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Watershed Alliance; Center for Biological  
Diversity; Sierra Club; Maricopa Audubon  
Society; Tucson Audubon Society; and  
Cascabel Conservation Association*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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)  
Lower San Pedro Watershed Alliance; )  
Center for Biological Diversity; )  
Sierra Club; Maricopa Audubon Society; )  
Tucson Audubon Society; and )  
Cascabel Conservation Association, )  
)  
Plaintiffs, )

No. CV-19-48-TUC-RCC  
Judge: Raner C. Collins

v. )  
)  
Col. Aaron Barta, in his official capacity )  
as Commander of the Los Angeles District )  
of the U.S. Army Corps of Engineers; )  
Amy Lueders, in her official capacity )  
as Regional Director of the Southwest )  
Region of the U.S. Fish and Wildlife )  
Service; the U.S. Army Corps of Engineers; )  
and the U.S. Fish and Wildlife Service, )  
)  
)  
Defendants. )  
\_\_\_\_\_ )

AMENDED COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

## INTRODUCTION

1. The San Pedro River is the last major, free-flowing river in the desert southwest, a sanctuary for millions of migrating birds, and home to one of the most diverse assortment of animal and plant species in the United States. The River supports a tremendous level of biodiversity, including breeding or migration habitat for 389 bird species (almost half of those seen in North America), 84 species of mammals (second in diversity only to the rainforests of Costa Rica), and 47 species of reptiles and amphibians. Groundwater sustains the San Pedro River's flows, as well as its riparian vegetation and springs, especially during the seasons with little or no rainfall.

2. Recognizing the importance of the San Pedro River, Congress designated 36 miles of the River's upper basin as the San Pedro Riparian National Conservation Area (SPRNCA), for which the United States holds an express federal reserved water right, to protect the River's aquatic and riparian resources, as well as its recreational, scientific, cultural, and wildlife values. 16 U.S.C. §§ 460xx(a), 460xx-1(d).



Photo of the San Pedro River courtesy of George Bushno.

3. Groundwater pumping poses an existential threat to the San Pedro River because it lowers the water table and reduces stream flows. Excessive groundwater pumping has already begun to dry up the San Pedro River and its riparian vegetation and springs, leaving the River with little or no water to spare.

4. In this increasingly arid environment, El Dorado Benson, LLC (El Dorado) obtained approval from the City of Benson, Arizona, to transform 12,167 acres of largely undeveloped habitat approximately two miles upland from the San Pedro River into a master-planned community that integrates 28,000 residential units with local businesses, open spaces, and luxurious amenities, including golf courses, resorts, fountains, lakes, and a town center.

5. El Dorado proposes to pump groundwater from the underlying aquifer at a rate of 8,427 acre-feet per year to support 70,000 new residents and replicate a verdant Italian village in the Sonoran desert of Arizona.

6. This magnitude of groundwater pumping threatens the San Pedro River's surface and subsurface flows, and would compound the current groundwater overdraft, irreversibly degrading the River's riparian habitat, and adversely affecting hundreds of migratory bird species, including multiple endangered and listed species that depend on the River for their survival. In addition, the proposed development would degrade thousands of acres of upland habitat and significantly alter surface hydrology, resulting in increased runoff and erosion into the San Pedro River.

7. El Dorado designed the Villages at Vigneto as an integrated, master-planned community that closely links residential, commercial, mixed use, public services, and village centers to form an attractive, harmonious unit in the community. The site where El Dorado proposes to construct this community is characterized by a dense network of desert washes that are directly tributary to the San Pedro River and convey stormwater flows to the River. These jurisdictional washes weave across the site

like capillaries through tissue and cannot be disturbed in any way without a 404 Permit from the U.S. Army Corps of Engineers (Corps).

8. El Dorado seeks to obtain authorization from the Corps to fill these jurisdictional washes through a two-phased permitting process. El Dorado requested a 404 permit for an 8,212-acre portion of the proposed development, which would straddle 75 miles of jurisdictional waters. El Dorado needs a permit to fill these washes at over 350 locations spread broadly across the site to develop its cohesive, master-planned community. El Dorado will seek additional 404 permits from the Corps for the remaining 3,995 acres of the planned development.

9. Under these circumstances, the Corps has an obligation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.*, to thoroughly analyze the environmental consequences of granting El Dorado a 404 permit, including the significant adverse effects of the entire, integrated Vigneto development on upland habitat, surface hydrology, groundwater, riparian habitat, SPRNCA (including federally reserved water rights), and listed species and critical habitat. *See White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1042 (9th Cir. 2009) (“Because this project’s viability is founded on the Corps’ issuance of a Section 404 permit, the entire project is within the Corps’ purview.”).

10. In addition, the Corps has an obligation under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, to formally consult with the Fish and Wildlife Service (FWS) regarding the adverse effects of the proposed development on listed species—including the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel—and their proposed and designated critical habitat.

11. Finally, the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, and its implementing regulations, require the Corps to thoroughly analyze the impacts of the proposed Vigneto development and to ensure that any unavoidable impacts are adequately mitigated.

12. The Environmental Protection Agency (EPA) repeatedly directed the Corps to prepare a comprehensive analysis of the entire Vigneto development based on high quality data, adequate public disclosure, and thorough NEPA analysis.

13. FWS also urged the Corps to analyze the impacts of developing the entire 12,167-acre Vigneto parcel to avoid a piecemeal analysis that failed to account for the adverse impacts of the project on listed species and critical habitat.

14. Yet, contrary to these agencies' expert advice, the Corps refused to analyze the significant impacts of granting a 404 permit for the Vigneto development on listed species and critical habitat, the San Pedro River, and the broader environment.

15. Instead, the Corps artificially narrowed its scope of analysis in two ways to avoid analyzing the full impacts of El Dorado's 12,167-acre master-planned community. First, the Corps limited its analysis to a so-called "Phase I" permitting area that encompasses only 8,212 acres. This permitting area does not, however, correspond with El Dorado's approved plan for the Vigneto development. Instead, the Corps based this permitting area on a prior plan created and then abandoned by a different developer over a decade ago that did not encompass El Dorado's plan to build a 12,167-acre development.

16. Second, the Corps narrowed its scope of analysis even further by claiming it could analyze only activities on 1,919 acres within the 8,212-acre permit area. The 1,919-acre scope of analysis includes only: (1) the desert washes to be filled under the 404 Permit and some upland areas around those washes; (2) avoided desert washes and associated primary and secondary buffers around the avoided washes; and (3) an offsite parcel to be used for compensatory mitigation.

17. As a result, neither the Environmental Assessment (EA) nor the Biological Evaluation (BE) prepared by the Corps evaluates the extensive impacts of the Vigneto development on the environment, a clear oversight that violates NEPA, the CWA, and the ESA, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–06.

18. Furthermore, the Corps' impermissibly constrained scope of analysis was the product of improper political interference. For years, FWS refused to concur with the Corps' narrow definition of the action area, demanding a comprehensive analysis of the adverse impacts of the entire Vigneto development. In 2017, however, FWS abruptly reversed course and issued a Letter of Concurrence, deferring to the Corps' artificially narrow definition of the action area and leaving the Corps free to approve the project without ever analyzing the significant adverse effects on listed species and critical habitat.

19. Steven Spangle, the FWS official who issued the 2017 Letter of Concurrence, has since revealed that he was improperly pressured by a senior political appointee at the Department of Interior to retract FWS's objections, concur with the Corps' constrained definition of the action area, and turn a blind eye on the adverse impacts of the Vigneto development on endangered species and critical habitat. FWS's concurrence was not based on fact or science, but on politics, rendering it arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. §§ 701–06. The Corps can no longer rely on the Letter of Concurrence to satisfy its obligation under the ESA to consult with FWS on impacts to listed species and critical habitat.

20. Plaintiffs bring this lawsuit asserting violations of NEPA, the CWA, the ESA, the APA, and their implementing regulations. Plaintiffs seek declaratory and injunctive relief to remedy the alleged violations of law set forth below. Plaintiffs ask the Court to set aside and vacate the Corps' decision granting the 404 Permit and FWS's Letter of Concurrence.

### **JURISDICTION AND VENUE**

21. Plaintiffs bring this action pursuant to the APA, 5 U.S.C. § 706(2), and the ESA, 16 U.S.C. § 1540(g), which waive the federal defendants' sovereign immunity, *see* 5 U.S.C. § 702; 16 U.S.C. § 1540(g)(1)(A).

22. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 16 U.S.C. § 1540(c), (g) (ESA citizen suits).

23. Over 60 days ago, on December 21, 2018, Plaintiffs provided the named defendants with written notice of their intent to sue based on the ESA violations alleged in this Amended Complaint. *See id.* § 1540(g)(2)(A). Defendants have not corrected their violations of the ESA.

24. This Court has authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201–02, 5 U.S.C. §§ 705–06, and Rule 65 of the Federal Rules of Civil Procedure. This Court also has inherent authority to award injunctive relief.

25. This Court has authority to award costs and attorneys’ fees under 28 U.S.C. § 2412 and 16 U.S.C. § 1540(g)(4).

26. Venue is properly vested in this District pursuant to 28 U.S.C. § 1391(e)(i) and 16 U.S.C. § 1540(g)(3)(A) because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District. The challenged federal action is a permit authorizing activities in Benson, Arizona. Plaintiffs Lower San Pedro Watershed Alliance, Center for Biological Diversity, Maricopa Audubon Society, Tucson Audubon Society, and Cascabel Conservation Association, as well as the Grand Canyon Chapter of the Sierra Club, are headquartered within Arizona.

27. This case should be assigned to the Tucson Division of this Court because the challenged federal action authorizes activities on property in Cochise County, which is within the Tucson Division. *See* LRCiv 77.1(a), (c).

### **PARTIES**

28. Plaintiff LOWER SAN PEDRO WATERSHED ALLIANCE (Watershed Alliance) is a landowner-based nonprofit conservation organization headquartered in Mammoth, Arizona. The Watershed Alliance has nearly 200 members, about half of whom manage thousands of acres of land in the Lower San Pedro Basin. Most of the members owning land in this watershed reside in Cochise County. The organization is dedicated to protecting the threatened lower San Pedro riparian ecosystem and supporting watershed. Its members regularly survey for western yellow-billed cuckoos, southwestern willow flycatchers, and other threatened and endangered species in the

middle and lower San Pedro watersheds. The Watershed Alliance has a history of advocacy on behalf of the San Pedro River—particularly the need to protect its flows from excessive groundwater pumping—and previously has written to the Corps, FWS, and the City of Benson urging that endangered species and San Pedro stream flows be protected from the Vigneto development.

29. Plaintiff SIERRA CLUB is a national nonprofit organization with 67 chapters and more than 780,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Grand Canyon Chapter of the Sierra Club is headquartered in Phoenix and has approximately 15,900 members in the state of Arizona. The Sierra Club's concerns encompass protection of the San Pedro River, desert grasslands, and woodlands of the Whetstone Mountains. The Sierra Club's members enjoy wildlife watching in these areas and have advocated for protection of endangered and threatened wildlife in the area, including the jaguar, ocelot, southwestern willow flycatcher, and northern Mexican gartersnake. Members of the Grand Canyon Chapter monitor water quality on the upper and middle San Pedro River each month from May through October and assist with annual wet-dry mapping of the River. The Sierra Club has provided comments to the City of Benson on the proposed Villages at Vigneto development, and Sierra Club members have attended public meetings on Vigneto to oppose the development.

30. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (CBD) is a nonprofit corporation headquartered in Tucson, with more than 50,000 members. CBD works to raise public awareness and to preserve, protect, and restore biodiversity, native species, ecosystems, and public lands. CBD's members research, study, observe, publicize, and seek protection for ecosystems, plants, and animals, including the San Pedro River, jaguar, ocelot, yellow-billed cuckoo, southwestern willow flycatcher, lesser long-nosed



bat, and northern Mexican gartersnake. CBD and its members analyze and disseminate information to the public about the areas affected by the decreasing water levels in the San Pedro River. CBD's and its members' extensive involvement in the San Pedro River includes over 25 years of activism and litigation, including advocacy to prevent the proposed Villages at Vigneto development's harmful environmental impacts.

31. Plaintiff MARICOPA AUDUBON SOCIETY (Maricopa Audubon) is an organization of volunteers dedicated to the enjoyment of birds and other wildlife, with a primary focus on the conservation and restoration of the riparian habitat of the southwest through education and community involvement. Maricopa Audubon is a nonprofit Arizona organization headquartered in Phoenix, with approximately 2,500 members. Maricopa Audubon has a long history of involvement with the San Pedro River, including being instrumental in the successful 1977 opposition to the proposed Charleston Dam, which would have inundated the southern half of the upper San Pedro River. Maricopa Audubon's volunteers and members use, enjoy, and benefit from the San Pedro River for wildlife observation, research, education, and recreational activities.

32. Plaintiff TUCSON AUDUBON SOCIETY (Tucson Audubon) is a nonprofit conservation organization that inspires people to enjoy and protect birds through recreation, education, conservation, and restoration of the environment upon which we all depend. Founded in 1949, Tucson Audubon has more than 2,500 members. Tucson Audubon established the Arizona Important Bird Area (IBA) Program in 2001, which seeks to identify and protect vital habitats for birds in Arizona, and is a steward of the Lower San Pedro Global IBA. Tucson Audubon and its members have surveyed for western yellow-billed cuckoos in the Lower San Pedro Global IBA and in southeastern Arizona mountain ranges, including the Whetstone Mountains. Tucson Audubon advocated for the designation of SPRNCA in 1988, the designation of the Upper San Pedro Global IBA by the American Bird Conservancy in 1996, and the designation of the Lower San Pedro Global IBA in 2008. Tucson Audubon also actively participated in

litigation to protect southwestern willow flycatcher critical habitat in 2009, and continues to advocate for the health of the watershed.

33. Plaintiff CASCABEL CONSERVATION ASSOCIATION (CCA) is a nonprofit conservation group headquartered in Cochise County. CCA is dedicated to the collaborative stewardship of the middle San Pedro watershed in a way that promotes the health, stability, and diversity of the whole community, including its earth, waters, plants, and animals. Founded in 1997, CCA has about 150 members primarily from Cochise and Pima Counties. CCA runs retreat and education programs to provide members of the public with information and an appreciation for the middle San Pedro watershed. CCA has advocated for both the City of Benson and the Corps to more fully evaluate the impact the proposed Vigneto development would have on water resources and the riparian habitat of the San Pedro River. For the last four years, CCA has conducted official surveys for western yellow-billed cuckoos on the San Pedro River in support of the National Audubon Society's IBA Program.

34. Plaintiff Organizations have long histories of advocating for the protection of the San Pedro River ecosystem and its supporting watershed, and for the sensitive species that rely on those habitats. Their activities have included filing legal challenges to other federal actions and development projects whose groundwater pumping threatened to reduce San Pedro River flows and degrade habitat; commenting on proposed rules to list species and designate critical habitat in the San Pedro watershed under the ESA; collecting and submitting data to federal agencies—including the Corps—on occurrences and habitat use by threatened and endangered species and other wildlife in the watershed; and sending letters to federal agencies and local political subdivisions urging that the San Pedro River, the watershed's native ecosystems, and the area's sensitive species be protected from large development projects, including the Villages at Vigneto.

35. The Plaintiff Organizations submitted extensive comments to the Corps and FWS regarding the significant effects of granting the 404 Permit for the Villages at

Vigneto on the environment, including the effects of construction activities, increased runoff and sedimentation, groundwater pumping, and induced growth.

