



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

CESWT-RO

15-Mar-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 SWT-2023-00482

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 Oklahoma due to litigation.

1. SUMMARY OF CONCLUSIONS.

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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- 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).

Feature ID:	Review Area	Jurisdictional Status	Area (Acre) Linear Length (Feet)	Authority
Stream 1	WRANG	Non-RPW; Non Jurisdictional, is not a water of the United States	0.01 acre (482 linear feet)	None
Stream 2	WRANG	RPW; Jurisdictional, is a water of the United States	0.005 acre (216 linear feet)	Section 404 CWA
Ditch	WRANG	Ditch; Non-Jurisdictional, is not a water of the United States	0.14 acre	None
Wetland 1	WRANG	Scrub-Shrub; Jurisdictional, is a water of the United States	0.56 acres	Section 404 CWA
Stream 3a	4	Non-RPW; Non- Jurisdictional, is not a water of the United States	0.004 acre (196 linear feet)	None
Stream 3b	4	Non-RPW; Non- Jurisdictional, is not a water of the United States	0.004 acre (180 linear feet)	None
Stream 3c	4	Non-RPW; Non- Jurisdictional, is not a water of the United States	0.004 acre (137 linear feet)	None
Wetland 2	4	Non-adjacent, Emergent; Non-Jurisdictional, is not a water of the United States	0.07 acres	None
Stream 4	3A	RPW; Jurisdictional, is a water of the United States	0.03 acre (1299 linear feet)	Section 404 CWA
Stream 5a	3A	RPW; Jurisdictional, is a water of the United States	0.02 acre (750 linear feet)	Section 404 CWA
Stream 5b	3A	RPW; Jurisdictional, is a water of the United States	0.003 acre (1206 linear feet)	Section 404 CWA
Stream 5c	3B	RPW; Jurisdictional, is a water of the United States	0.02 acre (826 linear feet)	Section 404 CWA
Wetland 3	3A	Emergent; Jurisdictional, is a water of the United States	0.015 acre	Section 404 CWA
Wetland 4	3A	Emergent; Jurisdictional, is a water of the United States	1.13 acre	Section 404 CWA
Wetland 5	3A	Non-adjacent, Emergent; Non-Jurisdictional, is not a water of the United States	0.04 acre	None

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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 135 acres (55 hectares) within the property boundary of the Will Rogers Air National Guard Base (ANGB) (referred to as the WRANG parcel) in Oklahoma County, Oklahoma as well as three additional parcels (Parcel 3A, Parcel 3B, and Parcel 4; 386 acres located south of the Will Rogers ANGB on the property of the Will Rogers World Airport located in Cleveland and Oklahoma counties, Oklahoma. The approximate latitude and longitude for the center of the review area is 35.4049754 N, 97.6114615 W.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The review areas are located in two different watersheds as identified below.

HUC 1100302: Lower North Canadian, Oklahoma

Navigable Waters Subject to Section 10:

WRANG Parcel

North Canadian River – Southeast of the town of Henryetta, River Mile 35+

HUC 11090202: Lower Canadian – Walnut, Oklahoma

Parcels 3A, 3B, 4

Canadian River – Interstate Water

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

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WRANG Parcel; unnamed tributary of the North Canadian River to the North Canadian River. Parcels 3A, 3B, 4; unnamed tributary of Cow Creek, to Cow Creek, to Canadian 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
 - d. Impoundments (a)(4): N/A
 - e. Tributaries (a)(5):

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.

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WRANG:

The location of Stream 2 where delineated is not mapped, however, downstream is mapped on the USGS Topo and USGS NHD and continuous with the delineated area. USGS StreamStats indicates a 422-acre drainage basin and an average daily streamflow of 0.164 ft³/s. Surface water was observed during the requestor's delineation and through the entire reach during the USACE site visit. The reach of this stream is depicted on the WRANG Parcel and is approximately 3,230 linear feet.

Parcels 3A & 3B:

The features denoted as Stream 5A, 5B, 5C are one reach of a RPW, indicated as a dashed blue line, intermittent stream on the USGS Topo and USGS NHD maps. USGS StreamStats indicates a 294-acre drainage basin with an average daily streamflow of 0.627 ft³/s. Surface water was observed and flowing during the requestor's delineation and USACE site visit. The overall reach of this stream is depicted on the 3A & 3B Parcel and is approximately 5,320 linear feet.

