

MEMORANDUM TO ASSERT JURISDICTION FOR NWP-2007-945

Subject: Assertion of jurisdiction for Jurisdictional Determination (JD) NWP-2007-945

Summary

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are asserting jurisdiction over two ditches (ditches 1 and 2) and their abutting wetlands (wetlands B and D) for JD# NWP-2007-945. This JD is based on our finding that the ditches are relatively permanent waters (RPWs), and that the subject wetlands have a continuous surface connection with the ditches. The agencies have also determined that Ochoco Reservoir is the closest traditional navigable water (TNW) for this JD. The agencies are returning the JD to the district to re-evaluate whether a third wetland on the site, wetland C, is jurisdictional based upon a significant nexus evaluation in relation to Ochoco Reservoir.

This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R. Parts 328.3 and 329), relevant case law, and existing guidance, including the *JD Form Instructional Guidebook*¹ and *Appendix D Regarding Waters that Qualify as Waters of the US Under Section (a)(1) of the Agencies' Regulations* ("Appendix D").

I. Location

This JD involves 3 wetlands (wetlands B, C, and D) located on a site east of Prineville in Crook County, Oregon. The site is located near 44.3364° N latitude and 120.576° W longitude. The site includes wetlands that are adjacent to a network of irrigation ditches that begin as a single diversion from Marks Creek (an RPW) and then split into 2 diversions (ditches 1 and 2) used to irrigate pasture. Wetlands B and D abut the ditch network, and wetland C is separated from a lateral of ditch 1 by a berm. The ditches convey flow approximately 0.2 miles downstream of the project site to Ochoco Creek (an RPW), which flows into Ochoco Reservoir, the nearest TNW, approximately 5 miles downstream of the project site.

II. TNW Determination

The agencies have determined that Ochoco Reservoir is the closest TNW for purposes of this JD. Collectively, the factors described below demonstrate that Ochoco Reservoir is navigable-in-fact, resulting in its designation as a TNW for purposes of CWA jurisdictional determinations.

As stated in *Appendix D*: "when determining whether a water body qualifies as a "traditional navigable water" (i.e., an (a)(1) water), relevant considerations include whether a

¹U.S. Army Corps of Engineers *Jurisdictional Determination Form Instructional Guidebook* (June 5, 2007).

Corps district has determined that the water body is a navigable water of the United States pursuant to 33 CFR 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 CFR 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is “navigable-in-fact” under the standards that have been used by the federal courts.”²

To determine whether Ochoco Reservoir is a TNW, the agencies conducted a case-specific analysis to evaluate whether it is navigable-in-fact. The agencies have determined that Ochoco Reservoir is a TNW due to several factors:

- There is documented use of Ochoco Reservoir for navigation. Ochoco Reservoir supports recreational boating, as documented by numerous public and private entities including the Ochoco National Forest,³ the Oregon Department of Fish and Wildlife,⁴ the Oregon State Marine Board,⁵ Coleman.com,⁶ and the U.S. Bureau of Reclamation.⁷
- The physical characteristics also support a determination that the Reservoir is capable of navigation. The 1,100-acre Ochoco Reservoir is formed by Ochoco Dam, part of the Bureau of Reclamation’s Crooked River Project. Depth ranges from 30 to 100 feet.⁸ This project provides water for irrigation and flood control for Prineville and adjacent lands.⁹
- Ochoco Reservoir is accessible to the public at Ochoco Lake Park/Campground, operated by the Crook County Parks and Recreation District.¹⁰ In addition to camping and day-use facilities, this public park also has a concrete boat ramp.
- Ochoco Reservoir supports water-body based attractions that are likely to be used by out-of-state travelers for commercial navigation. As indicated above, numerous public and private entities identify Ochoco Reservoir as a destination for recreational boating. There is a boat rental area within the Reservoir,¹¹ and the Ochoco Lake Park/Campground notes both the fees & the boat ramp.¹² Vacation Rentals By Owner lists at least one lakefront rental home that advertises a boat dock.¹³ In addition to boating, the Reservoir is also widely advertised as a popular fishing destination as documented by the Ochoco National Forest,¹⁴ the Oregon Department of Fish and Wildlife,¹⁵ the Oregon State Marine Board,¹⁶ Trails.com,¹⁷ Travel

²Section 10 waters under the Rivers and Harbors Act of 1899 are only a subset of TNWs. Any water which meets the considerations identified in Appendix D is also a TNW.

³ See <http://www.fs.fed.us/r6/centraloregon/recreation/boating/index.shtml>.

⁴ See http://www.dfw.state.or.us/RR/fishing_forecast/central.asp.

