

MEMORANDUM OF AGREEMENT

BY AND AMONG

THE CALIFORNIA RESOURCES AGENCY,
THE CALIFORNIA DEPARTMENT OF FISH AND GAME,
THE UNITED STATES FISH AND WILDLIFE SERVICE,
THE COUNTY OF ORANGE, CITIES WITHIN ORANGE COUNTY
THE FOOTHILL/EASTERN TRANSPORTATION CORRIDOR AGENCY,
SANTA MARGARITA COMPANY,
COTO DE CAZA AND ARVIDA

REGARDING THE PREPARATION OF A
NATURAL COMMUNITY CONSERVATION PLAN
FOR THE SOUTHERN ORANGE COUNTY
SUBREGION OF THE COASTAL SAGE SCRUB NATURAL
COMMUNITY CONSERVATION PROGRAM

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THIS MEMORANDUM OF AGREEMENT ("MOA" or "Agreement") dated as of _____, 1993 is made by and among the CALIFORNIA RESOURCES AGENCY ("Resources Agency"), an agency of the State of California, CALIFORNIA DEPARTMENT OF FISH AND GAME ("CDFG"), a department of the Resources Agency, the UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), an agency of the Department of Interior of the United States of America, the COUNTY OF ORANGE ("County"), a political subdivision of the State of California, the FOOTHILL/EASTERN TRANSPORTATION CORRIDOR AGENCY ("TCA"), a joint powers authority, THE CITIES OF _____, _____, _____ (collectively, "Cities"), SANTA MARGARITA COMPANY, ARVIDA and COTO DE CAZA. The County, TCA and the Cities may be referred to as "Local Governments"; SANTA MARGARITA COMPANY, ARVIDA and COTO DE CAZA are referred to as "Landowner"; and all of the above-described entities may be referred to collectively as "Parties" and each individually as a "Party".

As among the nonfederal signatories to this MOA, this Agreement serves as the "Planning Agreement" described in the Southern California Coastal Sage Scrub Natural Community Conservation Planning Process Guidelines (dated September 1, 1992) (the "Process Guidelines"). This Agreement shall be effective as to all executing Parties upon execution by the Resources Agency, CDFG, USFWS, TCA, the County and the Landowner.

1.0 RECITALS.

1.1 The purpose of this Agreement is to establish the guidelines and procedures that will be followed by the Parties in the preparation of a Natural Community Conservation Plan ("NCCP Plan") for the Southern Orange County Subregion of Orange County with regard to the California gnatcatcher and other related Target Species, as described herein.

1.2 The Natural Community Conservation Planning Program ("NCCP Program") is established by California law under the Natural Community Conservation Planning Act of 1991 (Fish & G. Code, § 2800 *et seq.*) ("NCCP Act"). CDFG is the trustee agency implementing the NCCP Act.

1.3 The purpose of the statewide NCCP Program is to provide for regional protection and perpetuation of natural wildlife diversity while allowing

compatible and appropriate development and growth. The NCCP Program intends that these goals be achieved through the development and implementation of Natural Community Conservation Plans. The NCCP Program is designed to provide an alternative to current single species conservation efforts by formulating regional, natural community based habitat protection programs to protect the numerous species inhabiting each of the targeted natural communities. The Parties believe that the shift in focus from single species to natural communities will enhance the effectiveness of ongoing species preservation efforts.

1.4 The coastal sage scrub ("CSS") NCCP Program ("CSS NCCP Program") is the first effort to be undertaken pursuant to the NCCP Act. It is intended to be undertaken as a pilot project to develop a process for accelerated conservation planning at a regional scale, and it is contemplated that the NCCP process for coastal sage scrub may serve as a model for other efforts elsewhere in the State. This planning process is sponsored jointly by the California Resources Agency and CDFG, and conducted in cooperation with USFWS, pursuant to a Memorandum of Understanding between CDFG and USFWS dated December 4, 1991.

1.5 The CSS NCCP Program creates a regional planning and management system designed to protect coastal sage scrub habitat and to reconcile conflicts between habitat protection and new development within Southern California. The study area established for the CSS NCCP Program includes existing coastal sage scrub habitat in portions of five counties, including Orange County. The CSS NCCP Program anticipates that NCCP plans will be prepared for designated planning subregions. This Agreement is intended to establish the planning process for development of an NCCP Plan in the Southern Subregion of the CSS NCCP Program. As among the nonfederal signatories to the MOA, the Agreement serves as the "Planning Agreement" called for in the Process Guidelines.

1.6 The CSS NCCP Program contemplates an 18 month planning period from May 1, 1992 to October 31, 1993. Prior to and during this planning period, landowners and local governments have enrolled in the CSS NCCP Program by entering into voluntary agreements with CDFG. To the extent described in the enrollment agreements, no activity that would cause disturbance of CSS is allowed on land subject to a Landowner or Land Management Agency enrollment agreement during the planning period, other than actions mandated for public safety. This Agreement is not intended to replace the enrollment agreements.

1.7 USFWS and CDFG have identified a number of mammal, bird, reptile and plant species which utilize coastal sage scrub habitat as species which are candidates for, or have been proposed for listing, pursuant to the Federal Endangered Species Act, 16 U.S.C. sections 1531 et seq. ("ESA") or the California Endangered Species Act, Fish and Game Code sections 2050 et seq. ("CESA"). Among these

species are the California gnatcatcher (*Polioptila californica californica*), the cactus wren (*Campylorhynchus brunneicapillus*), and the orange-throated whiptail lizard (*Cnemidophorus hyperythrus beldingi*).

1.8-- The Landowner is the owner of certain real property situated in the County of Orange, State of California, within the Southern Orange County Subregion (the "Landowner's Property"). The Landowner's Property is currently used for a variety of purposes including, but not limited to, conservation, agricultural, residential and commercial purposes.

