



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

CESPK-RDI-U

07 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-2022-00545²

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.

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00545]

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.

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).

- a. W10, non-jurisdictional under Section 404 of the Clean Water Act (CWA).
- b. Ditch 1, non-jurisdictional under Section 404 of the CWA.
- c. Ditch 2, non-jurisdictional under Section 404 of the CWA.
- d. Ditch 3, non-jurisdictional under Section 404 of the CWA.
- e. Channel 3, jurisdictional under Section 404 of the CWA.

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 3,943-acre review area is located at the center point, Latitude 39.21185°, Longitude -110.96839°, Castle Dale, Emery 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 Green River. The Green River is a “navigable water” for purposes of the 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:

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00545]

- 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 Green River, a relatively permanent water (RPW), from Flaming Gorge Reservoir to above its confluence with the Price River, meets Criteria C, above, since it was determined to be a navigable-in-fact waterway in a September 12, 2008, Sacramento District Regulatory Division memo, in accordance with Appendix D of the Rapanos Guidance. Thus, the Green River, from Flaming Gorge Reservoir to above its confluence with the Price River, is a "traditional navigable water" and is regulated by the Corps under Section 404 of the CWA. US Supreme Court May 18, 1931 (283 U.S. 64)). This reach of the Green River is tributary to, the lower reach of the Green River, which is a navigable waterway as defined under Section 10 of the Rivers and Harbors Act, from the confluence with the Colorado River to 20 miles above Green River Station.

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

The aquatic resources in the survey area have a connection to the Green River, a third-order RPW and navigable-in-fact waterway, via connection with either Cottonwood Creek (RPW) or Huntington Creek (RPW). Cottonwood Creek and Huntington Creek are both fourth-order RPWs and (a)(5) tributaries of the San Rafael River (RPW). The San Rafael River remains a fifth-order RPW from the point of confluence with the Cottonwood and Huntington Creeks to the Green River. At the point of confluence, the Green River is a third-order RPW/TNW.

Ditch 1 (non-RPW), W10, and Ditch 2 (non-RPW) have a confined surface connection to Huntington Creek (RPW) via an unnamed third-order RPW (in orange on AJD MFR Enclosure 2). The unnamed third-order RPW, flows southeast into Huntington Creek, a fourth-order RPW at the point of confluence.

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00545]

- Ditch 1 flows southeast before entering a culvert that directly abuts a wetland, W8, as identified in the delineation report. W8 directly abuts the unnamed third-order RPW.
- W10 directly abuts Ditch 2 (non-RPW) which flows southeast into W9. W9 has a shallow channel that extends east and then has surface flow through the wetland before channelizing again. W9 directly abuts the unnamed third-order RPW (in orange on AJD MFR Enclosure 2).

Ditch 3, a non-RPW of unknown stream order, and Channel 3, a first-order RPW, have a connection to Cottonwood Creek (RPW) via Rock Canyon Creek (RPW).

- Ditch 3 (non-RPW) flows southeast and out of the survey area before discharging into Channel 3, an RPW.
- Channel 3 is a first-order RPW within the survey area but becomes a second-order RPW approximately 0.53 river mile outside of the survey area. Channel 3 then continues to flow southeast into Rock Canyon Creek, a third-order RPW, before flowing into Cottonwood Creek, a fourth-order RPW (AJD MFR Enclosure 2).

6. SECTION 10 JURISDICTIONAL WATERS⁶: There are no 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 1899.⁷

7. SECTION 404 JURISDICTIONAL WATERS: The following aquatic resources within the review area (AJD MFR Enclosure 3) 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*.

- a. TNWs (a)(1): N/A.
- b. Interstate Waters (a)(2): N/A.
- c. Other Waters (a)(3): N/A.

