



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
2000 FORT POINT ROAD
GALVESTON, TEXAS 77550

CESWG-RD-C

13 August 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-2023-00754 MFR 1 of 1

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.

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. Prior Converted Cropland, 467.47 acres, non-jurisdictional, 29.659076, -94.414010
 - ii. Wetlands, 30.65 acres, non-jurisdictional, 29.654494, -94.419981
 - iii. Open Water, 14.81 acres, non-jurisdictional, 29.661247, -94.420546
 - iv. Wetland Fringe, 2.96 acres, non-jurisdictional, 29.662261, -94.420356
 - v. Man-made Ditches, 17.56 acres, jurisdictional, 29.658066, -94.415670

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 Bay Prairie Farm Mitigation Bank is located east of Anahuac National Wildlife Refuge and two miles southwest of the intersection of Farm-to-Market 1985 and State Highway 124, near High Island, Chambers County, Texas. The coordinates for the 537.45-acre mitigation bank are 29.660217, -94.415213.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. East Bay Bayou⁵

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

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. The man-made irrigation ditches flow from the project site through 2 culverted impoundments with a flap gate to East Bay Bayou. One impoundment is located at 29.658183, -94.420224 and the other impoundment is located at 29.650240, -94.419057. The impoundments are evaluated under a PJD.
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 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

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.

- d. Impoundments (a)(4): N/A
- e. Tributaries (a)(5): The man-made irrigation ditches have an ordinary high water mark and are tributaries. Based on a review of Google Earth aerial photos, the ditches have water in them in every photo and therefore, are relatively permanent. The irrigation ditches are used to flood the rice fields for crop growth and are also used to de-water the rice fields prior to harvest. The water from the rice fields flows through the irrigation ditches to two impoundments that allow the water to flow into East Bay Bayou, a TNW. The ditches appear to be created from uplands and drain only PCC rice fields and not wetlands. The ditches are relatively permanent and flow in to a TNW. Therefore, the man-made irrigation ditches are tributaries subject to Section 404.
- 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”).⁸ 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.
- 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

⁸ 51 FR 41217, November 13, 1986.

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.

The Corps and EPA will continue to generally rely on valid prior-converted cropland (PCC) designations made by USDA-NRCS for making determinations of the applicability of the PCC exclusion, provided that the PCC has not been abandoned. However, the final authority regarding Clean Water Act (CWA) jurisdiction remains with EPA. There are 467.47 acres of prior converted cropland in the mitigation bank. These parcels were designated as prior converted cropland by the NRCS in 2010. The applicant submitted crop history dated from 2010 to 2022; therefore, the parcels have not been abandoned and still qualify for PCC designation.

- 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*.

There are 4.15 acres of open water ponds with fringe wetlands in the mitigation bank. These ponds were constructed out of uplands before 1970 for aquaculture and then later used for irrigation. The ponds are not used for interstate or foreign travelers for recreational or other purposes, fish or shellfish are not taken and sold in interstate or foreign commerce and are not used for industrial purpose by industries in interstate commerce. The ponds are clay-lined; therefore, they do not have a shallow sub-surface connection to a Traditional Navigable Water. The ponds are not an impoundment of a tributary and do not flow to a Traditional Navigable Water, therefore, the ponds are not waters of the United States.

- 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).

Based on our desk review, the 30.65 acres of wetlands and 2.96 acres of fringe wetlands do not have any known continuous surface connection to any water of the United States. The wetlands and fringe wetlands are surrounded by clay berms; therefore, there is no shallow sub-surface connection to a Traditional Navigable Water. Visual inspection of the berms by Corps staff and the Inter-

