

**AMENDMENT TO THE
PROGRAMMATIC AGREEMENT
BETWEEN THE UNITED STATES DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICE
STATE OFFICE OF WEST VIRGINIA AND THE
STATE HISTORIC PRESERVATION OFFICE OF WEST VIRGINIA,
REGARDING THE VOLUNTARY FLOODPLAIN BUYOUT ALONG
ELKHORN CREEK/TUG FORK RIVER**

WHEREAS, the Agreement was executed on August 1, 2022; and

WHEREAS, the original Agreement was insufficient in clarity and executable responsibilities of the required signatories; and

WHEREAS, the West Virginia Natural Resource Conservation Service (NRCS) will send a copy of this executed Agreement to the Advisory Council on Historic Preservation; and

NOW, THEREFORE, in accordance with Stipulation X of the Agreement, NRCS and the West Virginia State Historic Preservation Officer (SHPO) agree to amend the Agreement so it reads as follows:

STIPULATIONS

Signatories shall ensure that the following measures are carried out for any undertaking in which this Agreement is used to comply with the NHPA:

I. DEFINITIONS

The definitions in 36 CFR § 800.16 are applicable to this Agreement and are incorporated by reference herein. For the purposes of this Agreement:

- A. "Project" is interchangeable with the term "undertaking;" and
- B. "Historic property" is interchangeable with the term "cultural resource"; and
- C. Anything "written" and "in writing" refers to hardcopy or electronic communication.

II. APPLICABILITY

Once executed by the signatories, this Agreement sets forth the review process for specific NRCS undertakings within the watersheds described in Stipulation II (A) subject to 54 U.S.C. §306108 located within the exterior boundaries of McDowell County West Virginia.

- A. Once executed, this agreement sets forth the review process for NRCS Public Law 83-566 (PL 83-566) funded undertakings subject to Section 106 for locations described within "FINAL WATERSHED PLAN-ENVIRONMENTAL ASSESSMENT VOLUNTARY FLOODPLAIN BUYOUT ALONG ELKHORN CREEK/TUG FORK RIVER".
- B. Execution of this Agreement is applicable only to those undertakings funded whole or in part by PL 83-566 funds within the geographic boundaries described in Stipulation II (A) and does not supersede nor replace consultation protocols executed under the NRCS nationwide Prototype Programmatic Agreement nor does this Agreement replace any existing project-specific Section 106 agreements (Memoranda of Agreement or Programmatic Agreements).
- C. This Agreement applies only where NRCS has qualified staff, access to qualified staff through agreements with other agencies or Indian tribes) who meet the Secretary of Interior's Professional Qualification Standards in the West Virginia NRCS State Office.

III. ROLES AND PROFESSIONAL QUALIFICATIONS

- A. The NRCS State Conservationist is responsible for consultation with the SHPO and government-to-government consultation with federally recognized Indian Tribes, Bands or Nations to develop consultation protocols. These responsibilities may not be delegated to any contractor, nor carried out on behalf of NRCS by another governmental entity.
- B. Tribal Governments and SHPO, if provided sufficient data on a proposed undertaking by West Virginia NRCS State Office, shall consult and provide a response to all NRCS determinations or findings within 30 calendar days of receipt. The definition of sufficient data is provided in 36 CFR Part 800.11.
- C. All technical review required for historic preservation activities implemented pursuant to this Agreement shall be carried out by or under the direct supervision of a person or persons meeting, at a minimum, the "Secretary of Interior's Professional Qualifications Standards" for archeology and architectural history or historic architecture, as appropriate.
- D. "Technical review" is defined as all efforts to inventory, evaluate, and perform subsequent treatment, such as Historic American Building Surveys, data recovery excavation or recordation, analysis of potential adverse effects to historic properties as required under this Agreement.

IV. DURATION

This Programmatic Agreement will expire if its terms are not carried out within ten (10) years from the date of its execution. Prior to such time, NRCS may consult with the other signatories to reconsider the terms of the Agreement and amend it in accordance with Stipulation IX below.

V. REVIEW

As specific aspects or locations of the APE are refined and access is gained, the agency official, pursuant to 36 C. F. R. §800.4 et seq, shall proceed with the identification and evaluation of historic properties, the assessment of effects, and propose resolution of adverse effects on the individual parcels contained within the APE that is cumulative for the entire undertaking.

