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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

20 May 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-2024-00284**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. OW-1, man-made pond created by an impoundment of INT-1, non-jurisdictional
 - ii. OW-2, man-made pond excavated in uplands, non-jurisdictional
 - iii. INT-1, intermittent stream channel, non-jurisdictional
 - iv. DD-1/D-1, an ephemeral drainage feature resulting from overflow of a spillway structure of OW-1, 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 is located primarily in the eastern half of Section 28, Township 20 North, Range 30 West, with a small portion extending to the western edge of Section 27, Township 20 North, Range 30 West. Historically agricultural, including poultry farming evidenced by numerous former chicken houses in aerial imagery, and residential, the land use remained consistent from the 1960s-1990s. I-49 was constructed along the eastern boundary between 1985-1994. Following the removal of most chicken houses in the 1990s, the property transitioned to hay production, with ongoing residential and other developed uses with some forest remaining intact. Site location, topography, and aquatic resources are shown in Figures 1-4. Approximate central coordinates of the review area are 36.37605, -94.17263.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A
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.
 - a. TNWs (a)(1): N/A
 - b. Interstate Waters (a)(2): N/A
 - c. Other Waters (a)(3): N/A

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.

- 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. One open water feature was identified in the agent report as a man-made farm pond: OW-2 (~0.24-acre). This feature located in the norther portion of the review area did not have an observable inlet or outlet. OW-2 is a result of excavation in uplands and has served as stock watering for livestock operations predating 1993. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering are generally not considered jurisdictional according to the November 13, 1986, Federal Register (51 FR, 41217).
- 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

⁹ 51 FR 41217, November 13, 1986.

- 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). Two drainage features were identified on site: INT-1 (~1,138 linear feet) and DD-1, also referred to as D-1, (~142 linear feet). Additionally, an open water feature, OW-1 (~0.60-acre), was identified and is a result of a man-made berm impoundment of INT-1. INT-1 is a shallow channel that carries water seasonally. It’s generally about 3 feet wide, with the OHWM being around 0.3 ft above the stream bed. The channel bed is primarily gravel and silt. INT-1 runs alongside the road leading into the site from the west and then flows into a constructed pond (OW-1). There appears to be some groundwater contributing to the flow in INT-1 which is likely seasonal with most of the flow being a result of sheet flow during and after precipitation events. Due to the termination of INT-1 into an old man-made impoundment creating a pond (OW-1), no indicators of continuous hydrologic connection with downstream waters were observed. It is likely that during heavy precipitation events there is overflow at OW-1 across a concreted spillway, temporarily contributing flow into DD-1/D-1 which flows into stormwater ditches along I-49. Due to the lack of significant hydrologic contribution to downstream waters, INT-1 is considered non-jurisdictional. DD-1/D-1 is a drainage feature downstream of the impound of INT-1 and OW-1 that appears to flow only during and shortly after intense or prolonged precipitation events. This feature is likely an old relict channel that has been impacted by the construction of a concrete scour apron on the downstream edge of OW-1. During a joint site visit with the agent and Corps personnel, no flow was observed in the drainage feature despite receiving moderate rainfall within the previous 24-hours of the site visit. DD-1/D-1 was considered non-jurisdictional as it does appear to convey flow for any duration except for intense precipitation events and therefore not meet the criteria to be considered WOTUS. OW-1 is a pond feature located in the central portion of the review area in a topographically low-lying area of the site along INT-1. OW-1 is a direct result of the impoundment of INT-1 receiving inflow from surface runoff and sheet flow and from INT-1 which enters OW-1 from the west. On the eastern (downstream) edge of OW-1, a concrete scour apron was constructed along the man-made berm as an overflow spillway feature, which leads to DD-1/D-1. Because the hydrologic connection between OW-1 through DD-1/D-1 only occurs

when OW-1 is over capacity, the hydrologic connection is temporary, likely only occurring during and after significant rainfall events. Therefore, OW-1 does not exhibit a relatively permanent hydrologic connection to DD-1/D-1 and is considered non-jurisdictional.

