DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT
2488 E 81ST STREET
TULSA, OK 74137-4290

CESWT-RO 22 August 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] SWT-2019-00689

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.

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[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.

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. DR-01, approximately 2,228 linear feet, **Jurisdictional**, Section 404

      ii. DR-02, approximately 432 linear feet, **Jurisdictional**, Section 404

      iii. DR-03, approximately 734 linear feet, **Jurisdictional**, Section 404

      iv. DR-04, approximately 400 linear feet, **Jurisdictional**, Section 404

      v. DR-05, approximately 176 linear feet, **Jurisdictional**, Section 404

      vi. DR-07, approximately 313 linear feet, **Jurisdictional**, Section 404

      vii. DR-08, approximately 53 linear feet, **Non-Jurisdictional**

      viii. DR-09, approximately 324 linear feet, **Jurisdictional**, Section 404

      ix. DR-10, approximately 521 linear feet, **Jurisdictional**, Section 404

      x. DR-11, approximately 290 linear feet, **Jurisdictional**, Section 404

      xi. DR-12, approximately 832 linear feet, **Non-Jurisdictional**

      xii. DR-13, approximately 379 linear feet, **Non-Jurisdictional**

      xiii. DR-14, approximately 153 linear feet, **Non-Jurisdictional**

      xiv. DR-15, approximately 25 linear feet, **Non-Jurisdictional**

      xv. DR-16, approximately 150 linear feet, **Non-Jurisdictional**

      xvi. Pond 3, approximately 0.27 acre, **Jurisdictional**, Section 404

      xvii. Pond 4, approximately 0.62 acre, **Non-Jurisdictional**,

      xviii. WET02, approximately 0.65 acre, **Non-Jurisdictional**

xix. WET03, approximately 1.10 acre, **Non-Jurisdictional**

xx. WET06, approximately 0.41 acre, **Jurisdictional**, Section 404

xxi. WET09, approximately 0.16 acre, **Jurisdictional**, Section 404

xxii. WET10, approximately 0.13 acre, **Non-Jurisdictional**

xxiii. WET13, approximately 0.14 acre, **Jurisdictional**, Section 404

xxiv. WET14, approximately 0.15 acre, **Jurisdictional**, Section 404

xxv. WET15, approximately 0.16 acre, **Non-Jurisdictional**

xxvi. WET17, approximately 0.13 acre, **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. _, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. This project site is located within the USGS HUC 8 (11110104) Robert S. Kerr Reservoir watershed, more generally in the watershed of the Lower Arkansas River (USGS HUC 4 1111). In Sections 22 & 23 of Township 11 North Range 24 East, the 62-acre site is primarily abandoned cattle pasture with some forested areas. Tree clearing activities in preparation for the landfill expansion project occurred in the fall and winter of 2020 leaving some areas with rough terrain. The study area is located 2.5 miles east of Sallisaw, west of N4660 Road in Sequoyah County, Oklahoma (Lat/Long: 35.411739, -94.755911). This study area has been reviewed previously under 2 separate AJDs. One being completed March 19, 2021 under the Navigable Waters Protection Rule and one being completed utilizing the Rapanos guidance on March 17, 2022. Each previous AJD identified jurisdictional and non-jurisdictional features within the study area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Jurisdictional waters identified within the study area contribute downstream flow to the Arkansas River, a traditionally navigable water utilized for interstate commerce.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS Jurisdictional waters within the study area flow into Wolf Creek, a relatively permanent water (RPW), that flows from the study area east into Big Skin Bayou, approximately 5 river miles downstream of the project site, that continues flows southeast to the confluence of the Arkansas River approximately 16.5 river miles downstream, a navigable water.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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. 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

[5] 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.

d. Impoundments (a)(4):

Pond 3 (0.27 acre) is a man-made impoundment constructed on channel of RPWs DR-11 and DR-02.

e. Tributaries (a)(5):

DR-01 is an intermittent tributary and relatively permanent water. The 2,285 linear feet of stream channel on the project site known as Wolf Creek, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW.

DR-02 is an intermittent tributary and relatively permanent water. The 432 linear feet of stream channel on the project site exhibits a clear OHWM and receives flow from jurisdictional impoundment Pond 3. DR-02 flows into DR-01, a RPW, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW.

