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X

**Note to Recorder:**  
**Record against the real property**  
**located in Washington County,**  
**Utah described in Exhibit A.**

Recorded at the Request of  
Color Country Community Housing, Inc.

After recording mail to:  
Jenkins Ronnow Jensen & Bayles, LLP  
Attn: Bruce C. Jenkins  
902 North 1400 West, Suite B  
St. George, UT 84770

**DOC # 20080041141**

Restrictive Page 1 of 50  
Russell Shirts Washington County Recorder  
10/24/2008 03:47:42 PM Fee \$ 108.00  
By JENKINS BRUCE C



**FIRST AMENDED AND RESTATED  
DECLARATION OF COVENANTS, CONDITIONS AND  
RESTRICTIONS AND RESERVATION OF EASEMENTS  
FOR**

**RED HAWK AT SPRINGDALE HOMEOWNERS ASSOCIATION  
(A Mixed Income Planned Unit Development)**

FIRST AMENDED AND RESTATED  
DECLARATION OF COVENANTS, CONDITIONS AND  
RESTRICTIONS AND RESERVATION OF EASEMENTS  
FOR  
RED HAWK AT SPRINGDALE HOMEOWNERS ASSOCIATION

PREAMBLE

This First Amended and Restated Declaration of Covenants, Conditions and Restrictions and Reservations of Easements for Red Hawk Subdivision has been made by the Declarant pursuant to Section 15.3 of the original Declaration of Covenants, Conditions and Restrictions and Reservations of Easements for Red Hawk Subdivision and affects the following real property located in Washington County, State of Utah:

See Exhibit A attached hereto and incorporated herein.

This First Amended and Restated Declaration of Covenants, Conditions and Restrictions and Reservations of Easements for Red Hawk Subdivision supercedes and replaces in its entirety the original Declaration of Covenants, Conditions and Restrictions and Reservations of Easements for Red Hawk Subdivision recorded in the records of the Washington County Recorder on the 24 day of January, 2008 as Document No. 20080003078.

The terms contained in this Preamble and the Recitals below, which are hereafter defined in Article I, shall be given the meaning assigned to them in Article I.

RECITALS

A. Color Country Community Housing, Inc., a Utah corporation, as Declarant, will develop the real property described in Exhibit A as a residential planned unit development.

B. Declarant has established or will establish Red Hawk at Springdale Homeowners Association and the Association will be vested with powers of owning, maintaining and administering the Common Area, administering and enforcing the covenants and restrictions pertaining to the Property, promulgating Rules and Regulations through its Board and Architectural Control Committee, and collecting and disbursing the assessments and charges hereinafter created.

C. The Declarant intends that the Property shall be maintained, developed and conveyed pursuant to a general plan for the Property and subject to certain protective covenants, easements, equitable servitudes, liens and charges, all running with the Property as hereinafter set forth.

D. The Declarant hereby declares that all of the Property shall be maintained, held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the following easements, restrictions, reservations, rights, covenants, conditions and equitable servitudes, all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Property, in furtherance of a general plan for the protection, maintenance, subdivision, improvement, and sale of the Property or any portion thereof. The covenants, conditions, restrictions, rights, reservations, easements, and equitable servitudes set forth herein shall run with and burden the Property and shall be binding upon all persons having or acquiring any right, title, or interest in the Property, or any part thereof, their heirs, successors and assigns; shall inure to the benefit of every portion of the Property and any interest therein; and shall inure to the benefit of and be binding upon and may be enforced by Declarant, the Association, as hereinafter defined, each owner and their respective heirs, executors and administrators, and successors and assigns.

E. Declarant intends to develop the Property as mixed income housing pursuant to that certain Moderate Income Housing Development Agreement entered into by and between Declarant and the Town of Springdale.

F. The Property and surrounding lands may currently be, and at times in the past, been inhabited by the desert tortoise, a threatened reptile species protected under the Endangered Species Act (16 U.S.C. 1531, et. seq.). The Property has been identified as a designated "incidental take" area under the Washington County HCP which allows for development of the Property (need to site Washington County HCP). Nevertheless, upon completion of the development, desert tortoises will be free to roam the Property and Owners must take all appropriate measures to protect the desert tortoise such as, by way of example and not limitation, to not handle, touch or engage in any interaction that could change the behavior or habitat of the desert tortoise, taking any desert tortoises as pets, taking desert tortoises off of the land, selling or transporting desert tortoises in any way shape or form and should one find an injured or deceased desert tortoise, the tortoise should not be touched in any way and the person should report it to the U.S. Fish & Wildlife Service or the Utah Division of Wildlife Resources, together with such other and further protections as are set forth in this Declaration. Notwithstanding the foregoing, if a person finds a tortoise in harms way, then the person should carefully move the tortoise out of harms way. A letter dated October 20, 2004 and reinitiated on May 8, 2008 from the United States Department of Interior, Fish and Wildlife Service, Utah Field Office setting forth a biological opinion on the desert tortoise and the Property are attached hereto collectively as Exhibit B.

G. These Recitals shall be deemed covenants as well as recitals.

## ARTICLE I

#### DEFINITIONS

Unless otherwise expressly provided, the following words and phrases when used herein shall have the meanings hereinafter specified.

1.1 ACC. ACC shall mean the Architectural Control Committee created pursuant to Article VIII hereof.

1.2 ACC Rules and Regulations. ACC Rules and Regulations shall mean such rules and regulations as may be adopted and promulgated by the ACC pursuant to Sections 8.1 and 8.4 hereof as such rules and regulations may be amended from time to time.

1.3 Annual Assessment. Annual Assessment shall mean the annual charge against each Owner and his Lot, representing a portion of the Common Expenses, which are to be paid by each Owner to the Association in the manner and proportions provided herein.

1.4 Articles. Articles shall mean the Articles of Incorporation of the Association filed in the office of the Department of Commerce of the State of Utah, as such Articles may be amended from time to time.

1.5 Association. Association shall mean RED HAWK AT SPRINGDALE HOMEOWNERS ASSOCIATION, a corporation formed under the Nonprofit Corporation Law of the State of Utah, its successors and assigns.

1.6 Beneficiary. Beneficiary shall mean a mortgagee under a mortgage or a beneficiary under a deed of trust, as the case may be, and the assignees of such mortgagee or beneficiary.

1.7 Board. Board shall mean the Board of Directors of the Association, elected pursuant to the Bylaws of the Association.

1.8 Budget. Budget shall mean a written, itemized estimate of the expenses to be incurred by the Association in performing its functions under this Declaration.

1.9 Bylaws. Bylaws shall mean the Bylaws of the Association, as adopted by the Board, as such Bylaws may be amended by the Board from time to time.

1.10 Corrective Assessments. Corrective Assessments shall mean a charge against a particular Owner and his Lot representing the costs to the Association for corrective action set forth in Sections 2.8, 9.1, and 14.9, Article XI, and as otherwise provided for herein.

1.11 Common Area and Limited Common Area. Common Area means that portion of property owned by the Association, shown on the Plat as dedicated to the common use and enjoyment of the Owners and all improvements constructed thereon. Limited Common Area means that portion of the property owned by the Association shown on the Plat as dedicated to the exclusive use and enjoyment of the Owner of the Lot to which such Limited Common Area is adjacent and/or appurtenant. The Owner is responsible for the repair, replacement and maintenance of the Limited Common Area.

1.12 Common Expenses. Common Expenses shall mean those expenses for which the Association is responsible under this Declaration, including the actual and estimated costs of: maintenance, management, operation, repair, replacement and improvement of the Common Area; costs of management and administration of the Association, including, but not limited to, compensation paid by the Association to managers, accountants, attorneys and other employees; the costs of all utilities, certain landscaping and Improvements on the Common Area, gardening, against the Property, or portions thereof; and the costs of any other items incurred by the Association for any reason whatsoever, in connection with the Property, for the benefit of all of the Owners.

1.13 Declarant. Declarant shall mean Color Country Community Housing Inc., a Utah corporation, its successors and any Person to which it shall have assigned any rights hereunder, except that a party acquiring all or substantially all of the right, title and interest of Declarant, in the Property by foreclosure, judicial sale, bankruptcy proceedings, or by other similar involuntary transfer, shall automatically be deemed a successor and assignee under this Declaration.

1.14 Deed of Trust. Deed of Trust shall mean a mortgage or a deed of trust as the case may be.

1.15 Development. Development shall mean RED HAWK SUBDIVISION according to the Plat.

1.16 Dwelling Unit. Dwelling Unit shall mean a single family dwelling, with or without walls or roofs in common with other single family dwelling. Dwelling Unit includes fee title to the real property lying directly beneath the single family dwelling, within Lot boundary lines.

1.17 Fiscal Year. Fiscal Year shall mean the fiscal accounting and reporting period of the Association selected by the Board from time to time.

1.18 Improvement. Improvement shall mean any structure or appurtenance thereto of every type and kind, including but not limited to Dwelling Units and other buildings, walkways, sprinkler pipes, swimming pools, athletic fields or areas, garages, roads, driveways, parking areas, fences, screening walls, block walls, retaining walls, stairs, decks, landscaping,

ponds, antennae, hedges, wind-breaks, patio covers, railings, plantings, planted trees and shrubs, poles, signs, storage areas, exterior air conditioning and water-softening fixtures or equipment.

1.19 Lot. Each Lot is owned in fee simple by the Owner. Lots shall be designated on the Plat.

1.20 Manager. Manager shall mean the Person appointed by the Association, if any, hereunder as its agent and delegated certain duties, powers or functions of the Association as further provided in this Declaration and in the Bylaws.

1.21 Member, Membership. Member shall mean any Person holding a membership in the Association, as provided in this Declaration. Membership shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations contained in this Declaration and the Articles, Bylaws and Rules and Regulations.

1.22 Mortgage, Mortgagee, Mortgagor. Mortgage shall mean any Recorded first mortgage or first deed of trust. The term "Deed of Trust" or "Trust Deed" when used herein shall be synonymous with the term "Mortgage." The term Mortgagee shall mean a person or entity to whom a Mortgage is made and shall include the beneficiary of a Deed of Trust. Mortgagor shall mean a Person who mortgages his, her, or its Lot to another (i.e., the maker of a Mortgage), and shall include the Trustor of a Deed of Trust. The term "Trustor" shall be synonymous with the term "Mortgagor," and the term "Beneficiary" shall be synonymous with the term "Mortgagee."

1.23 Notice of Members Meeting. Notice of meetings of the Members required or provided for in this Declaration shall be in writing, shall satisfy the notice requirements set forth in the Bylaws, and may be delivered either personally or by first class or registered mail. Notice of Members Meetings shall be delivered at least ten (10) days but not more than thirty (30) days prior to the date of the meeting of the Members. Notwithstanding the foregoing, notice given by other means shall be deemed fair and reasonable if given in accordance with the Utah Revised Nonprofit Corporation Act.

1.24 Owner. Owner shall mean the Person or Persons, including Declarant, who is the owner of record (in the office of the County Recorder of Washington County, Utah) of a fee simple or an undivided fee simple interest in a Lot. Notwithstanding any applicable theory relating to a Mortgage, the term Owner shall not mean or include a Mortgagee unless and until such party has acquired title pursuant to foreclosure or any arrangement or proceeding in lieu thereof.

1.25 Person. Person shall mean a natural individual or any other entity with the legal right to hold title to real property.

1.26. Plat. Plat shall mean the "RED HAWK SUBDIVISION" Plat executed and acknowledged by Declarant, prepared and certified by Pratt Precision Engineering, recorded in the records of the Washington County Recorder, as the same has been modified and amended. The Plat may show multiple family housing (apartments) but they shall not be governed or bound by this Declaration.

1.27. Property or Project. Property or Project shall mean the Red Hawk Subdivision described in the Plat.

1.28. Record, Recorded, Filed or Recordation. Record, Recorded, Filed or Recordation shall mean, with respect to any document, the recordation of such document in the office of the County Recorder of Washington County, Utah.

