

Appendix D. Sample Deed and Memorandum of Agreement

WHEN RECORDED RETURN TO:

QUITCLAIM DEED

THIS INDENTURE, made and entered into between the **UNITED STATES OF AMERICA**, hereinafter referred to as the **GRANTOR**, acting by and through the Secretary of the Army, under and pursuant to the power and authority contained in the Defense Base Closure and Realignment of 1990, Public Law 101-510, as amended, and _____, as amended, and _____ hereinafter referred to as the **GRANTEE**.

WITNESSETH THAT:

WHEREAS, Fort Ord was officially closed on 30 September 1994; any reference herein made to Fort Ord will refer to what is presently designated as the Presidio of Monterey Annex and Excess Lands; and

WHEREAS, the GRANTOR is the owner of certain real property located within the formerly designated Fort Ord Military Installation situated in the County of Monterey, State of California, more particularly described as _____ hereinafter referred to as the **Property**, and more fully described and shown on Exhibits A and B, attached hereto and made a part hereof; and

WHEREAS, the Property has been determined surplus to the needs of the **GRANTOR**; and

WHEREAS, the California State Historic Preservation Officer has determined that _____; and

WHEREAS, the GRANTOR has appropriately fulfilled the requirements of the Stewart B. McKinney Homeless Assistance Act, 40 U.S.C. 11411; and

WHEREAS, the GRANTEE'S use of the Property is compatible with the December, 1994, Fort Ord Reuse Authority's Reuse Plan; and

WHEREAS, Fort Ord, California, has been identified as a National Priority List under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) of 1980, as amended. The GRANTOR has provided the GRANTEE with a copy of the Fort Ord Base Federal Facility Agreement (FFA) and all amendments thereto entered into by EPA Region IX, the State of California, and the Department of the Army that were effective on November 19, 1990; and

WHEREAS, an Installation-Wide Multispecies Habitat Management Plan for former Fort Ord, California (HMP) dated December, 1994 as revised and amended by the "Installation-Wide Multispecies Habitat Management Plan for Former Fort Ord, California" dated _____ 1997, has been developed to assure that disposal and reuse of Fort Ord lands is in compliance with the Endangered Species Act (ESA), 16 U.S.C. 1531 et seq. Timely transfer of these lands and subsequent implementation of the HMP is critical to ensure effective protection and conservation of the former Fort Ord lands' wildlife and plant species and habitat values while allowing appropriate economic redevelopment of Fort Ord and the subsequent economic recovery of the local communities; and

WHEREAS, the Bureau of Land Management, U.S. Department of the Interior, (BLM) will receive and compile monitoring reports for the parcels (identified in the HMP as restricted) which are transferred to other public and private entities, and these reports will be sent to the United States Fish and Wildlife Service (USFWS) for review to ensure that HMP requirements are being met; and

WHEREAS, the Installation-Wide Multispecies Habitat Management Plan has been developed consistent with the requirements of Section 10(a)(1)(B) of the ESA and may be converted into a habitat conservation plan under Section 10(a)(2)(A) of the ESA which will support the issuance of incidental take permits, covering both listed and unlisted HMP target wildlife species, to state and local governments and other third parties receiving former Fort Ord lands.

NOW THEREFORE, the GRANTOR, for and in consideration of the assumption by the GRANTEE of all the obligations set forth herein for the benefit of the United States and the general public and for the performance by the GRANTEE of the covenants, conditions, reservations, and restrictions hereinafter contained, does hereby **REMISE, RELEASE**, and forever **QUITCLAIM**, unto the GRANTEE, its successors and assigns, all such interest, rights, title, and claim as the GRANTOR has in and to the **Property** lying and

being in the County of Monterey, State of California.

1. This conveyance is made subject to the following **EXCLUSIONS** and **RESERVATIONS**:

a.

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d. The GRANTOR reserves a right of access to any and all portions of the herein described Property for purposes of environmental investigation, remediation, or other corrective action. These rights shall be exercisable in any case in which a remedial action or corrective action is found to be necessary after the date of conveyance of the Property, or such access as necessary to carry out a remedial action, response action, or corrective action on adjoining property. Pursuant to this reservation, the GRANTOR and its officers, agents, employees, contractors and subcontractors shall have the right (upon reasonable notice to the GRANTEE or its successors and assigns and any authorized occupant of the property) to enter upon the herein described Property and shall not unreasonably interfere with the GRANTEE's use of the Property.

e. The GRANTOR also reserves a right of access to those portions of the herein described Property which are subject to the Habitat Management covenants, conditions, reservations and restrictions contained in this deed under Paragraph 8 and to the provisions of the HMP, by USFWS and its designated agents, for the purpose of monitoring GRANTEE's compliance with Paragraph 8 and the HMP and for such other purposes as are identified in the HMP. Pursuant to this reservation, GRANTOR, acting through USFWS and its designated agents, shall have the right to enter onto the herein described Property upon reasonable notice of not less than 48 hours to GRANTEE or its successors and assigns and shall not unreasonably interfere with GRANTEE'S use of the Property.

