



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

CESPK-RDC-S

29 OCTOBER 2025

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 SPK-2025-00476.

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

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),⁴ 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 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.

CESPK-RDC-S

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2025-00476]

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) “Clear Creek” (within the review area) is non-jurisdictional.

(2) “Wetland” is non-jurisdictional.

2. REFERENCES.

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 3004 (September 8, 2023)

c. *Sackett v. EPA*, 598 U.S. 651 (2023)

d. “Memorandum To the Field Between the U.S. Department of The Army, U.S. Army Corps of Engineers and The U.S. Environmental Protection Agency Concerning The Proper Implementation Of ‘Continuous Surface Connection’ Under The Definition Of “Waters Of The United States” Under The Clean Water Act” (March 12, 2025).

3. REVIEW AREA. The approximately 2.17-acre review area (labeled as “Clear Ck Polygon” on Enclosure 1) is located along CA State Highway 58 in Section 1, Township 31 South, Range 31 East, MDB&M at Post Miles 78.7 and 78.8, Kern County, California. The approximate center of the review area is Latitude 35.25378°, Longitude -118.60734° (Enclosure 2). There are no previous jurisdictional determinations that overlap with the review area.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A. The aquatic resources within the review area, “Clear Creek” and “Wetland,” do not connect to a TNW. The nearest TNW is the Pacific Ocean, which is located approximately 78 air miles to the southwest.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. N/A. The aquatic resources within the review area, a riparian scrub wetland and an intermittent drainage, labeled as “Wetland” and “Clear Creek,” respectively, on Enclosure 1, do not possess a surface flowpath to a TNW (Enclosure 3).

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 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): N/A.
- g. Additional Waters (a)(5): N/A.

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.

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).⁷

1. The feature labeled as “Clear Creek” on Enclosure 1 is a fifth-order channel⁸ that does not meet the definition of waters of the U.S. because it does not display a continuous surface connection to a TNW, nor any other jurisdictional water. Within the review area, this intermittent channel drains from the south side of CA State Highway 58 through a 180-foot culvert with a 5-foot diameter and exits the review area to the north. Within the review area it is approximately 581 feet in length with an average width of approximately 8 feet and displays an ordinary high water mark throughout. Flowing water was observed during field surveys conducted by TRC Companies, Inc. biologists in April of 2022.

Due to restricted access outside of the review area, the characteristics of Clear Creek were extrapolated based on a review of aerial photography. Upon exiting the review area, Clear Creek drains to the north for approximately 3.2 river miles and merges with Tehachapi Creek. Tehachapi Creek flows northward for approximately 0.6 river miles and merges with Caliente Creek, which in turn flows west for approximately 17.0 river miles to a terminus at Malaga Road, two miles east of the town of Lamont. Caliente Creek does not connect to a TNW.

2. The feature labeled as “Wetland” on Enclosure 1 does not meet the definition of waters of the U.S. Although it meets the Corps’ definition of a wetland as defined in 33 CFR §328.3(c)(16), this aquatic resource does not exhibit a continuous surface connection to a TNW, nor any other jurisdictional water. “Wetland” is a 1.05-acre riparian scrub wetland with a continuous surface connection to “Clear Creek” described above, which does not possess a continuous surface connection to a TNW.

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

⁷ 88 FR 3004 (January 18, 2023)

⁸ EPA WATERS GeoViewer 2.0 (October 27, 2025)

CESPK-RDC-S

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2025-00476]

non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A.

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. A site visit as described in Section 10 below was conducted as part of the verification for the [REDACTED] SPK-2009-00116.

b. [REDACTED], SPK-2009-00116 AJD verification dated December 11, 2024.

c. EPA WATERS GeoViewer 2.0, accessed October 27, 2025. Retrieved from: <https://www.epa.gov/waterdata/waters-geoviewer>.

d. USGS. Topographic Map, *Oiler Peak, CA* 1:24000. 1972, 2012, 2015, 2018, and 2021. Accessed on October 24, 2025. Retrieved from: <https://ngmdb.usgs.gov/topoview/>.

