



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT  
2488 E 81ST STREET  
TULSA, OK 74137-4290

CESWT-RO

27 September 2023

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), SWT-2023-00283

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>1</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>2</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>3</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 amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

1. SUMMARY OF CONCLUSIONS.

---

<sup>1</sup> 33 CFR 331.2.

<sup>2</sup> Regulatory Guidance Letter 05-02.

<sup>3</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.

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2023-00283

- 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. WW-1, approximately 1.75 acre/6,356 linear feet, **Jurisdictional, Section 404**
  - ii. WW-3, approximately 0.52 acre/ 2,853 linear feet, **Jurisdictional, Section 404**
  - iii. Wetland 2, approximately 0.02 acre, **Jurisdictional, Section 404**
  - iv. Wetland 4, approximately 0.05 acre, **Jurisdictional, Section 404**
  - v. WW-2, approximately 485 linear feet, **Non-jurisdictional**
  - vi. WW-4, approximately 605 linear feet, **Non-jurisdictional**
  - vii. WW-5, approximately 755 linear feet, **Non-jurisdictional**
  - viii. WW-6, approximately 970 linear feet, **Non-jurisdictional**
  - ix. WW-7, approximately 330 linear feet, **Non-jurisdictional**
  - x. WW-8, approximately 400 linear feet, **Non-jurisdictional**
  - xi. WW-9, approximately 505 linear feet, **Non-jurisdictional**
  - xii. WW-10, approximately 975 linear feet, **Non-jurisdictional**
  - xiii. WW-11, approximately 83 linear feet, **Non-jurisdictional**
  - xiv. Wetland 1, approximately 0.011 acre, **Non-jurisdictional**
  - xv. Wetland 3, approximately 0.023 acre, **Non-jurisdictional**
  - xvi. Impoundment 1, approximately 0.48 acre, **Non-jurisdictional**

## 2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2023-00283

- 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 320 acre review area is located in Section 21, Township 25 North, Range 21 East, approximately 4 miles east of Vinita, Craig County Oklahoma. Center coordinates of the review area are Latitude: 36.6303° Longitude: -95.0627°.
  4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Neosho River is the TNW in which the unnamed tributaries within the review area flow. The Neosho River was historically utilized for interstate commerce.
  5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS The unnamed tributaries within the review area flow to the northwest and join Shawnee Creek. Shawnee Creek flows into Big Cabin Creek which flows into the Neosho River approximately 23.8 river miles downstream.
  6. SECTION 10 JURISDICTIONAL WATERS<sup>4</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>5</sup> 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

---

<sup>4</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>5</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.

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2023-00283

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
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5):
  - a. **WW-1** is approximately 6,356 linear feet in length and flows from the southeastern portion of the review area to the northwest where it leaves the review area. WW-1 has a defined bed and bank and an average ordinary high water mark (OHWM) width of 12 feet. WW-1 is a relatively permanent water visible on National Wetland Inventory (NWI) mapping, National Hydrography Data (NHD), and topographical maps and water can be observed throughout different time periods in available aerial imagery. Vegetation was matted down or absent throughout WW-3's reach within the review area. A site investigation was conducted on 20 July 2023, and standing water was observed in numerous locations throughout the reach of WW-1 within the review area. WW-1 is identified in blue on the attached map.
  - b. **WW-3** is approximately 2,853 linear feet in length and flows from the northeastern portion of the review area to the northwest where it leaves the review area. WW-3 has an established bed, bank, and ordinary high water mark throughout the entire reach within the review area. Vegetation was matted down or absent throughout WW-3's reach within the review area. WW-3 is a relatively permanent water visible on NWI, NHD, and topographical maps. Aerial imagery shows multiple observed flow events.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):
  - a. **Wetland 2** is an emergent wetland situated near the western boundary of the review area where WW-1 leaves the property. Wetland 2 exhibits a direct hydrologic surface connection to WW-1. WW-1's OHWM extends laterally into Wetland 2. At the confluence of WW-1 and Wetland 2 there is no distinction of where WW-1 ends, and Wetland 2 begins.
  - b. **Wetland 4** is an emergent wetland located in the southcentral portion of the review area. Wetland 4 is hydrologically influenced by an artesian well and exhibits a direct hydrologic surface connection to WW-1. The confluence of Wetland 4 and WW-1 shows no definitive boundary of either feature. The two features converge without a discernible point separating the wetland and RPW.

