

MEMORANDUM OF AGREEMENT
Between the
U.S. ARMY CORPS OF ENGINEERS
LOS ANGELES DISTRICT
&
The Nature Conservancy
Arizona Chapter
Concerning the Establishment and Operation
of the Statewide In-Lieu-Fee Program

Section 1: INTRODUCTION

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 Nature Conservancy (“**Conservancy**”) to administer the In-Lieu-Fee Program (hereinafter “**Program**”) effective as of the last date set forth on the signatory page hereto.

- .2 The Conservancy is a District of Columbia private, nonprofit corporation whose mission is to preserve the plants, animals and natural communities that represent the diversity of life on earth by protecting the lands and waters they need to survive. The Conservancy is organized to protect and conserve ecologically significant land for scientific, charitable, and educational purposes; is qualified to acquire and hold conservation easements under the laws of the United States and the State of Arizona; and is a qualified tax-exempt organization under the requirements of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The Conservancy has significant land and water protection experience, and has completed conservation projects across the State of Arizona in partnership with private landowners, public land managers, and government agencies at the local, State, and Federal levels.

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, for impacts to waters of the U.S. authorized under a standard individual permit, and for impacts to waters of the U.S. resulting from a violation of Section 404. 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 targeted watersheds throughout Arizona, 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 impacts to aquatic resources resulting from projects authorized under a Corps standard Individual Permit, a Corps General Permit, or from unauthorized activities in the State of Arizona.
- 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 boundaries of 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 Conservancy. In addition, the Conservancy may use other funds to augment conservation projects.

Section 3: AUTHORITY

3. 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. 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:

Be located within the boundaries of the Corps' Los Angeles District within the State of Arizona.

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.

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.

Generally be allocated toward the acquisition, restoration, enhancement, and/or creation of riparian/freshwater wetland habitats. The Conservancy may use Program funds for aquatic habitat acquisition or preservation, provided the projects include a restoration, enhancement, and/or creation component, or provided the aquatic resource functions and values in a proposed preservation area are threatened and without permanent legal protection. 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).

Be selected, as stated in Section 7.3.2, in accordance with applicable Federal policies and guidelines.

Have provisions for in-perpetuity long-term operations and maintenance.

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.** The Corps shall determine the required compensatory mitigation acreage for Corps permitted projects and for resolution of Corps enforcement actions.
- 5.2** The Conservancy 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 Conservancy shall utilize qualified wetland, riparian, and aquatic resource restoration expertise and use aggregated monies from the Program fund to implement, maintain and monitor selected aquatic resource acquisition, 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 Conservancy 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 acquisition, 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. Acquisition projects may include the acquisition of fee or conservation easement interest in a property. 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 Conservancy's mitigation program may involve the purchase of conservation easements and the purchase of private or State Trust lands in the State of Arizona. 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 execute a land or water purchase or lease agreement. In the interim, the Conservancy shall provide reports as detailed in Section 6.5.
- 5.6** The Conservancy or a qualified organization designated by the Conservancy 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 Conservancy shall perform, in-perpetuity, long-term operation and maintenance of the site as described in the mitigation plan for the particular site.

- 5.7 The Conservancy may choose to transfer any fee or conservation easement interests acquired with in-lieu fees at a future date to a qualified organization that agrees to perform, in-perpetuity, long-term operation and maintenance of the site, or conservation easement monitoring, as described in the mitigation plan for the particular site. Prior to transfer, Corps must provide written approval of the qualified organization. With this approval, the qualified organization shall be eligible to receive any stewardship endowment established per the compensatory mitigation plan.
- 5.8 To ensure permanent protection of these compensatory mitigation sites, the Conservancy shall 1) on lands they do not own in fee, obtain from the fee title owner of the mitigation site lands an in-perpetuity conservation easement or 2) on lands they own in fee, execute and record a restrictive covenant. The conservation easements and restrictive covenants shall not be executed and recorded without prior written approval from the Corps. The Conservancy shall ensure the conservation easements and restrictive covenants are recorded at the Registry of Deeds at the County in which the mitigation site is located prior to compensatory mitigation site construction. The Conservancy shall forward to the Corps copies of the recorded conservation easements or restrictive covenants for our records.
- 5.9 In the event the Conservancy transfers all or a portion its fee title interest in the mitigation site lands to a subsequent owner, the Conservancy will reserve a conservation easement over such mitigation site lands. At the time of transfer, the Conservancy shall cause the conservation easement to be recorded at the Registry of Deeds at the County in which the mitigation site is located. The conservation easements shall not be recorded without prior written approval from the Corps. The Conservancy shall forward to the Corps copies of the recorded conservation easement(s) for our records.