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): N/A.

e. Tributaries (a)(5): Channel 3 is a first-order RPW within the survey area that is tributary to the Green River, a third-order RPW and TNW. Channel 3 meets the (a)(5) category “waters of the United States” in the pre-2015 regulatory regime. The stream is 8,860 linear feet/1.22 acre and mainly consists of overflow water from nearby irrigated fields. The stream originates from mountains west of Castle Dale city and flows east collecting a combination of stormwater and irrigation overflow as a first-order stream. Approximately 0.53 river mile outside of the survey area, Channel 3 becomes a second-order stream. Channel 3 flows for approximately 0.85 river mile before discharging into Rock Canyon Creek, a third-order RPW. Despite some of the surrounding fields switching from flood irrigation to sprinkler irrigation in the past decade, the stream remains relatively permanently flowing. Based on a photo in the delineation report, aerial records, and the antecedent precipitation tool (APT), Channel 3 does have relatively permanent flow (AJD MFR Enclosure 4). The photo in the delineation report and aerial records show water consistently in the stream channel. Using the APT, the area was experiencing range of drier than normal and normal conditions and a drought index ranging from normal to severe drought. Since the stream was flowing despite drought conditions, the stream was determined to be an RPW.

f. The territorial seas (a)(6): N/A.

g. Adjacent wetlands (a)(7): N/A.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. There are no 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

b. There are no aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance.

c. There are no 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.

d. There are no aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.).

⁸ 51 FR 41217, November 13, 1986.

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00545]

e. There are no 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.”

f. Ditch 1, 2, and 3, and W10 totaling 1.12-acre/7,475 linear feet 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*. They are tributaries that are non-relatively permanent waters or non-tidal wetlands that do not have a continuous surface connection (i.e. directly abutting) to a jurisdictional water.

Ditches 1, 2, and 3 are non-RPWs that previously contained overflow from the flood irrigated fields upstream. Most of the surrounding fields have switched to sprinkler irrigation in the past five years, resulting in drying within the survey area, including the ditches. Ditches 1, 2, and 3 now only experience flow due to discrete precipitation events. Ditch 1 is 3,243 linear feet and 6 feet wide (0.45-acre); Ditch 2 is 3,957 linear feet and 3 feet wide (0.27-acre), and Ditch 3 is 275 linear feet and 6 feet wide (0.04-acre). Additionally, Ditches 1, 2, and 3 do not have relatively permanent flow. While photos provided in the delineation report show flowing water in Ditch 2, based on the APT, it appears that there was a precipitation event directly preceding the site visit that explains the water shown in the photo (AJD MFR Enclosure 5).

W10 is a 0.36-acre palustrine emergent wetland that directly abuts, and flows through, Ditch 2 (non-RPW), which then flows indirectly to the Green River (TNW) through multiple RPWs. While Ditch 2 does provide for a continuous hydrologic surface connection between W10 to W9, Ditch 2 is a non-RPW; therefore under the Pre-2015 Post-Sackett regime, it cannot be used to establish a continuous surface connection between W10 and W9. Wetlands adjacent by virtue of an unbroken surface connection that did not abut a TNW or RPW require a significant nexus analysis. Since significant nexus is no longer a valid exercise of jurisdiction and since the interpretation of continuous surface connection was limited to directly abutting under the pre-2015 regulatory regime, W10 is not jurisdictional under Section 404 of the CWA.

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. The office evaluation was done on 31 January 2024.

b. Delineation Report prepared by [REDACTED] dated September 19, 2022. The consultant prepared the delineation report in accordance with the U.S. Army Corps of Engineers 1987 Wetland Delineation manual and the USACE Regional Supplement for the Arid West Region.

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00545]

- c. Wetland Delineation Report Addendum by [REDACTED] dated September 19, 2023.
- d. Photos included in the [REDACTED] Delineation Report and the Wetland Delineation Report Addendum.
- e. Google Earth. (12 July 2006, 14 September 2011, 30 May 2013, 2 April 2015, 17 August 2015, 10 July 2020, 15 June 2022, 9 October 2022). Castle Dale, Emery County, Utah. Latitude 39.21185°N, Longitude -110.96839°W. Retrieved 31 January 2024, from <http://www.earth.google.com>.
- f. LiDAR – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 31 January 2024.
- g. National Hydrography Dataset Flowlines – Large Scale from National Layers in the National Regulatory Viewer for the South Pacific Division. Retrieved 31 January 2024.
- h. USDA Natural Resources Conservation Service Soil Survey: Included in the [REDACTED] Delineation Report.
- i. US Fish and Wildlife Service Wetland Mapper – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 31 January 2024 and NWI Map included in the [REDACTED] Delineation Report.
- j. Antecedent Precipitation Tool. Version 2.0. (02 April 2015, 10 July 2020, 25 April 2022, 09 October 2022). Latitude 39.17791°N, Longitude -111.02038°W. Retrieved 14 February 2024.
- k. SPK-2008-00206: Memorandum for Record verified on 12 September 2008.
- l. LRL-2023-00466: Memorandum on Evaluating Jurisdiction verified on February 7, 2024.

