



REPLY TO  
ATTENTION OF:

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

April 02, 2001

Civil Works and Management Directorate  
Operations Division

Ms. Heather Gaines  
DeConcini, McDonald, Yetwin & Lacy  
Attorneys at Law  
2525 East Broadway Boulevard, Suite 200  
Tucson, Arizona 85716-5300

Dear Ms. Gaines:

I have completed my review of your appeal of the Turner Property Jurisdictional Determination, File Number, 2000-00554-RJD issued November 16, 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.

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 your area.

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

Sincerely,

original signed by

Enclosure

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

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

**FILE NO. 2000-00554-RJD**

**LOS ANGELES DISTRICT**

**DATE April 2, 2001**

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

**District Representative:** Robert Dummer, USACE, Los Angeles District, Arizona – Nevada Field Office, Phoenix, Arizona

**Appellant Representative:** Ms. Heather Gaines, DeConcini, McDonald, Yetwin, & Lacy, Attorneys at Law, Tucson, Arizona

**Receipt of Request For Appeal (RFA):** 15 January 2001

**Appeal Conference Date:** 22 February 2001      **Site Visit Date:** 22 February 2001

**Background Information:** The Arizona – Nevada Field Office, Los Angeles District, USACE (district) issued an approved jurisdictional determination (JD) file number 2000-00554-RJD for property owned by Ms. Dorothy Turner on November 16, 2000. The JD identified two desert washes on Ms. Turner's property as being subject to Corps jurisdiction under Section 404 of the Clean Water Act (CWA). The Corps identified these two washes as tributaries to the Santa Cruz River, which is a tributary to the Gila River, which is a tributary to the Colorado River, an interstate navigable waterway.

On January 9, 2001, after completion of the JD, the U.S. Supreme Court issued its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (SWANCC decision). The SWANCC decision was related to Corps jurisdiction over non-navigable, isolated, intrastate waters based solely on the use of such waters by migratory birds. The appellant has appealed the approved JD on the basis that the desert washes on the Turner property are non-navigable waters, are not adjacent to navigable waters, and are actually isolated waters, not tributaries to the Santa Cruz River. The Appellant asserts that these washes are now outside of Corps jurisdiction as a result of the SWANCC decision.

**Summary of Decision:** The district's decision was based on substantial information in the administrative record. The clarifying information provided by both the district and the appellant supported the district's conclusion that the two desert washes are jurisdictional as tributaries to a navigable, interstate water and are subject to Corps regulation as waters of the United States. The basis for this determination is consistent with the current Corp regulatory program regulations. The recent SWANCC decision is not germane to the basis of Corps jurisdiction used in this JD. The appeal does not have merit.

**Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE):** 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 this appeal.

**Reason 1:** The two desert washes on the Turner property are not subject to Corps jurisdiction because they are non-navigable, not adjacent to navigable waters, are not tributaries to the Santa Cruz River and in fact are isolated from the Santa Cruz River. As such they are no longer within Corps jurisdiction as a result of the SWANCC decision.

**FINDING:** The appeal does not have merit.

**ACTION:** None required.

**DISCUSSION:** The district explained its basis for jurisdiction on portions of the Turner property in paragraph 2 of its November 16, 2000 approved JD letter. The district stated:

“Each water of the United States herein delineated is an interstate water, *or* (or added for clarity) a water that is tributary to an interstate water.”

The administrative record clearly showed that the district reached this conclusion because it determined that the desert washes on the Turner property connected to the Santa Cruz River, which connected to the Gila River, which connected to the Colorado River, which is an interstate, navigable water of the United States. So the district has identified jurisdiction based on the desert washes on the Turner property being part of a tributary system. This is consistent with the Corps current regulations and the SWANCC decision as described in more detail in the following paragraphs.

The Corps defines waters of the United States in 33 CFR Part 328. At 33 CFR 328.3 (a) (2) waters of the United States are defined to include:

“All interstate waters including interstate wetlands.”

At 33 CFR 328.3 (a) (5) waters of the United States are defined to include:

“Tributaries of waters identified in paragraphs (a) (1)-(4) of this section.”

The district's JD is consistent with the requirements of 33 CFR 328.3 (a) (5). The district should have cited the specific subsection of the Corps regulations used to support the JD in its November 16, 2000 letter, but that oversight is a harmless error, as the basis for the JD was verbally described and consistent with 33 CFR 328.3 (a) (2) and 33 CFR 328.3 (a) (5).

