

MEMORANDUM OF AGREEMENT
Between the
U.S. ARMY CORPS OF ENGINEERS
LOS ANGELES DISTRICT
&
THE TUCSON AUDUBON SOCIETY
Concerning the Establishment and Operation of
TAS CONSERVATION ACCOUNT

Section 1: INTRODUCTION

- 1.1 This document (the “Agreement”) establishes an in-lieu fee mitigation agreement between the Los Angeles District of the U.S. Army Corps of Engineers (Corps) and the Tucson Audubon Society (TAS) to create and administer the TAS Conservation Account (the “Account”) effective as of the last date set forth on the signatory page hereto.

Section 2: PURPOSE AND OBJECTIVES

- 2.1 The primary purpose of the Account 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 habitat that have been degraded or destroyed as a result of activities conducted in compliance with or in violation of the section 404 of the Clean Water Act and/or section 10 of the River and Harbor Act of 1899.
- 2.2 Under Section 404 of the Clean Water Act (33 U.S.C. 1251 *et. seq.*) 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 (33 U.S.C. 403), 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 wetland and waters of the U.S. losses to the maximum extent practicable by avoiding impacts and by 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.

- 2.3 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 monies on independent conservation projects which will offset waters of the U.S. impacts caused by the authorized activity. In particular, it is anticipated that projects funded under this agreement will be used to mitigate for waters of the U.S. impacts as a result of unauthorized activities or those authorized under the nationwide or regional general permit programs as well as for individual permits.
- 2.4 The geographic scope of 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 4.2.1) shall be the boundaries of Pima County, 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 TAS. In addition, the TAS may use other funds to augment conservation projects.

Section 3: AUTHORITY

- 3.1 This Agreement is entered into under the authority of Section 404 of the Clean Water Act (33 U.S.C. 125 *et. seq.*) and/or Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403).
- 3.2 The TAS is a private non-profit conservation organization designed to undertake activities which further the conservation and management of wildlife and riparian resources for present and future generations of Americans. The TAS works with private, local, State, and Federal organizations and agencies to conduct such conservation activities.

Section 4: SPECIFIC OBLIGATIONS OF THE PARTIES

- 4.1 Pursuant to the criteria identified in Section 5 herein, the Corps and the TAS shall jointly:
 - 4.1.1 Identify aquatic resource mitigation projects which meet the purposes of Section 2 of this Agreement.
 - 4.1.2 Coordinate project development directly with land management agencies, land trusts, environmental organizations, and other entities, as appropriate.
 - 4.1.3 Provide information on the Account to potential project sponsors and to the general public, as appropriate.

4.2 The TAS shall:

- 4.2.1 Establish a 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 5 herein.
- 4.2.2 Make disbursements of funds upon direction from the Corps from the Account pursuant to Sections 4.1 and 6 of this Agreement.
- 4.2.3 Enter into agreements, as the TAS deems necessary, to implement riparian and aquatic resource conservation projects pursuant to Sections 2 and 4.1.
- 4.2.4 Develop potential riparian and other aquatic resource restoration projects in conjunction with other partners, when appropriate, in accordance with Section 4.1.1 and submit them in writing to the Corps.
- 4.2.5 Report annually to the Corps on the account balance, a list of projects, and short description of each project including an evaluation of project success.
- 4.2.6 For each specific activity, provide an implementation schedule.

4.3 The Corps shall:

- 4.3.1 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.
- 4.3.2 Determine, for each specific project, the number of acres of mitigation required.
- 4.3.3 Select riparian and other aquatic resource conservation projects which meet the purposes of Sections 2 and 4.1.1 of this Agreement. Direct the TAS to make project disbursements in accordance with the preceding statement.
- 4.3.4 Review and approve in writing and in a timely manner, all riparian and aquatic resources restoration projects submitted by the TAS under Section 4.2.4.

- 4.3.5 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.
- 4.3.6 Prepare an annual status summary of actions which have served as sources for the funds for the Account.
- 4.3.7 Enter into agreements with the TAS and other sponsors, co-sponsors, and contractors as deemed necessary and practicable.
- 4.3.8 Cooperate and assist the TAS in entering into agreements as described in Section 4.2.3.

Section 5: CRITERIA

- 5.1 Projects developed under this Agreement are intended primarily to provide in-lieu 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 permit conditions which were not satisfied. 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.
- 5.2 Habitat-based projects developed and selected for funding under this Agreement shall:
 - 5.2.1 Be located within the boundaries of the Corps Los Angeles District within the State of Arizona.
 - 5.2.2 Provide, to the extent appropriate and practicable, the full replacement of functions of aquatic and riparian resources which have been impacted by the projects serving as sources of funds for the Account.
 - 5.2.3 Be selected according to the priority sequence of restoration of former riparian/aquatic resources, creation of new riparian/aquatic resources, enhancement of existing riparian/aquatic resources, and preservation of existing riparian/aquatic resources. In addition, restoration, enhancement, or preservation of upland areas which protect, buffer, or support important riparian/aquatic resources will be considered for funding only when they will have direct riparian/aquatic benefit. With respect to project selection, projects will be selected, as stated in Section 4.3.2, in accordance with applicable Federal policies and guidelines.

