DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS ALBUQUERQUE DISTRICT REGULATORY DIVISION
NW COLORADO BRANCH, GRAND JUNCTION OFFICE
400 ROOD AVENUE, ROOM 224
GRAND JUNCTION, CO 81501-2520

SPA-RD-W May 10, 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-2023-00502

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. SUMMARY OF CONCLUSIONS.

[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.

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. **AC-01 (0.05-acre), not a water of the United States**

ii. **AC-02 (0.23-acre), not a water of the United States**

iii. **AC-03 (0.12-acre), not a water of the United States**

iv. **AC-04 (0.04-acre), not a water of the United States**

v. **AC-05 (0.01-acre), not a water of the United States**

vi. **Daggett and Parker (D&P) ditch (0.11-acre), not a water of the United States**

vii. **PEM-01 (0.10-acre), not a water of the United States**

viii. **PEM-02 (0.16-acre), not a water of the United States**

ix. **PEM-03 (0.04-acre), not a water of the United States**

x. **PEM-04 (0.25-acre), not a water of the United States**

xi. **PEM-05 (0.40-acre), not a water of the United States**

xii. **PEM-06 (0.05-acre), not a water of the United States**

xiii. **PEM-07 (0.01-acre), 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. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 3116-17 (September 8, 2023))

c. *Sackett v. EPA*, 598 U.S. _, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. **The review area is 162 acres, approximately centered at latitude 39.6174°, longitude -106.9470°, approximately 1.5 mile south of the Town of Gypsum, in Eagle County, Colorado.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.[5] **N/A**

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **N/A**

6. SECTION 10 JURISDICTIONAL WATERS[6]: 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.

[5] This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.
[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.

Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

a. Traditional Navigable Waters (TNWs) (a)(1)(i): **N/A**

b. The Territorial Seas (a)(1)(ii): **N/A**

c. Interstate Waters (a)(1)(iii): **N/A**

d. Impoundments (a)(2): **N/A**

e. Tributaries (a)(3): **N/A**

f. Adjacent Wetlands (a)(4): **N/A**

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

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).[8]

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).

AC-01 is an approximately 750-linear-foot (0.05-acre) segment of agricultural irrigation ditch that receives relatively permanent flow from the D&P ditch. The water diversion for the D&P ditch is located on Gypsum Creek, an (a)(3) water, and is approximately 1.7 aerial miles southwest from this feature. Irrigation water is periodically diverted from Gypsum Creek to the D&P ditch to this segment of ditch typically from May to October. This segment of ditch does not fall under the (a)(3) classification because it

[8] 88 FR 3004 (January 18, 2023)

does not have a direct or indirect return flow to an (a)(1) water or (a)(2) impoundment, but instead flows from the ditch dissipate into diffuse overland sheetflow over uplands. The analysis of these features was based on review of Google Earth aerial photographs, Historic Aerial imagery, Natural Resources Conservation Service (NRCS) web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's Division of Water Resources (DWR), and wetland delineation report submitted by applicant's agent.

D&P Ditch within the review area is an approximately 1,618-linear-foot (0.11-acre) segment of agricultural irrigation ditch that receives relatively permanent flow from the D&P Ditch. The water diversion for the D&P ditch is located on Gypsum Creek, an (a)(3) water, and is approximately 1.5 aerial miles southwest from this feature. Irrigation water is periodically diverted from Gypsum Creek to the D&P ditch to this segment of ditch typically from May to October. This segment of ditch does not fall under the (a)(3) classification because it does not have a direct or indirect return flow to an (a)(1) water or (a)(2) impoundment, but instead flows from the ditch dissipate into diffuse overland sheetflow over uplands. The analysis of these features was based on review of Google Earth aerial photographs, Historic Aerial imagery, Natural Resources Conservation Service (NRCS) web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's Division of Water Resources (DWR), and wetland delineation report submitted by applicant's agent.

