

RESOLUTION AND ORDER NO. FC _____

RESOLUTION OF THE BOARD OF DIRECTORS OF THE PIMA COUNTY FLOOD CONTROL DISTRICT APPROVING AND AUTHORIZING THE EXECUTION OF AN IN-LIEU FEE PROGRAM ENABLING INSTRUMENT BETWEEN THE PIMA COUNTY FLOOD CONTROL DISTRICT, THE U. S. ARMY CORPS OF ENGINEERS, AND THE TUCSON AUDUBON SOCIETY FOR THE ESTABLISHMENT OF THE PIMA COUNTY FLOOD CONTROL DISTRICT - TUCSON AUDUBON SOCIETY IN-LIEU FEE PROGRAM (*All Districts*)

WHEREAS, the Pima County Regional Flood Control District ("DISTRICT") is authorized by Arizona Revised Statutes (A.R.S.) Section 48-3603 to construct, maintain and operate flood control structures and storm drainage facilities, and to regulate flood plains within the DISTRICT, and

WHEREAS, the DISTRICT is authorized under A.R.S. Section 48-3603 to exercise the powers of the DISTRICT for general planning and regulatory purposes, including habitat conservation planning and management, and

WHEREAS, the Tucson Audubon Society ("AUDUBON") is a 501(c)(3) nonprofit organization established in 1949 that promotes the protection and stewardship of southern Arizona's biological diversity through the study and enjoyment of birds and the habitats in which they live with an emphasis on the preservation and restoration of riparian and adjacent upland habitats, and

WHEREAS, the U. S. Army Corps Of Engineers, ("USACE") and Region 9 of the Environmental Protection Agency ("USEPA") have jurisdiction over Waters of the United States ("WUS") pursuant to the Clean Water Act, 33 U.S.C § 1251, et seq., ("CWA"). WUS also includes all designated jurisdictional wetlands, and

WHEREAS, the DISTRICT, the USACE, AUDUBON share an interest in establishing a regional In-Lieu Fee ("ILF") Program to facilitate federal mitigation requirements imposed on local entities in connection with the USACE's CWA Section 404 permitting process, and

WHEREAS, the DISTRICT and AUDUBON ("Program Sponsors") wish to become Co-sponsors in cooperation with USACE in the ILF Program to provide Compensatory Mitigation for unavoidable Impacts to WUS, including wetlands, which result from activities authorized under Section 404 of the CWA or as a result of completed enforcement actions pursuant to Sections 404 of the CWA,

NOW, THEREFORE, UPON MOTION DULY MADE, SECONDED AND CARRIED, BE IT RESOLVED THAT:

1. The District shall hereby enter into the In-Lieu Fee Program Enabling Instrument for the purpose of establishing an ILF Mitigation Program in cooperation with the USACE and the Tucson Audubon Society.
2. The Chairman of the Board is hereby authorized and directed to sign the ILF Enabling Instrument for the Board.

3. The appropriate District officers and employees are hereby authorized and directed to perform all acts necessary and desirable to give full force and effect to this Resolution.

PASSED, ADOPTED AND APPROVED this _____ day of _____, 2013.

**PIMA COUNTY FLOOD CONTROL DISTRICT
BOARD OF DIRECTORS**

Ramón Valadez, Chairman

ATTEST:

Clerk of the Board

APPROVED AS TO FORM:



Deputy County Attorney

Enabling Instrument
Pima County Regional Flood Control District
and Tucson Audubon Society In-Lieu Fee Program

This In-Lieu Fee Enabling Instrument ("Instrument") is made by and among the Pima County Regional Flood Control District ("DISTRICT") and the Tucson Audubon Society ("AUDUBON"), collectively referred to as the Program Sponsor, the Los Angeles District of the U.S. Army Corps of Engineers ("USACE"), Region IX of the US Environmental Protection Agency ("USEPA"), US Fish and Wildlife Service ("USFWS"), Arizona Department of Environmental Quality ("ADEQ"), Arizona Game and Fish Department ("AGFD"), Pima County ("PC"), and the City of Phoenix ("CoP"). The USACE, USEPA, USFWS, AGFD, ADEQ, PC, and COP comprise and are referred to jointly as the Interagency Review Team ("IRT"). The Program Sponsor and the IRT members who have agreed to sign this Instrument are hereinafter referred to jointly as the "Parties." This Instrument sets forth the agreement of the Parties for the purpose of establishing guidelines, responsibilities and standards for the continued development, implementation, use, operation and maintenance of the Pima County Flood Control District-Tucson Audubon Society In-Lieu Fee Program (the "Program"). Concurrence of this document, on behalf of the USACE, is provided by the Interagency Review Team (IRT).

RECITALS

- A. This Instrument is to continue the operation of the Program Sponsor's In-Lieu Fee Program in conformance with the requirements of 33 CFR Parts 325 and 332. This Instrument, except for actions covered under Section VI, supersedes the January 24, 2004 Memorandum of Agreement ("MOA") between USACE and AUDUBON that established an in-lieu-fee program between the parties.
- B. This Instrument also adds DISTRICT as a co-sponsor with AUDUBON and modifies the Program's Service Area.
- C. The DISTRICT is authorized by Arizona Revised Statutes ("ARS") Section 48-3603 to construct, maintain and operate flood control structures and storm drainage facilities, and to regulate flood plains within the District.
- D. The DISTRICT is further authorized under ARS Section 48-3603 to exercise the powers of the DISTRICT for general planning and regulatory purposes, including habitat conservation planning and management.

- E. AUDUBON is a 501 (c) 3 non-profit organization established in 1949 that promotes the protection and stewardship of southern Arizona's biological diversity through the study and enjoyment of birds and the habitats in which they live with an emphasis on the preservation and restoration of riparian and adjacent upland habitats.
- F. The USACE and Region 9 of the Environmental Protection Agency ("USEPA") have jurisdiction over Waters of the United States ("WUS") pursuant to the Clean Water Act, 33 U.S.C § 1251, et seq., ("CWA"). WUS also includes all designated jurisdictional wetlands.
- G. The mission of the USEPA is to protect human health and the environment; the mission of the USFWS is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people; the mission of the ADEQ is to protect public health and the environment; the mission of the AGFD is to conserve, enhance, and restore Arizona's diverse wildlife resources and habitats through aggressive protection and management programs, and to provide wildlife resources and safe watercraft and off-highway vehicle recreation for the enjoyment, appreciation, and use by present and future generations; The Pima County Office of Conservation Science and Environmental Policy is located in Pima County; and the City of Phoenix, Office of Environmental Programs advances environmental protection and sustainability by promoting sound environmental policies and practices. The IRT is the interagency group which oversees the establishment, use, operation, and maintenance of the Program.
- H. The DISTRICT and AUDUBON ("Program Sponsor") wish to become Co-Sponsors in cooperation with USACE in the reauthorization of an In-Lieu Fee Program (the "ILF Program") to provide Compensatory Mitigation for unavoidable Impacts to WUS, including wetlands, which result from activities authorized under Section 404 of the CWA or as a result of completed enforcement actions pursuant to Sections 404 of the CWA.
- I. The objectives of the ILF Program shall be to:
 - 1. provide an alternative to permittee-responsible compensatory mitigation with In-Lieu Fees (or "ILF") adequate to meet current and expected demand for mitigation credits within a defined Service Area;
 - 2. create a program that has a level of accountability commensurate with mitigation banks as specified in 33 C.F.R. Part 332;
 - 3. provide ILF Projects that meet current and expected demand for Credits;
 - 4. achieve ecological success on a watershed basis by siting ILF Projects using the best available decision support tools; and

5. integrate ILF Projects with ongoing conservation activities being undertaken within the Region.

J. The USACE, through its Interagency Review Team (“IRT”) shall oversee the development, use, operation, and maintenance of the ILF Program.

K. The mitigation plan, as referenced in 33 CFR 332.4 and containing the requirements in paragraphs c2-c14 of that section, will be addressed in each proposed ILF Project by submissions required in Exhibits D-F of this Instrument (Development Plan, Interim Management Plan, Long Term Management Plan).

NOW, THEREFORE, in consideration of the foregoing Recitals, the Parties agree as follows:

AGREEMENT

Section I: Purpose and Authorities

A. Purpose:

The purpose of this Instrument is to establish guidelines, responsibilities and standards for the continued development, implementation, use, operation and maintenance of the ILF Program. The ILF Program will be used for Compensatory Mitigation of (1) unavoidable Impacts to WUS, including wetlands, which result from activities authorized under Section 404 of the CWA or (2) completed enforcement actions under the auspices of Sections 404 and 401 of the CWA.

B. Authorities:

1. The Pima County Regional Flood Control District Board of Directors is the oversight board of the DISTRICT and the Tucson Audubon Society Board of Directors is the oversight board for AUDUBON. The DISTRICT is a political taxing subdivision of the State of Arizona authorized under Title 48 of the Arizona Revised Statutes and is responsible for all aspects of floodplain management in Pima County. The Tucson Audubon Society is a 501 (c) 3 non-profit organization that promotes the protection and stewardship of Southern Arizona’s biological diversity through the study and enjoyment of birds and the habitats in which they live, and the restoration of riparian and upland habitats.

2. The development, use, operation and maintenance of the Program will be carried out in accordance with the following Federal authorities:

- a. Clean Water Act (33 U.S.C. § 1251 *et seq.*);
- b. Rivers and Harbors Act (33 U.S.C. § 403);

- c. National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*);
- d. Endangered Species Act (16 U.S.C. § 1531 *et seq.*);
- e. Fish and Wildlife Coordination Act (16 U.S.C. § 661 *et seq.*);
- f. National Historic Preservation Act (16 U.S.C. § 470);
- g. Regulatory Program of the USACE (33 C.F.R. Parts 320-332); and
- h. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 C.F.R. Part 230).

3. Authority of the USACE

The USACE will make the final decision regarding the amount and type of Compensatory Mitigation to be required of federal permittees, and determine whether and how use of Credits from the Program is appropriate to compensate for unavoidable Impacts.

C. Term:

This Instrument shall remain in effect for an initial period of 25 years from the Program Effective Date unless earlier terminated by any party as authorized herein. Any Program Termination/Program Closure under this Instrument, including Term expiration, will be subject to the terms of Section IX D 2 and other applicable provisions herein. This Instrument may be amended at any time, extended, or renewed by the parties for any additional periods subject to the terms of Section IX D 1 and other applicable provisions herein. .

Section II: Definitions

“Adaptive Management” means an approach to natural resource management which incorporates changes to management practices, including corrective actions as determined to be appropriate by the IRT in discussion with Program Sponsor based upon annual report results and IRT review of overall Program performance and compliance.

“Advance Credits” means any Credits of the Program that are available for sale prior to being fulfilled in accordance with an approved Development Plan.

“Buffer” means an upland, wetland, and/or riparian area that Protects and/or Enhances aquatic resource functions associated with wetlands, rivers, stream, and lakes from disturbances associated with adjacent land uses.

“Catastrophic Event” shall mean an unforeseen event, such as the impact of a vehicle or falling aircraft, which has a material and detrimental impact on the ILF Project site(s), and over which the Program Sponsor has no control.

“Compensatory Mitigation” means the Restoration, Establishment, Enhancement, or the Preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable Impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

“Conservation Easement” means a perpetual conservation easement, as defined by Arizona Revised Statute Section 33-271, substantially in the form of **Exhibit J**.

“Credit” is a unit of measure (e.g., a functional or a real measure or other suitable metric) representing the accrual or attainment of aquatic functions at an ILF Project Site. The measure of aquatic functions is based on the resources Restored, Established, Enhanced, or Preserved.

“Credit Release” means an action by USACE to make specified Credits available for Transfer pursuant to this Instrument.

“Development Plan” is the document that formally establishes an ILF Project and stipulates the terms and conditions of its construction and habitat establishment activities required to be conducted on the ILF Project Site to establish Credits. Each Development Plan will be bound by the terms and conditions of the Instrument by reference.

“Enhance” or “Enhancement” means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource Function(s). Enhancement results in the gain of selected aquatic resource Function(s), but may also lead to a decline in other aquatic resource Function(s). Enhancement does not result in a gain in aquatic resource area.

“Establish” or “Establishment” means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and Function(s).

“Force Majeure” shall mean war, insurrection, riot or other civil disorder, flood, drought, lightning, earthquake, fire, landslide, disease, effects of climate change on habitat or hydrology, condemnation or other taking by governmental body. Other conditions beyond the Program Sponsor’s control will include: interference by third parties; condemnation or other taking by any governmental body; change in applicable law, regulation, rule, ordinance, or permit condition, or the interpretation or enforcement thereof; any order, judgment, action or determination of any federal, state or local court, administrative agency or governmental body; and/or suspension or interruption of any permit, license, consent, authorization or approval.

“Functions” mean the physical, chemical, or biological processes that occur in ecosystems.

“Impacts” mean adverse effects.

“ILF Project” means a specific compensatory mitigation project implemented by the Program Sponsor under the conditions of the ILF Program.

“Interim Management Period” means the period from the Program Effective Date until all Performance Standards in the Development Plan have been met.

“Interim Management Plan” is the document that describes the management, monitoring, Adaptive Management, reporting and other activities to be implemented by the Program Sponsor during the Interim Management Period. Each Interim Management Plan will be bound by the terms and conditions of the Instrument by reference.

“Long-term Management Period” means the period beginning upon conclusion of the Interim Management Period and continuing in perpetuity, during which each ILF Project is to be managed, monitored and maintained pursuant to the Long-term Management Plan.

“Long-term Management Plan” means the document that identifies specific land management activities that are required to be performed at each of the ILF Project Sites, including, but not limited to, biological monitoring, improvements to biological carrying capacity, enforcement measures, and other actions designed to protect or improve the habitat values of the ILF Project Site.

“Performance Standards” means the minimum standards, as set forth in the Development Plan that defines the Project, for achieving Plan objectives.

“Phase I Environmental Site Assessment” is an assessment of the environmental condition of the Property performed in accordance with the American Society of Testing and Materials (ASTM) Standard E1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,” or any successor to such ASTM Standard at the time of the assessment.

“Preservation” means the protection of existing ecologically important wildlife, habitat or other ecosystem resources in perpetuity.

“Program Account” means an account established by the Program Sponsor at an institution that is a member of the Federal Deposit Insurance Corporation and that is used by the Program Sponsor for the purpose of providing compensatory mitigation for Department of the Army permits.

“Program Effective Date” is the date determined pursuant to Section IV.D., when the Program is considered effective and Transfer of Advance Credits may begin.

“Property Assessment” means the written ILF Project Site evaluation signed by the Program Sponsor, using the form attached in Exhibit I (if applicable).

“Remedial Action” means any corrective measures which Program Sponsor is required to take pursuant to 33 CFR 332.7 to address any injury or adverse impact to the ILF Project Site as Preserved, Restored or Enhanced or as a result of a failure to achieve the Performance Standards. “Remedial Action” does not include any duty or responsibility under this Instrument to remediate the release or threatened release of hazardous substances, hazardous wastes, pollutants or contaminants for which Program Sponsor or the State of Arizona is not liable pursuant to applicable federal, state or local laws.

“Re-establishment” means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic Functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area, Functions and Services.

“Rehabilitation” means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic Functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource Function, but does not result in a gain in aquatic resource area.

“Restore” or “Restoration” means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic Functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, Restoration is divided into two categories: Re-establishment and Rehabilitation.

“RIBITS” means the Regulatory In-Lieu Fee and Bank Information Tracking System.

“Service Area” means the geographic area(s) within which Impacts to Waters of the U.S. may be mitigated or compensated through Credits from the Program.

“Services” mean the benefits that human populations receive from Functions that occur in ecosystems.

“Subordination Agreement” means a written, recorded agreement in which the holder of an interest in, or lien or encumbrance on the ILF Project site makes the lien or encumbrance subject to and of lower priority than the Conservation Easement or equivalent protection mechanism, even though the lien or encumbrance was recorded before the Conservation Easement or equivalent protection mechanism

“Transfer” means the use, sale, or conveyance of Credits by the Program Sponsor

“Unlawful Act” shall mean the unlawful act of any person or entity other than Program Sponsor and shall include an event or series of events in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the ILF Project Site.

“Waters of the United States” or “Waters of the U.S.” or “WUS” means all waters and wetlands under USACE and USEPA jurisdiction pursuant to the Clean Water Act [33 U.S.C. § 1251, *et seq.* (2006)].

Section III: Stipulations

A. Disclaimer

This Instrument does not in any manner affect the statutory authorities and responsibilities of the Parties.

