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CESWL-RD 11 October 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] **SWL-2024-00052 (Ouachita Solar Array)**.

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.

[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.

    1. 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. Pond-01 (upland excavated farm pond), non-jurisdictional water
ii. Pond-07 (upland excavated farm pond), non-jurisdictional water
iii. Pond-10 (upland excavated farm pond), non-jurisdictional water
iv. Pond-11 (upland excavated farm pond), non-jurisdictional water
v. Pond-13 (upland excavated farm pond), non-jurisdictional water
vi. Pond-14 (upland excavated farm pond), non-jurisdictional water
vii. Pond-15 (upland excavated farm pond), non-jurisdictional water
viii. Pond-16 (upland excavated farm pond), non-jurisdictional water
ix. Pond-17 (upland excavated farm pond), non-jurisdictional water
x. W-2 (emergent wetland) non-jurisdictional water
xi. W-3 (emergent wetland), non-jurisdictional water
xii. W-4 (emergent wetland), non-jurisdictional water
xiii. W-5 (emergent wetland), non-jurisdictional water
xiv. W-6 (emergent wetland), non-jurisdictional water
xv. W-7 (emergent wetland), non-jurisdictional water
xvi. W-10 (emergent wetland), non-jurisdictional water
xvii. W-12 (emergent wetland), non-jurisdictional water
xviii. W-13 (emergent wetland), non-jurisdictional water
xix. W-18 (emergent wetland), non-jurisdictional water
xx. W-19 (emergent wetland), non-jurisdictional water
xxi. W-20 (emergent wetland), non-jurisdictional water
xxii. W-24 (emergent wetland), non-jurisdictional water
xxiii. W-26 (emergent wetland), non-jurisdictional water
xxiv. W-30 (emergent wetland), non-jurisdictional water
xxv. W-33 (emergent wetland), non-jurisdictional water
xxvi. W-34 (emergent wetland), non-jurisdictional water
xxvii. W-35 (emergent wetland), non-jurisdictional water
xxviii. W-36 (emergent wetland), non-jurisdictional water
xxix. W-37 (emergent wetland), non-jurisdictional water
xxx. W-38 (emergent wetland), non-jurisdictional water
xxxi. W-39 (emergent wetland), non-jurisdictional water
xxxii. W-40 (forested wetland), non-jurisdictional water
xxxiii. W-41 (emergent wetland), non-jurisdictional water
xxxiv. W-42 (emergent wetland), non-jurisdictional water
xxxv. W-43 (emergent wetland), non-jurisdictional water
xxxvi. W-44 (emergent wetland), non-jurisdictional water
xxxvii. W-48 (emergent wetland), non-jurisdictional water
xxxviii. W-49 (emergent wetland), non-jurisdictional water
xxxix. W-50 (emergent wetland), non-jurisdictional water

xl. W-51 (emergent wetland), non-jurisdictional water
xli. W-52 (emergent wetland), non-jurisdictional water
xlii. W-53 (emergent wetland), non-jurisdictional water
xliii. W-54 (emergent wetland), non-jurisdictional water
xliv. W-55 (emergent wetland), non-jurisdictional water
xlv. W-56 (emergent wetland), non-jurisdictional water
xlvi. W-57 (emergent wetland), non-jurisdictional water
xlvii. W-58 (emergent wetland), non-jurisdictional water
xlviii. W-59 (emergent wetland), non-jurisdictional water
xlix. W-60 (emergent wetland), non-jurisdictional water

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.

The project area consists of an approximate 867-acre area split into three review areas, Review Area A (Figure 5A), Review Area B (Figure 5B), and Review Area C (Figure 5C). All sections of the review areas are located adjacent to Floyd Moore Road, near Gentry, Benton County, Arkansas. The approximate center coordinates for the overall project area are Lat 36.2901, Long. -94.5406.

Within the review area two sections are a total of 76 waters known to exist (54 wetlands, 17 ponds, and 5 streams). This Jurisdictional Determination covers forty-nine non-jurisdictional features (40 wetlands and 9 ponds) within the project area (see list below).

Jurisdiction will be assumed on all other features within the review area not included in this determination. There are two named creeks are within the review area, Crazy Creek and Cherokee Creek. The waters analyzed within this AJD are not immediately adjoining to the named creek features.

All delineated waters can be found on Figures 4A, 4B, and 4C. All waters regarding this AJD can be found on Figures 5A, 5B, and 5C.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. On-site wetlands and waters (ponds) reviewed within this determination are not connected to an off-site TNW, Interstate Water, or Territorial Sea. The nearest TNW is the Illinois River, which transitions from an RPW to TNW northeast of Tahlequah, Oklahoma, Latitude: 36.040570, Longitude: -94.904086, at River Mile 75.7 (approximately 26 miles southwestward from the project boundary).[5]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. All on-site wetlands and waters (ponds) reviewed within this determination are not connected to an off-site TNW, Interstate Water, or Territorial Sea.

6. SECTION 10 JURISDICTIONAL WATERS[6]: 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] 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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[5] 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.

[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 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): N/A
c. Other Waters (a)(3): N/A
d. Impoundments (a)(4): N/A
e. Tributaries (a)(5): N/A
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.

1. Pond-01 consists of a 1.16-acre upland stock pond that abuts W-3 (non-adjacent wetland) and W-4 (non-adjacent wetland), within the northeastern portion of the Review Area A. Pond-01 discharges off-site into an upland dug pond (located at 36.303338, -94.536472) via W-3 during precipitation events; the off-site pond feature does not drain to any other wetlands or waters. It is believed this feature meets the pre-amble criteria of "artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." Abutting wetlands are believed to have formed as a direct result of the excavation of uplands and ponding of surface water. Pond-01 is located at 36.301925, -94.535389, and can be found of Figure 5A.

2. Pond-07 consists of a 0.65-acre upland stock pond that abuts W-19 (non-adjacent wetland) within the northwestern portion of Review Area B. Pond-07 discharges on-site to W-19 during precipitation events; W-19 does not have a continuous surface connection to any other waters on or off-site. It is believed this feature meets the pre-amble criteria of "artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." Abutting wetlands are believed to have formed as a direct result of the excavation of uplands and ponding of surface water. Pond-07 is located at 36.288145, -94.51997, and can be found of Figure 5B.

[8] 51 FR 41217, November 13, 1986.

3. Pond-10 consists of a 0.10-acre upland stock pond that abuts W-35 (non-adjacent wetland) within the southern portion of Review Area B. Pond-10 discharges on-site to W-35 during precipitation events; W-35 does not have a continuous surface connection to any other waters on or off-site. It is believed this feature meets the pre-amble criteria of “artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Abutting wetlands are believed to have formed as a direct result of the excavation of uplands and ponding of surface water. Pond-10 is located at 36.285254, -94. 548468, and can be found of Figure 5B.

4. Pond-11 consists of a 0.04-acre upland stock pond that abuts W-34 (non-adjacent wetland) within the southern portion of Review Area B. Pond-10 discharges on-sight to W-34 during precipitation events; W-34 does not have a continuous surface connection to any other waters on or off-site. It is believed this feature meets the pre-amble criteria of “artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Abutting wetlands are believed to have formed as a direct result of the excavation of uplands and ponding of surface water. Pond-11 is located at 36.284127, -94.547734, and can be found of Figure 5B.

5. Pond-15 consists of a 0.97-acre upland stock pond that abuts W-44 (non-adjacent wetland) within the eastern portion of Review Area B. Pond-15 discharges to W-44 during precipitation events; W-44 does not have a continuous surface connection to any other waters on or off-site. It is believed this feature meets the pre-amble criteria of “artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Abutting wetlands are believed to have formed as a direct result of the excavation of uplands and ponding of surface water. Pond-15 is located at 36.287473, -94.535845, and can be found of Figure 5B.

6. Pond-16 consists of a 0.02-acre shallow upland stock pond within the eastern portion of Review Area B. Pond-16 discharges to uplands and does not have a continuous surface connection to any other waters on or off-site. It is believed this feature meets the pre-amble criteria of “artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Pond-16 is located at 36.284679, -94.534648, and can be found of Figure 5B.

7. Pond-17 consists of a 0.13-acre upland stock pond within the eastern portion of Review Area C. Pond-17 discharges to uplands does not have a continuous surface connection to any other waters on or off-site. It is believed this feature meets the pre-amble criteria of “artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Pond-17 is located at 36.28754, -94.520755, and can be found of Figure 5C.

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

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).

Determinations were made utilizing information gained from field visits on May 30, 2024, and September 10, 2024, applicant supplied datasheets and pictures, and remote data accessed by the Corps. All resources are shown in Section 9 – Data Sources.

1. W-2 is a 0.09-acre emergent wetland within the northwest portion of Review Area A. W-2 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. This resource is located at 36.300439, -94.545648, and can be found of Figure 5A.

2. W-3 is a 0.74-acre emergent wetland, which directly abuts Pond-01, a preamble upland stock pond upland stock pond, within the northeastern portion of Review Area A. W-3 and Pond-01 are entirely surrounded by uplands, discharge into uplands, and do not have a continuous surface connection to any other waters. W-3 is located at 36.302190, -94.53548, and can be found of Figure 5A.

3. W-4 is a 0.27-acre emergent wetland, which directly abuts Pond-01, a preamble upland stock pond upland stock pond, within the northeastern portion of Review Area A. W-4 and Pond-01 are entirely surrounded by uplands, discharge into uplands, and do not have a continuous surface connection to any other waters. W-4 is located at 36.302162, -94.534564, and can be found of Figure 5A.

