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LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

21 September 2023

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-2023-00164**

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.² 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.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ 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 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.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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.

- 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, non-jurisdictional
 - ii. OW1, non-jurisdictional
 - iii. OW3, non-jurisdictional
 - iv. OW4, 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. ___, 143 S. Ct. 1322 (2023)
- e. 2003 SWANCC guidance

3. REVIEW AREA. The review area consists of an approximately 40-acre undeveloped subject property located immediately south of Wallis Road in Cave Springs, Benton County, Arkansas. The geographic center of the project is (lat/long): 36.2790,-94.2058. Figures 1-3 illustrate the review area boundary and features addressed within this document.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Illinois River, HUC 11110103⁵

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The ephemeral channel

⁵ 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.

(DR01) located in the review area flows to an intermittent tributary to Osage Creek, then to Osage Creek, to Illinois River (TNW).

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
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): N/A
 - f. The territorial seas (a)(6): N/A
 - g. Adjacent wetlands (a)(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.

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*. Three man-made ponds were observed in the review area. These include, OW1 totaling approximately 0.58 acre, OW2 totaling approximately 0.24 acre, and OW3 totaling approximately 0.15 acre. All three ponds are hydrologically connected to an ephemeral channel (DR01). However, based on the ephemeral characteristics of DR01 (non-RPW) and due to DR01 representing the only hydrologic relationship between the ponds and downstream waters, the ponds would not be regulated under Section 404 of the Clean Water Act.
- 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

⁸ 51 FR 41217, November 13, 1986.

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). A wetland delineation by Cattails Environmental, LLC (agent) identified an ephemeral channel (DR01) that flows through the subject property from the northeast and exits near the southwestern corner of the property. This channel extends approximately 1,604 linear feet and exhibits a discontinuous ordinary high water mark (OHWM). In reaches where DR01 supports an OHWM, indicators included scour, sediment sorting, and destruction of terrestrial vegetation. DR01 averages approximately 2 feet wide and 1 foot in depth. DR01 exits a man-made pond (OW1) located in the northeast portion of the subject property and flows southwest entering and exiting two additional man-made ponds (OW2 and OW3). Following its exit of OW3, the channel lacks OHWM indicators and exits the subject property with the characteristics of a swale (exhibiting more or less sheet flow). A review of aerial photography (Google Earth Pro, 1994-2021) does not indicate flow in the channel during the period of review. It is estimated the channel likely supports flow following approximately 6-10 storm events annually. In summary, this channel is a non-RPW and is not regulated under Section 404 of the Clean Water Act under the Pre-2015 Regulatory Regime implemented consistent with *Sackett*.

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 was conducted on July 3, 2023.
 - b. Preliminary Waters of the U.S. Assessment & Wetland Delineation Report, Simpson Property, Cave Springs, Benton County, Arkansas by Cattails Environmental, LLC, May 2023.
 - c. NRCS Web Soil Survey (Ver. 3.4), accessed September 21, 2023
 - d. NHD data accessed on National Regulatory Viewer, September 21, 2023
 - e. USGS Topographic Quadrangle Bentonville South, AR (1:24K) accessed on September 1, 2023
 - f. Google Earth Pro (image dates 1994-2021) accessed on September 1, 2023, and provided by agent in wetland delineation (May 2023).
10. OTHER SUPPORTING INFORMATION. A field report completed by the Corps on July 3, 2023, was utilized to verify the status of features included in the agent's wetland delineation.

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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.



Figure 1-1. Site Location Map for the Simpson Property, Cave Springs, Benton County, Arkansas.

