



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

CESPK-RDI-U

18 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),<sup>1</sup> SPK-2023-00252

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.<sup>2</sup> 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.<sup>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</sup> 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 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 this state due to litigation.

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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.

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## 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) W-1 (0.016 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (2) W-2 (0.02 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (3) W-3 (0.006 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (4) W-4 (0.69 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (5) W-5 (0.08 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (6) W-6 (0.012 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (7) W-7 (0.006 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (8) W-8 (0.20 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (9) OW-1 (0.47 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (10) OW-2 (0.014 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (11) OW-3 (0.02 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (12) OW-4 (0.008 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (13) OW-5 (0.69 ac)- Non-jurisdictional under Section 404 of the Clean Water Act.

**Note-** The ditch (potential RPW) in the southwest corner is outside of the review area for this jurisdictional determination and is being verified under an aquatic resource verification.

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## 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 31.4-acre review area is located between the Fox Hollow Golf Club and 980 North, Latitude 40.39894°, Longitude -111.78882°, American Fork, Utah County, Utah. The review area is an agricultural field that was mainly utilized for cattle grazing and most recently horse grazing. This field has been flood irrigated prior to 1950 through 2023, as evidenced from the historic and recent aerial photographs.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Utah Lake, the nearest navigable in fact waterway, is located approximately 3.5 aerial miles south-southwest. The subject aquatic resources have no potential hydrologically connection to Utah Lake.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Subject aquatic resources within the site do not flow offsite the 31.4 acre review area.

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</sup> [None]

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<sup>5</sup> 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.

<sup>6</sup> 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.

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.

- a. TNWs (a)(1): [None.]
- b. Interstate Waters (a)(2): [None.]
- c. Other Waters (a)(3): [None.]
- 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

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").<sup>7</sup> 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. [None.]

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. [None.]

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<sup>7</sup> 51 FR 41217, November 13, 1986.

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.]

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*. Two ponds (OW-1 and OW-5) were determined to be isolated and lack a confined surface hydrologic connection (CSC) to the nearest a(5) RPW, the unnamed ditch in the southwest corner of the property, 320 feet from nearest pond (OW-5). The unnamed RPW ditch is tributary to the American Fork River, which is tributary to Utah Lake, the nearest TNW. Wetland (W-1) directly abuts pond OW-1. This wetland is non-adjacent and described in detail under Section 8. F.

OW-1 (0.49 ac) and OW-5 (0.69 acre) are two ponds that appear to have been constructed in wetlands, but do not have CSC with the nearest downslope RPW. OW-5, the southernmost pond was constructed around 1958 and the OW-1, northern pond was constructed around 1980 during golf course construction. These ponds are connected by a culvert and the configuration of these ponds have been manipulated throughout the years. Pond OW-5 occasionally overflows and sheet flows to the south and appears to connect with a ditch in the southwest corner of the survey area, which appears to be a RPW. This tenuous hydrologic connection is only sheet flow with no field indicators of a CSC. The sheet flow area is mainly comprised of cheatgrass (*Bromus tectorum*), an upland species and does not have a swale or channel that connects with this potential RPW, which is apparent from the LIDAR maps. There are no culverts, ditches, or other potential flow conveyance features that would connect these ponds with the nearest RPW.

In addition to the ponds lacking a CSC to the nearest TNW, no interstate or foreign commerce could be associated with these ditches and ponds. Therefore, the 0.042 acre of ditches (OW-2 through OW-4) and the 1.18 acres of ponds (OW-1 and OW-5) have been determined to be isolated and non-jurisdictional.

Therefore, the 1.18 acres of ponds within the review area are not subject to CWA jurisdiction.

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). Ditches OW-2 (0.014 ac), OW-3 (0.02 ac), OW-4 (0.008 ac) are RPWs that do not have a CSC with an a(1) or a(5) water. The source of these ditches originates on the Fox Hollow Golf Club to the northwest and flow south and are the hydrologic source for the review area wetlands and ponds. These ditches appear to have been constructed in wetlands, but do not have a CSC with the nearest TNW.

