



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

CESWT-RO

17 April 2025

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-2024-00463]

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 this state 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. IS-2.1, approximately 4,511 linear feet, **Jurisdictional**
- ii. IS-2.2, approximately 793 linear feet, **Jurisdictional**
- iii. IS-3, approximately 957 linear feet, **Jurisdictional**
- iv. IS-4, approximately 1,276 linear feet, **Jurisdictional**
- v. DD-7, approximately 180 linear feet, **Non-jurisdictional**
- vi. DD-8, approximately 145 linear feet, **Non-jurisdictional**
- vii. DD-9, approximately 134 linear feet, **Non-jurisdictional**
- viii. DD-10.0, approximately 2,464 linear feet, **Non-jurisdictional**
- ix. DD-10.1, approximately 302 linear feet, **Non-jurisdictional**
- x. DD-11.0, approximately 486 linear feet, **Non-jurisdictional**
- xi. DD-11.1, approximately 226 linear feet, **Non-jurisdictional**
- xii. ES-1.1, approximately 3,262 linear feet, **Non-jurisdictional**
- xiii. ES-2.0, approximately 138 linear feet, **Non-jurisdictional**
- xiv. ES-2.1, approximately 235 linear feet, **Non-jurisdictional**
- xv. ES-2.2, approximately 158 linear feet, **Non-jurisdictional**
- xvi. ES-3, approximately 25 linear feet, **Non-jurisdictional**
- xvii. ES-4.0, approximately 1,584 linear feet, **Non-jurisdictional**
- xviii. ES-4.1, approximately 947 linear feet, **Non-jurisdictional**

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- xix. ES-4.2, approximately 336 linear feet, **Non-jurisdictional**
- xx. ES-5.0, approximately 905 linear feet, **Non-jurisdictional**
- xxi. ES-5.1, approximately 380 linear feet, **Non-jurisdictional**
- xxii. ES-5.2, approximately 120 linear feet, **Non-jurisdictional**
- xxiii. ES-6, approximately 330 linear feet, **Non-jurisdictional**
- xxiv. ES-7, approximately 216 linear feet, **Non-jurisdictional**
- xxv. ES-8.0, approximately 674 linear feet, **Non-jurisdictional**
- xxvi. ES-8.1, approximately 144 linear feet, **Non-jurisdictional**
- xxvii. ES-9.0, approximately 266 linear feet, **Non-jurisdictional**
- xxviii. ES-9.1, approximately 117 linear feet, **Non-jurisdictional**
- xxix. ES-9.2, approximately 314 linear feet, **Non-jurisdictional**

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. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is comprised of approximately 580 acres with center coordinates of latitude: 36.1963°, longitude: -95.2873°, in Sections 20, 21, 28, and 29, Township 20 North, Range 19 East, in Mayes County, Oklahoma.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS

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CONNECTED. The Neosho River is the nearest downstream TNW (navigable under Section 10 of the Rivers and Harbors Act of 1899).

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS The tributaries flow off-site into Chouteau Creek which flows into the Neosho River, a TNW.
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

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.

e. Tributaries (a)(5):

- IS-2.1 is a relatively permanent water (RPW) that has been channelized along a roadway that receives flow from IS-2.2 along the toe of an approximately 37 acre man-made impoundment. IS-2.1 flows downstream through an impoundment before flowing into Chouteau Creek and ultimately the Neosho River, a TNW.
- IS-2.2 is an RPW that serves as an overflow channel from an approximately 37 acre man-made impoundment located outside of the study area. IS-2.2 contributes flow directly to IS-2.1 which exhibits the downstream flow characteristics identified in the paragraph above.
- IS-3 is an RPW that flows across a corner of the western study area boundary. Within the study area, IS-3 receives flow from ephemeral channels ES-4.0, ES-4.1, and ES-4.2 before flowing west into Chouteau Creek and ultimately the Neosho River, a TNW.
- IS-4 is an RPW that receives ephemeral surface flow from ES-6.0, ES-7.0, and ES-8.0 along the western boundary of the study area. IS-4 flows out of the study area to the west and into Chouteau Creek which flows into the Neosho River, a TNW.

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.

The following are ditches with ephemeral flow that are not a relocated tributary or excavated within a tributary:

- **DD-7**, approximately 180 linear feet
- **DD-8**, approximately 145 linear feet
- **DD-9**, approximately 134 linear feet

⁷ 51 FR 41217, November 13, 1986.

