

IN-LIEU FEE ENABLING INSTRUMENT

La Paz County Endangered Species 290

IN-LIEU FEE PROGRAM

This In-Lieu Fee Enabling Instrument (“Instrument”), dated this ____ day of _____, 2013 (“Execution Date”), is made by and between La Paz County (“County”), the U.S. Fish and Wildlife Service (“Service”), the Los Angeles District of the U.S. Army Corps of Engineers (“USACE”), Region IX of the U.S. Environmental Protection Agency (“USEPA”), the Arizona Department of Environmental Quality (“ADEQ”), the Arizona Game and Fish Department (“AGFD”), Pima County (“PC”), and the City of Phoenix (“CoP”). The USACE, USEPA, ADEQ, AGFD, PC, and CoP comprise and are referred to jointly as the Interagency Review Team (“IRT”). The County and Service are hereinafter collectively referred to as the “Program Sponsor.” 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 regarding the continued use, operation and maintenance of the La Paz County Endangered Species 290 In-Lieu Fee Program (the “Program”).

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 2005 Memorandum of Agreement (“MOA”) between USACE and Program Sponsor that formally established an in-lieu-fee program between the parties.
- B. The Program Sponsor is responsible for continuing the operation of the Program.
- C. USACE and USEPA have jurisdiction over Waters of the U.S. pursuant to the Clean Water Act (“CWA”), 33 U.S.C § 1251 *et seq.* Waters of the U.S. include jurisdictional wetlands.
- D. USACE has jurisdiction over Navigable Waters of the U.S. pursuant to section 10 of the Rivers and Harbors Act (“RHA”) of 1899, 33 U.S.C. § 403.
- E. 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.

- F. The IRT is the interagency group which oversees the establishment, use, operation, and maintenance of the Program.
- G. The primary goal of the Program is to provide effective Compensatory Mitigation for the Functions and Services of Waters/Navigable Waters of the U.S. lost through authorized Impacts.
- H. The objectives of the Program are (1) to provide an alternative to permittee-responsible Compensatory Mitigation by implementing In-Lieu Fee (“ILF”) Projects adequate to meet current and expected demand for Credits in the 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; and (3) achieve ecological success on a watershed-basis by siting ILF Projects using the best available decision support tools, and by integrating ILF Projects with ongoing conservation activities being undertaken within the Service Area.
- I. 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).

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

SECTION I: PURPOSE, BACKGROUND, AND AUTHORITIES

A. Purpose

The purpose of this Instrument is to establish guidelines, responsibilities, and standards for the continued use, operation, and maintenance of the Program. The Program will be used for Compensatory Mitigation for (1) unavoidable Impacts to Waters of the U.S. that result from activities authorized under section 404 of the CWA and section 10 of the RHA or (2) completed enforcement actions under the auspices of section 404 and of the CWA and Section 10 of the RHA.

B. Authorities

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

- 1. Federal Authorities
 - a. Clean Water Act (33 U.S.C. § 1251 *et seq.*);

- b. Rivers and Harbor Act (33 U.S. C. § 403 *et seq.*);
 - 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).
2. 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.

SECTION II: DEFINITIONS

The initially-capitalized terms used and not defined elsewhere in this Instrument are defined as set forth below.

1. **“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 the Program Sponsor based upon annual report results and IRT review of overall Program performance and compliance.
2. **“Advance Credits”** means any Credits of the Program that are available for sale prior to being fulfilled in accordance with an approved Development Plan.
3. **“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.
4. **“Compensatory Mitigation”** means the Restoration and/or Enhancement of aquatic resources for the purposes of offsetting unavoidable Impacts which remain after all appropriate and practicable avoidance and minimization measures have been achieved.
5. **“Credit”** is a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic ecosystem Functions at an ILF Project site(s). The measure of aquatic Functions is based on the resources Restored or Enhanced.
6. **“Credit Release”** means an action by the USACE to make specified Credits available for Transfer pursuant to this Instrument.

7. **“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.
8. **“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.
9. **“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 Functions.
10. **“Force Majeure”** shall mean war, insurrection, riot or other civil disorder, flood, earthquake, fire, disease, governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction, which has a material and detrimental impact on the Program or ILF Project site(s) and is beyond the control of Program Sponsor that could not be avoided through exercise of due care. Force Majeure does not include a failure to achieve Performance Standards.
11. **“Functions”** mean the physical, chemical, or biological processes that occur in ecosystems.
12. **“ILF Project”** means Compensatory Mitigation implemented by the Program Sponsor under the Program.
13. **“Impacts”** mean adverse effects.
14. **“Interim Management Period”** means the period from the Program Establishment Date until all the Performance Standards in the Development Plan have been met.
15. **“Interim Management Plan”** means 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.
16. **“Long-term Management Period”** means the period beginning upon conclusion of the Interim Management Period and continuing until long-term sustainability of the resource is achieved, during which each ILF Project is to be managed, monitored and maintained pursuant to the Long-term Management Plan. The Long-term Management Period will be specified in the Long-term Management Plan.
17. **“Long-term Management Plan”** means the document that identifies specific management activities that are required to be performed at each of the ILF Project sites,

including, but not necessarily 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. Each Long-term Management Plan will be bound by the terms and conditions of the Instrument by reference.

