

AGREEMENT WITH RESPECT TO THE
HELL CANYON HABITAT CONSERVATION PLAN

I. Introduction

This agreement is entered into on this 15th day of February, 1994, by and among the following parties: The United States Fish & Wildlife Service (USFWS), and Allan W. Flandro and Helen A. Flandro and Flandro Venture Capital Group, a Limited Partnership, of which Allan W. Flandro and Helen A. Flandro are the General Partners (FVCG).

AGREEMENT

For and in consideration of the recitals of fact set for the below, the mutual Assurances set forth herein and other consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto do hereby agree as follows:

II. Definitions

- A. Assurances. The term "Assurances" refers collectively to the representations, assurances, commitments and covenants provided by and between the parties to this Agreement.
- B. HCP. The abbreviation HCP refers to the Habitat Conservation Plan that is the basis of this implementation agreement.
- C. Conserved Habitat. The term "Conserved Habitat" refers to the three (3) acres of real property FVCG proposes to dedicate for conservation purposes that is part of the 18.3 acre property that FVCG owns adjacent to the quarry, which is shown and described in the Habitat Conservation Plan.
- D. PF. The abbreviation PF refers to the peregrine falcon (*Falco peregrinus*), a federally listed endangered species.
- E. Hell Canyon. The term "Hell Canyon" refers to the approximate 30 acre tract located at 1020 North Victory Road in Salt Lake City, Salt Lake County, Utah owned by FVCG and upon which FVCG proposes to continue the operation of a sand, gravel, and aggregate quarry.

III. Recitals of Fact

This agreement is based upon the following Facts:

- A. The Hell Canyon quarry is within the planning jurisdictions of the City of Salt Lake and Salt Lake County, Utah.

- B. The Hell Canyon quarry is located within an area of Salt Lake County where a PF population occurs. The quarry site has been documented to support a PF pair.
- C. The primary focus of the conservation planning for the PF involves attaching a nesting box on a cliff in a smaller quarry located north of the present eyrie and restricting access to the new site to authorized personnel only.
- D. The participants of this plan have concluded that the incidental taking is not likely to jeopardize the continued existence of the PF and that the HCP will, to the maximum extent practicable, minimize the taking of this species; that the taking of this species will be incidental to otherwise lawful activity; that the HCP promotes the long-term survival and conservation of this species; and that the HCP provides adequate funding and will be fully implemented as discussed in greater detail below.
- E. The parties hereto desire to provide for the implementation of the HCP, and in connection therewith, the assurances, permits and undertakings required in connection therewith, as provided below.
- F. The Secretary of the Interior has authority under the Endangered Species Act to, among other things, determine whether any species is endangered or threatened, to regulate the taking of endangered species, to encourage states and other interested parties to develop and maintain conservation programs, including programs for habitat acquisition and maintenance, to issue permits for the taking of endangered species incidental to otherwise lawful activity, and to enforce the provision of the Endangered Species Act, 16 U.S.C. 19531, *et seq.* The Secretary of the Interior is also acting pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. Section 661, *et seq.*, and the Fish and Wildlife Act of 1956, as amended, 16 U.S.C. 742a, *et seq.*
- G. The objectives of the HCP and this agreement are:
 - 1. To assist in the indefinite perpetuation of the PF;
 - 2. To enhance the survival of the PF as a species and a component of a larger ecological community;
 - 3. As provided in Section IV below, to describe the Hell Canyon area that can be devoted to human development without jeopardizing the continued existence of the PF or appreciably diminishing the likelihood of survival or recovery of this species in the wild and to require, in

connection with any such exclusion, appropriate mitigation and compensation therefor.

