

D R A F T

August, 2007

IMPLEMENTING AGREEMENT

for the

TRIBAL HABITAT CONSERVATION PLAN
FOR THE AGUA CALIENTE INDIAN RESERVATION
PALM SPRINGS, CALIFORNIA

[DATE]

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1.0 PARTIES

The parties to this Implementing Agreement are the Agua Caliente Band of Cahuilla Indians (“the Tribe”) a federally recognized Indian tribe, and the United States Fish and Wildlife Service, an agency of the United States Department of the Interior (“Agency”). The Tribe and Agency are referred to collectively herein as the “Parties”.

2.0 RECITALS AND PURPOSES

2.1 Recitals

The Parties have entered into this Agreement in consideration of the following facts:

(a) The Tribe is a federally recognized Indian tribe whose jurisdictional territory includes the approximately 31,500 acres of land within the exterior boundaries of the Agua Caliente Indian Reservation (“the Reservation”) located in Riverside County, California. The Reservation contains several different land ownerships, including tribal trust land, allotted trust land, tribally owned fee land, and land owned in fee by parties other than the Tribe.

(b) The Tribe has been exercising, and continues to exercise, habitat and species conservation and land use management authority within the Reservation through the protection, management, and enhancement of certain open space areas within the Reservation, as well as through its role in permitting development activities. The Tribe has entered land use agreements with three cities (Cathedral City, Palm Springs, and Rancho Mirage) and the County of Riverside (County) whose geographic areas overlap that of the Reservation; through these agreements the Tribe has adopted certain state and local land use and zoning laws and has delegated to the cities/county the authority to implement them as the Tribe’s agents, as specified in those agreements, through development permitting in certain areas of the Reservation, reserving to itself, through its Tribal Council, an appellate review role of permitting decisions made by the cities/county. The Tribe exercises direct development permitting authority in those areas of the Reservation not governed by any land use agreement. The Tribe has elected to prepare a Tribal Habitat Conservation Plan (“Tribal HCP”) in order to ensure implementation of species conservation and land use management within the Reservation in a way that reflects the Tribe’s traditional resource management practices, and to make comprehensive the scope of the development permits issued by the Tribe or under the land use agreements. The Tribe intends the Tribal HCP, including this Implementing Agreement, to serve as the basis for obtaining Incidental Take authority and otherwise complying with the Endangered Species Act (“ESA”) with regard to all Covered Activities and Covered Species on all lands within the Plan Area.

(c) The Plan Area has been determined to provide, or potentially provide, habitat for the Listed Species set forth in Appendix A;

(d) The Plan Area has also been determined to provide, or potentially provide, habitat for the Unlisted Species set forth in Appendix A;

(e) The Tribe has developed a series of measures, described in the Tribal HCP, to minimize and mitigate to the maximum extent practicable the effect of Take of Covered Species incidental to the Covered Activities;

(f) Pursuant to this Agreement, the Tribe is committing to mitigation measures and the protection of habitat for Covered Species, and would not have made such commitments without the assurances provided herein by the Agency;

(g) The United States has a unique legal relationship with Indian tribal governments, including the Tribe, as set forth in the Constitution of the United States, Executive Orders and court decisions. The United States has recognized the right of Indian tribes to self-government and the exercise of inherent sovereign authority over their members and territory. Executive Order 13175 (November 6, 2000), Secretarial Order No. 3206 issued by the Secretaries of the Interior and Commerce, and the Native American Policy of the U.S. Fish & Wildlife Service, among other authorities, reflect the unique legal relationship between the United States and the governments of Indian tribes, and impose certain obligations on the Agency with regard to the implementation of the ESA. In reliance on the unique legal relationship between the Tribe and the U.S. Department of the Interior, Secretarial Order No. 3206 and Executive Order 13175, the Tribe has elected to prepare and approve the Tribal HCP in lieu of continuing to obtain Take Authorization on a project-by-project basis for the Covered Activities either through section 7 or section 10 of the ESA. The Tribe and the Agency hereby set forth their respective commitments and assurances; and

(h) This Agreement is intended to implement the Tribal HCP in compliance with the ESA and in a manner consistent with the provisions of Executive Order 13175, Secretarial Order No. 3206, and the Agency's Native American Policy.

2.2 Purposes

The purposes of this Agreement are:

- (a) To ensure implementation of each of the terms of the Tribal HCP;
- (b) To describe remedies and recourse should either Party fail to perform its obligations as set forth in this Agreement;
- (c) To implement Executive Order 13175, Secretarial Order No. 3206, and the Agency's Native American Policy with respect to the relationship between the Agency and the Tribe and the management of species and habitat within the Plan Area;
- (d) To provide assurances to the Tribe that, pursuant to the "No Surprises" regulations, as long as the terms of the Tribal HCP, the Permit, and this Agreement are properly implemented, no additional mitigation, enhancement or compensation or other measures will be required of the Tribe by the Agency, with respect to Covered Species, except as provided for in this Agreement or required by law; and
- (e) To provide the Agency with a basis to issue a Permit that will provide authority for the Tribe and other persons to Take Covered Species incidental to Covered Activities.

3.0 DEFINITIONS

The following terms as used in this Agreement will have the meanings set forth below. All references to figures and tables are to those figures and tables set forth in the Tribal HCP.

3.1 Terms defined in Endangered Species Act. Terms used in this Agreement and specifically defined in the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, or in regulations promulgated by the Agency under the ESA have the same meaning as stated in the ESA and those implementing regulations, unless this Agreement expressly provides otherwise.

3.2 “Action Area” means the geographic area addressed for the purposes of analysis in the Tribal HCP, including: (1) 30,653 acres of the Reservation outside of Federal ownership; (2) 5,218 acres of off-Reservation lands owned by or held in trust for the Tribe; (3) 5,725 acres of BLM lands within the BLM Exchange Areas on and off the Reservation; and (4) 54,587 acres of off-Reservation lands within the Target Acquisition Areas. To minimize the burdens of multi-jurisdictional permitting requirements as to any Covered Activities undertaken by a third party and taking place partially within and partially outside the Reservation, the Tribe may choose not to assume direct permitting authority and instead to defer, for purposes of permitting, to the governmental agency with jurisdiction over the off-Reservation portions of the Covered Activity. Even if it does not assume direct permitting authority, the Tribe will retain the responsibility to make the required consistency determinations, work with the local land use jurisdictions to ensure the appropriate conditions are placed on any Conditional Use Permits (CUPs), monitor compliance with the Plan, and ensure that all activities on Tribal Lands under direct or indirect control of the Tribe are compliant with the Plan, pay all appropriate fees, and provide the required conservation measures.

