

**BANK ENABLING INSTRUMENT**  
for the  
**NORTH COUNTY HABITAT BANK**  
Carlsbad, San Diego County, California  
April 30, 2007

This Bank Enabling Instrument ("BEI") made this 23 day of ~~May~~ 2007, regarding the establishment, use, operation, and maintenance of the North County Mitigation/Conservation Bank ("Bank") is made and entered into by and among Westmark Development Corporation ("Bank Sponsor" and "Property Owner"), the Los Angeles District of the U.S. Army Corps of Engineers ("USACE"), Region IX of the U.S. Environmental Protection Agency ("USEPA"), the Carlsbad field office of the U.S. Fish & Wildlife Service ("USFWS"), and the South Coast Region (*i.e.*, Region 5) of the California Department of Fish & Game ("CDFG"). The state and federal agencies named above comprise and are referred to jointly as the Mitigation Bank Review Team ("MBRT"), and the Bank Sponsor and the MBRT are hereinafter referred to jointly as the "Parties."

**Recitals**

- A. The Bank Sponsor is the person or entity responsible for establishing and operating the Bank.
- B. The Property Owner is the owner of real property containing approximately 18.7 acres (the "Property"), located just south of Palomar Airport Road in the City of Carlsbad, San Diego County, State of California, designated Assessor's Parcel No. 211-040-33. The Property is generally shown and legally described in Exhibit A (Bank Location Maps) and in Exhibit E-1 (Preliminary Title Report, Legal Description, and Parcel Maps) attached hereto. Westmark Development Corporation, as Bank Sponsor and Property Owner, desires to create a mitigation/conservation bank over a 15.7-acre portion of the Property (the "Bank Property"). The Bank Property is generally shown in Exhibit A and described in Exhibit C (Restoration Plan).
- C. The CDFG has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species pursuant to Fish and Game Code sec. 1802, and other provisions of state law.
- D. The USFWS, an agency within the United States Department of the Interior, has jurisdiction over the conservation, protection, restoration and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species within the United States pursuant to the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. § 661-666c, the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f), *et seq.*, and other provisions of federal law.
- E. The USEPA and USACE have jurisdiction over waters of the United States, pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* Waters of the United States includes jurisdictional wetlands.

- F. The MBRT is an interagency group which oversees the establishment, use, operation, and maintenance of the Bank.
- G. The goals and objectives for the Bank are set forth in Exhibit C (Restoration Plan) and Exhibit D (Long Term Management Plan).
- H. The Bank Property, formerly used for ranching and farming, is bisected longitudinally by Encinas Creek, with the southeastern corner of the site sloping up from the creek, and with portions of the site heavily infested with pampas grass (*Cortaderia selloana*). The site is within the Encinas Creek floodplain and provides groundwater recharge, filtration of surface and sub-surface flows, habitat that supports wildlife, and sediment transport. A general baseline description of Bank resources is provided in Exhibit H (Biological Resources Survey) and Exhibit I (Wetland Delineation Verification Letter).

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to the following.

## **I. PURPOSE AND AUTHORITIES**

### **A. Purpose.**

The purpose of this BEI is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the Bank to compensate, conserve, and protect Waters of the United States and Covered Habitat. The Bank Sponsor and Property Owner shall preserve, create, restore, and/or enhance and then manage and maintain Waters of the United States and Covered Habitat in accordance with the Restoration Plan and Long Term Management Plan.

### **B. Authorities.**

The Bank is available to be used for off-site compensatory mitigation or conservation for unavoidable impacts to waters of the United States and Covered Habitat, governed by the following regulations, policies, and guidance.

#### **1. Federal:**

- a. Clean Water Act (“CWA”) (33 USC § 1251 *et seq.*);
- b. Rivers and Harbors Act (33 USC 403);
- c. National Environmental Policy Act (“NEPA”) (42 USC § 4321 *et seq.*);
- d. Fish and Wildlife Coordination Act (16 USC § 661 *et seq.*);
- e. Endangered Species Act (“ESA”) (16 USC § 1531 *et seq.*), particularly including impacts to federal listed threatened or endangered species under sections 7 and 10 of the Endangered Species Act and/or occupied habitat;
- f. Executive Order 11990, Protection of Wetlands;

- g. Executive Order 11988, Floodplain Management;
- h. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-331);
- i. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
- j. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990);
- k. Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks (60 F.R. 58605 et seq.) (November 28, 1995);
- l. Guidance for the Establishment, Use and Operation of Conservation Banks (United States Department of Interior Memorandum, dated May 2, 2003); and
- m. Regulatory Guidance Letter 02-2, dated December 24, 2002, titled “Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.”

2. State:

- a. California Environmental Quality Act (“CEQA”) (Public Resources Code Section 21000 et seq) and State CEQA Guidelines (Tit. 14 Cal. Code Regs., Chapter 3);
- b. California Endangered Species Act (“CESA”) (Fish & Game Code Section 2050 et seq.);
- c. California Natural Community Conservation Planning (“NCCP”) Act (Fish & Game Code Section 2800 et seq.);
- d. Fish & Game Code Section 1600 et seq (Fish and Wildlife Protection and Conservation); and
- e. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly.

## II. DEFINITIONS

The initially capitalized terms used and not defined elsewhere in this BEI are defined as set forth below.

- A. “Bank Closure Plan,” means a plan designed to ensure that the Bank is managed and maintained, in perpetuity, consistent with the purpose of the Bank. The Bank Closure Plan is comprised of the Section in the Restoration Plan entitled *Bank Closure*, and Section X in this BEI. The Bank Closure

Plan describes actions required to close the Bank following the sale of the last authorized Credit and identifies and describes the long-term proposals for and responsibilities of the Bank Sponsor, Property Owner, Bank Manager, endowment holder, and beneficiaries.

