



**DEPARTMENT OF THE ARMY**  
**CORPS OF ENGINEERS, NORTHWESTERN DIVISION**  
**PO BOX 2870**  
**PORTLAND OR 97208-2870**

REPLY TO  
ATTENTION OF

Program Support Division

Mr. Michael Comodeca  
Spence, Fane, Britt & Browne, LLP  
Suite 700, 40 Corporate Woods  
9401 Indian Creek Parkway  
Overland Park, Kansas 66210-2005

Dear Mr. Comodeca:

I have completed my review of the Request for Appeal, submitted on behalf of Mr. Bruce Pearson, regarding the approved jurisdictional determination (JD) made by the Kansas City District for the Pearson property, located in Sedgwick County, Kansas, File No. 20041363.

After evaluating the information provided in the Request for Appeal; the District's administrative record; and the information obtained during the appeal meeting and site visit, I have determined that your appeal has merit. Enclosed is a copy of the Administrative Appeal Decision document, which provides the details of my findings for the appeal.

I am remanding the JD decision to the Kansas City District with instructions to re-evaluate their determination. The District will contact you to provide their final decision on jurisdiction when they complete their re-evaluation. If you have any questions about that process, you may contact William Jeffries of the Kansas City District at 316-322-8247.

If you have any questions about the appeal decision, you may contact the Appeal Review Officer, Mr. Mores Bergman, at 402-697-2533.

I am also providing a copy of my decision to Mr. Timothy Austin, at his request.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter C. Gibson".

Peter C. Gibson  
Chief, Program Support Division

Enclosure

**ADMINISTRATIVE APPEAL DECISION**

**BRUCE PEARSON, FILE NO. 200401363**

**KANSAS CITY DISTRICT**

**DATE: April 11, 2005**

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

**Appellant:** Bruce Pearson

**Appellant's Representatives:** Timothy Austin (AM Consulting) and Michael Comodeca (Spencer Fane Britt Browne, LLP) for the appellant.

**Receipt of Request for Appeal:** August 3, 2004

**Appeal Conference and Site Visit Date:** October 13, 2004

**Background Information:** On May 6, 2004, the Kansas Regulatory Office of the Corps Kansas City District (District) received a request for a jurisdictional determination from Geotechnical Services Inc (GSI), on behalf of Mr. Bruce Pearson, regarding a parcel of property owned by Mr. Pearson. The property is located in Section 5, Township 27 South, Range 1 West, Sedgwick County, Kansas and lies within a lake and wetland basin area known as Cadillac Lake. GSI submitted a Preliminary Wetland Identification and Delineation report for the property, dated January 2004, along with their request. On June 4, 2004, the District provided GSI and the Pearsons with an approved Jurisdictional Determination (JD) for the property. In the approved JD, the District concurred with the wetland report prepared by GSI, which identified 8.5 acres of wetlands and five (5) acres of open water on the Pearson property. The District also stated in the approved JD that Cadillac Lake and its adjacent wetlands are tributaries of Cowskin Creek, which is a tributary of the Arkansas River, which is an interstate water of the United States.

On August 1, 2004, Mr. Timothy Austin submitted a Request for Appeal (RFA) of the Approved JD, on behalf of Mr. Pearson, to the Corps Northwestern Division, in accordance with the Corps Administrative Appeal Regulation 33 CFR 331. The appellant's reasons for appeal are listed below. The Review Officer conducted an appeal meeting and site visit on October 13, 2004. A copy of the Review Officer's summary of the meeting and site visit is attached.

**Summary of Reasons for Appeal Submitted by Appellant:**

**Reason 1:** The Statement of Rationale for Basis is in direct conflict with the Corps' historical position with respect to the area known as Cadillac Lake.

**Reason 2:** Prior to the construction of the referenced ditches and storm water retention facilities, no natural drainage connected the subject property to waters of the United States. Clarification to the definition of waters of the United States (33 CFR 323.3) states that non-tidal drainage and irrigation ditches excavated on dry land are generally not considered to be waters of the United States.

