

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

MICHAEL COLOSI,

Plaintiff,

v.

CHARLOTTE COUNTY, FLORIDA;
UNITED STATES FISH AND
WILDLIFE SERVICE; MARTHA
WILLIAMS, in her official capacity as
Director of the United States Fish and
Wildlife Service; MIKE OETKER, in his
official capacity as Regional Director of
the United States Fish and Wildlife
Services Southeast Region; UNITED
STATES DEPARTMENT OF THE
INTERIOR; and DEB HAALAND, in
her official capacity as Secretary of the
Interior,

Defendants.

Civil Action No. 2:24-cv-1004

**VERIFIED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Before it will allow Michael Colosi to build a modest home on his own property, Charlotte County demands that he first pay an enormous and arbitrary fee because a federally protected bird, the Florida scrub-jay, might nest on his land. But the U.S. Constitution requires that when a government orders property owners to pay fees like this, it must first demonstrate not only that the fee will offset the impacts of the proposed use of land, but that the fee

is “roughly proportional” to those demonstrated impacts. Here, however, Charlotte County did not engage in that mandatory process, and established its fees based on the overall size of the property, not simply the portion where Mr. Colosi would build his home. Instead of even a rough tailoring of the money demanded to actual impacts, the County’s fee schedule is arranged into arbitrary tiers that increase somewhat exponentially—but not at all proportionally—with the overall size of the property. To make matters worse, those fees apply regardless of whether Florida scrub-jay habitat even exists on the property. This is unconstitutional. The County’s fee lacks both a nexus and a rough proportionality to the potential impacts of Mr. Colosi’s planned development of a moderately-sized, single-family home.

2. The federal regulation underlying the County’s development fees is also unconstitutional. Regulation of the Florida scrub-jay—a purely intrastate species with no commercial or economic value—does not substantially affect interstate commerce and thus exceeds Congress’ limited authority under the Commerce and Necessary and Proper Clauses. Therefore, it is unconstitutional under the Constitution’s enumerated powers in U.S. Const. art. I, § 8.

PARTIES

3. Plaintiff Michael Colosi (“Mr. Colosi”) is an individual and a citizen of the United States. Mr. Colosi is domiciled and resides in Ave Maria, Florida.

He is the fee simple owner of 5.07 acres of vacant real property located at 18151 Bending Willow Court, Punta Gorda, in Charlotte County, Florida (“Property”).

4. Defendant Charlotte County (“County”) is a political subdivision of Florida and is a “person” under 42 U.S.C. § 1983. The County has the power to implement and enforce state and local laws and regulations for managing the habitat of the Florida scrub-jay, a species designated “threatened” under the Endangered Species Act. Endangered and Threatened Wildlife and Plants; Threatened Status for the Florida Scrub Jay, 52 Fed. Reg. 20,715 (June 3, 1987).

5. Defendant United States Fish and Wildlife Service (“USFWS”) is an agency of the United States, within the Department of the Interior, and has been delegated responsibility for the day-to-day administration of the Endangered Species Act, including adoption and enforcement of the regulations under ESA Section 4(d), 16 U.S.C. § 1533(d). As such, the Fish and Wildlife Service is responsible for enforcing the regulation prohibiting the take of the Florida scrub-jay.

6. Defendant Martha Williams is the Director of USFWS (“Director”) and is sued in her official capacity. The USFWS Director is responsible for administering the ESA and enforcing the regulation prohibiting the take of the Florida scrub-jay.

7. Defendant Mike Oetker is the Regional Director of the USFWS (“Regional Director”) Southeast Region and is sued in his official capacity. The Southeast Region includes Florida. The Regional Director is responsible, in part, for administering the ESA within the Southeast Region and enforcing the regulation prohibiting the take of the Florida scrub-jay.

8. Defendant United States Department of the Interior (“Department”) is an agency of the United States. Congress has charged the Department with administering the ESA for all terrestrial species. As the Department oversees the administration of the ESA, it is responsible for adopting and enforcing the regulation prohibiting the take of the Florida scrub-jay.

9. Defendant Deb Haaland is the Secretary of the Interior (“Secretary”) and is named herein and sued in her official capacity. The Secretary is the official charged with enacting regulations pursuant to ESA Section 4(d), 16 U.S.C. § 1533(d). As the Secretary is responsible for enacting these regulations, she is responsible for adopting and enforcing the regulation prohibiting the take of the Florida scrub-jay.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 1343 (jurisdiction to redress deprivations of civil rights); § 1346(a)(2) (civil action against the

United States); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief), and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

FACTUAL ALLEGATIONS

The Endangered Species Act

11. The Endangered Species Act of 1973, 16 U.S.C. § 1531, *et. seq.*, grants USFWS authority to list as endangered “any species which is in danger of extinction throughout all or a significant portion of its range,” and to list as threatened “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. §§ 1532(6), (20); 1533.

12. The ESA lists various prohibited acts for endangered species, including the “take” of any endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B), 50 C.F.R. § 17.21(c); 50 C.F.R. § 17.31(a). “‘Take’ means to harass, harm, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any of these activities.” 16 U.S.C. § 1532(19).

13. “‘Harm’ in the definition of ‘take’ in the [ESA] . . . may include significant habitat modification or degradation” 50 C.F.R. § 17.3.

14. The ESA provides that “[t]he Secretary may permit . . . any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B); *see* 50 C.F.R. § 402.02.

15. To obtain an Incidental Take Permit (“ITP”), an applicant must submit a Habitat Conservation Plan (“HCP”) to USFWS that details, in part, the impacts of the taking and how they will be minimized and mitigated. 16 U.S.C. § 1539(a)(2)(A).

Florida scrub-jay and the County’s HCP

16. The Florida scrub-jay is a long-tailed, blue songbird endemic to Florida. It inhabits dry, sandy, scrubby oak and pine flatwoods throughout peninsular Florida. In 1987, USFWS listed the Florida scrub-jay (*Aphelocoma coerulescens*) as threatened. 52 Fed. Reg. 20,715.

