



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT
332 MINNESOTA STREET, SUITE E1500
ST. PAUL, MN 55101-1323

MVP

February 28, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023),¹ MVP-2015-02675-DAS MFR 1 of 1²

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

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

¹ While the Revised Definition of "Waters of the United States"; Conforming 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, the territorial seas, or interstate water 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.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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. W01 (0.19 acres), non-jurisdictional
 - ii. W02 (0.16 acres), non-jurisdictional
 - iii. W03 (0.28 acres), non-jurisdictional
 - iv. W04 (0.10 acres), non-jurisdictional
 - v. W05 (0.05 acres), non-jurisdictional
 - vi. W06 (0.18 acres), non-jurisdictional
 - vii. W07 (0.19 acres), non-jurisdictional
 - viii. W08 (0.06 acres), non-jurisdictional
 - ix. W09 (1.36 acres), non-jurisdictional
 - x. W10 (0.46 acres), non-jurisdictional
 - xi. W11 (0.09 acres), non-jurisdictional
 - xii. W12 (0.46 acres), non-jurisdictional
 - xiii. W13 (0.08 acres), non-jurisdictional

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023))

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- c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
 - d. January 2023 Rule preamble at 88 FR 3090
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- 3. REVIEW AREA. The review area is approximately 100 acres and is identified as the JD Request Area on the attached figures labeled MVP-2015-02675-DAS (AJD) Page 3 through 15 of 15. Latitude (NAD83) 43.890716, Longitude (NAD83) -93.295305. The review area includes the project limits of the UNION PACIFIC RAILROAD ALBERT LEA SUB MP 268.5 TO 271.71 SIDING EXTENSION PROJECT and extends from the city of Ellendale to the north 3.52 miles in Steele County, Minnesota.
 - 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. None.
 - 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. A review of the delineated wetland boundaries and landscape position depicted in aerial imagery identified there is no flow path from the subject aquatic resources to a TNW, territorial sea, or interstate water.
 - 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 2023 Rule as amended, consistent with the Supreme Court's

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.

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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 2023 Rule as amended. 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. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁸ N/A
- b. 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 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

⁸ 88 FR 3004 (January 18, 2023)

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Based on review of the delineated wetland boundaries and landscape position depicted in aerial imagery, W01, W02, W03, W04, W05, W06, W07, W08, W09, W10, W11, W12, and W13 are not TNWs, territorial seas, or interstate waters; therefore, these waters are not category (a)(1) waters. In addition, they are not tributaries and have not been created by impounding a water of the U.S.; therefore, they are not category (a)(2) or (a)(3) waters.

The closest mapped relatively permanent water is an unnamed tributary to the Straight River that is at least 800 feet west of the wetlands in the review area. The unnamed tributary and the wetlands are separated by agricultural fields with no designated surface water features.

These wetlands do not directly abut a jurisdictional water identified in paragraph (a)(1), (a)(2), or (a)(3) of the conforming rule and are not separated from a jurisdictional water by a natural berm, bank, dune, or similar natural landform. W02, W03, W05, W08, W10, W11, W12, and W13 are located entirely within the review area with no continuous surface or near surface connection to any (a)(1-3) water.

W01, W04, W06, W07, and W09 extend outside of the review area; however, a review of soils, aerial photography, National Wetland Inventory (NWI) maps confirmed there is no continuous surface or near surface connection to any (a)(1-3) water. W01, W04, W06, and W07 are located along the existing tracks entirely within depressional areas within the adjacent agricultural field. W09 is located along the west edge of the existing tracks and is a portion of a larger wetland. The larger wetland is located in a depressional area that is bordered on the south by the city of Ellendale and along the north by an adjacent agricultural field. This was confirmed on NWI map which depicted wetland located within the agricultural field without a connection to down gradient waters.

W01, W02, W03, W04, W05, W06, W07, W08, W09, W10, W11, W12, and W13 do not meet the terms of paragraph (a)(4) because they lack a continuous surface connection to waters identified in paragraph (a)(1) or relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3); and therefore, are not adjacent.

