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

CESPK-RDI-U 28 Apr 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-2022-00159][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

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[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.

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 1, jurisdictional Section 404

(2) Ditch 1, jurisdictional Section 404

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) (*Rapanos* Guidance).

d. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

e. January 31, 2025, Emails 1 thru 4, Cover Letter and attachments 1 thru 29 from Lawrence Kogan, Managing Principal of Kogan Law Group.

f. March 12, 2025, Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act.

3. REVIEW AREA. The approximately 2.94-acre review area is located at 7045 South Hwy 89, Willard, Box Elder County, Utah Latitude 41.38178°, Longitude -112.03779°, (AJD MFR Enclosure 1 and 2). This review area only includes the extent of Wetland 1, as delineated by the requestor, and Ditch 1. It is a smaller portion of the overall 118-acre Swain Property aquatic resource (AR) survey area. The Corps reduced the review area in order to simply determine if jurisdiction was present at the site (e.g. a jurisdictional presence/absence determination as identified in 33 CFR 331.2), prior to

completing its determination of onsite AR boundary accuracy for the remainder of the site. Should jurisdiction not be present onsite, the latter step would be moot.

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

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

Ditch 1 is a relatively permanent water (RPW) that flows west along the northern property line which derives its flows from two natural water sources, the Pettingill Spring located on the adjacent north property and a spring source near the northeast corner of the Swain property (AJD MFR Enclosure 8). Ditch 1 was determined to be a perennially flowing (a)(5) RPW base on review of the historic aerial photo record showing water being consistently present in the ditch, the February 4, 2025 site visit where flowing water was observed in the ditch and the National Hydrography Dataset, which identifies it as a perennial feature.

Ditch 1 originates from spring sources located near the northeast corner of the property and on the property adjacent to the north. Water flows westward under the Union Pacific Railroad via a 37-foot culvert. It then merges with another unnamed perennially flowing RPW ditch, where it turns north and flows for about 225 feet before turning west to flow under Interstate 15 (I-15) via an approximately 223-foot culverted crossing. It then daylights, merging with the perennially flowing Willard Bay Reservoir (WBR) toe ditch (hereinafter referred to as Ditch 1/WBR toe ditch) and turns south. The Ditch 1/WBR toe ditch flows approximately 15,749 feet (2.98 miles) along the east and southeast boundaries of the WBR. At this point the flows enter an approximate 473-foot pipe/siphon that crosses under the Willard Canal. The Ditch 1/WBR toe ditch then daylights and continues southwest intercepting Cold Springs Creek (an RPW) and west for approximately 8,597 feet before crossing under another 42-foot culverted road crossing. Flows continue west, intercepting Dix Creek and First Salt Creek (both RPWs) along the way, for approximately 8,563 feet before crossing under another 100-foot culverted canal crossing where it enters the Harold Crane Waterfowl Management Area (WFMA), an (a)(4) water[6]. At this point the ordinary high water mark (OHWM) of the Ditch 1/WBR toe ditch dissipates, as it merges with the open water and palustrine emergent wetland complex in the WFMA. Water continues to flow for about 12,900 aerial feet (2.44 miles) through the WFMA before discharging into Willard Bay to the north and northwest. Willard Bay then flows into Bear River Bay, which is an “arm” of the GSL since a large portion of Bear River Bay lies below 4200 feet MSL. The State of

[6] Under the pre-2015 regulatory regime, (a)(4) waters are defined in 33 CFR §328.3(a)(4) as “all impoundments of waters otherwise defined as waters of the United States …” (58 FR 45008).

Utah owns the bed of the GSL below this elevation, which is the extent to which it is considered a navigable water per federal court decisions. The GSL is the nearest TNW (AJD MFR Enclosure 4).

Cold Springs Creek, Dix Creek, First Salt Creek and Second Salt Creek are (a)(5) RPWs based on review of the historic aerial photo record showing water being consistently present in those streams and the National Hydrography Dataset, which identified Dix and Cold Springs Creeks as perennial features.

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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.[8] 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): N/A

b. Interstate Waters (a)(2): N/A

c. Other Waters (a)(3): N/A

d. Impoundments (a)(4): N/A

[7] 33 CFR 329.9(a) states in part: "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."
[8] 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.

e. Tributaries (a)(5): Ditch 1, approximately 1,502 linear feet within the Corps' review area as identified on Enclosure 2. Under the pre-2015 regulatory regime, relatively permanent, non-navigable tributaries of traditional navigable waters where the tributaries typically flow year-round or have continuous flow at least seasonally are jurisdictional.[9] Tributaries include natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water.[10] Ditch 1 is a first order tributary, originating from springs onsite and the adjacent parcel to the north. The relevant reach of Ditch 1 (identified in the yellow box on AJD MFR Enclosure 2) is from the spring source to the confluence with another downstream unnamed perennial ditch [an a)(5) RPW] located just west of the first culvert crossing under the UPRR railroad, along the western boundary of the property. Ditch 1 has a defined bed and bank and contains OHWM indicators such as destruction of terrestrial vegetation, a clear, natural line impressed on the bank and shelving (AJD MFR Enclosure 3), Ditch 1 is a RPW that carries year-round flow based on review of historic and current aerial photos (which consistently shows flows in Ditch 1), historic and current topographical maps, the February 4, 2025 site visit and the NHD. Per AJD MFR Enclosure 8, the landowner's response email to the Corps states "there are two water sources that provide the water that [the Corps] observed flowing in the North ditch [i.e. Ditch 1]. The water originates from the Pettingill Spring that is just North of our property and a source close to our North East property corner that flows into a ditch that runs North into the Westerly flowing ditch [Ditch 1] you observed". Aerial imagery during different months (spring and later summer) over many years consistently shows flow within Ditch 1. Additionally, during the site visit conducted on February 4, 2025, the Corps observed flows in the ditch. Lastly, Ditch 1 is depicted on USGS topo maps since 1955 (the earliest historical 24K Quad available) as a solid blue line and the National Hydrography Dataset (NHD) identifies Ditch 1 as perennial. Based on this information, the Corps has determined flows in Ditch 1 are perennial (year-round). Lastly, obligate wetland vegetation (i.e. cattails [*Typha latifolia*]), which requires long term saturation/inundation, is seen growing along the banks of Ditch 1 (AJD MFR Enclosure 8).Ditch 1 is a tributary to the GSL, flowing directly or indirectly through other waters to a TNW. The requestor did not provide any information regarding the type/duration of flows for Ditch 1 in their aquatic resource delineation (AR) report, nor did they acknowledge the presence of this ditch on the AR map. This required the Corps to identify Ditch 1 and completed the assessment of flow duration for purposes of finalizing this AJD.

g. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7): Wetland 1, approximately 2.74 acres (within the Corps' revised review area as identified on AJD MFR Enclosure 2). During the Corps'

[9] *Rapanos* Guidance at page 6.
[10] *Id*. at footnote 24.

February 4, 2025, site visit, Wetland 1 was observed to directly abut (e.g. touch) the OHWM of Ditch 1 (AJD MFR Enclosure 3). When water levels are high, under normal conditions, Ditch 1 flows into Wetland 1 without any impediments, such as uplands, berms, dikes, or similar features, and thus is indistinguishable from the RPW and has a continuous surface connection with Ditch 1.[11]

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").[12] 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

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*. N/A

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

[11] Wetlands that directly abut a relatively permanent, non-navigable tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) have a continuous surface connection with such tributary and therefore are jurisdictional in accordance with the *Rapanos* Guidance and the Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023).
[12] 51 FR 41217, November 13, 1986.

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). N/A

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. USGS topography map 24K Willard Quad. 1955 and 1992. And 24k Plain City SW Quad. 1955 and 1972. USGS TopoView. https://ngmdb.usgs.gov/topoview/

b. 1953 June, 1965 November, 1993 August, 2023 October aerial photo, Willard Bay. USGS EarthExplorer. https://earthexplorer.usgs.gov/

c. Google Earth 7.3.3.7692. (2023 June, 2022 June, 2020 September, 2011 August, 2005 April, 2002 November, 2002 July, 1997 July, 1993 August) Willard, Utah. Latitude 41.38178°, Longitude -112.03779°. Retrieved February 4, 2025

d. February 7, 2025, Lew Swain's response to the Corps post site visit explaining the source of water of the ditch on north property boundary.

e. February 4, 2025, USACE site visit and Mapped Photo Log (Site Visit Photos).

10. OTHER SUPPORTING INFORMATION. This is a Presence/Absence AJD in accordance with 33 CFR 331.2. There are other aquatic resources (ARs) on site with disputed boundaries. This AJD is not intended to identify the geographic limits of all jurisdictional ARs on the parcel. Rather it is simply to establish if Section 404 jurisdiction exists onsite, in order to determine if the remaining AR boundaries need to be further investigated.

The Corps reviewed the materials submitted by Mr. Swain and his team. The Corps does not concur with some of the information as follows:

1. The AR delineation received March 11, 2022:
    a. Report does not identify the presence of Ditch 1 on the map or in the report, nor does it have any discussion of flow durations or flow paths offsite (AJD MFR Enclosure 9). SPK has determined Ditch 1, which serves as the northern boundary on the Swain Property, is a RPW. Wetland 1 directly abuts (touched the ordinary high water mark of Ditch 1 in the northwest corner of the property (AJD MFR Enclosure 3). Ditch 1 is a relatively permanent tributary to the GSL per the flow path described above.

b. Report states the mapped National Wetland Inventory wetland area (Wetland 1) in the northwest portion of the property appears to be a collection basin from crop irrigation runoff. Flows within Ditch 1 are natural surface waters from onsite and adjacent springs (AJD MFR Enclosures 7 and 8).

2. Materials submitted via email on January 31, 2025. SPK disagrees with much of the information/claims in the Cover Letter/Memorandum of Law as follows:

a. Memo claims Ditch 1 carries irrigation tail waters. (see AJD MFR Enclosure10, pages 6, 7, 8, 9 and 10).

Corps response: Site visit and February 7, 2025, response from Mr. Swain indicate waters are natural surface waters collected from onsite and adjacent spring sources. Ditch 1 was flowing during February 4, 2025, site visit, which is outside of the irrigation season. Further, all available aerial photos show water in the ditch. Water is not delivered to Ditch 1 via an artificial irrigation system/ditch company, as is the case in many parts of arid Utah. Ditch 1 has been in place since at least 1953, as seen on the 1953 USGS historic aerial, and was likely constructed through aquatic resources (i.e. wetlands and streams as opposed to dry land) at least in part to convey the natural surface waters originating from onsite and adjacent springs.

Lastly, even though water is diverted from Ditch 1 to irrigate the upper fields, and excess irrigation waters may flow back into it, irrigation tail water, while exempt as a point source discharge from Section 402 permitting (33 U.S.C. Sec. 1342(l)(1)), does not exclude the ditch from being a water of the U.S. (The fact that Congress included an exemption for certain discharges into irrigation ditches in its 1977 CWA Amendments indicates that at least some irrigation ditches are waters of the U.S., see 33 U.S.C. Sec. 1344(f)(1)(C ), see also Headwaters v. Talent, 243 F.3d 526, 37 (9th Cir. 2001) in which the irrigation canal in question connected to Bear Creek through “waste gates” were tributaries for purposes of the Clean Water Act.)

b. Memo claims the Ditch 1/WBR toe ditch “terminates” at several distinct points. (see AJD MFR Enclosure 10, page 6)

Corps response: Ditch 1/WBR toe ditch does not terminate. It flows thru 4 culvert crossings of linear transportation facilities (railroad, I-15, one single-lane road crossing and under a 100-foot canal crossing) and one pipe (siphon under Willard Canal). Discharges into the culvert crossings

are still regulated. Water continues to flow through these features downstream, and ultimately to the GSL.

c. Memo claims Ditch 1 is piped under railroad. (see AJD MFR Enclosure 10, page 6)

Corps response: Ditch 1 is not piped under the railroad crossing. It flows through a culvert under the railroad, but remains at its original grade and the railroad is elevated above it.

d. Memo claims dich is piped under I-15. (see AJD MFR Enclosure 10, page 6)

Corps response: Ditch is not piped under I-15. It is an approximately 223-foot culvert crossing. I-15 is elevated above the native grade.

e. Memo states the Ditch 1/WBR toe ditch is a man-made ditch. (see AJD MFR Enclosure 10, pages 6, 8 and 10)

Corps response: SPK agrees with this statement, however, the WBR toe ditch was partially constructed in ARs adjacent to I-15 (for approx 0.5 mile) and further downstream when the canal turns due west towards Harold Crane WMA (for approx 1.7 miles) and further intercepts four RPWs, Cold Springs Creek, Dix Creek, First Salt Creek and Second Salt Creek, per the historic 1955 USGS Willard 24K Quad topo map and 1953 aerial photos referenced in AJD MFR in AJD MFR Enclosures 4, 5 and 6. Even if the WBR toe ditch were not a jurisdictional ditch (which it is because it is an RPW tributary to a TNW), tributaries can flow indirectly through non-jurisdictional waters on their way to a TNW. The fact that Ditch 1 connects to a man-made ditch does not severe the tributary connection pursuant to guidance and case law.

f. Memo claims the Ditch 1/WBR toe ditch are piped subsurface underground over 781 feet. (see AJD MFR Enclosure 10, page 7)

Corps response: The approximately 473-foot manmade siphon is the only non-jurisdictional segment of the Ditch 1/WBR toe ditch. This is the only time the Ditch 1/WBR toe ditch is “piped subsurface”. In all other segments, the Ditch 1/WBR toe ditch is either an open channel or flowing through a jurisdictional culverted crossing. Regardless, water enters the pipe/siphon and continues flowing downstream, maintaining its physical hydrologic connection the entire way from the Swain Property to the GSL.

As such, Ditch 1 is a tributary, flowing directly or indirectly thru other waters to the GSL.

g. Memo argues that onsite wetlands are "distinguishable" from TNW. (see AJD MFR Enclosure 10, page 7)

Corps response: SPK does not claim Wetland 1 directly abuts (is "indistinguishable" from) a traditional navigable water. However, that is not the standard. Wetlands have to be indistinguishable from (e.g. touching or directly abutting the OHWM) an RPW that is tributary to a TNW or a TNW itself. As such, SPK asserts Wetland 1 directly abuts (is "indistinguishable" from) Ditch 1, which is a 328.3(a)(5) RPW tributary, flowing directly or indirectly to the GSL, the nearest TNW.

h. The memo also asserts that the cumulative "781 feet of public offsite subsurface underground piping establish a "clear demarcation between 'waters' and wetlands'" that render those wetlands easily "distinguishable from any possible 'waters of the United States'…in its own right," and consequently, as "separated," non-adjacent, non-jurisdictional waters not subject to CWA 404 permitting under Sackett or the amended 2023 Corps regulations". (see AJD MFR Enclosure 10 page 7)

Corps response: Ditch 1/WBR Toe Ditch does not "terminate" along is flow path. Because flows are continually contributed from upstream sources and along its length, were it to "terminate", water would back up, pond and overflow its banks. This does not occur. As such, Ditch 1/WBR Toe Ditch must have a continuous, unobstructed physical hydrologic flow path from the Swain Property to the GSL. Under the pre-2015 regulatory regime and *Sackett*, adjacent wetlands are jurisdictional when they have a continuous surface connection with traditional navigable waters, the territorial seas, interstate waters, relatively permanent jurisdictional impoundments, or relatively permanent tributaries. The Supreme Court in *Sackett* adopted the "continuous surface connection" requirement used in *Rapanos v. United States* & *Carabell v. United States* 126 S. Ct. 2208 (2006) (*Rapanos* decision) and determined that adjacent wetlands must have a "continuous surface connection" with covered waters to qualify as "waters of the United States". The *Rapanos* decision describes the "continuous surface connection" requirement with phrases like "physical-connection requirement" and "physical-connection criterion". See *Rapanos*, 547 U.S. at 751 n.13 (referring to the physical-connection requirement"). Thus, when a wetland has a continuous physical connection to a covered water, the wetland is jurisdictional. In this case, Wetland 1 directly abuts (touches) the OHWM of Ditch 1 as shown in AJD MFR Enclosure 3. Further, there is nothing in current EPA/ASA Joint

Guidance governing Section 404 CWA jurisdiction that states that breaks in open channel (i.e. culverted or piped sections) of a RPW sever a continuous surface or physical connection to a downstream TNW. Ditch 1, a RPW located on the Swain Property, has a continuous, unobstructed hydrologic connection with the GSL via its merged flow path with the WBR Toe Ditch. Even though it flows through four culverts and a pipe, flows continue unabated downstream.

i. Memo disputes that the South Ditch (referred to above as Ditch 1/WBR toe ditch) is navigable. (see AJD MFR Enclosure 10, pages 8-10)

Corps response: SPK makes no assertion that the Ditch 1/WBR toe ditch (South Drain) is navigable, only that it is an (a)(5) RPW that is tributary, flowing directly or indirectly through other waters to the GSL.

j. Memo makes several references to the surface water on the Swain property as “irrigation runoff” or “irrigation wetland runoff”. (see AJD MFR Enclosure 10, pages 6, 7, 8, 9 and 10)

Corps response: Surface water on the property is natural surface water conveyed from springs located to the east of I-15. The Ditch 1/WBR toe ditch also intercepts four other tributaries (Cold Springs Creek, Dix Creek, First Salt Creek and Second Salt Creek, all natural RPW streams) in the more westerly segments of the Ditch 1/WBR toe ditch prior to entering Harold Crane WMA (AJD MFR Enclosure 6 and 7).

k. Memo claims the Ditch 1/WBR toe ditch does not possess the jurisdictional characteristics of a “relatively permanent, standing or continuously flowing water forming geographic[al]n features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes,’” which the Supreme Court, in both Sackett and Rapanos, emphasized Congress included within the definition of “waters of the United States.” (see AJD MFR Enclosure 10, pages 9-10)

Corps response: It is not necessary to determine if Ditch 1/WBR is a water of the U.S. instead, the relevant analysis is whether or not this feature provides a tributary flow path to the Great Salt Lake. The mere fact that Ditch 1/WBR is a man-made feature does not eliminate it from the definition of a tributary. Ditch 1/WBR Toe Ditch is a relatively permanent, continuously flowing waterway, with a bed and bank and ordinary high water mark. Ditch 1/WBR Toe Ditch intercepts other natural streams (Cold Springs Creek, Dix Creek, First and Second Salt Creek, also RPWs) along its flow path which contribute to its perennial flows in addition to WBR seepage and groundwater. Further, evaluation of aerial photographs and

site observations at different times of the year, over several years, show perennially flowing water throughout its length. Ditch 1/WBR Toe Ditch may have been constructed partially in uplands but was also constructed in ARs adjacent to what is now I-15 and further downstream near where it intercepts First and Second Salt Creek (AJD MFR Enclosure 4 and 5). As such, Ditch 1/WBR Toe Ditch meets the definitions of an RPW tributary that flows directly or indirectly through other waters to the GSL.

l. Memo states the Harold Crane WFMA (WFMA) is not a water of the U.S. (see AJD MFR Enclosure 10, pages 10-14)

Corps response: It is not necessary to determine if the WFMA is a water of the U.S. instead, the relevant analysis is whether or not this feature provides a tributary flow path to the Great Salt Lake. The WFMA impounds Ditch 1/WBR toe ditch other ARs, that are tributary to the GSL. Further, the memo discusses the location at which WBR was constructed as "formerly a large mudflat covered by a shallow depth of fresh water during the fall and winter months only…[P]art of the reservoir area was intermittently covered by the waters of the Willard Bay." This is validated by the 1955 topo map and 1953 aerial image. The location description is a textbook definition of a playa, which is a jurisdictional AR, if it is tributary to a TNW. Based on analysis of historic aerial photos and USGS topographic maps, the former playa was tributary to the GSL. The WFMA is located immediately adjacent to the WBR's southwest boundary and was constructed in the same ARs as the WBR which are tributary to the GSL, therefore, the construction of the WFMA dikes would constitute an impoundment of a jurisdictional AR. The WFMA is located further west, and closer to, Bear River Bay, which is the northeast arm of the GSL. The memo further states the WFMA was constructed on "1,800 acres of State sovereign land". Within the GSL, Utah sovereign lands are defined as those waters that were navigable at the time of statehood. 1953, 1964, 1993 and 2023 aerial photos show the pre and post-construction footprint of the WFMA. 1993 and 2023 aerials show the WFMA completely surrounded by streams, wetlands and open water. SPK believes this is proof the WFMA was constructed in, and is an impoundment of, historic jurisdictional ARs that are tributary to the GSL. Furthermore, as stated above, the Ditch 1/WBR toe ditch, Cold Spring Creek, Dix Creek, First Salt Creek and Second Salt Creek, all of which are (a)(5) tributaries to the GSL, are also impounded by the WFMA. Although the WFMA impounds these flows and wetlands, it does discharge into Willard Bay and continues flows downstream to the GSL. As such, the WFMA is also tributary to a TNW. Furthermore, WFMA need not be jurisdictional itself, it must only provide a flow path for the tributary connection to GSL, which it does.

