



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT  
819 TAYLOR STREET  
FORT WORTH, TEXAS 76102

CESWF-RDE

February 8, 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),<sup>1</sup> [SWF-2021-00360](#), MFR 1 of 1<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

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<sup>1</sup> 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.

<sup>2</sup> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

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

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amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Texas 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).

Enclosure 1

Water Feature	TNW	Size	Status	Rationale
OW1	No	1.45 AC	Not Jurisdictional	Does not meet (a)(4) or (a)(5)
UT1	No	2132 LF	Not Jurisdictional	Does not meet (a)(5)
UT2	No	1160 LF	Not Jurisdictional	Does not meet (a)(5)
UT3	No	1252 LF	Not Jurisdictional	Does not meet (a)(5)
UT4	No	2939 LF	Not Jurisdictional	Does not meet (a)(5)
UT5	No	1310 LF	Not Jurisdictional	Does not meet (a)(5)
UT6	No	4366 LF	Not Jurisdictional	Does not meet (a)(5)
UT7	No	4525 LF	Not Jurisdictional	Does not meet (a)(5)

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 review area for the approved jurisdictional determination (AJD) is in the southeastern corner of Palo Pinto County, Texas (Latitude: 32.591048°; Longitude: -98.104361°) and is not within a municipality. The review area is approximately 300 AC (Enclosure 1). An on-channel impoundment (OW1) appears to be part of an ephemeral tributary (UT1), which drains to UT6, also an ephemeral tributary. Other aquatic features within the review area (UT2 - UT5, UT7) comprise the remainder of the ephemeral streams within the review area. No other JDs have been performed within the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. [Brazos River is an \(a\)\(1\) TNW.](#)<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

[All aquatic features within the review area boundary drain northward offsite approximately 1.25 miles to form Coffee Creek, which flows approximately 3.4 miles to the Brazos River \(Enclosure 2\).](#)<sup>7</sup>

6. SECTION 10 JURISDICTIONAL WATERS<sup>6</sup>: 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.<sup>7</sup> [Not applicable.](#)
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): [Not applicable.](#)
  - b. Interstate Waters (a)(2): [Not applicable.](#)
  - c. Other Waters (a)(3): [Not applicable.](#)
  - d. Impoundments (a)(4): [Not applicable.](#)

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<sup>6</sup> 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.

<sup>7</sup> 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): [Not applicable.](#)
- f. The territorial seas (a)(6): [Not applicable.](#)
- g. Adjacent wetlands (a)(7): [Not applicable.](#)

## 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”).<sup>8</sup> 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. [Not applicable.](#)
- 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. [Not applicable.](#)
- 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. [Not applicable.](#)
- 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. [Not applicable.](#)
- 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*. [Not applicable.](#)
- 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

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<sup>8</sup> 51 FR 41217, November 13, 1986.

consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

- I. UT1 (1st order stream) and UT2 (2nd order stream) converge on site, starting UT6. UT3 (1st order stream) converges with UT6 (2nd order stream) further downstream, all within the review area. Of the overall stream reach that comprises UT6, approximately 39% is within the review area (Enclosure 2).

UT4 (1st order stream) converges with UT7 (2nd order stream) approximately 0.1 mile off site. Of the overall stream reach that comprises UT4, approximately 87% is within the review area. UT5 (1st order stream) converges with UT7 within the review area. Of the overall stream reach that comprises UT7, approximately 36% is within the review area (Enclosure 2).

The National Hydrography Dataset (NHD) identifies the unnamed streams within the review area, UT1-UT7, as having an intermittent flow duration. However, evidence from on-site observation, aerial imagery (supported with the antecedent precipitation tool (APT) and station rainfall data), small drainage areas, and desktop resources indicate that these streams have an ephemeral flow duration. Thus, UT1-UT7 do not provide sufficient flow durations to constitute sustained, seasonal flows and are not relatively permanent waters. UT1-UT7 flow only in direct response to precipitation events, as evidence detailed herein indicates.

USACE site visits were performed on 12 Aug., 19 Oct. 2022, and 05 Oct. 2023, all within the dry season when climatic conditions were drier than normal. On-site observation for UT1-UT7 during these visits did not reveal any evidence of long standing pooled or seasonally flowing water, e.g., water within the streams was not observed, evidence of aquatic invertebrate species was not observed, hydrophytic plant species were not observed, and evidence of nearby springs / seeps was not observed.

The consultants field work on 08 Apr. 2021, collected during the wet season during slightly drier than normal conditions, provides corroborating evidence that UT1-UT7 are not RPWs. Photographs (Enclosure 3) provided indicate water was not present within UT2-UT7, but only visible within a short segment of UT1, directly downstream from OW1. Reasonably, the observed water within the segment of UT1 was a result of overflow from OW1. The consultant reported that an outfall from OW1 was not present, but that overflow from OW1 went around the dam for a short distance before flowing into UT1 below the dam.

