

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY** 2006 NOV 28 AM 9:13  
**REGION 8**

FILED  
EPA REGION VIII  
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**IN THE MATTER OF:** )  
 )  
**Robert E. Cross** )  
**and** )  
**Wolf Creek Associates, LLC** )  
**7309 49<sup>th</sup> Ave. East** )  
**Bradenton, FL 34203** )  
 )  
 )  
**Respondents.** )  
\_\_\_\_\_ )

**ADMINISTRATIVE COMPLIANCE  
ORDER ON CONSENT**

Docket No. **CWA-08-2007-0006**

**I. INTRODUCTION**

This Administrative Compliance Order on Consent (“Consent Order” or “Order”) is entered into voluntarily between the United States Environmental Protection Agency (“EPA”) and Robert E. Cross and Wolf Creek Associates, LLC (hereinafter “WCA”). This Consent Order concerns the implementation and completion of on-site mitigation to compensate for approximately 6.22 acres of wetlands that were impacted by the previous owner of property called the Moses-Bolton Tract (“Site”) located in South Fork, Mineral County, Colorado.

**II. STATUTORY AUTHORITY**

This Consent Order is issued pursuant to the authority vested in the Administrator of the EPA by section 309 of the Clean Water Act (“CWA”), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Consent Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

### **III. PARTIES BOUND**

This Consent Order shall apply to and be binding upon EPA and shall be binding upon Robert E. Cross and WCA, for purposes of this agreement "Respondents", their agents, heirs, successors, and assigns. The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Order. No change in the ownership or legal status of WCA or ownership of the property that is the subject of this Consent Order shall alter Robert E. Cross and WCA's responsibilities under this Order, except upon a conveyance or assignment of the property and improvements approved by EPA in writing, such approval not to be unreasonably withheld.

### **IV. STATEMENT OF PARTIES**

The following FINDINGS OF FACT are made solely by EPA. In signing this Consent Order, Robert E. Cross and WCA do not admit the FINDINGS OF FACT. Notwithstanding the foregoing, in order to provide for resolution of the alleged CWA violations on the Site and without acknowledging any liability, Robert E. Cross and WCA consent to the issuance of this Consent Order and agree to abide by all the terms and conditions herein.

The parties desire to enter into this Consent Order for a compensatory mitigation plan pursuant to which Robert E. Cross and WCA would implement on-site mitigation, as more particularly described below, for previous impacts to 6.22 acres of wetlands at the Moses-Bolton Tract site in exchange for which EPA agrees not to pursue any other civil enforcement action outside of this Consent Order against Robert E. Cross and WCA for these previous CWA violations.

## **V. FINDINGS OF FACT**

1. Robert E. Cross is a person who owns the Moses-Bolton Tract and whose address is 7309 49<sup>th</sup> Ave. East, Bradenton FL 34203.

2. Wolf Creek Associates, LLC is a Colorado limited liability company whose address is 7309 49<sup>th</sup> Ave. East, Bradenton, FL 34203. It is currently in good standing with the Colorado Secretary of State's office and its registered agent is Charles C. Powers, 0020 West Lodge Drive, PO Box 1273, South Fork, CO 81154.

3. Respondents own, control, and/or operate property containing the South Fork of the Rio Grande River and its adjacent wetlands located in Mineral County, Colorado. The South Fork of the Rio Grande River and its adjacent wetlands are situated on a property called the Moses-Bolton Tract and they are specifically located in Section 24, Township 39 North, Range 2 East. The "affected waters and wetlands" in this matter are specifically shown on the map in Figure 3 of Attachment 1.

4. The South Fork of the Rio Grande River is tributary to the Rio Grande River. The Rio Grande River is, and was at all relevant times, a navigable, interstate water.

5. Respondents purchased approximately 78.44 acres comprising the Moses-Bolton Tract from Charles Lindy and Athalene Daniels on July 2, 2002. At the time of the alleged violation, the Daniels owned, controlled, and/or operated the Moses-Bolton Tract. The Daniels purchased or otherwise acquired the Site in January 1995.

6. In May of 1995, the U.S. Army Corps of Engineers ("Corps"), Southern Colorado Regulatory Office, received a report that the Daniels were clearing willows on the property described in paragraph 3 of Section V of this Consent Order, and that a subdivision development on the Site was planned and staked. The Corps contacted the Daniels and informed them that

wetlands or other regulated waters were likely to be found on the property and that permits from the Corps are required prior to dredge or fill activities in waters of the United States, including wetlands. The Corps requested that the Respondents contact the Corps for an on-site inspection for wetlands before they conducted any ground-disturbing activities in potential wetland areas or in the South Fork of the Rio Grande River.

7. On June 15, 1995, the Corps visited the Site and confirmed the presence of wetlands and found that the Daniels had discharged dredged or fill material by placing spoil material into an adjacent wetland during the dredging of a pond on the Site. During a telephone conversation on June 19, 1995, the Corps informed the Daniels of the presence of wetlands under CWA jurisdiction and indicated that a Section 404 permit was required prior to leveling the discharged spoil material. The Corps also informed the Daniels that a Section 404(f)(1)(c) exemption for construction or maintenance of farm or stock ponds did not apply for activities associated with the proposed subdivision development at the Site.

8. In a letter dated July 11, 1995, the Daniels stated to the Corps that they had decided not to pursue developing the Site at any time in the foreseeable future.

9. On February 13, 1996, the Corps inspected the Site and found that the Daniels had discharged dredged or fill material by leveling piles of spoil material and placing road base material into wetlands adjacent to ponds on the Site and in other areas where wetlands were present without first receiving a Section 404 permit, as required by the CWA. On February 14, 1996, the Corps notified the Daniels in writing by certified mail, return receipt requested, that they were in violation of the CWA and ordered them to cease and desist from any further filling or construction in the South Fork of the Rio Grande and its adjacent wetlands.

10. Following observation of additional work underway on the Site in September 1996, the Corps inspected the Site again on October 4, 1996. At that time, the Corps determined that the Daniels had discharged dredged or fill material into wetlands during the construction of roads and ditches and leveling the land at the Site. The Corps determined that the activities in question constituted additional violations of the CWA and that these activities also violated the February 14, 1996 cease and desist order. On November 4, 1996, the Corps issued a second written notification of violation and cease and desist order to the Daniels by certified mail, return receipt requested.

11. At the request of the Daniels, the Corps conducted a site inspection and wetland delineation at the Site on May 20, 1998. On August 18, 1998, the Corps notified the Daniels in writing by certified mail, return receipt requested, that it had determined, based on the May 20, 1998 inspection, that the Daniels had discharged dredged or fill material into wetlands during the construction of drainage ditches across the wetlands to remove excess water from the Site, and that this work violated the CWA and the Corps' two previously issued cease and desist orders. The August 18, 1998, letter again ordered the Daniels to cease and desist from any further filling or construction in the South Fork of the Rio Grande and its adjacent wetlands until they first received written authorization from the Corps. The August 18 letter also ordered the Daniels to submit a restoration plan or apply for an after-the-fact permit for all work completed as of that date and for all proposed work no later than September 18, 1998.