4. W-5 consists of a 0.01-acre emergent wetland within the northern portion of Review Area A. W-5 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-5 is located at 36.299178, -94.537692, and can be found of Figure 5A.

5. W-6 consists of a 0.08-acre emergent wetland within the northern portion of Review Area A. W-6 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-6 is located at 36.298621, -94.537726, and can be found on Figure 5A.

6. W-7 consists of a 0.67-acre emergent wetland within the eastern portion of Review Area A. W-7 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-7 is located at 36.298024, -94.533732, and can be found on Figure 5A.

7. W-10 is a 5.0-acre emergent wetland, consisting of multiple prairie potholes and pimple mounts, located within the western-central portion of Review Area A. W-10 is entirely surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-10 is located at 36.297546, -94.543450, and can be found on Figure 5A.

8. W-12 consists of a 0.02-acre emergent wetland, consisting of multiple prairie potholes and pimple mounts, located within the western-central portion of Review Area A. W-12 is entirely surrounded by uplands, discharges into uplands in response to precipitation events, does not have a continuous surface connection to any other waters on or off-site. W-12 is located at 36.296616, -94.543076, and can be found on Figure 5A.

9. W-13 consists of a 1.04-acre emergent wetland within the south-central portion of Review Area A. W-13 is entirely surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-13 is located at 36.293784, -94.544068, and can be found on Figure 5A.

10. W-18 consists of a 0.07-acre emergent wetland within the northwest portion of Review Area B. W-18 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. This resource is located at 36.287676, -94.550284, and can be found of Figure 5B.

11. W-19 consists of a 0.41-acre emergent wetland directly abuts Pond-07, a preamble upland stock pond upland stock pond, within the northwest portion of Review Area B. W-19 and Pond-07 are entirely surrounded by uplands, discharge into uplands, and do not have a continuous surface connection to any other waters. W-19 is located at 36. 288611, -94.551818, and can be found on Figure 5B.

12. W-20 consists of a 0.92-acre emergent wetland within the western portion of Review Area B. W-20 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-20 is located at 36.287676, -94.550284, and can be found on Figure 5B.

13. W-24 consists of a 0.29-acre emergent wetland within the southwestern portion of Review Area B. W-24 is located west of Crazy Creek (RPW) but does not intersect or extend the OHWM, as indicated by the applicants supplied data points WDP-24 and UPD-25. W-24 is entirely surrounded by uplands, and, in direct response to precipitation events, discharges into uplands without a continuous surface connection to any other waters on or off-site. W-24 is located at 36.284737, -94.552398, and can be found on Figure 5B.

14. W-26 consists of a 0.01-acre emergent wetland within the southwestern portion of Review Area B. W-26 is surrounded by uplands, discharges into

uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-26 is located at 36.283327, -94.553407, and can be found on Figure 5B.

15. W-30 consists of a 0.38-acre emergent wetland within the southwestern portion of Review Area B. W-30 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-30 is located at 36.283413, -94.551193, and can be found on Figure 5B.

16. W-33 consists of a 0.70-acre emergent wetland within the southern portion of Review Area B. W-33 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-33 is located at 36.283285, -94.546993, and can be found on Figure 5B.

17. W-34 consists of a 0.17-acre emergent wetland abutting Pond-11, a preamble upland stock pond upland stock pond, within the southern portion of Review Area B. W-34 and Pond-11 are entirely surrounded by uplands, discharge into uplands, and do not have a continuous surface connection to any other waters. W-34 is located at 36.283953, -94.547920, and can be found on Figure 5B.

18. W-35 consists of a 0.10-acre emergent wetland abutting Pond-10, a preamble upland stock pond upland stock pond, within the southern portion of Review Area B. W-35 and Pond-10 are entirely surrounded by uplands, discharge into uplands, and do not have a continuous surface connection to any other waters. W-35 is located at 36.284896, -94.548524, and can be found on Figure 5B.

19. W-36 consists of a 0.05-acre emergent wetland within the southern portion of Review Area B. W-36 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-36 is located at 36.283758, -94.541871, and can be found on Figure 5B.

20. W-37 consists of a 0.12-acre emergent wetland within the southern portion of Review Area B. W-37 is surrounded by uplands, discharges into uplands in response to precipitation events, does not have a continuous surface connection to any other waters on or off-site. This feature is adjacent to an off-site ditch feature abutting W-40 but does not abut this off-site feature. See Section 10. Other Information for additional discussion on off-site features and potential connections. W-37 is located at 36.283123, -94542291, and can be found on Figure 5B.

21. W-38 consists of a 0.06-acre emergent wetland within the southern portion of Review Area B. W-38 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. This feature is adjacent to an off-site ditch feature abutting W-40 but does not abut this off-site feature. See Section 10. Other Information for additional discussion on off-site features and potential connections. W-38 is located at 36.283109, -94.541449, and can be found on Figure 5B.

22. W-39 consists of a 0.12-acre emergent wetland within the southern portion of Review Area B. W-39 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. This feature is adjacent to an off-site ditch feature abutting W-40 but does not abut this off-site feature. See Section 10. Other Information for additional discussion on off-site features and potential connections. W-39 is located at 36.283257, -94.539646, and can be found on Figure 5B.

23. W-40 consists of a 1.04-acre forested wetland abutting Pond-14,within the southern portion of Review Area B. W-40 and Pond-14 appear to abut and discharge to an off-site ditch immediately south of the project area. This off-site excavated ditch discharges into an excavated roadside ditch, which does not have an outflow. This ditch does not connect to any relatively permanent water or potential continuous surface connection, other than the excavated roadside ditch, which does not have an outflow. See Section 10. Other Information for additional discussion on off-site features and potential connections. W-40 is located at 36.283257, -94.539646, and can be found on Figure 5B.

24. W-41 consists of a 0.04-acre emergent wetland within the southern portion of Review Area B. W-41 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-41 is located at 36.283364, -94.539002, and can be found on Figure 5B.

25. W-42 consists of a 0.03-acre emergent wetland within the southern portion of Review Area B. W-42 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-42 is located at 36.283381, -94.538626, and can be found on Figure 5B.

26. W-43 consists of a 0.41-acre emergent wetland abutting Pond-14, within the southern portion of Review Area B.W-43 discharges to Pond-14 during precipitation events; W-43 does not drain to any other wetlands or waters.

W-43 is located at 36.285254, -94. 548468, and can be found on Figure 5B.

27. W-44 consists of a 0.12-acre emergent wetland abutting Pond-15, a preamble upland stock pond upland stock pond, within the eastern portion of Review Area B. W-44 and Pond-15 are entirely surrounded by uplands, discharge into uplands, and do not have a continuous surface connection to any other waters. W-44 is located at 36.287141, -94. 535442, and can be found on Figure 5B.

28. W-48 consists of a 0.12-acre emergent wetland within the eastern portion of Review Area A. W-48 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-48 is located at 36.297791, -94.532423, and can be found on Figure 5A.

29. W-49 consists of a 0.12-acre emergent wetland within the eastern portion of Review Area A. W-49 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-49 is located at 36.298097, -94.531368, and can be found on Figure 5A.

30. W-50 consists of a 0.07-acre emergent wetland within the eastern portion of Review Area A. W-50 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-50 is located at 36.297785, -94.532983, and can be found on Figure 5A.

31. W-51 consists of a 0.20-acre emergent wetland within the eastern portion of Review Area A. W-51 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-51 is located at 36.298142, -94.532611, and can be found on Figure 5A.

32. W-52 consists of a 0.18-acre emergent wetland within the eastern portion of Review Area A. W-5 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-52 is located at 36.298306, -94.531779, and can be found on Figure 5A.

33. W-53 consists of a 0.05-acre emergent wetland within the eastern portion of Review Area A. W-53 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-53 is located at 36.297967, -94.531906, and can be found on Figure 5A.

34. W-54 consists of a 0.52-acre emergent wetland within the eastern portion of Review Area A. W-54 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-54 is located at 36.298687, -94.532908, and can be found on Figure 5A.

35. W-55 consists of a 0.17-acre emergent wetland within the eastern portion of Review Area A. W-55 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-55 is located at 36.298653, -94.532255, and can be found on Figure 5A.

36. W-56 consists of a 0.23-acre emergent wetland within the eastern portion of Review Area A. W-56 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-56 is located at 36.298464, -94.531670, and can be found on Figure 5A.

37. W-57 consists of a 0.21-acre emergent wetland within the eastern portion of Review Area A. W-57 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-57 is located at 36.298954, -94.531171, and can be found on Figure 5A.

38. W-58 consists of a 0.19-acre emergent wetland within the eastern portion of Review Area A. W-58 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-58 is located at 36.299206, -94.532428, and can be found on Figure 5A.

39. W-59 consists of a 4.24-acre emergent wetland within the northeast portion of Review Area C. W-59 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-59 is located at 36.289006, -94.524012, and can be found on Figure 5C.

40. W-60 consists of a 0.02-acre emergent wetland within the northeastern portion of Review Area A. W-60 is surrounded by uplands, discharges into uplands in response to precipitation events, and does not have a continuous surface connection to any other waters on or off-site. W-60 is located at 36.301247, -94.536392, and can be found on Figure 5A.

