



DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, U.S. ARMY CORPS OF ENGINEERS
3636 N CENTRAL AVENUE, SUITE 900
PHOENIX, ARIZONA 85012-1939

May 26, 2017

Steve Spangle
Field Supervisor, Arizona Ecological Services
U.S. Fish and Wildlife Service
Phoenix, Arizona 85021

Dear Mr. Spangle:

The U.S. Army Corps of Engineers (Corps), Los Angeles District requests concurrence from the United States Fish and Wildlife Service (Service) that the proposed offsite mitigation located in Cochise County, Arizona, associated with our re-evaluation of a 2006 Clean Water Act section 404 permit issued to Whetstone Partners L.L.P. is not likely to adversely affect northern Mexican gartersnake (*Thamnophis eques Megalops*), southwestern willow flycatcher (*Empidonax traillii extimus*) and the western distinct population segment (DPS) of the yellow-billed cuckoo (*Coccyzus americanus*). Should you decide not to concur, we request that you accept this letter as our request for formal consultation for these two federally listed species and conference for proposed critical habitat for these two species.

The 2006 section 404 permit authorized discharges of dredged and fill material into Waters of the United States associated with the 8,212 acre master-planned community within Whetstone Ranch near Benson in Cochise County, Arizona. Whetstone Ranch was a 15,550-acre project annexed into the City of Benson in 1993. Whetstone Partners L.L.P., in conjunction with Pulte Homes, proposed development of the 8,212-acre master planned community ("Whetstone Project") within the boundaries of the larger project area. In May 2014, El Dorado Benson L.L.C. purchased all undeveloped land within the larger project area, including the 8,212-acre master-planned community, and renamed the larger project area Villages at Vigneto. As part of this transaction, Whetstone Partners L.L.P. also transferred its 2006 section 404 permit to El Dorado Benson L.L.C. El Dorado Benson L.L.C. now intends to move forward with the proposed Whetstone Project. The project design has not changed from what was approved by the Corps in 2006 except for the addition of the proposed offsite habitat mitigation area and its habitat mitigation and monitoring plan ("HMMP").

In late 2015, due to the changed environmental circumstances in and around the project area since 2006, the Corps began re-evaluating the circumstances and conditions of the 2006 section 404 permit. On April 12, 2016, as part of this re-evaluation, the Corps initiated informal consultation with the Service under section 7 of the ESA to analyze the potential effects of issuing the permit on ESA-listed species in the area and their designated critical habitat. The Corps decided on July 20, 2016 that it was in the public interest to suspend this permit and re-evaluate the circumstances and conditions of the permit prior to making a decision whether to reinstate, modify, or revoke the permit. On September 8, 2016, the Corps and the Service conducted a field visit to the project area to survey habitat and discuss project details. On October 14, 2016, the Corps received the Service's post-field visit analysis, which also requested

additional information from the Corps. Since that time, the Corps has been evaluating the Service's October 14, 2016 analysis, carefully evaluating our proposed Federal action, reviewing our administrative record, including past correspondence from our agency, and gathering the additional information which has resulted in additional conversations with El Dorado Benson and its consultants (Westland Research) in order to more clearly document and describe our action area for this consultation. Also, since that time, the Corps has been in regular contact with the Service including an in-person meeting on March 17, 2017.

Our attached biological evaluation addresses listed species as well as designated or proposed critical habitats in the vicinity of the proposed development site as well in the vicinity of the proposed offsite mitigation area.