12. In response to the Daniels' August 26, 1998 letter requesting consideration of the use of Section 404(f) exemptions for the unauthorized activities at the Site to date, the Corps sent a letter to the Daniels on September 8, 1998, determining that, after careful review of the Section

404(f) exemptions found at 33 C.F.R. § 323.4, none of the exemptions are applicable to discharges of dredged and fill material that they already placed into wetlands at the Site.

13. On September 17, 1998, the Corps received a permit application from the Daniels seeking after-the-fact authorization to allow discharges of dredged and fill material for roads and building sites, ditches, and approximately 1,820 cubic yards of earthen material to remain in approximately 20,000 square feet of wetlands (0.46 acres) on the Site. No additional discharges of dredged or fill material were proposed in the application.

14. Following issuance of a Public Notice for an Individual Permit (Permit Application No. CO-95-30131) under Section 404 of the CWA on October 2, 1998, the Daniels sent a letter dated December 4, 1998, to the Corps. The letter described road reconstruction and other activities performed by the Daniels and enclosed photographs depicting the work. On December 18, 1998, the Corps notified the Daniels in writing by certified mail, return receipt requested, that the new work appeared to be in violation of the CWA and again ordered the Daniels to cease and desist from any further filling or construction on the Site. The Corps' December 18 order also stated that the Corps was placing the permit application on hold until the Corps could determine the total scope of the new activities.

15. On January 19, 1999, the Corps inspected the Site and found that the Daniels had discharged dredged or fill material into wetlands during the new roadway construction and the expansion of existing roads described in paragraph 14 of Section V of this Consent Order, and that one or more spoil piles of earthen material had been discharged in wetlands. The Corps determined that these additional discharges of dredged or fill material to wetlands were conducted by the Daniels without the necessary authorization from the Corps.

16. In a letter to the Daniels dated March 26, 1999, the Corps determined that approximately 6.22 acres of wetlands were impacted during the Daniels' unauthorized activities. Also in this letter, the Corps informed the Daniels that it had suspended review of their September 17, 1998 permit application and referred the matter to EPA for enforcement action.

17. Pursuant to section 309 of the CWA, 33 U.S.C. § 1319, EPA issued a Findings of Violation and Order for Compliance to the Daniels on April 28, 2000, for failure to obtain the appropriate authorization under the CWA for discharging dredged or fill material into waters of the United States.

18. By letters dated June 1, 2000, January 3, 2001, October 24, 2001, and May 21, 2002, EPA determined that the Daniels were in violation of section 309(a) of the CWA, 33 U.S.C. §1311 for failure to comply with the April 28, 2000 Findings of Violation and Order for Compliance. To date, the Daniels remain in violation of multiple sections of the CWA.

19. The Respondents maintain that they were not informed or notified of the information found in paragraphs 6 - 18 of the FINDINGS OF FACT above, by the Daniels prior to or at the time of the purchase of the property in July, 2002.

20. EPA alleges that the South Fork of the Rio Grande River and its adjacent wetlands filled and disturbed by the Daniels' unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.

21. The discharged dredged material referenced above are and were at all relevant times "dredged material" within the meaning of 33 C.F.R. § 323.2(c) and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The discharged fill material referenced above is and was at all relevant times "fill material" within the meaning of 33 CFR § 323.2(e) and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

23. The earthmoving equipment used to move the dredged or fill material referenced above is a "point source" within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

24. The Daniels are each a "person" within the meaning of CWA Section 502(5), 33 U.S.C. § 1362(5).

25. The South Fork of the Rio Grande River and its adjacent wetlands referenced in paragraphs 3 and 4 of Section V of this Consent Order are and were at all relevant times "waters of the United States" within the meaning of 33 CFR § 328.3(a) and therefore "navigable waters" within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

26. The placement of dredged or fill material into the South Fork of the Rio Grande River and its adjacent wetlands constitutes the "discharge of pollutants" within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

27. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

28. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters which are defined as waters of the United States.



29. 33 CFR § 323.3(a) specifies that, unless exempted pursuant to 33 CFR § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

30. The Daniels are not and never have been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraphs 6 - 8 and 10 - 15 of Section V of this Consent Order.

31. The activities conducted by the Daniels and/or their agents as described above, violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by the Daniels into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).

32. The impact of the CWA violations described above will continue each day that the fill remains in the affected waters and wetlands.

33. On August 18, 2003 the Corps sent a wetlands jurisdictional determination to Robert E. Cross' and WCA's wetlands consultant on the Moses-Bolton Tract for a proposed construction project. The determination indicated that the South Fork of the Rio Grande and its adjacent wetlands on the Site are jurisdictional, regulated under Section 404 of the CWA, and may require a Section 404 permit for the discharge of dredged or fill material.

34. Activities to be carried out under this Consent Order are remedial, not punitive, and are achievable as a practicable matter through commonly used construction, digging, filling, revegetation, and best management practices. EPA asserts that the actions required by this Consent Order are necessary to achieve the CWA's objective "to restore and maintain the

chemical, physical, and biological integrity of the Nation's waters." CWA Section 101(a), 33 U.S.C. § 1251(a).

35. Robert E. Cross and WCA assert that they had no knowledge of dredging and filling of wetlands or any Cease and Desist Order prior to purchasing the property.

36. In order to resolve the violations alleged herein by EPA, Respondents have agreed to comply with this Consent Order and agree to abide by all of its terms and conditions herein and agree not to challenge the jurisdiction of EPA or these Findings of Fact in any proceeding to enforce this Consent Order. Respondents' position with respect to the Consent Order and Mitigation Plan is summarized in paragraph 35. By entering into this Consent Order, Respondents do not admit that its activities at the site have caused any impact to jurisdictional wetlands or that it has any liability pursuant to the CWA at the site.

37. These preceding FINDINGS OF FACT and the ORDER FOR COMPLIANCE below have been made after consultation and coordination with the United States Army Corps of Engineers, Albuquerque District.

## **VI. ORDER FOR COMPLIANCE**

Based upon the foregoing FINDINGS OF FACT AND OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED and AGREED:

1. Respondents shall not discharge any pollutant into wetlands or other regulated waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

2. Prior to execution of this Consent Order, Respondents submitted a Compensatory Wetland Mitigation Plan, dated June 20, 2006, (hereinafter, the Mitigation Plan) to EPA that provides for a compensatory wetland mitigation project that shall be the responsibility of, and performed by, Respondents. The project consists of 3.53 acres of wetlands that will be restored and created, 0.38 acres of wetlands that will be enhanced, 2.30 acres of wetlands north of the South Fork of the Rio Grande that will be preserved, and 1.61 acres of existing wetlands south of the South Fork of the Rio Grande that will be preserved. An additional 0.47 acre of wetland will be created or restored as mitigation for impacts to wetlands caused by the proposed development of the Moses-Bolton Tract. In all, 6.30 acres of wetlands north of the South Fork of the Rio Grande and 1.61 acres south of the South Fork of the Rio Grande will be present and preserved after completion of the work required by the Mitigation Plan. The Mitigation Plan, attached hereto as Attachment 1, is approved by EPA and incorporated into this Consent Order. Further, the Respondents shall record in the real property records of Mineral County, Colorado, a Conservation Restriction of Deed, in the form attached hereto as Attachment 2, protecting a total of 6.30 acres of wetlands north of the South Fork of the Rio Grande, 1.61 acres of wetlands south of the South Fork of the Rio Grande, and 33.42 acres of uplands south of the South Fork of the Rio Grande. For all purposes related to this Consent Order, the Conservation Restriction of Deed described above shall be deemed to be part of and included in the Mitigation Plan.