DR-03 is an intermittent tributary and relatively permanent water. The 734 linear feet of stream channel on the project site contributes flow to DR-01 a RPW, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW.

DR-04 is an intermittent tributary and relatively permanent water. The 400 linear feet of stream channel on the project site contributes flow to DR-01, a RPW, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW.

DR-05 is an intermittent tributary and relatively permanent water. The 176 linear feet of stream channel on the project site contributes flow to DR-01, a RPW, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW. DR-05 receives flow from channels offsite originating from two, man-made impoundments.

DR-07 is an intermittent tributary and relatively permanent water. The 313 linear feet of stream channel on the project site contributes flow to DR-01, a RPW, that flows from the study area east into Big Skin Bayou, that

continues flows southeast to the confluence of the Arkansas River, a TNW. DR-07 is a highly incised channel that originates at an upland head cut.

DR-09 is an intermittent tributary and relatively permanent water. The 324 linear feet of stream channel on the project site contributes flow to DR-01, a RPW, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW. DR-09 originates from the eastern most culvert under the landfill entrance road, contributing flow from north of the project site.

DR-10 is an intermittent tributary and relatively permanent water. The 521 linear feet of stream channel on the project site contributes flow to DR-01, a RPW, through jurisdictional wetland WET06, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW.

DR-11 is an intermittent tributary and relatively permanent water. The 290 linear feet of stream channel on the project site contributes flow through the outfall of Pond 3 (DR-02), downstream to DR-01, a RPW, that flows from the study area east into Big Skin Bayou, that continues flows southeast to the confluence of the Arkansas River, a TNW.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7):

WET06 is a 0.41 acre adjacent wetland with a relatively permanent continuous surface connection DR-01, a RPW. WET06 is a wetland receiving surface flow that originates north of the project site and groundwater seep from an abutting hillside.

WET09 is a 0.16 acre adjacent wetland that exhibits a continuous surface connection to DR-01 via non-relatively permanent flow through DR-16, a non-RPW of approximately 150 linear feet.

WET13 is a 0.14 acre adjacent wetland with a continuous surface connection to DR-01. WET13 is abutting DR-01, an RPW.

WET14 is a 0.15 acre adjacent wetland with a continuous surface connection to DR-01. WET 14 is abutting DR-01, an RPW.

WET17 is a 0.13 acre adjacent wetland that exhibits a continuous surface connection to DR-01 via non-relatively permanent flow through DR-15, a non-RPW of approximately 25 linear feet.

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").[6] 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.

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*.

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

[6] 51 FR 41217, November 13, 1986.

non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

DR-08 is an ephemeral drainage feature of approximately 53 linear feet in length that does not contribute relatively permanent flow to a downstream TNW.

DR-12 is an 832 linear foot long ephemeral drainage feature that does not contribute relatively permanent flow downstream to a TNW. DR-12 conveys runoff from the adjacent landfill through Pond 4 during and immediately following a rain event.

DR-13 is a 379 linear foot long ephemeral drainage that is located upstream of non-jurisdictional, non-adjacent wetland WET03. DR-13 only contributes flow during and after rain events for a short duration.

DR-14 is a 153 linear foot long ephemeral drainage that is also located upstream of non-jurisdictional, non-adjacent wetland WET03. DR-14 only contributes flow during and after rain events for a short duration.

DR-15 is a 25 linear foot long ephemeral drainage that acts as a continuous surface connection between jurisdictional wetland WET17 and jurisdictional RPW DR-01. DR-15 is ephemeral in nature as flows are only in short durations during and after rain events.

DR-16 is a 150 linear foot long ephemeral drainage that acts as a continuous surface connection between jurisdictional wetland WET09 and jurisdictional RPW DR-01. DR-16 is ephemeral in nature as flows are only in short durations during and after rain events.

WET02 is an emergent wetland approximately 0.65 acre in size. WET02 extends beyond the study area of this project to the southeast. No continuous surface connection was observed to DR-01 or another RPW downstream. Land clearing activity that occurred prior to this evaluation likely altered the natural conveyance of WET02 but a continuous surface connection could not be confirmed.

WET03 is an emergent wetland approximately 1.10 acres in size. WET03 extends beyond the study area of this project to the southeast. No continuous surface connection was observed to DR-01 or another RPW downstream. Land clearing activity that occurred prior to this evaluation

likely altered the natural conveyance of WET03 but a continuous surface connection could not be confirmed.

