



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

CESPK-RDI-U

1 Nov 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-2023-00381] (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

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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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.

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) W-1, Jurisdictional under Section 404 of the Clean Water Act.

(2) C-1 (Mendon South Canal), 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 7-acre review area is located at approximately 1725 South 5400 West on Parcel 11-021-0040, Latitude 41.699984°, Longitude - 111.968170°, Mendon, 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 Bear River 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.

Bear River is a “navigable TNW” since it meets criteria 4.a and 4.d above.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The Mendon South Canal (Canal 1) enters the study area from the south and continues north as depicted on the study area flow map as identified on (AJD MFR Enclosure 2, page 1). The Mendon South Canal’s hydrology source is Merrill’s Spring, which is located to the south of the survey area and has relatively permanent flows. The canal flows northward through the study area before turning east on West 1600 South. The canal crosses the road around the 2000 South 5400 West intersection and continues to flow until it intersects the Little Bear River to the east of the survey area via a wetland complex butting the Little Bear. The Little Bear River flows into the Bear River, the nearest TNW.

W-1 is down gradient from Canal 1 but is separated by an upland berm along the west wetland boundary. However, W-1 indirectly flows to Canal 1 via several relatively permanent ditches along the east wetland boundary. W-1 directly abuts a drainage ditch (DD) which is an RPW flowing along 5400 West. DD receives water from the Mendon South Canal by way of the east ditch located to the north of the subject property. Water flows south in DD and connects to Ditch 1 via a culvert. Ditch 1 is also a RPW which continues to flow south and connects with the Mendon South Canal via another culvert crossing 5400 West (AJD MFR Enclosure 2, page 2). The canal flows northward through the study to the Bear River, per the C-1 flow path described above.

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

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

There are no Section 10 waters in the survey area.

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 0.034 acre (130 linear feet) of tributaries that are relatively permanent waters (RPWs) within the review area.

Mendon South Canal (Canal 1) – Approximately 0.034 acre (130 linear feet) of the canal occurs within the study area. Mendon South Canal is a relatively permanent tributary to a large wetland complex which abuts the Little Bear River, which flows into the Bear River (TNW). The Mendon South Canal meets the (a)(5) category "waters of the United States" in the pre-2015, post *Sackett* regime. Water was flowing in the canal at the time of survey. In addition, a review of aerial records between 2009 and 2020 with photos taken during different times of the year show water flows year-round. The portion of Mendon South Canal within the review area is approximately 130 linear feet in length and has an average width of 12 feet which was measured below the ordinary high water mark from bank to bank.

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

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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g. Adjacent wetlands (a)(7): There is a wetland (W-1) having a continuous surface connection (directly abutting) to a RPW within the review area (AJD MFR Enclosure 3).

Wetland 1 (W-1), totaling 2.8-acres, is located in an actively managed agricultural field with no evidence of irrigation within the survey area. The aquatic resource report indicates the main source of hydrology for the wetland within the study area is a high water table. Wetland 1 has a continuous surface connection via a relatively permanent water to the nearest TNW, the Bear River.

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 “preamble waters”).⁸

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 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 decision in “SWANCC,” would have been jurisdictional based solely on the “Migratory Bird Rule.”

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.

⁸ 51 FR 41217, November 13, 1986.