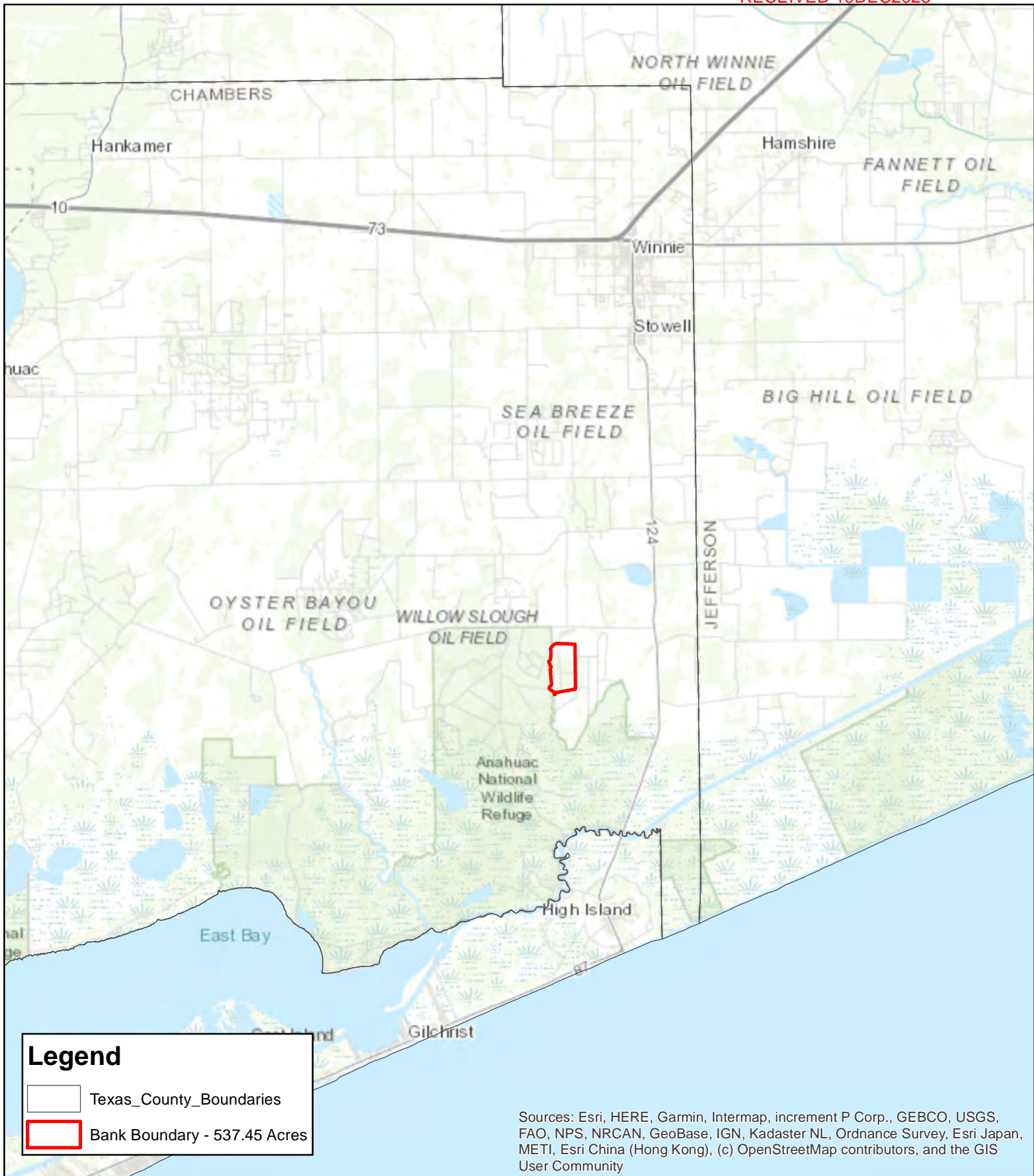
agency review team on April 18, 2024, did not detect any breaks in the berms. There are no swales, erosional features, ditches, or culverts that would potentially serve as continuous surface connections to the wetlands and fringe wetlands. The LiDAR Digital Elevation Map (DEM) and Google Earth aerial photos do not show any continuous surface connection between the wetlands and fringe wetlands and any Traditional Navigable Water. No more than overland sheet flow would exit the wetlands. The wetlands and fringe wetlands do not meet the definition of adjacent as defined in the pre-2015 regime post *Sackett* guidance and are not waters 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. Site visit April 18, 2024
- b. Google Earth aerials 1970 and 2024
- c. Approved Jurisdictional Determination Report dated December 19, 2023, submitted by applicant.
- d. Prior Approved Jurisdictional Determinations dated March 11, 2010, and March 29, 2018
- e. United States Geological Survey Quadrangles: Sea Breeze, Texas 1943 (1955 edition) and Stanolind Reservoir, Texas 1994