36. Plaintiff Organizations' members and staff derive educational, scientific, aesthetic, recreational, and spiritual benefits from the San Pedro River watershed, including its hemispherically-significant bird migration corridor, International Birding Areas, extraordinary biological diversity, and the ecosystem services the watershed provides. Plaintiffs' members and staff enjoy activities that include viewing, studying, and photographing the birds, wildlife, and habitats in the middle and lower San Pedro watersheds, and have concrete plans to continue these activities. Many of Plaintiffs' members live along the San Pedro River or in the middle or lower San Pedro watershed, and participate in these activities daily.

37. Plaintiffs' members also live and own property in close proximity to the proposed Vigneto development, including in the alluvial fan—a triangle-shaped deposit of sediment—immediately downstream from the proposed development. These members enjoy the peace and solitude of the San Pedro River valley, including the opportunity to birdwatch during the day, enjoy unspoiled vistas of the Whetstone Mountains in the evening, and stargaze at night. These members also depend upon the desert washes that run across the Vigneto development to convey stormwater runoff from the Whetstone Mountains down to the San Pedro River.

38. The Corps' decision to grant the 404 Permit for the Vigneto development threatens these members' recreational interests and enjoyment of their own property. With the 404 Permit, El Dorado would fill and irreversibly alter the natural washes that protect these members' properties. The development would also destroy thousands of acres of upland habitat, exponentially increasing runoff and erosion on these members' property. In addition, the Vigneto development would increase light and noise pollution, while also degrading scenic vistas of the Whetstone Mountains. Moreover, groundwater pumping at the proposed development would lower the groundwater table, impairing

riparian habitat along the San Pedro River and adversely affecting Plaintiffs' enjoyment of species that depend on this habitat.

39. The legal violations alleged in this complaint cause direct injury to the scientific, aesthetic, recreational, conservation, educational, spiritual, and other interests of Plaintiffs and their members and staff. These are actual, concrete injuries to Plaintiffs, caused by Defendants' failure to comply with NEPA, the CWA, the ESA, the APA, and their implementing regulations and policies. Unless the requested relief is granted, Plaintiffs' interests will continue to be injured by the Defendants' failure to comply with NEPA, the CWA, the ESA, and the APA. The relief sought herein would redress Plaintiffs' injuries. Plaintiffs have no other adequate remedy at law.

40. Defendant COLONEL AARON BARTA is sued in his official capacity as Commander and District Engineer of the Los Angeles District of the U.S. Army Corps of Engineers. The Los Angeles District Engineer is responsible for issuing and overseeing dredge and fill permits under CWA Section 404 in the District, which includes Cochise County, Arizona. The Los Angeles District office issued the 404 Permit that is the subject of this litigation.

41. Defendant AMY LUEDERS is sued in her official capacity as Regional Director of the Southwest Region of the U.S. Fish and Wildlife Service. The Southwest Regional Director is responsible for leading ESA consultations with federal agencies whose actions may affect species in the Region, which includes Cochise County, Arizona.

42. Defendant UNITED STATES ARMY CORPS OF ENGINEERS is the federal agency within the Department of Defense responsible for issuing dredge and fill permits under CWA Section 404.

43. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the federal agency within the U.S. Department of Interior responsible for administering and implementing the ESA with respect to terrestrial species, including all species at issue in this litigation.

## STATUTORY BACKGROUND

### I. The Clean Water Act

44. With the enactment of the CWA, Congress set forth a comprehensive program to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” to conserve the recreational value of such waters, and to protect wildlife species that rely on aquatic resources for their survival. 33 U.S.C. § 1251(a).

45. Section 404 of the CWA authorizes the Corps to regulate and issue federal permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” *Id.* § 1344(a).

46. A “discharge” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12) and (16). “Dredged material” is “material that is excavated or dredged from waters of the United States.” 33 C.F.R. § 323.2(c). “Fill material” includes any material placed in waters of the United States that has the effect of “replacing any portion of a water of United States with dry land” or “changing the bottom elevation of any portion of a water of the United States.” *Id.* § 323.2(e)(1)(i)–(ii).

47. “Navigable waters” means the “waters of the United States.” 33 U.S.C. § 1362(7). “[W]aters of the United States” includes “[a]ll interstate waters,” “[a]ll tributaries . . . of [interstate waters],” and “[a]ll waters . . . whether they are determined . . . to have a significant nexus to a[n interstate water].” 33 C.F.R. § 328.3(a)(1), (5), (7).

48. When it reviews a permit application, the Corps must follow binding guidelines established by the Corps and EPA (the “404(b)(1) Guidelines” or the “Guidelines”), which are codified at 40 C.F.R. Part 230. *See* 33 U.S.C. § 1344(b).

49. Under the Guidelines, the Corps is prohibited from issuing a 404 permit “if there is a [1] practicable alternative to the proposed discharge [2] which would have less adverse impact on the aquatic ecosystem, [3] so long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. § 230.10(a). “An alternative is practicable if it is available and capable of being done after taking into

consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.10(a)(2).

50. The 404(b)(1) Guidelines also prohibit the Corps from issuing a 404 permit “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” *Id.* § 230.10(d). Consequently, those seeking a 404 permit must mitigate the impacts of the proposed dredge and fill activities by “avoiding, minimizing, rectifying, reducing, or compensating for resource losses.” 33 C.F.R. § 320.4(r)(1). The Corps “must determine the compensatory mitigation to be required in a DA [404] permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.” 40 C.F.R. § 230.93(a)(1). In making this determination, “the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project.” *Id.*

51. Mitigation activities follow a three-part sequence. First, the district engineer must ensure that potential impacts from permitted activities have been avoided to the maximum extent practicable. *Id.* § 230.91(c). Second, remaining unavoidable impacts must be minimized to the extent appropriate and practicable. *Id.* Third, compensatory mitigation is then required for any impacts that cannot be avoided or minimized. *Id.*

52. The Corps cannot use compensatory mitigation as a means to make an alternative appear to have less environmental impact than another when identifying the least environmentally damaging practicable alternative under § 230.10(a). Memorandum of Agreement Between EPA and ACE—The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210, 9211 (March 12, 1990) [hereinafter “MOA”] (“Compensatory mitigation may not be used as a method to

reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives.”).

53. Mitigation efforts must be monitored for an adequate period of time to ensure the project meets its performance standards and objectives. 40 C.F.R. § 230.96(b). A longer monitoring period is required where the aquatic resources at issue have slow development rates. *Id.*

54. The Corps must make a finding of non-compliance with the 404(b)(1) Guidelines where “[t]here does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.” *Id.* § 230.12(a)(3)(iv).

55. In addition to the 404(b)(1) Guidelines, the Corps may not issue a permit if the “district engineer determines that it would be contrary to the public interest.” 33 C.F.R. § 320.4(a)(1). This far-reaching inquiry requires the Corps to consider “the probable impacts” of a proposed project on “[a]ll factors which may be relevant to the proposal[,] including cumulative effects.” *Id.* The decision should “reflect the national concern for both protection and utilization of important resources.” *Id.* The Corps’ public interest regulations also require that it give “full consideration” to FWS’s views. *Id.* § 320.4(c).

56. EPA plays an important role in administering the 404 program and NEPA. Pursuant to its authority under Section 404(b)(1) of the CWA, EPA may provide comments to the Corps with its expert views regarding compliance with the Section 404(b)(1) Guidelines. EPA also has the authority to prohibit, restrict, or deny 404 permits whenever it determines that the proposed permit will have an unacceptable adverse effect. 33 U.S.C. § 1344(c); *see also* 40 C.F.R. § 231.1.

57. The CWA imposes strict penalties, including civil and criminal sanctions, on any unauthorized discharge of a pollutant (including dredge or fill material) into waters of the United States. 33 U.S.C. § 1319.

## II. The National Environmental Policy Act

58. NEPA is “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Congress enacted NEPA “to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action.” *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).

59. NEPA implements the precautionary principle to think first, then act by requiring agencies, “to the fullest extent possible . . . use all practicable means, consistent with the requirements of [NEPA] and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(f).

60. The scope of a NEPA analysis is essential to an informed decision regarding the effects of a proposed action. NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision-making so that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.

61. A comprehensive analysis under NEPA also ensures that the public has sufficient information to participate in the agency’s decision-making process.

62. A Section 404 dredge and fill permit issued by the Corps is a “Federal action” to which NEPA applies. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005).

63. The Corps “has responsibility under NEPA to analyze all of the environmental consequences of a project. Put another way, while it is the development’s impact on jurisdictional waters that determines the scope of the Corps’ permitting authority, it is the impact of the permit on the environment at large that determines the Corps’ NEPA responsibility. The Corps’ responsibility under NEPA to consider the



environmental consequences of a permit extends even to environmental effects with no impact on jurisdictional waters at all.” *Id.* at 1122.

64. The Corps’ NEPA regulations recognize that the scope of analysis for a 404 permit decision must:

address the impacts of the specific activity requiring a [Corps] permit and *those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant federal review . . . .* Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project.

33 C.F.R. Pt. 325 App. B §§ 7(b)(1), 7(b)(2)(A) (emphasis added).

65. In order to determine whether sufficient control and responsibility exists over the proposed project, the Corps typically considers the following factors:

- (i) Whether or not the regulated activity comprises “merely a link” in a corridor type project (e.g., a transportation or utility transmission project).
- (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
- (iii) The extent to which the entire project will be within Corps jurisdiction.
- (iv) The extent of cumulative Federal control and responsibility.

*Id.* § 7(b)(2).

66. To fulfill Congress’s twin aims of comprehensive environmental analysis and broad and informed public involvement, NEPA requires federal agencies to prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4.

67. To determine whether an EIS is required, the responsible agency may prepare an EA with “sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact.” 40 C.F.R. § 1508.9. The agency may forego preparation of an EIS if it makes a “finding of no significant impact” (FONSI), *id.*

§§ 1501.4(e), 1508.13, and provides a convincing statement of reasons to explain why a project's impacts are insignificant.

68. If the EA establishes that the agency's action may have a significant effect upon the environment, an EIS must be prepared.

69. Relevant factors in determining whether an EIS is necessary include "considerations of both context and intensity." 40 C.F.R. § 1508.27. Some of the factors relevant to "intensity" are:

- Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the ESA.
- Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

*Id.* § 1508.27(b)(3)–(5), (7), (9)–(10).

70. NEPA requires agencies to take a hard look at the direct, indirect, and cumulative impacts of a proposed action to inform its decision about whether a proposed action significantly impacts the environment. *Id.* §§ 1502.16, 1508.8, 1508.25(c).

71. Agencies must also take a hard look at mitigation measures for a proposed action in order to evaluate the severity of the action's adverse effects. *Id.* §§ 1502.14(f), 1502.16(h), 1508.25(b)(3). A reasonably complete discussion of mitigation measures requires an assessment of whether the proposed mitigation measures will be effective. Agencies also must adopt a monitoring and enforcement program for any mitigation. *Id.* § 1505.2(c); *see also id.* § 1505.3 (providing that agencies should "provide for monitoring to assure that their decisions are carried out").

### **III. The Endangered Species Act**

72. Congress enacted the ESA to protect endangered and threatened species and the ecosystems on which those species depend. 16 U.S.C. § 1531(b). Through the ESA, Congress declared its policy "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act]." *Id.* § 1531(c)(1).

73. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," intended to "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978).

74. The ESA provides protection to those species designated as either "endangered" or "threatened." If FWS lists a species as threatened or endangered, it must designate critical habitat for that species. 16 U.S.C. § 1533(a)(3)(A)(i). Critical habitat includes areas occupied by the species containing "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and areas not occupied by the species that "are essential for the conservation of the species." *Id.* § 1532(5)(A)(i).

75. Section 7(a)(2) of the ESA requires each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” *Id.* § 1536(a)(2).

76. The ESA and its implementing regulations establish an interagency consultation process to ensure that federal agencies comply with their substantive obligations. 16 U.S.C. § 1536(a)(2). Federal agencies must “use the best scientific and commercial data available” in assessing the impacts of a proposed action on listed species and critical habitat. *Id.* The best available science includes “biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by [FWS] during [its] implementation of the Act.” Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34,271-01, 34,271 (July 1, 1994).

77. An agency must consult with the appropriate wildlife agency—here, FWS—under Section 7 whenever it takes an action that “may affect” a listed species. 50 C.F.R. § 402.14(a). The minimum threshold for an agency action to trigger consultation with FWS is low. “*Any possible effect*, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement . . . .” Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added); *see also* U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv., Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act xvi (1998) [hereinafter “Consultation Handbook”] (“May affect [is] the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat.” (emphasis in original)).

78. Through the consultation process, the agency must consider all possible effects across the “action area,” which encompasses “all areas to be affected directly or

indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. The “effects of the action” that must be considered include “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.” *Id.* “Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.” *Id.* “Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.” *Id.* “Interdependent actions are those that have no independent utility apart from the action under consideration.” *Id.*

79. FWS has an independent obligation to determine the proper scope of the “action area” for purposes of consultation under the ESA. *Id.*; *see also* Consultation Handbook at 4-15 (“Reaching agreement on the description of the action area is desirable, but ultimately the Services are responsible for this biological determination.”).

80. To determine whether an action triggers consultation under Section 7, the action agency must prepare a BE, or a biological assessment, that “shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat.” *Id.* § 402.12(a). The purpose of the biological evaluation is to determine whether any “species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.” *Id.*

81. Formal consultation is not required if the Corps determines, with FWS’s written concurrence, that the proposed action may affect but “is not likely to adversely affect” the listed species. *Id.* §§ 402.13(a), 402.14(b)(1). A finding of “not likely to adversely affect” can be made only if the effects of the proposed action on the listed species are expected to be “discountable, or insignificant, or completely beneficial.” Consultation Handbook at xv, 2-6. Otherwise, formal consultation must proceed. *Id.* § 402.14(a)–(b).

82. As a result of formal consultation, FWS will issue a biological opinion evaluating the effects of the federal action on listed species and their critical habitats. *Id.*

§ 402.14(h). If FWS concludes that a proposed action is likely to jeopardize a listed species or result in adverse modification of its critical habitat, FWS must propose a reasonable and prudent alternative, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A).

#### **IV. The Administrative Procedure Act**

83. The APA confers a right of judicial review on any person adversely affected by final agency action, and provides for a waiver of the federal government's sovereign immunity. 5 U.S.C. §§ 701–06.

84. Upon review of agency action, the court shall “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Id.* § 706(2). An action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Further, “the agency must . . . articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* (quotations and citations omitted).

85. This standard ensures that agencies “offer genuine justifications for important decisions that can be scrutinized by courts and the interested public.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.”). An agency’s decision must be set aside if it rests on a pretextual rationale. Furthermore, a court must set aside an agency decision if it is based not on the relevant factors or evidence before the agency, but rather was the product of

political pressure. In such circumstances, the appropriate remedy is to vacate the decision and remand to the agency to establish “a full scale administrative record which might dispel any doubts about the true nature of [the agency’s] action.” *ATX, Inc. v. U.S. Dep’t of Transp.*, 41 F.3d 1522, 1528 (D.C. Cir. 1994).

## STATEMENT OF FACTS

### I. The San Pedro River and Watershed

#### A. The Last Major Free-Flowing River in the Desert Southwest

86. The San Pedro River is one of the most significant perennial undammed desert rivers in the United States and is unquestionably an aquatic resource of international ecological importance.



87. The River and its surrounding cottonwood-willow forest support one of the most important corridors for millions of migratory songbirds in the United States. It also serves as important habitat for many other species of plants, fish, and wildlife, and provides a unique refuge for many threatened or endangered species protected by the ESA, including the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel.

88. The San Pedro River is also a global IBA. Thousands of bird watchers visit the San Pedro River each year to view native and migrating songbirds, generating millions of dollars in economic activity for the local economy. The total economic effect from watchable wildlife activities in Arizona in 2011 was estimated at \$1.4 billion, which includes \$14.2 million dollars in retail sales in Cochise County and \$179.5 million in retail sales in Pima County.

