

APPENDIX 3:

Example of an HCP Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING

BY AND BETWEEN

U.S. FISH AND WILDLIFE SERVICE

U.S. BUREAU OF LAND MANAGEMENT,

CALIFORNIA DEPARTMENT OF FISH AND GAME,

CALIFORNIA ENERGY COMMISSION,

**CALIFORNIA DEPARTMENT OF CONSERVATION
DIVISION OF OIL AND GAS,**

and the

COUNTY OF KERN

TO ESTABLISH A PROGRAM FOR THE CONSERVATION OF SPECIES OF CONCERN
IN KERN COUNTY.

This Memorandum of Understanding ("Memorandum") is made and entered into this *17th day of April, 1989*, by and between U.S. Fish and Wildlife Service, hereinafter called the Service, U.S. Bureau of Land Management, hereinafter called the Bureau, California Department of Fish and Game, hereinafter called the Department, California Energy Commission, hereinafter called the Commission, California Department of Conservation, Division of Oil and Gas, hereinafter called the Division, and the County of Kern represented by the Kern County Department of Planning and Development Services, hereinafter called Kern County (collectively, "Public Agencies").

WITNESSETH:

WHEREAS, the Public Agencies are among the Federal, State, and local agencies that have regulatory authority or responsibility under certain Federal and State statutes, including the Endangered Species Act of 1973, as amended ("ESA"), the California Endangered Species Act of 1984 ("CESA"), the National Environmental Policy Act ("NEPA"), the California Environmental Quality Act ("CEQA"), and State Planning and Zoning Law, to protect "Species

of Concern” and their habitats from adverse effects resulting from public and private development actions, and

WHEREAS, the multiple sources of authority under which the Public Agencies operate do not provide any individual agency with the authority to implement a comprehensive program, enlisting the efforts of all levels of government, to provide for the long-term survival of the Species of Concern in Kern County, and

WHEREAS, because of the overlap and concurrent jurisdiction of the Public Agencies, the private sector lacks assurances that compliance with requirements imposed by any one Public Agency will be timely and will satisfy requirements that may be imposed by any other agency, and

WHEREAS, the Public Agencies desire that their respective concerns and responsibilities with regard to the conservation of Species of Concern be integrated and coordinated in such a manner as to ensure effective, timely, and mutually beneficial resolution of such issues within Kern County, and

WHEREAS, the Public Agencies together with representatives from private conservation groups, and oil and gas, agriculture, and urban development, have voluntarily and mutually established a multi-agency work group, known as the Kern County Threatened and Endangered Species Work Group (“Work Group”), for the purpose of developing a program to conserve the Species of Concern in Kern County, with emphasis on the valley floor portion of the county, and

WHEREAS, Kern County is desirous that their local land use regulations and development decisions comply with State and Federal environmental and endangered species statutes and regulations, and, along with local industry, that planning within the County provides for continued economic growth and development and ensures a healthy economic environment for its citizens and industries,

THEREFORE, it is mutually agreed and understood that:

1.0 PURPOSE OF MEMORANDUM

The Public Agencies have entered into this Memorandum to define relationships and agencies with permit or regulatory authority over Species of Concern and to develop a cooperative program called the Kern County Endangered Species Program, which will ensure that the activities of private parties will comply with applicable laws and regulations concerning the Species of Concern in Kern County, and which will provide long-term protection of such species.

2.0 PURPOSES OF THE PROGRAM

The purposes of the Kern County Endangered Species Program, hereinafter called the Program, are as follows:

2.1 Protection of Species of Concern. To conserve and protect Species of Concerns and their habitats within Kern County.

2.2 Assurances to Private Sector. To provide a means to standardize and integrate mitigation/compensation measures for Species of Concern so that public and private development actions together with mitigation/compensation measures established by the Program for such action(s) will satisfy concurrently without duplication or unnecessary delay applicable provisions of Federal and State laws and applicable local ordinances and regulations.

2.3 Cumulative Effects. To specify mitigation measures needed to lessen or avoid the cumulative effects of development activities on Species of Concern and eliminate, where possible, the requirement of case-by-case review of all such effects that will be mitigated by the specific measures.

The foregoing shall be accomplished through certain procedural components of the Program, as described below, including, but not limited to, (a) an Endangered Species Element to be adopted by the Board of Supervisors of Kern County that addresses the conservation of Species of Concern, (b) a conservation plan(s) for such species in the valley floor portion and perhaps other parts of Kern County which may affect adjoining counties (e.g., San Luis Obispo - Carrizo Plain), (c) an implementing agreement between the public and private sector participants to ensure execution of the conservation plan(s), and (d) Section 10(a) permit(s) pursuant to the ESA to authorize incidental taking of federally listed species.

2.4 Equitable Distribution of Mitigation/Compensation Obligations. To ensure that the costs of mitigation/compensation measures apply equitably to all agencies and private sector groups conducting activities affecting Species of Concern.

