



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Colorado Field Office
P.O. Box 25486, DFC (65412)
Denver, Colorado 80225-0486



IN REPLY REFER TO:
TAILS: 06E24000-2016-TA-0143

Moneka Worah
Natural Resource Specialist
ERO Resources Corporation
1842 Clarkson Street
Denver, Colorado 80218

Dear Ms. Worah:

Thank you for your May 23, 2016, letter to the U.S. Fish and Wildlife Service (Service) regarding Mr. Tim Dumler's proposal to continue grading and filling at the Larkspur Truck Stop Property commercial development located immediately to the north of the Spruce Mountain Road and Upper Lake Gulch Road intersection in the Town of Larkspur, Douglas County, Colorado (Latitude: 39.243101°; Longitude: -104.882605°). We provided updates on the status of our review by email on June 2, 16, and 21, July 1, and 11, 2016.

Grading within an approximately 2.0-acre area started before March 27, 2016, and removed upland habitats for the federally threatened Preble's meadow jumping mouse, or Preble's (*Zapus hudsonius preblei*), within 300 feet of the 100-year floodplain. The grading also removed approximately 3,200 square feet of upland Preble's habitats mapped as Riparian Conservation Zone (RCZ) for the Douglas County Habitat Conservation Plan (HCP). On May 6, 2016, we visited the site with you and the project proponents to discuss the already completed grading, your current proposal, and potential future development on the subject property and an adjoining property to the south across Upper Lake Gulch Road (06E24000-2016-TA-0822).

The already completed grading and the current proposal to continue grading are the first phase of a larger, second and final phase of the project to develop and operate a commercial truck stop on approximately 8.0 acres of the subject property. You have not provided project plans for the second phase of the project, but the project proponents want to continue work on phase one. To continue work on phase one, you propose to:

- Remove all topsoil and organic matter to a minimum depth of 8 inches;
- Stockpile topsoil on site outside of Preble's habitats or remove them from the site;
- Place fill dirt within the phase one project area in 1.0-foot lifts; and
- Implement grading, erosion, and sediment (GES) and stormwater management (SWMP) plans.

Continuing work during phase one would occur only within the previously graded area and a new 2.0-acre area located immediately to the north (Figure 2, enclosed). The currently proposed action would start as soon as possible, last approximately 5 months, and work would occur only during the day between 7 am and 6 pm.

You determined that continuing phase one, continuing grading and filling in the previously disturbed area and within the new, 2.0-acre area, may affect, but is not likely to adversely affect the Preble's. You requested the Service's technical assistance with this determination for phase one. You explained that when project plans are finalized, you will request formal consultation for the second and final phase of the project, the construction and operation of the truck stop. In response to your request, we prepare these comments under the authority of the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*).

Federal nexus and interrelated development on the subject property:

You have determined that continuing phase one of the project is not likely to adversely affect the Preble's. These proposed activities are the first phase of a larger project to develop and operate a commercial truckstop on approximately 8.0 acres of the subject property. You explained that although there is no Federal funding or permitting associated with phase one, phase two could require a variety of Federal permits and could adversely affect the Preble's.

But for the future development and operation of the truck stop, the grading and filling would not likely occur. In other words, phase one of the project is directly interrelated to phase two. The second phase of the project could impact approximately 2.073 acres of wetlands along East Plum Creek, which could be subject to the requirements of the Clean Water Act of 1972 (33 U.S.C. 1251 *et seq.*). Any intentional or unintentional placement of fill within jurisdictional waters along East Plum Creek could also be subject to the Clean Water Act. Any future development could also impact East Plum Creek's floodplain and ordinary high water mark, which may require a Conditional Letter of Map Revision (CLOMR) from the U.S. Federal Emergency Management Agency (FEMA). Additionally, development activities on the subject property could potentially take Preble's by crushing, disturbing, or permanently removing, degrading, or fragmenting upland and riparian habitats for Preble's along East Plum Creek, which would be subject to the take prohibitions of the Act.

