



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

CENWP-ODG

20 May 2024

MEMORANDUM FOR RECORD

SUBJECT: U.S. Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; 88 FR 3004 (18 January 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023),¹ NWP-2024-270.²

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

On 18 January 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 (18 January 2023) ("2023 Rule"). On 8 September 2023 the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", 88 FR 61964 (8 September 2023) 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),⁵ the 2023 Rule as amended,

¹ 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.

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, 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.).

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.

CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2024-270

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

1. SUMMARY OF CONCLUSIONS.

- a. The Review Area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire Review Area and there are no areas that have previously been determined to be jurisdictional under the Rivers and Harbors Act of 1899 in the Review Area).

The Review Area is comprised of three sections (polygons), all located in a rural area approximately four miles southeast of the town of Fort Rock, Oregon. The northwestern and southern Review Area polygons are actively used for crop production and the northeastern Review Area polygon is used for livestock pasture. In general, topography ranges from nearly flat to gently sloping, however, prominent exposed and windblown ridgelines bisect the northeastern study area. Elevations in the Review Area range from approximately 4,304 to 4,340 feet above mean sea level. The Review Area is surrounded by shrub vegetation and rangeland to the east and west, agriculture and rangeland to the north, and solar field and agriculture to the south. Additionally, seasonal lakebeds border the Review Area to the west and to the south of the northwest study area.

There is no indication of wetland or waterway presence in the Review Area. Soils within the Review Area are mapped as non-hydric by the U.S. Department of Agriculture Natural Resources Conservation Service. The wetland delineation was conducted during a time period which is drier than normal pursuant to the Corps Antecedent Precipitation Tool but there is no indication the period of dryness affected the identification of wetlands or other waters on-site. U.S. Geological Survey quadrangle maps do not denote wetlands or other waterways within the Review Area.

The Corps has determined the Review Area is comprised entirely of dry land and that no waters of the U.S. are present within the Review Area.

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (18 January 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023)

CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2024-270

- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
3. REVIEW AREA. The Review Area is comprised of three polygons totaling 617.3-acres in size located near Fort Rock, Lake County, Oregon. The Review Area encompasses a portion of tax lots 800, 900, 100 on Lake County Assessor's map Township 26 South, Range 14 East, Sections 12 and 13; and a portion of tax lot 1300 and all of tax lot 1200 on Lake County Assessor's map Township 26 South, Range 15 East, Section 7. The center coordinates of the northern Review Area polygon are latitude/longitude: 43.342469°, -121.0048°; the center coordinates of the northeast Review Area polygon are latitude/longitude: 43.340397°, -120.991664°; and the center coordinates of the southern Review Area polygon are latitude/longitude: 43.31128°, -121.000728°.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW to the Review Area is the Willamette River which is approximately 114 linear miles northeast of the Review Area, west of the crest of the Cascade Range Mountains. The Corps Portland District recognizes the Willamette River as a TNW to river mile 183.2, one mile upstream of the Interstate-5 bridge in Eugene, Lane County, Oregon.⁶
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The Review Area is comprised of entirely dry land and does not possess a flowpath to a TNW, the territorial seas, or an interstate water.
 6. SECTION 10 JURISDICTIONAL WATERS⁷: 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

⁶ 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.

⁷ 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.

CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2024-270

resource or other feature within the Review Area and how it was determined to be jurisdictional in accordance with Section 10.⁸ 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 2023 Rule as amended at 33 CFR § 328.3(a)(1) through (a)(5), 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): N/A

f. Adjacent Wetlands (a)(4): N/A

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

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

CENWP-ODG

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), NWP-2024-270

feature within the Review Area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹ 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). N/A