Pursuant to 50 C.F.R. section 402.14(c), I am enclosing or otherwise identifying the following information:

- 1. Description of the action considered:** The permittee has requested reinstatement of a Clean Water Act section 404 permit (consistent with the original 2006 permit) to authorize the discharge of dredged or fill material into 51 acres of Waters of the United States associated with the development of an 8,212 acre master-planned community located within the City of Benson's "Villages at Vigneto" Community Master Plan (CMP) area, Cochise County, Arizona. In addition, reinstatement of the original permit special conditions would require implementation of El Dorado Benson LLC's proposed offsite HMMP. The Corps' proposed action is more fully described in the enclosed biological evaluation.
- 2. Description of the specific areas that may be affected by the action:** The enclosed Memorandum For Record, Subject: "National Environmental Policy Act Scope of Analysis and Endangered Species Act Action Area for the Phase I Villages at Vigneto Community Master Plan Area" provides the evaluation and determination of both the NEPA scope of analysis and ESA action area. The action area consists of 1,775 acres of the Phase I project area (composed of the 475 acres of waters of the United States, 100 acres of upland areas adjacent (within 25 feet) to waters of the United States proposed to be filled, 385 acres of uplands adjacent (within 25 feet) to all unfilled waters, 815 acres of upland open space to be preserved located adjacent to and in association with waters of the United States) and the 144-acre offsite compensatory mitigation site. The effects in these areas are subject to the Corps' control and responsibility. Areas outside the Corps' federal control and responsibility are not within the action area.
- 3. Description of any listed species or critical habitat that may be affected by the action:** The enclosed biological evaluation describes the listed species and critical habitats in the vicinity of the proposed federal permit action. There are no designated critical habitats in

the 1,775 acre onsite action area. Proposed critical habitat for northern Mexican gartersnake (*Thamnophis eques megalops*) and western distinct population segment (DPS) of the yellow-billed cuckoo (*Coccyzus americanus*) occurs on the proposed offsite action area. Yellow-billed cuckoo has also been documented at the offsite action area. While northern Mexican gartersnake has not been found in the proposed offsite action area, because this area has been proposed as critical habitat, there is potential for this species to be present.

4. Description of the manner in which the action may affect any listed species or critical habitat, and an analysis of any cumulative impacts:

1,775 Acre Onsite Action Area

As described in the enclosed biological evaluation, the onsite action area lacks designated critical habitat and does not contain suitable habitat for any of the listed species that could potentially occur in the area. The Corps has determined the proposed federal action at the onsite area would have no effect on any listed species and would not cause destruction or adverse modification of any designated or proposed critical habitat.

144 Acre Offsite Action Area

The offsite action area contains suitable habitat for the yellow-billed cuckoo and detections there of individual birds were documented. Due to the intermittent flow regime of the San Pedro River within and adjacent to the offsite mitigation area, and the lack of primary prey species, the northern Mexican gartersnake is not expected to occur. Critical habitat for northern Mexican gartersnake (*Thamnophis eques Megalops*) and western DPS of the yellow-billed cuckoo (*Coccyzus americanus*) is proposed within the offsite mitigation area. The proposed habitat mitigation and monitoring actions on the offsite compensatory mitigation area would enhance the overall riparian habitat structure and function of the site. Those activities would occur outside the nesting and breeding season. The Corps has determined that the proposed action at the offsite compensatory mitigation area may affect, but is not likely to adversely affect the yellow-billed cuckoo, southwestern willow flycatcher and the northern Mexican gartersnake, is not likely to result in the destruction or adverse modification of proposed critical habitat for those two species, and would have no effect on any other listed species.

Our prior consultation request letter dated April 12, 2016 requested consultation only for proposed habitat mitigation and monitoring activities at the offsite action area. Because we have found no effects within our 1,775 acre onsite action area, there is no requirement to consult under ESA section 7 for that area. Our request for section 7 consultation remains limited to the offsite action area. Your October 14, 2016 response letter asserted that ESA section 7 consultation must extend to the entire 8,200 acre development project because the compensatory mitigation being implemented via the HMMP is a “necessary and inseparable component” of the 2006 permit.

Your assertion that the section 404 permit could not be issued “but for” approval of the HMMP is not correct. While many section 404 permits require compensatory mitigation, applicants are free to identify and propose mitigation plans and locations for Corps review. Even in this case, the permittee could have proposed to provide mitigation at a different location or could have chosen to meet their mitigation obligation by purchasing in-lieu fee credits. So, while “a” compensatory mitigation effort was necessary for this permit, “the” compensatory mitigation effort proposed by the permittee and accepted by the Corps was not the only option available.

