



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

CESWF-RDE

16 DECEMBER 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-2024-00487](#), [MFR 1 of 1](#).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 AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

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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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).

Water Feature	TNW	Size	Status	Rationale
Pond	No	5.0 AC	Not Jurisdictional	Preamble Water
Swale	No	415 LF	Not Jurisdictional	Rapanos Guidance

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 is approximately 43 acres, located off of 172 Colorado Circle, Cedar Creek, Bastrop County, Texas. Center coordinates: 30.13323, -97.44654, HUC 12-1209-3010110. There is no other relevant site-specific information or previous JDs associated with the review area. Reference enclosed maps of the review area. FEMA FIRM panel 48021C0190G eff. May 9, 2023 shows all of the site, except the pond as being in Zone X, outside of the 100-year floodplain.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Not applicable.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The flow path of the swale is into an isolated pond that appears to have been excavated in uplands. There is no channel continuity past the pond.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ [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.](#)
 - 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").⁸ Include size of the aquatic resource or feature within

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.

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.

the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water.

Information referenced in Section 9 indicates that the pond listed in Section 1a was excavated by humans (i.e., artificially created) within dry land (i.e., upland) prior to 1995. Flows received to and conveyed from the pond are from stormwater runoff from uplands. The USGS topographic maps and NHD layer do not show a stream channel where the connecting swale is located or one on the downstream end. The pond is high in the watershed and topography suggests overland flow that is moving toward a potential swale or ephemeral flow. The NWI data layer in the National Regulatory Viewer indicates a stream or channel connected to the pond only on the downstream side, which connected to off-site channels. Per the consultant's site investigation and report, there was no channel found on this downstream end. Refer to photos within the report. No wetlands were found during the site reconnaissance associated with the pond. Highway 71 is offsite and south of the property and appears to have swales associated with the road drainage and a small culvert that sends that drainage south of the road to a potential swale or ephemeral stream as shown in the NWI map. See Google Earth image dated January 2018.

The pond meets the description of water features that generally are not considered waters of the United States as detailed in the 1986 preamble of the regulations—33 CFR, part 328.3 (c)—artificial lakes or ponds created by excavating and / or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

- 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.