- B. “Bank Establishment Date” means the date when (a) this BEI is signed by all Parties (i.e., the Effective Date of this BEI) and (b) the Conservation Easement over the Bank Property has been recorded or the owner has provided to CDFG an executed Conservation Easement in a form approved by the MBRT along with all supporting documentation.
- C. “Bank Manager” or “Long-Term Manager” is any person or public or private entity responsible for managing the Bank and its habitat in perpetuity using the annual interest payments from the Endowment Fund as capital. The Bank Manager assumes responsibility for long-term management upon Bank closure. The Bank Manager may become the Property Owner before Bank closure under Section XIII.F. of this BEI.
- D. “Bank Property” is a site where a specified number of acres of Waters of the United States and Covered Habitat are created, restored, enhanced, and, in certain circumstances, preserved. Based on the specified acreage, the Bank accrues Credits available for compensatory mitigation in advance of authorized impacts to similar resources. A Conservation Easement (Exhibit E-4) will protect the Bank Property.
- E. “Bank Sponsor” means any person or public or private entity responsible for establishing and operating the Bank. At the time of Bank establishment, and until transfer of the Bank Property under the terms of this BEI, the Property Owner is the Bank Sponsor.
- F. “BEI” means Bank Enabling Instrument, which is this document and all Exhibits, incorporated by reference.
- G. “Catastrophic Event” shall mean an event, such as a spill of hazardous or toxic substance, the impact of a vehicle or falling aircraft, or a fire, which has a material and detrimental impact on the quality of native vegetation, soils, or wildlife on the Bank Property and over which the Bank Sponsor or Property Owner has no control.
- H. “CEQA” means the California Environmental Quality Act (California Public Resources Code Sections 21000 et seq.; guidelines for implementation at California Public Resources Code Sections 15000 et seq.), including all regulations promulgated pursuant to that Act.
- I. “CESA” means the California Endangered Species Act (California Fish and Game Code Sections 2050 et seq.), including all regulations promulgated pursuant to that Act.

- J. “CNLM” means the Center for Natural Lands Management, the Long-Term Manager of the property.
- K. “Conservation Easement” means a perpetual conservation easement, as defined by California Civil Code § 815.1, in the form of Exhibit E-4.
- L. “Contingency Fund” means a fund (in a form acceptable to the MBRT) established by the Bank Sponsor for any required remediation as outlined in Sections V.A.2 and VIII.
- M. “Covered Habitat” means: (i) riparian and wetland habitat and (ii) those additional habitats, if any, within the Service Area(s), the loss of which the MBRT determines can be adequately mitigated for by acquisition of Credits from the Bank. Covered Habitat includes the CDFG Credits listed in Table 1.
- N. “Credit” is a unit of measure representing the accrual of acres of created, restored, enhanced, or preserved Waters of the US or Covered Habitat on the Bank Property; one Credit here is equivalent to one acre or as otherwise defined in the Restoration Plan. Credits in the Bank serve as mitigation or conservation for agency-approved projects within the Service Area. The minimum Credit unit that may be sold or obligated is 0.1 Credit.
- O. “Endowment Deposit” is money to be deposited in the Endowment Fund in order to fully fund the endowment principal.
- P. “Endowment Fund” means an investment fund maintained in trust by the Center for Natural Lands Management (“CNLM”). The Endowment Fund shall be non-wasting; that is, the principal amount shall not decrease in value through expenditure, inflation, or investment strategy, and therefore, using an appropriate inflation adjustment, such as the Consumer Price Index, a portion of the interest and earnings on the principal balance shall be re-invested into the endowment principal to account for inflation. The remaining interest and earnings on the principal balance shall be used exclusively for the management of the Bank Property after Bank closure and in accordance with the terms of the BEI and Management Plan.
- Q. “Force Majeure” shall mean war, insurrection, riot or other civil disorders, flood, earthquake, disease, fire, governmental restriction or the failure by authority, or any injunction, which has a material and detrimental impact on the Bank Property, provided, however, that: (i) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has broad regional impacts and is not endemic to the Bank and its immediate locale; (ii) a flood shall be considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where "flood" refers to a runoff event; (iii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank is greater than that presently projected from an earthquake with a return period of 475 years; (iv) disease

shall constitute an event of Force Majeure only if such event has broad regional impact and is not endemic to the Bank and its immediate locale; and (v) governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction, shall not constitute an event of Force Majeure unless there is no other feasible means of remediation.

- R. “Habitat Creation” is the establishment of wetland and/or other aquatic resources in an area that does not provide wetland hydrology or support wetland habitat, but will be physically modified and vegetated to do so.
- S. “Habitat Enhancement” is a set of activities conducted in existing resources which increases one or more biological function; here, enhancement will increase the biological value of the native riparian habitat which currently supports some native species (25 to 75 percent total native species cover) but is otherwise infested with non-native species.
- T. “Habitat Preservation” is the protection of existing habitat through placement of a Conservation Easement and providing long-term management funded by the Endowment Fund. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the riparian and aquatic ecosystem. Preservation Credits are assigned on the basis of specific values as described in Exhibit C.
- U. “Habitat Restoration” is the re-establishment of habitat resource characteristics and functions in areas where they have ceased to exist or exist in a substantially degraded state. Habitat Restoration on the Bank Property shall occur through the removal of non-native species (*e.g.*, pampas grass). Because none of the areas occupied by pampas grass are considered USACE wetlands, the USACE will consider its removal as creation. CDFG will consider the removal of pampas grass as restoration; and when appropriate, on a case-by-case basis, will allow the use of restoration Credits to meet the State’s no-net-loss requirement. Created/Restored wetlands will be fully assessed as described in Exhibit C.
- V. “Long-term Management Period” means the period of management beginning after the Restoration Phase and in perpetuity pursuant to the approved Management Plan and the Property Analysis Record defined below.
- W. “Long-term Management Plan” (“Management Plan”) means the plan developed for implementation to ensure that the Bank is managed and maintained, in perpetuity, consistent with the purpose of the Bank, attached as Exhibit D-2.
- X. “MBRT” means Mitigation Bank Review Team, an interagency group of

federal, state and /or local agency representatives which oversee the establishment, use, and operation of the Bank.

