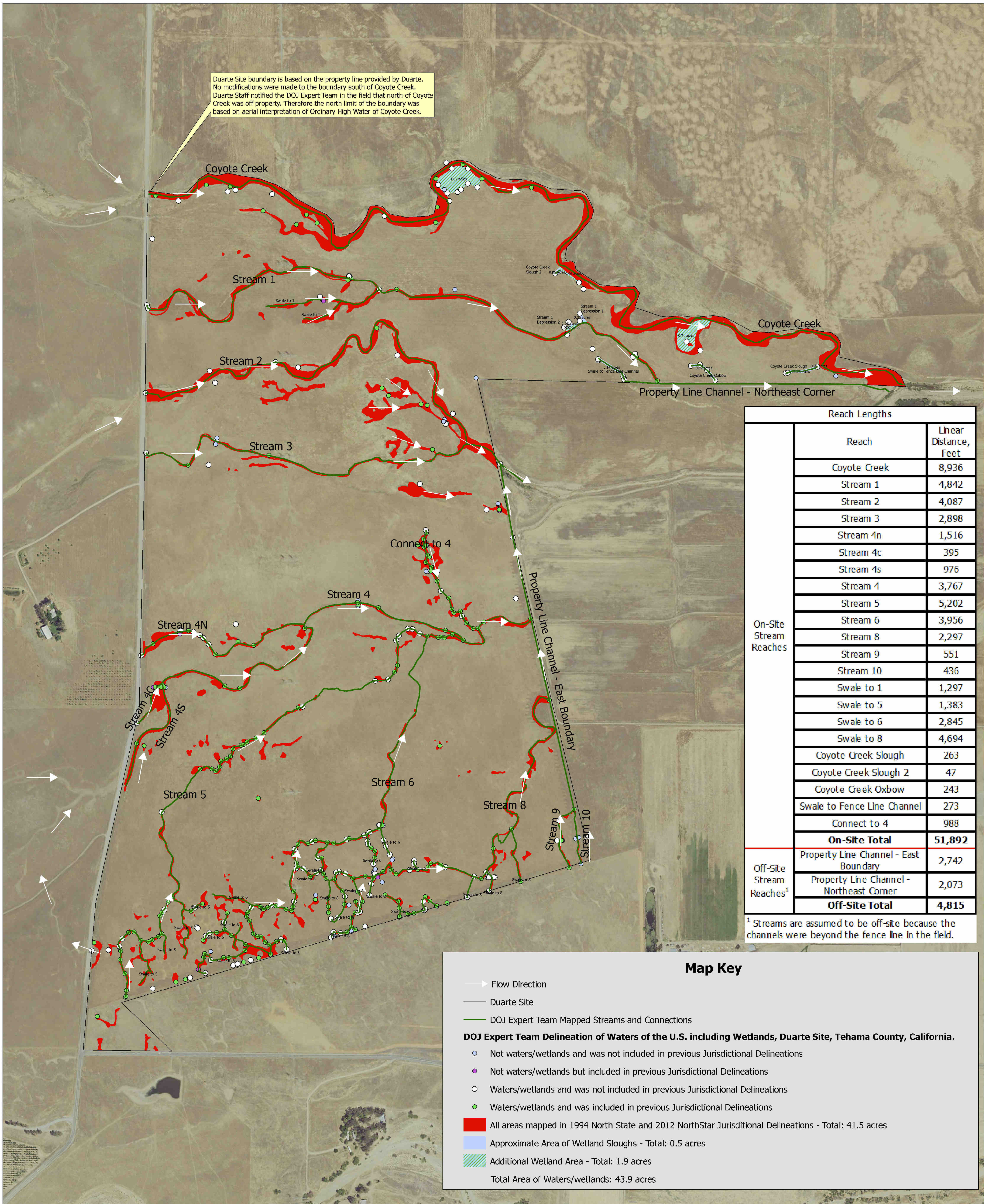


## **Appendix 1**





Data Source: USDA 2014 Aerial.

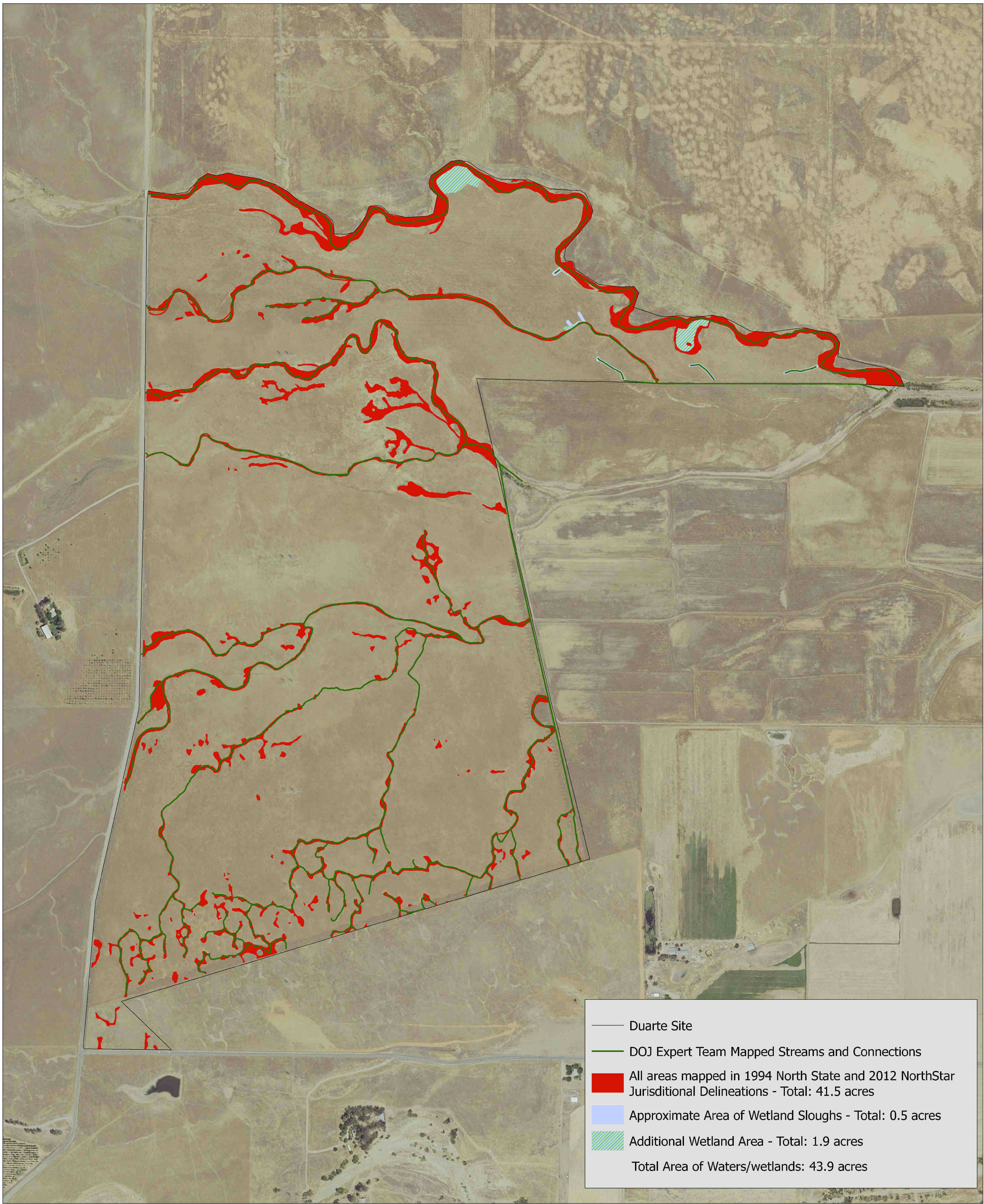
F:\projects\14\_112\_Duarte\_Nursery\_v\_USACE\Expert\_Delineation34x44a.mxd

0 500 1,000 2,000 Feet



Figure V-33a. Duarte Site: DOJ Expert Team Delineation of Waters of the U.S., including Wetlands, Duarte Site, Tehama County, California.





