

ADMINISTRATIVE APPEAL DECISION

**APPROVED JURISDICTIONAL DETERMINATION
FOR DESERT MOON SHADOWS ESTATES**

BUCKEYE, MARICOPA COUNTY, AZ

ARMY CORPS OF ENGINEERS FILE NO. 2001-01675-AP

LOS ANGELES DISTRICT

JULY 11, 2002

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

District Representatives: Anne Palaruan and Ron Fowler, U.S. Army Corps of Engineers (Corps) Los Angeles District, Arizona – Nevada Field Office (District)

Appellant Representatives: Cormac Nolan and Glen Rau, Core Group Consultants

Receipt of Request For Appeal (RFA): April 1, 2002

Appeal Conference Date: May 23, 2002 **Site Visit Date:** May 23, 2002

Background Information: The District determined a desert wash on the Appellant's property was within Corps regulatory jurisdiction because it had a tributary connection via a series of desert washes to the Roosevelt Canal (Canal), and subsequently to the Hassayampa River. The Appellant disagrees that a tributary connection exists because the hydrology of the area has been altered, and because the Canal is man-made structure primarily used for irrigation.

Summary of Decision: The District's decision was based on a review of aerial photographs, topographic maps, and several site visits. The Administrative Record was not conclusive regarding whether a continuous tributary connection existed between the desert wash on the project site and the Hassayampa River. However, even if such a connection does not exist it is clearly documented that the Canal is acting to impound the waters of the desert wash on the north side of the Canal. The Administrative Record supports the conclusion that the desert wash on the Appellant's property is regulated as a tributary to a water of the United States under 33 CFR 328.3(a)(5) and/or as an impoundment of a water of the United States under 33 CFR 328.3(a)(4), or possibly both. Although the Administrative Record does not clearly differentiate between these two possibilities, this is a harmless procedural deficiency because the Administrative Record demonstrates that the desert wash on the property meets one or more of the above definitions of a water of the United States. The Administrative Record as a whole provides sufficient basis of establishing Corps Regulatory jurisdiction over the desert wash on the project site. The appeal does not have merit.

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

Reason 1: The Appellant's position is that the Ordinary High Water Mark (OHWM) the District used to establish regulatory jurisdiction is related to historical, not current flow levels of the desert wash.

FINDING: The appeal does not have merit.

ACTION: None required.

DISCUSSION: The subject of this administrative appeal is a desert wash located on the northeast portion of a 197 acre undeveloped property being proposed for the Desert Moon Shadows Estates project. The property is located in the Buckeye area of Maricopa County, about 36 miles west of Phoenix, Arizona. Agriculture use of nearby properties has occurred for many years. Residential development in the vicinity is increasing.

The unnamed desert wash that is the subject of this administrative appeal enters the property from the north, approximately 1,800 feet south of Interstate 10 and approximately 2,400 feet south of the Buckeye Flood Retention Structure (FRS). The Buckeye FRS is designed to provide protection for the Buckeye area from a 100-year storm and provides detention and controlled release of potential floodwaters. A desert wash starting at the Buckeye FRS continues downslope, extends under Interstate 10 via a culvert, and extends to the project site.

From the project site, the wash then extends approximately 800 feet southeast to the eastern boundary of the site, meanders on and off the eastern boundary of the site, and then exits the project site and continues southeast approximately 1,100 feet until it intersects with a larger, unnamed wash. This larger wash has been modified and proceeds in a straight line approximately 2,500 feet southeast to Watson Road.

The wash continues through a culvert under Watson Road and then turns directly south and continues approximately 1,500 feet along the eastern boundary of Watson Road to the north boundary of the Canal. The Canal then continues west about 5 miles to its connection into the Hassayampa River.

The District and the Appellant disagree regarding the interpretation of several physical features as they relate to the jurisdictional status of the desert wash. The District and the Appellant agree that the Hassayampa River is within Corps regulatory jurisdiction.

The District's position is that the unnamed desert wash on the property is subject to Corps 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 this desert wash, 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 identified several indicators of the presence of an OHWM. The District’s interpretation included that the substrate below the OHWM had more coarse sandy material than the surrounding area (evidence that finer materials had been removed by water) and that there was evidence of shelving of material. The District also considered changes in vitality and species composition of plants in the vicinity of the desert wash to be evidence of a biological response to water in the desert wash. Some portions of the wash showed evidence of debris transported by water.

The Appellant’s position is that the evidence of an OHWM on the project site is the result of historical flow levels that no longer occur. The Appellant also stated that the agricultural activities between the project site and the Canal would have destroyed any evidence of the desert washes. However, during the site visit the District, the Appellant and the Review Officer followed the desert wash in dispute to within approximately 300 feet of the Canal. I conclude that the District sufficiently documented the presence of an OHWM from the desert wash on the project site to within approximately 300 feet of the Canal. The District’s documentation of whether the desert wash actually forms a tributary connection with the Canal and the Hassayampa River is discussed separately under Reason 2 below.

Reason 2: The Appellant asserts the desert wash on the property does not flow into Canal with sufficient frequency (if at all) to be considered a jurisdictional tributary connection, and should be considered an isolated water that is outside of Corps regulatory jurisdiction.

FINDING: The appeal does not have merit.