- a. Performance of the Mitigation Plan shall be a condition of any Corps' authorization for the past discharges and proposed future discharges into alleged wetlands at the Site. Implementation of the Mitigation Plan, including earthwork and planting for the on-site wetland mitigation project, shall commence within 30 days after the date on which a permit has become final and non-appealable and

shall be completed as soon as practicable thereafter. The parties acknowledge and agree that their mutual intent in entering into this Consent Order is that the Mitigation Plan will be fully implemented according to the schedule set forth in the Mitigation Plan, after obtaining all necessary permits and approvals from the Corps of Engineers and other governmental authorities, unless a shorter time frame is specified in these permits or approvals.

- b. Respondents shall monitor the success of the on-site wetland mitigation project beginning when the Mitigation Plan is complete or 90 days after the commencement of the Mitigation Plan. Annual monitoring shall continue for three (3) calendar years after the date of final planting required in the Mitigation Plan unless, prior to that time, the success of the entire mitigation project has been fully demonstrated and accepted in writing by EPA. If an annual monitoring report demonstrates that the mitigation project is not making progress toward meeting the criteria for success set forth in the Mitigation Plan, Respondents shall submit the analysis required in subsection (c) below.
- c. In the event that any on-site wetland mitigation project fails to meet the criteria for success, Respondents will repair, replace and maintain any improvements necessary to meet the criteria for success of the plan. Respondents shall submit to the Corps and EPA, in its annual report or upon realization of project failure, an analysis of the project's failure and a proposed plan for correcting all deficiencies in the mitigation project. The proposed plan for correcting these deficiencies shall include provisions for adequately monitoring the effectiveness of the

measures proposed to correct the deficiencies and shall be submitted to EPA for approval.

- d. Respondents may file a Petition to Amend the Mitigation Plan to move or alter the proposed mitigation areas without reducing the size thereof as provided above, should circumstances change beyond the control of Respondents that would require an amendment. At any time after the entry of this Order any such application will be subject to EPA and any other governmental permits and/or approvals.

3. Upon receiving the final executed Consent Order, Respondents shall obtain all necessary permits to implement the Mitigation Plan and then commence mitigation activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondents shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

4. This Consent Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Consent Order requires a permit from the Corps under section 404 of the CWA. If required, Respondents shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 7 of Section VI of this Consent Order prior to initiating any work that is to be performed pursuant to this Consent Order.

U.S. Army Corps of Engineers  
Durango Regulatory Office  
103 Sheppard Drive, Suite 116  
Durango, CO 81303-7995  
Telephone: 970-375-9509

5. This Consent Order, or the signature pages thereof, may be executed in counterparts, all of which shall have full force and effect as an original, including admission into evidence, and facsimile signatures shall constitute originals for all purposes.

6. Respondents' obligations under this Consent Order are severable. In the event that a court of competent jurisdiction enters a final judgment holding invalid any material provision of this Consent Order, the remainder of the Consent Order shall be fully enforceable.

7. Respondent shall submit all notifications, and related correspondence to:

Kenneth Champagne, 8ENF-W  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6608  
Facsimile: 303-312-6409

A copy of all notifications, and related correspondence shall also be provided to:

Wendy Silver, 8ENF-L  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6637  
Facsimile: 303-312-6953

8. EPA agrees to submit all notifications and correspondence to:

Robert E. Cross  
James L. Cross  
Wolf Creek Associates, LLC  
8775 SW 133 Street  
Miami, FL 33176

Any party hereto may, by notice, change the address to which future notices shall be sent or the identity of the person designated to receive notices hereunder. Actual receipt by a person specified above of any written notice, whether or not given in accordance with the terms of this paragraph, shall be deemed to be notice given pursuant to the Consent Order.

9. In addition to the notification requirement set forth in paragraph 7 of Section VI of this Consent Order, after issuance of any Corps authorization required for the mitigation work, Respondents shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

10. Any deliverables, plans, reports, specifications, schedules and attachments required by this Consent Order are, upon approval by EPA, incorporated into this Consent Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Consent Order and subject to EPA enforcement.

11. If any event occurs which causes or may cause delays in the completion of the on-site mitigation project as required under this Consent Order, Respondents shall notify and consult with EPA in an expeditious manner. Respondents shall adopt all reasonable measures to avoid or minimize any such delay.

- a. If the parties agree that the delay or anticipated delay in compliance with this Consent Order has been or will be caused by circumstances beyond the control of Respondents, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time.

12. Respondents shall allow access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, and the State of Colorado Department of Public Health and Environment, upon proper presentation of credentials, to sites and records relevant to this Consent Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Consent Order;
- b. To inspect and monitor compliance with this Consent Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Consent Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

13. If Respondents transfer ownership of or lease, in whole or in part, any portion of a location where restoration and/or mitigation has occurred before it has fulfilled its obligations under this Consent Order, the Respondents shall provide a copy of this Consent Order and the EPA-approved mitigation plan to the transferee or lessee not less than thirty (30) days prior to the transfer or lease. A transfer or lease of interest shall not relieve the Respondents of any responsibility in the Consent Order unless EPA, Respondents, and the transferee or lessee agree in writing to allow the transferee or lessee to assume such responsibility. Additionally, thirty (30) days prior to such transfer or lease, Respondents shall notify EPA at the address specified in paragraph 7 of Section VI of this Consent Order.

14. This Consent Order shall be effective upon execution by the parties.



15. Respondents understand and acknowledge that 33 U.S.C. § 1319(d) authorizes civil penalties of up to \$32,500 per day for each violation of Clean Water Act Section 301, 33 U.S.C. § 1311, and Section 1319(c), 33 U.S.C. § 1319(c) authorizes fines and imprisonment for willful or negligent violations of the Clean Water Act. Issuance of this Consent Order shall not be deemed an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Clean Water Act for violation of this Consent Order or of the Act from and after the date of this Consent Order.

16. Respondents understand and acknowledge that compliance with the terms and conditions of the Consent Order shall not be construed to relieve Respondents of its obligation to comply with any applicable Federal, state, or local law or regulation.

17. Each party shall bear its own costs and attorneys fees in connection with this matter.


18. This Consent Order constitutes the final, complete and exclusive agreement and understanding among the parties with respect to the settlement embodied in this Consent Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement of this matter other than those expressly contained in this Consent Order.

19. Each party agrees to execute, approve, and adopt any and all instruments, documents and resolutions as may be reasonably required to effectuate the terms, conditions and provisions contained in this Consent Order. Such instruments, documents and resolutions shall be in form and substance reasonably acceptable to the parties.