B. Exhibits

The following Exhibits are attached to and incorporated by this reference into this Instrument:

- A - Prioritization and Compensation Planning Framework
- B - Service Area Map
- C - Instrument Modification Procedure
- D - Development Plans
- E - Interim Management Plans
- F - Long-term Management Plans
- G - Statement of Sale of Credit
- H - Credit Ledger Report Form
- I - Property Assessment Form
- J - Conservation Easement Form

SECTION IV: PROGRAM STRUCTURE

A. Framework

This Instrument is intentionally broad and sets the framework under which ILF Projects will be identified, funded, operated, maintained and managed. The Instrument provides the authorization for the Program to provide Credits to be used as Compensatory Mitigation for Department of the Army permits or as a result of completed enforcement actions pursuant to Section 404 of the Clean Water Act. As ILF Projects are identified, the Program Sponsor will submit site-specific Development Plans, which will include Interim Management Plans and Long-term Management Plans to USACE for review and approval as modifications to the Instrument through the process outlined in Exhibit C, and will be included in this Instrument as subparts of Exhibits D-F.

B. Service Area

The majority of the ILF Geographic Service Area shall be comprised of the Santa Cruz Basin (HUC 150503) and the four main sub-basins within the Santa Cruz Basin. Each of the sub-basins, the Upper Santa Cruz (HUC 15050301), the Rillito (HUC15050302), the Lower Santa Cruz (HUC 15050303) and the Brawley (HUC 15050304), will each represent a Service Area. Should significant impacts to WUS in the San Pedro-Wilcox Basin occur and significant compensatory mitigation needs arise in that area, the program may extend its Service Area into the San Pedro-Wilcox Basin (HUC 150502) and encompass the Upper San Pedro (HUC 15050202) and Lower San Pedro (HUC 15050203) sub-basins, through development of a mitigation site within that Basin. The sub-basin boundaries that will typically form the Service Areas are illustrated in Exhibit B. Proposed Service Areas for individual ILF projects will be identified in a site-specific Development Plan (Site Mitigation Plan), based on an analysis of the extent of ecologically similar areas, the expected amount and type of mitigation required in the Service Area (demand) compared with the aquatic resources and amount of credits that are expected from an ILF Project, population and growth information, ongoing watershed management programs, and the watershed's compensation planning framework. Service Areas are sized appropriately to ensure that the aquatic resources provided by an ILF Project will effectively compensate for expected adverse Impacts. Priority will be given to Compensatory Mitigation projects in the same geographic Service Area nearest to where Impacts occur although it is proposed that Impacts occurring within any sub-basin may be mitigated within any adjacent sub-basin, if appropriate and agreed upon by the USACE. Final Service Area determinations will be made by USACE in consultation with the IRT.

C. Program Account

1. Upon the Instrument being fully executed by all of the Parties and prior to accepting any fees from federal permittees, the Program Sponsor must establish a Program Account. DISTRICT will manage the Program Sponsor's Program Account and the

Program Account will collect deposits from the sale of Credits, which will be used only for the comprehensive costs associated with site selection, acquisition, design, implementation, management, monitoring and administrative costs of ILF Projects. Administrative costs equal to 15% of each Credit sale will be allowed to manage the Program. All interest and earnings from the Program Account will remain in that account for the purpose of providing Compensatory Mitigation for unavoidable Impacts to Waters of the U.S. Funds for the operation of the Program may be obtained from other sources and repaid as Credits are sold.

2. Complete budgets for individual ILF Projects will be approved as part of Development Plans.
3. Annual accounting reports will be presented by September 30th for approval by USACE. Reports will include detailed summaries of Program Account deposits and disbursements for each ILF Project made over the previous state fiscal year (July 1 – June 30) (Section VII). Any deviation in excess of ten percent from the approved budget will require USACE approval before additional funds are disbursed. USACE may review Program Account records with 14 days written notice. When so requested, Program Sponsor shall provide all books, accounts, reports, files, and other records relating to the Program Account.

D. Program Effective Date

The Program Effective Date will occur and Transfer of Advance Credits may begin only after (1) the Instrument has been executed by all Parties and (2) the Program Account has been established. Within 30 days of the Program Effective Date, the Program Sponsor shall upload the executed Instrument including its Exhibits to RIBITS with an electronic copy to each member of the IRT.

E. ILF Projects

Program Sponsor will identify potential ILF Projects consistent with the Instrument and submit a Development Plan, including a project budget, Interim Management Plan, and Long-term Management Plan to USACE along with a written request for an Instrument Modification (Exhibit C). Program Sponsor will implement the ILF Projects upon approval and report annually to the IRT (Section VIII).

F. Establishment and Use of Credits

In accordance with the provisions of this Instrument and upon satisfaction of the Credit Release schedule described in Development Plans (contained herein as subparts of Exhibit D) and in Section VII.C, Credits are available for Transfer as Compensatory Mitigation in accordance with all applicable requirements for permits issued under Section 404 of the Clean Water Act

and associated Clean Water Act Section 401 Water Quality Certifications. Based on recommendations of the IRT, USACE will determine the number of Credits available for each ILF Project, in accordance with the terms and conditions contained herein.

SECTION V: ILF PROJECT ESTABLISHMENT AND OPERATION

This section identifies the general framework in which individual ILF Projects will be established and operated. Each ILF Project will be approved individually, as detailed herein, and the specific requirements for its operation, monitoring, and management will meet USACE standard operating procedures at the time of its approval. Program Sponsor shall provide for access to the ILF Project Site for the IRT or its agents at reasonable times to conduct inspections and compliance monitoring with respect to the requirements of the Instrument. Inspecting parties shall not unreasonably disrupt or disturb activities on the ILF Project Site, and will provide written request for access within a reasonable time prior to the inspection.

A. Establishment

1. Project Site Selection

All individual ILF Projects will be located within the Geographic Service Area. Program Sponsor will seek ILF Projects based on the prioritization and compensation planning framework outlined in Exhibit A.

2. Instrument Modifications

As ILF Projects are identified, Program Sponsor will prepare a Development Plan, including a project budget, Interim Management Plan, and Long-term Management Plan and submit a written request to USACE to modify the Instrument. This process is outlined in Exhibit C.

3. Permits

The Program Sponsor will obtain all applicable permits and authorizations needed to construct and maintain the ILF Project(s). This Instrument does not constitute or substitute for any such approval.

4. Financial Assurances

Notwithstanding any other provision of this Instrument, the Program Sponsor's financial obligation for the Program will be limited to funds in the Program Account. The Program Sponsor will take the following actions to ensure funds are available to meet mitigation requirements for Credits Transferred:

- a. Funds outlined in approved ILF Project budgets will be earmarked and held in the Program Account, and disbursed as work is accomplished to operate and monitor the individual ILF Projects.
- b. Funds outlined in approved ILF Project budgets will be earmarked and held in the specified Program subaccount to manage the individual ILF Project, including contingency and Remedial Actions.
- c. A financial assurance for each ILF Project in accordance with 33 C.F.R. 332.3(n). Each approved ILF Project will have an identified schedule for the release of the financial assurances as the ILF Project meets its approved Performance Standards.

B. Operation

1. Development Plans

Program Sponsor shall be responsible for preparing Development Plans in accordance with Exhibit D. The Development Plans shall outline measurable objectives, Performance Standards, and monitoring requirements. Pre- and post-ILF Project implementation jurisdictional determinations and delineations (as appropriate) and functional assessments will be completed using USACE-approved techniques. Development Plans must include a survey or other document acceptable to the USACE, completed by a professional land surveyor or other qualified person or entity, defining the ILF Project site, and a Property Assessment using the Form in **Exhibit I**. Upon approval of the Development Plan by the USACE, the Program Sponsor shall be responsible for implementing the plan.

2. Interim Management and Monitoring

Program Sponsor shall be responsible for preparing Interim Management Plans in accordance with Exhibit E. Upon approval of the Interim Management Plan by USACE, the Program Sponsor shall be responsible for conducting management and monitoring activities according to the Interim Management Plan until completion of the Interim Management Period.

3. Long-term Management and Monitoring

ILF Projects shall be designed, to the maximum extent practicable, to be self-sustaining once Performance Standards have been achieved. Program Sponsor shall be responsible for preparing Long-term Management Plans in accordance with Exhibit F. Once the Interim Management Period is completed, the Program Sponsor shall implement long-term management and monitoring of the ILF Project Site(s) according to the Long-term Management Plan. The Program Sponsor shall manage and monitor the ILF Project Site in perpetuity to preserve its habitat and conservation

values in accordance with this Instrument, the real estate instrument (e.g., Conservation Easement), and the Long-term Management Plan. Such activities shall be funded through the Program Account, including, but not limited to, the potential transfer of long-term management funds to a land steward entity pursuant to 33 C.F.R. § 332.8(u)(3). Program Sponsor and the IRT members shall meet and confer upon the request of any one of them, after notification of and concurrence with the USACE, to consider revisions to the Long-term Management Plan which may be necessary or appropriate to better conserve the habitat and conservation values of the ILF Project site(s). During the Long-term Management Period, Program Sponsor shall be responsible for submitting annual reports to each member of the IRT in accordance with Section VIII.A of this Instrument. The Program Sponsor shall upload annual reports into RIBITS.

4. Remedial Action Plan

Prior to Program closure, if any Party documents any failure to achieve the Performance Standards or any injury or adverse impact to the ILF Project Site as Preserved, Established, Restored, or Enhanced, the Party shall notify the other Parties. Subject to the limitations on any duty of Program Sponsor to remediate outlined in Section IX.A, the USACE, in consultation with the IRT members, may require the Program Sponsor to develop and implement a Remedial Action plan to correct such condition, as described below. The annual report required under Section VIII.A shall identify and describe any Remedial Action proposed, approved, or performed and, if the Remedial Action has been completed, evaluate its effectiveness.

- a. Within 60 days of the date of written notice from the USACE, Program Sponsor shall develop a Remedial Action plan and submit it to the USACE for approval. The Remedial Action plan must identify and describe proposed actions to achieve the Performance Standards or address injury or adverse impact to the ILF Project Site and set forth a schedule within which the Program Sponsor will implement those actions. The Program Sponsor shall implement the necessary and appropriate Remedial Action in accordance with the Remedial Action plan approved by the USACE. In the event the Program Sponsor fails to submit a Remedial Action plan to the IRT in accordance with this section, the USACE will notify the Program Sponsor that the Program Sponsor is in default and may identify Remedial Action the USACE deems necessary. If (a) the Program Sponsor fails to develop a Remedial Action plan or to implement Remedial Action identified by the USACE, in accordance with this section, or (b) conditions have not improved or continue to deteriorate two years after the date that the USACE approved a Remedial Action plan or notified Program Sponsor of Remedial Actions

the USACE deemed necessary, then USACE may direct funds from the Program Account to undertake Remedial Action on the ILF Project Site.

- b. If USACE determines, in consultation with the IRT, that the Program is operating at a Credit deficit (i.e., that Credit Transfers made exceed the Credits authorized for release, as adjusted in accordance with this Instrument), then USACE shall notify the Program Sponsor. Upon the USACE giving such notice, the Program Sponsor shall immediately cease Transfer of Credits. The USACE, in consultation with the IRT, will determine what Remedial Action is necessary to correct the Credit deficit, and Program Sponsor shall implement such Remedial Action, in accordance with this Section V.B.4.

5. Long-term Ownership and Protection

Program Sponsor shall be responsible for ensuring long-term protection of each ILF Project through the use of real estate instruments in accordance with 33 C.F.R. 332.7(a). Program Sponsor will ensure that the real estate instrument is in place *prior to* ILF Project implementation, as stipulated in each Development Plan. The draft real estate instrument, substantially in the form of **Exhibit J**, shall be submitted to the IRT for review and USACE approval. The real estate instrument shall include, but is not limited to, assigning long-term management responsibility for the ILF Project and will, to the extent practicable, prohibit incompatible uses that might otherwise jeopardize the objectives of the ILF Project. A copy of the recorded real estate instrument shall be furnished to the Parties and become part of the official Program record. If any action is taken to void or modify an ILF Project real estate instrument, Program Sponsor must notify the USACE in writing.

SECTION VI: PRE-EXISTING ILF PROJECTS

A. ILF Projects (a) previously approved for design under the January 24, 2004 MOA and (b) fully funded (for construction through long term management) prior to the Program Effective Date shall be completed in accordance with the terms of the January 24, 2004 MOA. If any of the ILF Projects approved under the January 24, 2004 MOA are discontinued, abandoned, or completed and closed, any remaining monies shall become unobligated, placed in the Program Account, and managed in accordance with this Instrument.

All AUDUBON- sponsored ILF Projects under the January 24, 2004 MOA have been scalable in size as funds have been received through the program. All projects approved under the January 24, 2004 MOA are therefore fully funded, and funds are obligated upon receipt to a designated project.

B. ILF Projects previously approved for design under the January 24, 2004 MOA but not fully funded as defined by Section VI A shall be completed in accordance with the terms of this Instrument. For ILF Projects subject to this Section VI B, any funds received prior to the Program Effective Date will be transferred to the Program Account within 10 days of the Program Effective Date.

C. Funds received under the January 24, 2004 MOA that remain unobligated as of the Program Effective Date, will be transferred to the Program Account within 10 days of the Program Effective Date and managed in accordance with this Instrument.

SECTION VII: CREDIT ACCOUNTING

A. Advance Credits

Upon the Program Effective Date, Program Sponsor is permitted to Transfer one hundred (100) Advance Credits for each Service Area covered by the ILF Program. This number of Advance Credits may be adjusted upward thru Instrument amendment should a single permittee require more than 50 Advance credits. The number of Advance Credits that are approved for Transfer was developed in coordination with the USACE and IRT and is based on (1) the historic loss of wetlands/aquatic resources and future threats within the Service Area as outlined in the compensation planning framework in **Exhibit A**, (2) the Program Sponsor's past performance for implementing Enhancement, Restoration, Establishment, and/or Preservation activities within the Service Area, and (3) the projected financing necessary to begin planning and implementation of ILF Projects. No more than 25%, or 25 Advance Credits, may be Transferred and later fulfilled as Preservation Credits within a Service Area. At least 75% of the Advance Credits must be fulfilled as Establishment, Enhancement, Buffer and/or Restoration Credits.

Once the Program Sponsor has sold all of its Advance Credits in a given Service Area, no more Advance Credits may be sold until an equivalent number of Credits has been released in accordance with the approved Credit Release schedule outlined in an ILF Project-specific Development Plan. Once all Advance Credits are fulfilled, an equivalent number of Advance Credits may be made available for Transfer, at the discretion of the USACE, in consultation with the IRT.

Program Sponsor shall complete land acquisition and initial Mitigation Site improvements by the third full growing season (year) after the Transfer of Advance Credits. If Program Sponsor fails to meet these deadlines, the USACE must either make a determination that more time is needed to plan and implement an ILF Project or, if doing so would not be in the public interest, direct the Program Sponsor to disburse funds from the Program Account to provide alternative Compensatory Mitigation to fulfill those compensation obligations.

B. Generation of Credits

Each approved ILF Project Development Plan will include the method for determining the Credits generated by the individual ILF Project. Program Sponsor may only generate Credits from an ILF Project when there is a net benefit to aquatic resources at the site as determined by the difference between pre- and post-site conditions. Credit generation will be determined using an USACE approved functional assessment method on a per-acre basis. Preservation of existing Waters of the United States that support a significant population of rare plant or animal species, or that are a rare aquatic resource type may be proposed to generate Credits. Credits may also be proposed for Preservation or improvements of riparian areas, Buffers and uplands if the resources in these areas are essential to maintain the ecological viability of a Water of the U.S. Credits generated for Preservation and Buffers will be determined on a case-by-case basis by the USACE, in consultation with the IRT, in accordance with 33 C.F.R. 332.3(h) and (i).

C. Credit Release

Each approved ILF Project Development Plan will include a Credit Release schedule referenced to Performance Standards. As milestones in an individual ILF Project's Credit Release schedule are reached (i.e., Restoration, Establishment, Enhancement and/or Preservation is implemented), Advance Credits are converted to Released Credits. At a minimum, Credits will not be released until the Program Sponsor has obtained USACE approval of the Development Plan for the ILF Project site, has achieved the applicable milestones in the Credit Release schedule, and has submitted a request for Credit Release to the USACE along with documentation substantiating achievement of the criteria for release to occur and Credit Releases have been approved by the USACE. If the ILF Project does not achieve the performance-based milestones, the USACE may modify the Credit Release schedule, including reducing the number of Credits.

A general target Credit Release schedule is defined herein although this general schedule will be further refined to an actual Credit Release schedule within each ILF Project Development Plan.