3.0 COMPONENTS OF THE PROGRAM

The program will include the following components:

3.1 Endangered Species Element: The Element will establish county-wide goals, policies, and implementation programs for addressing issues affecting Species of Concern and their habitats. The Element will provide a comprehensive policy framework that links State and Federal species conservation programs with local land use planning to ensure coordinated, effective, and timely resolution of conflicts between development and the conservation of Species of Concern, especially listed species.

3.1.1 The Element will provide broad based policy, foundation, and direction for the preparation of conservation plan(s) and other related programs in the county. The Element will be broader in scope and more comprehensive than the area-specific conservation plan(s).

3.1.2 The Element will address the full range of land use issues, including urban, oil and gas, mineral and agricultural development. The State requirement for consistency between general plan elements will afford the opportunity to conform land use planning programs, including the land use, conservation, and open space elements of the general plan, with the Endangered Species Element, and to provide for the necessary linkage with local permit, zoning, and subdivision ordinances.

3.1.3 The Element will be prepared concurrent with and independent of the preparation of any conservation plans to be prepared pursuant to Section 3.2, below.

3.2 Conservation Plan: A conservation plan will be prepared by Kern County for Species of Concern within the valley floor portion of Kern County (shown on Exhibit A) concurrent with the preparation of the Element described in Section 3.1, above. Other portions of the county may be similarly addressed later. Kern County will submit the plan to (1) the U.S. Fish and Wildlife Service as part of County's application for a Federal permit authorizing incidental taking of federally listed endangered and threatened species pursuant to Section 10(a) of the ESA and to (2) the other Federal and State agencies party to this Memorandum for their respective review and approval. The plan will identify the mitigation/compensation measures that will satisfy the requirements of Federal, State, and local law, including but not limited to ESA, CEQA, and CESA, regarding the protection of the Species of Concern and their habitats. Development of the conservation plan must comply with requirements described in 50 CFR Part 17. (For additional details, see Federal Register 50:39681-39691, 1985.) The Section 10(a) permit will authorize Kern County, and private parties operating under the authority of the permit, to carry out activities that result in the incidental take of Species of Concern that are federally listed.

3.2.1 It is intended that the review and approval of the conservation plan by the participating Federal, State, and local agencies will satisfy the requirements of applicable Federal and State environmental law. It is the intent of the parties to eliminate project-by-project review of the effect of development activities on the Species of Concern, to the full extent authorized by law, and to ensure that mitigation/compensation measures are not imposed beyond those detailed in the conservation plan(s) for such development activities provided conditions under which the conservation plan was formulated have not significantly changed. Such a conservation plan will satisfy the participating Federal and State agencies with respect to the protection of the Species of Concern by, among other possible mechanisms, providing uniform and biologically viable mitigation/compensation measures for application to development activities. Such mitigation measures will be developed subject to the approval of participating Federal and State agencies.

3.2.2 Individual landowners, groups of landowners, or development interests may choose to comply with the terms and conditions of an applicable and approved conservation plan affecting their proposed activities. Alternately, they may choose to prepare and submit their own conservation plan and Section 10(a) permit application when their activities may result in incidental take of federally listed species and, if State or local agency approval is required, they may choose to submit their proposal outside the existing conservation plan umbrella.

3.3.3 The conservation plan for the valley floor will be prepared concurrent with and independent of the preparation of the Element prepared pursuant to Section 3.1, above.

3.3 Implementing Agreement. The conservation plan shall be implemented through an enforceable agreement. The agreement shall specify the operating parameters of the conservation plan for the valley floor and any other area in the county. The Agreement specifies the obligations, authorities, responsibilities, liabilities, benefits, rights, and privileges of all parties or signatories to the subject conservation plan to be prepared and submitted with the Section 10(a) permit application. It is intended that the agreement will be entered into by Kern County, the other Public Agencies approving the conservation plan, and any private party having an obligation or role in implementing the conservation plan. The agreement will provide specific mitigation commitments for private parties and Public Agencies conducting development activities, and assurances by the Public Agencies to prevent the imposition of inconsistent or overlapping mitigation/compensation requirements under any Federal, State, or local law.

4.0 STEERING COMMITTEE

Kern County will appoint steering committee(s), consisting of representatives of the parties of this Memorandum, insofar as each may agree to so serve, and other members as may be determined by the County, including, but not limited to, the private sector members of the Work Group, to oversee preparation of the Element, conservation plan(s), and associated environmental documents. Actual preparation of these documents will be undertaken by the County and/or their consultant.

