

**FINDINGS AND RECOMMENDATIONS REGARDING
AN ENHANCEMENT OF SURVIVAL PERMIT APPLICATION
SUBMITTED BY
WILLIAM SMITH PROPERTIES, INC. *ET AL.*
IN CONJUNCTION WITH
A CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES
FOR THE OREGON SPOTTED FROG WITHIN THE OLD MILL DISTRICT
CITY OF BEND, DESCHUTES COUNTY, OREGON**

I. BACKGROUND

William Smith Properties, Inc.; Fifteen SW Colorado LLC; Mill A Associates Limited Partnership; River Bend Limited Partnership; Mill Shops LLC; River Shops II LLC; Deschutes River Amphitheater LLC; and River Bend Master Owners Association, Inc. (applicants) have submitted an enhancement of survival permit application and the draft Old Mill District Oregon Spotted Frog (*Rana pretiosa*) Candidate Conservation Agreement with Assurances (CCAA) to the U. S. Fish and Wildlife Service (Service). The CCAA, prepared by the Service and the applicants, addresses activities related to commercial real estate management in an area of natural and man-made wetlands and water bodies that are used, and may be used in the future, by Oregon spotted frogs. The CCAA provides the applicants with the opportunity to voluntarily conserve the Oregon spotted frog while managing commercial real estate properties owned and/or managed by the applicants. An approved CCAA would offer the applicants assurances that their management practices could continue as outlined under the CCAA in the event the species was listed without the need for any additional conservation measures.

Section 10(a)(1)(A) of the Endangered Species Act (ESA) allows the Service to issue an enhancement of survival permit (permit) to address the incidental take of listed species caused by implementation of a CCAA provided certain criteria are met. This Findings and Recommendations document includes a discussion of the permit issuance criteria under section IV below. Documents used in the preparation of these Findings and Recommendations include the CCAA, the environmental action statement (Service 2014a), and the Service's Conference Opinion on the proposed permit issuance (Service 2014b). All of the above documents are herein incorporated by reference pursuant to 40 CFR § 1508.13.

II. DESCRIPTION OF THE PROPOSED ACTION

The Service proposes to issue a section 10(a)(1)(A) permit to the applicants. The permit would authorize incidental take of the Oregon spotted frog, proposed for listing under the ESA, should it become listed during the 20-year term of the proposed permit. Incidental take would only be authorized for otherwise lawful activities covered under the CCAA within the approximately 170 acres of the Old Mill District, in Deschutes County, Oregon. The Old Mill District is a mixed-use development complex including shops, galleries, restaurants, trails, and events.

Covered activities under the CCAA include: maintenance and management of the 0.15 acre Casting Pond (including its use for recreational fly fishing casting opportunities), other stormwater ponds and bioswales, and their vegetated perimeters, as needed; control and removal of non-native predators; maintenance of existing landscaping and natural vegetation in the vicinity of the Les Schwab Amphitheater (LSA) Marsh and the adjacent Deschutes River riparian zone; implementation of Conservation Measures and Changed Circumstances Conservation Measures (*see* CCAA); and, implementation of compliance, effectiveness, and biological monitoring.

CCAA Conservation Strategy

The covered lands contain habitat suitable for supporting all life stages of the Oregon spotted frog. In general, the intent of the CCAA is to maintain current Oregon spotted frog habitat, to reduce the likelihood of habitat degradation, and to improve habitat conditions. The estimated adult breeding population (approximately 100 individuals) represents less than three percent of the estimated population (3,530 frogs) within the Upper Deschutes River sub-basin. However, the Old Mill District breeding location is currently the most downstream extent of the known occupied range of the spotted frog in the sub-basin. Maintaining a healthy Old Mill District population is important to the conservation of the spotted frog because it could provide a source population for re-colonization of historically occupied habitat both downstream to Lower Bridge and upstream to Slough Camp.

The CCAA includes the following key conservation measures:

- Maintain a consistent water level in the Casting Pond that enables breeding through metamorphosis for spotted frog.
- Maintain adequate water levels in the Casting Pond to protect developing embryos and larvae during the breeding and summer season.
- Maintain adequate water level in the Casting Pond during the winter to help protect overwintering spotted frogs from freezing.
- Management of Casting Pond vegetation to support open water areas and hiding cover will provide habitat for breeding and rearing habitat.
- Improvement of Casting Pond perimeter to include natural barriers and sedges to manage human access where appropriate.
- Protection of the riparian zones and the continued biological successional changes of the river banks will provide cover used by the spotted frog during the summer active season.
- Protect and maintain the LSA Marsh to enable breeding through metamorphosis for spotted frog.
- Land management practices covered under the CCAA will continue in the event the Oregon spotted frog gets federally-listed, even if some incidental take primarily associated with implementing conservation and monitoring measures may occur.