1. Establishment, Enhancement, Restoration Credits. In general, the Credits for Establishment, Enhancement, and Restoration areas may be released according to the following schedule:

a. Up to 25% of anticipated Credits may be released upon approval of a Development Plan and recordation of a real estate instrument for the purpose of implementing an ILF Project.

b. Up to an additional 15% of anticipated Credits may be released upon completion of physical improvements per the approved Development Plan and USACE approval of the as-built report.

c. Up to an additional 15% of anticipated credits may be released upon completion of biological improvements per the approved ILF Project Development Plan and USACE Approval.

d. Up to an additional 30% of anticipated Credits may be released incrementally upon achievement of short term (i.e., Years 2-4) Performance Standards.

e. The remaining generated Credits may be released upon achievement of long-term (i.e., Year 5) Performance Standards.

2. Preservation and Buffer Credits. In general, because Preservation and Buffers do not involve construction of improvements or meeting short term Performance Standards, up to 80% of anticipated Credits associated exclusively with Preservation and Buffers may be released upon acquisition and full legal protection of the lands to be Preserved. Up to an additional 20% of anticipated Credits may be released upon achievement of long-term Performance Standards, which, under normal circumstances, will be no later than five (5) years after the approval of the Development Plan for the site.

D. Balance of Credits

The Program will have available for Transfer the number of available Advance Credits for the Program, plus any released Credits generated by ILF Projects beyond those required to fulfill Advanced Credit Transfers.

E. Fee Schedule

The cost per unit of Credit must include the expected costs associated with the Restoration, Establishment, Enhancement, and/or Preservation of aquatic resources in the Service Area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition (including, without limitation, options to purchase), project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, as well as administration of the Program. This list is not meant to be exhaustive and may include other categories, as appropriate, as determined by the Program Sponsor on a case-by-case basis. The cost per unit of Credit must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses. The cost per unit of Credit must also take into account the resources necessary for the long-term management, protection of the ILF Project, and enforcement of the long-term instrument or other protection mechanism. In addition, the cost per unit of Credit must include financial assurances that are necessary to ensure successful completion of ILF Projects. These fees shall be reviewed at least annually and updated as appropriate.

F. Transfer of Credits

1. All activities regulated under Sections 404 and 401 of the Clean Water Act may be eligible to use the Program as Compensatory Mitigation for unavoidable Impacts.
2. Credits purchased may only be used in conjunction with a USACE permit authorization, including permitted activities of the DISTRICT requiring Compensatory Mitigation, or resolution of an unauthorized activity.
3. Deposits for such Credits shall be placed in the Program Account.
4. USACE will make decisions about the most appropriate Compensatory Mitigation on a case-by-case basis, during evaluation of a Department of the Army permit application. This Instrument does not guarantee that USACE will accept the use of Program Credits for a specific project, and authority for approving use of the Program for Compensatory Mitigation lies solely with USACE.
5. The responsibility to provide Compensatory Mitigation remains with the permittee unless and until Credits are purchased from the Program. Upon USACE approval of purchase of Credits from the Program, the permittee may contact Program Sponsor to secure the necessary amount and resource type of Credits, as outlined in Department of the Army permit conditions. Upon Transfer of Credits, the Program Sponsor shall enter the Transfer into RIBITS.
6. Program Sponsor assumes all legal responsibility for fulfilling Compensatory Mitigation requirements for USACE-authorized activities for which fees have been accepted. The transfer of liability is established by: 1) the approval of this Instrument; 2) receipt by USACE of a Credit sale certificate that is signed by Program Sponsor and the permittee and dated (see Exhibit G); and 3) the transfer of fees from the permittee to Program Sponsor. A copy of each certificate will be retained in the administrative and accounting records for the Program Instrument. Other than what is described in this paragraph, no other legal responsibility for the permit will transfer to the Program Sponsor, unless a separate agreement is entered into between Program Sponsor and the permittee.
7. Debits will be reflected in annual accounting reports as outlined in Section VIII.
8. Subject to the limitations on any duty of Program Sponsor to remediate outlined in Section IX.A, if an ILF Project Site is damaged after the Program Effective Date, and such damage materially impairs Waters of the U.S. or habitat values on such damaged ILF Project Site, then USACE, in consultation with the IRT, may, at its discretion, direct Program Sponsor to suspend the Transfer of Credits and/or reduce the number of Credits

allocated to the ILF Project in proportion to such damaged area unless and until Program Sponsor has reasonably restored such damaged area, if required, pursuant to a Remedial Action plan approved by the IRT.

9. Joint and Several Liability. Notwithstanding Title 12, Section 2506 of the Arizona Revised Statutes, all of the DISTRICT'S and AUDUBON'S promises in this Instrument are joint and several.

SECTION VIII: PROGRAM REPORTING

A. Annual Report

The Program Sponsor shall upload an annual report to RIBITS and furnish a copy to each member of the IRT, in hard copy and in editable electronic format, on or before September 30 of each year following the Program Effective Date. Each annual report shall cover the period from July 1 of the preceding year (or if earlier, the Program Effective Date for the first annual report) through June 30 of the current year (the "Reporting Period"). The annual report shall address the following:

1. ILF Project Development

The annual report shall document the degree to which each ILF Project Site in the Program is meeting its Performance Standards as defined in site-specific Development Plans. The annual report shall describe any deficiencies in attaining and maintaining Performance Standards and any Remedial Action proposed, approved, or performed. If Remedial Action has been completed, the annual report shall also evaluate the effectiveness of that action.

2. Interim Management and Long-term Management

The annual report shall contain an itemized account of the management Program Sponsor conducted during the reporting period in accordance with the Interim Management or Long-term Management Plan for each ILF Project Site, including the following:

- a. The time period covered;
- b. A description of each management activity conducted by Program Sponsor, the dollar amount expended and time required; and
- c. The total dollar amount expended for management conducted by Program Sponsor during the reporting period.

3. Credit Ledger Report

The annual report shall include an updated Credit Transfer Ledger (Exhibit H, for each ILF Project Site) showing the beginning and end balance of available Credits

and permitted Impacts for each resource type, all additions and subtractions of Credits, and any other changes in Credit availability (e.g., additional Credits released, Credit sales suspended).

4. Program Account

The annual accounting report shall be prepared in accordance with Section IV.C.3.

B. Credit Transfer Reporting

Upon the Transfer of each and every Credit, the Program Sponsor shall enter the Credit Transfer into RIBITS and submit to each member of the IRT:

1. A copy of the certification, in the form provided at Exhibit G that identifies the permit number, a statement indicating the number and resource type of Credits that have been secured from the Program Sponsor, and that legal responsibility has transferred from the permittee to the Program Sponsor; and
2. An updated Credit Transfer Ledger, in hard copy and in editable electronic format in the form provided at Exhibit H.

SECTION IX: OTHER PROVISIONS

A. Force Majeure or Unlawful Acts

1. The Program Sponsor shall be responsible to maintain the ILF Project site and perform Remedial Action except for damage or non-compliance caused by Catastrophic Events, events of Force Majeure or Unlawful Acts. In order for such exception to apply, the Program Sponsor shall bear the burden of demonstrating all of the following:
 - a. That the damage or non-compliance was caused by circumstances beyond the control of the Program Sponsor and any person or entity under the direction or control of the Program Sponsor, including its employees, agents, contractors and consultants;
 - b. That neither the Program Sponsor, nor any person or entity under the direction or control of the Program Sponsor, including its employees, agents, contractors and consultants, could have reasonably foreseen and prevented such damage or non-compliance; and
 - c. The period of damage or non-compliance was a direct result of such circumstances.
2. The Program Sponsor shall cease Transfer of Credits and notify the USACE and IRT within seventy-two (72) hours of occurrence of a Catastrophic Event, event of Force Majeure, or Unlawful Act, and as promptly as reasonably possible thereafter Program

Sponsor, USACE, and IRT shall meet to discuss the course of action in response to such occurrence. In the meantime, Program Sponsor shall continue to manage and maintain the ILF Project to the full extent practicable.

B. Default

1. Notice of Violation. In the event that the Program Sponsor is in violation of the terms of this Instrument or that a violation is threatened, any Party may demand the cure of such violation. In such a case, the Party shall issue a written notice to the Program Sponsor (hereinafter "Notice of Violation") informing the Program Sponsor of the actual or threatened violations and demanding cure of such violations.
2. Time to Cure. The Program Sponsor shall cure the noticed violation within thirty (30) days of receipt of said written Notice of Violation. If said cure reasonably requires more than thirty (30) days, the Program Sponsor shall, within the thirty (30) day period, submit to the other Parties for review and approval a plan and time schedule to diligently complete a cure. The Program Sponsor shall complete such cure in accordance with the approved plan. If the Program Sponsor disputes the notice of violation, it shall issue a written notice of such dispute (hereinafter "Notice of Dispute") to the other Parties within thirty (30) days of receipt of written Notice of Violation.
3. Failure to Cure. If the Program Sponsor fails to cure the violation within the time period(s) described in Section IX B.2, the USACE may take appropriate action. Such actions may include, but are not limited to, suspending Credit sales, Adaptive Management, decreasing available Credits, directing funds to alternate locations, taking enforcement actions, or terminating the Instrument. The USACE cannot directly accept, retain, or draw upon funds in the Program Account in the event of a default. Any delay or failure of the Program Sponsor to comply with the terms of this Instrument or an approved Development Plan shall not constitute default if and to the extent that such delay or failure is primarily caused by any Force Majeure or other conditions beyond Program Sponsor's reasonable control and significantly adversely affects its ability to perform its obligations hereunder. Program Sponsor shall give written notice to the other Parties if the performance of its ILF Project is affected by any such event in accordance with Section IX.A.2.
4. Notice of Dispute.
 - a. If the Program Sponsor provides the other Parties with a Notice of Dispute, as provided herein, the other Parties shall meet and confer with the Program Sponsor at a mutually agreeable place and time, not to exceed thirty (30) days from the date that the other Parties receive the Notice of Dispute. The other Parties shall consider all relevant information concerning the disputed violation provided by the Program Sponsor and shall determine whether a violation has in fact occurred and, if so, whether the Notice of Violation and demand for cure issued by a Party or Parties is appropriate in light of the violation.

- b. If, after reviewing the Program Sponsor's Notice of Dispute, conferring with the Program Sponsor, and considering all relevant information related to the violation, the Parties determine that a violation has occurred, the Parties shall give the Program Sponsor notice of such determination in writing. Upon receipt of such determination, the Program Sponsor shall have fifteen (15) days to cure the violation. If said cure reasonably requires more than fifteen (15) days, the Program Sponsor shall, within the fifteen (15) day period, submit to the Parties for review and approval a plan and time schedule to diligently complete a cure. The Program Sponsor shall complete such cure in accordance with the approved plan.

C. Dispute Resolution

Resolution of disputes concerning the Parties' compliance with this Instrument shall be in accordance with those stated in 33 C.F.R. 332.8. Disputes related to satisfaction of Performance Standards may be referred to independent review from government agencies or academia that are not part of the IRT. The Parties will evaluate any such input and determine whether the Performance Standards have been met.

D. Modification, Amendment and Termination of Instrument

1. Modification and Amendment. This Instrument, including its Exhibits, may be amended or modified only with the written approval of the Parties. Instrument modifications, including the addition or expansion of ILF Projects, will follow the process outlined in Exhibit C. USACE may use a streamlined modification review process for changes reflecting Adaptive Management of an ILF Project Site, Credit Releases, changes in Credit Releases and Credit Release schedules, and changes that USACE determines are not significant (Exhibit C).
2. Termination/Program Closure. Any Party to this Instrument may terminate its participation in this Instrument by giving 60 days written notice to the other Parties. In the event that the Program operated by Program Sponsor is terminated (i.e., closed), Program Sponsor is responsible for fulfilling any remaining ILF Project obligations including the successful completion of ongoing mitigation projects, relevant maintenance, monitoring, reporting, and long-term management requirements. Program Sponsor shall remain responsible for fulfilling these obligations until such time as the long-term ownership of all mitigation lands has been transferred to the land steward entity responsible for all long-term management of the project(s). Funds remaining in the Program Accounts must continue to be used for the Restoration, Establishment, Enhancement, and/or Preservation of aquatic resources within the Service Area. USACE shall direct Program Sponsor to use these funds to secure Credits from another source of third-party mitigation, such as another in-lieu fee program, mitigation bank, or another entity such as a governmental or non-profit natural resource management entity

willing to assume the duties of a land steward. The funds should be used, to the maximum extent practicable, to provide compensation for the amount and type of aquatic resource for which the fees were collected.

E. Controlling Language

The Parties intend the provisions of this Instrument and each of the documents incorporated by reference to be consistent with each other, and for each document to be binding in accordance with its terms. These documents shall be interpreted in a manner that avoids or limits any conflict between or among them. However, if and to the extent that specific language in this Instrument conflicts with specific language in any document that is incorporated into this Instrument by reference, the specific language within the Instrument shall be controlling.

F. Entire Agreement

This Instrument, and all exhibits, appendices, schedules and agreements referred to in this Instrument, constitute the final, complete and exclusive statement of the terms of the agreement between and among the Parties pertaining to the Program, and supersede all prior and contemporaneous discussions, negotiations, understandings or agreements of the Parties. No other agreement, statement, or promise made by the Parties, or to any employee, officer, or agent of the Parties, which is not contained in this Instrument, shall be binding or valid. No alteration or variation of this instrument shall be valid or binding unless contained in a written amendment in accordance with Section IX.D. Each of the Parties acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any of the other Parties or anyone acting on behalf of any of the Parties unless the same has been embodied herein.

G. Reasonableness and Good Faith

Except as specifically limited elsewhere in this Instrument, whenever this Instrument requires a Party to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If a Party disagrees with any determination covered by this provision and reasonably requests the reasons for that determination, the determining Party shall furnish its reasons in writing and in reasonable detail within 30 days following the request.

H. Successors and Assigns

This Instrument 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 subject to the limitations on transfer set forth in this Instrument.

I. Partial Invalidity

If a court of competent jurisdiction holds any term or provision of this Instrument to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining terms and provisions shall not be affected unless an essential purpose of this Instrument would be defeated by loss of the invalid or unenforceable provision.

J. Notices

1. Any notice, demand, approval, request, or other communication permitted or required by this Instrument shall be in writing and deemed given when delivered personally, sent by receipt-confirmed facsimile, or sent by recognized overnight delivery service, addressed as set forth below, or five days after deposit in the U.S. mail, postage prepaid, and addressed as set forth below.
2. Notice by any Party to any other Party shall be given to all Parties. Such notice shall not be effective until it is deemed to have been received by all Parties.
3. Addresses for purposes of giving notice are set forth below. Any Party may change its notice address by giving notice of change of address to the other Parties in the manner specified in this Section IX.J.

USACE:

U.S. Army Corps of Engineers
Los Angeles District – Regulatory Division
915 Wilshire Blvd.
Los Angeles, CA 90017

CO-SPONSORS:

Pima County Regional Flood Control District
97 East Congress
Tucson, AZ 85701

AND

Tucson Audubon Society
300 East University Blvd #120
Tucson, AZ 85705

IRT Members:

USACE:

U.S. Army Corps of Engineers
Los Angeles District – Regulatory Division
915 Wilshire Blvd.
Los Angeles, CA 90017
Marjorie.E.Blaine@usace.army.mil

AGFD:

Arizona Game and Fish Department
5000 West Carefree Highway
Phoenix, AZ 85086
BBroscheid@azgfd.gov

USEPA:

USEPA, Region IX
WTR-8
75 Hawthorne Street
San Francisco, CA 94105
Goldman.Elizabeth@epamail.epa.gov

Pima County:

Pima County
201 N. Stone Ave., 6th Floor
Tucson, AZ 85701
Julia.Fonseca@pima.gov

ADEQ:

ADEQ
Mailstop 5415A-1
1110 W. Washington
Phoenix, AZ 85007
Taunt.Linda@azdeq.gov

City of Phoenix:

City of Phoenix
Office of Environmental Programs
200 W. Washington Street
14th Floor
Phoenix, AZ 85003
Wendy.Wonderley@phoenix.gov

K. Counterparts

This Instrument may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall constitute a single executed agreement.

L. No Third Party Beneficiaries

This Instrument shall not create any third party beneficiary hereto, nor shall it authorize anyone not a Party hereto to maintain any action, suit or other proceeding, including without limitation, for personal injuries, property damage or enforcement pursuant to the provisions of this Instrument. The duties, obligations and responsibilities of the Parties to this Instrument with respect to third parties shall remain as otherwise provided by law in the event this Instrument had never been executed.

M. Availability of Funds

Implementation of this Instrument by the IRT and Program Sponsor is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and A.R.S. 35-154 relating to the availability of appropriated funds and prohibiting unauthorized obligations. Nothing in this Instrument may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or the Pima County Treasury. Neither Pima County nor any agency of the IRT is required under this Instrument to expend any appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

N. No Partnerships

This Instrument shall not make or be deemed to make any Party to this Instrument an agent for or the partner or joint venture of any other Party.

