IMPLEMENTING AGREEMENT

by and between

EXETER LXI, L.L.C.

and the

U.S. FISH AND WILDLIFE SERVICE

for the

SKYRANCH PROJECT

PIMA COUNTY, ARIZONA

____________________, 2004
IMPLEMENTING AGREEMENT

by and between

EXETER LXI, L.L.C.

and the

U.S. FISH AND WILDLIFE SERVICE

TO ESTABLISH A MITIGATION PROGRAM FOR ENDANGERED SPECIES AT
THE PROPOSED SKYRANCH PROJECT, PIMA COUNTY, ARIZONA.

This Implementing Agreement made and entered into as of the _____ of ______, 2004, by and between Exeter LXI, L.L.C. (“Permittee”) and the U.S. Fish and Wildlife Service (“Service”) defines their roles and responsibilities and provides a common understanding of actions that will be undertaken by Exeter LXI, L.L.C. to minimize and mitigate to the maximum extent practicable the effects of the proposed Skyranch project on a certain species subject to the Endangered Species Act of 1973.

1.0 RECITALS

This Implementing Agreement is entered into with regard to the following facts:

WHEREAS, the site of the proposed Skyranch project selected after environmental review has been determined to contain and be adjacent to habitat for the cactus ferruginous pygmy owl (Glaucidium brasilianum cactorum) designated as an endangered species under the Endangered Species Act of 1973; and

WHEREAS, Exeter LXI, L.L.C., with technical assistance from the U.S. Fish and Wildlife Service, has developed a series of measures, described in the Habitat Conservation Plan pertaining to the proposed Skyranch project, to minimize and mitigate to the maximum extent practicable the effects of the proposed Skyranch project upon the cactus ferruginous pygmy owl and associated habitat;

THEREFORE, Exeter LXI, L.L.C. and the U.S. Fish and Wildlife Service do hereby understand and agree as follows:
2.0 DEFINITIONS

The following terms as used in this Implementing Agreement shall have the meanings set forth below:


2.2 The Term “Agreement” shall mean this Implementing Agreement.

2.3 The term "Permit" shall mean an incidental take permit requested by, and issued by the U.S. Fish and Wildlife Service to, the Permittee, as defined in paragraph 2.4 of this Agreement, pursuant to ESA § 10(a)(1)(B) (16 U.S.C. § 1539(a)(1)(B)).

2.4 The term "Permittee" shall mean Exeter LXI, L.L.C. and its successors and assigns as applicable pursuant to the terms of the Permit and this Agreement.

2.5 The term “Service” shall mean the U.S. Fish and Wildlife Service.

2.6 The term “Parties” shall mean the Permittee and the Service; and the term “Party” shall mean either the Permittee or the Service.

2.7 The term “HCP” shall mean the Habitat Conservation Plan prepared for the Project, as defined in paragraph 2.8 of this Agreement, pursuant to ESA § 10(a)(2)(A) (16 U.S.C. § 1539(a)(2)(A)).

2.8 The term “Project” shall mean the residential development project of the Permittee depicted in Figure 6 of the HCP.

2.9 The term “ Permit Area” shall mean the area of approximately 512 acres which will include the Project and an open space habitat Reserve, defined in paragraph 2.11 of this Agreement, located in the northeastern portion of the Town of Marana, Pima County, Arizona, as depicted on Figures 1 and 2, and as described generally in paragraph 3.1, and by metes and bounds in paragraph 3.1.1, in the HCP.

2.10 The term "Project Area" shall mean the approximately 103 acres of the Permit Area in which the Project will be situated.

2.11 The term “Reserve” shall mean the approximately 409 acres of the Permit Area that will be preserved in their natural state.

2.12 The term “CFPO” shall mean the cactus ferruginous pygmy owl (Glaucidium brasilianum cactorum).
2.13 The term “Manager” shall be the entity chosen in accordance with paragraph 10.1.b. of this Agreement to manage the Reserve as required by the terms of the HCP and this Agreement.