18. **“Navigable Waters of the U.S.”** are waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.
19. **“Performance Standards”** means the minimum standards set forth in the Development Plan to define the successful development of Waters/Navigable Waters of the U.S.
20. **“Phase I Environmental Site Assessment”** is an assessment of the environmental condition of the ILF Project site 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 which is active at the time of the assessment.
21. **“Preservation”** means the protection of existing ecologically important wildlife, habitat or other ecosystem resources.
22. **“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 or completed enforcement actions under the auspices of section 404 of the CWA or section 10 of the RHA.
23. **“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.
24. **“Property Assessment”** means the written ILF Project site evaluation signed by the Program Sponsor, using the form attached in **Exhibit I**.
25. **“Remedial Action”** means any corrective measures which the Program Sponsor is required to take to ameliorate any injury or adverse Impact to the ILF Project site as Restored or Enhanced or as a result of a failure to achieve the Performance Standards.
26. **“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.
27. **“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.

28. **“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.
29. **“RIBITS”** means the Regulatory In-Lieu Fee and Bank Information Tracking System.
30. **“Services”** mean the benefits that human populations receive from Functions that occur in ecosystems.
31. **“Service Area”** means the geographic area(s) within which Impacts to Waters/Navigable Waters of the U.S. that occur may be compensated through Credits from the Program.
32. **“Transfer”** means the use, sale, or conveyance of Credits by the Program Sponsor.
33. **“Unlawful Act”** shall mean the unlawful act of any person or entity other than the Program Sponsor and shall include an event or series of events, such as the intentional release within the ILF Project site(s), or any connected watercourse, of any Hazardous Substance, or the discharge of such a substance 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.
34. **“Waters of the U.S.”** mean waterbodies, including wetlands, over which there is federal jurisdiction under section 404 of the CWA.

SECTION III: STIPULATIONS

A. Disclaimer

This Instrument does not in any manner affect the statutory authorities and responsibilities of the Parties, but is, instead, an implementation of such authorities and responsibilities.

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
- 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

SECTION IV: PROGRAM STRUCTURE

A. Framework:

This Instrument is intentionally broad and sets the framework under which Program sponsored 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 and or as a result of completed enforcement actions under the auspices of section 404 of the CWA and section 10 of the RHA. As ILF Projects are identified, the Program Sponsor will submit site-specific Development Plans, Interim Management Plans, and Long-term Management Plans as necessary to the USACE for review and approval as modifications to the Instrument through the process outlined in **Exhibit C**, and included in this Instrument as subparts of **Exhibits D-F**.

B. Program Objectives

Program objectives include, but are not limited to providing Compensatory Mitigation to offset Impacts to Waters/Navigable Waters of the U.S., with a focus on restoring and enhancing Federally-listed native fish species/habitats. The Program, consistent with Restoration and Enhancement of Waters/Navigable Waters of the U.S., will seek to provide for specific needs of Federally-listed aquatic species within the watershed including support for augmentation and reestablishment recovery activities, population and habitat enhancement, and evaluation and monitoring (occupancy, census, trends, habitat use & evaluation, etc). No physical habitat Establishment is expected as part of this Program.

C. Service Area

The Service Area for the Program is defined as an area of the Lower Colorado River bounded up-river by Hoover Dam and down-river by the Southern International Boundary with Mexico constituting the Lower Colorado River watershed Exhibit B. From a watershed perspective, the Service Area is comprised of the Lower Colorado River six-digit Hydrologic Unit Code (HUC) 150301 and encompasses the Colorado portion of the following eight-digit HUCs:

15030102 -- Piute Wash.

15030103 -- Sacramento.

15030104 -- Imperial Reservoir.

15030105 -- Bouse Wash.

15030106 -- Tyson Wash.

15030107 -- Lower Colorado.

15030108 -- Yuma Desert.

This specific Service Area was chosen based on environmental considerations and overlays the remaining riverine range of the focal endangered fish species in the lower Colorado River basin.

D. Program Account

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. The Program Sponsor will utilize the Program Account to deposit proceeds from the sale of Credits, and will be used only for the comprehensive costs associated with site selection, design, acquisition, implementation, monitoring, and management of ILF Projects, and administrative costs for the Program Sponsor. Administrative costs equal to 15% of each Credit sale will be allowed for the Program Sponsor 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 Impacts to Waters/Navigable Waters of the U.S. Funds for the operation of the Program may be obtained from other sources and repaid as Credits are sold.

