



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
4101 JEFFERSON PLAZA NE
ALBUQUERQUE, NEW MEXICO 87109-3435

SPA-2023-418

09 Aug 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-2023-418]².

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.³ 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.⁴

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),⁵ the 2023 Rule as amended,

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 When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPA-2023-418]

as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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).

i. JKB Lateral Ditch is a water of the United States as an (a)(3) Tributary.

ii. North Wetlands 1, 3, 4, and 5 are not waters 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 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. **The review area for this AJD includes the 171-acre Northern Review Area (NRA) for the Garnett Mesa Solar Development Project. A separate AJD is also being processed for the 282-acre Southern Review Area (SRA) for the same project. The NRA is centered at latitude 38.746130°, longitude -107.963999°, and is generally located 5 miles east of the Town of Delta, Delta County, Colorado. The review area is depicted on the enclosed map created by the Corps, dated July 25, 2024.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The Colorado River at its confluence with the Gunnison River is the nearest downstream (a)(1) water, as it is both a Traditionally Navigable Water and Interstate Water at that location.

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

Any flows from the subject wetlands and the JKB Lateral Ditch contribute to flows within the East Canal. The East Canal converges with the Gunnison River, which then contributes perennial flows to the Colorado River, at a location near the 5th Street Bridge in the City of Grand Junction, Colorado.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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): **Two separate reaches, totaling approximately 4,399 linear feet (1.01 acres) of the JKB Lateral ditch are located within the NRA. This**

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.

ditch is primarily used for agricultural purposes and carries seasonal flows to the East Canal at a location outside of the NRA. The East Canal, which also has active flows from at least May to August, contributes flows to the Gunnison River. The Gunnison River contributes perennial flows to the Colorado River at a location where the Colorado River is an (a)(1) water of the United States. Therefore, the JKB Lateral Ditch is a water of the United States as an (a)(3) Tributary because it contributes relatively permanent flows to an (a)(1) water.

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

North Wetlands 1 (3.88 acres), 3 (0.10 acre), 4 (0.11 acre), and 5 (1.29 acres) are located within the NRA. All these wetlands have been found to be solely supported by artificial irrigation and would revert to dry land if irrigation ceased. Irrigation water for the wetlands within the NRA is delivered to agricultural hay fields located south and downslope of the JKB Lateral Ditch. Hydrology from the fields appears to rise to the surface at the toe of slope below the fields, where water saturates the soils sufficiently to create the subject wetlands. Similar nearby reference areas where no agricultural irrigation is occurring exhibit a general lack of vegetation, indicating that the subject wetlands are solely supported by water being applied to agricultural fields located upslope of the subject wetlands.

The majority of the NRA has a “Montrose Silty Clay Loam” soil (0-2% slope) which is described as well drained with no hydric soil rating and no restrictive layer or water table within the upper 80 inches. The soil type of the remaining area with the NRA has similar silty clay soils and a similarly deep water table. The NRA is located at approximately 5,000 feet elevation within the Arid West

⁸ 88 FR 3004 (January 18, 2023)

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ecological region and received less than 8 inches of overall annual precipitation.

Based on the hydrologic source and topographic position, wetlands labeled as North Wetlands 1, 3, 4, and 5 are solely supported by artificial irrigation and are excluded from being waters of the United States ((b)(4)).

- 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. **August 8, 2023, *Wetland Delineation Report Garnet Mesa Solar Development Project*, prepared by ERO Resources, Corporation.**
 - b. **May 14, 2024, Memo: *Request for Approved Jurisdictional Determination for the Garnet Mesa Solar Delta County, Colorado*, prepared by ERO Resource Corporation.**
 - c. **July 25, 2024, Corps Northern Review Area Map SPA-2024-418.**

10. OTHER SUPPORTING INFORMATION.

A separate AJD is being issued for a distinct review area referred to as the Southern Review Area (SRA) for the same Garnet Mesa Solar Development Project. Both AJDs and any Department of Army (DA) permits for either the SRA or NRA will be issued under the same DA file number, SPA-2024-148.

