



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

3817 Luker Road  
Cortland, NY 13045

August 11, 2015

Ms. Virginia Robbins  
Bond, Schoeneck & King, PLLC  
One Lincoln Center  
Syracuse, NY 13202-1355

**RECEIVED**

AUG 14 2015

Dear Ms. Robbins:

**BOND, SCHOENECK & KING, PLLC**

This responds to your letter of July 24, 2015 regarding the proposed Lago Resort and Casino to be constructed on 84 acres located on the east side of New York State Route 414 and north of Interstate 90, Town of Tyre, Seneca County, New York. We understand that the Tyre Town Board is reviewing an application submitted by Whitetail 414, LLC, (applicant) of Rochester, New York, requesting that the Town create a Planned Unit Development (PUD) district for the construction of the proposed project.

The applicant proposes to construct a six-story, 208-room hotel including meeting rooms, a ballroom, a pool area, a 210,640 square foot casino, and support services that include restaurants, a theater, a four-story parking garage with parking for 790 vehicles and surface parking for 2,400 vehicles.

The U.S. Fish and Wildlife Service (Service) acknowledges your request for comments on the proposed project. The Service is providing preliminary comments pursuant to our authorities under the Endangered Species Act (ESA) of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*), the Fish and Wildlife Coordination Act (FWCA)(48 Stat. 401, as amended; 16 U.S.C. 661 *et seq.*), the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d), and the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712; Ch. 128; July 13, 1918; 40 Stat. 755).

### Endangered Species

Mr. Adam Cummings, of Barton and Loguidice, the consultant for the Town of Tyre, contacted our office on July 30, 2015, regarding the Service's on-line project review process. We understand that they identified three federally-listed species that may occur at or within the vicinity of the project area; the threatened bog turtle (*Clemmys [=Glyptemys] muhlenbergii*), the threatened northern long-eared bat (*Myotis septentrionalis*), and the endangered Indiana bat (*Myotis sodalis*). We also understand that bat surveys are being completed this year on the project site to assess the potential presence of northern long-eared bats and/or Indiana bats. We

look forward to receiving the results of those surveys. Once we receive those results we may recommend measures to avoid or minimize impacts from tree removal, lighting, noise, or water quality impacts.

To assess whether the site provides suitable habitat for bog turtles, a Phase 1 bog turtle habitat survey should be completed and sent to the Service for our review.

The most recent compilation of federally-listed and proposed endangered and threatened species within New York is available for your information. Until the proposed project is complete, we recommend that you check our website\* every 90 days from the date of this letter to ensure that listed species presence/absence information for the proposed project is current.

We received a copy of the U.S. Army Corps of Engineers (USACE) Buffalo District preliminary jurisdictional determination for the project site. If the applicant anticipates discharges of dredged or fill material into waters of the U.S., including wetlands, we recommend that they contact the USACE, Buffalo District, Regulatory Branch to see if a permit is required under the Clean Water Act of 1977 (Section 404). Please note that if federal permits are required, the USACE is responsible for making the final determination of effects to federally-listed species, pursuant to Section 7(a)(2) of the ESA.

The Indiana bat, the northern long-eared bat, and the bog turtle are also listed by the state of New York. Any additional information regarding the proposed project and its potential to impact these species should be coordinated with both this office and with the New York State Department of Environmental Conservation.

#### *Fish and Wildlife Coordination Act*

We understand that 6 wetlands were delineated on the site (approximately 8.6 acres of palustrine forested wetlands and 0.49 acres of palustrine emergent wetland) as well as a portion (1,170 linear feet) of White Brook, a permanent and intermittent stream channel. Wetlands are important to society from an ecological and economic standpoint. They provide important habitat (shelter, feeding, and breeding areas) for many species of fish and wildlife and educational and recreational opportunities for the public.

We also understand that the site consists of agricultural land, forests, and shrubs. These cover types, along with the wetlands and stream, may provide habitat for many fish and wildlife species. According to the New York State Breeding Bird Atlas (McGowan and Corwin 2008, Block 3475A), the site provided habitat for species such as wood duck (*Aix sponsa*), mallard (*Anas platyrhynchos*), wild turkey (*Meleagris gallopavo*), great blue heron (*Ardea herodias*), green heron (*Butorides virescens*), American kestrel (*Falco sparverius*), Eastern wood-pewee (*Contopus virens*), alder flycatcher (*Empidonax alnorum*), willow flycatcher (*Empidonax traillii*), Eastern phoebe (*Sayornis phoebe*), great crested flycatcher (*Myiarchus crinitus*), Eastern kingbird (*Tyrannus tyrannus*), cerulean warbler (*Setophaga cerulean*), red-winged blackbird (*Agelaius phoeniceus*), and many other bird species.

