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Watershed Alliance*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity; Sierra
Club; Maricopa Audubon Society; Tucson
Audubon Society; Cascabel Conservation
Association; and Lower San Pedro
Watershed Alliance,

Plaintiffs,

v.

Col. Kirk E. Gibbs, in his official capacity
as Commander of the Los Angeles District
of the U.S. Army Corps of Engineers;
Benjamin Tuggle, in his official capacity
as Regional Director of the Southwest
Region of the U.S. Fish & Wildlife Service;
U.S. Army Corps of Engineers; and
U.S. Fish and Wildlife Service,

Defendants.

No. _____

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the failure of the U.S. Army Corps of Engineers (Corps) and U.S. Fish and Wildlife Service (FWS) to reinstate mandatory Endangered Species Act (ESA) consultation regarding a Clean Water Act (CWA) section 404 fill permit the Corps issued for a residential and resort development planned on over 12,000 acres near the San Pedro River in Benson, Arizona. The development, dubbed “The Villages at Vigneto,” threatens significant adverse effects to wildlife species that are protected under the ESA as threatened or endangered, as well as to their designated critical habitats.

2. The project would transform largely undeveloped habitat approximately two miles from the San Pedro River into 28,000 residential units, commercial buildings, golf courses, vineyards and orchards, resorts, and an extensive road and utility network. The proposed development, which could balloon the population of Benson by 1500%, would rely on groundwater pumped from aquifers that feed the San Pedro River.

3. The San Pedro River is the last free-flowing, undammed river in the desert Southwest. The San Pedro flows north from northern Mexico through southeastern Arizona for about 130 miles until its confluence with the Gila River at Winkelman, Arizona. The river and its surrounding cottonwood-willow forest support one of the most important corridors for millions of migratory songbirds in the United States, especially because so many other desert rivers in the Southwest have been degraded or destroyed. Nearly 45% of the 900 bird species in North America use the San Pedro River’s habitat corridor at some point in their lives. The river and its watershed also are home to hundreds of species of mammals, reptiles, amphibians, fish, and insects; including species protected by the ESA, such as the jaguar (*Panthera onca*), ocelot (*Leopardus pardalis*), western yellow-billed cuckoo (*Coccyzus americanus occidentalis*), southwestern willow flycatcher (*Empidonax extimus traillii*), lesser long-nosed bat (*Leptonycteris curasoae yerbabuena*), and northern Mexican gartersnake (*Thamnophis eques megalops*) at issue in this case.

4. The San Pedro River's flows and habitat depend largely on the close nexus between the river and subsurface groundwater. Groundwater sustains the San Pedro's flows, as well as its riparian (riverside) vegetation and springs, during seasons with little or no rainfall. Groundwater pumping is the greatest threat to the San Pedro River because it lowers the water table to levels at which groundwater no longer is able to sustain riparian habitat or river and spring flows. Over the last several decades, the rate of groundwater pumping from aquifers feeding the San Pedro River has far exceeded the rate of recharge of water to the aquifer, creating a groundwater "deficit." This pumping has begun to dry up the San Pedro River and its riparian vegetation and springs, leaving the San Pedro River with little or no water to spare.

5. Vigneto's developer, El Dorado Benson, LLC, plans to bulldoze over 9,000 acres of upland habitat and to fill at least 51 acres of jurisdictional desert washes, which the Environmental Protection Agency (EPA) has determined are an Aquatic Resource of National Importance (ARNI). El Dorado requires a CWA section 404 permit from the Corps to fill the washes and develop the property. El Dorado intends to rely on a permit issued by the Corps in 2006 to a different developer, which had planned to construct a substantially smaller development called "Whetstone Ranch." The developer never broke ground on Whetstone Ranch, and sold its land and permit to El Dorado in 2014.

6. Groundwater pumping to supply the proposed Vigneto development likely will deplete the San Pedro River's flows and degrade the river's riparian habitat.

7. Since the Corps issued the section 404 permit in 2006, FWS has listed new species and proposed and designated new critical habitats in the San Pedro watershed under the ESA that may be affected by the activities the permit authorizes. Moreover, new scientific studies and observations of ESA-listed species reveal that actions taken under the permit may affect listed species and critical habitats in ways not previously considered. And the substantial increase in the development's size may affect listed species or critical habitats in ways not previously considered.

8. Each of these circumstances requires the Corps to consult with FWS to insure that ESA protected species are not jeopardized and critical habitats are not adversely modified or destroyed by the development. The Corps and FWS have not done so here and thus are in violation of the ESA.

9. Plaintiffs Center for Biological Diversity, Sierra Club, Maricopa Audubon Society, Tucson Audubon Society, Cascabel Conservation Association, and Lower San Pedro Watershed Alliance ask this Court to require the Corps and FWS to complete the required consultation to evaluate effects that activities to be taken under CWA section 404 permit number 2003-00826-SDM may have on the jaguar, ocelot, western yellow-billed cuckoo, southwestern willow flycatcher, lesser long-nosed bat, and northern Mexican gartersnake, and on the jaguar's, western yellow-billed cuckoo's, southwestern willow flycatcher's, and northern Mexican gartersnake's critical habitats, before any actions under the permit may be taken.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540(c), (g) (ESA citizen suits).

11. Plaintiffs provided written notice of the legal violations alleged in this Complaint to the named Defendants on March 8, 2016 — more than 60 days ago, as required by the ESA. *See id.* § 1540(g)(2)(C). Defendants have not corrected their violations of law.

12. This Court has authority to grant Plaintiffs' requested relief pursuant to the ESA, *id.* § 1540(g), the Administrative Procedure Act (APA), 5 U.S.C. § 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202. Defendants' sovereign immunity has been waived under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), and the APA, 5 U.S.C. § 702.

13. Venue is properly vested in this District pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(i) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District. The challenged

federal action is a permit authorizing activities on property in Benson, Arizona. Plaintiffs Center for Biological Diversity, Maricopa Audubon Society, Tucson Audubon Society, Cascabel Conservation Association, and Lower San Pedro Watershed Alliance, as well as the Grand Canyon Chapter of the Sierra Club, are headquartered within Arizona.

14. This case should be assigned to the Tucson Division of this Court because the challenged federal action authorizes activities on property in Cochise County, which is within the Tucson Division. *See* LRCiv 77.1(a), (c).

PARTIES

15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (CBD) is a nonprofit corporation headquartered in Tucson, with more than 50,000 members. CBD works to raise public awareness and to preserve, protect, and restore biodiversity, native species, ecosystems, and public lands. CBD's members research, study, observe, publicize, and seek protection for ecosystems, plants, and animals, including the San Pedro River, jaguar, ocelot, yellow-billed cuckoo, southwestern willow flycatcher, lesser long-nosed bat, and northern Mexican gartersnake. CBD and its members analyze and disseminate information to the public about the areas affected by the decreasing water levels in the San Pedro River. CBD's and its members' extensive involvement in the San Pedro River includes over 25 years of activism and litigation, including advocacy to prevent the proposed Villages at Vigneto development's harmful environmental impacts.

16. Plaintiff SIERRA CLUB is a national nonprofit organization with 64 chapters and more than 630,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Grand Canyon Chapter of the Sierra Club is headquartered in Phoenix and has approximately 12,600 members in the state of Arizona. The Sierra Club's concerns encompass protection of the San Pedro River, desert grasslands, and woodlands of the Whetstone Mountains. The Sierra Club's members

enjoy wildlife watching in these areas and have advocated for protections of endangered and threatened wildlife in the area, including the jaguar, ocelot, southwestern willow flycatcher, and northern Mexican gartersnake. Members of the Grand Canyon Chapter monitor water quality on the upper and middle San Pedro River each month from May through October and assist with annual wet-dry mapping of the river. The Sierra Club has provided comments to the City of Benson on the proposed Villages at Vigneto development, and Sierra Club members have attended public meetings on Vigneto. The Sierra Club also has provided comments to the Corps asking that it revoke Vigneto's section 404 permit.

17. Plaintiff MARICOPA AUDUBON SOCIETY (Maricopa Audubon) is an organization of volunteers dedicated to the enjoyment of birds and other wildlife, with a primary focus on the conservation and restoration of the riparian habitat of the Southwest through education and community involvement. Maricopa Audubon is a nonprofit Arizona organization headquartered in Phoenix, with approximately 2,500 members. Maricopa Audubon has a long history of involvement with the San Pedro River, including being instrumental in the successful 1977 opposition to the proposed Charleston Dam, which would have inundated the southern half of the upper San Pedro River. Maricopa Audubon's volunteers and members use, enjoy, and benefit from the San Pedro River for wildlife observation, research, education, and recreational activities.

18. Plaintiff TUCSON AUDUBON SOCIETY (Tucson Audubon) is a nonprofit conservation organization that inspires people to enjoy and protect birds through recreation, education, conservation, and restoration of the environment upon which we all depend. Founded in 1949, Tucson Audubon has more than 2,500 members. Tucson Audubon established the Arizona Important Bird Area (IBA) Program in 2001, which seeks to identify and protect vital habitats for birds in Arizona, and is a steward of the Lower San Pedro Global IBA. Tucson Audubon and its members have surveyed for western yellow-billed cuckoos in the Lower San Pedro Global IBA and in southeastern Arizona mountain ranges, including the Whetstone Mountains. Tucson Audubon was

involved in advocating for the designation of the San Pedro Riparian National Conservation Area in 1988, the designation of the Upper San Pedro Globally Important Bird Area by the American Bird Conservancy in 1996, the designation of the Lower San Pedro Globally Important Bird Area in 2008, litigation to protect southwestern willow flycatcher critical habitat in 2009, and continues to advocate for the health of the watershed. The organization has provided comments and new information to the Corps and FWS urging the agencies to reconsider potential impacts to threatened and endangered species and critical habitats from the proposed Villages at Vigneto development.