3.3 “Agency” means the United States Fish and Wildlife Service.

3.4 “Assurances Rule” means the Agency’s “No Surprises” regulations, set forth at 50 C.F.R. §§ 17.22(b)(5) and 17.32 (b)(5).

3.5 “Changed Circumstances” means changes in circumstances affecting a Covered Species or the geographic area covered by the Tribal HCP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the Tribal HCP (*e.g.*, the listing of a new species, or a fire or other natural catastrophic event in areas prone to such event). Changed Circumstances and the planned responses to those circumstances are described in section 4.14 of the Tribal HCP. Changed Circumstances are not Unforeseen Circumstances.

3.6 “Covered Activities” means activities carried out, approved, or authorized by the Tribe, including, but not limited to, activities carried out by contractors, lessees, sublessees, and agents of the Tribe as well as Third Party Participants, in the Plan Area that may result in Incidental Take of Covered Species within the Plan Area or adjacent thereto. Covered Activities include but are not limited to the following activities, provided that these activities are otherwise lawful:

- (a) The Covered Activities described in section 4.2 of the Tribal HCP and all actions necessary and appropriate to implement the Covered Activities; and

- (b) All conservation and mitigation measures in connection with the Covered Activities.

3.7 “Covered Species” means the species identified in Appendix A, each of which the Tribal HCP addresses in a manner sufficient to meet all of the criteria for issuing an incidental take permit under ESA § 10(a)(1)(B). 16 U.S.C. § 1539(a)(1)(B).

3.8 “Environmental Laws” include federal laws governing or regulating the impact of development activities on land, water, or biological resources as they relate to Covered Species, including but not limited to, the ESA, National Environmental Policy Act, Migratory Bird Treaty Act, the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*, the Fish and Wildlife Act of 1956, 16 U.S.C. § 742a *et seq.*, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and any regulations promulgated pursuant to such laws.

3.9 “Habitat Preserve” means those lands dedicated by or on behalf of the Tribe for the benefit of the Covered Species within the Action Area and conserved and managed in perpetuity. Only upon formal dedication of lands through a conservation mechanism as described in Section 4.5.1 of the THCP, shall these lands be considered part of the Habitat Preserve.

3.10 “Incidental Take” means Take of an individual or individuals of a Covered Species incidental to an otherwise lawful activity, and includes, but is not limited to, Take resulting from the modification of habitat of Covered Species.

3.11 “Listed Species” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is federally protected as an endangered or threatened species under the ESA.

3.12 “MBTA” means the Migratory Bird Treaty Act. 16 U.S.C. § 703 *et seq.*

3.13 “MBTA Special Purpose Permit” means a permit issued by the Agency under 50 CFR § 21.27 authorizing Take under the MBTA of the applicable Covered Species listed as endangered or threatened under ESA in connection with the Covered Activities.

3.14 “NEPA” means the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and regulations promulgated thereunder, as they may be amended from time to time.

3.15 “Permit” means the Section 10(a) Permit. 16 U.S.C. § 1539(a).

3.16 “Plan Area” means the lands upon which the Permit authorizes Incidental Take of Covered Species and the lands to which the Tribal HCP’s conservation and mitigation measures apply. These lands are described in section 1.4 of the Tribal HCP. Generally, the Plan Area includes the Reservation and certain off-Reservation lands, including certain identified lands within the Action Area that will fall within the Plan Area at the time such lands are acquired or regulated by the Tribe.

3.17 “Section 10(a) Permit” means the incidental take permit issued by the Agency to the Tribe pursuant to Section 10(a)(1)(B) of the ESA, 16 U.S.C. § 1539(a)(1)(B), for Take incidental to Covered Activities, as it may be amended from time to time.

3.18 “Take” means the definition of such term in the ESA and its implementing regulations with regard to any activities subject to the ESA, and the definition in the MBTA and its implementing regulations with regard to any activities subject to the MBTA. The Take of Listed Species that are plants is not prohibited under the ESA, and therefore, Take authorization for listed plants is not required. Plant species included on the list of Covered Species will be listed on the Permit in recognition of the conservation measures and benefits provided for those plants under the Tribal HCP. Such plant species receive assurances pursuant to the Assurances Rule. As of the Effective Date, any reference in this Agreement or in the Tribal HCP to the Take of Covered Species shall, for the purpose of Incidental Take authorized under Section 10(a)(1)(B), refer solely to Listed Species other than plants on the Covered Species list.

3.19 “Third Party Participant” means a non-Federal party other than the Tribe that is acting under the jurisdiction and authorization of the Tribe and qualifies for and receives take authorization in exchange for compliance with the terms and conditions of this Agreement, the Tribal HCP, and the Permit.

3.20 “Tribal HCP” means the habitat conservation plan prepared by the Tribe, approved by the Tribal Council, and approved by the Agency under ESA § 10(a)(2)(B). 16 U.S.C. § 1539(a)(2)(B).

3.21 “Unforeseen Circumstances” means any change in circumstances affecting a Covered Species or geographic area covered by the Tribal HCP that could not reasonably have been anticipated by the Parties at the time of the Tribal HCP’s negotiation and development, and that results in a substantial and adverse change in the status of a Covered Species.

3.22 “Unlisted Species” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not federally protected as an endangered or threatened species under the ESA.

4.0 OBLIGATIONS OF THE PARTIES

4.1 Obligations of the Tribe

4.1.1 Compliance with ESA Obligations

The Tribe will fully and faithfully perform all obligations assigned to it under this Agreement, the Permit, and the HCP.

4.1.2 Interim obligations upon a finding of Unforeseen Circumstances

If the Agency makes a finding of Unforeseen Circumstances, during a reasonable period agreed to by the Parties that is necessary to determine the nature and location of additional

or modified mitigation, the Tribe will avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

4.2 Obligations of the Agency

4.2.1 Issuance of Section 10(a) Permit

Upon execution of this Agreement by all Parties, and satisfaction of all other applicable legal requirements, the Agency will issue the Tribe a permit under section 10(a)(1)(B) of the ESA, authorizing Incidental Take resulting from Covered Activities carried out by the Tribe or a Third Party Participant of each listed Covered Species resulting from Covered Activities in the Plan Area.