1.29. Rules and Regulations. Rules and Regulations shall mean rules and regulations as may be adopted and promulgated by the Board pursuant to the Bylaws and this Declaration, as the Board deems necessary or desirable (i) to aid it in administering the affairs of the Association, (ii) to insure that the Property is maintained and used in a manner consistent with the interests of the Owners, (iii) to regulate the use of the Common Areas and to regulate the personal conduct of the Members and their guests thereon, and (iv) to establish penalties for the infractions thereof, as such rules and regulations may be amended from time to time.

1.30. Recreational Vehicles. Recreational Vehicles shall mean all watercraft, travel trailers, campers, camper shells, tent trailers, motorhomes, snowmobiles, all-terrain-vehicles and off-highway-vehicles (ATVs and OHVs, respectively), dune buggies, or devices similar to any of the foregoing.

1.31. Special Assessments. Special Assessments shall mean a charge against each Owner and his Lot, representing a portion of the costs to the Association of defraying any extraordinary expenses incurred or special projects approved as set forth in Article VI.

1.32. Streets. Streets shall mean public streets and thoroughfares on the Property.

1.33. Vehicle. Vehicle shall mean any and all equipment or device (mobile or immobile, operable or inoperable) of any type, designed to transport persons, objects -- or are designed to be transported on wheels, skids, skis or tracks-- including, without limitation, dump trucks, cement mixer trucks, gas trucks, delivery trucks, buses, aircraft, trailers, Recreational Vehicles, minivans, cars, pickup trucks, motorcycles, other devices or equipment similar to any of the foregoing, whether or not used for daily transportation.

## ARTICLE IA

### DESCRIPTION OF PROPERTY

The real property which is associated with the Development and which has been and shall hereafter continue to be held, transferred, sold, conveyed and occupied subject to the provisions of this Declaration consists of all the property described in Exhibit A hereto; TOGETHER WITH all easements, rights-of-way, and other appurtenances and rights incident to, appurtenant to, or accompanying the described parcel of real property.

ALL OF THE FOREGOING IS SUBJECT TO: All liens for current and future taxes, assessments, and charges imposed or levied by governmental or quasi-governmental authorities; all patent reservations and exclusions; any mineral reservations of record and rights incident thereto; all instruments of record which effect the above-described land or any portion thereof, including without limitation, any Mortgage; all visible easements and rights-of-way; all easements and rights-of-way of record; any easements, rights-of-way, encroachments, or discrepancies otherwise existing; an easement for each and every pipe, line, cable, wire, utility line, or similar facility which traverses or partially occupies the above-described land at such time as construction of all Development improvements is complete; and all easements necessary for ingress to, egress from, maintenance of, and replacement of all such pipes, line, cables, wires, utility lines, and similar facilities.

## ARTICLE II

### OWNERS' PROPERTY RIGHTS

2.1 Common Area. The Common Area shall consist of certain landscaping strips as marked on the Plat.

2.2 Form For Conveyancing. Any deed, lease, mortgage, deed of trust, or other instrument conveying or encumbering title to a Lot shall describe the interest or estate involved substantially as follows:

All of Lot \_\_\_\_\_ of RED HAWK at Springdale SUBDIVISION, according to the official Plat thereof, subject to the Declaration of Conditions, Covenants and Restrictions and Reservation of Easements, on file in the office of the Washington County Recorder.

Whether or not the description employed in any such instrument is in the above-specified form, however, all provisions of this Declaration shall be binding upon and shall inure to the benefit of any party who acquires any interest in a Lot.

2.3 Transfer of Title to Common Area. Declarant represents that it will, on or prior to the first conveyance of a Lot, convey to the Association title to all Common Area, and Declarant further agrees that it will discharge all liens and encumbrances on said Common Area on or before the sale and close of escrow of the last Lot.



2.4 Limitations on Common Area Easement. An Owner's right and easement of use and enjoyment concerning the Common Area shall be subject to the following:

(a) Subject to the provisions of Article XIII of this Declaration, the right of the Association to dedicate or transfer all or any part of the Common Area to any public agency or authority for such purposes and subject to such conditions as may be agreed to by the Association. Any such dedication or transfer must, however, upon Notice of Members Meeting be assented to by two-thirds (2/3) of the vote of the Membership which Members present in person or by proxy are entitled to cast at a meeting duly called for the purpose. The quorum requirement for such meeting shall be as set forth in the Bylaws.

(b) The right of the Association, to be exercised by the Board, to reconstruct, replace or refinish any Improvement or portion thereof upon the Common Area in accordance with the original design, finish or standard of construction of such Improvement;

(c) The right of the Association to replace destroyed trees or other vegetation and plant trees, shrubs and ground cover upon any portion of the Common Area;

(d) The right of the Association, to be exercised by the Board, to reasonably restrict access to portions of the Common Area; and

(e) The easements in Sections 2.5, 2.7, 2.9 and 2.12.

2.5 Easements for Public Service Use. In addition to the foregoing easements over the Common Area, there shall be and Declarant hereby reserves and covenants for itself and all future owners within the Property, easements for public services of the Town of Springdale in which the Property are located, including but not limited to, the right of the police and fire departments to enter upon any part of the Common Area for the purpose of carrying out their official duties.

2.6 Waiver. No owner may exempt himself from personal liability for assessments duly levied by the Association nor release the Lot or other property owned by him from the liens and charges hereof. All owners waive any right to object to, and by accepting a deed consent Declarant amending the Plat to create additional lots.

2.7 Easements for Water and Utility Purposes. In addition to the foregoing easements over the Common Area, there shall be and Declarant hereby reserves and covenants for itself and all future Owners within the Property, easements for public and private utility

purposes. The Lots shall also be subject to such public utility easements as shown on the Plat and as required by the City of Washington.

2.8 Taxes. Each Owner shall execute such instruments and take such action as may reasonably be specified by the Board to obtain separate real estate tax assessment of each Lot. If any taxes or assessments may, in the opinion of the Board, become a lien on the Common Area, or any part thereof, they may be paid by the Association as a Common Expense, and the Association may levy against the Lot as a Corrective Assessment any amounts paid by the Association to rectify the problem.

2.9 Easement for Encroachments. If any portion of a Dwelling Unit or other Improvement is constructed by Declarant with the approval of Springdale Town, or if any portion of a Dwelling Unit or other Improvement reconstructed so as to substantially duplicate the Dwelling Unit or other Improvement originally constructed by Declarant, encroaches upon the Common Areas, as a result of the construction, reconstruction, repair, shifting, settlement or movement of any portion of the Property, a valid easement for the encroachment and for the maintenance of the same shall exist so long as the encroachment exists.

2.10 Landscaping of Common Area. Only plants native to the Property or surrounding area may be utilized in landscaping the Common Area and any landscaping shall be installed in such a manner to destroy desert tortoise habitat.

2.11 Trails on the Common Area. The Association may designate a trail through the Common Area to be used for pedestrian and bicycle usage to minimize impact on desert tortoise habitat. Only plants native to the Property or surrounding area may be utilized in landscaping the Common Area and any landscaping shall be installed in such a manner as to destroy desert tortoise habitat. Within the Common Area all dogs should be leashed as to minimize any harm or "take" to the desert tortoise habitat and to the desert tortoises.

2.12 Conservation Easement over Common Area. If requested by the Town of Springdale for protection of the desert tortoise, the Association shall grant to the Town of Springdale a conservation easement over and across the Common Area.

### ARTICLE III

#### RED HAWK AT SPRINGDALE HOMEOWNERS ASSOCIATION

3.1 Organization of Association. Declarant has caused or will cause the Association to be organized and the Articles filed with the State of Utah, Department of Commerce, Division of Corporations and Commercial Code.

3.2 Parties and Powers. The Association shall have such duties and powers as set forth in the Articles, Bylaws, and this Declaration (and such other powers and duties as

properly delegated or assigned through the Rules and Regulations), as such documents are amended from time to time.

3.3 Membership. Every Owner shall be a Member of the Association. Membership in the Association shall be mandatory and shall be appurtenant to the Owner's Lot.

3.4 Transfer. Membership in the Association is nontransferable and shall not be separated from the Lot to which it appertains.

3.5 Obligation to Educate Members on Tortoise Protection. The Association shall have the obligation at each and every annual meeting of the Members to educate the Members on the needs of the desert tortoise and how to minimize adverse impacts upon the tortoise.

#### ARTICLE IV

##### VOTING RIGHTS

4.1 Vote Distribution. The Association shall have the following two classes of voting membership:

(a) Class A. Class A Members shall be all the Owners. Class A Members shall be entitled to one vote for each Lot which the interest required for Membership, in the Association is held. In no event, however, shall more than one Class A vote exist with respect to any Lot.

(b) Class B. The Class B member is the Declarant. The Class B member is entitled to three (3) votes for each Lot owned. The Class B membership will cease and be converted to Class A membership on the happening of either of the following events, whichever occurs earlier:

- (i) upon conveyance of seventy-five percent (75%) of the Lots subject to this Declaration to purchasers; or
- (ii) the expiration of seven (7) years from the first Lot conveyance to a purchaser; or
- (iii) the voluntary surrender of Class B voting rights evidenced in writing.

4.2 Multiple Ownership. In the event there is more than one Owner of a particular Lot, the vote relating to such Lot shall be exercised as such Owners may determine among themselves. A vote cast at any Association meeting by any of such Owners, whether in person or by proxy, shall be conclusively presumed to be the vote attributable to the Lot concerned,

unless an objection is immediately made by another Owner of the same Lot. In the event such an objection is made, the vote involved shall not be counted for any purpose whatsoever, other than to determine whether a quorum exists.

#### ARTICLE V

##### JURISDICTION OF ASSOCIATION

The Association has been organized to provide for the operation, maintenance, preservation and architectural control of the Property and Improvements, to administer the Common Areas of the Association, and to reasonably regulate the Members of the Association. The Association shall have jurisdiction and authority over the Property and the Members of the Association to the full extent allowed by law and also as provided for in this Declaration and in the Articles, Bylaws, and Rules and Regulations, as such documents may be modified from time to time.

#### ARTICLE VI

##### COVENANT FOR ASSESSMENTS

6.1 Creation of Assessment Obligation. Each Owner of any Lot by acceptance of a deed therefore, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association (1) Annual Assessments for Common Expenses, (2) Special Assessments, (3) Corrective Assessments, and (4) any other amount or assessment levied by the Board pursuant to this Declaration; all such assessments to be established and collected as provided in this Declaration. The Association shall not levy or collect any Annual Assessment, Special Assessment or Corrective Assessment that exceeds the amount necessary for the purpose or purposes for which it is levied. All such assessments, together with interest, costs and reasonable attorneys' fees for the collection thereof, shall be charge on the Lot and shall be a continuing lien upon the Lot against which such assessment is made. Each such assessment, together with interest, costs and reasonable attorneys' fees, if applicable, shall also be and remain the personal obligation of the Person who was the Owner of such property at the time when the assessment fell due. This personal obligation cannot be avoided by abandonment of a Lot or by an offer to waive use of the Common Area. The personal obligation for delinquent assessments liability shall not pass to any new Owner ("Purchaser") successors in title unless expressly assumed by such Purchaser. For the purpose of assessment, the term "Owner" shall exclude the Declarant, builder, contractor, investor, or other person or entity who purchases a Lot for the purpose of constructing improvements thereon for resale to an Owner, who shall pay no assessment unless a unit constructed on a Lot is occupied for a permanent residence, provided that the Declarant or its assigns shall have the obligation to subsidize the Association until control of the Association passes to the Owners. Subsidization shall be defined as the payment of the reasonable cash needs of the Association for ordinary and necessary maintenance expenses (not including reserves or capital replacement). The determination of the reasonable cash needs

for ordinary and necessary maintenance expenses shall be within the sole discretion of the Board and Declarant shall have no liability to the Association if subsequent Boards shall disagree with the determination of the Board which made such determination. In no event, however, shall the subsidy exceed the monthly assessments.

6.2 Purpose of Annual and Special Assessments. The Annual and Special Assessments levied by the Association shall be used exclusively to promote the common health, safety, benefit and welfare of the Owners and for the improvement and maintenance of the Common Area, including establishing and funding a reserve to cover major repair or replacement of Improvements within the common Area and any expense necessary or desirable to enable the Association to perform or fulfill its obligations, functions, or purposes under this Declaration or its Articles.

