



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

CESWT-RO

5 April 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-2023-00128 (MFR 1 of 1)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 amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this

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.

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decision, the Amended 2023 Rule is not applicable [in the state](#) of Oklahoma 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. S1, Snake Creek, approximately 0.140 acre (204 lf), **Jurisdictional**, Section 404 CWA
 - ii. S2, Unnamed tributary of Snake Creek, approximately 0.057 acre (309 lf), **Jurisdictional**, Section 404 CWA
 - iii. S3, approximately 0.022 acre (324 lf), **Non-jurisdictional**, Section 404/10
 - iv. S4 approximately 0.279 acre (2,187 lf), **Jurisdictional**, Section 404 CWA
 - v. S5 approximately 0.022 acre (475 lf), **Non-jurisdictional**, Section 404/10
 - vi. S6 approximately 0.01 acre, **Non-jurisdictional**, Section 404/10
 - vii. S7 Cato Creek approximately 0.468 acre (1,020 lf), **Jurisdictional**, Section 404 CWA
 - viii. S8 approximately 0.234 acre (600 lf), **Non-jurisdictional**, Section 404/10
 - ix. S9 approximately 0.03 acre, **Non-jurisdictional**, Section 404/10
 - x. S10 approximately 0.02 acre, **Non-jurisdictional**, Section 404/10

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).

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- 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. [Appendix A "Pre-2015 Regulatory Regime:] The agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until further notice. Additionally, the agencies will be interpreting the phrase "waters of the United States" consistent with the Supreme Court's decision in *Sackett*.
 - f. [USGS 1:24K Quad Name: Blackgum, OK]
3. REVIEW AREA. [The review area is approximately 6 acres (Latitude 35.620855, -94.964067 Longitude (NAD83) at the center of the review area, Sequoyah County, Oklahoma.]
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Illinois River. Cato Creek and Snake Creek flow into Tenkiller Lake (Illinois River impounded).
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The unnamed tributaries of Snake Creek and Cato Creek flow into Lake Tenkiller (Illinois River). Illinois River is a 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 Lake Tenkiller (Illinois River) 12,900 surface acres.

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

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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):
 - i. S-1 Snake Creek, 0.18 Review Area, 35.637792 -94.960529, 30 wide at 4 feet (ft) depth (0.140 Acre) 204 LF, Sequoyah, OK. The stream channel (RPW) flows directly into a TNW, Lake Tenkiller (Illinois River).
 - ii. S-2 unnamed tributary of Snake Creek, 0.11 Review Area, 35.634990 -94.962101, 8 wide at 2 ft depth (0.057 Acre) 309 LF Sequoyah, OK. The stream channel (RPW) flows directly into Snake Creek which flows directly into a TNW, Lake Tenkiller (Illinois River).
 - iii. S-4 unnamed tributary of Snake Creek, 0.35 Review Area, 35.627719 - 94.962549, 4-6 wide at 1-2 ft depth (0.279 Acre) 2,187 LF, Sequoyah, OK. The stream channel (RPW) flows directly into Snake Creek which flows directly into a TNW, Lake Tenkiller (Illinois River).

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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iv. S-7 Cato Creek, 0.49 (Review Area), 35.616958 -94.961629, 20 wide at 3 ft depth 0.468 Acre) 1,020 LF, Sequoyah, OK. The stream channel (RPW) flows directly into a TNW, Lake Tenkiller (Illinois River).

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]

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*. [N/A]

⁸ 51 FR 41217, November 13, 1986.

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- 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).

S-3 Ephemeral feature (**Non-RPW**), 0.06 Review Area, 35.633178 -94.962885, 3ft wide at 3 ft depth (0.022 Acre) 324 LF, Sequoyah, OK. This is an ephemeral feature with a very steep gradient within an upland ravine/valley. No flowing or pooled water present site evidence indicated flow only during extreme precipitation events.

S-5 Ephemeral feature (**Non-RPW**), 0.05 Review Area, 35.628927 -94.963804, 2ft wide at 1 ft depth (0.022 Acre) 475 LF, Sequoyah County, OK. This is an ephemeral feature with a very steep gradient within an upland ravine/valley. No flowing or pooled water present site evidence indicated flow only during extreme precipitation events.

S-6 Ephemeral feature (**Non-RPW**), 0.01 (Review Area), 35.626636 -94.961951, Sequoyah County, OK. This is an ephemeral feature with a very steep gradient within an upland ravine/valley. No flowing or pooled water present site evidence indicated flow only during extreme precipitation events.