O. Governing Law

This Instrument shall be governed by and construed in accordance with the Clean Water Act, 33 U.S.C. § 1251 et seq., and other applicable federal laws and regulations.

P. Headings and Captions

Any paragraph heading or captions contained in this Instrument shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this Instrument.

Q. Right to Refuse Service

USACE approval of Transfer of Credits from the Program does not signify Program Sponsor's acceptance or confirmation of Program Sponsor's offer to Transfer. Program Sponsor reserves the right to refuse to Transfer Credits from the Program for any reason.

SECTION X: EXECUTION

Each of the undersigned certifies that he or she has full authority to bind the Party that he or she represents for purposes of entering into this Instrument. This Instrument shall be deemed executed on the date of the last signature by the Parties.

IN WITNESS WHEREOF, the Parties have executed this Instrument as follows:

Pima County Regional Flood Control District

Ramon Valadez, Chair
Pima County Regional Flood Control District
Board of Directors

Date

AND

Tucson Audubon Society

R. Cynthia Pruett, Chair
Tucson Audubon Society
Board of Directors

Date

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

David J. Castanon
Chief, Regulatory Division
Los Angeles District

Date

Concurring Interagency Review Team

Marjorie E. Blaine
Interagency Review Team Chair

Date

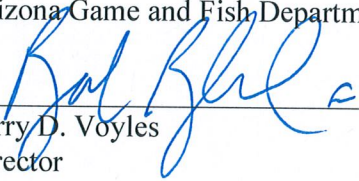
Concurring Agencies

U.S. Environmental Protection Agency, Region IX

Jason Brush
Manager, Wetlands Office, Water Division

Date

Arizona Game and Fish Department



Larry D. Voyles
Director

6-12-13

Date

Pima County

Chuck Huckelberry
County Administrator

Date

Steven L. Spangle
Field Supervisor, Arizona Ecological Services Field Office

Date

Arizona Department of Environmental Quality

Linda Taunt
Deputy Director, Water Quality Division

City of Phoenix

Date

Philip McNeely
Environmental Programs Manager

Date

Exhibit A**Prioritization and Compensation Planning Framework**

- The Compensation Planning Framework (§§332.8(d)(2)(viii)(A) & 332.8 (c))

Strategies that will be used by Program Sponsor to select, secure and implement aquatic resources will involve the following.

Section 332(c)(2)(i): The geographic Service Area, including a watershed-based rationale for the delineation of each Service Area.

The geographic Service Area is primarily the Santa Cruz Basin (HUC150503), and four of its major sub-basins as set forth in Section 4B and Exhibit B (Lower Santa Cruz HUC15050303, Rillito HUC15050302, Upper Santa Cruz HUC15050301, and Brawley HUC15050304). Additionally, the San Pedro-Wilcox Basin (HUC150502) and two of its sub-basins set forth in Section 4B and Exhibit B (Upper San Pedro HUC15050202, Lower San Pedro HUC15050203) may also comprise a portion of the geographic Service Area. In various areas within each of the sub-basins identified, there have been losses to many of their aquatic Functions and Services from external Impacts. Consequently, there are specific Restoration needs within each of the sub-basins. In using these HUCs as the basis for the Program, Impacts within each would be offset by Compensatory Mitigation within the same, or in some cases adjacent, HUCs, promoting the goal of no-net loss of Functions on a sub-basin or watershed basis.

A watershed-based rationale for each of the ILF Project Sites described in future mitigation plans will be based upon what resources (wetland, riparian, ephemeral) would be best protected and how those resources would be conserved through the purchase, Preservation, Establishment or Restoration of various sites that may not currently have sufficient funds for long term maintenance or restoration.

Section 332.8(c)(2)(ii): A description of the threats to aquatic resources in the Service Area, including how the in-lieu fee program will help offset Impacts resulting from those threats:

Aquatic resource Impacts in each of the Sub-basins and watersheds of the Santa Cruz and San Pedro Basins are expected to have threats from a variety of sources including but not limited to: utility line siting, flood management activities, linear transportation projects, residential, commercial and industrial developments, alternative energy projects and mining operations.

The aquatic resources of the sub-basins of the Santa Cruz and San Pedro Basins in and around Pima County are threatened by numerous factors that include loss of surface water, groundwater decline, agricultural and urban encroachment, non-native species invasion, and climate change.

Regional managers are working to reduce or eliminate causes and effects of surface water loss, groundwater decline, and encroachment issues, but, to date, little has been done about climate change effects. As reported in Global Climate Change Impacts in the United States (2009), “Human-induced climate change appears to be well underway in the Southwest. Recent warming is among the most rapid in the nation, significantly more than the global average in some areas.” Projections for climate change in the Southwest include continued increases in average temperature, which has already increased around 1.5 degrees Fahrenheit (°F) in the Southwest since the baseline period of 1960 to 1979. By the end of this century, the annual average temperature in the Southwest could reach as much as 10 ° F higher than in the baseline period. The report goes on to state, “Future landscape impacts are likely to be substantial, threatening biodiversity, protected areas, and ranching and agricultural land. These changes are often

driven by multiple factors, including changes in temperature and drought patterns, wildfire, invasive species, and pests.”

Rainfall patterns will be affected with an increasing likelihood of drought due to both natural weather cycles and human-induced climate change. Anticipated drought impacts in Southern Arizona include long periods of drought with short periods of heavy intense rainfall and fewer winter storm systems. Plants that require regular rainfall will be the most stressed. Warmer winter temperature and increased areas denuded of native vegetation created by human activity and climate change will allow non-native plants, such as buffelgrass, to spread.

Implementation of In-lieu Fee Program protection has the ability to offset some of these threats through actions that preserve or enhance and manage remaining riparian resources areas.

Specific needs within the watershed would be identified and Compensatory Mitigation would be developed to address the losses of Function and Services as future Project Sites were identified and proposed for inclusion in the Program. Once identified, the Project Co-Sponsors will conduct preliminary monitoring of the priority ILF Project Sites to determine current aquatic resource conditions, functional values and approximate acreages to be Restored, Enhanced or Established and to determine occupation by federally listed Threatened, Endangered, or Candidate plant and animal species, State identified Wildlife of Special Concern in Arizona (WSCA) and/or Species of Greater Conservation Need (SGCN), and Forest Service or BLM identified Sensitive species.

Section 332.8(c)(2)(iii): An analysis of historic aquatic resource loss in the Service Area.

Detailed information pertaining to the specific aquatic losses within the appropriate HUC and Project Site will be presented in development plans as they are developed.

For the Upper Santa Cruz River Service Area, the landscape within this region of the Santa Cruz Basin has changed dramatically since the early 20th century. The Upper Santa Cruz River main stem has a history of being a river oasis in the arid southwest, with long winding reaches of reliable year-round flow from several springs around Tubac and Tucson, adjacent to downstream marshy cienega areas, and all surrounded by a lush riparian corridor with cottonwoods and a wide mesquite bosque supported by shallow groundwater (Mauz, 2011). Over the past hundred plus years, groundwater pumping, agricultural activities, mining, urban encroachment, channelization and climatic change have been primarily responsible for the ecosystem degradation in the Upper Santa Cruz Sub-basin Service Area in and around Pima County.

Based on stream gauge daily discharge records, the loss of year round base flow began around 1912. By 1940, surface flow in the formally wet Tubac and Tucson portions of the Upper Santa Cruz was limited to rainy seasons. The river now flows only in response to storm runoff. Areas of shallow groundwater only exist around the city of Tubac and downstream of the regional wastewater treatment plant(s).

Not only has the amount and location of perennial flow in the Santa Cruz River changed, but the seasonality and magnitude of flows also have shifted as a result of climate change in this region. Although the majority of flow events occur during the summer season, the magnitude and number of flows that occur in the fall and winter were higher before 1930 and since 1960. Also, annual peak discharges are increasing, as six of the seven largest floods on the Santa Cruz River at Tucson occurred after 1960 (Woods et al., 1999).

Section 332.8(c)(2)(iv): An analysis of current aquatic resource conditions in the Service Area, supported by an appropriate level of field documentation.

The current aquatic resource conditions within the each HUC and Project Site that is developed will be determined as Development Plans are prepared. The types, locations and approximate amounts of wetland, riparian and ephemeral habitats in the selected Project Sites will be determined through detailed site visits that will assess the actual amount and type of habitats that are present within the proposed site. Since this will require extensive field work, this activity will be undertaken once the Program is approved and Project Sites are selected

For the Upper Santa Cruz Sub-basin, due to declines in groundwater, loss of surface water, channelization, arroyo formation, and climate change effects, aquatic resources along many parts of the Upper Santa Cruz River Sub-basin are desiccated and contain declining plant communities. Perennial flow areas are now limited to effluent release downstream of sewage treatment plants at Nogales and Tucson. Non-native invasive weed encroachment is threatening the ecosystem function of remaining riparian resources.

Habitat classification is frequently based on plant communities because plant species are definitive of their biomes, since they are rooted in place, and generally adapted to the site-specific environment. Plants are also the most obvious and easily recognizable element of the biological community. Individual site vegetation and other aquatic resource assessments have been undertaken for various areas within the Upper Santa Cruz Sub-basin service area by DISTRICT, Tucson Audubon Society, Sky Island Alliance, Sonoran Institute, and others. Assessments done by DISTRICT include vegetation transect surveys at Paseo de las Igelsias Phase One near the confluence of the Santa Cruz River and Julian Wash, Big Wash near the confluence with the Canada del Oro Wash, and at Oasis along the middle Canada del Oro Wash; photo monitoring at Canoa Ranch, at the confluence of the Santa Cruz River with Madera Canyon Wash, and along the upper Canada del Oro Wash; and groundwater level monitoring at Oasis and the upper Canada del Oro Wash.

Several regional vegetation classifications have been done for the Upper Santa Cruz Sub-basin, not limited to the Brown and Lowe biotic communities classifications (1994), the SWReGAP Digital Land Cover Data at <http://earth.gis.usu.edu/swgap/>, and Pima County's habitat mapping and classification used for development of the Sonoran Desert Conservation Plan and implementation of Pima County Code, Title 16 (Floodplain and Erosion Hazard Management), Section 16.54, Watercourse and Riparian Habitat Protection and Mitigation Requirements. This mapping used multi-spectral satellite imagery (LANDSAT) to interpret riparian habitat value and created classifications based on plant community structure and composition, vegetation density, and availability of water, cross referenced with field data inventories, as described in Table IV.

Table IV. Sonoran Desert Plant Communities

Classification	Plant Community	Description
Hydro-riparian Meso-riparian	Open Water	Streams, springs, ponds, lakes: provides habitat for aquatic species and resting/forage for water fowl
	Wetland	Cattail-sedge: aquatic, wetland species, moist soil and habitat for food, shelter, and nesting sites, high biodiversity
	Cottonwood - Willow Community	Deciduous Gallery Forest: most threatened forest type in North America,

		one of the most important native habitats, dependent on shallow groundwater, high biodiversity
	Seasonal Cienega	Riparian grasses, sedges, “edge” habitat bordering bosque and gallery forests: provides forage, shelter, important for wildlife
	Meso-riparian Bosque Mesquite	Mixed forest of mesquite, hackberry, acacia: second most threatened forest type in North America, valuable for wildlife forage and nesting habitat
Xero-riparian	Xero-riparian Bosque Mesquite	Similar plant community to Meso-riparian mesquite bosque: lower total vegetation volume than Meso-riparian bosque habitat, occurs along ephemeral streams, Includes Ironwood-Palo Verde community,
	Riparian scrub	Saltbush-wolfberry-graythorn community, also Ironwood: historically common along rivers, important to wildlife.
	Riparian grassland	Sacaton, tobosa grass communities: Seasonal cienegas, floodplain fringe, important for wildlife
Uplands	Upland Sonoran Desert Scrub	Palo Verde-Bursage community
	Desert grassland	Desert grasses, cacti

The habitat classification map for Pima County may be viewed at: <http://rfcd.pima.gov/>. For regulatory and simplification purposes, the County ordinance and associated maps identify three classifications of riparian habitat: Important Riparian Areas (IRA), Hydro-riparian/Meso-riparian (Class “H”), and Xero-riparian classes “A” through “D”, where A is has dense vegetation ($>0.85 \text{ m}^3/\text{m}^2$), and Xero-riparian D is less dense ($\leq 0.50 \text{ m}^3/\text{m}^2$), lower structure vegetation found along the floodplain fringe. The sandy bottom channel and associated obligate and facultative wetland species, where present, are classified as Hydro-riparian/ Meso-riparian. This map shows that along the main stem of the Upper Santa Cruz River, most areas currently transition directly from Hydro-riparian/Meso-riparian into undesignated upland plant/habitat community, with no adjacent Xero-riparian habitat as one would expect in a more natural riverine condition. The main channel currently has Xero-riparian habitat along the margins in only a few limited reaches, mainly at major or undeveloped tributaries confluences and downstream of wastewater treatment effluent discharges. Reaches that preserve buffers of Xero-riparian plant communities include areas of Madera Canyon Wash and Box Canyon Wash in the Santa Rita Mountains of the Coronado National Forest, the Hughes, Airport, Julian, Arroyo Chico, Rillito, and Canada del Oro Washes, and river reaches downstream of the Roger and Ina Road Wastewater Treatment Plant effluent release points.

Numerous undeveloped upper tributaries to the Upper Santa Cruz River Watershed Sub-basin preserve high quality Xero-riparian habitats, including Sopori Wash, Fagan and Lee More Washes, and the upper reaches of the Canada del Oro Wash system in Pima County, and areas upstream of Amado in Santa Cruz County (note: tributaries located in alternate sub-basins are not listed herein).

The Upper Santa Cruz River floodplain upstream of Pima County in the Tubac region of Santa Cruz County (Rio Rico to Amado) was the subject of a multi-disciplined health assessment through partnership with Sonoran institute, Friends of the Santa Cruz River, and others. This report series documents the relatively depauperate, yet fairly stable current conditions of water quality, macroinvertebrates, birds and fish, groundwater, and riparian vegetation along the main stem of the Santa Cruz River upstream of Pima County. As part of this work, a 2006 floodplain vegetation survey in the Tubac region (Rio Rico to Amado) of the Upper Santa Cruz River reach classified percentages of Cottonwood Forest and Woodlands, Mesquite Forests and Woodlands, and Other Vegetation. In partnership with Sonoran Institute, the DISTRICT recently received a wetlands grant from US-EPA to collect data and produce a "Reviving River" annual report series to inform development of a Lower Santa Cruz River Managing Plan, as required by the City of Tucson and Pima County Water Study (www.tucsonpimawaterstudy.com/). This work will include collection of new data and a compilation of existing current aquatic resource conditions, similar to the Sonoran Institute's Living River series, based on monitoring by numerous agencies including ADEQ, Friends of the Santa Cruz River, National Park Service at Tumacacori, National Weather Service, Tucson Audubon Society, and the USGS.

Section 332.8(c)(2)(v): A statement of aquatic resource goals and objectives for the Service Area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide.

The goal of the Program is the Restoration of lost aquatic resource Functions of riverine, riparian and xero-riparian ecosystems, particularly as they relate to habitat, water quality, and flood control purposes and the Preservation of ecologically important wildlife, habitat, connectivity or other ecosystem resource Functions and Services.

Mitigation Areas within the Upper Santa Cruz Sub-basin include Sopori Ranch, Canoa Ranch, Upper Canada del Oro Wash at Catalina, Canada del Oro Wash at Oasis, and Canada del Oro Wash/Santa Cruz River Confluence. These specific locations were described separately in the ILF Program Prospectus. Within each of these potential mitigation areas, the general amounts, types and locations of aquatic resources the program will seek to provide, including attendant buffer areas, will be site-specific and developed using the following goals and guidance:

- 1) Protect and maintain existing high functioning riparian habitat and other aquatic resources.
- 2) Where appropriate, improve riparian function using sustainability design techniques, including restoration of hydrologic connections, spreading and attenuating flood flows, rainwater harvesting, mulching, temporary establishment irrigation, and others.
- 3) Focus potential re-vegetation efforts on types of native species appropriate for current and expected future conditions that will create more diverse habitat and structure, stabilize erosion-prone areas, and displace non-native invasive species.

- 4) Decrease threats, possibly including but not limited to continued groundwater decline, destructive human and livestock trespass, and invasive non-native species.
- 5) Monitor site conditions to determine impacts and adjust maintenance and management strategies as needed to increase benefits.

Through applications of this guidance, it will be possible to best preserve and enhance natural floodplain function and associated native wildlife habitat at each Mitigation site.

Prioritization Strategy (§332.8(c)(2)(vi)).