2.14 The terms “activity” or “activities” that “are subject to this Agreement” shall mean any activity or activities that are described in the HCP as covered by the HCP, with the restrictions applied thereto in the HCP.

2.15 The term “take” shall mean the “take” of an individual or individuals of the CFPO under ESA § 9(a)(1)(B) (16 U.S.C. § 1538(a)(1)(B)), as that term is defined by ESA § 3(19) (16 U.S.C. § 1532(19)); and the term “incidental take” shall mean take that is incidental to an otherwise lawful activity.

2.16 The term “Covered Species” means the CFPO, and any other species determined to be an endangered species or a threatened species under ESA § 4 (16 U.S.C. § 1533) that is included in the coverage of the HCP and Permit by amendment thereto.

2.17 The term “Changed Circumstances” means changes in circumstances affecting a species or geographic area covered by a conservation plan prepared pursuant to ESA § 10(a)(2)(A) (16 U.S.C. § 1539(a)(2)(A)) that can reasonably be anticipated by plan developers and the Service and that can be planned for.

2.18 The term “Unforeseen Circumstances” means changes in circumstances affecting a species or geographic area covered by a conservation plan prepared pursuant to ESA 10(a)(2)(A) (16 U.S.C. § 1539(a)(2)(A)) that could not reasonably have been anticipated by the plan developer and the Service 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 species to which the conservation plan applies.

2.19 Terms used in this Agreement and specifically defined in the ESA, in regulations adopted by the Service to implement the ESA, or in the HCP shall have the same meaning as in the ESA, those regulations, or the HCP, unless this Agreement expressly provides otherwise.

3.0 HABITAT CONSERVATION PLAN

The Permittee has prepared a Habitat Conservation Plan and submitted it to the Service with a request that the Service issue the Permit to allow the incidental take of CFPO within and (indirectly) adjacent to the Permit Area.
The HCP proposes a program to minimize and mitigate to the maximum extent practicable the effect of incidental take of CFPO resulting from activities that are subject to this Agreement and to conserve CFPO habitat.

4.0 INCORPORATION OF HCP

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

5.0 LEGAL REQUIREMENTS

In order to fulfill the requirements that will allow the Service to issue the Permit, the HCP and this Agreement set forth measures that are intended to ensure that any take of CFPO occurring within or adjacent to the Permit Area will be incidental take; that the impacts of the incidental take will, to the maximum extent practicable, be minimized and mitigated; that procedures to deal with unforeseen circumstances will be provided; that adequate funding for the HCP will be provided; and that the incidental take will not appreciably reduce the likelihood of the survival and recovery of the CFPO in the wild.

6.0 COOPERATIVE EFFORT

In order that each of the legal requirements as set forth in paragraph 5.0 of this Agreement are fulfilled, each Party to this Agreement must perform certain obligations, responsibilities, and tasks as more particularly set forth in the HCP and this Agreement. The HCP thus describes a cooperative program by Federal and private interests to minimize and mitigate the effects of the Project on the CFPO.

7.0 PURPOSES

The purposes of this Agreement are:

7.1 To ensure implementation of each of the terms of the HCP;

7.2 To describe remedies and recourse should either Party fail to perform its obligations, responsibilities, and tasks as set forth in the HCP and this Agreement; and,
7.3 As stated in paragraph 11.3 of this Agreement, to provide assurances to the Permittee that as long as the terms of the HCP, this Agreement, and the Permit applicable to the Permittee are performed, no additional mitigation will be required.

8.0 TERMS

This Agreement shall become effective on the date that the Service issues the Permit and shall remain in full force and effect for a period of five (5) years or until termination of the Permit, whichever occurs sooner. The Permit shall have a term of five (5) years and may be extended upon the consent of both Parties. If the Permittee desires to extend the Permit, it will notify the Service at least 180 days before the then-current term is scheduled to expire. Extension of the Permit constitutes extension of the HCP and this Agreement for the same amount of time, subject to any modifications that the Service may require at the time of extension.