S-8 Ephemeral feature (**Non-RPW**), 0.28 (Review Area), 35.613041 - 94.964804, 17 ft wide at 3 ft depth (0.234 Acre) 600 LF, Sequoyah County, OK. The ephemeral erosional feature of Cato Creek was not flowing during the visit. Water (small pools) appear to remain after rain events (as noted within delineation report). Per the APT, weather conditions were normal during delineation site work. The gradient ranges from moderate to steep. Site visit evidence indicates this feature only flows for a short duration in direct response to extreme precipitation events.

S-9 Ephemeral feature (**Non-RPW**), 0.03 (Review Area), 35.613041 -94.963998, Sequoyah County, OK. This is an ephemeral feature with a very steep gradient within an upland ravine/valley. No flowing or pooled water present site evidence indicated flow only during extreme precipitation events.

S-10 Ephemeral feature (**Non-RPW**), 0.02 (Review Area), 35.622017 - 94.959851, Sequoyah County, OK. This is an ephemeral feature with a very

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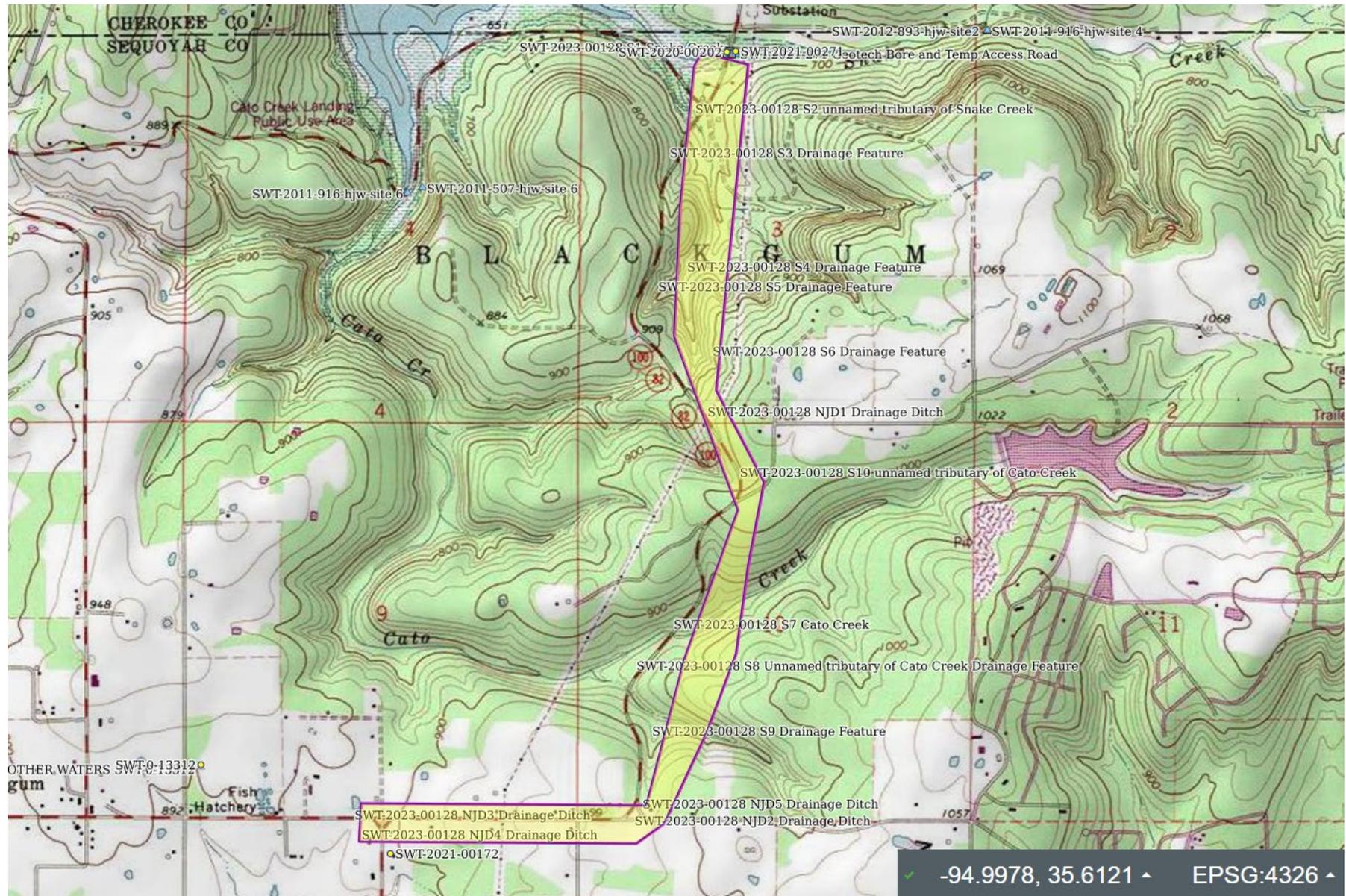
SUBJECT: Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SWT-2023-00128]

steep gradient within an upland ravine/valley. No flowing or pooled water present site evidence indicated flow only during extreme precipitation events.

