

DAH 2/28/02
Acting
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Set of Findings: Habitat Conservation Plan for Florida scrub-jay and Eastern Indigo Snake to Palm Coast Blue Water International and Matanzas Shores Owners Association Flagler County, Florida, Application for an Incidental Take Permit, TE038885-0

The Jacksonville, Florida, Field Office has worked with representatives of Palm Coast Blue Water International and Matanzas Shores Owners Association (Applicants), in the development of the Habitat Conservation Plan and the necessary Service documents associated with the subject permit application. The Jacksonville staff has determined that the application meets the minimum regulatory and statutory standards and offers the attached Set of Findings which recommends that the requested incidental take permit be issued.

I. DESCRIPTION OF PROPOSAL

The Applicants, a developer and owners association, have applied to the Service for an Incidental Take Permit (ITP) to incidentally take the Florida scrub-jay and eastern indigo snake under authority of Section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended. The co-applicant, Blue Water Palm Coast International Corporation ("Blue Water") seeks an ITP for the proposed development of a 290-acre parcel located in the Matanzas Shores Development of Regional Impact ("DRI"), Flagler County, Florida.

The Matanzas Shores Owners Association ("Association") which was formed in 1989 when development initially occurred in the DRI, is a co-applicant for the permit because the 290-acre project site is subject to the Association's Declaration of Covenants as will be any subsequent purchasers of the proposed structure. The Association also is a co-applicant because of the expected impact of the proposed development on existing scrub jay conservation areas in the DRI, which the Association is obligated to maintain and manage pursuant to a 1985 Development Order, issued by the State of Florida in conjunction with the creation of the DRI.

The proposed activity involves clearing the 290-acre parcel and subsequent activities associated with constructing residential and commercial buildings and associated infrastructure. This ITP is requested for a period of 20 years. The Project site is located in Flagler County, south of Marineland, and is bounded to the east by the Atlantic Ocean, the west by the Intracoastal Waterway, the north by vacant lands, and the south by vacant lots and Washington Oaks State Gardens. The eastern boundary of this property abuts the right-of-way for Hwy 27. The site is bisected by SR A1A and consists of a mix of previously developed parcels and vacant lands. The project is located in Sections 20, 38 and 39, Township 10 South, Range 31 East, Flagler County, Florida.

The parcels contain densely vegetated, overgrown scrub habitat. Phase 1 consists of tall (≥ 3 m) oaks with interspersed herbaceous areas. The scrub habitat adjacent to the beach

consists of smaller scrub oaks interspersed with dense stands of palmetto and prickly pear cactus. These areas are utilized by 3 scrub-jays (Group 1). These jays also utilize adjacent property to the south including private residential lots and Washington Oaks State Gardens. Phase 2 consists of vacant lots interspersed within existing single family patio homes. These lots contain disturbed coastal scrub with very tall and extended canopies. No scrub-jays were observed in Phase 2 of the proposed project. Phase 3 is located just north of the existing developed area. This area is currently undeveloped coastal scrub with open disturbed spaces. Two scrub-jays (Group 2) were observed using this area along with the offsite scrub to the north.

The Project, as described in the Applicants' HCP would likely result in the take of up to two families of Florida scrub-jays (confirmed to be present on the site) consisting of approximately five individuals and any eastern indigo snakes that may be present. Both species are federally listed as threatened. The applicants have not requested any additional species be included in this permit review.

II. SECTION 10(a)(2)(A) HCP CRITERIA - ANALYSIS AND FINDINGS

1. The impact to result from such taking.

Project development will result in direct adverse impacts to two families of Florida scrub-jays and any eastern indigo snakes currently occupying the Project site. It is expected that the resident Florida scrub-jays and eastern indigo snakes will be harmed, including death or injury. Foraging, sheltering, and nesting habitat will be altered, affecting the ability of the Florida scrub-jays and eastern indigo snakes to breed, forage, and evade predators. As adult Florida scrub-jay breeders die, pair bonds will be broken (Woolfenden and Fitzpatrick 1984). Indirect adverse effects will result to any Florida scrub-jays still living near the Project site due to an increase in human habitation, potential increased predation and management activities near Florida scrub-jays. Fitzpatrick *et al.* (1991) noted that individual encounters between humans and Florida scrub-jays are likely to result in increased mortality rates of both juveniles and adults.

The 1992-93 state-wide survey indicates that scrub-jays were resident within the Flagler-Northeast Volusia County metapopulation. There were 12 jay territories, excluding suburban jays, documented by the 1992-1993 Statewide Mapping Project (SMP) within this metapopulation. Only one of these territories occurred within a protected area of North Peninsula State Recreation Area. All other groups inhabited scrub habitat on private lands. Current surveys done in conjunction with this project indicate that scrub-jays are using a small portion of Washington Oaks State Gardens as well as several private parcels in the immediate area. Most of the scrub habitat in this area has been impacted by ocean-front residential development or has not been managed for scrub-jays. There are only small patches of scrub remaining and some jays are living in scattered groups in suburban

areas and coastal scrub. The Service believes that the numbers provided by the 1992-1993 state-wide survey may overstate the current population of Florida scrub-jays within the Action Area (as defined in the Service's Biological Opinion) due to the scrub-jay epidemic suffered during the spring/summer 1998 (D. Breininger, pers. comm. 1998, and R. Bowman, pers. comm. 1998), unchecked residential and commercial development in the county, and continued absence of fire management.

