



DEPARTMENT OF THE ARMY
ALBUQUERQUE REGULATORY DIVISION, SOUTHERN COLORADO BRANCH
DURANGO OFFICE
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DURANGO, CO 81301-5025

SPA-RD-S

July 19, 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-2024-256²

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.

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).
 - i. Black Squirrel Creek 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 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA.

The review area 1 is approximately 20 acres, centered at latitude 38.9157625 longitude -104.443383, El Paso County, Colorado (enclosure 1). Review Area 2 begins is approximately 400 feet south of review area 1 and is approximately 10 acres, centered at latitude 38.9108394, longitude -104.4403367, El Paso County, Colorado (enclosure 1). Review area 2 begins approximately 400 feet south of review area 1. The applicant has requested the review of one aquatic resource, Black Squirrel Creek, located within both review areas.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest TNW is the Arkansas River, however the aquatic resource under review does not contribute relatively permanent flows to the Arkansas River. The Arkansas River is approximately 45 miles from the aquatic resource under review.⁶

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Surface flows within Black Squirrel Creek flow south for approximately 43 river miles before reaching Chico Creek. Chico Creek flows approximately 15 river miles south before reaching the Arkansas River near Avondale, Colorado. The Arkansas River has a Strahler stream order of 8 at this location, until approximately 8.25 river miles downstream with the confluence of the Huerfano River. The Arkansas River becomes stream order 9 at this location and is an (a)(1)(iii) interstate water that crosses into Kansas.
6. SECTION 10 JURISDICTIONAL WATERS⁷: 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 10.⁸ 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

⁷ 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.

⁸ 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.

- 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).⁹ 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).

Black Squirrel Creek

The National Hydrography Dataset (NHD) shows that the reach of stream within the review areas is a Strahler stream order three. The stream converges with Chico Creek approximately 43 stream miles south of the review areas. The applicants May 10, 2024, delineation report states that there is no OHWM on the stream reaches within the two review areas. These reaches experienced heavy erosion due to flash flooding in June of 2023. Relatively normal channel conditions can be found upstream and downstream of the review area, though the applicants review found no indication of an OHWM along Black Squirrel Creek in these areas either, indicating that there may not be an OHWM on the reaches within the review areas under normal conditions. Additionally, the January 30, 2024, SDAM data provided by the applicant reports that there were no surface flows, subsurface flows, or isolated pools present in review area 1. In review area 2 there were no surface or subsurface flows, though there

⁹ 88 FR 3004 (January 18, 2023)

was minor ponding, likely due to the elevation of the channel being lower than the elevation of a culvert crossing.

A USGS StreamStats report generated on July 17, 2024, estimates that the drainage area into this stream is 36.6 square miles. The mean annual precipitation at the site is 19.8 inches, and the estimated maximum 24-hour precipitation that occurs once in 2 years is 1.86 inches. NRCS Web Soil Survey data shows that the review area consists of 91% Ellicott loamy coarse sand, classified as somewhat excessively drained, and 8% Ustic Torrifluvents soils, classified as well drained and 1% Columbine gravely sandy loam, classified as well drained. The HUC12 (110200040105) of the review area is situated on the edge of the Upper Arkansas basin and does not receive seasonal snowmelt from the mountains in the western portions of the Upper Arkansas basin.

Based on the available information, the reach within that same Strahler stream order encompassing the review areas does not experience relatively permanent flows due to its well-drained soils and the general area having an arid environment. Additionally, any local snowpack is unlikely to accumulate such that it would contribute sustained or seasonal flows to downstream tributaries. Therefore, the reach does not experience relatively permanent flows and is not a water of the United States under paragraph (a)(3).

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. *SDAM Reports for JD Johnson Road Site, Garrett Road Site, and Ellicott Site*. Prepared by Felsburg Holt & Ullevig, dated January 30, 2024.
 - b. *AJD Request: El Paso County NRCS Emergency Flood Repairs, El Paso County, Colorado*. Prepared by Felsburg Holt & Ullevig, dated May 10, 2024.
 - c. USGS National Hydrography Dataset (NHD), accessed through USACE National Regulatory Viewer, July 17, 2024.
 - d. USGS StreamStats report entitled SPA-2024-256, generated July 17, 2024.
 - e. NRCS Web Soil Survey accessed July 17, 2024.