4.2.2 Permit coverage

The Permit will identify all Covered Species. The Permit will take effect for listed Covered Species at the time the Permit is issued. Subject to compliance with all other terms of this Agreement, the Permit will take effect for an unlisted Covered Species upon the listing of such species. If it is judicially determined that the Agency was not authorized to cause the Permit to become effective automatically as to Covered Species as they become listed pursuant to the ESA, the Tribal HCP and this Agreement shall be deemed adequate to support an application for Section 10(a) Permits, MBTA permits, and/or other Take authorizations, as applicable, as are necessary and lawful to permit Take of such Covered Species for the remaining term of the Permit. The Agency shall use all reasonable efforts to process and issue such Take authorizations concurrently with the listing of the newly listed Covered Species. In issuing such permits and/or Take authorizations, the Agency shall not request, impose, recommend, or require further mitigation, conservation, compensation, enhancement, or other protection for such Covered Species except as expressly provided in this Agreement or required by law.

4.2.3 “No surprises” Assurances

Provided that the Tribe is properly implementing its obligations under the Tribal HCP, this Agreement, and the Permit, the Agency can require the Tribe or Third Party Participants to provide mitigation, enhancement, or compensation beyond that provided for in the Tribal HCP only under Unforeseen Circumstances, and only in accordance with the “no surprises” regulations at 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) (“Assurances Rule”). In the event that the Assurances Rule is rescinded or vacated, the Tribe may, at its discretion, withdraw or seek an amendment to the Tribal HCP. In such an event, the Tribe shall comply with all applicable legal requirements.

(a) Pursuant to the Assurances Rule, for so long as the Tribal HCP is properly implemented, the Agency will not require from the Tribe the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources with regard to Covered Activities and their impact on the Covered Species

beyond the level and/or amounts specified in the Tribal HCP, the Section 10(a) Permit, and this Agreement.

(b) Pursuant to the Assurances Rule, the Agency has the burden of making a finding that Unforeseen Circumstances exist with regard to any Covered Species, using the best scientific and commercial data available. The findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

(c) In the event that the Agency makes a finding of Unforeseen Circumstances and such Unforeseen Circumstances warrant the requirement of additional mitigation, enhancement, or compensation measures, and if there is a choice of options equally effective to address the Unforeseen Circumstance, the selected option shall be the least burdensome measure on the Tribe that is available.

(d) Changed Circumstances, as described in 50 C.F.R. § 17.22(b)(5)(i), are adequately addressed in the Tribal HCP, and the Parties shall implement any measures for such circumstances as called for in the Tribal HCP and described in section 11.0 of this Agreement.

4.2.4 Critical Habitat Designation for Covered Species; Findings and Determinations

The Tribal HCP and this Agreement provide a comprehensive, habitat-based approach to the protection of Covered Species consistent with the overall purposes of the ESA to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). Section 424.12 of the ESA Regulations specifies the criteria to be used by the Agency in designating critical habitat. These criteria include “those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection.” 50 C.F.R. § 424.12(b). The Tribal HCP and this Agreement provide for the protection of “those physical and biological features essential to the conservation” of the Covered Species in a manner consistent with the Agency regulations concerning the designation of critical habitat and provide for special management protection of the Covered Species and areas essential for the conservation of Covered Species. The Tribal HCP, the Permit, and this Agreement create a valuable conservation partnership between the Tribe and the Agency.

4.2.4.1 No Surprises Covenant Regarding Critical Habitat Designations

The Agency agrees that, except as expressly provided in section 4.2.3 of this Agreement regarding the determination of Unforeseen Circumstances, in the event that a critical habitat determination is made for any Covered Species, and unless the Agency finds that the Tribal HCP is not being properly implemented, no mitigation, enhancement, or compensation

shall be required of the Tribe that is in addition to, or is different from the mitigation, enhancement, and compensation measures specified in this Agreement.

4.2.4.2 Covenant Regarding Future Critical Habitat Designations

The Agency acknowledges and agrees that the Tribal HCP provides a comprehensive habitat-based approach to the conservation of Covered Species by focusing on the preservation of resources essential for the long-term conservation of the Covered Species and by providing for appropriate management of those resources. This approach is consistent with the overall purposes of the ESA. *See* 16 U.S.C. § 1531(b). The Agency agrees that, to the maximum extent allowable by law (including but not limited to the ESA and its implementing regulations) after public review and comment, in the event that a Critical Habitat determination is made for any Covered Species, and unless the Agency finds that the Tribe is not in compliance with the Tribal HCP, the Permit, this Agreement, and associated documents, lands within the boundaries of the Tribal HCP will not be designated as critical habitat.

In the event that the Agency nevertheless intends to propose or designate critical habitat for Covered Species on lands within the Plan Area, the Agency will, in accordance with Secretarial Order 3206, provide timely, written notification to the Tribe, as far in advance as practicable, of its intent and, to the extent consistent with federal disclosure laws, provide the Tribe with all data and other documents in its possession relevant to the Agency's intended action. In the event that any data and other documents are withheld pursuant to the Freedom of Information Act or other applicable federal disclosure law, the Agency will provide the Tribe with an index of such data and other documents in accordance with such applicable law. Thereafter, the Agency will meet and confer with the Tribe regarding the Agency's intended action to propose or designate critical habitat. The Agency will not propose or designate critical habitat for Covered Species on lands within the Plan Area without first determining that inclusion of lands within the Plan Area is essential to conserve the Covered Species, and ensuring that the Tribe is not being required to bear a disproportionate burden for conservation of the Covered Species. In determining whether designation of lands within the Plan Area is essential to conserve the Covered Species, the Agency will evaluate and document the extent to which the conservation needs of the Covered Species can be achieved by limiting the designation to other lands. If the Agency proposes or designates critical habitat for Covered Species on lands within the Plan Area, the Agency will provide to the Tribe a written explanation for such action.

If for any reason critical habitat for a Covered Species is designated within the Plan Area, then pursuant to the Assurances Rule, no measures in addition to those provided for under the Assurances Rule, Tribal HCP, this Agreement, and the Permit shall be required of the Tribe or Third Party Participants in any future ESA section 7 consultation evaluating the impacts of a Covered Activity on the designated critical habitat.

