

ADMINISTRATIVE APPEAL DECISION

**APPROVED JURISDICTIONAL DETERMINATION FOR THE
MOLYCORP INC PROPERTY**

FILE NO. 200001678-AJS

LOS ANGELES DISTRICT

DATE August 16, 2001

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

Review Officer Technical Advisor: Nancy Kang, USACE, Sacramento District, Nevada Field Office, Reno, Nevada.

Appellant Representative: Penelope Alexander-Kelly, Gresham, Savage, Nolan & Tilden, LLP, San Bernardino, California.

Receipt of Request For Appeal (RFA): 2 May 2001

Appeal Conference Date: 21 June 2001

Site Visit Date: 21 June 2001

Background Information: On March 30, 2001, the Corps of Engineers, Los Angeles District (District), issued an approved geographic jurisdictional determination for the Molycorp Inc. East Tailings Storage Area, near Mountain Pass, San Bernardino County, California in the Mojave Desert. The District's support for that determination was that unnamed desert washes on the Molycorp Inc. property were part of a tributary system that flowed via Wheaton Wash into Ivanpah Lake, which was an interstate water.

The Appellant disagrees for two reasons. First, the Appellant claims that the District incorrectly identified Ivanpah Lake, a desert playa lake, as an interstate water, when it should be considered an intrastate, isolated water outside Corps jurisdiction. Second, the Appellant claims that even if Ivanpah Lake is jurisdictional, there is no tributary connection between the desert washes on Molycorp's property and Ivanpah Lake that establishes jurisdiction under Section 404 of the Clean Water Act.

Summary of Decision: I found the District's conclusions regarding the jurisdictional status of Ivanpah Lake and unnamed tributaries on the Molycorp Inc. property to be insufficiently documented, and not supported by substantial evidence and analysis in the Administrative Record. Therefore, I direct the District to reconsider the jurisdictional status of Ivanpah Lake and the unnamed tributaries on the Molycorp Inc. property as discussed in detail in this Administrative Appeal Decision.

Appeal Evaluation, Findings and Instructions to the Los Angeles District Engineer:

Reason 1: The Appellant asserts Ivanpah Lake is not an interstate water, and is contained completely within the State of California. Therefore, the assertion that any tributaries to this wash, such as desert washes on the appellant's property, are subject to Corps regulatory jurisdiction as tributary to interstate water is incorrect.

FINDING: The appeal has merit.

ACTION: The District should reconsider the jurisdictional status of Ivanpah Lake. As part of this reconsideration, the District should document and evaluate whether the ordinary high water mark for Ivanpah Lake crosses the state line and, if necessary to determine jurisdiction, whether a tributary to Ivanpah Lake crosses the state line. If applicable, the District should also document and evaluate whether any adjacent wetland crosses the state line. The District should document the presence of physical indicators of any ordinary high water mark such as those described in 33 CFR Part 328.3 (e) as part of its reconsideration. The District should consider whether the surface water observed extending across the state line on the March 7, 2001 site visit was within the ordinary high water mark for Ivanpah Lake or represented a response to an extreme storm event that extended the surface water connection beyond the ordinary high water mark. If needed to make this jurisdictional determination, the District should consider whether the fill for urban development at the state line has affected the jurisdictional status of Ivanpah Lake.

If upon reconsideration the District concludes that Ivanpah Lake is an isolated, intrastate water, then the District should reconsider its jurisdictional status under 33 CFR 328.3 (a)(3).

The District's reconsideration should then also address the Supreme Court decision *Solid Waste Agency of Northern Cook County v. United States*, (SWANCC decision) No. 99-1178, issued January 9, 2001, the Corps Chief Counsel memorandum of January 19, 2001 regarding the SWANCC decision, and any other Corps guidance regarding the SWANCC decision which may be issued during reconsideration of this action.

The District's decision and conclusions should be clearly and thoroughly documented in a revised Administrative Record.