9.0 FUNDING

9.1 Exeter fully commits to ensure that adequate funding will be provided to meet all of its obligations in the HCP. Exeter will ensure adequate funding to conserve and manage the Reserve in perpetuity, including all relevant requirements as described in the HCP, the Permit, and this Agreement.

9.2 During the first 6 months of the Permit, or prior to habitat disturbance, whichever occurs first, Exeter will provide sufficient funding to: 1) execute a conservation easement on 368 acres (90 percent) of the Reserve, 2) erect a fence around the Reserve, and 3) implement all other relevant requirements of the HCP directly related to any such disturbance.

9.3 No later than 12 months from the date of the permit, Exeter shall ensure that permanent funding is available to meet its continuing obligations under the HCP. Exeter shall provide sufficient funding to: 1) hire a Reserve Manager, 2) complete a Resource Management Plan, 3) complete a Property Analysis Report (PAR) to determine the cost of perpetual management and monitoring of the Reserve, and 4) establish an endowment consisting of a non-wasting account designated solely for the purpose of implementing the HCP, the Permit, and this Agreement. Funding will be sufficient for land management, monitoring, surveys, recording of the subsequent conservation easement on the remaining 41 acres of the Reserve, enforcement of the conservation easement, and other relevant conservation measures as
detailed in the HCP. Principal will be placed in a non-wasting account designated solely for that purpose. Principal in the account will be of an amount to generate annual cash flow sufficient to satisfy Exeter’s continuing obligations under the HCP, as agreed to by the Service and Exeter. Cash flow will include that needed for inflation as measured by an annual index calculated by dividing the U.S. Department of Commerce’s final estimate of the chain-type annual weights price index for the Gross Domestic Product for the most recently completed third quarter by the value of that same index for the third quarter of the prior year.

9.4 At least once every 3 years, Exeter shall contract for a third-party audit of the endowment to ensure that it is being managed appropriately. The cost of the audit shall be funded through the endowment.

9.5 The Permittee will provide to the Service notice of any material change in the Permittee’s funding resources, including a discussion of the nature of the change. If the prospective change is known to the Permittee more than 60 days before it occurs, the Permittee shall give the Service 60-days notice thereof.

9.6 The Permittee shall establish an escrow fund to be available solely to the Manager to support the activities of the Manager on the Reserve. Until the Permittee and the Service agree on the amount to be deposited in the fund and the fund is established, the Permittee shall be responsible for providing funding directly to the Manager to support the Manager's activities on the Reserve or for expending funds itself on any activity required by the HCP or this Agreement on the Reserve to be undertaken prior to the selection of the Manager pursuant to paragraph 10.1.b. of this Agreement.

9.7 If the Permittee and/or the Manager proposes that another entity assume its or their funding and/or management obligations under this Agreement, the Permittee and/or the Manager shall ensure that the assuming entity has sufficient funds to perform such obligations.

10.0 RESPONSIBILITIES OF THE PARTIES

10.1 Responsibilities of the Permittee.

The HCP will be properly functioning if the terms of this Agreement have been or are being fully implemented. The Permittee shall undertake all activities assigned to the Permittee in the HCP in order
to meet the terms of the HCP and comply with the Permit. The Permittee will fully and faithfully perform all obligations assigned to it under this Agreement, the Permit and the HCP.

a. The Permittee shall comply with the provisions concerning changes in circumstances as set forth in the HCP and paragraph 11.3 of this Agreement.

b. The Permittee shall select, subject to the approval of the Service, the Manager for the Reserve. Upon approval of the Manager by the Service, the Manager shall be deemed responsible for operation, management, and monitoring of the Reserve. The failure of the Manager to carry out such obligations under and in accordance with the HCP, Permit, or this Agreement shall subject the Manager to enforcement by the Service, but shall not be a basis for revocation, termination, or suspension of the authorization for development and operation of the Project pursuant to the Permit.

