



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

CESPA-RDN

May 8, 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> SPA-2024-00145.<sup>2</sup>

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>3</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>4</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>5</sup> the 2023 Rule as amended, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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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> 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.).

<sup>3</sup> 33 CFR 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</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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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. Unnamed Drainage 1, and tributaries, non-jurisdictional.
  - ii. Unnamed Drainage 4, and tributaries, non-jurisdictional.
  - iii. Unnamed Drainage 7, non-jurisdictional.
  - iv. Unnamed Drainage 8, non-jurisdictional.
  - v. Unnamed Drainage 12, non-jurisdictional.
  - vi. Unnamed Drainage 14, non-jurisdictional.
  - vii. Unnamed Drainage 21, non-jurisdictional.
  - viii. Unnamed Drainage 22, non-jurisdictional.
  - ix. Unnamed Drainage 30, and tributaries, non-jurisdictional.

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 consists of a polygon of 3,800 acres centered at approximately latitude 36.8699, longitude -108.6128. In addition, the review area includes a distance of 20 meters upstream and downstream of the following sampling points: #22 (36.8487, -108.6308), #12 (36.8415, -108.6250), #14 (36.8389, -108.6227), and #21 (36.8427, -108.6324). The review area polygon and sampling sites are shown on the attached maps prepared by Barr Engineering Co., dated

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January 2, 2024. The review area begins approximately 5 miles northeast of Shiprock, San Juan County, New Mexico.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The nearest downstream TNW is the San Juan River. It is a Strahler stream order 9 at the confluence of Salt Creek Wash near Shiprock, New Mexico, and flows northwest across state lines into Colorado.<sup>6</sup>
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The unnamed drainages within the review area flow west into Salt Creek Wash within 2.1 river miles, measured from the western boundary of the review area. Measured from the southernmost confluence of an unnamed tributary and Salt Creek Wash (at 36.8417, -108.6556). Salt Creek Wash flows for approximately 6.9 river miles west-southwest until reaching the San Juan River. The San Juan River is a TNW of stream order 9 at this location, flowing northwest across state lines into Colorado.
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</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>8</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

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<sup>6</sup> 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.

<sup>7</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>8</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.

“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 exclusions listed in 33 CFR 328.3(b).<sup>9</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).
  - i. Unnamed Drainages 1 and 4. According to National Hydrography Dataset flowline data, Unnamed Drainage 1 and 4 each have a Strahler stream order of 2 at the downstream extent of the review area. Their upstream tributaries with a stream order of 1 are also within the review area. USGS StreamStats

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<sup>9</sup> 88 FR 3004 (January 18, 2023)



- data shows that the basin encompassing these two tributaries is 5.9 square miles, that the mean annual precipitation is 9.26 inches, and the maximum 24-hour precipitation that occurs on average once in 100 years is 2.77 inches. Stream Duration Assessment Method (SDAM) data sheets provided by the consultant returned a result of “ephemeral” for Unnamed Drainages 1 and 4, sampled at the downstream extent of the review area. Based on the available information, these drainages experience surface flows in direct response to precipitation events but do not experience sustained flows. Therefore, these reaches, at both stream order 1 and 2, do not experience relatively permanent flows and are not waters of the U.S.
- ii. Unnamed Drainage 7. Based on aerial imagery accessed in Google Earth, Unnamed Drainage 7 has a stream order of 1. An SDAM data sheet provided by the consultant returned a result of “ephemeral” for this drainage. As shown on USGS topographic maps (1:24,000 Shiprock Quadrangle) and aerial maps of the review area provided by the consultant, the drainage area for Unnamed Drainage 7 is considerably smaller than the basins encompassing Unnamed Drainages 1 and 4 or Unnamed Drainages 12, 14, 21, and 22. Therefore, it receives less flow than these basins. Based on the available information, this reach experiences surface flows in direct response to precipitation events but does not experience sustained flows. Therefore, the reach does not experience relatively permanent flows and is not a water of the U.S.
  - iii. Unnamed Drainage 8. According to National Hydrography Dataset flowline data, Unnamed Drainage 8 has a stream order of 1. An SDAM data sheet provided by the consultant returned a result of “ephemeral” for this drainage. As shown on USGS topographic maps (1:24,000 Shiprock Quadrangle) and aerial maps of the review area provided by the consultant, the drainage area for Unnamed Drainage 8 is considerably smaller than the basins encompassing Unnamed Drainages 1 and 4 or Unnamed Drainages 12, 14, 21, and 22. Therefore, it receives less flow than these basins. Based on the available information, this reach experiences surface flows in direct response to precipitation events but does not experience sustained flows. Therefore, the reach does not experience relatively permanent flows and is not a water of the U.S.
  - iv. Unnamed Drainages 12, 14, 21, and 22. USGS StreamStats data shows that the basin encompassing these four tributaries is 7.5 square miles, that the mean annual precipitation is 8.52 inches, and the maximum 24-hour precipitation that occurs on average once in 100 years is 2.71 inches.