## 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>6</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. Impoundment 1 (approximately 0.48 acre) identified in Section 1a above, is a man-made impoundment constructed in the uplands likely for the purpose of providing water to livestock. Impoundment 1 is not a located on-channel of a water of the U.S.
- 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. Features **WW-2 (485 lf)**, **WW-4 (605 lf)**, **WW-5 (755 lf)**, **WW-6 (970 lf)**, **WW-7 (330 lf)**, **WW-8 (400 lf)**, **WW-9 (505 lf)**, **WW-10 (975 lf)**, and **WW-11 (83 lf)**, identified in Section 1a above, are ephemeral drainages that lack bed and banks and do not exhibit OHWMs. The features are channels where runoff flows downgrade across the landscape and do not contribute seasonal flow to a downstream TNW.

---

<sup>6</sup> 51 FR 41217, November 13, 1986.

CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2023-00283

- 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 an “isolated water” in accordance with *SWANCC*. N/A
  - 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). The delineation report identifies two features as “**Wetland 1 and Wetland 3**” in Section 1a above. Wetland 1 and Wetland 3 are isolated depressional features whose hydrologic conditions have likely been influenced by cattle traversing the landscape. Wetland 1 and Wetland 3 are non-jurisdictional features that lack a discernible link to navigable waters or interstate commerce. Wetland 1 and Wetland 3 do not have a continuous surface connection to a jurisdictional water.
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. Office Determination: 21 September 2023  
Field Determination: 20 July 2023
  - b. Wetland and Waterway Investigation – May 2023
  - c. USGS National Hydrography Data – 21 September 2023