- A. If a portion of the undertaking will result in an Adverse Effect to Historic Properties as defined in 36CFR800.5(a), the procedures outlined in 36CFR§800.6 shall be followed.
 - 1. NRCS shall describe proposed measures to minimize or mitigate the adverse

effects, and follow the process in 36 CFR Part 800.6, including consultation with the signatories, other consulting parties with a demonstrated interest, and notification to the ACHP, to develop a Memorandum of Agreement to resolve the adverse effects.

- B. The Undertaking will involve the demolition and removal of portions of the built environment, some of which may contain hazardous material such as lead and asbestos. In the event such material is encountered it will be disposed of in a manner consistent with Federal, State, and local laws.
- C. The Undertaking may require fill material (borrow) obtained from various locations. When practicable, the material will be sourced from established/permitted sites. The borrow sites will become part of the APE and are subject to the National Historic Preservation Act and National Environmental Policy Act as applicable.

VI. POST-REVIEW DISCOVERIES

In accordance with 36 C. F. R. §800.13(2)(b) et seq, and cultural resource is discovered after Section 106 review is complete, the NRCS shall consult to seek avoidance or minimization strategies and/or to resolve adverse effects in accordance with 36CFR§800.6.

- A. The NRCS shall ensure that every contract for assistance includes provisions for halting work in the area where potential historic properties are discovered or unanticipated effects are found after implementation, installation, or construction has begun. When such a discovery occurs, the participant who is receiving financial assistance or their contractor shall immediately notify the McDowell County Commission representative (SLO), the NRCS Project Manager, and the NRCS Cultural Resource Specialist. The contact information for the individuals should be supplied to the contractor prior to any ground disturbing activities.
 - 1. The NRCS Field Office personnel shall establish a protective buffer zone of no less than 50 feet (15 meters) surrounding the discovery. This action may require inspection by tribal cultural resources experts in addition to the specialized cultural resources personnel for NRCS.
 - 2. Security shall be established to protect the historic properties, workers, and private property. Local law enforcement will be notified in accordance with applicable State law and in accordance with NRCS National Cultural Resource Handbook 601.29.
 - a. NRCS' specialized cultural resources personnel shall inspect the discovery within 24 hours, if weather permits, and notify the NRCS State

Engineer or program supervisor, and the beneficiary of the program (whomever NRCS is assisting).

- b. NRCS' CRS shall notify signatories of this Agreement and the ACHP no later than 48 hours, or the next business day, after the discovery and describe NRCS' assessment of the National Register eligibility of the property, as feasible and proposed actions to resolve any adverse effects to historic properties. The eligibility determination may require the assessment and advice of concerned Indian tribes, the SHPO, and technical experts (such as historic landscape architects) not employed by NRCS.
 - c. The signatories of this agreement and ACHP shall respond within 48 hours of the notification with any comments on the discovery and proposed actions. NRCS shall take any comments provided into account and carry out appropriate actions to resolve any adverse effects.
 - d. NRCS shall provide a report to the signatories of this agreement and the ACHP of the actions when they are completed.
 - e. All NRCS contact with media shall occur only under the direction of the NRCS Public Affairs Officer or the NRCS State Conservationist, as appropriate.
3. Construction and/or work may resume outside the buffer only when the NRCS State Conservationist determines it is appropriate and safe for the resources and workers.
- B. If unmarked human remains are encountered during construction activities, all activities in the vicinity of the human remains (100' foot buffer) will stop and the person making the discovery shall make a reasonable effort to protect the area from further disturbance. The person making the discovery will call 911 Emergency immediately, and notify the county sheriff within forty-eight hours of the discovery and its location (West Virginia Code §29-1-8A). Additionally, the contractor shall notify the NRCS Project Manager and assigned NRCS Cultural Resource Specialist. The NRCS Cultural Resource Specialist will ensure that NRCS presence remains on site until dismissed by competent authority. No photographs, or discussion of the site outside of with the NRCS Project Manager, NRCS Cultural Resource Specialist, NRCS State Conservationist, or Law Enforcement should occur until the NRCS State Conservationist provides clearance through the appropriate Public Affairs Officer.
- C. An NRCS representative shall flag or fence off the area, using a 100-foot (30 meter)

buffer around the remains or the outer perimeter of a group of remains. If the law enforcement agency determines that the remains do not reflect a crime scene and/or if they otherwise relinquish their jurisdiction over the remains, the Cultural Resource Specialist (CRS) will consult appropriate parties (e.g., federally recognized Indian tribes and/or the property owners) regarding additional steps to be followed.

