DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
5151 FLYNN PARKWAY, SUITE 306
CORPUS CHRISTI, TEXAS 78411-4318

Corpus Christi Field Office September 30, 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023) ,[1] SWG-2023-00451

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] For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),[4] the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in Texas due to litigation.

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[1] While the Supreme Court’s decision in *Sackett* 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).

      i. Wetland 1 (2.72 acres), PEM wetland, 25.992528 N, 97.437523 W, non-adjacent, non-jurisdictional

      ii. Ditch 1 (4.67 acres/5,987 linear feet), (a)(5) tributary, 25.99456 N, 97.445545 W, RPW, jurisdictional, Section 404

      iii. Ditch 2 (0.10 acre/142 linear feet), (a)(5) tributary, 25.99467 N, 97.449657 W, RPW, jurisdictional, Section 404

2. REFERENCES.

   a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).

   b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).

   c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)

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

3. REVIEW AREA. The approximately 487-acre review area is located near Old Port Isabel Road and is approximately 0.4 mile north of Highway 550 in Brownsville, Cameron County, Texas. Latitude: 25.996935 N, Longitude: 97.445570 W

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. San Martin Lake, an extension of the Bahia Grande

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Ditch 1 begins at an outfall from Highway 550 and flows east approximately 3,187 feet (including 1,645 feet within the Review Area) to its confluence with Ditch 2. Ditch 2 begins at an outfall from State Highway 550 and flows north approximately 2,165 feet (including 147 feet inside the Review Area) to its confluence with Ditch 1. From its confluence with Ditch 2, Ditch 1 flows approximately 6,400 feet (including 4,342 feet inside the Review

Area) east and southeast into Loma Alta Lake, that drains through approximately 1.97 miles of drainage ditch into the Rancho Viejo Floodway, that flows approximately 2.4 miles northeast into San Martin Lake, an extension of the Bahia Grande which is subject to the ebb and flow of the tide through the Brownsville Ship Channel, a Traditional Navigable Water.

6. SECTION 10 JURISDICTIONAL WATERS[5]: 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.[6] 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 pre-2015 regulatory regime and 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 pre-2015 regulatory regime. 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. TNWs (a)(1): N/A

   b. Interstate Waters (a)(2): N/A

   c. Other Waters (a)(3): N/A

   d. Impoundments (a)(4): N/A

[5] 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.

[6] 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.

e. Tributaries (a)(5): **Ditch 1 and Ditch 2:** LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that Ditches 1 and 2 have an ordinary high water mark and maintain relatively permanent flow to Loma Alta Lake. Loma Alta Lake drains through approximately 1.97 miles of drainage ditch into the Rancho Viejo Floodway, that drains directly into San Martin Lake, an extension of the Bahia Grande which is subject to the ebb and flow of the tide through the Brownsville Ship Channel, a Traditional Navigable Water. Ditches 1 and 2 are waters of the United States subject to Section 404 of the Clean Water Act.

f. The territorial seas (a)(6): N/A

g. Adjacent wetlands (a)(7): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).[7] Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A

b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. N/A

c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. N/A

d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A

[7] 51 FR 41217, November 13, 1986.

e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in "*SWANCC*," would have been jurisdictional based solely on the "Migratory Bird Rule." Include the size of the aquatic resource or feature, and how it was determined to be an "isolated water" in accordance with *SWANCC*. N/A

f. 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 pre-2015 regulatory regime consistent with the Supreme Court's decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland 1 (2.72 acres): LiDAR, topo, aerial imagery, site visit photos, and wetland delineation field data forms were utilized as part of the desktop analysis to identify that this palustrine emergent wetland resides in a depressional area entirely within the review area that collects rainwater from the surrounding countryside. There is no presence of a continuous surface connection from Wetland 1 to Ditch 1 or any water of the United States through a swale, ditch, tributary, or culvert due to slight elevation changes, with no more than overland sheet flow exiting from this wetland to Ditch 1. This wetland does not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and is not a water of the United States.

