



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

CESPK-RDI-U

28 AUGUST 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-2024-00473] [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.

(1) W1, jurisdictional under Section 404 of the Clean Water Act.

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

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

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

(5) W5, 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)

e. 19 December 2023 Environmental Protection Agency (EPA) and the Office of the Assistant Secretary of the Army for Civil Works (OASACW) Guidance Memorandum NWO-2003-60436 regarding One Wetland Concept.

3. REVIEW AREA. The approximately 38.7-acre review area is located at the Great Salt Lake Marina, at the edge of Section 17, Township 1S, Latitude 40.731859°, Longitude - 112.209941°, 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 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. §230.2(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;

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- 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. The GSL is directly abutting W1/W5 within the review area, as evidenced by aerial imagery (Google Earth, 24 May 2022). Surface water flows from the aquatic resources within the survey area southwest to the GSL. Surface water flows from the WX northwest to the GSL (See Section 10).

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 N/A. No Section 10 RHA waters are in the vicinity of this survey area.

7. SECTION 404 JURISDICTIONAL WATERS: The following aquatic resources within the review area (AJD MFR Enclosure 2) 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*.

- a. TNWs (a)(1): None.
- b. Interstate Waters (a)(2): None.
- c. Other Waters (a)(3): None.
- d. Impoundments (a)(4): There are 4.34 acres of impounded waters within the survey area.

W2 is a 4.34-acre playa located within a depressional area surrounded by W4. W2 is separated from W1 by a man-made berm and is also bordered by the Great Salt Lake State

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.

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Park (Park) access road to the north and the Interstate 80 frontage road to the southeast. There are no culverts present within the berm or access road that would maintain a surface hydrologic connection between W2 and W1 to the west or the Great Salt Lake and its abutting wetlands (WX) to the northeast of W2. Review of historic aerial imagery indicates the Park access road to the north was installed sometime between 1943 and 1965 (AJD MFR Enclosure 3). The timing of installation of the western berm cannot be deduced as it is present on the earliest available aerial image, which is 1943. WX, which is located outside of the survey area to the northeast, is separated from W2 only by the access road. As seen on the aerial from 1943, WX and W2 were once one large, undivided aquatic resource. Open water signatures are absent from the 1943 aerial due to poor quality but it is likely this area was wetland because of its proximity to the groundwater discharge/spring complex to the south. It is presumed the wetland converted to open water after being impounded by the Park access road. W2 inundation frequency and duration are almost identical to WX since they share the same hydrology source (groundwater discharge from the southern spring complex). W2 remains inundated longer due to the inability of water to drain out across the surface. Review of the elevation profiles also demonstrates W1 and W2 were originally connected as one aquatic resource and would have drained to the northeast into the GSL prior to the construction of the Park access road that currently bisects them.

Therefore, the Corps has determined that W2 and WX were once one aquatic resource and are functioning as such. W2 meets the (a)(4) category “waters of the United States” in the pre-2015 regulatory regime since it is an impoundment of a historically larger aquatic resource that was tributary to the GSL, a TNW.

e. Tributaries (a)(5): There are 1.23 acres of tributary waters having a continuous surface connection to a TNW within the review area.

W1 is a 1.23-acre playa located within a depressional area of W5. Its hydrology source is primarily groundwater discharge supplemented by precipitation throughout the year. As water levels rise in the depressional areas, they flow southwest to the GSL. W1 meets the a(5) category “waters of the United States” in the pre-2015 regulatory regime since it has a continuous surface connection to the GSL, a TNW. This is evidenced by the surface flows through W5 connecting W1 to the ordinary high-water mark of the GSL during normal precipitation years, as seen in aerial imagery (Google Earth June 2019 and May 2022).

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

g. Adjacent wetlands (a)(7): There are 26.02 acres of adjacent wetlands having a continuous surface connection to a TNW within the review area.

W3 is an approximately 0.27-acre emergent marsh wetland located in the southeastern portion of the review area. It is separated from W4 by a concrete pad and is bounded by the Park access road to the north and frontage road to the southeast. Per Section 10 below, W3 is part of the larger Wetland X complex and is adjacent to, and has a continuous surface connection to, the GSL.

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W4 is an approximately 6.63-acre emergent marsh wetland, bounded by a manmade berm to its west, the Park access road to the north and frontage road to the southeast. Per Section 10 below, W3 is part of the larger Wetland X complex and is adjacent to, and has a continuous surface connection to, the GSL.

