



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

CESPK-RDI-U

27 JANUARY 2025

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-2022-00300]

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 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.

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00300]

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) WM-1, non-jurisdictional under Section 404 of the Clean Water Act.

(2) WM-2, non-jurisdictional under Section 404 of the Clean Water Act.

(3) OW-1, non-jurisdictional under Section 404 of the Clean Water Act.

(4) OW-2, non-jurisdictional under Section 404 of the Clean Water Act.

(5) OW-3, 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 17 acre review area is located near 1400 West Burke Lane, Latitude 40.992507°, Longitude -111.918831°, Farmington, Davis County, Utah (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 Clean Water Act (CWA) and is considered a "traditional navigable water" 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;

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00300]

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 b, 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. OW-1, OW-2, and OW-3 all sit within closed depressions. Surface flows may move from these resources into Wetland 1, which is the lowest elevation within the project area. WM-2 flows into WM-1 via an abandoned ditch. Wetland 1 directly abuts a storm drain collector pipe, which extends approximately 2,800 feet underground before discharging into Sheppard Creek (a relatively permanent water (RPW)). Sheppard Creek flows in an open channel through residential neighborhoods before entering a detention basin that outlets into the Great Salt Lake (MFR Enclosure 2).

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

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.

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00300]

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): N/A
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

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. N/A

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. N/A

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. N/A

⁷ 51 FR 41217, November 13, 1986.

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00300]

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. N/A

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*. Approximately 0.74 acre of open water aquatic resources were identified as isolated. There are no upland swales or other continuous surface connections (CSC) that connect these ponds to downstream waters. A site visit done on 24 August 2021 by Corps staff confirmed that impoundments of water identified as OW-01 (0.36 acres), OW-02 (0.29 acres), and OW-03 (0.09) are intrastate isolated aquatic resources with no apparent interstate or foreign commerce connection because they are part of closed, isolated depressions that do not connect to Spring Creek (MFR Enclosure 3).

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). Approximately 2.89 acres of wetlands consisting of WM-1 (1.48 acres) and WM-2 (1.41 acres) are within the survey area. WM-2 drains into WM-1 via an abandoned ditch. WM-1 directly abuts a culvert that connects to a storm drain collector pipe, which runs for approximately 2,800 linear feet underground (0.53 mile) before discharging into Sheppard Creek, a RPW tributary to the Great Salt Lake. Per the joint memorandum on NWP-2023-602 between the EPA and the OASACW, subsurface flow through a storm sewer system does not qualify as flow through a discrete feature that can serve as a continuous surface connection. In addition, due to the the approximately 2,800 linear foot subsurface connection, WM-2 and Sheppard Creek are not physically close enough to meet the continuous surface connection requirement, per the joint memorandum on NWK-2024-00392.

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 titled “[REDACTED] Farmington Burke Lane Property Aquatic Resources and Wetlands Delineation Technical Report” prepared by [REDACTED] and dated October 2024. 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

CESPK-RDI-U

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2022-00300]

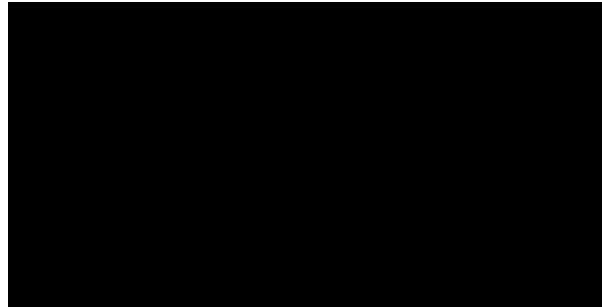
the Arid West Region. Figure 4: Aquatic Resources and Wetland Delineation Survey Map did not demarcate the aquatic resources outside of the 2024 Delineation Survey Area, but within the Project Area. As such, the map was amended by Corps personnel to include these features.

b. Photographs – aerial images dated (May 2023, June 2022, and May 2022). Davis County, Latitude 40.992320°, Longitude -111.918579°. Retrieved 23 January 2025, from <http://www.earth.google.com> (AJD MFR Enclosure 4)

c. LiDAR – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 22 January 2025 (AJD MFR Enclosure 5)

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.



