CHAPTER 1
INTRODUCTORY PROVISIONS

1.1 BACKGROUND

The Agua Caliente Indian Reservation (Reservation), home of the Agua Caliente Band of Cahuilla Indians (Tribe), consists of approximately 31,420 acres of land in the Coachella Valley, Riverside County, California. Specifically, the Reservation is situated in a checkerboard pattern on 51 of the 108 sections[1] of land within Township 4 South, Range 4 East; Township 4 South, Range 5 East; and Township 5 South, Range 4 East. The Reservation landholdings include Tribal trust land, allotted trust land, and fee land. Individual sections of Reservation land are interspersed with public lands owned or under the control of various federal and state agencies, and privately owned land under the jurisdiction of the County of Riverside (County) and/or one of three municipalities (City of Palm Springs, City of Cathedral City, and City of Rancho Mirage; Figures 1 and 2).

The interdependence between the Agua Caliente Band of Cahuilla Indians and natural resources is integral to the Tribe's heritage and culture. Natural resources have been a means of sustenance for the Tribe and its members for the entire history of the Tribe's existence, and the Tribe has a demonstrated successful tradition of managing land and resources within its jurisdictional territory in a way that balances land use and development needs with resource conservation measures. As development and human population expand throughout the Coachella Valley, the Tribe continues to recognize the need for managing the remaining natural resources on the Reservation and on surrounding Tribally-owned lands. This Tribal Habitat Conservation Plan (Tribal HCP or Plan) was developed to formally document the Tribe's traditional strategies for managing land and natural resources within its jurisdictional territory and provide a conservation plan for a future term in a way that serves to support the statutory mission of the U.S. Fish and Wildlife Service (USFWS) to protect sensitive species and habitat, meet the requirements for issuance of a Section 10(a) Permit to the Tribe to enhance the Tribe's primacy in the regulation and management of land uses within the Reservation, and coordinate the Tribe's wildlife conservation efforts with the administration of other Tribal affairs (such as management and control of fire, water quality, trails, cultural resources, reforestation, and hazardous materials).

This Plan describes the natural setting of the approximately 88,258-acre Action Area[2] (including the 36,055-acre Plan Area and delineated in section 1.4); provides a complete description of the activities sought to be authorized [50 Code of Federal Regulations (CFR) 17.22(b)(1)(i)]; identifies sensitive resources, including federally listed species potentially occurring within the Action Area; sets forth Tribal goals and objectives for conservation; establishes processes for implementing the Tribe's conservation

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[1]A section typically presents approximately one square mile.

[2]The Action Area encompasses land both within and outside of the Plan Area that may be impacted by either direct or indirect effects from the Covered Activities. The Plan Area is a subset of the Action Area and includes only those lands that the Tribal HCP and associated Section 10(a)(1)(B) permit covers, including the Reservation (encompassing Tribal trust land, allotted trust land, and fee land) and off-Reservation land owned by or held in trust for the Tribe.

measures in connection with the authorization of development and other activities within the Action Area, which will accomplish these goals and objectives; and documents operating policies for ongoing natural resource protection. The Plan includes a conservation plan that specifies: (1) the impacts that will likely result from the activities sought to be authorized under the proposed USFWS Section 10(a) Permit; (2) the steps the Tribe will take to monitor, minimize, and mitigate such impacts; (3) the funding that will be made available by the Tribe to implement such steps; (4) the procedures the Tribe will use to address changed circumstances; and (5) alternative actions to those sought for authorization that the Tribe considered and the reasons why such alternatives were not proposed [50 CFR 17.22(b)(1)(iii)]. This Tribal HCP is designed to function as an adaptive tool, allowing the Tribe to update and revise baseline information, refine its conservation goals and management priorities, contribute to the conservation of the species proposed for coverage, and complement other conservation efforts occurring outside the Plan Area in the region.

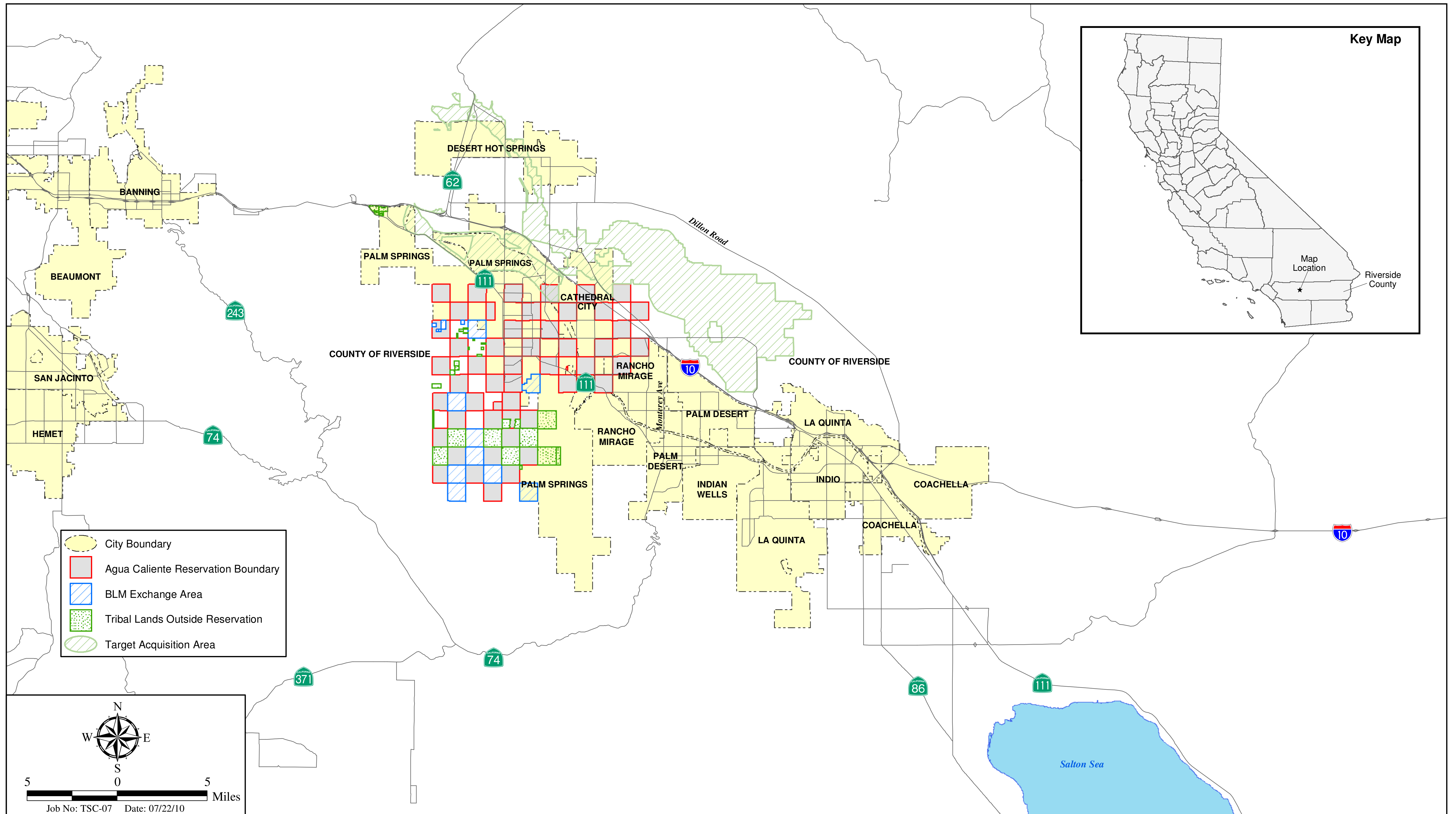
1.2 PURPOSES OF THE TRIBAL HCP

Lands and natural resources within the Reservation and on other Tribal Lands within the Plan Area (as defined in section 1.4) provide the means for spiritual and physical sustenance, as well as economic self-sufficiency, for the Tribe and its members. These lands also provide open space and habitats for a number of federally listed and Tribally identified sensitive species. This Tribal HCP serves four main purposes: (1) it establishes and implements a program for protecting and managing biological resources important to Covered Species; (2) it manages economic development within the Reservation and other Tribal Lands of the Plan Area; (3) it provides a conservation plan that streamlines compliance with the Federal Endangered Species Act (ESA), in a comprehensive approach for all lands within the Plan Area, pursuant to the application requirements [50 CFR 13.21, 17.22(b)(1), and 17.32(b)(1)] and issuance criteria [50 CFR 17.22(b)(2) and 17.32(b)(2)] for an incidental take permit under Section 10 of ESA; and (4) it formalizes the Tribe's traditional sovereign land and resource management policies and practices in a conservation plan.

