PROJECT FILE

United States Department of the Interior
FISH AND WILDLIFE SERVICE
UTAH FIELD OFFICE
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WEST VALLEY CITY, UTAH 84119

SURNAME

September 18, 2008

In Reply Refer To
FWS/R6
ES/UT
6-UT-08-F-011
65411-2008-B-0007

Memorandum

To: Assistant Regional Director, U.S. Fish & Wildlife Service, Region 6, Denver, Colorado

From: Utah Field Supervisor, U.S. Fish & Wildlife Service, Ecological Services, West Valley City, Utah

Subject: Findings and Recommendations on Issuance of an Enhancement of Survival Permit for the Southwestern Willow Flycatcher via a Programmatic Safe Harbor Agreement in Washington and Kane Counties, Utah and associated impacts to the Western Yellow-billed Cuckoo, Virgin River Chub and Woundfin (Permit Number TE199631-0)

I. DESCRIPTION OF PROPOSAL

Color Country Resource Conservation and Development Council, Inc. (Program Administrator) has applied to the U.S. Fish and Wildlife Service (Service) for a section 10(a)(1)(A) Enhancement of Survival Permit (Permit) to authorize incidental take of the southwestern willow flycatcher ("flycatcher"), (*Empidonax traillii extimus*) associated with the implementation of a Programmatic Safe Harbor Agreement (Agreement) within Washington and Kane counties, Utah. Associated impacts to the western yellow-billed cuckoo (*Coccyzus americanus occidentalis*), Virgin River chub (*Gila seminuda*) and woundfin (*Plagopterus argentissimus*) are covered under the Biological Opinion for the Programmatic Safe Harbor Agreement, September 18, 2008. The Program Administrator has submitted the Agreement as part of the permit application. The proposed Permit will be issued in accordance with section 10(a)(1)(A) of the Endangered Species Act (ESA) of 1973, as amended (16 USC 1531 et seq.), and the Service's Safe Harbor Policy (64 FR 32717). As part of this programmatic Agreement, the Program Administrator will enter into Cooperative Agreements with willing non-Federal landowners that define conservation measures for flycatchers on their properties. Such properties are referred to herein as the "enrolled properties" and will be permitted by the Program Administrator via Certificates of Inclusion.

The purposes of this Agreement are: (1) to promote the conservation of the southwestern willow flycatcher through the voluntary restoration, enhancement, and management of native riparian habitat in southwestern Utah, (2) to provide certain regulatory assurances to landowners participating in such restoration, enhancement, and management activities, and (3) to accomplish the foregoing without negatively affecting farming and ranching activities. The areas covered by the Agreement and Permit are shown on the attached map. This Agreement between the Program Administrator and the Service and the subsequent Cooperative Agreements between the Program Administrator and willing non-Federal landowners (Program Participants) are intended to create an incentive for private landowners to voluntarily conserve flycatchers and their habitat while securing regulatory certainty. These Agreements will provide support of riparian habitat enhancement on the "enrolled properties" and provide the Program Participants with assurances that future activities will not be constrained and result in ESA restrictions.

The programmatic Safe Harbor Agreement proposes to cover flycatcher habitat within portions of its range in Utah, on non-Federally owned lands in Washington and Kane counties. The programmatic nature of the proposed Agreement makes it impossible to characterize each site enrolled in this program, specific conservation measures planned on the sites, and the individual success of the conservation measures. This is especially true as participation is voluntary for landowners, and particular sites that may be enrolled under the Safe Harbor Agreement and individual management activities can not be predicted. However, the Program Administrator shall develop for each enrolled property, and append to each Cooperative Agreement, a plan that specifies the habitat restoration, enhancement, and management activities to be carried out on the enrolled property and a timetable for implementing those activities. Activities may be partially or wholly funded by NRCS under existing or future legislative authorities. Activities under the Cooperative Agreements which are intended to restore, enhance, and manage native riparian habitats in southwestern Utah shall include one or more of the following:

- Planting native vegetation associated with flycatcher breeding habitat that is appropriate for the site, such as native trees (i.e., cottonwoods), shrubs (i.e., willows, alders), and herbaceous plants (i.e., grasses and forbs).