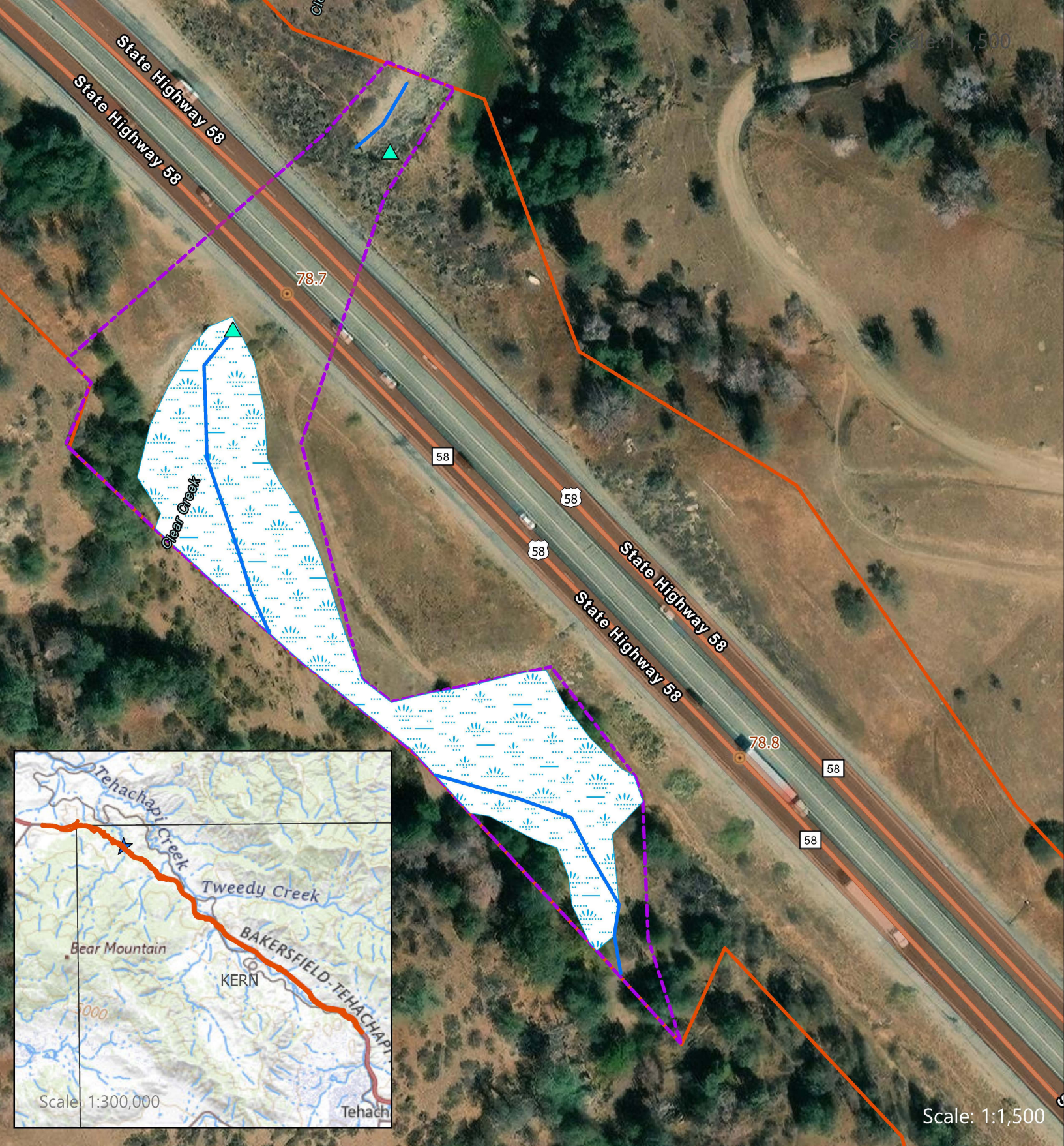
e. USGS. Topographic Map, *Keene, CA* 1:24000. 1966, 1992, 2012, 2015, 2018, and 2022. Accessed on October 24, 2025. Retrieved from: <https://ngmdb.usgs.gov/topoview/>.

f. [REDACTED], *Aquatic Resources Delineation Highway 58 Truck Climbing Lane, Kern County, California, Contract 09A0841, Project 09-1900-0011 (09-37960)*. Prepared for [REDACTED]. August 2022.

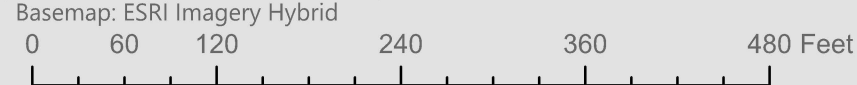
g. [REDACTED], *Keene Pavement Clear Creek ARD Map for ACOE AJD [REDACTED] Kern County State Route 58 – PM 76.3/88.56*. October 23, 2025.

10. OTHER SUPPORTING INFORMATION. On May 8, 2014, a site visit was conducted by Corps staff as part of the AJD verification for the [REDACTED] (SPK-2009-00116) to determine whether there was a hydrologic connection from the terminus of Caliente Creek at Malaga Road to a TNW or other jurisdictional waters of the U.S.; the Corps documented no such connection.

