

DRAFT

IMPLEMENTING AGREEMENT

EL CORONADO RANCH, WEST TURKEY CREEK,

COCHISE COUNTY, ARIZONA

HABITAT CONSERVATION PLAN

**TO ESTABLISH A PROGRAM FOR THE CONSERVATION OF YAQUI CHUB,
YAQUI FORM OF LONGFIN DACE, AND YAQUI CATFISH**

INTRODUCTION

This Implementi Agreement ("Agreement"), made and entered into as of the _____ ay of _____, 1997, by and among El Coronado Ranch and Cattle Company (and Valer Austin), the USDA Forest Service (Forest Service), the U. S. Fish and Wildlife Service (Service), and the State of Arizona, by and through the Arizona Game and Fish Commission (Commission), and its administrative agency the Arizona Game and Fish Department, (Department) hereinafter collectively called the "Parties", defines the Parties' roles and responsibilities and provides a common understanding of actions that will be undertaken for the conservation of the subject listed and unlisted species and their habitats during activities associated with the operation of the El Coronado Ranch (ECR).

AGREEMENT

Based upon the recitals, definitions, mutual covenants and obligations, and other provisions set forth below and in the Habitat Conservation Plan/Environmental Assessment, and other valuable consideration, the Parties agree as follows:

1.0 RECITALS

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

WHEREAS, the Yaqui chub (*Gila purpurea*) was listed as endangered with critical habitat and the Yaqui catfish (*Ictalurus price!*) was listed as threatened with critical habitat in the Federal Register on August 31, 1984, pursuant to the provisions of the Endangered Species Act, 16 U.S.C. § 1531, *et. seq.*, as amended (ESA);

WHEREAS, the El Coronado Ranch contains populations of the federally listed Yaqui chub and the sensitive Yaqui form of longfin dace (*Agosia chrysogaster*) and contains potential habitat for the federally listed Yaqui catfish;

WHEREAS, the El Coronado Ranch and Cattle Company (^{Josiah} Joe and Valer Austin), through consultation with the Service, the Department, and the Forest Service, have developed a series of measures, described in the Habitat Conservation Plan (HCP), to conserve the subject listed and unlisted species and their associated habitats during operation of the El Coronado Ranch; and,

THEREFORE, for and in consideration of the mutual covenants and conditions herein, the Parties hereto do hereby understand and agree as follows:

2.0 DEFINITIONS

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

- 2.1 The term "Conservation Plan" shall mean the Habitat Conservation Plan prepared for the proposed operation of the El Coronado Ranch.
- 2.2 The term "Permit" shall mean an incidental take permit issued by the Service to the El Coronado Ranch and Cattle Company (~~Joe~~ and Valer Austin) pursuant to Section 10(a)(1)(B) of the ESA.
- 2.3 The term "Permit Area" shall mean the El Coronado Ranch consisting of 778 ha (1920 ac) of private land and 5376 ha (13,284 ac) on the Coronado National Forest under a grazing permit. The private land includes part or all of the following Sections: T18S, R29E, Sections 8, 9, 14-17, 20. The ECR grazing allotment on Forest Service lands include part or all of the following Sections: T18S, R29E, Sections 1, 10-14, 21-25; T17S, R29E, Section 30; T17S, R30E, Sections 31, 32; T18S, R30E.
- 2.4 The term "Permittee" shall mean the El Coronado Ranch and Cattle Company (~~Joe~~ ^{Josiah} and Valer Austin).
- 2.5 The term "Plan Species" shall mean the federally listed (Yaqui catfish, Yaqui chub) and unlisted species (Yaqui form of longfin dace) identified in Section 1.0 of this agreement, which are adequately conserved by the

Conservation Plan. Plan species are subject to incidental take under the Take Authorizations issued in conjunction with this Agreement.

2.6 The term "unforeseen circumstances" means any significant, unanticipated, adverse change in the status of species addressed under the HCP or in their habitats; or any significant, unanticipated, adverse change in impacts of the project or in other factors upon which the HCP is based. The term "unforeseen circumstances" as defined in this Agreement is intended to have the same meaning as "extraordinary circumstances" as used in the No Surprises policy (Federal Register 62(103):29091-29098; May 29, 1997).

3.0 HABITAT CONSERVATION PLAN

Pursuant to provisions of Section 10(a)(2)(A) of the ESA [16 U.S.C. § 1539 (a)(2)(A)], the El Coronado Ranch and Cattle Company has prepared a Habitat Conservation Plan and submitted it to the Service with a request that the Service issue a Permit pursuant to Section 10(a)(1)(B)[16 U.S.C. § 1539 (a)(1)(B)] to allow the Plan Species to be incidentally taken, within the Permit Area as depicted and described in Figure 1 of the HCP. The HCP proposes a program of conservation for the Plan Species and their habitats.