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs

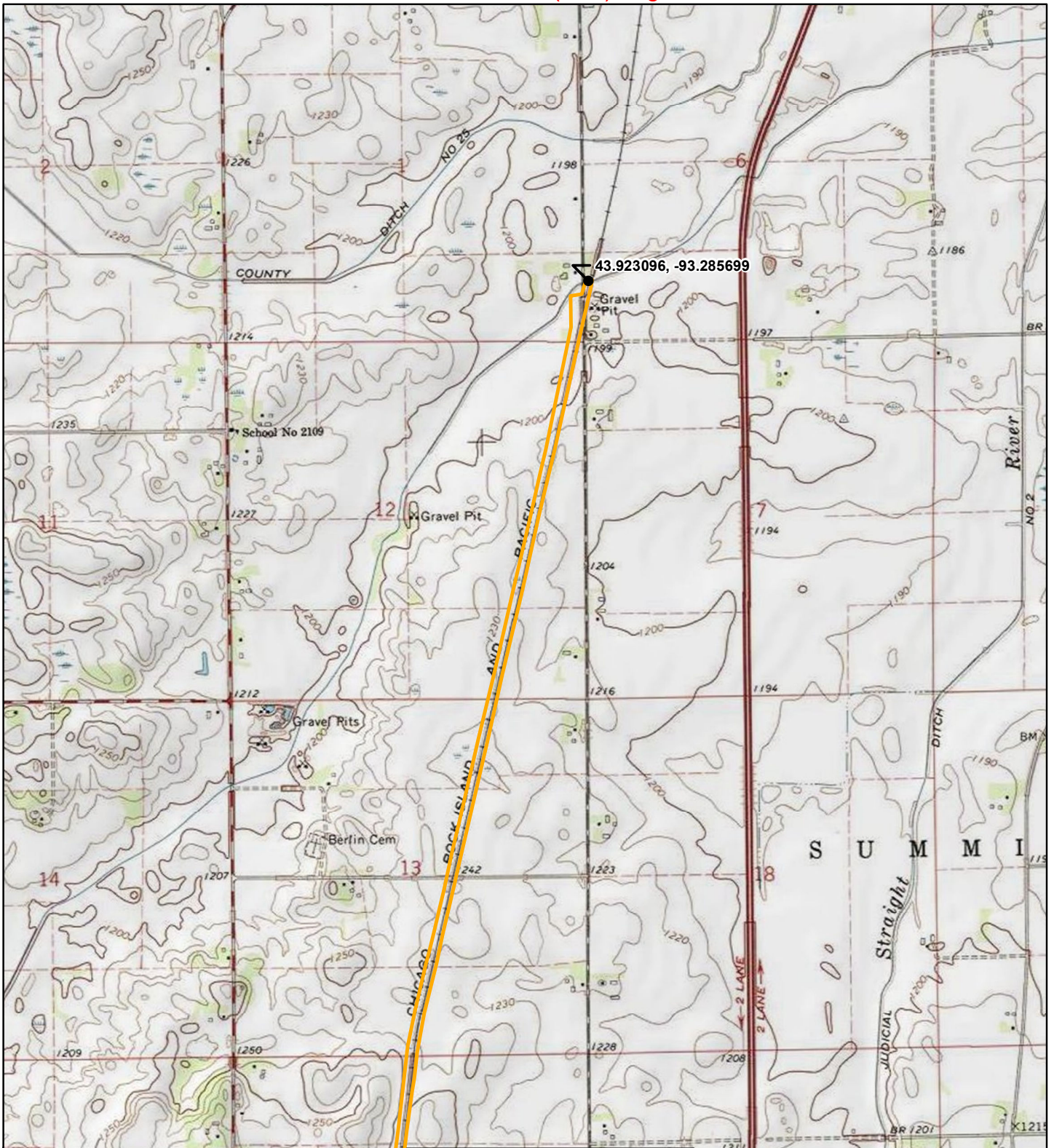
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(a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.”