c. The Permittee shall provide for the funding required by section 9.0 of this Agreement, in accordance with the terms of that section.

d. Within 6 months of the date of the permit, or prior to habitat disturbance, whichever occurs first, Exeter shall:

1) Erect a fence around the Reserve;

2) Execute a Conservation Easement on the first 368 acres of the Reserve that incorporates the Reserve Manager and a third party right of enforcement for the Conservation Easement;

3) Select the entity that will hold the Conservation Easement, subject to the approval of the Service; and

4) Select the entity that will enforce the Conservation Easement, subject to the approval of the Service.

e. Within 12 months of the date of the Permit, Exeter shall:

1) Hire a Reserve Manager, subject to the approval of the Service, who will be signatory to this Agreement;

2) Complete a Resource Management Plan for the Reserve that is acceptable to the Service:
3) Complete a PAR analysis, subject to the approval of the Service, to determine the amount of funding necessary for the endowment; and

4) Establish an endowment fund sufficient to implement the HCP, the Permit, and this Agreement.

f. Prior to the expiration of the Permit, the final 10% of the Reserve (approximately 41 acres) will be placed in a Conservation Easement subject to the management obligations for the Reserve in perpetuity.

10.2 Responsibilities of the Service.

The Service shall have the following responsibilities related to the Permit, the HCP, and this Agreement:

a. Upon execution of this Agreement by all parties, and satisfaction of all other applicable legal requirements, the Service will issue to the Permittee a Permit under Section 10(a)(1)(B) of the ESA, authorizing Incidental Take by the Permittee of CFPO from activities in the Project Area as described in the HCP, the Permit, and this Agreement.

b. The Service shall act promptly (but not later than 30 days) after receipt of notice of selection of a Manager by the Permittee pursuant to paragraph 10.1.b. of this Agreement, and shall not unreasonably withhold its approval of the selection. If the Service disapproves the selection, it shall provide the reasons for disapproval in detail to the Permittee in a written statement.

c. To the extent resources are available, the Service shall make itself available to, cooperate with, and provide technical assistance to the Permittee and the Manager.

d. After issuance of the Permit, the Service may monitor the implementation of the Permit, this Agreement, and the HCP in order to ensure compliance with those documents.

e. The Service finds that the Permit constitutes a Special Purpose Permit under 50 C.F.R. § 21.27, authorizing take, pursuant to the Migratory Bird Treaty Act, for the CFPO. The Special Purpose Permit shall be valid for a period of three years from the date of issuance if the Permit remains in effect for such period. The Special Purpose Permit shall be renewed automatically if the Permittee remains in compliance with the
terms of this Agreement, the HCP, and the Permit. Each renewal shall be valid for a period of three years if the Permit remains in effect for such period.

11.0 REMEDIES AND ENFORCEMENT

11.1 Remedies in general.

Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit, and the HCP, and to seek remedies for any breach thereof, or any termination, revocation, or suspension of the Permit, subject to the following:

a. 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. Notwithstanding the foregoing:

(1) Retain Liability

Each Party shall retain whatever liability it would possess for its present and future acts or failure to act without existence of this Agreement.

(2) Land Owner Liability

Each Party shall retain whatever liability it possesses as an owner of interests in land.

(3) Responsibility 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. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

(4) Rights of the Permittee

Nothing contained in this Agreement is intended to limit the rights of the Permittee under the U.S. Constitution or
other applicable Federal or state law to seek any appropriate remedies against the Service that are otherwise permitted by law and this Agreement.

b. **Injunctive and Temporary Relief**

The Parties acknowledge that the CFPO is unique and that its loss as a species would result in irreparable damage to the environment and that therefore pursuit of injunctive and temporary relief by the Federal government may be appropriate to ensure compliance with the terms of this Agreement.