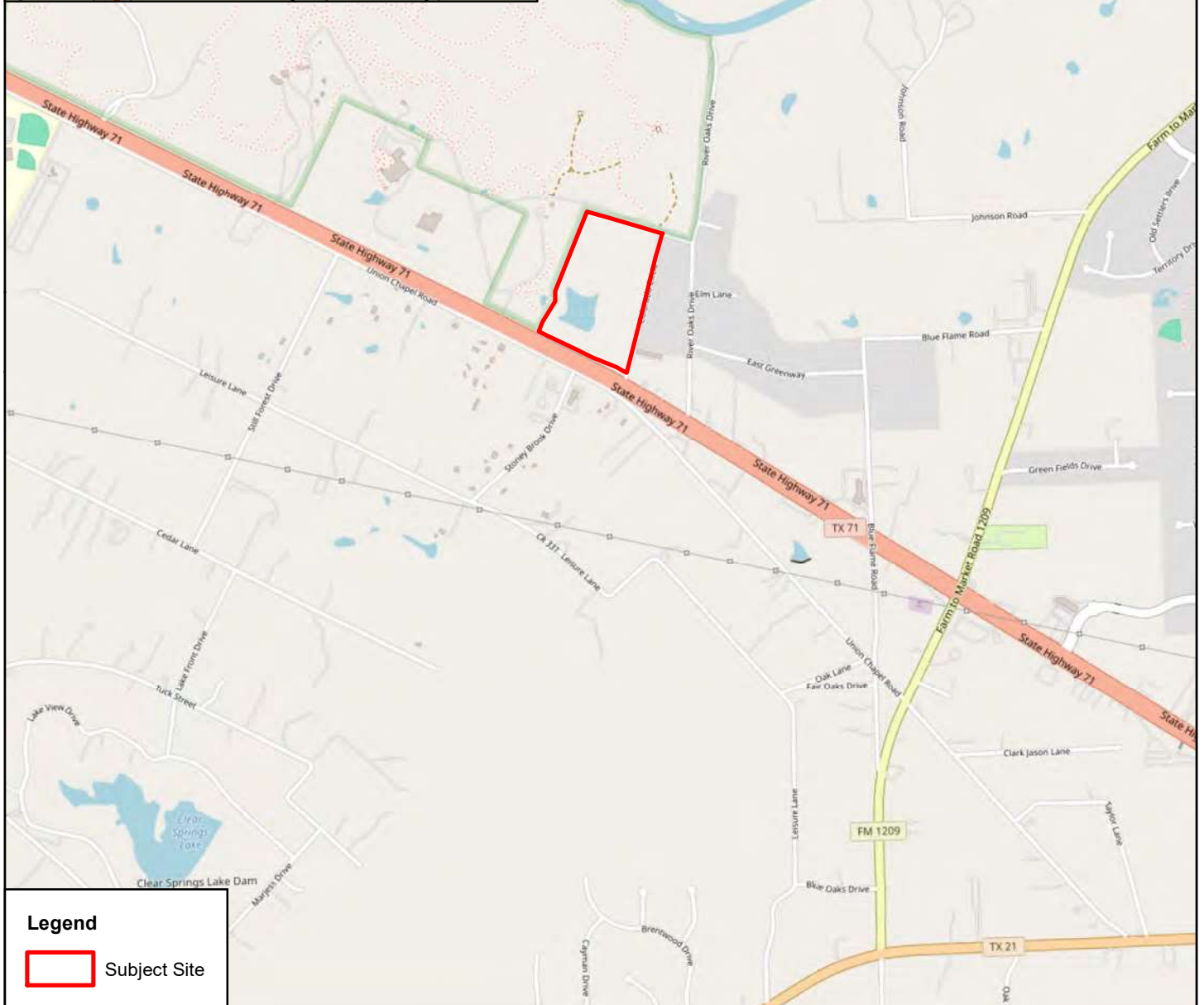
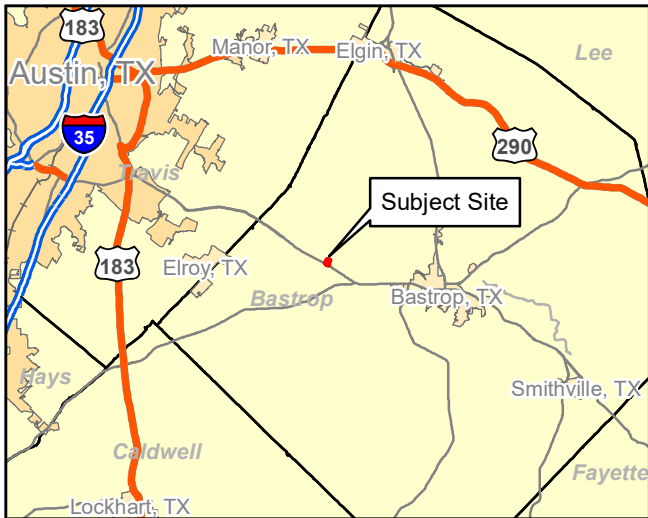
The grassed swale is included herein because it is at the uppermost end of the pond and does not exhibit an ordinary high-water mark (OHWM) per the Delineation Report prepared by the consultant and based on the consultant's site visit. The swale appears to be completely vegetated in photos and aeriels. The entire project area including the swale is rangeland or pasture with woody vegetation and has been used historically for livestock grazing. The NWI Desktop tools (i.e., topo maps, NHD) do not indicate a historic stream drainage system, upstream of the pond (swale site). Evidence collected and detailed herein indicates that topographic maps, NWI, and NHD do not accurately identify the current landscape within the review area.

- 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 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). [Not applicable.](#)
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. [Consultant’s site visit occurred on November 6, 2024, USACE in-office review occurred on December 12 and 16, 2024.](#)
 - b. [Nationwide Regulatory Viewer including data layers, NWI, FEMA, NHD, aerial, hillshade, accessed on December 16, 2024.](#)
 - c. [Determination of WOTUS, including Wetlands, by Horizon Environmental Services, dated November 11, 2024, consisting of 19 pages.](#)
 - d. [Google Earth Imagery from 1995-2023 and Topographic layer](#)
10. OTHER SUPPORTING INFORMATION. [Not applicable.](#)

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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.



