



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

CESPK-RDI-U

15 July 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-2022-00103]

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 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 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.

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- (1) W1 (85.33 acres)- Jurisdictional under Section 404 of the Clean Water Act.
- (2) W2 (2.07 acres)- Jurisdictional under Section 404 of the Clean Water Act.
- (3) D1 (3,437.7 linear feet)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (4) W3 (1.81 acres)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (5) W4 (2.13 acres)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (6) W5 (4.56 acres)- Non-jurisdictional under Section 404 of the Clean Water Act.
- (7) W6 (0.4 acre)- 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 320-acre review area is located between Utah Lake and 4000 South, Latitude 40.16544°, Longitude -111.67906°, Spanish Fork, Utah County, Utah (MFR Enclosure 1). The review area is an agricultural field that was mainly utilized for cattle grazing. This field has been flood irrigated prior to 1950 through 2023, as evidenced from the historic and recent aerial photographs. Overall, the study area generally slopes to the north.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Utah Lake, the nearest (a)(1) TNW and is located directly north of the study area. The two northern most aquatic resources (W1 and W2) are the only aquatic resources within the study area that have a confined surface connection (CSC) with Utah Lake.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetlands W1 and W2 are adjacent (directly abutting) to Utah Lake, which is the main hydrologic source for these wetlands. Ditch D1 and Wetland W3-W6 do not flow into Utah Lake. (MFR Enclosure 3)

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6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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]

g. Adjacent wetlands (a)(7): There are 87.4- acres of adjacent (i.e. directly abutting) wetlands within the study area (MFR Enclosure 2). Wetlands W1(85.33 acres) and W2 (2.07 acres) in the north of the study area have a continuous surface connection (CSC) to the ordinary high water mark of Utah Lake, an a(1) water. These wetlands meet the (a)(7) category "waters of the United States" in the pre-2015 regulatory regime since they have are directly abutting and have a continuous surface connection to Utah Lake.

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.

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.

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”).⁷ 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.

D1 (3,437.7 linear feet) is an irrigation ditch that was constructed in uplands and was abandoned in 2023. This ditch is north flowing and originates approximately 1.25 miles south of the study area with many lateral ditches that flow in and out of this ditch between the origination point and subject site. Within the site, the ditch flows directly north and terminates approximately 0.25 mile north of Utah Lake, where water then sheet flows across the land. D1 is not jurisdictional under Section 404 of the Clean Water Act. Review of the site revealed no CSC to W1, W2 or Utah Lake, which are the nearest jurisdictional waters. This is confirmed by Google Earth Aerial data and the AR delineation map. (MFR Enclosure 2 and 3)

- 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. [None]

- 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. [None]

- 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. [None]

- 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*. [None]

- 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

⁷ 51 FR 41217, November 13, 1986.

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waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Aquatic resources W3 (1.81 acres), W4 (2.13 acres), W5 (4.56 acres), W6 (0.4 acre) are non-adjacent wetlands with no CSC to Utah Lake the nearest (a)(1) water. W3 is the nearest wetland to W2 (a)(7) water and the area between is approximately 200 feet of dryland which has no indicators of a CSC. There are no culverts, ditches, dryland swales, or other potential flow conveyance features that would connect these aquatic resources with the nearest (a)(1) water. Therefore, the 8.9 acres (W3-W6) of wetlands within the study area are non-adjacent wetlands and not subject to CWA jurisdiction. (MFR Enclosure 2 and 3)

In addition, the site wetlands were analyzed under the one wetland concept. Wetland W3 through W6 are approximately 3-5 feet higher in elevation than W1 and W2 nearest (a)(7) waters that are adjacent and sustained by Utah Lake (a)(1) water. W3 through W6 are depressional with similar herbaceous vegetation but are separated by dryland dominated by cheat grass (*Bromus tectorum*- UPL) and orchard grass (*Dactylis glomerata*- FACU). These wetlands developed as the result of onsite flood irrigation practices with irrigation waters that originate from the south. Irrigation ceased around 2022 and these wetlands are sustained by groundwater but appear to be drying and are not influenced by the (a)(7) waters. W4, W5, and W6 are palustrine emergent wetlands, and W3 is a vegetated playa. The dryland separation is clearly represented on the AR delineation map and the recent aerial photographs. Even if these wetland areas function as one wetland pursuant to (U.S. Environmental Protection Agency Memorandum on LRB-2021-01386 and NWK-2022-00809) they as a whole lack a CSC to Utah Lake the nearest (a)(1) water. (MFR Enclosure 2 and 3)

