



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT  
P.O. BOX 2946  
PORTLAND, OR 97208-2946

CENWP-ODG

12 March 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023),<sup>1</sup> [NWP-2023-186]<sup>2</sup>

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>3</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>4</sup>

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> While the Revised Definition of "Waters of the United States"; Conforming 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.

<sup>2</sup> 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, the territorial seas, or interstate water 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

## 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. Wetland 1, 1.04-acres, jurisdictional, Section 404
- ii. Wetland 2, .09-acre, non-jurisdictional
- iii. South Highland Canal, .10-acre, jurisdictional, Section 404
- iv. Allen Creek, .18-acre, jurisdictional, Section 404
- v. Upland Ditch 1, 180 feet, non-jurisdictional
- vi. Upland Ditch 2, 160 feet, non-jurisdictional

## 2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The Review Area is composed of an 9.76-acre parcel (tax lot 1700, 2000, and 2100) at 225 Allenwod Drive, Grants Pass, Josephine County, Oregon at Latitude/Longitude: 42.40030289°, -123.34955493° (Township 36 South, Range 6 West, Section 36). The site was utilized in the past for agricultural purposes.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Aquatic resources within the Review Area are approximately 1.93 river miles from the Rogue River (river mile 100). The Rogue River has been determined to be a TNW up to river mile 27.1 by Portland District Corps of Engineers as described in the October 1993 District list of Navigable Riverways within the State of Oregon. The Rogue River has been determined to be a Section 404 TNW up to river mile 157.5 as described in the June 2008 list of Section 404 TNWs of the United States within the Portland District, Corps of Engineers Regulatory Boundary. Aquatic resources are approximately 1.78 aerial (straight) miles south of nearest TNW (Rogue River).<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Wetland 1 contributes flow via a culvert into the South Highline Canal. From October to May, the South Highline Canal flows into Allen Creek in the northwestern region of the Review Area. Allen Creek extends beyond the Review Area and flows north for approximately 1.93 river miles until meeting the Rogue River near river mile 100. Allen creek flows as open surface water channels through recreational parks, residential neighborhoods, agricultural areas, and business districts and subsurface under several roadways and railroad crossings within culverts and under bridges along this 1.93-mile flowpath. From May to October, the South Highline Canal conveys flows offsite to the west via pipe. Water flows through a series of open canals and pipes for approximately 9.32 river miles before eventually discharging into the Rogue River near river mile 95.
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</sup> N/A

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

<sup>7</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>8</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

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 2023 Rule as amended, 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 2023 Rule as amended. 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. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A

b. The Territorial Seas (a)(1)(ii): N/A

c. Interstate Waters (a)(1)(iii): N/A

d. Impoundments (a)(2): N/A

e. Tributaries (a)(3):

- i. Allen Creek: Allen Creek, a relatively permanent water (RPW), flows north through a 0.18-acre area for approximately 475 linear feet along the western boundary of the Review Area. Allen Creek flows north from the Review Area directly into the Rogue River (a TNW), as described in Section 5 above. Allen Creek is a second order (Strahler) tributary of the Rogue River identified and mapped by the U.S. Geological Survey National Hydrography Dataset (NHD) as a perennial stream. Allen Creek is a medium sized fish bearing stream according to Oregon Department of Fish and Wildlife data. Based on review of the Antecedent Precipitation Tool, precipitation at the time of data collection, normal conditions were present. Allen Creek could not be accessed at the time of the wetland delineation due to dense blackberry thickets. Allen Creek appeared to be incised greater than ten feet, and the ordinary high-water mark was delineated using topographic data. Riparian vegetation along Allen Creek is composed of an overstory of cottonwood (*Populus balsamifera*), red

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329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

alder (*Alnus rubra*), and Oregon ash (*Fraxinus latifolia*) with a thick understory of Himalayan blackberry (*Rubus armeniacus*). Allen Creek meets the relatively permanent standard and flows directly into a TNW. Thus, the Corps has determined Allen Creek is a water of the U.S.

