

IMPLEMENTATION AGREEMENT:
NORTH OF PLAYA
HABITAT CONSERVATION PLAN

APR 29 1996

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THIS AGREEMENT is made and entered into as of the 25th day of April, 1996, by and among the City of Sand City (City), D.B.O. Development No. 25. (Developer), and the United States Fish and Wildlife Service (Service), hereafter collectively referred to as the "Parties".

For and in consideration of the mutual covenants and conditions contained herein, the Parties do hereby agree as follows:

I. RECITALS

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

A. LISTING

The Smith's blue butterfly (*Euphilotes enoptes smithi*) has been listed as an endangered species by the federal government, pursuant to the provisions of the Endangered Species Act, 16 U.S.C. §§ 1531, et. seq., as amended (ESA). The black legless lizard (*Anniella pulchra nigra*) has been proposed for listing as an endangered species. The sand gilia (*Gilia tenuiflora* ssp. *arenaria*) has been listed as endangered, the Monterey spineflower (*Chorizanthe pungens* var. *pungens*) has been listed as threatened, and sandmat manzanita (*Arctostaphylos pumilla*) and Monterey Ceanothus (*Ceanothus rigidus*) are both federal "Species of Concern" (formerly category 2 candidates). All of these species are hereafter collectively referred to as the "species of concern."

A1. PRESENCE

The species of concern are found in or may use or inhabit portions of the North of Playa project site and as a consequence, urban growth foreseeable over the next twenty years may result in a diminution of habitat and an unintentional taking of individuals of the species of concern incidental to the normal course of urban development.

B. HABITAT CONSERVATION PLAN

Pursuant to the provisions of Section 10(a)(1)(B) of the ESA, the Developer, in consultation with the City, has prepared a Habitat Conservation Plan (HCP) and submitted

it to the Service with a request that the Service issue a Permit to allow the Smith's blue butterfly ("butterfly") to be incidentally taken, as that term is defined in the ESA, at the site of the proposed North of Playa development project (see HCP for description). The HCP also proposes a program to minimize and mitigate adverse effects on Smith's blue butterfly habitat, sand gilia, Monterey spineflower, black legless lizard, sandmat manzanita, and Monterey ceanothus through restoration, maintenance and permanent protection of 4.6 acres of coastal dune scrub habitat on the project site.

C. INCORPORATION OF HCP

The HCP and each of its terms are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the 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.

D. LEGAL REQUIREMENTS

In order to fulfill the requirements which will allow the Service to issue the Permit, the HCP provides measures that are intended to ensure that: any take occurring within the development site will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and mitigated; that adequate funding for the HCP will be provided; and that the take will not appreciably reduce the likelihood of survival and recovery in the wild of the species of concern. In order to fulfill these legal requirements, each party to this agreement must perform specific tasks delineated in this document.

E. PURPOSES

The purposes of this Agreement are:

1. To ensure implementation of the terms of the HCP and conservation of the species of concern;
2. To contractually bind each Party to fulfill and faithfully perform the obligations, responsibilities and tasks assigned to it pursuant to the terms of the HCP; and,
3. To provide remedies and recourse should any Party fail to perform its obligations, responsibilities and tasks as set forth in this Agreement.

F. TERMS USED

Terms defined and utilized in the HCP and the ESA shall have the same meaning when utilized in this Agreement, except as specifically noted.

II. TERM

A. STATED TERM

This Agreement shall become effective on the date that the Service issues the Permit requested in the HCP, and shall remain in full force and effect until termination of the Permit. The term of the Permit will be five years.

B. ACTIONS EXTENDING BEYOND STATED TERM OF AGREEMENT

Notwithstanding the stated term as herein set forth, the Parties agree and recognize that once the butterfly has been incidentally taken and their habitat modified within the project site, the take and habitat modification will be permanent. The Parties, therefore, agree that the mitigation area (Management Areas 1 and 2 identified in the HCP) shall likewise be permanent and extend beyond the term of this Agreement.

The parties also agree that monitoring of the mitigation area may extend beyond the term of the Permit if final success criteria are not met at the end of five years and/or contingency measures are required beyond the third year of monitoring.

The parties agree that City of Sand City will be the designated entity responsible for long-term maintenance of the mitigation area.