**Reason 3:** The ditches in question carry water only during and for a short duration after precipitation events. The frequency and duration of flow within the upper reaches of the drainage ditch exiting the storm water retention facility is not sufficient to establish an OHWM and therefore these ditches should not be considered jurisdictional waters of the United States.

**Reason 4:** The Corps' actions have created a substantial hardship on the appellant.

**Reason 5:** In the absence of any changes to the law, regulation or officially promulgated policy, the subject property remains an isolated system not meeting the definition of waters of the United States as defined at 33CFR 328.3 and therefore is not subject to the permitting requirements of Section 404 of the Clean Water Act.

**Reason 6:** The jurisdictional decision was the result of an incorrect application of the Section 404(b) (1) Guidelines (see 40 CFR Part 230).

**Reason 7:** The jurisdictional decision was based upon facts not supported by the evidence, an erroneous application of the law; and, was unreasonable, arbitrary, and capricious.

**Information Received during the Appeal Review and Its Disposition:** The District provided the Review Officer (RO) and the appellant with a copy of the administrative record for the permit decision. This information was considered in the appeal review. Information obtained during the appeal meeting and site visit conducted on October 13, 2004 was considered in the appeal review, to the extent that it provided clarification or explanation of the administrative record. Also at the appeal meeting, the appellant's representative provided the RO with an affidavit from Mr. Pearson that contained information regarding the timing and purpose of drainage ditches that were constructed by Mr. Pearson. The appellant's representatives also provided the RO with copies of aerial photos at the appeal meeting, which showed the Pearson site and surrounding areas at various time frames from 1950 to 1989. This information was considered to the extent that it clarified information in the administrative record. In addition, by letter dated October 19, 2004, Mr. Michael Comodeca submitted a document to the RO, entitled "Letter in Support of Administrative Appeal of Jurisdictional Determination, Applicant Bruce Pearson, File No. 200401363." In this document, Mr. Comodeca provided additional reasons for appeal, which were not contained in the original August 1, 2004 submittal. These additional "reasons for appeal" were not considered in the appeal review. However, Mr. Comodeca's October 19, 2004 document also contains information that provides clarification or explanation of issues contained in the August 1, 2004 reasons for appeal. This clarifying information was considered in the appeal review.

**Summary of Decision:** The appellant's appeal has merit. It is determined that the District has not provided sufficient evidence in the administrative record to support their determination that the wetlands and other waters on the Pearson property are adjacent and tributary to other known

waters of the United States and therefore are also waters of the United States. The Jurisdictional Determination is remanded to the District for reevaluation of their decision.

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

**Reason 1:** The Statement of Rationale for Basis is in direct conflict with the Corps' historical position with respect to the area known as Cadillac Lake.

**Finding:** It is found that this appeal reason has merit because the District's approved JD for the Pearson property does not adequately explain at least one other recent jurisdictional determination made by the District for property in the Cadillac Lake area.

**Action:** The approved JD for the Pearson property is remanded to the District to re-evaluate the determination. In the reevaluation the District should evaluate information contained in past JDs that the District has prepared for the Cadillac Lake area.

