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U.S. ARMY CORPS OF ENGINEERS, WALLA WALLA DISTRICT
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[CENWW-RD] [07 12 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) ,[1] [2023-00517]

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 Idaho 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.

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 – jurisdictional – Section 404, (a)(7) water

      ii. Wetland 2 – non-jurisdictional

      iii. Drainage 1 – jurisdictional – Section 404, (a)(5) water

      iv. Ditch 1 – non-jurisdictional

      v. Ditch 2 – non-jurisdictional

      vi. Ditch 3 – 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. _, 143 S. Ct. 1322 (2023)

   e. United States v. Cundiff, 555 F.3d 200 (6th Cir.), cert. denied, 130 S. Ct. 74 (2009)

3. REVIEW AREA.
   The review area is a 54.8-acre parcel located at 48.29677689°, -116.56987283° in Sandpoint, Bonner County, Idaho. This parcel runs along both sides of an existing road and includes two wetlands, three ditches, and a drainage feature. On February 22, 2016, an AJD (NWW-2007-821) was issued for features included in the current request.
   Figure 1. Review Area

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED.
   Lake Pend Oreille – (a)(1) water – Section 10 water

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

   a. Water flows from Wetland 1 through a short culvert located at (48.296479°, -116.570445°) under the BNSF railroad into Chuck Slough. Chuck Slough is a tributary of Lake Pend Oreille, a Section 10 water. Chuck Slough appears to be a relatively permanent (a)(5) water [RPW(a)(5)] based on the USGS Quad maps.
   b. Water flows from Drainage 1 through a culvert into Chuck Slough. Chuck Slough is a tributary of Lake Pend Oreille, a Section 10 water. Chuck Slough appears to be a relatively permanent (a)(5) water [RPW(a)(5)] based on the USGS Quad maps.

   Figure 2. Map showing flowpaths.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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

[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.

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):
   1. Drainage 1: 0.05 acres/172 linear feet – A relatively permanent water that is fed by Ditch 2 and a creek running from northeast. This is an intermittent tributary that contributes flow to Chuck Slough [RPW (a)(5)] based on the description given in the delineation. Additionally, Google Earth images show the drainage holding water in November 2021 and sediment sorting and an OHWM are visible in photograph 3 of the delineation report, supporting the conclusion that this is an RPW. Flowpath is shown in Section 5 above.

   Figure 3. Map of Aquatic Resources (from delineation)
   Figure 4. Google Earth image of Drainage 1.
   Figure 5. Google Earth image of Drainage 1.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):
   Wetland 1: 1.42 acres – Wetland 1 abuts Chuck Slough [RPW (a)(5)] and has a continuous surface connection to Chuck Slough by way of the culvert under the BNSF railroad. While they appear separate on the map provided in the delineation, the two portions of Wetland 1 are one contiguous unit based on the LiDAR map (Figure 6. LiDAR of Wetlands 1 and 2.) and a subsurface hydrologic connection. On a site visit conducted 2/13/2024 during spring run-off conditions, ponding was observed to connect both parts of Wetland 1 on the southern and middle portions of the wetland. Chuck Slough is a tributary of Lake Pend Oreille (Section 10 Water). Flowpath is shown in Section 5 above.

   Figure 7. Map of aquatic features (from delineation).

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.

1. Ditch 1: 0.03 acres/484 linear feet – Non-jurisdictional under the preamble to the 1986 regulations as this is a ditch constructed wholly in uplands to drain uplands and does not carry relatively permanent flow. This is a ditch that was dug to allow water to drain from the road; it is not fed by groundwater and only contains water in direct response to a precipitation event. During a site visit 2/13/2024, minimal water was observed in this ditch even though the snow was melting and there had been recent precipitation (see Figure 8. Image of Ditch 1, facing south, taken during site visit 2/13/24). Furthermore, there is no connection with any downstream features.
2. Ditch 2: 0.03 acres/367 linear feet – Non-jurisdictional under the preamble to the 1986 regulations as this is a ditch constructed wholly in uplands to drain uplands and does not carry relatively permanent flow. This is a ditch that was dug to allow water to drain from the road; it is not fed by groundwater and only contains water in direct response to a precipitation event. The catch area for this feature is not sufficient to produce relatively permanent flows. During a site visit 2/13/24, no water was observed in this feature, even though the snow was melting and there had been recent precipitation (see Figure 9. Image of Ditch 2, facing south, taken during site visit 2/13/24).

