



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

September 25, 2022

Regulatory Division (SPK-2006-00303)

Panattoni Development Company, Inc.
Attn: Ms. Lindy Deller
980 Sandhill Road, Suite 100
Reno, NV 89521-3909
LDeller@panattoni.com

Dear Ms. Deller:

We are providing an approved jurisdictional determination (AJD) for the *Mt. Rose Commerce Park site*, which has been revised through the JD appeals process and recent changes in the definition of waters of the United States. The approximately 89-acre project site is located due west of Alt. US HWY 395 and due south of Highway 431 (Mt. Rose Highway), Latitude 39.39883°, Longitude -119.74859°, South Reno, Washoe County, Nevada (*Enclosure 1*).

Based on available information, we concur with your aquatic resources delineation for the site, as depicted on the enclosed April 11, 2022, drawing prepared by GeoUAS, Inc. (*Enclosure 2*). Approximately 3,200 linear feet of non-relatively permanent stream channel, identified as Unnamed Channel, is present within the survey area. This letter verifies that the location and boundaries of non-tidal waters conform with the ordinary high water mark definition at 33 CFR §328.3(c)(7), Regulatory Guidance Letter 05-05, and any applicable regional guide.

Of these aquatic resources, we have determined that the 3,200 linear feet of Unnamed Channel are not waters of the U.S. regulated under Section 404 of the Clean Water Act or under Section 10 of the Rivers and Harbors Act.

We are enclosing a copy of the Approved Jurisdictional Determination Memorandum for Record for your site (*Enclosure 3*).

This approved jurisdictional determination is valid for five years from the date of this letter unless new information warrants revision of the determination before the expiration date. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 Code of Federal Regulations (CFR) Part 331. A Notification of Appeal Process (NAP) and Request for Appeal (RFA) Form is enclosed (*Enclosure 4*). If you request to appeal this determination, you must submit a completed RFA form to the South Pacific Division Office at the following address: Administrative Appeal Review Officer, Army Corps of Engineers, South Pacific Division, CESPD-PDO,

1455 Market Street, 2052B, San Francisco, California 94103-1399, Telephone: 415-503-6574, FAX: 415-503-6646.

In order for an RFA to be accepted by the Corps, we must determine that the form is complete, that it meets the criteria for appeal under 33 CFR Part 331.5, and that the form was received by the Division Office within 60 days of the date of the NAP. It is not necessary to submit an RFA form to the Division Office unless you object to the determination in this letter.

We recommend that you provide a copy of this letter and notice to all other affected parties, including any individual who has an identifiable and substantial legal interest in the property.

The delineation included herein has been conducted to identify the location and extent of the aquatic resource boundaries and/or the jurisdictional status of aquatic resources for purposes of the Clean Water Act for the particular site identified in this request. This delineation and/or jurisdictional determination may not be valid for the Wetland Conservation Provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should discuss the applicability of a certified wetland determination with the local USDA service center, prior to starting work.

We appreciate feedback, especially about interaction with our staff and our processes.

Please refer to identification number SPK-2006-00303 in any correspondence concerning this project. If you have any questions, please contact Samuel Bohannon at the Reno Regulatory Field Office, 300 Booth Street, Room 3050, Reno, Nevada 89509-1328, by email at Samuel.T.Bohannon@usace.army.mil, or telephone at (775) 799-8232. For program information or to complete our Customer Survey, visit our website at www.spk.usace.army.mil/Missions/Regulatory.aspx.