"After-the-fact" consultations:

The Service does not make determinations under the Act "after-the-fact," or following the completion of an action or project, because we are unable to assess effects to our trust resources that may have already occurred from the project or any associated activities. We work with project proponents early, when designing projects, to effectively integrate the proposed activities with the conservation needs of limited natural resources, before the proposed actions are fully designed or executed. When we consult or provide technical assistance, we help address potential effects and provide conservation recommendations designed to help avoid and minimize any potential effects to listed species and other natural resources. Without documented biological reviews or collaboration through technical assistance or consultation, we assume that already impacted habitats were of high quality and that the unauthorized action potentially affected listed species.

The project proponents did not provide the Service with an opportunity to review the proposed project before they graded approximately 2.0 acres of relatively undisturbed, upland grasslands located next to East Plum Creek, including 3,200 square feet of mapped Preble's habitats within the RCZ. Therefore, at this time, we are unable to comment on your determination for the phase one activities that occurred before we had an opportunity to review the project.

Status of the Preble's within and near the proposed project area:

The proposed project area is within 100 feet immediately to the west of East Plum Creek. East Plum Creek's broad floodplain within and immediately downslope from the proposed project area provides well-developed riparian and upland grassland habitats for the Preble's. These riparian and upland habitats border East Plum Creek, with tall willows (*Salix* spp.), cottonwoods (*Populus deltoides*), and a dense herbaceous understory of grasses, forbs, and herbs in the riparian habitats. The upland habitats feature relatively undisturbed grasslands that may be used by the Preble's to hibernate, feed, breed, or travel. Previous trapping surveys confirmed that Preble's occupy these habitats along East Plum Creek, with the closest capture near the Upper Lake Gulch Bridge within 100 feet of the proposed project area, well within the maximum dispersal distances recorded for the Preble's. Additionally, Douglas County identified these habitats and approximately 3,200 square feet of the proposed project area as a Riparian Conservation Zone (RCZ) during their mapping for the Douglas County Habitat Conservation Plan (HCP).

The RCZ, the Douglas County HCP, and applicability to this proposed project:

In your letter, you quote language from the Douglas County HCP to help you determine that continuing phase one activities are not likely to adversely affect the Preble's. Although the RCZ mapped for the Douglas County HCP can be a useful tool to help identify Preble's habitats within Douglas County, the corresponding incidental take permit would not apply to either phase of this project. The incidental take permit for the Preble's (TE-036717; May 11, 2006) associated with the Douglas County HCP applies only to Douglas County, only for specific and previously identified road, trail, and bridge activities listed in the HCP or reviewed individually by the Service, and only when the permittees implement specific conservation measures to avoid and minimize potential effects to the Preble's.

Further, the Service's biological opinion for Douglas County's incidental take permit analyzed only the potential adverse effects to the Preble's from the specific activity types and identified projects outlined in the HCP, not commercial developments. In the biological opinion, we analyzed the effects to the Preble's in the context of these specific projects and the proposed conservation measures. Therefore, although the Douglas County HCP explains that "no take of Preble's is anticipated to result from Applicant activities occurring within these [areas outside the RCZ]," (Douglas County 2006, p. 37) the determination applies only to the permittees and only for incidental take associated with the specific activities when the conservation measures outlined in the HCP are used, or the project is reviewed individually by the Service.

Urban development continues to reduce and fragment the Preble's riparian and upland habitats rangewide. We have consistently worked with project proponents throughout Douglas County

and along East Plum Creek, including previously with Mr. Dumler (06B24000-2013-TA-0402), to avoid and minimize potential effects to the Preble's from activities located outside the RCZ, especially those projects close to the mapped RCZ boundaries or within 300 feet of the 100-year floodplain. Additionally, habitats and species distributions may have changed since the RCZ was finalized in 2006 and Preble's may move into or out of the RCZ's mapped boundaries. Therefore, activities outside the RCZ may still affect the Preble's.

