DEPARTMENT OF THE ARMY
SOUTH PACIFIC DIVISION, CORPS OF ENGINEERS
333 Market Street, Room 923
San Francisco, California 94105-2195

REPLY TO
ATTENTION OF:

Executive Office August 31, 2000

Mr. Mike Rowe
Vice President
Sienna Corporation
41-865 Boardwalk, Suite 205
Palm Desert, California 92211

Dear Mr. Rowe:

I have completed my review of your appeal of the King Ranch Property Jurisdictional Determination, File Number, 1999-16526-EHB issued April 3, 2000, by the U.S. Army Corps of Engineers, Los Angeles District, Arizona – Nevada Field Office. After a detailed review and consideration, I conclude that this appeal does not have merit. The jurisdictional determination is based on substantial field evidence and is consistent with U.S. Army Corps of Engineers regulatory program requirements. The appeal decision describing the reasons for my conclusion is enclosed.

However, during evaluation of your appeal, my Review Officer identified several inconsistencies between the jurisdictional maps provided to you and those retained in the district files. These inconsistencies are identified on the enclosed maps. I am directing the district to provide you with a revised jurisdictional determination to resolve these inconsistencies. I also discovered that although the district identified isolated waters on the King Ranch property as subject to regulatory jurisdiction, you did not receive a statement of the basis for that regulatory jurisdiction. This inconsistency is also addressed in the appeal decision.

I understand these inconsistencies may have made it difficult for you to understand the basis of regulatory jurisdiction regarding this property. I anticipate this appeal decision will clarify for you why portions of the property are subject to U.S. Army Corps of Engineers regulatory jurisdiction under Section 404 of the Clean Water Act.

The finding of regulatory jurisdiction means that regulated activities that occur in jurisdictional areas on a property will typically require some form of Army Corps of Engineers permit to authorize the activity. However, the jurisdictional determination is not a conclusion as to whether a particular project will have an adverse affect on the aquatic environment, whether a permit will be required, the type of permit required, or whether a permit will be issued. The Arizona – Nevada Field Office, telephone number

602-640-5385, can advise you regarding these questions and is our point-of-contact for regulatory permits in the Phoenix area.

If you have any questions about this appeal decision you may contact my Review Officer, Mr. Doug Pomeroy at (415) 977- 8035.

Sincerely,

original signed by

Enclosure

Peter T. Madsen
Brigadier General, U.S. Army
Division Engineer

Copy Furnished

Commander
U.S. Army Corps of Engineers
Los Angeles District
P.O. Box 532711
Los Angeles, California 90053-2325

U.S. Army Corps of Engineers
Los Angeles District
ATTN: Chief, Arizona Section
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Arizona – Nevada Area Office
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ADMINISTRATIVE APPEAL DECISION

KING RANCH PROPERTY JURISDICTIONAL DETERMINATION

FILE NO. 1999-16526-EHB

LOS ANGELES DISTRICT – ARIZONA/NEVADA FIELD OFFICE

DATE August 31, 2000

Review Officer: Doug Pomeroy, U.S. Army Corps of Engineers (USACE), South Pacific Division, San Francisco, California.

Review Officer Technical Advisor: Dan Malanchuk, USACE, Albuquerque District, El Paso Field Office

Appellant Representative: Mike Rowe, Sienna Corporation, Palm Desert, California

USACE District Representative: Mr. Ron Fowler, Regulatory Project Manager, Arizona - Nevada Field Office, Los Angeles District, USACE

Receipt of Request For Appeal: June 8, 2000

Appeal Conference Date: July 27, 2000 **Site Visit Date:** July 27, 2000

Background Information: The approximately 1,745 acre King Ranch property is located in the City of Goodyear, about 20 miles west of Phoenix, Maricopa County, Arizona. The Gila River flows from east to west, along the northern boundary of the King Ranch property and is a non-navigable tributary to the navigable Colorado River. The Gila River bank line and a dirt road separate the Gila River from the King Ranch property. Most of the property immediately south of the road is in agricultural production. South of the agricultural area, a second dirt road and a ditch separate the agricultural area from a series of vegetated, undeveloped hills. The ditch is designed to redirect water from the hills away from the agricultural area. The USACE Los Angeles District, Arizona - Nevada Field Office (district) issued a jurisdictional determination consisting of a cover letter and maps on April 3, 2000, which showed USACE regulatory jurisdiction in many narrow drainages and the Gila River channel. The appellant disagrees with the extent USACE Clean Water Act, Section 404, regulatory jurisdiction for the property.

