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

CESPK-RDI-N 11 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-2023-00789

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.[2] 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.[3] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[4] 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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[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] 33 CFR 331.2.
[3] Regulatory Guidance Letter 05-02.
[4] 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.

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) W1, non-jurisdictional under Section 404 of the Clean Water Act.

(2) W2, non-jurisdictional under Section 404 of the Clean Water Act.

(3) W3, non-jurisdictional under Section 404 of the Clean Water Act.

(4) W4, non-jurisdictional under Section 404 of the Clean Water Act.

(5) W5, 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 35.19-acre review area is located approximately 1 mile southeast of the intersection of Interstate 80 and 5600 West, Salt Lake City, Salt Lake County, Utah Latitude: 40.762594 Longitude: -112.004851 (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. N/A. Historically, the Little Goggin Drain ran through the study area which flowed from east to west through the site before continuing north and west flowing into the Goggin Drain and later connecting to the GSL. The portion of the Little Goggin Drain (i.e. W3) within the study area has been isolated since sections upstream and downstream of the study area have been filled severing the connection to the GSL, the nearest TNW. This determination is further supported by an evaluation of hydrologic data in the NHD map (AJD MFR Enclosure 2) that shows a gap between W3 and an artificial channel with a potential connection to the GSL (AJD MFR Enclosure 3).

In addition, the aquatic resources delineation report indicates that surface water hydrology for W2 drains west through an artificial channel that drains into waters of the U.S. During a site visit on 9 January 2024, USACE confirmed that W2 does not flow west of the study area. Any potential connections between W2 and a RPW or TNW have been historically severed and W2 is now isolated from any potential connections to any nearby RPW or the GSL.

Based on this analysis, USACE has determined that none of the aquatic resources within the Review Area have a downstream connection to the GSL.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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

[5] 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.

resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.[6] 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 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.

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

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").[7]

[6] 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] 51 FR 41217, November 13, 1986.

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.).

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. There are 2.63-acre of aquatic resources and features within the review area (AJD MFR Enclosure 4) that are 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).

W1 is 0.44-acre vegetated playa that does not exhibit a continuous surface connection to an RPW or other waters of the US. W1 is a closed topographic feature with no outflow surrounded by uplands. W1 has no continuous surface connection to an RPW or the GSL. Therefore, W1 is not jurisdictional under Section 404 of the Clean Water Act.

W2 is a 0.51-acre non-adjacent depressional wetland located along the northwest study area boundary. Although W2 meets the Corps' definition of a wetland as defined in 33 CFR §328.3(c)(16), this wetland does not exhibit a continuous surface connection, nor is it connected via discrete feature to an RPW. In addition, W2 was evaluated under the one wetland concept but was found to be separated from any nearby potential waters of the U.S. by uplands. Therefore, W2 is not jurisdictional under Section 404 of the Clean Water Act.

W3 is an 0.08-acre non-adjacent depressional wetland located at the center of the study area. Although W3 meets the Corps' definition of a wetland as defined in 33 CFR §328.3(c)(16), this wetland does not exhibit a continuous surface connection, nor is it connected via discrete feature to an RPW. W3 is a remnant wetland adjacent to the Little Goggin Drain that ran through the study area before continuing north and west flowing into the Goggin Drain and later connecting to the GSL. This section of the Little Goggin Drain has been isolated since the upstream and downstream sections have been hisotriclly filled, severing the connection to the GSL, the nearest TNW. In addition,

W3 was evaluated under the one wetland concept but was found to be separated from any nearby potential waters of the U.S. by uplands. Therefore, W3 is not jurisdictional under Section 404 of the Clean Water Act.

W4 is a 1.34-acre non-adjacent depressional wetland located along the southeast corner of the study area. Although W4 meets the Corps' definition of a wetland as defined in 33 CFR §328.3(c)(16), this wetland does not exhibit a continuous surface connection, nor is it connected via discrete feature to an RPW. In addition, W4 was evaluated under the one wetland concept but was found to be separated from any nearby potential waters of the U.S. by uplands. Therefore, W4 is not jurisdictional under Section 404 of the Clean Water Act.