- Y. “NCCP” is a Natural Community Conservation Plan created pursuant to Fish and Game Code, Section 2801, *et seq.* An NCCP is a plan developed in accordance with the NCCP Act, which provides comprehensive management and conservation of multiple habitats and plant and wildlife species, and which identifies and provides for the regional or area-wide protection and perpetuation of natural diversity while allowing compatible and appropriate development and growth.
- Z. “Perpetuity” means an indefinite period of time; forever.
- AA. “Preservation” means the protection of existing ecologically important habitat or other ecosystem resources in perpetuity.
- BB. “Property Analysis Record” (“PAR”) is an analysis that, based on assumptions it identifies, determines the amount of money to be placed in the Endowment Fund; it also provides a schedule for funding, and for utilizing available earnings from, the Endowment Fund. The PAR, developed by CNLM, contains the transaction dates for payment and release of the financial assurances and shows the amount estimated to be provided from the Endowment Fund, shown as an annual amount for every year of long-term management funding into the future, including at least the minimum number of years necessary to show at least one cycle of replacement for all capital expenditures.
- CC. “Property Assessment and Warranty” means a written and signed evaluation, legal description and depiction, and the number of acres of the Bank Property. This Property Assessment shall describe any recorded or unrecorded rights-of-way, recorded or unrecorded easements, and recorded or unrecorded liens or other encumbrances that may prevent establishment of a Conservation Easement on the Bank Property in accordance with California Civil Code Section 815 and this BEI. Plat maps depicting encumbrances and improvements are included as part of this Property Assessment.
- DD. “Property Owner” means the legal owner of the Bank Property in fee simple; at the time of Bank establishment, and until transfer of the Bank Property under the terms of this BEI, the Property Owner is the Bank Sponsor.
- EE. “Remediation” means corrective measures taken to ameliorate damage to or impact on the Bank Property or fencing around it, or non-conformance to the Restoration Plan, Management Plan, Conservation Easement, or any other portion of this BEI.
- FF. “Restoration Phase” means the period of time prior to full funding of the

Endowment Fund plus one year for interest accrual or the time required to meet five-year success criteria, whichever is greater. During this period, the short-term management, monitoring, and reporting activities will be implemented as described in the Restoration Plan.

- GG. “Restoration Plan” means the document that describes the proposed activities conducted during the Restoration Phase of the Bank to establish the Credits. The Restoration Plan describes the creation, restoration, and enhancement of habitat (i.e., the schedule, planting scheme, plant palette, and monitoring procedures), the habitat establishment period, the success criteria to obtain successful habitat establishment, monitoring to evaluate the success, and reporting. The Restoration Plan also includes the provisions for interim management and monitoring.
- HH. “Restoration Specialist” is the person or entity, employed and directed by the Bank Sponsor, with requisite professional credentials, to implement the Restoration Plan.
- II. “Service Area” means the geographic area(s) within which impacts that occur to Waters of the United States or Covered Habitat may be mitigated through the acquisition of Credits in accordance with this BEI.
- JJ. “Unlawful Act” shall mean the unlawful act of another and shall include an event or series of events, such as the intentional dumping within the Bank, or any connected watercourse, of a hazardous toxic substance, or the discharge of such a substance by any person or entity other than the Property Owner or Bank Sponsor in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the water quality, native vegetation, soils, fish, or wildlife of the Bank Property.

### **III. STIPULATIONS**

- A. **Baseline Conditions.** The current condition of the Bank Property is described in the Restoration Plan (Exhibit C) and Biological Resources Survey (Exhibit H).
- B. **Disclaimer.** This BEI does not in any manner limit the statutory authorities or responsibilities of the MBRT, but is, instead, an implementation of such statutory authorities and responsibilities.
- C. **Exhibits and Appendices.** The following exhibits, and all subsequent revisions and addenda to the Exhibits hereto, are attachments incorporated by reference into this BEI.

**Exhibit A – Bank Location Maps**

**Exhibit B – Service Area Map**

**Exhibit C – Restoration Plan**

**Exhibit D – Bank Management and Operation**

**D-1 Property Analysis Record (PAR)**



- D-2 Long-Term Management Plan (Management Plan), including the Bank Closure Plan**
- Exhibit E – Real Estate Records and Assurances**
  - E-1 Preliminary Title Report, Legal Description, and Parcel Maps**
  - E-2 Bank Property Assessment and Warranty**
  - E-3 Plat Maps**
  - E-4 Approved-as-to-form Conservation Easement**
  - E-5 Title Insurance policy**
- Exhibit F – Bank Crediting and Credit Sales**
  - F-1 Credit Table**
  - F-2 Credit Sale Ledger**
  - F-3 Credit Purchase Agreements**
  - F-4 Credit Purchase Payment Receipt**
- Exhibit G – Phase I Environmental Site Assessment**
- Exhibit H – Biological Resources Survey**
- Exhibit I –Wetland Delineation Verification Letter**

#### **IV. EVALUATION, ACCEPTANCE, and ESTABLISHMENT OF THE BANK**

Representatives of the MBRT have inspected and evaluated the Waters of the United States and Covered Habitats on the Bank Property, and have agreed upon the assignment of Credits based on the Bank Property’s biological, chemical, and physical functions as described in Section VI and detailed in Exhibits C and H.

- A. Bank Sponsor’s Performance. The Bank Sponsor agrees to perform all necessary work, in accordance with the provisions of this BEI, to establish the 15.7 acres of Waters of the United States and Covered Habitats, as proposed in Exhibit C, until it is demonstrated to the satisfaction of the MBRT that the Bank complies in all respects with all conditions contained herein. The Bank Sponsor agrees to be responsible for all costs associated with the establishment of the Bank, including but not limited to construction, remediation, documentation, maintenance, management, monitoring, and reporting, until one year after the Endowment Fund is fully funded and all success criteria are met.
- B. The Bank will be considered established and Credit sales may begin only upon completion of the following:
  - 1. Signature of the BEI by all Parties; and
  - 2. Recordation of the Conservation Easement or the owner has provided to CDFG an executed Conservation Easement in a form approved by the MBRT along with all supporting documentation.
- C. Modification of the Restoration Plan. Creation, restoration, and enhancement of habitat on the Bank Property will be performed as described in Exhibit C, and the Credits will become available in accordance with the schedule specified in Section VI of this BEI. In the event that the Bank Sponsor determines that modifications must be made in the Restoration Plan to ensure successful establishment of habitat on the Bank Property, or in order to comply with specific permits or other authorizations needed to establish the Bank, the Bank Sponsor shall submit a written request for such modifications to the MBRT.

