



United States Department of the Interior

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In Reply Refer to:

AESO/SE

May 2, 2008

Mr. Norman D. James
Fennemore Craig, P.C.
3003 North Central Avenue, Suite 2600
Phoenix, AZ 85012-2913

Dear Mr. James:

Thank you for your letter dated April 1, 2008, referencing the Fish and Wildlife Service (FWS) presentation on habitat conservation plans (HCP) to the Upper Verde River Watershed Protection Coalition (Coalition) on February 27, 2008. In your letter you expressed a number of concerns about the presentation, stating your opinion that the presentation was one-sided and inaccurate in several key respects. You took issue with Ms. Brenda Smith and Mr. John Nystedt of my Flagstaff Suboffice, alleging that they "improperly acted as advocates for their views, rather than fairly presenting the relevant facts and legal requirements" by encouraging the Coalition to consider entering into a HCP for the Big Chino Ranch pipeline project.

I was not at the presentation in question and have not viewed the video recording that apparently exists. However, I have discussed your letter and its allegations with Brenda and John, and provide this response in that light. Before I address your specific concerns, however, I want it to be clear that I write this in the spirit of our cooperative relationship and my desire that such a relationship continue into the future. I hope you receive the following comments in a similar vein.

As a general matter, the FWS mission is "...to work with others to preserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people." Thus, our mission statement itself encourages advocacy for these resources, and we proudly promote programs, activities, and partnerships that will conserve and recover federally-listed species. I think that you are aware that I take the "...work with others..." portion of our mission statement seriously and demand that my staff do so as well.

Contrary to the allegations in your letter, Brenda and John emphasized that HCPs are voluntary processes and did not state, nor intentionally imply, that the Coalition would have to enter into an HCP in order to complete the Big Chino Ranch project. It is my belief that Brenda and John did fairly present their biological opinion on what species *may* be present and *may* be taken through groundwater depletion associated with the Big Chino Ranch project. I firmly believe they were within their areas of responsibility in advising potential project proponents of the availability of a process such as an HCP as a way of minimizing the risk of future legal and/or procedural

challenges to their project. They also provided examples of other communities and entities that have developed, or are in the process of developing, HCPs with us, including Pima County and the Salt River Project. They did this while offering my office's assistance should your clients choose to engage in this voluntary process. If your clients inferred from the discussion that an HCP would be required, we apologize for anything we said that led to such inference and are grateful to you for advising them about their legal responsibilities and options. It is imperative that any and all parties contemplating the voluntary HCP process have a thorough understanding of its associated requirements and ramifications.

In regard to your characterization of John's discussion on "the elements of a section 9 violation", you correctly point out that John touched on this only "very briefly", suggesting that "habitat modification may violate the Act." I find nothing untrue in that statement, nor anything improper in the fact that John touched on this issue only superficially. I again point out that the more in-depth treatise of this issue in your letter is properly within your purview as counsel to the Coalition. It was not, nor should it have been, John's intent to go into the intricacies of the legal points associated with the prohibitions of "harm" to species, including the details on case law cited in your letter.

Turning to the matter of which listed species may be present in the Verde River, the Powerpoint slides did include photos, names, and status of listed species and species of concern in the river. You correctly point out that our staff did not discuss listed species and potential effects during their presentation. However, when prompted by a question from Supervisor Springer, Brenda listed several federally-protected species, each of which has occurred in the Verde River in the past. From a biological standpoint, species occurrence is variable through space and time; it is often exceedingly difficult to detect many species, and impossible to prove non-occupancy. For example, FWS still believes that spikedace likely occur in the river, based on occupancy records from 1999. FWS designated critical habitat in the Upper Verde River because of the importance of this area to conservation of the species.

Your letter then questions the basis upon which Brenda stated her "professional opinion" that "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." Our understanding, based on recent hydrology reports completed by U.S. Geological Survey (USGS), is that the Big Chino watershed contributes 80 to 86 percent of the flow that discharges at the upper Verde River springs, providing baseflow for the first 26 miles of the river. Based on this generally accepted understanding of the hydrology of the river, along with known habitat needs of the protected fish and riparian species that occur in the upper and middle Verde River, we believe that there could be impacts from the project from reduction of baseflows in the Upper Verde River that could also result in reduced habitat availability and habitat conditions for listed species in both of these reaches at some time in the future. Since HCPs are only developed when take of Federally-listed species is likely to occur as a result of project activities, Brenda and John would not have requested the Coalition's time if we did not believe that take of listed species is at least a possibility as a result of this project.

Your letter states that John said that even the "threat" of a taking would lead to litigation. John's response to the audience question was that the threat of a taking could lead to litigation by an

outside party. His intent was to point out that a perceived violation of the Act could lead to litigation. Whether well founded or not, litigation could significantly interrupt or delay this project. As you are well aware, the Center for Biological Diversity filed a notice of intent to sue several entities over this project, and Salt River Project has opposed the withdrawal of water from the Big Chino subbasin for this project in the absence of a sound monitoring and mitigation plan. John did not state or imply that simply the possibility that listed species could be present would be a violation of the Act.

We still have much to learn about the hydrology of this area, and the regional model that USGS has recently developed should help us to better understand effects that could occur, as well as a timeframe for these effects. As you are aware, the issue is also complicated by cumulative factors from other development occurring in the Big and Little Chino watersheds and changes to habitat conditions and species populations that may occur over time. We are actively involved with other agencies and partners in recovery efforts for listed species, including those in the Verde River. Any effects on baseflow from this project are not likely to be detected for many years. Whether the effects of this project may result in take of listed species in the future is not clear. However, we are advising the Coalition that an HCP is an avenue that they may wish to consider taking. We understand and value your role in advising them that there are many potential outcomes that could occur as a result of the Big Chino project.

