

**RESTRICTIVE COVENANTS
FOR
ELK SPRINGS ESTATES SUBDIVISION (Revised)**

These Restrictive Covenants are a revised copy, and supercede the Restrictive Covenants previously filed in Otero County (Instrument # 200803143).

The owners of all lots located in Elk Springs Estates Subdivision, a subdivision located in Otero County, New Mexico, a plat of which was recorded in the records of Otero County, New Mexico, do hereby consent and agree that the following restrictive covenants shall be in full force and affect all property within said subdivision.

1. There shall not be erected on any one lot more than one (1) single private family dwelling house together with the necessary and appurtenant attached building such as servant quarters, garages and car ports customarily used in connection therewith. No structure shall have more than two (2) stories unless otherwise approved by the Architectural Control Committee named below. On lots with gross area greater than 3 acres, a barn to house horses will be allowed after the architecture and color of the building has been approved by the Architectural Control Committee. All structures will be site-built. Mobile homes are not permitted. Garages and accessory buildings must match in material and color to the main building. All homes must have a minimum living space of 1200 square feet.
2. No business or profession, manufacturing operation, commercial enterprise or public or commercial amusement enterprise shall be conducted, operated or maintained on any lot.
3. There is hereby created the Architectural Control Committee (hereinafter sometime referred to as the "Committee") composed of a Chairperson, and other property owners in good standing, appointed by the developer. Future and succeeding members shall be selected at an annual meeting of the committee.
 - (a) No dwelling house, garage, car port, outbuilding, fence, wall, retaining wall, pier, breakwater, or other structure of any kind shall be erected, constructed, placed, moved on, or maintained on any lot or lots, or any parcel or portion thereof, nor shall any alterations, additions, change or repair be made to the exterior thereof, unless prior to the commencement of any constructions, excavation, grading, or other work, three (3) complete sets of plans and specifications thereof, including front, side, and rear elevations, and floor plan for each floor and basement, color scheme thereof, and plot plan, indication and fixing the exact location of such structure of such altered structure thereof, shall first have been submitted to the Committee in writing for its approval and such approval obtained in writing from the committee. One (1) approved set will go to the committee. One (1) approved set will go to the builder, and One (1) approved set will go to the owner.
 - (b) All structures must have a slanting roof with a minimum of a two and one half in twelve pitch. The Architectural committee must approve roofing materials and color. The Committee may grant variances below the minimum pitch requirement.
 - (c) Approval by the committee of such plans, specifications, and location of buildings shall be endorsed on all three sets of plans and specifications, and once set thereof shall be

returned to the person submitting the same, one set will be given to the builder and the committee will retain the other set.

- (d) In the event that the proposed improvements be for the repairing and/or redecoration of the exterior of a structure, without remodeling the same or making additions thereto, it shall be necessary only to file the color scheme or such proposed work with the committee and have the same approved in writing by it prior to commencement of such repairs and/or redecoration.
 - (e) After such plans and specifications and other data submitted have been approved by the committee, no building, garage, fence, wall, car port or other structure of any kind shall be erected, constructed, placed, altered or maintained upon said property unless the same shall be erected, constructed, place, altered or maintained in conformity with the plans and specifications, color scheme and plot plan therefore approved by the committee. No building, garage, car port, fence wall, retaining wall, or other structure of any kind shall be erected, constructed, placed, altered, or maintained on said property other than in accordance with the plans and specifications, color scheme, and plot plan therefore approved by the Committee.
 - (f) Building or structures shall not be constructed of a building material that will cause the sunlight to be reflected there from; nor shall any building or other structure be painted with any paint or other substance that will cause the sunlight to be reflected there from.
 - (g) All plans for septic tanks in Elk Springs Estates shall be submitted to the Architectural committee for approval. The Committee will base its approval for the installation of such septic tanks on the existing or anticipated municipal, county, state or federal regulations regarding septic tanks of other methods of sewage disposal.
 - (h) In the event of any ambiguity in a provision of these restrictions, the interpretation of the Architectural Control Committee as to the meaning intended shall prevail.
 - (i) The Committee may withhold its approval for any of the following reasons: (1) Non-compliance with any of the specific conditions and restrictions contained in these Restrictive Covenants; or (2) Reasonable dissatisfaction of the committee with the locations of the structure of the building site, or with the appearance of the proposed structure, or with the lot grading, having in mind the character of the neighborhood in which it is proposed to be erected, the materials of which it is to be built, the harmony thereof with the surroundings, and the effect of the building or other structure as planned on the outlook from the adjacent or neighboring property or properties. However, the Committee shall act with all due promptness; in the event the committee shall fail to approve or disapprove any matters submitted to it within thirty (30) days from such submission, then the submission shall be deemed to have been fully complied with.
4. No lots shall be subdivided into smaller lots or parcels of land, for the purpose of these restrictions, if one owner shall own two or more adjacent lots, such adjacent lots may be considered to be one lot with set backs to be measured from the perimeter thereof. Further, if two or more adjacent lots are under common ownership, the owner thereof may elect by written notice to the Committee to develop them as a single lot. In the event of such election they shall thenceforth be treated as a single lot for the purposes of set back restrictions only.
5. No structure shall be erected, constructed, placed or maintained on any lot nearer than twenty-five (25) feet to the front lot line, nearer than ten (10) feet to the side lot lines, no nearer than twenty (20) feet to the back lot lines, except that upon written application to the

committee, if the configurations and typography permit, a variance may be granted from said set backs, provided, however, that the owners of lots within 75 feet of the lot being considered for a variance, be notified and be given 15 days to voice objection. The Architectural Control Committee has the authority to make the final decision to grant/or not grant a variance from above said set backs.

6. No garage, carport, shed, tent, trailer or temporary structure of any kind shall be erected, constructed, permitted or maintained on any lot prior to the commencement of the erection of a principal dwelling house thereon. No garage, carport, shed, tent, trailer, basement, or temporary building shall be used for temporary residence purpose unless written permission is granted by the committee for use only during construction of the principal dwelling.
7. When construction of a dwelling is commenced upon any lot, the owner or owners thereof shall prosecute, with all reasonable diligence, the completion thereof and shall complete the construction thereof within twelve (12) months from the date of commencement, delays caused by Act of God excepted, unless written consent of the committee is obtained for a longer period of time for construction prior to the commencement to such construction.
8. No exposed concrete block, whether painted or otherwise, shall exist on any lot without the written consent of the committee.
9. No old or second-hand building shall be moved on any lot in this subdivision; and no second-hand materials shall be used in the construction of any building thereon; except upon the prior written consent of the committee.
10. No brush, trash, or other material shall be burned except in compliance with the fire regulations of the appropriate regulatory agency.
11. Neither barbed wire nor chicken wire shall be used in this subdivision.
12. No windmills or wind chargers shall be erected upon any lot in this subdivision.
13. No obnoxious or offensive activity shall be carried on upon any lot, nor shall anything be done on any lot, which may be or become an annoyance to the neighborhood.
14. No television, radio antennas, or large satellite dish (over 3 feet in diameter), located upon any lot shall be permitted to be visible from any adjoining lot or street in this subdivision without prior written consent of the Committee; and no laundry upon or above any lot shall be permitted to be visible from any adjoining lot or street in the subdivision.
15. No garbage, refuse, junk, trash or obnoxious or offensive material shall be permitted to accumulate on any lot; the owner or owners of each lot shall cause the same to be disposed of by and in accordance with accepted sanitary practices. All garbage or trash containers, oil and other facilities must be placed under ground or in walled-in or fenced-in areas so that they shall not be visible from any adjoining lot, any street, or waterway. Garbage shall be disposed of in accordance with the regulations of the State of New Mexico and of any of its subdivision. Such garbage shall be removed by the lot owner to a sanitary landfill provided by Otero County or other governmental agency.

