

**Final Recirculated
Coachella Valley Multiple Species Habitat
Conservation Plan
and
Natural Community Conservation Plan**

**Appendix IV: Settlement Agreement for
Shadowrock**

September 2007

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Calif Dept of Fish & Game
Settlement Agr - Cs 5.0609
PD-224 - Shadowrock
AGREEMENT #3291
M05267, 10-20-93

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SETTLEMENT AGREEMENT

**CALIFORNIA DEPARTMENT OF FISH AND GAME v.
CITY OF PALM SPRINGS**

RIVERSIDE SUPERIOR COURT CASE NO. I-69777

SETTLEMENT AGREEMENT

1. INTRODUCTION

This Settlement Agreement ("Agreement") is made and entered into in Riverside County, California by and among the California Department of Fish and Game ("Department"), the City of Palm Springs and the City Council of the City of Palm Springs (Collectively, "City"), and Shadowrock Ventures ("Shadowrock").

2. FACTUAL BACKGROUND

A. This Agreement relates to the City's approval of Case No. 5.0609-PD-224, and the certification of the Environmental Impact Report ("EIR") therefor on May 5, 1993. Case No. 5.0609-PD-224 is a planned development district ("PDD") on approximately 1,100 acres of land located 1.5 miles west of Highway 111 on Tramway Road in Sections 5, 6 and 8 of Township 4 South, Range 4 East on USGS 7.5' Palm Springs, California.

B. Case No. 5.0609-PD-224 is the proposed Shadowrock Resort, which is planned as a destination resort and residential development which includes an 18-hole championship golf course, a spa/fitness/tennis facility, single family and luxury estate homes and a 270 unit hotel. The proposed project, including the development alternatives, is further described in the resolutions approving the project adopted on May 5, 1993. The project is referred to hereinafter as the "Shadowrock Project".

C. As approved, the Shadowrock Project site consisted of approximately 1,100 acres (the "Shadowrock Project Site"), of which only 331 acres would be developed. The remaining 769 acres

are to be set aside for permanent open space. Shadowrock has voluntarily offered to make a gift to the City of 565 acres of that property in fee. The balance shall be maintained as open space through a long-term Indian lease, for the term of the Indian lease or the life of the permits, whichever is shorter.

D. Prior to its approval of the Shadowrock Project, the City studied the appropriate land uses for the Shadowrock Project Site. The Shadowrock Project Site has been designated in the City's General Plan as an appropriate site for a destination resort for over 25 years. In March 1993, the City conducted a City-wide General Plan update, during which time it reassessed the appropriate land uses on the Shadowrock Project Site. Following extensive community workshops, public hearings, and expert consultation, the City made substantial changes to its General Plan as it affects the Chino Canyon, including the Shadowrock Project Site. The properties located to the west of the Shadowrock Project Site were designated as "Conservation". Previously, that westerly area had been designated as "Resort Hotel" and "Residential" which would have allowed considerably more development than the "Conservation" designation. Additionally, the City lowered the overall density allowed in the Chino Cone area to reduce potentially significant impacts of development. However, the City reaffirmed its desire to have the Shadowrock Project Site developed with the following target land uses: "high-end residential, large-scale destination resorts and commercial recreation".

E. The City is committed to preserving undeveloped open space within and without its jurisdiction.

F. The City's Open Space Element designates 66% of the City (approximately 33,530 acres of land) as "Conservation", "Hillside", "Watercourse", and "Parks & Recreation".

G. Pursuant to a land acquisition program originated in the 1970s, the City has acquired approximately 2,570 acres of hillside areas within the San Jacinto and Santa Rosa Mountains. The City's General Plan encourages a wide range of acquisition techniques, including donations, transfer of development rights, public acquisitions and assisting other agencies and organizations to acquire sensitive hillside lands.

H. In the early 1980s, the City formed the Parks, Open Space, and Trails Foundation ("POST"), a California non-profit foundation, for the purpose of implementing the parks, open space, and trails policies of the General Plan. POST has recently participated in the acquisition of 80 acres in the Santa Rosa Mountains, 565 acres adjacent to the Shadowrock Project Site which is a gift by Shadowrock, and is working toward the acquisition of 240 acres near Blaisdell Canyon, at no cost to any public agency. These lands will be dedicated to the City for permanent open space purposes, and this year alone, the City may receive up to 885 acres of such land.