- ii. South Highline Canal is part of the Grants Pass Irrigation District. South Highline Canal flows through a 0.10-acre area for approximately 422 linear feet of the Review Area. This feature is cement lined within the Review Area and carries irrigation water from 1 May to 1 October offsite to the west. South Highline canal maintains relatively permanent flow through a series of open canals and pipes. Grants Pass Public Works confirmed that the South Highland Canal discharges into the Rogue River. During the non-irrigation season, a spillway is open that allows precipitation and stormwater to collect in the South Highline Canal and drain into Allen Creek. Allen Creek then drains into Rogue River. Site photos from the submitted Wetland Delineation taken on 22 October 2022 show surface flow present in the canal, as well as bed, bank, and several ordinary high water mark indicators (top of bank, wrack or scour lines, and presence of litter and debris). The Antecedent Precipitation Tool for the site data collection date shows that conditions were normal during the data collection. The South Highline Canal meets the relatively permanent standard, as it has continuously flowing water during certain times of the year. The South Highline Canal flows directly into a TNW. Thus, the Corps has determined the South Highline Canal is a water of the U.S.

f. Adjacent Wetlands (a)(4):

- i. Wetland 1: Wetland 1 is a non-tidal, 1.04-acre palustrine emergent (PEM) wetland with a slope/depression Hydrogeomorphic (HGM) class. Wetland 1 is located in a relatively flat to slight depression encompassing much of the north and central portion of the site. Wetland 1 is defined by toe of slope along the eastern margins extending west into an excavated drainage ditch which flows onsite from the south. To the south, Wetland 1 is composed of two vegetated ditches, one entering the site at the southern property boundary (extending north) and one extending east along the southern property boundary. The north/south ditch appears on historical aerial photographs. The ditched wetland was well defined with near vertical two-to-three-foot embankments. The ditch width at the bottom ranged from two to five feet wide. The ditched portions of wetland are considered part of Wetland 1. Field data for the delineation was recorded on 12 October 2021 (dry season) and 01 February 2023 (wet season). Based on the site conditions, wetland hydrology is provided by

groundwater discharge, proximity to the excavated ditch, and upslope runoff from the east, which settles in the slight topographic depression. No direct indicators of hydrology were present at the time of the October site visit. February site observations included surface water (A1) within the western, lower areas of the wetland with saturation (A3) and high-water table (A2) to the east. Hydrology was observed at both wetland and upland plots during the February site visit. Soil samples met hydric soil indicators for sandy redox (S5) (SP22), redox dark surface (F6) (SP14 and 17) and depleted matrix (F3) (SP11). Soils were a brown (10YR 3/2) to dark grayish brown (10YR 4/2) with red brown redoximorphic features. Soil texture ranged from loam to sandy loam or coarse sand. Adjacent upland plots did not contain hydric soil indicators or hydrology indicators. Vegetation within Wetland 1 was dominated by soft rush (*Juncus effusus*, FACW), red-osier dogwood (*Cornus alba*; FACW), tall rye grass (*Schedonorus arundinaceus*, FAC) and Yorkshire fog (*Holcus lanatus*, FAC). A culvert extends from Wetland 1, under the access road, and conveys flows into the South Highland Canal near the north end of the property. The South Highland Canal flows directly into Allen Creek. Wetland 1 has a continuous surface connection to the South Highline Canal. Based on adjacency to a relatively permanent tributary (South Highline Canal), the Corps has determined Wetland 1 is a water of the U.S.

g. Additional Waters (a)(5): N/A

## 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>9</sup> N/A
- b. 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 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

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<sup>9</sup> 88 FR 3004 (January 18, 2023)