The scrub-jays utilizing the subject property comprise the northern most families of scrub-jays currently documented on the Atlantic Coast of Florida. The loss of this piece of scrub and the accompanying scrub-jay families will potentially reduce the range of the species and the fitness of the metapopulation of which they are a part. However, this impact is difficult to quantify. The project site is located in an area which has been reviewed as a DRI and was granted a Development Order by the state of Florida, which included a management plan for the scrub-jays onsite. At the time of the issuance of the Development Order, there were up to 12 scrub-jays within two families in the DRI. However, the number of scrub-jays has continued to decline due to a lack of management in the coastal scrub required pursuant to the Development Order. With the lack of compliance with and enforcement of the Development Order's coastal scrub management plan, construction in the DRI and in subsequent years, the occupied habitat has become less suitable. As the occupied habitat on the Project site continues to succeed to a less suitable condition for Florida scrub-jays, the birds currently occupying the project site will be forced out with no other suitable unoccupied habitat located within normal dispersal distances. Since there is currently no active management and all potentially suitable scrub-jay habitat within the site is overgrown, unmanaged and low quality, it is very likely that these birds will become extirpated with or without construction activity occurring. However, the proposed mitigation for the project, the management of 27.1 acres of habitat for scrub-jays, is expected to provide some benefits to the onsite scrub-jays while plans are being developed to manage state-owned lands nearby.

The Eastern indigo snake has not been observed on the Project site since the original survey completed prior to the issuance of the Development Order; however potentially suitable habitat is present. Since this species tends to be difficult to detect and surveys are often inconclusive, the Applicants have requested to be covered for incidental take, should it be present. Moler (1992) stated that even very low density development can significantly impact indigo snake populations, since the eastern indigo snake is wide-ranging and requires relatively large tracts of suitable habitat to persist. In situations where development occurs around this species, they are especially vulnerable to vehicles, domestic dogs, and insensitive land owners. Little is known about how eastern indigo snakes interact as populations. Therefore, the Service can only estimate impacts based on the indigo snake's presumed presence and on territory sizes observed in other populations. Assuming that the project site provides similar habitat value as in other parts of the species range, the site could have up to 290 acres of potentially occupied eastern indigo habitat within the proposed development area. The Applicants will implement the Standard

Protective Measures developed by the Jacksonville and Vero Beach Ecological Services Field Offices to reduce potential impacts to eastern indigo snakes during all construction related activities. As a result, the Service expects the impact of this action to the indigo snake sub-population to be minimal.

2. The steps taken to minimize and mitigate such impacts, and the funding that will be available to implement such steps.

The Service worked with the Applicants in the design of the minimization and mitigation measures. To minimize impacts to listed species resulting from the proposed construction activity, the Applicants will ensure clearing of vegetation within 150 feet of active nests will not take place during the nesting season for Florida scrub-jays (March 1 through July 1). As stated above, the Applicants also will implement the Standard Protective Measures developed by the Jacksonville and Vero Beach Ecological Services Field Offices to reduce potential impacts to eastern indigo snakes. The Service encouraged the Applicants to mitigate within and adjacent to the currently occupied territories. The mitigation would consist of the applicants enhancing and/or restoring 27.1 acres of coastal scrub habitat to suitable scrub-jay habitat. The Applicants will also implement a control program to regulate and reduce the number of domestic predators, such as cats, located on the property. The Service has determined that Florida scrub-jay families and eastern indigo snakes existing on remnant habitats, such as those on the Project site, will continue to decline due to environmental and demographic factors; most notably, increased predation rates, habitat fragmentation, reduced nesting success (largely due to intra-specific competition and predation pressures), and lack of habitat management required to maintain scrub in the appropriate successional stage to support Florida scrub-jays. The Service believes that the implementation of the Standard Protection Measures for the eastern indigo snake and mitigation based on the accepted mitigation ratios used for the Florida scrub-jay adequately addresses mitigation concerns for both the Florida scrub-jay and the indigo snake since both species are expected to be found on the managed land and both species benefit from a mitigation strategy that focuses on the management of contiguous pieces of habitat. This will be accomplished through the use of a conservation easement, established by amendments to the Development Order, specifying that the land be left undeveloped and managed into perpetuity.

