

**Master Restrictive Covenant for
Pima County MSCP Mitigation Land**

This Master Restrictive Covenant ("**MSCP Master Covenant**") is entered into by Pima County, a political subdivision of the State of Arizona ("**County**"), the Pima County Regional Flood Control District, a political taxing subdivision of the State of Arizona ("**District**"), and the Arizona Land and Water Trust, Inc., an Arizona nonprofit corporation ("**Beneficiary**") (County, District, and Beneficiary being collectively the "**Parties**").

1. Background and Purpose

1.1. The United States Fish and Wildlife Service issued permit #TE84356A to County (the "**Permit**") for the incidental take of threatened and endangered species caused by specific, lawful activities within Pima County. To direct the mitigation of these incidental takes and ensure compliance with the permit, the County has established its Multi-Species Conservation Plan ("**MSCP**"). The objectives of the MSCP (the "**Objectives**") include managing mitigation lands to prioritize conservation of Covered Species and their habitats, prevent landscape fragmentation, and support species establishment or recovery.

1.2. The County owns the real property listed in Exhibit A (the "**Restricted Property**" or "**Restricted Properties**"). A map identifying the Restricted Property is attached hereto as Exhibit B. Individual maps of each of the Restricted Properties are attached hereto as Exhibit C. The Restricted Property contains significant undisturbed natural open space that the County wishes to preserve and protect for the mitigation of incidental take covered by the County's incidental take permit.

1.3. The Parties intend this MSCP Master Covenant to prohibit uses of the Restricted Properties that would impair or interfere with the mitigation efforts of the County, except for any pre-existing uses as shown on imagery by Pictometry or Pima Association of Governments dated 2015 or 2016, whichever is more recent (the "**Pre-existing Uses**").

1.4. The Parties intend that this MSCP Master Covenant assure that the Restricted Properties will be forever preserved as natural open space for the conservation of natural habitat for wildlife, the protection of rare and unique native plants and animals and the scenic enjoyment of the general public.

2. Recording of Site Specific Restrictive Covenants

2.1. The Parties intend that a site specific agreement ("**Site Specific Agreement**") be recorded for each individual property listed on Exhibit A and depicted on Exhibits B and C. The Site Specific Agreement shall be in the form of Exhibit D attached hereto. The Parties intend that each Site Specific Agreement incorporate all of the terms and conditions contained in this MSCP Master Covenant. Each Site Specific Agreement will contain the legal description of the referenced property, and recordation of a Site

Specific Agreement will subject the real property described therein to the terms of this MSCP Master Covenant and cause such property to be a Restricted Property.

2.2. County hereby delegates to the County Administrator or his designee the authority to sign each of the Site Specific Agreements on behalf of County. District hereby delegates to the General Manager of the District or his designee the Authority to sign each of the Site Specific Agreements on behalf of District.

3. Nature of MSCP Master Covenant

3.1. This MSCP Master Covenant runs with each Restricted Property and binds the County and its successors and assigns.

3.2. This MSCP Master Covenant remains in perpetuity with respect to each Restricted Property, unless released by written consent of County, District, and Beneficiary, with the written concurrence of the U. S. Fish & Wildlife Service. Any release will specify if it relates to a specific Restricted Property or to this Master Agreement and, therefore, all the Restricted Properties.

3.3. The uses of the Restricted Properties prohibited by this MSCP Master Covenant remain in effect notwithstanding any future annexation of all, or any portion, of a specific Restricted Property by a municipality.

3.4. This MSCP Master Covenant may not be amended or modified except upon written agreement of County, District, and Beneficiary, and written concurrence from the U.S. Fish and Wildlife Service.

