



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

June 5, 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-2016-00366².

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).

Non-Wetland Water Feature	Latitude, Longitude ¹	Linear Feet Delineated within the Study Area	Acreage Delineated within the Study Area	Square Feet Delineated within the Study Area
Red Creek	38.604239°, -104.948346°	1,054	0.242	10,542

2. REFERENCES.

1. USACE. 2009. List of Navigable Waters of the United States in the Albuquerque District. June 17, 2009.
2. Pinyon Environmental Inc. 2024 Aquatic Resource Delineation Report. February 23, 2024
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 Red Creek project area a 0.242-acre parcel of land, approximate center point of latitude 38.604239°N, longitude - 104.948346°W, Fremont County, Colorado. The applicant has requested the review for 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. This feature has a continuous surface connection to the Arkansas River 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. Red Creek flows for over 20

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miles before connecting to the Arkansas River which is approximately 20 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
 - 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

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.

- 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 0.242 acres of defined bed and bank. For the purpose of this jurisdictional determination (JD), this water will collectively be referred to as Red Creek (Pinyon Environmental Inc. 2024).

Red Creek is an intrastate, non RPW water with a continuous surface water connection downstream, to a Traditionally Navigable Water (TNW). Red Creek also has no interstate commerce connection. The district’s evaluation is described in more detail below.

The Mount Pittsburg 7.5 minuet Quadrangle map is the collective area containing the Red Creek, it is a sloping valley that is part of the Arkansas River watershed, it is characterized by alkaline soils, upland vegetation, and moderate slopes. It is a topographic valley with external surface drainage. The Arkansas River is the nearest A1 water.

Red Creek within the review area receives flow only after a storm event (Pinyon Environmental Inc. 2024). Therefore, Red Creek is a non-RPW.

Based on Cooperative Climatological Station data, the average annual precipitation is 38 inches for the period 1986 to 2014. The majority of the precipitation falls during the summer monsoon season. The monsoon rains are

⁸ 88 FR 3004 (January 18, 2023)

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typically characterized as high intensity, short duration, isolated thunderstorms. Evaporation is moderate, nearly 3 times the amount of annual precipitation.

According to the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM), the Sunset waters are unmapped therefore fall outside of the 100-year floodplain of the Rio Grande River.

The dominant soils in the review area are medium-textured to moderately fine-textured Alfisols 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).

Evaporation and infiltration are the dominant forms of water loss from this water. No fish or amphibious species are known to inhabit the creek.

Since Red Creek only flows briefly in direct response to precipitation events, 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

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.