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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

29 December 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 **SWL-2024-00288**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 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.

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. DR01-A, non-jurisdictional
 - ii. DR01-B, non-jurisdictional
 - iii. Upland swale, 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 encompasses approximately 37.5 acres located near 431 Airport Loop in Rogers, Benton Co., AR. It is situated in part of Section 30, Township 20 North, Range 29 West on the Pea Ridge, AR 7.5-minute quadrangle. The review area is located in the upper Brush Creek watershed and is primarily characterized by cleared land, which is routinely maintained through brush hogging. The exception to this is approximately 6 acres of forest situated along the west property line. Aerial imagery from the past 30 years indicates that the site has largely been a managed plant community, excluding the forested area. Notably, in 2012, construction debris was dumped in the northwest corner adjacent to the remaining tree line, and an onsite bermed pond was filled around 2005. Within the review area, three drainage features have been identified: DR01-A, DR01-B, and Upland Swale, all of which appear to flow northward, eventually discharging offsite. The approximate geographic center of the review area is 36.378726°N, -94.108986°W (NAD 83). Maps detailing the review area and resource locations are provided in Figures 1-4.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Grand (Neosho) River (11070103) is the nearest downstream TNW (Oklahoma) as it is designated as a Section 10 water north of Fort Gibson, (35.869618, -95.230020)⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. DR01-A and DR01-B drain into the upper watershed of Brush Creek which flows into Little Sugar Creek which subsequently flows into the Elk River before reaching the Grand (Neosho) River in Oklahoma (TNW). Upland Swale terminates in uplands and does not exhibit a hydrologic connection to downstream waters.
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 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 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.

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.

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

- 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): N/A
- 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”).⁹ 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.

The agent identified an upland swale which was confirmed by a Corps site evaluation: Upland Swale (175 linear feet). The upland swale feature does not have a clearly defined Ordinary High Water Mark (OHWM) and lacks distinct bed and banks. There was no observable flow or standing water; only a few erosional spots, likely caused by sheet flow, were noted. This feature appears to convey flow solely during and shortly after significant rainfall events. Based on site observations and a desktop review, the upland swale is deemed non-jurisdictional. Swales that do not maintain relatively permanent flow do not qualify for jurisdictional status, as they are neither tributaries nor do they have a significant hydrologic connection to downstream traditional navigable waters (TNWs), often terminating in uplands, as outlined in the *Rapanos* 2008 Guidance.

- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet

⁹ 51 FR 41217, November 13, 1986.

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 agent identified two stream drainage features in the review area that were confirmed by a Corps desktop evaluation: DR01-A (1,542 lf) and DR01-B (39 lf). The ephemeral stream DR01-A exhibits a discontinuous Ordinary High Water Mark (OHWM) and lacks consistent bed and bank geomorphology across the review area. It has a bankfull depth of approximately 1 foot and a bankfull width between 1 and 2 feet, with an OHWM depth of around 0.3 feet and an OHWM width of 0.5 to 2 feet where applicable. During the agent’s site visit, DR01-A was dry but appears to receive flow from a culverted discharge at the southern edge of the review area, conveying flow only during and shortly after significant rainfall events. The stream’s hydrology appears to be primarily influenced by sheet flow, with no observable groundwater contribution. Vegetation along DR01-A is either flattened or absent, and there is noticeable sediment sorting and redistribution of leaf litter, likely due to unstable runoff from large storm events. Because of the lack of a discernible OHWM and the absence of hydrologic and geomorphological features consistent with waters that meet the Relatively Permanent Water standard, DR01-A is classified as non-jurisdictional.

The ephemeral stream DR01-B is identified as a short, braided section of the main DR01 stream. Similar to DR01-A, DR01-B does not have a consistent or recognizable Ordinary High Water Mark (OHWM) and lacks defined bed and bank geomorphology. During the agent’s site visit, no water was observed in

