



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

CESPK-RDC-N

3 May 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-2010-00126

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.

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).

Waters Name	Cowardin Code	Description	CWA Jurisdiction	RHA Jurisdiction
ES-1	R6	Non-relatively permanent stream	None	No
ES-2	R6	Non-relatively permanent stream	None	No
ES-3	R6	Non-relatively permanent stream	None	No
IS-1	R4	Relatively permanent stream	Section 404	No
IS-2	R4	Relatively permanent stream	Section 404	No
SW-1	PEM	Seasonal Wetland	None	No
ISW-1	PEM	In-stream Wetland	Section 404	No
SW-1	PEM	Seasonal Wetland	None	No

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 No. 173 (September 8, 2023))

c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

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3. REVIEW AREA. The review area is an approximately 4.6-acre area located within Empire Mine State Historic Park, Latitude 39.20438°, Longitude -121.04933°, in the City of Grass Valley, Nevada County, California (Enclosure 1). Enclosure 2 is a figure provided by [REDACTED], titled Figure 3. *Potential Aquatic Features within the Study Area*, dated December 13, 2023.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Feather River is the closest downstream connection of the review area to a traditionally navigable water.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The unnamed relatively permanent stream IS-1 flows into the in-stream wetland ISW-1. ISW-1 flows into IS-2, a relatively permanent stream in the same relevant reach as IS-1. IS-2 drains through a 20-foot culvert, where it flows into a wetland outside of the review area (Enclosure 3). The wetland area outside of the review area flows into Little Wolf Creek, which flows into Wolf Creek. Wolf Creek connects downstream to the Bear River. The Bear River is a tributary of the Feather River, a traditionally navigable water (Enclosure 4).

There is no discernable flow path from either SW-1 or SW-2 to any other aquatic resources inside or outside of the review area.

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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 10.⁶ 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 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

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.

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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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): ISW-1 is an 0.147-acre wetland impoundment of the relatively permanent (a)(3) tributary IS-1/IS-2. This tributary is labeled IS-2 below ISW-1 and IS-1 above the impoundment but is reach of the same stream order both above and below the impoundment. The impounding structure is depicted in photograph 6, page 49, of the delineation report (Enclosure 5), dated December 2023, prepared by [REDACTED]. ISW-1 meets the requirements for a jurisdictional impoundment both because it was created by impounding one of the “waters of the United States” (i.e. the relatively permanent (a)(3) tributary IS-1/IS-2) and because is at the time of assessment ISW-1 is an (a)(4) adjacent wetland because it abuts the relatively permanent (a)(3) tributary IS-1/IS-2 (reference 2.a. at 3075).

e. Tributaries (a)(3): There are two relatively permanent (a)(3) tributaries located within the review area, IS-1, and IS-2. IS-1 receives flows through a culvert from the remediated Cyanide plant, directly north of the review area. IS-1 is approximately 976 linear feet and flows downstream to ISW-1, an in-stream wetland. ISW-1 flows downstream into IS-2. IS-2 is a relatively permanent water that receives flows from ISW-1 and flows for approximately 108 linear feet to a 20-foot culvert, where it flows out of the review area (Enclosure 6). The stream drains into a wetland area southwest of the review area. Little Wolf Creek drains to that wetland area. The wetland area has a concrete apron and spillway on the west end, which flows under an access road (Enclosure 7). After the access road, through the spillway, Little Wolf Creek continues and flows west to Wolf Creek. IS-1 and IS-2 are part of the same relevant reach. The streams, IS-1 and IS-2, were determined to be relatively permanent through a site visit, conducted during the dry season, noting the features were still inundated (Enclosure 8).

f. Adjacent Wetlands (a)(4): As noted above, ISW-1 is a jurisdictional (a)(2) impoundment. However, even if we did not consider it to be an impoundment pursuant to (a)(2) it would still qualify as an adjacent wetland because it abuts the relatively permanent (a)(3) tributary IS-1/IS-2. ISW-1 is an approximately 0.147-acre instream

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wetland that abuts both IS-1 and IS-2. The consultant conducted a site visit and delineation during the dry season, IS-1 and IS-1 were inundated during the time of the site visit.

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).⁷ 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).

The aquatic resource ES-1 is a non-jurisdictional, non-relatively permanent tributary. ES-1 is located along IS-1 and is approximately 64 linear feet.

The aquatic resource ES-2 is a non-jurisdictional, non-relatively permanent tributary. ES-2 is located along IS-1 and is approximately 90 linear feet.

The aquatic resource ES-3 is a non-jurisdictional, non-relatively permanent tributary. ES-3 is located along ISW-1 and is approximately 42 linear feet.

The non-relatively permanent nature was determined through a review of imagery, a site visit conducted by the consultant, and with the Antecedent Precipitation Tool (APT). Prior to the site visit, the APT showed that the region was experiencing “moderate wetness”.

