



DEPARTMENT OF THE ARMY
LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
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CESWL-RD

24 June 2024

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-2024-00174**

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. Palustrine Forested Wetland (Wet_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. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is ≈57 acres, including one 0.3-acre palustrine forested wetland and ≈56.7 acres of Prior Converted Cropland (PCC). The review area is located in the SW 1/4 of section 17, Township 8 N, Range 3 W, center point of the review area is Lat: 35.316357°, Long: -91.3367994°, NE of Augusta, Woodruff County, Arkansas.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Glaise Creek-White River 11010013, the White River is a TNW⁵

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. N/A – On-site wetland does not have a continuous surface connection to a traditional navigable water (TNW), interstate water (IW), or territorial sea (TS).

6. SECTION 10 JURISDICTIONAL WATERS⁶: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

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.

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.

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

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

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 51 FR 41217, November 13, 1986.

- 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. The review area contains ≈56.7 acres of PCC, which has been precision land-leveled and continuously farmed since at least 1985.
 - 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). Wet_1 is a 0.3-acre palustrine forested wetland located in the north-central section of the review area. Wet_1 lacks a continuous surface connection to any relatively permanent or non-relatively permanent water (RPW). Due to the non-adjacency of this wetland to an RPW, it would not be regulated under Section 404 of the CWA.
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. An office/desktop evaluation was conducted on June 5th and 6th, 2024.
 - b. Delineation Report: Created by The Dirt Dude LLC, dated April 2023

CESWL-RD

SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SWL-2024-00174

- c. USGS 3D Elevation Program (3DEP) Bare Earth DEM, June 5, 2024
 - d. Web Soil Survey, <https://websoilsurvey.nrcs.usda.gov/app/>, June 06, 2024
 - e. Google Earth Pro (years of record 1989-2024), June 05, 2024
 - f. USGS National High Altitude Photography (1986), June 06, 2024
 - g. USGS Historical Topos (<https://ngmdb.usgs.gov/topoview/viewer/>), June 06, 2024
 - h. National Hydrologic Database, June 6, 2024
10. OTHER SUPPORTING INFORMATION. The applicant conducted a wetland delineation with two (2) data points to identify the boundaries of the wetland and verify the entire area met the criteria of the wetland per the 1986 Corps Delineation Manual and the regional supplement. Upland data points were not taken because the uplands were farmland that had been precision leveled and determined to be PCC.

Historic USGS Topos from 1935 identifies the area as a large wetland complex connected to the White River via Caney Creek. However, by 1957, the large wetland complex was turned into farm fields, with multiple irrigation and drainage ditches still connecting the few remaining wetlands. By 1986, only a few small patches of wetlands remained of the previous large wetland complex, with Wet_1 isolated in the middle of a PPC field without a continuous surface connection to a TNW, IW, TS.

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.