10. OTHER SUPPORTING INFORMATION. N/A

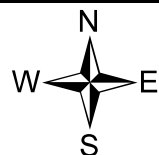
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional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



Site Location
 Bay Prairie Farm
 Chambers County, TX

Figure
 1

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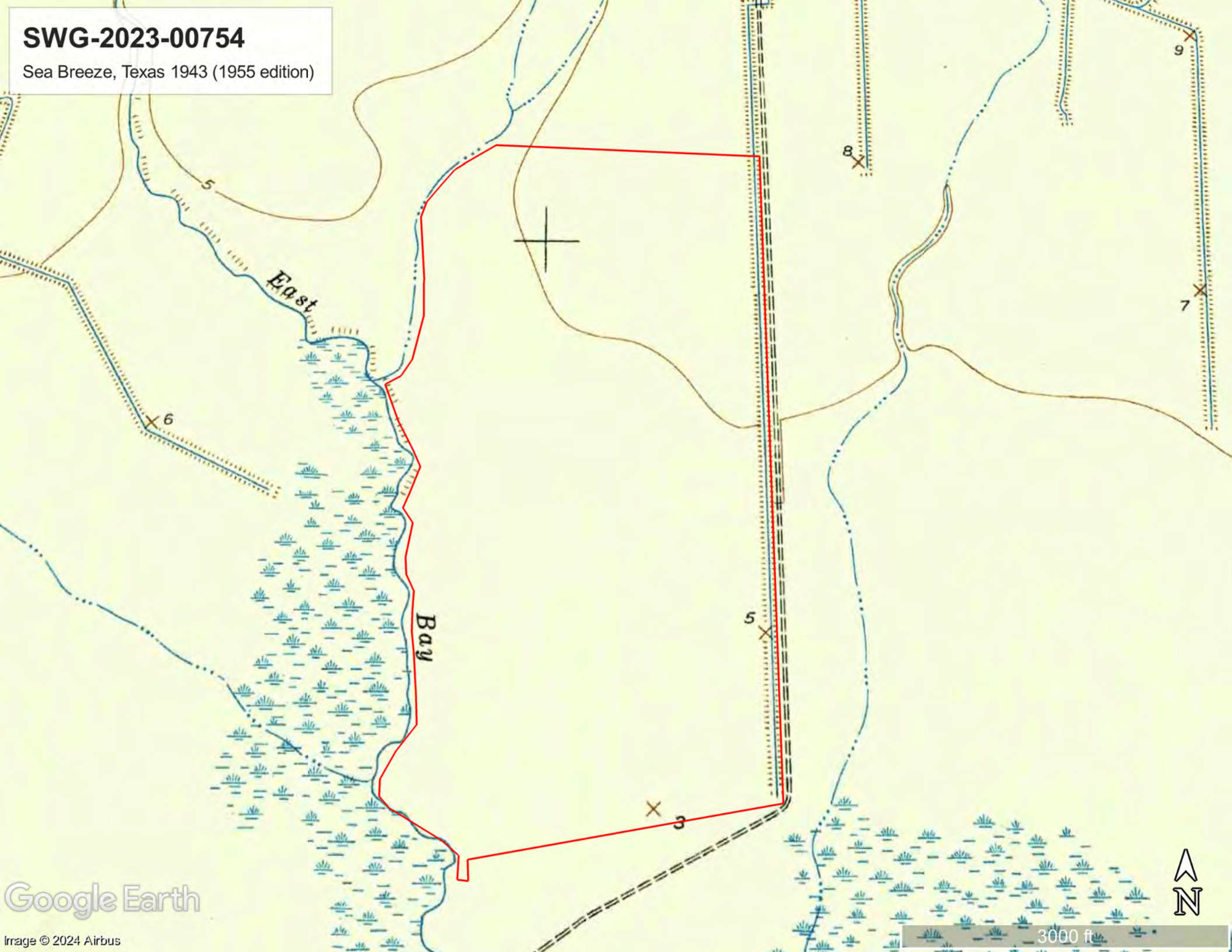