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



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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

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).
 - i. **Irrigation Ditch Network (6.07 acres) is a water of the United States as an (a)(3) Tributary.**
 - ii. **Southern Wetlands 1, 2, 3, and 4 are not waters 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 61964 (September 8, 2023))
- c. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. **The review area for this AJD includes the 284-acre Southern Review Area (SRA) for the Garnett Mesa Solar Development Project. A separate AJD is also being processed for the 171-acre Northern Review Area (NRA) for the same project. The SRA is centered at latitude 38.742705°, longitude -107.963921° and is generally located 5 miles east of the Town of Delta, Delta County, Colorado. The review area is depicted on the enclosed map created by the Corps, dated July 25, 2024.**

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.

The Colorado River at its confluence with the Gunnison River is the nearest downstream (a)(1) water, as it is both a Traditionally Navigable Water and Interstate Water at that location.

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

Any flows from the subject wetlands or the irrigation ditch network contribute to flows within the East Canal. The East Canal converges with the Gunnison River, which then contributes perennial flows to the Colorado River, at a location near the 5th Street Bridge in the City of Grand Junction, Colorado.

6. SECTION 10 JURISDICTIONAL WATERS⁶: 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): **The subject Irrigation Ditch Network, totaling approximately 5.3 miles of ditch (6.07 acres) is located within the SRA. The**

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.

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ditch network is interconnected at various locations with flows generally heading north, where it converges with the East Canal at a location outside of the SRA. Water within the ditch network is used solely for agricultural purposes and flows are active from at least May to August. The East Canal, which also has active flows from at least May to August, contributes flows to the Gunnison River. The Gunnison River contributes perennial flows to the Colorado River at a location where the Colorado River is an (a)(1) water of the United States. Therefore, the ditch network is a water of the United States as an (a)(3) Tributary because it contributes relatively permanent flows to an (a)(1) water.

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

South Wetlands 1 (0.10 acre), 2 (0.12 acre), 3 (0.17 acre), and 4 (0.70 acre) are located within the SRA. All these wetlands have been found to be solely supported by artificial irrigation and would revert to dryland if irrigation ceased. There are two primary locations along the southern boundary of the SRA where off-site irrigation water enters the SRA from man-made irrigation ditches. Both of these ditches receive water from a primary canal that generally travel across the slope, from the southeast to the southwest. The irrigation network within the SRA involves several laterals that both distribute and collect irrigation water and transport any flows off-site to the north. Wetlands in the SRA are located directly adjacent to and within the network of irrigation ditches.

The area surrounding the wetlands and irrigation ditches has no natural stream courses and has been graded flat with a slight slope towards the north. Irrigation has been applied to SRA for the past several decades for the production of agricultural hay. Land areas within the SRA and outside the SRA

⁸ 88 FR 3004 (January 18, 2023)

are arid and generally lack vegetation where irrigation water is not being applied. Striations in the hay fields provide evidence of water management on the site and suggest that vegetation is dependent on irrigation water.

The majority of the SRA has a “Montrose Silty Clay Loam” soil (0-2% slope) which is described as well drained with no hydric soil rating and no restrictive layer or water table within the upper 80 inches. The soil type of the remaining area with the SRA has similar silty clay soils and a similarly deep water table. The SRA is located at approximately 5,000 feet elevation and within the Arid West ecological region and received less than 8 inches of overall annual precipitation.

Based on the hydrologic source and topographic position, wetlands labeled as South Wetlands 1, 2, 3, and 4 are solely supported by artificial irrigation and are excluded from being waters of the United States ((b)(4)).

