

The Corps of Engineer's Seattle District recently posted the following statement on their website as part of an agreement to settle a Notice of Intent to Sue from the National Wildlife Federation. All Corps of Engineers Districts in the Northwestern Division that are also within the jurisdiction of the Ninth Circuit Court of Appeals are subject to this agreement. This includes the Montana regulatory program within the Omaha District.

We view Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001) as binding on the U.S. Army Corps of Engineers, Northwestern Division, in the geographic jurisdiction of the U.S. Court of Appeals for the Ninth Circuit. In that case, the court held that irrigation canals that receive water from natural streams and lakes, and divert water to streams and creeks, are connected as "tributaries" to those other waters. The Ninth Circuit further held that a "stream which contributes its flow to a larger stream or other body of water is a tributary. . . . As tributaries, the canals are 'waters of the United States,' and are subject to the CWA and its permit requirement." Headwaters, 243 F.3d at 533. Moreover, the court held that, "Even tributaries that flow intermittently are 'waters of the United States.'" *Id.* at 534. Corps of Engineers regulations at 33 C.F.R. § 328.3(a)(5) assert CWA jurisdiction over all tributaries to other jurisdictional waters of the United States. In factual situations where the Headwaters precedent applies, it would supercede any contrary conclusion that might be drawn from previous Corps of Engineers policy statements regarding ditches.

Questions regarding implementation of the *Talent* decision in Montana may be directed to the Helena Regulatory Office at (406) 441-1375.