Photos provided by the consultant show that Unnamed Drainage 12 has no OHWM until reaching a headcut downstream (west), outside of the review area. Therefore, Unnamed Drainage 12 is not a jurisdictional feature.

According to National Hydrography Dataset flowline data, Unnamed Drainages 14 and 22 are first-order streams within the review area, and Unnamed Drainage 21 is a third-order stream. SDAM data sheets provided by the consultant returned a result of “ephemeral” for all three of these drainages. Based on the available information, these three reaches experience surface flows in direct response to precipitation events but do not experience sustained flows. Therefore, the reaches do not experience relatively permanent flows and are not waters of the U.S.

- v. Unnamed Drainage 30. Based on aerial imagery accessed in Google Earth, Unnamed Drainage 30 has a stream order of 2 at the downstream edge of the review area, and tributaries of order 1 within the review area. An SDAM data sheet provided by the consultant returned a result of “ephemeral” for this drainage. As shown on USGS topographic maps (1:24,000 Shiprock Quadrangle) and aerial maps of the review area provided by the consultant, the drainage area for Unnamed Drainage 30 is considerably smaller than the basins encompassing Unnamed Drainages 1 and 4 or Unnamed Drainages 12, 14, 21, and 22. Therefore, it receives less flow than these basins. Based on the available information, this reach experiences surface flows in direct response to precipitation events but does not experience sustained flows. Therefore, Unnamed Drainage 30 and its tributaries of stream order 1 do not experience relatively permanent flows and are not waters of the U.S.

