DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
400 ROOD AVENUE, ROOM 224
GRAND JUNCTION, COLORADO 81501

SPA-RD-W March 12, 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-2023-00218

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.

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).

      - **Wetland PEM 1 (0.45 acre) is 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 a 3.7-acre area located within a 10-acre parcel (Lot 2a). The review area is approximately centered at latitude 39.6780°, longitude -106.6785°, approximately 1.5 miles south of the Town of Wolcott, in Eagle County, Colorado (Enclosure 1).**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. **The Colorado River is the nearest downstream paragraph (a)(1) water. Specifically, the Colorado River intersects the boundary between the states of Colorado and Utah at a location approximately 136 aerial miles to the southwest of the review area making it an interstate water. This reach of the Colorado River has a Strahler stream order of nine (9) from its confluence with the Roaring Fork River (upstream extent) in Colorado to its confluence with the Green River in Utah (downstream extent). Therefore, the nearest paragraph (a)(1) water to the review area is the upstream extent of the reach (stream order 9) located at the confluence of the Colorado River and the Roaring Fork River. Further, the Colorado River has been identified as a TNW, from its confluence of the Gunnison River in the town of Grand Junction, Colorado to the Utah State line but this reach of TNW river is farther away from the review**

area. The most proximal portion of this TNW is approximately 110 aerial miles away from the review area.[5]

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. **Wetland PEM 1 is part of a larger wetland area which extends approximately 370 feet to the northeast from the review area and abuts an unnamed first order channel (Reach 1) (at latitude 39.6798°, longitude -106.6778°). Reach 1 exhibits a continuous ordinary high water mark (OHWM) for all except the most downstream portion, where the OHWM becomes indeterminate. Flows from within the first order channel are conveyed downstream towards the east, where another unnamed first order channel converges with the subject flow path to become a second order flow path (Reach 2). Reach 2 is characterized by a discontinuous OHWM along its length and flows from this second order channel are conveyed to Travis Creek, an (a)(3) water (intersecting at latitude 39.6861°, longitude -106.6617°). From the intersection with the abutting wetland described above, the unnamed first and second order drainage channels flow to the east/northeast for approximately 1.2 miles before discharging to Travis Creek. Travis Creek flows through 2 culverts prior to converging with the Eagle River, an (a)(3) water (intersecting at latitude 39.6640°, longitude -106.6445°). The Eagle River then converges with the Colorado River at a location approximately 29 river miles west of the review area.**

The portion of the larger wetland area located outside of the review area as well as all the drainage channels were not available for access by the Corps or the applicant, therefore only desktop resources were utilized in our analyses of these aquatic resources. Based on the best available information obtained by the Corps' desktop analysis, the first and second order drainage channels and Travis Creek described above are likely relatively permanent waters (RPW). This conclusion is supported by USGS Hill Shade maps and historic Google Earth aerial imagery from May 2023, September 2021, August 2020, June 2017, and October 2015. Analysis of these desktop resources indicates the Reach 1 drainage channel has a distinct continuous ordinary high-water mark (OHWM) from the intersection with Wetland PEM 1 down to a point located at latitude 39.6831°, longitude -106.6675°, at this point the flow path features a discontinuous OHWM likely caused by construction of stock ponds or other factors (see Enclosure 3). The USGS StreamStats web application was utilized

[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.

to delineate and model the watershed area for the drainage channels described above. Calculations from this web application estimated a watershed area of 1.9 square miles and predicted a monthly flow as well as an average yearly flow rate of approximately 0.81 cubic foot per second for the watershed.

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. 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**

[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.

f. Adjacent Wetlands (a)(4): **Wetland PEM 1 is 0.45-acre wetland within the review area that is part of a larger wetland which continues offsite and abuts a first order channel drainage feature located approximately 370 feet northeast of the review area. From its intersection with the larger wetland, this channel drainage feature has a 1.2-mile discrete conveyance path draining to the east/northeast to Travis Creek and then to the Eagle River.**

Wetland PEM 1 is a jurisdictional water based on a review of desktop resources (USACE National Regulatory Viewer (various maps) accessed on 12/21/2023; Google Earth aerial photographs dated 1999, 2004, 2005, 2011, 2015, 2017, and 2023; USGS Hill Shade maps; and USDA NRCS Websoil Survey, 2023), as well as a wetland delineation and photographs provided by [redacted] 2023.

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] **N/A**

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). **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. Google Earth Imagery dated September 1999, September 2004, October 2005, September 2011, April 2015, June 2017, and April 2023. Accessed on December 21, 2023.

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

b. USACE National Regulatory Viewer, Hill Shade Maps. Accessed on January 26, 2024.

c. USACE National Regulatory Viewer, Digital Elevation Model Map. Accessed on December 21, 2023.

d. USACE National Regulatory Viewer, Slope Map. Accessed on December 21, 2023.

e. USACE National Regulatory Viewer, National Hydrology Data Map. Accessed on December 21, 2023.

