



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

CESPK-RDC-N

28 MAR 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 SPK-2023-00243

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

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),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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 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.

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1. SUMMARY OF CONCLUSIONS. Aquatic resources in the review area flow to the Smoke Creek Desert playa, within the Smoke Creek hydrographic basin, which lacks a surface connection to an interstate water, traditionally navigable water, or territorial seas.

2. REFERENCES.

a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004, ("2023 Rule"), 18 January 2023.

b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 6194, 8 September 2023.

c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322, 2023.

d. CESPK, memorandum for record (Navigable-in-Fact Determination for the Truckee River and Pyramid Lake (ID SPK-2007-01872)), 11 June 2008.

3. REVIEW AREA. The 3,425-acre review area is located in Washoe County, Nevada, about 13 miles north of Gerlach, Nevada (Latitude 40.841046°N, Longitude 119.517533° W) (Enclosure 1). No previous approved jurisdictional determinations are associated with the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is Pyramid Lake, approximately 45 miles south of the review area (reference 2.d). However, no aquatic resources within the survey area have a downstream connection to Pyramid Lake or any TNW, Territorial Seas, or Interstate Waters.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. No aquatic resources within the survey area have a downstream connection or flow path to any TNW, Territorial Seas, or Interstate Waters. Aquatic resources in the review area flow to Smoke Creek Desert playa which has no downstream connection to (a)(1) waters.

6. SECTION 10 JURISDICTIONAL WATERS⁵: There are no 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 1899.⁶

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

7. SECTION 404 JURISDICTIONAL WATERS: There are no aquatic resources within the review area that meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*.

- 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. None of the aquatic resources within the review area are jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended.

Table 1: Non-relatively permanent streams.

Channel ID	Length (linear feet)	Acres	Local Water Way
Channel 2b	7371.5	0.51	Deep Hole Spring Creek
Channel 2c	3880	0.23	Deep Hole Spring Creek
Channel 3.5	4315.7	0.62	Deep Hole Spring Creek
Channel 3a	5089.3	0.42	Deep Hole Spring Creek
Channel 3b	1703.3	0.17	Deep Hole Spring Creek
Channel 3c	2403	0.17	Deep Hole Spring Creek
Channel 4a	5031.3	0.39	Deep Hole Spring Creek
Channel 4b	4091.6	1.73	Deep Hole Spring Creek

"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.

⁶ 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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Channel 4d	2268.3	0.1	Deep Hole Spring Creek
Channel 7	9300.7	0.61	Deep Hole Spring Creek
Channel 8	4625.6	0.37	Deep Hole Spring Creek
Channel 9	2288.8	0.32	Deep Hole Spring Creek

Table 2: Wetlands adjacent to non-relatively permanent streams.

Wetland Name	Acres	Wetland Type	Local Waterway
MtnView_WW01	0.04	PSS	Adjacent to Channel 7
MtnView_WW02	0.05	PSS	Adjacent to Channel 4b

Table 3: Relatively permanent water that is not an (a)(3) tributary.

Name	Acres	Water Type	Local Waterway
Granite Mountain Reservoir	0.96	L1UB	Deep Hole Spring Creek

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. Office Evaluation conducted between December 2023 and January 2024.
- b. Aquatic Resources Delineation Report for the Mountain View Exploration Project”, [REDACTED] (December 2023).
- c. Photographs: Provided in the *Aquatic Resources Delineation Report*, prepared by [REDACTED], from field visit occurring from June 12-15, 2022.
- d. U.S. Fish and Wildlife Service. (n.d.). National Wetland Inventory. Project area: Mountain View Project Source imagery date: 2013. Washington, D.C.: U.S. Fish and Wildlife Service, Dept. of the Interior. Created on August 5, 2022, by [REDACTED] [REDACTED] from Wetland Mapper: <https://www.fws.gov/wetlands/data/mapper.htm>
- e. USDA NRCS Soil Survey: NRCS. (2023, September 11). Custom Soil Resource Report for Washoe County, Nevada, Central Part-Mountain View AJD SPK-2023099243. Natural Resources Conservation Service, U.S. Dept. of Agriculture. Retrieved by [REDACTED] from <https://websoilsurvey.sc.egov.usda.gov/App/HomePage.htm>

