DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WALLA WALLA DISTRICT
900 NORTH SKYLINE DRIVE, SUITE A
IDAHO FALLS, IDAHO 83402

CENWW-RD January 25, 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] NWW-2021-00609.[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

[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.

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.

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. ST-06, Black Pine Canyon, jurisdictional, Section 404

        ii. ST-07, non-jurisdictional

        iii. ST-08, non- jurisdictional

        iv. ST-09 jurisdictional, section 404

        v. ST-10 jurisdictional, section 404

        vi. WL-02, non-jurisdictional

        vii. WL-03, non-jurisdictional

        viii. “Wetlands too small to delineate, 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. Cassia County, Idaho, Lat/Long: 42.080, -113.058

The survey area is located within the Black Pine Mountains, in south-east Idaho near the border of Utah. The survey area was separated into two distinct assessment areas (AAs): the Western Slope AA containing Black Pine Canyon (an interstate water), and the Eastern Slope AA. These AAs are separated by a ridgeline and are addressed in separate Approved JD's. This Approved JD is for the Western Slope AA.

The Western Slope AA (Black Pine Canyon HUC-12 Watershed) is located within the greater Northern Basin and Range Ecoregion (Ecoregion 80), encompassing Semiarid Hills and Low Mountains (80b). It is generally considered semi-arid and characterized by cool season grasses and Juniper woodlands in high elevations, transitioning to open sagebrush grasslands at lower elevations. Cattle grazing and mining within the AA, appear to have modified some localized drainage patterns.

The AA was surveyed between April-June of 2021. The survey consisted of a desktop review of available information to include Soil Maps, NHD and NWI data followed by a physical survey of the area, by the consultant, to confirm the presence or absence of aquatic features. Field work was completed during the growing season but occurred in a drier than normal period. Site forms were completed for reaches that exhibited indicators, and/or a geolocated photo was completed for potential features which did not.

Drainage patterns, including delineated channels within the Western Slope AA, flow convergently south towards Black Pine Canyon.