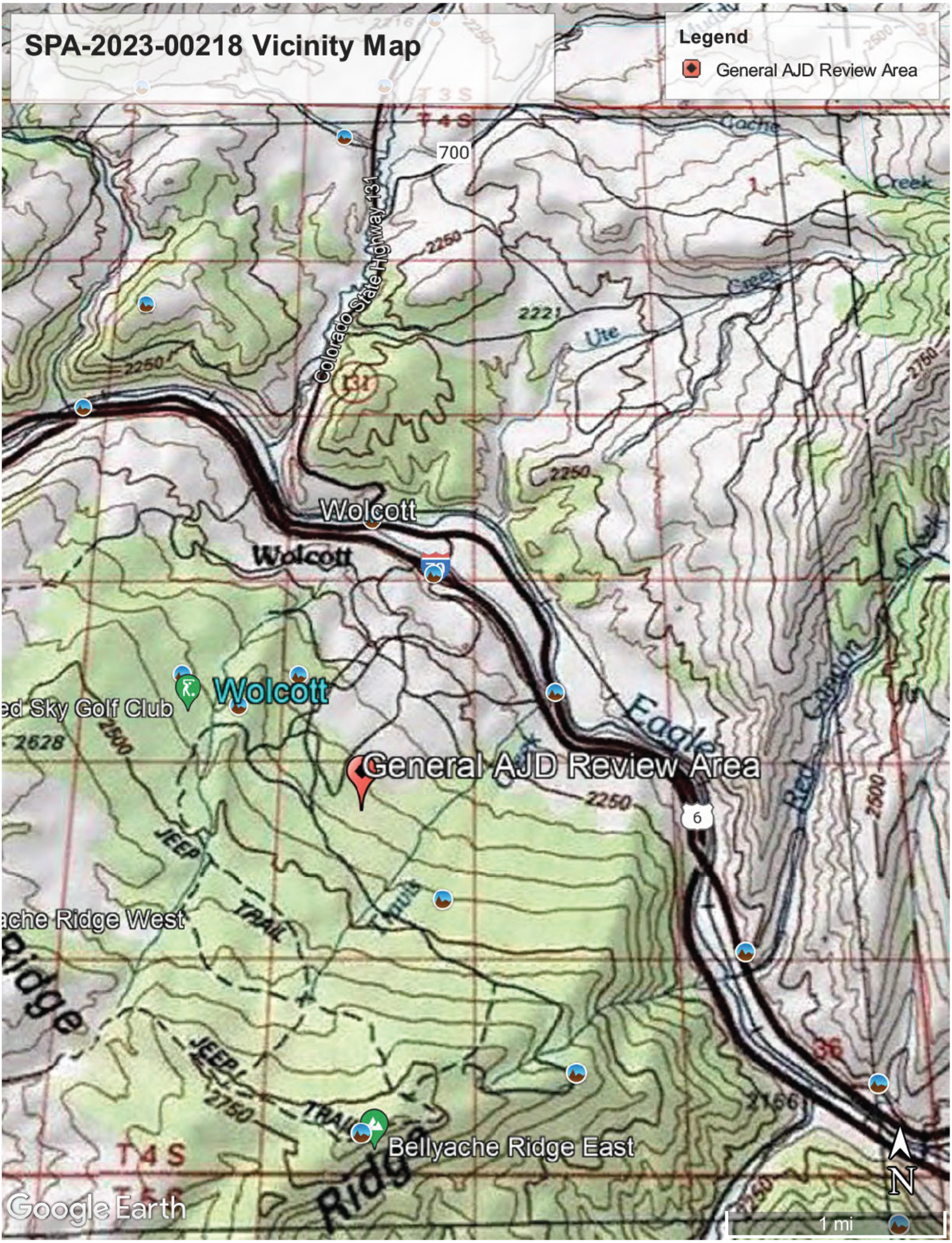
f. USACE National Regulatory Viewer, National Wetland Inventory Map. Accessed on December 21, 2023.

g. USDA, Natural Resources Conservation Service, Web Soil Survey (https://websoilsurvey.sc.egov.usda.gov/app/WebSoilSurvey.aspx). Accessed on December 21, 2023.

