

Implementing Agreement  
for the  
Southeastern Lincoln County  
Habitat Conservation Plan  
Lincoln County, Nevada

December 2008

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## 1.0 PARTIES

This Southeastern Lincoln County Habitat Conservation Plan (SLCHCP) Implementing Agreement (Agreement) is made and entered into by and among the following parties:

Lincoln County, a political subdivision of the State of Nevada (County); the City of Caliente, a political subdivision of the State of Nevada; the Union Pacific Railroad Company, a Delaware corporation (UPPR); the Bureau of Land Management (BLM); and the United States Fish and Wildlife Service (USFWS). The County, City of Caliente and UPPR may be referred in this Agreement as an “Applicant” or “Permittee” and may be collectively referred to as the “Applicants” or “Permittees.” Each Applicant, BLM, and the USFWS may be referred to in this Agreement as a “Party” and may be collectively referred to as the “Parties.”

## 2.0 RECITALS AND PURPOSES

**2.1 Recitals.** The parties have entered into this Agreement in consideration of the following facts:

(a) Southeastern Lincoln County has been determined to provide, or potentially provide, habitat for the following federally listed species covered by this Agreement:

- Desert tortoise
- Southwestern willow flycatcher

(b) Permittees are seeking authorization from the USFWS for the “take” of the desert tortoise and southwestern willow flycatcher as incidental take is defined under Federal law (refer to Section 3.14 of this Agreement) incidental to certain development and other Covered Activities.

(c) Permittees have developed a series of measures, described in Section 6.0 of the SLCHCP, to minimize and mitigate to the maximum extent practicable the impacts of take of Covered Species incidental to the Permittee’s Covered Activities.

**2.2 Purposes.** The purposes of this Agreement are:

- (a) To ensure implementation of each of the terms of the SLCHCP;

(b) To describe remedies and recourse should any Party fail to perform its obligations as set forth in this Agreement; and

(c) To provide assurances to the Permittees, pursuant to the “No Surprises” regulations, that as long as the terms of the SLCHCP, the Permits, and this Agreement are properly implemented, no additional mitigation will be required of each Permittee or the Permittees collectively with respect to Covered Species, except as provided for in this Agreement or required by law.

### 3.0 DEFINITIONS

The following terms as used in this Agreement will have the same meanings set forth below:

**3.1 Terms defined in Endangered Species Act.** Terms used in this Agreement and specifically defined in the Endangered Species Act (ESA) or in regulations adopted by the USFWS under the ESA have the same meaning as in the ESA and those implementing regulations, unless this Agreement expressly provides otherwise.

**3.2 “Adaptive Management Program” or “AMP”** means the program of adaptive management that will be undertaken by the Parties as part of the conservation plan as described in Section 7.3 of the SLCHCP.

**3.3 “Agreement” or “IA”** means this Implementing Agreement.

**3.4 “Changed circumstances”** means changes in circumstances affecting a Covered Species or the geographic area covered by the SLCHCP that can reasonably be anticipated by the Parties to the SLCHCP and that can reasonably be planned for in the SLCHCP. Changed circumstances and the remedial responses to those circumstances are described in Section 8.3.1 of the SLCHCP. Changed circumstances are not unforeseen circumstances.

**3.5 “Covered Activities”** means certain activities carried out by each of the Permittees on Covered Lands (described below and in the SLCHCP) that may result in incidental take of Covered Species. Covered Activities means the following activities as specifically described in Section 4.0 of the SLCHCP:

- Land development and maintenance activities
- Utility and infrastructure development and maintenance activities

- Flood control activities
- Roadway construction and maintenance activities
- Union Pacific Railroad activities
- Conversion of agricultural and livestock lands to developable land
- Conversion of grazing land to irrigated and/or cultivated agricultural land

**3.6 “Covered Lands” or “Covered Area”** means the non-Federal lands (approximately 30,674 acres) upon which the Permits authorize incidental take of Covered Species as well as the Federal and non-Federal lands within Southeastern Lincoln County to which the HCP's conservation and mitigation measures will be applied. Covered Lands on which incidental take of the Covered Species is expected to occur include:

- LCLA land
- Meadow Valley Industrial Park site
- Alamo Industrial Park site and Community Expansion area
- BLM lands identified for disposal within the Covered Area (includes the 640-acre Section 36 disposal parcel and lands in the vicinity of the town of Alamo)
- Lincoln County roads and rights-of-way
- Union Pacific Railroad land and rights-of-way
- City of Caliente property
- Other privately owned lands along the Meadow Valley Wash within Southeastern Lincoln County where the landowners become Third Party Participants pursuant to IA Section 8.0

The surrounding Federal lands administered by BLM on which most of the SLCHCP's conservation and mitigation measures are contemplated to occur are depicted in Figure 1-2 of the SLCHCP and described in Sections 1.3.4 and Section 2.1 of the SLCHCP.