TO HAVE AND TO HOLD the Property unto GRANTEE, its successors and assigns forever, provided that this deed is made and accepted upon each of the following conditions, restrictions, and covenants which shall be binding upon and enforceable against GRANTEE, its successors and assigns, and shall run with the land, in perpetuity, as follows:

2. "AS IS"

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3 ENVIRONMENTAL CONDITION OF PROPERTY.

The GRANTEE has received the technical environmental reports, prepared by, or on behalf of, the Grantor, the Grantee, and others, and agrees, to the best of the GRANTEE'S knowledge, that they accurately describe the environmental condition of the Property. The GRANTEE has inspected the Property and accepts the physical condition and current level of environmental hazards on the Property and deems the Property to be safe for the GRANTEE'S intended use. The GRANTEE'S acknowledgment of the condition of the Property creates a rebuttable presumption that any substance discovered on the Property after the date of transfer is related solely to the activity of, caused, deposited, or created by the GRANTEE, its successors or assigns. If, after conveyance of the Property to GRANTEE, there is an actual or threatened release of a hazardous substance on the Property, or in the event that a hazardous substance is discovered on the Property after the date of the conveyance, whether or not such substance was set forth in the technical environmental reports, GRANTEE or its successor or assigns shall be responsible for such release or newly discovered substance unless GRANTEE is able to demonstrate that such release or such newly discovered substance was due to GRANTOR'S activities, ownership, use, or occupation of the Property, or the activities of GRANTOR'S contractors and/or agents. GRANTEE, its successors and assigns, as consideration for the conveyance, agrees to release GRANTOR from any liability or responsibility for any claims arising out of or in any way predicated on release of any hazardous substance on the Property occurring after the conveyance, where such substance was placed on the Property by the GRANTEE, or its agents or contractors, after the conveyance. This paragraph shall not affect the GRANTOR'S responsibilities to conduct response actions or corrective actions that are required by applicable laws, rules and regulations, or the GRANTOR'S indemnification obligations under applicable laws.

4. FEDERAL FACILITY AGREEMENT.

By accepting this deed, the GRANTEE acknowledges that the GRANTEE has read the FFA and recognizes that, should any conflict arise between the terms of the FFA and the terms of this deed, the FFA will take precedence. Notwithstanding any other provisions of this deed, the GRANTOR assumes no liability to the GRANTEE should implementation of the FFA interfere with GRANTEE'S use of the premises. In exercising the rights hereunder, GRANTOR shall give GRANTEE or its successors or assigns reasonable notice of its actions required by the FFA and GRANTOR shall, consistent with the FFA, and at no additional cost to the GRANTOR, endeavor to minimize the disruption of the GRANTEE'S, its successors',

or assigns' use of the Property. The GRANTEE shall have no claim on account of any such interference against the GRANTOR or any officer, agent, employee or contractor thereof.

5. CERCLA NOTICE and COVENANTS.

a. Pursuant to Section 120(h)(3) of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. Section 9620(h)(3), the GRANTOR hereby notifies the GRANTEE that

b. The GRANTOR hereby covenants that:

(1) all remedial action necessary to protect human health and the environment with respect to any such hazardous substances remaining on the Property has been taken before the date of conveyance hereunder; and

(2) any additional remedial action found to be necessary after the date of this transfer by applicable law that resulted from past activities of the GRANTOR shall be conducted by the GRANTOR.

(3) The GRANTOR reserves a right of access to the Property in any case in which remedial or corrective action by the GRANTOR is found to be necessary after the date of this conveyance.

6. INDEMNIFICATION.

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UNEXPLODED ORDNANCE.

