

RESOLUTION NO. 2014-058

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK AUTHORIZING AND APPROVING AN AGREEMENT WITH TRI DEVELOPMENT SERVICES, LLC FOR PURCHASE OF ENVIRONMENTAL MITIGATION CREDITS AND ESCROW INSTRUCTIONS RELATING TO THE DOWDELL AVENUE EXTENSION SOUTH OF BUSINESS PARK DRIVE

WHEREAS, the City entered into an off-site public improvements and public facilities fee credit agreement with Spanos Corporation, pursuant to city council Resolution No. 2013-138 adopted October 8, 2013 (Spanos Agreement); and

WHEREAS, the 2011 Update of the City Public Facilities Finance Plan (PFFP) approved a budget for Dowdell Avenue Extension between Business Park Drive and 850-feet south of Business Park Drive (North Segment), per city council Resolution No. 2011-109 adopted on November 8, 2011; and

WHEREAS, the City Capital Improvement Program (CIP) includes the North Segment as a project titled; Dowdell Avenue ROW Acquisition, Project No. 2011-09, per city council Resolution No. 2013-102 adopted on June 25, 2013; and

WHEREAS, the Spanos Agreement requires Spanos to design and construct the North Segment of Dowdell Avenue at Spanos's expense in exchange for PFFP fee credits; and

WHEREAS, the Spanos Agreement also requires the City to acquire "the property necessary to accommodate the construction of the North Segment of Dowdell Extension" ; and

WHEREAS, the City has acquired the right-of-way from the property owners for the North Segment; and

WHEREAS, the City retained the firm of Dudek to prepare the necessary biological assessments to determine the impact of the roadway construction on certain endangered species which require mitigation; and

WHEREAS, Dudek has prepared the biological assessment and identified the scope of impact the construction will have on wetlands, Sebastopol Meadowfoam, California Tiger Salamander (CTS); and

WHEREAS, the City has submitted to the state and federal agencies the appropriate applications for environmental permits to allow the construction of the North Segment; and

WHEREAS, the City has solicited proposals from three mitigation banks for purchase of environmental mitigation credits and received a response from TRI Development, LLC; and

WHEREAS, the City wishes to enter into an agreement with TRI Development, LLC.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Rohnert Park does hereby resolve, determine, find and order as follows:

1. Recitals. The above recitals are true and correct and are hereby incorporated into this Resolution as findings of the City Council of the City of Rohnert Park.
2. CEQA Compliance. An Initial Study and Mitigated Negative Declaration (MND) have been prepared for the Dowdell Ave. Extension North Segment and are on file with the City of Rohnert Park Planning Division. A Notice of Determination (NOD) was filed with the County Clerk on March 5, 2014 in compliance with Section 21152 of the Public Research Code. The NOD also was submitted to the State Clearinghouse, Office of Planning and Research in compliance with Section 21152.1(a) of the Public Resources Code, reference #2014012020.
3. Encumbrance of Funds. The City Council of the City of Rohnert Park hereby encumbers an amount not to exceed One Hundred Eighty Four Thousand Dollars (\$184,000) for the purchase of the environmental mitigation credits required to mitigate the impacts within the Dowdell Avenue Extension roadway construction between Business Park Drive and approximately 850-feet south of Business Park Drive.
4. Approval of Agreement for Mitigation Credits and Escrow Instructions. The City Council of the City of Rohnert Park hereby approves the Agreement for Mitigation Credits and Escrow Instructions with TRI Development, LLC, in substantially similar form as provided for in Exhibit A attached hereto, which is incorporated by this reference, for purchase of environmental mitigation credits associated with the Dowdell Avenue Extension construction, between Business Park Drive and approximately 850-feet south of Business Park Drive, and the City Manager and City Attorney are hereby authorized to execute said Agreement subject to minor modifications by the City Manager or City Attorney on behalf of the City. The City Manager and City Attorney are also hereby authorized to execute all documents necessary in carrying out said agreement.
5. Escrow Authorization. The City Manager and City Attorney are hereby authorized and directed to facilitate the opening of escrow in the manner set forth in said Agreement. The City Manager and City Attorney are further hereby authorized to execute and deposit into escrow the funds and required documents in substantially similar form as provided for in the said Agreement.
6. Effective Date. This Resolution shall become effective immediately.
7. Severability. All portions of this resolution are severable. Should any individual component of this Resolution be adjudged to be invalid and unenforceable by a body of competent jurisdiction, then the remaining resolution portions shall continue in full force and effect, except as to those resolution portions that have been adjudged invalid. The City Council of the City of Rohnert Park hereby declares that it would have adopted this Resolution and each section, subsection, clause, sentence, phrase and other portion thereof, irrespective of the fact that one or more section, subsection, clause, sentence, phrase or other portion may be held invalid or unconstitutional.

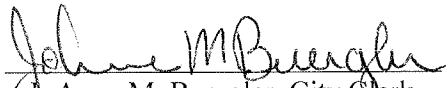
DULY AND REGULARLY ADOPTED this 10th day of June, 2014.



CITY OF ROHNERT PARK


Joseph T. Callinan, Mayor

ATTEST:


JoAnne M. Buergler, City Clerk

Attachment: Exhibit A

BELFORTE: AYE MACKENZIE: AYE STAFFORD: AYE AHANOTU: AYE CALLINAN: AYE
AYES: (5) NOES: (0) ABSENT: (0) ABSTAIN: (0)

EXHIBIT "A" TO CITY COUNCIL RESOLUTION

AGREEMENT WITH TRI DEVELOPMENT SERVICES, LLC FOR PURCHASE OF ENVIRONMENTAL MITIGATION CREDITS AND ESCROW INSTRUCTIONS RELATING TO DOWDELL AVENUE EXTENSION SOUTH OF BUSINESS PARK DRIVE

This AGREEMENT FOR MITIGATION CREDITS AND ESCROW INSTRUCTIONS ("**Agreement**") is entered into as of June __, 2014 ("**Effective Date**") between the City of Rohnert Park, a California Municipal Corporation, ("**Buyer**") and TRI Development Services, LLC, a California Limited Liability Company ("**Seller**"). Buyer and Seller are sometimes individually referred to as "Party" and collectively referred to as "Parties."

RECITALS

A. All of the necessary approvals and written agreements from the US Fish & Wildlife Service ("**USFWS**"), the U.S. Army Corps of Engineers ("**Corps**"), and the California Department of Fish and Wildlife ("**CDFW**") (collectively referred to as "**Approving Agencies**") have been issued to establish the Slippery Rock Conservation Bank and the Carinalli Todd Road Mitigation Bank, more particularly described in Exhibit A, which is attached and incorporated by this reference, as the banks ("**Banks**"), pursuant to the mitigation requirements of the Approving Agencies for impacts to California Tiger Salamander ("**CTS**"), wetlands, Sebastopol Meadow Foam

B. Seller represents the Banks are established and are being maintained. Seller represents the Banks are authorized by the Approving Agencies to sell off-site compensatory mitigation credits from the Banks on an acreage basis for projects or permits that require minimization of impacts to California Tiger Salamander ("**CTS Mitigation Credits**"), wetlands ("**Wetland Mitigation Credits**") and to Sebastopol Meadow Foam ("**Plant Mitigation Credits**"). Seller represents to be authorized to use the Banks to sell mitigation credits on an acreage basis for impacts to California Tiger Salamander and a combination of California Tiger Salamander, wetlands, Sebastopol Meadow Foam ("**Combination Wetland Mitigation Credits**").

C. Buyer is planning to construct a roadway and associated improvements in Rohnert Park, Sonoma County, California, which roadway is referred to as Dowdell Avenue Extension and is located between Business Park Drive and approximately 850-feet south of Business Park Drive ("**Project**"). The location of the Project is more specifically depicted on Exhibit B hereto, which is attached and incorporated herein by this reference.

D. As a part of the approval process for the Project, Buyer must obtain approvals from the Approving Agencies to compensate for the Project's impacts on waters of the United States, waters of the State of California, and certain protected species by purchasing sufficient suitable mitigation values to offset the Project's impacts. The City's biological assessment for the Project, prepared by Dudek, determined that the Project affected Sebastopol Meadowfoam, CTS and Wetlands. The Buyer solicited proposals from three mitigation banks and Seller responded with a proposal that would mitigate all three impacted items. Seller's proposal is attached as

Exhibit C and incorporated by this reference.

E. Corps' designation for Buyer's Project is File No. 2013-00140N.

F. Seller intends to provide the City with the CTS Mitigation Credits and Combination Wetland Mitigation Credits for the Project in of the City of Rohnert Park that are required to mitigate impacts for CTS, Wetlands or Plants by those Approving Agencies having jurisdiction with regard to such mitigation requirements.

G. Pursuant to Seller's proposal, Seller agrees to sell to Buyer and Buyer agrees to buy from Seller CTS Mitigation Credits for Ninety-Seven Thousand Five Hundred Dollars (\$97,500) per acre. CTS Mitigation Credits are sold in 0.01 of acre increments.

H. Seller agrees to sell to Buyer and Buyer agrees to buy from Seller Combination Mitigation Credits for Three Hundred Twenty Thousand Dollars (\$320,000) per acre. Combination Wetland Mitigation Credits are sold in "0.5" of acre increments.

I. The CTS Mitigation Credits and Combination Wetland Mitigation Credits that Seller identified in Recitals F and G are collectively referred to in this Agreement as the "**Mitigation Credits.**"

J. On June 10, 2014, the City Council authorized the execution of this Agreement with Seller and the expenditure of the purchase price for mitigation credits from the Banks to mitigate the impacts of the Project.

K. The Parties wish to enter into this Agreement to establish the terms and conditions to provide for the purchase and sale of CTS Mitigation Credits and Combination Wetland Mitigation Credits for the Project.

AGREEMENT

NOW, THEREFORE, in consideration of the good and valuable consideration and mutual promises, the sufficiency of which is hereby acknowledged, Seller and Buyer agree as follows:

1. **Incorporation of Recitals.** The Recitals are incorporated by reference.

2. **Transfer of Mitigation Credits.**

(a) **Sale of CTS Mitigation Credits.** Seller agrees to sell to Buyer and Buyer agrees to buy from Seller a total of 1.24 acres of CTS Mitigation Credits for the exclusive use of Buyer at a cost of Ninety Seven Thousand Five Hundred Dollars (\$97,500) per acre. The purchase price shall be \$120,900 (One Hundred Twenty Thousand Nine Hundred Dollars) (hereinafter referred to as the "**CTS Mitigation Credit Purchase Price**").

(b) **Sale of Combination Wetland Mitigation Credits which include Wetland, CTS and Plant Credits.** Seller agrees to sell to Buyer and Buyer agrees to buy from Seller a total of 0.10 acre of Combination Wetland Mitigation Credits for the exclusive use of Buyer, which includes 0.10 acre of Wetland Credits, 0.10 acre of CTS Credits, 0.10 acre of Sebastopol

Meadowfoam credits, at a cost of Three Hundred Twenty Thousand Dollars (\$320,000) per acre. The purchase price shall be \$32,000 (Thirty-Two Thousand Dollars) (hereinafter referred to as the "**Combination Wetland Mitigation Credit Purchase Price**").

(c) Mitigation Credits Purchase Price. Pursuant to the foregoing sections, Buyer shall pay a total of \$152,900 (One Hundred Fifty-Two Thousand Nine Hundred Dollars) to Seller (the sum of the CTS Mitigation Credits Purchase Price and the Combination Wetland Mitigation Credits Purchase Price) for the purchase of the Mitigation Credits (hereinafter referred to as the "**Mitigation Credits Purchase Price**"). The Mitigation Credits Purchase Price shall be paid pursuant to the terms of Section 4 of this Agreement.

3. Buyer's Due Diligence Period. Buyer shall have thirty (30) days from the Effective Date within which to perform all the due diligence that Buyer deems necessary to determine if the Mitigation Credits proposed in this Agreement are sufficient to meet Buyer's environmental mitigation requirements for Buyer's Project ("Due Diligence Period").

If prior to the termination of the Due Diligence Period, Buyer, in Buyer's sole and exclusive discretion, determines that the Mitigation Credits proposed in this Agreement will not meet Buyer's environmental mitigation requirements for the Project, then Buyer shall give written notice ("**Buyer's Cancellation Notice**"), pursuant to the Terms of Section 23 of this Agreement, to Escrow Company, as defined in Section 9; that Buyer is cancelling this Agreement. Upon Escrow Company's receipt of Buyer's Cancellation Notice, Escrow Company shall return to Buyer the Deposit, as defined in Section 4, less any fees due Escrow Company pursuant to the terms of Section 9 of this Agreement.

The failure of Buyer to timely give the Buyer's Cancellation Notice shall be deemed an election by Buyer to purchase the Mitigation Credits pursuant to the terms of this Agreement.

4. Buyer's Payments.

(a) Buyer's Deposit. Buyer shall deposit the sum of \$15,290 (Fifteen Thousand Two Hundred Ninety Dollars), which represents ten percent (10 %) of the Mitigation Credits Purchase Price, ("**Deposit**") to Escrow Company within five (5) business days of the Effective Date. This deposit amount shall be applicable to the Mitigation Credits Purchase Price.

If Buyer so desires, it shall be Buyer's responsibility to give written instructions to the Escrow Company to place the Deposit into an interest bearing account for the benefit of the Buyer.

The failure of Buyer to timely deposit the full amount of the Deposit shall, at Seller's sole election, be cause for Seller to terminate this Agreement.

(b) Balance of Mitigation Credits Purchase Price. Buyer shall deposit with Escrow Company the balance of the Mitigation Credits Purchase Price fourteen (14) days after receipt of the Approvals Notice, as defined in Section 5.

(c) Buyer's Default of Section 4(b): If Buyer does not timely deposit the balance of the Mitigation Credits Purchase Price, as provided in Section 4(b); Buyer shall be in default

under this Agreement. If any such default occurs, Seller shall have the remedies identified in Section 15 of this Agreement.

5. Seller's Obligation to Deliver Mitigation Credits.

(a) Reservation of Mitigation Credits. Upon termination of the Due Diligence Period, Seller shall reserve the Mitigation Credits for the sole use of the City or its successors or assigns. This reservation shall in no way restrain Seller from selling mitigation credits in the Banks to others, so long as the additional mitigation values have been authorized for sale by the Approving Agencies and so long as the aggregate number of credits and mitigation values sold to all other parties, including the Buyer, from the Banks, does not exceed the aggregate number of credits or mitigation values authorized for sale by the Approving Agencies from the Banks.

(b) Approvals and Notice. Seller shall apply for and use its best efforts to secure any and all forms of authorization required from the Approving Agencies for the exchange of the Mitigation Credits as legally sufficient mitigation of the impacts of the Project ("**Approvals**"). Within two business days of receipt of all of the Approvals, Seller shall notify Buyer in writing (herein referred to as the "**Approvals Notice**"). Seller shall also send a copy of this Approval Notice to Escrow Company.

(c) Conditions. Buyer and Seller agree and acknowledge that Seller's obligation to deliver the Mitigation Credits pursuant to this Agreement is conditioned on:

(i) Seller with Buyer's cooperation obtains all of the Approvals from the Approving Agencies authorizing the Buyer's purchase of the CTS Mitigation Credits and the Combination Wetland Mitigation Credits applied for by Seller with Buyer's cooperation; or

(ii) In the event that all of the Approvals cannot be obtained for the exchange of some or all of the Mitigation Credits from the Banks, Seller providing Buyer an alternative source for the some or all of the Mitigation Credits, which source is acceptable to the Approving Agencies and to the Buyer ("**Alternative Source**").

(d) Seller's Continuing Obligation. The Parties agree that Buyer shall have no obligation whatsoever by reason of the purchase of the Mitigation Credits, to support, pay for, monitor, report on, sustain, continue in perpetuity, or otherwise be obligated or liable for the success or continued expense or maintenance in perpetuity of the credits sold, or the Banks. The Seller shall monitor and make reports to the appropriate agency or agencies on the status of any Mitigation Credits sold to Buyer. Seller shall be fully and completely responsible for satisfying any and all conditions placed on the Banks, Alternative Source, or the Mitigation Credits by all state or federal jurisdictional agencies.

6. Closing.

(a) The Parties agree to close the purchase and sale as agreed to in this Agreement no later than thirty (30) days after Seller gives Buyer and Escrow Company the Approval Notice ("**Closing Date**"). The Approval Notice shall also identify the Closing Date. The period of time from giving of the Approval Notice to the Closing Date is referred to as the "**Closing Period**."

(b) No later than two (2) business days prior to the Closing Date, Seller shall deliver the “**Bill of Sale**” and “**Payment Receipt**” in the form attached respectively as Exhibit D and Exhibit E to this Agreement and incorporated by this reference, to Escrow Company transferring the Mitigation Credits to Buyer.

(c) On the Closing Date, Escrow Company shall release the Mitigation Credits Purchase Price to Seller and Escrow Company shall transfer the “Bill of Sale” and “Payment Receipt” to Buyer.

7. **Brokerage Commissions.** Buyer and Seller shall each be responsible for their own brokerage commissions which may be payable in connection with this Agreement.

8. **Escrow Company.** Lynette Rhodes, Escrow Officer, Chicago Title Company, 591 Watt Avenue, Sacramento, CA 95864 (“Escrow Company”) shall be the Escrow Company for both the Seller and the Buyer, and herein shall be referred to as “Escrow Company.”

9. **Escrow Company Fees and Transfer Fees.**

(a) The Escrow Company fee of \$1,000 (One Thousand Dollar) fees shall be deducted from Buyer’s Deposit. Escrow Company fees are non-refundable and immediately payable to Escrow Company.