17. The Florida scrub-jay exists only Florida.

18. The Florida scrub-jay has no commercial or economic value.

19. In 2014, USFWS issued the County a 30-year ITP based on the County-developed HCP, which addresses the potential impacts of development on the Florida scrub-jay habitat and prescribes various measures for protection and mitigation.

20. The County’s Florida scrub-jay HCP is implemented by County Ordinance No. 2015-003, §1, 2-10-15.


21. Property owners subject to the conditions of the HCP must apply and pay the pertinent HCP Development Fee (“Scrub-jay Fee”) as detailed in the County’s HCP Development Fee Schedule (“Fee Schedule”).

22. The County uses the Scrub-jay Fees to fund implementation of the HCP, including land acquisition and reserve development; habitat assessment, planning and restoration; habitat management and maintenance; monitoring and adaptive management; changed circumstances; and plan administration.

23. The current Fee Schedule, which became effective in January of 2023, is a tiered system based on the total acreage of the parcel as it was originally platted.

HCP Development Fees	
Tiered fee based on original platted lot size.	
Total acreage of consolidated parcels DOES NOT apply.	
0.00 – 0.22 acres	= \$1,700
0.23 – 0.49 acres	= \$3,400
0.50 – 1.00 acres	= \$8,499
1.01 – 3.00 acres	= \$19,780
3.01 – 5.00 acres**	= \$52,696
5.01 – 20.00 acres**	= \$118,527
20.01 – 99.99 acres**	= \$492,959
100 acres + **	= \$1,916,205

*Standard rounding applicable when acreage falls in between tiers.
 **On-site conservation may be required in addition to the fee.



24. The County provides no mechanism by which a landowner could seek an individualized determination of how much Florida scrub-jay habitat, if any, exists on a property or would be impacted by any planned development.

25. The County Ordinance and the County’s website indicate that Charlotte County landowners may seek an individual ITP directly from USFWS.

26. But in a September 19, 2019, letter from Roxanna Hinzman, Field Supervisor for the South Florida Ecological Services Office for United States Fish and Wildlife Service (USFWS), to Tina Powell, the Parks and Natural Resources Manager for Charlotte County, USFWS stated that it would no longer consider individual requests for a Florida Jay Incidental Take Permit (ITP) or for a “release” from the Charlotte County Habitat Conservation Plan (HCP). Exhibit A.

27. This was confirmed in a January 18, 2024, email to Mr. Colosi from Elizabeth Landrum, Fish and Wildlife Biologist for the USFWS Florida Ecological Services Field Office, explaining that “[l]egally, [USFWS] can’t issue an [individual ITP] that would undermine the County’s ability to fulfill the terms of their existing [HCP]” and that “[USFWS] can’t issue a release letter for your property regardless of the results of any environmental survey.” Exhibit B.

28. This was also confirmed in a January 19, 2024, email to Mr. Colosi from Jamie Scudera, the Projects Manager for Charlotte County Community services, in which she stated that “[USFWS] has taken the stance they will not review parcels in our county since they issued us a county wide take permit. *Your only other option would be not to buy anything in a scrub jay area because there is no other alternative besides our plan at this time.*” Exhibit C (emphasis added).

29. The above correspondences together show that the only avenue available for Mr. Colosi to develop his property is to first apply to the County for inclusion in the County's ITP and HCP.

Mr. Colosi's Property

30. In March of 2024, Mr. Colosi purchased a vacant 5.07-acre parcel at 18151 Bending Willow Court, Punta Gorda, Florida, in Charlotte County ("Property"). The Property is in the Prairie Creek Park subdivision.

31. The Property is also located within the Florida scrub-jay permit boundary and is subject to the conditions of the ITP and HCP.

32. Mr. Colosi plans to build a single-family home with a detached garage on the Property. He does not plan to clear and develop more than 2 acres of his property (and likely considerably less). He wants to maintain the natural and private environment that the trees and foliage provide.

33. Mr. Colosi believes that substantial portions of the Property are not suitable Florida scrub-jay habitat, because there are several tall pines (which serve as predatory perches) and abundant dense saw palmetto on the Property.

34. Mr. Colosi also believes that, even if he were to develop a full 2-acre portion of the Property, the impacted area of Florida scrub-jay habitat, if any, would be significantly smaller.

35. To receive permission from the County to build a home, Mr. Colosi must apply to join the County's ITP and HCP for the Florida scrub-jay and obtain tree clearing and building permits.

36. The cost for inclusion of Mr. Colosi's 5.07-acre Property into the County's ITP and HCP is the \$118,527 Scrub-jay Fee. This fee applies regardless of how much of the Property would be affected by the development of his home.

37. If the Property were just 0.07 acres smaller, the applicable Scrub-jay Fee would be \$52,696.

38. The Scrub-jay Fee is mandatory and neither the County's ordinance nor the County's HCP provide any mechanism by which Mr. Colosi may appeal to eliminate or reduce the Scrub-jay Fee.

39. In addition to paying the Fee, Mr. Colosi must adhere to other requirements of the HCP, including not clearing during Florida scrub-jay nesting season (March 1 through June 30) and planting native scrub oaks on the property.

40. On August 26, 2024, Mr. Colosi submitted via email to Jamie Scudera, Projects Manager for Charlotte County Community Services, a completed Florida scrub-jay HCP Application as the first step towards realizing his plans. Exhibit D.

41. On the Application, Mr. Colosi crossed out a declaration that erroneously suggests that the County's HCP is merely voluntary and that a landowner may seek an individual ITP from USFWS. *Id.* As explained above in paragraphs 25–29, that is plainly contradicted by statements from the USFWS and the County.

42. In response, Ms. Scudera stated that the HCP Application would only be considered with a building permit, but that if Mr. Colosi did not “meet all of [the] requirements” of the HCP, his building permit would be rejected. Exhibit E.

43. And, despite her statement to Mr. Colosi eight months earlier that “there is no other alternative besides [the County's HCP] at this time,” Ms. Scudera erroneously suggested that Mr. Colosi retains the right to pursue an individual ITP with USFWS. *Id.*

44. In addition to disputing the HCP Application's statement that the County's HCP is voluntary, Mr. Colosi protests the mandatory application of the Fee to the Property because it is an unconstitutional condition on his right to use and develop his property.