19. Plaintiff CASCABEL CONSERVATION ASSOCIATION (CCA) is a nonprofit conservation group headquartered in Cochise County. CCA is dedicated to the collaborative stewardship of the middle San Pedro watershed in a way that promotes the health, stability, and diversity of the whole community, including its earth, waters, plants, and animals. Founded in 1997, CCA has about 150 members primarily from Cochise and Pima Counties. CCA runs retreat and education programs to provide members of the public with information and an appreciation for the middle San Pedro watershed. CCA has advocated for both the City of Benson and the Corps to more fully evaluate the impact the proposed Vigneto development will have on water resources and the riparian habitat of the San Pedro River. For the last four years, CCA has conducted official surveys for western yellow-billed cuckoos on the San Pedro River in support of the National Audubon Society's IBA Program.

20. Plaintiff LOWER SAN PEDRO WATERSHED ALLIANCE (LSPWA) is a landowner-based nonprofit conservation organization headquartered in Mammoth, Arizona. LSPWA has nearly 200 members, about half of whom manage thousands of acres of land in the Lower San Pedro Basin. Most of the members owning land in this watershed reside in Cochise County. The organization is dedicated to protecting the threatened lower San Pedro riparian ecosystem and supporting watershed. Its members regularly survey for western yellow-billed cuckoos, southwestern willow flycatchers, and

other threatened and endangered species in the middle and lower San Pedro watersheds. LSPWA has a history of advocacy on behalf of the San Pedro River — particularly the need to protect its flows from excessive groundwater pumping — and previously has written the Corps and the City of Benson urging that endangered species and San Pedro stream flows be protected from the Vigneto development.

21. Plaintiff Organizations have long histories of advocating for the protection of the San Pedro River ecosystem and its supporting watershed, and for the sensitive species that rely on those habitats, including: filing legal challenges to other federal actions and development projects whose groundwater pumping threatened to reduce San Pedro River flows and degrade habitat; commenting on proposed rules to list species and designate critical habitat in the San Pedro watershed under the ESA; collecting and submitting data to federal agencies — including the Corps and FWS — on occurrences and habitat use by threatened and endangered species and other wildlife in the watershed; and sending letters to federal agencies and local political subdivisions urging that the San Pedro River, the watershed's native ecosystems, and the area's sensitive species be protected from large development projects.

22. Plaintiff Organizations' members and staff derive educational, scientific, aesthetic, recreational, and spiritual benefits from the San Pedro River watershed, including its hemispherically-significant bird migration corridor, Global IBAs, extraordinary biological diversity, and the ecosystem services the watershed provides. Plaintiffs' members and staff enjoy activities that include viewing, studying, and photographing the birds, wildlife, and habitats in the middle and lower San Pedro watersheds, and have concrete plans to continue these activities. Many of Plaintiffs' members live along the San Pedro River or in the middle or lower San Pedro watershed, and participate in these activities daily.

23. The legal violations alleged in this complaint cause direct injury to the scientific, aesthetic, recreational, conservation, educational, spiritual, and other interests of Plaintiffs and their members and staff. These are actual, concrete injuries to Plaintiffs,

caused by Defendants' failure to comply with the ESA and its implementing regulations and policies. Unless the requested relief is granted, Plaintiffs' interests will continue to be injured by the Defendants' failure to comply with the ESA. The relief sought herein would redress Plaintiffs' injuries. Plaintiffs have no other adequate remedy at law.

24. Defendant COLONEL KIRK E. GIBBS is sued in his official capacity as Commander and District Engineer of the Los Angeles District of the U.S. Army Corps of Engineers. The Los Angeles District Engineer is responsible for issuing and overseeing dredge and fill permits under CWA section 404 in the District, which includes Cochise County, Arizona. The Los Angeles District office issued the section 404 permit that is the subject of this litigation.

25. Defendant BENJAMIN TUGGLE is sued in his official capacity as Regional Director of the Southwest Region of the U.S. Fish & Wildlife Service. The Southwest Regional Director is responsible for leading ESA consultations with federal agencies whose actions may affect species in the Region, which includes Cochise County, Arizona.

26. Defendant UNITED STATES ARMY CORPS OF ENGINEERS is the federal agency within the Department of Defense responsible for issuing dredge and fill permits under CWA section 404.

27. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the federal agency within the U.S. Department of the Interior responsible for administering and implementing the ESA with respect to terrestrial species, including all species at issue in this litigation.

STATUTORY BACKGROUND

I. The Endangered Species Act

28. Congress enacted the ESA to protect endangered and threatened species and the ecosystems on which those species depend. 16 U.S.C. § 1531(b). Through the ESA, Congress declared its policy "that all Federal departments and agencies shall seek

to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act].” *Id.* § 1531(c)(1).

29. The ESA provides protection to those species FWS designates as either “endangered” or “threatened.” A species is endangered when it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is threatened if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

30. If FWS lists a species as threatened or endangered, it must designate critical habitat for that species. *Id.* § 1533(a)(3)(A)(i). Critical habitat includes areas occupied by the species containing “physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection,” and areas not occupied by the species that “are essential for the conservation of the species.” *Id.* § 1532(5)(A). Conservation means “the use of all methods and procedures which are necessary” to recover species to the point that they no longer need ESA protection. *Id.* § 1532(3).

31. Section 7(a)(2) of the ESA requires each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” *Id.* § 1536(a)(2). An “action” includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” — including “the granting of . . . permits” — that are within the agencies’ discretionary control. 50 C.F.R. §§ 402.02, 402.03.

32. The ESA and its implementing regulations establish an interagency consultation process to assist federal agencies in complying with this duty. An agency must consult with the appropriate wildlife agency — here, FWS — under section 7 whenever it takes an action that “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). In addition, an agency must confer with the appropriate wildlife

agency “on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under [ESA section 4] or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.” 16 U.S.C. § 1536(a)(4); *see also* 50 C.F.R. § 402.10.

33. The agency must consider all possible effects across the “action area,” which encompasses “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. The “effects of the action” that must be considered include “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.” *Id.* “Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.* “Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.” *Id.* “Interdependent actions are those that have no independent utility apart from the action under consideration.” *Id.*

34. “The minimum threshold for an agency action to trigger consultation with FWS is low” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). “*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement” Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added); *see also* U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook* at xvi (1998) (“May affect [is] the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat.”).

35. As a result of consultation, the federal agency will obtain either a written concurrence letter from FWS that the proposed action is “not likely to adversely affect” listed species or their habitats, 50 C.F.R. §§ 402.13(a), 402.14(b)(1), or a biological opinion evaluating the effects of the federal action on listed species and their critical habitats, *id.* § 402.14(h). If FWS concludes that a proposed action is likely to jeopardize

a listed species or result in adverse modification of its critical habitat, FWS must propose a reasonable and prudent alternative, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C.

§ 1536(b)(3).

36. The duty to consult is ongoing:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. So long as an action agency has retained discretionary involvement or control, the occurrence of any of the four listed circumstances triggers an immediate duty for the agency and FWS to enter into consultation.

37. ESA section 7(d) prohibits federal agencies, after the initiation of consultation under ESA section 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d).

II. The Clean Water Act

38. The CWA makes it unlawful to “discharge . . . any pollutant” to “navigable waters” without a permit. 33 U.S.C. §§ 1311(a), 1362(12).

39. “Pollutant” includes, *inter alia*, “rock” and “sand.” *Id.* § 1362(6).

40. “Navigable waters” means the “waters of the United States.” *Id.* § 1362(7). “[W]aters of the United States” includes “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce,” “[a]ll interstate waters,” “[a]ll other waters such as intrastate . . . rivers [or] streams (including intermittent streams) . . . the use, degradation or destruction of which could affect interstate or foreign commerce,” and “[t]ributaries” of such waters. 33 C.F.R. § 328.3(a)(1)–(3), (5) (2014).

41. The Secretary of the Army, acting through the Corps’ Chief of Engineers, “may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a) (CWA section 404). “Fill material” is “material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States.” 40 C.F.R. § 232.2.

STATEMENT OF FACTS

I. The San Pedro River and Watershed

42. The San Pedro River originates in Mexico and flows into Arizona where it ultimately joins the Gila River north of Tucson. The river is lined with one of the few remaining cottonwood-willow gallery forest riparian habitats in the world.

43. The San Pedro River is home to over 100 species of breeding birds. The river provides invaluable habitat for millions of songbirds representing over 250 species that migrate between their wintering grounds in Central and South America and Mexico and their summer breeding grounds in Canada and the northern United States. In 1996, the American Bird Conservancy recognized the San Pedro River as the first “Globally Important Bird Area” in North America.

44. The river is home to more than 80 species of mammals, two native species and several introduced species of fish, and more than 40 species of amphibians and reptiles.

45. In 1988, Congress recognized the importance of the San Pedro River and the habitat it provides and designated 36 miles of the river's upper basin as the San Pedro Riparian National Conservation Area (SPRNCA). Congress mandated that SPRNCA be managed "to protect the riparian area and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River." 16 U.S.C. § 460xx(a).