The Covered Lands specifically exclude State Park land, those lands owned or leased by Coyote Springs Investment, LLC, the landfill owned and operated by the City of Mesquite within the Lincoln County Land Act (LCLA) land area and certain other privately-owned lands, all totaling approximately 49,070 acres within Southeastern Lincoln County.

**3.7 “Covered Species”** means the following species, each of which the SLCHCP addresses in a manner sufficient to meet all of the criteria for issuing an incidental take permit under ESA § 10(a)(1)(B):

- Desert tortoise (*Gopherus agassizi*)
- Southwestern willow flycatcher (*Empidonax traillii extimus*)

**3.8 “Listed Species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under the ESA.

**3.9 “Party”** means an entity that is a signatory to this Agreement. Such entities may be referred to individually as “Party” or collectively as “Parties”.

**3.10 “Permit” or “Permits”** means the incidental take permit(s) issued by the USFWS to each of the Permittees pursuant to Section 10(a)(1)(B) of the ESA for take incidental to Covered Activities on the Covered Lands within Southeastern Lincoln County, as it may be amended from time to time.

**3.11 “Permittees”** means Lincoln County, the City of Caliente and UPRR.

**3.12 “Program Documents”** means the SLCHCP, Environmental Impact Statement, Implementing Agreement, Biological Opinion, and the Permits.

**3.13 “SLCHCP”** means the Southeastern Lincoln County Habitat Conservation Plan prepared by the Permittees.

**3.14 “Take”** means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in such contact any listed Covered Species. Harm means an act that actually kills or injures a member of a Covered Species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a Covered Species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

**3.15 “Third Party Participants”** are those entities subject to the jurisdiction or legal control of one of the Permittees and that qualify for and receive take authorization from either one of the three Permittees pursuant to 50 C.F.R. §§ 13.25(d) or (e). Under certain circumstances described in Section 8.0 of this Agreement, Third Party Participants seeking take

authorization must sign a Participation Agreement with the Permitted entity before any such take authorization is extended.

**3.16 “Unforeseen circumstances”** means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the USFWS at the time of the conservation plan’s negotiation and development, and that result in a substantial and adverse change in the status of the Covered Species. For purposes of this Agreement and the SLCHCP, all changes in circumstances that are not designated Changed circumstances under SLCHCP Section 8.3.1 are considered not reasonably foreseeable and, therefore, if they occur are unforeseen circumstances. Unforeseen circumstances are further described and addressed in Section 8.3.2 of the SLCHCP.

**3.17 “Unlisted species”** means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under the ESA.

## **4.0 OBLIGATIONS OF THE PARTIES**

**4.1 Obligations of all Permittees.** Permittees will fully and faithfully perform all obligations assigned to each of them under this Agreement, the Permit, and the SLCHCP, specifically including those obligations as described in Sections 8.1.4.1.1, 8.1.4.1.2 and 8.1.4.1.3 of the SLCHCP.

**4.1.1 Payment or Collection of Fees.** Each of the Permittees shall pay or collect mitigation fees as required pursuant to the applicable sections of the SLCHCP. Under the SLCHCP, a two-tier impact fee assessment system for desert tortoise will be implemented over the 30-year permit within the Covered Area. A fee of \$550/acre will apply to development occurring south of the northern-most location of critical habitat for desert tortoise within the Covered Area of the SLCHCP, and a fee of \$250/acre will apply to development occurring north of the northern-most location of desert tortoise critical habitat within the Covered Area; with the exception of UPRR who will pay \$550/acre throughout the Covered Area. The amount of these fees shall not change during the term of the SLCHCP, the Permit and this Agreement. Where mitigation fees are required to be paid pursuant to the SLCHCP and this agreement, no party shall be required to pay such fees for land disturbance in previously disturbed habitat as defined in Section 6.3.2.1 of the SLCHCP.

**4.1.2 Participation on Implementation and Monitoring Committee (IMC).**

Each of the Parties shall provide staff to serve on the Lincoln County IMC, as appropriate given their role in the SLCHCP, and shall ensure, to the extent possible, staff participation in discussions and meetings with the other Parties to ensure that the implementation of the SLCHCP is consistent with any findings upon which the Permit is based. Refer to Section 8.1.1 in the SLCHCP.

**4.1.3 Interim Obligations upon a Finding of Unforeseen Circumstances.**

If the USFWS makes a finding of unforeseen circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, the Permittees will collectively and individually avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

**4.2 Obligations of the USFWS.** Upon execution of this Agreement by all Parties, and satisfaction of all other applicable legal requirements, the USFWS will issue Lincoln County, the City of Caliente and UPRR each a Permit under Section 10(a)(1)(B) of the ESA, authorizing incidental take by the Permittees of each listed Covered Species resulting from Covered Activities on Covered Lands.

