



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, SWF DISTRICT  
819 TAYLOR STREET, ROOM 3A37  
FORT WORTH, TEXAS 76102

CESWF-RDE

19 NOVEMBER 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),<sup>1</sup> SWF-2024-00503.

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.<sup>2</sup> 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.<sup>3</sup> For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>4</sup> 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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<sup>1</sup> 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.

<sup>2</sup> 33 CFR 331.2.

<sup>3</sup> Regulatory Guidance Letter 05-02.

<sup>4</sup> 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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## 1. SUMMARY OF CONCLUSIONS.

- a. The review area is comprised entirely of dry land (i.e., there are no waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like in the entire review area and there are no areas that have previously been determined to be jurisdictional.

There were no aquatic features found on site during field reconnaissance, which was supported by various data sources.

## 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. 2023, 143 S. Ct. 1322 (2023)

## 3. REVIEW AREA.

The project is generally located south of East US Highway 158 in Goldsmith, Ector County, Texas on 11.2 acres of undeveloped rangeland. The site appears to be located in the Upper Monahans Draw watershed (USGS Hydrologic Unit Code (HUC) 12-120800050305). Most of the site is undeveloped rangeland and has one distinct vegetation type, Hardland shortgrass. The soil type within the study area is Kimbrough-Stegall association (KSA), nearly level, and this soil is not located on the Ector County Hydric Soils List. According to the USGS Topographic map, there are no "blue line" features within the study area. The FEMA flood hazard map designates the entire site as FEMA Flood Zone X, Area of Minimal Flood Hazard (Map Panel 48135C0200E, eff. 3/15/2012). The USFWS NWI map does not identify any features within the study area. There were no aquatic features found during the site reconnaissance.

Center coordinates: 31.990878, -102.550718 (1983 NAD)

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. N/A, site is entirely on uplands.
5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS N/A, site is entirely on uplands.
6. SECTION 10 JURISDICTIONAL WATERS<sup>5</sup>: 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.<sup>6</sup> 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

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<sup>5</sup> 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.

<sup>6</sup> 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): N/A
- 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”).<sup>7</sup> 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
- 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

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<sup>7</sup> 51 FR 41217, November 13, 1986.

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- 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).  
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. Contractor field visit occurred on December 20, 2022; in-office USACE evaluation was conducted on November 18, 2024.
- b. National Regulatory Viewer (SWD), including USGS topography map, NWI map, FEMA map, NHD map, aerial and hillshade.
- c. Google Earth software and series of aerial photos, USGS topography layer
- d. Consultant's report: Aquatic Resources Delineation Report, Seragio BESS, Goldsmith, Ector County, Texas, dated October 8, 2024, prepared by Kimley Horn.

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.