To mitigate the loss of the 9.11 acres of occupied Florida scrub-jay habitat, and the 290 acres of potential eastern indigo habitat, the Applicants will enhance and/or restore 27.1 acres of coastal scrub habitat to suitable scrub-jay habitat. A 3:1 (replaced:lost) ratio was utilized for unoccupied habitat restoration and a 2:1 (replaced:lost) ratio was utilized for occupied habitat restoration to maintain consistency with other similar projects already reviewed and approved by the Service. Fitzpatrick *et al.* (unpubl. data) state that such a ratio will preserve 2/3 of

existing scrub-jay numbers state-wide, enough to ensure continued survival of the species. In addition, Stith *et al.* (1996) recommended that five landscape rules be applied to each metapopulation to preserve the scrub-jay as a species. One of the rules recommends that “further reductions of jay numbers within a viable metapopulation be limited to no more than 33 percent of their 1993 numbers and that all habitat losses be accompanied by measures which would protect twice the acreage of extant scrub.” Another rule recommends that habitat gaps be kept below the 12km threshold to facilitate continued interaction of scrub-jays within a metapopulation.

The Service believes that the implementation of the Standard Protection Measures for the eastern indigo snake and mitigation based on the mitigation ratios used for the Florida scrub-jay adequately address mitigation concerns for both the Florida scrub-jay and the indigo snake because both species will be found on the managed land and both species benefit from a mitigation strategy that focuses on the procurement and management of contiguous pieces of habitat.

The mitigation for this project is consistent with the guidelines developed by the Jacksonville and Vero Beach Ecological Services Offices for mitigation and conservation of the Florida scrub-jay. Land management will also be carried out in accordance with these guidelines. As a result, the Service believes that this mitigation will act to slow scrub-jay declines within this metapopulation.

The Service also reviewed the availability of a guaranteed source of funding to provide for the proposed mitigation. Palm Coast Blue Water International has agreed to place \$62,709 in an escrow account, prior to the issuance of a permit, to be used solely for the management of the mitigation site for the life of the permit (20 years). Details regarding the escrow account are specified in the terms and conditions of the ITP as well as in an escrow agreement. Future funding of the mitigation at the expiration of the 20-year permit and into perpetuity is reliant upon the Matanzas Shores Owners Association and will be included as a yearly line item in their budget as part of its obligation to maintain conservation areas pursuant to the Association’s Declaration. This is further detailed in the terms and conditions of the ITP.

3. Alternative actions to the take that were considered by the Applicants and reasons why such alternatives are not being utilized

In assessing possible alternatives, the Service also considered its statutory requirement pursuant to section 10(a)(1)(B) of the Act, whereby certain limitations are placed on the Service with respect to actions which may be undertaken. More specifically, section 10(a)(2)(B) of the Act requires that the Service issue a Permit

when an Applicant's HCP satisfies the criteria established in section 10(a)(2)(B)(i-v)[issuance criteria]. The Service considered seven action alternatives which are provided in the Environmental Assessment. Four of the action alternatives were considered, but dismissed from detailed analysis due to economic and logistic reasons that were unacceptable to the Applicants. Three action alternatives were analyzed in detail, the No Action Alternative, the Initial Proposed Action issuance of an ITP and mitigation through a combination of onsite and offsite land management, and the Final Proposed Action issuance of an ITP and mitigation through onsite land management after onsite impacts have been reduced. The proposed Action alternative reflects a compromise between the needs of the applicants and the plight of this particular Florida scrub-jay population and its commensurate value to recovery and survival. By directing mitigation to these sites, we believe that there will be positive impacts contributing towards survival of the species (see additional discussion in the attached Biological Opinion).

4. Other measures the Secretary may require as being necessary or appropriate for the purposes of the HCP.

The Service has identified other measures it has found necessary to ensure funding of the mitigation plan found in the HCP and to implement its intent and purpose. These measures are incorporated in the terms and conditions of the ITP and the Escrow Agreement.

III. ENVIRONMENTAL ASSESSMENT AND PUBLIC COMMENT - ANALYSIS AND FINDINGS

Prior to public notice, the Service began receiving comments from residents of the existing units in the Matanzas Shores development. Within the Matanzas Shores Owners Association, there are eight subordinate associations for the respective sections of Matanzas Shores. We received 30 sets of comments in July and August 2001 from homeowners stating their "non-concurrence" with being named as co-applicants (as members of the Matanzas Shores Owners Association). These owners did not consider themselves to be a party to the application and stated their intention to legally contest any attempt to burden them with financial obligations resulting from the ITP.

Given the nature and the volume of these comments, the Service, with the assistance of the Regional Solicitor's Office, began to evaluate the funding mechanism initially proposed: to fund the HCP solely through homeowners assessments. This evaluation, for the most part, ran concurrently with the public notice period. Our first question was whether authority existed to obligate the Association to fund the mitigation. After consulting the Solicitor's Office, we concluded that authority did not exist to obligate the Owners Association to

fund the mitigation as proposed. This was based on an examination of the Development Order and “Declarations of Covenants, Conditions, and Restriction for Matanzas Shores” filed in the Public Records of Flagler County, Florida at Book 403, Page 928, *et seq* (Declaration). Fundamentally, we could not conclude that the language in the Declaration obligating the Association to fund maintenance of conservation areas pursuant to the Development Order was broad enough to encompass the HCP and ITP. At about this time, the Public Notice period concluded, see the timeline below, and we carried these issues into the consideration of public comments received.