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f. 3DEP Hillshade, 3DEP Digital Elevation Model Map: LiDAR Map (SPK-2023-00243). Generated by the U.S. Army Corps of Engineers, December 18, 2023. Using ArcGISPro.

g. NHD Flowline (USGS 2023): NHD Flow Line Map (1 of 3) – SPK-2023-00243 [map]. 1:16,000. Generated by Army Corps of Engineers, January 12, 2024. Using ArcGIS Pro.

h. NHD Flowline (USGS 2023): NHD Flow Line Map (2 of 3) – SPK-2023-00243 [map]. 1:20,000. Generated by Army Corps of Engineers, January 12, 2024. Using ArcGIS Pro.

i. NHD Flowline (USGS 2023): NHD Flow Line Map (3 of 3) – SPK-2023-00243 [map]. 1:20,000. Generated by Army Corps of Engineers, January 12, 2024. Using ArcGIS Pro.

j. Digital Globe: *October 2014 – (SPK-2023-00243), October 2, 2014, Imagery [map]*. 1:5,000. Generated by the Army Corps of Engineers, on January 26, 2024.

k. Digital Globe: *August 2022 – (SPK-2023-00243), August 29, 2022, Imagery [map]*. 1:4,000. Generated by the Army Corps of Engineers, on January 26, 2024.

l. Digital Globe: *November 2016 – (SPK-2023-00243), November 26, 2016, Imagery [map]*. 1:4,000. Generated by the Army Corps of Engineers, on January 26, 2024.

m. U.S. Geological Survey. (1959). USGS 1:250,000-scale. Lovelock, Nevada; California.

n. U.S. Geological Survey. (1984). USGS 1:250,000-scale. Kumiva Peak, Nevada – California. 40119-A1-TM-100 1984: U.S. Geological Survey.

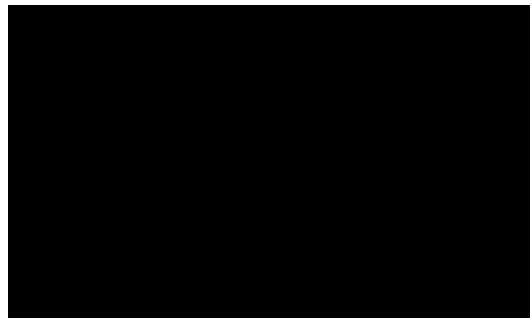
10. OTHER SUPPORTING INFORMATION. There are several non-relatively permanent aquatic resources located within the project area, the non-relatively permanent features flow into Deep Hole Spring Creek, which flows southwest into Smoke Creek Playa, which has no downstream connection to a downstream traditionally navigable water, interstate water, or the territorial sea. There are three wetlands that are adjacent to non-relatively permanent waters. Granite Mountain Reservoir, an impounded relatively permanent water, was created through impounding Deep Hole Spring Creek, a relatively permanent water with no connection to a traditionally navigable water. Evidence to support that streams are relatively permanent, or wetlands have continuous surface connection via physical feature was gathered from

