

January 5, 2007

Red Rock Rural Community Assoc.
C/O Brian Myers
2370 N. Hwy 89a, Suite 11, PMB 217
Sedona, Arizona 86336

Re: Bella Terra Project Clean Water Act Compliance

Mr. Myers:

The following information is based on my professional knowledge and experience with Clean Water Act regulations and permitting compliance. Information provided to me for this evaluation includes:

- Proposed jurisdictional waters determinations by Shepard Wesnitzer Engineers (July 17 and August 26, 2006, see attached)
- Approved Corps jurisdictional delineation on aerial photography with jurisdictional waters superimposed (appendix A)
- Various photographs of the project areas waters of the United States included in the engineer's proposed determination
- Historic information regarding the historic Red Rock ditch water rights (attached)

From the information provided to me and from a field visit conducted on October 2, 2006 there are at least three major, and two minor jurisdictional waters of the US on the Bella Terra project property. These include Oak Creek, which is designated as a Unique Water by the Arizona Department of Environmental Quality, Carroll Canyon Wash, the Red Rock ditch, and three minor washes farther upland from Oak Creek. The U.S. Army Corps of Engineers (Corps) has completed a jurisdictional delineation for this project (2003-00700-DE) and has determined these areas jurisdictional (Appendix Photo 1).

At 67 FR 2020, Nationwide Permits for Linear Transportation projects (NWP 14) and Residential, Commercial, and Institutional Developments (NWP 39) authorize dredge and fill activities under Section 404 of the Clean Water Act. All General Conditions must be met before the Corps can authorize any activity. At this time the impacts of the Bella Terra project to waters of the U.S. has not been exactly determined but based on the available information and observations fill has been placed in waters of the US. Therefore, General Conditions 11 (Endangered Species) and 12 (Historic Properties) must be met.

Three areas within the Bella Terra project have dredge and fill activities within the ordinary high water mark of waters of the US. These include replacing of old culverts with new culverts (fill) for a road crossing of Red Rock Ditch, a drainage culvert entering Carroll Canyon Wash and rock fill in an unnamed tributary upland to Oak Creek (Appendix Photo 2,3,4). These photographs are provided as evidence of fill within waters of the U.S. as determined by the Corps delineation. Future drainage culverts are planned for the project that will enter Carroll Canyon Wash and must also be considered as potential impacts to waters of the U.S.

These activities constitute dredge and fill into waters of the U.S. under the authority of the Corps, and compliance with the CWA is required. This requires compliance under the Endangered Species Act (ESA) and Section 106 of the National Historic Preservation Act (NHPA). The project proponent must provide evidence that project activities do not adversely affect resources under either ESA or NHPA.

The defining issue is the destruction of the Schuerman Homestead (Appendix Photo 5) and any other archaeological sites, and potential habitat modification for threatened or endangered species.

FEDERALLY LISTED ENDANGERED, THREATENED, AND CANDIDATE SPECIES

Twelve federally listed species and three candidate species are known to occur within Yavapai County. The species list was accessed by SWCA through the USFWS Internet database (<http://arizonaes.fws.gov/>). Because Corps jurisdictional waters are located on the property, the proposed project will require documentation of ESA compliance. A Biological Evaluation (BE) determines the potential for occurrence of each species and the effects that the proposed project may have on all 12 federally listed species and the three candidate species for Yavapai County. Two of the twelve species, one threatened and one candidate, are known to occur in or within three miles of the project area. Additional correspondence with the Arizona Game and Fish Department (AGFD) (Sabra Schwartz, *pers. comm.*, e-mail 12/05/06) indicated there are bald eagle (*Haliaeetus leucocephalus*) (wintering population) and western yellow-billed cuckoo (*Coccyzus americanus occidentalis*) records of occurrence within the Oak Creek drainage and within Sections 26 & 27. These records are from as recent as 2004 and 2005 and occurrences are located in the same sections as the proposed project.

As stated in Nationwide Permit General Condition 11, Endangered Species:

“No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (*ESA*), or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer (*DE*) if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the DE that the requirements of the ESA have been satisfied and that the activity is authorized.”

This would require the Bella Terra project to have completed a BE that would satisfy the requirement of General Condition 11. At this time no BE is available from Bella Terra or the Corps.