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. Jurisdictional Determination Request via the Joint Application submittal for the Union Pacific Railroad Company Ellendale Siding Extension Project prepared by Arcadis Design and Consultancy dated December 11, 2023.
 - b. USDA Hydric Soils Class viewed in Minnesota Regulatory Viewer on February 6, 2024.
 - c. National Hydrography Dataset (NHD) viewed in Minnesota Regulatory Viewer on February 6, 2024.
 - d. National Wetland Inventory (NWI) viewed in Minnesota Regulatory Viewer on February 6, 2024.
10. OTHER SUPPORTING INFORMATION. N/A
 - a. National Wetland Inventory (NWI) and National Hydrography Dataset (NHD) aerial imagery figure labeled MVP-2015-02675-DAS (Union Pacific Railroad/ Albert Lea Subdivision Ellendale Siding Extension)
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.

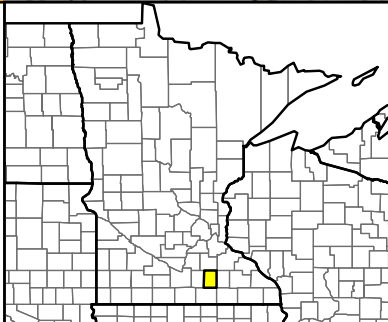
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 Project Limits

USGS Topographic Quadrangles for Hope and Ellendale, MN
obtained through ArcGIS Online Streaming Service