**4.2.1 Permit Coverage.** The Permits will identify all Covered Species. The Permits will take effect for listed Covered Species at the time the Permits are issued.

**4.2.2 “No Surprises” Assurances.** Provided that the Permittees have complied with their obligations under the SLCHCP, this Agreement, and the Permits, the USFWS can require the Permittees to provide mitigation beyond that provided for in the SLCHCP only under unforeseen circumstances, in accordance with the “No Surprises” regulations at 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5).

**4.2.3 Other Obligations of the USFWS.** USFWS agrees to implement the tasks described in SLCHCP Section 8.1.4.1.4, including providing technical assistance on prioritization and use of Section 10 mitigation funds, development and approval of the Annual Work Plan, participation in the IMC and technical work group meetings, approving the qualifications of qualified biologists, coordination with the Desert Tortoise Recovery Office on relocation and transport of desert tortoises removed from development lands, approval of qualified biologists, and development and approval of the Desert Tortoise Head Starting

Program. USFWS agrees to review and approve the plans, studies, and survey locations, and participate in planning efforts identified in SLCHCP Section 8.1.4.1.4.

**4.3 Obligations of Lincoln County.** In addition to performing the activities specified in Section 4.1, Lincoln County agrees to implement the Avoidance, Minimization, and Mitigation Measures specified in Section 8.1.4.1.1 of the SLCHP including:

- Fee Collection and Implementation of a Section 10 Trust Fund
- SLCHCP Administration, Reporting, and Establishment of the Implementation and Monitoring Committee
- Public Outreach and Education
- County Road Worker Education
- Species Avoidance for County Road Maintenance
- The SLCHCP Specific Measures for Disturbances in Desert Tortoise Habitat Associated with the LCLA Lands
- Vegetation Management Programs for the LCLA development boundary areas
- Development and implementation of Education Program for the LCLA development boundary areas
- Development and implementation of a Landowner Assistance Program for private landowners along the Meadow Valley Wash or along Clover Creek who may have suitable or potential habitat for the southwestern willow flycatcher on their property.
- Development and implementation of a Southwestern Willow Flycatcher Habitat No Net Habitat Loss Program to mitigate the permanent removal of suitable habitat by creating suitable habitat out of “potential habitat” as identified in the Meadow Valley Wash Baseline Ecological Assessment.

**4.4 Obligations of the City of Caliente.** In addition to performing the activities specified in Section 4.1, the City of Caliente agrees to implement the Avoidance, Minimization, and Mitigation Measures specified in Section 8.1.4.1.2 of the SLCHCP, including public education, and payment of \$12,000 per acre for disturbance of up to 8.3 acres of southwestern willow flycatcher suitable habitat.

**4.5 Obligations of Union Pacific Railroad.** In addition to performing the activities specified in Section 4.1, UPRR agrees to implement the Avoidance and Minimization Measures described in Section 6.7.1 of the SLCHCP and the Mitigation Measures specified in Sections 6.7.2.1 and 6.7.2.2 of the SLCHCP for desert tortoise and southwestern willow flycatcher, respectively. This includes payment of \$550 per acre for disturbance of up to 800 acres of desert tortoise suitable habitat and \$12,000 per acre for disturbance of up to 54 acres of southwestern willow flycatcher suitable habitat, subject to reduction pursuant to the habitat delineation provisions of Sections 5.2.1 and 5.2.2.4 of the SLCHCP. UPRR shall be responsible for conducting its own monitoring and reporting the results to USFWS, and agrees to provide a copy to Lincoln County. Should UPRR pay its mitigation fees in advance pursuant to Section 7.0 of this Agreement, its reporting obligations shall be limited to annual reporting of general locations where Covered Activities were performed and the results of any biological monitoring conducted pursuant to Section 6.7.1.2 of the SLCHCP regarding pre-disturbance surveys and clearances in specified areas.

**4.6 Obligations of the BLM.** BLM agrees to implement the tasks described in Section 8.1.4.1.5 of the SLCHCP, and to use its best efforts to facilitate implementation of the SLCHCP. The following shall apply to all mitigation work or other work under the SLCHCP proposed to occur on public lands administered by BLM.

(a) Participation of BLM or use of public lands for any mitigation work, or any other action under the SLCHCP, is at BLM's discretion; however, BLM agrees to work with the Permittees to review proposed actions seeking use of lands administered by BLM in a timely manner.

