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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

10 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-2025-00250**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. EPH-1, non-jurisdictional
 - ii. EPH-2, 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 33.4 acres located west of the intersection of Hwy 72 and Dove Rd. and northeast of Hwy 27 and It'll Rd. Pea Ridge, Benton Co., AR. It is situated in the northwest quarter of Section 2, Township 20 North, Range 30 West and the southeast quarter of Section 35, Township 21 North, Range 30 West on the Bentonville, Arkansas 7.5-minute quadrangle. The review area is characterized by mostly flat topography, with a slight slope toward the west. Historical aerial imagery from 1968 to 2013 shows that the review area has primarily been cleared for pasture, featuring three residential structures. One home was built southwest of the Hwy 72 and Dove Rd intersection between 1980 and 1994, followed by two homes northeast of the intersection between 1994 and 2001. The southwestern part of the review area retains forested vegetation in two swales (EPH-1 and EPH-2), and a small commercial gravel lot is located northeast of the intersection. Two farm ponds previously identified on maps were filled between 1980 and 1984. The approximate geographic center of the review area is 36.4406°N, -94.1427°W (NAD 83). Maps detailing the review area and resource locations are provided in Figures 1-5.

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. EPH-1 flows southwest within the review area, while EPH-2 flows northward. Both streams drain into an unnamed tributary of Spanker Creek, which subsequently flows into Little Sugar Creek. Little Sugar Creek then continues north into Missouri, where it merges with Big Sugar Creek to form the Elk River. The Elk River flows westward into the Grand (Neosho) River, classified as a Traditional Navigable Water (TNW).
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. 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

⁹ 51 FR 41217, November 13, 1986.