6.3 Annual Assessments. Annual Assessments shall be used to satisfy Common Expenses of the Association, as provided herein and in the Bylaws. The initial Annual Assessment shall be \_\_\_\_\_ (\$ \_\_\_\_\_), payable in such installment payments as determined by the Board. The Annual Assessment shall be based upon the Budget prepared by the Board. The Common Expenses of the Association, and therefore the Annual Assessment, may increase because of, among other reasons, Common Facilities constructed in the sole discretion of Declarant. Nothing herein shall obligate Declarant to construct any Common Facilities.

6.4 Special Assessments. In addition to the Annual Assessment, a Special Assessment can be assessed to pay the costs of repair, replacement and maintenance of the Common Area.

6.5 Uniform Rate of Assessment. Annual Assessments and Special Assessments imposed pursuant to subsections 6.2, 6.3, and 6.4(a) and (b) of this Declaration shall be assessed equally and uniformly against all Owners and their Lots.

6.6 Date of Commencement of Annual Assessments. The Board shall authorize and levy the amount of the Annual Assessment upon each Lot, as provided herein, by a majority vote of the Board. Annual Assessments shall commence on all Lots on the first day of the first calendar month following the first Close of Escrow for the sale of a Lot in the Property. The first Annual Assessment shall be adjusted according to the number of months remaining in the Fiscal Year as set forth in the Bylaws. The Board shall fix the amount of the Annual Assessment against each Lot at least thirty (30) days in advance of each Annual Assessment period. Written notice of any change in the amount of any Annual Assessment shall be sent to every owner subject thereto, not less than thirty (30) days prior to the effective date of such change. The due dates shall be established by the Board. The Association shall, upon demand, and for a reasonable charge, furnish a certificate signed by an officer or agent of the Association, setting forth whether the assessments on a specified Lot have been paid. A properly executed certificate of the Association as to the status of assessments against a Lot is binding upon the

Association as of the date of its issuance.

6.7 Corrective Assessments. In addition to the Annual Assessment and any Special Assessments, the Association may levy Corrective Assessments against a particular Owner and his Lot to pay the following: costs directly attributable to, or reimbursable by, that Owner, equal to the costs incurred by the Association for corrective action, performed pursuant to the provisions of this Declaration, including without limitation Sections 2.8, 9.1, 14.9, and Article XI, plus interest and other charges on such Corrective Assessments.

The Board shall deliver a Notice of Noncompliance by the Board and Right to Hearing to the Owner upon whom it intends to levy a Corrective Assessment. Corrective Assessments shall be due and payable within (45) days following delivery of Notice of Board Adjudication and shall bear interest thereafter at the rate of eighteen percent (18%) per annum until paid in full.

6.8 Exempt Property. The following property subject to this Declaration shall be exempt from the assessments herein:

- (a) All portions of the Property dedicated to and accepted by a local public authority; and
- (b) The Common Area owned by the Association in fee.

6.9 Notice of Members Meetings; Quorum Requirements for Special Assessments. Before any Special Assessment is levied, the Board shall deliver a Notice of Members Meeting. The quorum required for any action authorized by Section 6.4 shall be as follows: at the first meeting called, the presence of Members or of proxies entitled to cast fifty percent (50%) of all outstanding votes shall constitute a quorum. If a quorum is not present at any meeting another meeting may be called by the Board issuing a Notice of Members Meeting at which a quorum shall be one-half of the quorum which was required at such preceding meeting. No such subsequent meeting shall be held more than forty-five (45) days following such preceding meeting at which a quorum was not present.

6.10 Additional Assessments. In addition to the annual assessments, special assessments, and corrective assessments, the Association shall levy such additional assessments as may be necessary from time to time for the purpose of (i) maintaining the Common Areas if the Association fails to do so and; (ii) repairing and restoring the damage or disruption resulting to the Common Areas from the activities of the Town of Springdale in maintaining, repairing or replacing the City's utility lines and facilities thereon.

6.11 Preparation of Budget. The Board shall prepare a Budget to be presented to the Members at the annual meetings of the Members held as provided in the Bylaws.

6.12 Reserve Fund. The Board shall, on behalf of the Association, cause to be

funded through Annual Assessments or other periodic assessments an adequate reserve to cover the cost of reasonably predictable and necessary major repairs and replacement to the Common Areas.

## ARTICLE VII

### NONPAYMENT OF ASSESSMENTS; REMEDIES

7.1 Nonpayment of Assessments; Remedies: Pursuant to Utah Code Ann. §§ 57-8a-101, *et seq.* (2004), any assessment installment payment not paid when due shall, together with the hereinafter provided for interest and costs of collection, be, constitute, and remain a continuing lien on the Lot provided, however, that any such lien will be subordinate to the lien or equivalent security interest of any Mortgage on the Lot recorded prior to the date any such installment payment on assessments become due. If any installment payment on the assessment is not paid within thirty (30) days after the date on which it becomes due, the amount thereof shall bear interest from the date of delinquency at the rate of eighteen percent (18%) per annum plus a late payment service charge of Ten Dollars (\$10.00) if the assessment is not paid within ten (10) days of when it is due, or such larger amount as set by the Board, provided the charge does not exceed twenty-five percent (25%) of the amount of the installment payment, and the Association may, in its discretion, bring an action either against the Owner or to foreclose the lien against the Lot. Any judgment obtained by the Association and any foreclosure commenced shall include reasonable attorney fees, court costs, and each and every other expense incurred by the Association in enforcing its rights. If a monthly installment payment is not timely made, the Board may declare the entire Annual Assessment in default and accelerate the Annual Assessment and declare the entire amount of the Annual Assessment immediately due and owing.

7.2 Washington County Tax Collection. It is recognized that under the Charter the Association will own the Common Area and that it will be obligated to pay property taxes to Washington County. It is further recognized that each Owner of a Lot is a Member of the Association and as part of his assessment will be required to pay to the Association his pro rata share of such taxes. Notwithstanding anything to the contrary contained in this Charter, or otherwise, Washington County shall be, and is, authorized to collect such pro rata share (on an equal basis) of taxes directly from each Owner by inclusion of said share with the tax levied on each Lot. To the extent allowable, Washington County is hereby directed to do so. In the event that the assessor shall separately assess Common Areas to the Association, the Board may impose, in its discretion a Special Assessment to pay such taxes, or they may be incorporated into the Annual Assessment.

7.3 Lien. The Board may elect to file a claim of lien against the Lot of the delinquent Owner by Recording a notice ("Notice of Lien") setting forth (a) the amount of the claim or delinquency, (b) the interest and costs of collections which have accrued thereon, (c) the legal description of the Lot against which the lien is claimed, and (d) the name of the Owner

thereof. Such Notice of Lien shall be signed and acknowledged by an officer of the Association or duly authorized agent of the Association. The lien shall continue until the amounts secured thereby and all subsequently accruing amounts are fully paid or otherwise satisfied. When all amounts claimed under the Notice of Lien and all other costs and assessments which may have accrued subsequent to the Notice of Lien have been fully paid or satisfied, the Association shall execute and Record a notice releasing the lien upon payment by the Owner of a reasonable fee as fixed by the Board to cover the cost of preparing and recording the release of lien. Unless paid or otherwise satisfied, the lien may be foreclosed in a like manner as a mortgage or any other manner provided by law, including without limitation, a deed of trust as set forth in this Charter.

7.4 Trust Deed for Assessments: By acceptance of a deed for a Lot, each Owner as Trustor conveys and warrants to Trustee in trust for the Association as Beneficiary, with power of sale, the Owner's Lot and all Improvements thereon for the purpose of securing payment of all assessments (including basis of collection) provided for in this Charter. For purposes of this Section and Utah Code Ann. §§ 57-1-19, *et seq.*, as amended from time to time. The Trustee shall mean the attorney for the Association and the Association may provide notice and disclosure of the Trustee by recording an "Appointment of Trustee" on the records of the Washington County Recorder. Each Owner hereby also grants to the Association and Trustee all powers and rights of non-judicial trust deed foreclosure provided for in Utah Code Ann. §§ 57-1-19, *et seq.*

7.5 Perfection of Lien and Priority. Upon the recording of Notice of Lien by the Manager or Board, such lien constitutes a lien on the Lot Owner's interest in the property prior to all other liens and encumbrances, recorded or unrecorded, except:

- (a) tax and special assessment liens on the Lot in favor of any assessing lot or special improvement district; and
- (b) encumbrances on the interest of the Lot Owner:
  - (i) recorded prior to the date of the recording of Notice of Lien; and
  - (ii) that by law would be a lien prior to subsequently recorded encumbrances.

The Manager or Board may enforce the assessment lien by sale or foreclosure of the Owner's interest. The Manager or Board may bid at a sale or foreclosure and hold, lease, mortgage, or convey the Lot that is subject to the assessment lien.

7.6 Future Lease Payments. If the Owner of a Lot who is leasing the Lot fails to pay an assessment for more than sixty (60) days after the assessment is due, the Board, upon compliance with this Section, may demand that the tenant pay to the Association all future lease



payments due to the Owner, beginning with the next monthly or other periodic payment, until the amount due to the Association is paid. The Manager or Board shall give the Owner written notice of its intent to demand full payment from the tenant under this Section. The notice shall: (i) provide notice to the tenant that full payment of the remaining lease payments will begin with the next monthly or other periodic payment unless the assessment is received within the time period provided in the Charter, Bylaws, or Association Rules; (ii) state the amount of the assessment due, including any interest or late payment fee; (iii) state that any costs of collection, not to exceed One Hundred Fifty Dollars (\$150.00), and other assessments that become due may be added to the total amount due; and (iv) provide the requirements and rights described in this Section. If the Owner fails to pay the assessment due by the date specified in the notice, the Manager or Board may deliver written notice to the tenant that demands future payments due to the Owner be paid to the Association pursuant to this Section. The Manager or Board shall mail a copy of the notice to the Owner. The notice provided to the tenant under this Section shall state: (i) that due to the Owner's failure to pay the assessment within the time period allowed, the Owner has been notified of the intent of the Board to collect all lease payments due to the Association; (ii) that until notification by the Association that the assessment due, including any interest, collection cost, or late payment fee, has been paid, the tenant shall pay to the Association all future lease payments due to the Owner; and (iii) that payment by the tenant to the Association in compliance with this Section will not constitute a default under the terms of the lease agreement. If a tenant makes payments in compliance with this Section, the Owner may not initiate an action against the tenant. All funds paid to the Association pursuant to this Section shall be: (i) deposited in a separate account; and (ii) disbursed to the Association until the assessment due, together with any cost of administration which may not exceed Twenty-Five Dollars (\$25.00), is paid in full. Any remaining balance shall be paid to the Owner within five (5) business days after payment in full to the Association. Within five (5) business days after payment in full of the assessment, including any interest or late payment fee, the Manager or Board shall mail a copy of such notification to the Owner.

7.7 Statement of Account. The Manager or Board shall issue a written statement indicating any unpaid assessment with respect to a Lot covered by the request, upon the written request of any Owner, and payment of a reasonable fee not to exceed Ten Dollars (\$10.00). The written statement shall be binding in favor of any person who relies in good faith on the written statement upon the (i) remaining Owners; (ii) Manager; and (iii) Board. Unless the Manager or Board complies with such request within ten (10) days, any unpaid assessment that became due prior to the date the request was made is subordinate to a lien held by the person requesting the statement.

7.8 Payment by Encumbrancer. An encumbrancer holding a lien on a Lot may pay any unpaid assessment due with respect to the Lot. Upon such payment, the encumbrancer has a lien on the Lot for the amounts paid.

7.9 Cumulative Remedies. The assessment liens and the rights to foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies

which the Association and its assigns may have hereunder and by law, including a suit to recover a money judgment for unpaid assessments, as above provided.

7.10 Mortgage Protection. Notwithstanding all other provisions hereof, no lien created under this Article VII, nor any breach of this Charter, nor the enforcement of any provision hereof shall defeat or render invalid the rights of the Beneficiary under any Recorded first Deed of Trust (meaning any deed of trust with first priority over other deeds of trust) upon a Lot made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Lot by judicial foreclosure or by means of the powers set forth in such Deed of Trust or through a deed in lieu of foreclosure, such Lot shall remain subject to the Charter and the payment of all installments of Assessments accruing subsequent to the date such Beneficiary or other Person obtains title.

