

**APPENDIX E – Supplemental Wetland Delineation and Joshua Tree inventory Study
Report**





**AQUATIC RESOURCES ASSESSMENT
AND PRELIMINARY JURISDICTIONAL
DELINEATION REPORT**

Vidal Energy Project – Jurisdictional
Delineation Field Verification

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Project Number:

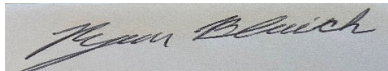
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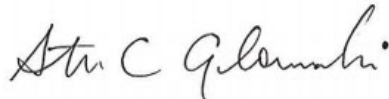
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Acronyms / Abbreviations

CDFW	California Department of Fish and Wildlife
CFGC	California Fish and Game Code
CFR	Code of Federal Regulations
CWA	Clean Water Act
FAC	Facultative Plants
FACU	Facultative Upland Plants
FACW	Facultative Wetland Plants
LSAA	Lake and Streambed Alteration Agreement
NRCS	National Resources Conservation Service
NWPL	National Wetland Plant List
NWPR	Navigable Waters Protection Rule
OBL	Obligate Wetland Plants
OHWM	Ordinary High-Water Mark
Porter-Cologne Act	Porter-Cologne Water Quality Control Act
Project	Vidal Energy Project
Rapanos	Rapanos v. United States and Carabell v. United States
RWQCB	Regional Water Quality Control Board
SWRCB	Stater Water Resources Control Board
UPL	Upland Plants
USACE	U.S. Army Corps of Engineers
USEPA	U.S. Environmental Protection Agency
WDR	Waste Discharge Requirements
WIS	Wetland Indicator Status
WOTUS	Waters of the United States
WQC	Water Quality Certification



1 Introduction

1 Introduction

This Jurisdictional Delineation (JD) field verification Report is intended to verify impacts to biological resources associated with construction of the proposed Vidal Energy Project (Project). The proposed Project consists of an approximately 1,100-acre solar photovoltaic (PV) component and associated battery energy component. The survey conducted and discussions presented within this JD are intended to support planning and regulatory agency permitting and associated documentation.

A field verification of jurisdictional aquatic features as well as a presence/absence Joshua tree (*Yucca brevifolia*) survey was conducted on December 21, 2023, by Stantec Consulting Services Inc. (Stantec) Biologists Ryan Blaich and Lysa DuCharme within accessible portions of the Project site. This site visit describes the existing aquatic resources that occur within the Survey Area (BSA) and documents changes to previously mapped aquatic resources as well as recording aquatic resources not previously mapped in the 2020 Jurisdictional Delineation (JD) Report.

1.1 Project Description

The Vidal Energy Project includes the construction and operation of an approximately 1,100-acre photovoltaic (PV) and battery energy storage system (BESS) facility to generate and store renewable energy in the form of electricity. The project will be supported by the Western Area Power Administration (WAPA) 161-kV overhead transmission corridor and would supply 160 megawatts of alternating current energy. The energy generated onsite will be collected and converted by the constructed on-site substation facility for transmission in an overhead or underground line to the WAPA transmission system and interconnection location. The Project's permanent impacts will include PV panels, BESS, fencing, service roads, a power collection system, communication cables, overhead and underground transmission lines, electrical switchyards, a project substation, and operations and maintenance facilities.

Because the Project occurs adjacent to or within the bed and banks of potentially jurisdictional aquatic resources, focused aquatic surveys and reporting are required to support regulatory permitting.

1.2 Project Location

The Project area is surrounded by Sonoran/Mojave Desert scrub plant community, with agricultural lands and the Colorado River approximately 1.8-miles to the east and Highway-95 approximately 0.8-miles to the west. The unincorporated town of Vidal is approximately 2.5-miles to the northwest of the Project area in San Bernardino County, California (Appendix A: Figure 1). The Project location as depicted in Figure 1 is referred to throughout this report as the Project Area. It is located within the United States Geologic Survey (USGS) Vidal, California, and Parker SW, California-Arizona quadrangles. The Figure 1 area straddles the Arizona-California border, and is located approximately 9.0 km (5.6 mi) west-southwest of Parker, CA, immediately south of the unincorporated communities of Vidal and Vidal Junction, CA.



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The site occurs at an elevation of approximately 470 feet above mean sea level in an area of mostly creosote bush (*Larrea tridentata*) scrub vegetation. Average annual temperatures range from a minimum of 59 degrees Fahrenheit (°F) to a high of 89°F. Annual precipitation averages approximately 5.09 inches (U.S. Climate Data 2023).

2 Regulatory Background

2.1 CLEAN WATER ACT SECTION 404 AND FEDERAL JURISDICTIONAL WATERS

The Clean Water Act (CWA), introduced in 1977 via amendatory legislation of the Federal Water Pollution Control Act, is the primary federal law in the United States (U.S.) regulating water pollution. Section 404 of the CWA regulates the discharge of dredged material, placement of fill material, or certain types of excavation within federal waters of the United States (WOTUS) and authorizes the Secretary of the Army, through the Chief of Engineers, to issue permits for such actions. Permits can be issued for individual projects (individual permits) or for general categories of projects (general permits). Terrestrial WOTUS as defined by the CWA have typically included rivers, creeks, streams, and lakes extending to their headwaters and any associated wetlands. Wetlands are defined by the CWA as “areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands are transitional areas between well-drained upland habitats and permanently flooded (deepwater) habitats, and generally include swamps, marshes, bogs, and similar areas. The definition of WOTUS has changed over time, and U.S. Army Corps of Engineers (USACE) has adopted several revisions to their regulations in order to more clearly define WOTUS. The protection of federal jurisdictional WOTUS has been particularly contentious and subject to numerous legal decisions since 2001.

2.1.1 1986 REGULATIONS

Waters of the U.S. are divided into several categories as defined by the Code of Federal Regulations (CFR). In 1986, the federal agencies (USACE and U.S. Environmental Protection Agency [USEPA]) implemented historic regulations (the 1986 Regulations) that defined WOTUS (under CFR 33 §328.3) to mean traditional navigable waters, the territorial seas, interstate waters, intrastate waters whose use or degradation could affect interstate or foreign commerce, as well as tributaries (streams that flow into larger streams or other bodies of water) of, and wetlands adjacent to any of those waters.



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2.1.2 2001 SWANCC RULING

Until the beginning of 2001, WOTUS included isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable WOTUS. The jurisdictional extent of USACE regulation changed with the 2001 Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers ruling. The U.S. Supreme Court held that the USACE could not apply Section 404 of the CWA to extend their jurisdiction over an isolated quarry pit. The Court ruled that the CWA does not extend federal regulatory jurisdiction over non-navigable, isolated, intra-state waters. However, the Court made it clear that non-navigable wetlands adjacent to navigable waters are still subject to USACE jurisdiction.

2.1.3 2006 RAPANOS RULING

In 2006, the U.S. Supreme Court issued its seminal decision in the consolidated cases Rapanos v. United States and Carabell v. United States (collectively referred to as Rapanos). Justice Scalia narrowly interpreted the statutory term “waters of the United States” in a four-Justice plurality opinion, holding that CWA jurisdiction extended over only “relatively permanent, standing or continuously flowing bodies of water” that are connected to traditional navigable waters, plus wetlands with a “continuous surface connection” to such relatively permanent water bodies. Justice Kennedy wrote separately, concurring with the Court’s judgment with respect to the facts of the case, but interpreted “waters of the United States” to include wetlands that possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made.

The Court’s split decision and lack of a commanding majority opinion in Rapanos created confusion among the federal agencies and public. On December 2, 2008, the federal agencies released a regulatory guidance document, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States (USACE and USEPA 2008), addressing common questions about federal jurisdiction over WOTUS and clarifying the two jurisdictional standards from Rapanos. In the 2008 Rapanos Guidance, the federal agencies concluded that federal jurisdiction existed over certain waterbodies that meet the “relatively permanent” standard from Justice Scalia’s plurality opinion or Justice Kennedy’s “significant nexus” standard, the latter of which would be determined by a fact-specific analysis.

2.1.4 2015 CLEAN WATER RULE

The 1986 Regulations as interpreted by the 2008 Rapanos Guidance were later replaced by the 2015 Clean Water Rule. The federal agencies attempted to provide clarification on jurisdiction following the Rapanos ruling by replacing the numerous categories of waterbodies found in the 1986 Regulations with four broader categories: (1) waters that are categorically “jurisdictional by rule” without the need for further analysis, including traditional navigable waters, interstate waters, the territorial seas, and impoundments of these waters; (2) waters that are jurisdictional by rule, if they meet the definitions for



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tributaries and adjacent waters established in the 2015 Clean Water Rule; (3) waters that are subject to case-specific jurisdictional analysis under the “significant nexus” standard; and (4) waters that are categorically excluded from jurisdiction. The 2015 Clean Water Rule therefore resulted in an expansion in federal jurisdiction over waterbodies that might have otherwise been excluded from the definition of WOTUS on a case-by-case basis under the 1986 Regulations and the Rapanos ruling.