- H. To accomplish the foregoing objectives, the HCP, among other things:
1. Relies on the creation of an alternate PF nest site that will be maintained by the applicant for life of the permit;
 2. Will be implemented to provide for the protection of the nest site by the applicant; and
 3. Will continue for a term of twenty (20) years, subject to review and modification as discussed in further detail below.
- I. Prior to the adoption of the HCP and this Agreement, the continued existence of the PF has been threatened by one or more of a variety of factors, including the following:
1. Human encroachment; and
 2. Use of pesticides that affected PF reproduction by causing eggshell thinning and increased embryo mortality.
- J. Based on a review of plans for the Hell Canyon quarry, and analysis by the USFWS (including the review and analysis with respect to the biological opinion of the USFWS prepared pursuant to Section 7(b) of the Endangered Species Act, 16 U.S.C. Section 1536(b)), it has been determined that the implementation of the HCP, and the actions contemplated and provided for herein and allowed by the permit for the incidental taking of endangered species issued pursuant to Section 10(a) of the Endangered Species Act, 16 U.S.C Section 1539(a) ("Section 10(a) Permit") described below will carry out the objectives referred to above, and ameliorate the threats described above, and;
1. Are not likely to jeopardize the continued existence of the PF or otherwise violate the requirements of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. Section 1536(a)(2);
 2. Will, to the maximum extent practicable, minimize and mitigate the taking of the PF and its habitat;
 3. Will enhance the long term survival of, and will result in only incidental takings, of the PF;

4. Will promote the long term conservation and enhancement of the PF and its habitat;
 5. Will provide adequate funding and will be fully implemented; and
 6. Will promote the conservation and enhancement of a portion of Salt Lake County in general.
- K. It is the desire of all the parties hereto to provide for the long term reconciliation of their individuals concerns and interests regarding; (1) The protection and enhancement of PF habitat; and (2) the existing and proposed human development related to the Hell Canyon quarry and to provide assurances to each other in connection therewith so as to encourage and permit such a reconciliation.

IV. Designation of Land

The quarry in Hell Canyon and the area designated for future dedication as Conserved Habitat, subject to the conditions set forth below are generally shown on the map in the HCP. Dedication of privately owned land as Conserved Habitat shall occur only in accordance with provisions of this Agreement.

V. Habitat Conservation Plan

The following outlines the main features of the proposed Habitat Conservation Plan as described in more detail in that separate document (attached hereto).

A. HCP Features

1. An annual report will be submitted to the Service outlining the previous years activities at the quarry. Annual meetings will take place to discuss any changes made in the plan.
2. The owner of the property also owns 18.3 acres contiguous to the north on which a smaller quarry is located. It is approximately 1200 feet away from the present eyrie, higher in elevation, and about 1100 feet from the presently planned excavation. Within the 18.3 acres the applicant will dedicate three (3) acres for conservation purposes. Within the 3 acre area the applicant will attach a nesting box similar to those used in downtown Salt Lake City near the top of a cliff. The specifications for the box are detailed in Sherrod, *et al* 1981. The site selected for the nesting box faces northwest and has a clear drop down the face of about 100 feet. At the toe of the face the ground slopes

downward quite rapidly. The applicant will maintain the nesting box for the life of the permit.

3. No trapping, handling or any other contact with the falcons is planned.
4. Access to the new site will be restricted to authorized personnel only. Any activity that would disturb the pair would be restricted.
5. Upon locating a dead, injured, or sick individual of an endangered or threatened species, initial notification would be made to the U.S. Fish and Wildlife Service Law Enforcement Office in Salt Lake City, Utah (801-975-3632). Care should be taken in handling sick or injured individuals to ensure effective treatment and care and in handling dead specimens to preserve biological materials in the best possible state for analysis of cause of death. In conjunction with the care of sick or injured individuals or preservation of biological materials from a dead animal, the finder will have the responsibility to ensure the evidence intrinsic to the specimen is not unnecessarily disturbed.

VI. Hell Canyon Quarry Development

A. General. The property of concern is a quarry on a 30-acre tract at 1020 North Victory Road in Salt Lake City, Utah. This area has been a source of construction aggregates since the turn of the 20th century. Its products are limestone, sand and gravel. It has been owned by the applicant since 1962.

B. Assurances.

1. In General.

A primary purpose of this Agreement is to provide for the long-term reconciliation of the concerns of the parties regarding (a) the protection and enhancement of the Endangered Species; and (b) the development of urban uses within the Hell Canyon area.