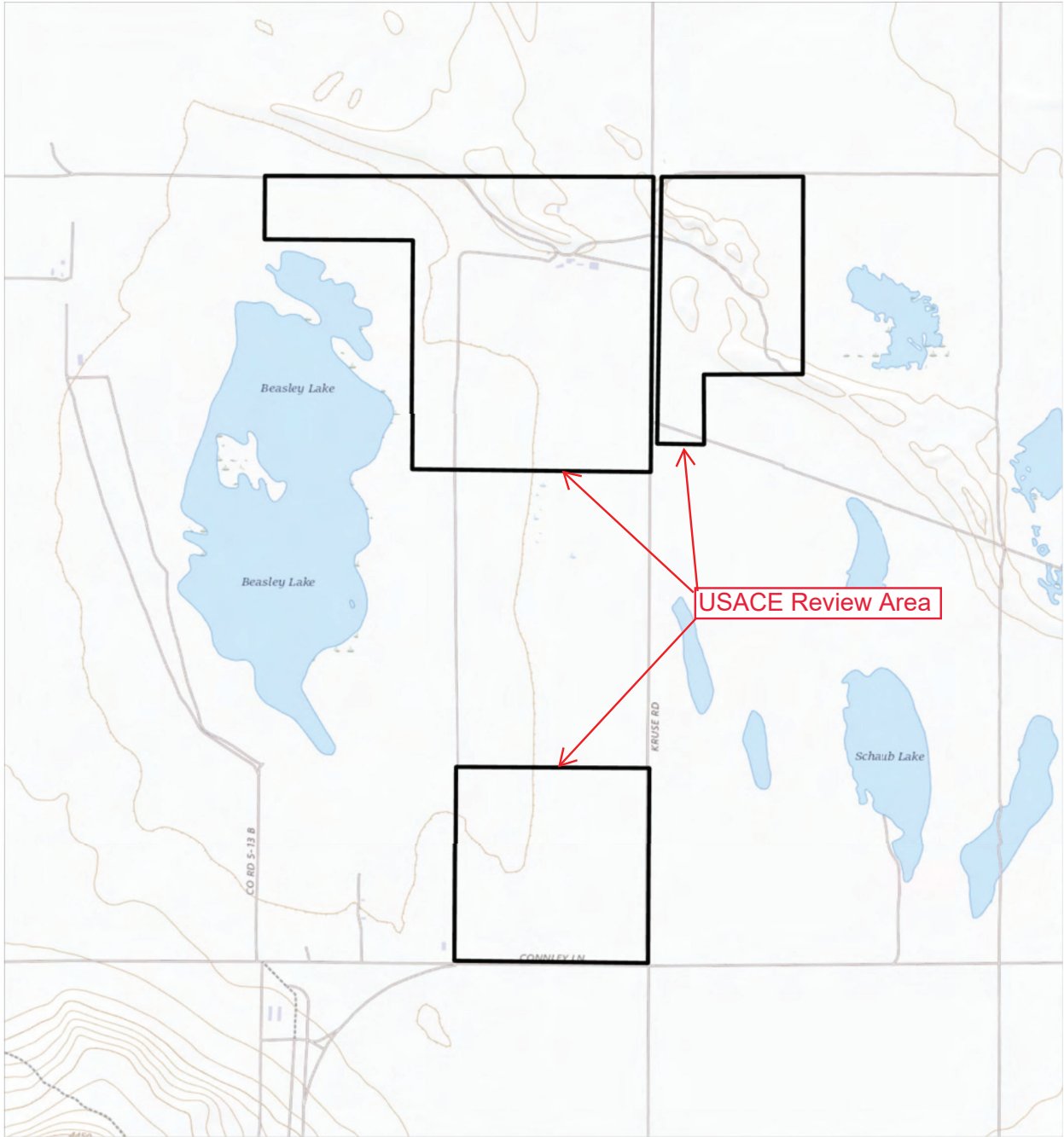
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Wetland delineation titled "Fort Rock Phase II Wetland Determination, 60830 Kruse Road, Fort Rock, Oregon" prepared by PBS Engineering and Environmental on 25 April 2024, received 15 May 2024, last accessed 20 May 2024.
- b. Google Earth Pro aerial imagery last accessed 17 May 2024.
- c. Corps Portland District October 1993 list of Navigable Riverways within the State of Oregon, last accessed 17 May 2024 at https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/jurisdiction/Navigable_US_Waters_Oregon_1993.pdf
- d. U.S. Geological Survey quadrangle maps; Schaub Lake 1983 and 2023, 1:24,000K last accessed 20 May 2024 at <https://ngmdb.usgs.gov/topoview/viewer/#4/39.98/-100.06>.

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.


⁹ 88 FR 3004 (18 January 2023)




SOURCE: ESRI USGS BASEMAP (2023).