III. OBLIGATIONS OF THE PARTIES

A. MINIMIZATION AND MONITORING OF THE IMPACTS OF INCIDENTAL TAKE

In order to minimize and monitor the impacts of incidental take, the Parties agree that they shall undertake the following tasks, responsibilities and obligations:

1. The Developer

- a. Shall provide an educational program to all workers, prior to construction, advising them of the presence of the special status species on and adjacent to the job site. This program shall be administered by a qualified biologist, as defined in 1(b) below. Construction personnel shall be informed that the Smith's blue butterfly is listed by the federal government as an endangered species, and that there are penalties for take of the species as specified in the 1990 edition of the Federal Criminal Code and Rules (18 § 3571).
- b. Shall hire a qualified biologist approved by the Service whose duties shall include performing all of the actions described in the HCP involving the species of concern addressed. The Developer shall provide the Service with resumes of prospective biologists at least 15 days prior to the start of any site-disturbing activities so that the Service may review and approve his/her qualifications. Included among his or her responsibilities, the authorized biologist:
 - (1) Shall stake the temporary construction fence location with the project engineer and be present on the site at the time of fence installation to ensure that installation does not result in harm to the species of concern ;
 - (2) Shall organize seed and plant material collection by restoration specialist as described in HCP for sand gilia, Monterey spineflower, seacliff and coast buckwheat, sandmat manzanita and Monterey ceanothus;
 - (3) Shall coordinate and oversee capture and relocation efforts for the black legless lizard prior to the initiation of construction within the developable area.
 - (4) Shall collect and remove any buckwheat plants found on the developable portions of the site, following the protocols found in the HCP--and relocate them to the mitigation area.

- (5) Shall remain on the site and monitor all site-disturbing activities for the presence and protection of the Smith's blue butterfly and black legless lizards until fencing, preconstruction surveys, grading, retaining wall installation and construction are completed
- c. Shall take every precaution to ensure that no Smith's blue butterflies are killed or host buckwheat plants are removed outside of the proposed take area by grading and construction activities, regardless of the timing of construction. These precautions shall include:
 - (1) Fencing the site prior to conducting any site-disturbing activities;
 - (2) Ensuring that all construction vehicles, including heavy equipment and personal vehicles, use established roadways to reach the site, and ensuring--once the fencing and the preconstruction survey have been completed--that all vehicles are restricted to the project site and do not impact adjacent properties.
 - (3) Arranging, to the extent possible, for all grading and construction activities to occur when the butterflies are inactive.
 - d. Shall take every precaution to limit the number of black legless lizards* killed by grading and construction activities, regardless of the timing of construction. These precautions shall include:
 - (1) Preconstruction surveys within the development footprint to capture and relocate individual black legless lizards from the construction area into the mitigation area or other appropriate site.
 - (2) Monitoring of construction activities by a qualified biologist who will recover any black legless lizards that may be excavated with the native material. If the animals are in relatively good shape, they will be immediately relocated to the mitigation area. If they are injured, the animals will be turned over to a specialist who will care for them until they are in a condition to be released into the mitigation area.
 - e. Shall consult the Service prior to on-site use of insecticides, herbicides, and rodenticides and use such materials in a manner acceptable to the Service.
 - f. Shall keep the Service informed as to the progress of construction and advise when construction has been completed.

- g. Shall install permanent fencing around the perimeter of the mitigation area following completion of construction.
- h. Shall hire a qualified individual to monitor implementation of the Habitat Conservation Plan for a period of five years. Included among his or her responsibilities, the qualified individual:
 - (1) Shall collect data regarding changes in vegetation cover over time once a year for the first five years of the project.
 - (2) Shall conduct surveys to assess use by Smith's blue butterfly of revegetated and enhanced habitat areas every year for the first five years of the project.
 - (3) Shall prepare brief progress reports during the five year monitoring period (as described in the HCP) and forward them to responsible or interested agencies such as the Sand City Planning Department, CDFG, and the Service.
- i. Shall consent to and shall allow entry by agents or employees of the Service upon premises where the permitted activity is conducted at any reasonable hour..

2. The Service

- a. Shall review and approve the education program prior to its use.
- b. Shall review the credentials of any biologist(s) under consideration by the Developer (to determine if he or she is qualified to perform protection and monitoring actions), and shall approve the selection.
- c. Shall maintain open communication with representatives to assist with compliance procedures.
- d. Shall provide guidance to the Developer, as needed, relating to implementation of specific protective measures detailed in the HCP.