Stream 4, an RPW, is indicated on USGS Topo and USGS NHD as a dashed blue line, intermittent stream. USGS StreamStats indicates a 268-acre drainage basin and an average daily streamflow of 0.581 ft³/s. Surface water was observed during the requestor's delineation and flowing during the USACE site visit. The reach of this stream is depicted on the 3A & 3B Parcel and is approximately 2,920 linear feet.

- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7):

Wetland 1 was delineated and observed abutting Stream 2, an RPW.

Wetlands 3 and 4 were delineated and observed abutting Stream 5, an 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").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

⁷ 51 FR 41217, November 13, 1986.

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- 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.
- 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 feature denoted as Stream 1 is not located on the USGS Topographic Map or USGS NHD. There was no flow observed during the delineation or during the USACE field visit. This feature flows into Stream 2. The reach of this feature is depicted on WRANG Parcel and is approximately 482 linear feet.

The features denoted as Stream 3A, 3B, 3C are all one reach of a non-RPW. This feature is only mapped (mapped location doesn’t exactly match the physical ground location) for 475 linear feet at the furthest downstream point of the reach - with a pond feature mapped at the upstream extent. The reach of this stream is partially depicted within Parcel 4 and is approximately 2,860 linear feet in total.

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Surface water was observed present mostly upstream and immediately downstream of a roadway culvert, but not throughout the reach, with no flow observed during the delineation or USACE site visit. The Antecedent Precipitation Tool indicated wetter than normal conditions during the USACE site visit.

Wetland 2 within Parcel 4, wasn't observed to have a discrete continuous surface connection and is not adjacent to waters of the U.S. Any surface runoff would be through overland sheet flow.

Wetland 5 within Parcel 3A wasn't observed to have a discrete continuous surface connection and is not adjacent to waters of the U.S. Any surface runoff would be through overland sheet flow.

Excavated ditch wholly constructed in uplands with non-RPW flow. This feature is not indicated on USGS Topographic Map or USGS NHD.

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. Draft Final Waters of the US Report, dated October 2023
- b. USACE Site Visit, March 8, 2024
- c. USGS Topographic Map, accessed March 7, 2024
- d. USGS NHD, accessed March 7, 2024
- e. USGS StreamStats, accessed March 18, 2024.
- f. Antecedant Precipitation Tool, accessed March 18, 2024
- g. Google Earth Imagery; accessed March 7, 2024