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- **DD-10.0**, approximately 2,464 linear feet
 - **DD-10.1**, approximately 302 linear feet
 - **DD-11.0**, approximately 486 linear feet
 - **DD-11.1**, approximately 226 linear feet
- 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 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 following non-relatively permanent waters lack relatively permanent flow within the study area. The following ephemeral features have been determined to be non-jurisdictional:

- **ES-1.1**, approximately 3,262 linear feet
- **ES-2.0**, approximately 138 linear feet
- **ES-2.1**, approximately 235 linear feet

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- **ES-2.2**, approximately 158 linear feet
- **ES-3**, approximately 25 linear feet
- **ES-4.0**, approximately 1,584 linear feet
- **ES-4.1**, approximately 947 linear feet
- **ES-4.2**, approximately 336 linear feet
- **ES-5.0**, approximately 905 linear feet
- **ES-5.1**, approximately 380 linear feet
- **ES-5.2**, approximately 120 linear feet
- **ES-6**, approximately 330 linear feet
- **ES-7**, approximately 216 linear feet
- **ES-8.0**, approximately 674 linear feet
- **ES-8.1**, approximately 144 linear feet
- **ES-9.0**, approximately 266 linear feet
- **ES-9.1**, approximately 117 linear feet
- **ES-9.2**, approximately 314 linear feet

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.

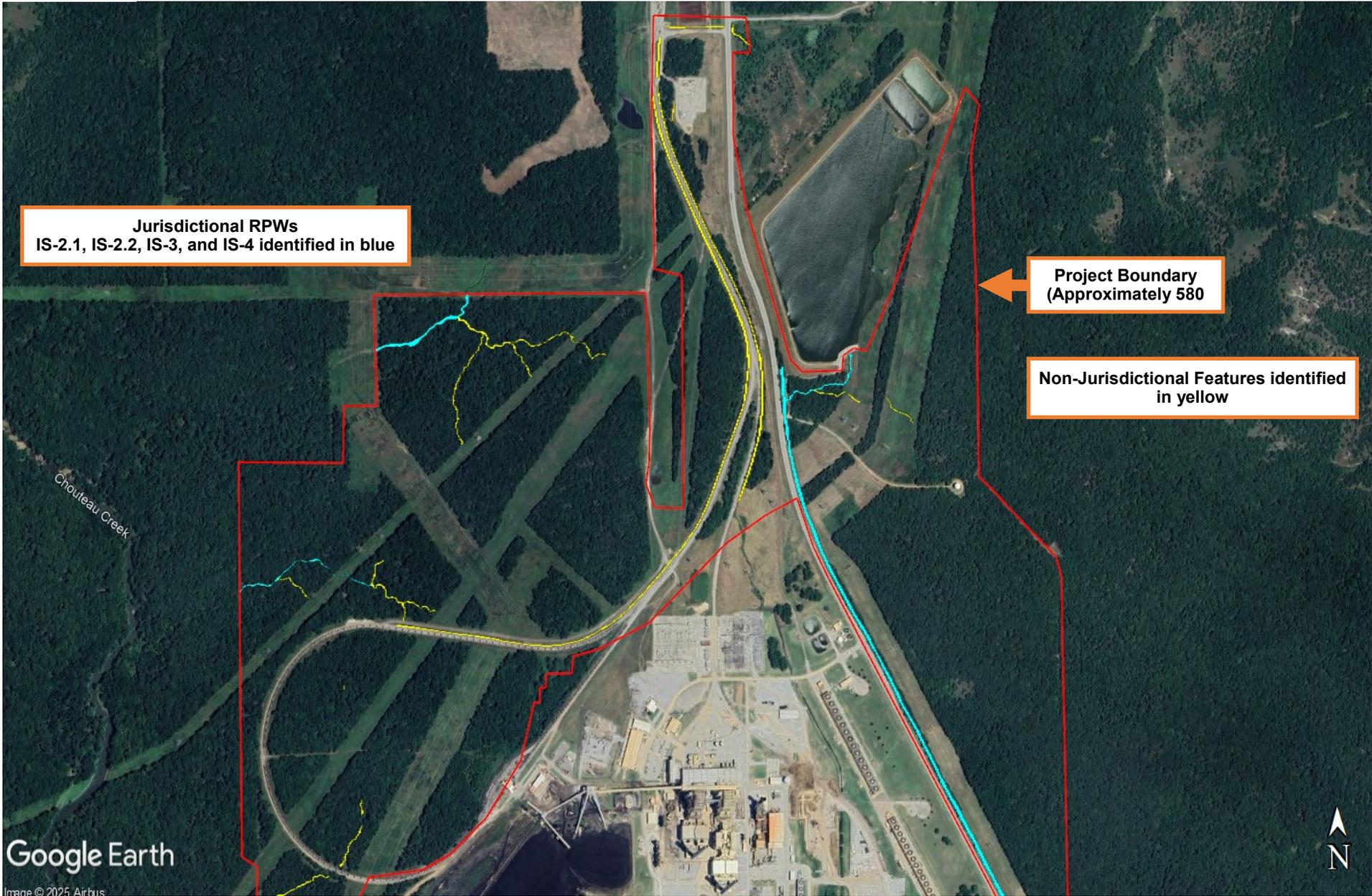
- a. Waters of the United States Delineation Report (January 2024)
- b. Antecedent Precipitation Tool (November 2023)
- c. Google Earth/Digital Globe (1995-2025)