10. OTHER SUPPORTING INFORMATION. The 3,943-survey area is located east of Castle Dale, Utah in a shale desert consisting of benches, low rounded hills, and badlands. The topography varies in the survey area with elevation ranging from 5,470 to 5,860 feet, but generally slopes to the southeast. The survey area is mostly undeveloped, with irrigated agricultural fields scattered throughout the area. Due to agricultural fields within, and surrounding, the survey area that have been historically flood irrigated, surface water overflow has created drainage swales throughout the survey area, generally flowing southeast towards the San Rafael River. As indicated in

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00545]

the delineation report, many of the fields surrounding the survey area have transitioned to sprinkler irrigation within the last five years, and aquatic resources found within the survey area appear to be drying. The aquatic resources in the survey area that are subject to this AJD are Wetland 10, Ditches 1, 2, and 3, and Channel 3, totaling 0.36-acre of wetland, and 1.98 acres/16,335 linear feet of stream channel.

The 0.36-acre wetland, W10 was evaluated by USACE for hydrologic connections to the nearest TNW using aerial records, NHD, and LiDAR. Based on this information, USACE did not establish a continuous surface (i.e., directly abutting) connection from W10 to an RPW/TNW. Therefore, W10 is not a water of the U.S.

Ditches 1, 2, and 3 were evaluated by USACE to determine if they had relatively permanent flow using aerial records and photos provided in the delineation report. Based on this information, USACE determined that Ditches 1, 2, and 3 do not have relatively permanent flow, and therefore, are not waters of the U.S.

Channel 3 was evaluated by USACE to determine if it had relatively permanent flow using aerial records, photos provided in the delineation report, and the APT. Based on this information, USACE determined that Channel 3 does have relatively permanent flow, and therefore, is a water of the U.S.

There are no previous jurisdictional determination verifications for the review area.

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.