- 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.**
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 - b. **May 14, 2024, Memo: *Request for Approved Jurisdictional Determination for the Garnet Mesa Solar Delta County, Colorado*, prepared by ERO Resource Corporation.**
 - c. **July 25, 2024, Corps Southern Review Area Map SPA-2024-418.**

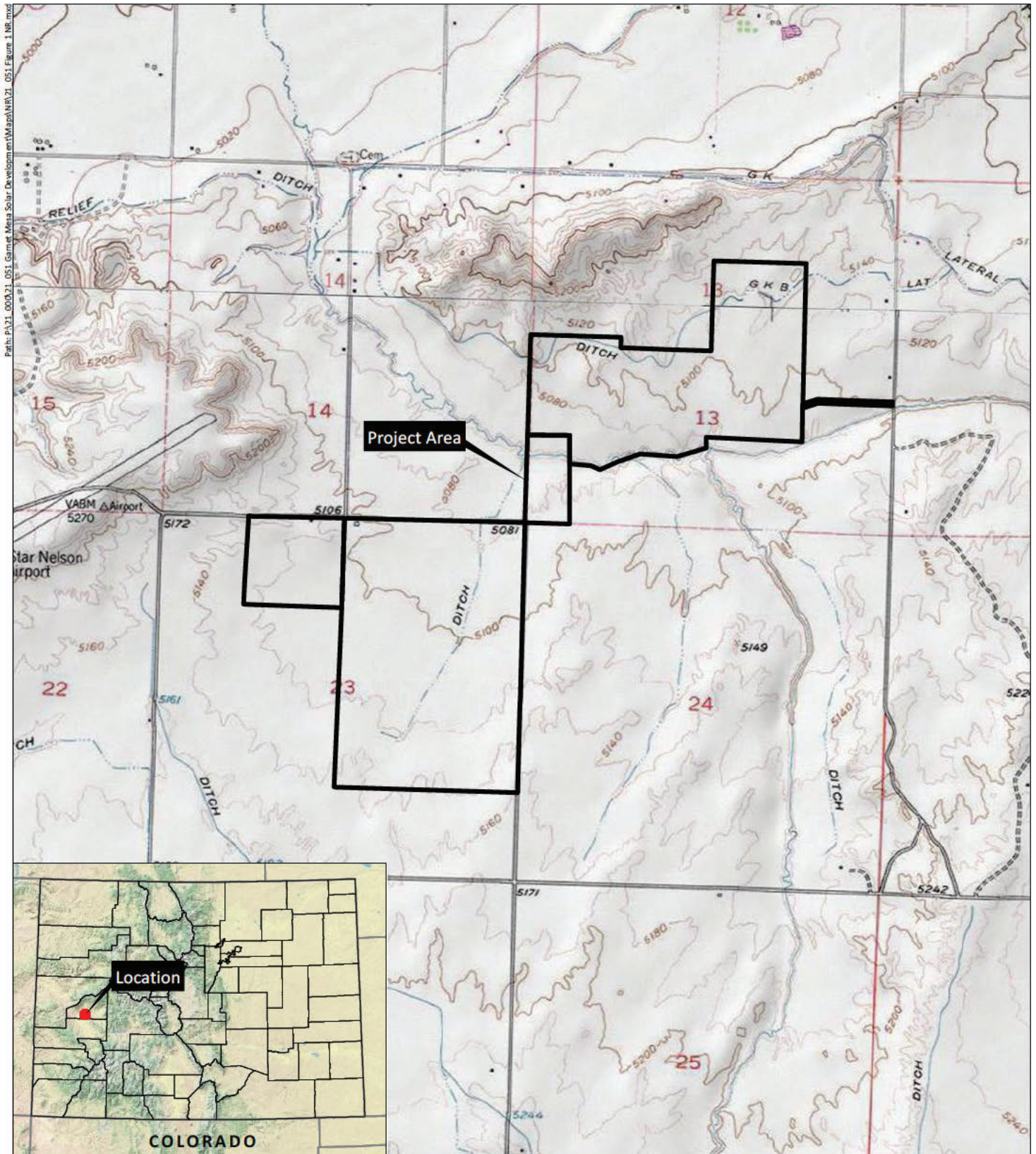
10. OTHER SUPPORTING INFORMATION.

A separate AJD is being issued for a distinct review area referred to as the Northern Review Area (NRA) for the same Garnet Mesa Solar Development Project. Both AJDs and any Department of Army (DA) permits for either the SRA or NRA will be issued under the same file DA number, SPA-2024-148.