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. Site visit August 17, 2022, and April 10, 2024.
- b. Google Earth 7.3.3.7692. (2005 July, 2013 June, 2015 June, 2020 May, 2022 May, and 2023 June). Spanish Fork, Utah. 40.165440° latitude, -111.679061° longitude, eye alt 3,500 ft. Retrieved 11 July 2024.
- d. LiDAR - National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 4 March 2024.
- g. USDA Natural Resources Conservation Service Soil Survey: Included in the Martin and Nicholson Environmental Consultants- Aquatic Resources Delineation Report.
- h. US Fish and Wildlife Service Wetland Mapper – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 14 May 2024.
- j. Aquatic Resource Delineation Report- Spanish Fork 320 Acres [REDACTED]
[REDACTED] Dated: February 9, 2022; and Updated Boyer

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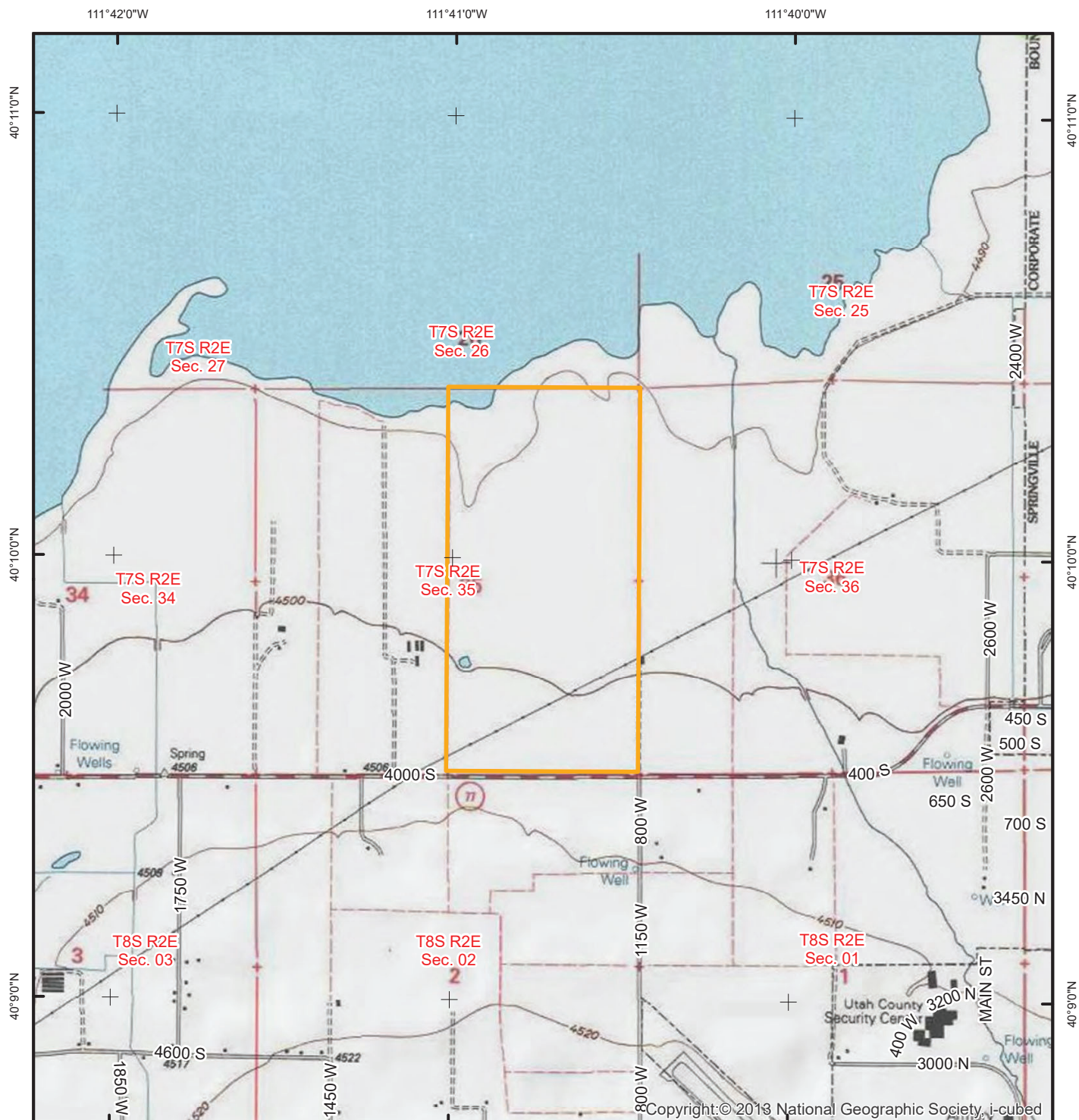
[REDACTED]
[REDACTED] Dated: April 18, 2024.

