



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS ALBUQUERQUE DISTRICT REGULATORY DIVISION
NW COLORADO BRANCH, GRAND JUNCTION OFFICE
GRAND JUNCTION, CO 81501-2520

SPA-RDW

June 10, 2024

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-2024-00063

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.² 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.³

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),⁴ the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

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 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ 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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- 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).
 - i. **OHWM 1 is an excluded water and is not a water of the United States.**
 - ii. **Wetland 1 is an excluded water and is not a water of the United States.**

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 3116-17 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. **The review area is approximately 1.67-acre, centered at latitude 38.7267°, longitude -107.5043°, approximately 6 miles northeast of the Town of Crawford, in Delta County, Colorado.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **N/A**

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

6. SECTION 10 JURISDICTIONAL WATERS⁵: 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

⁵ 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.

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resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ **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**

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

⁶ 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.

exclusions listed in 33 CFR 328.3(b).⁷ **OHW 1 (0.73-acre) is an open water settling pond originally excavated from uplands and is an excluded artificial pond. According to Google Earth imagery and historic aerial, OHW 1 was created between 1999 and 2005. OHW 1 is used for irrigation purposes for the Ranch and receives water through a culvert from the Smith Fork. Even though there is a hydrologic connection to a water of the United States, this feature is not jurisdictional according to the 2023 rule since the feature was created in uplands and is being used exclusively for stock or irrigation purposes. This resource is excluded and is not jurisdictional under Exclusion (b)(5): Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.**

Wetland 1 (0.12-acre) is a palustrine emergent (PEM) lacustrine wetland that is dominated by partially submerged *Typha latifolia* and has developed entirely within the confines of the excluded pond (OHW 1). Therefore, Wetland 1 is also excluded (88 FR 3105).

- 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).

N/A

- 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. **Google Earth aerial photograph imagery dated September 1993, September 1999, March 2005, October 2011, October 2015, and August 2019. Accessed on May 31, 2024.**
- b. **USACE National Regulatory Viewer, Hillshade Map. Accessed on May 31, 2024.**
- c. **USACE National Regulatory Viewer, National Wetland Inventory Map. Accessed on May 31, 2024.**

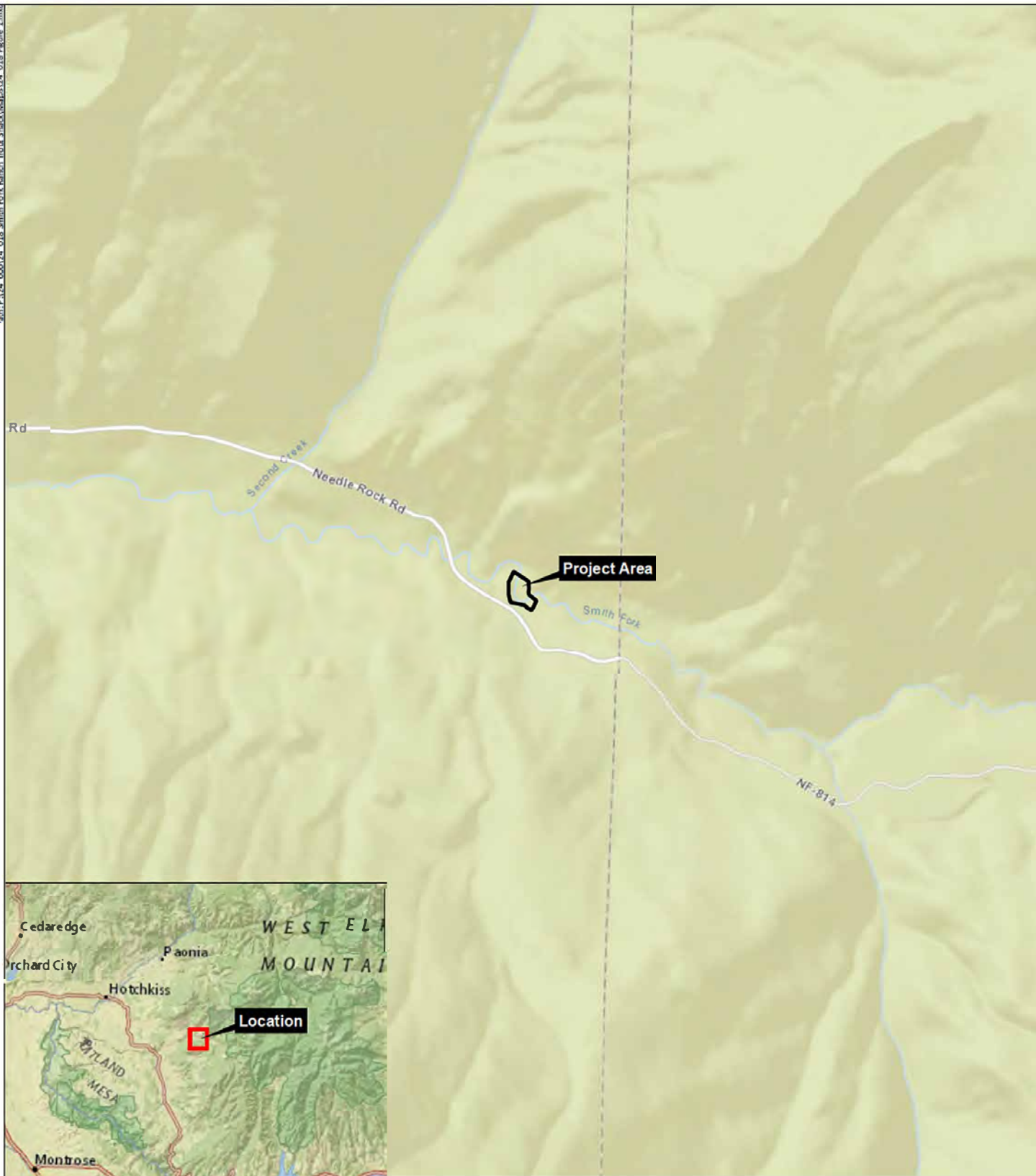
⁷ 88 FR 3004 (January 18, 2023)

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- d. **USACE National Regulatory Viewer, Slope Map. Accessed on May 31, 2024.**
 - e. **USDA, Natural Resources Conservation Service, Web Soil Survey (<https://websoilsurvey.sc.egov.usda.gov/app/WebSoilSurvey.aspx>). Accessed on May 31, 2024.**
 - f. **USACE National Regulatory Viewer, National Hydrology Data Map. Accessed on May 31, 2024.**
 - g. **May 2024, Wetland Delineation Report with photographs, prepared by ERO Resources Corporation.**
10. **OTHER SUPPORTING INFORMATION. In conclusion, one wetland (Wetland 1) and an open-water pond feature (OHWM 1) are in the within review area.**

OHWM 1 and Wetland 1 are excluded features and therefore these resources have been determined to not be waters of the United States.



Smith Fork Ranch Trout Shack

Sections 24 and 25, T15S, R91W; 6th PM

UTM NAD 83: Zone 13N; 282295mE, 4289434mN

Longitude 107.504370°W, Latitude 38.726767°N

USGS Crawford, CO Quadrangle

Delta County, Colorado

Figure 1
Vicinity Map

0 750 1,500
Feet





Smith Fork Ranch Trout Shack

- | | |
|------------------|-------------------------------------|
| ● Data Point | Ordinary High Water Mark (0.736 ac) |
| ➔ Photo Point | Wetland (0.123 ac) |
| ➔ Flow Direction | Project Area Boundary |

Image Source: Google Earth©, May 22, 2023

0 30 60 Feet



Figure 2
Existing Conditions