As clarification, the WFMA or any other offsite ARs identified in MFR are not subject to this AJD but are noted simply to support the AJD for the ARs within the Swain property.

m. Memo states "**the Harold S. Crane WFMA impounds only freshwater derived from these multiple surface and groundwater sources**, rendering the impoundment waters as physically separate from and as bearing characteristics different than the Great Salt Lake" and that "WFMA impoundments are not an "impoundment[] with a continuous surface connection to…[a] relatively permanent, standing or continuously flowing tributar[y] connected to traditional navigable waters, the territorial seas, or interstate waters, or to traditional navigable waters..." (see AJD MFR Enclosure 10, pages 10-14).

Corps response: SPK disagrees with this assertion. The memo itself argues that the WFMA does in fact act to impound surface waters. If not impounded, these surface waters would freely flow to the GSL. The January 31, 2025, Email Ex 10, pdf page 52 states "The [toe ditch] located beyond the reclaimable lands would be only deep enough to convey the drainage water into Great Salt Lake or, where possible, into bird refuges adjacent to the lake". As such, the WFMA impoundments (a)(5) waters, being Ditch 1/WBR Toe Ditch, its RPW tributaries and historic wetlands and playas that existed in the pre-construction footprint of the WFMA. In absence of the WFMA dikes, these ARs would freely flow to the GSL. Water is released from the WFMA into Willard Bay, which it tributary to Bear River Bay. Bear River Bay is an "arm" of the GSL since Bear River Bay lies below 4200 feet MSL, the nearest TNW. As such, the WFMA is also an (a)(5) tributary to the GSL. The WFMA need not itself be jurisdictional, and since it is not in our review area, we do not reach that conclusion here. The WFMA merely needs to provide a flow path for the tributary connection to GSL, which it does.

n. Lastly the memo claims that the GSL is not a TNW (see AJD MFR Enclosure 10, pages 14-18).

Corps response: The GSL was found to be navigable in federal court. USACE has considered the GSL to be a navigable-in-fact water for purposes of Section 404 of the Clean Water Act since the inception of said Act. Navigability of the GSL has been addressed in several court decisions. In *Utah v. United States*, 403 U.S. 9 (1971), the Supreme Court determined that GSL was navigable for purposes of determining whether the United States or the State of Utah owned the bed and banks of the GSL. The Supreme Court stated that if the GSL was navigable at the time

Utah achieved statehood in 1896, then ownership of the bed and banks would vest with the State. The Court found that the GSL was navigable at the time of statehood, based on the use of the lake to haul livestock and salt, and therefore denied the United States' claim of ownership. In reaching this decision, the Supreme Court stated that the GSL, an intrastate water body, was navigable for purposes of determining ownership even though it is not part of a navigable interstate or international commerce highway used to transport "water-borne freight." The Supreme Court held that the historic hauling of animals by ranchers constituted "use as a highway and that was the gist of the federal test." Navigability of the GSL under the Rivers and Harbors Act of 1899 (RHA)(33 U.S.C §401 et seq.) was not at issue in *Utah v. United States* and was not addressed at all by the Supreme Court's decision.

Although GSL is not a navigable water under the RHA, it is a "navigable-in-fact water" for purposes of the Clean Water Act of 1972 (CWA) (33 U.S.C. §1251, et seq.). [13] The CWA defines "navigable water" as "the waters of the United States, including the territorial seas". The CWA implementing regulations, under the pre-2015 regulatory regime implemented consistent with *Sackett*, which is currently operative in Utah, further define "waters of the United States" in 33 C.F.R. §328.3(a)(1)-(8) and 40 C.F.R. §230.3(s)(1)-(8). Specifically, 33 C.F.R. §328.3(a)(1) and 40 C.F.R. §230.3(s)(1) encompass those waters that are commonly referred to as "traditional navigable waters." For purposes of the CWA, waters are considered "traditional navigable waters" and therefore jurisdictional under 33 C.F.R. §328.3(a)(1) and 40 C.F.R. §230.3(s)(1), if they meet one of the following criteria:[14]

• Are subject to section 9 or 10 of the Rivers and Harbors Appropriations Act of 1899;
• Have been determined by a Federal court to be navigable-in-fact under Federal law;

[13] *Hardy Salt Co. v. Southern Pacific Transportation Co.*, 501 F.2d 1156, 1169 (10th Cir. 1974), cert. denied, 419 U.S. 1033, 42 L. Ed. 2d 308, 95 S. Ct. 515 (1974) (holding that the Great Salt Lake is not a navigable water of the United States within the meaning of Sections 9, 10 and 13 of the Rivers and Harbors Act of 1899.) *Hardy Salt Co.* only addressed navigability under the Rivers and Harbors Act of 1899 and did not address navigability of the Great Salt Lake for any other purposes. As noted by the court in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754 (9th Cir 1978), "[i]t is clear from the legislative history of the [Federal Water Pollution Control Act of 1972] that for the purposes of that Act, Congress intended to expand the narrow definition of the term 'navigable waters', as used in the Rivers and Harbors Act."

[14] *Rapanos* Guidance at page 5.

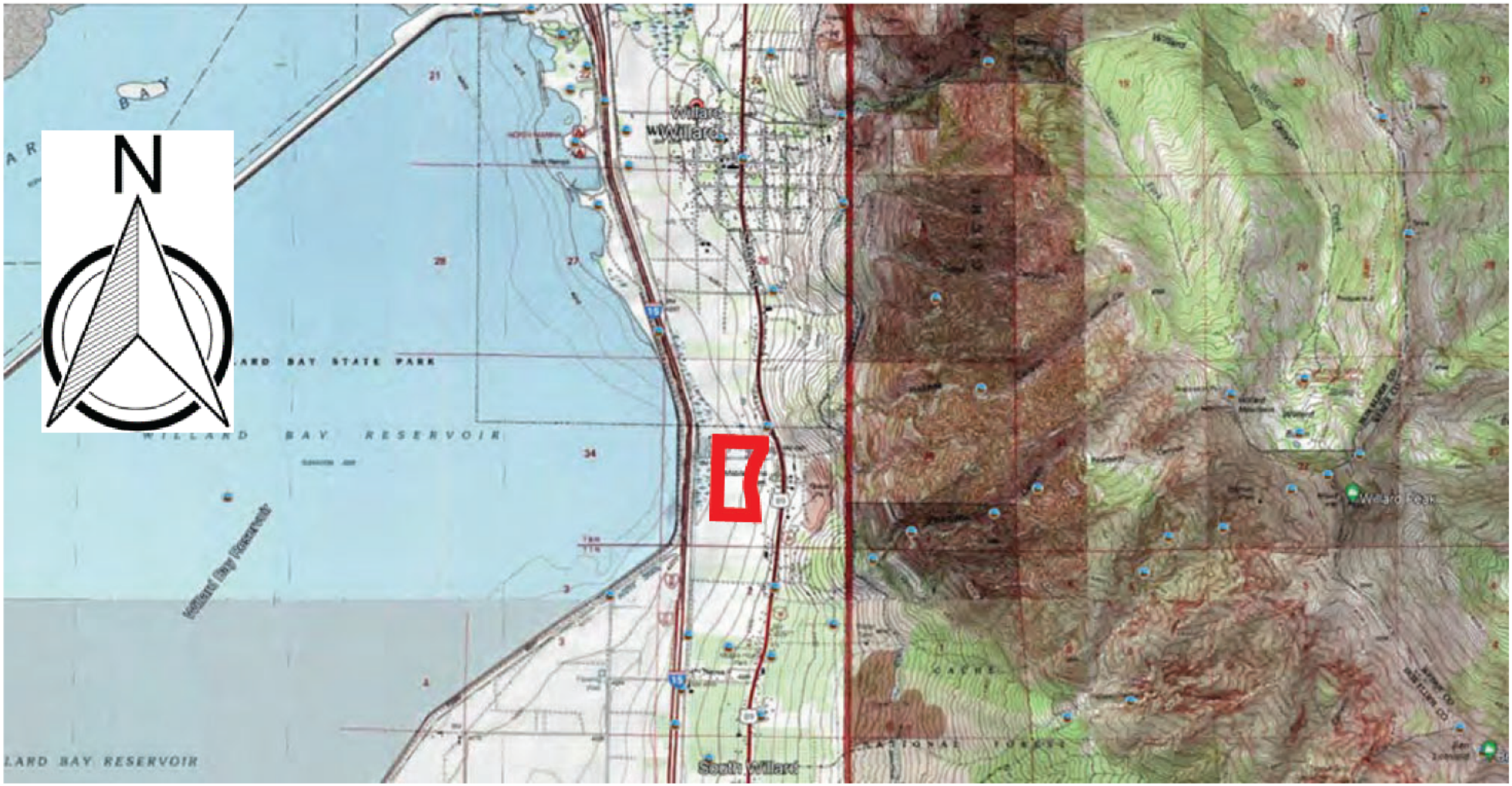
• Are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);
• Have historically been used for commercial navigation, including commercial waterborne recreation; or
• Are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.

The GSL meets the second criteria, above, having been found navigable-in-fact under Federal law in *Utah v. United States*, 403 U.S. 9 (1971) as discussed above. Thus, the GSL is a "traditional navigable water" and is regulated by the Corps under Section 404 of the CWA.

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.

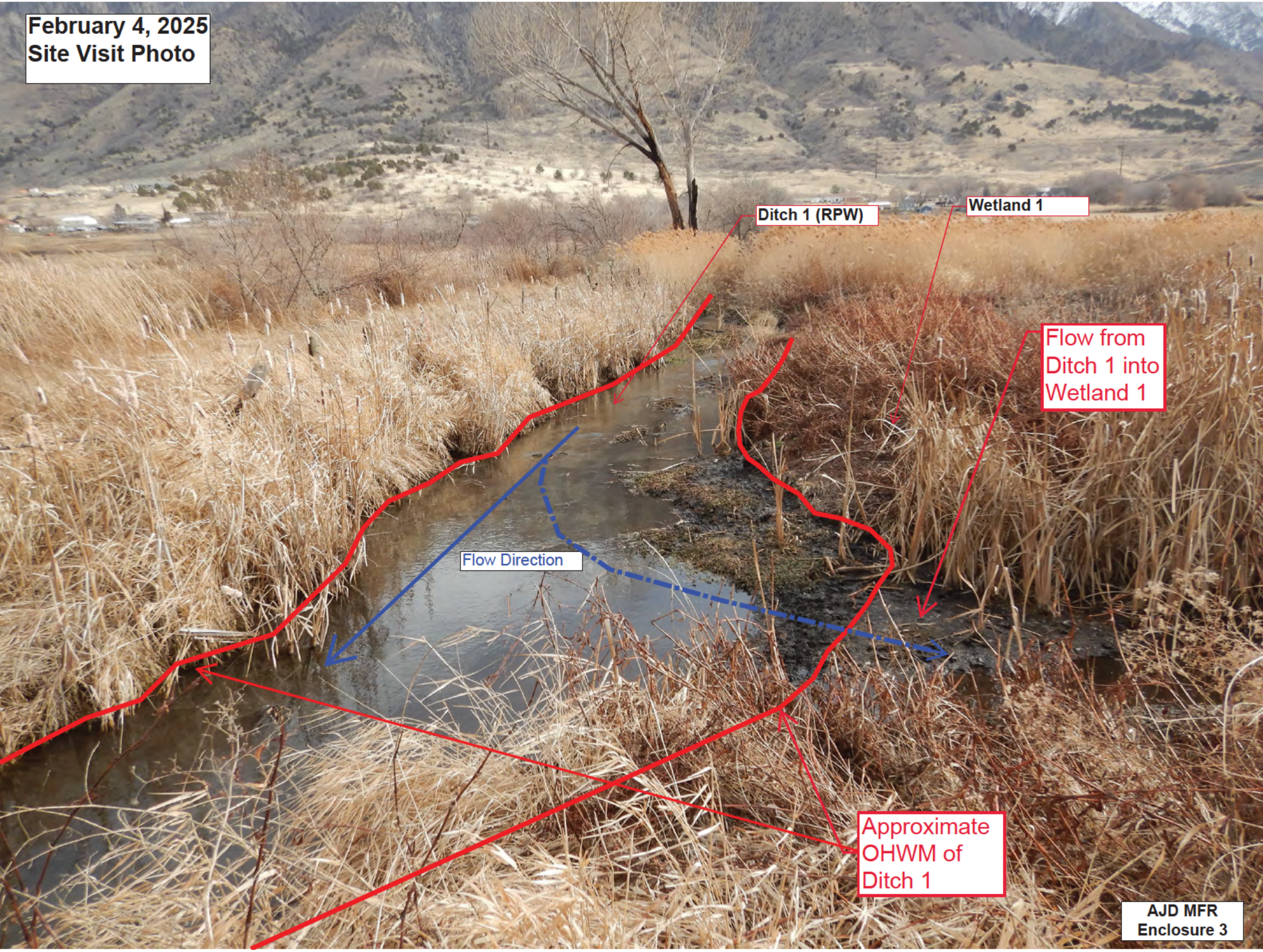
[redacted]

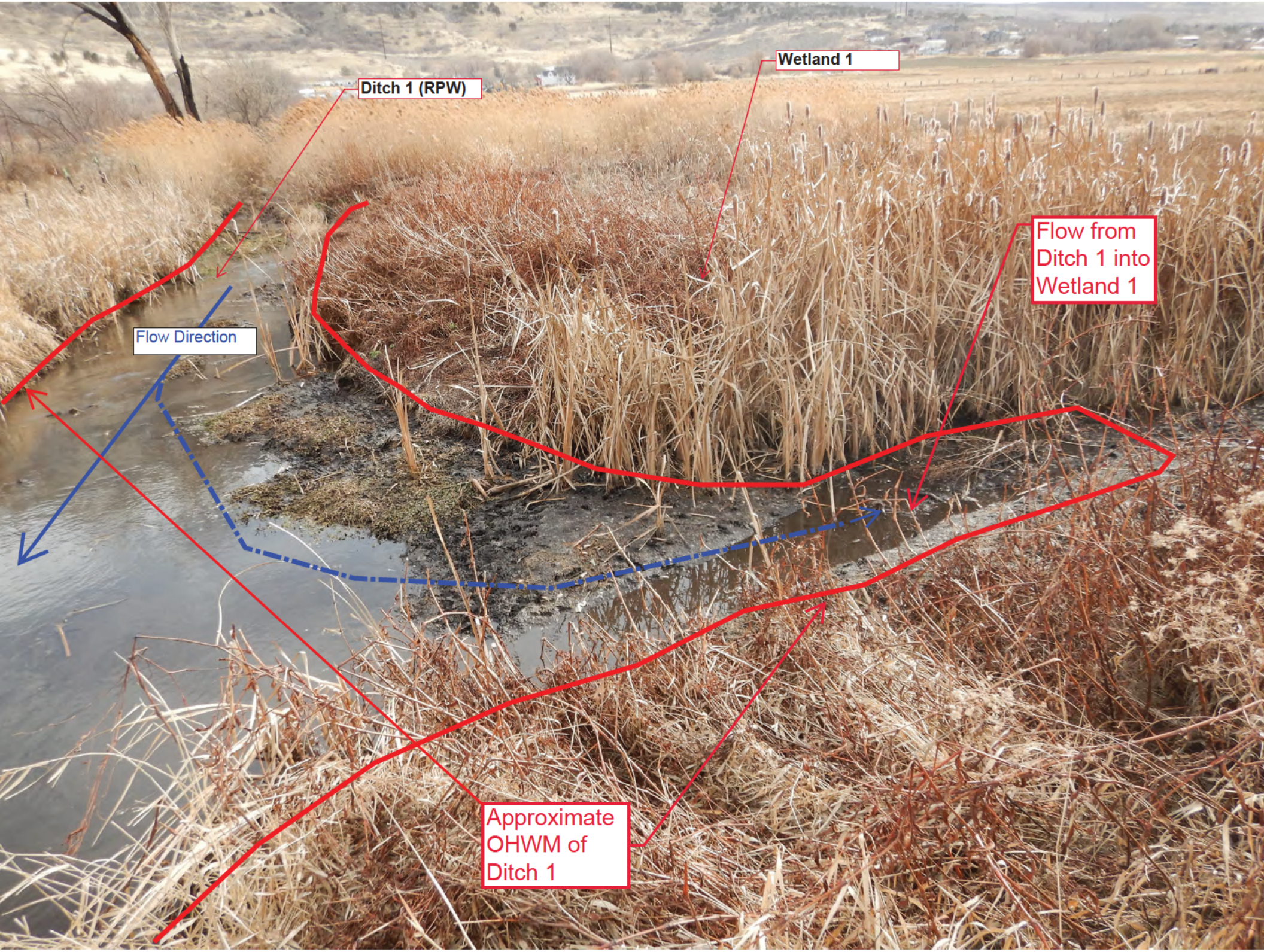
11 Encls
Encl 1- Vicinity Map
Encl 2- AR Delineation Map
Encl 3- 04FEB25 Site Visit Photo (Wetland 1 abutting Ditch 1)
Encl 4- Flow Path
Encl 5- 1953 USGS Aerial Photo
Encl 6- 1955 USGS Willard 24K Topo Quad Map
Encl 7- 1998 Willard USGS 24K Topo Quad Map
Encl 8- 07FEB25 Email-Post-Site Visit Swain Response
Encl 9- Feb 2021 Aquatic Resource Delineation Report, Lew Swain Property
Encl 10- 31JAN25 Kogan Cover Letter/Memo of Law
Encl 11- February 4, 2025 Site Visit Photo Log

