DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

CESPK-RDI-N 7 March 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023) ,[1] [SPK-2022-00512] (MFR 1 of 1)[2]

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.[3] 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.[4] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[5] the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This

[1] While the Supreme Court’s decision in *Sackett* 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] When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).
[3] 33 CFR 331.2.
[4] Regulatory Guidance Letter 05-02.
[5] 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.

AJD did not rely on the 2023 "Revised Definition of 'Waters of the United States,'" as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Utah due to litigation.

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) Coon Canyon Creek, non-jurisdictional under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

(2) Right Hand Fork Coon Canyon Creek, non-jurisdictional under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

(3) Left Hand Fork Coon Canyon Creek, non-jurisdictional under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

(4) Pond 1, non-jurisdictional under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

(5) Pond 2, non-jurisdictional under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

2. REFERENCES.

a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).

c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)

d. *Sackett v. EPA*, 598 U.S. _, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The approximately 436-acre project site is located in portions of Sections 7 and 18, Township 2 South, Range 2 West, and Sections 11, 12, 13, 14, and 15, Township 2 South, Range 3 West Salt Lake Base and Meridian, Latitude 40.650844°, Longitude -112.143909°, Salt Lake County, Utah (AJD MFR Enclosure 1).

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The nearest TNW is the Great Salt Lake (GSL). The GSL is a “navigable water” for purposes of the Clean Water Act (CWA) and is considered as "traditional navigable waters" and therefore jurisdictional under 33 C.F.R. §328.3(a)(1) and 40 C.F.R. §230.3(s)(1). Waters are traditional navigable waters if they meet one of the following criteria:

a. Are subject to section 9 or 10 of the Rivers and Harbors Appropriations Act of 1899;

b. Have been determined by a Federal court to be navigable-in-fact under Federal law;

c. Are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);

d. Have historically been used for commercial navigation, including commercial waterborne recreation; or

e. Are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.

The GSL meets Criteria 2, above, having been found navigable-in-fact under Federal law in *Utah v. United States,* 403 U.S. 9 (1971). Thus, the GSL is a "traditional navigable water" and is regulated by the Corps under Section 404 of the CWA.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

The flow path between the study area and the GSL is approximately 17-river miles. Cook Canyon Creek forms when the north and south forks convey into one stream along the northwest corner of the study area which continues downgradient and crosses State Road 111, and traverses to a point where it is redirected into a channel that empties into a large regional stormwater detention basin approximately 66 acres in size. The purpose of the detention basin is to prevent flows from crossing 4100 South except for very large runoff events as a measure to protect Magna City from flooding. Under normal circumstances/average precipitation events, water does not escape the basin downstream, but rather percolates/evaporates.

During extreme storm events, runoff from the detention basin flows through an outlet into a broad drainage swale and then into a buried storm drain. The buried storm drain

crosses under a railroad line and outlets into an upland drainage swale within a residential subdivision. Any surface water in the upland drainage swale is captured in a buried storm drain that is part of the regional stormwater collection system. At this point, the Coon Canyon Creek drainage is incorporated into the regional storm water collection system as the buried storm drain passes through Magna to a point where it outlets at a lift station on the Riter Canal. The lift station connects to the man-made C7 Ditch on the north side of State Road 201. The C-7 Ditch continues on a northwestern path until it reaches the GSL, the nearest TNW, approximately 17 river-miles to the northwest of the study area (AJD MFR Enclosure 2).

6. SECTION 10 JURISDICTIONAL WATERS[6]: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.[7] N/A. There are no Section 10 waters within the review area.

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed. N/A. There are no Section 404 waters within the review area.

a. TNWs (a)(1): None

b. Interstate Waters (a)(2): None

c. Other Waters (a)(3): None

[6] 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.