- Installing or constructing fencing, livestock watering facilities, and stream crossings to exclude or control use of the riparian area by livestock.

- Implementing prescribed grazing management to adjust grazing periods, or stocking rates to meet the desired objectives of the plant community.

- Controlling or removing nonnative vegetation, such as tamarisk, Russian olive, or herbaceous weeds, provided that its removal is done as part of a restoration effort to replace the nonnative species with native species.

- Restoring or enhancing the physical and biological functions of the stream to provide available habitat for aquatic species and to provide morphological characteristics required to sustain riparian plant communities by 1) Restoring channel widths; 2) Improving floodplain-to-channel connectivity; 3) Installing in-stream structures to control direction, rate, and/or level of water in the floodplain; 4) Removal of dams, dikes, or levees; and other means such as the use of bioengineering techniques.

- Restoring floodplain wetlands to provide desired conditions of slow-moving water, saturated soils, and other conditions enabling the establishment of wetland and riparian plant communities.

Each restoration plan within the Cooperative Agreements will be to designed to provide either (1) sufficient available flycatcher habitat on the enrolled property capable of supporting a breeding pair of flycatchers if sufficient habitat for that purpose does not already exist, (2) sufficient available flycatcher habitat capable of supporting one or more additional breeding pairs of flycatchers if sufficient habitat to support at least one pair currently exists, or (3) improved quality of flycatcher habitat by removing nonnative vegetation and replacing it with native vegetation.

The Program Administrator will ensure management activities prescribed in the Cooperative Agreement are carried out as described and that all reporting requirements are completed. Emergency situations, such as flood, drought, wildfire, disease, or other unforeseen circumstances may require management actions not specified in the Cooperative Agreement. In these situations, the Parties acknowledge that it may be impossible to provide the 90-day notice required by Section 6 of the Cooperative Agreement prior to initiation of activities that could result in take of the covered species. However, the Program Administrator will immediately notify the Service of such a situation and implement actions as described in Section 10 of the Cooperative Agreement.

Occupied flycatcher habitats existing on the properties at the time of enrollment are considered baseline and are fully protected under the Act. The Agreement and the Act's regulatory assurances would be applicable to flycatcher habitat created above and beyond baseline conditions through participation in the Agreement. Landowners may take their properties back to the baseline condition after the agreed term of at least 15 years.

The Safe Harbor Agreement becomes effective upon issuance by the Service of the 10(a)(1)(A) Permit described in the Programmatic Safe Harbor Agreement and will be in effect for a term of 50 years. As mentioned above, Cooperative Agreements developed pursuant to the Safe Harbor Agreement will be for a term of at least 15 years. Certificates of Inclusion issued under this permit will have a term of 10 years beyond the term of the Cooperative Agreement but in no event beyond 2058. This Safe Harbor Agreement and the Permit may each be extended by mutual written consent of the parties given prior to the date of expiration and in compliance with all applicable laws and regulations. The additional years of Permit duration in the Certificates of Inclusion beyond the term of the Cooperative Agreements is approximately the amount of time that the Program Participants' conservation measures are expected to benefit the flycatcher without further active management. This additional time will allow the Program Participants to continue routine ranching and farming operations without actively managing habitat for the covered species.

<u>Other Responsibilities of the Parties</u>

- The Program Administrator agrees to enter into Cooperative Agreements with Program Participants, in the form attached hereto as Exhibit 1, that specify in part the management activities to be undertaken on the enrolled land, require the Program Participant to give

the Program Administrator advance notice of certain activities likely to reduce the amount of flycatcher habitat on the enrolled property, allow access to the enrolled property by the Program Administrator and the Service or their agents, and address the responsibilities of the Program Participants in the event of the transfer of ownership of the enrolled property or the termination of the Cooperative Agreement, all as set forth in further detail in Exhibit 1. In addition to entering into Cooperative Agreements with willing non-Federal landowners and managers, as described above, the Program Administrator agrees to:

