

193.00 INDX  
2 3 04/16/92

4:46 PM 3185

DECLARATION OF AGREEMENTS AND RESTRICTIONS

The undersigned, being the owners of certain property in Travis County, Texas (collectively the "Property"), as more particularly described and delineated in Exhibit A attached hereto and hereby made a part hereof for all purposes, do hereby make, publish and give notice of certain agreements in the Real Property Records of Travis County, Texas, in order to give the public notice thereof.

WHEREAS, the U.S. Department of Army, Corps of Engineers ("Corps") and United States Department of Interior, Fish and Wildlife Service ("Service") have made certain reviews and issued certain approvals in connection with a portion of the Property; and

WHEREAS, the Corps and the Service have made and set certain requirements and restrictions in connection with those reviews and approvals.

4:46 PM 3185

3.00 RECM  
2 3 04/16/92

NOW, THEREFORE, the undersigned owners of the Property do hereby:

1. Record and publish the approvals and restrictions issued by the Corps and the Service and attach the same hereto as Exhibit B and Exhibit C, which exhibits are incorporated herein as if written herein at length.

60.74-CHK#  
277.88-CHK#

2. Give notice of all requirements, conditions and restrictions set out in Exhibit B and Exhibit C to the public and all present and future owners of that of the Property covered and affected by such requirements, conditions and restrictions.

920346.96-DOC#

EXECUTED AND PUBLISHED effective the 15 day of April, 1992.

TEXAS COMMERCE BANK-AUSTIN,  
NATIONAL ASSOCIATION

By: [Signature]  
Name: JOHN M. GAULDING, JR.  
Title: Assistant Vice President

[Signature]  
DEIDRE LYONS VEDDER

[Signature]  
HOWARD L. BURRIS, JR., INDIVIDUALLY  
AND AS AGENT

THE STATE OF TEXAS §  
§  
COUNTY OF TRAVIS §

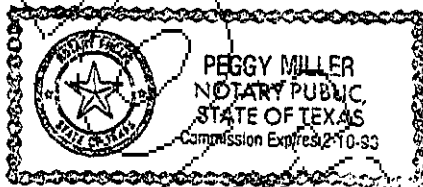
This instrument was acknowledged before me on the 13th day of April 1992 by Howard L. Burris, Jr. Individually and as agent. XXXX

THE STATE OF TEXAS

§  
§  
§

COUNTY OF TRAVIS

This instrument was acknowledged on the 16<sup>th</sup> day of April, 1992, by Deidre Lyons Vedder.



Peggy Miller  
Notary Public in and for  
the State of Texas  
Printed Name: PEGGY MILLER  
My commission expires: 2-10-93

THE STATE OF TEXAS

§  
§  
§

COUNTY OF TRAVIS

This instrument was acknowledged on the \_\_\_ day of \_\_\_\_\_, 1992, by Howard L. Burris, Jr., Individually and as Agent.

\_\_\_\_\_  
Notary Public in and for  
the State of Texas  
Printed Name: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

THE STATE OF TEXAS

§

COUNTY OF TRAVIS

§

This instrument was acknowledged before me on the 16<sup>th</sup> day of April, 1992, by John M. Stalder, Jr., Vice President of Texas Commerce Bank-Austin, National Association, a national banking association, on behalf of said association.



Patricia Ann Thomson  
Notary Public in and for  
the State of Texas  
Printed Name: \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

**Trimble & Associates**

**Land Surveying**

1250 Capital of Texas Highway  
Building II, Suite 329  
Austin, Texas 78746  
(512) 329-2777

TRACT I

**METES AND BOUNDS DESCRIPTION**

BEING ALL THAT CERTAIN TRACT OR PARCEL OF LAND OUT OF AND A PART OF THE A.E. PATTON SURVEY NO. 541 SITUATED IN TRAVIS COUNTY, TEXAS, SAID TRACT BEING MORE PARTICULARLY DESCRIBED AS BEING A 16.655 ACRE PORTION OF THAT CERTAIN TRACT OF LAND DESCRIBED IN A DEED TO TEXAS COMMERCE BANK - AUSTIN, NATIONAL ASSOCIATION OF RECORD IN VOLUME 11634 PAGE 1570 OF THE TRAVIS COUNTY, TEXAS DEED RECORDS AND 1.799 ACRES OF THAT CERTAIN TRACT OF LAND DESCRIBED IN A DEED TO HOWARD BURRIS OF RECORD IN VOLUME 7948 PAGE 824 OF THE TRAVIS COUNTY, TEXAS DEED RECORDS SAID TRACT BEING 18.454 ACRES OF LAND MORE FULLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING at a point in the westerly line of the James Cole Survey No. 600 being an easterly line of said A.E. Patton Survey No. 541 being the westerly line of that certain tract of land described in a deed to Southwest Federal Savings Association of record in volume 11222 page 3 of the Travis County, Texas Deed Records being in the easterly line of said Texas Commerce Bank - Austin, National Association tract for the southeast corner of the herein described tract from which said POINT OF BEGINNING the southwest corner of said Cole Survey being the southwest corner of said Southwest Federal Savings Association tract bears S29°37'32"W 159.00 feet, S30°07'07"W 235.96 feet, S29°55'49"W 440.02 feet and S29°25'00"W 135.43 feet.

THENCE for the southerly line of the herein described tract N69°46'35"W 762.34 feet for an angle point and N60°36'00"W 1400.00 feet to a point in the southeasterly line of Jester Point 2 Section 5-B, a subdivision of record in plat book 88 page 202 and 203 of the Travis County, Texas Plat Records for the southwest corner of the herein described tract from which said corner the most southerly southeast corner of said Jester Point 2 Section 5-B bears S29°24'00"W 674.61 feet;

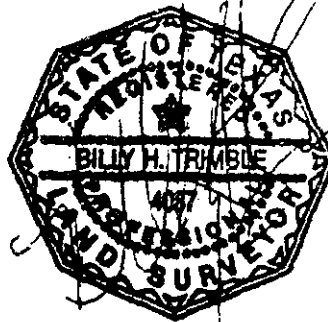
THENCE with the southeasterly line of said Jester Point 2 Section 5-B for the westerly line of the herein described tract N29°24'00"E 300.00 feet to a point for the northwest corner of the herein described tract;

Job No. 92-014  
18.454 Ac.

THENCE for the northerly line of the herein described tract S70°17'07"E 663.17 feet to an angle point and S60°36'00"E 973.28 feet pass a present easterly line of said Burris tract, in all a distance of 1500.00 feet to a point in the common line of said Patton and Cole Surveys being the westerly line of said Southwest Federal Savings Association tract being an easterly line of said Burris tract for the northeast corner of the herein described tract;

THENCE with the common line of said Patton and Cole Surveys being the westerly line of said Southwest Federal Savings Association tract being an easterly line of said Texas Commerce Bank - Austin, National Association tract and the easterly line of said Burris tract for the easterly line of the herein described tract S29°37'32"W at 160.00 pass the northeast corner of said Texas Commerce Bank - Austin, National Association tract being the present southeast corner of said Burris tract, a distance in all of 290.00 feet to the PLACE OF BEGINNING containing 18.454 acres of land.

Prepared by TRIMBLE AND ASSOCIATES LAND SURVEYING this the 7th day of April, 1992.



Job No. 92-014  
18.454 Ac.

**Trimble & Associates**

**Land Surveying**

1250 Capital of Texas Highway  
Building II, Suite 329  
Austin, Texas 78746  
(512) 329-2777

TRACT II

**METES AND BOUNDS DESCRIPTION**

BEING ALL THAT CERTAIN TRACT OR PARCEL OF LAND OUT OF AND A PART OF THE A.E. PATTON SURVEY NO. 541 SITUATED IN TRAVIS COUNTY, TEXAS, SAID TRACT BEING MORE PARTICULARLY DESCRIBED AS BEING A PORTION OF THAT CERTAIN TRACT OF LAND DESCRIBED IN A DEED TO TEXAS COMMERCE BANK - AUSTIN, NATIONAL ASSOCIATION OF RECORD IN VOLUME 11634 PAGE 1570 OF THE TRAVIS COUNTY, TEXAS DEED RECORDS SAID TRACT BEING 0.825 OF AN ACRE OF LAND MORE FULLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING at an iron rod found at the most easterly northeast corner of Jester Point 2 Section 5-B a subdivision of record in plat book 88 page 202 and 203 of the Travis County, Texas Plat Records for the northwest corner of the herein described tract;

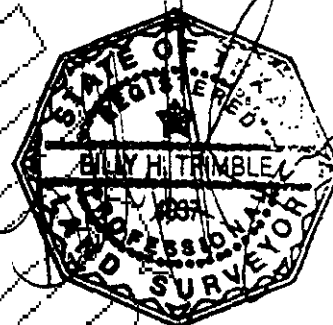
THENCE for the northerly line of the herein described tract S60°36'00"E 354.52 feet to a point for the northeast corner of the herein described tract;

THENCE for the easterly line of the herein described tract S29°24'00"W 202.90 feet to an iron rod found at the most easterly southeast corner of said Jester Point 2 Section 5-B for the most southerly corner of the herein described tract;

THENCE with the easterly line of said Jester Point 2 Section 5-B for the southwesterly line of the herein described tract N30°49'00"W 408.48 feet to the PLACE OF BEGINNING containing 0.825 of an acre of land.

Prepared by TRIMBLE AND ASSOCIATES LAND SURVEYING this the 7th day of April, 1992.

Job No. 92-014  
0.825 Ac.



## Trimble & Associates

### Land Surveying

1250 Capital of Texas Highway  
Building II, Suite 329  
Austin, Texas 78746  
(512) 329-2777

TRACT III

### METES AND BOUNDS DESCRIPTION

BEING ALL THAT CERTAIN TRACT OR PARCEL OF LAND OUT OF AND A PART OF THE A.E. PATTON SURVEY NO. 541 SITUATED IN TRAVIS COUNTY, TEXAS, SAID TRACT BEING MORE PARTICULARLY DESCRIBED AS BEING A PORTION OF THAT CERTAIN TRACT OF LAND DESCRIBED IN A DEED TO TEXAS COMMERCE BANK - AUSTIN, NATIONAL ASSOCIATION OF RECORD IN VOLUME 11634 PAGE 1570 OF THE TRAVIS COUNTY, TEXAS DEED RECORDS SAID TRACT BEING 81.715 ACRES OF LAND MORE FULLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING at an iron rod found in the easterly line of that certain tract of land described in a deed to Beard/Biggar Joint Venture of record in volume 9394 page 600 of the Travis County, Texas Deed Records being in the westerly line of said Texas Commerce Bank - Austin, National Association tract being the northwest corner of Jester Point 2 Section 5-B, a subdivision of record in plat book 88 page 202 and 203 of the Travis County, Texas Plat Records for the southwest corner of the herein described tract;

THENCE with the easterly line of said Beard/Biggar Joint Venture tract being a westerly line of said Texas Commerce Bank - Austin, National Association tract, for a westerly line of the herein described tract the following four (4) courses and distances as enumerated below:

- 1) N30°09'46"W 220.97 feet to an iron rod found,
- 2) N30°03'11"W 298.76 feet to an iron rod found,
- 3) N30°11'24"W 337.00 feet to an iron rod found,
- 4) N29°54'19"W 291.56 feet to an iron rod found in the easterly line of the S.P.R.R. Co. Survey No. 3 being an angle point of said Patton Survey being the southeast corner of that certain tract of land described in a deed to Ivanhoe Inc. of record in volume 8716 page 42 of the Travis County, Texas Deed Records being the northwest corner of said Beard/Biggar Joint Venture tract being the most westerly corner of said Texas Commerce Bank - Austin, National Association tract for the most westerly corner of the herein described tract;

THENCE with the easterly line of said S.P.R.R. Co. Survey being a westerly line of said Patton Survey being the easterly line of said Ivanhoe Inc. tract being a westerly line of said Texas Commerce Bank - Austin, National Association tract for a westerly line of the herein described tract the following four (4) courses and distances as enumerated below:

- 1) N30°02'13"E 182.51 feet to an iron rod found,
- 2) N28°48'41"E 102.43 feet to an iron rod found,
- 3) N29°55'04"E 824.30 feet to an iron rod found,
- 4) N29°59'46"E 394.77 feet to a point for the most northwesterly corner of the herein described tract;

THENCE leaving the common line of said S.P.R.R. Co. and Patton Surveys being the common line of said Ivanhoe Inc. and Texas Commerce Bank - Austin, National Association tracts for the northerly line of the herein described tract the following five (5) courses and distances as enumerated below:

- 1) S60°00'14"E 335.00 feet to a point of curvature,
- 2) with said curve being a curve to the left, having a radius of 1190.36 feet, an arc distance of 295.97 feet and whose chord bears S67°07'37"E 295.21 feet to the point of tangency,
- 3) S74°15'00"E 340.00 feet to a point of curvature,
- 4) with said curve being a curve to the right, having a radius of 1127.32 feet, an arc distance of 298.25 feet and whose chord bears S66°40'15"E 297.38 feet to the point of tangency,
- 5) S59°05'30"E 209.00 feet to a point for the most northeasterly corner of the herein described tract;

THENCE for the easterly line of the herein described tract the following three (3) courses and distances as enumerated below:

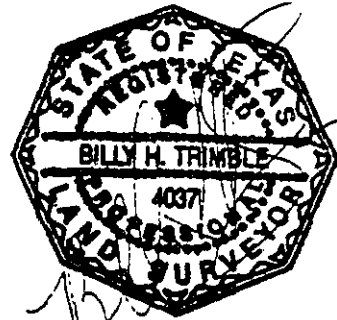
- 1) S10°30'56"W 723.91 feet to an angle point,
- 2) S45°53'00"E 239.94 feet to an angle point,
- 3) S17°11'00"E 535.00 feet to an iron rod found at the most easterly northeast corner of said Jester Point 2 Section 5-B for the southeast corner of the herein described tract;

THENCE with the northerly line of said Jester Point 2 Section 5-B for the southerly line of the herein described tract the following seven (7) courses and distances as enumerated below:

- 1) S32°30'00"W 435.00 feet to an iron rod found for an angle point,
- 2) S76°21'00"W 311.21 feet to an iron rod found for an angle point,
- 3) N62°54'00"W 462.53 feet to an iron rod found for an angle point,

- 4) N51°54'00"W 324.54 feet to an iron rod found for an angle point  
5) S64°13'00"W 455.50 feet to an iron rod found for an angle point  
6) with a curve being a curve to the left, having a radius of 541.52 feet, an arc distance of 32.60 feet and whose chord bears S25°58'57"E 32.59 feet to an iron rod found for an angle point,  
7) S62°18'00"W 120.61 feet to the PLACE OF BEGINNING containing 81.715 acres of land.

Prepared by TRIMBLE AND ASSOCIATES LAND SURVEYING this the 7th day of April, 1992.

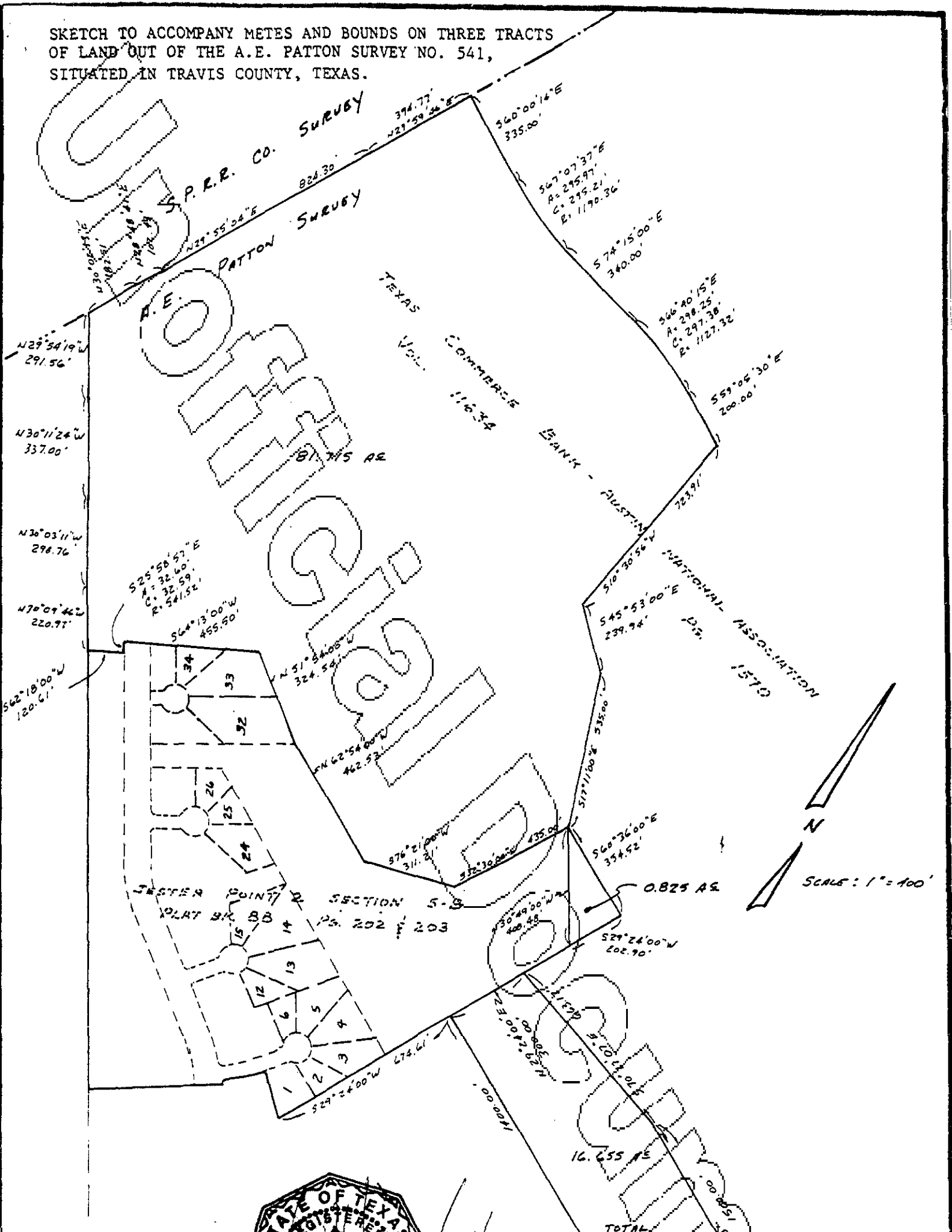


TRACT IV

Lots 3-6, 12-15, 24-26, 29 and 32-34, Block B, JESTER POINT 2, Section 5-B, a subdivision in Travis County, Texas, according to the map or plat of record in Volume 88, Page 202 of the Plat Records of Travis County, Texas.



SKETCH TO ACCOMPANY METES AND BOUNDS ON THREE TRACTS OF LAND OUT OF THE A.E. PATTON SURVEY NO. 541, SITUATED IN TRAVIS COUNTY, TEXAS.

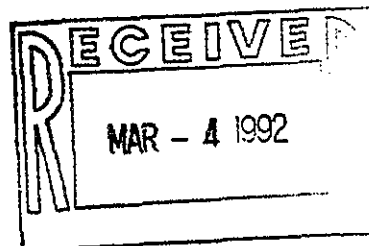




DEPARTMENT OF THE ARMY  
 FORT WORTH DISTRICT, CORPS OF ENGINEERS  
 P. O. BOX 17300  
 FORT WORTH, TEXAS 76102-0300

REPLY TO  
 ATTENTION OF:

March 2, 1992



Operations Division  
 Regulatory Branch

SUBJECT: Project Number 199000181

Mr. Howard L. Burris, Jr.  
 98 San Jacinto Boulevard, Suite 350  
 Austin, Texas 78701

Dear Mr. Burris:

Reference is made to a letter dated June 27, 1991 from Horizon Environmental Services, Inc. requesting authorization, on your behalf, under Section 404 of the Clean Water Act to construct a wastewater pipeline in a tributary to Bull Creek. This wastewater pipeline is to service parts of the Jester Estates Development in Austin, Travis County, Texas (Figures 1 and 2).

We reviewed your request and determined that the activity may affect the golden-cheeked warbler (Dendroica chrysoparia) which is listed as endangered under the Endangered Species Act (ESA). On August 14, 1991, we reinitiated formal consultation with the United States Fish and Wildlife Service (USFWS) in accordance with the ESA. On February 25, 1992, the USFWS rendered their Biological Opinion (copy enclosed), concluding that the issuance of a nationwide permit for the wastewater pipeline is not likely to jeopardize the continued existence of the golden-cheeked warbler or the Bee Creek Cave harvestman. The USFWS also required that reasonable and prudent measures be taken to minimize take. The activities considered in the USFWS Biological Opinion includes approximately 1,400 feet of wastewater pipeline, approximately 121 single family homes, a 5.5 acre Jester Estate Cave preservation area, and conservation and greenbelt areas (Figures 3 and 4). This consultation also included a review of the reasonable and prudent measures and conservation recommendations of the previous biological opinion dated September 26, 1990.

This letter authorizes the construction of the wastewater pipeline crossing a tributary to Bull Creek under nationwide permit 12 for the discharge of material for backfill or bedding for utility lines within a water of the United States. The only requirements in the use of the above nationwide permit is that the person responsible for the project must ensure that the work is in compliance with the enclosed Biological Opinion, Enclosure 1, and the below listed special conditions. Failure to satisfy these conditions invalidates this authorization and may subject you to legal action for violation of the Clean Water Act and/or the Endangered Species Act.

REAL PROPERTY RECORDS  
 TRAVIS COUNTY, TEXAS

11666 0836

EXHIBIT B

EXHIBIT B

Thank you for your interest in our nation's water resources. If you have any questions concerning this matter please contact Mr. Jim Townsend at the address above or telephone (817) 334-4625.

Sincerely,

*Wayne A. Lea*

Wayne A. Lea  
Chief, Regulatory Branch

Enclosures

Copy Furnished: w/o encls

U.S. Fish and Wildlife Service  
611 East 6th Street  
Grant Bldg., Suite 407  
Austin, Texas 78701

Honorable J. J. Pickle  
United States Congressman  
300 East 8th Street, Room 763  
Austin, Texas 78701

Special Conditions:

11. That golden-cheeked warbler nesting surveys shall be conducted around the project boundaries covered by this consultation and in accordance with the following terms and conditions. (These survey requirements supersede those listed as reasonable and prudent measures in the previous biological opinion on Jester Estates.):

a. The area to be surveyed is the area between the back edge of the lots and 500 feet beyond the perimeter or the boundaries of the land considered in this consultation (Figure 4).

b. Surveys should be initiated during the first breeding season after issuance of the Corps authorization and continue until the third nesting season after build-out (at least 95 percent of the lots contain buildings).

c. Presence/absence surveys are to be conducted in accordance with the following procedures:

(1) Conduct the survey on days when weather conditions are suitable for the detection of bird singing.

(2) The general limits to the survey season are March 15 - May 20. It should be understood that the actual survey season varies from year-to-year and knowledge of the singing activity of the golden-cheeked warbler should be followed. During 1990 and 1991 the golden-cheeked warbler singing in the Travis County area declined significantly after May 20. Therefore, surveys conducted in the Travis County area after that date would not be reliable in determining whether an area was used as breeding habitat by the warbler.

(3) A minimum of three visits on separate days.

(4) The total survey time should be a minimum of eight hours per 100 acres of suitable habitat.

d. The survey format would be a repeating cycle of one year of territorial delineation followed by two years of presence/absence surveys and then the cycle repeating (i.e., the first year (1992) would be a territorial survey followed by two years of presence/absence surveys (1993 and 1994)) until three years after build out when the cycle would terminate with a territorial delineation. The territorial delineation must be done in accordance with procedures identified in:

An International Standard for a Mapping Method in Bird Census Work Recommended by the International Bird Census Committee, 1970, Audubon Field Notes. 24(6). pgs 722-726.

2. That written survey reports, summarizing the previous year of activity, are to be provided to this office and the U. S. Fish and Wildlife Service Field Office, 641 East 6th Street, Suite 407, Austin, Texas 78701 by October 1 of each year. The report is to include a map of the warbler territories or sightings as well as location of residences that have been constructed.
3. That upon locating a dead, injured, or sick individual of an endangered or threatened species, initial notification must be made to the Fish and Wildlife Service Law Enforcement Office at San Antonio, Texas (telephone 512-229-5412). Care should be taken in handling sick or injured individuals to insure effective treatment and care and in handling dead specimens to preserve biological materials in the best possible state for analysis of cause of death. In conjunction with the care of sick or injured individuals or preservation of biological materials from a dead animal, the finder has the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.
4. That new construction will not be initiated between March 15 and July 1 within 300 feet of the edge of a golden-cheeked warbler territory.
5. That this permit letter and enclosures shall be recorded with the County Clerk, Travis County, Texas, prior to the sale of the 121 residential lots. A recorded copy of this action shall be returned to this office within 60 days of the date of this letter.
6. That the wastewater line right-of-way is recommended to be replanted with native oak, evergreen sumac and native vegetation beneficial to the golden-cheeked warbler, not to include the ashe juniper. Consideration should be given to allowing a width of no more than 15 feet to remain unplanted to allow future access by maintenance vehicles.