4 ENCL

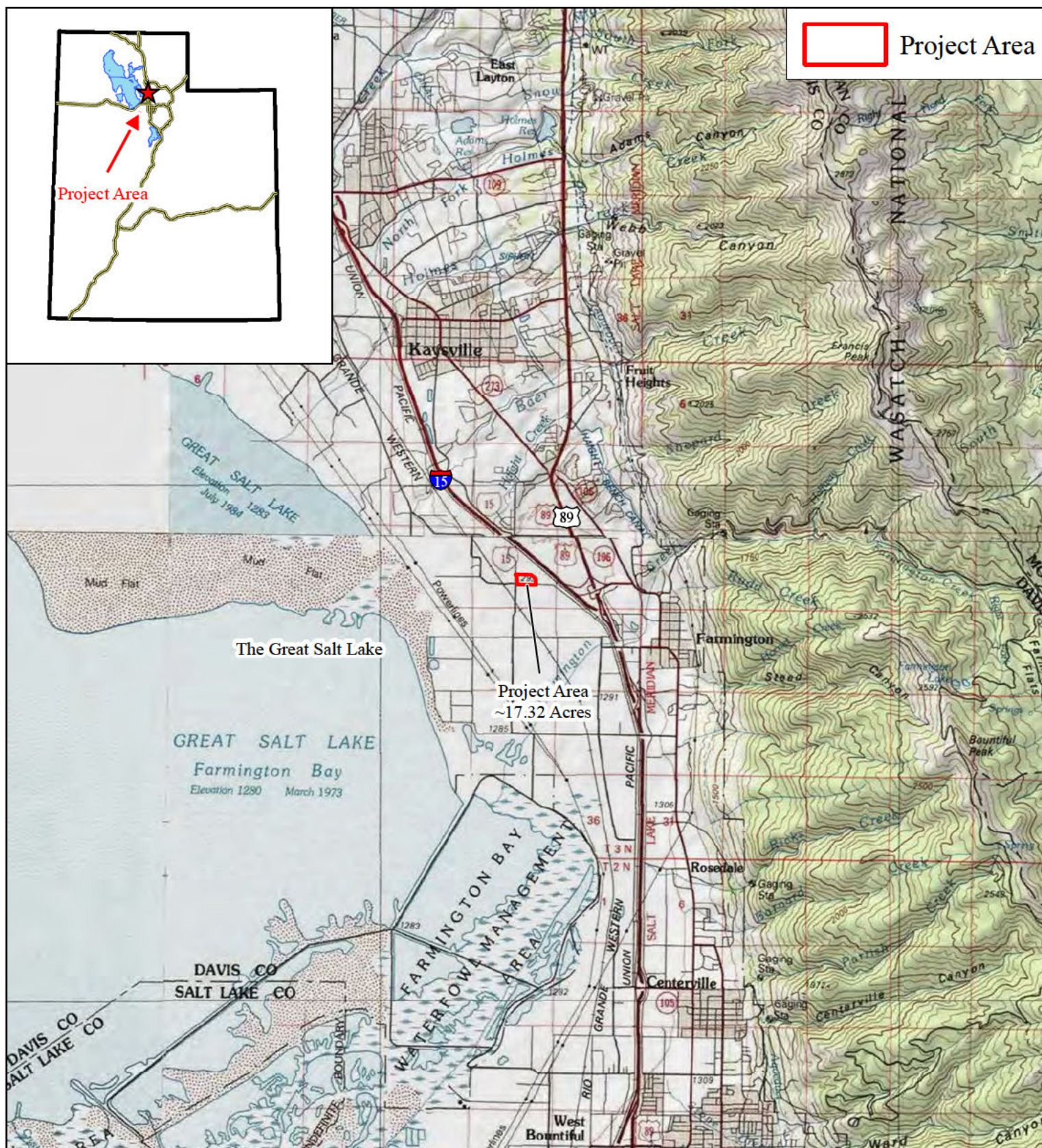
Enclosure 1: Location map

Enclosure 2: Flow path map

Enclosure 3: AR map

Enclosure 4: Aerial images

Enclosure 5: LiDAR-Digital elevation model and hillshade map



**Figure 1: General Site Vicinity Map
1:100,000 Scale Topographic Base**

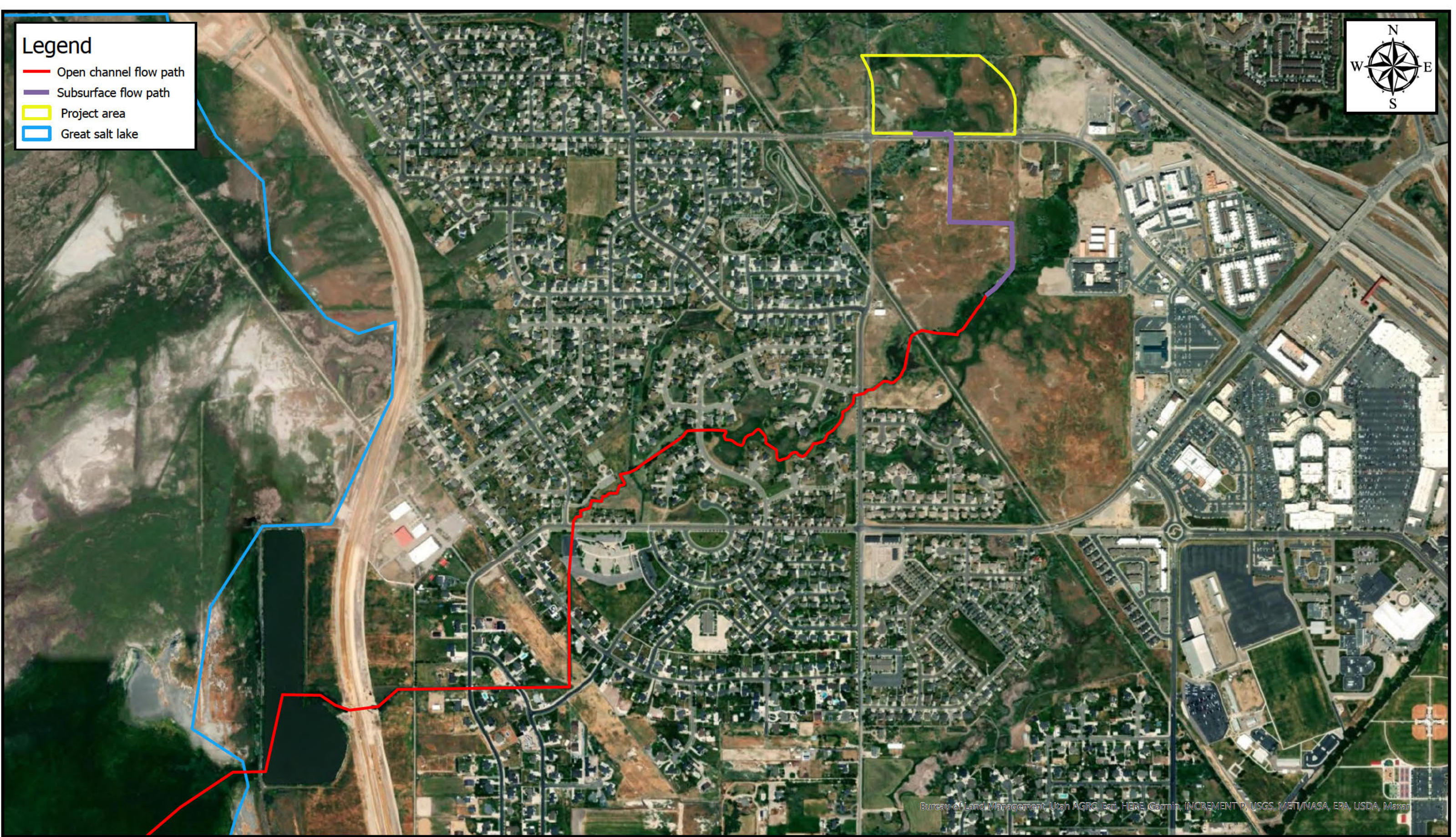
Map Date: 9/20/2024

Created By: [REDACTED]

0 1 2 Miles

1 in = 1.58 miles
at 1:100k Scale





Legend

- Open channel flow path
- Subsurface flow path
- Project area
- Great salt lake



Bureau of Land Management, Utah AGRC, Esri, HERE, Garmin, INCREMENT P, USGS, METI/NASA, EPA, USDA, Maxar



SPK-2022-00300

0 0.17 0.35 0.7
mi
Map Center: 111.925401°W 40.98469°N

Map Created by: [REDACTED]
Date: 1/24/2025
Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



Figure 4: Aquatic Resources and Wetland Delineation Survey Map

Map Date: 8/19/2024
 Created By: XXXXXXXXXX
 Aerial Imagery: Maxar 5/2023
 Grid Coordinates: UTM Zone 12N