0 1,600 3,200
Feet

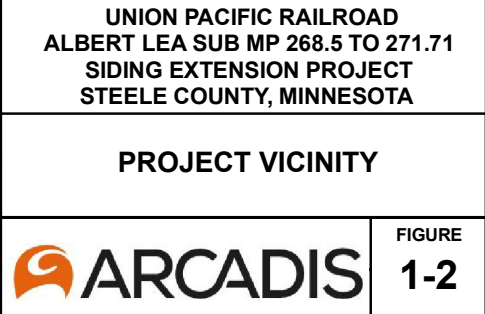


**UNION PACIFIC RAILROAD
ALBERT LEA SUB MP 268.5 TO 271.71
SIDING EXTENSION PROJECT
STEELE COUNTY, MINNESOTA**

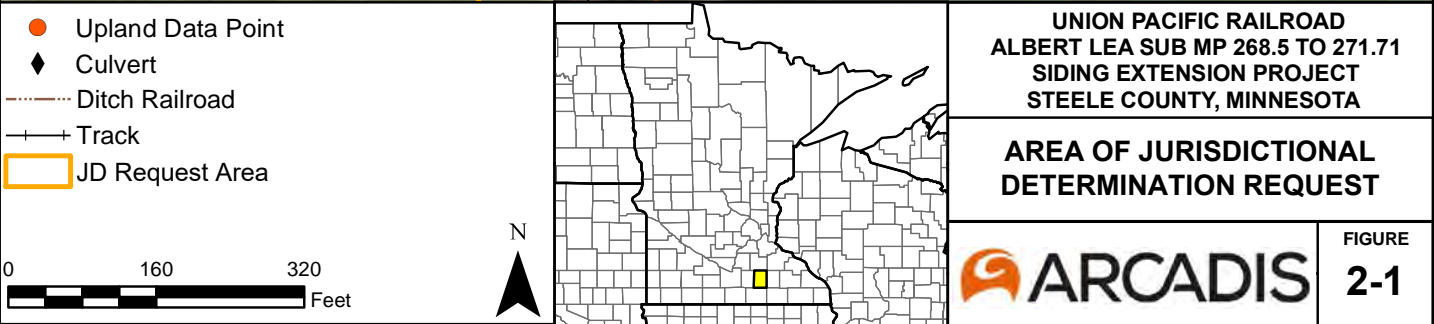
PROJECT VICINITY



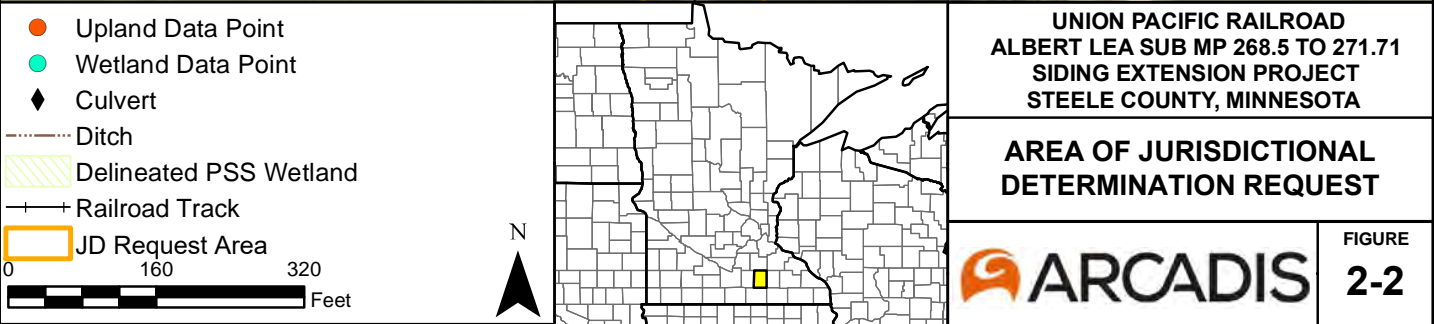
**FIGURE
1-1**



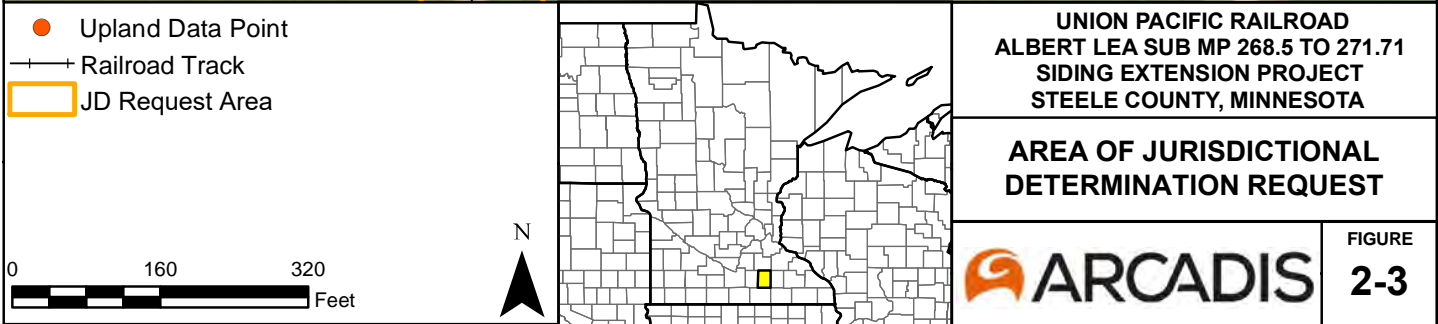
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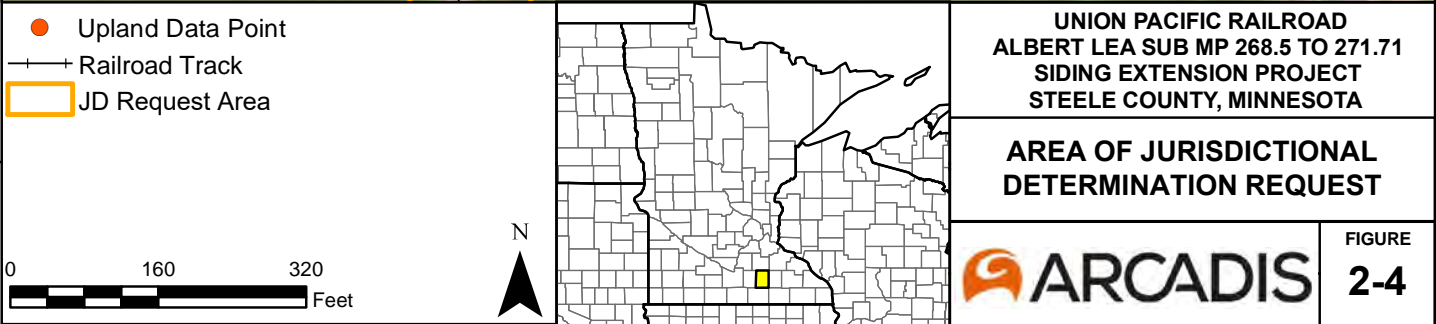
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<ul style="list-style-type: none">● Upland Data Point● Wetland Data Point▨ Delineated PSS