DISCUSSION: On March 30, 2001, the District issued an approved geographic jurisdictional determination for the Molycorp Inc. East Tailings Storage Area, near Mountain Pass, San Bernardino County, California, in the Mojave Desert. The District's support for that determination was that unnamed desert washes on the Molycorp Inc. property were part of a tributary system that flowed via Wheaton Wash into Ivanpah Lake, a desert playa lake, which was an interstate water. The Corps regulations at 33 CFR Part 328 define the term "waters of the United States" as it applies to the jurisdictional limits of the Corps regulatory program. The District concluded the unnamed tributaries on the Molycorp Inc. property were jurisdictional as tributary to an interstate water (Ivanpah Lake). Corps regulations at 33 CFR Part 328.3 (a)(5) state waters of the United States include:

“All interstate waters including interstate wetlands”

The District previously issued a geographic jurisdiction determination for this area on December 6, 2000, which was reevaluated and replaced by the March 30, 2001 geographic jurisdiction determination as a result of the *SWANCC* decision. The December 6, 2000, geographic jurisdictional determination is no longer relevant and will not be discussed further.

The Appellant asserts that Ivanpah Lake is an isolated, intrastate lake contained entirely in California, and not an interstate lake.

As stated in 33 CFR Part 328.3 (a)(3), Corps jurisdiction extends to:

“(3) 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 including any such waters.....”

The Appellant did not discuss in detail why Ivanpah Lake would not come under Corps jurisdiction as an intrastate lake under of 33 CFR Part 328.3 (a)(3) if it was not an interstate lake.

The Appellant claims that the District erred by using the 1985 United States Geological Survey map of the area to establish that Ivanpah Lake crossed the California/Nevada State line. The Appellant claims that the District did not consider the affect of the post-1985 urban development on the Nevada side of the state line on the boundary of Ivanpah Lake.

The District did not use the 1985 United States Geological Survey map as its sole source of information for its jurisdictional determination. The District supplemented that information with a site visit on March 7, 2001. The District’s March 27, 2001 Memorandum for the Record summarized the March 7, 2001 site visit. In that memorandum the District stated:

“...standing water contiguous with the playa (*Ivanpah Lake*) in CA (*California*) was observed extending across the state line immediately adjacent to the I-15 (*Interstate 15*) freeway. My conclusion from what was observed is that Ivanpah Lake is an interstate water of the U.S.” *Text in italics added for clarity.*

The District’s March 30, 2001 geographic jurisdictional determination stated the same reasoning for determining Ivanpah Lake was an interstate water.

The Appellant claims that the District incorrectly interpreted the field conditions present on March 7, 2001 because a “major rain event” had occurred on March 6 and 7, 2001. The Appellant claims that the contiguous surface water connection across the state line present on March 7, 2001 was the result of the concentration of runoff water from constructed channels on the edges of the Interstate 15 freeway. Whether these channels replaced natural streams courses is not discussed in the Administrative Record. The Appellant does not consider these channels part of Ivanpah Lake and considers Ivanpah Lake to be located entirely within California. The

Appellant submitted clarifying information claiming that the March 6 to 7, 2001 rain event in the project vicinity was approximately a 10-year rain event.

As further evidence that the District's interpretation of the ordinary high water mark and the boundary of jurisdiction on Ivanpah Lake was incorrect, the Appellant cited *U.S. v. Harrell*, 926 F.2d 1036 (11th Cir. 1991). *U.S. v. Harrell* found that:

“Evidence failed to establish that tributary of navigable river was below “ordinary high water mark,” for purposes of determining whether tributary was within “bed” of river and subject to Government's navigational servitude...” and

“Debris and litter left from temporary and unpredictable floodwaters, unlike that left from ordinary high water, was not evidence of ordinary high water mark of navigable river, for purposes of determining whether tributary was subject to Government's navigable servitude...”