- Project Area
- 2024 AJD Delineation Survey Area
- Upland Boundary - No Wetlands Present in 7.40 acres Survey Area
- Wetland Delineation Sample Point
- X Capped Well
- Earthen Berm with Culvert
- Photo Point & View Direction

0 100 200 Feet
 1 in = 100 feet





Baker Ln

Baker Way

Imagery © 2025 Airbus

Google Earth



6/20/22

Maker Wy

Maker Wy

Burke Ln

Image © 2025 Maxar Technologies

Google Earth

Imagery Date: 6/20/2022 lat: 40.992480° lon: -101.918537° elev: 4252 ft eye alt: 5735 ft

1985



5/2022

Baker Wy

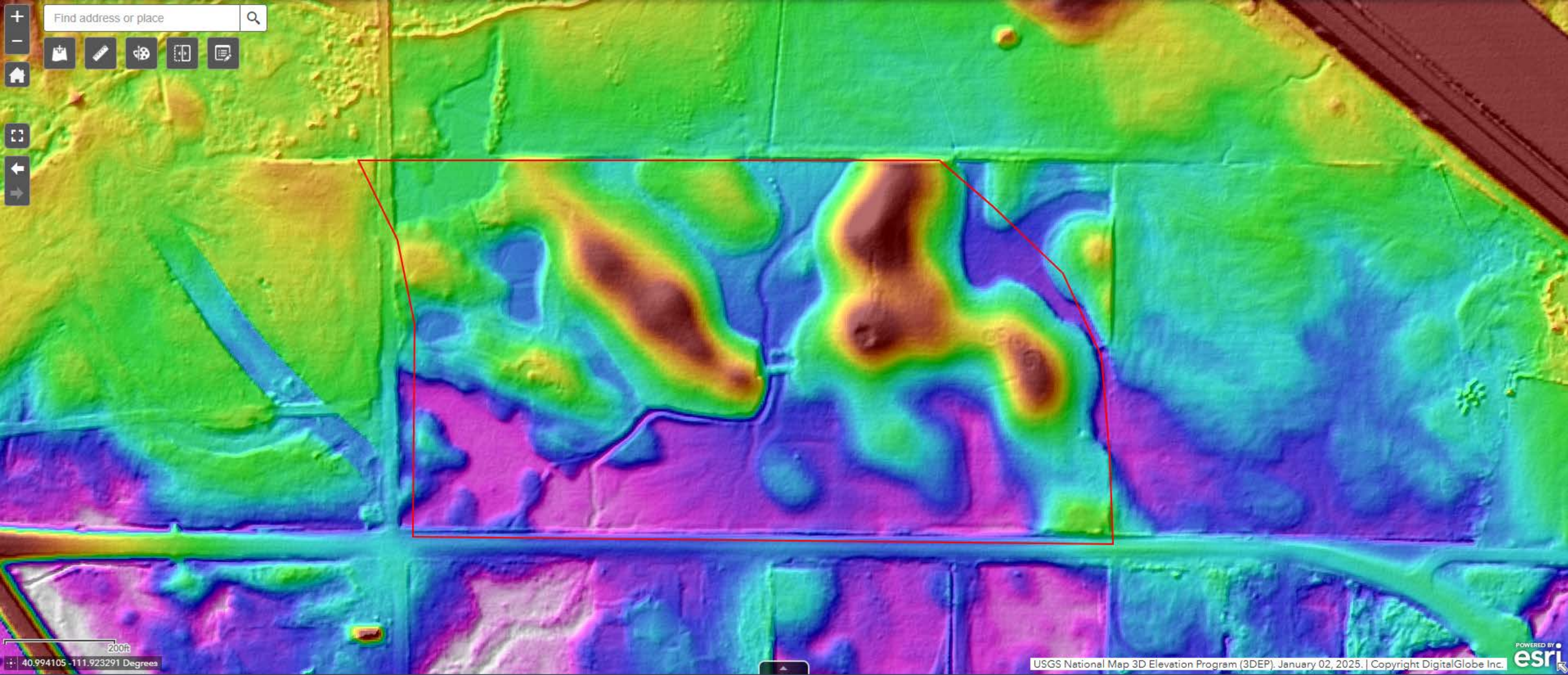
Baker Wy

Burke Rd

Google Earth

Imagery Date: 5/24/2022 lat: 40.992480° lon: -91.8537° elev: 4252 ft eye alt: 5735 ft

1985



+

-

Find address or place

Q

200ft

40.994105 -111.923291 Degrees