The Service prepared an EA for this ITP request. A Notice of Availability was published in the Federal Register notifying the public of the availability of the EA and HCP for a 60-day period from August 23 through October 22, 2001. The Service received seven requests for the EA and HCP. Eleven comment letters were received during the public notice period.

Eight commentors expressed general objections to permit issuance based on adverse effects to the Florida scrub-jay. One of these commentors went on to object based on adverse effects to all wildlife species in general, and recommended that we issue the permit for only one year. One of these commentors expressed confusion over the off-site mitigation measures and the apparent failure to set up enforceable mechanisms for their success. This commentor questioned who would enforce and monitor the off-site mitigation.

Service Response:

The scrub management plan detailed in the HCP and the ITP contains measures that we believe will adequately compensate for the incidental take resulting from the proposed development. Moreover, the Service believes that the scrub management plan will benefit the long term survival of local scrub-jay populations by establishing an enforceable management structure on a potential corridor of habitat between publicly owned tracts that are occupied by scrub-jays, but have management potential for significant improvement. This Statement of Findings, the Environmental Assessment, and the Biological Opinion contain the Service’s reasoning and conclusions in this regard.

The legal mandates of the Service do not extend to all wildlife in the area, but we believe that existing scrub species resident to the site will benefit from the scrub management plan. We do not believe that issuing the permit for a one-year term would meet the needs of the Applicants, nor our need for assuring long term conservation of the scrub-jay and eastern indigo snake. We write ITPs for multiple-year terms to ensure certainty in planning by Permittees and certainty in species conservation.

The HCP presented to the public does include references to off-site mitigation. These references are obsolete, however, as the Applicants re-arranged development plans to

incorporate 1.1 acres of on-site scrub conservation in addition to the existing scrub conservation area, and to avoid portions of occupied scrub-jay habitat. This alternative, Alternative 3 in the HCP, describes these actions and was transmitted to the Service as part of the final version of the HCP on July 26, 2001.

Three commentors stated that the mitigation proposed was not adequate, that not enough land was set aside for two families of scrub-jays, or mitigation plans vague . One of these also believed that other sections in this development, including those in the southern parcel, should also pay toward the mitigation.

Service Response:

For reasons noted in the above response, the Service believes the mitigation to be adequate. Any vagueness in the mitigation plan has been clarified by the Applicants and addressed in the terms and conditions of the ITP.

The permit application presented to the Service considers only the north parcel (Matanzas Shores) of the overall Development of Regional Impact. As the impacts to listed species and the compensatory habitat management are all contained within this parcel, the Service has no need to go beyond the project area to include other units of this development.

A fourth commentor objected to the mitigation plan also, and raised specific objections:

1. Long term effects of mechanical vegetation treatment are unknown, while the effects of fire are proven beneficial for the whole ecosystem.
2. Rather than setting a schedule of management in each cell (one treatment every 9 years), we should specify vegetation control as needed by location and time.
3. The implementation and monitoring of scrub management should be conducted by a qualified biologist.
4. Management Cell 1 should be subdivided to avoid effects to too much occupied scrub-jay territory at any one time.
5. This commentor recommended off-site mitigation at the adjacent Washington Oaks Gardens to the south, and other state property to the north.

Service Response:

We agree that mechanical vegetation control is relatively untested over long term management. The Applicants are constrained, however, by public safety concerns over the proximity of existing and proposed development, and by state laws limiting the extent and form of vegetation control in coastal dunes. We believe that mechanical control is the most practicable form of vegetation management available to the Applicants.

The Service believes that vegetation control only on an as-needed basis is impracticable to enforce. We believe that setting an enforceable schedule of vegetation management is preferable to help ensure long term compliance with the ITP.

The Service has conditioned the ITP to specify that monitoring will be conducted by a qualified biologist.

The Service has specified the management plan to begin in Cell 3 of the scrub management area in order to avoid immediate impacts to the scrub-jays occupying Cell 1. We do not believe it would be necessary to subdivide the cells to achieve this minimization of adverse effects.

As noted in previous responses, in the Biological Opinion, and other documents in this administrative record, the Service believes the on-site conservation measures will adequately offset project impacts.

Two commentors expressed doubt of whether the Applicants would comply with the scrub management plan. One commentor complained that the Service did not disclose the Applicants' citation for land clearing without a permit in July 2000. Two commentors recommended the implementation or enforcement of the existing Development Order, and one claims that the Service ignored the ongoing violation of Development Order.

