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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

21 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 2025-00073** []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 (~0.36-acre) pond, non-jurisdictional
 - ii. DD-1 (~1,570-linear foot) roadside ditch, 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)
- e. 1987 Corps of Engineers Wetlands Delineation Manual, Eastern Mountains and Piedmont Region

3. REVIEW AREA. The site is located in the N ½ of Section 4 T 17 N., R 31 W., west of Tontitown in Washington County, Arkansas. The review area is an approximately 44-acre site labeled as "Project Area" on the attached maps. Approximate center coordinates for the review area are Lat. 36.1794, Long. -94.2882

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Illinois River which is also a Section 10 Waterway.⁶

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.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. OW-1(~0.36-acre) pond is not connected to an off-site TNW, Interstate Water, or Territorial Sea. This feature appears to receive and discharge flows via drainage swale to the south. DD-1 (~1,570-linear foot) roadside ditch appears to drain to the south under U.S. HWY 412 via a culvert (exiting the review area), then flows via drainage swale south for approximately 0.7 miles before reaching what appears to be a defined channel. This unnamed tributary flows into Wildcat Creek, which flows north toward Osage Creek, thence to the Illinois River (TNW), which is also a Section 10 Waterway.
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
 - d. Impoundments (a)(4): N/A

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.

- 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.
 - i. OW-1 is an approximate 0.36-acre pond located in the northwest corner of the review area. Upon review the available data (historical aerial photography, USGS Topographic Maps, LiDAR, and the delineation report, this pond appears to have been dug in an upland and only receives or discharges water via drainage swale to the south.
- 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.
 - i. DD-1, is an approximately 1,570 linear feet long non-RPW roadside ditch. This feature has weakly defined bed/banks. Approximately 1,345 linear feet of this ditch has a herbaceous vegetation substrate, and lacks any riffle/pool morphology, the remaining approximate 225 linear feet has been concrete lined in the area of the culvert that runs under U.S. HWY 412. Additionally, it appears to have been excavated wholly in and draining only uplands. This feature appears to be characterized by infrequent short duration flows after rainfall events (ephemeral).
- 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

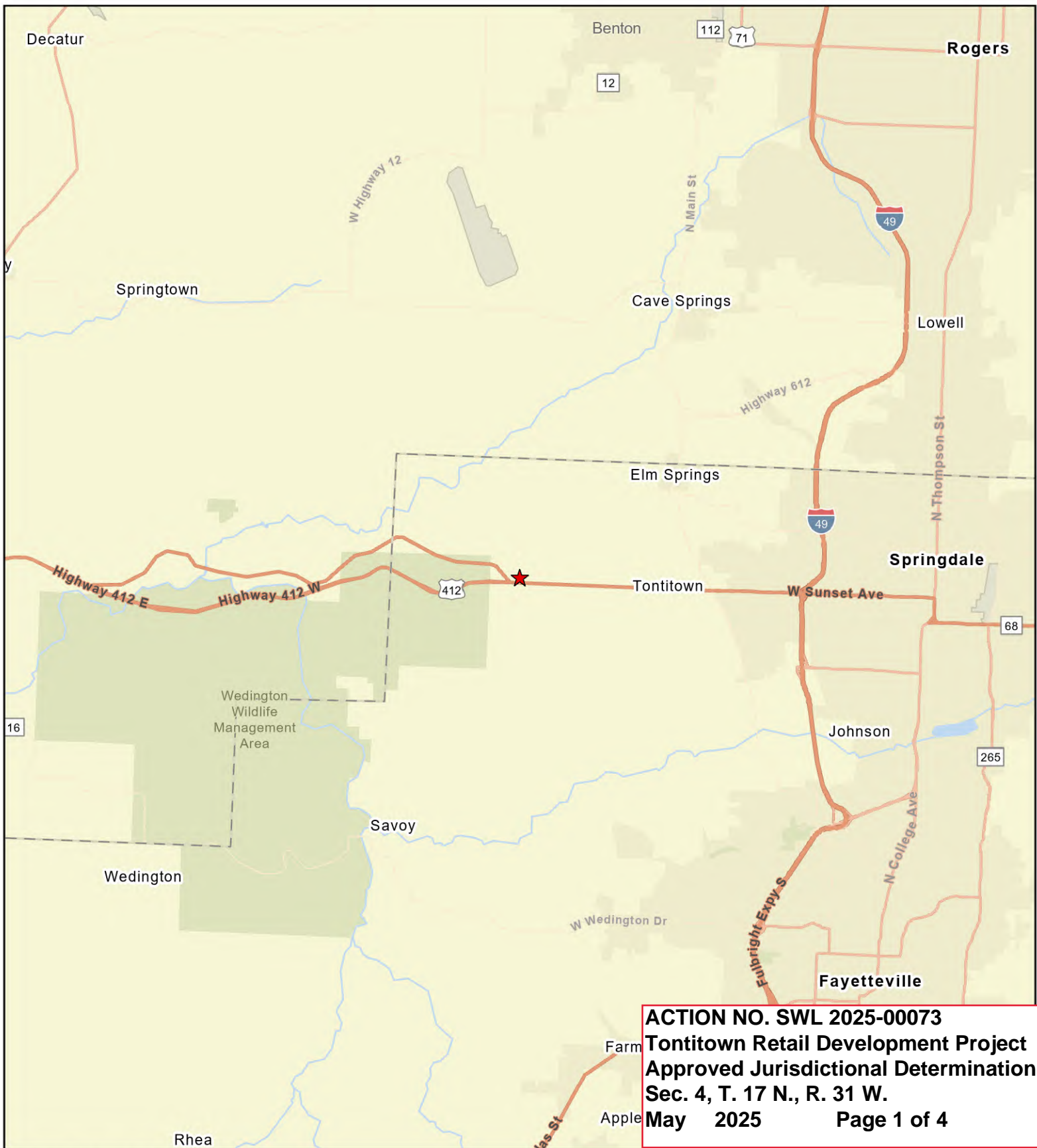
⁹ 51 FR 41217, November 13, 1986.