Data Source: USDA 2014 Aerial.

F:\projects\14\_112\_Duarte\_Nursery\_v\_USACE\Expert\_Delineation34x44b.mxd



Figure V-33b. Duarte Site: DOJ Expert Team Delineation of Waters of the U.S., including Wetlands, Duarte Site, Tehama County, California.



## **Appendix 2**



1 ROBERT G. DREHER  
2 Acting Assistant Attorney General

3 Andrew J. Doyle (FL Bar No. 84948)  
4 John Thomas H. Do (CA Bar No. 285075)  
5 Trial Attorneys  
6 United States Department of Justice  
7 Environment and Natural Resources Division  
8 P.O. Box 7611  
9 Washington, DC 20044

10 Attorneys for the Defendant and Counterclaim-Plaintiff

11 UNITED STATES DISTRICT COURT  
12 EASTERN DISTRICT OF CALIFORNIA

13 DUARTE NURSERY, INC., a  
14 California Corporation; and  
15 JOHN DUARTE, an individual,

16 Plaintiffs,

17 v.

18 UNITED STATES ARMY CORPS OF  
19 ENGINEERS,

20 Defendant.

No. CIV. S-13-2095 LKK/DAD

**ANSWER AND COUNTERCLAIM**

21 UNITED STATES OF AMERICA,

22 Counterclaim-  
23 Plaintiff,

24 v.

25 DUARTE NURSERY, INC., a  
26 California Corporation; and  
27 JOHN DUARTE, an individual,

28 Counterclaim-  
Defendants.



1 In the first part of this pleading, *infra* pp. 2-16  
2 ("Answer"), the United States Army Corps of Engineers ("Corps")  
3 responds to the Complaint for Declaratory and Injunctive Relief  
4 ("Duarte's Complaint," ECF No. 1) filed by Duarte Nursery, Inc.  
5 and John Duarte (collectively "Duarte").

6 In the second part of this pleading, *infra* pp. 16-29  
7 ("Counterclaim"), the United States of America ("United States"),  
8 by the authority of the Attorney General and at the request of  
9 Secretary of the United States Department of the Army, acting  
10 through the Corps, asserts a claim for injunctive relief and  
11 civil penalties against Duarte under the Clean Water Act.

## 12 **ANSWER**

13 The Corps asserts defenses to Duarte's Complaint and answers  
14 each numbered paragraph as follows:

### 15 **JURISDICTION**

16 1. Paragraph 1 constitutes Duarte's legal conclusion to  
17 which no response is required. To the extent that a response is  
18 required, the Corps denies that Duarte has properly invoked the  
19 limited subject matter jurisdiction of this Court.

### 20 **INTRODUCTION**

21 2. With respect to the first sentence of paragraph 2, the  
22 Corps admits that Duarte Nursery, Inc. owns real property on  
23 Paskenta Road in rural Tehama County, a few miles south of the  
24 city of Red Bluff. The Corps is without knowledge or information  
25 sufficient to form a belief as to the truth of the remaining  
26 allegations in the first sentence of paragraph 2 and therefore  
27 denies the same. The Corps is without knowledge or information  
28 sufficient to form a belief as to the truth of the allegations in



1 the second sentence of paragraph 2 and therefore denies the same.  
2 The third sentence of paragraph 2 constitutes Duarte's legal  
3 conclusion to which no response is required. To the extent that  
4 a response is required, the Corps denies the third sentence of  
5 paragraph 2.

6 3. With respect to the first sentence of paragraph 3, the  
7 Corps admits that Exhibit A to Duarte's Complaint is a true and  
8 correct copy of a letter that the Corps issued to Duarte on or  
9 about February 25, 2013. The remaining allegations in the first  
10 sentence of paragraph 3 contain Duarte's characterization of  
11 Exhibit A, which speaks for itself, and the Corps denies any  
12 allegations contrary to the plain meaning of Exhibit A. The  
13 Corps denies the allegations in the second and third sentences of  
14 paragraph 3.

15 4. Paragraph 4 is not directed to the Corps and relates  
16 entirely to the defendants or claims that were dismissed by this  
17 Court's Order of April 23, 2014 (ECF No. 27) and thus requires no  
18 response.

19 5. The Corps denies the allegations in the first sentence  
20 of paragraph 5 to the extent they are directed to the Corps.  
21 With respect to the second, third, fourth, and fifth sentences of  
22 paragraph 5, they constitute Duarte's characterization of  
23 Duarte's Complaint to which no response is required. To the  
24 extent that a response is required, the Corps denies the  
25 allegations in these sentences to the extent they are directed to  
26 the Corps. The balance of paragraph 5 is not directed to the  
27 Corps and relates entirely to the defendants or claims that were  
28 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)



1 and thus requires no response.

2 **VENUE**

3 6. Paragraph 6 constitutes Duarte's legal conclusion to  
4 which no response is required. To the extent that a response is  
5 required, the Corps admits that venue is proper in the United  
6 States District Court for the Eastern District of California  
7 assuming, for the sake of argument, that Duarte has properly  
8 invoked the limited subject matter jurisdiction of this Court.

9 **PARTIES**

10 **Plaintiffs**

11 7. The Corps admits that Duarte Nursery, Inc. owns the  
12 property that is the subject of Duarte's Complaint. The Corps is  
13 without knowledge or information sufficient to form a belief as  
14 to the truth of the remaining allegations in paragraph 7 and  
15 therefore denies the same.

16 8. The Corps admits that John Duarte is the President of  
17 Duarte Nursery, Inc. The Corps is without knowledge or  
18 information sufficient to form a belief as to the truth of the  
19 remaining allegations in paragraph 8 and therefore denies the  
20 same.

21 **Defendants**

22 9. The Corps admits the allegations in the first sentence  
23 of paragraph 9. The remaining allegations in paragraph 9  
24 constitute Duarte's legal conclusion, which require no response,  
25 and characterize 33 U.S.C. § 1344(a) and 33 C.F.R. § 326.3, which  
26 speak for themselves as to their content and meaning.

27 10-16. Paragraphs 10 through 16 are not directed to the  
28 Corps and relate entirely to the defendants or claims that were



1 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)  
2 and thus require no response.

### 3 **LEGAL BACKGROUND**

4 17-35. Paragraphs 17 through 35 constitute Duarte's  
5 characterization of the Clean Water Act and associated  
6 regulations, case law, and guidance documents which speak for  
7 themselves as to their content and meaning. Paragraphs 17  
8 through 35 also contain Duarte's legal conclusions to which no  
9 response is required.

10 36-38. Paragraphs 36 through 38 are not directed to the  
11 Corps and relate entirely to the defendants or claims that were  
12 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)  
13 and thus require no response.

14 39-43. Paragraphs 39 through 43 constitute Duarte's  
15 characterization of the United States Constitution, case law, and  
16 a treatise which speak for themselves as to their content and  
17 meaning. Paragraphs 39 through 43 also contain Duarte's legal  
18 conclusions to which no response is required.

### 19 **FACTUAL ALLEGATIONS**

20 44. The Corps admits the allegation in the first sentence  
21 of paragraph 44 that Duarte Nursery, Inc. owns property located  
22 on Paskenta Road in rural Tehama County, south of the city of Red  
23 Bluff and roughly three miles west of Interstate 5. (Duarte uses  
24 the shorthand "Property," so this Answer does as well.) The  
25 Corps admits the allegation in the first sentence of paragraph 44  
26 that the Property includes Tehama County Assessor's Parcel  
27 Numbers ("APN") 037-070-35-1 and 037-070-37-1, but the Corps  
28 denies that the Property is limited to these two parcels. The



1 Corps is without knowledge or information sufficient to form a  
2 belief as to the truth of the remaining allegations in the first  
3 sentence of paragraph 44 and the allegations in the second  
4 sentence of paragraph 44 and therefore denies the same.

5 45. The Corps is without knowledge or information  
6 sufficient to form a belief as to the truth of the allegations in  
7 paragraph 45 and therefore denies the same.