Service Response:

The Service believes that the terms and conditions of the ITP and the mechanisms required to ensure funding, including an escrow account, provide enforceable standards to help ensure compliance with the scrub management plan. The Applicants' land clearing activities in 2000 are what instigated the permit application process. We believe that we have adequately noted this fact in the Biological Opinion. The Service does not have the authority to enforce state and local land use planning laws. The Regional Planning Council was the body that issued the Development Order, and therefore, the enforcement agency. However, we note that by enforcing compliance with ITP conditions, the Service will be ensuring that scrub management very similar to that outlined in the Development Order occurs.

Two commentors re-submitted copies of their pre-notice objection letters. Six complaints contesting the funding mechanism for the scrub restoration and management were received. These complaints were made against the Applicants for holding residents “hostage” and saddling them with mitigation debt. These owners felt “shut out” of the permit planning process and that they should not be applicants. One commentor stated that the Service failed to verify corporate officers. One of these commentors went on to detail discrepancies between the development plan presented in the HCP compared to existing site plans of which he was aware.

Service Response:

Funding Mechanism

As noted in the discussion of pre-notice comments, above, the Service determined that the Applicants’ first proposed funding mechanism where the Owners Association would fund the entire mitigation through a line item in their budget was not acceptable because of the provisions of the Association’s Declaration. Based upon advice from our Solicitors’ Office, we believed that the proposed funding mechanism failed to satisfy the issuance criterion regarding the assurance of funding. Therefore, we worked with the Applicants to explore other funding mechanisms. We explored funding options with the Applicants in consultation with the Regional Solicitor. The timeline of these events is provided below. We considered two approaches. One was to have the Association amend its Declaration to provide a funding obligation. The second was to require that the developer co-applicant establish an advance escrow account or management endowment in order to assure the availability of funding throughout the ITP and to avoid the Association being responsible for such funding during the terms of the ITP. The second option was the funding mechanism preferred by the Service.

The Applicants, however, chose to pursue the first option, to amend the Declaration. In an effort to explore this option with the Applicants, the Regional Solicitor’s Office offered suggested amendment language. Up to this point, however, the Service was aware only of verbal complaints made by certain residents against the Palm Coast Blue Water International Corporation and other entities regarding the composition of the Board of Directors and voting members, as well as regarding purported improprieties in the manner in which Association funds were being used. In January, 2002, we were given a copy of a lawsuit filed against Matanzas Shores Owners Association, Inc. and Bay Communities Real Estate, Inc. by the Surf Club Condominium Association, Inc., which is part of Matanzas Shores Owners Association. Based on the allegations of the complaint filed in this lawsuit, the Service determined that we could not in good faith rely on amendments to the Declaration to provide funding. In light of the issues raised in the lawsuit, the Service believed the assurance of funding was severely impacted.

In a series of communications throughout February 2002, the Service and the Applicants pursued the negotiation an escrow account option which the Service believes will ensure

funding of the ITP and the HCP mitigation plan for the term of the permit. This is reflected in the terms and conditions of the ITP as well as in the Escrow Agreement. This option was accepted by the Applicants. After expiration of the permit, however, the Applicants propose to ensure funding of the mitigation into perpetuity by the Owners Association. The Service explored this funding mechanism by considering the provisions of the Development Order regarding scrub jay habitat management and the Declaration, which obligates the Owners Association to fund all maintenance and management of the scrub conservation areas into perpetuity in accordance with the Development Order and other plans issuing from the Development Order. Because the Association is already obligated to provide such funding, we compared the Development Order's management plan and the management plans of the HCP and ITP. While there are differences in the prescribed management schemes, we believe they are minimal. Moreover, we determined that, regardless of the HCP and ITP, the Association is already obligated to maintain the scrub conservation areas into perpetuity - an obligation that began at the issuance of the Development Order and that is memorialized in the Association's Declaration. The Association is subject to this continuing obligation notwithstanding that such maintenance has not been performed over the past years. After considering these matters, we determined that the Applicants could seek an amendment to the Development Order whereby the HCP and ITP would be adopted by the Florida Regional Planning Council as a management plan under the Development Order and incorporated as part of the Order. We have determined, based on informal communications with the staff of the Regional Planning Council, that the discrepancies of which we are aware (commercial construction in Phase III rather than construction of a golf course) would be easily accommodated by amendments to the Development Order.

As stated earlier, Applicant Blue Water will provide the sole funding of the permit activities for the entire 20-year duration of the permit. Consequently, the Association is not required to take any actions toward maintaining the area for the next 20 years. We believe that this is more than a minor benefit to the Association inasmuch as the Association's ongoing obligation to maintain the conservation areas pursuant to the Development Order is deferred for 20 years. Moreover, the Regional Planning Council, which has the authority to enforce the Development Order and require that the Association comply with the Order, could do so at any time notwithstanding that it has not taken such action heretofore. Certainly, had the Regional Planning Council taken such action there would be no dispute that the Association would be liable to fund such activities which would cost substantially more than mere maintenance, particularly since the site has not been maintained for some years. Because of the HCP and ITP and the proposed endowment fund, the Association is not required to take any actions for the next twenty years. Moreover, by involving the Regional Planning Council in this process, the specter of imminent enforcement actions against the Association by the Regional Planning Council for failure to maintain the area (a condition that existed prior to the ITP application) is removed. We have also received assurances through the endowment fund and ITP that no Association funds or accounts will be used to fund the management during the entire

twenty year period. The ITP provides the procedure that will be followed for the adoption of the HCP and ITP by the Regional Planning Commission.