FIRST CLAIM FOR RELIEF
Unconstitutional Condition
(U.S. Const. Amends. V & XIV and 42 U.S.C. § 1983)

45. Paragraphs 1–44 are realleged and incorporated herein by reference.

46. This claim is against the County and pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

47. The U.S. Constitution places the burden on the County to make an individualized determination that a permit exaction bears an essential nexus and rough proportionality to the public impacts caused by the proposed project. If no such finding is or can be made, the exaction violates the unconstitutional conditions doctrine.

48. Here, the County must demonstrate that there is an essential nexus and a rough proportionality between Mr. Colosi's planned construction of a single-family home on a portion of his property and the demand for the \$118,527 Scrub-jay Fee, which allegedly serves to mitigate the impacts to the bird's habitat caused by the construction of Mr. Colosi's home.

49. There is no essential nexus between the \$118,527 Scrub-jay Fee and Mr. Colosi's planned development because the County has not made, and will never make, an individualized determination that any existing Florida scrub-jay habitat would be impacted by Mr. Colosi's planned development.

50. There is not even rough proportionality between the \$118,527 Scrub-jay Fee and Mr. Colosi's planned development, because the Scrub-jay Fee is tied to the overall size of the Property, including the portion he is not planning to develop, without a showing that Florida scrub-jays actually inhabit any portion of Mr. Colosi's property.

51. Because the Scrub-jay Fee bears no essential nexus or rough proportionality to Mr. Colosi's planned development, the Scrub-jay Fee as applied to his property is unconstitutional.

52. Mr. Colosi would readily comply with virtually all the requirements of the County's HCP, including performing no clearing activities during Florida scrub-jay nesting season, and planting new scrub oaks where appropriate.

53. Mr. Colosi refuses to comply with one mandatory term of the HCP—He will not pay the County an unconstitutional Scrub-jay Fee.

54. Because Mr. Colosi will not agree to the HCP's requirement that he pay an unconstitutional Scrub-jay Fee, the County will not approve his Scrub-jay HCP Application or any clearing or building permits for the Property.

55. The County's refusal to approve Mr. Colosi's Scrub-jay HCP Application or any clearing or building permits based on its improper demand for an unconstitutional condition is a violation of the Fifth Amendment Takings Clause as incorporated by the Fourteenth Amendment of the United States Constitution.

SECOND CLAIM FOR RELIEF
Unconstitutional Final Agency Action
(5 U.S.C. § 706)

56. Paragraphs 1–44 are realleged and incorporated herein by reference.

57. This claim is against USFWS, Director, Regional Director, Department, and Secretary (collectively, “Federal Defendants”).

58. Under the Administrative Procedure Act, an agency action, finding, or conclusion is invalid if (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to any constitutional right, power, privilege, or immunity; (c) inconsistent with any statute; (d) adopted without compliance with required procedures; (e) unsupported by substantial evidence; or (f) unwarranted by the facts (if reviewed de novo). 5 U.S.C. § 706.

59. An agency action that would extend an act of Congress beyond Congress’ enumerated powers is contrary to a constitutional right, power, privilege, or immunity and not in accordance with law.

60. The United States Constitution grants Congress the power to regulate commerce among the several states.

61. The United States Constitution also grants Congress the power to enact laws that are Necessary and Proper for carrying into execution those enumerated powers.

62. Pursuant to the Commerce and Necessary and Proper Clauses, Congress may regulate economic activities that substantially affect interstate commerce. Congress may also regulate noneconomic activities if such regulation is necessary to vindicate an otherwise valid comprehensive economic regulatory scheme.

63. Pursuant to the ESA, USFWS has classified the Florida scrub-jay as a threatened species. Also under the ESA's aegis, the Service has generally prohibited the take of the Florida scrub-jay wherever found, including nonfederal property.

64. The Florida scrub-jay is found only within the state of Florida.

65. The Florida scrub-jay has no commercial or economic value. USFWS has not made any findings that take of the Florida scrub-jay substantially affects interstate commerce.

66. The take of the Florida scrub-jay does not substantially affect interstate commerce.

67. Takes of the Florida scrub-jay, aggregated to include the entire species, do not substantially affect interstate commerce.

68. The take of the Florida scrub-jay is categorically noneconomic activity.

69. The ESA is not a comprehensive economic regulatory scheme. The inability to regulate the Florida scrub-jay would not frustrate USFWS's ability

to regulate the take of commercially valuable species or species within the channels of commerce. Thus, the regulation of take of the Florida scrub-jay is unnecessary to vindicate any comprehensive economic regulatory scheme.

70. No enumerated power supports the regulation of the take of the Florida scrub-jay on nonfederal land.

71. Regulation of the take of the Florida scrub-jay on nonfederal land is neither necessary nor proper to exercise any power of the federal government.

72. Therefore, regulation of the take of the Florida scrub-jay on nonfederal land is contrary to a constitutional right, power, privilege, or immunity, 5 U.S.C. § 706(2)(B), as well as arbitrary, capricious, and contrary to law, 5 U.S.C. § 706(2)(A). USFWS has no authority to require landowners to obtain a permit or satisfy any other conditions, before engaging in activity that takes, or may result in the incidental take, of the Florida scrub-jay.

THIRD CLAIM FOR RELIEF
Executive Action in Excess of
Congress' Enumerated Powers
(U.S. Const. Art. I, § 8)

73. Paragraphs 1–44 are realleged and incorporated herein by reference.

74. This claim is against the Federal Defendants.

75. The United States Constitution grants Congress specific, limited, and enumerated power to regulate commerce among the several states.

76. The United States Constitution also grants Congress the power to enact laws that are Necessary and Proper for carrying into execution those enumerated powers.

77. Pursuant to current Commerce Clause doctrine, Congress may regulate economic activities that substantially affect interstate commerce. Congress may also regulate noneconomic activities if such regulation is necessary to vindicate an otherwise valid comprehensive economic regulatory scheme.