[7] This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

d. Impoundments (a)(4): None

e. Tributaries (a)(5): None

f. The territorial seas (a)(6): None

g. Adjacent wetlands (a)(7): None

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES: There are 2.31 acres (16,701 linear feet) of non-jurisdictional aquatic resources within the study area (AJD MFR Enclosure 3)

a. Describe aquatic resources and other features within the review area identified as "generally non-jurisdictional" in the preamble to the 1986 regulations (referred to as "preamble waters").[8] Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

Ponds 1 (0.06 acre) and 2 (0.14 acre) are non-relatively permanent, non-jurisdictional, man-made stock ponds in the eastern portion of Coon Canyon. Based on information provided in the aquatic resource delineation report, the ponds receive water rerouted from Coon Canyon Creek. The two ponds are filled in the spring and are dry by mid-summer when stream flows in Coon Canyon Creek cease to exist. Ponds 1 and 2 fit the description of a type of water that is generally not consider to be waters of the United States pursuant to the preamble to the 1986 regulations (51 FR 41206, 41217, 13 November 1986) since they are artificial ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering.

b. Describe aquatic resources and features within the review area identified as "generally not jurisdictional" in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance.

c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. None

[8] 51 FR 41217, November 13, 1986.

d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. None

e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in "*SWANCC*," would have been jurisdictional based solely on the "Migratory Bird Rule." Include the size of the aquatic resource or feature, and how it was determined to be an "isolated water" in accordance with *SWANCC*. None

f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

The aquatic linear features identified as Coon Canyon Creek (14,295 linear feet/1.75 acres), Right Hand Fork Coon Canyon Creek (643 linear feet/0.10 acres), and Left Hand Fork Coon Canyon Creek (1,763 linear feet/0.26 acres) totaling 2.11acres (16,701 linear feet) within the study area, are relatively permanent tributaries since snowpack is the hydrology source for these features which convey flows for a short continuous period during the spring snowmelt runoff. Flows from these streams are redirected into a channel that empties into a large regional stormwater detention basin approximately 66 acres in size. Flows from these streams do not normally/routinely escape the detention basin. This detention basin allows downstream flows only during non-reoccurring, abnormally high storm events. As such, the basin isolates the linear features from a continuous surface connection with the GSL. As such, Coon Canyon Creek, Right Hand Fork Coon Canyon Creek, and Left Hand Fork Coon Canyon Creek are not waters of the U.S., pursuant to 33 CFR 328.3, as amended.

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. USACE 27 February 2024 Office Evaluation.

b. Aquatic Resources Delineation Report "Oquirrh Pumped Storage Project" prepared by Frontier Corporation, dated July 2023 and addendum letter dated 22 December 2023.

c. Google Earth, 2023. Historic Aerial Imagery, 1985-2023. Accessed 27 February 2024.

d. LiDAR - National Layer in the National Regulatory Viewer for the South Pacific Division. Accessed 27 February 2024.

e. National Hydrography Dataset Flowlines – Large Scale from National Layers in the National Regulatory Viewer for the South Pacific Division. Accessed 27 February 2024.

10. OTHER SUPPORTING INFORMATION.

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.