1) Annually, the Program Administrator, in cooperation with the Service and the Utah Division of Wildlife Resources, will ensure that surveys are carried out on the restored habitat of enrolled properties to assess the general condition of habitat, use of the habitat by the covered species, progress of the ongoing management activities, and the satisfaction of the Program Participant with the project. If flycatchers are observed in the course of such surveys, that observation will be noted. Such survey activities may be carried out on the Program Administrator's behalf by a qualified entity pursuant to an agreement with the Program Administrator and Program Participant;

2) Provide the Service with an annual report, due by December 31 of each year, in the form attached hereto as Exhibit 2; and,

3) Furnish the Service with copies of all draft Cooperative Agreements hereunder prior to executing them and refrain from executing any to which the Service has objected in writing within 15 days of receiving the draft Cooperative Agreement.

- In consideration of the foregoing, the Service agrees to:

1) Upon execution of the Agreement, issue to the Program Administrator a permit in accordance with Section 10(a)(1)(A) of the Act, and valid for a period of 50 years, authorizing take of the covered species as a result of implementing management activities specified in a Cooperative Agreement, or as a result of other lawful activities on enrolled properties after the management activities specified in such Cooperative Agreement have been initiated, provided that such taking shall be consistent with maintaining baseline conditions on the enrolled property.

2) Provide to the Program Administrator and Program Participants technical assistance, to the maximum extent practicable, when requested; and provide information on Federal funding programs.

Incidental Take

Amount or Extent of Take Anticipated

During the terms of these Cooperative Agreements, flycatchers are expected to continue to occupy and expand within the restored habitat on the "enrolled properties." Incidental take of

flycatchers, cuckoos, as well as Virgin River chub and woundfin could occur as a result of a variety of activities, including the implementation of the management activities identified in the programmatic Safe Harbor Agreement. Take of these species through normal agricultural activities such as grazing, ranching, and farming and restoration activities is authorized under the 10(a)(1)(A) permit associated with this programmatic Safe Harbor Agreement. Specifically, take may occur through harm and harassment of flycatchers of individual flycatchers due to restoration activities or during or the course of normal grazing, ranching, and farming activities. Take may also occur through harm and harassment to cuckoos, Virgin River chub, and woundfin via the management activities executed for flycatchers habitat enhancement.

Incidental take numbers from implementing the management activities are difficult to quantify because we are unable to characterize each site that may be enrolled in this program, specific management activities planned on the sites, and the individual success of the management activities. However, we anticipate the total amount of take for the programmatic project over the course of 50 years will not exceed 3 flycatchers, 3 cuckoos, 5 Virgin River chubs, and 5 woundfins.

Effect of Take

In the Biological Opinion, the Service determined that the level of anticipated take is not likely to result in jeopardy to these species. The Agreement authorizes incidental take, because without the voluntary habitat improvements associated with this Agreement, it is unlikely that enhanced riparian habitat would continue to occur on these private lands.

If, after the term of these Agreements, the Program Participants propose to undertake any actions that fall outside the scope of habitat enhancements or their normal grazing, ranching or farming operations, they will give the Service advance notice thereof. This provision also encompasses expected actions that will result in the taking of the covered species, including any activities that will return the Program Participants' Properties to baseline conditions. The Program Participants and the Service will work cooperatively to minimize negative impacts to the covered species from such actions.

Specifically, incidental take will be avoided and minimized through the following:

a) Southwestern willow flycatcher and Western yellow-billed cuckoo surveys will be conducted in accordance with Service approved survey protocol prior to any habitat modification activities.

b) Habitat disturbances will be avoided within 0.25 mile of occupied southwestern willow flycatcher and western yellow-billed cuckoo habitat from May 1 to August 15.

c) To avoid direct and indirect (downstream) impacts to spawning fish (spawning period is April 1 – July 31) all channel disturbing activities will be conducted from August 1 thru March 31 and will be implemented in as short of a construction time period as possible.

d) The Service's list of best management practices (BMPs) for construction activities in aquatic and riparian habitats (located in the Biological Opinion Terms and Conditions Section) will be implemented for all Cooperative Agreements.

