

June 26, 2008

Intco Dominion Partnership
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**RE: NOTICE OF INTENT TO SUE FOR VIOLATIONS OF THE
ENDANGERED SPECIES ACT**

On behalf of Aquifer Guardians In Urban Areas, Citizens Alliance for Smart Expansion, Greater Edwards Aquifer Alliance and Helotes Heritage Association, this letter is to provide you notice, pursuant to Section 11(g) of the Endangered Species Act (ESA),¹ that INTCO Dominion Partnership and others working in concert with INTCO Dominion have violated and continue to violate the ESA by causing the “take” of the federally-endangered golden-cheeked warbler (“GCW”). The take is the result of land clearing and site construction activity on a tract of land located in northwest Bexar County adjacent to Camp Bullis (the “Dominion Property”). The land clearing and construction activity has destroyed, modified, and degraded habitat for the GCW, including occupied habitat, and thereby harmed the species. The above-named parties intend to sue, pursuant to Section 11(g) of the ESA, to enjoin the ongoing violations.

The GCW is a small, migratory song bird listed as endangered on December 27, 1990.² The entire nesting range of the GCW is in 33 counties in Central Texas. The nesting season of the GCW begins around March 1 and continues until mid-August. The GCW’s habitat is tall, dense, mature stands of Ashe juniper mixed with hardwood trees

¹ 16 U.S.C. §1540(g)(2)(A)(i).

² 55 FR 53153.

such as Texas (Spanish) oak, live oak, post oak, Texas ash, and cedar elm. Much of the Dominion property, including portions that have been cleared for roadway construction has been identified by FWS habitat mapping as “high quality” habitat for the GCW. The most serious threat to the GCW is habitat loss and fragmentation. Additional threats include adverse “edge” effects that degrade habitat value for many hundreds of feet beyond the edge of development and land clearing.

Clearing of land and construction within GCW habitat outside the nesting season also results in take by destroying essential nesting and feeding areas.

The above parties also give notice of intent to sue for likely unauthorized take of listed endangered karst invertebrates. Construction over and near caves and karst features inhabited by listed karst invertebrates harms individuals and disrupts essential cave and karst feeding, breeding, and sheltering habitat by sealing over and filling features, changing input and patterns of water, humidity, and nutrients, and introducing fire ants and other harmful pests.

The high likelihood of unauthorized take of karst species and the GCW on the subject property is also described in the June 24, 2008 letter of Adam Zerrenner to Alan Glen as representative of INTCO Dominion.

Take of the GCW is prohibited³ absent an incidental take permit issued by the United States Fish and Wildlife Service (“FWS”).⁴ No incidental take permit has been issued by FWS to authorize the take associated with the clearing and site construction underway at the Dominion property. Members of the above organizations have experienced an actual injury as a result of the take associated with the illegal clearing and site construction. The organizations’ members’ ability to observe, study and appreciate the GCW and the listed karst invertebrates has been curtailed as a result of the take, and their ongoing efforts to conserve the species’ habitat have been undermined..

Take is defined broadly as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”⁵ The Secretary of the Interior regulations define “harm” as “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁶ The Supreme Court upheld this definition in the 1995 decision of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁷

The citizen suit provision of the ESA authorizes any person to bring suit on his own behalf “to enjoin any person . . . who is alleged to be in violation of any provision of

³ 16 U.S.C.A. § 1538(a)(1)(B).

⁴ 16 U.S.C.A. § 1539(a)(1)(B).

⁵ 16 U.S.C. § 1532(19).

⁶ 50 C.F.R. § 17.3.

⁷ *Babbitt v. Sweet Home*, 115 S.Ct. 2407, 2414-18 (1995).

this Act or regulation issued under the authority thereof.”⁸ This 60-day notice letter puts listed parties on notice that the above parties intend to sue under this provision of the act.

However, it is the desire of those giving notice to avoid litigation, that FWS and INTOCO take immediate action to halt any further take of endangered species and take steps to remedy to the greatest extent possible the unauthorized take and destruction of habitat that has already occurred (including, where appropriate, the payment of civil and criminal penalties).

The clearing of Zone 1 GCW habitat on and after the beginning of the nesting season on March 1, 2007 resulted in significant habitat modification and degradation that has caused the death and/or injury to the GCW, disruption of its feeding, sheltering, breeding, and behavioral patterns -- an illegal take under Section 9(a) of the ESA.

The ESA anticipates that, in certain situations, an individual may undertake an activity that may result in the incidental take of a listed species. Section 10(a)(1)(B) of the Act provides a mechanism for authorizing the take of endangered species by an individual, association, private landowner, corporation, or state or local governmental entity, provided the take is incidental to, and not the purpose of, an otherwise lawful activity.⁹ To obtain a section 10 incidental take permit from the FWS, the applicant must develop a habitat conservation plan that contains a number of specific provisions.¹⁰ The ESA provides that, in order to obtain an incidental take permit, the applicant must submit a conservation plan that specifies (1) the impact that will likely result from the taking; (2) the steps the applicant will take to minimize and mitigate the impacts and funding available to implement the steps; (3) what alternative actions to taking were considered and the reasons why the alternatives were not chosen; and (4) other measures that the Service may require as necessary or appropriate for purposes of the conservation plan.¹¹

Since INTOCO Dominion has not obtained an incidental take permit from the FWS, the take that is occurring as a result of the site clearing and construction activities on the Dominion property is unlawful under Section 9(a) of the ESA.

If you have any questions, please feel free to contact us.

Sincerely,

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⁸ 16 U.S.C.S. § 1540(g)(1)(A).

⁹ 16 U.S.C. § 1539(a)(1)(B).

¹⁰ 16 U.S.C. § 1539(a)(2)(A).

¹¹ 16 U.S.C. § 1539(a)(2)(A).