



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT
201 WEST 8TH STREET, SUITE 350
PUEBLO, CO 81003-3040

January 18, 2024

CESPA-RDS

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-2022-00496².

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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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. W-1, is not a water of the United States
 - ii. W-2, is not a water of the United States
 - iii. W-3, is not a water of the United States
 - iv. W-4, is 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 61964 (September 8, 2023)
- c. *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area consists of an 854-acre parcel located at approximately Latitude 37.574789, Longitude -104.707415, Section 30-31, Range 28S, Township 65W, Huerfano County, Colorado. The applicant has requested the review of four (4) aquatic resources located within the review (i.e., W-1, W-2, W-3, & W-4)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The aquatic resources within the review area have no connection to a TNW, territorial sea, or interstate water.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The aquatic resources onsite do

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not have a surface water connection to a TNW. There were no flow paths identified between the aquatic resources within the review area and the Mayne Arroyo to the west.

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

- 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).

W-1 is a 0.05-acre palustrine emergent wetland located on the fringe of a stock pond (W-2), which was constructed in uplands and is surrounded by anthropogenically constructed earthen berms for the purpose of watering stock. Since W-1 is a wetland fringe and part of a constructed stock pond, it is considered a (b)(5) exempt water.

W-2 is a 0.66-acre stock pond, which was constructed in uplands and is surrounded by anthropogenically constructed earthen berms for the purpose of watering stock. It is considered a (b)(5) exempt water.

W-3 is a 0.52-acre stock pond which was constructed in uplands and is surrounded by anthropogenically constructed earthen berms for the purpose of watering stock. It is considered a (b)(5) exempt water.

W-4 is a 0.77-acre palustrine wetland located immediately west of W-3 on the opposite side of a constructed earthen berm. W-4 is located within a low spot near the base of the constructed berm. Wetland hydrology is supported by flows from the surrounding uplands and from stormwater runoff from Interstate-25 located approximately 975-feet to the west and as indicated by a discontinuous swale in the direction of W-4. Indications of a surface water connection (e.g., ordinary high-water mark (OHWM) or depressional swale) between W-4 and the Mayne Arroyo to the west were not identified after review of Google Earth aerial