Wetland--- Railroad Track▭ JD Request Area <div data-bbox="94 1911 446 1982"><p>0 160 320 Feet</p></div> <div data-bbox="581 1877 630 1982"><p>N</p></div>		<p>UNION PACIFIC RAILROAD ALBERT LEA SUB MP 268.5 TO 271.71 SIDING EXTENSION PROJECT STEELE COUNTY, MINNESOTA</p> <p>AREA OF JURISDICTIONAL DETERMINATION REQUEST</p> <div data-bbox="1044 1902 1396 1965"></div> <div data-bbox="1425 1885 1497 1961"><p>FIGURE 2-5</p></div>
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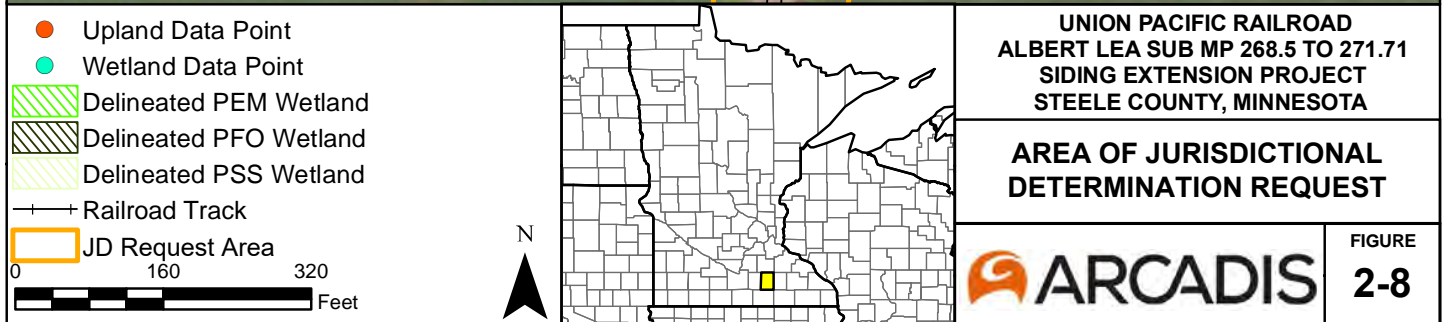
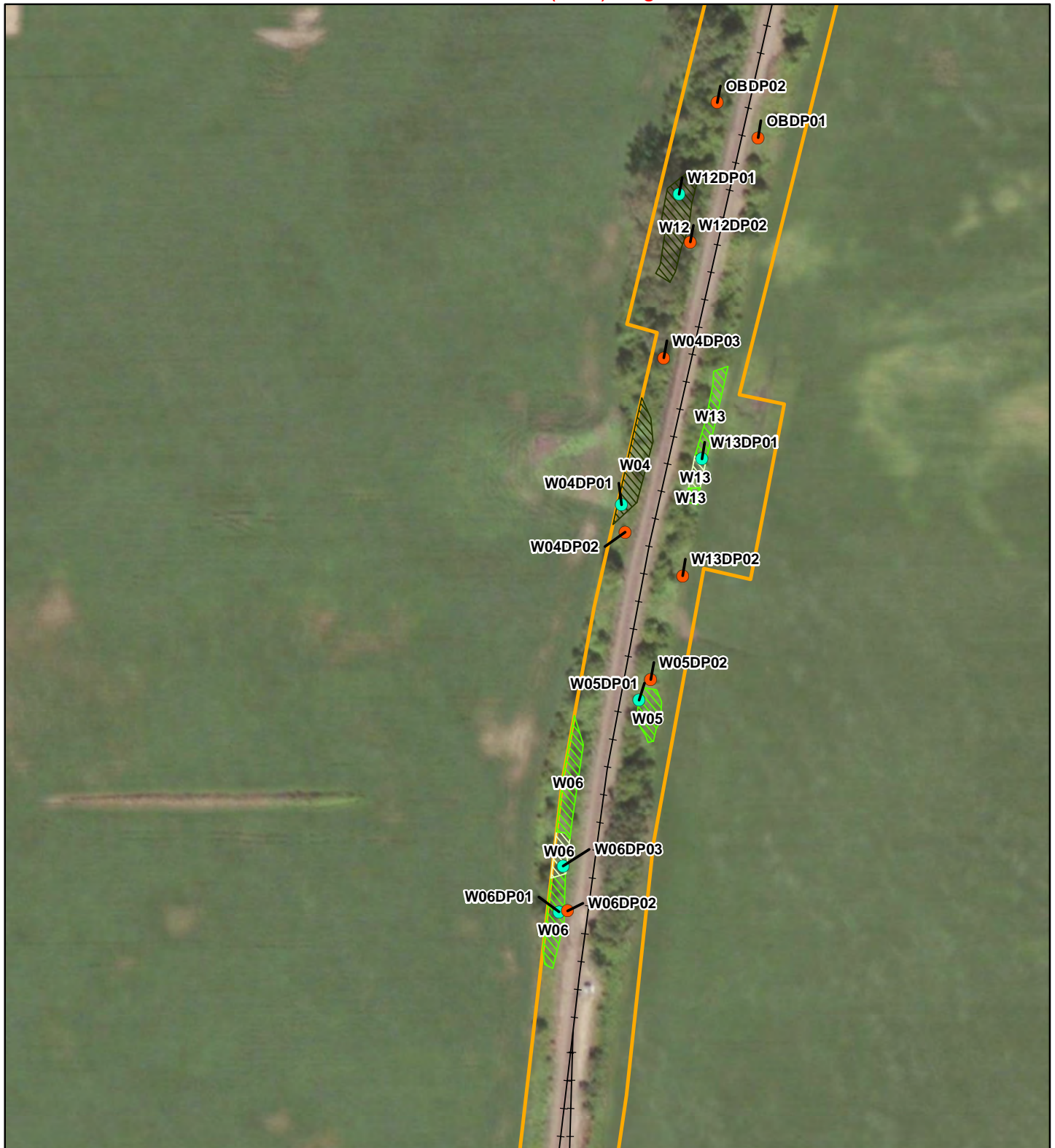