10. OTHER SUPPORTING INFORMATION. The August 17, 2022 and April 10, 2024, site visits determined that the aquatic resource delineation for the review area needed updates, which required the expansion of W1 and the addition of W6. The final updated wetland delineation map was received on April 18, 2024. The updated delineation is accurate and illustrates that W1 (85.33 acres) and W2 (2.07 acres) are a(7) waters and have a CSC with Utah Lake an (a)(1) water; and D1 (3,437.7 linear feet), W3 (1.81 acres), W4 (2.13 acres), W5 (4.56 acres), and W6 (0.4 acre) have no CSC with the Utah Lake, the nearest (a)(1) water.

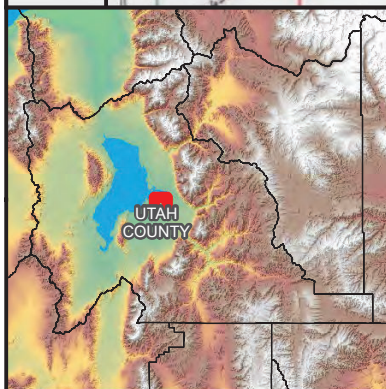
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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

4 Encls

Enclosure 1: Boyer Project Location Map
Enclosure 2: Boyer Wetland Delineation Map
Enclosure 3: Boyer Flow Path Map
Enclosure 4: LiDAR



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 Survey Area (320 acres)