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8. HABITAT MANAGEMENT.

a. The Property contains habitat occupied and/or potentially occupied by several sensitive wildlife and plant species, some of which are listed or proposed for listing as threatened or endangered under the ESA. Applicable laws and regulations restrict activities that involve the potential loss of populations and habitats of listed species. To fulfill GRANTOR'S commitment in the Fort Ord Disposal and Reuse Environmental Impact Statement Record of Decision, made in accordance with the National Environmental Policy

Act of 1969, 42 U.S.C. 4321 et seq., this deed requires the conservation in perpetuity of these sensitive wildlife and plant species and their habitats consistent with the USFWS Biological Opinions for disposal of the former Fort Ord lands issued pursuant to Section 7 of the ESA on _____, 1994 and _____, 1997, respectively. By requiring GRANTEE, and its successors and assigns to comply with the Habitat Management Plan, GRANTOR intends to fulfill its responsibilities under Section 7 of the ESA property and to minimize future conflicts between species protection and economic development of portions of the Property.

b. GRANTEE acknowledges that it has received a copy of the HMP dated _____, 1997. The HMP, which is incorporated herein by reference, provides a basewide framework for disposal of lands within Former Fort Ord wherein development and potential loss of species and/or habitat is anticipated to occur in certain areas of the former Fort Ord (the HMP Development Areas) while permanent species and habitat conservation is guaranteed within other areas of the former Fort Ord (i.e., the HMP Reserve and Corridor parcels). Disposal of former Fort Ord lands in accordance with and subject to the restrictions of the HMP is intended to satisfy the Army's responsibilities under Section 7 of the Endangered Species Act.

c. The following parcels of land within the Property hereby conveyed or otherwise transferred to GRANTEE are subject to the specific use restrictions and/or conservation, management, monitoring, and reporting requirements identified for the parcel in the HMP:

- 1) Habitat Reserve Parcel(s) numbered: _____; and
- 2) Habitat Corridor Parcel(s) numbered: _____; and
- 3) Habitat reserves within the Development with Reserve Areas or Development Restrictions Parcels numbered: _____.

d. Any modifications of the boundaries of the Habitat Reserve Parcel(s), Habitat Corridor Parcel(s), or Habitat reserves within the Development with Reserve Areas or Development Restrictions Parcels must be approved in writing by the USFWS and must maintain the viability of the HMP for permanent species and habitat conservation.

e. The HMP describes existing habitat and the likely presence of sensitive wildlife and plant species that are treated as target species in the HMP. Some of the target species are currently listed or proposed for listing as threatened or endangered under the ESA. The HMP establishes general conservation and management requirements applicable to the property to conserve the HMP species. These requirements are intended to meet

mitigation obligations applicable to the property resulting from Army disposal and development reuse actions. Under the HMP, all target species are treated as if listed under the ESA and are subject to avoidance, protection, conservation and restoration requirements. GRANTEE shall be responsible for implementing and funding each of the following requirements set forth in the HMP as applicable to the property:

- 1) GRANTEE shall implement all avoidance, protection, conservation and restoration requirements identified in the HMP as applicable to the Property and shall cooperate with adjacent property owners in implementing mitigation requirements identified in the HMP for adjacent sensitive habitat areas.
- 2) GRANTEE shall protect and conserve the HMP target species and their habitats within the Property, and, other than those actions required to fulfil a habitat restoration requirement applicable to the Property, shall not remove any vegetation, cut any trees, disturb any soil, or undertake any other actions that would impair the conservation of the species or their habitats. GRANTEE shall accomplish the Resource Conservation Requirements and Management Requirements identified in Chapter 4 of the HMP as applicable to any portion of the Property.
- 3) GRANTEE shall manage, through an agency or entity approved by USFWS, each HMP parcel, or portion thereof, within the Property that is required in the HMP to be managed for the conservation of the HMP species and their habitats, in accordance with the provisions of the HMP.
- 4) GRANTEE shall either directly, or indirectly through its USFWS approved habitat manager, implement the management guidelines applicable to the parcel through the development of a site-specific management plane. The site-specific habitat management plan must be developed and submitted to USFWS (and, for non federal recipients, CDFG as well) for approval, within six months from the date the recipient obtains title to the parcel. Upon approval by USFWS (and , as appropriate, CDFG) the recipient shall implement the plan. Such plans may thereafter be modified through the CRMP process or with the concurrence of USFWS (and, as appropriate, CDFG) as new information or changed conditions indicate the need for adaptive management changes. The six month deadline for development and submission of a site-specific management plan may be extended by mutual agreement of USFWS, CDFG(if appropriate), and the recipient.
- 5) GRANTEE shall restrict access to the Property in accordance with the HMP, but shall allow access to the Property, upon reasonable notice of not less than 48

hours, by USFWS, and its designated agents, for the purpose of monitoring GRANTEE'S compliance with, and for such other purposes as are identified in, the HMP.