B. MITIGATION OF IMPACTS OF INCIDENTAL TAKE

In order to mitigate the impacts of incidental take, the Developer, the City and the Service shall undertake and fulfill the following responsibilities and obligations:

1. The Developer

- a. Shall implement the measures described in the HCP to minimize the adverse effects on all species of concern considered in the HCP. These measures are prescribed for four different management areas and are summarized as follows:
 - (1) Management Area 1 (3.4 acres of primarily dune scrub and iceplant) will be stabilized and existing coastal dune scrub habitat will be enhanced and monitored regularly. Special status plant species propagated from onsite material will be installed in this area.
 - (2) Management Area 2 (1.2 acres of sediment pond, paved areas, disturbed dune scrub habitat) will be stabilized, backfilled with clean sand, and contoured. The habitat will be enhanced with installation of native coastal scrub vegetation and associated special status species. The area will be maintained and monitored regularly.
 - (3) Management Area 3 (1.4 acres of primarily disturbed dune covered with iceplant) will be recontoured and stabilized in preparation for planting of native coastal scrub vegetation.
 - (4) Management Area 4 (27 acres of primarily developed areas with some coastal dune scrub and central maritime chaparral habitat) will be developed. Prior to initiation of construction, collection of seed, other plant material or topsoil will occur for the coastal dune scrub species, including special status species.
- b. Shall grant a conservation easement in perpetuity over the 4.6 acre mitigation area (Management Areas 1 and 2) and a second conservation easement over the 1.4 acre area (Management Area 3) in favor of the City of Sand City as a site for coastal dune restoration to offset losses in other parts of the city. The conservation easements shall give the Service the right to approve any amendments to the conservation easements and to approve any public agency or private association to which the grantee of the conservation easements assigns its rights. The conservation easements will be integrated with covenants and restrictions for the commercial development in a manner that will assure that the provisions of the HCP,

including the long-term financial responsibilities associated with it, will be carried out by the Developer or its assignees and/or successors. The Developer shall not take any action which may effect a taking of Smith's blue butterfly until the City has accepted the conservation easements required by this paragraph.

- c. Shall, prior to undertaking any activities that are inconsistent with or materially differ from the terms and conditions of the approved HCP, consult with and obtain the approval of the Service.
- d. Shall cooperate and maintain open communication with the Service and the City of Sand City to carry out the terms and conditions of the HCP.

2. The City

- a. Shall be designated as the management entity for the 4.6 acre habitat preserve in perpetuity.
- b. Shall ensure that annual maintenance activities on the habitat preserve are carried out consistent with the goals of the HCP.
- c. Shall provide the Service unlimited access to the habitat preserve.

3. The Service

- a. Shall cooperate with and provide technical assistance to the Developer and any designees in carrying out the terms and conditions of the HCP and Section 10(a)(1)(B) permit, particularly with regard to acquisition and permanent management of replacement habitat.

C. FUNDING OF THE HCP

1. The Developer

- a. Shall expend the funds necessary for implementation, monitoring and maintenance for 5 years in accordance with the terms of the HCP and in accordance with the provisions of Section III (B)(1) of this agreement.
- b. Shall issue a letter of credit or give a corporate guarantee that funds are available and are a line item for the amount of estimated implementation costs as described in the HCP (including costs for implementing paragraphs c. and d. below) prior to any take of Smith's blue butterfly habitat on the site.

- c. Shall establish the mechanism for generating annual funds for long term maintenance (in perpetuity following the first five years) of the mitigation area.
- d. Shall establish a special account to be administered by the City of Sand City for the annual funds generated for maintenance of the mitigation area.

2. The City

- a. Shall administer the special account established for long-term maintenance (in perpetuity following the first five years) of the mitigation area

IV. ENVIRONMENTAL REVIEW

Construction and operation of the proposed North of Playa project is an action subject to review under the California Environmental Quality Act. As lead agency under CEQA, the City of Sand City has completed and certified an Environmental Impact Report addressing project actions pursuant to CEQA Guidelines (certified September 28, 1995).