While all the future proposed ILF Project Sites will have natural values, some of the sites may currently provide habitat for sensitive and listed species while other sites will need a restoration treatment to increase their Functions and Services. Sites that have the highest potential for imminent impacts or contain, or can potentially contain, the constituent elements to support sensitive or listed species, will be considered first for inclusion in the Program. The goal will be to Acquire, Preserve, Restore and/or Enhance these areas. Specifically, Program Sponsor will:

1. Restore aquatic resources on existing DISTRICT and Pima County lands as well as on sites that contain sensitive, rare or listed plants, animals or habitat and that have been, or may be in the near future, impacted by development or negative human activity, and which require immediate action to reduce or eliminate removal or loss.
2. Purchase lands that have been degraded by activities not compatible with conservation lands, and which are not currently protected. The targeted sites, including buffer lands, will be identified in future Development Plans.
3. Conduct the Restoration, Enhancement, Preservation, or Establishment of ecosystem function and long-term management of lands once they are brought into, or accepted into, the Program.

Explanation of How Preservation Objectives Identified and Addressed in the Prioritization Strategy Satisfy the Criteria for Use of Preservation in § 332.3(h) (§332.8(c)(2)(vii)).

The main components of the Program strategy will be to Restore, Enhance and/or Establish, and Preserve aquatic resources using science-based development, maintenance and monitoring strategies to secure the Project Sites in perpetuity. Program Sponsor will ensure that Credits are adequately priced to allow the set-aside of sufficient endowment funds to cover the long-term maintenance and monitoring requirements.

Section 332.8(c)(2)(vii) requests applicants to address the Preservation criteria enumerated in Section 332.3(h). Accordingly, Program Sponsor will provide the following information:

1. The resources to be preserved provide important physical, chemical or biological Functions for the watershed.

All of the areas which will be proposed for Restoration, Protection, or Enhancement will have biological Functions considered essential for the continued health of the subject watersheds. The prioritization strategy will allow Program Sponsor to focus first on Preservation, Restoration, Enhancement, and

Establishment of resources on lands that already have the highest potential for success, are in the greatest need or at the greatest risk.

2. The resources to be preserved contribute significantly to the ecological integrity of the watershed. In determining the contribution of those resources to the ecological integrity of the watershed, the District Engineer must use appropriate qualitative and quantitative assessment tools, where available.

The Preservation objectives implemented through the prioritization strategy above will contribute significantly to the ecological sustainability of the watersheds. Program Sponsor will use a functional assessment method accepted by USACE for each of the proposed Project Sites to determine habitat quality and quantity, and the areas that would require Enhancement, Restoration or Establishment. A Habitat Monitoring and Mitigation Plan (HMMP) will also be developed to follow the recommendations of the assessment. However, it is likely that even when such a methodology is used, there may be instances where unforeseen circumstances occur and Adaptive Management of these sites is necessary. In these instances, best management practices for the site will be used based upon site assessment at the time of the problem. It should be noted that acreages should be used to determine compensatory mitigation requirements in place of linear stream feet where appropriate, or where adequate stream conditions exist to help assess aquatic resource Functions.

3. Preservation is determined by the District Engineer to be appropriate and practicable.

While the District Engineer must make the final determination, Program Sponsor staff will select Project Sites based upon the prioritization criteria above to be submitted for inclusion in the Program.

4. The resources are under threat of destruction or adverse modifications.

Many of the future proposed sites may be under threat of adverse modification and/or destruction from outside Impacts. The extent and type of threats vary from site to site, and will be discussed in more detail as specific Project Sites are proposed for inclusion in the Program. Many of the proposed sites may contain sensitive habitats.

5. The preserved sites will be permanently protected through an appropriate real estate or other legal instrument (e.g., Conservation Easement or title transfer to USACE, land trust, or other appropriate steward).

DISTRICT is a special taxing district of the state of Arizona authorized under Title 48 of the Arizona Revised Statutes responsible for flood control and riparian regulatory programs in Pima County. Both entities comprising the Program Sponsor have demonstrated the ability and responsibility to manage Project Sites consistent with the terms and conditions of any Mitigation and Long-term Management plan approved by USACE in connection with a Compensatory Mitigation project situated on Sponsor-owned or other property. Where an ILF Mitigation Project is or has been placed on DISTRICT-owned property, appropriate site protection measures will be recorded in a perpetual Deed of Conservation Easement in a form acceptable to USACE.

For lands not owned by the DISTRICT upon which an ILF Mitigation Project is proposed, the Co-Sponsors will draft and record a perpetual Deed of Conservation Easement and a perpetual Access Easement in a form acceptable to USACE and will thereafter monitor and enforce the deeded permanent site protections.

DISTRICT-AUDUBON In-Lieu Fee Program

Exhibit A

Arizona Revised Statutes §§ 33-271 through 33-276 authorizes the use of Conservation Easements to preserve Arizona's natural ecosystems. The DISTRICT and AUDUBON are qualified to act as "holders" of a Conservation Easement pursuant to A.R.S. §§ 33-271 and are "qualified organizations" within the provisions of Sections 170(b)(1)(A)(v), 170(h) and 170(c) of the Internal Revenue Code of 1986, as amended.

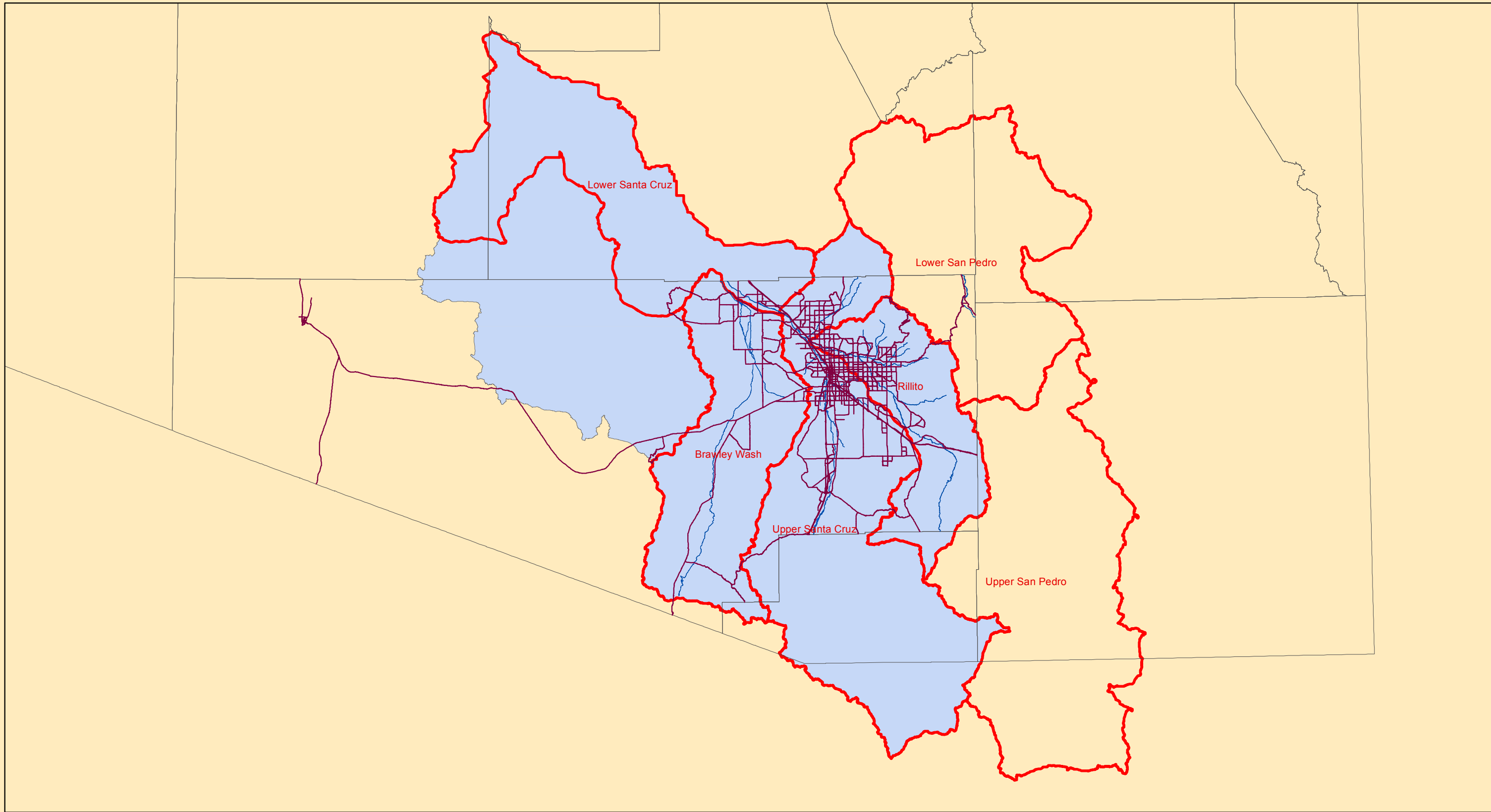
Public and Private Stakeholder Involvement (§332.8(c)(2)(viii)). The Project Co-Sponsors have existing MOUs with a variety of county, city, state and federal partners concerned with watershed, habitat and species protection and related objectives. The ILF Instrument, as well as Development Plans or other amendments to the Instrument, will be examined and acted on in a public forum by the Pima County Regional Flood Control District Board of Directors. As such, these documents will be noticed as part of any upcoming Board Agenda and may be reviewed by Public and Private stakeholders in advance of the meeting. Opportunity for comment by any public or private entity is provided thru this public review process.

Long-term Management Strategies (§332.8 (c)(2)(ix)). Project Sites will be managed on a long-term basis pursuant to the Co-Sponsor's responsibilities as ILF Co-Sponsors or the land owner, grantee or flood control authority. Long-term maintenance of Project Sites will be funded by the sales of credits to permittees.

Periodic Progress Evaluations (§332.8 (c)(2)(x)). The Project Co-Sponsors will prepare an annual report in accordance with the requirements of this Instrument that (1) briefly evaluates the current state of each Project Site and (2) reports on the progress of the program in achieving the goals and objectives set forth for each geographic Service Area encompassing those Project Sites. The annual report may contain photographs, as appropriate. Adaptive Management strategies will be used as appropriate. Reports will be provided to USACE.

Exhibit B

Geographic Service Area Map

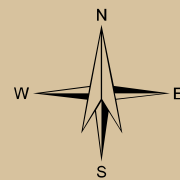


Pima County Regional Flood Control District
 97 E Congress - 3rd Floor
 Tucson, Arizona 85701-1207
 (520) 243-1800, FAX: (520) 243-1821
<http://www.rfcd.pima.gov>

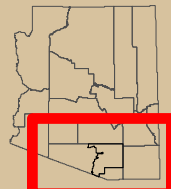
Exhibit B - Program Service Area Map

1 inch = 20 miles

- Major Streets
- Major Washes
- County Boundary
- Subbasins
- Santa Cruz Basin



0 5 10 20 30 40 Miles



Date: 4/22/2013

The information depicted on this display is the result of digital analyses performed on a variety of databases provided and maintained by several governmental agencies. The accuracy of the information presented is limited to the collective accuracy of these databases on the date of the analysis. The Pima County Regional Flood Control District makes no claims regarding the accuracy of the information depicted herein.

This product is subject to the GIS Division Disclaimer and Use Restrictions.



Exhibit C
Instrument Modifications

Instrument Modifications

As ILF Projects are identified, Program Sponsor will submit a written request to the USACE to modify the Instrument according to the process outlined in this Exhibit (33 C.F.R. 332.8). Other forms of Instrument modifications, including expansion of approved ILF Projects, will also follow the process outlined herein.

Requests for Instrument modifications will be accompanied by the appropriate supporting documentation as determined by the District Engineer. The Parties expect that requests for addition of an ILF Project will include the following information:

- The river basin and watershed (hydrologic unit code) of the site
- The goals and objectives of the site related to the watershed compensation planning framework
- Proposed service area
- Site conditions and location
- Proposed preliminary concept plan and/or feasibility study (if complete/available)
- How the project meets the project selection criteria outlined in Exhibit A
- Estimate of proposed acreage/linear footage and type of mitigation
- Proposed protection and long-term management strategy
- Other information as needed

Program Sponsor may elect to ask for a preliminary review and consultation of a modification request. In this case, the USACE will provide copies of the draft request to the IRT and will provide comments back to Program Sponsor within 30 days. Within 30 days of receipt of Program Sponsor's formal request for an Instrument modification, the USACE will notify Program Sponsor whether the Instrument modification request is complete. Within 30 days of receipt of a complete modification request, the USACE will provide public notice of the request that summarizes the project documentation provided by Program Sponsor, and makes this information available to the public upon request. The comment period will be 30 days, unless otherwise determined and justified by the USACE. The USACE and IRT members may also provide comments to the Program Sponsor at this time. The USACE will provide copies of all comments to IRT members and Program Sponsor within 15 days of the close of the public comment period.

Program Sponsor will prepare a draft amendment and submit it to the District Engineer for a completeness review. The draft amendment will include the following information as required by 33 C.F.R. Part 332.4(c):

- Information included in the initial modification request.
- Development Plan with a legend and scale
- Estimate of proposed acreage/linear footage and type of Compensatory Mitigation
- Description of existing functions and services and how they will be improved or enhanced through specific mitigation measures
- Project budget
- Determination of Credits and the Credit Release plan

- Interim and Long-term Management Plans
- Performance Standards
- Property Assessment
- Phase I Environmental Site Assessment of the ILF Project site
- Draft Site Protection Instrument
- Other information as needed

The USACE will notify Program Sponsor within 30 days of receipt of the amendment whether it is complete, or will request additional information. Once any additional information is received and the amendment is complete, the USACE will notify Program Sponsor. Program Sponsor will provide copies of the amendment for the USACE to distribute to the IRT for a 30 day comment period. This comment period begins 5 days after the copies of the amendment are distributed. Following the comment period, the USACE will discuss any comments with the appropriate agencies and Program Sponsor to seek to resolve any issues using a consensus based approach, to the extent practicable. Within 90 days of receipt of the complete amendment, the USACE must indicate to Program Sponsor whether the amendment is generally acceptable and what changes, if any, are needed. Program Sponsor will submit a final amendment to the USACE for approval, with supporting documentation that explains how the final amendment addresses the comments provided by the IRT. Program Sponsor will also provide copies directly to IRT members. Within 30 days of receipt of the final amendment, the USACE will notify the IRT members whether or not it intends to approve the amendment. If no IRT members object by initiating the dispute resolution process within 45 days of receipt of the final amendment, the USACE will notify Program Sponsor of his final decision, and if approved, arrange for signing by the appropriate parties.

Streamlined Review Process

The USACE may use a streamlined modification review process for changes to the Program reflecting Adaptive Management of the Program, Credit releases, changes in Credit Releases and Credit Release schedules, and changes that the USACE determines are not significant. In this event, the USACE will notify the IRT members and Program Sponsor of this determination and provide them with copies of the proposed modification. IRT members and Program Sponsor will have 30 days to notify the USACE if they have concerns with the proposed modification. If IRT members or Program Sponsor notify the USACE of such concerns, the USACE will attempt to resolve those concerns. The USACE will notify the IRT members and Program Sponsor of his intent regarding the proposed modification within 60 days of providing the notice to the IRT members. If no IRT member objects, by initiating the dispute resolution process (33 C.F.R. 332.8) within 15 days of receipt of the notification, the USACE will notify the Program Sponsor of its final decision and, if approved, arrange for it to be signed by the appropriate parties.

Exhibit D

Development Plan

As individual ILF Projects are proposed and Development Plans approved by formal Instrument Modifications per Exhibit C, they will be incorporated into Exhibit D as subparts beginning with Exhibit D1 and continuing sequentially.

Exhibit E

Interim Management Plan

As Individual ILF Projects are proposed and Interim Management Plans approved by formal Instrument Modifications per Exhibit C they will be incorporated into Exhibit E as subparts beginning with Exhibit E1 and continuing sequentially.

Exhibit F

Long-term Management Plan

As Individual ILF Projects are proposed and Long-Term Management Plans approved by formal Instrument Modifications per Exhibit C they will be incorporated into Exhibit F as subparts beginning with Exhibit F 1 and continuing sequentially.

Exhibit G

Statement of Sale of Credit Form

[date]

U.S. Army Corps of Engineers
Los Angeles District – Regulatory Division
915 Wilshire Blvd.
Los Angeles, CA 90017

Subject: Statement of Sale for [Number] Credits from DISTRICT/AUDUBON In-Lieu Fee
Program to
[Permittee Name]

The DISTRICT/AUDUBON has an agreement with the U.S. Army Corps of Engineers – Los Angeles District to operate an In-Lieu Fee Program. This letter confirms the sale of [Number of Credits] credits of [Resource Type A], and [Number of Credits] credits of [Resource Type B]. These credits are being used as Compensatory Mitigation for [Number of Acres] acres of impact to [Resource Type A], and [Number of Acres] acres of impact to [Resource Type B] in the [Impact HUC] as authorized by DA permit [DA permit number]. By selling credits to the above permittee, DISTRICT/AUDUBON are the Co-Sponsors responsible for fulfilling the mitigation aspect of Special Condition(s) ___ of the Permit(s) listed above.