7.11 Rent After Foreclosure. In the event the Association takes title to a Dwelling Unit through foreclosure, the Board may elect to allow the occupant to remain in the Dwelling Unit and the occupant shall be required to pay a reasonable rental to the Association for the Dwelling Unit.

#### ARTICLE VIII

##### REVIEW AND APPROVAL PRIOR TO INITIAL CONSTRUCTION

8.1 Approval. Declarant, or its assignee as provided in the Moderate Income Housing Development Agreement with the Town of Springdale, Utah, shall construct all homes on the property. Construction plans and specifications for homes on the property are subject to Declarant's Moderate Income Housing Development Agreement with the Town of Springdale, Utah. No construction on any Lot shall begin and no Lot shall be modified except in accordance with an approved plan and Declarant's Moderate Income Housing Development Agreement with the Town of Springdale, Utah.

8.2 Standards. Declarant, subject to its Moderate Income Housing Development Agreement with the Town of Springdale, Utah, shall set standards for all aspects of the Lot visible from the outside, including without limitation the size and shape of the building, its roof, windows, doors, porches and other components, placement on the Lot, fences, drainage, paving and landscaping and all finish materials. Review shall include materials and color selection and selection and placement of any ornamentation or functional accessories, including but not limited to the following:

- (i) materials and color selection for the main building and any outbuilding (including roof, doors, windows and trim);
- (ii) driveways, walks, patios and other ground surface materials;
- (iii) antennas, satellite dishes or receivers, solar panels or other devices which are visible from outside the Lot;

- (iv) in keeping with the Endangered Species Act, lots that have open backyards allowing access by desert tortoises, will not be permitted to have water structures of any nature or kind;
- (v) privacy walls or other fences and gates;
- (vi) awnings, flower boxes, shelves, statues, or other outdoor ornamentation; and window coverings visible through the window;
- (vii) construction trailers or other trailers, temporary structures, tents, shacks, and sheds;
- (viii) signage of any type;
- (ix) permanent or semi-permanent play equipment, whether or not secured, such as tree houses, basketball hoops, skateboard ramps and swing sets; and
- (x) in all events, consideration must be given to the protection of the desert tortoise.

The listing of a category does not imply that such construction is permitted.

8.3 Modifications. All Dwelling Units constructed upon Lots within the Project shall retain their similar appearance, exterior building materials and landscaping (defined in Section 8.7 below). Accordingly, substantial modifications to a Dwelling Unit, surrounding Lot improvements or landscaping after completion of construction shall not be permitted except as stated herein. Minor modifications after completion of construction, or additions or changes to the approved plans during construction, may be permitted and must be reviewed and approved by Declarant prior to the commencement of any such work. However, review is not required to perform repairs or maintenance provided it is undertaken and completed with duplicates of the originally approved materials and colors. Significant new landscaping, grading and any removal or substantial pruning of trees or plants must be approved in advance by Declarant.

8.4 Review Procedure. The plans to be submitted for approval shall include (i) the construction plans and specifications, including all materials and colors, (ii) elevations of all proposed improvements (iii) proposed clearing, grading and landscaping, (iv) a foundation plan signed and stamped by an engineer licensed in the state of Utah, (v) a plot plan showing the location of the proposed Dwelling Unit on the lot, with setbacks from all lot-lines accurately measured and labeled on the plot plan, and (vi) all other items required by the Declarant and the Town of Springdale, Utah. All plans submitted for Dwelling Units within the Project shall be substantially the same in exterior appearance and surrounding Lot improvements, except that where appropriate some Dwelling Units may be constructed with basements. Plans must be drawn to scale. Plans and specifications for review shall be submitted in the form required by the Declarant and the Town of Springdale, Utah. Before the plans are approved and again just prior to commencement of construction, the area should be checked for the presence of desert tortoises by the Washington County HCP authorized biologist during the appropriate clearance windows (March 15 – May 15 and August 20 – October 20).

8.5 Review Fee. Each time plans are submitted, they must be accompanied by a \$50 nonrefundable review fee.

8.6 Basis For Decision. Applications shall be approved or denied based upon compliance with any specific requirements and overall design quality.

8.7 Landscaping. Declarant or its approved contractor shall complete all landscaping on each Lot within the Project within one (1) year following the completion of construction of a Dwelling Unit upon said Lot. Owners may select from a pre-approved list of landscaping features, including grass, trees, shrubs, organic ground cover, walks, patios, fences, gates and other similar landscaping features. Yard areas that are accessible by desert tortoises must keep vegetation in a natural state as much as possible. Further, all landscape plans must be approved by the U.S. Fish and Wildlife Service or the Utah Division of Resources.

## ARTICLE IX

### ARCHITECTURAL REVIEW AFTER INITIAL CONSTRUCTION

9.1 Members of Committee. The ACC shall consist of three (3) to five (5) members. The Board shall have the power to appoint and remove all of the members of the ACC. Persons appointed to the ACC by the Board need not be Members of the Association. If the ACC is not appointed, the Board itself shall perform the duties required of the ACC. Individual Board members may also serve as ACC members.

9.2 ACC General Powers. The ACC shall have the right and duty to promulgate reasonable standards against which to examine any request made pursuant to this Article, in order to ensure that the proposed Plans conform harmoniously to the exterior design and existing materials of the Improvements on the Property. This power shall include the power to issue ACC Rules and Regulations which, among other provisions, may set forth procedures for the submission of Plans for approval, and state additional factors which it will take into consideration in reviewing submissions.

9.3 Review of Plans and Specifications. After initial construction of a Dwelling Unit, the ACC shall consider and act upon any and all Plans and specifications submitted for its approval under this Declaration and perform such other duties as from time to time shall be assigned to it by the Board, including the inspection of construction in progress to assure its conformance with Plans and specifications approved by the ACC. No exterior construction, alteration, removal, relocation, repainting, demolition, addition, modification, or reconstruction of a Dwelling Unit or Improvement, including landscaping, in the Property shall be commenced or maintained, until the Plans and specifications therefore showing the nature, kind, shape, height, width, color, materials and location of the same shall have been submitted to the ACC (together with such fees for review and inspection as may be reasonably required by the

ACC) and approved in writing by the ACC. The ACC shall approve Plans and specifications submitted for its approval only if it deems that the construction, alterations or additions contemplated thereby in the locations indicated will not be detrimental to the appearance of the surrounding area or the Property as a whole or to the natural habitat of the desert tortoises in the area, that the appearance of any structure affected thereby will be in harmony with the surrounding structures, and that the construction thereof will not detract from the beauty, wholesomeness, natural habitat of the desert tortoises, and attractiveness of the Lots and the Common Area or the enjoyment thereof by the Members, and that the upkeep and maintenance thereof will not become a burden on the Association.

9.4 Meetings of the ACC. The ACC shall meet from time to time as necessary to perform its duties hereunder. The vote of a majority of the ACC, shall be sufficient to enact resolutions or motions of the ACC. The attendance of a majority of the members at any meeting shall constitute a quorum.

9.5 No Waiver of Future Approvals. The approval by the ACC of any proposals or Plans for any work done or proposed or in connection with any other matter requiring the approval and consent of the ACC, shall not be deemed to constitute a waiver of any right to withhold approval or consent as to any similar proposals, Plans or matters subsequently or additionally submitted for approval or consent.

9.6 Compensation of Members. The members of the ACC shall receive no compensation for services rendered, other than reimbursement for expenses incurred by them in the performance of their duties hereunder.

9.7 Limitation on Liability. Neither the ACC, the Board nor Declarant, nor any member thereof, acting in good faith shall be liable to the Association or to any owner for any damage, loss, or prejudice suffered or claimed on account of (i) the approval or rejection of, or the failure to approve or reject, any Plans, drawings, specifications, or variance requests (ii) the construction or performance of any work, whether or not pursuant to approved Plans, (iii) the development or manner of development of any of the Property, or (iv) any engineering or other defect in approved Plans, drawings and specifications.

9.8 Declarant's Rights. The Declarant shall not be required to comply with the provisions of this Article in the initial construction of the Property.

## ARTICLE X

### MAINTENANCE AND REPAIR OBLIGATIONS

10.1 Maintenance by Owner. It shall be the duty of each Owner, at his sole cost and expense, subject to the provisions of this Declaration requiring ACC Approval, to maintain, repair, replace and restore the Dwelling Unit, Limited Common Area, and Improvements located on his Lot, and to ensure that the Lot itself is maintained in a neat, sanitary and attractive condition. If any Owner shall permit any Dwelling Unit, Limited Common Area, or Improvement, the maintenance of which is the responsibility of such Owner, to fall into disrepair or to become unsafe for either other beings within the community or to the habitat of the desert tortoises to become unsightly or unattractive or to otherwise violate this Declaration, the Board shall have the right to seek any remedies at law or in equity which it may have. In addition, the Board shall have the right, but not the duty, to enter upon such Owner's Lot to perform such emergency and non-emergency repairs or maintenance as the Board deems appropriate and to charge the cost thereof to the Owner. Said cost shall be a Corrective Assessment enforceable as set forth in this Declaration. For non-emergency repairs or maintenance the Owner shall be entitled to Notice of Noncompliance by the Board and Right to Hearing.

10.2 Operation and Maintenance by Association. The Association shall provide for such maintenance and repair of the Common Areas as the Board determines is appropriate and necessary.

10.3 Mold. Whether or not you as an Owner experience mold growth depends to a great extent on how you manage and maintain your Dwelling Unit. You are hereby given notice to take all reasonable means to detect and prevent growth and infestation of mold and other similar agents. The Declarant will not be responsible for any damages, and as Owner you waive any claim to damages, caused by mold, or by some other agent, that may be associated with customary construction practices in the area, to include but not be limited to property damage, personal injury, loss of income, emotional distress, death, loss of use, loss of value, and adverse health effects, or any other effects or losses. Any implied warranties, including but not limited to an implied warranty of workmanlike construction, an implied warranty of habitability, an implied warranty of merchantability or an implied warranty of fitness for a particular purpose, are hereby waived and disclaimed by you as the Owner.

## ARTICLE XI

### BUILDING, USE AND OCCUPANCY

All real property within the Property shall be held, used and enjoyed subject to such limitations and restrictions set forth below:

11.1 Single Family Residence. The Lots into which the Property shall be divided shall be used only for single family residential dwellings. There shall be no multiple unit dwellings of any kind, including but not limited to basement apartments, duplexes or apartment buildings. No condominiums of any kind are allowed. No timesharing of any kind is allowed. Each Dwelling Unit shall be occupied only by a single family. No one shall be entitled to reside in a residence constructed on a Lot unless they are members of the immediate family therein residing, or are authorized foster children or wards. No boarding houses or other group housing for unrelated people of any kind is allowed, regardless of the method or structure of the occupancy arrangement.

11.2 Quiet Enjoyment. No noxious or offensive activity shall be conducted nor allowed to occur in or upon any part of the Property nor shall anything be done or placed in or upon the Property which is or may become a nuisance or may cause embarrassment, disturbance or annoyance to other Owners. Owners who desire to dry their laundry by hanging it outdoors must do so only in the rear yard of their Lot and must be obscure from the view of other property owners. No activity shall be conducted upon the Property, nor any improvements constructed thereon, which are or may become unsafe or hazardous to any person or property. Loud noise inconsistent with a residential environment is prohibited. It shall be forbidden for any person within the Subdivision to use or operate any radio, musical instrument, phonograph, television receiver, or other machine or device for the producing, reproducing or amplification of the human voice, or any other sound in such a manner as to (1) disturb, for that time of the day or night, the reasonable peace, quiet, and comfort of the occupants of neighboring Dwelling Units; or (2) create any loud or raucous noise level by such use or operation which is audible to the human ear during the hours of 9:00 p.m. to 7:00 a.m. of the following day, at a distance in excess of fifty (50') feet from the property line of the noise source.