The USFWS also recommended that access to the Jester Estate Cave be allowed to qualified cave ecologists and cave invertebrate specialists for the purpose of monitoring or surveying the troglobite species.

Our verification for the construction of an activity under this nationwide permit is valid for a period of no more than two years from the date of this letter, or a lesser time upon expiration of the nationwide permit on a regional or national basis. Continued confirmation that an activity complies with the specifications and conditions and any changes to the nationwide permit is the responsibility of the permittee.

This permit should not be considered as an approval of the design features of any activity authorized or an implication that such construction is considered adequate for the purpose intended. It does not authorize any damage to private property, invasion of private rights, or any infringement of federal, state, or local laws or regulations.

REAL PROPERTY RECORDS  
TRAVIS COUNTY, TEXAS

11666 0839

Mr. Robert M. Short  
U.S. Fish and Wildlife Service  
Ecological Services  
Stadium Centre Building  
711 Stadium Drive, East, Suite 252  
Arlington, Texas 76011

Mr. Norm Thomas  
U.S. Environmental Protection Agency  
Region VI  
1445 Ross Avenue  
Dallas, Texas 75202

Mr. Rollin MacRae  
Texas Parks and Wildlife Department  
4200 Smith School Road  
Austin, Texas 78444

REAL PROPERTY RECORDS  
TRAVIS COUNTY, TEXAS

11666 0840

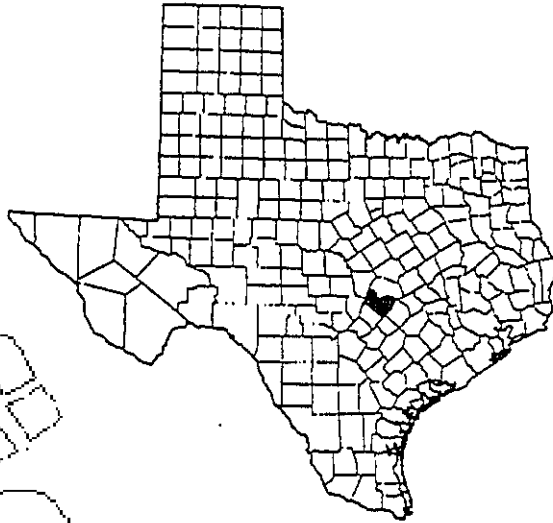


Figure 1. Location of Travis County, Texas.

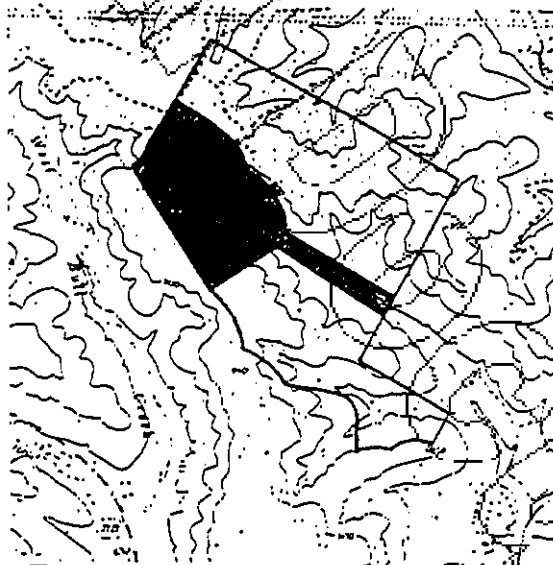


Figure 2. Jester Point 2 subdivision boundaries in the Bull Creek drainage basin, Travis County, Texas.

REAL PROPERTY RECORDS  
TRAVIS COUNTY, TEXAS

11666 0841

DUPLICATE

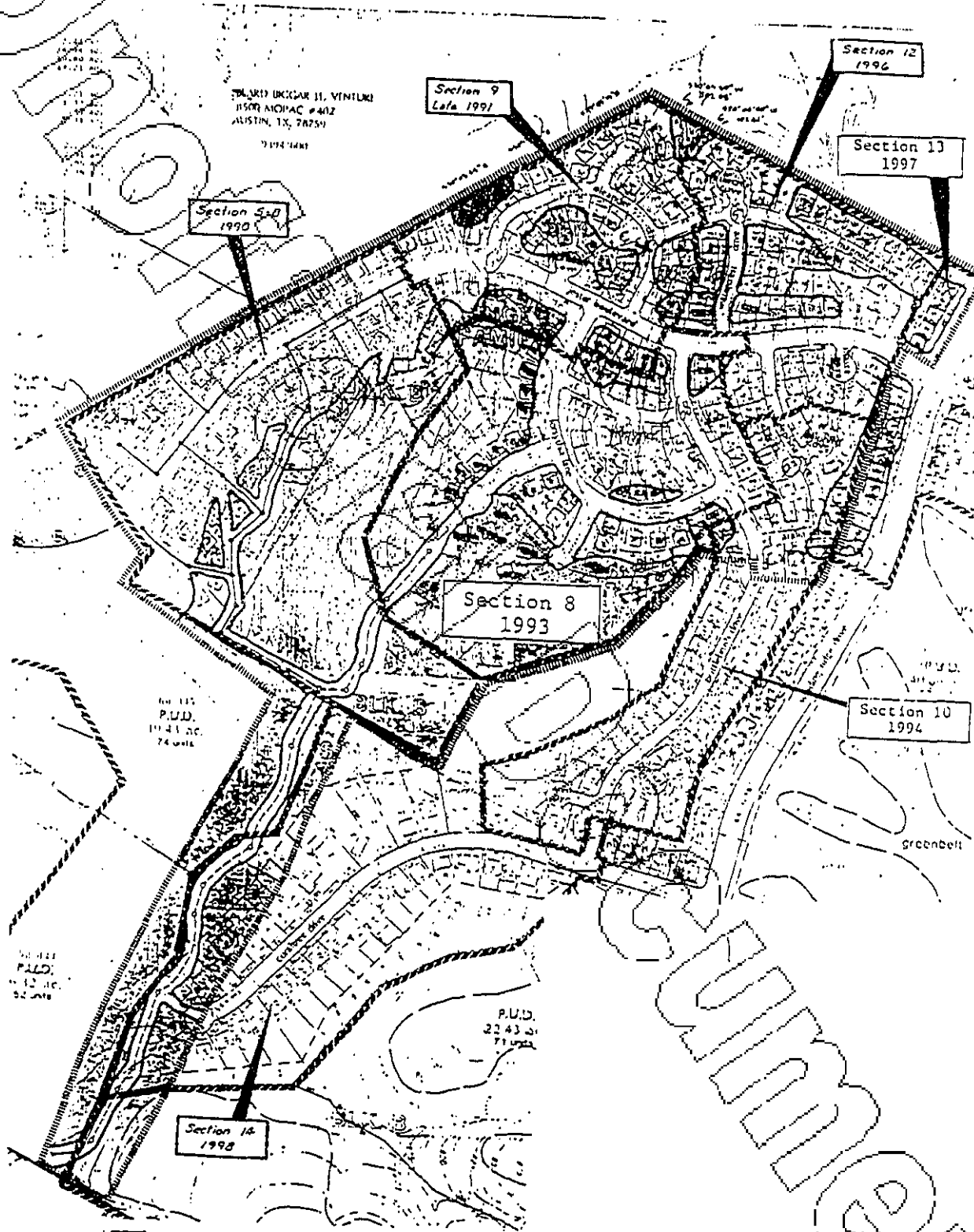


Figure 3. Location of Sections 5-B, 8, 9, 10, 12, and 13 being considered under this consultation.

REAL PROPERTY RECORDS  
TRAVIS COUNTY, TEXAS

11666 0842

Duplicate



jester point 2

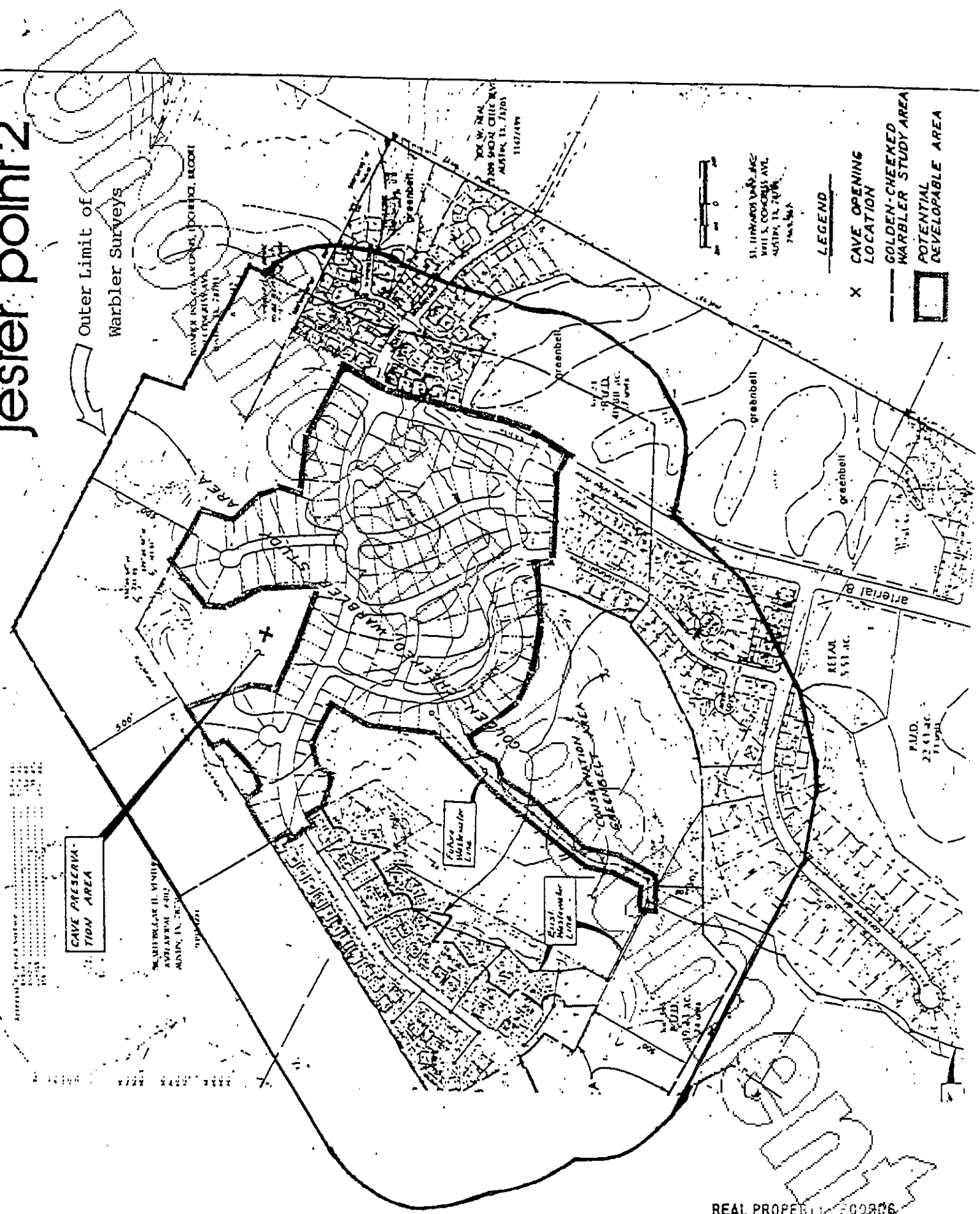
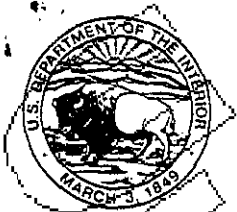


Figure 4. Outer limits of the golden-cheeked warbler surveys on Jester Point II subdivision in Travis County, Texas

REAL PROPERTY RECORDS  
TRAVIS COUNTY, TEXAS

11666 0843

11666



# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
611 E. Sixth Street  
Grants Bldg., Fourth Floor  
Austin, Texas 78701

February 25, 1992

Colonel John A. Mills  
District Engineer  
U.S. Army, Corps of Engineers  
P.O. Box 17300  
Fort Worth, TX 76102

2-12-90-F-205

Dear Colonel Mills:

This responds to your letter of August 14, 1991, requesting re-initiation of formal Section 7 consultation as provided by the Endangered Species Act of 1973, as amended (Act), and constitutes the Fish and Wildlife Service's (Service) biological opinion on the subject activity as provided by the Act. The Federal action under consultation is a nationwide permit from the U. S. Department of the Army, Corps of Engineers (Corps) for the discharge of backfill into a water of the United States in association with the construction of a wastewater pipeline. The project is located on an unnamed tributary to Bull Creek in north-central Travis County, Texas (Figure 1 and 2). The proposed action "may affect" the federally-listed endangered golden-cheeked warbler (Dendroica chrysoparia) and the Bee Creek Cave harvestman (Texella reddeni). This formal consultation was initiated on August 26, 1991, the date your request was received by this office.