## V. FINANCIAL ASSURANCE REQUIREMENTS

- A. The Bank Sponsor is responsible for providing financial assurances for all Bank establishment, management, monitoring, and remediation. The Bank Sponsor agrees to provide the following assurances for the work described in this BEI.
1. Construction Security. Because all specified grading and related implementation work has been completed prior to the release and sale of Credits, no Construction Security is required.
  2. Contingency Fund. A sum of not less than \$250,000 shall be deposited in an interest-bearing escrow account to be termed “Contingency Fund.” The funds are to be used by the Bank Sponsor, or by a third party to be designated by the USACE and CDFG, to rectify failures, as determined by the MBRT, by the Bank Sponsor to comply with one or more terms of this BEI. The Contingency Fund shall be funded by depositing 15 percent of the gross proceeds of each Credit sale into the interest-bearing account, up to the \$250,000 Contingency Fund total. Contingency Funds shall be released to the Bank Sponsor, under the direction of the USACE, and in consultation with the MBRT, in \$50,000 increments based on meeting yearly success criteria, with releases not to deplete the fund below the amount determined by the MBRT to be necessary to rectify unforeseen events. In the event that the remaining Contingency Funds are not used after five years from the Bank Establishment Date, and the MBRT determines the Bank has achieved the success criteria, the funds shall be returned to the Bank Sponsor.
  3. Long-term Management Endowment Fund. A sum of not less than \$499,356 will be placed in an interest-bearing escrow account to be known as the “Endowment Fund” to be used for the in-perpetuity management of the Bank Property. The amount to be deposited into the Endowment Fund was calculated using a PAR. The Endowment Fund shall be funded through the sale of Credits from the Bank, with 25 percent of the gross proceeds of each Credit sale to be deposited into the Fund until it is fully funded. The Fund shall also meet funding benchmarks before each new Credit release. The Bank Sponsor shall fund any shortfall between the amount provided through Credit sales and the benchmark to be funded through additional endowment deposits before each new Credit release, according to the following schedule.
    - a. A minimum of 25 percent of the Endowment shall be funded prior to the second Credit release.
    - b. A minimum of 60 percent of the Endowment shall be funded prior

- to the third Credit release.
- c. One hundred percent of the endowment shall be funded after three years from the Bank Establishment Date or prior to the release of the last Credit, whichever occurs first.
  - d. The Bank Sponsor shall notify each member of the MBRT of each Endowment Deposit made, concurrent with the notification of Credit sales in Section IX.C. of this BEI.
4. After the Fund is fully funded, and at the time the Bank Property is transferred to the Long-Term Manager, the Endowment Fund shall be transferred to the Long-Term Manager solely for managing and maintaining the Bank Property in perpetuity.
  5. The cost of long-term management of the Bank Property may be adjusted based on actual annual cost of maintenance that will be provided by the Bank Sponsor in the monitoring reports. The USACE, CDFG, the Long Term Manager, and the Bank Sponsor must mutually agree upon any adjustments before they are made.

## **VI. BANK HABITAT ESTABLISHMENT ASSESSMENT METHODOLOGY, SUCCESS CRITERIA, AND CREDIT RELEASE SCHEDULE.**

- A. **Summary of Anticipated Credits.** The Bank Sponsor will establish and/or enhance 12.85 acres of aquatic and riparian habitat in accordance with the provisions of this BEI, and shall then maintain the Bank Property in such condition until the 5-year success criteria have been met in accordance with the Bank Closure Plan or until all Credits are sold, whichever is later. As presented in Table 1 and Exhibit C, the Bank Property shall consist of a total of 15.7 acres and include conserved habitats totaling 6.78 acres of riparian forest (includes 0.21 acre of mule fat scrub), 1.01 acres of Diegan coastal sage scrub, 1.38 acres of sage scrub chaparral, and 0.45 acres of non-native grassland, and created habitats totaling 6.07 acres of riparian forest. It is anticipated that a minimum of 4.0 of the 6.07 acres of creation/restoration Credits will meet the USACE wetland definition when the restoration is completed. Additionally, based on increased wetland hydrology resulting from the removal of pampas grass, it is anticipated that at least 3.0 acres of the preservation/enhancement Credits will meet the USACE wetland definition. All of the 6.07 acres of wetland creation/restoration Credits and 6.78 acres of riparian enhancement Credits will meet the CDFG Waters of the State definition. Riparian areas not considered Waters of the U.S. may, at USACE discretion, be given mitigation credit as vegetated buffers to Waters of the U.S.
- B. **Assessment Methodology.** Credits will be assigned based on the type of mitigation (creation, restoration, enhancement, and preservation) and timing of the mitigation implementation.

<b>Table 1</b>			
<b>Mitigation Credits (acres)</b>			
<b>Credit Type</b>	<b>USACE and CDFG</b>	<b>CDFG</b>	<b>CDFG Upland</b>
Wetland Creation/Restoration	4.0	2.07	
Enhancement Riparian (CDFG)/ Vegetated Buffer (USACE)	6.78* *(3 USACE wetland)		
Preservation			2.84

Table 2 summarizes the mitigation type and associated ratio based on meeting success criteria for a given year in the five-year monitoring period.

<b>Table 2</b>					
<b>Mitigation Type</b>	<b>Mitigation Credit Ratio</b>				
	<b>Year 1<sup>+</sup></b>	<b>Year 2<sup>+</sup></b>	<b>Year 3<sup>+</sup></b>	<b>Year 4<sup>+</sup></b>	<b>Year 5<sup>+</sup></b>
Creation	0.4:1	0.6:1	0.8:1	0.9:1	1:1
Restoration	0.4:1	0.6:1	0.8:1	0.9:1	1:1
Enhancement	0.4:1	0.6:1	0.8:1	0.9:1	1:1
Preservation	0.5:1	0.5:1	0.5:1	0.5:1	0.5:1

<sup>+</sup>Represents meeting that year's success criteria

The mitigation Credit ratio will determine mitigation needs for a given project. For example, if a project impacts 1.0 acre of habitat, it would be required to purchase 2.5 Credits that have met first-year success criteria (2.5 Credits x 0.4:1 = 1 acre). 1.25 Credits would need to be purchased if the third-year success criteria had been met (1.25 Credits x 0.8:1 = 1 acre). If the Bank has met five-year success criteria, acquisition in the Bank would result in no net loss of habitat functions and values, and as a result 1 acre of Credit would be required for each acre impacted. Final project mitigation ratios will be determined on a case-by-case basis by the permitting agency(ies).

Under this methodology, the number of Credits available will be fixed at 15.7 Credits. The "value" of those Credits will be determined based on the methodology described above. A 1:1 mitigation Credit ratio will be given for habitats that have been fully restored and meet five-year success criteria. Because some or all of the Credits may be sold prior to completion of the five-year monitoring effort, the full value of the Bank may not be achieved, although the full biological value of the Bank will be achieved, regardless, at the completion of the five-year monitoring effort, or when five-year success criteria have been met.

Upland Credits shall be available at a 1:1 ratio for each acre of mitigation required.

- C. Success Criteria. The success criteria listed in Tables 3 and 4 shall be used to assess project success, and may be met in less than the five-year time frame upon the permitting agencies' approval and concurrence by the MBRT. When all

success criteria are met, the creation, restoration, and enhancement efforts on the Bank Property shall be deemed complete.