ACTION: None Required.

DISCUSSION: As the desert wash approaches the Canal from the north, it becomes wider and shallower. The OHWM of the desert wash becomes less distinct within approximately 300 feet of the Canal. A road and berm on the north side of the Canal are several feet higher in elevation than the desert wash at this point. There is also a berm extending from east to west across the agricultural field approximately 300 feet north of the Canal. The berm on the Canal functions as an impoundment and several feet of water would have to accumulate upstream of this berm before water would flow from the desert wash into the Canal.

The District concluded the desert wash has a tributary connection with the Canal, and that flows from the wash would reach the canal with sufficient frequency to establish a jurisdictional tributary connection. The District determined a tributary connection was present based on the presence of two concrete spillways and a cement culvert on the north side (upstream) of the Canal, which indicated a surface water connection between the desert wash and the Canal.

The Appellant's position is that a surface water connection between the desert wash and the Canal would only occur as a result of a severe precipitation event and flood. The Appellant concludes these occasional connections do not establish a Corps jurisdiction over the desert wash as a tributary to waters of the United States.

The District did not provide detailed documentation of the tributary connection from the desert wash to the Canal in the area immediately north of the Canal. The presence of the culvert and spillways on the north side of Canal indicate that water occasionally flows from the desert wash into the Canal. Even if this flow does not occur with sufficient frequency to establish a tributary connection between the desert wash and the Canal, the Canal is acting as an impoundment of waters from the desert wash.

The Corps definition of waters of the United States includes impoundments of waters which would otherwise be within Corps jurisdiction as waters as discussed at 33 CFR 328.3(a)(4) which states that waters of the United States include:

- (4) All impoundments of waters otherwise defined (*in 33 CFR 328.3 Definition of Waters of the United States*) as waters of the United States under the definition. (Note: Text in italics added for clarity).

The Administrative Record does not clearly show that a tributary connection exists between the desert wash and the Canal. However, even if such a connection does not exist, the Administrative Record establishes that the berm on the north side of Canal is acting to impound the waters of the desert wash that otherwise would flow into the Canal, and subsequently flow into the Hassayampa River. Therefore, the Administrative Record supports the conclusion that the desert wash on the Appellant's property is regulated as a tributary to a water of the United States under 33 CFR 328.3(a)(5) and/or as an impoundment of a water of the United States under 33 CFR 328.3(a)(4), or possibly both. Although the Administrative Record does not clearly differentiate between these two possibilities, this is a harmless procedural deficiency because the Administrative Record demonstrates that the desert wash on the property meets one or more of the above definitions of a water of the United States.

The Appellant also challenged whether it is appropriate for the Canal, a man-made irrigation channel constructed primarily in uplands, to be considered a tributary to establish Corps regulatory jurisdiction. The Preamble to the Corps November 13, 1986 Regulations 51 Fed Reg Pg 41217 stated that the Corps generally does not consider non-tidal drainage and irrigation ditches excavated on dry land to be waters of the United

States. However, the Preamble to the Corps March 9, 2000, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed Reg Pg 12823-12824 states:

“Drainage ditches constructed in uplands that connect two waters of the United States *may* (emphasis added) be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States.”

The Administrative Record shows that the Canal primarily provides irrigation water, but also provides surface water flow into the Hassayampa River. The Administrative Record supports the conclusion that if a surface tributary connection was established between the desert wash and the Canal, that this surface tributary connection continues to the Hassayampa River. If a tributary connection were not established, there is sufficient evidence in the Administrative Record that the berm on the Canal is impounding waters of the desert wash immediately north of the Canal. Either situation would establish Corps regulatory jurisdiction over the desert wash as discussed above. The District’s jurisdictional determination, and this Administrative Appeal, only address the jurisdictional status of the desert wash on the Appellant’s property, not the entire length of the tributary connection.

The U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (January 9, 2001) (SWANCC Decision) decreased the Corps jurisdiction over isolated waters. The SWANCC Decision is not germane to the action under appeal as SWANCC relates to the extent of Corps regulatory jurisdiction of isolated waters under 33 CFR 328.3(a)(3). This Administrative Appeal relates to the Corps regulatory jurisdiction under 33 CFR 328.3(a)(4), and 33 CFR 328.3(a)(5), regarding tributaries that connect to waters of the United States and impoundments of such tributaries.

Information Received and its Disposition During the Appeal Review: In addition to the Administrative Record, the following additional information was submitted during the appeal.

- 1) The District submitted supplementary clarifying photographs of the Buckeye FSR, the culvert under Interstate 10, the desert wash, the Canal, and the Hassayampa River.
- 2) The District and the Appellant submitted brief clarifying comments on Summary of the Site Visit and Appeal Conference prepared by the Review Officer.

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

Conclusion: The district's decision was based on substantial evidence in the administrative record from aerial photographs, topographic maps, and site visits. The District's determination that the desert wash was within Corps regulatory program jurisdiction was reasonable. Although the Administrative Record did not clearly demonstrate that a jurisdictional tributary connection existed between the desert wash on the project site and the Canal, the Administrative Record did clearly demonstrate that waters from the desert wash on project site were impounded by the presence of the Canal. The District's decision was consistent with the Corps current regulations and policies. The appeal does not have merit.

original signed by

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