WET10 is an emergent wetland approximately 0.13 acre in size. WET10 is geographically isolated with a defined boundary. WET10 is not connected downstream to either a non-RPW or RPW by a continuous surface connection. WET10 is non-adjacent, thus having no connectivity to an RPW via either a jurisdictional or non-jurisdictional water.

WET15 is an emergent wetland approximately 0.16 acre in size. WET15 is geographically isolated with a defined boundary. WET15 is not connected downstream to either a non-RPW or RPW by a continuous surface connection. WET15 is non-adjacent, thus having no connectivity to an RPW via either a jurisdictional or non-jurisdictional water.

Pond 4 is a 0.62 acre man-made impoundment that was not constructed on-channel of a relatively permanent water. Pond 4 does not have a nexus to interstate or foreign commerce and was likely constructed to provide water to livestock.

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. Field Investigation (January 11, 2024)

   b. Google Earth Aerial Imagery (1995-2023)

   c. USGS Topographic Map Layer (USA Topo Maps, accessed January 16, 2024)

   d. SWT-2019-00689 Approved Jurisdictional Determination (March 19, 2021)

   e. SWT-2019-00689 Approved Jurisdictional Determination (May 17, 2022)

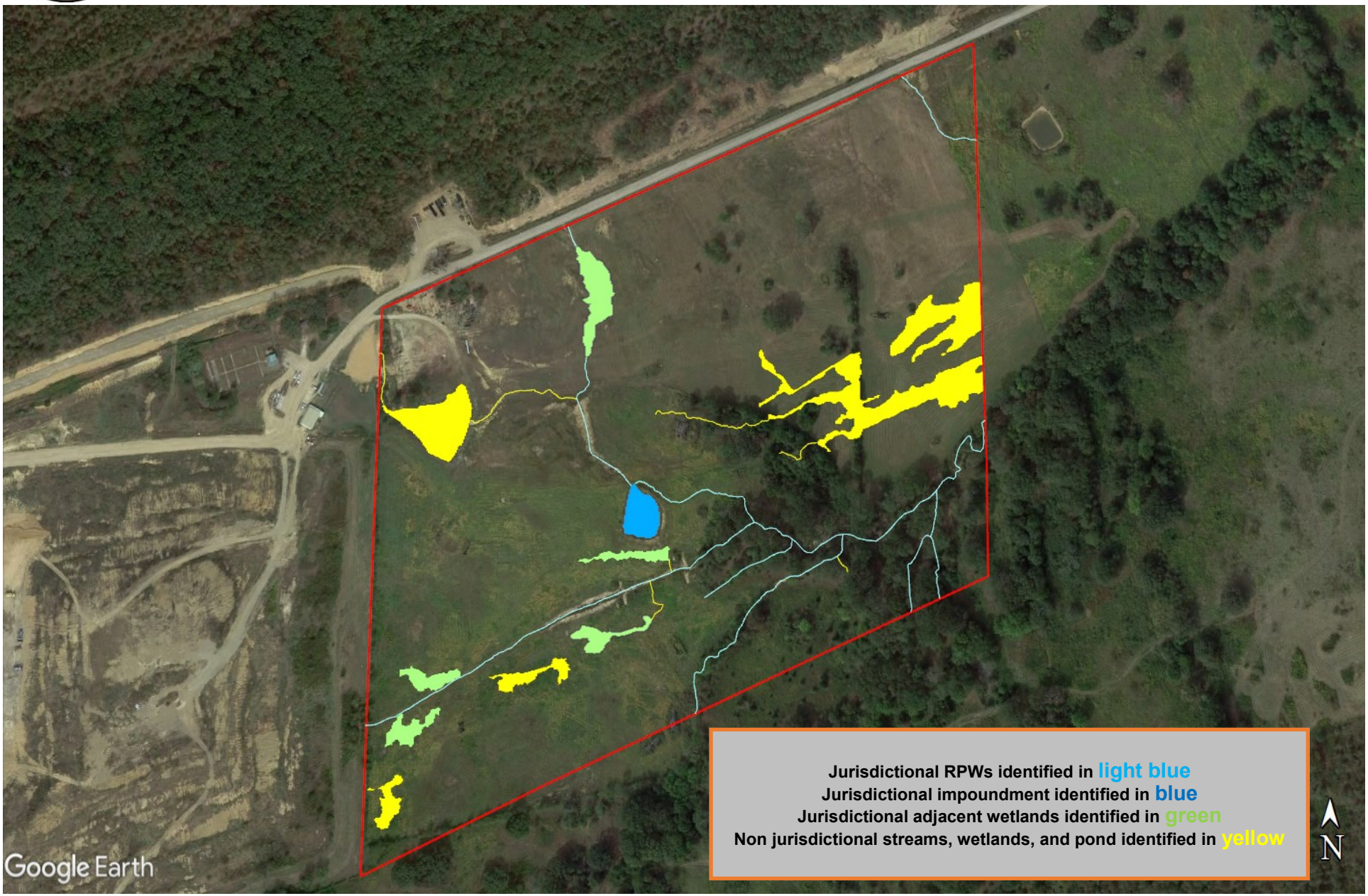
   f. Preliminary WOTUS Assessment & Wetland Delineation Report (May 2023)