Incidental take of these species will not negatively affect or reduce the net conservation benefits provided by this Agreement and will be avoided and minimized through the aforementioned measures. Conservation goals include restoring, enhancing, and managing native riparian habitats for flycatchers and allowing flycatchers to naturally expand on the "enrolled properties". These goals will be accomplished by implementing the aforementioned management activities.

Under the proposed Agreement and the associated 10(a)(1)(A) Enhancement of Survival Permit, the Program Participants will receive regulatory assurances that successful implementation of the management activities and conservation measures will not result in additional ESA restrictions on future land use activities. The Permit will authorize incidental take of flycatchers, cuckoos, Virgin River chub, and woundfin resulting from normal agricultural activities such as grazing, ranching, and farming and management activities on the "enrolled properties."

II. EFFECTS

As identified in the Service's Safe Harbor Policy, the Agreement must provide a net conservation benefit for the covered species and the benefit must be sufficient to contribute directly or indirectly to recovery of the species. The net conservation benefit is defined as "the cumulative benefits of the management actions that provide for an increase in species' population and/or enhancement, restoration, or maintenance of the covered species' habitat." Conservation benefits for flycatchers, cuckoos, as well as Virgin River chub and woundfin from implementation of the Agreement are expected by:

- Controlling or removing nonnative vegetation, such as tamarisk, Russian olive, or herbaceous weeds and restoring native vegetation.
- Restoring or enhancing the physical and biological functions of the stream to provide available habitat for aquatic species and to provide morphological characteristics required to sustain riparian plant communities.
- Restoring floodplain wetlands to provide desired conditions of slow-moving water, saturated soils, and other conditions enabling the establishment of wetland and riparian plant communities.

Furthermore, conservation of these species will be enhanced by improving and encouraging cooperative management efforts with private landowners, who will establish a model for others to follow.

Approval of the Agreement and issuance of the Permit as well as development of the Cooperative Agreements pursuant to this Agreement and the Certificates of Inclusion issued under the Permit will increase the likelihood that flycatcher recovery and associated beneficial impacts to the other species within the project area will occur. Under the Agreement, the Program Administrator will be covered under the Permit and the Program Participants (private

landowners) will be covered under the Certificates of Inclusion which will authorize incidental take in conjunction with the management activities.

Since the objective of this Programmatic Safe Harbor Agreement, and the expected net conservation benefit, is to promote the conservation of the southwestern willow flycatcher through the voluntary restoration, enhancement, and management of native riparian habitat, incidental take authorized under the Permit, will not affect the net conservation benefits or the contributions towards the enhancement and survival of the species, provided by the Agreement. The proposed habitat treatments will improve available riparian habitat for flycatchers, as well as cuckoos, Virgin River chub, and woundfin. Long term benefits of this project include a reduced risk of catastrophic decline by improving the health and availability of riparian habitats. This will benefit southwestern willow flycatcher and western yellow-billed cuckoo by increasing nesting success, increasing insect prey abundance, and decreasing predation. This will benefit Virgin River chub and woundfin by providing a long-term source of detritus to the stream, reducing erosion, improving turbidity levels, and reducing temperatures in the stream. While potential short-term adverse effects to these species may be associated with the proposed actions, this programmatic Safe Harbor Agreement can result in long-term benefits to riparian habitat.

Even with possible impacts from incidental take authorized under the Permit, conservation of these species and their habitat will be enhanced under the Agreement compared to without it. Under the Agreement, habitat restoration will occur that will not occur in the absence of the Agreement. The habitat improvement measures are expected to provide benefits to these species over term of the Agreements and may extend beyond. The impacts to these species under the Permit will be mitigated by the benefit of habitat restoration.