3.5. This MSCP Master Covenant may be enforced by District or Beneficiary as provided in Section 9 below.

4. The Restrictions. Except as provided in Section 5 of this MSCP Master Covenant, the following uses of the Restricted Properties are prohibited (collectively the "Restrictions"):

4.1. Development of the Restricted Properties, including subdividing or lot splitting of a Restricted Property;

4.2. Construction or placement of new or additional buildings or structures on a Restricted Property, unless the construction supports the purposes for which the Restricted Property was originally intended including any adopted master plan, and does not degrade the Restricted Property's values as expressed in the purpose statement;

4.3. Alteration of the ground surface or natural vegetation, except as may be needed for ranch, range improvement, or trail-based recreational uses, and only if such alterations are consistent with other provisions of the Multi-species Conservation Plan;

4.4. Impoundment, diversion or alteration of any natural watercourse unless for watershed enhancement to improve species habitat or to maintain a Restricted Property's mitigation values;

4.5. Development of, or the granting of, access, rights-of-way or easements for new roads or new utilities, including telecommunications facilities, except where County has no discretion to prohibit the activity;

4.6. Filling, excavation, dredging, mining, drilling, exploration, or extraction of minerals, hydrocarbons, soils, sand, gravel, rock or other materials on or below the surface of the Restricted Property, except where County has no discretion to prohibit the activity;

4.7. Storage, accumulation or disposal of hazardous materials, trash, garbage, solid waste or other unsightly material on the Restricted Property;

4.8. Introduction of non-native fish or amphibians or other non-native animals to or from catchments, tanks, springs or creeks. Other non-native species that might adversely affect the mitigation of permitted activities are also prohibited except for the purposes of supporting existing ranching operations, if any, and limited to those areas identified that have historically been devoted to the growing of such species, as shown on 2015 or 2016 aerial photographs;

4.9. Storage and use of biocides and chemical fertilizers except for residential and agricultural purposes. Aerial application of biocide or other chemicals is prohibited except where County and District concur that it is an appropriate and necessary management technique to promote the recovery and re-establishment of native species, to reduce threats to ecosystem structure and function, or to protect public health, safety and welfare;

4.10. Pumping of water from existing diversions for purposes other than on-site residential, wildlife, recreational, habitat enhancement and agricultural uses associated with livestock grazing on the Restricted Property. Increases in the pumped amounts of surface or subsurface water as allowed by the Arizona Department of Water Resources are not permitted without joint approval from the County and District and concurrence from the U.S. Fish and Wildlife Service;

4.11. Installation of underground storage tanks for petroleum or other polluting substances, except for already existing or permitted septic tanks;

4.12. Confinement of livestock where animals are permanently located in enclosures and the majority of their feed supplied from outside sources. This includes feeder cattle, dairy, pig, poultry and exotic animal farm operations;

4.13. Commercial enterprises inconsistent with the Objectives, excluding farming and ranching. The County and District may jointly approve commercial enterprises, other

than farming or ranching, that provide for ecotourism or wildlife-related recreation provided that it is consistent with the Objectives and does not degrade the Restricted Property's mitigation value;

4.14. Residential use for mobile homes, travel trailers, tent trailers, self-propelled recreational vehicles and like structures or vehicles, except temporary use as permitted by County Park Rules or reasonable use as needed to support the protection or enhancement of the Restricted Property's mitigation value;

4.15. Paving of roads using asphalt or concrete except where required by County ordinance;

4.16. Any modification of the topography of the Restricted Property through the placement of soil, dredging spoils, or other material, except for those uses permitted under this document, or to reduce soil erosion or to protect public health, safety and welfare;

4.17. Severance of water rights appurtenant to the Restricted Property including the transfer, encumbrance, lease and sale of water rights;

4.18. Off-road vehicular travel except to facilitate permitted activities on the Restricted Property; and

4.19. Removal of natural, mineral, or cultural resources that is not authorized by County.

5. Exceptions to Restrictions. Notwithstanding any other provision of this MSCP Master Covenant, the following uses of the Restricted Properties are not prohibited:

5.1. Any use of the Restricted Property which the County Board of Supervisors in its reasonable discretion determines is necessary to retain, restore, or enhance the mitigation of incidental take covered by the Permit;

5.2. Any Pre-existing Use of the Restricted Property;

5.3. Any use of the Restricted Property expressly permitted by a contract in effect between the County and a third party as of the date this MSCP Master Covenant is recorded; and

5.4. Any use of the Restricted Property which the County Board of Supervisors determines, based on clear and convincing evidence presented to said Board, is necessary to protect the public health, safety or welfare.

6. Obligations of County

6.1. County, through its employees, agents and contractors, retains all responsibilities and will bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Restricted Properties. County remains solely responsible for obtaining any applicable governmental permits and approvals for any activity or use undertaken on the Restricted Properties. All such activity shall comply with all applicable Federal, state, and local laws, regulations, and requirements.

