



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

CESPK-RDI-N

23FEB2024

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-2023-00856]

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 Utah 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 not a water of the United States and/or a navigable water of the United States).

(1) W-1, Non-Jurisdictional under 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 74-acre review area is located in Section 4, Township 14N, Range 6E, Latitude 41.98125°, Longitude -111.27019°, Rich 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 Bear Lake.

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

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> N/A

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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.

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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): N/A
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- 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”).<sup>7</sup>

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.).

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

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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. Wetland 1 (W-1), totaling 0.65-acre that was determined to be non-jurisdictional (AJD MFR Enclosure 3) because it does 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. non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). Wetland 1 is located on the western side of the study area and is adjacent to the east shore of Bear Lake but is separated by a large man-made berm. Wetland 1 is located in a depression area at an elevation of 5,915 feet. According to the United States Geological Survey, the ordinary high water mark elevation of Bear Lake in 2023 was 5,917 feet. The berm which separates Wetland 1 from Bear Lake has a top elevation of 5,925 feet which restricts any possible surface water connection between the two features. The berm has a soil profile characterized as Bear Lake silt loam (BB), which is a very poorly drained soil and has a water table depth at 0 to 24 inches. Wetland 1 soil profile is characterized as Wader variant gravelly loam, which is a poorly drained soil and has a water between 10 to 30 inches. The aquatic resource report indicates the main source of hydrology for the wetland within the study area is irrigation runoff and seasonal snowmelt from the hills above the delineation area to the east. However, because the lake water elevation exceeds the elevation of the wetland on the opposite side of the berm, hydrology of the wetland is likely also supported by groundwater. Further, based on this conclusion, wetland 1 would be connected to the lake via shallow subsurface connection (SSC) beneath the berm.

SSC between the lake and Wetland 1 were assessed and determined to likely occur, however in the Pre-2015 Post-Sackett regime, use of SSC can only be used in context of first establishing the “one wetland concept”. Since there are no wetlands on the lakeward side of the man-made berm, the one wetland concept cannot be established.

This wetland does not directly abut Bear Lake, nor have an apparent connection to interstate or foreign commerce. Wetlands adjacent by virtue of an unbroken surface or SSC that did not abut a relatively permanent tributary 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, and there is no apparent connection to interstate or foreign commerce. As such, Wetland 1 was determined to be non-jurisdictional under Section 404 of the Clean Water Act.

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.

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a. The Corps visited the site on 18 July 2023 to view the berm and potential aquatic resources on site prior to the applicant/agent submitting the aquatic resources delineation report. The office evaluation was finalized on 21 February 2024.

b. Aquatic Resources Delineation Report “Bear Lake Aquatic Resource Report” prepared by [REDACTED], dated December 2023. The consultant prepared the wetland delineation report in accordance with the U.S. Army Corps of 1987 Wetland Delineation Manual and the USACE Regional Supplement for the Arid West Region.

c. National Wetland Inventory with the nearest flow path. [REDACTED] Aquatic Resource Delineation Report (AJD MFR Enclosure 2).

d. Photographs: Photos included in [REDACTED] Aquatic Resources Delineation Report. Corps photolog collected (August 2013 and November 2022). Rich County, Latitude 41.981259°, Longitude -111.270193°. Retrieved 20 February 2024, from <http://www.earth.google.com> (AJD MFR Enclosure 4).

e. LiDAR – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 20 February 2024 (AJD MFR Enclosure 5).

f. USDA Natural Resources Conservation Service Soil Survey: Included in [REDACTED] Aquatic Resource Delineation Report (AJD MFR Enclosure 6).

10. OTHER SUPPORTING INFORMATION. N/A

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.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

**LEGEND**

-  Delineation Area (74 ac)
-  State Boundaries



Imagery: Hexagon 2021  
Figure Created 12/20/23



**BEAR LAKE  
DELINEATION**

**SITE LOCATION  
AERIAL**

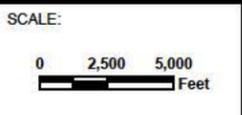


FIGURE NO.  
**1A**



PEAK BEAR LAKE ELEVATION FOR 2023 WAS 5,917 FT ACCORDING TO USGS.

BERM SEPARATING LAKE AND DEPRESSION REACHES HIGH POINT OF 5,925 FT

DEPRESSION COLLECTING IRRIGATION RUN OFF. STANDING WATER PRESENT DURING SUMMER SITE VISIT (W1). DRY DURING FALL AND SPRING SITE VISITS.

OHWM: 5,918.5 FT

BEAR LAKE

**LEGEND**

- Delineation Area (74 ac)
- Fall 2022 Sample Points (1-6)
- Spring 2023 Sample Points (7-10)
- Summer 2023 Sample Points (11-14)
- Photo Points
- 2023 Survey Major Contours (5 FT)
- 2023 Survey Minor Contours (1 FT)
- LiDAR Minor Contours (1 FT)
- LiDAR Major Contours (5 FT)
- Ordinary High Water Mark (OHWM)

**Aquatic Resources:**

- ❧ W1: Natural Depression / Irrigation Pooling (0.65 ac)

Imagery: Hexagon 2021  
Figure Created 12/20/23

P:\Cocimigli\1768-22-01 Bear Lake Delineation\3.0 GIS\Fig5\_2023DelineationResults-December.mxd cglabau 12/20/2023