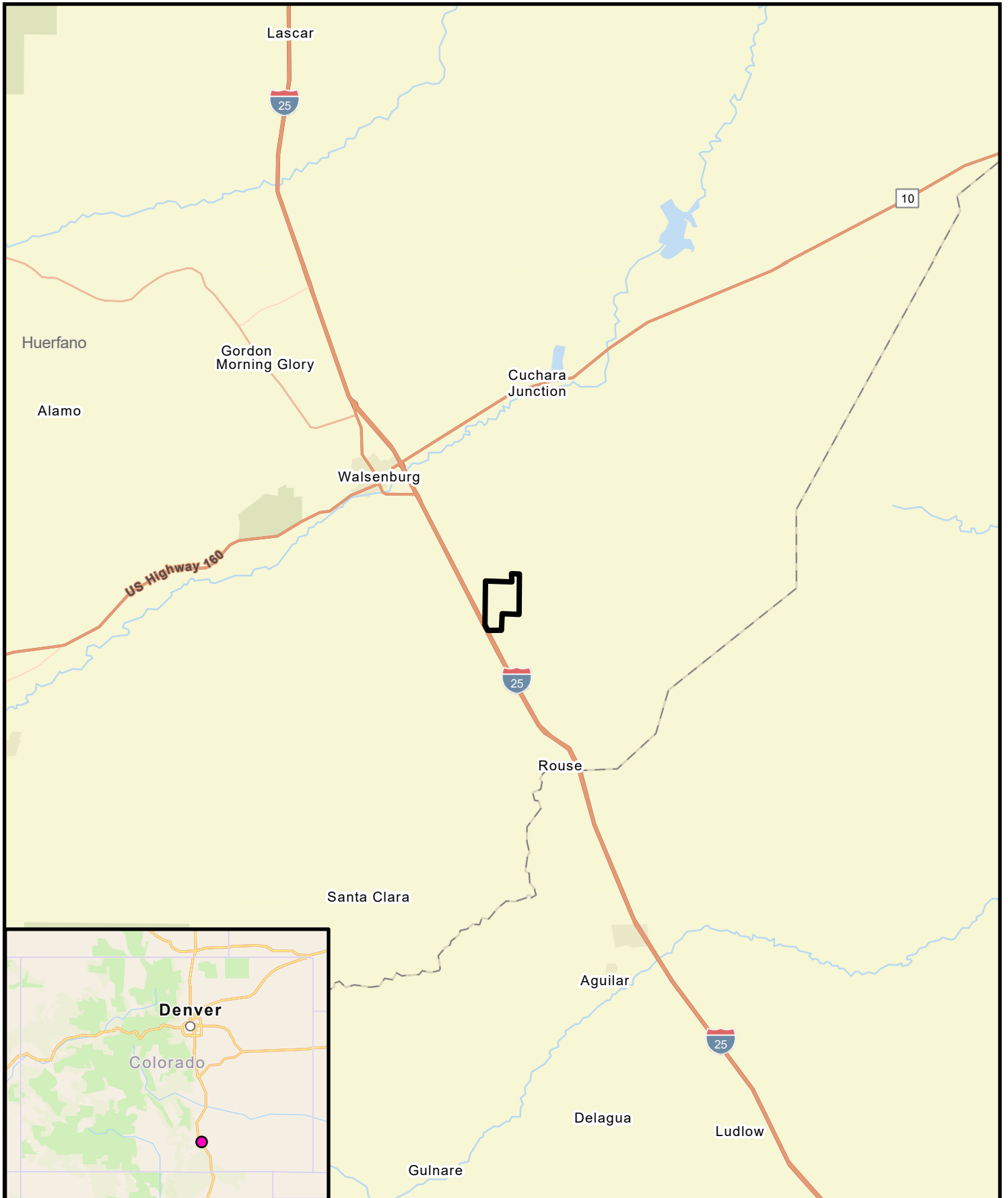
⁸ 88 FR 3004 (January 18, 2023)

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imagery between the years of 1999 to 2022 and Digital Globe aerial imagery between the years of 2021 to 2023. W-4 does not meet the definition of an (a)(2) through (a)(5) water of the U.S.

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. USGS StreamStats Report (Accessed 5/8/2023)
 - b. USGS National Hydrography Dataset (Accessed 5/8/2023)
 - c. Google Earth imagery (9/2022, 5/2020, 10/2015, 9/2013, 4/2012, 8/2006, 3/2006, 10/2005, 9/2004, 9/1999)
 - d. Digital Globe imagery (2/2023, 12/2022, 4/2022, 11/2021)
10. OTHER SUPPORTING INFORMATION. Aquatic resource delineation submitted by the applicant titled *Pine Gate Renewables Bear Claw Solar Project, Wetland Delineation Report*, dated March 16, 2023.
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