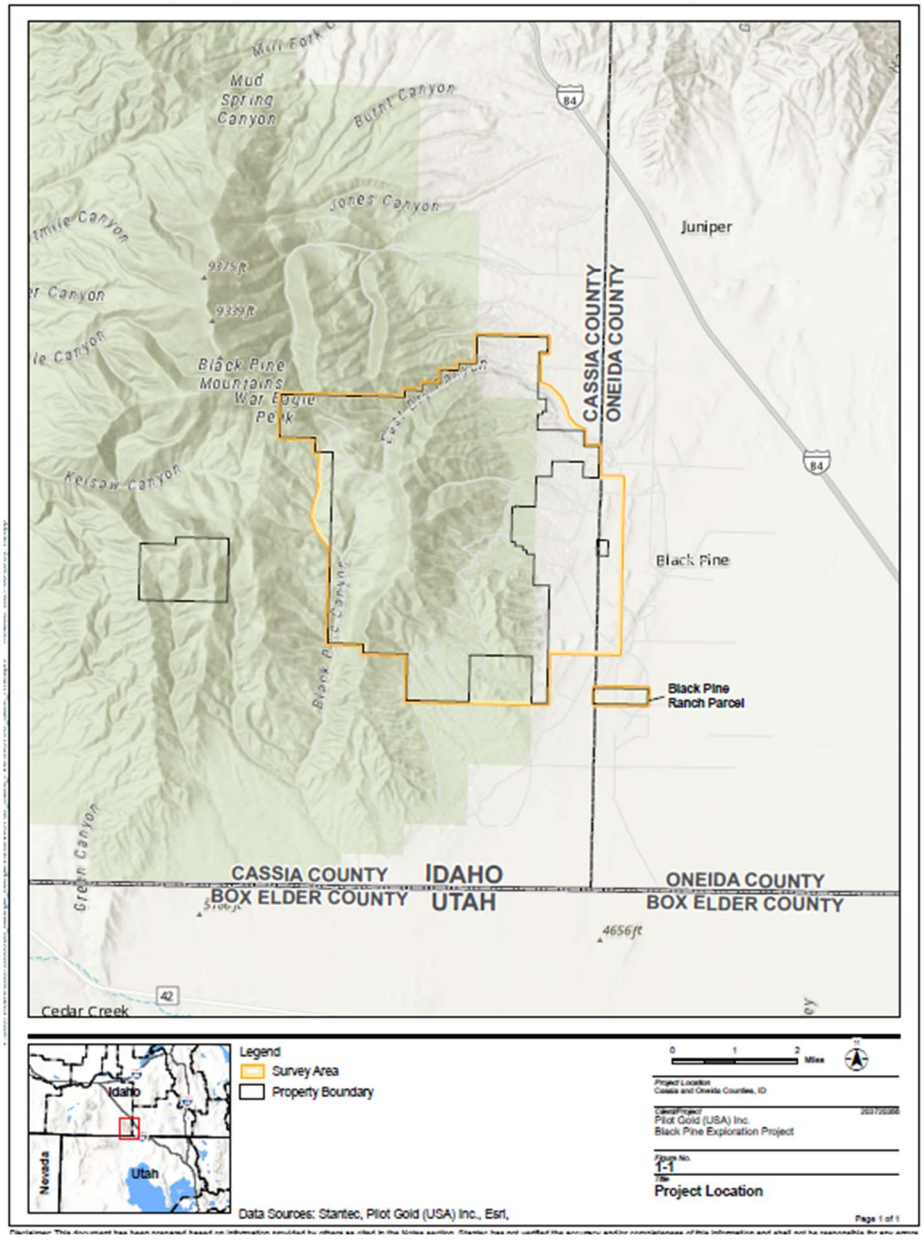

Figure 1. Vicinity Map.

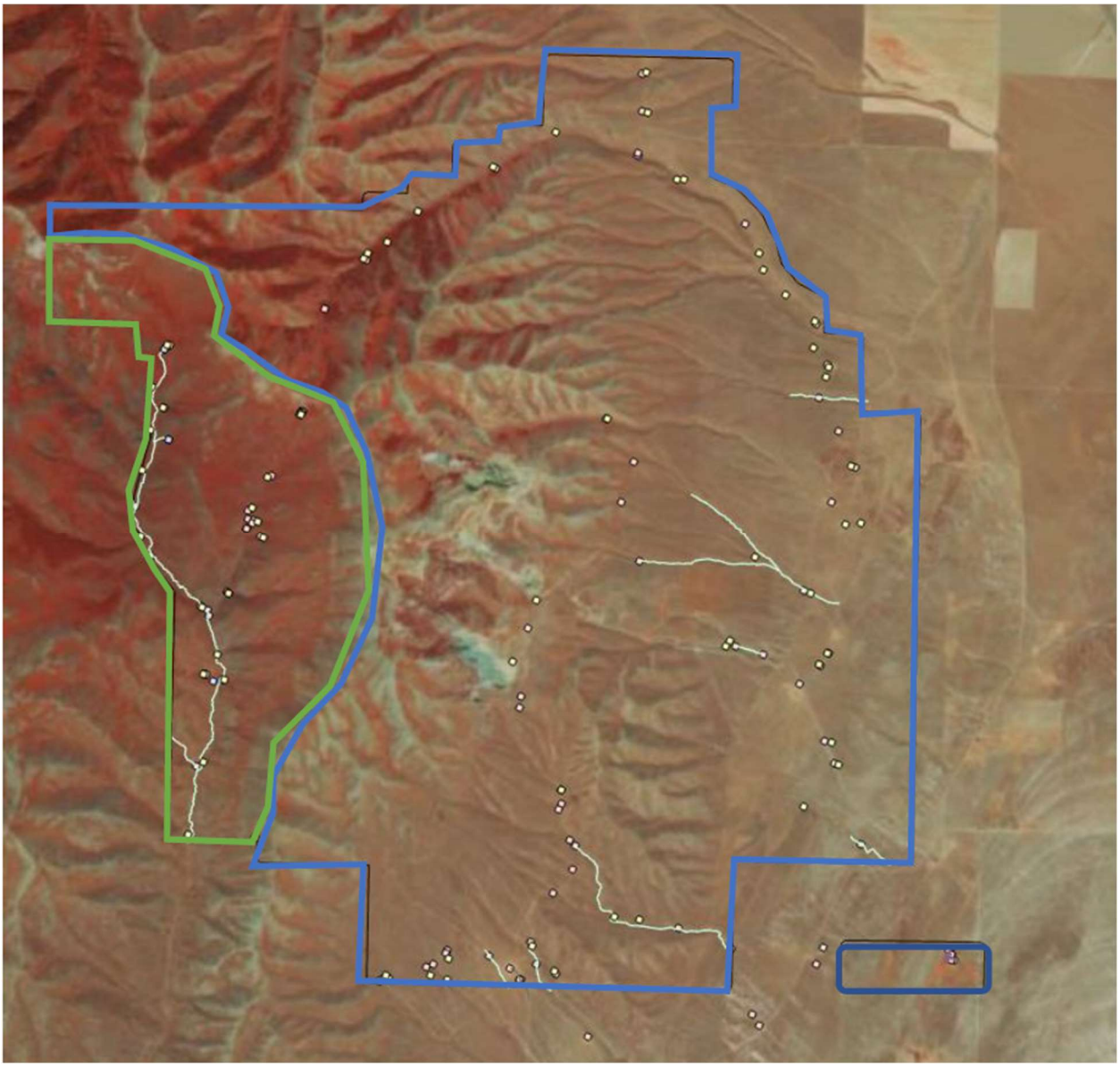

Figure 2. Aerial demonstrating East AA outlined in blue (not included in this AJD) and the West AA outlined in green.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Black Pine Canyon is a relatively permanent water fed by high elevation snowmelt as well as several springs and seeps that provide base flow throughout the year. Black Pine Canyon flows south from the review area, across the Utah border, where it transitions to a non-RPW before turning North to flow back

