**[THIS AGREEMENT IS NOT TO BE RECORDED IN ANY COUNTY RECORDER’S OFFICE OF THIS STATE**

**CONSERVATION LAND USE AGREEMENT**

**between the**

**ARIZONA GAME AND FISH COMMISSION**

**and the**

**UNITED STATES ARMY CORPS OF ENGINEERS, LOS ANGELES DISTRICT**

This CONSERVATION LAND USE AGREEMENT (“***Agreement***”) is entered into as of this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, by the Arizona Game and Fish Commission (“***Commission***”), acting through the Arizona Game and Fish Department (the “***Department***” or “***AGFD***”), and the United States Army Corps of Engineers (“***ACOE***”), collectively, referred to herein as the “***Parties***.”

R E C I T A L S

Whereas, the Commission is the

[sole owner in fee simple]

[holder of a federal land patent issued pursuant to the Recreation and Public Purposes Act of 1954 (43 USC 869 et seq)(the “*Land Patent*”)] [holder of a defeasible fee title in real property conveyed to the [State of Arizona][Commission] by [the Secretary of the Interior] [other federal agency as Grantor] (the “***Deed***”) for the conservation of wildlife pursuant to the Fish and Wildlife Coordination Act, 16 U.S. C. §667b]

consisting of approximately \_\_\_\_\_\_\_\_ acres, located in the County of\_\_\_\_\_\_, State of\_\_\_\_\_\_, designated Assessor’s Parcel Number \_\_\_\_\_ (the “***Property***”). The Property is legally described on ***Exhibit A.*** The Commission intends to conserve and protect a \_\_\_\_\_-acre portion of the Property (the “***Conserved Land***”). The Conserved Land is legally described and depicted on ***Exhibit B*** attached hereto and incorporated by this reference.

[**On lands for which the Commission holds a federal Land Patent**]:

Whereas, the federal Land Patent authorizes the Commission to dedicate the Patented Lands to wildlife habitat enhancement purposes consistent with the Recreation and Public Purposes Act of 1954;

Whereas, the habitat enhancement activities and other terms and conditions described in this Agreement are consistent with the terms of such Land Patent as shown by the consent of the Secretary of the Interior or his delegate attached to ***Exhibit C***;

Whereas, the written consent of the Secretary of the Interior or his delegate to the use of such portion of the Patented Land to the establishment and implementation of a In-Lieu Fee Compensatory Mitigation Project is attached to **Exhibit C**];

[**On lands for which the Commission is the defeasible fee title owner]:**

Whereas, the habitat enhancement activities and other terms and conditions described in this Agreement are consistent with the terms of such federal Deed as shown by the consent of the Secretary of the Interior or his delegate [or other federal agency as Grantor] attached to ***Exhibit C***;

Whereas, the written consent of the Secretary of the Interior or his delegate [or other federal agency as Grantor] to the use of such portion of the Property for the establishment and implementation of a In-Lieu Fee Compensatory Mitigation Project is attached to **Exhibit C**];

Whereas, the Conserved Land provides high quality habitat for [describe].

Whereas, under the provisions of Arizona Revised Statutes (“***A.R.S.***”) § 17-231, the Commission establishes policy for the management, preservation, and harvest of wildlife, and makes rules and regulations for managing, conserving, and protecting wildlife and fisheries resources.

Whereas, the laws of the State of Arizona relating to wildlife are administered by the AGFD pursuant to A.R.S. § 17-201.

Whereas, A.R.S. § 17-231 further provides that the Director of the Department, as chief administrative officer of the Commission, provides general supervision and control of all Department functions and activities.

Whereas, this Agreement is granted pursuant to the Amended In-Lieu Fee Enabling Instrument (the “Amended ***ILFEI***”) by and between AGFD, ACOE, and the United States Environmental Protection Agency, Region 9, dated \_\_\_\_\_\_ .