- i. Wetland 2 is a .09-acre, non-tidal, PEM wetland in the slope/depression HGM. Wetland 2 occupies a very shallow depression at the bottom of the eastern slope/swale. The wetland is bound to the west by a berm that appears to be a historic fence line. Field data for the delineation was recorded on 01 February 2023. Soil samples met the Corps hydric soil indicator for depleted below dark surface (A11). Soils were a gray to grayish brown sand beneath a brown loam. Wetland hydrology was observed with a high-water table (A2) and saturation (A3). The wetland hydrology was assumed to be sustained by groundwater and upslope runoff from the east, which settles into the depression. Due to the presence of high-water table in upland plots, upland plots were analyzed and tested with alpha-alpha dipyridyl strips. No reactions were observed, and wetland boundaries were established. Vegetation within Wetland 2 was dominated by tall rye grass (*Schedonorus arundinaceus*, FAC). Upland sample plots taken around Wetland 2, (Sample plots: 6 and 25) had no hydric soils present and Sample plot 28 had no hydric soils or hydrology present. Based on a review of contours and Light Detection and Ranging (LiDAR) data to assess topography within the Review Area, there are no discrete features which would provide a continuous surface connection between Wetland 2 and an RPW. Based on the lack of a continuous surface connection or adjacency to any jurisdictional waters, the Corps has determined Wetland 2 is not a water of the U.S.
- ii. Upland Ditch 1: Upland Ditch 1 was mapped based on top of bank in the western portion of the site. The feature extends 160 linear feet in an east-west orientation, is approximately 2-3 feet deep and 1-2 feet wide at the bottom. Ditch 1 is fully vegetated with no evidence of any ordinary high water mark (OHWM) indicators. There were no hydric soil or hydrology wetland parameters recorded at Sample plot 18 within Upland Ditch 1. There was no notable change in the vegetation community between the Upland Ditch 1 and the nearby upland sample plot 19. Based on LiDAR and site contours the excavated ditch portion of Wetland 1 collects upgradient hydrology from the eastern portion of the Review Area. The lack of hydrology to support wetland conditions and/or relatively permanent flow within Upland Ditch 1 is due to the ditched portion of Wetland 1. An old pump house was located nearby. It is believed this feature historically was connected to irrigation. Based on these factors, the Corps has determined that Upland Ditch 1 is not a water of the U.S.
- iii. Upland Ditch 2: Upland Ditch 2 is a roadside ditch that runs 180 linear feet, located along Williams Highway, at the eastern property boundary. This is a maintained cement lined road ditch culverted at both ends. Its

purpose is to carry excess precipitation offsite. Thus, Upland Ditch 2 would only have flowing or standing water for a short duration in direct response to precipitation. Because it was cement lined, a sample plot could not be taken within the ditch. Sample plot 4 was taken just west of the ditch and did not have hydric soil or hydrology present. After reviewing USGS Historical Topographic maps there were no tributaries mapped in this area, this ditch was excavated wholly in and draining only dry land and does not carry a relatively permanent flow of water. The Corps has determined Upland Ditch 2 is not a water of the U.S.

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. Google Earth Pro aerial imagery, last accessed on 20 January 2024
  - b. Jurisdictional Wetland Delineation Report for 225 Allenwood Drive, Grants Pass, Josephine County, Oregon, dated March 2023
  - c. Grants Pass Utility Irrigation Canal Schematic, dated 04 January 2024
  - d. Corps navigable waters' study: Corps EGIS, last accessed 2 January 2024
  - e. U.S. Department of Agriculture Natural Resources Conservation Service Soil Survey. Citation: NRCS Web Soil Survey, last accessed 22 January 2024. <https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>
  - f. Antecedent Precipitation Tool (USACE) software (v1.0.20) last accessed 20 December 2023.
  - g. Oregon Department of Mining and Minerals Industries (DOGAMI) Bare Earth Slope LiDAR: National Regulatory Viewer, last accessed 22 January 2024
  - h. Federal Emergency Management Agency Flood Insurance Rate Map data, National Regulatory Viewer, last accessed 22 January 2024
  - i. National Wetlands Inventory map: National Regulatory Viewer, last accessed 22 January 2024
  - j. Local Wetland Inventory map; National Regulatory Viewer, last accessed 22 January 2024