across the Idaho border where it terminates in the desert.[6] At the time of the delineation the channel within Black Pine Canyon held water even during drier than normal conditions, indicating that it is a perennial feature within the review area.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS The subject aquatic resources within the review area generally flow South to converge with Black Pine Canyon, an interstate water, and principal channel within the review area. Additional information on flowpaths for jurisdictional features are shown in the submaps below (Figures 4-9).

6. SECTION 10 JURISDICTIONAL WATERS[7]: 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.[8] 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.

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[6] This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

[7] 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.

[8] 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.

a. TNWs (a)(1): N/A

b. Interstate Waters (a)(2): ST-06-Black Pine Canyon (Black Pine Canyon) is a relatively permanent water (perennial) that flows south from the review area, across the Utah border, where it transitions to a non-RPW before turning North to flow back across the Idaho border where it terminates in the desert. 19,730.97 linear feet of Black Pine canyon lie within the review area where it is fed from multiple spring seeps and small ephemeral and intermittent tributaries, it runs south to the boundary of the review area. At the time of the delineation the channel within Black Pine Canyon held water even during drier than normal conditions, indicating that it is a perennial feature (Figures 3-8).

c. Other Waters (a)(3): N/A

d. Impoundments (a)(4): N/A

e. Tributaries (a)(5):

ST-09 is an RPW tributary to ST-06-Black Pine Canyon (Figure 6). 157.95 linear feet of ST-09 runs from the boundary of the review area to its confluence with ST-06-Black Pine Canyon. At the time of the delineation the channel within ST-09 held water despite drier than normal conditions indicating that it is a relatively permanent feature (Photo 1).

Photo 1. ST-09 Facing Northwest

ST-10 is a RPW tributary to ST-06-Black Pine Canyon (Figures 7 and 8). 1,613.58 linear feet of ST-10 runs from the boundary of the review area to its

confluence with ST-06-Black Pine Canyon. At the time of the delineation the channel within ST-10 held water despite drier than normal conditions indicating that it is a relatively permanent feature (Photo 2).

Photo 2. ST-10 facing Northwest.

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

g. Adjacent wetlands (a)(7): Within the Review Area the consultant identified three wetlands that they determined to be too small to delineate (Figures 4, 5, and 7). These small wetlands all appear to be associated with spring seeps with continuous surface connection (adjacent) to and feeding ST-06-Black Pine Canyon (Photo 4), or in the case of the wetland at the head of ST-07, has a continuous surface connection to ST-06-Black Pine Canyon through 519 linear feet of stream channel. (Photo 3).

Photo 3. The “Wetland too small to delineate” at the head of the channel of ST-07 (Figure 5).

Photo 4. The “Wetland too small to delineate” associated with a spring seep between WL-03 and ST-06-Black Pine Canyon (Figure 7).

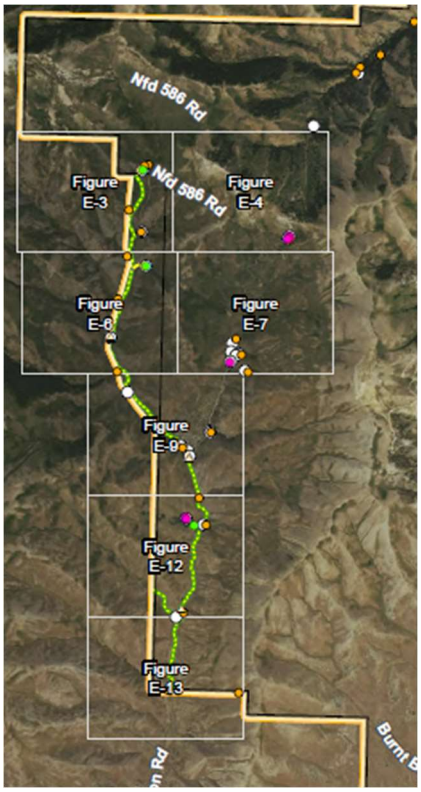

Figure 3. Western Review Area showing relative position of submaps.