1.9 The Landowner, Local Governments, and TCA, have participated in long-term regional planning efforts to conserve contiguous open space, recreational and wildlife habitat areas. At present in the Southern Subregion of the County, there are approximately 30,040 acres of large habitat areas in dedicated regional open space and project-committed open space. These regional planning efforts have been conducted to reduce and mitigate the impacts of development, and have been coordinated with regional planning of development to meet housing and employment goals and the infrastructure needed to support those goals. The Parties intend that the NCCP Process be integrated with the regional open space planning which has already taken place to identify and ensure appropriate mitigation for impacts on fish and wildlife, and to promote the conservation of broad-based natural communities and species diversity.

1.10 The Parties recognize the important role public and private partnerships play in protecting and enhancing the habitat and survival of species which are presently unlisted as well as those which are listed or proposed for listing. The Parties acknowledge that Congress recognized this role in conjunction with the 1982 Amendments to the ESA. Congress expressed its intent, (H.R. Rep. No. 97-835, 97th Cong., 2d Sess. 30, 31 (1982) regarding encouraging such partnerships for unlisted, as well as listed species, as follows:

(a) Application to Unlisted Species

"Although the conservation plan is keyed to the permit provisions of the Act which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species."

(b) Public Private Partnerships

"To the maximum extent possible, the Secretary should utilize this authority under this provision to encourage creative partnerships between the public and private sectors"

(c) Long-Term Assurance Provided by and for the Habitat Conservation Plan Proponent

"The Secretary, in determining whether to issue a long-term permit to carry out the conservation plan should consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem." . . . "Permits of 30 or more years duration may be appropriate in order to provide adequate assurances to the private sector to commit to long-term funding for conservation activities or long-term commitments to restrictions on the use of land."

(d) Reciprocal Assurances to be Provided by the Service

"The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act."

1.11 The CSS NCCP Program, pursuant to California law, provides a mechanism for the furtherance of the goals of the ESA and CESA with respect to conservation of species. In enacting the NCCP Act, the California Legislature stated the following:

- (a) The continuing population growth in California will result in increasing demands for dwindling natural resources and result in the continuing decline of the state's wildlife.
- (b) There is a need for broad-based planning to provide for effective protection and conservation of the state's wildlife heritage while continuing to allow appropriate development and growth.
- (c) Natural community conservation planning is an effective tool in protecting California's natural diversity while reducing

conflicts between protection of the state's wildlife heritage and reasonable use of natural resources for economic development.

- (d) Natural community conservation planning promotes coordination and cooperation among public agencies, landowners, and other private interests, provides a mechanism by which landowners and development proponents can effectively participate in the resource conservation planning process, provides a regional planning focus which can effectively address cumulative impact concerns, minimizes wildlife habitat fragmentation, promotes multispecies management and conservation, provides one option for identifying and ensuring appropriate mitigation for impacts on fish and wildlife, and promotes the conservation of broad based natural communities and species diversity.
- (e) Natural community conservation planning can provide for efficient use and protection of natural and economic resources while promoting greater sensitivity to important elements of the state's critical natural diversity.
- (f) Natural community conservation planning is an effective planning process which can facilitate early coordination to protect the interest of the state, the federal government, and local public agencies, landowners, and other private parties.
- (g) Natural community conservation planning is a mechanism that can provide an early planning framework for proposed development projects within the planning area in order to avoid, minimize, and compensate for project impacts to wildlife.
- (h) Natural community conservation planning is consistent with and will support the fish and wildlife management activities of the Department of Fish and Game in its role as the trustee for fish and wildlife within the state.
- (i) The purpose of natural community conservation planning is to sustain and restore those species and their habitat identified by the Department of Fish and Game which are necessary to maintain the continued viability of those

biological communities impacted by growth and development.

1.12 The Parties agree that subject to the requirements of the ESA and CESA, in the event that any of the Target Species are listed as a threatened species or an endangered species under the ESA or CESA, or as a candidate species under the CESA, and in the absence of Unforeseen Circumstances, the approved NCCP Plan and Implementing Agreement developed pursuant to this Agreement will be treated as a Habitat Conservation Plan ("HCP") by USFWS in connection with the issuance of Section 10(a) permits, and will be relied on by USFWS in issuing Section 7 biological opinions; and will be treated as a habitat conservation plan by CDFG in connection with the issuance of Section 2081 Permits, and as the basis for findings and determinations pursuant to Fish and Game Code Section 2090 et seq.

2.0 DEFINITIONS.

2.1 California Endangered Species Act. The "California Endangered Species Act" or "CESA" shall mean the California Endangered Species Act, Fish and Game Code section 2050 et seq.

2.2 California Gnatcatcher. The "California gnatcatcher" or "gnatcatcher" shall mean the California gnatcatcher (*Polioptila californica californica*), including the eggs and all other life stages thereof.

2.3 Cactus Wren. "Cactus wren" shall mean the coastal population of the cactus wren (*Campylorhynchus brunneicapillus*), including the eggs and all other life stages thereof.

2.4 Orange-Throated Whiptail Lizard. "Orange-throated whiptail lizard" shall mean the orange-throated whiptail lizard (*Cnemidophorus hyperythrus beldingi*) including the eggs and all other life stages thereof.

2.5 Conservation Representatives. "Conservation representatives" shall mean representatives of national and local environmental groups.

2.6 Southern Orange County Subregion. The "Southern Orange County Subregion" as generally shown in Exhibit A, attached hereto, refers to the Southern Orange County subregion of the CSS NCCP Program within Orange County. This Agreement is intended to establish the planning process leading to an NCCP Plan covering the Southern Orange County Subregion.

