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April 1, 2008

## **HAND-DELIVERED**

Mr. Steve Spangle  
Field Supervisor  
U.S. Fish and Wildlife Service  
Arizona Ecological Services Office  
2321 West Royal Palm Road, Suite 103  
Phoenix, Arizona 85021

**Re: Fish and Wildlife Service Presentation on Habitat Conservation Plans**

Dear Mr. Spangle:

We are representing the City of Prescott and the Town of Prescott Valley (collectively, "the Municipalities") in connection with the Big Chino Ranch Project. I was asked to contact you regarding a presentation made by Brenda Smith and John Nystedt on behalf of the Fish and Wildlife Service ("FWS") at a public meeting of the Upper Verde River Coalition on February 27, 2008.

I have carefully reviewed a video copy of that presentation. I believe that the presentation was one-sided and inaccurate in certain key respects. In fact, statements by Ms. Smith and Mr. Nystedt suggested that FWS believes the Big Chino Ranch Project will violate the "take" prohibition of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1). Unfortunately, the local officials and members of the public who attended the meeting – who are unfamiliar with the ESA and what actually constitutes a "take" – may have left the meeting believing a habitat conservation plan ("HCP") is legally required for groundwater pumping to take place in the Big Chino Valley. In short, they improperly acted as advocates for their views, rather than fairly presenting the relevant facts and legal requirements.

The Big Chino Ranch Project is an extremely important project to both Municipalities. It is being undertaken for the purpose of ensuring dependable, long-term water supplies for their communities. In 2004, the Municipalities purchased the JWK Ranch, located in the upper portion of the Big Chino Valley, approximately 15 miles south of Interstate 40, in portions of Townships 19 and 20 North-Range 4 West and Township 20 North-Range 5 West, G&SRB&M,

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in Yavapai County. The ranch is comprised of 4,582.1 acres of deeded lands and 1,948.6 acres of State land, including land that has been irrigated for crop production (which will be retired). State law authorizes the transportation of groundwater by the Municipalities from the Big Chino groundwater basin to the Prescott active management area. The Municipalities are currently constructing a pipeline to transport groundwater south from the ranch to their respective communities.

Within days after the Municipalities acquired the ranch, in December 2004, the Center for Biological Diversity ("CBD") served a notice of intent to bring suit for purported violations of Section 9 of the ESA. At that time, I investigated this threatened claim, and concluded then that it has no merit. Of course, no lawsuit was ever filed. Nevertheless, CBD and other groups have voiced opposition to the project, primarily on the ground that it may affect base flows in the upper Verde River. This is not surprising, given this group's record of opposing community growth and development. *See, e.g., Defenders of Wildlife v. Bernal*, No. CV 98-120 (D. Ariz.), *aff'd* 204 F.3d 920 (9th Cir. 2000) (rejecting claims by CBD and Defenders of Wildlife that the construction of a new high school in northwest Tucson would "take" pygmy-owls).

The FWS, however, is an agency of the Federal government. It should be providing information about the laws it administers in an unbiased and objective fashion. That has not been the case in regard to the Big Chino Ranch Project. I attended a public meeting in Prescott in mid-2005, at which another one-sided presentation was given by FWS employees (who, I believe, included Ms. Smith and Mr. Nystedt) on the "benefits" of HCPs without squarely addressing the law and regulations that pertain to Section 9.

During the 45-minute presentation on February 27, Mr. Nystedt touched very briefly (a few sentences) on the elements of a Section 9 violation. He mentioned the regulation defining "harm," but also suggested later that habitat modification may violate the Act. However, the term "harm" may include habitat modification or degradation only if the action (1) *significantly* modifies or degrades habitat, (2) *significantly* impairs essential behavior patterns, and (3) *actually kills or injures wildlife*. Therefore, modification of habitat that is suitable for a listed species, even habitat formally designated as critical under Section 4, is insufficient by itself to establish a taking under Section 9. *See, e.g., Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1237-39 (9th Cir. 2001) (discussion of recent decisions involving habitat modification); *Bernal*, 204 F.3d at 923 n. 2 (9th Cir. 2000) (designation of critical habitat is not relevant to determining whether an activity violates Section 9).

Notably, there was no discussion of the listed species that might be taken by groundwater pumping until, after the slide show on HCPs was completed, Supervisor Springer asked what listed species are actually found in the upper Verde River. Ms. Smith explained that the listed species in that reach of the river and, presumably, would be taken are the spikedace, razorback sucker, Colorado pikeminnow and the southwestern willow flycatcher. She did not address the

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locations and abundance of those species, or otherwise describe how or why a "take" might result from groundwater pumping occurring some 20 miles northwest of Sullivan Lake.

Despite extensive surveys, there has been one spikedace found in the upper Verde River since 1997, and that observation occurred in 1999. It is also well documented that the upper Verde River contains a variety of nonnative species (including smallmouth bass, several catfish species, red shiner and green sunfish) at levels that would not allow the persistence of spikedace. See, e.g., Prescott National Forest, *TE&S Fish Resources Report for the Chino Livestock Grazing Project Environmental Assessment* (Dec. 2003). As the Ninth Circuit held in *Arizona Cattle Growers*, speculative evidence that a species might be present and could be taken is insufficient to establish a violation of Section 9.