In order to effect such reconciliation and to promote such individual concerns of each of the parties hereto, and in recognition of the fact that FVCG is wholly responsible for funding the means by which such reconciliation will be made possible, it is necessary and desirable for each of the parties hereto to provide to the other parties the Assurances set forth in this Agreement.

2. Assurances to FVCG

Based on and in return for the Assurances of FVCG, which require FVCG to pay sums of money and to undertake other actions in reliance upon the Assurances of the other parties to this Agreement, the parties agree that as permitted by the Endangered Species Act and authority under other applicable acts, statues, ordinances, order and regulations:

- a. Compliance by FVCG with the terms of this Agreement and the Section 10(a) Permit constitute compliance with the provisions of the Endangered Species Act as it relates to the development of the Hell Canyon Quarry development;
- b. No further mitigation or compensation is necessary or will be required of FVCG solely as a result of the development of the quarry area to provide for the conservation and enhancement of the PF except if any additional development or significant changes to the proposed development plan described in the HCP and EA are made.
- c. A breach of this Agreement or failure to perform according to the terms of this Agreement by any party other than FVCG shall not constitute a breach by FVCG.

C. Compliance with Section 10(a) Permit Requirements

1. Habitat Conservation Plan

The HCP has been developed in consultation with professionals in the field of biology and ecology to allow FVCG to comply with Section 10(a) Permit requirements. This HCP is premised on allowing incidental take of the Endangered Species in the development of the Hell Canyon Quarry area and providing mitigation to enhance survivability.

2. Permit Issuance

Concurrent with the execution of this Agreement, the USFWS shall issue a Section 10(a) Permit to FVCG authorizing the incidental take of the peregrine falcon at the Hell Canyon quarry site.

VII. Funding Program

FVCG will provide funds of up to \$7,500. It is believed that this will adequately and sufficiently fund the HCP.

VIII. Public Agency Obligations

A. USFWS.

Subject to the availability of funds and personnel, USFWS will coordinate their endangered species program with the HCP to include, among other things, the following:

1. The implementation of the peregrine falcon recovery plan that is not inconsistent with the provisions of this Agreement and HCP;
2. Assist in the monitoring of the peregrine falcon nest site;
3. Cooperate in and observe the provisions of this Agreement with respect to amendments to this Agreement;
4. Generally use and exercise the rights and authority available to it in furthering the purposes of and ensuring compliance with the terms of this Agreement; and
5. Cooperate with the other applicable parties in the operation and administration of the HCP.

IX. Remedies and Enforcement

A. General.

Generally, except as set forth in Section IX.A.1. below, each of the parties hereto shall have all the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement and the Section 10(a) Permit, and to seek remedies and compensation for any breach thereof, consistent with and subject to the other terms hereof (including, without limitation, the terms with respect to notice and cure).

1. The governmental entities shall not be liable for damages to any party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary duty or obligation

imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

- a. All governmental entities shall retain whatever liability they possess as holders of interests in real property; and
- b. All parties shall retain whatever liability they possess as holders of interests in real property; and
- c. All parties shall have the right to seek equitable relief, including but not limited to injunctive relief, specific performance and declaratory relief, regarding any breach of this Agreement.

The parties agree that nothing in this Agreement constitutes the taking of private property without the payment of just compensation. The parties shall have all remedies available with respect to any future actions of any governmental entities which result in a taking of private property without the payment of just compensation.

2. The parties acknowledge that the Endangered Species are unique, that the loss of these species would be irreplaceable, and that, therefore, injunctive and temporary relief may be appropriate in certain instances involving a violation of this Agreement.