16. Fuel tanks shall be installed to comply with municipal county, state and federal regulations. The location of the tank on the property owner's lot also requires written approval of the Architectural Committee.
17. No animal or fowl of any description shall be raised, housed or kept on any lot smaller than 3 acres in gross area; except that dogs, cats, or other household pets that are of such a nature as not to interfere with the safety and comfort of adjoining lot owners may be kept on a lot, provided that they are not bred or maintained thereon for any commercial purposes. On all lots with a gross area greater than 3 acres, a maximum of two (2) horses will be permitted.
18. During construction the builder will provide outdoor portable toilets at the building site. All permanent toilets shall be located inside the principal buildings and shall be connected with proper septic tanks that conform to the State of New Mexico and Otero County health laws and regulations.
19. All principal dwelling houses, exclusive of garage, carport patios, terraces and porches, shall be constructed or maintained with a heated living area of not less than 1200 square feet as determined by the Architectural Committee.
20. Parking for three standard size American automobiles (not compact size) must be provided on each lot by the property owner. Parking spaces must be used instead of on-street parking.
21. No work or exploration for any minerals, or drilling for water (beyond that required for shared wells) or any minerals or mining of any minerals or quarrying of any rock minerals, soil or material of any nature shall be conducted on any lot or portion thereof, nor shall any excavation of any nature be made upon any lot or portion thereof except as may be incident to the installation of utility services, drainage lines, excavation incident to the grading and preparation of building sites, the construction of dwelling and/or swimming pools and the grading of roads and streets.
22. No signs of any character shall be permitted to be placed or maintained on any lot except a sign not larger than 72 square inches setting forth the name of the owner or occupant of said lot. All other signs are prohibited on any lot without prior written approval of the Committee. This restriction does not apply to addresses assigned and posted by the Rural Addressor for Otero County.
23. In the event the owner or purchaser of any lot shall fail to maintain the premises and the improvements situated thereon in a manner satisfactory to the Committee, and after a reasonable attempt has been made to allow the owner or purchaser to correct the deficiency themselves, said Committee shall have the right to enter upon such lot and so repair, maintain, rehabilitate and restore the premises and the exterior or any improvements situated thereon and the cost thereof shall be charged against the owner of said lot by notice to the lot owner or purchaser by regular mail addressed to his/her last address as shown on the records of the Committee, and if the sum is not paid within thirty (30) days after such notice has been mailed, the amount due shall be and become a lien on said lot when the Committee has caused to be filed or recorded in the office of the County Clerk of Otero

County an affidavit of non payment of such sum in the form of a material man's lien, and posting a copy of the same upon said lot within one (1) year from the date of mailing such of amount due. Such lien shall be foreclosed in the manner provided by the laws of the State of New Mexico for the foreclosure of material man's liens.

24. The Committee reserves easements over or under the surface or both, required for the installation and maintenance of electric lines, telephone lines, water lines and for all other utilities, both public and private, with the right to assign such easements. The easements herein reserved shall consist of a ten (10) foot strip of land along the rear lot line and ten (10) foot strip of land along each side of each lot, thus reserving an easement of twenty (20) feet along the rear lot line and twenty (20) feet along the side lot lines when two abutting lots are considered. There is also an easement of fifteen (15) feet reserved along the rear lines common with the adjacent owners along the boundary of Elk Springs.
25. The Committee expressly reserves the right to make any reasonable and necessary changes in these restrictions to benefit the lot owners. There shall be no changes in any of these restrictions without the formal approval by written vote of no less than two thirds (2/3) of the lot owners, such vote to be taken no sooner than five (5) days after one hundred per cent (100%) of the lot owners have been fully informed in writing of any such proposed changes. Proposed changes in these restrictions requiring approval as aforesaid must be submitted in writing to the Architectural Control Committee, which Committee shall have the duty and responsibility to prepare and send complete copies of such proposed changes to all lot owners by mail addressed to their address as shown on the records of the Committee. Such copies shall be sent within fifteen (15) days of receipt by the committee and deposited in the U. S. Mail and shall be considered as meeting this requirement. Voting on any proposed change may be by mail.
26. The Committee provides maintenance of all roads, entrance gate, guardrails, drainage structures, etc., within the subdivision; it also provides snow plowing of the roads. Fees to be determined annually based on:
 1. Cost of operation and maintenance
 2. Inflation.
27. Ownership of all streets remains vested in the Committee. The Committee may, at its discretion and upon reasonable notice to the lot owners and lot buyers, make assessments against each lot for the maintenance and repair of such streets. Such assessments, if unpaid shall be considered as a lien against such lots, and after said lien has been filed in the manner provided in paragraph 21 above, said lien may be foreclosed in the manner provided by the laws of the State of New Mexico.
28. The Committee reserves the right to control the number and types of vehicles in the subdivision so as to promote the best interests of the lot owners. The owners of any motorized vehicle that causes or emits excessive pollutants, including but not limited to noise and particulate matter, may be required to modify or repair such vehicle to meet the standards required by the Committee. Failure of the owner to do so shall be considered a breach of these covenants and in addition to the other remedies provided herein; the Committee may suspend the right of the violator to enter the subdivision in the vehicle.
29. The covenants are to run with the land and shall be binding upon the undersigned and all persons claiming under them their heirs, successors and assigns.