Determination:

Your phase one proposal to continue grading and filling does not have a Federal nexus and is interrelated to a future, phase two action, the construction and operation of a commercial truck stop. But for the future construction and operation of the truck stop, the proposed phase one activities would not likely occur. You have not finalized plans for the interrelated phase two activities. Without final plans or a complete proposal for the entire project, we are unable to fully evaluate potential effects to the Preble's from the entire action. Therefore, we are unable to comment on your not likely to adversely affect determination for the first phase of the project. Below we provide conservation recommendations that if implemented, could help the project proponents minimize effects to the Preble's from the phase one proposal.

Conservation recommendations:

The Act protects the Preble's and other endangered and threatened species and their habitats by prohibiting the "take" of listed animals without a permit. The Act defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." The Service's regulations define the term "harm" as "an act which actually kills or injures wildlife." Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

Grading, filling, and other commercial development activities could take Preble's, either by direct crushing and disturbance or by removing and fragmenting riparian and upland Preble's habitats along East Plum Creek. Increased noise, activity, human presence, and ambient nighttime lighting could also affect the Preble's. Altering floodplains, improperly managing stormwater runoff, and converting permeable soils to impervious rooftops and parking areas could also generate creek and stormwater flows that increase erosion, floods, contaminants, and sediments flowing into East Plum Creek. These activities could affect the Preble's by degrading or removing habitats within the project area and downstream along East Plum Creek.

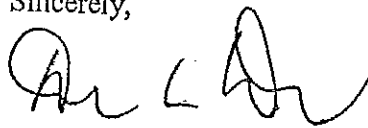
To help minimize potential effects to the Preble's, we recommend:

- Restricting all work to previously disturbed, graded areas or to weedy uplands that are more than 300 feet outside of the 100-year floodplain and that do not provide Preble's habitats;
- Fully implementing grading, erosion, sediment, and stormwater control and management plans;
- Controlling and preventing the spread of noxious weeds;

- Using only weed free certified materials, including gravel, sand, top soil, seed, mulch, and fill dirt;
- Clearly delineating limits of work and explaining the limits of work and any conservation measures to all onsite workers;
- Minimizing the number and footprint of access routes, staging areas, and work areas, and restricting these to previously disturbed areas;
- Minimizing the use of heavy machinery and use smaller equipment when possible;
- Locating, storing, staging, operating, and refueling equipment outside of riparian or adjacent upland habitats;
- Stockpiling topsoil and debris outside the riparian corridor and protecting it from stream flows or runoff;
- Promptly removing waste to minimize site disturbance and avoid attracting predators;
- Covering exposed holes or piles of loose dirt with boards, tarps, or other materials to prevent entrapment; and
- Revegetating all disturbed areas with native shrubs, trees, and grasses.

Our biologists are available to review project proposals and recommend conservation measures to avoid and minimize potential effects to listed species and other natural resources. We are also available to recommend and navigate permitting options under the Act. We are also interested in working with the Town of Larkspur to address development and natural resource concerns programmatically, rather than project-by-project. If the Service can be of any additional assistance, please contact Alison Michael at 303-236-4758. Thank you for your concern for the Preble's and other natural resources.