3 Encls
Encl 1. Location Map
Encl 2. Flow Map
Encl 3. Aquatic Resources Map

NICOLE D. FRESARD
Senior Regulatory Project Manager
Utah Section

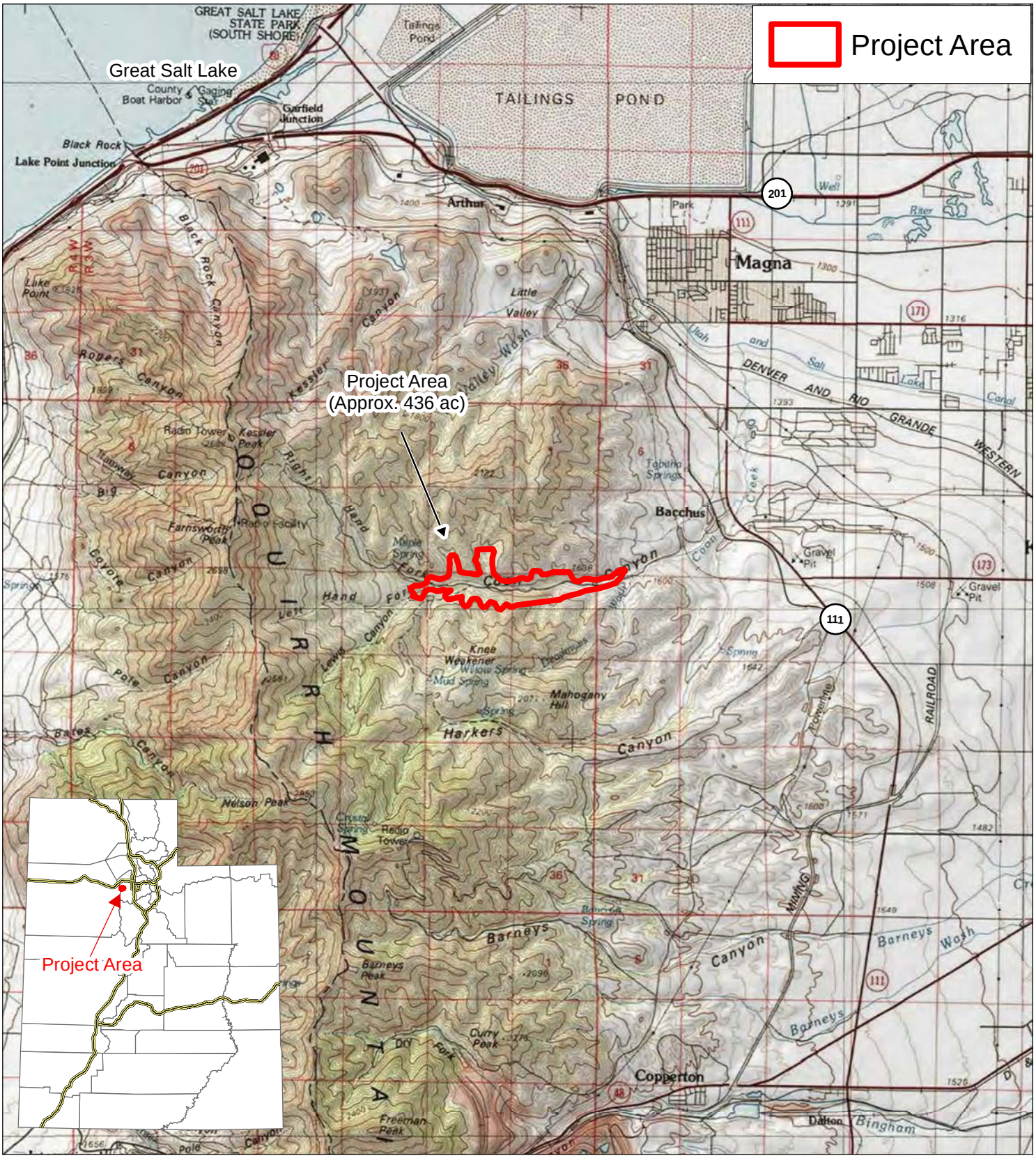

Figure 1. Site Vicinity Map
1:100,000 Scale Topographic Base.

Date: 6/23/2023
Created by: B. Frasier

0 1 2 Miles

1 inch = 1.58 miles
at 1:100k scale

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FRONTIER CORPORATION USA
Environmental Consultants
221 N. Gateway Drive Suite B
Providence UT, 84332
(435) 753-9502

AJD MFR Enclosure 1

AJD MFR Enclosure 1

Resource ID	Resource Type	Length (ft)
Left Hand Fork Coon Canyon Creek	Intermittent Stream Channel	1,763
Right Hand Fork Coon Canyon Creek	Intermittent Stream Channel	643
Coon Canyon Creek Segment 1	Intermittent Stream Channel	14,295
Segment 2	Intermittent Stream Channel	1,869
Segment 3	Road Culvert	52
Segment 4	Intermittent Stream Channel	2,211
Segment 5	Road Culvert	520
Segment 6	Intermittent Stream Channel	2,689
Segment 7	Road Culvert	93
Segment 8	Intermittent Stream Channel	536
Segment 9	Road Culvert	52
Segment 10	Intermittent Stream Channel	701
Segment 11	Road Culvert	232
Segment 12	Intermittent Stream Channel	2,651
Segment 13	Road Culvert	195
Segment 14	Intermittent Stream Channel	2,215
Segment 15	Road Culvert	121
Segment 16	Relocated Stream Channel	4,207
Segment 17	Road Culvert	182
Segment 18	Ephemeral Stream Channel	1,891
Segment 19	Storm Ditch	396
Segment 20	Buried Storm Drain	864
Segment 21	Upland Drainage Swale	759
Segment 22	Buried Storm Drain	11,416
Segment 23	Storm Ditch	1,008
Segment 24	C7 Canal	10,055
Segment 25	C7 Canal	16,779
Total Intermittent Stream Channel:		**29,573**
Total Ephemeral Stream Channel:		**1,891**
Total Relocated Stream Channel:		**4,207**
Total Storm Ditch:		**1,404**
Total Road Culvert:		**1,447**
Total Buried Storm Drain		**12,280**
Total C7 Canal:		**26,834**
Total Upland Drainage Swale:		**759**
Total Flow Path Length Between Project Area and Lee Creek:		**78,395**