5.0 ENVIRONMENTAL REVIEW

5.1 CEQA Compliance - Conservation Plan. Adoption of an Endangered Species Element by Kern County and approval of a conservation plan(s) and implementation agreements(s) by the State agencies are actions subject to CEQA Review. It is understood the County will act as the lead agency and prepare an Environmental Impact Report ("EIR") or EIR's for the Element and the valley floor conservation plan. In the preparation of the environmental documents for the conservation plans, the participating State agencies shall act as responsible agencies in accordance with Section 15096 of the CEQA Guidelines. The EIR of the Element and

the valley floor conservation plan shall operate ad Program EIR(s) pursuant to Section 15168 of the CEQA Guidelines. The preparation of the Program EIR(s) will provide for the certification of appropriate environmental documents (e.g., negative declarations), if necessary, by Kern County and other agencies for projects within the conservation plan area that comply with the measures described in the plan that avoid or mitigate significant impacts to Species of Concern, as defined under Section 15065 of the CEQA Guidelines. The preparation of a Program EIR(s) will avoid duplicative reconsideration of basic policy considerations and ensure consideration of cumulative effects of individual project impacts. Upon certification of the Program EIR(s), all subsequent projects, as defined in the PRC 21065 and Section 15378 of the CEQA Guidelines, shall continue to be processed by the lead agency through preparation of an initial study and circulation of that study for comment by trustee agencies.

5.1.1 CEQA Compliance - Project. It is not the intent of this Memorandum to create new discretionary permit requirements or to increase unnecessary land use regulation. The lead agency will comply with CEQA requirements to mitigate adverse impacts to Species of Concern by implementing the mitigation requirements established by the Program EIR. All permits and other entitlement shall be issues as early in the process as is feasible for project development. Nothing in this Memorandum is intended to modify or alter the requirements of CEQA with regard to review of projects by lead, trustee, or responsible agencies. Further this Memorandum shall not have the effect of transforming discretionary approvals into ministerial acts or ministerial acts into discretionary approvals.

5.2 NEPA Compliance. Issuance of a Section 19(a) permit by the Service is an action subject to NEPA review. It is understood that the Service will act as the lead agency under NEPA and will prepare either an Environmental Assessment (“EA”) or an Environmental Impacts Statement (“EIS”), as appropriate with regard to the Section 19(a) permit and accompanying conservation plan. The EA and EIR may be prepared and circulated concurrently with the Program EIR.

6.0 FUNDING

The Work Group will attempt to secure funding for preparation of these documents and the associated environmental reports. The group will explore all potential sources, including but not limited to Federal and State agencies, conservation organizations, and private industry. Work will continue on Program development so long as sufficient funding is available to Kern County to offset all costs.

7.0 SPECIES OF CONCERN

Species to be specifically addressed in the Endangered Species Element and any area-specific conservation plan will be determined by Kern County based upon recommendations to be provided by the Steering Committee, following opportunity for public input.

8.0 Public Involvement

It is the intent of the parties to this agreement that the public will be afforded sufficient opportunity to provide input to the Element and the conservation plan for the valley floor, not only during the required CEQA and NEPA review process, but during the scoping and planning process, as well.

9.0 RELATIONSHIP OF PROGRAM TO THE ESA AND CESA

9.1 Section 4 of the ESA. Because of the requirements of Section 4(f) of ESA, as amended in 1988, the preparation or revision by the Service of recovery plans for any Species of Concern must be closely coordinated and consistent with the terms of any conservation plan or other program affecting such species. In addition, the Service will, to the maximum extent practicable, incorporate in each recovery plan objective, measurable criteria that when met would result in the delisting of such species.

9.2 Section 7 of the ESA. Section 7 of the ESA requires all Federal agencies to initiate formal consultation if their action may affect federally listed species (50 CFR § 402.14). Though a conservation plan may address in some fashion Federal lands, the issuance of a Section 10(a) permit does not eliminate the need for Federal agencies to comply with Section 7. Nonetheless, the appropriate use by a Federal agency, regardless whether that agency is a signatory to this Memorandum or any conservation plan, of mitigation/compensation measures established by an approved conservation plan will satisfy the requirements of Section 7. Moreover, in the case of jeopardy biological opinion, the Service intends to use, where appropriate, such measures as reasonable and prudent alternatives.

9.3 CESA. Section 2053 of the Fish and Game Code establishes State policy that State agencies should not approve projects that would jeopardize the continued existence of any endangered or threatened species or result in the adverse modification of habitat essential to the continued existence of those species. Further Section 2080 of the Fish and Game Code prohibits the import or export from California, or take, possession or sale within California of any threatened or endangered species. It is the intent of this Memorandum to implement the identified provision of CESA by establishing a planning process that will avoid the adverse modification of habitat essential to the species, and ensure the continued existence of such species.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum, on the date(s) set forth below, as of the day and year first above written.

By _____ Date _____
Regional Director,
U.S. Fish and Wildlife Service,
Portland, Oregon

By _____ Date _____
State Director,
U.S. Bureau of Land Management,
Sacramento, California

By _____ Date _____
Director
California Department of Fish and Game
Sacramento, California

By _____ Date _____
Executive Director,
California Energy Commission,
Sacramento, California

By _____ Date _____
Director,
California Department of Conservation,
Division of Oil and Gas,
Sacramento, California

By _____ Date _____
Chairman,
Kern County Board of Supervisors
Bakersfield, California