



# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846

In reply refer to:  
1-1-07-TA-1235

Mr. Gary Chandler, President  
Panoche Energy Center, LLC  
2542 Singletree Lane  
South Jordan, UT 84095

JUL 31 2007

<b>DOCKET</b>	
<b>06-AFC-5</b>	
DATE	JUL 31 2007
RECD.	AUG 08 2007

Subject: Memorandum of Understanding between the Panoche Energy Center, LLC and the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service

Dear: Mr. Chandler:

Enclosed is the Memorandum of Understanding (MOU) between the Panoche Energy Center, LLC and the Sacramento Fish and Wildlife Office (SFWO). If you are satisfied with the MOU please sign it, make copies for reference, and return the original to the Service address above.

Once the SFWO receives the signed MOU, we will prepare a Biological Opinion for the proposed project. If you have any questions regarding this MOU, please contact Jason Hanni, or Susan Jones, the San Joaquin Valley Branch Chief, at (916) 414-6600.

Sincerely,

Kenneth D. Sanchez  
Acting Field Supervisor

cc: Margaret Fitzgerald, URS Corporation, Santa Ana, California



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**MEMORANDUM OF UNDERSTANDING**  
**BETWEEN**  
**PANOCHÉ ENERGY CENTER, LLC**  
**AND**  
**THE U. S. FISH AND WILDLIFE SERVICE**  
**FOR**  
**PANOCHÉ ENERGY CENTER PROJECT**  
**FRESNO COUNTY, CALIFORNIA**  
**JUNE 2007**

## PURPOSES AND RECITALS

### PURPOSES

The purposes of this Memorandum of Understanding (MOU) are to ensure implementation of each of the terms of this agreement by:

- (1) describing remedies and recourse should any party fail to perform its obligations as set forth in this agreement; and
- (2) providing assurances to Panoche Energy Center, LLC (PEC) that as long as the terms of this MOU are performed, no additional compensation will be required of them by the U.S. Fish and Wildlife Service (USFWS) with respect to the San Joaquin Kit Fox (*Vulpes macrotis mutica*) (kit fox), except as required by law.

### RECITALS

The parties have entered into this MOU in consideration of the following facts:

- (1) The Panoche Energy Center project site has been determined to provide potential, habitat for the endangered kit fox.
- (2) PEC has developed a series of measures, described in this MOU, to minimize and mitigate to the maximum extent practicable the possible effects of incidental take of the kit fox that may occur during PEC's construction activities at the Panoche Energy Center project in Fresno County, California.

### PARTIES

The parties to this Memorandum of Understanding are Panoche Energy Center, LLC and the USFWS.

### DEFINITIONS

The following terms as used in this agreement will have the meanings set forth below:

**Terms defined in the Federal Endangered Species Act.** Terms used in this agreement and specifically defined in the Federal Endangered Species Act of 1973, as amended (15 U.S.C. § 1531 et seq.) (Act) or in regulations adopted by the USFWS under the Act have the same meaning as in the Act and those implementing regulations, unless this MOU expressly provides otherwise.

**"Conservation Measures"** means the conservation measures for the impacts to the kit fox resulting from the Panoche Energy Center project that will be implemented by PEC or its designees, as described in this MOU.

**"Covered Activities"** means certain activities carried out by PEC that may result in incidental take of kit fox.

**"Covered Species"** means the San Joaquin kit fox.

**"Panoche Energy Center Project"** means the approximately 16.8<sup>1</sup> acre energy center as well as the temporary 9.0<sup>2</sup> acre construction area for temporary laydown and parking site. The site is adjacent to the Panoche Hills and east of the San Benito County line. West Panoche Road lies just north of the site. The nearest intersections are West Panoche Road and South Fairfax Avenue approximately one mile to the northeast and West Panoche Road and I-5 approximately 2 miles to the southwest. The site is more specifically described as the Southwest Quarter of Section 5, Township 15, Range 13 East, on the USGA Quadrangle map. The assessor parcel number (APN) is 027-060-78S.

**"Listed Species"** means a species (including a subspecies or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under the Act.

**"MOU"** means this Memorandum of Understanding between PEC and USFWS.

**"Take"** means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed or unlisted covered species. Harm means an act that actually kills or injures a member of a covered species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a covered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

**"USFWS"** means the U.S. Fish and Wildlife Service. **"kit fox"** means the San Joaquin kit fox.

**"PEC"** means Panoche Energy Center, LLC.

### **OBLIGATIONS OF THE PARTIES**

**Obligations of PEC.** PEC will fully and faithfully perform all obligations assigned to it under this MOU.

**Obligations of the USFWS.** Upon execution of this agreement by all parties, and satisfaction of all other applicable legal requirements, the USFWS will issue a biological opinion pursuant to section 7 of the Act that will analyze the potential effects of the Panoche Energy Center Project on kit fox.

