Staff Summary Report

Tempe

Council Meeting Date: 12/13/07 **Agenda Item Number:** 28

SUBJECT: A Resolution approving and authorizing the Mayor to sign a Safe Harbor Agreement under the Endangered Species Act with the U.S. Fish and Wildlife Service for the Tempe and U.S. Army Corps of Engineers Habitat Restoration in the Rio Salado Project Area and the existing LoPiano Habitat

DOCUMENT NAME: 20071213cacc03 **RIO SALADO MASTER PLAN (0112-07-03)** Resolution No. 2007.106

SUPPORTING DOCS: None

COMMENTS: The agreement covers 159 acres of enhanced habitat, and identifies an additional 132 acres of existing and future private development land adjacent to the habitat.

PREPARED BY: Nancy Ryan, Rio Salado Project Manager, 350-8096

REVIEWED BY: Chris Salomone, Community Development Manager, 350-8294
Jeff Kulaga, Interim Assistant City Manager, 350-8844

LEGAL REVIEW BY: Charlotte Benson, Senior Assistant City Attorney, 350-2813

FISCAL NOTE: N/A

RECOMMENDATION: Authorize the City of Tempe to enter into the Safe Harbor Agreement with the U.S. Fish and Wildlife Service to cover Rio Salado habitat enhancement under the Endangered Species Act.

ADDITIONAL INFO: The Safe Harbor program encourages conservation efforts by non-Federal landowners while providing them certainty that future property use restrictions will not be imposed if their efforts attract federally protected species. In return for voluntary conservation commitments, the Agreement provides the City assurances allowing future modification of the enrolled property back to its original baseline conditions.

The Tempe City Council approved Resolution No. 2006.51 on July 6, 2006, authorizing the City's participation in a Safe Harbor Agreement. After the Mayor signed the Agreement, the U.S. Fish & Wildlife Service published notice of its proposed action in the Federal Register. Based on comments received and on changes in the status of certain species, the Agreement was modified in terms of acreage and species covered. The revised Safe Harbor Agreement now requires the Council's approval.

RESOLUTION NO. 2007.106

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, APPROVING AND AUTHORIZING THE MAYOR TO SIGN A SAFE HARBOR AGREEMENT WITH THE U.S. FISH AND WILDLIFE SERVICE.

WHEREAS, the City has entered into an agreement with the U.S. Army Corps of Engineers to develop wildlife habitat in the Salt River from the downstream dam of Tempe Town Lake to the Priest Road Bridge, and from McClintock Drive to the upstream dam of Tempe Town Lake; and

WHEREAS, the City has developed upland habitat north of the Red Mountain freeway between Rural Road and Mill Avenue, known as the LoPiano Bosque; and

WHEREAS, the habitat areas are designed to attract wildlife that could include endangered or threatened species that are protected by the Endangered Species Act; and

WHEREAS, the City and the U.S. Fish and Wildlife Service agree that it will benefit both parties to maintain the wildlife habitat while providing that future property-use restrictions will not be imposed if the enhanced habitat attracts certain threatened or endangered species, specifically the Yuma clapper rail or the southwestern willow flycatcher.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

That the Mayor is authorized to execute the Safe Harbor Agreement with the U.S. Fish and Wildlife Service, and any other documents necessary to implement this resolution.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this _____ day of _____, 2007.

_____
MAYOR

ATTEST:

_____
CITY CLERK

APPROVED AS TO FORM:

_____
CITY ATTORNEY

Safe Harbor Agreement with The City Of Tempe For Voluntary Enhancement/Restoration Activities Benefiting the Yuma Clapper Rail, Southwestern Willow Flycatcher, and Bald Eagle at The Rio Salado Project Area, Tempe, Maricopa County, Arizona

November 2007

Involved Parties:

City of Tempe
Rio Salado Project
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Tempe, Arizona, 85281
480-350-8096

U.S. Fish and Wildlife Service,
2321 W. Royal Palm Road
Suite 103,
Phoenix, Arizona, 85021
602/242-0210

U. S. Fish and Wildlife Service
Endangered Species Division
PO Box 1306
500 Gold Avenue SW – Room 4012
Albuquerque, NM – 87103
505/248-6920

Agreement/Tracking Number: TE-133286-0

This Agreement covers the following species: bald eagle (*Haliaeetus leucocephalus*), Yuma clapper rail (*Rallus longirostris yumanensis*), and southwestern willow flycatcher (*Empidonax traillii extimus*).

The enrolled lands include: the Salt River from approximately McClintock Drive to Priest Drive (excluding Tempe Town Lake), Tempe, Maricopa County, Arizona.

Agreement Duration: The Agreement becomes effective upon final signature below and will be in effect for 50 years, unless terminated earlier as provided herein.

Document Author: Nancy Ryan, City of Tempe, 480-350-8096, and Mike A. Martinez, U.S. Fish and Wildlife Service, 2321 W. Royal Palm Road, Suite 103, Phoenix, Arizona, 85021 – 602/242-0210.

SAFE HARBOR AGREEMENT WITH THE CITY OF TEMPE FOR VOLUNTARY ENHANCEMENT/RESTORATION ACTIVITIES BENEFITTING THE YUMA CLAPPER RAIL, SOUTHWESTERN WILLOW FLYCATCHER, AND BALD EAGLE AT THE RIO SALADO PROJECT AREA, TEMPE, MARICOPA COUNTY, ARIZONA

November 2007

1. INTRODUCTION

This Safe Harbor Agreement (Agreement) is made and entered into as of the date of the last signature between the City of Tempe (Permittee) and the U.S. Fish and Wildlife Service (Service); hereinafter collectively called the "Parties." The purpose of this Agreement is to provide and maintain environmental restoration along the Salt River and within the Rio Salado Project Area to the direct and indirect benefit of biological resources including, but not limited to, threatened and endangered species. This Agreement follows the Service's Safe Harbor Agreement final policy (64 FR 32717) and final regulations (64 FR 32706), and implements the intent of the Parties to follow the procedural and substantive requirements of section 10(a)(1)(A) of the Endangered Species Act (ESA) of 1973, as amended.

This Agreement covers proposed management activities affecting lands owned or otherwise controlled by the Permittee, and covers only Yuma clapper rail (*Rallus longirostris yumanensis*), southwestern willow flycatcher (*Empidonax traillii extimus*), and bald eagle (*Haliaeetus leucocephalus*). Under this Agreement, the Permittee will restore/enhance/maintain 159 acres of the covered species habitat for a period of 50 years by enhancing the Salt River from approximately McClintock Drive to Priest Drive (excluding Tempe Town Lake). Enhancements will include planting and maintaining native vegetation.