- 5.2.4 To the extent appropriate and practicable, mitigation funds shall be used to restore, create, enhance, or preserve riparian/aquatic resources with similar functions, values, and quality as those impacted through Section 404/10 permits.
- 5.2.5 In general and with few exceptions, be completed by the first growing season after receipt of funds.
- 5.2.6 Have provisions for long-term management and stewardship by a responsible local, State, or Federal agency or conservation organization.
- 5.2.7 Priority to fund mitigation projects shall be given to those of the same habitat type within a watershed located as close to the site of impacted riparian/aquatic resources as practicable.

Section 6: FINANCIAL ADMINISTRATION

- 6.1 Contributions to the Account shall be held in a bank which 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 TAS 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 TAS, except as otherwise set forth in Sections 6.2 and 6.3. 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 5. All interest and earnings are under the authority of the Corps and can only be spent with their approval as stated in Section 4.3
- 6.2 The TAS shall receive, at the time that funds are contributed to the Account, an initial administrative overhead reimbursement equal to five percent (5%) of funds contributed to the Account to cover expenses for day to day management of the Account, initial bank charges for establishment of the Account, and for personnel time in carrying out the responsibilities of this Agreement. This reimbursement shall be made against the corpus of the Account.
- 6.3 In addition to the amount specified in Section 6.2, the TAS, as project manager or implementing partner of a project set forth in Section 5, will be reimbursed all reasonable expenses incurred in connection with the satisfaction of its obligations under this Agreement. Such reimbursement, however, shall be subject to an annual operating budget approved in writing by the Corps. Bank charges for the Account after the first year may be paid from interest collected, and to the extent not covered by accrued interest, shall be paid from the corpus of the Account.

- 6.4 Disbursements from the Account shall be made upon receipt of a written request from the Corps Project Officer (as set forth in Section 8.1) to fund particular projects pursuant to Sections 4 and 5 herein.
- 6.5 The TAS will furnish an annual report to the Corps detailing all income, disbursements, and interest earned with respect to the Account.
- 6.6 The Corps retains the right to audit all books and records of the TAS pertaining to this Agreement upon reasonable prior notice to the TAS.
- 6.7 If this Account is determined to be a taxable entity under Section 468B of the Internal Revenue Service's Tax Code, than any appropriate taxes shall be paid out of the accrued interest.

Section 7: AMENDMENT AND TERMINATION

- 7.1 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.
- 7.2 This agreement shall last in perpetuity unless amended by one of the parties herein.
- 7.3 This Agreement may be terminated by a signatory upon 30 days written notice to the other party. In the event of termination, the TAS will retain such funds as necessary to meet existing project obligations made under the terms of this Agreement. The TAS shall transfer all remaining funds to a restricted account dedicated to riparian/aquatic conservation as specified by the Corps in writing.

Section 8: NOTICES AND PROJECT OFFICERS

- 8.1 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).

If for the Corps: Cindy Lester
Chief, Arizona Section
Regulatory Branch
3636 N. Central Avenue, Suite 900
Phoenix, Arizona 85012

If for the TAS: Sonja Macys
Executive Director
Tucson Audubon Society
300 E. University Blvd., #120
Tucson, Arizona 85705

8.2 Local points of contact for this Agreement at each Corps' Arizona office shall be:

U.S. Army Corps of Engineers
Arizona Section, Regulatory Branch
3636 N. Central Avenue, Suite 900
Phoenix, Arizona 85012

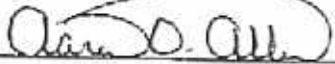
U.S. Army Corps of Engineers
Arizona Section, Regulatory Branch
5205 E. Comanche Street
Tucson, Arizona 85707

8.3 Local point of contact for this Agreement for the TAS shall be:

Tucson Audubon Society
300 E. University Blvd., #120
Tucson, Arizona 85705

Acceptance of the terms of this Agreement as outlined herein is indicated by signing two originals of this letter.

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

By: 
Aaron Allan, Ph.D.

Title: Acting Chief, Regulatory Branch

Date: 2/10/04

Tucson Audubon Society

By: 
Sonja Macys

Title: Executive Director

Date: 1/16/04

AGREED AND ACCEPTED AS OF THE DATES HEREOF