



United States Department of the Interior

Fish and Wildlife Service
Arizona Ecological Services Office

9828 N. 31st Avenue Ste C3

Phoenix, AZ 85051

Telephone: (602) 242-0210 Fax: (602) 242-2513



AESO/SE

02EAAZ00-2015-I-0600

02EAAZ00-2015-CPA-0021

October 14, 2016

Sallie Diebolt
Chief, Arizona Branch
Department of the Army
Los Angeles District, Corps of Engineers
Arizona-Nevada Area Office
3636 North Central Avenue, Suite 900
Phoenix, Arizona 85012-1939

RE: Request for Endangered Species Act Consultation on the Offsite Mitigation Parcel for the Villages at Vigneto Development Project, Cochise County, Arizona (Permit Number 2003-00826-SD)

Dear Ms. Diebolt:

Thank you for your correspondence of April 12, 2016, received on April 12, 2016, requesting informal consultation pursuant to section 7 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) (Act) on the proposed Offsite Mitigation Parcel for the Villages at Vigneto Development Project, Cochise County, Arizona (proposed mitigation action). Your April 12, 2016, letter also transmitted the December 18, 2015, *Biological Evaluation, Vigneto (aka Whetstone Ranch) Offsite Mitigation Parcel* (Mitigation Parcel BE), prepared by WestLand Resources, Inc. for El Dorado Benson, LLC. We are also in possession of the November 23, 2015, *Implementation Plans for the Whetstone Ranch Habitat Mitigation and Monitoring Plan - Corps File No. SPL-2003-00826-SDM, WestLand Project No. 460.76* (HMMP), the May 24, 2016, WestLand Resources and Hilgart-Wilson *Villages at Vigneto Final Community Master Plan and Development Plan* (Final CMP), and your July 20, 2016, Notice of Permit Suspension.

The U.S. Army Corps of Engineers (Corps) has requested concurrence from the U.S. Fish and Wildlife Service (FWS) that the proposed mitigation action may affect, but is not likely to adversely affect the threatened northern Mexican gartersnake (*Thamnophis eques megalops*), the threatened yellow-billed cuckoo (*Coccyzus americanus*), and the respective species' proposed critical habitat.

Based on the information you provided with your April 12, 2016, correspondence; our understanding of the proposed mitigation action and the Villages at Vigneto development; and information gathered during a September 8, 2016, site visit with you, your staff, and

Sallie Diebolt

representatives of WestLand Resources, Inc.; we do not concur with your determination that the proposed action may affect, but is not likely to affect these species and their respective proposed critical habitat.

Our rationale for non-concurrence appears below, and is followed by a request for additional information pursuant to the regulations governing section 7(a)(2) interagency consultation at 50 CFR §402.14.

Description of the Proposed Action

Activities proposed to be conducted on an offsite mitigation parcel were described in the December 18, 2015, Mitigation Parcel BE (incorporated herein via reference), and include: (1) removal of structures followed by soil ripping; (2) installation of 1,890 feet of fencing along an existing railroad right-of-way; (3) removal of weeds, tilling, and planting of native plant species, including container-grown mesquite (*Prosopis* spp.); (4) removal of construction debris and nonnative tamarisk (*Tamarix* spp.) and planting of native meso- and hydriparian trees around an existing artesian well and its existing wetland complex; (5) grading of and placement of gabion structures within eroding channels in the southwest portion of the parcel; and (6) planting 3,300 native mesquite and cottonwood trees throughout the mitigation parcel, including along the San Pedro River. All activities are proposed to be conducted between October 1 and April 15.

The Villages at Vigneto development project (formerly known as Whetstone Ranch) is a large residential development (28,000 dwelling units on approximately 12,167 acres, with associated commercial and recreational facilities) and is proposed to be constructed in the area partially covered by a prior Clean Water Act section 404 permit (Permit Number 2003-00826-SDM) signed on June 21, 2006. The 2006 permit authorized the discharge of dredged and/or fill material into 51 acres of waters of the United States and around unnamed washes in Sections 31, 32, and 33, Township 17 South, Range 20 East; and Sections 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, and 18, Township 18 South, Range 20 East, in Benson, Cochise County, Arizona. The discharges were permitted in order to develop the approximately 8,200-acre Whetstone Ranch (as the project was known at that time) as a master-planned community that would have included residential and commercial land uses, and associated stormwater management facilities, roadways, utilities, and recreational amenities. Most notably, the Final CMP (page 13) currently states that 20,000 dwelling units will be built on the 8,200 permitted acres. We also note that as of July 20, 2016, the Corps has suspended the June 21, 2006, Clean Water Act section 404 permit.