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



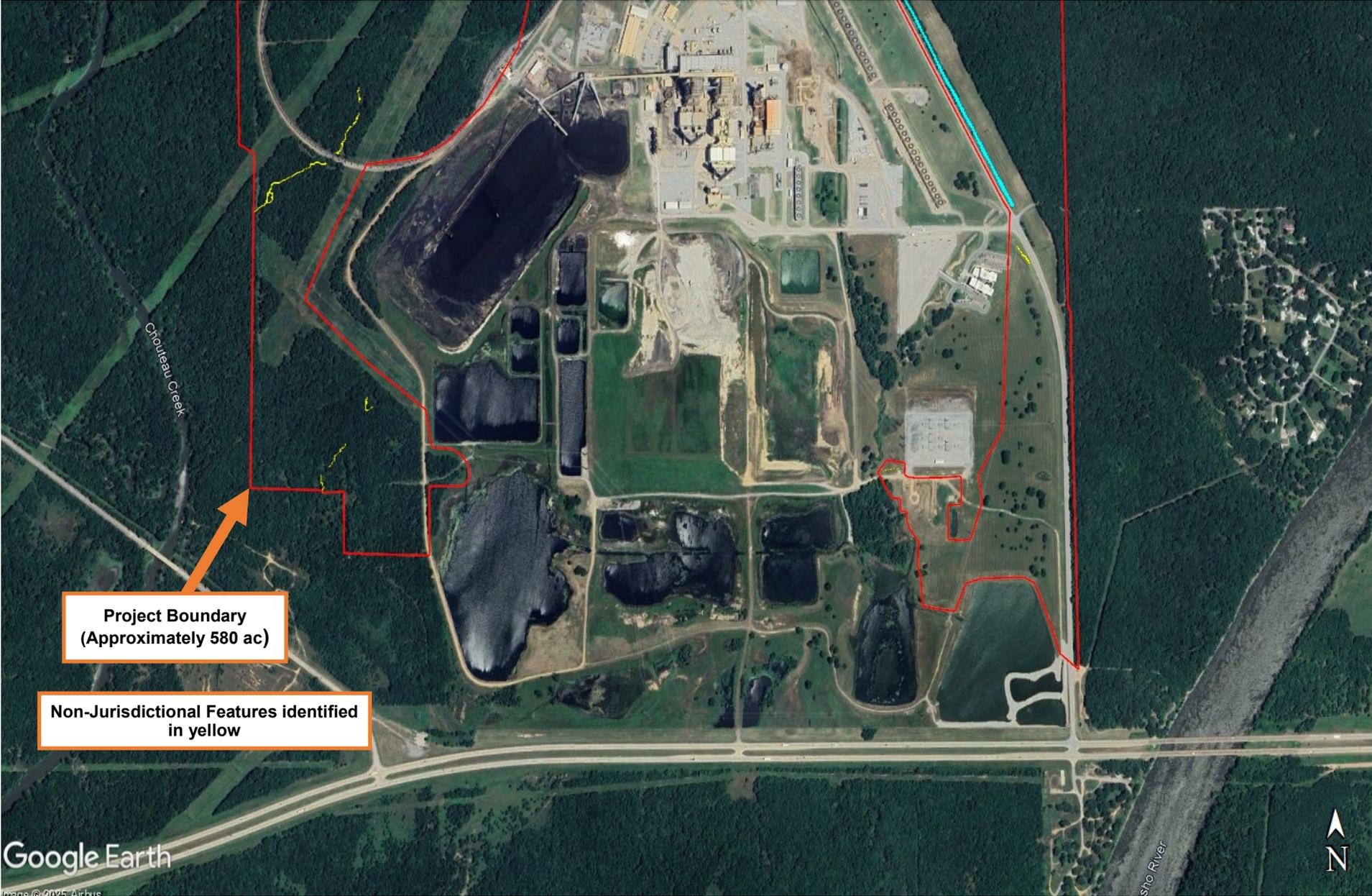
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Center Coordinates: latitude: 36.1963, longitude: -95.2873° , Mayes County, Oklahoma



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