Wetlands W-1 (0.02 ac), W-2 (0.02 ac), W-3 (0.006 ac), W-4 (0.69 ac), W-5 (0.08 acre), W-6 (0.012 ac), W-7 (0.006 ac), and W-8 (0.20 ac) are non-adjacent wetlands, with no CSC to the nearest RPW, an unnamed ditch in the southwest corner of the survey area, approximately 200 feet west of W-4, the nearest wetland. The ditch is a RPW that is tributary to the American River, an a(5) water tributary to Utah Lake, the nearest TNW. The subject wetlands are fed by the ditches that originate on the Fox Hollow Golf Club to the northwest. The review area slopes to the south and the southernmost wetland W-4 dissipates at the southern property line. There are no culverts, ditches, or other potential flow conveyance features that would connect these aquatic resources with the nearest TNW. Therefore, the 1.14 acres of wetlands within the review area are non-adjacent wetlands and not subject to CWA jurisdiction.

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. Site visit May 30, 2023.
- b. Google Earth 7.3.3.7692. (1993 August, 1997 September, 2003 September, 2004 October, 2005 May, 2006 September, 2010 June, 2011 October, 2013 June, 2015 June, 2017 June, 2019 July, 2020 May, 2021 September, and 2023 June). American Fork, Utah. 40.39841° latitude, 111.78912° longitude, eye alt 2,708 ft. Retrieved 4 March 2024.
- c. Historic Aerials (1947, 1950, 1958, 1965, 1981, 1983, 1993, 2004, 2009, 2014, 2018, and 2021) <https://www.historicaerials.com/viewer>. Retrieved 4 March 2024.
- d. LiDAR - National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 4 March 2024.
- e. USA NAIP Imagery: Color Infrared - National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 6 February 2024.

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- f. National Hydrography Dataset Flowlines – Large Scale from National Layers in the National Regulatory Viewer for the South Pacific Division. Retrieved 18 December 2023.
- g. USDA Natural Resources Conservation Service Soil Survey: Included in the Western-Enviro Resources, Inc. Aquatic Resources Delineation Report.
- h. US Fish and Wildlife Service Wetland Mapper – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 18 December 2023 and NWI Map included in the Western-Enviro Resources, Inc. Aquatic Resources Delineation Report.
- i. Topographic Map - National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 4 March 2024.
- j. American Fork City Utilities Map-  
<https://afgis.maps.arcgis.com/apps/MapTools/index.html?appid=73301123ae4b49eea1df5832f5f83168>. Retrieved 4 March 2024.

10. OTHER SUPPORTING INFORMATION. A May 30, 2023, site visit determined that the aquatic resource delineation for the review area was accurate and the 0.042 acre of ditches, 1.18 acres of pond, and the 1.034 acres of wetland have no CSC with the nearest TNW.