Legend

 **USACE Review Area**



SCALE: 1" = 2,000' (8.5X11 SHEET)

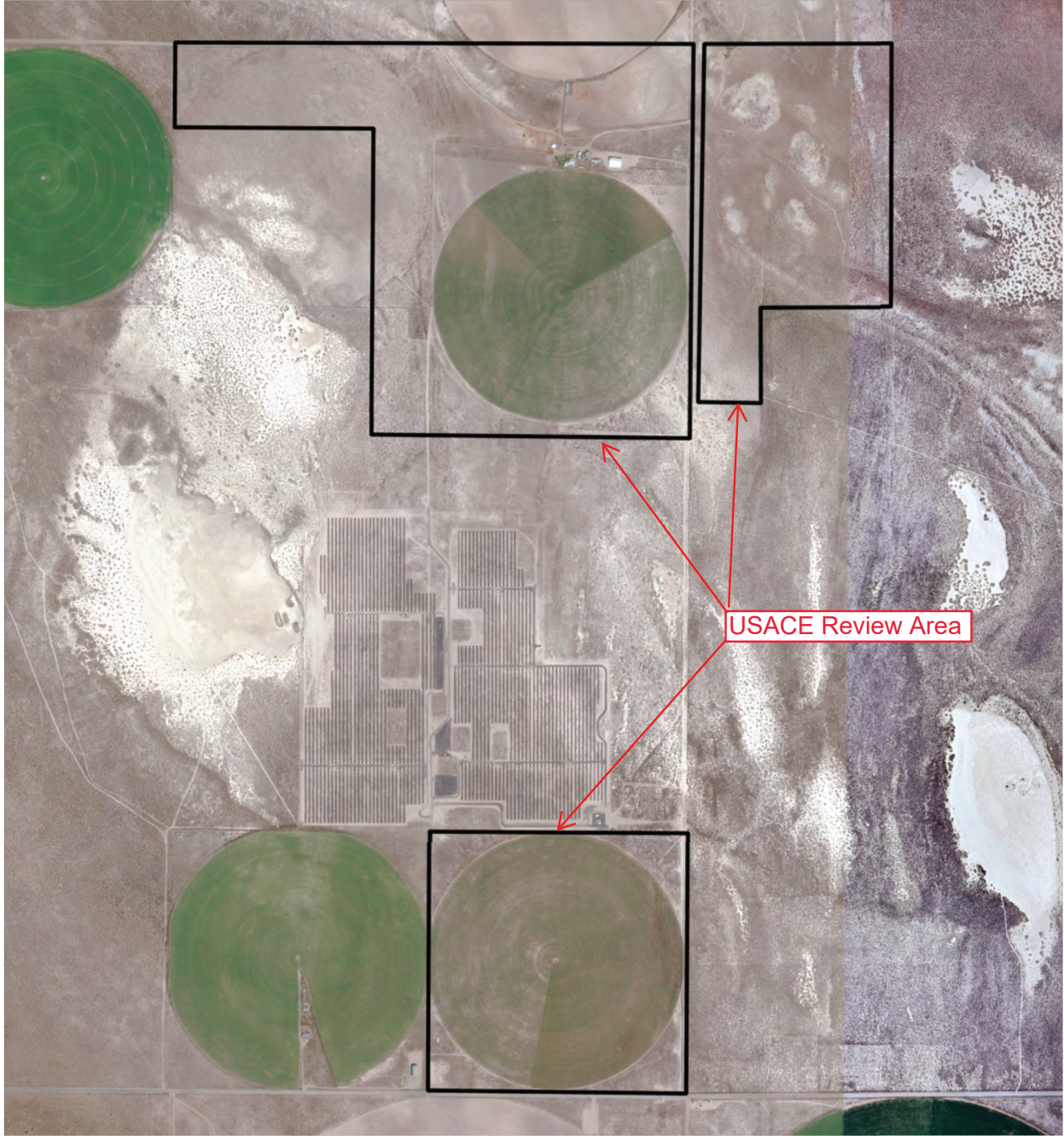


PREPARED FOR: NEWSUN ENERGY




LOCATION MAP
FORT ROCK PHASE II WETLAND DETERMINATION
FORT ROCK, LAKE COUNTY, OREGON


APR 2024
80812.025
FIGURE
1



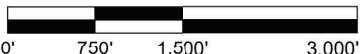
SOURCE: GOOGLE EARTH (2023).

Legend

 **USACE Review Area**



SCALE: 1" = 1,500' (8.5X11 SHEET)



PREPARED FOR: NEWSUN ENERGY



JULY 22, 2023 AERIAL PHOTOGRAPH
FORT ROCK PHASE II WETLAND DETERMINATION
FORT ROCK, LAKE COUNTY, OREGON

APR 2024
80812.025
FIGURE
5