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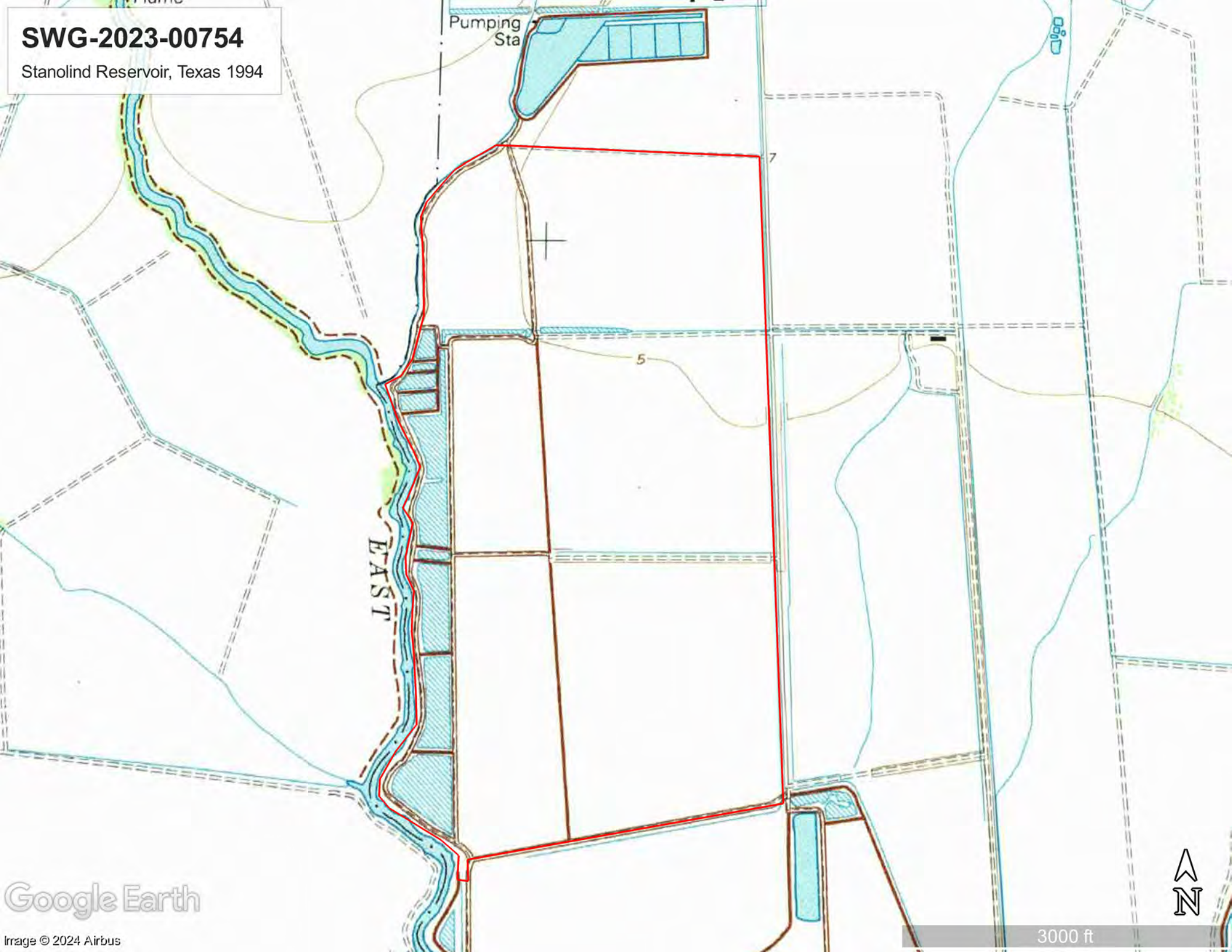