Authorized under Section 10(a) of the ESA, habitat conservation plans (HCPs) are developed to enhance the habitats of listed (and unlisted) species and increase the survivability of such species [50 CFR 17.22(b)(4)], and to permit the "incidental take" of wildlife associated with non-federal actions when the "taking" is incidental to and not the purpose of an otherwise lawful activity. Individuals, corporations, tribes, and state or local agencies may apply to the USFWS for a Section 10(a) incidental take permit. Generally, an incidental take permit allows the incidental taking of individuals or habitat so long as the impacts of the taking are minimized and mitigated to the maximum extent practicable, the applicant ensures that adequate funding for the conservation plan will be provided, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The Tribe intends that this Plan will:

- Provide a conservation plan with avoidance, minimization, and mitigation measures consistent with the requirements of ESA Section 10(a)(1)(B) that enhances the habitats and survivability of Covered



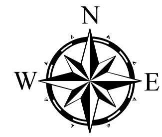
Regional Map

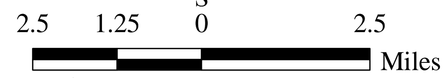
AGUA CALIENTE THCP

Figure 1

City Boundary
5 Section Number
Action Area Includes:
BLM Exchange Area
Target Acquisition Area
Plan Area Includes:
Agua Caliente Reservation Boundary
Tribal Lands Outside Reservation

DESERT HOT SPRINGS
PALM SPRINGS
PALM SPRINGS
CATHEDRAL CITY
Gene Autry Trail
Dillon Road
COUNTY OF RIVERSIDE
COUNTY OF RIVERSIDE
RANCHO MIRAGE
PALM DESERT
LA QUINTA
PALM SPRINGS
RANCHO MIRAGE
INDIO
PALM DESERT
INDIAN WELLS
COACHELLA
LA QUINTA





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Location Map

AGUA CALIENTE THCP

Figure 2

Species, which include species that are currently listed as threatened or endangered, are candidates for listing, or are expected by the USFWS and/or the Tribe to have a high probability of being proposed for listing in the future if not protected (Table 1-1).

- Fulfill the application requirements and issuance criteria of ESA Section 10(a)(1)(B) so that the USFWS will provide an incidental take permit for the Covered Activities described in the Plan.
- Appropriately contribute to the conservation of listed and sensitive Covered Species and the ecosystems upon which they depend.
- Minimize disruption of economic development activities within the Plan Area.

Table 1-1
Covered Species

Common Name	Scientific Name	Federal Status[1]	Presence/Absence in Plan Area[2]
MOUNTAINS AND CANYONS SPECIES			
Peninsular bighorn sheep	*Ovis canadensis nelsoni*	FE	Present
Least Bell's vireo	*Vireo bellii pusillus*	FE	Present
Southwestern willow flycatcher	*Empidonax traillii extimus*	FE	Present
Summer tanager	*Piranga rubra cooperi*	None	Present
Yellow-breasted chat	*Icteria virens*	None	Present
Yellow warbler	*Dendroica petechia brewstri*	None	Present
Mountain yellow-legged frog	*Rana muscosa*	FE	Historical records only
Southern yellow bat	*Lasiurus ega (xanthinus)*	None	Present
Desert tortoise[3]	*Xerobates* or *Gopherus agassizii*	FT	Present
Burrowing owl[3]	*Athene cunicularia*	BCC	Present
Gray vireo	*Vireo vicinior*	BCC	Not observed
Triple-ribbed milk-vetch	*Astragalus tricarinatus*	FE	Not observed
VALLEY FLOOR SPECIES			
Coachella Valley fringe-toed lizard	*Uma inornata*	FT	Present
Flat-tailed horned lizard	*Phrynosoma mcalli*	FPT	Present
Palm Springs (Coachella Valley round-tailed) ground squirrel[4]	*Spermophilus tereticaudus* var. *coachellae*	FC	Present
Palm Springs pocket mouse[4]	*Perognathus longimembris bangsi*	None	Present
Crissal thrasher	*Toxostoma crissali*	BCC	Not observed
Le Conte's thrasher[4]	*Toxostoma lecontei*	BCC	Present
Coachella giant sand-treader cricket	*Macrobaenetes valgum*	None	Not observed
Coachella Valley Jerusalem cricket	*Stenopelmatus cahuilaensis*	None	Not observed
Coachella Valley milk-vetch[4]	*Astragalus lentiginosus coachellae*	FE	Present
Little San Bernardino Mountains gilia	*Linanthus maculatus*	None	Not observed

[1]Status abbreviations and acronyms: FE=federally listed endangered; FT=federally listed threatened; FPT=federally proposed threatened; FC=candidate for federal listing; BCC=bird of conservation concern; None=no formal federal status.
[2]Species that have not been observed are included in the list of Covered Species because they have potential to occur within the Plan Area; all Covered Species have modeled habitat within the Action Area.
[3]These species also have potential to occur on the valley floor.
[4]These species primarily occur on the valley floor but also may occur in lower mountain and canyon elevations.

The intentions of the Plan will be accomplished as follows:

1. For species occurring or potentially occurring within the Action Area that are currently listed as threatened or endangered, the Tribal HCP will be the basis for the issuance of a Section 10(a) Permit from the USFWS for Covered Activities. For Covered Species occurring or potentially occurring

within the Action Area that are not currently listed, the Tribal HCP will provide the basis for issuance of a Section 10(a) Permit for Covered Activities, which would take effect upon the listing of such species should it occur during the Permit term.

2. For the ecosystems within the Action Area that the above species depend upon, provide a conservation plan that perpetually protects and manages lands and ecological processes important to the conservation of these species, commensurate with the context of the Action Area within the surrounding region, expected future impacts, and the future range-wide needs of these species.

It should be recognized that the Tribal HCP is intended to address only the requirements of ESA and the Migratory Bird Treaty Act (MBTA) with respect to Covered Activities (defined in Chapter 4), and does not address or resolve compliance with any other applicable law, such as the Clean Water Act, etc.

1.3 GOALS

The Tribe is the ultimate authority on land use matters and conservation measures within the Reservation. With this in mind, the Tribal HCP addresses current and future land use as well as conservation measures within the Plan Area while adhering to the following general concepts:

- Tribal Lands will be used for spiritual and physical sustenance as well as self-sufficiency.
- The Tribe will balance the need for economic development and self-sufficiency with the needs of wildlife and plant species, with special emphasis on federally protected and/or Tribal sensitive species.
- The Tribe has a demonstrated successful tradition of land and resource management within its jurisdictional territory, and it already has in place management plans and interagency agreements regarding several conservation programs for areas within and around the Reservation. The Tribe will continue to coordinate Tribal conservation programs and land use practices with other resource planning efforts in the area.
- Tribal Lands designated for preservation by the Tribe will continue to provide open space and wildlife habitats for a number of federally protected and Tribal sensitive species.
- The Tribe will assist and encourage the recovery of listed species and will proactively implement conservation measures for those species not yet listed to contribute to their conservation, enhance their habitats and survivability, and provide or implement measures that help to avoid the need for future listings.

- This Tribal HCP will serve as a comprehensive biological assessment of which lands are important for long-term conservation of Covered Species and which can be developed or otherwise utilized with mitigation without significant impairment of long-term conservation value for those species.
- The Tribe will continue to comply with all applicable federal laws, such as the Clean Water Act and MBTA.

The Plan will result in the establishment and management of a Habitat Preserve within portions of the Mountains and Canyons Conservation Area, Valley Floor Planning Area, and Valley Floor Target

Acquisition Areas. Pursuant to the USFWS's Five-Point Policy (Federal Register [FR] 64:11485-11490) regarding issuance of Section 10(a)(1)(B) permits, overall biological goals of the Plan are as follows (specific biological goals and objectives for each Covered Species are set forth in Chapter 4):