78. Pursuant to the ESA, USFWS has classified the Florida scrub-jay as a threatened species. Also under the ESA's aegis, the Service has generally prohibited the take of the Florida scrub-jay wherever found, including nonfederal property.

79. The Florida scrub-jay is found only within the state of Florida.

80. The Florida scrub-jay has no commercial or economic value. USFWS has not made any findings that take of the Florida scrub-jay substantially affects interstate commerce.

81. The take of the Florida scrub-jay does not substantially affect interstate commerce.

82. Takes of the Florida scrub-jay, aggregated to include the entire species, do not substantially affect interstate commerce.

83. The take of the Florida scrub-jay is categorically noneconomic activity.

84. The ESA is not a comprehensive economic regulatory scheme. The inability to regulate the Florida scrub-jay would not frustrate USFWS's ability to regulate the take of commercially valuable species or species within the channels of commerce. Thus, the regulation of take of the Florida scrub-jay unnecessary to vindicate any comprehensive economic regulatory scheme.

85. No enumerated power supports the regulation of the take of the Florida scrub-jay on nonfederal land.

86. Regulation of the take of the Florida scrub-jay on nonfederal land is neither necessary nor proper to exercise any power of the federal government.

87. Therefore, the prohibition of the take of the Florida scrub-jay exceeds Congress' power under U.S. Const. art. I, § 8, and is unconstitutional.

PRAYER FOR RELIEF

For the violations above, Mr. Colosi respectfully requests the following relief:

1. A declaration as to the County that the County's \$118,527 Florida scrub-jay development fee as applied to Mr. Colosi's property is an unconstitutional condition on the use of his property in violation of the

Fifth Amendment as incorporated by the Fourteenth Amendment to the United States Constitution.

2. An injunction against the County preventing enforcement of the County's Fee Schedule as applied to Mr. Colosi's property.
3. Award Plaintiff his costs, attorney's fees, and other expenses in accordance with law, including 42 U.S.C. § 1983;
4. A declaration as to the Federal Defendants that the USFWS regulation prohibiting take of the Florida scrub-jay on nonfederal land is invalid under the Administrative Procedure Act, 5 U.S.C. § 706, because it is inconsistent with constitutional right, power, privilege, or immunity and not in accordance with law;
5. Vacatur of 52 Fed. Reg. 20,715 pursuant to 5 U.S.C. § 706.
6. A declaration as to the Federal Defendants that the USFWS regulation prohibiting take of the Florida scrub-jay is an invalid exercise of power under the United States Constitution, and that USFWS is without authority to prohibit the take of the Florida scrub-jay on nonfederal land;
7. A permanent injunction against the Federal Defendants preventing USFWS from enforcing the regulation prohibiting take of the Florida scrub-jay on nonfederal land; and
8. Any other relief the Court deems just and proper.

DATED: October 29, 2024.

Respectfully submitted,

/s/ Johanna B. Talcott

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Counsel for Plaintiff

**Motion for Special Admission forthcoming*

VERIFICATION

I, MICHAEL COLOSI, declare under penalty of perjury pursuant to the laws of Florida that the foregoing is true and correct,

DATED: October 29, 2024.

By: /s/ Michael Colosi
Michael Colosi

EXHIBIT A



United States Department of the Interior



FISH AND WILDLIFE SERVICE
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960

September 12, 2019

Tina Powell
Parks and Natural Resources Manager
Charlotte County Community Services
514 E. Grace Street
Punta Gorda, Florida 33950

Dear Ms. Powell,

In December 2014, The U.S. Fish and Wildlife Service (Service) issued Charlotte County (County) an Incidental Take Permit (ITP) based on the County's Habitat Conservation Plan (HCP) to address impacts to the state and federally protected Florida scrub-jay and eastern indigo snake. As noted on the County's web site, the HCP was developed as an effort to reduce and streamline the Endangered Species Act (ESA) regulatory burden and to provide regulatory certainty to land owners in Charlotte County. The HCP defines a Reserve Design to help ensure the long term survival of the Florida scrub-jay and establishes a development fee system in order to implement the HCP for the 30 year duration of the ITP. The HCP Plan Area, the designation of the properties included in that Area, and the covered activities were applied throughout the County wherever the covered activities may impact habitat that was occupied by the scrub-jay at the time the HCP was signed. The original Plan Area and property designations do not change (i.e., remain static) for the duration of the ITP/HCP unless the County requests an amendment. Further, for the ITP to be issued, the Service required funding assurances from the County to ensure that the obligations outlined in the HCP would be fulfilled. The current fee schedule is a tier system based on the total acreage of the parcel proposed to be developed and includes all parcels in the Plan Area.

The County and the Service have been working well together since the ITP was issued, and we appreciate the County's commitment to this collaborative effort. However, the County and the Service have identified two challenges for which the Service, after consulting with the section 10 coordinators in both the Southeast Region and in Headquarters, would like to offer clarity about our process.

First, in February 2016, the County submitted a request to modify the HCP to revise the fee schedule to a density-based system that would be based upon the entire allotted density of the parcel per current zoning regulations. This amendment would alter the reserve design by encouraging development in the Prairie Creek Park subdivision, which would result in many small conservation easements on partially developed parcels instead of the owners willingly selling entire parcels to the County. Also, in May 2017, the County found an opportunity to acquire a 1,342 acres of converted agricultural land, of which 1,092 acres could be restored to scrubby habitat east of the portion of the Prairie Creek Park subdivision portion of the Reserve

Design. The County requested the Service's approval of an alternative Reserve Design configuration that incorporates the converted agricultural land to allow for adjustments in acquisition that are likely to result from the County's ability to acquire land only from willing sellers.

The Service has reviewed these modification requests and supports these proposed amendments contingent upon the County completing a population viability analysis that demonstrates that the new Reserve Design would provide adequate scrub-jay conservation to meet the mitigation requirements outlined in the ITP/HCP and section 10(a)(2)(B) of the ESA.