B. Section 10(a) Permit

1. Permit Revocation, Termination and Suspension

a. Suspension

- (1) The USFWS may suspend the Section 10(a) Permit for any violation by FVCG, its successors or assigns of the Permit or this Agreement in the manner hereinafter provided;
- (2) Except where the USFWS determines that emergency action is necessary to protect any endangered or threatened species, the USFWS shall not suspend the Section 10(a) Permit without first:
 - (a) Requesting FVCG or its assigns to take appropriate remedial action: and

- (b) Providing to FVCG or its assigns notice in writing of the facts or conduct which may warrant the suspension and a reasonable opportunity (not to exceed thirty (30) days to demonstrate or achieve compliance with the Permit and this Agreement.
- (3) Any suspension under this Subsection IX.B.1.a. shall be lifted immediately upon the reasonable determination by the USFWS that the violation has been effectively redressed. As soon as possible, but no later than ten (10) working days after any suspension under this Subsection, the USFWS will consult with FVCG or its assigns concerning actions to be taken to effectively redress the violation that necessitated the suspension. At the conclusion of such consultation, the USFWS shall make a determination of the actions necessary to effectively redress the violation. In making this determination, the USFWS shall consider the conservation needs of the species concerned and any comments or recommendations received during these consultations. As soon as possible, but no later than ten (10) working days after the conclusion of such consultation, the USFWS shall transmit to FVCG or its assigns written notice of the USFWS determination of the actions necessary to effectively redress the violation, and the USFWS shall immediately lift the suspension upon its reasonable determination that there has been performance of the action specified in its written notice.
- (4) It is the intent of the parties hereto that in the event of any suspension of the Section 10(a) Permit, all parties shall act expeditiously to cooperate to lift any suspension of the Section 10(a) Permit to carry out the objectives of this Agreement. Notwithstanding any provision of this Subsection IX.B.1., no suspension of the Section 10(a) Permit, or the rights, benefits or privileges of the Section 10(a) Permit, shall extend beyond a period of ninety days (90) days, unless the USFWS makes the determinations required by Subsection IX.B.1.b. below.

b. Revocation or Termination

(1) The USFWS shall not revoke or terminate the Section 10(a) Permit for violation by FVCG or its assigns of the Permit or this Agreement unless the USFWS determines that such violation:

(a) Involves the unpermitted taking of an endangered or threatened species; and

(b) Cannot be effectively redressed by other remedial or enforcement action, including remedies from the process specified in Section IX.B.1.b.2.

(2) The USFWS shall not revoke or terminate the Section 10(a) Permit without first:

(a) Requesting FVCG or its assigns to take appropriate remedial action and otherwise completing the suspension process set forth in Subsection IX.B.1.a above; and

(b) Providing to FVCG or its assigns notice in writing of the facts or conduct which may warrant the revocation or termination and a reasonable opportunity (not to exceed thirty (30) days to demonstrate or achieve compliance with the permit and this Agreement.

c. Other Permit Rights, Benefits or Privileges

The provisions of Subsections IX.B.1.a. and IX.B.1.b. (including, without limitation, any notice and cure provisions) shall also apply to any suspension, revocation or termination by the USFWS of any specific rights, benefits or privileges of FVCG or its assigns under the Section 10(a) Permit. The USFWS shall have the express authority, exercisable at its option, under the Section 10(a) Permit to enforce the provisions of the Section 10(a) Permit and this Agreement as provided above directly with respect to each agent, contractor or employee of FVCG or its assigns. Such enforcement authority shall include suspension, revocation and termination of the rights of such agents, contractors, or employees under the

Section 10(a) Permit, all subject to and in accordance with the terms, conditions and limitations of this Agreement, without being obligated to proceed against FVCG or its assigns.

d. No Further Mitigation

- (1) In the event that the USFWS or any other party to this Agreement attempts to require, contrary to the terms and provisions of this Agreement, additional mitigation or compensation beyond that provided in this Agreement, FVCG or its assigns may, in addition to all other remedies available, at its option, terminate this Agreement, whereupon the Section 10(a) Permit shall terminate and FVCG or its assigns shall be relieved from any and all obligations to provide mitigation or compensation as provided in this Agreement.
- (2) In the event that the USFWS revokes or terminates the Section 10(a) Permit or the rights, benefits or privileges of the Section 10(a) Permit, this Agreement shall terminate and be of no further force or effect.

e. Emergency Action

Should the Section 10(a) Permit expire or terminate for any reason, FVCG will continue to be authorized to take emergency action, in order to protect human health or safety in which event, FVCG shall contact the USFWS and coordinate with said party any action which may be necessary or appropriate to respond to such emergency. To the extent possible, such action shall be consistent with the HCP.

