

MEMORANDUM OF AGREEMENT
Between the
U.S. ARMY CORPS OF ENGINEERS
LOS ANGELES DISTRICT
&
MCDOWELL SONORAN CONSERVANCY
Concerning the Establishment and Operation of the
McDowell Sonoran Conservancy In-lieu-fee Program

Section 1: INTRODUCTION

- 1.1 This document (the “**Agreement**”) establishes a written in-lieu-fee mitigation agreement between the Los Angeles District of the U.S. Army Corps of Engineers (“**Corps**”) and the McDowell Sonoran Conservancy (“**MSC**”) to administer the MSC In-Lieu-Fee Program (hereinafter “**Program**”) effective as of the last date set forth on the signatory page hereto.
- 1.2 The MSC is a non-profit organization which goals are to ensure completion, management and public appreciation of the McDowell Sonoran Preserve (“**Preserve**”); to continuously educate residents and visitors about the Preserve’s environmental and archaeological significance; to ensure the public appropriate access to protected areas; and to facilitate continuity of the preserve vision in the ever-changing political environment.

Section 2: PURPOSE AND OBJECTIVES

- 2.1 The primary purpose of the Program shall be to accept monies generated as an in-lieu-fee funding requirement for authorized activities, as well as monies generated by enforcement and compliance actions initiated by the Corps, and to serve as a funding source for wetland and/or riparian restoration, creation, enhancement, and preservation of wetlands and other aquatic resources. The primary objective of projects developed and funded under this Agreement will be to replace functions and values of aquatic resources and associated habitats that have been degraded or destroyed as a result of activities conducted in compliance with or in violation of Section 404 of the Clean Water Act of 1972 and/or Section 10 of the River and Harbor Act of 1899.
- 2.2 In accordance with Clean Water Act Section 404(b)(1) Guidelines and the federal “no net loss” goal, the Corps often requires compensatory mitigation to offset adverse impacts associated with permitted projects. Under certain circumstances, the Corps has determined it may offer greater resource protection and conservation benefits to gather funds collected in lieu of actual required mitigation actions, and to expend such in-lieu-fee monies on independent conservation projects which will offset impacts to waters of the U.S. caused by the authorized activity. In particular, it is anticipated that projects funded under this agreement will generally be used to mitigate for impacts to waters of the U.S.

authorized under the nationwide or regional general permit programs (“**General Permit**”), under an individual permit (“**Individual Permit**”), or which occurred as a result of an unauthorized activity. The purpose of the Program is to provide a voluntary, alternative compensatory mitigation option that will result in better-designed and managed aquatic resource restoration projects. The Program is designed to facilitate a holistic approach to aquatic resource management in the Verde River watershed, allocating money to where there is the greatest opportunity for long-term ecological benefit. This approach is often superior to the creation of small, isolated compensatory mitigation projects managed by developers, homeowners associations, or other permittee-designated managers, as occurs under the traditional permitting approach.

- 2.3 Permittees will be approved by the Corps to pay monies into the Program fund to satisfy Corps compensatory mitigation requirements only after avoidance and minimization of project-related impacts to wetlands have been accomplished to the maximum extent practicable, and onsite compensatory mitigation opportunities have been evaluated and determined impracticable or ecologically less desirable. The Program will generally be limited to compensatory mitigation for unavoidable, minor impacts to aquatic resources resulting from projects authorized under a Corps General Permit, a Corps Individual Permit, or from unauthorized activities in the Verde River watershed.
- 2.4 The geographic service area for consideration for in-lieu-fee mitigation, enforcement, and compliance actions that generate funds for the Account and for conservation projects developed for funding under the Account (defined in Section 7.2.2) shall be the State of Arizona. The projects will be located as close to specific impact sites as is appropriate and practicable as determined by the Corps in coordination with the MSC. In addition, the MSC may use other funds to augment conservation projects.
- 2.5 There are no existing mitigation banks in the geographic service area.