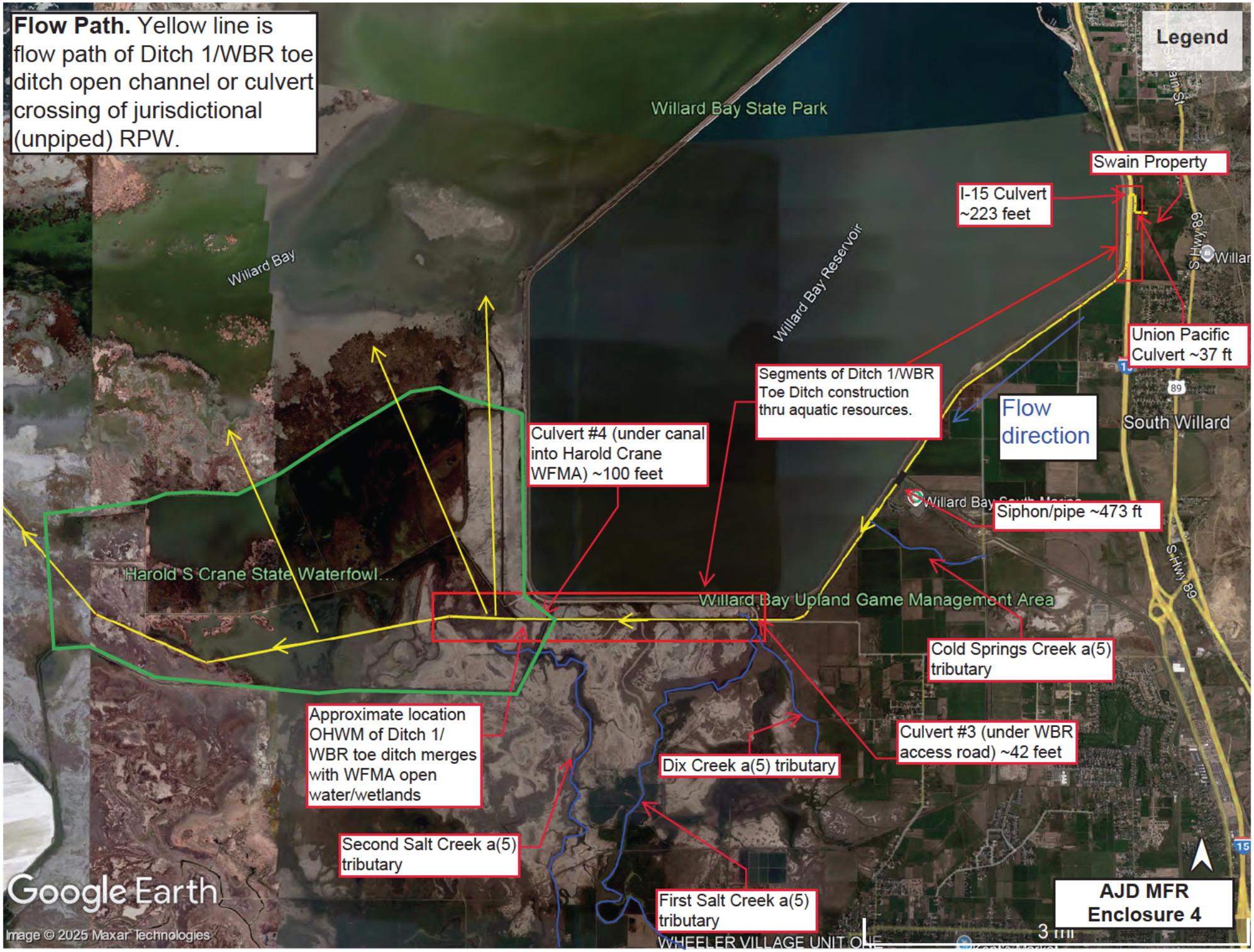



**AJD MFR**
**Enclosure 1**

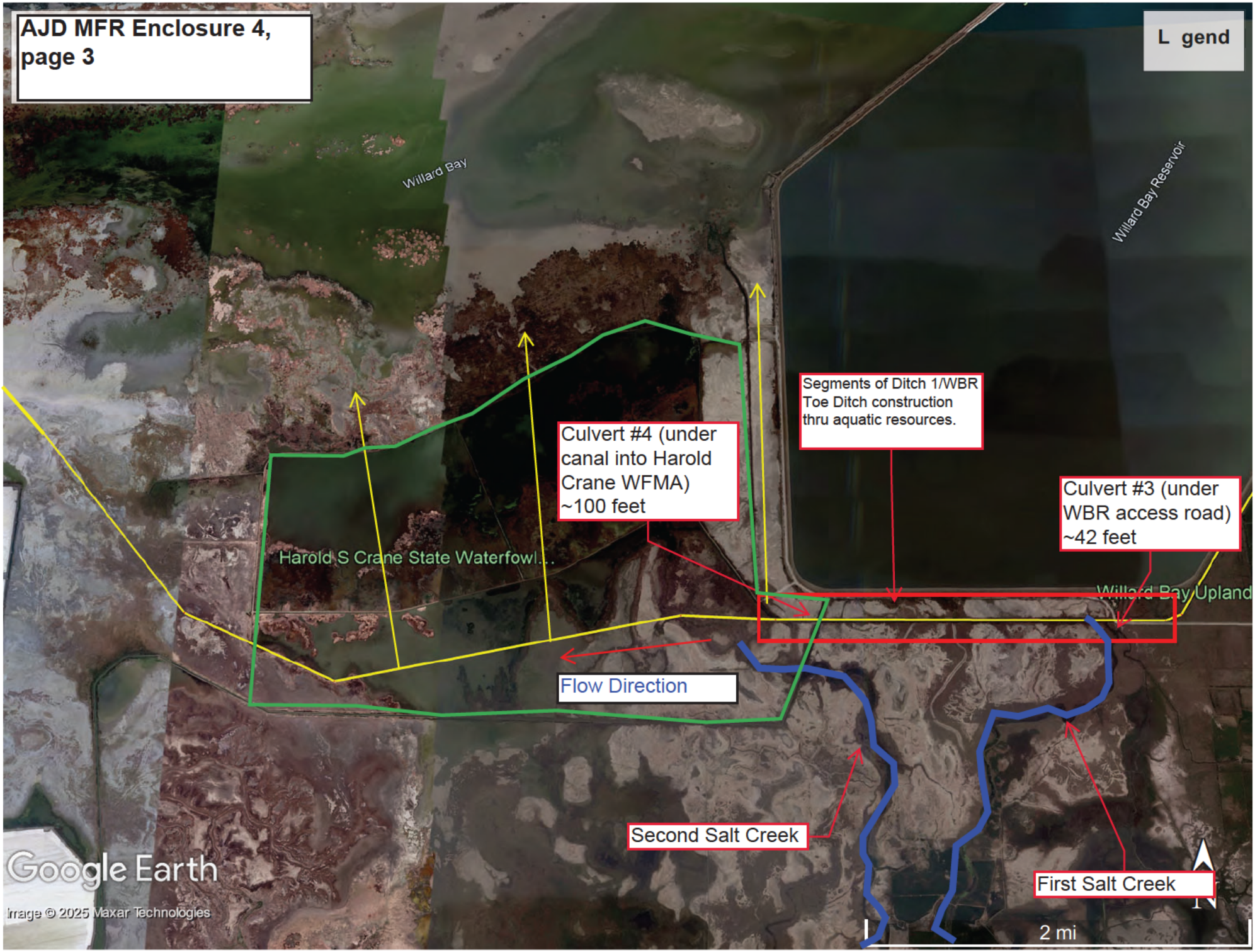
**AJD MFR Enclosure 2**

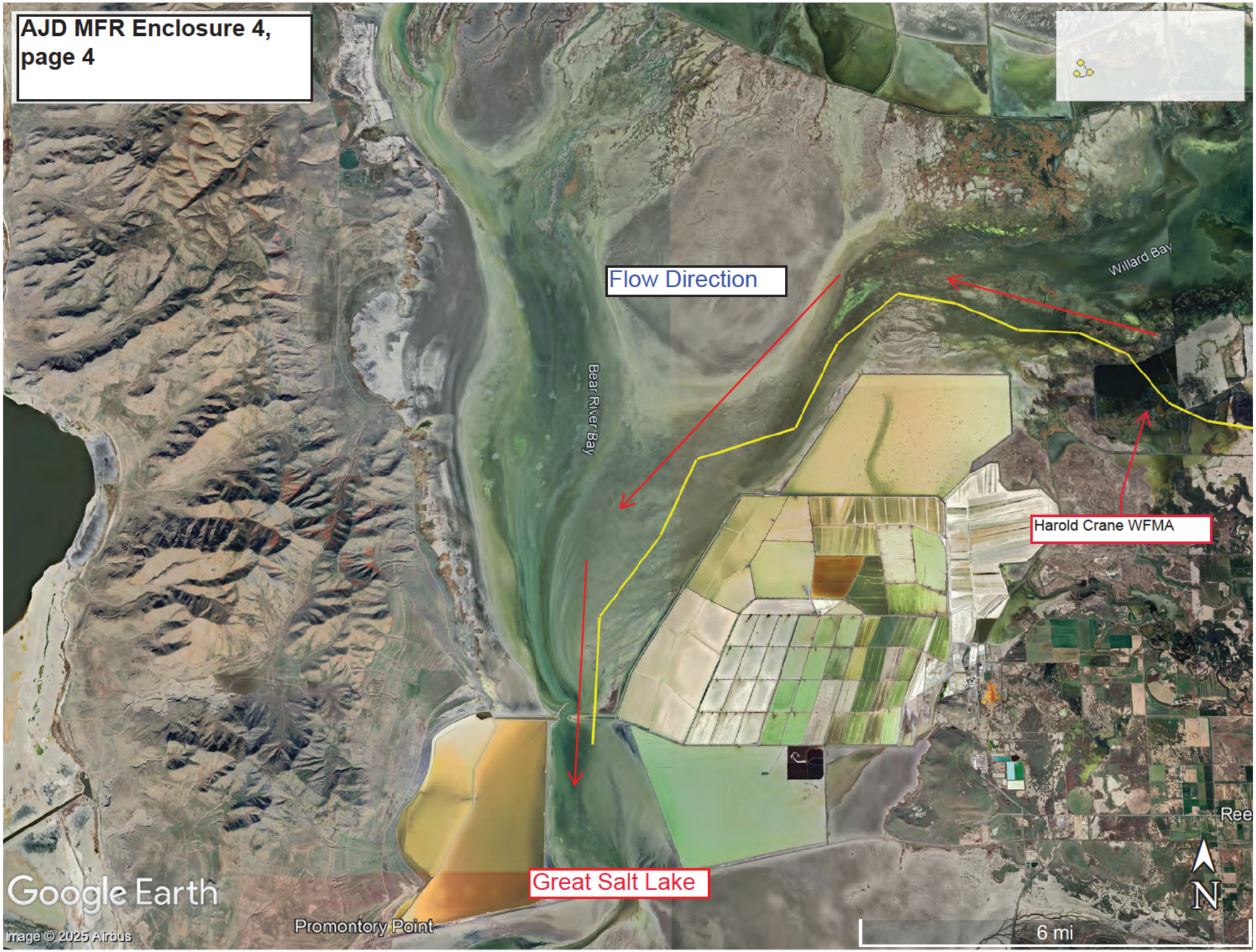

February 4, 2025
Site Visit Photo
Ditch 1 (RPW)
Wetland 1
Flow from Ditch 1 into Wetland 1
Flow Direction
Approximate OHWM of Ditch 1
AJD MFR Enclosure 3

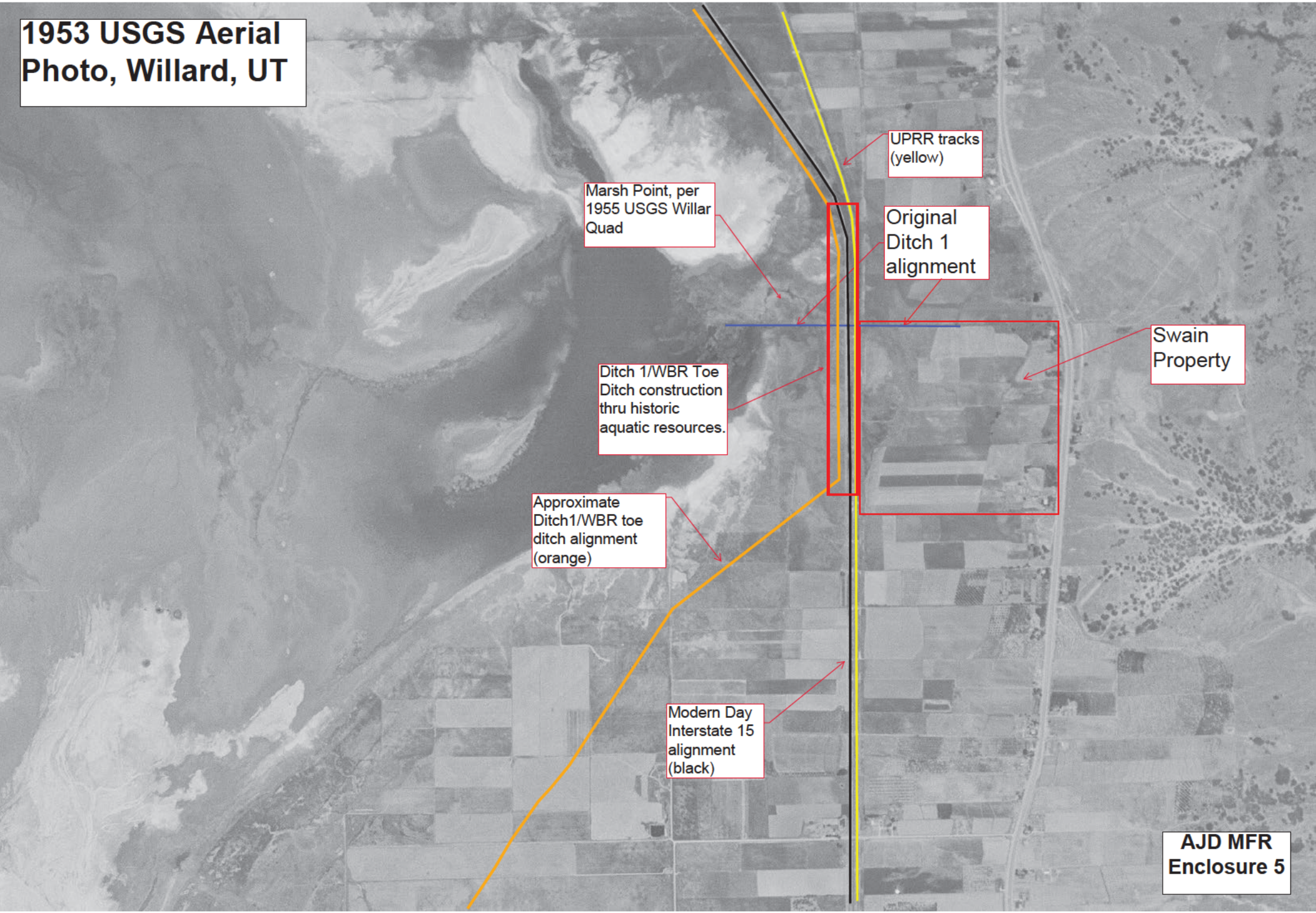

Wetland 1
Ditch 1 (RPW)
Flow from Ditch 1 into Wetland 1
Flow Direction
Approximate OHWM of Ditch 1

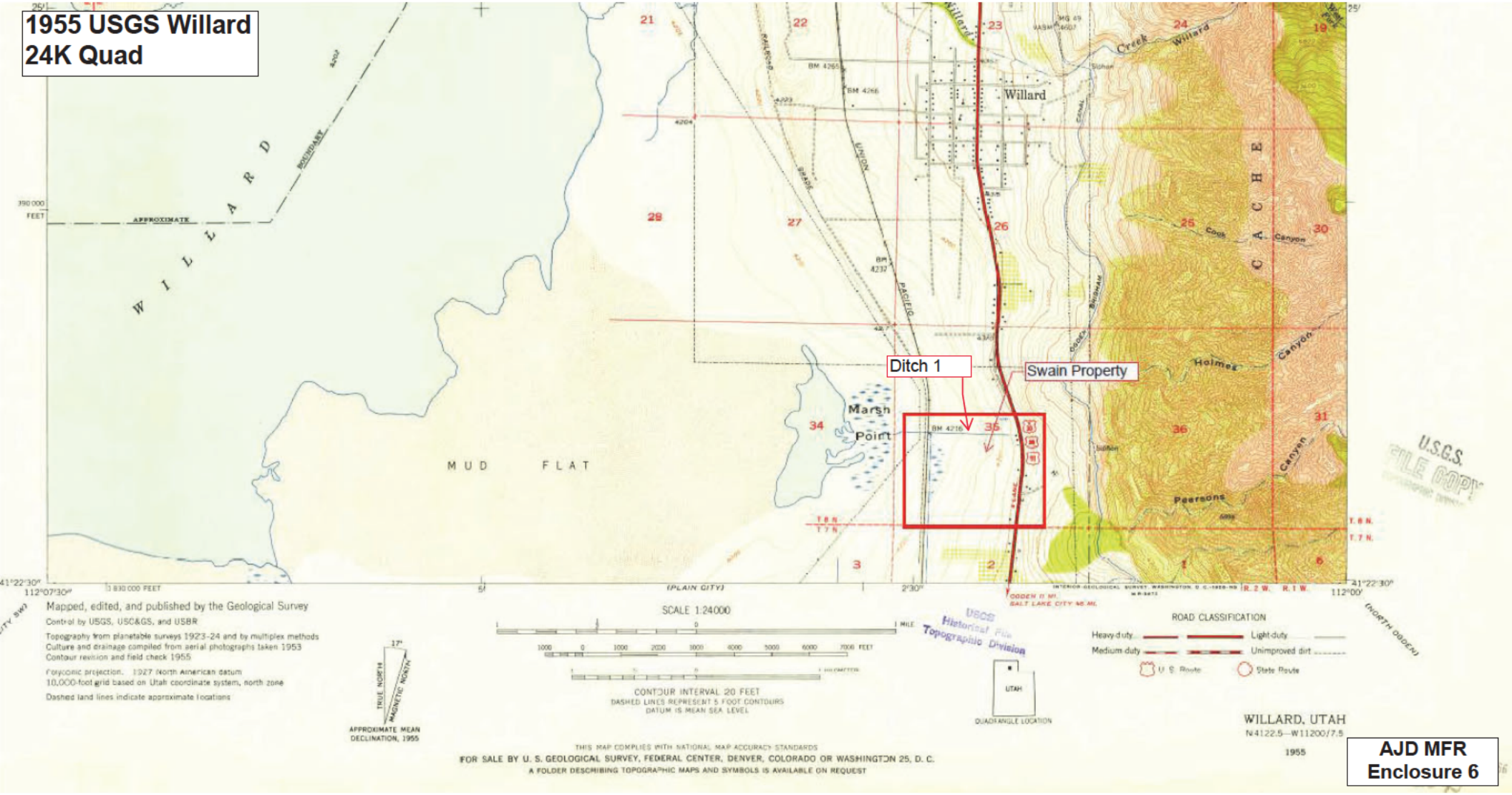

**Flow Path.** Yellow line is flow path of Ditch 1/WBR toe ditch open channel or culvert crossing of jurisdictional (unpiped) RPW.
Legend
Willard Bay State Park
Willard Bay
Willard Bay Reservoir
Swain Property
I-15 Culvert ~223 feet
Union Pacific Culvert ~37 ft
Segments of Ditch 1/WBR Toe Ditch construction thru aquatic resources.
Flow direction
South Willard
Culvert #4 (under canal into Harold Crane WFMA) ~100 feet
Willard Bay South Marina
Siphon/pipe ~473 ft
Harold S Crane State Waterfowl...
Willard Bay Upland Game Management Area
Cold Springs Creek a(5) tributary
Approximate location OHWM of Ditch 1/ WBR toe ditch merges with WFMA open water/wetlands
Culvert #3 (under WBR access road) ~42 feet
Dix Creek a(5) tributary
Second Salt Creek a(5) tributary
First Salt Creek a(5) tributary
WHEELER VILLAGE UNIT ONE
Google Earth
Image © 2025 Maxar Technologies
AJD MFR Enclosure 4

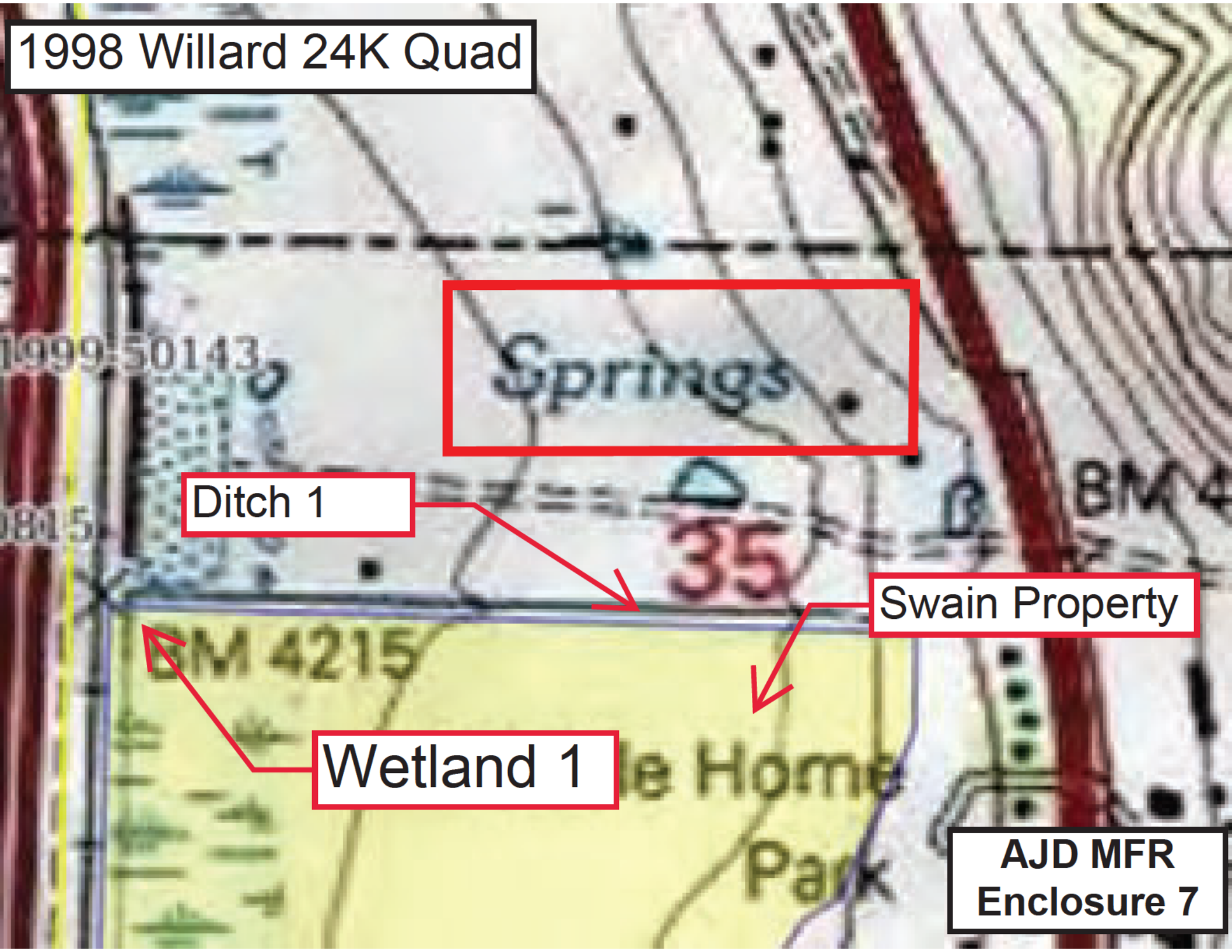

AJD MFR Enclosure 4, page 2
Legend
I-15 Culvert ~223 feet
Union Pacific Culvert ~37 ft
Ditch 1
Flow Direction
Segment of Ditch 1/ WBR Toe Ditch construction thru historic aquatic resources.
Veterans Memorial Hwy
Swain Property
N
2000 ft
Google Earth


AJD MFR Enclosure 4, page 3
L gend
Willard Bay
Willard Bay Reservoir
Segments of Ditch 1/WBR Toe Ditch construction thru aquatic resources.
Culvert #4 (under canal into Harold Crane WFMA) ~100 feet
Culvert #3 (under WBR access road) ~42 feet
Harold S Crane State Waterfowl...
Willard Bay Upland
Flow Direction
Second Salt Creek
First Salt Creek
Google Earth
Image © 2025 Maxar Technologies
2 mi


AJD MFR Enclosure 4, page 4
Flow Direction
Willard Bay
Bear River Bay
Harold Crane WFMA
Great Salt Lake
Promontory Point
Google Earth
Image © 2025 Airbus
6 mi
N


