised Definition of ‘Waters of the United States’”; (88 FR 3004 (January 18, 2023) as amended by the “Revised Definition of ‘Waters of the United States’; Conforming” (8 September 2023),¹ SPK-2006-00303

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³

On 18 January 2023, the Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) published the “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”). On September 8, 2023, the agencies published the “Revised Definition of ‘Waters of the United States’; Conforming”, which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) (“*Sackett*”).

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

¹ While the Revised Definition of “Waters of the United States”; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

CESPK-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPK-2006-00303

1. SUMMARY OF CONCLUSIONS.

a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

(1). Unnamed Channel is a 4th order non-relatively permanent, non-jurisdictional water, which has both a defined channel and an Ordinary High-Water Mark (OHWM) measuring at 3,200 linear feet in length within the 89-acre project area.

2. REFERENCES.

a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")

b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))

c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

d. Robb, James T. 2023. "Memorandum for Record, Jurisdiction Evaluation and Recommendations for Responding to the Administrative Appeal Remand, with Enclosures" Sacramento: Sacramento District, U.S. Army Corps of Engineers, September 7.

e. Gipson, Jason A. 2022 "Approved Jurisdictional Determination," Sacramento: Sacramento District, U.S. Army Corps of Engineers, September 7

f. Gant, Antoinette R. BG. 2023. "Panattoni Development Company, Inc., c/o Lindy Deller, Approved Jurisdictional Determination, Sacramento District, SPK-2006-00303." Administrative Appeal Decision. San Francisco: South Pacific Division, U.S. Army Corps of Engineers, July 27.

g. Jewell, Michael S. 2008. "Memorandum for Record, Navigable-in-Fact Determination for the Truckee River and Pyramid Lake (ID SPK-2007-01872)." Sacramento: Sacramento District, U.S. Army Corps of Engineers, June 11.

3. REVIEW AREA. The review area is an approximately 89-acre property located west of Alt. US-395, south of Nevada Highway NV-431 (also known as Mt. Rose Highway), east of US-580, and north of a geothermal power plant, at latitude 39.4010°N, longitude 119.7464°W. The Corps issued a previous AJD for the project area on 7 September 2022, which claimed jurisdiction over the 3,200 linear foot Unnamed

CESPK-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPK-2006-00303

Channel pursuant to Section 404 of the Clean Water Act (CWA). The decision was issued under the pre-2015 regulatory regime, which involved implementation of the CWA under the 2019 recodification of the 1986 regulations, the 1993 exclusion, and regulatory guidance following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (the "Rapanos guidance"). The applicant/appellant requested an appeal on 22 November 2023, based on three assertions. On 23 July 2023, the South Pacific Division Review Officer found that the Administrative Record (AR) did not contain sufficient documentation to support a finding of CWA jurisdiction pursuant to Section 404; specifically, the AR did not sufficiently support the district's finding that the Unnamed Channel had a significant nexus with the Truckee River and remanded the decision to the District Engineer for further consideration and final action. On 8 September 2023, The Sacramento District's Wetlands Specialist provided an MFR for Jurisdiction Evaluation and Recommendations for Responding to the Administrative Appeal Remand which concluded that the 3,200 linear foot Unnamed Channel is not a Water of the United States pursuant to 33 CFR §328.3.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Unnamed Channel is a non-relatively permanent tributary to the Truckee River, which is a Navigable-in-Fact TNW, pursuant to 33 CFR §328.3(a)(1)(i), as determined by the Sacramento District in 2008.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The Unnamed Channel flows through a 24-inch culvert to the east of the project area, under Alt U.S. HWY 395 South, for approximately 600 linear feet before entering Steamboat Creek- a Relatively Permanent Waterway. The confluence of the Unnamed Channel and Steamboat Creek is approximately 10.5 stream miles upstream of the confluence of Steamboat Creek and the Truckee River.

6. SECTION 10 JURISDICTIONAL WATERS⁵: There are no Section 10 waters within the review area.

7. SECTION 404 JURISDICTIONAL WATERS: There are no Section 404 waters within the review area.

⁵ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce or is presently incapable of such use because of changed conditions or the presence of obstructions.

CESPK-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPK-2006-00303

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. The Unnamed Channel is a non-relatively permanent tributary and as such is not a water of the U.S. pursuant to 33 CFR 328.3, as amended. (See reference d. for a detailed analysis of the flow characteristics of Unnamed Channel.)