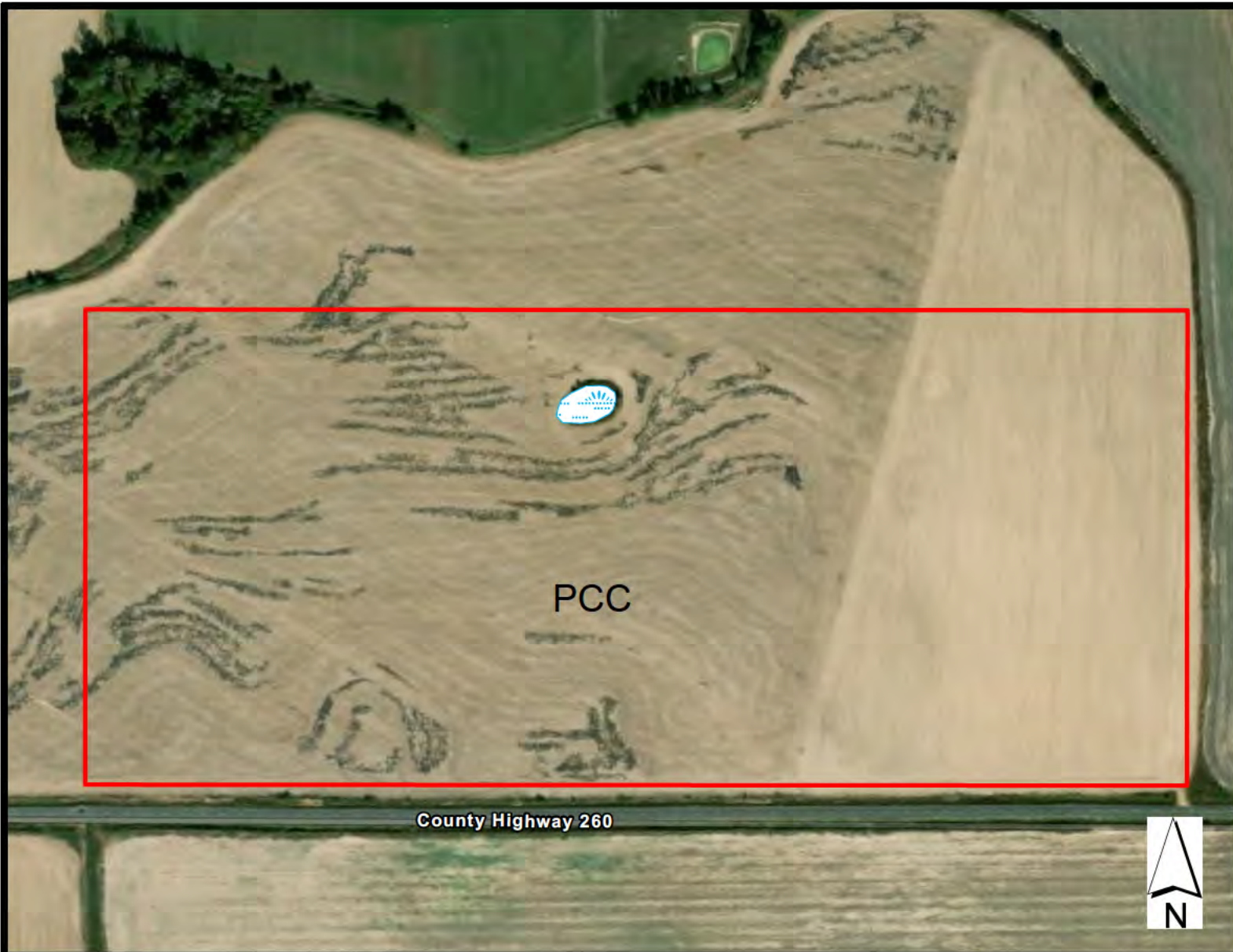


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SWL-2024-00174

Approved Jurisdictional Determination



Legend

Review_Area

Notes: An approved AJD for a ≈57-acre review area includes one 0.3-acre palustrine forested wetland that does not have a continuous surface connection to a jurisdictional water and ≈56.7 acres of Prior Converted Cropland.

Aerial: ESRI World Imagery

For planning purposes only.

Action Number: SWL-2024-00174
 [REDACTED] /AJD
 SW 1/4 of section 17, T. 8 N, R. 3 W
 Woodruff County
 June 2024 Page 1 of 4



U.S. ARMY

US Army Corps of Engineers

SWL-2024-00174

Approved Jurisdictional Determination



Legend

- Review_Area
- NWI_Wetlands
- WETLAND_TY
- Freshwater Emergent Wetland
- Freshwater Forested/Shrub Wetland
- Freshwater Pond
- Lake
- Other
- Riverine

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Action Number: SWL-2024-00174