(b) BLM has not authorized any specific proposed mitigation actions on public land administered by BLM through the SLCHCP, EIS, or the SLCHCP IA. All future actions on lands administered by BLM would be subject to applicable laws, regulations, and BLM policy.

(c) In general, BLM will be the lead agency for all regulatory compliance (i.e. NEPA, National Historic Preservation Act, Endangered Species Act, etc.) for any proposed actions on public lands administered by BLM; however, any document preparation or other action to comply with laws, regulations, and BLM policy will be paid for by the Permittees. Under some

circumstances, other agencies (such as USFWS) may act as a lead and BLM will be a partner or cooperator.

(d) After appropriate regulatory compliance review, BLM may authorize mitigation work on BLM-administered land, and the Permittees will accomplish the mitigation work. Any maintenance, restoration, rehabilitation, or funding of accomplished mitigation projects carried out on BLM-administered lands would be the responsibility of the Permittees unless otherwise agreed to by BLM.

(e) Based on BLM's watershed assessments or other relevant information, BLM may set restoration priorities. Restoration will conform to the Ely RMP management decisions. Permittees will coordinate with BLM on priorities for mitigation projects.

(f) All mitigation monitoring costs will be the responsibility of the Permittees or the USFWS. BLM staff may participate in mitigation monitoring in a technical advisory capacity and will be compensated for its participation.

(g) BLM may agree to translocation and habitat restoration research studies. Translocations will conform with BLM Manual Section 1745 "Introduction, Transplant, Augmentation and Reestablishment of Fish, Wildlife and Plants." Prior to, and following translocation, Permittees, USFWS, or their assignees, will conduct an assessment of desert tortoise habitat, densities, carrying capacity, and mortality in suitable areas proposed for translocation.

(h) The Permittees shall bear all cost associated with issuing authorizations, coordinating actions, development of mitigation proposals, and project meeting attendance time and travel costs incurred by BLM for all activities pertaining to the SLCHCP. Other than attendance at Implementation and Monitoring Committee meetings, BLM will not encumber base funding to ensure success of the SLCHCP and is under no obligation to expend any appropriated funds for any activity required under or related to the SLCHCP. Expenses to the BLM will be offset through a cost recovery structure.

(i) BLM may identify projects that could be used for SLCHCP mitigation. Permittees may select the projects they want to accomplish or propose others. Permittees (or an appropriate third party) shall enter into a cooperative agreement with BLM to accomplish

restoration/rehabilitation/mitigation work according to such terms and conditions as BLM may specify.

(j) All data collected pertaining to the SLCHCP on BLM-administered lands will be made available to BLM. Original work of authorship in any medium, including data in any form, prepared and originated by BLM, USFWS or Permittees as a result of work conducted under this Agreement on or pertaining to BLM administered lands, shall be shared jointly by the BLM, USFWS or Permittees with each having full and unlimited rights of use. If any requirement of the SLCHCP or Agreement involves information, including data, previously developed and under the control or copyright of BLM, USFWS or Permittees, BLM, USFWS or Permittees shall permit the other parties limited use of such information and data as necessary to accomplish the Agreement, to the extent otherwise allowed by law.

(k) BLM will have a seat on the Implementation and Monitoring Committee.

## **5.0 INCORPORATION OF SLCHCP**

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

## **6.0 TERM**

**6.1 Initial term.** This Agreement and the SLCHCP will become effective on the date that the USFWS issues the Permits. This Agreement, the SLCHCP, and the Permits will remain in effect for a period of 30 years from issuance of the original Permits, except as provided below.

**6.2 Permit suspension or revocation.** The USFWS may suspend or revoke a permit issued to any one of the Applicants for cause in accordance with the laws and regulations in force at the time of such suspension or revocation (See 5 U.S.C. § 558; 50 C.F.R. §§ 13.27 – 13.29, 17.22(8), and 17.32(8)). Such suspension or revocation may apply to the entire permit, or only to specified Covered Species, Covered Lands, or Covered Activities. In the event of suspension or revocation, Permittee's obligations under this Agreement and the SLCHCP will

continue until the USFWS determines that all take of Covered Species that occurred under the Permits have been fully mitigated in accordance with the SLCHCP.

**6.3 Extension of the Permits.** Upon agreement of the Parties and compliance with all applicable laws, the Permits may be extended beyond their initial term under regulations of the USFWS in force on the date of such extension. If the Permittees desire to extend the permit, they will so notify the USFWS at least 180 days before the then-current term is scheduled to expire. Extension of the permit constitutes extension of the SLCHCP and this Agreement for the same amount of time, subject to any modifications that the USFWS may require at the time of the extension.