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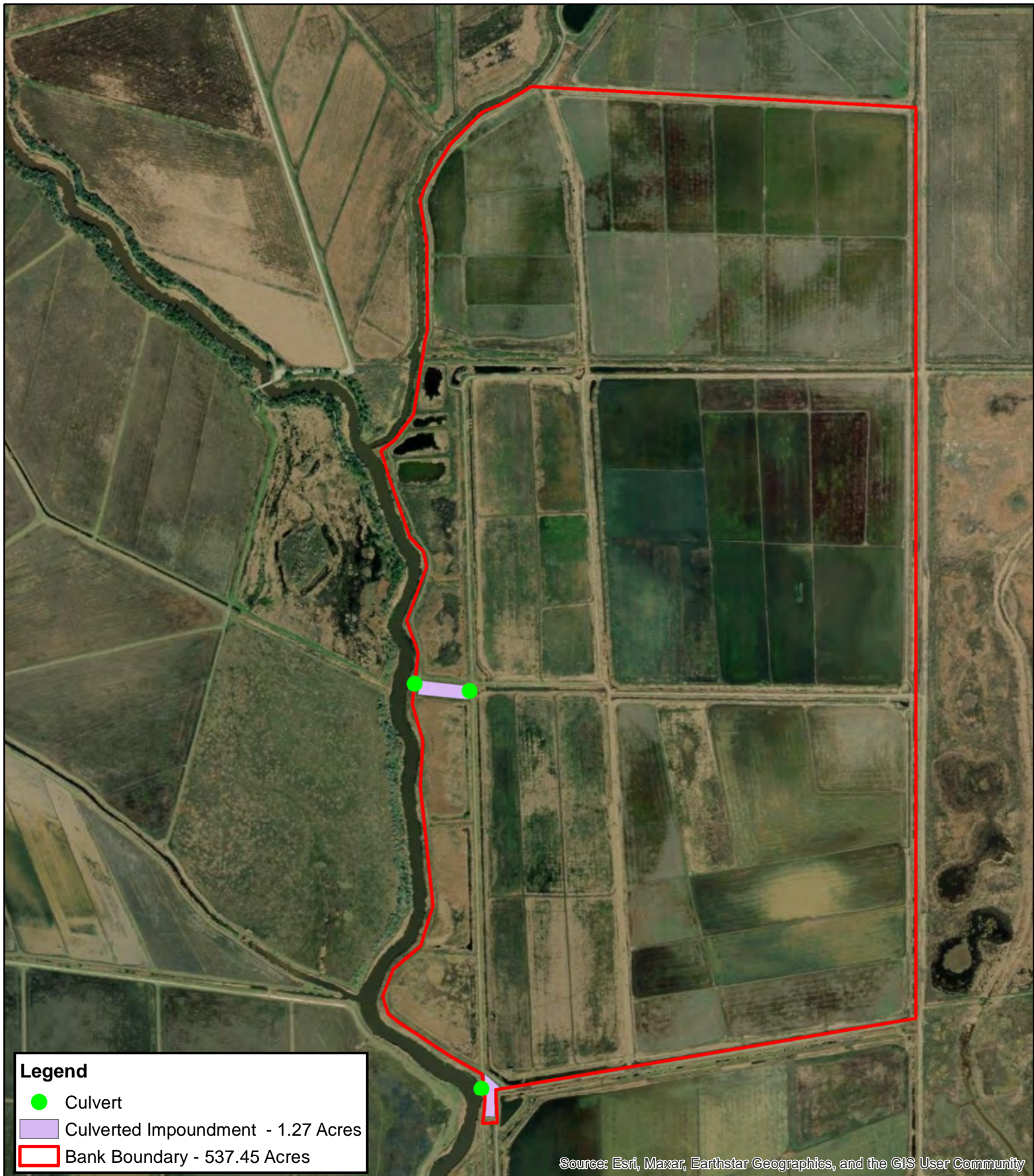
Sea Breeze, Texas 1943 (1955 edition)