I. The City's approval of the Shadowrock Project included over 100 conditions of approval and mitigation measures. From a biological standpoint, the most important of these conditions was the limitation placed on the amount of development permitted. Of

the 1,100 acres, only 331 would be developed. The remaining 769 acres would remain as open space as set forth in Recital "c".

J. Riparian Habitat Mitigation was required as a condition of approval. These mitigation measures were designed to reduce the impacts on the Least Bell's vireo (Vireo Bellii Pusillus). These included limitations on the widening of the Tramway Road, protection of the Cienega Oasis, limitations on blasting and grading, control of urban runoff, setbacks from the riparian areas, and a cowbird monitoring and trapping program.

K. The City believes protection of the Desert tortoise (Gopherus Agassizii) was also provided. Biologists supervision of all grading was required, as was a habitat conservation plan, if deemed necessary by the U.S. Fish & Wildlife Service.

L. There were several steps taken to mitigate the impacts on Peninsular Bighorn sheep (Ovis Canadensis Cremnobates). The mitigation included the provision of permanent drinking stations in the Nichols Canyon Area, under the supervision of wildlife agencies, fencing, education of residents and guests, dedication of open space, and the introduction of Mosquito Fish in standing water areas to allow the avoidance of exotic chemicals to control insect vectors.

M. Additional mitigation measures were imposed, including limitations on lighting, the requirement of temporary fencing of sensitive areas during construction, and compliance with all state and federal laws and regulations regarding endangered or protected wildlife.

N. When the Shadowrock Project came before the City Council on May 5, 1993, no one spoke in opposition to its approval.

O. The City feels there are numerous benefits of the Shadowrock Project. It will allow 769 acres of hillside property to be preserved in perpetuity for the establishment of a Peninsular Bighorn Sheep Preserve. In the face of the \$7 to \$10 million deficit in the City, the economic benefits of the Shadowrock Project cannot be ignored. It is projected to generate \$10,000,000 in combined tax revenues annually, and will help stabilize the local economy. It may create as many as 1,200 jobs, and help the City improve its jobs-to-housing ratio. It will help the City attain its regional housing needs in the higher income categories, as it is the first major residential subdivision in the City in 10 years. It brings sorely needed new resort development to the City, which has not occurred in over five (5) years, and which will help to once again make the City a premier destination resort community. It will improve flood control in the area, and will contribute to the improvement of the Tramway Road. It is not only consistent with the General Plan Update, but carries out the policies of the General Plan for the Chino Cone area, including the development of the alluvial fan emphasizing resort development, promoting the creation of open space, and contributing to the local and state economy.

P. On or about June 4, 1993, the Department commenced a Petition for Writ of Mandate and Complaint for Injunctive Relief ("Petition") against the City and Shadowrock entitled California

Department of Fish and Game v. City of Palm Springs, et al.,
Riverside Superior Court Case No. Indio 69777. Therein, the
Department challenges the Shadowrock Project and the EIR therefor
on the basis of alleged failure to comply with the California
Environmental Quality Act ("CEQA"), Public Resources Code §21,000
et seq. The City and Shadowrock never filed a responsive
pleading to the Petition due to reaching this Agreement.
However, the City and Shadowrock would deny the allegations of
the Petition and contend that the approval of the Shadowrock
Project was done in full accordance with the requirements of
CEQA.

Q. Prior to the filing of the Petition, the Department,
the City and Shadowrock began discussions regarding additional
mitigation measures that the Department proposed. However, there
was insufficient time to fully explore and resolve the many
issues relating to additional mitigation measures prior to the
expiration of the statute of limitations. In order to preserve
its right to challenge the Shadowrock Project, the Department
deemed it necessary to file the Petition. However, its goal at
the time was to come to an agreeable resolution of all issues
faced by the parties.

R. Following the filing of the Petition, additional
meetings were held by the parties, including on-site meetings,
and much information was exchanged by the parties, their
biologists, consultants and other experts. As a result of this
exchange of information, and the agreement to the additional
mitigation measures set forth herein, the parties believe it

would be in their respective best interest to resolve their differences and settle the claims set forth in the Petition pursuant to the terms and conditions set forth herein. Further, the parties believe that the additional mitigation measures, when combined with the already imposed conditions and measures, will provide long-term protection to valuable plant and animal resources including, the Least Bell's vireo, Peninsular Bighorn sheep, and will further help to harmonize the Shadowrock Project with its surrounding environment.