III. PUBLIC COMMENTS

On July 21, 2014, we issued a Notice of Availability in the *Federal Register* (79 FR 42348) for the permit application, draft CCAA, and draft Environmental Action Statement for public review. A 30-day public review and comment period was open until August 20, 2014. The documents were available for review at the Service's Oregon Fish and Wildlife Office and its website. We did not receive any public comments.

IV. ENHANCEMENT OF SURVIVAL PERMIT CRITERIA – ANALYSIS AND FINDINGS

As set forth in 50 CFR 17.32 (d)(2), the Service finds that the section 10(a)(1)(A) issuance criteria for an enhancement of survival permit associated with the above Candidate Conservation Agreement with Assurances are met, as detailed below.

A. The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the CCAA.

The Service finds that take of the Oregon spotted frog caused by covered activities under the CCAA would be incidental to otherwise lawful activities. These otherwise lawful activities would occur as a result of implementing the covered activities and associated conservation measures as described in the CCAA, including management of stormwater ponds and bioswales, new bioswale construction, vegetation control and treatment, removal of non-native frog predators, and recreational activities. The take authorization provided by the permit will become effective if and at such time that the Oregon spotted frog becomes federally listed as either threatened or endangered under the ESA.

B. The CCAA complies with the requirements of the Service's CCAA policy.

The Service has determined that the CCAA contains and adequately addresses all the required elements of a CCAA as described in the Service's CCAA policy and regulations. This includes satisfying the following CCAA standard:

“When evaluating a potential CCAA, the Service must determine that the benefits of conservation measures to be implemented by a property owner under a CCAA, when combined with those benefits that would be achieved if the conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species.”

The proposed listing rule (Service 2013) described range-wide threats and limiting factors to the spotted frog that included, but are not limited to: 1) loss and degradation of wetland habitat necessary to support all life stages of the spotted frog; 2) hydrologic changes resulting from operation of existing water diversions/manipulation structures; 3) habitat modification and changes in water temperature and vegetation structure resulting from reed canarygrass and plant succession; 4) removal of beavers and beaver dams that support wetland hydrology; and 5) predation by invasive nonnative fish and bullfrogs.

Other threat factors include small and isolated breeding locations, low connectivity, low genetic diversity within occupied sub-basins, and genetic differentiation between sub-basins.

The covered lands contain habitat suitable for supporting all life stages of the spotted frog. Within the covered lands Oregon spotted frogs are only known to occur in the Casting Pond, LSA Marsh, and within the Deschutes River. The estimated adult breeding population within the covered lands is about 100 adults represents a small percentage of the estimated population of 3,530 breeding adults within the Upper Deschutes River sub-basin. However, this Old Mill District breeding location is currently the most downstream extent of the known occupied range of the spotted frog in the sub-basin. Maintaining a healthy Old Mill District population is important to the conservation of the spotted frog because it could provide a source population for re-colonization of historically occupied habitat both downstream to Lower Bridge and upstream to Slough Camp.

Maintenance of hydrology and water temperatures

Existing occupied habitat at the Casting Pond and the LSA Marsh will be protected, maintained, and managed. To address maintaining appropriate water levels throughout the year, the Casting Pond water level will be monitored using a staff gauge that was installed in 2013 for this purpose. Water levels during the breeding through metamorphosis period (March through July) will be maintained at approximately 40-45 cm to prevent freezing and excessive warming of the water. During the over-wintering period (December through February) adequate water levels are important to prevent freezing and provide oxygenated water below the surface ice. Water levels will be maintained at approximately 40-45 cm during this period. Extra water may be added to the pond to maintain this level.

Vegetation Management

Excessive aquatic vegetation can reduce the quality of habitat for Oregon spotted frogs in the Casting Pond. Under the CCAA, encroaching plant removal will be conducted, both manually and when necessary, mechanically, to maintain approximately 30 percent cattail/sedge cover. This will provide an appropriate amount of open water for breeding, and cover for hiding, rearing, and overwintering.