Neither the USFWS nor PEC are aware of any other Federally-listed species that are even potentially affected by the project. If a new species that is not discussed in this MOU, but that may be affected by activities covered by the MOU is listed under Federal Endangered Species Act, the project will be reevaluated by USFWS and the MOU covered activities may be modified, as necessary, to ensure that the activities covered under the MOU are not likely to jeopardize or result in take or in adverse modification of any designated critical habitat of the newly listed species.

### **EFFECTIVE DATE**

**Initial Term.** This MOU will become effective on the date that the USFWS issues its section 7 biological opinion on the MOU.

### **PROJECT LOCATION AND SITE DESCRIPTION**

The Panoche Energy Center Project is a proposed generating facility which will consist of four General

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<sup>1</sup> 16.8 acres of Permanent impacts include: construction and operation of a permanent energy center; permanent expansion of the existing Panoche substation, permanent expansion of existing roads and access areas.

<sup>2</sup> 9.0 acres of Temporary impacts include: temporary construction laydown area; and ancillary upgrades to existing natural gas and electrical distribution facilities within the aforementioned permanent disturbance footprint.

Electric LMS 100 natural gas-fired combustion turbine generators. The 16.8 acre project site is approximately 50 miles west of the city of Fresno and approximately 2 miles east of the Interstate 5 (I-5).

Offsite improvements include a 400-foot access road south of West Panoche Road to the project site, 2,400 linear feet of new gas pipeline, 300-foot transmission line to tie into the Panoche Substation, and an expansion of the Panoche Substation by approximately 2.5 acres south of the existing substation boundary.

The project site is located in the unincorporated area of western Fresno County approximately 50 miles west of the city of Fresno. The site is adjacent to the Panoche Hills and east of the San Benito County line. West Panoche Road lies just north of the site. The nearest intersections are West Panoche Road and South Fairfax Avenue approximately one mile to the northeast and West Panoche Road and I-5 approximately 2 miles to the southwest. The site is more specifically described as the Southwest Quarter of Section 5, Township 15, Range 13 East, on the Chaney USGA Quadrangle map. The assessor parcel number (APN) is 027-060-78S.

The facility and surrounding supporting facilities will be situated on approximately 16.8 acres of land within a 128-acre parcel. The plant site is leased by the applicant from the property owners. The land surrounding these electric generation facilities is agricultural lands dominated orchards and row crops. The site is relatively flat and supports bare ground and a sparse growth of ruderal weedy species. Other portions of the 128-acre parcel, not used for electric generation facilities, are currently in agricultural production with pomegranate trees.

#### **SPECIES AFFECTED**

The San Joaquin kit fox was federally listed as endangered on March 11, 1967 (32 FR 4001) and state listed as endangered on June 27, 1971. The kit fox can be identified visually by its size (averaging 30.3-31.7 inches in length), large ears, its black-tipped tail, and the absence of a black dorsal stripe in the fur. Its dens are typically described as taller than wide with 2-18 entrances. Ramp-shaped mounds of dirt typically surround the new entrances in dens located in the central portion of the Valley, and can be as long as two meters. The entrances are approximately 20-25 centimeters wide. Scat, prey remains, and matted vegetation may be observed near entrances.

No potential kit fox burrows have been detected on the project site. The kit fox historical distribution is believed to have extended from approximately Tracy to the Bakersfield. Currently, the species is believed to be restricted to the fringes of the San Joaquin Valley and the eastern foothills of the Coast Ranges, and the western foothills of the Sierra Nevada. Scattered occurrences are known to isolated patches of undeveloped, uncultivated land in Kern, Tulare, Kings, Fresno, Madera, and Merced Counties. The kit fox historically occurred in natural communities including Valley Sink Scrub, Saltbush Scrub, Annual Grassland, and native grassland in the San Joaquin Valley. Habitats in which kit fox are currently found have, in many cases, been drastically modified including non-irrigated, grazed pasture such as the site. The fox may forage on agricultural lands including irrigated row crops, tilled fields, orchards, and vineyards. Other threats to the species beyond habitat loss include predation from coyote and non-native red fox and human-induced mortality factors.

#### **EFFECTS OF THE PROPOSED PROJECT ON THE SAN JOAQUIN KIT FOX**

No kit foxes have been identified on or in the immediate vicinity of the site; however, the subject site is a potential suitable migration corridor for the fox. No natural habitats (e.g., grasslands) occur within 2 miles of the site. The nearest kit fox sighting location is over 2.5 miles north of the site associated with Panoche Creek and this sighting was recorded 21 years ago, in 1986 (CNDDDB database). Foxes have been extensively documented west of Interstate 5 approximately 3 miles west of the site. No den sites have been

identified on the subject site or the immediately surrounding properties. Based on the possibility that kit fox might migrate through the project site, potential impacts to kit fox from the proposed project include loss of approximately 9.0 acres of temporary impacts of the potential migration corridor and 16.8 acres of permanent impacts of a potential migration corridor, potential mortality from vehicle strikes, and potential harassment (interruption of foraging activities) by the activities of construction and operation of the facility. The likelihood of direct mortality from vehicles on the site is low due the absence of night-time construction activity when the fox is most active. Mitigation measures for loss and interrupting of foraging are discussed hereafter.