After the final 2015 Clean Water Rule was published, the Sixth Circuit Court of Appeals issued an order staying the rule nationwide, pending a determination by the court on jurisdiction to review the rule. While the 2015 Clean Water Rule was stayed, the pre-2015 regulatory regime remained in effect. Following additional litigation and administrative processes, the 2015 Clean Water Rule was briefly in effect in select states beginning in August 2018.

2.1.5 2020 NAVIGABLE WATERS PROTECTION RULE

In 2017, the Trump Administration issued Executive Order 13778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” The executive order directed the federal agencies to review the 2015 Clean Water Rule for consistency with the policy “to ensure that the nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.” It further directed the federal agencies to issue a proposed rule rescinding or revising the 2015 Clean Water Rule as appropriate and consistent with law.

On December 11, 2018, the federal agencies proposed a revised definition of WOTUS, which would repeal the 2015 Clean Water Rule. On December 23, 2019, the federal agencies repealed the 2015 Rule and restored the previous regulatory regime as it existed prior to finalization of the 2015 Clean Water Rule with the publication of a final rule described as “Definition of ‘Waters of the United States’—Recodification of Pre-Existing Rules.”

On April 21, 2020, the federal agencies published the Navigable Waters Protection Rule (NWPR) to redefine WOTUS. The agencies streamlined the definition to include four simple categories of jurisdictional waters:

1. Traditional navigable waters and the territorial seas;
2. Tributaries of traditional navigable waters and the territorial seas;
3. Lakes, ponds, and impoundments of the first two categories of waters; and
4. Wetlands adjacent to the first three categories of waters.

The NWPR provided clear exclusions for many water features that traditionally have not been regulated, and defined terms in the regulatory text that had never been defined before. Congress, in the CWA,



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explicitly directed the federal agencies to protect “navigable waters.” The intent of the NWPR was to regulate waters and the core tributary systems that provide perennial or intermittent flow and excluded ephemeral waters. The final NWPR fulfilling Executive Order 13788 became effective on June 22, 2020. However, on August 30, 2021, the U.S. District Court for the District of Arizona vacated the NWPR finding “fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition.” The federal agencies subsequently announced that they would interpret WOTUS consistent with the pre-2015 regulatory regime until further notice.

2.1.6 2023 REVISED DEFINITION OF “WATERS OF THE UNITED STATES” RULE

On June 9, 2021, the USACE and USEPA under the Biden Administration announced their intent to revise the definition of WOTUS to protect more waterways, beginning a new rulemaking process that restores protections put in place before 2015.

On January 18, 2023, the federal agencies published the final "Revised Definition of 'Waters of the United States'" rule (2023 Rule) in the Federal Register, which became effective on March 20, 2023 (USACE and USEPA 2023). The 2023 Rule generally returns to the pre-2015 definition. The implications of the final 2023 WOTUS rule are such that many ephemeral waters not considered protected under the former 2020 NWPR would now be protected.

The 2023 Rule defines WOTUS to include:

1. Traditional navigable waters, the territorial seas, and interstate waters;
2. Impoundments of other jurisdictional WOTUS, except for those that qualify under category 5, below;
3. Tributaries to either of the above waters and tributaries that meet the “relatively permanent” standard or the “significant nexus” standard, (collectively, “jurisdictional tributaries”);
4. Wetlands adjacent to traditional waters, wetlands adjacent and with a continuous surface connection to relatively permanent tributaries and impoundments, and wetlands adjacent to other jurisdictional tributaries when those wetlands meet the “significant nexus” standard; and
5. Intrastate lakes and ponds, streams, or wetlands that are not identified in categories 1–4 above that meet either the “relatively permanent” standard or the “significant nexus” standard.

For purposes of characterizing a “jurisdictional adjacent wetland” under the 2023 WOTUS Rule, a wetland may be considered “adjacent” to WOTUS if it is bordering, contiguous, or neighboring a WOTUS,



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including wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes, and similarly situated wetlands.

However, a wetland, even if “adjacent,” must satisfy either the “relatively permanent” standard or the “significant nexus” standard to be considered WOTUS. The federal agencies have not necessarily defined “relatively permanent” or “significant nexus” and will likely determine the applicability of these standards on a case-by-case basis.

On March 19, 2023, the U.S. District Court for the Southern District of Texas enjoined the 2023 Rule in Texas and Idaho pending its consideration of those states’ legal challenges to the rule. On April 12, 2023, the U.S. District Court for the District of North Dakota similarly issued a preliminary injunction preventing the application of the 2023 Rule in 24 states: Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. The federal agencies announced that, pending resolution of the litigation, they will apply the pre-2015 regulatory regime in the 26 states subject to injunctions and the 2023 Rule in the remaining 24 states, including California.

2.1.7 2023 SACKETT RULING

On May 25, 2023, the U.S. Supreme Court issued its ruling in *Sackett v. Environmental Protection Agency* (Sackett), which established a more stringent test to determine whether the CWA applies to certain categories of wetland. With Sackett, the U.S. Supreme Court unanimously reversed the previous Rapanos guidance regarding waters that are adjacent or have a significant nexus to a WOTUS. The new Sackett ruling states that the CWA applies to a particular wetland only if it blends or flows into a neighboring water that is a channel for interstate commerce. While the Court decided that some “adjacent” wetlands will also qualify under the CWA as “waters of the United States,” wetlands that are entirely separate from traditional bodies of water will not qualify. The CWA will apply only to wetlands that are “as a practical matter indistinguishable from waters of the United States” because they have a “continuous surface connection” with a larger body of water, “making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

The result of the Sackett ruling is that certain adjacent wetlands formerly protected under the CWA will no longer be federally protected. The USACE and USEPA have acknowledged the Sackett ruling and indicated they will interpret the phrase “waters of the United States” consistent with the U.S. Supreme Court’s decision in Sackett.

2.1.8 AMENDMENT TO THE 2023 WOTUS RULE

On August 29, 2023, the USEPA and USACE issued a final rule amending the 2023 definition of WOTUS to conform with the recent Sackett decision. While EPA’s and USACE’s 2023 WOTUS rule defining



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WOTUS was not directly before the Supreme Court, the decision in Sackett made clear that certain aspects of the WOTUS 2023 rule are no longer valid. The amendments issued are limited and change only parts of the 2023 rule that are invalid under the Sackett decision. For example, the final rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected under the CWA.

2.1.9 EXEMPTIONS UNDER CLEAN WATER ACT SECTION 404

Activities that are exempt under CWA Section 404(f) include

1. Nominal farming, silviculture and ranching activities,
2. (Emergency) maintenance activities that would not change the original fill design;
3. Construction and maintenance of farm ponds, stock ponds, or irrigation ditches or the maintenance of drainage ditches;
4. Construction of temporary sedimentation basins;
5. Any activity with respect to which a State has an approved program under CWA Section 208(b)(4) which meets the requirements of sections 208(b)(4) (B) and (C) (this pertains to certain applicable statewide waste treatment management programs); and
6. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

Exceptions to these exemptions (USACE 2023b) include:

1. Discharge of toxic pollutants, and
2. If it is part of an activity whose purpose is to convert an area of a WOTUS into a use to which it was not previously subject, where the flow and/or circulation of waters may be impaired or the reach of the waters reduced.

2.1.10 EXTENT OF JURISDICTION

The extent of CWA Section 404 jurisdiction for non-tidal waters includes non-isolated aquatic features (including wetlands qualifying under the original federal 1986 standards and non-wetland WOTUS) bound by an “ordinary high water mark” (OHWM) as defined by 33 CFR 328.3(e):

“The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes



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in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

Features considered isolated from traditional navigable waters and the exemptions listed above are not considered WOTUS under the jurisdiction of CWA Section 404.

2.2 CLEAN WATER ACT SECTION 401, PORTER-COLOGNE WATER QUALITY CONTROL ACT, AND WATERS OF THE STATE OF CALIFORNIA

2.2.1 CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION

Section 401 of the CWA ensures that federally permitted activities comply with the federal CWA and state water quality laws. Under CWA Section 401, an applicant for a federal permit or license for any activity which may result in a discharge to federal waters must obtain a Water Quality Certification (WQC) certifying that the proposed activity will comply with applicable water quality standards. WQCs are generally issued by the state or tribe with jurisdiction over the area in which the activity will occur. If there is not a state or tribe with authority over the activity, the EPA will issue a WQC.