Sincerely,



Michael S. Jewell
Chief, Regulatory Division

Enclosures

cc:

Ms. Lori Carpenter, GeoUAS, Inc., loric@nevada.unr.edu

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Panattoni Development Company, Inc. Attn: Ms. Lindy Deller		File No.: SPK-2006-00303	Date: September 25, 2023
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A	
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B	
	PERMIT DENIAL	C	
→	APPROVED JURISDICTIONAL DETERMINATION	D	
	PRELIMINARY JURISDICTIONAL DETERMINATION	E	

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/cecw/pages/reg_materials.aspx or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer (address on reverse). This form must be received by the division engineer within **60 days** of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer (address on reverse). This form must be received by the division engineer within **60 days** of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within **60 days** of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer (address on reverse). This form must be received by the division engineer within **60 days** of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process, you may contact:

Samuel Bohannon
Regulatory Project Manager
U.S. Army Corps of Engineers
Nevada Section
1325 J Street, Room 1827
Sacramento, CA 95814-2922
Phone: (775) 799-8232, FAX 916-557-7803
Email: Samuel.T.Bohannon@usace.army.mil

If you only have questions regarding the appeal process, you may also contact:

Travis Morse
Administrative Appeal Review Officer
U.S. Army Corps of Engineers
South Pacific Division
Phillip Burton Federal Building, Post Office Box 36023
450 Golden Gate Avenue
San Francisco, California 94102
Phone: 970-243-1199x1014, FAX: 971-241-2358
Email: W.Travis.Morse@usace.army.mil

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15-day notice of any site investigation and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.

Date:

Telephone number:

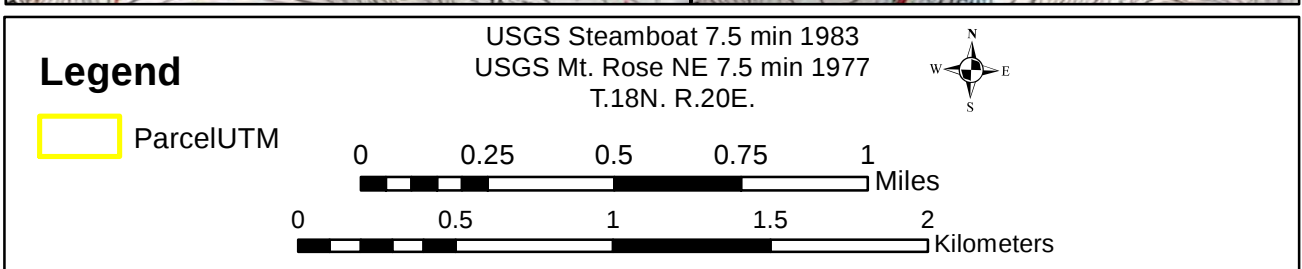
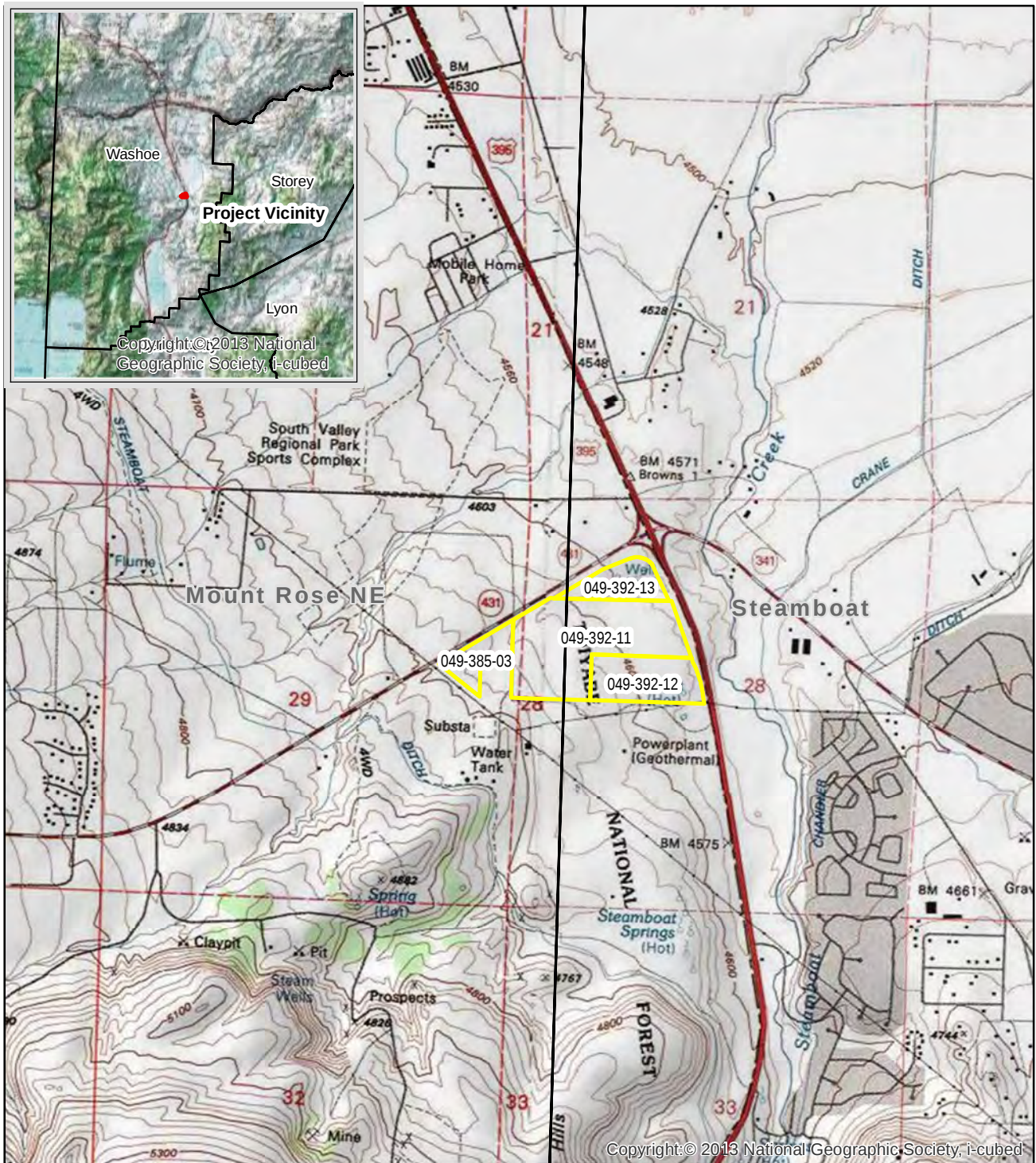