By letter dated September 4, 1991, we acknowledged receipt of your letter and indicated that additional information was needed for our review. However, this information was not received in a timely manner, and by letter dated October 30, 1991, we requested and you subsequently agreed to a 60-day extension of the consultation process. Given this, the time period for completion of this consultation ends on January 19, 1992.

A previous Section 7 consultation on a portion of this project was initiated on June 5, 1990 and completed on September 26, 1990. That consultation and resulting biological opinion addressed 43 single-family lots in Section 5-B and included the following as conditions and recommendations:

The Service anticipates no direct loss of warblers or warbler habitat with project development. However, habitat may be indirectly affected and an unquantifiable level of incidental take occur as a result of residential development associated with this wastewater pipeline. Therefore, any quantifiable take will be regarded as exceeding the anticipated incidental take level. The level of take is unquantifiable for the following reasons:

1. The minimum distance from a residential development that warblers may nest is not known;
2. The distance from developed areas that typical urban animals (such as blue jays) will range and adversely impact nesting of the

REAL PROPERTY RECORDS  
TRAVIS COUNTY, TEXAS

11666 0844

FEB 27 1992

warbler is not known;

3. The minimum patch size that warblers will occupy is not accurately known.

The indirect impact of construction on adjacent habitat through increased human activity, and disturbance or predation by pets and other animals associated with residential areas, could result in nest abandonment and, thus, "take". Therefore, the Service believes the following reasonable and prudent measures are necessary and appropriate to minimize "take".

1. Conduct golden-cheeked warbler surveys (The survey procedure shall be provided to the Service for review 45 days prior to initiation of the survey) during the nesting season for 3 years on and adjacent to Jester Point 2 Section 5-B to monitor warbler activity; and
2. New construction not be initiated between April 1 and August 1 within 500 feet of an active golden-cheeked warbler nest.

We provided the following "conservation recommendations" to minimize adverse impacts and promote the conservation of the golden-cheeked warbler:

1. Revegetate the wastewater line right-of-way that services the 43 lots in Section 5-B with native oak and Ashe juniper.
2. The Corps condition the issued permit as follows: 1) the applicant, prior to any alteration of the designated undeveloped areas, will complete biological studies on use by federally-listed species and request the Corps to re-initiate consultation with the Service; or 2) the designated undeveloped areas will not be developed until completion of the Balcones Canyonlands Conservation Plan.

This current biological opinion is based upon information from the Corps; Lockwood Engineers, Inc.; Horizon Environmental Services, Inc.; data in Service files; and discussions with biologists familiar with the species.

Information obtained from the above sources indicated that residential construction associated with the wastewater line would result in direct alteration of suitable habitat for the golden-cheeked warbler (warbler) but would not for the Bee Creek Cave harvestman (harvestman). Indirect impact to the warbler would also occur as the project lies within the large block of warbler habitat in the Bull Creek drainage basin.

#### Background Information

The action under consultation involves construction of about 1,400 feet of wastewater pipeline and approximately 121 single-family homes, a Jester Estates Cave preservation area, and conservation and greenbelt areas. The Jester Point 2 subdivision totals about 425 acres. Formal consultation is being conducted on about 117 acres, the area identified by the Corps during formal consultation in 1990 as the service area formed by direct connection to the proposed wastewater pipeline. This consultation includes all or

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portions of Sections 5-B, 8, 9, 10, 12 and 13 of Jester Point 2 (Figure 3). The 14 lots of Section 5-B, 57 single family lots in total, not addressed in the previous biological opinion are considered in this biological opinion. This consultation also included a review of the "reasonable and prudent measures" and "conservation recommendations" of the previous biological opinion.

The project originally proposed the construction of approximately 200 lots within the project boundaries. The roads and lots have been modified and currently include about 121 residential lots within the project boundaries. The majority of these lots have been eliminated from areas that are endangered species habitat.

The project lies within the breeding range of the warbler. In central Texas, male warblers arrive at their breeding areas in early to mid-March, and females typically follow a week or two later. Warblers generally return to the same nesting territory year after year, and may remain in the area until mid- to late July. An estimated 4,822 to 16,016 pairs occur within the breeding range in Texas (Wahl et al, 1990).

Warbler habitat in Texas is a mixed evergreen-deciduous forest or woodland of Ashe juniper (Juniperus ashei), Texas oak (Quercus buckleyi) and other oaks generally over 30 years old. Warblers forage for insects in broad-leaved trees and shrubs. The warbler will nest in a variety of trees, but nesting depends on the presence of old Ashe junipers. The bark from this tree is necessary for nest construction. Thus, prime warbler habitat has a fairly closed canopy of mixed hardwood trees along with mature Ashe juniper; it often occurs in the steep canyons of the Texas Hill Country (Edwards Plateau). The warbler occupies and defends a territory from 3 acres in high quality habitat to 25 acres in marginal habitat. The species appears to require relatively large blocks of undivided habitat for long-term survival. A single clutch of three to four eggs is laid in late March or early April. The eggs hatch in about 12 days, and the young fledge in another 8 to 9 days. Both adults care for the young.

Habitat loss and habitat fragmentation are the main threats to this species. Wahl et al. (1990) estimated that the annual rate of warbler habitat loss in western Travis County was 4 percent over the last 10 years. This rate is slightly less than the 7.4 percent annual rate that Clark (1985) estimated for the Austin area. In addition to the direct loss of habitat, development has fragmented the remaining habitat so that only 46 percent of the vegetation suitable for warbler use in Travis County occurs in blocks large enough for warbler use. If this rate of decline is continued, Wahl et al. (1990) estimate the maximum carrying capacity for the warbler would be reduced by 53 percent by the year 2000. Cowbird nest parasitism is also a threat to the species, with Pulich (1976) reporting a parasitism rate of 56 percent. The added impact of habitat fragmentation on this rate is not known.

In addition to the warbler, the federally-listed Bee Creek Cave harvestman (Texella reddelli) was found in Jester Estates Cave located in Section 9. No other karst features were located within the sections under consideration in this consultation.

The Bee Creek Cave harvestman is a troglobite (cave dwelling species) whose

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body measures 2-3 millimeters in length. It has a yellowish-brown body and moves along cave walls and ceilings to catch small invertebrates (Mitchell and Reddell, 1971). The adults are more likely to be seen moving over silt and moist rocks, while immatures are usually found under rocks. The harvestman generally occupies those features with high humidity, stable temperatures, and a food source (Elliott et al, 1989). This species' distribution consists of 44 caves where it has been positively identified and six caves where it has been tentatively identified in Travis and Williamson Counties.

The harvestman inhabits karst areas along the Balcones Escarpment. The karst is an area characterized by landforms and subsurface features, such as sinkholes and caves that are produced by solution of bedrock. These areas are generally flat with few surface streams. Thus, water usually moves through the subsurface openings. The subsurface openings used by federally-listed cave invertebrates are above the water table, generally contain water only after rains and have high moisture content.

The surface vegetation community is important to the nutrient inflow to the sub-surface system. Cave crickets and other non-troglobite species forage outside the cave and bring nutrients into the cave for the benefit of the troglobite fauna. Nutrients are also brought into the subsurface system by water infiltration. These nutrient inflows are considered vital to the survival of the troglobitic fauna.

Threats to cave/karst systems and their troglobitic fauna include alteration of moisture quality, moisture quantity, nutrient inflow, predators, and direct habitat destruction. Increase of moisture quantity could result in flooding of areas and the elimination of air breathing species. A reduction in moisture quantity could result in the elimination of most of the troglobitic fauna because they rely on moist air environments. Alteration of the quantity of surface water inflow could also result in a change in nutrient inflow. Since these species rely on nutrients from the surface for their existence, any alteration of inflow could cause an adverse impact.

Another threat to the cave invertebrates is the red imported fire ant. The fire ant is an aggressive predator that has become established in the area. It moves into disturbed areas and generally reduces the diversity of the surface faunal community. Fire ants have been found in 33 percent of the caves that contain federally-listed invertebrates, and have been observed attacking cave invertebrate larvae (James Reddell pers. comm.). This non-native species could result in the destruction of troglobitic fauna. Finally, direct destruction of karst habitat such as filling for road or building construction and digging for installation of utilities results in loss of these subsurface features.

#### IMPACTS OF THE ACTION

Direct impact of your action on the warbler would be the destruction of about six (6) acres of warbler habitat to be cleared for roads and residential development as a result of this action. Indirect impacts would include increased noise and disturbance adjacent to the single-family houses and new roads as well as the introduction of fauna associated with residential

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warbler habitat and 40 percent of these lands are suitable for development. This estimate does not account for potential habitat that could be lost due to development-related habitat fragmentation. Potential habitat for the harvestman covers a larger area than potential warbler habitat within the general area of the project. Therefore, development impacts could be greater depending upon actual distribution of suitable habitat.

In considering cumulative impacts, an environmental baseline for the species is determined by considering past and present impacts of all projects and human activities in the area, regardless of whether they are Federal, State, or private in nature. After establishing this baseline, a determination is made concerning the "cushion" of remaining natural resources that may be used for completion of development projects associated with endangered species before the point of jeopardy and/or adverse modification of critical habitat is reached. After that point, further Federal actions would be precluded under Section 7, unless reasonable and prudent alternatives are available or an exemption is granted by the Endangered Species Committee.

Numerous development actions in Travis County are undergoing evaluation by the Service to determine possible impacts to the endangered warbler and/or cave invertebrates. Pending actions include road projects, water and utility line activities, residential developments, and commercial developments. Wahl et al. (1990) estimate there are from 80,000 to 260,000 acres of potential warbler habitat in all or part of 39 counties in Texas. This excludes habitat blocks smaller than 125 acres. A viable population is projected to be 500 to 1,000 breeding pairs (Pease and Gingerich 1989). A total of about 7,400 to 14,800 unfragmented acres of good quality habitat would be required to support this viable population, and more than one viable population would be required over the total warbler range to maintain the species over the long-term. Based upon total past, present, and reasonably certain to occur cumulative effects on the warbler, plus anticipated impacts of the proposed activity under consultation, we believe a jeopardy threshold for the warbler would not be reached.

One additional impact of concern with reference to the Bee Creek Cave harvestman is the impact as a result of the imported fire ant (*Solenopsis invicta*). As a probable result of land disturbances that have previously occurred throughout the range of the harvestman, there has been infestation by the imported fire ant. Fire ants generally invade an area after some sort of a disturbance. This disturbance generally results in the elimination or severe reduction in the population of native ants that retard the spread of fire ants. Fire ants spread faster into the disturbed areas and restrict the reestablishment of native ants.

Fire ants have been observed to invade endangered species caves and cause potentially severe perturbations including observed predation on endangered species (Reddell, pers. comm., 1991). The fire ant is a hardy and prolific species and the continued existence of the endangered invertebrates may not be compatible with the presence of fire ants in the long-term. The potential impact of fire ants on troglobites and the endangered species is not definitely known.

The total population of the harvestman or area required for a viable population is not known. However, this project as proposed is not likely to impact known populations of the harvestman. Based upon the absence of known populations of the harvestman in the proposed development area, we believe

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the impacts due to the proposed development, along with total cumulative effects, would not reach a jeopardy threshold for the harvestman.

#### Biological Opinion

Based on this evaluation, it is the Service's biological opinion that your action of issuing this nationwide permit for the wastewater pipeline crossing in Jester Estates Point II, north-central Travis County, Texas, is not likely to jeopardize the continued existence of the golden-cheeked warbler or the Bee Creek Cave harvestman.

#### Incidental Take

Section 9 of the Act prohibits any taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct) of listed species without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Under terms of Sections 7(b)(4) and 7(e)(2) of the Act, taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking; provided that such taking is in compliance with this incidental take statement.