In California, CWA Section 401 is implemented either by the State Water Resources Control Board (SWRCB) or the applicable Regional Water Quality Control Board (RWQCB), with most WQCs issued in connection with USACE CWA Section 404 permits for dredge and fill discharges. The SWRCB or RWQCB issues a WQC via the CWA Section 401 process verifying that a proposed project complies with water quality standards and other conditions of California law. CWA Section 401 certification typically precedes USACE CWA Section 404 permit issuance.

In addition, the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) serves as the primary water quality state law in California and addresses two primary functions: water quality control planning and waste discharge regulation. The SWRCB and various RWQCBs are charged with protecting all waters of the state of California (waters of the state), broadly defined as “any surface water or groundwater, including saline waters, within the boundaries of the State.” This encompasses all waters of the state, including those waters not under federal jurisdiction; therefore, the State of California’s jurisdiction expands beyond federal jurisdiction. The Porter-Cologne Act does not include physical descriptors or interstate commerce limitations in defining “waters of the state.”

2.2.2 PORTER-COLOGNE ACT WASTE DISCHARGE REQUIREMENTS

Under the Porter-Cologne Act, discharges of dredged or fill material to waters of the state not subject to CWA Section 404 (i.e., non-USACE jurisdictional) are regulated under the Porter-Cologne Act Chapter 3, Article 4 via Waste Discharge Requirements (WDRs). The WDR permit requirements ensure that the



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permitted activities comply with state water quality standards over the term of the action and are consistent with the requirements of the Porter-Cologne Act, CEQA, and the California Endangered Species Act. There are two types of WDRs: individual WDRs, which are tailored to specific dischargers, and general WDRs, which are for a similar group of dischargers. The applicable RWQCB (for respective regions) or the SWRCB (for statewide applicability) can adopt general WDRs for categories of discharges if they involve similar operations, types of waste, and monitoring. Applicants must file an application with the Water Boards for any activity that could result in the discharge of dredged or fill material to waters of the state in accordance with Title 23 California Code of Regulations Section 3855. Procedures for complying with WDR regulations, including submittal of an application with a project description and impact assessment, are similar to CWA Section 401 procedures.

2.2.3 STATE WETLAND DEFINITION AND PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIAL TO WATERS OF THE STATE

On April 2, 2019, the California Water Boards (including the SWRCB and the nine RWQCBs) adopted the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Procedures) (SWRCB 2021). The Procedures became effective on May 28, 2020, and were subsequently revised on April 6, 2021. Additional Implementation Guidance for the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State was released in April 2020 (SWRCB 2020); this implementation guidance has been considered during the preparation of this ARDR.

The Procedures define wetlands as follows:

“An area is wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both; (2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area’s vegetation is dominated by hydrophytes or the area lacks vegetation.”

Per the Procedures, the following wetlands are considered waters of the state (SWRCB 2021):

1. Natural wetlands,
2. Wetlands created by modification of a surface water of the state, and
3. Artificial wetlands (that result from human activity) that meet any of the following criteria:
 - a. Approved by an agency as compensatory mitigation for impacts to other waters of the state, except where the approving agency explicitly identifies the mitigation as being of limited duration;



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- b. Specifically identified in a water quality control plan as a wetland or other water of the state;
- c. Resulted from historic human activity, is not subject to ongoing operation and maintenance, and has become a relatively permanent part of the natural landscape; or
- d. Greater than or equal to one acre in size, unless the artificial wetland was constructed, and is currently used and maintained, primarily for one or more of the following purposes (i.e., the following artificial wetlands are not waters of the state unless they also satisfy the criteria set forth in 2, 3a, or 3b);
 - i. Industrial or municipal wastewater treatment or disposal,
 - ii. Settling of sediment,
 - iii. Detention, retention, infiltration, or treatment of stormwater runoff and other pollutants or runoff subject to regulation under a municipal, construction, or industrial stormwater permitting program,
 - iv. Treatment of surface waters,
 - v. Agricultural crop irrigation or stock watering,
 - vi. Fire suppression,
 - vii. Industrial processing or cooling,
 - viii. Active surface mining – even if the site is managed for interim wetlands functions and values,
 - ix. Log storage,
 - x. Treatment, storage, or distribution of recycled water, or
 - xi. Maximizing groundwater recharge (this does not include wetlands that have incidental groundwater recharge benefits); or
 - xii. Fields flooded for rice growing.



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All artificial wetlands that are less than an acre in size and do not satisfy the criteria set forth in 2, 3.a, 3.b, or 3.c as outlined above are not waters of the state. If an aquatic feature meets the wetland definition, the burden is on the applicant to demonstrate that the wetland is not a water of the state (SWRCB 2021).

2.2.4 ACTIVITIES AND AREAS EXCLUDED FROM THE APPLICATION PROCEDURES FOR REGULATION OF DISCHARGES OF DREDGED OR FILL MATERIAL TO WATERS OF THE STATE

The Procedures do not apply to proposed discharges of dredged or fill material to waters of the state from the following activities or to the following areas (SWRCB 2021):

1. Activities excluded from application procedures:
 - a. Activities that are exempt under CWA section 404(f) include:
 - i. Nominal farming, silviculture and ranching activities,
 - ii. (Emergency) maintenance activities,
 - iii. Construction and maintenance of farm ponds, stock ponds, or irrigation ditches or the maintenance of drainage ditches,
 - iv. Construction of temporary sedimentation basins,
 - v. Any activity with respect to which a State has an approved program under CWA Section 208(b)(4) which meets the requirements of sections 208(b)(4) (B) and (C) (this pertains to certain applicable statewide waste treatment management programs), and
 - vi. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.
 - vii. Exceptions to these exemptions (USACE 2023b) include:
 1. Discharge of toxic pollutants, and
 2. If it is part of an activity whose purpose is to convert an area of a WOTUS into a use to which it was not previously subject, where the flow and/or circulation of waters may be impaired or the reach of the waters reduced.
 - b. Suction dredge mining activities for mineral recovery regulated under CWA Section 402.



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- c. Routine and emergency operation and maintenance activities conducted by public agencies, water utilities, or special districts that result in discharge of dredged or fill material to artificial, existing waters of the state:
 - i. Currently used and maintained primarily for one or more of the purposes previously listed in 3.d. (ii), (iii), (iv), (x), or (xi) of Section 3.2.3 of this ARDR; or
 - ii. For the purpose of preserving the line, grade, volumetric or flow capacity within the existing footprint of a flood control or stormwater conveyance facility.
 - d. Routine operation and maintenance activities that result in discharge of dredged or fill material to artificially-created waters currently used and maintained primarily for one or more of the purposes previously listed in section II.3.d. (i), (ii), (iii), (vi), (vii), (x), or (xi) of this ARDR. This exclusion does not apply to the discharge of dredged or fill material to (a) a water of the U.S., (b) a water specifically identified in a water quality control plan, (c) a water created by modification of a water of the state, or (d) a water approved by an agency as compensatory mitigation.
2. Areas excluded from application procedures:
- a. Wetland areas that qualify as prior converted cropland (PCC) within the meaning of 33 CFR 507 Section 328.3(b)(2). The applicant may establish that the area is PCC by providing relevant documentary evidence that the area qualifies as PCC and has not been abandoned due to five consecutive years of non-use for agricultural purposes, or by providing a current PCC certification by the National Resources Conservation Service (NRCS), the USACE, or the USEPA to the permitting authority;
 - b. Wetlands that are, or have been, in rice cultivation (including wild rice) within the last five years as of April 2, 2019 and have not been abandoned due to five consecutive years of non-use in rice production;
 - c. The following features used for agricultural purposes:
 - i. Ditches with ephemeral flow that are not a relocated water of the state or excavated in a water of the state;
 - ii. Ditches with intermittent flow that are not a relocated water of the state or excavated in a water of the state, or that do not drain wetlands other than any wetlands described in (iv) or (v) below;
 - iii. Ditches that do not flow, either directly or through another water, into another water of the state;



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2 Regulatory Background

- iv. Artificially irrigated areas that would revert to dry land should application of waters to that area cease; or
- v. Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, and settling basins.

These exclusions do not apply to discharges of dredged or fill material that convert wetland areas to a non-agricultural use.