10. OTHER SUPPORTING INFORMATION. N/A

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.

SWT-2019-00689
Approved Jurisdictional Determination



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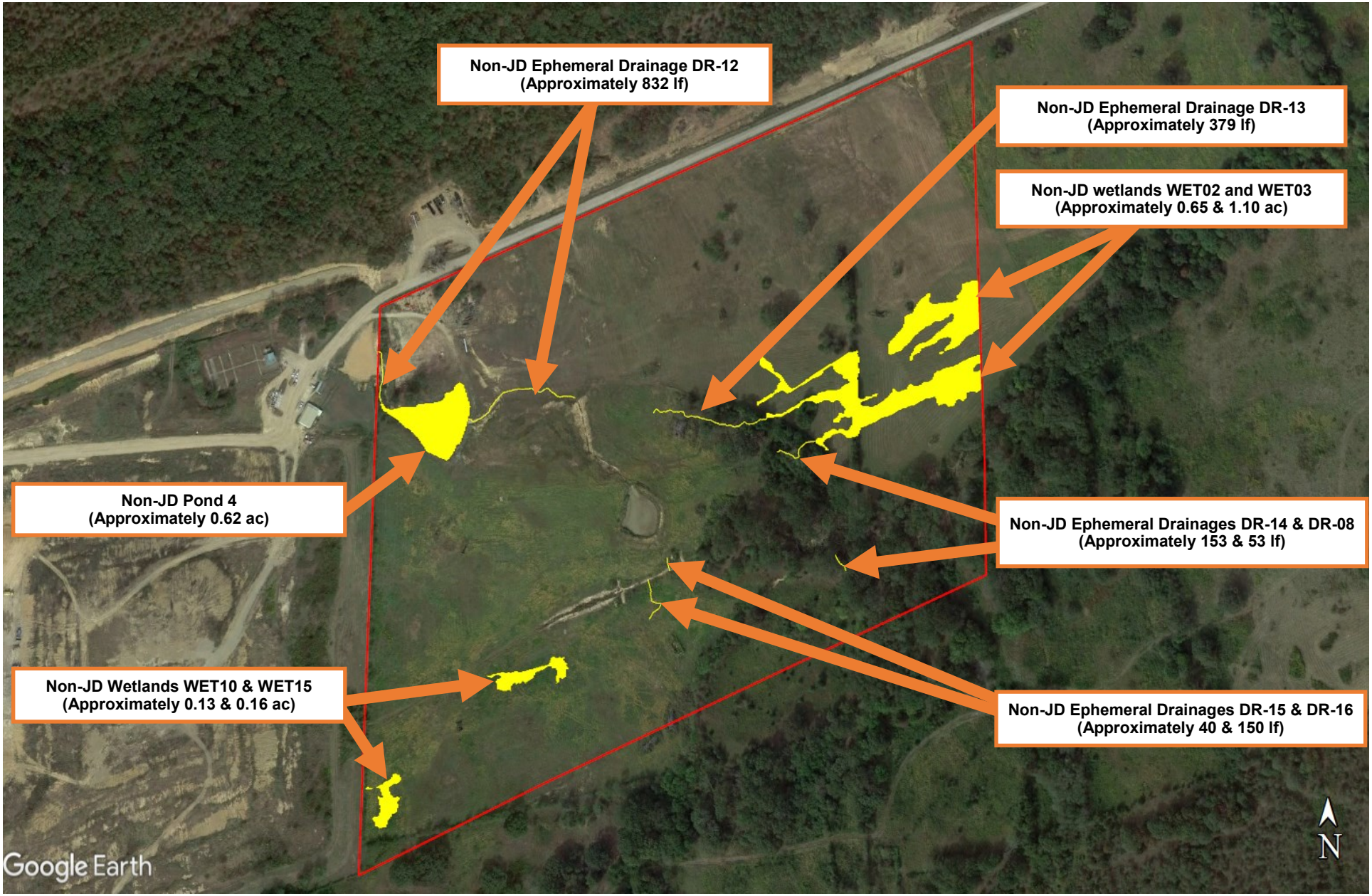
Approved Jurisdictional Determination