The aquatic resource SW-1 is a non-jurisdictional wetland, as it does not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) water. SW-1 is located upslope of ISW-1 and is approximately 0.055-acres. There were no swales or culverts observed around SW-1. There is a forested upland berm located between SW-1 and

⁷ 88 FR 3004 (January 18, 2023)

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ISW-1. There is no discernable flow path from SW-1 to another water or discrete physical feature that could provide a continuous surface connection to another water.

The aquatic resource SW-2 is a non-jurisdictional wetland, as it does not have a continuous surface connection to an (a)(1), (a)(2), or (a)(3) water. SW-2 is located at the western end of the review area, adjacent to a gravel road used for regular park activities and maintenance. The approximately 0.172-acre wetland is located within a depression in the review area. The wetland extends north out of the review area. The entire wetland is approximately 0.75-acres total. There were no swales or culverts observed within or around SW-2. There is no discernable flow path from SW-1 to another water or discrete physical feature that could provide a continuous surface connection to another water.

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 January 2024 and February 2024.
- b. Aquatic Resources Delineation Report, prepared by WRA Inc., in December 2023.
- c. Photographs: Provided in the Aquatic Resources Delineation Report, prepared by [REDACTED], from field visit occurring from May 23 and 24, 2023.
- d. U.S. Fish and Wildlife Service. (1975). National Wetland Inventory. Project area: SPK-2010-00126. Source imagery date: 2013. Washington, D.C.: U.S. Fish and Wildlife Service, Dept. of the Interior. Created on February 1, 2024, by the U.S. Army Corps of Engineers, from Wetland Mapper: <https://www.fws.gov/wetlands/data/mapper.htm>
- e. USDA NRCS Soil Survey: NRCS. (2023, August 31). Custom Soil Resource Report for Nevada County Area, California. Natural Resources Conservation Service, U.S. Dept. of Agriculture. Retrieved by U.S. Army Corps of Engineers from <https://websoilsurvey.sc.egov.usda.gov/App/HomePage.htm>
- f. U.S. Geological Survey. (1949). USGS 1:62,500-scale. Grass Valley, California.
- g. U.S. Geological Survey. (1998). USGS 1:24,000-scale. Grass Valley, California
- h. 3DEP Hillshade, 3DEP Digital Elevation Model Map: LiDAR Map (SPK-2023-00243). Generated by the U.S. Army Corps of Engineers, January 8, 2024. Using ArcGISPro.

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Digital Globe: *April 21, 2021 – Empire Mine State Historic Park (SPK-2010-00126), Imagery [map]*. 1:520. Generated by the Army Corps of Engineers, on February 5, 2024.

j. USGS LiDAR Map. Empire Mine State Historic Park – (SPK-2010-00126). Imagery [map]. 1:500. Generated by the Army Corps of Engineers on February 21, 2024. Retrieved from <https://apps.nationalmap.gov/downloader/#/>.

k. Ground photos: U.S. Army Corps of Engineers. 2024. *Photographs from January 10, 2024, Field Visit*.

l. Ground Photos: U.S. Army Corps of Engineers. 2024. Photographs from March 27, 2024, Field Visit.

m. Map: Connection to Little Wolf Creek. Created by [REDACTED] on March 21, 2024.

n. Aerial image: 1984. Retrieved by the U.S. Army Corps of Engineers on April 5, 2024. Retrieved from <https://www.historicaerials.com/viewer>

o. 3DEP Hillshade, 3DEP Digital Elevation Model Map: Little Wolf Creek and Review Area, Generated by the U.S. Army Corps of Engineers, April 5, 2024. Using ArcGISPro.

p. Email from [REDACTED] Dated May 4, 2024.

10. OTHER SUPPORTING INFORMATION. There are two relatively permanent (a)(3) tributaries located within the project area, with a connection to an (a)(1) water. IS-1 and IS-2 are relatively permanent (a)(3) tributaries that flow downstream to Little Wolf Creek, which flows downstream to a wetland area. IS-2 flows downstream from a 20-foot culvert to that same wetland area, where it flows to a concrete apron and spillway, and continues west to Wolf Creek. IS-1 and IS-2 are considered to be two parts of the same relevant reach. Wolf Creek flows downstream to Bear River, which flows downstream to the Feather River. There is one adjacent wetland, ISW-1 within the review area. ISW-1 directly abuts and receives flows from IS-1 and drains directly to IS-2. Given the proximity and hydrological connection of ISW-1, it is an adjacent wetland, with a connection to a relatively permanent (a)(3) tributary. ISW-1 is also a jurisdictional impoundment, as it impounds a relatively permanent (a)(3) tributary. ES-1, ES-2, and ES-3 are non-relatively permanent tributaries to IS-1 and ISW-1. SW-1 and SW-2 are seasonal wetlands located within the review area. Both wetlands lack a continuous surface connection to jurisdictional waters. Evidence to support the streams relatively permanent nature, or wetlands with or without a continuous surface connection via physical feature was gathered from the sources cited above.