W5 is a 0.26-acre non-adjacent depressional wetland. Although W5 meets the Corps' definition of a wetland as defined in 33 CFR §328.3(c)(16), this wetland does not exhibit a continuous surface connection, nor is it connected via discrete feature to an RPW. In addition, W5 was evaluated under the one wetland concept but was found to be separated from any nearby potential waters of the U.S. by uplands. Therefore, W5 is not 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.

a. The office evaluation was finalized on 11 APRIL 2024.

b. Aquatic Resources Delineation Report "Dominguez Grid Energy Storage Project" prepared by [redacted] dated 10 November 2023. The consultant prepared the wetland 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. The requestor's 10 November 2023 Aquatic Resources Delineation Report was relied upon, with the exception of the suggested federal jurisdictional status of W2. The AR report recommends that W2 be considered jurisidictional due to a potential connection to an RPW. During a site visit on 9 January 2024, USACE confirmed that W2 does not flow west of the study area. Any potential connections between W2 and a RPW or TNW have been severed and W2 is now isolated from any potential connections to any nearby RPW or the GSL as indicated in Sections 5 and 8.f. of this MFR.

d. Photos included in the Dominguez Grid Energy Storage Project Aquatic Resources Delineation Report. GoogleEarth 7.3.3.7692. (30 September 1997, 7 October 1998, 3 May 2022, 14 July 2003, 14 July 2003, 24 August 2004, 30 December 2004; 31 July 2006, 30 December 2006, 27 April 2007, 22 June 2009, 17 June 2010, 14

September 2011, 4 June 2013, 16 June 2016, 30 May 2016, 25 September 2016, 14 February 2014, 8 July 2017, 4 December 2017, 20 April 2018, 18 September 2018, 18 July 2019, 10 October 2019, 18 July 2019, 10 October 2019, 22 February 2020, 13 June 2020, 11 September 2020, 28 August 2021, 8 September 2021, 24 May 2022, 20 June 2022, 6 July 2022, 29 May 2023). Salt Lake City, Salt Lake County, Utah. Latitude 40.763783°N, longitude -112.002537°W, eye alt 7632 ft. Retrieved 8 January 2024, from http://www.earth.google.com.

e. Historic Aerials, 1950, 1977, 1985, 1994, 1997, and 2004. Salt Lake City, Salt Lake County, Utah. Latitude 40.763783°N, longitude -112.002537°W. Retrieved 11 January 2024, from historiacerials.com.

f. LiDAR - National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 8 January 2023.

g. National Hydrography Dataset Flowlines – Large Scale from National Layers in the National Regulatory Viewer for the South Pacific Division. Retrieved 8 January 2023.

h. Antecedent Precipitation Tool for 4 and 5 May 2023 (AR delineation site visit).