(b) If Buyer purchases the Mitigation Credits delivered by Seller pursuant to Sections 5(a), then Seller and Buyer shall equally share the escrow and title fees charged by the Escrow Company. Buyer will be credited at Closing for fifty (50%) percent of the total fees invoiced by Escrow Company.

(c) If Buyer fails to purchase the Mitigation Credits delivered by Seller pursuant to Sections 5(a) and 5(b), then Buyer shall pay for all of the escrow and title fees charged by Escrow Company unless the entire Buyer’s Deposit is returned to Buyer pursuant to the terms of this Agreement.

(d) Buyer’s failure to pay Escrow Company fees as required by this Agreement shall be a material breach of this Agreement and shall relieve Seller of any duty to perform any of its duties or obligations required by this Agreement.

(e) Seller shall pay all the costs (if any) of registering the transfer of the Mitigation Credits from Seller to Buyer.

10. **Seller’s Warranties to Buyer.**

(a) Seller represents and warrants to Buyer the following, which representations and warranties shall be in effect as of the Effective Date, upon Closing, and shall survive Closing:

(i) If Seller transfers any Mitigation Credits to Buyer:

(A) Seller’s bank sources shall have obtained all of the Approvals to establish the Banks from the applicable Approving Agencies;

- (B) Seller's bank sources have good and marketable title to such Mitigation Credits.
- (C) Seller's bank sources agree to maintain the validity of the Mitigation Credits purchased by the Buyer.
- (D) Seller's bank sources agrees not to enter into any agreement that would "over-sell" or diminish the number of Mitigation Credits allocated to Buyer under this Agreement.

(ii) If Seller transfers any Mitigation Credits to Buyer from an Alternative Source, then:

- (A) The Mitigation Credits was approved by the Approving Agencies.
- (B) Seller and/or Seller's bank sources have good and marketable title to such Mitigation Credits.
- (C) Seller's bank sources will use their best efforts to meet the requirements of the Approving Agencies of the Mitigation Credits purchased by the Buyer in "good standing."
- (D) Seller's bank sources agree not to enter into any agreement that would "over-sell" the interest in the Mitigation Credits or diminish the number of Mitigation Credits allocated to Buyer under this Agreement.

(iii) The execution and delivery of this Agreement and the performance of Seller's obligations hereunder have been or will be duly authorized by all necessary action on the part of Seller and this Agreement constitutes the legal, valid and binding obligation of Seller. The individuals signing this Agreement on behalf of Seller have the power, right and authority to (a) enter into this Agreement, (b) bind Seller hereto, and (c) consummate the transaction contemplated hereby, without the consent or joinder of any other Party or order or approval of any court.

(b) Seller does not warrant that:

(i) the Mitigation Credits are applicable to Buyer's Project. Buyer is solely responsible for determining the suitability of Seller's Mitigation Credits for Buyer's Project.

(ii) Buyer's ability to resell or transfer the Mitigation Credits.

(iii) the Mitigation Credits identified in Section 2 of this Agreement are all of the Mitigation Credits that Buyer will require to satisfy the requirements of the Approving Agencies for Buyer's Project.

(iv) the cost of Mitigation Credits identified in Paragraph 2 of this Agreement is the total cost that Buyer will incur to satisfy the requirements of the Approving Agencies for Buyer's Project.

11. Buyer's Warranties to Seller. At the Closing, Buyer will represent and warrant to Seller the following:

(a) Buyer has performed all of the due diligence necessary to determine:

(i) whether Buyer may use the Mitigation Credits for Buyer's Project.

(ii) the suitability of Seller's Mitigation Credits for Buyer's Project.

(iii) whether Buyer may resell or transfer the Mitigation Credits.

(iv) whether the Mitigation Credits identified in Paragraph 2 of this Agreement are all of the Mitigation Credits that Buyer will require to satisfy the requirements of the governing agencies for Buyer's Project.

(b) The execution and delivery of this Agreement and the performance of Buyer's obligations hereunder have been or will be duly authorized by all necessary action on the part of Buyer and this Agreement constitutes the legal, valid and binding obligation of Buyer. The individuals signing this Agreement on behalf of Buyer have the power, right and authority to (a) enter into this Agreement, (b) bind Buyer hereto, and (c) consummate the transaction contemplated hereby, without the consent or joinder of any other party or order or approval of any court.

12. Buyer's Conditions to Closing. Buyer's obligation to pay the Mitigation Credits Purchase Price provided in this Agreement is conditioned solely upon Seller delivering to Escrow Company the "Bills of Sale" and "Payment Receipts" for the Mitigation Credits sold by Seller to Buyer pursuant to the terms of this Agreement.

13. Source of Mitigation Credits. Seller has Alternative Sources from which to provide the Mitigation Credits to Buyer. Seller reserves the right to provide the CTS Mitigation Credits or the Combination Wetland Mitigation-Credits or both from any of Seller's Alternative Sources or those Alternative Sources of Seller's affiliates, at the same Mitigation Credits Purchase Price, so long as the Alternative Source for the Mitigation Credits provides the same Mitigation Credits to Buyer as the Mitigation Credits from the Banks.

14. Further Acts. Each Party agrees to take such further action and to execute and deliver such further documents as may be necessary to carry out the purposes of this Agreement.

15. Remedies for Breach. The Parties agree that the remedies provided for in this section are the sole remedies available to the Parties for any breach by the other Party:

(a) If Seller provides Mitigation Credits pursuant to this Agreement, and if Buyer fails to complete this purchase pursuant to the terms of the Agreement, then Seller may:



(i) maintain the Mitigation Credits for Buyer's account.

(ii) sell the Mitigation Credits to a third party using reasonable commercial means, measures and efforts to determine the price ("Cover Price") and may bring an action against Buyer for the difference between the Mitigation Credits Purchase Price and the Cover Price.

(iii) give notice to Buyer that Seller is terminating this Agreement and that Seller is keeping the deposit as Liquidated Damages. IF BUYER FAILS TO COMPLETE THE PURCHASE PROVIDED FOR IN THIS AGREEMENT BY REASON OF THE DEFAULT OF BUYER AS STATED IN SECTION 1(a), SELLER SHALL BE RELEASED FROM SELLER'S OBLIGATION TO SELL THE MITIGATION CREDITS TO BUYER AND SELLER MAY PROCEED AGAINST BUYER UPON ANY CLAIM OR REMEDY THAT SELLER MAY HAVE PURSUANT TO THIS AGREEMENT; PROVIDED, HOWEVER, THAT, BY INITIALING THIS SECTION 15(a)(iv), BUYER AND SELLER AGREE THAT IN EVENT OF DEFAULT BY BUYER AS STATED IN SECTION 1(a), (A) IT WOULD BE IMPRACTICAL OR EXTREMELY DIFFICULT TO FIX ACTUAL DAMAGES; (B) AN AMOUNT EQUAL TO THE DEPOSIT MADE BY BUYER PURSUANT TO SECTION 4(a) OF THIS AGREEMENT SHALL CONSTITUTE LIQUIDATED DAMAGES PAYABLE TO SELLER; (C) THE PAYMENT OF THE LIQUIDATED DAMAGES TO SELLER SHALL CONSTITUTE THE EXCLUSIVE REMEDY OF SELLER; (D) SELLER MAY RETAIN THE BUYER'S DEPOSIT AS IDENTIFIED IN SECTION 4(a) AS LIQUIDATED DAMAGES; AND (E) PAYMENT OF THOSE SUMS TO SELLER AS LIQUIDATED DAMAGES IS NOT INTENDED AS A FORFEITURE OR PENALTY WITHIN THE MEANING OF CALIFORNIA CIVIL CODE SECTIONS 3275 OR 3369, BUT INSTEAD, IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO SELLER PURSUANT TO SECTIONS 1671, 1676, AND 1677 OF THE CALIFORNIA CIVIL CODE.

 /Seller____/Buyer

(b) If Seller is in breach of this Agreement, then Buyer may bring an action for specific performance;

16. Entire Agreement. This Agreement contains the entire understanding between Seller and Buyer and constitutes the sole and only agreement between Seller and Buyer concerning the subject matter hereof or the rights, duties, and obligations of Seller and Buyer in connection herewith. Any agreements or representations between Seller and Buyer prior to the date of this Agreement regarding the sale of Mitigation Credits to Buyer by Seller and concerning the subject matter of this Agreement that are not expressly set forth in the Agreement are null and void. Should any part, term or provision of this Agreement be declared or be determined by any court to be illegal or invalid for any reason, the validity of the remaining parts, terms and provisions shall not be affected thereby and said illegal or invalid part, term or provision shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement. The language of this Agreement shall be construed as a whole, according to its fair meaning and intent, and not strictly for or against any Party hereto, regardless of who drafted or was principally responsible for drafting this Agreement or any

 /Seller____/Buyer

specific terms or conditions thereof. This Agreement shall be deemed to have been drafted by all Parties hereto, and no Party shall urge otherwise.

17. **Amendments.** No amendment, modification, addendum, or revision of this Agreement shall be valid unless it is in writing and signed by both the Buyer and Seller.

18. **Waivers.** No waiver by a Party of any provision of this Agreement shall be considered a waiver of any other provision or any subsequent breach of the same or any other provision, including the time for performance of any such provision. The exercise by a Party of any remedy provided in this Agreement or at law shall not prevent the exercise by that Party of any other remedy provided in this Agreement or at law.

19. **Time Is of the Essence.** Time is of the essence with respect to the provisions of this Agreement. This provision shall be interpreted to its strictest sense, with any failure to perform any requirement set forth herein on or before the date upon which performance is due, even if performance is late by only a single day, resulting in the relief upon default set forth above without regard to the relative hardship to Buyer and Seller.

20. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.

21. **Forum.** The Parties agree that this Agreement is to be performed in whole or in part in Sonoma County and therefore the Parties agree that any action at law or equity shall be filed in the Superior Court for the County of Sonoma.

22. **Counterparts; Facsimile Signatures.** This Agreement may be executed in two or more counterparts and via facsimile transmission with original signatures to follow, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument. The Parties agree that faxed signatures may be used to expedite the transaction contemplated by this agreement. Each Party intends to be bound by its faxed signature and each is aware that the other will rely on the faxed signature, and each acknowledges such reliance and waives any defenses to the enforcement of the documents effecting the transaction contemplated by this Agreement based on a faxed signature.

23. **Notices.** All notices, requests, demands, or other communications under this Agreement shall be in writing. Notice shall be sufficiently given for all purposes in any of the following ways:

(a) **Personal Delivery.** When personally delivered to the recipient, notice is effective upon delivery.

(b) **United States Mail.** When mailed with postage prepaid, notice is effective five (5) calendar days after mailing.

(c) **Overnight Delivery.** When delivered by a national overnight delivery service, charges prepaid or charged to the sender's account, notice is effective on delivery, if delivery is confirmed by the delivery service, otherwise two (2) business days after it is logged into the tracking system of the delivery service.



(d) Facsimile Transmission. When sent by facsimile ("fax") to the last fax telephone number of the recipient known to the Party giving notice, notice given in this manner is effective on receipt, provided that a duplicate copy of the notice is promptly sent by mail or by overnight delivery. Any notice given by fax shall be deemed received on the next business day if it is received after 5:00p.m. (recipient's time) or on a non-business day.

(e) Addresses and Fax Telephone Numbers. Addresses and fax telephone numbers for purpose of giving notice are as set forth below. Any Party may change its address or fax number by notifying the other Parties of the change in any manner permitted by this Agreement. Notice to a Party's attorney constitutes notice to that Party.

Seller: TRI Development Services, LLC
336 Bon Air Center, # 387
Greenbrae, CA 94904
Attention: Harvey O. Rich, Managing Member
Telephone (415) 472-1086

Buyer: City of Rohnert Park
130 Avram Avenue
Rohnert Park, CA 94928
Attention: City Manager's Office
Telephone: 707-588-2226
Facsimile: 707-588-2263

Escrow Chicago Title Company
591 Watt Avenue
Sacramento, CA 95864
Attention: Lynette Rhodes, Escrow Officer
Telephone: (916) 480-6295
Facsimile: (916) 480-0932

24. Survival. All representations and warranties by the Parties contained in this Agreement or made in writing pursuant to this Agreement are intended to and shall remain true and correct as of the time of Closing, shall be deemed to be material, and shall survive the Closing Date for a period of one (1) year following the Closing Date. All statements contained in any certificate or other instrument delivered at any time by or on behalf of Seller in conjunction with the transaction contemplated hereby shall constitute representations and warranties hereunder. All obligations of Seller and Buyer stated in this Agreement shall survive the Closing Date.

25. Attorney's Fees. In the event that any legal dispute arises under this Agreement the prevailing Party shall be entitled to recover as an element of its costs of suit, and not as damages, its actual attorney's fees and costs (including expert witness fees) from the other Party. The "prevailing Party" shall be the Party who is entitled to recover its costs of suit, whether or not suit proceeds to final judgment. A Party not entitled to recover its costs shall not recover attorney fees. No sum for attorney's fees shall be included in calculating the amount of a judgment for purposes of deciding whether a Party is entitled to its costs or attorney's fees.

26. Review by Counsel. Each Party acknowledges that the Party has been represented (or has had the opportunity to be represented) in the review and signing of this Agreement by independent legal counsel selected of that Party's free will.

27. Escrow. Within two (2) business days after the complete execution and delivery of this Agreement by Buyer and Seller, Seller shall deliver a fully executed copy of this Agreement to Escrow Company. This Agreement shall constitute the joint escrow instructions of Buyer and Seller to Escrow Company and upon the opening of escrow, Escrow Company is authorized to act in accordance with the terms of this Agreement. Upon Escrow Company's request, the Parties shall execute such additional and supplementary escrow instructions as may be appropriate or required by Escrow Company to enable Escrow Company to comply with the terms of this Agreement.

[SIGNATURES FOLLOW ON THE NEXT PAGE]

IN WITNESS WHEREOF, Buyer and Seller have executed this Agreement as of the Effective Date.

SELLER

TRI Development Services, LLC
A California Limited Liability Company

Dated: June 3, 2014



By: Harvey O. Rich
Its: Managing Member

BUYER

City of Rohnert Park
A California Municipal Corporation

Dated: June, _____ 2014

Darrin Jenkins, City Manager

ATTEST:

City Clerk

APPROVED AS TO FORM:

Michelle Marchetta Kenyon, City Attorney

Attachments:

Exhibit A – Mitigation Banks Description
Exhibit B – Project Location
Exhibit C – Seller's Proposal
Exhibit D – Bill of Sale
Exhibit E – Payment Receipt

EXHIBIT "A"

**SLIPPERY ROCK CONSERVATION BANK
AGREEMENT**

Sonoma County

SLIPPERY ROCK CONSERVATION BANK AGREEMENT

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SLIPPERY ROCK CONSERVATION BANK

This Conservation Bank Agreement (hereinafter "CBA") regarding the establishment, use, operation and maintenance of the Slippery Rock Conservation Bank (hereinafter "Bank") is made and entered into this ____ day of _____ 2006, by and among Slippery Rock, LLC (Bank Owner(s)), the Sacramento Field Office of the U.S. Fish and Wildlife Service ("USFWS"), and the State of California, Department of Fish and Game (hereinafter "CDFG"). These agencies are referred to jointly as the "Wildlife Agencies," and the Bank Owner and the Wildlife Agencies are hereinafter referred to jointly as the "Parties", with reference to the following:

Section I: Recitals

A. Purpose

The purpose of this CBA is to establish guidelines and responsibilities for the establishment, use, operation and maintenance of the Bank. The Parties have determined the establishment of this Bank will provide compensation, conservation and protection for Covered Species and Covered Habitat Types and any additional species and habitat types the Parties determine will be adequately conserved as a result of implementation of this CBA. Goals and objectives for the Bank are set forth in the Interim Management Plan, Long-term Management Plan ("Management Plan") Exhibit C, and a general baseline description of Bank resources may be found in the Development Plan, Exhibit B.

B. Bank Owner's Performance Under the CBA

The Bank Owner agrees to perform all necessary work, in accordance with the provisions of this CBA, to establish, maintain and protect the Covered Habitat Types and Covered Species as proposed in this CBA, and to the satisfaction of the Wildlife Agencies that the Bank complies in all respects with all conditions contained herein.

C. Authorities and Permits

The Bank is available to be used for off-site compensatory mitigation for unavoidable impacts to Covered Species and Covered Habitat Types as regulated by the following, provided the Bank meets all requirements applicable for mitigation or conservation with respect to a particular project and that mitigation or conservation through use of a bank is authorized by the appropriate authority.

1. Federal: The USFWS has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species pursuant to the provisions of various federal laws including the Endangered Species Act, 16 USC § 661-666c, and the Fish and Wildlife Act of 1956, 16 USC § 742(f) et seq.
 - a. National Environmental Policy Act (42 USC 4321 et seq.);
 - b. Endangered Species Act (ESA) (16 USC 1531 et seq.), particularly including impacts to federally-listed threatened or endangered species under §§7 and 10a

1 impacts to federally-listed threatened or endangered species under §§7 and 10a
2 of the Endangered Species Act (hereinafter "§7" and "§10" respectively) and/or
3 occupied habitat;

4
5 c. Fish and Wildlife Coordination Act (16 USC 661 et seq.);

6
7 d. National Historic Preservation Act (16 USC 470);

8
9 e. Guidance for the Establishment, Use and Operation of Conservation Banks
10 (United States Department of Interior Memorandum, dated May 2, 2003).