30. All of the restrictive covenants contained herein are for the benefit of any and all of the owners of the lots within the boundaries of the subdivision, and if the undersigned owner or any of its assigns or successors in interest shall violate or attempt to violate any of such Restrictive Covenants, then it shall be lawful for any person owning land within said boundaries and for the Architectural Control Committee to prosecute any proceeding as law or inequity to recover damages or to enjoin such act and to have any and all further legal and equitable relief. The word (person) as used herein means any individual, partnership, firm, company, trust, committee, corporation, or any and all entities of any nature.
31. Invalidation of any one of these covenants shall in no way effect any of the other provisions hereof, which shall remain in full force and effect.
32. Property owners will be required to conform to New Mexico Dark Skies-Light Pollution Laws. Attached and made a part of these covenants is House Bill 39, New Mexico Light Pollution Law.
33. Property owners are encouraged to practice water conservation measures and outdoor restrictions include 600 sq. ft. maximum locally adapted grass, 200 sq. ft. max. shrubs or trees, or equivalent (or less) water use by analysis (TR-47 OSE). No decorative ponds, water fountains, or swimming pools will be allowed unless the water is supplied by a rainfall collection system (e.g. metal roofs, rain gutters, and cisterns) or an outside source. Indoor restrictions include 1.6 gpf toilets, 2.5 gpm showerheads, and 2.0 gpm sink faucets or lower flow devices. Heat pump climate control systems are recommended. Evaporative cooling systems are discouraged although budgeted in the analysis. Grasses should be selected that are well adapted to local climatic conditions, and non-native grasses are discouraged. Low-water use landscaping techniques applying the principles of xeriscape are suggested. Drip irrigation is encouraged whenever possible.
34. Any single water use greater than 96,000 gals/year, 8,000 gals/month, or 24,000 gals/quarter year may be considered "Excessive Use" and will be dealt with in the manner described in the Well Users Agreement, Paragraph "N", page 70. These water quantities are recommendations of the developer. The Office of the State Engineer determines the amount of water allowed for each well.
35. 700 cubic foot of ponding shall be installed downstream and as a catch basin for each 1500 square feet of impervious surface developed. 1500 cubic foot of ponding shall be installed downstream and as a catch basin for each 5000 square feet of impervious surface developed.
36. Attached and made a part of these covenants is Otero County Ordinance 01-05, laws governing the habitat of the Checkerspot Butterfly, which applies to Lots 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, & 15, designated as within the habitat area for the butterfly. Lot owners within this habitat will be required to follow the requirements of Ordinance 01-05 during construction of any structure or disturbance of existing vegetation. A survey has already been done by the subdivider and is made a part of the Preliminary Plat.

NEW MEXICO LIGHT-POLLUTION LAW

On April 6th, New Mexico Governor Gary E. Johnson signed a statewide light-pollution bill into law. State Representative Pauline K. Gubbels introduced the Night Sky Protection Act in January in order to "regulate outdoor night lighting fixtures to preserve and enhance the state's dark sky while promoting safety, conserving energy and preserving the environment for astronomy." Both legislative houses passed the bill by a wide margin. The law states that outdoor-lighting fixtures of more than 150 watts must be shielded, or they must be turned off between 11 p.m. and sunrise. Furthermore, after January 1, 2000, mercury-vapor lamps cannot be sold or installed.

HOUSE BILL 39

44TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1999

INTRODUCED BY

Pauline K. Gubbels

AN ACT

RELATING TO THE ENVIRONMENT; ENACTING THE NIGHT SKY PROTECTION ACT;
PROVIDING A PENALTY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. --This act may be cited as the "Night Sky Protection Act".

Section 2. PURPOSE. -- The purpose of the Night Sky Protection Act is to regulate outdoor night lighting fixtures to preserve and enhance the state's dark sky while promoting safety, conserving energy and preserving the environment for astronomy.

Section 3. DEFINITIONS. --As used in the Night Sky Protection Act:

A. "outdoor lighting fixture" means an outdoor artificial illuminating device, whether permanent or portable, used for illumination or advertisement, including searchlights, spotlights and floodlights, whether for architectural lighting, parking lot lighting, landscape lighting, billboards or street lighting; and

B. "shielded" means a fixture that is shielded in such a manner that light rays emitted by the fixture, either directly from the lamp or indirectly from the fixture, are projected at least fifteen degrees below a horizontal plane running through the lowest point on the fixture where light is emitted.

Section 4. SHIELDING OF OUTDOOR LIGHT FIXTURES. -- All outdoor lighting fixtures shall be shielded, except incandescent fixtures of one hundred fifty watts or less and other sources of seventy watts or less.

Section 5. NONCONFORMING LIGHT FIXTURES. --

A. In addition to other exemptions provided in the Night Sky Protection Act, an outdoor lighting fixture not meeting these provisions shall be allowed, if the fixture is extinguished by an automatic shutoff device between the hours of 11:00 p.m. and sunrise.

B. No outdoor recreational facility, whether public or private, shall be illuminated after 11:00 p.m. except to conclude any recreational or sporting event or other activity conducted, which is in progress prior to 11:00 p.m. at a ballpark, outdoor amphitheater, arena or similar facility.

Section 6. USE OF MERCURY VAPOR LIGHTING FIXTURES. --

No new mercury vapor outdoor lighting fixtures shall be sold or installed after January 1, 2000. No replacement equipment or bulbs for Mercury vapor lighting fixtures shall be sold in the state after January 1, 2001.

Section 7. EXEMPTIONS. --

A. The following are exempt from the requirements of the Night Sky Protection Act:

- (1) outdoor lighting fixtures existing and legally installed prior to the effective date of the Night Sky Protection Act; however, when existing lighting fixtures become inoperable, their replacements are subject to all the provisions of the Night Sky Protection Act;
- (2) outdoor lighting fixtures used on land or facilities under the control of the federal government; and
- (3) navigational lighting systems at airports and other lighting necessary for aircraft safety at airports.

B. The provisions of the Night Sky Protection Act are cumulative and supplemental and shall not apply within any county or municipality that, by ordinance or resolution, has adopted provisions restricting light pollution that are equal to or more stringent than the provisions of the Night Sky Protection Act.

Section 8. CONSTRUCTION INDUSTRIES DIVISION--

DUTIES:--The construction industries division of the regulation and licensing department shall review the outdoor lighting provisions in the uniform building codes used in New Mexico and make recommendations for appropriate changes to comply with the provisions of the Night Sky Protection Act.

Section 9. VIOLATIONS--PENALTY.--Any person, firm or corporation violating the provisions of the Night Sky Protection Act is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

**ORDINANCE NO. 01 - 05 AMENDING
THE OTERO COUNTY SUBDIVISION ORDINANCE**

WHEREAS, The Board of County Commissioners has been involved in and committed to developing the science and understanding necessary to provide for maximum protection of the privately owned lands, National Forest, BLM, State, Tribal and other Governmentally owned lands, (hereinafter "lands") within the County in recognition of their significant value to the custom, culture, history and economy of the County; and

WHEREAS, The Board of County Commissioners recognizes as a component of those "lands" the existence of certain species of insects, plants, and/or animals whose existence on the "lands" are an integral to a healthy ecosystem which will sustain the recreational, cultural, social and economic uses of "lands" that have evolved throughout the history of the County; and

WHEREAS, The Board of County Commissioners have committed themselves to develop County land use plans, subdivision regulations, and other ordinances which are designed to preserve and protect the valuable natural resources located within the County, including the manner that will insure their long term viability for multiple sustained use by the citizens of this County both in the present and for future generations; and

WHEREAS, The Board of County Commissioners have determined that as part of this effort, special recognition should be given to the Sacramento Mountains Checkerspot Butterfly; as a species that deserves attention and consideration when the County implements land use plans, subdivision regulations and development ordinances.