46. The middle San Pedro watershed extends from Fairbank in the south to Redington in the north. The middle San Pedro watershed encompasses the southern part of the Lower San Pedro Basin and the northern part of the Upper San Pedro Basin, which are groundwater basins designated by the Arizona Department of Water Resources. The middle San Pedro watershed is divided into two subareas: the Benson subarea, extending from Fairbank northward to the Narrows; and the Redington subarea, extending from the Narrows northward to Redington. *See* Figure 1.

47. Benson is the largest city in the middle San Pedro watershed. The Benson subarea is bounded by the Whetstone Mountains to the west and the Dragoon Mountains to the east.

48. The Whetstone Mountains, rising to over 7,700 feet, are covered by Madrean evergreen woodland habitat. This habitat supports a rich array of species, including black bears, mountain lions, ocelots, and the only known jaguar in the United States.

49. The habitat between the Whetstone Mountains and San Pedro riparian area is primarily semidesert grassland and desert scrub, which supports a variety of mammal, bird, and reptile species.

50. This area is crossed by a web of desert washes — stream beds that flood during and after precipitation events — that flow into the San Pedro River.

51. Desert washes provide important ecological and hydrological functions. Among other things, desert washes help reduce erosion and improve water quality, recharge groundwater, provide wildlife habitat and migration corridors, and filter water.

52. Desert washes are lined with larger and denser vegetation than the surrounding habitat which provides forage, cover, and nesting or denning habitat for desert animals. This vegetation is known as xeroriparian habitat.

53. Filling desert washes can alter the volume, duration, and frequency of water flows from those washes into downstream waters. Filling desert washes also can alter the amount of sediment transported from the washes into downstream waters. Changes in sediment transport from the washes can alter downstream riparian habitat and the washes' xeroriparian habitat. Such habitat alterations can harm wildlife.

54. Developing uplands adjacent to desert washes can alter the volume, duration, and frequency of water flows into those washes and, subsequently, from the washes into downstream waters. Developing uplands adjacent to desert washes also can alter the amount of sediment transported into those washes and, subsequently, from the washes into downstream waters. Such alterations to water flows and sediment transport can harm wildlife.

55. Groundwater pumping from the aquifers that supply water to the San Pedro River affects the river, its associated habitats, and the species that depend on these habitats.

56. Groundwater pumping from aquifers in the San Pedro watershed affects the river because there is a direct hydrologic connection between the groundwater and the San Pedro's flows.

57. Two aquifers underlie the Benson subarea: a shallow "alluvial" aquifer and a deeper "regional" aquifer. The shallow alluvial aquifer provides base flows — the flows that sustain the river year-round regardless of seasonal variations in rainfall or snowmelt — to the San Pedro River in the subarea.

58. A 2015 U.S. Geological Survey (USGS) study found that there is a hydrological connection between the deeper regional aquifer and the shallow alluvial aquifer in the Benson subarea, and, therefore, between the regional aquifer and the river. Groundwater in the deeper regional aquifer thus contributes to and sustains the base

flows in the San Pedro River in the subarea and the downstream river segments fed by that segment of the river.

59. Groundwater from the Benson subarea's regional aquifer also flows northward towards the Redington subarea where it may help provide base flows to the river in the Lower San Pedro Basin.

60. The Benson subarea's regional aquifer is recharged by precipitation that falls on the Whetstone Mountains to the west of the river.

61. Groundwater pumping in the watershed affects this hydrologic system in two ways. First, it intercepts groundwater flowing east from the Whetstone Mountains that otherwise would flow into the San Pedro River and maintain the river's base flows. Second, groundwater pumping lowers the water table in the regional aquifer to levels that are too low for the aquifer's groundwater to flow into the alluvial aquifer and the San Pedro River.

62. The Benson subarea's water table has been declining since monitoring began in the 1940s.

63. If the water table continues to drop, the river's base flows eventually will reverse; in other words, instead of the aquifers feeding the San Pedro River, the river will feed the aquifers and will dry up.

64. Cottonwood-willow gallery forests require fairly persistent streamflows and shallow (high) groundwater depths to survive. This habitat will die off wherever the San Pedro River dries up.

65. Congress has reserved federal water rights in "a quantity of water sufficient to fulfill the purposes" of the SPRNCA, 16 U.S.C. § 460xx-1(d), including rights to springs and to groundwater to support riparian vegetation, 16 U.S.C. § 460xx(a). If the water table in the Benson subarea continues to drop, sufficient groundwater likely would not reach the surface to support the springs and riparian vegetation in the SPRNCA.

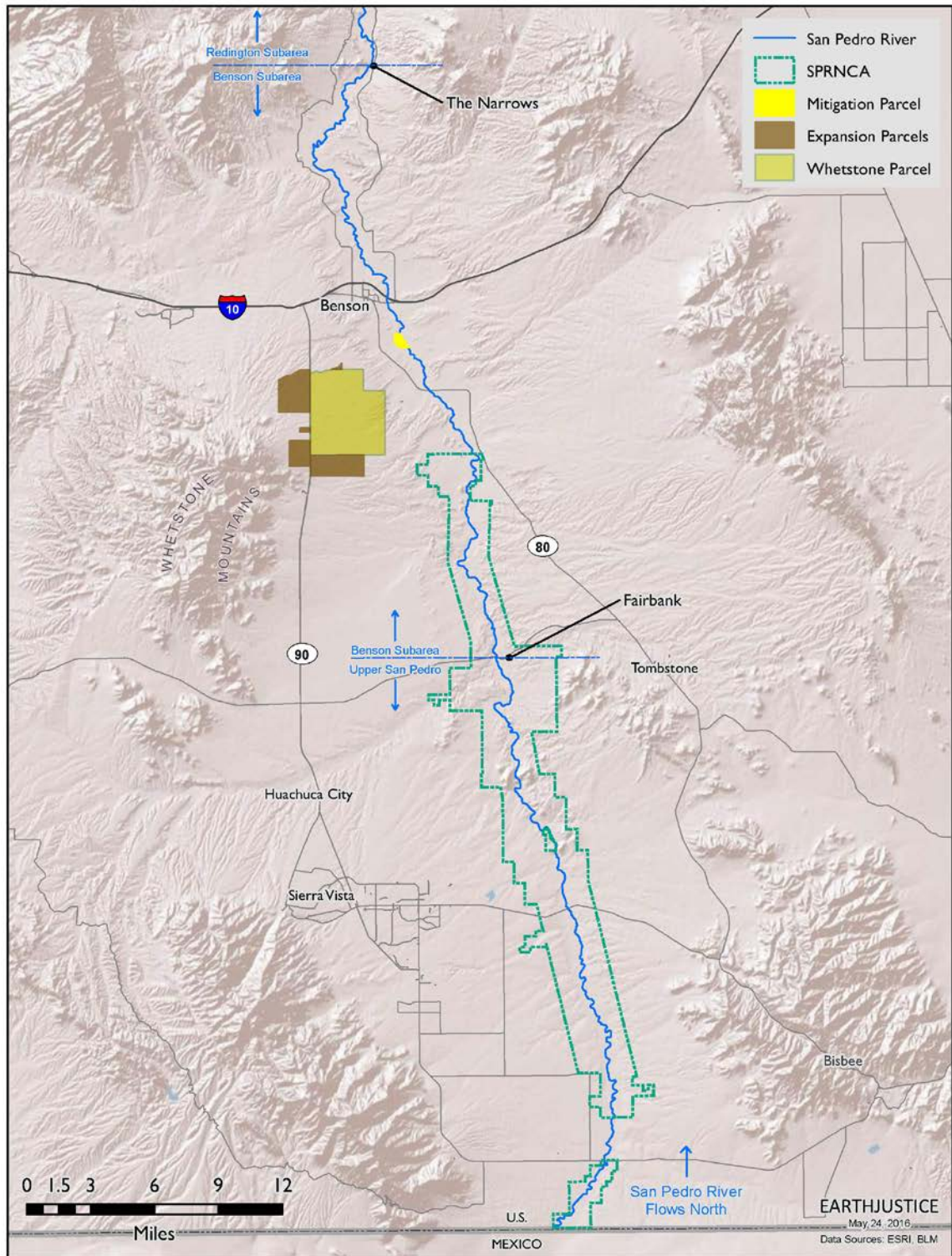


Figure 1 – Villages at Vigneto project area in relation to the upper San Pedro watershed and the Benson subarea of the middle San Pedro watershed

II. The Army Corps Issues a Section 404 Permit to Whetstone Partners to Enable Construction of a Master Planned Community.

A. The Whetstone parcel

66. In the early 2000s through 2014, Whetstone Partners LLP owned an 8,200-acre parcel in Benson, Arizona (hereinafter “Whetstone parcel”).

67. The parcel is located in the Benson subarea of the middle San Pedro watershed and is bounded by the Whetstone Mountains to the west. The San Pedro River is located less than two miles to the east of the parcel. *See* Figure 1.

68. The Whetstone parcel is crossed by a network of desert washes running generally eastward from the Whetstone Mountains into the San Pedro River.

B. The Whetstone parcel is crossed by a network of desert washes running generally eastward from the Whetstone Mountains into the San Pedro River. Whetstone Partners applies for a section 404 permit.

69. Whetstone Partners intended to develop a master-planned community called “Whetstone Ranch” on the parcel. The community would consist of approximately 20,000 housing units, commercial land uses, roadways, utilities, recreational amenities, and other facilities.

70. On April 7, 2003, Whetstone Partners asked the Corps for a determination of the jurisdictional limits of CWA section 404, 33 U.S.C. § 1344(a), on the Whetstone parcel to determine whether waters of the United States subject to the CWA’s protection would be affected by the development.