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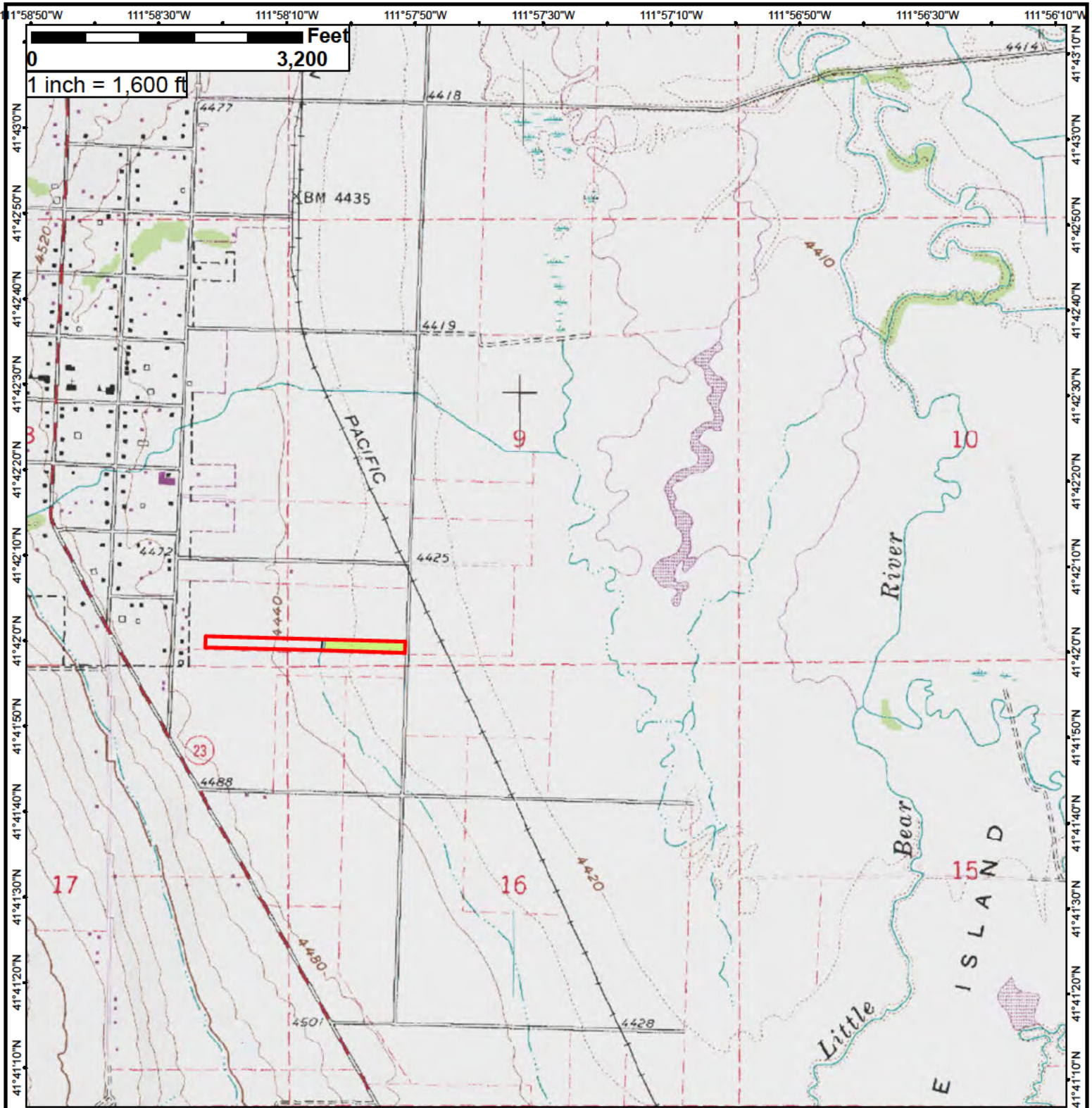
- i. b. Aquatic Resource Delineation Report [REDACTED] Cache County, Utah” prepared by [REDACTED], dated 23 May 2021. The consultant prepared the wetland delineation report in accordance with the U.S. Army Corps of 1987 Wetland Delineation Manual and the USACE Regional Supplement for the Arid West Region.
- b. National Wetland Inventory with the nearest flow path – Large Scale from National Layers created in Google Earth. Retrieved 22 February 2024. Flow path of ditches in the [REDACTED] (AJD MFR Enclosure 2).
- c. Photographs: Photos included in the [REDACTED] Aquatic Resources Delineation Report. Corps photolog collected (August 2009, June 2017, and June 2020). Cache County, Latitude 41.699985°, Longitude -111.968171°. Retrieved 20 February 2024, from <http://www.earth.google.com> (AJD MFR Enclosure 4).
- d. LiDAR – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 20 February 2024 (AJD MFR Enclosure 5).

10. OTHER SUPPORTING INFORMATION. The Corps concurs with the aquatic resource delineation report and map, with the exception of the flow path discussed in the report.

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]

[REDACTED]



Topographic Overview



Section 9
in T.11N, R.1W, S.L.B.&M.

Legend

- Project Area
- Palustrine Emergent Wetland
- Canal w/ OHWM

Projection:

NAD 83 UTM Zone 12N

Source:

