# United States Department of the Interior

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In Reply Refer to:
AESO/SE
02EAAZ00-2015-I-0600
02EAAZ00-2015-CPA-0021

October 26, 2017

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, Cochise County, Arizona (Permit Number 2003-00826-SD)

Dear Ms. Diebolt:

Thank you for your correspondence of May 26, 2017, 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 associated with your re-evaluation of the 2006 Clean Water Act section 404 permit for the Villages at Vigneto Development Project, Cochise County, Arizona (proposed action). Your May 26, 2017, letter transmitted the *Biological Evaluation for SPL-2003-00826* (May 2017 BE). Your May 26, 2017, letter seeks our concurrence with your determination that the proposed action may affect, but is not likely to adversely affect the western yellow-billed cuckoo (*Coccyzus americanus*) and, in conference, its proposed critical habitat; the southwestern willow flycatcher (*Empidonax traillii extimus*); and the northern Mexican gartersnake (*Thamnophis eques megalops*) and, in conference, its proposed critical habitat. We concur with your "may affect, not likely to adversely affect" determinations, as described below.

This letter supersedes our October 14, 2016, correspondence to you (File numbers: 02EAAZ00-2015-I-0600 and 02EAAZ00-2015-CPA-0021), in which we disagreed with your determinations with respect to the action area and effects of the proposed action. The contents of our October 14, 2016, letter, and other related correspondence are described in detail in the following correspondence history.

*April 12, 2016*: We received your request for informal consultation on the proposed Offsite Mitigation Parcel for the Villages at Vigneto Development Project. Your April 12, 2016, letter transmitted a now-superseded December 18, 2015, Biological Evaluation (December 2015 BE), Vigneto (aka Whetstone Ranch) Offsite Mitigation Parcel (April 2016 BE). Your May 26, 2017, correspondence and May 2017 BE supersede your April 12, 2016, letter and December 2015 BE, respectively.

*July 21, 2016*: We received a copy of your July 20, 2016, notice of permit suspension that you transmitted to El Dorado Holdings, Inc. (the permit applicant).

*October 14, 2016*: We transmitted a letter to you (File numbers: 02EAAZ00-2015-I-0600 and 02EAAZ00-2015-CPA-0021), in which we expressed "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." We also asserted that the proposed action should include analyses of the effects of residential development and its appreciable water use in addition to the effects of the Clean Water Act Section 404-related mitigation actions. Lastly, we expressed concerns regarding piecemeal implementation of a larger, 12,324-acre development area identified in development plans. Our October 14, 2016, assertions were based on our review of additional documents, including: (1) 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); (2) the May 24, 2016, WestLand Resources and Hilgart-Wilson *Villages at Vigneto Final Community Master Plan and Development Plan* (Final CMP); and (3) your July 20, 2016, Notice of Permit Suspension.

*September 25, 2017*: We received your letter transmitting a September 14, 2017, letter from El Dorado Holdings, Inc. (the permit applicant), in which the applicant stated definitively that development of the site without a Clean Water Act section 404 permit is feasible from an engineering and land use perspective and that El Dorado will develop the site in this manner if needed.

We now defer to your definition of the action area and retract our October 14, 2016, letter. Our rationale for this deferral appears in the following narrative.

Appendix H of your May 2017 BE describes the manner in which the "No Federal Action" alternative required for the proposed action's Clean Water Act Section 404 alternatives analysis and National Environmental Policy Act (NEPA) impact analysis was determined. Specifically, Appendix H documents your determination that the No Federal Action alternative for the development of the Villages at Vigneto is feasible based on the action's substantive differences from the Lone Mountain Development, which was the subject of *Save Our Sonoran v. Flowers*, 408 F.3d 1113 (Ninth Circuit 2005). That case found that no development of that property could

occur without affecting Waters of the United States. Unlike the situation in the Lone Mountain Development, in this case you have asserted that the Villages at Vigneto development can and will occur without affecting Waters of the United States if you choose to not issue a Section 404 permit to the developer of the Villages at Vigneto. Appendix I of your May 2017 BE contains a detailed description of the No Federal Action development alternative for the Villages at Vigneto, stating that it is feasible. In brief, the No Federal Action alternative would be the development of the Villages at Vigneto property without any need to fill waters of the U.S. and therefore, no need to obtain a Clean Water Act Section 404 Permit. You thus determined that the only substantive difference between the No Federal Action alternative and the action under consultation in this review are the effects associated with the areas directly and indirectly affected by fill material and the implementation of Clean Water Act mitigation activities (i.e. the HMMP). There would be no interdependent and/or interrelated actions (i.e. development of 28,000 dwelling units, with associated commercial and recreational facilities, and the resulting water use), as a similar development (resulting in similar effects) could occur absent permit issuance. The September 14, 2017, El Dorado letter expands on the analysis found in Appendix I, and states definitively that the No Federal Action alternative is feasible from an engineering and land use perspective and that El Dorado will develop the site in this fashion if necessary.