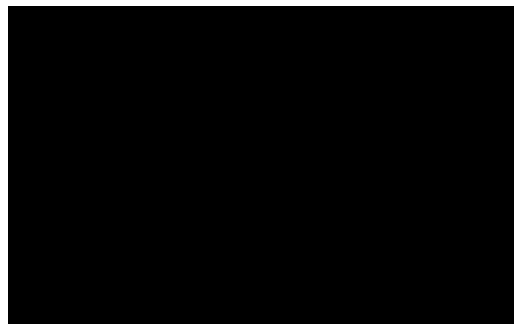
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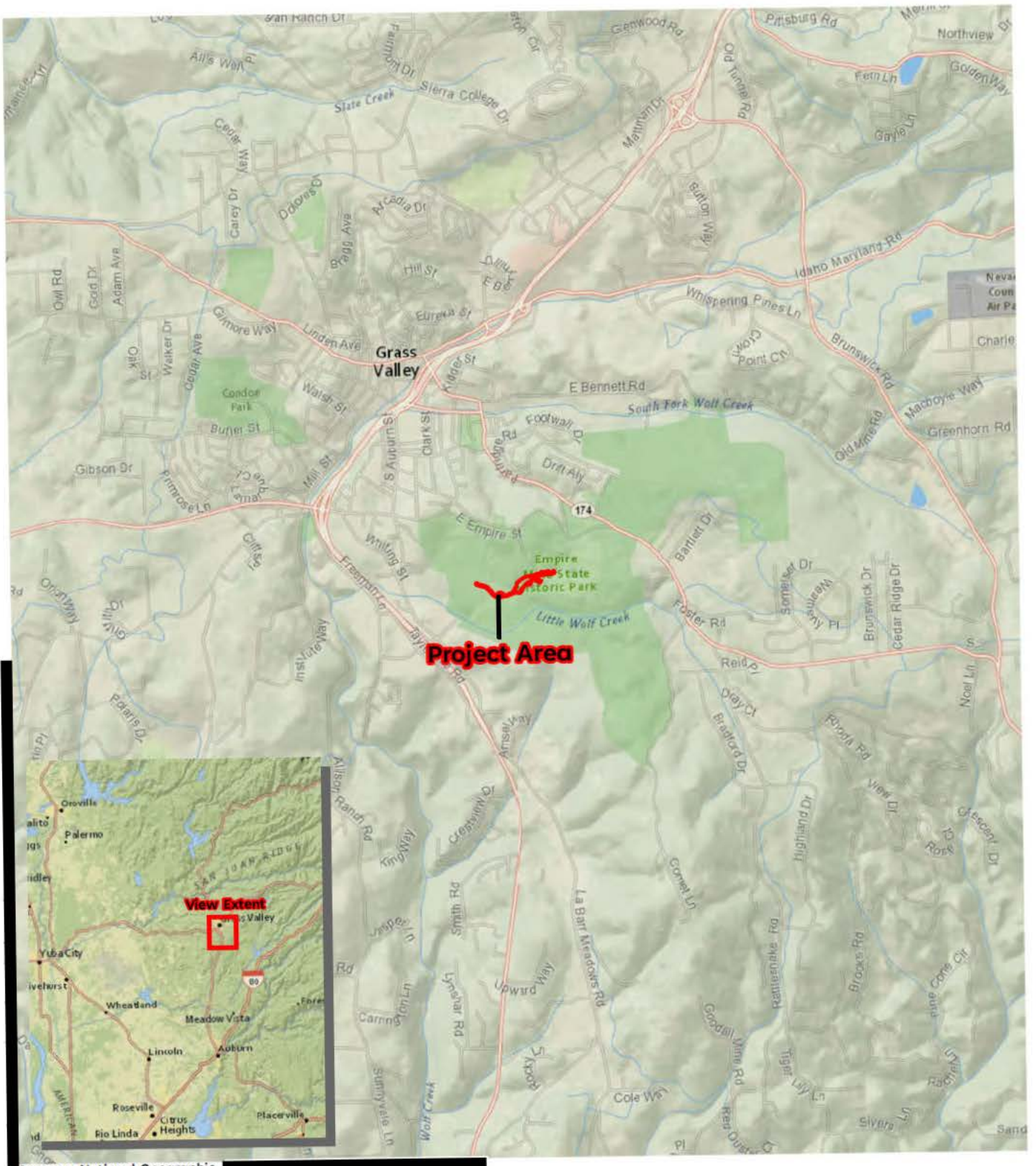
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Upon reviewing aerial imagery, going back to 1984, the access bordering SW-2 wetland remained in place. There are no culverts, swales, or other connections to the review area or those wetland areas south of the review area.