The Safe Harbor program encourages proactive conservation efforts by non-Federal landowners while providing them certainty that future property-use restrictions will not be imposed if those efforts attract listed species to their enrolled property or result in increased numbers or distributions of listed species already present. In return for voluntary conservation commitments, the Agreement will extend to the Permittee assurances allowing future alteration or modification of the enrolled property back to its original baseline conditions. Without this cooperative government/private effort, the enrolled lands would not otherwise be utilized by the covered species in the foreseeable future.

When signed, this Agreement will serve as the basis for the Service to issue a section 10(a)(1)(A) enhancement of survival permit (Permit) for incidental take of covered species associated with the potential future return of the Permittee's enrolled lands to baseline conditions. The Permit will authorize the Permittee to incidentally take all individuals of the covered species, and their progeny, that are introduced to the enrolled lands or have increased in numbers and/or distribution on those lands, as a result of the Permittee's voluntary conservation activities. The Parties anticipate that the maximum level of take authorized under this

Agreement and Permit will never be realized. Permit issuance will not preclude the need for the Permittee to abide by all other applicable Federal, State, and local laws and regulations that may apply.

2. BACKGROUND AND CURRENT BASELINE

As long as the Permittee implements the agreed-upon voluntary conservation measures and maintains baseline responsibilities on the enrolled lands, the Permittee may develop, farm, ranch, harvest timber, or make any other lawful use of the property even if such use results in the loss of covered species individuals or occupied habitat. Prior to conducting such an action, the Permittee must give the Service a minimum 60-day advance notice and an opportunity to relocate the individuals of species covered by this Agreement, if the Service so chooses.

Yuma clapper rail

The Yuma clapper rail was listed as endangered without critical habitat on March 11, 1967 (32 FR 4001) under Federal endangered species legislation enacted in 1966 (Public Law 89-669) due to low numbers of birds and loss of breeding habitat along the lower Colorado River.

The Yuma clapper rail is a medium sized marsh bird with a long, down-curved beak. The species' range extends from the Colorado River Delta in Mexico north along the Colorado River to Laughlin Bay, Nevada, and along the Gila and Salt Rivers east to Picacho Reservoir in central Arizona. New information suggests the Yuma clapper rail is extending its range north along the Colorado River, east along the Bill Williams/Big Sandy River drainage, and north along the Salt River. Habitat requirements of the Yuma clapper rail include freshwater or brackish stream sides and marshlands associated with heavy riparian and wetland vegetation, especially cattail and bulrush (Grinnell and Miller 1944). Openings within the wetland, especially channels with flowing water are also important. Habitat edges between marshes and terrestrial vegetation are important, but the main factors determining habitat use are the annual range of water depth and the existence of residual mats of marsh vegetation (Eddleman 1989). The most productive Yuma clapper rail areas consist of a mosaic of uneven-aged marsh vegetation interspersed with open water of variable depth (Conway *et al* 1993).

Nesting behavior begins in February with nesting commencing in mid-March and running through early July. Nests are primarily built in mature cattail/bulrush stands, which provide nest building material and cover. Most hatching occurs during the first week of June and it is thought that young rails fledge within 63-70 days. The preferred prey of the Yuma clapper rail is the non-native crayfish *Procambarus clarki* (Todd 1986), although Yuma clapper rails will also feed on isopods, aquatic and terrestrial beetles, damselfly and dragonfly nymphs, earwigs, grasshoppers, spiders, freshwater shrimp, freshwater clams, leeches, plant seeds, and small fish.

In 2001, a total of 529 Yuma clapper rails were detected in the United States during surveys. Surveys covered portions of the Lower Colorado River (LCR), central Arizona, and the Salton

Sea in California. The Cienega de Santa Clara, once part of the wetland/riverine/estuarine complex of the LCR delta, is home to the largest population of Yuma clapper rails, estimated at 6,000 birds (Hinojosa-Huerta *et al.* 2000). However, water supply to the cienega is not guaranteed into the future.

The Yuma Clapper Rail Recovery Plan (Service 1983) calls for consideration of delisting when: (1) breeding and wintering status in Mexico is clarified and evaluated; (2) surveys for the species and its habitat are established; (3) management plans are developed for important Federal and State controlled breeding areas; and (4) written agreements are effected with agencies having control or responsibility over Yuma clapper rail habitat in the United States and Mexico, to protect sufficient wintering and breeding habitat to support a population of 700-1,000 breeding birds in the United States.

Yuma clapper rails are not known to occur in the project area, although less than one-half acre of suitable habitat currently exists (Winterboer 2003). Therefore, the baseline for Yuma clapper rail is zero. Yuma clapper rails have, however, consistently been detected along the Gila River downstream of the project area. Based on information contained in Service files, eight Yuma clapper rails were detected along the Gila River from 107th Avenue to El Mirage Road during the 2002 survey season.

Southwestern willow flycatcher

The southwestern willow flycatcher was listed as endangered, without critical habitat on February 27, 1995 (60 FR 10693). Critical habitat was designated on July 22, 1997 (62 FR 39129), and a correction notice was published on August 20, 1997 to clarify the lateral extent of the designation (62 FR 44228). On May 11, 2001, the Tenth Circuit Court of Appeals set aside critical habitat for the southwestern willow flycatcher. The final rule regarding critical habitat designation was published on October 19, 2005 (70 FR 630886).

The southwestern willow flycatcher is a small passerine bird. The sub-species is a neotropical migrant that breeds in the southwestern United States and winters in Mexico, Central America, and northern South America (Phillips 1948, Stiles and Skutch 1989, Peterson 1990, Ridgely and Tudor 1994, Howell and Webb 1995). The southwestern willow flycatcher breeds in dense riparian environments. Four basic habitat types have been described for the southwestern willow flycatcher: monotypic willow, monotypic exotic, native broadleaf dominated, and mixed native/exotic (Sogge *et al.*1997).

The species primarily nests in willow, although other plants such as salt cedar are commonly used. Open water, marshes, or saturated soil are typical of southwestern willow flycatcher territories. The southwestern willow flycatcher arrives on breeding grounds in late April and May (Sogge and Tibbitts 1992, Sogge and Tibbitts 1994, Muiznieks *et al.* 1994, Maynard 1995, Sferra *et al.* 1995, 1997) and nesting begins in late May and early June. Young fledge from late June through mid-August (Willard 1912, Ligon 1961, Brown 1988a,b, Whitfield 1990, 1994). Brown-headed cowbird parasitism has been implicated in southwestern willow flycatcher

population declines or, at a minimum, has resulted in reduced or complete nesting failure (Muiznieks *et al.* 1994, Whitfield 1994, Maynard 1995, Sferra *et al.* 1995, Sogge 1995a,b,c, Whitfield and Strong 1995, Brown 1988a,b, Whitfield 1990, Hull and Parker 1995). The southwestern willow flycatcher is an insectivore, foraging primarily on true flies (Diptera); ants, bees, and wasps (Hymenoptera); and true bugs (Hemiptera) (Drost *et al.*1998), although other insect prey are probably taken.