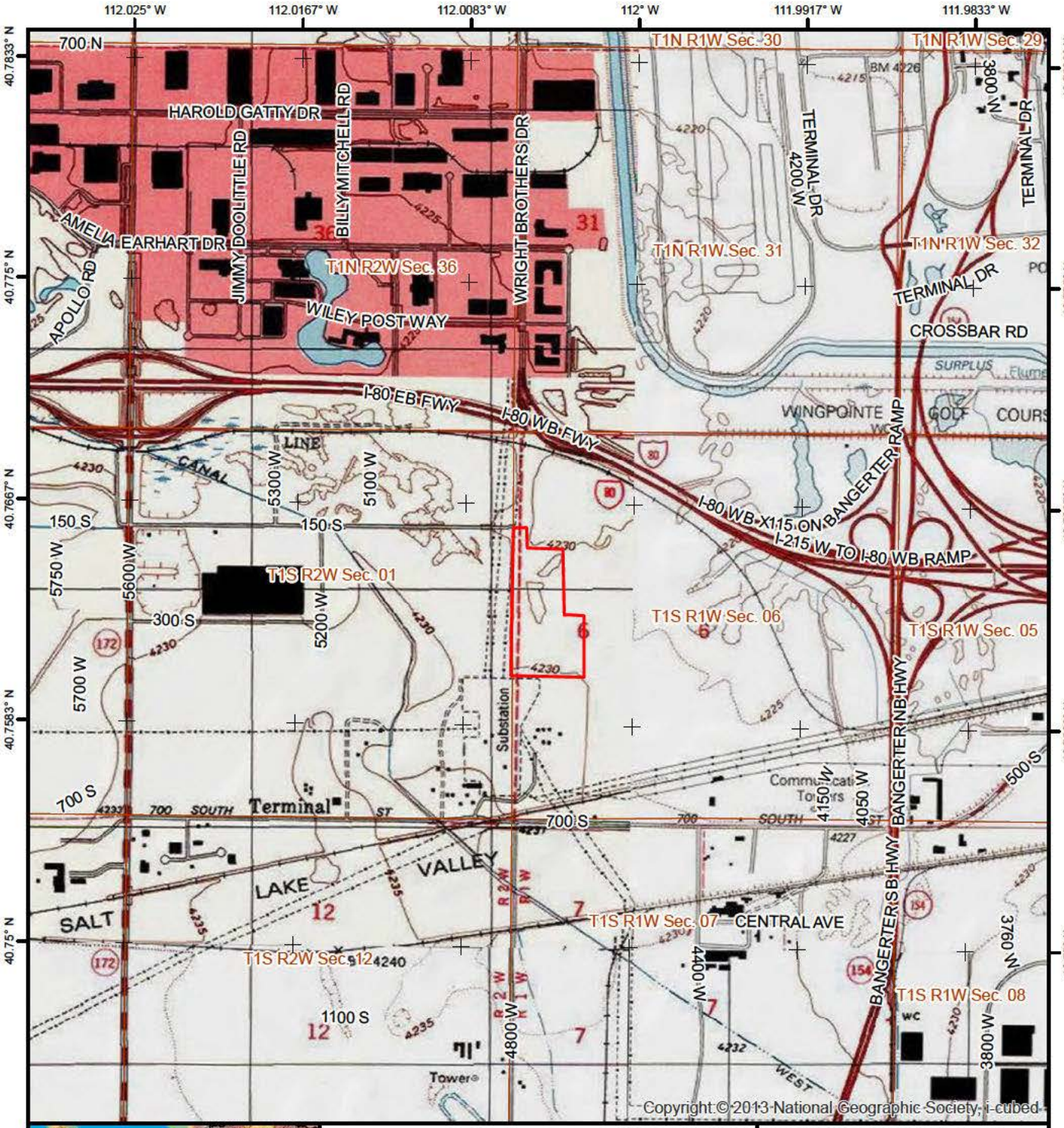
10. OTHER SUPPORTING INFORMATION. The aquatic resources delineated by [redacted] were evaluated for hydrologic connections between the review area and the nearest TNW, in this case, the GSL using NHD, aerial records, LiDAR, and topographic maps. Based on this analysis, USACE determined that the review area supports approximately 2.63 acres of aquatic resources. None of these aquatic resources were determined to be waters of the U.S. since none of them 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*.

The aquatic resources report indicates the presence of two "inundation areas" that were documented to be flooded during the AR delineation inspection on 4 and 5 May 2023. These areas did not show evidence of hydrophytic vegetation or hydric soils. Although high water years and larger areas of inundation as seen in 2023 in the survey area are not atypical, an analysis of LiDAR (AJD MFR Enclosure 5) revealed that these inundation areas are generally at a higher elevation than depressional areas that support aquatic resources. In addition, a review of aerial photographs revealed that 2023 is the only year where inundation was observed.

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]

