



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WALLA WALLA DISTRICT
720 EAST PARK BOULEVARD, SUITW 245
BOISE, IDAHO 83712-7757

CENWW-RD

February 14, 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 NWW-2023-00431, MFR 1 of 1²

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 For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ 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

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 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, interstate water, or territorial seas 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.

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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. 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. B-4 Canal, Water of the U.S.
 - ii. D-Fourteen Drain, Water of the U.S.
 - iii. D-12A Drain, Water of the U.S.
 - iv. Wetland 1, not a Water of the U.S.
 - v. Wetland 2, not a Water of the U.S.

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. *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001)

3. REVIEW AREA.

Attach relevant figures including one depicting the boundary of the review area. Include any additional relevant site-specific information associated with this AJD request, and any additional details, such as previous JDs (and their outcomes) in the review area.

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The review area is comprised of 61 acres, located within Section(s) 8 & 9, Township 10 South, Range 23 East near latitude 42.568175°, longitude -113.787859°, in Burley, Minidoka County, Idaho. Please refer to the Aquatic Resources Delineation Report for a figure of the review area (page 11) and mapped aquatic resources (page 11 & 14). The Corps concurs with the geographic bounds of the aquatic resource delineation dated March 2023. The survey area encompasses Idaho Transportation Department right of way. No Jurisdictional Determinations have previously been done in the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Snake River is the nearest TNW and is designated navigable under Section 10 of the Rivers and Harbors Act between the Idaho-Washington Border to River Mile 445.5.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS.

The B-4 Canal flows North to South through the survey area to the D-Seventeen Drain and flows to the Snake River approximately 3.8 miles from the survey area.

The D-Fourteen Drain flows East to West through the survey area to the D-12A Drain to Snake River approximately 1 mile from the survey area.

The D-12A Drain flows from North to South through the survey area to the Snake River approximately 1 mile from the survey area.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 10.⁷ [N/A]

⁶ 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.

⁷ 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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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): The B-4 Canal is part of the Minidoka irrigation network and flows greater than seasonally, receiving hydrology from the Snake River at an irrigation diversion point at Lake Walcott as well as water added by the irrigation district, from 180 to 190 days per year. The canal is 35 feet wide however, the lateral limit of jurisdiction is the ordinary high water mark (B-4 Canal – Information Summary, Page 20). The B-4 Canal continues to follow the flow path described in Section 5 above, from the survey area to the Snake River (Figure 4, Page 11).

The D-Fourteen and D-12A Drains are man-made and part of the Minidoka irrigation network that receive hydrology from croplands North of Burley as well as water added by the irrigation district from 180 to 190 days per year. The D-Fourteen D-12A drains follow the path described in Section 5 above (Figure 4, Page 11). The drains are approximately 25 feet wide however, the lateral limit of jurisdiction is the ordinary high water mark (D-Fourteen and D-12 Drains – Information Summary, Page 21). The D-Fourteen and D-12A Drains continue to follow the flow path described in Section 5 above, from the survey area to the Snake River (Figure 4, Page 11).

Because they flow at least—but consistently more—than seasonally, the B-4 Canal, D-Fourteen Drain, and D-12A Drain are determined to be relatively

permanent waters which are connected to the Snake River, a designated Section 10 water under the Rivers and Harbors Act from the Idaho-Washington border to River Mile 445.5.

- a. The territorial seas (a)(6): [N/A]
- b. 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”).⁸ 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.]
- 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.]

⁸ 51 FR 41217, November 13, 1986.

- 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 1 (0.47 acres) is a non-tidal wetland that does not have a continuous surface connection to a jurisdictional feature. Wetland 1 is a mapped depressional wetland maintained by the Idaho Transportation Department as lawn, located on the outside of the I-84 interchange loop. There is a culvert under the I-84 off ramp, allowing surface water from Wetland 1 to drain underneath the roadway. This culvert terminates approximately 50 feet before the D-Fourteen Drain, the nearest relatively permanent water. Wetland characteristics appear at the outlet of this culvert, encompassing a small depression measuring approximately 35 feet long by 8 feet wide. A rise in elevation extending approximately 14 feet wide that runs parallel with the D-Fourteen Drain prevents surface water from the unmapped depressional wetland from reaching the D-Fourteen Drain. According to aerial imagery, LIDAR, and onsite photography, no discreet feature such as a culvert, swale, or ditch exists between the small depressional wetland and the D-Fourteen Drain.