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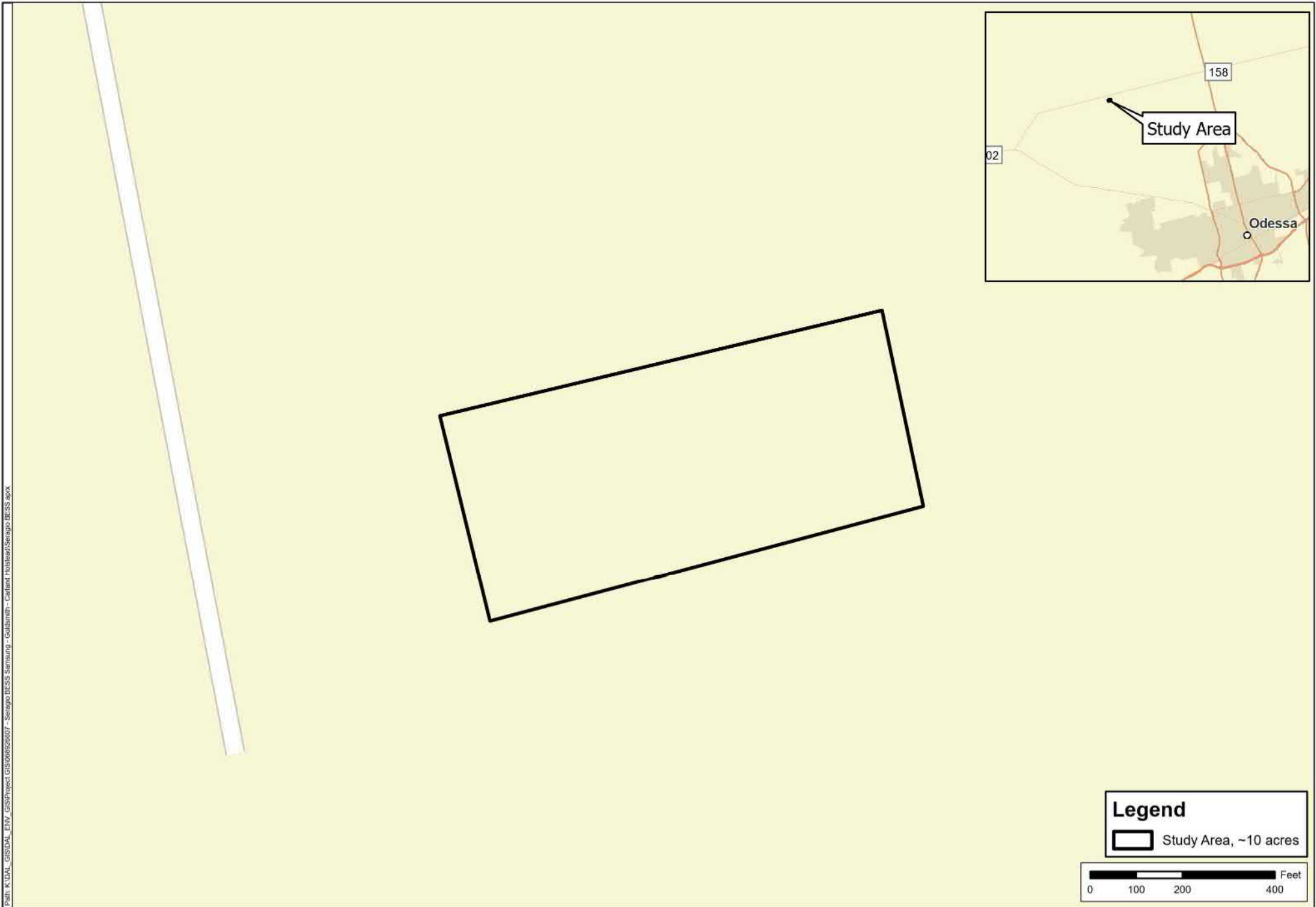


