



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

CESPK-RDE (SPK-2023-00753)

22 October 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ SPK-2023-00753.²

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

¹ While the Supreme Court's decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Utah due to litigation.

1. SUMMARY OF CONCLUSIONS.

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).

- a. W1, non-jurisdictional under Section 404 of the Clean Water Act.
- b. Ditch 1, non-jurisdictional under Section 404 of the Clean Water Act.

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The approximately 33-acre review area is located at the southwest corner of West Antelope Drive and South 300 West, Latitude 41.08762°, Longitude -112.08631°, Syracuse, Davis County, Utah. The maps in Enclosures 1 and 3 label this area “survey area” rather than review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Great Salt Lake, which is a water of the United States pursuant to 33 C.F.R. §328.3(a)(1) and 40 C.F.R. §230.3(s)(1), the “traditional navigable waters.” Waters are traditional navigable waters if they meet one of the following criteria:

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- a. Are subject to section 9 or 10 of the Rivers and Harbors Appropriations Act of 1899;
- b. Have been determined by a federal court to be navigable-in-fact under Federal law;
- c. Are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);
- d. Have historically been used for commercial navigation, including commercial waterborne recreation; or
- e. Are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. W1 abuts two culverts on the west of the survey area. The culverts connect to a piped irrigation ditch that flows south for approximately 0.28-mile from the southwestern corner of the survey area, and then west for approximately 0.75-mile (1.03 miles cumulatively) before discharging into a relatively permanent tributary ditch that parallels South 4000 West. The tributary ditch flows south for approximately 0.43-mile before entering a culvert under South 4000 West, and then flows southwest before discharging into the Great Salt Lake (Enclosure 2).

6. SECTION 10 JURISDICTIONAL WATERS⁶: There are no aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899.⁷

⁶ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

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7. SECTION 404 JURISDICTIONAL WATERS: None of the aquatic resources within the review area (Enclosure 3) meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*.

- a. TNWs (a)(1): N/A
- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. There are no aquatic resources and other features within the review area identified as "generally non-jurisdictional" in the preamble to the 1986 regulations (referred to as "preamble waters").⁷

b. There are no aquatic resources and features within the review area identified as "generally not jurisdictional" in the *Rapanos* guidance.

c. There are no aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA.

⁷ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

⁸ 51 FR 41217, November 13, 1986.

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d. There are no aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.).

e. There are no aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.”

f. Two aquatic resources totaling 18.95 acres within the review area are non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (Enclosure 3).

W1 is an 18.9-acre palustrine emergent wetland. It is not adjacent to an (a)(1)-(a)(6) water. While W1 connects to a relatively permanent tributary ditch through culverts, an underground irrigation pipe, and a control box, this connection is not a continuous surface connection. The 1.03-mile-long connection between the wetland and the relatively permanent tributary ditch through a multi-branched irrigation system does not constitute a continuous surface connection for the purposes of wetland adjacency (Enclosure 4). The irrigation system through which this connection flows is substantially similar to the city storm sewer system that the agencies found could not be a part of a continuous surface connection in *Memorandum on NWP-2023-602* (19 March 2024). See CESPK-RDE, memorandum for record (Initial Review Concerning the Administrative Appeal Decision in SPK-2023-00753), 10 October 2024.

Ditch 1 was disclaimed as non-jurisdictional in the 30 January 2024 AJD. Its jurisdiction status was not challenged by the request for appeal nor was it the subject of the administrative appeal remand dated 5 September 2024. We have included it here for clarity but are not reconsidering the jurisdictional status of Ditch 1. Ditch 1 is an irrigation ditch that is concrete lined with slide gates to divert water to the survey area as well as to surrounding flood irrigated land. It is 1,064 linear feet and 2 feet wide. The flow of water into Ditch 1 is controlled upstream, south of the survey area, for the purpose of flood irrigating the field for cattle grazing. Ditch 1 is not jurisdictional under Section 404 of the Clean Water Act since it has no tributary connection to the Great Salt Lake. There is no discrete, discernable flow path, other than sheet flow, to W1 and the pipes leading to the irrigation system which provide the surface water outlet from the review area. Ditch 1 flows only for short durations during the delivery of irrigation water to the field.