AC-02 is an approximately 3,574-linear-foot (0.23-acre) segment of agricultural irrigation ditch that receives relatively permanent flow from the D&P Ditch. The water diversion for the D&P ditch is located on Gypsum Creek, an (a)(3) water, and is approximately 1.5 aerial miles southwest from this feature. Irrigation water is periodically diverted from Gypsum Creek to the D&P ditch to this segment of ditch typically from May to October. This segment of ditch does not fall under the (a)(3) classification because it does not have a direct or indirect return flow to an (a)(1) water or (a)(2) impoundment, but instead flows from the ditch dissipate into diffuse overland sheetflow over uplands. The analysis of these features was based on review of Google Earth aerial photographs, Historic Aerial imagery, Natural Resources Conservation Service (NRCS) web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's Division of Water Resources (DWR), and wetland delineation report submitted by applicant's agent.

AC-03 is an approximately 1,625-linear-foot (0.12-acre) segment of agricultural irrigation ditch that receives relatively permanent flow from the McBrayer ditch. The water diversion for the McBrayer ditch is located on Gypsum Creek, an (a)(3) water, and is approximately one aerial mile southwest from this feature. Irrigation water is periodically diverted from Gypsum Creek to the McBrayer ditch to this segment of ditch typically from May to October. This segment of ditch does not fall under the (a)(3) classification because it does not have a direct or indirect return flow to an (a)(1) water or (a)(2) impoundment, but instead flows from the ditch dissipate into diffuse overland sheetflow over uplands. The analysis of these features was based on review of Google Earth aerial photographs, Historic Aerial imagery, Natural Resources Conservation Service (NRCS) web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's Division of Water Resources (DWR), and wetland delineation report submitted by applicant's agent.

AC-04 is an approximately 535-linear-foot (0.04-acre) segment of agricultural irrigation ditch that receives relatively permanent flow from the McBrayer ditch. The water diversion for the McBrayer ditch is located on Gypsum Creek, an (a)(3) water, and is approximately 1.3 aerial miles southwest from this feature. Irrigation water is periodically diverted from Gypsum Creek to the McBrayer ditch to this segment of ditch typically from May to October. This segment of ditch does not fall under the (a)(3) classification because it does not have a direct or indirect return flow to an (a)(1) water or (a)(2) impoundment, but instead flows from the ditch dissipate into diffuse overland sheetflow over uplands. The analysis of these features was based on review of Google Earth aerial photographs, Historic Aerial imagery, Natural Resources Conservation Service (NRCS) web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's Division of Water Resources (DWR), and wetland delineation report submitted by applicant's agent.

AC-05 is an approximately 122-linear-foot (0.01-acre) segment of agricultural irrigation ditch that receives relatively permanent flow from the McBrayer Ditch. The water diversion for the McBrayer ditch is located on Gypsum Creek, an (a)(3) water, and is approximately 1.7 aerial miles southwest from this feature. Irrigation water is periodically diverted from Gypsum Creek to the McBrayer ditch to this segment of ditch typically from May to October. This segment of ditch does not fall under the (a)(3) classification because it does not have a direct or indirect return flow to an (a)(1) water or (a)(2) impoundment, but instead flows from the ditch dissipate into diffuse overland sheetflow over uplands. The analysis of

these features was based on review of Google Earth aerial photographs, Historic Aerial imagery, Natural Resources Conservation Service (NRCS) web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's Division of Water Resources (DWR), and wetland delineation report submitted by applicant's agent.

PEM-01 is a 0.10-acre palustrine emergent wetland associated with the D&P Ditch which is an irrigation ditch with no documented return flows to any (a)(1), (a)(2), or (a)(3) water. The wetland doesn't have a continuous surface connection or discrete flow path to jurisdictional waters of the U.S. based on the review of Google Earth aerial photographs, Historic Aerial imagery, NRCS web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's DWR, and wetland delineation report submitted by applicant's agent.