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), SPA-2024-256

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.

Mr. Daniel Delgado
March 25, 2024

Figure I. Project Location Map

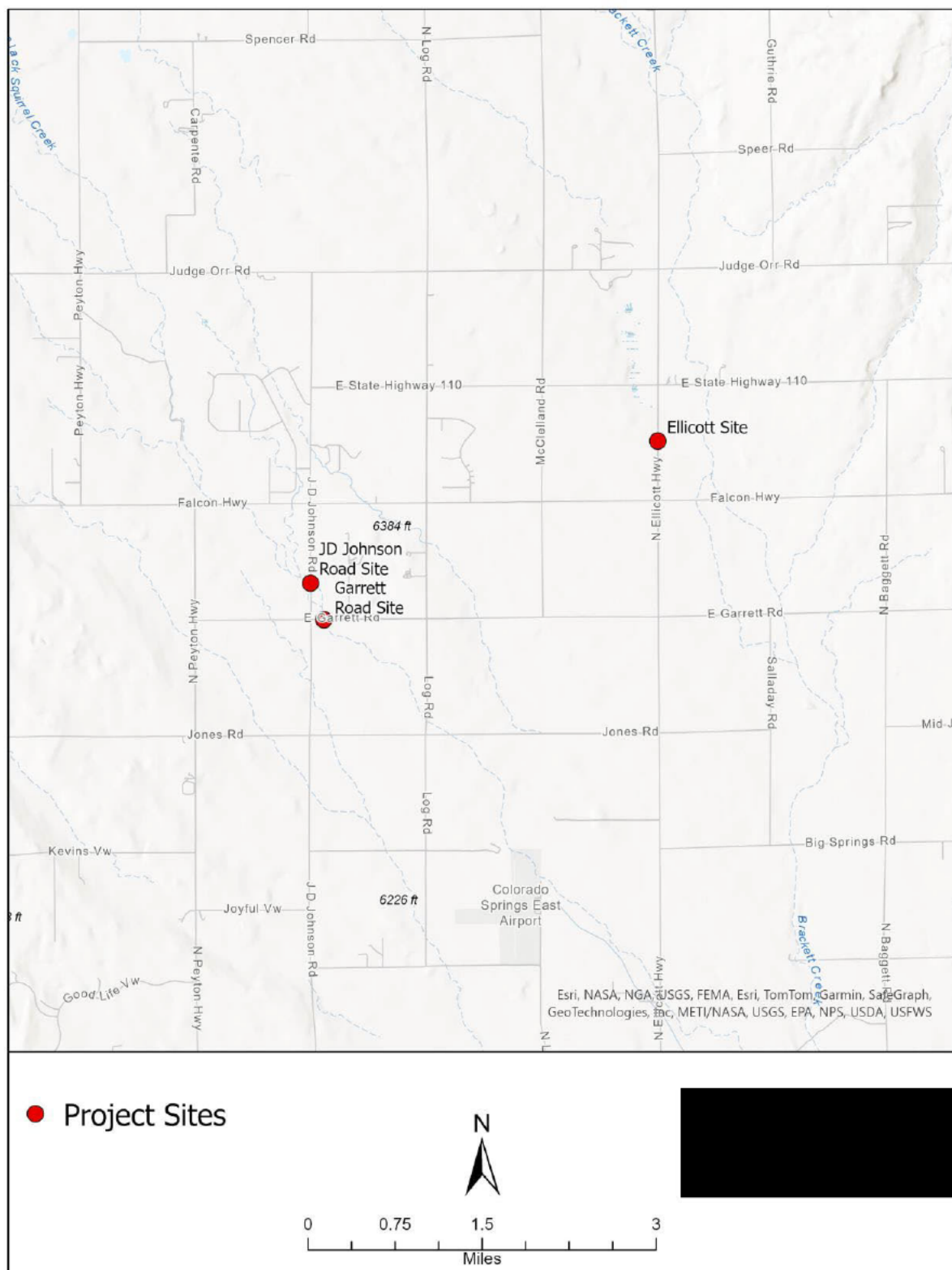


Figure 2. JD Johnson Road Site Environmental Study Area Map

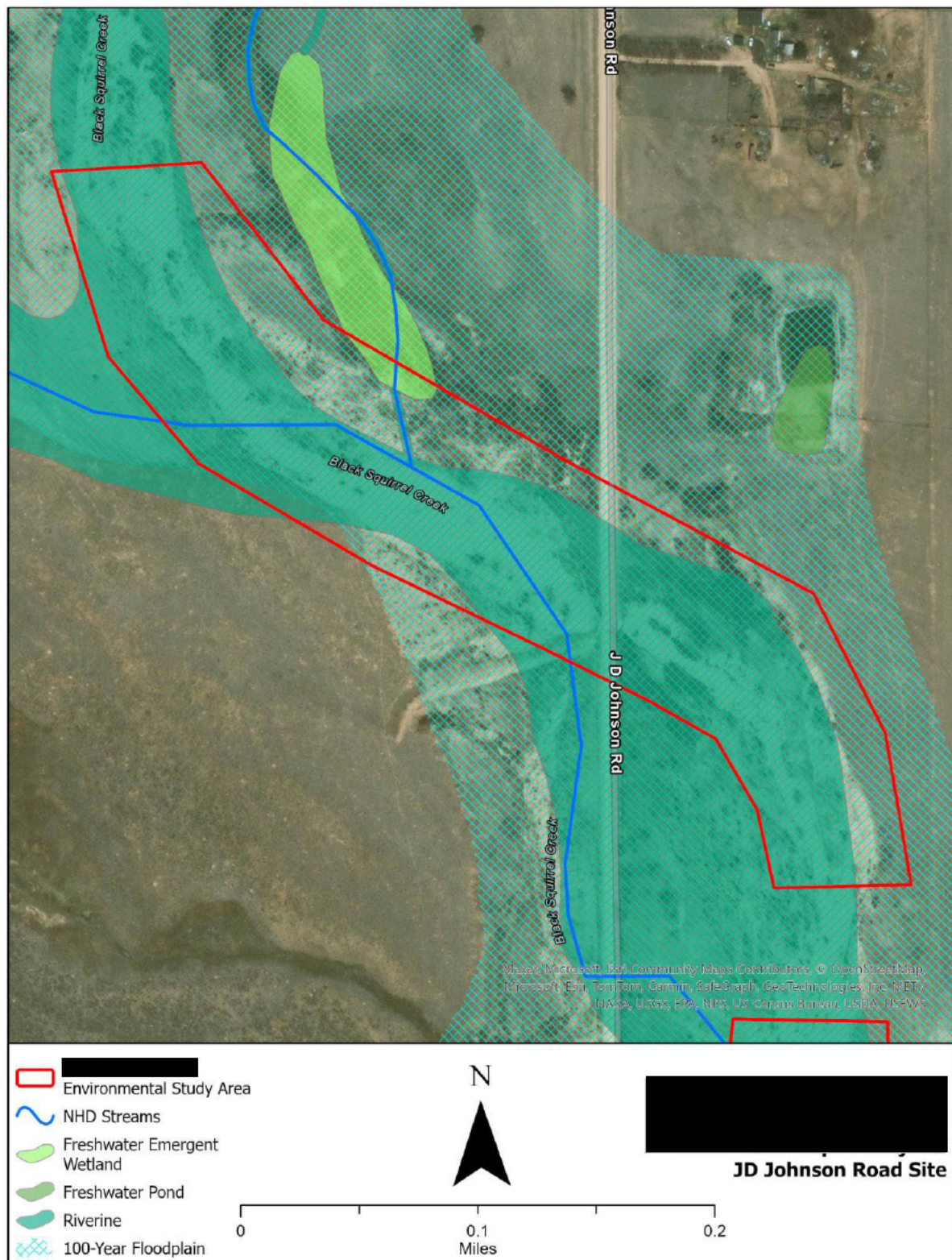


Figure 3. Garrett Road Site Environmental Study Area Map