8 46. The Corps admits the allegations in paragraph 46 that  
9 an environmental consultant was retained in approximately 2012  
10 regarding the Property. The Corps is without knowledge or  
11 information sufficient to form a belief as to the truth of the  
12 remaining allegations in paragraph 46 and therefore denies the  
13 same.

14 47. The Corps admits the allegation in paragraph 47 that in  
15 November 2012 the Property contained wetlands. The Corps denies  
16 the allegations in paragraph 47 that wetlands were avoided, and  
17 that no deep ripping has taken place on the Property while it has  
18 been owned by Duarte Nursery, Inc. or under the control of John  
19 Duarte. The Corps is without knowledge or information sufficient  
20 to form a belief as to the truth of the remaining allegations in  
21 paragraph 47 and therefore denies the same.

22 48. The Corps denies the allegations in paragraph 48.

23 49. The Corps denies the allegations in paragraph 49.

24 50. The Corps admits the allegation in paragraph 50 that on  
25 or about February 25, 2013, the Corps issued a true and correct  
26 copy of Exhibit A to Duarte's Complaint to Duarte. The remaining  
27 allegations in paragraph 50 purport to quote Exhibit A, which  
28 speaks for itself, and the Corps denies any allegations contrary



1 to the plain meaning of Exhibit A.

2 51. Paragraph 51 constitutes Duarte's characterization of  
3 Exhibit A to Duarte's Complaint, which speaks for itself, and the  
4 Corps denies any allegations contrary to the plain meaning of  
5 Exhibit A.

6 52. The Corps admits that allegation in paragraph 52 that  
7 on or about March 21, 2013, the Corps received a written  
8 communication from Duarte. The remaining allegations in  
9 paragraph 52 constitute Duarte's characterization of such  
10 communication, which speaks for itself, and the Corps denies any  
11 allegations contrary to the plain meaning of such communication.

12 53. The Corps admits the allegation in paragraph 53 that on  
13 or about April 18, 2013, the Corps communicated in writing to  
14 Duarte. The remaining allegations in paragraph 53, including all  
15 of its subparts, constitute Duarte's characterization of such  
16 communication, which speaks for itself, and the Corps denies any  
17 allegations contrary to the plain meaning of such communication.

18 54. The Corps denies the allegations in paragraph 54.

19 55-60. Paragraphs 55 through 60 are not directed to the  
20 Corps and relate entirely to the defendants or claims that were  
21 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)  
22 and thus require no response.

23 61. To the extent that the allegations in paragraph 61 are  
24 directed to the Corps, the Corps denies these allegations. To  
25 the extent that the allegations in paragraph 61 are not directed  
26 to the Corps and relate entirely to the defendants or claims that  
27 were dismissed by this Court's Order of April 23, 2014 (ECF No.  
28 27), these allegations require no response.



1           62. To the extent that the allegations in paragraph 61 are  
2 directed to the Corps, the Corps denies these allegations. To  
3 the extent that the allegations in paragraph 61 are not directed  
4 to the Corps and relate entirely to the defendants or claims that  
5 were dismissed by this Court's Order of April 23, 2014 (ECF No.  
6 27), these allegations require no response.

7           63. The Corps is without sufficient knowledge or  
8 information sufficient to form a belief as to the truth of the  
9 allegations in paragraph 63 that Duarte left wheat crop  
10 unattended, resulting in its total loss, at a cost to Duarte  
11 Nursery, Inc. of at least \$50,000 in planting costs, and  
12 therefore denies these allegations. To the extent that the  
13 remaining allegations in paragraph 63 are directed to the Corps,  
14 the Corps denies these allegations. To the extent that the  
15 remaining allegations in paragraph 63 are not directed to the  
16 Corps and relate entirely to the defendants or claims that were  
17 dismissed by this Court's Order of April 23, 2014 (ECF No. 27),  
18 these allegations require no response.

19           64. The Corps is without sufficient knowledge or  
20 information sufficient to form a belief as to the truth of the  
21 allegations in paragraph 64 that Duarte did not make necessary  
22 preparations for farming the Property in the Fall of 2013, and  
23 therefore denies these allegations. To the extent that the  
24 remaining allegations in paragraph 64 are directed to the Corps,  
25 the Corps denies these allegations. To the extent that the  
26 remaining allegations in paragraph 64 are not directed to the  
27 Corps and relate entirely to the defendants or claims that were  
28 dismissed by this Court's Order of April 23, 2014 (ECF No. 27),



1 these allegations require no response.

2 65. With respect to the allegations in the first sentence  
3 of paragraph 65, to the extent that these allegations are  
4 directed to the Corps, the Corps is without knowledge or  
5 information sufficient to form a belief as to the truth of these  
6 allegations and therefore denies the same. To the extent that  
7 the allegations in the first sentence of paragraph 65 are not  
8 directed to the Corps and relate entirely to the defendants or  
9 claims that were dismissed by this Court's Order of April 23,  
10 2014 (ECF No. 27), these allegations require no response. With  
11 respect to the allegations in the second sentence of paragraph 65  
12 (and Duarte's citation to and quotation from case law), they  
13 constitute Duarte's legal conclusion to which no response is  
14 required. To the extent that a response is required, the Corps  
15 denies any allegation in the second sentence of paragraph 65 that  
16 is directed to the Corps.

17 66. Paragraph 66 constitutes Duarte's legal conclusion,  
18 which requires no response, and characterizes 33 C.F.R.  
19 § 326.3(c)(3) and 326.5(a), which speak for themselves as to  
20 their content and meaning. To the extent that a response is  
21 required, the Corps denies that actions referenced in 33 C.F.R.  
22 § 326.3(c)(3) and 326.5(a) are dependent upon whether the Corps  
23 had previously issued to Duarte a true and correct copy of  
24 Exhibit A to Duarte's Complaint.

25 67. Paragraph 67 is not directed to the Corps and relates  
26 entirely to the defendants or claims that were dismissed by this  
27 Court's Order of April 23, 2014 (ECF No. 27) and thus requires no  
28 response.



1           68. The Corps admits the allegation in the first sentence  
2 of paragraph 68 that the Corps disseminated to other state and  
3 federal agencies a true and correct copy of Exhibit A to Duarte's  
4 Complaint. With respect to the allegation in the first sentence  
5 of paragraph 68 that Exhibit A "labeled" Duarte as "violators,"  
6 this allegation constitutes Duarte's characterization of Exhibit  
7 A, which speaks for itself, and the Corps denies any allegation  
8 contrary to the plain meaning of Exhibit A. To the extent that  
9 the remaining allegations in the first sentence of paragraph 68  
10 are directed to the Corps, the Corps denies these allegations.  
11 To the extent that the allegations in paragraph 68 are not  
12 directed to the Corps and relate entirely to the defendants or  
13 claims that were dismissed by this Court's Order of April 23,  
14 2014 (ECF No. 27), these allegations require no response. With  
15 respect to the allegations in the second sentence of paragraph  
16 68, the Corps denies these allegations to the extent that they  
17 are directed to the Corps. To the extent that the allegations in  
18 the second sentence of paragraph 68 are not directed to the Corps  
19 and relate entirely to the defendants or claims that were  
20 dismissed by this Court's Order of April 23, 2014 (ECF No. 27),  
21 these allegations require no response.

22           69. The Corps incorporates by reference its responses to  
23 paragraphs 1 through 68 of Duarte's Complaint.

24           70. Paragraph 70 constitutes Duarte's legal conclusion to  
25 which no response is required. To the extent a response is  
26 required, the Corps denies paragraph 70 to the extent that it is  
27 directed to the Corps. To the extent that paragraph 70 is not  
28 directed to the Corps and relates entirely to the defendants or



1 claims that were dismissed by this Court's Order of April 23,  
2 2014 (ECF No. 27), paragraph 70 requires no response.