PEM-02 is a 0.16-acre palustrine emergent wetland associated with AC-02 which is an irrigation ditch with no documented return flows to any (a)(1), (a)(2), or (a)(3) water. The wetland doesn't have a continuous surface connection or discrete flow path to jurisdictional waters of the U.S. based on the review of Google Earth aerial photographs, Historic Aerial imagery, NRCS web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's DWR, and wetland delineation report submitted by applicant's agent.

PEM-03 is a 0.04-acre palustrine emergent wetland associated with AC-01 which is an irrigation ditch with no documented return flows to any (a)(1), (a)(2), or (a)(3) water. The wetland doesn't have a continuous surface connection or discrete flow path to jurisdictional waters of the U.S. based on the review of Google Earth aerial photographs, Historic Aerial imagery, NRCS web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's DWR, and wetland delineation report submitted by applicant's agent.

PEM-04 is a 0.25-acre palustrine emergent wetland associated with AC-03 and McBrayer ditch which are irrigation ditches with no documented return flows to any (a)(1), (a)(2), or (a)(3) water. The wetland doesn't have a continuous surface connection to jurisdictional waters of the U.S. or discrete flow path based on the review of Google Earth aerial photographs, Historic Aerial imagery, NRCS web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's DWR, and wetland delineation report submitted by applicant's agent.

PEM-05 is 0.40-acre palustrine emergent wetland associated with McBrayer ditch which is an irrigation ditch with no documented return flows to any (a)(1), (a)(2), or (a)(3) water. The wetland doesn't have a continuous surface connection or discrete flow path to jurisdictional waters of the U.S. based on the review of Google Earth aerial photographs, Historic Aerial imagery, NRCS web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's DWR and wetland delineation report submitted by applicant's agent.

PEM-06 is 0.05-acre palustrine emergent wetland associated with McBrayer ditch which is an irrigation ditch with no documented return flows to any (a)(1), (a)(2), or (a)(3) water. The wetland doesn't have a continuous surface connection or discrete flow path to jurisdictional waters of the U.S. based on the review of Google Earth aerial photographs, Historic Aerial imagery, NRCS web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's DWR, and wetland delineation report submitted by applicant's agent.

PEM-07 is a 0.01-acre palustrine emergent wetland associated with AC-05 which is an irrigation ditch with no documented return flows to any (a)(1), (a)(2), or (a)(3) water. The wetland doesn't have a continuous surface connection or discrete flow path to jurisdictional waters of the U.S. based on the review of Google Earth aerial photographs, Historic Aerial imagery, NRCS web soil survey, the Corps' National Regulatory Viewer desktop resources, written communication from Colorado's DWR, and wetland delineation report submitted by applicant's agent.

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. **USACE National Regulatory Viewer, Hillshade Map, Accessed on January 2, 2024.**

   b. **USACE National Regulatory Viewer, Digital Elevation Model Map. Accessed on January 2, 2024.**

   c. **USACE National Regulatory Viewer, Slope Map. Accessed on January 2, 2024.**

d. USACE National Regulatory Viewer, National Hydrology Data Map. Accessed on January 2, 2024.

e. USACE National Regulatory Viewer, National Wetland Inventory Map. Accessed on January 2, 2024.

f. Google Earth aerial photographs, dated September 1999, October 2005, March 2006, June 2010, October 2011, April 2015, June 2017, and August 2020.

g. USDA, Natural Resources Conservation Service, Web Soil Survey (https://websoilsurvey.sc.egov.usda.gov/app/WebSoilSurvey.aspx). Accessed on January 2, 2024.

h. Wetland Delineation Report, prepared by Wright Water Engineers, Inc., dated October 9, 2023.

i. Colorado Division of Water Resources, Daggett and Parker Ditch (https://dwr.state.co.us/Tools/Structures/3700561). Accessed on January 2, 2024.

j. Colorado Division of Water Resources, McBrayer Ditch (https://dwr.state.co.us/Tools/Structures/3700698?location=DiversionRecords). Accessed on January 2, 2024.

k. Historic aerial photographs taken in 1951, 1960, and 1983 (https://www.historicaerials.com/viewer).

l. Colorado Division of Water Resources Email, dated January 10, 2023.