NOW THEREFORE BE IT ORDAINED:

SECTION 1. TITLE

This Ordinance shall be known as the Otero County Subdivision Plan to implement the Sacramento Mountains Checkerspot Butterfly Conservation Plan.

SECTION 2. AUTHORITY

Authority for this Ordinance is found at NMSA 1978 § 4-37-1 et.seq.; NMSA 1978 § 47-6-1 through § 47-6-29; Otero County Ordinances No. 92-01, No. 92-02, No. 92-03, No. 92-04 and 97-03, as well as in the Otero County Comprehensive Plan

Bk 4 Pg 35

SECTION 3. EFFECTIVE DATE/SUNSET PROVISION

The effective date of this Ordinance shall be thirty days after its passage by the County Commission and recordation in the County Clerk's office as provided for in NMSA § 4-37-9. This Ordinance shall sunset and terminate on July 1, 2011 unless the Board of County Commissioners affirmatively extends the ordinance pursuant to law.

SECTION 4. PURPOSE

The Purpose of this Ordinance is to protect the public health, safety and general welfare of the citizens of Otero County through the development of specific measures designed to avoid and/or minimize impacts from the use and development of private lands around the community of Cloudcroft, New Mexico on the Sacramento Mountains Checkerspot Butterfly.

SECTION 5. DEFINITIONS

A. As used in this Ordinance and to enable Otero County to discharge its responsibility, the following definitions shall be used. The definitions shall be interpreted in all cases to achieve the purpose of the act:

1. Board -- the board of County Commissioners of Otero County;
2. Commission -- the Otero County Planning Commission;
3. County -- the County of Otero
4. Habitat -- the actual habitat for the Sacramento Mountains Checkerspot Butterfly that is located within the high mountain meadows in the mixed-conifer forest at approximate elevations between 2,450 and 2,750 meters (8,000 and 9,000 feet (ft)) in the vicinity of the Village of Cloudcroft, Otero County, New Mexico. (As more particularly delineated on that certain United States Fish and Wildlife Service map a copy of which is attached to this Ordinance as Exhibit "A" and is incorporated herein by reference as if fully set forth.)
5. parcel -- Unit of land capable of being described by location and boundaries and not dedicated for public or common use.
6. person -- Any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate, Governmental agency, non governmental organization or other entity.
7. Planning Coordinator -- County Administrative employee responsible for coordinating and processing subdivision applications and related planning matters. May serve as Recording Secretary to the Otero County Planning Commission.
8. preliminary plat -- Map of a proposed subdivision, prepared by a licensed, registered surveyor, showing the character and proposed layout of the subdivision and the existing conditions in and around it. (See Otero County Ordinance 97-03
9. Sacramento Mountains Checkerspot Butterfly -- (*Euphydryas Anicia Cloudcrofti*)
10. subdivide -- To divide a surface area of land into a subdivision.

Bk 4 Pg 36

11. **subdivider** – Any person/agent who creates or who has created a subdivision, individually or as part of a common promotional plan, or any person engaged in the sale, lease, or other conveyance of subdivided land; however, subdivider does not include any duly licensed real estate broker or salesperson acting on another's account.
12. **subdivision** – The division of a surface area of land, including land within a previously approved subdivision, into two (2) or more parcels for the purpose of sale, lease, or other conveyance; or for building development, whether immediate or future; however "subdivision" does not include:
 - a. sale, lease, or other conveyance of any parcel that is thirty-five (35) acres or larger in size within any twelve (12) month period, provided that the land has been used primarily and continuously for agricultural purposes, in accordance with § 7-36-20 NMSA 1978, for the preceding three (3) years;
 - b. sale or lease of apartments, offices, stores, or similar space within a building;
 - c. division of land within the boundaries of a municipality;
 - d. division of land in which only gas, oil, mineral, or water rights are severed from the surface ownership of the land;
 - e. division of land created by court order where the order creates no more than one (1) parcel per party;
 - f. division of land for grazing or farming activities, provided the land continues to be used for grazing or farming activities;
 - g. division of land resulting only in the alteration of parcel boundaries where parcels are altered for the purpose of increasing or reducing the size of contiguous parcels and where the number of parcels is not increased;
 - h. division of land to create burial plots in a cemetery;
 - i. division of land to create a parcel that is sold or donated as a gift to an immediate family member; however, this exception shall be limited to allow the seller or donor to sell or give no more than one (1) parcel per tract of land per immediate family member;
 - j. division of land created to provide security for mortgages, liens, or deeds of trust, provided that the division of land is not the result of a seller-financed transaction;
 - k. sale, lease, or other conveyance of land that creates no parcel smaller than one-hundred forty (140) acres;

Bk 4 Pg 37

- l. division of land to create a parcel that is donated to any trust or nonprofit corporation granted an exemption from federal income tax, as described in § 501(c)(3) of the United States Internal Revenue Code of 1986, as amended; school, college, or other institution with a defined curriculum and a student body and faculty which conducts classes on a regular basis; or to any church or group organized for the purpose of divine worship, religious teaching, or other specifically religious activity; or

- m. sale, lease, or other conveyance of a single parcel from a tract of land, except from a tract within a previously approved subdivision, within any five (5) year period, provided that a second or subsequent sale, lease, or other conveyance from the same tract of land within five (5) years of the first sale, lease, or other conveyance shall be subject to the provisions of the New Mexico Subdivision Act; provided further that a survey shall be filed with the County Clerk indicating the five (5) year holding period for both the original tract and the newly created tract.

SECTION 6. PRELIMINARY PLAT DATA REVIEW

The planning coordinator, as part of the preliminary plat review process shall determine whether a proposed subdivision is located within the habitat of the Sacramento Mountains Checkerspot Butterfly as that habitat is defined in this Ordinance.

- A. In the event the proposed subdivision is not located within the habitat of the Sacramento Mountains Checkerspot Butterfly as defined in this Ordinance, no further action is required with respect to the requirements of this Ordinance.
- B. In the event the proposed subdivision is located within the habitat of the Sacramento Mountains Checkerspot Butterfly as defined in this Ordinance, the Planning Coordinator shall require the person submitting the proposed subdivision to submit in addition to those matters required by NMSA 1978 § 47-6-1 through § 47-6-29 and Otero County Ordinance No. 97-03, a survey conducted prior to commencement of any development/construction activity within the proposed subdivision boundary that is completed the Survey shall consist of the following:

(See Exhibit B "Guidance for conducting surveys to document the presence of the Sacramento Mountains checkerspot butterfly attached hereto)

The survey shall report:

- i. the presence, or lack of presence of the Sacramento Mountains Checkerspot Butterfly, or its larvae;
- ii. the presence, or lack of presence of the food plants Penstemon Neomexicanus, Valeriana Edulis, or Helenium Hoopsei;

Bk 4 Pg 38

- iii. the presence or lack of presence of habitat suitable for either the Sacramento Mountains Checkerspot Butterfly or the food plant species set forth in paragraph 6 B ii.