2.2.5 EXTENT OF JURISDICTION

The extent of CWA Section 401 jurisdiction is identical to CWA Section 404 jurisdiction (i.e., up to the OHWM of a federal wetland or non-wetland WOTUS); Porter-Cologne jurisdiction may extend beyond CWA Section 401 jurisdiction. If there happens to be both CWA Section 404/401 WOTUS and non-WOTUS waters of the state that could be impacted by a proposed project, the Water Boards may issue coverage under a single CWA Section 401 WQC permitting action, rather than separate WQC and WDR permitting actions.

2.3 JURISDICTIONAL AQUATIC RESOURCES UNDER CALIFORNIA FISH AND GAME CODE SECTION 1602

2.3.1 NOTIFICATION

Section 1602 of the California Fish and Game Code (CFG) requires a proponent proposing a project that may affect a "river, stream, or lake" to notify the California Department of Fish and Wildlife (CDFW) before beginning the project, within a format similar to a permit application process. Any activities that result in one or more of the following require a CDFW notification (CDFW 2023):

1. Substantially divert or obstruct the natural flow of any river, stream, or lake;
2. Substantially change or use any material from the bed, channel, or bank of any river, stream, or lake; or
3. Deposit or dispose of debris, waste or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake.

Note that "any river, stream, or lake" includes those features that are dry for periods of time (e.g., intermittent and ephemeral features) as well as those that flow perennially year-round. If an applicant is not certain a particular activity requires notification, CDFW recommends the applicant notify. CDFW has historically required a Lake and Streambed Alteration Agreement (LSA) for activities within a feature that



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3 Jurisdictional Waters/Wetlands Assessment and Western Joshua Tree Survey

has a definable “bed and bank.” In addition, CDFW does not necessarily distinguish between a “pond” and a “lake;” therefore, natural and artificial pond features may be regulated under CFGC Section 1602.

2.3.2 LAKE AND STREAMBED ALTERATION AGREEMENT

Once a Section 1602 notification is processed, CDFW may issue a draft LSA. An LSA is an agreement between the applicant and CDFW for the performance of activities subject to CFGC Section 1602. An LSA lists the conditions relative to a proposed project that CDFW identifies as necessary to protect applicable water quality, plants, and wildlife. If the parties agree to the conditions, they will execute the LSA, which will govern the activities described in the agreement.

2.3.3 EXTENT OF JURISDICTION

CFGC Section 1602 jurisdiction typically extends from the thalweg (deepest portion) of a river or stream, or from a lake surface up to the top of bank and the outer edge of associated riparian vegetation, or outer edge of the associated floodplain (whichever is greater).

3 Jurisdictional Waters/Wetlands Assessment and Western Joshua Tree Survey

3.1 Description of Federal and State Waters/Wetlands

Various agencies regulate activities within inland streams, wetlands, and riparian areas in California. The USACE Regulatory Program regulates activities pursuant to Section 404 of the federal CWA; the CDFW regulates activities under CFGC Section 1600-1607; and the SWRCB/RWQCB regulate activities under Section 401 of the CWA and the Porter-Cologne Act.

Positive indicators for each of the three parameters outlined below are required for a wetland to meet the USACE criteria for jurisdictional wetland determination, as follows:

- Hydrophytic vegetation is defined as macrophytic vegetation that is adapted to, and occurs in, areas where soils are frequently or permanently saturated of sufficient duration to exert a controlling influence on the plant species present. Plant species adjacent to the sample points were identified and included following the “50/20 rule,” meaning that plant species in each vegetation stratum (i.e., tree, sapling/shrub, herb, and woody vine) were included in order of abundance until at least 50% of the total vegetation cover was accounted for, plus any other species that, by itself, accounts for at least 20% of the total. Plants are assigned a Wetland Indicator Status (WIS) based on frequency of occurrence in wetland habitats following the 2020 National Wetland Plant List (NWPL) (USACE 2020) and using the Indicator Ratings Definitions (Lichvar et al. 2012) as follows:



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3 Jurisdictional Waters/Wetlands Assessment and Western Joshua Tree Survey

- OBL (Obligate Wetland Plants): Almost always occur under natural conditions in wetlands. With few exceptions, these plants (herbaceous or woody) are found in standing water or seasonally saturated soils (14 or more consecutive days) near the surface;
- FACW (Facultative Wetland Plants): Usually occur in wetlands but may occur in non-wetlands. These plants predominately occur with hydric soils, often in geomorphic settings where water saturates the soils or floods the soil surface at least seasonally;
- FAC (Facultative Plants): Occur in wetlands and non-wetlands. These plants can grow in hydric, mesic, or xeric habitats. The occurrence of these plants in different habitats represents responses to a variety of environmental variables other than just hydrology, such as shade tolerance, soil pH, and elevation, and they have a wide tolerance of soil moisture conditions;
- FACU (Facultative Upland Plants): Usually occur in non-wetlands but may occur in wetlands. These plants predominately occur on drier or more mesic sites in geomorphic settings, where water rarely saturates the soils or floods the soil surface seasonally; and
- UPL (Upland Plants): Almost never occur under natural conditions in wetlands. These plants occupy mesic to xeric non-wetland habitats. They almost never occur in standing water or saturated soils. Typical growth forms include herbaceous, shrubs, woody vines, and trees.

The hydrophytic vegetation parameter is met when at least one of the following tests is fulfilled:

- The prevalent vegetation (more than 50% of the dominant plant species) is typically adapted to areas having wetland hydrology and hydric soil conditions and rated OBL, FACW, or FAC.
- The prevalence index, which is a value determined by accounting for the relative cover and WIS and ranges from 1 (only OBL species present) to 5 (only UPL species present), is less than or equal to 3.
- Vegetation has morphological adaptations to growing in inundated or saturated conditions.

In the text that follows, the abbreviations for the WIS categories have been inserted after the initial use of Latin/scientific names for identified dominant plants to reflect the hydrophytic indicator status as most recently presented by USACE (2020). Plants not listed (NL) in USACE (2020) are treated as UPL.



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3 Jurisdictional Waters/Wetlands Assessment and Western Joshua Tree Survey

- Hydric Soils are defined as soils that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part (U.S. Department of Agriculture [USDA] Soil Conservation Service [SCS] 1994). Hydric soils are identified based on observable properties that result from prolonged saturated-anaerobic conditions. To assess whether hydric soil was present at each sample point, soil attributes (including color [hue, value, and chroma], redoximorphic features [color patterns in a soil formed by oxidation/reduction of iron and/or manganese that are caused by loss/depletion], or gain/concentration of pigment compared to the matrix color, mottling, texture, grain size, structure, streaking, etc.) were recorded on the delineation forms. Soil colors were assessed using Munsell Soil Color Charts (Munsell 2009).
- Wetland hydrology refers to inundation and/or saturation of the soil by flooding or a shallow water table for a prolonged period during the growing season, such that the character of the soil and vegetation are substantially different from areas that do not experience inundation/saturation in this manner. The identification of wetland hydrology follows the Wetlands Delineation Manual (Environmental Laboratory 1987) and Arid West Regional Supplement (USACE 2008). Visual evidence among the positive indicators of wetland hydrology include surface water, high water table, or soil saturation; geomorphic features associated with inundation (e.g., channels, shorelines); and water marks, sediment deposits, or drift deposits.

Regarding the types of federal Waters of the U.S. (WOTUS) regulated by the USACE:

- The term “wetlands” includes WOTUS in the instances where all three wetland parameters (i.e., hydrophytic vegetation, hydric soil, and wetland hydrology) are present.
- The term “other waters” typically encompasses drainages and other features bound by a definable OHWM with connectivity to jurisdictional waters and includes WOTUS lacking one or more of the three wetland parameters.

Potential jurisdictional boundaries for waters of the State under SWRCB jurisdiction were delineated using the latest available recommended procedures per the *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State* (SWRCB 2019). While there is no standard definition in place for “Waters of the State,” typically they are accepted to extend from the channel bed to the top of a bank or outer edge of riparian canopy dominated by hydrophytic vegetation (whichever is greater) and also include adjacent waters, non-federal isolated waters (if present), and certain anthropogenic features (such as concrete drainage ditches) that are not considered to be jurisdictional federal WOTUS.



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For the purposes of this delineation, CDFW jurisdiction has been conservatively considered to extend from the channel bed to the top of a bank or outer edge of adjacent riparian canopy (whichever is greater) and also may include certain anthropogenic drainage features not considered to be jurisdictional federal WOTUS.