3 71. Paragraph 71 constitutes Duarte's legal conclusion to  
4 which no response is required. To the extent a response is  
5 required, the Corps denies paragraph 71 to the extent that it is  
6 directed to the Corps. To the extent that paragraph 71 is not  
7 directed to the Corps and relates entirely to the defendants or  
8 claims that were dismissed by this Court's Order of April 23,  
9 2014 (ECF No. 27), paragraph 71 requires no response.

10 72. Paragraph 72 constitutes Duarte's legal conclusion to  
11 which no response is required. To the extent a response is  
12 required, the Corps denies paragraph 72 to the extent that it is  
13 directed to the Corps. To the extent that paragraph 72 is not  
14 directed to the Corps and relates entirely to the defendants or  
15 claims that were dismissed by this Court's Order of April 23,  
16 2014 (ECF No. 27), paragraph 72 requires no response.

17 73. Paragraph 73 constitutes Duarte's legal conclusion to  
18 which no response is required. To the extent a response is  
19 required, the Corps denies paragraph 73 to the extent that it is  
20 directed to the Corps. To the extent that paragraph 73 is not  
21 directed to the Corps and relates entirely to the defendants or  
22 claims that were dismissed by this Court's Order of April 23,  
23 2014 (ECF No. 27), paragraph 73 requires no response.

24 74. The Corps incorporates by reference its responses to  
25 paragraphs 1 through 73 of Duarte's Complaint.

26 75. Paragraph 75 constitutes Duarte's legal conclusion to  
27 which no response is required. To the extent a response is  
28 required, the Corps denies paragraph 75 to the extent that it is



1 directed to the Corps. To the extent that paragraph 75 is not  
2 directed to the Corps and relates entirely to the defendants or  
3 claims that were dismissed by this Court's Order of April 23,  
4 2014 (ECF No. 27), paragraph 75 requires no response.

5 76. Paragraph 76 constitutes Duarte's legal conclusion to  
6 which no response is required. To the extent a response is  
7 required, the Corps denies paragraph 76 to the extent that it is  
8 directed to the Corps. To the extent that paragraph 76 is not  
9 directed to the Corps and relates entirely to the defendants or  
10 claims that were dismissed by this Court's Order of April 23,  
11 2014 (ECF No. 27), paragraph 76 requires no response.

12 77. Paragraph 77 constitutes Duarte's legal conclusion to  
13 which no response is required. To the extent a response is  
14 required, the Corps denies paragraph 77 to the extent that it is  
15 directed to the Corps. To the extent that paragraph 77 is not  
16 directed to the Corps and relates entirely to the defendants or  
17 claims that were dismissed by this Court's Order of April 23,  
18 2014 (ECF No. 27), paragraph 77 requires no response.

19 78. Paragraph 78 constitutes Duarte's legal conclusion to  
20 which no response is required. To the extent a response is  
21 required, the Corps denies paragraph 78 to the extent that it is  
22 directed to the Corps. To the extent that paragraph 78 is not  
23 directed to the Corps and relates entirely to the defendants or  
24 claims that were dismissed by this Court's Order of April 23,  
25 2014 (ECF No. 27), paragraph 78 requires no response.

26 **FIRST CAUSE OF ACTION**

27 79. The Corps incorporates by reference its responses to  
28 paragraphs 1 through 78 of Duarte's Complaint.



1       80-82. Paragraphs 80 through 82 constitute Duarte's legal  
2 conclusions to which no response is required. To the extent a  
3 response is required, the Corps denies paragraphs 80 through 82.

4                   **SECOND CAUSE OF ACTION**

5       83. The Corps incorporates by reference its responses to  
6 paragraphs 1 through 82 of Duarte's Complaint.

7       84-86. Paragraphs 84 through 86 constitute Duarte's legal  
8 conclusions to which no response is required. To the extent a  
9 response is required, the Corps denies paragraphs 84 through 86.

10                   **THIRD CAUSE OF ACTION**

11       87. The Corps incorporates by reference its responses to  
12 paragraphs 1 through 86 of Duarte's Complaint.

13       88-90. Paragraphs 88 through 90 are not directed to the  
14 Corps and relate entirely to Duarte's Third Cause of Action that  
15 was dismissed by this Court's Order of April 23, 2014 (ECF No.  
16 27) and thus require no response.

17                   **FOURTH CAUSE OF ACTION**

18       91. The Corps incorporates by reference its responses to  
19 paragraphs 1 through 90 of Duarte's Complaint.

20       92-94. Paragraphs 92 through 94 are not directed to the  
21 Corps and relate entirely to Duarte's Fourth Cause of Action that  
22 was dismissed by this Court's Order of April 23, 2014 (ECF No.  
23 27) and thus require no response.

24                   **FIFTH CAUSE OF ACTION**

25       95. The Corps incorporates by reference its responses to  
26 paragraphs 1 through 94 of Duarte's Complaint.

27       96. Paragraph 96 constitutes Duarte's legal conclusion to  
28 which no response is required. To the extent a response is



1 required, the Corps denies paragraph 96.

2 97. The first sentence of paragraph 97 constitutes Duarte's  
3 legal conclusion, which requires no response, and characterizes  
4 33 C.F.R. § 326.3(a)-(b), which speak for themselves as to their  
5 content and meaning. The second sentence of paragraph 97  
6 constitutes Duarte's legal conclusion, which requires no  
7 response, and characterizes 33 C.F.R. pt. 326, which speaks for  
8 itself as to its content and meaning. To the extent a response  
9 is required, the Corps denies paragraph 97.

10 98. The first sentence of paragraph 98 constitutes Duarte's  
11 legal conclusion, which requires no response, and characterizes  
12 33 C.F.R. § 326.3(b), which speaks for itself as to its content  
13 and meaning. The second sentence of paragraph 98 constitutes  
14 Duarte's legal conclusion, which requires no response, and  
15 characterizes 33 C.F.R. pt. 326, which speaks for itself as to  
16 its content and meaning. To the extent a response is required,  
17 the Corps denies paragraph 98.

18 99. Paragraph 99 constitutes Duarte's legal conclusion,  
19 which requires no response, and characterizes 33 C.F.R. pt. 326,  
20 which speaks for itself as to its content and meaning. To the  
21 extent a response is required, the Corps denies paragraph 99.

#### 22 **PRAYER FOR RELIEF**

23 The remaining paragraphs of Duarte's Complaint state  
24 Duarte's prayer for relief, to which no response is required. To  
25 the extent a response is required, the Corps denies that Duarte  
26 is entitled to the relief it requests or to any relief  
27 whatsoever.  
28



1 **ALL CLAIMS**

2 The Corps denies any allegation in Duarte's Complaint,  
3 whether express or implied, that are not specifically admitted,  
4 denied, or qualified. To the extent that any allegation in  
5 Duarte's Complaint remains unanswered, the Corps denies any such  
6 allegation.

7 **DEFENSES**

8 Without limiting or waiving any defenses available to it,  
9 the Corps at this time asserts the following defenses, including  
10 but not limited to affirmative defenses, against Duarte:

11 1. Duarte has failed to properly invoke the limited  
12 subject matter jurisdiction of this Court.

13 2. Duarte has failed to challenge reviewable "final"  
14 agency action within the meaning of the judicial review  
15 provisions of the Administrative Procedure Act, 5 U.S.C. §§ 702-  
16 06.

17 3. Duarte's claims are barred in whole or in part by  
18 sovereign immunity.

19 4. Duarte lacks standing to bring the claims alleged  
20 against the Corps.

21 5. Duarte's claims are not ripe.

22 6. Duarte's claims are or may during this action become  
23 moot.

24 7. Duarte has failed to state a claim upon which relief  
25 can be granted.

26 8. Duarte should recover nothing, or less than its demand,  
27 for equitable reasons, including but not limited to: its own  
28 conduct; the violations of the Clean Water Act that it is



1 responsible for; and application of the doctrines of unclean  
2 hands, estoppel, waiver, release, or laches.

3 **CONCLUSION OF ANSWER**

4 WHEREFORE, the Corps respectfully requests that the Court  
5 deny all relief sought by Duarte; enter judgment in favor of the  
6 Corps; and award the Corps any appropriate relief.