Summary of Decision: I find the appeal does not have merit. The district's jurisdictional determination was consistent with regulatory requirements and supported by substantial evidence. However, during the appeal, the review officer identified minor inconsistencies between the jurisdictional determination maps provided to the appellant, and the maps retained in the district's file. I remand the jurisdictional determination to the district to resolve those inconsistencies.

Appeal Evaluation, Findings and Instructions to the Los Angeles District Engineer: The reasons for appeal described below are based on the appellant's Request For Appeal but have been rephrased to clearly describe the findings that must be made regarding the appeal.

Reason 1: The appellant asserted that the extent of USACE jurisdiction determined for the Gila River was incorrect and should be based on an ordinary or annual water flow of Gila River, not an ordinary high water mark based on water flow during floods or extreme conditions.

FINDING: The appeal does not have merit

ACTION: None required

DISCUSSION: The USACE has jurisdictional authority over waters of the United States. Waters of the United States are defined in the Code of Federal Regulations (CFR), 33 CFR Part 328, Section 328.3(a). The district determined the Gila River is a non-navigable water of the United States that is a tributary to the Colorado River, an interstate, navigable water of the United States. The district concluded the Gila River was subject to USACE regulatory jurisdiction under 33 CFR 328.3(a)(5) as a tributary to an interstate water. The extent of regulatory jurisdiction for non-tidal waters of the United States such as the Gila River, in the absence of wetlands, extends to the ordinary high water mark (33 CFR 328.4(c)(1)).

The term ordinary high water mark is defined in 33 CFR 328.3(e) as follows:

> "The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

During the site visit, the district representative pointed out the following evidence supporting the district's conclusion regarding the location of the ordinary high water mark for the Gila River.

In the Gila River channel on the northern portion of the property north of the bank line, the deepest portion of the channel consisted of fine, powdery material, which appeared to have settled out of the water during very low water flows. No vegetation was present in the deepest portions of the channel. Most of the remainder of the channel consisted of rounded cobblestones about 4 to 6 inches in diameter, which typically form when rocks periodically tumble in water over long periods of time. The soils of the agricultural fields located south of the bank line were distinctly different from the powdery material of the deepest portions of the channel. The large expanses of rounded cobblestones were restricted to the Gila River channel north of the bank line. Water-borne accumulations of vegetative debris and soil were present in the channel. The Gila River channel exhibited

these characteristics up to the bank line, which separated the channel from the agricultural area. The district representative stated that water was present in portions of the channel on his prior site visit. The district representative estimated that the Gila River has a high flow that would fill the Gila River channel up to the bank line approximately every 5-to-10 years. In a follow-up telephone call, the district representative clarified that the 5-to-10 year time period he estimated at the site visit/appeal conference was a rough approximation of high water flow events.

While the appellant agreed that the physical evidence pointed out by the district was present, he considered the interpretation of this information to be incorrect. The appellant asserted that the ordinary high water mark should be where a typical annual flow for the Gila River is located. The appellant considered this to be only the lowest portion of the channel, generally conforming to where the fine powdery material was deposited.

The USACE recently addressed using an "ordinary flow" to establish jurisdiction in place of an ordinary high water mark in the response to public comments in the preamble to the "Final Notice of Issuance and Modification of Nationwide Permits," Federal Register Vol. 65, No. 47, March 9, 2000, page 12823. Public commenters had asserted that ephemeral waters lacked sufficient flows to establish an ordinary high water mark and that using peak flows and/or flood stages in lieu of ordinary flows, or using cut banks, shelving, or debris that was influenced only by peak flows or flooding, was inappropriate. The USACE rejected using an "ordinary flow" to establish jurisdiction in place of an ordinary high water mark (FR Vol 65, No. 47, page 12823) and stated that ephemeral streams are waters of the United States, provided they have an ordinary high water mark meeting the definition in 33 CFR 328.3(e). The USACE stated that the frequency and duration at which water must be present to develop an ordinary high water mark has not been established for the USACE regulatory program. The USACE further stated that district engineers are to use their judgment on a case-by-case basis to determine whether an ordinary high water mark is present.