6) GRANTEE shall comply with all monitoring and reporting requirements set forth in the HMP that are applicable to the Property, and shall provide an annual monitoring report, as provided for in the HMP, to the Bureau of Land Management on or before November 1 of each year, or such other date as may be hereafter agreed to by USFWS and BLM.

7) GRANTEE shall not transfer, assign, or otherwise convey any portion of, or interest in, the Property subject to the habitat conservation, management or other requirements of the HMP, without the prior written consent of GRANTOR, acting by and through the USFWS (or designated successor agency), which consent shall not be unreasonably withheld. GRANTEE covenants for itself, its successors and assigns, that it shall include and otherwise make legally binding, covenants, conditions, restrictions and requirements of this deed and the provisions of the HCP in any deed, lease, right of entry, or other legal instrument by which Grantee divests itself of any interest in all or a portion of the Property. The covenants, conditions, restrictions and requirements of this deed and the provisions of the HMP shall run with the land. The covenants, conditions, restrictions and requirements of this deed and the HMP benefit the lands retained by GRANTOR that formerly comprised Fort Ord, as well as the public generally. Management responsibility for the property may only be transferred as a condition of the transfer of the Property, with the consent of the USFWS. USFWS may require the establishment of a perpetual trust fund to pay for the management of the property as a condition of transfer of management responsibility from GRANTEE.

9. This conveyance is made subject to the following ENFORCEMENT PROVISIONS

a. GRANTOR hereby reserves a reversionary interest in all of the Property. If GRANTOR (or its assigns), acting through the USFWS or a designated successor agency, determines that those parcels identified in Paragraph 8.c. above or any other portion of the Property subject to a restriction or other requirement of the HMP is not being conserved and/or managed in accordance with the provisions of the HMP, then GRANTOR may, in its discretion, exercise a right to reenter the Property, or any portion thereof, in which case, the Property, or those portions thereof as to which the right of reentry is exercised, shall revert to GRANTOR. In the event that GRANTOR exercises its right of reentry as to all or portions of the Property, GRANTEE shall

execute any and all documents that GRANTOR deems necessary to perfect or provide recordable notice of the reversion and for the complete transfer and reversion of all right, title and interest in the Property or portions thereof. Subject to applicable federal law, GRANTEE shall be liable for all costs and fees incurred by GRANTOR in perfecting the reversion and transfer of title. Any and all improvements on the Property or those portions thereof reverting back to GRANTOR shall become the property of GRANTOR and GRANTEE shall not be entitled to any payment therefor.

b. In addition to the right of reentry reserved in paragraph 9.a. above, if GRANTOR (or its assigns), acting through the USFWS or a successor designated agency, determines that GRANTEE is violating or threatens to violate the provisions of paragraph 8 of this deed or the provisions of the HMP, GRANTOR shall provide written notice to GRANTEE of such violation and demand corrective action sufficient to cure the violation, and where the violation involves injury to the Property resulting from any use or activity inconsistent with the provisions of paragraph 8 of this deed or the provisions of the HMP, to restore the portion of the Property so injured. If GRANTEE fails to cure a violation within sixty (60) days after receipt of notice thereof from GRANTOR, or under circumstances where the violation cannot reasonably be cured within a sixty (60) day period, or fails to continue to diligently cure such violation until finally cured, GRANTOR may bring an action at law or in equity in a court of competent jurisdiction to enforce the covenants, conditions, reservations and restrictions of this deed and the provisions of the HMP, to enjoin the violation, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the covenants, conditions reservations and restrictions of this deed or the provisions of the HMP, or injury to any conservation value protected by this deed or the HMP, and to require the restoration of the Property to the condition that existed prior to such injury. If GRANTOR, in its good faith and reasonable discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the species and habitat conservation values of the Property, GRANTOR may pursue its remedies under this paragraph without prior notice to GRANTEE or without waiting for the period provided for the cure to expire. GRANTOR'S rights under this paragraph apply equally in the event of either actual or threatened violations of covenants, conditions, reservations and restrictions of this deed or the provisions of the HMP, and GRANTEE acknowledges that GRANTOR'S remedies at law for any of said violations are inadequate and GRANTOR shall be entitled to the injunctive relief described in this paragraph, both prohibitive and mandatory, in addition to such other relief to which GRANTOR may be entitled, including specific performance of the covenants, conditions, reservations and restrictions of this deed and the provisions of the HMP.