Section 3: AUTHORITY

- 3.1 The Corps is the federal regulatory agency responsible for permitting activities under the Clean Water Act and approving associated mitigation for such activities. This Agreement is entered into under the authority of section 404 of the Clean Water Act of 1972 (33 U.S.C. § 1344) and/or Section 10 of the River and Harbor Act of 1899 (33 U.S.C. § 403). Under Section 404 of the Clean Water Act, a permit (“**Section 404 Permit**”) is required from the Corps for discharges of dredged and/or fill material within waters of the U.S., including wetlands. Under Section 10 of the River and Harbor Act of 1899, a permit (“**Section 10 Permit**”) from the Corps is required for any work and/or structure in or affecting the course, capacity, or condition of navigable waters of the U.S. The Corps is also authorized to seek administrative or civil penalties for unauthorized activities, and may enforce mitigation requirements included as permit conditions. The intent of

the regulatory program is to minimize losses to wetland and waters of the U.S. to the maximum extent practicable by avoiding and minimizing impacts and requiring appropriate mitigation to compensate for remaining impacts. However, when waters of the U.S. are filled or altered without benefit of a Corps permit, or when compensatory mitigation requirements included by the Corps as a condition of Section 404/10 Permits are not fulfilled, waters of the U.S. losses can occur. The intent of the Program is to offset such losses by providing a compensatory mitigation alternative to Corps permit applicants and violators in cases when onsite compensatory mitigation is impracticable or ecologically less desirable, and to improve the overall effectiveness of compensatory mitigation required by Corps permits and enforcement actions.

Section 4: CRITERIA

- 4.1 Projects developed under this Agreement are intended primarily to provide in-lieu-fee mitigation for ecological impacts to waters of the U.S. which occur as a result of work conducted in compliance with a Section 404 and/or Section 10 Permit, or mitigation required due to unauthorized activities or non-compliance with permit conditions required to mitigate adverse impacts to aquatic resources. Consistent with the goals of the Clean Water Act, the focus shall be to restore and maintain the chemical, physical, and biological integrity of the nation's waters. More specifically, emphasis will be on restoration, creation, enhancement, and preservation of riparian and aquatic habitat and waters of the U.S.
- 4.2 Habitat-based projects developed and selected for funding under this Agreement shall:
 - 4.2.1 Be located within the boundaries of the Corps' Los Angeles District within State of Arizona.
 - 4.2.2 Provide, to the extent appropriate and practicable, the full replacement of functions of aquatic and riparian resources impacted by the projects serving as sources of funds for the Account.
 - 4.2.3 Generally be limited to compensatory mitigation for permanent impacts to riparian/aquatic resources and shall not be used to mitigate for impacts to unique aquatic resources, such as vernal pools and eelgrass.
 - 4.2.4 Generally be allocated toward the restoration, enhancement, and/or creation of riparian/freshwater wetland habitats. The MSC may use Program funds for aquatic habitat acquisition or preservation, provided the projects include a restoration, enhancement, and/or creation component, or provided the proposed preservation area is under clear threat of direct loss to aquatic resource functions and values (i.e., a developer has all or most permits and entitlements to build, etc.). To ensure adherence to the federal "no net loss" goal referenced above, for proposed compensatory

mitigation sites containing upland components in-lieu-fee mitigation credit shall only be applied to waters of the U.S., including wetlands, and associated vegetated buffers as approved by the Corps with the following exception. In accordance with Corps Guidance for the Establishment and Maintenance of Compensatory Mitigation Projects (“**Regulatory Guidance Letter No. 02-02**”), credit may be given for the inclusion of upland areas occurring within a compensatory mitigation project to the degree that the protection and management of such upland areas is an enhancement of aquatic functions and increases the overall ecological functioning of the mitigation project (e.g., vegetated buffers or a mix of habitats).

- 4.2.5 Be selected, as stated in Section 7.3.2, in accordance with applicable Federal policies and guidelines.
- 4.2.6 Have provisions for long-term operations and maintenance.
- 4.2.7 Be given priority to the extent they provide the same habitat type and are located within a watershed as close to the site of impacted riparian/aquatic resources as practicable.

Section 5: PROGRAM ADMINISTRATION

- 5.1 The Corps shall determine the required compensatory mitigation acreage for Corps permitted projects and for resolution of Corps enforcement actions.
- 5.2 The MSC shall ensure proposed mitigation sites and compensatory mitigation plans have obtained written approval from the Corps prior to expenditure of Program funds at the mitigation site.
- 5.3 The MSC shall obtain qualified wetland, riparian, and aquatic resource restoration expertise and use aggregated monies from the Program fund to implement, maintain and monitor selected aquatic resource restoration, enhancement, and/or creation projects in accordance with compensatory mitigation plans approved by the Corps.
- 5.4 Prior to the expenditure of Program monies for physical improvements at any project site, the MSC shall prepare a compensatory mitigation plan for that site for the review and written approval of the Corps. Compensatory mitigation plans shall describe the project area and the restoration and enhancement activities to be carried out. Compensatory mitigation plans providing for the acquisition or preservation of aquatic habitat shall demonstrate compliance with the requirements of this paragraph. Implementation of mitigation plans for approved Program mitigation sites shall not be initiated until the Corps has provided written approval of the site-specific mitigation plan.

