

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION
FOR THE KUKAL PROPERTY**

MONTROSE, COLORADO

ARMY CORPS OF ENGINEERS FILE NO. 200275125

SACRAMENTO DISTRICT

25 September 2002

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

District Representatives: Nick Mezei, Colorado/Gunnison Basin Regulatory Office, U.S. Army Corps of Engineers (Corps), Sacramento District (District) Grand Junction, Colorado

Appellant Representative: James Kukal

Technical Assistance: Steve Woodis, Natural Resources Conservation Service, Montrose, Colorado

Authority: Clean Water Act (CWA), Section 404

Receipt of Request For Appeal (RFA): June, 19, 2002

Appeal Conference Date: July 11, 2002 **Site Visit Date:** August 15, 2002

Background Information: The District determined that the unnamed channel on the Appellant's property is a natural channel subject to Clean Water Act (CWA) jurisdiction. The Appellant asserts that the channel flowing across his property is an irrigation and/or irrigation drainage ditch that is not within CWA regulatory jurisdiction because it conveys only irrigation and irrigation drainage water. The District and the Appellant agree that water from channel on the Appellant's property flows to channels that are within CWA jurisdiction.

Summary of Decision: I conclude the administrative record for this action supports the District's conclusion that the channel on the Appellant's property is within CWA jurisdiction. The appeal did not have merit.

Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE):

Reason 1: The Appellant asserted that the channel flowing across his property is not a natural channel, but rather an irrigation and/or irrigation drainage ditch that is not within Clean Water Act regulatory jurisdiction because it conveys only irrigation water.

FINDING: The appeal does not have merit

ACTION: None required.

DISCUSSION: The Kukal property is located in Section 5, Township 49 North, Range 9 West, Montrose, Colorado. The relatively level property has been used for agriculture in the past, and the surrounding area consists of agricultural land and low-density residential developments. The property is lower in elevation than the surrounding properties. Whether the channel receives natural surface runoff, as well as irrigation and/or irrigation drainage water from other properties, is in dispute. The District believes that a substantial portion, but not all, of the water in the channel is irrigation or irrigation drainage water. The Appellant believes all the water in the ditch is irrigation and/or irrigation drainage water.

The District has estimated the watershed of the channel as about 15 square miles prior to agricultural irrigation and drainage ditch modifications. The District and the Appellant agree that much of the water in that 15 square mile area is actually diverted into other channels, particularly the Loutsenhizer Canal, and does not reach the channel on the Appellant's property. However, the District also stated that the Loutsenhizer Canal also periodically dropped excess flows across the channel. The Appellant believes that there is no natural flow in the channel on his property and that the Loutsenhizer Canal interrupts the natural flow upstream of the Appellant's property. A variety of irrigation channels are found in the area. The Gunnison Tunnel provides irrigation water from the Gunnison River to the general area.

The District and the Appellant agreed at the appeal conference that the north-south channel on the Kukal property flows north into the Loutsenhizer Arroyo, which flows into the Uncompahgre River, which flows into the Gunnison River, which flows into the Colorado River. The District and the Appellant agreed at the appeal conference that the Loutsenhizer Arroyo, Uncompahgre River, Gunnison River, and Colorado River, are within CWA jurisdiction. The Appellant had not been able to conclusively determine whether the channel on his property connected to the Loutsenhizer Arroyo. During the site visit and appeal conference, the District representative and the Review Officer confirmed that this connection was present.

The District determined that the unnamed channel was subject to CWA jurisdiction under 33 Code of Federal Regulations (CFR) 328.3. Based on the administrative record and the appeal conference and site visit, the District reached this conclusion based on two subsections of 33 CFR 328.3. Under 33 CFR 328.3 (a) (1) the District concluded the

Colorado River was a water of the United States subject to CWA jurisdiction as a body of water that has been used in interstate and foreign commerce. The District then concluded that the channel on the Appellant's property was within CWA jurisdiction under 33 CFR 328.3 (a) (5) as a tributary to the Colorado River via the series of tributaries described above.

The District stated that some portions of the Appellant's property upslope from the channel are probably subject to CWA jurisdiction as adjacent wetlands under 33 CFR 328.3 (a) (7). As the Appellant has not proposed any activities requiring a Corps permit in those areas, the District made no conclusive CWA jurisdictional determination regarding those areas. They are not under consideration here.