The largest concentrations of southwestern willow flycatchers in Arizona in 2000 were near the confluence of the Gila and San Pedro rivers (219 flycatchers, 119 territories); at the inflows of Roosevelt Lake (207 flycatchers, 115 territories); Gila River, Safford area (30 flycatchers, 15 territories); Topock Marsh on the Lower Colorado River (25 flycatchers, 15 territories); Verde River at Camp Verde (9 flycatchers, 5 territories); Alpine/Greer on the San Francisco River/Little Colorado River (7 flycatchers, 5 territories); Alamo Lake on the Bill Williams River (includes lower Santa Maria and Big Sandy river sites) (44 flycatchers, 24 territories); Big Sandy River, Wikiup (23 flycatchers, 16 territories), and Lower Grand Canyon on the Colorado River (14 flycatchers, 8 territories)(Paradzick *et al.* 2001). In 2001, 635 resident southwestern willow flycatchers were detected within 346 territories at 42 sites along 11 drainages statewide (Smith *et al.* 2002). The lowest elevation where territorial pairs were detected was Topock Marsh on the Lower Colorado River (459 feet) and the highest elevation was at the Greer River Reservoir (8203 feet). Just after listing in 1996, 145 territories were known to exist in Arizona, compared to 346 territories in 2001. However, the majority of this increase has occurred at Roosevelt Lake and at the San Pedro/Gila River confluence. Increased survey effort was a larger factor in detecting more birds at the San Pedro/Gila confluence, but the Roosevelt population has grown as habitat has developed in the conservation pool of the reservoir as decreased inflows have lowered its water level.

Southwestern willow flycatchers are not known to occur in the project area, and vegetation communities structurally suitable for nesting are generally lacking. Therefore, the baseline for southwestern willow flycatcher is zero. However, the species was recently detected (2002 surveys) along the Gila River downstream of the project area during the breeding season.

Bald eagle

The bald eagle (*Haliaeetus leucocephalus*) is a large bird of prey that was listed as endangered south of the 40th parallel on March 11, 1967 (32 FR 4001), and reclassified to threatened status on July 12, 1995 (60 FR 35999). No critical habitat was designated, and the bald eagle was proposed for delisting on July 6, 1999 (64 FR 36453). The final rule removing the bald eagle in the lower forty-eight states from the list of threatened and endangered wildlife was published on July 9, 2007, with an effective date of August 8, 2007 (72 FR 37346). As of the effective date of this final rule, the protective regulations of the Endangered Species Act no longer apply to the bald eagle. Since the bald eagle is not listed, the U.S. Fish and Wildlife Service does not require species-specific conditions for permits issued for projects.

The bald eagle continues to be protected by the Bald and Golden Eagle Protection Act (Eagle

Act). The Eagle Act prohibits anyone, without a permit issued by the Secretary of the Interior, from taking eagles, including their parts, nests, or eggs. "Take" is defined under the Eagle Act as "to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb" eagles. "Disturb" means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment by substantially interfering with normal breeding, feeding, or sheltering behavior (72 FR 31132-31140).

Declines in the number of waterfowl and shorebirds, loss of nesting habitat, and the widespread use of dichloro-diphenyl-trichloroethane (DDT) and other organochlorine compounds in the 1940s resulting in reproductive failure all contributed to declines in the bald eagle population. Threats persist largely due to the proximity of bald eagle breeding areas to major human population centers and recreation areas, and include entanglement in monofilament fishing line; overgrazing of riparian vegetation; malicious and accidental harassment such as shooting, off-road vehicle use, watercraft use, and low-level aircraft overflights; alteration of aquatic and riparian systems for water distribution systems; collisions with transmission lines; poisoning; and electrocution. As a whole, the Service believes the bald eagle is doing well across its range.

The bald eagle historically ranged throughout North America except extreme northern Alaska, Canada, and central and southern Mexico. The species occurs in association with aquatic ecosystems such as estuaries, lakes, reservoirs, major riverine systems, and some seacoast areas. All breeding areas in Arizona are located in close proximity to aquatic habitats. Southwestern bald eagles establish breeding territories in December or January and lay eggs in January or February. Young bald eagles remain in the vicinity of the nest until June (Hunt *et al.* 1992). Arizona also provides habitat for wintering bald eagles, which migrate through the state between October and April each year. The most concentrated population of wintering bald eagles is found at Lake Mary and Mormon Lake, Coconino County (Beatty and Driscoll 1996). Their primary food is fish, but also includes waterfowl and carrion.

According to Bays & CH2M-Hill *et al.* (1997), immature bald eagles were observed along the Gila River downstream of the project area during surveys in early May of 1996. No nesting bald eagles are known to occur in the study area and suitable habitat is generally lacking. Therefore, the baseline for the bald eagle is zero.

Species not covered by this Agreement, but addressed in this Agreement

The Safe Harbor Policy and regulations were developed for listed species only. Therefore, de-listed and unlisted species are not covered under this Agreement. However, the Permittees anticipated covering the cactus ferruginous pygmy-owl in this Agreement and continue to plan to provide a net conservation benefit to the species. In the event the cactus ferruginous pygmy-owl or other non-listed species becomes listed as threatened or endangered at some time in the future, the Permittes may request that it be added to this Agreement and its associated Permit through an amendment.

Yellow-billed cuckoo

Additionally, this Agreement addresses the potential for future occupation of the project area by the yellow-billed cuckoo (*Coccyzus americanus*), which is currently a candidate for listing under the ESA. Habitat for the species west of the Continental Divide includes riparian cottonwood-willow galleries (salt cedar is also used by the yellow-billed cuckoo). Dense understory foliage is an important factor in nest site selection, while cottonwood trees are important in foraging areas. In the event this species is listed as threatened or endangered in the future, we hereby establish a baseline of zero for the Rio Salado project area since suitable habitat is not present. In the event of listing, the yellow-billed cuckoo may be added to this Agreement under an amendment.

3. LIST OF COVERED SPECIES

Common name	Scientific name	Status
Yuma clapper rail	*Rallus longirostris yumanensis*	Endangered
Southwestern willow flycatcher	*Empidonax traillii extimus*	Endangered

4. RESPONSIBILITIES OF THE PARTIES

In addition to the following stipulations, the Parties will work cooperatively on related issues as necessary to further the purposes of the Agreement. Nothing in this Agreement shall limit the ability of Federal and State conservation authorities to perform their lawful duties, and conduct investigations as authorized by statute and by court guidance and direction.