- 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). N/A
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. Corps personnel office review, conducted on 21 March 2025.
 - b. ECCI Delineation Report dated, December 13, 2024
 - c. USGS Stream Stats accessed, March 21, 2025
 - d. USGS topoView Robinson, AR 1:24K accessed, March 21, 2025
 - e. Google Earth Pro. (1994-2023 Imagery) accessed, March 21, 2025
 - f. USDA Natural Resources Conservation Service Web Soil Washington County accessed, March 21, 2025
 - g. NHD data accessed on National Regulatory Viewer accessed, March 21, 2025
 - h. Historic Aerials via <https://www.historicaerials.com/viewer> accessed, March 21, 2025

10. OTHER SUPPORTING INFORMATION.

- i. Per historicaerials.com a pond was constructed in the southeast portion of the review area between 1980 & 1994. Per Google Earth Pro this pond was filled between 2021 & 2024. This feature was not assessed for its jurisdictional status as part of this AJD.
- ii. In the 2011, 2014, 2017, 2020, & 2024 (1:24,000; Robinson, AR) topographic maps available on USGS topoView, an intermittent stream (flowing north/south) and a perennial stream (flowing northwest/southeast) are depicted. These features were not found on site per the delineation report. These features were also not noted during historicaerials.com (1968 - 2021) aerial photo review.

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.



ACTION NO. SWL 2025-00073
Tontitown Retail Development Project
Approved Jurisdictional Determination
Sec. 4, T. 17 N., R. 31 W.
May 2025 **Page 1 of 4**