<ul style="list-style-type: none">● Upland Data Point● Wetland Data Point▨ Delineated PSS Wetland—+— Railroad Track▭ JD Request Area <div data-bbox="89 1911 446 1982"><p>0 160 320 Feet</p></div> <div data-bbox="576 1879 641 1982"><p>N</p></div>		<p>UNION PACIFIC RAILROAD ALBERT LEA SUB MP 268.5 TO 271.71 SIDING EXTENSION PROJECT STEELE COUNTY, MINNESOTA</p> <p>AREA OF JURISDICTIONAL DETERMINATION REQUEST</p> <div data-bbox="1039 1900 1404 1974"></div> <div data-bbox="1421 1879 1520 1974"><p>FIGURE 2-6</p></div>
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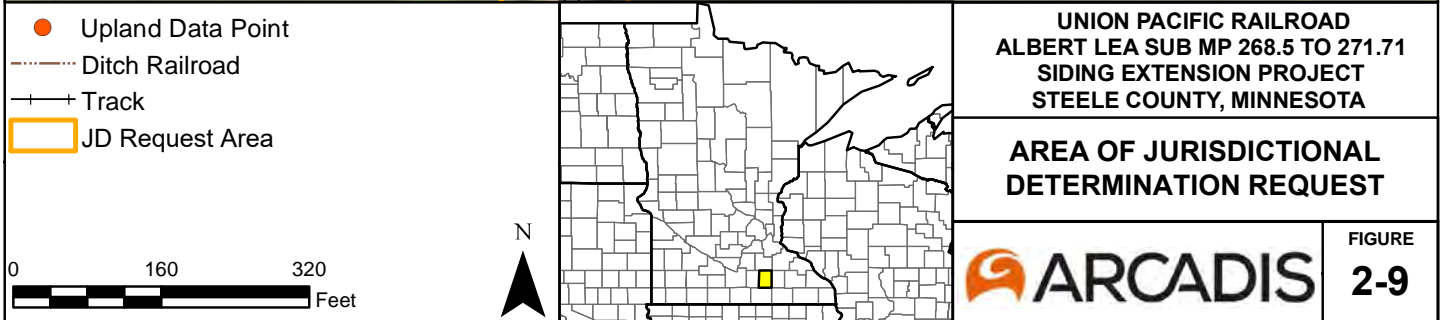