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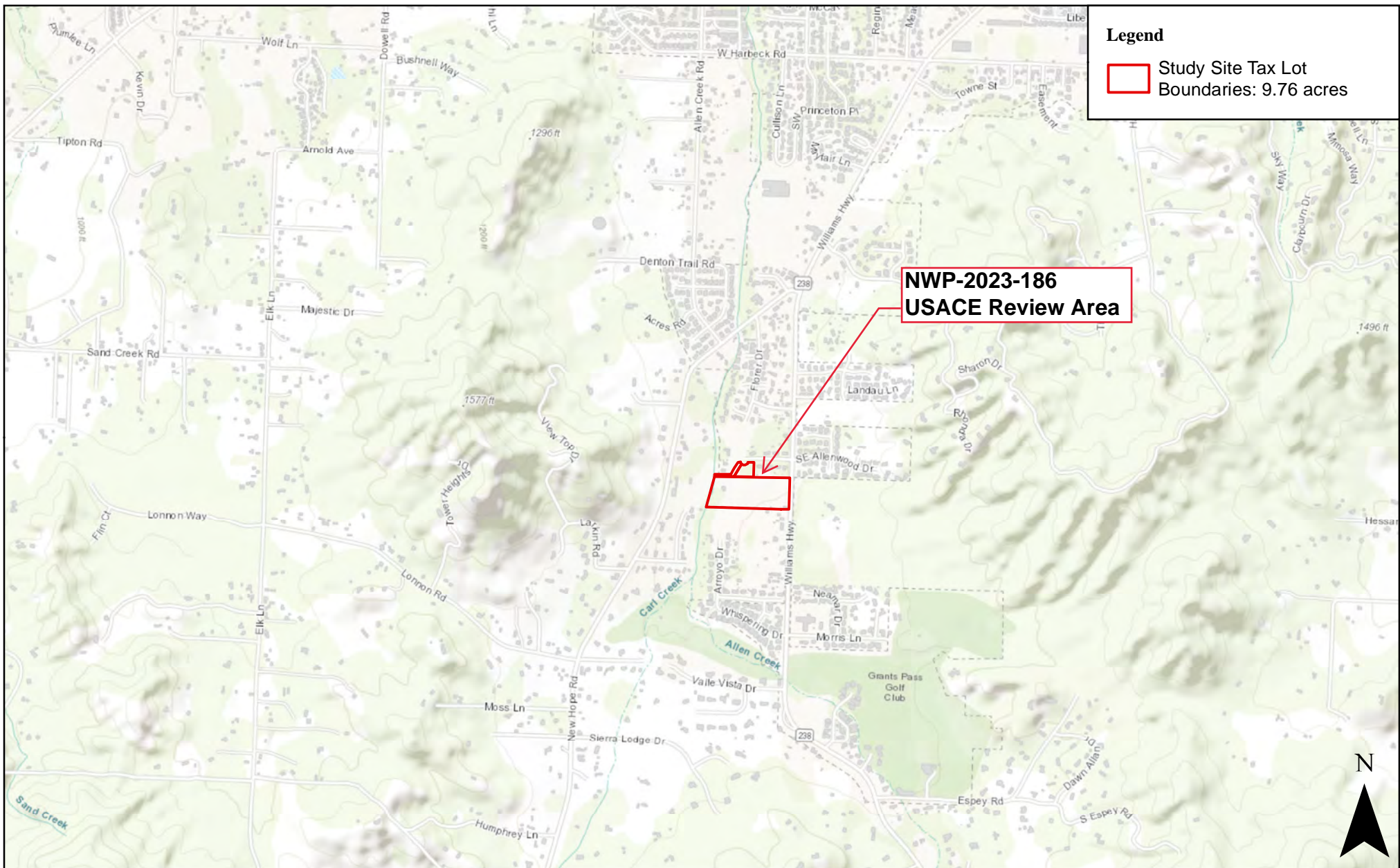
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- k. National Hydrology Dataset, National Regulatory Viewer, last accessed 22 January 2024

10. OTHER SUPPORTING INFORMATION. The National Wetland Inventory and the NHD show a second waterway being mapped from the southeast corner of the site, flowing northwest and then west across the northern portion of the site (Lots 2000 & 2100) running into the South Highline Canal. This feature was not located onsite during data collection. Historical imagery does not show this feature and LiDAR imagery does not show this feature as well.

On 20 February 2024 the Corps submitted this AJD to EPA Region 10 and Corps Headquarters for review. EPA Region 10 and Corps Headquarters did not provide any response within the required timelines.

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.