According to the Biological Assessment for the project and other information available to the USFWS, there are 16.8 acres of potential, low-quality habitat on the project site (Figure 2 of the Biological Assessment). The completion of the construction of the Panoche Energy Center Project would result in the removal of 16.8 acres of potential habitat and temporary impacts to 9 acres. The Proposed compensation for this loss of habitat is at a ratio of 1.1 to 1 acres and 0.3 to 1 acres for areas temporarily impacted. This contribution will be purchased from the Kreyenhagen Hills Conservation Bank located in Fresno County.

Because kit fox are rarely encountered, it is not possible to quantify if there would be any take, and if so, the exact number of individual animals that could be taken resulting from the removal of 16.8 acres of habitat, and temporary impacts to 9 acres. Thus, it is possible that the removal of 16.8 acres of potential habitat, and temporary impacts to 9 acres will result in incidental take via harassment of an unknown number of kit fox. Implementing the conservation measures will minimize potential impacts to this listed animal, and would otherwise be beneficial to the species.

### CONSERVATION MEASURES

To compensate for the possible impacts to the kit fox potentially using the 16.8 acres of the project site, PEC will buy credits at a compensation ratio 1.1 to 1 acres and 0.3 to 1 acres for areas temporarily impacted , at the Kreyenhagen Hills Conservation Bank located in Fresno County.

**Standard Construction Best Management Practices** would include:

1. Project-related vehicles should observe a 20-mph speed limit in all project areas, except on county roads and State and Federal highways; this is particularly important at night when kit foxes are most active. To the extent possible, night-time construction should be minimized. Off-road traffic outside of designated project areas should be prohibited.
2. To prevent inadvertent entrapment of kit foxes or other animals during the construction phase of a project, all excavated, steep-walled holes or trenches more than 2 feet deep should be covered at the close of each working day by plywood or similar materials, or provided with one or more escape ramps constructed of earth fill or wooden planks. Before such holes or trenches are filled, they should be thoroughly inspected for trapped animals. If at any time a trapped or injured kit fox is discovered, the procedures under number 12 of this section must be followed.
3. Kit foxes are attracted to den-like structures such as pipes and may enter stored pipe becoming trapped or injured. All construction pipes, culverts, or similar structures with a diameter of 4-inches or greater that are stored at a construction site for one or more overnight periods should be thoroughly inspected for kit foxes before the pipe is subsequently buried, capped, or otherwise used or moved in *any way*. If a kit fox is discovered inside a pipe, that section of pipe should not be moved until the Service has been consulted. If necessary, and under the direct supervision of the biologist, the pipe may be moved once to remove it from

- the path of construction activity, until the fox has escaped.
4. All food-related trash items such as wrappers, cans, bottles, and food scraps should be disposed of in closed containers and removed at least once a week from a construction or project site.
  5. No firearms should be allowed on the project site.
  6. To prevent harassment, no pets should be permitted on project site.
  7. Use of rodenticides and herbicides in project area should be restricted. This is necessary to prevent primary or secondary poisoning of kit foxes and the depletion of prey populations on which they depend. All uses of such compounds should observe label and other restrictions mandated by the U.S. Environmental Protection Agency, California Department of Food and Agriculture, and other State and Federal legislation, as well as additional project-related restrictions deemed necessary by the Service. If rodent control must be conducted, zinc phosphide or a similar product should be used because of proven lower risk to kit fox.
  8. A representative shall be appointed by the project proponent who will be the contact source for any employee or contractor who might inadvertently kill or injure a kit fox or who finds a dead, injured or entrapped individual. The representative will be identified during the employee education program. The representative's name and telephone number shall be provided to the Service.
  9. An employee education program should be conducted for any project that has expected impacts to kit fox or other endangered species. The program should consist of a brief presentation by persons knowledgeable in kit fox biology and legislative protection to explain endangered species concerns to contractors, their employees, and military and agency personnel involved in the project. The program should include the following: a description of the San Joaquin kit fox and its habitat needs; a report of the occurrence of kit fox in the project area; an explanation of the status of the species and its protection under the Endangered Species Act; and a list of measures being taken to reduce impacts to the species during project construction and implementation. A fact sheet conveying this information should be prepared for distribution to the above-mentioned people and anyone else who may enter the project site.
  10. In the case of trapped animals, escape ramps or structures should be installed immediately to allow the animal(s) to escape, or the Service should be contacted for advice.
  11. Any contractor, employee, or military or agency personnel who inadvertently kills or injures a San Joaquin kit fox shall immediately report the incident to their representative. This representative shall contact the USFWS immediately in the case of a dead, injured or entrapped kit fox. They will contact the local warden or biologist.
  12. The Sacramento Fish and Wildlife Office will be notified in writing within three working days of the accidental death or injury to a San Joaquin kit fox during project related activities. Notification must include the date, time, and location of the incident or of the finding of a dead or injured animal and any other pertinent information. The Service contact is the Assistant Field Supervisor of the Division of Endangered Species, at the addresses and telephone numbers given below.