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. Aerials (1950, 1996, 2014, 2018, 2022, 2023; source: Google Earth)

b. USGS Topographic Map East Brownsville, TX and 1:24,000 Los Fresnos, TX

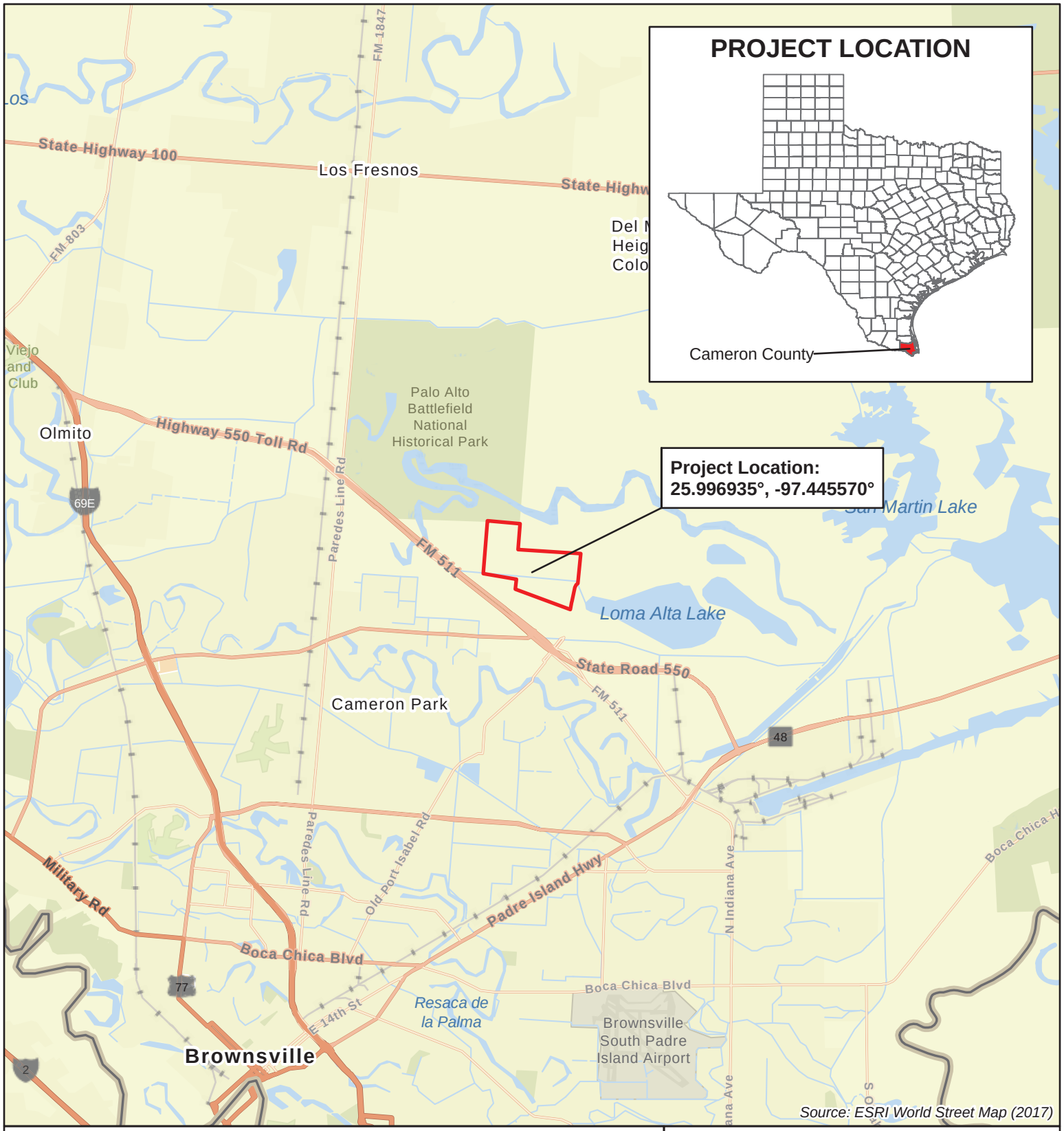
c. Web Soil Survey Hydric Rating Map for Aransas County, Texas (NRCS website accessed March 4, 2024)