Wetland 2 (0.08 acres) is a mapped non-tidal wetland that does not have a continuous surface connection to a jurisdictional feature. Wetland 2 is a depressional wetland maintained by the Idaho Transportation Department as lawn, located within the I-84 interchange loop. A culvert under the I-84 interchange loop provides a continuous surface connection between Wetlands 2 and 1, however, surface flow is ultimately unable to reach the D-Fourteen Drain as noted in the description of Wetland 1 above.

Mapped Wetlands 1 and 2 and the small, unmapped depressional wetland east of the I-84 off ramp are all connected by culverts under the roadway and, therefore, collectively function as one wetland. They are not, however, part of a larger wetland complex. The off ramp and interchange have been on the landscape since at least May 1992. Based on available aerial imagery, there is no evidence that a larger wetland complex was present prior to the roadway's construction, nor do conditions today suggest that existing roadways and ditches are separating the wetlands from a larger wetland complex. Rather, it appears the wetlands were either constructed for the purpose of stormwater retention or were a natural low spot that developed wetland characteristics over time. All three areas are depressional features that capture runoff from the adjacent roadway, irrigation water, rain, and snow melt. There is not an apparent historic

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continuous surface connection between these wetlands and the D-Fourteen Drain. The wetlands are confined to these depressions and do not expand beyond their footprint across roadways, ditches, or berms. The surrounding area either lacks wetland characteristics (where undisturbed), has been developed for residential or commercial use, or has been modified for agriculture purposes.

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 conducted October 17, 2023 & October 27, 2023.
 - b. Google Earth Pro, date of May 2023, September 2022, August 2020.
 - c. Digital Globe, November 21, 2022.
 - d. National Wetlands Inventory, date accessed October 30, 2023.
 - e. USGS LIDAR Explorer, accessed January 31, 2024.
 - f. Photos Taken by Applicant, January 31, 2024.
 - g. Applicant's Drone Photos (x3), August 8, 2023.
 - h. Final Aquatic Resource Delineation Report, Bury IC, Minidoka Co, Key Number 23344, Dated March 2023.
10. OTHER SUPPORTING INFORMATION. On October 13, 2023, the Corps sent the applicant a request for information regarding surface connectivity of flow from Wetland 1 to D-Fourteen Canal. According to the description of Wetland 1 in the ARDR (page 15) a culvert connects the wetland to the D-Fourteen Drain, which contradicts the map (page 14). Because of this, the Corps requested confirmation of a continuous surface connection, or lack thereof, between Wetland 1 and the D-Fourteen Drain. The applicant conducted a site visit and verified the culvert terminates approximately 50 feet from the D-Fourteen Drain. Any surface water from the culvert's outlet immediately enters an unmapped, 35-foot long by 8-foot-wide wetland depression described above in Part 8.f.