3.2 Methodology

On December 21, 2023, Stantec Biologists Ryan Blaich and Lysa DuCharme conducted a site visit to determine the accuracy and verify mapped aquatic resources of the 2020 Vidal Solar Jurisdictional Delineation (JD) prepared in support of the EIR for the Project. Each previously mapped aquatic resource was visited to determine presence of bed and bank and ordinary high-water mark (OHWM) and to assess current jurisdictional status. Additionally, aerial imagery was reviewed to assess potentially unmapped drainages. Any unmapped potential drainage that was observed from aerial imagery was visited, assessed for potential jurisdiction, and their jurisdictional boundaries mapped, if applicable.

Please review Appendix B: Photos 1 through 6 to see examples of aquatic resources that were observed during the December 21, 2023, site visit that were previously unmapped, and aquatic resources that no longer show evidence of an OHWM.

Potential jurisdictional aquatic resources are mapped and presented in Appendix A, Figure 2.

3.3 Resulting Delineation and Preliminary Jurisdictional Determination

3.3.1 RATIONALE FOR PRELIMINARY JURISDICTIONAL DETERMINATION

All mapped drainages fall under potential state and CDFW jurisdiction due to the clear evidence of bed, bank, and presence of an OHWM. Under the new Amendment to the 2023 WOTUS Rule, any ephemeral aquatic resources no longer fall under federal jurisdiction. Due to the arid environmental conditions of the Survey Area, where most rain events are flashy in nature, all drainages observed were ephemeral and are presumed to be exempt from potential federal jurisdiction. The landform on site is indicative of the lower region of a bajada where several alluvial fan-like drainages coalesce before entering the Colorado River to the east of the Project Area. Because of this, most channels observed within the Project Area exhibit a clear bed and bank and OHWM at the top of bank margins due to the hydrology and geology of the site characteristic of arid environments. Additionally, the drainages that were not mapped during the 2020 JD (Figure 1; Drainages 3, 4, 5, 6, 12, 14, 15, 16, 17, & 18) exhibit clear bed and bank and an OHWM at the top of bank margins. Like the features from the 2020 JD that exhibit an OHWM at the top of bank margins, these aquatic resources experience differing levels of erosion and deposition due to the infrequent and flashy rain events that are characteristic of the region. The aquatic resources that were not mapped during the 2020 JD that exhibit clear evidence of bed and bank and a well-established OHWM below the top of bank margins (Drainages 1, 2, 7, 8, 9, 10, 11, & 13), are either closer in proximity to a



Aquatic Resources Assessment and Preliminary Jurisdictional Delineation Report

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more established compound channel system, or form from a compound channel-like system that then begins to braid as the elevational gradient decreases. Since there is both evidence of OHWM and bed and bank, each drainage will fall under the potential jurisdiction of the state and CDFW. Thus, it will be necessary to obtain a general Waste Discharge Requirements Permit from the SWRCB and Lake and Streambed Alteration Agreement Permit from CDFW.

It should be noted that Stantec's assessments regarding areas of potential jurisdiction are subject to final verification and approval by the regulatory agencies, including the USACE, SWRCB, and CDFW.

3.4 Western Joshua Tree Survey Results

During the survey conducted on December 21, 2023, the Survey Area was assessed for presence or absence of western Joshua tree. No Joshua trees were observed within the Survey Area.



Aquatic Resources Assessment and Preliminary Jurisdictional Delineation Report

4 References

4 References

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Aquatic Resources Assessment and Preliminary Jurisdictional Delineation Report

4 References

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USEPA (U.S. Environmental Protection Agency). 2021. Definition of "Waters of the United States": Rule Status and Litigation Update. Online: <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>. Accessed March 2022.