- 5.5 The MSC's current mitigation program is two-pronged and involves the purchase of lands adjacent to the existing Preserve boundary often in partnership with the City of Scottsdale (these lands are donated to the Preserve with the appropriate deed restrictions) as well as land restoration projects done on permanently protected Preserve land in partnership with the City of Scottsdale and the Center for Native and Urban Wildlife of Scottsdale Community College. Therefore, in-lieu-fees collected would be accumulated in the interest-bearing account as referenced in Section 6.1 until sufficient funds are available to make a land purchase or conduct specific land restoration activities. In the interim, the MSC shall provide reports as detailed in Section 6.4. For restoration projects, initial physical and biological improvements should be completed by the first full growing season following collection of funds from each Corps permittee. However, because site improvements associated with in-lieu-fee mitigation may take longer to initiate, physical and biological improvements may be completed later than the first full growing season where 1) initiation by the first full growing season is not practicable and 2) the delay is approved in advance by the Corps. Delays of more than one year may require an increase in mitigation ratios to offset temporal losses.
- 5.6 The MSC or a qualified organization designated by the MSC and approved by the Corps, shall maintain and monitor each compensatory mitigation site for a minimum of five years following completion of compensatory mitigation site construction and shall be fully responsible for compensatory mitigation success in accordance with the final success criteria established in the approved compensatory mitigation plan for each site. After final success criteria have been achieved as confirmed by the Corps, the MSC shall perform, in-perpetuity, long-term operation and maintenance of the site as described in the mitigation plan for the particular site.
- 5.7 To ensure permanent protection of these compensatory mitigation sites, the MSC shall execute on lands they own in fee or shall obtain from the owner of the property on lands MSC leases an in-perpetuity conservation easement or restrictive covenant. Such easements and covenants shall be recorded at the appropriate County Registry of Deeds on each compensatory mitigation site prior to compensatory mitigation site construction. The conservation easements and restrictive covenants shall not be recorded until approved in writing by the Corps. The MSC shall immediately forward to the Corps copies of the recorded conservation easements or restrictive covenants for our records.

Section 6: FINANCIAL ADMINISTRATION

- 6.1 Contributions to the Account shall be held in a bank that must be a member of the Federal Deposit Insurance Corporation ("FDIC"), separate from all other accounts. The monies held in the escrow account shall earn interest. The MSC shall authorize the bank to invest the funds in direct obligations of the Government of the United States of America or in obligations of agencies or

insurers that are guaranteed by the Government of the United States of America. The Account shall be invested in such a manner as to ensure immediate liquidity. Any instrument must be subject to redemption on or prior to the date the funds will be needed by the MSC. All interest and earnings accruing to the Account shall remain in the Account and shall be used for the purposes specified in Sections 2 and 4. All interest and earnings are under the authority of the Corps and can only be spent with their approval as stated in Section 7.3.

- 6.2 The MSC shall determine the cost-per-acre for the required mitigation. To meet the federal goal of “no net loss” of the nation’s aquatic resource functions and values, the cost-per-acre must be sufficient to cover the expected costs of compensatory mitigation. Accordingly, the cost per acre should be based on a reasonable estimate of funds needed for land acquisition, project planning, construction, monitoring, maintenance, reporting, remedial contingencies, and in-perpetuity, long-term operation and maintenance.
- 6.3 Disbursements from the Account shall be made upon receipt of a written authorization from the Corps Project Manager (as set forth in Section 9.1) to fund particular projects pursuant to Sections 4 and 7 herein.
- 6.4 Program funds shall generally be allocated toward the restoration, enhancement, and/or creation of riparian/freshwater wetland habitats, including preparation of restoration plans, site maintenance and monitoring. Program funds may also be allocated toward the acquisition and preservation of riparian lands with vegetated upland buffers in danger of being developed or otherwise degraded.
- 6.5 The MSC will furnish an annual report to the Corps detailing all income, disbursements, and interest earned with respect to the Account. The annual report shall include:
 - A spreadsheet of all projects for which in-lieu-fees were accepted, identifying for each project the Corps file number, required mitigation acreage, in-lieu-fee amount, date of Corps letter approving acceptance of in-lieu-fee mitigation, date in-lieu-fee monies were received, and a breakdown of in-lieu-fee expenditures, i.e. cost of land acquisition, project planning, construction, monitoring, maintenance, contingencies and, particularly, administration;
 - An accounting of owed and satisfied compensatory mitigation acreage requirements;
 - Annual mitigation monitoring reports for all in-lieu-fee mitigation sites in the monitoring phase required under the compensatory mitigation plans prepared in accordance with Section 5.4.
- 6.6 The Corps retains the right to audit all books and records of the MSC pertaining to this Agreement upon reasonable prior notice to the MSC. All books, accounts, reports, files, and other records relating to this Agreement shall be subject at all reasonable times to inspection and audit.