USGS 7.5' TopoQuad
Wellsville

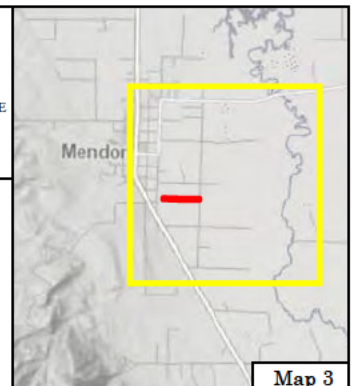


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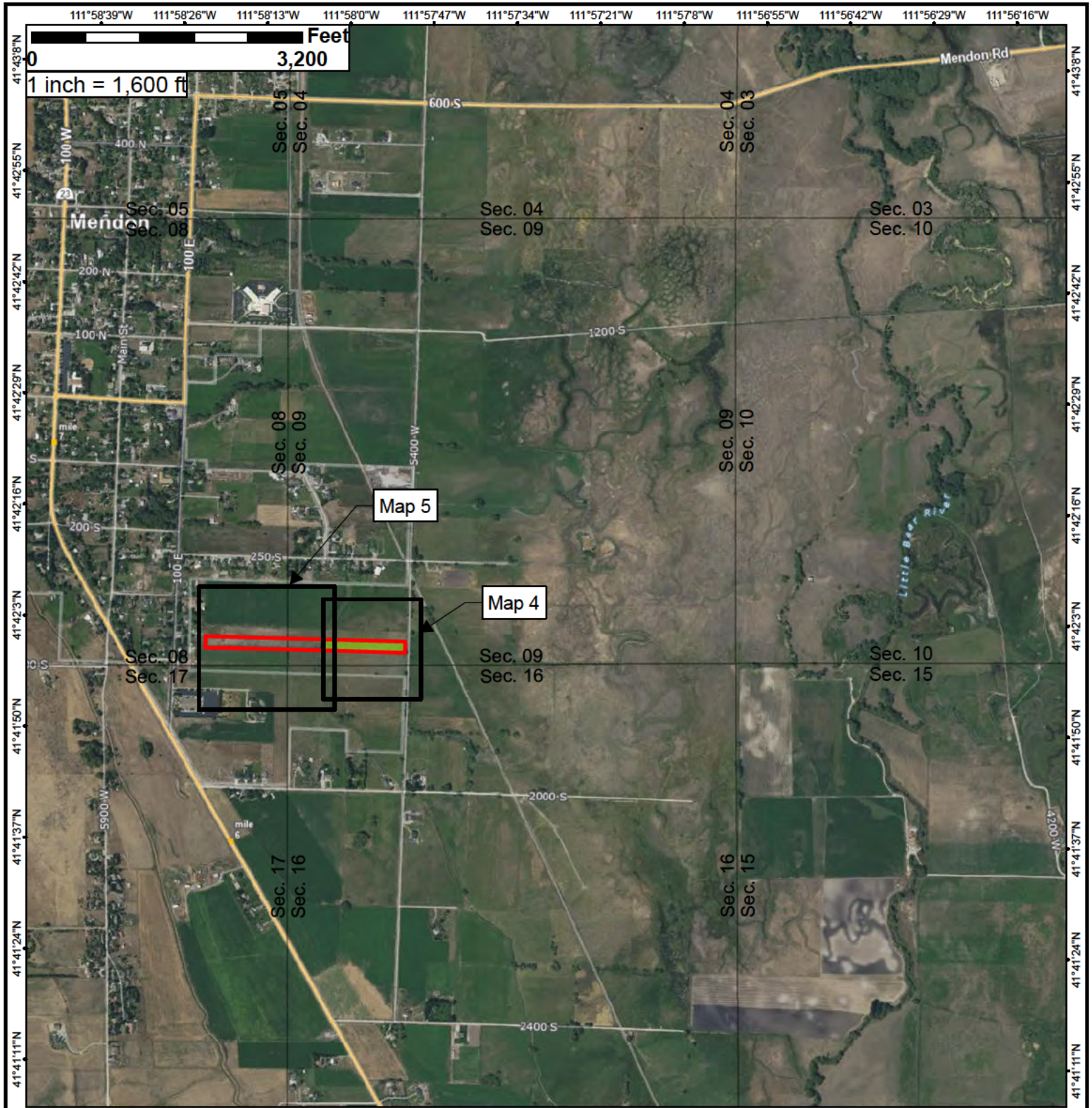
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Author: [redacted]



Map 3






Aerial Overview



Section 9
in T.11N, R.1W, S.L.B.&M.