2.7 CESA Candidate Species. "CESA Candidate Species" shall mean those species listed as candidates for listing as endangered or threatened pursuant to Fish and Game Code section 2074.2.

2.8 CSS Species. "CSS Species" shall mean those species other than the Target Species, associated with coastal sage scrub habitat, including but not limited to those species identified by the Scientific Review Panel ("SRP") as associated with coastal sage scrub habitat. CSS Species will be identified in each subregional NCCP Plan.

2.9 Endangered Species Act. "Endangered Species Act" or "ESA" shall mean the Federal Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 et seq.

2.10 Habitat. "Habitat" shall mean the area occupied by or suitable for occupation by particular wildlife species. Areas capable of restoration may be considered habitat for Target Species, for purposes of mitigation.

2.11 HCP. "HCP" shall mean a Habitat Conservation Plan pursuant to section 10 of the ESA.

2.12 AHCP. "AHCP" shall mean an Advance Habitat Conservation Plan.

2.13 NCCP Plan. "NCCP Plan" shall mean the plan for conservation of the coastal sage scrub natural community in the Southern Orange County Subregion, with special emphasis on the Target Species, prepared pursuant to this Agreement. The NCCP Plan shall be developed to meet the requirements for issuance of a section 10(a) permit under the ESA and a section 2081 permit under CESA. The NCCP Plan shall be deemed to be an Advance Habitat Conservation Plan and HCP covering the Target Species for purposes of the ESA.

2.14 Planned Activities. "Planned Activities" shall mean the development of planned communities and major regional infrastructure improvements, including development of certain transportation corridors, as well as other development activities within the Southern Orange County Subregion as physically delineated or evaluated in the NCCP Plan.

2.15 Proposed Listing. "Proposed listing" shall mean the proposed listing by USFWS of one or more of the Target Species as either an "endangered species" or a "threatened species," the proposed designation of the habitat of any such Target Species as "critical habitat" pursuant to the ESA, or the proposal to list a Target Species as "endangered" or "threatened", or to designate a species as a CESA Candidate Species by the California Fish and Game Commission pursuant to CESA.

2.16 Section 10(a) Permit. "Section 10(a) Permit" means any permit issued pursuant to section 10(a)(1)(B) of the ESA to permit incidental takings of endangered species or threatened species which may occur as a result of the Planned Activities.

2.17 Section 2081 Permit. "Section 2081 Permit" means any permit issued by CDFG pursuant to the CESA to authorize the take of endangered species or threatened species or CESA Candidate Species which may occur as a result of the Planned Activities.

2.18 Taking. "taking" or "take" shall have the same meaning as provided in the ESA and 50 C.F.R. 17.3 with regard to any activities subject to the ESA, and shall have the same meaning as provided in state law with regard to activities subject to the CESA.

2.19 Target Species. "Target Species" are:

- a. California gnatcatcher (*Polioptila californica californica*);
- b. Cactus wren (*Campylorhynchus brunneicapillus*);
- c. Orange-throated whiptail lizard (*Cnemidophorus hyperythrus beldingi*).

These species are to be the focus of conservation planning efforts leading to a NCCP Plan for the Southern Orange County Subregion and shall be treated in the NCCP Plan as if they were listed as an endangered species with regard to any NCCP Plan to which section 4.0 shall apply. In the sole discretion of the Local Governments and the Landowner, the NCCP Plan for the Southern Orange County Subregion may identify additional species as Target Species. Addressing the conservation needs of the Target Species is anticipated to provide significant protection for the coastal sage scrub natural community in general.

2.20 Unforeseen Circumstances. "Unforeseen Circumstances" shall mean (i) a significant adverse change in (A) the population of a Target Species, (B) the habitat and other biological resources of the Southern Orange County Subregion, or (C) the anticipated impacts of the Planned Activities or in other factors upon which the NCCP Plan/HCP is based, or (ii) any significant new or additional information relevant to an NCCP Plan/HCP (including information presented during a public comment period on a permit application or proposed rule) that was not anticipated by the Parties at the time the NCCP Plan/HCP was approved and that would likely result in a significant adverse change in (A), (B) or (C) above. The NCCP Plan/HCP will identify significant adverse changes which are anticipated, both in the long and short term. The existence of Unforeseen Circumstances shall be established in accordance with section 4.10 until or unless modified in an approved Implementing Agreement.

3.0 RESPONSIBILITIES AND PROCEDURES FOR DEVELOPMENT AND APPROVAL OF THE PLAN.

3.1 Project Coordinators. Each party shall designate a Project Coordinator to monitor the implementation of this Agreement and to coordinate communication among the Parties during the NCCP Process. Each party shall notify each other party of their respective Project Coordinators in writing within fourteen (14) days of the effective date of this Agreement.

3.2 Biological Data.

3.2.1 The Parties understand that the Secretary of The Resources Agency of the State of California has convened a Scientific Review Panel ("SRP"). The SRP will review and evaluate existing information regarding the biology, conservation, and protection of Target Species and will develop recommended standards necessary for the conservation and protection of these Target Species throughout the CSS study area. These recommendations will encompass conservation guidelines for the CSS natural community throughout the study area.

3.2.2 Information and analysis undertaken by the SRP shall be presumed to constitute the best information available unless further credible analysis or investigation show the contrary.

3.3 Preparation of the NCCP Plan and Environmental Documentation.

3.3.1 The NCCP Plan/HCP will be prepared in conjunction with environmental documentation pursuant to the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA"). The Parties intend that public review of the NCCP Plan/HCP and the CEQA and NEPA documentation will occur simultaneously through the public review process described below in section 3.3.7 and section 3.4. It is contemplated that the NCCP Plan/HCP, the EIR, and the EIS, will be prepared as a single integrated document ("NCCP Plan/EIR/EIS"). If the NCCP Program is certified pursuant to Public Resources Code Section 21080.5, the NCCP Plan shall satisfy the requirements of Section 21080.5 regarding the preparation of a CEQA environmental document.