- D. The CRS shall inform the signatories of this Agreement, as well as appropriate federally recognized tribes, within 24 hours of the find.
1. If it is determined by competent authority that the remains are not Native American, a reasonable effort will be made to determine the identity or next of kin of the deceased. If the construction activities cannot be moved, the State Conservationist will direct the property owner to find another location for the remains and to seek a court order to have the remains removed to that location.
 - a. Competent authority is defined as law enforcement, coroner, or medical examiner, who has assumed custody and control of the human remains, or State Conservationist, or NRCS staff member possessing the delegated authority of the State Conservationist.
 2. If it is determined that the remains are Native American, the Cultural Resource Specialist shall contact the appropriate federally recognized tribes to consult on the disposition of the remains, funerary goods, and/or objects of cultural patrimony, if applicable.
 3. The NRCS shall follow all applicable federal, and state burial laws and ordinances, including the Native American Graves Protection and Repatriation Act, related human rights, and health statutes where appropriate.
 4. NRCS will also refer to the ACHP's Policy Statement regarding Treatment of Burial Sites, Human Remains and Funerary Objects and the ACHP's Section 106 Archaeology Guidance. NRCS shall also follow USDA and NRCS policy on treatment of human remains and consultation (National Cultural Resource Handbook §601.29).
 5. Communication with Media shall be conducted by the NRCS Public Affairs Officer or other as agreed to by the signatories. NRCS shall not provide public discussion or disclosure should Native American remains be inadvertently discovered.

VII. MONITORING AND REPORTING

Each October, beginning the fiscal year following the execution of this Agreement until it expires or is terminated, NRCS State Conservationist shall provide all parties to this Agreement a summary report detailing work undertaken pursuant to this Agreement's terms. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes or objections received in NRCS's efforts to carry out the terms of this Agreement.

VIII. DISPUTE RESOLUTION

Should any required signatory or invited signatory to this Agreement object at any time to any actions proposed or the manner in which the terms of this Agreement are implemented, NRCS shall consult with such party for a period of 30 calendar days to resolve the objection. If NRCS determines that such objection cannot be resolved, NRCS will:

- A. Forward all documentation relevant to the dispute, including the NRCS's proposed resolution, to the ACHP. The ACHP shall provide NRCS with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, NRCS shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP, signatories and concurring parties, and provide them with a copy of this written response. NRCS will then proceed according to its final decision.
- B. If the ACHP does not provide its advice regarding the dispute within the thirty (30) calendar day period, NRCS may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, NRCS shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to the Agreement and provide them and the ACHP with a copy of such written response.
- C. NRCS' responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remain unchanged.

IX. AMENDMENTS

This Agreement may be amended when such an amendment is agreed to in writing by all Required or Invited Signatories. The amendment will be effective on the date it has been signed by all the required signatories. The fully executed copy shall be filed with the ACHP to meet Section 106 requirements.

X. TERMINATION

If a required or invited signatory to this Agreement determines that its terms will not or cannot be carried out, that party shall immediately consult with the other signatories to attempt to develop an amendment per Stipulation IX, above. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, any signatory may terminate the Agreement upon written notification to the other signatories.

Once the Agreement is terminated, and prior to work continuing on the undertaking, NRCS must either;

- A. Execute an MOA pursuant to 36 CFR § 800.6(b)(2) or;
- B. Request, take into account, and respond to the comments of the ACHP under 36 CFR § 800.7(a)(2) or (3) as appropriate.

NRCS shall notify the signatories as to the course of action it will pursue.

XI. ANTI-DEFICIENCY ACT

The NRCS's obligations under this Programmatic Agreement are subject to the availability of appropriated funds, and the stipulations of this Programmatic Agreement are subject to the provisions of the Anti-Deficiency Act. The NRCS shall make reasonable and good faith efforts to secure the necessary funds to implement this Programmatic Agreement in its entirety. If compliance with the Anti-Deficiency Act alters or impairs the NRCS' ability to implement the stipulations of this agreement, the NRCS shall consult in accordance with the amendment and termination procedures found at Stipulations IX & X of this agreement.