4.2.5 Migratory Bird Treaty Act

The Permit shall constitute a Special Purpose Permit under 50 C.F.R. § 21.27, authorizing Take, pursuant to the MBTA, of Covered Species listed under ESA and also under MBTA. The Special Purpose Permit shall be valid for a period of three (3) years from its

Effective Date, provided the Permit remains in effect for such period. The Special Purpose Permit shall be renewed without conditions or requirements beyond those set forth in the Tribal HCP, this Agreement, or the Permit provided the Tribe remains in compliance with the terms of this Agreement and the Permit. Each such renewal shall be valid for a period of three years, provided that the Permit remains in effect for such period.

4.2.6 Section 7 Consultations

In any consultation that may be required or processed pursuant to section 7 of ESA, 16 U.S.C. § 1536, subsequent to the Effective Date, with regard to the Covered Activities analyzed in the ESA intra-Service section 7 consultation for the Tribal HCP, the Agency shall, to the maximum extent appropriate, rely upon, and utilize, the ESA biological opinion completed in association with the Tribal HCP. Unless otherwise required by law, the Agency will not impose measures on the Tribe or Third Party Participants in excess of those that have been or will be required by the Permit, the Tribal HCP or this Agreement. In no event shall the Agency require the Tribe to implement measures, or recommend that other Federal agencies impose on the Tribe measures or other requirements, that are inconsistent with the Permit, the Tribal HCP, or this Agreement.

4.2.7 Future Recovery Plans

The Parties acknowledge that ESA recovery plans have no effect on this Tribal HCP, except to the extent that they may contribute information assisting in adaptive management, and such recovery plans cannot impose costs or restrictions on the Tribe in addition to or different than those set forth in the Tribal HCP.

4.3 Mutual Obligations

The Agency will, upon request of the Tribe and subject to the responsibilities of the United States Department of Justice in the conduct of litigation, provide appropriate support to the Tribe in defending, consistent with the terms of the Tribal HCP, lawsuits arising out of the Tribe's adoption or implementation of the Tribal HCP. In the event of a legal challenge alleging a breach of the Department of the Interior's tribal trust responsibilities due to implementation of the Tribal HCP, the Tribe will provide appropriate support to the Department in defending against such a legal challenge irrespective of whether the Tribe is named in such a legal challenge.

5.0 AGENCY PERMIT FINDINGS

The Agency, after opportunity for public review and comment and based on the best scientific and commercial data available and the terms and provisions of this Agreement and the Tribal HCP, has found that with respect to the Covered Species:

(a) The Taking of Covered Species will be incidental to otherwise lawful activities.

(b) Implementation of the Tribal HCP by the Tribe, Tribal members, and Third Party Participants will, to the maximum extent practicable, minimize and mitigate the impacts of the Incidental Taking of Covered Species.

(c) The Tribal HCP and this Agreement provide procedures to deal with Changed Circumstances and Unforeseen Circumstances.

(d) The Taking of Covered Species in accordance with this Agreement will not appreciably reduce the likelihood of the survival and recovery of the Covered Species.

(e) The measures agreed upon by the Tribe and the Agency for purposes of the Tribal HCP will be met.

(f) Through this Agreement, the Agency has received the required assurances that the Tribal HCP will be implemented.

6.0 AGENCY ASSURANCES REGARDING THE TRIBAL HCP AND AGREEMENT

6.1 Assurances regarding the Tribal HCP

After opportunity for public review and comment, based on the best available current scientific and other information, the Agency has found that the Tribal HCP, as implemented by this Agreement: (1) will complement other applicable conservation planning and regulatory programs and efforts addressing wildlife within the region, and (2) minimizes and mitigates the potential adverse impacts of the Covered Activities on the Covered Species to the maximum extent practicable. So long as the Tribe is in compliance with the Tribal HCP, the Permit, this Agreement, and associated documents, the Agency shall not take a position inconsistent with the acknowledgments set forth in this section, including, without limitation, in the form of comments offered by the Agency in the context of any NEPA process, during a Section 7 consultation (e.g., associated with Section 404 of the Clean Water Act), or in connection with any other process associated with approvals for Covered Activities.

6.2 Assurances regarding the Agreement

A primary purpose of this Agreement and the Tribal HCP is to provide for the long-term reconciliation of Covered Activities with the conservation and protection of the Covered Species. Based on and in consideration of this Agreement and the Tribal HCP, the Parties hereby agree, and the Agency assures the Tribe, that:

(a) Compliance with the terms of this Agreement, the Tribal HCP, and the Permit constitutes compliance with the provisions of the Environmental Laws, as described herein, with regard to Covered Activities' impacts on Covered Species.

(b) Proper implementation of this Agreement, the Tribal HCP, and the Permit will minimize and mitigate the impacts of Take to the maximum extent practicable pursuant to the ESA.

(c) Except as specifically provided in section 4.2.3 of this Agreement, no further or additional mitigation, enhancement, or compensation will be required of the Tribe pursuant to the Environmental Laws, as described herein, with respect to Covered Activities' impacts on Covered Species, that is in addition to, or different from, the mitigation, enhancement, and compensation measures specified in this Agreement and the Tribal HCP.

7.0 INCORPORATION OF TRIBAL HCP

The Tribal HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the Tribal HCP, the terms of this Agreement will control. In all other cases, the terms of this Agreement and the terms of the Tribal HCP will be interpreted to be supplementary to each other.

8.0 TERM

8.1 Initial Term

This Agreement and the Tribal HCP will become effective on the date of execution by all Parties. This Agreement, the Tribal HCP, and the Permit will remain in effect for a period of 75 years from issuance of the original Permit, except as provided below.

8.2 Permit suspension or revocation

The Agency may suspend or revoke the Permit for cause in accordance with the laws and regulations in force at the time of such suspension or revocation, *see* 5 U.S.C. § 558; 50 C.F.R. §§ 13.27 – 13.29, 17.22(b)(8), 17.32(b)(8)). The Parties agree that revocation of the Permit is an unlikely action of last resort. 69 Fed. Reg. 71,723, 71,730 (Dec. 10, 2004). The Agency shall not initiate an action to revoke the Permit without first pursuing action to suspend the permit in accordance with 50 C.F.R. § 13.27 and without first making the following findings:

1. The proposed action is reasonable and necessary;
2. The conservation purpose of the action cannot be achieved by reasonable regulation of non-Indian activity;
3. The action is the least restrictive alternative on the Tribe required to achieve the purpose of the action;
4. The action does not discriminate against Indian activities; and
5. The Tribal HCP and other voluntary tribal measures are not adequate to comply with section 10(a)(1)(B) of the ESA.