FIGURE  
**1**

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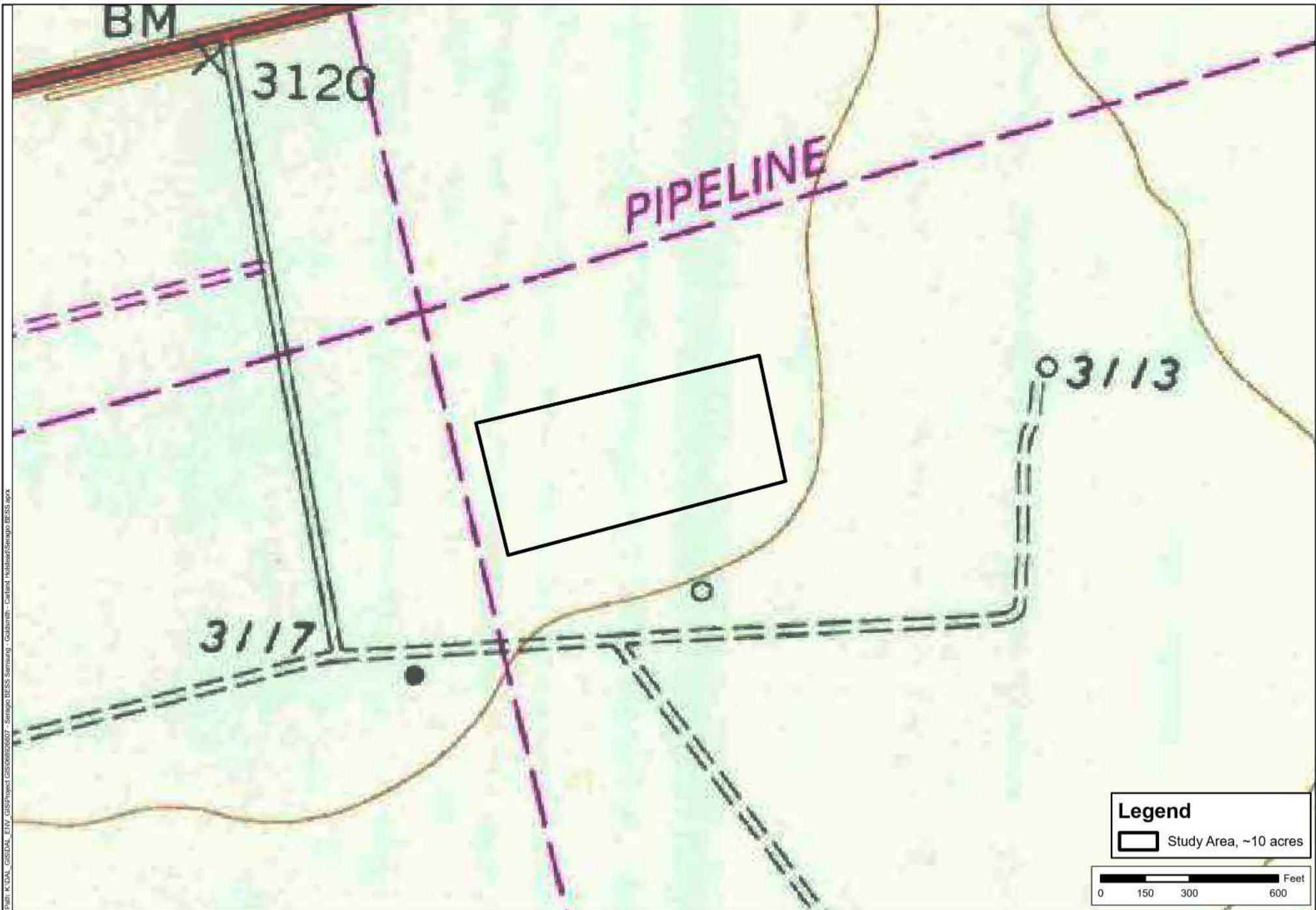
Vicinity Map  
Source: ESRI Basemap

Seragio BESS  
Goldsmith, Ector County, Texas



**Kimley»Horn**

This product is for informational purposes and may not have been prepared for, or be suitable for, legal, engineering, or survey purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.