SECTION 7. CONSERVATION/MITIGATION REQUIREMENTS

In the event that the survey required by Section 6 demonstrates the presence within the boundary of the proposed subdivision of either the Sacramento Mountains Checkerspot Butterfly or its food plant species as set forth in Section 6 B i, and ii, the Planning Coordinator shall require the person submitting the proposed subdivision to provide the following:

- A. A plan to reduce the risk of wild fire within the proposed subdivision by requiring either pre development thinning of trees and fuels management or tree thinning and fuels management as a requirement for lot owners within the subdivision;
- B. A plan that provides for all construction activities either by the subdivision developer or the individual lot owners to be conducted in a manner that will minimize modification and/or loss of Sacramento Mountains Checkerspot Butterfly habitat, potential habitat, food plant species, or food plant species habitat defined herein;
- C. A plan that provides for staging areas (i.e., areas where vehicles or equipment will be located during the construction of the subdivision or the construction of improvements on individual lots to be located within areas that do not contain any life stages of the Sacramento Mountains Checkerspot Butterfly, and/or any visible life stages of its food plant species as identified in Section 6 B ii. Staging areas should be clearly delineated (i.e., with survey stakes, flagging or taping so that contractors and workmen are aware of the staging requirements.
- D. In the event that development or construction within the boundary of the proposed subdivision or on any particular lot cannot occur without disturbing either any life stage of the Sacramento Mountains Checkerspot Butterfly or its food plant species, a plan that provides for the salvage and re-location to other Sacramento Mountains Checkerspot Butterfly habitat of any life stages of the Sacramento Mountains Checkerspot Butterfly or any of the food plants referred to in Section 6 B., ii. of this Ordinance, to other locations within the boundary of the proposed subdivision that are suitable. This plan shall be submitted to, the Otero County Planning Coordinator who shall provide a copy to the United States Fish and Wildlife service. The U.S. Fish and Wildlife service shall comment on the proposed plan in accordance with the requirements of NMSA 1978 §47-6-10 and 47-6-11; and Article 4, §4.4 of the Otero County Subdivision Regulations.
- E. A plan that provides for the revegetation or reseeding of suitable Sacramento Mountains Checkerspot Butterfly habitat that is impacted during construction within the proposed subdivision. This plan shall be submitted to, reviewed by the U.S. Fish and Wildlife Service. The U.S. Fish and Wildlife service shall comment on the proposed plan in accordance with the requirements of NMSA 1978 §47-6-10 and 47-6-11; and Article 4, §4.4 of the Otero County Subdivision Regulations. The

comments shall address the effectiveness of the measures employed and assess, monitor and verify the results achieved.

- F. A plan that provides for the monitoring of the habitat areas for the Sacramento Mountains Checkerspot Butterfly for the infestation, of noxious weeds (i.e., Russian Knapweed (*Acroptilon Repens*), musk thistle (*Carduus Nutans*), and teasel (*Dipsacus Sylvestris*). If noxious weed infestations are located, control and eradication treatments shall be specified in the plan and implemented.
- G. A plan that provides, to the extent possible for the concentration of construction activities during that period of the calendar year that the Sacramento Mountains Checkerspot Butterfly is not active (i.e., October through March) in each year.
- H. A statement contained within the disclosure statement for the proposed subdivision that informs the purchaser of the specific conservation requirements to be implemented on individual lots within the subdivision.

SECTION 8. EXCEPTION/EXCLUSIONS

In the event the survey required in Section 6 B of this ordinance reveals that there is not present any life stage of the Sacramento Mountains Checkerspot Butterfly, nor is there present any food plant species, then the Planning Coordinator shall notify the person submitting the proposed subdivision of that lack of presence in writing and the proposed subdivision shall not be required to fulfill any of the requirements of Section 7 of this Ordinance.

SECTION 9. ENFORCEMENT, PENALTIES REMEDIES

- A. **Purpose and Authority.** Violations of the provisions of these Regulations shall be prosecuted in the manner provided by law to protect the health, safety, and welfare of the public according to the County's authority under the New Mexico Subdivision Act, §§ 47-6-1 et seq., NMSA 1978. The remedies provided in these Regulations shall be cumulative and not exclusive.
- B. **Investigation of Alleged Violations.** All written, signed complaints alleging one or more violations of the provisions of the New Mexico Subdivision Act or these Regulations shall be referred to the Board of County Commissioners for investigation. The Board of County Commissioners shall direct an investigation of the complaint and take such action as is warranted. The Board of County Commissioners shall inform the complainant in writing of what actions have been taken or will be taken in response to the complaint.
- C. **Penalties and Remedies.** Violations of these Regulations shall be subject to the following penalties, remedies, and enforcement procedures:
 - 1. **Utility connections.** Any water, sewer, electric, or gas utility that connects service to individual parcels within a subdivision before a final plat for the

Bk 4 Pg 40

subdivision has been approved by the Board of County Commissioners or before the landowner holds a valid building permit, may be fined a civil penalty of up to five hundred dollars (\$500.00) by the Board of County Commissioners. The Board of County Commissioners may also require that any utility connected in violation of this section and of §47-6-27.2 NMSA 1978 be disconnected.

2. **Suspension of Right of Sale.** The Board of County Commissioners may suspend or revoke approval of a plat as to unsold, unleased, or otherwise not conveyed portions of a subdivider's plat if the subdivider does not meet the schedule of compliance approved by the Board of County Commissioners.
3. **Injunctive Relief, Mandamus.** The Board of County Commissioners, the District Attorney, or the Attorney General may apply to the District Court for any one or more of the following remedies in connection with violations of the New Mexico Subdivision Act and these Regulations:
 - a. **injunctive relief to prohibit a subdivider from selling, leasing, or otherwise conveying any interest in subdivided land until the subdivider complies with the terms of the New Mexico Subdivision Act and these Regulations;**
 - b. **injunctive relief to compel compliance by any person with the provisions of the New Mexico Subdivision Act and these Regulations;**
 - c. **rescission and restitution for persons who have purchased, leased, or otherwise acquired an interest in subdivided land that was divided sold, leased, or otherwise conveyed in material violation of the New Mexico Subdivision Act or these Regulations; or**
 - d. **a civil penalty of up to five-thousand dollars (\$5,000.00) for each parcel created in knowing, intentional, or willful violation of the New Mexico Subdivision Act or these Regulations.**
- D. **Bond not required.** The Board of County Commissioners, the District Attorney, and the Attorney General shall not be required to post bond when seeking a temporary or permanent injunction or mandamus according to the provisions of the New Mexico Subdivision Act.

lee

Bk 4 Pg 71

E. Criminal penalties.

a. §47-6-27 NMSA 1978 provides that:

- i) any person who knowingly, intentionally, or willfully commits a material violation of the New Mexico Subdivision Act is guilty of a misdemeanor, punishable by a fine of not more than ten thousand dollars (\$10,000.00) per violation, or by imprisonment for not more than one (1) year, or both; and**
- ii) any person who is convicted of a second or subsequent knowing, intentional, or willful violation of the New Mexico Subdivision Act is guilty of a fourth degree felony, punishable by a fine of not more than twenty-five thousand dollars (\$25,000.00) per violation or by imprisonment for not more than eighteen (18) months, or both.**

b. Any violation of the provisions of this Ordinance is punishable by a fine not to exceed three hundred dollars (\$300.00) or imprisonment for not more than ninety (90) days, or both, in accordance with §4-37-3 NMSA 1978.