In summary, we were previously consulting on the issuance of the permit on the proposed development, which we believed would enable the development. We subsequently received assurance from both the Corps and the applicant that the "no-permit" development is feasible and will in fact occur with or without a permit. Therefore, considering this new information in light of the language in our Section 7 Handbook (U.S. Fish and Wildlife Service (FWS), and National Marine Fisheries Service 1998, page 4-28), the Act's implementing regulations (50 CFR 402.02, page 881), and prior court findings [*Save Our Sonoran v. Flowers* as well as *National Wildlife Federation v. Coleman* (529 F.2d 359 Fifth Circuit , cert denied 429 U.S. 979 (1976)], without "but-for" causation we cannot evaluate the development itself as an interrelated or interdependent action.

Our October 14, 2016, letter also expressed our concerns with piecemeal development of a larger, 12,324-acre development described in the Final CMP. Your May 26, 2017, letter, stated that "development on the other approximately 4,000 acres might occur many years from now and have not yet been planned at a level to determine whether section 404 permits are necessary". We defer to your determination that the potential future development has independent utility relative to the proposed action presently under consultation (i.e. future development will not occur solely "but for" implementation of your current proposed action). Again, we concur with your species effects determinations, and our rationales appear in the species-by-species analyses below.

**Description of the Proposed Action**

The proposed action is described in detail in your May 2017 BE, and that description is incorporated herein by reference. In brief, the proposed action is the issuance of a Clean Water Act Section 404 permit for the discharge of dredged and/or fill material into 51 acres of Waters of the United States for development of the 8,200-acre Villages at Vigneto master planned community. The proposed action also includes implementation of a Habitat Mitigation and Monitoring Plan (HMMP, WestLand 2005 and Appendix A of the May 2016 BE; incorporated herein via reference) for an offsite mitigation parcel.

As outlined in the HMMP, which is required by the Permit, compensatory mitigation consists of: (1) onsite preservation of 1,624 acres of waters of the United States and associated xeroriparian habitat (in upland buffers adjacent to waters) within the 8,200-acre master planned community; and (2) the preservation, enhancement and restoration of a 144-acre offsite mitigation parcel along the San Pedro River (see BE Figure 1). Planned activities on the offsite area (BE Figure 2b) consist of restoration and enhancement work pursuant to the approved HMMP and are depicted in the Implementation Plans provided as BE Appendix A. The aforementioned descriptions of mitigation activities are incorporated herein via reference, but briefly, they include: (1) removal of structures; (2) installation of wildlife-friendly perimeter fencing; (3) management of fallow agricultural fields to support the development of a velvet mesquite (*Prosopis velutina*) bosqué; (4) enhancement of habitat at a wetland complex associated with an artesian well; (5) stabilization of actively eroding channels on the site with further mesquite bosqué restoration; and (6) planting of 3,300 native plants throughout the offsite area, including within the San Pedro River channel. All work associated with the mitigation activities planned within the offsite area will occur between October 1 and April 15 to avoid the potential nesting and migration season for yellow-billed cuckoo and southwestern willow flycatcher.

**Yellow-billed Cuckoo and Proposed Critical Habitat**

The western Distinct Population Segment of the yellow-billed cuckoo was listed as a threatened species under the Act on October 3, 2014 (79 FR 59992; FWS 2014a). We proposed critical habitat for the species on August 15, 2014 (79 FR 48548; FWS 2014b). Proposed critical habitat encompasses 546,335 acres across the western United States. Your May 2016 BE contains additional information regarding the rangewide status of the species and its status within the action area, and this is incorporated herein via reference.

