



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
4101 JEFFERSON PLAZA NE
ALBUQUERQUE, NM 87109-3435

May 6, 2024

CESPA-RD

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023) ,¹ SPA-2024-00152².

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

¹ While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Stream Number	Water Type	Acres	Length (feet)	Average Cross Section (feet)
1	Ephemeral Stream	0.54	4104	3
2	Ephemeral Stream	3.21	12034	5.6
3	Ephemeral Stream	1.83	22158	17
4	Ephemeral Stream	4.14	24947	16.5
5	Ephemeral Stream	1.20	8854	6
6	Ephemeral Stream	1.91	8292	15.5

2. REFERENCES.

- 1. **USACE. 2009. List of Navigable Waters of the United States in the Albuquerque District. June 17, 2009.**
 - 2. **Tetra Tech. March 2024 Waters of the U.S. Delineation Report. December 20, 2022**
 - 3. **USDA, NRCS. 2016. Web Soil Survey. Available online at <http://websoilsurvey.nrcs.usda.gov/>.**
 - 4. **Dick-Peddie, W.A. and W.H. Moir. 1999. New Mexico Vegetation: Past, Present, and Future. University of New Mexico Press.**
3. **REVIEW AREA.** The review area consists of the six stream channels within the Crane I project area a 1576-acre parcel of land, approximate center point of latitude

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32.29729°, longitude -107.688937°, Luna County, New Mexico. The applicant has requested the review of nine (6) aquatic resources located within the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. These features do not have a continuous surface connection to a water identified in paragraph (a)(1) or (a)(3) of the 2023 Rule, as amended
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There were no flow paths identified between the aquatic resource within the review area and the Gila River which is approximately 35 miles from the review area.
6. SECTION 10 JURISDICTIONAL WATERS⁶: 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 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
 - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A

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.

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- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁸
- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

The waters covered by this AJD include 6 ephemeral tributaries (12.83 acres) (TETRA TECH, 2024). For the purpose of this jurisdictional determination (JD), these waters will collectively be referred to as CRANE I waters.

CRANE I waters are intrastate, ephemeral waters with no continuous surface water connection downstream, that have no connection to a Traditionally Navigable Water (TNW). The CRANE I waters also have no interstate commerce connection. The district’s evaluation is described in more detail below.

⁸ 88 FR 3004 (January 18, 2023)

The Deming East 7.5 minute Quadrangle map is the collective area containing the CRANE I waters, it is a nearly level plain that is part of the Mimbres River watershed, it is characterized by alkaline soils, upland vegetation, and nearly level slopes. It is a topographic plain with no external surface drainage (TETRA TECH, 2024). The Rio Grande River is the nearest jurisdictional water body, which is a traditionally navigable water (TNW). The confluence of the Rio Grande is approximately 85 miles from the review area.

Surface water in the CRANE I waters is ephemeral. Surface waters drain to the surrounding area and turn into sheet flow that terminate and have no surface outlet. The Mimbres River is approximately 5 miles southwest of CRANE I waters. However, all surface water flow terminates before, never reaching the Gila River (TETRA TECH, 2024).

Based on Cooperative Climatological Station data, the average annual precipitation is 12.88 inches for the period 1986 to 2014. The climate is arid to semi-arid, and the majority of the precipitation falls during the summer monsoon season. The monsoon rains are typically characterized as high intensity, short duration, isolated thunderstorms. Evaporation is high, nearly 8 times the amount of annual precipitation.

According to the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM), the CRANE I waters are unmapped therefore fall outside of the 100-year floodplain of the Pecos River (TETRA TECH, 2024).

The dominant soils in the review area include the Luna and Dona Ana Soil Series. The Luna and Dona Ana series are medium-textured to moderately fine-textured Aridisols formed in residuum weathered from Limestone. These soils are slightly saline to strongly saline with high calcium carbonate concentrations in the soil profiles. The soils in the review area are generally not mapped as hydric soils and therefore cannot be considered jurisdictional wetlands (USDA NRCS 2016).

The CRANE I waters do not have a connection to an A1 water. As discussed above, there is no physical connection between the CRANE I waters and the Gila River, the closest A1 water. Likewise, there is no biological or chemical connection. Evaporation is the dominant form of water loss from the waters and there is limited ground water recharge. No fish or amphibious species are known to inhabit the ponds.

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Since the CRANE I waters are all ephemeral in nature there is no form of navigation to contribute to interstate commerce, also no other form of interstate commerce regardless of navigation is known to occur.

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. National Wetlands Inventory Mapper
- b. USGS Topo Map Saragosa, TX 2022
- c. Stantec Delineation Report Bracero Pecan Storage, Reeves County, Texas, September 3, 2023.

10. OTHER SUPPORTING INFORMATION.

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.