At least 90 days prior to taking any action to suspend or revoke the Permit, the Agency shall meet and confer with the Tribe, in accordance with section 15.6 of this Agreement, in order to attempt to resolve the need to suspend or revoke the Permit; however, the Agency

may suspend the Permit immediately in the event that the Agency makes a written determination based on the best scientific and commercial data available that such action is required to avoid jeopardy to a Covered Species or Listed Species. Such suspension may apply to the entire Permit, or only to specified Covered Species, to specified portions of the Plan Area, or to specified Covered Activities. In the event of suspension or revocation, the Tribe's obligations under this Agreement and the Tribal HCP will continue until the Agency determines that all Take of Covered Species that occurred under the Permit has been fully mitigated in accordance with the Tribal HCP.

8.3 Treatment of Unlisted Species

Unlisted Covered Species are treated in the Tribal HCP as though they were listed species in determining the amount of Take and the mitigation required.

8.4 Extension of the Permits

Upon agreement of the Parties and in compliance with all applicable laws, the Permits may be extended beyond their initial term under regulations under the ESA in force on the date of such extension. If the Tribe desires to extend the Permit, it will so notify the Agency at least 180 days before the then-current term is scheduled to expire. Extension of the Permit constitutes extension of the Tribal HCP and this Agreement for the same amount of time, subject to any modifications that the Agency and Tribe mutually approve.

8.5 Conservation and Management in Perpetuity

Notwithstanding the stated term as herein set forth, the Parties agree and recognize that once the Covered Species have been taken and their habitat modified within the Plan Area, the Take and habitat modification will be permanent. The Parties, therefore, agree that the obligation to conserve and manage the Habitat Preserve shall likewise, to the extent permitted by law, be permanent and extend beyond the terms of this Agreement.

9.0 FUNDING

9.1 Sources of Agua Caliente Funding

The Tribe shall fund implementation of the Tribal HCP from (1) a Tribal HCP mitigation fee as provided in section 4.15.3.1 of the Tribal HCP, (2) Tribal funding as provided in section 4.15.3.2 of the Tribal HCP, (3) endowment earnings as provided in section 4.15.3.3 of the Tribal HCP; and (4) reimbursements for Covered Project administration as provided in section 4.15.3.4 of the Tribal HCP.

9.2 Uses of Funding

The Tribe shall fund the following measures from the funds obtained from the sources identified in section 9.1:

- Tribal HCP;
- (a) Administration of the Tribal HCP as set forth in section 4.15.2.2 of the Tribal HCP;
 - (b) Habitat Preserve Assembly as set forth in section 4.15.2.3 of the Tribal HCP; and
 - (c) Habitat Preserve Adaptive Management as set forth in section 4.15.2.4 of the Tribal HCP.

10.0 MONITORING AND REPORTING

10.1 Planned periodic reports

As described in the Tribal HCP, the Tribe will submit periodic reports describing its activities and results of the monitoring program provided for in the Tribal HCP.

10.2 Other reports

The Tribe will provide, within 30 days of being requested by the Agency, any additional information in its possession or control related to implementation of the Tribal HCP that is requested for the purpose of assessing whether the terms and conditions of the Permit and the Tribal HCP, including the Tribal HCP's adaptive management plan, are being fully implemented.

10.3 Certification of reports

All reports will include the following certification from a responsible Tribal official who supervised or directed preparation of the report:

“I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete.”

10.4 Monitoring by Agency

The Agency may conduct inspections and monitoring in connection with the Permit in accordance with its regulations, *see* 50 C.F.R. § 13.47, provided the Agency provides at least 48 hours notice to the Tribe and an opportunity for a representative of the Tribe to accompany Agency personnel in such inspections and monitoring.

11.0 CHANGED CIRCUMSTANCES

11.1 General

Consistent with the Assurances Rule, this section and section 4.14 of the Tribal HCP identify changes in the circumstances affecting the Plan Area and/or the Covered Species that can reasonably be anticipated, and describe the responses to such changes that will be

carried out by the Parties. Since the Tribal HCP includes an adaptive management approach to habitat management, changes over time and adaptive responses are already contemplated. In addition, however, section 4.14 of the Tribal HCP identifies all reasonably foreseeable Changed Circumstances and describes specific responses to them. Changed Circumstances include woodland fire, flood, drought, lowering of the water table, invasion by new exotic species, and new listings of species not covered by the Tribal HCP. The Parties agree that section 4.14 of the Tribal HCP addresses all reasonably foreseeable Changed Circumstances, and that other changes will be treated by the Agency as Unforeseen Circumstances.

11.2 Tribe-initiated response to Changed Circumstances

The Tribe will give notice to the Agency within 60 days after learning that any of the Changed Circumstances listed in section 4.14 of the Tribal HCP has occurred, and the Agency will provide notice to the Tribe if they become aware of an existing or potential Changed Circumstance. As soon as practicable thereafter, the Tribe will initiate action to modify its activities in the manner described in section 4.14 of the Tribal HCP, to the extent necessary to mitigate the effects of the Changed Circumstances on Covered Species. In such circumstances, the Tribe will report to the Agency on its actions not more than 90 days after initiating such actions. The Tribe will make such modifications without awaiting notice from the Agency.

11.3 Agency-initiated response to Changed Circumstances

If the Agency determines that Changed Circumstances have occurred and that the Tribe has not responded in accordance with section 4.14 of the Tribal HCP, the Agency will so notify the Tribe and will direct the Tribe to make the required changes. Within 60 days after receiving such notice, the Tribe will initiate action to make the required changes. In such circumstances, the Tribe will report to the Agency on its actions not more than 90 days after initiating such actions. Such changes are provided for in the Tribal HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the Permit or HCP.