SECTION 10. AMENDMENT/REPEAL

This Ordinance may be amended from time to time as conditions warrant. Amendments shall be made by ordinance adopted by the Board of County Commissioners in accordance with §4-37-1 et. seq., NMSA 1978 compilation as amended, and in accordance with §47-6-1 et seq., NMSA 1978 compilation as amended. Additionally, the population numbers of the Sacramento Mountains Checkerspot Butterfly shall be monitored and reported by the U.S. Fish and Wildlife Service to the County Commission on an annual basis to determine the effectiveness of the measures contained in this Ordinance and the need or lack thereof of continued regulation.

SECTION 11. INTERPRETATION

In the event a particular case presents circumstances requiring interpretation of the ordinance, this Ordinance shall be interpreted broadly in order to accomplish its purpose which purpose is contained in Section 4.

SECTION 12. SEVERABILITY

If any section, subsection, sentence, clause, phrase, or portion of this Ordinance or the application thereof to any person or circumstances is declared invalid or unconstitutional by the decision of a court of competent jurisdiction, the remainder of this Ordinance shall be severed therefrom and shall remain in full force and effect.

SECTION 13. APPEALS JUDICIAL REVIEW

A. Who may appeal.

1. Any person who is adversely affected by a decision of the Planning Commission in approving or disapproving a subdivision plat may appeal to the Board of County Commissioners within fifteen (15) days after the date of the action of the Planning Commission. The Board of County Commissioners shall hear the appeal and render a decision within thirty (30) days after receiving the notice of appeal.
2. Any person who is adversely affected by a decision of the Board of County Commissioners in approving or disapproving a subdivision plat may appeal to the District Court of the county in which the subdivision is located within thirty (30) days after the date of the action of the Board.

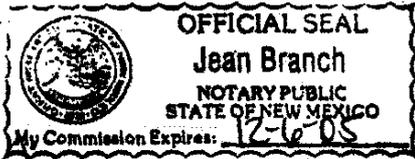
B. Appeal process.

1. The appeal shall consist of a whole record review, and the reviewing authority, whether it be the Board of County Commissioners or the District Court, shall set aside the action of the lower tribunal only if it is found to be:
 - a. arbitrary, capricious, or an abuse of discretion; or
 - b. not supported by substantial evidence; or
 - c. otherwise not in accordance with law.
2. Any party to the action in District Court shall have full appellate rights in accordance with NMRA 1-074.
3. The appeal shall be perfected by filing a written notice of appeal which sets forth the specific portion or portions of the decision being appealed. A copy of the decision or order being appealed shall be attached to the notice of appeal. The appeal shall be perfected upon filing of the notice required by these Regulations and payment of the required docket fee. The Notice of Appeal shall otherwise conform to the requirements set forth in NMRA 1-074.

APPROVED, PASSED and ADOPTED on this 29th day of ^{JUNE} 2005.



(Seal)