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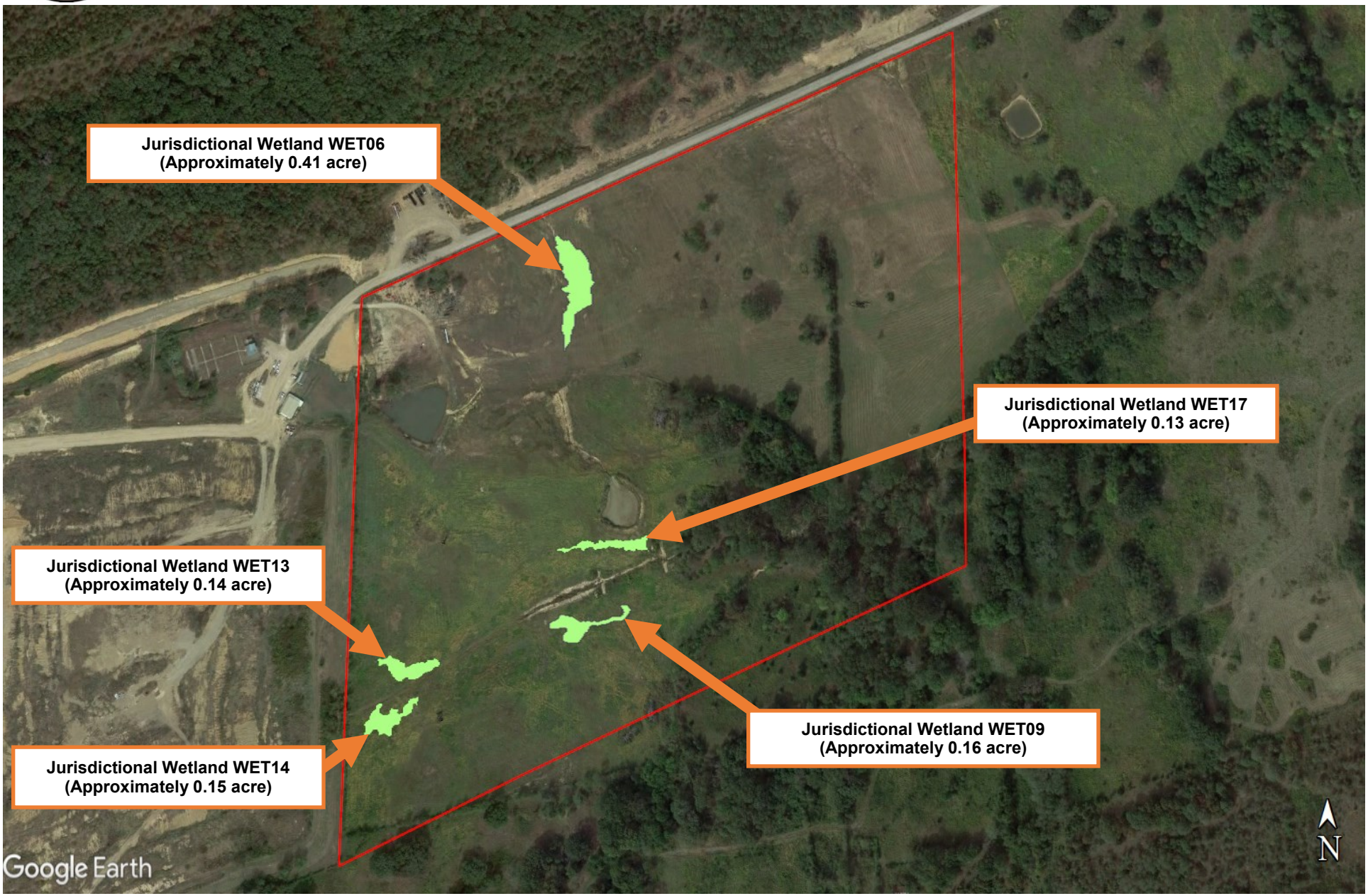