11.3 Parking. No trailers, boats or other forms of recreational vehicles may be parked, kept or stored within the Subdivision unless they are kept within the garage. No automobiles may be parked on streets within the Subdivision.

11.4 Signs. No commercial signs of any kind shall be displayed to public view on any Lot, except that each Owner may display one sign of not more than five (5) square feet advertising the property for sale. Anything contained herein notwithstanding, Declarant may, during the course of development of the Property and sale of Lots, place attractive signs in excess of the five (5) square foot restriction as necessary to advertise the Property in conformity with Springdale Code Title 10, Chapter 24, as amended.

11.5 Animals. No animals, livestock or poultry of any kind shall be raised, bred or kept on the Property, or any Lot, excepting only household pets. For Lots 1 through 7, dogs may not exceed 60 pounds in weight. For Lots 8 through 15, there is no maximum weight limit for dogs. Dogs, cats and other household pets may not be kept for commercial purposes

and are restricted to the Owner's Lot or under the Owner's control by leash or similar restraint and Owner's must either have indoor pets or a Board approved enclosed run for pets. Pets must be leashed when not in an enclosed area.

11.6 Trash Receptacles. All such waste shall be kept at all times in appropriate sanitary containers. The garbage containers shall at all times be stored out of prominent view. Any building materials or construction materials shall be neatly stacked and kept upon the Property and shall not remain thereon for more the sixty (60) days following the completion or construction. All Lots shall be used and kept free from trash, rubbish, garbage or other waste, and the Property shall at all times be kept by the various Owners in an attractive manner.

11.7 Land Use; Zoning. All land use and all buildings constructed shall fully comply with all zoning, land-use, building, and other relevant ordinances, codes, and regulations applicable to the property, which include but are not limited to the land-use, zoning, and building ordinances of the State of Utah, of Washington County, and of the Town of Springdale. All grading shall be done so as to preserve or restore the drainage of the land and so as to comply with all flood control requirements of any applicable agency. All disturbance of the natural vegetation must be restored back to a natural like kind condition.

11.8 Subdivision. No Lot within the Property shall be further subdivided. No Owner shall further partition or subdivide his Lot or the rooms in the Dwelling Unit, including without limitation any division of his Lot into time-share estates, time-share uses, or creation of additional living quarters; provided, however, that this provision shall not be construed to limit the right of an Owner (1) to rent or lease his entire Lot to a single family by means of a written lease or rental agreement subject to the restrictions of this Declaration, so long as the Lot is not leased for transient or hotel purposes; (2) to sell his Lot; or (3) to transfer or sell any Lot to more than one person to be held by them as tenants-in-common, joint tenants, tenants by the entirety or some other form of joint ownership. The terms of any such lease or rental agreement shall be made expressly subject to this Declaration and the Bylaws of the Association. Any failure by the lessee of such Lot to comply with the terms of this Declaration, the Bylaws of the Association or the Rules and Regulations shall constitute a default under the lease or rental agreement.

11.9 Drainage. Easements for installation and maintenance of utilities and drainage are reserved as shown on the recorded plat. Within these easements, no structure shall be permitted to remain which may damage or interfere with the installation and maintenance of utilities. This easement area of each Lot shall be maintained continuously by the Owner except for those improvements for which a public or utility company is responsible.

11.10 Landscaping. All Owners agree that a major influence on property values is the appearance of each individual Lot within the Subdivision. All Lots shall be well maintained so as to present a quality appearance. The front and side yard landscaping shall be completed for each Lot by Declarant within one (1) year after the completion and/or occupancy of any Dwelling Unit on said Lot. At a minimum, all Lots shall be suitably planted, in grass, ground cover, flower beds, or low-water landscape materials (xeriscape), said planting to be



completed within one year of the completion of any building or structure on the Lot. Lot Owners shall maintain the landscape and control the growth of weeds on the entire Lot not covered by finished structure, concrete, or asphalt. Lots 1 – 7 must maintain and control growth of weeds with non-pesticide and non-herbicide methods. On such lots only mechanical removal of weeds by hand and shovel is allowed. Any plot that is forage for a desert tortoise is not a weed and shall not be removed.

11.11 Driveways. Driveways shall be constructed out of concrete, inlaid brick, or other hard materials approved by the Town of Springdale. Driveways consisting of cinders, sand, gravel, asphalt or dirt shall not be permitted on any Lot. Driveways shall be of a sufficient size that two (2) vehicles can park thereon side by side, and shall in all other respects conform to the Town of Springdale's requirements. Driveways shall be limited solely to providing a connection between the street and the garage area; no private lanes or streets traversing Lots shall be allowed.

11.12 Minimum Livable Area. All Dwelling Units within the Project shall be of the same principal design, floor plan and square footage, except that some Lots within the Project are situated to accommodate Dwelling Units that are constructed with a full basement. In such case, the main and second floors of these Dwelling Units shall be substantially similar to the other Dwelling Units in the Project that do not have basements. The finished ground-level living area of all Dwelling Units shall be not less than one thousand two hundred (1,200) square feet, excluding garages and outbuildings. Each Dwelling Unit shall also have a second story of at least three hundred seventy-five (375) square feet. In the event any Dwelling Unit within the Project is destroyed by any natural or unnatural cause, said Dwelling Unit shall be reconstructed of substantially the same materials and design so as to achieve its prior appearance and design. In order to maintain the integrity and continuity of the Project, all Dwelling Units within the Project shall be insured against risk of a total loss and provide for exact reconstruction in the event of a total loss.

11.13 Completion of Construction. Construction of any Dwelling Unit on a Lot in the Subdivision shall be completed within nine (9) months after the beginning of such construction, unless Declarant provides an extension for good cause shown. No Dwelling Unit constructed on any Lot in the Subdivision shall be occupied or used for residential purposes or human habitation until the Owner has received certification for occupancy by the appropriate governmental agencies.

11.14 Temporary Buildings. No temporary buildings, structures, or improvements of any kind shall ever be erected or maintained on any of the Lots within the Property. Provided, however, that in a reasonable manner during construction, a general or subcontractor shall be entitled to keep a temporary construction trailer or portable building on the Property.

11.15 Roofs. No Dwelling Unit may have a roof pitch of less than 5/12 pitch. Roofing material may be flat concrete tile, or bar tile, or of comparable or better masonry roofing

material. All Dwelling Units to be constructed or erected on any Lot shall conform with these covenants and be in harmony with external design with existing structures in the Subdivision.

11.16 Fenced Areas. The Project has been designed to retain an openness between Lots. Accordingly, fences shall not be constructed around the perimeter of any Lot; however, Declarant may designate as Limited Common Area an area that may be enclosed with a fence. Where allowed, no fence, wall or hedge higher than six (6) feet shall be erected or maintained on any Lot. Declarant may place fencing for desert tortoises on the property in a design and location approved by the U.S. Fish & Wildlife Service. Except as modified and further restricted herein, all fences or walls shall comply with existing municipal regulations, except that fences may not be constructed of vinyl, plastic or chain link.

11.17 Diseases and Insects. No Owner shall permit any thing or condition to exist upon any property within Red Hawk which shall induce, breed or harbor infectious plant diseases or noxious insects. No chemicals potentially harmful to the desert tortoises or to desert tortoise forage are to be used in lands adjacent to or lands accessible to desert tortoises.

11.18 Air-Conditioning Equipment. No heating, air conditioning or refrigeration equipment shall be placed, allowed or maintained anywhere other than on the ground unless screened or concealed (subject to required approvals by the Homeowner's Committee) in such manner that the screening or concealment thereof appears to be part of the integrated architectural design of the building and does not have the appearance of a separate piece of machinery fixtures or equipment.

11.19 Burning and Incinerators. No open fires or burning shall be permitted on any Lot at any time and no incinerators or like equipment shall be placed, allowed or maintained upon any Lot. The foregoing shall not be deemed to preclude the use, in customary fashion, of outdoor residential barbecues or grills.

11.20 FCC Policy.

(a) Types of Antennas. This Section applies only to antennas, masts and dishes (collectively antennas) listed in FCC Rules. All other antennas, except the ones requested by the FCC, are *prohibited without the approval of the ACC.*

(b) Location and Installation. If the antenna is one of the types now allowed under FCC Rules, the antenna must still comply with the following regulations:

(i) No antenna may encroach upon the Common Area or the property of another Owner.

(ii) An antenna must be placed on the backside of the roof (or in the attic) or screened in the backyard so no part of the antenna or satellite dish may be seen from the street in front of the Dwelling Unit, provided an acceptable signal quality may be received from such location.

- (iii) The antenna must be shielded from view from the street and neighboring Property to the maximum extent possible as long as an acceptable signal quality may be received. If necessary to shield the antenna from view, the Association may require that the antenna be shielded by reasonably priced landscaping that complies with the Association's landscape requirements.
- (iv) Antennas and any visible wiring must be painted to match the color of the structure to which they are installed, provided the painting does not interfere with acceptable quality signal and does not void the manufacturer's warranty.
- (v) The antenna must comply with all applicable city, county and state laws, regulations and codes. The Association must be provided with a copy of any applicable governmental permits and local codes.
- (vi) Installation must be pursuant to the manufacturer's instructions.
- (vii) In order to protect against personal injury and property damage, an antenna may not be placed in a location where it may come into contact with a power line.
- (viii) In order to protect against personal injury and property damage, all antennas must be properly grounded and secured.
- (ix) In order to protect against personal injury, antennas may not block or obstruct any driver's view of an intersection or street.
- (x) If the antenna is attached to a mast, the mast height shall be no higher than absolutely necessary to receive acceptable signal quality.

(c) Maintenance.

- (i) The Owner is responsible for all costs associated with the installation and maintenance of an antenna.
- (ii) The Owner is responsible for all damage caused by or connected with the antenna.
- (iii) The Owner must hold the Association harmless and indemnify the Association in the event that someone is injured by the antenna.
- (iv) The Owner shall keep the antenna in good repair so that it does not violate any portion of this Section.

(d) FCC Notice. The FCC Rules provide that a restriction will impair installation, maintenance, or use if it:

- (i) Causes unreasonable delay in installation;
- (ii) Unreasonably increases the cost of the equipment or its installation, maintenance, or use; or
- (iii) Precludes reception of an acceptable quality signal.

(e) Notification.

- (i) An Owner must complete the notification form attached as Exhibit B and submit a copy of the completed form to the Association within five (5) business days after installing an antenna allowed pursuant to this Section.
- (ii) If requested by the Association, the Owner must establish a mutually convenient time to meet with a representative of the Association to review and discuss the antenna.

(f) Enforcement.

- (i) In the event of a violation of this Section, the Association may bring an action for declaratory relief with the FCC or the Fifth District Court, Washington County, after notice and an opportunity to be heard. If the FCC or Court determines that this Section is enforceable, the Owner shall pay a \$50.00 fine to the Association for each violation. If the violation is not corrected within a reasonable length of time, additional fines of \$10.00 per day will be imposed for each day that the violation continues.
- (ii) If an antenna poses a serious, immediate safety hazard, the Association may seek injunctive relief to compel the removal of the antenna.
- (iii) The Association shall be entitled to recover its reasonable attorney's fees, costs and expenses incurred in the enforcement of this Section.

(g) Severability.

- (i) If any provision of this Section is ruled invalid, the remainder of this Section and the Declaration shall remain in full force and effect.
- (ii) If the FCC modifies its rules, the modified rules shall be incorporated into this Section as if fully set forth herein.

## ARTICLE XII

### DAMAGE AND CONDEMNATION

Damage to or destruction of all or any portion of the Common Area and condemnation of all or any portion of the Common Area shall be handled in the following manner:

(a) Each Member shall be liable to the Association for any damage to the Common Area or Improvement thereon sustained by reason of the negligence or willful misconduct of said Member. All expenses of fixing the damage may be levied by the Association as a Corrective Assessment.

(b) If at any time the Common Area, or any part thereof, shall be taken or condemned by any authority having the power of eminent domain, the Association shall represent the Lot Owners in these proceedings, negotiations, settlements or agreements. All compensation and damages shall be payable to the Association and shall be used

promptly by the Association to the extent necessary for restoring and replacing any Improvements on the remainder of the Common Area. Upon completion of such work and payment in full therefore, any proceeds of condemnation then or thereafter in the hands of the Association which are proceeds for the taking of any portion of the Common Area shall be disposed of in such manner as the Association shall reasonably determine.