11
12 2. State: Under the California Endangered Species Act, California Fish and Game
13 Code § 2050 et seq. ("CESA"), the California Fish and Game Code § 1802, and
14 other State laws, CDFG has jurisdiction over the conservation, protection,
15 restoration, enhancement and management of fish, wildlife, native plants, and
16 habitat necessary for biologically sustainable populations of those species. CDFG is
17 also the manager and trustee of fish and wildlife resources and their habitat pursuant
18 to Fish and Game Code § 1802.

19 a. California Environmental Quality Act (CA Pub. Res. Code § 21000 et seq.
20 regulations for implementation at CA Code of Regulations, Title XIV, Section
1 15000 et seq.), including all regulations promulgated pursuant to that Act ;

22
23 b. California Endangered Species Act (Fish & Game Code § 2050 et seq.);

24
25 c. California Natural Community Conservation Planning Act (Fish & Game Code
26 § 2800 et seq.);

27
28 d. Streambed Alteration Agreements (Fish & Game Code §§ 1600 et seq.);

29
30 e. Official Policy on Conservation Banks, April 7, 1995, by California Resources
31 Agency and California Environmental Protection Agency, jointly;

32
33 f. Mitigation for significant impacts to wetland and wildlife resources under the
34 applicable sections of the California Environmental Quality Act, Public
35 Resources Code Sections 21000 et seq. (hereinafter "CEQA"); and,

36
37 g. The establishment and/or preservation of habitat associated with the Natural
38 Communities Conservation Planning program, Fish and Game Code §2800 et
39 seq. (hereinafter "NCCP").

1 period of the Endowment Fund, the Contingency Security may be released by the
2 Wildlife Agencies according to the Contingency Security Section of this CBA.

- 3
- 4 19. "Long-term Management" means management of the Bank lands pursuant to the
5 Management Plan approved by the Wildlife Agencies, and incorporation of any
6 subsequent amendments or adaptive management related to the Management Plan.
7
- 8 20. "Management Plan" means a specific plan developed for the Bank to ensure that the
9 Bank is managed and maintained, in perpetuity, consistent with the conservation
10 purposes of the Bank. The Management Plan is the document approved by the Wildlife
11 Agencies that governs the maintenance, management, monitoring, and adaptive
12 management and reporting of the special status species habitats and other habitats in
13 perpetuity beyond meeting establishment success criteria, after bank closure and as
14 funded through the management endowment fund.
15
- 16 21. "Management Endowment Fund" or Endowment Fund means an investment fund
17 maintained in trust by the CDFG, or other qualified Wildlife Agency-approved entity.
18 The endowment fund shall be non-wasting and a portion of the interest and earnings on
19 the principal balance (minus inflation and re-investment contingency %) shall be used
20 exclusively as endowment from which the interest earned on the principal balance is to be
21 used exclusively for the management of the Bank lands in accordance with the terms of
22 the CBA and Management Plan. "Non-wasting Endowment" means an endowment fund
23 principal amount that does not decrease in value through expenditure, inflation, or
24 investment strategy.
25
- 26 22. "NCCP" (Natural Community Conservation Plan) is a conservation plan created pursuant
27 to Fish and Game Code, Section 2801, et seq. An NCCP is a plan developed in
28 accordance with the NCCP Act which provides comprehensive management and
29 conservation of multiple wildlife species, and which identifies and provides for the
30 regional or area-wide protection and perpetuation of natural wildlife diversity while
31 allowing compatible and appropriate development and growth.
32
- 33 23. "Phase I Environmental Site Assessment" is an evaluation of the environmental
34 conditions of the property performed as outlined by the American Society of Testing and
35 Materials (ASTM) 1527 "Standard Practice for Environmental Site Assessments: Phase I
36 Environmental Assessment Process."
37
- 38 24. "Bank Property" or "Property" means Bank Owner's real property on which a Bank may
39 be established by this CBA, Conservation Easements will be recorded, and protection
40 and management will occur in perpetuity.
41
- 42 25. "Property Assessment" means a written evaluation and maps depicting the number of
43 acres on the Bank Property that Bank Owner intends to convey for conservation purposes
44 in accordance with California Civil Code Section 815 and this CBA, and which describes
45 any portion of the Bank Property subject to any recorded or unrecorded rights of way,
46 easements, liens or other encumbrances that may prevent establishment of a Conservation

- 1 Easement on that portion of the Property for conservation purposes in accordance with
2 California Civil Code Section 815 and this CBA, and which shall be attached hereto in
3 Exhibit D.
4
- 5 26. "Property Assessment Acknowledgement" means a Property Assessment that is signed
6 and dated by the Bank Owner, a copy to be attached hereto as Exhibit D.
7
- 8 27. "Remediation" means corrective measures taken to ameliorate injury, impact to, or lack
9 of success in accordance with the Interim Management Plan, Management Plan,
10 Conservation Easement or any other portion of this CBA.
11
- 12 28. "Service Area" means the geographic area(s) within which impacts that occur may be
13 mitigated or compensated through the sale or use of Credits in accordance with this CBA.
14
- 15 29. "USFWS" means the United States Fish and Wildlife Service, an agency of the United
16 States Department of Interior.
17
- 18 30. "Wildlife Agencies" means the USFWS and CDFG.
19
20

21 **Section III. Stipulations**

22 A. Baseline Condition

23 Whereas, the Bank Property is currently described in the Management Plan (Exhibit C)
24 and Development Plan (Exhibit B).
25

26 B. Disclaimer

27 Whereas, this CBA does not in any manner limit the statutory authorities and
28 responsibilities of the signatory parties, but is, instead, an implementation of such
29 statutory authorities and responsibilities.
30

31 C. Exhibits

32 Whereas, the following Exhibits, and all subsequent revisions and addenda to the
33 Exhibits hereto, are attachments incorporated into this CBA:
34

35 Tab

- 36
- 37 1. "Index to Exhibits
 - 38 2. "Exhibit A" – Bank Location, Legal Description of the Parcels, Geographic
39 Service Area
 - 40 3. "Exhibit B" – Development Plan
 - 41 4. "Exhibit C" – Interim Monitoring and Management Plan, Bank Closure Plan,
42 Management Plan

- 1 5. "Exhibit D" – Real Estate Records and Assurances: Letter of Intent to Grant
- 2 Fee Title, Preliminary Title Report, Legal Description, Parcel Map, Draft
- 3 Conservation Easement, Pacific Gas and Electric Company Easement
- 4 6. "Exhibit E" – Financial Assurances and Processes: Contingency Security and
- 5 Management Endowment
- 6 7. "Exhibit F" – Table of Credits and Calculations: California Tiger Salamander
- 7 Credits
- 8 8. "Exhibit G" – Phase-1 Environmental Assessment
- 9 9. "Exhibit H" – Agreement To Purchase Tiger Salamander Habitat Credits,
- 10 Mitigation Payment Transmittal Form, Agreement For Sale Of California
- 11 Tiger Salamander Mitigation Credits
- 12 10. "Exhibit I" – Results For Two-Year Survey for Special-Status Plant Species
- 13 11. "Exhibit J" -- Evaluation of Cultural and Historic Resource Significance

14
15 NOW, THEREFORE, in consideration of the forgoing Recitals and Stipulations and other good
16 and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the
17 Parties agree to the following:

18
19 **Section IV: Bank Evaluation and Acceptance**

20 Representatives of the Wildlife Agencies have inspected and generally evaluated the
21 Property's conservation and protection of Covered Species and Covered Habitat Types for the
22 purpose of determining its biological functions and values in connection with the sale of Credits.
23 As a result of benefits accruing to biological resources, upon the establishment of the Bank for
24 conservation purposes, the Wildlife Agencies acknowledge and agree that the Bank Property
25 possesses biological functions and values sufficient for the issuance of the Credits as
26 acknowledged in this CBA.

27
28 Notwithstanding anything to the contrary in this CBA, in the event that the Bank Property
29 is evaluated and the Wildlife Agencies reasonably determine that portions of the Bank Property
30 have been damaged subsequent to the establishment date of this CBA and: (1) the effect of such
31 damage has been to materially impair the habitat values on such damaged Bank Property; and (2)
32 Bank Owner has not reasonably restored habitat value to such damaged Bank Property or
33 provided the Wildlife Agencies with reasonable evidence that habitat value will be restored, then
34 the Wildlife Agencies may, at their discretion, either reduce the number of Credits allocated to
35 the Bank in proportion to the damaged area or, if the Wildlife Agencies determine that habitat
36 values on the Bank Property have been so impaired as to render the Bank Property unsuitable for
37 use as a Bank, the Wildlife Agencies may terminate this CBA.

38
39 Subsequent Phases

40 Any proposals for subsequent Phase(s) of the Bank must be reviewed and approved by
41 the Wildlife Agencies prior to establishment of that Phase. Each subsequent Phase(s) shall

1 conform to this CBA and shall at a minimum include the documents listed in Appendix 1 of this
2 CBA. The Bank Owner shall submit a written request for approval of each subsequent Phase
3 and all relevant documents. Upon written approval from each member of the Wildlife Agencies,
4 the Bank Owner may then implement all approved Phases. Subsequent Phases may simply
5 require amendment of the Interim Plan, Management Plan and other CBA Exhibits. Subsequent
6 phases need to comply with Wildlife Agencies' content requirements at the time subsequent
7 phases are proposed.
8

9 Bank Owner's Performance Under the CBA

10 The Bank Owner agrees to perform all necessary work, in accordance with the provisions
11 of this CBA, to protect special status species habitats, as proposed in Exhibit B, until it is
12 demonstrated to the satisfaction of the Wildlife Agencies that the Bank complies in all respects
13 with all conditions contained herein. Bank Owner agrees to be responsible for all costs
14 associated with the establishment of the Bank, including but not limited to remediation,
15 maintenance, management, monitoring, and reporting, until one year after the Management
16 Endowment Fund is fully funded and interim management obligations are met.
17

18 **Section V: Bank Establishment**

19 Signature of the CBA will begin when the Exhibits and their associated supporting
20 documents have been filed with, reviewed by, and approved in the form attached hereto by the
21 Wildlife Agencies. Required documents for review and Bank Establishment shall include and
22 adhere to those Exhibits listed in Section III and attached to this CBA. The Bank will be
23 considered established and credit sales may begin only upon the following:

24 A. The CBA is signed by all Parties ("Bank Establishment Date"),

25 B. All of the requirements of the Bank Establishment Section of this CBA have been met,
26 and

27 C. The Conservation Easement has been recorded. Without limiting the rights of approval
28 reserved to the Wildlife Agencies, the Wildlife Agencies require all monetary encumbrances
29 (such as, but not necessarily limited to, deeds of trust and mechanic's liens) to be removed from
30 the title to the Property. If a monetary encumbrance cannot be removed, the Wildlife agencies
31 may require the holder of the encumbrance to execute and deliver a written agreement
32 satisfactory to each of CDFG and USFWS, subordinating the encumbrance(s) to the
33 Conservation Easement.
34

35 **Section VI: Financial Assurances**

36 A. Contingency Security

37 The Bank Owner shall furnish the CDFG or other entity approved by the Wildlife
38 Agencies, with a "Contingency Security" in the form of a letter-of-credit or cash in an
39 amount equal to 1 year of interim maintenance, management, monitoring and reporting
40 obligations as described in the Interim Management Plan. A copy of the assurance
41 instrument shall be provided to each Wildlife Agency by the Bank Owner. The
42 Contingency Security shall be funded no later than concurrent with the initial sale of
43 Credits at the Bank. The purpose of the Contingency Security is to ensure the

1 implementation of maintenance, management and monitoring activities in the event the
2 Bank Owner is non-compliant or unable to carry out their obligations. Obligations
3 covered by this Contingency Security include maintenance, management, monitoring and
4 reporting obligations under this CBA during the Interim Management Period (until a fully
5 funded Management Endowment has generated interest for one year), including, without
6 limitation, its obligation to cure its defaults and deficiencies under this CBA.

7 **B. Endowment Fund**

8 1. The Endowment Fund shall be funded by the Bank Owner through Endowment
9 Deposits in amounts according to the analysis and schedule described in Exhibit E.
10 Concurrent with the sale of the first Credit, Bank Owner shall begin deposits into the
11 Endowment Fund. Prior to the first deposit by Bank Owner, CDFG shall establish a
12 dedicated interest bearing account for the purpose of holding endowment deposits
13 ("Endowment Deposits"), the aggregate of all deposits shall be called the
14 "Endowment Fund".

15
16 2. For any year the Endowment Fund is not fully funded, the total Endowment and
17 Deposits shall be adjusted annually, beginning on January 1, 2007, and upon each
18 one-year anniversary thereafter (each such date, beginning January 1, 2007, is
19 referred to hereinafter as an "Adjustment Date"), by a percentage equal to the
20 percentage increase, if any, in the Consumer Price Index (CPI) for All Urban
21 Consumers (Base Years 1982-1984 = 100) for California, calculated by the CA
22 Department of Finance using a formula developed by the CA Dept. of Industrial
23 Relations (DIR) which is published most immediately preceding the Adjustment
24 Date, as compared to the CPI published most immediately preceding the date of this
25 CBA (the "CPI Adjustment").

26 3. Bank Owner shall use the form provided in Exhibit H in order to notify each
27 member of the Wildlife Agencies of each Endowment Deposit made, within 30 days
28 of such deposit.
29

30 **Section VII. Credit Release Schedule For Covered Species and Covered Habitat Types**

31 Credits for Covered Species and Covered Habitat Types shall be determined as described
32 in this CBA, and Exhibit F. Credits have been assigned to the Bank based upon credit
33 methodologies developed by the Wildlife Agencies.

34 Upon submittal of all appropriate documentation by the Bank Owner, and subsequent
35 approval by the Wildlife Agencies, it is agreed that Credits for Covered Species and
36 Covered Habitat Types will be released by the Wildlife Agencies in accordance with the
37 Credits Table, Exhibit F.
38
39

40 **Section VIII: Operation of the Bank**

1
2 **A. Service Area**

- 1 1. The Bank is established to provide mitigation to compensate for unavoidable
2 impacts to threatened, endangered and sensitive species habitat within the Service
3 Area of the Bank, as described and shown in Exhibit A. Decisions authorizing use
4 of Credits from the Bank for project compensation will be made by the appropriate
5 authority on a case-by-case basis in accordance with applicable requirements. In
6 general, it is agreed that use of Credits from the Bank will be authorized whenever
7 the appropriate authority determines: (i) that the particular project requiring
8 compensation/mitigation may purchase Bank Credits; and, (ii) the Bank has
9 available for sale Credits of the type required for the particular project, and in an
10 appropriate location, and (iii) the Bank Owner is in compliance with this CBA.
11 Covered Habitat Types and Covered Species Credits at the Bank are intended to
12 provide "in-kind" compensation/mitigation.
- 13 2. The Bank shall not be used to mitigate impacts to any state or federal listed or
14 special status species which do not occur and/or whose habitat does not occur on the
15 Property.

16
17 B. Establishment and Use of Credits

- 18 1. Upon Bank Establishment, the Bank shall have an initial total of Credits to sell or
19 convey as specified in Exhibit F. In no case shall the acres sold or expended exceed
20 the total number of Credits which have been allocated to the Bank for each Covered
21 Habitat or Covered Species or as released by written verification by the Wildlife
22 Agencies prior to the proposed date of sale. All Credit releases subsequent to this
23 CBA shall be substantiated in writing signed by the Wildlife Agencies, with a copy
24 sent to all Parties, prior to any Credit sales.
- 25 2. Subject to Bank Owner's obligations under this CBA, Bank Owner shall have the
26 exclusive right to determine the price for any and all Credits offered for sale or use
27 at this Bank.
- 28 3. Upon determination by the Wildlife Agencies that the purchase of Credits is an
29 appropriate form of compensation, a project applicant will be referred by the
30 appropriate Wildlife Agencies to acceptable Wildlife Agency-approved Banks so
31 that the applicant may determine where they would like to purchase credits, if they
32 should decide to do so. Bank Owner shall follow the agency-specific methodology
33 for selling credits as detailed in Exhibit F.
- 34 4. In the event that the Wildlife Agencies reasonably determine that portions of the
35 Bank have been damaged subsequent to the Bank Establishment Date, and the effect
36 of such activity has been to materially impair habitat values on such damaged
37 Property; and Bank Owner has not reasonably restored habitat value to such
38 damaged area or provided the Wildlife Agencies with reasonable evidence that
39 habitat value will be restored, then the Wildlife Agencies may, at their discretion,
40 suspend Credit sales and/or reduce the number of Credits allocated to the Bank in
41 proportion to such damaged area.
- 42 5. If any member(s) of the Wildlife Agencies approve(s) an NCCP and/or HCP
43 covering all or any part of the Service Area, and that plan uses habitat categories

1 different from those set forth herein, then, at the request of the Bank Owner, the
2 remaining credits may be reallocated by the Wildlife Agencies in accordance with
3 such different habitat categories.

- 4 6. All Credit sales shall be reported to the Wildlife Agencies in accordance with
5 reporting requirements described in the Reporting Section of this CBA.
- 6 7. Credit modifications due to Bank expansion, restoration or other proposed means,
7 shall be amended to this CBA according to the Modification Section.
- 8 8. Credit sales agreements are contracts strictly between the Bank Owner and project
9 applicant detailing the sale and purchase of Bank Credits by a specific project
10 applicant.
- 11 9. Nothing contained in this Agreement shall be deemed to limit the Wildlife
12 Agencies' respective jurisdiction over impacts and applicable mitigation of
13 endangered, threatened, and sensitive species and biological resources, or to restrict
14 the ability of the CDFG and USFWS to fully discharge their respective
15 responsibilities under applicable law, including, without limitation, CESA and ESA,
16 respectively; provided, however, that subject to Section IV, the Wildlife Agencies
17 will not object to the use of Credits as set forth in Exhibit F. When discharging their
18 responsibilities, the Wildlife Agencies will utilize common conservation biology
19 principles to compare the species and habitat aspects of a development site within
20 the Service Area with those at a Conservation Bank. Considered factors may include,
21 but are not limited to, project habitat composition, project size and shape, habitat use
22 patterns by the species, core habitat areas, linkages, adjacent land uses, relationship
23 to other conserved areas, relationship to HCPs and NCCPs and other regional
24 conservation strategies, and other factors. If a development site is determined to
25 provide specific and important species needs or habitat characteristics that are not
26 provided at a bank site, the Wildlife Agencies may, through their approval or
27 oversight role, at their discretion, not authorize or recommend certain projects to
28 mitigate at the Bank.