The Service does not anticipate that the proposed action will result in any incidental take of the Bee Creek Cave harvestman. Accordingly, no incidental take is authorized. Should any take occur the Corps must reinitiate formal consultation with the Service and provide the circumstances surrounding the take.

The Service anticipates that two pairs of golden-cheeked warblers could be taken as a result of your proposed action. This take may be in the form of harassment or harm.

The Service believes that the following reasonable and prudent measures are necessary and appropriate to minimize the take. The reasonable and prudent measures described below are nondiscretionary, and must be undertaken by the agency or made a binding condition of any permit issued to the applicant, as appropriate.

1. Conduct golden-cheeked warbler nesting surveys around the project boundaries covered by this consultation and in accordance with the following terms and conditions.
2. Provide reports of the preceding survey results.

In order to be exempt from the prohibitions of Section 9 of the Act, the Corps is responsible for compliance with the following terms and conditions, which implement the reasonable and prudent measures described above.

1. Conduct golden-cheeked warbler nesting surveys around the project

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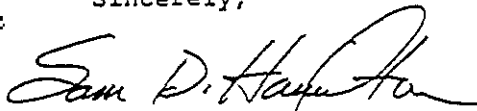
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This concludes formal consultation on this action. Re-initiation of formal consultation is required if: 1) the amount or extent of incidental take is exceeded (i.e. any quantifiable take occurs); 2) new information reveals effects of the action that may impact listed species or critical habitat in a manner or to an extent not considered in this opinion; 3) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or, 4) a new species is listed or critical habitat designated that may be affected by the action.

We appreciate the opportunity to provide input to you to promote conservation of endangered species. Please provide us documentation on how the reasonable and prudent measures will be implemented. If the conservation recommendations are adopted and must be modified due to unforeseen problems, please coordinate changes with this office. If we may be of further assistance, please contact Joe Johnston or myself of this office at (512) 482-5436.

Sincerely,



Sam D. Hamilton  
Field Supervisor

cc: Regional Director, FWS, Albuquerque, NM (FWE)  
Executive Director, TPWD, Austin, TX  
Congressman J.J. Pickle, Austin, TX  
Senator Lloyd Bentsen, Austin, TX  
Maury Hood, Jester Land Management Corporation, Austin, TX  
Director, FWS, Washington, D.C. (DES)

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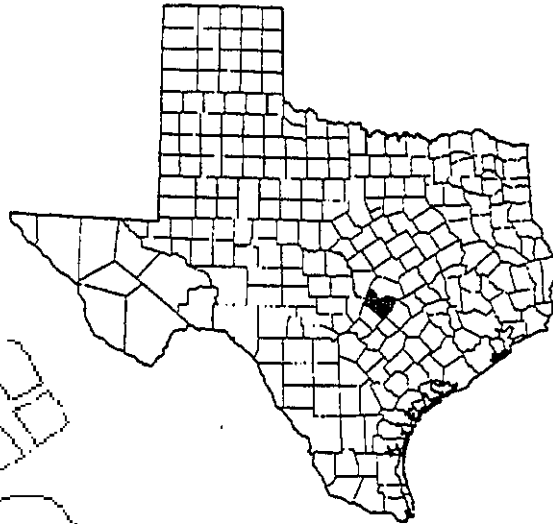
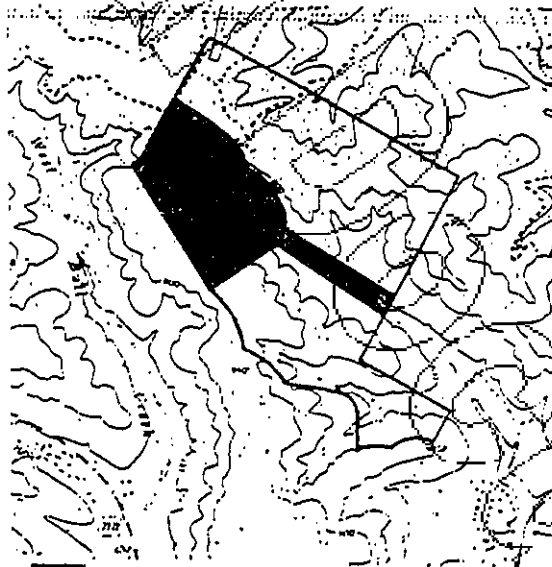


Figure 1. Location of Travis County, Texas.



Area of Section 7 Consultation  
Figure 2. Jester Point 2 subdivision boundaries in the Bull Creek drainage basin, Travis County, Texas.

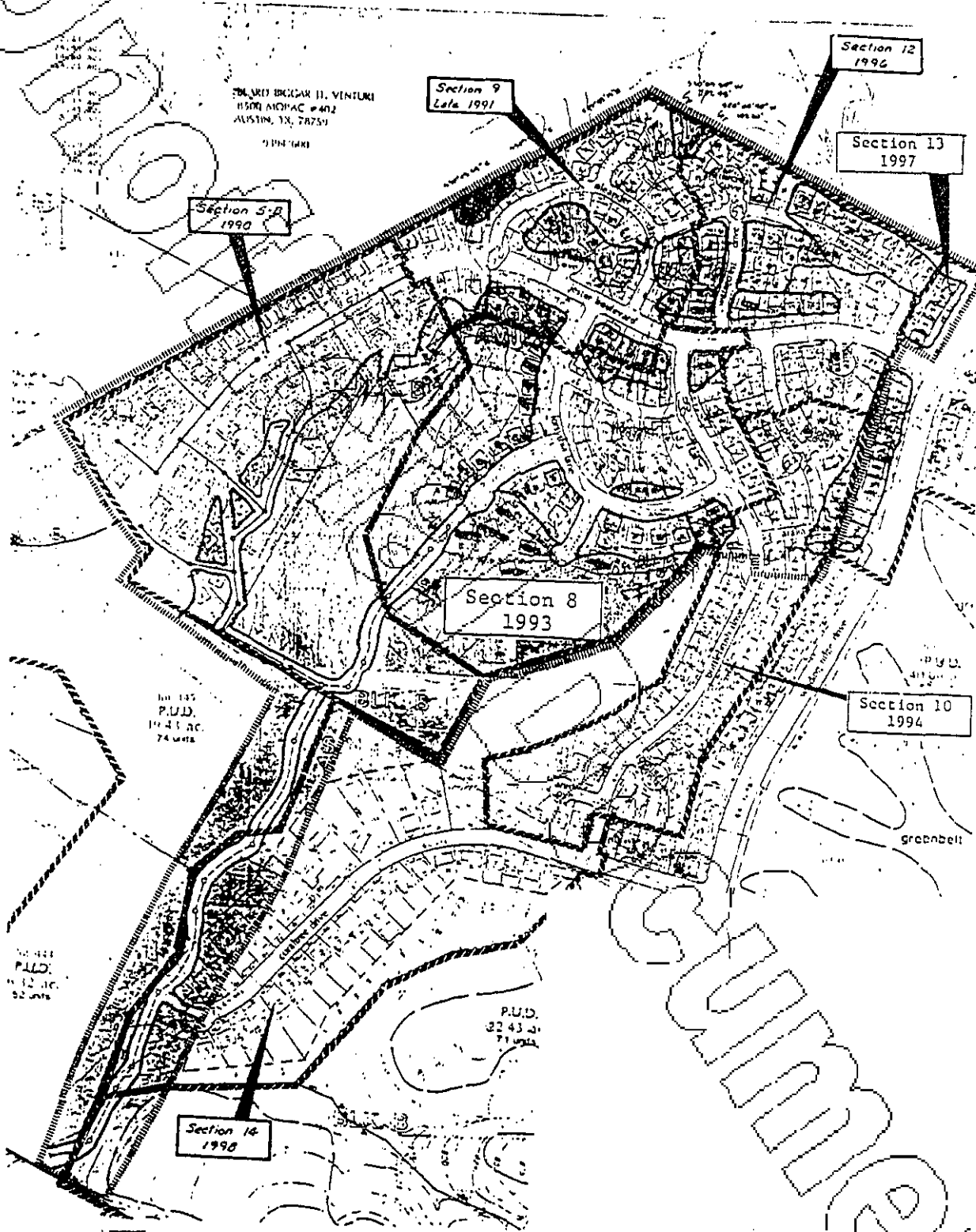


Figure 3. Location of Sections 5-B, 8, 9, 10, 12, and 13 being considered under this consultation.

boundaries covered by this consultation and in accordance with the following terms and conditions. (These survey requirements supersede those listed as reasonable and prudent measures in the previous biological opinion on Jester Estates.):

A. The area to be surveyed is the area between the back edge of the lots and 500 feet beyond the perimeter or the boundaries of the land considered in this consultation (Figure 4).

B. Surveys should be initiated during the first breeding season after issuance of the Corps authorization and continue until the third nesting season after build-out (at least 95 percent of the lots contain buildings).

C. Presence/absence surveys are to be conducted in accordance with the following procedures:

1. Conduct the survey on days when weather conditions are suitable for the detection of bird singing.
2. The general limits to the survey season are March 15 - May 20.

It should be understood that the actual survey season varies from year-to-year and knowledge of the singing activity of the golden-cheeked warbler should be followed. During 1990 and 1991 the golden-cheeked warbler singing in the Travis County area declined significantly after May 20. Therefore, surveys conducted in the Travis County area after that date would not be reliable in determining whether an area was used as breeding habitat by the warbler.

3. A minimum of three visits on separate days.
4. The total survey time should be a minimum of eight hours per 100 acres of suitable habitat.

D. The survey format would be a repeating cycle of one year of territorial delineation followed by two years of presence/absence surveys and then the cycle repeating (i.e. The first year (1992) would be a territorial survey followed by two years of presence/absence surveys (1993 and 1994)) until three years after build out when the cycle would terminate with a territorial delineation. The territorial delineation must be done in accordance with procedures identified in:

*An International Standard for a Mapping Method in Bird Census Work Recommended by the International Bird Census Committee, 1970, Audubon Field Notes. 24(6). pgs 722-726.*

2. Written survey reports, summarizing the previous year of activity, are to be provided to the U. S. Fish and Wildlife Service Field Office, 611 East 6th Street, Suite 407, Austin, Texas 78701 by October 1 of each year. The report is to include a map of the

warbler territories or sightings as well as location of residences that have been constructed.

3. Upon locating a dead, injured, or sick individual of an endangered or threatened species, initial notification must be made to the Fish and Wildlife Service Law Enforcement Office at San Antonio, Texas (telephone 512-229-5412). Care should be taken in handling sick or injured individuals to insure effective treatment and care and in handling dead specimens to preserve biological materials in the best possible state for analysis of cause of death. In conjunction with the care of sick or injured individuals or preservation of biological materials from a dead animal, the finder has the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.
4. New construction will not be initiated between March 15 and July 1 within 300 feet of the edge of a golden-cheeked warbler territory.

If during the term of this action, quantifiable incidental take in excess of two (2) breeding pairs of golden-cheeked warblers occurs, the Corps must re-initiate consultation with the Service immediately to avoid violation of Section 9. Operations must be stopped in the interim period between the initiation and completion of the new consultation if it is determined that the impact of the additional taking will cause an irreversible and adverse impact on the species, as per Section 402.14(i) of the Act. The Corps should provide an explanation of the causes of the taking.

The incidental take statement provided in this opinion satisfies the requirements of the Act. This statement does not constitute an authorization for take of migratory birds under the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act or any other Federal statute.

#### Conservation Recommendations

Section 7(a)(1) of the Endangered Species Act directs Federal agencies to use their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. The term "conservation recommendations" has been defined as suggestions of the Service regarding discretionary measures the Corps should take to minimize or avoid adverse effects of a proposed action on listed species and/or critical habitat, or regarding the development of information.

1. The wastewater line right-of-way be replanted with native oak, evergreen sumac and native vegetation beneficial to the golden-cheeked warbler, not to include the ash/juniper. Consideration should be given to allowing a width of no more than 15 feet to remain unplanted to allow future access by maintenance vehicles.
2. Access to Jester Estates Cave should be allowed, upon adequate request notification, to qualified cave ecologists and cave invertebrate specialists for the purpose of monitoring or surveying the troglobite species.

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developments. Although such impacts currently exist in the general area, the areal extent of these impacts would be expanded due to the construction of new houses. This could further reduce the potential warbler habitat (i. e., area with suitable vegetation characteristics for which warbler use has not been documented) that is available for use by reducing these areas to narrow strips, or reducing the overall width of the habitat.