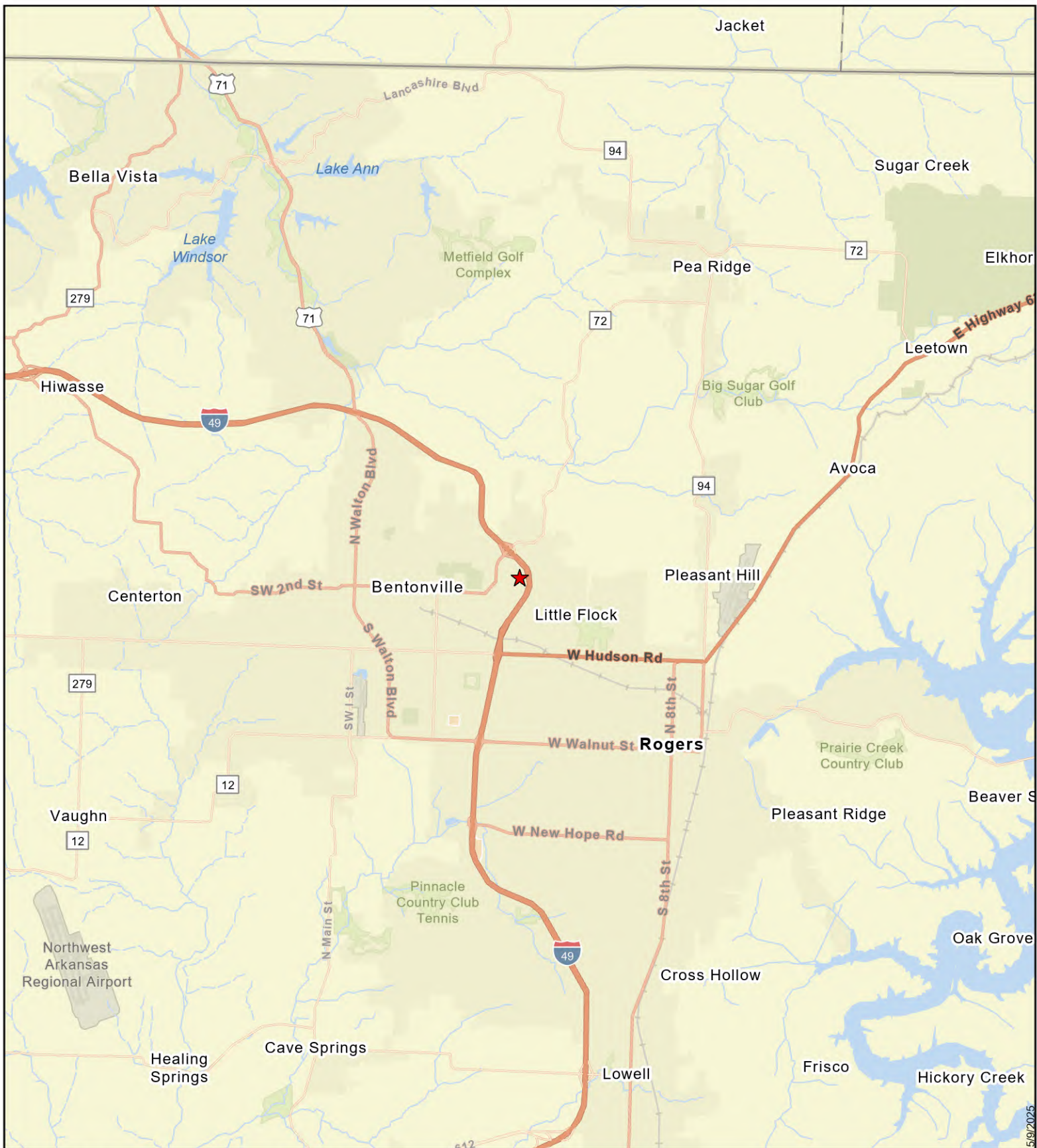
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. A Corps site visit and field inspection (File: SWL-2024-00284 Field Report) was conducted along with a desktop review on April 30, 2025.
- b. 20250514 CEI Confidential Development Project - Bentonville, AR - AJD_NPR Request, May 20, 2025.
- c. NHD data accessed on National Regulatory Viewer, Accessed May 20, 2025.
- d. USGS Topographic Quadrangle Bentonville South, AR (1:24K), Accessed May 20, 2025.
- e. U. S. Fish and Wildlife Service. Publication date (found in metadata). National Wetlands Inventory website, Accessed May 20, 2025.
- f. Google Earth Pro. (1993-2024 Imagery). *Lat. 36.37605°, Long. -94.17263°*, Accessed May 20, 2025.
- g. USDA Natural Resources Conservation Service Soil Survey. Citation: USDA-NRCS Web Soil Survey. Accessed May 20, 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.