4.0 INCORPORATION OF HCP

The HCP and each of its provisions 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.

5.0 LEGAL REQUIREMENTS

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

and recovery of the Plan Species in the wild. It also includes measures which have been suggested by the Service as being necessary or appropriate for purposes of the HCP.

6.0 COOPERATIVE EFFORT

In order that each of the legal requirements as set forth in Paragraph 5.0 hereof are fulfilled, each of the Parties to this Agreement must perform certain specific tasks as more particularly set forth in the HCP. The HCP thus describes a cooperative program by Federal and State agencies and private interests to mitigate the effects of the proposed operation of the El Coronado Ranch on the Plan Species.

7.0 TERMS USED

Terms defined and utilized in the HCP and the ESA shall have the same meaning when utilized in this Agreement.

8.0 PURPOSES

The purposes of this Agreement are:

- 8.1 To ensure implementation of each of the terms of the HCP;
- 8.2 To delineate the roles and responsibilities of each of the parties in the implementation of the conservation program.
- 8.3 To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and,
- 8.4 As stated in paragraph 12.3.A hereof, to provide assurances to the Permittee that as long as the terms of the HCP and the Permit issued pursuant to the HCP and this Agreement are fully and faithfully performed, no additional mitigation will be required except as provided for in this Agreement or required by law.
- 8.5 If a Plan Species subject to incidental take is not listed as threatened or endangered under the ESA as of the effective date, and becomes so

listed during the term of this Agreement, then the Section 10(A) Permit shall become effective with respect to such species concurrent with its listing as threatened or endangered.

9.0 TERM

9.1 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 for a period of 25 years or until termination of the Permit, whichever occurs sooner.

9.2 Notwithstanding the stated term as herein set forth, the Parties agree and recognize that once the Plan Species have been incidentally taken and their habitat modified pursuant to the HCP, the take will be permanent and the habitat modification may be permanent. It is therefore the intention of the Parties that the provisions of the HCP and of this Agreement regarding the establishment and maintenance of habitat for the Plan Species may likewise, to the extent permitted by law, be permanent and extend beyond the terms of this Agreement.

10.0 FUNDING

The El Coronado Ranch and Cattle Company will provide the funds to carry out the conservation measures within the Permit Area cited in the HCP and this Agreement. The Permittee shall notify the Service in writing if Permittee's funding resources have materially changed, in a way that precludes fulfillment of the responsibilities in Section 11.2 below. The Service, the Department, and Forest Service shall include in their annual budget requests sufficient funds to fulfill their obligations under the HCP and their statutory requirements to protect the species of concern.

11.0 ROLES AND RESPONSIBILITIES OF THE PARTIES IN CONSERVATION PROGRAM IMPLEMENTATION

11.1 The roles of the Permittee:

- A. Fulfill the responsibilities identified in Section 11.2 of this Agreement.

- B. Facilitate the conservation and recovery of the Plan Species.
- C. Manage the portions of the West Turkey Creek watershed that the El Coronado Ranch and Cattle Company is responsible for in a manner which maintains and improves watershed health.
- D. Provide habitat for the Plan Species.
- E. Mitigate the impact of Incidental Take on the Plan Species.

11.2 The responsibilities of the Permittee are to:

- A. Ensure that the HCP is properly functioning. The HCP will be properly functioning if the terms of this Agreement have been or are being fully implemented.
- B. Undertake all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit.
- C. Manage diversions to maintain a balance of water supply in both West Turkey Creek (WTC) and ponds to enhance survival of Plan Species.
- D. Perform routine maintenance at ECR expense on all components of the water-delivery system and ponds on private land to assure they remain in good repair.
- E. Maintain water levels and biological conditions in ponds where Plan Species are located to assure adequate habitat to the extent possible given the variable water supply from WTC.
- F. To the extent possible, eliminate and avoid reintroduction of non-indigenous predators and competitors, with the exception of non-reproducing species, of resident populations of Plan Species.
- G. Implement plans, in cooperation with the other parties, which minimize adverse impacts of livestock grazing in the watershed on native fish habitat or indigenous fishes.

- H. Consistent with the Permittee's obligations under the Endangered Species Act and **recovery** plans adopted thereunder, manage their private land portion of the watershed to protect and promote recovery of the Plan Species.

Review and approve the monitoring plan to be completed by the Department, the Service, and coordinated with the Forest Service, within 60 days of receipt. The monitoring plan will include procedures to handle emergencies such as, but not limited to droughts and invasion by non-native species.