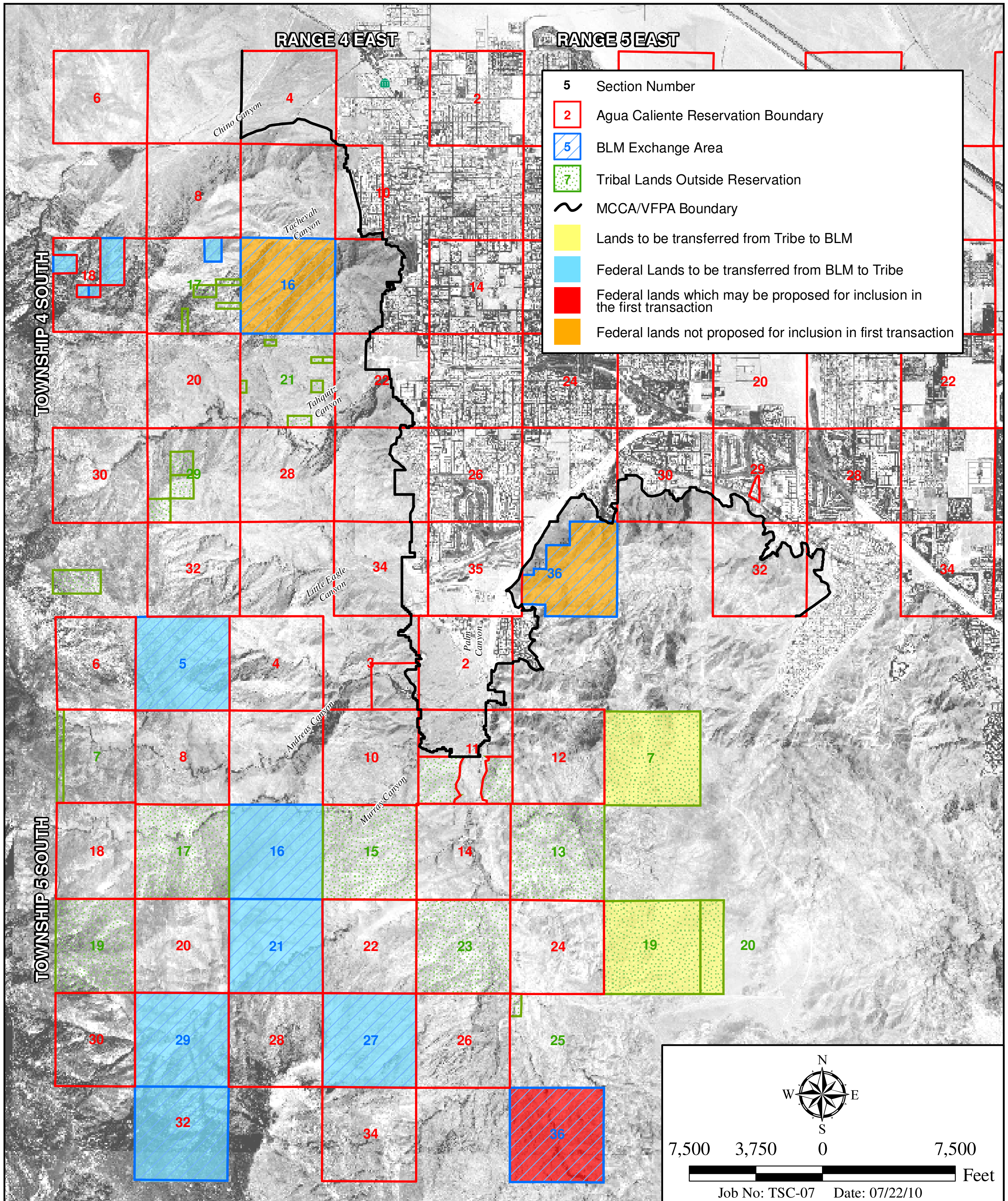
1. Represent native ecosystem types or natural communities across their natural range of variation in a system of conserved areas.
2. Protect and manage a comprehensive Habitat Preserve system of connected ecologically functional preserves having high long-term benefit to Covered Species.
3. Coordinate Tribal conservation efforts with those of the Coachella Valley Association of Governments (CVAG) Multiple Species Habitat Conservation Plan (MSHCP).
4. Support the maintenance or restoration of self-sustaining populations or metapopulations of the Covered Species included in the Plan to ensure their permanent conservation so that take authorization can be obtained for currently listed wildlife species, and non-listed wildlife species can be covered in case they are listed in the future.
5. Sustain the ecological and evolutionary processes necessary to maintain the biological integrity and functionality of the conserved natural communities and habitats utilized by the species included in the Plan.
6. Maximize connectivity among populations and minimize habitat fragmentation within the Habitat Preserve to conserve biological diversity, ecological balance, and connected populations of Covered Species.
7. Minimize adverse impacts from off-highway vehicle (OHV) use, illegal dumping, edge effects, exotic species, and other disturbances in accordance with the management and monitoring programs.
8. Manage the Habitat Preserve adaptively to be responsive to short-term and long-term environmental change and new science.
9. Utilize the Tribe's existing legal authorities to assure the Habitat Preserve is protected and managed in perpetuity.

1.4 SCOPE OF THIS PLAN

The Reservation includes land held by the United States (U.S.) in trust for the Tribe (Tribal trust land), land held by the U.S. in trust for individual Tribal members or their successors (allotted trust land), and land held in fee simple or other non-trust status by the Tribe, Tribal members, or non-Indians (fee land). Approximately 765 acres of lands within the boundaries of the Reservation currently are owned by the Bureau of Land Management (BLM). Because these lands are federally owned, they are outside of the jurisdiction of the Tribe and are excluded from the Plan Area. Outside of the Reservation, several additional properties totaling approximately 5,400 acres are owned by or held in trust for the Tribe. Together with the non-federally owned portions of the Reservation, these lands comprise the approximately 36,055-acre Plan Area (refer to Figure 2).

The Action Area for this Tribal HCP includes the Plan Area, along with certain other lands over which the Tribe may have authority during the permit period, including off-Reservation Target Acquisition Areas and land to be acquired through exchange with BLM. The Tribe anticipates acquiring off-Reservation land for conservation and mitigation purposes from one or more of the Target Acquisition Areas discussed in section 4.9.1 and Appendix F. Lands conserved by the Tribe within the Target Acquisition Areas will be mitigation lands legally protected and managed in perpetuity for the benefit of Covered Species. These lands will include up to a maximum of 1,541 acres. The potential variability in this acreage is a result of the potential variability in the amount of development occurring within the Plan Area. There is a linear relationship (a 1:4 ratio) between the acreage of development within the Valley Floor Planning Area and the concomitant acreage of mitigation required under the Plan. Thus, if no development occurs, no impacts would occur and therefore, no conservation would be needed. Parcels within the off-Reservation Target Acquisition Areas would become part of the Plan Area if they are acquired by the Tribe as mitigation lands as part of Tribal HCP implementation. The only incidental take authorized in the off-Reservation Target Acquisition Areas will be for Covered Conservation Activities (see section 4.2) undertaken after Tribal acquisition. If lands in excess of the required 1,541 acres are acquired by the Tribe (e.g., as a condition of sale for a parcel), such lands could be resold for conservation uses, or used for development, subject to the conditions of the CVAG MSHCP. No incidental take will be provided for any development activities on parcels within the off-Reservation Target Acquisition Areas acquired by the Tribe, and the management of properties acquired in these areas will be coordinated with that of adjacent conserved properties (refer to section 4.11).

The Tribe also expects to grant certain of its lands (up to a maximum of 1,470 of the 5,400 acres of off-Reservation Tribal Lands) to the BLM as part of the exchange program discussed in section 2.2.1.1 and outlined in Figure 3. After such exchange, any parcels granted to BLM would become BLM lands with no further Tribal control and would no longer be subject to the provisions of this Plan. Prior to any grant to BLM (or if any parcels are not granted to BLM), these lands would remain Tribal Lands and would be subject to the provisions of this Plan. As part of this potential exchange, the Tribe also expects to acquire from BLM some lands in certain defined areas (BLM Exchange Areas) within the Reservation, as well as lands outside the Reservation and outside Target Acquisition Areas. Up to a maximum of 5,725 acres of existing BLM lands could be transferred to the Tribe under this program. The exchange would be based on the monetary value of the land exchanged, rather than on acreage. Prior to any exchange (or if no exchange occurs), the BLM parcels would remain under BLM control and not be subject to the provisions of this Plan. These BLM parcels would become Tribal Lands only if transferred to the Tribe and following any such transfer would become subject to the provisions of this Plan and would no longer be under BLM control.



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BLM Land Exchange Proposal

AGUA CALIENTE THCP

Figure 3

Given this context, the geographic scope addressed for the purposes of analysis in this Plan (the Action Area) includes the following:

1. The 30,655 acres of the Reservation outside of Federal ownership plus 5,400 acres of off-Reservation lands owned by or held in trust for the Tribe, for a total of 36,055 acres, known as the Plan Area;
2. BLM lands within the BLM Exchange Areas on and off the Reservation (5,799 acres); and
3. Off-Reservation lands within the Target Acquisition Areas (these off-Reservation Target Acquisition Areas total 46,404 acres, of which a maximum of 931 acres could be acquired).

The Action Area, including the non-federally owned portions of the Reservation and other Tribal Lands, the BLM Exchange Areas, and the off-Reservation Target Acquisition Areas, is depicted on Figure 2 and totals 88,258 acres. Within this Action Area, a minimum of 36,055 acres and a maximum of 41,315 acres would be subject to the Plan at any time (30,655 acres of non-federally owned Reservation, 3,930 acres of off-Reservation Tribal Lands not proposed for exchange, up to 5,799 acres within the BLM Exchange Areas, and up to 931 acres of off-Reservation Target Acquisition Area parcels), under the current terms of the Plan, or through the minor amendment process (see section 4.17.2.1). Other increases in the Plan Area that are not solely for conservation purposes would require a major amendment (see section 4.17.4).

The Tribe has (or will have, to the extent that additional lands are acquired, as described above) authority over all lands within the Plan Area and will fully implement the Plan throughout this area. The Section 10(a) Permit and Plan would cover specified Tribal activities as well as certain third-party activities authorized by or under the direct control of the Tribe within the Plan Area, as described in section 4.2 (Covered Activities); for these activities, the Tribe will authorize issuance of a permit or similar approval (e.g., a grading permit) through which the Tribe will include compliance with the Section 10(a) Permit as a condition of its permitting/approval action and will expressly grant (transfer to the third party) the take authorization in the issued permit/approval.