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.
   1. Ditch 3: 0.03 acres/415 linear feet – Non-jurisdictional under Rapanos as this feature drains into Wetland 2 (see Figure 10. Image of Ditch 3 and Wetland 2, facing south, taken during site visit 2/13/24). On a site visit conducted on 2/13/2024 during runoff conditions and after recent precipitation, water was observed flowing into Wetland 2 as shown by water ripples and the movement of light debris flowing that direction. Wetland 2 is a non-jurisdictional feature so there is no connection to a downstream jurisdictional waterbody.

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

[7] 51 FR 41217, November 13, 1986.

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).

Wetland 2: 1.3 acres – Non-jurisdictional because it does not have a direct surface connection and is not abutting an (a)(1) - (a)(4) water. While the delineation map shows Wetland 2 as having two separate parts, the LiDAR image (Figure 6. LiDAR of Wetlands 1 and 2.) shows that these wetlands are one contiguous unit. Wetland 2 was determined to be jurisdictional in 2007 (based on a significant nexus) as shown in NWW-2007-00821-C03, but due to rule changes, this is no longer the case. This feature was determined not to be an extension of Wetland 1 as there is no continuity shown in the LiDAR map and Wetland 1 is shown as being much higher in the LiDAR imagery. While there are a few ditches running attached to Wetland 2, these ditches do not appear to provide a continuous surface connection to a jurisdictional waterbody based on aerial and LiDAR imagery. Due to a lack of property access, Corps staff was not able to investigate these features on the ground. While the City of Sandpoint GIS shows a culvert connecting Wetland 2 to Wetland 1 by way of Ditch 3, no culvert was found during two site visits by USACE staff or by city engineers in a recent survey (see supporting document labeled NWW-2023-00517_SandpointGIS_StormSewerMap). On a site visit conducted by Corps personnel on 2/13/2024, no culvert was observed between Wetlands 1 and 2, even to the north outside of the review area.

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 Evaluation: 12.07.2023
   b. Site Visit: 11.14.2023
   c. Aquatic Resource Delineation Report for the Great Northern Road Improvement Project prepared for [redacted] by [redacted] on July 2023 Revised December 2023: 12.07.2023
   d. USGS StreamStats: 12.07.2023
   e. Google Earth: 12.07.2023
   f. City of Sandpoint GIS: 11.08.2023 – Storm lines
   g. Reg Viewer: 02.14.2024, 12.07.2023 – LiDAR, NHD
   h. NWI: 12.07.2023

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.