Due to public use of the perimeter of the Casting Pond, the edges have experienced some erosion which contributes to sedimentation of the pond and reduces cover for tadpoles, juveniles, and adult Oregon spotted frogs. The addition of native vegetation and boulders along the pond's edge has occurred and will continue as needed as part of the pond's maintenance activities. In addition, signage will be posted at the Casting Pond to inform the public of the sensitivity of the area and reduce their potential impacts to vegetation and the areas that may contain frog egg masses. Since signage alone may not be sufficiently effective, temporary fencing and netting may be used to keep people and dogs out of sensitive areas.

Public utilization of the Deschutes River bank along the LSA Marsh also can lead to vegetation loss and erosion. Signs and temporary fencing will be installed if monitoring determines that damage is either occurring or may occur to Oregon spotted frog habitat.

Non-native predators

While the Casting Pond is not presently known to support non-native predators such as warm-water fish or bullfrogs, these threats to Oregon spotted frogs are known to be present in the sub-basin. Therefore, the Casting Pond will be annually surveyed for the presence of non-native predators and an appropriate strategy for their removal will be implemented with input from the Service.

As described above, the conservation measures under the CCAA specifically address those areas that are occupied by Oregon spotted frogs, are under the control of the applicants in the covered area, and are identified as threats to the species. The conservation measures minimize any future impacts, and reduce impacts that might otherwise occur without specific proactive management. Therefore, we believe the conservation measures under the CCAA do address the recognized threats and meet the standard of actions being appropriately taken to preclude or remove the need to list the species.

C. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any species.

The ESA's legislative history establishes the intent of Congress that this issuance criterion be identical to a regulatory finding of no jeopardy under section 7(a)(2) (see 50 CFR 402.03). Pursuant to that intent, the potential effects to any candidate, proposed or listed species likely to be caused by the issuance of this section 10(a)(1)(A) permit were reviewed by the Service under section 7 of the ESA. There are no other listed species that are likely to be affected by this permit.

After reviewing the current status of the Oregon spotted frog, the environmental baseline for the action area, the effects of the proposed Old Mill CCAA, and the cumulative effects, the Service's Conference Opinion concluded that the issuance of a Enhancement of Survival permit for the Old Mill CCAA is not likely to jeopardize the continued existence of the Oregon spotted frog, and is not likely to destroy or adversely modify proposed critical habitat. We reached this conclusion based on the following reasons.

Management of covered lands and implementation of conservation measures outlined within the CCAA are designed to avoid most impacts to Oregon spotted frogs and their habitat and to improve habitat conditions. Overall, the implementation of the management and conservation measures outlined in the CCAA will have long-term benefits to the Oregon spotted frog by: 1) monitoring and maintaining sufficient water levels in the Casting Pond to support breeding, rearing and overwintering habitat; 2) managing vegetation encroachment in the Casting Pond to maintain open water areas for breeding; 3) removing nonnative predators in the pond should they be discovered during

annual surveys; and 4) protecting the riparian zone along the banks of the Deschutes River within the covered lands through the use of signs and temporary fencing.

The estimated amount of incidental take represents 1.1 percent (i.e., 12/1,045) of the current adult/juvenile population of frogs in the vicinity of the Old Mill. Oregon spotted frogs occur throughout the Upper Deschutes River sub-basin. Population estimates conducted in 2012 indicated that there is a minimum breeding adult population of 3,530 frogs in the Upper Deschutes River sub-basin. A loss of up to two adults in one year due to vegetation work at the Casting Pond represents two percent of the estimated adult population at the Old Mill District and only 0.057 percent of the estimated adult population in the Upper Deschutes sub-basin. Authorizing this level of incidental take will not adversely affect the population of frogs that occur in the vicinity of the Old Mill District because the majority of the population resides in the LSA marsh, which will be unaffected by management actions that may result in incidental take.

The Service estimates that 50 egg masses are deposited by the Old Mill spotted frog population of 100 individuals. Assuming that each egg mass is comprised of 600 eggs with an embryonic survival rate of 70 percent, there are approximately 21,000 tadpoles (30,000 x 0.7) following the breeding season. We assumed that 420 tadpoles could be stranded each year in bioswales. The loss of 420 tadpoles annually due to undetected breeding occurring in bioswales within the Old Mill District represents two percent of the current tadpole population. However, if breeding is detected in bioswales in the future, the conservation measures would allow for the maintenance of water levels similar to the Casting Pond or the salvage of the egg masses or tadpoles. Authorizing this level of take will not adversely affect the population of frogs that occur in the vicinity of the Old Mill District because the majority of the population resides in the LSA marsh, which will be unaffected by management actions that result in incidental take.