C. Limitations and Extent of Enforceability

It is acknowledged that this Agreement and the HCP is to provide for the conservation and enhancement of the Endangered Species and the mitigation and compensatory measures required in connection with the operation of the quarry in Hell Canyon. Accordingly, to the extent permitted by law, no further mitigation or compensation for the conservation of the Endangered Species will be required by any of the parties hereto solely because of the operation of the quarry.

Nothing herein contained shall be deemed to limit the power of FVCG or its assigns to regulate the use of its land subject hereto for purposes other than and not related to conservation of the Endangered Species and their habitats, subject to such other limitations as may apply to such power under the United States and Utah Constitutions, the laws of the United States or the State of Utah, except as expressly set forth herein and in the HCP.

Notwithstanding the terms of this Agreement, any person may take endangered wildlife in defense of his or her own life or the lives of others. FVCG or its assigns may take emergency action in response to an actual or threatened disaster. To the extent possible, such action shall be consistent with the HCP.

Nothing herein is intended to limit the authority of the United States government to invoke the penalties provided for in the Endangered Species Act, 16 U.S.C. Section 1540.

D. Enforceability by FVCG

It is acknowledged and agreed by the parties hereto that any Assurance provided to FVCG or its assigns by USFWS with respect to the extent of conservation and mitigation measures which will be required in connection with the use of the quarry in Hell Canyon are:

1. Intended to be relied upon by FVCG and its assigns;
2. Made with full knowledge of the extent and effect thereof;
3. Made in exchange for valuable and adequate consideration to be provided by FVCG and its assigns in the form of money, dedication of lands, and other Assurances; and
4. Made with the understanding that such Assurances will not be amended, changed or increased except in accordance with the express terms of this Agreement.

E. Enforcement by Other Persons

1. The parties to this Agreement intend to provide that persons who are entitled to enforce the Endangered Species Act are also entitled to enforce the provisions of this Agreement. Such persons shall be entitled to enforce the terms of this Agreement against all parties to the Agreement.

2. The parties acknowledge that the provisions of the Endangered Species Act can be enforced against all parties to this Agreement, as provided in the Endangered Species Act. The parties acknowledge that they have no power to, and do not intend to, exempt themselves from the enforcement provisions of the Endangered Species Act.
3. Limitations of Actions

In the event that litigation is initiated under or based in whole or in part on this Agreement by a person who is not a party to this Agreement:

- a. The obligations of FVCG or its assigns herein to pay sums under the funding provisions of this Agreement shall be suspended during the pendency of any court order, other than a final judgement, which stops FVCG or its assign's activity within the quarry in Hell Canyon. If the court finally determines that FVCG or its assigns has violated this Agreement, FVCG or its assigns shall pay the sums which accrued and would have otherwise been payable during such period of suspension. Otherwise, FVCG or its assigns shall have no obligation to pay the sums which accrued and would have been otherwise payable.
- b. In the event that a person not a party to this Agreement seeks an injunction or other equitable relief against any party to this Agreement, a bond shall be required as provided by applicable Utah and/or Federal law.

X. Amendments

Except as provided in Section X.B., with regard to unforeseen circumstances, this Agreement may be amended only in accordance with the provisions of this Section X.A.

- A. Amendment to Provisions of the HCP, this Agreement and the Section 10(a) Permit. It is necessary to establish a procedure whereby this Agreement and the Section 10(a) Permit can be amended. However, it is extremely important that the cumulative effect of amendments will not jeopardize any Endangered Species or the Species of Concern. Amendments must be evaluated based on their effect on the habitat as a whole. The USFWS must be consulted on all proposed amendments. The types of proposed amendments and the applicable amendment procedures are as follows:

1. Amendments to Plans in the Hell Canyon area.

It is acknowledged that upon the written request of FVCG or its assigns, the local agency having land use regulatory jurisdiction is authorized in accordance with applicable law to approve amendments to development plans for the quarry in Hell Canyon that do not encroach on any endangered species habitat that is not, as of the date hereof, contemplated to be taken as a consequence of the development and that do not alter the conditions set forth in the HCP or this Amendment.