Figure 1a. Mt. Rose Commerce Park Project Location



Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

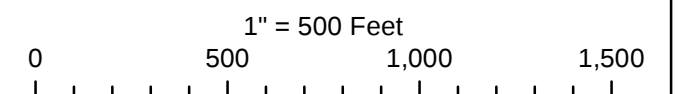


P.O. Box 1
Mead, WA 99021

Panattoni Project



Attachment 1, Figure 1d.





DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET – ROOM 1640
SACRAMENTO, CA 95814

CESPK-RD

25 September 2023

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the “Revised Definition of ‘Waters of the United States’”; (88 FR 3004 (January 18, 2023) as amended by the “Revised Definition of ‘Waters of the United States’; Conforming” (8 September 2023),¹ SPK-2006-00303

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³

On 18 January 2023, the Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) published the “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”). On September 8, 2023, the agencies published the “Revised Definition of ‘Waters of the United States’; Conforming”, which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) (“*Sackett*”).

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

¹ While the Revised Definition of “Waters of the United States”; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPK-2006-00303

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). Unnamed Channel is a 4th order non-relatively permanent, non-jurisdictional water, which has both a defined channel and an Ordinary High-Water Mark (OHWM) measuring at 3,200 linear feet in length within the 89-acre project area.

2. REFERENCES.

a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")

b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))

c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

d. Robb, James T. 2023. "Memorandum for Record, Jurisdiction Evaluation and Recommendations for Responding to the Administrative Appeal Remand, with Enclosures" Sacramento: Sacramento District, U.S. Army Corps of Engineers, September 7.

e. Gipson, Jason A. 2022 "Approved Jurisdictional Determination," Sacramento: Sacramento District, U.S. Army Corps of Engineers, September 7

f. Gant, Antoinette R. BG. 2023. "Panattoni Development Company, Inc., c/o Lindy Deller, Approved Jurisdictional Determination, Sacramento District, SPK-2006-00303." Administrative Appeal Decision. San Francisco: South Pacific Division, U.S. Army Corps of Engineers, July 27.

g. Jewell, Michael S. 2008. "Memorandum for Record, Navigable-in-Fact Determination for the Truckee River and Pyramid Lake (ID SPK-2007-01872)." Sacramento: Sacramento District, U.S. Army Corps of Engineers, June 11.