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FIGURE  
2

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USGS Topographic Map

Quad: Goldsmith, TX

Seragio BESS

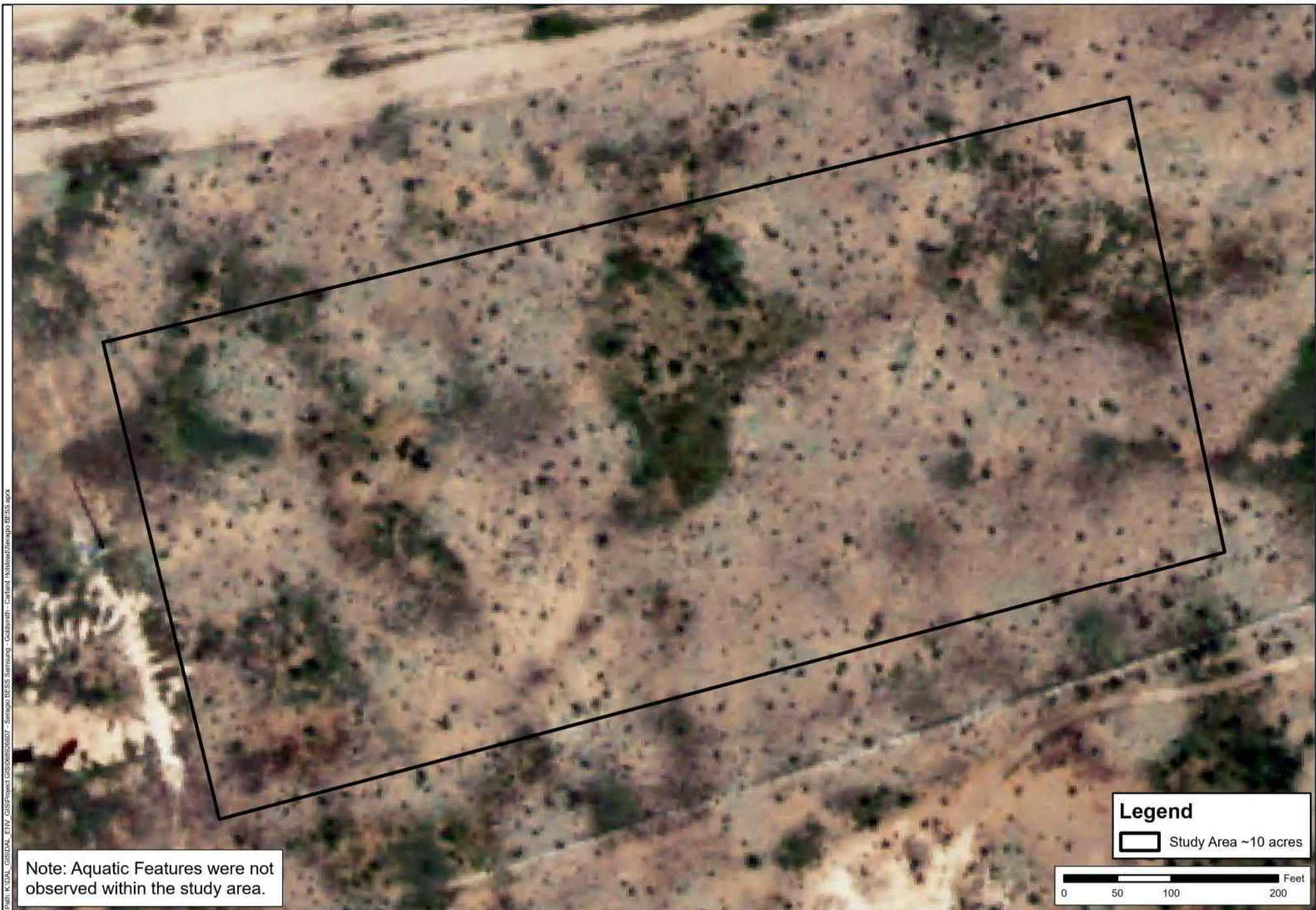
Goldsmith, Ector County, Texas



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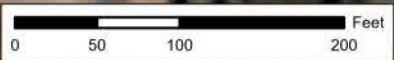




Note: Aquatic Features were not observed within the study area.

**Legend**

Study Area ~10 acres



<p>FIGURE</p> <p><b>3</b></p>	<p>DATE: 10/07/2024</p> <p>DRAWN: MCF</p> <p>CHECKED: MMC</p> <p>KHA NO.: 068926643</p>	<p><b>Final Aquatic Features Map</b></p> <p>Source: NAIP September 2022</p>	<p><b>Seragio BESS</b></p> <p>Goldsmith, Ector County, Texas</p>	<div data-bbox="1680 1445 1753 1567"> </div> <div data-bbox="1774 1445 2047 1567"> <p><b>Kimley»Horn</b></p> <p><small>This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or survey purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.</small></p> </div>
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FIGURE  
8

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# National Wetlands Inventory Map