4 Encls
Encl 1: Location Map
Encl 2: Flow Map
Encl 3: NHD Map
Encl 4: Aquatic Resources Map
Encl 5: LiDAR

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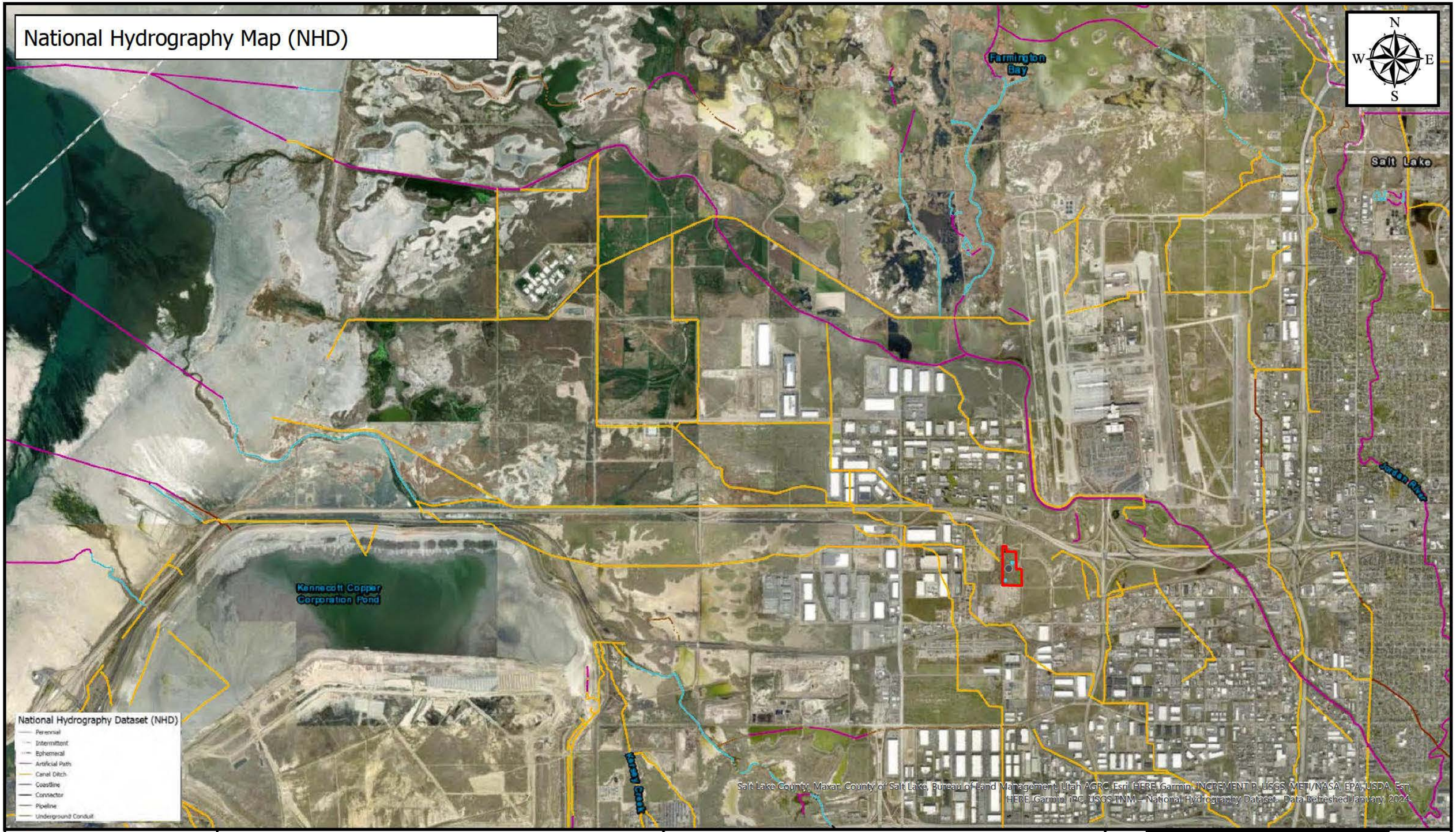
National Hydrography Map (NHD)

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[redacted]