10. OTHER SUPPORTING INFORMATION. N/A

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

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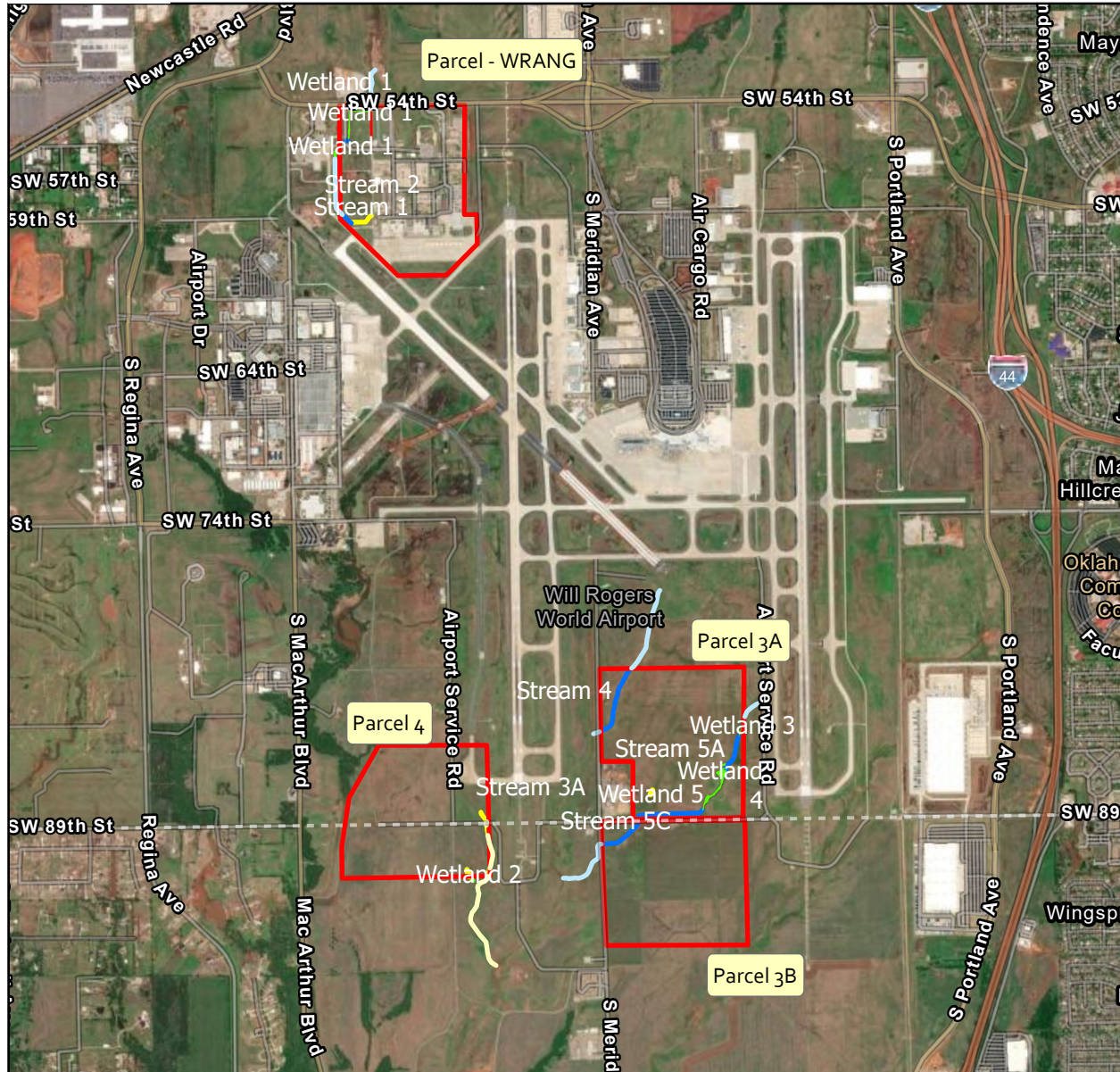
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additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



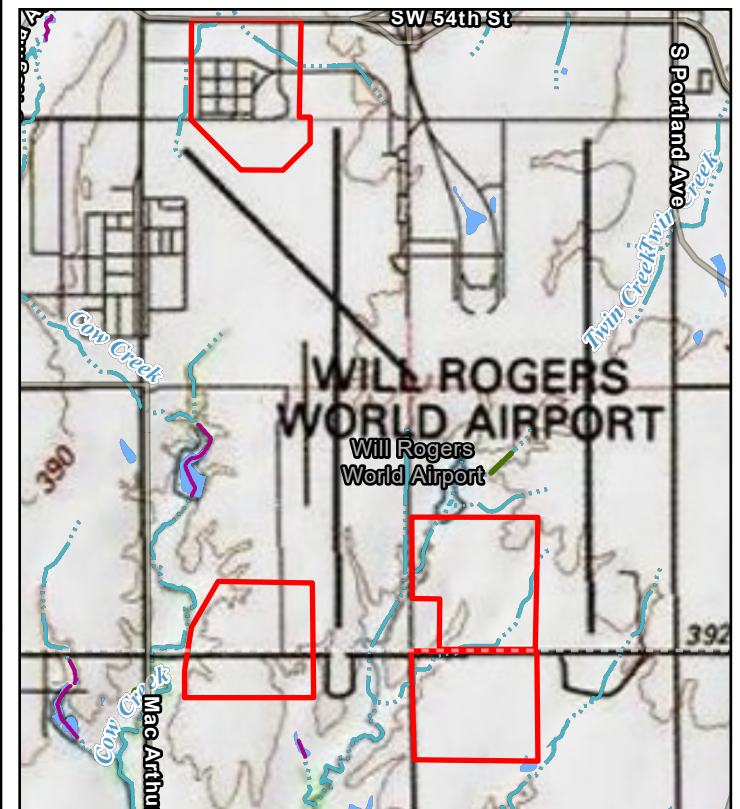
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Legend - Overview Map

- Review_Area
- Non-RPW
- RPW
- Emergent Wetland - Abutting
- Emergent Wetland - Non-Adjacent
- Ditch - Non-RPW
- Wetland Area outside Review Area
- Additional Reach Non-RPW
- Additional Reach RPW

