



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

CESPK-RD-U

13 JUNE 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-2007-01488] (MFR #1 of #1)<sup>2</sup>

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>3</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>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</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

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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> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

CESPK-RD-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2007-01488]

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) Wetland A, non-jurisdictional
- (2) Wetland B, non-jurisdictional
- (3) Wetland C, non-jurisdictional
- (4) Excavated Ditch 1, non-jurisdictional
- (5) Excavated Ditch 2, non-jurisdictional

## 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 38.8-acre review area is located near the intersection of River Road and US-40, Latitude 40.555041°, Longitude -111.427502°, Heber City, Wasatch County, Utah (AJD MFR Enclosure 1). The review area is currently being utilized for cattle grazing and has historically been irrigated via the excavated ditches within the review area. The review area was irrigated in 2023 but had not been irrigated during the 2024 season in anticipation of the site visit conducted on April 24, 2024.

CESPK-RD-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2007-01488]

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The aquatic resources within the review area are not connected to a TNW, interstate water, or territorial sea. The nearest TNW is Utah Lake, which is approximately 28 miles to the southwest, to which the aquatic resources have no downstream connection.

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

Rock Creek, located adjacent just outside of the western survey boundary, is a relatively permanent water (RPW) adjacent to the review area. It flows southwest where it eventually flows into Spring Creek, to the Upper Charleston Canal, and to Daniels Creek that then drains into Deer Creek Reservoir. The Provo River then drains from Deer Creek Reservoir and continues to flow southwest where it eventually drains into Utah Lake. A Federally Navigable Determination for Utah Lake (SPK-2007-01601) was made on November 09, 2007, where it was determined that Utah Lake was navigable after meeting all three conditions of navigability per 33 CFR 329.5. The aquatic resources within the review area do not have a continuous surface connection to Rock Creek, and therefore no downstream connection to Utah Lake.

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: There are no 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.

7. SECTION 404 JURISDICTIONAL WATERS: There are no aquatic resources or other features within the review area determined to be jurisdictional in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. There are no aquatic resources or 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 or other features within the review area identified as "generally not jurisdictional" in the *Rapanos* guidance.

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<sup>6</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.

CESPK-RD-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2007-01488]

c. There are no aquatic resources or other features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA.

d. There are no aquatic resources or other features identified 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. 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).

Wetland A (0.22-acre), Wetland B (0.38-acre), and Wetland C (0.08-acre) are non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water. The wetlands are isolated, as their boundaries do not directly abut the adjacent RPW (Rock Creek) or continue offsite into the adjacent fields as evidenced by available aerial imagery, LiDAR, and a site visit conducted on April 24, 2024. Additionally, no features (i.e. culverts, streams, swales, etc.) or other aquatic resources connecting Wetlands A, B, and C to Rock Creek were observed during the site visit. In addition, there is an increase in elevation in the western portion of the site consisting of uplands that separates Wetlands B and C from Rock Creek. Wetlands A, B, and C lack a continuous surface connection to Utah Lake, the nearest TNW.

Excavated Ditch 1 (0.37-acre/1,333 linear feet) begins at the northwest corner of the review area where it continues to flow south through the review area. Ditch 1 receives water from Rock Creek and has relatively permanent flow based on the presence of ordinary high-water mark indicators, flow observed during the site visit, and based on the information provided in the delineation report. However, review of available remote sensing information (aerial imagery, LiDAR, etc.) depicts Ditch 1 continuing to flow south through the review area, and then through agricultural fields for approximately 0.27-mile where it appears to terminate in the fields. Ditch 1 therefore does not have a continuous surface connection to a jurisdictional water.

Excavated Ditch 2 (0.11-acre/ 606 linear feet) begins in the northeast corner of the review area where it continues south for approximately 606 linear feet and terminates

CESPK-RD-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2007-01488]

within the review area. This ditch was used for irrigation and is unmaintained, as it was overgrown with reed canarygrass (*Phalaris arundinacea*) and had no flow during the April 24, 2024, site visit. Further, it terminates in upland mid-way through the field as seen on the delineation map (Enclosure 2). Based on review of aerial imagery and information collected during the site visit, Ditch 2 does not have a continuous downstream surface connection to a jurisdictional water.

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. A site visit was conducted on April 24, 2024. A mapped photolog of the review area titled "Mapped Photo Log", dated April 24, 2024, is available for review in the administrative record.

b. [REDACTED] 38.8-acres Survey Area Aquatic Resources Report, dated September 2022, [REDACTED]. The report was prepared in accordance with the U.S Army Corps of Engineers 1987 Wetland Delineation Manual and the USACE Regional Supplement for the Western Mountain Vallets and Coast Region.

c. Photographs: Photos includes in the [REDACTED] Property 38.8-acres Survey Area Aquatic Resources Report.

d. LiDAR-National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 28 March 2024.

e. National Hydrography Dataset Flowlines- Large Scale from National Layers in the Nation Layers in the National Regulatory Viewer for the South Pacific Division. Retrieved 28 March 2024.

f. Approved Jurisdictional Determination-SPK-2007-01488

10. OTHER SUPPORTING INFORMATION.

A preliminary jurisdictional determination (PJD) was completed on November 1, 2011. The Corps found that approximately 0.11 acre of wetlands and/or other waterbodies were present within the site and were potentially waters of the U.S. On January 08, 2021, an AJD was verified under the Navigable Waters Protection Rule. The Corps determined that the wetland (Wetland 1, approximately 0.12 acre) was an excluded water ((b)(1) non-adjacent wetland) because it did not abut, or become inundated by flooding from, an (a)(1)-(a)(3) water in a typical year and was physically separated from an (a)(1)-(a)(3) water by a natural upland barrier. In addition, no hydrologic surface water connection between the wetland and an (a)(1)-(a)(3) water in a typical year was found.