402000 403000 404000 405000 406000 407000 408000 409000

4511000 4510000 4509000 4508000 4507000 4506000 4505000 4504000 4503000 4502000 4501000 4500000 4499000 4498000 4497000

Segment 25 C7 Canal (Stormwater)
Kersey Creek
Segment 24 C7 Canal (Stormwater)
Clarification Canal (Industrial Process Water)
Drain Ditch
P23
Segment 23 (Storm Ditch)
201
P22
Lift Station
Ritter Canal (Irrigation/Industrial)
111
Segment 22 (Buried Storm Drain)
3500 S
Utah/Salt Lake Canal
P21
Segment 21 (Upland Drainage Swale)
Segment 20 (Buried Storm Drain)
Railroad Tracks
Segment 19 (Storm Ditch)
Regional Detention Basin
P20
RP5
RP6
RP3
RP4
4100 S
P18
P16
P17
P19
Segment 16 (Relocated Stream Channel)
Detention Basin (Approx. 66 acres)
P15
P14
P13
P12
P11
Segment 15 (Culvert)
P10
Segment 14 (Intermittent Stream Channel)
P9
P8
P7
Segment 13 (Culvert)
P6
P5
P2
P3
Segment 10 (Intermittent Stream Channel)
Segment 12 (Intermittent Stream Channel)
P4
P1
Segment 8 (Intermittent Stream Channel)
Segment 11 (Culvert)
RP2
Segment 6 (Intermittent Stream Channel)
Segment 9 (Culvert)
RP1
Segment 7 (Culvert)
Segment 4 (Intermittent Stream Channel)
RP10
RP9
RP7
RP8
Segment 5 (Culvert)
Segment 2 (Intermittent Stream Channel)
Coon Canyon Access Road
Right Fork Coon Canyon Creek (Intermittent Stream Channel)
Segment 3 (Culvert)
Extent of Channel Flows 6/13/2023
Delineation Project Boundary for Lower Reservoir Storage Area (436-acres)
Left Fork Coon Canyon Creek (Intermittent Stream Channel)
Coon Canyon Creek Segment 1 (Intermittent Stream Channel)

Coon Canyon Creek AJD Flow Path Map 1

Oquirrh Pumped Storage Project
(SPK-2022-00512)
Map Date: 11/08/2023
By: J. Eddings
Imagery: Salt Lake County, 10/15/21
UTM Coordinates: NAD1983 Zone 12 N

Project Area
Detention Basin
Intermittent Stream Channel
Ephemeral Stream Channel
Relocated Stream Channel
Storm Ditch
Culvert
Buried Storm Drain
Upland Drainage Swale
C7 Canal
County/City Storm Drains
Lift Station
Extent of Flows 6/13/2023
P ↑ Photopoint and view direction
RP ↑ Flow Monitoring Repeat Photopoint and view direction

0 1,500 3,000 Feet
1 in = 1,500 feet

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FRONTIER CORPORATION USA
Environmental Consultants
221 N. Gateway Drive Suite B
Providence UT, 84332
(435) 753-9502

AJD MFR Enclosure 2

Resource ID	Resource Type	Length (ft)
Left Hand Fork Coon Canyon Creek	Intermittent Stream Channel	1,763
Right Hand Fork Coon Canyon Creek	Intermittent Stream Channel	643
Coon Canyon Creek Segment 1	Intermittent Stream Channel	14,295
Segment 2	Intermittent Stream Channel	1,869
Segment 3	Road Culvert	52
Segment 4	Intermittent Stream Channel	2,211
Segment 5	Road Culvert	520
Segment 6	Intermittent Stream Channel	2,689
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Segment 14	Intermittent Stream Channel	2,215
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Segment 16	Relocated Stream Channel	4,207
Segment 17	Road Culvert	182
Segment 18	Ephemeral Stream Channel	1,891
Segment 19	Storm Ditch	396
Segment 20	Buried Storm Drain	864
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Segment 22	Buried Storm Drain	11,416
Segment 23	Storm Ditch	1,008
Segment 24	C7 Canal	10,055
Segment 25	C7 Canal	16,779
Total Intermittent Stream Channel:		**29,573**
Total Ephemeral Stream Channel:		**1,891**
Total Relocated Stream Channel:		**4,207**
Total Storm Ditch:		**1,404**
Total Road Culvert:		**1,447**
Total Buried Storm Drain		**12,280**
Total C7 Canal:		**26,834**
Total Upland Drainage Swale:		**759**
Total Flow Path Length Between Project Area and Lee Creek:		**78,395**