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

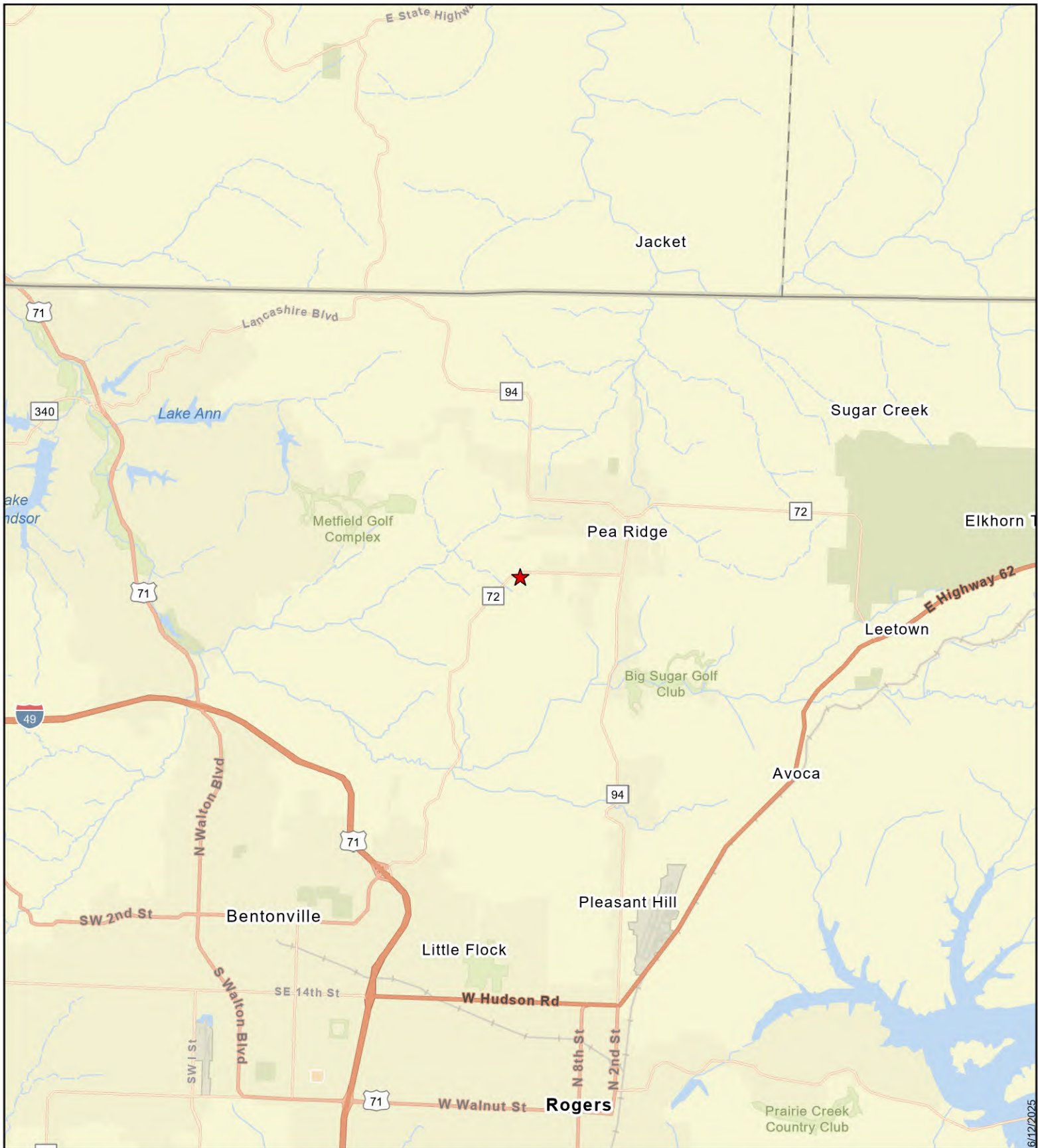
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries 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 non-jurisdictional drainage features that were confirmed by a Corps site evaluation: EPH-1 (273 lf) and EPH-2 (245 lf). EPH-1 does not display the typical bed and bank geomorphology associated with streams and lacks a discernible, continuous ordinary high water mark (OHWM). During the agent's site visit, standing water was observed following significant rainfall (approximately 3.7 inches), but the flow within EPH-1 is entirely reliant on precipitation and sheet flow, with no influence from groundwater or sustained flow duration that would meet the Relatively Permanent Water standard. EPH-1 only conveys flow to downstream waters during and shortly after substantial precipitation events and lacks geomorphological indicators consistent with prolonged flow duration. Therefore, EPH-1 is classified as non-jurisdictional. EPH-2 does not exhibit the characteristic bed and bank geomorphology typical of streams and does not have a clear, continuous ordinary high water mark (OHWM). The flow in EPH-2 is solely dependent on precipitation and sheet flow, with no contribution from groundwater or any sustained flow duration that would satisfy the Relatively Permanent Water standard. EPH-2 conveys flow to downstream waters only during and shortly after significant precipitation events and does not exhibit geomorphological indicators indicative of prolonged flow duration. Consequently, EPH-2 is 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 on 10 December 2025.
 - b. Agent provided Section 404 Delineation Report: HWY 72 and Dove Rd. – Section 404 Permit Application_opt EXECUTED 2025-07-16.pdf, December 10, 2025
 - c. NHD data accessed on the National Regulatory Viewer, Accessed 10 December 2025.

- d. USGS Topographic Quadrangle Bentonville, AR (1:24K), Accessed 10 December 2025.
- e. U. S. Fish and Wildlife Service. Publication date (found in metadata). National Wetlands Inventory website, Accessed 10 December 2025.
- f. Google Earth Pro. (1985-2025 Imagery). *Lat. 36.4406°, Long. -94.1427°*, Accessed 10 December 2025.
- g. USDA Natural Resources Conservation Service Soil Survey. Citation: USDA-NRCS Web Soil Survey. Accessed 10 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.