**B. The San Pedro Riparian National Conservation Area**

89. In 1988, Congress recognized the importance of the San Pedro River and designated 36 miles of the River's upper basin as a National Conservation Area. Congress mandated that SPRNCA be managed "to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River." 16 U.S.C. § 460xx(a).

90. The United States holds an express federal reserved water right to accomplish the purposes of the SPRNCA reservation. Congress reserved federal water rights in "a quantity of water sufficient to fulfill the purposes" of SPRNCA, *id.* § 460xx-1(d), including rights to springs and to groundwater to support riparian vegetation, *id.* § 460xx(a).

91. St. David Cienega is a large groundwater-fed wet marsh within the northern boundary of SPRNCA that lies adjacent to the San Pedro River floodplain. The Bureau of Land Management (BLM) manages this site as a Research Natural Area within SPRNCA. Due to the large number of species supported by St. David Cienega, the Audubon Society included it as a part of the San Pedro IBA.

92. A retired FWS employee observed a ten-meter long and approximately 0.5-meter wide patch of endangered Huachuca water umbel in May of 2017 next to St. David Monastery. This stretch of the San Pedro River is intermittent and depends heavily on discharge flows from St. David Cienega.



93. St. David Cienega is an important indicator of the health of SPRNCA and the San Pedro River. Recent declines in water depth at St. David Cienega and the area of wetted land, and the loss of wetland vegetation, threaten the ecological integrity of the San Pedro River basin, and St. David Cienega in particular.

**C. Groundwater Pumping Threatens Surface Flows Along the San Pedro River and at SPRNCA.**

94. The San Pedro River, SPRNCA, and their lush corridors of riparian habitat depend on groundwater contributions from the regional aquifer. Pressure in the regional aquifer causes groundwater to move from the deep, regional aquifer, up into the shallow aquifer, and then into the River as baseflow. Without baseflow, the ecological function of the River is impaired, and the purposes of SPRNCA are undermined.

95. Groundwater studies have demonstrated that an area of vertical flow, i.e., groundwater rising from the deep aquifer and into the shallow system, is likely present along the San Pedro River near St. David Cienega.

96. Chris Eastoe, a hydrologist and expert in isotope geochemistry, conducted isotope testing at St. David Cienega in 2017. His results demonstrated that surface discharges at the Cienega were isotopically and thermally similar to the confined aquifer. These results clearly show that there is a hydrologic connection between the confined aquifer and the surface flow system of the San Pedro River at St. David Cienega.

97. In 2018, Eastoe conducted additional isotope testing and confirmed that there is a permeable zone connecting the San Pedro River to the confined aquifer at St. David Cienega. Due to this connection, large increases in groundwater withdrawal from the confined aquifer would likely reduce groundwater discharge from the aquifer at the Cienega and nearby springs.

98. Groundwater pumping is the greatest threat to the San Pedro River because it lowers the water table, reducing the groundwater elevation and creating an expanding cone of depression. The expanding cone of depression reduces groundwater flow towards the River and, in turn, pressure near the River. This depression eventually

“captures” water from the aquifer that would have otherwise reached the surface near the River and sustained riparian habitat or River and spring flows. Drawdown associated with the cone of depression also reduces the groundwater volume in storage in the aquifer.

99. Even small reductions in the aquifer caused by groundwater pumping could reduce the aquifer’s artesian head, or the natural pressure that forces water to the ground surface, thereby eliminating or even reversing flows at seeps and springs near St. David Cienega.

100. Groundwater pumping is already reducing stream flow levels along the San Pedro River. Over the last several decades, the rate of groundwater pumping from aquifers feeding the San Pedro River has far exceeded the rate of recharge of water to the aquifer, creating a groundwater “deficit.” This pumping has begun to dry up the San Pedro River and its riparian vegetation and springs, leaving the San Pedro River with little or no water to spare.

101. Because there is a time lag between groundwater pumping and the point at which pumping affects a river, a well’s effects on baseflows may not be fully realized until decades after the well stops pumping. This is because the cone of depression created by groundwater pumping gradually radiates laterally until its edge is close enough to a stream that it begins to reduce baseflows. The farther from the river the center of a cone of depression is—both vertically and laterally—the longer it will take for elevation declines to affect baseflows to the river. For example, modeling along the upper San Pedro River predicts that it will take at least 50 years from the start of pumping in the Sierra Vista/Fort Huachuca area for baseflow effects from that pumping to affect San Pedro baseflows (assuming continuous pumping).

**D. Groundwater Pumping Threatens Riparian Habitat Along the San Pedro River.**

102. There is a cause-and-effect relationship between groundwater drawdown and loss of riparian habitat:

The reduction in groundwater lowers the water table, while the reduction in streamflow reduces the length, width, and depth of wetted streambed. The net result is reduced plant regeneration, herbaceous and shrub growth, tree survival, foliar cover, woodland width, and prey abundance that coincides with the reduced length, width, and depth of wetted streambed and depth to groundwater.<sup>1</sup>

103. Even minor declines in groundwater levels can have devastating impacts on riparian vegetation and the associated ecosystem. Increasing depths to groundwater would eventually change the species composition of a sites' riparian community, i.e., hydri-riparian communities would suffer decreased vigor and extent, and transition to a xeroriparian community.

104. Cottonwood-willow gallery forests require fairly persistent streamflows and shallow (high) groundwater depths to survive. This habitat would die off wherever the San Pedro River dries up.

105. If the water table in the Benson subarea continues to drop, sufficient groundwater likely would not reach the surface to support the springs and riparian vegetation in SPRNCA.

#### **E. Surface Water Diversions Threaten the San Pedro River.**

106. Desert washes provide important ecological and hydrological functions. Among other things, desert washes help reduce erosion and improve water quality, recharge groundwater, provide wildlife habitat and migration corridors, and filter water.

107. Desert washes are lined with larger and denser vegetation than the surrounding habitat, thereby providing forage, cover, and nesting or denning habitat for desert animals. This vegetation is known as xeroriparian habitat.

108. Filling desert washes can alter the volume, duration, and frequency of water flows from those washes into downstream waters. Filling desert washes also can alter the amount of sediment transported from the washes into downstream waters. Changes in

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<sup>1</sup> Fish and Wildlife Serv., Dep't of Interior, Amended Final Reinitiated Biological and Conference Opinion for the Rosemont Copper Mine, Pima County, Arizona 242 (2016).

sediment transport from the washes can alter downstream riparian habitat and the washes' xeroriparian habitat. Such habitat alterations can harm wildlife and aquatic ecosystems.

**F. Climate Change Will Exacerbate Threats to the San Pedro River.**

109. A group of expert hydrologists studied and modeled the impacts of climate change on eight aquifers in the southwest United States, including the San Pedro basin. They found that existing data demonstrates that groundwater recharge in the San Pedro basin will decrease from between 30% to 100% over the next 100 years.

110. EPA has also noted that climate change will worsen already fragile conditions in the southwest, explaining that groundwater pumping in the region is already lowering water tables in this region.

111. A group of climate scientists also found that, based on modeling climate change simulations, the risk of a decade-scale drought occurring this century is at least 50% for most of the greater southwestern United States and may indeed be closer to 80%. The probability of multidecadal megadrought is also high: the likelihood of a 35-year event is between 10% and 50%.

**II. Procedural History of 404 Permitting for the Villages at Vigneto Parcel**

112. For over a decade, multiple developers have sought a 404 permit to develop an integrated, master-planned community in proximity to the San Pedro River.

113. In 2006, Pulte Homes proposed, and received preliminary approval from the City of Benson, to construct an 8,212-acre master-planned community, known as the Whetstone Ranch, adjacent to the San Pedro River. Pulte Homes obtained a 404 Permit from the Corps for the proposed development. However, Pulte Homes never received final approval to construct the development from the City of Benson. As a result, the preliminary approval lapsed, and Pulte Homes did not develop the property. Rather, it sold approximately 12,339 acres of undeveloped lands and transferred its 404 Permit to El Dorado in May 2014.

114. El Dorado has since acquired additional property and now plans to construct an even larger 12,167-acre master-planned community, known as the Villages

at Vigneto, in the same location. The proposed development is almost 50% larger than the prior Whetstone Ranch proposal.

115. Because El Dorado greatly expanded the proposed development covered by the 404 Permit and FWS listed new species under the ESA and designated critical habitat in the area after the 404 Permit was first issued in 2006, the Corps suspended the Permit in 2016 and reinitiated consultation with FWS. The Corps completed an EA and BE and reinstated the 404 Permit in 2018. However, the Corps limited its analysis and consultation with FWS to just 1,919 acres, about 17% of the 12,167-acre development proposed by El Dorado.

116. On January 31, 2019, Plaintiffs filed the original complaint in this action, challenging the Corps' 2018 EA and reinstatement of the modified 404 Permit under NEPA and the CWA. Just two weeks later, on February 15, 2019, the Corps suspended the 404 Permit again, stating that it needed to clarify and correct its analysis in the 2018 EA and determine whether further modifications of the 404 Permit were necessary.

117. Ultimately, the Corps did not expand its scope of analysis to encompass the effects of the development. Nor did the Corps or FWS consult with each other regarding the adverse effects of the Vigneto development on listed species and critical habitat. Instead, the Corps reinstated the 404 Permit on July 26, 2019, based on the same unduly narrow scope of analysis.

### **III. The “Villages at Vigneto” Master-Planned Community**

#### **A. El Dorado’s Plan for an Integrated Community**

118. El Dorado spent two and a half years developing a Community Master Plan (Master Plan) for the Villages at Vigneto. As El Dorado states, the Master Plan was “carefully considered and dynamically planned” to ensure a harmonious, cohesive, connected, and integrated community.<sup>2</sup>

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<sup>2</sup> El Dorado Benson, LLC, The Villages at Vigneto Final Community Master Plan and Development Plan 18 (2016).

119. According to the Master Plan, El Dorado plans to build the Villages at Vigneto around a Town Center—the heart of the community—which would be located on a series of community lakes and contain a mix of commercial and office uses, a portion of which is depicted below:



120. The proposed development would include residences (28,000 dwellings), commercial developments (271 acres/3 million square feet), golf courses (four, totaling 546 acres), a resort (220 acres), open spaces (1,624 acres), and a Town Center (115 acres), among other things. The Master Plan depends on an intricate network of roads, paths, and trails to integrate all of these uses into one harmonious community.

121. The lifestyle of the residents within the Villages at Vigneto depends largely on the degree of mobility/access that the roadways, multi-modal pathways, and sidewalks provide. According to the Master Plan, transportation infrastructure must provide connectivity to regional roadways, address traffic control needs, and create well-coordinated circulation throughout the development.

122. El Dorado prepared a Transportation Master Plan, which sets forth an integrated transportation network that would rely on a series of looping arterial, collector, and local roadways to provide internal circulation within the project and access to State Route 90.

123. The Transportation Master Plan predicts that the majority of vehicle trips would begin and end within the Vigneto development due to this interconnected transportation network, thereby reducing the need for vehicles to exit the development and use State Route 90. This network also ensures that emergency services, such as police and fire crews, can respond to any emergency within the Vigneto development in less than five minutes.

124. The proposed transportation network would also include a network of multi-use paths for golf carts or similar electric vehicles, which would reduce internal trips via automobile by 60% and limit traffic noise, pollution, and congestion. By placing emphasis on multi-use paths, El Dorado claims that the transportation network would encourage greater neighborhood interaction and a more attractive environment.

125. El Dorado prepared a preliminary traffic analysis to ensure that the proposed transportation network would be safe, efficient, and meet traffic control needs. According to that analysis, a 28,000-residence development would normally generate 237,607 vehicle trips per day. For the Villages at Vigneto, however, the report assumed that the vast majority of vehicle travel (60%) would be satisfied internally by alternate means (i.e. golf carts), due to the extensive network of multi-modal paths, and thus would not depend on State Route 90. Even with this interconnected network and alternate modes of transport, the increased traffic along State Route 90 would border on unstable flows. State Route 90 has the capacity to handle only 30,600 vehicles per day.

126. The City of Benson approved the Master Plan for the 12,167-acre Villages at Vigneto because it determined that the Master Plan ensures that the proposed development complies with the City's General Development Plan, including the requirements for land use and circulation.

127. The City of Benson prohibited El Dorado from making any major amendments to the Master Plan without approval from the Benson City Council. Major amendments include, but are not limited to, changing arterial street intersections at locations other than presented in the plan, or materially changing the objectives or goals of the Master Plan.

128. El Dorado signed an agreement with the City of Benson to develop the Villages at Vigneto in accordance with the approved Master Plan.

129. El Dorado applied to the City of Benson to form ten special taxation districts to secure public financing for the construction and acquisition of public infrastructure for the Vigneto development, as set forth in the Master Plan. The City of Benson approved the formation of all ten special taxation districts.

130. El Dorado would rely on these taxation districts to raise almost \$1 billion in public financing needed to develop the infrastructure and utilities essential to the Master Plan. The following table sets forth the amount of public financing El Dorado would obtain through General Obligation (GO) Bonds, Special Assessment (SA) Bonds, and Revenue Bonds.

**The Villages at Vigneto  
Revitalization Districts  
No. 1, No. 2, No. 3, No. 4, No. 5, No. 6 and No. 7  
Anticipated Public Infrastructure Financing Sources**

Description	Total Costs	Sources of Funding			
		GO Bonds (1)	SA Bonds	Revenue Bonds	Developer Contributions
RD 1	\$ 344,119,876	\$ 65,198,630	\$ 88,532,494	\$ 35,964,123	\$ 154,424,630
RD 2	\$ 391,327,222	\$ 74,142,764	\$ 100,677,634	\$ 40,897,784	\$ 175,609,041
RD 3	\$ 331,294,411	\$ 62,768,654	\$ 85,232,858	\$ 34,623,728	\$ 148,669,171
RD 4	\$ 219,899,525	\$ 41,663,236	\$ 56,574,045	\$ 22,981,798	\$ 98,680,446
RD 5	\$ 184,674,656	\$ 34,989,361	\$ 47,511,664	\$ 19,300,431	\$ 82,873,200
RD 6	\$ 231,340,081	\$ 43,830,820	\$ 59,517,383	\$ 24,177,456	\$ 103,814,423
RD 7	\$ 67,619,706	\$ 12,811,559	\$ 17,396,674	\$ 7,066,966	\$ 30,344,507
<b>Total</b>	<b>\$ 1,770,275,477</b>	<b>\$ 335,405,024</b>	<b>\$ 455,442,750</b>	<b>\$ 185,012,287</b>	<b>\$ 794,415,417</b>

Source: Applicant

(1) Proceeds to be provided through Community Facilities District general obligation bonds.

Note: Costs, Bond amounts, and Developer Contributions are shown in 2017 dollars and are likely to increase over time due to inflation.

