

ADMINISTRATIVE APPEAL DECISION

GOTTSCH FEEDING CORP. FILE NO. NE02-10076

OMAHA DISTRICT

DATE: JULY 25, 2002

Review Officer: Mores Bergman, U.S. Army Corps of Engineers (Corps), Northwestern Division.

Appellant: Gottsch Feeding Corp., Webster County, NE

Appellant Representative: Dean Settje, Agri-Services and Engineering, Raymond, NE.

Receipt of Request For Appeal: April 17, 2002

Site Visit Date: May 17, 2002

Background Information:

On February 22, 2002, the Corps of Engineers Omaha District (District) provided an approved jurisdictional determination (JD) to Gottsch Feeding Corp, in connection with a permit application for expansion of Gottsch Feeding's Webster County cattle feeding operation. The project would involve filling and rerouting two watercourses that are located on the Gottsch property in the southeast ¼ of section 6, township 2 north, range 10 west, Webster County, Nebraska. The watercourses are identified on U.S. Geological Service (USGS) and National Wetlands Inventory (NWI) maps as Dry Creek and an unnamed tributary to Dry Creek. The combined drainage area for the two waterways is 2,210 acres.

Mr. Keith Tillotson of the Omaha District's Kearney, Nebraska field office performed a site investigation on February 21, 2002 and prepared a JD, which identified the two watercourses as being waters of the United States (US) based on the fact that the watercourses are tributaries to other known waters of the US. No wetlands were identified on the site. This concurs with a non-wetland determination made by the Natural Resource Conservation Service in 1990. Since no wetlands were identified on site, the District's JD was based solely on the presence of tributaries to waters of the US. On April 10, 2002, Mr. Dean Settje, sent a Request for Appeal (RFA) of the approved JD to the Corps Northwestern Division, on behalf of the appellant. The RFA was received by the Corps on April 17, 2002. A site visit was conducted by the Review Officer, Mr. Bergman, on May 17, 2002. Mr. Tillotson represented the District at the site visit. Mr. Mike Danehey, Gottsch Feeding Corp, also attended the site visit. The site visit trip report, dated June 3, 2002, is attached (enclosure 1).

Reasons For Appeal Submitted by Appellant's Agent: Appeal reasons are summarized here for brevity and clarification. The verbatim text of the reasons for appeal is attached (enclosure 2).

Reason 1: The unnamed tributary and upland portions of Dry Creek on the site are not waters of the United States (US) because no waters are present, no bed and bank exist, and a clear, natural line impressed on the banks of said tributaries are not visible, as the site is tilled, cropped and farmed.

Reason 2: Flows in these tributaries are only present during runoff events generated from snowmelt or excessive rainfall on upland adjacent cropland.

Reason 3: Water flow in waters of the US downstream of the property is the result of overflow of clean uncontaminated drinking water sources from the feedlot, and would not be present without this source.

Reason 4: The appellant states that existing cropping activity has not been hindered as the result of wetness, channelization and formations such as "banks" that would prohibit such tillage activities associated with traditional farming activities.

Information Received During the Appeal Review and Its Disposition:

The District provided the Review Officer and the appellant with a copy of the administrative record for the jurisdictional determination, which included the basis for JD, and maps and photographs of the area in question. This information was considered in the appeal review. A site visit was also conducted at the area in question as part of the appeal review. Information obtained during the site visit was also considered in the appeal review.

Summary of Decision:

The appeal does not have merit. The District's JD and supporting administrative record demonstrate that Dry Creek and its unnamed tributary, located on the Gottsch property, are waters of the US even though those areas have been tilled and cropped. The District's approved jurisdictional determination is therefore upheld.

Appeal Decision Findings and Instructions for District Action (if required):

Reason 1: The unnamed tributary and up land portions of Dry Creek on the site are not waters of the United States (US) because no waters are present, no bed and bank exist, and a clear, natural line impressed on the banks of said tributaries are not visible, as the site is tilled, cropped and farmed.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by District relative to this appeal reason.

Discussion: The appellant contends that since there is presently no clearly visible stream bed and bank or continuously flowing water at the site, that the area in question cannot be a water of the US. The definition of waters of the US as contained in regulation 33 CFR Part 328.3 (a)(5) indicates that tributaries to other waters of the US are also waters of the US. The District has shown via USGS, NWI, and county maps that Dry Creek flows into the Republican River, which is a known “interstate” water of the US. The appellant concurs that Dry Creek is a water of the US downstream of the Gottsch property, as he has stated in his reasons for appeal, but believes that Dry Creek and its unnamed tributary are not waters of the US where they cross the Gottsch property because they do not show characteristics of a water of the US at that location.