The Permittee agrees to:

1. Carry out adaptive management actions to maintain the habitat value established by the Rio Salado Environmental Restoration Project, in accordance with the implementation schedule in Appendix A.

2. Provide an Annual Monitoring Report to the Service in the format provided in Appendix B for the enrolled lands.

3. Notify the Service at least 60 days in advance of any planned land management activity (such as controlled burn, fencing, construction, tilling, hay operation, etc.) that the Permittee reasonably anticipates will result in the take of the species on the enrolled

lands; and provide the Service the opportunity to capture and/or relocate any potentially affected covered species.

4. Notify the Service of any change to the enrolled property's management, including prior notification for returning the enrolled property to baseline conditions; and identify the actions that would result in changed management or return to baseline.

5. Be responsible for monitoring and reporting on the implementation of the Agreement and fulfilling its provisions, including agreed-upon conservation measures and take authorized by the Permit.

6. Allow access by the Service, or another agreed-upon party to the enrolled lands for the purpose of carrying out monitoring and management activities. In the event of an emergency, the Service may enter the premises to care for and protect covered species at any time.

The Service agrees to:

1. Provide technical assistance, to the maximum extent practicable, when requested; and provide information on Federal funding programs.

2. Issue a permit to the Permittee in accordance with the ESA, section 10(a)(1)(A), upon execution of the Agreement and satisfaction of all other applicable legal requirements, authorizing incidental take of the covered species as a result of lawful activities within the enrolled property. The term of the permit will be 50 years.

3. Verify that the Permittee is implementing the terms and conditions of the Agreement and fulfilling its provisions, including agreed-upon conservation measures and take authorized by the Permit, either through review of reports or after reasonable prior notice to the Permittee, entering the covered area to ascertain compliance with the Agreement.

5. BASELINE DETERMINATION

Description of baseline conditions on the Enrolled Property for each covered species

Due to upstream river management of dams and reservoirs by the Salt River Project, the portion of the Salt River within the project area normally receives little water from the upper Salt River watershed. The Final Environmental Impact Statement for the Rio Salado Environmental Restoration Project provides a description of environmental conditions (U.S. Army Corps of Engineers 1998). However, the Rio Salado Restoration Project – Tempe Reach Annual Report August 2003- July 2004 (US Department of Agriculture 2004) provides the most recent published description of environmental conditions.

The majority of the Tempe project area is characterized by essentially barren uplands and riverbed, although desert broom (*Baccharis sarothroides*) and rabbitbrush (*Chrysothamnus nauseosus*) occur sparsely and sporadically. Stream side terraces contain a few scattered desert scrub species such as creosote (*Larrea tridentata*), brittlebush (*Encelia farinosa*), and salt cedar (*Tamarix* sp.).

No suitable habitat for southwestern willow flycatcher or bald eagle exists within the Rio Salado project area. Southwestern willow flycatchers require dense stands of riparian vegetation, such as cottonwood-willow or salt cedar, in close proximity to permanent water for nesting and foraging. Bald eagles require large trees, such as cottonwoods, and large bodies of water for nesting and foraging. These conditions do not exist in the project area. Cattail stands within the project area do provide suitable habitat for the Yuma clapper rail. However, surveys for Yuma clapper rail were conducted during the 2003 season at the outfall of the Arizona Department of Transportation (ADOT) Priest-Hardy drain (SR-17) and no Yuma clapper rails were detected (Winterboer 2003). Accordingly, we hereby establish a baseline of zero for the southwestern willow flycatcher, bald eagle, and Yuma clapper rail.

6. MANAGEMENT ACTIVITIES FOR COVERED SPECIES

Monitoring and adaptive management will be part of the ongoing activities to be implemented by the Permittee, as part of the U.S. Army Corps of Engineers habitat restoration project. With a baseline of zero for the Yuma clapper rail, southwestern willow flycatcher, and bald eagle, as well as the yellow-billed cuckoo, adaptive management activities may enhance habitat for these species and attract them to the environmental restoration area. Success criteria established by the Final Environmental Impact Statement for the Rio Salado Environmental Restoration Project identify that attraction of threatened and endangered species indigenous to the area is a desired outcome. Establishing measures to support attraction and preservation of indigenous species is the overriding goal of the design and project implementation. The monitoring that will be provided by the City of Tempe and U.S. Army Corps of Engineers during the first five years after project construction provides thresholds and a process to evaluate undesirable outcomes that will trigger adaptive management actions recommended by an advisory committee. The advisory committee will exist during the initial five year period. The Restoration Advisory Committee (RAC) includes representatives from the City of Tempe, the Service, the U.S. Army Corps of Engineers, and the Arizona Game and Fish Department. The RAC will collectively evaluate and recommend adaptive management actions to address diversity and abundance, population management, and habitat modification consistent with the success criteria.

Nothing in this Agreement prevents the Permittee from implementing management activities not described in the Agreement, as long as such actions maintain the original baseline conditions and do not affect the beneficial actions set forth in the Agreement. The Permittee will notify the Service at least 60 days in advance of any activities likely to result in the loss of covered species individuals or occupied habitat. The notification will allow the Service an opportunity to capture and relocate the affected individuals, thereby minimizing the impact of authorized take. The

Permittee will strive to avoid potentially disturbing actions during the breeding season of any covered species and to minimize the impact of authorized take by avoiding any possible disruption of reproductive efforts.

Emergency situations such as natural disasters (e.g., excessive rainfall, extreme drought, insect infestations, or epidemic disease) may require initiation of certain management actions (such as salvage or sanitation harvesting) within less than 60 days prior notification. The Permittee will notify the Service within 10 days of discovering such a situation, and will make reasonable accommodations to the Service for survey and/or relocation of affected individuals of covered species. The Parties acknowledge that survey and translocation of species may be precluded by certain urgent situations.

This Agreement will grant to the Service, after reasonable prior notice, the right to enter the Permittee's property for the purpose of ascertaining compliance with the Agreement and for censussing, banding, and in certain circumstances, relocating individuals of covered species, as well as other measures that may be necessary. In addition, the Permittee will complete and submit to the Service, an annual report of activities related to covered species management and the biological effectiveness of the conservation measures implemented, as well as other reports as required by the Agreement.

Events that could return the enrolled properties to a baseline condition are those associated with termination of the Agreement or those associated with operation and maintenance (e.g., removal of understory vegetation for fire safety, burning cattail stands to promote new growth) However, ongoing conservation activities undertaken by the Permittee on the enrolled lands, described in Section 10 below, are not anticipated to result in returning the covered property to baseline conditions.