Whereas, consistent with the terms and conditions of this Agreement and the Amended ILFEI, the Conserved Land is and will remain in a Natural Condition as defined herein. The Conserved Land remaining in its Natural Condition is of importance to citizens of the State of Arizona and United States.

NOW THEREFORE, the Parties agree as follows:

AGREEMENT

1. Authority

* 1. The ACOE enters into this Agreement pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344, and its implementing regulations.
  2. The Commission enters this Agreement pursuant to A.R.S. § 17-231(B)(7).
  3. The Department has authority to act on behalf of the Commission pursuant to A.R.S. § 17-231.

1. **Purpose**
   1. The purpose of this Agreement is two-fold: (i) to ensure the Conserved Land will be retained in perpetuity in a Natural Condition (as defined below) and (ii) to prevent any use of the Conserved Land that will impair or interfere with the Natural Condition of the Conserved Land (the “***Purpose***”). The Parties intend that this Agreement will confine the use of the Conserved Land to such activities that are consistent with this Purpose, including without limitation, those involving the preservation, restoration, and enhancement of native species and their habitats.
   2. The term “***Natural Condition***,” as referenced in the preceding paragraph and other portions of this Agreement, shall mean the condition of the Conserved Land as it exists at the time this Agreement is executed, as well as future enhancements or changes to the Conserved Land that occur directly as a result of the following activities:

i. Long-term maintenance obligations (“***Long-Term Maintenance***”) that occur on the Conserved Land as described in Section 7 herein;

ii. Activities described in Section 3 herein;

iii. Additional compensatory mitigation measures authorized on the Conserved Land by future Department of the Army permits issued to the Department;

iv. Additional habitat establishment, enhancement, and/or restoration activities undertaken on the Conserved Land by the Department and approved by ACOE; or

v. Natural changes to the Conserved Land over time, and changes occurring due to acts beyond the Department’s control as described in Section 8(d) herein.

* 1. The Commission represents and warrants the only structures or other man-made improvements existing on the Conserved Land at the time this Agreement is executed consist of [describe]. The Commission further represents and warrants there are no previously granted easements existing on the Conserved Land that interfere or conflict with the Purpose of this Agreement as evidenced by the Condition of Title Report, attached hereto as ***Exhibit D***. The present Natural Condition is evidenced in part by the depiction of the Conserved Land attached on ***Exhibit E*** showing all relevant and plottable property lines, easements, dedications, improvements, boundaries and major, distinct natural features such as waters of the United States. The Department has delivered further evidence of the present Natural Condition to the ACOE consisting of (i) a color aerial photograph of the Conserved Land at an appropriate scale taken as close in time as possible to the date this Agreement is executed; (ii) an overlay of the Conserved Land boundaries on that aerial photograph; and (iii) on-site color photographs showing the major, distinct natural features of the Conserved Land.
  2. If a controversy arises with respect to the present Natural Condition of the Conserved Land, the Department and/or ACOE 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.

1. **Department’s Duties**

The Department shall:

(a) Undertake all reasonable actions to prevent the unlawful entry and trespass by persons whose activities would be inconsistent with the Natural Condition and would violate the permitted uses of the Conserved Land set forth in this Agreement;

(b) Cooperate with ACOE in the protection of the Natural Condition of the Conserved Land;

(c) Undertake construction, maintenance and monitoring of the approved-in-lieu fee project on the Conserved Land as described in the Development Plan prepared by \_\_\_\_\_\_ dated \_\_\_\_\_\_ and Interim Management Plan prepared by \_\_\_\_\_\_\_\_ dated \_\_\_\_\_\_\_\_, both of which are incorporated by this reference into this Agreement as if fully set forth herein, until issuance of final approval from the ACOE (“***Final Approval***”);

(d) Within 120 days from the Effective Date of this Agreement, erect signs and other notification features designed to limit unauthorized access to the Conserved Land or uses of the Conserved Land that are not consistent with this Agreement, Development Plan, and/or Management Plan. The erection and maintenance of informative signage shall not be in direct or potential conflict with the preservation of the Natural Condition of the Conserved Land or the Purpose of this Agreement;