Some Covered Activity boundaries may be situated partially on the Reservation and partially off the Reservation. In these instances, the Tribe may choose to defer to the Coachella Valley MSHCP and allow the requirements of that HCP to be imposed on the on-Reservation portion of the Covered Project This determination by the Tribe (to assume or defer permitting authority) will depend upon such factors as the status of the activity at the time this Plan is approved, and the extent of on-Reservation, as opposed to off-Reservation land, subject to or impacted by the proposed Covered Activity. Such actions would require inter-plan coordination and tracking of take to ensure that all plan requirements are maintained.

The Tribe has entered into Land Use Agreements with the cities of Cathedral City, Palm Springs, and Rancho Mirage as well as with the County (see section 1.6.4.2, below). These Agreements allow each of those jurisdictions to act as the land use regulatory agent for the Tribe but require each jurisdiction to consult with the Tribe prior to issuing permits that may affect lands of the Reservation. It is through this

established entitlement process that the Section 10(a) Permit and Plan requirements will be imposed. Even if it does not assume direct land use permitting authority, the Tribe will retain the responsibility of making the required consistency determinations, working with the local land use jurisdictions to ensure the appropriate conditions are placed on any Conditional Use Permits, conferring take authorization to the applicant, monitoring compliance with the Plan, and ensuring that all activities in the Plan Area under direct or indirect control of the Tribe are compliant with the Plan, pay all appropriate fees, and provide the required conservation measures. Through this process, the Tribe will ensure that no disturbance is authorized within the Plan Area that is inconsistent with the terms of this Tribal HCP. Legal disturbance/development activities occurring within the Plan Area will be counted towards the acreage totals of "take" impacts of the Plan, to the extent described in section 4.2.

The Tribe is requesting that the Section 10(a) Permit be issued for a period of 75 years. This timeframe is considered reasonable because of the Tribe's demonstrated tradition of resource management, the commitments within the Plan to legally protect and manage perpetually (including adaptive management and specified responses to Changed Circumstances, where appropriate) significant conservation areas essential to the Covered Species, and the management of economic development of the Plan Area provided by the Tribal HCP.

1.5 PLANNING CONTEXT

The checkerboard land ownership pattern of the Reservation and some of the other lands in the Action Area complicates land management and requires cooperation among neighboring landowners and jurisdictions to achieve large-scale integrated resource and land use planning. To ensure its success, this Tribal HCP complements existing and expected conservation efforts on adjacent lands outside of the Plan Area. The implementation of this Plan will therefore be coordinated with other resource planning efforts in the Coachella Valley to mesh Tribal conservation programs and land use practices with those other efforts. To that end, the Tribe has consulted with other resource agencies, organizations, and land managers in the development of this Plan to optimize the compatibility of the Tribal HCP with other conservation and land use management plans and activities, consistent with the goals of the Tribe. Other existing and planned conservation efforts in the vicinity of the Action Area are described in sections 2.2 through 2.4.

1.6 JURISDICTIONAL FRAMEWORK/REGULATORY CONTEXT OF THIS PLAN

There are many layers of regulatory acts and authorities applicable and/or operating within and around the Action Area that play a role in the management and conservation of listed and sensitive species and their habitats. These merit identification and discussion not only to define the Tribe's authority to adopt and implement this Plan but also because of the Tribe's intent that (1) the development and implementation of this Plan and related activities be undertaken in coordination and in a manner consistent with those acts and authorities; and (2) the Tribe be given due deference in accordance with these authorities.

This section describes the regulatory and management authority of the Tribe and how such authority has been implemented to date. It also describes the applicability of ESA, the USFWS's authority there under, and the trust obligations of the USFWS in dealing with federally recognized Indian nations as well as to a limited extent the authority of other federal agencies under legislation applicable within the Reservation and Plan Area and the roles of state and local regulators and land managers in and around the Reservation. The conservation activities of federal, state, and private land managers in the region are discussed in more detail in Chapter 2.

1.6.1 Overview of Jurisdictional Framework Applicable in Indian Country

1.6.1.1 Inherent Sovereign Authority of Tribal Government

Tribal governments have broad regulatory and management authority within their jurisdictional territories. The inherent sovereign authority of tribal governments to manage and regulate their people, lands, and resources is supported by an extensive body of treaties, federal legislation and regulations, executive orders and policies, and case law. This authority includes the ability to regulate and manage activities of members and non-members on both Tribal and allotted trust land. It may also apply to non-Indians engaging in activities on fee land within the boundaries of an Indian reservation in certain circumstances determinable on a case-by-case basis, such as where the non-Indian has entered a consensual relationship with the Tribe; where the regulated activity has a direct effect on the political integrity, the economic security, or the health, safety and welfare of the Tribe; or where the Tribe has been delegated such authority by the U.S. Congress. Because development and conservation directly affect the health, safety and welfare of the Tribe, the provisions of this Plan will be applicable on fee land within the Reservation. The Tribe's federally approved Constitution confirms that the Tribe's land use jurisdiction extends to all land within the exterior boundaries of the Agua Caliente Indian Reservation.

1.6.1.2 Authority of the Federal Government; Authorization to Delegate Authority to Tribal Governments

Based on the plenary powers doctrine, the federal government has jurisdiction to enact, implement, and enforce law that applies within Indian reservations, and federal law of general applicability will usually apply there as well. This authority is concurrent with inherent tribal authority, and does not supersede it unless expressly provided by the U.S. Congress.

Recognizing the inherent sovereign regulatory and management authority of tribal governments and the significant role tribal governments may play in implementing and enforcing environmental protection measures, several federal environmental laws also provide for federal implementing agencies to delegate their authority to tribal governments, in a manner similar to delegation of authority to states. For example,

under the Clean Water Act, a tribal government may receive delegated authority from the Administrator of the U.S. Environmental Protection Agency (USEPA) to implement water quality standards, total maximum daily loads, and National Pollutant Discharge Elimination System (NPDES) programs, and dredge and fill permits. Other federal statutes that expressly authorize delegation of program or permitting authority include the Clean Air Act; the Safe Drinking Water Act; the Federal Insecticide, Fungicide, and Rodenticide Act; and the Comprehensive Environmental Response, Compensation, and Liability Act.

Such delegated authority is in addition to and not in lieu of a tribe's inherent regulatory and management authority. In cases where the U.S. Congress has made federal law applicable within Indian reservations, tribal governments can regulate more strictly under either inherent or delegated authority but must meet minimum federal law requirements.

1.6.1.3 Limited Authority of State and Local Government

Based on principles of sovereignty and federal preemption, state and local laws generally do not apply within Indian reservations absent an express grant of such authority by a tribal government or the U.S. Congress. Such an express grant of authority has been given by the U.S. Congress to certain states, including California, under a statute commonly referenced as Public Law 280 (PL-280), as further described in section 1.6.4. As described in section 1.6.4.2, the Tribe has entered into Land Use Agreements with each of the local land use jurisdictions whose territories overlap the Reservation. Through these agreements, the Tribe has chosen to adopt relevant land use laws of the state, cities, and County as its own on allotted trust lands within the Reservation.

1.6.2 Establishment of the Agua Caliente Indian Reservation; Tribal Government Structure, Regulatory, and Planning Activities

The Tribe is composed of several small groups of Cahuilla Indians whose ancestors at least 350 to 500 years ago occupied the Tahquitz alluvial fan and nearby hot springs as well as Andreas, Murray, Palm, Snowcreek, and Whitewater Canyons. The Cahuilla historically had clear, self-governing political and social structures, a complex and extensive trade network, and a rich ceremonial life integrally tied to the natural world around them. They sustained themselves through hunting, gathering, and irrigated agriculture and constructed and maintained trails connecting their villages to one another and to their hunting and gathering areas. After non-Indian populations began to encroach upon the Tribe's traditional territory in the early- to mid-1800s, the Agua Caliente Indian Reservation was created by Executive Order (EO) on May 15, 1876 and was supplemented by additional EOs and other actions taken pursuant to the Mission Indian Relief Act to ensure the protection of a portion of the Tribe's historic homeland for the sole use and benefit of the Tribe.

The Tribe's authority to enforce its obligations under the Tribal HCP on all lands of the Agua Caliente Indian Reservation, including non-Indian controlled fee land, flows from its inherent sovereign authority supplemented by delegated federal authority.

The Agua Caliente Band of Cahuilla Indians' Constitution and by-laws, approved by the Commissioner of Indian Affairs on April 18, 1957, delegated to the Tribe specific federal powers and authority over all lands of the Reservation. Specifically, Article V. a vests with the Tribal Council the power to "protect and preserve Tribal property, including wildlife and natural resources." Article V. h. grants the authority for the Tribal Council "[t]o confer with and advise the Secretary of the Interior with regard to . . . the development of resources." Last, the Tribal Council is empowered by the federal government through Article V. i. "[t]o promulgate and enforce assessments or permit fees upon non-members doing business and obtaining special privileges on the Agua Caliente Reservation, including the privilege of fishing . . . ."

The extent of the Tribe's territory over which the Tribe may exercise the above-described jurisdiction is designated in Article II of the Constitution, which "shall extend to the territory within the boundaries of the Agua Caliente Indian Reservation as heretofore designated and to any other lands which may hereafter be added."