W5 is an approximately 19.12-acre emergent marsh located west of the manmade berm. This wetland meets the (a)(7) category “waters of the United States” in the pre-2015 regulatory regime because it has a continuous surface connection to the GSL, a TNW. This connection is evidenced by aerial imagery (Google Earth, June 2019 and May 2022) (AJD MFR Enclosure 7).

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”).⁸

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

c. There are no aquatic resources or 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 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 no aquatic resources or 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).

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. Aquatic Resources Delineation Report, Great Salt Lake Marina Aquatic Resources Report, dated June 2024 [REDACTED].
The consultant prepared the wetland delineation report in accordance with the

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U.S. Army Corps of Engineers 1987 Wetland Delineation Manual and the USACE Regional Supplement for the Arid West Region.

b. The requestor's June 2024 Aquatic Resources Delineation Report was relied upon, except for the suggested federal jurisdictional status of W2, W3, and W4. The report indicates that W2, W3, and W4, may not be considered jurisdictional due to a lack of connection to waters of the U.S. SPK did not agree with the determination of no connection to waters of the U.S. for these aquatic resources. Evaluation of a connection of waters of the U.S. is included in Sections 7.c. and 7.g. of this MFR. Please note that Wetland X (WX) was added to the delineation map by the Corps to demonstrate adjacency and support the One Wetland Concept for the purposes of this MFR. WX was not evaluated during the wetland delineation and occurs outside of the survey area to the northeast. It was determined to be wetland based on desktop review of available resources (aerial imagery, Google Earth Streetview, LiDAR).

c. Photographs: Photos included in the [REDACTED] Aquatic Resources Delineation Report.

d. LiDAR-National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 15 August 2024.

e. Aerial Records: Google Earth 7.3.6.9796 (24 May 2022).

f. Historical Aerial Imagery, 1943-1985, from <https://earthexplorer.usgs.gov/>.

g. USDA Natural Resources Conservation Service Soil Survey: [REDACTED]

10. OTHER SUPPORTING INFORMATION.

Per the 19 December 2023 EPA/OASACW Guidance Memo (NOW-2003-60436) regarding One Wetland Concept, the District analyzed topographic maps, historical aerial and ground-level imagery, soils maps, hydrology, and vegetation of these three wetlands. Results show that vegetation, soils, and hydrology are identical, or nearly identical between W3, W4 and WX. The access road to the Great Salt Lake State Park/Marina (Park) was constructed sometime between 1843 and 1965 (AJD MFR Enclosure 3). Imagery from 1943 shows the absence of the Park access road. The barrier separating W3 and W4 was constructed sometime after 1965, as it is absent from that aerial photo. Wetland signatures are faint due to the poor quality of the 1943 aerial imagery, but saturation can be seen emanating from the spring complex that exists at the base of the Oquirrh Mountains to the south of the survey area. W3 and W4 are dominated by *Phragmites australis* and are classified as the same soil type, Saltair Series silty clay loam (AJD MFR Enclosure 4). Google Earth streetview photographs (AJD MFR Enclosure 6), show that WX is also dominated by *Phragmites australis* and is mapped as Saltair Series silty clay loam as well. LiDAR (AJD MFR Enclosure 5) shows W4/W3/WX at the same elevation, draining northeast to the GSL, which also demonstrates they were once one wetland. The hydrology of W3, W4, and WX is

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fed by groundwater discharge from the spring complex to the southeast. WX directly abuts the ordinary high water mark of the GSL (AJD MFR Enclosure 8) Based on the available information, a shallow subsurface connection between W3, W4, and WX exists due to similarities in soil, hydrology, and vegetation despite W3 and W4 being separated from the WX by the by the Park access road to the north and frontage road to the southeast. Therefore, the Corps has determined that W3, W4, and WX were once one wetland and are functioning as such. The W3/W4/WX complex meets the (a)(7) category "waters of the United States" in the pre-2015 regulatory regime since it has a continuous surface connection to the GSL, a TNW.

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.