5 Encls

Enclosure 1: Project Location

Enclosure 2: Flow Path Map

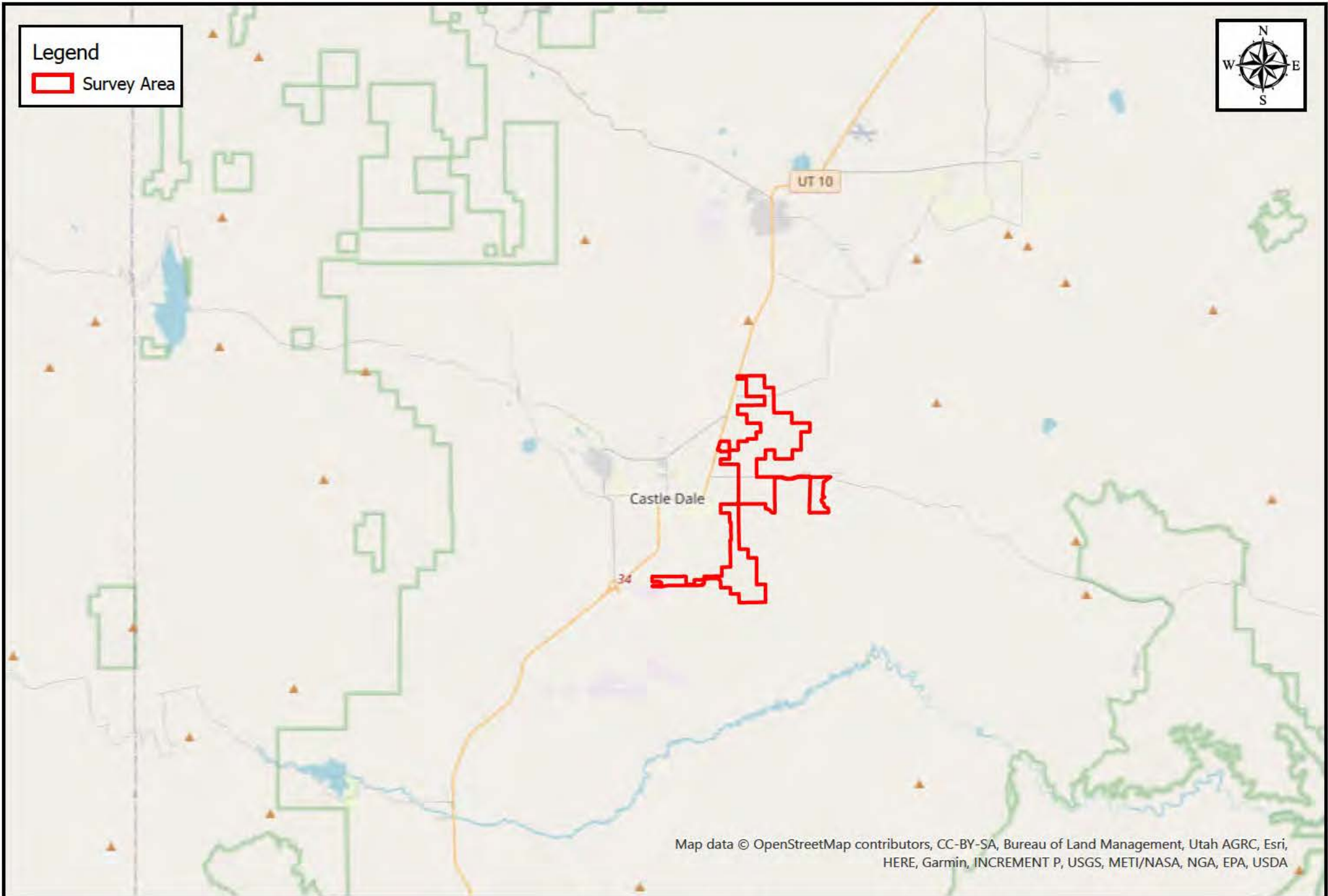
Enclosure 3: AR Map

Enclosure 4: Channel 3 Photos, Aerials,
& APT Records

Enclosure 5: Ditch 1, 2, & 3 Photos,
Aerials, & APT



Legend
Survey Area



SPK-2022-00545
Project Location

0 2.25 4.5 9
mi

Map Center: 111.020932°W 39.231311°N

Map Created by: [REDACTED]

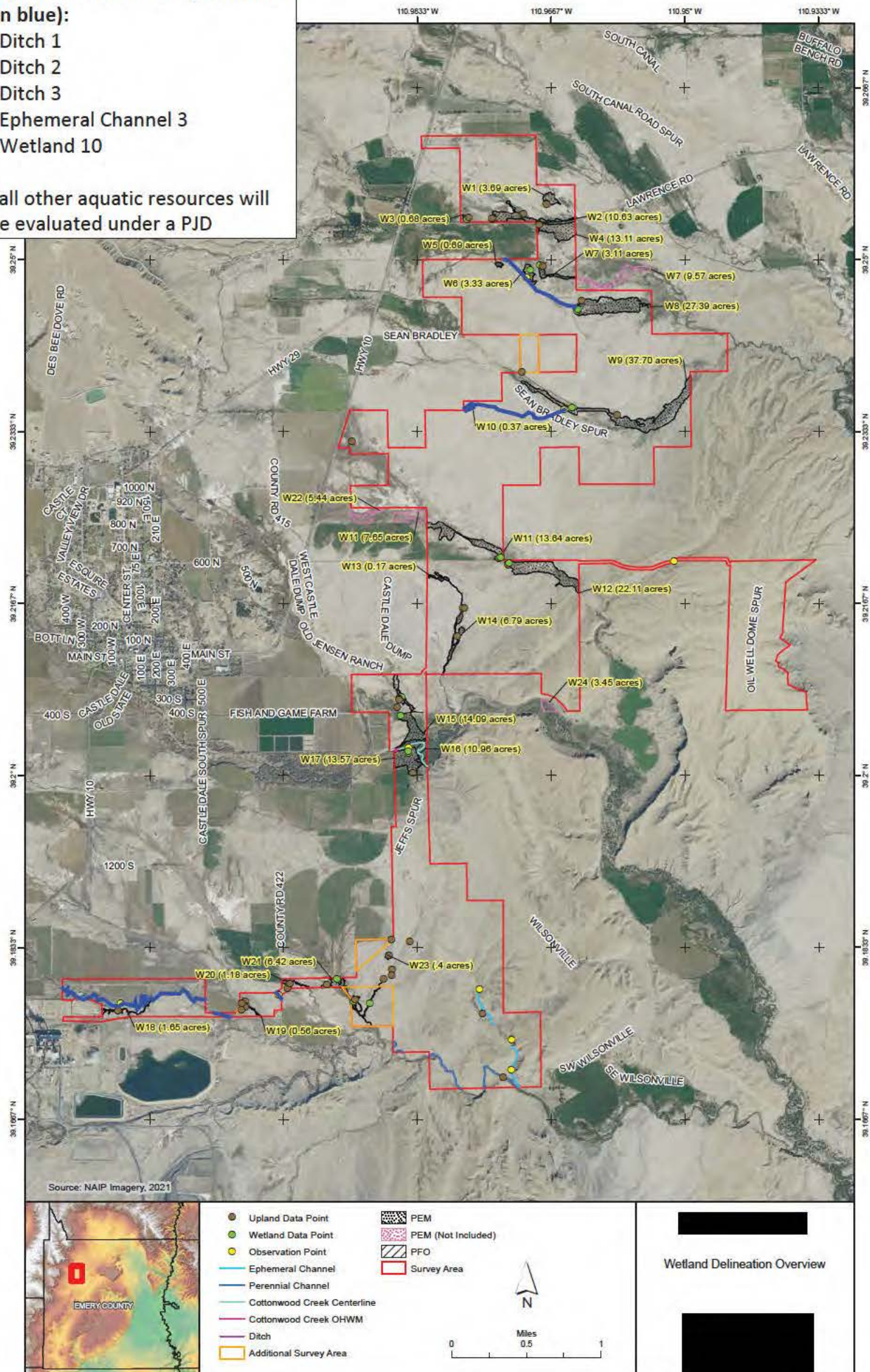
Date: 1/30/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary
Sphere