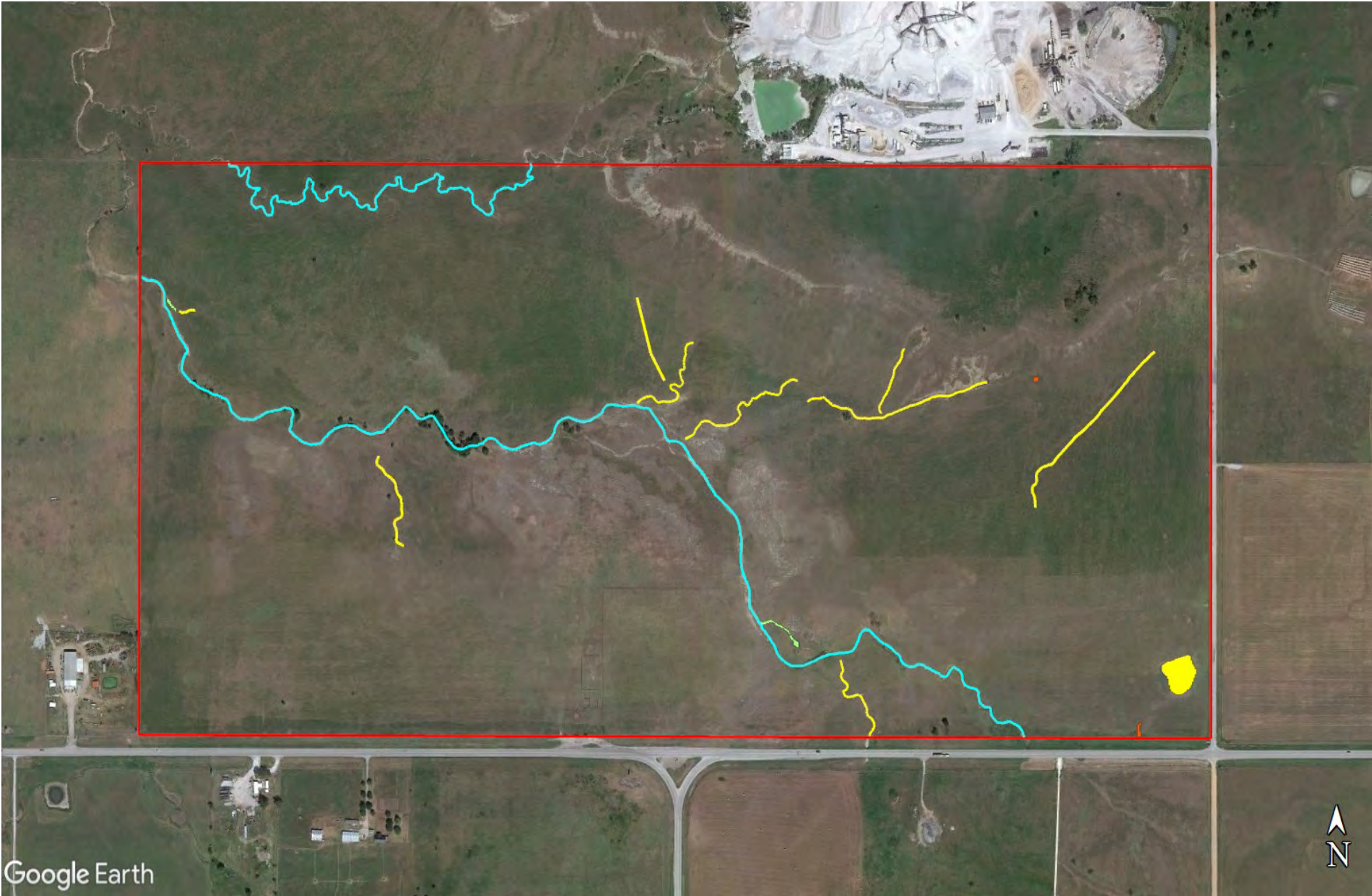
CESWT-RO

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWT-2023-00283

- d. USGS 12 digit HUC map – 110702090104
  - e. USDA NRCS Soil Survey – 21 September 2023
  - f. National Wetlands Inventory Mapper – 21 September 2023
  - g. Google Earth/Digital Globe Aerial Imagery – 1995-2023
10. OTHER SUPPORTING INFORMATION. Within the review area there are two, jurisdictional relatively permanent waters that exhibit seasonal flow. WW-1 and WW-3 are regulated under Section 404 of the Clean Water Act. Wetland 2 and Wetland 4 exhibit a direct surface hydrologic connection to a relatively permanent water (WW-1) and are jurisdictional wetlands under Section 404 of the Clean Water Act.
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.