2. Minor Amendments to the HCP.

Minor amendments involve routine administrative revisions or changes to the operation and management program and that do not diminish the level or means of mitigation, do not alter the terms of the Section 10(a) Permit and do not conflict with the primary purpose of the HCP or this Agreement. USFWS is authorized to approve the same after consultation with FVCG or its assigns. Examples of minor amendments include, but are not limited to, the following:

- a. Changes in personnel or contracted parties involved in implementation of the HCP;
- b. Changes in the entity having ownership and/or control of all or any portion of the habitat.

3. All Other Amendments.

All other amendments will be considered an amendment to the Section 10(a) Permit, subject to any other procedural requirements of Federal law or regulation that may be applicable to amendment of such a permit.

B. Unforeseen Circumstances

1. In reconciling their interests, and in identifying the measures in the HCP and this Agreement, the parties to this Agreement have used their best efforts to anticipate and take into consideration future changes and circumstances affecting the quarry in Hell Canyon, Salt Lake County, and the endangered species found therein. The following procedures shall be followed, however, with respect to unforeseen circumstances that (a) appreciably reduce the likelihood of survival of the PF, (b) result in the presence of other species listed under the Endangered

Species Act being discovered the Hell Canyon area, or (c) result in new species being listed under the Endangered Species Act whose conservation necessitates additional emphasis in the HCP.

2. In response to any unforeseen circumstances as set forth in Subsection X.B.1. above, any party to this Agreement may request the other parties to this Agreement to meet to discuss appropriate modifications or amendments to the HCP or this Agreement as applied to the Conserved Habitat, the operating program or any provision of this Agreement. Any party to this Agreement who fails to vote upon any such proposed changes that are otherwise approved by USFWS shall be bound by the terms and conditions of any modification or amendment adopted pursuant to the provisions of this Agreement.
3. The parties to this agreement shall, to the maximum extent possible, attempt to reach a consensus in response to the unforeseen circumstances described in Subsection X.B.1. of this Section. No modification or amendment proposed under Subsection X.B.2 of this Section shall be adopted and become effective without the approval of USFWS.
4. Notwithstanding the provisions of Subsection X.B.3., upon a written finding by the USFWS that an emergency exists wherein either the continued implementation of the HCP or this agreement, appreciably reduces the likelihood of survival of a species listed under the Endangered Species Act, such plan shall be immediately modified in accordance with the recommendations of the USFWS. The recommendations shall be in writing and shall include justification which demonstrates the requested modifications were (a) necessary for the conservation of a species listed under Endangered Species Act, (b) can not be accomplished through the continued implementation of the existing HCP and (c) represents the minimal modifications available that would not appreciably reduce the likelihood of survival of the affected listed species. Upon issuance of such findings, the requested modifications shall remain in force and effect until such time as the USFWS determines that the emergency threat to the existence of the affected listed species has been avoided.

C. Taking Effect of Amendments

1. Upon the satisfaction of the conditions precedent and the approvals required as set forth in this Section X, the provisions of this Agreement shall be thereupon amended.

2. The local agency required to approve such proposed amendments shall maintain a copy of such amendments that have become effective, together with all written determinations and approvals required hereunder in connection therewith in its official records and shall also provide to all parties to this Agreement a copy thereof together with certified copies of all other written approvals and determinations required in connection therewith and a certified statement that the required amendment procedures have been fully and properly complied with. FVCG or its lenders, purchasers, investors, partners, joint venturers, successors and assigns may rely upon such a certified statement and the parties hereto shall be estopped from denying the effectiveness of any such amendment for which a certified statement has been so issued.

XI. Miscellaneous Provisions

A. Successors and Assigns

The terms, provisions and conditions of this Agreement shall be binding on the parties hereto and their successors and assigns, and shall inure to the benefit of the parties hereto and such successors and assigns as may be expressly assigned the benefits hereof by any party to the Agreement; provided, however, that the terms and conditions of this Agreement shall not be binding upon any tenant or other occupant (including, without limitation, any office or retail) in the Hell Canyon area and shall, with respect to FVCG, be binding only upon a person or entity who is a transferee of all of FVCG's then existing right, title and interest in and to the quarry in Hell Canyon or any portion thereof.