### 11.2 Permit Suspension or Revocation

a. **In General**

Except as otherwise provided for under the terms of this Agreement, the Permit may be suspended or revoked in conformance with Section 10(a)(2)(C) of the ESA, 50 CFR 13.27-29, and applicable statutes and regulations. In the event of suspension or revocation, the Permittee’s obligations under any provision of this Agreement and the HCP related to mitigation of “Take” will continue until the Service determines that all "Take" of Covered Species that occurred under the Permit has been fully mitigated in accordance with the HCP.

b. **Notice**

The Service agrees that it will not terminate, revoke, or suspend the Permit by reason of breach of this Agreement or the HCP without giving the Permittee and the Manager at least sixty (60) days prior written notice and opportunity to cure such breach, except in the event of an emergency involving clear and immediate substantial likelihood of death or injury to a CFPO.

### 11.3 Changed Circumstances

a. **No Surprises Rule**

The Permit will include the “assurances provided to the Permittees in the case of changed or unforeseen circumstances” pursuant to the Service’s Habitat Conservation Plan Assurances (“No Surprises”) Rule published February 23, 1998, 63 Fed. Reg. 8859 and set forth in CFR Part 17 (including without limitation Sections 17.3, 17.22, and 17.32). The Service has found that the Covered Species (CFPO) is “adequately covered” (as such term is
defined in the Rule) by the HCP. The following provisions are
entered into pursuant to and are intended to comply with such
Rule.

(1) Permittee-initiated response to Changed Circumstances.
The Permittee will give notice to the Service within seven days
after learning that any of the Changed Circumstances listed in
section 10 of the HCP has occurred. As soon as practicable
thereafter, but no later than 30 days after learning of the
Changed Circumstances, the Permittee will modify its activities
in the manner described in section 10 of the HCP, to the extent
necessary to mitigate the effects of the Changed Circumstances
on Covered Species, and will report to the Service on its actions.
The Permittee will make such modifications without awaiting
notice from the Service.

(2) Service-initiated response to Changed Circumstances. If the
Service determines that Changed Circumstances have occurred
and that the Permittee has not responded in accordance with
section 10 of the HCP, the Service will so notify the Permittee
and will direct the Permittee to make the required changes.
Within 30 days after receiving such notice, the Permittee will
make the required changes (unless such changes, by their
nature, require additional time to complete) and report to the
Service on its actions. Such changes are provided for in the HCP,
and hence do not constitute Unforeseen Circumstances or
require amendment of the Permit or HCP.

(3) Unforeseen Circumstances. In the event of any such changes
in circumstances during the Permit term which the Permittee
and the Service could not reasonably have foreseen at the time
Service approved the HCP and issued the Permit, the Service
may require the Permittee to implement conservation and
mitigation measures in response to the change in circumstances
only if the following conditions are satisfied:

(i) Obligations under a finding of Unforeseen
Circumstances. Provided that the Permittee has complied
with its obligations under the HCP, this Agreement, and
the Permit, the Service can require the Permittee to
provide mitigation beyond that provided for in the HCP
only under Unforeseen Circumstances in accordance with
the no surprises regulations at 50 C.F.R. 17.22(b)(5),
17.32(b)(5).
(ii) **Interim obligations upon a finding of Unforeseen Circumstances.** If the Service makes a finding of Unforeseen Circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, the Permittee will endeavor to avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected species.