10. OTHER SUPPORTING INFORMATION.

The D&P ditch's water diversion on Gypsum Creek is located at latitude 39.5952°, longitude -106.9696°. The approximate elevation at this location is 6,672 feet above sea level. The D&P ditch terminates at latitude 39.6196°, longitude -106.9443° in uplands. The approximate elevation at this location is 6,550 above sea level.

The McBrayer ditch's water diversion on Gypsum Creek is located at latitude 39.6105°, longitude -106.9653°. The approximate elevation at this location is 6,554 above sea level. The McBrayer ditch terminates at latitude 39.6229°,

longitude -106.9444° where it connects with the Chatfield & Bartholomew (C&B) ditch. The elevation at this location is approximately 6,498 above sea level.

The C&B ditch's water diversion on Gypsum Creek is located at latitude 39.6145°, longitude -106.9634°. The approximate elevation at this location is 6,519 above sea level. The Chatfield & Bartholomew terminates at latitude 39.6381°, longitude -106.9335° in uplands. The approximate elevation at this location is 6,458 above sea level.

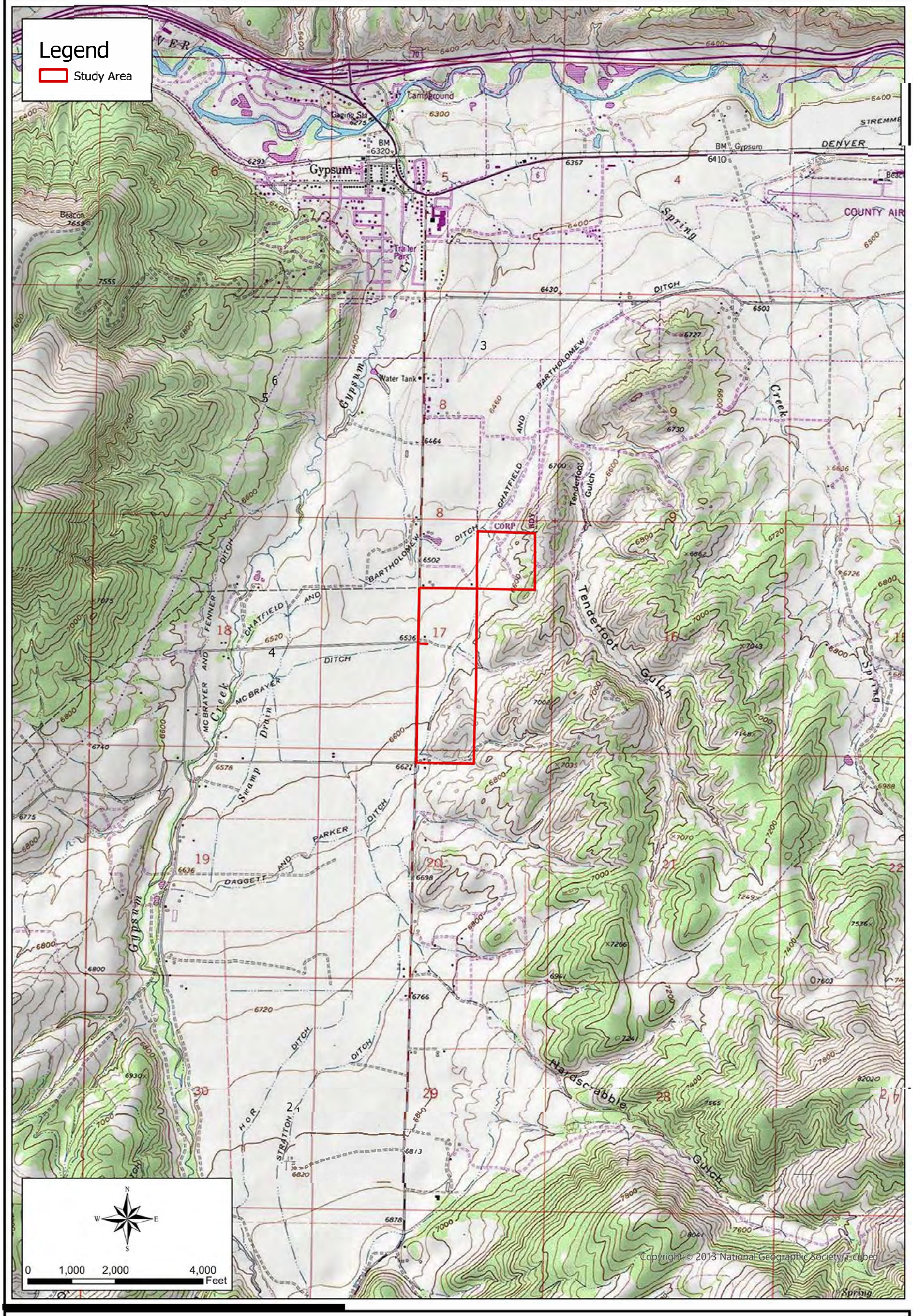
The unnamed ditch that extends north from C&B ditch beginning at latitude 39.62335°, longitude -106.94445°, has an elevation of approximately 6,495 feet above sea level at its intersection with the C&B Ditch. The unnamed ditch is a lateral off of the C&B ditch which received irrigation water from Gypsum Creek via a diversion structure located at latitude 39.61450 °, longitude -106.96340°. The approximate elevation at the C&B Ditch diversion point is approximately 6,519 feet above sea level. As the unnamed ditch extends north, it crosses Cooley Mesa Road via a culvert at latitude 39.63811°, longitude -106.93497° and then turns west for a short distance before turning north again.