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Stanolind Reservoir, Texas 1994





Preliminary Jurisdictional
Determination

Bay Prairie Farm
Chambers County, TX

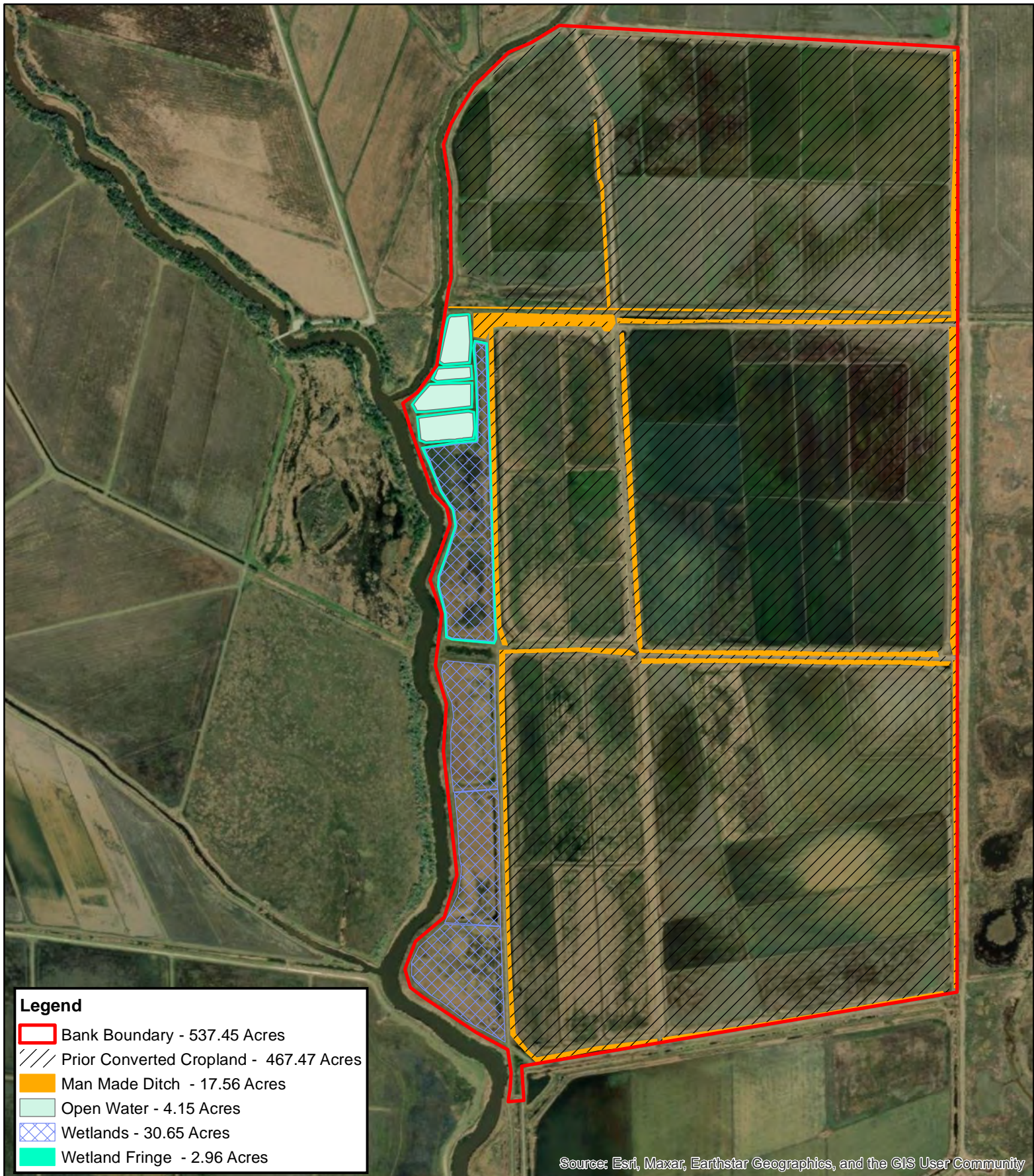
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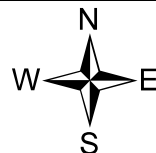