The larger federal action under consideration for the section 7 consultation is the Corps’ section 404 permit for the onsite action area. The proposed HMMP depends on the permit for its justification (i.e., but for the permit, no HMMP would be needed). In fact, the HMMP has no independent utility since it exists only to comply with a permit condition. While the Corps is required to evaluate whether the activities authorized by the section 404 permit in Waters of United States may affect listed species or critical habitats, we have found no effects at the onsite action area. The Corps also must evaluate whether activities required under the HMMP may affect listed species or critical habitats because the HMMP is an interrelated and interdependent action of the federal permit action.

As addressed in the enclosed Memorandum For Record, Subject: “National Environmental Policy Act Scope of Analysis and Endangered Species Act Action Area for the Phase I Villages at Vigneto Community Master Plan Area”, our documentation of a feasible no federal action option for private development of the 8,212 acre property demonstrates that many of the environmental effects (such as groundwater withdrawals) from the larger development could and would occur regardless of whether a federal permit is granted. The Corps does not have regulatory authority over “development projects”, or any other “types” of projects, per se. Our regulatory authority under section 404 of the Clean Water Act only covers discharges of specific pollutants (dredged or fill material) and only into Waters of the United States. As a result, the Corps’ federal control and responsibility are often, as in this case, limited. In this case, our federal control and responsibility also defines our ESA section 7 consultation onsite action area as 1,775 acres of Waters of the United States and adjacent upland buffer and preservation areas. Environmental effects of the larger private development beyond our 1,775 acre onsite action area (including groundwater pumping and as described above and in the attached no action alternative) are beyond the Corps’ authority or discretion to control or regulate.

Your letter also expressed concern that there might be piecemeal development because the City of Benson CMP covers a larger area. The Corps considered this issue and found that the 8,212 master-planned development area, which is Phase I of the CMP has independent utility. Build out of the proposed project is projected to take 15 years. There are 4,000 acres of land owned by El Dorado Benson, LLC within the CMP that are beyond the boundaries of the

proposed project.¹ Development on the other 4,000 acres might occur many years from now and have not yet been planned at a level to determine whether section 404 permits are necessary.

We hope that with the additional explanations provided in this letter and the attachments, you will concur with our not likely to adversely affect determination for yellow-billed cuckoo, southwestern willow flycatcher, and northern Mexican gartersnake at the offsite action area. Should you not concur, we request that you accept this letter as our request for formal section 7 consultation and conference. Given your familiarity with the project area including prior site visits and interagency meetings, we would also request that this consultation be completed within 90 days and that a biological opinion and conference opinion be provided within 135 days (or sooner if possible) following your receipt of this letter. If you wish to receive additional data pursuant to 50 C.F.R. section 402.14(f), which you believe would provide a better information base from which to conclude this process and formulate a biological opinion and conference opinion, please contact Kathleen Tucker at (602) 230-6956 or via e-mail at Kathleen.A.Tucker@usace.army.mil during the 90-day consultation period.

Sincerely,



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DN: c=US, o=U.S. Government, ou=DoD,
ou=PKI, ou=USA,
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David J. Castanon
Chief, Regulatory Division

Enclosure

Cc: Scott Richardson, USFWS
Mike Reinbold, El Dorado Holdings, Inc.
Dennis Krahn, El Dorado Holdings, Inc.
Eric Hollensbe, El Dorado Holdings, Inc.
Jim Tress, Westland Resources, Inc.
Diana Shiel, Westland Resources, Inc.

¹ On June 1, 2016, the City of Benson passed Resolution 16-2016, "authorizing execution of a new Development Agreement between the City of Benson and El Dorado Benson, L.L.C. for the project known as The Villages at Vigneto." The new Development Agreement allows for the Villages at Vigneto to expand by another 2,433 acres. Similar to the 4,000 additional lands included in the CMP, any development of this 2,433 acres would occur many years from now and have not yet been planned at a level to determine whether section 404 permits are necessary.