Hwy 72 & Dove Rd. Section 404 Delineation



★ Project Area

4

Miles

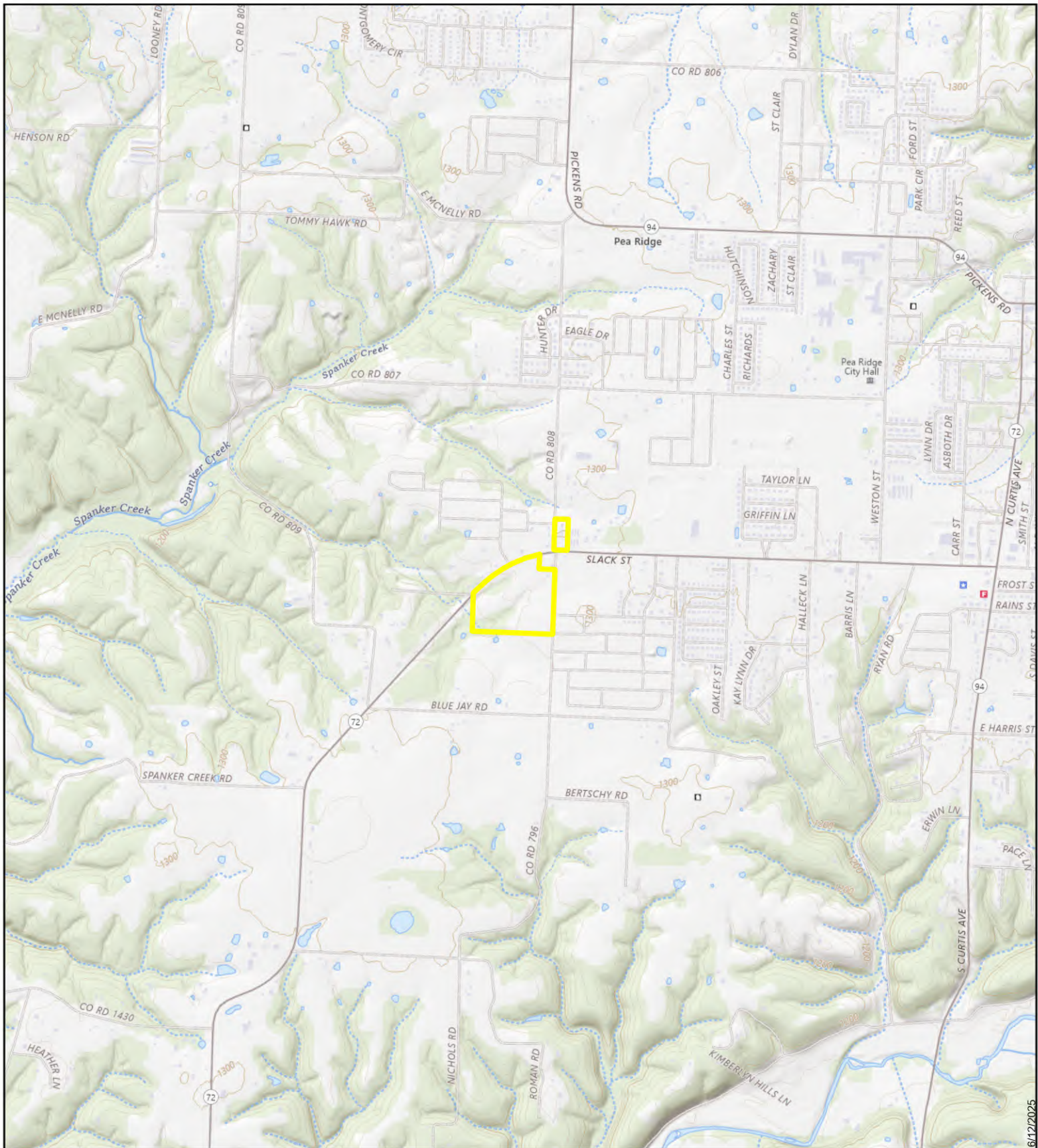


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Background: Esri, DeLorme, NRCAN, Esri Japan, METI

Figure 1. Map showing project vicinity overlaid on ESRI World Street Map

Action No. SWL 2025-00250
Pea Ridge, Benton Co. AR
Commercial Development - HWY 72 & Dove Rd.
Section: 2 Township: 20 N. Range: 30 W. and
Section: 35 Township: 21 N. Range: 30 W.
December 2025 Page 1 of 5