Date: 10/26/2022

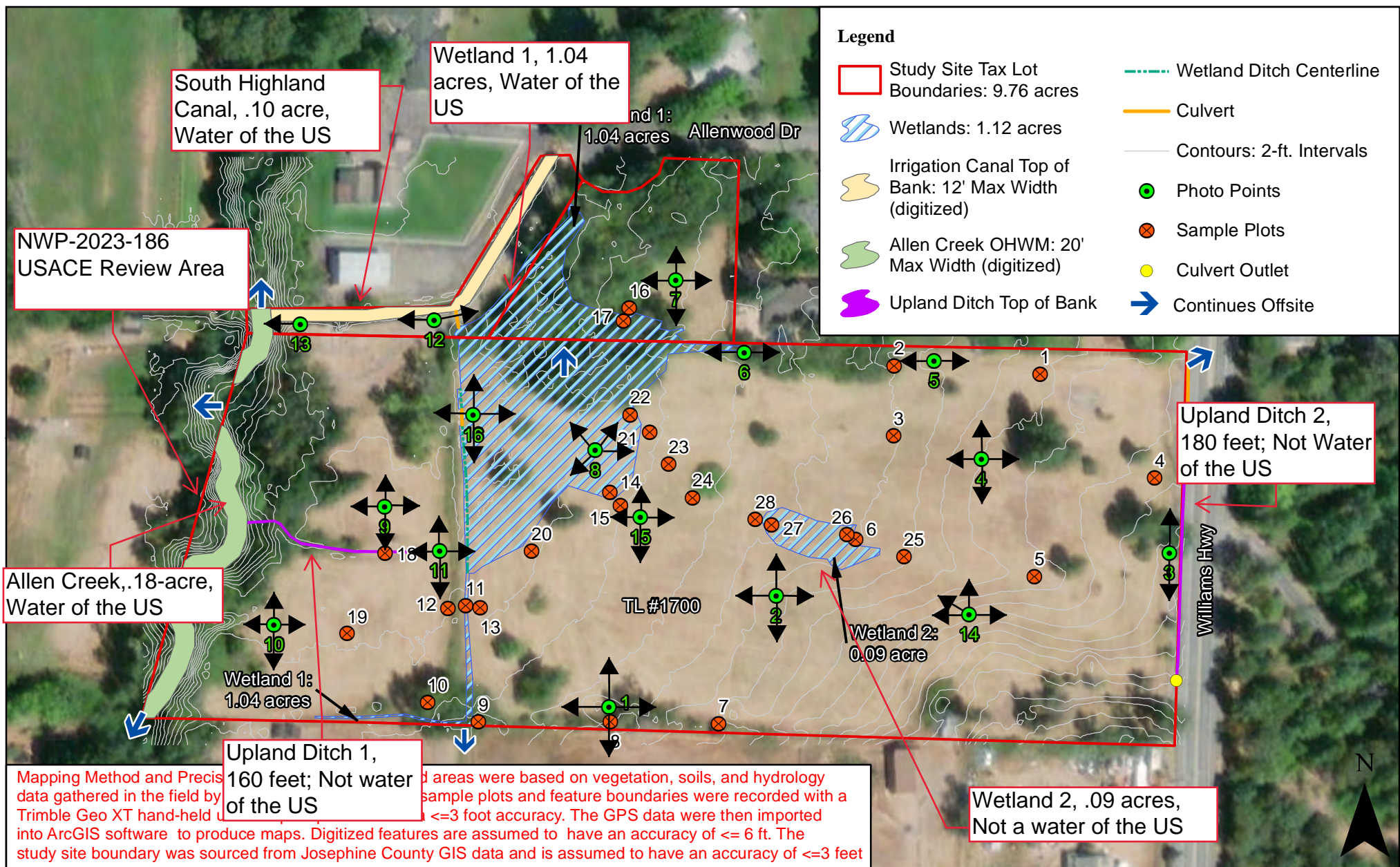
Data Source: ESRI, 2022; Josephine  
County GIS Dept., 2022

Figure 1. Location Map

Allenwood Drive Project Site: S&A #3020

0 500 1,000 2,000 Feet





Date: 3/9/2023

Data Source: ESRI, 2023; Jackson County GIS Dept., 2023; DOGAMI, 2010

Figure 6. Wetland Delineation Map

Allenwood Drive Project Site: S&A #3020



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