403000 404000 405000 406000 407000 408000 409000 410000

4522000 4521000 4520000 4519000 4518000 4517000 4516000 4515000 4514000 4513000 4512000 4511000 4510000 4509000 4508000

Great Salt Lake

Lee Creek

Lee Creek

N. Temple Storm Drain

80

Segment 25 C7 Canal (Stormwater)

Brighton Drain

Tailings Impoundment

Lee Creek

Segment 25 C7 Canal (Stormwater)

Kersey Creek

Segment 24 C7 Canal (Stormwater)

Clarification Canal (Industrial Process Water)

Segment 23 (Storm Ditch)

201

Lift Station

Segment 22 (Buried Storm Drain)

Ritter Canal

Coon Canyon Creek AJD Flow Path Map 2

Oquirrh Pumped Storage Project
(SPK-2022-005121)
Map Date: 11/09/2023
By: J. Eddings
Imagery: Salt Lake County, 10/15/21
UTM Coordinates: NAD1983 Zone 12 N

C7 Canal | Lift Station | Buried Storm Drain | Storm Ditch

0 1,500 3,000 Feet

1 in = 1,500 feet

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Environmental Consultants
221 N. Gateway Drive Suite B
Providence UT, 84332
(435) 753-9502

Feature Name	Feature Type	Area (ac)	Length (ft)
Main Stem Coon Canyon Creek	Intermittent Stream Channel	1.75	14,295
Right Hand Fork Coon Canyon Creek	Intermittent Stream Channel	0.10	643
Left Hand Fork Coon Canyon Creek	Intermittent Stream Channel	0.26	1,763
Pond 1	Man-Made Stock Pond	0.06	-
Pond 2	Man-Made Stock Pond	0.14	-
	Total:	**2.31**	**16,701**

401750.000000 402000.000000 402250.000000 402500.000000 402750.000000 403000.000000 403250.000000 403500.000000 403750.000000 404000.000000

4501250.000000 4501000.000000 4500750.000000 4500500.000000 4500250.000000

Porter Hollow
Project Area (Approx 436 ac.)
Right Hand Fork Coon Canyon Creek (0.10 ac, 643 ft)
Coon Canyon Creek (1.75 ac, 14,295 ft)
Gravel Access Road
OHWM
QHWM
Left Hand Fork Coon Canyon Creek (0.26 ac, 1,763 ft)
XS-1
XS-2
XS-3
XS-4
SP-1
SP-2
P1 P2 P3 P4 P5 P6 P7 P9 P10 P11 P12 P13 P14 P15 P16 P17 P18 P19 P20 P21 P22 P23 P24 P25 P26 P27 P28 P29 P30 P45 P46 P47 P48 P49 P50 P51 P52 P53 P54 P55 P56 P57

Figure 3a: Aquatic Resources Delineation Survey Map 1

Map Date: 06/27/2023
By:J. Eddings
Imagery: NAIP 2021
UTM Zone 12 N

- OHWM Cross Section Sample Points
- Wetland Delineation Sample Points
- P1 Photo Point & View Direction
- Intermittent Stream Channel OHWM
- Stock Pond OHWM
- Project Area

0 500 1,000 Feet

1 in = 500 feet

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FRONTIER CORPORATION USA
Environmental Consultants
221 N. Gateway Drive Suite B
Providence UT, 84332
(435) 753-9502

AJD MFR Enclsoure 3

Feature Name	Feature Type	Area (ac)	Length (ft)
Main Stem Coon Canyon Creek	Intermittent Stream Channel	1.75	14,295
Right Hand Fork Coon Canyon Creek	Intermittent Stream Channel	0.10	643
Left Hand Fork Coon Canyon Creek	Intermittent Stream Channel	0.26	1,763
Pond 1	Man-Made Stock Pond	0.06	-
Pond 2	Man-Made Stock Pond	0.14	-
	Total:	**2.31**	**16,701**