Date: 1/8/2024

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere


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Date: 1/8/2024

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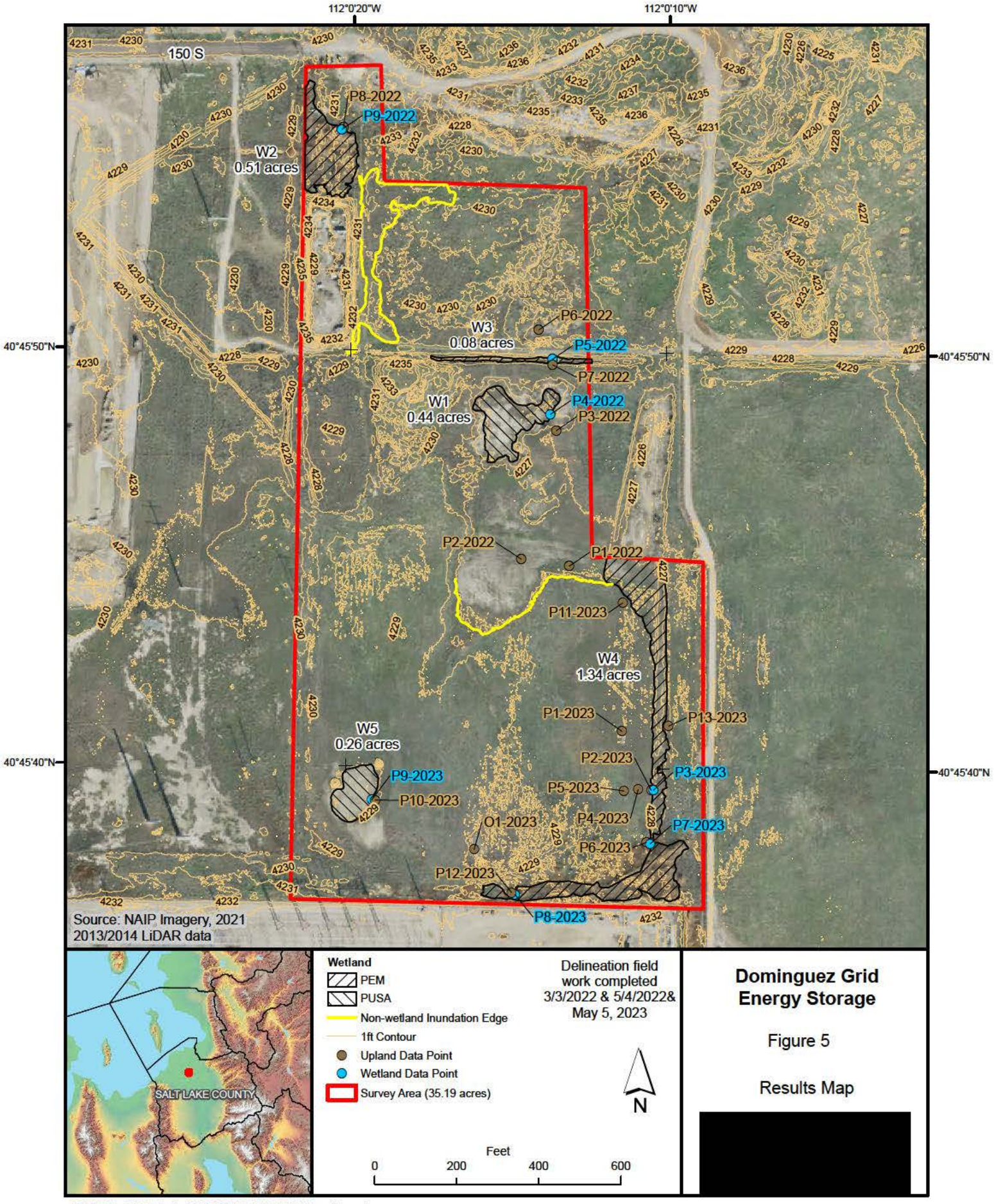