11.4 Listing of species that are not Covered Species

(a) In the event that a non-Covered Species that may be affected by Covered Activities is proposed for listing under the ESA during the term of this Agreement, including a proposal for listing on an emergency basis, and the Agency determines that the species may be affected by one or more Covered Activities, the Agency shall notify the Tribe of the proposed listing as early as feasible and shall consult with the Tribe during the proposed and final rule development stage regarding such proposed listing. The notification shall take place no later than the publication of the proposed listing in the Federal Register.

(b) Upon receipt of notice of the potential listing of a non-Covered Species, the Tribe may, but is not required to, enter into negotiations with the Agency regarding necessary modifications, if any, to the Tribal HCP required to amend the Permit to cover the non-Covered Species. If the Tribe elects to pursue amendment of the Permit, the Agency will provide technical assistance to the Tribe to identify any modifications to the Tribal HCP that may be necessary to amend the Permit.

(c) In determining whether any further conservation or mitigation measures are required in order to amend the Permit to authorize incidental take of such non-Covered Species, the Agency shall consider the conservation and mitigation measures already provided in the Tribal HCP and cooperate with the Tribe to minimize the adverse effects of the listing of such non-Covered Species on the Covered Activities.

(d) Based on the Tribal HCP and other relevant information, the Tribe shall evaluate the potential effect of any Covered Activities that have not been completed on the species proposed for listing and inform the Agency in writing of the Tribe's determination with regard to such potential effect.

(e) If the Tribe notifies the Agency that one or more Covered Activities may affect the species proposed for listing, or if Agency disagrees with the Tribe's determination that the Covered Activities will not affect the species proposed for listing, the Parties shall meet and confer in order to develop an appropriate response. The Agency shall identify any necessary measures to avoid the likelihood of jeopardy to, take of, or adverse modification of any designated critical habitat of (the "no take/no jeopardy/no adverse modification" measures) the non-Covered Species. The measures shall be developed in consultation with the Tribe. If the Tribe and the Agency cannot come to agreement on the "no take/no jeopardy/no adverse modification" measures, the Tribe may invoke the alternative dispute resolution process set forth in section 15.6 of this Agreement.

(f) If the Permit has not been amended to include the non-Covered Species at the time the species is listed, then the Tribe will implement the "no take/no jeopardy/no adverse modification" measures identified by the Agency until (1) the Permit is amended to include the non-Covered Species; (2) the Agency notifies the Tribe that such measures are no longer needed to avoid the likelihood of jeopardy to, take of, or adverse modification of any designated critical habitat of the non-Covered Species; or (3) the Tribe has otherwise complied with the requirements of the ESA.

(g) If Covered Activities require the amendment of the Permit, further section 7 consultation, or the issuance of new Take authorizations, to address newly listed species, the Agency shall, upon proper application, expeditiously consider the issuance of and, if appropriate, shall expeditiously amend, complete, or issue all Section 10(a) Permits, Special Purpose Permits, and/or other Take authorizations (including section 7 consultations) as are necessary or desirable in order to complete the Covered Activities consistent with all applicable laws and regulations.

12.0 ADAPTIVE MANAGEMENT

12.1 Agua Caliente-initiated adaptive management

The Tribe will implement the adaptive management provisions in section 4.13 of the Tribal HCP, when changes in management practices are necessary to achieve the Tribal HCP's biological objectives, or to respond to monitoring results or new scientific information. The Tribe will make such changes without awaiting notice from the Agency, and will report to the Agency on any actions taken pursuant to this section not more than 90 days after initiating such actions.

12.2 Agency-initiated adaptive management

If the Agency determines that one or more of the adaptive management provisions in the Tribal HCP may be triggered and that the Tribe has not changed its management practices in accordance with section 4.13 of the Tribal HCP, the Agency will notify the Tribe. Not more than 30 days after the Agency provides such notice to the Tribe, the Agency and the Tribe will meet and confer in an effort to come to agreement regarding whether one or more of the adaptive management provisions in the Tribal HCP was triggered. Provided the Agency and the Tribe agree, within 30 days after receiving such notice, the Tribe will initiate the required changes. Within 90 days of initiating such action, the Tribe will report to the Agency on its action. Such adaptive management is provided for in the Tribal HCP, and hence does not constitute Unforeseen Circumstances or require amendment of the Permit or Tribal HCP, except as provided in this section. In the event that the Agency and the Tribe cannot come to agreement regarding whether one or more of the adaptive management provisions in the Tribal HCP was triggered, the Parties will engage in informal dispute resolution pursuant to section 15.6.

12.3 No increase in Take

This section does not authorize any modifications that would result in an increase in the amount and nature of Take, or increase the impacts of Take, of Covered Species, or result in increased adverse effects to Covered plant Species, beyond that analyzed under the original Tribal HCP and any amendments thereto. Any such modification must be reviewed as a permit amendment under section 13.4 of this Agreement.

13.0 MODIFICATIONS AND AMENDMENTS

13.1 Modifications

As more fully described in sections 4.17.1.1 and 4.17.1.2 of the Tribal HCP, clerical changes and adaptive management changes shall not require any amendment to the Tribal HCP, the Section 10(a) Permit, or the IA.

13.2 Plan Refinement

Plan Refinements may be initiated by the Tribe or, if applicable, a private landowner or leaseholder, and shall be initiated and processed as described in section 4.17.2 of the Tribal HCP. Plan Refinements are changes to conservation requirements that result in equivalent or superior conservation of Covered Species and that have been fully analyzed. Plan Refinements shall not require any amendment to the Tribal HCP, the Section 10(a) Permit, or the IA.

13.3 Minor amendments

(a) The Tribe may propose minor amendments to the Tribal HCP or this Agreement by providing notice to the Agency. Such notice shall include a statement of the reason for the proposed amendment and an analysis of its environmental effects, including its effects on operations under the Tribal HCP and on Covered Species. The Parties will use

reasonable efforts to respond to proposed amendments within 60 days of receipt of such notice. Proposed amendments will become effective upon the Parties' written approval. If the Agency requires the proposed minor amendments to be treated as a standard amendment, or denies concurrence with the proposed minor amendment, it shall include in its written response a detailed explanation of the reasons for such determinations. In the event the Agency objects to a proposed amendment, the Parties shall meet and confer to resolve the objection. The Agency will not approve minor amendments to the Tribal HCP or this Agreement if the Agency determines that such amendments would result in operations under the Tribal HCP that are significantly different from those analyzed in connection with the original Tribal HCP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the original Tribal HCP, or additional Take not analyzed in connection with the original Tribal HCP.