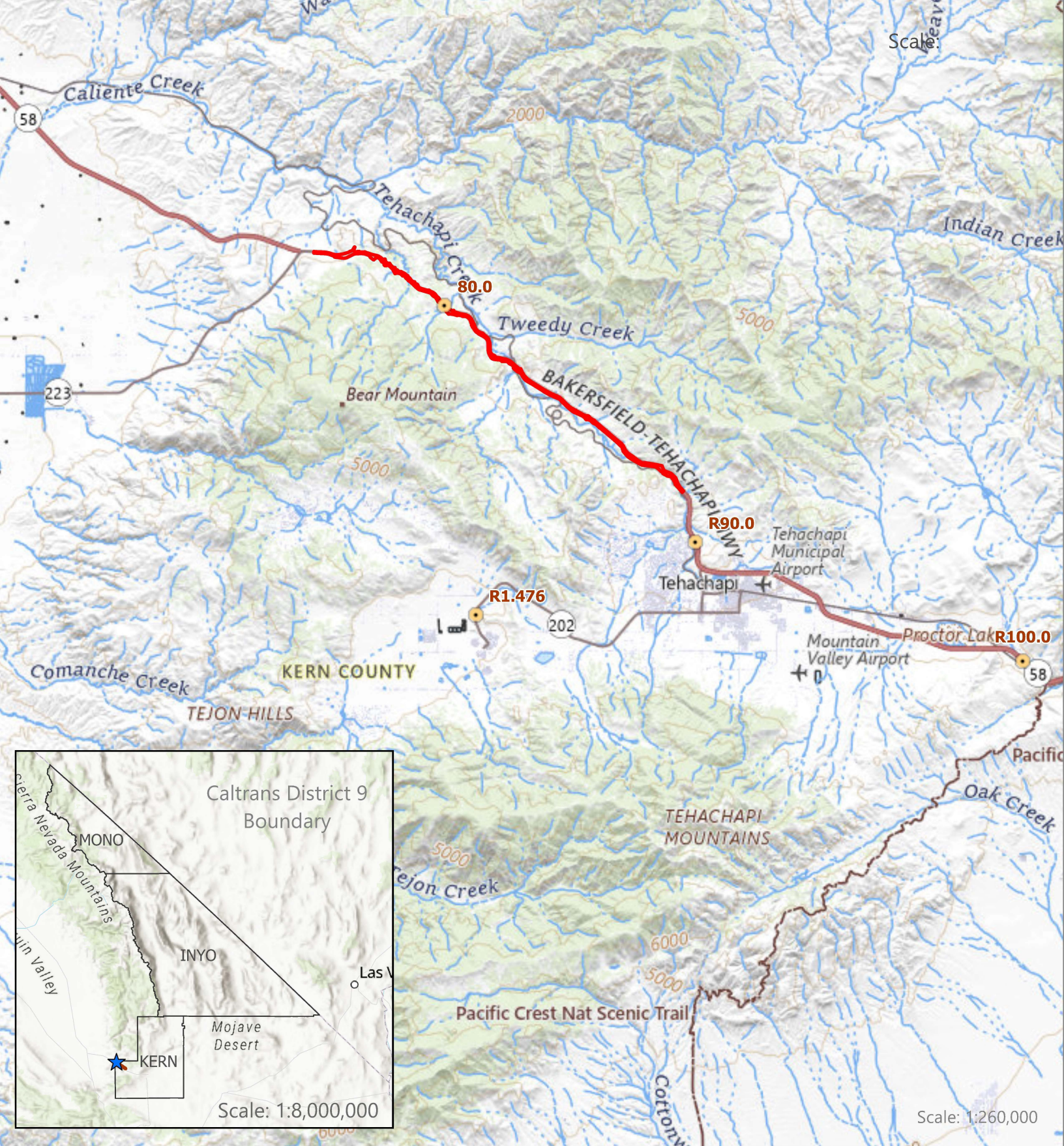
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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



Keene Pavement
Clear Creek ARD Map for ACOE AJD



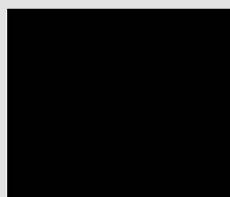
- OHWM pts
- Clear Creek - 580.9 ft
- Wetland - 1.05 acres
- Clear Cr Polygon - 2.17 acres
- Project Study Limits - 481 acres
- Post Miles