Signed

Exhibit H
Credit Ledger Form

[INSERT NAME OF] MITIGATION SITE

	Advanced Credits in Service Area			Project Site	
	Advanced Credits Initially Awarded By ACOE	Advanced Credits Sold By DISTRICT/TAS (including ACOE Permit #)	Advanced Credits Available for Sale by DISTRICT/TAS	Credits Awarded by ACOE from approved Development Plan	Number of Credits Released
Preservation					
Rehabilitation/ Reestablishment					
Enhancement					
Establishment					
Buffer					
Total					

Exhibit I
Property Assessment Form

PROPERTY ASSESSMENT

for

the DISTRICT/AUDUBON

In-Lieu Fee Program

This Property Assessment (Property Assessment”) is made as of this ____ day of _____, 20__, by [insert property owner full legal name(s)] (“Property Owner”), for the benefit of the Pima County Regional Flood Control District/Tucson Audubon Society and the Los Angeles District of the U.S. Army Corps of Engineers, and Region IX of the U.S. Environmental Protection Agency, which agencies are jointly referred to in this Property Assessment as the “Signatory Agencies.” Property Owner acknowledges that this Property Assessment and the statements in it may be conclusively relied upon by the Signatory Agencies in entering into a conservation easement or other appropriate real property conveyance document (“Conservation Easement”) for the DISTRICT/AUDUBON In-Lieu Fee Program.

This Property Assessment provides a summary and explanation of each recorded or unrecorded lien or encumbrance on, or interest in, the Property (as defined below), including, without limitation, each exception listed in the Preliminary Report issued by [insert title company name], [insert title report date], [insert title report number] (the “Preliminary Report”), covering the Property, as described in Attachments 1 and 2, attached hereto and incorporated by this reference. Specifically, this Property Assessment includes a narrative explaining each lien, encumbrance or other exception to title and the manner in which it may affect the Conservation Easement to be recorded upon the Property pursuant to the DISTRICT/AUDUBON ILF Program.

Property Owner covenants, represents and warrants to each of the Signatory Agencies as follows:

1. Property Owner is the sole owner in fee simple of certain real property containing approximately _____ acres located in the City of _____ [insert city name], County of _____ [insert county name], State of Arizona, designated as Assessor’s Parcel Number(s) [insert parcel number(s)] (the “Property”), as legally described in the Preliminary Report. Property Owner has, and upon the recordation of the Conservation

Easement Property Owner shall have, good, marketable and indefeasible fee simple title to the Property subject only to any exceptions approved in advance of recordation, in writing, by the Signatory Agencies.

2. The Property is available to be burdened by the Conservation Easement for the conservation purposes identified in the Conservation Easement, in accordance with the Program Instrument.

3. The Property includes legal access to and from [insert name of public street or road]. [If special access rights are required to reach the Property, those access rights must also be addressed in this Property Assessment.]

4. A true, accurate and complete listing and explanation of each recorded or unrecorded lien or encumbrance on, or possessory or non-possessory interest in, the Property is set forth in Attachment 3 attached to and incorporated by reference in this Property Assessment. Except as disclosed in Attachment 3, there are no outstanding mortgages, liens, encumbrances or other interests in the Property (including, without limitation, mineral interests). Attachment 4, attached hereto and incorporated by reference in this Property Assessment, depicts all relevant and plottable property lines, easements, dedications, etc. on the Property.

5. Prior to recordation of the Conservation Easement, Property Owner shall certify to the Signatory Agencies in writing that this Property Assessment remains true, accurate and complete in all respects.

6. Property Owner has no knowledge or notice of any legal or other restrictions upon the use of the Property for conservation purposes, or affecting its Conservation Values, as described in the Conservation Easement, or any other matters that may adversely affect title to the Property or interfere with the establishment and implementation of an In-Lieu Fee Program thereon.

7. Property Owner has not granted any options, or committed or obligated to sell the Property or any portion thereof, except as disclosed in writing to and agreed upon in writing by the Signatory Agencies.

8. The following Appendix and attachments are incorporated by reference in this Property Assessment:

- a) Attachment 1 – Preliminary Report;
- b) Attachment 2 - Encumbrance Documents;
- c) Attachment 3 – Summary and Explanation of Encumbrances; and
- d) Attachment 4 - Map(s).

[Note: Attachment 2 shall include copies from the Official Records of the county recorder's office of all recorded exceptions to title (e.g., leases or easements). Attachment 4 shall include a map(s), preferably in GIS Format, illustrating the area of the Property affected by each exception to title.]

PROPERTY OWNER

[Insert property owner full legal name(s)]

Date

Attachment 1
Preliminary Report

[Attached]

Attachment 2
Encumbrance Documents

[Attached]

Attachment 3

Sample Format for: Summary and Explanation of Encumbrances

MONETARY LIENS

Note: Any deeds of trust or other monetary lien(s) must be released or subordinated to the [identify land use agreement] by a recorded Subordination Agreement approved by the Signatory Agencies.

- Preliminary Report Exception or Exclusion #:
- Amount or Obligation secured:
- Term:
- Date:
- Trustor:
- Trustee:
- Beneficiary:
- Description:

_____ acres of Property subject to lien

_____ acres of Property not subject to lien

EASEMENTS AND RIGHTS OF WAY

- Preliminary Report Exception or Exclusion #:
- Date:
- Grantor:
- Grantee:
- Holder (if different from Grantee):
- Description:
- Analysis: [whether and how this exception will affect the Conservation Easement or the Conservation Values of the Property]

_____ acres of Property subject to easement

_____ acres of Property not subject to easement

LEASES

- Preliminary Report Exception or Exclusion #:
- Date:
- Landlord/Lessor:
- Tenant/Lessee:
- Premises:
- Term:

- Description:
- Analysis: [whether and how this exception will affect the Conservation Easement or the Conservation Values of the Property]
 ____ acres of Property subject to lease
 ____ acres of Property not subject to lease

COVENANTS, CONDITIONS, RESTRICTIONS AND RESERVATIONS

- Preliminary Report Exception or Exclusion #:
- Dated:
- Grantor or Declarant:
- Grantee (if applicable):
- Description:
- Analysis: [whether and how this exception will affect the Conservation Easement or the Conservation Values of the Property]
 ____ acres of Property subject to exception/exclusion
 ____ acres of Property not subject to exception/exclusion

OTHER INTERESTS (INCLUDING MINERAL OR OTHER SEVERED INTERESTS)

- Holder
- Description: [must address whether or not the interest includes any surface rights and, if applicable, a description of those rights]
- Analysis: [whether and how this exception will affect the Conservation Easement or the Conservation Values of the Property]
 ____ acres of Property subject to interest
 ____ acres of Property not subject to interest

Attachment 4

Map(s)

[Attached]

Exhibit J
Conservation Easement Template

RECORDING REQUESTED BY:)
AND WHEN RECORDED MAIL TO:)
Address)
)
)
)
)
)
)

Space Above Line for Recorder's Use Only

CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT is made this _____ day of _____, 201_ by [insert name], a _____ company, ("Grantor"), in favor of the _____ ("Grantee(s)") with reference to the following facts:

RECITALS

A. Grantor is the sole owner in fee simple of certain real property containing approximately ____ acres, located in the City of _____, County of _____, State of Arizona, designated Assessor Parcel Number(s) _____ (the "Property"). The Property is legally described on **Exhibit "A"** attached hereto and incorporated by this reference. Grantor intends to grant a conservation easement over a ____-acre portion of the Property (the "**Easement Area**"). The Easement Area is legally described and depicted in **Exhibit "B"** attached hereto and incorporated herein by this reference.

B. The Easement Area possesses wildlife and habitat values of great importance to Grantee, the people of the State of Arizona and the people of the United States. The Easement Area will provide high quality natural, restored and/or enhanced habitat for [*specify listed and sensitive plant and/or animal species*] and contain [*list habitats; native and/or non-native*], [*include the following phrase only if there are jurisdictional wetlands: and restored, created, enhanced and/or preserved jurisdictional Waters of the United States*]. Individually and collectively, these wildlife and habitat values comprise the "**Conservation Values**" of the Easement Area.

C. Grantee is authorized to hold conservation easements pursuant to Arizona Revised Statute Section 33-271, *et seq.* Specifically, Grantee is an entity identified in Arizona Revised Statute Section 33-271 and otherwise authorized to acquire and hold title to real property.

D. The United States Army Corps of Engineers ("USACE") is the Federal agency charged with regulatory authority over discharges of dredged and fill material in Waters of the United States pursuant to Section 404 of the Clean Water Act, and is a third party beneficiary of this Conservation Easement.

E. This Conservation Easement is granted pursuant to the In-Lieu Fee Enabling Instrument (the "**ILFEI**") by and between Grantee, the Los Angeles District of USACE, Region

IX of the United States Environmental Protection Agency (“USEPA”), the U.S. Fish and Wildlife Service (USFWS), the Arizona Game and Fish Department (AGFD), the Arizona Department of Environmental Quality (ADEQ), Pima County, and the City of Phoenix dated _____, and the Development Plan (the “**Development Plan**”), and the Interim Management Plan and Long-Term Management Plan (as applicable, the “**Management Plan**”) created under the ILFEI. USACE, USEPA, USFWS, AGFD, ADEQ, Pima County, and the City of Phoenix are together referred to in this Conservation Easement as the “**Signatory Agencies.**” The ILFEI, the Development Plan and the Management Plan are incorporated by this reference into this Conservation Easement as if fully set forth herein.

F. All section numbers referred to in this Conservation Easement are references to sections within this Conservation Easement, unless otherwise indicated.

COVENANTS, TERMS, CONDITIONS AND RESTRICTIONS

In consideration of the above recitals and the mutual covenants, terms, conditions, and restrictions contained herein, and pursuant to the laws of the United States and State of Arizona, including Arizona Revised Statute Section 33-271, *et seq.*, Grantor hereby voluntarily grants and conveys to Grantee a conservation easement in perpetuity over the Easement Area of the nature and character and to the extent hereinafter set forth (“**Conservation Easement**”). This Conservation Easement shall run with the land and be binding on Grantor’s heirs, successors, administrators, assigns, lessees, and other occupiers or users of the Easement Area or any portion of it.

1. Purposes.

(a) The purposes of this Conservation Easement are to ensure that the Easement Area will be retained in perpetuity in its natural, restored, or enhanced condition as contemplated by the ILFEI, the Development Plan, and the Management Plan, and to prevent any use of the Easement Area that will impair or interfere with the Conservation Values of the Easement Area. Grantor intends that this Conservation Easement will confine the use of the Easement Area to activities that are consistent with such purposes, including, without limitation, those involving the preservation, restoration and enhancement of native species and their habitats implemented in accordance with the ILFEI, the Development Plan and the Management Plan.

(b) The term “**Natural Condition,**” as referenced in the preceding paragraph and other portions of this Conservation Easement, shall mean the condition of the Easement Area, as it exists at the time this Conservation Easement is executed, as well as future enhancements or changes to the Easement Area that occur directly as a result of the following activities:

(1) Compensatory mitigation activities, including implementation, maintenance and monitoring as described in the Development Plan and Management Plan; or

(2) Activities described in Section 4 and Section 6 herein.

(c) Grantor represents and warrants that there are no structures or improvements existing on the Easement Area at the time this grant is executed that interfere or conflict with the Purposes of this Conservation Easement. Grantor further represents and warrants that there are no other previously granted easements existing on the Easement Area that interfere or conflict with the Purposes of this Conservation Easement as evidenced by the Title Report attached at **Exhibit "C."** The present Natural Condition is evidenced in part by the depiction of the Easement Area attached on **Exhibit "D,"** showing all relevant and plottable property lines, easements, dedications, improvements, boundaries and major, distinct natural features such as Waters of the United States. Grantor has delivered further evidence of the present Natural Condition to Grantee and USACE consisting of (1) a color aerial photograph of the Easement Area at an appropriate scale taken as close in time as possible to the date this Conservation Easement is executed; (2) an overlay of the Easement Area boundaries on such aerial photograph; and (3) on-site color photographs showing all man-made improvements or structures (if any) and the major, distinct natural features of the Easement Area.

(d) If a controversy arises with respect to the current Natural Condition of the Property, Grantor, Grantee or USACE or any designees or agents of Grantor, Grantee, and USACE shall not be foreclosed from utilizing any and all other relevant documents, surveys, photographs or other evidence or information to assist in the resolution of the controversy.

2. Grantee's Rights. To accomplish the Purposes of this Conservation Easement, Grantor, its successors and assigns hereby grants and conveys the following rights to Grantee. These rights are also granted to the USACE or its designees as third party beneficiaries of this Conservation Easement:

(a) To preserve and protect the Conservation Values of the Easement Area; and

(b) To enter upon the Property and Easement Area at reasonable times in order to monitor compliance with and to otherwise enforce the terms of this Conservation Easement, the ILFEI, the Development Plan and the Management Plan, to implement at Grantee's sole discretion Development Plan and Management Plan activities that have not been implemented, and for scientific research and interpretive purposes by Grantee or its designees, provided that Grantee shall not unreasonably interfere with Grantor's authorized use and quiet enjoyment of the Easement Area; and

(c) To prevent any activity on or use of the Easement Area that is inconsistent with the Purposes of this Conservation Easement and to require the restoration of such areas or features of the Easement Area that may be damaged by any act, failure to act, or any use that is inconsistent with the Purposes of this Conservation Easement; and

(d) To require that all mineral, air and water rights as Grantee deems necessary to preserve and protect the biological resources and Conservation Values of the

Easement Area shall remain a part of and be put to beneficial use upon the Easement Area, consistent with the Purposes of this Conservation Easement.

(e) All present and future development rights allocated, implied, reserved or inherent in the Easement Area; such rights are hereby terminated and extinguished, and may not be used on or transferred to any portion of the Easement Area; and

(f) The right to enforce by any means, including, without limitation, injunctive relief, the terms and conditions of this Conservation Easement; and

(g) The right to enhance native plant communities, including the removal non-native species, the right to plant trees and shrubs of the same type as currently existing on the Easement Area, or other appropriate native species. Habitat enhancement activities shall not conflict with the preservation of the Natural Condition of the Easement Area or the Purposes of this Conservation Easement and shall be performed in compliance with all applicable laws, regulations, and permitting requirements.

3. Prohibited Uses. Any activity on or use of the Easement Area that is inconsistent with the Purposes of this Conservation Easement is prohibited. Without limiting the generality of the foregoing, the following uses and activities by Grantor, Grantee, and their respective agents, and third parties are expressly prohibited:

(a) Introduction of nuisance water, such as any drainage or overflow, including but not limited to water from pools, aquariums, waterbeds and fountains, and unseasonable and supplemental watering, except nuisance water associated with irrigation outside the Easement Area by adjacent homeowners or others and the natural drainage of rainfall and water related to Grantee's habitat enhancement activities as set forth in the Development Plan;

(b) Use of herbicides, pesticides, biocides, fertilizers, or other agricultural chemicals or weed abatement activities, except weed abatement activities necessary to control or remove invasive, exotic plant species as set forth in the Development Plan or Management Plan;

(c) Use of off-road vehicles and use of any other motorized vehicles except in the execution of management duties;

(d) Grazing or other agricultural activity of any kind except highly managed, short duration, spatially controlled grazing utilized for invasive species control in areas effectively devoid of native perennial vegetation

for the execution of management duties (e.g. a few goats corralled within a mobile and flexible shaped paddock made of electric fencing used to graze Bermuda grass back to the roots which encourages new sprouts which make the plant more susceptible to herbicides);

(e) Recreational activities including, but not limited to, camping, picnicking, horseback riding, biking, hunting or fishing;

(f) Residential, commercial, retail, institutional, or industrial uses;

(g) Any legal or de facto division, subdivision or partitioning of the Easement Area;

(h) Construction, reconstruction or placement of any building, road, wireless communication cell towers, billboard, sign, or any other structure or improvement of any kind except those signs specifically allowed under Section 5(e) or as specifically provided for in the Development Plan or Management Plan;

(i) Dumping soil, trash, ashes, refuse, waste, bio-solids, garbage or any other material;

(j) Planting, gardening, or introduction or dispersal of non-native plant or animal species except in the execution of management duties where biologically or ecologically advantageous to the restoration of the site including, but not limited to:

1-introducing temporary hives of honeybees to ensure pollination during critical periods for areas depauperate of native pollinators

2-introducing certain plants, with future removal once purpose is accomplished, used in specific instances to:

a- increase soil nutrient level for heavily depleted former agricultural fields

b- decrease soil nutrient level for areas that have become hyper-nutrient due to anthropogenic effects

c- remediate levels of toxins in soil making them more suitable to native plants which may not be tolerant of anthropogenic chemical loads

3-introducing soil mycorrhizae that are commercially available if unable to generate sufficient quantities of inoculum from mycorrhizae that are native to the specific restoration site

4-introducing soil Rhizobial bacteria that are commercially available if unable to generate sufficient quantities of inoculum from Rhizobia that are native to the specific restoration site

5-introducing established biological control agents for control of invasive species

6-introducing commercially available species of plants, with planned removal once purpose is accomplished, used to provide equivalent critical habitat

components for local sensitive species of animals while native species, which are not commercially available, can be produced and established in a bespoke fashion, that will fill the habitat needs long-term.