131. This public financing is contingent on El Dorado's compliance with the Master Plan. With this public money, El Dorado plans to develop the districts in



sequential order on an accelerated timeline, commencing with Units 1 through 9, and moving on to the remaining units (Units 10–14). The Master Plan projects a twenty-year buildout. El Dorado provided the following schedule for constructing 29,400 residential units and 2.9 million square feet of commercial space across the Villages at Vigneto development:

**Exhibit G**  
**The Villages at Vigneto**  
 Revitalization District:  
 No. 1, No. 2, No. 3, No. 4, No. 5, No. 6 and No. 7  
 Estimated Absorption Schedule

Years (1)	RD 1		RD 2		RD 3		RD 4	
	Residential (1)	Commercial (2)	Residential (1)	Commercial (2)	Residential (1)	Commercial (2)	Residential (1)	Commercial (2)
2017-2019	200	-	-	-	-	-	-	-
2020-2024	5,300	244,507	-	-	-	-	-	-
2025-2029	215	337,792	6,499	589,297	3,286	-	-	-
2030-2035	-	-	-	72,814	2,216	560,474	3,652	372,042
2035-2039	-	-	-	-	-	-	-	-
2040-2044	-	-	-	-	-	-	-	-
<b>Total</b>	<b>5,715</b>	<b>582,299</b>	<b>6,499</b>	<b>662,111</b>	<b>5,502</b>	<b>560,474</b>	<b>3,652</b>	<b>372,042</b>

Years (1)	RD 5		RD 6		RD 7		Total	
	Residential (1)	Commercial (2)	Residential (1)	Commercial (2)	Residential (1)	Commercial (2)	Residential (1)	Commercial (2)
2017-2019	-	-	-	-	-	-	200	-
2020-2024	-	-	-	-	-	-	5,300	244,507
2025-2029	-	-	-	-	-	-	10,000	927,089
2030-2035	2,873	13,450	-	-	-	-	8,741	1,018,780
2035-2039	194	299,064	3,842	366,456	1,123	-	5,159	665,520
2040-2044	-	-	-	24,885	-	114,405	-	139,290
<b>Total</b>	<b>3,067</b>	<b>312,515</b>	<b>3,842</b>	<b>391,341</b>	<b>1,123</b>	<b>114,405</b>	<b>29,400</b>	<b>2,995,186</b>

Source: Applicant.

**Footnote**

(1) Represents units.

(2) Represents square footage.

(3) Assumes total anticipated absorption within the time period illustrated.

132. El Dorado has acquired all 12,167 acres of land subject to the Master Plan. El Dorado has continued to acquire additional lands adjacent to the Villages at Vigneto development. On June 1, 2016, El Dorado signed a new development agreement with the City of Benson allowing it to expand the Vigneto development by an additional 2,433 acres on adjacent or contiguous lands that it now owns or will purchase.

133. El Dorado has aggressively marketed the Villages at Vigneto as a world-class community that facilitates a socially interactive lifestyle found nowhere else in North America. El Dorado created a marketing video for the Villages at Vigneto, which is available online at <https://vignetoaz.com/>. The marketing video reinforces El Dorado's reliance on the interconnected transportation network and system of interrelated villages to develop a cohesive 12,167-acre community.

**B. El Dorado Seeks 404 Permits through a Phased Permitting Process.**

134. Even though the City of Benson approved the Master Plan's cohesive 12,167-acre plan for the Villages at Vigneto, El Dorado asked the Corps to limit its review of the 404 Permit to just the prior Whetstone Ranch proposal, which covered only 8,212 acres. If El Dorado can secure the 404 Permit for 8,212-acres, it asserts that it will obtain additional 404 Permits for the remaining 3,955 acres of the Vigneto development at a later time.

135. The Corps, thus, based its permit boundary on the prior 8,212-acre Whetstone Ranch proposal, not the 12,167-acre Villages at Vigneto development proposed by El Dorado.

136. The Corps labeled its 8,212-acre permit boundary as Phase I of the Vigneto Development. The Master Plan does not, however, identify an 8,212-acre "phase" of the planned development.

137. The so-called "Phase I" permit boundary does not align with the boundaries of the significantly larger 12,167-acre proposed Villages at Vigneto.

138. The permit boundary used by the Corps does not align with the planning units laid out in the Master Plan, either. Multiple planning units overlap and extend beyond the 8,212-acre permit area, including Units 10 and 11.

139. The remaining planning units (Units 12–14), which are outside of the 8,212-acre permit boundary, do not contain core elements of the development like the Town Center or Golf Center. Nor do they contain any Information Centers, Community Recreation Centers, or Public Services. The remaining planning units contain unique elements, such as the 220-acre resort, that are part of El Dorado's comprehensive vision for the Villages at Vigneto.

**C. El Dorado Needs a 404 Permit to Develop an Integrated Master-Planned Community.**

140. El Dorado requested the 404 Permit for the Vigneto development based on its purpose and need to develop "a master-planned community with interrelated villages

in or proximate to the City of Benson, Arizona, and proximate to regional transportation infrastructure.”<sup>3</sup>

141. The Corps stated that the overall project purpose is to build a master-planned community consisting of residential, commercial, and recreational facilities, including all appurtenant features such as building pads, roads, and utilities, in the Benson, Arizona, area that is proximate to local, regional, and national transportation facilities. It noted that El Dorado seeks to construct a development with interrelated villages and a well-coordinated transportation network that provides for circulation throughout the development.

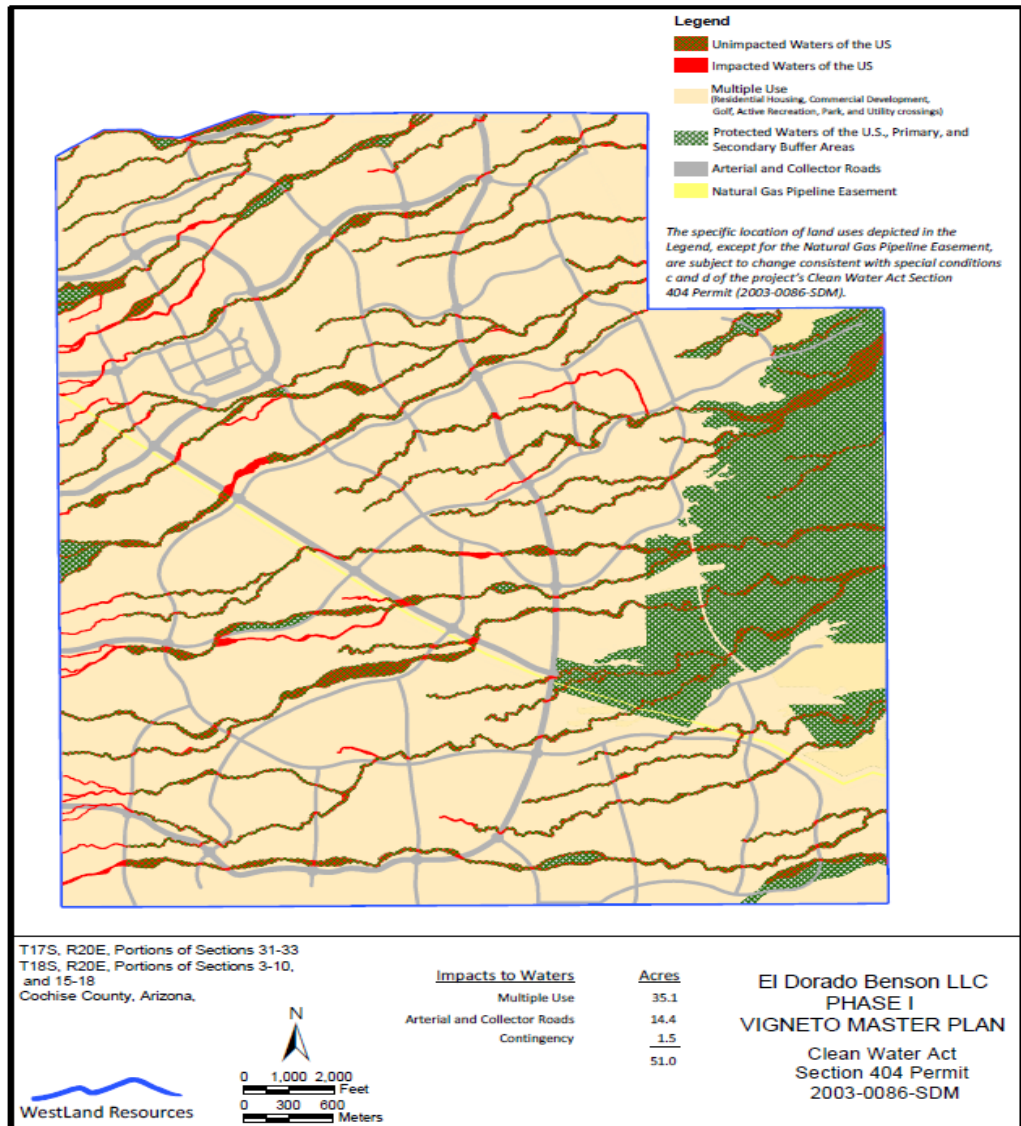
142. The Corps’ 8,212-acre permit area is characterized by a dense network of 475 acres of braided ephemeral streams directly tributary to the San Pedro River. There are at least 75 miles of jurisdictional washes (i.e., waters of the United States) within the permit boundary. These desert washes weave across the project site, as depicted by the red lines in the map below:

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<sup>3</sup> U.S. Army Corps of Eng’rs, Dep’t of the Army, Amended and Superseded Memorandum for Record: Department of the Army Environmental Assessment and Statement of Findings for Re-Evaluation of Previously Issued Department of the Army Standard Individual Permit Application, File No. SPL 2003-00826 at 14 (2019) [hereinafter “2019 Revised EA”].



143. El Dorado would need to fill these jurisdictional washes, at over 350 locations broadly dispersed across the site, to develop the transportation network and utility crossings essential to the Master Plan, as depicted below:



144. El Dorado would also have to fill jurisdictional washes to achieve the harmonious balance of uses set forth in the Master Plan, including residential housing, commercial development, golf courses, recreation centers, and parks.

145. El Dorado requested a 404 Permit to fill 51 acres of jurisdictional waters associated with the 8,212-acre permit area.

146. The jurisdictional washes on the site are so ubiquitous that El Dorado requested and was granted a special “flexibility” condition in the Permit to allow fill

activities anywhere along the 475 acres of desert washes on the property, instead of at fixed locations.<sup>4</sup>

147. El Dorado submitted a Habitat Mitigation and Monitoring Plan (HMMP) to mitigate impacts on jurisdictional washes. The HMMP includes onsite mitigation activities (i.e., avoiding jurisdictional washes on the development site and preserving upland buffers) as well as activities on a 144-acre offsite parcel along the San Pedro River.

#### **IV. Granting a 404 Permit Would have a Significant Impact on the Environment.**

##### **A. The Vigneto Development Threatens The San Pedro River and SPRNCA.**

148. The Vigneto development would significantly impact the San Pedro River and SPRNCA by altering surface runoff patterns within the watershed and increasing the depth to groundwater.

##### **1. The Vigneto Development Would Alter Surface Runoff Patterns.**

149. Hydrologists with the U.S. Department of Agriculture (USDA) and EPA conducted a hydrologic modeling study of the previously proposed Whetstone Ranch development to assess the impacts of that development on the San Pedro River. Their results “definitively indicate that the proposed land-use changes [for the Whetstone Ranch] will result in significant alteration of the hydrologic regime both within and downstream of the impacted watersheds where they empty into the San Pedro River.”<sup>5</sup>

150. Increases in sediment yield would be most significant for the smaller, more frequent rainfall events. For the two-year, one-hour event, average runoff and sediment yield would have increased 413% and 231%, respectively, for the Whetstone Ranch proposal.

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<sup>4</sup> 2019 Revised EA at 137–38.

<sup>5</sup> L. Levick et al., U.S. Dep’t of Agric. Research Serv., U.S. Env’tl. Prot. Agency, EPA/600/R-06/158, ARS/1873, Simulated Changes in Runoff and Sediment in Developing Areas near Benson, Arizona 1 (2006) [hereinafter “Levick et al. (2006)”]

151. The Vigneto development is at least 3,955 acres larger than the Whetstone Ranch proposal modeled by the USDA and EPA hydrologists, increasing impervious surfaces within the same watersheds. Runoff from Vigneto, thus, would be even greater than that amount projected for Whetstone Ranch, with even more severe impacts to the San Pedro River and wildlife that depends upon the River.

152. Increased surface runoff and/or sediment yield would result in harmful impacts to the aquatic ecosystem. These impacts would include more frequent and severe flooding, stream channel adjustment, stream bank erosion, water quality degradation from sedimentation and contaminant transport, habitat destruction, and decreased biological diversity.

## **2. Groundwater Pumping Would Increase Depth to Groundwater and Capture Surface Flows.**

153. The City of Benson allocated 12,000 acre-feet of water per year to the Villages at Vigneto, nearly 15 times City's current groundwater demand of approximately 800 acre-feet per year.

154. El Dorado would need at least 6,032 acre-feet per year for the 8,212 acres of the development in the permit area and up to 8,427 acre-feet per year for the entire 12,167-acre development. This magnitude of pumping would draw down the regional aquifer by hundreds of feet over the next 100 years, according to the Arizona Department of Water Resources (ADWR).

155. Groundwater pumping at the Vigneto development poses two threats to surface flows on the San Pedro River. First, pumping intercepts groundwater flowing east from the Whetstone Mountains that otherwise would flow into the San Pedro River and maintain the River's base-flows. Second, groundwater pumping lowers the water table in the regional aquifer to levels that are too low for the aquifer's groundwater to flow into the alluvial aquifer and the San Pedro River.

156. Dr. Robert Prucha, an expert in hydrogeology and water resource engineering, updated a prior, peer-reviewed groundwater model to evaluate the potential

impacts of groundwater pumping at the Villages at Vigneto development. The groundwater model predicts that groundwater pumping at the Vigneto development would spread to distant quarters of the aquifer system due to the effects of the aquifer's confining layer.

157. The model predicts that groundwater pumping at the Vigneto development could drawdown the aquifer below the San Pedro River east of the development by five meters after 100 years. The groundwater model also predicts that groundwater drawdown could adversely impact spring flow in the St. David Cienega area on the order of 0.25 to 0.45 meters after 100 years.

158. Another expert hydrologist reviewed Dr. Prucha's groundwater model and concluded that the model is reasonable given that St. David Cienega is a known discharge point for groundwater in the basin—i.e., a location where groundwater percolates all the way to the surface. The same hydrologist rejected the Corps' prior assumption that the groundwater aquifer was not connected to the unconfined aquifer that feeds the San Pedro River and St. David Cienega.

159. The magnitude of predicted drawdown would have a significant impact on the San Pedro River along this stretch, which is already losing water to the aquifer as groundwater levels decline. The projected drawdown would increase depth to groundwater, eventually resulting in the loss of riparian communities (i.e., hydri-riparian communities would suffer decreased vigor and extent, eventually transitioning to xeroriparian communities).

160. The projected groundwater drawdown could also capture groundwater discharges at St. David Cienega, potentially impairing riparian habitat at SPRNCA and infringing on the federally reserved groundwater rights that support these areas.

161. Climate change will exacerbate the impacts of groundwater drawdown on the San Pedro River, SPRNCA, and riparian habitat.



**B. The Vigneto Development Would Negatively Impact Listed Species and Critical Habitat.**

162. The proposed Vigneto development would adversely affect listed species by degrading or eliminating habitat, increasing surface runoff and erosion, and capturing surface water and base flows along the San Pedro River and at St. David Cienega.

**1. The Vigneto Development Would Adversely Affect the Jaguar.**

163. The jaguar is the largest species of cat native to the Western Hemisphere. Its current range is restricted to Mexico, southern Arizona, and New Mexico.

164. In 1972, FWS listed the jaguar as endangered under the Endangered Species Conservation Act of 1969—the ESA’s precursor—after hunting had virtually eradicated the species from the United States. FWS extended protections to jaguars in the United States in 1997. Final Rule to Extend Endangered Status for the Jaguar in the United States, 62 Fed. Reg. 39,147 (July 22, 1997). FWS identified the clearing of habitat, destruction of riparian areas, and fragmentation or blocking of movement corridors as threats that would prevent the species from recolonizing its historic range in the United States. *Id.* at 39,154.

165. In 2014, FWS designated 94,269 acres of the Whetstone Mountains and foothills as critical habitat essential for the recovery of the species. Designation of Critical Habitat for Jaguar, 79 Fed. Reg. 12,572, 12,572 (Mar. 5, 2014). Jaguars are known to avoid human development and highly disturbed areas.

166. The jaguar’s critical habitat is adjacent to the 8,212-acre permit area of the Vigneto development. It is likely that jaguars move across the Vigneto parcel, or travel in the vicinity of the development’s impacts, given recent sightings of jaguars in the Huachuca Mountains.