**Discussion:** In the explanation of reasons for appeal document that was included with the Request for Appeal (RFA) letter dated August 1, 2004, Mr. Austin discusses the fact that on October 16, 2002, Ms. Shannon Warner of the Kansas City District had prepared a Preliminary Jurisdictional Determination (PJD) for a parcel of land within the Cadillac Lake area (PJD number 200300057), and that in the PJD Ms. Warner stated that: "The Cadillac Lake system and its associated wetlands are an isolated system." Mr. Austin provided a copy of Ms. Shannon's determination with his request for appeal letter. The parcel of land identified in PJD 200300057 is located immediately to the west of the Pearson property. Mr. Austin also provided a copy of an undated memo sent to him by Ms. Warner, which referenced a study prepared by S. W. Parker for the parcel of land mentioned above which reiterated the isolated status of the Cadillac Lake/ Pracht Wetland system. In reviewing the District's administrative record for the Pearson case, no record is found that the District had considered information contained in the above referenced PJD or any other previous prepared JDs in the Cadillac Lake area, in preparing the approved JD for the Pearson property. At the appeal meeting, held on October 13, 2004, Mr. Penaluna, the District's project manager for the Pearson case, stated that in preparing the approved JD, he had reviewed current site conditions and found that the wetlands on the Pearson property connect to a drainage ditch which connected to other ditches, which connect to Cowskin Creek, which is a tributary to the Arkansas River. He did not indicate that earlier jurisdictional determinations were reviewed. Since the approved JD for the Pearson property is not consistent with at least one previous jurisdictional determination regarding the Cadillac Lake area, the approved JD is being returned to the District to reevaluate the decision, giving consideration to information contained in JD case number 200300057 and other pertinent JD decisions that the District may have made in the Cadillac Lake area.

**Reason 2:** Prior to the construction of the referenced ditches and storm water retention facilities, no natural drainage connected the subject property to waters of the United States. Clarification to the definition of waters of the United States (33 CFR 323.3) states that non-tidal drainage and irrigation ditches excavated on dry land are generally not considered to be waters of the United States.

**Finding:** This reason for appeal has merit to the extent that it identifies facts that are relevant in determining if the area in question is a water of the United States. However, no evidence is

found in the District's administrative record to indicate whether or not the District considered these facts in preparing their Approved JD. What is found is that the District has not provided sufficient evidence to support their determination that the ditches in question form a tributary connection between the waters on the Pearson property and known waters of the United States.

**Action:** The approved JD decision is remanded to the District to reevaluate the determination regarding the tributary connection.

**Discussion:** In Mr. Austin's attachment to the appeal request of August 1, 2004, he points out that in the clarifying statement in the preamble of the Corps' Regulation, regarding definition of waters of the United States (33 CFR 323.3), it states that non-tidal drainage and irrigation ditches excavated on dry land are generally not considered to be waters of the United States.<sup>1</sup> In reviewing the paragraph that Mr. Austin referenced (51 Fed. Reg. 41216), it is found that the reference further states that the Corps reserves the right, on a case by case basis, to determine that a particular waterbody within these categories is indeed a water of the United States. At the appeal meeting, the appellant's representatives provided copies of aerial photos of the area around the Pearson property and explained the history of changes to drainage features that have occurred over time in the area. (See summary of appeal meeting memorandum dated October 21, 2005, attached.) These photographs show the evolution of the geomorphology of the area and illustrate the development of the current condition. It is found that the District has not provided sufficient evidence to support their determination that the ditches form a tributary connection between the waters on the Pearson property and other known waters of the United States. The approved JD is therefore remanded to the District for reevaluation.

**Reason 3:** The ditches in question carry water only during and for a short duration after precipitation events. The frequency and duration of flow within the upper reaches of the drainage ditch exiting the storm water retention facility is not sufficient to establish an OHWM and therefore these ditches should not be considered jurisdictional waters of the United States.

**Finding:** This appeal reason does not have merit.

**Action:** No action required by the District regarding this reason for appeal.

**Discussion:** The District's record shows, and the appellant's representative acknowledges that water does flow in the ditches at least intermittently, and there is some evidence showing an OHWM was present in many locations within that portion of the drainage ditch system that is in question, it is determined that this reason for appeal, as stated, does not have merit. There are no specific flow data records found in the District's administrative record or in the appeal request submittal that document frequency, water flow rates or water levels in the drainage ditches that carry water from the Pearson property to the known waters of the United States. What is found in the record is the GSI report of January 2004, which indicates that the ditches in question do carry surface water drainage and that there are indications of an ordinary high water mark (OHWM) in at least portions of the drainage ditches. Also Mr. Austin acknowledges, in his appeal request document, that water flows in the ditches at least intermittently. In the District's approved JD, dated June 4, 2004 (CENWK-OD-R JD Form, Ver. 5), the District indicates that

