



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SWF DISTRICT
819 TAYLOR STREET, ROOM 3A37
FORT WORTH, TEXAS 76102

CESWF-RDE

22 AUGUST 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 SWF-2024-00397.

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of "waters of the United States" found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 "Revised Definition of 'Waters of the United States,'" as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Texas due to litigation.

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

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

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

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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).
 - i. Excavated Pond, non-jurisdictional, not a WOTUS.
 - ii. Non-adjacent, Wetland, non-jurisdictional, not a WOTUS.

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 site (4.8-acre) is located at 3381 Farm to Market Road 720 and Martop Road in Denton County, Texas. Coordinates: 33.196460, -96.976359. USGS Quad: Little Elm 7.5-minute quad. Slopes are oriented west to east and the average site elevation is approximately 590 feet above mean sea level. The site is mapped as having only one soil type, Navo Clay Loam, 1 to 3 percent slopes and is listed as being non-hydric. This soil has slow permeability and a high rate of runoff with low water availability and severe water erosion potential. FEMA Maps classify the site as being in Zone X, which is outside of the 0.2 percent annual chance floodplain. There is an excavated online pond and a small, non-adjacent wetland on the site. Two metal culverts are on the east side boundary and connected to the pond.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Trinity River, which is listed on the State of Texas' TNW list.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Drainage of the pond is through two culverts which is connected to poorly defined Non-RPW stream remnant. From that point hydrology is piped for a distance of approximately 641 feet through the northeast development. The pipe outlet joins the lower portion of the historic stream. According to the USGS topography map, this stream feeds into Lake Lewisville. Lake Lewisville drains into the Elm Fork of the Trinity River and into the Trinity River.
6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each 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

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

⁶ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): N/A
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁷ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A
- 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 a non-adjacent wetland in accordance with *SWANCC*. N/A

⁷ 51 FR 41217, November 13, 1986.

- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

There is a small, non-adjacent wetland (Wetland 1, Seasonally Inundated, less than 0.01-acre) on the site, which was determined to be a depressional feature surrounded by uplands.

Pond 1 (Permanently Inundated, 0.88) is an online, excavated pond. There once was a first order stream that ran through and off the site (per USGS maps). The site's pond and stream remnant were linked to a series of off-site, man-made, on-line stock ponds which drained into Lewisville Lake (RPW) and eventually into the Trinity River (TNW). Over the past decade (see Google Earth aerial for 2016, 2022 and 2024), the neighboring areas have undergone intensive urbanization, which has resulted in severed linkages. Both highway 720 (west of the site) and the northeast development have altered the flow of water. Two metal culverts exist on the east boundary and serve as a spillway for the pond during high moisture periods. Off-site, a poorly defined remnant of the downstream Non-RPW stream appears to connect to the culverts.

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. Contractor field visit was on February 28, 2024, or office evaluation(s) were August 21, 2024.
 - b. U.S.G.S topographic Map, Little Elm 7.5' Quadrangle 1960, (revised 1969) and Little Elm 7.5' Quadrangle map
 - c. Soil Survey of Denton County, Texas and the U.S. Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) digital soil databases for Denton County
 - d. Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM), (Map Panel 48121C0405G, effective 18 April 2011)
 - e. Recent and historical aerial photographs of the proposed survey area

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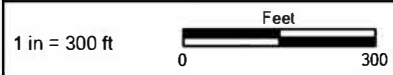
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- f. 1987 Corps of Engineers Wetland Delineation Manual and Regional Supplement to the Corps of Engineer Wetland Delineation Manual: Great Plains Region (Version 2.0)
 - g. Antecedent Precipitation Tool (APT) and Wunderground.com Wildridge weather station (KTXOAKPO16)
10. OTHER SUPPORTING INFORMATION. [N/A or Provide any additional discussion to support this determination.]
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.