SW 1/4 of section 17, T. 8 N, R. 3 W

Woodruff County

June 2024 Page 2 of 4

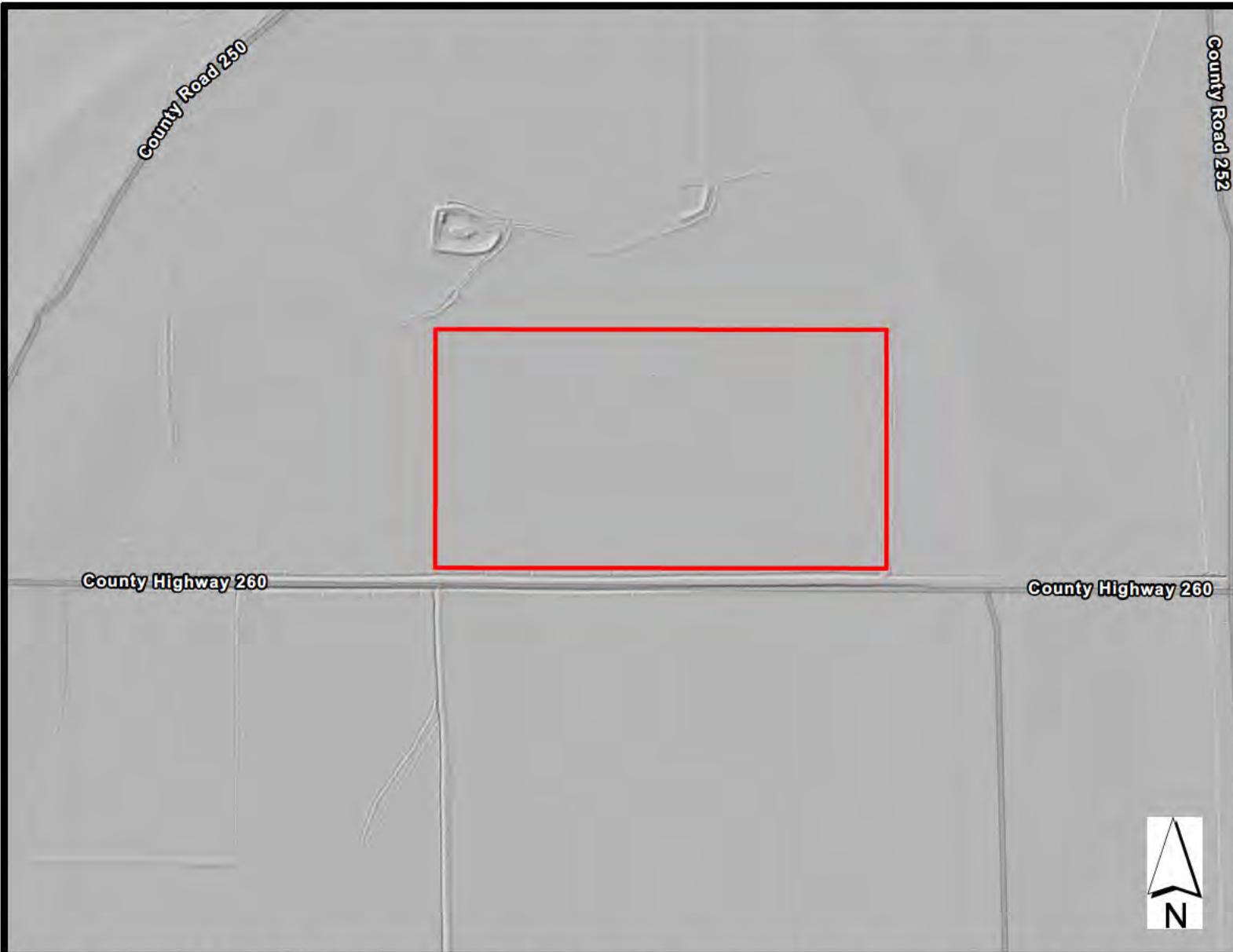


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SWL-2024-00174

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Aerial: USGS 3DEP Hillshade

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Action Number: SWL-2024-00174

SW 1/4 of section 17, T. 8 N, R. 3 W
Woodruff County

June 2024 Page 3 of 4



U.S. ARMY
US Army Corps
of Engineers

SWL-2024-00174

Approved Jurisdictional Determination



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Aerial: ESRI Topo

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Action Number: SWL-2024-00174
[REDACTED] /AJD
SW 1/4 of section 17, T. 8 N, R. 3 W
Woodruff County
June 2024 Page 4 of 4