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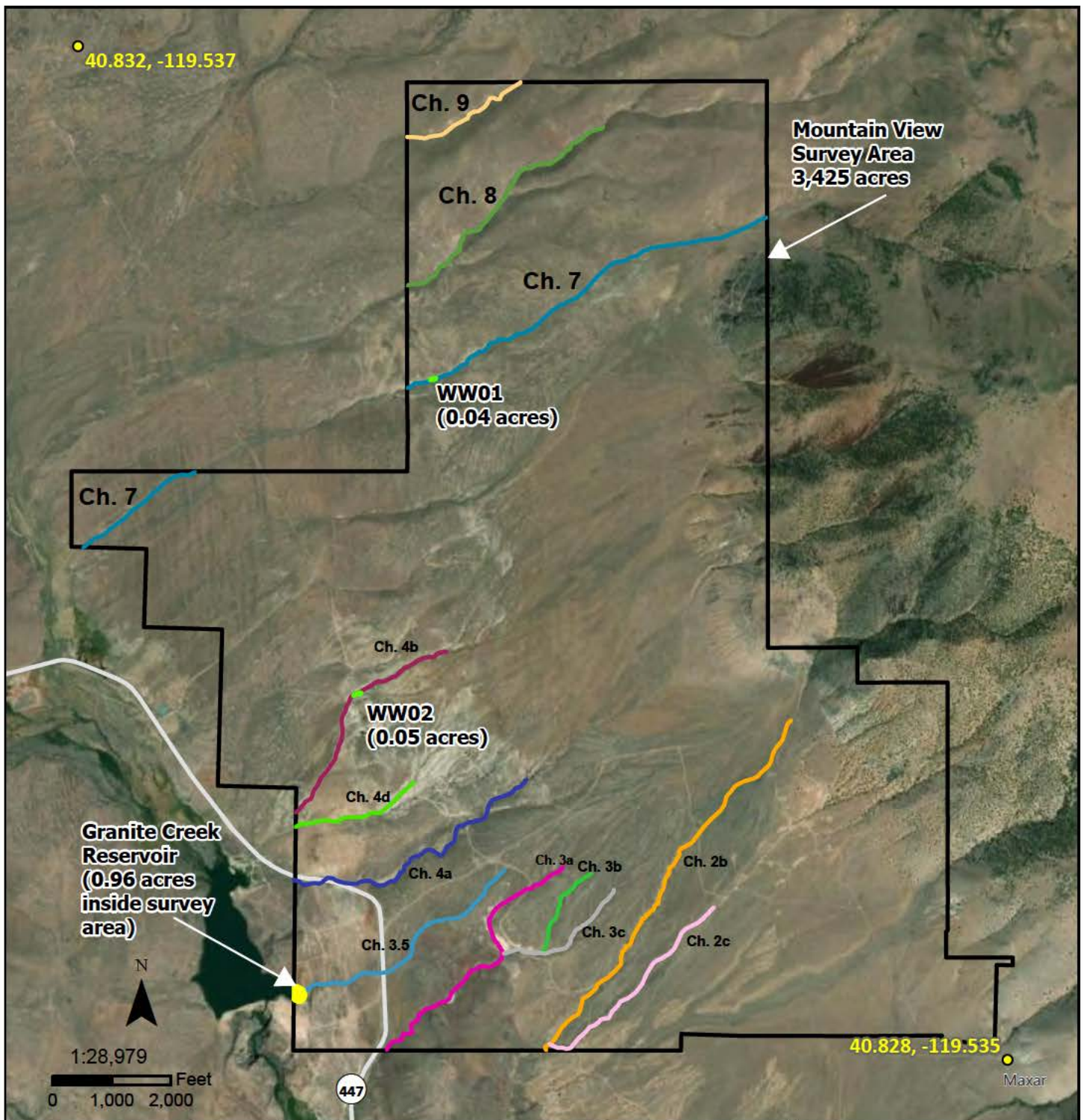
the sources cited above. In this case, streams that have relative permanent standing or flowing water are not jurisdictional as these streams do not ultimately connect to an (a)(1) water.

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.



3 Encls

1. Delineation Map
2. Flowpath of Study Area to Smoke Creek Playa
3. Kumiva Peak (1984)



Coordinate System: NAD 1983
UTM Zone 11N
Projection: Transverse Mercator
Datum: North American 1983
Created on August 5, 2022
Service Layer Credit: ESRI World Imagery (August/September 2021)

Made in accordance with the
Updated Map and Drawing
Standards for the South Pacific
Division Regulatory Program, as
amended on February 10, 2016,
by:

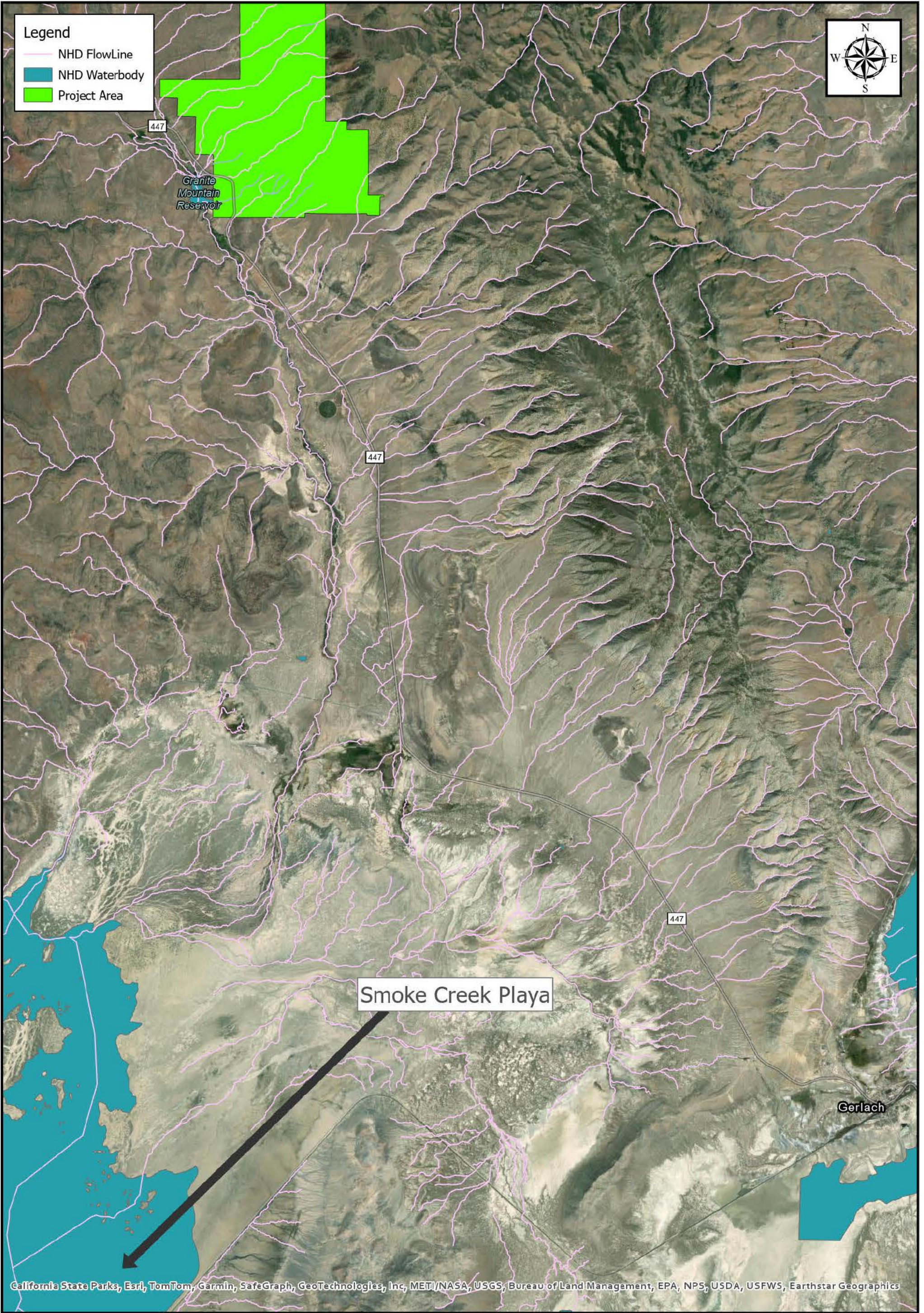
Map Legend

Survey Area (3,425 acres)	Channel 3b
Delineated Wetlands	Channel 3c
Lake	Channel 4a
Observed Channels	
Channel 2b	Channel 4b
Channel 2c	Channel 4d
Channel 3.5	Channel 7
Channel 3a	Channel 8
	Channel 9
	Road

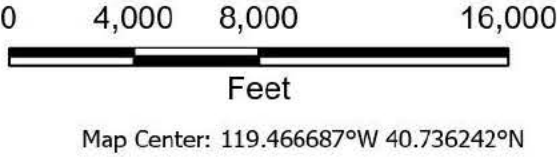
Mountain View Project

Figure 1

Mtn View Channels and Wetlands



NHD Flow Line Map (1 of 3) -
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Date: 1/12/2024

Coordinate System: WGS 1984 UTM Zone 11N

Enclosure 2