⁵ See

<http://159.121.106.106/osmb/index.cfm?fuseaction=facilityDisplay&BoatingFacilityUID=057307307>.

⁶ See

<http://www.coleman.com/coleman/travel/planner.asp?locid=ORLROH&state=Oregon&activity=Recreation%20Areas>.

⁷ See <http://www.usbr.gov/dataweb/html/crooked.html>.

⁸ See <http://www.fs.fed.us/r6/centraloregon/recreation/fishing/lake-reservoir/ochoco.shtml>.

⁹ See <http://www.usbr.gov/dataweb/html/crooked.html>.

¹⁰ See http://www.ccprd.org/parks_ochoco.cfm.

¹¹ See <http://www.fs.fed.us/r6/centraloregon/recreation/boating/index.shtml>.

¹² See http://www.ccprd.org/parks_ochoco.cfm.

¹³ See <http://www.vrbo.com/142839>.

¹⁴ See <http://www.fs.fed.us/r6/centraloregon/recreation/fishing/lake-reservoir/ochoco.shtml>.

¹⁵ See http://www.dfw.state.or.us/RR/fishing_forecast/central.asp.

¹⁶ See

<http://159.121.106.106/osmb/index.cfm?fuseaction=facilityDisplay&BoatingFacilityUID=057307307>.

¹⁷ See http://www.trails.com/tcatalog_trail.asp?trailid=FGW017-047.

Oregon.com,¹⁸ Coleman.com,¹⁹ Lake Billy Chinook Houseboats,²⁰ and the U.S. Bureau of Reclamation,²¹ and the Ochoco Inn.²²

- Ochoco Reservoir is located near conduits of interstate travel. The Reservoir is on US 26, one of only two major highways transecting central Oregon in an east-west direction. US 26 serves as a major conduit for travelers from other states east of Oregon. In addition to Ochoco Reservoir, other nearby attractions include John Day Fossil Beds National Monument, Smith Rock State Park, and Bend, Oregon, a major outdoor recreation destination.

A combination of the factors above demonstrate Ochoco Reservoir supports actual navigation and is susceptible to being used for commercial navigation, demonstrating that Ochoco Reservoir is navigable-in-fact, resulting in its designation as a TNW for purposes of CWA jurisdictional determinations.

III. Jurisdictional Determination

Ditches 1 and 2 are jurisdictional because they are RPWs, and wetlands B and D are jurisdictional because they abut RPWs. The agencies are returning the JD to the district to re-evaluate whether wetland C is jurisdictional based upon a significant nexus evaluation in relation to the Ochoco Reservoir, the nearest TNW.

IV. Basis for Determination²³

A. Relatively Permanent Waters

The agencies have determined that ditches 1 and 2 are RPWs because they have continuous seasonal flow. The JD form (dated 10/29/2007) indicates the ditches convey “seasonal flow,” which is documented as occurring from May to June²⁴ and that they “flow in response to spring high flows in Marks Creek.”²⁵ In addition, the district describes the ditches as carrying flow during other high flow events in Marks Creek (i.e., outside of May and June) and when the creek is diverted into the ditch network for irrigation purposes. Ditches 1 and 2 are approximately 8 to 10 feet wide. The ditch network begins where Ditch 2 diverts flow from Marks Creek, approximately 0.5 mile north of the review area. Ditch 1 splits off of ditch 2 outside the review area as well. Both main ditches have several lateral ditches. Ditches 1 and 2 continue south beyond the JD site and, as described in the JD form, “act as tributaries to Ochoco Creek” approximately 0.6 mile south of the original diversion.²⁶ The JD form describes the

¹⁸ See <http://www.traveloregon.com/Explore-Oregon/Central-Oregon/Attractions/Outdoors-and-Nature/Ochoco-Reservoir.aspx>.

¹⁹ See

<http://www.coleman.com/coleman/travel/planner.asp?locid=ORLROH&state=Oregon&activity=Recreation%20Areas>.

²⁰ See <http://www.lakebillychinook.com/area.html>.

²¹ See <http://www.usbr.gov/dataweb/html/crooked.html>.

²² See <http://www.ochocoinn.com>.

²³ The evidence included in this memorandum is a summary of the evidence considered by the agencies in reaching this conclusion. Additional information regarding the determination is contained in the administrative record for this action.

²⁴ JD Form, Sections III.B.1(ii)(c), page 3, III.B.2(i)(b), page 4, and III.B.3, page 5.

²⁵ JD Form, Section III.B.3., page 5.