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<sup>1</sup> It is believed that the correct reference that Mr. Austin intended, regarding the definition of waters of the United States, is 33 CFR 328.3, not 323.3.

tributaries are present and that there is an OHWM indicated by “destruction of vegetation” and “shelving”. At the appeal site visit on October 13, 2004, the RO noted that there was water and an OHWM present in the ditches on the Pearson property and in the ditch that exits the Pearson property at the south boundary of the property. Flowing water and indications of an OHWM (flowage lines) were also noticed by the RO, during the site visit, in the ditch located immediately downstream of the Pearson site and at the ditch crossing of 21<sup>st</sup> Street (one-half mile south of the Pearson property). The areas that were examined during the appeal site visit were in the upper portion of the drainage ditch system. In addition, Mr. Penaluna showed pictures, during the appeal site visit, that showed the presence of water and flow lines in the ditches at various locations on the Pearson property and downstream of the Pearson property. There was no documentation found in the District’s administrative record or presented by the appellant that proved that there is or is not an OHWM present for the entire length of the drainage system that leads from the Pearson property to known waters of the United States. Consequently, and for the above reasons, this reason for appeal does not have merit.

**Reason 4:** The Corps’ actions have created a substantial hardship on the appellant.

**Finding:** This appeal reason does not have merit.

**Action:** No action required by the District regarding this reason for appeal.

**Discussion:** Impacts to a landowner, including possible hardships, are not factors that are considered in determining whether or not there are “waters of the United States” on a property, as defined in 33 CFR Part 328. Therefore, this reason for appeal does not have merit.

**Reason 5:** In the absence of any changes to the law, regulation or officially promulgated policy, the subject property remains an isolated system not meeting the definition of waters of the United States as defined at 33CFR 328.3 and therefore is not subject to the permitting requirements of Section 404 of the Clean Water Act.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required by the District regarding this reason for appeal.

**Discussion:** In Mr. Comodeca’s October 19, 2004 letter, on page 3, he stated that the District had not followed the existing Corps regulations. (See discussion under Reason 2 above.) Also on page 6 of the October 19, 2004 letter, Mr. Comodeca referenced a Headquarters USACE Memorandum, dated May 11, 2001, entitled *Prohibition on the Development of Local Operating Procedures Addressing Jurisdictional Determinations in Light of the SWANCC Decision*. Mr. Comodeca points out that in the memorandum, Corps Headquarters issued the following guidance: “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, the agencies agreed that, pending the development of National Policy, Corps Districts would continue to base these determinations on the local practices that were in effect prior to the 9 January 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). In light of this, and effective immediately, the Regulatory offices in all Major Subordinate Commands (MSC) and District Commands are prohibited from developing local practices for determining the extent of Clean Water Act Section 404 regulatory jurisdiction,