1953 USGS Aerial Photo, Willard, UT
UPRR tracks (yellow)
Marsh Point, per 1955 USGS Willar Quad
Original Ditch 1 alignment
Swain Property
Ditch 1/WBR Toe Ditch construction thru historic aquatic resources.
Approximate Ditch1/WBR toe ditch alignment (orange)
Modern Day Interstate 15 alignment (black)
AJD MFR Enclosure 5


1955 USGS Willard
24K Quad
Ditch 1
Swain Property
Willard
Marsh
Point
MUD FLAT
WILLARD
BOUNDARY
APPROXIMATE
CACHE
Holmes
Canyon
Peersons
Creek
Willard
Cook
Canyon
Mapped, edited, and published by the Geological Survey
Control by USGS, USC&GS, and USBR
Topography from planetable surveys 1923-24 and by multiplex methods
Culture and drainage compiled from aerial photographs taken 1953
Contour revision and field check 1955
Polyconic projection. 1927 North American datum
10,000-foot grid based on Utah coordinate system, north zone
Dashed land lines indicate approximate locations
SCALE 1:24000
CONTOUR INTERVAL 20 FEET
DASHED LINES REPRESENT 5 FOOT CONTOURS
DATUM IS MEAN SEA LEVEL
ROAD CLASSIFICATION
Heavy duty
Medium duty
Light duty
Unimproved dirt
U. S. Route
State Route
APPROXIMATE MEAN DECLINATION, 1955
TRUE NORTH
MAGNETIC NORTH
UTAH
QUADRANGLE LOCATION
WILLARD, UTAH
N4122.5—W11200/7.5
1955
THIS MAP COMPLIES WITH NATIONAL MAP ACCURACY STANDARDS
FOR SALE BY U. S. GEOLOGICAL SURVEY, FEDERAL CENTER, DENVER, COLORADO OR WASHINGTON 25, D. C.
A FOLDER DESCRIBING TOPOGRAPHIC MAPS AND SYMBOLS IS AVAILABLE ON REQUEST
USGS Historical File Topographic Division
U.S.G.S. FILE COPY
AJD MFR
Enclosure 6


1998 Willard 24K Quad
Springs
Ditch 1
Swain Property
Wetland 1
35
BM 4215
AJD MFR
Enclosure 7

**From:** [redacted]
[redacted]
**Subject:** [Non-DoD Source] Willard Land LLC
**Date:** Friday, February 7, 2025 9:22:17 AM

---

[redacted] there are two water sources that provide the water that you observed flowing in the North ditch. The water originates from the Pettingill Spring that is just North of our property and a source close to our North East property corner that flows into a ditch that runs North into the Westerly flowing ditch you observed. The water rights from these two sources are diverted and used to irrigate our farm through a series of surface ditches.
[redacted]

**AJD MFR Enclosure 8**

# AQUATIC RESOURCES DELINEATION REPORT

[redacted]

*Prepared for:*

[redacted]

*Prepared by:*

[redacted]

**AJD MFR Enclosure 9**

# TABLE OF CONTENTS

## ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| Corps: | United States Army Corps of Engineers |
| KE: | [redacted] |
| Manual: | 1987 Corps of Engineers Wetlands Delineation Manual |
| MU: | Soil Map Unit |
| NWI: | National Wetlands Inventory |
| P.W.S.: | Professional Wetland Scientist |
| Supplement: | Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region, Version 2.0, September 2008. United |
| USGS: | States Geological Survey |

## EXECUTIVE SUMMARY

This report describes vegetative, edaphic, and hydrologic parameters pursuant to current federal wetlands regulations associated with an approximate 118-acre study area, referred to as the [redacted] Property, and is located in Willard, Utah). The focus of this report is the identification and delineation of waters of the U.S., including wetlands that are located within the study area.

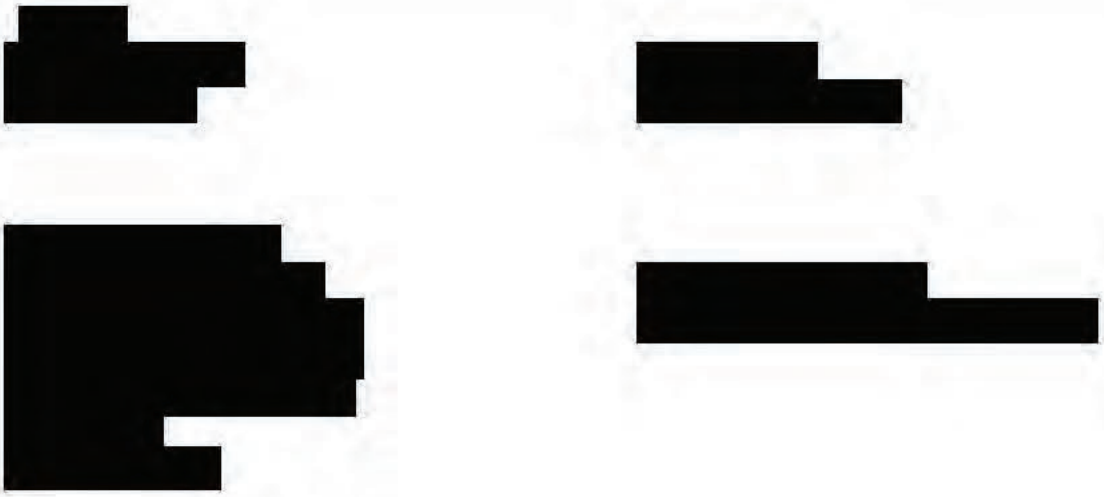
The purpose of this aquatic resources study is to provide the U.S. Army Corps of Engineers with sufficient detailed information necessary for issuing an Approved Jurisdictional Determination (AJD) to the [redacted]. If potential future activities might necessitate unavoidable impacts to regulated areas, an approved wetland jurisdictional determination will provide the landowner the necessary information to apply for a future Section 404 permit(s) where impacts to regulated areas cannot be reasonably or practicably avoided.

The [redacted] contracted with [redacted] to conduct an environmental analysis involving the identification and delineation of waters of the U.S., including wetlands , which may be located within the study area. The following wetland delineation report, including the survey found herein, has been completed for submission to the U.S. Army Corps of Engineers for review and approval. The following paragraphs describe KE's methods, findings, and conclusions.

KE performed the wetland delineation in accordance with the 1987 "Corps of Engineers Wetland Delineation Manual" and in accordance with the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0). The field visits were conducted on November 4-5 and November 30-December 1, 2021. Fifty-five (55) soil sample pits or borings were excavated, and vegetative, edaphic, and hydrologic data collected. Based upon the available data, 3.19 acres of wetlands were identified.

This report contains KE's findings and conclusions. KE is respectfully requesting that the findings presented in this report be reviewed, verified, and provided with an approved wetland jurisdictional determination, so that any future activities may avoid unnecessary impacts to regulated areas to the greatest extent practicable.

## INTRODUCTION AND PURPOSE



The wetland survey for this report was requested by [redacted], and he was KE's main point-of-contact during the study. The project is referred to as the [redacted] Property in this report. The purpose of the study is to provide [redacted] with reliable information regarding the location and size of regulated waters of the U.S., including wetlands, so that such areas may be avoided where practicable, and for Section 404 permitting to be pursued where impacts to regulated areas would be unavoidable. KE was asked to identify and delineate regulated waters throughout the study area.

This comprehensive report contains KE's methods, findings, and conclusions pertaining to the limits of regulated waters and wetlands within the Swain Property, 118-acre study area.

## LOCATION

The [redacted] Property is located in [redacted], at approximately 4,350 feet above sea level, and it lies within [redacted]° in decimal degrees. (See Figure 1).

## METHODS

The methodology used for identifying and delineating wetlands on the subject site was the three parameter [factor] approach promulgated and approved by the U.S. Army Corps of Engineers and described in the official *1987 Corps of Engineers Wetlands Delineation Manual* (*Manual*),

including the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual:* Arid West Region (*Supplement*). To meet the Corps' definition of a wetland, under normal circumstances all three of the following factors: wetland vegetation, hydric (wetland) soils, and wetland hydrology must be satisfied (re: *Manual* & *Supplement*).

KE collected field data from fifty-five (55) soil sampling sites. Soil sampling sites were soil pits excavated with a small excavator. Soil sampling test pits/borings ranged from a minimum of 16-inches deep to a maximum of 41-inches deep. The average depth for all soil sample sites was 30-inches. Using the data collected from the study area, KE determined that ten (10) of the sampling points met the criteria of a wetland. KE uses the customary practice of setting wetland/upland boundary lines by moving up-slope from identified wetland through the transition zone toward previously identified upland areas, based upon breaks in site topography, vegetation changes and field analysis of soil sample pit data. When present, wetland/upland boundaries are marked by using pink surveyor pin flags and the boundary lines are surveyed. Delineated wetlands and regulated waters are calculated an tabulated in square feet, acreage, or both.

## STUDY CONDITIONS

The [redacted] Property study area consists of an approximately 118-acre parcel that has historically been heavily irrigated and grazed by livestock. The National Wetland Inventory (NWI) shows approximately 22 acres of the property as being potential palustrine emergent (PEM1C) wetlands (see Figure 2). The entire study area is mostly flat landform. (Figure 3).

Antecedent precipitation showed normal conditions were present at the time of KE's field visit (Figure 4).

## VEGETATION

To assure the accuracy of plant identification, KE's botanist, [redacted] described the vegetation for this environmental study. A comprehensive list of the plants positively identified to species found at the sampling sites is shown in Table 1.

## SOILS

According to the Web Soil Survey, there are six soil series mapped as underlying the delineation study area (Figure 5 and Table 2). The largest is approximately 59.04 acres, Map Unit (MU) 481341: Dagor Loam, 3 to 6 percent slopes. This is well-drained and generally considered a non-hydric soil type. The second largest soil series is Woods Cross silty clay loam, 0 to 3 percent slopes, MU 481525. This is a poorly drained, hydric soil and makes up 25.32 acres. Next is Logan silty clay loam, 0 to 3 percent slopes, MU 481413, which made up 14.02 acres, which is a poorly drained, hydric soil. Roshe Springs silt loam, 0 to 3 percent slopes, MU 481467, and made

up 7.3 acres. This is a poorly drained, hydric soil. Wasatch gravelly sandy loam, 3 to 10 percent slopes, MU 481515, made up 3.06 acres. This is a somewhat excessively drained, non-hydric soil. Collett silty clay loam, 0 to 2 percent slopes, MU 481337, was the smallest at 0.002 acres. This is a somewhat poorly drained, non-hydric soil.

## HYDROLOGY/WATER RESOURCES

As mentioned above, antecedent precipitation conditions were normal at the time of KE's field visit (Figure 4). The current sources of hydrology are from precipitation and decades of irrigation water. The mapped NWI) wetland area in the northwest portion of the property appears to be a collection basin from crop irrigation runoff.

## CONCLUSION

The [redacted] would like to prepare and proceed with development of the subject site, and the purpose of this aquatic resources study is to provide the landowner with an approved jurisdictional determination identifying the limits of federally protected waters of the U.S., including wetlands.

KE collected field data at fifty-five (55) separate sampling sites on November 4, 5, 30 and December 1, 2021. The overall area of KE's wetland delineation study totaled approximately 118 acres. Within this study site, the National Wetland Inventory mappd approximately 22 acres (958,320 sf) of Palustrine Emergent (PEM1C) wetlands. Using the data collected from the study area, KE determined that ten (10) of the sampling points met the criteria of a wetland. The delineation identified a total of 3.19 acres (138,956 sf) classified as wetland (see Wetland Delineation Map at end of report).

KE performed the delineation employing the 1987 "Corps of Engineers Wetland Delineation Manual" and in accordance with the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0). This report contains KE's findings and conclusions. The aquatic resources study identified waters and/or wetlands pursuant to current Clean Water Act Section 404 methodology. KE is requesting that the findings presented in this report be verified, and an Aquatic Resources Verification and approved Jurisdictional Determination for the subject study area be provided by the Corps of Engineers as soon as practicable. Should the reviewer of this comprehensive report have any questions, comments, or need for additional information, please feel welcome to contact KE at your earliest convenience.

Respectfully submitted,

[redacted]

## REFERENCES

Environmental Laboratory. 1987. *Corps of Engineers wetlands delineation manual.* Technical Report Y-87-1. Vicksburg, MS: U.S. Army Engineer Waterways Experiment Station.

Soil Survey Staff, Natural Resources Conservation Service, United States Department of Agriculture. *Official Soil Series Descriptions.*

U. S. Army Corps of Engineers. 2008. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region(Version 2.0),* ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-10-3. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

United States Department of Agriculture, Natural Resources Conservation Service. 2018. *Field Indicators of Hydric Soils in the United States, Version 8.2.* L.M. Vasilas, G.W. Hurt, and J.F. Berkowitz (eds.). USDA, NRCS, in cooperation with the National Technical Committee for Hydric Soils.

## TABLES

**TABLE 1: VEGETATIVE SPECIES FOUND AT SAMPLE POINTS ON [redacted] PROPERTY, WILLARD, UTAH.**

| Taxa | Indicator | Common Name |
|---|---|---|
| **Herb Stratum** | | |
| *Agrostis stolonifera* | FACW | Spreading Bent |
| *Bromus tectorums* | NI/UPL | Cheatgrass |
| *Carex nebrascenis* | OBL | Nebraska Sedge |
| *Carex pellita* | OBL | Wooly Sedge |
| *Carex praegracilis* | FACW | Clustered Field Sedge |
| *Chorispora tenella* | NI/UPL | Crossflower |
| *Cirsium vulgare* | FACU | Bull Thistle |
| *Conium maculatum* | FACW | Poison Hemlock |
| *Cyrtorhyncha cymbalaria* | OBL | Alkali Buttercup |
| *Descurainia sophia* | NI/UPL | Herb Sophia |
| *Dispacus fullonum* | FAC | Wild Teasel |
| *Elaeagnus angustifolia* | FAC | Russian Olive |
| *Elymus elongatus* | NI/UPL | Tall Wheatgrass |
| *Elymus repens* | FAC | Creeping Wild Rye (Quackgrass) |
| *Juncus balticus* | FACW | Baltic Rush |
| *Lactuca serriola* | FACU | Prickly Lettuce |
| *Lepidium draba* | NI/UPL | Whitetop Cress |
| *Lotus corniculatus* | FAC | Bird's-foot Trefoil |
| *Malva neglecta* | NI/UPL | Mallow |
| *Medicago sativa* | UPL | Alfalfa |
| *Melilotus officinalis* | FACU | Sweetclover |
| *Onopordum acanthium* | NI/UPL | Scotch Thistle |
| *Persicaria lapathifolia* | FACW | Curlytop Knotweed |
| *Phalaris arundinacea* | FACW | Reed Canarygrass |
| *Phleum pratense* | FACU | Timothy |
| *Poa bulbosa* | FACU | Bulbous Bluegrass |
| *Poa pratensis* | FAC | Kentucky Bluegrass |
| *Polygonum aviculare* | FAC | Prostrate Knotweed |

**TABLE 1: VEGETATIVE SPECIES FOUND AT SAMPLE POINTS ON [redacted] PROPERTY, WILLARD, UTAH (CONTINUED).**

| Taxa | Indicator | Common Name |
|---|---|---|
| **Herb Stratum** | | |
| *Rorippa palustris* | OBL | Bog Yellowcress |
| *Schedonorus arundinaceus* | FACU | Tall Fescue |
| *Schoenoplectus acutus* | OBL | Bullrush |
| *Schoenoplectus pungens* | OBL | Three-square Bullrush |
| *Sonchus arvensis* | FACU | Perennial Sow Thistle |
| *Taraxacum officinale* | FACU | Dandelion |
| *Trifolium repens* | FACU | White Clover |
| *Typha latifolia* | OBL | Broadleaf Cattail |
| *Veronica anagallis-aquatica* | OBL | Water Speedwell |
| *Xanthium strumarium* | FAC | Rough Cocklebur |

*NI = Not Indicated and thus upland.

**TABLE 2: MAPPED SOILS OF [redacted] PROPERTY, WILLARD, UTAH.**

| Map Unit | Map Unit Symbol | Approx. Area Mapped (acres | Drainage | Hydric |
|---|---|---|---|---|
| Dagor loam | 481341 | 59.04 | Well drained | No |
| Woods Cross | 481525 | 25.32 | Poorly drained | Yes |
| Logan Silt | 481413 | 14.02 | Poorly drained | Yes |
| Roshe Springs | 481467 | 7.3 | Poorly drained | Yes |
| Wasatch Gravelly | 481515 | 3.06 | Somewhat excessively drained | No |
| Collett Silty | 481337 | .002 | Somewhat poorly drained | No |

## FIGURES

[redacted]

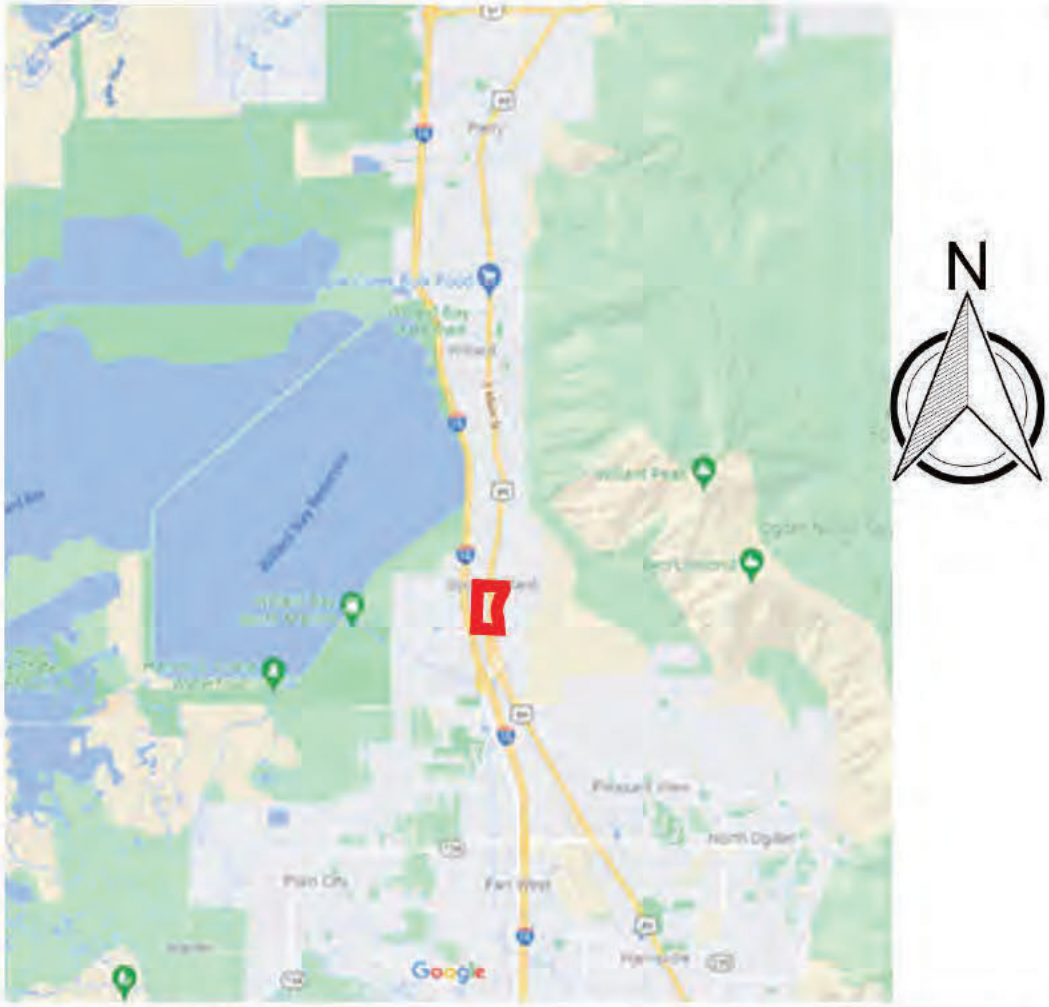



**FIGURE 1. LOCATION OF [redacted] PROPERTY, WILLARD, UT.**

The map is derived from the USGS National Map. The scale is 1:72,000. The property is outlined in red. The Swain Property is in Willard, Box Elder County, Utah, at approximately 4,350 feet above sea level, and it lies within Section 35, Township 8 North, Range 2 West, Salt Lake Meridian, in the Willard, UT, quadrant. The approximate center of the project is located [redacted]° in decimal degrees.

To reach the [redacted] Willard site, take I-15 N/I-84 W northbound to exit 351. Merge onto UT-126 toward state highway US-89. Continue on US-89 for 2.5 miles and the property is on the left (west) side of the road.