Execution of this Agreement by the signatories and the implementation of its terms evidence that NRCS has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

REQUIRED SIGNATORIES:

West Virginia Natural Resource Conservation Service

Jon Bourdon, State Conservationist

Date

West Virginia State Historic Preservation Officer



Cabinet Secretary

4/5/24

Randall Reid-Smith, Secretary – WV Department of Arts, Culture and History

Date

Cabinet Secretary

Invited Signatories

McDowell County Commission

Clayton Patterson

County Commissioner

4-10-2021

Date

Concurring Party (if opted to participate)

The Cherokee Nation

Chuck Hoskin, Chief

Date

The Eastern Band of Cherokee Indians

Richard Sneed, Chief

Date

Monacan Indian Nation

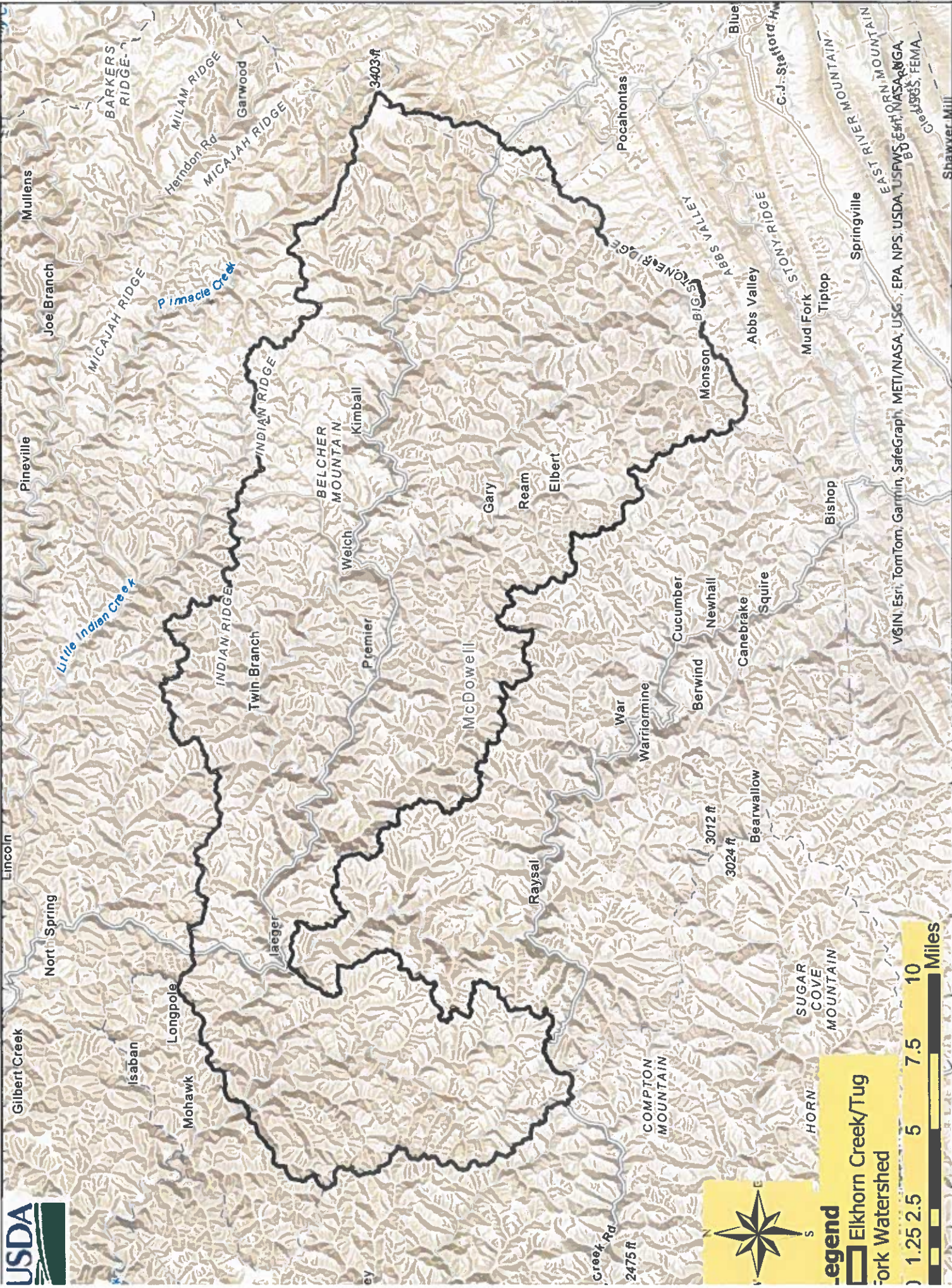
Kenneth Branham, Chief

Date

Appendix A

Maps and location data.

