



DEPARTMENT OF THE ARMY
LITTLE ROCK DISTRICT, CORPS OF ENGINEERS
POST OFFICE BOX 867
LITTLE ROCK, ARKANSAS 72203-0867
www.swl.usace.army.mil

CESWL-RD

14 November 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-2025-00051**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. Channel 1, non-jurisdictional
 - ii. Channel 2 (Osage Creek), jurisdictional, Section 404
 - iii. Channel 3, jurisdictional, Section 404
 - iv. Wetland 1, jurisdictional, Section 404

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 24.25 acres, extending north to south between Scoggins Road and the property near the intersection of North Main Street and North Wallis Road in Bentonville, Benton County, Arkansas. The proposed impacts to the review area are associated with the realignment/relocation of a 48" water pipeline resulting from the roadway expansion of Hwy 112. The review area is located within sections 24, 25, and 36 of Township 19 North, Range 31 West, on the Bentonville South, Arkansas, 7.5-minute quadrangle. The review area is bordered by pasture and deciduous forest along the westside of Hwy 112 with some adjacent residential development as well as on going site preparations for future residential development. The approximate geographic center of the review area is 36.290601, -94.237027°. Maps of the review area, including resource locations are provided in Figures 1-15.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Illinois River (11110103) is the nearest downstream TNW (Oklahoma) as it is designated as a Section 10 water north of Fort Gibson, Oklahoma (35.86962, -95.23002).⁶
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Channel 1, Channel 3, and Wetland 1 discharge into Channel 2 Osage Creek (RPW) which flows into the Illinois River (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.
 - a. TNWs (a)(1): 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.

- b. Interstate Waters (a)(2): N/A
- c. Other Waters (a)(3): N/A
- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): The agent identified three drainage features within the review area, two of which are considered jurisdictional: Channel 2 (94.72 lf) and Channel 3 (87.70 lf). Channel 2 is a segment of Osage Creek, a perennial stream located near the southern edge of the review area. The channel flows from east to west, passing beneath North Main Street. It features 2:1 side slopes with a defined and confined surface flow heavily influence by groundwater springs. The channel exhibits distinct bed and bank features, with a discernible Ordinary High Water Mark (OHWM) that spans 30 feet in width and reaches a height of 2 feet. The top of bank width measures 45 feet, with the top of bank height standing at 15 feet. The OHWM displays a clear natural line along the bank, with shelving vegetation that is either matted down or absent, indicating a change in plant community. The substrate consists of silt and cobble, and the channel exhibits clear, low turbidity geomorphological features typical of riffle-run-pool sequences. Channel 2 eventually drains into the Illinois River to the south, maintaining year-round flow, and is therefore considered jurisdictional. Channel 3 is an intermittent stream located near the southern end of the review area, functioning as a braided side channel of Osage Creek. It also features 2:1 side slopes and displays flowing geomorphology with clear, low turbidity water. The distinct bed and bank are evident, with a discernible OHWM measuring 15 feet in width and 0.5 feet in height. The top of bank width is 15 feet, with the top of bank height at 8 feet. Similar to Channel 2, the OHWM has a clear natural line on the bank, with shelving vegetation that is matted down or absent, indicating a change in vegetation. The substrate is composed of silt and cobble, and the channel exhibits riffle-run-pool geomorphology. Channel 3 maintains a discrete and confined surface flow, and while it is classified as intermittent, it retains a hydrologic connection to Osage Creek. Given that Channel 3 demonstrates a distinct bed and bank structure, hydrology that meets the RPW standard, and a hydrologic connection to Channel 2 (Osage Creek), Channel 3 is also considered jurisdictional.
- f. The territorial seas (a)(6): N/A
- g. Adjacent wetlands (a)(7): The agent identified one wetland which was confirmed during a Corps site inspection and evaluation: Wetland 1 (0.0048-acre). Wetland 1 is a palustrine emergent wetland in a concave area located near the southern border of the review area. Wetland 1 is located within the Ordinary High Water Mark (OHWM) of Channel 3, an intermittent stream with an OHWM of approximately 15 feet. This wetland feature experiences periodic and seasonal

flooding, having developed primarily due to siltation processes within the channel. The area is predominantly populated with hydrophytic vegetation, including species such as dark-green bulrush (*Scirpus atrovirens*), softstem bulrush (*Schoenoplectus tabernaemontani*), southern annual saltmarsh aster (*Symphotrichum divaricatum*), reed canarygrass (*Phalaris arundinacea*), and Virginia wildrye (*Elymus virginicus*), passing a FAC-neutral test. The soils in Wetland 1 are composed of gravelly silt loam and demonstrate saturation, a geomorphic position, and a depleted soil matrix characteristic of hydric soils. Wetland 1 possesses indicators of hydric soils, hydrophytic vegetation, and hydrology consist with wetlands in the region. Given its location within the OHWM of Channel 3, Wetland 1 is considered jurisdictional due to its continuous surface connection to jurisdictional waters.