71. On May 30, 2003, the Corps issued its determination delineating approximately 475 acres of desert washes on the Whetstone parcel qualifying as waters of the United States regulated by CWA section 404.

72. In 2004, Whetstone Partners applied to the Corps for a permit under CWA section 404 to discharge fill or dredge material into 70 acres of the washes the Corps had determined are waters of the United States. Whetstone Partners had determined that it was necessary to fill a portion of the parcel’s washes to construct the planned community-oriented development.

C. The Corps disregards FWS and EPA concerns about significant environmental impacts from developing the Whetstone parcel.

73. In June 2004, the EPA advised the Corps that the development authorized by the proposed section 404 permit “will have” a substantial and unacceptable impact on an ARNI, specifically desert washes that cross the Whetstone parcel.

74. An ARNI is a “resource-based threshold” used to identify waters of such importance that section 404 permits should be referred to high-level EPA officials to determine whether the severity of the permit’s effects on the environment requires that the permit be denied.

75. EPA concluded in its June 2004 letter that the washes on the Whetstone parcel are an ARNI because they “perform a diversity of hydrologic, biogeochemical, and habitat support functions that directly affect the integrity and functional condition of higher-order waters downstream.” In particular, the washes filter water running from uplands to the San Pedro, help recharge the area’s aquifers, and “support diverse habitats for wildlife unique to [the] region.” EPA stated that desert washes, like those on the Whetstone parcel, “are, more than ever, of critical value regionally, and their support of human health and the economies of the region underscore their national importance.”

76. EPA stated, “Development in and around these [desert washes] fragments habitat and eliminates much, if not all, of the habitat support functions provided by these waters.”

77. EPA concluded:

The Whetstone Ranch project . . . will both cause and contribute to the significant degradation and/or elimination of much the functions and acreage of this portion of the San Pedro River watershed. The range and severity of environmental consequences resulting from the Whetstone Ranch project are substantial and unacceptable and are contrary to the goals of the Clean Water Act.

78. Corps staff met with EPA staff to attempt to resolve EPA’s concerns. During these meetings, Whetstone Partners agreed to reduce the acreage to be filled in its permit application from 70 to 51 acres. Whetstone Partners also agreed to purchase and

actively preserve (through vegetation management) a 144-acre parcel (hereinafter “mitigation parcel”) along the San Pedro River approximately two miles northeast (downstream) of the Whetstone parcel to mitigate the environmental effects of activities authorized by the section 404 permit. *See* Figure 1. EPA continued to object to issuing the permit despite the mitigation measures.

79. On May 14, 2004, FWS warned the Corps that “[t]here is the possibility that groundwater withdrawal associated with this development could impact listed species and designated critical habitat in the San Pedro River. In addition, if agaves are present on the project site and will be impacted, that may be an impact on the lesser long-nosed bat.”

80. The Corps completed an environmental assessment on May 31, 2006 for the fill activities proposed to be approved via the 404 permit pursuant to its duties under the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347. The Corps did not consider the effects of the development that would be caused by and was the purpose of the permit.

81. The environmental assessment cited 24 “special status” species with the potential to occur in Cochise County, including the jaguar, ocelot, western yellow-billed cuckoo, and southwestern willow flycatcher. The Corps concluded development of the Whetstone parcel would have “no effect” on these species on the assumption that the species never use the parcel.

82. The environmental assessment also noted that the lesser long-nosed bat “may forage on agaves within the [Whetstone parcel],” but assumed that destruction of the agaves would have no effect on the species.

83. The environmental assessment did not mention the northern Mexican gartersnake.

84. The Corps did not consult with FWS — either formally or informally — on possible effects on listed species or critical habitats that may be caused by issuing the section 404 permit.

D. The Corps issues a section 404 permit to Whetstone Partners over EPA's objections.

85. Despite the Corps' addition of mitigation measures in the 404 permit, EPA advised the Corps in May 2006 that the Corps' environmental assessment was legally inadequate because: the Corps failed to consider alternatives that would achieve "the maximum practicable level of avoidance and minimization of adverse impacts to waters of the U.S."; the Corps failed to require "an adequate compensatory mitigation plan to replace the functions and values of waters lost to unavoidable impacts"; and the Corps improperly limited the scope of its environmental analysis to ignore the development's effects other than the direct effects of filling washes.

86. The Corps issued a supplemental environmental assessment on June 13, 2006, disagreeing that it was required to consider the effects and alternatives specified by EPA.

87. The Corps' Los Angeles District office issued section 404 permit number 2003-00826-SDM to Whetstone Partners on June 21, 2006.

88. The permit authorizes the permit-holder to fill up to 51 acres of desert washes delineated as waters of the United States at unspecified locations within the Whetstone parcel.

89. The permit provides:

This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation

procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5.

(Emphases added.)

90. The permit requires the permit-holder to comply with the terms of a Habitat Mitigation and Monitoring Plan prepared by a consultant for Whetstone Partners in 2005. The permit requires the permit-holder to record a restrictive covenant limiting development on lands specified in the Habitat Mitigation and Monitoring Plan.

91. The Habitat Mitigation and Monitoring Plan requires the permit-holder to keep human disturbance out of a 25-foot buffer along washes where they are not filled.

92. The Habitat Mitigation and Monitoring Plan requires the permit-holder to preserve, enhance, and restore the 144-acre mitigation parcel. The conservation actions the Plan requires on the mitigation parcel include regrading and stabilizing gullies, installing livestock fencing, removing invasive plants, and planting native mesquite and cottonwood.

III. Whetstone Partners Transfers the Section 404 Permit to El Dorado Benson, Enabling El Dorado to Construct a Significantly Larger Master Planned Community.

93. Whetstone Partners never broke ground on the Whetstone Ranch project. Instead, in 2014, Whetstone Partners sold the Whetstone parcel to El Dorado Benson. Whetstone Partners also transferred the 2006 section 404 permit for the Whetstone parcel to El Dorado.

94. At about the same time, El Dorado acquired an additional 4,139 acres of undeveloped land (hereinafter “expansion parcels”) in the vicinity of the Whetstone Ranch parcel. *See* Figure 1.

95. El Dorado plans to construct a master-planned community called “The Villages at Vigneto” on the Whetstone parcel and expansion parcels. The development’s planned total acreage is 12,339 acres, nearly 20 square miles.

96. Plans for the development include approximately 28,000 residential units, commercial developments, golf courses, vineyards and orchards, resorts, and an extensive road and utility network, among other facilities and amenities.

97. El Dorado intends to rely on the 2006 section 404 permit it obtained from Whetstone Partners to fill up to 51 acres of desert washes on the Whetstone parcel. Due to the network of washes across the Whetstone parcel, El Dorado cannot construct the Villages at Vigneto development as conceived without filling some washes. Therefore, the development could not proceed without a valid section 404 permit for the Whetstone parcel.

98. Approximately 9,000 acres of semidesert grassland and desert scrub habitat will be bulldozed to make way for the development.

99. In addition to filling the 51 acres of desert washes on the Whetstone parcel, as authorized by the section 404 permit issued to Whetstone Partners, construction of the Vigneto development on the expansion parcels apparently will require filling an unspecified additional acreage of desert washes.

100. Water for the development will be supplied by the City of Benson. Benson — with a population around 5,000 — obtains its water supply by pumping groundwater from the Benson subarea aquifer.

101. Benson's current water demand is approximately 800 acre-feet per year.

102. Benson has allocated over 12,000 acre-feet of water per year to supply the Villages at Vigneto, more than 15 times Benson's current water demand.

103. El Dorado submitted a Final Community Master Plan and Development Plan to the City of Benson on September 8, 2015.

104. Benson's City Council has scheduled a public hearing on its proposed development agreement with El Dorado on June 1, 2016.

IV. FWS Advises the Corps that the Section 404 Permit May Affect Several Listed Species and Critical Habitats and Recommends that the Corps Reinitiate ESA Consultation on the Permit.

105. FWS apparently became aware in 2015 that El Dorado was seeking approvals from the City of Benson to begin construction of the Villages at Vigneto development.

106. In light of the potential start of construction and likely effects on listed species, FWS sent the Corps an unsigned “draft letter” on July 15, 2015 recommending that the Corps “request agency consultation” on the section 404 permit.

107. FWS explained it was advising that consultation be reinitiated because new species had been listed and new critical habitat proposed since the permit originally was issued in 2006, new information reveals the development may affect listed species and critical habitats in ways not previously considered, and the proposed Vigneto development is substantially larger than the Whetstone proposal evaluated prior to issuing the permit and thus may have additional effects on listed species and critical habitat not previously considered.

108. FWS explained that the project specifically “may affect,” both directly and indirectly, the northern Mexican gartersnake and the western yellow-billed cuckoo and their proposed critical habitats.

109. FWS also recommended that the Corps “reconsider[.]” the project’s direct and indirect effects on the lesser long-nosed bat and on jaguar critical habitat.

110. On March 8, 2016, Plaintiffs sent a letter to Defendants explaining that the Corps and FWS are required to reinitiate consultation under 50 C.F.R. § 402.16 because: 1) FWS has listed new species under the ESA and designated and proposed new critical habitat for listed species that may be affected by the action; 2) new information reveals that the action may affect listed species in a manner and to an extent not previously considered; and 3) the proposed development authorized by the permit has been modified in a manner that causes effects on listed species not previously considered. Neither the Corps nor FWS has responded in any way to Plaintiffs’ notice letter.

V. FWS Has Listed New Species as Threatened, Proposed New Critical Habitat, and Finalized New Critical Habitat that May Be Affected by the Section 404 Permit.