Sand City, the City of Seaside, and Seaside Sanitation District applied for a \$2 million Infrastructure Improvement grant from the U.S. Department of Commerce, Economic Development Administration (EDA project No. 07-01-04075) for the project. Issuance of the grant is an action subject to review under the National Environmental Policy Act. An environmental Assessment was completed and a Finding of no Significant Impact (FONSI) was recommended by EDA on June 30, 1995.

Issuance of a Section 10 (a)(1)(B) permit to the Developer by the Service is an action subject the NEPA review. The Service is the lead agency under NEPA and has prepared an Environmental Assessment addressing the project Section 10 (a)(1)(B) permit and accompanying Habitat Conservation Plan.

V. ISSUANCE OF THE PERMIT

A. FINDINGS

The Service shall issue a Permit to the developer upon finding (after opportunity for public comment) that:

1. INCIDENTAL TAKE

Any permitted taking of the Smith's blue butterfly will be incidental to the carrying out of otherwise lawful activities; and,

2. MINIMIZE AND MITIGATE

The HCP and this Implementation Agreement will, to the maximum extent practicable, minimize and mitigate the impacts to the species considered in the HCP; and,

3. ADEQUATE FUNDING

The funding sources identified and provided for herein will ensure that adequate funding for the HCP will be provided; and,

4. NO LIKELY JEOPARDY

Any permitted taking of the species of concern will not appreciably reduce the likelihood of the survival and recovery of these species in the wild; and,

5. OTHER MEASURES

Any other measures set forth in the HCP and required by the Service as being necessary or appropriate for the purposes of the HCP (including any measures determined by the Parties to be necessary to deal with unforeseen circumstances) will be fulfilled;

The Service shall issue a Permit to the Developer concurrently with the execution of this Agreement by the Parties, and it is specifically agreed that this Agreement shall not become effective nor binding upon the Parties until and unless the Permit has been issued.

B. ISSUANCE AND MONITORING

After issuance of the Permit, the Service shall monitor the implementation thereof, including all of the terms of this Agreement and the HCP, including (but not limited to) the management, maintenance and monitoring of the coastal dune scrub habitat and associated special status species in order to assure compliance with the Permit, the HCP and this Agreement. In addition, the Service shall, to the maximum extent possible, ensure the availability of its staff to cooperate with and provide technical and research assistance to the Parties.

VI. REMEDIES AND ENFORCEMENT

A. REMEDIES IN GENERAL

Except as set forth hereinafter, each Party hereto shall have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement and the Permit, and to seek remedies and compensation for any breach hereof, consistent with and subject to the following:

1. NO MONETARY DAMAGES

None of the Parties shall be liable in damages to the other Parties 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:

a. 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.

b. Land Owner Liability

The Developer shall retain whatever liability he/she possesses as an owner of interests in land.

2. INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that the species of concern are unique and that their loss as a species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement.

B. THE PERMIT

1. PERMIT SUSPENSION, REVOCATION OR TERMINATION

a. Suspension

In the event of any significant violation or breach of the Permit or this Agreement, the Service may suspend the Permit; however, except where

the Service determines that emergency action is necessary to protect the Smith's blue butterfly, it will not suspend the Permit without first:

- (1) Requesting that the Developer take appropriate remedial, enforcement or management actions; and
- (2) Providing the Developer notice in writing of the facts or conduct which may warrant the suspension and an opportunity for the Developer to demonstrate or achieve compliance with the ESA, regulations issued thereunder, the Permit and this Agreement.

b. Reinstatement

In the event the Permit is suspended, the Service shall, as soon as possible--but no later than ten (10) working days after any suspension--consult with the Developer concerning actions to be taken to effectively redress the violation or breach that necessitated the suspension. At the conclusion of any such consultation, the Service shall make a determination of the actions necessary to effectively redress the violation or breach. In making this determination the Service shall consider the requirements of the ESA, regulations issued thereunder, the conservation needs of the Smith's blue butterfly, the terms of the Permit and this Agreement, and any comments and recommendations received during the consultations. As soon as possible, but not later than thirty (30) days after the conclusion of the consultations, the Service shall transmit to the Developer written notice of the actions necessary to effectively redress the violation or breach. Upon full performance of the necessary actions specified by the Service in its written notice, the Service shall immediately reinstate the Permit. It is the intent of the Parties hereto that in the event of any suspension of the Permit all Parties shall act expeditiously to cooperate to rescind any suspension to carry out the objectives of this Agreement.

c. Revocation or Termination

- (1) The Service agrees that it will revoke or terminate the Permit for violation of the Permit or breach of this Agreement only if the Service determines that:
 - (A) Such violation cannot be effectively redressed by other remedies or enforcement action; and

(B) Revocation or termination is required to fulfill a responsibility of the Service under the ESA or regulations issued thereunder.

