

AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND THE CITY OF POWAY FOR THE CONSTRUCTION, MAINTENANCE AND USE OF A PORTION OF THE HERITAGE TRAIL

THIS AGREEMENT (Agreement) is entered into by and between the City of San Diego, a California municipal corporation (SAN DIEGO), and City of Poway, a California municipal corporation (POWAY), to be effective when signed by the parties and approved by the City of San Diego Attorney (Effective Date), as follows:

RECITALS

WHEREAS, on August 1, 2000, pursuant to Resolution No. P-00-59, the Council of the City of Poway approved Tentative Tract Map No. TTM-98-02 for the Heritage II Subdivision; and

WHEREAS, Heritage II Subdivision subdivided 44 lots on property situated at the existing northern terminus of Old Coach Way, approximately two miles north of the intersection of Espola Road and Old Coach Road, in the northern part of the City of Poway near the boundary between the City of Poway and the City of San Diego; and

WHEREAS, one of the conditions of approval in Resolution P-00-59 was the dedication to the City of Poway of a recreational trail easement, and construction of the recreational trail according to City of Poway standards; and

WHEREAS, according to Resolution P-00-59, the recreational trail, known as the Heritage Trail, was intended to be a part of a regional trail system connecting to a section of trail located in the City of San Diego; and

WHEREAS, that portion of the trail located within, and owned by, the City of San Diego is leased to Evergreen Nursery Distributor's, Inc. (EVERGREEN); and

WHEREAS, the City of Poway and City of San Diego desire to formalize the City of Poway's right to enter upon the City of San Diego's property and document the understanding between the two parties regarding the placement and management of a trail for public use across a portion of the EVERGREEN leasehold.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Agreement Area. The Agreement Area is all or part of that certain SAN DIEGO-owned real property commonly known as Heritage Trail and located on a portion of APN 272-140-01 and APN 276-071-01, and more particularly described on "Exhibit A: Agreement Area", attached hereto.
2. Agreement Use. Subject to the terms and conditions of this Agreement, SAN DIEGO hereby grants permission to POWAY, its officers, employees, agents and contractors to enter upon and utilize the Agreement Area solely to establish, monitor and maintain a trail, which includes the installation of signs (Agreed Use). POWAY may use the Agreement Area on a non-exclusive basis solely for the Agreed Use and for no other purpose without SAN DIEGO'S prior written consent in each instance.

3. Term. This Agreement shall be a perpetual license/right to construct a trail and use the Agreement Area for the Agreed Use/public purposes. This Agreement shall continue in full force and effect until terminated by either party, pursuant to the requirements of Section 4.
4. Revocable License. This Agreement is a license/right to use the Agreement Area, and may be revoked at will by SAN DIEGO upon giving POWAY sixty (60) days prior written notice. SAN DIEGO shall not be obligated for any loss, financial or otherwise, which may be incurred by POWAY as a result of such revocation or the termination of this Agreement. POWAY expressly waives any claim for expense or loss which POWAY might incur as a result of SAN DIEGO's revocation or termination of this Agreement. POWAY may terminate this Agreement for any reason upon thirty (30) days prior written notice. Should POWAY terminate this Agreement POWAY releases SAN DIEGO of all obligations to maintain or continue the existence of a trail system through SAN DIEGO property and agrees to take all necessary actions to block public access to the trail; said terminus of the trail to be agreed upon by SAN DIEGO.
5. Patrol, Monitoring and Maintenance of the Agreement Area. POWAY shall, at POWAY'S sole cost and expense patrol, monitor, and maintain the Agreement Area in good order and repair and in a safe, healthy and sanitary condition at all times during the Term. SAN DIEGO shall at no time during the Term of this Agreement be required to make any improvements or repairs to the Agreement Area.
6. Trail Management A Trail Management Agreement (attached hereto as "Exhibit C") has been entered into by POWAY and EVERGREEN and is subject to the terms of this Agreement.
7. Improvements/Alterations. POWAY shall not construct any improvements, structures, or installations on the Agreement Area inconsistent with the use and function of the trail, and shall not alter the Agreement Area without the express written consent of SAN DIEGO. Except as required by law, SAN DIEGO shall not be obligated to make any repair or assume any expense for any improvements or alterations to the Agreement Area. Any approved improvements, if not removed prior to the termination of the Agreement, shall be deemed to be part of the Agreement Area and shall become SAN DIEGO'S property free of all liens and claims.
8. Signs. POWAY shall be allowed to only install and maintain trail signs, trail markers and trail maps providing directions or other appropriate information in connection with the trail per the standards shown in Exhibit "B" without requiring future SAN DIEGO approval.
9. Inspection. SAN DIEGO may at all times enter and inspect the Agreement Area.
10. Poway's Risk. POWAY shall bear all risks and liability arising out of or in any manner directly or indirectly connected with POWAY'S occupancy, use, development and maintenance of the Agreement Area and any damages to the improvements on, under, or in the vicinity of the Agreement Area resulting directly or indirectly thereby.
11. Indemnification & Hold Harmless. POWAY shall protect, defend, indemnify, and hold SAN DIEGO and its officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to POWAY'S officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with this Agreement or POWAY'S occupancy, use, development, or maintenance of the Agreement Area,