<b>Table 3</b>			
<b>Plant Species Diversity Milestones for Riparian Woodland</b>			
<b>Success Criterion</b>	<b>Year</b>		
	<b>3</b>	<b>4</b>	<b>5</b>
Plant Species Diversity	6	8	10

<b>Table 4</b>			
<b>Vegetative Success Criteria (percent)</b>			
<b>Habitat/Parameter</b>	<b>Year</b>		
	<b>3</b>	<b>4</b>	<b>5</b>
Freshwater marsh			
Total cover	60	70	80
Riparian forest			
Total cover	60	70	80
Tree cover	35	55	65
Shrub cover	30	40	50
Herb cover	50	40	30
Mule fat scrub			
Total cover	55	65	75
Shrub/tree cover	30	45	60
Herb cover	50	40	30
All habitats			
Weed cover	10 / 0 <sup>+</sup>	8 / 0 <sup>+</sup>	5 / 0 <sup>+</sup>
<sup>+</sup> There shall be zero tolerance for the most invasive species listed by the California Invasive Plant Council ( <i>e.g.</i> , pampas grass).			

**D. Release of Habitat Creation, Restoration, and Enhancement Credits**

1. Habitat Creation, Restoration, and Enhancement Credits, including both Waters of the United States Credits and Covered Habitat Credits, shall be released, as described below, based upon attainment of the success criteria summarized above and more fully described in Exhibit C. No subsequent Credit releases may occur until the prior Credit release has occurred. Credit releases shall occur according to the following schedule.
  - a. 25 percent of the Credits upon the Bank Establishment Date;
  - b. 35 percent of the Credits upon attainment of Year Two success criteria;
  - c. 20 percent of the credits upon attainment of Year Four success criteria and recordation of the approved Conservation Easement;

- d. Balance of the credits upon attainment of Year Five success criteria.
2. Each Credit release, with the exception of the first, is subject to the Bank Sponsor's submission of a yearly monitoring report in accordance with Section IX. A., a site visit by the MBRT at the appropriate time of year, and approval by the MBRT.
3. Failure to meet success criteria will reduce the number of Credits available for release. The Bank Sponsor shall revise Table 1 accordingly, as directed by the MBRT.

#### E. Upland Preservation Credit Release

All Preservation Credits shall be immediately available for release upon establishment of the Bank.

### **VII. OPERATION OF THE BANK**

A. **Service Area.** The Bank is established to provide mitigation to compensate for impacts to Waters of the United States as well as Covered Habitat, occurring in the cities of Oceanside, Vista, San Marcos, Carlsbad, Encinitas and the western portions of the unincorporated portions of the County of San Diego as shown in Exhibit B.

B. **Projects Eligible to Use the Bank.** In general, it is agreed that projects requiring the following mitigation for impacts within the Service Area shall typically be eligible to use the Bank:

- Mitigation required by Nationwide 404 permits;
- Mitigation required by Individual 404 permits when the applicant has minimized impacts to wetlands to the maximum extent practicable;
- Mitigation required by Section 1602 Agreements;
- Mitigation required by any government agency within the Service Area for upland impacts; and
- Mitigation for other projects as deemed appropriate by the USACE, USEPA, USFWS, or CDFG, provided the Bank meets all requirements applicable for the mitigation required for a particular project and that mitigation through use of a Bank is authorized by the appropriate authority.

#### C. Credit Sales

1. Credit sales by the Bank Sponsor may begin once Credits are released pursuant to Section VI.D and E. Subject to Bank Sponsor's obligations under this BEI, Bank Sponsor shall have the exclusive right to determine the price for any and all Credits offered for sale or use at this Bank.

2. In no case shall the Credits sold or obligated by Bank Sponsor exceed the total number of Credits that have been released pursuant to Section VI. D and E.

3. Decisions related to use of Credits in the Service Area (*e.g.*, determination of the appropriate mitigation ratios), will be made by the appropriate MBRT agencies on a case-by-case basis in accordance with applicable law, regulations, and guidance.

4. The Bank Sponsor shall notify all members of the MBRT upon completion of any Credit sale, as described in the reporting section of this BEI.

D. Conditions on Debiting. Any Credits debited before achieving the five-year success criteria shall require posting sufficient financial assurance (see V.A.2. above) to cover contingency actions in the event of partial or total failure. Upon meeting yearly success criteria as determined by the MBRT, the Contingency Fund shall be released to the Sponsor according to the schedule described in Section V.A.2.

## **VIII. MAINTENANCE AND MONITORING OF THE BANK**

A. Interim Maintenance Provisions: The Bank Sponsor and Property Owner agree to perform all necessary work to maintain the Bank Property consistent with the maintenance requirements articulated in the Restoration Plan until achievement of the 5-year success criteria, full funding of the Endowment Fund for one year, and closure of the Bank.

B. Interim Monitoring Provisions: The Bank Sponsor and Property Owner shall perform all work necessary to monitor the Bank Property in accordance with the monitoring procedures set forth in the Restoration Plan, activities which shall remain in effect until achievement of the 5-year success criteria, full funding of the Endowment Fund for one year, and closure of the Bank. Monitoring will be carried out under the direction of a restoration specialist who will direct maintenance activities (maintenance monitoring) and assess the progress (technical monitoring) of the restoration effort. Maintenance monitoring will rely on visual observations of plant establishment and growth and other site conditions (*e.g.*, soil stability).

C. Contingency Plans/Remedial Actions:

1. In the event the MBRT reasonably determines that portions of the Bank Property have been damaged subsequent to the Bank Establishment Date, and the effect of such activity has materially impaired habitat functions and values on the Bank Property, and neither the Bank Sponsor nor Property Owner has reasonably restored habitat functions and values to the damaged portions or provided the MBRT with reasonable evidence that habitat functions and values will be restored, the MBRT may, at its discretion, suspend Credit sales and/or reduce the number of Credits allocated to the Bank equivalent to the decrease in functions and values of the

Bank Property.