B. Notices

Notices provided for herein shall be delivered to the persons set forth above or shall be deemed given five (5) days after deposit in the United State mail, certified and postage prepaid, return receipt requested, and addressed as follows:

1. If to USFWS: Assistant Field Supervisor, U.S. Fish and Wildlife Service, Utah Field Office, 2060 Administration Building, 1745 West 1700 South, Salt Lake City UT 84104;
2. If to FVCG: Allan W. Flandro, 2075 Parleys Canyon Blvd., Salt Lake City, UT 84109

C. Entire Agreement

This Agreement, together with the Section 10(a) Permit, supersedes any and all other agreements either oral or in writing, between the parties hereto with respect to the subject matter hereof and contains all of the covenants and Agreements between the parties with respect to said matter, and each party to this Agreement acknowledges that no representations, inducements, promises or Agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, that are not embodied herein, and that no other Agreement, statement or promise not contained herein shall be valid or binding.

D. Interpretation

This Agreement was prepared as the implementing program of the HCP. Because the provisions of the HCP were not, when drafted, intended to be a legal document and because of the desirability of having a single document that can be considered and focused upon by all the parties for legal effect and consistency in defining the regulatory and proprietary rights, obligations, privileges and authority of the affected parties, this Agreement shall be the sole evidence and basis for the interpretation of its terms and provisions. Without limiting the generality of the foregoing, the other provisions of the HCP shall not be referred to in the interpretation of any provisions of this Agreement except where such provision makes specific reference to such provision of the HCP and then only to the extent of such reference.

E. Damages and Certain Causes

Except to the extent of intentional or negligent acts or omissions attributable to FVCG, FVCG shall not be liable or responsible to the USFWS for any loss or damage to or trespass to any real property or person occasioned by theft, fire, act of God, public enemy, injunction, riot, strike, insurrection, war, court order, requisition or order of governmental body of authority, or any cause beyond FVCG's control.

F. Attorney's Fees

If any action at law or in equity, including an action for declaratory relief, is brought to enforce or interpret the provisions of the Agreement, all parties to the litigation shall bear their own attorneys fees and costs. Attorneys fees and costs against the United States shall be governed by applicable Federal law, including the Equal Access to Justice Act, 20 U.S.C. Section 2412.

G. Counterpart

This Agreement may be executed in any number of counterparts. A complete original copy of this Agreement with all counterparts, signature pages attached thereto, and all amendments thereto, together with any amendments to the HCP, shall be maintained in the official records of Salt Lake County, Utah.

H. Term of Agreement

Except as otherwise provide in this Agreement, the term of this Agreement shall commence and this Agreement shall take effect upon the execution and delivery of this Agreement by all parties to the Agreement and shall continue in effect for twenty (20) years or until earlier terminated in writing by all of the parties to the Agreement.

I. Default

A default by any party in an obligation set forth herein shall not result in, or be the basis for, the termination or rescission of this Agreement.

J. Savings Clause

It is the intention of all governmental entities party to this Agreement to enter into this Agreement to the extent permitted by law.

K. Exercise of Responsibility

All parties will carry out their responsibilities under this Agreement expeditiously and carefully.

L. Effective Date

The provisions of this Agreement shall take effect only upon its execution by all parties.

M. Estoppel Certificates

Within twenty (20) days after written request from any party hereto, the other parties shall execute and deliver to any person designated by the requesting party a written instrument (a) identifying this Agreement and the HCP and any amendments or modifications thereto; (b) that all conditions under this Agreement and the HCP to be performed by the requesting party have been

performed (stating exceptions, if any); (c) and such other information as the requesting party reasonable requires.

IN WITNESS WHEREOF, The parties have executed this Agreement as of the date first set forth above and agreed to abide by its terms.

U.S. FISH & WILDLIFE SERVICE

By: Ralph O. Morynwick
Regional Director

Date: Feb 15, 1994

Flandro Venture Capital Group

By: Allan W. Flandro
Allan W. Flandro

Date: 8 Jan 1994