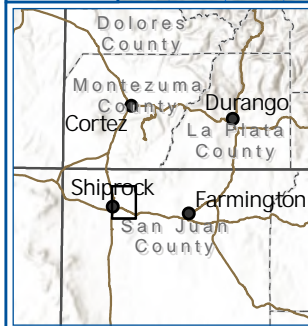
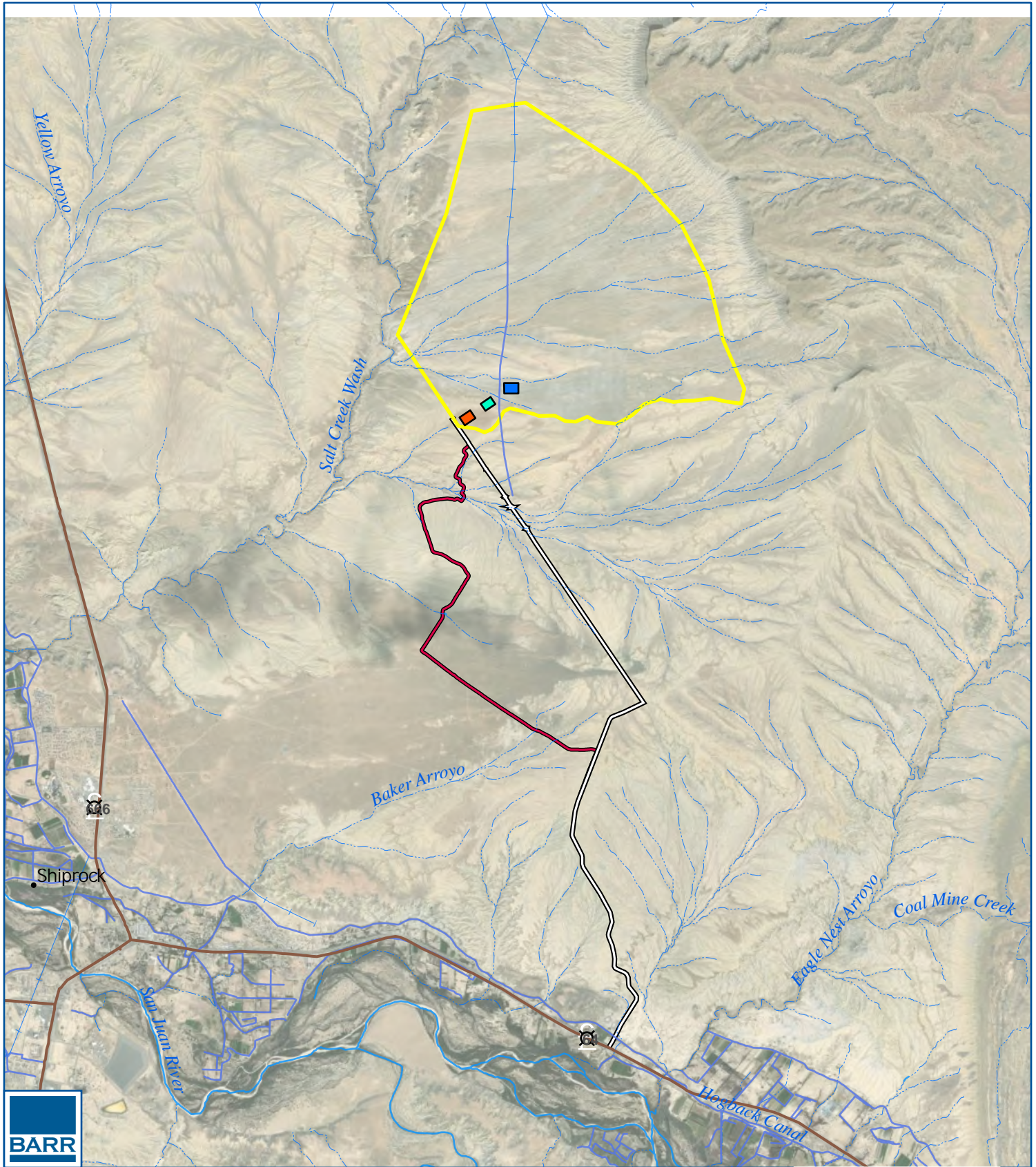
9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Maps of the project area prepared by Barr Engineering Co., dated January 2, 2024, entitled *Figure 1: [REDACTED], Project Area and Figure 2: [REDACTED]. Stream Duration Assessment Method.*
- b. Streamflow Duration Assessment Method (SDAM) for the Arid West data sheets with photos, conducted by Barr Engineering Co. The SDAM reports were generated on December 20, 2023.
- c. USGS StreamStats data, for SPA-2024-00145, reach 1 and 4 and SPA-2024-00145, reach 12, 14, 21, and 22, generated on May 1, 2024.

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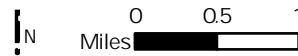
- d. USGS National Hydrography Dataset (NHD), accessed through USACE National Regulatory Viewer, May 6, 2024. NHD flowlines are also shown in the applicant's *Figure 1* (listed in data source a, above).
  - e. USFWS, National Wetlands Inventory, entitled *SPA-2024-00145*, dated May 1, 2024.
  - f. USGS 1:24,000 topographic maps for Shiprock Quadrangle (2017), Chimney Rock Quadrangle (2017), Skinney Rock Quadrangle (2020), and Palmer Mesa Quadrangle (2017).
  - g. Aerial imagery from Google Earth, dated October 19, 2016.
10. OTHER SUPPORTING INFORMATION. In conclusion, all stream paths with an OHWM within the review area are not waters of the U.S. Locations within the review area that do not exhibit an OHWM are not waters of the U.S.
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.



- Substation
- Utility Switchyard
- Battery Energy Storage System
- Site Boundary
- Proposed Access Road
- Alternative Access Road
- Populated Places

#### National Hydrography Dataset Flowline

- River/Stream: Perennial
- River/Stream: Intermittent
- Aqueduct or Canal Ditch
- Pipeline