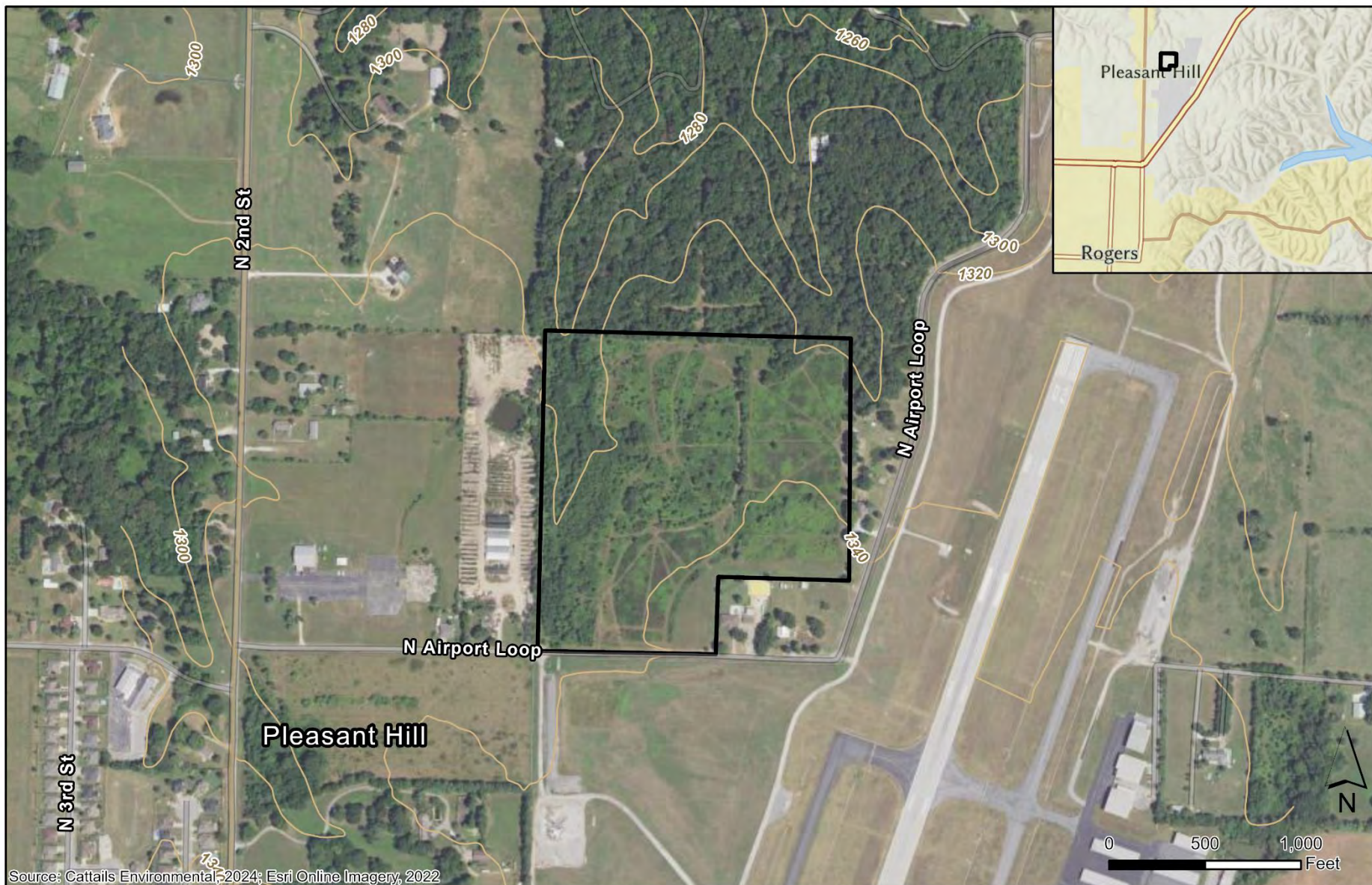
DR01-B. The area showed signs of scouring, flattened vegetation, sediment sorting, and a rack line, along with rooted upland vegetation growing within the stream channel. Given that DR01-B demonstrates hydrology and geomorphology typical of ephemeral features that do not meet the Relatively Permanent Water standard, it is also classified as non-jurisdictional.

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. A Corps desktop evaluation was conducted 29 December 2025.
 - b. Agent provided Section 404 Delineation Report: Cattails_SalleyProject_BentonCountyAR_WOTUSrpt_20240425.docx.pdf, accessed 29 December 2025.
 - c. NHD data accessed on National Regulatory Viewer, Accessed 29 December 2025.
 - d. USGS Topographic Quadrangle Pea Ridge, AR (1:24K), Accessed 29 December 2025.
 - e. U. S. Fish and Wildlife Service. Publication date (found in metadata). National Wetlands Inventory website, Accessed 29 December 2025.
 - f. Google Earth Pro. (1993-2025 Imagery). *Lat. 36.378726°N, Long. -94.108986°*, Accessed 29 December 2025.
 - g. USDA Natural Resources Conservation Service Soil Survey. Citation: USDA-NRCS Web Soil Survey. Accessed 29 December 2025.

10. OTHER SUPPORTING INFORMATION.

Leasure, D.R.; Magoulick, D.D.; Longing, S.D. 2016. Natural flow regimes of the Ozark-Ouachita interior highlands region. *River Res. Appl.* 32: 18–35.

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.