(e) Obtain any applicable governmental permits and approvals for any activity or use permitted by this Agreement, 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;

(f) Upon receipt of Final Approval, perform Long-Term Maintenance on the Conserved Land set forth in Section 7, below;

(g) Perform an annual compliance inspection of the Conserved Land, prepare an inspection report, and make inspection reports available to ACOE upon request; and

# (h) Pay before delinquency all lawful taxes, assessments, fees, and charges of whatever description levied on or assessed against the Property by competent authority, and furnish ACOE with satisfactory evidence of payment upon request.

1. **Prohibited Uses**

Any activity on or use of the Conserved Land inconsistent with the Purpose of this Agreement is prohibited. Without limiting the generality of the foregoing, the following uses by the Department, and its respective employees, contractors, representatives, agents, and invitees under the Department’s control, are expressly prohibited:

## Unseasonable or supplemental watering except for (i) in-lieu fee projects undertaken by the Department set forth in the Development Plan; (ii) additional compensatory mitigation measures authorized on the Conserved Land by future Department of the Army permits issued to the Department or as otherwise approved by the ACOE; and (iii) irrigation authorized pursuant to Section 6 of this Agreement;

(b) Use of herbicides, pesticides, rodenticides, biocides, fertilizers, or other agricultural chemicals or weed abatement activitiesexcept as set forth in the Development Plan or Management Plan;

(c) Incompatible fire protection activities except emergency fire prevention activities set forth in Section 5;

(d) Use of off-road vehicles and use of any other motorized vehicles except in the execution of management or law enforcement duties, or as needed to conduct maintenance, repair or replacement activities for any [identify existing structures/improvements on Conserved Land] on the Conserved Land set forth in Section 5;

(e) Unless authorized in the Development Plan, Interim Management Plan or Long-term Management Plan for the Conserved Land and consistent with Section 6 of this Agreement, grazing or other agricultural activity of any kind;

(f) Camping, horseback riding or any other recreational use not specifically authorized below,

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

(h) Any legal or *de facto* division, subdivision or partitioning of the Conserved Land;

(i) Construction, reconstruction or placement of any building, road, trail, wireless communication cell towers, billboard or sign, or any other structure or improvement of any kind;except those signs specifically allowed under Sections 3 and 5(f) or as specifically provided for in the Development Plan, Interim Management Plan or Long-term Management Plan or as otherwise allowed in Section 5;

(j) Depositing or accumulation of soil, trash, ashes, refuse, waste, bio-solids or any other material;

(k) Planting, introduction or dispersal of non-native or exotic plant or animal species except for planting non-native plants as specifically provided in the Development Plan, Interim Management Plan or the Long-Term Management Plan;

(l) 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 Conserved Land;

(m) Altering the general topography of the Conserved Land, including, but not limited to, building of roads and flood control work; except as specifically provided for in the Development Plan, Interim Management Plan, or Long-term Management Plan;

(n) Removing, destroying, or cutting of trees, shrubs or other vegetation, except as required by law for (i) fire breaks, (ii) prevention or treatment of disease or the eradication of non-native species, (iii) completing the Development Plan, Interim Management Plan, and Long-term Management Plan, or (iv) activities described in Section 3;

(o) Manipulating, impounding or altering any natural watercourse, body of water or water circulation on the Conserved Land, and activities or uses detrimental to water quality, including but not limited to degradation or pollution of any surface or sub-surface waters unless the manipulation of such a water body returns the system to a natural functioning condition;

(p) Creating, enhancing, or 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;

(q) Target shooting;

## (r) Transferring, encumbering, selling, leasing, or otherwise separating the mineral or air rights for the Conserved Land;

## (s) 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 Department, the Conserved Land, or the use or activity in question;

(t) No use shall be made of the Conserved Land, and no activity thereon shall be permitted, that is or is likely to become inconsistent with the Purpose of this Agreement. The Parties acknowledge that, in view of the perpetual nature of this Agreement, 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 Purpose of this Agreement. ACOE, therefore, in its sole discretion, may determine whether (i) proposed uses or proposed improvements not contemplated by or addressed in this Agreement or (ii) alterations in existing uses or structures, are consistent with the Purpose of this Agreement; and

(u) The recording of any involuntary lien (which is not released within a reasonable period of time), or the granting of any lease, license or similar possessory interest in the Conserved Land which will affect the Natural Condition of the Conserved Land.