167. The remaining 3,995 acres of the Vigneto development overlap with approximately 650 acres of designated jaguar critical habitat. Development on these lands would eliminate or alter the jaguar’s critical habitat, thereby affecting the species.

168. The Vigneto development would also result in indirect effects to the species due to increased activity, as well as increased noise, olfactory, and light pollution, all of which would occur in areas within or adjacent to the jaguar's critical habitat.

**2. The Vigneto Development Would Adversely Affect the Western Yellow-Billed Cuckoo.**

169. FWS listed the western distinct population of the yellow-billed cuckoo as a threatened species on October 3, 2014, as a result of habitat loss and degradation caused by human interference with river hydrology and encroachment from livestock grazing and agriculture. Determination of Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo (*Coccyzus americanus*), 79 Fed. Reg. 59,992, 60,015–18 (Oct. 3, 2014). FWS specifically listed groundwater diversion as one cause of the cuckoo's habitat loss. *Id.* at 60,018.

170. FWS concluded that habitat in and around the San Pedro River is essential for the recovery of the western yellow-billed cuckoo. Accordingly, FWS proposed an 83-mile segment of the upper and middle San Pedro River—from the Mexico border north past the Narrows—as critical habitat for the species. Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo, 79 Fed. Reg. 48,548, 48,563 (Aug. 15, 2014). Hydrology along the San Pedro River must be managed to mimic natural flows to conserve the habitat features essential to the conservation of the cuckoo. *Id.* at 48,558–60.

171. Surveys document the presence of western yellow-billed cuckoos along the San Pedro River adjacent to the proposed Villages at Vigneto development, including at the offsite parcel where El Dorado proposes to undertake mitigation activities.

172. The Villages at Vigneto site contains suitable xeroriparian nesting and foraging habitat in the numerous ephemeral channels and portions of the uplands within the project area. Cuckoos likely use this habitat to travel between two areas of occupied habitat (the San Pedro River and Guindani Canyon).

173. The Villages at Vigneto would transform these washes and woodlands into a master-planned community, adversely affecting cuckoos that use or move through this habitat. The partial avoidance and small buffering of desert washes proposed by El Dorado are not sufficient to ensure there are no direct or indirect effects to yellow-billed cuckoo habitat on the development site.

174. The Villages at Vigneto would also transform thousands of acres of natural upland habitat into paved, impervious surfaces. The increased runoff and sediment generated by these impervious surfaces would likely affect yellow-billed cuckoos that depend on downstream habitat along the San Pedro River, including proposed critical habitat.

175. Groundwater pumping at the Vigneto development would have a measurable impact on surface water levels along the San Pedro River, as documented above. Reduced surface flows would adversely affect the western yellow-billed cuckoo by reducing (1) depth to groundwater and wetted length and width of the streambed that would decrease riparian and mesquite habitat quality and quantity; (2) prey population; and (3) flood flows that promote regeneration, as well as scouring of regeneration that grows in the narrowed stream channel.

176. Furthermore, the cuckoo relies on cottonwood-willow gallery forests, which in turn depend on fairly persistent streamflows and shallow (high) groundwater depths to survive. By reducing these critical flows, groundwater pumping at the Vigneto development would likely have an adverse effect on the cuckoo and its proposed critical habitat.

177. Groundwater pumping would cause a transition of the San Pedro River from a hydriparian to xeriparian corridor with significant adverse effects for cuckoos and their proposed critical habitat. Climate change will further exacerbate the impacts of groundwater drawdown on the cuckoo and its proposed critical habitat.

**3. The Villages at Vigneto Development Would Adversely Affect the Southwestern Willow Flycatcher.**

178. The southwestern willow flycatcher is a riparian-dependent bird, nesting along rivers, streams, and other wetlands. The San Pedro River serves as a migration corridor for southwestern willow flycatchers traveling between wintering grounds in Latin America and breeding grounds in the southwestern United States.

179. FWS listed the southwestern willow flycatcher as endangered in 1995 due to large-scale losses of southwestern wetlands, particularly cottonwood-willow riparian habitats. Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher, 60 Fed. Reg. 10,694, 10,707 (Feb. 27, 1995).

180. FWS first designated critical habitat for the southwestern willow flycatcher in 1997. FWS revised the flycatcher critical habitat in 2013. The revised designation extended flycatcher critical habitat an additional 17.9 miles upstream along the 100-year floodplain of the San Pedro River to cover the lower 78.4 miles of the River from its confluence with the Gila River to the Narrows. Designation of Critical Habitat for Southwestern Willow Flycatcher, 78 Fed. Reg. 344, 376–77 (Jan. 3, 2013). In revising the critical habitat designation, FWS recognized that this stretch of San Pedro River habitat is essential to the conservation of the flycatcher and has substantial recovery value. *Id.*

181. FWS identified groundwater and surface water diversions as one cause of habitat loss. 60 Fed. Reg. at 10,698, 10,707–08. FWS also explained that development near rivers can result in direct loss of riparian habitats and in stream channelization, which can affect riparian habitat suitability. *Id.* at 10,702, 10,707.

182. As documented above, the Vigneto development would significantly alter surface hydrology, transforming thousands of acres of upland habitat into impervious, paved surfaces. The runoff and sediment generated by these impervious surfaces would likely affect southwestern willow flycatchers that depend on downstream critical habitat along the River.

183. Groundwater pumping to supply the Vigneto development likely would reduce stream flows in the San Pedro River. Because the San Pedro River north of the Narrows may be hydrologically connected to the regional aquifer in the Benson sub-area immediately to the south, groundwater pumping and reduced base flows in the Benson subarea may adversely affect San Pedro River stream flows north of the Narrows, including at least one of the two perennial reaches near Cascabel (Three Links) that presently provides a nesting stronghold for this species.

184. Reduced stream flows in the San Pedro north of the Narrows would alter or destroy the riparian habitat in the flycatcher's critical habitat.

#### **4. The Villages at Vigneto Would Adversely Affect the Northern Mexican Gartersnake.**

185. The northern Mexican gartersnake lives in near aquatic habitats in parts of Arizona, New Mexico, and Mexico, including the San Pedro River. In southern Arizona, the snake generally is found in cienegas (wetlands) and stock tanks (livestock watering tanks), as well as slow-moving river habitat and adjacent woodlands.

186. FWS listed the northern Mexican gartersnake as threatened under the ESA on July 8, 2014, due to threats from non-native species and land uses that divert water from or dry-up the snake's aquatic habitats. Threatened Status for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 79 Fed. Reg. 38,678, 38,678 (July 8, 2014). FWS documented threats from increased land development adjacent to riparian habitat and related reductions in stream flow, removal or alteration of vegetation, and increased frequency of adverse human interactions with gartersnakes. *Id.* at 38,708–09. FWS further identified groundwater pumping for urban developments in the San Pedro watershed as a threat to the species. *Id.* at 38,704–05.

187. FWS concluded that habitat adjacent to and within the San Pedro River is essential for the recovery of the northern Mexican gartersnake. Accordingly, FWS proposed the length of the San Pedro River—from the Mexico border to the River's confluence with the Gila River—encompassing 22,669 acres, as critical habitat for the

species. Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 78 Fed. Reg. 41,550, 41,566–67 (July 10, 2013).

188. FWS considers the upper San Pedro River to be occupied by the gartersnake. FWS's proposed critical habitat for the gartersnake includes habitat along the San Pedro River in proximity to the Vigneto parcel.

189. Gartersnakes may occasionally occur in the artesian spring system located at St. David Cienega. Groundwater pumping at the Vigneto development likely would reduce stream flows at this site, as documented above, thereby altering or destroying the riparian habitat on which the gartersnake relies.

190. The runoff and sediment generated by the Vigneto development also would likely affect northern Mexican gartersnakes that depend on downstream critical habitat along the River.

191. Appreciable direct and indirect effects to the gartersnake, including critical habitat, are reasonably certain to occur.

##### **5. The Villages at Vigneto Would Adversely Affect the Huachuca Water Umbel.**

192. The Huachuca water umbel is an herbaceous, semiaquatic perennial plant with slender, erect leaves that grow from creeping rhizomes. Determination of Endangered Status for Three Wetland Species Found in Southern Arizona and Northern Sonora, Mexico, 62 Fed. Reg. 665, 666 (Jan. 6, 1997). In 1997, FWS listed the umbel as an endangered species, *id.* at 665, and, two years later, designated critical habitat along 51.7 miles of streams or rivers in Cochise and Santa Cruz Counties, Arizona, including 33.7 miles of the San Pedro River within SPRNCA, Designation of Critical Habitat for the Huachuca Water Umbel, a Plant, 64 Fed. Reg. 37,441, 37,441, 37,444 (July 12, 1999); 50 C.F.R. § 17.96.

193. The umbel depends on a stream channel that is relatively stable but subject to periodic flooding, refugial sites (sites safe from catastrophic flooding), and a substrate (soil) that is permanently wet or nearly so for growth and reproduction of the plant. 64

Fed. Reg. at 37,442. Given these requirements, FWS identified groundwater pumping as a clear and present threat to the ability of the San Pedro River to support the species. 62 Fed. Reg. at 682. As FWS explained, “withdrawal of water from the [Sierra Vista subwatershed] aquifer in excess of recharge threatens the baseflow of the upper San Pedro River and, in turn, threatens [umbel] habitat.” *Id.* at 676.

194. A retired FWS employee observed a ten-meter long and approximately 0.5 meter wide patch of umbel in May of 2017 next to St. David Monastery. This stretch of the San Pedro River is intermittent and depends heavily on discharge flows from St. David Cienega.

195. Any reduction in flow at St. David Cienega caused by pumping at the Vigneto development would adversely affect the species.

**V. EPA, FWS, and the Public Urge the Corps to Analyze the Effects of the Vigneto Development.**

196. EPA submitted multiple comment letters urging the Corps to prepare a NEPA analysis that corresponds to the size and design of the Master Plan to adequately address the direct, secondary, and cumulative impacts of the 12,167-acre master-planned community. In addition, EPA explained that the Corps needed to ensure adequate mitigation of impacts to jurisdictional waters of the United States.

197. During the Corps’ re-evaluation of the 404 Permit following its suspension in 2016, EPA reiterated its prior objections to the 404 Permit for the Whetstone Ranch. EPA objected to: (1) limiting of the Corps’ NEPA scope of analysis area through an unrealistic, impracticable No Federal Action Alternative that fails to meet the project purpose; (2) the lack of an adequate analysis of alternatives to demonstrate the maximum practicable level of avoidance and minimization of adverse impacts to waters of the United States, as required by Section 404(b)(1) of the CWA; and (3) the lack of an adequate compensatory mitigation plan to replace the functions and values of waters lost to unavoidable impacts.

198. Pursuant to 40 C.F.R. § 230.12(a)(3)(iv), the 404(b)(1) Guidelines, and NEPA, EPA recommended that the Corps reconsider its findings, require meaningful compliance from the applicant, or deny the Permit.

199. FWS also submitted letters criticizing the Corps' review of the proposed Vigneto development. As far back as 2004, FWS warned the Corps that it had to expand its scope of analysis and action areas for the prior Whetstone Ranch development to encompass "the total acreage of the proposed development."<sup>6</sup>

200. In July 2015, FWS requested that the Corps consult on the proposed Vigneto development and concluded that it was reasonably certain that the development's direct and indirect effects would adversely impact listed species and habitat.

201. Furthermore, FWS noted that the project area for the proposed Vigneto development was appreciably larger than that for the prior Whetstone Ranch. Consequently, FWS determined that the Corps should reconsider the impact of its permit decision on listed species and habitat in light of the larger affected area.

202. FWS sent the Corps another letter in October 2016, reaffirming its determinations that (1) "appreciable direct and indirect effects to threatened and endangered species, including proposed and final critical habitat, are reasonably certain to occur" as a result of the development; and (2) the Corps had to assess the "appreciably larger" size of the Vigneto development, noting that it was "concerned that the action will be implemented in a piecemeal manner that does not include analysis of its full environmental impact."<sup>7</sup> In light of these concerns, FWS stated that it "d[id] not concur with [the Corps'] determination that the proposed [mitigation] may affect, but is not

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<sup>6</sup> Letter from Steven L. Spangle, Field Supervisory, U.S. Fish and Wildlife Serv., to Cindy Lester, Regulatory Branch Chief, U.S. Army Corps of Eng'rs at 1 (July 9, 2004).

<sup>7</sup> Letter from Steven L. Spangle, Field Supervisor, Ariz. Ecological Servs., Filed Office, Fish and Wildlife Serv., to Sally Diebolt, Chief, Ariz. Branch, L.A. Dist., U.S. Army Corps of Eng'rs 4 (Oct. 14, 2016).



likely to affect” listed species and critical habitat.<sup>8</sup> FWS thus refused to terminate consultation under the ESA.

203. The Corps stated in its 2019 EA that it received a total of 4,467 letters, emails, or phoned-in comments from the public. In addition, the public submitted another approximately 15,000 letters roundly condemning the proposed 404 Permit due to the unanalyzed impacts of groundwater pumping on the San Pedro River and ecosystem.

204. Plaintiffs submitted comments to the Corps on December 4, 2017, urging the Corps to prepare a thorough EIS analyzing the environmental impacts of the Villages at Vigneto development. Plaintiffs further demanded formal consultation, including the preparation of a comprehensive Biological Opinion to evaluate the impacts of the Vigneto Development on listed species and critical habitat.

205. Plaintiffs submitted additional comments to the Corps on January 12, March 16, and June 15, 2018, as well as on March 8, March 20, and May 3, 2019, identifying new information regarding the impacts of the proposed Vigneto development. Plaintiffs also sent the May 3, 2019, letter and attachments to FWS.

## **VI. The Corps Impermissibly Limits Its Analysis of the Vigneto Development.**

206. On July 26, 2019, the Corps finalized an EA and Statement of Findings in connection with the 404 Permit for the 8,212-acre permit area for the Villages at Vigneto.

### **A. The Corps Limits the Scope of Analysis Area and Foregoes Preparation of an EIS.**

207. The Corps’ scope of analysis area did not encompass the 12,167-acre Vigneto development, as proposed by El Dorado in the Master Plan.

208. Rather, the Corps limited the scope of analysis area to include only 1,775 acres within the Vigneto development, as well as the 144-acre offsite parcel, for a total of 1,919 acres. The 1,775-acre onsite area consists of (1) 475 acres of waters of the United States, (2) 100 acres of upland areas adjacent to the washes to be filled, (2) 385 acres of

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<sup>8</sup> *Id.* at 2.

primary buffers around all unfilled washes, and (4) 815 acres of upland secondary buffers around the unfilled washes.

209. The Corps concluded that the effects of its decision within this scope of analysis area would not have a significant impact on the environment. Accordingly, the Corps did not prepare a comprehensive EIS.

210. The Corps narrowed its scope of analysis area based on the assumption that someone else could hypothetically develop the property, separate and apart from the proposed Vigneto development, without a 404 Permit (i.e., the No Action Alternative). There is no basis for this assertion, and it is contradicted by the evidence.

211. Neither the Corps nor El Dorado has provided *any* development plan demonstrating how they would avoid jurisdictional washes while constructing 28,000 residences on the site. This oversight is problematic given the Corps' admission that "the development of over 8,000 acres *demand*s . . . a high level of planning."<sup>9</sup> While the Corps assumes that development could occur on a random, *ad-hoc* basis, this assumption violates "[s]ound urban planning principles"<sup>10</sup> and would lead to fragmented subdivisions that lack the critical "sense of place and cohesive continuity afforded through development of a master planned community."<sup>11</sup>

212. Neither the Corps nor El Dorado have identified a feasible transportation plan under the No Action Alternative, either. To the contrary, El Dorado explained in 2018 that several "key objectives, principally related to transportation and access and to land use" cannot be achieved without the 404 Permit.<sup>12</sup> An "effective north-south transportation network" would not be possible due to the jurisdictional washes

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<sup>9</sup> U.S. Army Corps of Eng'rs, Dep't of the Army, Department 9 of the Army Environmental Assessment and Statement of Findings for the Above-Referenced Standard Individual Permit Application, SPL 2003-00826 at 49 (2018) (emphasis added) [hereinafter "2018 EA"].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 51.