**SWT-2023-00283**  
**Approved Jurisdictional Determination**  
**Brett L. Adams**

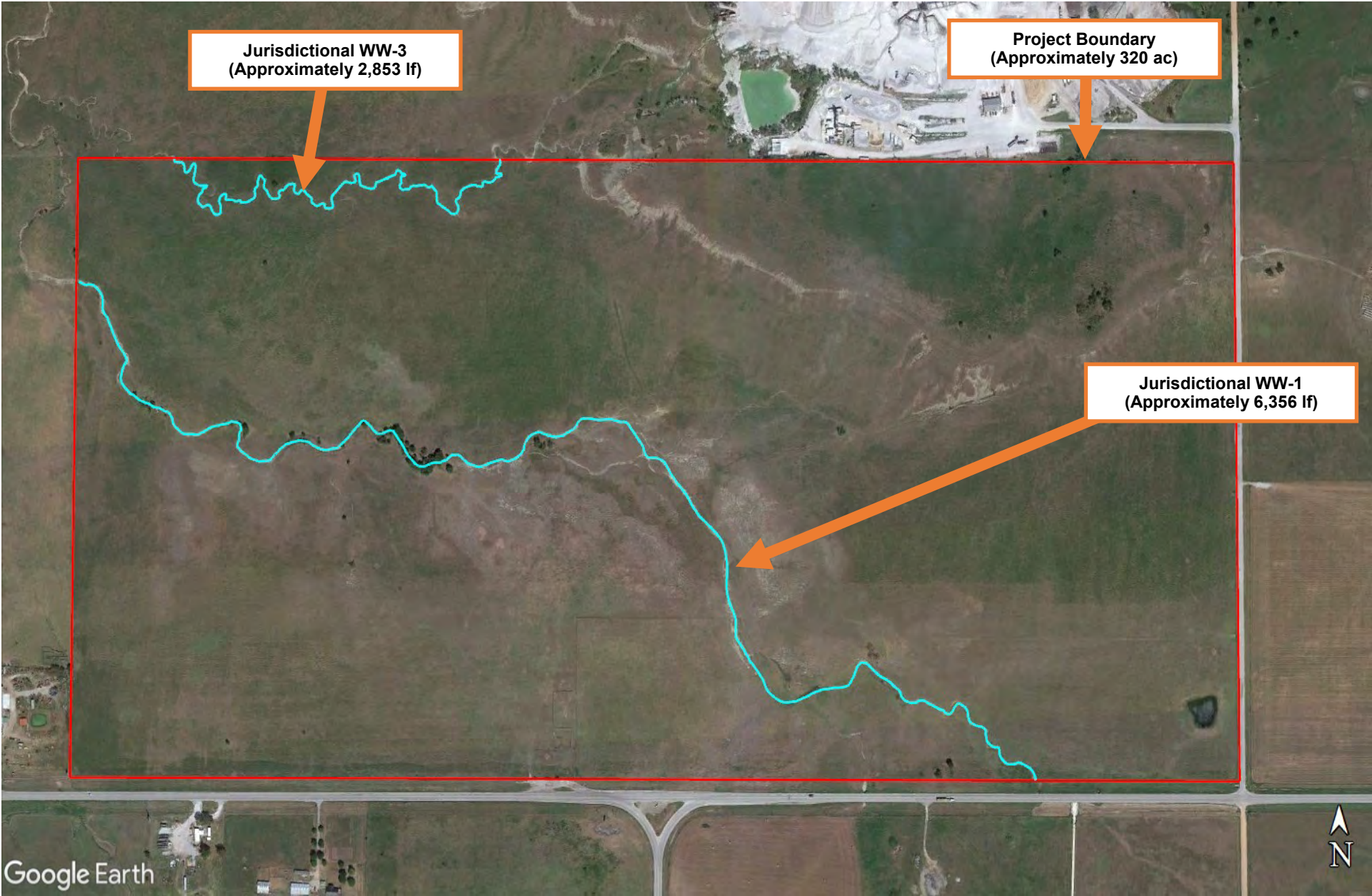


Project Center Coordinates: 