(2) The Service agrees that it will not revoke or terminate the Permit without first:

(A) Requesting the Developer to take appropriate remedial action; and,

(B) Apprising the Developer by notice in writing of the facts or conduct which may warrant the revocation or termination, and providing a reasonable opportunity--but not less than sixty (60) days--to demonstrate or achieve compliance with the ESA, regulations issued thereunder, the Permit and this Agreement.

C. LIMITATIONS AND EXTENT OF ENFORCEABILITY

1. NO FURTHER MITIGATION OBLIGATION

It is acknowledged that the purpose of this Agreement is to set forth the obligations and rights of the Parties hereto with respect to the HCP, and to provide for the conservation of the species of concern and the mitigation and compensatory measures required in connection with incidental taking of these species in the course of otherwise lawful activities within the project site. Accordingly, except as otherwise required by law and/or provided under the terms of the HCP, including unforeseen circumstances, no further mitigation or compensation will be required by the Service.

2. PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES UNAFFECTED

Except as otherwise specifically provided in this Agreement, nothing herein contained shall be deemed to restrict the rights of the Developer to manage the use of and exercise all of the incidents of land ownership over those lands and interests in lands constituting the project site subject to such other limitations as may apply to such rights under the Constitution and laws of the United States and the State of California. Furthermore, nothing herein contained is intended to limit the authority or responsibility of the United States government to invoke the penalties or otherwise fulfill its responsibilities under the Endangered Species Act.

VII. MISCELLANEOUS PROVISIONS

A. AMENDMENTS

1. AMENDMENTS TO THE IMPLEMENTATION AGREEMENT

Except as otherwise set forth herein, this Agreement may be amended only with the written consent of each of the Parties hereto.

2. AMENDMENTS TO THE HCP

Material changes to the HCP proposed by the Developer after the effective date of the Permit shall be processed by the Service as an amendment to the Permit in accordance with the ESA and permit regulations at 50 C.F.R. Parts 13 and 17, and shall be subject to appropriate environmental review.

B. NO PARTNERSHIP

Neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

C. 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 hereto and their respective successors and assigns.

D. 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:

United States Fish and Wildlife Service
Region 1, Eastside Federal Complex
911 Northeast Eleventh Avenue
Portland, Oregon 97232-4181

D.B.O. Development No. 25
c/o Coats Consulting
1200 Piedmont, Suite B
Pacific Grove, CA 93950

E. ENTIRE AGREEMENT

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

F. ATTORNEY'S FEES

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

G. 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.

H. AVAILABILITY OF FUNDS

Implementation of this Agreement by the Service and the City shall be subject to the availability of appropriated funds. This paragraph shall not affect the City's authority or duty to manage the account referred to in Section III (C)(2)(a) of this Agreement.

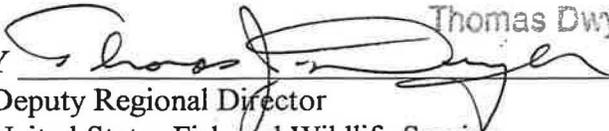
I. DUPLICATE ORIGINALS

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

J. THIRD PARTY BENEFICIARIES

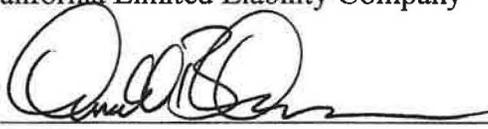
Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create the public or any member thereof as a third Party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit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

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

BY  Thomas Dwyer
Deputy Regional Director
United States Fish and Wildlife Service
Portland, Oregon Date 4/25/96

BY  Steve Matarazzo, Community Development Director
City of Sand City
Sand City, California Date 4/4/96

D.B.O. Development No. 25
A California Limited Liability Company

BY  Donald Orosco, Member
Pacific Grove, California Date 4/4/96