SPA-RDW

SUBJECT: 2023 Rule, as amended, Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), [SPA-2023-418]

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



Garnet Mesa Solar Development

Sections 13 and 23, T15S, R95W; 6th PM

UTM NAD 83: Zone 13N; 241848mE, 4292415mN

Longitude 107.970238°W, Latitude 38.742705°N

USGS Olathe NW and Orchard City, CO Quadrangles

Delta County, Colorado

0 1,000 2,000
Feet
1:24,000



Figure 1
Vicinity Map

Prepared for: Garnet Mesa Solar, LLC
File: 21_051 Figure 1 NR.mxd (WH)
July 28, 2023

Garnet Mesa Solar

AJD Map- Northern Review Area

Created by Corps: July 25, 2024

Northern
Review Area
Boundary

JKB Lateral Ditch

North Wetland 1

North Wetland 4

North Wetland 3

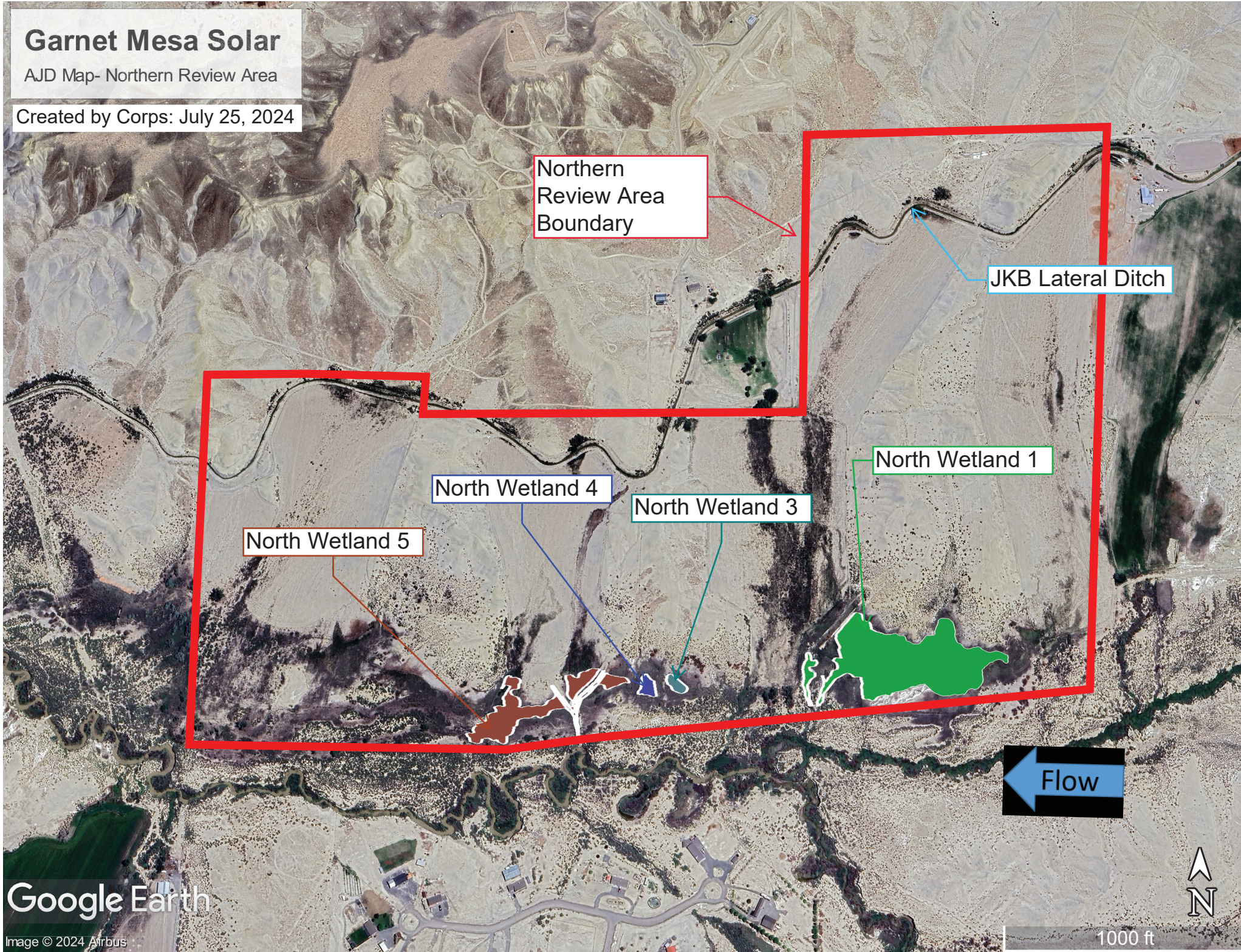
North Wetland 5

Flow

Google Earth

Image © 2024 Airbus

1000 ft



Garnet Mesa Solar

AJD Map- Southern Review Area

Created by Corps: July 25, 2024

Southern
Review Area
Boundary

South Wetland 1

South Wetland 2

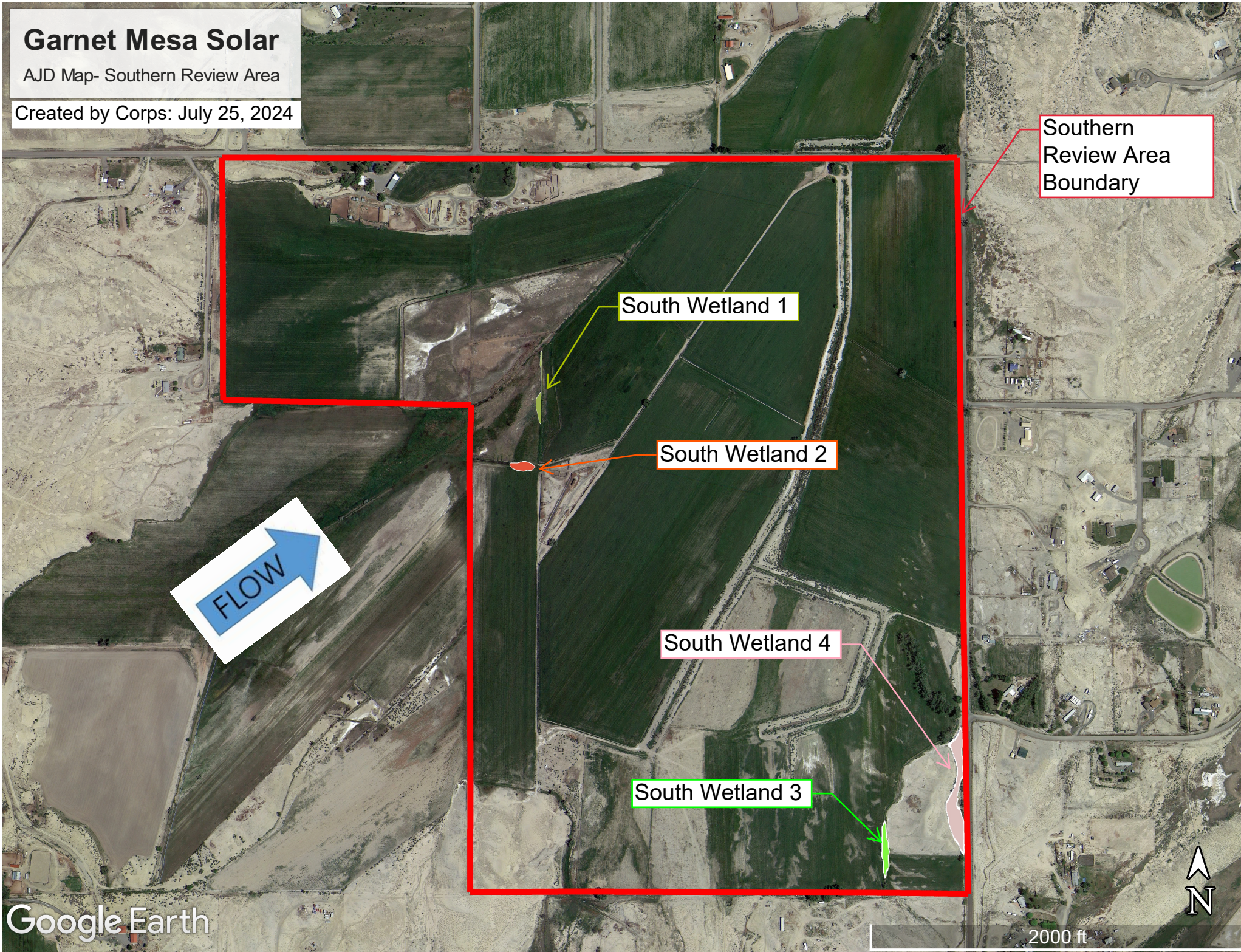
South Wetland 4

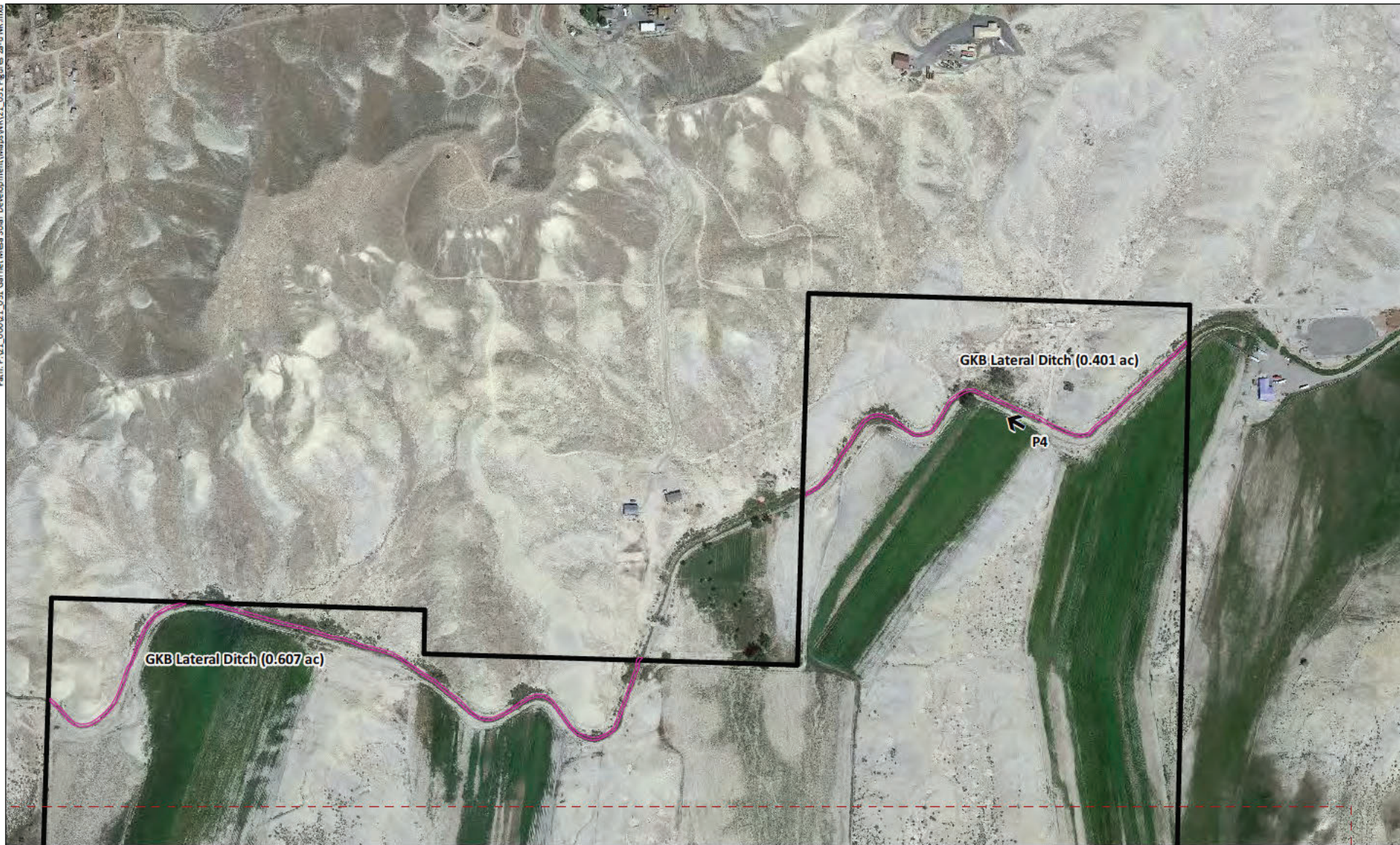
South Wetland 3

FLOW

Google Earth

2000 ft





Garnet Mesa Solar Development

Image Source: Google© Earth August 25, 2019

- Drain Wetland (2.844 ac)
- Wetland (7.966 ac)
- Nontributary Lateral Ditch (1.008 ac)
- Ordinary High Water Mark (1.047 ac)