c. Enforcement of the covenants, conditions, reservations and restrictions in this deed and the provisions of the HMP shall be at the discretion of GRANTOR, and any forbearance by GRANTOR to exercise its rights under this deed and the HMP in the event of any breach or violation of any provision of this deed or the HMP by GRANTEE shall not be deemed or construed to be a waiver by GRANTOR of such provision or of any subsequent breach or violation of the same or any other provision of this deed or the HMP or of any of GRANTOR'S rights under this deed or the HMP. No delay or omission by GRANTOR in the exercise of any right or remedy upon any breach or violation by GRANTEE shall impair such right or remedy or be construed as a waiver.

d. In addition to satisfying Army's responsibilities under Section 7 of the Endangered Species Act, GRANTEE'S compliance with the covenants, conditions, reservations and restrictions contained in this deed and with the provisions of the HMP are intended to satisfy mitigation obligations included in any future incidental take permit issued by USFWS pursuant to Section 10(a)(1)(B) of the Endangered Species Act which authorizes the incidental take of a target HMP species on the Property. GRANTEE acknowledges that neither this deed nor the HMP authorizes the incidental take of any species listed under the ESA. Authorization to incidentally take any target HMP wildlife species must be obtained by GRANTEE separately, or through participation in a broader habitat conservation plan and Section 10(a)(1)(B) permit based on the HMP and approved by FWS.

10. AIR NAVIGATION RESTRICTION.

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11. NON-DISCRIMINATION.

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THE CONDITIONS, RESTRICTIONS, and COVENANTS set forth in this deed are a binding servitude on the herein conveyed Property and will be deemed to run with the land in perpetuity. Restrictions, stipulations and covenants contained herein will be inserted by the GRANTEE verbatim or by express reference in any deed or other legal instrument by which it divests itself of either the fee simple title or any other lesser estate in the Property or any portion thereof. All rights and powers reserved to the GRANTOR, and all references in this deed to GRANTOR shall include its successor in function. The GRANTOR may agree to waive, eliminate, or reduce the obligations contained in the covenants.

THIS CONVEYANCE IS MADE SUBJECT TO all covenants, easements, reservations, and encumbrances, whether or not of record, and any facts which a physical inspection or accurate survey of the Property may disclose.

19. LICENSE AGREEMENT. CSU shall enter into a license agreement, subject to the approval of the Assistant Secretary of Army for Installations, Logistics, and Environment for use of Building Nos. 4562 and 4552, which are outside the subject Property. These facilities house the hot water boilers that provide heat and hot water to certain facilities located within the Property. This license arrangement shall serve as a temporary measure until such time as these facilities can be transferred to CSU or some other permanent arrangements prevail. The license is at Appendix D.

20. HABITAT MANAGEMENT. CSU will minimize the destruction, loss, or degradation of the wildlife habitat area in accordance with the requirements of this agreement until such time as the Basewide Habitat Management Plan (HMP) is signed by all the participating parties. After this plan is formalized and signed by all applicable parties, CSU will cooperate with adjacent property owners in implementation mitigation requirements identified in the HMP for adjacent sensitive habitat areas. CSU agrees to be held responsible for those mitigation measures related to CSU as described in the Environmental Impact Statement and Record of Decision for the Fort Ord Disposal and Reuse (December 1993) and CSU's Record of CEQA Decision (May 17, 1994). This agreement provides for interim protection for designated areas of habitat by CSU within the lands transferred to them as follows:

a. The parcel being transferred to California State University Monterey Bay (CSU) contains habitat for species that have special status in terms of state and federal protection. The Army and U. S. Fish and Wildlife Service Office of Endangered Species (FWS) have reached agreement on a Basewide Habitat Management Plan (HMP) for the preservation of these species and avoidance of a jeopardy biological opinion from FWS for the Army action of disposal of lands at Fort Ord. The HMP requires that portions of land to be transferred to California Department of Parks and Recreation, U. S. Bureau of Land Management, University of California Santa Cruz, and County of Monterey will be improved and managed to increase habitat for these and other special status species to mitigate for the loss of habitat on other lands at Fort Ord that will be made available for transfer to other agencies with a future development entitlement for destruction of special species habitat. Once the plan is signed and implemented by all participating parties to the HMP, the habitat within the CSU lands (and other parcels not required to maintain habitat long term for the HMP) may be developed and have the

habitat removed or disturbed.