7 **COUNTERCLAIM**

8 The United States alleges as follows:

9 **NATURE OF THE ACTION**

10 1. This Counterclaim is a civil enforcement action  
11 commenced under sections 309 and 404 of the Clean Water Act  
12 ("CWA"), 33 U.S.C. §§ 1319 and 1344, and under 28 U.S.C. §§ 516  
13 and 519 to obtain injunctive relief and civil penalties against  
14 Duarte Nursery, Inc. and John Duarte (collectively "Duarte") for  
15 the discharge of pollutants into waters of the United States in  
16 Tehama County, California without authorization by the Corps, in  
17 violation of CWA section 301(a), 33 U.S.C. § 1311(a).

18 2. The United States seeks: (a) injunctive relief  
19 prohibiting Duarte from further unauthorized discharges of  
20 pollutants; (b) injunctive relief compelling Duarte to restore  
21 and mitigate the impacts of the unauthorized discharges of  
22 pollutants alleged in this Counterclaim; (c) civil penalties in  
23 favor of the United States and against Duarte; and (d) such other  
24 relief as the Court may deem appropriate.

25 **JURISDICTION AND VENUE**

26 3. This Court has jurisdiction over the subject matter of  
27 this action pursuant to 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331  
28 and 1345.



4. Venue is proper in the United States District Court for the Eastern District of California pursuant to 33 U.S.C. §§ 1319(b) and 28 U.S.C. § 1391(b) and (c) because Duarte conducts business in this District; the waters of the United States into which pollutants were discharged without authorization are located in this District; and the cause of action alleged in this Counterclaim arose in this District.

5. The United States has provided notice of the commencement of this action to the State of California pursuant to 33 U.S.C. § 1319(b).

## PARTIES

6. The counterclaim-plaintiff in this action is the United States of America, and authority to bring this action is vested in the United States Department of Justice pursuant to Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

7. The counterclaim-defendants in this action are Duarte Nursery, Inc. and John Duarte.

8. Duarte Nursery, Inc. is a corporation formed under the laws of California with a business address of 1555 Baldwin Road, Hughson, California 95326.

9. John Duarte is an individual residing at 1555 Baldwin Road, Hughson, California 95326.

## STATUTORY AND REGULATORY BACKGROUND

10. Section 101(a) of the CWA, 33 U.S.C. § 1251(a), provides that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."



1        11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a),  
2 prohibits the "discharge of any pollutant by any person" except,  
3 *inter alia*, as authorized by a permit issued pursuant to section  
4 404 of the CWA, 33 U.S.C. § 1344.

5        12. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines  
6 "person" to include, *inter alia*, an "individual" and a  
7 "corporation."

8        13. Section 502(12) of the CWA, 33 U.S.C. § 1362(12),  
9 defines "discharge of a pollutant" as "any addition of any  
10 pollutant to navigable waters from any point source."

11       14. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines  
12 "pollutant" to include, *inter alia*, "dredged spoil," "biological  
13 materials," "rock," "sand," and "cellar dirt."

14       15. Section 502(14) of the CWA, 33 U.S.C. § 1362(14),  
15 defines "point source" to include "any discernible, confined and  
16 discrete conveyance . . . from which pollutants are or may be  
17 discharged."

18       16. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines  
19 "navigable waters" as "the waters of the United States, including  
20 the territorial seas."

21       17. 33 C.F.R. § 328.3(a)(1), (5) and (7) define "waters of  
22 the United States" to include, *inter alia*: all waters that are  
23 currently used, were used in the past, or may be susceptible for  
24 use in interstate or foreign commerce ("traditional navigable  
25 waters"); tributaries of traditional navigable waters; and  
26 wetlands adjacent traditional navigable waters or their  
27 tributaries.



1        18. 33 C.F.R. § 328.3(b) defines "wetlands" as "those areas  
2 that are inundated or saturated by surface or ground water at a  
3 frequency and duration sufficient to support, and that under  
4 normal circumstances do support, a prevalence of vegetation  
5 typically adapted for life in saturated soil conditions."

6        19. 33 C.F.R. § 328.3(c) defines "adjacent" as "bordering,  
7 contiguous, or neighboring." It further provide: "Wetlands  
8 separated from other waters of the United States by man-made  
9 dikes or barriers, natural river berms, beach dunes and the like  
10 are 'adjacent wetlands.'"

11        20. 33 U.S.C. § 1319(b) authorizes the commencement of a  
12 civil action for appropriate relief, including a permanent  
13 injunction, against any person who violates 33 U.S.C. § 1311(a).

14        21. 33 U.S.C. § 1319(d) provides that any person who  
15 violates 33 U.S.C. § 1311(a) shall be subject to a civil penalty  
16 not to exceed \$25,000 per day for each violation.

17        22. Effective after January 12, 2009, 40 C.F.R. § 19.4  
18 adjusts the \$25,000 amount provided in 33 U.S.C. § 1319(d) to  
19 \$37,500.

20        23. Each day that dredged or fill material remains in the  
21 place where it was discharged without authorization constitutes a  
22 separate violation of 33 U.S.C. § 1311(a).

#### 23                    **GENERALLY APPLICABLE ALLEGATIONS**

##### 24            **The Site**

25        24. Duarte Nursery, Inc. owns real property on Paskenta  
26 Road in Tehama County, California, just south of the city of Red  
27 Bluff and roughly three miles due west of Interstate 5 ("the  
28 Site").

1        25. The Site is located on or near Sections 24 and 25,  
2 Township 26 North, Range 4 West, and unsectioned portions of the  
3 La Barranta Colorada Mexican Land Grant within Township 26 North,  
4 Range 3 West, Mount Diablo Base & Meridian, Latitude 40.08274°,  
5 Longitude -122.268048 °.

6        26. The Site includes but is not limited to the following  
7 parcels, as identified by their Tehama County Assessor's Parcel  
8 Numbers ("APN"): 037-070-35-1 and 037-070-37-1.

9        27. The Site is approximately 500 acres in size.

10       28. Duarte Nursery Inc. has owned or controlled the Site  
11 since at least April 2012.

12       29. John Duarte has been the President and co-owner of  
13 Duarte Nursery, Inc. since at least April 2012.

14       **Coyote Creek and Downstream Waters**

15       30. The northern portion of the Site contains or is  
16 bordered by an aquatic feature, "Coyote Creek."

17       31. Coyote Creek carries water.

18       32. Coyote Creek has a bed and bank.

19       33. Coyote Creek is a stream.

20       34. Coyote Creek originates generally west of the Site.

21       35. The direction of the flow of water in Coyote Creek is  
22 generally from west to east.

23       36. Coyote Creek exceeds 10 miles in length.

24       37. Coyote Creek's watershed, or the area from which it  
25 receives water, exceeds 16,000 acres.

26       38. Approximately eight miles downstream (east) of the  
27 Site, Coyote Creek joins another aquatic feature, "Oat Creek."

28       39. Oat Creek carries water.



1           40. Oat Creek has a bed and bank.

2           41. Oat Creek is a stream.

3           42. The direction of the flow of water in Oat Creek is

4 generally from west to east.

5           43. Oat Creek exceeds 20 miles in length.

6           44. Oat Creek's watershed, inclusive of Coyote Creek's

7 watershed, exceeds 44,000 acres.

8           45. Less than a mile downstream of Coyote Creek's

9 confluence with Oat Creek, Oat Creek joins the Sacramento River.

10          46. Coyote Creek and Oat Creek contribute flow to the

11 Sacramento River.

12          47. The Sacramento River is the longest river in

13 California.

14          48. From approximately two miles northwest of the city of

15 Redding, California the Sacramento River flows in a southerly

16 direction for over 300 miles before it reaches San Francisco Bay

17 and the Pacific Ocean.

18          49. The Sacramento River's watershed is approximately

19 27,500 square miles.

20          50. The Sacramento River contributes flow to the Pacific

21 Ocean.

22          51. The Sacramento River is currently used for interstate

23 commerce.

24          52. The Sacramento River was used in the past for

25 interstate commerce.