2. The MBRT shall be notified upon discovery by any Party of any failure to achieve the success criteria described in Section VI.C. of this BEI. The MBRT shall require, in writing, that the Bank Sponsor develop a remediation plan. Within 60 days of receiving such written notification from the MBRT, the Bank Sponsor shall develop a remediation plan and submit it to the MBRT for review and approval. The remediation plan will include proposed remedial actions and a schedule within which the Bank Sponsor will implement the actions. The Bank Sponsor shall, at Bank Sponsor's expense, implement the necessary and appropriate remedial actions as approved by the MBRT. All remediation efforts and an evaluation of their effectiveness shall be incorporated into the annual monitoring report set forth in Section IX.A. of this BEI. In the event the Bank Sponsor or Property Owner fails to implement such remedial actions approved by the MBRT, the MBRT will notify the Bank Sponsor, in writing, that the Bank Sponsor is in default and identify corrective measures the MBRT believes to be necessary in order to cure the default. If conditions do not improve or if they continue to deteriorate, within one year (unless otherwise negotiated among the Bank Sponsor, Property Owner, and the MBRT) from the date that the specific corrective measures were first identified in writing to the Bank Sponsor by the MBRT, a demand on the Contingency Fund will be made by CDFG or USACE, as appropriate, to ensure the corrective measures are implemented as approved by the MBRT.
3. If the MBRT determines that the Bank is operating at a Credit deficit, the Bank Sponsor shall be notified in writing, whereupon Credit sales and debiting of Credits will immediately cease. The MBRT shall determine what corrective actions are necessary to correct the Credit deficit. Bank Sponsor shall develop and implement a remediation plan in accordance with Section VIII.C.2. As determined by the Chair of the MBRT, in coordination with the MBRT and the Bank Sponsor, if conditions at the Bank Property do not improve or if they continue to deteriorate, within one year (unless otherwise negotiated among the Bank Sponsor, Property Owner, and the MBRT) from the date that the specific corrective actions were first identified in writing to the Sponsor by the Chair of the MBRT, a demand on the Contingency Funds and the Endowment Fund shall be made by CDFG or the USACE, as appropriate, to ensure corrective



measures are implemented as approved by the MBRT.

4. At the request of the Bank Sponsor, the MBRT will perform a final compliance visit to determine whether all success criteria have been satisfied. Upon satisfaction of the success criteria, any remaining contingency funds will be released to the Sponsor.
- D. Long-Term Management. Once the five-year success criteria in the Restoration Plan and this BEI have been met and the Endowment Fund is fully funded for one year, long-term management of the Bank Property shall be implemented according to the Management Plan. The Property Owner shall be obligated to manage the Bank Property in perpetuity to preserve its habitat and conservation values in accordance with the terms of this BEI, the Conservation Easement, and the Management Plan, as funded through the Endowment Fund. The Management Plan shall provide the basis for the implementation and prioritization of the management tasks. The Property Owner and the MBRT shall meet and confer, upon the request of any one of them, to consider revisions to the Management Plan to better conserve the values of the Bank Property.
- E. Long Term Monitoring. Long-term monitoring shall be performed as described in the Management Plan. The Property Owner shall be responsible for annual reporting to the MBRT as described in Section IX of this BEI.
- F. Conservation Easement Monitoring. Bank Sponsor's and Property Owner's obligations shall include using reasonable efforts to prevent uses of the Bank Property not permitted under this BEI or the Conservation Easement.

## **IX. REPORTING**

- A. Annual Reporting. Sponsor shall submit a report to the USACE as Chair of the MBRT, for distribution to the other members of the MBRT, on or before November 15<sup>th</sup> of each year, with the first report due after the end of the first full growing season. The annual report shall address or provide the following, as appropriate:
1. All elements set forth in the Restoration Plan and/or Management Plan;
  2. All remediation efforts and an evaluation of their effectiveness;
  3. A copy of all Contingency Fund and/or Endowment Fund deposits; and
  4. A record of all disbursements made from the Contingency Fund and/or the Endowment Fund for Bank activities.
- B. As-built Report. The Bank Sponsor shall submit to the USACE, for distribution to the other members of the MBRT, an as-built report for the Bank Property not more than 60 days after the Effective Date of this BEI..
- C. Accounting Procedure. The Bank Sponsor shall notify the MBRT upon the sale of each and every Credit and approval of each and every additional Credit. Sponsor shall send a full and complete updated ledger (Exhibit F-2) to each

member of the MBRT within 10 days of each Credit sale.

- D. Bank Sponsor and Property Owner must maintain accurate records of costs, in accordance with Generally Accepted Accounting Principles, and shall retain said records throughout the term of this BEI. During such time, the Bank Sponsor and Property Owner shall make said records available for review at the request of the MBRT. In addition, Bank Sponsor and Property Owner must have accounts audited upon request of and with results provided to the MBRT, not more than annually. If the Property Owner becomes the holder of the Endowment Fund, the Conservation Easement shall be amended to include an endowment and auditing provision approved by the MBRT.

## **X. PROCEDURES FOR BANK CLOSURE**

Once the success criteria in the Restoration Plan have been met, long term maintenance and monitoring of the Bank Property shall be carried out according to the Management Plan as required by Section VIII. The implementation of the Management Plan shall be assured pursuant to the closure provisions in this BEI and in the Management Plan.

A. Bank Site and Bank Closure. The Bank shall be deemed closed, and the Sponsor's obligations complete, upon all of the following:

1. All success criteria have been met consistent with the Restoration Plan;
2. The Bank Sponsor has implemented the Bank Closure Plan included within the Management Plan, including the implementation of Bank closure reporting and accounting activities;
3. All financial responsibilities have been met, including full funding of the Endowment Fund for not less than one year; and
4. Either:
  - (a) The last authorized Credit has been sold or used; or
  - (b) The Sponsor requests bank closure by written notice to the MBRT, and MBRT provides written approval of the closure.
5. Upon Bank closure, Credit sales shall immediately cease.
6. All responsibilities and obligations for Bank monitoring and maintenance in perpetuity are transferred to the Property Owner upon Bank closure.

## **XI. BANK SPONSOR AND PROPERTY OWNER DUTIES**

- A. The Bank Sponsor agrees to perform all necessary work in accordance with the provisions of this BEI.
- B. The Bank Sponsor agrees to be responsible for all costs associated with the establishment of the Bank, including but not limited to construction, remediation, documentation, maintenance, management, monitoring, and

reporting, until one year after the Endowment Fund is fully funded and all success criteria are met.