d. National Wetland Inventory (NWI) (USFWS website accessed March 4, 2024)

e. National Hydrologic Dataset (NHD) – 12110208 Brownsville Ship Channel

10. OTHER SUPPORTING INFORMATION. N/A

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.



Legend

Project Area

N

0 1 2 4 Miles

1 inch = 2 mile

FIGURE 1
VICINITY MAP

487 AC SITE
BROWNSVILLE
CAMERON COUNTY, TX 78526

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023392
Date: 1/4/2024

Source: USGS Topo East Brownsville & Los Fresnos, TX Quads (1983)

Legend

Project Area

N

0 1,000 2,000 4,000 6,000 Feet

1 inch = 2,000 feet

FIGURE 2
TOPOGRAPHIC MAP

487 AC SITE
BROWNSVILLE
CAMERON COUNTY, TX 78526

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023392
Date: 1/4/2024

Legend

- Project Area

Delineated Feature

- PEM Wetland
- Drainage Ditch

0 500 1,000 2,000 3,000 Feet

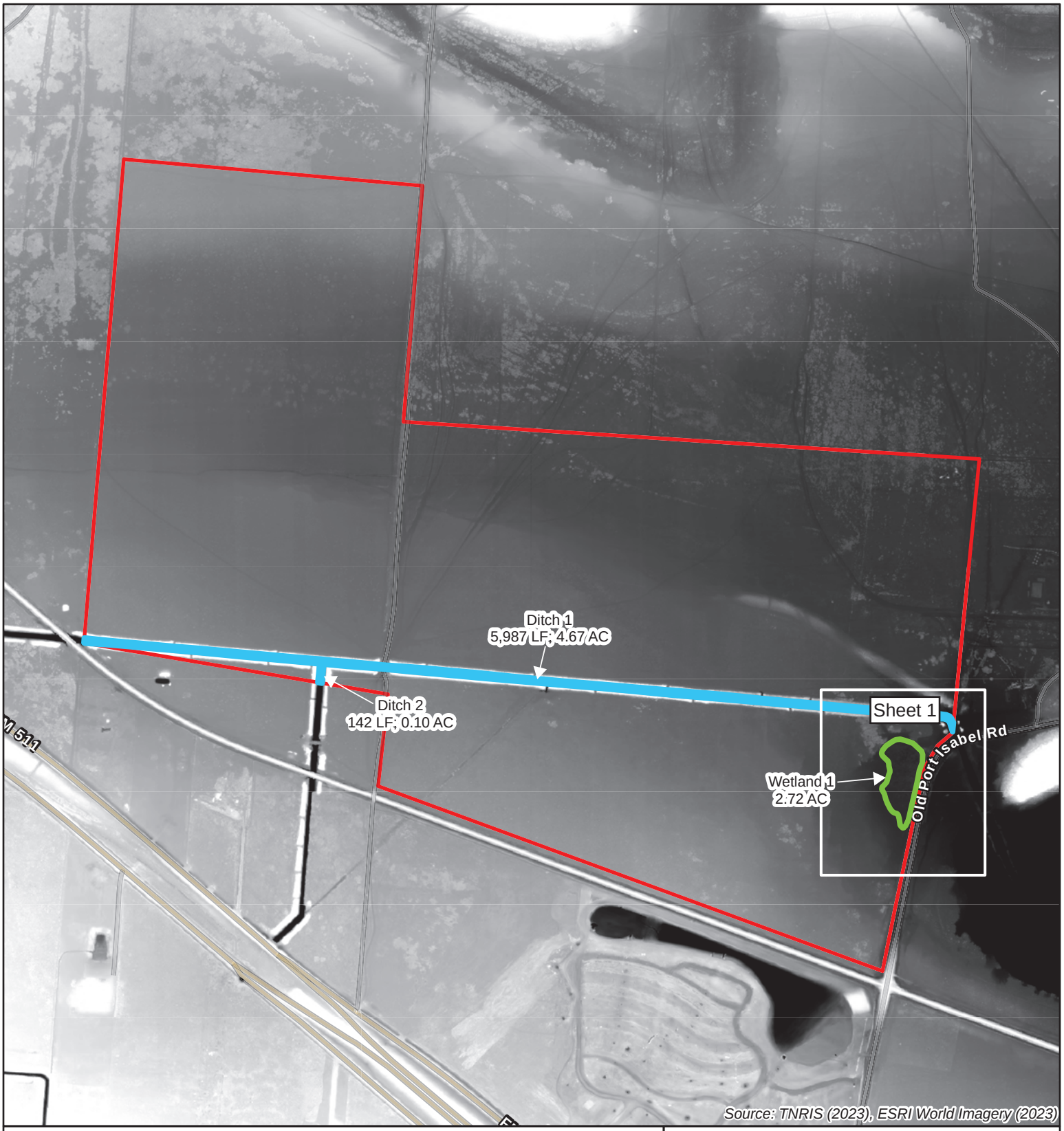
1 inch = 1,000 feet

N

FIGURE 9
DELINEATED FEATURES MAP

487 AC SITE
BROWNSVILLE
CAMERON COUNTY, TX 78526

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023392
Date: 1/4/2024



Legend

Project Area

Elevation

High: 22 feet

Low: 8 feet

Delineated Feature

PEM Wetland

Drainage Ditch

0 500 1,000 2,000 3,000 Feet

1 inch = 1,000 feet

N

DIGITAL ELEVATION MODEL WITH DELINEATED FEATURES MAP

487 AC SITE
BROWNSVILLE
CAMERON COUNTY, TX 78526

