

ADMINISTRATIVE APPEAL DECISION

**APPROVED JURISDICTIONAL DETERMINATION
FOR LEAVELL/GREY PROPERTY**

SUN CITY, LINCOLN HILLS, LINCOLN, CA

ARMY CORPS OF ENGINEERS FILE NO. 199700375

SACRAMENTO DISTRICT

DATE April 24, 2002

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

District Representatives: Tom Cavanaugh and Michael Jewell, U.S. Army Corps of Engineers (Corps) Sacramento District, (District) Sacramento, California

Appellant Representative: Robert Uram, Sheppard, Mullin, Richter & Hampton LLP, San Francisco, California

Receipt of Request For Appeal (RFA): January 14, 2002

Appeal Conference Date: February 25, 2002 **Site Visit Date:** February 25, 2002

Background Information: The 76 acre, relatively flat, Leavell/Grey (L/G) property is located immediately north of an extensive housing and golf course development of Del Webb Lincoln Hills, Lincoln, California. The Corps previously permitted the Del Webb development. The Appellant and the District agree that two waters of the United States occur in the vicinity of this site - the Auburn Ravine to the north of the site and the Ingram Slough to south of the site. The jurisdictional status of two man-made ditches on the L/G property and wetlands near these ditches are in dispute. The Appellant and the District disagree on whether the man-made ditches are part of a tributary system and thus within the Corps jurisdiction. The Appellant and the District also disagree whether the wetlands in the vicinity of the two man-made ditches are within Corps regulatory jurisdiction as adjacent wetlands.

Summary of Decision: I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding the jurisdictional status of all features on the Leavell/Grey property as waters of the United States. In completing this reconsideration, the District will follow the specific instructions identified in this Administrative Appeal Decision.

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

Reason 1: The Appellant asserts that the man-made Southern Ditch on the Leavell/Grey (L/G) property is not tributary to waters of the United States and therefore is not within Corps geographic regulatory jurisdiction.

FINDING: The appeal has merit

ACTION: The District is directed to reconsider its jurisdictional determination as described in detail in this Administrative Appeal Decision.

DISCUSSION: In recent years the Corps Sacramento District Office (District) has issued permits for residential development of the Del Webb, Lincoln Hills project immediately south and west of the L/G property. The L/G property is proposed for development as an additional portion of the Del Webb complex. At the southern boundary of the L/G property a man-made ditch, the “Southern Ditch”, flows from east to west. This ditch is a remnant of past agricultural and mining activities in the area. The Appellant and the District disagree on the jurisdictional status of the Southern Ditch.

The Appellant and the District agree that most of the water on the site entering the Southern Ditch originates from irrigation runoff entering the site from offsite to the north via culverts under State Highway 193. This irrigation water is also thought to be the primary water source for the approximately 14.11 acres of wetlands the District has identified as jurisdictional on the L/G property. West of the L/G property, the Appellant has eliminated the Southern Ditch as part of the site preparation for additional development, which was previously authorized by Corps permit.

Based on the Appeal Review conference and the limited amount of material submitted regarding the prior Corps permit for the adjoining Del Webb property, I have concluded that prior to delineation of the L/G property both the District and the Appellant considered most, if not all, of the Southern Ditch to be non-jurisdictional. A complete and conclusive review of the past jurisdictional determinations for the adjoining Del Webb property is unnecessary to determine whether the administrative record for the action currently under appeal is sufficient to support the District’s decision.

In the L/G jurisdictional determination, the District identified the Southern Ditch as a jurisdictional tributary to Auburn Ravine. The District clarified at the appeal conference that its position was that the Southern Ditch on the L/G Property was within Corps jurisdiction as a tributary to a water of the United States because there was a historical tributary connection between the Southern Ditch and Auburn Ravine. The Appellant disputes that such a past connection is relevant at all. In addition, as a matter of fact, the Appellant asserts that such a connection has not existed for at least 15 – 20 years. The Appellant has removed a major portion of the route of the Southern Ditch just west of the L/G property, as authorized by a previous Corps permit.