Eikhorn Creek/Tug Fork Watershed



Legend
 Eikhorn Creek/Tug Fork Watershed



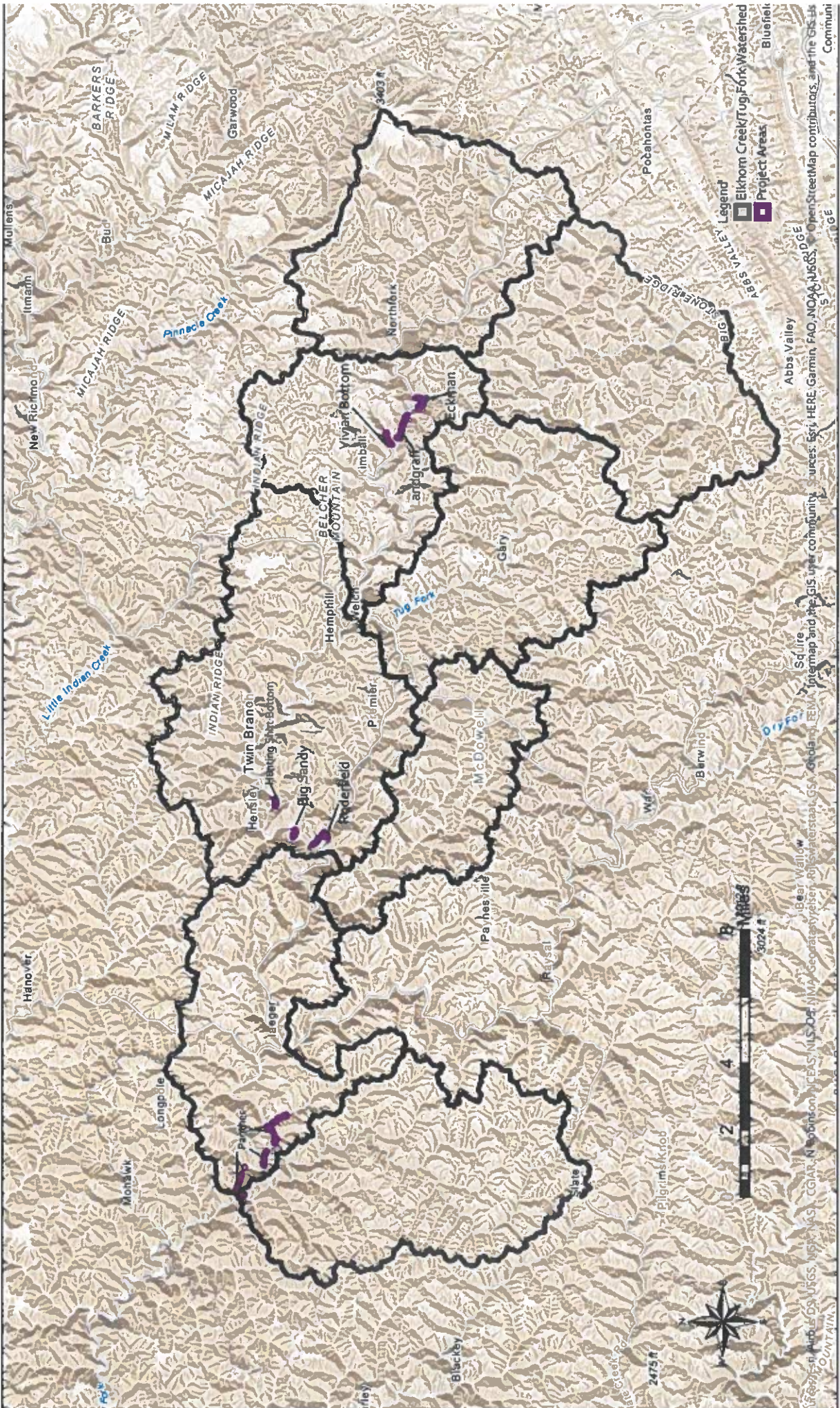
USGS, FEMA, Esri, TomTom, Garmin, SafeGraph, METI/NASA, USGS, EPA, NPS, USDA, USFWS, EAST RIVER MOUNTAIN, BLUE VALLEY, STONY RIDGE, SUGAR COVE MOUNTAIN, SHAWVER MILL

Elkhorn Creek/Iug Fork Watershed within McDowell County



USDA
 VGIN, Esti, TomTom, Garmin, SafeGraph, METI/NASA, USGS, EPA NPS, USDA, USFWS, Esri, NOAA, RIGA, POB, USGS, FEMA
 Shawver Mill