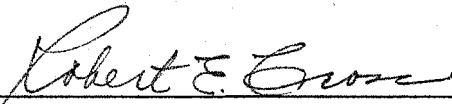
20. This Consent Order constitutes the entire agreement of the parties and a complete merger of all prior negotiations and agreements. This Consent Order shall not be modified except in writing signed by all of the parties hereto or their authorized representatives. Minor

modifications to the Consent Order, such as granting extensions to meet scheduled milestones in the mitigation plan, can be approved by designated assignees.

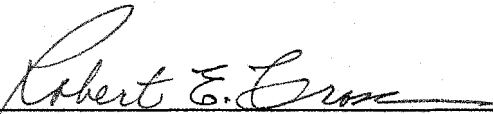
**FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8,**

Date: 11/17/2006 By:   
Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance, and  
Environmental Justice  
U.S. Environmental Protection Agency, Region 8

**FOR ROBERT E. CROSS,**

Date: Nov. 10, 2006 By:   
Robert E. Cross  
7309 ~~X~~ 49<sup>th</sup> Ave. East  
Bradenton FL 34203.

**FOR WOLF CREEK ASSOCIATES, LLC,**

Date: Nov 10, 2006 By:   
Robert E. Cross, President  
Wolf Creek Associates, LLC  
~~PO Box 1286~~ 7309 49TH AVE. E. REC 11-10-06  
Pagosa Springs, CO 81147  
BRADENTON, FL 34203

**ATTACHMENT 1**

**FINAL  
COMPENSATORY WETLAND  
MITIGATION PLAN  
SADDLE BROOK  
MINERAL COUNTY, COLORADO**

*Prepared for—*

Environmental Protection Agency  
Technical Enforcement Program  
999 18<sup>th</sup> Street, Suite 300  
Denver, Colorado 80202

*On behalf of—*

Wolf Creek Associates, LLC  
8775 SW 133 Street  
Miami, Florida 33176

*Prepared by—*

ERO Resources Corporation  
1842 Clarkson Street  
Denver, Colorado 80218  
(303) 830-1188

October 12, 2006

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Figure 1. Site Location

Figure 2. Wetland Map

Figure 3. Site Plan

Plan P1. Wetland Planting Plan

Plan P2. Wetland Planting Plan – Phase 1

Plan P3. Wetland Planting Details

Plan P4. Tabulation of Landscape Quantities

**FINAL  
COMPENSATORY WETLAND MITIGATION PLAN**

**SADDLE BROOK  
MINERAL COUNTY, COLORADO**

**OCTOBER 12, 2006**

**Project Description**

**Location of Project**

The Saddle Brook property is located along Highway 160 in Mineral County, Colorado, about 6 miles southwest of South Fork. The property is located in a portion of Section 24, Township 39 North, Range 2 East on the Beaver Creek Reservoir, Colorado quadrangle (Figure 1). UTM coordinates of the approximate center of the property are 4163550 mN and 438660 mE.

**Background and Summary of Project**

In 2002, Wolf Creek Associates (WCA) purchased the Saddle Brook property from Mr. Lindy Daniels. Mr. Daniels is currently involved in an enforcement action with the Environmental Protection Agency (EPA) for placing unauthorized fill in wetlands and other waters of the U.S. In 1998, the U.S. Army Corps of Engineers (Corps) mapped the wetlands on the site and determined the amount of wetlands believed to be impacted by Mr. Daniels (Figure 3). In order to develop the property before the enforcement action is resolved with Mr. Daniels, WCA agreed to increase the amount of wetlands on the property to offset the losses caused by Mr. Daniels. This compensatory mitigation plan is for the wetlands impacted by Mr. Daniels as well as for proposed impacts from WCA's planned development of Saddle Brook.

The Saddle Brook property is a 75-acre site located along the South Fork of the Rio Grande. The proposed development plan includes 10 low-rise 18-unit buildings with a maximum total of 180 condominiums and a 90-room hotel, commercial parcels, a privacy berm, a trail system with two pedestrian bridges over the South Fork of the Rio Grande, and a small wastewater treatment facility. As part of the project, WCA, in accordance

with the Colorado Department of Transportation's (CDOT) regulations, is constructing two sections of deceleration lanes along Highway 160 to connect to CDOT's approved access into the property.

Construction of buildings, roads, and the wastewater treatment facility would result in up to 0.41 acre of permanent and temporary wetland impacts (Table 1; Figure 3). Construction of the deceleration lane would impact 0.06 acre of wetland that occurs within CDOT's highway right-of-way. CDOT obtained authorization from the Corps for temporary impacts to these wetlands. The deceleration lane would permanently impact these wetlands, and CDOT's policy is for the landowner requiring the additional lanes to pay for mitigation costs. Mitigation for the 0.06 acre of wetland would be included in the total 0.47 acre of wetland mitigation for the Saddle Brook property. Pedestrian bridges would be placed and constructed in such a way to avoid impacts to wetlands. Impacts from the proposed project would result from fill being placed in wetlands to construct building pads, retaining walls, and roads. Figure 3 shows the amount and location of wetlands that would be impacted by the proposed project.

The total amount of wetlands that currently exist on the site is 2.71 acres north of the river (based on a 2002 wetland delineation) and 1.61 acres south of the river (based on a 2004 wetland delineation) (Figure 2). Wetlands are present along the South Fork of the Rio Grande River and in low areas within the floodplain that may receive supplemental moisture from adjacent ponds. Wetland areas, which include RG1 (a, b, c, and d), RG2, RG3, RG4, RG5, W1, W3, W5, and NW1, were delineated and mapped (Figure 2). Wetland delineations have been reviewed and approved by the Corps' Durango Regulatory office.

In 1998, Van Truan with the U.S. Army Corps of Engineers (Corps) mapped wetlands on the site including areas that were impacted by unauthorized fill. In a letter to Mr. Daniels from Andrew Rosenau (Chief, Albuquerque Corps District) dated March 26, 1999, Mr. Rosenau stated that the area of direct and indirect wetland impacts totaled 6.22 acres (Rosenau 1999). The location of former wetlands and impacts is shown on Figure 3, which also shows the proposed development and mitigation sites. The proposed



Saddle Brook development would impact an additional 0.47 acre of existing wetland. This document presents WCA's proposed wetland mitigation that would compensate for Mr. Daniels' alleged unauthorized fill as well as WCA's impacts from the proposed development plan for the site. The compensatory mitigation will be accomplished in four ways: restoration of previously impacted wetlands, enhancement of existing wetlands, creation of new wetlands, and preservation of existing wetlands. To mitigate for Mr. Daniels' unauthorized fill, WCA is proposing to restore and create 3.53 acres of wetland, to enhance 0.38 acre of wetland, and to preserve 3.91 acres of wetland (1.61 on south side of river and 2.3 acres on the north side of the river). To mitigate for the 0.41 acre of impacts from the proposed development and for the 0.06 acre of impact from the deceleration lane, WCA is proposing to create and restore a total of 0.47 acre. The total amount of wetland proposed to be present and preserved after completing the restoration and creation and by accounting for the existing wetlands is 7.91 acres (3.53 of restoration/creation, 2.3 acres of existing wetlands on north side not impacted by proposed development, 1.61 acres of existing wetlands on south side of the river, and 0.47 acres of wetlands created as part of the mitigation for the proposed development that will be preserved).

