



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

CESPK-RDI-U

3 JUN 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-2024-00132] (MFR 1 of 1)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 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 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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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) Wetland 1, jurisdictional under Section 404 of the CWA.

(2) Stormwater Water Ditch, 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 3.22-acre review area is located within section 20 of Township 11 North, Range 1 East. Latitude 41.672002°, Longitude -111.863436°, Nibley, Cache 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 Cutler Reservoir.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The subject wetland directly abuts an existing stormwater ditch (an RPW with seasonal flow), which then connects with a culvert within a concrete-grated drop structure. The drop structure connects to Nibley City's stormwater system. According to page 5 of *Nibley City Stormwater Management Plan (SWMP) Update 2021*, "the majority of the system where stormwater is collected drains to either the Blacksmith Fork River or the Hyrum Slough." (nibleycity.com/wp-content/uploads/2023/10/Nibley_SWMP_2021.pdf). Hyrum Slough is approximately 0.38 miles west of the survey area, so based off of proximity, the stormwater ditch most likely discharges into Hyrum Slough rather than Blacksmith Fork, which is over 1.75 miles away. Both Hyrum Slough and Blacksmith Fork River flow to Cutler Reservoir, the nearest TNW (AJD MFR Enclosure 2)

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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

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): There is 0.02 acre (122 linear feet) of tributaries that are relatively permanent waters (RPWs) within the review area. (AJD MFR Enclosure 3)

Stormwater drainage ditch – Approximately 0.02 acre (122 linear feet) occur within the study area. The stormwater drainage ditch is a relatively permanent tributary with seasonal flows to Hyrum Slough which flows into Cutlers Reservoir (TNW). On March 15, 2024, the Corps conducted a site visit which demonstrates water flows during this period. In addition, a review of aerial photo records taken during different times of the year between 2017 and 2023 show water flows for an extended period during the months of June and July. At the time of the survey, the stormwater ditch was maintained free of vegetation. The ditch is rock

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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lined and empties into a culvert within a concrete-grated drop structure. The drop structure connects to Nibley City's stormwater system.

f. The territorial seas (a)(6): None

g. Adjacent wetlands (a)(7): There is an adjacent wetland having a continuous surface connection to a TNW within the review area. (AJD MFR Enclosure 3)

A total of 0.52 acre of palustrine emergent wetlands within the study area meet the (a)(7) category of "waters of United States" per the pre-2015 regulatory regime.

Wetland 1 is adjacent (i.e. directly abutting) the seasonally running stormwater drainage ditch. During the first few months of the growing season, surface water collected in the palustrine emergent wetlands drain into the stormwater ditch, which connects to Nibley City's stormwater system via the drop structure. This wetland meets the (a)(7) category "waters of the United States" per the pre-2015 regulatory regime since it is directly abutting and have a continuous surface connection to the seasonal stormwater drainage ditch, an (a)(5) water.

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").

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

f. There are no 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).

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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 Corps visited the site on 15 March 2024 to verify the findings of the aquatic resources delineation report. The office evaluation was finalized on 2 April 2024.

b. Aquatic Resources Delineation Report "[REDACTED] Aquatic Resources Delineation Report Cache County, Utah" prepared by [REDACTED] dated February 2024. The Corps did not fully concur with the delineation report. Specifically, the Corps did not concur with the flow regime of the storm water ditch as stated in the report.

c. Photos included in [REDACTED] Aquatic Resources Delineation Report, Corps photolog dated 15 March 2024 (AJD MFR Enclosure 4), GoogleEarth (September 2018, June 2020, July 2022, and June 2023). Nibley City, Cache County, Utah. Latitude 41.671919°N, longitude -111.863581°W. Retrieved 26 March 2024, from <http://www.earth.google.com>.

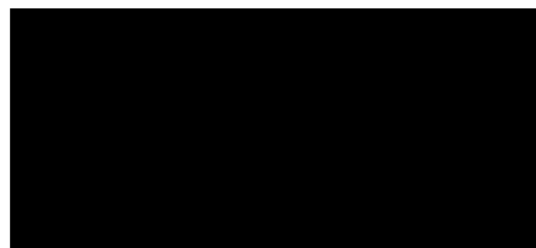
d. LiDAR – National Regulatory Viewer for the South Pacific Division. Retrieved 26 March 2024. (AJD MFR Enclosure 5)

e. Nibley City Stormwater Management Plan (SWMP) Update 2021. Retrieved 1 April 2024. nibleycity.com/wp-content/uploads/2023/10/Nibley_SWMP_2021.pdf

f. National Hydrology Dataset Flowlines – Large Scale from National Layers created in Google Earth. Retrieved 26 March 2024. (AJD MFR Enclosure 2)

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.



