



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

CESPK-RDI-U

15 January 2025

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ [SPK-2004-50485]

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 For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of "waters of the United States" found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 "Revised Definition of 'Waters of the United States,'" as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

¹ While the Supreme Court's decision in *Sackett* 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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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).

(1) Wetland 1 (0.028 ac): Jurisdictional under Section 404 of the Clean Water Act.

(2) Wetland 2 (0.305 ac): Jurisdictional under Section 404 of the Clean Water Act.

(3) Wetland 3 (0.13 ac): Jurisdictional under Section 404 of the Clean Water Act.

(4) Wetland 4 (0.659 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(5) Wetland 5 (0.093 ac): Jurisdictional under Section 404 of the Clean Water Act.

(6) Graveyard Wash- perennial channel (4,048 lf, 2.271 ac): Jurisdictional under Section 404 of the Clean Water Act.

(7) Wash 1 (1,158 lf, 0.607 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(8) Wash 2 (528 lf, 0.136 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(9) Wash 3 (1,852 lf, 0.338 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(10) Wash 4 (440 lf, 0.079 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(11) Wash 5 (384 lf, 0.022 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(12) Wash 6 (322 lf, 0.007 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(13) Wash 7 (332 lf, 0.007 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

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(14) Wash 8 (120 lf, 0.001 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(15) Wash 9 (205 lf, 0.002 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(16) Wash 10 (203 lf, 0.076 ac): Non-jurisdictional under Section 404 of the Clean Water Act.

(17) Wash 11 (58 lf, 0.023 ac): Jurisdictional under Section 404 of the Clean Water Act.

2. REFERENCES.

a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).

c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)

d. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The approximately 82-acre review area is located adjacent to Old Highway 91 on Graveyard Wash and is approximately 1,100 feet upstream of the confluence with the Santa Clara River, Latitude 37.14198°, Longitude -113.6736°, between Santa Clara and Ivins, Washington County, Utah (AJD MFR Enclosure 1). The review area is located in an arid desert environment at an elevation of approximately 2,850 feet and includes in a small ravine with thick vegetation growing along the valley floor. A previous jurisdictional determination has been entered into ORM, dated January 1, 2001, but the records for this action appear to be incomplete. The delineation maps are attached as AJD MFR Enclosure 2.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Virgin River is located approximately 7 straight-line miles southeast of the review area. In 2011, the Corps conducted a review of the Virgin River and completed a memorandum for record documenting that it is an interstate water as defined under 33 CFR 328.3, and that portions of the river meet the definition a Navigable-in-Fact TNW (NIF-TNW). This is based on well-documented examples of fee-based commercial water-related recreation, such as canoeing, rafting, swimming, kayaking, sport fishing, and irrigation, to include foreign and out of state users.

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The tributaries within the subject AJD review area flow offsite and into the Santa Clara River. The Virgin River meets the definition of a NIF-TNW at its confluence with the Santa Clara River.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The review area contains Graveyard Wash, a perennial drainage channel with directly abutting wetlands, which flows southeast directly into the Santa Clara River, approximately 1,700 feet from where the channel crosses the review area boundary. The Santa Clara River continues generally southeast for approximately 7.5 river miles to its confluence with the Virgin River (AJD MFR Enclosure 3). From that point, the Virgin River flows generally southwest for approximately 12 river miles, where it crosses the Utah/Arizona state line.

Wetlands 1, 2, 3, and 5 directly abut Graveyard Wash, sharing a hydrologic surface connection with the perennial flow of the channel. Wetland 4 is located in a deeply excavated detention basin that receives storm water from developments to the east. Water drains through a standpipe or over the spillway, through Wash 10, and into Graveyard Wash.

Washes 1-6 and 8-11 have a continuous ordinary high water mark (OHWM) and drain directly into Graveyard Wash. The OHWM of Wash 7 dissipates before reaching Graveyard Wash.

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 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 pre-2015 regulatory regime and 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

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.

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.

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aquatic resource, supporting that the aquatic resource meets the relevant category of “waters of the United States” in the pre-2015 regulatory regime. 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. TNWs (a)(1): N/A.

b. Interstate Waters (a)(2): N/A.

c. Other Waters (a)(3): N/A.

d. Impoundments (a)(4): N/A.

e. Tributaries (a)(5): The review area contains two tributaries (Graveyard Wash and Wash 11) that meets the (a)(5) category of “waters of the United States” in the pre-2015 regulatory regime.