I conclude the district's determination of waters of the United States and USACE regulatory jurisdiction is consistent with the requirements and definitions of 33 CFR 328.3. The changes in soil characteristics, presence of rounded cobblestones, and presence of water-borne debris were appropriate field indicators of an ordinary high water mark.

Reason 2: The appellant asserted the basis for USACE regulatory jurisdiction had been extinguished because roads and ditches now permanently separate former tributaries from the Gila River.

FINDING: The appeal does not have merit.

ACTION: Although the appeal does not have merit, the review officer identified minor inconsistencies between the jurisdictional determination maps provided to the appellant and the jurisdictional maps retained in the district's file. I direct the

district to complete and provide to the appellant a revised jurisdictional determination that resolves these inconsistencies.

DISCUSSION: The jurisdictional determination stated:

> "The basis for identifying the Gila River and its tributaries as waters of the United States is found in 33 CFR 328.3(a)(5), which defines tributaries of interstate waters as "waters of the United States." "

This was the only basis of USACE regulatory jurisdiction cited in the jurisdictional determination.

The review officer compared the King Ranch property jurisdictional determination maps retained in the USACE Arizona/Nevada Field Office file to the maps provided to the appellant and identified several minor inconsistencies. These inconsistencies are shown on the attached maps and are as follows:

Map 1. On the USACE and Appellant Map 1, the drainage at the south boundary of the agricultural area does not connect to the Gila River. On USACE and Appellant Map 2, the same drainage does connect to the Gila River.

Map 2: The USACE Map 2 shows a drainage extending south from the Gila River, through the agricultural area to connect to drainages between the agricultural area and the undeveloped hills. This connection is also shown on USACE Map 3 and Map 5, but is only shown on Appellant Map 3.

Map 3: The Appellant Map 3 shows a small jurisdictional drainage area that is not shown on the USACE Map 3. The USACE Map 3 shows a small jurisdictional area which is not shown on Appellant Map 3, however, this area appears to be outside the Appellant's property boundary. The Appellant Map 3 shows a drainage extending south from the Gila River, through the agricultural area to connect to drainages between the agricultural area and the undeveloped hills. This connection is also shown on the USACE Maps 2 and 5, but not on the Appellant Maps 2 and 5.

Map 4: The USACE Map 4 shows a small jurisdictional drainage area that is not shown on the Appellant Map 4. Another small drainage is shown as jurisdictional on the USACE Map 4, but the jurisdictional area is in a different location on the Appellant Map 4.

Map 5: The USACE Map 5 shows a small jurisdictional drainage area that is not shown on the Appellant Map 5. The Appellant Map 5 shows a small jurisdictional drainage that is not shown on the USACE Map 5. The Appellant Map 5 shows a small jurisdictional drainage that is not shown as jurisdictional on the USACE Map 5, but is shown as

jurisdictional on the USACE Maps 2 and 3.

During the site visit/appeal conference, the district representative pointed out the following evidence regarding the location of the ordinary high water mark in areas of the property south of the Gila River channel bank.

The district representative pointed out depressions in the gully bottoms that he considered the result of repeated flows of water. The gully bottoms contained primarily sand and usually contained no vegetation. At the edges of the gullies, the soil contained less sandy material. The district representative considered this evidence that water had scoured the silt and clay particles and vegetation from the bottom of the gully, leaving an area of sand without vegetation. The district representative identified the ordinary high water mark and the limit of USACE regulatory jurisdiction within the gullies as the lateral extent of the scoured areas containing more sand. Several gullies had evidence of debris lines where silt, clay or vegetative material had been transported by water and subsequently trapped in vegetation.

The appellant agreed these factors were present but questioned whether they should represent an ordinary high water mark if water only occasionally flowed in these gullies. As described for Reason 1 above, using an "ordinary flow" to establish jurisdiction in place of physical evidence of an ordinary high water mark is inconsistent with the USACE regulatory program regulations.

The district identified 3 locations where tributaries on the property connected to the Gila River. Although the annual water flow through these tributaries is not known, they did exhibit an ordinary high water mark indicating periodic water flow, and this ordinary high water mark continued in drainages that connected to the Gila River. This is counter to the appellant's claims that these areas no longer tributaries to the Gila River because a ditch traversing the property has severed the hydrologic connection between the ephemeral tributaries and the Gila River. The tributaries still showed evidence of an ordinary high water mark on both sides of the road and ditch.