<ul style="list-style-type: none">Upland Data PointWetland Data PointCulvertDelineated PEM WetlandRailroad TrackJD Request Area <div><div></div><div>0160320</div><div>Feet</div></div> <div><div>N</div><div></div></div>		<p>UNION PACIFIC RAILROAD ALBERT LEA SUB MP 268.5 TO 271.71 SIDING EXTENSION PROJECT STEELE COUNTY, MINNESOTA</p>	
<p>AREA OF JURISDICTIONAL DETERMINATION REQUEST</p>			<p>FIGURE 2-7</p>

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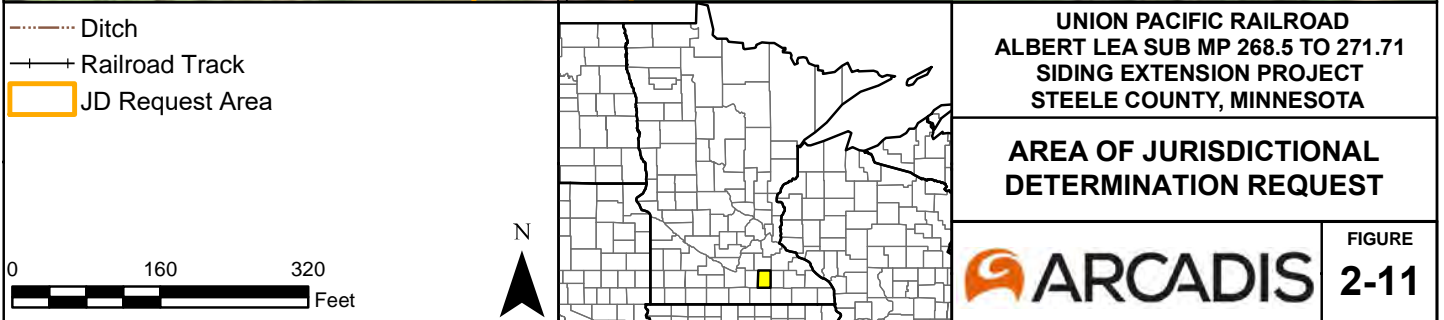


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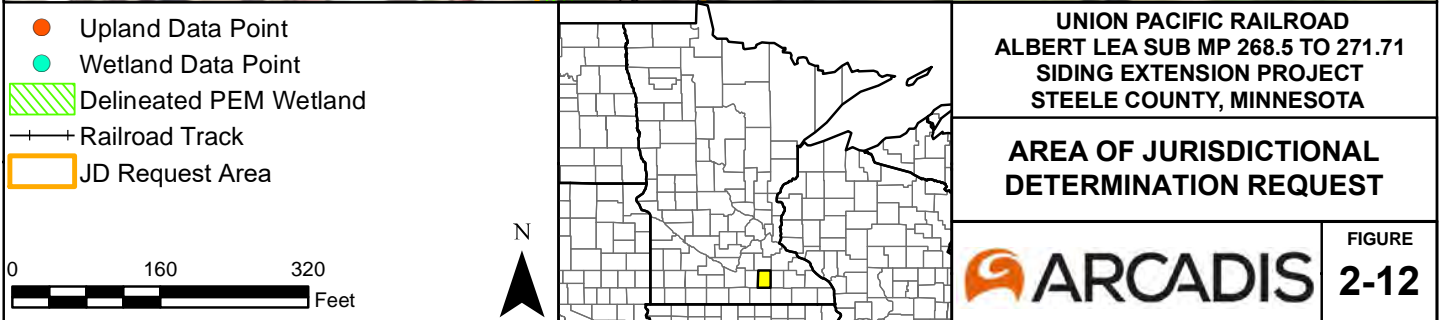


<ul style="list-style-type: none"> Upland Data Point Wetland Data Point Ditch Delineated PEM Wetland Railroad Track JD Request Area <p>0 160 320 Feet</p> <p>N</p>		<p>UNION PACIFIC RAILROAD ALBERT LEA SUB MP 268.5 TO 271.71 SIDING EXTENSION PROJECT STEELE COUNTY, MINNESOTA</p>	
<p>AREA OF JURISDICTIONAL DETERMINATION REQUEST</p>			<p>FIGURE 2-10</p>

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