- J. Arrange for, and pay for, monitoring of incidental take. Arrange for, and pay for, monitoring of Plan Species populations and habitat conditions on ECR private lands when monitoring cannot be done by the agencies, subject to an annual limit of \$500.
- K. Report information obtained from pertinent monitoring operations and make these reports available to all partners. Reports shall include information from population and take monitoring, actions undertaken to implement the HCP. Reports will be completed annually the first five years of the permit, triennially the next 15 years, and then every five years for the remainder of the permit. The report completed by the Permittee will always include an account of incidental take. It may also include other monitoring results, dependent on whether the agencies or the Permittee does the fish and habitat monitoring. Additionally, a cumulative summary report will be produced by a mutually agreeable partner at 5-year intervals following each thorough and linear survey of the WTC system.
- L. Allow Agency personnel or their designated representatives access to ECR private lands where and when necessary for monitoring, sampling, habitat evaluation, renovation, and research, including translocation of Plan Species from place to place as necessary for management purposes, upon reasonable notice and within limits of agreed-upon maintenance, management, and enhancement actions for chub and other species of concern that may occur under current or future circumstances.

- D. Provide personnel from San Bernardino National Wildlife Refuge and the Arizona Ecological Services Field Office to assist with monitoring activities.
- E. Be co-lead, with the Department, for all restocking, relocation, or new introduction activities and projects of Plan Species in the plan area and West Turkey Creek watershed.

Provide personnel from San Bernardino National Wildlife Refuge and the Arizona Ecological Services Field Office to assist with restocking, relocation, or new introduction activities or projects of Plan Species from ponds as needed.

- F. Be co-lead, with the Department, for all projects removing non-indigenous aquatic species in the plan area and the West Turkey Creek watershed.

Provide personnel from San Bernardino National Wildlife Refuge and the Arizona Ecological Services Field Office to assist with removal projects.

- G. Monitor implementation and provide guidance as needed to all Parties to the agreement in implementing the specific measures of the HCP and this Agreement. The Service will determine whether all Parties are adequately meeting their responsibilities under this Agreement and the HCP.
- H. Assist with the revision of the grazing plan, if a revision is deemed necessary.

11.5 The roles of the Forest Service include:

- A. Fulfill the responsibilities identified in Section 11.6 of this Agreement.
- B. Implement the Coordinated Land Management Plan for the West Turkey Creek Allotment.
- C. Assist with monitoring, reintroduction, and renovation on Forest System lands.

- D. Assist with the conservation and recovery of the Plan Species on Forest System lands, as per Section 2(c)(1) and Section 7(a)(1) of the ESA.

11.6 The responsibilities of the Forest Service are:

- A. Continue implementation of the Coordinated Land Management Plan for the West Turkey Creek Allotment. Be the lead for revising the plan, if a revision is deemed necessary.
- B. Request adequate funding in its annual Federal budget to allow it to fully perform the obligations and tasks assigned to it pursuant to the terms of the HCP and this Agreement.
- C. Review the monitoring plan to be completed by the Department, the Service, and coordinated with the Permittee, within 60 days of receipt. The monitoring plan will include procedures to handle emergencies such as, but not limited to droughts and invasion by non-native species.
- D. Provide personnel to assist with monitoring activities on Forest System lands as funding and personnel are available.
- E. Provide personnel to assist with relocation of Plan Species on Forest System lands as needed, as funding and personnel allow.
- F. Nothing in this Agreement shall require the Forest Service to act in a manner contrary to the requirements of the Anti-Deficiency Act.
- G. Consistent with its obligations under the Endangered Species Act and recovery plans adopted thereunder, manage the Forest Service portion of the watershed to protect and promote recovery of the Plan Species.

11.7 The roles of the Department include:

- A. Fulfill the responsibilities identified in Section 11.8 of this Agreement.
- B. Assist with monitoring, reintroduction, and renovation.

- C. Provide technical assistance and guidance to all parties.

11.8 The responsibilities of the Department are:

- A. Cooperate and provide technical assistance to the Permittee as detailed in Section 6.0 of the HCP.
- B. Request adequate funding in its annual State budget to allow it to fully perform the obligations and tasks assigned to it pursuant to the terms of the HCP and this Agreement.
- C. Be co-lead, with the Service, in developing a monitoring plan for the EA/HCP. The monitoring plan will establish type of data to be collected, sampling protocols and locations, and personnel qualifications and will be reviewed and approved by the Permittee and reviewed by the Forest Service. The monitoring plan will include procedures to handle emergencies such as, but not limited to droughts and invasion by non-native species.
- D. Provide personnel to assist with monitoring activities.
- E. Be co-lead, with the Service, for restocking, relocation, or new introduction activities and projects of Plan Species in the plan area and West Turkey Creek watershed.