Elkhorn Creek/Tug Fork Watershed with Project Boundaries



Big Sandy



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



- Legend
- Tug Fork
- Anticipated APE
- Big Sandy



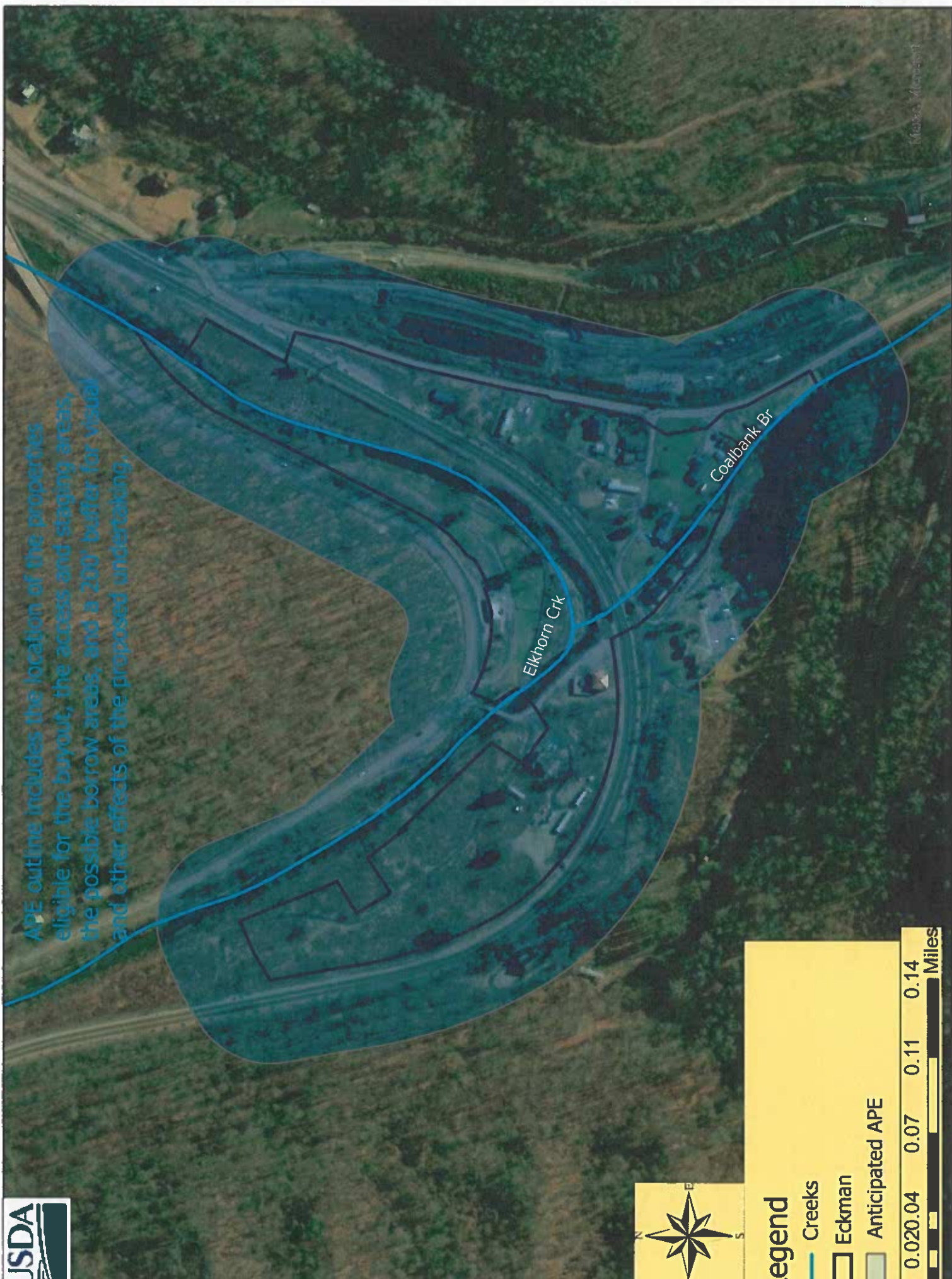
0.02 0.04 0.06 0.08

Miles

Eckman



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

- Creeks
- Eckman
- Anticipated APE

0 0.020.04 0.07 0.11 0.14 Miles

Hunting Shirt Bottom



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

- Tug Fork
- Hunting Shirt Bottom
- Anticipated APE



Landgraff



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

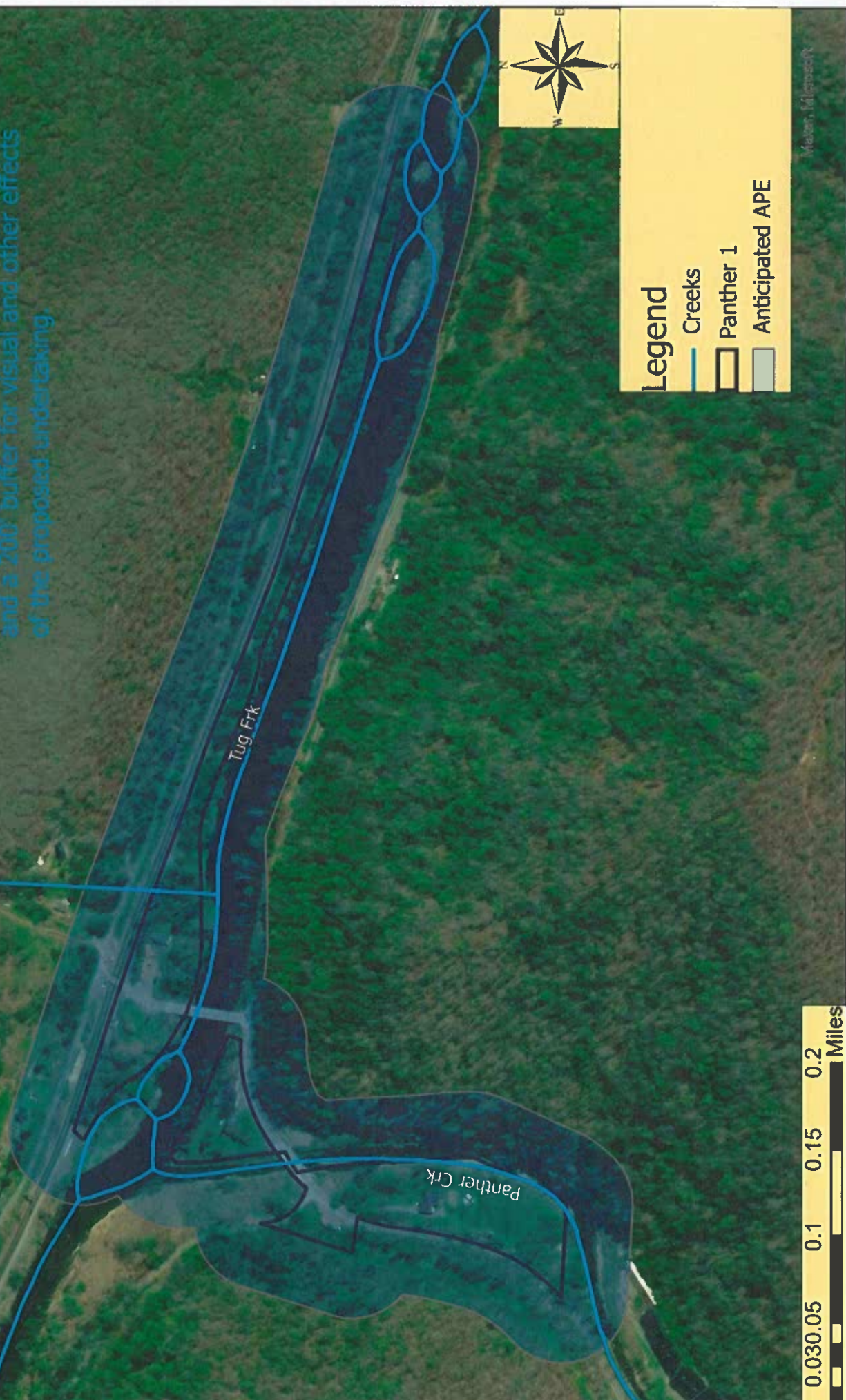
- Elkhorn Creek
- Landgraff
- Anticipated APE



Panther 1



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

- Creeks
- Panther 1
- Anticipated APE



Mapkin, Microsoft

Panther 2

APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

- Creeks
- Panther 2
- Anticipated APE



Mapac/Microsoft

Panther 3



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Panther 4



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

- Creeks
- Panther 4
- Anticipated APE

0 0.01 0.02 0.04 0.06 0.08 Miles

Panther 5



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

- Creeks
- Panther 5
- Anticipated APE

0 0.03 0.06 0.12 0.18 0.24 Miles

Roderfield



APE outline includes the location of the properties eligible for the buyout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