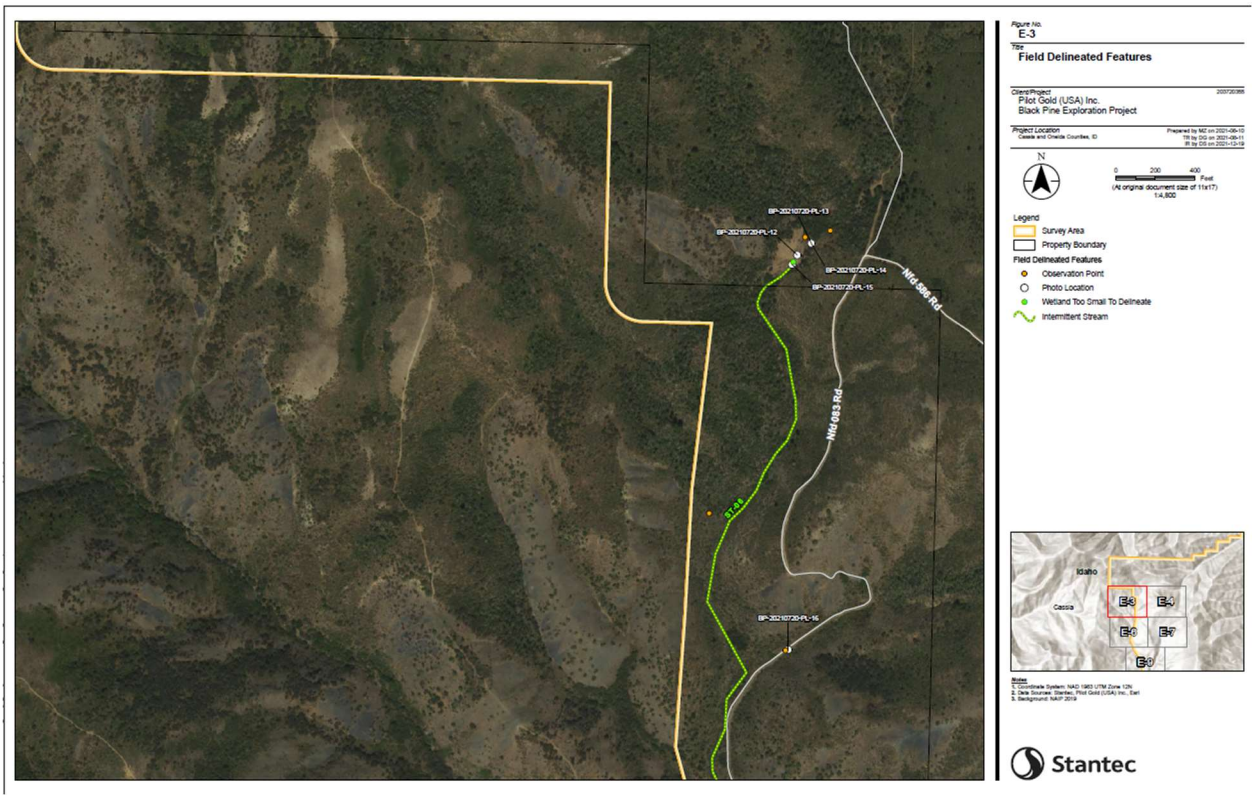

Figure 4. Submap E-3 includes the northernmost reach of ST-06 and a wetland indicated by the consultant to be too small to delineate.