Tontitown Retail Project



★ Project Area

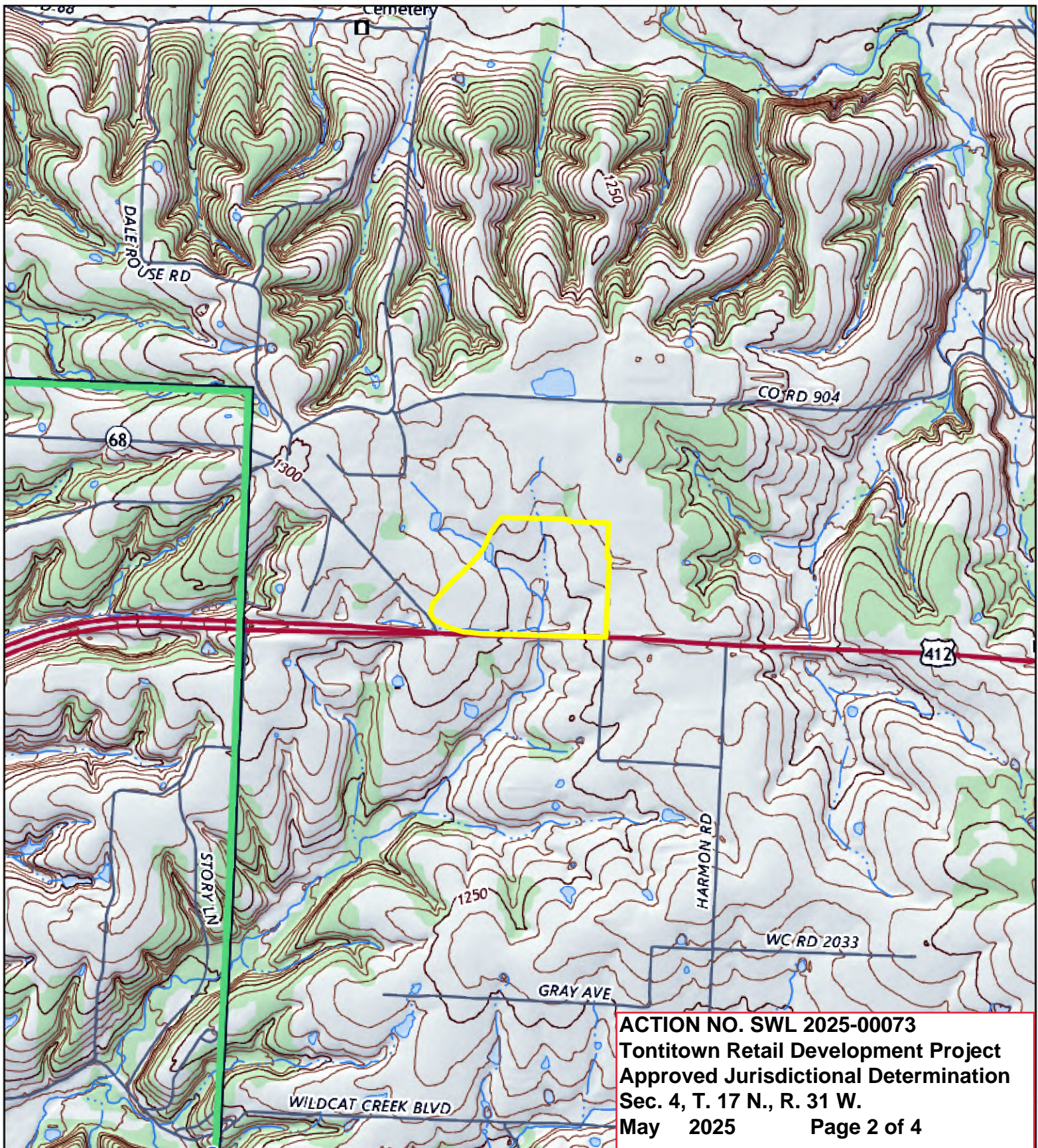
6 Miles



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Background: Esri, DeLorme, HERE, USGS, Intermap, increment P Corp., NRCAN, Esri Japan, METI, Esri China (Hong Kong), Esri (Thailand), TomTom

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

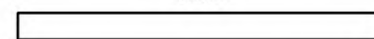


Tontitown Retail Project



 Project Area

0.5

 Miles



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Background: USGS The National Map

Figure 2. Map showing project area overlaid on USGS The National Map 7.5 Minute Quadrangle Topo.

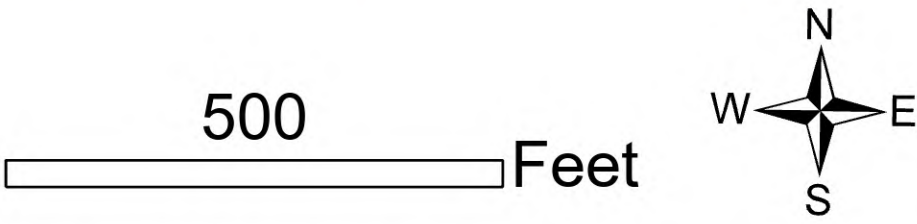


Tontitown Retail Project



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- Project Area
- Sample Points
- Drainage Ditch
- Culvert
- Open Water



Background: USGS The National Map; December 2024

Figure 3. Map showing project details overlaid on USGS The National Map 7.5 Minute Quadrangle Topo.



Tontitown Retail Project



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- Project Area
- Sample Points
- Drainage Ditch
- Culvert
- Open Water



Background: https://gis.arkansas.gov/arcgis/services/ImageServices/IMAGERY_9IN_2023/ImageServer

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