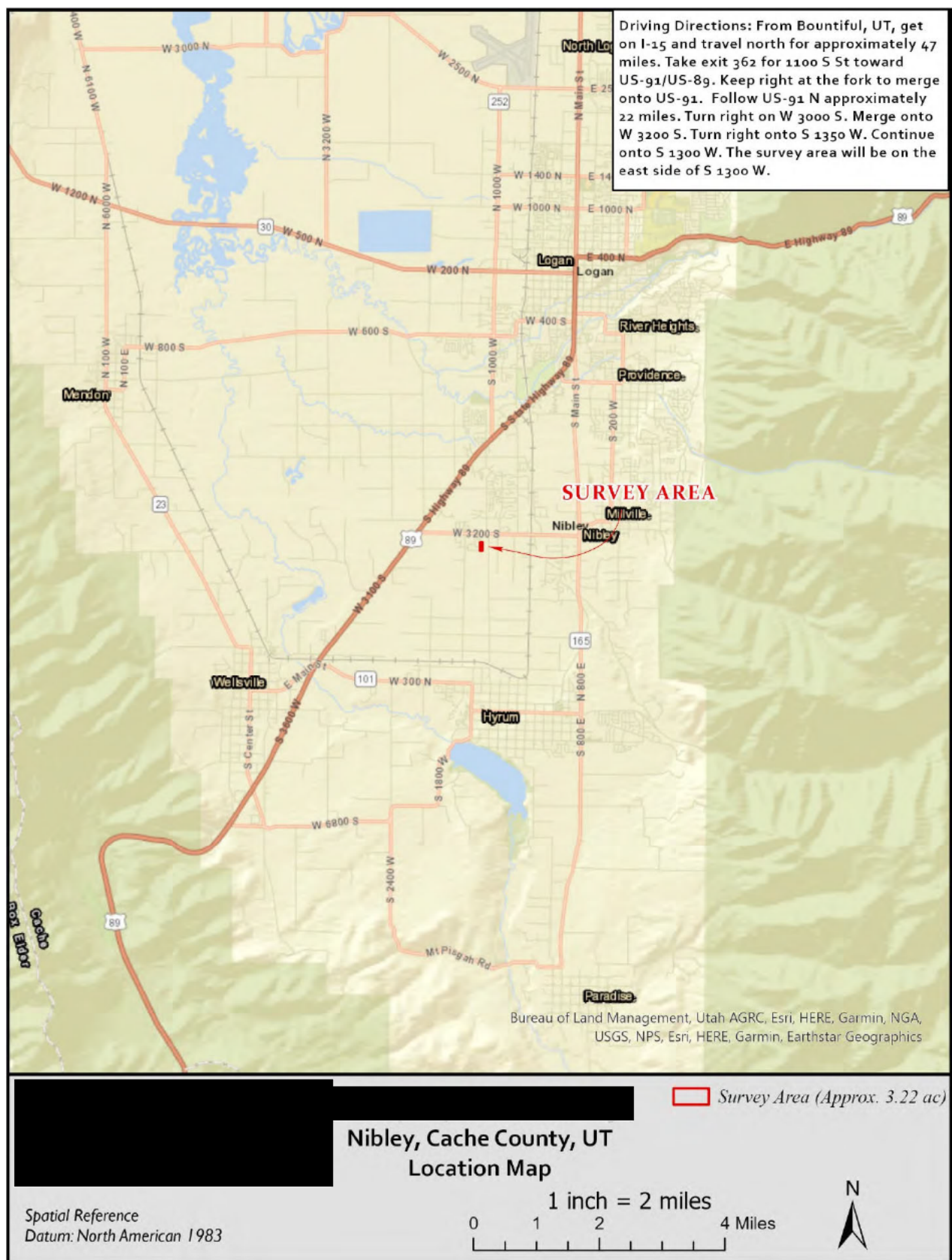
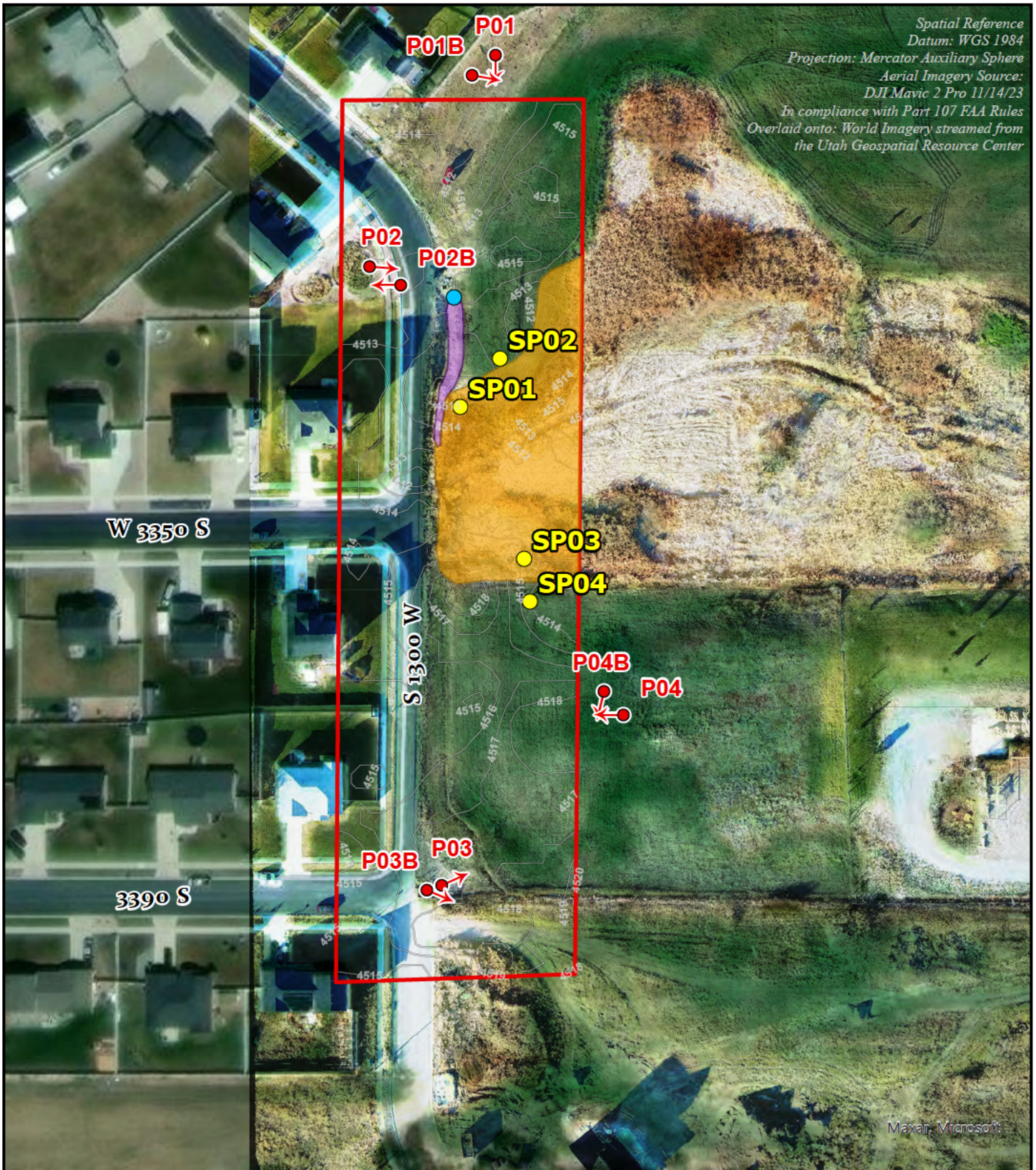


Figure 1. Survey-area location map.



- Survey Area (Approx. 3.22 ac)
- Palustrine Emergent Wetland (0.52 ac)
- Storm Water Ditch (122 lf, 0.02 ac)
- Delineation Sampling Points
- Culvert
- ↖ Photo Points and View Direction
- ~ 1 Foot Contours

0 75 150 Feet
1 inch equals 150 feet

The wetland delineation results are preliminary and have not been verified by the US Army Corps of Engineers.
Wetlands Delineated by [REDACTED], November, 2023. Wetland Delineation Maps Prepared by [REDACTED]

Nibley, Cache County, UT Aquatic Resources Delineation Map