<sup>12</sup> WestLand Resources, Villages at Vigneto Section 404(B)(1) Alternatives Analysis at 20 (2018) [hereinafter "2018 404(b)(1) Analysis"].

crisscrossing the property.<sup>13</sup> As a result, access to the property would “be limited to right in and right out turning movements” along State Route 90, precluding an integrated roadway system and constraining “the integration of multi-modal transportation pathways with parks, golf courses, and the Village Center.”<sup>14</sup>

213. There is no evidence that this hypothetical road system under the No Action Alternative could handle 237,607 vehicle trips per day—the amount of vehicle trips projected in the Master Plan for a community of 28,000 residences and commercial spaces. El Dorado has not prepared a Transportation Master Plan or conducted a preliminary traffic analysis to ensure that the No Action Alternative includes a safe and effective transportation network.

214. Due to the lack of an interconnected transportation network under the No Action Alternative, residents would rely to a much greater extent on State Route 90 to provide north-south access to other portions of the hypothetical development. The resultant increase in vehicle trips would overwhelm the capacity of State Route 90, which can only handle 30,600 trips per day within an acceptable level of service. Traffic volumes in excess of 30,600 trips would lead to forced or breakdown flow. Drivers would experience at least an 80-second delay at every signalized intersection proposed under the No Action Alternative for State Route 90 (of which there would be five) and at least a 50-second delay at every unsignalized intersection (of which there would be 15).

215. Under such circumstances, fire, medical, or police services would not be able to respond to emergencies within 5 minutes. As a result, Healthcare Innovations, Inc., the ambulance service provider for the City of Benson, could not meet the requirements of its Certificate of Necessity, which sets forth specific response times for emergency services that are approved by the Arizona Department of Health Services. *See* Ariz. Admin. Code § R9-25-902(A)(2)(d).

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<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 7–8.

216. El Dorado noted how a No Action Alternative would greatly limit traffic flow and prevent an integrated configuration of neighborhoods throughout the project site. As El Dorado explained in 2019:

A large percentage of the impacts to [WOTUS] are associated with linear wash crossings that are distributed across the Development Project property and are *necessary* to implement the community's . . . traffic circulation plans. This wide distribution cannot be practically concentrated or changed substantially *without disrupting the overall plan* [for the development].<sup>15</sup>

217. Due to the jurisdictional washes, El Dorado would likely subdivide and sell the property rather than develop it without a 404 Permit.

218. There is no evidence that another developer could sell 28,000 residences on this site, without the allure of the Villages at Vigneto master-planned community. The City of Benson projects a housing unit growth rate of 4% over the next twenty years in normal circumstances—i.e., without the Vigneto development—resulting in an increase in total housing units from 3,065 in 2020 to 3,325 in 2040. There is no evidence the City of Benson's population would grow by over 950% over this time frame—the amount of growth necessary to absorb the 28,000 new residential units proposed for the Vigneto development. Indeed, the high-growth projection for the City of Benson over this twenty-year timeframe is only 20%, resulting in at most 3,700 new residences by 2040.

219. The reduced housing demand would delay construction under the No Action Alternative. El Dorado claims that it would initially develop vineyards and nut orchards on up to 3,000 acres of the 8,212-acre permit area under the No Action Alternative, instead of the homes and businesses specified in the Master Plan. But it lacks approval from ADWR to pump additional groundwater to support the vineyards and orchards.

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<sup>15</sup> WestLand Resources, Villages at Vigneto Section 404(B)(1) Alternatives Analysis 16 (2019) (emphasis added) [hereinafter "2019 Revised 404(b)(1) Analysis"].

220. Furthermore, El Dorado has no plans and expresses no intention to develop the additional 3,955 acres of land identified in the Master Plan, if it does not receive the 404 Permit for the 8,212-acre permit area.

221. In fact, El Dorado does not have approval from the Benson City Council to develop any homes under the No Action Alternative, as this alternative would require major amendments to the Master Plan to increase the number of access points along State Highway 90 and would materially change the objectives/goals of the Master Plan. Due to erosion hazard potential and lack of roadway connectivity, the No Action Alternative may significantly hinder the potential of the City of Benson to ensure the required mix of housing to meet the City's residential development needs and objectives. Moreover, the City's housing potential stock and diversity would be reduced significantly.

222. There is no evidence El Dorado can obtain public financing to develop the No Action Alternative. In August 2017, El Dorado petitioned for the creation of special taxing districts that would allow it to raise approximately \$1 billion in public financing for the Vigneto Development. This approved funding would not be available under the No Action Alternative, as it does not comply with the Master Plan.

223. Both the Corps and El Dorado repeatedly concluded that the No Action Alternative was unreasonable and impracticable because it would not meet El Dorado's overall project purpose and need to develop a cohesive master-planned community on the site.

224. In its 2018 EA, the Corps explained that it relied on four criteria for determining whether the No Action Alternative could meet the project purpose and need, including achieving objectives of the approved Master Plan: (1) transportation and access, (2) land uses, (3) open spaces, and (4) community infrastructure. Based on a systematic evaluation of these factors, the Corps concluded that "[t]he No Federal Action Alternative would not meet the Overall Project Purpose and the Permittee's need for

action, therefore the Corps has determined that the No Federal Action is not practicable in accordance with the requirements of the 404(b)(1) Guidelines.”<sup>16</sup>

225. Likewise, El Dorado admitted in its 2018 404(b)(1) analysis that it would not be able to meet its project purpose of developing an interconnected master-planned community or retain its core concept of interconnected villages without a 404 Permit.

226. Yet, in the 2019 revised EA, the Corps reversed its position and now asserts that the No Action Alternative is feasible because it meets the purpose and need. The Corps entirely fails to explain, let alone acknowledge, this change from the 2018 EA to the 2019 revised EA. Neither the underlying facts nor El Dorado’s proposed project design for the No Action Alternative have changed since the Corps issued the 2018 EA.

227. To the contrary, the revised EA still acknowledges that there would be fundamental differences between the No Action Alternative and the proposed Vigneto development. For example, the Corps explained that an essential part of the Vigneto development was the establishment of “an efficient system of arterial, collector, and local roadways” and the construction of “multi-modal pathways to link residences to trip generators . . . to encourage alternative means of transportation” in order to reduce vehicle miles traveled within the development.<sup>17</sup> The Corps stated that “[t]he lifestyle of the residents within the Villages at Vigneto depends largely on the degree of mobility/access that the roadways, multi-modal pathways, and sidewalks provide” and that “[t]ransportation infrastructure would provide connectivity to regional roadways, address traffic control needs, and create well-coordinated circulation throughout the development.”<sup>18</sup>

228. The No Action Alternative would lack this critical infrastructure and the connectivity essential to a master-planned community. Indeed, the Corps acknowledges

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<sup>16</sup> 2018 EA at 52.

<sup>17</sup> Revised 2019 EA at 14.

<sup>18</sup> *Id.*

in its 2019 EA that “no multimodal trails would be constructed” without a 404 Permit due to the jurisdictional washes.<sup>19</sup>

229. Even El Dorado acknowledged in its 2019 revised 404(b)(1) analysis that the No Action Alternative “would change the nature and character of the resulting development.”<sup>20</sup>

230. El Dorado has not taken steps to construct the Villages at Vigneto without a 404 permit. Just seven days after the first suspension of the 404 Permit in 2016, El Dorado stated that it did not expect any delays in construction and would press forward with its plans to develop the property in 2017. However, El Dorado did not begin construction in the two years the Permit was suspended, confirming its dependence on the 404 Permit.

231. When the Corps reissued the Permit in 2018, El Dorado expressed its plans to break ground on the Villages at Vigneto development in the first quarter of 2019. The Corps, however, subsequently suspended the Permit in February 2019. El Dorado did not undertake any construction on the site while the Permit was suspended, underscoring once again its dependence on the 404 Permit.

**B. The Corps Fails to Consider Impacts on the Unique Characteristics of SPRNCA and the San Pedro River from Groundwater Drawdown.**

232. The Corps accepted a report from Dr. Prucha, discussing the impact of groundwater pumping for the Vigneto development on surface flows in the San Pedro River.

233. The Corps constrained its consideration of the effects modeled by Dr. Prucha by limiting his model to apply only to water use within the narrow 1,919-acre scope of analysis area, rather than the entire 12,167-acre Vigneto development. As a result, the Corps considered only a fraction of the groundwater drawdown from the Vigneto development modeled by Dr. Prucha. The Corps asserted that groundwater

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<sup>19</sup> *Id.* at 61.

<sup>20</sup> 2019 Revised 404(b)(1) Analysis at 19.

pumping within its narrow scope of analysis area would cause only a two to three inch drawdown of the aquifer east of the development underlying the San Pedro River after 100 years, and disregarded the larger five meter drawdown identified in the model. The Corps then dismissed these impacts, reasoning that they would be far less than the expected natural seasonal fluctuations in the depth to groundwater along the San Pedro River.

234. The Prucha report does not support the Corps' conclusion. In fact, it showed drawdown levels in the aquifer across all seasons. Thus, even limiting the effects of drawdown to just the Corps' narrow scope of analysis, the two to three inch drawdown the Corps acknowledged would be *on top of* the existing seasonal fluctuation in depth to groundwater under the River.

235. Even an additional two to three inch drawdown in groundwater levels in the arid southwest is a measurable effect that would cause significant adverse impacts on surface water flows and riparian habitat.

236. The Corps also asserted that the Prucha report was based on conservative assumptions, and so, overestimates the amount of groundwater drawdown caused by the Vigneto development.

237. However, the Prucha report did not include impacts from climate change, nor did it include pumping from municipal groundwater wells in the area. The Prucha report focused on pumping just from the Vigneto development and ignored expected and known impacts from other sources. The Prucha report, therefore, likely underestimated the impacts of pumping for the Vigneto development on the underlying aquifer and surrounding aquatic environment.

### **C. The Corps Refuses to Consider Cumulative Impacts from the Vigneto Development.**

238. The Corps acknowledged that development of the remaining 3,955 acres of the Vigneto parcel covered by the Master Plan constitutes reasonably foreseeable future development that it had to consider in its cumulative effects analysis.



239. However, the Corps did not analyze the impacts of the 404 Permit in connection with reasonably foreseeable development on those remaining acres. For example, in discussing cumulative impacts to jurisdictional waters, the only reference the Corps makes to reasonably foreseeable future actions is that “known future projects are expected to have minimal effect to waters of the United States.”<sup>21</sup> The majority of the Corps’ discussion of reasonably foreseeable cumulative effects is limited to statements that “[w]hen considered with past, present, and reasonably foreseeable future actions, the Permittee’s Preferred Alternative would have minor cumulative contribution to adverse effects.”<sup>22</sup>

240. The Corps did not consider the cumulative effects of the permitted activity on the jaguar in connection with the reasonably foreseeable development of the remaining 3,955 acres of the Vigneto parcel, despite the fact that the remaining acres of the parcel overlap with 650 acres of the jaguar’s designated critical habitat.

241. The Corps had ample available data it could have used to analyze the impacts of the development on the remaining 3,955 acres of the Vigneto parcel. The Master Plan specifies development plans for the entire 12,167-acre parcel—which encompasses the remaining 3,955 acres outside of the permit boundary—including a water budget for development on the remaining acres. It also contains detailed maps setting out the transportation system and land uses on the remaining acres.

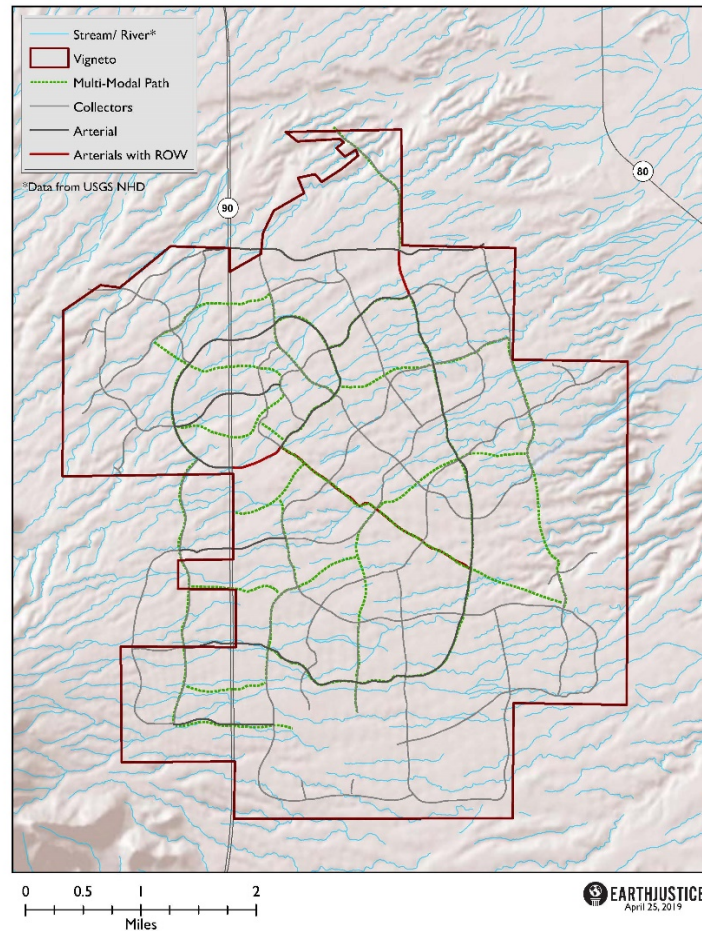
242. The Corps also could have mapped the placement of the jurisdictional washes on the other 3,955-acre area utilizing the EPA WATERS tool, which the Corps has recognized as a sound methodology for analyzing impacts on jurisdictional waters. By utilizing the EPA WATERS tool in combination with the Master Plan’s detailed transportation maps, the Corps could have readily determined how development of the remaining acres would impact the jurisdictional washes throughout the Vigneto parcel, as

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<sup>21</sup> Revised EA at 150, 156.

<sup>22</sup> *Id.* at 151; *see also id.* at 152.

demonstrated in the map below, showing where the proposed transportation infrastructure (black and green lines) crosses washes (blue lines):



243. Yet, rather than utilizing this information to engage in the required cumulative impacts analysis, the Corps largely copied its cumulative impacts analysis from the 2018 EA, in which it had determined that development of the remaining 3,955 acres of the Vigneto parcel *was not* reasonably foreseeable and thus was not analyzed.

**D. The Corps Fails to Objectively Assess Less Environmentally Damaging Practicable Alternatives.**

244. The Corps claimed that it systematically screened alternatives in the EA to determine whether there were any practicable alternatives to the proposed discharge,

which would have less adverse impacts on the aquatic ecosystem, without causing other significant adverse environmental consequences.

245. According to the Corps, the No Action Alternative is a practicable alternative that meets the project's purpose and need. Furthermore, the No Action Alternative does not involve the discharge of fill material into any jurisdictional washes, and thus has no impact on the aquatic ecosystem. Yet, the Corps did not select the No Action Alternative as the least environmentally damaging practicable alternative based on the Corps' determination that it would cause other significant adverse environmental consequences.

246. This rationale conflicts with the Corps' BE and FWS's 2017 Letter of Concurrence, both of which were based on the premise that the effects of development under either the Preferred Alternative or the No Action Alternative would be *similar*.