and from utilizing local practices that were not in effect prior to the SWANCC decision.” Mr. Comodeca states that in accordance with this guidance the District could not ignore previous guidance regarding ditches, or establish new policy, that being the surface water connection test. In the discussions at the appeal meeting, the District representatives stated that they did consider the existence of a surface water connection in determining jurisdiction, but that the District did not have specific written policy on the matter. At the appeal meeting, Mr. Penaluna, of the District, stated that he believed that his JD was in accordance with guidance provided by Headquarters after the SWANCC decision. In the October 19, 2004 letter, Mr. Comodeca also referenced (page 6, footnote 1) a policy guidance document that was published in the Federal Register, Vol 68, No. 10, dated January 15, 2003. The document is a Joint Memo that was issued by the Environmental Protection Agency and the Department of the Army, which begins by stating “This document provides clarifying guidance regarding the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U. S. 159 (2001) (SWANCC).” In the footnote, Mr. Comodeca stated he believed that nothing in the memorandum changes the previous Corps policy regarding the jurisdiction status of man-made ditches created in uplands. In reviewing the memorandum, it is found that it addresses “The Scope of CWA (Clean Water Act) Jurisdiction after SWANCC.” It discusses isolated waters, traditional navigable waters, adjacent wetlands, and tributary waters. In regard to tributary waters, the document makes reference to some post-SWANCC court cases that upheld that ditches can be tributaries and that intermittent flowing tributaries can be waters of the United States. *Headwaters v. Talent Irrigation District* and *Community Ass. For Restoration of the Environment v. Henry Bosma Dairy* are two of the cases mentioned in that category. The document also mentions other court cases that supported decisions where it was determined that ditches were not tributaries, for example, *United States v. Newdunn*. In the “Conclusion”, the memorandum states “Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands). Field staff should make jurisdictional and permitting decisions on a case-by-case basis considering this guidance, applicable regulations, and any additional relevant court decisions.” This guidance supersedes previous guidance relating to SWANCC. After reviewing the District’s record, information submitted with the appeal and obtained at the appeal meeting, and after reviewing the above referenced documents, no evidence is found that the District violated any current laws, regulations, or policies in preparing the JD for the Pearson property. Therefore this reason for appeal does not have merit. However, consistent with the discussion under reasons 1 and 2 above, the approved JD is being remanded to the District for reevaluation of the determination, to include a fuller discussion of the above Headquarters policy guidance, applicable regulations, and any additional relevant court decisions.

**Reason 6:** The jurisdictional decision was the result of an incorrect application of the Section 404(b) (1) Guidelines (see 40 CFR Part 230).

**Finding:** This appeal reason does not have merit.

**Action:** No action required by the District regarding this reason for appeal.

**Discussion:** In the request for appeal letter of August 1, 2004, Mr. Austin lists “incorrect application of the Section 404(b)(1) Guidelines” as a reason for appeal, but did not provide any reasoning or evidence showing how the Guidelines may have had a bearing on the jurisdictional determination for the Pearson property. Section 230.2 of the Guidelines state: “The Guidelines

are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States.” The Guidelines provide a process and criteria for determining if a project can be permitted under Section 404 of the Clean Water Act, once a project area has been determined to be a water of the United States. The Guidelines do not provide a process or criteria for defining such waters. Therefore, this reason for appeal does not have merit.

**Reason 7:** The jurisdictional decision was based upon facts not supported by the evidence; was based upon an erroneous application of the law; and, was unreasonable, arbitrary, and capricious.

**Finding:** This appeal reason has merit, for the reasons contained in the Discussion section below.

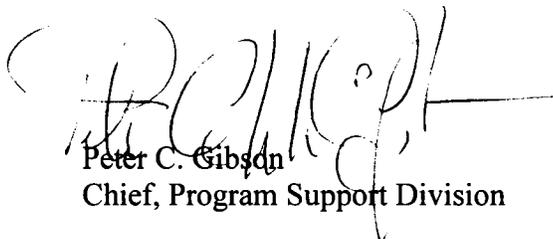
**Action:** The approved JD is being remanded to the District to reevaluate the decision.

**Discussion:** Regarding the issue of the decision not being supported by evidence, it has already been determined under appeal reasons 1 and 2 above that the District has not provided sufficient evidence to justify or support their determination of jurisdiction in this case. Because I find that the jurisdictional determination should be reevaluated for this reason, I do not need to address the erroneous application of law claim or the claim that the District’s decision was unreasonable, arbitrary or capricious claims.

**Overall Conclusion:**

After reviewing and evaluating information provided by the appellant, the District’s administrative record, and information obtained during the appeal conference, I conclude that this Request for Appeal has merit pursuant to Reasons 1, 2, and 7 for the reasons contained in the findings above. It is determined that the District has not provided sufficient evidence in the administrative record to support their determination that the wetlands and other waters on the Pearson property are adjacent and tributary to other known waters of the United States and therefore are also waters of the United States. The approved JD is remanded to the District for reevaluation of their decision.