**5.** **Reserved Rights**

The Commission reserves all rights accruing from its ownership of the Conserved Land, including the right to engage in or to permit or invite others to engage in all uses of the Conserved Land that are not prohibited or limited by, and are consistent with, the Purpose of this Agreement, including the following uses:

(a) Access. Reasonable access through the Conserved Lands to adjacent land over existing roads, or to perform obligations or other activities permitted by this Agreement or that are required under the Development Plan or Management Plan. In addition, peace officers or other government agencies may enter the Conserved Land to address any legitimate public health or safety matter.

(b) Habitat Enhancement Activities. Establishment, restoration, and/or enhancement of native plant communities, including the right to plant trees and shrubs of the same type as currently existing on the Conserved Land, so long as such activities do not harm the habitat types identified in the Development Plan or Management Plan. For purposes of preventing erosion and reestablishing native vegetation, the Department shall have the right to revegetate areas that may be damaged by the permitted activities, naturally occurring events, or by the acts of persons wrongfully damaging the Natural Condition of the Conserved Land. Prior to any habitat enhancement activities, the Department shall submit detailed plans to the ACOE for review and approval. Habitat enhancement activities shall not be in direct or potential conflict with the preservation of the Natural Condition of the Conserved Land or the Purpose of this Agreement and shall be performed in compliance with all applicable statutes, regulations, and permitting requirements.

(c) Vegetation, Debris, and Exotic Species Removal. Removal or trimming of vegetation downed or damaged due to natural causes, removal of man-made debris, removal of parasitic vegetation (as it relates to the health of the host plant) and removal of non-native or undesirable plant or animal species. Vegetation, debris, and undesirable plant species removal shall not be in direct or potential conflict with the preservation of the Natural Condition of the Conserved Land or the Purpose of this Agreement and shall be performed in compliance with all applicable laws, regulations, and permitting requirements.

(d) Fire Protection. The right, in an emergency situation only, to maintain firebreaks (defined as a strip of plowed or cleared land made to check the spread of a fire), trim or remove brush, otherwise perform preventative measures required by the fire department to protect the Conserved Land from encroaching fire. All other brush management activities shall be limited to areas outside the Conserved Land.

(e) Future Compensatory Mitigation Activities. The Department shall have the right to conduct future compensatory mitigation activities, provided those activities do not negatively impact the terms of the Development Plan or Management Plan and are otherwise authorized by ACOE as part of the Amended ILFEI or separate Department of the Army permit; however, in no event will future compensatory mitigation activities conducted in accordance with a Department of the Army permit issued to the Department be available as credits under the Departments’ In-Lieu Fee Program.

(f) Signage installation and maintenance. The right, as needed, to install and maintain signage and other notification features or to provide appropriate warnings.

(g) Recreational uses. The Department shall have the right to allow the following public recreational uses on the Conserved Land: hiking, bird-watching, fishing, educational visits and scientific study.

(h) Maintenance of Existing Improvements. [Address on a case-by-case basis based on existing improvements/structures present on the Conserved Land].

**6.**  **Water Rights**

(a) Unless authorized in a Development Plan, Interim Management Plan, or Long-term Management Plan or as otherwise authorized by the ACOE, the following actions are prohibited: encumbering, selling, leasing, or otherwise severing or transferring the water rights for the Conserved Land; 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, round water rights, or other rights in and to the use of water historically used on or otherwise appurtenant to the Conserved Land, including but not limited to: (i) riparian water rights; (ii) appropriative water rights; (iii) rights to waters which are secured under contract with any irrigation or water district, to the extent such waters are customarily applied to the Conserved Land; and (iv) any water from wells that are in existence or may be constructed in the future on the Conserved Land.