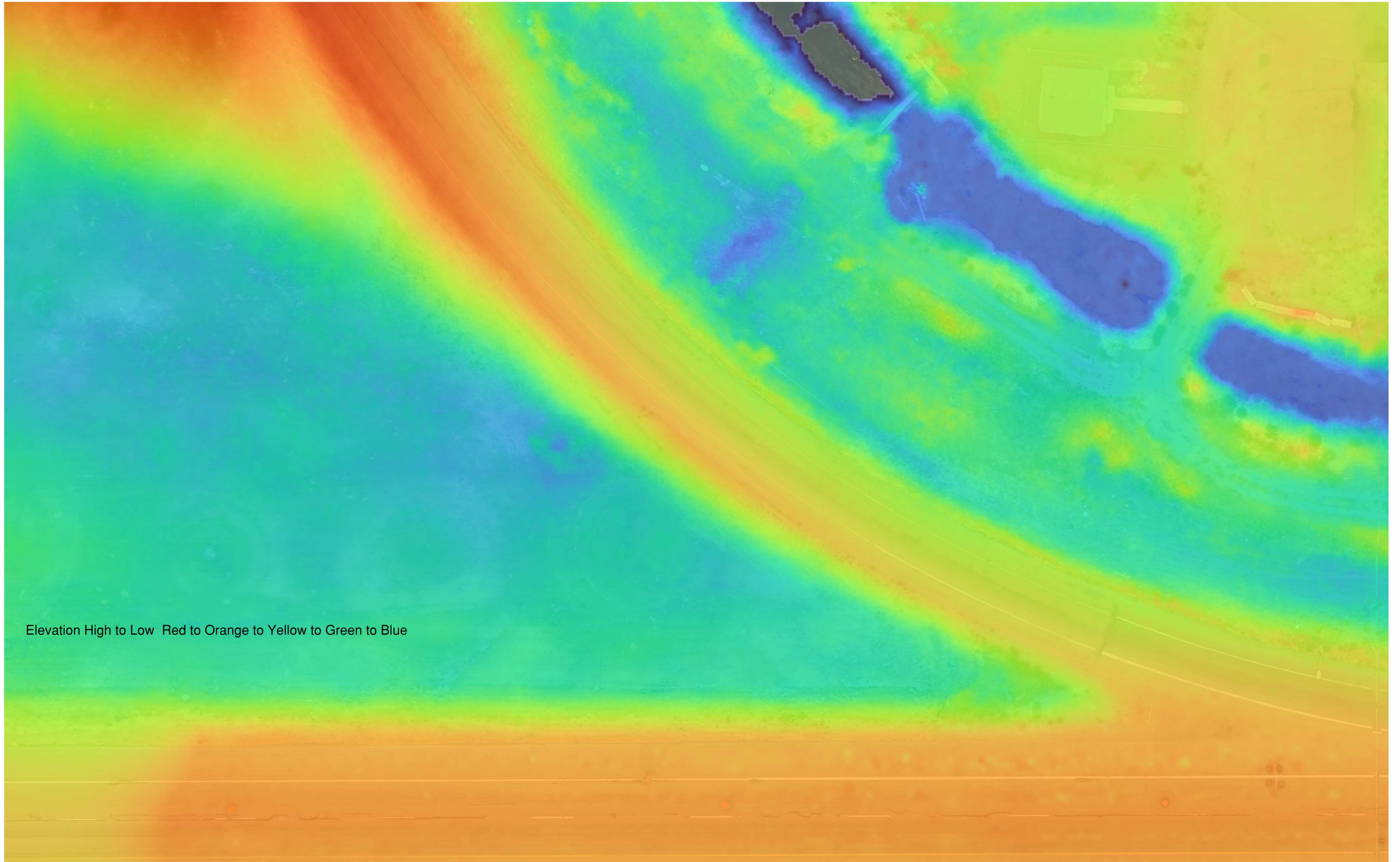
On January 31, 2024, the Corps requested additional information on the unmapped wetland depression between the off ramp and D-Fourteen Drain. Seven onsite photos taken on the same date were provided showing the separation of the wetland depression and the Drain. Approximately 14 feet of uplands separates the wetland

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depression and the D-Fourteen Drain. The applicant confirmed the width of the upland area by taking measurement using a wheel and confirmed there is no pipe, ditch, or other connection between the wetland depression and the D-Fourteen Drain. Additionally, the applicant provided drone footage that shows a rise in elevation between the wetland depression and the 14-foot-wide stretch of uplands that aerial imagery indicates is used by vehicles driving alongside the D-Fourteen Drain.

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.