The appellant asserted that the washes should not be subject to Corps jurisdiction because the areas are not navigable waters, nor are they adjacent to navigable waters. This assertion is inconsistent with the Corps regulatory program definitions of waters of the United States. The district established that the washes on the property are linked via tributaries to an interstate, navigable water. This basis of jurisdiction is supported by

Corps regulations at 33 CFR 328. 3 (a) (2) and 33 CFR 328. 3 (a) (5) as described above and does not require the washes to be navigable waters, nor that they be adjacent to navigable waters.

In addition to having an appropriate basis of jurisdiction, the district's administrative record must also show that the district had sufficient evidence to establish an ordinary high water mark, and that there was sufficient evidence of a tributary connection to an interstate water.

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

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

As clarified at the appeal conference, the district and appellant agree that the Santa Cruz River is a tributary to the Gila River, which is a tributary to the Colorado River, an interstate navigable waterway. The Appellant provided the following information to demonstrate that the washes on the Turner property were isolated waters, and not tributaries. The Appellant's request for appeal letter of January 12, 2001, stated that:

“At some time in the past, the wash segment which exists on the subject property was an intermittent stream; however due to extensive development surrounding the subject property, particularly to the north and east, the wash segment which exists on the property is no longer part of a stream. Instead, a minute flow is occasionally discharged on to the subject property from the north, via pipes from the adjacent development, and this flow dissipates into many tiny rivulets as it crosses Sumter Road to the south.”

and also that:

“...the wash segment which exists on my property is no longer part of a stream, intermittent or otherwise, but instead is a mere segment of a once-existent wash, that will carry water only during flooding conditions on the subject property, and will not carry the water from a stream, or to a stream, outside the boundaries of the property.”

The district identified several indicators of the presence of an ordinary high water mark on the Turner property in its November 16, 2000 JD including destruction of terrestrial vegetation in the drainages, changes in soil characteristics (e.g. sandy channel bottoms), water line on the bank, presence of litter/debris (carried by water), exposed roots, and presence of manmade drainage features/scour protection. These indicators were present and observed by the review officer on the site visit. These indicators established that an ordinary high water mark was present on the Turner property.

Also, the review officer visited the locations where the washes from the Turner property exited the southern boundary of the property and crossed Sumter Road. In both cases the washes were the same width on both sides of the road. The review officer observed that

the washes continued, rather than dissipating or disappearing after crossing to the south of Sumter Road. To the contrary, these washes combined and increased in size after crossing Sumter Road. The district submitted aerial photographs as clarifying information that showed there was a tributary connection between the washes on the property and the Santa Cruz River.

The appellant's engineer submitted clarifying information that showed the west wash on the Turner property was connected by tributaries to the Santa Cruz River. This conclusion was inconsistent with the assertion in the appellant's January 12, 2001 request for appeal letter that both washes on the Turner property were isolated waters. The conclusion of the appellant's engineer is consistent with the district's conclusion, and the district's clarifying information, which showed the west wash was connected by tributaries to the Santa Cruz River.

The appellant's engineer considered the east wash to be isolated. Although several indicators of periodic flow were present, the appellant's request for appeal letter asserted that the wash would flow only during flood conditions, and would not carry water from a stream, or to a stream, outside the boundaries of the Turner property. The east wash had an ordinary high water mark on the property, a corresponding ordinary high water mark immediately south of the property, and Sumter Road dips at the wash to allow water to flow across the road between the segments of the wash. The district had sufficient information to determine that the east wash was a tributary to the Santa Cruz River, and therefore within Corps jurisdiction.

Also, the description in the appellant's original request for an approved JD also supports the district's conclusion that the wash is present on both sides of Sumter Drive. In the appellant's original request for a Corps JD submitted by Timothy S. Oliver on January 12, 2000, he stated:

“Flow enters the wash from a retention/detention (see photo in Tab 4) in the southeast corner of the property to the north. The wash is poorly defined as it crosses, from northeast to southwest, the northwest corner of the lot to the east of the subject property. The wash flows generally from northeast to southwest across the property with variable visibility on the aerial photos. About 400 feet after crossing Sumter Drive, the wash joins another unnamed wash. The combined wash southwesterly for several miles. This wash appears to terminate without reaching another watercourse in Section 25, T12S, R12E.”