Second, the County has referred landowners who do not want to participate in the HCP to the Service to pursue an individual ITP. Applicants have come to the Service with negative scrub-jay survey results and asked to be "released" from the HCP and further compliance with the ESA. Based on negative scrub-jay surveys, the Service released 1 parcel using this process in 2016. Consequently, the County asked the Service to refrain from releasing applicants from the HCP because it violates the no surprises assurances (section 7.5 of the HCP), and undermines the County's ability to fully fund the mitigation required by the ITP and implement the HCP.

The Service will not release additional parcels, and we have further concluded that we do not have the ability to offer an individual ITP unless the County releases an applicant from compliance with the HCP. The reasoning for this determination is as follows.

The amount of take authorized in the ITP was calculated on the proposed take of potentially occupied habitat throughout the future development area over the 30 year permit term, and it includes 17,984 undeveloped lots that would be subject to development fees to fund HCP implementation. Undeveloped parcels that fell wholly or partially within the Plan Area were included in the total acreage of take calculation. In other words, the take for scrub-jays in the HCP Plan Area was calculated on a "full build out" scenario for all lots for the entire acreage even if the lot partially falls out of the regulated area or is only partially developed. Whether a survey documents scrub-jay presence or absence on an individual parcel has no effect on the landowner's responsibility to pay required mitigation monies as outlined in Section 5 of the HCP. Although, surveys that document presence help inform landowners which minimization measure may be required at the time of development.

The Charlotte County Board of County Commissioners initiated the HCP in accordance with the Natural Resources Element of the Smart Charlotte 2050 Comprehensive Plan. The HCP was developed as a result of countywide efforts to resolve conflict between development and conservation of federally and state listed species. Charlotte County's goals were to establish control for ESA compliance and streamline regulatory processes for property owners. Through the HCP and ITP, Charlotte County assumed sole responsibility for administering the permitting program and reviewing permit applications. Therefore, the authority to "release" an applicant from the HCP lies only with the County, not with the Service.

By incorporating a scrub-jay review while reviewing applications for building and/or site plan permits, Charlotte County ensures compliance with the ESA and County-wide HCP concurrent with reviewing other aspects of the application. Mitigation funds for take of scrub-jays are

required under this process, and these funds remain in Charlotte County. Because take has been estimated and issued for all covered species (including scrub-jays) in the entire Plan Area, the Service does not have the ability to issue additional incidental take, and therefore cannot contemplate additional HCPs requiring mitigation that would undermine the County's ability to fulfill the requirements of the ITP.

For these reasons, we ask that the County no longer refer landowners, who fall under the HCP Plan Area, to the Service. Applicants requesting "release" from the Charlotte County-wide HCP, or who are seeking an individual ITP from the Service, will be referred back to the County for ESA compliance. This includes landowners currently seeking, from the Service, "release" from the HCP. These landowners will also receive a copy of this letter.

We look forward to working with the County to complete the amended fee structure and alternative Reserve Design analysis as soon as possible, so the HCP remains a streamlined and viable solution for ESA compliance for Charlotte County landowners.

If you have questions or need additional information, please contact Connie Cassler, Supervisory Regulatory Biologist (constance_cassler@fws.gov, 772-469-4243).

Sincerely,



Roxanna Hinzman
Field Supervisor
South Florida Ecological Services Office

cc: (electronic only)

Service, Atlanta, Georgia (David Dell)

Service, Falls Church, Virginia (Trish Adams)

Service, Vero Beach, Florida (Elizabeth Landrum)

Applicant, Punta Gorda, Florida (Michael Barnes)

Applicant, Englewood, Florida (Glen Burnap)

Applicant, Punta Gorda, Florida (Yeniel Garcia)

Applicant, Cape Coral, Florida (Frank Indrisek)

Applicant, Englewood, Florida (Henry Neumann)

Applicant, Punta Gorda, Florida (Casey Ortlieb)

Applicant, Punta Gorda, Florida (John R. Wood, Jr.)

Applicant, TAG Lakeside, LLC, Punta Gorda, Florida (Alois Rommer)

Ecology Group Inc., Punta Gorda, Florida (Dorothea Zysko)

EXHIBIT B



Michael Colosi [REDACTED]

Re: [EXTERNAL] Re: Scrub-jay incidental take permit

1 message

Landrum, Elizabeth [REDACTED]

Thu, Jan 18, 2024 at 11:28 AM

To: Michael Colosi [REDACTED]

Cc: "Carey, Robert L" [REDACTED]

Mr. Colosi,

Legally, we can't issue an incidental take permit (ITP) that would undermine the County's ability to fulfill the terms of their existing habitat conservation plan (HCP) or ITP. Because the County included no mechanism in its HCP to compensate for the release of properties from the HCP Plan Area without mitigation, we can't issue a release letter for your property regardless of the results of any environmental survey. This also means that the terms of an individual HCP and ITP would have to be crafted so that it would not cause the County to fall short of its HCP goals, so we would likely recommend the mitigation fees from the individual HCP be paid to Charlotte County instead of a conservation bank and the establishment of an on-site conservation easement (CE) similar to what the County would require.

I don't believe the County would be willing to issue a permit for just 1 acre out of the 5+ acres on your parcel unless it is officially subdivided, which may or may not be allowed depending on zoning. If the County isn't willing, then it makes no sense to put an unobtainable provision like that in the individual HCP. While I haven't had this exact question come up, I'm not in favor of this idea either. While I am sure you fully intend to mitigate for part of the property up front, then for the remaining acreage at a later date, none of us knows or can control what will happen in the future. We had a property with a CE on it get sold without our knowledge, and since the seller never informed the buyer of the CE, the scrubby habitat was cleared. (The new owner apparently either didn't know, or didn't care that they needed a County permit to remove vegetation, and proceeded to clear the CE habitat without permission.)

Establishing a CE for listed species as part of an individual HCP involves finding a Grantee to accept the CE, and establishing a non-wasting fund so the habitat management can be paid for by the interest the fund earns. The land owner would be responsible for the appropriate management and either the land owner (as CE Grantor) or the CE Grantee would have to submit annual monitoring reports to us for the life of the easement (usually CEs are in perpetuity). However, if you participate in the County's HCP, you would have to contact County staff to see if the scrub-jay mitigation fee has CE management funding built into the fee or if it is separate. Also, you would have to check to see if the land owner or the County would be responsible for the CE habitat management.