3.3.2 The NCCP Plan/HCP shall treat the Target Species in the Southern Orange County Subregion as though they were listed as "endangered species" under the ESA and CESA for the purposes of developing conservation measures and proposed takings of the Target Species. The Draft NCCP Plan/HCP for the Southern Orange County Subregion will address the requirements of both the CESA and the ESA.

3.3.3 The NCCP Plan/HCP shall be prepared in a manner consistent with the provisions of the Process Guidelines. Consistent with the habitat conservation planning requirements for listed species contained in section 10(a)(2)(A) of the ESA, 50 C.F.R. § 17.22(b) and 50 C.F.R. § 17.32(b) the Draft NCCP Plan/HCP shall specify the habitat requirements for the Target Species, the impacts likely to result from the proposed taking of one or more Target Species, the measures that will be undertaken to monitor, minimize and mitigate for such impacts, the funding that will be made available to undertake such measures, the procedures to address Unforeseen Circumstances, identification of funding mechanisms and other assurances that the NCCP Plan/HCP will be carried out; and additional measures that the CDFG or USFWS may require as necessary or appropriate. The Draft NCCP Plan/HCP shall include provisions governing the amendment of the NCCP Plan/HCP.

3.3.4 The County shall act as Lead Agency for the development of the NCCP Plan/HCP and for preparation of environmental documentation pursuant to CEQA. The Parties acknowledge that the County is appropriately the Lead Agency for preparation of the NCCP Plan/EIR because of the need for county-wide planning and coordination, and because the County will have the greatest responsibility for supervising the NCCP Plan. CDFG shall act as a Responsible Agency as well as a Trustee Agency under CEQA. Local Governments other than the County shall be Responsible Agencies under CEQA, and shall be consulted in the preparation of the NCCP Plan/EIR, and at a minimum, shall have the opportunities for comment described in section 3.4.

3.3.5 USFWS shall be responsible for compliance with NEPA in connection with the NCCP Plan/HCP. The County shall act as the local co-lead agency for compliance with NEPA pursuant to 40 C.F.R. section 1506.2(c). To the maximum extent practicable, USFWS will coordinate its obligations under NEPA with corresponding state and local obligations under CEQA and the NCCP Act. Coordination is expected to include the following:

- a. completion of a joint EIR/EIS;
- b. joint conduct of "scoping" meetings, public hearings and participation in other joint NEPA/CEQA activities;
- c. the joint EIR/EIS shall be prepared and funded in conjunction with the NCCP Plan/HCP.

3.3.6 Pursuant to Fish and Game Code section 2840, CDFG shall be compensated for costs incurred in participating in the planning process and reviewing the NCCP Plan. The terms of CDFG compensation shall be set forth in a separate compensation agreement.

3.3.7 A schedule for preparation and distribution for review of the NCCP Plan/HCP and associated environmental documentation, consistent with this Agreement, shall be prepared by the Parties ("NCCP Schedule"). The Parties agree to use their best efforts to comply with the NCCP Schedule. The Parties acknowledge that regular discussions will be convened with conservation representatives in addition to the mandated public involvement procedures required by CEQA and NEPA to solicit their views on the plans and participation in the process. Discussions required by this section are intended to occur concurrent with ongoing review/consultation among Parties to this Agreement.

3.4 Review and Approval of the NCCP Plan/HCP and Environmental Documentation.

3.4.1 The Preliminary Draft NCCP Plan/HCP and associated preliminary draft environmental documentation shall be prepared by a consultant selected by the Parties, consistent with CEQA and NEPA (40 C.F.R. § 1506.5) requirements. The Parties acknowledge that the Landowner will have a primary role in preparing the NCCP Plan/HCP. The County and USFWS, as co-lead agencies, shall independently review, analyze and supervise the preparation of the CEQA and NEPA documentation before circulating the Plan and environmental document for public review. It is the intent of sections 3.3.7, 3.4.1, 3.4.2, 3.4.3 and 3.4.4 to establish an efficient ongoing process of consultation and coordination between the County, the Landowner, the CDFG and USFWS, and conservation representatives with regard to the preparation of the NCCP Plan/HCP and associated environmental documentation.

3.4.2 The consultant shall submit an outline for a Draft NCCP Plan/HCP to USFWS and the County for review and comments prior to initiation of the CEQA and NEPA public review processes. As soon as possible after submission of such outline, the County and USFWS shall complete review of the outline and determine whether it is sufficiently detailed to justify commencement of the "scoping" phase of the environmental review process pursuant to NEPA and CEQA. For the purposes of this section and section 3.4.3, the outline will be "sufficiently detailed to justify commencement of the scoping phase" if the outline is adequate to serve as the project description for a Notice of Intent pursuant to 40 C.F.R. § 1508.22 and a Notice of Preparation pursuant to 14 C.C.R. § 15082. If the USFWS concludes that the outline is sufficiently detailed to justify commencement of the "scoping" phase of the environmental review process, then USFWS shall so advise the County in writing and the County, in cooperation with USFWS, will initiate the joint scoping phase of the environmental review process. USFWS shall publish a Notice of Intent, in accordance with the Department of the Interior NEPA regulations, as soon as possible after advising the County that the outline is complete. The County shall circulate the Notice of Preparation pursuant to 14 C.C.R. § 15082.