29 C. Interim Monitoring and Management and Long-term Management 30

31 1. Interim Monitoring and Management

32 Interim management, maintenance, monitoring and reporting activities shall be
33 implemented according to the Interim Monitoring and Management Plan in Exhibit
34 C until the Endowment Fund is fully funded for one year.

35 2. Long-Term Management

- 36 a. Once the Endowment Fund is fully funded for one year, long-term maintenance
37 and management of the Bank shall be implemented as per Exhibit C. Bank
38 Owner, or its successors or assigns, shall be obligated to oversee, manage,
39 monitor and maintain the Bank lands in perpetuity to preserve its habitat and
40 conservation values in accordance with the terms of this CBA, the Conservation
41 Easement and the prescriptions identified in the Management Plan (Exhibit C) as
42 funded through the Management Endowment Fund and in accordance with the
43 Financial Operations Section of this CBA.

- 1 b. The Management Plan prepared for the Bank shall provide the basis for the
2 implementation of the specific management measures and tasks and identify the
3 priority of the various measures and tasks.
- 4 c. Bank Owner or its successors or assigns and the Wildlife Agencies shall meet
5 and confer from time to time, upon the request of any one of them, to revise the
6 Management Plan to better preserve the habitat and conservation values of the
7 Property ("Adaptive Management").
- 8 d. Any amendments to the Management Plan which cost more than the anticipated
9 costs estimated for the endowment will only be carried out when there is
10 sufficient funding available in the endowment or if the Bank Owner agrees to
11 implement the management at their own expense.
- 12 e. If the interest earnings on the Endowment Fund are not sufficient to meet
13 projections after the Endowment Fund is fully funded, the Bank Owner shall
14 continue to implement management based on prioritized management goals.

15
16 3. Long-term Monitoring

17 Long-term monitoring shall be performed as described within the Management
18 Plan. The Management Plan shall include specific measures for regular and
19 ongoing perpetual monitoring of the Bank and the biological resources to be
20 conducted by a monitoring entity or entities approved by the Wildlife Agencies.
21 Bank Owner shall be responsible for reporting on monitoring results to the Wildlife
22 Agencies per the Reporting Section of this CBA.

23 4. Conservation Easement Monitoring

24 Bank Owner's easement monitoring obligations shall include using reasonable
25 efforts to prevent third party use of the Property in a manner not permitted under
26 this CBA or the Conservation Easement. Easement monitoring shall be conducted
27 by the holder of the Conservation Easement or another Wildlife Agency-approved
28 designee, and reports submitted as per the Reporting Section of this CBA.

29
30 D. Bank Closure

- 31 1. The Bank shall be deemed closed upon the following:
- 32 a. Either:
- 33 1) The last authorized Bank Credit has been sold or transferred; or
- 34 2) The Bank Owner requests bank closure by written notice to the Wildlife
35 Agencies and the Wildlife Agencies provide written approval of the closure;
36 and
- 37 b. All financial responsibilities have been met, including full funding of the long-
38 term endowment fund, and
- 39 c. Identification of Bank Owner, intended successor or assigns for long-term
40 management and identification of grantee or fee title owner.

- 1 2. Deviation from the approved Bank Closure Plan is subject to review and written
2 approval by the Wildlife Agencies.

3
4 E. Financial Operations

5 1. Contingency Security

6 The Contingency Security shall be funded per the method and schedule described in
7 the Interim Monitoring and Management Plan in Exhibit C.

- 8 a. Provided the Bank meets all obligations as described under Contingency
9 Security Section in Exhibit E, the Contingency Security shall be released one
10 year after the Endowment Fund has been fully funded and successful
11 implementation of the Interim Management Plan. If the Endowment Fund has
12 not been fully funded once the obligations secured by the Contingency Security
13 have been met, the Contingency Security shall be used to supplement the
14 funding of the Management Endowment Fund.

15
16 2. Management Endowment Fund

17 a. Endowment Fund Trustee

- 18 1) CDFG shall hold the Management Endowment Fund principal and interest
19 monies as required by existing law in the Special Deposit Fund or
20 subsequent State authorized trustee fund, which consists of moneys that are
21 paid into it in trust pursuant to law, and is appropriated to fulfill the purposes
22 for which payments into it are made. CDFG shall manage these monies as
23 required by Fish and Game Code Section 13014 and Section 16370 of the
24 Government Code and use the interest monies to fund long-term
25 management, enhancement, monitoring, and enforcement activities on
26 habitat lands in a manner consistent with the terms of this CBA, including
27 the Management Plan and any amendments to the Management Plan
28 approved by CDFG and USFWS.

- 29 b. A portion of the interest and earnings from the Management Endowment Fund
30 shall be used for the long-term management, monitoring, maintenance and
31 reporting of the Bank and Bank related activities. The Management Endowment
32 Fund shall be determined through an economic analysis as provided in Exhibit C
33 of this CBA. During the Interim Management Period, the Bank Owner shall
34 make minimum total annual deposits equal to 10% of the total endowment
35 principal amount required, as annually adjusted for inflation, to fully fund the
36 Management Endowment Fund.

- 37 c. Interest earnings on the Endowment Funds available from the Endowment
38 Account, beyond those necessary to provide for Endowment Principal growth
39 commensurate with inflation and a re-investment contingency, may be used by
40 the Bank Owner for management of the Property in accordance with the
41 Management Plan and following the general estimate of the Financial
42 Assurances Analysis and Schedule.

- 1 d. If there is not sufficient funding available from the Endowment Fund interest
2 and earnings or if long-term Property management expenses exceed those
3 estimated in the Financial Analysis and Schedule, Bank Owner shall consult
4 with the Wildlife Agencies to identify the most effective means to implement the
5 management measures and tasks with the resources available. Any endowment
6 fund revenues (including earnings and interest) as adjusted for inflation that may
7 be determined to be generated in excess of the anticipated annual expenditures
8 shall be retained to address unexpected expenses, including but not limited to,
9 adaptive management needs and other unexpected events.

10
11 **Section IX: Reporting**

12 **A. Annual Report**

13 Bank Owner shall submit an annual report to each Wildlife Agency by July 31 of each
14 year, with the first report due after the first full growing season is complete after re-
15 vegetation. All elements required to be in the annual reports are described in the
16 Management Plan, and include but are not limited to management and maintenance tasks,
17 a schedule of monitoring dates for all activities and for monitoring the easement,
18 financial accounting and credit sales accounting.

19
20 **1. Interim Management Monitoring and Maintenance**

21 This information shall include monitoring and maintenance requirements, the
22 schedule for, and progress towards meeting, interim management goals,
23 deficiencies, recommendations, and proposed actions.

24
25 **2. Long-term Bank Management, Maintenance and Monitoring**

26 The reporting requirements for long-term management, maintenance and monitoring
27 are fully described in the Management Plan

28 **a. Financial Accounting**

29 Bank Owner shall submit to each Wildlife Agency a copy of any and all
30 payment transmittals for contingency security. Bank Owner shall maintain an
31 accounting of all funds deposited into the Endowment Fund.

32 Bank Owner shall maintain an accounting of all funds received and expended
33 for the management of the Bank Property using accepted accounting methods.
34 An itemized account of the management activities conducted in accordance with
35 the Management Plan shall be submitted to the Wildlife Agencies annually
36 according to the schedule provided in Exhibit C, including the following:

- 37 1) The time period covered, i.e. the dates "from" and "to";
38 2) All endowment disbursements received for bank activities (from interest and
39 earnings on Endowment Funds, or any other source to fund Bank activities);
40 3) A description of the activities completed, e.g. management and monitoring
41 tasks, operations, and equipment. The accounting must be itemized using

the categories and following the format of the Annual Funding Schedule, PAR or equivalent economic analysis and the Management Plan;

- 4) The rate charged for the activity;
- 5) Number of hours worked; and,
- 6) The total amount expended.

Bank Owner's shall have this accounting audited annually and the accounting and the results of the audits shall be made available to the public.

b. Credit Sales Accounting

Bank Owner is responsible for reporting, separately and in writing, to the Wildlife Agencies any additional crediting awarded to the Bank after completion of the CBA. The Bank Owner shall include a full ledger in the annual reports to the Wildlife Agencies showing all transactions at the Bank to date. Bank Owner shall be responsible for entering all required Bank information into electronic databases and tracking systems approved by the Wildlife Agencies and as amended to this agreement.

c. Credit Sales Reporting

Upon the sale or debit of each and every Credit, regardless of the agency initiating the credit sale or debit, or under whose jurisdiction the purchase is made, notification in the form of a credit sale invoice or receipt using the templates in Exhibit I, and a full and complete "Credits Table" shall be sent to the Wildlife Agencies within 10 days of each credit sale or debit.

Section X: Responsibilities of the Bank Owner

A. Bank Owner hereby agrees and covenants for so long as this CBA is in effect, that:

1. Bank Owner shall not discharge or release to the Property, or permit others to discharge or release to the Property, any material or substance deemed hazardous or toxic under any federal, state, or local environmental law;
2. Bank Owner shall not create any encumbrance to the title of the Property other than those set forth in Exhibit D and accounted for in the Property Assessment in Exhibit D, and Bank Owner shall not execute, renew, or extend any lien, license, or similar interest without the prior written consent of the Wildlife Agencies;
3. Bank Owner shall not construct any structure or engage in any activity or use of the Property, including mineral exploration, excavating, draining, dredging, or other alteration of the Property, that is not consistent with and in accordance with this CBA, any Conservation Easement, and the Management Plan, without the prior written consent of the Wildlife Agencies;
4. Bank Owner shall ensure that the Property is maintained to ensure its suitability as a Bank consistent and in accordance with this CBA, any Conservation Easement, and the Management Plan; and

- 1 5. The Bank Owner shall allow, or otherwise provide for, access to the site by all
2 signatory Parties, as necessary, for the purpose of inspection and compliance
3 monitoring consistent with the terms and conditions of this CBA. Inspecting Parties
4 shall provide reasonable notice to the Bank Owner during normal business hours
5 and not less than 24 hours in advance, prior to inspection of the Bank.

6
7 **Section XI: Responsibilities of the Wildlife Agencies**

8
9 A. Wildlife Agency Oversight

10 The Wildlife Agencies agree to provide appropriate oversight in carrying out provisions
11 of this CBA.

12
13 B. Wildlife Agency Review

14 The Wildlife Agencies agree to review and provide comments on all required documents
15 for the Bank, as identified or incorporated by reference into this CBA, in a timely
16 manner. Comments on the annual reports will be reviewed within 60 calendar days from
17 the date of complete submittal, except for good cause.

18
19 C. Evaluation of Bank Progress

20 The Wildlife Agencies agree to review and confirm reports on evaluation of success
21 criteria prior to certifying credits in the Bank, within 90 calendar days from the date of
22 complete submittal, except for good cause.

23
24 D. Compliance Inspections

25 The Wildlife Agencies will conduct compliance inspections as deemed necessary:

- 26 1. To verify the credits then currently available in the Bank; and/or
27 2. Recommend corrective measures as needed; or
28 3. For any other purpose as necessary to assure compliance with this CBA. These
29 inspections shall continue until the effort to restore and enhance the Bank site, as
30 described in this CBA, has been determined to be successful or otherwise ceases,
31 and as necessary thereafter, as determined by the Wildlife Agencies .

32
33 **Section XII: Other Provisions**

34
35 A. Force Majeure

- 36 1. The Bank Owner shall be responsible to maintain and remediate the Bank except
37 upon Catastrophic Events, events of Force Majeure or unlawful acts as defined
38 below.

2. Definitions

- a. Catastrophic Event shall mean an event, such as a spill of hazardous or toxic substance, the impact of a vehicle or falling aircraft, or a fire, which has a material and detrimental impact on the quality of native vegetation, soils, or wildlife of the mitigation bank and over which the Bank Owner has no control.
- b. Force Majeure shall mean war, insurrection, riot or other civil disorders, flood, earthquake, fire, governmental restriction or the failure by authority, or any injunction, which has a material and detrimental impact on the Bank; provided, however, that (i) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has broad regional impacts and is not endemic to the Bank and its immediate locale; (ii) a flood shall be considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where "flood" refers to a runoff event; (iii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank is greater than that presently projected from an earthquake with a return period of 475 years; (iv) disease shall constitute an event of Force Majeure only if such event has broad regional impact and is not endemic to the Bank and its immediate locale; and (v) governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction shall not constitute an event of Force Majeure unless there is no other feasible means of remediation.
- c. Unlawful Act shall mean the unlawful act of another and shall include an event or series of events, such as the intentional dumping within the Bank, or any connected watercourse, of a hazardous toxic substance, or the discharge of such a substance by any person or entity other than the Bank Owner in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the water quality, native vegetation, soils or wildlife of the Bank.
3. Notwithstanding the foregoing, subject to the availability of funds in the Contingency Security and/or the Management Endowment Fund, Bank Owner shall not be relieved from the obligation to maintain and remediate the Bank by reason of any such discharge which occurs as a result of normal non-catastrophic activities. In case of occurrence of a Catastrophic Event, events of Force Majeure, or unlawful acts, Bank Owner, and the Wildlife Agencies shall meet to discuss the future course of action and management of the Bank and shall continue their obligation to the extent practicable using the remaining funds in the accounts.
4. The Bank Owner shall bear the burden of demonstrating:
- a. That the non-compliance was caused by circumstances beyond the control of the Bank Owner and/or any entity controlled by the Bank Owner, including its contractors and consultants;

b. That neither the Bank Owner nor any entity controlled by the Bank Owner, including its contractors and consultants, could have reasonably foreseen and prevented such noncompliance; and

c. The period of noncompliance was caused by such circumstances.

5. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this CBA, or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this CBA or extensions for the performance of the requirements of this CBA.

6. Compliance with any requirement of this CBA by itself shall not constitute compliance with any other requirement. An extension of one compliance date based on a particular incident shall not necessarily result in the extension of a subsequent compliance date or dates. The Bank Owner must make an individual showing of proof regarding the cause of each delayed step or requirement for which an extension is sought.

B. Dispute Resolution

1. Disagreements Regarding Interpretation of this CBA Between the Wildlife Agencies and Bank Owner

In the event of any disagreement or dispute between one or more of the Wildlife Agencies, and the Bank Owner, regarding the interpretation and applications of this CBA, the appropriate Wildlife Agency and the Bank Owner shall meet within 30 days of a written request therefore made by a Party, and shall attempt to resolve such disagreement or dispute. In the event that the Wildlife Agencies and Bank Owner have not resolved the disagreement or dispute within 60 days of the date of the notice first requesting a meeting, then either party may elect to resolve the disputed disagreement by the appropriate remedies below.

2. Disputes Between Members of the Wildlife Agencies:

Resolution of disputes about application of this CBA as between the members of the Wildlife Agencies shall be in accordance with those authorities and guidance documents listed in the Recitals Section of this CBA and shall in such instance where authorities and guidance are unclear involve consensus.

3. Disputes Between the Wildlife Agencies and Bank Owner:

a. The Wildlife Agencies and the Bank Owner shall each have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this CBA and to seek remedies for any breach or violation thereof. Nothing in this CBA shall be deemed to limit the jurisdiction of the individual members of the Wildlife Agencies over endangered, threatened,

1 and sensitive species and biological resources, or to restrict the ability of the
2 Wildlife Agencies to seek civil or criminal penalties or otherwise fully discharge
3 their responsibilities under applicable law.

4 b. The Wildlife Agencies and the Bank Owner agree to work together in good faith
5 to resolve disputes concerning this CBA, but any party may seek any available
6 remedy. Unless an aggrieved party has initiated administrative proceedings or
7 suit in federal court, the Parties may elect to employ an informal dispute
8 resolution process whereby:

- 9 1) The aggrieved party shall notify any other Parties of the provision that may
10 have been violated, the basis for contending that a violation has occurred,
11 and the remedies it proposes to correct the alleged violation;
- 12 2) The party alleged to be in violation shall have thirty (30) days or such other
13 time as may be agreed upon to respond and, during this time, may seek
14 clarification of the initial notice and shall use its best efforts to provide any
15 responsive information;
- 16 3) Within thirty (30) days after such response was provided or due, Party
17 representatives shall confer and negotiate in good faith toward a resolution
18 satisfactory to each Party, or shall establish a specific process and timetable
19 to seek such solution.