111. The information in Plaintiffs' notice letter identifying significant new information which the Corps did not consider in approving the 404 permit in 2006 addressed changes in the status or critical habitat of four species protected by the ESA, including the western yellow-billed cuckoo, northern Mexican gartersnake, southwestern willow flycatcher, and jaguar.

A. Western yellow-billed cuckoo

112. The western yellow-billed cuckoo is a Neotropical bird. Western yellow-billed cuckoos spend the winter thousands of miles south of Arizona — east of the South American Andes Mountains, primarily south of the Amazon Basin — and migrate north in the spring, breeding in San Pedro riparian habitat and Whetstone Mountains' Madrean woodlands, among other places. The San Pedro River is home to the largest population of western yellow-billed cuckoos in Arizona.

113. Cuckoos reside and forage primarily in riparian and woodland habitats. The birds use a variety of vegetation types when moving between their primary habitats. Individual birds use a large home range for feeding — approximately 125 acres in the San Pedro watershed.

114. FWS listed the western distinct population of the yellow-billed cuckoo as a threatened species on October 3, 2014 as a result of habitat loss and degradation caused by human interference with river hydrology and by encroachment from livestock grazing and agriculture. Determination of Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo (*Coccyzus americanus*), 79 Fed. Reg. 59,992 (Oct. 3, 2014). FWS specifically listed groundwater diversion as one cause of the cuckoo's habitat loss. *Id.* at 60,026.

115. FWS has concluded that habitat in and around the San Pedro River is essential for the recovery of the western yellow-billed cuckoo. Accordingly, FWS proposed an 83-mile segment of the upper and middle San Pedro River — from the

Mexico border north past the Narrows — encompassing 21,786 acres as critical habitat for the species. Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo, 79 Fed. Reg. 48,548, 48,563 (Aug. 15, 2014); *see* Figure 2. FWS stated that hydrology along this segment must be managed to mimic natural flows to conserve the habitat features essential to the conservation of the cuckoo. 79 Fed. Reg. at 48,558–60.

116. The cuckoo occupies, and critical habitat has been proposed for the cuckoo in, San Pedro River riparian areas adjacent to and downstream from the Whetstone parcel.

117. Western yellow-billed cuckoos occupy Madrean evergreen woodlands adjacent to ephemeral streams in the Whetstone Mountains and the nearby Patagonia Mountains. Madrean evergreen woodlands exist immediately to the west of the Whetstone parcel and likely within the expansion parcels.

118. FWS stated in its July 2015 letter to the Corps that this pattern of upland habitat use “make[s] it more likely that yellow-billed cuckoos occur in the intervening habitat between the mountain range and the San Pedro River, which necessarily includes the project area [i.e., the Villages at Vigneto development area].”

119. FWS concluded in its July 2015 letter to the Corps that “suitable xeroriparian nesting and foraging habitat exists in the numerous ephemeral channels and portions of the uplands within the project area.”

120. Cuckoos frequently have been observed in desert scrub and semidesert grassland habitats. Desert scrub and semidesert grasslands are the dominant habitat types on the Whetstone parcel.

121. Cuckoos also have been observed specifically within the mitigation parcel.

122. Destroying habitat on the Whetstone parcel to construct the Vigneto development may affect cuckoos that use or move through this habitat.

123. FWS stated in its July 2015 letter that it “do[es] not consider the partial avoidance and/or small buffering of ephemeral washes described in the *Habitat*

Mitigation and Monitoring Plan to be sufficient to ensure there are no direct or indirect effects to yellow-billed cuckoo habitat on the development site.” (Citation omitted.)

124. Filling desert washes on the Whetstone parcel under the section 404 permit will alter the water flows and sediment transport from washes into the San Pedro River and thus may affect the river’s riparian habitat on which the cuckoo relies and that has been proposed as critical habitat for the species.

125. Groundwater pumping from the Vigneto development likely will reduce stream flows in the San Pedro River. Reduced stream flows may alter or destroy the riparian habitat on which the cuckoo relies and that has been proposed as critical habitat for the species.

126. Altering riparian habitat along the San Pedro may affect the cuckoo and would affect the cuckoo’s proposed critical habitat.

127. Altered flows and sediment transport may affect the San Pedro River’s ecological processes, thereby affecting the cuckoo.

128. FWS has proposed cuckoo critical habitat on lands within the mitigation parcel.

129. Management activities on the mitigation parcel pursuant to the section 404 permit’s terms may alter the cuckoo’s habitat on the parcel and thus may affect the cuckoo and its proposed critical habitat.

B. Northern Mexican gartersnake

130. The northern Mexican gartersnake lives in and near aquatic habitats in parts of Arizona, New Mexico, and Mexico, including the San Pedro River.

131. In southern Arizona, the snake generally is found in cienegas (wetlands) and stock tanks (livestock watering tanks), as well as in slow-moving river habitat and adjacent woodlands. The species also has been documented in semidesert grassland.

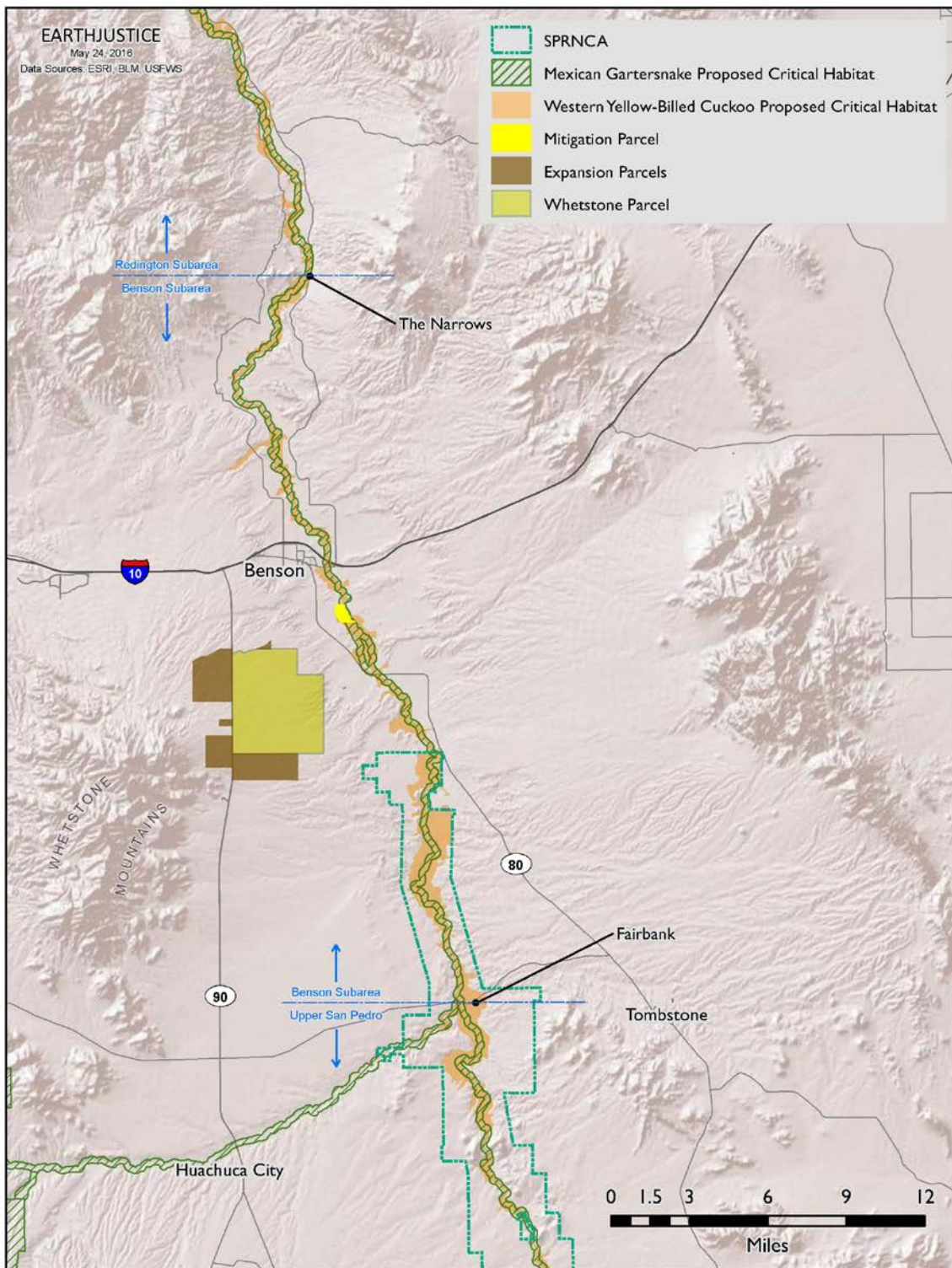


Figure 2 – Villages at Vigneto project area in relation to proposed critical habitats for the western yellow-billed cuckoo and northern Mexican gartersnake

132. FWS listed the northern Mexican gartersnake as threatened under the ESA on July 8, 2014 due to threats from non-native species and land uses that divert or dry up the snake's aquatic habitats. Threatened Status for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 79 Fed. Reg. 38,678, 38,678 (July 8, 2014). FWS also identified as a threat to the gartersnake increased land development adjacent to riparian habitat that has led to further reductions in stream flow, removal or alteration of vegetation, and increased frequency of adverse human interactions with gartersnakes. *Id.* at 38,702, 38,713. FWS specifically listed groundwater pumping in the San Pedro watershed as a threat to the species. *Id.* at 38,704–05.