FOR THE DIVISION ENGINEER:



Peter C. Gibson  
Chief, Program Support Division

## MEMORANDUM TO FILE

SUBJECT: Summary of the Appeal Meeting and Site Visit Regarding the Bruce Pearson Appeal Case, File No. 20041363

**1. Date of Appeal Meeting and Site Visit:** October 13, 2004

**2. Purpose:** The purpose of the appeal meeting and site visit was to review and clarify information presented in the appellant's Request For Appeal and information contained in the District's administrative record, regarding the approved jurisdictional determination (JD) made by the Corps of Engineers Kansas City District. The appeal meeting and site visit was held in accordance with Corps of Engineers Administrative Appeal Regulation 33 CFR Part 331.

**3. Attendees:**

Michael Comodeca, Attorney Representing Bruce Pearson

Timothy Austin, AM Consulting Inc., Representing Bruce Pearson

Len Marotte, Business Associate of Bruce Pearson

Gregg Armstrong, GSI Inc., Environmental Consultant Representing Mr. Pearson

William Jeffries, Corps of Engineers Kansas City District, Kansas Regulatory Office

Stephen Penaluna, Kansas City District, Kansas Regulatory Office

Mores Bergman, Appeal Review Officer (RO), Corps of Engineers Northwestern Division (NWD)

**4. Background:** On May 6, 2004, the Kansas Regulatory Office of the Corps Kansas City District (District) received a request for a jurisdictional determination (JD) from Geotechnical Services Inc. (GSI), on behalf of Mr. Bruce Pearson, regarding a parcel of property owned by Mr. Pearson. The property is located in Section 5, Township 27 South, Range 1 West, Sedgwick County, Kansas. The site is about 80 acres in size. The Pearson property is part of a larger, historical wetland complex area known as Cadillac Lake. GSI submitted a Preliminary Wetland Identification and Delineation report for the property, dated January 2004, along with the JD request. On June 4, 2004, the District provided GSI and Mr. and Mrs. Pearson with an Approved Jurisdictional Determination for the property. In the Approved JD, the District stated that they concurred with the wetland report prepared by GSI, which identified 8.5 acres of wetlands and 5 acres of open water on the Pearson property. The District also stated in the Approved JD that Cadillac Lake and its adjacent wetlands are tributaries of Cowskin Creek, which is a tributary of the Arkansas River, which is a known water of the United States. On August 1, 2004, Mr. Timothy Austin submitted a Request for Appeal (RFA) of the Approved JD, on behalf of Mr. Pearson, to the Corps Northwestern Division, in accordance with the Corps Administrative Appeal Regulation 33CFR 331.

**5. Summary of Appeal Meeting:** The appeal meeting was held at the Corps of Engineers Regulatory office in El Dorado, Kansas. The Review Officer (RO) opened the meeting by explaining the appeal review process and telling the attendees that the purpose of the meeting was to give the appellant (or his representatives) the opportunity to explain the reasons for appeal, to allow the District to explain how they made their jurisdictional determination, and to allow for informal discussion of the issues relative to the case. The site visit is for the RO to see the site conditions in person, and to allow both the District and the appellant to point out and explain site features relative to the case.

The RO then asked the appellant's representatives if they would like to discuss the reasons for appeal. Since Mr. Armstrong prepared the wetland delineation report (dated January 2004) for the Pearson property, he explained that he had used the Corps wetland delineation manual and had determined that there were 8.5 acres of wetlands on the site plus 5 acres of open water. He also indicated that there are drainage ditches on the site that connect the ponds and wetlands on the site and join into one ditch that drains to the south off the property, connecting with the drainage system of the housing development that exists to the south. Mr. Jeffries of the District then said that there is documentation that these drainage ditches connect to tributaries to the south, which are connected to the Arkansas River. Mr. Comodeca asked what criteria are used by the District in determining that wetlands are jurisdictional. Mr. Jeffries said that the District uses hydrologic criteria; that is, a surface water connection. He said that the District also uses the 100-year flood plain as criteria, and considers wetlands that are within the 100-year flood area of a river as being adjacent, and therefore jurisdictional. Mr. Comodeca said that he did not believe there is any evidence that the Pearson wetlands were within the 100-year flood plain of the Arkansas River as shown on the FEMA flood zone maps.

