



**DEPARTMENT OF THE ARMY**  
**U.S. ARMY CORPS OF ENGINEERS ALBUQUERQUE DISTRICT REGULATORY DIVISION**  
**NW COLORADO BRANCH, GRAND JUNCTION OFFICE**  
**400 ROOD AVENUE, ROOM 224**  
**GRAND JUNCTION, CO 81501-2520**

SPA-RDW

June 11, 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),<sup>1</sup> SPK-2016-00814

**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.<sup>2</sup> 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.<sup>3</sup>

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

**1. SUMMARY OF CONCLUSIONS.**

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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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. **Wetland W is not a water of the United States**

- ii. **Wetland K (2 separate wetland polygons) is 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 88 FR 3116-17 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. \_\_\_, 143 S. Ct. 1322 (2023)
- d. Memorandum on LRB-2021-01386 (2023)

3. REVIEW AREA. **The review area is 2.3 acres, and is located east of the Uncompahgre River, centered at latitude 38.4809°, longitude -107.8881°, within the city limits of Montrose, in Montrose County, Colorado.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **The Colorado River, beginning at the 5th Street Bridge located in Grand Junction, Colorado is the closest downstream Traditional Navigable water. This is approximately 53 aerial miles away from the review area.<sup>6</sup>**

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **Wetland W does not have a conveyance feature or flow path that connects it to the nearest TNW or interstate water. Wetland K is part of a wetland system that abuts the Uncompahgre River at a location outside of the review area. See paragraph (7)(f) for more information on this wetland system. The Uncompahgre River conveys relatively permanent flows to the Gunnison River at a location approximately 27 miles northwest of the review area. The Gunnison River conveys relatively permanent flows to the Colorado River at a location approximately 53 miles northwest of the review area. Within that reach, the**

**Colorado River is a TNW and interstate water, making it the nearest (a)(1) water.**

6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</sup> **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): **Wetland K is part of a wetland system that extends outside of the review area to abut the Uncompahgre River. The larger**

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<sup>5</sup> 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.

<sup>6</sup> 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.

**Wetland K system was first delineated in 2016 and was 1.64-acre at that time. The wetland system was mapped again in 2019 and was 1-acre in size. The most recent delineation was conducted in 2023 but was limited to the subject review area, which estimated Wetland K to be 0.08-acre within the review area. Previous delineations were provided to the Corps to facilitate permitting of the Montrose Recreational Trail in 2019. The permitted trail created a physical surface barrier between the Wetland K in the review area and the remainder of the wetland system that abuts the Uncompahgre River at a location outside the review area.**

**This physical surface barrier (i.e., paved recreational pathway) filled part of Wetland K but based on previous delineations, the larger Wetland K system is one wetland. In general, wetland delineation information indicates that hydric shallow groundwater hydrology in the Wetland K fluctuates with the seasonal changes in water levels of the Uncompahgre River. Specifically, we compared SP-1 to SP-2 to discern any relation in shallow subsurface hydrology. SP-1 showed hydric soils but did not have a hydrological indicator likely due to the timing of sampling, in August during the dry season. It should be noted that SP-2 which is mapped as a wetland point also did not have hydrological indicator in August, but it did in June. SP-2 was illustrated to have saturation at approximately 10 inches in depth in June. Additionally, the distance between the two points is approximately 10 feet without a significant elevational change.**

**We have determined that the portion of Wetland K within the subject review area is part of a wetland system that abuts the Uncompahgre River. This determination because Wetland K is documented to abut the Uncompahgre River prior to the construction of the barrier and current delineation information indicates that the subject wetland no longer directly abutting the river has similar shallow groundwater activity as wetlands that do currently abut the Uncompahgre River.**

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).<sup>7</sup> **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 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).

**Wetland W total 0.08-acre in size and is comprised of palustrine emergent (PEM) wetland species. Wetland W is found within a depression and is primarily supported by near surface groundwater. The wetland likely also receives rainwater runoff from a nearby residential development but there are no discrete hydrological inputs identified. Aerial imagery indicates that an open irrigation return ditch located between the wetland and the residential development was piped within the last 5 years and that this wetland has since been shrinking in size. Wetland W is approximately 491 feet west of the Uncompahgre River and approximately 273 feet of upland separates it from Wetland K.**

**Based on hill shade mapping, the depressional wetland does not have a sufficient slope or a defined flow path that would allow for a continuous connection between this wetland and Wetland K or the Uncompahgre River (a perennial (a)(3) water). Additionally, Wetland W is not considered to be part of the same wetland system as Wetland K due to a naturally occurring upland section between the two wetlands. Therefore, the wetland does not have a continuous surface connection or discrete flow conveyance to a jurisdictional water. This determination is based on review of Google Earth aerial photographs, the Corps' National Regulatory Viewer desktop resources, and wetland delineation reports submitted by the applicant's agent.**

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 1999, October 2005, August 2007, September 2011, October 2015, September 2019, and April 2023. Accessed on April 29, 2024.**