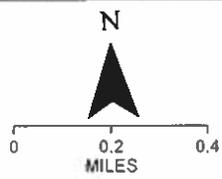
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Site visit on November 16, 2023, field visit and office evaluation was conducted March 7, 2024
 - b. ORM database March 7, 2024.
 - c. Google Earth March 7, 2024
 - d. Oklahoma Department of Transportation, Mr. Jared Bechtol and HDR Engineering, Inc, provided a delineation and proposed Jurisdiction Determination of Waters of the United States for State Highway 82 JP 30745(04) for December 2023 and updated in February 2024.
10. OTHER SUPPORTING INFORMATION. Oklahoma Department of Transportation provided a Waters and Wetlands Evaluation Report for Sequoyah/Cherokee County for JP 30574(04) and 27116(04) on SH-82, beginning at JCT of SH-100 & SH-82 and extending east and north approximately 3.0 miles dated June 17, 2020
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-2023-00128 AJD Request, JP 30574(04) and JP 27116(04) SH100/SH-82 Junction, Cato Creek Blackgum, Sequoyah County)

Applicant: Joe Brutsche (Environmental Project Manager, Oklahoma Department of Transportation) (Agent: Jared Bechtol (ODOT))



SWT-2023-00128 AJD State Highway 82, JP 30574(04) Sequoyah and Cherokee County, Oklahoma for water of the United States.