41. Pond-13 consists of a 0.65-acre shallow stock pond excavated out of historic wetlands and/or waters, within the southern portion of Review

Area B. Pond-13 discharges to uplands and does not have a continuous surface connection to any other waters on or off-site. This pond is bermed on the southern side and a data point from the applicant indicates this pond feature does not abut adjacent waters (W-37 and W-36) See Section 10. Other Information for additional discussion on the history of the site and adjacent land. Pond-13 is located at 36.283493, -94.542937, and can be found of Figure 5B.

42. Pond-14 consists of a 0.55-acre upland shallow stock pond excavated out of historic wetlands and/or waters, within the southern portion of Review Area B. Pond-13 abuts W-40 (non-adjacent wetland) and W-43 (non-adjacent wetland) within the southern portion of Review Area. W-40 and Pond-14 appear to abut and discharge to an off-site ditch immediately south of the project area. This off-site excavated ditch discharges into an excavated roadside ditch, which does not have an outflow. This ditch does not connect to any relatively permanent water or potential continuous surface connection, other than the excavated roadside ditch, which does not have an outflow. See Section 10. Other Information for additional discussion on the history of the site and adjacent land. Pond-14 is located at 36.284058, -94.539826, and can be found of Figure 4B.

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. US Army Corps of Engineers Field Visit May 30, 2024, and September 10, 2024.

b. Energy Renewal Partners (Agent) Wetland Delineation dated April 2023.

c. Energy Renewal Partners (Agent) Data Sheets dated October 11-13, 2022, November 29-2, March 1, 2023, May 29, 2024, and June 14, 2024.

d. US Army Corps of Engineers Southwest Division Regulatory Viewer, accessed on June 28, 2024.

e. US Army Corps of Engineers Antecedent Precipitation Tool (Version 1), accessed on June 18-28, 2024.

f. **Google Earth, open-source global imagery, dated 1990-2024, accessed June 18-28, 2024.**

g. Applicant provided on and off-site photographs. See exhibit, titled: "SWL-2024-00052 - AJD - Applicant Provided Information - Pond 13-14 and W-37"

10. OTHER SUPPORTING INFORMATION.

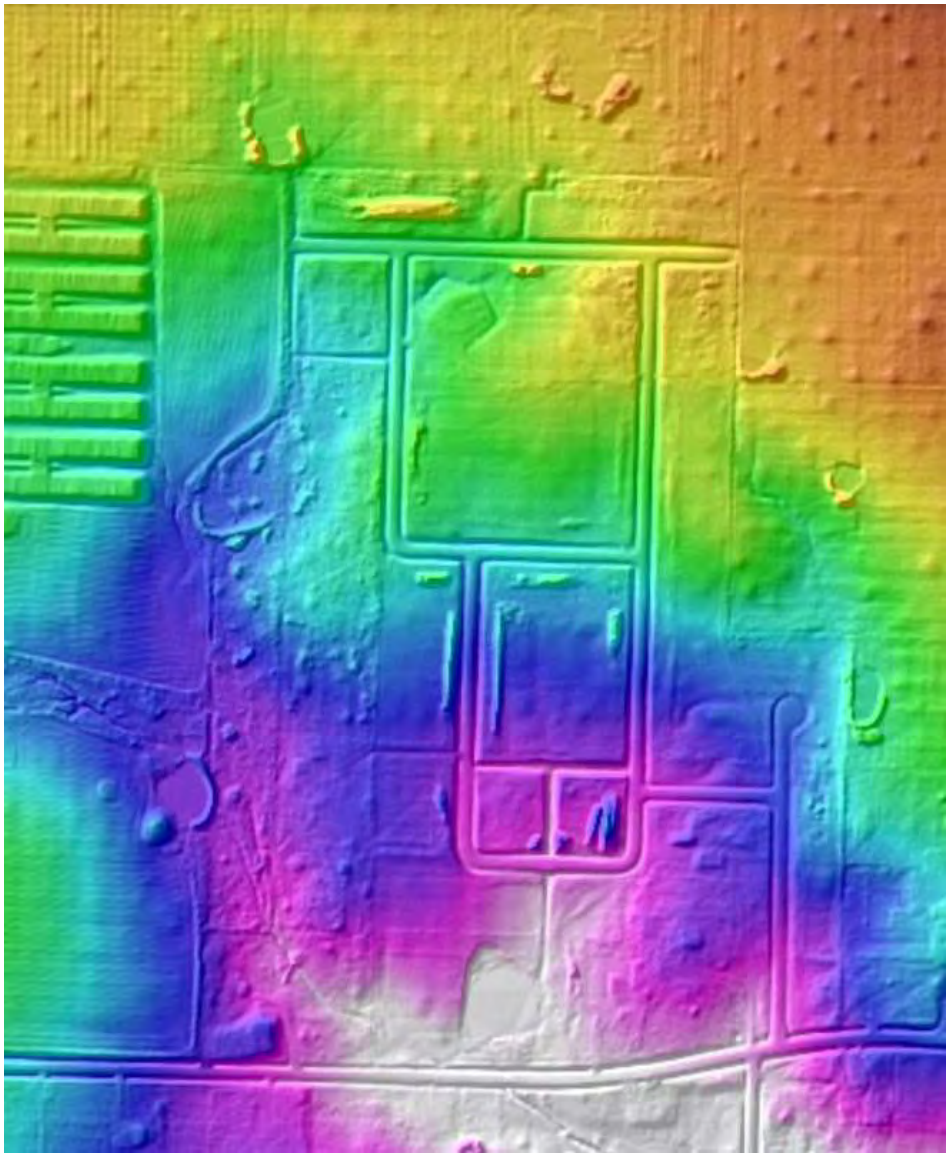
On-site historic information determined:

During the desktop review of the project area and potential off-site connections, it was determined that sometime prior to 1990 land manipulation likely occurred at the locations of Pond-13 and Pond 14 (at 36.2837, -94.5401) to excavate wetlands and linear waters that formed the (previous) headwaters of Little Flint Creek to form stock ponds for agriculture. This area still drains southward towards Little Flint Creek, as it did historically, however, there are currently no continuous surface connections from the on-site resources to Little Flint Creek. Additional manipulation occurred south of the project area in the 2000s, discussed below, further altering hydrology.

Off-site historic information determined:

Immediately south of the project area (off-site), potentially abutting W-40 is one excavated ditch that discharges into an excavated roadside ditch (at 36.2825, -94.5404), which does not have an outflow, immediately south. This ditch does not connect to any relatively permanent water or potential continuous surface connection. Features W-37, W-38, W-39, Pond 13, and Pond 14 are adjacent, but not connected to the off-site ditch. (See below Google Earth imagery, dated 2008, and LiDAR, dated 2000-2015)

2008 Google Earth Areal Imagery



LiDAR Dated 2000-2015

Between 2006-2009 significant land manipulation occurred south of the project area and north of Hwy 12 (at 36.2822, -94.5410) for a proposed residential development. The development was only partially completed but resulted in the filling of a complex of wetlands and waters between the project site and Highway 12. The manipulated area contains a series of roadways and appear to not be contiguously ditched; it appears all roadside ditches discharge into uplands and/or are stagnant. (See below Google Earth imagery, dated 2009, and above LiDAR, dated 2000-2015)

A small complex of wetlands and waters exists (at 36.2796, -94.5431) adjacent to the off-site development discussed above, The Corps was not able to gain access of this area to further investigate the breadth of the waters, but these waters do not

directly abut to the on-site waters (northward) and/or potential off-site waters (southward). (See below Google Earth imagery, dated 2009, and above LiDAR, dated 2000-2015)

2009 Google Earth Areal Imagery

Further south of the project area, adjacent to Highway 12, is an unnamed potential tributary of Little Flint Creek beginning south of Highway 12 (at 36.2757, -94.5406, -94.5424) that may constitute a relatively permanent water and/or a continuous surface connection starting at/or adjacent to the Hwy 12 culvert. However, the off-site unnamed potential tributary of Little Flint Creek appears to discharge within

uplands after a short (480-ft) run (at 36.2749, -94.5389). (See below Google Earth imagery, dated 2014)

2014 Google Earth Areal Imagery

Additionally, south of the project area, and north of the potential unnamed tributary of Little Flint Creek, is one excavated upland ditch (at 36.276448°, -94.542496°) likely for driveway drainage, which is not connected to any potential wetlands, other aquatic resources, or potential conveyances, such as other ditches or swales, north or south of the ditch. (See below Google Earth imagery, dated 2024)