Hwy 72 & Dove Rd. Section 404 Delineation



Project Areas

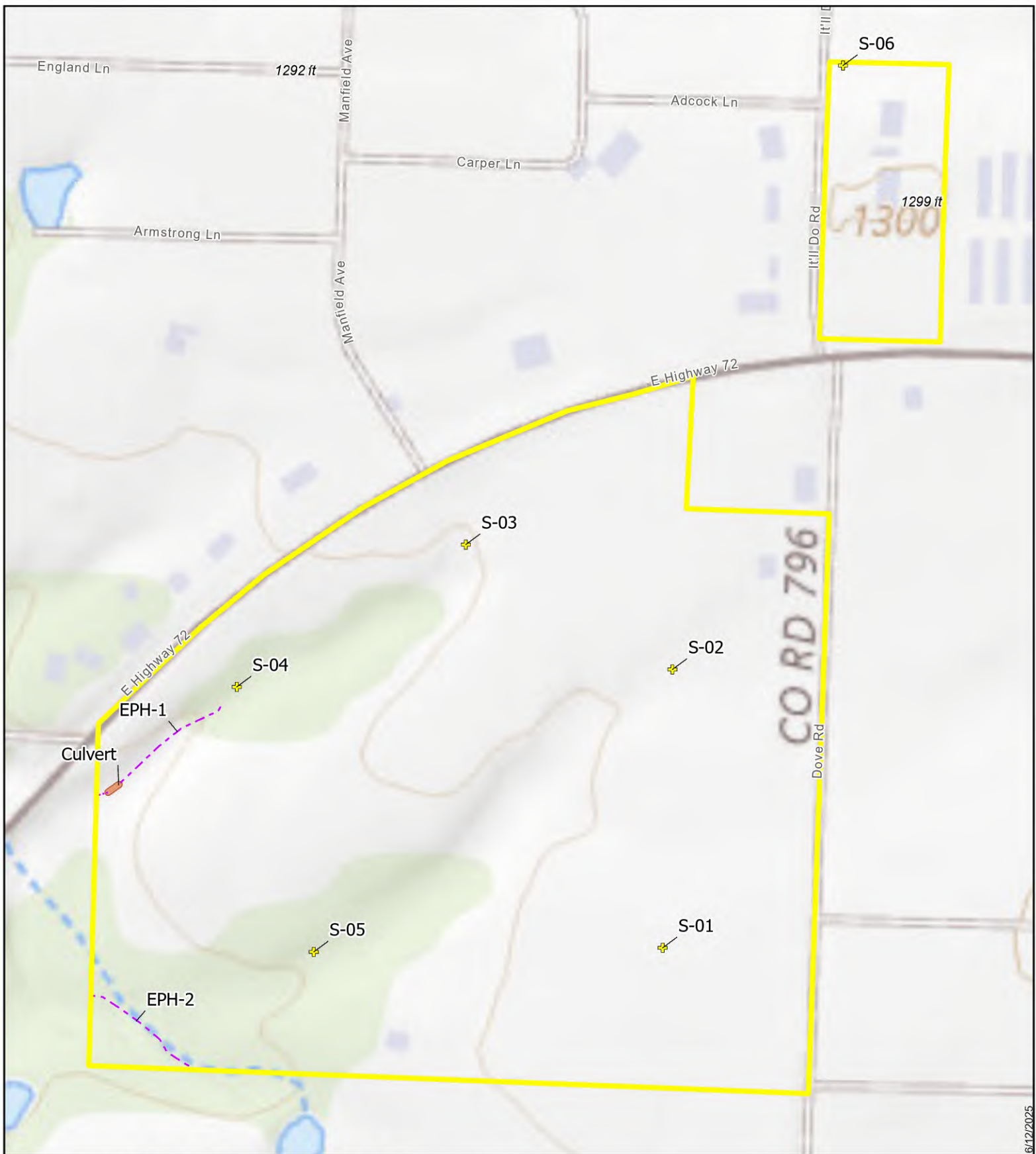
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Figure 2. Map showing project area overlaid on USGS TNM Topo Base Map.

Action No. SWL 2025-00250
Pea Ridge, Benton Co. AR
Commercial Development - HWY 72 & Dove Rd.
Section: 2 Township: 20 N. Range: 30 W. and
Section: 35 Township: 21 N. Range: 30 W.
December 2025 Page 2 of 5