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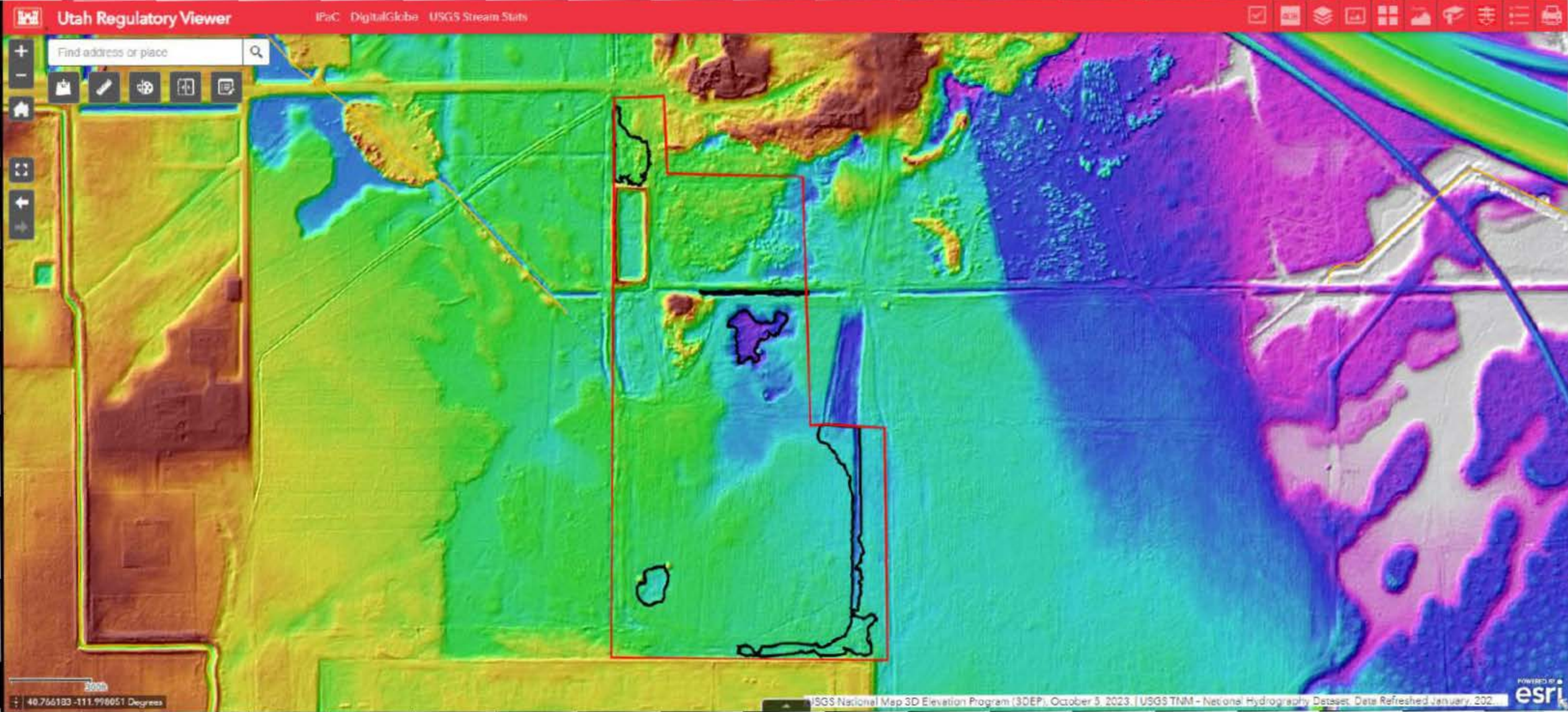
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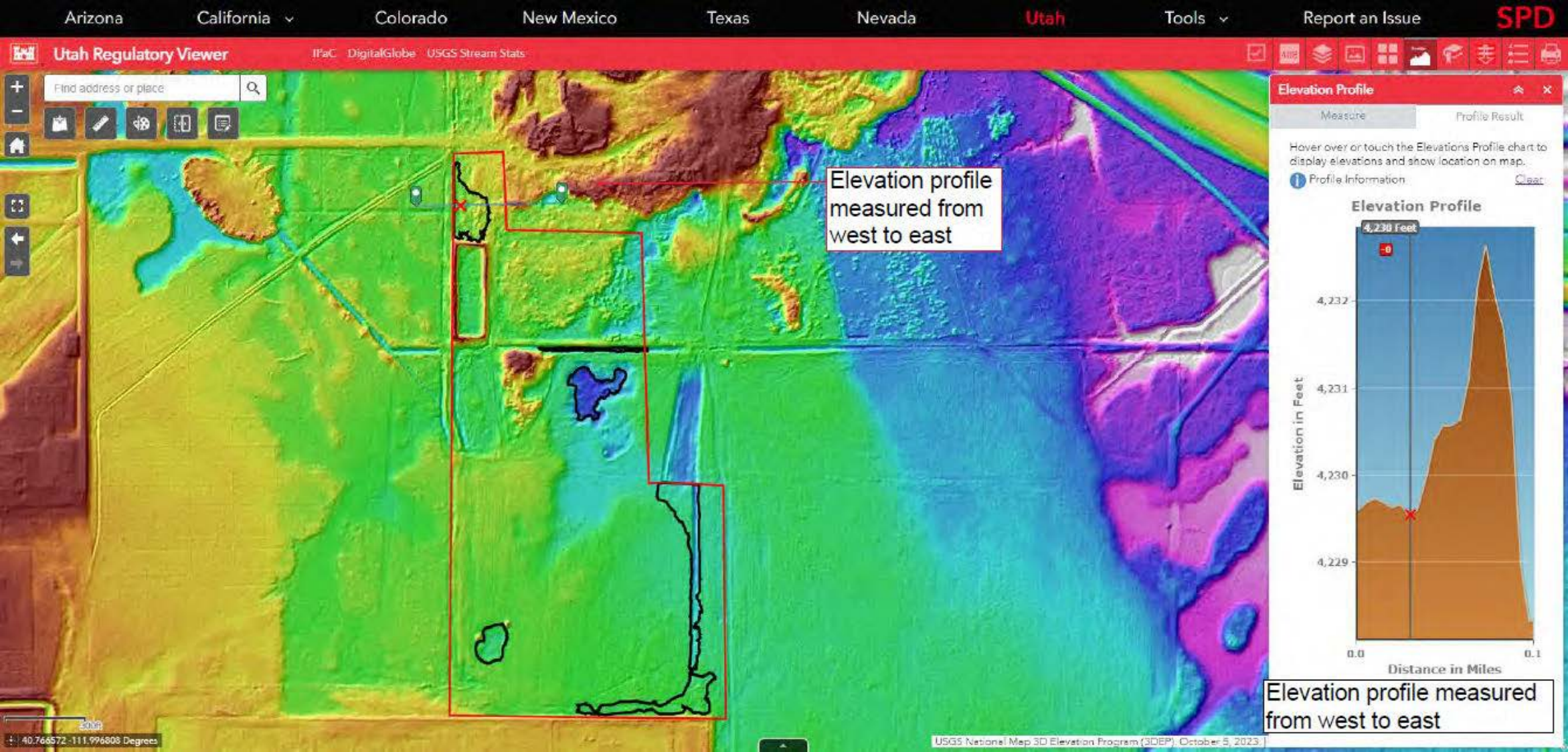
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Elevation profile measured from west to east
Elevation Profile
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Profile Result
Hover over or touch the Elevations Profile chart to display elevations and show location on map.