20
21 C. Transfer

- 22 1. Once the Bank has been established, no voluntary conveyance, assignment or
23 transfer of any portion of, or interest in, the Bank lands shall be made without the
24 prior written concurrence by the Wildlife Agencies, which concurrence shall be
25 subject to the requirement that the successor or assign assume all of the Sponsor's
26 obligations pursuant to this CBA. If such transfer is made without the prior written
27 concurrence of the Wildlife Agencies, such transfer may, at the Wildlife Agency's
28 discretion, result in the termination of this CBA.
- 29 2. If any of the required financial obligations under this CBA are not completely
30 funded at the time of transfer, either the current Bank Owner, or the replacement
31 Bank Owner, successors or assigns, shall deposit or provide security in a form
32 approved by the Wildlife Agencies for any funds necessary to completely fund these
33 accounts prior to the transfer of the Bank. Prior to transfer, the Bank Owner shall
34 provide to each Wildlife Agency a signed commitment from the replacement Bank
35 Owner stating that the replacement Bank Owner accepts all of the responsibilities of
36 the CBA. Transfer or assignment of this CBA to a party approved in writing by the
37 Wildlife Agencies shall also be subject to the requirement that any funds in a
38 Contingency Fund or Management Endowment Fund shall continue to be expended
39 in a manner consistent and in accordance with this CBA, the Conservation
40 Easement, and the Management Plan.
41

1 D. Execution, Modification, and Termination of the CBA

2 1. Execution

3 The Conservation Easement shall be recorded, and a copy of the recorded easement
4 shall be submitted to the Wildlife Agencies for inclusion in the CBA. The Bank
5 Owner must sign the CBA, prior to the signature and execution of the CBA by the
6 Wildlife Agencies. Subsequently, the CBA shall be executed by each signatory
7 agency to said document. The CBA will become valid and enforceable as between
8 each signatory agency and the Bank Owner after the conservation easement has
9 been recorded, and the Wildlife Agencies have signed this CBA (Bank
10 Establishment Date).

11
12 2. Modification

13 This CBA may be amended or modified with the written approval of each
14 Wildlife Agency and the Bank Owner.

15
16 3. Termination of this CBA

17 a. Termination of CBA Prior to Credit Sales

18 Prior to any Credit sales, the Bank Owner may withdraw the entire Bank Site
19 and terminate this CBA at any time provided that:

- 20 1) No Credits developed in the Bank have been sold or conveyed in order to
21 compensate for the loss of Covered Habitat Types, Covered Species or other
22 special status species habitats; and
23 2) The habitat values of any habitat existing on the Bank site prior to the
24 initiation of efforts to restore and enhance the site shall be preserved in a
25 condition at least equal to that prior to initiation of Bank establishment
26 efforts.
27 3) Bank Owner shall have the right to convey or transfer the Property prior to
28 establishment of the Bank in accordance with this CBA and subject to
29 written concurrence by the Wildlife Agencies. If such transfer is made
30 without the prior written concurrence of the Wildlife Agencies, such transfer
31 shall result in the termination of this CBA.

32
33 b. Termination of CBA after Credit Sales Begin. Termination of the CBA may
34 only happen consistent with the following terms:

- 35 1) The CDFG and USFWS may terminate their participation in this CBA on the
36 condition that each of the following has occurred:
37 a) Bank Owner has breached one or more Owner Covenants or terms and
38 conditions set forth herein;
39 b) Bank Owner has received written notice of such breach and order to
40 cease Credit sales from the CDFG and USFWS; and

- 1 c) Bank Owner has failed to cure such breach within thirty (30) days after
2 such notice; provided that in the event such breach is curable in the
3 judgment of the CDFG and USFWS, but cannot reasonably be cured
4 within such thirty (30) day period, the CDFG and USFWS shall not
5 terminate this CBA so long as Bank Owner has commenced the cure of
6 such breach and is diligently pursuing such cure to completion. Nothing
7 in this paragraph is intended or shall be construed to limit the legal or
8 equitable remedies (including specific performance and injunctive relief)
9 at law available to the CDFG and USFWS in the event of a threatened or
10 actual breach of this CBA.
- 11 d) Bank Owner is in default under this CBA as described above, and fails to
12 cure such breach, and Bank Owner fails to designate a replacement in
13 accordance with Section VI, F above within 180 days of Bank Owner's
14 receipt of written notice from the Wildlife Agencies that the Bank Owner
15 is in default of its obligations under the CBA. If Bank Owner fails to
16 designate a replacement, then such public or private land or resource
17 management organization acceptable to and as directed by the Wildlife
18 Agencies may enter onto the Property in order to fulfill the purposes of
19 the Bank as described in the CBA.
- 20 e) Bank Owner provides the remainder of any endowment fund deposits
21 necessary to fully fund the endowment to carry out the long-term
22 management of the Property.
- 23 2) Upon written concurrence of the Wildlife Agencies, this CBA may be
24 terminated following the sale or conveyance of all available Credits and
25 satisfaction of all substantive terms and conditions of this CBA other than
26 ongoing management obligations such as maintenance and monitoring, as set
27 forth in the Management Plan, provided that the Endowment Fund shall
28 continue to be expended in a manner consistent and in accordance with the
29 conservation purposes for which it was established pursuant to this CBA and
30 California Civil Code Section 815, any Conservation Easement, and the
31 Management Plan, and any Conservation Easement shall continue in
32 perpetuity as a covenant running with the land.
- 33 3) If requested, the Wildlife Agency proposing to terminate participation in the
34 CBA shall agree to meet with the other Wildlife Agency members to discuss
35 the reason(s) for such termination, prior to the termination taking effect.
36 Notice of a request for such meeting shall be made by the requesting
37 Wildlife Agency member(s) not later than 15 calendar days from receipt of
38 the notice of termination.
- 39 c. Termination by one of the Wildlife Agencies of its involvement in this CBA
40 shall not terminate or affect the relationship between the remaining Wildlife
41 Agency, toward each other or the Bank Owner, under this CBA.
- 42 d. As regards the termination of the CBA in its entirety, the terms and provisions of
3 this CBA will be valid:

- 1) For two years from the last date of execution of the CBA by the Parties in the event that no credits are sold from the bank; or
- 2) Until the Bank Closure Plan has been implemented to the satisfaction of the Wildlife Agencies and each provides notice, in writing, to the Bank Owner that this instrument may be terminated.

E. Specific Language of Bank Enabling Instrument Shall be Controlling

To the extent that specific language in this document changes, modifies or deletes terms and conditions contained in those documents that are incorporated into the CBA by reference, the specific language within the CBA shall be controlling.

F. Entire Agreement

This CBA, and all exhibits, addenda, schedules and agreements referred to in this CBA, in addition to any other elements of a CBA required under the Authorities in the Recitals Section not heretofore provided by the Bank Owner, constitute the final, complete and exclusive statement of the terms of the agreement between and among the Wildlife Agencies and the Bank Owner pertaining to the Bank and supersedes all prior and contemporaneous understandings or agreements of the Parties. No other agreement, statement, or promise made by the Parties, or to any employee, officer, or agent of the Parties, which is not contained in this CBA, shall be binding or valid. 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 Party unless the same has been embodied herein.

All Exhibits referred to in this CBA are attached to this CBA and are incorporated herein by reference.

G. Reasonableness, And Good Faith

Except as specifically limited elsewhere in this CBA, whenever this CBA requires Bank Owner or the Wildlife Agencies to give their consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If either the Bank Owner or the Wildlife Agencies disagree with any determination covered by this provision and reasonably requests the reasons for that determination, the determining party shall furnish its reason in writing and in reasonable detail within 30 calendar days following the request.

H. Successors and Assigns

This CBA 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.

Bank Owner may only transfer or assign its rights and obligations under this CBA consistent with applicable Federal and State regulations, this CBA, and with the prior written approval of the Wildlife Agencies, which approval shall not be unreasonably withheld.

1
2 I. Partial Invalidity

3 If a court of competent jurisdiction holds any clause of this CBA to be invalid or
4 unenforceable, in whole or in part, for any reason, the validity and enforceability of the
5 remaining clauses, or portions of them, shall not be affected unless an essential purpose
6 of this CBA would be defeated by loss of the invalid or unenforceable provision.

7
8 J. Notices

9 Any notice, demand, approval, request, or other communication permitted or required by
10 this CBA shall be in writing and delivered personally, sent by facsimile, or sent by
11 recognized overnight delivery service, to the persons in the positions set forth below or
12 shall be deemed given five (5) days after deposit in the United States mail, certified and
13 postage prepaid, return receipt requested, and addressed as follows or at such other
14 address as any of the Parties may from time to time specify in writing:

15 Notices by the Bank Owner to the Wildlife Agencies shall be made to each of the
16 Wildlife Agencies. Such notice shall not be effective until deemed received by all
17 members of the Wildlife Agencies.

18 Addresses for purposes of giving notice are set forth below. Either Party may change its
19 address or telephone or fax number by giving the other party notice of the change in any
20 manner permitted by this Section.

1 Bank Owner:

22 Mr. Chris Peterson
23 Slippery Rock, L.L.C.
24 P.O. Box 2873
25 Santa Rosa, CA 95401
26 Telephone: (707) 303-3156
27 Fax: (707) 569-3044

28
29 Wildlife Agencies:

30 U.S. Fish and Wildlife Service
31 Sacramento Field Office
32 2800 Cottage Way, Room W-2605
33 Sacramento, CA 95825-1846
34 Attn: Field Supervisor
35 Telephone: 916-414-6600
36 Fax: 916-414-6713

37
38 California Department of Fish and Game
39 Central Coast Region
40 Post Office Box 47

1 Yountville, CA 94599
2 Attn: Regional Manager
3 Telephone: 707-944-5500
4 Fax: 707-944-5563
5

6 California Department of Fish and Game
7 Habitat Conservation Planning Branch
8 1416 Ninth Street, 12th Floor
9 Sacramento, CA 95814
10 Attn: Branch Chief
11 Telephone: 916-653-4875
12 Fax: 916-653-2588
13
14

15 K. Restriction on Benefit

16 No member of or delegate to the United States Congress or Federal Resident
17 Commissioner shall be entitled to any share or part of this CBA, or to any benefit that
18 may arise from it.
19

20 L. Counterparts

21 This CBA may be executed in any number of duplicate and counterpart originals. A
22 complete original of this CBA containing original signatures of each of the Parties shall
23 be circulated to each of the Parties by Bank Owner and a complete original of this CBA
24 shall be maintained in the official records of each of the Parties hereto.
25

26 M. No Third Party Beneficiaries

27 This CBA shall not create any third party beneficiary hereto, nor shall it authorize anyone
28 not a party hereto to maintain a suit for personal injuries, property damages or
29 enforcement pursuant to the provisions of this CBA. The duties, obligations and
30 responsibilities of the Parties to this CBA with respect to third Parties shall remain as
31 otherwise provided by law in the event this CBA had never been executed.
32

33 N. Attorney Fees

34 If any action at law or equity, including any action for declaratory relief, is brought to
35 enforce or interpret the provisions of this CBA, each Party to the litigation shall bear its
36 own attorneys fees and costs.
37

38 O. Availability of Funds

39 The duty of the CDFG and USFWS to carry out their respective obligations under this
40 CBA shall be subject to the availability of state and federal appropriated funds and is

1 subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341. Nothing in this
2 CBA may be construed to require the obligation, appropriation, or expenditure of any
3 money from the United States Treasury or California State Treasury.

4
5 P. No Partnerships

6 This CBA shall not make or be deemed to make any Party to this CBA an agent for or the
7 partner of any other Party.

8
9 Q. Governing Law

10 This CBA shall be governed by and construed in accordance with the internal laws of the
11 State of California, the Federal Endangered Species Act and other applicable Federal
12 laws and regulations.

13
14 R. Continued Authority of Resource Agencies

15 Nothing contained in this CBA shall be deemed to limit the Resources Agencies'
16 respective jurisdiction under applicable law, including, without limitation, CESA, ESA,
17 respectively, to regulate the taking of endangered or threatened species.

18
19 S. Elected Officials

20 No member of or delegate to the California State Legislature, the United States Congress,
21 or any county or city government shall be entitled to any share or part of this CBA, or to any
22 benefit that may arise from it.

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Chris Peterson, Slippery Rock, L.L.C.

Date _____

Field Supervisor
Sacramento Fish and Wildlife Office
U.S. Fish and Wildlife Service

7/25/06

Date _____

Regional Manager
Central Coast Region
California Department of Fish and Game

Date _____

MITIGATION BANK ENABLING INSTRUMENT CARINALLI TODD ROAD MITIGATION BANK

This Bank Enabling Instrument (hereinafter "BEI") regarding the establishment, use, operation and maintenance of the Carinalli Todd Road Mitigation Bank (hereinafter "Bank") is made and entered into by and among the following:

Carinalli Nature Preserve, L.L.C. (hereinafter, "Sponsor")
San Francisco District of the U.S. Army Corps of Engineers (USACE)
Region 9 of the U.S. Environmental Protection Agency (USEPA)
Sacramento Field Office of the U.S. Fish and Wildlife Service (USFWS)
California Department of Fish and Game (CDFG), Bay Delta Region

with reference to the following:

Section 1: Preamble

A. Purpose: The purpose of this BEI is to establish guidelines and responsibilities for the implementation, use, operation, and maintenance of the Bank. The Bank is available to be used for off-site compensatory mitigation for any of the following:

- unavoidable impacts to waters of the United States, including wetlands, which result from activities authorized under Section 404 of the Clean Water Act (hereinafter "Section 404");

- impacts to federally-listed threatened or endangered species under Section 7 and 10a of the Endangered Species Act (hereinafter "Section 7" and "Section 10a" respectively) and/or occupied habitat;

- impacts to State of California-listed threatened or endangered species under the California Endangered Species Act, Fish and Game Code Section 2050 et seq. (hereinafter "CESA");

- mitigation for significant impacts to wetland and wildlife resources under the applicable sections of the California Environmental Quality Act, Public Resources Code Section 21000 et seq. (hereinafter "CEQA");

- unavoidable impacts to waters of the State of California which result from activities authorized under Section 1600 et seq. of the California Fish and Game Code (hereinafter "Section 1600");

- the establishment and/or preservation of habitat associated with the Natural Communities Conservation Planning program, Fish and Game Code Section 2800 et seq. (hereinafter "NCCP");

provided the Bank meets all requirements applicable for mitigation with respect to a particular project and that mitigation through use of a bank is authorized by the appropriate authority.

B. Location and Ownership of Parcel: The Bank site is owned by Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD and is located at 4301 Todd Road in Sebastopol, CA 95472. The mailing address is 520 Mendocino Avenue, Suite 250, Santa Rosa, CA 95401. The site is located on Todd Road southwest of the Todd Road-Llano Road intersection. The Property size is approximately 86.00 acres, 66.55 acres of which are proposed as the Bank.

The assessor's parcel numbers, size, and ownership of the seven parcels are shown in the following table.

A.P. No.	Area (ac)	Owner
060-070-023 (part)	20.95	Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD
060-070-024	7.28	Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD
060-070-025	4.97	Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD
063-180-034	12.28	Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD
063-180-037	15.90	Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD
063-180-033 (part)	4.69	Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD
063-180-036 (part)	0.48	Mr. Clement C. Carinalli and Charles P. Carinalli Trustees UTD
Total	66.55	

C. Project Description: Whereas, under this banking instrument, the Sponsor may preserve, restore, enhance and/or establish, and then maintain the following types of habitat in accordance with the Bank Development Plan:

1. Corps Jurisdictional Waters of the United States (including wetlands);
2. Non-Corps jurisdictional Oak/Riparian Habitat;
3. Habitat(s) of Endangered and Threatened Species listed under the federal ESA; and
4. Habitat(s) of Endangered and Threatened Species listed under the California CESA.

The habitats to be protected at the Bank are described in Exhibit B and Exhibit G.

Section II: Stipulations

A. Baseline Condition: Whereas, the Bank area is currently as described in the Bank Development Plan (Exhibit B).

B. Establishment and Use of Credits: Whereas, it is anticipated that, in accordance with the provisions of this banking instrument at Section (V)(D-G), *infra*, credits will be available to be used as off-site mitigation in accordance with all applicable requirements.

C. Composition of the Mitigation Bank Review Team (MBRT): Whereas, the members of the Mitigation Banking Review Team (MBRT) consist of the following:

U.S. Army Corps of Engineers, San Francisco District (USACE), Chair;

U.S. Fish and Wildlife Service, Sacramento Field Office, (USFWS);

California Department of Fish and Game (CDFG); and

U.S. Environmental Protection Agency, Region 9 (USEPA).

D. Disclaimer: Whereas, this BEI does not in any manner limit the statutory authorities and responsibilities of the signatory parties, but is, instead, an implementation of such statutory authorities and responsibilities.

E. Exhibits: Whereas, the following Exhibits are incorporated as appendices to this BEI:

1. "Exhibit A", Bank Location, parcel map, and legal description of the parcel
2. "Exhibit B", Bank Development Plan, service area, and all subsequent revisions and addenda thereto, as identified by the MBRT;
3. "Exhibit C", Conservation Easement;
4. "Exhibit D", Financial Assurances;
5. "Exhibit E", Summary of Habitat Acreages;
6. "Exhibit F", Bank Closure Plan;
7. "Exhibit G", Table of Credits;
8. "Exhibit H", Title Report;
9. "Exhibit I", Level 1 Environmental Contaminants Survey;
10. "Exhibit J", Credit Sale Confirmation/Agreement, Mitigation Payment Transmittal Form, Instructions for Invoicing, Payee Data Record Form, Payee Notification Form.
11. "Exhibit K", Cultural Resources Survey Report;
12. "Exhibit L", Map of pre-existing jurisdictional Wetlands and Other Waters;
13. "Exhibit M", Management Plan;
14. "Exhibit N", Results of Two-year Survey for Special-status Plant Species, Carinalli Todd Road Mitigation Bank, Santa Rosa, California.

F. Definitions:

"Bank Closure Plan" is designed to ensure that the Bank Site is managed and maintained, in

perpetuity, consistent with the conservation purposes of the Project.

"BEI" means this Mitigation Bank Enabling Instrument.

"Bank Development Plan" means the document that describes the proposed construction and wetland and/or special status species habitat establishment activities including creation, restoration, enhancement, habitat establishment period, and the success criteria to obtain successful habitat establishment.