Legend

Subject Site

Horizon
Environmental Services

Date:	11/04/2024
Drawn:	TED
HJN NO:	24278.001WD
Source:	OSM, 2024



Figure 1
Vicinity Map
Colorado Circle RV Cabin Park
172 Colorado Circle
Cedar Creek, Bastrop County, Texas



0 1,000 2,000
Feet



Legend

-  100-Year Floodplain - Zone A
-  Subject Site

Horizon
Environmental Services

Date:	11/04/2024
Drawn:	TED
HJN NO:	24278.001WD
Source:	FEMA, 2023; Nearmap, 2024

Figure 3
Flood Hazard Map
Colorado Circle RV Cabin Park
172 Colorado Circle
Cedar Creek, Bastrop County, Texas



0 300 600
Feet



Legend

 Subject Site

Horizon
Environmental Services

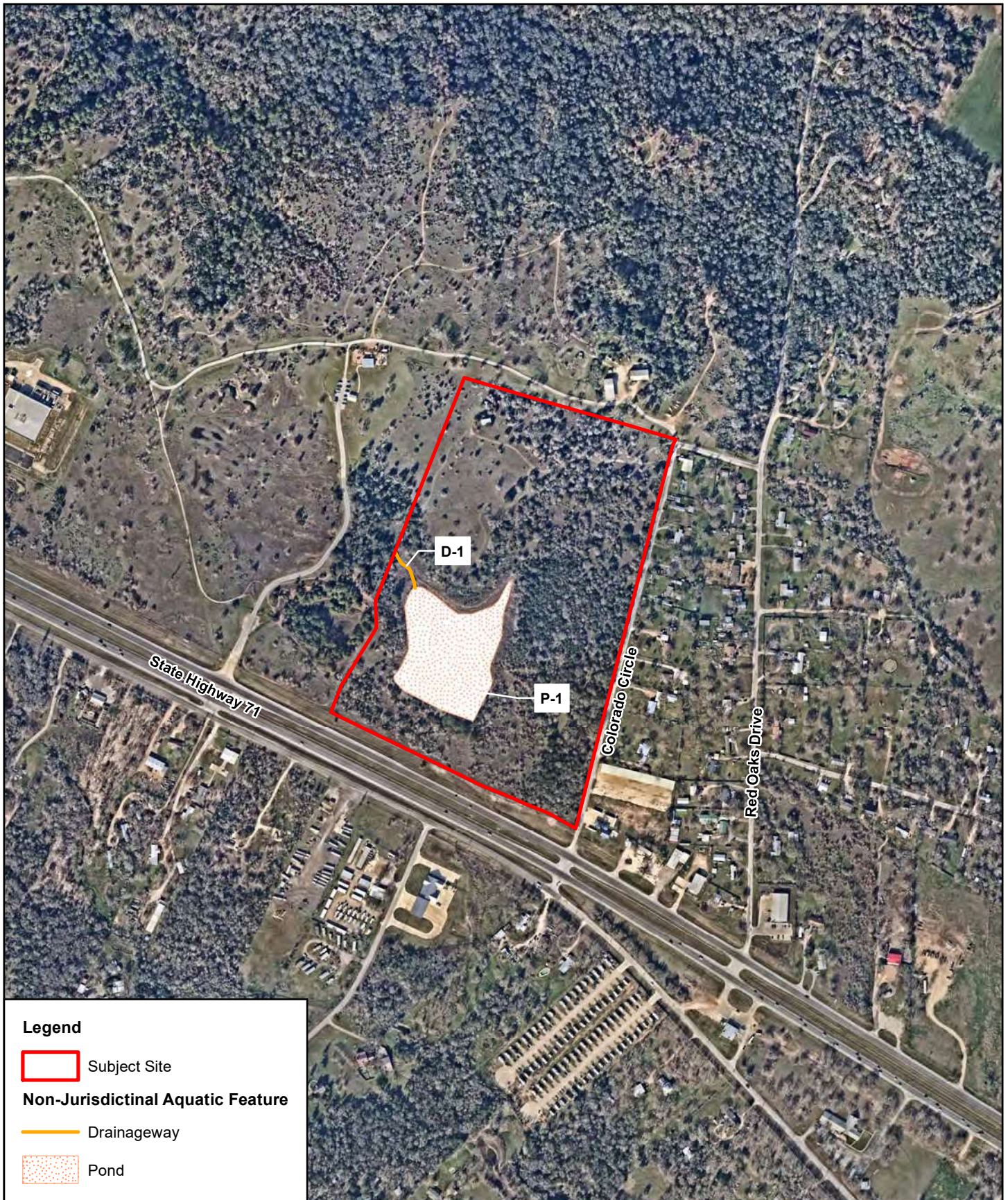
Date:	11/04/2024
Drawn:	TED
HJN NO:	24278.001WD
Source:	USDA, 2020


Figure 7

2020 Infrared Aerial Photography
Colorado Circle RV Cabin Park
172 Colorado Circle
Cedar Creek, Bastrop County, Texas



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	Date:	11/06/2024	Figure 9 Jurisdictional Determination Map Colorado Circle RV Cabin Park 172 Colorado Circle Bastrop, Bastrop County, Texas	
	Drawn:	TED		
	HJN NO:	24278.001WD		
	Source:	Nearmap, 2024		
			0 300 600  Feet	