Profile Information
Clear
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4,230 Feet
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4,230
4,229
Elevation in Feet
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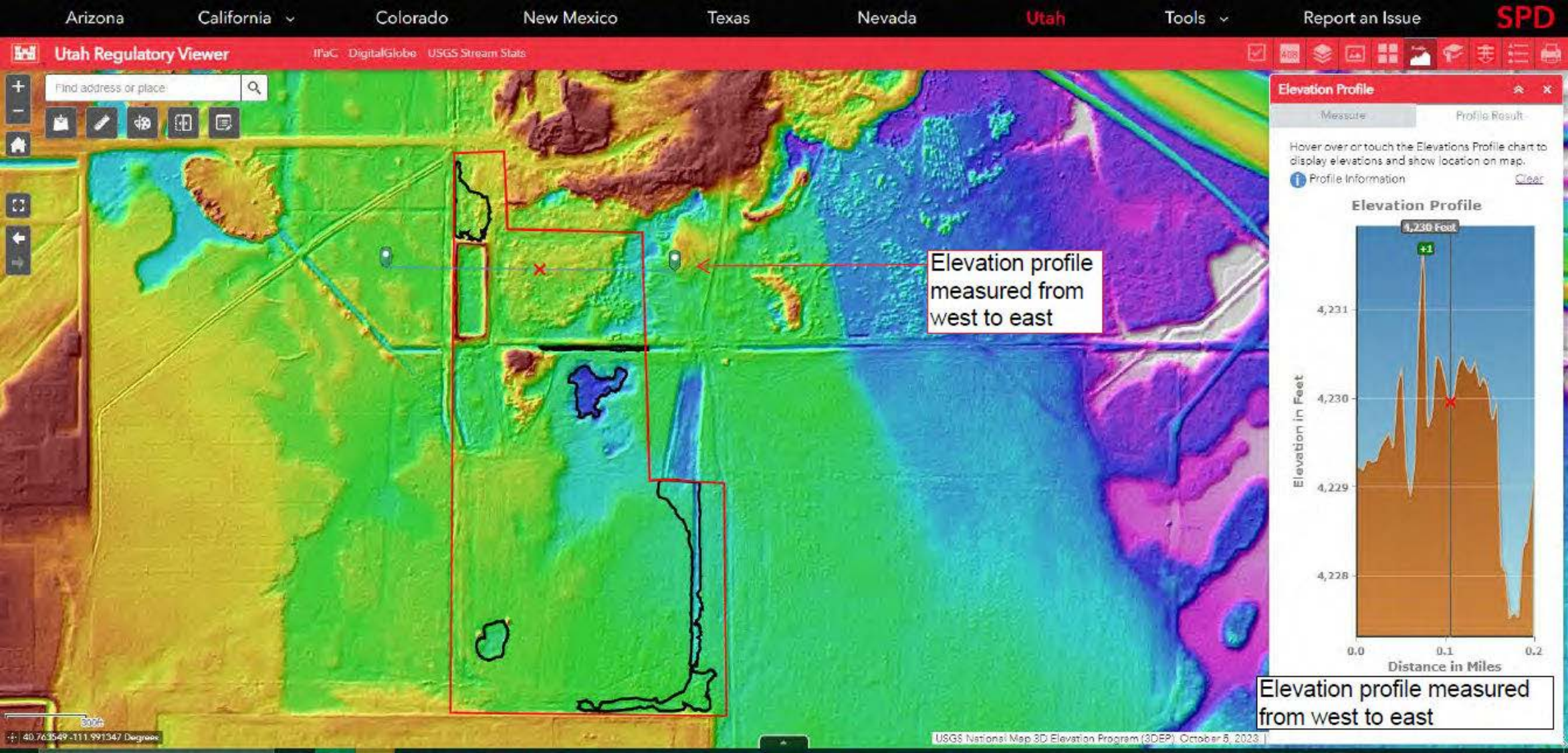
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Find address or place
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4,230 Feet
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Elevation in Feet