The Corps regulations at 33 CFR Part 328.5 state that:

“Man-made changes may affect the limits of waters of the United States.”

The District stated at the Appeal Conference that they had not investigated whether a connection between the Southern Ditch and Auburn Ravine currently exists, and if so, the nature of that connection. So it is unclear from the administrative record and the Appeal Conference if a tributary connection meeting Corps criteria to establish regulatory jurisdiction currently exists between the Southern Ditch and Auburn Ravine. Whether the Southern Ditch had a tributary connection with Auburn Ravine in the past is relevant if the connection was extinguished by an unauthorized activity. As stated at the Note at 33 CFR 323.2 (d) (4):

“Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.”

Based on the information in the administrative record, there has been no unauthorized discharge associated with the Appellant’s development of the adjoining property. The appellant has obtained a Corps permit to develop the property west of the L/G property including the Southern Ditch, and no violation of that permit has been identified. I conclude the District must reconsider and further document its decision regarding the jurisdictional status of the Southern Ditch.

This reconsideration should include an evaluation of whether the Southern Ditch on the L/G Property currently meets the definition of a tributary to waters of the United States, including an evaluation of the extent of the Ordinary High Water Mark between the Southern Ditch and the Auburn Ravine. The reconsideration should also discuss why the man-made Southern Ditch, which appears to have been constructed in uplands, should be regulated. 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.

I recognize that the Preamble to the Corps March 9, 2000, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed Reg Pg 12823-12824 allows that:

“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.”

However, since the Corps does not generally regulate drainage and irrigation ditches constructed in uplands, as discussed above, if the District should determine in its reconsideration that the Southern Ditch is within Corps jurisdiction, it should explain in detail why this situation is appropriately considered an exception to the generally applicable Corps guidance on the subject.

Reason 2: The Appellant asserts that the man-made Hemphill Ditch on the L/G property is not tributary to waters of the United States and therefore is not within Corps geographic regulatory jurisdiction.

FINDING: The appeal has merit

ACTION: The District is directed to reconsider its jurisdictional determination as described in detail in this Administrative Appeal Decision.

DISCUSSION: The Hemphill Ditch is located on the eastern boundary of the L/G property and flows from north to south. Originally, the Hemphill Ditch conveyed water through L/G property and continued south through additional Del Webb property, and eventually entered Ingram Slough. At the Appeal Conference, the Appellant and the District clarified that the jurisdictional determination and permit for the Del Webb development of the property to the south and downstream of the L/G concluded that only a small portion of the Hemphill Ditch near its entrance to Ingram Slough was identified in the prior Corps permit number 199700375 as within Corps regulatory jurisdiction.

Since issuance of that permit, the Appellant has filled portions of the old Hemphill Ditch on the property south of the L/G site, and excavated and located new ditches in uplands in Year 2000 and 2001 to replace it. Currently, irrigation water is diverted into the Hemphill Ditch from Auburn Ravine, and flows through ditches excavated in uplands to Del Webb Golf Course Hole Number 13 Pond. This water then continues through a series of man-made channels and empties into Ingram Slough. The Appellant and the District agree that Ingram Slough is a water of the United States. California law requires the Appellant continue to convey water through these ditches to downstream irrigation users.

The District considers the Hemphill Ditch and its replacement ditches on the Del Webb property to be waters of the United States because they connect two waters of the United States, Auburn Ravine and Ingram Slough. As discussed under Reason 1 above, the Corps does not typically regulate drainage and irrigation ditches constructed in entirely in uplands. In this case the District did not provide a detailed explanation why it was appropriate to do so.