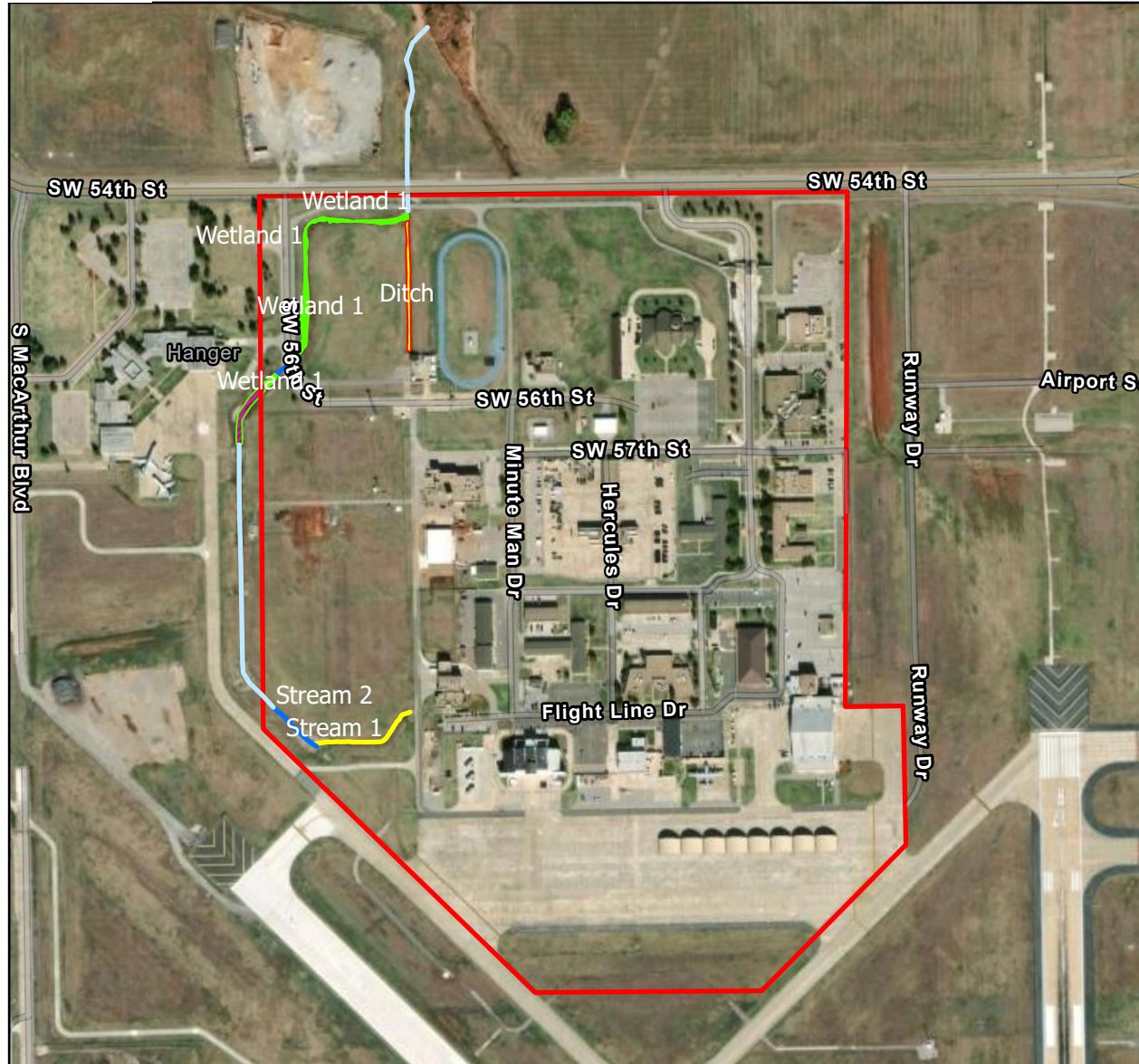


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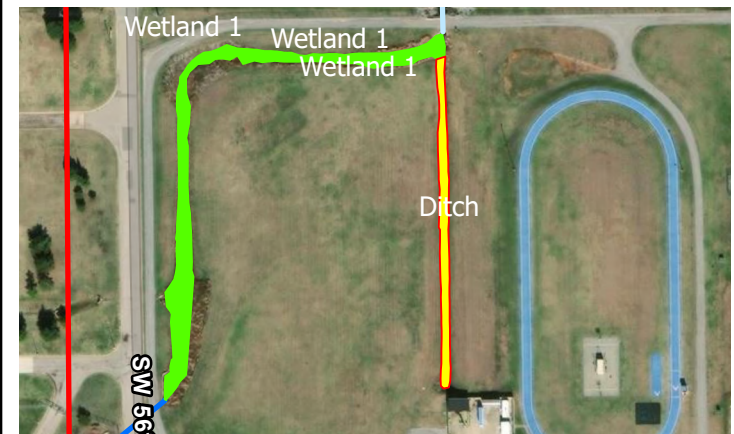
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Legend - WRANG Parcel