26          53. The Sacramento River is susceptible for use in

27 interstate commerce.

28          54. The Sacramento River is navigable-in-fact.

1           55. Coyote Creek, Oat Creek, and the Sacramento River are  
2 critical habitat for, *inter alia*, two threatened species:  
3 Central Valley Spring Run Chinook Salmon (*Oncorhynchus*  
4 *tshawytscha*) and Central Valley Steelhead (*Oncorhynchus mykiss*).  
5 50 C.F.R. § 223.102(c)(4) and (17); *id.* § 226.211(k) and (l).  
6 The Endangered Species Act ("ESA") defines "critical habitat" for  
7 a threatened or endangered species, in pertinent part, as "the  
8 specific areas within the geographical area occupied by the  
9 species, at the time it is listed in accordance with the  
10 provisions of section 1533 of this title, on which are found  
11 those physical or biological features (I) essential to the  
12 conservation of the species and (II) which may require special  
13 management considerations or protections"; and "specific areas  
14 outside the geographical area occupied by the species at the time  
15 it is listed in accordance with the provisions of section 1533 of  
16 this title, upon a determination by the Secretary that such areas  
17 are essential for the conservation of the species." 16 U.S.C.  
18 § 1532(5)(A)(i), (ii). The ESA defines "endangered species" in  
19 pertinent part as "any species which is in danger of extinction  
20 throughout all or a significant portion of its range." *Id.*  
21 § 1532(6). The ESA defines "threatened species" as "any species  
22 which is likely to become an endangered species within the  
23 foreseeable future throughout all or a significant portion of its  
24 range." *Id.* § 1532(20). The ESA defines "species" to include  
25 "subspecies" and certain "distinct population segment[s]." *Id.* §  
26 1532(16).

27           56. Central Valley Spring Run Chinook Salmon and Central  
28 Valley Steelhead are anadromous fish, which means that they are



1 hatched in freshwater, spend most of their life in oceanic  
2 waters, and return to freshwater to spawn.

3 57. Critical habitat for Central Valley Spring Run Chinook  
4 Salmon extends upstream from the confluence of Oat Creek with the  
5 Sacramento River to the following location in Coyote Creek:  
6 Latitude 40.0929°, Longitude -122.1621°. 50 C.F.R.  
7 § 226.211(k)(1)(ii).

8 58. Critical habitat for Central Valley Steelhead extends  
9 upstream from the confluence of Oat Creek with the Sacramento  
10 River to the following location in Oat Creek: Latitude 40.0769°,  
11 Longitude -122.2168°. 50 C.F.R. § 226.211(l)(1)(ii).

12 59. The Site is upstream of critical habitat for Central  
13 Valley Spring Run Chinook Salmon and Central Valley Steelhead.

14 60. Exhibit 1 to this Counterclaim is a map that fairly and  
15 accurately depicts the flow path from Coyote Creek at the Site to  
16 the Sacramento River.

17 **Streams at the Site**

18 61. In addition to being bordered by Coyote Creek, the Site  
19 contains -- or contained prior to the discharges of pollutants  
20 alleged in this Counterclaim -- at least two additional streams.

21 62. These streams carried water.

22 63. These streams had a bed and bank.

23 64. The direction of the flow of water in these streams was  
24 generally from west to east.

25 65. These streams joined Coyote Creek east of the Site.

26 66. At least one of these streams may have contained  
27 wetlands.

1        67. These streams contributed flow to Coyote Creek and may  
2 be regarded as branches of Coyote Creek.

3        68. The discharges of pollutants alleged in this  
4 Counterclaim had the effect of replacing portions of streams with  
5 dry land or changing the bottom elevation of portions of streams.

6        69. The discharges of pollutants alleged in this  
7 Counterclaim destroyed portions of streams at the Site.

8        **Wetlands at the Site**

9        70. In addition to streams, the Site contains -- or  
10 contained prior to the discharges of pollutants alleged in this  
11 Counterclaim -- other aquatic features.

12        71. These aquatic features were inundated or saturated by  
13 surface or ground water at a frequency and duration sufficient to  
14 support, and under normal circumstances did support, a prevalence  
15 of vegetation typically adapted for life in saturated soil  
16 conditions.

17        72. These aquatic features were "wetlands" within the  
18 meaning of 33 C.F.R. § 328.3(a)(7), (b).

19        73. Wetlands at the Site provided suitable habitat for,  
20 *inter alia*, vernal pool fairy shrimp (*Branchinecta lynchi*), a  
21 threatened species, and vernal pool tadpole shrimp (*Lepidurus*  
22 *packardi*), an endangered species. 50 C.F.R. § 17.11(h);  
23 *Endangered and Threatened Wildlife and Plants; Determination of*  
24 *Endangered Status for the Conservancy Fairy Shrimp, Longhorn*  
25 *Fairy Shrimp, and Vernal Pool Tadpole Shrimp; and Threatened*  
26 *Status for the Vernal Pool Fairy Shrimp*, 59 Fed. Reg. 48,136  
27 (Sept. 19, 1994).  
28



1       74. Since at least 2006, wetlands at the Site have been  
2 designated critical habitat for vernal pool fairy shrimp. 50  
3 C.F.R. § 17.95(h)(13); *Endangered and Threatened Wildlife and*  
4 *Plants; Designation of Critical Habitat for Four Vernal Pool*  
5 *Crustaceans and Eleven Vernal Pool Plants*, 71 Fed. Reg. 7,118,  
6 7,141-42 (Feb. 10, 2006).

7       75. Exhibit 2 to this Counterclaim is a true and correct  
8 copy of a map, codified at 50 C.F.R. § 17.95(h)(13), depicting  
9 areas of critical habitat for vernal pool fairy shrimp.

10       76. The Site falls within the area marked as "Unit 6" on  
11 Exhibit 2.

12       77. Wetlands at the Site bordered, were contiguous to, or  
13 neighbored Coyote Creek or another stream at the Site.

14       78. The discharges of pollutants alleged in this  
15 Counterclaim had the effect of replacing wetlands with dry land  
16 or changing the bottom elevation of wetlands.

17       79. The discharges of pollutants alleged in this  
18 Counterclaim destroyed wetlands at the Site.

19                   **ADDITIONAL GENERALLY APPLICABLE ALLEGATIONS**

20       80. The Sacramento River is a traditional navigable water  
21 under 33 C.F.R. § 328.3(a)(1).

22       81. Coyote Creek and Oat Creek are "tributaries" of the  
23 Sacramento River within the meaning of 33 C.F.R. § 328.3(a)(5).

24       82. Streams at the Site are or were, prior to their  
25 destruction, "tributaries" of Coyote Creek, Oat Creek, and the  
26 Sacramento River within the meaning of 33 C.F.R. § 328.3(a)(5).

27       83. Wetlands at the Site are or were, prior to their  
28 destruction, "adjacent" to one or more tributaries within the

1 meaning of 33 C.F.R. § 328.3(a)(7), (c), and 40 C.F.R. §  
2 230.3(s)(7).

3 84. Coyote Creek, either alone or in combination with  
4 similarly situated lands in the region, significantly affects the  
5 chemical, physical, or biological integrity of the Sacramento  
6 River.

7 85. Oat Creek, either alone or in combination with  
8 similarly situated lands in the region, significantly affects the  
9 chemical, physical, or biological integrity of the Sacramento  
10 River.

11 86. Streams at the Site, either alone or in combination  
12 with similarly situated lands in the region, significantly affect  
13 or affected the chemical, physical, or biological integrity of  
14 the Sacramento River.

15 87. Wetlands at the Site, either alone or in combination  
16 with similarly situated lands in the region, significantly affect  
17 or affected the chemical, physical, or biological integrity of  
18 the Sacramento River.

19 88. At all times relevant to this Counterclaim, the  
20 Sacramento River, Oat Creek, Coyote Creek, streams at the Site,  
21 and wetlands at the Site constituted "waters of the United  
22 States" and "navigable waters" within the meaning of 33 U.S.C.  
23 § 1362(7).