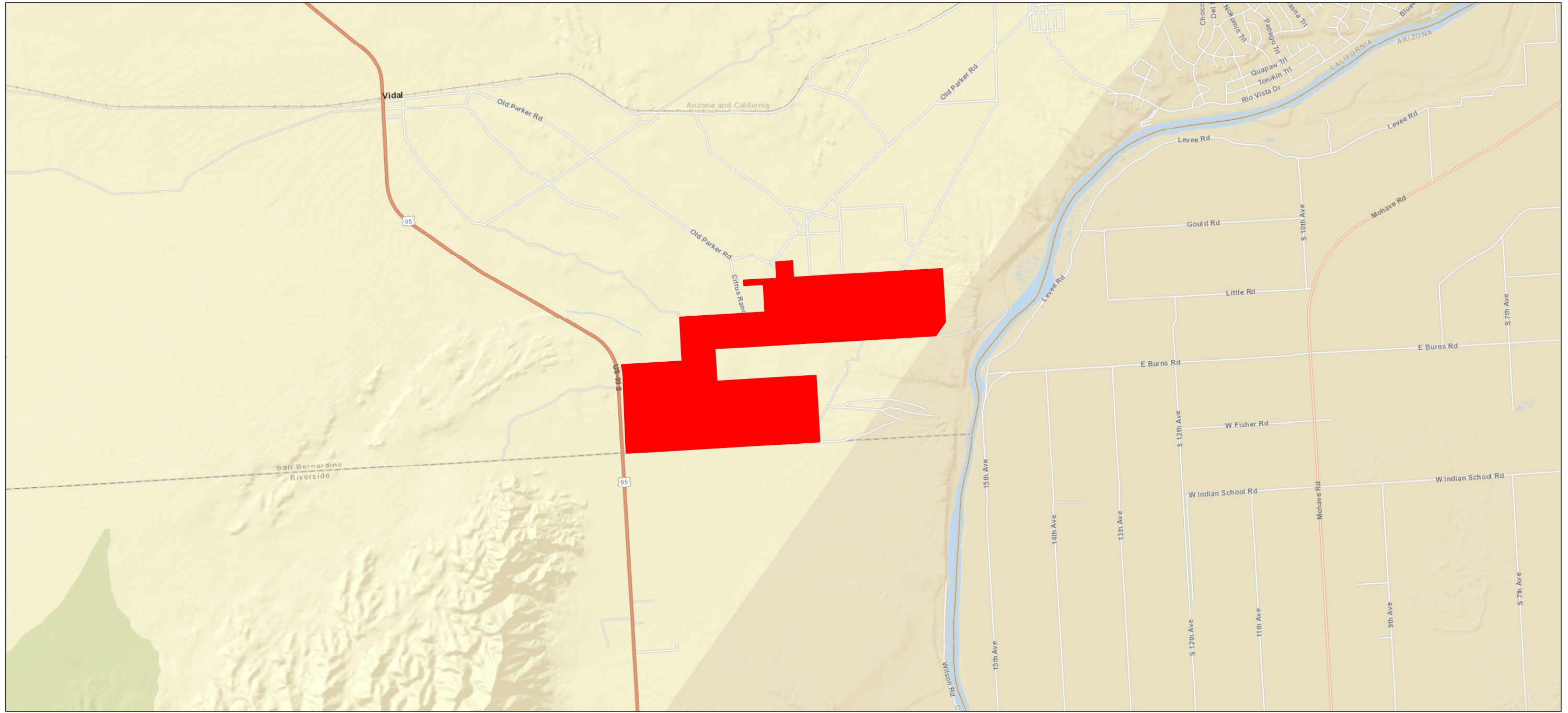


APPENDICES

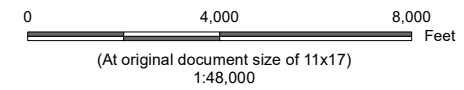


Appendix A Figures





■ Project Location



Project Location
San Bernardino County,
California

Prepared by DL on 2024-01-03
TR by SET on 2024-01-03
IR by RB on 2024-01-03

Client/Project 185806317

CDH VIDAL LLC
Vidal Energy Project
Jurisdictional Delineation Field Verification

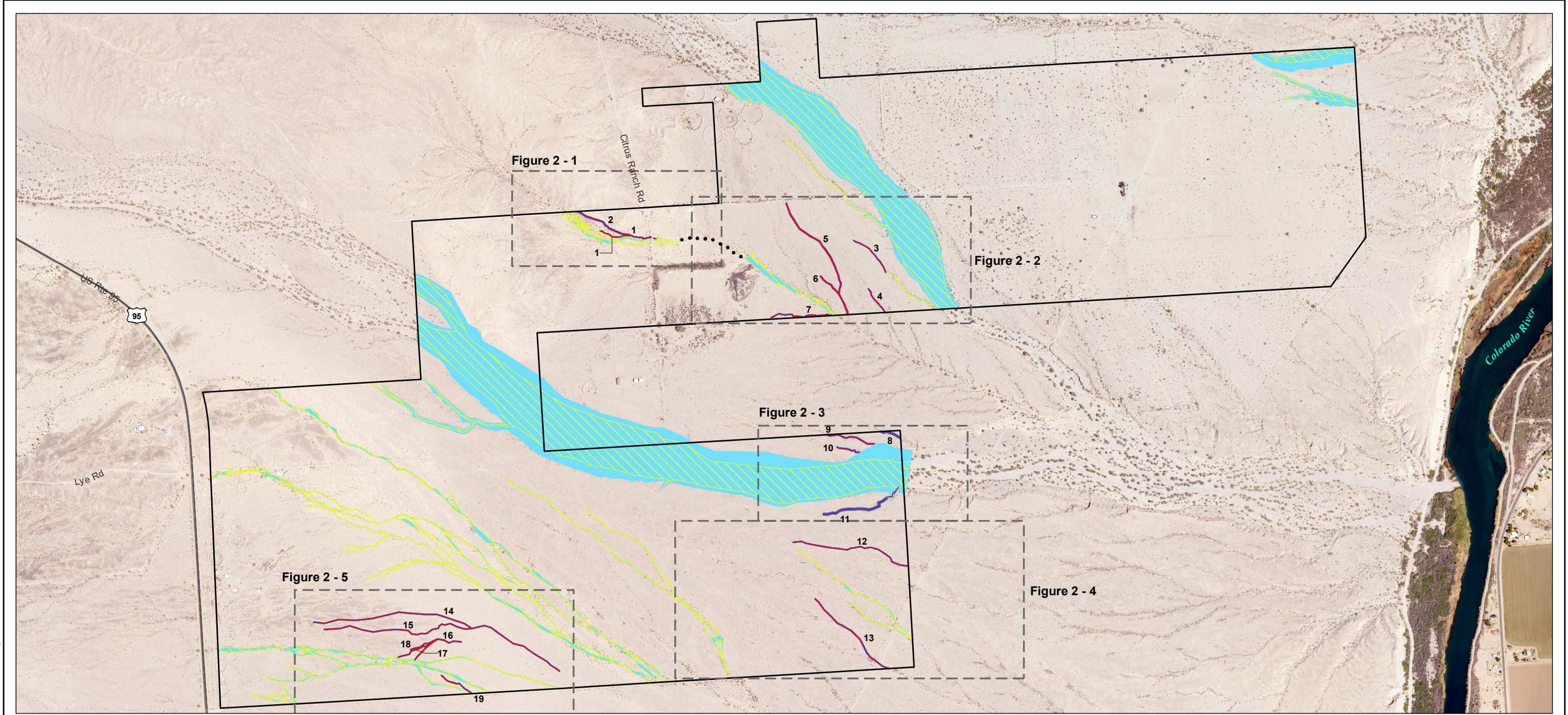
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Project Location Map

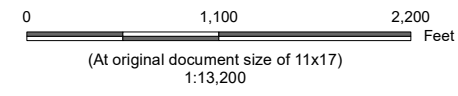
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 3. Background: Sources: Esri, GEBCO, NOAA, National Geographic, Garmin, HERE, Geonames.org, and other contributors
 Sources: Esri, HERE, Garmin, USGS, Intermap, INCREMENT P, NRCan, Esri Japan, METI, Esri China (Hong Kong), Esri Korea, Esri (Thailand), NGCC, (c) OpenStreetMap contributors, and the GIS User Community
 Esri, Garmin, GEBCO, NOAA NGDC, and other contributors California 60cm NAIP Imagery 2022.



Revised: 2024-01-11 By: dalaw
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- Project Location
- Previously Mapped 2020 Feature No Longer Existent
- Potential CDFW Jurisdictional Waters**
- Chambers Group Drainage Data (133.711 ac.)
- Stantec Updated Drainage Data (1.789 ac.)
- Potential State Jurisdictional Waters**
- Chambers Group Drainage Data (100.453 ac.)
- Stantec Updated Drainage Data (1.168 ac.)

Notes
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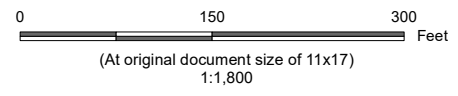
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Title
Potential Jurisdictional Features