U.S. v. Harrell discusses the Corps jurisdictional authority regarding navigable waters and navigational servitude under the 1899 Rivers and Harbors Act. The Appellant claims that *U.S. v. Harrell* should be considered in this Administrative Appeal because the definition of the ordinary high water mark for navigable waters of the United States at 33 CFR Part 329.11 (a)(1) is the same as the definition of ordinary high water mark at for water of the United States at 33 CFR Part 328.3 (e).

The Appellant also cited *U.S. v. Pend Oreille Public Utility District No. 1*. 926 F.2d 1502 (9th Cir. 1991), which affirmed in the context of a trespass case involving the Kalispell Indian Reservation that:

“The (*district*) court held that ordinary high water line marked the boundary between riparian land and riverbed, and that the line corresponded with the highest level normally reached each year, excluding the annual spring rise.” (*Text in italics added for clarity*)

The Appeal Review Officer clarified the following issues during the June 21, 2001, site visit and appeal conference. All parties at the June 21, 2001, site visit agreed that the fence line at the California/Nevada state line that crossed Interstate 15 accurately represented the state line. All parties agreed that Ivanpah Lake does not cross the state line north of Interstate 15.

South of Interstate 15, District Administrative Record Exhibit 8, Photograph E, showed water extending across the state line from California to Nevada on the District's March 7, 2001 site visit. On the June 21, 2001 appeal conference and site visit, the area near the state line was dry. However, the Review Officer did observe that an area several inches lower in elevation extended into Nevada approximately 20 to 30 feet, corresponding to the area covered by water on the Nevada side of the state line in Photograph E.

The District insufficiently documented in the Administrative Record that Ivanpah Lake was an interstate water subject to Corps jurisdiction. The District's Administrative Record did not address whether the continuous surface water connection observed extending across the state line

on March 7, 2001, demonstrated that Ivanpah Lake was an interstate water subject to Corps jurisdiction or that an unusual storm event had occurred. Also, the District did not document in the Administrative Record the evidence of factors usually considered in determining the presence or absence of an ordinary high such as those discussed 33 CFR Part 328.3 (e) as restated below:

“(e) 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.”

No conclusive information was provided at the appeal conference as to whether the fill material for urban development on the Nevada side of the state line at Ivanpah Lake had affected the jurisdiction of Ivanpah Lake. If necessary for purposes of the reconsideration of this action, the District should consider whether the fill at the state line changed the jurisdiction of Ivanpah Lake.

If upon reconsideration of this jurisdictional determination, the District determines that Ivanpah Lake is an isolated intrastate water, not an interstate water, its jurisdictional status should be considered under 33 CFR Part 328.3 (a)(3). The District should also consider, the *SWANCC* decision, the Corps Chief Counsel memorandum of January 19, 2001 regarding the *SWANCC* decision, and any subsequent Corps guidance regarding the *SWANCC* decision that may be issued during reconsideration of this jurisdictional determination.

The District’s decision and conclusions should be clearly and thoroughly documented in a revised Administrative Record.

Reason 2: The Appellant asserts that regardless of the jurisdictional status of Ivanpah Lake, the unnamed desert washes on the Molycorp Inc. property are not jurisdictional because they are not connected to Ivanpah Lake by a continuous tributary connection with an ordinary high water mark. Therefore there is no tributary connection meeting the requirements of 33 CFR Part 328.3 (a)(5) to establish Corps’ geographic jurisdiction over the unnamed washes on the Molycorp Inc. property as a water of the United States. The Appellant claims these areas have insufficient connection to interstate commerce for regulation under 33 CFR Part 328. 3 (a)(3).

FINDING: The appeal has merit.

ACTION: The District should reconsider and further document its decision regarding the evidence supporting a tributary connection that establishes jurisdiction under 33 CFR Part 328.3 (a)(5) between the unnamed desert washes on the Molycorp Inc. property and Ivanpah Lake. This reconsideration regarding the desert washes should consider, but is not limited to, evidence of the presence and extent of the ordinary high water mark, estimates of annual and/or seasonal flow, extent of concentrated surface and/or subsurface water flow (not groundwater), and biological responses by plants or animals to such concentrated flow. Any field indicators of Corps jurisdiction should be considered with regard to the Corps regulations and all relevant court decisions.