## **7.0 FUNDING**

The Permittees warrant that they have, and will expend, such funds as may be necessary to fulfill their obligations under the SLCHCP. Each of the Permittees will promptly notify the USFWS of any material change in the Permittees' financial ability to fulfill their obligations. In addition to providing any such notice, Lincoln County will provide the USFWS with a copy of its annual report each year of the Permit or with such other reasonably available financial information that the Parties agree will provide adequate evidence of the Permittee's ability to fulfill its obligations.

UPRR may pre-pay mitigation fees in advance of carrying out Covered Activities that trigger the obligation to pay such fees. The City of Caliente and UPRR (if UPRR does not exercise the option to pay mitigation fees up front pursuant to Section 9.1.1 of the SLCHCP) shall file annual reports that the Parties agree will provide adequate evidence of the Permittees' ability to fulfill their obligations.

## **8.0 EXTENSION OF TAKE AUTHORIZATION TO THIRD PARTY PARTICIPANTS BY PARTICIPATION AGREEMENT**

**8.1 General Provisions.** As provided by this Agreement, the SLCHCP and the Permits, the Permittees may extend take authorization granted by their respective Permits to other persons or entities that qualify as Third Party Participants provided that each proposed Third Party Participant's activity is a Covered Activity as outlined in the SLCHCP, and each Third Party Participant agrees to comply with all applicable conservation measures and other

terms and conditions of this Agreement, the SLCHCP and the Permits. The applicable Permittee shall be responsible for determining whether an application from a potential Third Party Participant complies with all applicable terms and conditions and must make findings supporting such determination before extending take authorization to the Third Party Participant.

**8.2 Potential Third Party Participants.** To qualify as a Third Party Participant under the SLCHCP and this Agreement, and obtain take authorization from either one of the three Permittees pursuant to 50 C.F.R. §§ 13.25(d) or (e), the proposed Third Party Participant must sign a Participation Agreement with the Permitted entity before any such take authorization is extended, and assume the obligation to comply with all terms and conditions of this Agreement, the SLCHCP and the Permits. Alternatively, the Permittee must impose, and the proposed Third Party Participant must accept, the applicable terms and conditions of the SLCHCP, the Permits, and this Agreement as conditions of approval of the Third Party Participant's activity. Provided the proposed Third Party Participant is obligated under an agreement or conditions of approval of the Third Party Participant's activity to comply with such terms and conditions, the Permittee may extend the take authorization to the Third Party Participant upon issuance of a grading permit for the activity or, if a grading permit is not required, issuance of the first construction permit. Once take authorization has been extended to the Third Party Participant for its activity, the take authorization shall remain in effect with regard to the activity, even if the applicable Permit is suspended or revoked, for as long as the Third Party Participant fully complies with the applicable terms and conditions of this Agreement, the SLCHCP, and the Permits; provided, however, that if the applicable Permit is suspended or revoked, the USFWS may suspend or revoke the extension of take authorization to the Third Party Participant if the USFWS determines that implementation of the activity would likely jeopardize the continued existence of a Covered Species. Before making such a determination, the USFWS will meet and confer with the Third Party Participant and the Permittee to discuss the threat of jeopardy and possible ways to avoid it short of suspending or revoking the take authorization extended to the project.

**8.3 Early Extension of Take Authorization.** A Third Party Participant may receive an early extension of take authorization from either one of the three Permittees (i.e., before issuance of a grading permit or first construction permit) by paying all SLCHCP-related fees that apply to the Third Party Participant's proposed activity and by agreeing in writing to all other

applicable terms and conditions of this Agreement, the SLCHCP, and the Permits upon, or at any time after, the Permittee's approval of the Third Party Participant's activity. Third Party Participants seeking take authorization must sign a Participation Agreement with the Permitted entity upon receiving such take authorization under the applicable Permit. The Permittee that issued the take authorization may, by written notice to the Third Party Participant, suspend early extensions of take authorization if it determines such extensions are hindering its ability to implement or administer the SLCHCP (for example, if fee revenues are being accumulated faster than they can be spent, thereby diminishing the value of these funds in the likely event that costs continually increase or if mitigation is not keeping up with habitat disturbance). Any such suspension by the applicable Permittee shall apply to subsequent early extensions of take authorization only and shall not apply retroactively, where fees or in-lieu land dedications were made before the prohibition is communicated in writing to the other holders of early extensions. A proposed Third Party Participant seeking an early extension of take authorization shall be required to pay the applicable mitigation fees. Unless otherwise agreed by USFWS and the applicable Permittee, where the proposed activity requires a tentative subdivision map or similarly detailed approval, the fees may not be paid for and early take authorization may not be extended to a particular proposed activity until the Permittee has approved such tentative subdivision map or similarly detailed activity plan.