## **REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION**

**In general.** Except as set forth below, each party shall have all remedies otherwise available to enforce the terms of this MOU.

**Injunctive and temporary relief.** The parties acknowledge that the kit fox is an endangered species and that its loss as a species would result in irreparable damage to the environment, and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this agreement where there is the risk of jeopardy to the species.

**Enforcement authority of the United States.** Nothing contained in this agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the Act or other applicable law.

**Reservation of Rights of PEC.** Nothing in this agreement shall be construed as an admission by PEC that the project site is used by kit fox, that the project in fact will affect the kit fox, or that the project will result in the incidental take of any kit fox. PEC's purpose in entering into this agreement is to avoid even potential impacts to the kit fox, and to benefit the species through the purchase of credits at a compensation bank.

**Dispute resolution.** The parties recognize that disputes concerning implementation of, compliance with, or termination of this MOU may arise from time to time. The parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the parties may later agree. However, if at any time any party determines

that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution.

**Informal dispute resolution process.** Unless the parties agree upon another dispute resolution process, or unless an aggrieved party has initiated administrative proceedings or suit in federal court as provided in this section, the parties may use the following process to attempt to resolve disputes:

- (a) The aggrieved party will notify the other parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.
- (b) The party alleged to be in violation will have thirty (30) days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.
- (c) Within thirty (30) days after such response was provided or was due, representatives of the parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all parties, or will establish a specific process and timetable to seek such a solution.
- (d) If any issues cannot be resolved through such negotiations, the parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

## MISCELLANEOUS PROVISIONS

**No partnership.** This MOU shall not make or be deemed to make any party to this agreement the agent for or the partner of any other party.

**Notices.** Any notice permitted or required by this agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Assistant Field Supervisor  
Endangered Species Program  
United States Fish and Wildlife Service  
2800 Cottage Way Room W-2605.  
Sacramento, California 95825  
Telephone 916/414-6600

Gary Chandler, President  
Panoche Energy Center, LLC  
2542 Singletree Lane  
South Jordan, UT 84095

**Entire agreement.** This MOU constitutes the entire agreement among the parties. It supersedes any and all other agreements, either oral or in writing, among the parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and *each* party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other party or anyone acting on behalf of any other party that is not embodied herein.

**Elected officials not to benefit.** No member of or delegate to Congress shall be entitled to any share or part of this agreement, or to any benefit that may arise from it.

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

**Duplicate originals.** This agreement may be executed in any number of duplicate originals. A complete original of this agreement shall be maintained in the official records of each of the parties hereto.

**No third-party beneficiaries.** Without limiting the applicability of rights granted to the public pursuant to the Act or other federal law, this agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this agreement. The duties, obligations, and responsibilities of the parties to this agreement with respect to third parties shall remain as imposed under existing law.

**Relationship to the Act and other authorities.** The terms of this agreement shall be governed by and construed in accordance with the Act and applicable federal law. In particular, nothing in this agreement is

intended to limit the authority of the Services to seek penalties or otherwise fulfill their responsibilities under the Act. Moreover, nothing in this agreement is intended to limit or diminish the legal obligations and responsibilities of the Services as agencies of the Federal government. Nothing in this agreement will limit the right or obligation of any Federal agency to engage in consultation required under Section 7 of the Act or other Federal law; however, it is intended that the rights and obligations of PEC under this MOU will be considered in any consultation affecting PEC's use of the covered lands.

**References to regulations.** Any reference in this MOU to any regulation or rule of the Services shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

**Applicable laws.** All activities undertaken pursuant to this MOU must be in compliance with all applicable State and Federal laws and regulations.

**Successors and assigns.** This agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the parties and their respective successors and assigns. Assignment or other transfer of the permit shall be governed by the Services' regulations in force at the time.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum of Understanding to be in effect as of the date that the Services issue the biological opinion.

BY 

Date 7/27/07

Assistant Field Supervisor  
Sacramento Fish and Wildlife Office  
United States Fish and Wildlife Service  
Sacramento, California 95825

BY 

Date 8/7/07

Gary Chandler, President  
Panoche Energy Center, LLC  
2542 Singletree Lane  
South Jordan, UT 84095

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