Source: USFWS

Seragio BESS

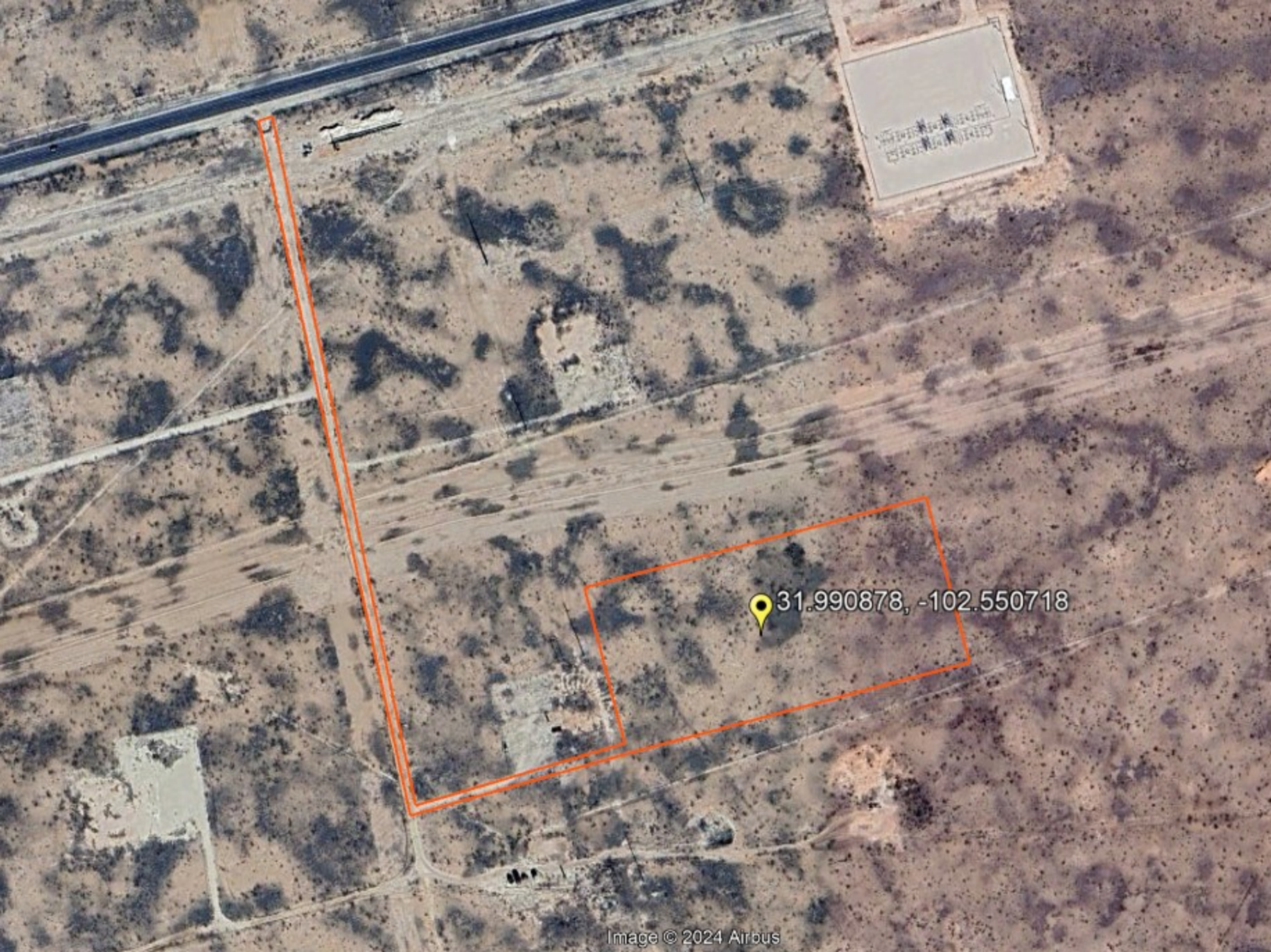
Goldsmith, Ector County, Texas



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3122

BM

3120

PIPELINE

Northwest Lake

Gravel Pit

Northwest  
Lake

31.990878, -102.550718

3113

3117