## **9.0 MONITORING AND REPORTING**

**9.1 Planned Periodic Reports.** As described in Section 8.2 of the SLCHCP, Lincoln County will submit periodic reports discussing all activities and the results of the monitoring program.

**9.2 Other Reports.** Lincoln County will provide, within 30 days of a request by the USFWS, any additional information in its possession or control related to implementation of the SLCHCP that is requested by the USFWS for the purpose of assessing whether the terms and conditions of the permit and the SLCHCP, including the SLCHCP's adaptive management plan, are being fully implemented.

**9.3 Certification of Reports.** All reports will include the following certification from a responsible representative of the Permittee who supervised or directed preparation of the report:

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

**9.4 Monitoring by the USFWS.** The USFWS may conduct inspections and monitoring in connection with the permit in accordance with their regulations (See 50 C.F.R. §§ 13.47).

## **10.0 CHANGED CIRCUMSTANCES**

**10.1 Permittee-initiated Response to Changed Circumstances.** SLCHCP Section 8.3.1 contains the complete list of Changed Circumstances and describes those specific conservation and mitigation measures that the Permittees agree to implement where they are deemed necessary to respond to the Changed Circumstances. The Permittees will give notice to the USFWS within seven (7) days after learning that any of the changed circumstances listed in Section 8.3.1 of the SLCHCP has occurred. As soon as practicable thereafter, but no later than 30 days after learning of the changed circumstances, the Permittee(s) will modify its activities in the manner described in Section 8.3.1 of the SLCHCP, to the extent necessary to mitigate the effects of the changed circumstances on Covered Species, and will report to the USFWS on its actions. The Permittee(s) will make such modifications without awaiting notice from the USFWS.

**10.2 USFWS-initiated Response to Changed Circumstances.** If the USFWS determines that changed circumstances have occurred and that the Permittee(s) has not responded in accordance with Section 8.3.1 of the SLCHCP, the USFWS will so notify the Permittee(s) and direct the Permittee(s) to make the required changes. Within 30 days after receiving such notice, the Permittee(s) will make the required changes and report to the USFWS on its actions. Such changes are provided for in the SLCHCP, and hence do not constitute unforeseen circumstances or require amendment of the Permit or SLCHCP.

**10.3 Listing of Species that are not Covered Species.** In the event that a non-covered species that may be affected by the Covered Activities becomes listed under the ESA, the Permittees will not have incidental take authority with respect to such newly-listed species. The Permittees will seek technical assistance from USFWS and implement “no-take/no-jeopardy” measures identified by the USFWS until the permits are amended to include such

species, or until the USFWS notifies the Permittees that such measures are no longer needed to avoid jeopardy to, take of, or adverse modification of the critical habitat of, the non-covered species.

## **11.0 ADAPTIVE MANAGEMENT**

**11.1 Permittee-initiated Adaptive Management.** The Permittees will implement the adaptive management provisions as provided in Section 7.3 of the SLCHCP, when changes in management practices are necessary to achieve the SLCHCP's biological objectives, or to respond to monitoring results or new scientific information, consistent with the provisions of Section 7.3 establishing the SLCHCP as a prescription-based HCP under the USFWS Five-Points Policy. The Permittees will make such changes without awaiting notice from the USFWS, and Lincoln County will report to the USFWS on any actions taken pursuant to this section.

**11.2 USFWS-initiated adaptive Management.** If the USFWS determines that one or more of the adaptive management provisions in the SLCHCP have been triggered and that the Permittee has not changed its management practices in accordance with Section 7.3 of the SLCHCP, the USFWS will so notify the Permittees and will direct the Permittees to make the required changes. Within 30 days after receiving such notice, the Permittees will make the required changes, and Lincoln County will report to the USFWS on its actions. Such changes are provided for in the SLCHCP, and hence do not constitute unforeseen circumstances or require amendment of the permits or SLCHCP, except as provided in this section.

**11.3 Reductions in Mitigation.** The Permittees will not implement adaptive management changes that may result in less mitigation than provided for the Covered Species under the original terms of the SLCHCP, unless the USFWS first provides written approval. The Permittees may propose any such adaptive management changes by notice to the USFWS, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on Covered Species, and other environmental impacts. Within 120 days of receiving such a notice, the USFWS will either approve the proposed adaptive management changes, approve them as modified by the USFWS, or notify the Permittees that the proposed changes constitute permit amendments that must be reviewed under Section 13.2 of this Agreement.

**11.4 No Increase in Take.** This section does not authorize any modifications that would result in an increase in the amount and nature of take, or increase the impacts of take, of Covered Species beyond that analyzed under the original SLCHCP and any amendments thereto. Any such modification must be reviewed as a permit amendment under Section 13.2 of this Agreement.