247. Furthermore, the Corps' rationale was based on an inconsistent comparison of the Preferred Alternative and No Action Alternative. For the Preferred Alternative, the Corps considered only the impacts of development within a narrow 1,919-acre scope of analysis. By contrast, for the No Action Alternative, the Corps considered impacts occurring beyond that narrow scope of analysis area. Specifically, the Corps stated that the No Action Alternative would have significant other environmental effects because it would use 50% more water than the Preferred Alternative to support orchards and vineyards. But the orchards and vineyards would be sited outside of the narrow scope of analysis area used to assess the impacts of the Preferred Alternative. The Corps thus failed to undertake an accurate comparison of these two alternatives.

248. The Corps relied heavily on the preservation of avoided washes and upland buffers to claim the Preferred Alternative would have beneficial effects, as compared to the No Action Alternative. However, the Corps failed to acknowledge that those same measures were essential to offset the unavoidable impacts of the Preferred Alternative on jurisdictional washes that would not occur under the No Action Alternative.

249. The Corps did not consider the use of spanned crossings or other measures to avoid or minimize discharges into waters of the United States under the Preferred Alternative. Yet, it determined that, under the No Action Alternative, El Dorado could avoid waters of the United States by using spanned crossings without placement of any structures (concrete, metal culvert, or gunnite) in the channel bottoms. El Dorado could also complete utility crossings without direct impact to any waters of the United States by using jack and bore, directional drilling, or placement within the road crossing spans.

**E. The Corps Fails to Adequately Mitigate the Impacts of the Project.**

250. The Corps determined that compensatory mitigation was necessary to offset the unavoidable impacts of the dredge and fill activities for El Dorado's proposed development under the 404 Permit.

251. The HMMP purports to provide for compensatory mitigation "in perpetuity" for the unavoidable impacts of the permitted activity, i.e., the filling of 51 acres of jurisdictional washes on the development site.<sup>23</sup>

252. The HMMP includes activities on the development site, such as avoidance of 424 acres of desert washes and preservation of 1,200 acres of primary and secondary buffers within the associated upland habitat of the desert washes.

253. The HMMP also includes activities on a 144-acre offsite parcel located just northeast and downstream of the development site along the San Pedro River. The offsite parcel encompasses the active San Pedro River channel and associated riparian habitat, adjacent active and abandoned floodplains, an artesian well and associated wetland habitat, and fallowed agricultural fields.

254. El Dorado proposes to undertake habitat restoration and erosion control activities on the offsite parcel, including (1) stabilizing and grading active gully head cut erosion by installing rock chutes and rip raps; (2) planting native trees and shrubs, and

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<sup>23</sup> WestLand Res., Inc., Habitat Mitigation and Monitoring Plan: ACOE File No. 2003-00826-SDM: Phase I of the Villages at Vigneto (Formerly Whetstone Ranch) at 2, 5, 12 (2018).

seeding with a native seed mix in a reclamation area around gully areas, around the artesian well, and in the active floodplain along the San Pedro River; and (3) revegetating of the fallowed agricultural fields.

255. The HMMP assumes that the habitat restoration activities would be successful if the basic natural processes that support mesquite woodland habitat remain in place (*e.g.*, depth to groundwater, hydrology, and soils).

256. For example, under the HMMP, El Dorado would to plant 400 cottonwoods on the offsite parcel, which require persistent streamflows and shallow (high) groundwater depths to survive. The HMMP identifies the depth to alluvial groundwater on the offsite parcel as approximately 44 to 53 inches, and proposes to plant the cottonwoods with the rootball at least 48 inches below the ground surface and as close to the water table as possible.

257. The HMMP also presumes that the preservation, maintenance, and enhancement of the artesian well/wetland complex will successfully provide a perennial water source to wildlife in an area where surface water is limited. These wetlands expand and contract depending on fluctuations in groundwater discharge from this system.

258. The Corps did not analyze the impacts of groundwater pumping for the Vigneto development or the cumulative impacts of climate change on these proposed mitigation activities. As discussed above, though, the Vigneto development would significantly lower depth to groundwater, thereby depleting, or even eliminating, surface flows in the San Pedro River and adversely affecting the River's riparian habitat.

259. Groundwater pumping at the Vigneto development could result in drawdown of the aquifer below the San Pedro River near the offsite parcel by five meters after 100 years, adversely affecting El Dorado's proposal to plant 400 cottonwood trees. Climate change would further exacerbate these impacts. No supplemental watering is proposed for cottonwood plants in the HMMP.

260. The anticipated drawdown also could eliminate surface flows at the artesian well on the offsite parcel. Absent the source of water at the artesian well, the wetland

area within the mitigation site would no longer support wetland hydrology and the wetland soils and vegetation would cease to exist at the site over time.

261. The Corps dismissed these projected impacts, claiming they were speculative and minor because they would not occur for 100 years.

262. The Corps' conclusion ignores the fact that groundwater pumping will have an immediate impact on the regional aquifer, depleting this resource and lowering the groundwater table. By continuously pumping water over the next 100 years, the Vigneto Development would lower the depth to groundwater by hundreds of feet, as explained by the ADWR. The resultant cone of depression would reduce surface flows along the San Pedro River over this same 100-year period, as modeled by Dr. Prucha. In fact, due to the lag between the drop in groundwater levels and the loss of surface flows along the San Pedro River, the effects on the San Pedro River would likely increase after the 100 year timeframe used by Dr. Prucha.

263. Additionally, the Corps' analysis of the impacts from groundwater drawdown on the offsite parcel was limited to its narrow 1,775-acre onsite scope of analysis, rather than the entire 12,167-acre development.

264. The HMMP also acknowledges that active head cut erosion is an on-going problem contributing to habitat degradation and water quality concerns on the offsite parcel. The HMMP thus proposes the construction of a rock chute at the head cut and installation of rip rap in the channel immediately downgradient of the new chute to stabilize the advancing head cut. The HMMP claims these measures would prevent habitat degradation and protect the artesian well/wetland complex from future degradation.

265. The proposed Vigneto development would, however, increase runoff and erosion, as documented above. There is no evidence the erosion control measures in the HMMP would offset the harm from the development's projected increased runoff and erosion.

266. The HMMP provides for a 5-year monitoring period once mitigation activities are complete. This monitoring period does not account for the 20-year buildout of the Vigneto development or the delayed effects of groundwater pumping and surface runoff on surface and subsurface flows.

267. As discussed above, there is a time lag between groundwater pumping and the point at which pumping effects would reach the San Pedro River, such that the effects of pumping on baseflows may not be fully realized until decades after pumping ceases. A 5-year monitoring period would not capture these impacts.

268. By the time the monitoring period would end, El Dorado would have constructed less than one-fourth of the Vigneto development.

## **VII. The Corps Arbitrarily Constrains the Consultation Process with FWS.**

### **A. The Corps and FWS Limit Their Analyses of Impacts on Listed Species and Critical Habitat.**

269. The Corps limited its review under the ESA to the same portion of the Vigneto development used for its NEPA scope of analysis area, which omitted the vast majority of the 12,167-acre Villages at Vigneto development.

270. As a result, the Corps ignored the adverse effects of the Vigneto development on the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel, including these species' designated and proposed critical habitat.

271. The Corps concluded in its BE that the proposed activities within its 1,775-acre onsite area would have no effect on listed species and critical habitat and that activities on the offsite parcel may affect but are not likely to adversely affect listed species or critical habitat. The Corps requested concurrence from FWS on its BE.

272. As noted above, in 2016, FWS determined that appreciable direct and indirect impacts to these species and their proposed and designated critical habitat were reasonably certain to occur. As a result, FWS refused to concur with the Corps' BE.

273. However, in 2017, FWS abruptly changed its position and issued a Letter of Concurrence, deferring to the Corps' narrow definition of the action area and concurring with the BE. Both FWS and the Corps claim that the 2017 Letter of Concurrence concluded informal consultation.

274. Consequently, FWS failed to consult with the Corps regarding the effects of the Vigneto development on listed species and critical habitat, even though FWS determined that the Permit would adversely affect the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel.

275. The Corps relied on FWS's Letter of Concurrence to terminate the consultation process and evade formal consultation, including preparation of a comprehensive Biological Opinion.

**B. Political Interference Infects FWS's Concurrence.**

276. In April 2019, Steven Spangle, the former Field Supervisor for FWS's Arizona Ecological Services office and agency decisionmaker on the Vigneto development, revealed to the Arizona Daily Star that officials in the Trump Administration pressured him to change FWS's position on the development's impacts.

277. Investigations into the Spangle's claims revealed that Mike Ingram, El Dorado's owner, and then Deputy Interior Secretary David Bernhardt had a meeting at a hunting lodge in Montana. That meeting was not noted in Bernhardt's official calendar.

278. After this meeting, Deputy Secretary Bernhardt met with Peg Romanik, an associate solicitor from the Department of Interior's Solicitor Office, according to Bernhardt's calendar.

279. The same day Deputy Secretary Bernhardt spoke with Romanik, Romanik called Spangle. Romanik told Spangle that she had received a call from a higher-up political appointee at the Department of Interior who told her that the Arizona Ecological Services office's position was not the position of the administration. Romanik told Spangle that "if he knew what was good for him politically at his job," he would reverse



FWS's position on the Vigneto development.<sup>24</sup> During the call, Romanik told Spangle that his reversal would remove a major roadblock for the development and allow it to move forward without an in-depth analysis.

280. Several weeks after Spangle received the phone call from Romanik, Ingram made a \$10,000 donation to the Trump Victory Fund, a political action committee set up to raise money for President Trump's re-election campaign.

281. Despite having repeatedly determined that granting a 404 Permit would have severe adverse impacts on listed species and critical habitat, Spangle reversed his position after the Romanik call and issued the 2017 Letter of Concurrence. Spangle disagreed with the reasons set forth in the 2017 Letter of Concurrence.

282. Spangle stated that he was rolled by higher-up political appointees. He explained that, he used the term "rolled" to distinguish FWS's change in position "from making a policy call based on fact, as opposed to making a policy call based on politics."<sup>25</sup> He stated that this was the first time in his 30 year career at FWS that he had been pressured to change an official decision. He retired from FWS four months later.

283. In light of the political interference in Spangle's decision, the House Committee on Natural Resources is investigating FWS's concurrence with the Corps on the impacts of the Vigneto development. The Committee has requested documents from FWS and raised questions about whether a key permit decision at FWS was inappropriately reversed.

284. Despite the news stories documenting the political interference in FWS's decision, the Corps sent a letter to FWS asserting that the 2017 Letter of Concurrence concluded informal consultation. The Corps further asserted that there was no basis to reinitiate consultation and requested that FWS affirm its 2017 Letter of Concurrence.

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<sup>24</sup> Tony Davis, *Ex-Federal Official: 'I Got Rolled' by Trump Administration to Ease Way for Vigneto Housing Development*, ARIZONA DAILY STAR (April 29, 2019), available at [https://tucson.com/news/local/ex-federal-official-i-got-rolled-by-trump-administration-to/article\\_e6d7a688-0a63-5f88-b993-24384d87a4bd.html](https://tucson.com/news/local/ex-federal-official-i-got-rolled-by-trump-administration-to/article_e6d7a688-0a63-5f88-b993-24384d87a4bd.html).

<sup>25</sup> *Id.*

285. Although the Corps claimed that it took Spangle's allegations of political interference seriously, the Corps limited its review of its prior determinations to only those regarding permitted activities at the offsite parcel, and did not review its "no effect" determination regarding the project site.

286. FWS did not set aside the 2017 Letter of Concurrence, despite Spangle's serious allegations of political interference and pretext. FWS did not investigate Spangle's allegations or the extent of political interference in the consultation process.

287. Instead, FWS took the position that its 2017 Letter of Concurrence ended the consultation in 2017, and thus limited its review to only the facts contained in the records supporting the 2017 Letter of Concurrence. FWS did not independently determine the action area, but instead "defer[ed] to the Corps' determination regarding the 'no Federal action alternative' for the Villages at Vigneto Development."<sup>26</sup> Just 20 days after receiving the Corps' letter, FWS affirmed its 2017 Letter of Concurrence without any further analysis.

#### **VIII. The Corps Grants a 404 Permit for the Villages at Vigneto.**

288. The Corps reinstated the 404 Permit for the 8,212-acre permit area of the Villages at Vigneto development on July 26, 2019. The Corps did not notify the public of its decision.

289. The Permit contains a special condition requiring compliance with the HMMP to mitigate the impacts on jurisdictional waters of the United States.

290. El Dorado must provide notification, either written or verbal, to the Corps at least 30 days prior to the start of work in any jurisdictional waters.

291. Upon information and belief, El Dorado has not yet provided the Corps with any notification of construction activities.

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<sup>26</sup> Letter from Jeffrey A. Humphrey, Field Supervisor, Ariz. Ecological Servs. Office, U.S. Fish and Wildlife Serv., to David J. Castanon, Regulatory Div. Chief, L.A. Dist., U.S. Army Corps of Eng'rs 1 (June 12, 2019).

**FIRST CAUSE OF ACTION**  
**(Violation of NEPA and APA – Inadequate Scope of Analysis)**

292. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

293. NEPA requires federal agencies to analyze and disclose any adverse environmental effects that cannot be avoided should the proposed federal action be implemented. 42 U.S.C. § 4332(C)(ii).

294. As expressed in the Corps' regulations, the scope of analysis must "address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Pt. 325, App. B § 7(b)(1).

295. The Corps has "control and responsibility" over portions of a project in which "the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* § 7(b)(2). The crux of the inquiry is whether jurisdictional "waters must be affected to fulfill the project's goals." *White Tanks Concerned Citizens, Inc.*, 563 F.3d at 1041.

296. El Dorado and the Corps have conceded that El Dorado cannot fulfill the basic objectives of the Vigneto development, including the construction of a community of interconnected neighborhoods with an integrated transportation system, on this site without a 404 Permit due to the density and layout of jurisdictional washes. The jurisdictional washes are dispersed throughout the site in such a way that El Dorado needs to fill the washes at 350 locations spread broadly across the site to develop a cohesive master-planned community. Accordingly, the Corps has sufficient control and responsibility over the Vigneto development, thereby requiring a comprehensive analysis of the effects of the entire development on the environment.

297. The Corps' 1,919-acre scope of analysis area omits the effects of the Vigneto development by impermissibly focusing on only the proposed fill, a fraction of the development, and the mitigation activities under the Permit. As a result, the Corps

overlooked the impacts of degrading 12,167 acres of upland Sonoran desert habitat and turning this natural habitat into impervious surfaces that would exponentially increase surface runoff and erosion into the San Pedro River. The Corps also disregarded the significant impacts of pumping 8,427 acre-feet of groundwater per year, which will lower surface and subsurface flows at St. David Cienega and the San Pedro River, irreversibly damaging the riparian ecosystem and SPRNCA.

298. By artificially narrowing the scope of analysis area, the Corps violated NEPA, 42 U.S.C. § 4321, *et seq.*; its implementing regulations, 40 C.F.R. § 1500, *et seq.*; the Corps' own binding NEPA regulations, 33 C.F.R. Pt. 325, App. B; and this Court's precedent.

299. The Corps' limited scope of analysis was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA. Therefore, the EA and 404 Permit should be set aside under the APA. 5 U.S.C. § 706(2)(A).

**SECOND CAUSE OF ACTION  
(Violation of NEPA and APA – Impermissible Segmentation)**

300. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

301. NEPA prohibits “an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) (quotations omitted). Even if multiple projects are not governed by a single proposal, they still must be analyzed together in a comprehensive EIS if they are “connected” or “cumulative” actions. 40 C.F.R. § 1508.25(a)(1), (2).