b. **No Surprises Assurances Contingency**

In the event that any judicial decision or determination, including without limitation the decision from the District Court for the District of Columbia in *Spirit of the Sage, et al. v. Norton, et. al, 98-CV-1873 (D.D.S.)*, may hold that the Department of the Interior’s “No Surprises” assurances rule (or similar successor rule) is vacated, unenforceable or enjoined for any reason or to any extent, the “No Surprises” assurances provisions in the Permit, this Agreement, and the HCP shall be enforceable only to the degree allowed by any such decision or determination; provided that the remainder of the Permit, this Agreement, and the HCP shall remain in full force and effect to the maximum extent permitted by law. In the event that the “No Surprises” assurances rule may be vacated, unenforceable or enjoined by such decision or determination but is later reinstated, the “No Surprises” assurance provisions of the Permit, this Agreement, and the HCP shall likewise be automatically reinstated and apply to the entire term of the Permit. If, in response to any such judicial decision or determination, the “No Surprises” assurances rule is revised, the “No Surprises” assurances provisions of the Permit, this Agreement, and the HCP shall be automatically amended in a manner consistent with the revised rule so as to afford the maximum protection to the Permittee consistent with the revised rule.

**12.0 AMENDMENTS**

Except as otherwise set forth herein, this Agreement may be amended consistent with the ESA and the HCP, and with the written consent of each Party. The Service agrees to expedite the processing of requested amendments and to process minor amendments (including minor land plan changes) on an administrative basis. The Service will not propose or approve minor amendments to this Agreement if the Service determines that such amendments would result in operations under the HCP that are significantly different from those analyzed in connection with the preparation and
approval of the HCP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the HCP, or additional Take not analyzed in connection with the HCP.

Minor amendments to the HCP and AGREEMENT 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) correction of any maps or exhibits to correct errors in mapping or to reflect previously approved changes in the Permit or HCP;

(3) minor changes to survey, monitoring or reporting protocols;

(4) Changes that do not increase Take or decrease mitigation; and

(5) All other minor amendments related to the HCP and agreed upon by both the Permittee and the Service.

13.0 **MISCELLANEOUS PROVISIONS**

13.1 **No Partnership**

Except as otherwise expressly set forth in this Agreement, neither this Agreement nor the HCP shall make or be deemed to make either Party the agent for, or the partner of, the other Party.

13.2 **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. The Permittee may freely, in whole or in part, assign its rights and obligations under the Permit, this Agreement, and the HCP to third parties that purchase or represent purchasers of some or all of the Permit Area, which assignment shall be effective upon delivery of written notice of such assignment to the Service. In addition, the Manager may freely, in whole or in part, assign its rights and obligations under this Agreement and the HCP to third parties as long as the Manager notifies the Service of any such assignment. No such assignment by either the Permittee or the Manager shall serve to release any Party from its obligations under the Permit, this Agreement, or the HCP unless the assignment is to a corporation, limited partnership, general partnership, property owners'
association, or other entity that is controlled by, or affiliated with the assignor, except with the prior consent of the Service, which consent shall not be unreasonably withheld or delayed.

13.3 Notice

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth 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 Party in writing:

The Service:

Regional Director
United States Fish and Wildlife Service
Region 2
500 Gold Ave., S.W. Room 4102 (zip-87102)
P.O. Box 1306
Albuquerque, NM 87103-1306

With a copy to:

Field Supervisor
Arizona Ecological Services Field Office
U.S. Fish and Wildlife Service
2321 W. Royal Palm Road, Suite 103
Phoenix, AZ 85021-4951

The Permittee:

Exeter LXI, L.L.C.
c/o Chris Hodgson
Stellar Homes
5215 N. Sabino Canyon Road, Suite 100
Tucson, AZ 85750
13.4 **Entire Agreement**

This Agreement, together with the HCP and the Permit, constitutes the entire agreement between the Parties. It supersedes any and all other agreements, either oral or in writing between the Parties with respect to the subject matter hereof and contains all of the covenants and agreements between 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 Party or anyone acting on behalf of any Party that is not embodied herein.

13.5 **Damages from Certain Causes**

Except to the extent of intentional or grossly negligent acts or omissions by the Permittee, the Permittee shall not be liable or responsible to the Service for any loss or damage to or trespass to any property or person occasioned by theft, fire, act of God, public enemy, injunction, suit, strike, insurrection, war, court order, requisition or order of governmental body or authority, or any cause beyond the Permittee's reasonable control, nor shall the occurrence of any such event enlarge or increase the duties or obligations of any Party under this Agreement, the HCP, or the Permit.