5 Encl

Encl 1 Location Map

Encl 2 Aquatic Resources Map

Encl 3 Historic Aerials

Encl 4 NRCS Soil Map

Encl 5 LiDAR

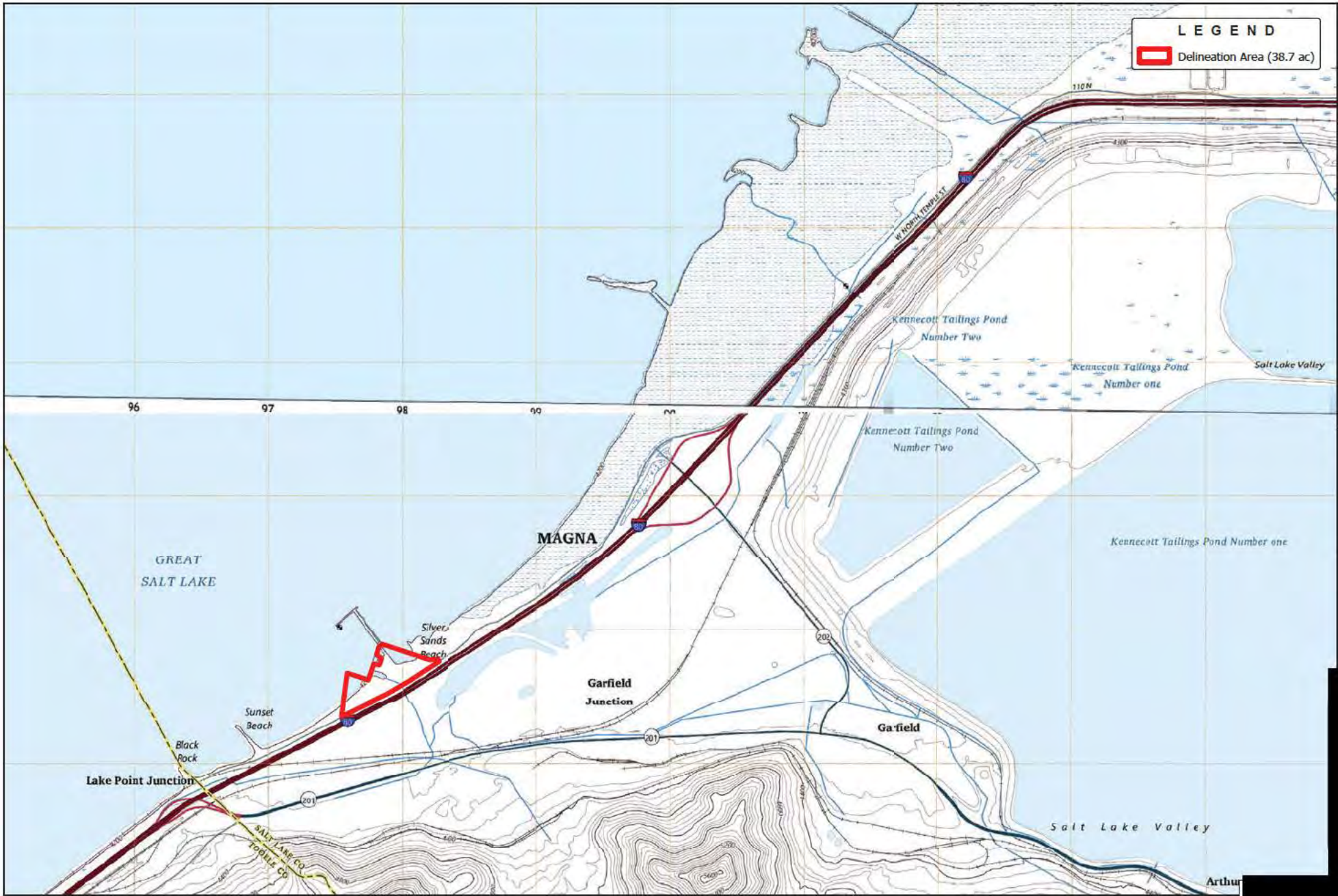
Encl 6 Google Earth Streetview Photos

Aug 2015

Encl 7 Google Earth Aerial Photos 2019

and 2022





LEGEND
[Red outline box] Delineation Area (38.7 ac)



SITE LOCATION

F.S.L.
GREAT SALT LAKE MARINA





Approx. GSL OHWM: 4,200 ft

Great Salt Lake

Surface flow path to the GSL

OHWM: 4,204 ft (LiDAR 2016)

Wetland X (WX)

LEGEND

- Delineation Area (35.4 ac)
- Sample Points
- Photo Points
- Minor Contour (1 ft) - LiDAR 2016
- Major Contour (5 ft) - LiDAR 2016
- ~4200 FT GSL Ordinary High Water Mark (LiDAR 2016)
- Ponds Ordinary High Water Mark

Aquatic Resources:

- W1: Pond (1.23 ac)
- W2: Pond (4.34 ac)
- W3: Emergent Marsh (0.27 ac)
- W4: Emergent Marsh (6.63 ac)
- W5: Emergent Marsh (17.94 ac)



DELINEATION RESULTS

GREAT SALT LAKE MARINA