302. The Corps violated NEPA by impermissibly segmenting the Villages at Vigneto development into a so-called “Phase I” permit area to avoid a finding of significance under NEPA. The Master Plan, however, contains no mention of a so-called “Phase I.” In fact, this 8,212-acre permit area does not even align with the approved Master Plan. Instead, the Corps borrowed this boundary from the prior Whetstone Ranch proposal, which involved a different developer, expired over a decade ago, and does not

reflect El Dorado's plan to obtain 404 Permits and develop 12,167 acres of its property into a cohesive, master-planned community.

303. As a result of this impermissible segmentation, no document analyzes the collective impacts of the proposed Vigneto development on the environment.

304. Even assuming the Master Plan did carve out a so-called "Phase I," which it did not, the remaining 3,955 acres of the proposed Vigneto development are "connected" actions that must be analyzed in a single EIS. 40 C.F.R. § 1508.25(a)(1). El Dorado planned the Villages at Vigneto as one comprehensive master-planned community. There is no evidence that the remaining 3,955 acres of the proposed development would be built without the Corps' issuance of the 404 Permit for the 8,212-acre permit area. The remaining portions of the development lack independent utility, and must be analyzed as part of the Corps' decision to grant this 404 Permit.

305. The remaining portions of the Vigneto development are also "cumulative" actions that must be analyzed in a single EIS. 40 C.F.R. § 1508.25(a)(2). As the Corps recognized, development of the remaining 3,955 acres of the Vigneto parcel is reasonably foreseeable, as (1) El Dorado purchased these lands, (2) developed an integrated plan to develop these lands, and (3) secured financing approval from the City of Benson for the accelerated buildout of these lands. Developing an additional 3,955 acres, as set forth in the Master Plan, would likely result in significant cumulative impacts to the environment by transforming thousands of acres of upland habitat (including critical habitat for the jaguar) into impervious surfaces and drawing down groundwater levels by an additional 2,395 acre-feet per year.

306. The Corps' segmentation of the Vigneto development and failure to prepare a comprehensive EIS was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA. Therefore, the EA and 404 Permit should be set aside under the APA. 5 U.S.C. § 706(2)(A).

**THIRD CAUSE OF ACTION**  
**(Violation of NEPA and APA – Failure to Take a Hard Look at**  
**Direct, Indirect, and Cumulative Impacts)**

307. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

308. NEPA requires federal agencies to prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C).

309. To forego preparation of an EIS, an agency must prepare an EA that provides sufficient evidence and analysis to support a FONSI. 40 C.F.R. § 1508.9. The EA must take a hard look at the direct, indirect, and cumulative impacts of each reasonable alternative to determine if there may be any significant impacts requiring preparation of an EIS. *Id.* §§ 1502.16(a), (b), 1508.25(c). Furthermore, the EA must take a hard look at mitigation measures for a proposed action in order to evaluate the severity of the action’s adverse effects. *Id.* §§ 1502.14(f), 1502.16(h), 1508.25(b)(3).

310. Agencies must consider “both context and intensity” in determining whether an EIS is required. *Id.* § 1508.27. Factors relevant to “intensity” include: (1) the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas”; (2) “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial”; (3) “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks”; (4) “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts”; (5) “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973”; and (6) “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Id.* § 1508.27(b)(3)–(5), (7), (9)–(10). Any one of these factors may be sufficient to require preparation of an EIS.

311. The Corps relied on a flawed EA to conclude that granting a 404 Permit for the Villages at Vigneto development would not have a significant impact on the environment. The EA failed to take a hard look at (1) the impacts of the entire Vigneto development, including habitat destruction, increased runoff, and groundwater pumping, on the unique characteristics of the San Pedro River and SPRNCA; (2) the highly controversial impacts of the development on groundwater drawdown, surface runoff, and endangered and threatened species; (3) the significant uncertainty regarding the effectiveness of the proposed mitigation measures; (4) the cumulative impacts of granting a 404 Permit for 8,212 acres of the Vigneto development when combined with the reasonably foreseeable impacts of the entire Vigneto development and climate change on upland habitat, surface hydrology, and riparian habitat; (5) the adverse effects of the Vigneto development on listed species and critical habitat; and (6) whether and to what degree granting the 404 Permit violates the CWA and impairs federally reserved water rights at SPRNCA.

312. As a result of the flawed and truncated EA, the Corps' FONSI and decision to forego preparation of an EIS were arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with NEPA, and therefore should be set aside under the APA. 5 U.S.C. § 706(2)(A). Due to the significant impacts of granting the 404 Permit, the Corps must prepare an EIS to comply with NEPA.

**FOURTH CAUSE OF ACTION**  
**(Violation of CWA and APA – Public Interest Determination)**

313. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

314. The Corps' public-interest requirement prohibits issuance of a Section 404 Permit if the "district engineer determines that it would be contrary to the public interest." 33 C.F.R. § 320.4(a). This far-reaching inquiry requires the Corps to consider "the probable impacts" of the proposed Vigneto development on "[a]ll factors which may be relevant to the proposal," including water supply and conservation, wetlands, fish and wildlife values, and recreation, among other things. *Id.*

315. The Corps overlooked the probable impacts of the proposed Vigneto development on the public interest, including impacts on surface and baseflows along the San Pedro River and within SPRNCA; the reduction in groundwater levels throughout the middle San Pedro River basin; the degradation of thousands of acres of desert washes and upland habitat; the adverse impacts on hundreds of species of wildlife, including listed species and critical habitat; and the potential loss of millions of dollars of revenue from recreational activities, including bird watching.

316. Consequently, the Corps' conclusion that granting the 404 Permit was not contrary to the public interest, and subsequent issuance of the 404 Permit, was arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with the CWA and its implementing regulations. The decision therefore should be set aside under the APA. 5 U.S.C. § 706(2)(A).

**FIFTH CAUSE OF ACTION  
(Violation of CWA and APA –  
Least Environmentally Damaging Practicable Alternative)**

317. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

318. The Corps shall not issue a Section 404 Permit “if there is a [1] practicable alternative to the proposed discharge [2] which would have less adverse impact on the aquatic ecosystem, [3] so long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. § 230.10(a).

319. Furthermore, the Corps shall not issue a 404 Permit if “the proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem.” *Id.* § 230.12(a)(3)(iii). Specifically, the 404(b)(1) Guidelines state that “no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” *Id.* § 230.10(d).



320. To ensure an objective analysis, the Corps' NEPA Guidelines admonish the agency to use the same scope of analysis for impacts, alternatives, and benefits. *See* 33 C.F.R. Part 325, Appendix B § 7(b)(3).

321. The Corps has failed to provide a rational explanation for refusing to select the No Action Alternative as the least environmentally damaging practicable alternative. According to the Corps, the No Action Alternative is practicable and would have less adverse impacts on the aquatic ecosystem as compared to the Vigneto development, which would impact at least 51 acres of jurisdictional waters.

322. Yet, the Corps refused to select the No Action Alternative as the least environmentally damaging alternative, which would have required denial of the 404 Permit for the Vigneto development. *See* 40 C.F.R. § 230.10(a). Instead, the Corps concluded that the No Action Alternative was not the least environmentally damaging practicable alternative because it would have significant other environmental consequences, as compared to the Preferred Alternative. This rationale was arbitrary and capricious for at least three reasons.

323. First, both the Corps' BE and FWS' Letter of Concurrence are premised on the position that the No Action Alternative and Preferred Alternative have similar effects.

324. Second, the Corps' analysis was based on an inconsistent and thus inaccurate comparison of the Preferred Alternative and No Action Alternative. For the Preferred Alternative, the Corps considered only the impacts of development within a narrow 1,919-acre scope of analysis. By contrast, for the No Action Alternative, the Corps considered impacts occurring beyond this narrow scope of analysis area. For example, the Corps stated that the No Action Alternative would have significant other environmental effects because it would use 50% more water than the Preferred Alternative to support orchards and vineyards. But the orchards and vineyards would be sited outside of the narrow scope of analysis area used to assess the impacts of the Preferred Alternative.

325. Third, the Corps improperly relied on the preservation of avoided washes and upland buffers to claim the Preferred Alternative would have beneficial effects, as compared to the No Action Alternative. However, the Corps failed to disclose the fact that those same measures were necessary to offset the unavoidable impacts of the Preferred Alternative on jurisdictional washes. There is thus no basis for the Corps' assertion that these mitigation measures make the Preferred Alternative more environmentally friendly than the No Action Alternative. The No Action Alternative would not impact jurisdictional washes in the first place, and so, would not require compensatory mitigation to make up for impacts.

326. These flaws rendered the Corps' least environmentally damaging practicable alternatives determination arbitrary, capricious, and contrary to the CWA.

327. Furthermore, the Corps failed to demonstrate that El Dorado has taken all appropriate and practicable steps to avoid or minimize impacts to jurisdictional washes, including the construction of crossings (both roads and utilities) without any direct impact to waters of the United States.

328. Consequently, the Corps' issuance of the 404 Permit was arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with the CWA and its implementing regulations. The decision therefore should be set aside under the APA. 5 U.S.C. § 706(2)(A).

**SIXTH CAUSE OF ACTION  
(Violation of CWA and APA – Failure to Mitigate Impacts)**

329. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

330. The Corps shall not issue a 404 Permit (1) “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem,” and (2) the proposed discharge will not “cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c), (d).

331. Mitigation activities follow a three-part sequence: avoidance, minimization, and then compensatory mitigation. *Id.* § 230.91(c); *see also* 33 C.F.R. § 320.4(r). Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives. MOA at 9211; 40 C.F.R. § 230.92 (defining compensatory mitigation to require the “offsetting [of] unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved”).

332. The Corps “must determine the compensatory mitigation to be required in a DA [404] permit, based on what is practicable and capable of compensating for aquatic resource functions that will be lost as a result of the permitted activity.” *Id.* § 230.93(a)(1). In making this determination, “the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project.” *Id.*

333. Mitigation efforts must be monitored for an adequate period of time to ensure the project meets its performance standards and objectives. 40 C.F.R. § 230.96(b). Longer monitoring periods are required where the aquatic resources at issue have slow development rates. *Id.*

334. The Corps may condition the issuance of a permit on the implementation of compensatory mitigation. *Id.* § 230.12(a)(2).

335. The Corps failed to ensure that the HMMP would be ecologically successful and sustainable because it failed to analyze the significant impacts of the full Vigneto development on the mitigation lands and failed to require a sufficient monitoring period to ensure the HMMP meets its purpose and goals.

336. Additionally, the Corps improperly double-counted the mitigation activities provided in the HMMP in both the least environmentally damaging practicable alternative and compensatory mitigation, in violation of the CWA and the 404(b)(1) Guidelines.

337. Consequently, the Corps' decision to issue the 404 Permit was arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with the CWA and its implementing regulations. The decision therefore should be set aside under the APA. 5 U.S.C. § 706(2)(A).

### **SEVENTH CAUSE OF ACTION**

#### **(Corps and FWS – Violation of Section 7(a)(2) of the ESA and APA)**

338. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

339. An agency must consult with the appropriate wildlife agency under Section 7 whenever it takes an action that “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). “*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement . . . .” 51 Fed. Reg. at 19,949 (emphasis added).

340. The “action area” for analyzing effects to listed species and habitats during consultation encompasses “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. “Effects of the action” refers to the “direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.” *Id.* § 402.02. The relevant test for interrelated or interdependent actions is whether the actions in question would occur but for the Corps' decision to grant a 404 permit. *See id.* § 402.02; Consultation Handbook at 4-27.

341. The Corps must prepare a BE to “evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat.” 50 C.F.R. § 402.12(a), (k). The BE is “used in determining whether formal consultation or a conference is necessary.”

342. FWS has an independent obligation to determine the proper scope of the “action area” for purposes of consultation under the ESA. *Id.*; *see also* Consultation Handbook at 4-15 (“Reaching agreement on the description of the action area is desirable, but ultimately the Services are responsible for this biological determination.”).

Subsequent analyses of the environmental baseline, effects of the action, and levels of incidental take are based upon the action area as determined by FWS.

343. If the action agency prepares a BE and determines that the action is not likely to adversely affect listed species or critical habitat, FWS can concur with that determination in a Letter of Concurrence only if the action has no likelihood of adverse effect on the listed species or designated critical habitat. *Id.* § 402.13(a).

344. Federal agencies must “use the best scientific and commercial data available” in determining whether a proposed action will jeopardize listed species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2).

345. The Corps’ BE adopted an impermissibly narrow action area and improperly segmented the analysis of the Vigneto development. As a result of this narrow, piecemeal analysis, the Corps turned a blind eye on the adverse effects of granting the 404 Permit on the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel, and their designated and proposed critical habitat.

346. Even if the Corps was justified in narrowly defining the action area, it still failed to consider the adverse effects of activities within that action area on the western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel, including these species’ designated and proposed critical habitat.

347. The Corps overlooked multiple available studies demonstrating the effects of the Vigneto development—including its impacts on groundwater drawdown and the effects of climate change—thereby violating the ESA’s best available science mandate.

348. Additionally, to the extent that the Corps determined that the proposed development would have environmentally beneficial effects for wildlife, including listed species, the Corps was required to consult with FWS on those beneficial effects.

349. Thus, the Corps’ failure to analyze the effects of granting a 404 Permit was arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA, and

therefore the Corps' BE should be set aside under the ESA and APA. 5 U.S.C. § 706(2)(A).

350. Furthermore, FWS violated the ESA and APA by issuing its 2017 Letter of Concurrence, despite the adverse effects of granting a 404 Permit for the Vigneto development. For years, FWS rejected the Corps' "not likely to adversely affect determination," objecting to the Corps' narrow definition of the action area and demanding an analysis of the significant adverse effects of the Villages at Vigneto development on listed species and critical habitat. Yet, in its 2017 Letter of Concurrence, FWS arbitrarily retracted its non-concurrence without any factual basis. FWS abdicated its independent obligation to determine the proper scope of the action area and ignored the best available science and commercial data showing that El Dorado could not proceed with the development without a 404 Permit.

351. Instead of basing its Letter of Concurrence on the relevant factors and best available science and commercial data, FWS's decision was the result of improper political interference. Furthermore, FWS's only disclosed reason for concurring with the Corps' BE in the 2017 Letter of Concurrence was not genuine, but pretextual. The actual, but unstated, reason for concurrence was improper political interference in the agency decision-making process.

352. Thus, the 2017 Letter of Concurrence, and the Corps' and FWS's continued reliance on the Letter of Concurrence, are arbitrary, capricious, an abuse of discretion, and not in accordance with the APA. 5 U.S.C. § 706(2)(A).

### **PRAYER FOR RELIEF**

THEREFORE, Plaintiffs respectfully request that this Court:

353. Declare that the Corps violated NEPA by granting the 404 Permit for the Villages at Vigneto development without preparing an adequate NEPA analysis;

354. Declare that the Corps violated the CWA by granting the 404 Permit without objectively analyzing whether granting a permit was the least environmentally

damaging practicable alternative and without adequately mitigating the impacts of the 404 Permit or ensuring that granting a 404 Permit is in the public interest.

355. Declare that the Corps' BE and FWS' Letter of Concurrence are arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the ESA or APA;

356. Set aside and vacate the Corps' decision granting the 404 Permit for the Villages at Vigneto development;

357. Set aside and vacate the Corps' BE and FWS's Letter of Concurrence;

358. Issue an injunction prohibiting Defendants from taking any action pursuant to any Section 404 Permit for the Villages at Vigneto development, unless and until Defendants comply with NEPA, the CWA, the ESA, the APA, and their implementing regulations;

359. Enter such other declaratory relief, and temporary, preliminary, or permanent injunctive relief as necessary;

360. Award Plaintiffs their reasonable fees, costs, and expenses, including attorney's fees, associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d); the ESA, 16 U.S.C. § 1540(g)(4); and/or all other applicable authorities; and

361. Grant Plaintiffs such additional relief as the Court deems just and proper.

DATED this 23rd day of August, 2019,

/s/ Stuart Gillespie  
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