



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

CESPK-RDI-U

4 APRIL 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-2024-00022]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.

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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.

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) Pond 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 5-acre review area is located at 3215 North 2200 West, Latitude 40.836788°, Longitude -111.956381°, 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);

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- 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 b, 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. N/A. The nearest TNW to the site is the GSL. An aerial review of the site revealed that there were no aquatic resources realigned into, through, or impounded to create Pond 1. Pond 1 is an isolated, intrastate aquatic resource with no outlet or overflow structure. There is no surface or shallow subsurface connection to any a(5) RPW or a(1) TNW (i.e. the Jordan River or the Great Salt Lake) nor any adjacent wetland to either TNW. In addition, Pond 1 is not a part of, or adjacent to, any wetland complex or mosaic associated with a TNW. Therefore, there is no flow path from the subject aquatic resource to the GSL.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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.

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

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.

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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. 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.

Pond 1 as shown on the enclosed aquatic resources map (ADJ MFR Enclosure 2) was evaluated under the preamble category "generally non-jurisdictional" for artificial lakes or 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, irrigation, settling basins, or rice growing. A review of historic aerial photographs revealed that the pond area was part of a large playa complex as show on records from 1950, which is the oldest aerial photograph found for this area. The study area was fenced in 1962 and filled. By 1965, a 0.59-acre pond was excavated from the north to south property boundaries along the west property line. The pond was progressively filled until approximately 1977, which is when the current 0.45- acre pond configuration was first documented. Based on information provided by the environmental consultant, the source of hydrology for Pond 1 was a concrete irrigation ditch. This concrete irrigation ditch conveyed water from the ditch that lies east of current day property located at 3286 N 2200 W (AJD MFR Enclosure 3). This irrigation ditch was the primary water supply for the pond since its construction, until the ditch operations were discontinued in the 1990s. The pond was also fed by the two groundwater wells that are located on the

⁸ 51 FR 41217, November 13, 1986.

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subject property (3215 North 2200 West), which were constructed in the 1960s. Pumping from these two wells was ceased in August 2022 by the current landowner. The review of aerial photography and LiDAR revealed that Pond 1 was excavated in uplands within a previously filled parcel for the purpose of stock watering or irrigation of this agricultural parcel. There are no streams, wetlands, or other confined surface hydrologic connections to any jurisdictional waters of the U.S on or adjacent to the subject property. Therefore, Pond 1 is not jurisdictional under Section 404 of the Clean Water Act per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance.

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. N/A.

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. N/A.

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. N/A.

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*. N/A.

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). N/A.

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 finalized on 4 April 2024.

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- b. Aquatic Resource Delineation Report prepared by [REDACTED] dated December 2023. 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.
- c. Photos included in the [REDACTED] Aquatic Resource Delineation Report.
- d. The requestor's December 2023 Aquatic Resources Delineation Report was relied upon, with the exception of the suggested federal jurisdictional status of Pond 1. The report indicates that "*Pond 1 is, by all accounts, an isolated, intrastate waterway that is anticipated to continue drying out following the removal of all hydrology sources. Applying the Rapanos Guidance, it does not appear that Pond 1 is a jurisdictional WOTUS*" which was modified by SPK based on the evaluation listed in Section 8.a of this MRF.
- e. GoogleEarth. (14 August 1994, 3 October 1997, 24 August 2004, 30 December 2004, 23 June 2005, 30 December 2005, 31 December 2005, 12 July 2006, 22 June 2009, 17 June 2010, 14 September 2011, 4 June 2013, 15 June 2015, 30 December 2015, 6 July 2016, 1 November 2016, 7 November 2016, 30 December 2016, 8 July 2017, December 30, 2016, 4 December 2017, 4 January 2018, 20 April 2018, 24 July 2018, 10 September 2018, 31 May 2020, 1 June 2020, 11 September 2020, 28 August 2021, 24 May 2022, 20 June 2022, 24 May 2022, 6 July 2022). Salt Lake County, Utah. Latitude 40.836605°N, Longitude - 111.956737°W, eye alt 5900 ft. Retrieved 30 January 2024, from <http://www.earth.google.com>.
- f. Historic Aerial Imagery 2022, NET Ronline, LLC (1950, 1958, 1962, 1965, 1971, 1977, 1980, 1981, 1994, 1997, 2003, 2006, 2009, 2011, 2014, 2016, 2018, and 2021). Retrieved 30 January 2024 from Historicaerials.com
- g. LiDAR – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 29 December 2023.
- h. National Hydrography Dataset Flowlines – Large Scale from National Layers in the National Regulatory Viewer for the South Pacific Division. Retrieved 29 December 2023.

10. OTHER SUPPORTING INFORMATION.

A request for an AJD verification for this site was submitted on December 1, 2022. The original submittal included the parcel to the north, for a total area of 10 acres. The parcel was then subdivided into two 5-acre properties, identified as 3215 North 2200 West (subject AJD review) and parcel 3253 North 2200 West, currently being evaluated under SPK-2022-00699.

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The aquatic resources delineated by UES were evaluated for hydrologic connections between the review area and the nearest TNW, in this case, the GSL using NHD, aerial records, LiDAR data, and topographic maps. Based on this analysis, USACE determined that the review area supports approximately 0.45 acre of aquatic resources identified as Pond 1. The pond was determined to be non-jurisdictional under Section 404 of the Clean Water Act Section per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance.