Communication with Homeowners

We communicated with both co-applicants throughout the permitting process. Mr. William Harkins represented himself to the Service as the President of both of these entities. Based upon the advice of our Solicitors' Office, and with no concrete evidence to demonstrate otherwise, we accepted Mr. Harkins' representation of himself as President of these entities which was reflected in documents submitted to the Service. Inasmuch as we accepted Mr. Harkins' representations, we believed, in good faith, that our communications with the Board of the Association were in fact communications with the members of the Association. Likewise, the Service did not verify corporate officers as none were presented to us in the application other than the President, and because we have not done so in past negotiations regarding HCPs. Nonetheless, we considered all communications with members of the Association.

Due in part to investigations that we initiated after receiving comments from individual homeowners, and due in part to our Solicitor's involvement, we carefully evaluated the proposed funding mechanism. Our negotiation with the Applicants resulted in a new funding mechanism that is responsive to the homeowners' concerns because it only obligates them to provide funding 1) after 20 years, and 2) at a level similar to that required by the original Development Order which the Association is obligated to provide and fund. Notwithstanding that, it is not within the Service's authority or legal mandate to try and settle any legal disputes between the Applicants and other interested parties. We believe that our efforts nonetheless resulted in what we believe to be an amenable situation.

One commentor stated that the EA and HCP do not fully disclose all documents appended and referenced within.

Service Response:

These documents were forwarded to the commentor.

One commentor referred to the Palm Coast Blue Water International Corporation President's association with certain criminal activities. Two Matanzas Shores residents and commentors provided the Service with copies of and references to news clippings and web pages that detail this association with certain savings and loan

fraud charges, alleged mistreatment of residents in other developments, and various other charges, convictions, or alleged links to other crimes. Another commentor stated that the legal problems of the President and his associates call for more stringent funding mechanisms.

Service Response:

These charges do not directly affect the Service's permit issuance criteria, as they do not constitute a disqualifying factor as defined at 50 CFR 13.21(c)(1). The disqualifying factor at 50 CFR 13.21(c)(3) might have applied, however, in the case of the \$5.5 million judgement sought by the United States Attorney in Boston against an associate of the Association President, William Harkins, and William Harkins. To the best of our knowledge, however, this judgment is still subject to appeal and other legal action, and we were unable to determine how, if at all, a decision on the appeal would directly impact the Association. Moreover, the disqualifying factor at 50 CFR 13.21(c)(3) would only come into effect if the Applicants failed to pay any fines or judgements due to the United States. We are not aware of any such failures on the part of the Applicant Blue Water.

We believe that we have established a much more stringent funding mechanism than that originally proposed and that the terms and conditions of the ITP and the escrow agreement will ensure funding of the scrub mitigation.

The Service received one petition signed by 85 residents voicing support of permit issuance. Interestingly, several of the signatories to this petition appear to be the same persons as those who objected in pre-notice comment letters.

The Service received a letter from the Flagler County Board of County Commissioners that expressed support for the project and for ITP issuance. The County is concerned about scrub-jay conservation, but expressed satisfaction with the proposed mitigation plan.

Timeline of Events

February 15, 2001	Application was certified by Jacksonville Field Office (FO) to be statutorily complete and was forwarded to the Regional Office, Southeast Region, Atlanta, Georgia (RO).
March 5, 2001	Request for formal solicitor review was made by RO.
March 15, 2001	The FO responded to a request by letter for stockpiling soil onsite. This letter indicated that the

land clearing which occurred in January and July 2000 had resulted in enhanced habitat for the scrub-jays. Therefore, we replied that the potential placement of stockpiled soil would result in the loss of 1.25 acres of occupied scrub-jay habitat which was not yet permitted. The Service suggested that alternative locations could be used for the stockpile outside of the occupied habitat.

March 23, 2001

A request for revisions to the public notice for the proposed project was sent from the RO to the FO.

May 22, 2001

A meeting between William Harkins, Greg Robinson, Keith Faver and Scott Sailor was held at the RO with Noreen Walsh, Dave Flemming, and David Dell. We discussed your desire to facilitate our review in a timely manner and we noted that we did not yet have our Solicitor's office comments in hand.

May 25, 2001

The Solicitor's office provided comments on the HCP by memorandum to RO.

May 31, 2001

The FO forwarded Solicitor's comments on the HCP to the initial permit applicant. Our letter asked for revision and clarification of several points which were required prior to publishing in the *Federal Register*.

June 25, 2001

The FO notified the Florida Fish and Wildlife Conservation Commission of the proposed project and solicited comments.