Legend

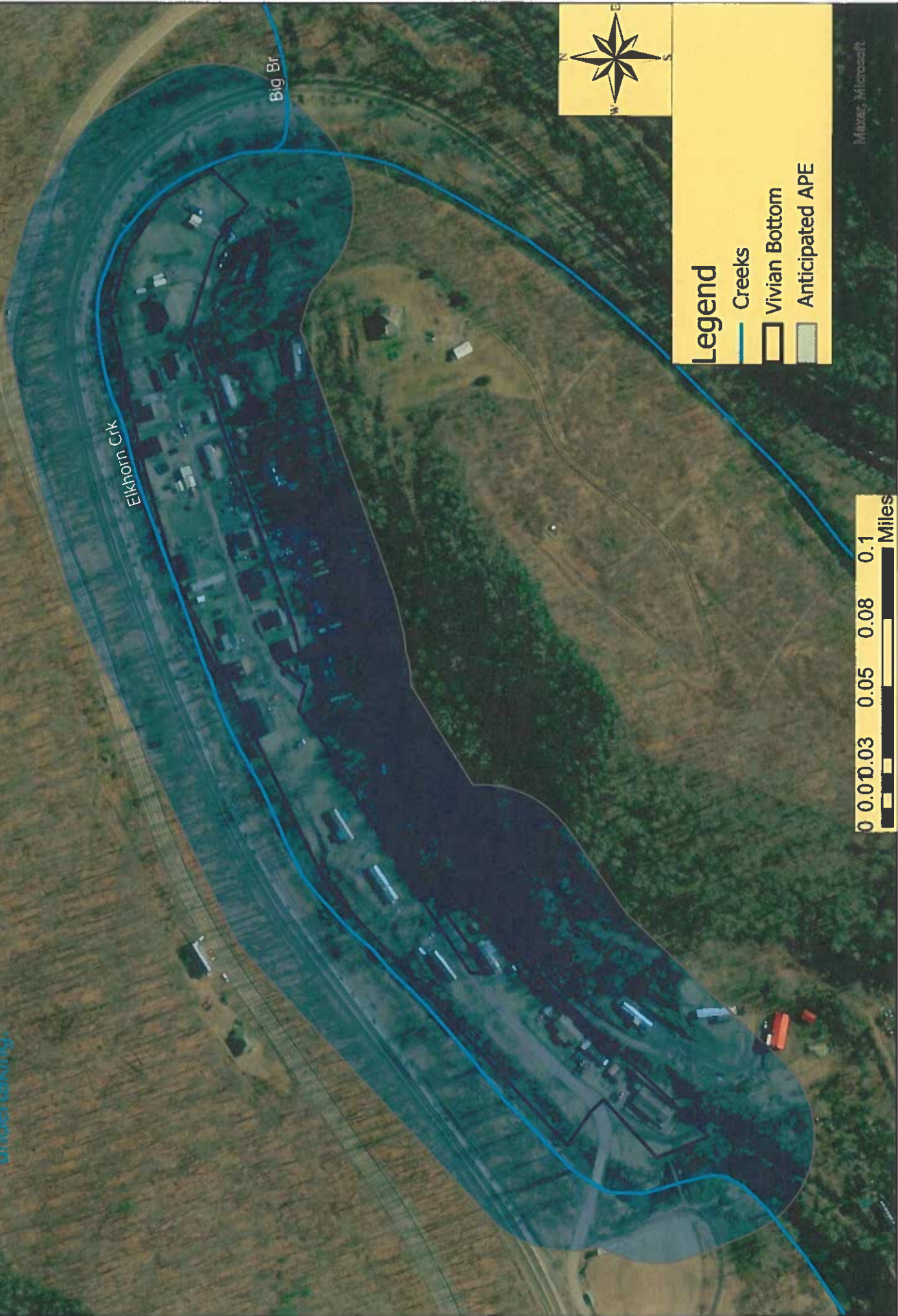
- Creeks
- Roderfield
- Anticipated APE

0 0.020.04 0.09 0.14 0.18 Miles



Vivian Bottom

APE outline includes the location of the properties eligible for the layout, the access and staging areas, the possible borrow areas, and a 200' buffer for visual and other effects of the proposed undertaking.



0 0.01 0.03 0.05 0.08 0.1 Miles

Maxar, Microsoft