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 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic

⁹ 51 FR 41217, November 13, 1986.

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 three stream features, one of which is considered non-jurisdictional that was confirmed by a Corps site inspection and evaluation: Channel 1 (171.30 lf). Channel 1 begins at the western edge of South 84th Street, adjacent to a newly constructed residential development, and slopes down toward Channel 2 to the south. Although the National Wetlands Inventory (NWI) classifies Channel 1 as a riverine habitat and the National Hydrography Dataset (NHD) identifies it as an intermittent stream channel, field observations indicate that it functions as an ephemeral stream, characterized by conveying surface flow and a flashy, runoff hydrologic regime, only flowing during and shortly after significant precipitation events. The channel has 3:1 side slopes and did not show any observable hydrology or standing water on site during the Corps site inspection, which took place shortly after a significant precipitation event. Channel 1 has a discontinuous bed and bank, marked by a heavily incised channel and an indistinct Ordinary High Water Mark (OHWM). The substrate consists of silt and cobble, with chunks of concrete rubble present, and the area displays evidence of excessive erosion. As Channel 1 does not meet the Relatively Permanent Water standard and lacks a discernable hydrologic connection to downstream jurisdictional waters, it 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 was conducted along with a desktop review on 11 June 2025 and 13 November 2025.
 - b. Agent provided Section 404 Delineation Report: Updated Bentonville 48 inch Waterline-Habitat Assessment 22 July 2024; Updated Wetland Report - Bentonville Water Pipeline 23 July 2024.
 - c. NHD data accessed on National Regulatory Viewer, Accessed 13 November 2025.
 - d. USGS Topographic Quadrangle Bentonville South, AR (1:24K), Accessed 13 November 2025.

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- e. U. S. Fish and Wildlife Service. Publication date (found in metadata). National Wetlands Inventory website, Accessed 13 November 2025.
- f. Google Earth Pro. (1993-2025 Imagery). *Lat. 36.290601°*, *Long. -94.237027°*, Accessed 13 November 2025.
- g. USDA Natural Resources Conservation Service Soil Survey. Citation: USDA-NRCS Web Soil Survey. Accessed 13 November 2025.