June 26, 2001

A meeting was held between FO and the applicant and consultant to discuss the items which are needed for the HCP to be finalized so that the notice of receipt of permit application could be published in the *Federal Register*.

June 27, 2001

An edited HCP document was forwarded to the applicant's consultant by the FO.

June 27, 2001	By letter, the applicant submitted to the FO a response to our Solicitor's comments.
July 3, 2001	The applicant's consultant forwarded to the Service a revised HCP by e-mail for review.
July 5, 2001	The Service (FO) returned the revised HCP with edits to the consultant.
July 6, 2001	Revisions to the HCP and responses to Solicitor comments were forwarded to the Service FO by the applicant.
July 25, 2001	Additional revisions to the HCP were submitted to the Service in response to FO requests for edits. The permit applicant was listed differently on this application than the previous application. The new permit applicants were listed as Palm Coast Blue Water International, Corp., and Matanzas Shores Owners Association, both listing Mr. William Harkins as President.
August 14, 2001	William Harkins notified the Service by letter that the Matanzas Shores Owners Association would provide all funding of the HCP and any incidental take permit issued in this matter. The letter also included copies of the Association's Declaration and other related documents.
August 23 through October 22, 2001	The availability of the HCP, application, and Environmental Assessment were advertised in the <i>Federal Register</i> , which opened the public comment period. Among the comments were letters from owners in the Matanzas Shores DRI questioning the Association's obligations to fund the HCP and the ITP
September 25, 2001	The RO by letter to William Harkins, President, Palm Coast Blue Water International and Matanzas Shores Association, questioned whether the Declaration authorized and obligated the Owners

Association to provide funding for the HCP and requested additional information to the contrary on this issue, and information regarding related matters.

October 15, 2001

Vicki Mott (Solicitor's office) received a letter from Chiumento and Associates, Palm Coast's legal counsel, providing information in response to RO's September 25 letter.

October 15-December 20, 2001

Vicki Mott periodically communicated with Applicants' attorneys.

December 20, 2001

Teleconference among Applicants and representatives, the RO and FO staff and Vicki Mott. We discussed with the Applicants the need to ensure funding for implementation of HCP in order for the Service to meet its statutory issuance criterion. We discussed that the Owners Association's Declaration not providing that the Association could assess the residents for costs associated with implementing the HCP. We discussed potential options that the applicants might pursue in order to assure the funding for the mitigation actions contained in the HCP: establishing an endowment fund or escrow account, as well as amending the Declaration to obligate the Association to provide funding of the mitigation actions.

December 21, 2001

Telephone conversation between Noreen Walsh and William Harkins to further discuss and clarify options addressed during the December 20th teleconference. Mr. Harkins stated that two-thirds of the habitat restoration actions outlined in the HCP were already complete and agreed to fund the remaining work up front. Mr. Harkins agreed to forward documentation showing how much work was completed and cost estimates for remaining work. This information was received from Mr. Harkins that day but it did not clearly indicate that two-thirds of the habitat restoration actions were complete.

January 15, 2002	FO biologist inspected project site to review status of habitat management as asserted by Applicants and to help evaluate management cost estimates provided by Applicants.
January 16, 2002	The Service transmits a letter to Mr. Harkins regarding the information received from Applicants on December 21, 2001. The Service explained why the Applicants' proposed management cost was not adequate and how the existing management work completed on the ground did not constitute two-thirds of the restoration work outlined in the applicants' HCP. The Service reiterated its offer to work with the Applicants to reach an agreement on the amount of funding necessary to be placed in an escrow account, and to provide suggested wording for amendments to the Declaration.
January 23, 2002	Letter was transmitted from the Service to Applicants suggesting potential Declaration amendments.
January 24, 2002	The Service received from Applicants copies of missing or unclear pages from the Declaration.
January 28, 2002	The FO receives a copy of the January 11, 2002, lawsuit filed against Matanzas Shores Owners Association, Inc. and Bay Communities Real Estate, Inc. by the Surf Club Condominium Association, Inc. The lawsuit, which seeks declaratory and injunctive relief, raises a number of issues regarding the composition of the current Board of Directors, the legality of the Board, and the financial solvency of the Matanzas Shores Owners Association, which could impact whether the Association would be obligated to fund the HCP regardless of any amendments of the Declaration obligating it to do so.
February 7, 2002	The Service transmits a letter by facsimile to the Applicants stating that we have become aware of the lawsuit filed against the Matanzas Shores Owners Association. We stated that this lawsuit calls into

question the Applicants' authority to use the Homeowners Association budget as a mechanism to assure the funding to perform the mitigation actions outlined in their HCP. We stated that the lawsuit and other concerns resulted in our questioning whether such a funding mechanism would satisfy our issuance criteria.

IV. SECTION 10(A)(2)(B) PERMIT ISSUANCE CRITERIA - ANALYSIS AND FINDINGS

1. The taking will be incidental.

The Service finds that the take will be incidental to otherwise lawful activities. The Service has no indication that the construction of the development will not be otherwise lawful.