(b) To the extent consistent with applicable law, any water rights appurtenant to the Conserved Land shall be dedicated to the establishment, enhancement, restoration, and/or maintenance of riparian or wetland habitat on the Conserved Land in accordance with the Development Plan and Management Plan, or to future habitat enhancement activities on the Conserved Land pursuant to Section 5(b) approved by ACOE that does not degrade the habitat improvements to the Conserved Land made pursuant to the Development Plan.

(c) To the extent consistent with applicable law, any water rights appurtenant to the Conserved Land may be used for irrigation on the Conserved Land if such irrigation is necessary to protect and preserve water rights or to provide forage and shelter to protected species as authorized in a Development Plan, Interim Management Plan, or Long-term Management Plan.

**7.** **Long-Term Maintenance**

(a) Upon receipt of Final Approval, the Department shall be responsible for ongoing, long-term maintenance of the Conserved Land as described in the Long-Term Management Plan prepared by \_\_\_\_ dated \_\_\_\_\_ , which is incorporated by this reference into this Agreement as if fully set forth herein.

(b) The Department shall be responsible for annual restoration of the Conserved Land damaged by any activities caused by the Department, and its respective employees, contractors, representatives, agents, and invitees under the Department’s control prohibited by Section 4 (a) - (v) herein.

(c) The Department shall prepare a monitoring and maintenance report documenting activities performed under Section 7(a) above, and shall make reports available to ACOE upon request.

(d) When activities are performed pursuant to Section 7(b) above, the Department shall prepare and submit a draft Restoration Plan to ACOE for review and approval prior to its implementation. Upon completion of restoration as specified in the approved Restoration Plan, the Department shall prepare a detailed monitoring report, and shall make the report available to ACOE within thirty (30) days of completion of restoration activities.

**8.** **Enforcement**

(a) Notice of Non-Compliance.

* + 1. If ACOE determines the Department is in non-compliance with the terms of this Agreement or that a violation is threatened, ACOE may demand the cure of such non-compliance. In such a case, ACOE shall issue a written notice to the Department (hereinafter "***Notice of Non-Compliance***") informing the Department of the violation and demanding cure of such violation.
    2. The Department shall cure the noticed violation within thirty (30) days of receipt of the written Notice of Non-Compliance. If a cure reasonably requires more than thirty (30) days, the Department shall, within the thirty (30) day period submit to ACOE for review and approval a plan and time schedule to diligently complete a cure. The Department shall complete such cure in accordance with the approved plan. If the Department disputes the Notice of Non-Compliance, it shall issue a written notice of such dispute (hereinafter "***Notice of Dispute***") to ACOE within thirty (30) days of receipt of written Notice of Non-Compliance.
    3. If the Department fails to cure the noticed violation(s) within the time period(s) described in Section 5(a)(ii) above or Section 5(b) below, ACOE may bring an action at law or in equity in a court of competent jurisdiction to enforce compliance by the Department with the terms of this Agreement. In such action, the ACOE may (1) recover any damages to which it may be entitled for violation by the Department of the terms of this Agreement. ACOE shall first apply any damages recovered to the cost of undertaking any corrective action on the Conserved Land; (2) enjoin the violation, *ex parte* if necessary, by temporary or permanent injunction without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies or (3) pursue other equitable relief, including, but not limited to, the restoration of the Conserved Land to the condition in which it existed prior to any such violation or injury.
    4. If the Department provides ACOE with a notice of dispute, as provided herein, the Parties shall meet and confer at a mutually agreeable place and time, not to exceed thirty (30) days from the date that ACOE receives the notice of dispute. ACOE shall consider all relevant information concerning the disputed violation provided by the Department, and shall determine whether a violation has in fact occurred and, if so, whether the Notice of Non-Compliance and demand for cure issued by ACOE is appropriate in light of the violation.
    5. If, after reviewing the Department's notice of dispute, conferring with the Department, and considering all relevant information related to the violation, ACOE determines that a violation has occurred, ACOE shall give the Department notice of such determination in writing. Upon receipt of such determination, the Department shall have thirty (30) days to cure the violation. If a cure reasonably requires more than thirty (30) days, the Department shall, within the thirty (30) day period submit to ACOE for review and approval a plan and time schedule to diligently complete a cure. The Department shall complete such cure in accordance with the approved plan.