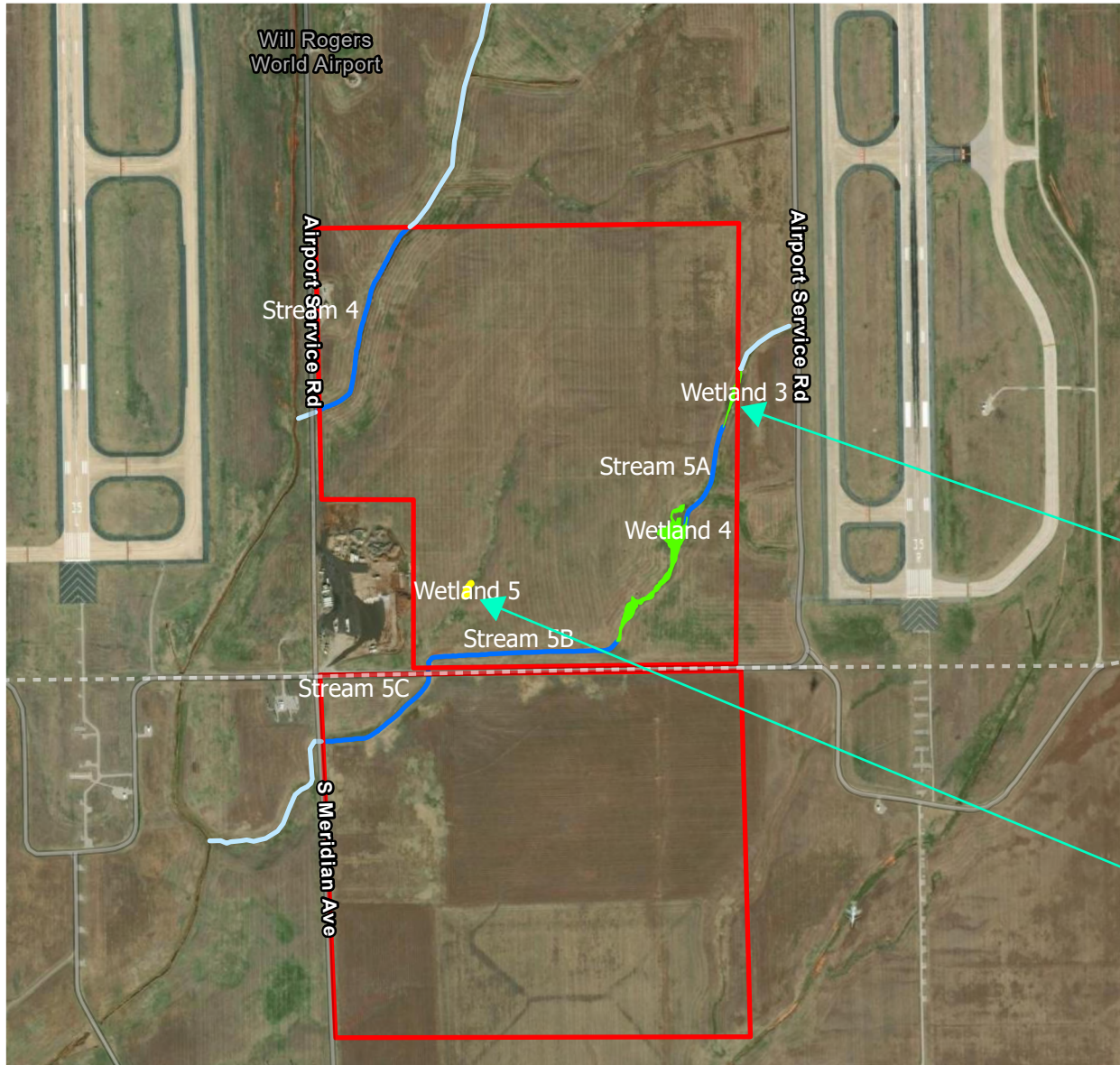
- Review_Area
- Emergent Wetland - Abutting
- Ditch - Non-RPW
- Non-RPW
- RPW
- Wetland Area outside Review Area
- Additional Reach
 RPW