Jean Branch

APPROVED AS TO LEGAL FORM
AND SUFFICIENCY

Daniel A. Bryant
Daniel A. Bryant, Otero County Attorney

**BOARD OF COUNTY COMMISSIONERS
OTERO COUNTY, NEW MEXICO**

Clarissa McGinn, Chairperson

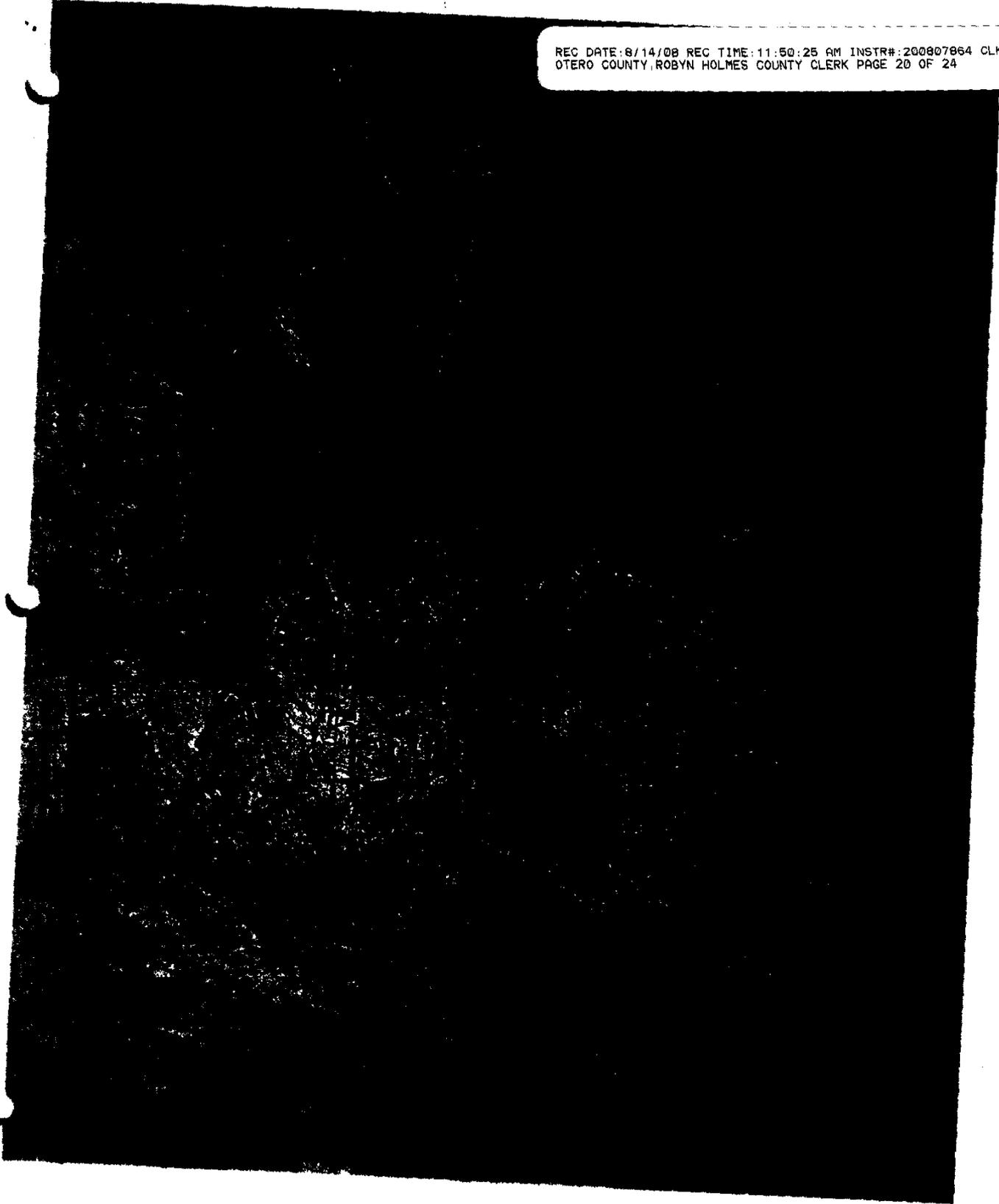
Doug Moore

Doug Moore, Vice-chairperson

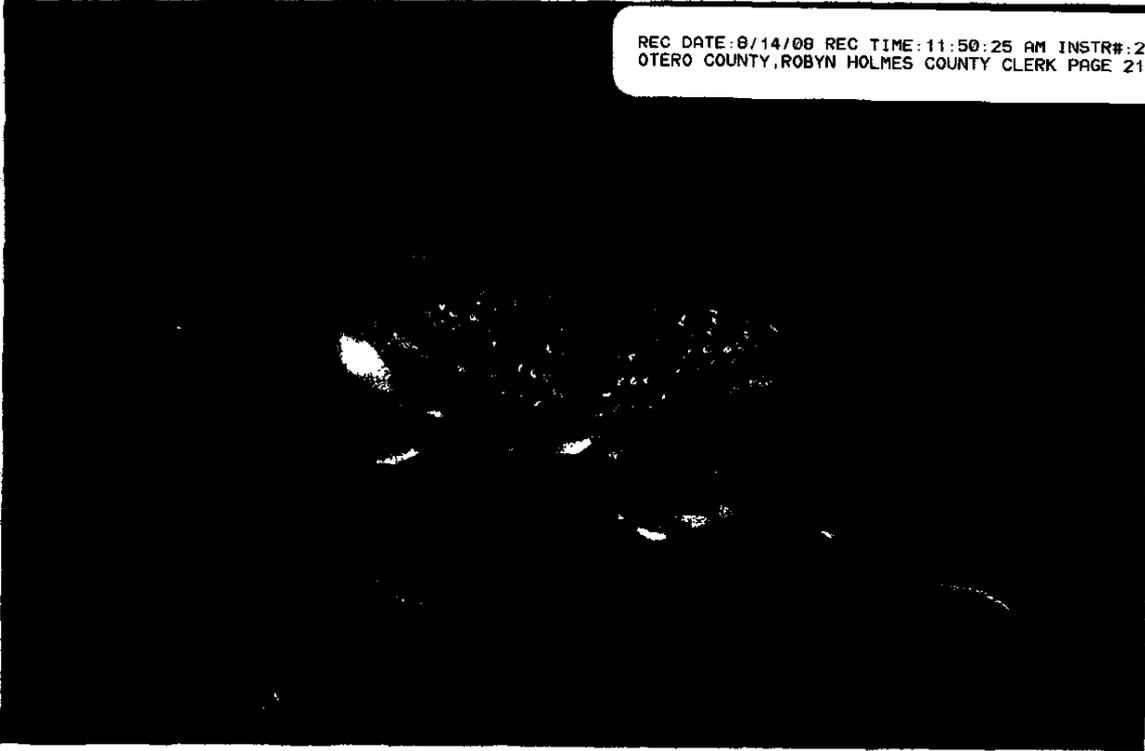
Michael Nivison

Michael Nivison, Member

REC DATE: 8/14/08 REC TIME: 11:50:25 AM INSTR#: 200807864 CLK *lee*
OTERO COUNTY, ROBYN HOLMES COUNTY CLERK PAGE 20 OF 24



REC DATE: 8/14/08 REC TIME: 11:50:25 AM INSTR#: 200807864 CLK lee
OTERO COUNTY, ROBYN HOLMES COUNTY CLERK PAGE 21 OF 24



Guidance for conducting surveys to document the presence of the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*)

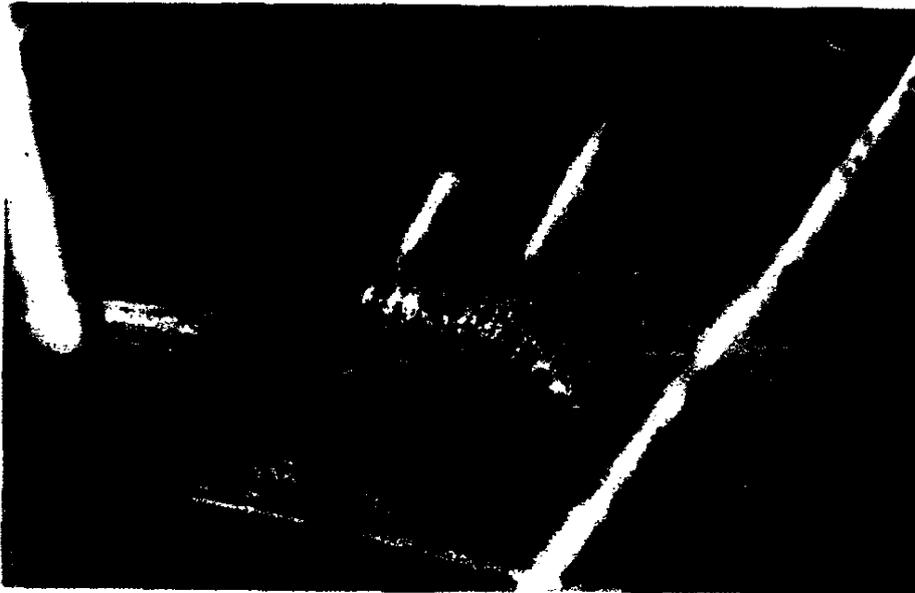


EXHIBIT "B"

Bk 4 Pg 46

Sacramento Mountains checkerspot butterfly surveys

2

On September 6, 2001, the U.S. Fish and Wildlife Service (Service), proposed to list the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) as endangered with critical habitat under the authority of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*). This species is restricted to meadows within the mixed-conifer forest at approximate elevations between 8,000 to 9,000 feet in the vicinity of the Village of Cloudcroft, Otero County, New Mexico. The species is threatened by destruction and fragmentation of habitat from private and commercial development, habitat degradation and loss of host plants from grazing, encroachment of conifers and nonnative vegetation into non-forested openings, over collection, and, due to its limited range, vulnerability to local extirpations from extreme weather events or catastrophic wildfire including fire suppression activities.