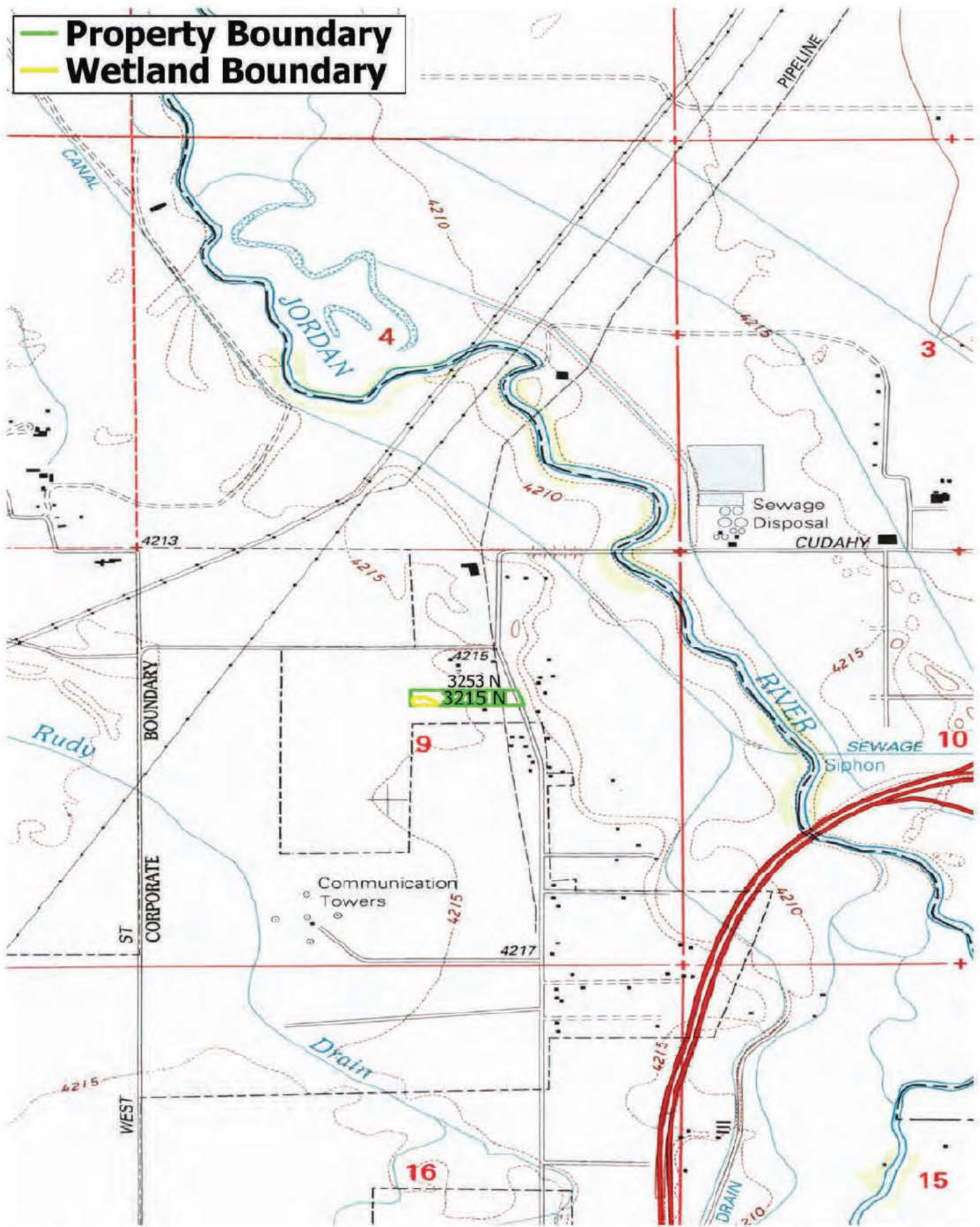
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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

3 Encls

1. Location Map
2. Aquatic Resources Map
3. Irrigation Map



— Property Boundary
— Wetland Boundary



3215 N Delineation
Topo Map



0 250 500 750 1,000 m

0 1,000 2,000 3,000 ft

1 inch = 833 feet

Base Imagery: USGS Topo

CRS: EPSG:4326 - WGS 84 / Pseudo-Mercator



Total Survey Area:
5 Acres
Elevation Range:
4,217'-4,220'



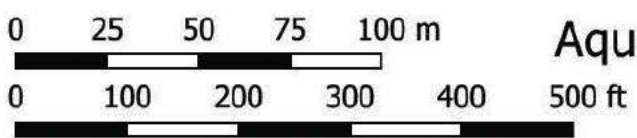
ACOE Note: Revised sketch submitted on February 19, 2024.

Legend

- **Property Boundary**
- **Wetland Boundary**

Elevation Lines:

- **4,217'**
- **4,218'**
- **4,219'**



Base Imagery: Google Earth CRS: EPSG:4326 - WGS 84 / Pseudo-Mercator

3215 N Delineation Aquatic Resources and Elevation Map

Figure 2. Water Supplies for Pond 1