10. OTHER SUPPORTING INFORMATION.

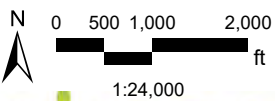
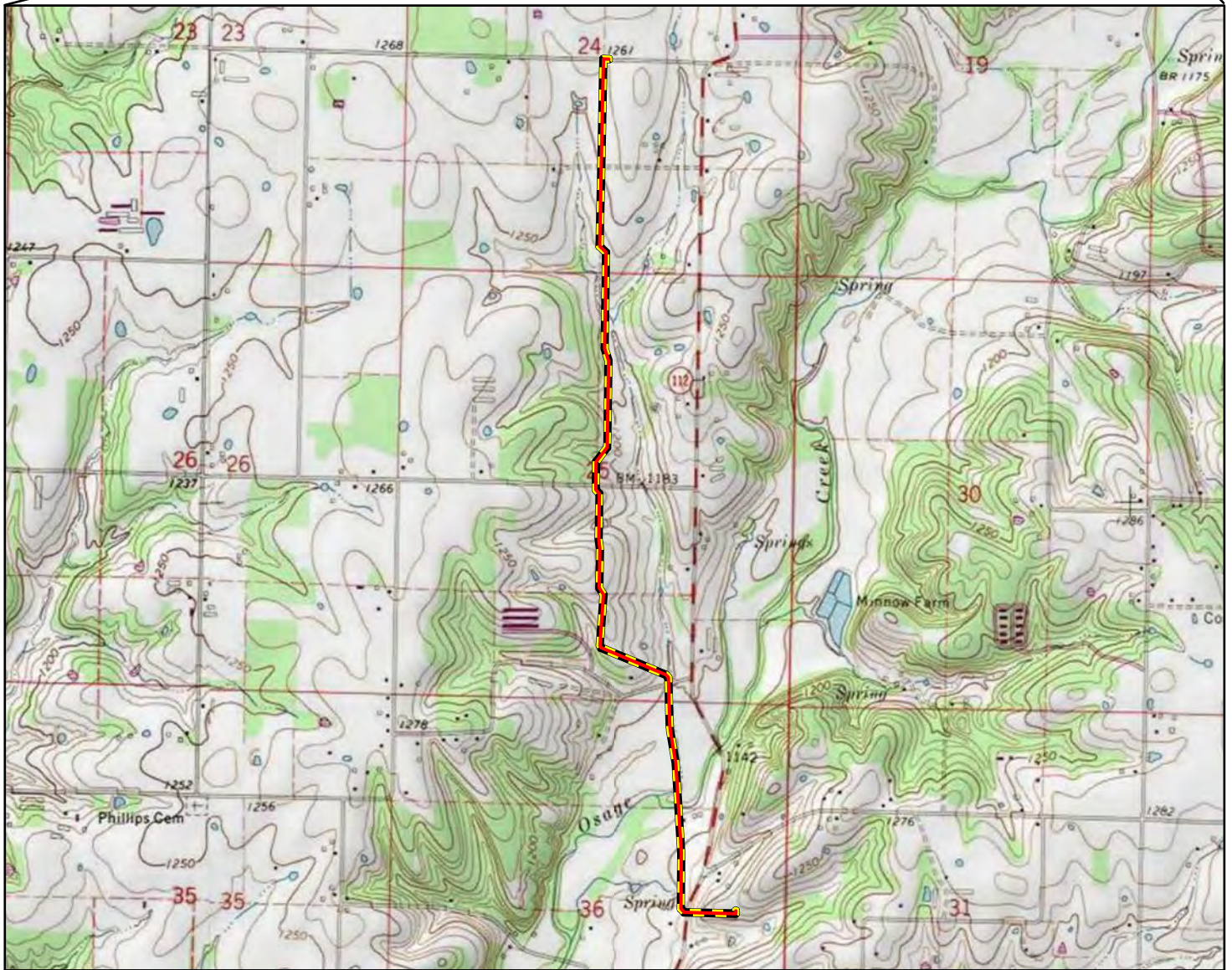
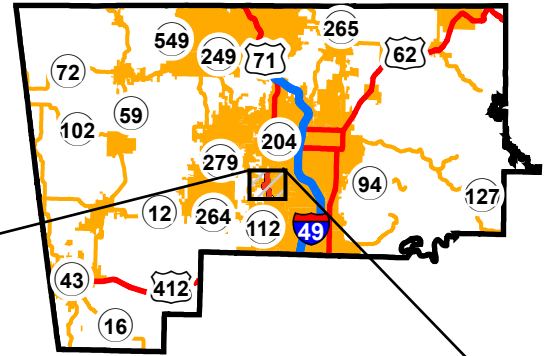
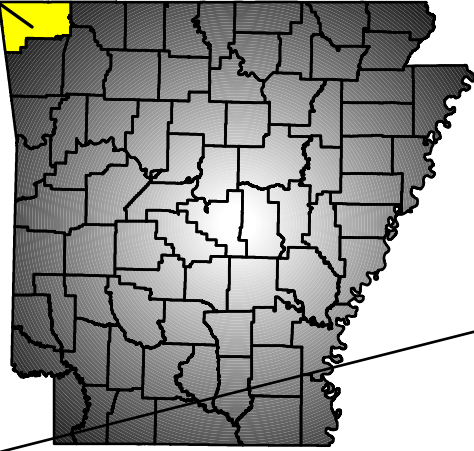
Leasure, D.R.; Magoulick, D.D.; Longing, S.D. 2016. Natural flow regimes of the Ozark-Ouachita interior highlands region. *River Res. Appl.* 32: 18–35



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.