**Responsible Parties**

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**Existing Physical Conditions (Baseline Information)**

Highway 160 and the South Fork of the Rio Grande split the Saddle Brook property into three sections. About 3 acres of the Saddle Brook property are north of Highway 160, about 40 acres are between Highway 160 and the river, and about 32 acres are located south of the river. North of the highway, the site is characterized by aspens and other woody vegetation with a small willow-dominated wetland that continues on the adjoining property to the west. Between the highway and the river, the site is fairly flat with a broad grassy area used historically for grazing and haying operations, three ponds, and riparian and wetland habitat along the river. The south side of the river is a steep slope covered with a spruce-fir forest. A few wide benches occur between the toe of the slope and the river, allowing herbaceous- and shrub-dominated wetlands to occur. A natural spring occurs in the southeast corner, creating a high quality wetland complex with willows and sedges.

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**Table 1. Area of existing wetlands, proposed impacts, and preserved areas.**

Wetland Identifier	Area of Existing Wetland	Area of Proposed Wetland Impact	Total Wetland Area Preserved
	(acres)		
NW-1	0.0301	0	0.0301
RG1a	0.5649	0	0.5649
RG1b	0.0754	0	0.0754
RG1c	0.0691	0	0.0691
RG1d	0.4095	0	0.4095
RG2	0.1922	0	0.1922
RG3	0.5039	0	0.5039
RG4	0.4656	0.1600	0.3056
RG5	0.1143	0.0700	0.0443
W-1	0.1692	0.0700	0.0992
W3	0.0051	0	0.0051
W5	0.1043	0.1043	0
W6	0.0060	0.0060	0
RGS1	0.5400	0	0.5400
RGS2	0.1900	0	0.1900
RGS3	0.0100	0	0.0100
RGS4	0.1600	0	0.1600
RGS5	0.0100	0	0.0100
RGS6	0.7000	0	0.7000
CDOT1	0.0100	0.0100	0
CDOT2	0.0500	0.0500	0
CDOT3	0.0040	0.0040	0
CDOT4	0.0030	0.0030	0
Subtotal-north side of river	2.7096	0.4103	2.2993
Subtotal-south side of river	1.6100	0	1.6100
Subtotal-CDOT	0.0670	0.0670	0
Total	4.3866	0.4773	3.9093

**Jurisdictional Areas to be Filled**

The total amount of wetland that currently exists north of the river is 2.71 acres (based on a 2002 wetland delineation) and 1.61 acres on the south side (based on a 2004 wetland delineation) (Figure 2). Wetlands were delineated in the field following methods outlined in the Corps of Engineer's Wetland Delineation Manual (Corps 1987). Wetland delineations were based on three criteria: dominance of hydrophytic vegetation, presence

of hydric soils, and the presence of wetland hydrologic conditions. Wetland indicator status of plant species was determined using Sabine (1994). Wetlands were given a label that corresponds to Figure 2. The proposed project would result in 0.47 acre of new, temporary and permanent impacts to the existing wetlands. WCA requested authorization for placement of fill into 0.06 acre of wetland under Nationwide Permit 18 (already authorized) and 0.41 acre of wetlands under Nationwide Permit 39 from the Durango Regulatory Office of the U.S Army Corps of Engineers. Issuance of Nationwide Permit 39 is dependent on approval of this mitigation plan. These additional fills will be mitigated through an additional 0.47 acre of wetland being created on site (Figure 3).

### **Types, Functions, and Values of Jurisdictional Areas**

ERO evaluated wetland functions using the Montana Wetland Field Evaluation Form and Instructions (Montana Department of Transportation 1996). The "Montana Method" uses a classification system that combines the U.S. Fish and Wildlife Service classification system (Cowardin et al. 1979) with a hydrogeomorphic (HGM) approach (Brinson 1993). The Montana Method provides a landscape context to the U.S. Fish and Wildlife Service classification. It is a rapid functional assessment process designed primarily to address wetland resources associated with linear projects such as highways and pipelines although it can be applied to all types of projects. A functional assessment was conducted for wetlands within the project area, based on community types and landscape position.

Wetland values, such as recreation and uniqueness, are attributes not necessarily important to the integrity of wetland systems; however, these values are perceived as being valuable to society (Adamus et al. 1991). The rating for different values for each wetland is shown in Table 3.

Two classes of wetlands, riverine and depressional, are present within the study area. Using the Montana Method (Montana Department of Transportation 1996), ERO identified four wetland types in the project area for functional assessment:

- Riverine, palustrine, emergent
- Riverine, palustrine, scrub-shrub
- Depressional, palustrine, emergent
- Depressional, palustrine, scrub-shrub

ERO conducted a functional assessment and completed a Field Evaluation Form for representative wetlands found within each class. The following section briefly describes the functions and values assessed:

***General Wildlife Habitat*** — General wildlife habitat potential of the assessment area based on perceived use by aquatic, semi-aquatic, and non-aquatic wildlife groups and habitat diversity as determined by the variety of wetland types.

***General Fish/Aquatic Habitat*** — General fish use of the assessment area based on the known or suspected presence of native or introduced fish and the duration of surface water.

***Flood Attenuation and Storage*** — The capability of the wetland within the assessment area to detain moving water from in-channel or overbank flows for a short duration when the flow is outside of its channel. This parameter applies only if the assessment area occurs within or contains a discernable flood plain (e.g., is subject to flooding and possesses the opportunity to attenuate and store flood waters), and is based on floodwater proximity, evidence of flood deposits, and Federal Emergency Management Agency maps. This function can apply to any assessment area that includes a flowing water/channel component (e.g., rivers, streams, flowing ditches).

***Sediment/Nutrient/Toxicant Retention and Removal*** — The ability of the assessment area to retain sediments and retain and remove nutrients and toxicants. The assessment is based on the site's proximity to sediment/nutrient/toxicant sources; transport potential of these constituents to the assessment area via surface water; potential for the site to detain the constituents; and potential of the site to filter and/or process (uptake) the constituents.

***Sediment/Shoreline Stabilization*** — The ability of the assessment area to dissipate flow or wave energy and reduce shoreline erosion. This function only applies if the assessment area occurs on or within the banks of a river, stream, or other natural or man-made drainage, or on the shoreline of a standing water body with a maximum depth exceeding 6.6 feet.

***Production Export/Food Chain Support*** — The potential of the assessment area to produce and export food/nutrients for living organisms. Production export typically refers to the flushing of relatively large amounts of organic material from the wetland to downstream habitats or adjacent deeper waters (Adamus et al. 1991).

***Ground Water Discharge/Recharge*** — Ground water discharge and recharge potential of the assessment area. Ground water recharge is the movement of surface water (usually downward), whereas ground water discharge is the movement of ground water into surface water (usually laterally or upward). The evaluation includes observations of springs and seeps and presence of inlets and outlets.