Also, although these ephemeral tributaries are within or at the edge of an agricultural area, the ephemeral tributaries would still be subject to jurisdiction. This is because the ephemeral waters in the undeveloped hills on the southern portion of the property exhibit an ordinary high water mark which is continued in the drainage ditches that make a connection to the Gila River. This circumstance is discussed with regard to drainage ditches in the preamble to the "Final Notice of Issuance and Modification of Nationwide Permits," Federal Register Vol. 65, No. 47, March 9, 2000, page 12823, which states:

> "A drainage ditch constructed in a stream, wetland, or other water of the United States remains a water of the United States, provided an ordinary high water mark is still present. Since drainage ditches constructed in waters of the United States area constructed either by channelizing a stream or excavating the substrate to improve drainage, it is unlikely that the drainage ditches will become dry land unless the hydrology is removed by some other action. District engineers will

> determine, on a case-by-case basis, whether a particular area is a water of the United States. If construction of a drainage ditch has legally converted the entire area to dry land, then the area drained is not a water of the United States, *however, in most cases the drainage ditch would remain a water of the United States*. (italics added)"

Applying the guidance above to this situation, the agricultural areas are not waters of the United States, but the drainage ditches which have an ordinary high water mark that extend through or along the boundary of the agricultural area to connect to the Gila River are waters of the United States. The drainage ditches identified as part of the tributary system function as tributaries to the Gila River during periodic high water flow events, and are subject to regulatory jurisdiction as waters of the United States.

However, even if the tributary connections to the Gila River had been extinguished, it is likely that most of the areas identified as tributaries would still be subject to regulatory jurisdiction as isolated waters of the United States as discussed in more detail below. The jurisdictional determination also included several areas that were isolated waters, and which did not connect to a tributary system that entered the Gila River.

The review officer requested clarification from the district representative why no basis of jurisdiction for isolated areas was provided to the appellant. The district representative stated that it was a new requirement of the appeal regulations issued March 28, 2000, to provide the basis for jurisdiction in the jurisdictional determination and that the district had inadvertently not included this basis for jurisdiction. (Note: This jurisdictional determination was issued April 3, 2000, six days after the new requirement went into effect.). The district representative stated during the site visit/appeal conference that the basis for jurisdiction for isolated waters would be 33 CFR 328.3(a)(3) which states:

> "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce..."

The omission of this regulatory citation from the jurisdictional determination appears to be an inadvertent error.

The authority to regulate such isolated waters is discussed in the preamble to the "Final Rule for the Regulatory Programs of the Corps of Engineers" Federal Register, Volume 51, Number 219, November 13, 1986, page 41217. It states:

> "...EPA has clarified that waters of the United States at 33 CFR 328.3(a)(3) also include the following waters: (a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or (b) Which are or would be used as habitat by other migratory birds which cross state lines."

The "Biological Evaluation of King Ranch, Maricopa County, Arizona, March 2000, Appendix B, Wildlife Observed at the Project Site," prepared by a consultant for the appellant, lists a variety of migratory birds known or expected to occur at the project site, most of which are protected by Migratory Bird Treaties. A full list of birds protected by Migratory Bird Treaties can be found at 50 CFR 10.13.

The isolated waters identified on the property would be subject to USACE regulatory jurisdiction provided they exhibited an ordinary high water mark consistent with the requirements of 33 CFR 328.3(e) and there was a connection to interstate commerce. As discussed above, there was evidence of an ordinary high water mark, and the presence of migratory birds established an interstate commerce connection. The district did not cite isolated waters (33 CFR 328.3(a)(3)) as a basis for jurisdiction in their jurisdictional determination. I consider this to be a confusing, but ultimately harmless, procedural error given that such waters were indicated on the jurisdictional determination maps provided to the appellant.

The appellant supplied clarifying information regarding topographic survey data showed that the ditch or tributary separating the undeveloped hills from the agricultural areas had several low spots, or sumps, which would need to fill with water before water could flow to the Gila River. However, based on the site visit/appeal conference, sufficient water is periodically present in this area to maintain an ordinary high water mark, fill the sumps, and flow to the Gila River. If the sump did extinguish the connection to the Gila River, these areas would be under USACE jurisdiction as isolated waters as discussed above if they retained an ordinary high water mark. Therefore, the basis for USACE regulatory jurisdiction might change, but all areas currently exhibiting an ordinary high water mark would still be subject to USACE regulatory jurisdiction as isolated waters of the United States, as long as they retained that ordinary high water mark.