3.4.3 If USFWS determines that the outline for a Draft NCCP Plan/HCP is not sufficiently complete under the ESA to justify commencement of the "scoping" phase of the environmental review process, USFWS shall provide the consultant with written comments and recommendations for changes necessary or appropriate under the ESA. The consultant will revise the outline consistent with USFWS comments, and, if requested by USFWS, submit a revised outline to USFWS. If a revised outline is submitted to USFWS, the Parties shall repeat the process described in sections 3.4.2 and 3.4.3 until USFWS determines that the outline is sufficiently detailed to justify commencement of the "scoping" phase. Any comments on a revised outline shall address the provisions of the revised outline regarding issues identified in the initial USFWS comments. USFWS shall use their best efforts to raise all significant issues to be considered in the NCCP Plan/HCP during the process in order to ensure that such issues can be efficiently addressed in the preparation of the Draft NCCP Plan/HCP. Nothing in section 3.4.2 or 3.4.3, however, is intended to limit comments by the USFWS and CDFG on the NCCP Plan/HCP during the public review process.

3.4.4 The selected consultant shall develop a Preliminary Draft NCCP Plan/HCP and EIR/EIS ("Preliminary Draft"). The Preliminary Draft shall be circulated to all Parties for review. Comments on the Preliminary Draft shall be submitted to the consultant as soon as possible after the circulation of the Preliminary Draft. The Parties should focus comments on aspects of the Preliminary Draft affecting their property or jurisdiction. The County, as CEQA Lead Agency, has the responsibility to independently review and approve the Preliminary Draft NCCP Plan and has the sole authority to determine the form and content of the Draft and Final NCCP Plan and EIR.

3.4.5 As soon as possible after review of the Preliminary Draft, USFWS shall determine whether the document satisfies applicable NEPA requirements for circulation to the public as a Draft EIS. USFWS, as NEPA Lead Agency, has the responsibility to independently review and approve the EIS, and has sole authority for the content and scope of the EIS. If USFWS concludes that the Preliminary Draft is sufficiently complete to justify release pursuant to NEPA, then USFWS shall so advise the County in writing. USFWS shall publish notice of the availability of the Draft NCCP Plan/HCP/EIR/EIS in the *Federal Register* as soon as possible after of advising the County that the Preliminary Draft is complete. Following receipt of USFWS approval, and publication in the *Federal Register*, the County and USFWS will circulate a Draft NCCP Plan/HCP/EIR/EIS for a public review period of sixty (60) days, pursuant to CEQA and NEPA.

3.4.6 If USFWS determines that the Preliminary Draft is not sufficiently complete to justify circulation as a Draft EIS, USFWS shall provide the consultant with changes necessary or appropriate under NEPA. The consultant, in

consultation with the Parties, shall revise the Preliminary Draft, and if requested by USFWS, submit a revised Preliminary Draft to USFWS for review pursuant to NEPA. If a revised Preliminary Draft is submitted to USFWS, the Parties shall repeat the process described in sections 3.4.5 and 3.4.6 until USFWS determines that the document meets NEPA requirements for circulation as a Draft EIS. Any comments on a revised Preliminary Draft shall address the provisions of the revised Preliminary Draft regarding issues identified in the initial USFWS comments. The USFWS shall use its best efforts to insure that the period for review and approval of the Preliminary Draft does not exceed ninety (90) days from the submission of the initial Preliminary Draft to the USFWS.

3.4.7 Following the close of the public comment period pursuant to CEQA and NEPA, responses to public comments shall be prepared. As expeditiously as possible thereafter, the County shall finalize the EIR and adopt the NCCP Plan.

3.4.8 As expeditiously as possible after the preparation of responses to public comments, the USFWS shall publish a Notice of Availability of the Final EIS in the *Federal Register*. USFWS shall prepare a draft Record of Decision ("ROD") pursuant to 40 C.F.R. 1505.2, and draft biological opinion ("BO") and shall submit the draft BO to the County for review and comment. The USFWS shall make a decision on the proposed action, and shall issue the Record of Decision as soon as practicable after the expiration of the thirty day waiting period following publication of the Notice of Availability in the *Federal Register*.

3.4.9 The Parties acknowledge that the EIR and EIS may be completed separately due to the various requirements of CEQA and NEPA. The County, as the CEQA Lead Agency, has the sole discretion and authority to adopt the NCCP Plan. The USFWS has sole authority to approve the NCCP Plan as an HCP or Advance HCP in accordance with section 10(a) of the ESA and its implementing regulations.

3.4.10 Concurrent with the approval of the NCCP Plan and the Final EIR and Final EIS, one or more of the Parties may enter into an Implementing Agreement with USFWS and CDFG, consistent with the Process Guidelines, specifying all terms and conditions of activities under the NCCP Plan/HCP and the rights and obligations of the Parties to the Implementing Agreement. The execution of the Implementing Agreement shall constitute the formal approval of the NCCP Plan by the Local Governments other than the County, and CDFG, and the execution of the Implementing Agreement shall constitute the legal commitment by Landowner to the implementation of the NCCP Plan. Issuance of a section 10(a) permit incorporating an NCCP Plan/HCP, including an Implementing Agreement, shall constitute the formal approval by USFWS. If no Target Species has been listed by USFWS as an endangered species or threatened species, execution by USFWS of an Implementing

Agreement shall constitute formal approval of an AHCP. The Implementing Agreement will become effective as to any party to the Implementing Agreement upon execution by the Landowner, CDFG, the USFWS and the County. The Parties recognize that regular monitoring activities will be included as part of the Implementing Agreement, and appropriate mechanisms to insure funding of the NCCP Plan/HCP will be included as part of the Implementing Agreement. The Implementing Agreement will be signed by those parties necessary to establish an effective HCP or AHCP.

3.4.11 In reviewing and approving the NCCP Plan/HCP, CDFG shall employ the SRP conservation principles concerning CSS conservation, habitat needs, species distribution and abundance. CDFG shall also review and approve the NCCP Plan in accordance with the purposes and requirements of the CESA, including the provisions of Fish and Game Code section 2081.