"CDFG" means the California Department of Fish and Game, a subdivision of the California Resources Agency.

"CEQA" means the California Environmental Quality Act (California Public Resources Code Sections 21000 et seq.; guidelines for implementation at California Public Resources Code Sections 15000 et seq.), including all regulations promulgated pursuant to that Act.

"CESA" means the California Endangered Species Act (California Fish and Game Code Sections 2050 et seq.), including all regulations promulgated pursuant to that Act.

"Conservation Easement" means a recorded conservation easement established to conserve biological resources, and which imposes certain habitat management obligations for the Mitigation Bank lands.

"Contingency Security" is an amount that the Sponsor shall fund to assure performance of Sponsor's maintenance and remediation obligations to meet success criteria under this BEI during the interim management period (prior to the time that the Management Endowment is fully funded for one year), including, without limitation, its obligation to cure its defaults and deficiencies under this BEI.

"Credit" is a unit of measure representing the accrual or attainment of wetland/riparian functions and/or special status species habitat at a mitigation bank; the measure of function is typically indexed to the number of wetland acres and/or the number of special status species habitat acres restored, enhanced, created, or preserved. One credit here is equivalent to one acre.

"Endowment Deposit" means the sum of money per Credit deposited into the Management Endowment Fund for purposes of perpetually endowing the long-term management of the Mitigation Bank lands for the benefit of biological resources.

"ESA" means the federal Endangered Species Act (16 U.S.C. Section 1531 et seq.), including all regulations promulgated pursuant to that Act.

"Habitat Conservation Plan" ("HCP") means a conservation plan prepared pursuant to Section 10(a)(2)(A) of the ESA (16 U.S.C. Section 1539(a)(2)(A)).

"Management Endowment Fund" means a fund maintained by the CDFG as a non-wasting endowment to be used exclusively for the management of the Mitigation Bank lands in accordance with the Management Plan, the Bank Closure Plan, and the Conservation Easement.

"Management Plan" means a specific, long-term plan developed for the Bank to ensure that the Bank is managed and maintained, in perpetuity, consistent with the conservation purposes of the Bank. The Management Plan is the document approved by the MBRT that governs the maintenance, management, monitoring, and reporting of the wetlands and special status species habitats in perpetuity after bank closure and as funded through the management endowment fund. For special status species there will be an adaptive management component.

"Mitigation Bank Review Team" (MBRT) means an interagency group of Federal, State and /or local agency representatives which oversee the establishment, use and operation of a mitigation bank.

"Performance Security" means an account funded by the Bank Sponsor in the amount of 100% of the cost of wetland construction and enhancement. The Security shall be in the form of a letter-of-credit, an escrow account, or cash. The cost of construction shall be the amount set forth in the construction contract entered into by Sponsor. The Performance Security assures performance of Sponsor's obligation to construct the wetlands in accordance with this BEI.

"Service Area" means the geographic area within which impacts that occur may be mitigated through use of credits at the Carinalli Todd Road Mitigation Bank consistent with the BEI.

"USACE" mean the United States Army Corps of Engineers, an agency of the Department of the Army.

"USFWS" means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.

Section III: Authorities

A. Federal:

1. Clean Water Act (33 USC 1251 et seq.);
2. Rivers and Harbors Act (33 USC 403);
3. National Environmental Policy Act (42 USC 4321 et seq.);
4. Endangered Species Act (16 USC 1531 et seq.);
5. Fish and Wildlife Coordination Act (16 USC 661 et seq.);
6. National Historic Preservation Act (16 USC 470);
7. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 CFR Parts 320, 330);
8. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 30);

9. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404(b)(1) Guidelines;
10. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60 FR 58605 et seq., hereinafter "Guidelines"); and
11. Guidance for the Establishment, Use and Operation of Conservation Banks (United States Department of Interior Memorandum, dated May 2, 2003).
12. San Francisco District Public Notice 02-03, dated March 5, 2003, titled "Mitigation Bank Policy on the Santa Rosa Plain"

B. State:

1. California Environmental Quality Act (Pub. Res. Code Section 21000 et seq.);
2. California Endangered Species Act (Fish & Game Code Section 2050 et seq.);
3. California Natural Community Conservation Planning Act (Fish & Game Code Section 2800 et seq.);
4. Streambed Alteration Agreements (Fish & Game Code Section 1600 et seq.);
5. Sacramento-San Joaquin Valley Mitigation Bank Act of 1993 (Fish & Game Code Section 1775 et seq.); and
6. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly.

NOW, THEREFORE, the parties agree to the following:

Section IV: Establishment of the Bank

A. Sponsor's Performance Under the BEI: The Sponsor agrees to perform all necessary work, in accordance with the provisions of this BEI, to establish the wetland and/or special status species habitats, as proposed in Exhibit B, until it is demonstrated to the satisfaction of the MBRT that the Bank complies in all respects with all conditions contained herein. Sponsor agrees to be responsible for all costs associated with the establishment of the Bank, including but not limited to construction, remediation, maintenance, management, monitoring, and reporting, until one year after the Management Endowment Fund is fully funded.

B. Environmental Documentation and Permitting: To the extent not already obtained, the Sponsor will be responsible for obtaining all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank, which may consist of any or all of the following permits, clearances, or approvals:

1. CEQA compliance;
2. Section 401 Clean Water Act Water Quality Certification or Waiver;
3. Section 404 Clean Water Act Fill Discharge Permit;
4. Streambed Alteration Agreement;
5. Federal Endangered Species Act (Section 7 or Section 10) compliance; and
6. California Endangered Species Act (Fish and Game Code Section 2050 et seq.) compliance.

C. Modification of the Bank Development Plan: Creation and enhancement of habitat on the Bank site will be performed as described in Exhibit B, and the credits will become available in accordance with the schedule specified in Section V(F), of the BEI. Any subsequent Phase of the bank must be approved by the MBRT prior to establishment of that Phase. In the event that the Sponsor determines that modifications must be made in the Bank Development Plan to ensure successful establishment of habitat within the Bank, or in order to comply with specific permits or other authorizations needed to establish the Bank, the Sponsor shall submit a written request for such modification to the MBRT. The Sponsor shall then implement all modifications approved by the MBRT. Documentation of implemented modifications shall be made consistent with Section IV(F), *infra*.

Additional future phases (i.e., new parcels of land) may be added or incorporated into the Carinalli Todd Road Mitigation Bank via the review and approval by the MBRT of an "Amendment" describing said new parcels and any associated particulars as apply to said new parcels.

D. Financial Assurance Requirements: The Sponsor agrees to provide the following financial assurances over the life of the Bank and at Bank Closure, for the periods noted:

1. The first 15% of Bank credits shall be released upon the signing of the BEI and submission of an executed Conservation Easement. Prior to the transfer of any Bank credits, Sponsor shall furnish CDFG with a "Performance Security" in the amount of 100% of the cost of construction. The Security shall be in the form of a letter-of-credit, cash, or some other form acceptable to CDFG. The cost of construction shall be the amount set forth in the construction contract entered into by Sponsor. The Performance Security shall assure performance of Sponsor's obligation to construct the wetland and special status species habitats in accordance with this BEI. If all specified grading and related implementation work is completed prior to the release and sale of credits, no Performance Security is required. The Performance Security shall be released upon Sponsor's completion of such construction, as evidenced by:
 - (a) The submission of the as-built drawings, per Section IV(F); and
 - (b) Verified by a subsequent on-site inspection involving some, or all, of the

members of the MBRT.

2. During the period of Bank operation, the Sponsor shall furnish the "Contingency Security" to CDFG.
 - (a) The Contingency Security shall assure performance of Sponsor's maintenance and remediation obligations under this BEI during the interim management period (prior to the time that the Management Endowment is fully funded for one year), including, without limitation, its obligation to cure its defaults and deficiencies under this BEI. The amount of the Contingency Security shall be equal to the amount indicated in Exhibit D and shall be fully funded prior to the release of the second group (35%) of wetland creation credits.
 - (b) Provided the Bank meets the success criteria specified in the Bank Development Plan, the Contingency Security shall be released upon the later of: (i) the fifth anniversary of the date of this BEI; or (ii) the third anniversary of the remedial action most recently taken in order to meet the success criteria set forth in the Bank Development Plan; or (iii) after the Management Endowment Fund has been fully endowed for one year.
3. During the period the Bank is open, the Sponsor shall make deposits into a non-wasting endowment fund held by the CDFG in order to assure long-term maintenance of the Bank property in perpetuity (Management Endowment Fund). The total amount of endowment to be funded is shown in Exhibit D. For any year the endowment is not fully funded, this total endowment shown in Exhibit D shall be adjusted annually, beginning on January 1, 2006, and upon each one-year anniversary thereafter (each such date, beginning January 1, 2006, is referred to hereinafter as an "Adjustment Date"), by a percentage equal to the percentage increase, if any, in the Consumer Price Index (CPI) for All Urban Consumers (Base Years 1982-1984 = 100) for California, calculated by the CA Department of Finance using a formula developed by the CA Dept. of Industrial Relations (DIR) which is published most immediately preceding the Adjustment Date, as compared to the CPI published most immediately preceding the date of this BEI (the "CPI Adjustment").
 - (a) Endowment funds shall be sent to CDFG on the following schedule:
 - (i) 25% of the total endowment shall be funded prior to release of the second group (35%) of wetland creation credits.
 - (ii) An additional 50% of the total endowment shall be funded prior to release of the third group (20%) of wetland creation credits.
 - (iii) The remaining amount to fund the endowment shall be funded prior to release of the final group of wetland creation credits.
 - (b) Funds deposited in the Endowment Fund shall be held by the CDFG and

expended in accordance with the description in Section VI, G. 3. of this BEI.

E. Legal Assurances: The Bank shall be established upon signature of this BEI.

1. Included in this BEI for the purpose of permanent conservation of the Bank lands and habitats are the following:
 - (a) "Exhibit C", the draft conservation easement to CDFG as Grantee containing provisions that the property be held and managed in perpetuity as natural lands ("Conservation Easement"),
 - (b) "Exhibit H", a preliminary title report and supporting documents.
 - (c) "Exhibit I", a Phase-1 environmental site assessment covering the Bank Site.
2. Upon signing of the BEI by the Sponsor and CDFG, a duly executed and acknowledged Conservation Easement granted to CDFG shall be submitted and shall be recorded as soon as possible by the CDFG. Prior to recording the Conservation Easement a copy of the Title Insurance shall be submitted by the Sponsor to the MBRT for approval. CDFG shall provide all parties with copies of the recorded Conservation Easement as soon as possible after its recording. All parties shall use reasonable efforts to cooperate in the expeditious recordation of the conveyance documents.
3. Sponsor shall pay all fees and recording charges associated with the conveyance of the Conservation Easement.
4. If the land is transferred by the State of California, an MBRT-approved Conservation Easement and/or deed restriction shall be reserved and/or imposed by the CDFG in conjunction with the transfer to ensure the ongoing management of the Bank for conservation purposes in accordance with Section 815 of the California Civil Code.

F. As-Built Drawing: The Sponsor agrees to submit as-built drawings, with accurate maps of the constructed wetlands no later than 90 calendar days following completion of construction. The as-built drawings will describe in detail any deviation from that described in the Bank Development Plan.

Section V: Operation of the Bank

A. Service Area: The Bank is established to provide mitigation to compensate for unavoidable impacts to Waters of the United States, including wetlands, stream bed habitat and endangered species habitat within the Service Area of the Bank, as described and shown at Exhibit B. Decisions authorizing use of credits from the Bank will be made by the appropriate authority on a case-by-case basis in accordance with applicable requirements. In general, it is agreed that use of credits from the Bank will be authorized whenever the appropriate authority

determines: (i) that the particular project requiring mitigation may mitigate through bank credits; and (ii) the Bank has available for sale, mitigation credits of the type required for the particular project.

B. Access to the Bank by the MBRT: The Sponsor will allow, or otherwise provide for, access to the site by all signatory parties, as necessary, for the purpose of inspection and compliance monitoring consistent with the terms and conditions of this banking instrument. Inspecting parties shall provide reasonable notice to the Sponsor, during normal business hours and of not less than 24 hours in advance, prior to inspection of the Bank.

C. Projects Eligible to Use the Bank: Appropriate to its jurisdictional authority, each regulatory and/or resource agency will determine the eligibility of projects to use the Bank on a case-by-case basis. In general, it is agreed that activities falling within a permit under any one or more of the following authorities will typically be eligible to use the Bank, provided that the wetlands, habitats and species at the impact site are comparable to those for which the Bank has been established (wetlands and species at the Bank are intended to provide "in-kind" mitigation):

1. Section 404 of the United States Clean Water Act;
2. Sections 7 and/or 10(a) of the United States Endangered Species Act;
3. Section 1600 of the California Fish and Game Code;
4. Section 2081 of the California Endangered Species Act;
5. Mitigation identified in the County Biological Mitigation Ordinance, and/or other local agency plans, rules, regulations and/or ordinances; and
6. Mitigation under the provisions of an approved plan which is consistent with the Natural Community Conservation Program (California Fish & Game Code Section 2800 et seq.).

D. Credit Value and Assessment Methodology:

Credits are assigned to the Bank for both plant establishment and wetland replacement (creation) purposes (one credit equals one acre, sold in a minimum increment of 0.05 credit).

1. Plant establishment credits are assigned on the basis of specific values associated with the Bank's pre-existing wetlands, as well as the average quality of the wetlands likely to be impacted by purchasers of credits (Exhibit B). The number of Plant Establishment Credits is presented in Exhibit G.
2. Created/restored wetlands will be assessed as described in Exhibit B. The number of Creation Credits is presented in Exhibit G.
3. Endangered, threatened, and other special-status species credits will be measured as described in Exhibit B. The number of endangered, threatened, and other special-status species credits is presented in Exhibit G.

4. The total credit sales must comply with the San Francisco District Public Notice 02-03, dated March 5, 2003, titled "Mitigation Bank Policy on the Santa Rosa Plain".

E. Success Criteria: The success criteria described in Exhibit B will be used to assess project success.

F. Schedule of Wetlands Credit Availability: The Sponsor may sell or convey wetland creation credits identified in Exhibit G and released as follows:

1. 15% of the total credits shall be available upon approval (signing) of this BEI and the submission of an executed Conservation Easement.
2. 35% of the total credits shall be available upon the submission of as-built drawings and recordation of the Conservation Easement.
3. 20% of the total credits shall be available upon demonstration of successful hydrology (Exhibit B) and the recordation of the Conservation Easement.
4. The remaining credits shall be available after three years, attainment of the "Year 3" success criteria, and verification of the "Year 3" wetland delineation. The remaining number of wetland credits shown in Exhibit G may be revised based on the verification of the delineation by the USACE.

G. Schedule of Endangered and Threatened Species Credit Availability: Upon recording of the conservation easement, it is agreed that Endangered, Threatened, and other special-status species credits identified in Exhibit G will become available for sale or conveyance by the Sponsor in accordance with determinations to be made by the USFWS and CDFG on a case-by-case basis.

H. Provisions for Uses of the Mitigation Bank Area: Sponsor agrees and covenants that Sponsor shall comply with the Conservation Easement and shall not:

1. Use or authorize the areas proposed for dedication within the Bank for any purpose that unreasonably interferes with its use as a mitigation bank, or unreasonably interferes with or compromises the ecological functions of the bank site.
2. Erect any permanent structures within or upon the areas proposed for dedication within the Bank unless required or permitted by the approved Management Plan.
3. Construct any structures or engage in any development activities within the Bank other than those specified in the Bank Development Plan. Development activities shall mean only those actions that may change the, biological, hydrological or physical characteristics of the land, but specifically do not include entry upon the land for other purposes, such as investigation, measurement, surveying, or as may be required by law or lawful order.

Section VI: Maintenance and Monitoring of the Bank

A. Maintenance Provisions: The Sponsor agrees to perform all work necessary to maintain the Bank consistent with the Bank Development Plan and the Management Plan. Upon closure of the Bank, the Sponsor shall implement the management actions described and established in the Bank Closure Plan (Exhibit F). The Management Plan has been designed to ensure that the Bank Site is managed and maintained, in perpetuity, consistent with the conservation purposes of the Project. Deviation from the approved Management Plan is subject to review and written approval by the MBRT.

B. Monitoring Provisions: The Sponsor agrees to perform all work necessary to monitor the Bank in accordance with the monitoring procedures set forth in the Bank Development Plan and the Management Plan.

C. Reports: The Sponsor shall submit to the members of the MBRT annual reports describing the conditions of the Bank and relating those conditions to the success criteria in the Bank Development Plan. Long-term reports shall be submitted in perpetuity as required in the Management Plan. All reports are due by July 31.

D. Accounting Procedure: The Sponsor shall within 30 days of credit sales submit a copy of the invoice showing to whom the credits were sold, date of the transaction and the related USACE, CDFG, and/or USFWS action identification numbers to each member of the MBRT each time credits are debited or additional credits are certified. The Sponsor shall submit an annual ledger to the MBRT showing all transactions at the Bank for the previous year and an updated ledger provided with each credit sale.

E. Remediation Plans: In the event the Bank fails to achieve the Success Criteria:

1. If remediation needs are identified by the Sponsor or by the MBRT in writing, the Sponsor shall develop a remediation plan and submit it within 30 days to the MBRT. The remediation plans will include proposed remedial actions and a schedule within which the actions will be implemented. Upon approval of the MBRT, the Sponsor shall then implement the necessary and appropriate remedial actions for the Bank in coordination with, and under the schedule approved by, the MBRT. In the event the Sponsor fails to implement such remedial actions within the schedule approved by the MBRT, the USACE will implement steps in Section VIII, C, 3.
2. If the MBRT determines that the Bank is operating at a credit deficit, the Sponsor shall be notified, whereupon debiting of credits will immediately cease, and the members of the MBRT and the Sponsor, will determine what remedial actions are necessary to correct the situation. If conditions do not change or continue to deteriorate, within two years from the date that the specific remediation actions were first identified in writing to the Sponsor by the USACE, the Contingency Security funds held by CDFG may be utilized to undertake corrective measures.