1. Complete budgets for individual ILF Projects will be approved as part of Development Plans.
2. Annual accounting reports will be presented by September 30th for approval by the 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. The 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.

E. Program Effective Date

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

F. 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, as applicable, 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).

G. 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 CWA and section 10 of the RHA as well as appropriate enforcement actions under the purview of those authorities. The USACE, based on recommendations of the IRT, will determine the number of Credits available for each ILF Project based upon the approved design and the resulting habitats achieved, 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 the USACE standard operating procedures at the time of its approval. The Program Sponsor shall provide for access to the ILF Project site by members of the IRT or their agents or designees at reasonable times as necessary to conduct inspections and compliance monitoring with respect to the requirements of this Instrument. Inspecting parties shall not unreasonably disrupt or disturb activities on the ILF Project site, and will provide written notice within reasonable time prior to the inspection.

A. Establishment

1. Project Site Selection

All individual ILF Projects will be located within the Program 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 (as applicable) and submit a written request to the 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, 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, held in the Program Account to manage the individual ILF Project, including contingency costs, Adaptive Management, and Remedial Actions.

- c. A financial assurance or Letter of Commitment for each ILF Project as determined to be necessary by the USACE in consultation with the IRT in accordance with 33 C.F.R. 332.3(n).
- d. 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 determination 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**. Depending on the proposed ILF Project, the USACE, at its sole discretion, may determine that the Property Assessment is not required or may otherwise determine that certain sections or attachments associated with the Property Assessment Form are inapplicable to a particular ILF Project. 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 the 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. Where active long-term management and maintenance is determined by the USACE, in consultation with the IRT, to be necessary to ensure long-term sustainability, the Program Sponsor must provide for such management and maintenance, and shall be responsible for preparing Long-term Management Plans in accordance with **Exhibit F**. For ILF Projects requiring long-term management and maintenance, the Program Sponsor shall implement long-term management and monitoring of the ILF Project site(s) according to the Long-term Management Plan. Program Sponsor shall be obligated to manage and monitor the ILF Project site to preserve its habitat and conservation values in accordance with this Instrument 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 be managed by a land steward entity in a separate endowment account 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, 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 discovers any failure to achieve the Performance Standards or any injury or adverse impact to the ILF Project site as Restored or Enhanced, the Party making the discovery shall notify the other Parties. Subject to the limitations on any duty of the Program Sponsor to remediate outlined in Section IX.A, the USACE in consultation with the IRT 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, the 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 ameliorate 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 USACE 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 the USACE may direct funds from the Program Account to undertake Remedial Action on the ILF Project site.
- b. If the 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 the USACE shall notify the Program Sponsor. Upon the USACE giving such notice, 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 Protection Strategy

Program Sponsor is responsible for ensuring long-term protection of the ILF Project site. Long-term protection may be provided through real estate instruments or other available mechanisms, as appropriate. The long-term protection mechanism must be approved by the USACE and must be finalized before any Advance Credits can be become released Credits.

SECTION VI: PRE-EXISTING ILF PROJECTS

A. ILF Projects (1) previously approved for design under the 2005 MOA and (2) fully funded (for construction through long term management) prior to the Program Effective Date shall be completed in accordance with the terms of the 2005 MOA. If any of the ILF Projects approved under the 2005 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.

B. ILF Projects previously approved for design under the 2005 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 2005 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 fifty (50) Advance Credits for the Service Area. The number of Advance Credits that are approved for Transfer is based on (1) the projected mitigation opportunities within the Service Area, (2) the Program Sponsor's past performance for implementing Enhancement and Restoration activities within the Service Area, and (3) the projected financing necessary to begin planning and implementation of ILF Projects.

Once the Program Sponsor has sold all of its Advance Credits, 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 initial physical and biological improvements by the third full

growing season after the Transfer of Advance Credits. If Program Sponsor fails to meet these deadlines, 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 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.

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

1. Up to 25% of anticipated Credits may be released upon approval of a Development Plan.
2. Up to an additional 25% of anticipated Credits may be released upon completion of improvements per the approved Development Plan and USACE approval of the as-built report.
3. Up to an additional 25% of anticipated Credits may be released incrementally upon achievement of short term (i.e., Years 1-3) Performance Standards.
4. The remaining generated Credits may be released upon achievement of long-term (i.e., Year 5) Performance Standards.

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 or Enhancement 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, as applicable. 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 section 404 of the CWA and/or section 10 of the RHA 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 or resolution of an unauthorized activity under section 404 of the CWA or section 10 of the RHA.
3. Deposits for such Credits shall be placed in the Program Account.
4. The 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 the USACE will accept the use of Program Credits for a specific project, and authority for approving use of the Program for Compensatory Mitigation lies with the 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 the 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 the USACE of a Credit sale certificate that is signed by the Program Sponsor and the permittee and dated (see **Exhibit G**); and 3) the transfer of fees from the permittee to the 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 the Program Sponsor and the permittee.