 STUDY AREA

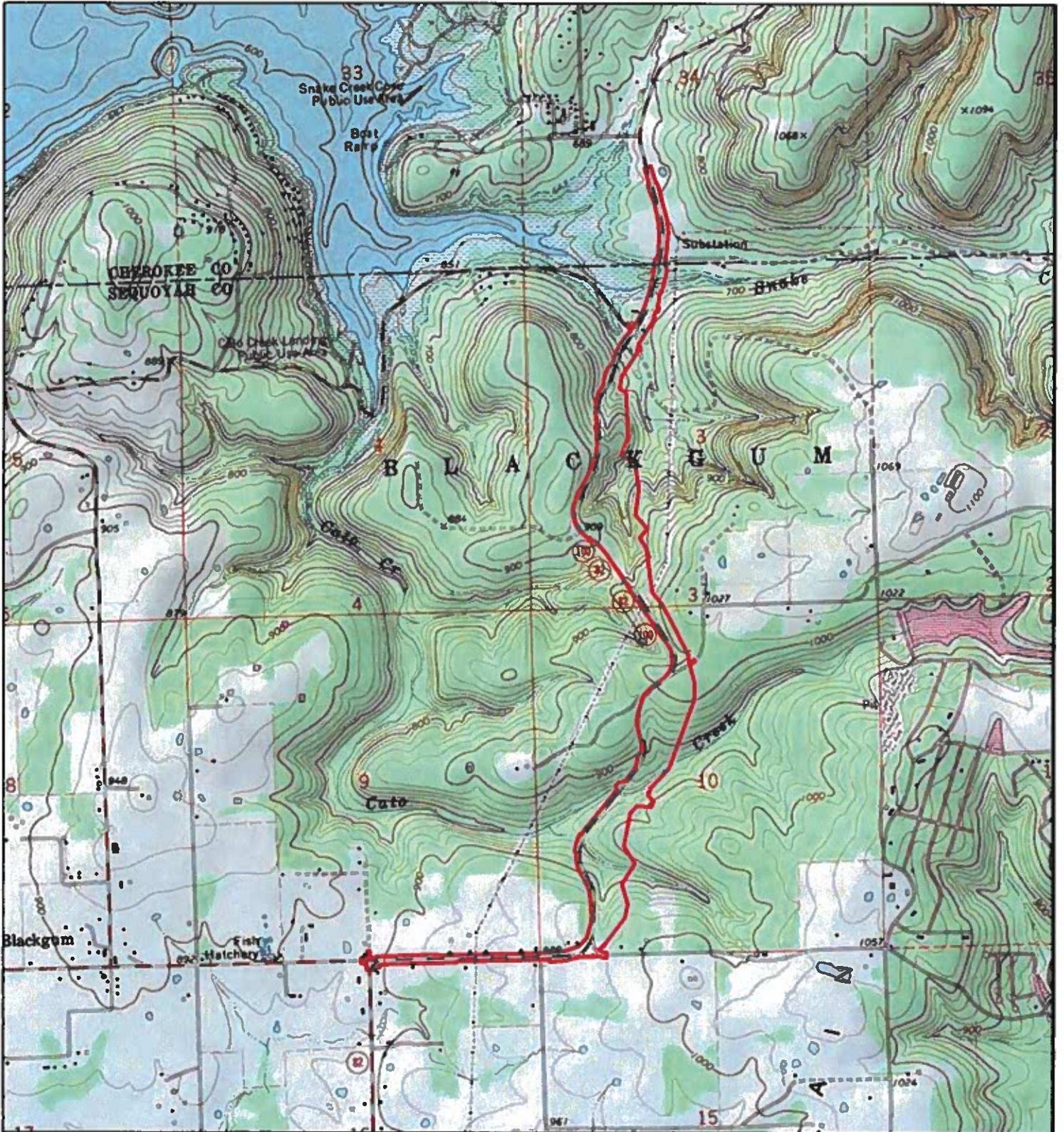
AERIAL MAP

STATE HIGHWAY 82
 JP 30574(04)
 SEQUOYAH/CHEROKEE
 COUNTY, OKLAHOMA



FEB 2024

FIGURE 2



N



STUDY AREA

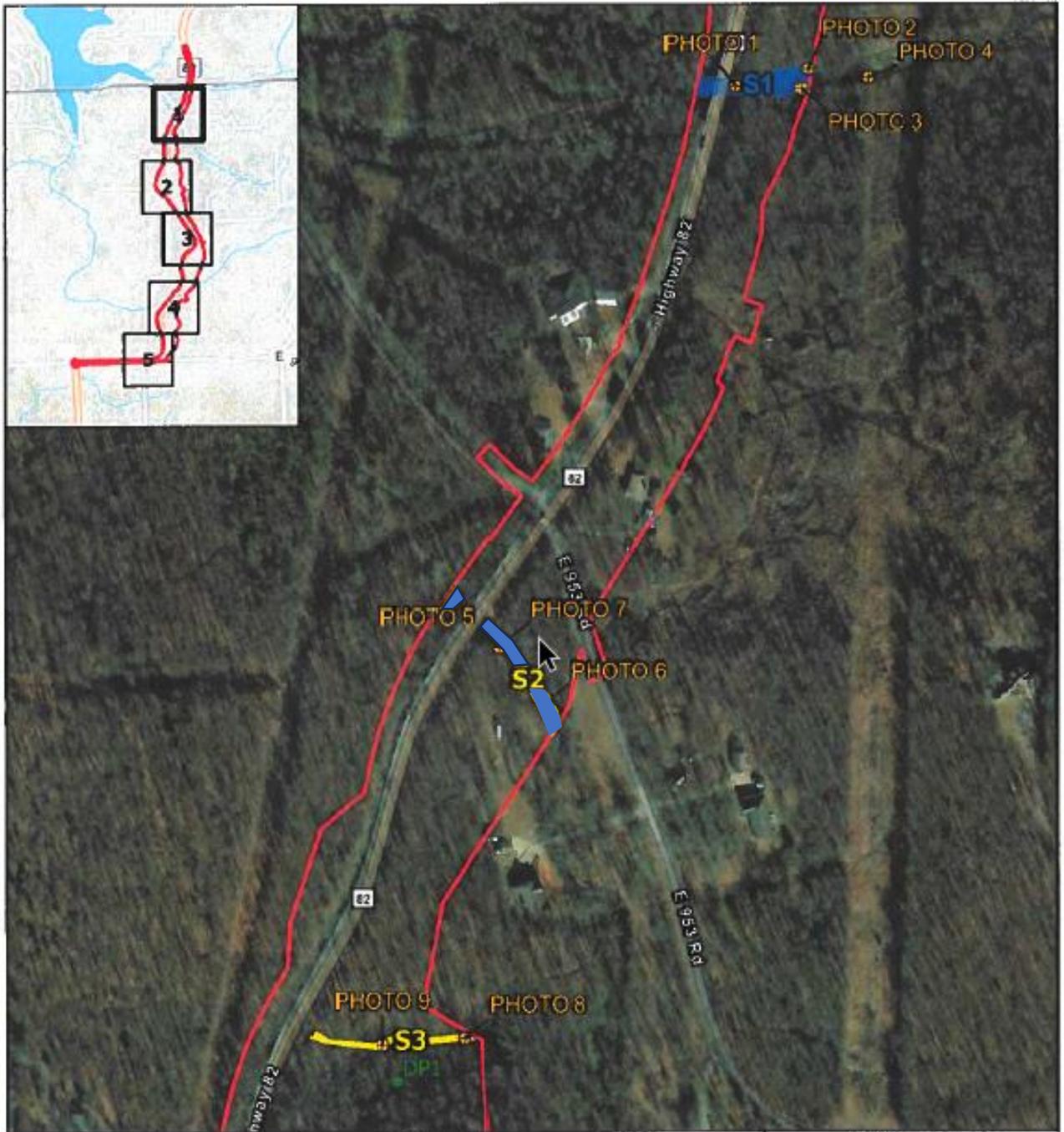
TOPOGRAPHIC MAP

STATE HIGHWAY 82
 JP 30574(04)
 SEQUOYAH/CHEROKEE
 COUNTY, OKLAHOMA



FEB 2024

FIGURE 3



- WATERS OF THE U.S.**
- █ INTERMITTENT STREAM
- NOT WATERS OF THE U.S.**
- █ NON-JURISDICTIONAL STREAM
 - DATA POINT
 - ⊕ PHOTO POINT
 - STUDY AREA