Approved Jurisdictional Determination

Bay Prairie Farm
Chambers County, TX

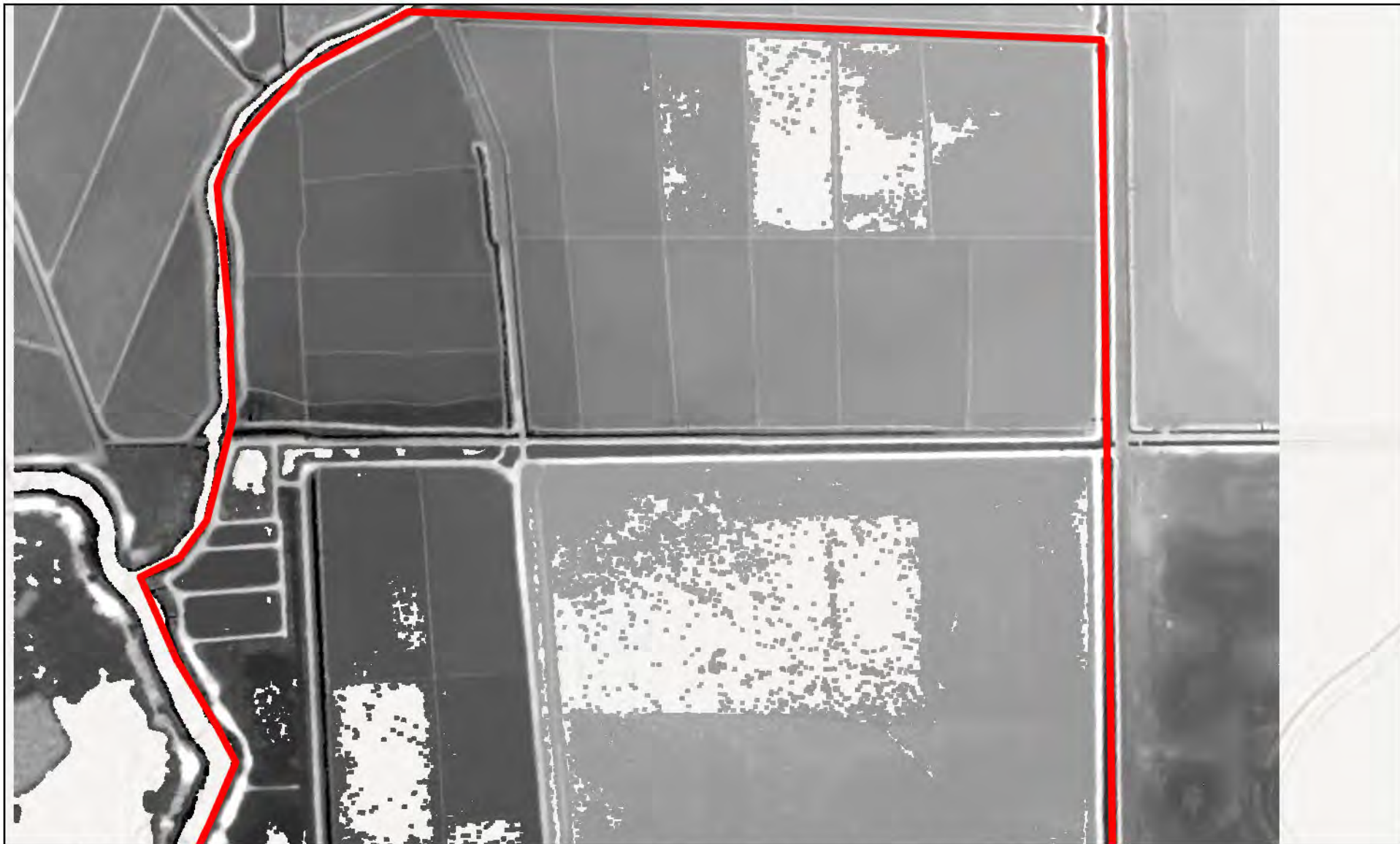
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Legend

Elevation



Bay Prairie Farm Mitigation Bank SWG-2023-00754

Esri, CGIAR, USGS, Sources: Esri, Airbus DS, USGS, NGA, NASA, CGIAR, N Robinson, NCEAS, NLS, OS, NMA, Geodatastyrelsen, Rijkswaterstaat, GSA, Geoland, FEMA, Intermap and the GIS user community, Texas Parks & Wildlife, Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USFWS, Esri Community Maps Contributors, Baylor University, Texas Parks & Wildlife,