Common mammals that may be found on the project site may include Eastern coyote (*Canis latrans*), red fox (*Vulpes vulpes*), gray fox (*Urocyon cinereoargenteus*), beaver (*Castor canadensis*), raccoon (*Procyon lotor*), striped skunk (*Mephitis mephitis*), and white-tailed deer (*Odocoileus virginianus*).

The project site is located in the vicinity of the Montezuma National Wildlife Refuge (Refuge), which is located approximately 3.5 miles east of the project site. The Refuge was established for migratory birds and other wildlife (<http://www.fws.gov/refuge/Montezuma/about.html>). The site is also near the Northern Montezuma Wildlife Management Area and the Montezuma Wetlands Complex Bird Conservation Area (a larger complex of state, federal, and private lands). The habitats include high quality wetlands bordered by deciduous forest, shrub/scrub, and open agricultural fields. The site hosts one of the largest migratory concentrations of waterfowl in the Northeast and provides important stopover sites for migratory birds (NYSDEC 2015). Given this large concentration of migratory birds in the local area, if there is suitable habitat on the site, it may also provide migratory or breeding habitat for birds.

The Service is providing recommendations to the Town as they evaluate the PUD request from the applicant. The Service will provide additional comments during the federal permit process, if required under the FWCA, and we look forward to working with the Town and applicant.

The Service recommends that the Town protect aquatic and terrestrial habitat for fish and wildlife, avoid impacting wetlands, and create, restore, and enhance wetlands where feasible, and consider alternative sites to minimize adverse impacts to fish and wildlife resources. Please consider the following general recommendations as appropriate to reduce impacts to fish and wildlife resources:

1. We encourage preservation of sensitive environmental areas including wetlands, streams, vegetative buffers greater than 50 feet, if possible, and floodplains adjacent to stream channels in perpetuity. Appropriate native vegetation (trees and shrubs) should be preserved or planted to create buffers.
2. We encourage the use of natural stream design methods over installing heavy rock rip rap in stream channels and drainages to provide habitat for fish and wildlife.
3. Incorporate and maintain "green space" on the project site to provide areas for wildlife, migration corridors, wildlife crossings, and green roofs to provide habitat for migratory birds and reduce energy use. We encourage green pavements and pervious parking areas as opposed to asphalt, recycling roof water, and incorporating other features such as rain gardens, bio-swales, and check dams, using less rock and more natural materials to reduce sedimentation on- and off-site.
4. Stormwater basins (Stormwater Pollution Prevention Plans) should be designed to accommodate more intense precipitation events as predicted with climate change. These basins should be located outside any wetlands and buffer areas. Sediment collection or retention/detention basins should incorporate forebays that can be periodically maintained. The basins provide limited habitat for wildlife.

5. Use appropriately sized culverts to provide sufficient space for high water flows, reduce erosion and sedimentation, and provide migration corridors for fish and wildlife. Wildlife crossings should be incorporated into the design to protect wildlife and reduce human interactions, especially on roads.
6. Reduce energy use and conserve resources by installing solar power panels, efficient lighting, planting rooftop gardens, bio swales, and rain gardens, and recycle water wherever possible.

The Service is providing the above preliminary recommendations. Additional specific recommendations will be provided during the federal review process, if required.

*Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act*

As you are aware, bald eagles are protected under the BGEPA and the MBTA, and by the state of New York, as a threatened species. Bald eagles and their nests are located in the vicinity of the PUD, and the closest known nests are located approximately 4 miles from the site. If bald eagles are found within the project area, the applicant/Town should follow the Bald Eagle Management Guidelines found at <http://www.fws.gov/northeast/ecologicalservices/eaglenationalguide.html> and contact the Service and the NYSDEC to see if a permit is required.

The MBTA implements four treaties that provide for international protection of migratory birds. The MBTA prohibits taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. Unlike the ESA, neither the MBTA nor its implementing regulations at 50 CFR Part 21, provide for permitting of “incidental take” of migratory birds. However, we recognize that some birds may be killed or injured, even if all reasonable measures to avoid it are implemented.

To protect migratory birds, the Service recommends maintaining suitable habitat that provides breeding habitat for migratory birds. If clearing of the site for construction is completed in the spring, it could result in direct mortality to adults, chicks, or eggs, and the disturb nests. Therefore, we recommend conducting vegetation clearing associated with construction, operations, or maintenance activities, prior to April 1 or after July 15 to avoid impacts to most breeding migratory birds.

Thank you for the opportunity to provide our preliminary comments on the proposed PUD. If you have any questions on this letter or require additional information, please contact Sandra Doran at 607-753-9334. Future correspondence with us on this project should reference project file 14TA0700.