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023392
Date: 3/29/2024

Legend

Project Area

Elevation

High: 22 feet

Low: 8 feet

Delineated Feature

PEM Wetland

Drainage Ditch

0 75 150 300 450 Feet

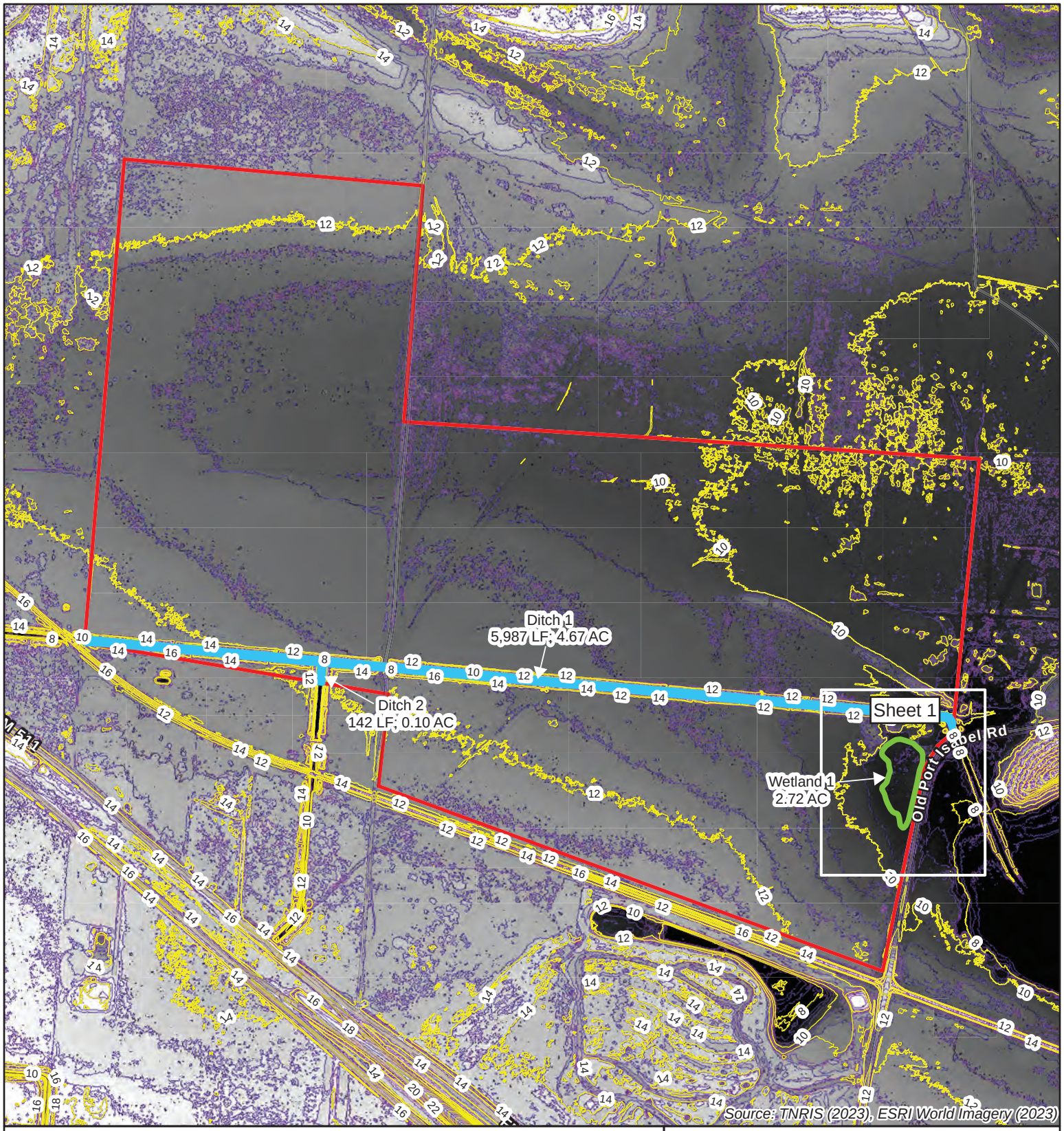
1 inch = 150 feet

N

SHEET 1
DIGITAL ELEVATION MODEL
WITH DELINEATED FEATURES MAP

487 AC SITE
BROWNSVILLE
CAMERON COUNTY, TX 78526

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023392
Date: 3/29/2024



Legend

- Project Area
- 2-foot Contour
- 6-inch Contour

Elevation

High: 22 feet

Low: 8 feet

Delineated Feature

- PEM Wetland
- Drainage Ditch

N

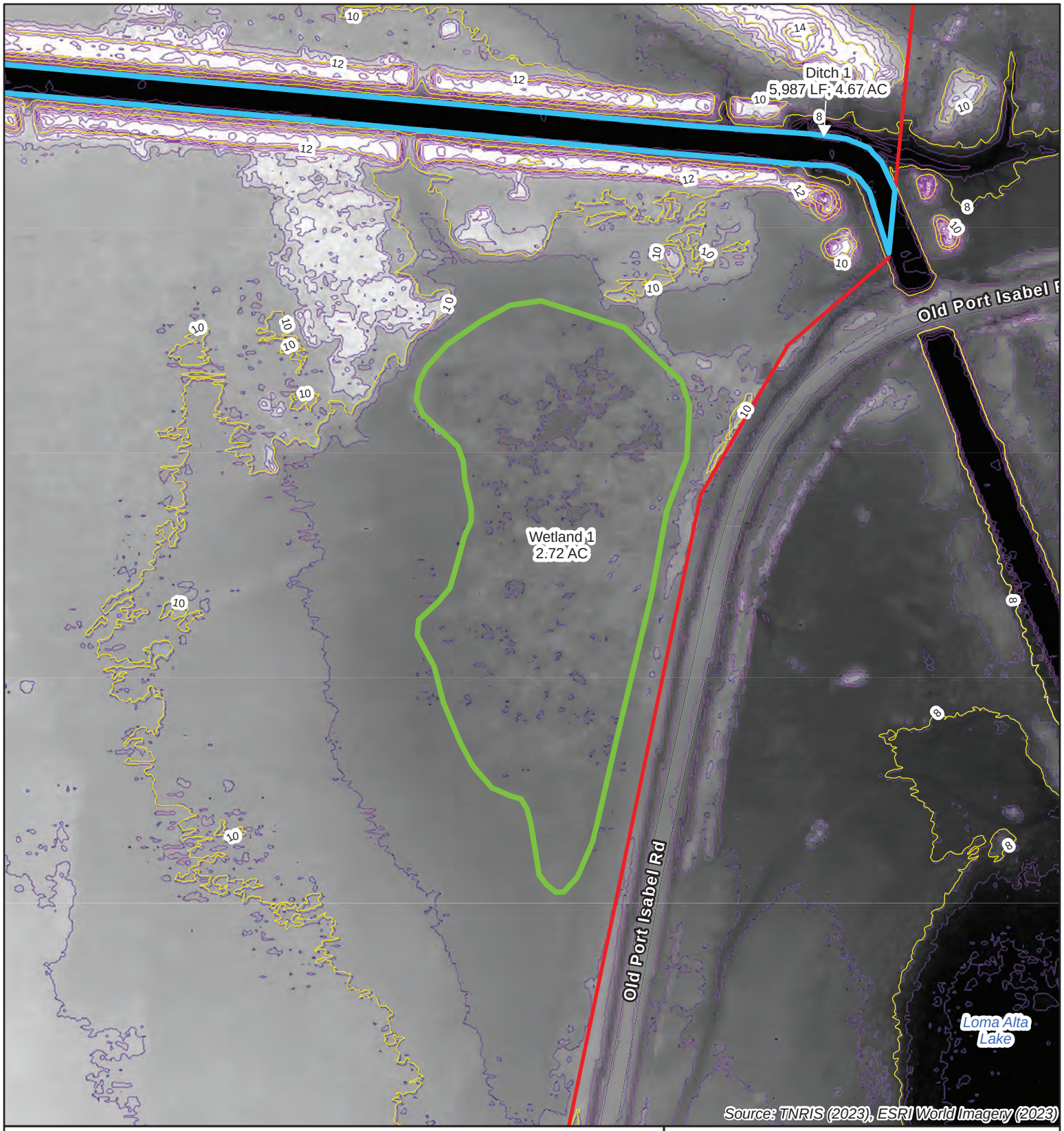
0 500 1,000 2,000 3,000 Feet

1 inch = 1,000 feet

DIGITAL ELEVATION MODEL WITH CONTOURS AND DELINEATED FEATURES MAP

487 AC SITE
BROWNSVILLE
CAMERON COUNTY, TX 78526

Prepared By: Cypress Environmental Consulting LLC
Project Number: 023392
Date: 3/29/2024



Legend

- Project Area
- 2-foot Contour
- 6-inch Contour

Elevation

High: 22 feet

Low: 8 feet

Delineated Feature

- PEM Wetland
- Drainage Ditch

N

0 75 150 300 450 Feet

1 inch = 150 feet

SHEET 1
DIGITAL ELEVATION MODEL WITH CONTOURS AND DELINEATED FEATURES MAP

487 AC SITE
BROWNSVILLE
CAMERON COUNTY, TX 78526

Prepared By: Cypress Environmental Consulting LLC
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