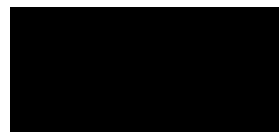
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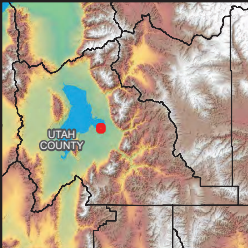
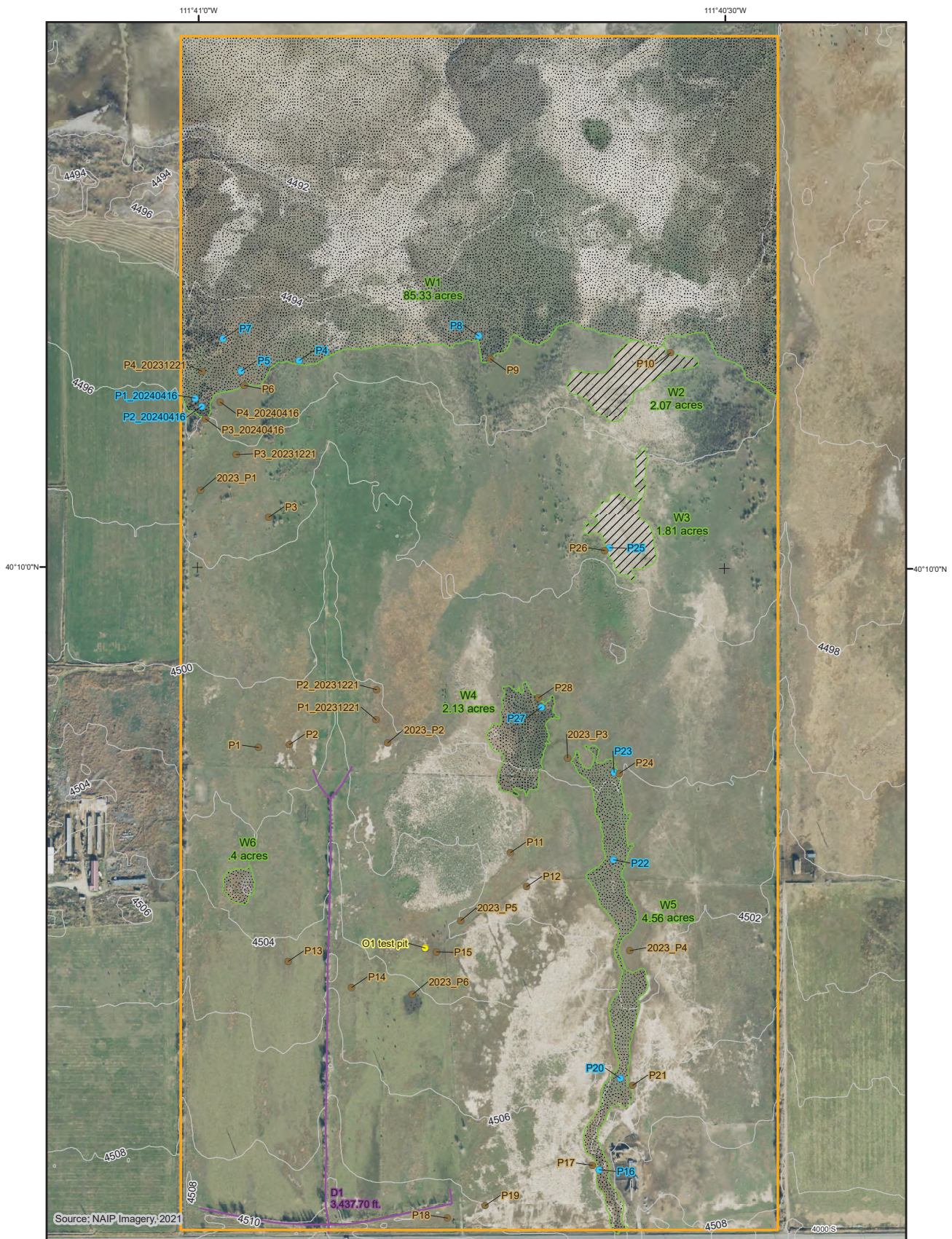


Boyer

Figure A-1

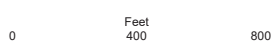
Project Location Map





- Survey Area (320 acres)
- PEM1C
- PUSA
- Ditch
- 2 foot contour
- Upland Data Point
- Wetland Data Point
- Observation Point