At the Appeal Conference, the District did mention the discussion of drainage and irrigation in the Preamble to the Corps March 9, 2000, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed Reg Pg 12823-12824 discussed above, and the *Headwaters Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) decision as supporting its position. The Appellant asserted that the *Headwaters Inc. v. Talent Irrigation District* decision was Clean Water Act, Section 402, case and was therefore not applicable to the determination of Clean Water Act, Section 404, jurisdiction.

The District's administrative record did not clearly explain why the Hemphill Ditch should be considered an exception to the Corps general policy that drainage and irrigation

ditches constructed in uplands are outside Corps regulatory jurisdiction. It also appears that the District's prior geographic jurisdictional determination for the Appellant's adjoining property concluded most of Hemphill Ditch was outside Corps jurisdiction. As these issues were not thoroughly addressed in the action under appeal, I conclude that the District's geographic jurisdictional determination for the Hemphill Ditch on the L/G Property must be reconsidered.

This reconsideration should include an evaluation of whether the Hemphill Ditch on the L/G Property currently meets the definition of a tributary to waters of the United States, including an evaluation of the extent of the Ordinary High Water Mark between the Hemphill Ditch and the Auburn Ravine. However, since the Corps does not generally regulate drainage and irrigation ditches constructed in uplands, as discussed above, if the District should determine in its reconsideration that the Hemphill Ditch is within Corps jurisdiction, it should explain in detail why this situation is appropriately considered an exception to the generally applicable Corps guidance on the subject.

The Appellant claims that the Corps October 13, 1999 jurisdictional determination for the L/G property shows that the District concluded Hemphill Ditch was non-jurisdictional at that time, and that the District's most recent jurisdictional determination represents a change from that position. Based on my review of the Administrative Record, it appears that the District, as well as the Appellant's consultant at that time, may have considered the Hemphill Ditch beyond the boundary of the area being surveyed.

Reason 3: The Appellant asserts that the wetlands on the site are isolated and have no connection to interstate commerce, and therefore are not within Corps jurisdiction.

FINDING: The appeal has merit

ACTION: The District is directed to reconsider its adjacency determination as described in detail in this Administrative Appeal Decision.

DISCUSSION: Most of the wetlands on the L/G Property are on the eastern half of the property. These wetlands receive most of their water from irrigation runoff flowing from the north and onto the site, much of which appears to then end up in the Southern Ditch. There are also several small discretely mapped wetland units on the western portion of the site. The District's position is that all the wetlands delineated as jurisdictional meet the Corps definition of adjacent wetlands.

The Corps regulation regarding jurisdiction over wetlands adjacent to jurisdictional waters is defined at 33 CFR Part 328.4 (b) and 4 (c):

“(b) Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:

- (1) Extends to the high tide line, or
- (2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.”

The term adjacent is defined in the Corps regulations at 33 CFR 328.3 (c) as:

“(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes *and the like* are “adjacent wetlands.” ”
[Emphasis added]

The adjacency concept was further discussed in the Preamble to the Corps 1977 regulations 42 Fed Reg page 37129 (1977), which stated:

“...we have defined the term “adjacent” to mean “bordering, contiguous, or neighboring.” The term would include wetlands that directly connect to other waters of the United States, or *that are in reasonable proximity* to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, *and similar obstructions.*” [Emphasis added]

The Corps regulations at 33 CFR Part 328.3 (a)(7) states that waters of the United States include:

“Wetlands adjacent to waters (*other than waters that are themselves wetlands*) identified in paragraphs (a) (1) – (6) of this section [waters of the United States]
[Emphasis added].

The Appellant believes that the wetland areas in question are isolated, not adjacent, wetlands, and if considered pursuant to the *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (January 9, 2001) (SWANCC Decision), those areas would be outside Corps regulatory jurisdiction, because there is an insufficient connection between those areas and interstate commerce.