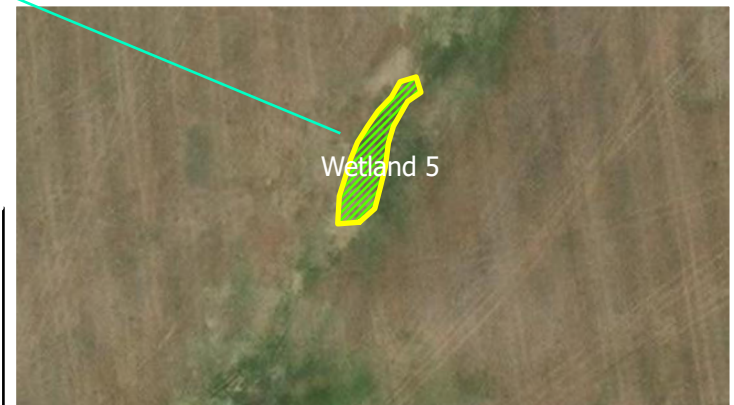
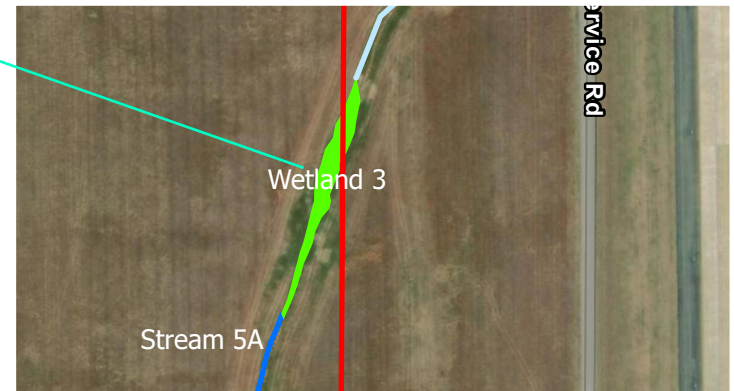
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Legend - Parcels 3A & 3B

- Review_Area
- Stream Reach within Review Area
 - RPW
- Wetland Area within Review Area
 - Emergent Wetland - Abutting
 - Emergent Wetland - Non-Adjacent
- Additional Reach
 - Non-RPW
 - RPW