You also took issue with our recommendation to the Coalition to consider a regional HCP. We consistently strive to encourage partnerships that gain the greatest participation. Regional HCPs can have a greater benefit for listed species by providing more opportunities for off-setting the effects of a project and more cooperation in implementing minimization or off-setting actions. Participation in any HCP is voluntary, and entering into a large-scale, regional effort requires the participation and commitment of all parties. We continue to offer our assistance in working with any or all of the communities in the Upper Verde watershed to better understand what impacts may occur from future groundwater development, the likelihood and level of those impacts, appropriate methods for off-setting the impacts, and options for further planning.

You requested copies of documents that Brenda relied on for the opinions she expressed during the Coalition presentation, specifically regarding effects of groundwater pumping from the Big Chino Valley and presence of listed species in the Upper Verde River. Copies of these documents are enclosed, as well as a list of additional references that are available online.

If you have any questions, please contact me at my temporary phone number (703) 358-2332. We would like to continue to work with you and the Coalition to discuss the many complex issues associated with the Big Chino Ranch project.

Sincerely,



Steven L. Spangle
Field Supervisor

Mr. James

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Enclosure

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List of documents

<u>Document Type</u>	<u>Date</u>	<u>Title/Subject</u>
Re: 2/27/2008 HCP presentation to Upper Verde River Watershed Protection Coalition		
Power point	2/27/2008	Habitat conservation plans
Fact sheet	rev. 2/2008	Habitat conservation plans
Email	1/17/2008	HCP's for Upper Verde River Watershed Coalition
Email	2/7/2008	RE: HCP presentation for Coalition on Feb 27
Email	2/19/2008	HCP talk to Coalition – more thoughts
Email	2/25/2008	RE:
Email	2/26/2008	RE:
Re: species presence in Verde River		
Fact sheet	8/2007	General species information, spikedace (from Arizona Ecological Services Office web site)
Federal Register	3/21/2007	Excerpt from 72 FR 13361, final rule designating critical habitat for spikedace and loach minnow
Letter	8/30/2007	Letter to Nora Rasure, review of threatened, endangered, proposed, and candidate species list for Coconino National Forest
Draft EA	3/2007	Summary from Draft Environmental Assessment for Renovation of Stillman Lake
Fact sheet	rev. 2002	Arizona Game and Fish Department Heritage Data Management System information on Colorado pikeminnow
Briefing Statement	5/15/2006	Listed and native fish management and restoration of the Upper Verde River
Re: Big Chino groundwater pumping and effects to Verde River/species		
Letter	8/9/2002	Letter to Brad Husa, City of Prescott
Fact sheet	9/2006	Information re: effects of flow reductions on spikedace
Unpubl. Rept.	2/28/2006	Water resources issues in the Upper Verde River Watershed
Publ. paper	7/2002	Big Chino Valley ground water as the source of the Verde River (Published in Ground Water/Surface Water Interactions, American Water Resources Association Summer Specialty Conference. July 1-3, 2002)
Unpubl. Rept.	3/30/2004	Water commitments in the Prescott Active Management Area
Unpubl. Paper	4/27/2004	Herb Dishlip Consulting
Graph	Undated	Verde River at Paulden

Additional documents available online:

General habitat requirements and location information for listed species are in species descriptions included in Federal Register notices for species listings, critical habitat designations, and recovery plans:

http://www.fws.gov/southwest/es/arizona/Docs_Species.htm

<http://sbsc.wr.usgs.gov/cprs/research/projects/swwf/reports.asp>

http://www.fws.gov/southwest/es/arizona/Documents/HCPs/Horseshoe/Draft_HCP_July_07.pdf

Blasch, K.W., J.P. Hoffman, L.F. Graser, J.R. Bryson, and A.L. Flint. 2006. Hydrogeology of the upper and middle Verde River watersheds, central Arizona. U.S.G.S. Scientific investigations report 2005-5198.

<http://pubs.usgs.gov/sir/2005/5198/pdf/sir20055198.pdf>

Haney, J.A., D.S. Turner, A.E. Springer, J.C. Stromberg, L.E. Stevens, P.A. Pearthree, V. Supplee. 2008. Ecological implications of Verde River flows. A report by the Arizona Water Institute, The Nature Conservancy, and the Verde River Basin Partnership. 114 pp. <http://www.azconservation.org/>

Wirt, L., and H.W. Hjalmarson. 2000. Sources of springs supplying base flow to the Verde River headwaters, Yavapai County, Arizona. U.S.G.S. Open-file report 99-0378. <http://pubs.usgs.gov/of/1999/ofr-99-0378/>

Wirt, L. 2005. Hydrogeologic review of the Drake Cement Project, Yavapai County, Arizona. U.S.G.S. Open-file report 2004-1439. <http://pubs.usgs.gov/of/2004/1439/>

Wirt, L., E. DeWitt, and V.E. Langenheim, eds. 2005. Geologic framework of aquifer units and ground-water flow paths, Verde River headwaters, north-central Arizona. U.S. G.S. Open-file report 204-1411. <http://pubs.usgs.gov/of/2004/1411/>

Yavapai County Water Advisory Committee. 2004. Big Chino subbasin – historical and current water use and water use projections. <http://www.co.yavapai.az.us/Content.aspx?id=20562>