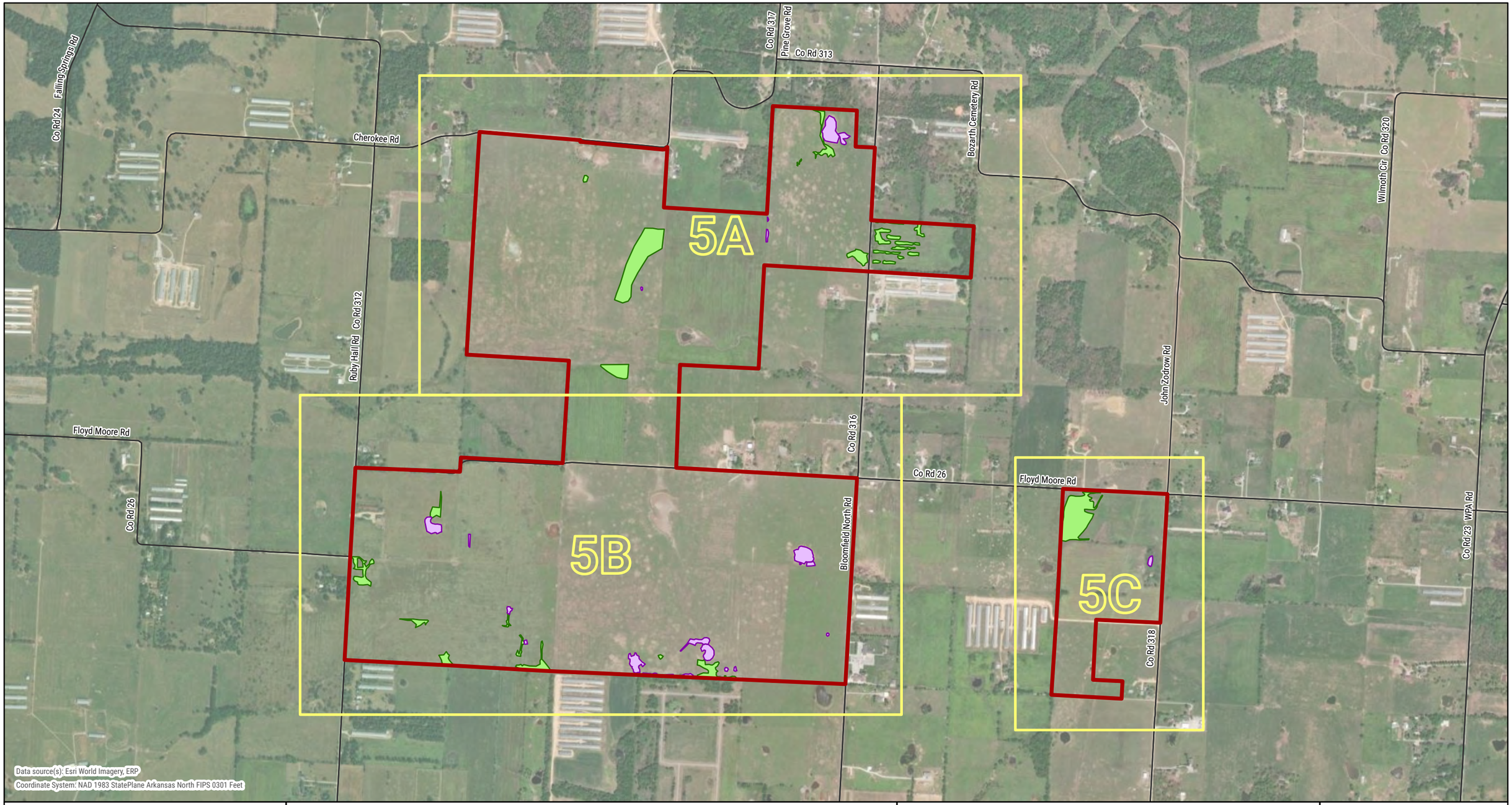
Additionally, south of the project area and adjacent to Hwy 12 there is one excavated pond with no channelized outflow. The surrounding land around the pond has been graded to contain all water; the pond appears to only have outflows during heavy precipitation events that overtop the banks. (See below Google Earth imagery, dated 2024)

2024 Google Earth Areal Imagery

Off-site in-person visit:

While the Corps could not gain access to the off-site areas discussed in the above section, a site visit was conducted along the public road on September 10, 2024, and it was determined the area north of, and draining to, the potential unnamed tributary of Little Flint Creek was uplands with no apparent swale, ditch, or channel that could potentially form a continuous surface connection. Some apparent drainage and water staining can be seen on aerial imagery; above (dated 2024). However, no perceivable conveyance other than overland sheet flow was able to be seen during the site visit.

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.



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LEGEND

- Project Area (~786 acres, total)
- Figure Extent
- Pond
- Wetland

Forsite Renewables, LLC

Ouachita Solar Project

Delineated Water Features for
Approved Jurisdictional Determination
Index

Project Location: Benton County, Arkansas

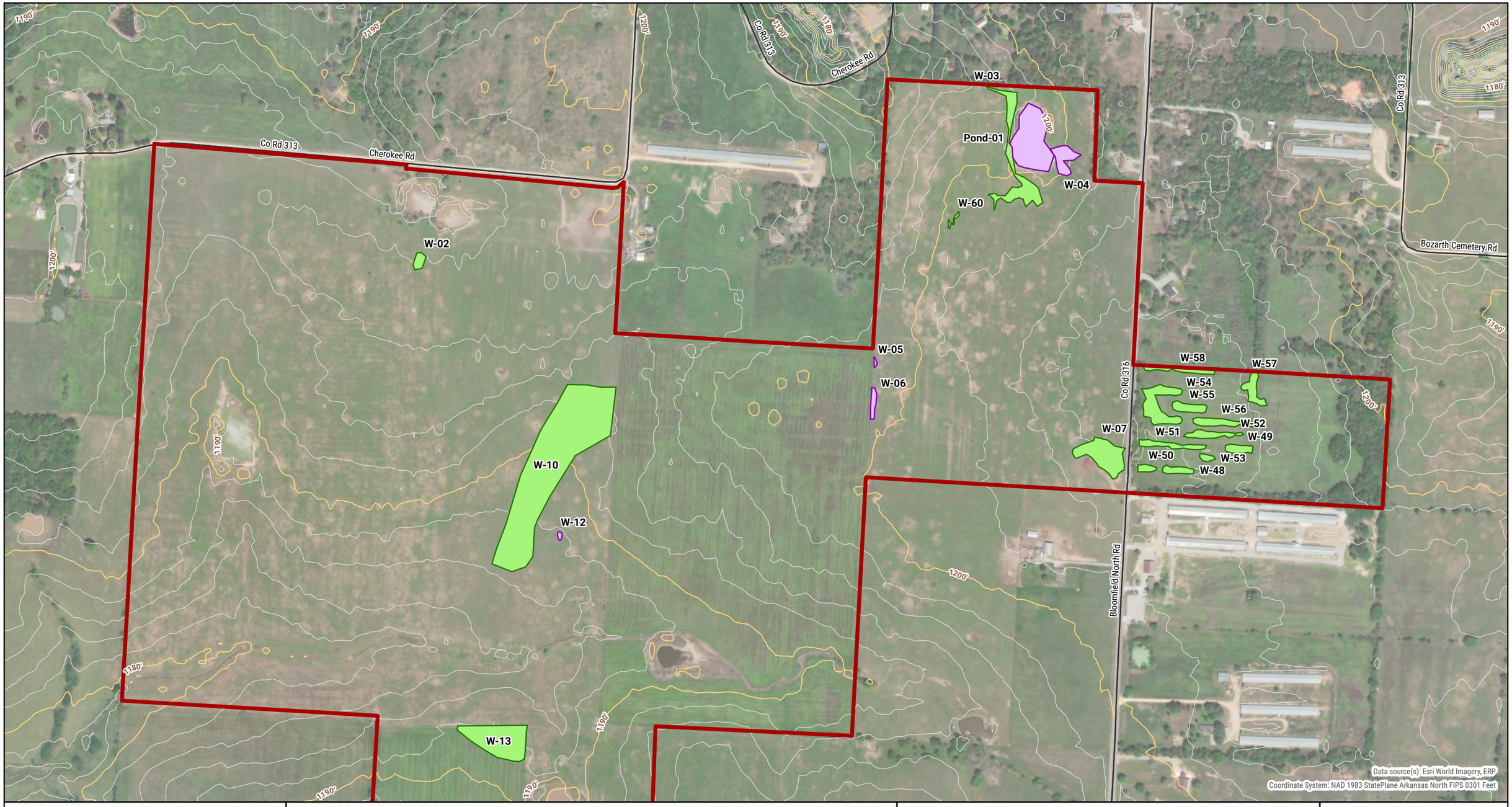
N

0 600 1,200 Feet

FIGURE 5

Prepared by: J. Hobbs

Date: 2024-07-29



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LEGEND

- Project Area (~786 acres, total)
- Pond
- Wetland
- Ground Elevation Contour (10-ft interval)
- Ground Elevation Contour (2-ft interval)