If upon reconsideration the District concludes that the unnamed desert washes on the Molycorp Inc. property are isolated waters, then the District should consider whether the use, degradation, or destruction of these waters could produce a sufficient interstate commerce connection to establish jurisdiction under 33 CFR 328.3 (a)(3). This reconsideration should also consider the *SWANCC* decision, the Corps Chief Counsel memorandum of January 19, 2001 regarding the *SWANCC* decision, and any other Corps guidance regarding the *SWANCC* decision, which may be issued during reconsideration of this action.

The District's decision and conclusions should be clearly and thoroughly documented in a revised Administrative Record.

DISCUSSION: The District and the Appellant clarified at the appeal conference that they agree that there is a continuous ordinary high water mark extending from approximately 10 miles down gradient from the Molycorp Inc. property to Wheaton Wash. The ordinary high water mark continues on Wheaton Wash to a point approximately 1000 to 1500 feet from the Ivanpah Lake as discussed in detail in the Appellant's Exhibit 13, *Wheaton Wash Surface Flow Mapping* dated June 15, 2001. The District and the Appellant agree that evidence of an ordinary high water mark disappears at that point. The District and the Appellant disagree as to whether a tributary connection establishing jurisdiction over the washes on the Molycorp Inc. property as tributaries to a water of the United States under 33 CFR Part 328.3 (a)(5) can exist if a continuous ordinary high water mark extending from Ivanpah Lake to the Molycorp Inc. property is not present.

Applicable Corps regulations regarding this subject are described below.

The definition of "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps regulatory program is defined in 33 CFR Part 328. Several portions that regulation are relevant to this appeal. These include 33 CFR Part 328.3 (a)(2) which states that waters of the United States include:

"All interstate waters including interstate wetlands;"

33 CFR Part 328.3 (a)(3) which states waters of the United States include:

"(3) 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 including any such waters..."

and 33 CFR Part 328.3 (a)(5), which states that waters of the United States include:

"Tributaries to waters identified in paragraphs (a)(1) through (4) of this section;"

The limits of waters of the United States in non-tidal waters is defined at 33 CFR Part 328.4 (c)(1) as:

“In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark.”

The Preamble to the Corps November 13, 1986 Final Rule, Regulatory Programs of the Corps of Engineers, FR Vol 51, No. 219, Page 41217, further discussed the proper interpretation of 33 CFR Part 328.4 (c)(1) as follows:

“Section 328.4: *Limits of Jurisdiction*. Section 328.4 (c)(1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdictional also stops when the ordinary high water mark is no longer perceptible.”

In addition, Corps Regulatory Guidance Letter (RGL) 88-06, issued June 27, 1988 (now expired but still applicable), discussed the ordinary high water mark (OHWM) as follows:

“OHWM: The OHWM is the physical evidence (shelving, debris lines, etc.) established by normal fluctuations of water level. For rivers and streams, the OHWM is meant to mark the within-channel high flows, not the average annual flood elevation that generally extends beyond the channel.”

(Note: Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol 64, No. 54, Pg 13783.)

The Appellant asserts, regardless whether Ivanpah Lake is jurisdictional, that the unnamed desert washes on Molycorp Inc. properties are isolated waters as there is no tributary connection to Ivanpah Lake. Therefore, the Corps jurisdiction of those unnamed washes should be reevaluated based on the recent SWANCC decision and associated guidance. The Appellant also asserts that the use, degradation, or destruction of these desert washes would not affect interstate commerce, so it is not appropriate to extend Corps jurisdiction to these areas as isolated waters under 33 CFR Part 328.3 (a)(3).