36.6303, -95.0627, Craig County, Oklahoma





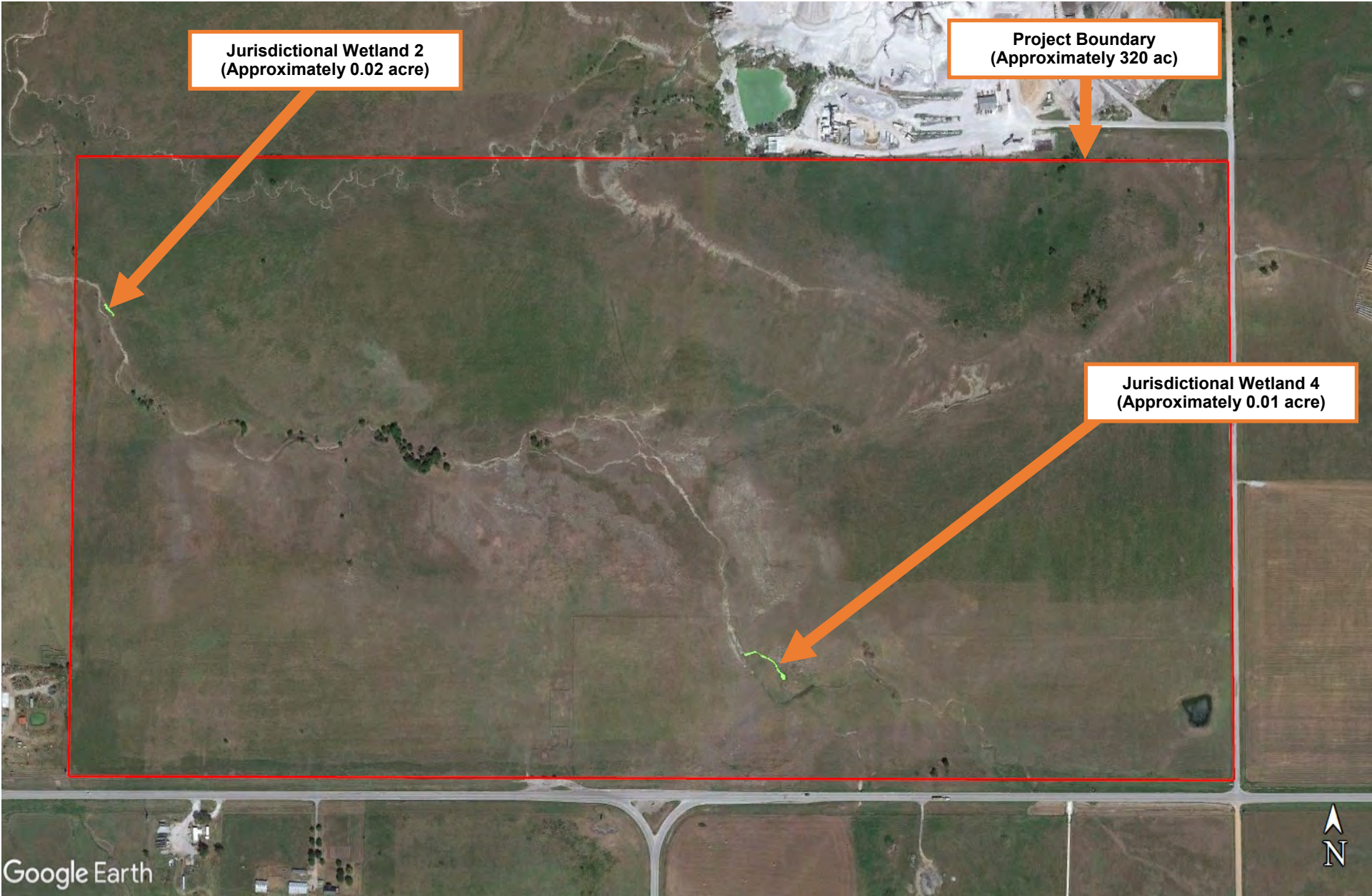
**SWT-2023-00283**  
**Approved Jurisdictional Determination**  
**Brett L. Adams**