Construction activities associated with this project could result in the elimination of portions of, or the width of, the natural vegetation associated with territories of two (2) pairs of warblers. Based upon information from biologists and data collected in the Austin area, these territories would be abandoned as a result of the proposed action.

The habitat for the Bee Creek Cave harvestman has been determined by surveys to identify the surface and subsurface areas that contribute to the cave's environment. These studies indicate that federally listed species do not extend beyond the known hydro-geologic limits of Jester Estates Cave. The current project proposes a cave preservation area of approximately 5.5 acres. This covers the area currently believed to provide nutrient and moisture input into the Jester Estates Cave system. Therefore, we do not believe the Bee Creek Cave harvestman will be adversely impacted as a result of this project.

Section 7 Interagency Cooperation Regulations (50 CFR 402:19926-19963) require the Service to consider cumulative impacts to listed species as well as analyzing impacts due solely to the Federal action currently under formal consultation. Cumulative impacts are those future state and private actions, not involving Federal activities, that are reasonably certain to occur within the project area of the Federal action under consultation. Future Federal actions will be subject to the consultation requirements established in Section 7 and, therefore, are not considered cumulative in the proposed action. A non-federal action is "reasonably certain to occur" if the action requires the approval of a state or local resource or land use control agency, and such agency has essentially approved the action.

The largest blocks of prime nesting habitat for the warbler are located in the Travis County area. Additionally, the harvestman is known to occur only in Travis and Williamson Counties. Veni (1991) indicates that the majority of the developable land in north-central Travis County is known or suitable habitat for the federally endangered cave invertebrates.

The immediate project area is subject to heavy commercial and residential development pressure with such proposed developments, as 3M Corporation, Four Points Development, Long Canyon and Canyon Creek subdivisions, and Ranch Road 620. Western Travis County, where much of the best warbler habitat is located, is primarily where urban growth is occurring in the Austin area (e.g. construction continues on existing developments such as Crystal Mountain and Rob Roy on the Lake subdivisions). Additionally, new developments, such as Caprock, Barton Creek Planned Unit Development, Bohls Ranch, and Wolf Ranch subdivisions are being planned. To support these developments, services such as water and sewer systems and roads (e.g. Comanche Trail and Lohman's Crossing) are proposed for upgrading.

The City of Austin Environmental and Conservation Department estimates that about 30 percent of lands in the western Austin Planning Area are potential



NATIONWIDE PERMIT 12  
UTILITY LINE BACKFILL AND BEDDING

Discharges of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, however, it does apply to pipes conveying drainage from another area. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side-casting up to 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if in navigable waters of the United States. (See 33 CFR Part 322). (Section 404)

NATIONWIDE PERMIT CONDITIONS

GENERAL CONDITIONS: The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

1. Navigation. No activity may cause more than a minimal adverse effect on navigation.
2. Proper maintenance. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.
3. Erosion and siltation controls. Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills must be permanently stabilized at the earliest practicable date.
4. Aquatic life movements. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.
5. Equipment. Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.
6. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.
7. Tribal rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.
8. Endangered Species. No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the district engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work on the activity until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (see 33 CFR 330.4(f))
9. Historic properties. No activity which may affect historic properties listed or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR 325, Appendix C. The prospective permittee must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).
10. Notification. (a) Where required by the terms of the NWP, the prospective permittee must notify the District Engineer as early as possible and shall not begin the activity:
  - (1) Until notified by the District Engineer that the activity may proceed under the NWP with any

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special conditions imposed by the district or division engineer; or

(2) If notified by the District or Division engineer that an individual permit is required; or

(3) Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) The notification must be in writing and include the following information and any required fees:

(1) Name, address and telephone number of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;

(4) Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands; and

(5) A statement that the prospective permittee has contacted: (i) The USFWS/NMFS regarding the presence of any Federally listed (or proposed for listing) endangered or threatened species or critical habitat in the permit area that may be affected by the proposed project; and any available information provided by those agencies. (The prospective permittee may contact Corps District Offices for USFWS/NMFS agency contacts and lists of critical habitat.)

(ii) The SHPO regarding the presence of any historic properties in the permit area that may be affected by the proposed project, and the available information, if any, provided by that agency.

(c) The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a NWP and must include all of the information required in (b)(1)-(5) of General Condition 13.

(d) In reviewing an activity under the notification procedure, the District Engineer will first determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or will be contrary to the public interest. The prospective permittee may, at his option, submit a proposed mitigation plan with the predischage notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the nationwide permits and the need for mitigation to reduce the project's adverse environmental effects to a minimal level. The district engineer will upon receipt of a notification provide immediately (e.g. facsimile transmission, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the District Engineer if they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, he will notify the permittee and include any conditions he deems necessary. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) that the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or (2) that the project is authorized under the nationwide permit subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level. This mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the DE will expeditiously review the proposed mitigation plan, but will not commence a second 30-day notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

(e) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period will not start until the wetland delineation has been completed.

(f) Mitigation: Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

(1) To be practicable the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of overall project purposes;

(2) To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.

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TRAVIS COUNTY, TEXAS

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Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In addition, mitigation must address impacts and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the nationwide permits (e.g. 5 acres of wetlands cannot be created to change a 6 acre loss of wetlands to a 1 acre loss; however, the 5 created acres can be used to reduce the impacts of the 6 acre loss).

SECTION 404 ONLY CONDITIONS: In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be followed in order for authorization by the nationwide permits to be valid:

1. Water supply intakes. No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.
2. Shellfish production. No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.
3. Suitable material. No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).
4. Mitigation. Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensation mitigation plan for the specific regulated activity.
5. Spawning areas. Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.
6. Obstruction of high flows. To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).
7. Adverse impacts from impoundments. If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.
8. Waterfowl breeding areas. Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.
9. Removal of temporary fills. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

REAL PROPERTY RECORDS  
TRAVIS COUNTY, TEXAS

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# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
611 E. Sixth Street  
Grants Bldg., Fourth Floor  
Austin, Texas 78701

February 25, 1992

Colonel John A. Mills  
District Engineer  
U.S. Army, Corps of Engineers  
P.O. Box 17300  
Fort Worth, TX 76102

2-12-90-F-205

Dear Colonel Mills:

This responds to your letter of August 14, 1991, requesting re-initiation of formal Section 7 consultation as provided by the Endangered Species Act of 1973, as amended (Act), and constitutes the Fish and Wildlife Service's (Service) biological opinion on the subject activity as provided by the Act. The Federal action under consultation is a nationwide permit from the U. S. Department of the Army, Corps of Engineers (Corps) for the discharge of backfill into a water of the United States in association with the construction of a wastewater pipeline. The project is located on an unnamed tributary to Bull Creek in north-central Travis County, Texas (Figure 1 and 2). The proposed action "may affect" the federally-listed endangered golden-cheeked warbler (Dendroica chrysoparia) and the Bee Creek Cave harvestman (Texella reddelli). This formal consultation was initiated on August 26, 1991, the date your request was received by this office.

By letter dated September 4, 1991, we acknowledged receipt of your letter and indicated that additional information was needed for our review. However, this information was not received in a timely manner, and by letter dated October 30, 1991, we requested and you subsequently agreed to a 60-day extension of the consultation process. Given this, the time period for completion of this consultation ends on January 19, 1992.

A previous Section 7 consultation on a portion of this project was initiated on June 5, 1990 and completed on September 26, 1990. That consultation and resulting biological opinion addressed 43 single-family lots in Section 5-B and included the following as conditions and recommendations:

The Service anticipates no direct loss of warblers or warbler habitat with project development. However, habitat may be indirectly affected and an unquantifiable level of incidental take occur as a result of residential development associated with this wastewater pipeline. Therefore, any quantifiable take will be regarded as exceeding the anticipated incidental take level. The level of take is unquantifiable for the following reasons:

1. The minimum distance from a residential development that warblers may nest is not known;
2. The distance from developed areas that typical urban animals (such as blue jays) will range and adversely impact nesting of the

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warbler is not known;

3. The minimum patch size that warblers will occupy is not accurately known.

The indirect impact of construction on adjacent habitat through increased human activity, and disturbance or predation by pets and other animals associated with residential areas, could result in nest abandonment and, thus, "take". Therefore, the Service believes the following reasonable and prudent measures are necessary and appropriate to minimize "take".

1. Conduct golden-cheeked warbler surveys (The survey procedure shall be provided to the Service for review 45 days prior to initiation of the survey) during the nesting season for 3 years on and adjacent to Jester Point 2 Section 5-B to monitor warbler activity; and
2. New construction not be initiated between April 1 and August 1 within 500 feet of an active golden-cheeked warbler nest.

We provided the following "conservation recommendations" to minimize adverse impacts and promote the conservation of the golden-cheeked warbler:

1. Revegetate the wastewater line right-of-way that services the 43 lots in Section 5-B with native oak and Ashe juniper.
2. The Corps condition the issued permit as follows: 1) the applicant, prior to any alteration of the designated undeveloped areas, will complete biological studies on use by federally-listed species and request the Corps to re-initiate consultation with the Service; or 2) the designated undeveloped areas will not be developed until completion of the Balcones Canyonlands Conservation Plan.

This current biological opinion is based upon information from the Corps; Lockwood Engineers, Inc.; Horizon Environmental Services, Inc.; data in Service files; and discussions with biologists familiar with the species.

Information obtained from the above sources indicated that residential construction associated with the wastewater line would result in direct alteration of suitable habitat for the golden-cheeked warbler (warbler) but would not for the Bee Creek Cave harvestman (harvestman). Indirect impact to the warbler would also occur as the project lies within the large block of warbler habitat in the Bull Creek drainage basin.

#### Background Information

The action under consultation involves construction of about 1,400 feet of wastewater pipeline and approximately 121 single-family homes, a Jester Estates Cave preservation area, and conservation and greenbelt areas. The Jester Point 2 subdivision totals about 425 acres. Formal consultation is being conducted on about 117 acres, the area identified by the Corps during formal consultation in 1990 as the service area formed by direct connection to the proposed wastewater pipeline. This consultation includes all or

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portions of Sections 5-B, 8, 9, 10, 12 and 13 of Jester Point 2 (Figure 3). The 14 lots of Section 5-B, 57 single family lots in total, not addressed in the previous biological opinion are considered in this biological opinion. This consultation also included a review of the "reasonable and prudent measures" and "conservation recommendations" of the previous biological opinion.

The project originally proposed the construction of approximately 200 lots within the project boundaries. The roads and lots have been modified and currently include about 121 residential lots within the project boundaries. The majority of these lots have been eliminated from areas that are endangered species habitat.

The project lies within the breeding range of the warbler. In central Texas, male warblers arrive at their breeding areas in early to mid-March, and females typically follow a week or two later. Warblers generally return to the same nesting territory year after year, and may remain in the area until mid- to late July. An estimated 4,822 to 16,016 pairs occur within the breeding range in Texas (Wahl et al, 1990).

Warbler habitat in Texas is a mixed evergreen-deciduous forest or woodland of Ashe juniper (Juniperus ashei), Texas oak (Quercus buckleyi) and other oaks generally over 30 years old. Warblers forage for insects in broad-leaved trees and shrubs. The warbler will nest in a variety of trees, but nesting depends on the presence of old Ashe junipers. The bark from this tree is necessary for nest construction. Thus, prime warbler habitat has a fairly closed canopy of mixed hardwood trees along with mature Ashe juniper; it often occurs in the steep canyons of the Texas Hill Country (Edwards Plateau). The warbler occupies and defends a territory from 3 acres in high quality habitat to 25 acres in marginal habitat. The species appears to require relatively large blocks of undivided habitat for long-term survival. A single clutch of three to four eggs is laid in late March or early April. The eggs hatch in about 12 days, and the young fledge in another 8 to 9 days. Both adults care for the young.

Habitat loss and habitat fragmentation are the main threats to this species. Wahl et al. (1990) estimated that the annual rate of warbler habitat loss in western Travis County was 4 percent over the last 10 years. This rate is slightly less than the 7.4 percent annual rate that Clark (1985) estimated for the Austin area. In addition to the direct loss of habitat, development has fragmented the remaining habitat so that only 46 percent of the vegetation suitable for warbler use in Travis County occurs in blocks large enough for warbler use. If this rate of decline is continued, Wahl et al. (1990) estimate the maximum carrying capacity for the warbler would be reduced by 53 percent by the year 2000. Cowbird nest parasitism is also a threat to the species, with Pulich (1976) reporting a parasitism rate of 56 percent. The added impact of habitat fragmentation on this rate is not known.

In addition to the warbler, the federally-listed Bee Creek Cave harvestman (Texella reddellii) was found in Jester Estates Cave located in Section 9. No other karst features were located within the sections under consideration in this consultation.