MIGRATORY BIRD TREATY ACT

Four avifauna species are known to occur within three miles of or in the project area (Table 1) are protected under the MBTA, which provides federal protection to all migratory birds, including nests and eggs. Formerly, the U.S. Fish and Wildlife Service (USFWS) rarely enforced the MBTA, but more recently, the USFWS fined a mining company for violating this Act. In order to relocate or alter any MBTA protected nests, it will be necessary to obtain a permit from the USFWS to maintain compliance with the MBTA. However, Section 1 of the Interim Empty Nest Policy of the USFWS, Region 2, states that if the nest is completely inactive at the time of destruction or movement, a permit is not required in order to comply with the MBTA. If an active nest is observed before or during construction, measures should be taken to protect the nest from destruction.

Table 1. Birds Known to Occur in or Within Three Miles of the Project Area Protected by the ESA and/or MBTA

Common Name	Scientific Name
American Peregrine Falcon	<i>Falco peregrinus anatum</i>
Bald Eagle (wintering pop.)	<i>Haliaeetus leucocephalus</i>
Common Black Hawk	<i>Buteogallus anthracinus</i>
Western Yellow-billed Cuckoo	<i>Coccyzus americanus occidentalis</i>

ARIZONA NATIVE PLANT LAW

Protected native plants classified under the ADA Arizona Native Plant Law (ARS §3-904) are present in or within three miles of the project area. This law states that protected plants cannot be removed from any lands, including private lands, without permission and a permit from the ADA. One protected plant species, Verde Valley Sage (*Salvia dorrii mearnsii*), is known to occur in or within three miles of the project area.

It is recommended that the ADA Notice of Intent to Clear Land form be completed and submitted to ADA at least 60 days prior to vegetation removal activities and after completion of a BE. If native plants will be salvaged and replanted in the project area, then the applicant needs to include this information with the Notice of Intent to Clear Land form at the time of its submittal and request salvage permits.

HISTORIC PROPERTIES

The Schuerman Homestead and associated historic structures were established in the 1800s. This area is part of the larger historic context of the Oak Creek area that is well documented (Alam 1997; Dean 2003; Edwards 2005). The NHPA requires that federal agencies consider the effects of their actions on properties on or eligible to the National Register of Historic Places (NRHP).

Section 106 of the NHPA (16 U.S.C. 470f) states that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

In addition, Nationwide Permit General Condition 12, Historic Properties, states that:

“No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR part 325, Appendix C. The prospective permittee must notify the DE if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the DE that the requirements of the NHPA have been satisfied and that the activity is authorized.”

Furthermore, Section 110 of the NHPA (16 U.S.C. 470h-2[k]) states that, with regard to anticipatory demolition:

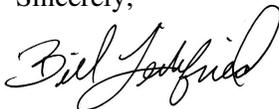
Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

It is our understanding that the Schuerman homestead, and any other cultural resources that may have been on the property, were destroyed (see Appendix Photo 5) without being inventoried or evaluated, thus foreclosing on the Federal agency's opportunity to make a determination of effect. Not only did Bella Terra not complete a cultural resource survey that would satisfy the requirement of Section 106 of the NHPA and Nationwide Permit General Condition 12, the Advisory Council on Historic Preservation was not afforded the opportunity to comment on this undertaking.

CONCLUSIONS

- Dredge and fill has occurred in waters of the U.S., therefore requiring compliance with the Clean Water Act Section 404.
- The project does not comply with NWP General Conditions 11 and 12.
- Anticipatory demolition of an historic property may have occurred on the property.

Sincerely,



Bill Leibfried
Senior Scientist

WCL/lrb

REFERENCES

Alam, James

- 1997 *Irrigation in the Verde Valley: A Report of the Irrigation Diversion Improvement Project.*
Published by the Verde Natural Resource Conservation District.

Dean, Charlotte

- 2003 *Photos and History of the Owenby and Schuerman Families, Early Settlers Along Oak Creek.*
A Family Album compiled by Charlotte Dean.

Edwards, Joshua S.

- 2005 Archaeological Investigations Along Oak Creek: Data Recovery at Cross Creek Ranch and the Talon Site Near Red Rock State Park, Yavapai County, Arizona. *SWCA Cultural Resources Report* No. 2004-089, Flagstaff.

APPENDIX A

Photographs

Photo 1. Army Corps approved delineation of waters of the U.S. for Bella Terra project.



Photo 2. Red Rock Ditch showing new culvert and unauthorized fill from road construction. The ditch runs under the new road in right-hand photo



Photo 3. Culvert constructed in jurisdictional area of Carroll Canyon Wash



Photo 4. Fill in upland tributary water of the U.S.



Photo 5. Remains of the Schuerman Homestead after demolition.

ATTACHEMENTS