A return to baseline does not include natural events such as a flood or fire that would destroy the habitat, or disease or insect outbreaks that would destroy habitat or established populations of the covered species on the enrolled lands. These events would constitute changed circumstances.

7. DESCRIPTION OF ENROLLED LANDS

The enrolled lands are part of the Tempe Rio Salado project area which includes the Tempe Town Lake and segments of the Salt River downstream and upstream of Tempe Town Lake, including the adjacent park and public and private development. The enrolled lands include 146 acres to be restored in partnership with the U.S. Army Corps of Engineers and 13 acres of the Lo Piano Habitat, for a total of 159 acres.

The City of Tempe has partnered with the U.S. Army Corps of Engineers to revitalize portions of the Salt River. The City of Tempe's Rio Salado restoration project includes (1) the area upstream of the Tempe Town Lake, to McClintock Drive; and (2) the area downstream of the Tempe Town Lake to Priest Drive. (Figure 1)

Between the upstream and downstream environmental restoration areas is the 220-acre manmade Tempe Town Lake. The Tempe Town Lake was created by installation of rubber dams in the dry streambed of the Salt River. Completed and filled in 1999, the Tempe Town Lake is a flood control, economic development, and recreational resource for the City of Tempe. About 2 miles of the 5-mile perimeter of the lake is currently developed as a linear park. Remaining development of the linear park will be completed over the next 5 to 10 years. Turf, native species, and ornamental trees and shrubs are included in the urban landscape. Urban mixed use development, including multi-story office and housing, retail, hospitality, and cultural land uses are being developed adjacent to the linear park (Figure 2).

Environmental restoration on 146 acres, sponsored by the U.S. Army Corps of Engineers and the City of Tempe, will include removing non-native vegetation and planting native species to provide habitat value. Amenities include walking paths outside of the habitats, viewing areas for watching animals, ramadas, restrooms, and interpretive signs. The upstream portion is ideal for riparian vegetation, and consists of Cottonwood-Willow and Mesquite Bosque habitat. The downstream (largest) portion has Mesquite Bosque and Upper Sonoran habitats.

8. NET CONSERVATION BENEFIT

The Permittee agrees to voluntarily manage the enrolled lands to produce a cumulative net conservation benefit to the covered species, by implementing conservation measures that will establish 146 acres with native vegetation habitat within the Salt River and retain an additional 13 acres of established Mesquite Bosque habitat north of the 202 freeway. Continued monitoring and maintenance will be implemented through monitoring and adaptive management in an effort to increase species populations and/or enhance/restore/maintain suitable habitat. The net conservation benefit will be sufficient to contribute, directly or indirectly, to recovery of the covered species, after taking into account the length of the Agreement and any off-setting adverse effects of authorized take. Although the Agreement may not permanently conserve or recover species populations or their habitats, it provides for important short-, mid-, or long-term benefits to the species, including but not limited to the following: maintenance/restoration/enhancement of habitat; maintenance/increase of population numbers or distributions; increase in habitat connectivity; reduction of habitat fragmentation; insurance against catastrophic events; establishment of buffers for other protected areas; and creation of areas for testing and implementing new conservation strategies.

The Parties anticipate that this Agreement will result in an increased number and/or distribution of the covered species, and/or an increase in the total area of occupied suitable habitat, within the enrolled lands. Without this cooperative government/private effort, these lands would not otherwise be utilized by the species in the foreseeable future. The Agreement will also provide an example of a mutually beneficial relationship between government agencies and a non-Federal landowner to benefit endangered and threatened species, and evidence that such species can coexist with current land-use practices. Therefore, the cumulative impact of this Agreement

and
the activities it covers, which are facilitated by the authorized take, will provide a net conservation benefit to the species.

9. AGREEMENT DURATION

The Agreement, including any commitments related to funding under Service programs, will be in effect for 50 years following its approval and signing by the Parties. The City of Tempe is requesting that the Permit have a term of 50 years from the effective date of the Permit. Given the probable species response time to the planned conservation measures, the Service estimates it may take 5 to 10 years of implementing the Agreement to fully reach a net conservation benefit for the species, although some level of benefits will likely occur within a shorter time period (3 years). Based on previous experience elsewhere, the 50-year duration of this Agreement is considered sufficient to establish an incipient population of the species; increase the numbers or distribution of the species; increase occupied habitat acreage; or gain new information on the species or management of the species on the Permittee's enrolled property.

Implementation of this Agreement is expected to result in preservation, reintroduction, or expansion of the species population(s) beyond the zero acre baseline within the enrolled lands covered by the Agreement. If expansion in population numbers or occupied habitat occurs, at the end of the permit term the Permittee may take species individuals or occupied habitat in excess of the original baseline before the Permit expires, to avoid accruing additional take liability under the ESA. The 50-year Permit term will be advantageous to the Permittee because of the longer time period available to plan future land-use activities. The 50-year Permit term also would benefit species conservation because impacts associated with take of individuals or habitat above the baseline may not occur in the short term. The Permit and Agreement may be extended beyond the specified terms through amendment, upon agreement of the Parties. The timeframe for the management actions will remain in effect for 50 years.

10. TAKE

Under this Agreement, the Permittee is authorized to make use of the enrolled property in any manner that does not result in reducing the population and/or occupied habitat of the covered species below the original baseline conditions. Events that might be expected to return the enrolled property to baseline conditions include operation and management activities that would destroy the habitat or any individuals of covered species within enrolled areas. The Permit will authorize take of species and their progeny, or alteration of occupied habitat, resulting from lawful activities within the enrolled lands, from the time this Agreement is signed until Permit expiration. The Permittee may continue current land-use practices, undertake new ones, or make any other lawful use of the property, even if such use results in the loss of species individuals or their habitat covered under this Agreement.

Among the activities the Permittee plans to continue, which in no way shall be considered a limitation on any other activity the Permittee desires to engage in, are the following activities that may result in incidental take of the species: maintenance of habitat vegetation, introduction of non-listed species into the created habitat; maintenance and operation of urban park and landscaping; maintenance of trails, paths, and service roads; planning, development, and operation of urban (public and private) development adjacent to the Tempe Town Lake, including relocation and installation of utilities; and operation of events on Tempe Town Lake and within the linear park adjacent to Tempe Town Lake.