and all expenses of investigating and defending against same, including without limitation attorney fees and costs; provided, however, that POWAY'S duty to indemnify and hold harmless shall not include any claims or liability arising from the sole negligence, or intentional misconduct of SAN DIEGO and its elected officials, officers, employees, representatives, and agents. SAN DIEGO may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If SAN DIEGO chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, POWAY shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.

12. Accident Reports. POWAY shall immediately report to SAN DIEGO any accident causing property damage or injury to persons and related to the Agreement or on the Agreement Area. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.
13. No Nuisance. POWAY shall not use the Agreement Area in any manner which creates a nuisance or unreasonably disturbs the quiet enjoyment of persons in and to the surrounding area.
14. Hazardous Substances. POWAY, its agents and contractors shall not install, store, utilize, generate, or sell any hazardous substance on the Agreement Area. In the event of an accidental release of a hazardous substance by POWAY, its agents and contractors POWAY shall:
 - a) Immediately notify SAN DIEGO and any appropriate regulatory or reporting agency per California Administrative Code Title 19 and any other applicable laws or regulations.
 - b) Initiate an environmental assessment under regulatory oversight of the suspect area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at POWAY'S sole cost and expense, and shall establish what, if any, hazardous substances were released. If any such hazardous substances exist in quantities greater than allowed by city, county, state, or federal laws, statutes, ordinances, or regulations, or require future restricted re-use of the Agreement Area, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect unrestricted re-use and in compliance with those laws or statutes, and estimates of the cost of such remediation or removal.
 - c) Undertake the remediation and/or removal recommended in the environmental assessment such that unrestricted re-use of the Agreement Area and compliance with environmental law and regulations are achieved, and POWAY shall pay all associated costs and expenses.
 - d) Protect, defend, indemnify, and hold SAN DIEGO harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from a release caused by POWAY, its agents or contractors.

For the purposes of this provision, a release shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean any hazardous liquid, solid, or gaseous material substances listed by the Environmental Protection Agency or the State of California as a hazardous substance, and any type of petroleum-related substances and their chemical constituents. A copy of the presently effective EPA and the State lists is on file in the Office of the San Diego City Clerk as Document 769704 and is hereby incorporated into this Agreement.