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9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

a. Aquatic Resource Delineation Report prepared by [REDACTED] [REDACTED] dated September 27, 2023. The consultant prepared the delineation report in accordance with the U.S. Army Corps of Engineers 1987 Wetland Delineation manual and the USACE Regional Supplement for the Arid West Region.

b. Photos included in the [REDACTED] Aquatic Resource Delineation Report.

c. GoogleEarth. (31 August 2003, 14 September 2011, 16 June 2015, 10 September 2018, 18 July 2019, 16 May 2021, 3 June 2023). Syracuse, Davis County, Utah. Latitude 41.08206°N, Longitude -112.10302°W, eye alt 1299 ft. Retrieved 29 January 2024, from <http://www.earth.google.com>.

d. GoogleEarth. (31 July 2006, 22 June 2009, 16 June 2015, 8 July 2016, 17 June 2017, 10 September 2018, 18 July 2019, 11 September 2020, 16 May 2021, 24 May 2022). Syracuse, Davis County, Utah. Latitude 41.08765°N, Longitude -111.08641°W, eye alt 2436 ft Retrieved 26 January 2024, from <http://www.earth.google.com>.

e. GoogleEarth. (17 June 2010, 15 June 2015, 16 May 2021, 24 May 2022). South 3000 West, Syracuse, Davis County, Utah. Latitude 41.08792°N, Longitude -112.08392°W. Retrieved 30 January 2024, from <http://www.earth.google.com>.

f. LiDAR – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 26 January 2024.

g. National Hydrography Dataset Flowlines – Large Scale from National Layers in the National Regulatory Viewer for the South Pacific Division. Retrieved 26 January 2024.

h. USDA Natural Resources Conservation Service Soil Survey: Included in the [REDACTED] Aquatic Resource Delineation Report.

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i. US Fish and Wildlife Service Wetland Mapper – National Layer in the National Regulatory Viewer for the South Pacific Division. Retrieved 26 January 2024 and NWI Map included in the [REDACTED] Aquatic Resource Delineation Report.

j. Flow Path Description and Figures provided as additional information from [REDACTED].

k. Google Street View. (June 2019, November 2021, August 2023). South 4000 West, Syracuse, Davis County, Utah. Latitude 41.08206°N, Longitude -112.10302°W. Retrieved 29 January 2024, from <https://www.google.com/maps>.

l. Google Street View. (September 2011, June 2019, September 2021, November 2022, August 2023). South 3000 West, Syracuse, Davis County, Utah. Latitude 41.08792°N, Longitude -112.08392°W. Retrieved 29 January 2024, from <https://www.google.com/maps>.

m. SPK-2007-01985: Preliminary Jurisdictional Determination verified on 4 February 2019.

10. OTHER SUPPORTING INFORMATION. This AJD is a reconsideration of our 30 January 2024 jurisdictional determination in response to the South Pacific Division's 6 September 2024 administrative appeal decision remanding the determination to the District. The administrative appeal decision found that SPK did not properly consider whether wetland W1 had a continuous surface connection to a relatively permanent tributary. We have reconsidered our jurisdictional determination and conclude that wetland W1 is not an adjacent wetland pursuant to 33 CFR 328.3(a)(7) because it lacks a continuous surface connection.

The culverts, irrigation pipeline, and control structure are discrete features physically connecting the W1 to the relatively permanent tributary ditch. Pipes can serve as a continuous surface connection under the pre-2015 regulatory regime (*Memorandum on NAP-2023-01223*, 25 June 2024). Although we have no quantitative information about the frequency of the discharge from W1 to the irrigation system or the discharge from the irrigation system to the tributary system, the qualitative information in the record indicates that these discharges do occur periodically. The location and timing of discharge from the irrigation system to the tributary network is a system management decision.

Nevertheless, we conclude that subsurface flow through the irrigation system is not a continuous surface connection consistent with current guidance because the irrigation system is similar to the city storm sewer system in *Memorandum on NWP-2023-602* (19

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March 2024). While the pipe that connects this wetland to the relatively permanent tributary ditch is not a city's storm sewer system, it shares the complexity of such a system as it also branches into multiple laterals (Enclosure 4) and is more than a minor subsurface interruption.