3. ADDITIONAL MITIGATION MEASURES

In addition to all other conditions of approval of the Shadowrock Project and the Mitigation Measures imposed thereon, Shadowrock agrees to the following additional mitigation measures. The parties hereto agree that these additional measures may be imposed without further environmental documentation, and that the EIR and the City's CEQA findings adequately cover these additional measures. The parties agree to these additional mitigation measures to lessen the direct and indirect environmental impacts on four state-listed Endangered or Threatened species: the Peninsular Bighorn sheep, the Coachella Valley Fringe-toed lizard, the Desert tortoise and the Least Bell's vireo.

A. Wildlife Corridor

(1) In order to provide a sufficient wildlife corridor to the west of the Shadowrock Project, Shadowrock agrees not to construct any buildings on the land designated "Golf Related Use

Only" marked on Exhibit "A", attached hereto and by this reference made a part hereof; provided, however, that Shadowrock may develop a portion of a "modified target golf course" in this area. A "modified target golf course" is defined as one that limits areas of maintained grass to tees, fairways and greens. Areas outside of tees, fairways and greens shall be maintained in their natural condition and shall not be disturbed; provided, however, that Shadowrock may develop a pond for irrigation purposes in the Golf Related Uses Only area north of Tramway Road. Such pond shall be designed to minimize its surface area in order to minimize its attraction to Peninsular Bighorn sheep.

(2) Shadowrock shall not disturb any land designated "No Development" marked on Exhibit "A", except to comply with conditions of approval imposed by the City or other governmental entity, to construct one paved golf cart path, and all or a portion of one tee and one green in the area north of Tramway Road.

(3) Shadowrock and the City agree to restrict play on the portion of the golf course constructed in the No Building Area during the hour immediately following sunrise and the hour preceding sunset, and shall promulgate rules and regulations for golf play consistent herewith.

B. Replacement of Sheep Habitat Disturbed by the Project

The intent of the parties is to replace Peninsular Bighorn sheep habitat disturbed by the project with suitable replacement habitat. Upon the issuance of all federal, state and local permits for the Shadowrock Project, Shadowrock agrees to use its

best efforts to acquire replacement habitat in the amount of no less than 340 acres in Blaisdell Canyon. Shadowrock agrees to spend up to \$300,000 to acquire 340 acres in Blaisdell Canyon within the City of Palm Springs to replace the 331 acres peninsular bighorn sheep habitat disturbed by the project. If the cost of purchasing 340 acres in Blaisdell Canyon rises above \$300,000, this amount may be pooled with monies available from other sources, including the City if the City Council votes to approve such expenditures, or other developers with mitigation requirements, to complete the purchase of 340 acres in Blaisdell Canyon. If, despite its best efforts, Shadowrock is unable to acquire replacement habitat in Blaisdell Canyon, Shadowrock agrees to spend up to \$300,000 to acquire suitable replacement habitat in a location to be approved by the Department. All acreage purchased in compliance with this paragraph shall be acquired by Shadowrock and transferred in fee title to the City as a permanent wildlife preserve.

The requirement to acquire suitable replacement habitat contained in this paragraph is subject to the security requirements set out in Paragraphs 5 and 6 below. The acquisition required by this paragraph must be completed no later than one (1) year after the issuance of all federal, state and local permits for the Shadowrock Project. If after twelve (12) months from the issuance of all federal, state and local permits, the acquisition has not been completed, the Department may draw upon its security, as set out in Paragraph 5 below, to complete the task.

Nothing herein shall be deemed to require the City to expend City funds to implement the provision of this Section without the express consent of the City Council given at the time of the proposed expenditure.