The limit of CWA jurisdiction in a water body generally extends upstream to the Ordinary High Water Mark (OHWM), or if present, to the limit of adjacent wetlands as described at 33 CFR 328.4. The Appellant did not challenge the District's identification of an OHWM for the channel. As mentioned above, this approved JD did not address whether any adjacent wetlands are present.

The Appellant provided as clarifying information, a copy of the United States Bureau of Reclamation (BOR) 1929 map titled *Uncompahgre Irrigation Project, Colorado, Map Number 23444*. The Appellant's interpretation of this map is that since no creeks are shown on his property on this map, there were historically no natural creeks or streams in the area of his property. Therefore, the Appellant believes all the channels on his property should be considered non-jurisdictional irrigation or drainage channels that are not subject to CWA jurisdiction.

I reviewed the 1929 BOR map. This map is at relatively low level of detail: (1 inch = 3 miles or about 1:190,000). This map shows the extensive channels of the BOR Uncompahgre Irrigation Project. The Appellant presented no basis to support his assumption that the presence or absence of creeks on the 1929 BOR map would directly correspond to the determination of what channels in the area would subsequently be within the jurisdiction of the CWA of 1972, a law enacted 43 years after the map was made.

The District and the Appellant agree that the majority of the water flow in the channel is from irrigation and/or irrigation drainage water. However, the channel on the Appellant's property is located at the lowest elevation of the surrounding area, where a natural channel would be expected, and the District has identified a watershed that contribute to that channel.

The District established jurisdiction based on the presence of a natural channel with an OHWM connecting to another channel (Loutsenhizer Arroyo) that the District and the Appellant agreed was within CWA jurisdiction. The District's conclusion that this channel is a natural channel and carries natural flows is reasonable. Although the water flow in this channel is predominantly irrigation and irrigation drain water, the District

reasonably concluded natural water flow is also present and that this channel was within CWA jurisdiction.

Reason 2: The District's CWA jurisdictional decision has caused the Appellant harm and possibly monetary loss.

FINDING: This reason for appeal is outside the purview of the regulatory appeal process.

ACTION: None required.

DISCUSSION: The District is required to follow the CWA and its implementing regulations and relevant judicial decisions in reaching a determination of whether a property is within the regulatory jurisdiction of the CWA. The Federal Court of Claims is the appropriate authority with responsibility for determining whether a federal government action has resulted in a taking of private property, and if so, what is an appropriate remedy.

Reason 3: The District staff were personally biased against the Appellant, which contributed to the District reaching unreasonable conclusions regarding the CWA jurisdictional status of the Appellant's property.

FINDING: The appeal does not have merit

ACTION: None required.

DISCUSSION: The District's conclusions were supported by the administrative record and were consistent with the Corps regulatory program regulations. The Appellant provided no evidence that the District's representatives were personally biased against him.

Information Received and its Disposition During the Appeal Review:

- 1) The Appellant provided as clarifying information, a United States Bureau of Reclamation (BOR) 1929 map titled *Uncompahgre Irrigation Project, Colorado, Map Number 23444*. This map was considered during the appeal.
- 2) The Appellant provided a letter dated August 26, 2002 clarifying that his position on several issues discussed at the site visit and appeal meeting was different than the Review Officer understood them at the appeal meeting. The Appellant's letter was appended to the summary of the site visit. I considered the portions of the letter that related to the site conditions or the laws, regulations, and policies under consideration as part of this appeal.
- 3) The District provided a letter from Mr. Steve Woodis of the Natural Resources Conservation Service dated April 26, 2002, with photographs, and

received by the District April 29, 2002. The historical photographs contained in this letter were considered clarifying information and considered during the appeal. The text of the letter provided Mr. Woodis's opinion that the channel on the Appellant's property represented a natural drainage pattern. The letter supports the District's conclusions, but was provided after the District issued an approved CWA jurisdictional determination to the Appellant. Therefore, the text of Mr. Woodis's April 26 letter was classified as new information and not considered further.

Conclusion: I conclude the administrative record for this action supports the District's conclusion that the channel on the Appellant's property is within CWA jurisdiction. The appeal did not have merit.

Original signed by

Robert L. Davis
Brigadier General, U.S. Army
Division Engineer