



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS ALBUQUERQUE DISTRICT REGULATORY DIVISION
4101 JEFFERSON PLAZA NE
ALBUQUERQUE, NEW MEXICO 87109-3435

CESPA-RD

October 9, 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-2024-00354 (MFR 1 of 1)²

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, as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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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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. ***Tijeras Creek Study Reach 1* – 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. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)
- c. “Revised Definition of ‘Waters of the United States’; Conforming” 88 FR 61964 (September 8, 2023))

3. REVIEW AREAS: The review area (*Tijeras Creek Study Reach 1*) consists of one distinct stream segment of Tijeras Creek that is approximately 450 linear feet in length. The upstream extent of the stream segment is located at latitude 35.061377°, longitude -106.476764° and the downstream extent of the stream segment is located at latitude 35.061276°, longitude -106.478178°. This stream segment is situated along the western foothills of the Sandia Mountains approximately 5 miles west of the village of Tijeras, in Bernalillo County, New Mexico. This stream segment is located within the requestor’s overall project site, which is slated for implementation of diverse stream and riparian habitat restoration initiatives.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The subject stream segment discussed above (*Tijeras Creek Study Reach 1*) is part of a channelized tributary (Tijeras Creek) that flows into the Rio Grande, a Traditional Navigable Water.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. Tijeras Creek flows west and is directly connected to the Rio Grande. From the downstream extent of *Tijeras Creek Study Reach 1*, *Tijeras Creek tributary* flows for approximately 12.5 river miles until it empties into a large sediment basin just after crossing under the Pan American Highway 25 Bridge. From the sediment basin the flowpath of the

***Tijeras Creek* tributary continues approximately 2 river miles within a concrete-lined channel to the Rio Grande.**

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): **None**
 - b. The Territorial Seas (a)(1)(ii): **None**
 - c. Interstate Waters (a)(1)(iii): **None**
 - d. Impoundments (a)(2): **None**
 - e. Tributaries (a)(3): **None**
 - f. Adjacent Wetlands (a)(4): **None**

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): **None**

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 **None**
- 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).

***Tijeras Creek Study Reach 1* is part of a 4th order stream relative reach, based on data provided by the National Hydrography Dataset (Buto, S.G., Anderson, R.D., 2020). The relative reach starts at the confluence of Arroyo San Antonio with Tijeras Creek, located upstream of the review area at latitude 35.09189°, longitude -106.371174°, where Tijeras Creek changes from a stream order 3 to stream order 4. Extending approximately 20 river miles to where Tijeras Creek enters a large sediment basin at latitude 35.00327°, longitude -106.64606°. Based on the information provided by the requester, data available from a previous AJD (DA file number SPA-223-375, issued on July 18, 2024) evaluated within the same stream order as that of the review area, and other information obtained by the Corps, approximately 83.9% of the relative reach includes areas consistent with indicators of potential non-relatively permanent stream characteristics. Approximately 16.1% of the relative reach contains standing water which is an indicator of relatively permanent stream flow. This information obtained within the relative reach provides support that the approximately 450-linear-foot study reach (*Tijeras Creek Study Reach 1*) is a non-relatively permanent water, as more than 70% of its relative reach exhibits non-relatively permanent characteristics.**

Additionally, the beta Stream Duration Assessment Method (SDAM) for the Western Mountains was used to assess the *Tijeras Creek Study Reach 1* and the results of that assessment were consistent with a non-relatively

⁸ 88 FR 3004 (January 18, 2023)

permanent flow duration (i.e. the study reach was assessed to be an ephemeral stream).

Therefore, the *Tijeras Creek Study Reach 1* review area does not exhibit relatively permanent flow characteristics and is considered to be non-relatively permanent waters. Further, the channel within the review area contains flow or standing water for only a short duration and solely in direct response to high intensity precipitation events. Therefore, the *Tijeras Creek Study Reach 1* review area does not experience relatively permanent flows and is not a water of the United States under paragraph (a)(3) of the 2023 conforming rule.

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. Report entitled, *Field form beta Streamflow Duration Assessment Method for the Western Mountains*, project name: *Tijeras Creek Bio Zone Education Center, Tijeras, NM*, Site Code/identifier: 1, Waterway Name: Tijeras Creek, prepared by Ciudad Soil and Water Conservation District, dated June 27, 2024.
 - b. Buto, S.G., and Anderson, R.D., 2020, National Hydrography Dataset Plus High Resolution (NHDPlus HR)-A hydrography framework for the Nation: U.S. Geological Survey Fact Sheet 2020-3033, 2 p., <https://doi.org/10.3133/fs20203033>.
 - c. NetworkNHDFlowline feature class of the NHDPlus_H_National_Release geodatabase, last modified 2022-07-10: <https://prd-tnm.s3.amazonaws.com/index.html?prefix=StagedProducts/Hydrography/NHDPlusHR/National/GDB/>
 - d. Office evaluation of Google Earth© Pro images dated August 2023, May 2023, October 2022, June 2022, February 2022, October 2020, August 2020, March 2020, November 2019, September 2019, October 2018, September 2018, March 2018, January 2018, April 2017, November 2016, November 2015, May 2015, March 2014, February 2014, January 2013, March 2012, August 2011, February 2011, November 2009, June 2007, July 2006, July 2005, March 2004.
 - e. The USACE, National Regulatory Viewer, South Pacific Division, New Mexico viewer, NHD data set and NWI data set, accessed on 9/18/2024.
 - f. Esri, NASA, NGA, USGS, FEMA | City of Albuquerque, Bernalillo County, NM, Texas Parks & Wildlife, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, Bureau of Land Management, EPA, NPS, USDA, USFWS. <https://ipgr.maps.arcgis.com>