***Uniqueness*** — Includes the general uniqueness of the assessment area relative to the abundance of similar sites occurring in the same major watershed basin, the replacement potential and habitat diversity of the assessment area, and the degree of human disturbance in the assessment area.

***Recreation/Education Potential*** — The potential of the assessment area to support recreational or educational activities. If the assessment area is a known recreation or education site, a high rating is assigned.

***Dynamic Surface Water Storage*** — The potential of the assessment area to capture water from precipitation, upland surface (sheetflow) or subsurface (ground water) flow. This function only applies to wetlands that do not flood from overbank or in-channel flow.

### **Functions Provided by Project Area Wetlands**

Table 3 provides the rating of each function, the HGM class, and Cowardin system and class for each wetland within the project area. Except for sediment/nutrient/toxicant removal function, wetlands associated with the river scored high for all functions because of the presence of both palustrine emergent and scrub-shrub vegetation types along with open water. The three isolated, depressional wetlands with emergent habitat (W-1, W5, and W6) scored low for all applicable functions. The isolated depressional wetland (NW-1) with the scrub-shrub class scored moderate for all applicable functions.

### **Values Provided by Project Area Wetlands**

Recreation/education potential and uniqueness values were rated for the two classes of wetlands. All wetlands within the project area received a low rating for uniqueness because the vegetation types are abundant. All sites received a low rating for recreational value because they occur on private property and have been directly disturbed in the past.

### **Threatened and Endangered Species**

The project area was assessed for suitable habitat for species listed as threatened or endangered under the Endangered Species Act, including the Canada lynx and the southwestern willow flycatcher. A southwestern willow flycatcher presence/absence survey was conducted during the 2004 breeding season. No southwestern willow flycatchers were detected and the final results were provided to the Corps.

A Biological Assessment was submitted to the U.S. Fish and Wildlife (Service) regarding this project. A Biological Opinion has been released by the U.S. Fish and Wildlife Service. WCA will comply with all of the terms and conditions of the Service's Biological Opinion.

### **Cultural Resources**

A cultural resources survey of the Saddle Brook property was conducted on August 3, 2004 by La Plata Archaeological Consultants. La Plata Archaeological reported no cultural resources associated with the site. Their report was submitted to the Corps.

### **Goals of Mitigation**

Wetlands created on the site will be willow-dominated and wet meadows with a diversity of species. Existing wetlands along the river are dominated by willows, often with a mix of sedges and grasses in the understory. Many of the mitigation areas will be adjacent to existing willow-dominated wetlands and will add to the functions and values of the wetlands by increasing the number of communities and species diversity. The newly created wetlands will increase the area of wetlands that already exist, thereby enhancing the functions and values. The new wetlands will increase species diversity, increase habitat for birds, small mammals, aquatic and non-aquatic reptiles, amphibians and invertebrates, aid in flood attenuation and storage, help remove sediment, retain nutrients, stabilize streambanks, support food chain functions, aid in ground water discharge and recharge and provide recreational opportunities (birdwatching, nature hikes, meditation, etc.). Wetlands also will be created along the existing ponds on the site. Currently, no wetlands occur around the ponds so that the creation of emergent wetlands surrounding open water habitat will increase the functions and values of the

ponds, especially for use by water fowl and fish. Wetlands around the edges of the ponds will improve water quality, stabilize banks, trap sediment and nutrients, and create valuable habitat. Wetlands north of the landscape berm along Highway 160 as well as the wetland north of the highway will be planted with willow stakes collected on site. Planting plans P1 and P2 show locations and quantities of the species proposed to be planted. Where appropriate, willows stakes will be planted around the edges of the wetlands, especially along the river to help stabilize banks.

The mitigation areas will be constructed over several years, starting in the spring of 2005 and continuing through the spring of 2011 (Table 2). Proposed construction of the mitigation areas corresponds to the proposed development construction schedule. If possible, mitigation areas will be constructed sooner than the development schedule allows. A portion of the mitigation (along Highway 160 near the berm) has been completed.

It is expected that the plants will be well established after three years following construction of each wetland mitigation area. Monitoring would continue until the success criteria (defined below) have been met.



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**Table 2. Proposed schedule of construction for mitigation areas.**

Construction Phase No.	Description of Area	Area of Wetland (acres)				Proposed Const. Date
		Restored	Mitigated	Enhanced	Preserved	
I	Tract A - Two mitigation areas along Highway 160	0.10	0.49	0	0	Completed 2005
II	Mitigation sites for the Corps of Engineers NW Permit 39 (Located in Lots 10 and 13)	0.17	0.30	0	0	Spring/Summer 2007
III	Mitigation areas around the lakes (Lots 3, 4, and 5)	0.28	1.54	0	0	Spring/Summer 2007
IV	Lot 3	0.06	0.01	0.10	0.22	Spring or Summer 2007-
V	Lot 1 and Lot 12	0.23	0.01	0.28	0.48	Spring 2008
VI	Lot 2	0.15	0.02	0	0.37	Spring 2008
VII	Lot 4 (all of mitigation will be conducted during Phase III)	0	0	0	0.26	Spring 2007
VIII	Lot 5 (all of mitigation will be conducted during Phase III)	0	0	0	0	Spring 2007
IX	Lot 6, 7, and 9	0.02	0.17	0	0.24	Spring 2009
X	Lot 8 and 9	0.37	0.04	0	0.14	Spring 2010
XI	Lot 10	0.04	0	0	0.59	Spring 2011
XII	Lot 14 (south side of river)	0	0	0	1.61	N/A
	<b>Total</b>	<b>1.42</b>	<b>2.58</b>	<b>0.38</b>	<b>3.91</b>	

Quantities listed in table are related to construction schedule.

Completion dates may be revised depending on the timing of issuance of the permit.

### **Final Success Criteria**

Wetland mitigation areas will be considered successful when vegetation cover is at least 80 percent with at least 50 percent cover of wetland indicator species (obligate wetland, facultative wetland, and facultative).

### **Target Functions and Values**

Target functions and values are to increase species diversity, increase flood control, enhance wildlife habitat, stabilize streambanks, support food chain functions, aid in ground water discharge and recharge, and increase recreational opportunities. Mitigation areas do not currently have wetland functions and values because they have been disturbed or are upland areas. With the establishment of wetland plants, which will increase the amount of vegetation cover and diversity of the mitigation areas, all functions and values are expected to be similar to existing wetlands or increase in function and value.

### **Target Hydrological Regime**

Most wetlands will be supported by ground water from the alluvial aquifer associated with the South Fork of the Rio Grande or by shallow surface water. Ground water data have been collected and final grading will be conducted so that depth to ground water is appropriate for the planting group (see P3). Wetlands along the river also will benefit from seasonal overbank flow. Wetlands along Highway 160 will be supported by ground water as well as by supplemental runoff from the road. As water travels from the upper slopes toward the river during spring run off, the water table is expected to be highest in the wetland mitigation areas. In wetland mitigation areas that do not meet the success criteria, investigations will be conducted to determine if an adequate hydrologic regime is present. One technique will be to install new ground water monitoring wells near unsuccessful mitigation areas. Ground water will continue to be monitored by using existing wells unless it is determined to be unnecessary.