15. Encumbrances. POWAY shall keep the Agreement Area and all SAN DIEGO-owned property of which the Agreement Area is a part free from all encumbrances and liens of any nature which arise out of or are in any manner directly or indirectly connected with this Agreement or POWAY'S occupancy, use, development, maintenance or restoration of the Agreement Area.
16. Acceptance of Agreement Area. By signing this Agreement, POWAY represents and warrants that it has independently inspected the Agreement Area and made all tests, investigations, and observations necessary to satisfy itself as to the condition of the Agreement Area and its suitability for the Agreement. POWAY further represents and warrants that it is not relying on any representation by SAN DIEGO as to the condition of the Agreement Area or its suitability for the Agreement, and that POWAY is relying solely on its own and independent inspections, tests, investigations and observations of the Agreement Area in entering into this Agreement. POWAY accepts the Agreement Area in its current condition, and acknowledges and agrees that SAN DIEGO has fulfilled all obligations it may have had to improve, modify, repair, replace, alter, or otherwise develop the Agreement Area prior to the Effective Date. POWAY shall not hold SAN DIEGO responsible for any defects in the Agreement Area. POWAY accepts and assumes all risk of harm to all persons and property, including without limitation POWAY'S employees, from any defects in the Agreement Area, and shall be solely responsible therefore.
17. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any and all prior understandings, representations, warranties and agreements between them pertaining to this Agreement and POWAY'S occupancy, use, development, maintenance and restoration of the Agreement Area. Any modification, alteration, or amendment of this Agreement shall be in writing and signed by all the parties hereto.
18. Notices. Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or delivered by United States mail, postage prepaid, and addressed to SAN DIEGO, and to POWAY as follows:

SAN DIEGO

THE CITY OF SAN DIEGO
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Suite 1700 (MS 51A)
San Diego, California 92101
(619) 236-6020

POWAY

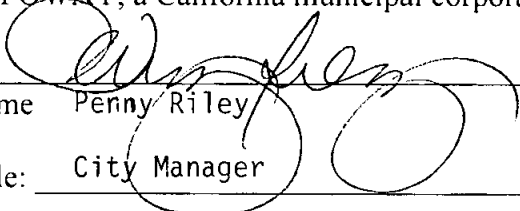
CITY OF POWAY
Attention: City Manager
P.O. Box 789
Poway, CA 92074-0789

19. Authority to Contract. Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms.

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date.

Date: 1/12/11

CITY of POWAY, a California municipal corporation

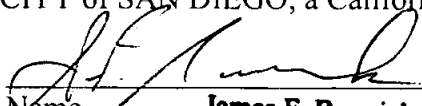
BY: 

Name Penny Riley

Title: City Manager

Date: 1/19/11

THE CITY of SAN DIEGO, a California municipal corporation

BY: 

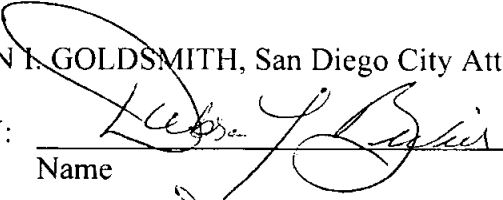
Name **James F. Barwick, CCIM**
Director, Real Estate Assets

Title: _____

APPROVED AS TO FORM AND LEGALITY:

Date: 1/20/11

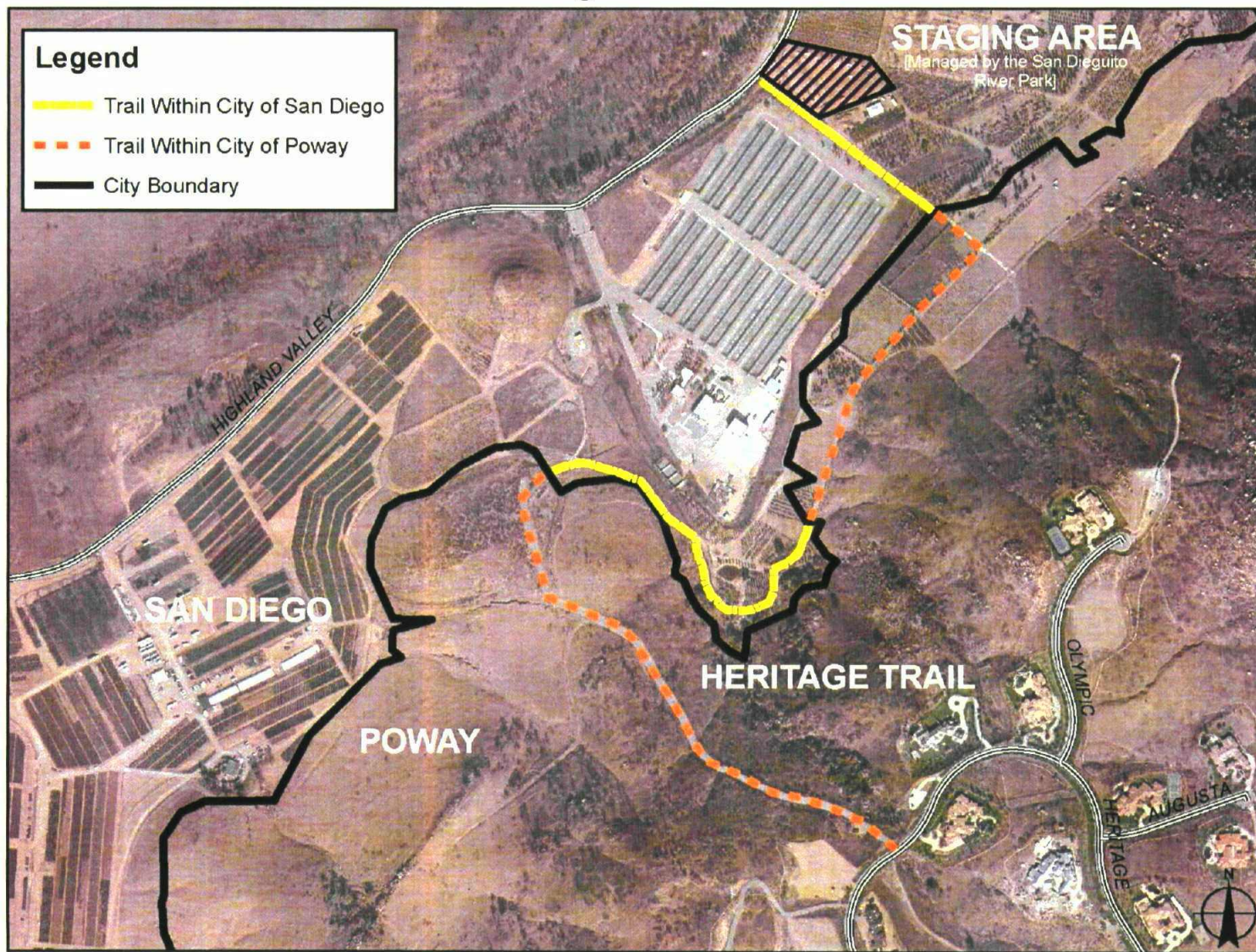
JAN I. GOLDSMITH, San Diego City Attorney

BY: 

Name

Title: City Attorney

Heritage Trail



Note: Not To Scale

Exhibit A: Agreement Area

Exhibit B: Trail Sign Standards

TRAIL SIGNS

- A. Trail identification signs shall be placed every one-half mile. Trail signs on community and regional trails shall be constructed in accordance with State of California trail design standards.
- B. Hazard signs shall be constructed to State trail design standards. Place signs wherever potential safety hazards may be present - for example, steep embankments and 20 percent, or greater, trail grades.
- C. Example of City of Poway trail signs, trail markers, and trail maps that do not require sign permits from the City of San Diego per Section 8 of this Agreement.



Exhibit C:
Trail Management Agreement
Between POWAY and EVERGREEN

**AGREEMENT BETWEEN THE CITY OF POWAY AND
EVERGREEN NURSERY FOR THE CONSTRUCTION,
MAINTENANCE AND USE OF A PORTION OF THE HERITAGE
TRAIL**

THIS "Agreement" is entered into by and between the City of Poway, a California municipal corporation, and Evergreen Nursery to be effective as (the "Effective Date") when signed by the parties and approved by the City of Poway Attorney, as follows:

RECITALS

Whereas, on August 1, 2000, pursuant to Resolution No. P-00-59, the City Council of the City of Poway approved Tentative Tract Map No. TTM-98-02 for the Heritage II Subdivision; and

Whereas, Heritage II Subdivision subdivided 44 lots on property situated at the existing northern terminus of Old Coach Way, approximately two miles north of the intersection of Espola Road and Old Coach Road, in the northern part of the City of Poway near the boundary between the City of Poway and the City of San Diego; and