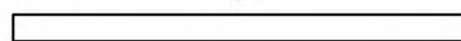


Confidential Development Project – SWL-2024-00284



★ Project Area

5



Miles

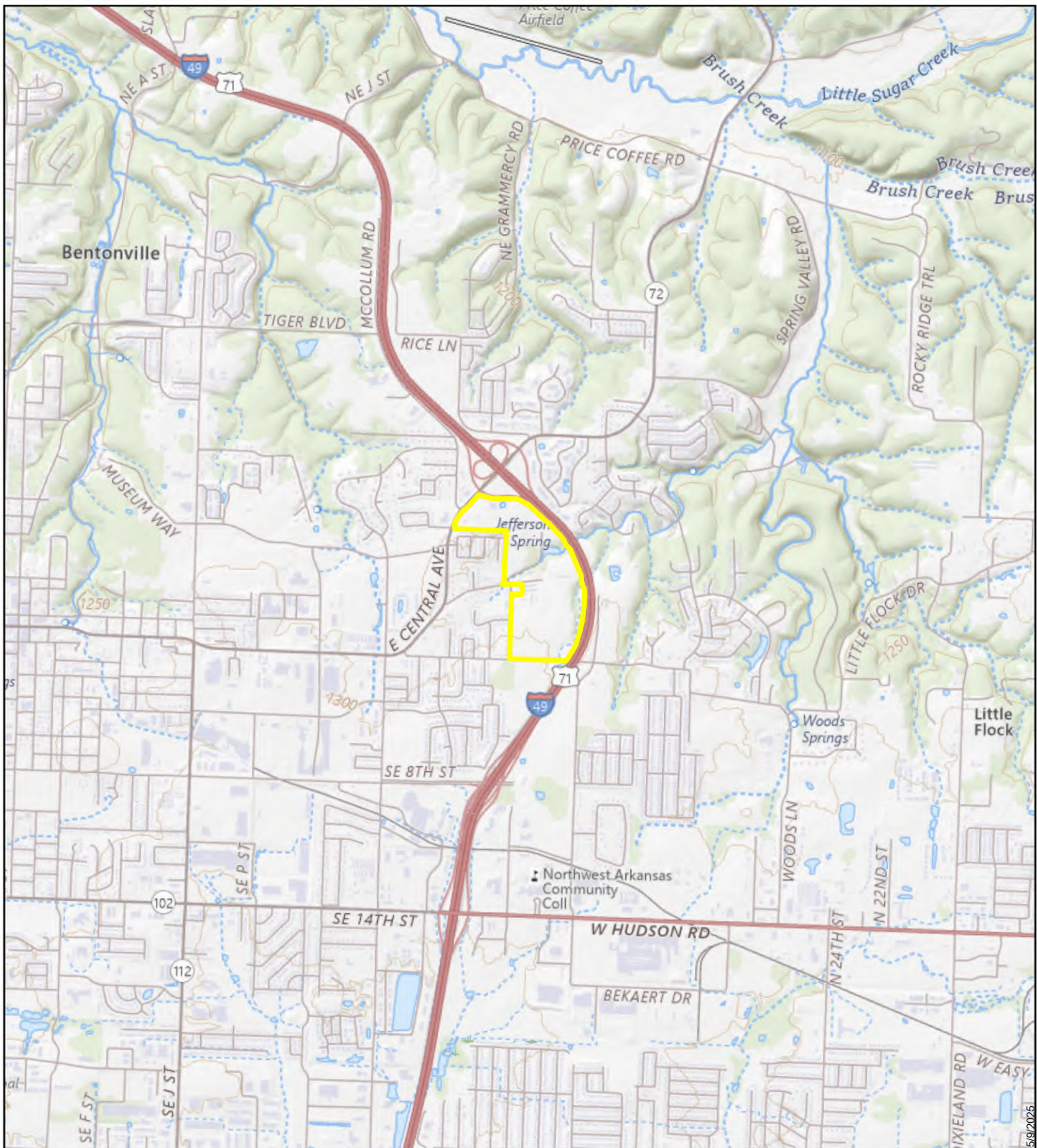


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Background: Esri, DeLorme, HERE, USGS, NOAA, NRCAN, Esri Japan, METI, Esri