The review officer clarified at the review conference that neither the district nor the appellant's representatives had visited the Section 25, T12S, R12E mentioned above or the other desert washes southwest of the property to evaluate the tributary connection between the desert washes on the appellant's property and the Santa Cruz River. Both the district and the appellant had done that portion of their work from aerial photography and topographic maps.

During the site visit, the review officer visited several locations on the wash between the appellant's property and the Santa Cruz River. The review officer confirmed the information from the aerial photography that the washes increased in size as they

extended southwest from the Turner property. The washes were about 6 feet wide on the property, but combined with other washes to form a wash up to approximately 60 feet wide about 0.5 mile southwest of the property. This larger wash had been directed through several housing developments with concrete bank stabilization, and in some cases concrete banks and channel bottoms.

About 3 miles southwest of the Turner property, the wash is completely concrete lined when it goes through a housing development. The wash exits the housing development to the west and is still approximately 60 feet wide at this point where it crosses Hartman Lane into an undeveloped area, and again becomes a sandy wash. The wash then extended approximately another 0.75 miles west and into culverts under the Union Pacific Railroad tracks. The wash is less distinct in this area. The district submitted clarifying aerial photographs that the wash flowed through this area, then under Interstate 10, then along the eastern and northern boundaries of a golf course, and into the Santa Cruz River. The appellant's engineer submitted clarifying maps showing the same alignment and connection.

The administrative record and the clarifying information submitted by the appellant and the district support the conclusion that the washes on the appellant's property have an ordinary high water mark, join with several other washes into a larger wash, and are connected to the Santa Cruz River. Although the consolidated larger wash crosses a number of paved roads, and is modified with concrete banks, or in some locations consists of a concrete channel, this wash still functions as a tributary to the Santa Cruz River. The district correctly concluded that both washes on the Turner property are tributaries to an interstate navigable waterway, and are subject to Corps regulatory jurisdiction under Section 404 of the CWA, qualifying as waters of the United States under 33 CFR 328.3(a)(5) of the Corps regulations.

The district's JD was completed prior to issuance of the SWANCC Supreme Court decision. However, the district's JD is unaffected by the SWANCC decision because that decision was in regard to whether the Corps appropriately asserted CWA jurisdiction over an isolated, non-navigable, intrastate water based on that area's use as habitat by migratory birds. As explained in the January 19, 2001, Joint Environmental Protection Agency/Corps of Engineers Counsel Memorandum (EPA/Corps Counsel Memorandum) regarding the SWANCC decision, the Supreme Court held:

“...the Corps exceeded its statutory authority by asserting CWA jurisdiction over “an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds.”

In addition, the EPA/Corps Counsel Memorandum explained that:

“Although the Court held that the Corps' application of §328.3(a)(3) was invalid in SWANCC, the Court did not strike down of §328.3(a)(3) *or any component of the regulations defining waters of the United States (emphasis added).*”

and that:

“The Court did not overrule the holding or rationale of United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), which upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each.”

The district’s JD was supported by substantial information in the administrative record, and was based on criteria that were not affected by the recent SWANCC decision.

**Information Received and its Disposition During the Appeal Review:**

- 1) The district provided aerial photographs printed out from the Pima County Department of Transportation website that showed how the nature of the connections between the washes on the appellant’s property and the Santa Cruz River. This information was considered during the appeal.
- 2) The appellant’s engineer submitted clarifying maps from the Pima County Department of Transportation website. The appellant’s engineer had annotated the map to show the west wash on the Turner property as a jurisdictional tributary to the Santa Cruz River and the east wash on the property as a non-jurisdictional isolated wash. This information was considered during the appeal.

**Conclusion:** The district’s decision was based on substantial information in the administrative record. The clarifying information provided by both the district and the appellant supported the district’s conclusion that the areas are jurisdictional as tributaries to a navigable, interstate water and are subject to Corps regulation as waters of the United States. The basis for this determination is consistent with the current Corp regulatory program regulations. The recent SWANCC decision is not germane to the basis of Corps jurisdiction used in this JD. The appeal does not have merit.

original signed by

Peter T. Madsen  
Brigadier General, Corps of Army  
Division Engineer