CESPK-RD-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2007-01488]

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.



4 ENCL

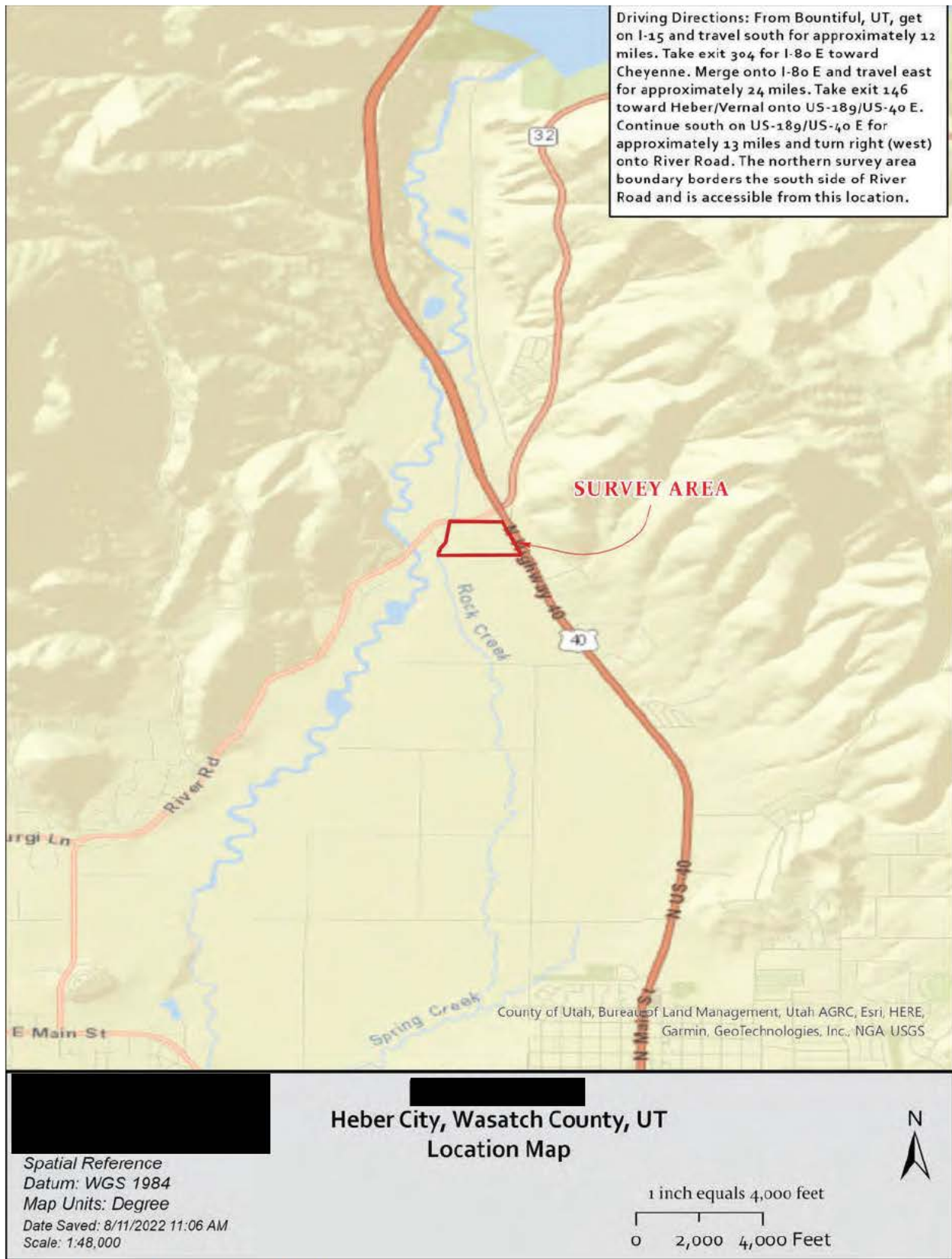
Enclosure 1: Location Map

Enclosure 2: AR Map

Enclosure 3: Flow Path Map

Enclosure 4: LiDAR





**Figure 1. Survey area location map.**

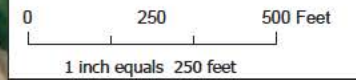
111°25'54"W 40°33'31"N



**Property**  
**Aquatic Resources Inventory**  
**Wetland Delineation Map**  
**April 17, 2024**

**Legend**

- ▭ Survey Area (38.8 acres)
- Wetland Delineation Sample Points
- ▲ OHWM Sample Point
- Culvert
- Aquatic Features**
- Wetlands (0.68 acre)
- Excavated Ditch OHWM (0.48 ac.; 1,939 lf)
- 1 ft. Contour Interval
- 1 ft. Contour Interval



*The wetland delineation results are preliminary and have not been verified by the US Army Corps of Engineers.*



111°25'23"W 40°33'6"N

Maxar, Microsoft