The Bee Creek Cave harvestman is a troglobite (cave dwelling species) whose

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body measures 2-3 millimeters in length. It has a yellowish-brown body and moves along cave walls and ceilings to catch small invertebrates (Mitchell and Reddell, 1971). The adults are more likely to be seen moving over silt and moist rocks, while immatures are usually found under rocks. The harvestman generally occupies those features with high humidity, stable temperatures, and a food source (Elliott et al, 1989). This species' distribution consists of 44 caves where it has been positively identified and six caves where it has been tentatively identified in Travis and Williamson Counties.

The harvestman inhabits karst areas along the Balcones Escarpment. The karst is an area characterized by landforms and subsurface features, such as sinkholes and caves, that are produced by solution of bedrock. These areas are generally flat with few surface streams. Thus, water usually moves through the subsurface openings. The subsurface openings used by federally-listed cave invertebrates are above the water table, generally contain water only after rains, and have high moisture content.

The surface vegetation community is important to the nutrient inflow to the sub-surface system. Cave crickets and other non-troglobite species forage outside the cave and bring nutrients into the cave for the benefit of the troglobite fauna. Nutrients are also brought into the subsurface system by water infiltration. These nutrient inflows are considered vital to the survival of the troglobitic fauna.

Threats to cave/karst systems and their troglobitic fauna include alteration of moisture quality, moisture quantity, nutrient inflow, predators, and direct habitat destruction. Increase of moisture quantity could result in flooding of areas and the elimination of air breathing species. A reduction in moisture quantity could result in the elimination of most of the troglobitic fauna because they rely on moist air environments. Alteration of the quantity of surface water inflow could also result in a change in nutrient inflow. Since these species rely on nutrients from the surface for their existence, any alteration of inflow could cause an adverse impact.

Another threat to the cave invertebrates is the red imported fire ant. The fire ant is an aggressive predator that has become established in the area. It moves into disturbed areas and generally reduces the diversity of the surface faunal community. Fire ants have been found in 33 percent of the caves that contain federally-listed invertebrates, and have been observed attacking cave invertebrate larvae (James Reddell pers. comm.). This non-native species could result in the destruction of troglobitic fauna. Finally, direct destruction of karst habitat such as filling for road or building construction and digging for installation of utilities results in loss of these subsurface features.

#### IMPACTS OF THE ACTION

Direct impact of your action on the warbler would be the destruction of about six (6) acres of warbler habitat to be cleared for roads and residential development as a result of this action. Indirect impacts would include increased noise and disturbance adjacent to the single-family houses and new roads as well as the introduction of fauna associated with residential

Colonel John A. Mills  
February 25, 1992

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developments. Although such impacts currently exist in the general area, the areal extent of these impacts would be expanded due to the construction of new houses. This could further reduce the potential warbler habitat (i. e., area with suitable vegetation characteristics for which warbler use has not been documented) that is available for use by reducing these areas to narrow strips, or reducing the overall width of the habitat.

Construction activities associated with this project could result in the elimination of portions of, or the width of, the natural vegetation associated with territories of two (2) pairs of warblers. Based upon information from biologists and data collected in the Austin area, these territories would be abandoned as a result of the proposed action.

The habitat for the Bee Creek Cave harvestman has been determined by surveys to identify the surface and subsurface areas that contribute to the cave's environment. These studies indicate that federally listed species do not extend beyond the known hydro-geologic limits of Jester Estates Cave. The current project proposes a cave preservation area of approximately 5.5 acres. This covers the area currently believed to provide nutrient and moisture input into the Jester Estates Cave system. Therefore, we do not believe the Bee Creek Cave harvestman will be adversely impacted as a result of this project.

Section 7 Interagency Cooperation Regulations (50 CFR 402:19926-19963) require the Service to consider cumulative impacts to listed species as well as analyzing impacts due solely to the Federal action currently under formal consultation. Cumulative impacts are those future state and private actions, not involving Federal activities, that are reasonably certain to occur within the project area of the Federal action under consultation. Future Federal actions will be subject to the consultation requirements established in Section 7 and, therefore, are not considered cumulative in the proposed action. A non-federal action is "reasonably certain to occur" if the action requires the approval of a state or local resource or land use control agency, and such agency has essentially approved the action.

The largest blocks of prime nesting habitat for the warbler are located in the Travis County area. Additionally, the harvestman is known to occur only in Travis and Williamson Counties. Veni (1991) indicates that the majority of the developable land in north-central Travis County is known or suitable habitat for the federally endangered cave invertebrates.

The immediate project area is subject to heavy commercial and residential development pressure with such proposed developments as 3M Corporation, Four Points Development, Long Canyon and Canyon Creek subdivisions, and Ranch Road 620. Western Travis County, where much of the best warbler habitat is located, is primarily where urban growth is occurring in the Austin area (e.g. construction continues on existing developments such as Crystal Mountain and Rob Roy on the Lake subdivisions). Additionally, new developments, such as Caprock, Barton Creek Planned Unit Development, Bohls Ranch, and Wolf Ranch subdivisions are being planned. To support these developments, services such as water and sewer systems and roads (e.g. Comanche Trail and Lohman's Crossing) are proposed for upgrading.

The City of Austin Environmental and Conservation Department estimates that about 30 percent of lands in the western Austin Planning Area are potential

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warbler habitat and 40 percent of these lands are suitable for development. This estimate does not account for potential habitat that could be lost due to development-related habitat fragmentation. Potential habitat for the harvestman covers a larger area than potential warbler habitat within the general area of the project. Therefore, development impacts could be greater depending upon actual distribution of suitable habitat.

In considering cumulative impacts, an environmental baseline for the species is determined by considering past and present impacts of all projects and human activities in the area, regardless of whether they are Federal, State, or private in nature. After establishing this baseline, a determination is made concerning the "cushion" of remaining natural resources that may be used for completion of development projects associated with endangered species before the point of jeopardy and or adverse modification of critical habitat is reached. After that point, further Federal actions would be precluded under section 7, unless reasonable and prudent alternatives are available or an exemption is granted by the Endangered Species Committee.

Numerous development actions in Travis County are undergoing evaluation by the Service to determine possible impacts to the endangered warbler and/or cave invertebrates. Pending actions include road projects, water and utility line activities, residential developments, and commercial developments. Wahl et al. (1990) estimate there are from 80,000 to 260,000 acres of potential warbler habitat in all or part of 39 counties in Texas. This excludes habitat blocks smaller than 125 acres. A viable population is projected to be 500 to 1,000 breeding pairs (Pease and Gingerich 1989). A total of about 7,400 to 14,800 unfragmented acres of good quality habitat would be required to support this viable population, and more than one viable population would be required over the total warbler range to maintain the species over the long-term. Based upon total past, present, and reasonably certain to occur cumulative effects on the warbler, plus anticipated impacts of the proposed activity under consultation, we believe a jeopardy threshold for the warbler would not be reached.

One additional impact of concern with reference to the Bee Creek Cave harvestman is the impact as a result of the imported fire ant (*Solenopsis invicta*). As a probable result of land disturbances that have previously occurred throughout the range of the harvestman, there has been infestation by the imported fire ant. Fire ants generally invade an area after some sort of a disturbance. This disturbance generally results in the elimination or severe reduction in the population of native ants that retard the spread of fire ants. Fire ants spread faster into the disturbed areas and restrict the reestablishment of native ants.

Fire ants have been observed to invade endangered species caves and cause potentially severe perturbations including observed predation on endangered species (Reddell, pers. comm., 1991). The fire ant is a hardy and prolific species and the continued existence of the endangered invertebrates may not be compatible with the presence of fire ants in the long-term. The potential impact of fire ants on troglobites and the endangered species is not definitely known.

The total population of the harvestman or area required for a viable population is not known. However, this project as proposed is not likely to impact known populations of the harvestman. Based upon the absence of known populations of the harvestman in the proposed development area, we believe



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the impacts due to the proposed development, along with total cumulative effects, would not reach a jeopardy threshold for the harvestman.

#### Biological Opinion

Based on this evaluation, it is the Service's biological opinion that your action of issuing this nationwide permit for the wastewater pipeline crossing in Jester Estates Point II, north-central Travis County, Texas, is not likely to jeopardize the continued existence of the golden-cheeked warbler or the Bee Creek Cave harvestman.

#### Incidental Take

Section 9 of the Act prohibits any taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct) of listed species without a special exemption. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Under terms of Sections 7(b)(4) and 7(o)(2) of the Act, taking that is incidental to and not intended as part of the agency action is not considered a prohibited taking; provided that such taking is in compliance with this incidental take statement.

The Service does not anticipate that the proposed action will result in any incidental take of the Bee Creek Cave harvestman. Accordingly, no incidental take is authorized. Should any take occur the Corps must reinitiate formal consultation with the Service and provide the circumstances surrounding the take.

The Service anticipates that two pairs of golden-cheeked warblers could be taken as a result of your proposed action. This take may be in the form of harassment or harm.

The Service believes that the following reasonable and prudent measures are necessary and appropriate to minimize the take. The reasonable and prudent measures described below are nondiscretionary, and must be undertaken by the agency or made a binding condition of any permit issued to the applicant, as appropriate.

1. Conduct golden-cheeked warbler nesting surveys around the project boundaries covered by this consultation and in accordance with the following terms and conditions.
2. Provide reports of the preceding survey results.

In order to be exempt from the prohibitions of Section 9 of the Act, the Corps is responsible for compliance with the following terms and conditions, which implement the reasonable and prudent measures described above.

1. Conduct golden-cheeked warbler nesting surveys around the project

boundaries covered by this consultation and in accordance with the following terms and conditions. (These survey requirements supersede those listed as reasonable and prudent measures in the previous biological opinion on Jester Estates.):

A. The area to be surveyed is the area between the back edge of the lots and 500 feet beyond the perimeter or the boundaries of the land considered in this consultation (Figure 4).

B. Surveys should be initiated during the first breeding season after issuance of the Corps authorization and continue until the third nesting season after build-out (at least 95 percent of the lots contain buildings).

C. Presence/absence surveys are to be conducted in accordance with the following procedures:

1. Conduct the survey on days when weather conditions are suitable for the detection of bird singing.

2. The general limits to the survey season are March 15 - May 20.

It should be understood that the actual survey season varies from year to year and knowledge of the singing activity of the golden-cheeked warbler should be followed. During 1990 and 1991 the golden-cheeked warbler singing in the Travis County area declined significantly after May 20. Therefore, surveys conducted in the Travis County area after that date would not be reliable in determining whether an area was used as breeding habitat by the warbler.

3. A minimum of three visits on separate days.

4. The total survey time should be a minimum of eight hours per 100 acres of suitable habitat.

D. The survey format would be a repeating cycle of one year of territorial delineation followed by two years of presence/absence surveys and then the cycle repeating (i.e. The first year (1992) would be a territorial survey followed by two years of presence/absence surveys (1993 and 1994)) until three years after build out when the cycle would terminate with a territorial delineation. The territorial delineation must be done in accordance with procedures identified in:

*An International Standard for a Mapping Method in Bird Census Work Recommended by the International Bird Census Committee, 1970, Audubon Field Notes. 24(6). pgs 722-726.*

2. Written survey reports, summarizing the previous year of activity, are to be provided to the U. S. Fish and Wildlife Service Field Office, 611 East 6th Street, Suite 407, Austin, Texas 78701 by October 1 of each year. The report is to include a map of the

warbler territories or sightings as well as location of residences that have been constructed.

3. Upon locating a dead, injured, or sick individual of an endangered or threatened species, initial notification must be made to the Fish and Wildlife Service Law Enforcement Office at San Antonio, Texas (telephone 512-229-5412). Care should be taken in handling sick or injured individuals to insure effective treatment and care and in handling dead specimens to preserve biological materials in the best possible state for analysis of cause of death. In conjunction with the care of sick or injured individuals or preservation of biological materials from a dead animal, the finder has the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.
4. New construction will not be initiated between March 15 and July 1 within 300 feet of the edge of a golden-cheeked warbler territory.

If during the term of this action, quantifiable incidental take in excess of two (2) breeding pairs of golden-cheeked warblers occurs, the Corps must re-initiate consultation with the Service immediately to avoid violation of Section 9. Operations must be stopped in the interim period between the initiation and completion of the new consultation if it is determined that the impact of the additional taking will cause an irreversible and adverse impact on the species, as per Section 402.14(i) of the Act. The Corps should provide an explanation of the causes of the taking.