Regulation 33 CFR Part 328.4(c) describes the limits of jurisdiction for non-tidal waters of the US. It states under subparagraph 328.4(c)(1) that “In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark.” The definition of ordinary high water mark (OHWM) is found at 33 CFR Part 328.3(e), which states: “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 presents of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” The District has shown in their JD documentation, site visit report and photographs, that a stream channel, having these listed characteristics, exists immediately upstream and downstream of the area in question. The District has also determined, as is indicated in Mr. Tillotson’s site visit report dated February 21, 2002, that channels are discernable through the farmed areas by contours and elevations. Since the area in question had been disturbed and manipulated by the cropping and tillage operations, the District’s determination of jurisdiction is believed to be reasonable and supportable based primarily on that part of the OHWM definition that states: “or other appropriate means that consider the characteristics of the surrounding areas”.

During the Review Officer's site visit on May 17, 2002, it was observed that drain-ways are visible crossing the Gottsch property that connect with the undisturbed defined channel sections above and below the site in question. The drain-ways at the site appeared as shallow swales, which slope to drain generally from north to south across the property. These drain-ways showed evidence of water flowage lines, although water was not flowing at the time of the visit. It was clear that these drain-ways provide for the conveyance of water flow for Dry Creek and its tributary across the Gottsch property. It was also mentioned by Mr. Danahey at the May 17th site visit, that in 1989, Gottsch Corp. had obtained a permit from the Corps for the modification of the Dry Creek channel across the property in question to make it straighter, wider and shallower, to enable farming operations through the creek area. This fact was confirmed by Mr. Tillotson at the site visit. This information supports the belief that before the creek area was modified and farmed, it likely had the same characteristics as does the presently undisturbed portions of Dry Creek that are located above and below the site in question.

Reason 2: Flows in these tributaries are only present during runoff events generated from snowmelt or excessive rainfall on upland adjacent cropland.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this appeal reason.

Discussion: The definition of waters of the US contained in regulation 33 CFR Part 328 does not prescribe the source of water or the frequency that water must be present in order for an area to be considered a water of the US. The definition of OHWM contained in Part 328.3(e) only requires that water be present sufficiently that "fluctuations of water" will provide indications of an OHWM. It is a fact that the primary source for the water found in rivers, streams and tributaries is precipitation (rainfall and snowmelt). Other sources are ground water and other point source water discharges, which for the most part, also originate from precipitation. In the March 9, 2000 Federal Register (FR Vol 65, No. 41, page 12897), the Corps of Engineers defined ephemeral stream for the purpose of the Corps permit program as: "An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year." Since Dry Creek and its tributary at the site in question are not continuous flowing streams and receive their water primarily from precipitation, they meet the definition of ephemeral streams. On page 12881 of the March 9, 2000 Federal Register, the Corps further states: "An ephemeral stream that meets the criteria at 33 CFR Part 328 is a water of the United States." The District's JD documentation has shown that Dry Creek and its tributary, located on the Gottsch property, meet the criteria contained in 33 CFR Part 328.

Reason 3: Water flow in waters of the US downstream of the property is the result of overflow of clean uncontaminated drinking water sources from the feedlot, and would not be present without this source.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this appeal reason.

Discussion: The appellant asserts in Reason 3 that the only source of water providing flow in Dry Creek downstream of the Gottsch property is the overflow of drinking water from the feeding operation. However, as noted in the “Discussion” sections of Reasons 1 and 2 above, the District has determined that water does flow into those portions of Dry Creek and its tributary that cross the Gottsch property, from tributaries upstream of the Gottsch property. This source of water is in addition to the overflow from the watering operation and any precipitation that falls directly onto the Gottsch property and drains into Dry Creek. Although it is true that the flow of water from these sources does not provide a continuous flow of water in Dry Creek and its tributary on the Gottsch property, it is not necessary for the flow to be continuous to be considered as waters of the US (per the definition of waters of the US).

Reason 4: The appellant states that existing cropping activity has not been hindered as the result of wetness, channelization and formations such as “banks” that would prohibit such tillage activities associated with traditional farming activities.

Findings: This appeal reason does not have merit, for the reasons contained in the Discussion section below.

Action: No action required by the District relative to this appeal reason.

Discussion: As discussed in the “Discussion” sections for Reasons 2 and 3 above, the District has shown that even though Dry Creek and its tributary are capable of being farmed in their present condition, they still provide a drain-way for carrying, and in fact do carry, water flow across the Gottsch property during and after precipitation events. In addition, the District has demonstrated that these waterways possess characteristics indicating an OHWM and they are part of a surface tributary system connected to a known water of the US. The definition of “waters of the US” does not require that a waterway have water present at all times or indicate that a waterway cannot be farmed.

Overall Conclusion:

After reviewing the information contained in the Omaha District's administrative record, information presented by the appellant, and observations made during the site visit, I conclude that this Request For Appeal does not have merit for the reasons provided in the discussions above.

Enclosures

/ Signed /
Peter C. Gibson
Chief, Operations Division