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

a. Carpenter, Lori. 2022. "(SPK-2006-00303): Reclassification of Intermittent Drainage, Washoe County, NV." Request for Approved Jurisdictional Determination. April 11.

b. Carpenter, Lori. 2022. "Panattoni Project, Reno NV, Rainfall/Thunderstorm Photos, SPK-2006-00303." August 22.

c. Gant, Antoinette R. BG. 2023. "Panattoni Development Company, Inc., c/o Lindy Deller, Approved Jurisdictional Determination, Sacramento District, SPK-2006-00303." Administrative Appeal Decision. San Francisco: South Pacific Division, U.S. Army Corps of Engineers, July 27.

d. Jewell, Michael S. 2008. "Memorandum for Record, Navigable-in-Fact Determination for the Truckee River and Pyramid Lake (ID SPK-2007-01872)." Sacramento: Sacramento District, U.S. Army Corps of Engineers, June 11.

e. GeoEye. 2022. "GE01 22APR01190825-P3DS-015948101010_01_P001 and 22APR01190856-P3DS-015948083010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 1.

f. GeoEye. 2020. "GE01, 20APR08185901-P3DS-015961107010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 8.

g. GeoEye. 2020. "GE01, 20APR11190858-P3DS-015961117010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 11.

h. GeoEye. 2020. "GE01, 20APR30190336-P3DS-015948128010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 30.

i. GeoEye. 2020. "GE01, 20MAY08185613-P3DS-015948127010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., May 8.

CESPK-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPK-2006-00303

j. Robb, James T. 2023. "Memorandum for Record, Jurisdiction Evaluation and Recommendations for Responding to the Administrative Appeal Remand, with Enclosures" Sacramento: Sacramento District, U.S. Army Corps of Engineers, September 7.

k. USACE 12 July 2022, and 16 February 2023, site visits.

l. WorldView. 2020. "WV01, 20APR15214414-P3DS-015948126010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 15.

m. WorldView. 2020. "WV01, 20APR23215631-P3DS-015948129010_01_P001, and 20APR23215542-P3DS-015948139010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 23.

n. WorldView. 2022. "WV01, 22APR09214721-P3DS-015948035010_01_P001, 22APR09214802-P3DS-015948037010_01_P001, 22APR09185915-P3DS-015948105010_01_P001, and 22APR09190021-P3DS-015948088010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 9.

o. WorldView. 2022. "WV01, 22JUN16215348-P3DS-015948043010_01_P001, and 22JUN16215253-P3DS-015948049010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., June 16.

p. WorldView. 2022. "WV01, 22MAY21220226-P2AS-015948044010_01_P001 and 22MAY21220139-P3DS-015948042010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., May 21.

q. WorldView. 2020. "WV02, 20APR02185147-P3DS-015961111010_01_P001 and 20APR02185147-M3DS-015961111010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 2.

r. WorldView. 2020. "WV02, 20APR10185749-M3DS-015961109010_01_P001, 20APR10185749-P3DS-015961109010_01_P001, 20APR10185633-M3DS-015961118010_01_P001, and 20APR10185633-P3DS-015961118010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 10.

s. WorldView. 2020. "WV02, 20APR13184640-M3DS-015961112010_01_P001, and 20APR13184640-P3DS-015961112010_01_P001." *Orthorectified satellite imagery.* Westminster, CO: DigitalGlobe, Inc., April 13.

t. WorldView. 2022. "WV03, 22APR10190239-P3DS-015948038010_01_P001, 22APR10190239-M3DS-015948038010_01_P001, 22APR10190118-P3DS-

CESPK-RD

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPK-2006-00303

015948046010_01_P001, and 22APR10190118-M3DS-015948046010_01_P001." *Orthorectified satellite imagery*. Westminster, CO: DigitalGlobe, Inc., April 10.

10. OTHER SUPPORTING INFORMATION. The reach of the tributary is a second order stream formed by the confluence of two first order streams at approximately 39.398735°N, 119.748633°W. The reach of the tributary flows to the east, under Alt. US-395, and into Steamboat Creek, a 4th order stream. Approximately 3,200 feet of the 3,788-foot-long reach of the tributary is within the review area. The tributary was investigated in two separate site visits by the Corps on 12 July 2022, and again on 16 February 2023, during the appeal meeting site visit. The tributary has both a defined channel and an OHWM. An approximately 904-foot-long portion of the reach of the tributary between approximately latitude 39.399859°N, longitude 119.750957°W and latitude 39.398735°N, longitude 119.748633°W, consistently contains standing or flowing water both during ground observations and in aerial imagery during the late wet and early dry seasons. However, this portion is neither the bottom of the reach, nor the majority of the reach of the tributary. (The reach of the tributary is 3,788 feet long.) As such, the district concludes that "non-relatively permanent" best characterizes the entire reach of the tributary. A flow path from the Unnamed Tributary to the Truckee River is included as an enclosure to this MFR (Enclosure 1).