24 89. Duarte Nursery, Inc. is a "person" under 33 U.S.C.  
25 § 1362(5).

26 90. John Duarte is a "person" under 33 U.S.C. § 1362(5).  
27  
28



**COUNT**

91. The United States repeats the allegations set forth in Paragraphs 1 through 90 of this Counterclaim.

92. As a result of earthmoving activities undertaken at the Site, Duarte added pollutants to waters of the United States from point sources without authorization.

93. Beginning in approximately November 2012, Duarte prepared much of the Site for planting.

94. During such preparation, Duarte used mechanized equipment to drag long metal shanks through the ground ("deep ripping").

95. Deep ripping or other earthmoving activities occurred throughout much of the Site.

96. Deep ripping or other earthmoving activities resulted in the placement of dredged spoil, biological materials, rock, sand, cellar dirt, or other earthen material constituting "pollutants" within the meaning of 33 U.S.C. § 1362(6) into streams or wetlands at the Site.

97. Equipment used during deep ripping or other earthmoving activities constituted a "point source" within the meaning of 33 U.S.C. § 1362(14).

98. Equipment operated in at least 15 acres of streams or wetlands.

99. The deep ripping or other earthmoving activities resulted in the "discharge of any pollutant" within the meaning of 33 U.S.C. § 1311(a).

100. The deep ripping or other earthmoving activities were carried out by Duarte Nursery, Inc., John Duarte, or one or more

1 persons acting on behalf of or with the consent or knowledge of  
2 Duarte.

3 101. At no time did Duarte or any person on Duarte's behalf  
4 apply for, secure, and comply with a CWA section 404 permit to  
5 discharge pollutants at the Site.

6 102. Duarte violated 33 U.S.C. § 1311(a).

7 103. Duarte has allowed pollutants to remain in waters of  
8 the United States.

9 104. Duarte remains in violation of 33 U.S.C. § 1311(a).

10 105. Duarte Nursery, Inc. and John Duarte are jointly and  
11 severally responsible for the CWA violations alleged herein.

12 REQUEST FOR RELIEF

13 WHEREFORE, the United States respectfully requests that this  
14 Court order the following relief:

15 Enjoin Duarte from further discharges of pollutants except  
16 as in compliance with the CWA;

17 Compel Duarte to restore impacted waters of the United  
18 States;

19 Require Duarte to mitigate for impacted waters of the United  
20 States;

21 Assess and direct Duarte to pay civil penalties;

22 Award the United States the costs and disbursements of this  
23 action; and

24 Grant the United States such other relief as the Court finds  
25 appropriate.



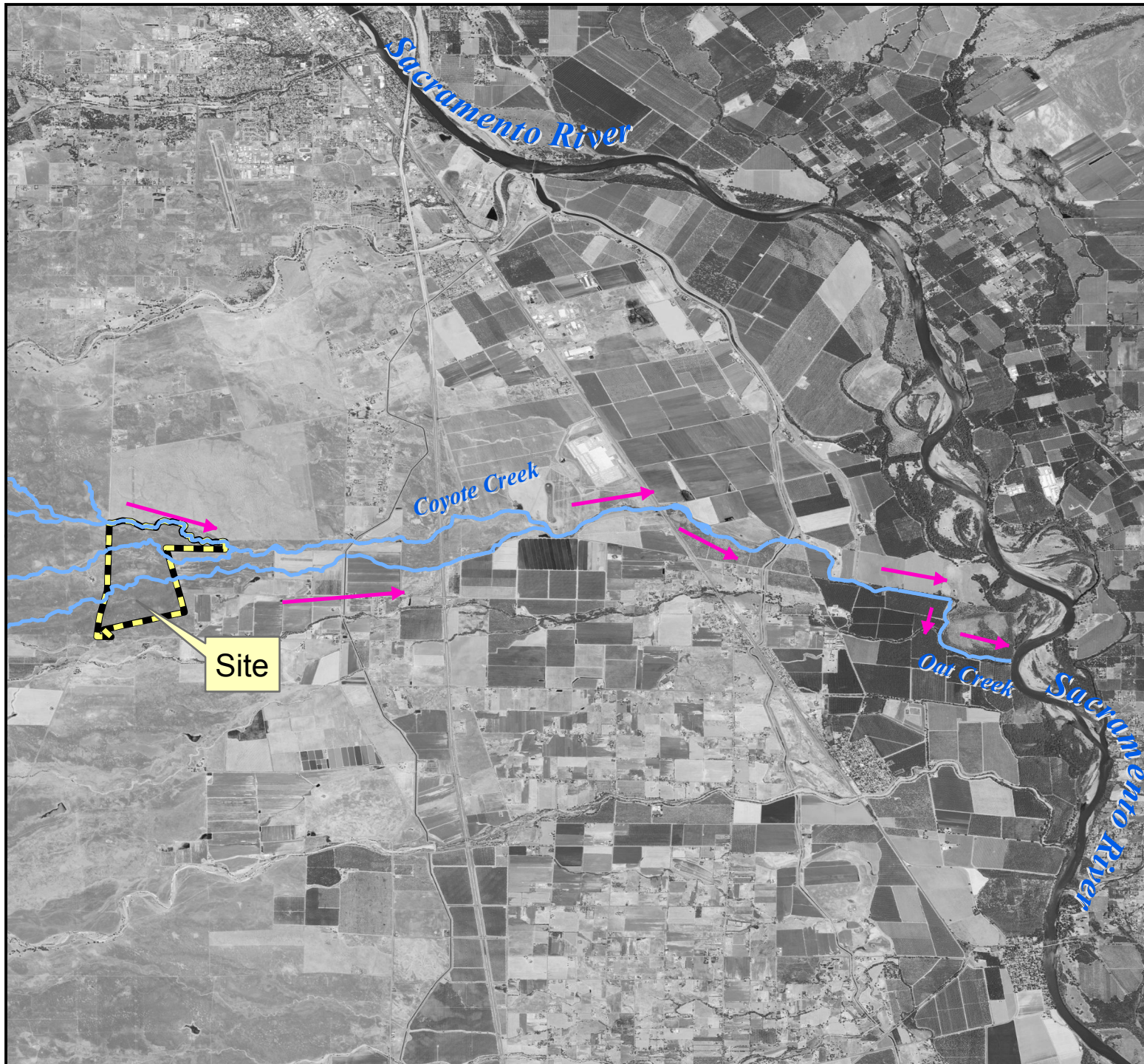
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Respectfully submitted,  
  
ROBERT G. DREHER  
Acting Assistant Attorney General

Dated: May 7, 2014      \_\_\_\_/s/ Andrew J. Doyle\_\_\_\_\_  
Andrew J. Doyle (FL Bar No.84948)  
  
\_\_\_\_/s/ John Thomas H. Do\_\_\_\_\_  
John Thomas H. Do (CA Bar No. 285075)  
Trial Attorneys  
United States Department of Justice  
Environment and Natural Resources  
Division  
P.O. Box 7611  
Washington, DC 20044  
(202) 514-4427 (phone; Doyle)  
(202) 514-2593 (phone; Do)  
(202) 514-8865 (facsimile; both)  
andrew.doyle@usdoj.gov  
john.ho@usdoj.gov

Of Counsel:  
  
Joshua Holmes  
Assistant District Counsel  
U.S. Army Corps of Engineers  
Sacramento District  
1325 J Street  
Sacramento, CA 95814