- Unnamed Lateral Ditch/Drain (4.010 ac)
- Soil Pit
- Jurisdictional Wetland (all other wetlands are potentially non-jursidcitional)
- Project Area Boundary (490.471 ac)
- Map Grid/Matchline

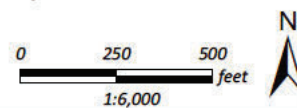


Figure 2a
Wetlands and
Waters of the U.S.

Prepared for: Garnet Mesa Solar LLC
File: 21_051 Figures 2a-d NR.mxd (WH)
August 4, 2023



Garnet Mesa Solar Development

Image Source: Google© Earth August 25, 2019

- Drain Wetland (2.844 ac)
- Wetland (7.966 ac)
- Nontributary Lateral Ditch (1.008 ac)
- Ordinary High Water Mark (1.047 ac)
- Unnamed Lateral Ditch/Drain (4.010 ac)
- Soil Pit
- ▨ Jurisdictional Wetland (all other wetlands are potentially non-jurisdictional)
- Project Area Boundary (490.471 ac)
- - - Map Grid/Matchline

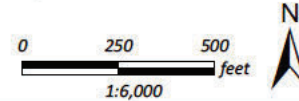


Figure 2b
Wetlands and
Waters of the U.S.

Prepared for: Garnet Mesa Solar LLC
File: 21_051 Figures 2a-d NR.mxd (WH)
August 4, 2023



Garnet Mesa Solar Development

Image Source: Google© Earth August 25, 2019

- Drain Wetland (2.844 ac)
- Wetland (7.966 ac)
- Nontributary Lateral Ditch (1.008 ac)
- Ordinary High Water Mark (1.047 ac)
- Unnamed Lateral Ditch/Drain (4.010 ac)
- Soil Pit
- Jurisdictional Wetland (all other wetlands are potentially non-jurisdictional)
- Project Area Boundary (490.471 ac)
- Map Grid/Matchline