Legend

-  Project Boundary
-  Contour, 20-ft



SITE LOCATION

Salley Project
Benton County, Arkansas

Action No. SWL 2024-00288
Rogers, Benton Co. AR
Salley - Proposed Warehouse Construction
Section: 30 Township: 20 N. Range: 29 W.
December 2025 Page 1 of 4



Legend

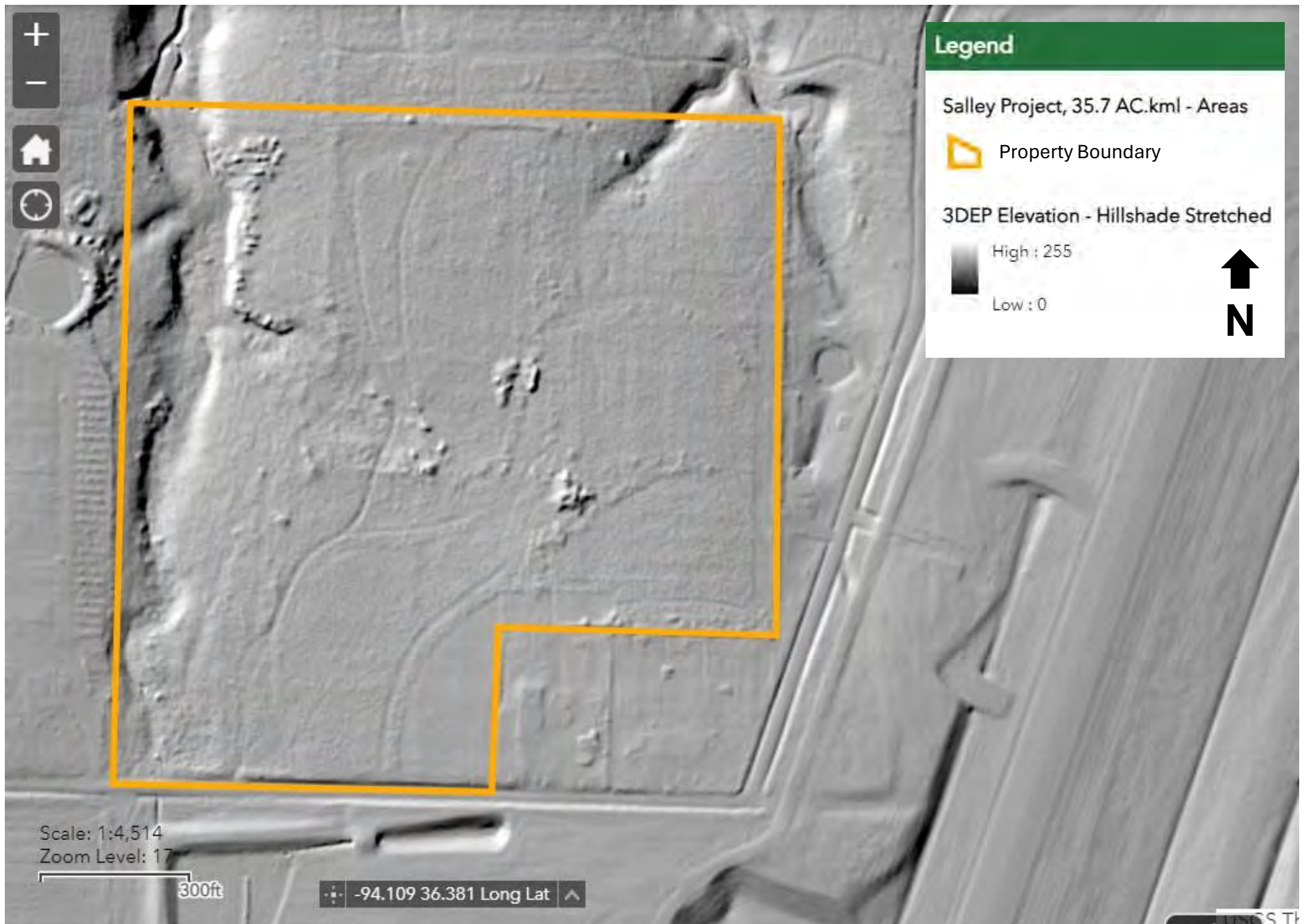
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|------------------|------------------|
| Ephemeral | Culvert |
| Upland | Contour, 20-ft |
| Ephemeral Stream | Project Boundary |
| Upland Swale | |