Hwy 72 & Dove Rd. Section 404 Delineation



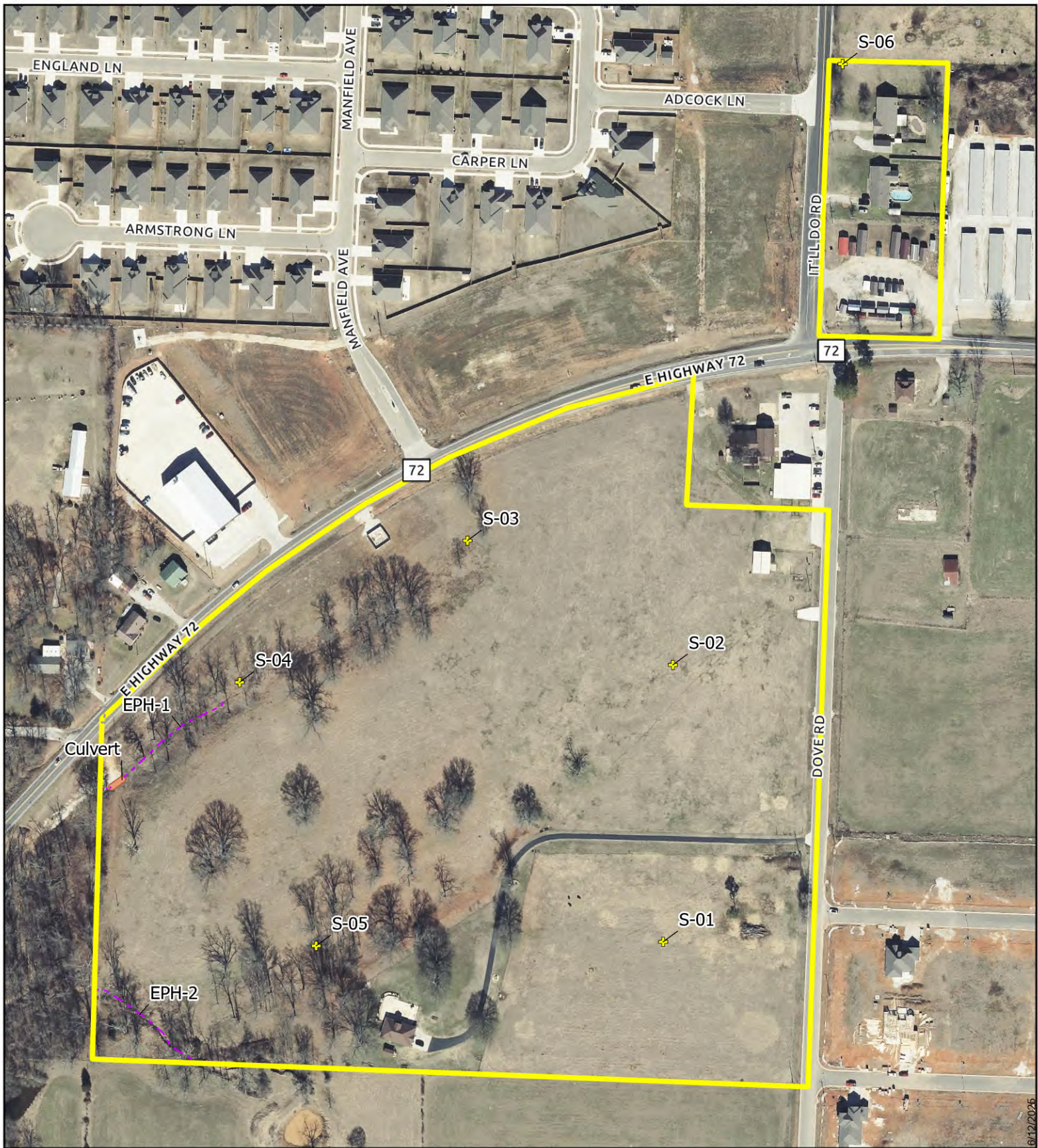
- Project Areas
- Culvert
- + Sample Points
- EPH

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Figure 3. Map showing project details overlaid on USGS TNM Topo Base Map.

Action No. SWL 2025-00250
 Pea Ridge, Benton Co. AR
 Commercial Development - HWY 72 & Dove Rd.
 Section: 2 Township: 20 N. Range: 30 W. and
 Section: 35 Township: 21 N. Range: 30 W.
 December 2025 Page 3 of 5