Project Center Coordinates: 36.6303, -95.0627, Craig County, Oklahoma

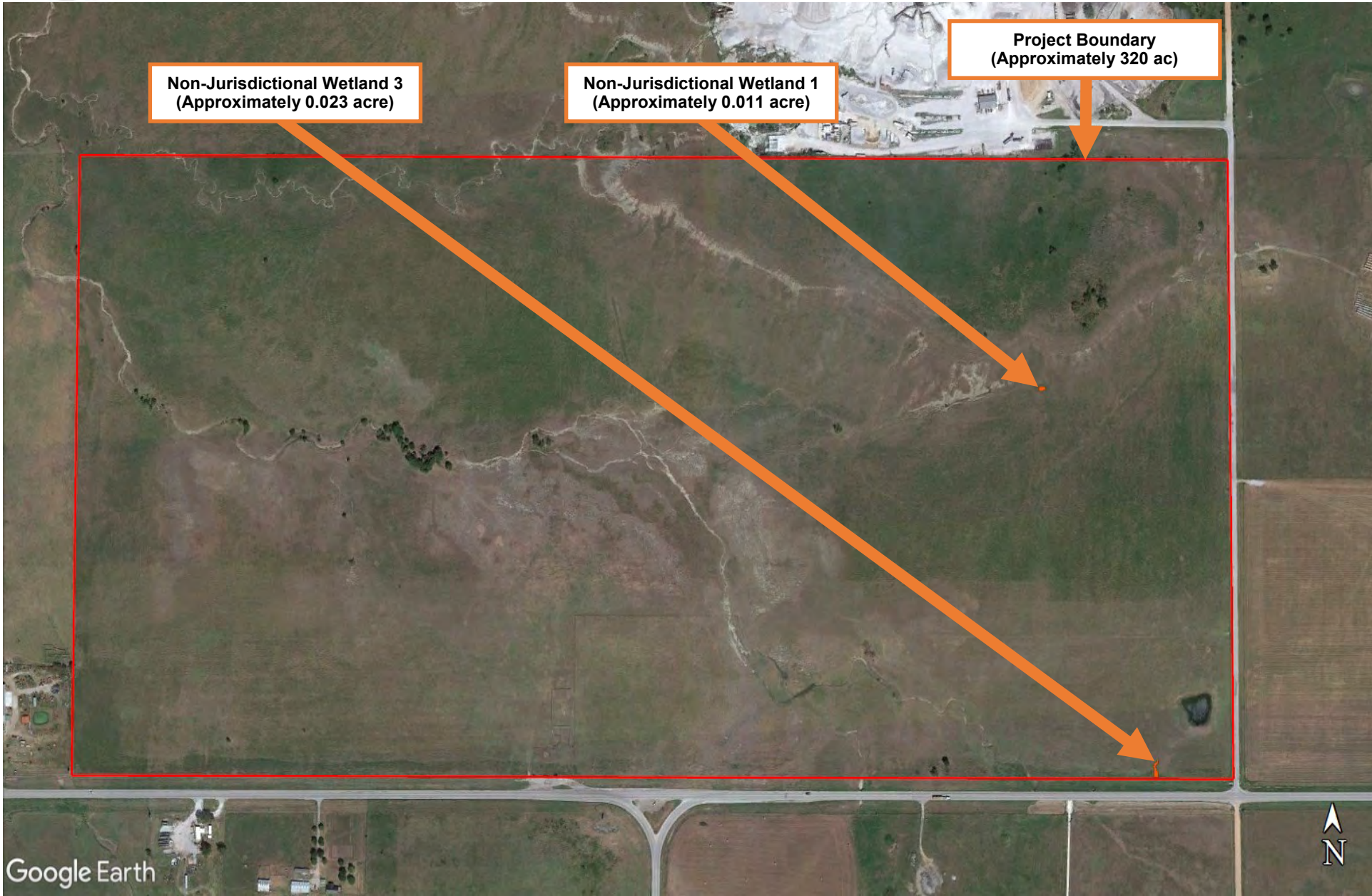


**SWT-2023-00283**  
**Approved Jurisdictional Determination**  
**Brett L. Adams**





**SWT-2023-00283**  
**Approved Jurisdictional Determination**  
**Brett L. Adams**



Project Center Coordinates: 36.6303, -95.0627, Craig County, Oklahoma



**SWT-2023-00283**  
**Approved Jurisdictional Determination**  
**Brett L. Adams**



Non-Jurisdictional Features WW-2. WW-4. WW-5. WW-6. WW-7, WW-8, WW-9, WW-10, WW-11, and Impoundment 1 identified in yellow