(b) Minor amendments to the Tribal HCP and IA processed pursuant to this subsection include:

- (1) Corrections to land ownership;
- (2) Adjustment of land ownership, Plan Area, and conservation acreages upon completion of the currently contemplated BLM Land Exchange;
- (3) Adjustment of land ownership and Plan Area acreages upon acquisition within the Target Acquisition Areas;
- (4) Updates/corrections to the vegetation map and species occurrence data;
- (5) Minor revisions to survey, monitoring, reporting, and/or management protocols that do not affect Covered Species or overall Habitat Preserve functions and values;
- (6) Minor revisions to Habitat Preserve assembly or funding strategies and schedules that do not result in substantial adverse effects to Covered Species or overall Habitat Preserve functions and values;
- (7) Plan modifications determined to result in biologically equivalent or superior conservation; and
- (8) Any other modification to the Tribal HCP that the Agency and the Tribe agree is a minor modification.

The Tribe must provide notice to the Agency when it approves any minor amendment under section 13.3(b)(1)-(6) of this Agreement. The Tribe must seek concurrence from the Agency before it approves any minor amendment under section 13.3(b)(7)-(9) of this Agreement.

13.4 Amendment of the Permit

The Permit may be amended in accordance with all applicable legal requirements, including but not limited to the ESA, NEPA, and the Agency's permit regulations. The Tribe shall provide a statement of the reasons for the amendment and an analysis of its environmental

effects, including its effects on operations under the Tribal HCP and on Covered Species. The Parties shall propose standard amendments in the same manner as required for proposing minor modifications, set forth in section 4.17.4 of the Tribal HCP.

14.0 IMPLEMENTATION

14.1 Projects Implemented by Tribe

As further provided by the Tribal HCP, the Section 10(a) Permit, and this Agreement, the Tribe is authorized to Take Covered Species in compliance with all terms and conditions of the Tribal HCP, the Section 10(a) Permit, and this Agreement including avoidance, minimization, and mitigation requirements.

14.2 Extension of Take Authorization to Third Party Participants

As further provided by the Tribal HCP, the Section 10(a) Permit, and this Agreement, the Tribe is authorized to extend take authorization to Third Party Participants that agree to comply with all terms and conditions of the Tribal HCP, the Section 10(a) Permit, and this Agreement including avoidance, minimization, and mitigation requirements. The Tribe shall be responsible for determining whether a Third Party Participant complies with all applicable terms and conditions and must make findings supporting such determinations prior to extending take authorization.

14.3 Payment of Mitigation Fees

Extension of take authorization to Third Party Participants is conditioned upon payment of mitigation fees, which must occur prior to any ground or habitat disturbance other than disturbance necessary to complete the entitlement process, for example, completion of required biological surveys and geotechnical testing.

14.4 Conservation of Habitat Preserve Lands

As more particularly described in section 4.5.1 of the Tribal HCP, the Tribe shall conserve and manage the Habitat Preserve lands in perpetuity. To implement this obligation, the Tribe shall enact one or more resolutions to conserve and manage the Habitat Preserve lands in perpetuity. Except with respect to privately-owned fee lands within the Plan Area, these assurances are intended to provide the Agency with a basis to determine that the Tribal HCP will be implemented, particularly in light of the status of the Tribe as a sovereign nation and the principal of comity. Privately-owned fee lands within the Plan Area may be included in the Habitat Preserve provided the fee owner grants a conservation easement in perpetuity to the Tribe or a qualified third party (*e.g.*, a land trust), in a form acceptable to the Tribe and the Agency, that names the Agency as a third party beneficiary. This assurance is intended to provide the Agency with a basis to determine that the Tribal HCP will be implemented on privately-owned fee lands within the Plan Area.

14.5 Conservation Credits and Enhancement/Restoration Mitigation Credits

14.5.1 General

Conservation credits and enhancement/restoration mitigation credits may be used by the Tribe or a Third Party Participant to offset mitigation requirements for Covered Activities. Conservation credits are described in section 4.5.3 of the Tribal HCP and enhancement/restoration mitigation credits are described in section 4.10 of the Tribal HCP. The Tribe or Third Party Participants may accrue credits in four categories: Mountains and Canyons Conservation Area credits; Valley Floor Conservation Area credits; Casey's June Beetle habitat credits, and riparian habitat credits. Credits are not transferable between categories.

14.5.2 Conservation Credits

Pursuant to section 4.5.3 of the Tribal HCP and in accordance with Agency policies, the Tribe or Third Party Participants may enter into Conservation Banking Agreements with the Agency whereby land is committed to conservation and the land is assigned conservation credits that can be sold to offset mitigation requirements. Each acre of land committed to conservation will be assigned one conservation credit that can in turn be used to offset impacts from a Covered Activity. The number of conservation credits needed to offset one acre of impacts in each category described in section 14.5.1 is set forth below.

Category	Ratio of conservation credits to acres of impacts
Mountains and Canyons Conservation Area	5.67: 1
Valley Floor Conservation Area	0.25: 1
Casey's June Beetle habitat	5.67: 1
Riparian habitat	9: 1

14.5.3 Enhancement/Restoration Mitigation Credits

The Tribe is authorized to accept proposals for enhancement/restoration mitigation credits after consultation with the Agency pursuant to section 4.10 of the Tribal HCP. The Tribe may use or authorize the use of mitigation credits. The value of mitigation credits vis-à-vis impacts from a Covered Activity will be equivalent to the incremental net conservation value of the enhancement or restoration.

15.0 REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION

15.1 In general

Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permits, and the Tribal HCP.

15.2 No monetary damages

No Party shall be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement.

15.3 Injunctive and temporary relief

The Parties acknowledge that the Covered Species are unique and that their loss as species would result in irreparable damage to the environment, and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement, the Permit, and the Tribal HCP.

15.4 Enforcement authority of the United States

Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA or other applicable law.

15.5 Trust responsibility of the United States

Nothing contained in this Agreement is intended to limit the trust responsibility and other obligations of the United States government with regard to the Tribe under Federal law.