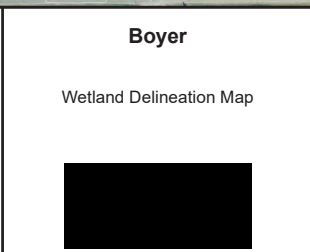
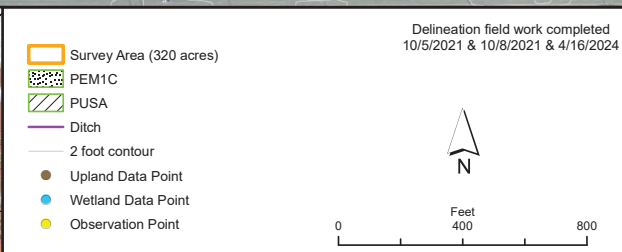
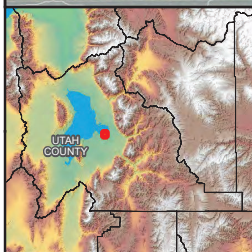
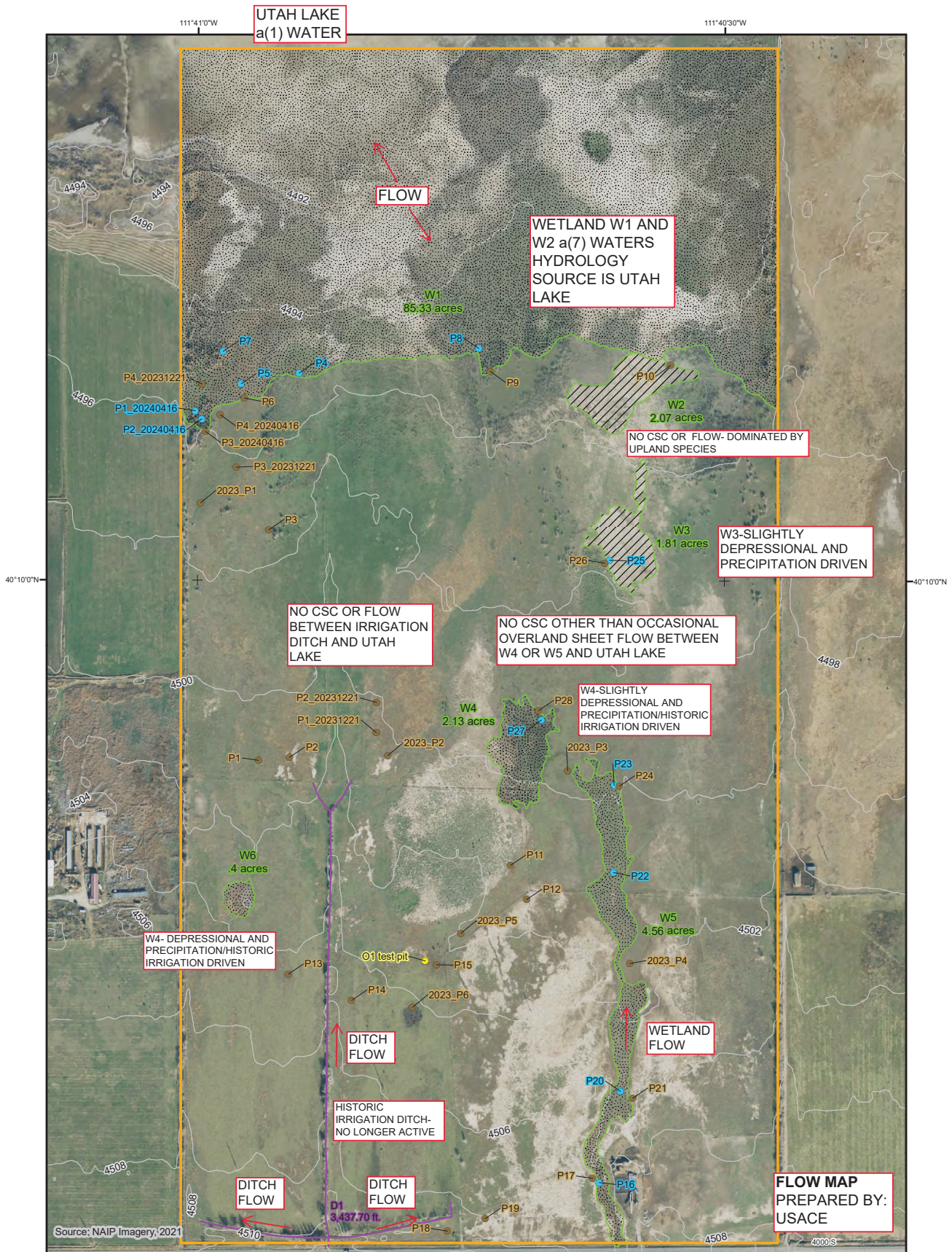
Delineation field work completed
10/5/2021 & 10/8/2021 & 4/16/2024