While there is a potential drainage path from Gypsum Creek to the C&B Ditch, to the unnamed ditch, and finally to the Eagle River based solely on hillshade data. Relatively permanent flows actually cease to exist along this drainage path well before reaching the Eagle River in uplands. The reach where non-relatively permanent flows begin is at approximately latitude 39.64256°, longitude -106.93499°. The reach is approximately 4,257 linear feet (elevation: 6,415 feet above sea) and majority of the reach does not have relatively permanent flows. The Corps reviewed hillshade map data and Google Earth aerial imagery in the desktop survey analysis and the historic aerial imagery from the dates of August 2006, June 2010, September 2011, June 2017, August 2020, July 2021, September 2021, and July 2023 which all illustrate no relatively permanent flows throughout this reach during the irrigation season (which is typically May – September for this area of Colorado). Evidence for lack of relatively permanent flows in this drainage path includes the lack of water present in the drainage. Additional locations where relatively permanent flows cease on the reach in uplands include latitude 39.64359°, longitude -106.93472°, latitude 39.64634, longitude -106.93471°, and latitude 39.64887°, longitude -106.93451°. The unnamed ditch terminates in upland areas in multiple areas in the listed locations above and there is not a downstream discrete conveyance via unnamed ditch that could potentially serve as a means to connect the study area ditches to any jurisdictional water.

The elevation differences between the diversion points of all four listed ditches and their termination points (i.e. where relatively permanent flows cease) illustrates down-gradient flows to the termination points and that no relatively permanent flows will return to either Gypsum Creek or the Eagle River ((a)(3) waters).

In conclusion, six ditches (D&P Ditch, AC-01, AC-02, AC-03, AC-04, AC-05 and D&P Ditch) are located within the review area. None of these features have a direct or indirect flow to any (a)(1) or (a)(2) waters.