### **Proposed Mitigation Sites**

About 4.0 acres of new wetlands will be created within the Saddle Brook property (Figure 3). Most of the proposed wetlands would occur along the river adjacent to existing wetlands or around the ponds. The presence of existing wetlands suggests that appropriate conditions can be created for wetland establishment.

Saddle Brook is private property, owned by WCA. WCA will be fully responsible for implementing the mitigation plans and ensuring the success and long-term management of the wetland mitigation. Water for the mitigation areas will be dependent on ground water levels and will not require long-term management. Flow into the ponds can be adjusted so that a near constant level is maintained.

Most areas that will be converted into wetlands have been disturbed in the past by the previous landowner. Some areas are sparsely vegetated with pasture grasses or are dominated by upland/riparian grasses. By converting upland areas to wetlands, WCA will be recreating conditions that occurred prior to the unauthorized fill, thereby re-establishing former values and functions. As the site becomes developed, the wetlands will become an important buffer between the development and the river, helping to maintain water quality. While trails around the site will allow visitors and property owners to enjoy the natural setting of the river and its wetlands, disturbance and direct use of the wetlands will be discouraged with interpretative signs.

The property was zoned commercial when WCA purchased it in 2002. At present it has been approved by the Mineral County Board of Commissioners for adoption of a preliminary plat, which in effect down zones the property to a mixed-use residential condo/hotel use. The bulk of the property will be multi-family condos and a small portion (3 acres) will be for a 90-unit hotel. All property on the south side of the river is protected under a conservation easement (about 38 acres). Fire, sewer and water districts have been formed pending resolution of the final plat, which is scheduled to be approved in 2007.

## **Implementation Plan**

The wetland mitigation areas are expected to develop successfully. WCA's consultants, ERO Resources and Sugnet Environmental, have proven successes in wetland mitigation projects. Although WCA's consultants will be directly involved with construction observation and planting completion, WCA will be fully responsible for the implementation of the wetland mitigation plan. Construction of the site has been divided into 12 Phases as described below and described in Table 2.

### **Expected Order of Mitigation Activity:**

- Phase I - Site work of areas along Highway 160 and at the project entry, approximately 0.59 acres of mitigation.
- Phase II - 0.47 acres mitigation of two areas located at west end of property for NW 39 (Figure 3).
- Phase III - Site work of areas around the three existing lakes, approximately 1.82 acres of mitigation.
- Phases IV thru XI (Lots) - Mitigation under these phases shall be done as each respective building is constructed.
- Phase XII - Approximately 1.61 acres of existing wetlands on the south side of the river will be zoned and platted as open space and protected under a conservation easement.

### **Site Preparation**

Proposed wetland areas will be graded depending on the depth to ground water and the proposed planting group (see P1, P2, and P3). A minimum of 12 inches of topsoil will be salvaged and stored in an upland location. Wetland areas will be over-excavated, and stockpiled topsoil will be replaced in the wetland so that the topsoil is the final grade. Details for tree and shrub plantings are shown on P3. A representative from WCA's consulting team will monitor grading and provide final approval before any planting or seeding is conducted.

### **Planting Plan**

Planting plans are presented in P1, P2, and P3 and a seed mix is provided in P4. All graded areas will be seeded with the approved wetland seed mix. Smaller areas within the mitigation sites will be planted 3-foot on center with a variety of wetland plugs. The wetland plugs are expected to spread throughout the wetland areas. Some willow stakes

collected on site will be planted around the edges of the wetlands, especially near the river. Where possible, 1 foot x 1 foot reedgrass sod collected on site will be transplanted into the wetland. The amount of sod to be transplanted will depend on the timing of construction and the amount of sod available in impact areas. Seeding will be conducted any time during the year except when the soil is frozen. Plugs, transplants and willows will be planted in the spring (late April to May). Willows stakes will be planted before the plants have begun to leaf out. All plants will be watered at the time of planting. Irrigation for shrubs and trees will continue at least through the first growing season to ensure successful establishment.

### **As-built Conditions**

Because of the phased timing of construction, WCA will submit annual monitoring reports with as-built plans of newly constructed areas that were completed in that year. Topographic maps showing as-built contours of the mitigation areas as well as quantities of planted species will be provided to the EPA.

### **Maintenance During Monitoring Period**

The mitigation sites may require some maintenance through the monitoring period. Maintenance during the monitoring period will include weed control, reseeding, mulching, and if necessary, fine grading in the mitigation areas. Shrubs and trees that die will be replaced during the first three growing seasons. Tree and shrub replacement will be the responsibility of the contractor and will be included as part of the warranty. The establishment of noxious weeds will be identified and will be controlled as appropriate. If necessary, a weed management plan will be developed after initial monitoring has identified any noxious weed infestations. Mechanical and chemical control may be necessary depending on the species. Maintenance of the weirs that control the water levels of the ponds will be the responsibility of WCA or its on-site contractors.

### **Monitoring Plan**

Vegetation cover from seeding is not expected to be high the first growing season after initial construction, although a minimum of 90 percent of planted material is

expected to be healthy and living at the end of the growing season. At the end of the second growing season, vegetation cover should not be less than 30 percent. At least 75 percent of the willow stakes that are planted should be living. Trees and shrubs that die will be replaced during the first three growing seasons, but any volunteer willows, cottonwoods, and other shrubs will be used to offset an equal amount of mortality. By the end of the third growing season, vegetation cover should not be less than 65 percent and at least 75 percent of the planted shrubs and trees will be living. By the end of the fourth growing season, the success criteria of at least 80 percent vegetation cover is expected to be met and at least 70 percent of the planted shrubs and trees will be living. Noxious weed cover will be less than 10 percent of the wetland areas throughout the monitoring period. Because of the phased construction, monitoring for different mitigation areas also will be phased.

Wetland mitigation areas will be monitored annually for a minimum of three years to determine success of wetland development. If, after three years, the success criteria have not been met, monitoring will continue and possible remedial action will be taken. Transects will be established within a minimum of 10 wetland areas to quantitatively determine aerial vegetation cover. The length of the transect will depend on the size of the wetland mitigation area. Data from transects will allow a comparison of growing seasons and help determine if the amount of overall vegetation cover as well as wetland indicator species has met the success criteria. Vegetation cover data will be collected at the end of each growing season using a point intercept method at 1-meter intervals along transects. At each sampling point on the transect, ecologists will note the plant species or other features present (bare ground, litter, rock, open water, etc.). Each sample point will represent a percentage of the cover of the transect (depending on the length), for a total of 100 percent cover. For example, each sample point along a 50-meter transect would represent 2 percent cover. A qualitative assessment of the general restoration of the site will be provided for each wetland as well. Successes, problems and concerns will be discussed in an annual report. Permanent photo points will be established for each transect to document annual changes. Annual monitoring reports will be submitted to

both the EPA and the Corps by December 31 of each year until monitoring is determined to be complete. The first annual report shall be submitted in December after the first growing season following Phase II planting.