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

Map 1: Project Location

Map 3: Aquatic Resource Survey Detail

Map 4: Bridges at Fox Hollow







## Map 1: Project Location Bridges at Fox Hollow

Section 12 in T.5S, R.1E., S.L.B.&M.  
Utah County, Utah

Projection: NAD 83 UTM Zone 12N  
Source: 2018 Google Imagery

### Legend

- Project Area
- Municipalities

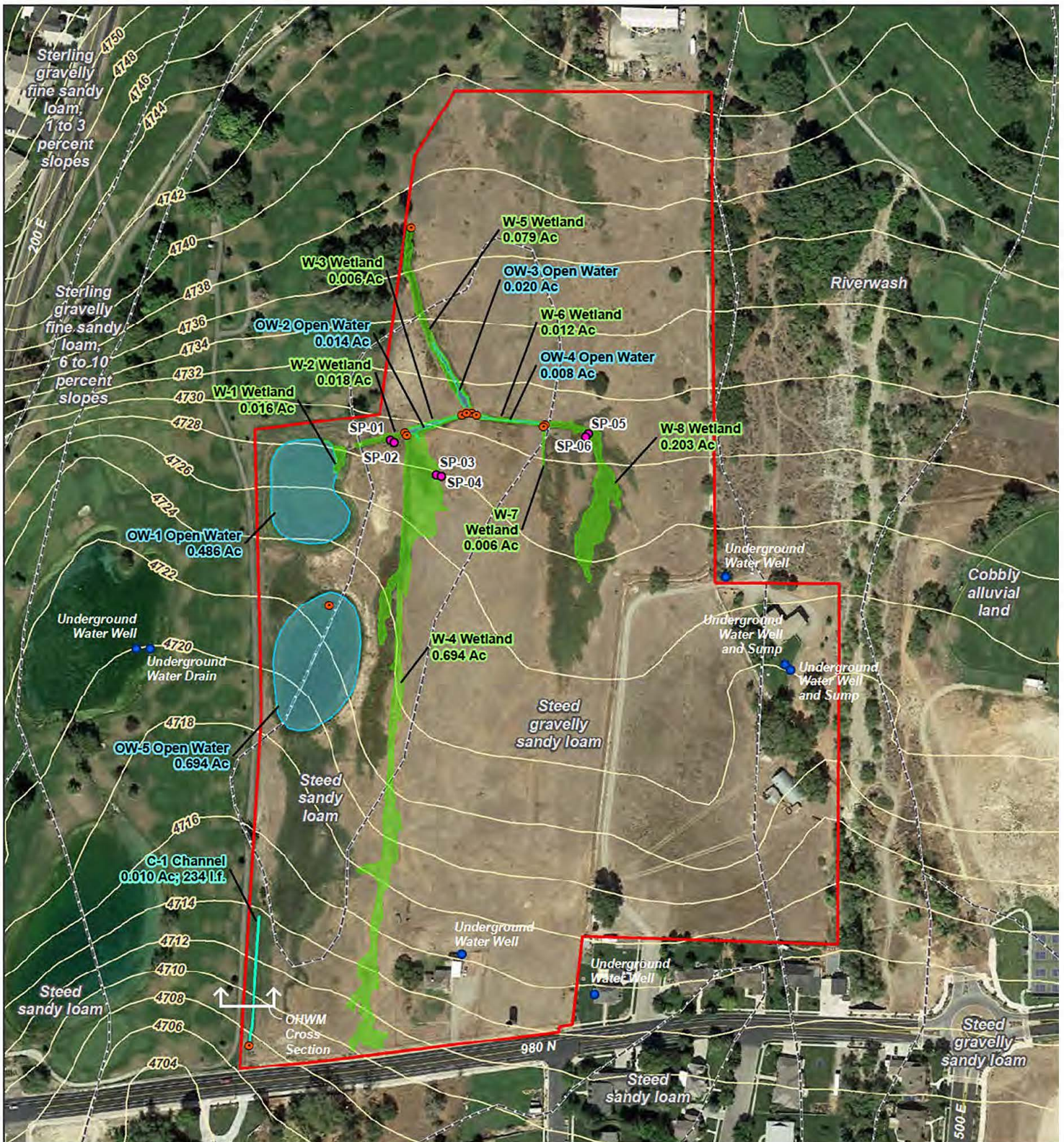


1 inch = 4,000 feet

0 6,000 Feet

Map Created: 03/17/2023





### Map 3: Aquatic Resource Survey Detail Bridges at Fox Hollow

Section 12 in T.5S, R.1E., S.L.B.&M.  
Utah County, Utah

Projection: NAD 83 UTM Zone 12N  
Source: 2018 Google Imagery

1 inch = 250 feet

0 300 Feet North

#### Legend

- Project Area (31.167 Ac)
- Open Water (1.222 Ac)
- Waters of the U.S. (0.010 Ac; 234 Lf.)
- Wetlands - Proposed Non-Jurisdictional (1.034 Ac)
- Sample Point (SP)
- Culvert
- Points of Diversion (UDWR)

--- Soils  
--- Contours (2 ft Interval)

Map Created: 06/07/2023  
Revised: 1/26/2024