3. REVIEW AREA. The review area is an approximately 89-acre property located west of Alt. US-395, south of Nevada Highway NV-431 (also known as Mt. Rose Highway), east of US-580, and north of a geothermal power plant, at latitude 39.4010°N, longitude 119.7464°W. The Corps issued a previous AJD for the project area on 7 September 2022, which claimed jurisdiction over the 3,200 linear foot Unnamed

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Channel pursuant to Section 404 of the Clean Water Act (CWA). The decision was issued under the pre-2015 regulatory regime, which involved implementation of the CWA under the 2019 recodification of the 1986 regulations, the 1993 exclusion, and regulatory guidance following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (the "Rapanos guidance"). The applicant/appellant requested an appeal on 22 November 2023, based on three assertions. On 23 July 2023, the South Pacific Division Review Officer found that the Administrative Record (AR) did not contain sufficient documentation to support a finding of CWA jurisdiction pursuant to Section 404; specifically, the AR did not sufficiently support the district's finding that the Unnamed Channel had a significant nexus with the Truckee River and remanded the decision to the District Engineer for further consideration and final action. On 8 September 2023, The Sacramento District's Wetlands Specialist provided an MFR for Jurisdiction Evaluation and Recommendations for Responding to the Administrative Appeal Remand which concluded that the 3,200 linear foot Unnamed Channel is not a Water of the United States pursuant to 33 CFR §328.3.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Unnamed Channel is a non-relatively permanent tributary to the Truckee River, which is a Navigable-in-Fact TNW, pursuant to 33 CFR §328.3(a)(1)(i), as determined by the Sacramento District in 2008.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The Unnamed Channel flows through a 24-inch culvert to the east of the project area, under Alt U.S. HWY 395 South, for approximately 600 linear feet before entering Steamboat Creek- a Relatively Permanent Waterway. The confluence of the Unnamed Channel and Steamboat Creek is approximately 10.5 stream miles upstream of the confluence of Steamboat Creek and the Truckee River.

6. SECTION 10 JURISDICTIONAL WATERS⁵: There are no Section 10 waters within the review area.

7. SECTION 404 JURISDICTIONAL WATERS: There are no Section 404 waters within the review area.

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

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPK-2006-00303

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. The Unnamed Channel is a non-relatively permanent tributary and as such is not a water of the U.S. pursuant to 33 CFR 328.3, as amended. (See reference d. for a detailed analysis of the flow characteristics of Unnamed Channel.)

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. Carpenter, Lori. 2022. "(SPK-2006-00303): Reclassification of Intermittent Drainage, Washoe County, NV." Request for Approved Jurisdictional Determination. April 11.

b. Carpenter, Lori. 2022. "Panattoni Project, Reno NV, Rainfall/Thunderstorm Photos, SPK-2006-00303." August 22.

c. Gant, Antoinette R. BG. 2023. "Panattoni Development Company, Inc., c/o Lindy Deller, Approved Jurisdictional Determination, Sacramento District, SPK-2006-00303." Administrative Appeal Decision. San Francisco: South Pacific Division, U.S. Army Corps of Engineers, July 27.

d. Jewell, Michael S. 2008. "Memorandum for Record, Navigable-in-Fact Determination for the Truckee River and Pyramid Lake (ID SPK-2007-01872)." Sacramento: Sacramento District, U.S. Army Corps of Engineers, June 11.

e. GeoEye. 2022. "GE01 22APR01190825-P3DS-015948101010_01_P001 and 22APR01190856-P3DS-015948083010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 1.

f. GeoEye. 2020. "GE01, 20APR08185901-P3DS-015961107010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 8.

g. GeoEye. 2020. "GE01, 20APR11190858-P3DS-015961117010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 11.

h. GeoEye. 2020. "GE01, 20APR30190336-P3DS-015948128010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 30.

i. GeoEye. 2020. "GE01, 20MAY08185613-P3DS-015948127010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., May 8.