3.4.12 In reviewing and approving the NCCP Plan/HCP, USFWS shall apply the provisions of section 10(a) of the ESA, and shall employ, consistent with section 3.2.2, the SRP conservation principles concerning CSS conservation, habitat needs, species distribution and abundance, and other biological considerations, and shall make findings with respect to whether the NCCP Plan/HCP meets the requirements for a habitat conservation plan pursuant to section 10(a) of the ESA.

4.0 EFFECT OF PLAN WITH RESPECT TO SPECIES LISTED OR PROPOSED FOR LISTING.

Notwithstanding any other provision in this MOA, this MOA is subject to and shall be carried out in accordance with the ESA, the CESA, or any other applicable federal or state law or regulation.

4.1 Consideration of NCCP Plan in USFWS Decisions. In the absence of Unforeseen Circumstances as defined in section 2.20 and 4.10 of this Agreement, and provided an Implementing Agreement has been executed to implement the NCCP Plan/HCP in the Southern Orange County Subregion, USFWS shall (i) consider the NCCP Plan/HCP in any future determinations by the USFWS with regard to the listing of one or more of the Target Species as an endangered species or threatened species, (ii) consider that the satisfactory implementation of the NCCP Plan/HCP and Implementing Agreement will adequately provide for the conservation and protection of the Target Species and their habitats in the Plan area, and regard that the areas included in the approved NCCP Plan/HCP do not require further special management considerations or protection, and (iii) not prescribe any additional mitigation, enhancement or compensation measures pursuant to the ESA, or other certain statutes specifically addressed and provided for in the NCCP Plan/HCP, with regard to the Planned Activities for the conservation or protection of the Target Species or their habitat.

4.2 Listing of Target Species Before the NCCP Plan Has Been Approved by USFWS. If one or more of the Target Species is listed as an endangered species or threatened species pursuant to the ESA before an NCCP Plan/HCP for the Southern Orange County Subregion is approved by the USFWS, the Landowner, one or more of the Local Governments or TCA may seek authorization to take such Target Species in the conduct of Planned Activities in accordance with the ESA. A draft NCCP Plan/HCP for the Southern Orange County Subregion may be submitted as a proposed HCP for purposes of Section 10(a) of the ESA.

4.3 ESA Listing of Target Species After the NCCP Plan Has Been Approved by USFWS. In the event that one or more of the Target Species is listed as an endangered species or threatened species pursuant to the ESA after the NCCP Plan/HCP for the Southern Orange County Subregion, including an applicable Implementing Agreement, has been approved by USFWS, the NCCP Plan/HCP shall be adequate documentation to support an application for a Section 10(a) Permit to take such Target Species incidental to the Planned Activities, in the absence of Unforeseen Circumstances. In such event, any Party may submit an application for a Section 10(a) Permit, and the USFWS shall treat the approved NCCP Plan/HCP and associated Implementing Agreement as a Draft Habitat Conservation Plan for the Southern Orange County Subregion which has been prepared in compliance with section 10(a) of the ESA and, subject to 40 C.F.R. § 1502.9(c), shall treat the NCCP Plan/HCP/EIR/EIS as a final EIS regarding the issuance of the Section 10(a) Permit as authorized by 40 C.F.R. § 1506.3(a). USFWS shall publish notice ("Application Notice") of the Section 10(a) Permit application in the *Federal Register* pursuant to 16 U.S.C. § 1539(c), as soon as possible after the publication of the final rule in the *Federal Register* listing the Target Species as an endangered species or threatened species. The USFWS shall, after public review and comment and a determination that all biological and procedural requirements have been met, issue a Section 10(a) Permit on the basis of the NCCP Plan/HCP and Implementing Agreement authorizing incidental takings of the listed species in accordance with the NCCP Plan/HCP as soon as possible after publication of the Application Notice in the *Federal Register*. Unless the USFWS makes a determination that there are Unforeseen Circumstances as provided in section 2.20 and 4.10, in any Section 7 Consultation with regard to the issuance of the Section 10(a) Permit the USFWS shall adopt the biological opinion issued pursuant to section 3.4.8 with regard to the approval of the NCCP Plan/HCP and Implementing Agreement as the biological opinion issued pursuant to Section 7(b) of the ESA. In any Section 7 Consultation that may be required with regard to the Planned Activities, subsequent to the approval of the NCCP Plan/HCP and Implementing Agreement, USFWS intends to rely, to the greatest extent feasible, on the biological opinion issued with regard to the approval of the NCCP Plan/HCP and Implementing Agreement.

4.4 Consideration of NCCP Plan in CDFG Decisions. In the absence of Unforeseen Circumstances as defined in section 2.20 and 4.10 of this Agreement,

and provided an Implementing Agreement has been executed to implement the NCCP Plan in the Southern Orange County Subregion, CDFG shall (i) consider the NCCP Plan in any future determinations, including but not limited to any recommendations to the California Fish and Game Commission, with regard to the listing of one or more of the Target Species as a CESA Candidate Species, endangered species or threatened species pursuant to the CESA, (ii) consider that the satisfactory implementation of the NCCP Plan and Implementing Agreement will adequately provide for the conservation and protection of the Target Species and their habitats in the Plan Area, and regard that the areas included in the approved NCCP Plan do not require further special management considerations or protection, and (iii) not prescribe any additional mitigation, enhancement or compensation measures pursuant to CESA, or other certain statutes specifically addressed and provided for in the NCCP Plan, with regard to the Planned Activities for the conservation or protection of the Target Species or their habitat.