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

 Digitally signed by
JEWELL.MICHAEL.STEV
EN.1231810850
Date: 2023.09.25
13:56:38 -07'00'
MICHAEL S. JEWELL
CHIEF, REGULATORY DIVISION

Encl

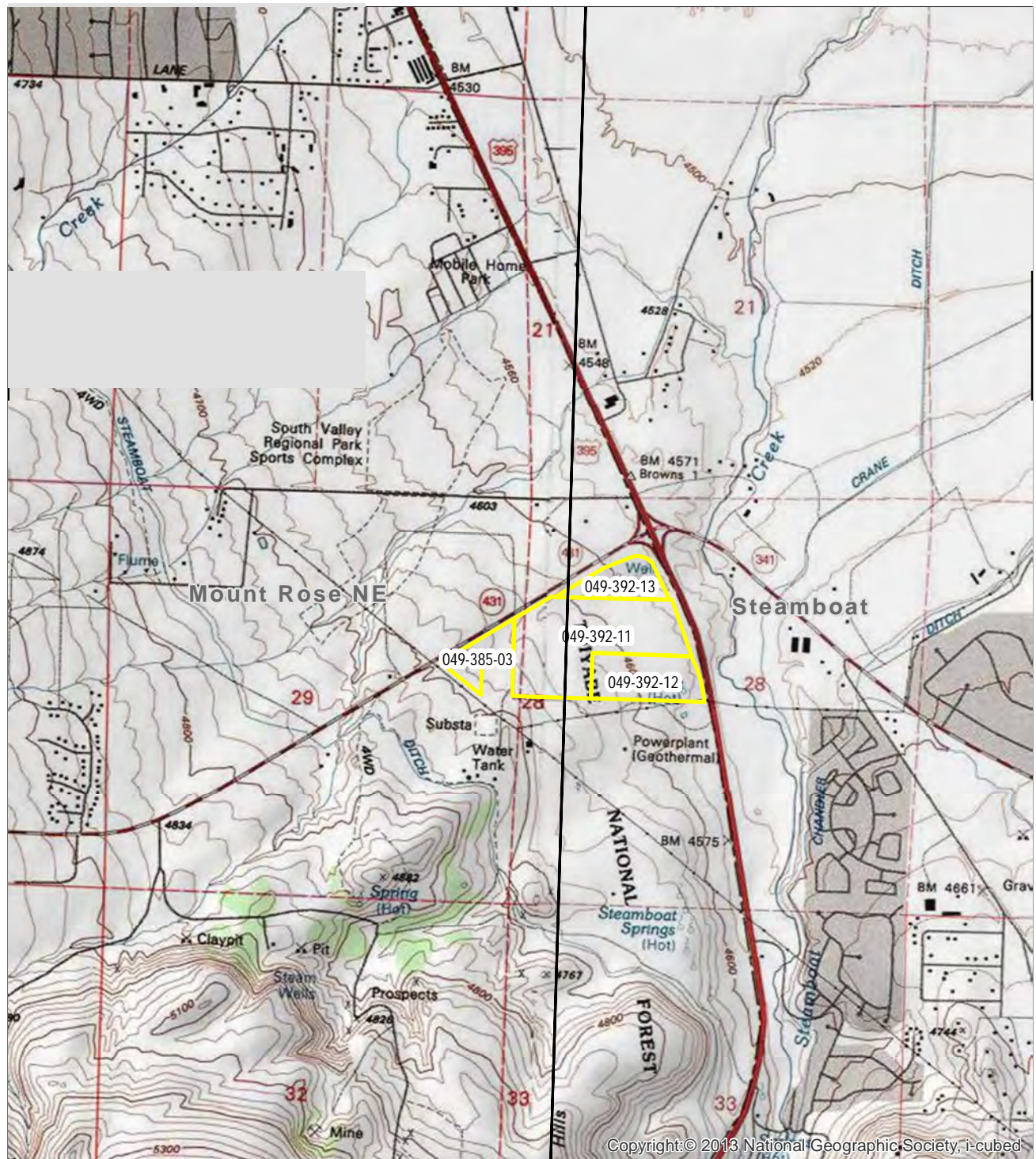


Figure 1a. Mt. Rose Commerce Park Project Location



Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community



P.O. Box 1
Mead, WA 99021

Panattoni Project



Attachment 1, Figure 1d.