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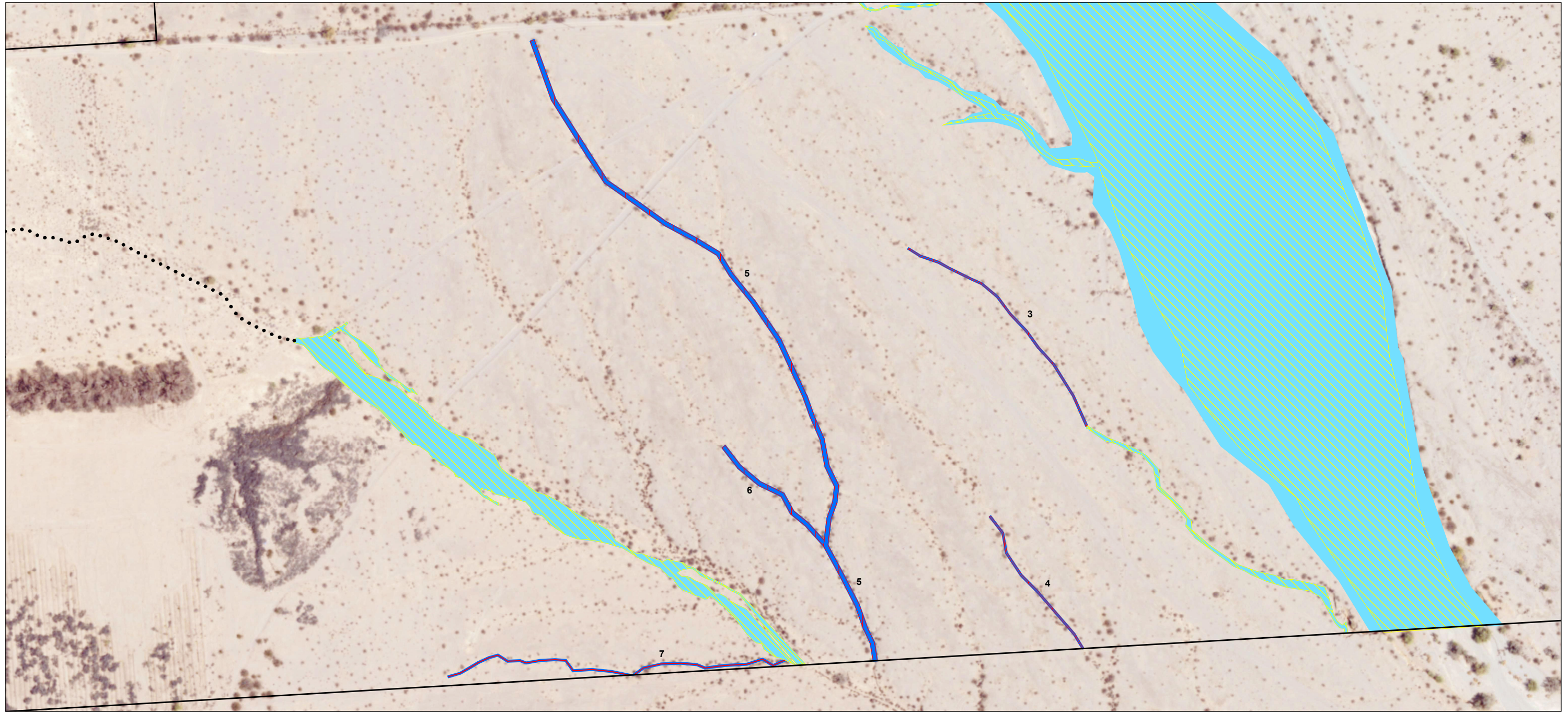
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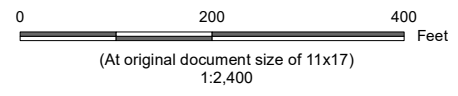
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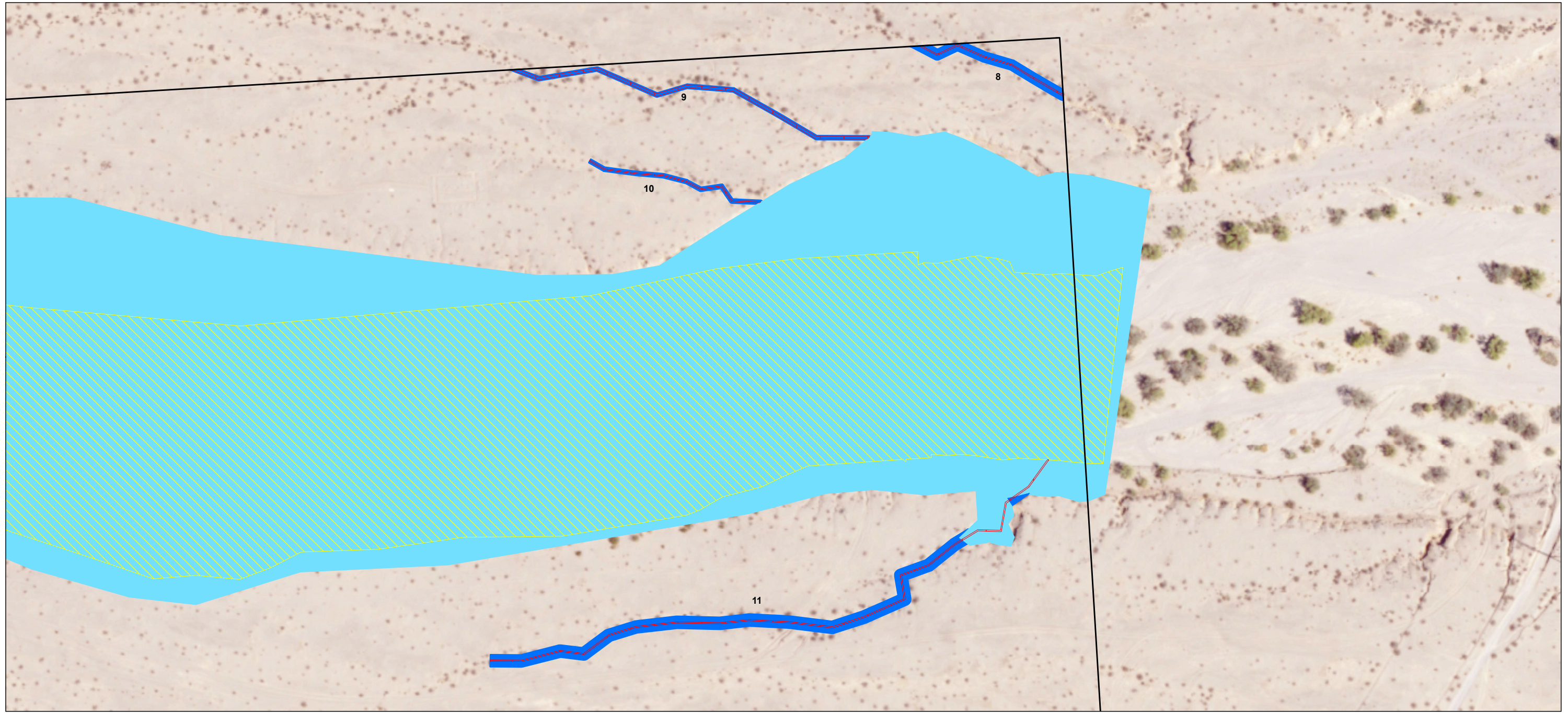
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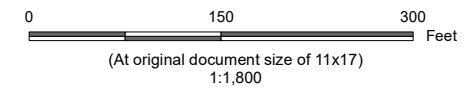
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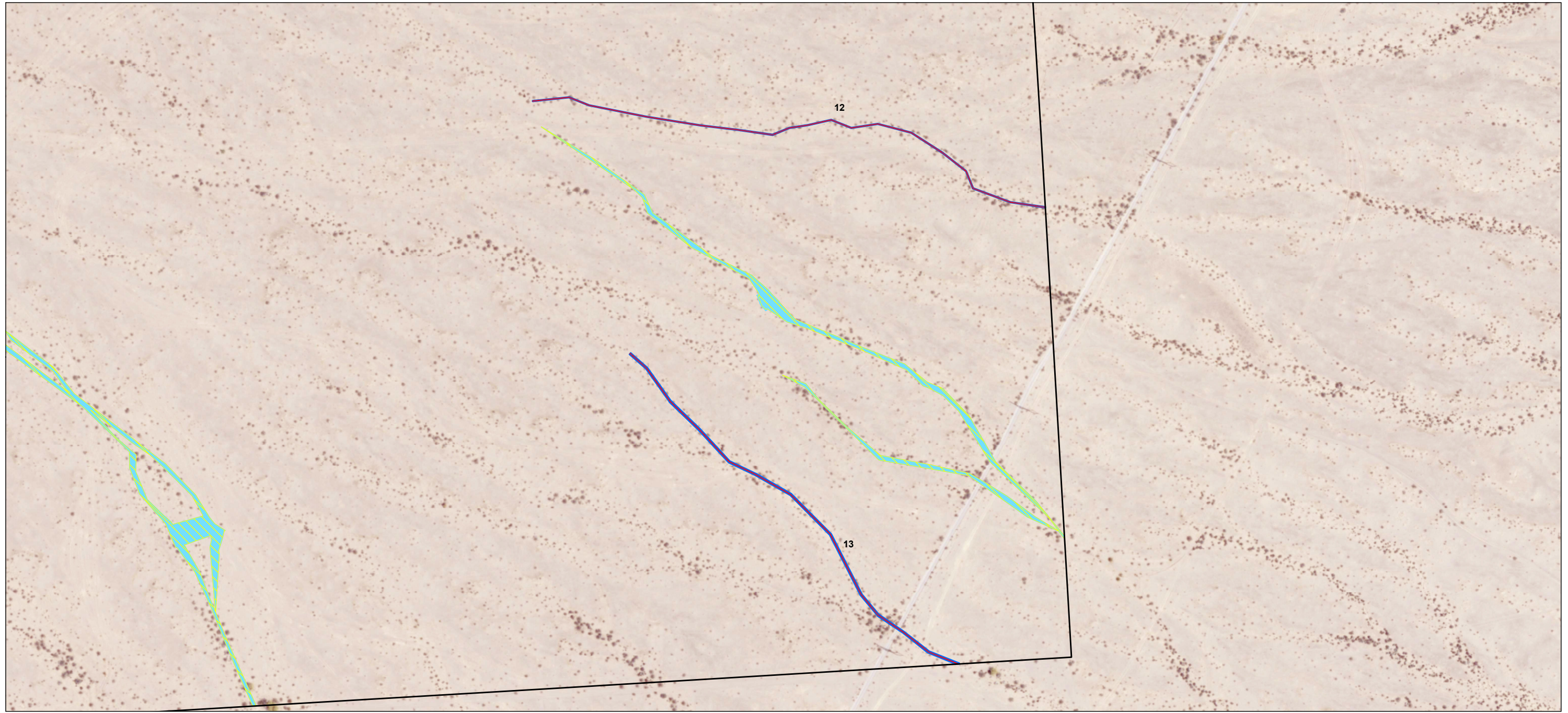
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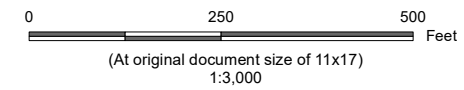
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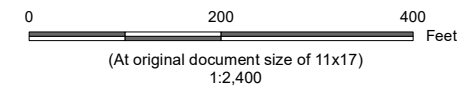
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Figure No.
2 - 5