Yellow-billed cuckoos have not been detected within the 1,624 acres of onsite preservation areas or within the 51 acres of waters of the United States that will be filled, though we note that only cursory, non-protocol-level surveys were conducted in and near these areas in 2016. Notwithstanding the incomplete survey history, it is unlikely that the 51 acres of fill will appreciably reduce the amount of yellow-billed cuckoo habitat within the ephemeral waters of the United States. Yellow-billed cuckoos that may be present in the 1,624 acres of onsite preservation areas will not be affected, as the preservation is a passive action with no potential to

alter the existing xeroriparian habitat. Protocol-level (Halterman *et al.* 2015) surveys were conducted in the 144-acre offsite mitigation area and there are two probable breeding territories documented on the mitigation site, with an additional six possible breeding territories in the vicinity. The offsite mitigation area is within yellow-billed cuckoo proposed critical habitat; the onsite preservation areas are not.

We concur that the proposed action is not likely to adversely affect the yellow-billed cuckoo or adversely modify or destroy its proposed critical habitat for the following reasons:

- The restoration activities within the offsite mitigation area will be conducted between October 1 and April 15. This is outside of the yellow-billed cuckoo breeding and migration season, thus avoiding effects to individuals of the species.
- The preservation of 1,624 acres of onsite habitat is a passive action and is likely to benefit yellow-billed cuckoos via the retention of the areas' existing xeroriparian habitat in an unaffected state.
- It is unlikely that the fill of 51 acres of Waters of the United States will result in measurable effects to xeroriparian habitat for yellow-billed cuckoos relative to the similar habitat contained within the 1,624 acres of onsite preservation areas. Therefore, these effects are insignificant because it is unlikely to measurably reduce the overall occurrence of xeroriparian habitat available to yellow-billed cuckoos within onsite areas.
- The restoration activities within the offsite mitigation area include the removal of tamarisk trees (*Tamarix* spp.), which will result in temporary negative effects to yellow-billed cuckoo proposed critical habitat Primary Constituent Element (PCE) 1 (riparian vegetation). However, we anticipate the planting of 3,300 native plants throughout the offsite mitigation area (see the HMMP) will minimize these temporary negative effects. The establishment of a mesquite bosqué in the fallow agricultural fields, in particular, is anticipated to benefit the species by increasing the areal extent of yellow-billed cuckoo habitat.
- We do not anticipate measurable effects to PCE 2 (adequate prey base), given the replacement of tamarisk (already interspersed with native riparian species) with additional native riparian species, as we anticipate no appreciable difference in the availability of nesting substrate and/or prey base between the two riparian communities (Fleishman *et al.* 2003).
- We anticipate potential improvements to PCE 3 (dynamic riverine processes) via the arresting of active erosion on the offsite mitigation parcel and the planting of additional native riparian vegetation within the San Pedro River on the site.

**Southwestern Willow Flycatcher**

The southwestern willow flycatcher was listed as endangered, without critical habitat, on February 27, 1995 (60 FR 10694-10715; FWS 1995). A definitive determination of critical habitat was published on January 3, 2013 (78 FR 344; FWS 2013a). A complete description of the biology of the southwestern willow flycatcher is contained in the *Southwestern Willow Flycatcher Recovery Plan* (FWS 2002). The content of these documents is incorporated herein via reference.

The 1,624 acres of onsite preservation areas and 51 acres of waters of the United States that will be filled are xeric, and lack the mesic riparian vegetation in which southwestern willow flycatchers are known to breed. We anticipate the unaffected habitat in the 1,624 acre onsite preservation area will remain available to migrating and dispersing southwestern willow flycatchers. Portions of the 144-acre offsite mitigation area away from the San Pedro River are likely too xeric to support southwestern willow flycatcher breeding, but may be used for foraging areas for breeding birds nesting closer to the river and as stopover sites during migration; these areas will remain available for use by birds, as the replacement of nonnative tamarisk trees will be supplanted by structurally-similar native trees. The portion of the offsite mitigation area immediately adjacent to the San Pedro River does contain some suitable southwestern willow flycatcher breeding habitat in the form of tamarisk interspersed with Fremont cottonwood (*Populus fremontii*) and Goodding's willow (*Salix gooddingii*). We do not, however, anticipate that the conversion from a mixed native/nonnative riparian community to a predominately native riparian community will measurably change the amount of potential nesting substrates, prey base, or stopover sites (Fleishman *et al.* 2003). Protocol-level surveys (Sogge *et al.* 2010) have not been performed in either the onsite preservation areas or offsite mitigation area. Again, we do not anticipate the proposed actions in these areas would adversely affect riparian birds, including southwestern willow flycatchers, (Fleishman *et al.* 2003) because the restored habitat will remain capable of supporting nesting, foraging and/or migration to the same or greater extent than at present.