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10. OTHER SUPPORTING INFORMATION.

Based on the information discussed above and an evaluation of a 20+ year span of aerial images, the flow regime of the stream reach within the review area does not meet the relatively permanent standard, per the 2023 Rule as amended. The review area is part of a larger relative reach, which does not have flowing or standing water year-round nor continuously during certain times of year for more than 70% of its length and is therefore a non-relatively permanent water.

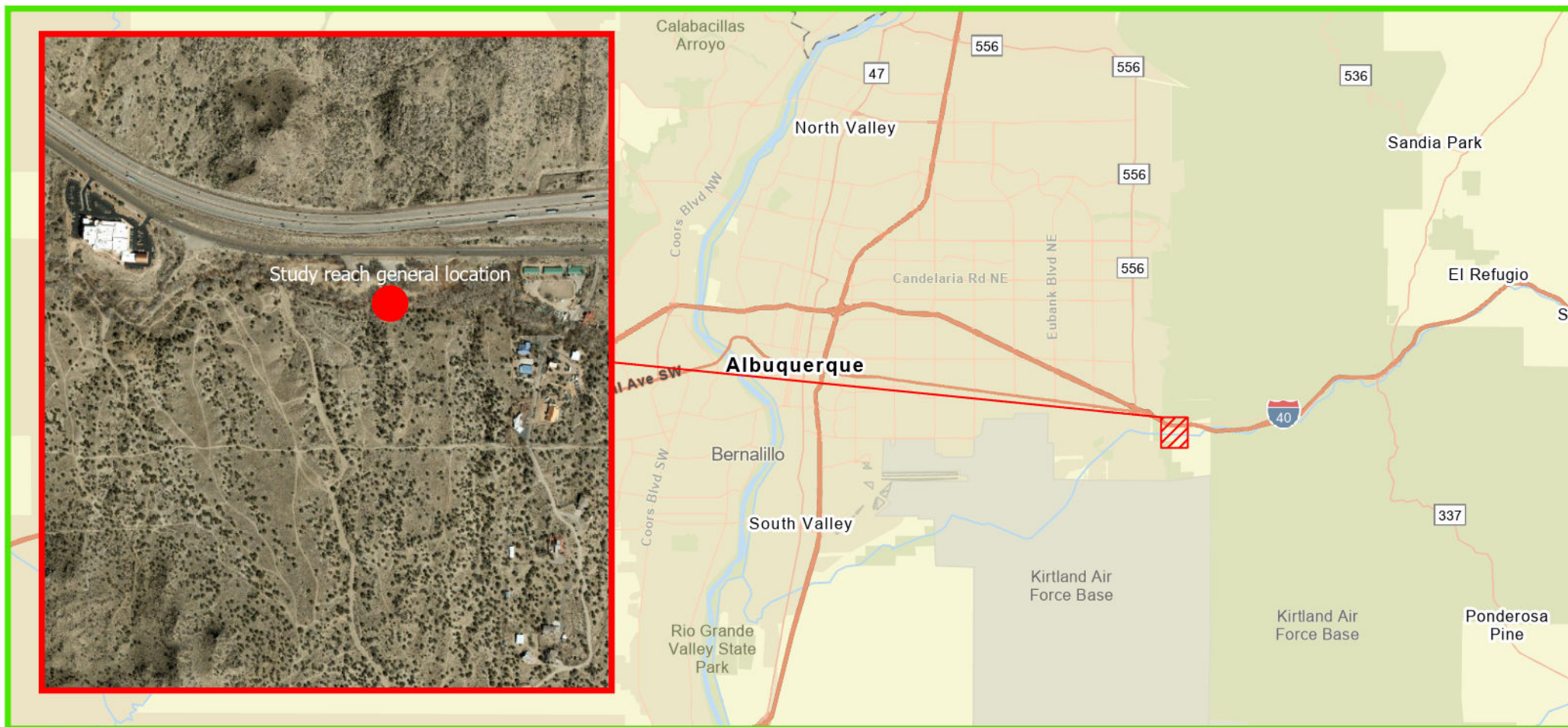
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