133. FWS has concluded that habitat adjacent to and within the San Pedro River is essential for the recovery of the northern Mexican gartersnake. Accordingly, FWS proposed the length of the San Pedro River — from the Mexico border to the river's confluence with the Gila River — encompassing 22,669 acres as critical habitat for the species. Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 78 Fed. Reg. 41,550, 41,566–67 (July 10, 2013); *see* Figure 2.

134. FWS has stated that livestock tanks provide “vital” habitat for the gartersnake. Many livestock tanks are present on the Whetstone parcel.

135. The northern Mexican gartersnake has been documented in semidesert grassland as far as one mile from the nearest aquatic site. Semidesert grassland is the dominant habitat type on the Whetstone parcel. FWS thus stated in its July 2015 letter to the Corps, “There is a reasonable potential for the species to be present in the project area.”

136. On information and belief, the livestock tanks on the Whetstone parcel will be removed to make way for the Vigneto development. Removal of this “vital” habitat may affect the gartersnake.

137. Destroying semidesert grassland and xeroriparian habitats on the Whetstone parcel to construct the Vigneto development may affect gartersnakes that occur in or move through these habitats.

138. FWS considers the upper San Pedro River to be occupied by the gartersnake. FWS's proposed critical habitat for the gartersnake includes habitat along the San Pedro River adjacent to the Whetstone parcel.

139. Filling desert washes on the Whetstone parcel under the section 404 permit will alter the water flows and sediment transport from the washes into the San Pedro River and thus may affect the river's riparian habitat on which the gartersnake relies and that has been proposed as critical habitat for the species.

140. Groundwater pumping to supply the Vigneto development likely will reduce stream flows in the San Pedro River. Reduced stream flows may alter or destroy the riparian habitat on which the gartersnake relies and that has been proposed as critical habitat for the species.

141. Altering riparian habitat along the San Pedro River may affect the gartersnake and would affect the gartersnake's proposed critical habitat.

142. Altered flows and sediment transport may affect the San Pedro River's ecological processes, thereby affecting the gartersnake.

143. FWS stated in its July 2015 letter that the mitigation parcel's "uplands landward from the river also exhibit a high likelihood of northern Mexican gartersnake occurrence." Critical habitat for the gartersnake has been proposed on the mitigation parcel.

144. Management activities on the mitigation parcel required by the section 404 permit may alter the gartersnake's habitat on the parcel and thus may affect the gartersnake and its proposed critical habitat.

C. Southwestern willow flycatcher

145. The southwestern willow flycatcher is a riparian-dependent bird, nesting along rivers, streams, and other wetlands. The San Pedro serves as a migration corridor

for southwestern willow flycatchers flying between wintering grounds in Latin America and breeding grounds in the southwestern United States.

146. The lower San Pedro River and the lower portion of the middle San Pedro River — a few miles north of Benson — support a population of flycatchers.

147. FWS listed the southwestern willow flycatcher as endangered in 1995 due to large-scale losses of southwestern wetlands, particularly cottonwood-willow riparian habitats. Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher, 60 Fed. Reg. 10,694, 10,707 (Feb. 27, 1995). FWS identified groundwater and surface water diversions as one cause of habitat loss. *Id.* at 10,698, 10,707–08. FWS also explained that development near rivers can result in direct loss of riparian habitats and in stream channelization, which can affect riparian habitat suitability. *Id.* at 10,702, 10,707.

148. FWS first designated critical habitat for the southwestern willow flycatcher in 1997. FWS revised the flycatcher critical habitat in 2013. The revised designation extended flycatcher critical habitat an additional 17.9 miles upstream along the 100-year floodplain of the San Pedro River to cover the lower 78.4 miles of the river from its confluence with the Gila River to the Narrows. Designation of Critical Habitat for Southwestern Willow Flycatcher, 78 Fed. Reg. 344, 376 (Jan. 3, 2013); *see* Figure 3. In revising the critical habitat designation, FWS recognized that this stretch of San Pedro habitat is essential to the conservation of the flycatcher and has substantial recovery value. *Id.*

149. Filling desert washes on the Whetstone parcel under the section 404 permit will alter the water flows and sediment transport from the washes into the San Pedro River and thus may affect the river's riparian habitat in the flycatcher's new critical habitat.

150. Groundwater pumping to supply the Vigneto development likely will reduce stream flows in the San Pedro River. Because the San Pedro River north of the Narrows may be hydrologically connected to the San Pedro River and the regional

aquifer in the Benson subarea immediately to the south, groundwater pumping and reduced base flows in the Benson subarea may adversely affect San Pedro River stream flows north of the Narrows. Reduced stream flows in the San Pedro north of the Narrows may alter or destroy the riparian habitat in the flycatcher's new critical habitat.

151. Altering riparian habitat along the San Pedro River may affect the flycatcher and would affect the flycatcher's new critical habitat.

152. Altered flows and sediment transport may affect the San Pedro River's ecological processes, thereby affecting the flycatcher.

D. Jaguar

153. The jaguar is the largest species of cat native to the Western Hemisphere. Its current range is restricted to Mexico and southern Arizona and New Mexico. At least one jaguar has been documented in the Whetstone Mountains since 2011.

154. Jaguars in northern Mexico and the southern United States use a variety of habitats, including thornscrub, desert scrub, lowland desert, mesquite grassland, Madrean oak woodland, and pine-oak woodland communities.

155. In 1972, FWS listed the jaguar as endangered under the Endangered Species Conservation Act of 1969 — the ESA's precursor — after hunting had virtually eradicated the species from the United States. FWS extended protections to jaguars in the United States in 1997. Final Rule to Extend Endangered Status for the Jaguar in the United States, 62 Fed. Reg. 39,147 (July 22, 1997). FWS identified the clearing of habitat, destruction of riparian areas, and fragmentation or blocking of movement corridors as threats that would prevent the species from recolonizing its historic range in the United States. *Id.* at 39,154.

156. FWS has concluded that the Whetstone Mountains provide habitat that is essential for the recovery of the jaguar. Accordingly, in 2014, FWS designated 94,269 acres of the Whetstone Mountains and foothills as critical habitat for the species. Designation of Critical Habitat for Jaguar, 79 Fed. Reg. 12,572, 12,572 (Mar. 5, 2014); *see* Figure 3.

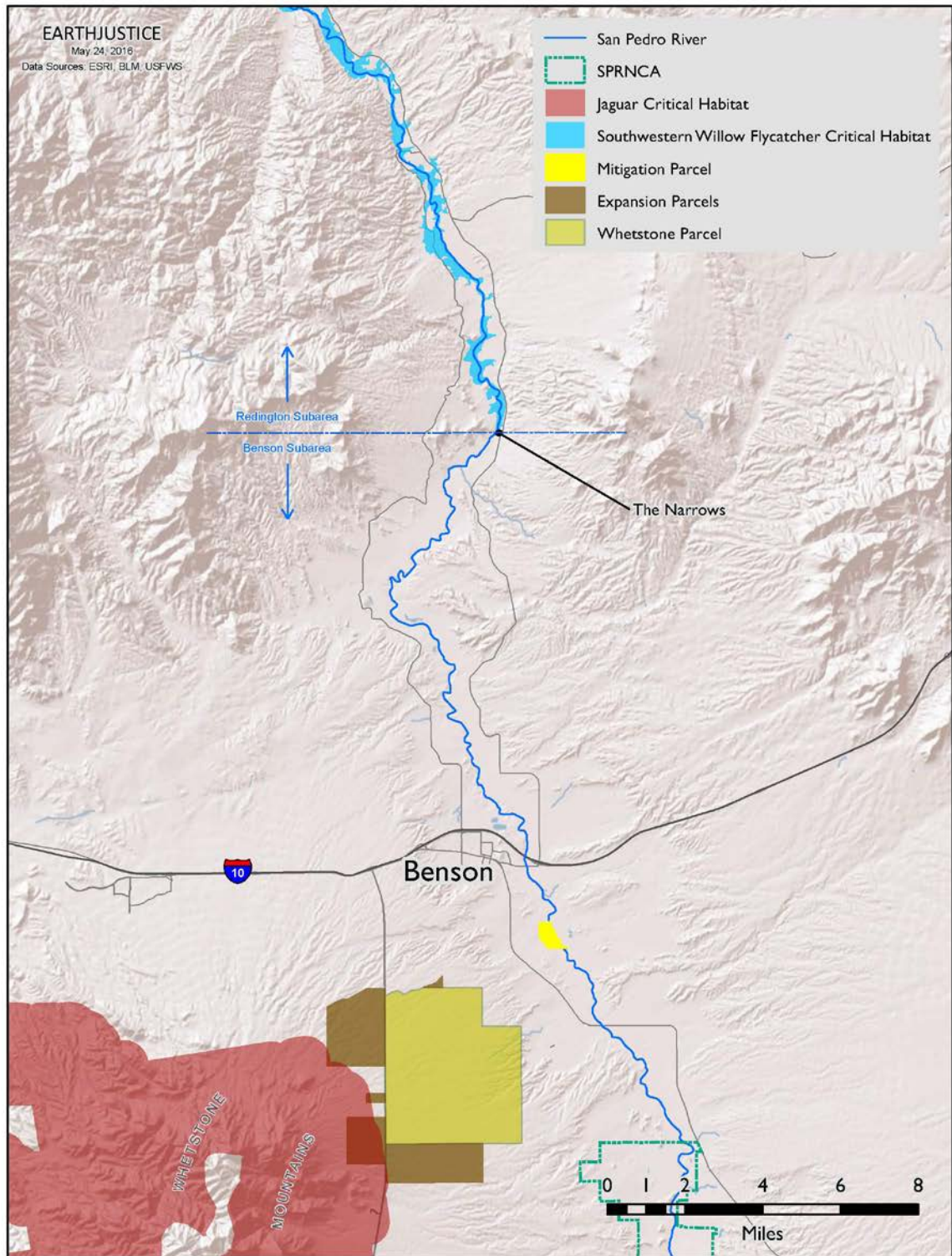


Figure 3 – Villages at Vigneto project area in relation to critical habitats for the jaguar and southwestern willow flycatcher.