**Aquatic Resources subject to AJD
(in blue):**

- Ditch 1
- Ditch 2
- Ditch 3
- Ephemeral Channel 3
- Wetland 10

***all other aquatic resources will
be evaluated under a PJD**





- | | | |
|-------------------------------|--------------------|------------------------|
| ● Observation Point | PEM | Survey Area |
| ● Upland Data Point | PEM (Not Included) | Additional Survey Area |
| ● Wetland Data Point | PFO | |
| — Cottonwood Creek OHWM | | |
| — Cottonwood Creek Centerline | | |
| — Ditch | | |
| — Ephemeral Channel | | |
| — Perennial Channel | | |

Delineation field work completed:
April 25th and 26th, July 26th, 2022
and May 22nd, 2023



Wetland Delineation Results Map 2 of 16

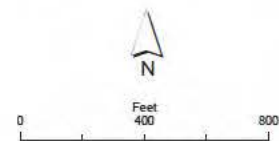


- Observation Point
- Upland Data Point
- Wetland Data Point
- Cottonwood Creek OHWM
- Cottonwood Creek Centerline
- Ditch
- Ephemeral Channel
- Perennial Channel

- PEM
- PEM (Not Included)
- PFO

- Survey Area
- Additional Survey Area

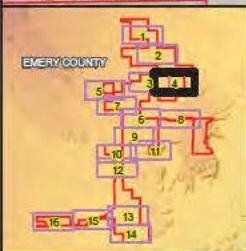
Delineation field work completed:
April 25th and 26th, July 26th, 2022
and May 22nd, 2023



Wetland Delineation Results Map 3 of 16



Source: NAIP Imagery, 2021



- Observation Point
- Upland Data Point
- Wetland Data Point
- Cottonwood Creek OHWM
- Cottonwood Creek Centerline
- Ditch
- Ephemeral Channel
- Perennial Channel