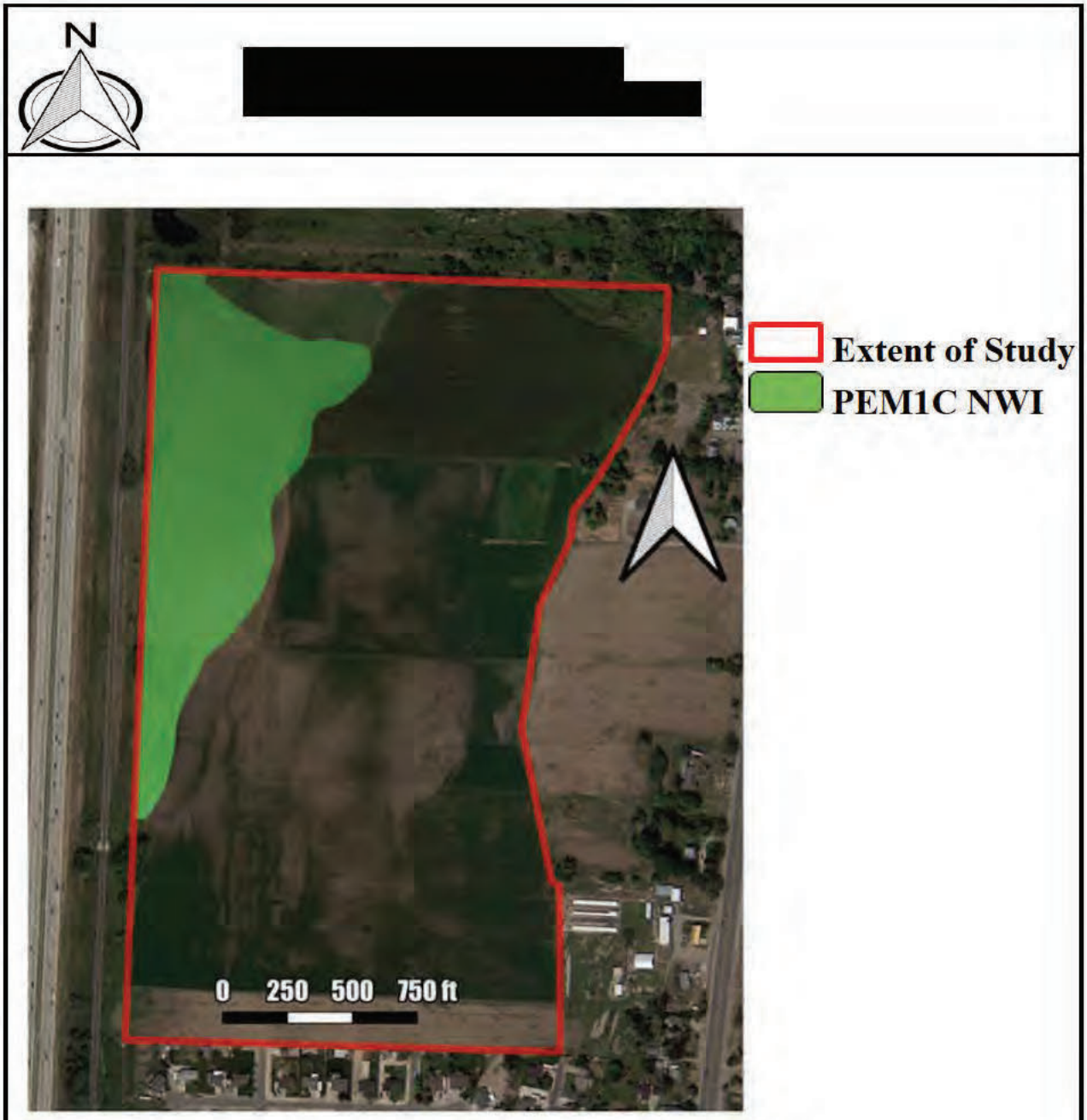



**FIGURE 2. POTENTIAL WETLANDS MAPPED BY THE NWI ON SWAIN PROPERTY, WILLARD.**

Map of the potential wetlands on the [redacted] property as mapped by the National Wetland Inventory. NWI had listed one type of wetland within the study area, Palustrine Emergent (PEM1C), which covers the approximate 22 acre area shown in green.

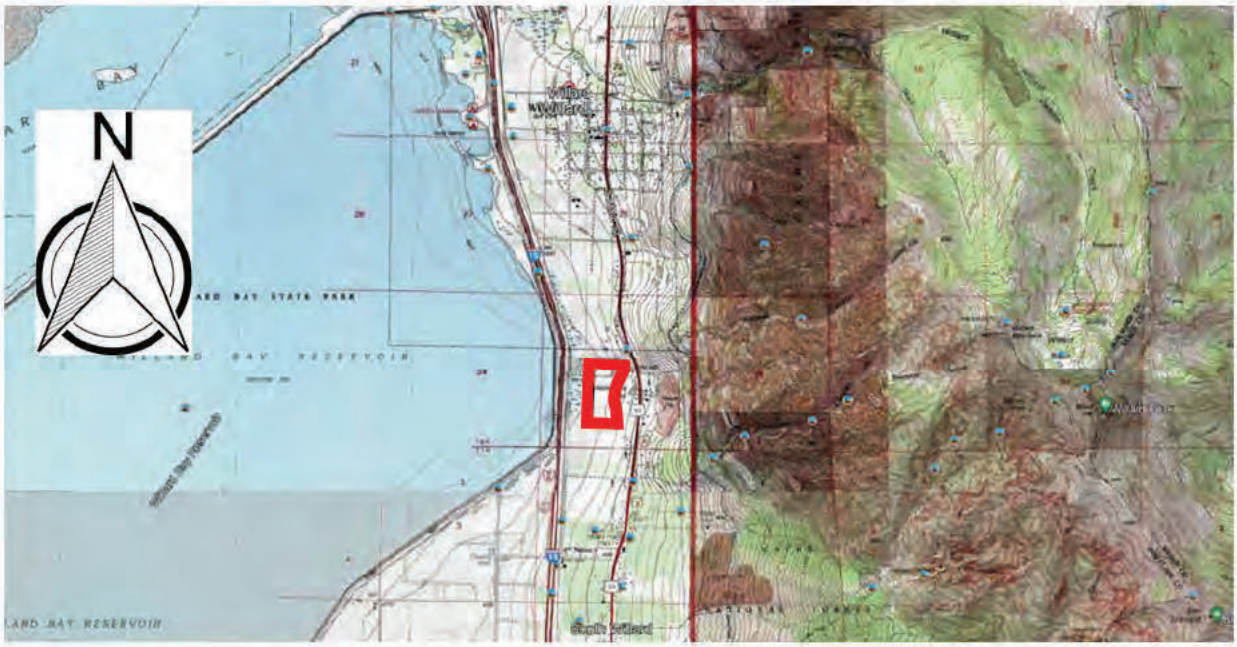



**FIGURE 3. TOPOGRAPHY OF SWAIN PROPERTY, WILLARD, UT.**

The map is derived from the USGS National Map. The scale is 1:72,000. The property is outlined in red.

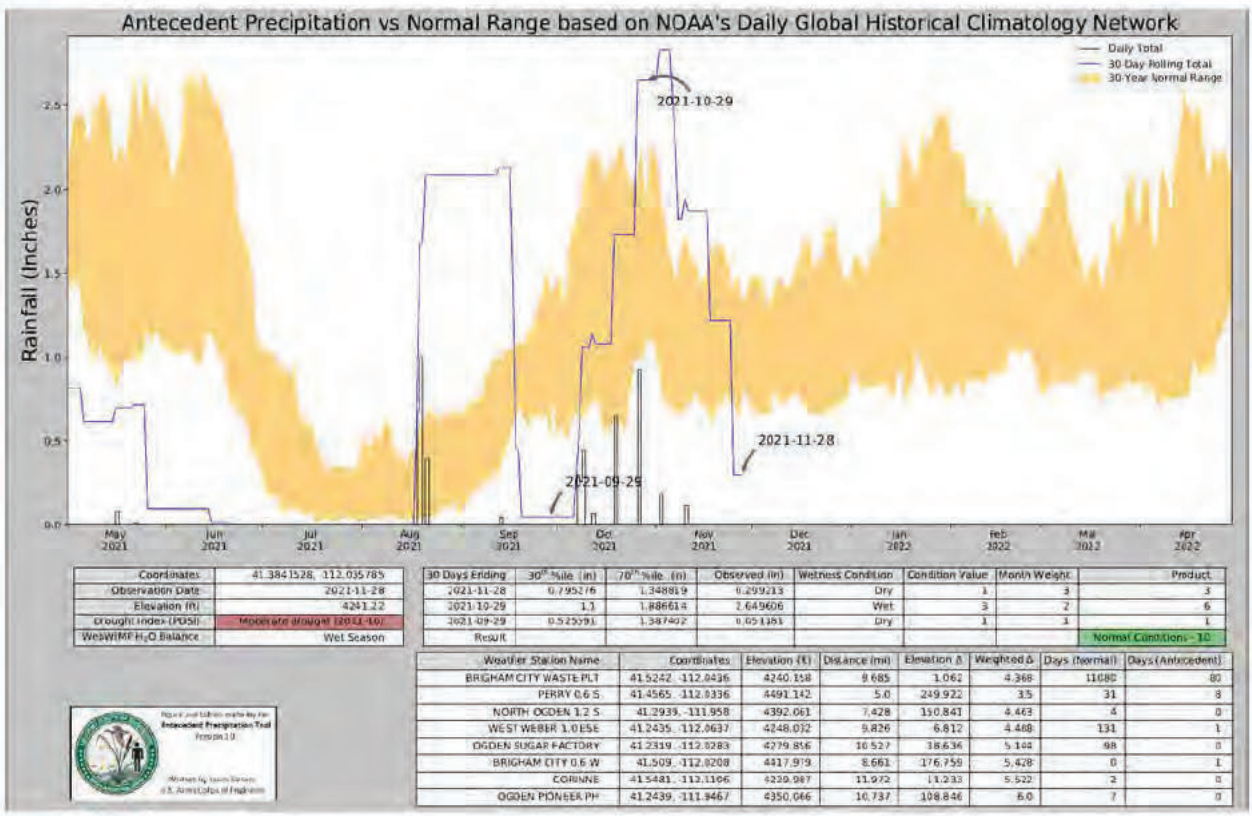



**FIGURE 4. ANTECEDENT PRECIPITATION FOR [redacted] PROPERTY, WILLARD, UT, AT THE TIME OF KE'S SITE VISIT.**

The figure is derived using the Antecedent Precipitation Tool developed by [redacted] of the Corps. Conditions were normal at the time of KE's field visit on 11/28/2021.

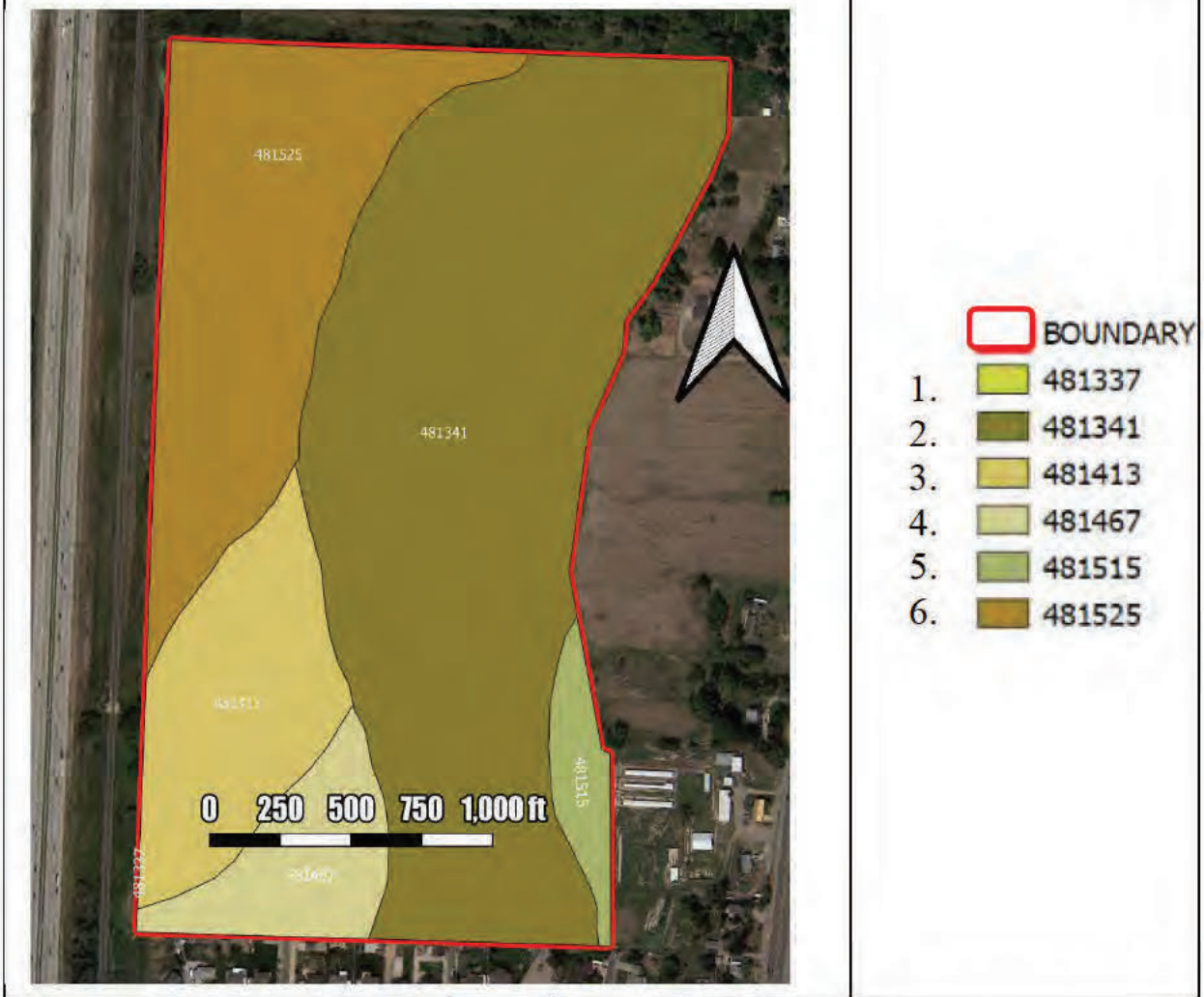



**FIGURE 5. MAPPED SOILS OF [redacted] PROPERTY, WILLARD.**

Six (6) different map units are mapped as underlying the [redacted] site in Willard. 1: Collett silty clay loam, 0 to 2 percent slopes. 2: Dagor loam, 3 to 6 percent slopes. 3: Logan silty clay loam, 0 to 3 percent slopes 4: Roshe Springs silt loam, 0 to 3 percent slopes. 5: Wasatch gravelly sandy loam, 3 to 10 percent slopes. 6: Woods Cross silty clay loam, 0 to 3 percent slopes.

[redacted]

January 31, 2025

[redacted]

Re: SPK-2022-00159

[redacted]

The [redacted] has been retained by [redacted] and [redacted] to evaluate whether approximately 3.2 acres of wetlands delineated in the northwest section of Willard Land's 142-acre property located in the City of Willard, Utah (Ex. 1),[1] that are situated approximately 41,104 feet (approximately 7.8 miles) from the Harold S. Crane Waterfowl Management Area ("WFMA") in Willard Bay are jurisdictional for purposes of Clean Water Act Section 404 (33 U.S.C. § 1344) permitting after the U.S. Supreme Court's May 2023 decision in *Sackett v. Env. Prot. Agcy.*, 143 S.Ct. 1322 (2023). For the reasons set forth below, we conclude that, after the U.S. Supreme Court's decision in *Sackett*, these wetlands are **not** jurisdictional "waters of the United States" ("WOTUS") under 33 U.S.C. § 1344 or 33 C.F.R. § 328.3(a).

## I. The U.S. Supreme Court's Decision in *Sackett v. EPA*

### A. The Sackett's Idaho Property

In *Sackett*, the Sackett's "purchased 0.63-acre vacant lot in a residential subdivision near Priest Lake, Idaho….On the north end, the lot is bounded by a county-owned road, on the other side of which runs a drainage ditch…To the south of the lot, across another road, is a row of houses that fronts Priest Lake…No [continuous] surface water connection exists between the Sacketts' lot and the roadside ditch, or between their lot and Priest Lake." (Ex. 2).[2]

The U.S. Environmental Protection Agency ("EPA") "classified the wetlands on the Sackett's lot as 'waters of the United States' because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable intrastate lake." *Sackett*, 143 S.Ct. at 1325. More specifically, the EPA claimed

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[1] *See* Kagel Environmental, LLC, *Aquatic Resources Delineation Report, Lew Swain Property, Willard, Utah* (Feb. 2021) (also noting, at 2, that the remote-sensing U.S. Fish & Wildlife Service's National Wetland Inventory Map shows nearly 22 acres of potential palustrine emergent (PEMIC wetlands).

[2] *See Sackett v. United States Environmental Protection Agency*, Petition for Writ of Certiorari, (Dkt. No. 21-454) at 7, and accompanying Sackett property map.



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as CWA 404-"jurisdictional" "the 'wetlands' on the Sackett's lot [that were] 'adjacent to' (in the sense that they are in the same neighborhood as) what it described as an 'unnamed tributary' on the other side of a 30-foot [-wide] road...[t]hat feeds into a non-navigable creek, which in turn, feeds into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable." *Sackett*, 143 S.Ct. at 331-1332. The Supreme Court majority, in *Sackett*, held that such wetlands were non-jurisdictional under CWA § 404, because "[t]he wetlands on the Sackett's property are distinguishable from any possibly covered waters." *Sackett*, 143 S.Ct. at 344.

B. Adjacent Wetlands Must Have a Continuous Surface Connection with 'Waters of the United States'

In *Sackett*, the majority discussed how, "[i]n *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that 'waters' may fairly be read to include only those wetlands that are 'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the 'water' ends and the 'wetland' begins.'" *Sackett*, 43 S.Ct. at 340 (quoting *Rapanos v. United States*, 547 U.S. 715, 742, 755 (2006) (plurality op.). As the *Sackett* Court further explained, "[t]hat occurs **when wetlands have 'a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.'**…We agree with this formulation of when wetlands are part of 'the waters of the United States." *Sackett,* 143 S.Ct. at 340 (quoting *Rapanos*, 547 U.S. at 742).

The Court, in *Sackett*, thus held that, "the CWA extends to **only those wetlands that are 'as a practical matter indistinguishable from waters of the United States** '" (emphasis added). *Sackett*, 143 S.Ct. at 341.

Apparently, the *Sackett* majority, by embracing the *Rapanos* plurality's definition of "adjacent" wetlands disregarded any **subsurface underground piping** connecting waters flowing from the wetland located **across the 0-foot-wide road** north of the Sackett's home beneath the Sackett property southward eventually into Priest Lake. It did so because the **subsurface underground piping and the distance between the wetland and Priest Lake** established a "clear demarcation between 'waters' and wetlands,'" *Sackett*, 143 S.Ct. at 1340, and therefore, rendered the wetlands "distinguishable from any possibly covered waters." *Sackett*, 143 S.Ct. at 344. (Ex. ).

C. 'Waters' of the United States

To recall, the *Sackett* majority held that, in order for the CWA to extend to a wetland, the wetland must be "'as a practicable matter indistinguishable from 'waters of the United States.'" *Sackett*, slip op. at 341 (citing *Rapanos*, 547 U.S. at 755). This means that "because the adjacent wetlands in § 344(g)(1) are 'includ[ed]' within 'the waters of the United States' [defined in § 362(7)], these wetlands must qualify as 'waters of the United States' in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Sackett*, 43 S.Ct. at 339.

The *Sackett* majority construed the term 'waters' consistent with the *Rapanos* plurality. "[W]e conclude that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses '**only**



**those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'**'" (emphasis added). *Sackett*, 143 S.Ct. at 1336 (quoting *Rapanos*, 547 U.S. at 739).

As the *Sackett* majority further explained, "[a]lthough we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read 'navigable' out of the statute, holding that it at least shows that Congress was focused on 'its traditional jurisdiction over waters thatwere or had been navigable in fact or which could reasonably be so made.'" *Sackett*, 143 S.Ct. at 1337 (quoting *Solid Waste Agency of Northern Cook Cnty. v. Army Corps of Engineers ("SWANCC")*, 531 U.S. 59, 72 (2001)). "At a minimum, then, the use of 'navigable' signals that definition principally refers to bodies of navigable water like rivers, lakes and oceans." *Sackett,* 143 S.Ct. at 337 (citing *Rapanos*, 547 U.S. at 734). The *Sackett* majority further noted how the "CWA's predecessor statute…defined 'interstate waters' as 'all rivers, lakes, and other waters that flow across or form a part of State boundaries.'" (italics in original). *Sackett*, 43 S.Ct. at 337 (citing 33 U.S.C. §§ 60(a), 1173(e) (1970 ed.)) and (citing 33 U.S.C. § 430, Rivers and Harbors Act of 1899 as amended). In fact, the *Sackett* majority emphasized how, ever since the Court's 1824 decision in *Gibbons v. Ogden*, U.S. (1824), "this Court has used 'waters of the United States' to refer to similar bodies of water, almost always in relation to ships." *Sackett*, 143 S.Ct. at 1338 (citing *SWANCC*, 531 U.S. at 8).