Figure 1.
General Location Map

Martop Road
Denton County, Texas



File Ref. 04.354.126
Date: 2/20/2024

 Survey Area



Area of Detail Scale: 1 inch equals 1 mile

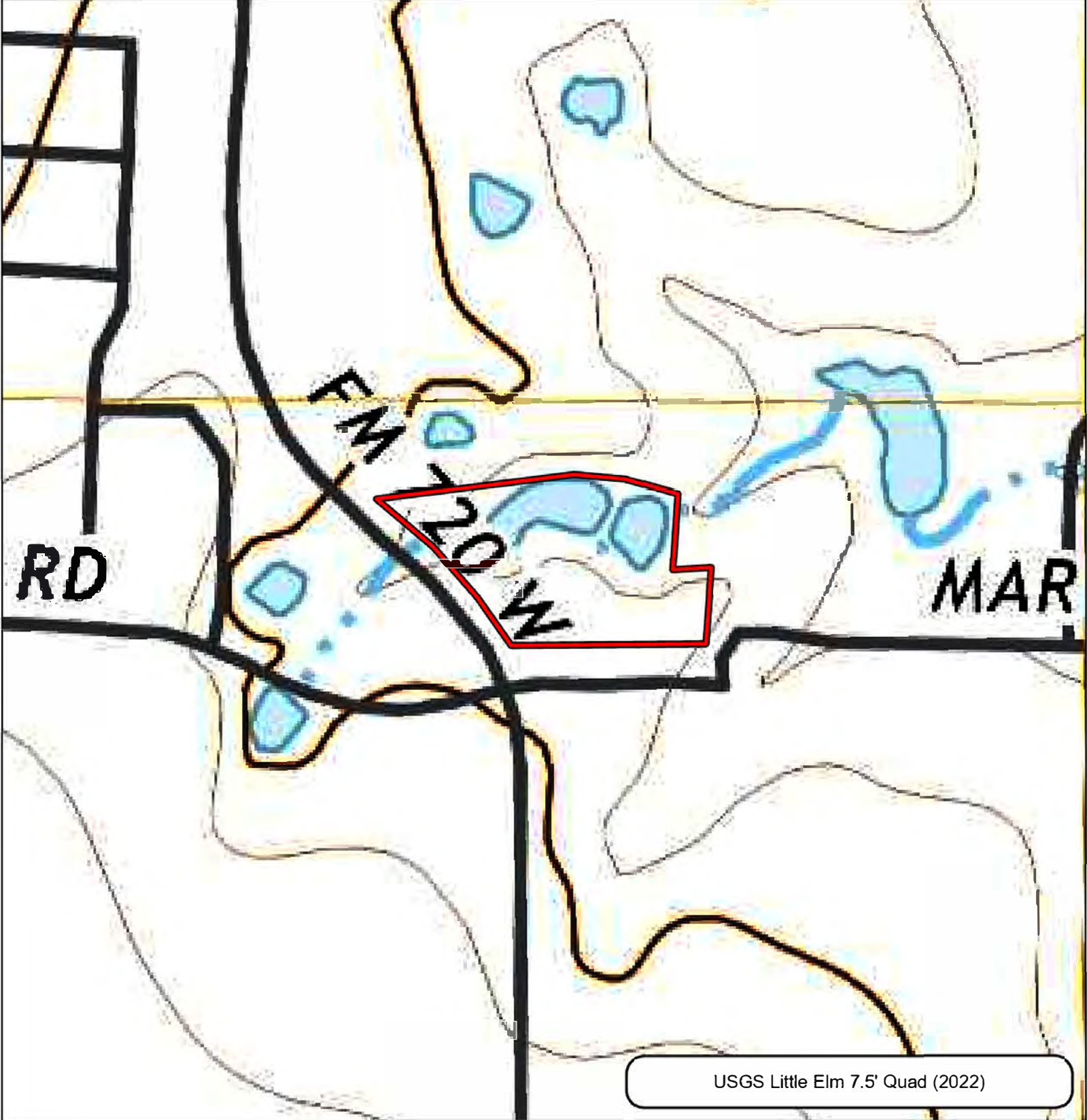



Figure 2B.
Topographic Setting

Martop Road
Denton County, Texas

1 in = 300 ft
0 300
Feet



File Ref. 04.354.126
Date: 2/20/2024

 Survey Area

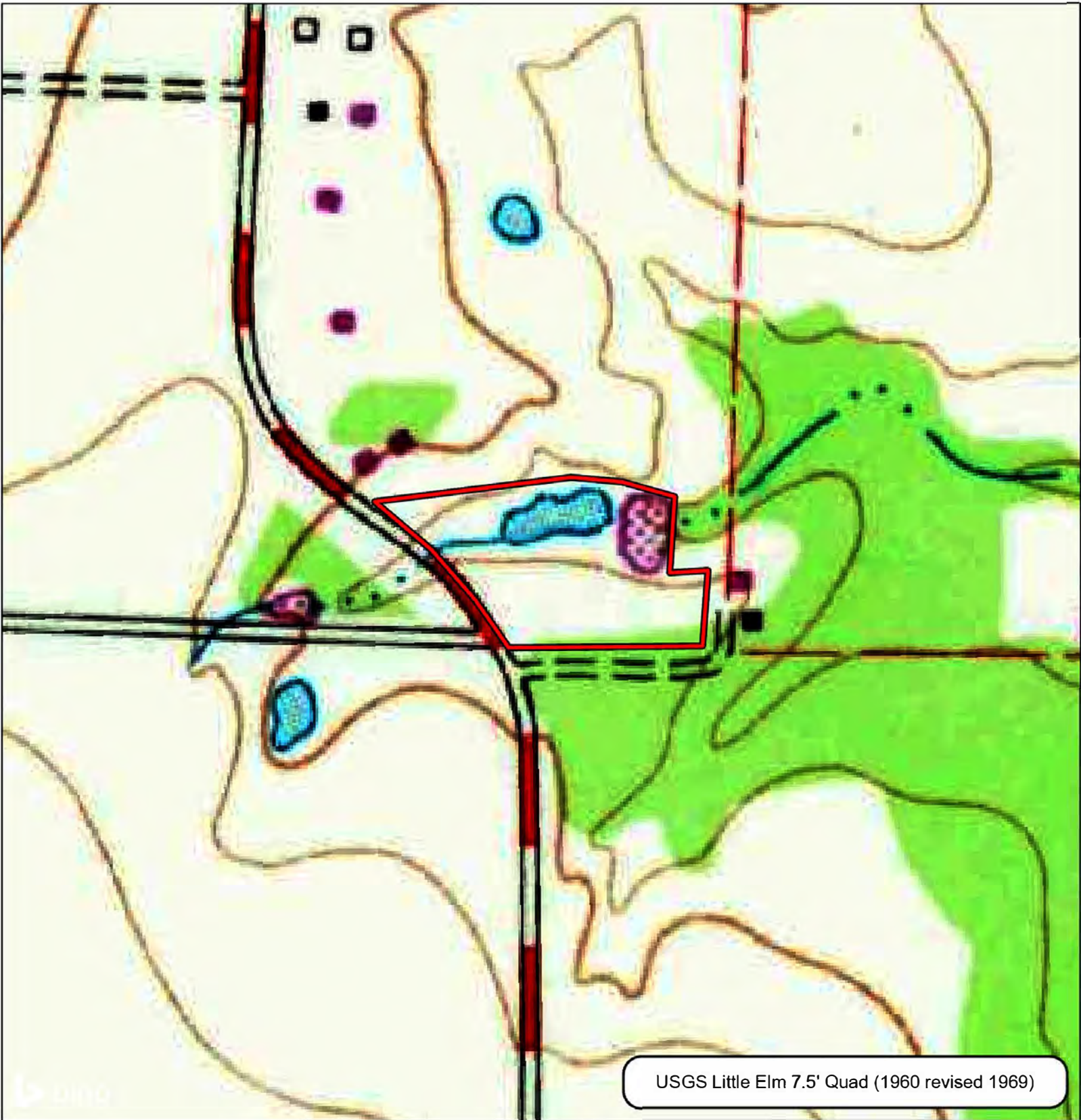


Figure 2A.
Topographic Setting

Martop Road
Denton County, Texas


1 in = 300 ft

Feet

0 300



File Ref. 04.354.126
Date: 2/20/2024

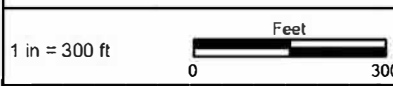
 Survey Area



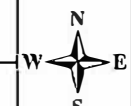
PANEL
48121C0405G
eff. 4/18/2011

Figure 4.
Federal Emergency
Management Agency
Flood Insurance Rate Map

Martop Road
Denton County, Texas



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Date: 2/20/2024



Survey Area

FEMA FIRM Zone Descriptions



Zone X - Areas determined to be outside the 0.2% annual chance floodplain



Zone X - Areas of 0.2% annual chance flood; areas of 1% annual chance flood with average depths of less than 1 foot or with drainage areas less than 1 square mile; and areas protected by levees from 1% annual chance flood



Zone A - Special Flood Hazard Areas subject to inundation by the 1% annual chance flood; No base flood elevations determined



Zone AE - Special Flood Hazard Areas subject to inundation by the 1% annual chance flood; Base flood elevations determined



Zone AE - Floodway areas in Zone AE



Figure 5.
Aquatic Features Identified
within the Survey Area


Martop Road
Denton County, Texas


1 in = 75 ft


0 75 150

Feet


File Ref. 04.354.126
Date: 7/25/2024


 Survey Area

 Wetland Determination Data Form

 Culvert

Aquatic Features

 Wetland

 Pond