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

Action No. SWL 2024-00284
Bentonville, Benton Co. AR
AJD/NPR - North Battlefield Rd.
Section: 28 Township: 20 N. Range: 30 W.
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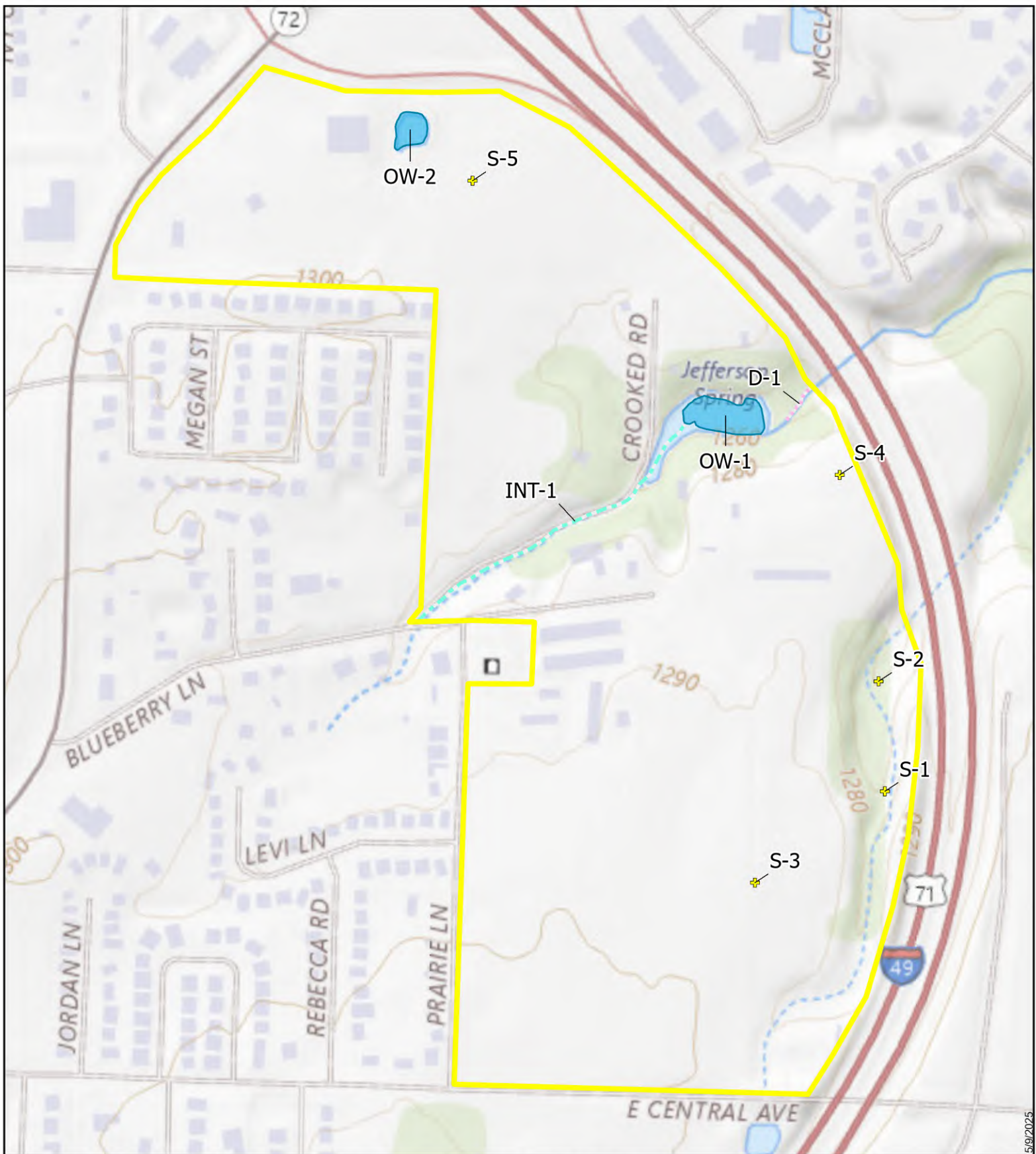
Project Area

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



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Confidential Development Project – SWL-2024-00284



Project Area

+ Sample Points

Pond

--- Intermittent channel

--- Drainage

500
Feet



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

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Confidential Development Project – SWL-2024-00284



 Project Area

+ Sample Points

 Pond

--- Intermittent channel

----- Drainage

500

Feet



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

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

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