Section 7: SPECIFIC OBLIGATIONS OF THE PARTIES

- 7.1 Pursuant to the criteria identified in Section 4 herein, the Corps and the MSC shall jointly:
 - 7.1.1 Identify aquatic resource conservation projects that meet the purposes of Section 2 of this Agreement.
 - 7.1.2 Coordinate project development directly with land management agencies, land trusts, conservation organizations, and other entities, as appropriate.
 - 7.1.3 Provide information on the Program to the general public, as appropriate.
- 7.2 The MSC shall:
 - 7.2.1 Assume full responsibility for compensatory mitigation success in accordance with the final success criteria established in the approved compensatory mitigation plan for each mitigation site.
 - 7.2.2 Administer the restricted account (the “**Account**”) pursuant to this Agreement and shall be responsible for the administration of the Account on behalf of the Corps as further described in Section 4 herein.
 - 7.2.3 Make disbursements of funds from the Account pursuant to Sections 7.1 and 6 of this Agreement.
 - 7.2.4 Enter into contracts as the MSC deems necessary, to implement riparian and aquatic resource conservation projects pursuant to Sections 2 and 7.
 - 7.2.5 Develop potential aquatic resource restoration plans in accordance with Sections 2, 5.4 and 7.1.1 and submit them in writing to the Corps.
 - 7.2.6 Maintain and monitor each compensatory mitigation site for a minimum of five years following completion of compensatory mitigation site construction.
 - 7.2.7 Perform in-perpetuity, long-term operation and maintenance of each particular mitigation site as described in the approved mitigation plan.
 - 7.2.8 Obtain all federal, state and local permits required for implementation of the restoration projects carried out under the Program.
 - 7.2.9 Report annually to the Corps on the account balance in accordance with Section 6.5.

7.3 The Corps shall:

- 7.3.1 Provide Federal oversight by ensuring projects developed and funded under this Agreement provide maximum benefit to Federal trust resources, further the goals and objectives of the appropriate Federal statutes, and comply with all applicable Federal statutes, regulations, and policies cited in Section 3 herein.
- 7.3.2 Select riparian and other aquatic resource conservation projects that meet the purposes of Sections 2 and 7.1.1 of this Agreement.
- 7.3.3 Review and approve in writing and in a timely manner, all compensatory mitigation plans submitted by the MSC under Section 7.2.5.
- 7.3.4 Maintain records of projects, enforcement, and compliance actions including project location, acres, and/or functions of lost resources by habitat type and similar information, which will be used in developing compensatory mitigation projects.

Section 8: AMENDMENT AND TERMINATION

- 8.1 Amendments to this Agreement may be proposed by any signatory party in writing and shall become effective only upon being reduced to a written instrument and being signed by a duly authorized representative of each party.
- 8.2 This Agreement may be terminated by a signatory upon 30 days written notice to the other party. In the event of termination, the MSC will retain such funds as necessary to meet existing project obligations made under the terms of this Agreement. The MSC shall transfer all remaining funds to a restricted account dedicated to riparian/aquatic conservation as specified by the Corps in writing.

Section 9: NOTICES AND PROJECT OFFICERS

- 9.1 The individuals listed below shall be the current Project Officers for this Agreement. Notices to be given herein shall be made in writing and may be given by delivering the same in person or to their successor, by mail or by fax. Notices shall be effective only if and when received at the address of the party to be notified (or their appointees).

For the Corps: Cindy Lester, P.E.
 Chief, Arizona Section, Regulatory Branch
 3636 N. Central Avenue, Suite 900
 Phoenix, AZ 85012

For the MSC: Carla
Executive Director
McDowell Sonoran Conservancy
PO Box 14365
Scottsdale, AZ 85267

9.2 Local points of contact for this Agreement for the Corps shall be: Cindy Lester, P.E.

Local point of contact for this Agreement for the MSC shall be: Carla.

Signing two originals of this letter as outlined herein indicates acceptance of the terms of this Agreement. This Agreement shall not be in effect until signed by all parties.


U.S. Army Corps of Engineers, Los Angeles District



David J. Castanon
Chief, Regulatory Branch

Date: 12-5-05

McDowell Sonoran Conservancy

By: 

Carla
Executive Director

11-19-05