157. The jaguar's critical habitat overlaps the expansion parcels by approximately 700 acres. see Figure 3.

158. Development of the expansion parcels in connection with the Vigneto development permit would destroy the parcels' habitat. Destroying habitat on the parcels would affect the jaguar's critical habitat and may affect the jaguar.

159. Development of the expansion parcels in connection with the Vigneto development would create disturbance to jaguar in the form of noise, light and odor pollution, as well as disturbance related to increased recreational uses in the area.

160. Mule deer and javelina — jaguar prey species — tend to concentrate their movements along vegetated xeroriparian washes. Jaguars may follow washes, such as those found on the Whetstone parcel, in pursuit of prey or to move between upland habitats.

161. Filling washes on the Whetstone parcel under the section 404 permit and developing upland habitats adjacent to the washes each may affect the jaguar.

VI. New Information Reveals the Section 404 Permit May Affect Listed Species and Critical Habitat in a Manner and to an Extent not Previously Considered.

162. Plaintiffs' notice letter identified significant new information which the Corps did not consider in approving the 404 permit in 2006, specifically new science on downstream impacts to the San Pedro River from filling washes and developing upland property, new science on groundwater in the middle San Pedro River, and new species occurrences in the project vicinity.

A. New science on downstream impacts on the San Pedro River

163. The U.S. Department of Agriculture and EPA released a study in November 2006 simulating effects that developing the Whetstone parcel would have on flows and sediment transport from the parcel to the San Pedro River. L. Levick et al., U.S. Dep't of Agric. & EPA, *Simulated Changes in Runoff and Sediment in Developing Areas near Benson, Arizona* (2006).

164. The study describes significant modeled increases in stormwater runoff and sediment transport into the San Pedro River that would result from filling washes and developing the Whetstone parcel.

165. The study explains that the modeled increase in runoff and sediment transport could affect downstream San Pedro River habitat through more frequent and severe flooding, stream channel adjustment, stream bank erosion, water quality degradation from sedimentation and contaminant transport, habitat destruction, and decreased biological diversity.

166. These effects to the San Pedro River and its riparian habitat may affect the listed species found in the river (western yellow-billed cuckoo, northern Mexican gartersnake, and southwestern willow flycatcher) and may affect critical habitat that has been proposed (for the western yellow-billed cuckoo and northern Mexican gartersnake) and finalized (for the southwestern willow flycatcher) along the river downstream of the proposed development.

167. On information and belief, neither the Corps nor FWS previously has considered the effects on listed species and critical habitats that this new study shows would result from the activities authorized by the section 404 permit.

B. New science on groundwater in the middle San Pedro watershed

168. The USGS released a new study of middle San Pedro watershed hydrology in 2015. Jeffrey T. Cordova et al., U.S. Geological Survey, *Hydrology of the Middle San Pedro Watershed, Southeast Arizona* (2015).

169. The USGS report describes the Benson subarea's hydrogeologic structure. A deep, "regional" aquifer underlies the watershed between the mountain ranges east and west of the San Pedro River. A shallow, "alluvial" aquifer sits just below the ground surface near the San Pedro River. A "fine-grained" unit separates the deep and shallow aquifers along the center of the watershed, restricting groundwater flow between these aquifers. A more permeable silt and clay "interbedded unit" separates the deep and shallow along the margins of the fine-grained unit.

170. The USGS researchers found that “[g]roundwater from the deep [aquifer] system flows through the interbedded unit to the shallow system before discharging in areas near the San Pedro River.”

171. Due to the hydrologic connection between the deep and shallow aquifers, Benson’s groundwater pumping from the deep aquifer also depletes the shallow aquifer, thereby reducing stream flows in the middle San Pedro River.

172. The USGS study also found that groundwater from the deep aquifer flows northward into the lower San Pedro watershed where it likely contributes to San Pedro River flows.

173. The reduction in middle and lower San Pedro River stream flows caused by groundwater pumping from the hydrologically connected deep aquifer may affect the listed species found in the river (western yellow-billed cuckoo, northern Mexican gartersnake, and southwestern willow flycatcher) and may affect critical habitat that has been proposed (for the western yellow-billed cuckoo and northern Mexican gartersnake) and finalized (for the southwestern willow flycatcher) along the river downstream of the proposed development.

174. On information and belief, neither the Corps nor FWS previously has considered the effects on listed species and critical habitats that this new study shows would result from the activities authorized by the section 404 permit.

C. New species occurrences in the project vicinity

1. Western yellow-billed cuckoo

175. The Corps’ 2006 environmental assessment did not reference western yellow-billed cuckoo observations in assuming that there was no potential for the species to occur in the project area.

176. During the summer of 2015, Tucson Audubon has documented numerous western yellow-billed cuckoos in major drainages of the Whetstone Mountains immediately to the west of the project area. These birds likely traverse the Whetstone

parcel when migrating or moving between the mountain drainages and San Pedro River riparian habitats.

177. El Dorado Benson indicated in a July 2, 2015 letter to the Corps that cuckoos recently have been observed on the mitigation parcel.

178. FWS identified in its July 2015 letter that studies published in 2008 and 2013 provide new information on the important value to cuckoos of habitat found on and near the Whetstone parcel.

179. This new information reveals that western yellow-billed cuckoos are more likely to be present in the project area and on the mitigation parcel, and thus may be affected by the section 404 permit to a greater or different extent than previously considered.

180. On information and belief, neither the Corps nor FWS previously has considered the effects on the western yellow-billed cuckoo that these new observations indicate would result from the activities authorized by the section 404 permit.

2. Jaguar

181. The most recent jaguar sighting the Corps considered in assuming there is no potential for jaguar occurrence in the project area was from 1986, in the Dragoon Mountains east of the Vigneto development.

182. A jaguar was photographed by a hunter in the Whetstone Mountains, west of the proposed Vigneto development, in 2011.

183. This sighting provides new information indicating that jaguars are more likely to be present in the project area and thus may be affected by the section 404 permit to a greater or different extent than previously considered.

184. On information and belief, neither the Corps nor FWS previously has considered the effects on the jaguar that this new observation indicates would result from the activities authorized by the section 404 permit.

3. Ocelot

185. The ocelot is a medium-sized spotted cat. Its current range extends from southern Texas and southern Arizona through Mexico and Central America to Ecuador and northern Argentina.

186. Ocelots generally inhabit areas with dense vegetation, such as pine, semideciduous, and riparian forests. Ocelots also are found in savanna, desert shrub, and marsh habitats. Contiguous areas of vegetation are necessary for ocelot dispersal between habitats.

187. FWS listed the ocelot as an endangered foreign species in 1972 under the Endangered Species Conservation Act of 1969. After the ESA was passed in 1973, FWS included the ocelot on its list of “Endangered Foreign Wildlife.” FWS extended ESA protection to United States ocelot populations on July 21, 1982. Endangered Status for U.S. Population of the Ocelot, 47 Fed. Reg. 31,670 (July 21, 1982). FWS identified habitat loss and small population size as the primary threats necessitating listing. *Id.* at 31,671.

188. Habitat conversion, fragmentation, and loss continue to threaten the ocelot. Draft Ocelot (*LEOPARDUS PARDALIS*) Recovery Plan, First Revision, 75 Fed. Reg. 52,547, 52,548 (Aug. 26, 2010).

189. Since 2009, ocelots have been observed in the Whetstone and Huachuca Mountains near the project area on multiple occasions.

190. These observations provide new information indicating that ocelots are more likely to be present in the project area and thus may be affected by the section 404 permit to a greater or different extent than previously considered.

191. On information and belief, neither the Corps nor FWS previously has considered the effects on the ocelot that these new observations indicate would result from the activities authorized by the section 404 permit.

VII. The Proposed Development Authorized by the Section 404 Permit Has Been Modified in a Manner That Causes Effects on Imperiled Species not Previously Considered.

192. The proposed Villages at Vigneto development is substantially larger than the proposed Whetstone Ranch development the Corps analyzed before issuing the section 404 permit. Vigneto will cover over 12,000 acres, a nearly 50% increase in comparison to the 8,200 acres Whetstone Ranch would have covered. Approximately 28,000 housing units are proposed for Vigneto, a 40% increase compared to the approximately 20,000 housing units proposed for Whetstone Ranch.

193. Constructing the Vigneto community involves developing the expansion parcels, covering 4,139 acres, in addition to the 8,200 Whetstone parcel.

194. El Dorado's September 2015 community master plan indicates that it cannot construct Vigneto as planned without developing the expansion parcels.

195. According to the community master plan, development of the expansion parcels depends on first developing the Whetstone parcel.

196. Developing the expansion parcels in connection with the Vigneto development will destroy existing habitat on these parcels.

197. Jaguars, ocelots, western yellow-billed cuckoos, and lesser long-nosed bats may occur on the expansion parcels.

198. The lesser long-nosed bat is a nectar-, pollen-, and fruit-eating bat that migrates seasonally from Mexico to southern Arizona and southwestern New Mexico. The bat is native to Cochise County.