Therefore, we have determined that the effects of this level of anticipated incidental take are unlikely to appreciably reduce the likelihood of survival and recovery of the Oregon spotted frog in the wild.

D. Implementation of the terms of the CCAA is consistent with applicable Federal, State, and Tribal laws and regulations.

The Service is not aware of any law or regulation that would prevent implementation of the CCAA. The CCAA does not preempt the need for the applicants to comply with other applicable Federal, State, Tribal, or local laws, but solely serves as an instrument to comply with certain provisions of the ESA for the covered area. The permit includes a specific condition that requires the applicants to be in compliance with all applicable State, Federal, Tribal, and local laws or regulation. Failure to comply with this term and condition can result in suspension or revocation of the permit.

E. Implementation of the terms of the CCAA will not be in conflict with any ongoing conservation programs for species covered by the permit.

Past and ongoing conservation efforts to benefit the spotted frog have occurred throughout the range of the spotted frog including habitat creation and restoration, reed canary grass management, livestock grazing management, water management, and efforts to control bull frog populations.

In the Deschutes River Basin, the Sunriver Nature Center has been managing water levels to benefit spotted frogs and has been monitoring the population at Sunriver Resorts since 2000. The Deschutes National Forest has restored Big Marsh by closing perimeter ditches and BLM has repaired headcuts to benefit spotted frog habitat.

Based upon recent surveys, the Old Mill District is the most downstream extent of spotted frog distribution in the Upper Deschutes sub-basin. The Old Mill District population is isolated from others in the Upper Deschutes River sub-basin because the next closest breeding location at Slough Camp is approximately 17 miles upstream from the Old Mill District. Should any Oregon spotted frogs travel downstream, they would benefit from the habitat conditions provided at the Old Mill District.

There are no other existing conservation programs for the Oregon spotted frog within the vicinity of the Old Mill District. The conservation measures in the CCAA attempt to avoid all incidental take within the LSA Marsh. The conservation measures at the Casting Pond are intended to provide for management actions to maintain habitat through monitoring and adjustment of water levels, minimizing the impacts of public use, and allowing for restoration of the pond's borders and interior, when needed to maintain suitable hydrologic and vegetative conditions. None of these measures would be considered contrary to the conservation of the Oregon spotted frog or its habitat, and would not conflict with any other conservation programs.

F. The applicant has shown the capability for and commitment to implementing all the terms of the CCAA.

The applicants have demonstrated their capability and commitment to implement the CCAA. Throughout the development process, the applicants funded staff to develop the agreement and secured funding to begin implementation of the CCAA. This includes funding to conduct baseline inventories. Several conservation measures outlined in the CCAA have been implemented prior to finalizing the CCAA, including fencing along the riparian zone of the Deschutes River and pond maintenance activities. Implementation of these costly conservation measures by the applicant demonstrates that the applicants are both capable and committed to implementing the terms of the CCAA.

V. GENERAL CRITERIA AND DISQUALIFYING FACTORS

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

VI. RECOMMENDATIONS ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed Permit action, I recommend issuance of permit number TE44034B-0 to William Smith Properties Inc.; Fifteen SW Colorado LLC; Mill A Associates Limited Partnership; River Bend Limited Partnership; Mill Shops LLC; River Shops II LLC Deschutes River Amphitheater LLC; and River Bend Master Owners Association, Inc. to authorize the incidental taking of the Oregon spotted frog in conjunction with the implementation of Old Mill District Oregon Spotted Frog (*Rana pretiosa*) Candidate Conservation Agreement with Assurances.



Paul Henson, State Supervisor
Oregon Fish and Wildlife Office



Date

Supporting References

- U.S. Fish and Wildlife Service. 2013. Endangered and Threatened Wildlife and Plants; Threatened Status for Oregon Spotted Frog. Proposed rule. Federal Register 78: 53582-53623.
- U.S. Fish and Wildlife Service and William Smith Properties Inc. *et al.* 2014. Old Mill District Oregon Spotted Frog (*Rana pretiosa*) Candidate Conservation Agreement with Assurances, City of Bend, Deschutes County, Oregon
- U.S. Fish and Wildlife Service. 2014a. Final Environmental Action Statement Screening Form for Candidate Conservation Agreements with Assurances - Old Mill District Oregon Spotted Frog CCAA.
- U.S. Fish and Wildlife Service. 2014b. Intra-Service Section 7 Conference Opinion.