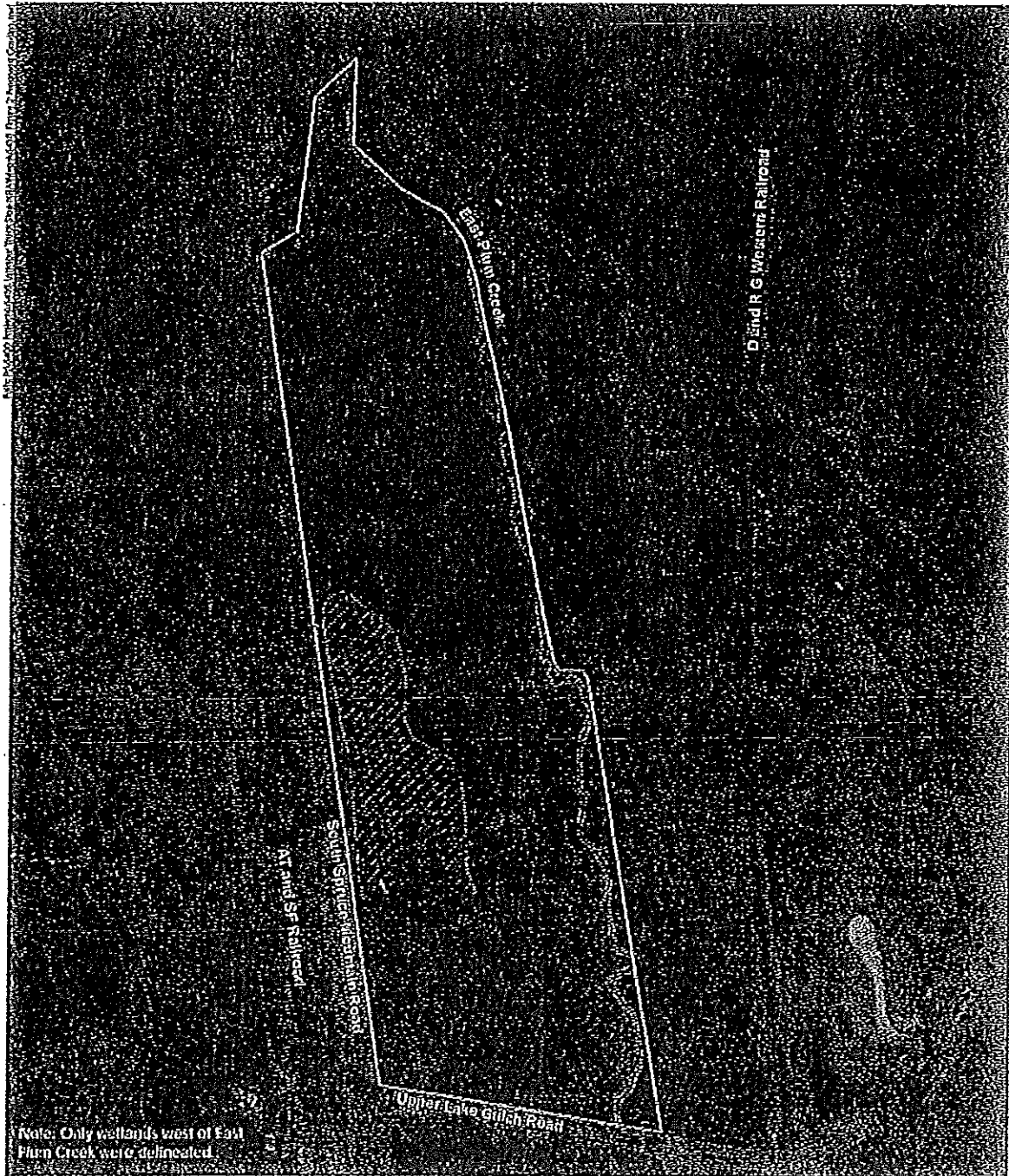
Sincerely,



Drue DeBerry
Acting Colorado Field Supervisor

Encl: Figure 2 – Site Description with project boundaries, provided by ERO Resources

cc: USFWS, Office of Law Enforcement
FEMA, Region VIII, Richard Myers
Corps, Denver Regulatory Office, Alex Kostra
Colorado Parks and Wildlife, James Romero
Douglas County, Andy Hough

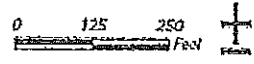


Larkspur Truck Stop

- Limit of Disturbance
- Property Boundary
- Area Proposed for Grading
- Riparian Conservation Zone

Image Source: Google Earth®, November 2015

- Wetland (2.073 ac)
- Ordinary High Water Mark (0.449 ac)



**Figure 2
Site Description**

Prepared for: E&K Engineers - Sonoma, Inc.
 File: J435 Figure 2 Proposed Grading and (GS)
 May 28, 2015