Keene Pavement Project Location Map

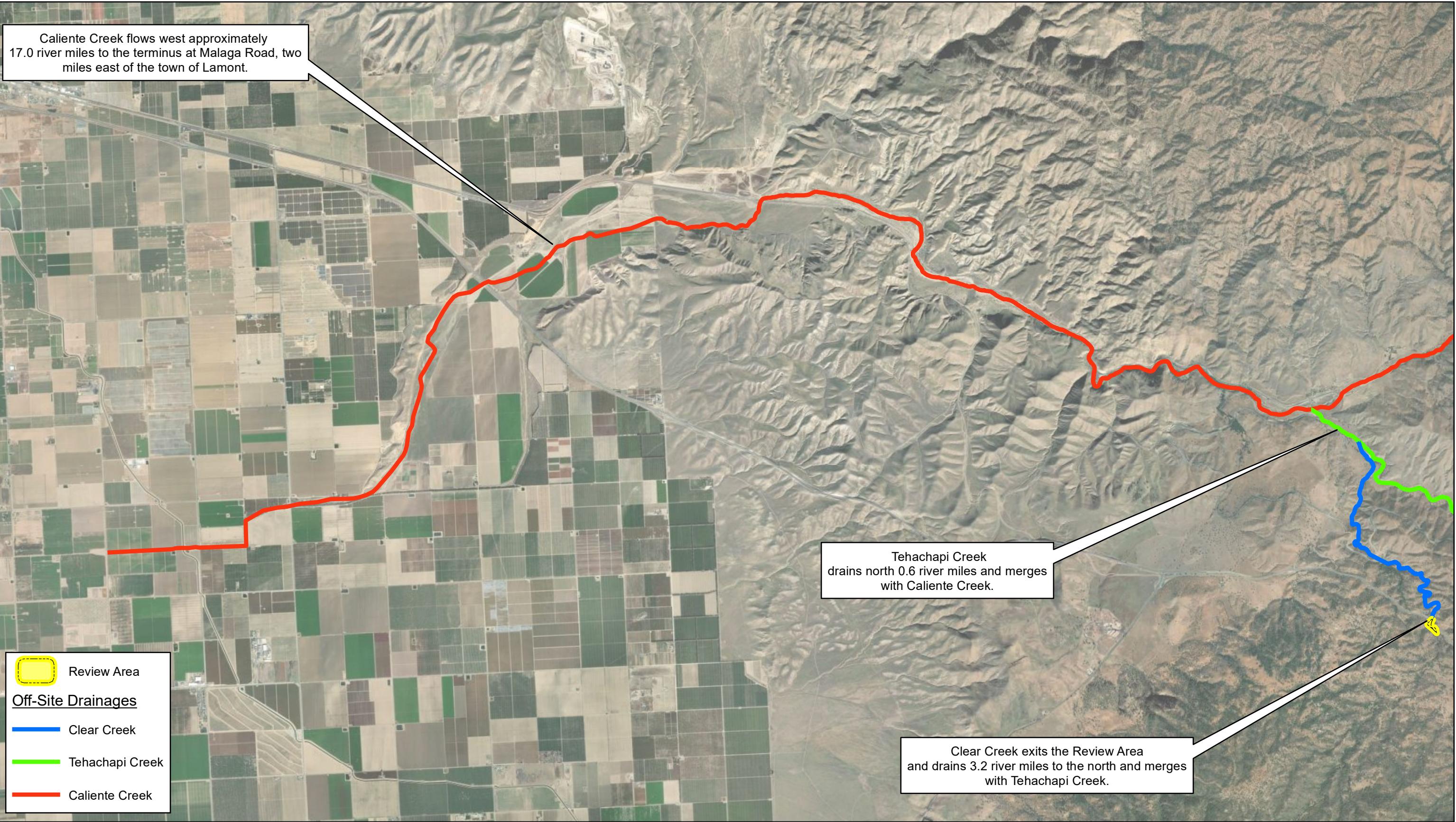
Kern County
State Route 58 - PM 76.3/88.56

0 2.5 5 10 15 20 Miles



- Post Miles (tens)
- Project Limits

Basemap: USGS National Map



Caliente Creek flows west approximately 17.0 river miles to the terminus at Malaga Road, two miles east of the town of Lamont.

Tehachapi Creek drains north 0.6 river miles and merges with Caliente Creek.

Clear Creek exits the Review Area and drains 3.2 river miles to the north and merges with Tehachapi Creek.

Review Area

Off-Site Drainages

Clear Creek

Tehachapi Creek

Caliente Creek

CESPK-RDC-S

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPK-2025-00476]

3 Encls

Aquatic Resources Delineation Map

Vicinity Map

Flowpath Map