Accordingly, the approval of the Tribe's Constitution by the United States Department of the Interior's representative delegated to the Tribe a degree of federal authority to manage natural resources on all of the Agua Caliente Indian Reservation, which includes non-Indian controlled fee land.

In addition to the above-described delegated authority over fee lands, the Tribe has inherent authority, as described in the *Montana* line of cases, to exercise jurisdiction over non-Indians on fee land within the bounds of its Reservation when such non-Indian activity threatens the Tribe's interest in self-government. Specifically, if the Tribe does not have authority to manage and control resources on its entire Reservation, as provided by its Constitution, the Tribe's interest in and ability to exercise governmental control within this area is frustrated.

The Tribal Council is the Tribe's representative in all dealings with outside governments and is the ultimate authority on land use matters within the Reservation. The Tribe's Planning and Development Department (Department) serves as the lead agency in matters of environmental concern and development on the Reservation.

The Tribe has a tradition of managing land and natural resources within its jurisdictional territory. In more modern times, the Tribe has exercised its inherent environmental protection, natural resources, and land use management authority through the adoption and implementation of numerous ordinances, plans, and intergovernmental agreements that serve to protect and regulate activities affecting the Reservation environment. These include the following:

- *Ordinance 1* – Establishes the Indian Planning Commission.
- *Ordinance 2* – Tribal Possessory Interest Tax funds to protect and preserve Tribal property and protect the safety and general welfare of Tribe and members.
- *Ordinance 4* – Adopts certain laws, ordinances, codes, regulations, and rules of the State and the City of Palm Springs governing the use and development of certain Reservation land within the jurisdictional boundaries of the City of Palm Springs and grants authority to the City to enforce.
- *Ordinance 5* – Land Use Appeals Ordinance, gives Tribal Council authority to receive and consider land use appeals, in order to affirm, modify, or reverse decisions made by Planning Commissions of Palm Springs, Cathedral City, and the County regarding land use within the exterior boundaries of the Reservation (attached as Appendix A to this Tribal HCP).
- *Ordinance 7* – Restricts Reservation for use by public utility projects to ensure the quality of the environment and the health and safety of members.
- *Ordinance 10* – Adopts certain laws, ordinances, codes, regulations, and rules of the State and City of Cathedral City governing the use and development of certain Reservation land within the jurisdictional boundaries of the City of Cathedral City, and grants authority to the City to enforce.
- *Ordinance 12* – Adopts certain laws, ordinances, codes, regulations, and rules of the State and County governing the use and development of certain Reservation land within unincorporated areas of the County, and grants authority to County to enforce.
- *Ordinance 14* – Prohibits use of Reservation land for disposal, storage, or treatment of hazardous and certain non-hazardous wastes.
- *Ordinance 16* – Regulates uses of Indian Canyons and prohibits activity with potential to harm environment and natural resources within the Canyons.
- *Ordinance 17* – Establishes "Property Maintenance Standards" for removal of graffiti, trash, debris, and any other hazards from Tribal trust property that are visually offensive, deter development, diminish the value of the property, and create a hazard to the environment and/or the health, safety, and well-being of the Tribe, its members and the public.
- *Ordinance 21 –* Establishes Floodplain Management Standards to ensure public health and safety, and to minimize threat of flood damage.
- *Ordinance 24 –* Prohibits discharge of pollutants into the waters of the Reservation and implements a fine up to $5,000 per day for every day the discharge of pollution occurs.
- *Ordinance 26 –* Establishes standards for safeguarding human health, safety, well-being, and property by regulating and controlling design, construction, quality of materials, use, occupancy, location, and maintenance of all buildings constructed on Tribal trust land.
- *Ordinance 28* – Tribal Environmental Policy Act (TEPA) ensures protection of natural resources and the environment while promoting the highest and best use and development of Tribal property by establishing standards for the review and consideration of environmental impacts associated with proposed major Tribal actions, including certain development within the Reservation.
- Interim Habitat Conservation and Management Plan.
- Indian Canyons Management Agreement.

- Indian Canyons Master Plan Study.
- Indian Canyons Park Final Cooperative Management Plan.
- Tribal Quality Assurance Protection Plan.
- Tribal Trails Management Plan.
- Tahquitz Canyon Wetland Conservation Plan.
- Section 14 Master Plan.
- Tribal Pesticides Management Plan.
- Land Use Agreement with City of Palm Springs.
- Land Use Agreement with Cathedral City.
- Land Use Agreement with the County of Riverside.
- Land Use Agreement with the City of Rancho Mirage.
- Cooperative Agreement regarding management of National Monument.
- Tribal Fire Management Plan.

These ordinances, plans, and agreements reflect the fundamental policies and traditional approach of the Tribe as an active and cooperative land and resource manager to protect and preserve the Reservation environment while promoting the highest and best use and development of Reservation lands and resources.

1.6.3 Federal Regulatory and Management Authority

1.6.3.1 Application of the Endangered Species Act within the Agua Caliente Indian Reservation

The application of ESA within Indian Reservations and, in particular, the role of tribal governments and the applicability of Section 10 is an open question not addressed expressly in the statute or by any interpretive decisions of the U.S. Supreme Court or lower courts whose decisions are applicable on the Reservation.

Despite this uncertainty, the Tribe is determined to work with the USFWS in a coordinated fashion in the context of government-to-government consultation. This will ensure maximum protection of the trust resources of the Tribe and its members and will allow for an approach that honors the duty and authority of the USFWS with respect to ESA while preserving Tribal sovereignty and honoring traditional Tribal land management practices. Because the Tribe is seeking an incidental take permit from the USFWS, the Tribe has developed a Habitat Conservation Plan that meets the application requirements [50 CFR 13.21 and 17.22(b)(1)] and issuance criteria [50 CFR 17.22(b)(2)] for a take permit under Section 10(a)(1)(B) of ESA and its implementing regulations. The Tribe elected to pursue incidental take authorization through ESA Section 10 rather than Section 7 because it believes that only a Tribal HCP would provide comprehensive consideration of the Plan Area, enhance the Tribe's land use primacy, and provide long-term assurances of implementation to both parties.

1.6.3.2 Summary of Relevant Provisions of the Federal Endangered Species Act

The purpose of ESA is to "provide a means whereby the ecosystems upon which endangered species depend may be conserved [and] to provide a program for the conservation of such endangered species." ESA establishes a program that:

- Defines a broad class of plants and animals qualifying for ESA protections;
- Sets out prohibited acts designed to protect such species, and provisions for enforcement;
- Provides for issuance of permits to take species in certain circumstances;
- Imposes broad duties on federal agencies to promote the survival and recovery of protected species in the wild; and
- Requires the preparation of plans for accomplishing recovery of species protected according to ESA.

Endangered species are defined as "any species which is in danger of extinction throughout all or a significant portion of its range." A threatened species is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." "Species" is defined to include "any subspecies of . . . wildlife or plants, and any distinct population segment of any species of . . . wildlife which interbreeds when mature." Thus, many protected "species" are actually subspecies or distinct populations.

Once a species is listed as endangered, Section 4 of ESA requires, to the maximum extent prudent and determinable, the designation of critical habitat (that is, habitat essential to the conservation of the species) and mandates the development of a recovery plan, if such action will promote conservation of the species. Pursuant to Section 7 of ESA, before authorizing, funding, or carrying out a federal project, the responsible agency must determine whether any listed species are present in the project area. If a threatened or endangered species or its critical habitat is present, the agency must analyze the proposed action to determine whether the activity is likely to adversely affect the species or designated critical habitat. If the activity "may affect but is not likely to adversely affect" a listed species or critical habitat, the federal agency must informally consult with the USFWS. If an activity is determined likely to adversely affect a species or critical habitat, the federal agency must formally consult with the USFWS. Formal consultation is concluded by the USFWS issuing a Biological Opinion that analyzes whether the activity would jeopardize the continued existence of the species or adversely modify critical habitat. The biological opinion often includes an incidental take statement that exempts the "incidental take" of fish or wildlife species in certain circumstances in connection with federal activities.

In certain circumstances, ESA also authorizes the incidental take of species in connection with otherwise lawful activities by non-federal entities. Section 10(a) of ESA provides for the preparation by non-federal parties and approval of an HCP as the basis for issuance of an incidental take permit (Section 10(a) Permit) from the USFWS. An HCP must address biological and economic factors. If the proposed HCP

is approved by the USFWS, a Section 10(a) Permit is issued, which authorizes take of Covered Species incidental to otherwise lawful activities. For the taking to be incidental and the permit to be valid, additional authorizations from other agencies (e.g., grading permits) may be required. An HCP can be prepared to support the issuance of a Section 10 permit for activities ranging from a single development project to numerous projects taking place in a multi-jurisdictional area. The legislative history of Section 10(a)(1) indicates that Congress also intended the USFWS to approve HCPs that protect unlisted species as if they were listed under ESA, and that in so doing, the USFWS would provide Section 10(a)(1) assurances for such unlisted species (H.R. Rep. No. 97-835, 975h Cong., 2d Sess. 30-31, 1982; Conference Report on 1982 Amendments to ESA). This legislative intent was codified in the USFWS's Habitat Conservation Plan Assurances ("No Surprises") Rule [50 CFR 17.22(b)(5), 17.32(b)(5) and 222.307(g); 63 FR 8859, February 23, 1998]. For HCPs, the USFWS uses the conservation standard identified in the Habitat Conservation Planning Handbook (USFWS and National Marine Fisheries Service 1996) for unlisted species; the Handbook states that an unlisted species is "adequately covered" in an HCP only if it is treated as if it were listed pursuant to Section 4 of the ESA and if the HCP meets the permit issuance criteria in Section 10(a)(2)(B) of the ESA with respect to the species. The USFWS routinely approves HCPs that address both listed and unlisted species.