Regarding UT1, additional analysis was necessary because a portion of the stream was shown (Enclosure 3, Pages 3, 11, 12—photographs 1, 53, 54, 55, 56, recorded on 08 Apr. 2021 by the consultant) to have water within the stream channel directly downstream of OW1. Photographs 1 and 2 show a break in the observed water within UT1. Photograph 1 (facing east) shows water within UT1, whereas photograph 2 (facing west) shows water is not within UT1 (Enclosure 3, Page 2). This portion of UT1, along with OW1, was used as the RPW portion in the following analysis of the overall 1<sup>st</sup> order stream reach that encompasses UT1 and OW1; only 34% of the stream reach is within the review area. Note photographs 47-50, upstream of OW1, water is not observed within UT1 (Enclosure 3, Pages 10, 11).

Access to the remainder of the reach was not available except by using aerial imagery. Landscape position, small drainage area, and aerial imagery indicates that portions of the off-site section might not have an OHWM, but this is difficult to discern. Thus, the length of the off-site section was estimated by using the NHD. The analysis concludes that the stream reach that includes UT1 and OW1 is 87% not RPW (RPW section: ~999 LF; non-RPW section: ~6748 LF). UT1 (including OW1) was the only stream with any RPW segments within the review area.

See Section 10 for analysis and discussion of aerial imagery by using multiple years and corresponding APT information (Enclosure 4).

Lastly, UT1-UT7 are not paragraph (a)(1) TNWs, are not paragraph (a)(2) interstate waters (i.e., they do not cross or serve as a state boundary), are not a lake or pond and are therefore not paragraph (a)(3) waters (i.e., lakes or ponds that support a link to interstate or foreign commerce because they are known to be used by interstate or foreign travelers), are not paragraph (a)(4) impoundments of a water of the U.S., are not paragraph (a)(5) tributaries due to their non-relatively permanent flows, are not paragraph (a)(6) territorial seas, and are not paragraph (a)(7) adjacent wetlands.

- II. Pond 1 (OW1) is an impoundment of a non-RPW, ephemeral stream (UT1). OW1 was excavated prior to 1958. OW1 receives water from the upper reach of UT1, the majority is off site. OW1 conveyed flow around the dam into UT1, but not through an outfall structure. However, as discussed previously, UT1 overall is not a RPW. Thus, OW1 is not an (a)(4) impoundment or (a)(5) tributary of a water of the U.S.



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Lastly, OW1 is not a paragraph (a)(1) TNW, is not a paragraph (a)(2) interstate water (i.e., it does not cross or serve as a state boundary), does not have a nexus with interstate or foreign commerce and is therefore not a paragraph (a)(3) water (i.e., it does not support a link to interstate or foreign commerce because it is not known to be used by interstate or foreign travelers for recreation or other purposes, it does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, and the water is not known to be used for industrial purposes by industries in interstate or foreign commerce), (a)(6) territorial sea, and is not a paragraph (a)(7) adjacent wetland.

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. USACE site visits conducted on 08 Apr. & 19 Oct. 2022, 05 Oct. 2023.
  - b. Maps, delineation of aquatic resources, and other information submitted on behalf of the applicant by the consultant (Kimley Horn), multiple submittal dates.
  - c. National Wetlands Inventory, National Hydrography Dataset, 3DEP Hillshade, USGS Topo Map, Soils Maps, National Regulatory Viewer-SWD-Texas, multiple assessment dates.
  - d. 1987 Wetland Delineation Manual and Great Plains Supplement were referenced to identify potential jurisdiction.
  - e. Regulatory Guidance Letter 05-05 was used to identify the boundaries of non-wetland water features.
  - f. Aerial imagery provided by online resources, Google Earth Pro and Historicaerials.com, all available years, multiple assessment dates.
  - g. Antecedent Precipitation Tool, Version 2.0.0, USACE, assessed over multiple dates.
  - h. NOAA, National Centers for Environmental Information, Climate Data Online, [www.ncei.noaa.gov/cdo-web](http://www.ncei.noaa.gov/cdo-web)
10. OTHER SUPPORTING INFORMATION.

An assessment of water features was conducted by using the APT (Enclosure 5), station rainfall data, and aerial imagery. Enclosure 4 compiles and summarizes the information that was used to support the Corps' determination that the streams (UT1-UT7) within the review area do not have seasonal flow, are not relatively permanent waters, and thus, are not jurisdictional streams.