7-non-native annual plants with no capacity to self-seed that are of high palatability to herbivorous animals on site may be planted as 'sacrificial plants' to help protect the establishment of native plants until mature enough to survive herbivory.

(k) Filling, dumping, excavating, draining, dredging, mining, drilling, removing or exploring for or extraction of minerals, loam, gravel, soil, rock, sand or other material on or below the surface of the Easement Area;

(l) Altering the surface or general topography of the Easement Area, including but not limited to any alterations to habitat, building roads or trails, paving or otherwise covering the Easement Area with concrete, asphalt or any other impervious material except for those habitat management activities specified in the Development Plan or Management Plan;

(m) Removing, destroying, or cutting of trees, shrubs or other vegetation, except for (1) emergency fire breaks as required by fire safety officials, (2) prevention or treatment of disease, (3) control of invasive species which threaten the integrity of the habitat, (4) completing the Development Plan and Management Plan, or (5) activities described in Section 2;

(n) Manipulating, impounding or altering any natural watercourse, body of water or water circulation on the Easement Area, and activities or uses detrimental to water quality, including but not limited to degradation or pollution of any surface or sub-surface waters except for as specifically provided for in the Development Plan or Management Plan;

(o) Creating, enhancing, and maintaining fuel modification zones (defined as a strip of mowed land or the planting of vegetation possessing low combustibility for purposes of fire suppression) or other activities that could constitute fuel modification zones;

(p) Without the prior written consent of Grantee, which Grantee may withhold, transferring, encumbering, selling, leasing, or otherwise separating the mineral, air or water rights for the Easement Area; changing the place or purpose of use of the water rights; abandoning or allowing the abandonment of, by action or inaction, any water or water rights, ditch or ditch rights, spring rights, reservoir or storage rights, wells, ground water rights, or other rights in and to the use of water historically used on or otherwise appurtenant to the Easement Area, including but not limited to: (1) riparian

water rights; (2) appropriative water rights; (3) rights to waters which are secured under contract with any irrigation or water district, to the extent such waters are customarily applied to the Easement Area; and (4) any water from wells that are in existence or may be constructed in the future on the Easement Area;

(q) Engaging in any use or activity that may violate, or may fail to comply with, relevant federal, state, or local laws, regulations, or policies applicable to Grantor, the Easement Area, or the use or activity in question; and

(r) No use shall be made of the Easement Area, and no activity thereon shall be permitted, that is or is likely to become inconsistent with the Purposes of this Conservation Easement. Grantor and Grantee acknowledge that, in view of the perpetual nature of this Conservation Easement, they are unable to foresee all potential future land uses, future technologies, and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Conservation Easement. Grantee, therefore, in its sole discretion, may determine whether (1) proposed uses or proposed improvements not contemplated by or addressed in this Conservation Easement or (2) alterations in existing uses or structures, are consistent with the Purposes of this Conservation Easement.

4. Grantor's Duties. To accomplish the Purposes of this Conservation Easement as described in Section 1, Grantor, its successors and assigns shall:

(a) Undertake all reasonable actions to prevent the unlawful entry and trespass by persons whose activities may degrade or harm the Conservation Values of the Easement Area. In addition, Grantor shall undertake all necessary actions to perfect Grantee's rights under Section 2 of this Conservation Easement;

(b) Cooperate with Grantee in the protection of the Conservation Values;

(c) Repair and restore damage to the Easement Area directly or indirectly caused by Grantor, Grantor's guests, representatives, employees or agents, and third parties within Grantor's control; provided, however, Grantor, its successors or assigns shall not engage in any repair or restoration work on the Easement Area without first consulting with the Grantee and USACE; and

(d) Obtain any applicable governmental permits and approvals for any Activity or use permitted by this Conservation Easement, and any activity or use shall be undertaken in accordance with all applicable federal, state, local and administrative agency statutes, ordinances, rules, regulations, orders or requirements.

5. Grantee's Duties. To accomplish the Purposes of this Conservation Easement as described in Section 1, Grantee, its successors and assigns shall:

(a) Perform, at a minimum on an annual basis, compliance monitoring inspections of the Easement Area; and

(b) Prepare reports on the results of the compliance monitoring inspections,

and provide these reports to the Signatory Agencies on an annual basis; and

(c) Undertake construction, maintenance and monitoring of mitigated areas pursuant to the Development Plan and Interim Management Plan until issuance of final approval from the USACE confirming that Grantee has successfully completed construction, maintenance and monitoring of mitigated areas pursuant to said Plans (“**Final Approval**”). This duty is non-transferable;

(d) Upon receipt of Final Approval, perform long-term management of the Easement Area pursuant to the Long-term Management Plan;

(e) Within 120 days of recordation of this Conservation Easement, install signs and other notification features saying “Natural Area Open Space,” “Protected Natural Area,” or similar descriptions. Prior to erection of such signage, the Grantee shall submit plans showing the location and language of such signs to the USACE for review and approval;

(f) Repair and restore damage to the Easement Area directly or indirectly caused by Grantee, Grantee’s guests, representatives, employees or agents, and third parties within Grantee’s control provided, however, Grantee, its successors or assigns shall not engage in any repair or restoration work on the Easement Area without first consulting with USACE.

6. Reserved Rights. Grantor reserves to itself, and to its personal representatives, heirs, successors, and assigns, all rights accruing from its ownership of the Easement Area, including the right to engage in or to permit or invite others to engage in all uses of the Easement Area that are not prohibited or limited by, and are consistent with, the Purposes of this Conservation Easement.

7. Enforcement.

(a) Right to Enforce. Grantor, its successors and assigns, grant to the USACE, the U.S. Department of Justice, and the State Attorney General a discretionary right to enforce this Conservation Easement in a judicial or administrative action against any person(s) or other entity(ies) violating or attempting to violate this Conservation Easement; provided, however, that no violation of this Conservation Easement shall result in a forfeiture or reversion of title. The USACE, U.S. Department of Justice, and the State Attorney General shall have the same rights, remedies and limitations as Grantee under this Section 7. The rights under this Section are in addition to, and do not limit rights conferred in Section 2 above. The term “Party” means Grantor or Grantee, as the case may be. Grantor, Grantee, and any third party beneficiaries, when implementing any remedies under this easement, shall provide timely written notice to each other of any actions taken under this section, including, but not limited to copies of all notices of violation and related correspondence.

(b) Notice of Violation. In the event that either Party or its employees, agents, contractors or invitees is in violation of the terms of this Conservation Easement or that a violation is threatened, the non-violating Party and/or third party beneficiaries may demand the cure of such violation. In such a case, the non-violating Party and/or third party beneficiaries shall issue a written notice to the violating Party (hereinafter “**Notice of Violation**”) informing the violating Party of the actual or threatened violations and demanding cure of such violations. The Notice of Violation shall be sent to the other Party and third party beneficiaries listed under Section 15 of this Conservation Easement.

(c) Time to Cure. The violating Party shall cure the noticed violation within thirty (30) days of receipt of said written Notice of Violation. If said cure reasonably requires more than thirty (30) days, the violating Party shall, within the thirty (30) day period, submit to the non-violating Party and/or third party beneficiaries, as the case may be, for review and approval a plan and time schedule to diligently complete a cure. The violating Party shall complete such cure in accordance with the approved plan. If the violating Party disputes the notice of violation, it shall issue a written notice of such dispute (hereinafter “**Notice of Dispute**”) to the appropriate Party and/or third party beneficiary within thirty (30) days of receipt of written Notice of Violation.

(d) Failure to Cure. If the violating Party fails to cure the violation within the time period(s) described in Section 7(c), above, or Section 7(e)(2), below, the non-violating Party and/or third party beneficiaries may bring an action at law or in equity in a court of competent jurisdiction to enforce compliance by the violating Party with the terms of this Conservation Easement. In such action, the non-violating Party and/or third party beneficiaries may:

(1) Recover any damages to which they may be entitled for violation by the violating Party of the terms of this Conservation Easement or for any injury to the Conservation Values of the Easement Area. The non-violating Party shall first apply any damages recovered to the cost of undertaking any corrective action on the Easement Area. Prior to implementation of any remedial or restorative actions pursuant to this paragraph, USACE shall be consulted.

(2) Enjoin the violation by temporary or permanent injunction without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies.

(3) Obtain other equitable relief, including, but not limited to, the restoration of the Easement Area to the condition in which it existed prior to any such violation or injury.

(e) Notice of Dispute.

(1) If the violating Party provides the non-violating Party and/or third party beneficiaries with a Notice of Dispute, as provided herein, the non-violating Party and/or third party beneficiaries shall meet and confer with the violating Party at a mutually agreeable place and time, not to exceed thirty (30) days from the date that the non-violating Party and/or third party beneficiaries receive the Notice of Dispute. The non-violating Party and/or third party beneficiaries shall consider all relevant

information concerning the disputed violation provided by the violating Party and shall determine whether a violation has in fact occurred and, if so, whether the Notice of Violation and demand for cure issued by the non-violating Party and/or third party beneficiaries is appropriate in light of the violation.

(2) If, after reviewing the violating Party's Notice of Dispute, conferring with the violating Party, and considering all relevant information related to the violation, the non-violating Party and/or third party beneficiaries determine that a violation has occurred, the non-violating Party and/or third party beneficiaries shall give the violating party notice of such determination in writing. Upon receipt of such determination, the violating Party shall have fifteen (15) days to cure the violation. If said cure reasonably requires more than fifteen (15) days, the violating Party shall, within the fifteen (15) day period, submit to the non-violating Party and/or third party beneficiaries for review and approval a plan and time schedule to diligently complete a cure. The violating Party shall complete such cure in accordance with the approved plan.

(f) Conflicting Notices of Violation.

(1) If any Party receives a Notice of Violation that is in material conflict with one or more prior written Notices of Violation that have not yet been cured by the Party (hereinafter "Active Notice(s) of Violation") such that the conflict makes it impossible for the Party to carry out the cure consistent with all prior Active Notices of Violation, the Party shall give written notice (hereinafter "Notice of Conflict") to the non-violating Party and/or third party beneficiaries issuing the later, conflicting Notice(s) of Violation. The Party shall issue said Notice of Conflict to the appropriate non-violating Party and/or third party beneficiaries within fifteen (15) days of the receipt of each such conflicting Notice of Violation. A valid Notice of Conflict shall describe the conflict with specificity, including a description of how the conflict makes compliance with all Active Notices of Violation impossible.

(2) Upon issuing a valid Notice of Conflict to the appropriate non-violating Party and/or third party beneficiaries, as described above, the violating Party shall not be required to carry out the cure described in the conflicting Notice or Notices of Violation until such time as the non-violating Party responsible for said conflicting Notice(s) of Violation issue(s) a revised Notice of Violation that is consistent with prior Active Notices of Violation. Upon receipt of a revised, consistent Notice of Violation, the violating Party shall carry out the cure recommended in such notice within the time period(s) described in Section 7(c) above. Notwithstanding Section 7(g), failure to cure within said time period(s) shall entitle the non-violating Party to the remedies described in Section 7(d) and Section 7(h).

(3) The failure of the violating Party to issue a valid Notice of Conflict within fifteen (15) days of receipt of a conflicting Notice of Violation shall result in a waiver of the violating Party's ability to claim a conflict.

(g) Immediate Action. In the event that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Property, the Party and/or third party beneficiary seeking enforcement pursuant to Section 7(b) above may immediately pursue all available remedies, including injunctive relief, available pursuant to both

this Conservation Easement and state and federal law after giving the violating Party at least twenty four (24) hours' written notice before pursuing such remedies. So long as such twenty-four (24) hours' notice is given, the non-violating Party may immediately pursue all available remedies without waiting for the expiration of the time periods provided for cure or Notice of Dispute as described in Section 7(c). The written notice pursuant to this paragraph may be transmitted to the violating Party by facsimile and shall be copied to the other Party and/or third party beneficiaries listed in Section 15 of this Conservation Easement. The rights of the non-violating Party and/or third party beneficiaries under this paragraph apply equally to actual or threatened violations of the terms of this Conservation Easement. The violating Party agrees that the remedies at law for any violation of the terms of this Conservation Easement are inadequate and that the non-violating Party and third party beneficiaries shall be entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which they may be entitled, including specific performance of the terms of this Conservation Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The remedies described in this Section 7(g) shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity, including but not limited to, the remedies set forth in Arizona Revised Statute Section 33-271, *et seq.*, inclusive.

(h) Costs of Enforcement. All costs incurred by a Party, where that Party is the prevailing party, in enforcing the terms of this Conservation Easement against the other Party, including, but not limited to, costs of suit and attorneys' and experts' fees, and any costs of restoration necessitated by negligence or breach of this Conservation Easement, shall be borne by the non-prevailing Party.

(i) Enforcement Discretion. Enforcement of the terms of this Conservation Easement by a Party and/or third party beneficiary shall be at the discretion of the Party and/or third party beneficiary, and any forbearance by such Party and/or third party beneficiary to exercise its rights under this Conservation Easement in the event of any breach of any term of the Conservation Easement by a Party or any subsequent transferee shall not be deemed or construed to be a waiver by the non-violating Party and third party beneficiary of such terms or of any subsequent breach of the same or any other term of this Conservation Easement or of any of the rights of the non-violating Party and third party beneficiary under this Conservation Easement. No delay or omission by the non-violating Party and/or third party beneficiaries in the exercise of any right or remedy upon any breach by the violating Party shall impair such right or remedy or be construed as a waiver. Further, nothing in this Conservation Easement creates a non-discretionary duty upon the non-violating Party and/or third party beneficiaries to enforce its provisions, nor shall deviation from these terms and procedures, or failure to enforce its provisions give rise to a private right of action against the non-violating Party and/or third party beneficiaries by any third parties.

(j) Acts Beyond Grantor's Control. Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Easement Area resulting from:

(1) Any natural cause beyond Grantor's control, including without limitation, fire not caused by Grantor, flood, storm, and earth movement;

(2) Any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Easement Area resulting from such causes;

(3) Acts by Grantee, USACE, or their employees, directors, officers, agents, contractors, or representatives; or

(4) Acts of third parties (including any governmental agencies) that are beyond Grantor's control.

Notwithstanding the foregoing, Grantor must obtain any applicable governmental permits and approvals for any emergency activity or use permitted by this Conservation Easement, and undertake any activity or use in accordance with all applicable federal, state, local and administrative agency statutes, ordinances, rules, regulations, orders or requirements.

(k) Acts Beyond Grantee's Control. Nothing contained in this Conservation Easement shall be construed to entitle Grantor to bring any action against Grantee for any injury to or change in the Easement Area resulting from:

(1) Any natural cause beyond Grantee's control, including without limitation, fire not caused by Grantee, flood, storm, and earth movement;

(2) Any prudent action taken by Grantee under emergency conditions to prevent, abate, or mitigate significant injury to the Easement Area resulting from such causes;

(3) Acts by Grantor, USACE or their employees, directors, officers, agents, contractors, or representatives; or

(4) Acts of third parties (including any governmental agencies) that are beyond Grantee's control.

Notwithstanding the foregoing, Grantee must obtain any applicable governmental permits and approvals for any emergency activity or use permitted by this Conservation Easement, and undertake any activity or use in accordance with all applicable federal, state, local and administrative agency statutes, ordinances, rules, regulations, orders or requirements.

8. Access. This Conservation Easement does not convey a general right of access to the public.

9. Costs and Liabilities.

(a) Grantor, its successors and assigns retain all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance (except Long-Term Maintenance by Grantee) of the Easement Area. Grantor agrees Grantee and USACE shall not have any duty or responsibility for the operation, upkeep, or maintenance (except Long-Term Maintenance by Grantee) of the Easement Area, the monitoring of hazardous conditions thereon, or the protection of Grantor, the public or any third parties from risks relating

to conditions on the Property. Grantor, its successor or assign remains solely responsible for obtaining any applicable governmental permits and approvals for any activity or use permitted by this Conservation Easement, and any activity or use shall be undertaken in accordance with all applicable federal, state, local and administrative agency statutes, ordinances, rules, regulations, orders and requirements.

(b) Hold Harmless.