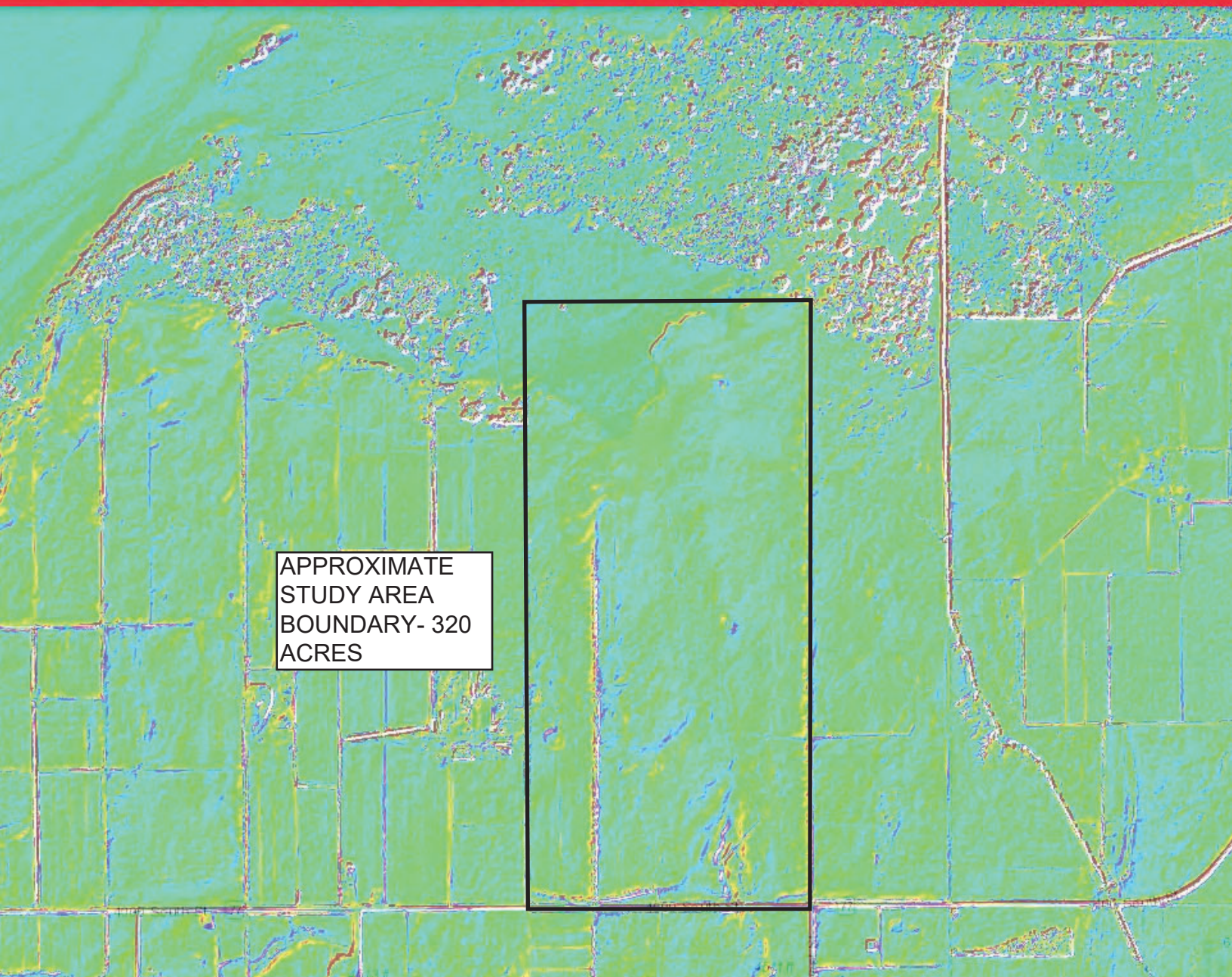


Boyer

Wetland Delineation Map







APPROXIMATE
STUDY AREA
BOUNDARY- 320
ACRES

320 ACRES

LIDAR- National Layer in the
National Regulatory Viewer for
the South Pacific Division.
Retrieved 4 March 2024.

ENCLOSURE 4