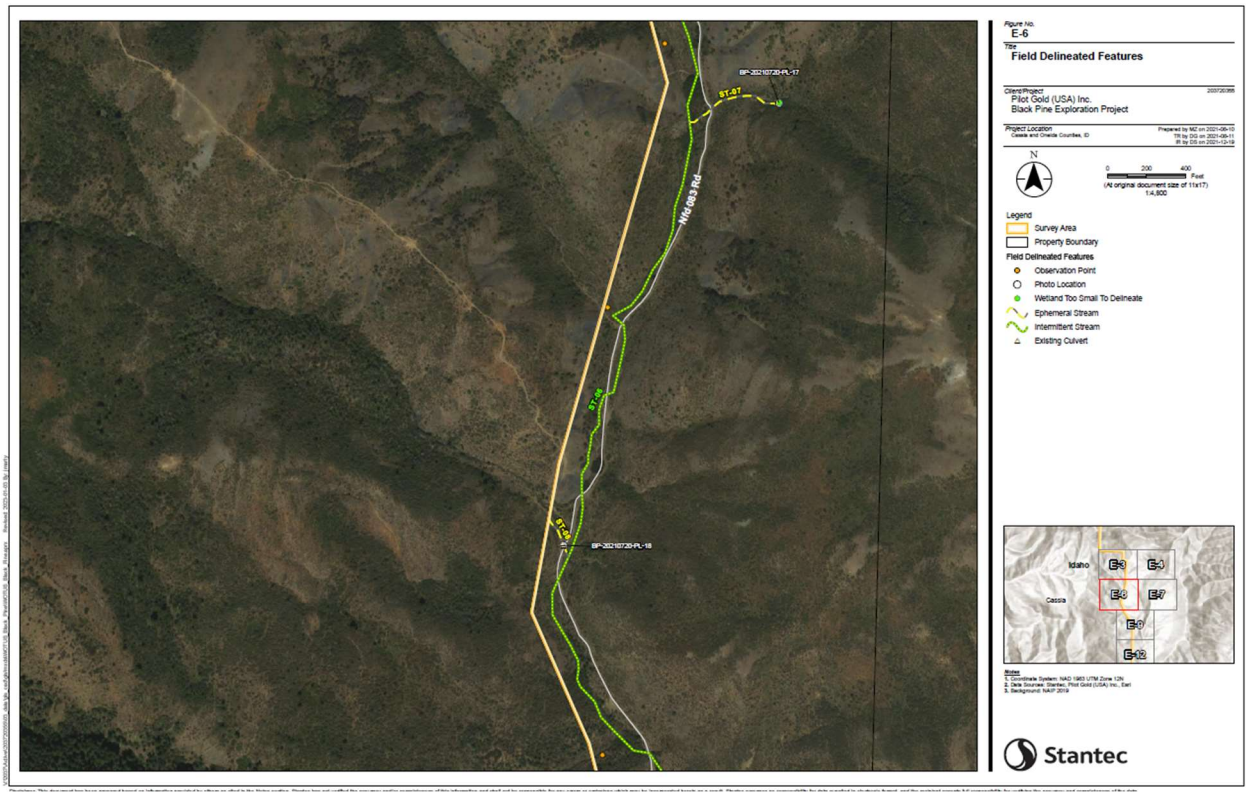

Figure 5. Submap E-6. Includes ST-06 which runs from North to South, ST-07 and ST-08 which are non-RPW tributaries to ST-06, and a wetland indicated by the consultant to be too small to delineate.