Hwy 72 & Dove Rd. Section 404 Delineation



Project Area

Culvert

+ Sample Point

--- EPH

500

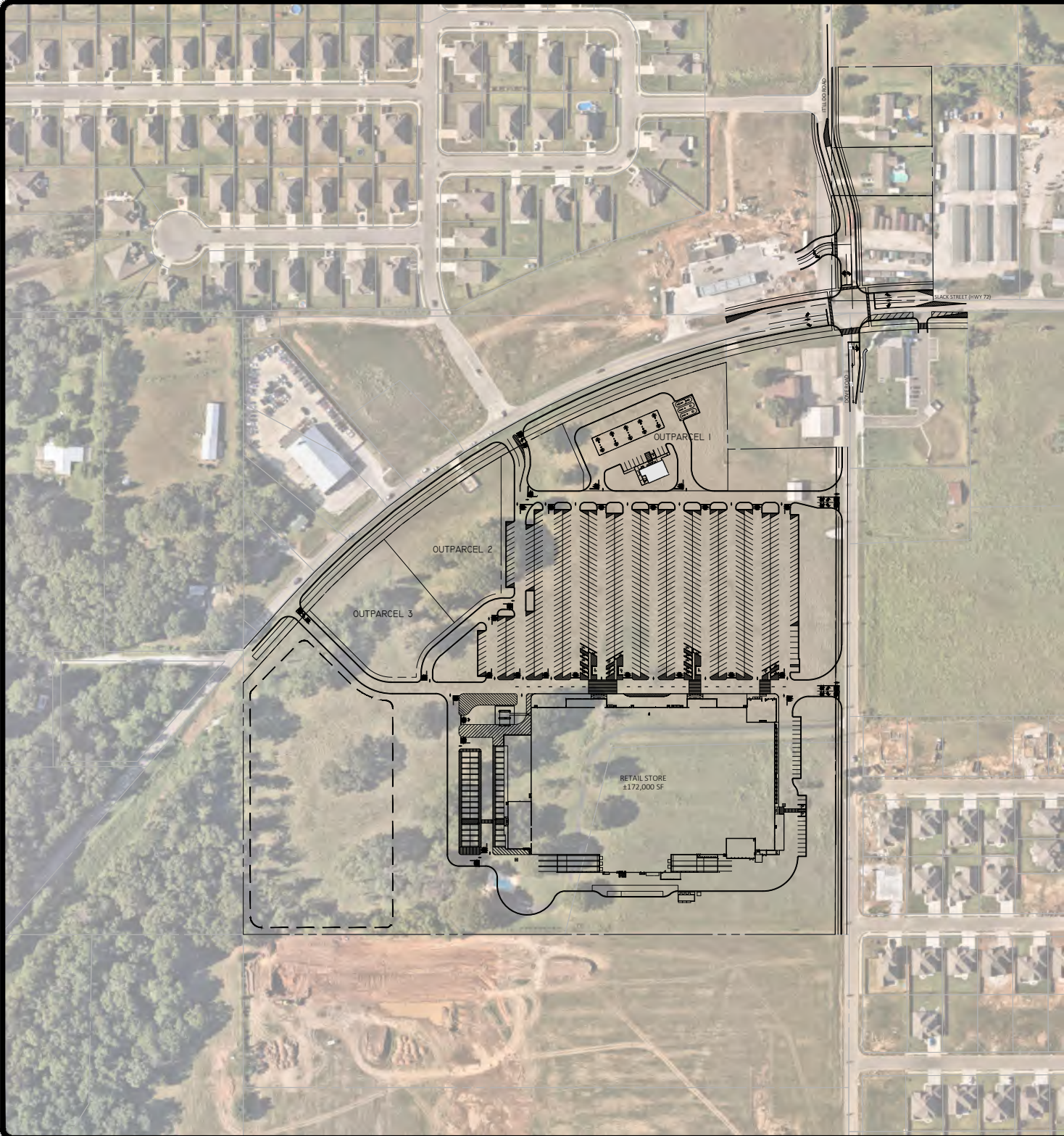


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Background: <https://gis.arkansas.gov/>

Figure 4. Map showing project details overlaid on 2023 9-inch aerial imagery.

Action No. SWL 2025-00250
 Pea Ridge, Benton Co. AR
 Commercial Development - HWY 72 & Dove Rd.
 Section: 2 Township: 20 N. Range: 30 W. and
 Section: 35 Township: 21 N. Range: 30 W.
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RETAIL
INTERSECTION OF HWY 72 AND DOVE ROAD
PEA RIDGE, ARKANSAS

SITE AREA TABLE	
RETAIL	±24.78 AC
OUTPARCEL 1	±1.68 AC
OUTPARCEL 2	±1.19 AC
OUTPARCEL 3	
ROW DEDICATION	
RESIDENTIAL TRACT 1	
RESIDENTIAL TRACT 2	
COMMERCIAL TRACT	
TOTAL	

DATE:

Action No. SWL 2025-00250
Pea Ridge, Benton Co. AR
Commercial Development - HWY 72 & Dove Rd.
Section: 2 Township: 20 N. Range: 30 W. and
Section: 35 Township: 21 N. Range: 30 W.
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