Under an individual HCP, it is customary to allow the CE Grantee (and sometimes Service personnel) access to the CE site by prior appointment with the land owner. We usually request this be included in the HCP, and we also add it as a condition of the ITP.

Although it is expensive, participating in Charlotte County's HCP and paying their scrub-jay fee is your lowest cost mitigation option, and the quickest, too. I do have to correct myself on one thing I mentioned in my previous email. Looking through my last set of meeting notes with County staff reminded me they will no longer accept pre-payment of scrub-jay fees because it is too difficult for them to track which parcels have had the mitigation paid for without yet having a clearing/building permit applied for/issued. Please also be aware that the County's scrub-jay fees are scheduled to increase again in 2025.

Liz.

Elizabeth Landrum
Fish and Wildlife Biologist

US Fish and Wildlife Service
Florida Ecological Services Field Office
[777 37th Street, Suite D-101](#)
Vero Beach, FL 32960
Main Office: 352-448-9151
Email: [REDACTED]

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From: Michael Colosi [REDACTED]
Sent: Wednesday, January 17, 2024 8:29 PM
To: Landrum, Elizabeth [REDACTED]
Cc: Carey, Robert L [REDACTED]
Subject: [EXTERNAL] Re: Scrub-jay incidental take permit

This email has been received from outside of DOI - Use caution before clicking on links, opening attachments, or responding.

Hi Elizabeth, thanks for the very detailed and quick response!

I have a few questions that arise from this:

If it is determined by an environmental assessment that there are no scrub jays present, or that the land currently has limited or no capability to support breeding or living of this animal, how does this affect any need to obtain a permit or cost to mitigate?

Secondly, and if such an impact is determined to exist, if I buy a credit to impact one acre now, may I impact this entire acre on the plan as though it is entirely unregulated (as it pertains to the scrub jay)? Also, If later I want to further develop the remaining 4 acres, using the credit option, I could do so at whatever the cost is available at that time?

When conceding to a conservation easement, is the property owner forever financially responsible for supporting said conservation easement? Does granting this easement forever constitute permission for the US FWS or its' agents unlimited access to that property, even if the only physical access to that property is through the private residential portion of the property that was not on the easement?

Regards,

Michael P. Colosi, CISSP
Private Investigator
Cyber Security Consultant
Spectre Intelligence
C: [REDACTED]

www.spectreintel.com

On Tue, Jan 16, 2024 at 2:20 PM Landrum, Elizabeth [REDACTED] wrote:

Mr. Colosi,

As part of the application for an individual ITP from the U.S. Fish and Wildlife Service (Service), the applicant (property owner or their designated agent) writes a habitat conservation plan (HCP) that describes the lot, where it is, what the owner wants to do on it, the federally listed species that will be impacted, what the owner proposes to do to avoid, minimize, and mitigate to the maximum extent practicable for those impacts, and how long they want the ITP to last. The HCP is the applicant's document to the Service, so we can't write this document for them; however, we can provide redacted examples of previous HCPs if the applicant would like to see them. The terms of the HCP are negotiated between the owner/applicant and the Service.

Effective onsite avoidance measures are usually possible on a 5-acre lot, but it involves establishing a conservation easement in perpetuity, plus a habitat management plan and how the management will be funded. Alternatively, the conservation easement can be structured in a way that Charlotte County staff or some other entity could manage the on-site habitat, although the County or entity may still charge a fee to fund the management of the easement.

Minimization measures usually consist of some or all of the following:

- not clearing woody vegetation during the scrub-jay nesting season, which extends from March 1 through June 30,
- planting scrub-oaks as part of the post-construction landscaping (three or four clusters of three or four scrub-oaks each), and
- agreeing to not let pets (especially cats) roam free.

Mitigation can also vary depending on the location of the lot and the resources of the applicant. Most mitigation for scrub-jays is at a 2:1 ratio unless development of the lot adversely affects the ability of appropriate management of nearby conservation lands, then the ratio may be higher. If the owner has, or can obtain twice the amount of acreage they are developing and that acreage is in an area suitable for scrub conservation, they can sign it over to an agency/entity willing to accept and manage the land for scrub conservation. A fee to facilitate management of the land may or may not be required by the receiving agency/entity. This mitigation option is usually not feasible for most applicants.

A second mitigation alternative is depositing money in a Service-approved fund for scrub-jay conservation. The mitigation amount is calculated by multiplying the acreage of impact by two by the per acre cost of mitigation for the scrub-jay metapopulation where the impact will occur. In the case of North Port, which is located in the Central Charlotte Metapopulation of scrub-jays, the mitigation for a typical 5-acre lot would be: $5 \text{ acres} \times 2 \times \$19,893 = \$198,930$ [rounded up to the nearest whole dollar amount].

A third mitigation alternative is to purchase scrub-jay credits in a Service-approved conservation bank. While the Prairie Creek Park area is not in the service area of a Service-approved conservation bank, we have approved the purchase of scrub-jay credits from the Tippen Bay Conservation Bank for some small lots in North Port, which is farther away from this bank than is Prairie Creek Park. As far as I know, one acre = 1 credit, and 1 credit costs \$18,000 in this bank. So, using the same 5-acre lot example: $5 \text{ acres} \times 2 \times \$18,000 = \$180,000$. The cost of a credit in a conservation bank can sometimes change, so it is always advisable to contact the bank to see what they currently charge. Whichever mitigation option is chosen for scrub-jays, it can be accomplished anytime during the process, but we highly recommend the mitigation be complete before the ITP is issued.