The razorback sucker and Colorado pikeminnow also are considered extremely rare in the Verde River. As you are aware, repeated attempts were made to reintroduce these fish in the Verde River system above Horseshoe Reservoir beginning around 1980, with very limited success, primarily due to predation by nonnative species. I believe that the most recent observation of a razorback sucker in the upper Verde River took place in 1994, while pikeminnows were last observed in 1992. Since 1994, all stockings of these fish have been made in the Verde River below Camp Verde, i.e., 50 miles below the upper reach of the river. Moreover, the Peck's Lake diversion dam is thought to constitute a major barrier to upstream fish migration (which is presumably why the Arizona Game and Fish Department has been allowed to stock rainbow trout and, perhaps, other nonnative game fish in the Cottonwood-Camp Verde reach of the river).

Finally, the reference to the southwestern willow flycatcher as a species that could be taken by the project was misleading. The flycatcher requires riparian vegetation, such as tamarisks, willows and cottonwood trees for nesting. Even assuming, for the sake of argument, that the Big Chino Ranch Project would reduce base flows in the upper Verde River, such habitat would continue to persist. The riparian vegetation occupied by flycatchers found at the upper portions of Roosevelt Lake and Horseshoe Reservoir, for example, developed because of low flows into those lakes and declining lake levels, as Mr. Nystedt explained in discussing Salt River Project's HCPs for its reservoir operations. Ms. Smith stated, however, that the flycatcher is in jeopardy because over 90% of the riparian habitat in Arizona has been lost during the past 150 years. As I am sure you are aware, that statement is simply a myth. E.g., R. Webb, S. Leake and R. Turner, *The Ribbon of Green*, Author's Preface (Univ. of Arizona Press 2007).

None of these facts were discussed by Ms. Smith or Mr. Nystedt during their presentation. In fact, Ms. Smith stated, in response to a question from an audience member, that in her professional opinion, groundwater pumping in the Big Chino Valley would reduce flows in the upper Verde River and result in the "taking" of listed species in violation of Section 9. Mr. Nystedt, in response to another audience question, stated that even the "threat" of a taking

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would lead to litigation, implying that even the mere possibility that listed fish could be present and might be killed or injured would violate the Act. That is not the law, as the courts have now stated on a number of occasions. For example, in *San Carlos Apache Tribe v. United States*, 272 F.Supp.2d 860 (D. Ariz. 2003), *aff'd* No. 03-16874 (9th Cir. 2005) (mem. decision), the district court summarized prior decisions interpreting the “harm” rule, stating:

[H]abitat modification does not constitute harm unless it actually kills or injures wildlife. . . . Thus, habitat degradation, by itself, does not equal harm. To show that habitat modification constitutes “harm” under the ESA, Plaintiffs must show a reasonably certain threat of imminent harm to a protected species. . . . A “potential injury” to wildlife is insufficient to constitute harm. . . . Thus, “harm” can be realized through the modification or degradation of a listed species’ habitat where it is shown that such modification or degradation, indirect or prospective, will either kill or injure wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.

*Id.* at 873-74 (quotation marks and citations omitted), *quoting and following Arizona Cattle Growers*, 273 F.3d at 1238; *Bernal*, 204 F.3d at 924-25; *Marbled Murrelet v. Pacific Lumber Co.*, 83 F.3d 1064, 1064 (9th Cir. 1996); *Forest Conservation Counsel v. Rosboro Lumber Co.*, 50 F.3d 781, 784-86 (9th Cir. 1995).<sup>1</sup>

It is not my intention to attack Ms. Smith or Mr. Nystedt for their personal views on the Big Chino Ranch Project or of growth and development in Yavapai County. However, I believe it is improper for them to become public advocates for the preparation of an HCP, as representatives of a Federal agency, without fairly presenting both sides of the issue. Thus, when Ms. Smith told elected officials of Prescott, Prescott Valley, Chino Valley and Yavapai County, for example, that a “large scale, regional” HCP is the “ideal way to go,” she is speaking for FWS. These sorts of comments, and the one-sided nature the presentation given by Ms. Smith and Mr. Nystedt, were designed to persuade, not inform. This was inappropriate, and will simply lead to greater confusion and controversy.

Finally, I would like to obtain copies of all reports, studies and other documents and records on which Ms. Smith relied in expressing her opinion that groundwater pumping in the

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<sup>1</sup> The plaintiff alleged that draining San Carlos Reservoir below 75,000 acre-feet of water would cause a “catastrophic fishkill” that would result in the taking of several listed species, including razorback suckers and southwestern willow flycatchers. *Id.* at 867, 873. That claim was rejected. Also, two of the listed species addressed in the *Arizona Cattle Growers* case were the spinedace and razorback sucker, in which the courts held that the possibility of future take was insufficient to support the issuance of incidental take statements restricting livestock grazing. *Arizona Cattle Growers*, 273 F.3d at 1243-44, 1247.

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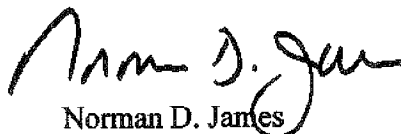
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Big Chino Valley will "take" members of listed species, including the four species she identified during the presentation. Without limiting the scope of this request, I would like to obtain all documents that indicate, in Ms. Smith's view, that groundwater pumping by the Municipalities will reduce base flows in the Verde River and the extent to which such flows will be reduced. Also, I would like all copies of all records concerning the presence of listed species in the upper reach of the Verde River, from Peck's Lake to Sullivan Lake, including any tributaries. If you believe it is necessary, I will provide a formal request for this information under the Freedom of Information Act.

Thank you for attention to this matter. Please free to contact me if you have questions, or would like to discuss this letter or the matter generally in greater detail.

Sincerely,

FENNEMORE CRAIG, P.C.



Norman D. James

cc: Gary D. Kidd, Esq.  
Ivan J. Legler, Esq.