ARKANSAS

BENTON COUNTY

Project Area





 Study Area
 Alignment

Bentonville 48" Water

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 Bentonville, Benton Co. AR
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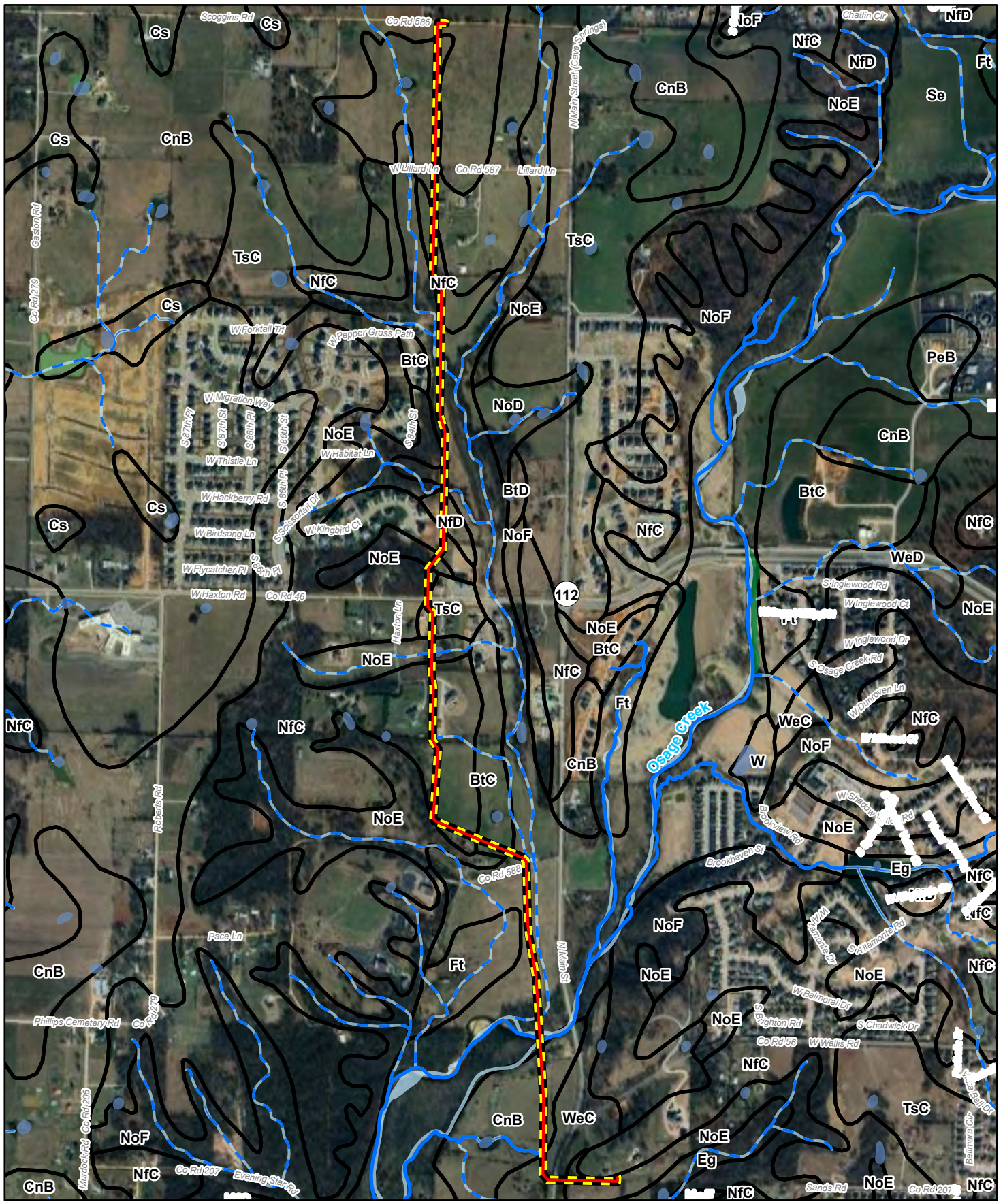




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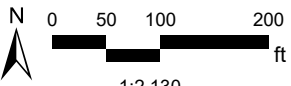
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- SSURGO Soils
- - - Intermittent Stream
- Perennial Stream
- Other Flowlines
- Freshwater Forested/Shrub Wetland
- Freshwater Pond
- Riverine Habitat