Forsite Renewables, LLC

Ouachita Solar Project

Delineated Water Features for Approved Jurisdictional Determination

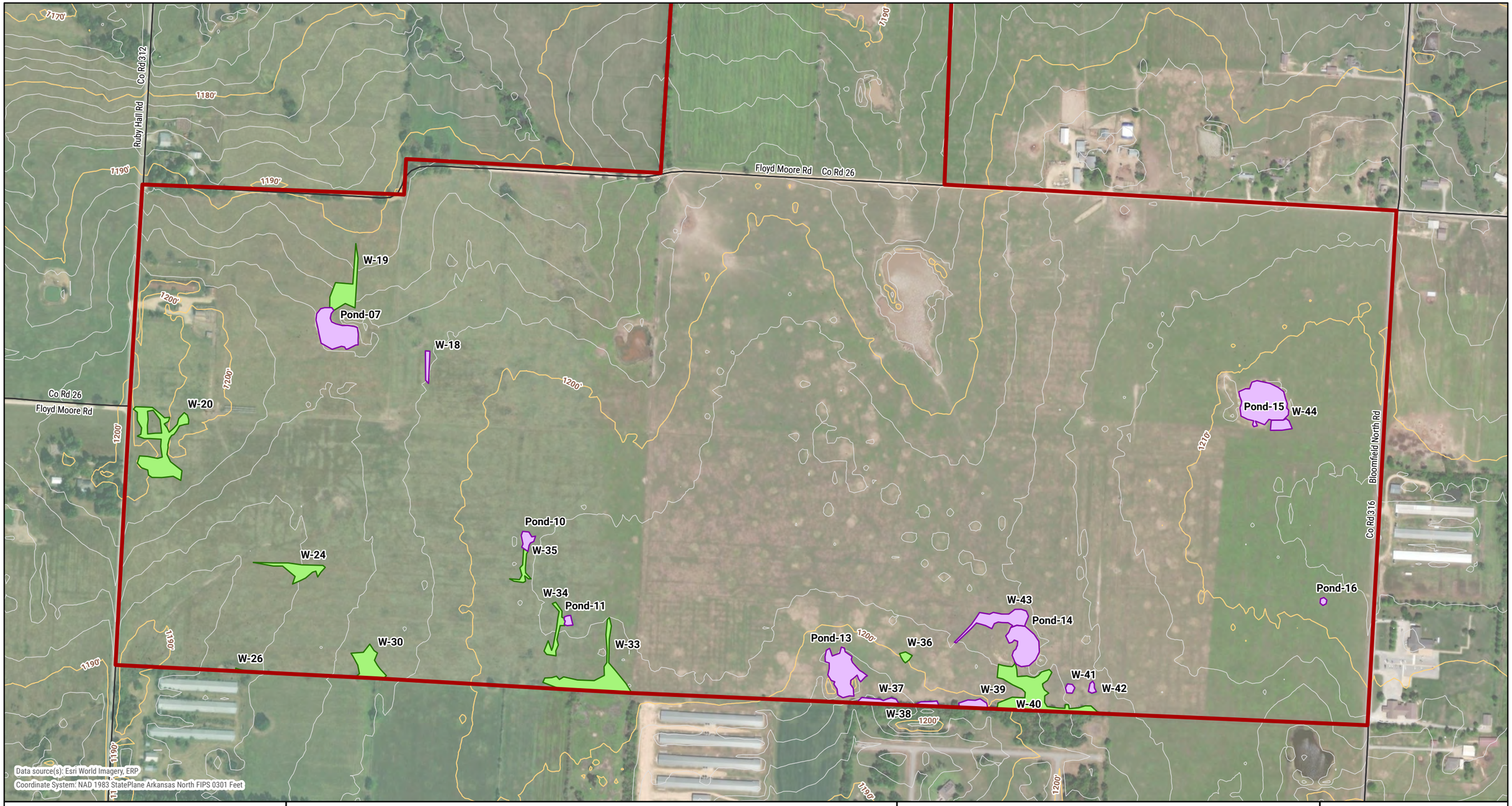
Project Location: Benton County, Arkansas

N

0 240 480 Feet

FIGURE 5A

Prepared by: J. Hobbs | Date: 2024-07-29



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LEGEND

- Project Area (~786 acres, total)
- Pond
- Wetland
- Ground Elevation Contour (10-ft interval)
- Ground Elevation Contour (2-ft interval)

Forsite Renewables, LLC

Ouachita Solar Project

Delineated Water Features for Approved Jurisdictional Determination

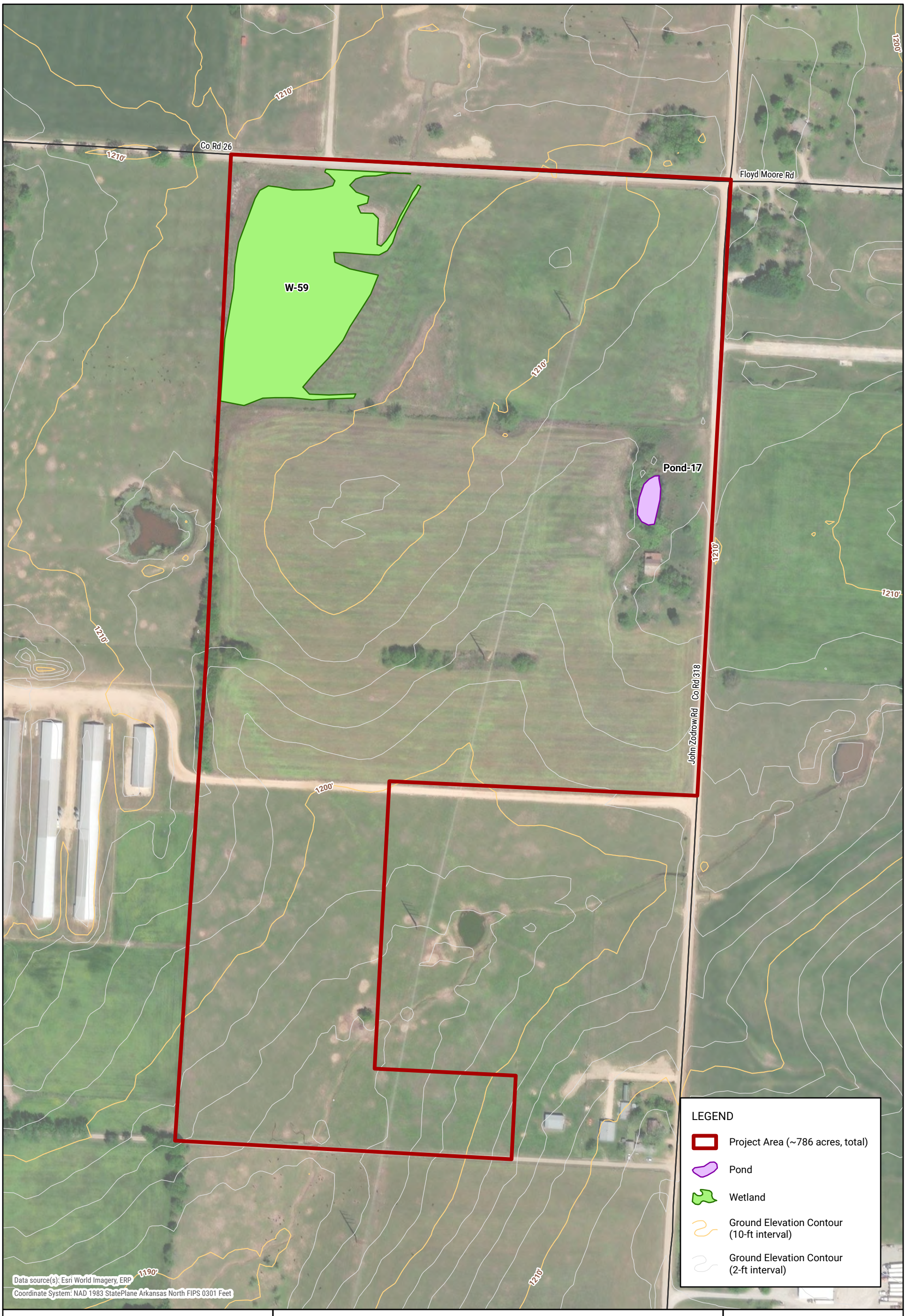
Project Location: Benton County, Arkansas

N

0 240 480 Feet

FIGURE 5B

Prepared by: J. Hobbs | Date: 2024-07-29



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Delineated Water Features for
Approved Jurisdictional Determination

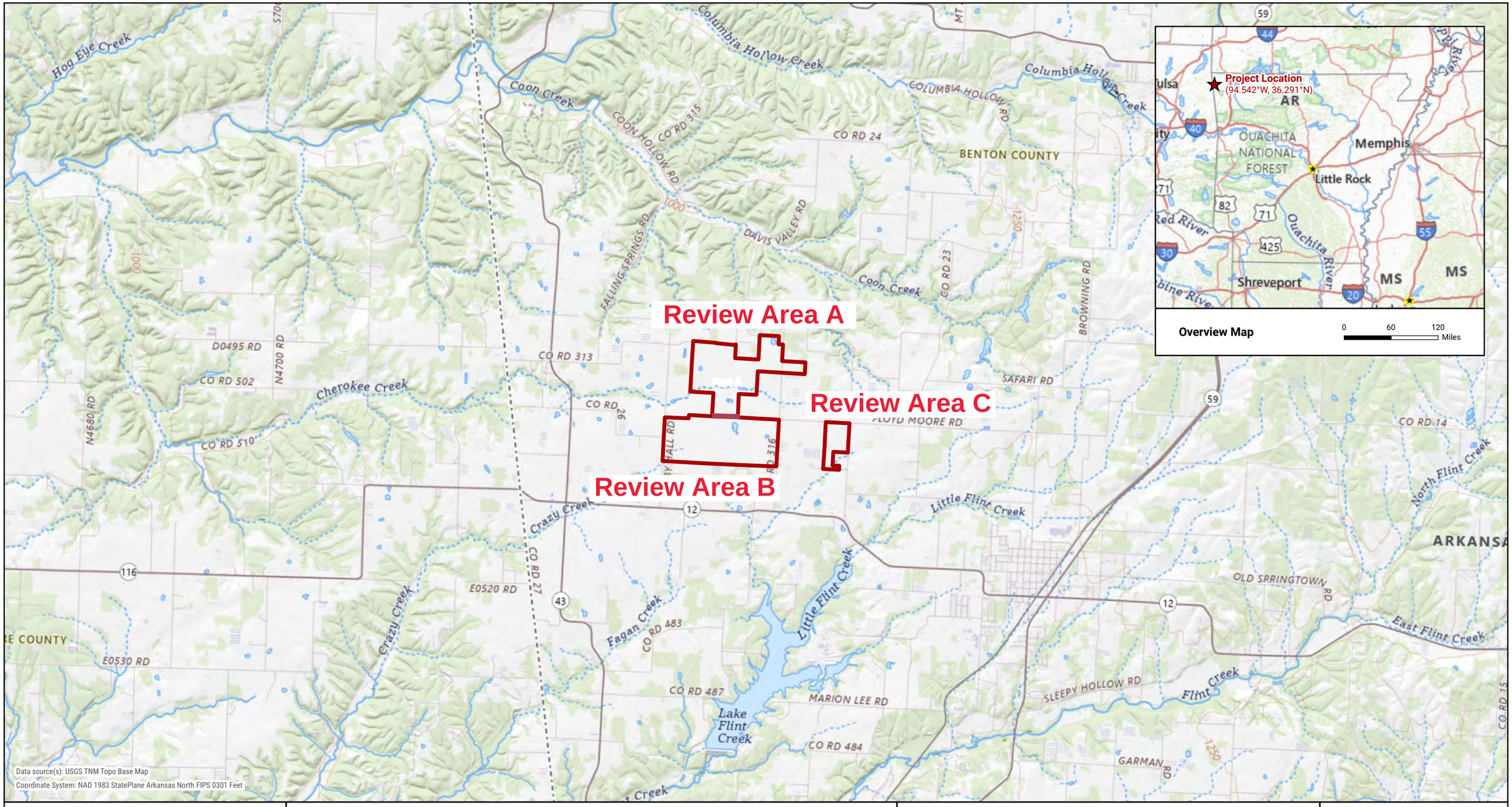
Project Location: Benton County, Arkansas