0.0
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Distance in Miles
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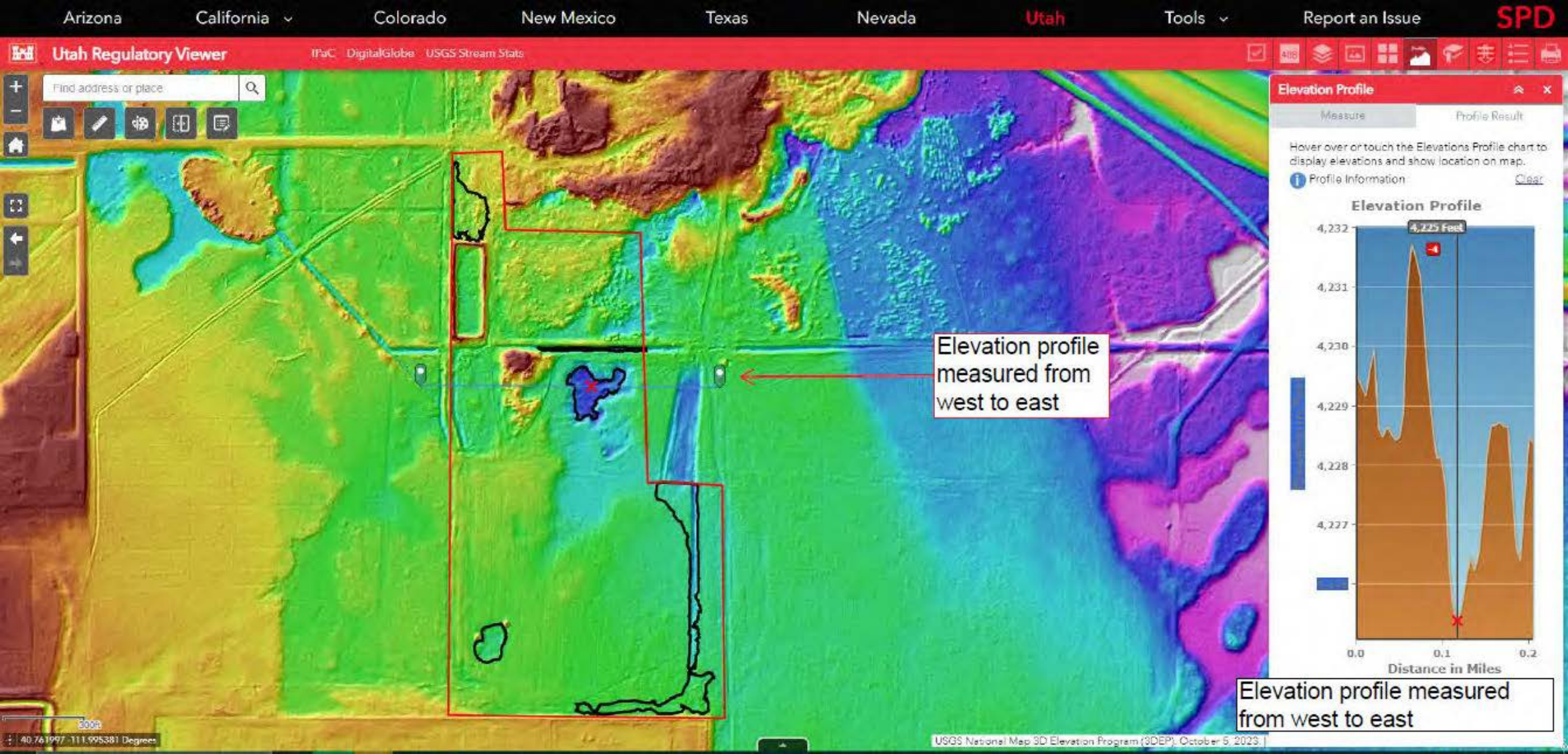
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Distance in Miles
Elevation profile measured from west to east
Elevation profile measured from west to east
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40.761997 -111.995381 Degrees
USGS National Map 3D Elevation Program (3DEP), October 5, 2023.