Whereas, one of the conditions of approval in Resolution P-00-59 was the dedication to the City of Poway of a recreational trail easement and construction of the recreational trail according to City of Poway standards; and

Whereas, according to Resolution P-00-59, the recreational trail, known as the Heritage Trail, was intended to be a part of a regional trail system connecting to a section of trail located in the City of San Diego; and

Whereas, that portion of the trail located within the City of San Diego and owned by the City of San Diego is leased to the Evergreen Nursery Distributor's, Inc.; and

Whereas, the City of Poway, "POWAY", and Evergreen Nursery, "EVERGREEN", desire to document the understanding between the two parties regarding the placement and management of a trail for public use across a portion of EVERGREEN's leasehold.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Agreement Area. The Agreement Area is all or part of that certain San Diego-owned real property that is under the leasehold of EVERGREEN, commonly known as Heritage Trail, and located on a portion of APN 272-140-01 and APN 276-071-01, and more particularly described in Attachment C-1: Agreement Area, attached hereto.
2. Term. This Agreement shall be a perpetual license/right to construct and use a trail for public purpose and shall continue in full force and effect until terminated by either POWAY or the City of San Diego.

3. Patrol, Monitoring and Maintenance of the Agreement Area. POWAY shall, at POWAY'S sole cost and expense patrol, monitor and maintain the Agreement Area in good order and repair, and in a safe, healthy and sanitary condition at all times during the Term.
4. Hours of Operation. Trail shall be open to the public from sunrise to sunset, seven (7) days a week. As the trail follows a nursery road, any closure will require POWAY to coordinate with EVERGREEN prior to closure. Conversely, if EVERGREEN needs to temporarily close the trail, they will be required to first contact POWAY. A simple trail closure consists of a "Trail Closed" sign along with a Public Works contact phone number for those seeking additional information. A full closure, for an extended period, will include signed barricades and a possible detour alignment. The duration of closure will dictate the type of barricade. For example, orange construction fencing might be used for a short term closure and semi-permanent posts, with additional signage for a longer term closure.
5. Improvements/Alterations. EVERGREEN shall not construct any improvements, structures or installations on the Agreement Area inconsistent with the use and function of the trail, and shall not alter the Agreement Area without the express written consent of POWAY. Any approved improvements, if not removed prior to the termination of the Agreement, shall be deemed to be part of the Agreement Area and shall become the City of San Diego's property free of all liens and claims.
6. Trail Relocation. POWAY or EVERGREEN has the right to relocate, as it deems necessary to benefit passage by the general public and/or to accommodate operational changes in the nursery (but not terminate), the trail alignment within the general Agreement Area, as shown in Attachment A herein, provided that POWAY/EVERGREEN shall first give the other reasonable advance notice of either party's intention to relocate the trail and that all parties agree with the new location.
7. Poway's Risk. POWAY shall bear all risks and liability arising out of, or in any manner directly or indirectly connected with, POWAY'S occupancy, use, development, and maintenance of the Agreement Area and any damages to the improvements on, under, or in the vicinity of the Agreement Area resulting directly or indirectly thereby.
8. Indemnification & Hold Harmless. POWAY shall protect, defend and indemnify EVERGREEN harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to POWAY'S officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with this Agreement or POWAY'S occupancy, use, development, or maintenance of the Agreement Area, and all expenses of investigating and defending against same, including without limitation attorney fees and costs.
9. Notices. Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or delivered by United States mail, postage prepaid, and addressed to POWAY or to EVERGREEN as follows:

POWAY

CITY OF POWAY
Attention: City Manager
P.O. Box 789
Poway, CA 92074-0789

EVERGREEN

Evergreen Nursery Distributors, Inc.
14225 Highland Valley Road
Escondido, CA 92025

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date.

Date: 12/8/10

CITY of POWAY, a California municipal corporation

BY: [Signature]

Name

Title: City Manager

Date: Nov. 9, 2010

Evergreen Nursery Distributors, Inc

BY: [Signature]

Name

Title: PRES.