b. The HMP describes the existing special status habitat and resources present within the Property. A map, found at enclosure 2 to the HMP, describes those areas within the Property that have presently undeveloped lands having natural habitat important for these species that need to be managed as INTERIM HABITAT AREAS. These areas do not include all areas of special status plant habitat, and exclude the habitat within 150 feet of the existing housing areas.

c. The areas described on enclosure 2 will not be developed or subjected to ground or vegetation disturbing activities. Non vehicular traffic will be allowed. Motorized vehicles will be prohibited from entering the areas. No roads, firebreaks, buildings or other construction will be allowed to take place on these interim habitat areas until the HMP is fully implemented. In the event that the HMP is not implemented in a timely fashion and CSU desires to use some of these areas for development, the Army and CSU shall confer and if needed develop a strategy for CSU to provide for offsetting mitigation agreeable to the Army and FWS prior to being allowed to develop any of the interim habitat areas.

21. UNEXPLODED ORDNANCE. An archives search indicated that there was no history of ordnance activity being conducted on the CSU Phase I parcel. Other areas of Fort Ord have been used in the past for ordnance training and testing. Reuse of these areas may be restricted due to the presence of ordnance materials. CSU should exercise caution in any earth-moving activity. Should CSU discover any such material on the Property, it shall not attempt to remove or destroy it as it might be dangerous, but shall notify the local Police Department and the Provost Marshall at the Presidio of Monterey and competent U.S. Army Explosive Ordnance personnel will promptly be dispatched to dispose of the material properly.

22. ACCESS TO PROPERTY. Access requirements and access routes to and from the Property shall be coordinated with the Government until such time as security fences have been moved and access can be attained without entering the military complex portion of Fort Ord. Until such time as is mutually agreed by each party, accommodations for unrestricted ingress and egress to the Property shall be coordinated with and agreed to by the Commander of the Presidio of Monterey and CSU administrators.

g. Endangered Species

The Grantee acknowledges and agrees to implement the following provisions, as applicable, relative to endangered species:

- 1) The Property is within a Habitat Management Plan (HMP) Development Area. No resource conservation requirements are associated with the HMP for these parcels. However, small pockets of habitat may be preserved within and around the Property.
- 2) The Biological Opinion identified sensitive biological resources that may be salvaged for use in restoration activities within reserve areas, and allows for development of the Property.
- 3) The HMP does not exempt the Grantee from complying with environmental regulations enforced by Federal, State, or local agencies. These regulations could include obtaining the Endangered Species Act (ESA) (16 U.S.C. §§ 1531-1544 et seq.) Section 7 or Section 10(a) permits from the U.S. Fish and Wildlife Service (USFWS); complying with prohibitions against take of listed animals under ESA Section 9; complying with prohibitions against the removal of listed plants occurring on federal land or the destruction of listed plants in violation of any state laws; complying with measures for conservation of state-listed threatened and endangered species and other special-status species recognized by California Department of Fish and Game (DFG) under the California ESA, or California Environmental Quality Act (CEQA); and, complying with local land use regulations and restrictions.
- 4) The HMP serves as a management plan for both listed and candidate species, and is a prelisting agreement between the USFWS and the local jurisdiction for candidate species that may need to be listed because of circumstances occurring outside the area covered by the HMP.

5) Implementation of the HMP would be considered suitable mitigation for impacts to HMP species within HMP prevalent areas and would facilitate the USFWS procedures to authorize incidental take of these species by participating entities as required under ESA Section 10. No further mitigation will be required to allow development on the Property unless species other than HMP target species are proposed for listing or are listed.

6) The HMP does not authorize incidental take of any species listed as threatened or endangered under the ESA by entities acquiring land at the former Fort Ord. The USFWS has recommended that all nonfederal entities acquiring land at former Fort Ord apply for ESA Section 10(a)(1)(B) incidental take permits for the species covered in the HMP. The definition of "take" under the ESA includes to harass, harm, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Although the USFWS will not require further mitigation from entities that are in conformance with the HMP, those entities without incidental take authorization would be in violation of the ESA if any of their actions resulted in the take of a listed animal species. To apply for a Section 10 (a)(1)(B) incidental take permit, an entity must submit an application form (Form 3-200), a complete description of the activity sought to be authorized, the common and scientific names of the species sought to be covered by the permit, and a conservation plan (50 CFR 17.22 [b]).