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j. Robb, James T. 2023. "Memorandum for Record, Jurisdiction Evaluation and Recommendations for Responding to the Administrative Appeal Remand, with Enclosures" Sacramento: Sacramento District, U.S. Army Corps of Engineers, September 7.

k. USACE 12 July 2022, and 16 February 2023, site visits.

l. WorldView. 2020. "WV01, 20APR15214414-P3DS-015948126010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 15.

m. WorldView. 2020. "WV01, 20APR23215631-P3DS-015948129010_01_P001, and 20APR23215542-P3DS-015948139010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 23.

n. WorldView. 2022. "WV01, 22APR09214721-P3DS-015948035010_01_P001, 22APR09214802-P3DS-015948037010_01_P001, 22APR09185915-P3DS-015948105010_01_P001, and 22APR09190021-P3DS-015948088010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 9.

o. WorldView. 2022. "WV01, 22JUN16215348-P3DS-015948043010_01_P001, and 22JUN16215253-P3DS-015948049010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., June 16.

p. WorldView. 2022. "WV01, 22MAY21220226-P2AS-015948044010_01_P001 and 22MAY21220139-P3DS-015948042010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., May 21.

q. WorldView. 2020. "WV02, 20APR02185147-P3DS-015961111010_01_P001 and 20APR02185147-M3DS-015961111010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 2.

r. WorldView. 2020. "WV02, 20APR10185749-M3DS-015961109010_01_P001, 20APR10185749-P3DS-015961109010_01_P001, 20APR10185633-M3DS-015961118010_01_P001, and 20APR10185633-P3DS-015961118010_01_P001." Orthorectified satellite imagery. Westminster, CO: DigitalGlobe, Inc., April 10.

s. WorldView. 2020. "WV02, 20APR13184640-M3DS-015961112010_01_P001, and 20APR13184640-P3DS-015961112010_01_P001." *Orthorectified satellite imagery.* Westminster, CO: DigitalGlobe, Inc., April 13.

t. WorldView. 2022. "WV03, 22APR10190239-P3DS-015948038010_01_P001, 22APR10190239-M3DS-015948038010_01_P001, 22APR10190118-P3DS-

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015948046010_01_P001, and 22APR10190118-M3DS-015948046010_01_P001." *Orthorectified satellite imagery*. Westminster, CO: DigitalGlobe, Inc., April 10.

10. OTHER SUPPORTING INFORMATION. The reach of the tributary is a second order stream formed by the confluence of two first order streams at approximately 39.398735°N, 119.748633°W. The reach of the tributary flows to the east, under Alt. US-395, and into Steamboat Creek, a 4th order stream. Approximately 3,200 feet of the 3,788-foot-long reach of the tributary is within the review area. The tributary was investigated in two separate site visits by the Corps on 12 July 2022, and again on 16 February 2023, during the appeal meeting site visit. The tributary has both a defined channel and an OHWM. An approximately 904-foot-long portion of the reach of the tributary between approximately latitude 39.399859°N, longitude 119.750957°W and latitude 39.398735°N, longitude 119.748633°W, consistently contains standing or flowing water both during ground observations and in aerial imagery during the late wet and early dry seasons. However, this portion is neither the bottom of the reach, nor the majority of the reach of the tributary. (The reach of the tributary is 3,788 feet long.) As such, the district concludes that "non-relatively permanent" best characterizes the entire reach of the tributary. A flow path from the Unnamed Tributary to the Truckee River is included as an enclosure to this MFR (Enclosure 1).

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.

MICHAEL S. JEWELL
CHIEF, REGULATORY DIVISION

Encl

Flow Path

Flow Path from Unnamed Channel within the project area for SPK-2006-00303 to the nearest TNW- the Truckee River. Map created by USACE staff 21-September-2023

Legend

-  Flow Path - Unnamed Channel to Truckee River
-  Reno

Reno

Google Earth

2 mi