D. Traditional Navigable Waters Constituting Channels of Interstate Commerce

The *Sackett* majority, moreover, held that in order for CWA jurisdiction to extend over "adjacent wetlands," the Corps or EPA must "establish 'first, that the adjacent [body of water constitutes]…'water[s] of the United States,' (i.e., a relatively permanent body of water this itself, or is connected to, **traditional interstate navigable waters**); and second, that **the wetland has a continuous surface connection with that water**, making it difficult to determine where the 'water' ends and the 'wetland' begins." (emphasis added). *Sackett*, 143 S.Ct. at 341 (quoting *Rapanos*, 547 U.S. at 742.

As the *Sackett* majority explained, "[f]or most of this Nation's history…federal regulation [of water pollution] was largely limited to ensuring that 'traditional navigable waters' – that is, **interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in this way – remained free of impediments** " (emphasis added). *Sackett*, 43 S.Ct. at 330 (citing Rivers and Harbors Act of 1899, 30 Stat. 51 as "prohibiting unauthorized obstructions 'to the **navigable capacity** of any of the waters of the United States"); (citing *United States v. Appalachian Elec. Pwr. Co.*, 311 U.S. 377, 406-407 (1940)); and (citing *The Daniel Ball*, 77 U.S. 577, 563 (1870)) (emphasis added). And "before the New Deal era, courts consistently construed statutes **to authorize only federal actions preserving navigable capacity in order to avoid exceeding Congress' navigation authority**." (emphasis added). *Sackett*, 143 S.Ct. at 1333, n.7 (**citing to**[3] *Sackett*, 143 S.Ct.

[3] Clearly, the Alito majority opinion did not indicate any disagreement with Justice Thomas' reaffirmation of the Court's understanding of the historically 'limited nature' of federal CWA jurisdiction. "The Court's observation that 'traditional navigable waters'…remained free of impediments,' *ante* at 330, thus does no more than reflect the original understanding of the federal authority over navigable waters." *Sackett*, 143 S.Ct. at 1349 (Thomas, J. concur. op.) (quoting 143 S.Ct. at 330 (majority op.). *See also* note 3, *infra*



at 348-1351 (Thomas, J. concur. op.) (describing the history of how the CWA and the Rivers and Harbors Act ("RHA") used the same terms to describe their jurisdictional scope of traditional interstate navigable waters and citing these same cases).

As the *Sackett* majority, moreover, explained, "[t]he historical context demonstrates that it was the Corps' failure to regulate to the full extent of **Congress' navigation power, not its commerce power generally**, that led to the enactment of the CWA." (emphasis added). *Sackett*, 143 S.Ct. at 333, n.8. "To be sure, the CWA is more aggressive in regulating navigable waters than the River and Harbors Acts. **But the increased stringency is not accomplished by expanding jurisdiction The [Clean Water and Rivers and Harbors] Acts use the same jurisdictional terms** Instead, the difference between them lies in the expanded scope of activities that the CWA regulates and its shift from an enforcement and injunctive regime to a previolation licensing regime." *Sackett*, 143 S.Ct. at 1333, n.7. Accord 143 S.Ct. at 351 (Thomas, J.) (concur. op.) (noting how both the CWA and RHA were previously interpreted in light of the expanded *Daniel Ball Test*).

In citing to *The Daniel Ball*, the *Sackett* majority endeavored to emphasize the Supreme Court's explanation of how, when interstate waters are capable of promoting interstate commerce to a substantial degree, they are considered "waters of the United States":

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, **over which trade and travel are or may be conducted in the customary modes of trade and travel on water** And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, **a continued highway over which commerce is or may be carried on with other States** or foreign countries **in the customary modes in which such commerce is conducted by water** " (emphasis added).

*The Daniel Ball*, 77 U.S. at 563.[4]

[4] In his concurrence "join[ing] the Court's opinion in full," Justice Thomas fully accepted both the judgment and rationale of the majority opinion in which he took part, while further emphasizing "the extent to which the CWA's other terms – 'navigable' and 'of the United States'" "limit the reach of the statute" consistent with the Commerce Clause navigation power, *Sackett*, 143 S.Ct. at 1344 (Thomas, J. concur.) and traditional state authority over land and water use. *Sackett*, 143 S.Ct. at 1345 (Thomas, J. concur.). He explained that the majority's reasoning was based on two key facts. "First, the Sackett's' wetlands are not 'waters' because they lack a continuous surface connection with a traditional navigable water…Second, "the nonnavigable so-called 'tributary' (really a roadside ditch) across the street from



In support of *The Daniel Ball's*[5] explanation of **the close interrelationship between interstate commerce and navigability** needed for federal agencies to regulate commerce under Congress's Commerce Clause authority, the *Sackett* majority also emphasized how "[f]urther scholarship notes that the term 'commerce' as originally understood 'was bound tightly with the *Lex Mercatoria* and the sort of activities engaged in by merchants: buying and selling products made by others (and sometimes land), associated finance and financial instruments, **navigation and other carriage, and intercourse across jurisdictional lines**.'" (emphasis added). *Sackett*, 143 S.Ct. at 1334, n.10 (citations omitted). "'**Nor did it include activities that merely 'substantially affected' commerce**; on the contrary, the cases included wording explicitly distinguishing such activities from commerce.'" *Id* *See also Sackett* 43 S.Ct. at 332 (noting, in particular, how the EPA and the Corps had previously promulgated regulations "to reach the outer limits of Congress's commerce power" that "encompassed '[a]ll…waters' that 'could affect interstate or foreign commerce.'").

Finally, in further support of *The Daniel Ball's* explanation of **the close interrelationship between interstate commerce and navigability** needed for federal agencies to regulate commerce under Congress's Commerce Clause authority, the *Sackett* majority emphasized how, "[f]or most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions." *Sackett*, 43 S.Ct. at 330. "**Regulation of land and water use lies at the core of traditional state authority…An overly broad interpretation of the CWA's reach would impinge on this authority**." (emphasis added). *Sackett*, 143 S.Ct. at 341. For this reason, "this Court 'require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power of the Government over private property '" *Id* "Particularly, given **the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use, § (b)** , this Court has required a clear statement from Congress when determining the scope of 'the waters of the United States.'" (emphasis added). *Sackett*, 143 S.Ct. at 342. Since the EPA was unable to show that Congress intended the term 'significant nexus' to be included within the definition of 'navigable waters'

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the Sackett's property is **not** a water of the United States because it is **not**, has never been, and cannot reasonably be made **a highway of interstate** or foreign **commerce** " (emphasis added). *See Sackett*, 43S.Ct. at 1357 (Thomas, J.) (concur. op.) (citing *Solid Waste Agency of Northern Cook Cnty. v. Army Corps of Engineers ("SWANCC")*, 531 U.S. 59, 72 (2001)).

[5] According to Justice Thomas, "[f]rom the beginning, it was understood that **'[t]he power to regulate commerce, includes the power to regulation navigation,' but only 'as connected with the commerce** with foreign nations, and **among the states**.'" (emphasis added). *Sackett*, 143 S.Ct. at 345 (Thomas, J. concur. op.) (quoting *United States v. Coombs*, 37 U.S. 72, 78 (1838)). His concurrence should be construed as part of majority opinion because it accepted both the majority's judgment and rationale, it was in accord with the majority's views, what he writes is not a 'gloss' but is the least common denominator, and he wrote separately to emphasize what seemed to him to be the limited nature of the Court's holding. *See* [redacted], *The United States Government's Ongoing Defiance of EPA v. Sackett-II*, Washington Legal Foundation Critical Legal Issues Working Paper Series No. 30 (May 2024) at 4-8 <https://www.wlf.org/wp-content/uploads/2024/04/[redacted]-2024-WP-.pdf>.

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[redacted]

under 33 U.S.C. § 1362(7), i.e., "the CWA never mentions the 'significant nexus' test," the *Sackett* majority ruled that "the EPA has no statutory basis to impose it." *Sackett*, 143 S.Ct. at 1342.

## II. Application of the *Sackett* Majority's Decision to [redacted] Wetlands

### A. [redacted] Wetlands are Not 'Adjacent' to any Possible 'Water of the United States' Since 'Continuous Surface Connection' Flows are Interrupted by 691 Feet of Subsurface Flows Beneath Railroad Tracks, I-15 and the Willard Canal

Based on the U.S. Supreme Court's *Sackett* decision, it may reasonably be concluded that there is a continuous surface connection between the approximately 3.2 acres of wetlands in the northwestern section of [redacted] 142-acre property formed from excess irrigation 'tail' waters and the manmade irrigation ditch to the north and the west located beyond the property's boundaries into which such wetlands irrigation runoff flows. (Ex. 3).[6] However, this continuous surface connection between the irrigation wetlands runoff and this irrigation ditch terminates at **several** distinct points before entering the Harold S. Crane WFMA that distinguish the [redacted] wetlands from any possible 'water of the United States.' An aerial video has been created of the [redacted] property and of the runoff origins, accessible at the following url: <**https://www.youtube.com/watch?v=yefnt8qDcYU**>.

The original surface water connection first terminates once the irrigation wetlands runoff, after entering such irrigation ditch, joins with other waters that had entered said ditch south of the site, travel approximately **750 feet** to a point north of the site. At that point they turn abruptly west and are first **piped subsurface underground** for approximately **37 feet** beneath and across the railroad track, and are then, after a distance of **90 additional feet** on the surface, are **piped, once again, subsurface underground 223 more feet** across interstate 15 ("I-15"). There, they finally 'daylight' and join with other surface runoff draining from the north in an apparent manmade stormwater drainage ditch located on the west side of the interstate. (Ex. 4).[7] At this juncture, [redacted] irrigation wetlands runoff, in other words, are **piped subsurface underground a total distance of approximately 350 feet after exiting the property**. [redacted] has created a second aerial video that confirms this disruption in surface flow. *See* Sec. II.B. at 8-9.

The original surface water connection next terminates on the west side of I-15, once such irrigation wetlands runoff flows southward and then southwestward a total distance of **approximately three (3) miles** along the Willard Reservoir from where they daylighted, through uplands between the 36-foot high Willard Reservoir containment dike and I-15, and then between that dike and cultivated farm fields until they meet the Willard Canal.[8] This entire portion of this manmade drainage ditch is

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[6] *See* [redacted], *Response to U.S. Army Corps of Engineers Sacramento District, Letter Requesting Additional Information and Withdrawing AJD Verification Request* (Apr. 5, 2023) ("*KE April 5, 2023 Response*") at 3-4.

[7] *See* [redacted] *Response to U.S. Army Corps of Engineers Sacramento District Supplemental Request for Information Letter* (Jan. 22, 2024) ("*KE Jan. 22, 2024 Response*") at 3 and Fig. 1.

[8] *Id.* at 3 and Fig. 2.

considered the South Drain of the Willard Reservoir. At the Willard Canal, the combined surface water flow then enters a **manmade siphon that proceeds subsurface** underground below the Willard Reservoir South Marina for a distance of **approximately feet**, at which point it 'daylights' via an outlet structure on the other side of Willard Canal. (Ex. 5).

In sum, the **original surface connection** that existed between the irrigation wetland runoff exiting the [redacted] property and entering the irrigation ditch running parallel to the site on the east side of I-15 continues for only approximately **750 feet** Thereafter, these runoff flows, after joining with offsite irrigation runoff from other farmlands, go **subsurface underground** for a distance of approximately **350 feet** And they go **subsurface underground again for an additional feet** after reaching the Willard Canal, which is approximately three (3) miles south from the point at which they surface on the west side of I-15. In total, [redacted] irrigation wetland runoff, after joining with other offsite stormwater and irrigation runoff flowing on both sides of I-15, is **piped subsurface underground for a total of 781 feet having drained a total distance of approximately three (3) miles** The combined surface runoff draining to and within the South Drain from all sources then travel **an additional** approximately **.5 miles** from the point at which they emerge from the subsurface underground siphon located south of the Willard Canal until the point at which they enter the Harold S. Crane WFMA, approximately **7.8 miles, in total,** from [redacted] property. (Ex. 6).[10]

It must be recalled that the *Sackett* majority embraced the *Rapanos* plurality's definition of "adjacent" wetlands, and thereby **disregarded any subsurface underground piping** of the waters flowing from the wetland located **across the 30-foot-wide road** north of the Sackett's home beneath the Sackett property southward and eventually into Priest Lake. It did so because the **subsurface underground piping and the distance between the wetland and Priest Lake** established a "clear demarcation between 'waters' and 'wetlands,'" *Sackett*, 143 S.Ct. at 1340, consequently rendering the wetlands "distinguishable from any possibly covered waters." *Sackett*, 143 S.Ct. at 344.

Based on the *Sackett* majority decision and the facts of this case – **the 781 feet of public offsite subsurface underground piping** of the [redacted] irrigation wetland runoff and the stormwater and irrigation water runoff draining into these irrigation and drainage ditches from other offsite locations, **and the approximately 7.8-mile distance** these runoff waters must travel through the South Drain between the [redacted] property wetlands and the Harold E. Crane WFMA – lead to only two conclusions. First, they establish that the approximately 3.2 acres of [redacted] property wetlands do **not** "actually abut[] on" a possible "navigable" "water of the United States." *Sackett*, 143 S.Ct. at 340. Second, **the 781 feet of public offsite subsurface underground piping** of such combined multi-source runoff and the long distance that runoff must travel from the [redacted] property wetlands to the WFMA establish a "clear demarcation between 'waters' and wetlands'" that render those wetlands easily "distinguishable from any possible 'waters of the United States'…in its own right," and consequently, as **"separated," non-adjacent, non-jurisdictional** waters **not** subject to CWA 404 permitting under *Sackett* or the amended 3 Corps regulations. *Sackett*, 43 S.Ct. at 340,

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*Id*

[10] *See* [redacted], Graphics – *Path of Water Flow from the* [redacted]

1344; 33 C.F.R. § 328.3(c)(2) (Sept. 3) (Ex. 7). "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." *Sackett*, 143 S.Ct. at 340.

[redacted] Watercourse (Ditch) Known as the South Drain, Carrying [redacted] Property Wetland Irrigation Runoff is Not a Navigable-in-Fact Relatively Permanent 'Water' Like a 'River' or 'Stream'

Both the Willard Bay Reservoir and the integrated A.V. Watkins Dam are features of the federal Weber Basin Project. (Ex. 8).[11] They are now owned by the U.S. Bureau of Reclamation ("BOR") (Ex. 9),[12] which had previously acquired the lands upon which they sit from the State of Utah. (Ex. ). [13] The Willard Bay Reservoir and A.V. Watkins Dam "provide irrigation and municipal and industrial (M&I) water to heavily populated and industrialized lands east of the Great Salt Lake." (Ex. ) [14] Technical documents discussing how the reservoir was repaired in 8-200 9 after having "nearly failed [in November 2006] as the result of piping and internal erosion of the foundation soils" (Ex. ), [15] reveal the true character and purpose of the watercourse running parallel with the reservoir's eastern and southern upland embankment walls carrying multiple sources of runoff draining southward along and away from the west side of I-15 a **distance of approximately 7.8 miles from the [redacted] property to the Harold S. Crane WFMA** [16] [redacted] has recorded the flow path of the irrigation

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[11] *See* P.L. 81-273, Weber Basin Project Act of Aug. 9, 1949 (authorizing *inter alia* the construction, operation and maintenance by BOR of the Willard Bay Reservoir and the A.V. Watkins Dam as part of the Weber Basin reclamation project).

[12] *See* United States Department of the Interior Bureau of Reclamation, *Willard Reservoir Resource Management Plan* (April 2000) (prepared by The Bear West Consulting Team under contract no. 425-CA-40-12580), at -5.

[13] *See* United States Bureau of Reclamation Project Planning Report No 4-7.10-2, *Weber Basin Project, Utah – Development of the Potential Weber Basin Project, Utah Bonneville Basin*, Doc. No. 147, United States Senate, 81[t] Cong. 2d Sess. (Jul. 5, 1949) at 30 ("[I]t is reasonable to assume that much of the land required for recreational use and development will be acquired in connection with other project phases of the reservoir").

[14] *See* United States Department of the Interior Bureau of Reclamation Provo Area Office, *A.V. Watkins Dam Safety of Dams Modification Draft Environmental Assessment PRO-EA-07-002*, Weber Basin Project, Box Elder County, Utah (Oct. 2007), at 3.

[15] *Id See also* Brandt Demars, Curt Pledger, and Bruce Barrett, *A.V. Watkins Dam Modification: Cement-Bentonite Slurry Cutoff Wall*, Paper Presented at United States Society on Dams 9[th] Annual Meeting and Conference (Nashville, TN Apr. 2009), Introduction at This document indicates the "5-mile long, 30-inch-wide Cement-Bentonite (CB) cutoff wall" that was installed as part of the repair work, "along with the reconstruction of the dam embankment area through the incident area," spanned much of the approximately 7-mile-plus distance the west-of-I-15 ditch carried waters originating in [redacted] wetlands along with other mixed waters ultimately to the Harold S. Crane WFMA. *Id* at

[16] *Id* at Figs. and *Cf. KE Jan. , 024 Response* at Figs. -3.

wetland runoff over this **7.8-mile distance** for your study and review which recording may be accessed online at <**https://www.youtube.com/watch?v=DdBbbGEjn2Y**>.

These technical documents, for example, reveal that, "[p]rior to construction [of the Willard Reservoir], **a drainage canal** was excavated downstream and parallel to the proposed embankment alignment to lower the groundwater table in the vicinity of the dam and facilitate embankment construction. **The canal or South Drain as it is referred to**, continues to collect local groundwater[, surface runoff (from both precipitation and irrigation), and dam seepage flows] and transports [them] under the Willard Intake Canal **through a siphon**, and discharges it into the Great Salt Lake." (emphasis added).[17] They also reveal that a CWA 404 permit to undertake the construction-related repair work associated with the prior Proposed Action was possibly needed from the Corps. "This area is highly disturbed, consisting mostly of typical upland vegetation. Several small (less than -acre) wetlands would be permanently impacted by this project."[18]

These technical documents also reveal that, during construction, "surface waters enter[ed] the reservoir area from intermittent creeks and drains along the southeast side. Natural runoff along this side of the bay is supplemented by return flows from the irrigated lands adjoining the Bay. **Irrigation operations and artesian [well] pressures in the ground water [] contributed to maintaining a high ground water table around the southeast side of Willard Bay** " (Ex. 3). [19] (emphasis added). "D]rains [had been] "constructed on the east and south sides of the reservoir **to exclude storm runoff water and Willard Bay** water from the reservoir during construction…Toe drains, consisting of 8-inch-diameter pipe [were] provided under the downstream toe of the dam."[20] "The [S]outh [D]rain, in conjunction with other preliminary construction, served to **intercept surface runoff and divert it around the south side of the reservoir area to Willard Bay** This drain was part of the scheme used to dry up the damsite and west segment borrow area. It was also designed **to handle runoff and reservoir seepage after the dam was completed** to prevent flooding or waterlogging of lands along the downstream toe." (emphasis added).[21]

In sum, these Willard Bay Reservoir-related technical documents confirm the character and purpose of the watercourse located, in part, between the reservoir's eastern embankment wall and the west side of I-15 carrying [redacted] property irrigation wetland runoff along with roadside stormwater and irrigation runoff from multiple offsite sources (i.e., from farmlands, I-15, commercial and residential lands, and Willard Reservoir seepage) much of the approximately 7 mile-plus distance to the Harold S. Crane WFMA. Clearly, because the exclusive purpose of said watercourse is as a "**drainage ditch**," it does **not** possess the jurisdictional characteristics of a "relatively permanent, standing or continuously flowing water 'forming geographic[al]n features' that are described in ordinary

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[17] *BOR A.V. Watkins Dam Safety of Dams Modification Draft Environmental Assessment PRO-EA-07-002*, *supra* at 2, 3.
[18] *Id* at 5.
[19] *See* United States Department of the Interior Bureau of Reclamation, *Willard Dam – Technical Record of Design and Construction*, Weber Basin Project, Utah (Denver, CO Jan. 1967) at 59.
[20] *Id* at 9.
[21] *Id* at 7.

parlance as 'streams, oceans, rivers, and lakes,'" which the Supreme Court, in both *Sackett* and *Rapanos*, emphasized Congress included within the definition of "waters of the United States." *See Sackett*, 143 S.Ct. at 1336 (quoting *Rapanos*, 547 U.S. at 739); 33 C.F.R. § 328.3(b)(3) (Sept. 3). [22] And, clearly, it is **not** a "navigable water" that was ever "navigable-in-fact," and "can never be." *See The Daniel Ball*, 77 U.S. at 563. Therefore, **this manmade drainage ditch is not a relatively permanent "bod[y]" that [is a] "water[] of the United States, in [its] own right,"** through which **non-adjacent** carry a relatively permanent flow of water." [redacted] property irrigation wetland runoff could continuously flow at the surface to the WFMA, i.e., it is **not** a "§ 328.3(a)(4) water." *See Sackett*, 143 S.Ct. at 1344 (citing *Rapanos*, 547 U.S. at 742.