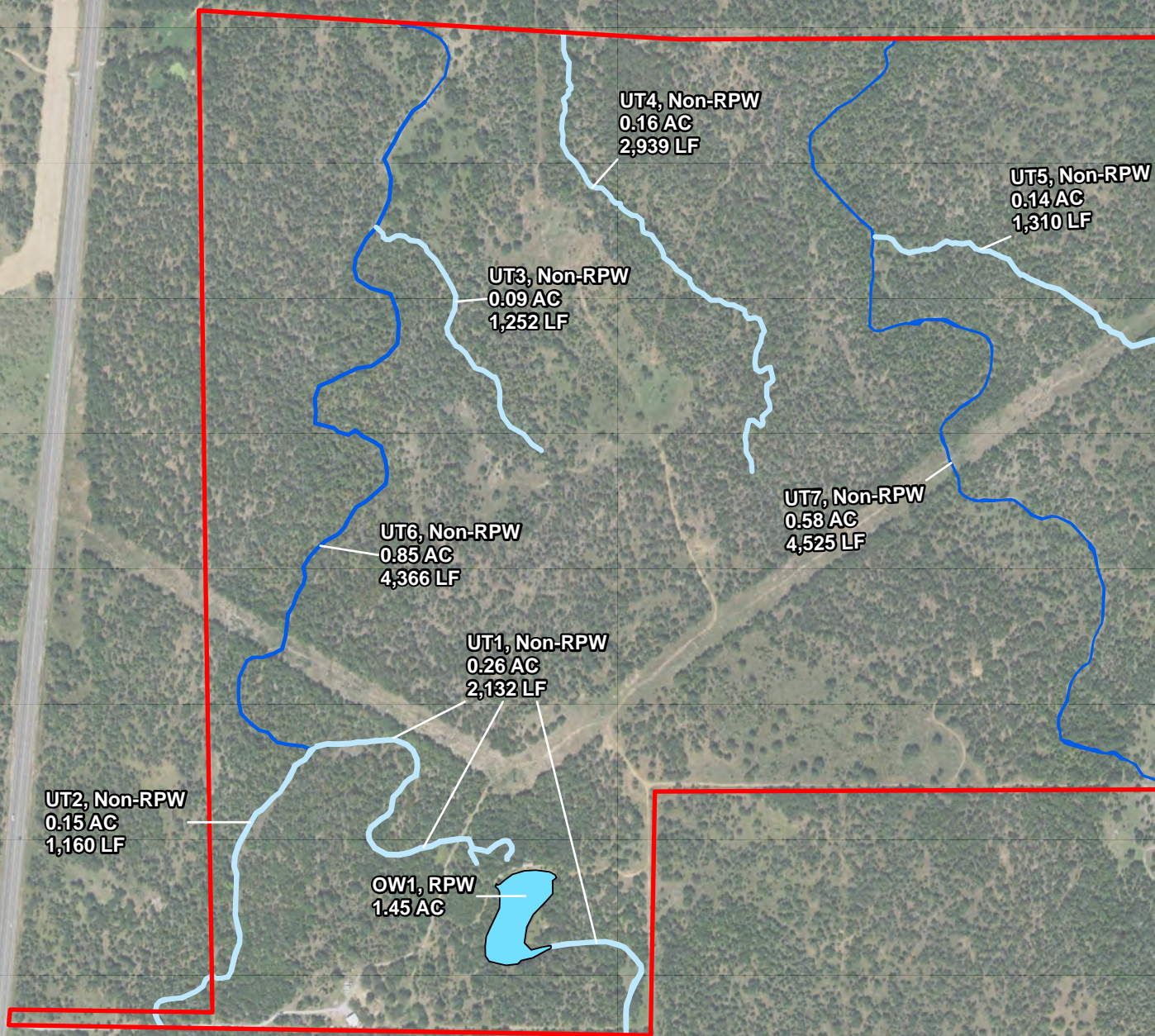
In support of the Corps' determination that UT1-UT7 are not RPW streams, aerial imagery from 27 Feb, 27 Apr. 2020, 24 Aug. 2018, 28 Jan., and 06 Sep. 2017, show no water within portions of UT1-UT7 that have unobstructed views. APT data from these dates (Enclosure 4) list normal or wetter than normal conditions. Additionally, rainfall data from Lipan 4NW (2 miles from review area) indicates 2.1 and 3.0 inches of precipitation on 28 Jan. 2017 and 24 Aug. 2018, respectively, within two weeks of the image date and water is not observable within UT1-UT7. Again, this strengthens the Corps' determination that UT1-UT7 are not RPWs.

To address aerial imagery from 4 May 2021 and 28 Mar. 2015, that shows water within unobstructed portions of UT1 and UT4 - UT7, under normal conditions during the wet season: Cumulative rainfall data recorded at Lipan 4NW (Enclosure 4) indicates the presence of visible water within these streams is a result of recent rainfall. Thus, UT1 and UT4-UT7, have flowing or ponding water is in direct response to recent rain events. As such, these aerial images showing water within the stream channel during normal conditions, inaccurately characterize these streams as having potentially seasonal flow. Lastly, all other available information reviewed, that has been detailed herein, supports these streams, UT1-UT7, as having ephemeral flow and therefore they are not relatively permanent waters.

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.

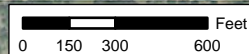


# Enclosure 1



## Legend

- Study Area, ~300 acres
- Non-RPW; ~0.80 acre; ~8,793 linear feet
- Non-RPW; ~1.43 acre; ~8,891 linear feet
- Open Water, RPW; ~1.45 acres



FIGURE

1

DATE: 11/02/2023

DRAWN: TMB

CHECKED: CGH

KHA NO.: 064429604

## Aquatic Features Map

Source: TNRIS, 2020

## Grindstone Quarry

Palo Pinto County, Texas



**Kimley»Horn**

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