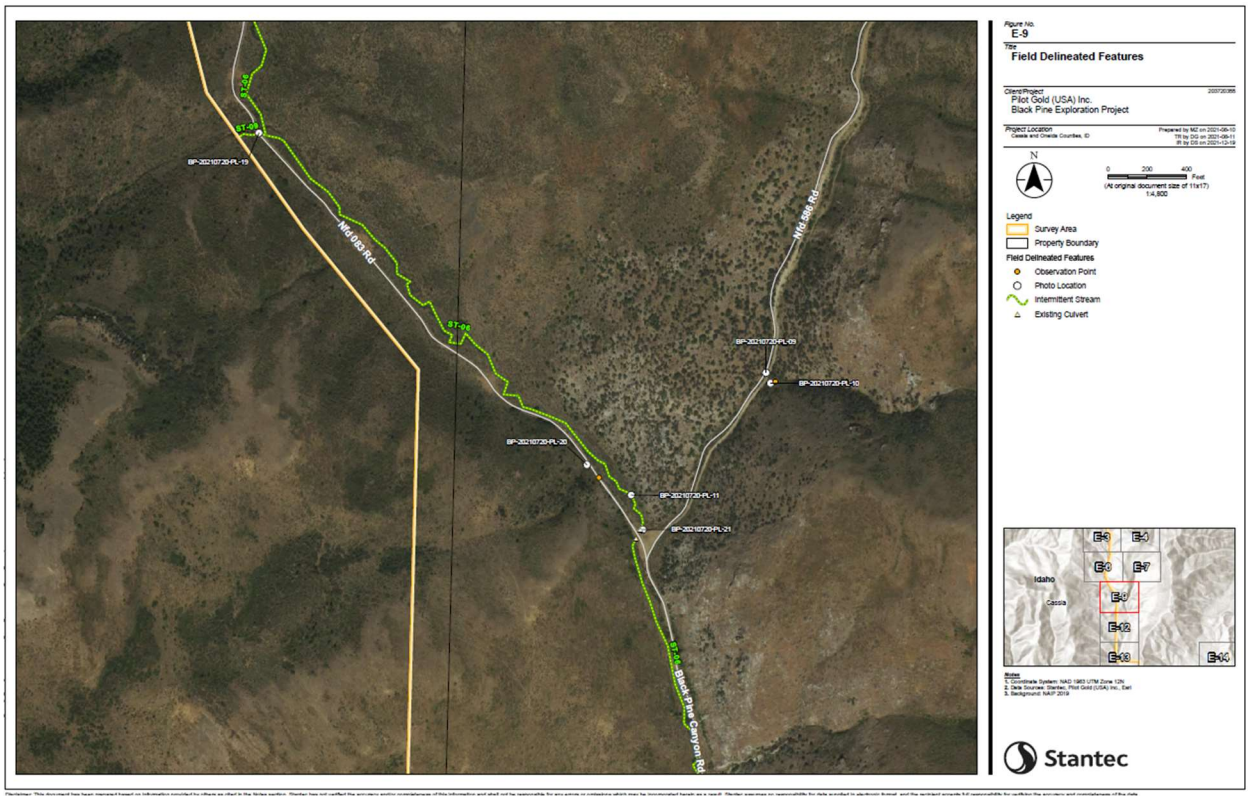

Figure 6. Submap E-9 featuring ST-06 running from North to South along NFD 083 Rd and Black Pine Canyon Road and ST-09 a RPW tributary to ST-06.

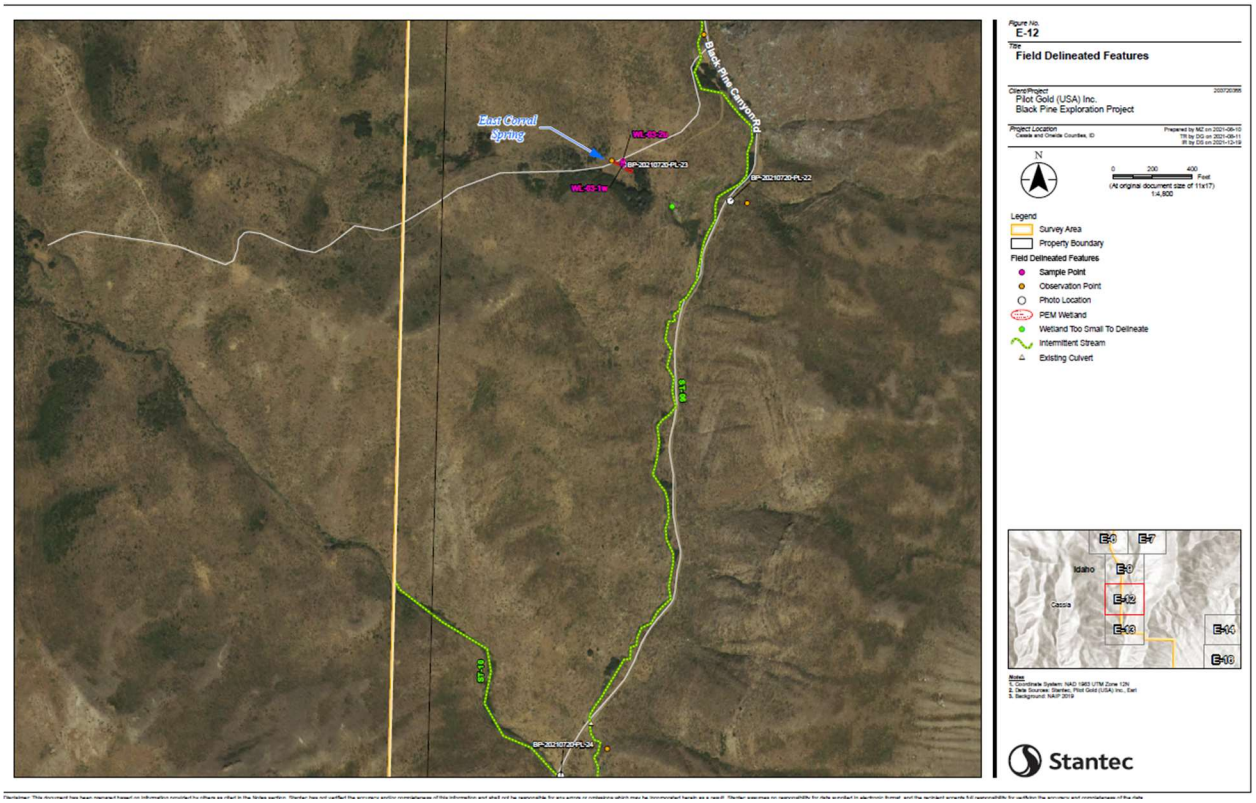

Figure 7. Submap E-12 featuring ST-06 running from North to South, ST-10 running from the Review Area Boundary towards its confluence with ST-06 (Figure 8), as well as WL-03, a wetland with no continuous surface connection to a regulated water, and a wetland indicated by consultant to be too small to delineate.