6.2. County, through its employees, agents and contractors, at County's expense, will conduct an inspection of the Restricted Properties at least biennially to determine if there are any violations of the Restrictions. The inspection will be completed by either examination of aerial photographs or by physical inspections with onsite photographs taken at the time of the inspections. The County will prepare and deliver copies of biennial reports ("Reports") of its inspections, which reports will describe the then current condition of the Restricted Properties inspected and note any violations of the Restrictions. Copies of the Reports will be provided to District and Beneficiary upon completion, and in no event later than October 15 of each biennial reporting year. County will maintain the Reports as County records in accordance with Arizona state law.

6.3. County shall report any violations of the terms of this MSCP Master Covenant to District and Beneficiary within 2 working days of County discovery and confirmation of any such violation. For purposes of this Section 6.3, the determination of what shall constitute a reportable violation of this MSCP Master Covenant shall be at County's reasonable discretion. However, County's determination of what is reportable pursuant to this Section 6.3 will not limit District or Beneficiary's right to enforce this MSCP Master Covenant as provided for in Sections 7, 8, and 9 of this MSCP Master Covenant.

6.4. The parties acknowledge that Beneficiary has no legal ownership interest in the Restricted Properties, and it is the parties' intent that the Beneficiary not undertake any responsibility or liability with respect to the Restricted Properties, other than liability related to Beneficiary's negligence ("Beneficiary's Negligence"), as more specifically limited below. Therefore, County agrees:

6.4.1. County (as indemnifying party) shall indemnify, defend and hold harmless, Beneficiary and its officers, directors, employees, agents, affiliates, successors and permitted assigns (collectively, "**Indemnified Party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including attorneys' fees, that are incurred by Indemnified Party (collectively, "**Losses**"), arising out of or related to any third-party claim alleging:

6.4.1.1. breach or non-fulfillment of any provision of this Agreement by County, District, or County or District's personnel;

6.4.1.2. any negligent or more culpable act or omission of County, District, or County or District's personnel (including any reckless or willful misconduct) in connection with the performance of County, District, or County or District's personnel under this Agreement;

6.4.1.3. any bodily injury, death of any person or damage to real or tangible personal property caused by the negligent or more culpable acts or omissions of County, District, or County or District's personnel (including any reckless or willful misconduct);

6.4.1.4. any failure by County, District, or County or District's personnel to comply with any applicable federal, state or local laws, regulations or codes, including any failure related to their performance under this Agreement; or

6.4.1.5. any claim by any third party asserting a failure of Beneficiary to enforce Beneficiary's rights, or perform Beneficiary's duties, under this Agreement. County's obligation to indemnify Beneficiary against third party claims related to any failure of Beneficiary perform Beneficiary's duties, under this Agreement will not preclude County from replacing Beneficiary as provided in Section 8.5. Replacement of Beneficiary will be County's sole remedy for Beneficiary's breach of its obligations under this Agreement.

6.4.2. Beneficiary must give notice to County (a "**Claim Notice**") of any claim filed which may give rise to a Losses. Indemnified Party's failure to provide a Claim Notice does not relieve County of any liability, but in no event shall County be liable for any Losses that result directly from a delay in providing a Claim Notice, which delay materially prejudices the defense of the claim. County's duty to defend applies immediately after receiving a Claim Notice.

6.4.3. County may select legal counsel to represent Beneficiary in any action for which County has an obligation to indemnify, defend and hold harmless Beneficiary, and County shall pay all costs, attorney fees, and Losses.

6.4.4. County shall give prompt written notice to Beneficiary of any proposed settlement of a claim that is indemnifiable under this Agreement. County may settle or compromise any claim without Beneficiary's consent, so long as Beneficiary is not responsible for paying any Losses.

7. Obligations of District

7.1. District shall review any and all reports on potential violations of the Restrictions provided by County to District as required by this MSCP Master Covenant, at District's expense.

7.2. If the event of any action that may constitute a violation of the terms of this MSCP Master Covenant, District shall determine, in its reasonable discretion, whether to take any action to enforce the terms of this MSCP Master Covenant.