C. The Harold S. Crane WFMA into Which [redacted] Irrigation Wetland Runoff Flows Along with Other Stormwater and Irrigation Runoff Down the Willard Reservoir South Drain is Neither a 'Tributary' to a 'Water of the United States' Nor a 'Water of the United States' in its Own Right

The manmade "drainage ditch" located, in part, between the reservoir's eastern embankment wall and the west side of I-15 carrying [redacted] property irrigation wetland runoff waters along with stormwater and irrigation runoff waters from multiple other sources ultimately to the Harold S. Crane WFMA, has been owned and operated by the Utah Department of Natural Resources for nearly 70 years.[23] It also is **neither** a "tributary" to a "water of the United States," **nor** a "water of the United States" in its own right.

Indeed, at least one BOR technical document discussing how the Willard Bay Reservoir was constructed reveals that "[t]he site of the reservoir formed by the dam was formerly a large mudflat covered by a shallow depth of **fresh water** during the fall and winter months only…[P]art of the reservoir area was intermittently covered by the waters of the **Willard Bay. This is a body of fresh water separated from the Great Salt Lake** [24] (Ex. 4). (emphasis added).

"The Harold S. Crane [WFMA] is an ,430-acre parcel located in Box Elder and Weber counties situated west of Willard Bay Reservoir (Appendix A, Map 1)…The W[F]MA is bordered to the north and west by State Sovereign lands in Bear River Bay and to the south and east primarily by private

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[22] 33 C.F.R. § 328.3(b)(3) (2023) excludes from the definition of "waters of the United States" "[d]itches (including roadside ditches) excavated wholly in and draining only dry land and that do not.

[23] *BOR A.V. Watkins Dam Safety of Dams Modification Draft Environmental Assessment PRO-EA-07-002*, *supra* at 3.

[24] *BOR Willard Dam – Technical Record of Design and Construction*, *supra* at 9, 59. *See* accord *Weber Basin Project, Utah – Development of the Potential Weber Basin Project, Utah Bonneville Basin*, *supra* at 124-125 (explaining that, "[a]t the east end of the Willard Bay arm of Great Salt Lake but separated by a dike to impound fresh waters and keep out saline waters, the Willard Reservoir site is generally flat and treeless…Although the reservoir is to be impounded in the edge of Great Salt Lake, **the fact should be emphasized that the dikes impounding the reservoir will not only contain fresh water from the Weber River but will exclude the saline waters from Great Salt Lake**").

[redacted]

lands. The Willard Bay Upland Game Area (UGA) is just east of the W[F]MA (Appendix A, Map ).” (Ex. 5). [25] The predecessor to the Harold S. Crane WFMA, previously known as the Willard Waterfowl Management Area” (“WMA”), served as a Bureau of Reclamation (“BOR”) “mitigat[ion project] for waterfowl habitat loss associated with the development of Willard Reservoir.”[26]

At least one BOR document reveals that, originally, the “[BOR] acquired and developed approximately ,800 acres of State sovereign land located west of the reservoir,” and “constructed…[d]ikes, and a delivery canal with inlet structures…to create ponds that could be managed as marshes. Ownership and management responsibility for these lands…was transferred to the [Utah Division of Wildlife Resources] UDWR in 1963,…and the size has since been expanded to encompass over ,000 acres.”[27]

And at least one UDWR report reveals that “[a]ctivity on the [Harold S. Crane] WMA began by **enclosing approximately 1,800 acres** with 9.5 miles of low dikes. In May of 1966, the first of three units was **flooded with [fresh] waters from First Salt, Third Salt, Dix, and Warm Spring creeks mostly via the Willard Bay South Drain as a collector channel** The primary [point of diversion] POD’s into the area are sited along the South Drain and Second Salt Creek.” (emphasis added).[28] (emphasis added). The “**main unit is comprised of three large adjoining diked impoundments and three smaller impoundments, which are collectively known as the mitigation ponds** The south side pond is impounded with a dike (height: three feet) and distributes POD’s water northward through 6 culverts with spillway risers. The two largest northward impoundments have dikes lining the east and west sides that enclose the water in the units and two water control structures for east or west lateral diversion into mitigation ponds.” (emphasis added).[29] (Ex. 6)

According to this UDWR report, “[t]he center dike that runs between the impoundments has one culvert with risers on both ends **to control water between the units** The dike (height: four feet) on the north side of the area **impounds the two larger lakes** Twelve culverts with spillway risers **regulate depth and spread the water from the impoundments** north across flats into the Willard Spur [Management] Area.”[30] (Ex. 7). (emphasis added). This report further notes that, “[a]pproximately 30 small culverts in the mitigation ponds also spread water northward. A small spur dike on the southwest corner of the unit **prevents the water behind the south distribution dike from running out onto the westward flats, except during flooding** It contains a **large headgate to bypass flood waters to the**

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[25] *See* Utah Division of Wildlife Resources Northern Region, *Harold S. Crane Waterfowl Management Area – Habitat Management Plan* (Jan. ) at 5.
[26] *Id* at 7 (The “Harold S. Crane WMA was created in 1965-1966 when the BOR donated to UDWR monies for [the] wetland development of [the] ,800 acres…as mitigation for the loss of waterfowl habitat that resulted from the construction of Willard Bay Reservoir.”). *See also BOR Willard Reservoir Resource Management Plan, supra* at -41.
[27] *UDWR Harold S. Crane Waterfowl Management Area – Habitat Management Plan*, *supra* at 7.
[28] *Id*
[29] *Id* at
[30] *Id*



**west if needed** Additional flood **POD** near the main access road outer gate." (emphasis added).[31]

Furthermore, the UDWR report indicates that "**[e]ssentially all water for the main unit is collected by the Willard Bay South Drain or the south impoundment dike systems**, then distributed north or west as desired. Except the south distribution system, all impoundments are independently operable. **Water depth or cutoff is regulated by spill board risers as needed for summer or winter drawdown, stabilized regime, nutrient recycling, vegetation or carp or ice or flood management, construction activities, boating, etc**…"[32] This report, moreover, refers to "[a] map showing headgate locations on the main unit [that] is enclosed in Appendix A, Map 3."[33] Map 3, entitled "Headgate Locations on Harold S. Crane WMA," shows overflow waters exiting the east impoundment at its northeast corner proceeding first eastward and then southward along the Willard Reservoir's westside channel **back toward the terminus of the South Drain** [34] (emphasis added).

The above-referenced BOR and UDWR documents describe in detail that the Harold S. Crane WFMA is comprised of **several self-regulating impounded areas These impoundments were originally filled and thereafter maintained exclusively with fresh waters** draining from several intrastate creeks (Ex. 8), *supra*,[35] freshwater seepage from the Willard Bay Reservoir impounding the Willard Bay's fresh waters, *supra*,[36] and multiple source-based farmland irrigation surface runoff and I-15 roadside, commercial and residential stormwater surface runoff draining into the reservoir's South Drain and South Drain terminus, and ultimately into these impoundments.[37]

Additionally, the Harold S. Crane WFMA **impoundments** continue to receive freshwater flows from **seven different BOR and UDWR groundwater sources** situated around the Willard Bay Reservoir.[38] The BOR holds **a single Utah State water right** to the Willard Reservoir, a key feature of the Weber Basin Project, bearing a June 1958 priority date **to two of these groundwater sources** (Ex. 9). [39] **It is, therefore, legally obligated to exercise this State-issued water right consistent with State law, pursuant to Section of the Weber Basin Project Act and Section 8 of the Reclamation Act of 902, Stat. 388 (1902)** *See supra* (Ex. 8). The UDWR, meanwhile, holds **four Utah State water rights** bearing priority dates of January 1953, November 1969 and March 987, **to five of these groundwater sources** (Ex. ), [40] (Ex. ) [41], (Ex. ) [42], (Ex. 3). [43] As the 1958 BOR's water right application reveals, the Willard Bar Reservoir "South Drain intercepts underground and surface

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[31] *Id.* at
[32] *Id* at
[33] *Id*
[34] *Id*., Appendix A, Map 3 at 9.
[35] *See* text accompanying notes 28-29 (and source cited therein), *supra*
[36] *See* text accompanying note (and source cited therein), *supra*
[37] *See* text accompanying ns. -17, 27 (and sources cited therein), *supra*
[38] *UDWR Harold S. Crane Waterfowl Management Area – Habitat Management Plan*, *supra* at 5,
[39] *See* BOR Water Right No. 29-1208 bearing a priority date of Jun. 7, 958.
[40] *See* UDWR Water Right No. 29-1128 bearing a priority date of Jan. , 953.
[41] *See* UDWR Water Right No. 29-1583 bearing a priority date of Nov. 7, 969.
[42] *See* UDWR Water Right No. 29-1584 bearing a priority date of Nov. 7, 969.
[43] *See* UDWR Water Right No. 29-3294 bearing a priority date of Mar. 8, 987.



water flows that would normally flow through the Willard Reservoir area and conveys such water around Willard Dam to Great Salt Lake. The length of the South Drain is 43,000 feet." (Ex. 4). [44] The map accompanying the current BOR water right record shows that one of the groundwater sources for this water right is located along the Willard Bay Reservoir's eastern embankment wall in an area north of the Willard Canal, while the other groundwater source for this water right is located at the South Drain terminus.[45] The primary purpose of each of these BOR and UDWR water rights was/is to "creat[e] and maint[ain…] marshlands for waterfowl habitat within the WMA "[46]

All of this means that the Harold S. Crane WFMA does **not** impound the salt waters of the Great Salt Lake, which the Corps asserts is a "water of the United States." Rather, **the Harold S. Crane WFMA impounds only freshwater derived from these multiple surface and groundwater sources, rendering the impoundment waters as physically separate from and as bearing characteristics different than the Great Salt Lake** *supra*

The plain meaning of the word "impound" in the context of water means "to collect and confine (water) in or as if in a reservoir."[47] "Impoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both." 88 Fed. Reg. 3004, 3075 (Jan. 8, 3) *revised otherwise* at 88 Fed. Reg. 61964, 61965 (Sept. 8, 3). Based on the policy logic employed by the Biden administration's final January 2023 WOTUS regulations, which still applies in the apparently revised regulations of September 3 so that such regulations would ostensibly comply with the Supreme Court's *Sackett* decision, if the Harold S. Crane WFMA does **not** impound "waters of the United States," its impoundments do **not** become "waters of the United States." *Id* And based on the science logic the Biden administration employs in both regulations, if Harold S. Crane WFMA impounded waters do **not** have the characteristics of a jurisdictional water, then the impoundment is **not** jurisdictional. *Id*

In sum, the Harold S. Crane WFMA impoundments are **not** an "impoundment[] with a continuous surface connection to…[a] relatively permanent, standing or continuously flowing tributar[y] connected to traditional navigable waters, the territorial seas, or interstate waters, or to traditional

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[44] *See* United States of America Department of the Interior Bureau of Reclamation, Application to Appropriate Water for Miscellaneous Purposes, State of Utah Application No. 30023 (Oct. , 959).
[45] *See* Map accompanying BOR Water Right No. 9-1208.
[46] It is interesting that original primary purpose of the BOR water right, as explained in the BOR water right claim application, was "to supply domestic needs of ,000 people and the watering of 5,000 cattle and sheep throughout the entire year,…" and that the residual purpose was that "[t]he water not used for the above-mentioned purposes will be used for wildlife purposes throughout the year for the propagation of migratory birds at bird refuges located at the east shoreline of the Great Salt Lake…" These purposes were thereafter reversed.
[47] *See* Merriam Webster Dictionary Online, *Impound* <https://www.merriam-webster.com/dictionary/impound#:~:text=pound%20im%2D%CB%88pau%CC%87nd-,1,impound%20evidence%20for%20a%20trial>.



navigable waters, the territorial seas, or interstate waters." In other words, since they do **not** serve as a surface-connecting "tributary" to a "water of the United States," i.e., "§ 328.3(a)(3) waters," and they are **not** a "water of the United States" in their own right, i.e., "§ 328.3(a)(2) waters," the impoundments of the Harold S. Crane WFMA are **not**, consequently, CWA 404 jurisdictional waters.

D. The Great Salt Lake is Not a 'Water of the United States'

In order for the Harold S. Crane WFMA impoundments to serve as a "tributary" to a "water of the United States," there must first be a "water of the United States" with which it has "a continuous surface connection." As the previous section concluded, there is **no** continuous surface connection between this WFMA and the Great Salt Lake. This section goes beyond the previous section and shows that the Great Salt Lake is **not** a "water of the United States in [its] own right." *See Sackett*, 143 S.Ct. at 1344 (citing *Rapanos*, 547 U.S. at 742).

There is only ONE portion of ONE Utah river located in the vicinity of the Great Salt Lake over which the Corps Sacramento District has asserted Rivers and Harbors Act (30 Stat. 1151) Section jurisdiction – and that is the approximately miles of the "Lower Bear River from its mouth at the Great Salt Lake to the limits of [its] area of responsibility at the Idaho-Utah state line." (Ex. 5). [48] (Ex. 6). [49] In October 2021, the Sacramento District determined that **this portion of the Bear River** "was used in the past and was susceptible for use in transporting **interstate** commerce…In the 1860's and 1870s, during the railroad construction era, **the Lower Bear River was used to transport railroad ties from points in Idaho to Corinne, Utah** " (emphasis added).[50] "In addition to the railroad tie trade, sawmills in Corinne were supplied with logs transported down the Lower Bear River from points in Idaho from 1869 to 875. **Corinne during this era, was a hub for interstate transport** "[51] "Railroads, waterborne freight, tie and log drives and interstate wagon freight lines all met in Corinne, which acted as a transfer point until the completion of the Utah and Northern Railroad. Interstate transport of railroad ties and logs driven on the Bear River from the north met stream and sail transport ascending the Bear River from the Great Salt Lake."[52]

Clearly, by determining that the Lower Bear River was once navigable-in-fact from the Idaho border to the City of Corinne, Utah, (Ex. 27) the Corps effectively conceded that the Lower Bear, only until the City of Corinne, formed a continuous "highway of interstate commerce" "susceptible to use in transporting interstate commerce." *See Sackett*, 43 S.Ct. at 357 (Thomas, J.) (concur. op.) This means the Corps acknowledged that **there was no interstate water transport from the Lower Bear**

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[48] *See* Department of the Army, U.S. Army Corps of Engineers South Pacific Division, *MEMORANDUM FOR RECORD, SUBJECT: Determination of Navigability, Lower Bear River in Utah* (Oct. , ), at paras. 1, 5 ("2021 Memorandum").

[49] *See also* U.S. Army Corps of Engineers, *Rivers and Harbors Act Navigable Waters of the U.S. in the Sacramento District*

[50] Memorandum, *supra* at para. 3.

[51] *Id*

[52] *Id*



**River directly into the Great Salt Lake** that could render the Great Salt Lake a traditionally navigable interstate water for purposes of asserting federal jurisdiction over it under Rivers and Harbors Act Section or CWA Section 404.

For this reason, the Corps Sacramento District has long relied on two earlier issued agency memorandums adopting practically the same legal rationale that have enabled it to unlawfully continue treating the Great Salt Lake as a traditional navigable water over which the Corps may assert CWA 404 jurisdiction. The more recent memorandum, issued in September 2015 (Ex. 8), [53] was derived from the earlier memorandum issued in November 7. (Ex. 9). [54] These memoranda, however, are no longer valid following the Supreme Court majority's decision in *Sackett*

The 7 Memorandum determined that the intrastate Utah Lake, from which the intrastate Jordan River exits as "the lake's only outlet" flowing northward from Utah Lake to the intrastate Great Salt Lake,[55] qualified as "traditional navigable waters" under the CWA. The Corps Sacramento District reached this determination because of the U.S. Supreme Court's earlier decision in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), wherein "the majority declare[d] 'Utah Lake is a navigable body of freshwater covering 50 square miles. It is drained by the Jordan River which flows northward and empties into the Great Salt Lake.'"[56] According to the District, "[t]he majority makes this declaration because the finding that the lake is a navigable body of water is a prerequisite to a finding that the 'bed and banks' of the water passed to the State upon statehood. Thus, under the Rapanos Guidance and Appendix D, the water is a TNW as the highest federal court in our county has determined the water body to be navigable-in-fact under federal law for the purpose of the Equal Footing Doctrine."[57]

Significantly, the 7 Memorandum failed to point out the limited nature of the Supreme Court's holding in *Utah Division of State Lands* – i.e., that its determination Utah Lake was a navigable

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[53] *See* Department of the Army, U.S. Army Corps of Engineers Sacramento District, *REGULATORY DIVISION MEMORANDUM 015-2, SUBJECT: Method for Identifying the Ordinary High Water Mark for the Great Salt Lake* (Sept. 8, 2015) ("2015 Memorandum").

[54] *See* Department of the Army, U.S. Army Corps of Engineers Sacramento District, *MEMORANDUM FOR RECORD, SUBJECT: Traditional Navigable Waterways, Federally Navigable Determination for Utah Lake* (SPK-2007-0161) (Nov. 9, 2007) ("2007 Memorandum").

[55] *See* Benjamin W. Abbott et al., *Getting to Know the Utah Lake Ecosystem*, Brigham Young University (July 9, 2021) at <https://pws.byu.edu/0000017b-379a-dfb0-a77b-3fdeb3070000/getting-to-know-utah-lake>.

[56] 2007 Memorandum at (quoting *Utah Division of State Lands*, 482 U.S. at 98).

[57] 2007 Memorandum at Generally speaking, pursuant to the Equal Footing Doctrine which derives from Art. IV, § 3, cl. of the United States Constitution and applied generally upon the admission of new states, the United States held federal territories in trust for the benefit of new states which, upon statehood, could exercise all the powers of government that belonged to the original thirteen colonies that had ceded the territories to the federal government in the first place. *See Pollard's Lessee v. Hagan*, 44 U.S. , 222-223 (1845) (citing the Ordinance of July 3, 787).



water was only for purposes of the Equal Footing Doctrine. Because the Supreme Court did **not** make any determination that Utah Lake was/is **part of a navigable interstate commercial highway**, the 7 Memorandum then applied the broadest possible reading of the Commerce Clause, citing the Tenth Circuit's decision in *Utah Division of Parks and Recreation v. Marsh*, 740 F.2d 799 (10th Cir. 984). According to the 2007 Memorandum, "[i]n [*MJarsh*, which was a 404 case, the court concluded 'that the discharge of dredged or fill material into Utah Lake by plaintiff or others could well **have a substantial effect on interstate commerce** '"[58] (emphasis added). The 2007 Memorandum further cited the Tenth Circuit's *Marsh* decision as having stated that the "'authority to regulate waters used in interstate commerce [is] consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable' water of the United States.'"[59] This quoted language, however, was not part of the *Marsh* Court's holding, but was instead an observation the Supreme Court had previously made in *Kaiser Aetna v. United States*, 444 U.S. 64, 74 (1979) regarding the "wide spectrum of economic activities [that] **'affect' interstate commerce** and [] are susceptible of congressional regulation under the Commerce Clause **irrespective of whether navigation, or indeed, water is involved** " *See Kaiser Aetna*, 444 U.S. at 174 (emphasis added).

The 2015 Memorandum thereafter concluded that the intrastate reat Salt Lake is a traditional navigable water based on the Supreme Court's 971 decision in *Utah v. United States*, 403 U.S. 9 (1971). In *Utah*, the Court had held that although the Great Salt Lake "is **not part of a navigable interstate or international commercial highway**" (emphasis added), it is a traditional navigable water for purposes of establishing that the State of Utah owned the beds and banks of the lake under the Equal Footing Doctrine."[60] The Court had limited its navigability holding to the Equal Footing Doctrine because Congress had not then regulated the Great Salt Lake under either the Rivers and Harbors Act or the Clean Water Act. Utah, 403 U.S. at , 4. *See also Utah v. United States*, 420 U.S. 304 (1975); *Utah v. United States*, 427 U.S. 461 (1975) (affirming same). This same conclusion had also been reached by the Tenth Circuit in *Hardy Salt Co. v. So. Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 974) (holding that the Great Salt Lake was **not** a traditional navigable water for Rivers and Harbors Act ("RHA") purposes).[61]

Although the Great Salt Lake ("GSL") was not deemed jurisdictional for RHA purposes, because it is not part of a navigable interstate commercial highway, the 2015 Memorandum, nevertheless, found it qualified as a jurisdictional traditional navigable water for CWA purposes. "Although Great Salt Lake is not a navigable water under the RHA, it is a 'navigable water' for purposes of the Clean Water Act of 972 (CWA) (33 U.S.C. § 51, *et seq* ). The CWA defines 'navigable water' as 'the waters of the

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[58] 2007 Memorandum at (citing *Marsh*, 740 F.2d at 803).
[59] *Id* (citing *Marsh*, 740 F.2d at 804).
[60] 2015 Memorandum at
[61] *Id* at 3. The Tenth Circuit, in reaching this conclusion, in *Hardy Salt Co.*, had recognized that the subsequently "modified and clarified…definition of 'navigable water of the United States', as laid down in *The Daniel Ball,*…requir[ing] a navigable interstate linkage by water, appear[ed] to remain unchanged." *Hardy Salt Co.*, 501 F.2d at 67.