### **Completion of Mitigation**

When WCA and its consultants believe monitoring is complete and that final success criteria have been met, WCA will provide the final monitoring report to both the EPA and the Corps with a request for confirmation that monitoring is complete. If necessary, wetlands will be delineated and mapped using a global positioning system (GPS) unit to determine areas. If requested by the Corps and the EPA, WCA and its consultants will review the wetlands at the site to confirm the completion of the mitigation effort and to confirm any jurisdictional wetland delineation.

### **Contingency Measures**

Failures to meet the performance criteria or the final success criteria will be discussed in the annual monitoring reports. A discussion of probable causes of failure will be provided and remedial actions will be presented. The contingency plan would not involve finding new mitigation areas. If there is a failure in the proposed mitigation areas, measures will be taken to establish better hydrologic conditions for the wetlands. This may involve lowering the grade or providing side channels through the wetland areas. WCA (as listed above) will be fully responsible for funding the planning, implementation, and monitoring of any contingency procedures that may be required to achieve mitigation goals.

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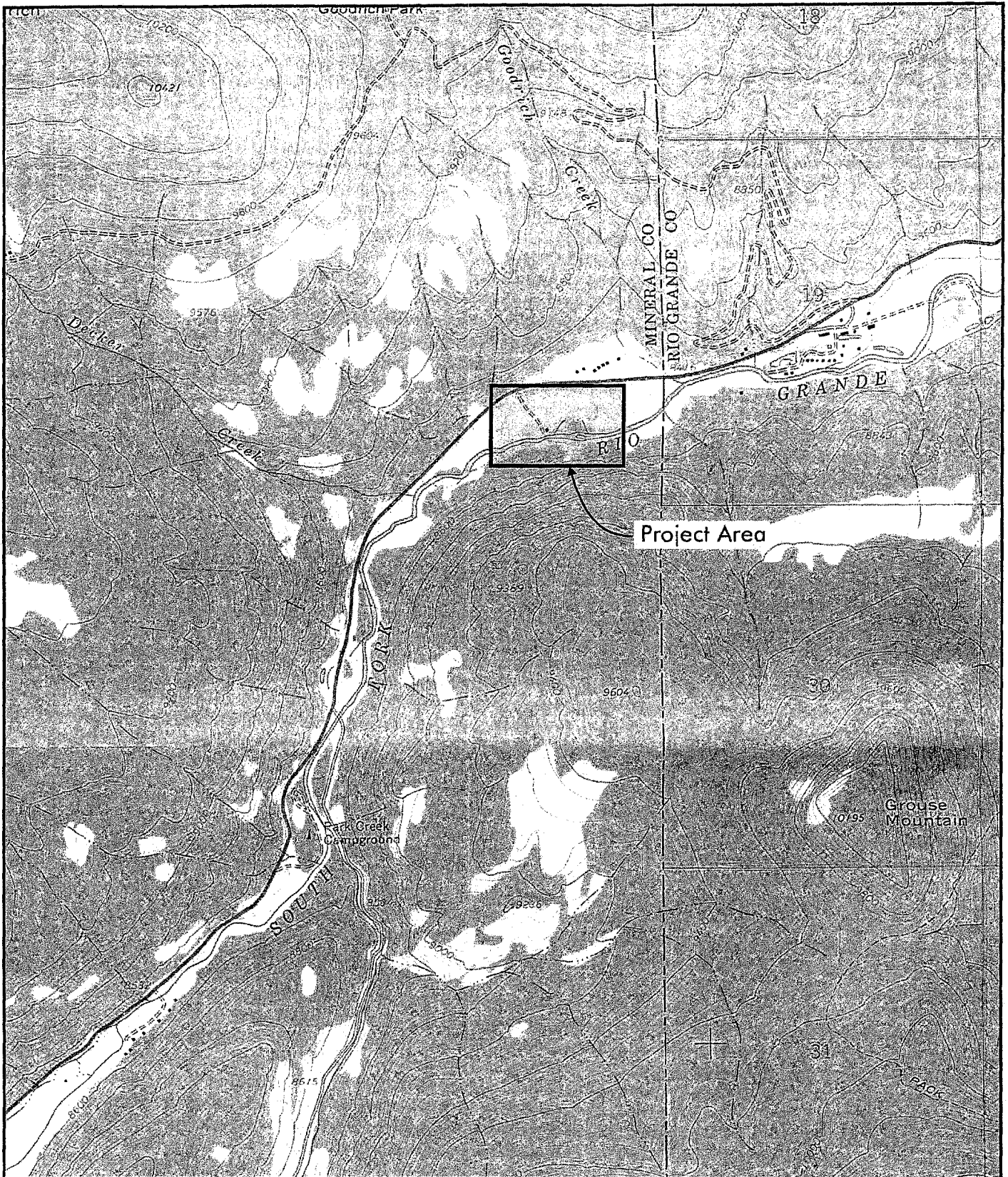
**Table 3. Functions and values of representative wetlands in the project area.**

Wetland Label	HGM Class	Cowardin Types		Wetland Functions and Values									
		System	Classes	General Wildlife Habitat	General Fish/Aquatic Habitat	Flood Attenuation/Storage	Sediment/Nutrient/Toxicant Removal	Sediment/Shoreline Stabilization	Production Export/Food Chain Support	Ground Water Discharge/Recharge	Uniqueness	Rec./Edu. Potential	Dynamic Surface Water Storage
				Rating									
RG1(a-d), RG2-RG5,W3, RGS1-RGS6	Riverine	Palustrine	Emergent/ Scrub- Shrub	High	High	High	Moderate	High	High	High	Low	Low	N/A
W-1, W5, W6	Depressional	Palustrine	Emergent	Low	N/A	N/A	Low	NA	Low	Unknown	Low	Low	Low
NW-1	Depressional	Palustrine	Scrub- Shrub	Moderate	N/A	N/A	Moderate	N/A	Moderate	Unknown	Low	Low	Low

Wetland labels refer to wetland polygons and areas shown on Figure 2.

N/A = Not applicable. The Montana Method does not consider riverine wetlands to provide dynamic surface water storage functions or depressional wetlands to provide flood attenuation/storage or sediment/shoreline stabilization functions.

Available information on ground water discharge/recharge function is inadequate to determine a rating.



**ERO**

ERO Resources Corp.  
 1842 Clarkson Street  
 Denver, CO 80218  
 (303) 830-1188  
 Fax: 830-1199

**Saddle Brook**  
 SE 1/2 of Section 24, T39N, R2E  
 UTM Coordinates: Zone 13; 4163550mN, 438660mE  
 USGS Beaver Creek Reservoir CO Quadrangle,  
 Mineral County, Colorado

**Figure 1**  
 Site Location

Prepared for: Davis Engineering  
 File: 1983- Fig1 .cdt  
 June 2003

1 Inch = 2,000 Feet



**FOR COPIES OF THE OVERSIZED MAPS PLEASE  
CONTACT THE REGIONAL HEARING CLERK.**