4.5 Listing of Target Species Before the NCCP Plan Has Been Approved by CDFG. If one or more of the Target Species is listed as a CESA Candidate Species, or as an endangered species or threatened species pursuant to the CESA before an NCCP Plan for the Southern Orange County Subregion has been approved by CDFG, the Landowner, one or more of the Local Governments or TCA may apply for a Section 2081 Permit to take such Target Species incidental to Planned Activities or for an approval pursuant to Fish and Game Code section 2084 ("Section 2084 Approval") to take any such Target Species which are listed as a CESA Candidate Species. A draft NCCP Plan for the Southern Orange County Subregion may be submitted as a proposed habitat management plan for purposes of the Section 2081 Permit application or Section 2084 Approval application.

4.6 Listing of Target Species After the NCCP Plan Has Been Approved By CDFG. Pursuant to Fish and Game Code sections 2825(c), 2830 and 2835, if one or more of the Target Species is listed as a CESA Candidate Species or as an endangered species or threatened species pursuant to the CESA after the NCCP Plan for the Southern Orange County Subregion and associated Implementing Agreement have been approved by CDFG, except where CDFG has made a determination that there are Unforeseen Circumstances as provided in section 2.20 and 4.10, the NCCP Plan may be considered as a habitat management plan under the requirements of the CESA. The CDFG shall issue a Permit substantially in the form of the NCCP Plan to take the Target Species and its habitat within the Plan area pursuant to section 2081 of the California Fish and Game Code. The CDFG shall rely on the NCCP Plan in making any recommendation to the California Fish and Game Commission with regard to Fish and Game Code section 2084. The CDFG shall consider that the satisfactory implementation of an Implementing Agreement and the NCCP Plan will adequately provide for the conservation, protection, restoration, and enhancement of the Target Species and their habitats in the Plan area.

4.7 Future Permits. This section describes the intent of the Parties with respect to the effect of an approved NCCP Plan/HCP and Implementing Agreement on future permits described in sections 4.7.1 and 4.7.2. These commitments will be made as part of the Implementing Agreement.

4.7.1 Except where CDFG or USFWS has determined the existence of Unforeseen Circumstances consistent with the provisions of section 2.20 and 4.10, CDFG or USFWS shall not prescribe, or request of any other agency, any further mitigation, enhancement, or compensation measures pursuant to the ESA or CESA, or other certain statutes specifically addressed and provided for in the NCCP Plan/HCP with regard to the Planned Activities for the conservation or protection of the Target Species or their habitat. It is not the intent of this section to limit informal discussion or recommendations between the Parties with regard to the implementation of the NCCP Plan/HCP. It is the intent of this section to assure that recommendations by USFWS and CDFG, in the context of public agency consideration of Planned Activities, conform to the mitigation, enhancement and compensation measures identified in an approved NCCP Plan/HCP and Implementing Agreement.

4.7.2 The Parties to this Agreement acknowledge that the Local Governments and the Landowner may also be subject to permit requirements of agencies not parties to this Agreement, and to the permit requirements of Fish and Game Code sections 1601 and 1603. In the absence of Unforeseen Circumstances, participation in the NCCP Plan/HCP shall constitute the full extent of the Mitigation Measures required by USFWS pursuant to the ESA and CDFG pursuant to the CESA, and pursuant to other certain statutes specifically addressed and provided for in the NCCP Plan/HCP for the take of Target Species, or the modification of the habitat of the Target Species, related to the Planned Activities within the Southern Orange County Subregion. In addition, in the event that the NCCP Plan/HCP and Implementing Agreement include commitments by the Local Governments and the Landowner to provide for the conservation or protection of biological resources other than the Target Species and their Habitat (e.g., wetland and riparian areas) the NCCP Plan/HCP and Implementing Agreement may include provisions for the Local Governments or Landowner to receive appropriate mitigation credit for the particular biological resources addressed in the NCCP Plan/HCP to offset any mitigation requirements that may be imposed by the CDFG or other agencies to provide for the conservation or protection of such other biological resources pursuant to any applicable law.

4.8 Future Environmental Documentation. In issuing any permits or other approvals for any Target Species that is listed as an endangered species or threatened species under the ESA or CESA, or listed as a CESA Candidate Species pursuant to the CESA with regard to Planned Activities, absent Unforeseen Circumstances, and subject to any requirements of CEQA or NEPA (including 40 C.F.R. § 1502.9(c)), USFWS and CDFG shall rely on and shall utilize the EIR/EIS

prepared in conjunction with the NCCP Plan/HCP as the CEQA and NEPA environmental document for such permits and approvals. The Local Governments shall rely on and shall utilize the EIR prepared in conjunction with the NCCP Plan/HCP in evaluating future planning decisions, and in issuing any permits or other approvals within the Southern Orange County Subregion with regard to the Planned Activities. The Parties understand and intend that the EIR/EIS prepared in conjunction with the NCCP Plan/HCP will operate as a "program" EIR and EIS pursuant to applicable provisions of the Council on Environmental Quality NEPA regulations (40 C.F.R. § 1500 et seq.), the CEQA Guidelines (14 C.C.R. § 15000 et seq.) and the NCCP Act. Subsequent activities will be examined in light of the program EIR/EIS to determine if additional environmental documentation is required.

4.9 CSS Species. The NCCP Planning Guidelines indicate and the Parties agree that an NCCP Plan/HCP which provides effective conservation measures for the Target Species should provide significant conservation for other CSS Species. USFWS and CDFG agree that they will consider the NCCP Plan/HCP in any future listing determinations with respect to CSS Species identified in the NCCP Plan/HCP, and, in particular, shall consider the adequacy or inadequacy of the approved NCCP Plan/HCP and Implementing Agreement in protecting CSS Species under 16 U.S.C. 1533(a)(1).

4.10 Identification of Unforeseen Circumstances. In order to establish Unforeseen Circumstances, as defined in section 2.20, USFWS or CDFG shall make a formal written determination that Unforeseen Circumstances have occurred, setting forth the basis for the determination. Upon making such a determination, USFWS or CDFG shall notify the Parties to this Agreement regarding the basis for any determination of Unforeseen Circumstances.