199. Lesser long-nosed bats feed almost exclusively on the nectar, pollen, and fruits of columnar cacti (such as saguaros) and paniculate agaves (such as the century plant). Paniculate agaves are found in semidesert grasslands and Madrean evergreen woodlands in southeast Arizona.

200. FWS listed the lesser long-nosed bat as endangered in 1988 due to habitat loss; primarily the destruction of habitat containing the bat's primary food plants.

Determination of Endangered Status for Two Long-Nosed Bats, 53 Fed. Reg. 38,456, 38,458 (Sept. 30, 1988).

201. FWS identified effects of “the explosive growth projected for Benson . . . in Cochise County” as “significant threats” to the lesser long-nosed bat. FWS, *5-Year Review: Summary and Evaluation, Lesser Long-nosed Bat* 21 (2007). FWS explained that this development would “affect[] directly” lesser long-nosed bats by “remov[ing] important foraging habitat [and] indirectly as growing numbers of people increase the potential for roost disturbance.” *Id.*

202. Approximately 700 acres of jaguar critical habitat overlaps the expansion parcels. *See* Figure 3.

203. The expansion parcels potentially contain paniculate agaves, the lesser long-nosed bat’s primary forage resource.

204. The expansion parcels are crossed by desert washes and associated xeroriparian habitat. These washes and xeroriparian habitat may function as movement corridors for jaguars, ocelots, and western yellow-billed cuckoos.

205. The expansion parcels are located between Whetstone Mountain habitat occupied by western-yellow billed cuckoos and the San Pedro River where cuckoos typically are found. Western yellow-billed cuckoos likely cross the expansion parcels when moving between these habitats.

206. Destroying habitat on the expansion parcels may affect the jaguar, ocelot, western yellow-billed cuckoo, and lesser long-nosed bat.

207. On information and belief, neither the Corps nor FWS previously has considered the additional or different effects that development of the expansion parcels may have on listed species or critical habitats.

VIII. The Corps and FWS Have Not Consulted on the Section 404 Permit, Despite FWS’s Informal Notice to the Corps That Such Consultation Is Required.

208. On information and belief, the Corps has not requested interagency consultation for the species and project area as FWS advised in its July 2015 letter.

FIRST CAUSE OF ACTION
Failure to Reinitiate Consultation on Section 404 Permit

209. Paragraphs 1–208 are incorporated herein by reference.

210. The ESA and its implementing regulations require all federal agencies to consult with the FWS when the agency’s action may affect terrestrial species listed as threatened or endangered under the ESA or may affect critical habitat designated under the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

211. The ESA and its implementing regulations require all federal agencies to confer with FWS when the agency’s action is likely to result in the destruction or adverse modification of critical habitat proposed to be designated. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10.

212. In determining whether an action may affect a species or critical habitat, agencies must consider all direct and indirect effects of the action, together with the effects of activities that are interrelated or interdependent with the federal action. 50 C.F.R. § 402.02.

213. The Corps’ issuance and continued authorization of the section 404 permit is a federal action subject to the consultation requirement.

214. Development of the Whetstone parcel, downstream effects of filling the washes and developing the parcel, and groundwater pumping and its effects on San Pedro stream flows are direct and/or indirect effects of issuing the section 404 permit that must be considered in determining whether the section 404 permit may affect any listed species or critical habitat.

215. Development of the expansion parcels is an interrelated action with the section 404 permit because it is part of the larger Vigneto development enabled by the permit and depends on the larger development for its justification. Development of the expansion parcels is an interdependent action with the section 404 permit because such development would have no independent utility apart from being part of the larger Vigneto development enabled by the permit. Effects from developing the expansion

parcels thus must be considered in determining whether the section 404 permit may affect any listed species or critical habitat.

216. The ESA's implementing regulations require all federal agencies and FWS to reinitiate consultation if discretionary federal involvement with the action has been retained or is authorized by law and: 1) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; 2) the action subsequently is modified in a manner that causes an effect on listed species or critical habitat not previously considered; or 3) a new species is listed or critical habitat is designated that may be affected by the federal action. 50 C.F.R. § 402.16.

217. The Corps has retained discretionary involvement with section 404 permit number 2003-00826-SDM by including a term authorizing the Corps to reevaluate its decision on the permit at any time the circumstances warrant, including when new information relating to the public interest and environmental effects arises.

218. Since the Corps issued the section 404 permit in 2006, the western yellow-billed cuckoo and northern Mexican gartersnake have been listed as threatened. The section 404 permit and the development it enables may affect the western yellow-billed cuckoo and northern Mexican gartersnake.

219. Since the Corps issued the section 404 permit in 2006, FWS proposed critical habitats for the western yellow-billed cuckoo and northern Mexican gartersnake. The section 404 permit and the development it enables may affect the proposed critical habitats for the western yellow-billed cuckoo and northern Mexican gartersnake.

220. Since the Corps issued the section 404 permit in 2006, FWS revised the southwestern willow flycatcher's critical habitat and designated critical habitat for the jaguar. The section 404 permit and the development it enables may affect the southwestern willow flycatcher's and the jaguar's critical habitats.

221. Since the Corps issued the section 404 permit in 2006, new information on the downstream effects of the development, the middle San Pedro watershed groundwater

hydrology, and occurrences of jaguars, ocelots, and western yellow-billed cuckoos reveals that the section 404 permit and the development it enables may affect the jaguar, ocelot, western yellow-billed cuckoo, southwestern willow flycatcher, and northern Mexican gartersnake, and the critical habitats of the western yellow-billed cuckoo, southwestern willow flycatcher, and northern Mexican gartersnake in a manner or to an extent not previously considered.

222. Since the Corps issued the section 404 permit in 2006, the development authorized by the section 404 permit has been substantially modified and is significantly larger than the development planned when the Corps issued the section 404 permit. The larger development may have effects that the Corps did not previously consider on the jaguar, ocelot, western yellow-billed cuckoo, southwestern willow flycatcher, lesser long-nosed bat, and northern Mexican gartersnake, and the critical habitats for the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, and northern Mexican gartersnake.

223. The Corps and FWS have not reinitiated consultation on the section 404 permit since 2006 based on the new listings, critical habitat proposals, new scientific studies and species observations, or significant expansion of the permitted project that have occurred subsequent to 2006.

224. By failing to reinitiate consultation, the Corps and FWS are in violation of section 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. §§ 402.14(a), 402.16.

SECOND CAUSE OF ACTION

Failure to Insure Section 404 Permit Does Not Jeopardize the Continued Existence of Listed Species or Result in the Adverse Modification or Destruction of Critical Habitat

225. Paragraphs 1–224 are incorporated herein by reference.

226. Section 7(a) of the ESA requires each federal agency to insure that any action the agency takes is not likely to jeopardize the continued existence of any

endangered species or threatened species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a).

227. Section 7(a) also requires each federal agency to confer with the appropriate wildlife agency “on any agency action which is likely to . . . result in the destruction or adverse modification of critical habitat proposed to be designated.” 16 U.S.C. § 1536(a)(4); *see also* 50 C.F.R. § 402.10.

228. The Corps is required to insure that the activities taken under the section 404 permit — a federal action — are not likely to jeopardize the continued existence of listed species or critical habitat or proposed critical habitat.

229. By failing to reinitiate consultation on the section 404 permit’s possible effects on the jaguar, ocelot, western yellow-billed cuckoo, southwestern willow flycatcher, lesser long-nosed bat, and northern Mexican gartersnake, and jaguar and southwestern willow flycatcher critical habitat, the Corps has not insured that the permit will not jeopardize the continued existence of any of these species or result in the destruction or adverse modification of their critical habitats, in violation of ESA section 7(a).

230. By failing to reinitiate consultation on the section 404 permit’s possible effects on proposed critical habitats for the western yellow-billed cuckoo or northern Mexican gartersnake, the Corps has not insured that the permit will not result in the destruction or adverse modification of proposed critical habitats, in violation of ESA section 7(a).

THIRD CAUSE OF ACTION

Violation of Prohibition on Irreversible or Irretrievable Commitment of Resources by Continuing to Authorize Section 404 Permit Before Consultation is Complete

231. Paragraphs 1–230 are incorporated herein by reference.

232. ESA Section 7(d) prohibits federal agencies and applicants for federal permits from making any irreversible or irretrievable commitment of resources prior to the completion of consultation if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d).

233. Filling desert washes and conducting other construction activities enabled by the section 404 permit could foreclose the implementation of reasonable and prudent alternatives necessary to protect listed species and critical habitats.

234. The Corps, by continuing to authorize fill activities under the section 404 permit, is making an irreversible or irretrievable commitment of resources in violation of ESA section 7(d).

PRAYER FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that the Corps and FWS have violated the ESA by failing to reinitiate consultation on section 404 permit number 2003-00826-SDM;
2. Award Plaintiffs such preliminary and permanent injunctive relief as Plaintiffs may request requiring the Corps and FWS to reinitiate consultation on the section 404 permit;
3. Award Plaintiffs such preliminary and permanent injunctive relief as Plaintiffs may request barring the Corps and the section 404 permittee from making any irreversible or irretrievable commitment of resources under the permit;
4. Retain continuing jurisdiction over this matter until the Corps and FWS fully remedy the violations of law identified herein;
5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorney's fees, associated with this litigation pursuant to 16 U.S.C. § 1540(g)(4) and/or 28 U.S.C. § 2412(d); and
6. Grant Plaintiffs such additional relief as the Court may deem just and proper.

DATED this 25th day of May, 2016,

/s/ Heidi J. McIntosh

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