After the HCP satisfies both the applicant and the Service, the applicant goes to the ePermits website, completes/uploads Form 3-200-56, a non-refundable \$100 processing fee (payable electronically via eGov), and uploads the HCP. Meanwhile, whichever of our biologists is assigned to your project reviews your project for preliminary compliance under the National Environmental Policy Act (NEPA), and writes a memo to our Regional Office (RO) in Atlanta notifying them that we will be processing the paperwork regarding the ITP here in Florida rather than having the RO do it. Then our biologist will prepare the documents, letters, and memos required to submit a notice to the Federal Register about the Service proposing to issue an ITP for this project. After the notice has been published in the Federal Register, there is a comment period of 30 days so anyone who is interested can ask for relevant documentation and/or submit information/comments. After the comment period closes, our biologist writes a biological opinion analyzing the effects of our issuing the ITP, and a Set of Findings document that addresses any comments received during the comment period as well as providing a final NEPA determination. This process can take from 6 months to 1 year depending on how quickly the terms of the HCP are negotiated and the workload of whichever biologist is assigned. I think our fastest issuance was 3 or 4 months, but that was because the HCP negotiations went quickly and smoothly, and the biologist had a lull in reviewing other projects, so was able to really concentrate on the ITP process documents.

The reason that Charlotte County applied to the Service for its own incidental take permit was to offer their affected land owners a quicker process (just pay the scrub-jay mitigation fee when applying for a development permit instead of going through the permitting process with the us) and lower mitigation fees in most cases.

If you have any questions, please contact me (email preferred).

Elizabeth Landrum
Fish and Wildlife Biologist

US Fish and Wildlife Service
Florida Ecological Services Field Office
[777 37th Street, Suite D-101](#)
Vero Beach, FL 32960
Main Office Tel.: 352-448-9151
Direct Tel.: [REDACTED]
Email: [REDACTED]

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EXHIBIT C



Michael Colosi <[REDACTED]>

RE: Scrub Jay Mitigation

1 message

Scudera, Jamie <[REDACTED]>
To: Michael Colosi <[REDACTED]>

Fri, Jan 19, 2024 at 10:50 AM

The CE area would be assessed a discounted rate since it is undevelopable. Couldn't say what that rate currently is but you can always call the property appraisers office for details.



Jamie Scudera | Projects Manager

Charlotte County Community Services

941.613.3226

CharlotteCountyFL.gov

To Exceed Expectations in the Delivery of Public Services



From: Michael Colosi <[REDACTED]>
Sent: Friday, January 19, 2024 10:48 AM
To: Scudera, Jamie <[REDACTED]>
Subject: Re: Scrub Jay Mitigation

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Does the county still assess property tax on the easement? Or will consider a reduction in taxes as half of it would be preserve?

On Fri, Jan 19, 2024, 10:46 AM Scudera, Jamie <[REDACTED]> wrote:

These are your two options and you are correct, FWS has taken the stance they will not review parcels in our county since they issued us a county wide take permit. Your only other option would be not to buy anything in a scrub jay area because there is no other alternative besides our plan at this time. Just to be clear, you won't manage the conservation easement area, we the county would so there would be no cost to you for that portion of the property besides not being able to develop it. We offer a reduction in your mitigation fee when half of your property is placed into a conservation easement dedicated to the county for management so technically you would be paying for only your half of the lot which for year 2024 would be \$19,780.



Jamie Scudera | Projects Manager

Charlotte County Community Services

941.613.3226

CharlotteCountyFL.gov

To Exceed Expectations in the Delivery of Public Services



From: Michael Colosi <[REDACTED]>
Sent: Thursday, January 18, 2024 3:39 PM
To: Scudera, Jamie <[REDACTED]>
Subject: Scrub Jay Mitigation

Caution – This email originated from outside of our organization. Please do not open any attachments or click on any links from unknown sources or unexpected email.

Hi Jamie, hope you are doing well!

We are looking at properties for sale in Prairie Creek to build a single family home and I am trying to assess permitting costs before making an offer. There are a few parcels we are looking at, all are approximately 5 acres. I've been in contact with Elizabeth at US FWS on this subject and have a few questions for the county:

US FWS stated they cannot give me an ITP if it conflicts with their existing agreement with the county. They also stated they could not release my property from your HCP if it was determined that the species is not present there.

However, I have assessed your HCP and I do not want to concede half the property as conservation easement. There are several reasons for this, but one of them is that I do not want to be responsible for the management of the easement.

US FWS also stated that both the County and FWS do not want me developing only a portion of it, so only 1 acre out of 5, and that you would force me to pick between the HCP and paying approximately \$180,000 (the approx market value of the entire plot of land) for a permit to build a single family home.

I am writing to you in hopes there is an alternative option to these.

Regards,

Michael P. Colosi, CISSP
Private Investigator
Cyber Security Consultant
Spectre Intelligence
C: [REDACTED]
www.spectreintel.com

EXHIBIT D



Permit # _____

Scrub-Jay Habitat Conservation Plan (HCP) Application

Owner of record: Michael Colosi

Phone Number: [REDACTED] E-mail Address [REDACTED]

Site Address: 18151 Bending Willow Court, Punta Gorda, Florida 33982

Parcel ID# 402424426001 Lot: 4 Block: 4 Subdivision: Prairie Creek Park

Size of platted parcel in square feet: 220,849.2 square feet

Size of platted parcel in acres: 5.07 acres

1. Is your parcel over or under 3 acres in size? **OVER 3 acres** or **UNDER 3 acres** (Please circle)
 - a. If under 3 acres in size, payment of mitigation fees as described in the Charlotte County Habitat Conservation Plan is required. Standard conditions, including but not limited to, prohibiting clearing during Scrub-Jay nesting season (March 1 – June 30) and recommended planting of scrub oaks on site will be applied.
 - b. If over 3 acres in size, please contact the Natural Resources division at 941-833-3817 for additional review and determination of the required mitigation. At a minimum, mitigation fees and on-site preservation will be required.