(1) Grantor shall hold harmless, protect and indemnify Grantee and its directors, officers, employees, agents, contractors, and representatives and the heirs, personal representatives, successors and assigns of each of them (each a "Grantee Indemnified Party" and collectively, "Grantee's Indemnified Parties") from and against any and all liabilities, penalties, costs, losses, damages, expenses (including, without limitation reasonable attorneys' fees and experts' fees), causes of action, claims, demands, orders, liens or judgments (each a "Claim" and, collectively, "Claims"), arising from or in any way connected with: (i) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Easement Area, regardless of cause, except that this indemnification shall be inapplicable to any Claim due solely to the negligence of Grantee or any of its employees; (ii) the obligations or rights specified in Sections 4, 6, 9(a), 10, and 19(l); and (iii) the existence or administration of this Conservation Easement. If any action or proceeding is brought against any of the Grantee's Indemnified Parties by reason of any such Claim, Grantor shall, at the election of and upon written notice from Grantee, defend such action or proceeding by counsel reasonably acceptable to the Grantee's Indemnified Party or reimburse Grantee for all charges incurred in defending the action or proceeding.

(2) Grantor shall hold harmless, protect and indemnify USACE and their respective directors, officers, employees, agents, contractors, and representatives and the heirs, personal representatives, successors and assigns of each of them (each a "**Third-Party Beneficiary Indemnified Party**" and collectively, "**Third-Party Beneficiary Indemnified Parties**") from and against any and all Claims arising from or in any way connected with: (i) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Easement Area, regardless of cause and (ii) the obligations or rights specified in Sections 4, 5, 6, 9(a), 10, and 19(l), except that any indemnification under this Section 9(b) shall be inapplicable to Third-Party Beneficiary Indemnified Parties with respect to any Claim due to the negligence or intentional acts only of USACE or any of its employees.

10. Taxes, No Liens. Grantor, its successors and assigns shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Easement Area by competent authority, including any taxes imposed upon, or incurred as a result of, this Conservation Easement, and shall furnish Grantee and USACE with satisfactory evidence of payment upon request. Grantor, its successors and assigns shall keep Grantee's interest in the Easement Area free from any liens.

11. Condemnation. The Purposes of the Conservation Easement is presumed to be the best and most necessary public use as defined in Arizona Revised Statute Section 12-1122 notwithstanding. Nevertheless, if the Easement Area is taken, in whole or in part, by exercise of the power of eminent domain, Grantor and Grantee shall be entitled to compensation in accordance with applicable law.

12. Transfers of Conservation Easement or Easement Area.

(a) Conservation Easement. This Conservation Easement may be assigned or transferred by Grantee upon written approval of the Signatory Agencies, which approval shall not be unreasonably withheld or delayed, but Grantee shall give Grantor and the Signatory Agencies at least sixty (60) days prior written notice of the proposed assignment or transfer. Grantee may assign or transfer its rights under this Conservation Easement only to an entity or organization: (i) authorized to acquire and hold conservation easements pursuant to Arizona Revised Statute Section 33-271 (and any successor or other provision(s) then applicable), or the laws of the United States; and (ii) otherwise reasonably acceptable to the Signatory Agencies. Grantee shall require the assignee to record the assignment in the county where the Easement Area is located. The failure of Grantee to perform any act provided in this section shall not impair the validity of this Conservation Easement or limit its enforcement in any way. Any transfer under this section is subject to the requirements of Section 13.

(b) Easement Area. Grantor agrees to incorporate the terms of this Conservation Easement by reference in any deed or other legal instrument by which Grantor divests itself of any interest in all or any portion of the Easement Area, including, without limitation, a leasehold interest. Grantor agrees that the deed or other legal instrument shall also incorporate by reference the ILFEI, the Development Plan, the Management Plan, and any amendment(s) to those documents. Grantor further agrees to give written notice to Grantee and the Signatory Agencies of the intent to transfer any interest at least sixty (60) days prior to the date of such transfer. Grantee or the Signatory Agencies shall have the right to prevent any transfers in which prospective subsequent claimants or transferees are not given notice of the terms, covenants, conditions and restrictions of this Conservation Easement (including the exhibits and documents incorporated by reference in it). The failure of Grantor to perform any act provided in this section shall not impair the validity of this Conservation Easement or limit its enforceability in any way. Any transfer under this section is subject to the requirements of Section 13.

13. Merger. The doctrine of merger shall not operate to extinguish this Conservation Easement if the Conservation Easement and the Easement Area become vested in the same party. If, despite this intent, the doctrine of merger applies to extinguish the Conservation Easement then, unless Grantor, Grantee, and the Signatory Agencies otherwise agree in writing, a replacement conservation easement or restrictive covenant containing the same protections embodied in this Conservation Easement shall be recorded against the Easement Area.

14. Additional Interests. Grantor shall not grant any additional easements, rights of way or other interests in the Easement Area (other than a security interest that is expressly subordinated to this Conservation Easement), nor shall Grantor grant, transfer, abandon or relinquish (each a

“**Transfer**”) any mineral, air, or water right or any water associated with the Easement Area, without first obtaining the written consent of Grantee and the Signatory Agencies. Such consent may be withheld if Grantee or the Signatory Agencies determine(s) that the proposed interest or Transfer is inconsistent with the Purposes of this Conservation Easement or will impair or interfere with the Conservation Values of the Easement Area. This Section 14 shall not limit the provisions of Section 2(d) or 3(p), nor prohibit transfer of a fee or leasehold interest in the Easement Area that is subject to this Conservation Easement and complies with Section 12. Grantor shall provide a copy of any recorded or unrecorded grant or Transfer document to the Grantee and Signatory Agencies.

15. Notices. Any notice, demand, request, consent, approval, or other communication that Grantor or Grantee desires or is required to give to the other shall be in writing, with a copy to each of the Signatory Agencies, and served personally or sent by recognized overnight courier that guarantees next-day delivery or by first class United States mail, postage fully prepaid, addressed as follows:

To Grantor:

To Grantee: To be included with each specific property for which this CE is executed.

With a copy to: District Counsel
U.S. Army Corps of Engineers
Los Angeles District
915 Wilshire Boulevard, Room 1535
Los Angeles, California 90017-3401
FAX: 213-452-4217

and IRT Members:

U.S. Army Corps of Engineers
Los Angeles District, Tucson Resident Office
5205 E. Comanche St
Tucson, AZ 85707
Attn: Marjorie Blaine
520-584-1684

United States Environmental Protection Agency
Region IX, WTR-8
75 Hawthorne Street
San Francisco, CA 94105
Attn: Elizabeth Goldmann
415-972-3398

Wildlife Management Division
Arizona Game and Fish Department
5000 W. Carefree Hwy
Phoenix, AZ 85086-5000
Attn: Bob Broscheid
623-236-7276

Arizona Department of Environmental Quality
Mailstop 5415A-1
1110 W. Washington
Phoenix, AZ 85007
Attn: Linda Taunt
602-771-4502

Pima County
Office of Conservation Science and Sustainability
201 N. Stone Ave, 6th Floor
Tucson, AZ 85701
Attn: Julia Fonseca
520-724-6460

City of Phoenix
Office of Environmental Programs
200 W. Washington Street
14th Floor
Phoenix, AZ 85003
Attn: Wendy Wonderley
602-534-1775

U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 W. Royal Palm Road, Suite 103
Phoenix, AZ 85021
Attn: Mike Martinez
602-242-0524, ext 224

or to such other address a party or a Signatory Agency shall designate by written notice to Grantor, Grantee and the Signatory Agencies. Notice shall be deemed effective upon delivery in the case of personal delivery or delivery by overnight courier or, in the case of delivery by first class mail, three (3) days after deposit into the United States mail.

The parties agree to accept facsimile signed documents and agree to rely upon such documents as if they bore original signatures. Each party agrees to provide to the other parties, within seventy-two (72) hours after transmission of such a facsimile, the original documents that bear the original signatures.

16. Amendment. This Conservation Easement may be amended only by mutual written agreement of Grantor and Grantee and written approval of the USACE, which approval shall not be unreasonably withheld or delayed. Any such amendment shall be consistent with the Purposes of this Conservation Easement and Arizona law governing conservation easements, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of the county in which the Easement Area is located, and Grantee shall promptly provide a conformed copy of the recorded amendment to the Grantor and the Signatory Agencies.

17. Recordation. Grantor shall promptly record this instrument in the official records of Pima County, Arizona and immediately notify the Grantee and USACE through the mailing of a conformed copy of the recorded easement. Grantee may re-record this Conservation Easement at any time as Grantee deems necessary to preserve its rights in this Conservation Easement.

18. Estoppel Certificate. Upon request, Grantee shall within fifteen (15) days execute and deliver to Grantor, its successors and assigns any document, including an estoppel certificate, which certifies compliance with any obligation of Grantor, its successors and assigns contained in this Conservation Easement and otherwise evidences the status of this Conservation Easement as may be requested by Grantor, its successors and assigns.

19. General Provisions.

(a) Controlling Law. The laws of the United States and the State of Arizona, disregarding the conflicts of law principles of such state, shall govern the interpretation and performance of this Conservation Easement.

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Conservation Easement shall be liberally construed in favor of and to effect the Purposes of this Conservation Easement and the policy and purpose set forth in Arizona Revised Statute 33-271, et seq. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the Purposes of this Conservation Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Change of Conditions. If one or more of the Purposes of this Conservation Easement may no longer be accomplished, such failure of purpose shall not be deemed sufficient cause to terminate the entire Conservation Easement as long as any other purpose of the Conservation Easement may be accomplished. In addition, the inability to carry on any or all of the permitted uses, or the unprofitability of doing so, shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment. Grantor and Grantee agree that global warming and climate change-caused effects shall not be a basis for termination of this Conservation Easement.

(d) Severability. If a court of competent jurisdiction voids or invalidates on its face any provision of this Conservation Easement, such action shall not affect the remainder of this Conservation Easement. If a court of competent jurisdiction voids or invalidates the application of any provision of this Conservation Easement to a person or circumstance, such action shall not affect the application of the provision to other persons or circumstances.

(e) Entire Agreement. This document (including its exhibits and ILFEI, the Development Plan, and the Management Plan incorporated by reference in this document) sets forth the entire agreement of the parties and the Signatory Agencies with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings, or agreements of the parties relating to the Conservation Easement. No alteration or variation of this Conservation Easement shall be valid or binding unless contained in an amendment in accordance with Section 15.

(f) No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

(g) Successors and Assigns. The covenants, terms, conditions, and restrictions of this Conservation Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall constitute a servitude running in perpetuity with the Easement Area. The covenants hereunder benefiting Grantee shall also benefit the USACE as a third party beneficiary.

(h) Termination of Rights and Obligations. Except as otherwise expressly set forth in this Conservation Easement and provided the transfer was consistent with the terms of this Conservation Easement, a party's rights and obligations under this Conservation Easement shall terminate upon transfer of the party's interest in the Conservation Easement or Property (respectively), except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(i) Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon its construction or interpretation.

(j) Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by all parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(k) Exhibits. All Exhibits referred to in this Conservation Easement are attached and incorporated herein by reference.

(l) No Hazardous Materials Liability.

(1) Grantor represents and warrants that there has been no release or threatened release of Hazardous Materials (defined below) or underground storage tanks existing, generated, treated, stored, used, released, disposed of, deposited or abandoned in, on, under, or from the Easement Area, or transported to or from or affecting the Easement Area.

(2) Without limiting the obligations of Grantor under Section 9(b), Grantor hereby releases and agrees to indemnify, protect and hold harmless the Grantee Indemnified Parties (defined in Section 9(b)(1)) from and against any and all Claims (defined in Section 9(b)(1)) arising from or connected with any Hazardous Materials or underground storage tanks present, alleged to be present, released in, from or about, or otherwise associated with the Easement Area at any time, except any Hazardous Materials placed, disposed or released by Grantee or any of its employees. This release and indemnification includes, without limitation, Claims for (i) injury to or death of any person or physical damage to any property; and (ii) the violation or alleged violation of, or other failure to comply with, any Environmental Laws (defined below). If any action or proceeding is brought against any of the Grantee's Indemnified Parties by reason of any such Claim, Grantor shall, at the election of and upon written notice from the applicable Grantee Indemnified Party, defend such action or proceeding by counsel reasonably acceptable to the Grantee Indemnified Party or reimburse Grantee for all charges incurred in defending the action or proceeding.

(3) Without limiting the obligations of Grantor under Section 9(b)(2) herein, Grantor hereby releases and agrees to indemnify, protect and hold harmless the Third Party Beneficiary Indemnified Parties (defined in Section 9(b)(2)) against any and all Claims (defined in Section 9(b)(1)) arising from or connected with any Hazardous Materials present, alleged to be present, or otherwise associated with the Easement Area at any time, except that this release and indemnification shall be inapplicable to the Third Party Beneficiary Indemnified Parties with respect to any Hazardous Materials placed, disposed or released by third party beneficiaries, their employees or agents. This release and indemnification includes, without limitation, Claims for (i) injury to or death of any person or physical damage to any property; and (ii) the violation or alleged violation of, or other failure to comply with, any Environmental Laws (defined below).

(4) Despite any contrary provision of this Conservation Easement, the parties do not intend this Conservation Easement to be, and this Conservation Easement shall not be, construed such that it creates in or gives Grantee and USACE any of the following:

(i) The obligations or liabilities of an "owner" or "operator," as those terms are defined and used in Environmental Laws (defined below), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Section 9601 et seq.; hereinafter, "CERCLA"); or

(ii) The obligations or liabilities of a person described in 42 U.S.C. Section 9607(a)(3) or (4); or

(iii) The obligations of a responsible person under any applicable Environmental Laws; or

(iv) The right to investigate and remediate any Hazardous Materials associated with the Property; or

(v) Any control over Grantor's ability to investigate, remove, remediate or otherwise clean up any Hazardous Materials associated with the Easement Area.

The term "**Hazardous Materials**" includes, without limitation, (a) material that is flammable, explosive or radioactive; (b) petroleum products, including by-products and fractions thereof; and (c) hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in CERCLA; Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.); the Hazardous Materials Transportation Act (49 U.S.C. Section 5101 et seq.); the Arizona equivalents (18 AAC Chapter 16 and Chapter 8; 17 AAC Chapter 5) and in the regulations adopted and publications promulgated pursuant to them, or any other applicable federal, state or local laws, ordinances, rules, regulations or orders now in effect or enacted after the date of this Conservation Easement.

The term "**Environmental Laws**" includes, without limitation, any federal, state, local or administrative agency statute, ordinance, rule, regulation, order or requirement relating to pollution, protection of human health or safety, the environment or Hazardous Materials. Grantor represents, warrants and covenants to Grantee and USACE that Grantor's activities upon and use of the Easement Area will comply with all Environmental Laws.

(m) Extinguishment. If circumstances arise in the future that render the preservation of Conservation Values, or other Purposes of this Conservation Easement impossible to accomplish, this Conservation Easement can only be terminated or extinguished, in whole or in part, by judicial proceedings in a court of competent jurisdiction.

(n) Warranty. Grantor represents and warrants that Grantor is the sole owner of the Easement Area. Grantor also represents and warrants that, except as specifically disclosed to and approved by the Grantee and USACE pursuant to the Property Assessment signed by Grantor and attached as an exhibit to the ILFEI, [*choose applicable statement*: there are no outstanding mortgages, liens, encumbrances or other interests in the Bank Property (including, without limitation, mineral interests) which may conflict or are inconsistent with this Conservation Easement or the holder of any outstanding mortgage, lien, encumbrance or other interest in the Easement Area (including, without limitation, mineral interest) which conflicts or is inconsistent with this Conservation Easement has expressly subordinated such interest to this Conservation Easement by a recorded Subordination Agreement approved by Grantee and the USACE].

(p) Third-Party Beneficiary. Grantor and Grantee acknowledge that the USACE (the "**Third-Party Beneficiary**") is a third party beneficiary of this Conservation Easement with the right of access to the Easement Area and the right to enforce all of the obligations of Grantor and Grantee under this Conservation Easement.

(q) Funding. Funding for the perpetual management, maintenance and monitoring of the Easement Area is specified in and governed by the ILFEI and the Management Plan.

IN WITNESS WHEREOF Grantor and Grantee have executed this Conservation Easement the day and year first above written and have agreed to be bound by the terms and provisions hereof.

GRANTOR:
[insert name]

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF Grantor and Grantee have executed this Conservation Easement the day and year first above written and have agreed to be bound by the terms and provisions hereof.

GRANTOR:
[insert name]

By: _____
Name: _____
Title: _____

State of Arizona }
County of _____ }

On _____ before me, _____,
Date Here Insert Name and Title of the Officer

personally appeared _____
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Arizona that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____
Signature of Notary Public

Place Notary Seal Above