#### ARTICLE XIII

##### INSURANCE

13.1 Insurance. The Association may secure liability and casualty insurance for the Common Area. The Association shall secure general liability insurance covering the Common Areas for at least \$500,000.00 per occurrence.

13.2 Fidelity Insurance. A fidelity policy or policies to protect against dishonest acts on the part of Board, officers, Manager, employees of the Association and all others (including volunteers) who handle or are responsible for handling funds of the Association. This fidelity coverage shall name the Association as the obligee or insured and shall be written in an amount sufficient to offer the protection reasonably required, but in no event less than one hundred percent (100%) of the Association's estimated annual operating expenses including reserves. The fidelity bond or insurance shall contain waivers of any defense based upon the exclusion of persons who serve without compensation from any definition of "employee" or similar expression. Said policy shall also provide that it may not be canceled or substantially modified (including cancellation for non-payment of premiums] without at least thirty (30) days prior written notice to all Mortgagees of Lots.

13.3 Lots and Dwelling Units Not Insured by Association. The Association shall have no duty or responsibility to procure or maintain any fire, liability, extended coverage or other insurance covering any Lot or Dwelling Unit on a Lot or any Improvement thereon erected by the Owner.

#### ARTICLE XIV

##### MORTGAGEE PROTECTION CLAUSE

Notwithstanding any other provision of this Declaration, the following provisions concerning the rights of first Mortgagees shall be in effect:

14.1 Preservation of Regulatory Structure and Insurance. Unless the holders of seventy-five percent (75%) of all first Mortgagees and seventy-five percent (75%) of the Lot Owners shall have given their prior written approval, the Association shall not be entitled:

(a) by act or omission to change, waive or abandon any scheme of regulations, or enforcement thereof, pertaining to the Architectural design of the exterior,

appearance of Dwelling Units, the exterior maintenance of Dwelling Units under certain conditions provided in Section 9.1, or the upkeep of the Common Area;

14.2 Notice of Meetings. The Association shall give to any first Mortgagee of a Lot requesting the same, notice of all meetings of the Association, and such first Mortgagee shall have the right to designate in writing a representative to attend all such meetings.

14.3 Right to Examine Association Records. Any first Mortgagee shall have the right to examine the books, records and audit financial statements of the Association.

14.4 Rights Upon Foreclosure of Mortgage. Each holder of a first Mortgage (or Deed of Trust) on a Lot and any purchaser from it who comes into possession of the Lot by virtue of foreclosure of the mortgage, or by deed or assignment in lieu of foreclosure, or pursuant to a power of sale or otherwise will take the Lot free of, and shall not be liable for any claims for unpaid assessments and charges against the Lot which accrue prior to the time such holder comes into possession of the Lot.

#### ARTICLE XV

#### GENERAL PROVISIONS

15.1 Enforcement. The restrictions set forth in this document shall operate as covenants running with the land for the benefit of the Town as set forth in Section 15.2 and any and all persons who now may own, or who may hereafter own, property in the Subdivision, and such persons are specifically given the right to enforce these restrictions through any proceeding, at law or in equity, against any person or persons violating or threatening to violate such restrictions and to recover any damages suffered by then from any violation thereof. In the event any enforcement action is necessary, the person or persons seeking enforcement shall be entitled to enjoin the violation of these covenants, and to recover any and all damages of any kind suffered by then because of the violation. In addition, the prevailing party in any action to enforce the Declaration shall be entitled to recover from the other all costs, attorney's fees and expenses incurred in the enforcement action.

15.2 Town's Rights to Enforce. Since the Subdivision and Project are part of an Affordable Housing Development in the Town and subject to a Moderate Income Housing Development Agreement between the Declarant and the Town, the Town shall have the right, in its sole discretion, to enforce these covenants, conditions and restrictions against any owner of property within the Project, including but not limited to the withholding of any permits required for development of any kind within the Project; however, the Town may not be compelled by any owner to so act, and the Town's failure to act in any specific instance shall not constitute a waiver of, nor enjoin it in the future from, its ability to enforce these covenants, conditions and restrictions.

15.3 Declarant's Right to Amend. The Declarant shall have the right to modify

these Restrictive Covenants, subject to its Moderate Income Housing Development Agreement with the Town, until all Lots in the Subdivision have been sold by the Declarant.

15.4 Amendment. Once all Lots in the Subdivision have been sold by the Declarant, The Declaration will remain in force, subject to amendment by a majority vote of three-fourths of the Lot Owners and approval by the Town of Springdale, Utah, pursuant to its development agreement with Declarant. The Amendment shall not be enforceable or effective until an instrument is recorded in the Washington County Recorder's office indicating that a vote has been duly and properly taken on the proposed amendment, that it has been approved by the requisite percentage of Owners within the Subdivision and the Town, and is signed and acknowledged by each Owner and the Town in favor of the modification.

15.5 Votes. Any vote, approval or other action specified herein to be taken by the Owners which requires a specified percentage shall be calculated on the basis of one vote for each Lot within the Subdivision.

15.6 Severability. Invalidation of any provision of this Declaration by judgment or court order shall in no way affect any other provisions which shall remain in full force and effect.

15.7 Interpretation. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development of a residential community and for the maintenance of the Common Area. The article and section headings have been inserted for convenience only, and shall not be considered or referred to in resolving questions of interpretation or construction. Unless the context requires a contrary construction, the singular shall include the plural and the plural the singular; and the masculine, feminine and neuter shall each include the masculine, feminine and neuter.

15.8 Notice. Any notice, including without limitation Notice of a violation of this Declaration, the Bylaws, or any Rules and Regulations of the Association, permitted or required to be delivered as provided herein shall be fair and reasonable if given in writing and may be delivered either personally or by first class or registered mail. If delivery is made by mail, it shall be deemed to have been delivered three (3) business days after a copy of the same has been deposited in the United States mail, postage prepaid, addressed to any person at the address given by such person to the Association for the purpose of service of such notice, or to the residence of such person if no address has been given to the Association. Such address may be changed from time to time by notice in writing to the Association. Notwithstanding the foregoing, notice given by other means shall be deemed fair and reasonable if given in accordance with the Utah Revised Nonprofit Corporation Act.

15.9 Manager. The Association may carry out through a Manager any of its functions which are properly the subject of delegation. Any Manager so engaged may be an independent contractor or an agent or employee of the Association. Such Manager shall be responsible for managing the Property for the benefit of the Association and the Owners, and

shall, to the extent permitted by law and the terms of a management agreement with the Association, be authorized to perform any of the functions or acts required or permitted to be performed by the Association itself.

15.10 Terms of Management Agreement. Any agreement for professional management of the Development, or any other contract providing for services of the Declarant, sponsor, or builder, may not exceed three (3) years. Any such agreement must provide for termination by either party without cause and without payment of termination fee on not more than ninety (90) but not less than thirty (30) days written notice.

15.11 Rules and Regulations. The Board shall have the authority to promulgate and adopt Rules and Regulations as the Board deems necessary or desirable (i) to aid it in administering the affairs of the Association, (ii) to insure that the Property are maintained and used in a manner consistent with the interests of the Owners, (iii) to regulate the use of the Common Areas and to regulate the personal conduct of the Members and their guests thereon, and (iv) to establish penalties and fines for the infractions of any Rules and Regulations, this Declaration, or the Bylaws. Fines levied may be assessed as a Corrective Assessment against the Lot.

IN WITNESS WHEREOF, Declarant executed this Declaration on the 24<sup>th</sup> day of October, 2008.

DECLARANT:

COLOR COUNTRY COMMUNITY HOUSING  
INC.

By: 

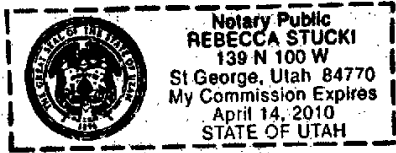
Its:

STATE OF UTAH, )  
 )  
 ) ss.  
County of Washington. )

On this 24<sup>th</sup> day of October, 2008, personally appeared before me C. Ty Tipples, who being personally known to me (or satisfactorily proved to me), and who being by me duly sworn did say that he/she is the Executive Director of COLOR COUNTRY COMMUNITY HOUSING, INC., a Utah corporation, and that he executed the foregoing



Declaration on behalf said corporation being authorized and empowered to do so by the bylaws of said Corporation or resolution of its Directors and he/she acknowledged before me that such Corporation executed the same for the uses and purposes stated therein.



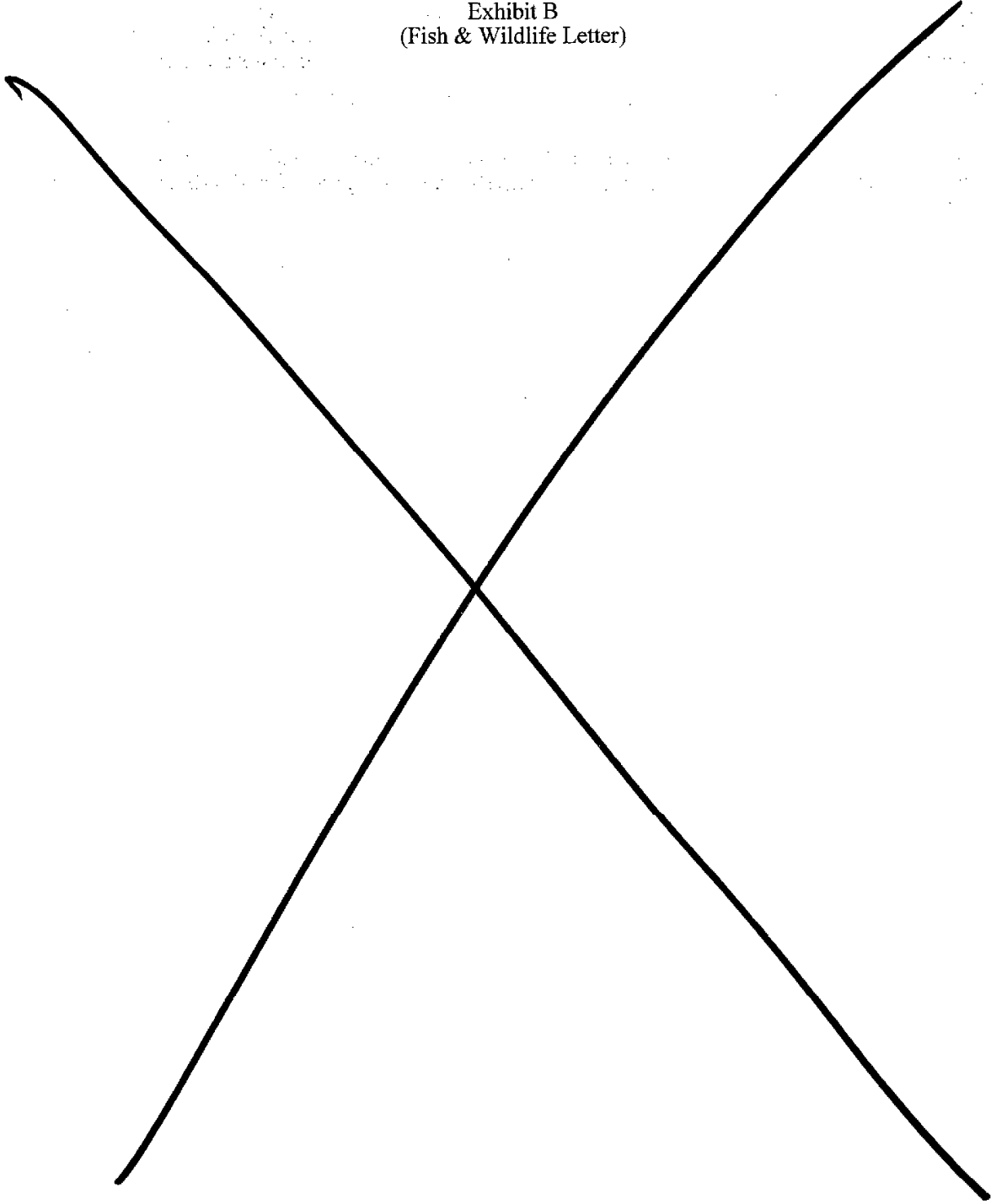
  
Notary Public

Exhibit A.  
(Legal Description)