FIELD DATA

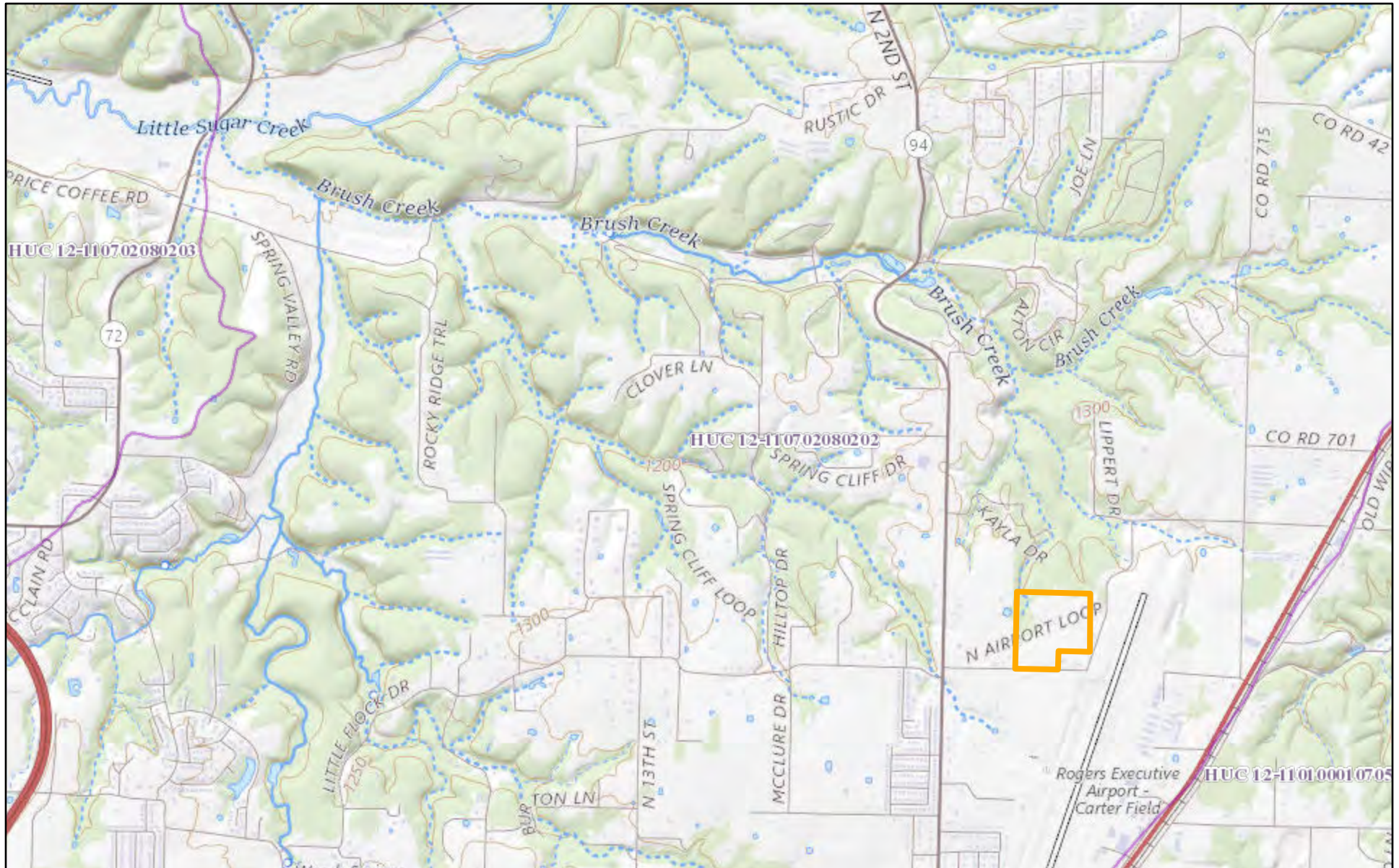
Salley Project
Benton County, Arkansas

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December 2025 Page 2 of 4



USGS National Map Advanced Viewer, 3DEP-Hillshade Stretched digital elevation model (DEM) for the Salley Project, Benton County, Arkansas. Boundaries shown in orange. Source: <https://apps.nationalmap.gov/viewer/>; accessed March 25, 2024.

The National Map Advanced Viewer

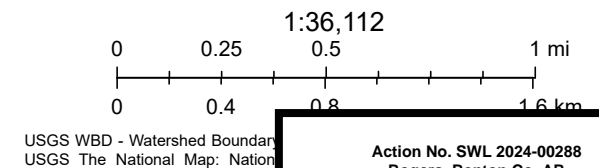


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 Property Boundary  12-digit HU (110702080202)

Salley Project
Benton County
Arkansas

Brush Creek-Little Sugar Creek
HUC8: Elk River (11070208)



Action No. SWL 2024-00288
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Salley - Proposed Warehouse Construction
Section: 30 Township: 20 N. Range: 29 W.
December 2025 Page 4 of 4