At a minimum, Section 10(a) requires a HCP to specify:

- Impacts likely to result from the proposed taking of the species for which the permit coverage is requested;
- Measures the applicant will undertake to monitor, minimize, and mitigate such impacts;
- Measures the applicant will take to ensure adequate funding for the plan will be provided;
- Procedures to be used to deal with Unforeseen Circumstances;
- Alternative actions to the taking of the species that the applicant considered and the reasons why such alternatives were not proposed to be utilized; and
- Additional measures the USFWS may require as necessary or appropriate for purposes of the plan.

In addition, the implementing regulations (50 CFR 13 and 17) pertaining to HCPs require that an application for an incidental take permit include:

- A complete description of the activity sought to be authorized; and
- The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known.

The implementing regulations (50 CFR 17.22) require that the USFWS decide whether or not a permit should be issued based on the following issuance criteria:

- The taking will be incidental;
- The applicant will minimize and mitigate the impacts of such takings to the maximum extent practicable;
- The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided;
- The taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild;
- The additional measures the USFWS may require as necessary or appropriate for purposes of the plan, if any, will be met; and
- The USFWS has received such other assurances as the USFWS may require that the plan will be implemented.

In making the decision of whether to issue the permit, the USFWS also considers the anticipated duration and geographic scope of the applicant's planned activities, including the extent of listed species habitats that are involved and the degree to which listed species and their habitats are affected [50 CFR 17.22(b)(2)].

In addition, the Habitat Conservation Plan Assurances Policy (August 11, 1994), as codified by the No Surprises Rule [50 CFR 17.22(b)(5), 17.32(b)(5) and 222.307(g); 63 FR 8859, February 23, 1998], provides that as long as an HCP is being properly implemented, USFWS will not require additional lands, water, or money from a permittee in the event of Unforeseen Circumstances, and that additional measures to mitigate reasonably foreseeable Changed Circumstances will be limited to those specifically addressed in the HCP (and only to the extent of the mitigation specified). These No Surprises assurances are provided to an applicant in return for adequate planning within an HCP for the conservation needs of the Covered Species for the duration of the permit, including procedures the applicant would implement to deal with Changed Circumstances that can be planned for and could adversely affect the status of the Covered Species.

Finally, guidance for approval of HCPs set forth in the *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (USFWS and National Marine Fisheries Service 1996), as amended to include the 5 Point Policy Guidance (see 65 FR 35242, June 1, 2000), calls for the following additional items to be included in an HCP:

- Statement of the HCP's biological goals and objectives;
- Adaptive management strategies, where appropriate, as determined by the HCP proponent and USFWS;
- A monitoring program to evaluate compliance, determine if biological goals and objectives are being met, and provide feedback information for any adaptive management strategies being utilized; and
- Definition of Section 10(a) Permit duration.

1.6.3.3 Roles of the USFWS and Tribe Under the Federal Endangered Species Act

Under authority delegated by the Secretary of the Interior, the USFWS is responsible for implementing ESA with respect to terrestrial plant and animal species, and a selection of non-marine species (the remainder of which are addressed by the National Oceanic and Atmospheric Administration's National Marine Fisheries Service). This implementation responsibility includes, among other things, the proposal and periodic review of listings of species as threatened or endangered; the designation of critical habitat; the development and implementation of recovery plans; consultation with federal agencies on federal actions that may adversely affect listed species; and the review of and action on applications for Section 10(a) Permits and HCPs.

The ESA does not expressly authorize the administering agencies to delegate their authority to tribal governments, nor does it otherwise expressly acknowledge the role of tribal governments in managing wildlife and habitat or regulating activities that may impact wildlife and habitat. Clarification and guidance for implementation of ESA on tribal lands have been provided by the President's Memorandum on Relations with Tribal Governments (April 29, 1994); the USFWS Native American Policy (June 28, 1994); Joint Secretarial Order No. 3206 issued by the Secretary of the Interior and the Secretary of Commerce (June 5, 1997); and EOs on Consultation and Coordination with Indian Tribal Governments (EO 13084 [May 14, 1998], revoked and superseded by EO 13175 [November 6, 2000]). These authorities, as well as other policies and directives to agencies of the federal government, recognize and reiterate the unique duty of trust owed by the federal government to Indian tribes. These include honoring tribal sovereignty and assisting tribal governments in the protection of tribal members, cultures, resources, and fundamental interests. The authorities also mandate that tribal governments be consulted on a government-to-government basis prior to federal decision-making or other action that may affect tribal interests. The applicable provisions of each of these authorities are summarized below.

<u>President's Memorandum on Relations with Tribal Governments</u>

Through this Memorandum issued in 1994, President Clinton called upon all executive departments and agencies to ensure maintenance and enhancement of the government-to-government relationship between the Federal Government and Indian tribes. This Memorandum confirms that federal activities affecting Native American tribal rights and trust resources "should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty." Among other things, it instructs executive departments and agencies "to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities."

<u>U.S. Fish & Wildlife Service Native American Policy</u>

The Policy is intended to be "consistent with Federal policy supporting Native American government self-determination" and recognizes the USFWS's "trust responsibilities to assist Native Americans in

protecting, conserving and utilizing their reserved, treaty guaranteed, or statutorily identified trust assets." Applicable provisions in the Policy include the following:

- Directs the USFWS, in addition to its own legislative mandates, to observe its "trust responsibilities and respect for Native American cultural values when planning and implementing programs."
- Recognizes "the authority that Native American governments have for making fish and wildlife resource management policy and for managing fish and wildlife resources on trust lands [and certain nonmember lands] within their reservations."
- Confirms that the USFWS supports "the missions and objectives of Native American governments in assuming program management roles and responsibilities . . . and the rights of Native Americans to be self-governing, and to manage fish and wildlife resources."
- Commits to assisting tribal governments in identifying funding sources that are available to them for fish and wildlife resource management activities.

Joint Secretarial Order 3206

The Secretarial Order provides that the Interior and Commerce Departments, including the USFWS, shall carry out their responsibilities under ESA in a manner that harmonizes federal trust responsibility to tribes and tribal sovereignty with the USFWS's statutory mission, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species. The Secretarial Order addresses American Indian tribal rights, the trust relationship, and the ESA generally. The USFWS has applied the Order in the context of Section 7 in the past. Its application in the context of Section 10 is also warranted.

The Secretarial Order also addresses the following:

- The special federal trust responsibility, involving the legal responsibilities and obligations of the U.S. toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights, which are defined as "those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decision, executive order or agreement, and which give rise to legally enforceable remedies."
- The importance of tribal self-governance and the protocols of a government-to-government relationship with the Tribes as well as long-standing congressional and administrative policies promoting tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life.
- Sovereign tribal authority to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights, and protect tribal trust resources, whereby Indian lands are managed by tribal governments in accordance with tribal goals and objectives.

The basic tenets of this Order are applicable to this Plan in that Section 10 of the ESA, 16 U.S. Code (USC) §1539(a)(2)(A) allows the Secretary to issue incidental take permits to "applicants," such as the Tribe, that submit an HCP to USFWS for approval. There is no restriction or definition of "applicant" that precludes the Tribe from receiving such permits; therefore, the Secretarial Order and its applicability are interpreted to serve this Tribal HCP.

In particular, Principle 3(B) provides:

> The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources. . . . Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that (a) govern activities on Indian lands, including . . . tribally-owned fee lands, and (b) address the conservation needs of listed species.

Principle 3(C) provides:

> The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions. . . . In cases involving an activity that could raise the potential issue of an incidental take under [ESA], [any conservation restriction the USFWS seeks to impose must be based on] an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (3) the measure is the least restrictive alternative available to achieve the required conservation purpose; (4) the restriction does not discriminate against Indian activities, either as stated or as applied; and (5) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

Building upon the guidelines set forth in the Native American Policy, the Appendix provides more specific direction to the USFWS in particular, including the following provisions:

- Section 2(E) directs the USFWS, upon the request of an Indian tribe, to cooperatively review and assess tribal conservation measures for sensitive species that may be included in tribal resource management plans, and to consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.
- In connection with habitat conservation planning, Section 3(D) instructs the USFWS to utilize the expertise of affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights, and to be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

- With respect to critical habitat designations, Section 3(B) requires the following:
  - That the USFWS recognize the contribution to be made by affected Indian tribes, in considering proposals to designate critical habitat, and in evaluating the economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights;
  - That the USFWS solicit information from affected Indian tribes regarding cultural values, tribal rights, and economic development issues for use in the preparation of economic analysis, in the preparation of "balancing tests" to determine appropriate exclusions, and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes;
  - That the USFWS, in keeping with its trust responsibility, consult with affected Indian tribes when considering designation of critical habitat in an area that may impact tribal trust resources, tribally owned fee lands, or the exercise of tribal rights; and
  - That the USFWS not designate critical habitat on such lands unless determined essential to conserve a listed species, and document the extent to which conservation needs of listed species can be achieved by limiting the designation to other lands.