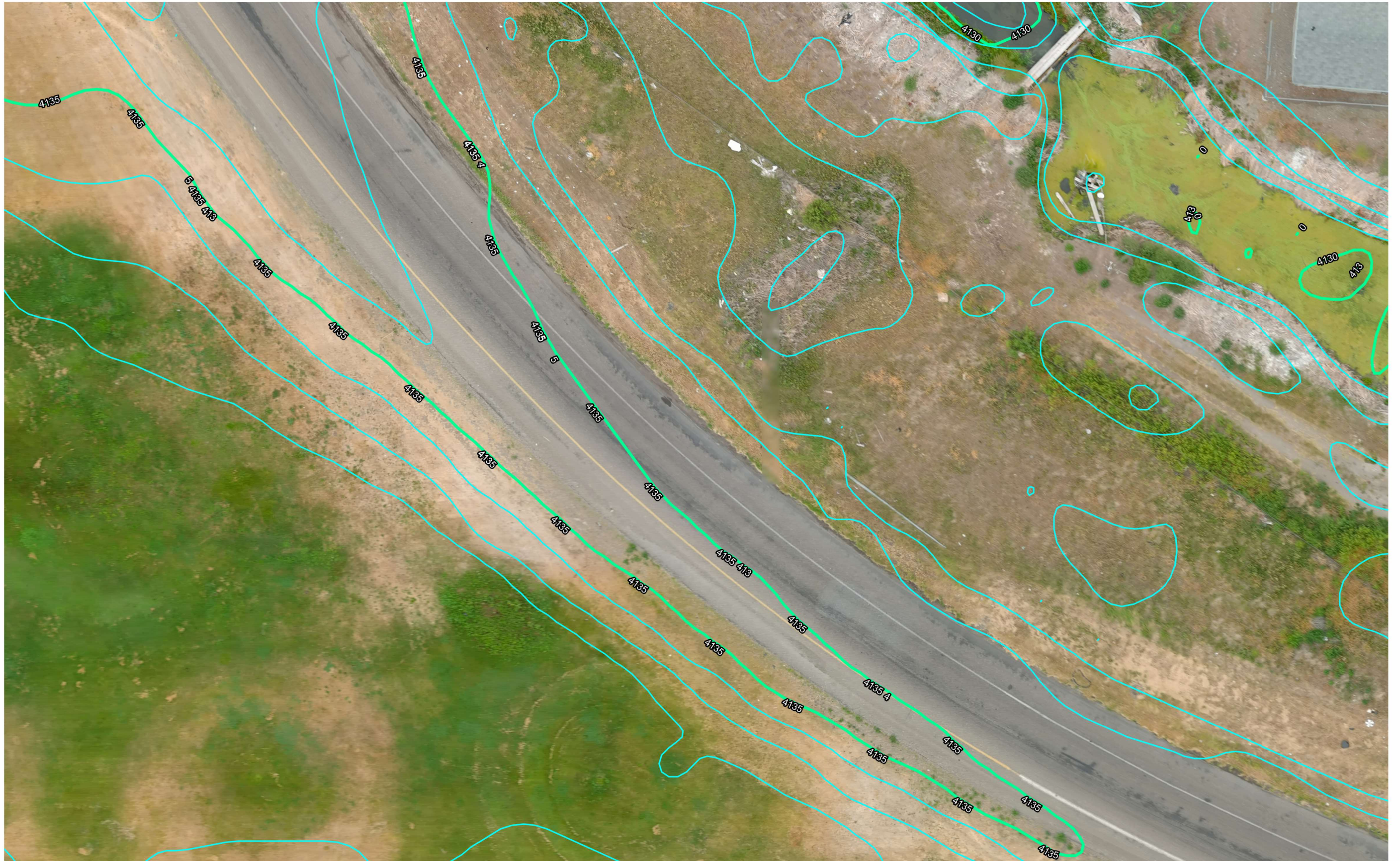


Elevation High to Low Red to Orange to Yellow to Green to Blue



50 ft

North ▲



30 ft

North ▲

Hwy.D4.I84.208.BurleyIC.22
344.2023_08_3
Imagery:AutelEvo2Pro.20
Project Dashboard
0.BurleyIC.108.23344.20
23_08_03
8/3/23, 12:00 AM

