

AESO/SE
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April 9, 2008

Memorandum

To: Regional Director, Fish and Wildlife Service, Albuquerque, New Mexico
(ARD-ES)(Attn: Luela Roberts)

From: Field Supervisor

Subject: Updated Findings and Recommendation on Issuance of an Incidental Take Permit
for Endangered Yuma Clapper Rail, Endangered Southwestern Willow Flycatcher,
and Threatened Bald Eagle in Maricopa County, Arizona (TE-133286-0)

I. DESCRIPTION OF PROPOSAL

The City of Tempe has developed a Safe Harbor Agreement (Agreement) and has applied to the U.S. Fish and Wildlife Service (FWS) for an incidental take permit pursuant to Section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 USC §1531-1544)(Act). The requested permit, which is for a period of 50 years, would authorize incidental take of Yuma clapper rails (*Rallus longirostris yumanensis*), southwestern willow flycatchers (*Empidonax traillii extimus*), and bald eagle (*Haliaeetus leucocephalus*) resulting from implementation of the Rio Salado Environmental Restoration Project. The area covered by the Agreement and associated permit is approximately 159 acres within the Salt River. The City will hold the Agreement's associated section 10(a)(1)(A) permit.

The Agreement identifies 159 acres of covered lands for restoration of native riparian and wetland ecosystems that will benefit the Yuma clapper rail, southwestern willow flycatcher, and bald eagle within the Salt River. The City of Tempe will notify the FWS 60 days before any activity is undertaken that could result in take of either species or loss of habitat, and allow FWS access to relocate individuals.

Analysis of Effects

II. PUBLIC COMMENT

The Notice of availability, receipt of application, request for comments for the Draft Safe Harbor Agreement, and Application for an Enhancement of Survival Permit for the Tempe Reach of the Rio Salado Environmental Restoration Project was published in the Federal Register on September 20, 2006 (71 FR 55007). Publication of the notice initiated a 30-day comment period,

which closed on October 20, 2006. The Agreement was available on the FWS - Arizona Ecological Services Office website and by request at the Phoenix Office. We received a total of three responses, including Arizona Game and Fish Department (AGFD), the Flood Control District of Maricopa County (District), and Cecilia D. Esquer, a longtime Tempe resident. Ms. Esquer solely wrote to express her support for the project. The AGFD provided comments regarding the baseline for non-covered species, biotic surveys, and provision of monitoring reports. All of AGFD comments are addressed in the final Agreement. The District pointed out that some of the property covered in the draft Agreement (Salt River upstream of Tempe Town Lake and Indian Bend Wash) is actually owned by them. The District did not wish to participate in a Safe Harbor Agreement for their property at this time. Therefore, those properties were removed from the covered lands in the final Agreement.

III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

1. The taking of the above listed species will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Agreement.

Incidental take of Yuma clapper rails, southwestern willow flycatchers, and bald eagles may occur under the Agreement primarily as a result of monitoring and adaptive management that will be part of the ongoing activities to be implemented by the Applicant, as part of the U.S. Army Corps of Engineers habitat restoration project. Any take of Yuma clapper rails, southwestern willow flycatchers, and bald eagles will be incidental to these otherwise legal activities.

2. Implementation of the terms of the Agreement is reasonably expected to provide a net conservation benefit to the affected listed species and the Agreement otherwise complies with the Safe Harbor policy (May 3, 2004).

The Agreement is reasonably expected to provide a net conservation benefit to the above listed species, as required by the FWS's Final Safe Harbor Policy as revised, 69 FR 24084 (May 3, 2004). The Agreement's purpose is to restore riparian and wetland ecosystems within the historical range of these species. Because these species are known to occur both upstream and downstream of the project, we believe there is a high likelihood that they will utilize these habitats.

3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species.

The Act's legislative history establishes the intent of Congress that issuance criteria be based on a finding of "not likely to jeopardize" under section 7(a)(2) [see 50 CFR 402.02]. As a result, we have also reviewed approval of the Applicant's permit application under section 7 of the Act. In the Biological Opinion, which is attached hereto and incorporated by reference, we concluded that issuance of the permit to the Applicant will not likely jeopardize the continued existence of the Yuma clapper rail, southwestern willow flycatcher, and bald eagle.

4. Implementation of the terms of the Safe Harbor Agreement is consistent with applicable Federal, State, local, and Tribal laws and regulations.

The Agreement complies with all other applicable Federal, State, local, and Tribal laws and regulations as outlined in the Safe Harbor Agreement and Categorical Exclusion.

5. Implementation of the terms of the Safe Harbor Agreement will not be in conflict with any ongoing conservation or recovery programs for listed species covered by the permit.

Implementation of the Agreement is consistent with applicable recovery plans. The Agreement will also demonstrate incentives for private landowners to establish populations of listed species on non-Federal property, which could stimulate more interest in developing habitat for these species on non-Federal lands.

6. The Applicant has shown capability for, and commitment to, implementing all of the terms of the Agreement.

The Agreement is intended to cover operation and maintenance activities for the Tempe portion of the Rio Salado Environmental Restoration Project which is a collaborative process between the U.S. Army Corps of Engineers and the City of Tempe. The Army Corps of Engineers has already dedicated the funds to construct the project and the City of Tempe has dedicated staff and resources to implement the terms of the Agreement.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS – ANALYSIS AND FINDINGS

We have no evidence that the permit should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21 (b)-(c). The Applicant has met the criteria for the issuance of the permit and does not have any disqualifying factor that would prevent the permit from being issued under current regulations.

V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, we recommend issuance of a permit to authorize incidental take of Yuma clapper rail, southwestern willow flycatcher, and bald eagle in accordance with the Agreement.

Debra T. Bills
 Acting Field Supervisor

4/9/08
 Date

[Signature]
 Deputy Regional Director

4-22-08
 Date