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Enclosure 1



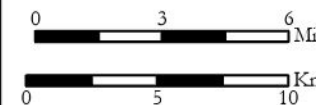


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Extent Map

Esri, TomTom, Garmin, FAO, NOAA, USGS, EPA, USFWS, City of Albuquerque, Bernalillo County, NM, Esri, TomTom, Garmin, SafeGraph, METI/NASA, USGS, Bureau of Land Management, EPA, NPS, USDA, USFWS, MRCOG-NM, Bohannon
 Houston, Maxar, Esri, USGS
 Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

2024

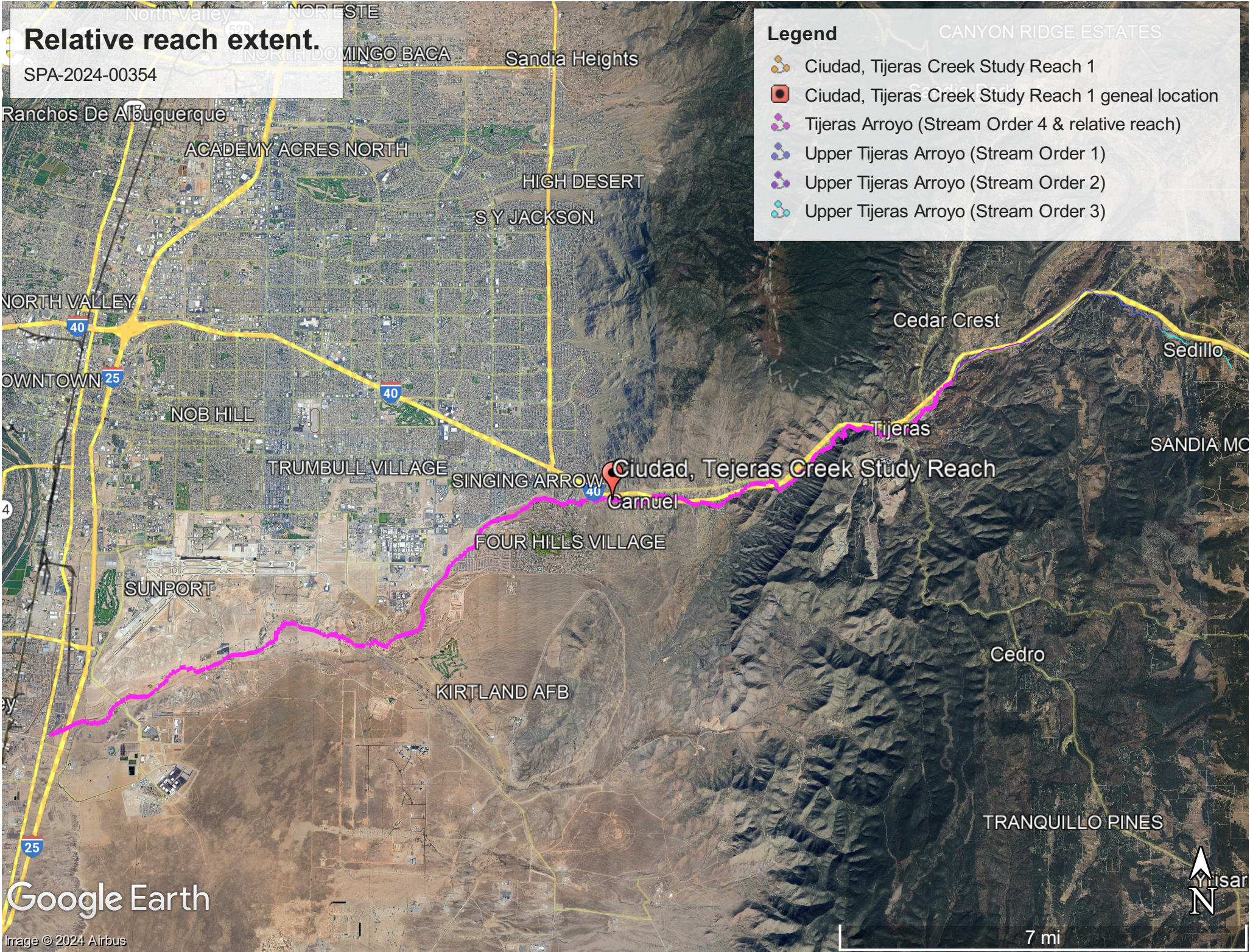


Relative reach extent.

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Legend

- Ciudad, Tijeras Creek Study Reach 1
- Ciudad, Tijeras Creek Study Reach 1 geneal location
- Tijeras Arroyo (Stream Order 4 & relative reach)
- Upper Tijeras Arroyo (Stream Order 1)
- Upper Tijeras Arroyo (Stream Order 2)
- Upper Tijeras Arroyo (Stream Order 3)



Google Earth

Image © 2024 Airbus

7 mi