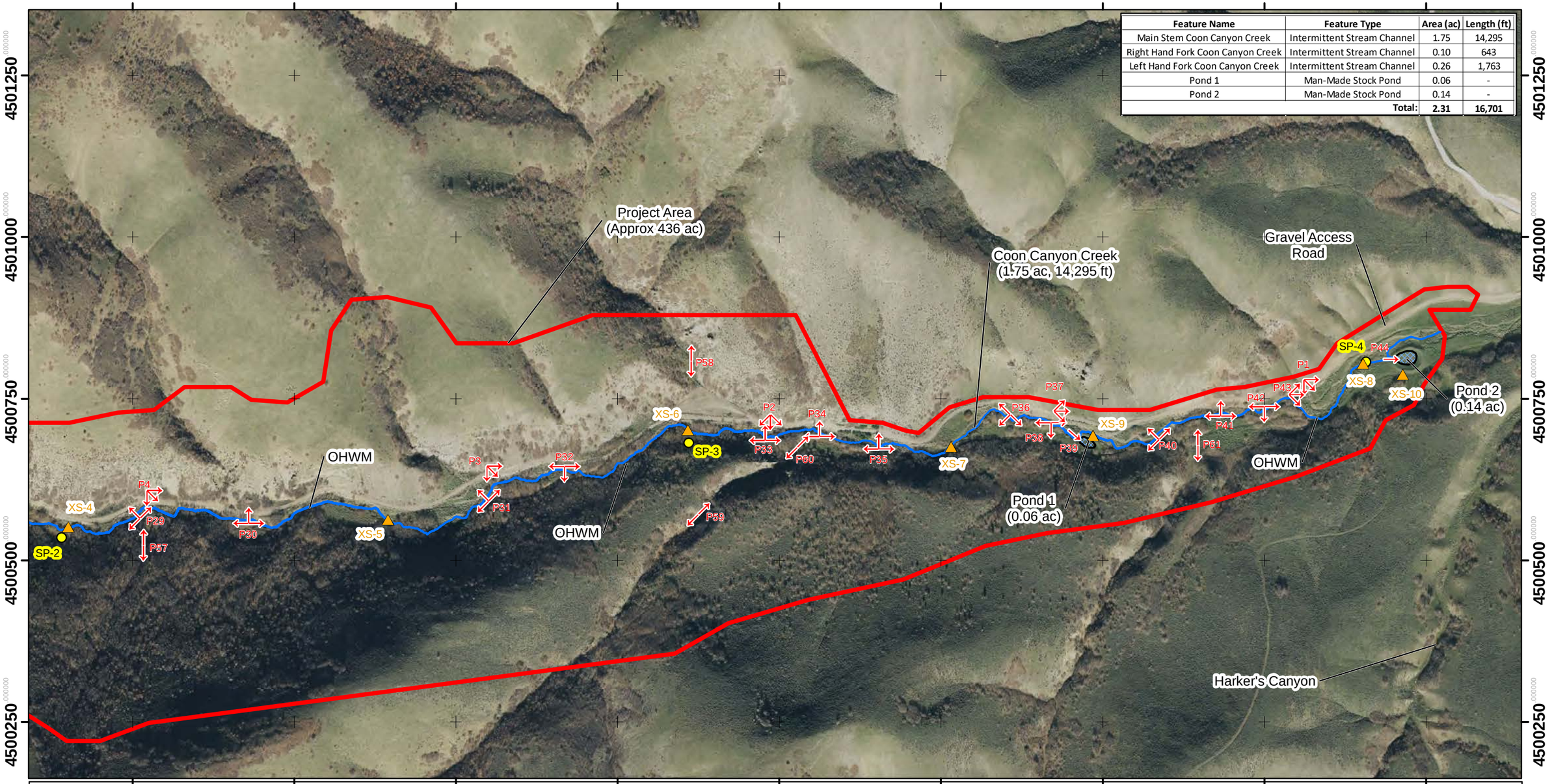

Figure 3b: Aquatic Resources Delineation Survey Map 2

Map Date: 06/27/2023
By:J. Eddings
Imagery: NAIP 2021
UTM Zone 12 N

- OHWM Cross Section Sample Points
- Wetland Delineation Sample Points
- P1 Photo Point & View Direction
- Intermittent Stream Channel OHWM
- Stock Pond OHWM
- Project Area

0 500 1,000 Feet

1 in = 500 feet

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FRONTIER CORPORATION USA
Environmental Consultants
221 N. Gateway Drive Suite B
Providence UT, 84332
(435) 753-9502