The proposed mitigation action is being implemented under the November 23, 2015, Villages at Vigneto (again, formerly Whetstone Ranch) Habitat Mitigation and Monitoring Plan (HMMP). The HMMP is intended to facilitate the proponent's compliance with Corps and Environmental Protection Agency (EPA) regulations governing compensatory mitigation for activities authorized by Department of the Army permits (CFR 33 C.F.R. § 332.1 through 332.83 and EPA 40 CFR § 230). Under 33 CFR § 332, which states that "Compensatory mitigation involves actions taken to offset unavoidable adverse impacts to wetlands, streams and other aquatic resources authorized by Clean Water Act section 404 permits and other Department of the Army (DA) permits, compensatory mitigation is a critical tool in helping the Federal government to

Sallie Diebolt

meet the long standing national goal of 'no net loss' of wetland acreage and function. For impacts authorized under section 404, compensatory mitigation is not considered until after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem pursuant to 40 CFR part 230 (i.e., the Clean Water Act Section 404(b)(1) Guidelines)." The compensatory mitigation being implemented via the HMMP is thus a necessary and inseparable component of the June 21, 2006, Clean Water Act section 404 permit already issued for Whetstone Ranch (and to be used for the Villages at Vigneto development). Our understanding of the HMMP is that it directs the onsite preservation of 1,624 acres of property within the 8,200-acre Villages at Vigneto development (including waters of the United States and associated xeroriparian habitat) as well as the aforementioned proposed mitigation action.

Interrelated and interdependent actions are defined in the October 1, 2008, edition of the Act's implementing regulations at 50 CFR 402.02 (page 882), wherein it states that "Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." The regulations' background narrative (see 51 FR 19926, page 19932) specifically states that the "but for" test should be used to assess whether an activity is interrelated with or interdependent to the proposed action. As stated above, the HMMP guides the implementation of the mitigation for the impacts to the waters of the US of the larger action, which is the Villages at Vigneto Development. It is therefore our opinion that the Corps' Clean Water Act section 404 permit for the Villages at Vigneto Development project should not have been issued (and cannot be released from its suspended status) *but for* the approval of the HMMP and thus, the proposed mitigation action is an interrelated action of the development.

Given the interrelatedness of the proposed development and mitigation actions, there exists a single action area, defined by the Act's implementing regulations at 50 CFR 402.02 (page 881) as "all areas to be affected by the Federal action and not merely the immediate area involved in the action" that encompasses both the development and mitigation parcels.

Furthermore, our review of the scientific literature and the proposed Villages at Vigneto Development, to which the mitigation action is interrelated, indicates that appreciable direct and indirect effects to threatened and endangered species, including proposed and final critical habitat, are reasonably certain to occur. For example, it is likely that an appreciable volume of groundwater will be withdrawn to serve the development. Such a displacement of groundwater from the aquifer is likely to reduce flow in the San Pedro River, in reaches designated as critical habitat for the southwestern willow flycatcher and proposed as critical habitat for the yellow-billed cuckoo and northern Mexican gartersnake.

Lastly, we note that the project area for the Villages at Vigneto (12,324 acres) as defined in the Final CMP is appreciably larger than the area permitted by the Corps on June 21, 2006, for Whetstone Ranch (8,200 acres); we are concerned that the action will be implemented in a piecemeal manner that does not include analyses of its full environmental impact.

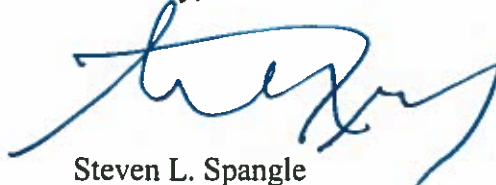
In summary, we cannot initiate consultation pursuant to the Act until we receive a Biological Assessment for the development and mitigation projects that includes analyses of all direct and

Sallie Diebolt

indirect effects, including the effects of interrelated actions.

We remain available to meet with you to discuss these issues. Please refer to file numbers 02EAAZ00-2015-I-0600 and 02EAAZ00-2015-CPA-0021 in any future contacts or correspondence. If we can be of further assistance, please contact Jason Douglas at (520) 670-6150 (x226) or Jean Calhoun (520) 670-6050 (x223).

Sincerely,



Steven L. Spangle
Field Supervisor

cc (hard copy):

Field Supervisor, Fish and Wildlife Service, Phoenix, AZ
Jean Calhoun, Assistant Field Supervisor, Fish and Wildlife Service, Tucson, AZ

cc (electronic copy):

Jason Brush, Wetlands Section Supervisor, Environmental Protection Agency, San Francisco, CA
Chief, Habitat Branch, Arizona Game and Fish Department, Phoenix, AZ (pep@azgfd.gov)
Raul Vega, Regional Supervisor, Arizona Game and Fish Department, Tucson, AZ