Mr. Comodeca then asked the District what had changed since 2002, when the District had determined that the Cadillac Lake wetlands were isolated. He was referring to an undated memo sent by Shannon Warner of the Kansas Regulatory office to Mr. Austin in late 2002. A copy of that memo was included with the request for appeal submitted by Mr. Austin. The Warner memo referenced a study prepared by a consultant and a preliminary JD that had been prepared by Ms. Warner for a property on the west side of Cadillac Lake that is adjacent to the Pearson property. Mr. Penaluna stated that Ms. Warner has transferred to another job, and that he was assigned as the project manager for the Pearson case after she left. Mr. Penaluna said that after reviewing the existing site conditions at the time he did the Pearson JD (in 2003), he determined that the ditches formed a tributary connection to the wetlands on the Pearson property. He said this was in agreement with what he understood was the guidance from Corps Headquarters. The appellant's representatives then showed some aerial photo maps to the group that indicated that there was historically no stream or other hydrologic connection from the Pearson property to the drainage basin to the south (approximately ¼ mile distance), because there was upland separating the two areas, until a ditch was dug across this property to the south in the 1970s. They said that since the ditch was dug in uplands and was therefore not a natural connection that this was not a tributary connection. In viewing the photos, it was noticed that over the years there had been much manipulation

of the drainage and landscape in the entire area due farm operations and housing developments. The photos showed that from 1950 through 1989, that a lot of the natural drainage channels in the area had been filled in and replaced by new ditches located along fence lines or by new collection ditches that were constructed through the housing developments that were being built to the south of the Pearson property. Mr. Comodeca also provided the RO with a copy of an affidavit prepared by Mr. Pearson. (Mr. Pearson had prepared the affidavit because he could not personally be present at the appeal meeting). In the affidavit, Mr. Pearson stated that, in 1975, he had dug a ditch from the current property that is in question, across the quarter section of property located to the south of the current property, connecting it to another drainage ditch that existed along 21st Street, for the purpose of draining Cadillac Lake. In the affidavit, Mr. Pearson also stated that prior to the construction of the drainage ditch, there was no natural outlet for Cadillac Lake.

At this point the RO asked if there was any more information that anyone wanted to present. There being no more comments at that time, the group agreed to proceed to the Pearson property for the site visit.

**6. Summary of Site Visit:** The site is located to the east of Maize Road at about 29<sup>th</sup> Street in Wichita, Kansas. We began the site inspection on the south side of the Pearson property, where a drainage ditch exits the property and continues into a housing development to the south. This is the main drainage ditch that carries water from the Pearson property that was mentioned at the appeal meeting. From that viewing location the group could see many of the drainage ditches, wetlands, and open water areas on the Pearson property. It was noticed, at that time, that water was present in the ditches on the Pearson property and water was flowing from the property into the ditch located on the developed property to the south. The RO asked if this was the normal situation. Mr. Penaluna said that he has seen water in the ditches on the Pearson property and flowing in the ditch to the south during the other visits he has made to the property. He also said that during larger rain events, water flows nearly bank full in the ditch to the south. He showed the group a picture that he had taken previously, just after a storm event that showed the ditch nearly to the top of the ditch channel. During the site visit, water and flow lines were visible in the ditch where it exits the Pearson property and in the ditch as it continues south into the housing development. Next the group went to the location on the south side of the housing development, to see where the ditch exits the housing development, at 21<sup>st</sup> Street. This was the location where the housing development drainage ditch connects with another ditch that carries water east along 21<sup>st</sup> Street for a short distance and then connects with another ditch that flows generally south to Cowskin Creek, which is a natural stream. Water and flowage lines were also observed in the ditches at the 21<sup>st</sup> location. The site visit ended at this location. I then thanked the participants for their assistance and we left the site.

  
Mores Bergman  
Appeal Review Officer