## **12.0 LAND TRANSACTIONS**

**12.1 Acquisition of Land by Permittees.** Nothing in this Agreement, the SLCHCP, or the Permit limits the Permittees' right to acquire additional lands. Any lands that may be acquired will not be covered by the permit except upon amendment of the permit as provided in section 13.2 of this Agreement.

**12.2 Disposal of Land by Permittees.** Any Permittee's transfer of ownership or control of Covered Land will require an amendment of the permit in accordance with section 13.2 of this Agreement, and such Permittee shall complete mitigation of any as yet unmitigated impacts of take of Covered Species relating to such Covered Land, except that transfers of Covered Lands may be processed as minor modifications in accordance with Section 13.1 of this Agreement if:

(a) The land will be transferred to an agency of the Federal government and, prior to transfer, the USFWS has determined that the transfer will not compromise the effectiveness of the SLCHCP based on adequate commitments by that agency regarding management of such land;

(b) The land will be transferred to a non-federal entity that has entered into an agreement acceptable to the USFWS (e.g. an easement held by the state fish and wildlife agency with the USFWS as third-party beneficiaries) to ensure that the lands will be managed in such a manner and for such duration so as not to compromise the effectiveness of the SLCHCP;

(c) The land will be transferred to a non-federal entity that, prior to completion of the land transaction, has agreed to be bound by the SLCHCP as it applies to the transferred land and has obtained an incidental take permit following normal permit procedures covering all species then covered by the Permittee's Permit(s); or

(d) The USFWS determines that the amount of land to be transferred does not impede and will not have a material impact on the ability of the Permittees to comply with the requirements of the SLCHCP and terms and conditions of the Permit.

## **13.0 MODIFICATIONS AND AMENDMENTS**

### **13.1 Minor Modifications.**

(a) Any party may propose minor modifications to the SLCHCP or this Agreement by providing notice to all other Parties. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under and implementation of the SLCHCP and on the Covered Species. The Parties will use best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon all other Parties' written approval. If, for any reason, a receiving Party objects to a proposed modification, it must be processed as an amendment of the permit in accordance with subsection 13.2 herein. The USFWS will not propose or approve minor modifications to the SLCHCP or this Agreement if the USFWS determines that such modifications would result in operations under and implementation of the SLCHCP that are significantly different from those analyzed in connection with the original SLCHCP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the original SLCHCP, or additional take not analyzed in connection with the original SLCHCP.

(b) Minor modifications to the SLCHCP and IA processed pursuant to this subsection may include but are not limited to the following:

- (1) corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning;
- (2) corrections of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the permits or SLCHCP;
- (3) correction of land ownership and/or land boundaries;

(4) correction of acres of suitable and potential habitat for southwestern willow flycatcher along the Meadow Valley Wash within the Covered Lands pursuant to the SLCHCP. Any upward adjustments to the amount of suitable habitat available in the Meadow Valley Wash does not result in an increase of acreage of suitable habitat authorized to be removed within the term of the permits without a corresponding amendment to the take authorization;

(5) inclusion of new non-Federal lands if they leave Federal ownership through public land disposal or other means and have gone through a Section 7 consultation with the USFWS within the SLCHCP Covered Area. This includes new parcels, new and expanded rights-of-ways, and the like. For example, inclusion of new land with very low to low desert tortoise densities proximate to existing development might be included as a minor amendment. The inclusion of additional non-Federal land to the Covered Area that supports desert tortoise habitat, regardless of the density of tortoises on the land, would not be considered a minor amendment if it would result in take of the species above what was authorized under the permits. Inclusion of new non-federal lands will be assessed on a case-by-case basis. Activities that will occur, and may result in take of Covered Species on such lands that was not analyzed either through a section 7 consultation or this HCP, will not be considered a minor modification.

(6) minor changes to surveying, monitoring, or reporting protocols; or

(7) changes in the ad valorem tax rate for the LCLA General Improvement District as described in Section 9.1.1.3 of the SLCHCP, either increased or decreased, as appropriate to support the minimization and mitigation measures.

(c) Any other modifications to the SLCHCP or Agreement will be processed as amendments of the permit in accordance with subsection 13.2 of this section.

**13.2 Amendment of the Permit.** The Permits may be amended in accordance with all applicable legal requirements, including but not limited to the ESA, NEPA, and the USFWS' permit regulations. The Party proposing the amendment shall provide a statement of the reasons for the amendment and an analysis of its environmental effects, including its effects on operations under or implementation of the SLCHCP and on Covered Species.

## **14.0 REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION**

**14.1 In general.** Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit(s), and the SLCHCP.

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

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

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

**14.5 Dispute resolution.** The Parties recognize that disputes concerning implementation of, compliance with or termination of this Agreement, the SLCHCP, and the Permits may arise from time to time. The Parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the Parties may later agree. However, if at any time any Party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution.