N

0 120 240 Feet

FIGURE 5C

Prepared by: J. Hobbs | Date: 2024-07-29



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LEGEND

Project Area (~786 acres, total)

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Ouachita Solar Project

Regional Topography

Project Location: Benton County, Arkansas

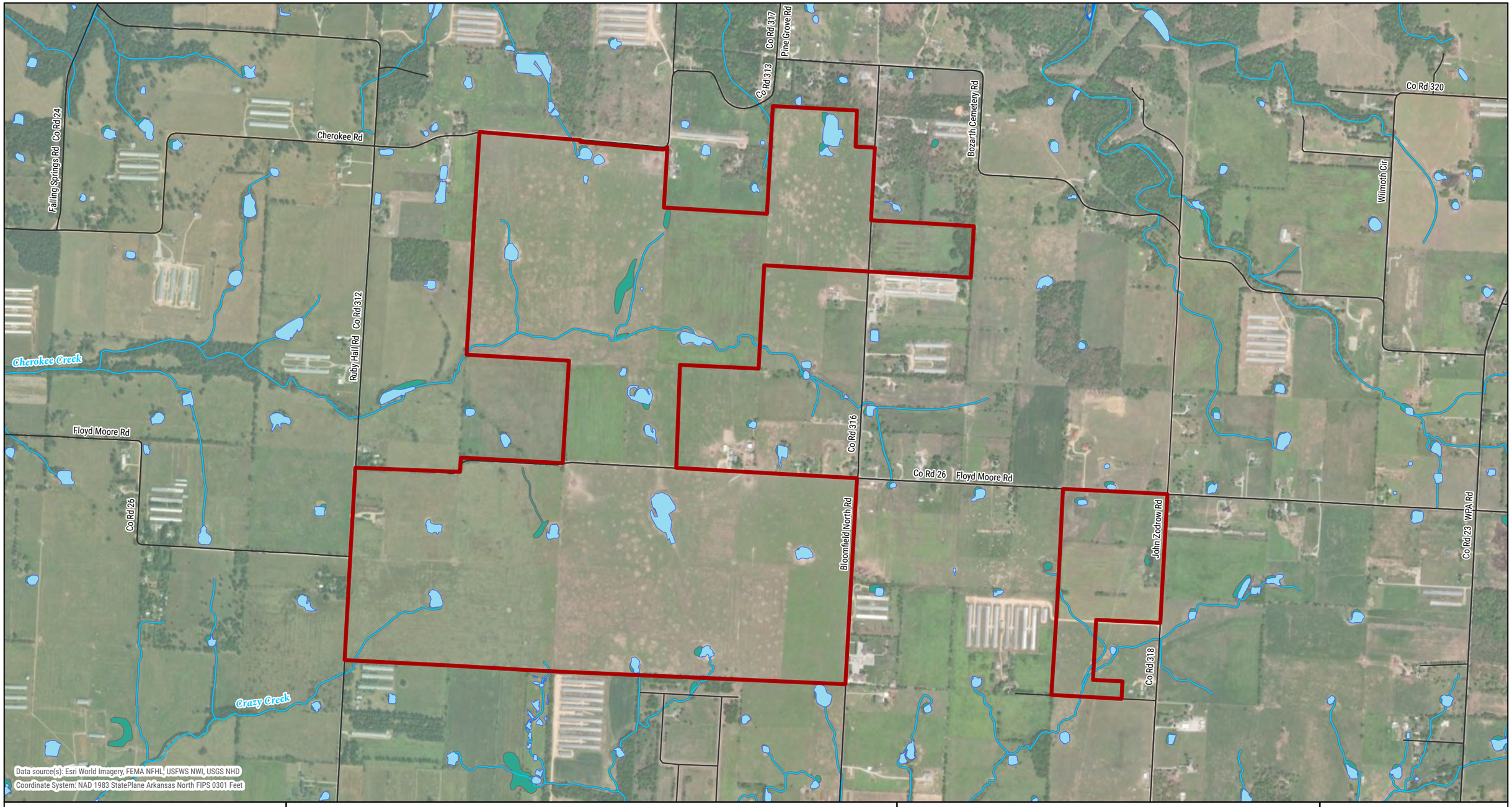
N

0 0.5 1 Mile

FIGURE 1

Prepared by: J. Hobbs

Date: 2024-07-26



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LEGEND

- Project Area (~786 acres, total)
- Wetland
- 100-year Floodplain
- Stream/Drainage
- Waterbody

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Ouachita Solar Project

Desktop-Identified Waters

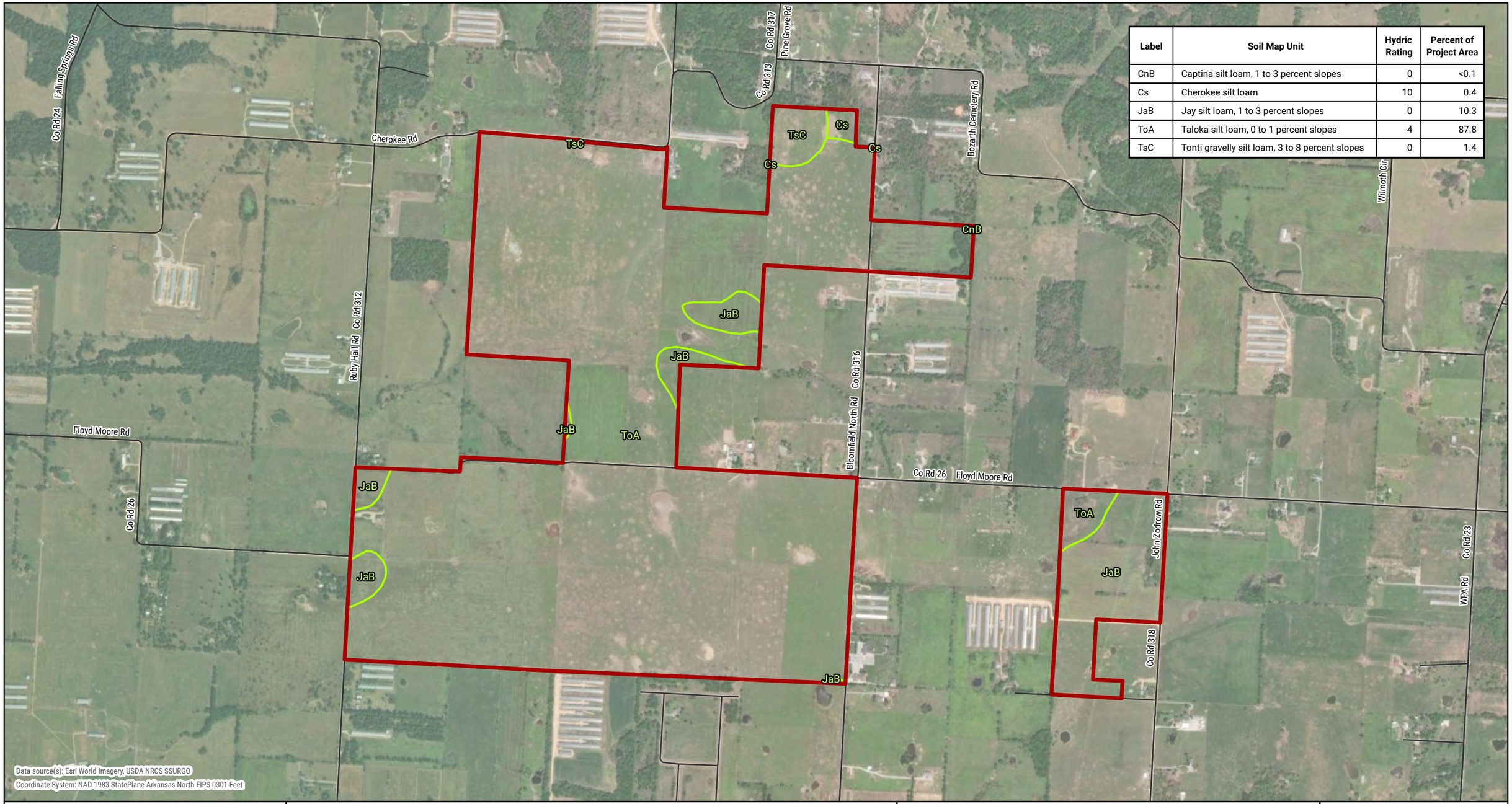
Project Location: Benton County, Arkansas