- C. Real Estate Provisions. The Property Owner has recorded a Conservation Easement on the Bank. The Conservation Easement shall preserve the Bank Property as Waters of the United States and wildlife/riparian habitat (*i.e.*, Covered Habitat) in perpetuity.
- D. The Bank Sponsor agrees to submit an as-built report for the Bank to the MBRT within 60 days after the Effective Date of this BEI. The as-built report shall include as-built drawings, with accurate maps showing the finish grades of the Bank Property. The maps shall clearly distinguish among the preserved habitats and the created, restored, and enhanced wetlands and Covered Habitats. The as-built drawings and any attachments will describe in detail any deviation from the proposal described in the Restoration Plan.
- E. The Bank Sponsor or Property Owner, as appropriate, agrees to have accounts audited using General Accepted Accounting Principles performed by a qualified, independent accounting organization upon request of the MBRT, not more frequently than annually, and submit the results of the audits to the MBRT.
- F. The Bank Sponsor and Property Owner shall not discharge or release to the Bank Property, or permit others to discharge or release to the Bank Property, any material or substance deemed hazardous or toxic under any federal, state, or local environmental law.
- G. The Property Owner shall not create any encumbrance to the title of the Bank Property other than those set forth in Exhibit E and accounted for in the Property Assessment in Exhibit E, and Property Owner shall not execute, renew, or extend any lien, license, or similar interest without the prior written consent of the MBRT.
- H. Neither the Bank Sponsor nor Property Owner shall construct any structure or engage in any activity or use of the Bank Property, including mineral exploration, excavating, draining, dredging, or other alteration of the Bank Property, that is not necessary for execution of the Restoration Plan without the prior written consent of the MBRT.
- I. The Bank Sponsor and Property Owner shall ensure that the Bank Property is maintained to ensure its suitability as a Bank consistent and in accordance with this BEI.
- J. The Bank Sponsor and Property Owner shall allow, or otherwise provide for, access to the site by all signatory Parties, as necessary, for the purpose of inspection and compliance monitoring consistent with the terms and conditions of this BEI. Inspecting Parties shall provide reasonable notice to the Property Owner during normal business hours and not less than 24 hours prior to

inspection of the Bank Property.

- K. The Bank Sponsor shall obtain all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank. This BEI does not fulfill or substitute for such authorization.
- L. The Property Owner shall grant all necessary authority and shall not limit Bank Sponsor's ability to carry out Bank Sponsor's responsibilities and obligations under this BEI.

## **XII. RESPONSIBILITIES OF THE MBRT**

A. The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this BEI.

B. The agencies represented on the MBRT agree to review and provide comments on all project plans, annual monitoring reports, Credit review reports, contingency plans, and necessary permits for the Bank in a timely manner. Comments on the monitoring reports, Credit review reports, and contingency plans will be provided within 60 calendar days from the date of receipt of complete submittal, except for good cause.

C. The agencies represented on the MBRT agree to review and concur with reports on evaluation of success criteria prior to approving Credits in the Bank.

D. The agencies represented on the MBRT shall conduct compliance inspections, as necessary, as determined in consultation with the Bank Sponsor, to:

1. verify Credits available in the Bank;
2. confirm implementation of remedial actions;
3. recommend corrective measures (if any), until the terms and conditions of this BEI have been determined to be fully satisfied or until all Credits have been sold, whichever is later; and
4. inspect for any other purpose determined by the MBRT as necessary to assure compliance with this BEI.

## **XIII. OTHER PROVISIONS**

A. Force Majeure. The Bank Sponsor and Property Owner shall be responsible to maintain and remediate the Bank Property except for damage or non-compliance caused by Catastrophic Events, events of Force Majeure, or Unlawful Acts. In case of occurrence, the Sponsor or Property Owner and MBRT shall meet to discuss the future course of action for and management of the Bank Property and shall continue their obligations to the extent practicable. In order for such exception to apply, Bank Sponsor and Property Owner shall bear the burden of demonstrating:

- a. that the damage or non-compliance was caused by circumstances beyond the control of the Bank Sponsor, Property Owner, and/or any person or entity under the direction or control of the Bank Sponsor or

Property Owner, including its employees, agents, contractors, and consultants;

b. that neither the Bank Sponsor/Property Owner, nor any entity controlled by it, including contractors and consultants, could have reasonably foreseen and prevented such damage or non-compliance; and

c. the duration of damage or non-compliance was caused by such circumstances beyond the Sponsor's or and Property Owner's control.

## B. Dispute Resolution

1. The Parties agree that, in the event of a dispute, the Parties shall use their best efforts to resolve the dispute in an informal fashion through consultation and communication involving ascending levels of management within each Party's organization, or other forms of non-binding alternative dispute resolution mutually acceptable to the Parties.

2. Resolution of disputes about application of this BEI as between members of the MBRT shall be in accordance with those stated in the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks (60 F.R. 58605 et seq., November 28, 1995).

C. Modification and Termination of the BEI. This BEI may be amended or modified with the written approval of all signatory Parties. Any of the MBRT members may terminate their participation upon written notification to all signatory Parties. Participation of the MBRT members will terminate 30 days after written notification.

D. Specific Language in the BEI Shall Be Controlling. To the extent that specific language in this document changes, modifies, or deletes terms and conditions contained in those documents which the BEI incorporates by reference, and that are not legally binding, the specific language within the BEI shall be controlling.

E. Entire Agreement. This BEI, and all exhibits, appendices, schedules, and agreements referred to in this BEI, constitute the final, complete, and exclusive statement of the terms of the agreement between and among the MBRT and the Bank Sponsor and Property Owner pertaining to the Bank, and supersede all prior and contemporaneous discussions, negotiations, understandings, or agreements of the Parties. No other agreement, statement or promise made by the Parties that is not contained in this BEI shall be binding or valid. No alteration or variation of this BEI shall be valid or binding unless contained in an amendment in accordance with Section XIII.C. Each party acknowledges that no representation, inducement, promise, or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any party unless the same has been embodied herein.

## F. Transfer.

### 1. Transfer of Property Owner's Interests

The Property Owner shall have the right to sell or convey its interest in the Bank Property at any time. Provided, however, that any such sale or

conveyance on or after the execution date of this BEI must be made in accordance with this BEI and shall be subject to written concurrence by the MBRT and Bank Sponsor. Such concurrence shall be subject to the requirement that the transferee assumes and agrees in writing to observe and perform all of the Property Owner's obligations pursuant to this BEI and the Conservation Easement. From and after the date of any such sale or conveyance made by Property Owner, the transferor shall have no further obligations hereunder and all references to Property Owner in this BEI and the Conservation Easement shall thereafter refer to such transferee, except that liability for acts, omissions, or breaches occurring prior to the sale or conveyance shall survive. Any such sale or conveyance made without the prior written concurrence of the MBRT, may, at the discretion of the MBRT, result in the termination of this BEI.