C. Desert Tortoise and Coachella Valley Fringe-Toed Lizard Habitat

The Shadowrock Project is not located upon habitat of the Coachella Valley Fringe-toed lizard. However, current development plans contemplate the importation of fill dirt from land managed by the federal Bureau of Land Management ("BLM") which is habitat for the Coachella Valley Fringe-toed lizard and the disturbance of which could affect habitat of both the Desert tortoise and the Coachella Valley Fringe-toed lizard. The BLM has not yet consented to the plan to import fill from its lands, and prior to any such consent, it shall be required to fulfill the requirements of Section 7 of the Federal Endangered Species Act which require it to consult with the United States Fish and Wildlife Service ("Service"). Shadowrock and the Department agree that they shall each abide by the decisions reached by the BLM and the Service, in such consultation process, including any conditions or mitigation requirements which may be imposed. Shadowrock and the Department each further agree, that in the event the Service may legally impose mitigation requirements for land disturbed by the Project which is determined to be Desert Tortoise Habitat, each will abide by lawful decisions of the Service.

D. Permits

(1) Shadowrock shall be required to obtain all necessary federal and state permits and/or other entitlements, including compliance with the California Fish and Game Code § 1600 et seq. and 2050 et seq.. The Department agrees that for these specifically identified permits/entitlements, the Department will not require mitigation and/or alternatives in addition to that which is agreed to pursuant to this Agreement.

(2) The Department has determined that the mitigation for environmental impacts to wildlife for this project as stated in this Agreement is sufficient. However, the Department cannot speak for nor bind the Service by entering into this Agreement.

4. PENINSULAR BIGHORN SHEEP STUDY

Upon the issuance of all federal, state and local permits for the Shadowrock Project, Shadowrock shall pay to the Department \$50,000, to be paid in yearly installments of \$10,000, for a study of Peninsular Bighorn sheep in the San Jacinto Mountains. The first payment will be due no later than six (6) months from the date of issuance of all federal, state and local permits. Each subsequent annual payment shall be due on January 1 of the succeeding year. This amount shall be paid to the Department in a manner to be specified by the Department.

5. IRREVOCABLE LETTER OF CREDIT AS SECURITY

A. As security for the performance of its obligations under this Agreement, Shadowrock hereby agrees to procure and to

deliver to the Department upon the issuance of all federal, state, and local permits, an irrevocable "standby" letter of credit ("Credit") in the stated amount of \$350,000 substantially in the form attached as Exhibit "B". Such letter shall be delivered to the General Counsel for the Department for approval as to form, who shall then transfer it to the accounting officer for safekeeping. The failure to provide the security may result in the revocation of any permit or approval issued by the Department.

B. In selecting a bank or other financial institution as issuer of such irrevocable letter of Credit, Shadowrock shall choose an entity which operates an office or branch in Sacramento, California, and at least two other cities within California.

C. The Department shall have the ability to draw any amount, up to the Principal Sum of this Credit, in one or more drawings, upon default by Shadowrock as specified in Paragraph 6 of this Agreement.

D. Each demand made upon the Credit shall be based upon a reasonable estimate of the costs necessary to cure the adverse effects of Shadowrock's default, including, but not limited to, administrative costs and costs for employment of third parties for the purpose of implementing the requirements and goals of this Agreement. Administrative costs shall be set at a rate of half of one percent of the sum total of other non-administrative costs.

E. Within three (3) business days from any draw made by the Department on the Credit, the Department shall notify Shadowrock and the City that such a draw has occurred. The Department shall thereafter allow Shadowrock fifteen (15) days to cure such default. If the default is cured within such time, the Department shall transfer to Shadowrock the funds drawn because of the default, less any administrative or other costs proximately caused by the default. If not, the Department shall use the funds for purposes of curing the default.

F. From time to time, upon timely request by Shadowrock and upon presentation of documentary evidence of substantial compliance with the terms of the Agreement, Shadowrock may request that the Department, as beneficiary of the Credit, join with Shadowrock to request from the issuer an equitable reduction of the Principal Sum of such Credit. However, the Principal Sum of the Credit may not be reduced below an amount determined by the Department to be reasonably necessary to cure any potential future default by Shadowrock.

G. Upon timely request and upon presentation of documentary evidence of full compliance with the terms and conditions of this Agreement, the Department shall effectuate a cancellation of the Credit if such full compliance occurs prior to the natural expiration of the Credit.

6. **DEFAULT**

Upon information and belief that a default by Shadowrock has occurred, the Department shall notify Shadowrock that a default

has occurred and give the basis for that determination.