We concur that the proposed action is not likely to adversely affect the southwestern willow flycatcher or adversely modify or destroy its critical habitat for the following reasons:

- The 1,624 acres of onsite preservation areas and 51 acres of waters of the United States that will be filled lack southwestern willow flycatcher breeding habitat, and the onsite preservation area will continue to be available as a stopover site during migration. There will be no effects to individuals of the species in these areas.
- We do not anticipate measurable effects to southwestern willow flycatchers within the offsite mitigation area along the San Pedro River because it is nominally suitable for breeding, feeding, and sheltering of the species, and will remain so (or be enhanced) as native trees are established along the channel and planted in place of nonnative species throughout the site. We also anticipate potential improvements to riparian habitat condition via the arresting of active erosion within upland areas on the offsite mitigation

area. Conducting these activities between October 1 and April 15 will minimize the potential to disturb the migration and/or potential nesting attempts by southwestern willow flycatchers. Therefore, these effects are insignificant.

- Critical habitat does not exist in the action area; therefore, none will be affected.

**Northern Mexican Gartersnake and Proposed Critical Habitat**

The northern Mexican gartersnake's status is described in detail in the final rule listing the species as threatened (79 FR 38678) (FWS 2014c) and the proposed critical habitat rule (78 FR 41550) (FWS 2013b); these documents are incorporated herein via reference. The offsite mitigation area is within northern Mexican gartersnake proposed critical habitat; the Waters of the United States and onsite preservation areas are not.

The northern Mexican gartersnake is a cryptic, highly mobile species that occurs in intermittent and ephemeral aquatic habitats and adjacent terrestrial habitats in which sufficient prey resources are available. It is likely extant in low-density populations along the San Pedro River from the International Border to its confluence with the Gila River. The species has also been documented in semidesert grasslands up to 1 mile (1.6 km) from the nearest known aquatic sites on the Appleton-Whittell Research Ranch in the Babocomari River watershed (J. Servoss pers. comm. 2015). The species' presence in terrestrial habitat may be due, in part, to the presence of thermal cover and hibernacula and/or prey, including reptiles, toads, rodents, and invertebrates.

We concur that the proposed action is not likely to adversely affect the northern Mexican gartersnake or adversely modify or destroy its proposed critical habitat for the following reasons:

- Northern Mexican gartersnakes could occur on the offsite mitigation parcel, but the likelihood of the species' occurrence is appreciably reduced by the ephemeral hydrology of the San Pedro River and the presence of harmful and competitive species (i.e. bullfrogs and spiny-rayed fishes) in upstream perennial reaches (FWS 2013c). We further believe northern Mexican gartersnakes occur in low densities because the May 2016 BE, citing FWS 2013c and FWS 2014, states that the closest known record of the species is approximately 33 miles upstream from the offsite area and that of the thirteen records with known location information from the Upper San Pedro River, none are within approximately 25 river miles of the offsite area. The northern Mexican gartersnake is thus anticipated to occur in low densities in the area, potentially using the ephemeral channel of the San Pedro River to move between other intermittent and/or perennial reaches and/or using the artesian wetland for opportunistic foraging (i.e. during summer toad breeding activities).
- Implementation of the restoration and enhancement activities on the offsite mitigation parcel will benefit gartersnakes by conserving and enhancing existing aquatic and riparian habitat along the San Pedro River and at the artesian spring system. Restoration activities could theoretically negatively affect northern Mexican gartersnakes by disturbing them in hibernacula, including during inactive periods in the winter. We feel, however, that there

is an immeasurably low likelihood that this will occur, again due to the species' low likelihood of occurrence on the offsite mitigation area. Therefore, the effects of restoration activities are discountable in the short-term and beneficial to the species in the long-term.

- Both the Waters of the United States that will be filled and the onsite preservation areas are dry except during runoff events (ephemeral), and do not contain the habitat in which northern Mexican gartersnakes typically occur. The Waters of the United States and onsite preservation areas are also located over one mile from the artesian spring system in the offsite mitigation area, in which northern Mexican gartersnakes might occasionally occur in low densities; dispersal from the latter to the former is not likely. Moreover, in the unlikely event that northern Mexican gartersnakes potentially occurring in the artesian spring system do disperse greater than one mile into the uplands, the 1,624 acres of onsite preservation areas will remain available for foraging, despite the fill of 51 acres of ephemeral Waters of the United States. There will thus be no measurable effects to individuals of the species in these areas.
- We anticipate some improvements to proposed critical habitat PCE 1 and PCE 2 (aquatic habitat characteristics and terrestrial habitat characteristics, respectively) via the restoration of native riparian habitat along the San Pedro River and the area surrounding the artesian spring system. We anticipate modest beneficial effects to PCE 3 (prey base) from habitat restoration at the artesian spring site because improved riparian conditions could provide additional cover for toads, small reptiles, and other northern Mexican gartersnake prey.