All of lots 1-15, and the common areas, of Redhawk at Springdale subdivision according to the official plat thereof on file in the records of the Washington County Recorder

S-RDHK-1, Redhawk amended  
S-RDHK-2, Redhawk amended  
S-RDHK-3, Redhawk amended  
S-RDHK-4, Redhawk amended  
S-RDHK-5, Redhawk amended  
S-RDHK-6, Redhawk amended  
S-RDHK-7, Redhawk amended  
S-RDHK-8, Redhawk amended  
S-RDHK-9, Redhawk amended  
S-RDHK-10, Redhawk amended  
S-RDHK-11, Redhawk amended  
S-RDHK-12, Redhawk amended  
S-RDHK-13, Redhawk amended  
S-RDHK-14, Redhawk amended  
S-RDHK-15, Redhawk amended

Exhibit B  
(Fish & Wildlife Letter)



## PROJECT FILE



### United States Department of the Interior FISH AND WILDLIFE SERVICE

UTAH FIELD OFFICE  
2369 WEST ORTON CIRCLE, SUITE 50  
WEST VALLEY CITY, UTAH 84119

SURNAME

In Reply Refer To  
6-UT-04-F-011

October 20, 2004

Howard Kutzer  
Housing and Urban Development  
1670 Broadway  
Denver, CO 80202-4801

RE: Biological Opinion for the Color County Community Housing Project Located in  
Springdale, Utah

Dear Mr. Kutzer:

This document transmits the U.S. Fish and Wildlife Service's (Service's) biological opinion based on our review of the Color County Community Housing project located in Springdale, Utah and its effects on desert tortoises in accordance with section 7 of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 et seq.). Your request for formal consultation was received on March 24, 2004.

This biological opinion is based on information provided in your September 29, 2003 letter; the December 4, 2003 meeting and field investigations; a March 22, 2004 Biological Assessment (BA) and other sources of information.

The proposed project will take place entirely in Washington County, Utah on private lands authorized for development by the Washington County HCP with federal funds provided by Housing and Urban Development (HUD). The Washington County HCP enables incidental take of desert tortoise associated with otherwise lawful activities such as development. The proposed project is located within identified "take" area of the HCP. This project is receiving federal funds through HUD which require compliance with section 7 of the Act.

Based on HUDs BA and associated correspondence outlining potential impacts to threatened or endangered species, we concur with the finding of not likely to adversely affect for bald eagle (*Haliaeetus leucocephalus*), southwestern willow flycatcher (*Empidonax traillii extimus*), Holmgren milkvetch (*Astragalus holmgreniorum*), and Shivwits milkvetch (*Astragalus ampullarioides*).

HUD has determined that the proposed action may adversely affect Mojave desert tortoise, a federally threatened species. Based on surveys completed by Washing County HCP administration on November 17, 2003, no burrow or dens were found in the project area. However, 2 dens were found on an adjacent parcel of land owned by Springdale City and

tortoises are known to occupy Zion National Park which is in close proximity to the project area. While no part of this project occurs in designated critical habitat for the desert tortoise, animals may utilize parts of the project lands during the active season. As a result, the Service is issuing this biological opinion with an Incidental Take Statement, reasonable and prudent measures, and terms and conditions.

#### **Consultation History**

On September 29, 2003 the Service was contacted by HUD with a no effect determination for desert tortoise. The proposed project is located within "take" areas identified in the Washington County HCP which allows for incidental take of desert tortoise as a result of otherwise lawful activities. As such, the Service would not concur with the no effect determination until HUD had shown compliance with the clearance criteria identified in the Washington County HCP. Upon discussions with Washington County Administration and the project proponent, it was determined that fewer long term impacts would occur to this population of tortoises with minor adjustments to the clearance criteria. Due to these modifications to the clearance protocol, HUD initiated formal consultation with the Service on March 22, 2004.

### **BIOLOGICAL OPINION**

#### **Description of the Proposed Action**

The proposed project consists of the development of 20 affordable housing units on private property in Springdale, Utah. The project is located adjacent to lands owned by the City and Zion National Park. The project area will be fenced off with tortoise proof fence prior to the active season. During the clearance window identified in the Washington County HCP, qualified biologists will clear the project lands in accordance with approved clearance protocol. However, instead of removing animals located on the project site to the Temporary Care Facility, any animals found will be located to the other side of the fence until development is completed. Upon completion of the development, the fences will be removed and tortoises will be free to utilize the project area.

#### **Applicant Committed Measures Designed to Lessen Environmental Impacts**

- The applicant will minimize development disturbance and restrict envelope size to 70 feet by 70 feet.
- The applicant will utilize native vegetation in all landscape efforts associated with this development.
- The applicant will utilize covenants and restrictions control dog size and discourage off leash.

- The applicant will grant a conservation easement to the City of Springdale on remaining undeveloped land for open space purposes.
- The applicant will promote an education program to residents on the needs and impacts of desert tortoise.
- The applicant will incorporate a designated trail through the area.

**Status of the Species/Critical Habitat**

*Species Description and Life History*

The desert tortoise is a large, herbivorous reptile that is generally active when annual plants are most common (spring, early summer, autumn). Desert tortoises usually spend the remainder of the year in sheltered sites, escaping the extreme weather conditions of the desert. Sheltering habits of desert tortoises vary greatly in different geographic locations. Shelter sites may be located under bushes, in the banks or beds of washes, in rock outcrops, or in caliche caves. Burrows function primarily as thermoregulatory aids and may also serve to help in water conservation and protection from predators. Burrow sites may be located under bushes, in the banks or beds of washes, in rock outcrops, or in caliche caves. The size of desert tortoise home ranges varies with respect to location and year. Females have long-term home ranges that are approximately half that of the average male, which range from 25 to 200 acres (Berry 1986).

The range of the Mojave population of the desert tortoise includes a portion of the Mojave Desert and the Colorado Desert subdivision of the Sonoran Desert and spans portions of four States. The Mojave Desert is located in southern California, southern Nevada, northwestern Arizona, and southwestern Utah. It is bordered on the north by the Great Basin Desert, on the west by the Sierra Nevada and Tehachapi Ranges, on the south by the San Gabriel and San Bernardino Mountains and the Colorado Desert, and on the east by the Grand Wash Cliffs and Hualapai Mountains of Arizona. In Utah, the native range of this species is generally restricted to Washington County below approximately 1,330 meters elevation (4,000 feet).

The desert tortoise is most commonly found within the desert scrub vegetation type, primarily in creosote bush scrub vegetation, but also in succulent scrub, cheesebush scrub, blackbush scrub, hopsage scrub, shadscale scrub, microphyll woodland, and Mojave saltbush-allscale scrub (Service 1994). Within these vegetation types, desert tortoises potentially can survive and reproduce where their basic habitat requirements are met. These requirements include a sufficient amount and quality of forage species; shelter sites for protection from predators and environmental extremes; suitable substrates for burrowing, nesting, and overwintering; various plants for shelter; and adequate area for movement, dispersal, and gene flow. Throughout most of the Mojave region, tortoises occur most commonly on gently sloping terrain with soils ranging

from sand to sandy-gravel and with scattered shrubs, and where there is abundant inter-shrub space for growth of herbaceous plants. Throughout their range, however, tortoises can be found in steeper, rockier areas. Tortoises are considered active from February 15 through October 31.

The desert tortoise is threatened by numerous factors, most of which are human-caused. These factors include destruction, degradation, and fragmentation of desert tortoise habitat resulting from habitat conversion to urban or agricultural development, construction of roads, mining, sheep and cattle grazing, and other activities; direct mortality or removal of animals from populations due to collecting, road kills, vandalism, etc.; and mortality due to an upper respiratory tract disease (URTD), particularly in the western Mojave Desert (Service 1994). Fire is an increasingly important threat to desert tortoise habitat. Over 500,000 acres of desert lands burned in the Mojave Desert in the 1980s, and these types of fires continued to occur on a grand scale throughout the 1990s. Fires in Mojave Desert scrub degrade or eliminate habitat for desert tortoises (Appendix D of Service 1994).

Further information on the range, biology, and ecology of the desert tortoise can be found in Luckenbach (1982), Turner et al. (1984), Weinstein et al. (1987), Ernst et al. (1994), various papers by J.R. Spotila and others in *Herpetological Monographs* (June 30, 1994), various papers in Bury and Germano (eds.)(1994), and Service (1994).

#### *Analysis of the Species & Critical Habitat to be Affected*

The project area does not occur within designated critical habitat therefore, none will be affected. However, the project is in close proximity to Zion National Park where a small isolated population of tortoises exists. Within 10 miles of the project area is the Upper Virgin River CHU. This recovery unit is the smallest of the six Recovery Areas designated for Mojave desert tortoise recovery. Most of the critical habitat within this Unit is intensely managed as the Red Cliffs Desert Reserve established as the primary mitigation measure for the 1996 issuance of an Endangered Species Act section 10(a)(1)(B) incidental take permit. Along its southern boundary, where proximity to urban development is highest, most of the unit is fenced and vehicular access by the public is restricted to paved roads. Grazing has functionally been eliminated; law enforcement patrols have been increased; and research and non-motorized recreation have been restricted. Overall, tortoise habitat in the Reserve (in which most of the CHU is found) is in moderate to good condition. Some areas are severely degraded, but the condition of most of the habitat is good. Utah Division of Wildlife Resources (Division) 2003 tortoise population monitoring has shown a decline of 45% in zone 3 of the Reserve. These declines are believed to be the result of upper respiratory disease brought on by increased stress due to drought. Declines in the population have not been noted elsewhere in Washington County.

### **Environmental Baseline**

The project area does not contain critical habitat for the desert tortoise. Surveys conducted in November 2003, March of 2004 and October 2004 by Washington County HCP administration found no burrows within the project area. It is however, adjacent to a small, isolated population of desert tortoise which exists within Zion National Park. According to population surveys completed by the Park in 2003, there is a population of 14 animals with a confidence interval of 12 to 26 animals in the Park (Kim et al 2003). These animals also have access to adjacent private lands some of which are identified as the project area. Other private land within the surrounding area has been identified as "take" areas of the Washington County HCP and will likely be developed in the future. As these private lands adjacent to the Park are cleared under the HCP, the Park population is at risk of continually losing animals through clearances. Therefore, the most imminent threat to this isolated population is the continual removal of animals through clearances.

### **Effects of the Action**

Although the proposed action will disturb 5 acres of desert tortoise habitat, it is habitat that has been identified as "take" in the Washington County HCP and is not designated critical habitat. The proposed action is however, located in close proximity to Zion National Park which hosts a small population of desert tortoise which the Park would like to maintain. Therefore, rather than completing a clearance of the project lands as per the HCP, the project lands will be temporarily fenced during construction and tortoises will be placed outside the construction area. Upon completion of the project, tortoises will be allowed to return to the area. While the risk of "take" of tortoises during construction will be avoided, the potential to take a tortoise during daily lawful activities through crushing with vehicles, take by dogs, poaching by humans etc. will still exist. However, it is believed that this risk is preferable to permanently removing these animals from the already small Park population.

### **Cumulative Effects**

Although there are no known reasonably foreseeable nonfederal actions, there are additional "take" lands adjacent to this project which could be cleared as per the HCP. The loss of these lands as well as the animals have been analyzed through section 7 on the issuance of the 10(a)(1)(B) permit and were not significant.

### **Conclusion**

After reviewing the current status of the Mojave desert tortoise, the environmental baseline for the action area, the effects of the proposed action and the cumulative effects, it is the Service's biological opinion that construction of the Color County Community Housing Project is not likely to jeopardize the continued existence of the Mojave desert tortoise in the Upper Virgin River Recovery Unit, nor is it likely to destroy or adversely modify designated critical habitat.



The Service reached this conclusion based on the following reasons:

- (1) The proposed project does not occur in Critical Habitat.
- (2) The proposed project will be fenced during construction and animals moved out of harms way but allowed access to the area post construction.