Adult butterflies apparently lay their eggs on New Mexico penstemon (*Penstemon neomexicanus*) the known larval host plant. After hatching, larvae feed on New Mexico penstemon and, during the 4th or 5th instar (the period between molts in the larval stage of the butterfly), enter an obligatory and extended diapause (maintaining a state of extended inactivity), generally as the food plants die back in the fall from freezing. Some larvae may remain in diapause for more than one year, depending on environmental conditions. During diapause, larvae probably remain in leaf or grass litter near the base of shrubs, under the bark of conifers, or in the loose soils associated with pocket gopher (*Thomomys bottae*) mounds. Once larvae break diapause, they feed on New Mexico penstemon and, in some areas valerian (*Valeriana edulis*), and grow through three or four more instars before pupating (entering the inactive stage within a chrysalis) and emerging as adults. Diapause is generally broken in late spring (March-April) and adults emerge in mid-summer (June-July).

SURVEY TECHNIQUES

- Recommended equipment includes: binoculars, wind meter, thermometer, and a camera with close focus telephoto or macro lens. A GPS unit is also useful.
- Survey carefully to avoid trampling or otherwise harming checkerspot larvae and butterflies. New Mexico penstemon and valerian are the checkerspot's primary larval host plants. The adult butterfly is often found in association with the larval host plants, and adult nectar sources such as sneezeweed (*Helenium hoopesii*). Other plants that have been documented in butterfly habitat include: arrowleaf groundsel (*Senecia triangularis*), curly-cup gumplant (*Grindelia squarrosa*), figworts (*Scrophularia sp.*), penstemon (*Penstemon sp.*), skyrocket (*Ipomopsis aggregata*), milkweed (*Asclepias sp.*), Arizona rose (*Rosa woodsii*), and Wheeler's wallflower (*Erysimum capitatum*).
- Care should be taken to avoid stepping on host plants, whether occurring singly, in small patches, or in dense stands. Female checkerspots often select lone plants found on bare soil (e.g., pocket gopher mounds) or in open areas for depositing their eggs.
- Walk slowly and stop periodically within areas that have an especially high potential for

Sacramento Mountains checkerspot butterfly surveys

3

checkerspot use, such as patches of host plants or nectar sources.

- Stop occasionally to look around—surveyors standing still are more likely to see a moving butterfly. Use binoculars to scan the area ahead and around you, and to help identify butterflies from a distance.
- Follow the movements of other butterflies. Some checkerspot males are aggressive, can spot other butterflies from a distance, and will chase them away. If a checkerspot is resting with wings closed, they can be very difficult to notice until another butterfly flies by and they give chase.

This animal may be exceedingly difficult to detect under some circumstances (e.g., low density populations, non-optimal weather); therefore, we recommend maximizing detection probabilities for the Sacramento Mountains Checkerspot butterfly by the following:

- The probability of detecting some populations (e.g., <10 individuals) may be extremely low, with only 1 or 2 surveys. Therefore, a maximum amount of survey effort should be concentrated on specific high potential locations (i.e., meadows containing larval host plants and/or nectar sources) throughout the flight season. These specific locations should be visited at regular intervals during the flight season, rather than surveyed once or occasionally during the flight season.
- Surveys should be directed toward observing and identifying Sacramento Mountains Checkerspot butterflies. Butterfly surveys should not be incidental or conducted in conjunction with other non-butterfly species (e.g., bird surveys) or during general biological (i.e., reconnaissance) surveys.
- The amount of acres surveyed per hour should be limited, by either increasing the number of people conducting surveys at a site or decreasing the area surveyed per person. A threshold for survey rate should be established to limit the amount of habitat that can be adequately surveyed (e.g., 12.5 acres/hr or 100 acres in a day).
- Surveys should not be conducted during poor weather conditions (i.e., precipitation, less than 65°F, winds >5 mph), because flight activity Sacramento Mountains Checkerspot butterflies will be severely restricted, thus reducing detection probabilities.
- Regardless of the number of surveys conducted in a given area, some Sacramento Mountains Checkerspot butterfly populations (e.g., low density) may not be detected on a given year, indicating that one flight season may not be adequate to document presence/absence. Multi-year (i.e., >1 year) butterfly surveys, could increase the detection of low density populations, document natural population fluctuations (e.g., dry and wet years), and increase the strength of inferences regarding those populations.

Sacramento Mountains checkerspot butterfly surveys

- An experienced person is more likely to observe and correctly identify a target species than a non-experienced or minimally-experienced person. Therefore, all people surveying for the Sacramento Mountains Checkerspot butterfly should be trained in the proper identification of the Sacramento Mountains Checkerspot butterfly and sympatric species. Personnel who conduct these surveys should also be trained to identify the early instars and post-diapause larvae of the Sacramento Mountains Checkerspot butterfly and its known host plants.
- Although it is extremely difficult to locate and identify early instar and post-diapause larvae of Sacramento Mountains Checkerspot butterfly, methods should be investigated to conduct and refine surveys for larvae. Surveys for early instar and post-diapause larvae may increase the probability of detection by increasing the survey length (i.e., survey pre and post-adult flight season) and reducing the survey difficulties associated with non-optimal weather conditions. However, the successful location and identification of larvae likely will require highly-experienced personnel.
- The development of data forms may be useful to collect consistent information. If data forms are used, surveyors should be instructed on the proper terms to use and forms should be proofed daily to assure they all records are completed.
- Some checkerspot butterflies may be found under less than optimal habitat conditions. Therefore, potentially suitable habitat can be difficult to categorize; surveys should be conducted in meadows that contain larval or adult plants and are within the elevational window (i.e., generally between 8,000 to 9,000 feet elevation).
- Personnel conducting surveys should use binoculars to determine butterfly species. Cameras should also be used to positively document presence of larvae and adult Sacramento Mountains Checkerspot Butterflies and verify questionable or unknown species.
- It would be useful to document areas that are surveyed using a global positioning system. This would assist in gathering and displaying accurate data for the Sacramento Mountains Checkerspot Butterfly surveys.

The following areas are not recommended for checkerspot surveys:

- meadows with existing features and structures, such as buildings, roads, residential landscaping (e.g., mowed nonnative ornamental grasses), ponds, wetlands (i.e., a lowland area that is permanently saturated with water), forests, and other features, do not contain, and are not likely to develop, suitable habitat.
- Active/in-use agricultural fields or livestock pens without natural or remnant inclusions of native vegetation (i.e., fields completely without any fallow sections, unplowed areas, or are devoid of native vegetation); and
- Closed-canopy forests or riparian areas



STATE OF NEW MEXICO, County of Otero, ss, Filed for record in my office this 1st day of August, 2005, at 1:15 o'clock P.M. and duly recorded in Book 4 Page 48 of the Records of said county. Robyn Selva by Christina Nino County Clerk Deputy 9617