7.3. In the event that County desires to take action with respect to the Restricted Properties that may constitute a violation of this MSCP Master Covenant, County will obtain District's prior approval of such action, and District shall respond to any such request from County in a timely manner.

7.4. District and County will advise Beneficiary in writing of any non-privileged communications between County and District with regard to the matters referred to in Sections 7.2 and 7.3. District and County will also provide Beneficiary with copies of any written communications, in whatever form, between District and County with regard to the matters referred to in Sections 7.2 and 7.3.

8. Obligations of Beneficiary

8.1. Beneficiary shall review any and all reports provided by County to Beneficiary as required by this MSCP Master Covenant, at County's expense. County shall compensate Beneficiary for performing its actions under this Section 8.1 on a time and materials basis, pursuant to the terms of professional services contract entered into between County and Beneficiary (the "Services Agreement"). In the event (i) County and Beneficiary cannot agree upon the Services Agreement; (ii) the Services Agreement is terminated, for any reason; (ii) County fails to timely pay Beneficiary under the Services Agreement; or (iii) County materially breaches any other term of the Services Agreement, then Beneficiary will have the right to terminate its obligations under this MSCP Master Covenant by providing County and District ten days prior written notice.

8.2. If the event of any action that may constitute a violation of the terms of this MSCP Master Covenant, Beneficiary shall determine, in its reasonable discretion, whether to take any action to enforce the terms of this MSCP Master Covenant. Beneficiary shall be reimbursed for any expenses incurred by Beneficiary to enforce this Master Agreement in accordance with the Services Agreement.

8.3. In the event that County desires to take action with respect to a Restricted Property that may constitute a violation of this MSCP Master Covenant, County will obtain Beneficiary's prior approval of such action, and Beneficiary shall respond to any such request from County in a timely manner. Beneficiary shall be compensated for any services performed in response to any such request in accordance with the Services Agreement.

8.4. In the event Beneficiary is no longer able to perform its obligations under this MSCP Master Covenant, or no longer desires to serve as Beneficiary, then Beneficiary shall provide not less than sixty (60) days' notice to County. Beneficiary may designate a replacement Beneficiary subject to County's approval. In the event Beneficiary does not designate a replacement Beneficiary within 45 days' after delivery of the notice, then

County will be solely responsible to designate a replacement Beneficiary. Beneficiary's resignation shall be effective sixty (60) days after the delivery of the notice by Beneficiary to County.

8.5. County's sole remedy for Beneficiary's failure to perform Beneficiary's obligations under this Agreement will be to terminate the Services Agreement and replace Beneficiary with a new party who will fill the role of Beneficiary. County will be solely responsible to designate a replacement Beneficiary in such event.

9. District and Beneficiary's Right To Enforce.

9.1. District and/or Beneficiary (for purposes of this Section 9, collectively or individually the "**Enforcing Party**") may enforce this MSCP Master Covenant against the County and its successors and assigns.

9.2. If the Enforcing Party has reason to believe that a violation of the Restrictions may have occurred, the Enforcing Party has the right to enter upon the Restricted Properties. The Enforcing Party must provide at least two (2) business days' notice to County prior to entering upon a Restricted Property.

9.3. The Enforcing Party shall hold County harmless from liability for any injuries to its employees or agents occurring on a Restricted Property in the course of its duties pursuant to this MSCP Master Covenant which are not directly or indirectly the result of acts, omissions, or the negligence of County, or County's employees, agents, successors and assigns.

9.4. If the Enforcing Party determines that there is a breach of the terms of the Restrictions, the Enforcing Party may, but is not obligated to, enforce the terms of this MSCP Master Covenant as provided in this Section 9. When evaluating any possible breach or enforcement action, the Enforcing Party will have the right to consult experts (e.g., biologists, engineers, etc.) to assist it in determining both whether or not there is a violation and appropriate remedial action, provided that the cost of any such experts is subject to the maximum dollar limitation in the Services Agreement. Beneficiary will be reimbursed by County for any such expenses in accordance with the Services Agreement.

9.5. Prior to any enforcement action by the Enforcing Party, the Enforcing Party must give written notice to County of such breach (the "**Notice of Breach**") and demand corrective action sufficient to cure the breach and, where the breach involves injury to a Restricted Property resulting from any activity inconsistent with the purpose of this MSCP Master Covenant, to restore the portion of the Restricted Property so injured.