2. The Applicants will, to the maximum extent practicable, minimize and mitigate the impacts of the take.

The Applicants have proposed mitigation as discussed in Section II(2) above. The "maximum extent practicable" concept consists of considering the economic objectives of the owner (reflected by the scope of the Project and its design), a measurement of the subsequent impact imposed on the endangered species, and the practicable extent of mitigation and minimization efforts. Minimization and mitigation can take many forms and combinations to address direct, indirect, and cumulative adverse effects on the species.

Florida scrub-jay families on remnant habitats, such as those on the Project site, will continue to decline due to environmental and demographic factors. The decline will occur with or without the action of issuance of the ITP for either this project or subsequent projects. The reasons for decline can be summarized as follows:

1. Predation rates will continue at relatively higher rates (as compared to rates in natural settings), due to poor habitat quality and larger home ranges (which increase potential interactions with predators).
2. Because of habitat fragmentation, vehicular mortalities increase with greater road density and proximity of nest sites to roads.
3. Nesting success rates will likely continue to be insufficient to replace existing breeders. Probable causes include elevated predation pressures and inter-specific competition (particularly from blue jays).
4. Lack of management of existing occupied habitat continues to be a limiting factor.

Management costs for maintaining, restoring or enhancing remnant scrub, particularly in a suburban setting, are comparatively more expensive than management of large blocks in an undeveloped area. The decreased likelihood of the use of certain land management practices, such as prescribed burning, and economics of scale in logistical, personnel, and equipment costs elevate the total cost of management of remnant scrub habitats. Additionally, the Service believes that, because factors in addition to the quality of the scrub will also affect the survival probabilities of Florida scrub-jay families occupying habitat remnants, the expenditures involved in managing fragmentary remnant scrub habitats do not necessarily achieve conservation benefits to the species commensurate with their expense. The Applicants, in this case, will manage 27.1 acres of coastal scrub located between the development parcel and the Atlantic Ocean. A portion of the coastal scrub is currently occupied and the proposed management will allow for the scrub-jays to expand their territory to the newly managed areas. In this particular case, the Service believes that the mitigation acreage proposed is appropriate to mitigate impacts to scrub-jays.

The Applicants will implement the Standard Protective Measures which were developed by the Jacksonville and Vero Beach Field Offices to reduce the potential for impacts to the eastern indigo snake during all construction related activities. The Service believes that with the implementation of the Standard Protection Measures for the eastern indigo snake, mitigation based on the mitigation ratios used for the Florida scrub-jay adequately addresses mitigation concerns for both the Florida scrub-jay and the indigo snake since both species will be found on the managed land and both species benefit from a mitigation strategy that focuses on the management of on-site areas of habitat that maintain local populations of these species.

3. The Applicants will ensure that adequate funding for the HCP and procedures to deal with unforeseen circumstances will be provided.

The HCP and subsequent correspondence from the Applicants, including an Escrow Agreement, document that Palm Coast Blue Water International Corporation will provide the funding necessary to carry out the proposed mitigation and monitoring at the mitigation area for the entire duration of the 20-year permit. Future management activities beyond the initial 20 years will be accomplished by the required amendments to the Development Order as detailed in the ITP. The Owners Association will also include such funding as a line item in its budget beginning in year 20 of the permit term. The HCP and ITP satisfactorily address procedures for dealing with unforeseen circumstances.

4. The take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The issuance of this ITP has been reviewed by the Service in accordance with Section 7 of the Act. In the biological opinion, which is part of the administrative record, the Service has concluded that the issuance of the ITP is not likely to jeopardize the continued existence of the Florida scrub-jay or eastern indigo snake.

5. Other measures the Secretary may require as being necessary or appropriate for the purposes of this HCP have been met.

None identified.

V. GENERAL PERMIT ISSUANCE CRITERIA AND DISQUALIFYING CRITERIA

The Service has no evidence that the permit application should be denied on the basis of 50 CFR 13.21(b)-(c).

VI. RECOMMENDATIONS ON ISSUANCE OF PERMIT

Based on our findings with respect to the ITP application, HCP, EA, and Section 7 biological opinion, issuance of the Section 10(a)(1)(B) ITP to Palm Coast Blue Water International and Matanzas Shores Owners Association is recommended.

Noreen E. Walsh 3/1/02
ARD-AES Date
Acting

Joseph D. Walsh 3/07/02
DRD Date

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- Fitzpatrick, J.W., B. Pranty, and B. Stith. 1994. Florida scrub jay statewide map. 1992-1993. Archbold Biological Station. Lake Placid, Florida.
- Moler, P.E. 1992. Eastern indigo snake. Pages 181-186 in P.E. Moler, ed. Rare and Endangered Biota of Florida, Volume III, Amphibians and Reptiles. University Press of Florida; Gainesville, Florida.
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