(Provide personnel to assist with restocking, relocation or introduction of Plan Species as needed.)
- F. Be co-lead, with the Service, for projects removing non-indigenous aquatic species in the plan area and the West Turkey Creek watershed. Provide personnel to assist with removal projects.

12.0 REMEDIES AND ENFORCEMENT

. 12.1 REMEDIES IN GENERAL

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

A. No Monetary Damages

No Party shall be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

(1) Retain Liability

All Parties shall retain whatever liability they would possess for their present and future acts or failure to act without existence of this Agreement.

(2) Land Owner Liability

All Parties shall retain whatever liability they possess as an owner of interests in land.

(3) Responsibility of the United States

Nothing herein contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

B. Injunctive and Temporary Relief

The Parties acknowledge that the Plan Species are unique and that their loss as species could result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

12.2 THE PERMIT

A. Permit Suspension or Revocation

Except as otherwise provided for under the terms of the Agreement, the Permit shall be suspended or revoked in conformance with the provisions of 50 CFR 13.27-13.29 (1994), as the same exists as of the date hereof.

12.3 LIMITATIONS AND EXTENT OF ENFORCEABILITY

A. No Surprises Policy

Subject to the availability of funds as provided in Section 14.6 hereof, and except as otherwise required by law, no further mitigation for the effects of the proposed project on the Plan Species may be required from the Permittee who otherwise abided by the terms of the HCP, except in the event of unforeseen circumstances; provided that any such additional mitigation may not require additional land use restrictions or financial compensation from the Permittee without their written consent.

B. Private Property Rights and Legal Authorities Unaffected

Except as otherwise specifically provided herein and in the HCP, nothing in this Agreement shall be deemed to restrict the rights of the Permittee to the use or development of those lands, or interests in lands, constituting his portion of the Permit Area; provided, that nothing in this Agreement shall absolve the Permittee from such other limitations as may apply to such lands, or interests in land, under other laws of the United States and the State of Arizona.

13.0 AMENDMENTS

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

14.0 MISCELLANEOUS PROVISIONS

14.1 NO PARTNERSHIP

Except as otherwise expressly set forth herein, 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.

14.2 SUCCESSORS AND ASSIGNS

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto and their respective successors and assigns.

14.3 NOTICE

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing:

El Coronado Ranch and Cattle Company
Joe and Valer Austin
Star Route, Box 395
Pearce, Arizona 85625

Regional Director
US Fish and Wildlife Service
500 Gold Avenue SW
PO Box 1306
Albuquerque, New Mexico 87103

Director
Arizona Game and Fish Department
2221 West Greenway Road
Phoenix, Arizona 85023

Forest Supervisor
Coronado National Forest
300 West Congress
Tucson, Arizona 85701

14.4 ENTIRE AGREEMENT

This Agreement, together with the HCP and the Permit, constitute the entire agreement between the Parties. It 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 any other Party or anyone acting on behalf of any other Party that is not embodied herein.

14.5 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.

14.6 AVAILABILITY OF FUNDS

Implementation of this Agreement and the HCP by the Service and Forest Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Service and Forest Service will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

Nothing in this agreement shall be construed as obligating the Commission in the expenditure of funds or as involving the Commission in any contract or other obligation for the future payment of money in excess of appropriations authorized by law and budgeted and approved by the Commission or Department.

14.7 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.

14.8 THIRD PARTY BENEFICIARIES

Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third Party beneficiary 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 under existing Federal or State law.

14.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in this Agreement is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

14.10 REFERENCES TO REGULATIONS

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

14.11 APPLICABLE LAWS

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

A. Cancellation

All parties are hereby put on notice that this agreement is subject to withdrawal by the State of Arizona pursuant to A.R.S. 38-511.

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

PERMITTEE, El Coronado Ranch and Cattle Company

BY _____ Date _____
Joe Austin, Owner
El Coronado Ranch and Cattle Company
Pearce, Arizona

BY _____ Date _____
Valer Austin, Owner
El Coronado Ranch and Cattle Company
Pearce, Arizona

BY _____ Date _____
Nancy Kaufman, Regional Director
United States Fish and Wildlife Service
Albuquerque, New Mexico

APPROVED:
STATE OF ARIZONA
ARIZONA GAME AND FISH COMMISSION

BY _____ Date _____
Duane L. Shroufe,
Secretary to the Commission,
Director, Arizona Game and Fish Department
Phoenix, Arizona

BY _____ Date _____
John McGee, Forest Supervisor
Coronado National Forest
USDA Forest Service
Tucson, Arizona

BY _____ Date _____
Douglas K. Duncan, Fisheries Biologist
United States Fish and Wildlife Service
Tucson, Arizona