 Survey Area

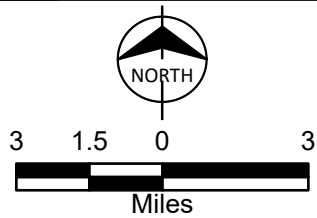
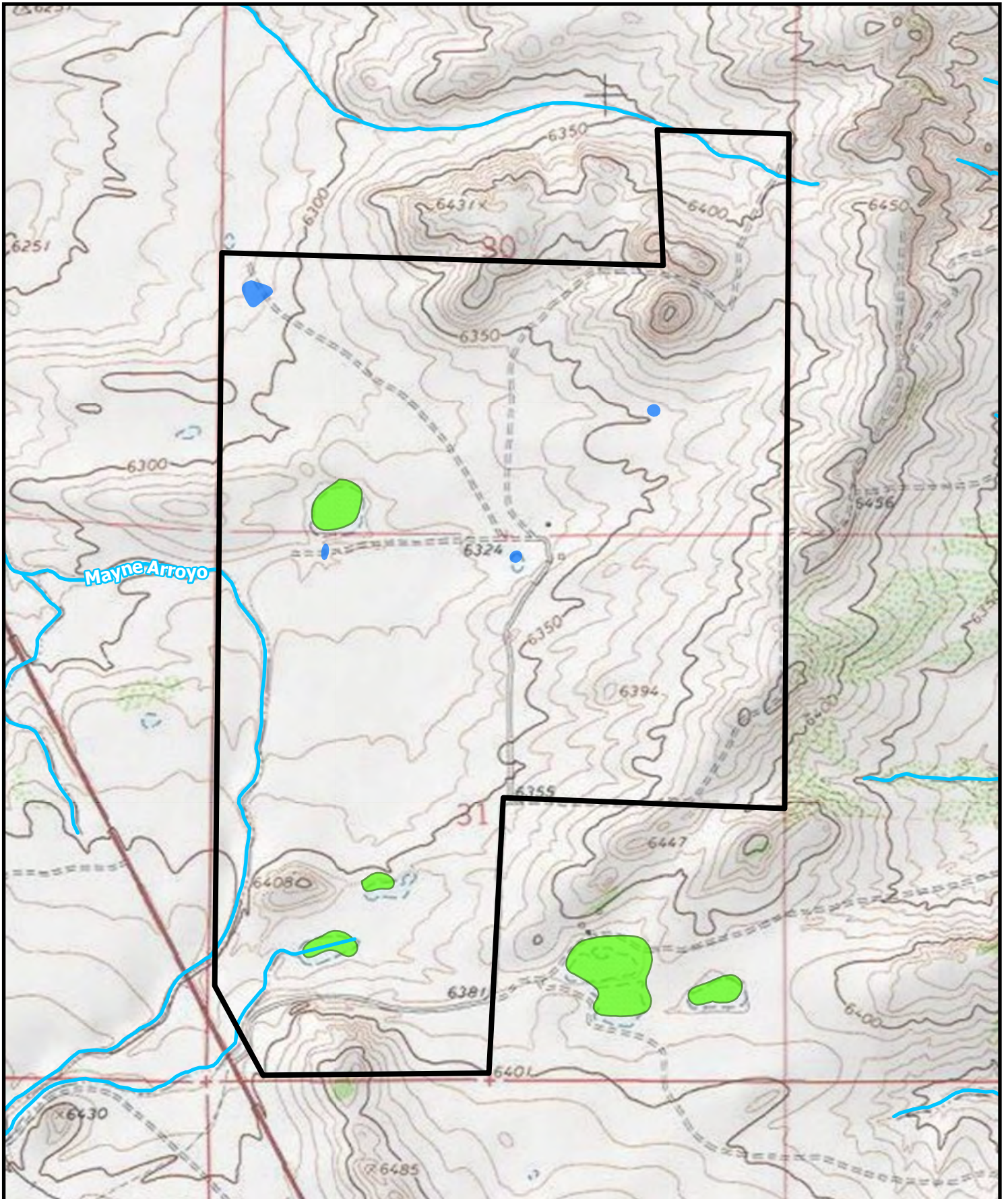






Figure A-1
General Vicinity Map
Bear Claw Solar Project
Huerfano County, Colorado