No loss of existing covered species individuals or occupied habitat is permitted as part of this Agreement, unless agreed to by the Service. The only occupied habitat that may be altered in the future is habitat that is unoccupied at the time the Agreement is signed. The maximum number of individuals or occupied habitat that can be taken pursuant to this Agreement will be no more than the number of additional individuals or acres of occupied habitat above the baseline created through this Agreement. Thus, the net impact of the take authorized under this program is, at the most, a return to baseline, and therefore would not negatively impact the species. The Permittee agrees to give the Service 60-days notice prior to engaging in any activity that is likely to cause take of individuals or occupied habitat, including returning the enrolled property to baseline conditions, to provide time to relocate any remaining individuals of covered species from the area to be impacted.

11. REPORTING AND MONITORING

Compliance Monitoring. The Permittee will be responsible for annual monitoring and reporting related to implementation of the Agreement and fulfillment of its provisions, including verification of baseline maintenance, implementation of agreed-upon conservation measures, and the amount of take that occurred, as authorized by the Permit. The Agreement will grant the Service, after reasonable prior notice to the Permittee, the right to enter the enrolled lands to ascertain compliance with the Agreement. In addition, the Permittee will report on anticipated activities for the following year.

Annual reports will be due to the Service by June 1 of each year. The first annual report will include a detailed description of the existing habitat conditions within the enrolled lands, an estimate of the population size or occupied habitat acreage for each covered species, a description of each covered species' distribution and productivity on the enrolled lands, and any conservation measures implemented during the first year.

Biological Monitoring. The City of Tempe will conduct biological monitoring and provide an annual report to the Service as described in Appendix B.

The U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services (USDA) has been providing weekly wildlife monitoring from 1999 to the present, with quarterly reports provided to Permittee as part of an ongoing contract concerning wildlife issues

related to aviation safety. This monitoring work is funded by the Permittee in conjunction with USDA. The Permittee intends to undertake, through contracted services, additional monitoring of habitat and species, and adaptive management to ensure the health and survival of the project.

12. FUNDING

Initial monitoring and adaptive management for 5 years from construction completion is funded by shared costs between the U.S. Army Corps of Engineers and the Permittee. Additional monitoring of wildlife is funded by the Permittee with USDA, and is anticipated to continue with renewal authorization annually. Implementation of adaptive management will be funded by the Permittee for the enrolled lands.

13. MODIFICATIONS

After approval of the Agreement, the Service may not impose any new requirements or conditions on, or modify any existing requirements or conditions applicable to a landowner or successor in interest to the landowner, to mitigate or compensate for changes in the conditions or circumstances of any species or ecosystem, natural community, or habitat covered by the Agreement except as stated in 50 CFR 17.22(c)(5) and 17.32(c)(5).

13.1. Modification of the Agreement. Either Party may propose modifications or amendments to this Agreement, as provided in 50 CFR 13.23, by providing written notice to, and obtaining the written concurrence of, the other Party. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The Parties will use their best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon the other Party's written concurrence.

13.2. Amendment of the Permit. The Permit may be amended to accommodate changed circumstances in accordance with all applicable legal requirements, including but not limited to the ESA, the National Environmental Policy Act, and the Service's permit regulations at 50 CFR 13 and 50 CFR 17. The Party proposing the amendment shall provide a statement describing the proposed amendment and the reasons for it.

13.3. Termination of the Agreement. As provided for in Part 12 of the Service's Safe Harbor Policy (64 FR 32717), the Permittee may terminate the Agreement prior to its expiration date, even if the expected net conservation benefits have not been realized. Upon termination of the Agreement, the Permittee would relinquish the Permit to the Service. The Permittee agrees to provide the Service with written notice at least 60 days prior to the termination date and provide the Service the opportunity to relocate covered species within 180 days of the notice to relocate any remaining individuals of covered species from the enrolled lands. For circumstances beyond the Permittee's control, such as drought, floods, or insect infestations, the Parties may agree to

revise the Agreement's baseline conditions to reflect the new circumstances, rather than terminate the agreement.

In the event that a court of competent jurisdiction issues an order, judgment, opinion, or decree that invalidates, nullifies, or sets aside any obligations or benefits of the Parties as set forth in this Agreement or finds that the Agreement violates applicable federal or state law, including invalidation of 50 CFR 17.22 and 17.32, as these sections read as of the date of this Agreement, the Parties may agree to amend the Agreement in a manner consistent with the revised rule to afford the maximum protection to the Permittee consistent with the revised rule.

13.4. Permit Suspension or Revocation. The Service may suspend or revoke the Permit for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. The Service also, as a last resort, may revoke the Permit if continuation of permitted activities would likely result in jeopardy to covered species (50 CFR 13.28(a)). Prior to revocation, the Service would exercise all possible measures to remedy the situation.

13.5. Baseline Adjustment. Unforeseen circumstances are events beyond the reasonable control of, and did not occur through, the fault or negligence of the Permittee, including but not limited to "acts of God" or sudden actions of the elements. Such catastrophes could either locally destroy the species population or render the habitat unsuitable, thereby reducing population numbers or occupied acreage below the original baseline conditions. For such circumstances beyond the control of the Permittee, the Parties may agree to revise the Agreement's baseline conditions to reflect the new circumstances, rather than terminate the Agreement.

13.6. Remedies. Each party shall have all remedies otherwise available to enforce the terms of the Agreement and the permit, except that no party shall be liable in damages, including money damages, for any breach of this Agreement, any performance or failure to perform an obligation under this Agreement, or any other cause of action arising from this Agreement.

13.7. Dispute Resolution. The Parties agree to work together in good faith to resolve any disputes, using dispute resolution procedures agreed upon by the Parties.

14. ADDITIONAL MEASURES

14.1. Neighboring Lands. The Permittee's land is adjacent to an evolving habitat not owned by the City of Tempe and within the Salt River bed and Indian Bend Wash. An approximately 90-acre area of the riverbed is continually inundated by stormwater runoff from the ADOT 202 and 101 freeway interchange, adjacent cities' stormwater discharge, and discharge of treated effluent from a City of Mesa water reclamation plant. This continual water source permits volunteer cottonwood trees and rushes to thrive, thereby attracting large numbers of birds and waterfowl. Thirty-eight (38) acres of the Indian Bend Wash, owned by the Flood Control District of Maricopa County, has been improved as an environmental restoration area. No threatened or

endangered species have been documented for this area, but there is a possibility that it could be colonized from the Permittee's land or as a result of the emerging habitat. Urban private development adjacent to the Tempe Town Lake is not immediately suitable as habitat, but could be used by species originating from the Permittee's land or the nearby 90 acre emerging habitat area. Non-participating private landowners, outside of the enrolled lands, are not covered under the Permit associated with this Agreement. If the Permittee's voluntary conservation actions result in listed species occupying adjacent properties, the Service will use the maximum flexibility allowed under the ESA to address neighboring properties under the Agreement and associated Permit. The Service's potential actions include, but are not limited to, granting incidental take authority to owners of neighboring lands where occupation is expected as a result of the Agreement. Implications to neighboring landowners with non-enrolled lands will be determined on a case-by-case basis. In general, the Service will make every effort to include the neighboring landowner as a signatory party to this or a separate agreement and permit. A separate agreement could allow, for example, the Service to enter the adjacent property and remove any covered species individuals for relocation elsewhere.