2D Timeline Cloud Mesh

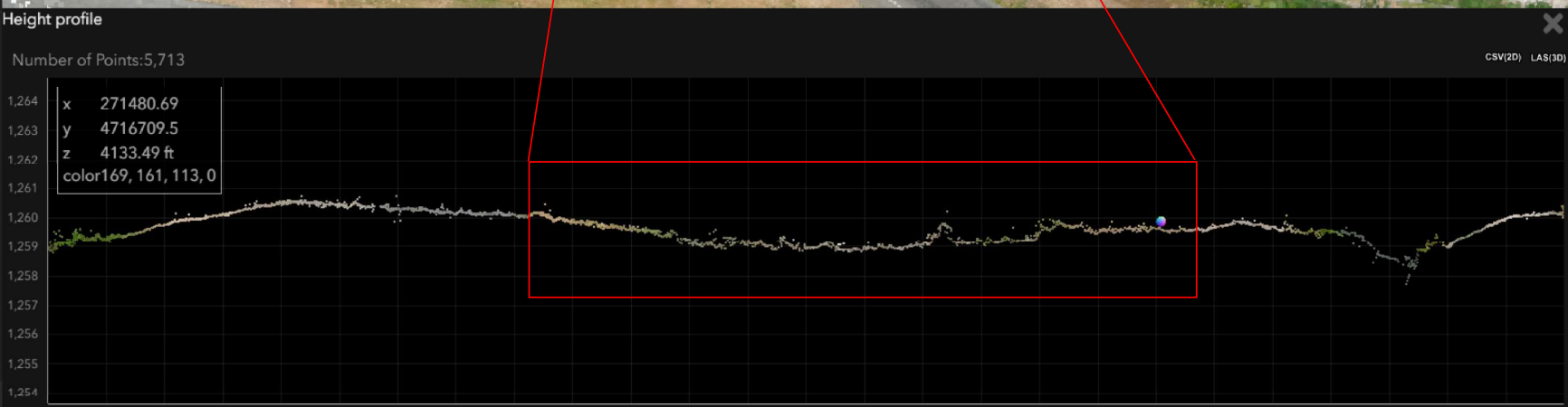
Appearance

Point Budget 1,000,000

Point Size 30

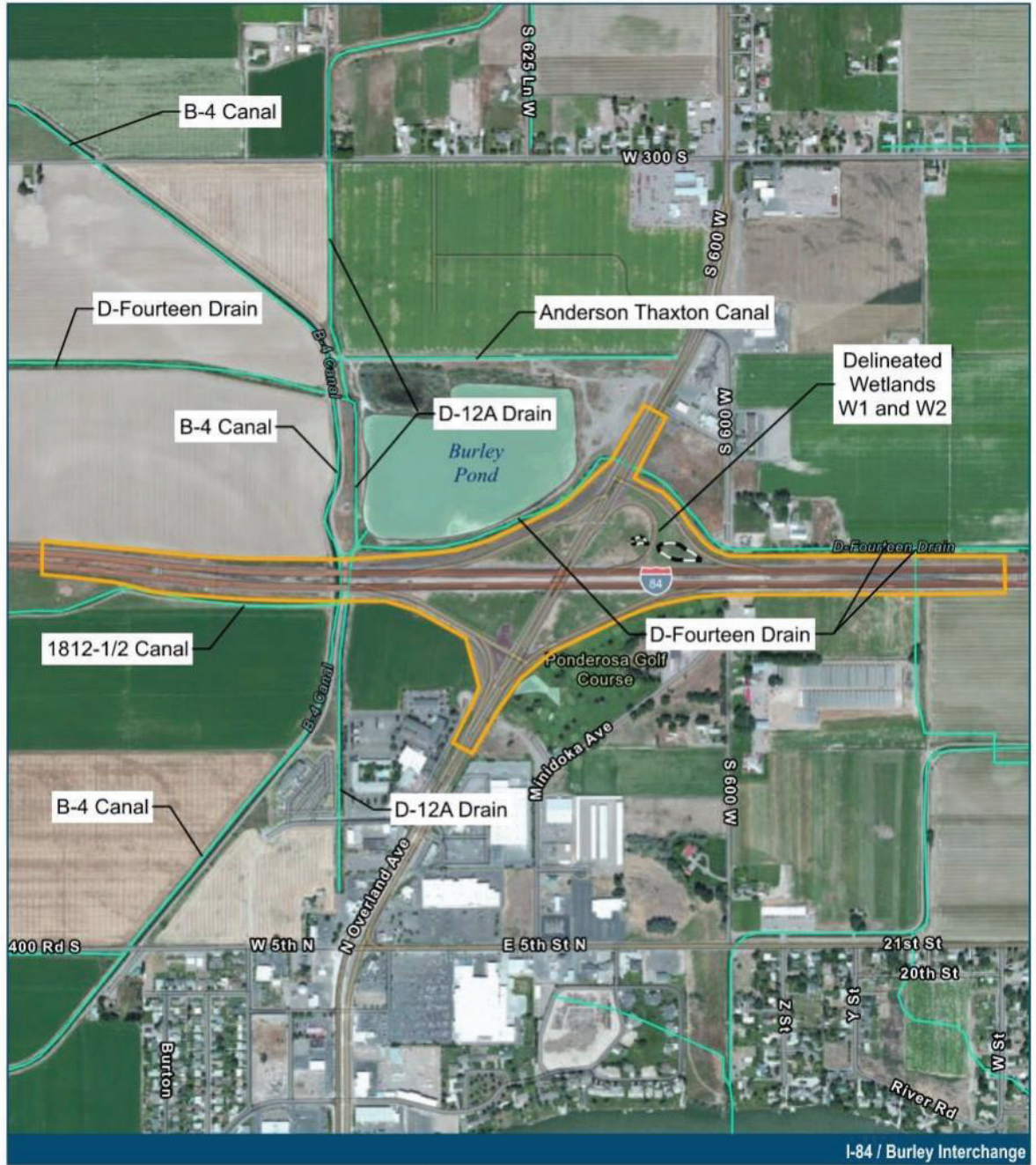
Annotations

Profile Line Width 0.5 ft



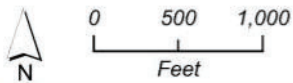
Navigation icons: Home, Back, Forward, Refresh, Print

Figure 2. Project Survey Area



Legend

- Survey Area
- Wetland
- Canal/Ditch (USGS NHD)
- Lake/Pond (USGS NHD)