²⁶ JD Form, Section III.B.1.(ii)(a), page 3.

estimated drainage area for the ditch network as encompassing 10 to 20 acres.²⁷

The JD site is located in a semi-arid region where most precipitation occurs as winter snow, especially in the higher elevations of the watersheds. Stream flow is driven predominantly by snow melt. Natural stream flows generally begin increasing in March and April and reach peak flows during May and June before beginning a gradual decline. A review of streamflow data (11/1999 – 09/2006) from a gauge near the project site (Station #14082550, Ochoco Creek below Marks Creek near Prineville) shows the spring peak flows occurring during a 2 month (water years 2002, 2004, 2005, 2006) to 2.5 month (water years 2000, 2001, 2003) period.²⁸ Based on this data, peak flows during this period increase from an average of approximately 33 cubic feet per second (cfs) to peak flows averaging approximately 175 cfs.²⁹ This continuous seasonal flow varies in length of time depending on the amount of snowpack, size of the watershed, amount of groundwater flow, and other factors, but the 2 to 2.5 month peak flow period is when other small stream channels and ditches would also carry flow. Flow in ditches 1 and 2 would be expected to occur during the annual two-month peak stream flow period when surface waters in Marks Creek are high enough to enter the ditch diversion along with shallow groundwater (*i.e.*, hyporheic) flow and floodplain connectivity. Diversions of stream flow into the ditches after the seasonal high stream flow would likely continue through the growing season for irrigation of the pastures. For these reasons, 2 months of continuous flow is considered “seasonal” flow at this particular site in this region, and is sufficient to support the RPW designation for ditches 1 and 2. The *Rapanos Guidance* gave an example of waters that have a continuous flow at least seasonally as those waters that typically flow three months. Three months was provided as an example and the agencies have flexibility under the guidance to determine what seasonally means in a specific case. In this case, the agencies have determined that the case-specific facts support the RPW determinations.

B. Wetlands with a continuous surface connection to RPW

As noted in the JD, wetlands B and D abut ditches 1 and 2.³⁰ Since we have determined that ditches 1 and 2 are RPWs, wetlands B and D are jurisdictional because they have a continuous surface connection with the RPWs.

C. Significant Nexus

The agencies are returning the JD to the district to re-evaluate whether a third wetland on the site, wetland C, is jurisdictional based upon a significant nexus evaluation in relation to the Ochoco Reservoir, the nearest TNW. Wetland C is separated from a lateral of ditch 1 by a berm. In the re-evaluation, to identify the relevant reach the district will need to determine if the source of flow for the lateral is from the irrigation ditch network (originating from Marks Creek) or solely from an offsite source providing independent flow to the lateral. If it is only from the network via Marks Creek, the significant nexus evaluation should consider the flow and functions of Marks Creek and the ditch network, along with the functions performed by any other wetlands

²⁷ JD Form, Section III.C.2., page 6.

²⁸ See <http://www.oregon.gov/OWRD/SW/index.shtml>.

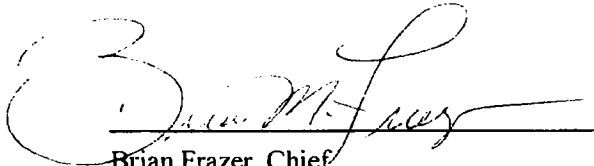
²⁹ For example, in water year 2004 (October 1, 2003 – September 30, 2004) stream flow on March 1, 2004 was approximately 50 cfs and increased to approximately 250 cfs on March 15, 2004 before gradually receding to less than 50 cfs by May 1, 2004.

³⁰ JD Form, Section III.B.2(i)(c), indicating that wetland B abuts laterals from ditch 1 and 2, and wetland D abuts ditch 1.

adjacent to Marks Creek and the ditch network.³¹ If the lateral supports independent or combined flow, the significant nexus evaluation should consider the flow and functions of the entire reach of the non-RPW lateral, along with the functions performed by any other wetlands adjacent to that lateral reach, to determine whether collectively they have a significant nexus to the Ochoco Reservoir.

V. Conclusion

Ditches 1 and 2 are jurisdictional RPWs, and wetlands B and D are jurisdictional because they abut the RPWs. The Ochoco Reservoir is the closest TNW for this JD. The agencies are returning the JD to the district to re-evaluate whether a third wetland on the site, wetland C, is jurisdictional based upon a significant nexus evaluation in relation to the Ochoco Reservoir.



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Date: 1/23/08



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³¹ Similar to oxbow and braided stream channels, which are treated as part of the same order tributary, the ditches and lateral are serving as an oxbow to Marks Creek, so that they are part of the tributary and same relevant reach.