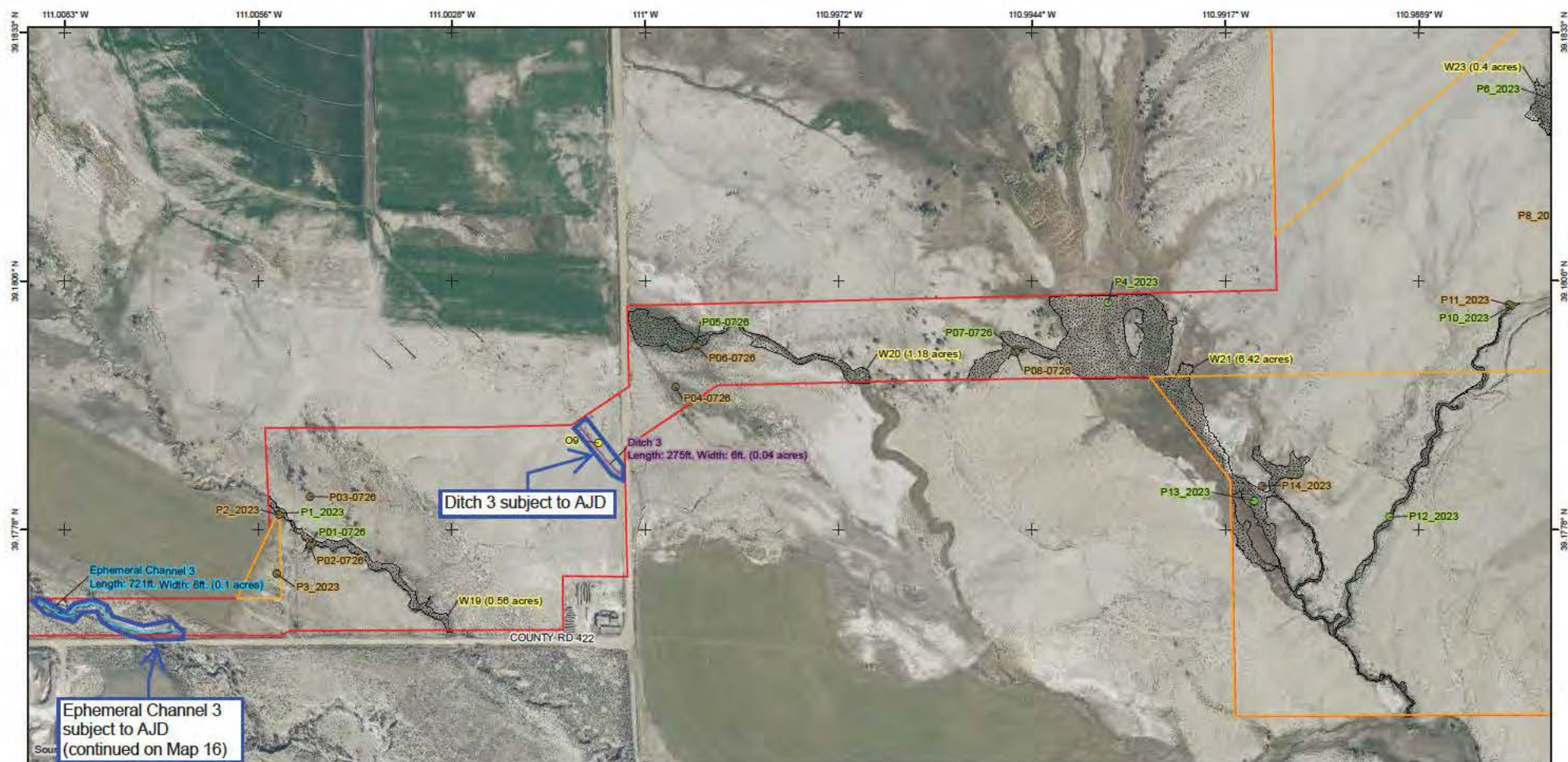
- PEM
- PEM (Not Included)
- PFO

- Survey Area
- Additional Survey Area

Delineation field work completed:
April 25th and 26th, July 26th, 2022
and May 22nd, 2023