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

4 Encls

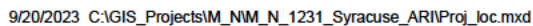
1. Location

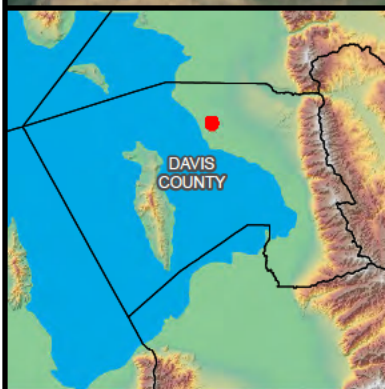
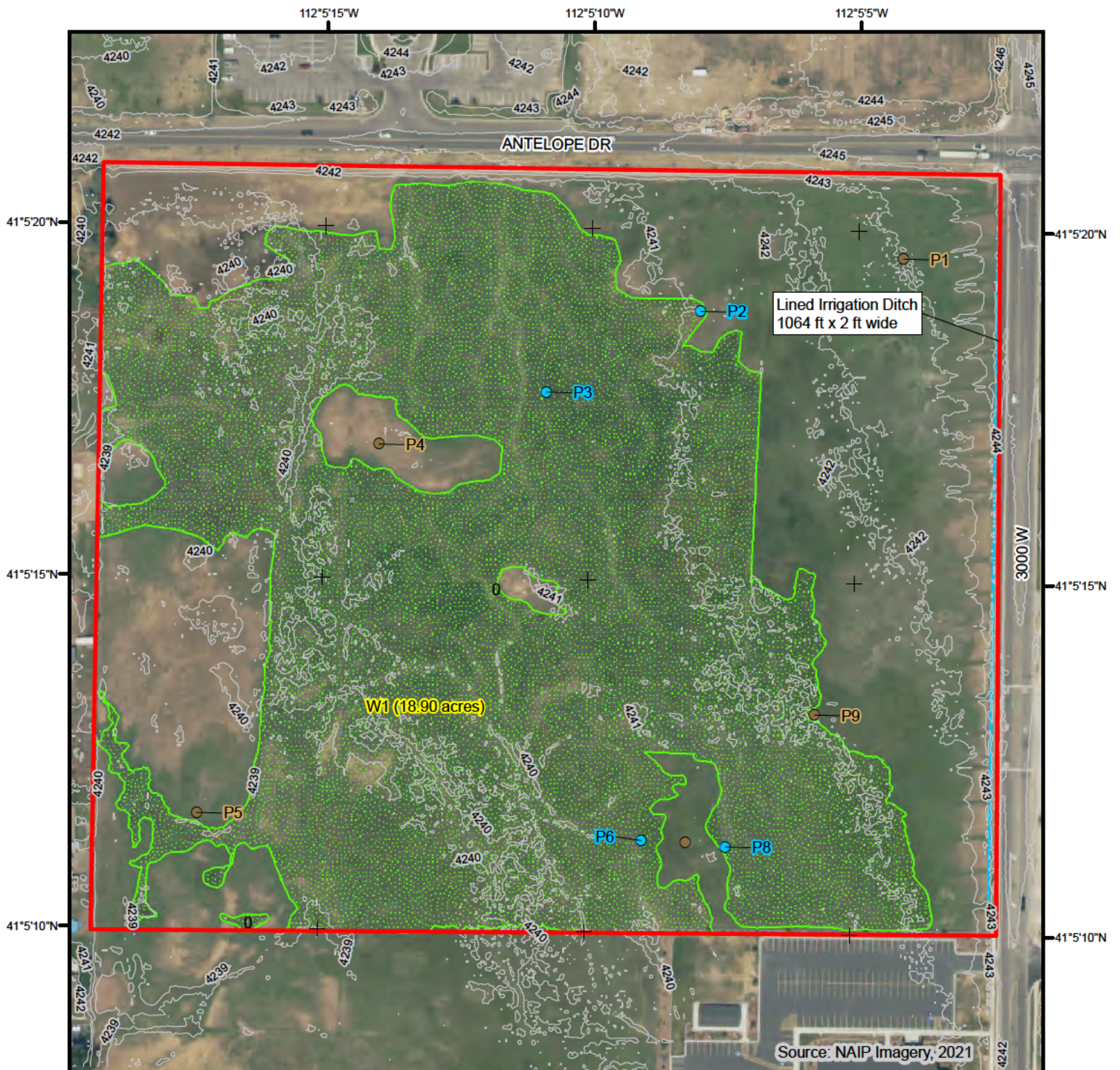
2. Flowpath

3. Aquatic Resources

4. Irrigation System

[REDACTED]
[REDACTED]
[REDACTED]





- Upland Data Point
- Wetland Data Point
- Lined Irrigation Ditch
- PEM
- 1 foot contour
- ▭ Survey Area (32.7 acres)

Delineation field work
completed Sept 10, 2023



0 200 400
Feet

Syracuse

Wetland Delineation Results