Shadowrock shall have twenty (20) days to cure such a default before the Department acts to acquire title to the security and cure the default. In the event of a default, the Department shall have all rights with respect to the security and all remedies available at law or equity including specific performance, injunction, and without limitation all rights of a secured party pursuant to the California Uniform Commercial Code.

The following non-exclusive list of actions shall constitute an event of default under this Agreement:

A. Shadowrock or its agent has not acquired and conveyed real property interests acceptable to the Department as provided in this Agreement.

B. Shadowrock has failed to make any of the annual payments required by Paragraph 4 of this Agreement.

7. DISMISSAL OF THE PETITION

As consideration for the promises of Shadowrock and the City contained within this Agreement, within ten (10) business days of the execution of this Agreement, the Department shall cause to be filed a Request for Dismissal of the entire Petition with prejudice.

8. NOTICES

All notices and other communications required or permitted to be given or delivered pursuant to this Agreement shall be in writing. Such writing shall be delivered personally, by courier,

by telecopy, or sent by first-class or certified mail, return receipt requested. All such notices or transmittals shall be deemed delivered upon the earlier of actual receipt or three (3) days after posting by certified mail addressed to the recipient as follows:

SHADOWROCK

Shadowrock Ventures
P.O. Box 5182
Palm Springs, CA 92263

--and--

Shadowrock Ventures
4890 Lincolnshire Avenue
Buena Park, CA 90621

CITY

Director of Planning & Zoning
City of Palm Springs
3200 Tahquitz Canyon Way
P.O. Box 1786
Palm Springs, CA 92263

--and--

City Manager
City of Palm Springs
3200 Tahquitz Canyon Way
P.O. Box 1786
Palm Springs, CA 92263

DEPARTMENT

California Department of Fish & Game
Legal Affairs Division
1416 Ninth Street
P.O. Box 944244
Sacramento, CA 94244-2090

--and--

Fred A. Worthley, Jr.
Regional Manager, Region 5
California Department of Fish & Game
330 Golden Shore, Suite 50
Long Beach, CA 90802

9. FURTHER ACTIONS

From time to time hereafter, Shadowrock, the City and the Department shall execute such instruments and other documents and take such other actions, upon the request of the other, as may be necessary to carry out the intent of this Agreement. This Agreement cannot be amended or modified in any way except by a written instrument duly executed by Shadowrock, the City and the Department. Any proposal for amendment or modification must be duly delivered for review and approval by the Director of the Department at 1416 Ninth Street, 12th Floor, Sacramento, California 95814.

10. AUTHORIZED DESIGNEES OF PARTIES

A. City's Designation

The City hereby designates its Director of Planning and Zoning, Douglas R. Evans, as its representative with regard to all decisions which must be made to carry out the obligations and purposes of this Agreement. The City may change its designation at any time, and if it does so, it will provide written notice of the change in designation to the Department and to Shadowrock.

B. Department's Designation

The Department hereby designates Fred A. Worthley, Jr. as its representative with regard to all decisions which must be made to carry out the obligations and purposes of this Agreement. The Department may change its designation at any time, and if it does so, it will provide written notice of the change in designation to the City and to Shadowrock.

C. Shadowrock's Designation

Shadowrock hereby designates its Senior Partner, Mark Bragg, as its representative with regard to all decisions which must be made to carry out the obligations and purposes of this Agreement. Shadowrock may change its designation at any time, and if it does so, it will provide written notice of the change in designation to the Department and to the City.

11. WAIVER OF COSTS/ATTORNEYS' FEES

Each party shall bear its own costs and attorneys' fees with regard to the Petition.

12. SUCCESSORS AND ASSIGNS

The parties agree that the rights and obligations arising out of this Agreement, and each of its terms, shall be assignable, and shall inure to the benefit of and be binding upon the employees, agents, successors and assigns of Shadowrock, the City and the Department.

13. ENFORCEMENT OF AGREEMENT

In addition to all of the legal and/or equitable rights that the parties may have with regard to this Agreement, the parties agree that the terms and covenants herein shall be specifically enforceable, and that the Riverside Superior Court, Indio Branch, shall have jurisdiction to enforce the terms and conditions of this Agreement.