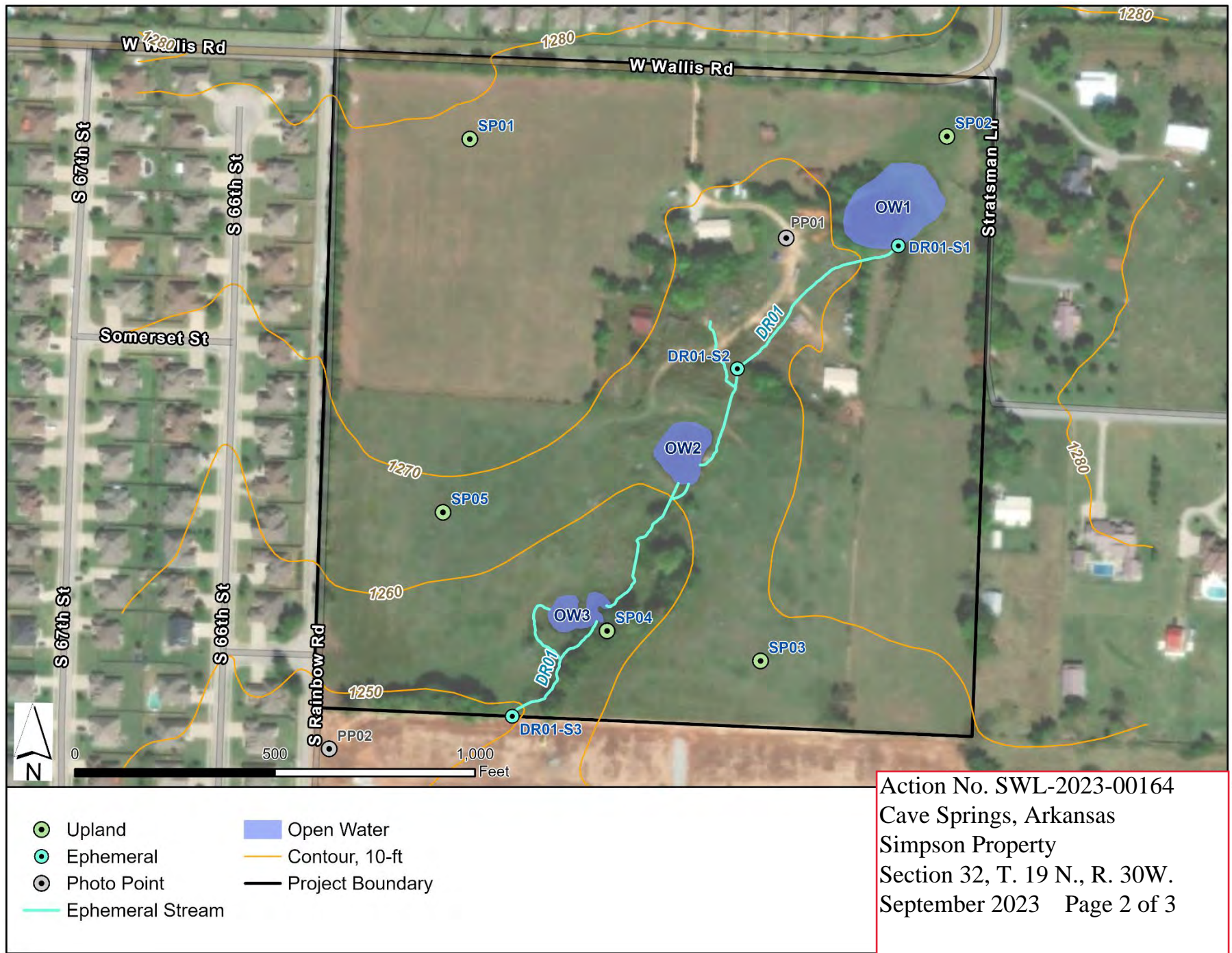


Figure 1-2. Field Data map for Simpson Property, Cave Springs, Benton County, Arkansas.

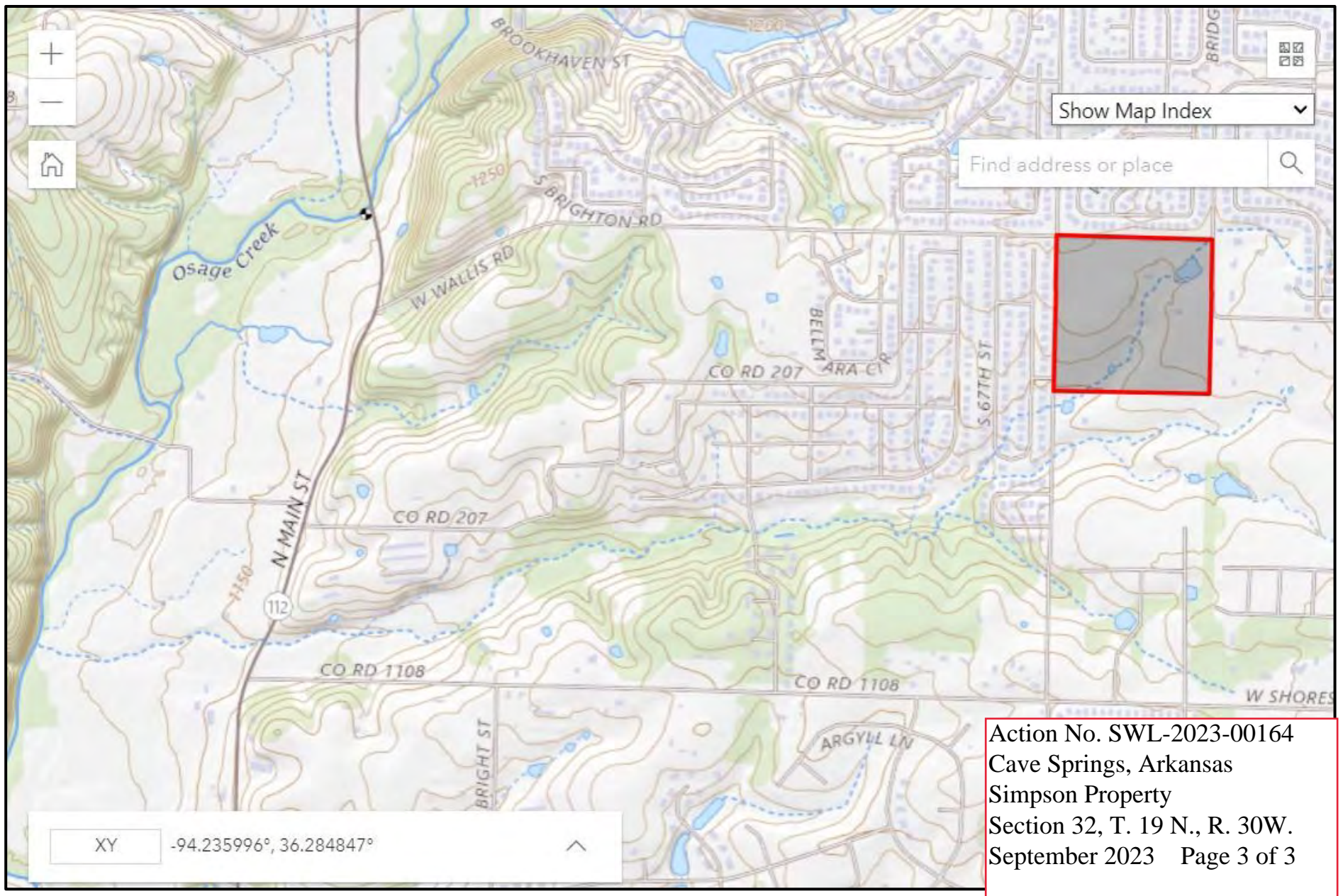


Figure 1-4. USGS National Hydrography Dataset (NHD) Map for the Simpson Property, Cave Springs, Benton County, Arkansas. Approximate boundaries shown in red.