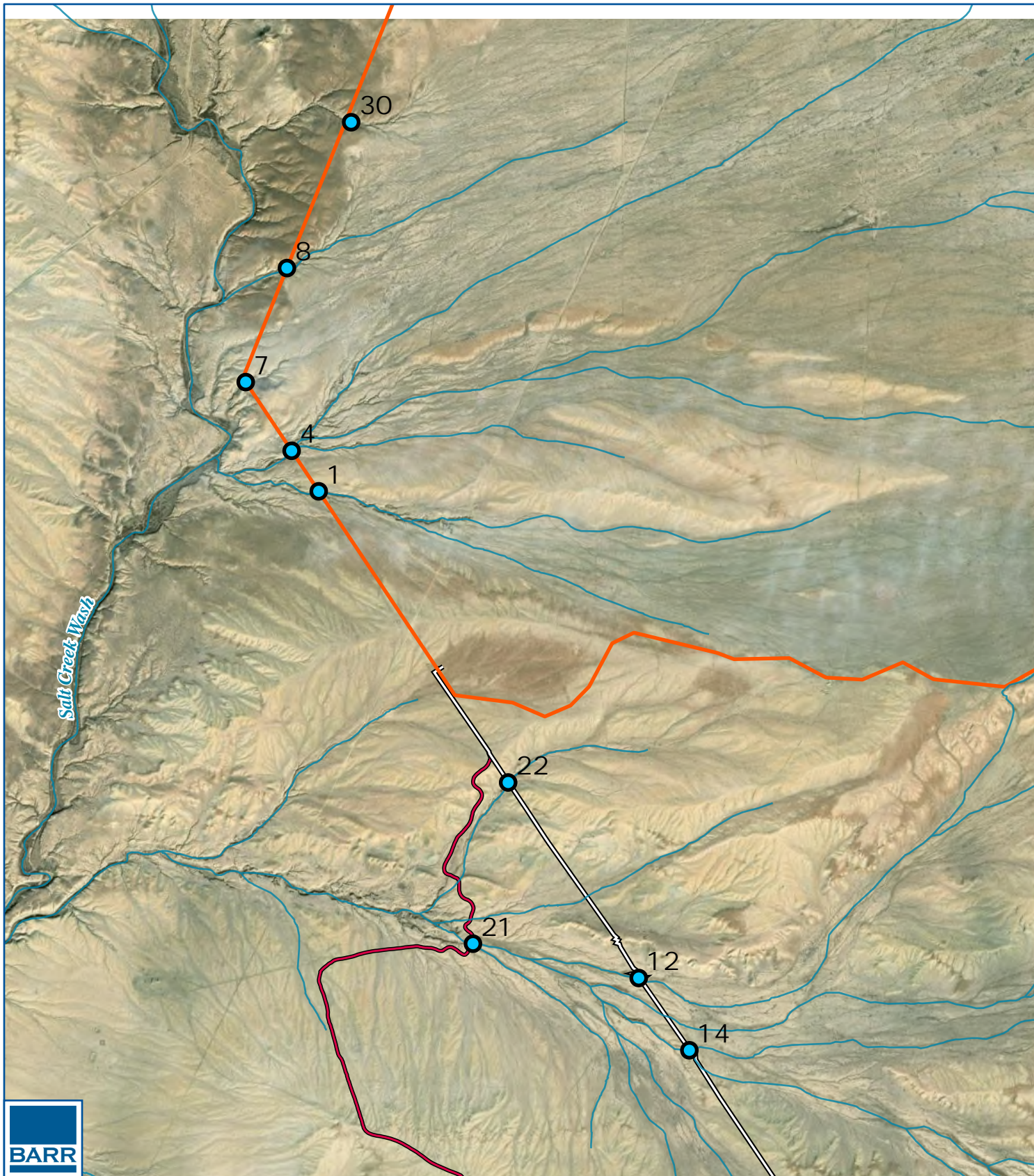


### Project Area

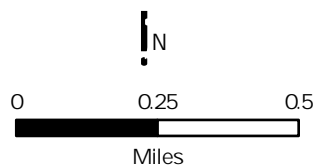
San Juan County, New Mexico  
T. 31N, R. 17W & T. 30N, R. 17W  
New Mexico Principal Meridian  
Chimney Rock and Shiprock 7-5 USGS Topographic Quadrangles

FIGURE 1





- Assessment Location
- National Hydrography Dataset Flowline
- Site Boundary
- Access Road
- Alternative Access Road



## Stream Duration Assessment

San Juan County, New Mexico  
T. 31N, R. 17W & T. 30N, R. 17W  
New Mexico Principal Meridian  
Chimney Rock and Shiprock 7.5' USGS Topographic Quadrangles

FIGURE 2