(b) Immediate Action. If ACOE determines that circumstances require immediate action to prevent or mitigate significant damage to the Natural Condition of the Conserved Land, ACOE may immediately pursue all available remedies, including injunctive relief, available pursuant to both this Agreement and state and federal law after giving the Department at least twenty-four (24) hours' written notice before pursuing such remedies. So long as such twenty-four (24) hours' notice is given, ACOE 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 8(a)(ii). The written notice pursuant to this paragraph may be transmitted to the Department by electronic mail. The rights of ACOE under this paragraph apply equally to actual or threatened violations of the terms of this Agreement. The Department agrees that the remedies at law for ACOE for any violation of the terms of this Agreement are inadequate and that ACOE shall be entitled to the injunctive relief described in this Section 8, both prohibitive and mandatory, in addition to such other relief to which ACOE may be entitled, including specific performance of the terms of this Agreement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The remedies described in this Section 8(b) shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(c) Enforcement Discretion. Enforcement of the terms of this Agreement shall be at the discretion of ACOE. Any forbearance by ACOE to exercise rights under this Agreement in the event of any breach of any term of this Agreement by the Department shall not be deemed or construed to be a waiver by ACOE of such term or of any subsequent breach of the same or any other term of this Agreement or of any of the rights of ACOE under this Agreement. No delay or omission by ACOE in the exercise of any right or remedy upon any breach by the Department shall impair such right or remedy or be construed as a waiver. Further, nothing in this Agreement creates non-discretionary duty upon ACOE 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 ACOE by any third parties.

(d) Acts Beyond the Department’s Control. Nothing contained in this Agreement shall be construed to entitle ACOE to bring any action against the Department for any injury to or change in the Conserved Land resulting from:

i. Any natural cause beyond the Department’s control, including without limitation, fire not caused by the Department, flood, storm, drought, climate change, and earth movement;

ii. Any prudent action taken by the Department under emergency conditions to prevent, abate, or mitigate significant injury the Conserved Land resulting from such causes;

iii. Any acts of third parties beyond the control of the Department.

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

(e) Use of Monies from the In-Lieu Fee Program Account. Monies from the In-Lieu Fee Program Account established pursuant to the ILFEI cannot be used to (i) defend an action brought against the State of Arizona by ACOE; or (ii) pay damages as part of any judgment awarded by a court of competent jurisdiction; or (iii) restore the Conserved Land to the condition in which it existed prior to the non-compliance.

**9. Costs and Liabilities**

(a) The Department retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Conserved Land. The Department agrees ACOE shall not have any duty or responsibility for the operation, upkeep, or maintenance of the Conserved Land, the monitoring of hazardous conditions thereon, or the protection of the Department, the public or any third parties from risks relating to conditions on the Conserved Land. The Department remains solely responsible for obtaining any applicable governmental permits and approvals for any activity or use permitted by this Agreement, and any activity or use shall be undertaken only in accordance with all applicable federal, state, local and administrative agency statutes, ordinances, rules, regulations, orders and requirements.

(b) Should eminent domain proceedings be commenced against the Conserved Land, the Department shall promptly notify ACOE, Los Angeles District of any condemnation or adverse actions that would extinguish or reduce the Natural Condition of the Conserved Land in order to allow the ACOE the opportunity to consult with the U.S. Department of Justice to file a motion to intervene or to remove the action to the U.S. Federal District Court in order to assure that assessed proceeds reflect the amount of funds required to protect properties containing comparable waters of the United States as required by the Clean Water Act.