Wetland Delineation Results Map 4 of 16

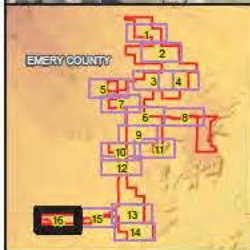
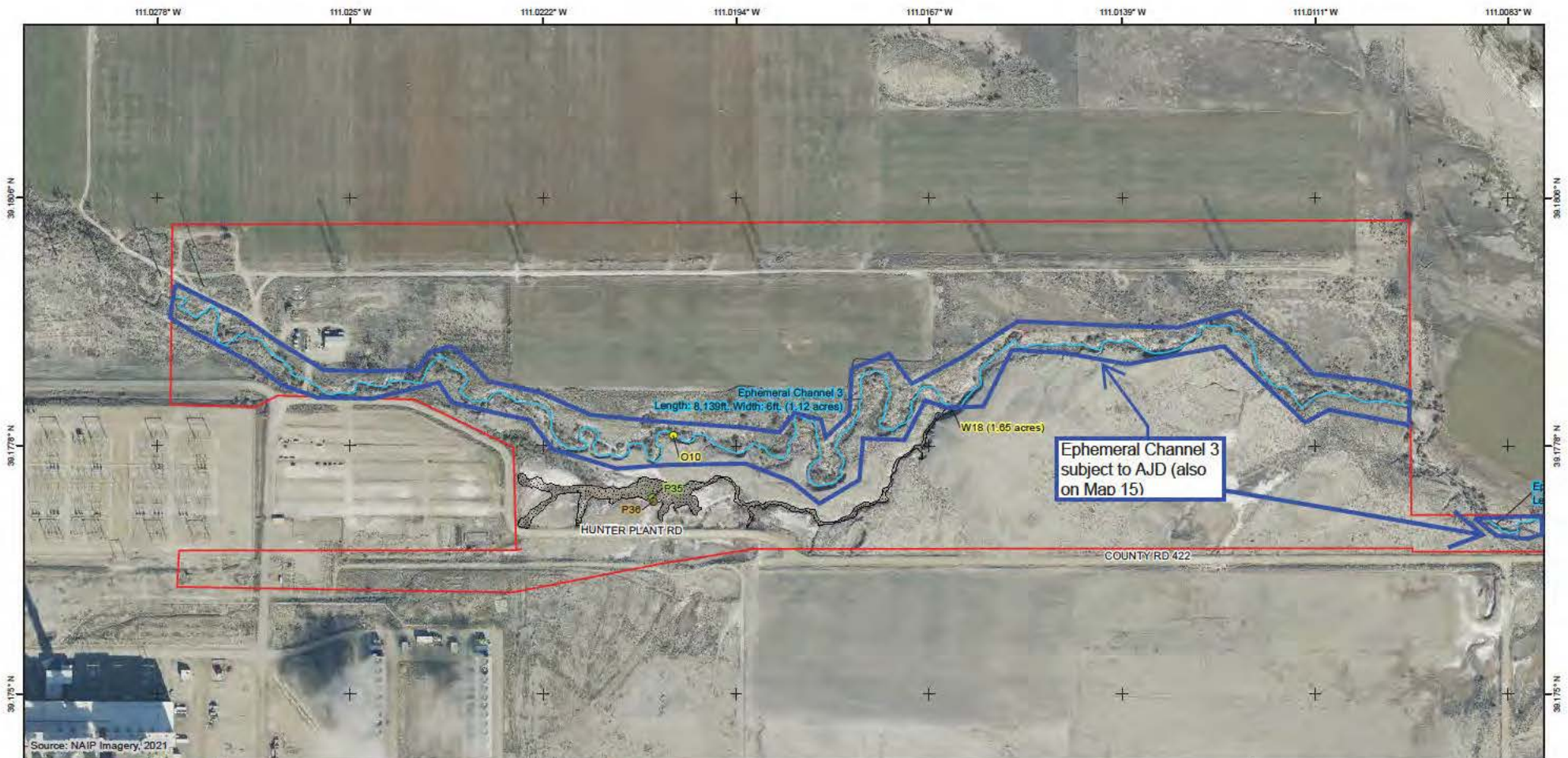


- Observation Point
- Upland Data Point
- Wetland Data Point
- Cottonwood Creek OHWM
- Cottonwood Creek Centerline
- Ditch
- Ephemeral Channel
- Perennial Channel
- PEM
- PEM (Not Included)
- PFO
- Survey Area
- Additional Survey Area

Delineation field work completed:
April 25th and 26th, July 26th, 2022
and May 22nd, 2023



Wetland Delineation Results Map 15 of 16

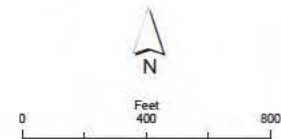


- Observation Point
- Upland Data Point
- Wetland Data Point
- Cottonwood Creek OHWM
- Cottonwood Creek Centerline
- Ditch
- Ephemeral Channel
- Perennial Channel

- PEM
- PEM (Not Included)
- PFO

- Survey Area
- Additional Survey Area

Delineation field work completed:
April 25th and 26th, July 26th, 2022
and May 22rd, 2023



Wetland Delineation Results Map 16 of 16