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.

Enclosure 1: Vicinity Map
Enclosure 2: Delineation Map
Enclosure 3: Relation of Review Area to Little Wolf Creek
Enclosure 4: Flow Path to TNW
Enclosure 5: ISW-1 Impoundment
Enclosure 6: 3DEP Map
Enclosure 7: Concrete Apron and Spillway
Enclosure 8: Stream Survey Methods

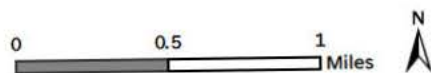




Sources: National Geographic, [redacted]

Figure 1. Project Area Regional Location Map

Empire Mine State Historic Park
Grass Valley, CA



Enclosure 1

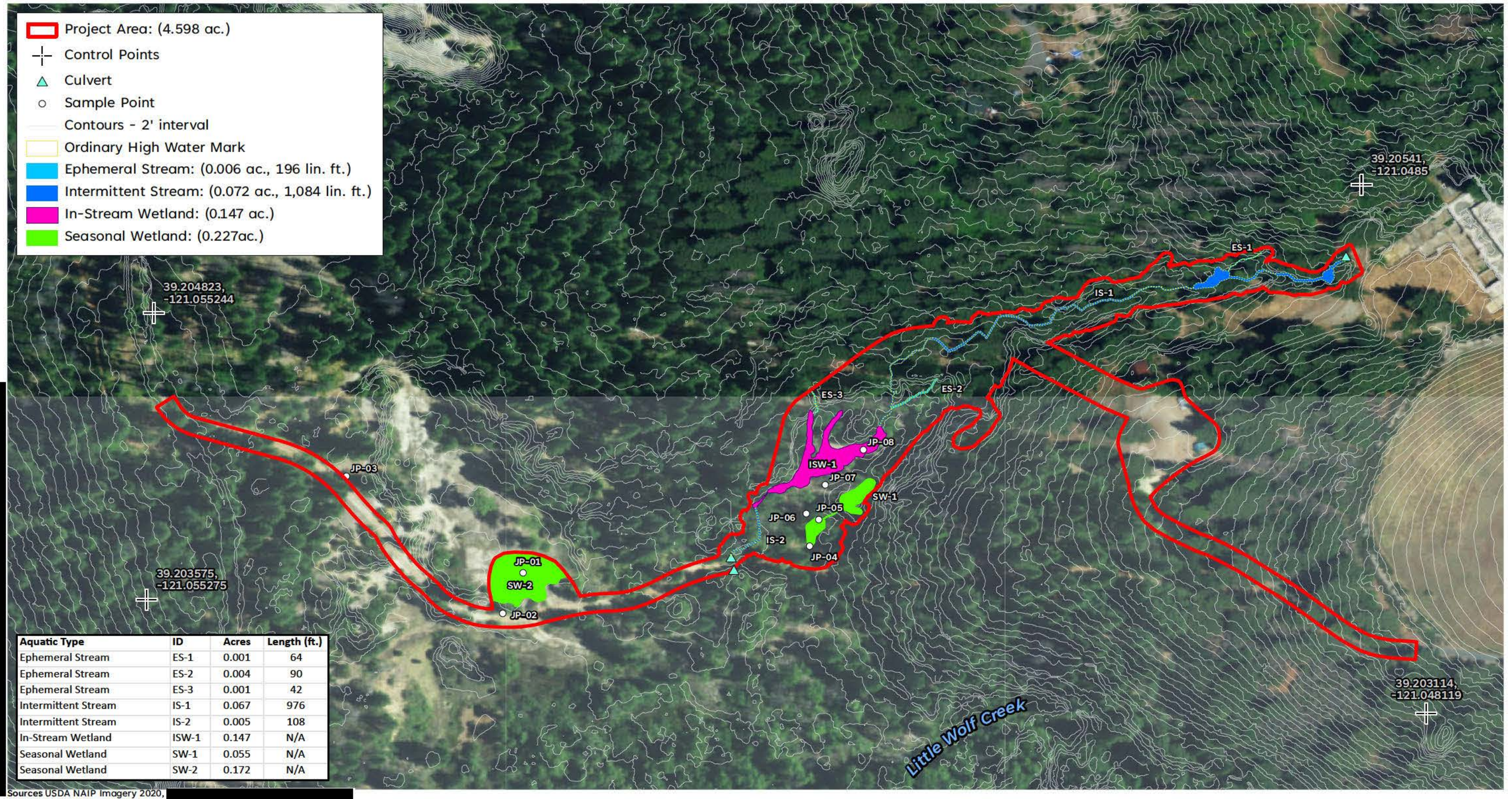


Figure 3. Potential Aquatic Features within the Study Area