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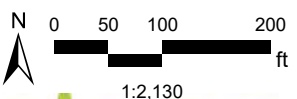
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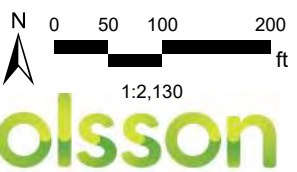
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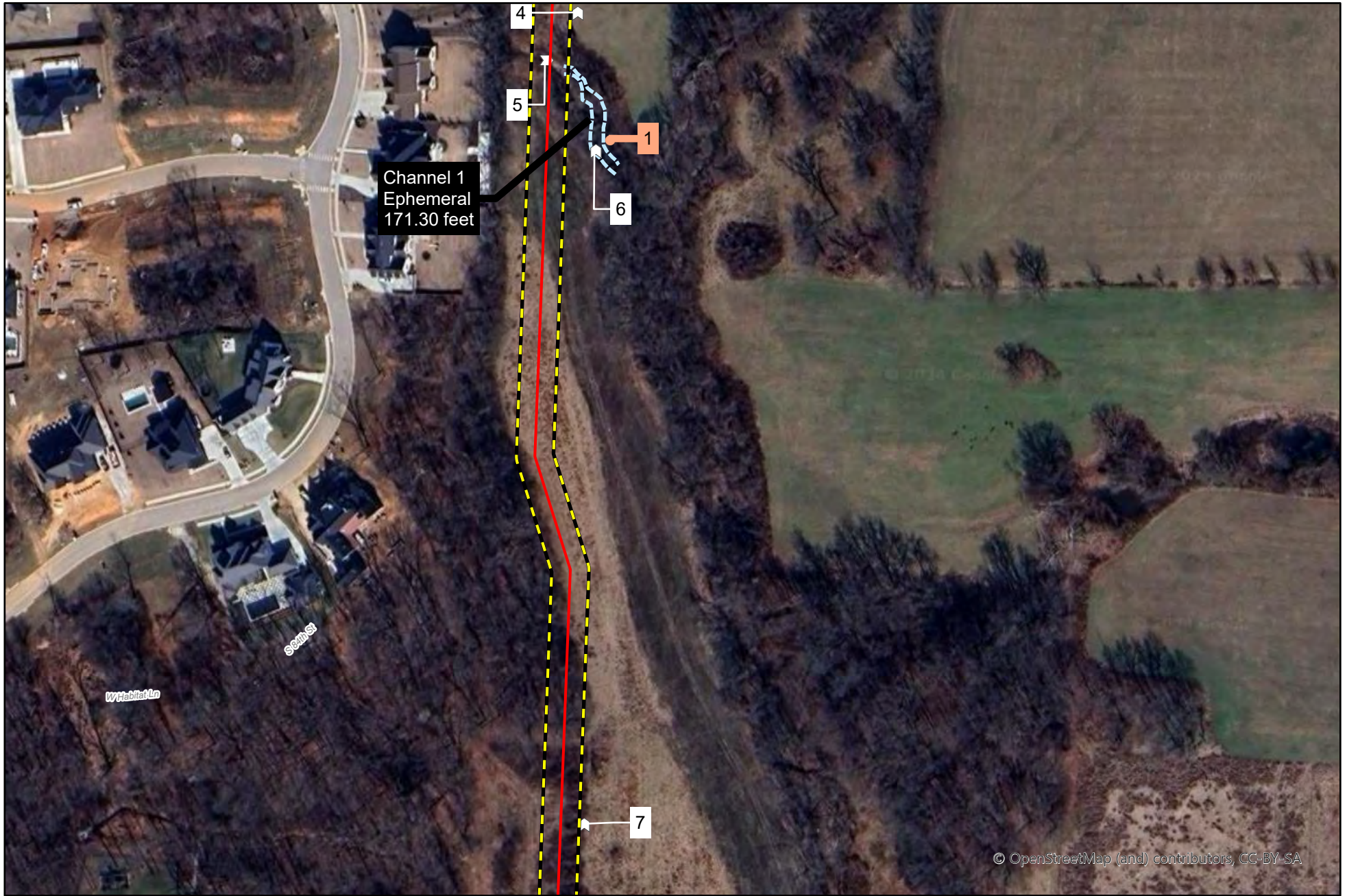
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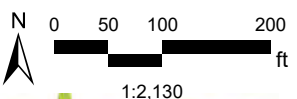
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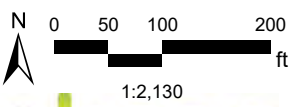
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W Hexton Rd



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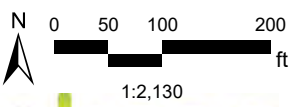
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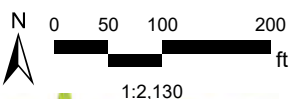
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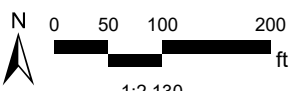
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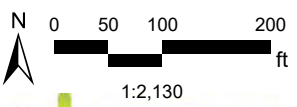
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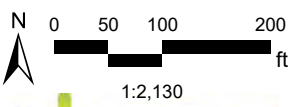


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