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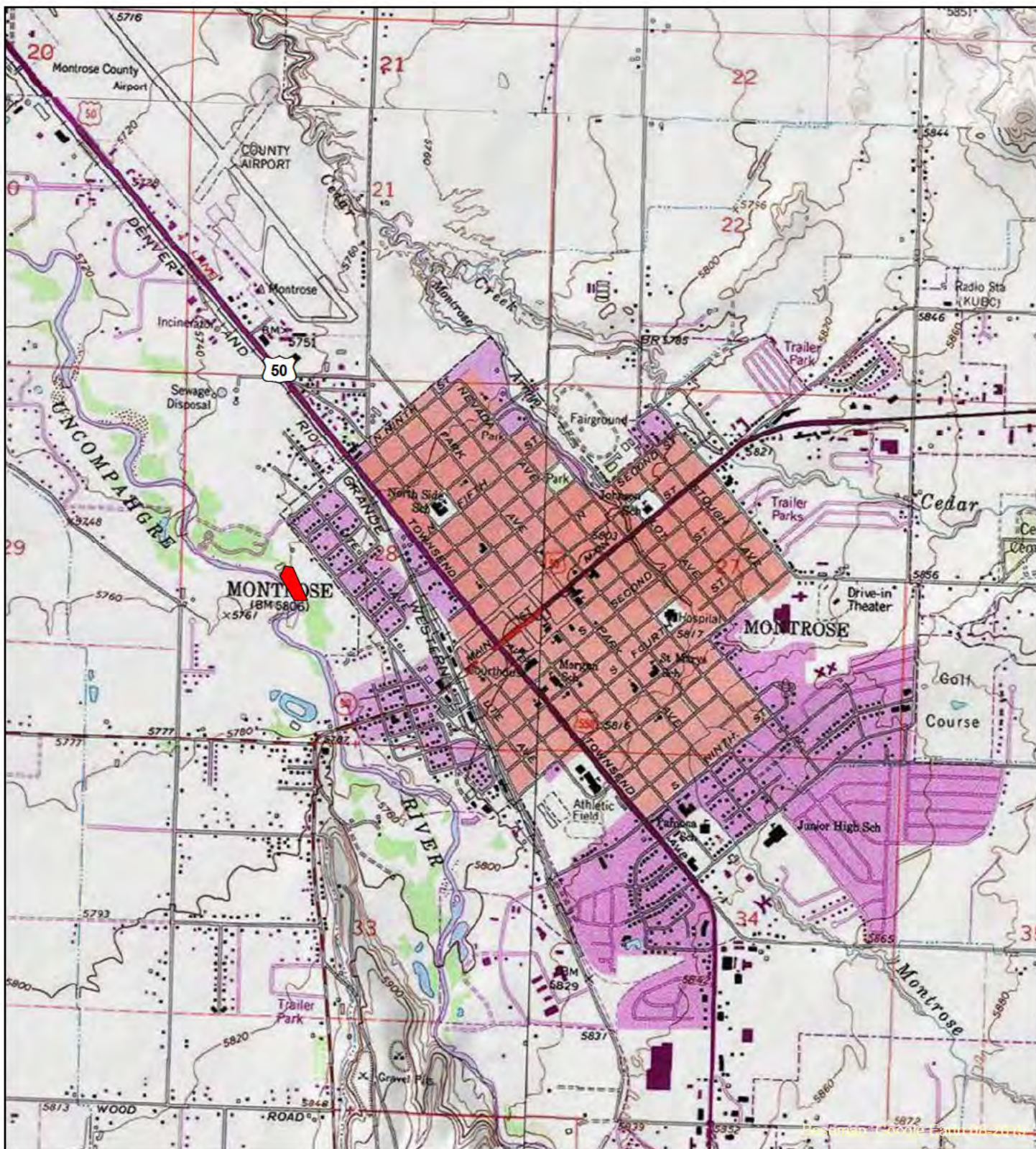
<sup>7</sup> 88 FR 3004 (January 18, 2023)

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- b. **USACE National Regulatory Viewer, Hillshade Map. Accessed on April 29, 2024.**
  - c. **USACE National Regulatory Viewer, National Wetland Inventory Map. Accessed on April 29, 2024.**
  - d. **USACE National Regulatory Viewer, National Hydrology Data Map. Accessed on April 29, 2024.**
  - e. **USACE National Regulatory Viewer, FEMA Map. Accessed on April 29, 2024.**
  - f. **USDA, Natural Resources Conservation Service, Web Soil Survey (<https://websoilsurvey.sc.egov.usda.gov/app/WebSoilSurvey.aspx>). Accessed on April 29, 2024.**
  - g. **August 2023, Wetland Delineation Report with photographs, prepared by BIO-Logic, Inc.**
  - h. **November 2016, Wetland Delineation Report with photographs, prepared by BIO-Logic, Inc.**
  - i. **November 2017, Wetland Delineation Report with photographs, prepared by BIO-Logic, Inc.**
10. **OTHER SUPPORTING INFORMATION. In conclusion, two wetlands (Wetland K and Wetland W) are located within the review area. Wetland K is part of a larger wetland system that abuts the Uncompahgre River (a perennial (a)(3) water) and is a jurisdictional water.**

**Wetland W has no surface connection or discrete flow conveyance to a water of the United States and therefore this resource has been determined to not be waters of the United States because it does not meet one or more categories of waters of the United States under the 2023 Rule, as amended.**



N Map drawn: 08-10-2023



1:24,000

0 0.25 0.5 Miles

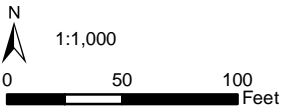
Survey Area

Figure 1  
Survey Area Location  
and Vicinity Map



Basemap Source:  
Google Earth 2024

Map drawn: 05-07-2024



- Wetland W 2023 (0.08 ac)
- Survey Area 2023 (2.3 ac)
- Wetland K 2023 (0.08 ac)

Wetland K and W