15.6 Informal Dispute Resolution

In the event of any dispute between the Parties regarding the Tribal HCP or this Agreement, either Party shall send a notice (“Notice of Dispute”) to the other Party of such dispute and the Parties shall engage in informal dispute resolution in a manner acceptable to the Parties to attempt to resolve such dispute without resorting to a formal enforcement or legal proceeding. Neither the Agency nor the Tribe shall initiate any formal enforcement or legal proceeding to enforce the terms of the Tribal HCP or this Agreement any earlier than 90 days subsequent to the date of delivery of the Notice of Dispute in accordance with section 15.2 of this Agreement except that the Agency may initiate a formal enforcement or legal proceeding earlier than 90 days subsequent to the date of delivery of the Notice of Dispute in the event that the Agency determines such action is required to avoid jeopardy to a Covered Species or Listed Species.

16.0 MISCELLANEOUS PROVISIONS

16.1 No partnership

Neither this Agreement nor the Tribal HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

16.2 Notices

Any notice permitted or required by this Agreement shall be in writing, delivered personally, or by overnight mail, to the persons listed below, or shall be deemed given five days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any Party may from time to time specify to the other Party in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by overnight or certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Deputy Manager
United States Fish and Wildlife Service
California/Nevada Operations Office
2800 Cottage Way, Room W-2606
Sacramento, California 95825
Telephone: 916-414-6464
Facsimile: 916-414-6486

Field Supervisor
United States Fish and Wildlife Service
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road
Carlsbad, California 92011
Telephone:

Agua Caliente Band of Cahuilla Indians
5401 Dinah Shore Drive
Palm Springs, CA 92264
Telephone: 760-883-1322
Facsimile: 760-883-1938

16.3 Entire agreement

This Agreement, together with the Tribal HCP and the Permit, constitutes the entire agreement among the Parties. It supersedes any and all other agreements, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise, or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

16.4 Elected officials not to benefit

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

16.5 Availability of funds

Implementation of this Agreement and the Tribal HCP by the Agency is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Agency will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

16.6 Duplicate originals

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

16.7 No third-party beneficiaries

Except as specifically provided in this Agreement, and without limiting the applicability of rights granted to the public pursuant to the ESA or other Federal law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

16.8 Relationship to the ESA and other authorities

The terms of this Agreement shall be governed by and construed in accordance with the ESA and applicable Federal law. In particular, nothing in this Agreement is intended to limit the authority of the Agency to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Agency as an agency of the Federal government, the trust responsibilities of the U.S. Department of the Interior, or the obligations created by Executive Order 13175, Secretarial Order No. 3206, and/or the Agency's Native American Policy, among other applicable authorities governing the relationship between the United States and Indian tribes. Nothing in this Agreement will limit the right or obligation of any Federal agency to engage in consultation required under section 7 of the ESA or other Federal law; however, it is intended that the rights and obligations of the Tribe under the Tribal HCP and this Agreement will be considered in any consultation affecting Tribe's use of the Plan Area. In no event shall the Agency require the Tribe to implement measures, or recommend that other Federal agencies impose on Tribe measures or other requirements, that are inconsistent with section 4.2.3 of this Agreement.

16.9 References to regulations

Any reference in this Agreement, the Tribal HCP, or the Permit to any regulation or rule shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

16.10 Applicable laws

All activities undertaken pursuant to this Agreement, the Tribal HCP, or the Permit must be in compliance with all applicable Federal laws and regulations, Executive Order 13175, Secretarial Order No. 3206, and/or the Agency's Native American Policy, and other applicable authorities governing the relationship between the United States and Indian tribes.

16.11 Successors and assigns

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the Permit shall be governed by the Agency's regulations in force at the time.

16.12 Due Authorization

The Agency represents and warrants for the benefit of the Tribe and its successors and assigns that (1) the execution and delivery of this Agreement has been duly authorized and approved by all requisite action, (2) no other authorization or approval, whether of governmental bodies or otherwise will be necessary in order to enable the Agency to enter into and comply with the terms of this Agreement, and (3) the person executing this Agreement on behalf of the Agency has the authority to bind the Agency.

16.13 Faxed Signatures

Any Party may deliver its signed duplicate of this Agreement to any other Party by facsimile transmission, and such delivery shall be deemed made and completed upon receipt of such facsimile transmission by such other Party. Any Party delivering a signed duplicate by facsimile transmission shall promptly send the duplicate original bearing its original signature to such other Party, provided that a delay or failure to do so shall not negate the effectiveness of the delivery made by the facsimile transmission.

16.14 Amendments to the Agreement

This Agreement may be amended only in a writing signed by the Parties.

16.15 Non-Severability

The Parties contemplate that the provisions of this Agreement and the Tribal HCP reflect the agreement of the Parties and that no element of these documents may be severed without terminating the Agreement. Notwithstanding the foregoing, and to the extent consistent with the Tribal HCP, in the event that any portion of this Agreement shall be declared by any court of competent jurisdiction to be invalid, illegal, or unenforceable, such portion shall be

deemed severed from this Agreement upon written notice from the Tribe to the other Parties, and in the event of such notice the remaining parts of the Agreement shall remain in full force and effect as though such invalid, illegal, or unenforceable portion had never been part of this Agreement.

16.16 Further Instruments

Each of the Parties shall, promptly upon the request of the other, execute, acknowledge, and deliver to the others any and all further instruments and shall give such further assurances as are reasonably requested or appropriate to evidence or give effect to the provisions of this Agreement.

16.17 Pre-Existing Rights

Notwithstanding anything to the contrary contained herein, the Parties agree and recognize that this Agreement is made subject to any and all existing rights of way, easements, surface leases, subsurface leases, contracts, and other instruments dated prior to the Effective Date, affecting all or any part of the Plan Area, including all rights of ingress and egress necessary for the owners of such pre-existing rights. The Tribal HCP, this Agreement, and the Permit do not authorize holders of such pre-existing rights to engage in any Take pursuant to the ESA. The Tribe shall not be liable for the failure of any holder of pre-existing rights to comply with this Agreement or the ESA.

16.18 Attorneys' Fees

If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each Party to the litigation shall bear its own attorneys' fees, cost and expenses, except that fees and costs recoverable against the United States shall be governed by applicable Federal law.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date that the Agency issues the Permit.

BY _____ Date _____
United States Fish and Wildlife Service

BY _____ Date _____
Agua Caliente Band of Cahuilla Indians

Secretarial Approval

I. APPENDIX A

A. Covered Species

(Scientific names are set forth in the Tribal HCP, Table XX)