9.6. If (i) under circumstances where an alleged breach can be cured within a 30 day period, County fails to cure an alleged breach within 30 days after receipt of the Notice of Breach, or (ii) under circumstances where an alleged breach cannot reasonably be cured within a 30 day period, County fails to begin curing such breach within the 30 day

period, or County fails to continue diligently to cure such breach until finally cured, the Enforcing Party may in any such event bring an action at law or equity to enforce the terms of this MSCP Master Covenant or to enjoin the breach by temporary or permanent injunction, and to recover any damages caused by the breach of the terms of this MSCP Master Covenant or injury to any protected uses or mitigation, including damages for any loss, and to require the restoration of any Restricted Property to the condition that existed prior to the injury.

9.7. In the event any action, suit or proceeding at law or in equity is instituted with respect to this MSCP Master Covenant, the Enforcing Party shall be entitled to reasonable attorneys' fees, expenses and court costs incurred if it is the prevailing party.

9.8. Nothing contained in this MSCP Master Covenant can be construed to entitle the Enforcing Party to bring any action against the County for any injury to or change in the Restricted Property resulting from causes beyond the County's control including unforeseeable acts of trespassers, fire, flood, storm, drought, pests, natural earth movement, vegetative disease, or resulting from any action taken by the County under emergency conditions to prevent, abate or mitigate significant injury to any Restricted Property resulting from such causes.

10. General Provisions

10.1. The laws and regulations of the State of Arizona govern this MSCP Master Covenant. Any action relating to this MSCP Master Covenant must be brought in a court of the State of Arizona in Pima County.

10.2. Unless the context requires otherwise, the term "including" means "including but not limited to".

10.3. Each provision of this MSCP Master Covenant stands alone, and any provision of this MSCP Master Covenant found to be prohibited by law is ineffective only to the extent of such prohibition without invalidating the remainder of this MSCP Master Covenant.

10.4. This instrument sets forth the entire Agreement of the County, District and Beneficiary with respect to this MSCP Master Covenant.

10.5. Any notice given under this MSCP Master Covenant must be in writing and served by delivery or by certified mail upon the other Parties as follows:

If to County: Office of Sustainability and Conservation
 Attn: Director
 Pima County Public Works
 201 N Stone Ave., 6th FL
 Tucson, Arizona 85701

If to District: Regional Flood Control District
Attn: Director
Pima Works Building
201 N Stone Ave., 9th FL
Tucson, Arizona 85701

If to Beneficiary: The Arizona Land and Water Trust
Attn: Diana Freshwater, President
3127 N. Cherry Ave.
Tucson, Arizona 85719

The Parties have executed this MSCP Master Covenant by their duly authorized representatives.

COUNTY: PIMA COUNTY, a political subdivision of the State of Arizona:

Chair, Board of Supervisors

Date

ATTEST:

Robin Brigode, Clerk of Board of Supervisors

Date

DISTRICT: The Pima County Regional Flood Control District

Chair, Board of Directors

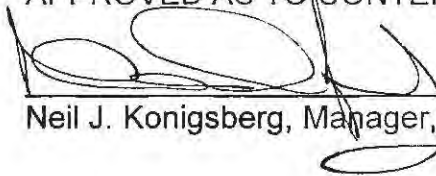
Date

ATTEST:

Robin Brigode, Clerk of Board of Directors

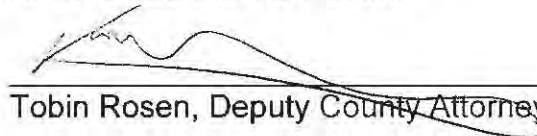
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APPROVED AS TO CONTENT:

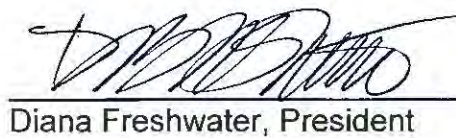

Neil J. Konigsberg, Manager, Real Property Services

John Bernal, Deputy County Administrator, Public Works

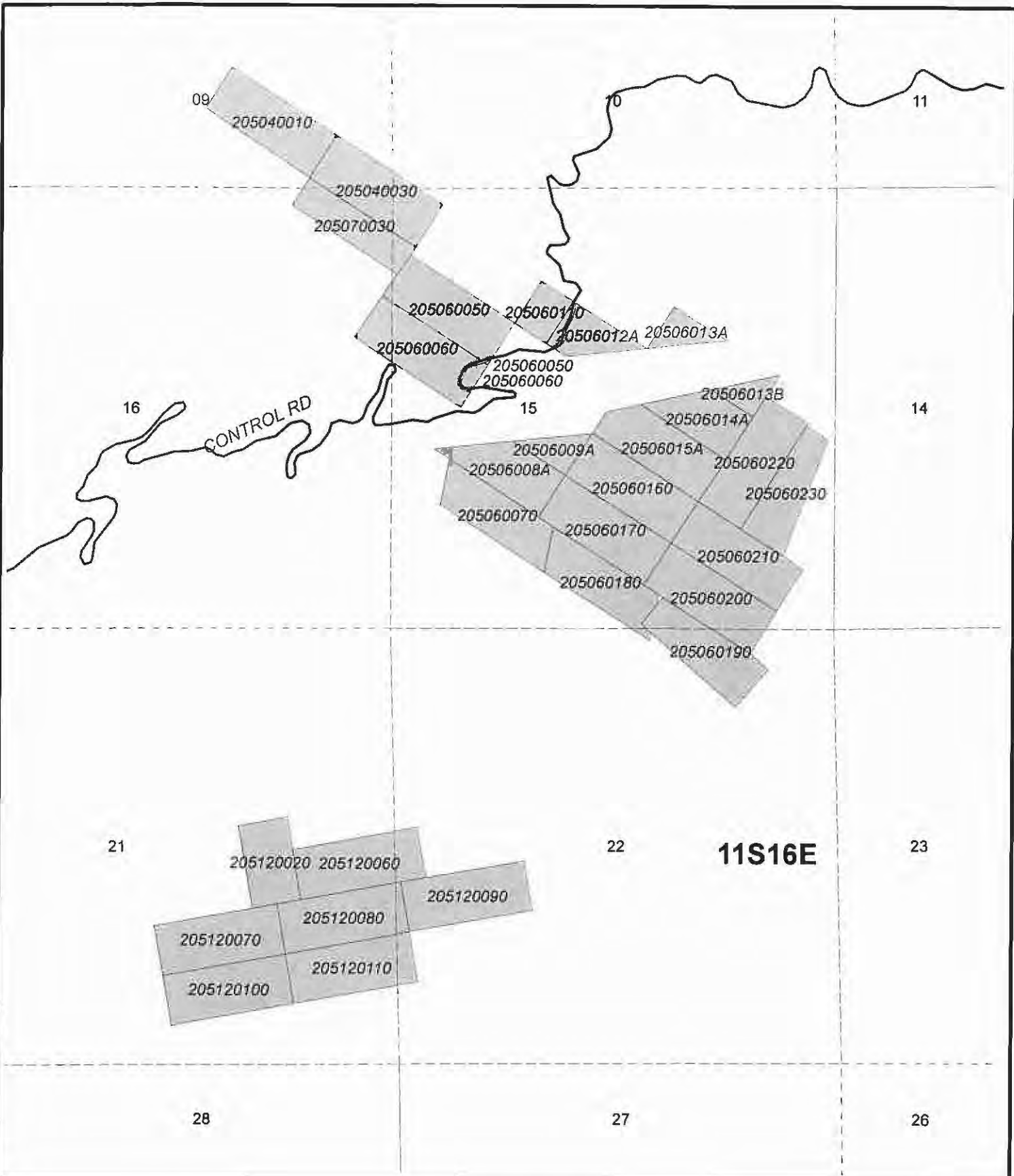
APPROVED AS TO FORM:

 10/18/16
Tobin Rosen, Deputy County Attorney

BENEFICIARY: The Arizona Land and Water Trust, Inc.


Diana Freshwater, President

10/11/16
Date



MSCP
Restrictive Covenants:
Pima County Owner & Grantor;
FCD Receives Covenant

EXHIBIT C



0 1,000 ft



Oracle Ridge (41)