The District considered the evidence of a tributary connection from the unnamed washes on the Molycorp Inc. property via Wheaton Wash to Ivanpah Lake in a watershed context. The District’s documentation in the Administrative Record that a tributary connection exists between the unnamed washes on the Molycorp Inc. property and Ivanpah Lake is provided primarily in the District’s Memorandum for the Record (MFR) of March 27, 2001 (Administrative Record Exhibit 3). The District states its conclusion from the March 27, 2001 MFR as follows regarding the unnamed desert washes on the Molycorp Inc property, Wheaton Wash, and Ivanpah Lake:

“...They are clearly hydrologically connected via surface flow, but they are not morphologically connected (i.e. there is no contiguous ordinary high water mark extending from the project site to the lake, roughly 10 miles away). It is unclear whether this discontinuity with the interstate lake would render the entirety of Wheaton Wash non-jurisdictional. A recent 9th Circuit court case (Headwaters vs. Talent Irrigation

District) may apply in this case. Although the case addressed irrigation canals and their connection to waters of the U.S., part of the ruling described “tributaries” as any “stream that contributes its flow to a larger stream or other body of water.” In this context, a hydrologic connection between the Molycorp Mine and Ivanpah Lake would be enough to assert jurisdiction (i.e. there is a federal interest in controlling potential sources of contaminants, etc. entering waters of the U.S.).”

The District did not describe the size or timing of the annual or seasonal surface flow representing the hydrologic connection that it asserts is present. The primary evidence of this surface water connection provided by the District in the Administrative Record and at the appeal conference is that the Molycorp Inc. property is at a higher elevation than Ivanpah Lake, and that the water must flow down gradient and therefore must reach the lake. Ivanpah Lake is the lowest area in the vicinity and clearly collects water from the surrounding area. I conclude that this information alone is not sufficient evidence of the presence of a tributary connection to establish jurisdiction under 33 CFR Part 328.3 (a)(5).

Several court decisions such as *Headwaters Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), *Quivara Mining Co. v. United States Environmental Protection Agency*, 765 F.2d 126, 130 (10th Cir. 1985), and *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979), have discussed the appropriate definition and evidence of a tributary connection relevant to this administrative appeal. In *Headwaters Inc. v. Talent Irrigation District*, a tributary was defined as:

“A “stream which contributes its flow to a larger stream or other body of water” is a tributary. *Random House College Dictionary* 1402 (rev. ed. 1980).”

In *Quivara Mining Co. v. United States Environmental Protection Agency*, 765 F.2d 126, 130 (10th Cir. 1985) a tributary connection was described as:

“Viewed in the light of the substantial evidence test, the court finds that both the Aroyo del Puerto and the San Mateo Creek flow for short distances from the discharge points. Although neither is navigable-in-fact, surface flow occasionally occurs, at times of heavy rainfall, providing a surface connection with navigable waters independent of the underground flow. “

In *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979) a tributary was described as:

“While there is nothing in this record to show the effect on interstate commerce of this unnamed tributary, without question it is within the intended coverage of the FWPCA (*Federal Water Pollution Control Act*). It was flowing a small amount of water at the time of the spill. Whether or not the flow continued into the Red River at that time, it obviously would during significant rainfall.” (*Note item in italics added for clarity*).

These three court decision consistently considered areas of concentrated surface flow, albeit occasional or seasonal flows, to be sufficient to be tributaries for purposes of the Clean Water Act.

The Appellant proposes a narrow interpretation of the Corps regulations and jurisdiction that would extinguish a tributary connection for jurisdictional purposes if there were any break in the ordinary high water mark. The District claims that the appropriate interpretation of the Corps regulations in this instance is to consider them in a watershed context. That is, that the vast majority of the desert wash between the Molycorp Inc. property and Ivanpah Lake had an ordinary high water mark, and that based on the size of the washes on the property it could be inferred that some water reached Ivanpah Lake to form a tributary connection.