In summary, benefits are expected to occur from the management activities and from the Cooperative Agreements serving as a model for other private landowners. The combination of these benefits with the Agreements' regulatory assurances creating a cooperative relationship with landowners, is expected to result in an overall benefit to flycatcher conservation and likely an increase in species abundance and recovery, as well as associated benefits to cuckoos, Virgin River chub, and woundfin.

III. ENHANCEMENT OF SURVIVAL PERMIT CRITERIA - ANALYSIS AND FINDINGS

The Service's analysis and findings with respect to the Agreement satisfying the permit issuance criteria through Safe Harbor Policy in accordance with 50 CFR 17.22(d)(2) (64 FR 32717) are presented below:

1. The taking of flycatchers, cuckoos, Virgin River chub, and woundfin will be incidental and will be in accordance with the terms of the Safe Harbor Agreement.

2. The Agreement complies with the requirements of the Service's Final Safe Harbor Policy. Based, in part, on the analysis provided above in Part II of this document, the Service finds that the Agreement's conservation measures and expected benefits to flycatchers will provide a net conservation benefit to the species, as discussed in the Safe Harbor Policy. The Agreement also complies with all other requirements of the Safe Harbor Policy.

3. The probable direct and indirect effects of any authorized take of flycatchers, cuckoos, Virgin River chubs, and woundfins under the Permit will not appreciably reduce the likelihood of survival and recovery in the wild of any species. Issuance of the section 10(a)(1)(A) Enhancement of Survival Permit to the Program Administrator was reviewed by the Service under section 7 of the ESA. In a biological opinion, which is incorporated here by reference (September 18, 2008), the Service concluded that the direct and indirect effects of issuing the Permit and authorizing take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed or candidate species.

4. Implementation of the terms of the Agreement is consistent with applicable Federal, State, and Tribal laws and regulations. The Agreement is consistent with all applicable Federal and State laws and regulations. The Agreement is approved and the Permit issued in accordance with the ESA. In accordance with the National Environmental Policy Act (NEPA), the Service determined it was categorically excluded from NEPA. Ground-disturbing activities in the form of agriculture have already occurred on many of the "enrolled properties", so additional activities associated with revegetation will not be in violation of the National Historic Preservation Act (NHPA). Additionally, a site specific clearance will occur on any enrolled property prior to ground-disturbing activities.

   There are no Tribal laws or regulations applicable to the Agreement as no tribal lands are located within the action area.

5. Implementation of the terms of the Agreement will not be in conflict with any ongoing conservation programs for flycatcher, cuckoo, Virgin River chub, and woundfin. Approval of the Agreement and issuance of the Permit will also not be in conflict with any ongoing conservation programs. In fact, Agreement approval will compliment ongoing conservation programs.

6. The Program Administrator has shown capability for and commitment to implementing all of the terms of the Agreement. Signing of the legally binding Agreement by the Program Administrator and the Service ensures that it will be implemented and commits all parties to obligations under the Agreement. Implementation of the Agreement will be a condition of the Permit, and a failure to perform obligations under the Agreement may be grounds for suspension or revocation of the Permit.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

The Service has no evidence that the Permit should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b)-(c). The Program Administrator has met the criteria for the issuance of the Permit and does not have any disqualifying factors that will prevent the Permit from being issued under current regulations.

V. PUBLIC COMMENTS

The Service published a Notice of Availability of the Program Administrator's permit application, including the Agreement and NEPA documentation, in the *Federal Register* on May 7, 2008. Publication of the notice initiated a 30-day comment period, which closed on June 7,

2008. One comment in support of the project was received from Environmental Defense, dated May 22, 2008.

VI. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing finding with respect to the proposed action, I recommend issuance of a section 10(a)(1)(A) Enhancement of Survival Permit to authorize incidental take of flycatcher, cuckoo, Virgin River chub, and woundfin by the Program Administrator in accordance with the programmatic Safe Harbor Agreement.