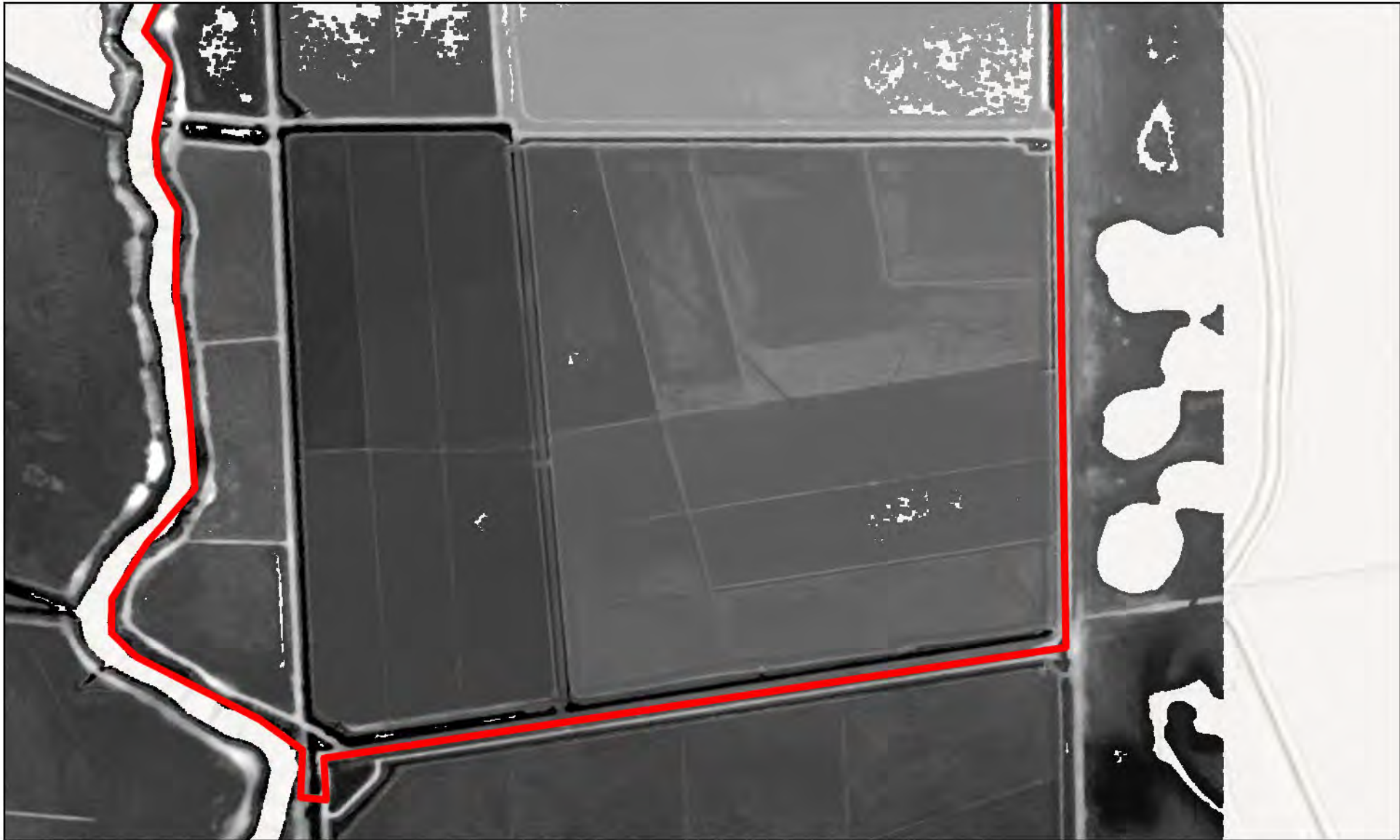
Texas Water
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LiDAR 2018

Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

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Legend

Elevation



Bay Prairie Farm Mitigation Bank SWG-2023-00754

Esri, CGIAR, USGS, Sources: Esri, Airbus DS, USGS, NGA, NASA, CGIAR, N Robinson, NCEAS, NLS, OS, NMA, Geodatastyrelsen, Rijkswaterstaat, GSA, Geoland, FEMA, Intermap and the GIS user community, Texas Parks & Wildlife, Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USFWS, Esri Community Maps Contributors, Baylor University, Texas Parks & Wildlife,

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