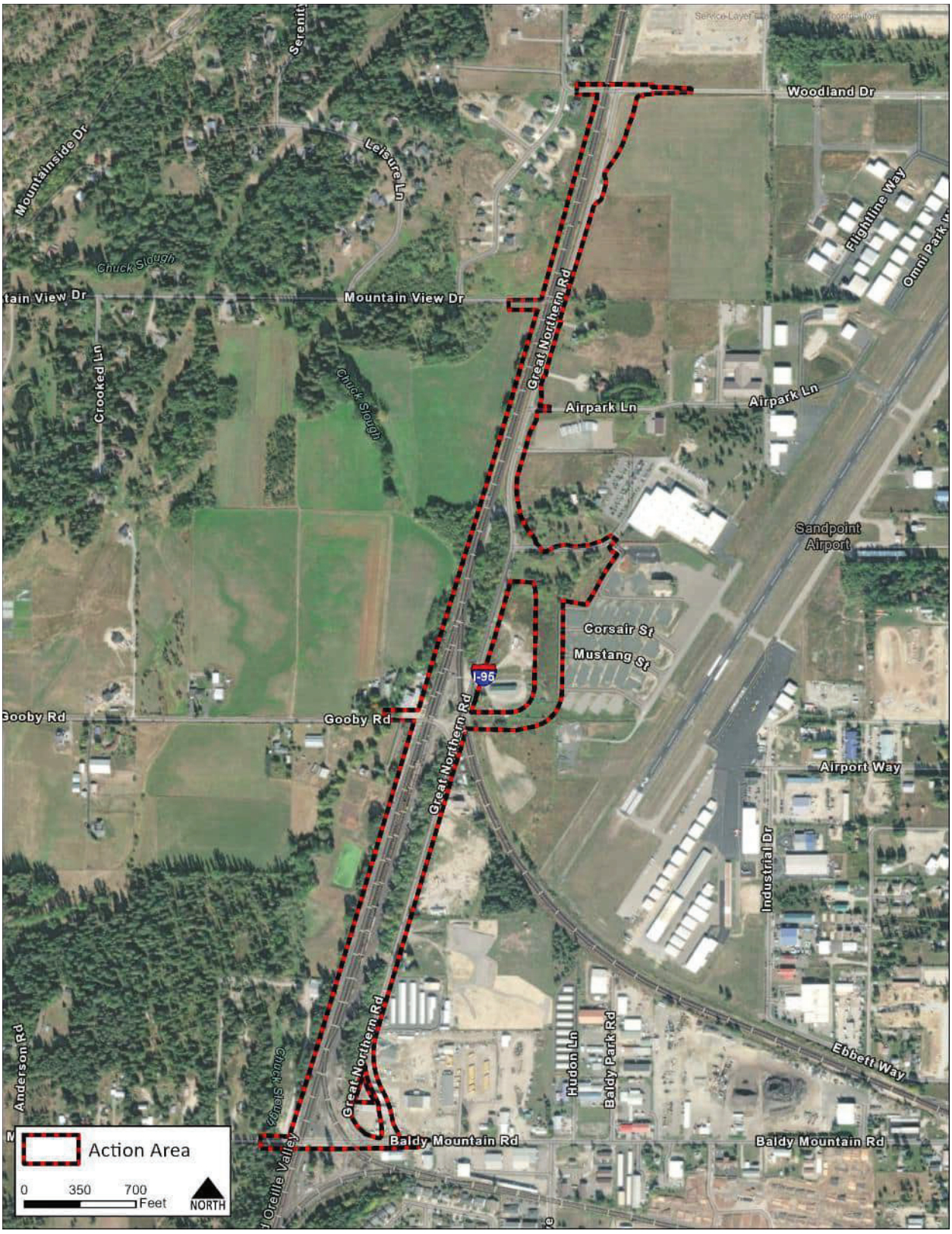


Figure 1. Review area

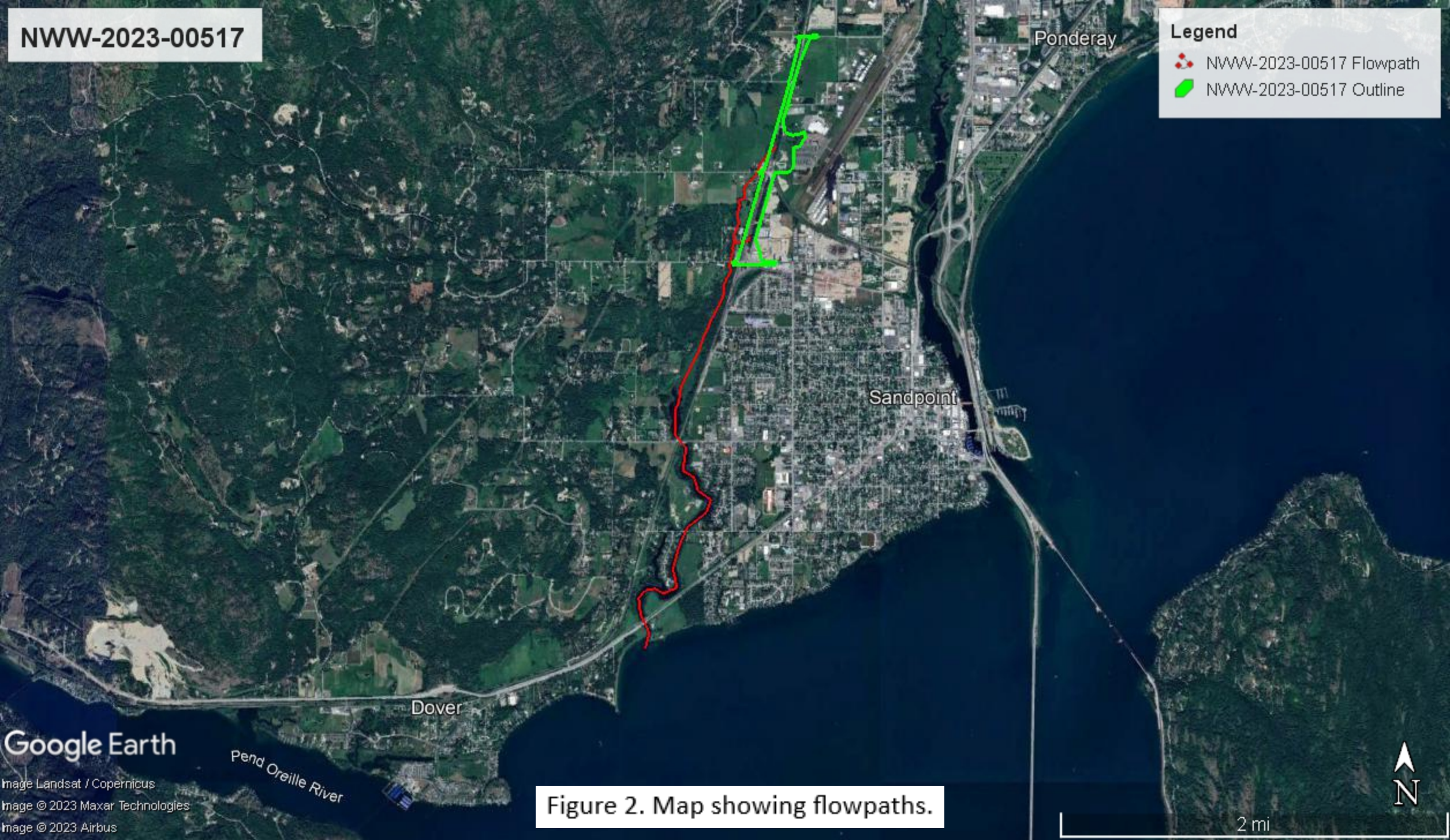


Figure 2. Map showing flowpaths.

Figure 3. Map of aquatic resources (from delineation)

NWW-2023-00517

Date given for data is 11/2021.
Water is visible in drainage.

Legend

- Feature 1
- Feature 2
- RIVER

Figure 4. Google Earth image of Drainage 1.

NWW-2023-00517

Date given for data is 11/2021.
Water is visible in drainage.