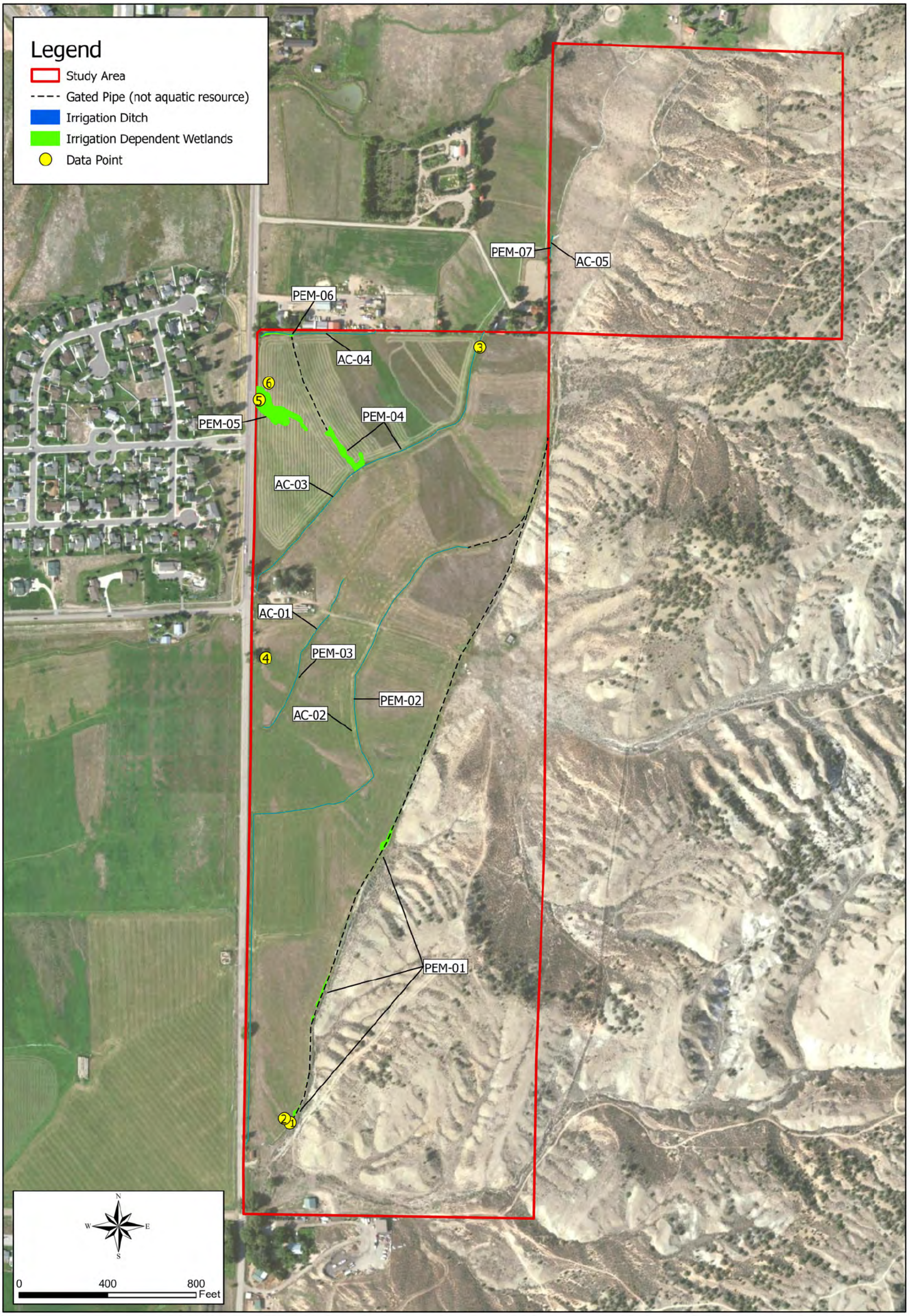
Also, seven wetlands (PEM-01, PEM-02, PEM-03, PEM-04, PEM-05, PEM-06, and PEM-07) are located within the review area. All of these features are associated with ditches that do not have a direct or indirect flow to any (a)(1) or (a)(2) waters.



GYPSUM, EAGLE COUNTY, COLORADO

AQUATIC RESOURCES INVENTORY

FIGURE 1



[redacted]

GYPSUM, EAGLE COUNTY, COLORADO

AQUATIC RESOURCES INVENTORY

[redacted]

[redacted]

FIGURE
2