



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

CESPA-RD

08/18/2025

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-2025-00253²

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

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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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).

Feature Name	Feature Type	WOTUS Status
Rio Peñasco (S-1)	Intermittent named stream	Yes – Water of the United States
Artificially Flooded Pond (OW-1)	Artificial pond	No – Not a WOTUS
Unnamed Ephemeral Stream (NHD-mapped)	Non-Relatively Permanent Water	No – Not a WOTUS

2. REFERENCES.

- a. “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”)
- b. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The area under review encompasses approximately 133 acres of privately owned parcels located in Sections 17, 19, and 20 of Township 18 South, Range 26 East, in Eddy County, New Mexico. The site lies south of the city of Artesia, near the intersection of U.S. Highway 285 and East Dayton Road, within the Chihuahuan Basins and Playas ecoregion. The landscape is generally characterized by flat upland terrain with localized topographic variation caused by erosion. Vegetation within the review area consists primarily of shrub/scrub communities with scattered herbaceous cover and areas of bare ground. Soils are predominantly non-hydric and include Harkey very fine sandy loam, Dev-Pima complex, Reagan loam, Upton gravelly loam, and Atoka loam. Land cover is largely undeveloped, with limited agricultural influence in portions of the site. The climate is arid, with infrequent precipitation events.
4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Rio Grande is a perennial traditional navigable water (TNW) that

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flows from Colorado through New Mexico and Texas to the Gulf of Mexico, supporting navigation, commerce, and habitat.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER.

The *Rio Peñasco (S1)* originates in the Sacramento Mountains, flows east to the Pecos River, and the Pecos River ultimately joins the Rio Grande in Texas. This hydrologic connection makes the Rio Peñasco a tributary to the Rio Grande under the 2023 Rule as amended, consistent with *Sackett*.

There is no flow path from the *Artificially Flooded Pond (OW-1)* nor the *Unnamed Ephemeral Stream (NHD-mapped)* to any TNW, territorial sea, or interstate water.

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 10.⁷N/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):

Within the review area, one aquatic resource, *Rio Peñasco (S-1)*, was identified as meeting the definition of “waters of the United States” under the 2023 Rule as amended, consistent with the Supreme Court’s decision in their *Sackett* ruling. The Rio Peñasco is a spring-fed, named tributary that originates in the Sacramento Mountains and flows approximately 40 miles to the Pecos River, a interstate water. Although the reach within the project area was mostly dry during the May 7, 2025, field assessment, small pools of standing water were present, and a clearly defined channel was observed. Field indicators of an ordinary high-water mark (OHWM) included a natural line impressed on the bank, erosional shelving, changes in soil and vegetation, and the absence of terrestrial vegetation within the bed. The OHWM measured approximately 130 feet in width in the project area. Based on its perennial headwaters, mapped intermittent flow regime in the National Hydrography Dataset, physical indicators of a sustained channel, and hydrologic connection to the Pecos River, Rio Peñasco is considered a relatively permanent tributary under the amended rule. The total length of Rio Peñasco within the review area is shown on Figure 4 (attached).

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 N/A

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

⁸ 88 FR 3004 (January 18, 2023)

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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).

Two aquatic features within the review area were determined to be non-jurisdictional because they do not meet any category of “waters of the United States” under the 2023 Rule as amended. The first feature, an artificially flooded pond (OW-1), was dry during the May 7, 2025, field assessment and appeared to have been historically used as a water source for adjacent agricultural fields. The pond is disconnected from any jurisdictional water and does not impound a relatively permanent flow. Based on these characteristics, OW-1 does not meet the definition of a WOTUS and is considered non-jurisdictional.