APPROVED AS TO FORM:

Date: 12-8-10

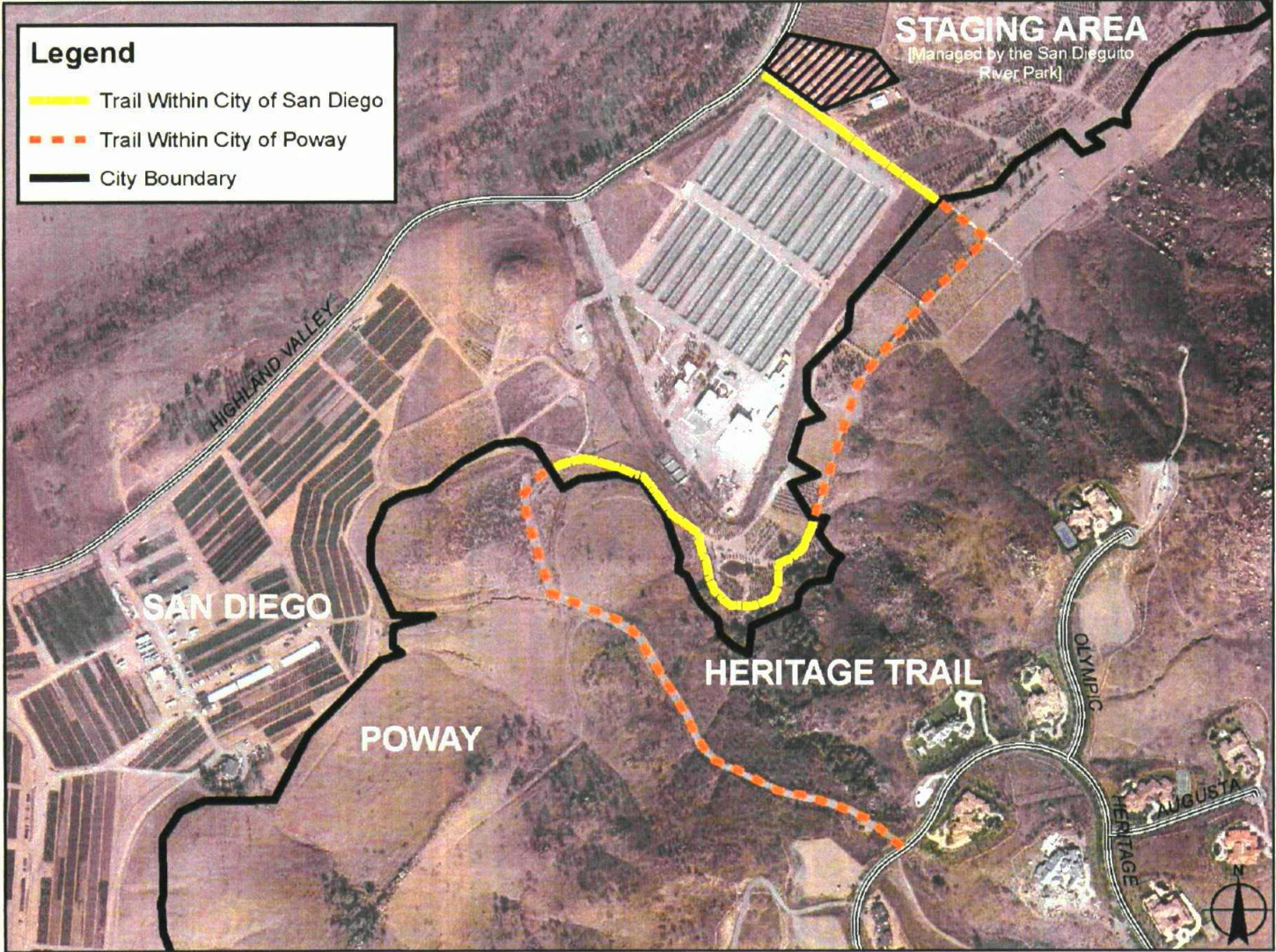
Office of the Poway City Attorney

BY: [Signature]

Name

Title: Lisa A. Foster, City Attorney

Heritage Trail



Note: Not To Scale