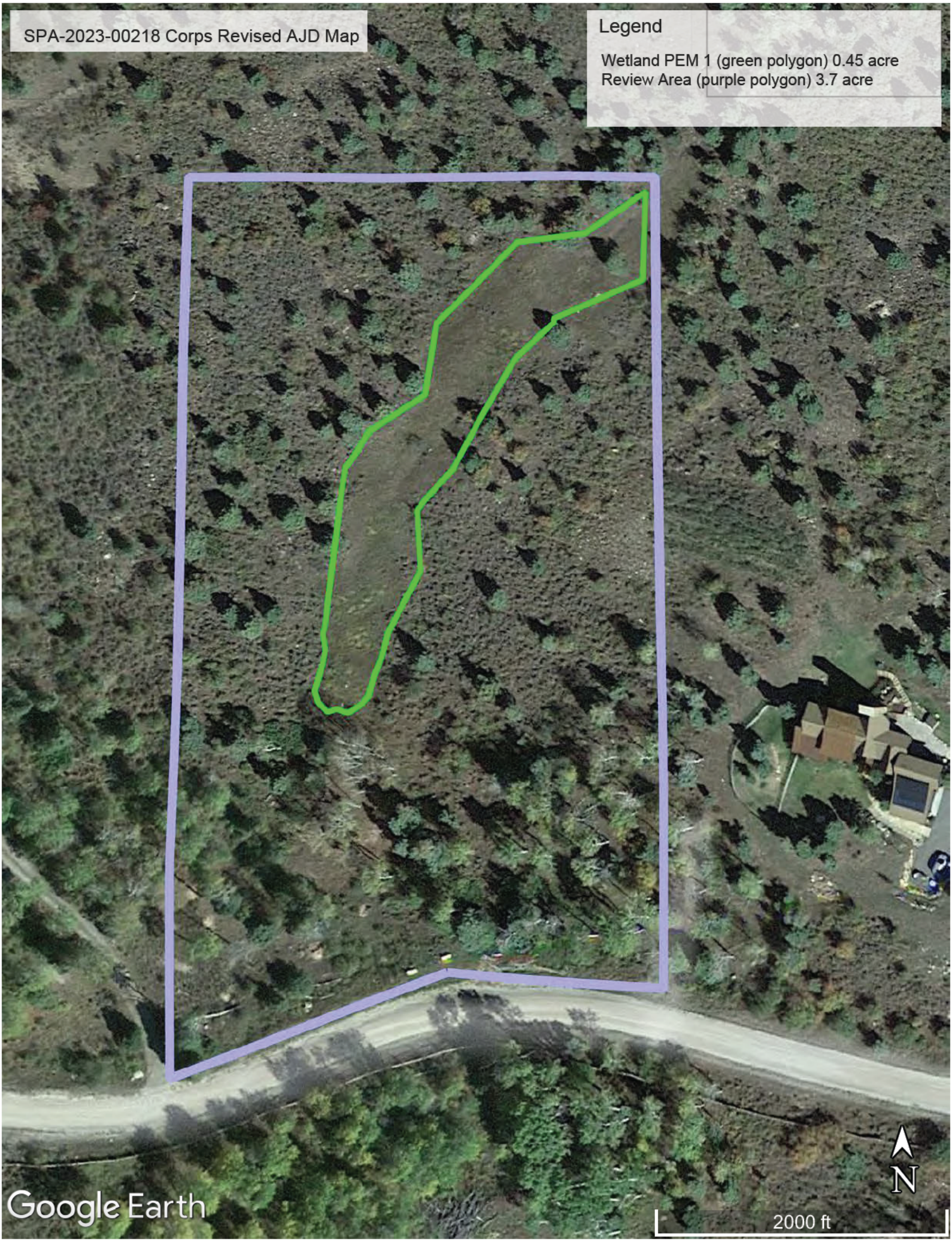
h. December 2022, [redacted]

i. USGS StreamStats web application (https://www.usgs.gov/streamstats). Accessed on February 15, 2024.

10. OTHER SUPPORTING INFORMATION. **Wetland PEM 1 extends offsite and abuts with an unnamed drainage channel (discreet conveyance feature). Due to the portion of the larger wetland area being off the requestor's property, access to this area was not available. However, extensive desktop survey information, including historic and current aerial photographs, topographic maps, USFW NWI maps, and USGS Hill Shade maps, provided sufficient evidence of an above-ground drainage connection between Wetland PEM 1 and the unnamed drainage channels. The above desktop survey information also provided sufficient evidence of the unnamed drainage channels' direct flow path from the point of intersection to Travis Creek and the Eagle River. Evidence provided by the desktop survey indicates the unnamed drainage channels and Travis Creek feature relatively permanent flows and are likely (a)(3) waters.**


SPA-2023-00218 Vicinity Map
Legend
General AJD Review Area
T4S
700
Colorado State Highway 131
Wolcott
Wolcott
Wolcott
General AJD Review Area
Eagle
6
JEEP TRAIL
JEEP TRAIL
Bellyache Ridge East
T4S
Google Earth
N
1 mi

Bellyache Ridge Rd
Juniper Trail
E Lakeside Trail
22
7600
Arrow Ln
7304
7200
70
6
23
7007
RIO GRANDE
Eagle Springs Golf Club
Eagle River
7076
Bellyache Ridge Rd
Stag Horn Trail
7651
7600
Creek
7400
Wolcott Spring Rd
Wolcott Spring Rd
Wolcott Spring Rd
Wolcott Spring Rd


SPA-2023-00218 Corps Revised AJD Map
Legend
Wetland PEM 1 (green polygon) 0.45 acre
Review Area (purple polygon) 3.7 acre
N
2000 ft
Google Earth