Transfer or assignment of the Bank Property shall be subject to the requirement that any funds in a Contingency Fund or Long-term Management Endowment Fund shall continue to be expended in a manner consistent and in accordance with this BEI, the Conservation Easement, and the Management Plan.

## 2. Transfer of Bank Sponsor's Interests

The Bank Sponsor may sell or convey its interest in the Bank at any time, provided Bank Sponsor is in full compliance with all requirements of this BEI (including all financial assurances), and subject to the prior written approval of the MBRT. If any of the financial assurances required under this BEI are not completely funded at the time of a sale or conveyance, then the MBRT shall not approve such sale or conveyance unless and until either the current Bank Sponsor, or the proposed replacement Bank Sponsor, shall provide all required financial assurances. In addition, prior to sale or conveyance, the Bank Sponsor shall provide to each member of the MBRT a written agreement signed by the replacement Bank Sponsor in which the replacement Bank Sponsor assumes and agrees to perform all of the responsibilities and obligations of the Bank Sponsor under the BEI. Any such sale or conveyance made without the prior written concurrence of the MBRT, may, at the discretion of the MBRT, result in the termination of this BEI.

Transfer or assignment of the Bank Sponsor's rights and duties under this BEI must be approved in writing by the MBRT, and shall be subject to the requirement that any funds in a Contingency Fund or Long-term Management Endowment Fund shall continue to be expended in a manner consistent and in accordance with this BEI, the Conservation Easement, and the Management Plan.

- G. Reasonableness and Good Faith. Except as specifically limited elsewhere in this BEI, whenever this BEI requires Bank Sponsor, Property Owner, or the MBRT to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld. If the Bank

Sponsor, Property Owner, or the MBRT disagrees with any determination covered by this provision and reasonably request the reasons for that determination, the determining party shall furnish its reason in writing and in reasonable detail within thirty (30) days following the request.

- H. Successors and Assigns. This BEI 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, subject to the limitations on transfer set forth in this BEI.
- I. Partial Invalidity. If a court of competent jurisdiction holds any term or provision of this BEI to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining terms and provisions, or portions of them, shall not be affected unless an essential purpose of this BEI would be defeated by the loss of the invalid or unenforceable provision.
- J. Notices. All notices (including requests, demands, approvals or other communications) under this BEI shall be in writing. Each Notice the Bank Sponsor or the MBRT desires to give to the other shall be in writing, shall clearly identify the name of the Bank and the subject of the Notice on its first page, and shall be personally delivered or sent by facsimile to the persons set forth below or shall be deemed delivered five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested, and addressed as follows.

MBRT Chair: District Counsel  
U.S. Army Corps of Engineers  
Los Angeles District  
915 Wilshire Boulevard, Room 1535  
Los Angeles, California 90017-3401  
FAX: 213-452-4217

MBRT Members: Regional Manager  
Department of Fish and Game Region 5  
4949 Viewridge Avenue  
San Diego, California 92123  
FAX: 858-467-4299

Carlsbad Office Manager  
U.S. Fish and Wildlife Service  
6010 Hidden Valley Road  
Carlsbad, California 92011  
FAX: 760-431-5901

Director, Water Division  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
Sacramento, California 94105

FAX: 415-744-1078

Bank Sponsor: Westmark Development Corporation  
3375 Pepper Lane, No. 102  
Las Vegas, Nevada 89120  
Attn: John D. Lee, Esq.

FAX: 702-898-9538

The Parties agree to accept facsimile signed documents and agree to rely upon such documents as if they bore original signatures. Each Party agrees to provide to the other Parties, within seventy-two (72) hours after transmission of such a facsimile, the original documents that bear the original signatures. Either Party may change its address or fax number by giving the other Party notice of the change in any manner permitted by this section.


- K. Counterparts. This BEI 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.
- L. No Third Party Beneficiaries. This BEI shall not create any third party beneficiary hereto, nor shall it authorize anyone not a party hereto to maintain a suit for personal injuries, property damages or enforcement pursuant to the provisions of this BEI. The duties, obligations, and responsibilities of the Parties to this BEI with respect to third parties shall remain as otherwise provided by law.
- M. Availability of Funds. Implementation of this BEI by the MBRT is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of appropriated funds. Nothing in this BEI may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or the California State Treasury. No agency of the MBRT is required under this BEI to expend any appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

#### **XIV. EFFECTIVE DATE**

This BEI shall become effective on the date of the signature by the last Party to sign this BEI.

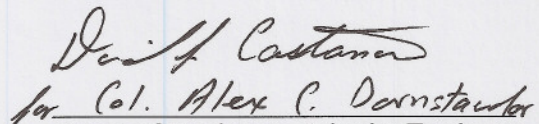


IN WITNESS THEREOF, the Bank Sponsor, the State of California acting by and through its Department of Fish and Game, the U.S. Army Corps of Engineers Los Angeles District, The U.S. Fish and Wildlife Service, the U.S. EPA, Region IX, have executed this BEI as of the date set forth above.

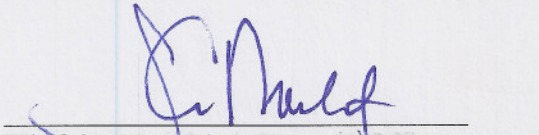
  
\_\_\_\_\_  
*PRESIDENT*  
Bank Sponsor and Property Owner

5/16/2007  
Date

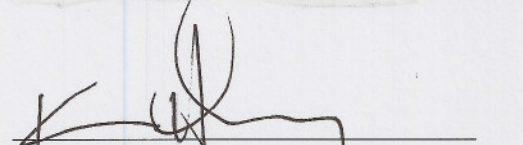
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MAY 21 2007  
REGULATORY BRANCH  
SAN DIEGO OFFICE

  
for Col. Alex C. Dornstaufer  
Corps of Engineers, District Engineer  
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District  
U.S. Army Corps of Engineers

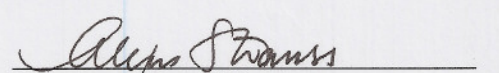
5-9-07  
Date

  
\_\_\_\_\_  
Field Supervisor  
Carlsbad Fish and Wildlife Office

May 8, 2007  
Date

  
\_\_\_\_\_  
Regional Manager  
*SOUTH COAST* Region  
California Department of Fish and Game

23 MAY 2007  
Date

  
\_\_\_\_\_  
Director, Water Division  
Region 9  
U.S. Environmental Protection Agency

originally signed  
10 May 2007  
Date