

ADMINISTRATIVE APPEAL DECISION

**APPROVED JURISDICTIONAL DETERMINATION
FOR THE SUNRISE OFFICE PARK**

FILE NO. 2001-00379-RJD

LOS ANGELES DISTRICT

DATE September 7, 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: Tom Guido, T and T Engineering, Tucson, Arizona

Receipt of Request For Appeal (RFA): 14 May 2001

Appeal Conference Date: 11 July 2001 **Site Visit Date:** 11 July 2001

Background Information: The Arizona – Nevada Field Office, Los Angeles District (District) issued an approved jurisdictional determination (JD) file number 2001-00379-RJD for the Sunrise Office Park property located in the Tucson area, Pima County, Arizona on April 4, 2001. The District identified a desert wash on the property as being subject to Corps jurisdiction under Section 404 of the Clean Water Act (CWA) because it was connected by a series of tributaries to an interstate, navigable water. The Appellant does not believe that a tributary connection establishing Corps jurisdiction exists.

Summary of Decision: The District's decision was based on substantial evidence in the administrative record from aerial photographs, geographic information system maps, and was supported by field evidence of a tributary connection establishing Corps jurisdiction. The District's determination that the desert wash was jurisdictional as a tributary to a navigable, interstate water and subject to Corps regulation as a water of the United States was reasonable. The District's decision was consistent with the Corps current regulations and policies. 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 desert wash on the project site has been isolated by upstream and downstream urban development and there is no tributary connection to waters of the United States to establish Corps regulatory jurisdiction as claimed by the District.

FINDING: The appeal does not have merit.

ACTION: None required.

DISCUSSION: The Arizona – Nevada Field Office, Los Angeles District (District) issued an approved jurisdictional determination (JD) file number 2001-00379-RJD for the Sunrise Office Park property located in the Tucson area at the southwest corner of the intersection of Camino Cortaro and Oracle Road, Section 25, T12S, R13E, Pima County, Arizona. The District established jurisdiction of the desert wash on the project site because the desert wash connected via a series of washes to the Rillito River, which is a tributary to the Santa Cruz River, which is a tributary to the Gila River, which is a tributary to the Colorado River, which is an interstate navigable waterway.

The relevant Corps regulations are 33 CFR Part 328.3 (a)(2) which states that waters of the United States include:

“All interstate waters including interstate wetlands”

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 Appellant asserted that a tributary connection did not exist between the desert wash on their project site and a water of the United States subject to Corps jurisdiction.

At the site visit and appeal conference, the Corps and the Appellant agreed that the desert wash extending across the Appellant’s project site had a continuous ordinary high water mark. The District and the Appellant also agreed that Corps jurisdiction extended from the Rillito River through a series of desert washes to the south side of Magee Road. The District and the Appellant disagreed as to whether a continuous tributary connection and Corps jurisdiction extended from the north side of Magee Road upstream for another mile to the Appellant’s project site.

The limits of waters of the United States and Corps jurisdiction 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.”

Therefore the District, the Appellant, and the Appeal Review Officer reviewed the evidence for the presence of an ordinary high water mark at several locations extending from the north side of Magee Road to the Appellant’s project site.

Immediately west of the project site, between the property and Magee Road, the desert wash empties into a water detention basin of a new residential housing development. This “L” shaped basin is approximately 200 feet long by 60 to 120 feet wide, and is drained by a 60 foot long, 6 inch diameter underground culvert. The District and the Appellant disagree as to whether a tributary connection is terminated by the presence of the detention basin and culvert.

The 6 inch culvert then connects to an approximately 1 foot wide channel. The 6 inch culvert just west of the project site has replaced the function of a natural tributary and has maintained a tributary connection. The District and the Appellant agreed that the 1 foot wide channel has an ordinary high water mark.

This 1 foot wide channel connects to a concrete channel, which then reconnects to a natural channel with an ordinary high water mark, which meanders southwest through several single-family home residential areas to Magee Road. The ordinary high water mark becomes indistinct at several locations between the project site and Magee Road where the desert wash follows or crosses paved surfaces. These road crossings act as conduits of the water and maintain the tributary connection. The evidence in the administrative record as clarified by the site visit and appeal conference clearly support the District’s conclusion that there is a tributary connection between the desert wash on the Appellant’s project site and waters of the United States.

The District’s position that there is a tributary connection is also supported by *United States v. TGR Corporation* 171 F.3d 762 (2nd Cir 1999). This court decision found that a natural stream that had been partially channelized into underground pipes was still a jurisdictional water of the United States because it was a tributary to a navigable water of the United States.

Several court decisions including *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 District’s position that the desert wash on the project site is a water of the United States within Corps jurisdiction is reasonable.

The Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States*, No. 99-1178, issued January 9, 2001, addressed the extent of the Corps regulatory jurisdiction over isolated, intrastate waters which have no tributary connections to waters of the United States. The District has demonstrated that jurisdiction extends to this area as a result of a tributary connection, so the *Solid Waste Agency of Northern Cook County v. United States* decision is not germane to this action.

Reason 2: This desert wash is of very low aquatic resource value and therefore should not be subject to Corps jurisdiction.

FINDING: The appeal does not have merit.

ACTION: None required.

DISCUSSION: The Appellant asserts that the desert wash on the project site is a very low quality aquatic site as a result of the urban development that has occurred both upstream and downstream of the site. The Appellant asserts that as a result, this low quality aquatic site should not be regulated. The Appellant’s argument is that since there are not high quality aquatic resources present, this area should not be within Corps jurisdiction.

The Corps regulations regarding the definitions of its jurisdiction are at 33 CFR Part 328 “Definition of Waters of the United States” and 33 CFR Part 329 “Definition of Navigable Waters of the United States.” Neither 33 CFR Part 328 or 33 CFR Part 329 require or authorize any consideration of the aquatic habitat quality as part of the determination of Corps jurisdiction.

The relationship of the Corps public interest review process to its jurisdictional determinations was discussed in *Vieux Carre Property Owners v. Colonel Lloyd Kent Brown* 875 F.2d 453 (5th Cir 1989). The court found that:

“...this public interest review regulation is clearly intended as a prerequisite to a decision to permit an activity within the Corps’ jurisdiction, rather than a factor in the decision on whether jurisdiction exists at all.”

I find no support for the Appellant’s assertion that the District should base its jurisdictional decision on whether or not the area in question is a high value aquatic site. The District’s approach was reasonable and considered the relevant factors for establishing the Corps jurisdiction under 33 CFR Part 328, and was consistent with *Vieux Carre Property Owners v. Colonel Lloyd Kent Brown*.

Should the applicant pursue a permit for an action on this site, the District will consider the environmental impacts of issuing such a permit as part of its public interest review under 33 CFR Part 320.4. The aquatic value of the site, or lack thereof, would be a part of that analysis.

Information Received and its Disposition During the Appeal Review:

- 1) A June 19, 2001 letter from the Appellant providing a drainage plan entitled “Sunrise Office Park, Lots 1 – 8 and Common Area “A”, a Part of Catalina Citrus Estates, Bk. 6, Pg. 24, Pima County M & P’s” dated April 22, 2001.
- 2) Original maps and additional color aerial photographs of the site were reviewed during the July 11, 2001 site visit and appeal conference.

All these submittals and information 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, geographic information system maps, and field evidence of a tributary connection establishing Corps jurisdiction. The District's determination that the desert wash was jurisdictional as a tributary to a navigable, interstate water and subject to Corps regulation as a water of the United States was reasonable. 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
Colonel (P), Corps of Engineers
Division Engineer