(c) The State of Arizona is self-insured. The State’s certificate of insurance is attached in ***Exhibit F*.**  The State of Arizona is not permitted to satisfy such potential liabilities with funds from the Program Account.

(d) (1) If liability of any kind is imposed on the United States relating to this Agreement due to the fault or negligence of the State of Arizona, its officers, agents or employees, the State shall, subject to the availability of funds, discharge the liability, and pay all related costs including the costs of settling claims arising out of work performed or contracts to perform work within the scope of this Agreement. Nothing in this Agreement shall be construed to imply that the legislature of the State of Arizona will appropriate funds sufficient to meet the liability.

(2) Notwithstanding the above, this Agreement does not confer any liability upon the State for claims payable by the ACOE under the Federal Torts Claims Act. Provided further that nothing in this Agreement is intended or will be construed to create any rights or remedies for any third party and no third party is intended to be a beneficiary of this Agreement.

(3) Nothing in this subparagraph 9(d) shall be construed to modify the Department’s responsibility for costs and liabilities pursuant to subparagraph 9(a).

**10. Transfer of Conserved Land**

(a) The Department shall give written notice to the ACOE of the Commission’s intent to transfer any interest at least sixty (60) days prior to the date of such transfer.

(b) Transfer of the Conserved Land shall provide for the future conservation protection of the Conserved Land pursuant to the intent of this Agreement. Although the ACOE is not authorized under the Clean Water Act, Section 404 to hold an interest in mitigation land either in fee or as a holder of an easement, it does have the authority pursuant to the Clean Water Act, Section 404, to enforce the protection of the waters of the United States, and their buffers, on the Conserved Land. Therefore, if the Conserved Land is transferred, the ACOE shall approve a new means for perpetual protection of the property prior to transfer.

**11. Assignment of Agreement**

This Agreement is not assignable by the Commission, either in whole or in part, without the prior consent of the ACOE, in the form of a formal written amendment to this Agreement.

**12. Notices**

Any notice, demand, request, consent, approval, or communication that either Party desires or is required to give to the other shall be in writing and be served personally or sent by first class mail, postage prepaid, addressed as follows:

|  |  |
| --- | --- |
| To AGFD: | Chief, Wildlife Contracts Branch  5000 W. Carefree Highway  Phoenix, AZ 85086  E-mail: [twade@azgfd.gov](mailto:twade@azgfd.gov) |
| To ACOE: | District Counsel U.S. Army Corps of Engineers 915 Wilshire Blvd, Room 1535 Los Angeles, CA 90017-3401  Email: Lawrence.n.minch@usace.army.mil  FAX: (213) 452-4217 |
|  |  |

or to such other address as either party shall designate by written notice to the other. Notice shall be deemed effective upon delivery in the case of personal delivery or, in the case of delivery by first class mail, five (5) 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.

**13. Amendment, Modification and Termination**

(a) This Agreement may be modified or amended only by written, mutual agreement of the Parties. Any such amendment shall be consistent with the Purposes of this Agreement.

(b) This Agreement may be terminated by either Party with ninety (90) days written notice of intent to terminate to the other Party. Termination of this Agreement shall provide for the future conservation protection of the Conserved Land pursuant to the intent of this Agreement. If the Agreement is terminated, the ACOE shall approve a new means for perpetual protection of the Conserved Land prior to termination.

**14. General Provisions**

(a) Controlling Law

The laws of the United States and the State of Arizona, disregarding the conflicts of laws principles of such state, shall govern the interpretation and performance of this Agreement.

(b) No forfeiture

Nothing contained herein shall result in a forfeiture or reversion of the Commission’s title to the Conserved Land in any respect.

(c) No waiver of sovereign immunity

This Agreement shall not be construed as a waiver of the sovereign immunity of the United States or of the State of Arizona. The United States and the State reserve all defenses and immunities to suit under applicable federal and state laws.