N

0 600 1,200 Feet

FIGURE 2

Prepared by: J. Hobbs | Date: 2024-07-26



Label	Soil Map Unit	Hydric Rating	Percent of Project Area
CnB	Captina silt loam, 1 to 3 percent slopes	0	<0.1
Cs	Cherokee silt loam	10	0.4
JaB	Jay silt loam, 1 to 3 percent slopes	0	10.3
ToA	Taloka silt loam, 0 to 1 percent slopes	4	87.8
TsC	Tonti gravelly silt loam, 3 to 8 percent slopes	0	1.4

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LEGEND

Project Area (~786 acres)

Soil Map Unit

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Ouachita Solar Project

Hydric Rating by Soil Map Unit

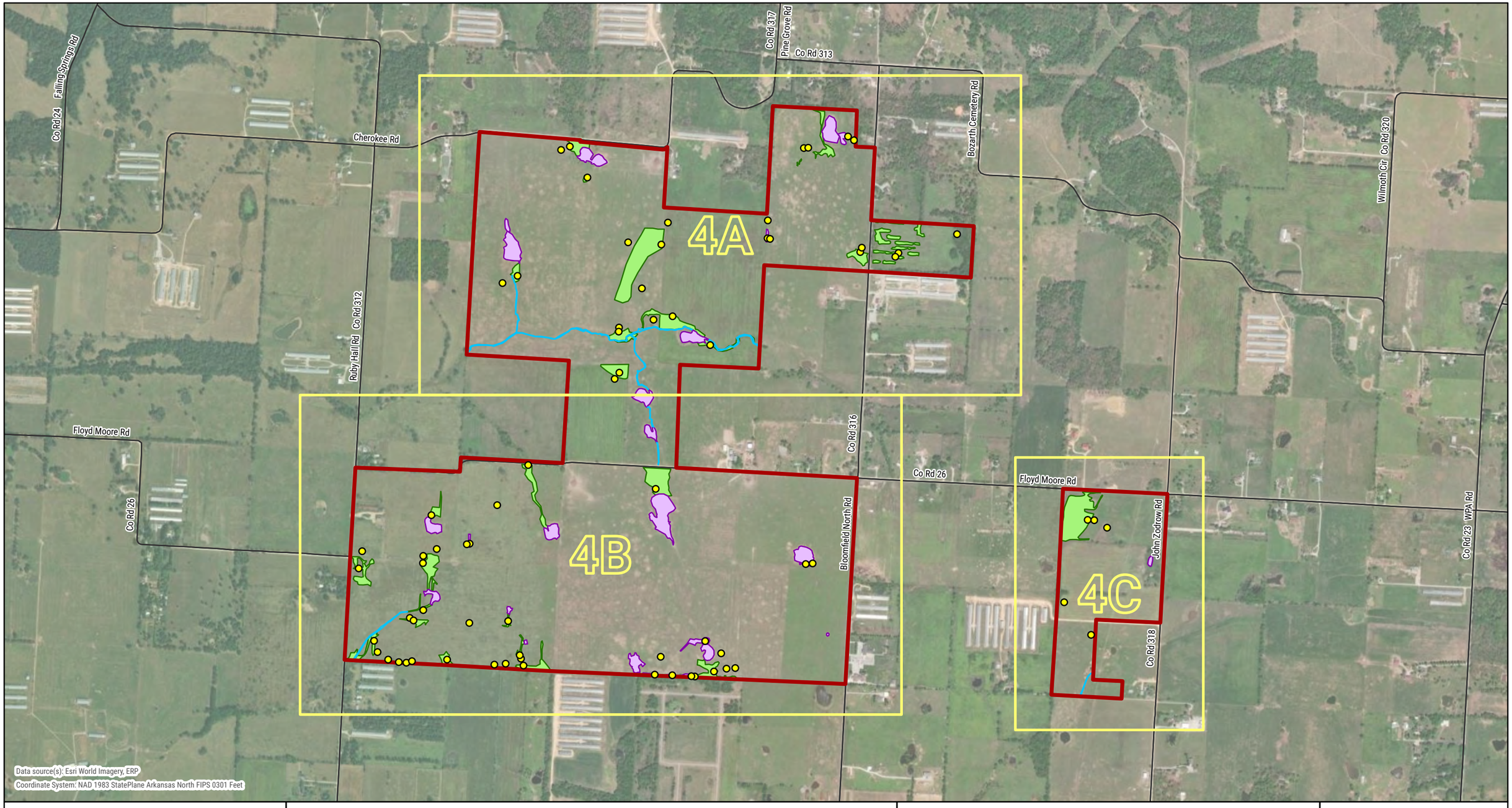
Project Location: Benton County, Arkansas

N

0 600 1,200 Feet

FIGURE 3

Prepared by: J. Hobbs | Date: 2024-07-26



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LEGEND

- Project Area (~786 acres, total)
- Figure Extent
- Data Point
- Stream
- Pond
- Wetland

Forsite Renewables, LLC

Ouachita Solar Project

Field-Identified Waters
Index

Project Location: Benton County, Arkansas

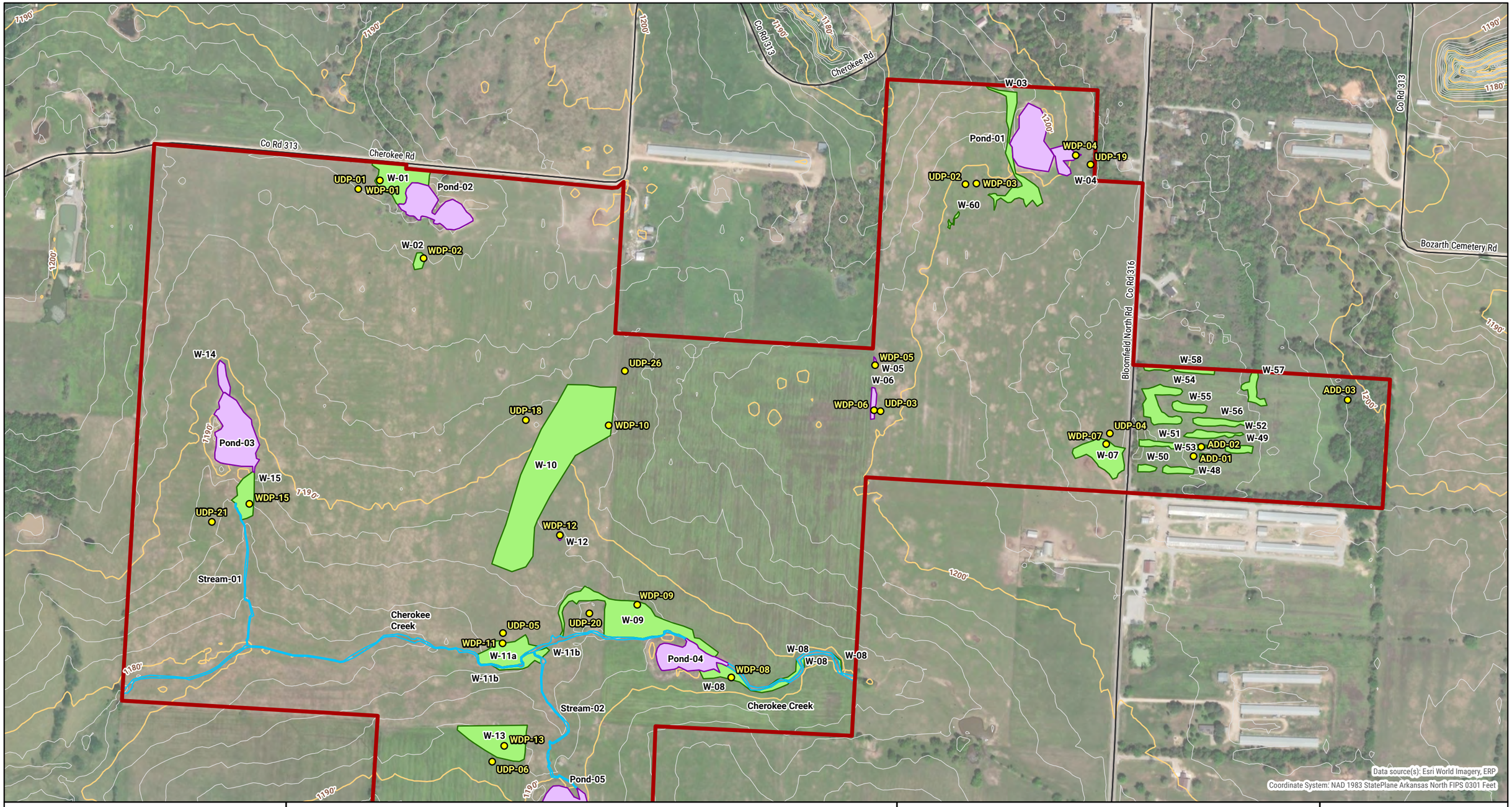
N

0 600 1,200 Feet

FIGURE 4

Prepared by: J. Hobbs

Date: 2024-07-29



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LEGEND

- Project Area (~786 acres, total)
- Data Point
- Stream
- Pond
- Wetland
- Ground Elevation Contour (10-ft interval)
- Ground Elevation Contour (2-ft interval)