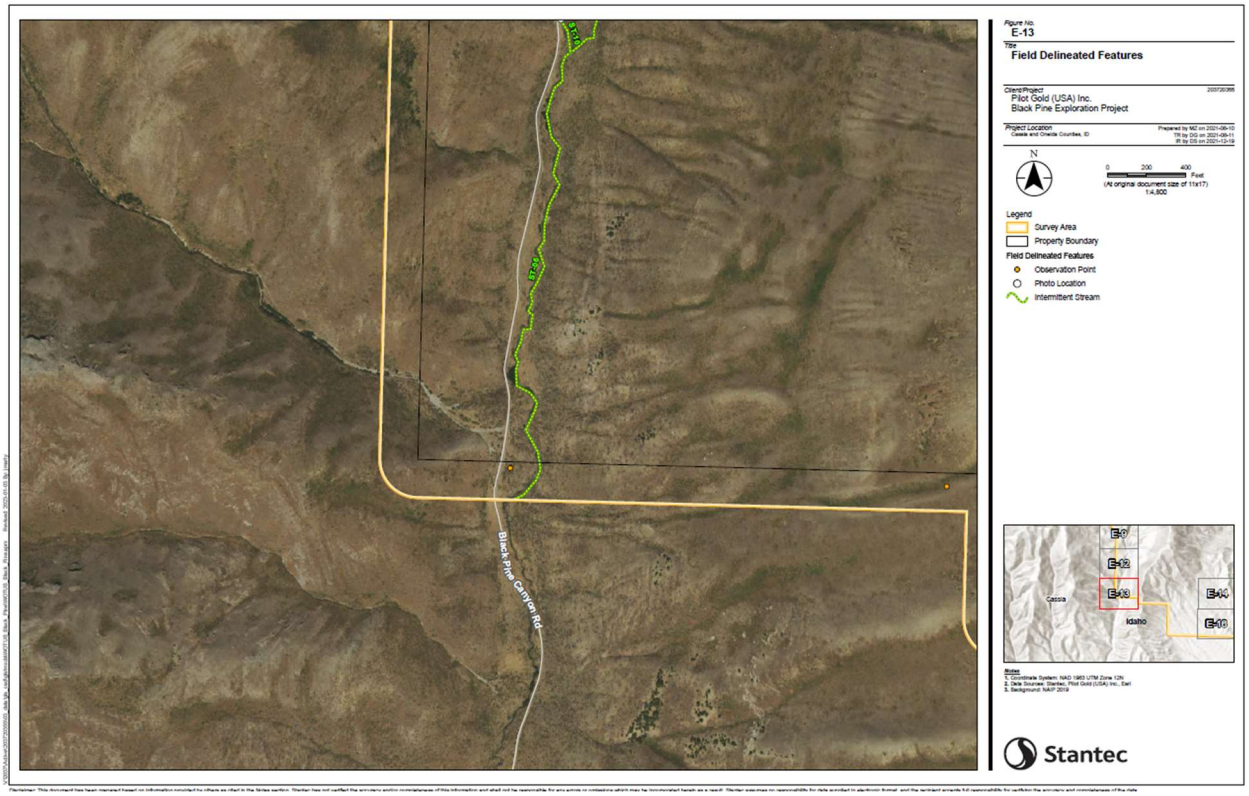

Figure 8. Submap E-13 featuring ST-06 running from North to the Southern boundary of the Review Area and ST-10 where it meets ST-06.

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").[9] 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

[9] 51 FR 41217, November 13, 1986.

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 or enter rationale/discussion here.]

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).

ST-07, ST-08, WL-02, WL-03.

ST-07 and ST-08 both appear to be ephemeral tributaries to ST-06-Black Pine Canyon and do not carry a relatively permanent flow. These non-relatively permanent waters have smaller catchment areas than ST-06 at a lower elevation and are not fed by a lasting high elevation snowpack, nor is there evidence of enough groundwater contribution to any baseflow.

WL-02/ Silver Hills Spring: WL-02 is a small emergent wetland located at the upper ridgeline of the basin and appears to be a developed spring that has no continuous surface connection to a regulated water. The wetland is approximately 1.5 miles up the drainage from Black Pine Canyon and is 0.02 acres in size (Figure 9). The NWI and NHD layers show what appears to be a stream channel that could serve as a continuous surface connection between WL-02 and Black Pine Canyon (ST-06), however in the aquatic resources delineation report the consultant demonstrated with SP-01 and photos that this connection does not exist.

The following description is provided from the submitted report.

*WL-02/Silver Hills Spring is located in the northwest corner of the Survey Area, adjacent to Forest Road (FR) 586. This is a small depressional wetland, with a water trough downslope of the depressional wetland area. Spillover from the trough supports a small narrow wetland below the trough for a short distance (approximately 20 feet). As with other develope*d springs in the Survey Area, it is heavily grazed and trampled by cattle.