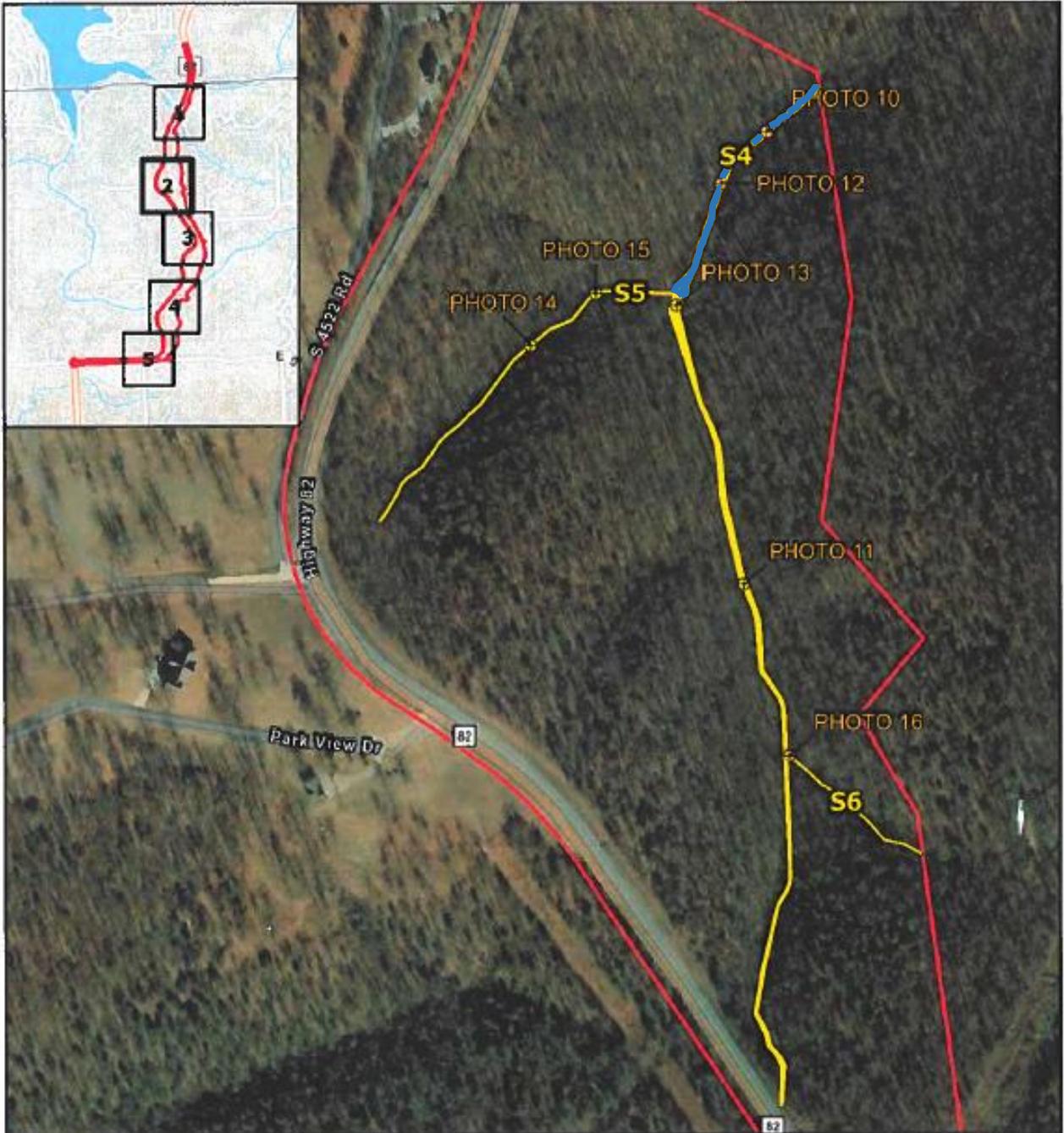
WATERS OF THE U.S.