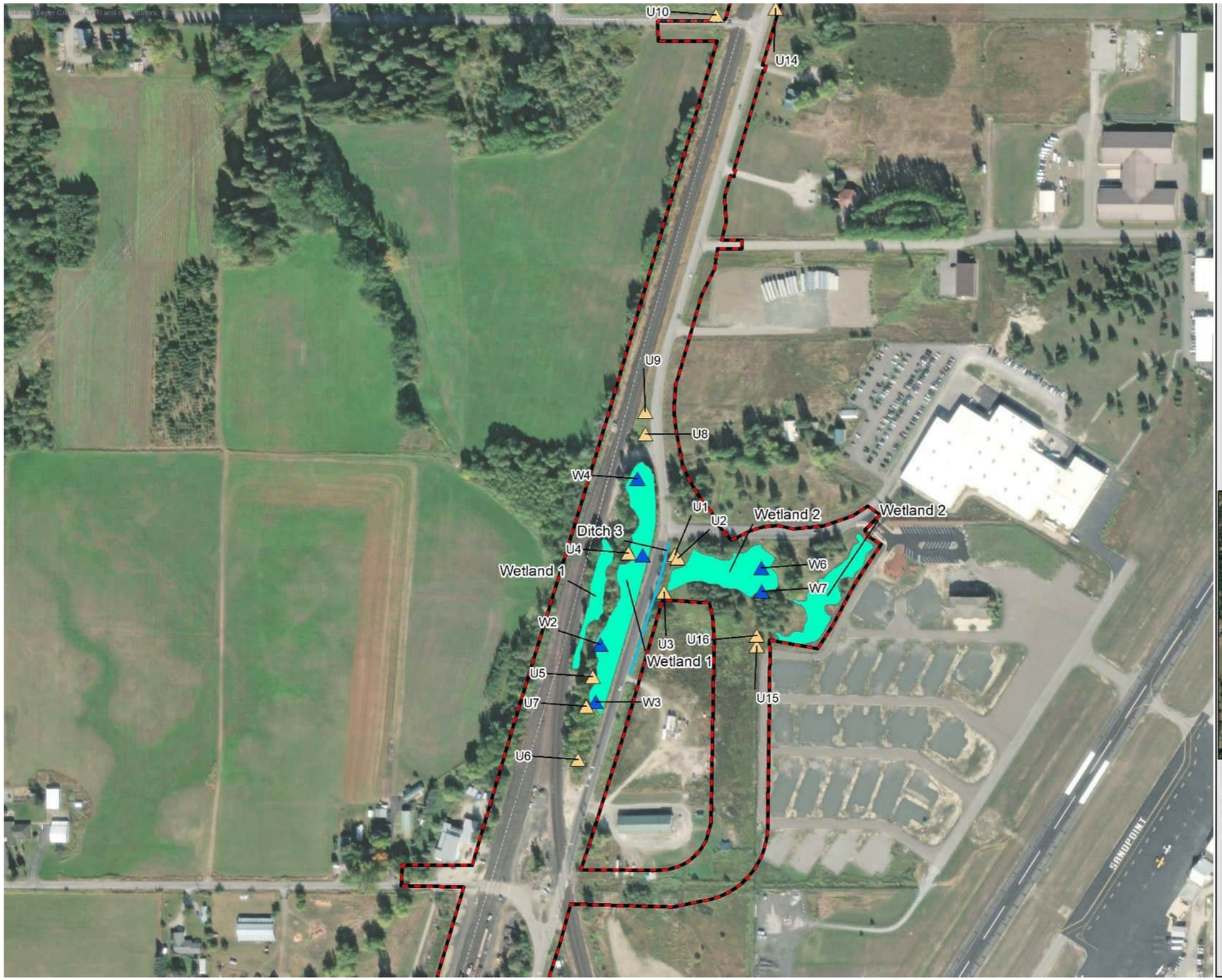
Legend
- Feature 1
- Feature 2
- RIVER

Google Earth
©2023 Google

4.79 ft

Figure 5. Google Earth image of Drainage 1.

Figure 6. LiDAR of Wetlands 1 and 2



Great Northern Road Wetland Map Book

Study Area (54.8 acres)

Linear Features (0.14 acres)

Wetland Area (2.72 acres)

Data Point

Upland

Wetland

0 137.5 275

Feet

NORTH

Coordinate System: NAD 1983 StatePlane Idaho West FIPS 1103 Feet
Datum: North American 1983
Projection: Transverse Mercator

Figure 7. Map of aquatic features

Figure 8. Image of Ditch 1, facing south, taken during site visit 2/13/24

Figure 9. Image of Ditch 2, facing south, taken during site visit 2/13/24

Figure 10. Image of Ditch 3 and Wetland 2, facing south, taken during site visit 2/13/24