Executive Orders 13084 and 13175

After the promulgation of the USFWS Native American Policy and Joint Secretarial Order 3206, President Clinton issued two EOs of note. The first was EO 13084 (May 19, 1998), the stated purposes of which included "to reduce the imposition of unfunded mandates upon Indian tribal governments; and to streamline the application process for and increase the availability of waivers to Indian tribal governments." More recently, EO 13175, while revoking 13084, incorporated and expanded its provisions. Additional language in EO 13175 provides that any regulation, legislative comment or proposed legislation, any other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between them are subject to certain fundamental principles: (1) the unique legal relationship between the Federal Government, on the one hand, and Indian tribes as protected domestic dependent nations, on the other hand, and the resulting federal trust responsibility; (2) the recognized tribal right of self-government, and the need to work with tribes on a government-to-government basis regarding issues concerning tribal self-government, trust resources, and treaty and other rights; and (3) support of tribal sovereignty and self-determination.

Additionally, EO 13175 requires that, "with respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible." Finally, all executive agencies must:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;
(2) defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Summary

These authorities collectively require the Secretary to give deference the Tribe's HCP and Implementing Agreement (IA) when processing these documents and issuing a Section 10(a) Permit. It is within this context that the Tribe has developed and intends to implement this Plan, which manifests its sovereign authority, embodies its traditional land use and resource management approach, and reflects uniquely Tribal values, with the formal support and cooperation of the USFWS.

1.6.3.4 Other Relevant Federal Agency Authority and Activity; Intent Regarding Consultation

The Tribe recognizes that several other federal laws and agency actions relevant to land use, environmental protection, and natural resource management are applicable within the Action Area, and that such authority and action often triggers a need for consultation regarding the environmental impacts of certain activities proposed to take place within the Plan Area.

1.6.3.4(a) Migratory Bird Treaty Act

The original 1918 federal MBTA implemented the 1916 Convention between the U.S. and Great Britain (for Canada) for the protection of migratory birds. Later amendments implemented treaties with Mexico, Japan and the Soviet Union (now Russia). The MBTA established a federal prohibition, unless permitted by regulations, to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird" (16 USC 703).

The Tribe is requesting that the Section 10(a) Permit also constitute a Special Purpose Permit under 50 CFR section 21.27 for the take of Covered Species listed under ESA which are also listed under the MBTA, as amended (16 USC §§ 703-712), in the amount and/or number specified in the Tribal HCP, subject to the terms and conditions specified in the Section 10(a) Permit. Any such Take would not be in violation of the MBTA. The MBTA Special Purpose Permit would extend to Covered Species listed under ESA and under the MBTA after the effective date of the Section 10(a) Permit. There are two species currently listed under both the ESA and the MBTA, which are Covered Species: least Bell's vireo (*Vireo bellii pusillus*) and southwestern willow flycatcher (*Empidonax traillii extimus*). Additionally, the

other avian Covered Species (i.e., summer tanager [*Piranga rubra cooperi*], yellow-breasted chat [*Icteria virens*], yellow warbler [*Dendroica petechia brewstri*], gray vireo [*Vireo vicinior*], crissal thrasher [*Toxostoma crissali*], and Le Conte's thrasher [*Toxostoma lecontei*]) are also covered by the MBTA. Actions conducted under the Tribal HCP would be conditioned by the Permit to comply with the provisions of the MBTA, with strict avoidance measures for actions affecting MBTA-covered species. This Special Purpose Permit would be valid for a period of three years from its Effective Date, provided the Section 10(a) Permit remains in effect for such period. The Special Purpose Permit will be renewed pursuant to the requirements of the MBTA, provided the Tribe submits a request for renewal and remains in compliance with the terms of the IA and the Section 10(a) Permit. Each such renewal shall be valid for a period of three years, provided that the Section 10(a) Permit remains in effect for such period.

1.6.3.4 (b) Water Quality and Wetlands Protection

Under the Clean Water Act, until such time as the Tribe elects to assume program and permitting authorization, the U.S. Army Corps of Engineers (USACE) maintains responsibility for water quality certifications pursuant to Section 401 and NPDES permits under Section 402 for discharges into waters that flow through the Reservation. Similarly, the USACE maintains responsibility for administering Section 404 of the Clean Water Act on the Reservation (with USEPA acting in a reviewing capacity). Section 404 establishes a permit system that regulates discharges of dredge or fill material into Waters of the U.S. and certain disturbances of wetlands. Impacts to wetlands must be avoided to the maximum extent practicable, which means "available and capable of being done after taking into consideration cost, existing technology, and logistics in the light of overall project purposes." Permits can be denied if a proposed activity, including any dredging, channelization, or development in a wetland, will result in "significant degradation" of the wetland. "Significant degradation" can include diminished recreational or aesthetic values as well as damage to aquatic systems. In addition, permits for such activities can be issued with conditions requiring mitigation of wetlands loss by restoring or enhancing existing wetlands or creating new wetland areas. Nothing in this Plan is intended to supersede or otherwise affect the application of any relevant provision of the Clean Water Act to any activities taking place within the Plan Area.

1.6.3.4(c) Environmental Impacts Consultation

The National Environmental Policy Act (NEPA) applies to actions undertaken, sponsored and, in some cases, permitted or funded by agencies of the federal government. For instance, on Tribal and allotted trust lands, the Bureau of Indian Affairs (BIA), among many other responsibilities, maintains review and approval authority of leasing, rights-of-way, permits and licenses, and other real estate transactions. The BIA, USEPA, and several other federal agencies, such as the Department of Housing and Urban Development, also provide grant or contract funding for tribal projects that may trigger environmental review and the requirement of ESA Section 7 consultation with USFWS regarding impacts to federally

listed species. The BIA generally serves as the lead or co-lead agency for compliance with the NEPA in connection with activities taking place on Tribal or allotted trust lands.

NEPA is primarily a procedural mandate that requires all federal agencies to conduct an evaluation of any action that may be defined as a "major federal action" that may involve a "significant impact on the natural environment." While judicial interpretations of this threshold definition vary with the circumstances, NEPA generally imposes a requirement that the agency at least consider all environmental impacts of a given action, as well as the alternative actions and measures that may mitigate such impacts. Although NEPA does not effect an outright prohibition even on those federal projects that do involve adverse environmental impacts, it does operate to provide information about the potential adverse impacts of such projects and opens them to public scrutiny. Among those factors that must be considered is the effect of the proposed project on sensitive species and their habitat.

Through adoption of this Tribal HCP, it is the intent of the Tribe that whenever any federal agency action within or impacting the Plan Area requires consultation regarding species or habitat, through NEPA under Section 7 of ESA or otherwise, the Tribe be directly consulted regarding the proposed activity's potential impacts to sensitive species and habitat on such lands, and this Plan be given deference (when applicable) as mandated by the authorities discussed above.

1.6.4 State and Local Authority

As mentioned previously, absent an express grant of authority from a tribal government or the U.S. Congress, state and local governments generally have no regulatory authority on Tribal or allotted trust land, and have regulatory authority only in certain circumstances, determinable on a case-by-case basis, on non-Indian fee land within an Indian reservation. In 2002, the U.S. Court of Appeals for the nine western states concluded that a county does not have land use jurisdiction over the use and development of fee lands on a reservation. The following discussion provides more information about the relationship of the Tribe to State and local governments as well as CVAG.

1.6.4.1 Federal Delegation of Authority to State of California under PL-280

As previously discussed, through the enactment of PL-280, the U.S. Congress has granted to the State of California (and its political subdivisions) general criminal jurisdiction on Indian reservations; and the State courts have jurisdiction over civil cases arising on a reservation and/or involving tribal members. This grant of jurisdiction by Congress, however, does not provide the State with general regulatory authority; thus, State laws such as California's endangered species law do not apply on Tribal or allotted trust land, and agencies such as the California Department of Fish and Game (CDFG) have no jurisdiction or authority on the Reservation, except to the extent the Tribe has delegated or otherwise authorized such authority.

Separate from the application of PL-280, state and local regulatory law may apply in certain circumstances on fee lands within the Reservation, such as where authorized by the U.S. Congress.

1.6.4.2 Tribal Delegation of Authority to State and Local Governments

In the interests of administrative efficiency, and consistency and clarity of land use regulation within and around the Reservation, the Tribe has chosen to enter Land Use Agreements with the three cities (Palm Springs, Rancho Mirage, and Cathedral City) and the County, the jurisdictions of which overlap the Reservation. With each of these Agreements, the Tribe has chosen to adopt relevant land use laws of the state, cities, and county as its own, and to delegate to the cities and county, as the Tribe's agents, the authority to enforce those laws on certain lands within the Reservation. The Agreements generally make state and local land use and environmental protection laws applicable on allotted trust lands (but *not* Tribal trust lands) within the Reservation.