Legend

-  Project Area
-  Palustrine Emergent Wetland
-  Canal w/ OHWM

Projection:

NAD 83 UTM Zone 12N

Source:


UGRC Basemap Hybrid
Imagery 8/12/21

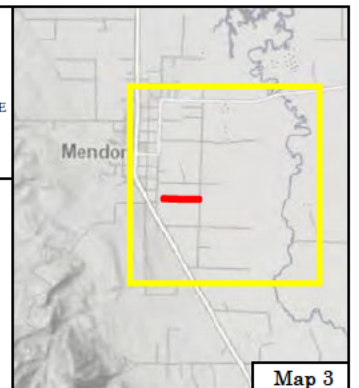


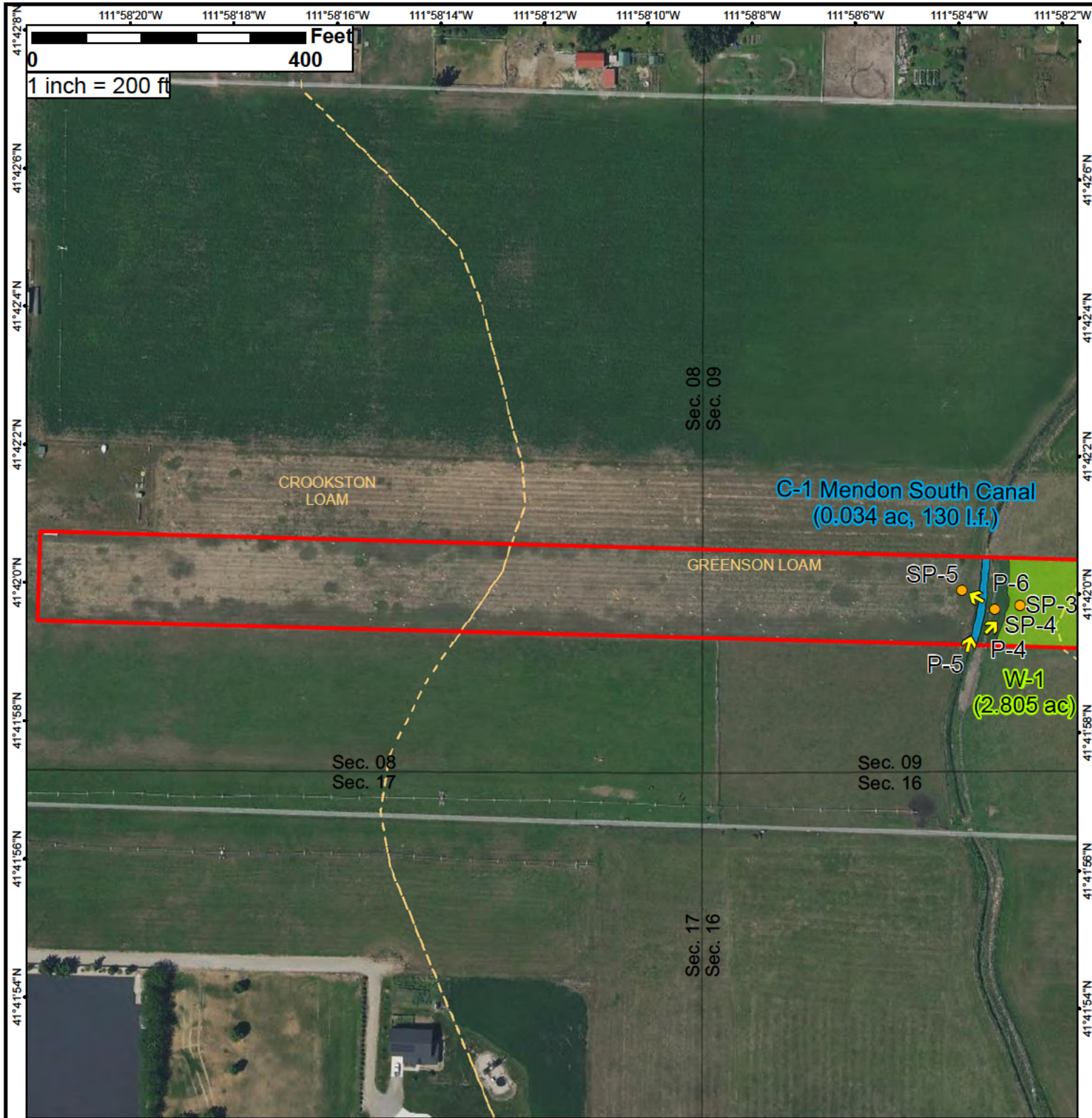
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Author: 





Delineation Detail



Project Dimensions:

Note: dimensions include features w/in project area

Project area = 7.021 ac
Wetlands = 2.805 ac
Canal w/ OHWM
= 0.034 ac; 130 l.f.