STATE HIGHWAY 82
 JP 30574(04)
 SEQUOYAH COUNTY,
 OKLAHOMA



FEB 2024

FIGURE 7-1



- WATERS OF THE U.S.**
- INTERMITTENT STREAM
- NOT WATERS OF THE U.S.**
- NON-JURISDICTIONAL STREAM
 - DATA POINT
 - ⊕ PHOTO POINT
 - STUDY AREA

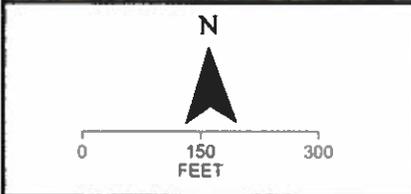
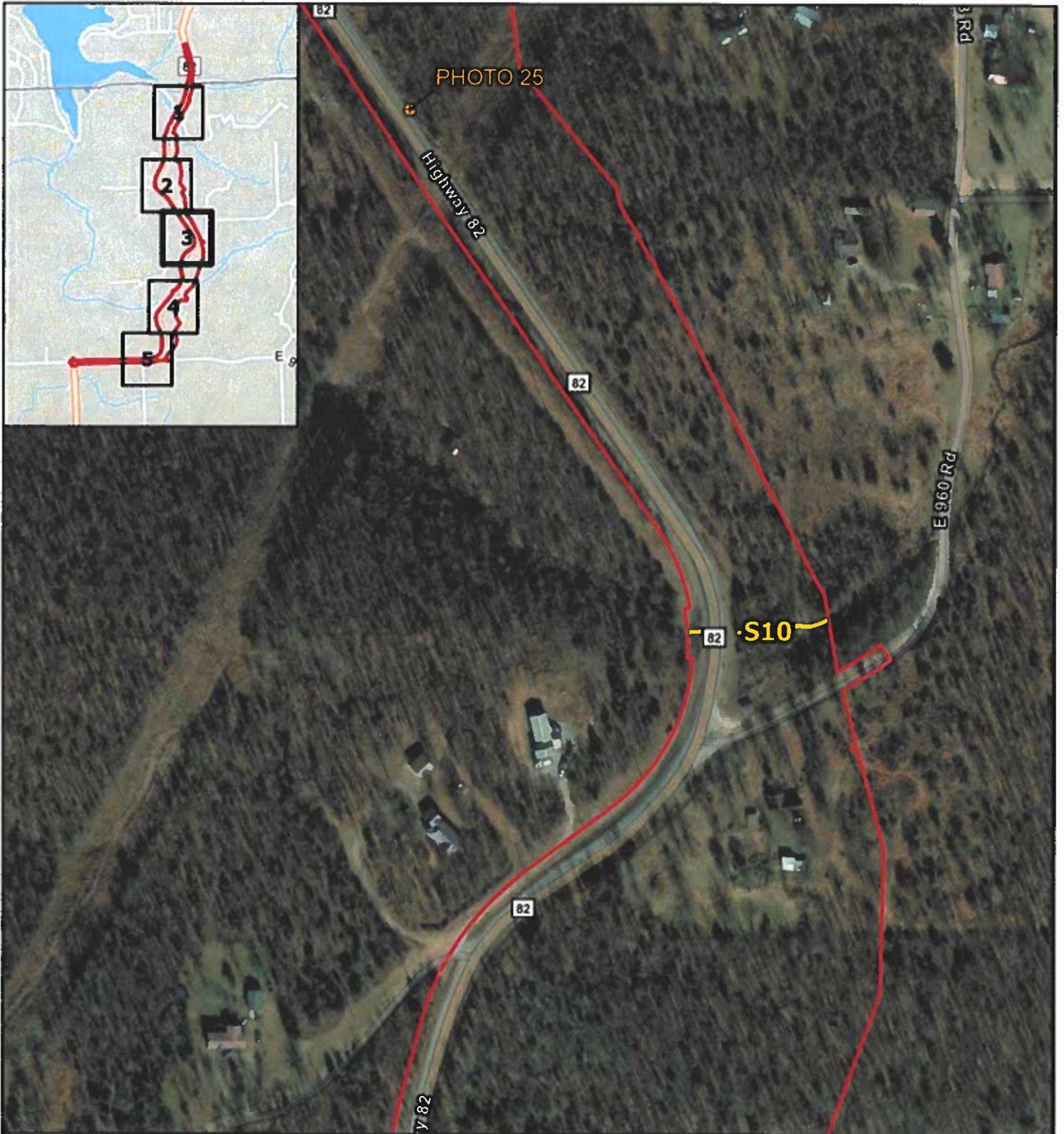
WATERS OF THE U.S.