Undeveloped fee land on the Reservation comprises 3,843 acres (13 percent) of all undeveloped land on the Reservation. Those lands include vacant hillsides in the MCCA and vacant lots in urbanized areas. It is the intent of the Plan to provide coverage for all fee land within the boundaries of the Reservation. The joint Coachella Valley MSHCP for the cities of Palm Springs, Cathedral City, and Rancho Mirage, and the County of Riverside, does not cover any lands within those jurisdictions that are also on the Reservation. Therefore, if the USFWS also approves the Tribe's HCP, all land in the area will be covered, without overlap or gap, by the two approved HCPs. One will start where the other ends.

Tribal processes to ensure the enforcement of the provisions of the Tribal HCP will vary by type of land, whether unallotted Tribal trust land, allotted trust land, or fee land.

<u>Unallotted Tribal Trust Land</u>

Enforcement is direct by the Tribe itself on unallotted Tribal trust land, in that compliance with the Tribal HCP will be incorporated into any project that the Tribe undertakes or approves on such land.

<u>Allotted Trust Land</u>

On allotted trust land, the Tribe can enforce the provisions of the Tribal HCP as a matter of Tribal law through the leasing process. When a potential lessee of such allotted trust land is negotiating a lease, that lease must include many standard provisions in order to receive the required approval of the BIA. There is already general language in the standard form lease requiring the lessee to comply with all applicable federal, state, and local laws, ordinances, and regulations. This is how, for example, local zoning ordinances are enforced. If a lease calls for a use prohibited by the applicable zoning, the lease cannot be approved. Similarly, if a lessee goes to the local city or county (with which the Tribe already has a land

use contract) and applies for a building permit or similar entitlement, that lessee must comply with all of that jurisdiction's normal procedures and requirements to obtain that permit or similar entitlement.

All such requirements are actually Tribal in nature and origin because the Tribe has adopted an ordinance in the case of each such city and county as part of the relevant land use contract, by which the Tribe adopts all of that local jurisdiction's land use measures, plus relevant state law, as the Tribe's own. For example, in the case of allotted trust land within the unincorporated areas of the County of Riverside, Tribal Ordinance No. 12, adopted in 1989, provides that:

> All of the laws, ordinances, codes, rules, regulations, or other similar enactments of the State of California and of the County of Riverside, as they now exist and as they may exist in the future, except as provided below, which govern, regulate, limit, zone, or otherwise control the use and/or development of all of the lands which are held in trust for individual Indians by the United States and which are located within the present or future unincorporated areas of the County of Riverside which included within the area covered by the Western Coachella Valley Community Plan are adopted as the Band's own such measures and are made applicable to the said lands as the Band's own said measures.

The same ordinance goes on to designate the County of Riverside as the Tribe's agent to enforce such Tribal measures, and gives a non-exhaustive list of examples of such adopted measures as follows:

A. General plan, Western Coachella Valley Community Plan, and specific plans;
B. Zoning;
C. Variances;
D. Conditional use permits and other similar permits;
E. Subdivisions;
F. Building and utility codes, permits and standards;
G. Enforcement of building and utility codes;
H. Environmental review;
I. Matters directly related to the above, except as noted in this Chapter.

In this way, *all* such state and local land use and directly related measures, from the California Environmental Quality Act to the California Endangered Species Act (California Fish and Game Code Section 2050 et seq.) are already part of Tribal law and are already being implemented by the local jurisdictions on allotted trust land within those jurisdictions.

Since those four local non-Indian jurisdictions already incorporate the Coachella Valley MSHCP into this process, incorporating the Tribal HCP into the same process should be no great burden. Any landowner or developer who seeks to develop will have to apply for all the normal entitlements to that local non-Indian

jurisdiction, including initial compliance with the Tribal HCP or the Coachella Valley MSHCP. If that landowner or developer does not so apply, the entitlement will not be issued and the development will not proceed. Any such amendment regarding allotted trust land will specify that, upon application, the local non-Indian jurisdiction will initiate the process for issuance of an incidental take permit, to the extent that one is needed for any particular project, with the Tribe being the ultimate source of that entitlement under the provisions of its approved Tribal HCP. In this way, the development of allotted trust land will be fully subject to all the normal state law measures regarding the use and development of land, plus the additional requirements of the Tribal HCP.

The Tribe has also signed an agreement with the California Department of Parks and Recreation recognizing the Tribe's management of Indians Canyons Heritage Park (discussed in more detail in section 2.1.1.1) as an "ecological entity" and "prime cultural resource area." It is the primary objective of that agreement that both governmental agencies recognize that the Park, with the Tribe's management, will provide long-term preservation of the major natural and cultural resources of the area. It is further recognized by the State that the Tribe will preserve the unique palm oases under its control and prevent negative impacts on the cultural/ecological continuity of the area or on the pristine esthetics of the viewshed.

1.6.4.3 Tribal Role in the Coachella Valley Association of Governments

In 1995, CVAG began planning efforts to develop a MSHCP for the Coachella Valley (discussed in more detail in section 2.4). Agencies participating in development of the MSHCP include cities within the Coachella Valley, County, USFWS, BLM, National Park Service (NPS), U.S. Forest Service (USFS) and CDFG. The area addressed by the MSHCP encompasses approximately 1.2 million acres in the Coachella Valley and surrounding mountains.

The MSHCP by its terms excludes local Indian reservations, unless a tribal government chooses to opt into the plan. The Tribe has been an active participant in the planning process but has chosen not to have the Reservation or other Tribal Lands covered by the MSHCP because the Tribe believes that only a Tribal HCP is broad enough to provide the foundation for both resources conservation and land use planning efforts on lands within its jurisdiction (as further described in section 1.2). Instead, Tribal participation has focused on coordinating Tribal conservation planning efforts with those being developed for the Coachella Valley by CVAG. The treatment of lands addressed by both documents is described in section 2.4.

1.6.4.4 Tribal Intent Regarding Relationship Between this Tribal HCP and State and Local Activities

The State of California and its political subdivisions have no direct regulatory or management authority over lands covered by the Tribe's Plan, other than those delegated to them in an agency capacity by the

Tribe. However, the Tribe recognizes the desirability of administrative efficiency and consistency with respect to land use regulations and management plans in and around the Reservation. Therefore, while the Tribe intends that this Plan supersede any other species/habitat management law administered and enforced by any non-tribal governmental entity as an agent of the Tribe and intends to assume and maintain responsibility for the Plan's implementation and enforcement pursuant to its inherent sovereign authority, the Tribe also intends that this Plan be coordinated with the law and actions of neighboring authorities to the extent practical.

Some Covered Activity boundaries may be situated partially in the Plan Area and partially outside the Plan Area. In these instances, the Tribe may choose to defer to the Coachella Valley MSHCP and allow the requirements of that HCP to be imposed on the portion of the Covered Project in the Tribal HCP Plan Area. This determination by the Tribe (to assume or defer permitting authority) will depend upon such factors as the status of the activity at the time this Plan is approved, and the relative extents of land inside and outside the Plan Area, subject to or impacted by the proposed Covered Activity. Such actions would require inter-plan coordination and tracking of take to ensure that all plan requirements are maintained.

1.7 OTHER PLANS AND PROGRAMS RELEVANT TO THE TRIBAL HCP

Other plans and programs relevant to this Tribal HCP include the adopted general plans of surrounding jurisdictions (County, Palm Springs, Cathedral City, and Rancho Mirage); various land use management plans governing state and federal lands located adjacent to or in the region of the Reservation; species management plans approved by state and/or federal agencies; and HCPs in adjoining or overlapping areas.

Relevant plans considered in the preparation of the Tribal HCP are listed below.

Bureau of Land Management

- California Desert Conservation Area Plan
- Willow Hole/Edom Hill Area of Critical Environmental Concern (ACEC) Management Plan
- Whitewater Canyon ACEC Management Plan

U.S. Forest Service

- San Bernardino National Forest Land and Resources Management Plan

National Park Service

- Land Protection Plan for Joshua Tree National Park
- Joshua Tree National Park General Management Plan
- Backcountry and Wilderness Management Plan

U.S. Fish and Wildlife Service

- Desert Tortoise Recovery Plan
- Peninsular Bighorn Sheep Recovery Plan
- Southwestern Willow Flycatcher Recovery Plan
- Least Bell's Vireo Recovery Plan

California Department of Fish and Game

- Carrizo Canyon Ecological Reserve Management Plan
- Hidden Palms Ecological Reserve Management Plan
- Magnesia Spring Ecological Reserve Management Plan

California Department of Parks and Recreation

- Mount San Jacinto State Park Management Plan

Multiple Agency Plans

- Coachella Valley Preserve System Management Plan
- Santa Rosa Mountains Wildlife Habitat Management Plan
- Santa Rosa and San Jacinto Mountains National Monument Management Plan

Coachella Valley Association of Governments

- Multiple Species Habitat Conservation Plan