The incidental take statement provided in this opinion satisfies the requirements of the Act. This statement does not constitute an authorization for take of migratory birds under the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act or any other Federal statute.

#### Conservation Recommendations

Section 7(a)(1) of the Endangered Species Act directs Federal agencies to use their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. The term "conservation recommendations" has been defined as suggestions of the Service regarding discretionary measures the Corps should take to minimize or avoid adverse effects of a proposed action on listed species and/or critical habitat, or regarding the development of information.

1. The wastewater line right-of-way be replanted with native oak, evergreen sumac and native vegetation beneficial to the golden-cheeked warbler, not to include the ash juniper. Consideration should be given to allowing a width of no more than 15 feet to remain unplanted to allow future access by maintenance vehicles.
2. Access to Jester Estates Cave should be allowed, upon adequate request notification, to qualified cave ecologists and cave invertebrate specialists for the purpose of monitoring or surveying the troglobite species.

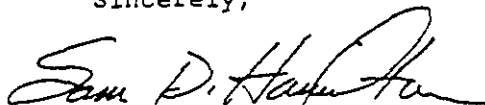
Colonel John A. Mills  
February 25, 1992

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This concludes formal consultation on this action. Re-initiation of formal consultation is required if: 1) the amount or extent of incidental take is exceeded (i.e. any quantifiable take occurs); 2) new information reveals effects of the action that may impact listed species or critical habitat in a manner or to an extent not considered in this opinion; 3) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or, 4) a new species is listed or critical habitat designated that may be affected by the action.

We appreciate the opportunity to provide input to you to promote conservation of endangered species. Please provide us documentation on how the reasonable and prudent measures will be implemented. If the conservation recommendations are adopted and must be modified due to unforeseen problems, please coordinate changes with this office. If we may be of further assistance, please contact Joe Johnston or myself of this office at (512) 482-5426.

Sincerely,



Sam D. Hamilton  
Field Supervisor

cc: Regional Director, FWS, Albuquerque, NM (FWE)  
Executive Director, TPWD, Austin, TX  
Congressman U.J. Pickle, Austin, TX  
Senator Lloyd Bentsen, Austin, TX  
Maury Hood, Jester Land Management Corporation, Austin, TX  
Director, FWS, Washington, D.C. (DES)

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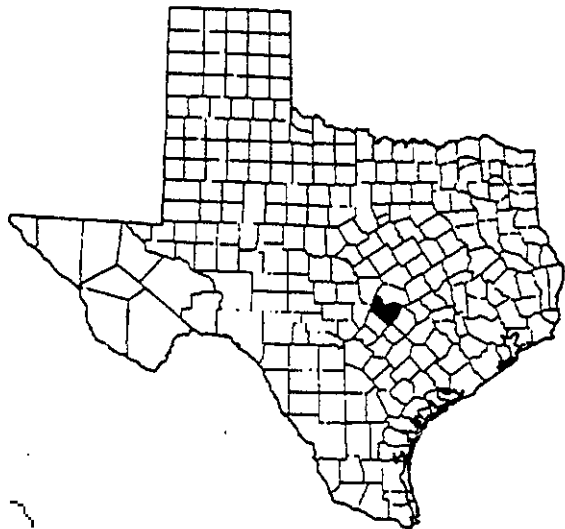
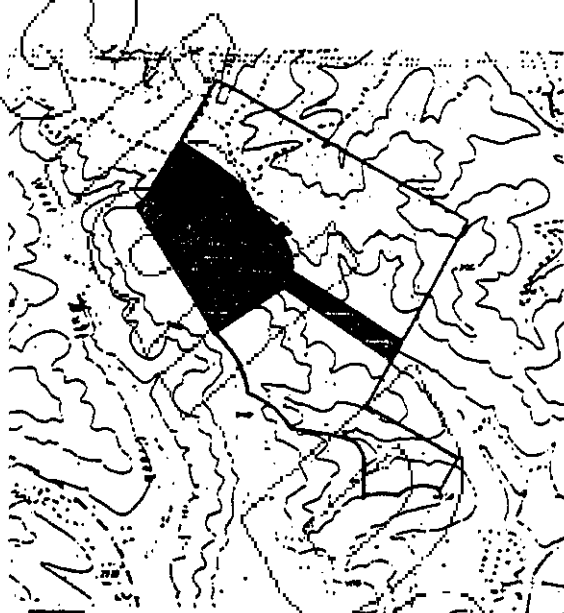


Figure 1. Location of Travis County, Texas.



Area of Section 7 Consultation  
Figure 2. Jester Point 2 subdivision boundaries in the Bull Creek drainage basin, Travis County, Texas



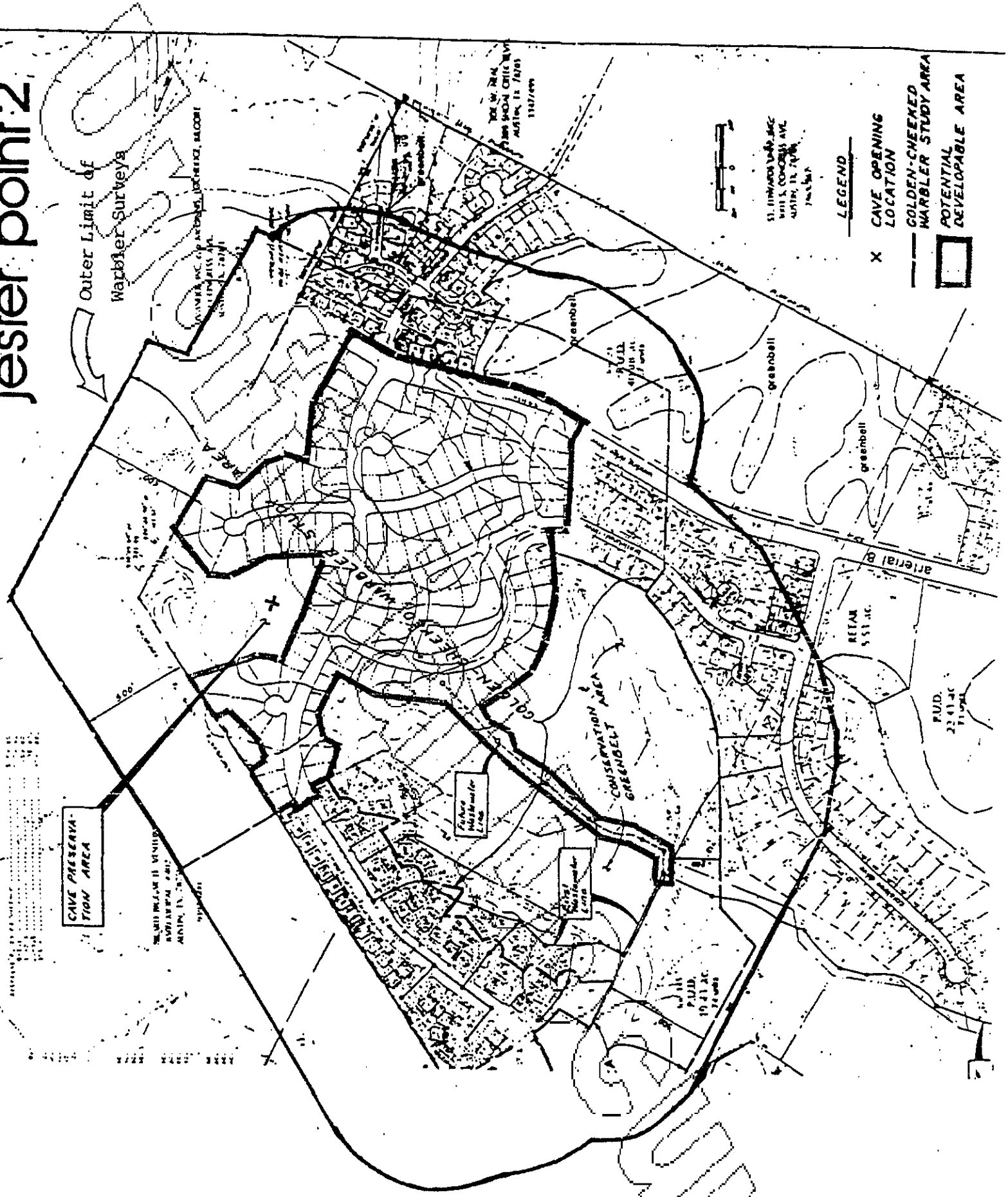


Figure 4. Outer limits of the golden-cheeked warbler surveys on Jester Point II subdivision in Travis County, Texas.



NATIONWIDE PERMIT 12  
UTILITY LINE BACKFILL AND BEDDING

Discharges of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, however, it does apply to pipes conveying drainage from another area. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side-casting up to 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if in navigable waters of the United States. (See 33 CFR Part 322). (Section 404)

NATIONWIDE PERMIT CONDITIONS

GENERAL CONDITIONS: The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

1. Navigation. No activity may cause more than a minimal adverse effect on navigation.
2. Proper maintenance. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.
3. Erosion and siltation controls. Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills must be permanently stabilized at the earliest practicable date.
4. Aquatic life movements. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.
5. Equipment. Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.
6. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.
7. Tribal rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.
8. Endangered Species. No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the district engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work on the activity until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (see 33 CFR 330.4(f))
9. Historic properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR 325, Appendix C. The prospective permittee must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).
10. Notification. (a) Where required by the terms of the NWP, the prospective permittee must notify the District Engineer as early as possible and shall not begin the activity:
  - (1) Until notified by the District Engineer that the activity may proceed under the NWP with any

special conditions imposed by the district or division engineer; or

(2) If notified by the District or Division engineer that an individual permit is required; or

(3) Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) The notification must be in writing and include the following information and any required fees:

(1) Name, address and telephone number of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;

(4) Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands; and

(5) A statement that the prospective permittee has contacted: (i) The USFWS/NMFS regarding the presence of any Federally listed (or proposed for listing) endangered or threatened species or critical habitat in the permit area that may be affected by the proposed project; and any available information provided by those agencies. (The prospective permittee may contact Corps District Offices for USFWS/NMFS agency contacts and lists of critical habitat.)

(ii) The SHPO regarding the presence of any historic properties in the permit area that may be affected by the proposed project, and the available information, if any, provided by that agency.

(c) The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PDN and must include all of the information required in (b)(1)-(5) of General Condition 13.

(d) In reviewing an activity under the notification procedure, the District Engineer will first determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or will be contrary to the public interest. The prospective permittee may, at his option, submit a proposed mitigation plan with the pre-discharge notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the nationwide permits and the need for mitigation to reduce the project's adverse environmental effects to a minimal level. The district engineer will upon receipt of a notification provide immediately (e.g. facsimile transmission, overnight mail or other expeditious manner) a copy to the appropriate offices of the fish and wildlife Service, State natural resource or water quality agency, EPA, and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the District Engineer if they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, he will notify the permittee and include any conditions he deems necessary. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) that the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or (2) that the project is authorized under the nationwide permit subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level. This mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the DE will expeditiously review the proposed mitigation plan, but will not commence a second 30-day notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

(e) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period will not start until the wetland delineation has been completed.

(f) Mitigation: Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

(1) To be practicable the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of overall project purposes;

(2) To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.

Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In addition, mitigation must address impacts and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the nationwide permits (e.g. 5 acres of wetlands cannot be created to change a 6 acre loss of wetlands to a 1 acre loss; however, the 5 created acres can be used to reduce the impacts of the 6 acre loss).

**SECTION 404 ONLY CONDITIONS:** In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be followed in order for authorization by the nationwide permits to be valid:

1. **Water supply intakes.** No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.
2. **Shellfish production.** No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.
3. **Suitable material.** No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).
4. **Mitigation.** Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensation mitigation plan for the specific regulated activity.
5. **Spawning areas.** Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.
6. **Obstruction of high flows.** To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).
7. **Adverse impacts from impoundments.** If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.
8. **Waterfowl breeding areas.** Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.
9. **Removal of temporary fills.** Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.



STATE OF TEXAS  
I hereby certify that this instrument was FILED on  
the date and at the time stamped hereon by me; and  
was duly RECORDED in the Volume and Page of the  
named RECORDS of Travis County, Texas, on

APR 16 1992

*Laura De Beauvoir*  
COUNTY CLERK  
TRAVIS COUNTY, TEXAS

FILED  
1992 APR 16 PM 4:44  
DANA DE BEAUVOIR  
COUNTY CLERK  
TRAVIS COUNTY, TEXAS

RECORDER'S MEMORANDUM - At the time of  
recording this instrument was found to be inadequate  
for the best photographic reproduction  
illegibility