F. Transfer. Once the Bank has been established the Sponsor shall, at any time, have the right to convey or transfer the BEI and/or Bank Property in accordance with this BEI and subject to written concurrence by the MBRT, which concurrence shall be subject to the requirement that

the successor or assign has the ability to, and agrees to assume all of the Sponsor's obligations pursuant to this BEI. If such transfer is made without the prior written concurrence of the MBRT, such transfer may, at the MBRT's discretion, result in the termination of this BEI according to Section VIII, C.

Prior to transfer, the Sponsor shall provide to each member of the MBRT a signed commitment from the replacement Sponsor stating that the replacement Sponsor accepts all of the responsibilities of the BEI and/or the Bank Property. Transfer or assignment of this BEI to a party approved in writing by the MBRT shall also be subject to the requirement that any funds in a Contingency Fund or Management Endowment Fund shall continue to be expended in a manner consistent and in accordance with this BEI, the Conservation Easement, and the Management Plan, and that the Property shall continue to be protected in accordance with section 815 of the California Civil Code. If any of the required financial obligations under this BEI are not completely funded at the time of transfer, either the current Sponsor, or the replacement Sponsor, successors or assigns, shall deposit or provide security in a form approved by the MBRT for any funds necessary to completely fund these accounts prior to the transfer of the Bank.

G. Long-Term Management, Monitoring and Reporting: Once the short-term success criteria in the Bank Development Plan have been met, the long-term maintenance and care of the Bank shall be assured by the Sponsor or its designees or successors as per Exhibit M ("Management Plan") including long-term management, monitoring, and reporting provisions.

1. The Sponsor hereby agrees to formally and legally dedicate the Bank to long-term wetland conservation, and shall maintain the Bank in perpetuity in accordance with the terms and provisions of the Management Plan (Exhibit M), Bank Closure Plan (Exhibit F), and the Conservation Easement (Exhibit C).
2. CDFG shall hold the endowment principal and interest monies as required by existing law in the Special Deposit Fund, which consists of moneys that are paid into it in trust pursuant to law, and is appropriated to fulfill the purposes for which payments into it are made. CDFG shall manage these monies as required by Fish and Game Code section 13014 and Section 16370 of the Government Code, depositing monies in the Fish and Game Mitigation and Protection Endowment Principal Account of the Special Deposit Fund and using interest monies to fund long-term management, enhancement, monitoring, and enforcement activities on habitat lands in a manner consistent with the terms of this BEI, including the Management Plan (Exhibit M), or any amendments to the Management Plan approved by BEI signatory agencies, or expended as otherwise deemed appropriate by all signatory agencies to this BEI.
3. Beginning one year after full endowment funding, Sponsor's management activities shall be funded from the Endowment Fund. Sponsor shall consult with CDFG on a year to year basis to determine the amount of funding available for management and monitoring activities. Following annual management activities, Sponsor may invoice CDFG for management activities following the invoicing instructions in Exhibit J.

H. Bank Closure: The Bank shall be deemed open on the date that the BEI is fully executed. The Bank shall be deemed closed upon the date that both:

1. All performance criteria in the Bank Development Plan have been met; and
2. Either:
 - (a) The last authorized Bank credit has been transferred and the endowment is fully funded for one year; or
 - (b) The Sponsor sends the MBRT members written notice stating that Sponsor is closing the Bank and the endowment is fully funded for one year.

At this point, the project shall be deemed complete.

Section VII: Responsibilities of the MBRT

A. MBRT Review: The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this banking instrument.

B. MBRT Review: The agencies represented on the MBRT agree to review and provide comments on all project plans, monitoring reports, remediation plans, and necessary permits for the Bank, as identified or incorporated by reference into the BEI, in a timely manner.

C. Evaluation of Bank Progress: The agencies represented on the MBRT agree to review and confirm reports on evaluation of success criteria prior to certifying credits in the Bank, also in a timely manner.

D. Compliance Inspections: The agencies represented on the MBRT shall conduct compliance inspections, as necessary, as determined in coordination with the Sponsor

1. To verify the credits then currently available in the Bank; and/or
2. Recommend corrective measures as needed.

These inspections shall continue until the effort to restore and enhance the Bank site, as described in the Bank Development Plan, has been determined to be completely successful, and as necessary thereafter, as determined by the MBRT in coordination with the Sponsor.

Section VIII: Other Provisions

A. Force Majeure:

1. The Sponsor shall be responsible to maintain and remediate the Bank (any portion of credits sold) except upon Catastrophic Events, events of Force Majeure or unlawful acts as defined below.
2. Definitions.

- (a) "Catastrophic Event" shall mean an event, such as a spill of hazardous or toxic substance, the impact of a vehicle or falling aircraft, or a fire, which has a material and detrimental impact on the quality of native vegetation, soils, or wildlife of the mitigation bank and over which the Property Owner and Sponsor have no control.
 - (b) "Force Majeure" shall mean war, insurrection, riot or other civil disorders, flood, earthquake, fire, governmental restriction or the failure by authority, or any injunction, which has a material and detrimental impact on the Bank; provided, however, that (i) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has broad regional impacts and is not endemic to the Bank and its immediate locale; (ii) a flood shall be considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where "flood" refers to a runoff event; (iii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank is greater than that presently projected from an earthquake with a return period of 475 years; (iv) disease shall constitute an event of Force Majeure only if such event has broad regional impact and is not endemic to the Bank and its immediate locale; and (v) governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction shall not constitute an event of Force Majeure unless there is no other feasible means of remediation.
 - (c) "Unlawful Act" shall mean the unlawful act of another and shall include an event or series of events, such as the intentional dumping within the Bank or tributaries of the creek of a hazardous toxic substance, or the discharge of such a substance by any person or entity other than Property Owner or the Sponsor in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the water quality, native vegetation, soils or wildlife of the Bank.
3. Notwithstanding the foregoing, subject to availability of funds as specified in Section VI, G, Sponsor shall not be relieved from the obligation to maintain and remediate the Bank by reason of any such discharge which occurs as a result of normal non-catastrophic activities. In case of occurrence of a Catastrophic Event, events of Force Majeure, or unlawful acts, Sponsor, and the MBRT shall meet to discuss the future course of action and management of the Bank (areas where credits have been withdrawn) and shall continue their obligation to the extent practicable using the remaining funds in the account.
4. The Sponsor shall bear the burden of demonstrating:
- (a) That the noncompliance was caused by circumstances beyond the control of the Sponsor and/or any entity controlled by the Sponsor, including its

contractors and consultants;

- (c) That neither the Sponsor nor any entity controlled by the Sponsor, including its contractors and consultants, could have reasonably foreseen and prevented such noncompliance; and;
 - (c) The period of noncompliance was caused by such circumstances.
5. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this BEI, or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this BEI or extensions for the performance of the requirements of this BEI.
 6. Compliance with any requirement of this BEI by itself shall not constitute compliance with any other requirement. An extension of one compliance date based on a particular incident shall not necessarily result in the extension of a subsequent compliance date or dates. The Sponsor must make an individual showing of proof regarding the cause of each delayed step or requirement for which an extension is sought.

B. Dispute Resolution:

1. Between Members of the MBRT: Resolution of disputes about application of this banking instrument as between the members of the MBRT shall be in accordance with those stated in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605 et seq.).
2. Between the MBRT and Sponsor: In the event of any disagreement or dispute between one or more members of the MBRT, and the Sponsor regarding the interpretation and application of the provisions of this BEI, the appropriate MBRT member and the Sponsor shall meet within 30 days of a written request therefore made by a party, and shall attempt to resolve such disagreement or dispute. In the event that the MBRT member and Sponsor have not resolved the disagreement or dispute within 60 days of the date of the notice first requesting a meeting, then either party may elect to resolve the dispute or disagreement by the appropriate remedies then available under federal law.

C. Execution, Modification and Termination of the Banking Instrument:

1. Execution

The Conservation Easement shall be recorded as per Section IV, E, and a copy of the recorded easement shall be submitted to the MBRT for inclusion in the BEI as a revised Exhibit C. The Sponsor must sign the BEI, prior to the signature and execution of the BEI by the members of the MBRT. Subsequently, the BEI may be executed in part by each agency that chooses to become signatory to said document. The BEI will become valid and enforceable as between each signatory agency and the Sponsor on the date of that agency's signature.

2. Modification

This banking instrument may be amended or modified with the written approval of each of the MBRT members and the Sponsor.

3. Termination

Terms and provisions of this BEI will be valid until:

- (a) Termination of BEI Prior to Credit Sales. The Sponsor may withdraw the entire Bank Site and terminate this BEI at any time provided that:
 - (i) No mitigation credits developed in the Bank have been sold or conveyed in order to compensate for the loss of wetland or special status species habitats; and
 - (ii) The wetland acreage and habitat values of any wetland habitat existing on the Bank site prior to the initiation of efforts to restore and enhance the site shall be preserved in a condition at least equal to that prior to initiation of Bank establishment efforts.
- (b) Termination of BEI After Credit Sales Begin. As regards individual signatories to the BEI, termination of the BEI may only happen consistent with the following terms:
 - (i) Any of the MBRT members, with the exception of the USACE, CDFG, and USFWS, may terminate their participation upon 30 calendar days' written notification to all signatory parties.
 - (ii) USACE may only terminate their participation on the MBRT upon failure of the Sponsor to perform per the terms of the BEI. Such termination shall occur only after written notice of deficiency and opportunity to correct by the Sponsor, under the terms of the BEI, have failed to produce necessary corrective action on the part of the Sponsor. Subject to the above, USACE may terminate their participation upon 60 calendar days' written notification to all signatory parties.
 - (iii) The CDFG and USFWS may terminate their participation in this BEI on the condition that each of the following has occurred:
 - (a) Sponsor has breached one or more Owner Covenants or terms and conditions set forth herein;
 - (b) Sponsor has received written notice of such breach and order to cease Credit sales from the CDFG and USFWS; and

- (c) Sponsor has failed to cure such breach within thirty (30) days after such notice; provided that in the event such breach is curable in the judgment of the CDFG and USFWS, but cannot reasonably be cured within such thirty (30) day period, the CDFG and USFWS shall not terminate this BEI so long as Sponsor has commenced the cure of such breach and is diligently pursuing such cure to completion. Nothing in this paragraph is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) at law available to the CDFG and USFWS in the event of a threatened or actual breach of this BEI.

CDFG and FWS can
terminate participa-
tion in BEI if →

↓
could mean they
would not approve
credit sales or
could not approve
credit sales.

- (d) Sponsor is in default under this BEI as described above, and fails to cure such breach, and Sponsor fails to designate a replacement. Sponsor in accordance with Section VI, F above within 180 days of Sponsor's receipt of written notice from any member of the MBRT that the Sponsor is in default of its obligations under the BEI. If Sponsor fails to designate a replacement Sponsor, then such public or private land or resource management organization acceptable to and as directed by the MBRT may enter onto the Bank property in order to fulfill the purposes of the Bank as described in the BEI.

- (e) Sponsor provides the remainder of any Endowment Fund deposits necessary to fully fund the Endowment to carry out the long-term management of the Bank property.

- (iv) Upon written concurrence of the MBRT, this BEI may be terminated following the sale or conveyance of all available Credits and satisfaction of all substantive terms and conditions of this BEI other than ongoing management obligations such as maintenance and monitoring, as set forth in the Management Plan, provided that the Endowment Fund shall continue to be expended in a manner consistent and in accordance with the conservation purposes for which it was established pursuant to this BEI and California Civil Code Section 815, any Conservation Easement, and the Management Plan, and any Conservation Easement shall continue in perpetuity as a covenant running with the land.

- (v) If requested, the member(s) of the MBRT proposing to terminate participation in the MBRT agree to meet with the other MBRT members to discuss the reason(s) for such termination, prior to the termination taking effect. Notice of a request for such meeting shall be made by the requesting MBRT member(s) not later than

15 calendar days from receipt of the notice of termination.

- (c) Termination by one member of the MBRT of its involvement in this BEI shall not terminate or affect the relationship between the remaining members of the MBRT, toward each other or the Sponsor, under this BEI.
- (d) As regards the termination of the BEI in its entirety, the terms and provisions of this BEI will be valid:
 - (i) For two years from the last date of execution of the BEI by the MBRT members in the event that no credits are sold from the bank; or
 - (ii) Until the Bank Closure Plan has been implemented to the satisfaction of the MBRT and the USACE provides notice, in writing, to the Sponsor that this instrument may be terminated.

D. Specific Language of Bank Enabling Instrument Shall be Controlling: To the extent that specific language in this document changes, modifies or deletes terms and conditions contained in those documents that are incorporated into the BEI by reference, the specific language within the BEI shall be controlling.

E. Entire BEI: This BEI, and all exhibits, addenda, schedules and agreements referred to in this BEI, in addition to any other elements of a BEI required under the Federal Guidelines not heretofore provided by the Sponsor, constitute the final, complete and exclusive statement of the terms of the agreement between and among the MBRT and the Sponsor pertaining to the Bank and supersedes all prior and contemporaneous understandings or agreements of the parties. 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 party unless the same has been embodied herein.

F. Reasonableness, And Good Faith: Except as specifically limited elsewhere in this BEI, whenever this BEI requires Sponsor or the MBRT to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If either the Sponsor, or the MBRT disagrees with any determination covered by this provision and reasonably requests the reasons for that determination, the determining party shall furnish its reason in writing and in reasonable detail within 15 business days following the request.

G. Partial Invalidity: If a court of competent jurisdiction holds any clause of this BEI to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining clauses, or portions of them, shall not be affected unless an essential purpose of this BEI would be defeated by loss of the invalid or unenforceable provision.

H. Notices: All notices (including requests, demands, approvals or other communications) under this BEI shall be in writing. Notices by the Sponsor to the MBRT shall be made to all of the members of the MBRT. Such notice shall not be effective until deemed received by all members of the MBRT.

Addresses for purposes of giving notice are set forth below. Either party may change its address, telephone number, or fax number by giving the other party notice of the change in any manner permitted by this section.

MBRT:

- (1) U.S. Army Corps of Engineers
San Francisco District
Attn: Chief, Regulatory Branch, Rm. 813
333 Market Street
San Francisco, CA 94105
Telephone: (415) 977-8439 Fax: (415) 977-8343

- (2) California Department of Fish and Game
Bay Delta Region
P.O. Box 47
Yountville, CA 94599
Telephone: 707-944-5500 Fax: (707) 944-5563

California Department of Fish and Game
Habitat Conservation Branch, Banking Coordinator
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Telephone: 916-653-4875 Fax: (916) 653-2588

- (3) U.S. Fish and Wildlife Service
Sacramento Fish and Wildlife Office
Attn: Field Supervisor
2800 Cottage Way, W-2605
Sacramento, CA 95825
Telephone: (916) 414-6600 Fax: (916) 414-6713

- (4) U.S. Environmental Protection Agency, Region 9
Attn: Director, Water Division
75 Hawthorne Street
San Francisco, CA 94105
Telephone: (415) 972-3572 Fax: (415) 947-3537

Sponsor:

Carinalli Nature Preserve, L.L.C.
520 Mendocino Avenue, Suite 250
Santa Rosa, CA 95401
Attn: Mr. Clem Carinalli
Telephone: (707) 578-1302 Fax: (707) 525-1206

I. Restriction on Benefit: No member or delegate to the United States Congress or


Federal Resident Commissioner shall be entitled to any share or part of this BEI, or to any benefit that may arise from it.

J. Counterparts: This BEI may be executed in any number of duplicate and counterpart originals. A complete original of this BEI containing original signatures of each of the parties shall be circulated to each of the parties by Sponsor and a complete original of this BEI shall be maintained in the official records of each of the parties hereto.

K. No Third-Party Beneficiaries: This BEI shall not create any third party beneficiary hereto, nor shall it authorize anyone not a party hereto to maintain a suit for personal injuries, property damages or enforcement pursuant to the provisions of this BEI. The duties, obligations and responsibilities of the parties to this BEI with respect to third parties shall remain as otherwise provided by law in the event this BEI had never been executed.

Section IX: Execution

This BEI shall become effective on the date of the signature by the last agency to sign this BEI, and shall be binding only upon Sponsor and the agencies so signing.


Sponsor – Carinalli Nature Preserve, L.L.C.

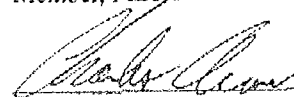
7/17/08
Date

District Engineer
San Francisco District
U.S. Army Corps of Engineers
Chair, MBRT

Date

Manager, California/Nevada Office
U.S. Fish and Wildlife Service
Member, MBRT

Date


Regional Manager
California Department of Fish and Game
Bay Delta Region
Member, MBRT

8/04/08
Date

Director, Water Division
U.S. Environmental Protection Agency, Region 9
Member, MBRT

Date



Exhibit "C"

RECEIVED
MAY 05 2014
CITY OF
ROHNERT PARK

May 1, 2014

Mr. Richard F. Pedroncelli, P.L.S.
Senior Engineering Technician
City of Rohnert Park, Development Services
130 Avram Avenue
Rohnert Part, CA 94928

Re: City of Rohnert Park's Dowdell Avenue Extension Project

Dear Rich:

The purpose of this letter is to update the information and cost estimates of mitigation credits provided to the City of Rohnert Park ("City") in my letter to Marilyn Ponton, Development Services Manager dated April 1, 2014. The information is for the City's Dowdell Avenue Extension Project ("Project"), as requested in Ms. Ponton's letter to me dated January 14, 2013.