14.2. Succession and Transfer. This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and transferees, in accordance with applicable regulations (50 CFR 13.24 and 13.25). The rights and obligations under this Agreement shall run with the ownership of the enrolled lands and are transferable to subsequent non-Federal property owners pursuant to 50 CFR 13.25. As a party to the original Agreement and Permit, the new owner(s) will have the same rights and obligations with respect to the enrolled lands as the original owner and the Permit issued to the Permittee will be extended to the new owner(s). The new owner(s) also will have the option of receiving Safe Harbor assurances by signing a new Agreement and receiving a new permit. The Permittee shall notify the Service of any transfer of ownership, so that the Service can attempt to contact the new owner, explain the baseline responsibilities applicable to the property, and seek to interest the new owner in signing the existing Agreement, or a new one, to benefit listed species on the property. Assignment or transfer of the Permit shall be governed by Service regulations in force at the time.

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

14.4. Relationship to Other Agreements. This Agreement is related to an agreement between the City of Tempe and the U.S. Army Corps of Engineers to construct the Rio Salado Environmental Restoration Project under the Water Resources Development Act.

14.5. No Third-Party Beneficiaries. This Agreement does not create any new right or interest in

any member of the public as a third-party beneficiary, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.

14.6. Other Listed Species, Candidate Species, and Species of Concern. The possibility exists that other listed, proposed, or candidate species, or species of concern may occur in the future on lands enrolled in the Agreement as a direct result of the Permittee's voluntary conservation actions. If biological surveys determine that this Agreement will provide a net conservation benefit to any such species or their potential habitat, the Parties may agree to amend the Agreement and Permit to cover additional species, at the Permittee's request.

If federally designated candidate species should occur on the property, the Service will recommend measures for including them in a joint Safe Harbor Agreement/Candidate Conservation Agreement with Assurances to contribute toward the conservation of those species. If appropriate measures are included in such an agreement, the Service, consistent with its No Surprises policy, will not impose additional requirements on the Permittee as a result of any such species later being listed as threatened or endangered.

14.7. Notices and Reports. Any notices and reports, including monitoring and annual reports, required by this Agreement shall be delivered to the persons listed below, as appropriate:

Permittee
City of Tempe
Rio Salado Project
31 E. 5th Street
Tempe, Arizona, 85281
480-350-8096
Attention: Nancy Ryan

U.S. Fish and Wildlife Service,
2321 W. Royal Palm Road
Suite 103,
Phoenix, Arizona, 85021
602/242-0210

U. S. Fish and Wildlife Service
Endangered Species Division
PO Box 1306
500 Gold Avenue SW – Room 4012
Albuquerque, NM – 87103
505/248-6920

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Agreement to be in effect as of the date that the Service issues the section 10(a)(1)(A) Enhancement of Survival Permit associated with this Agreement.

MAYOR, City of Tempe — Date

Attest:

City Clerk

Approved as to form:

City Attorney

Deputy Regional Director
U.S. Fish & Wildlife Service — Date

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Appendix A

Implementation Schedule

Rio Salado Environmental Restoration Project – Tempe Reach

Phase 2 – Salt River - Priest Drive to Tempe Town Lake

Construction initiated August 2006, Construction completed 2007

Phase 3 – Salt River – McClintock Drive to Tempe Town Lake

100% Design Completed September 2007, Construction to be completed March 2009

Appendix B

Annual Monitoring Report Program for
Safe Harbor Agreement between the U.S. Fish and Wildlife Service
and the City of Tempe, Arizona

Permittee's Name: City of Tempe, Arizona

Permit Tracking Number: TE-133286-0

Location: Salt River in the City of Tempe, Maricopa County, Arizona

Agreement Approved by: Region 2, U.S. Fish and Wildlife Service, Albuquerque, New Mexico

Covered Species:	Yuma clapper rail	*Rallus longirostris yumanensis*
	Southwestern willow flycatcher	*Empidonax traillii extimus*

Monitoring Program: The City of Tempe will conduct annual site investigations on the status of the vegetation health and growth. Annual reports are designed to provide information to the U.S. Fish and Wildlife Service (Service) concerning the effects and effectiveness of the Safe Harbor Agreement's (Agreement) conservation actions on the covered species, as well as to determine if the conservation actions the Permittee undertakes meet the Agreement's "standard." The monitoring report will document any changes in the condition of the habitat associated with the covered species over time and will denote whether the data provided is from the Permittee, professional scientist, or other specific individual or entity. Photographs at data points and affected areas will be provided.