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PANEL 48021C0175G eff. 5/9/2023

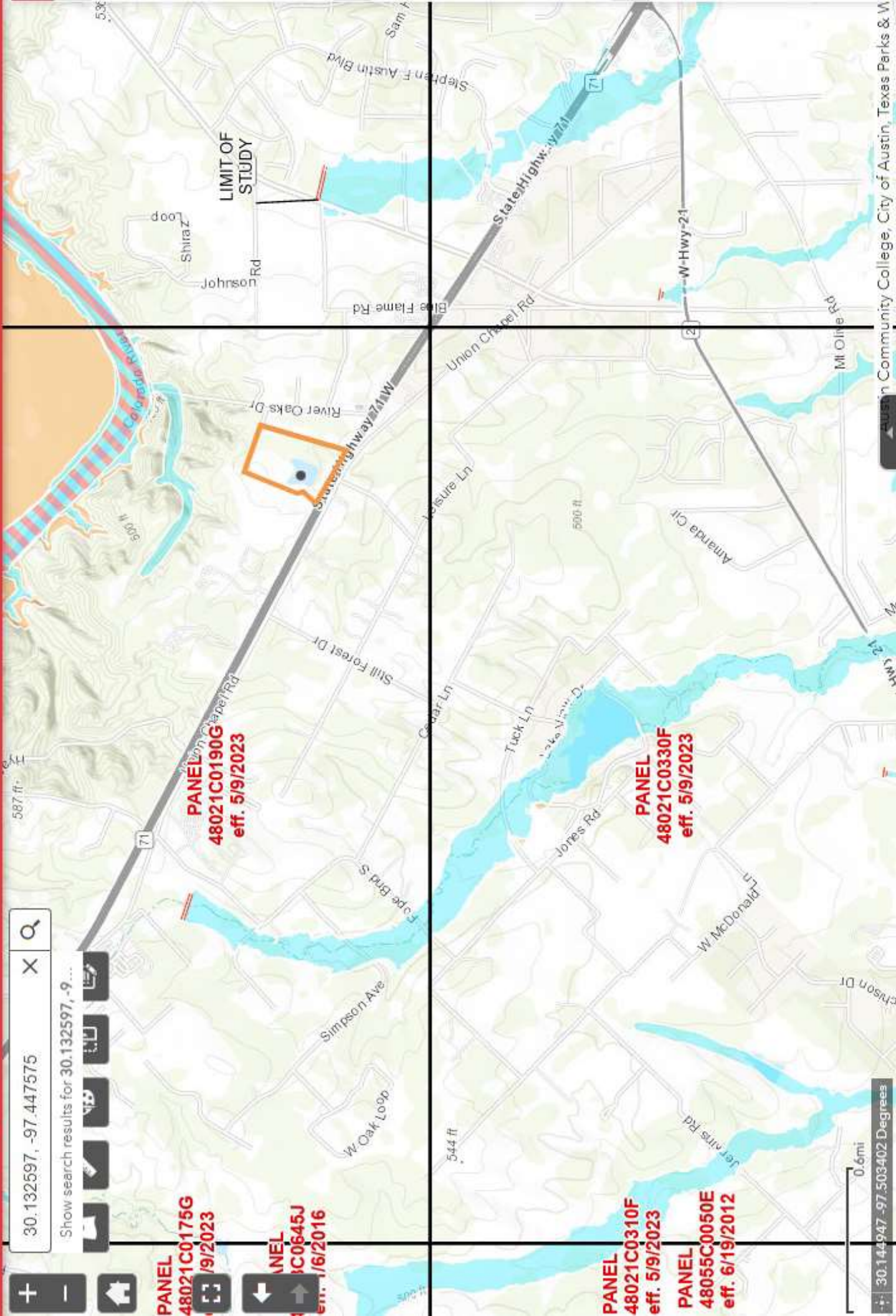
PANEL 48021C0645J eff. 1/6/2016

PANEL 48021C0310F eff. 5/9/2023

PANEL 48055C0050E eff. 6/19/2012

PANEL 48021C0190G eff. 5/9/2023

PANEL 48021C0330F eff. 5/9/2023



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Austin Community College, City of Austin, Texas Parks & Wildlife



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Image U.S. Geological Survey

Colorado Cir

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Zip Lost Pines Way

Union Chapel Rd

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