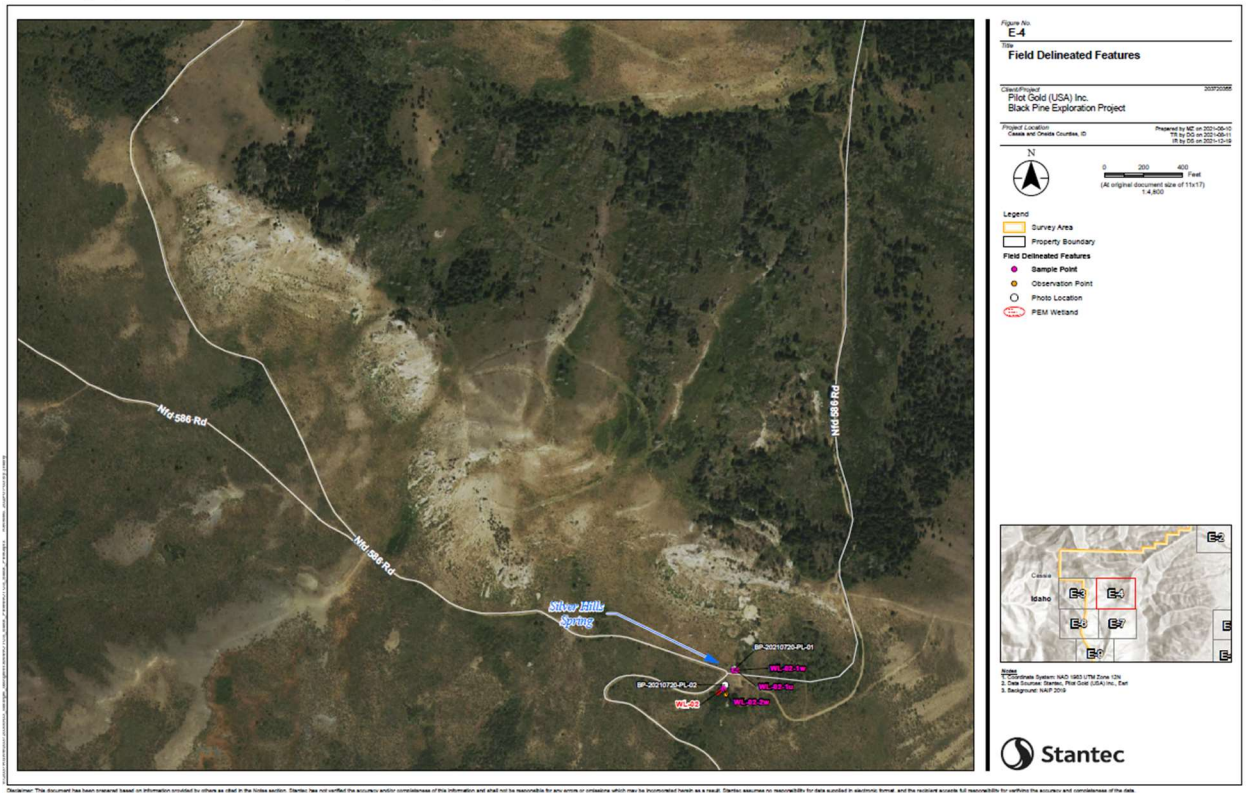

Figure 9. Submap E-4 featuring WL-02, an isolated aquatic resource.

WL-03/East Corral Spring: WL-03 is a small emergent wetland located lower in the basin and is also a developed spring. It also does not have a continuous surface connection to a regulated water. The wetland is approximately 500 feet from Black pine Canyon and is 0.03 acres in size (Figure 7).

The following description is provided from the submitted report.

WL-03/East Corral Spring is located in the southwest corner of the Survey Area, on an east facing slope above Black Pine Canyon. Similar to other wetlands in the Survey Area, it is fed by a developed spring that has been piped to a small trough. Overflow from the trough feeds the wetland. Surface water flow

and saturation continues a short distance down slope before infiltrating and losing saturation near the surface. A small portion reemerges as a very small seep at a steep headcut midway between the spring and the Black Pine Canyon Road. This small seep was marked on Figure E-12 [Figure 7 in this MFR] as a "wetland too small to delineate". The main spring is heavily used and trampled by cattle.

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, December 11, 2023
   b. Google Earth Aerial Imagery, 2021, 2013
   c. USGS Maps: USGS 1:24K Black Pine Peak, Idaho
   d. Black Pine Exploration Project, Wetland and Waterbody Delineation Report, September 28, 2012, Updated December 30, 2022

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.