Date Annual Report is Due: On or before June 1, for the prior calendar year

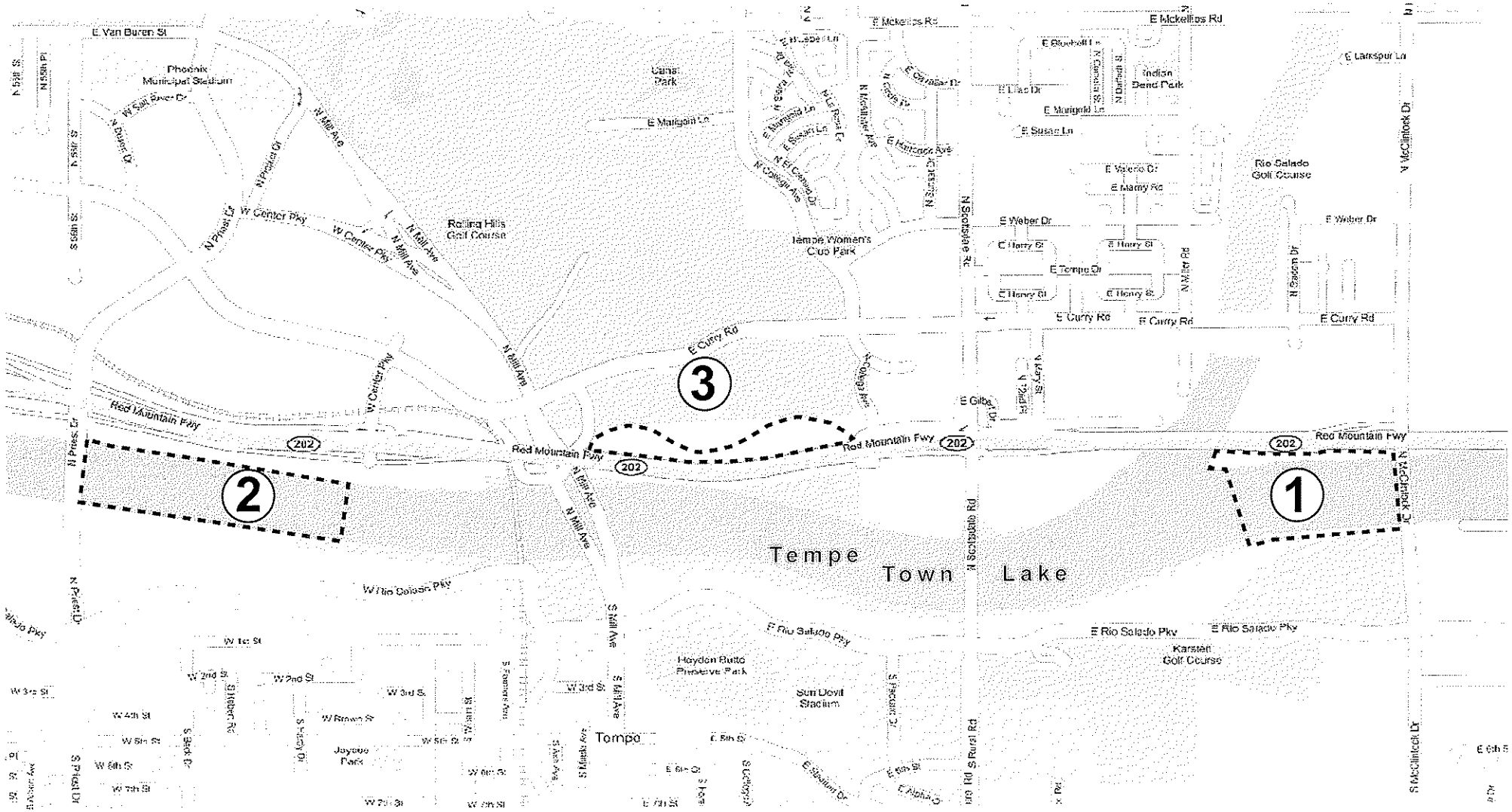
Management and Conservation Actions: The City of Tempe will summarize the actions taken to date and the results of the actions taken on each of the management and conservation activities as described in the Agreement.

Safe Harbor Agreement
City of Tempe, Arizona

PROJECT AREA MAP
FIGURE "1"

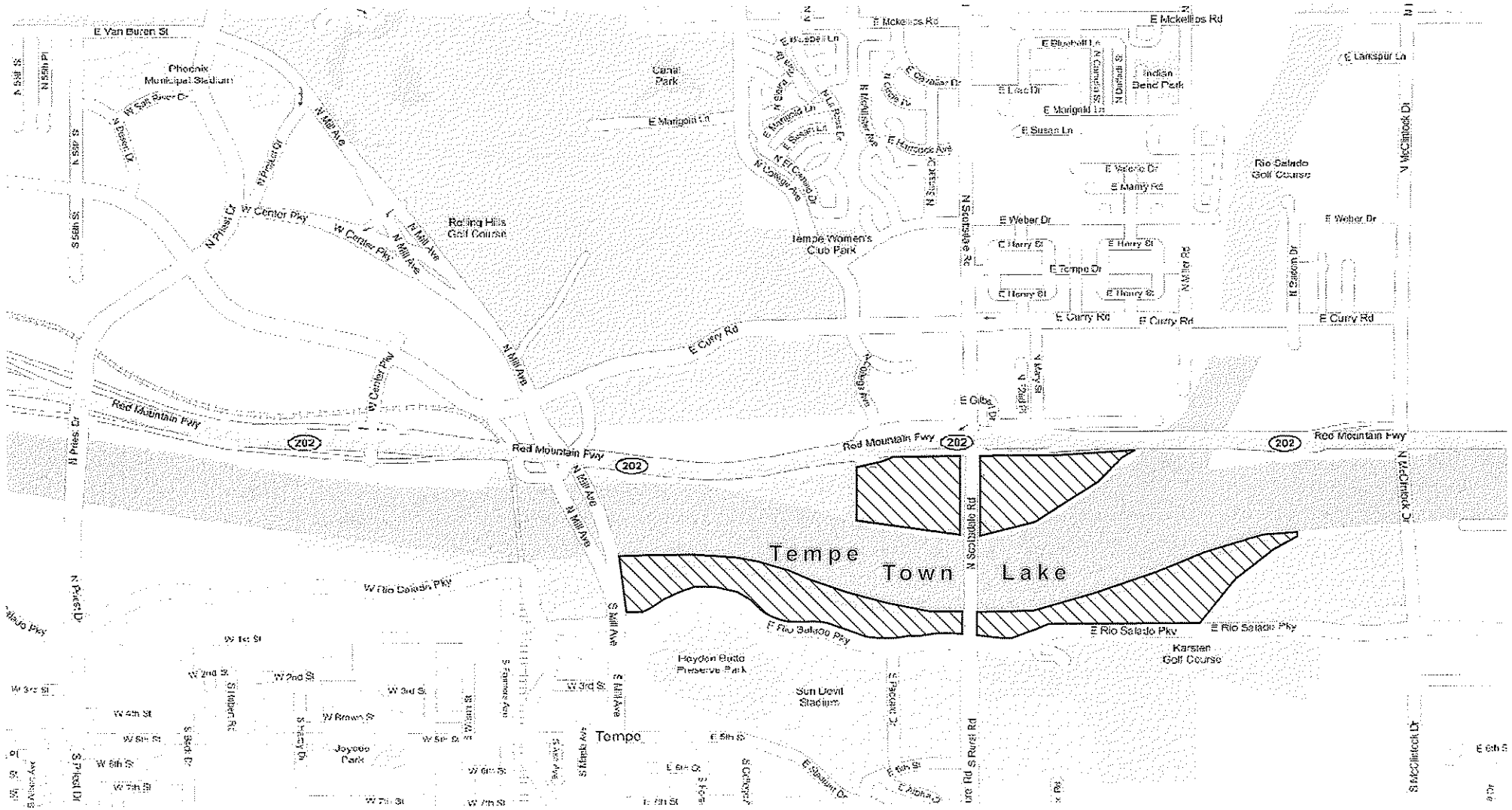
	Area	Established	Acres
①	Upstream Salt River	2009 (est.)	52.4
②	Downstream Salt River	2006 (est.)	93.4
③	LoPiano Mesquite Bosque	1993	13

north



Safe Harbor Agreement
City of Tempe, Arizona

EXISTING AND FUTURE DEVELOPMENT FIGURE "2"

Existing and Future Development

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