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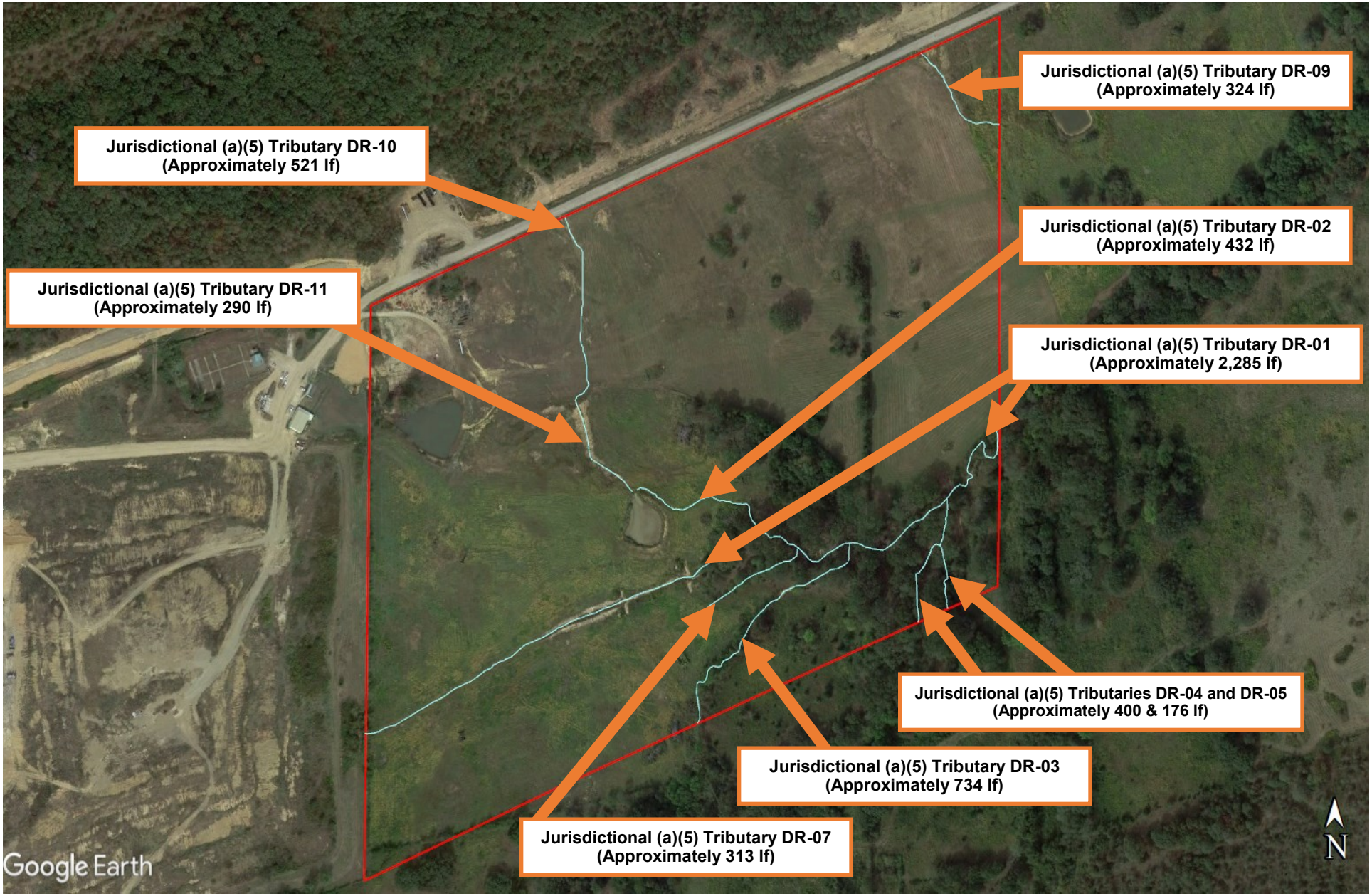

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