(d) Liberal Construction

Any general rule of construction to the contrary notwithstanding, this Agreement shall be liberally construed to effect the Purpose of this Agreement. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the Purpose of this Agreement that would render the provision valid shall be favored over any interpretation that would render it invalid.

* 1. Severability

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

* 1. 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 construction or interpretation.

* 1. Entire Agreement

This instrument together with the attached exhibits and any documents referred to herein sets forth the entire agreement of the Parties with respect to the Agreement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Agreement. No alteration or variation of this Agreement shall be valid or binding unless contained in an amendment in accordance with Section 13.

* 1. No Hazardous Materials Liability
     1. The Commission represents and warrants that it has no knowledge of any 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 Conserved Land, or transported to or from or affecting the Conserved Land.
     2. Despite any contrary provision of this Agreement, the Parties do not intend this Agreement to be, and this Agreement shall not be, construed such that it creates in or gives the ACOE any of the following:
        1. 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
        2. The obligations or liabilities of a person described in 42 U.S.C. Section 9607(a)(3) or (4); or
        3. The obligations of a responsible person under any applicable Environmental Laws (as hereinafter defined); or
        4. The right to investigate and remediate any Hazardous Materials associated with the Conserved Land; or
        5. Any control over the Department’s ability to investigate, remove, remediate or otherwise clean up any Hazardous Materials associated with the Conserved Land.
     3. The term “***Hazardous Materials***” includes, without limitation, (1) material that is flammable, explosive or radioactive; (2) petroleum products, including by-products and fractions thereof; and (3) hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in CERCLA, the Resource Conservation and Recovery Act (42 U.S.C. Section 6901 et seq.) the State Water Quality Assurance Revolving Fund (WQARF), A.R.S. 49-281 et seq. and the Arizona Hazardous Waste Management Act, A.R.S. Section 49-921 *et seq*., and regulations promulgated thereunder; the Hazardous Materials Transportation Act (49 U.S.C. Section 5101 et seq.); or any other applicable federal, state or local laws, ordinances, rules, regulations or orders now in effect or enacted after the date of this Agreement.
     4. 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. The Commission represents and covenants to the ACOE that the Department’s activities upon and use of the Conserved Land will comply with all Environmental Laws.
  2. Additional Interests

The Commission shall not grant easements, rights of way or other interests in the surface or subsurface of the Conserved Land (other than a security interest that is subordinate to this Agreement), or grant or otherwise abandon or relinquish any water agreement relating to the Conserved Land, without first obtaining the written consent of ACOE. ACOE may withhold such consent if it determines that the proposed interest or transfer is inconsistent with the Purpose of this Agreement or will impair or interfere with the Natural Condition of the Conserved Land. This Section shall not prohibit transfer of a fee or leasehold interest in the Conserved Land that complies with Section10. The Department shall record any easements or other interests in the Conserved Land approved by the ACOE in the official records of \_\_\_\_\_\_\_\_ County, Arizona and shall provide a copy of the recorded document to the ACOE.

**15.**  **Effective Date and Duration**

This Agreement will become effective on the date of signature by the last Party. The Agreement is not intended to be, and shall not be recorded by either Party to this Agreement in any county recorder’s office in this state. This Agreement shall remain in force until whichever of these events occurs first: 1) the Conserved Land is transferred pursuant to Section 10 of this Agreement or 2) the Agreement is terminated pursuant to Section 13 of this Agreement.

***[Signature Page Follows]***

IN WITNESS WHEREOF, the Arizona Fish and Game Commission, acting by and through the Director, Arizona Fish and Game Department, and the U.S Army Corps of Engineers, acting by and through its authorized officer, the District Engineer, executes this Agreement. 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 Agreement.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date

Colonel, US Army

Commander and District Engineer

The Arizona Game and Fish Commission

Larry Voyles, Director Date

Arizona Game and Fish Department

and Secretary to the Commission