-  Survey Area
-  NHD Stream
- NWI Wetland**
-  PEM
-  PUS

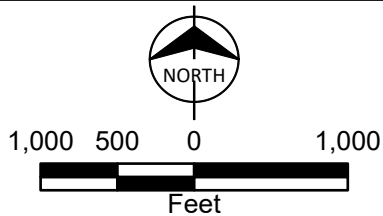
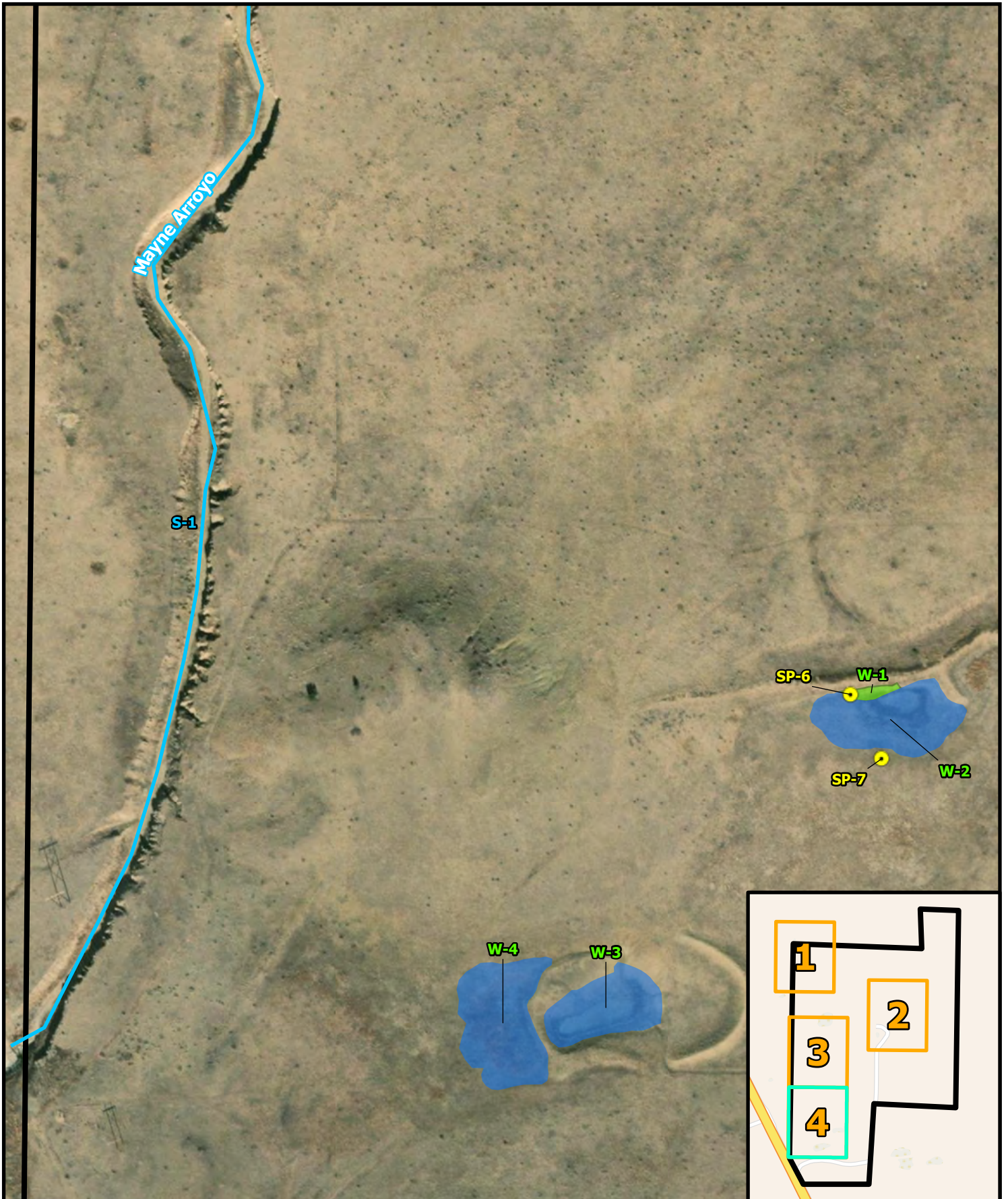


Figure A-2
USGS Topography and
NWI Wetlands Map
Project
Huerfano County, Colorado



Survey Area Wetland Type
● Sample Plot ■ PEM
— Stream ■ PUB

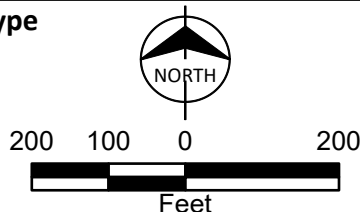


Figure A-4
Wetland Delineation Map
Bear Claw Solar Project
Huerfano County, Colorado
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