Title
Potential Jurisdictional Features


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Appendix B Photographic Log



Appendix B Photographic Log



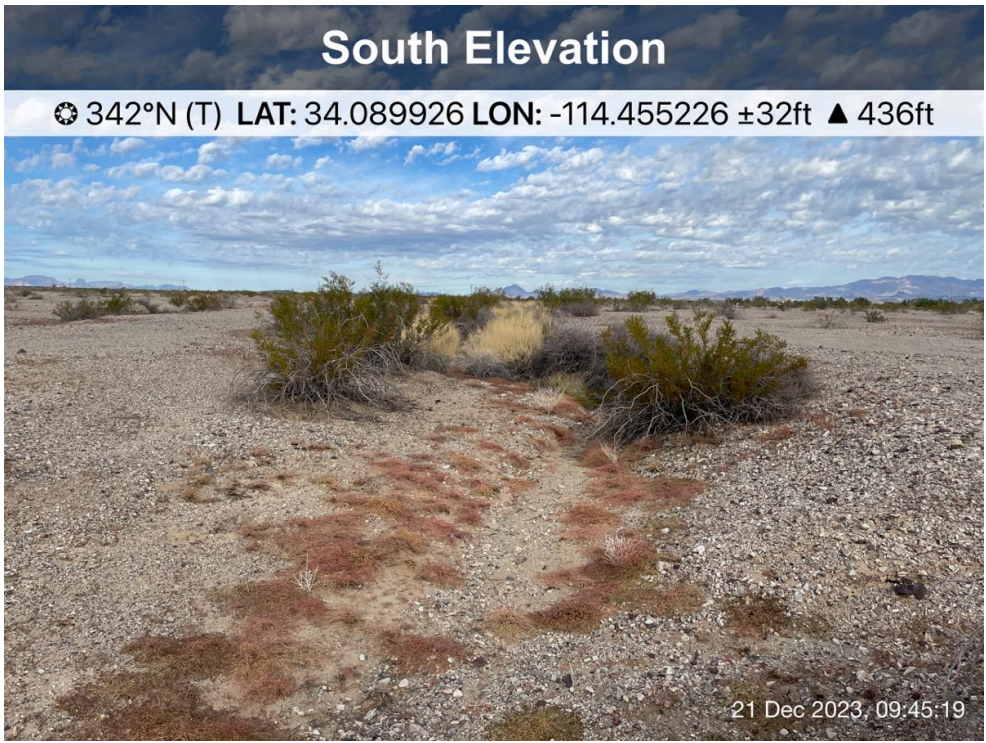
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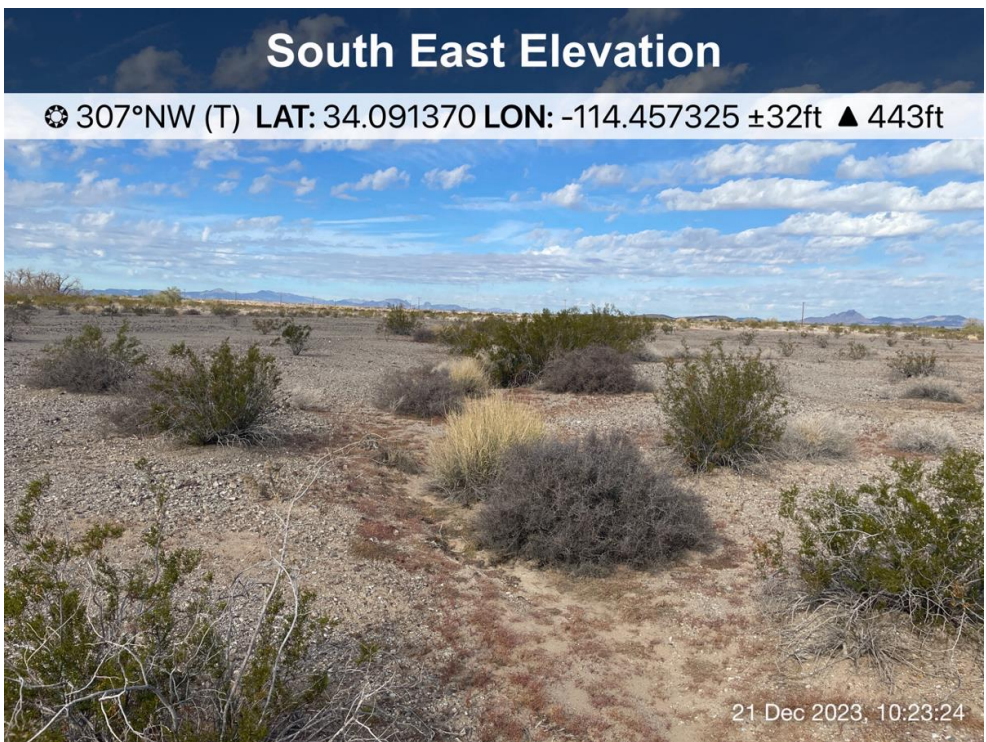
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Photo Location: San Bernardino County, CA	
Survey Date: 12/21/2023	
Comments: Drainage 1	

Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA
Photograph ID: 3	<div style="text-align: center;"> <h2 style="margin: 0;">West Elevation</h2> <p style="margin: 0;">📍 112°E (T) LAT: 34.094262 LON: -114.466623 ±32ft ▲ 475ft</p>  <p style="text-align: right; font-size: small;">21 Dec 2023, 08:55:29</p> </div>		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 2			
Photograph ID: 4	<div style="text-align: center;"> <h2 style="margin: 0;">West Elevation</h2> <p style="margin: 0;">📍 110°E (T) LAT: 34.092832 LON: -114.456468 ±32ft ▲ 447ft</p>  <p style="text-align: right; font-size: small;">21 Dec 2023, 10:14:49</p> </div>		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 3			


Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA


Photograph ID: 5	
Photo Location: San Bernardino County, CA	
Survey Date: 12/21/2023	
Comments: Drainage 4	



Photograph ID: 6	
Photo Location: San Bernardino County, CA	
Survey Date: 12/21/2023	
Comments: Drainage 6	

Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA
Photograph ID: 7	<div style="background-color: #333; color: white; padding: 5px; text-align: center;"> <h2 style="margin: 0;">West Elevation</h2> <p style="margin: 0;">📍 93°E (T) LAT: 34.090674 LON: -114.458116 ±32ft ▲ 442ft</p> </div>  <p style="text-align: right; font-size: small;">21 Dec 2023, 09:28:43</p>		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 7			
Photograph ID: 8	<div style="background-color: #333; color: white; padding: 5px; text-align: center;"> <h2 style="margin: 0;">South East Elevation</h2> <p style="margin: 0;">📍 308°NW (T) LAT: 34.086908 LON: -114.455570 ±32ft ▲ 436ft</p> </div>  <p style="text-align: right; font-size: small;">21 Dec 2023, 10:58:31</p>		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 8			

Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA

Photograph ID: 9	<div style="background-color: #002060; color: white; padding: 5px; text-align: center; font-weight: bold; font-size: 1.2em;">East Elevation</div> <div style="background-color: #e0e0e0; padding: 5px; text-align: center; font-weight: bold;">📍 278°W (T) LAT: 34.086661 LON: -114.456286 ±32ft ▲ 436ft</div> 
Photo Location: San Bernardino County, CA	
Survey Date: 12/21/2023	
Comments: Drainage 9	



Photograph ID: 10	<div style="background-color: #002060; color: white; padding: 5px; text-align: center; font-weight: bold; font-size: 1.2em;">East Elevation</div> <div style="background-color: #e0e0e0; padding: 5px; text-align: center; font-weight: bold;">📍 256°W (T) LAT: 34.084747 LON: -114.456249 ±32ft ▲ 438ft</div> 
Photo Location: San Bernardino County, CA	
Survey Date: 12/21/2023	
Comments: Drainage 11	

Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA
Photograph ID: 11	<div style="background-color: #1a3d4d; color: white; padding: 5px; text-align: center;"> <h2 style="margin: 0;">East Elevation</h2> <p style="margin: 0;">📍 288°W (T) LAT: 34.083496 LON: -114.456786 ±32ft ▲ 440ft</p> </div>  <p style="text-align: right; font-size: small;">21 Dec 2023, 11:25:55</p>		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 12			
Photograph ID: 12	<div style="background-color: #1a3d4d; color: white; padding: 5px; text-align: center;"> <h2 style="margin: 0;">North West Elevation</h2> <p style="margin: 0;">📍 143°SE (T) LAT: 34.081665 LON: -114.458400 ±32ft ▲ 441ft</p> </div>  <p style="text-align: right; font-size: small;">21 Dec 2023, 11:34:52</p>		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 13			

Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA

Photograph ID: 13	
Photo Location: San Bernardino County, CA	
Survey Date: 12/21/2023	
Comments: Drainage 14	

Photograph ID: 14	
Photo Location: San Bernardino County, CA	
Survey Date: 12/21/2023	
Comments: Drainage 15	

Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA
Photograph ID: 15	<div style="background-color: #2c3e50; color: white; padding: 5px; text-align: center;"> <h2 style="margin: 0;">North East Elevation</h2> <p style="margin: 0;">📍 229°SW (T) LAT: 34.081073 LON: -114.473309 ±32ft ▲ 476ft</p> </div> 		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 16			
Photograph ID: 16	<div style="background-color: #2c3e50; color: white; padding: 5px; text-align: center;"> <h2 style="margin: 0;">East Elevation</h2> <p style="margin: 0;">📍 253°W (T) LAT: 34.081321 LON: -114.473115 ±32ft ▲ 475ft</p> </div> 		
Photo Location: San Bernardino County, CA			
Survey Date: 12/21/2023			
Comments: Drainage 18			

Client:	CDH Vidal LLC	Project:	Vidal Energy Project
Site Name:	Vidal Energy	Site Location:	San Bernardino County, CA

Photograph ID: 17
Photo Location: San Bernardino County, CA
Survey Date: 12/21/2023

Comments:
Drainage 19