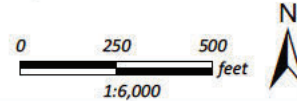
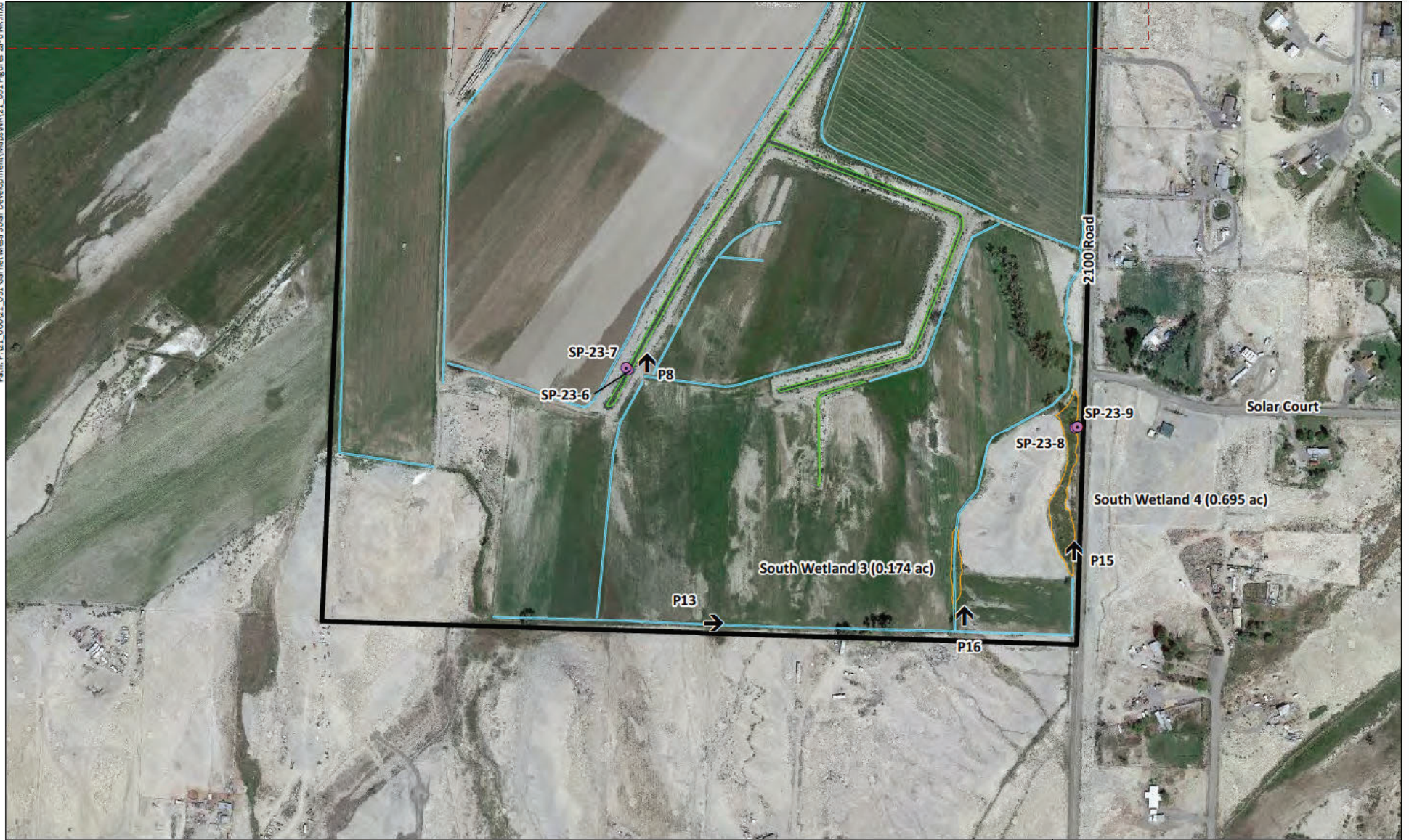











Figure 2c
Wetlands and
Waters of the U.S.

Prepared for: Garnet Mesa Solar LLC
File: 21_051 Figures 2a-d NR.mxd (WH)
August 4, 2023



Garnet Mesa Solar Development

Image Source: Google© Earth August 25, 2019

-  Drain Wetland (2.844 ac)
-  Wetland (7.966 ac)
-  Nontributary Lateral Ditch (1.008 ac)
-  Ordinary High Water Mark (1.047 ac)
-  Unnamed Lateral Ditch/Drain (4.010 ac)
-  Soil Pit
-  Jurisdictional Wetland (all other wetlands are potentially non-jursidcitional)
-  Project Area Boundary (490.471 ac)
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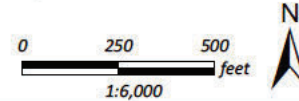


Figure 2d
Wetlands and
Waters of the U.S.

Prepared for: Garnet Mesa Solar LLC
File: 21_051 Figures 2a-d NR.mxd (WH)
August 4, 2023