The Corps Headquarters, Operations Division, Memorandum of May 11, 2001, prohibits Regulatory Offices in Major Subordinate Commands (MSCs, also called Divisions) and District Commands, from developing or utilizing new local practices for determining the extent of Clean Water Act Section 404 regulatory jurisdiction, or from utilizing local practices that were not in effect prior to the January 9, 2001 SWANCC decision. This is in order to minimize complications affecting the development and promulgation of National Policy subsequent to SWANCC in connection with interagency efforts to address Clean Water Act jurisdiction related to the ‘tributary’ status of waters, and to the ‘adjacent’ status of wetlands. In problematic situations, Districts can request case-specific guidance from Corps Headquarters Regulatory Branch.

It appears that some of the wetlands on the western portion of the site are closer to other wetlands than they are to the Southern Ditch. In order for these wetlands on the interior of the site to be considered jurisdictional, they must be directly adjacent to the Southern Ditch or the Hemphill Ditch, or they must form a “wetland continuum or complex” with other wetlands on the site which are adjacent waters of the United States. In such situations the entire complex can be considered an adjacent wetland. This situation was described, for purposes of determining which jurisdictional water a wetland was adjacent to, in the Preamble to the 1991 reissuance of the Corps Nationwide Permits 56 Fed Reg page 59113, 1991, as follows:

“In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous.”

The District’s administrative record for this action did not address whether a broad continuum of wetlands was present. At the Appeal Conference the District explained that some discretely mapped wetlands were considered in close enough proximity to the Southern Ditch or the Hemphill Ditch to be considered jurisdictional adjacent wetlands, while other wetlands which had been reevaluated as a result of the SWANCC decision, were considered too far away to be adjacent wetlands, and were considered non-jurisdictional isolated wetlands. The District’s project manager stated he used best professional judgment in reaching this conclusion, and did not list any other specific criteria for the decision in the administrative record. The District and the Appellant agreed that there was no surface water connection between the Hemphill Ditch and the wetlands on the L/G Property.

I conclude the District’s jurisdictional determination for the wetlands on the L/G property is not supported by substantial evidence in the Administrative Record, and remand this action to the District as required by 33 CFR Part 331.9 for reconsideration based on the instructions below.

I am directing the District to reconsider the jurisdictional status of the Southern Ditch and the Hemphill Ditch. Once those reconsiderations are complete, the District should then reconsider the jurisdictional status of the wetlands on the L/G property. The District must use its existing procedures to further document, reconsider, and if appropriate, modify its jurisdictional determination regarding the wetlands on the L/G property.

The District should first consider whether those wetlands could be considered adjacent to the nearby jurisdictional waterbodies. The District must undertake this evaluation based on its existing procedures in effect prior to January 9, 2001 as required by the Corps Headquarters, Operations Division, Memorandum of May 11, 2001.

If upon reconsideration the District has substantial evidence that some of the wetlands areas should be considered isolated wetlands rather than adjacent wetlands, then the jurisdictional status of these areas should be reconsidered pursuant to the SWANCC decision to determine if there is a sufficient connection to interstate commerce to regulate

these areas as isolated waters of the United States. If the District finds that after applying its existing procedures, that it still lacks substantial evidence upon which to reach a conclusion, the District may seek case-specific guidance from Corps Headquarters Regulatory Branch as discussed in the Chief of Operations Division May 11, 2001 Memorandum.

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 Appellant provided the complete report, “Analysis of Seasonal Wetlands in the Proposed Expansion Area of Sun City Lincoln Hills” dated July 13, 2001, by Robert Uram and Thomas Roth of Sheppard, Mullin, Richter & Hampton LLP. Much of this report had been included in the administrative record previously.
- 2) Eastlake Wetland Delineation Map prepared by Laurence Stromberg of Sugnet & Associates Environmental Consultants, dated April 5, 1990.

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

Conclusion: I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding whether the Southern Ditch, Hemphill Ditch, and wetlands on the L/G Property are jurisdictional waters of the United States. In completing this reconsideration, the District will follow the specific instructions identified in this Administrative Appeal Decision.

original signed by

Robert L. Davis
Brigadier General, U.S. Army
Commanding