Attorneys for the Defendant and  
Counterclaim-Plaintiff



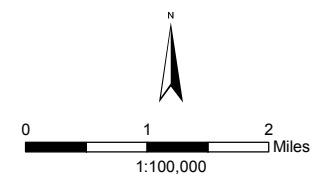
**Legend**

— Stream Flowline

■ Duarte Site

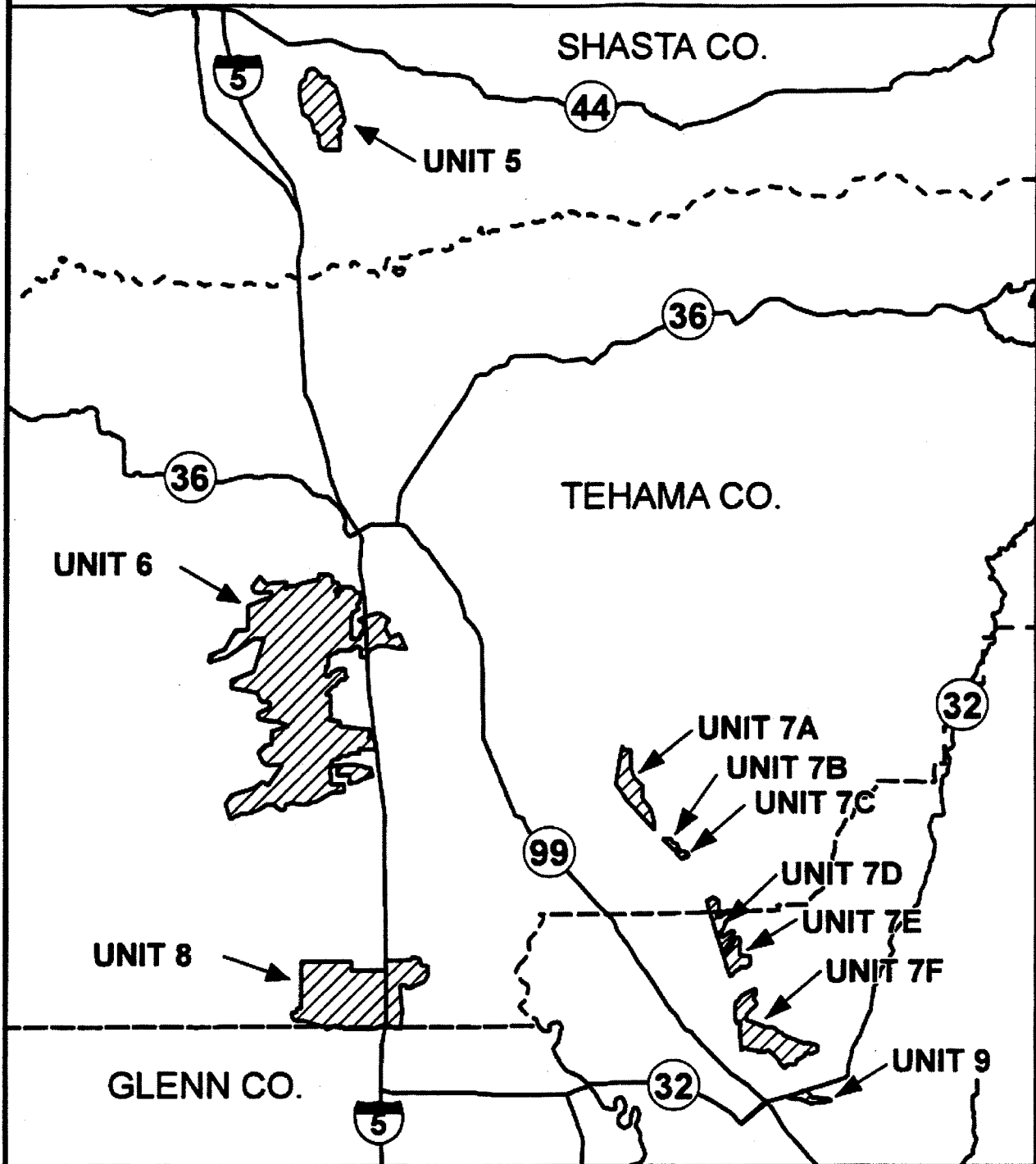
Data Source:  
USGS National Hydrography Dataset (Stream  
Flowline) & USDA 2012 National Agriculture  
Imagery Program (2012 NAIP)

Coordinate System: GCS\_WGS\_1984



**Flow of Coyote Creek  
from Site to Oat Creek  
to Sacramento River**

**Map 2. Vernal Pool Critical Habitat  
Vernal Pool Fairy Shrimp, Units 5 - 9**





---

### **Appendix 3**



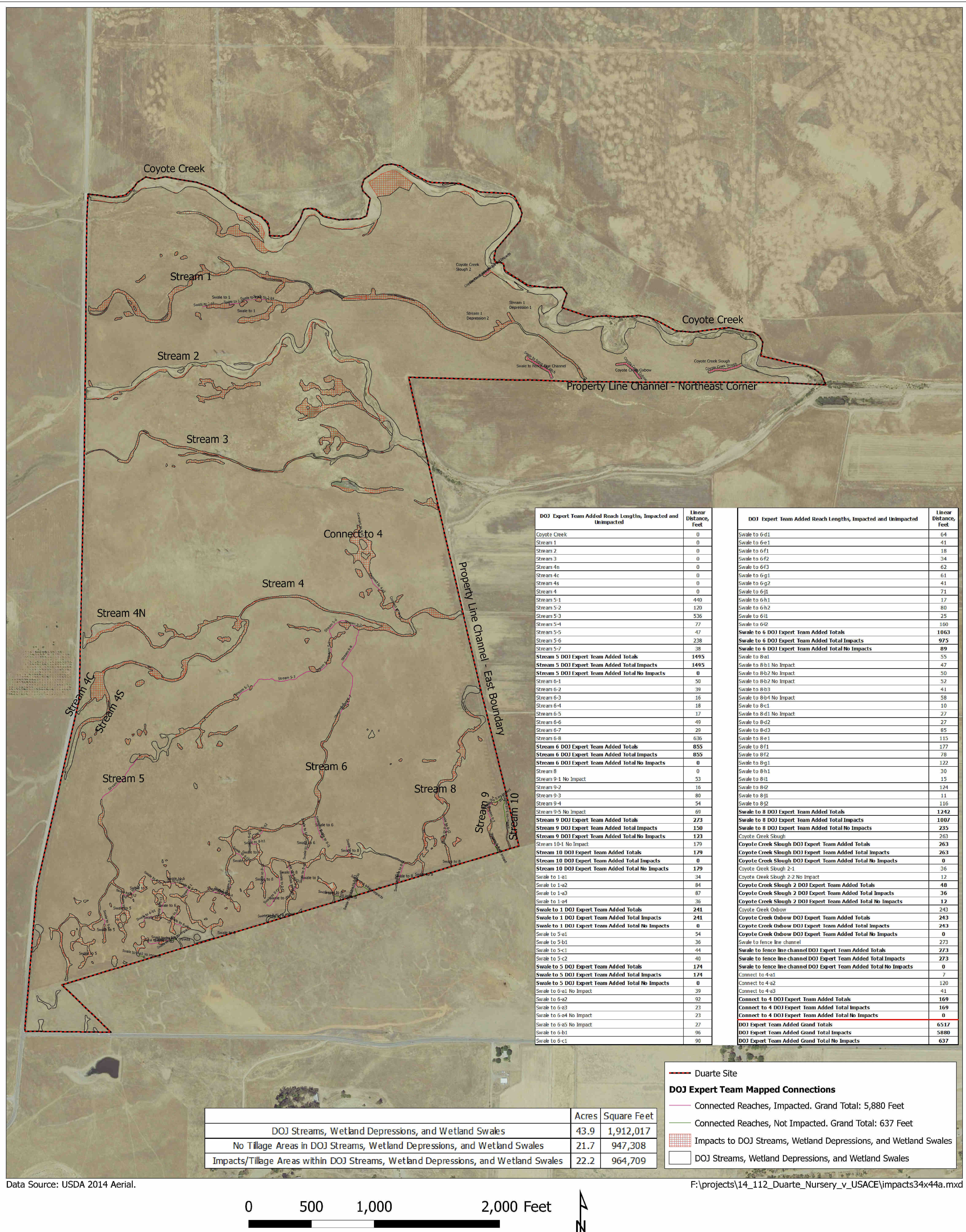


Figure V-47. Duarte Site: DOJ Expert Team Estimated Impacts to Streams, Wetland Depressions and Wetland Swales, Duarte Site, Tehama County, California.