**14.5.1 Informal dispute resolution process.** Unless the Parties agree upon another dispute resolution process, or unless an aggrieved Party has initiated administrative proceedings or suit in Federal court, the Parties may use the following process to attempt to resolve disputes:

(a) The aggrieved Party will notify the other Parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.

(b) The Party alleged to be in violation will have 30 days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved Party will use its best efforts to provide any information available to it that may be responsive to such inquiries within the allotted time.

(c) Within 30 days after such response was provided or was due, representatives of the Parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all Parties, or will establish a specific process and timetable to seek such a solution.

(d) If any issues cannot be resolved through such negotiations, the Parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

## **15.0 MISCELLANEOUS PROVISIONS**

**15.1 No partnership.** Neither this Agreement nor the SLCHCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

**15.2 Notices.** Any notice permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Deputy Regional Director  
United States Fish and Wildlife Service  
California and Nevada Region  
2800 Cottage Way, Room W-2606  
Sacramento, California 95825  
Telephone: (916) 414-6464  
Telefax: (916) 414-6486

Chairman  
Board of Lincoln County Commissioners  
P.O. Box 90  
Pioche, Nevada 89403  
Telephone: (775) 962-5390  
Fax: (775) 962-5180

Union Pacific Railroad Company  
General Director Maintenance of Way – Environmental  
1400 Douglas St.  
Omaha, NE 68179-0910  
Telephone: (402) 544-2358  
Fax: (402) 501-0324

Mayor  
City of Caliente  
P.O. Box 158  
Caliente, Nevada 89008  
Telephone: (775) 726-3132  
Fax: (775) 726-3370

District Manager  
Ely District Office  
HC 33 Box 33500  
Ely, Nevada 89318  
Telephone: (775) 289-1800

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

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

**15.5 Elected officials not to benefit.** No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

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

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

**15.8 No third-party beneficiaries.** Without limiting the applicability of rights granted to the public pursuant to the ESA or other federal law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

**15.9 Relationship to the ESA and other authorities.** The terms of this Agreement shall be governed by and construed in accordance with the ESA and applicable Federal law. In particular, nothing in this Agreement is intended to limit the authority of the USFWS to seek penalties or otherwise fulfill their responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the USFWS as an agency of the Federal government. Nothing in this Agreement will limit the right or obligation of any Federal agency to engage in consultation required under Section 7 of the ESA or other Federal law; however, it is intended that the rights and obligations of the Permittees under the SLCHCP and this Agreement will be considered in any consultation affecting the Permittees' use of the Covered Lands.

**15.10 References to regulations.** Any reference in this Agreement, the SLCHCP, or the Permits to any regulation or rule of the USFWS shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

**15.11 Applicable laws.** All activities undertaken pursuant to this Agreement, the SLCHCP, or the Permits must be in compliance with all applicable state and Federal laws and regulations.

**15.12 Successors and assigns.** This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the Permits shall be governed by the USFWS' regulations in force at the time.**Severability.** If any provision of this Agreement or the SLCHCP is found invalid or unenforceable, such provision shall be enforced to the maximum extent possible and the other provisions shall remain in effect to the extent they can be reasonably applied in the absence of such invalid or unenforceable provisions. Further, if any Permittee's Permit is revoked, or any Party fails to comply with its obligations, this Agreement and the other Permits shall nevertheless remain in effect.

This Implementing Agreement has been executed as of [DATE], 2008, and shall become effective on the Effective Date as defined herein.

**IN WITNESS THEREOF**, the Parties hereto have caused this Southeastern Lincoln County Habitat Conservation Plan Implementing Agreement to be executed and to be in effect as of the date that the USFWS issues the Permits.

BY \_\_\_\_\_ Date \_\_\_\_\_  
Deputy Regional Director  
United States Fish and Wildlife Service  
California and Nevada Region  
Sacramento, California.

BY \_\_\_\_\_ Date \_\_\_\_\_  
Ronda Hornbeck  
Chairperson  
Board of Lincoln County Commissioners  
Pioche, Nevada

BY \_\_\_\_\_ Date \_\_\_\_\_  
Kevin Phillips  
Mayor  
City of Caliente  
Caliente, Nevada

BY \_\_\_\_\_ Date \_\_\_\_\_  
Debra L. Schafer  
General Director, Maintenance of Way Environmental  
Union Pacific Railroad Company  
Omaha, Nevada

BY \_\_\_\_\_ Date \_\_\_\_\_  
John Ruhs  
District Manager  
Ely District Bureau of Land Management  
Ely, Nevada