Forsite Renewables, LLC

Ouachita Solar Project

Field-Identified Waters

Project Location: Benton County, Arkansas

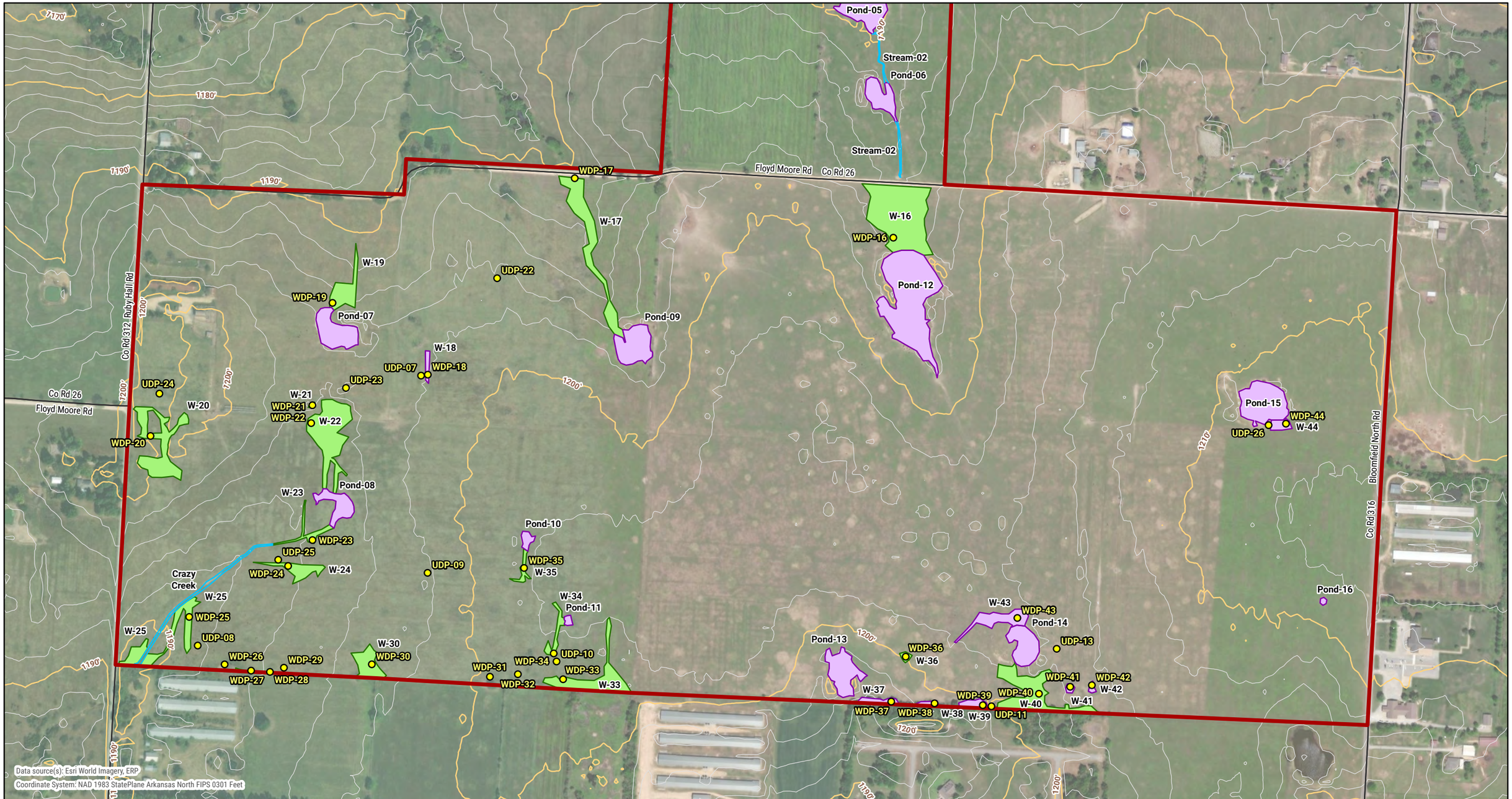
N

0 240 480 Feet

FIGURE 4A

Prepared by: J. Hobbs

Date: 2024-07-29



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LEGEND

- Project Area (~786 acres, total)
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- Pond
- Wetland
- Ground Elevation Contour (10-ft interval)
- Ground Elevation Contour (2-ft interval)

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Ouachita Solar Project

Field-Identified Waters

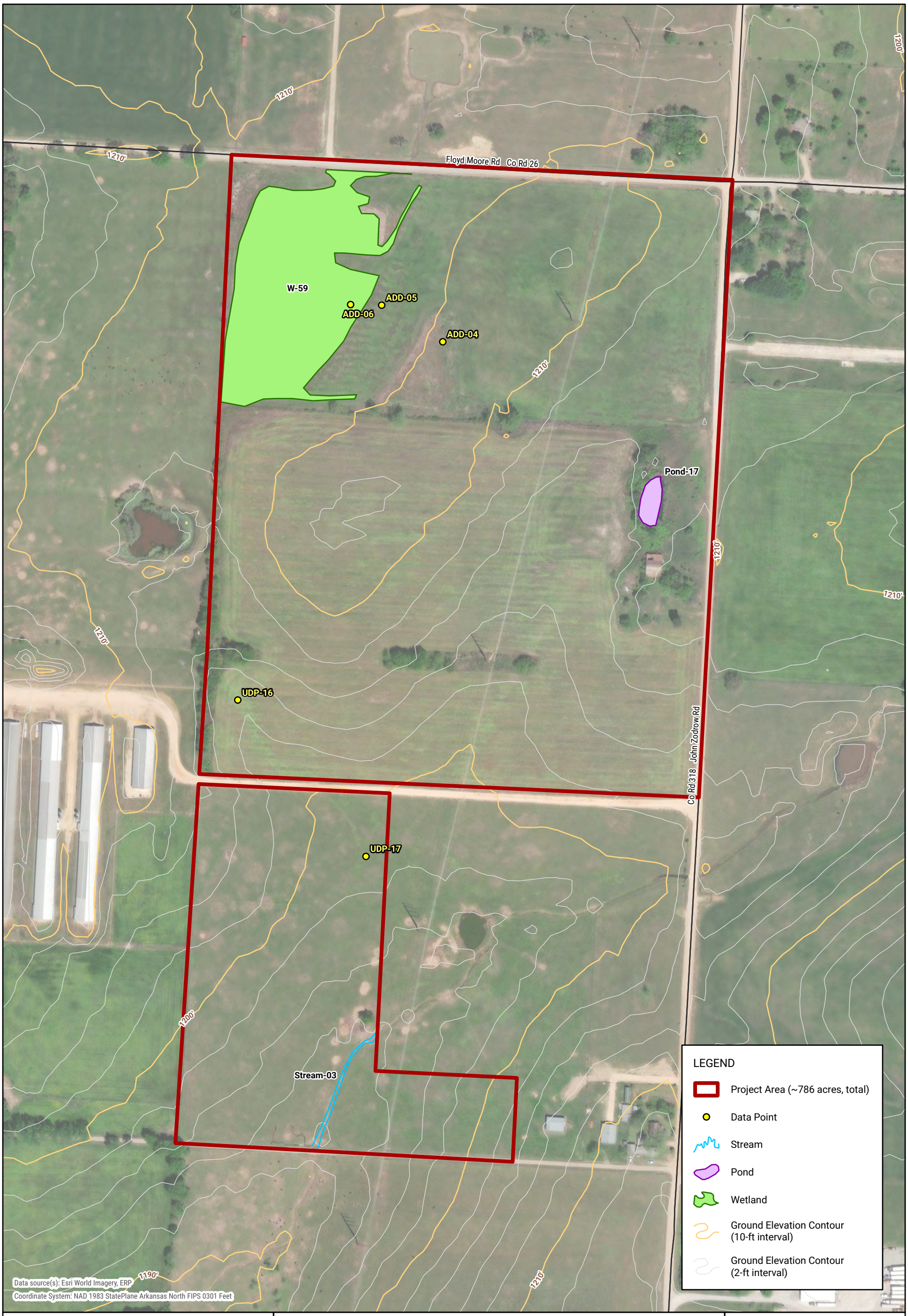
Project Location: Benton County, Arkansas

N

0 240 480 Feet

FIGURE 4B

Prepared by: J. Hobbs Date: 2024-07-29



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Field-Identified Waters

Project Location: Benton County, Arkansas

N

0 120 240 Feet

FIGURE 4C

Prepared by: J. Hobbs

Date: 2024-07-29