13.6 **Attorneys’ Fees**

If any action at law or in equity, including an action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, the HCP, or the Permit, all parties to the litigation shall bear their own attorneys’ fees and costs: **Provided, however, that attorneys’ fees and costs against the United States shall be governed by applicable federal law, including the Equal Access to Justice Act (20 U.S.C. § 2412).**
13.7 **Defense of Permit**

a. **Role of Permittee**

The Service and the Permittee agree and acknowledge that the Permittee has a significant and independent interest in maintaining the validity and effectiveness of this Agreement, the HCP, the Permit, and supporting documentation, including documentation under the National Environmental Policy Act and ESA, and the Permittee's interests may not be adequately protected or represented in the event of a judicial challenge to this Agreement, the HCP, and the Permit or their supporting documentation unless the Permittee is able to participate in such litigation.

b. **Role of Service**

The Service will, upon the request of the Permittee, and subject to the responsibilities of the U.S. Department of Justice in the conduct of litigation, use available resources to provide appropriate support to the Permittee in defending, consistent with the terms of this Agreement, the HCP, and the Permit, lawsuits against the Permittee arising out of the Service's issuance of the Permit.

13.8 **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.

13.9 **Availability of Funds**

Implementation of this Agreement and the HCP by the Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Service 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.
13.10 **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 Party.

13.11 **No Third Party Beneficiaries**

Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary of this Agreement, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties with respect to third parties shall remain as imposed under existing Federal or state law.

13.12 **References to Regulations**

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

13.13 **Applicable Laws**

All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance with all applicable state and Federal laws and regulations.

13.14 **Headings**

The subject headings of this Agreement are provided for convenience only and do not affect the contents or interpretation of any of the provisions of this Agreement.

13.15 **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 Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service 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 Permittee under the HCP and this Agreement will be considered in any consultation affecting the Permittee's use of the Permit Area.

13.16 Adaptive Management

(a) Permittee-initiated adaptive management. The Permittee will implement any adaptive management requirements in the HCP, when changes in management practices are necessary to achieve the HCPs biological objectives, or to respond to monitoring results or new scientific information. The Permittee will make such changes without awaiting notice from the Service, and will report to the Service on any actions taken pursuant to this section.

(b) Service-initiated adaptive management. If the Service determines that one or more of the adaptive management provisions in the HCP have been triggered and that the Permittee has not changed its management practices in accordance with the HCP, the Service will so notify the Permittee and will direct the Permittee to make the required changes. Within 30 days after receiving such notice, the Permittee will make the required changes and report to the Service on its actions (unless such changes, by their very nature, require additional time to complete). Such changes are provided for in the HCP, and hence do not constitute Unforeseen Circumstances or require amendment of the Permit or HCP, except as provided in this section.

(c) Reductions in mitigation. The Permittee will not implement adaptive management changes that may result in less mitigation than provided for Covered Species under the terms of the HCP, unless the Service first provides written approval. The Permittee may propose any such adaptive management changes by notice to the Service, 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 Service will either approve the proposed adaptive management changes, approve them as modified by the Service, or notify the Permittee that the proposed changes constitute Permit amendments that must be reviewed under Section 12.0 of this Agreement.

(d) 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 HCP and any amendments thereto. Any such modification must be reviewed as a Permit amendment under Section 12.0 of this Agreement.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Agreement to be in effect as of the date last signed below.

By: ___________________________  Date: ___________________________
Regional Director
United States Fish and Wildlife Service
Albuquerque, New Mexico

EXETER LXI, L.L.C.

By: ___________________________  Date: ___________________________
Name: _________________________
Title: _________________________
Reserve Manager

By: ___________________________  Date: ___________________________
Name: _________________________
Title: _________________________

01/29/2004