Utah Field Supervisor, Ecological Services

9/18/08
Date

Attachment: Map

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ORIGINAL SIGNED

Utah Field Supervisor, Ecological Services — Date

Attachment: Map

bcc: Project File
Reading File

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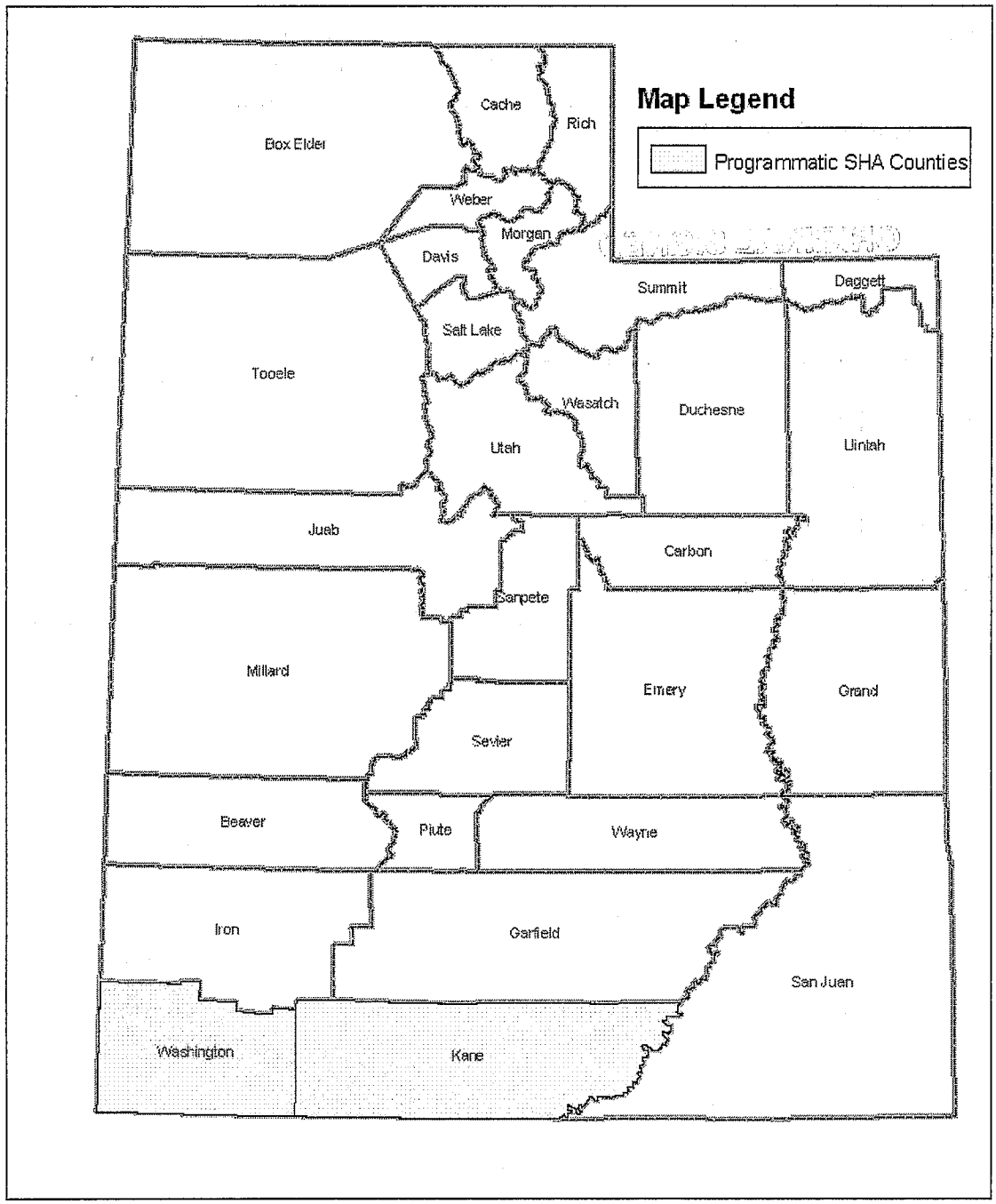
Flycatcher Programmatic Safe Harbor Agreement Map