I conclude the district's determination of waters of the United States and USACE regulatory jurisdiction is consistent with the requirements of 33 CFR 328.3. Requiring a reevaluation of the entire jurisdictional determination based on the district's omission of a basis of jurisdiction regulatory citation would simply delay a final decision for the appellant on the jurisdictional determination when substantial evidence is present that the jurisdictional determination is correct.

However, I direct the district to complete and provide to the appellant a revised jurisdictional determination that resolves the minor inconsistencies between the jurisdictional determination maps in the district's file and the jurisdictional determination maps provided to the appellant. I direct the district to consider and address the presence of agricultural areas during the reevaluation. The revised jurisdictional determination required by this appeal decision is limited to resolving the inconsistencies noted above and shown on the enclosed maps.

Other Considerations and Clarifications

In the Request For Appeal, the appellant asserted that areas above the headwaters of a stream with less than a 5 cubic foot per second average annual flow were not subject to USACE regulatory jurisdiction. As discussed above under Reason 1, this assertion that the ordinary high water mark is based on a measure of stream flow, rather than on the physical evidence of an ordinary high water mark is inconsistent with USACE regulatory program regulations.

The appellant stated in his August 2, 2000, letter that based on the appeal conference, he believed that the USACE representatives were asserting that the USACE regulatory program regulations regarding the presence of an ordinary high water mark changed among different regions or areas of the country. The appellant asserted if the USACE determined regulatory jurisdiction based on 5-to-10 year storm events, that the entire State of Arizona and the entire United States would be subject to USACE regulatory jurisdiction. This statement is inconsistent with the USACE regulations and the jurisdictional determination provided to the appellant, which was restricted to narrow drainages except within the Gila River channel.

As explained above, the USACE regulations use the presence of an ordinary high water mark as defined at 33 CFR 328.3(e) to determine the limits of waters of the United States. This definition is used throughout the country. However, as stated by the review officer at the site visit/appeal conference, the specific physical and biological features used to determine an ordinary high water mark may vary by region. As also stated above, district engineers are instructed to use their judgment on case-by-case basis to determine whether an ordinary high water mark is present.

Information Received and its Disposition During the Appeal Review:

1) The appellant provided topographic contour maps at the site visit/appeal conference on which he had plotted additional elevation data to demonstrate that water on the property collects in sumps and would have to flow uphill to enter the Gila River. I considered this data clarifying information and considered it as discussed under Reason 2 above.

2) The appellant provided an August 2, 2000, letter to follow-up and reiterate his positions as described at the site visit and appeal conference. This appeal decision considered and addressed the issues raised by appellant in that letter. I discussed this information under Reason 2 above.

3) After the site visit, the review officer examined the "Biological Evaluation of King Ranch, Maricopa County, Arizona, Appendix B, Wildlife Observed on the Project Site," dated March 2000, and prepared by a consultant for the appellant, for information clarifying the presence of migratory birds on the property. I discussed this information under Reason 2 above.

4) In a follow-up telephone call the district representative confirmed his statement that the Gila River has a high flow event every 5-to-10 years that would completely fill the channel was meant to be a rough approximation of the timing of high water flow events. I discussed this information under Reason 2 above.

5) In a follow-up telephone call confirming a discussion at the site visit/appeal conference, the district representative told the review officer that the isolated waters on the site would be subject to regulatory jurisdiction under 33 CFR 328.3(a)(3) and that this regulatory citation had been inadvertently omitted from the letter transmitting the jurisdictional determination to the appellant. I discussed this information under Reason 2 above.

Conclusion

For the reasons stated above, I conclude that Reason 1 and Reason 2 for this appeal do not have merit. However, I am remanding the jurisdictional determination to the Los Angeles District Engineer to complete and provide to the appellant a revised jurisdictional determination that resolves the inconsistencies between the jurisdictional determination maps provided to the appellant, and the maps retained in the district's file. The revised jurisdictional determination required by this appeal decision is limited to resolving the inconsistencies noted above and shown on the enclosed maps.

original signed by

Peter T. Madsen
Brigadier General, U. S. Army
Division Engineer