I have had my staff complete a thorough evaluation of the alternative policy interpretations supported by the Appellant and the District. As described at 33 CFR Part 331.7 (g), an Administrative Appeal Decision does not set precedent for any future Corps decision. Therefore, a general policy determination regarding the Appellant's and the District's alternative policy interpretations of the Corps regulations is neither necessary nor appropriate as part of this Administrative Appeal Decision. However, in this specific instance, I conclude that the District's policy position that a tributary connection can exist in the absence of a continuous ordinary high water mark is reasonable. I concur with the District's determination that the court decision in *Headwaters Inc. v. Talent Irrigation District* case regarding the Clean Water Act reasonably supports this position, as do the *Quivara Mining Co. v. United States Environmental Protection Agency*, and *United States v. Texas Pipe Line Co.* court decisions. However, I also find that District has supplied insufficient evidence that a tributary connection actually exists in this case.

If there were an undisputed, continuous ordinary high water mark extending from the unnamed desert washes on the Molycorp Inc. property, via Wheaton Wash, to Ivanpah Lake, and Ivanpah Lake was clearly within Corps jurisdiction, the entire area within the ordinary high water mark would certainly be within Corps regulatory jurisdiction. But that is not the case here. The District's Administrative Record, and subsequent clarifying discussions of its conclusions at the appeal conference and site visit, provided insufficient documentation that a tributary connection meeting the requirements of 33 CFR Part 328.3 (a)(5) extends from the unnamed desert washes on the Molycorp Inc. property via Wheaton Wash to Ivanpah Lake.

The District must reconsider and further document its decision that the unnamed tributaries on the Molycorp Inc. property form a tributary connection via Wheaton Wash to Ivanpah Lake that establishes jurisdiction under 33 CFR Part 328.3 (a)(5). This reconsideration regarding the desert washes should consider, but is not limited to, evidence of the presence and extent of the ordinary high water mark, estimates of annual and/or seasonal flow, extent of concentrated surface and/or subsurface water flow (not groundwater), and biological responses by plants or animals to such concentrated flow. Any field indicators of Corps jurisdiction should be considered with regard to the Corps regulations and all relevant court decisions.

The District's decision and conclusions should be clearly and thoroughly documented in a revised Administrative Record.

Information Received In Addition to the Administrative Record and the Request for Appeal, and its Disposition During the Appeal Review:

- 1) A June 16, 2001 letter from the Appellant including (i) a June 12, 2001 declaration from Glenn C. Lukos regarding the Molycorp Inc. property, and (ii) a June 15, 2001 Memorandum from Glenn Lukos Associates to Bill Sharer of Molycorp Inc. titled *Wheaton Wash Surface Flow Mapping*.
- 2) A June 18, 2001 letter from the Appellant including (i) a June 18, 2001 report from TRC entitled "March Rain Event Comparison to Known Return Period/Duration Storm Depths for Playa Area East of Mine Site.
- 3) A July 12, 2001 letter from the Appellant clarifying several specific details at the appeal conference including (i) July 5, 2001 letter from Geoff Nasen, clarifying comments he made his February 11, 2000 memorandum already contained in the Administrative Record, (ii) July 11, 2001 letter from Glenn C. Lukos clarifying portions of his June 12, 2001 declaration, which was requested by the Appeal Review Officer at the appeal conference, and including a copy of a two page May 1993 document, *Ordinary High Water Mark, Survey of Western Corps District Policies*, by Bernard N. Goode, Environmental Engineering Consultant, in which Mr. Goode summarized brief oral discussions with seven Western Corps districts regarding their policies associated with determining the ordinary high water mark.

All these submittals were classified as clarifying information, and were considered during the review of this administrative appeal.

Conclusion:

I found the District's conclusions regarding the jurisdictional status of Ivanpah Lake and unnamed tributaries on the Molycorp Inc. property to be insufficiently documented, and not supported by substantial evidence and analysis in the Administrative Record. Therefore, I direct the District to reconsider the jurisdictional status of Ivanpah Lake and the unnamed tributaries on the Molycorp Inc. property as discussed in this Administrative Appeal Decision.

original signed by

Robert L. Davis
Colonel (P), Corps of Engineers
Division Engineer