Path: P:\H\HDX\00009005\0600\INFO\GS\Burley_IB4\Burley_IB4.aprx

Figure 6. Delineated Wetlands Within Survey Area



Legend

- Survey Area
- Wetland
- Upland Data Plot
- Wetland Data Plot
- Ordinary High Water Mark (OHWM)
- Culvert

0 50 100 Feet

Path: P:\H\HDX\00009005\0600\INFO\GIS\Burley_184\Burley_184.aprx


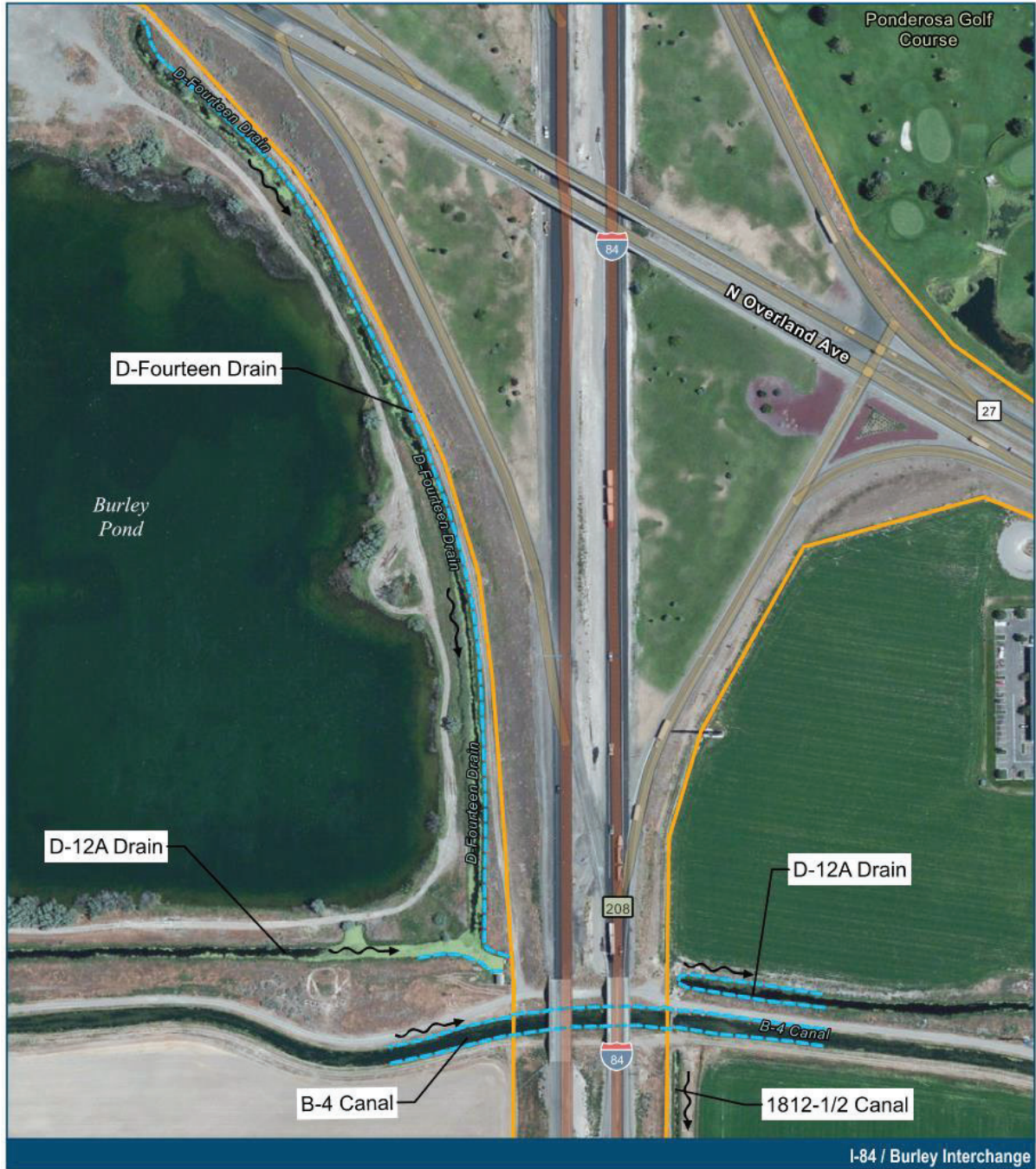


Figure 9. Delineated Canal and Drain Within Survey Area



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