14. COUNTERPARTS

This agreement may be executed in one or more counterparts, each of which shall be deemed to be an original instrument.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement.

Dated: 10-20-93

CALIFORNIA DEPARTMENT OF FISH AND GAME

By: Fred Wotthberg
Its: Regional Mgr.

Dated: 10/21/93

CITY OF PALM SPRINGS

By: George Mangano
Its: Mayor

Dated: 10/21/93

CITY COUNCIL OF THE CITY OF PALM SPRINGS

By: George Mangano
Its: Presiding Officer

Dated: 10-20-93

SHADOWROCK VENTURES

By: Mark A. Bragg
Its: Senior Partner

By: Anthony Ferrero
Its: Managing Partner

APPROVED BY THE CITY COUNCIL
BY RES. NO. 5267, 10-20-93
100
A3291

EXHIBIT

IRREVOCABLE "STANDBY" LETTER OF CREDIT

ISSUER:

ACCOUNT PARTY/CUSTOMER:

IRREVOCABLE LETTER OF CREDIT NO.: _____

Dated:

TO BENEFICIARY:

California Department of Fish and Game
1416 9th Street, 12th Floor
Sacramento, California 95814
Attention: Director

Dear Sirs:

1. At the request and on the instructions of our CUSTOMER, ("Applicant"), we hereby establish in favor of the BENEFICIARY, the California Department of Fish and Game (the "Department"), this Irrevocable Standby Letter of Credit ("CREDIT") in the Principal Sum of _____ \$

2. This CREDIT is and has been established for the sole benefit of the Department pursuant to the terms of the Memorandum of Understanding ("the CESA MOU") entered into between Applicant and the Department _____, 1993.

3. This CREDIT is intended by the parties to the CESA MOU to serve as a security device for the performance by Applicant of its obligations under the CESA MOU.

4. Upon the occurrence of any default by Applicant as determined by the Department in its sole discretion under the CESA MOU, the Department shall be entitled to draw upon this CREDIT by presentation of a duly executed CERTIFICATE FOR DRAWING in substantially the same form as Attachment A, attached hereto, at our office located at _____.

5. The CERTIFICATE shall be completed and signed by an "Authorized Representative" as defined in paragraph 12. Presentation by the Department of a completed CERTIFICATE may be made in person or by registered mail, return receipt requested.

6. Upon presentation of a duly executed CERTIFICATE as above provided, payment shall be made to the Department, or to an account designated by the Department, in immediately available funds, at such time and place as the Department shall specify.

7. Funds may be drawn in one or more drawings not to exceed the Principal Sum.

8. If a demand for payment does not conform to the terms of this CREDIT, we shall give the Department prompt notice that the demand for payment was not effected in accordance with the terms of this CREDIT, state the reasons therefor, and await further instructions.

9. Upon being notified that the demand for payment was not effected in conformity with the CREDIT, the Department may correct any such non-conforming demand for payment.

10. All drawings under this CREDIT shall be paid with our funds. Each drawing honored by us hereunder shall reduce, ~~REQ~~ tanto, the Principal Sum. By paying to the Department an amount demanded in accordance herewith, we make no representations as to the correctness of the amount demanded.

11. This CREDIT will be cancelled in whole or in part upon receipt by us of a CERTIFICATE OF CANCELLATION, which (i) shall be in the form of Attachment B attached hereto, and (ii) shall be completed and signed by any person purporting to be an Authorized Representative, as defined in the next paragraph.

12. An "Authorized Representative" shall mean one of the following persons: Director of the Department of Fish and Game, or the General Counsel of the Department of Fish and Game.

13. Communications with respect to this CREDIT shall be in writing and addressed to us at _____

_____ specifically referring upon such writing to this CREDIT by number.

14. This CREDIT may not be transferred or assigned, either in whole or in part.

15. This CREDIT shall be deemed a contract made under the laws of the State of California.

16. This CREDIT shall, if not cancelled as provided herein, expire no later than _____ of the date of its execution.

THEREFORE, _____

has executed and delivered this IRREVOCABLE STANDBY LETTER OF CREDIT to the BENEFICIARY as of the _____ day of _____, 19____.



NOTE: TIME DRAWN PER 04 13 03
 MTC IN HELM SPRINGS

SHADOW ROCK
 Palmy Springs, ca.