Section 6: FINANCIAL ADMINISTRATION

6. Contributions to the Account shall be deposited in an interest bearing account in a banking institution that is a member of the Federal Deposit Insurance Corporation (“FDIC”) and will be pooled and invested with other funds the Conservancy holds for similar or other purposes. Any and all funds received by the Conservancy for the Program shall be separately accounted for on a project basis, including the date and amount received, source of the funds (with permittee name and Corps file number). Funds shall be accounted for by watershed and acreage or linear feet of aquatic type, whichever is appropriate. The Corps recognizes that there may be a time lag between the Conservancy’s receipt of mitigation fees and investment in a mitigation project. The in-lieu-fee funds deposited in the Account under this Agreement shall be invested in such a manner as to ensure immediate liquidity. 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. Further, all interest and earnings accruing to the Account are under the authority of the Corps and can only be spent with prior written approval of the Corps as stated in Section 7.3.
- 6.2 The Conservancy 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.

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 including vegetated upland buffers in danger of being developed or otherwise degraded.

The Conservancy will furnish an annual report to the Corps detailing all income, disbursements, and interest earned with respect to the Account. The Conservancy's annual reporting obligation will persist as long as this Agreement is in effect, funds are being retained in the Account for existing project obligations per Section 8.2, or compensatory mitigation projects remain in the monitoring phase, whichever period is longer. 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. As described in Section 5.6, the monitoring phase for compensatory mitigation projects shall be a minimum of five years, and at the completion of the monitoring phase no further reporting on mitigation project status will be required.

The Corps retains the right to audit all books and records of the Conservancy pertaining to this Agreement upon reasonable prior notice to the Conservancy. All books, accounts, reports, files, and other records of the Conservancy relating to this Agreement shall be subject at all reasonable times to inspection and audit.

Section 7: SPECIFIC OBLIGATIONS OF THE PARTIES

7. Pursuant to the criteria identified in Section 4 herein, the Corps and the Conservancy shall jointly:
- 7. 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.

Provide information on the Program to the general public, as appropriate.

7.2 The Conservancy shall:

7.2. 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.

Establish and administer the restricted account (the “**Account**”) pursuant to this Agreement on behalf of the Corps as further described in Section 4 herein.

Make disbursements of funds from the Account pursuant to Sections 7.1 and 6 of this Agreement.

Enter into contracts as the Conservancy deems necessary, to implement riparian and aquatic resource conservation projects pursuant to Sections 2 and 7.

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.

Maintain and monitor each compensatory mitigation site for a minimum of five years following completion of compensatory mitigation site construction.

Perform in-perpetuity, long-term operation and maintenance of each particular mitigation site as described in the approved mitigation plan.

Obtain all federal, state and local permits required for implementation of the restoration projects carried out under the Program.

Report annually to the Corps on the account balance in accordance with Section 6.5.

7.3 The Corps shall:

7.3. 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.

Select riparian and other aquatic resource conservation projects that meet the purposes of Sections 2 and 7.1.1 of this Agreement.

Review and approve in writing and in a timely manner, all compensatory mitigation plans submitted by the Conservancy under Section 7.2.5.

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.

Section 8: AMENDMENT AND TERMINATION

8. 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 Conservancy will retain such funds as necessary to meet existing project obligations made under the terms of this Agreement. The Conservancy 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. 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 Conservancy: Tom Collazo
Director of Conservation
The Nature Conservancy in Arizona
1510 East Fort Lowell Road
Tucson, AZ 85719

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

- 9.3 Local point of contact for this Agreement for the Conservancy shall be:

Greg Gamble
The Nature Conservancy in Arizona
The Plaza at Squaw Peak I
7500 North Dreamy Draw Drive, Suite 145
Phoenix, AZ 85020
Phone: 602-322-6987
Email: ggamble@tnc.org

IN WITNESS WHEREOF, The Nature Conservancy, Arizona Chapter and the U.S. Army Corps of Engineers, Los Angeles District, through its authorized officer, have entered into this Agreement effective as of the latest date upon which it is executed as among the signatories hereto.

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

By: David J. Castanon
David J. Castanon
Chief, Regulatory Branch

Date: 5-9-06

The Nature Conservancy

By: Patrick Graham
Patrick Graham
Director, The Nature Conservancy in Arizona

Date: 6-14-06