STATE HIGHWAY 82
 JP 30574(04)
 SEQUOYAH COUNTY,
 OKLAHOMA



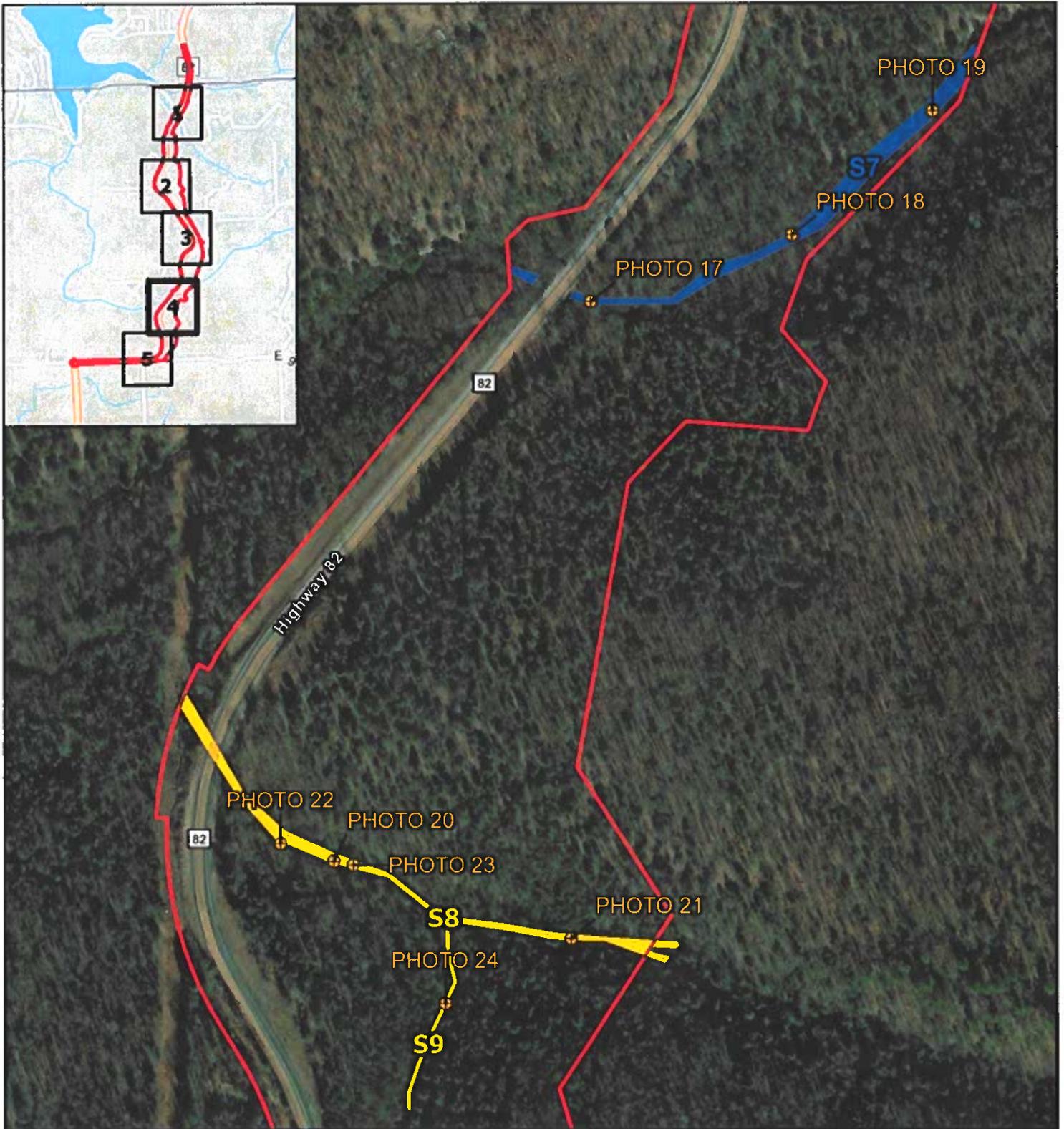
FEB 2024

FIGURE 7-2

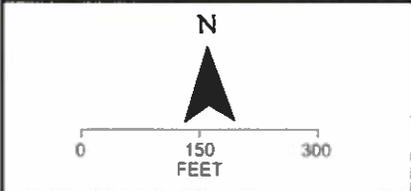
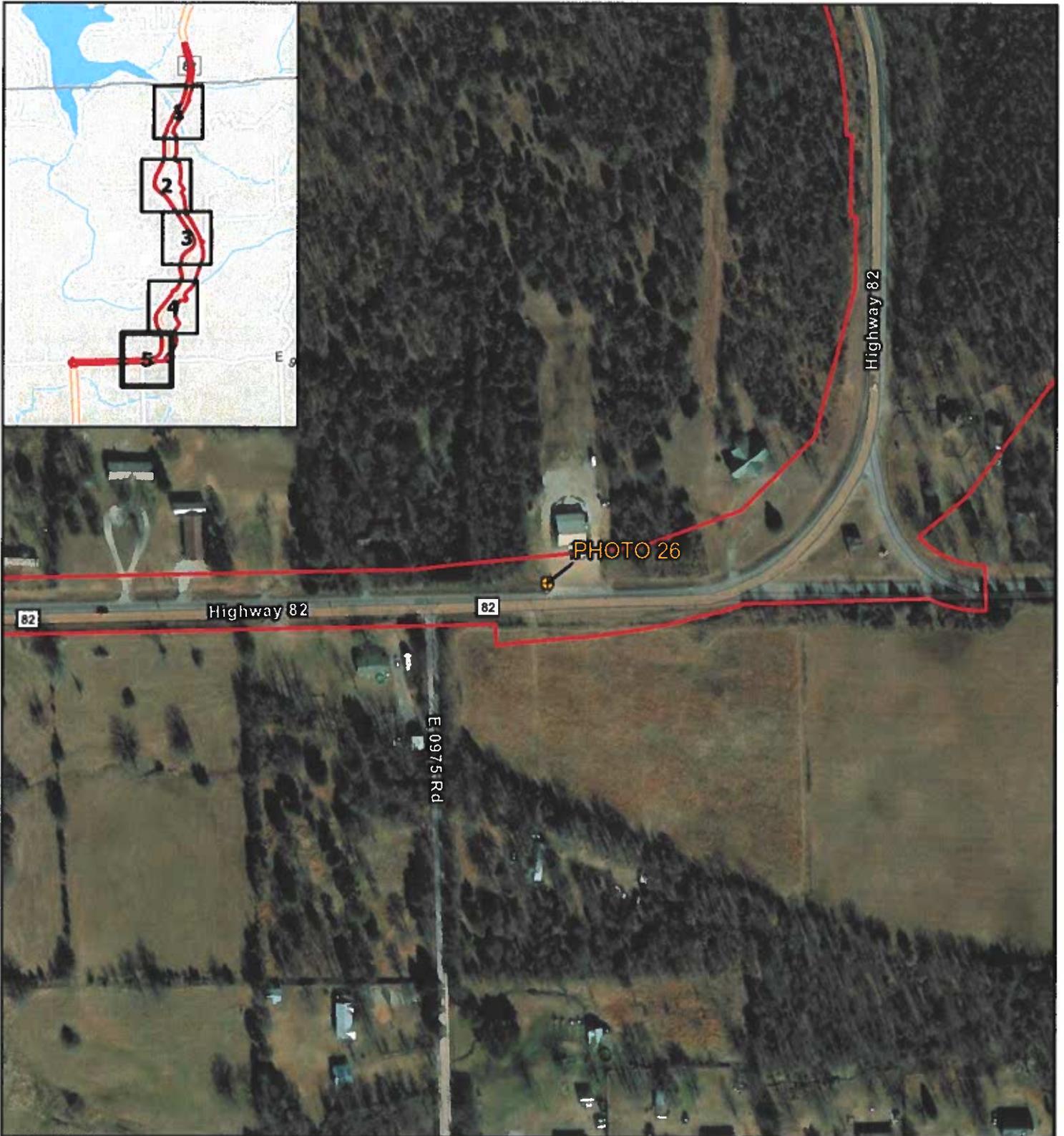


WATERS OF THE U.S.	
	INTERMITTENT STREAM
NOT WATERS OF THE U.S.	
	NON-JURISDICTIONAL STREAM
	DATA POINT
	PHOTO POINT
	STUDY AREA

WATERS OF THE U.S.	
STATE HIGHWAY 82 JP 30574(04) SEQUOYAH COUNTY, OKLAHOMA	
FEB 2024	FIGURE 7-3



<p>N</p> <p>0 150 300 FEET</p>	<p>WATERS OF THE U.S.</p> <p> INTERMITTENT STREAM</p> <p>NOT WATERS OF THE U.S.</p> <p> NON-JURISDICTIONAL STREAM</p> <p> DATA POINT</p> <p> PHOTO POINT</p> <p> STUDY AREA</p>	<p>WATERS OF THE U.S.</p> <p>STATE HIGHWAY 82 JP 30574(04) SEQUOYAH COUNTY, OKLAHOMA</p>	
		<p>FEB 2024</p>	<p>FIGURE 7-4</p>



WATERS OF THE U.S.

- INTERMITTENT STREAM

NOT WATERS OF THE U.S.

- NON-JURISDICTIONAL STREAM
- DATA POINT
- ⊕ PHOTO POINT
- STUDY AREA

WATERS OF THE U.S.

STATE HIGHWAY 82
 JP 30574(04)
 SEQUOYAH COUNTY,
 OKLAHOMA



FEB 2024

FIGURE 7-5