#### **INCIDENTAL TAKE STATEMENT**

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are non-discretionary, and must be undertaken by the Bureau so that they become binding conditions of any grant or permit issued to Color Country Community Housing and its contractors, as appropriate, for the exemption in section 7(o)(2) to apply. The Bureau has a continuing duty to regulate the activity covered by this incidental take statement. If the Bureau (1) fails to assume and implement the terms and conditions or (2) fails to require (CCCH) or its contractors to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, (CCCH) must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. [50 CFR §402.14(I)(3)]. Due to the unique nature of the manner in which the tortoise reserve and Upper Virgin River Recovery Unit are managed under the HCP, Washington County HCP staff (Dr. Bill Mader, Lori Rose, or Justin Neighbor) may fulfill HUD obligations outlined herein to the extent that both the HUD and the County agree that is appropriate.

**Amount or Extent of Take Anticipated**

Based on information provided in the BA and discussion with the Washington County Biologist, and Zion National Park biologist, Shannon Kim, the following amount of take can be anticipated:

1. Up to two (2) desert tortoises may be taken via direct harassment by the proposed action (e.g., moved out of harm's way).
2. Three (3) desert tortoise may be taken via mortality (e.g., crushed by vehicles, killed by dogs) after construction through occupation of residents.
3. An unknown number of desert tortoises may be taken indirectly in the form of harm or harassment through increased noise associated with occupation of the land by residents.

**Effect of the Take**

In the accompanying biological opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

**Reasonable and Prudent Measures**

The Service believes that the following reasonable and prudent measures are necessary and appropriate to minimize the incidental take of desert tortoises authorized by this biological opinion.

1. Measures shall be implemented to prevent injury or death of desert tortoise by any project-related activity.
2. Measures shall be taken to ensure compliance with the reasonable and prudent measures, terms and conditions, reporting requirements, and reinitiation requirements contained in this biological opinion.

**Terms and Conditions**

In order to be exempt from the prohibitions of section 9 of the Act, HUD and the Color County Community Housing must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are non-discretionary.

To implement reasonable and prudent measure number 1, the following terms and conditions shall be implemented:

- a) HUD and Color County Community Housing shall jointly designate an individual as a field contact representative who will be responsible for overseeing compliance with terms

and conditions contained in this biological opinion, and providing coordination with the Service during construction.

- b) Prior to construction, before the clearance window opens on March 15, a tortoise proof fence will be installed. The fence will be monitored regularly during construction to ensure that it is functioning properly.
- d) If desert tortoises are found on the project area, Washington County HCP administration will be contacted immediately. All surveys, required handling, and burrow excavation and construction shall be conducted following the protocol described in *Guidelines for Handling Desert Tortoises During Construction Projects* (Desert Tortoise Council, 1994 revised 1999).

To implement reasonable and prudent measure number 2, the following term and condition shall be implemented:

Within 30 days of project completion within desert tortoise habitat, the project proponent shall submit copies of a compliance report to Utah Ecological Services Field Office, U.S. Fish and Wildlife Service. This compliance report will include 1) number of desert tortoises seen (including locations, dates, and times); 2) numbers of desert tortoises moved, and the distance they were moved (including locations, dates, times, and who moved them); 3) number of desert tortoises taken, which includes capture and displacement, death, injury, and harassed by other means, during construction of the project.

The Service believes that no more than the following will be incidentally taken as a result of the proposed action:

- 1. Two (2) desert tortoises via direct harassment (e.g., moved out of harm's);
- 2. Three (3) desert tortoise may be taken via crushing etc.;
- 3. An unknown number of desert tortoises indirectly in the form of indirect harm or harassment.

The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize the impact of incidental take that might otherwise result from the proposed action. If, during the course of the action, this level of incidental take is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided. HUD must immediately provide an explanation of

the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

#### **REPORTING REQUIREMENTS**

Upon locating a dead or injured desert tortoise, initial notification must be made within one business day to the Service's Division of Law Enforcement in Cedar City, Utah at telephone (435) 865-0861, the Service's Ecological Services Office at telephone (801) 975-3330, and the St. George Office of the Utah Division of Wildlife Resources at telephone (435) 688-1426.

Instructions for proper handling and disposition of such specimens will be issued by the Service's Division of Law Enforcement consistent with the provisions of the Incidental Take Statement. Care must be taken in handling sick or injured animals to ensure effective treatment, care, and handling of dead specimens to preserve biological material in the best possible state.

#### **REINITIATION STATEMENT**

This concludes formal consultation on the proposed affordable housing project in Springdale, Utah. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: 1) the amount or extent of incidental take is exceeded; 2) new information reveals effects of the agency action that may impact listed species or critical habitat in a manner or to an extent not considered in this opinion, 3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion, or 4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

We appreciate your interest in conserving endangered species. If further assistance is needed or you have any questions, please contact Elise Boeke, at (801) 975-3330 extension 123.

Sincerely,

**ORIGINAL SIGNED**

Henry R. Maddux  
Utah Field Supervisor

cc: Native Species Biologist, Utah Division of Wildlife Resources, 344 East Sunland #8, St. George, Utah 84790

Administrator, Washington County HCP, 197 East Tabernacle, St. George, Utah 84770

Special Agent, USFWS Division of Law Enforcement, P.O. Box 917, Cedar City, Utah 8721

Cheryl Elliot, DCED, 324 South State, 5<sup>th</sup> floor, Salt Lake City, UT 84111

Elaine Murphy, Grants-Pro Consulting, P.O. Box 4693, Leeds, UT 84746-0903

bcc: Project file  
Reading file

BOEKE/tsb:10/20/04

File: *Formal Files* 10-UT-04-F-011

Z:\Finalized Letters\TSB\USDA\Hud\2004\Boeke\ColorCountyBO.doc

**LITURATURE CITED**

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United States Department of the Interior  
FISH AND WILDLIFE SERVICE

UTAH FIELD OFFICE  
2369 WEST ORTON CIRCLE, SUITE 50  
WEST VALLEY CITY, UTAH 84119

In Reply Refer To

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6-UT-04-F-011  
65411-2008-F-0044

May 28, 2008

Howard Kutzer  
Housing and Urban Development  
1670 Broadway  
Denver, Colorado 80202-4801

RE: Biological Opinion Re-initiation - Redhawk Housing Development Color Country  
Housing

This document transmits the Fish and Wildlife Service's (Service) Amendment to the 6-UT-04-F-0011 Biological Opinion of October 20, 2004. The purpose of this amendment is to update the project description and the terms and conditions of the construction activities. In the issued Biological Opinion, under "Applicant Committed Measures Designed to Lessen Environmental Impacts", the project proponent stated, "The applicant will minimize development disturbance and restrict envelope size to 70 feet by 70 feet" to minimize impacts to surrounding vegetation and habitat loss for the Mojave desert tortoises (*Gopherus agassizii*) in the area. On September 12, 2007, a site visit determined that the project description of "70 feet by 70 feet" construction envelope was not being maintained. In addition, native vegetation surrounding construction areas was not being left undisturbed as described in the minimization measures and the number of structures being constructed increased (permanent habitat loss increasing from 2.2 acres to 6.44 acres). The original biological opinion and impacts analysis were not based on the current project description and therefore require amendment.

The Service contacted Cheryl Elliott, Environmental Specialist for Housing and Urban Development (HUD), to notify her that the project was not in compliance with the Biological Opinion because the project description on which the 2004 formal consultation was based had changed. The change in project description was resulting in more adverse impacts to Mojave Desert tortoise (*Gopherus agassizii*) habitat than was originally analyzed. Due to these changes, Section 7 formal consultation has been re-initiated to amend the Biological Opinion issued in 2004.

Project Description

The proposed project area is approximately 10 acres in Springdale, Washington County, Utah. This project aims to provide affordable housing in an increasingly cost-prohibitive housing market. Development plans have changed since the Biological Opinion of October 24, 2004. Originally, 20 affordable housing units were planned for the area. New project development has changed to include construction of 24 apartment units which include 4 buildings and a small community building on 2.2 acres and 15 single family houses on 7.2 acres. The building disturbance envelopes were originally planned to be 70 feet by 70 feet but have been changed to 90 feet by 90 feet to encompass the additional impacts of the construction. Therefore, the permanent loss of tortoise habitat has gone from 2.25 acres of permanent loss from the housing structures to approximately 6.44 acres.

Originally, the "Applicant Committed Measures Designed to Lessen Environmental Impacts" included:

- a) The applicant will minimize development disturbance and restrict envelope size to 70 feet by 70 feet.
- b) The applicant will utilize native vegetation in all landscape efforts associated with this development.
- c) The applicant will utilize covenants and restrictions to control dog size and discourage off-leash dogs.
- d) The applicant will grant a conservation easement to the City of Springdale on remaining undeveloped land for open space purposes.
- e) The applicant will promote an education program to residents on the needs and impacts of desert tortoises.
- f) The applicant will incorporate a designated trail through the area.

Given that the vegetation surrounding the development has not been entirely maintained in keeping with the intent of the original Biological Opinion and the number of housing structures has increased, the permanent desert tortoise habitat loss has increased substantially. Originally, the project was going to have minimal impact on the desert tortoise habitat surrounding the housing envelopes, thereby justifying the continued access to tortoises after the development was completed. The availability of the remaining, undisturbed habitat around the houses was determined to be a benefit that outweighed the disadvantage/potentially harmful access to parked cars and the open road.

After a meeting on-site, January 25, 2008, between Service and Color Country Housing, a new plan was devised to minimize the loss of desert tortoise access to habitat (see Attachment A). Temporary tortoise fencing is currently in place and will be replaced by permanent tortoise proof fencing behind lots, 8, 9, and 10.



On the west side of the cul-de-sac, the backyards will be left open to tortoises and the side yards will have tortoise-proof fencing connecting them. A step-over trail gate will be constructed between lots 7 and 8. From the south side of lot 7, fencing will link to lot 6. Fencing between lot 6 and 5 will be closer to the road (where there is steeper topography) to allow tortoise access to that area. Fencing will link lot 5 and lot 4 by being placed partially on top of a retaining wall behind lot 4. From lot 4, the fencing will go straight to lot 2 (going behind lot 3 because the good habitat is well behind lot 3). There would be another retaining wall behind lot 2 due to the steep terrain. The final location of the end of the fencing will be approved by the Service and details included in a post-project report for administrative records. Fencing will be installed behind lot 11 at the toe of the slope (on northeast side) and end behind the beginning of lot 12 (east side). No fencing will be required around the remaining lots due to the distance from contiguous, undisturbed desert tortoise habitat.

The only "Applicant Committed Measures Designed to Lessen Environmental Impacts" that has changed is "a" which now specifies a 90 foot by 90 foot development and disturbance envelope. In keeping with the rest of the "Applicant Committed Measures Designed to Lessen Environmental Impacts", the Covenants, Conditions and Restrictions (CCRs) have been developed and approved by the Service (Attachment B).

We believe that the Reasonable and Prudent Measures and Terms and Conditions of the October 20, 2004 Color Country Community Housing Project Biological Opinion are still sufficient to minimize effects of the proposed activities and the incidental take statement is still applicable. We have attached the 2004 Biological Opinion (Appendix 1) for your convenience.

We appreciate HUD's continued interest in conserving endangered species, and your staff's ongoing efforts to develop and implement these conservation measures. If further assistance is needed or you have any questions, please contact Renee Chi or Laura Romin, 801-975-3330 at extensions 135 and 142.

Sincerely,



Larry Crist  
Utah Field Supervisor

#### Attachments

Cc: Native Species Biologist, Utah Division of Wildlife Resources, 344 East Sunland #8, St. George, Utah 84790

Administrator, Washington County HCP, 197 East Tabernacle, St. George, Utah 84770  
Special Agent, USFWS Division of Law Enforcement, P.O. Box 917, Cedar City, Utah 84721

Cheryl Elliot, DCED, 324 South State, 5<sup>th</sup> Floor, Salt Lake City, UT 84111

Tracy Dudson, Color Country Community Housing, Inc., 139 North 100 West,  
St. George, UT 84770

ATTACHMENT A