United States, including the territorial seas. The CWA implementing regulations further define 'waters of the United States' in 33 C.F.R. § 328.3(a)(1)-(8) […as] encompass[ing] those waters that are commonly referred to as 'traditional navigable waters.'"[62]

The 5 Memorandum, furthermore, stated that, "[f]or purposes of the CWA, waters are considered 'traditional navigable waters' and therefore jurisdictional under 33 C.F.R. § 328(a)(1)…, if they meet one of [several] criteria."[63] The second of the five criteria it listed provides that "'waters are considered 'traditional navigable waters' and therefore jurisdictional…if they… [h]ave been determined by a Federal court to be navigable-in-fact under Federal law."[64] The 2015 Memorandum then concluded that, since "[t]he GSL meets the second criteria above, having been found navigable-in-fact under Federal law in Utah v. United States, 403 U.S. 9 (1971) as discussed above,…the GSL is a 'traditional navigable water' and is regulated by the Corps under Section 404 of the CWA."[65]

As stated above, neither the 7 Memorandum nor the 5 Memorandum are 'good law' following the Supreme Court's 2023 majority decision in *Sackett* This conclusion has been reached for several reasons. First, the *Sackett* majority held that CWA jurisdiction will extend over "adjacent wetlands" **only if** the Corps establishes that there is a relatively permanent body of water that is, itself, or is connected to, a **traditional interstate navigable water**, and that such wetland has a continuous surface connection with either of such waters. *Sackett*, 143 S.Ct. at 341 (quoting *Rapanos*, 547 U.S. at 742. *See* Sec. I.D, *supra*

Second, the *Sackett* majority effectively held that since the CWA and the RHA use the same terms to limit their jurisdictional scope – **traditional interstate navigable waters** – courts must construe both the CWA and RHA as limiting the jurisdictional scope of federal action to **preserving the navigable capacity of interstate waters** to ensure that neither the EPA nor the Corps regulates in excess of **Congress's navigation power** *Sackett*, 143 S.Ct. at 1333, n.8 (citing to the *Appalachian Elec. Pwr. Co.* and *The Daniel Ball* cases in which this issue was addressed, and to Justice Thomas' historical account of these cases). *Sackett*, 143 S.Ct. at 1348-1351) (Thomas, J.) (concur. op.). The majority thus highlighted that the CWA's more aggressive regulation of navigable waters is due to its expanded scope of regulated activities, **not** to its expanded scope of regulatory jurisdiction – i.e., because the CWA shifted from an *ex-post* evidence-based enforcement and injunctive regime to an *ex ante* allegation-based pre-violation licensing regime. *Sackett*, 143 S.Ct. at 1333, n.7.

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[62] *Id* at

[63] The other four criteria the 2015 Memorandum identifies are as follows: "Are subject to section 9 or of the Rivers and Harbors Appropriations Act of 899"; 3. "Are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)"; 4. "Have historically been used for commercial navigation, including commercial waterborne recreation"; 5. "Are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation." *Id* at -3.

[64] *Id*

[65] *Id* at 3.



Third, the *Sackett* majority emphasized that, based on history, CWA regulation should focus on the extent of Congress's Commerce Clause navigation power, and **not its commerce power, alone** *Sackett*, 143 S.Ct. at 1333 n.8. To this end, the *Sackett* majority cited to *The Daniel Ball*, to show it is **the inextricable link between traditional navigable waters and the interstate commerce conducted on those waters** that serves to render them "waters of the United States," within the meaning of Congress's navigation power. Jurisdictional waters must "form in their ordinary condition by themselves, or by uniting with other waters, **a continued highway over which commerce is or may be carried on with other States…in the customary modes in which such commerce is conducted by water**." (emphasis added). *The Daniel Ball*, 77 U.S. at 563. Accord *Coombs*, 37 U.S. at 78 (cited at Sackett, 143 S.Ct. at 1345 (Thomas, J.) (concur. op.).

To recall, the *Sackett* majority supported this interpretation by explaining how the term 'commerce' was historically intertwined with the types of activities engaged in by merchants and financiers involved in navigation and other carriage and trade and intercourse across jurisdictional lines, and it did **not** include activities that 'substantially affected' commerce. This critically important point lies at the core of the State of Utah's traditional authority that CWA § 1251(b) was intended to preserve, *Sackett*, 143 S.Ct. at 332, 1334, n.10, over agricultural and developmental land and water use, which are at the center of the current Willard Land wetlands CWA regulatory dispute. *See also Sackett*, 43 S.Ct. at 329-1330, 341-1342 (citing *SWANCC*, 531 U.S. at 73-174, rejecting Congress's claimed "power to regulate intrastate activities that 'substantially affect' interstate commerce" as "an impingement of the States' traditional and primary power over land and water use"). Accord *Sackett*, 143 S.Ct. at 1345 (Thomas, J.) (concur. op.) (citing majority opinion, *Sackett*, 143 S.Ct. at 341, 329-330)

Both the 2007 and the 2015 Memorandums violate the Supreme Court's decision in *Sackett* to the extent they treat the **intrastate Great Salt Lake** as a "water of the United States," because federal courts had previously held it is "navigable-in-fact" for Equal Footing Doctrine purposes, and/or that the intrastate commerce conducted on GSL waters "substantially affected interstate commerce." Following the majority decision in *Sackett*, **interstate** commerce must henceforth be conducted via the fluid use of the Lake's and the Lower Bear River's navigable-in-fact waters.

The Great Salt Lake may be a relatively permanent body of water, but it is **not either of the following:** it is **not** itself, a traditional interstate navigable-in-fact water over which commerce is or may be conducted by water; and it is **not** connected to a traditional interstate navigable-in-fact water over which commerce is or may be conducted by water. Therefore, the Great Salt Lake does not and cannot serve as part of a continuous interstate highway on which commerce is or can be conducted.

In sum, because of the U.S. Supreme Court majority's decision in *Sackett*, and the Corps' limited jurisdiction over the Lower Bear River which lacks a continuous surface connection to the Great Salt Lake through which interstate commerce may be conducted by water, the intrastate Great Salt Lake is **not** a jurisdictional "water of the United States" within the meaning of the CWA and 33 C.F.R. § 328.3(a)(5) – i.e., it is **not** an intrastate lake not identified in § 328.3(a)(1) through (4) that is a relatively permanent, standing or continuously flowing body of water with a continuous surface connection to a § 328(a)(1) or (a)(3) water.



## III. Conclusion

For all the above reasons, the Corps Sacramento District does **not** possess the authority under Congress's Commerce Clause navigation power to assert CWA § 404 jurisdiction over the Great Salt Lake, the physically impounded Harold S. Crane WFMA, the Willard Bay Reservoir South Drain, or Willard Land, LLC's isolated wetlands which are **not** adjacent to a WOTUS or a tributary to a WOTUS. Therefore, any effort by the Corps Sacramento District to assert CWA § 404 jurisdiction over those nonadjacent wetlands would be *ultra vires*, contravene the Supreme Court's May 2023 *Sackett* decision, and likely prove fruitless, if not, counterproductive to the agency's interests in Utah.

Sincerely,

[redacted]

[redacted]
Managing Principal

Cc: [redacted]



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Exhibit 3 [redacted], *Response to U.S. Army Corps of Engineers Sacramento District, Letter Requesting Additional Information and Withdrawing AJD Verification* [redacted])

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Exhibit 6 [redacted] LLC, Graphics – *Distance of Irrigation Wetland Runoff Flow from the* [redacted]*, LLC Property*

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Exhibit 9 United States Department of the Interior Bureau of Reclamation, *Willard Reservoir Resource Management Plan* (April 2000)

Exhibit 10 United States Bureau of Reclamation Project Planning Report No. 4-7.10-2, *Weber Basin Project, Utah – Development of the Potential Weber Basin Project, Utah Bonneville Basin*, Doc. No. 147, United States Senate, 81st Cong. 2d Sess. (Jul. 15, 1949)

Exhibit 11 United States Department of the Interior Bureau of Reclamation Provo Area Office, *A.V. Watkins Dam Safety of Dams Modification Draft Environmental Assessment PRO-EA-07-002*, Weber Basin Project, Box Elder County, Utah (Oct. 2007)

Exhibit 12 Brandt Demars, Curt Pledger, and Bruce Barrett, *A.V. Watkins Dam Modification: Cement-Bentonite Slurry Cutoff Wall*, Paper Presented at United States Society on Dams 29th Annual Meeting and Conference (Nashville, TN Apr. 2009)

Exhibit 13 United States Department of the Interior Bureau of Reclamation, *Willard Dam – Technical Record of Design and Construction*, Weber Basin Project, Utah (Denver, CO Jan. 1967)

Exhibit 14 Willard Bay Graphic and Satellite Map Images

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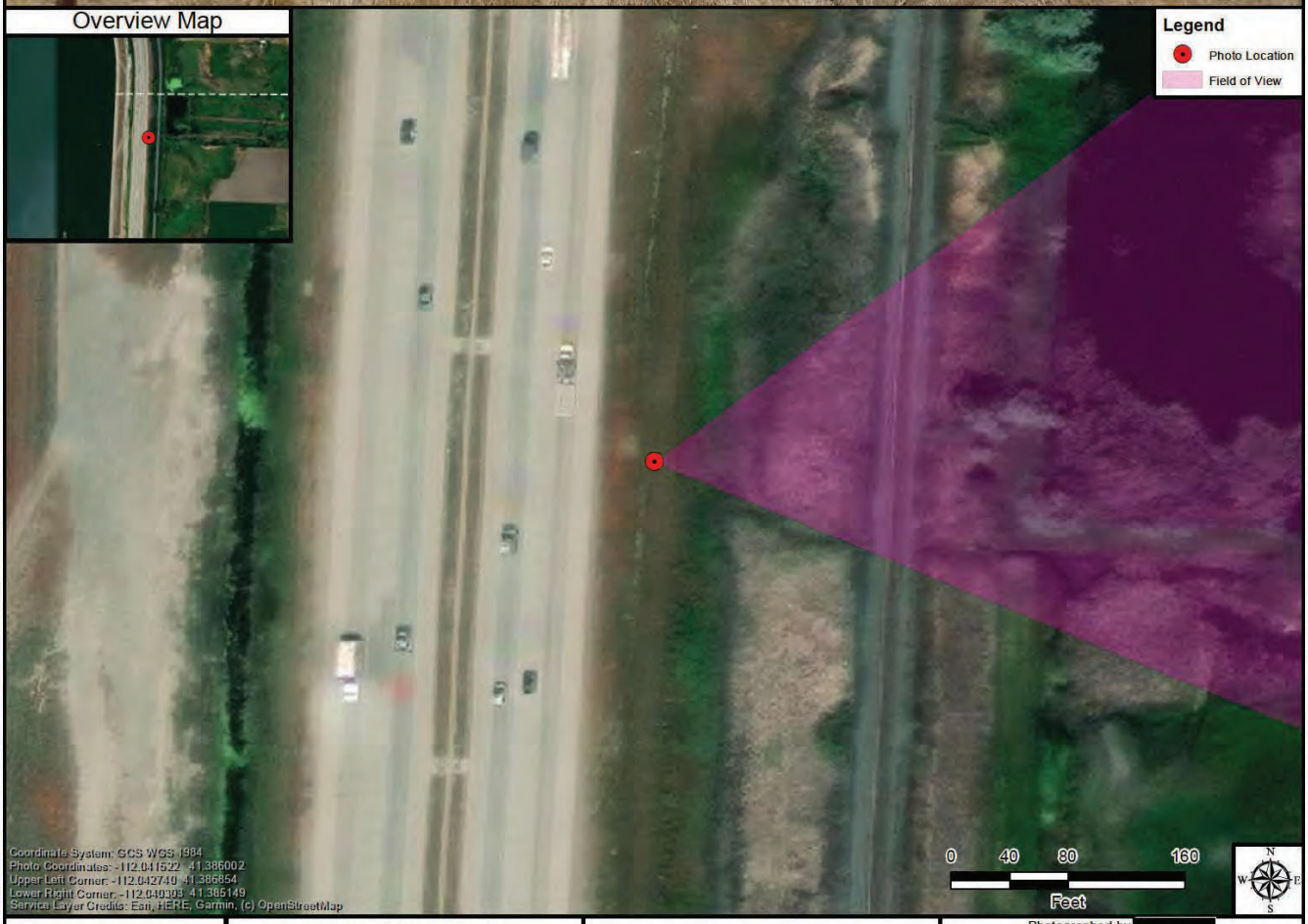
Overview Map






**Mapped Photo Log for Lew Swain Property 202200159**

Page 1 of 22

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**AJD MFR Enclosure 11**

Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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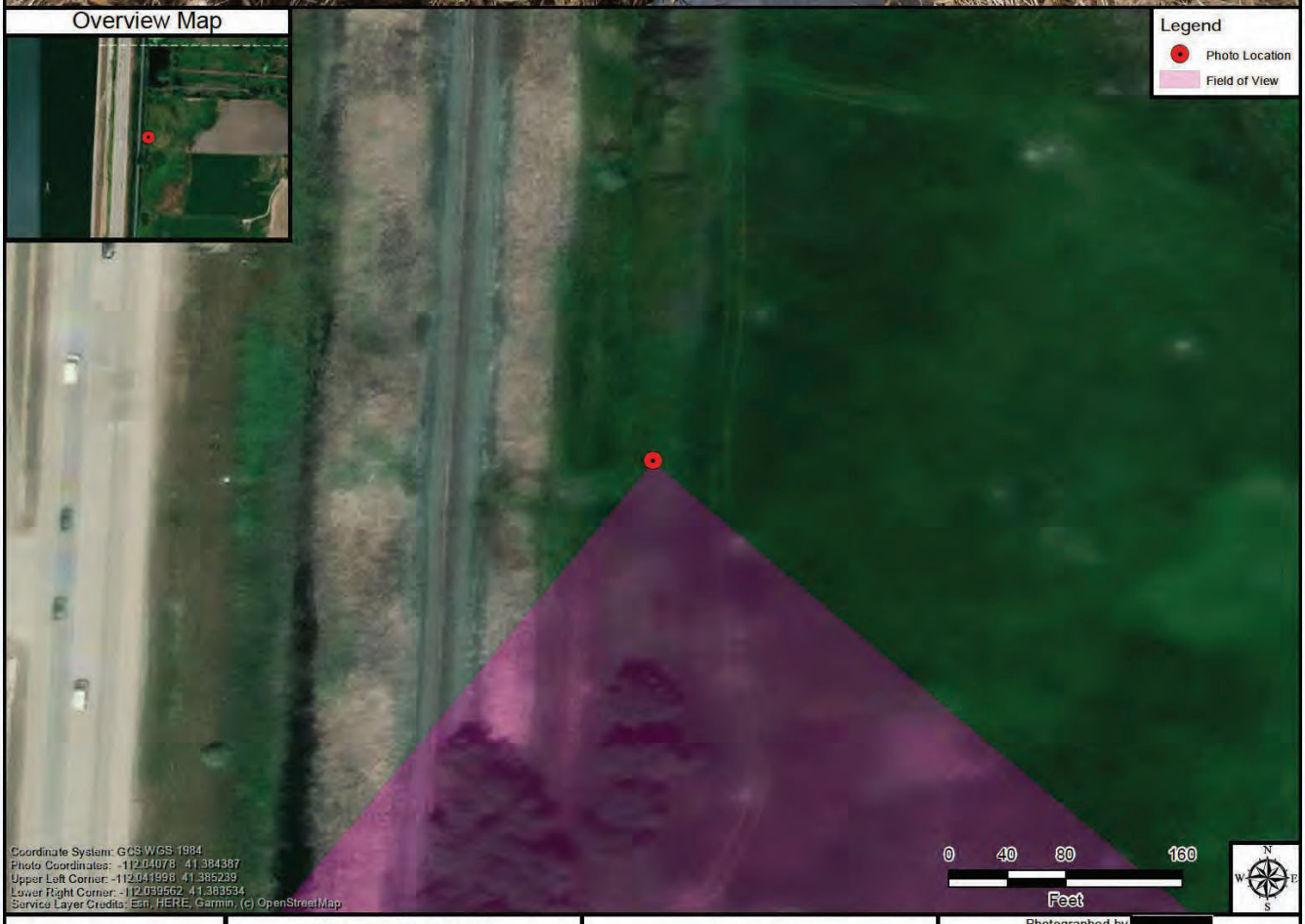
** Corrected by [redacted] on 2/13/2025

Overview Map



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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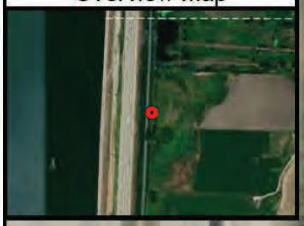
Overview Map



Legend

Photo Location

Field of View


Mapped Photo Log
for Lew Swain Property
202200159



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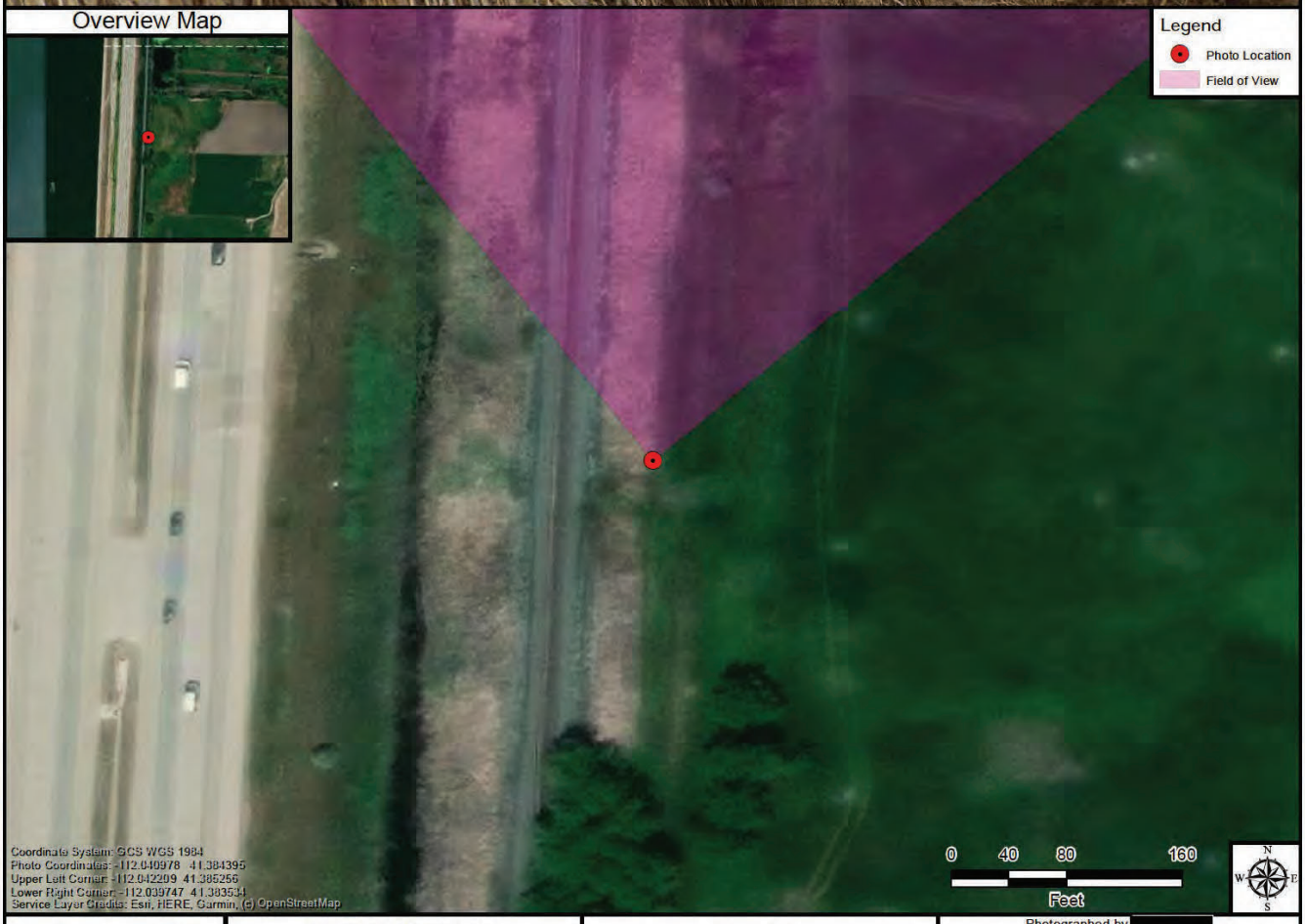
Overview Map



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Heading Source: Camera's internal compass
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Overview Map



Legend

Photo Location

Field of View


Mapped Photo Log
for Lew Swain Property
202200159



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Heading Source: Camera's internal compass
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Overview Map



Legend

Photo Location

Field of View


Mapped Photo Log
for Lew Swain Property
202200159



Description:

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Heading Source: Camera's internal compass
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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



Description:

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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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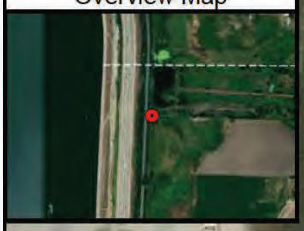
Overview Map



Legend

Photo Location

Field of View

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0 40 80 160

Feet

N W E S

Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




Mapped Photo Log
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Overview Map




Mapped Photo Log
for Lew Swain Property
202200159



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Overview Map




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for Lew Swain Property
202200159



Description:

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