Sincerely,



David A. Stilwell  
Field Supervisor

\*Additional information referred to above may be found on our website at:  
<http://www.fws.gov/northeast/nyfo/es/section7.htm>

#### References

McGowan, K. J., and K. Corwin (Editors) (2008). *The Second Atlas of Breeding Birds in New York State*. Cornell University Press, Ithaca, NY, USA. Available at <http://www.dec.ny.gov/animals/7312.html> - *accessed August 5, 2015*

New York State Department of Environmental Conservation. 2015. <http://www.dec.ny.gov/outdoor/31112.html> - *accessed August 5, 2015*

cc: NYSDEC, Albany, NY (Wildlife Diversity)  
NYSDEC, Avon, NY (Env. Permits, Wildlife)  
USACE, Buffalo, NY (Regulatory)  
USFWS, Montezuma National Wildlife Refuge, Seneca Falls, NY



**Parks, Recreation  
and Historic Preservation**

**ANDREW M. CUOMO**  
Governor

**ROSE HARVEY**  
Commissioner

August 7, 2015

Mr. Adam Cummings  
Senior Project Engineer  
Barton & Loguidice  
11 Centre Park  
Rochester, NY 14614  
*(via email)*

Re: DOT  
Lago Casino and Resort Development  
NY 414, Tyre, Seneca County  
14PR01895

Dear Mr. Cummings:

Thank you for requesting the comments of the Office of Parks, Recreation and Historic Preservation (OPRHP). We have reviewed the project in accordance with the New York State Historic Preservation Act of 1980 (Section 14.09 of the New York Parks, Recreation and Historic Preservation Law). These comments are those of the OPRHP and relate only to Historic/Cultural resources. They do not include potential environmental impacts to New York State Parkland that may be involved in or near your project. Such impacts must be considered as part of the environmental review of the project pursuant to the State Environmental Quality Review Act (New York Environmental Conservation Law Article 8) and its implementing regulations (6 NYCRR Part 617).

Based upon our review of the now revised plan for the proposed Lago Resort and Casino, it is the New York State Office of Parks, Recreation and Historic Preservation's opinion that the revised project will continue have **no impact** on archaeological and/or historical resources listed in or eligible for the New York State and National Registers of Historic Places.

If I can be of any further assistance I can be reached at (518) 268-2166.

Sincerely,

John A. Bonafide  
Director,  
Technical Preservation Services Bureau

Cc: Hon. Ronald F. McGreevy *(via email)*  
Virginia C. Robbins, Esq. *(via email)*

## Robbins, Virginia

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**From:** Metivier, Steven V LRB <Steven.V.Metivier@usace.army.mil>  
**Sent:** Friday, August 14, 2015 2:21 PM  
**To:** Robbins, Virginia  
**Subject:** Proposed Lago Resort and Casino (Department of the Army Processing Number 2014-00798 (UNCLASSIFIED))

Classification: UNCLASSIFIED  
Caveats: NONE

Virginia,

Thank you for the opportunity to comment on the current status of the proposed Lago Resort and Casino. As you indicated, the US Army Corps of Engineers (Corps) issued a Preliminary Jurisdictional Determination (PJD) to Whitetail 41, LLC on December 8, 2014 for the property adjacent to Route 414 in the Town of Tyre, Seneca County, NY. It is my understanding that this is the parcel proposed for the subject project.

Under Section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill material into waters of the US, including wetlands. Some examples of regulated discharges include filling, regarding and mechanized land clearing.

The PJD identifies areas on the site that may be waters of the United States. If the project proposes to discharge dredged or fill material into any of the identified waters, a permit may be required from the Corps of Engineers. If the proposed development completely avoids all identified waters, the Corps would have no jurisdiction over the activity and no further notification to this office is necessary.

I hope this is helpful.

v/r,

Steven Metivier  
Chief, NY Application Evaluation Section U.S. Army Corps of Engineers  
1776 Niagara Street  
Buffalo, New York 14207  
716-879-4314 (phone)  
716-879-4310 (fax)  
716-239-7167 (cell)

Classification: UNCLASSIFIED  
Caveats: NONE

## Robbins, Virginia

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**From:** Jasikoff, Tom <tom\_jasikoff@fws.gov>  
**Sent:** Friday, August 07, 2015 12:24 PM  
**To:** Robbins, Virginia  
**Cc:** Bill Stewart; Andrea Van Beusichem  
**Subject:** Proposed Lago Resort and Casino

To: Virginia C Robbins, Esq. at Bond, Schoeneck & Kink, PLLC

Virginia;

Thank you for your letter regarding the proposed Lago Resort and Casino requesting written comments from Montezuma NWR by August 15, 2015.

As Refuge Manager of Montezuma National Wildlife Refuge and on behalf of the Refuge, I choose not to comment. I sincerely thank you for your interest in Montezuma NWR.

Tom Jasikoff, Refuge Manager  
Montezuma NWR  
315-568-5987 x230