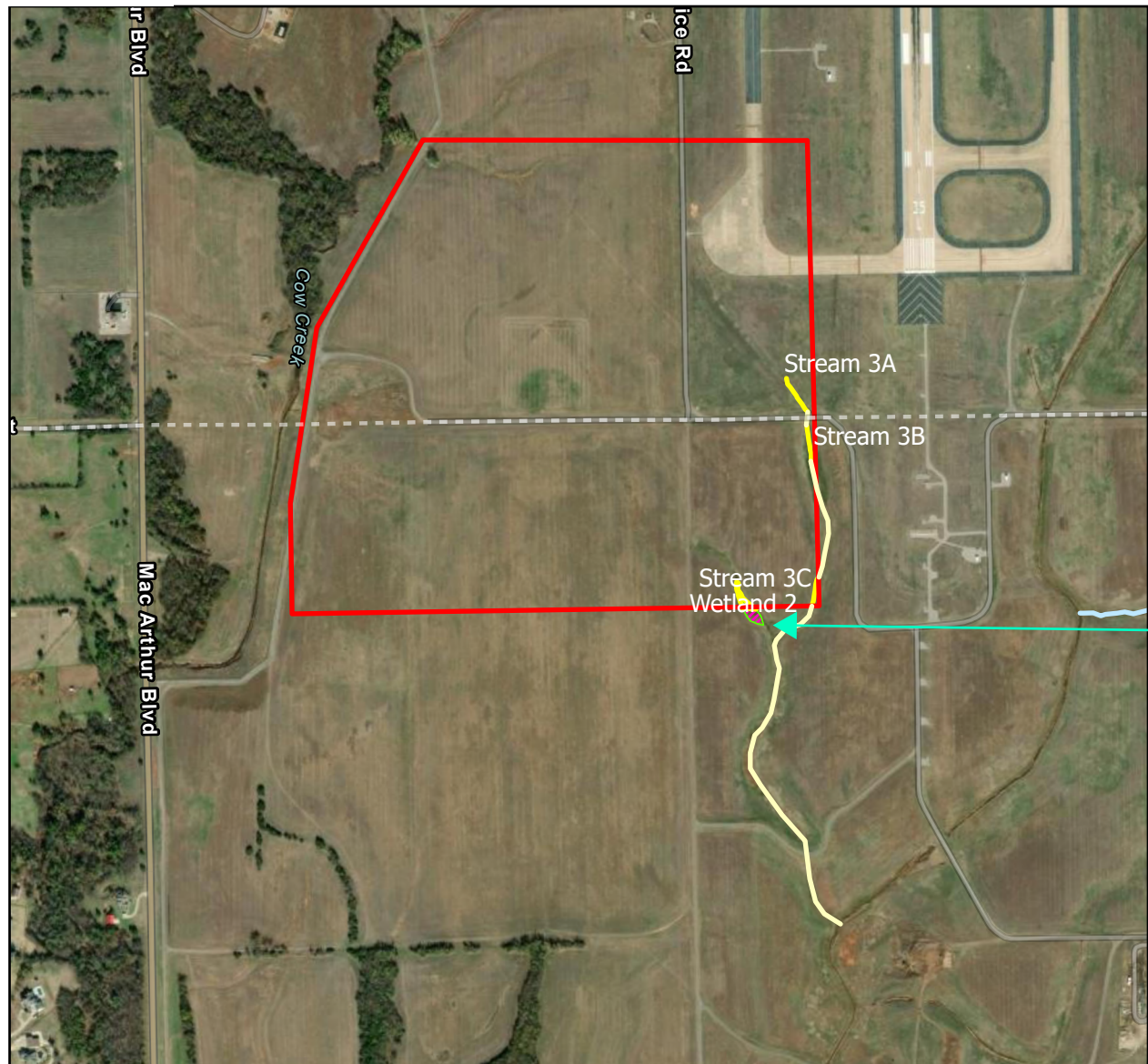


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Legend - Parcel 4

Review_Area

Stream Reach within Review Area

Non-RPW

Wetland Area within Review Area

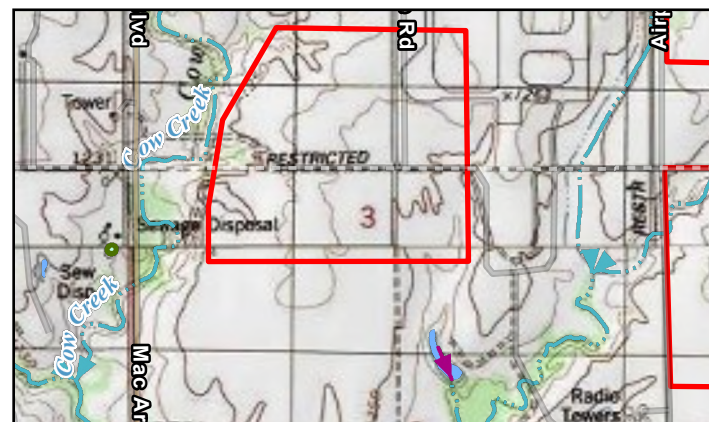
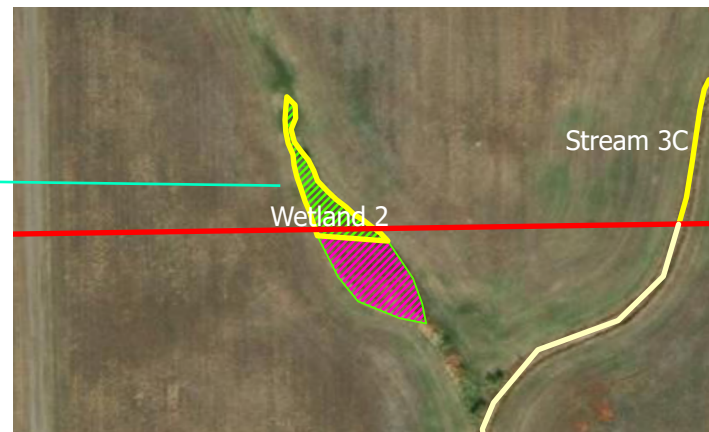
Emergent Wetland - Non-Adjacent

Wetland Area outside Review Area

Additional Reach

Non-RPW

RPW



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