- Attachment #1. This attachment outlines the mitigation approaches that can be implemented to meet the Project's requirements and gives a brief summary of the applicable mitigation guidelines for the Santa Rosa Plain. The mitigation costs for the City's Project depend upon the mitigation requirements approved by the approving agencies and the mitigation alternative selected by the City.
- Attachment #2. In this attachment, the costs of the four mitigation credit alternatives are summarized and the sources for the credits are noted. Alternative #3 is the least expensive alternative for the City.

Included in our credits purchase price is the preparation of a Project's "project description" by Ted Winfield. The project description is used in the submittal to the U.S. Fish and Wildlife Service to gain their approval for the City to purchase California tiger salamander and plant credits for the Project and for the mitigation bank to sell them to the City for the Project.

Thank you for the opportunity to help the City assess its mitigation alternatives. We look forward to working with you to help the City meet its mitigation credit needs for the Project.

Sincerely,

A handwritten signature in black ink, appearing to read "Harvey O. Rich".

Harvey O. Rich
Managing Member

Enc.

cc: Marilyn Ponton

ATTACHMENT #1

ATTACHMENT #1

- **REQUIREMENT FOR MITIGATION CREDITS.** On the Santa Rosa Plain there are three categories of environmental resources for which the regulating agencies require mitigation acreage for impacts to environmental resources, including the following:
 - **Wetlands Credits.**
 - Agencies. The U.S. Army Corps of Engineers (“Corps”) and the Regional Water Quality Control Board (“RWQCB”) regulate impacts to wetlands, which includes determining wetlands mitigation requirements for impacts subject to their jurisdiction.
 - Authorization to Purchase Wetland Credits. No preapproval from the Corps or RWQCB is required prior to purchase of wetland credits other than an agreement on the amount of mitigation required. These agencies, however, can accept or reject mitigation if the source bank does not have sufficient available mitigation credits or is not in “good standing.”
 - Purchasing Wetland Credits. The Corps requires that banks sell wetland credits in 0.05 acre increments; therefore, if the Project’s requirement is 0.09 acre, the Project will need to purchase 0.10 acre of wetland credits.
 - Wetland Credit Types. For the Project, the City may be able to purchase wetland credits with the following characteristics:
 - a. Standalone wetland credits
 - b. Wetland credits that include plant credits
 - c. Wetland credits that include California tiger salamander (“CTS”) credits
 - d. Wetland credits that include both plant credits and CTS credits
 - Wetland Credits Counting for Multiple Mitigation Requirements. As an example, the City may be able to purchase wetland credits that count for wetland mitigation, CTS mitigation, and plant credits; therefore, with the purchase of 0.10 acre of wetland credits, the Project would receive 0.10 acre of CTS credits and 0.10 acre of plant credits. This would be applied to the overall amount of CTS mitigation and plant mitigation needed for the Project.
 - Banks Selling Wetland Combination Credits. Banks that offer wetland combination credits cannot sell these credits for mitigation that does not include wetlands. In short, as an example, combination wetland credits cannot be sold for “stand-alone” CTS credits or plant credits.
 - **Endangered Plants.**
 - Types of Endangered Plants. On the Santa Rosa Plain, the primary endangered plant species are as follows:
 - a. Sebastopol meadowfoam

- b. Sonoma Sunshine
- c. Burke's Goldfields
- Agencies. The U.S. Fish and Wildlife Service ("USFWS") and the California Department of Fish and Wildlife ("CDFW") are the agencies responsible for regulating impacts to plants and for determining plant mitigation requirements for impacts to these endangered plants.
- USFWS's Approval of the Purchase of Plant Credits.
 - a. The USFWS requires that the purchase of plant credits be preapproved by them before a bank can sell plant credits and a project proponent can purchase plant credits from a bank.
 - b. The USFWS has a form that they require be submitted to them, which is signed by the bank sponsor and the project proponent, requesting the USFWS's approval to purchase plant credits. A copy of this form is attached as Exhibit A.
 - c. The City needs the USFWS's preapproval to purchase plant credits.
- Types of Plant Credits. In order to comply with the "Programmatic Biological Opinion for the Santa Rosa Plain," plant credits have to include the following coverage:
 - a. Preserved occupied plant mitigation habitat credits ("Preserved Credits") are those plant credits that were present at the time of bank formation and "preserved" by the bank. Established occupied plant mitigation habitat credits ("Established Credits") are mitigation credits that have been planted and grown, thus "established," at a bank following formation of the bank.
 - b. Plant mitigation can be accomplished with 100% Established Credits.
 - c. The amount of Plant mitigation is determined by whether the site has "occupied" or "suitable" plant habitat. "Occupied" habitat means the plants are present on-site and "suitable" habitat means that the area has the characteristics to grow the plants.
 - d. As an example, for "suitable" Sebastopol meadowfoam habitat, the City can satisfy its mitigation requirements by purchasing 0.06 acre of Preserved Credits and 0.03 acre of Established Credits.
 - e. As an example, for "occupied" Sebastopol meadowfoam habitat, the City will need to purchase 0.18 acre of plant credits ($0.09 \times 2 = 0.18$). It can be either Preserved Credits or Established Credits.

- Increments of Plant Credits. USFWS and CDFW allow plant credits to be purchased in 0.01 acre increments. If the Project's mitigation requirement is 0.06 acre of Sebastopol meadowfoam, then this is the amount of plant required for mitigation will be determined by whether the site has "occupied" or "suitable" plant habitat.
- Project's Plant Requirements. Since the Project has "suitable" plant habitat, the amount of plant mitigation required is 0.09 acre (0.06 x 1.5).
- Plant Credit Types. For the Project, the City may be able to purchase plant credits with the following characteristics:
 - a. Standalone plant credits
 - b. Wetland credits that include plant credits
 - c. Plant credits that include CTS credits
 - d. Wetland credits that include both plant credits and CTS credits.

➤ California Tiger Salamander.

- Endangered Species. On the Santa Rosa Plain, CTS is an endangered species.
- Agencies. USFWS and CDFW are the agencies responsible for regulating impacts to CTS and for determining CTS mitigation requirements for these impacts.
- USFWS Approval of the Purchase of CTS Credits.
 - a. USFWS requires that the purchase of CTS credits be preapproved by them before a bank can sell CTS credits or a project proponent can purchase CTS credits from a bank.
 - b. USFWS has a form that they require be submitted to them, which is signed by the bank sponsor and the project proponent, requesting the USFWS's approval. A copy of this form is attached as Exhibit A.
 - c. The City needs USFWS's preapproval to purchase CTS credits.
- Increments of CTS Credits. USFWS and CDFW allow CTS credits to be purchased in 0.01 acre increments; therefore, if the Project's CTS mitigation requirement is 1.34 acres, then this is the amount of CTS credits required to mitigate the Project.
- Determining the Amount of CTS Credits Required. The amount of CTS credits required is determined by the relationship of the Project to CTS breeding ponds and to sighting of adult CTS. A map is enclosed as Exhibit B which shows the CTS zone in which the Project is located.

- CTS Credit Types. For the Project, the City may be able to purchase CTS credits with the following characteristics:
 - a. Standalone upland CTS credits
 - b. Wetland credits that include CTS credits
 - c. Plant credits that include CTS credits
 - d. Wetland credits that include both plant credits and CTS credits.

- **MITIGATION ALTERNATIVES.**

- **Combination Credits.** Because of the availability of credits that count for multiple mitigation needs, the City will have several mitigation combinations from which to choose to solve its mitigation requirements. The use of combination credit alternatives will determine the cost of mitigating the City's Project.

- **Potential Mitigation Alternatives.** As an example, the City can select any of the following four mitigation alternatives to meet the Project's mitigation requirements. The alternatives assume the City's Project has to mitigate for "suitable" plant habitat.

- Project Mitigation Alternative #1.
 - a. Wetland Only (No Combination) 0.10 acre
 - b. Plants (Includes CTS) 0.09 acre
 - Includes CTS 0.09 acre
 - c. CTS (1.34 – 0.09) 1.25 acres
- Project Mitigation Alternative #2.
 - a. Wetland (Includes Plants) 0.10 acre
 - Includes Plant Mitigation 0.10 acre
 - b. Plants (Included with Wetland) 0.00 acre
 - c. CTS 1.34 acres
- Project Mitigation Alternative #3.
 - a. Wetlands 0.10 acre
 - Includes CTS 0.10 acre
 - Includes Plants 0.10 acre
 - b. Plants (Included with Wetland) 0.00 acre
 - c. CTS (1.34 – 0.10) 1.24 acres
- Project Mitigation Alternative #4.
 - a. Wetlands 0.10 acre
 - Includes CTS 0.10 acre
 - b. Plants (Includes CTS) 0.09 acre
 - Includes CTS 0.09 acre
 - c. CTS (1.34 – 0.10 – 0.09) 1.15 acres

EXHIBIT "A"

ATTACHMENT #2

MARILYN PONTON - CITY OF ROHNERT PARK
RE: DOWDEL AVENUE - MITIGATION CREDIT ALTERNATIVES - ASSUMES OCCUPIED PLANT HABITAT
DATE: 5/1/14

DESCRIPTION MITIGATION ALTERNATIVES	MITIGATION ACREAGE	BANK SOURCES FOR MITIGATION CREDITS	CREDIT PRICE/AC	PRICE OF CREDITS	TOTAL
PROJECT MITIGATION - ALTERNATIVE #1 WETLANDS - NO COMBINATIONS PLANTS - COMBINATION INCLUDES CTS CTS (1.34 - 0.09 = 1.25)	0.10 0.09 0.09 1.25	HAZEL BANK SWIFT CB & MARGARET WEST SLIPPERY ROCK BANK	\$ 177,500 \$ 227,000 \$ 97,500	\$ 17,750 \$ 20,430 \$ 121,875	\$ 160,055
PROJECT MITIGATION - ALTERNATIVE #2 WETLANDS - NO COMBINATIONS PLANTS CTS (1.16)	0.10 0.09 1.34	HAZEL BANK DESMOND BANK SLIPPERY ROCK BANK	\$ 177,500 \$ 400,000 \$ 97,500	\$ 17,750 \$ 36,000 \$ 130,650	\$ 184,400
PROJECT MITIGATION - ALTERNATIVE #3 WETLANDS - COMBINATION INCLUDES CTS PLANTS PLANTS (INCLUDED W/WETLANDS) CTS (1.34 - 0.10 = 1.24)	0.10 0.10 0.10 0.00 1.24	CARNALLI TODD BANK CARNALLI TODD BANK CARNALLI TODD BANK CARNALLI TODD BANK SLIPPERY ROCK BANK	\$ 320,000 \$ 320,000 \$ 97,500	\$ 32,000 \$ 120,900	\$ 152,900
PROJECT MITIGATION - ALTERNATIVE #4 WETLANDS - COMBINATION INCLUDES CTS PLANTS - COMBINATION INCLUDES CTS CTS (1.34 - 0.10 - 0.09 = 1.15)	0.10 0.10 0.09 0.09 1.15	HAZEL BANK HAZEL BANK SWIFT CB & MARGARET WEST SLIPPERY ROCK BANK	\$ 275,000 \$ 227,000 \$ 97,500	\$ 27,500 \$ 20,430 \$ 112,125	\$ 160,055

EXHIBIT D

SLIPPERY ROCK, LLC

P.O. Box 2217
SANTA ROSA, CA 95405
(415) 695-1874

BILL OF SALE

Buyer: City of Rohnert Park

Type and Amount of Credits: 1.24 Acres of California Tiger Credits

Project Name: Dowdell Expansion

Project Assessor's Parcel Number(s):

Contract Date:

Service File Number: 81420-2008-F-0261

Army Corps Number: 2013-00140N

CDFW File Number: 2081-2013-062-03

In consideration of \$120,900 (One Hundred Twenty Thousand Nine Hundred Dollars), receipt of which is hereby acknowledged, Slippery Rock, LLC does hereby bargain, sell and transfer to City of Rohnert Park herein referred to as "Buyer," 1.24 acres of California tiger salamander credits ("CTS Credits") in the Slippery Rock Conservation Bank in Sonoma County, California, developed, and approved by the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife.

Slippery Rock, LLC represents and warrants that it has good title to the CTS Credits, and has good right to sell the same, and that they are free and clear of all claims, liens, or encumbrances.

Slippery Rock, LLC covenants and agrees with the Buyer to warrant and defend the sale of the CTS Credits herein before described against all and every person and persons whomsoever lawfully claiming or to claim the same.

DATED:

Slippery Rock, LLC
A California Limited Liability Company

By: _____
Chris Peterson
Its: Managing Member

EXHIBIT E

SLIPPERY ROCK, LLC

P.O. Box 2217

SANTA ROSA, CA 95405

(707) 695-1874

PAYMENT RECEIPT

PROJECT: SLIPPERY CONSERVATION BANK

PAYMENT RECEIPT: 1.24 ACRES OF CTS CREDITS

PARTICIPANT INFORMATION:

Name: City of Rohnert Park
Address: 130 Avram, Rohnert Park, CA 94954
Telephone: 707-588-2232
Contact: Darrin Jenkins, City Manager

PROJECT INFORMATION:

Project Description: Dowdell Avenue Expansion
Army Corps File Number: 2013-00140N
Service Number: 81420-2008-F-0261
CDFW Number: 2081-2013-062-03
Species/Habitat Affected: California Tiger Salamander ("CTS")
Credits Purchased: 1.24 Acres of CTS Credits
Payment Amount: \$120,900 (One Hundred Twenty Thousand Nine Hundred Dollars)
Project Location: Rohnert Park, CA
County: Sonoma
Assessor's Parcel Number(s):
Payee: Slippery Rock, LLC
Payor: City of Rohnert Park
Amount: \$120,900 (One Hundred Twenty Thousand Nine Hundred Dollars)
Method of Payment: Cash or Exchange of Funds at Chicago Title Company

Received:

Slippery Rock, LLC
A California Limited Liability Company

By: _____

Date:

Chris Peterson
Its: Managing Member

EXHIBIT E

CARINALLI NATURE PRESERVE, LLC

520 Mendocino Ave. #250
Santa Rosa, CA 95401
707-579-0111

BILL OF SALE

Buyers: City of Rohnert Park, a California Municipal Corporation

Type and Amount of Credits: 0.10 Acre of Wetland Credits which include 0.10 acre of California Tiger Salamander Credits, 0.10 Acre of Sonoma Sunshine Credits and 0.10 Acre of Sebastopol Meadowfoam Credits

Project Name: Dowdell Avenue Expansion

Project Assessor's Parcel Number:

Contract Date:

Service File Number: 81420-2008-F-0261

Army Corps Number: 2013-00140N

CDFW Number: 2081-2013-062-03

In consideration of \$32,000 (Thirty-Two Thousand Dollars), receipt of which is hereby acknowledged, Carinalli Nature Preserve, LLC, a California limited liability company, does hereby bargain, sell and transfer to the City of Rohnert Park, a California Municipal Corporation, herein referred to as "Buyer," 0.10 acre of "Combination Credits" which include 0.10 acre of wetlands credits, 0.10 acre of California tiger salamander credits, 0.10 acre of Sonoma sunshine credits, and 0.10 acre of Sebastopol meadowfoam credits ("Combination Credits") in the Carinalli Todd Road Mitigation Bank in Sonoma County, California, developed, and approved by the U.S. Fish and Wildlife Service, the California Department of Fish and Wildlife, the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers.

Carinalli Nature Preserve, LLC represents and warrants that it has good title to the Combination Credits, has good right to sell the same, and that they are free and clear of all claims, liens, or encumbrances.

Carinalli Nature, LLC covenants and agrees with the Buyer to warrant and defend the sale of the Combination Credits herein before described against all and every person and persons whomsoever lawfully claiming or to claim the same.

DATED:

Carinalli Nature Preserve, LLC
A California Limited Liability Company

By: _____
Kevin E. Carinalli
Its: Managing Member

EXHBIT E

CARINALLI NATURE PRESERVE, LLC

520 Mendocino Ave. #250

Santa Rosa, CA 95401

707-579-0111

PAYMENT RECEIPT

PROJECT: CARINALLI TODD MITIGATION BANK

PAYMENT RECEIPT: 0.10 ACRE COMBINATION CREDITS

PARTICIPANT INFORMATION:

Name: City of Rohnert Park, a California Municipal Corporation

Address: 130 Avram, Rohnert Park, CA 94928

Telephone: 707-588-2251

Contact: Darrin Jenkins, City Manager

PROJECT INFORMATION:

Project Description: Dowdell Avenue Expansion

Army Corps File Number: 2013-00376N

Service Number: 81420-2008-F-0261

CDFW Number: 2081-2013-062-03

Species/Habitat Affected: Wetlands, Plants, CTS

Credits Purchased: 0.10 Acre of Combination Credits

Payment Amount: \$32,000 (Thirty-Two Thousand Dollars)

Project Location: Dowdell Avenue, Rohnert Park, CA

County: Sonoma

Assessor's Parcel Number:

PAYMENT INFORMATION:

Payee: Carinalli Nature Preserve, LLC

Payor: City of Rohnert Park

Amount: \$32,000 (Thirty-Two Thousand Dollars)

Method of Payment: Cash or Exchange of Funds at Chicago Title Company

RECEIPT

Carinalli Nature Preserve, LLC

A California Limited Liability Company

By: _____

Kevin E. Carinalli

Its: Managing Member

Date: _____