Graveyard Wash enters the northern extent of the review area, maintaining relatively permanent (perennial) flow through the site to the southeastern review area boundary. The flow regime was determined by the presence of well-defined banks throughout the channel length, abundantly growing early to mid-succession trees near the stream bed, presence of emergent marsh wetlands along portions of the channel, flow observed in the channel on aerial imagery from April through December, and field observations at various times by the agent and Corps staff. For the purpose of this determination, the reach of Graveyard Wash includes its entire length, beginning approximately 3,000 feet northwest of the northern study area boundary to its confluence with the Santa Clara River approximately 1,700 feet southeast of the southern study area boundary. A total of 4,048 linear feet (2.271 acres) of Graveyard Wash is contained within the review area.

Wash 11 (58 linear feet, 0.023 acre) is a separately named feature in the delineation, but is in fact a side channel of Graveyard Wash. Upgradient water in Graveyard Wash spreads laterally into Wetland 3, which drains south through Wash 11 separated from the main channel by a small upland island, then bends east around the upland island draining directly back into Graveyard Wash. Wash 11 has perennial flow as observed in the field and on aerial imagery.

f. The territorial seas (a)(6): N/A.

g. Adjacent wetlands (a)(7): The review area contains 0.556 acre of adjacent (directly abutting) wetlands, consisting of Wetland 1 (0.028 acre), Wetland 2 (0.305

acre), Wetland 3 (0.13 acre), and Wetland 5 (0.093 acre). These features directly abut Graveyard Wash, sharing a hydrologic surface connection and being supported by the perennial flow of the channel.

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁷ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. Wetland 4 (0.659 acre) is located in a deep detention basin that was constructed between 1993 and 2004 to control storm water and other surface runoff from developments to the east. The detention basin is part of an active storm water management system and is a man-made feature that was excavated into a hill side with a large, curved impoundment berm constructed to hold water. The basin was constructed in uplands and no indication of any previously existing aquatic features can be found within the footprint on topographic maps and aerial photos dating back to 1953. Water drains through a tall standpipe within the basin or over the spillway, through Wash 10, and into Graveyard Wash.

Wash 10 (203 linear feet, 0.076 acre) consists of the cement spillway and outlet pipe drainage channel associated with the detention basin and Wetland 4. The cement spillway connects the detention basin to Graveyard Wash and is only utilized if the basin is at maximum capacity. The spillway runs from the top of the berm at a steep angle down to an outlet structure. This is where the pipe draining the basin from the standpipe and under the berm daylight. From that point to Graveyard Wash, the drainage is an open channel. Wash 10 is a man-made feature constructed in uplands and draining only uplands.

b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A.

⁷ 51 FR 41217, November 13, 1986.

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c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A.

d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A.

e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. N/A.

f. 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 pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). The review area contains a total of 5,341 linear feet (1.199 acres) of non-relatively permanent waters, consisting of Wash 1 (1,158 lf, 0.607 ac), Wash 2 (528 lf, 0.136 ac), Wash 3 (1,852 lf, 0.338 ac), Wash 4 (440 lf, 0.079 ac), Wash 5 (384 lf, 0.022 ac), Wash 6 (322 lf, 0.007 ac), Wash 7 (332 lf, 0.007 ac), Wash 8 (120 lf, 0.001 ac), and Wash 9 (205 lf, 0.002 ac). The drainage area for each of these features is relatively small, and most are wholly contained within the review area. Therefore, the hydrology source for these features is discrete precipitation events that fall primarily within the review area. Washes 1-9 are non-relatively permanent tributaries and not subject to CWA jurisdiction.

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. Office evaluations conducted April 2, 2024 and September 12, 2024. Site visit conducted May 15-16, 2024.

b. Preliminary Aquatic Resources Delineation Report, dated June 2024, prepared by [REDACTED]. The consultant prepared the wetland delineation report in accordance with the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual and the USACE Regional Supplement for the Arid West Region. The Corps disagreed with applicant’s initial delineation submitted on December 7, 2023. Some wetland boundaries were inaccurate, and several channel and wetland features were

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not identified. Through coordination with the agent, multiple revisions, and the May 15-16, 2024 site visit, the Corps accepted the June 24, 2024 delineation for the site.

c. LiDAR- National Layer in the National Regulatory Viewer for the South Pacific Division (AJD MFR Enclosure 4). Retrieved September 12, 2024.

d. Aerial Imagery- Google Earth 7.3.6.9796. (July 3, 1993, August 24, 2004, May 10, 2023). Ivins, Utah, Latitude 37.142808°, Longitude -113.67319°, eye alt 15,000 ft (AJD MFR Enclosure 5). Retrieved April 2, 2024 and September 12, 2024.

e. Historical Aerial Imagery- HistoricAerials.com. 1953 (AJD MFR Enclosure 6).
retrieved April 2, 2024
from <https://www.historicaerials.com/viewer#>.

10. OTHER SUPPORTING INFORMATION. The aquatic resources delineation report included descriptions, photographs, and cross-section drawings to characterize the ephemeral channels on site (Washes 1-9) as clearly lacking relatively permanent flow. On September 20, 2024, the applicant provided supplemental background information regarding Wetland 4 and Wash 10 to support the Corps determination that these features are not currently regulated.