5.0 MISCELLANEOUS PROVISIONS.

5.1 Reservation of Rights. Nothing in this Agreement shall be construed as a waiver of any rights or objections that any of the Parties may have with respect to the Proposed Listing of any Target Species, or of any objections to the regulation of activities by CDFG which do not result in take of any species listed pursuant to the CESA as a candidate, threatened or endangered species as the term "take" is defined in California Fish and Game Code section 86. Landowner, Local Governments, and TCA reserve their right to oppose any formal listing or Proposed Listing of any Target Species pursuant to the ESA or CESA. USFWS and CDFG reserve the right to proceed with the listing of any Target Species as an endangered species or threatened species and to carry out all of their responsibilities and duties under the ESA and CESA.

5.2 Notices. Any notices required or permitted to be given under this Agreement shall be in writing and may be given by personal delivery, facsimile or by United States Postal Service first class mail, and shall be deemed sufficiently given if addressed to the following addresses for the respective Parties:

Mr. Michael A. Mantell
The Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, California 95814

Mr. Larry Eng
California Department of Fish and Game
1416 Ninth Street
Sacramento, California 95814

Mr. Gail C. Kobetich
U.S. Fish and Wildlife Service
Office of Endangered Species
2800 Cottage Way, Room E-1823
Sacramento, California 95825

Mr. Thomas Matthews
County of Orange
Environmental Management Agency
12 Civic Center Plaza, Room 236
Santa Ana, California 92702

Mr. Steve Letterly
Transportation Corridor Agencies
345 Clinton Street
Costa Mesa, California 92626

Mr. Richard Broming
Santa Margarita Company
30211 Avenida de las Banderas
Rancho Santa Margarita, California 92688

Mr. Glen Allen
Arvida Company
26471 Crown Valley Parkway, Suite 130
Mission Viejo, California 92691

Mr. Chris Taylor
Coto de Caza
One Coto de Caza Drive
Coto de Caza, California 92679-3602

5.3 Headings. The subject headings of the sections of this Agreement are provided for convenience only and shall not effect the construction or interpretation of any of the provisions of the Agreement.

5.4 Entire Agreement. This Agreement constitutes the full and complete agreement of the Parties and supersedes any and all prior or contemporaneous written or oral negotiations, correspondence, understandings and agreements between the Parties respecting the subject matter hereof. Any supplement, modification or amendment to this Agreement shall be executed in writing by all Parties. No waiver of any of the provisions of this Agreement shall constitute a waiver of any other provisions. No waiver shall be binding unless executed in writing by the Party making the waiver.

5.5 Assignment. This Agreement is intended to apply to the Parties and their respective successors and assigns.

5.6 Counterparts. This Agreement may be executed in multiple counterparts and each such executed counterpart shall be deemed an original, all of which together shall constitute a single executed Agreement.

IN WITNESS WHEREOF, the Parties have executed this Memorandum of Agreement effective as of the last date set forth below.

Dated: June 15, 1993

CALIFORNIA RESOURCES AGENCY, an agency of the State of California

By Michael A. Manser
Title Undersecretary for Resources

Dated: June 9, 1993

CALIFORNIA DEPARTMENT OF FISH AND GAME, a department of The Resources Agency of the State of California

By John A. Della
Title Chief Deputy Director

Dated: August 23, 1993

UNITED STATES FISH AND WILDLIFE SERVICE, an agency of the Department of Interior of the United States of America

By Marvin L. Pleneet
Title Regional Director

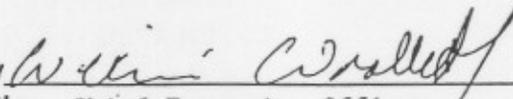
Dated: _____, 1993

COUNTY OF ORANGE, a political subdivision of the State of California

By Thomas J. [Signature]
Title Director of Planning, EMA

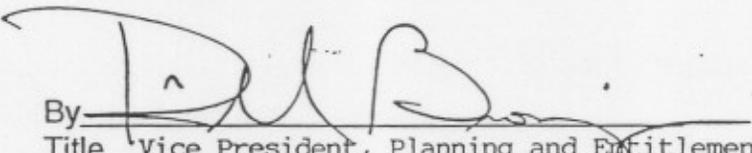
Dated: 6/25, 1993

FOOTHILL/EASTERN TRANSPORTATION
CORRIDOR AGENCY, a joint powers authority

By 
Title Chief Executive Officer

Dated: April 28, 1993

SANTA MARGARITA COMPANY

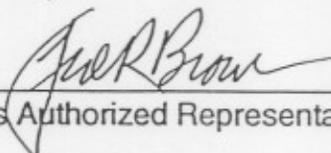
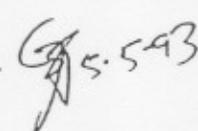
By 
Title Vice President, Planning and Entitlement

Dated: ~~April~~
May 13, 1993

ARVIDA/JMB PARTNERS, a Florida general partnership

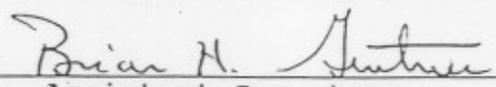
By: Arvida/JMB Partners, L.P.-II
a Delaware limited partnership, its general partner

By: Arvida/JMB Managers, Inc.,
a Delaware corporation, its general partner

By 
its Authorized Representative 

Dated: APRIL 30, 1993

COTO DE CAZA, a California limited partnership,
By: Chevron Land and Development Company,
a Delaware Corporation, General Partner

By 
Title Assistant Secretary

Dated: _____, 1993

By _____
Title _____

Dated: _____, 1993

By _____
Title _____

Dated: _____, 1993

By _____
Title _____