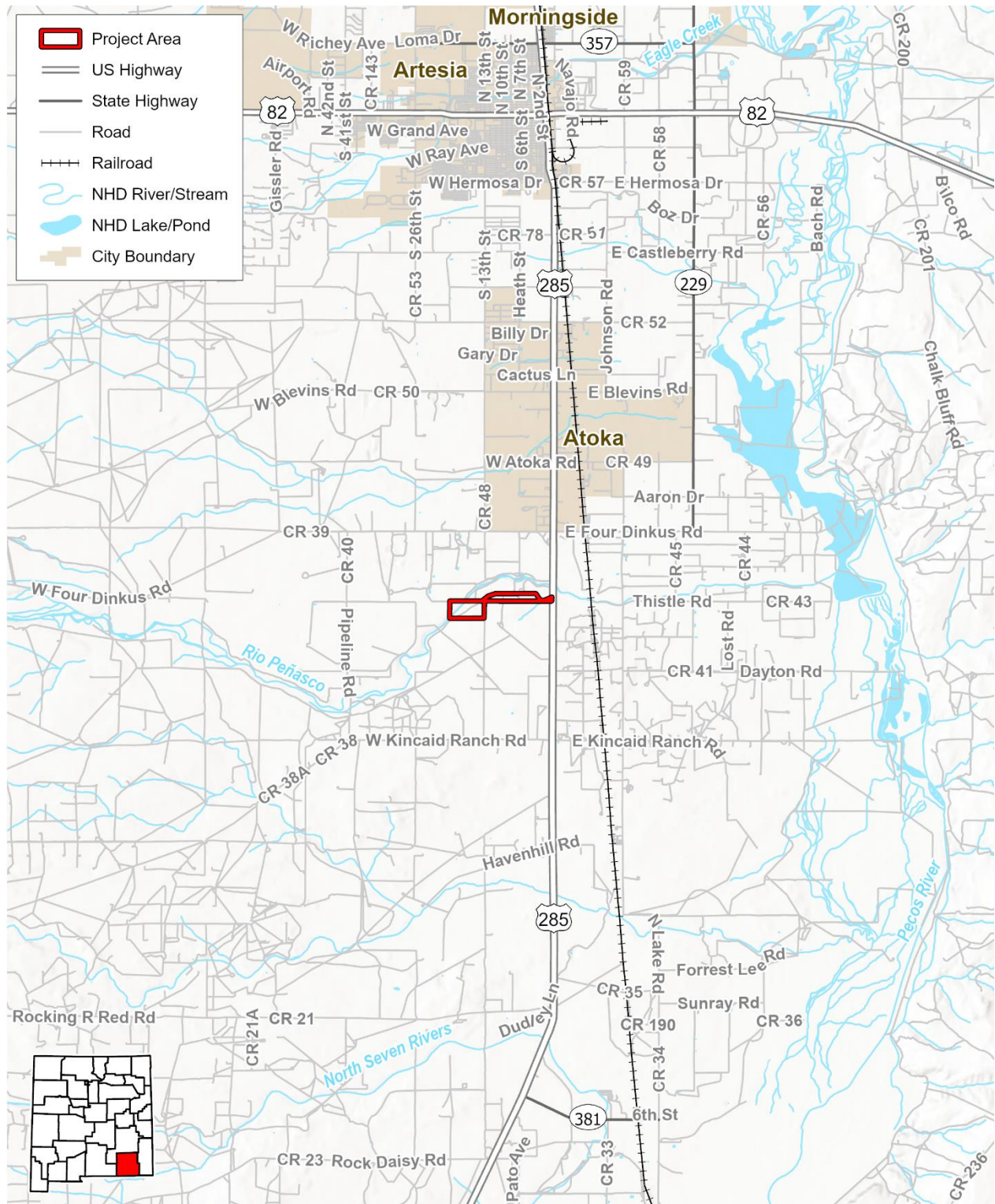
The second feature, an unnamed ephemeral stream mapped in the National Hydrography Dataset, was not observed in the field. No evidence of a defined channel, ordinary high-water mark, or other physical indicators of sustained flow were present at the mapped location. Because ephemeral features without relatively permanent flow are excluded from jurisdiction under the amended rule and the *Sackett* Supreme Court decision, this potential feature is considered non-jurisdictional. The locations of OW-1 and the ephemeral feature are shown in Figure 4 (attached).

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. Black Mountain Energy Storage. (2025, June). *Aquatic resources delineation: Nighthawk BESS Project, Eddy County, New Mexico*. HDR Engineering, Inc.

10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR’s structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