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.

6 Enclosures

AJD MFR Encl 1- Vicinity Map

AJD MFR Encl 2- Delineation Maps

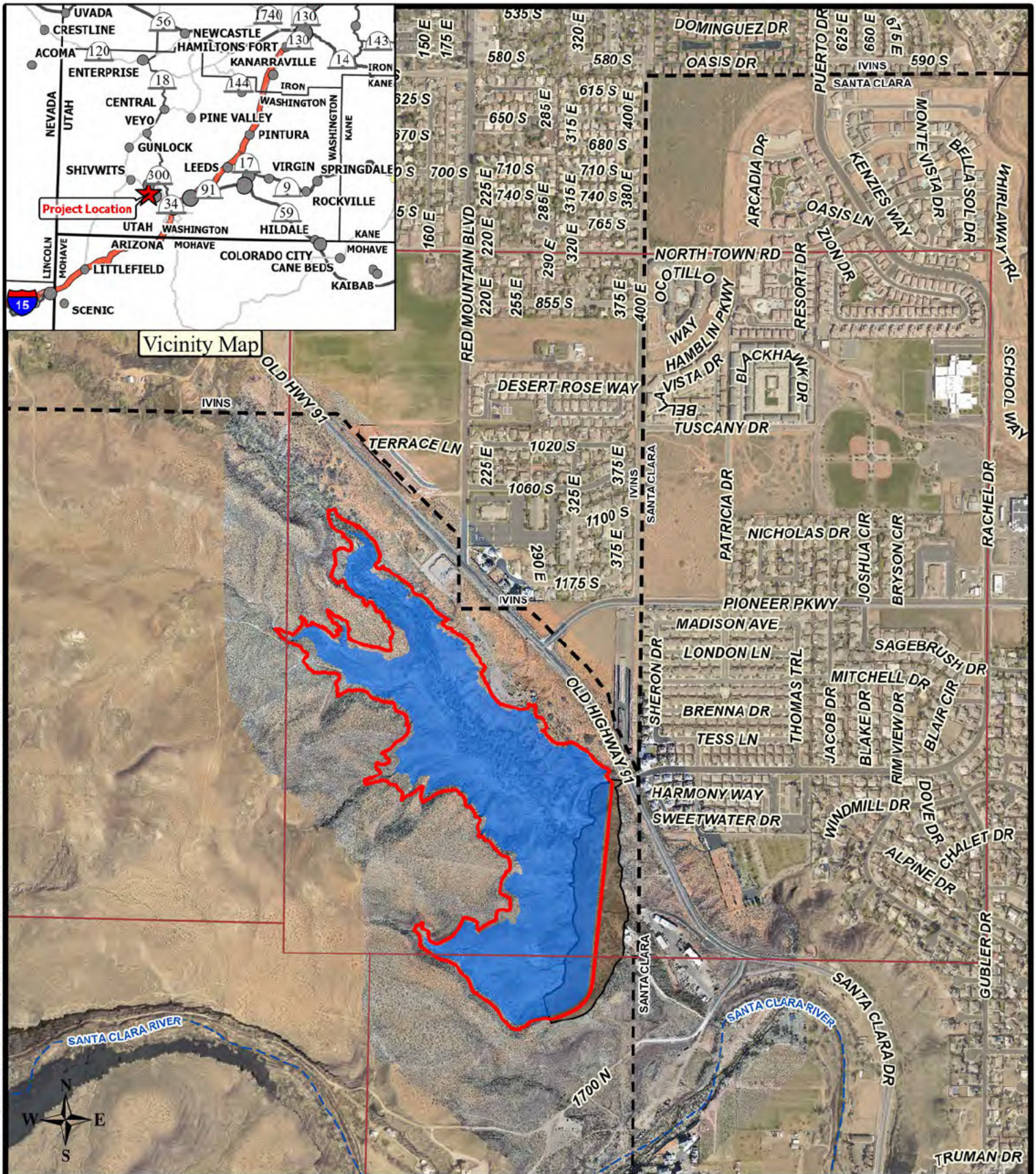
AJD MFR Encl 3- Flow Path Map

AJD MFR Encl 4- LiDAR

AJD MFR Encl 5- Google Earth 1993,
2004, 2023

AJD MFR Encl 6- HistoricAerials.com
1953





Legend

- Municipal Boundary
- Top of Dam (2,900')
- Proposed Reservoir Extent (High Water 2,894')
- Proposed Dam (Top of Dam at 2,900')
- Survey Section Lines

Vicinity Map

Graveyard Wash Reservoir Project

Spatial Reference: UT83-SF

Drawn By: TJD

Scale: 1" = 1,000 feet

Date: August 8, 2023