Legend

- Project Area
- ↑ Directional Photo Points (P)
- Sample Points (SP)
- Culverts
- Palustrine Emergent Wetland
- Canal w/ OHWM
- Soils

Projection:

NAD 83 UTM Zone 12N

Source:

UGRC Basemap Hybrid Imagery 8/12/21

Survey Performed by

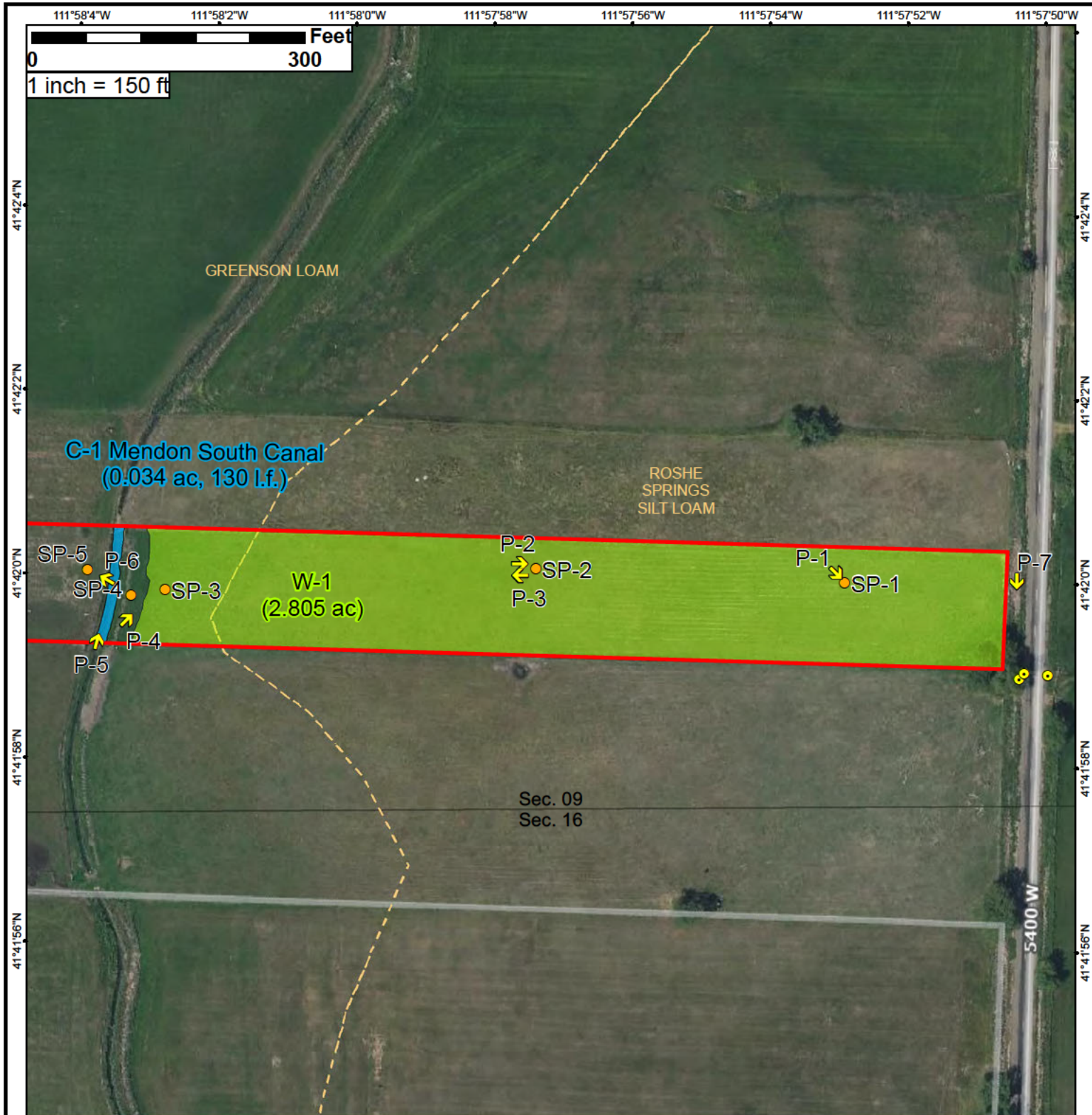


Created: 5/23/2023

Author: [Redacted]



Map 5



Delineation Detail



Project Dimensions:

Note: dimensions include features w/in project area

Project area = 7.021 ac
Wetlands = 2.805 ac
Canal w/ OHWM
= 0.034 ac; 130 l.f.

Legend

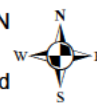
- Project Area
- ↗ Directional Photo Points (P)
- Sample Points (SP)
- ⊙ Culverts
- Palustrine Emergent Wetland
- Canal w/ OHWM
- Soils

Projection:

NAD 83 UTM Zone 12N

Source:

UGRC Basemap Hybrid
Imagery 8/12/21



Survey Performed by



Created: 5/23/2023

Author: [REDACTED]



Map 4