In summary, we based our concurrence with your determinations on the effects occurring within an action area including only: (1) the fill of 51 acres of waters of the United States for development of the Villages at Vigneto; (2) onsite preservation of 1,624 acres of waters of the United States and adjacent xeroriparian habitat within the 8,200-acre master planned community; and (3) preservation, enhancement, and restoration of a 144-acre offsite mitigation parcel. We evaluated the aforementioned actions because, as stated in your May 26, 2016, letter, they will occur in areas subject to your control and responsibility. We deferred to your determination that the effects of your proposed action do not include the development of 28,000 dwelling units, with associated commercial and recreational facilities, and the resulting water use because a similar development and effects will occur absent your proposed action.

This concludes informal consultation for your proposed action and further serves as a conference report for the proposed critical habitat for the yellow-billed cuckoo and northern Mexican gartersnake. No further section 7 consultation is required for this project at this time. Should project plans change, or if information on the distribution or abundance of listed species or critical habitat becomes available, our determinations may need to be reconsidered.

In keeping with our trust responsibility to American Indian Tribes, when we enter into consultation with agencies not in the Departments of Interior or Commerce on a proposed action that may affect Indian lands, Tribal trust resources, or Tribal rights, we encourage you to invite the affected Tribes and the Bureau of Indian Affairs to participate in the consultation process and, by copy of this letter, are notifying the Tribes listed below. We also encourage you to continue to coordinate the review of this project with the Arizona Game and Fish Department.

In all future correspondence on this project, please refer to consultation number 02EAAZ00-2015-I-0600. If we can be of further assistance, please contact Jason Douglas at (520) 670-6150 (x226), or Scott Richardson at (520) 670-6150 (x242).

Sincerely,

Steven L. Spangle
Field Supervisor

cc (hard copy):
Field Supervisor, Fish and Wildlife Service, Phoenix, Arizona ( 2 copies )
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cc (electronic copy):

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Chairman, San Carlos Apache Tribe, San Carlos, AZ
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## Literature Cited

Fleishman, E., N. McDonal, R. MacNally, D.D. Murphy, J. Walters, and T. Floyd. 2003. Effects of floristics, physiognomy and non-native vegetation on riparian bird communities in a Mojave Desert watershed. Journal of Animal Ecology 72: 484-490.

Sogge, M.K., D. Ahlers, and S.J. Sferra. 2010. A natural history summary and survey protocol for the Southwestern Willow Flycatcher: U.S. Geological Survey Techniques and Methods 2A-10, 38 p.

U.S. Fish and Wildlife Service (FWS). 2014a. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo (*Coccyzus americanus*); Final Rule. Federal Register 79: 59992-60038.

U.S. Fish and Wildlife Service (FWS). 2014b. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo; Proposed Rule. Federal Register 79(158): 48548- 48652.

U.S. Fish and Wildlife Service (FWS). 2014c. Endangered and Threatened Wildlife and Plants; Threatened Status for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake; Final Rule. 79 FR 38678-38746.

U.S. Fish and Wildlife Service (FWS). 2013a. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Southwestern Willow Flycatcher; Final Rule. 78 FR 344- 534.

U.S. Fish and Wildlife Service (FWS). 2013b. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake; Proposed Rule. 78 FR 41550-41608.

U.S. Fish and Wildlife Service (FWS). 2013c. Appendix A: Current Population Status of Northern Mexican and Narrow-headed Gartersnakes in the United States.

U.S. Fish and Wildlife Service (FWS). 2002. Southwestern Willow Flycatcher Recovery Plan, Region 2, Albuquerque, NM.

U.S. Fish and Wildlife Service (FWS). 1995. Final rule determining endangered status for the southwestern willow flycatcher. 60 FR 10694-10715.

U.S. Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS). 1998. Endangered Species consultation handbook: procedures for conducting consultation and conference activities under Section 7 of the Endangered Species Act.

WestLand Resources. 2005. "Habitat Mitigation and Monitoring Plan ACOE FILE NO. 2003-00826-SDM Whetstone Ranch." *Prepared for Whetstone Partners LLP. Project No. 460.41 340 340.* Tucson, Arizona: WestLand Resources, Inc.