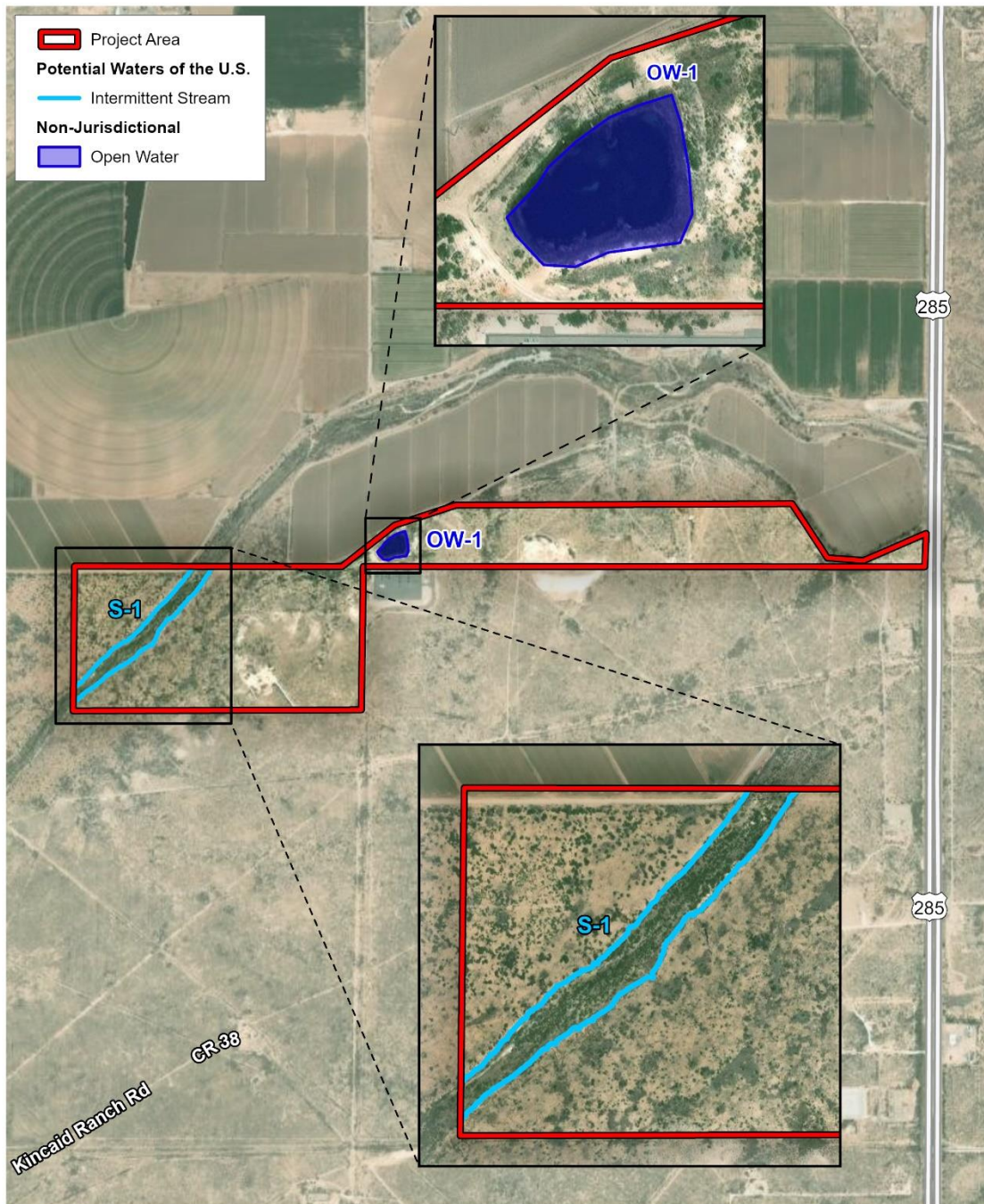


SITE LOCATION
Figure 1

DATA SOURCES: NATIONAL HYDROGRAPHY DATASET (NHD): USGS, 2025,
CITY BOUNDARY: USCB, 2020, COUNTY BOUNDARY: USCB, 2024, TRANSPORTATION: USGS, 2025

NIGHTHAWK BESS

\\SANPI-FS01\GIS_PROJECTS\2251086_BLACK_MOUNTAIN_ENERGY_STORAGE\BMES_NIGHTHAWK_BESS_ENV_104307037_2_WIP\APRX\ENVIRONMENTAL_FIGURES.APRX DATE: 5/22/2025



POTENTIAL WATERS OF THE U.S.
Figure 4

DATA SOURCES: COUNTY BOUNDARY: USCB, 2020, TRANSPORTATION: USGS, 2025

NIGHTHAWK BESS

\\SANPL-FSC1\GIS_PROJECTS\2251086_BLACK_MOUNTAIN_ENERGY_STORAGE\BMES_NIGHTHAWK_BESS_ENV_CR_104307037.2_WIP\APPROX\ENVIRONMENTAL_FIGURES\APRX DATE: 9/28/2025