2. Does your parcel currently have a county approved structure located on site? **Y** or **N** (Please circle)
 - a. If no, please read statements on page 2 and sign.
 - b. If yes, is the parcel over 3 acres in size? Yes _____ No _____
 - i. If over 3 acres in size, please provide the total square footage of vegetation proposed to be removed: _____ square feet

Please read and sign the following statements:

- ~~Thereby acknowledge that I am voluntarily opting to utilize Charlotte County's Incidental Take Permit (ITP), and I will comply with the requirements of the Charlotte County Habitat Conservation Plan (HCP). I understand that no local, state or federal regulation requires me to utilize the Charlotte County ITP, and I may instead choose to obtain an individual ITP or other approval directly from the U.S. Fish and Wildlife Service.~~
- I hereby authorize Charlotte County employees and agents to enter the property described above to inspect site conditions related to Scrub-Jay, Gopher Tortoise or Eastern Indigo Snake use, management and/or mitigation. I agree and understand that all vegetation clearing activities are prohibited during Scrub Jay nesting season (March 1 to June 30).
- I acknowledge that this document does not authorize any specific development activities and in no way guarantees any other permit approval. This only addresses the required Charlotte County Scrub-Jay mitigation criteria as outlined in the Charlotte County Habitat Conservation Plan.
- I have read and acknowledge the Eastern Indigo Snake Construction Precautions and Guidelines as outlined in Appendix 4 of the Countywide HCP and understand that any development impacts to the Gopher tortoise will be avoided and minimized through the implementation of the State of Florida's Gopher tortoise permitting guidelines and regulations.

Signature Michael P Colosi Date 8/26/2024

Printed Name Michael Colosi

Title _____ (applicable where owner is a business entity)

Affidavit of Applicant

I, the undersigned, being first duly sworn, depose and say that I am the owner, attorney, attorney-in-fact, agent, lessee or representative of the owners of the property described and which is the subject matter of the proposed application; that all answers to the questions in this application, and all sketches, data and other supplementary matters attached to and made a part of the application are honest and true to the best of my knowledge and belief. I understand that this application must be complete and accurate before the application may be considered.

State of Florida, County of Collier The foregoing instrument was acknowledged before me this 26 day of August, 2024,
(Month) (Year)

by Michael Colosi who is personally known to me or; has produced FL DL as identification and who did / did not take an oath.

[Signature]
Signature of Notary

Michael P Colosi
Signature of Applicant (or Agent)

Jordana Oros
Printed Name of Notary



HH 109665
Commission Number

EXHIBIT E

Monday, October 28, 2024 at 12:10:13 Eastern Daylight Time

Subject: Re: Scrub Jay Application
Date: Monday, August 26, 2024 at 5:01:19 PM Eastern Daylight Time
From: Scudera, Jamie
To: Michael Colosi

Per our prior discussions and per our website you reserve the right to request an individual FWS review and determination in lieu of participating in the countywide HCP

Sent from my Verizon, Samsung Galaxy smartphone
Get [Outlook for Android](#)

From: Michael Colosi [REDACTED]
Sent: Monday, August 26, 2024 2:17:44 PM
To: Scudera, Jamie [REDACTED]
Subject: Re: Scrub Jay Application

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One last question:

Just checking nothing has changed! Are you suggesting that I could now apply directly to USFWS even though I've been told by you and others that the County HCP is the only option?

On Mon, Aug 26, 2024, 1:46PM Scudera, Jamie [REDACTED] wrote:

Through your building permit application.

Jamie Scudera | Projects Manager

Charlotte County Community Services

941.613.3226

CharlotteCountyFL.gov

To Exceed Expectations in the Delivery of Public Services





From: Michael Colosi [REDACTED]
Sent: Monday, August 26, 2024 1:45 PM
To: Scudera, Jamie [REDACTED]
Subject: Re: Scrub Jay Application

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How do I submit it? Is it not through email?

On Mon, Aug 26, 2024, 1:42PM Scudera, Jamie [REDACTED] wrote:

There are 4 reviewers, they will all coordinate with me when they receive your application for review.

Jamie Scudera | Projects Manager
Charlotte County Community Services
941.613.3226
CharlotteCountyFL.gov

| To Exceed Expectations in the Delivery of Public Services

From: Michael Colosi [REDACTED]
Sent: Monday, August 26, 2024 1:35 PM
To: Scudera, Jamie [REDACTED]
Subject: Re: Scrub Jay Application

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Hey Jamie, thanks for the info.

Can you let me know the person responsible for HCP/Scrub Jay permitting? I will be applying for the HCP, I just do not agree it is voluntary. As you stated before, the US FWS will not perform individual reviews so the County's HCP is the only option and it is not voluntary. As such, I am submitting this permit as it is.

Regards,

Michael P. Colosi, CISSP
Intelligence & Investigations
C: [REDACTED] | www.spectreintel.com
Naples, FL | Brewster County, TX

On Mon, Aug 26, 2024 at 12:39PM Scudera, Jamie

[REDACTED] wrote:

Good afternoon Michael, I don't work in permitting so I can't really suggest anything as far as choosing to build as owner/builder. The application you signed is for our HCP, if you are choosing the federal review process then don't submit the HCP application with your building permit. When your permit goes to environmental for review they will reject the permit until you either choose to participate in the HCP and meet all of those requirements or you receive a written release/incidental take permit from the Fish and Wildlife Service.

Jamie Scudera | Projects Manager

Charlotte County Community Services

941.613.3226

CharlotteCountyFL.gov

To Exceed Expectations in the Delivery of Public Services

From: Michael Colosi [REDACTED]
Sent: Monday, August 26, 2024 11:54 AM
To: Scudera, Jamie [REDACTED]
Subject: Scrub Jay Application

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Hi Ms. Jamie, I hope you are doing well!

We spoke a bit in the past on the Scrub Jay issues and I do appreciate your help and

insight there.

I am in the initial stages of planning for my build in Prairie Creek Park. I've talked to a few builders in the area and am examining my options. I may just project manage the build myself to save on costs. Curious on your thoughts here, if it's particularly risky or difficult to manage for permitting?

In any event, the first step seems to be the Scrub Jay permitting. I've attached a notarized permit application below. The only section that I don't agree with is that I am voluntarily entering the County's HCP. We are not given an option here so I have crossed that section out.

Please let me know if you have any questions and let me know a rough timeline for this application.

Regards,

Michael P. Colosi, CISSP

Intelligence & Investigations

C: [REDACTED] | www.spectreintel.com

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