7. Joint and Several Liability. Notwithstanding Title 12, Section 2506 of the Arizona Revised Code, all of the County's and Service's promises in this Instrument are joint and several.
8. Debits will be reflected in annual accounting reports as outlined in Section VIII.
9. Subject to the limitations on any duty of the Program Sponsor to remediate outlined in Section IX.A, if a ILF Project site is damaged after the Program Effective Date, and such damage materially impairs Waters/Navigable Waters of the U.S. or habitat values on such damaged ILF Project site, then the 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 the Program Sponsor has reasonably restored such damaged area, if required, pursuant to a Remedial Action plan approved by the IRT.

SECTION VIII: PROGRAM REPORTING

A. Annual Report

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 30th 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 30th 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. 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 Interim and Long-term Management Plans, as applicable, contain reporting requirements that are separate from, and in addition to, the requirements listed below for the annual report.

The annual report shall contain an itemized account of the management tasks and Remedial Actions 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, i.e. the dates “from” and “to”;
- b. A description of each management task conducted, the dollar amount expended and time required;
- c. The total dollar amount expended for management tasks conducted during the reporting period; and
- d. A description of the overall condition of each ILF Project site, which may include color photos documenting the status of the ILF Project site and a map documenting the location of the photo points, as the USACE deems appropriate.

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 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 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

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

1. All disputes which arise under or with respect to this Instrument shall in the first instance be the subject of informal negotiations. The period for informal negotiations shall not exceed 30 days from the time the dispute arises, unless the Parties agree to extend this time period. The dispute shall be considered to have arisen when one Party sends a written Notice of Dispute to the other Parties.
2. In the event that the dispute cannot be resolved through informal negotiations, then the position advanced by the USACE shall be considered binding unless, within 14 days after the conclusion of the informal negotiation period, Program Sponsor invokes formal dispute resolution by serving on the other Parties a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position. Within 14 days after receipt of Program Sponsor's Statement of Position, USACE or the IRT may submit its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position. Within 10 days after receipt of USACE's or the IRT's Statement of Position, Program Sponsor may submit a Reply.
3. The Commander of the USACE, Los Angeles District shall resolve the dispute, which resolution shall be binding.
4. Resolution of disputes relating to Instruments and Amendments shall be in accordance with 33 C.F.R. 332.8. Disputes related to satisfaction of Performance Standards may be referred by a Party to independent review from government agencies or other recognized experts who are not members of the IRT.

D. Modification, Amendment and Termination/Program Closure 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. The 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 the 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 financing obligations have been met and the long-term ownership of all mitigation lands has been transferred to the party responsible for ownership and all long-term management of the ILF Project(s). Funds remaining in the Program Account after these obligations are satisfied must continue to be used for the Restoration and/or Enhancement of aquatic resources within the Service Area. The USACE shall direct the 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 undertake the compensation activities. 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 in it to be consistent with each other, and for each document to be binding in accordance with its terms. To the fullest extent possible, 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. The captions and headings of this Instrument are for convenient reference only, and shall not define or limit any of its terms or provisions.

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, or portions of them, 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.

Program Sponsors:

La Paz County
Dan Field
County Administrator
1108 Joshua Ave
Parker, AZ 85344
dfield@co.la-paz.az.us

U.S. Fish and Wildlife Service
Kirk Young
Project Coordinator
2500 South Pine Knoll Drive
Flagstaff, AZ 86001
Kirk_young@fws.gov

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 Parties is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of appropriated funds. Nothing in this Instrument may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or the Arizona State Treasury. No Parties are 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 venturer of any other Party.

O. Governing Law

This Instrument shall be governed by and construed in accordance with the CWA, 33 U.S.C. § 1251 *et seq.*, and other applicable federal and state 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 IX: 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:

Program Sponsor
La Paz County

Dan Field
County Administrator

Date

Program Sponsor
U.S. Fish and Wildlife Service

Stewart Jacks
Project Leader

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

Date

Pima County

Chuck Huckelberry
County Administrator

Date

Arizona Department of Environmental Quality

Linda Taunt
Deputy Director, Water Quality Division

Date

City of Phoenix

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))

Elements that will be used to plan for the selection, acquisition, and implementation of aquatic resources Restoration, Enhancement, and management.

- **33 CFR Section 332.8(c)(2)(i): The geographic Service Area, including a watershed-based rationale for the delineation of each Service Area.**

The proposed geographic Service Area for the Program is defined as an area of the Lower Colorado River (LCR) bounded up-river by Hoover Dam and down-river by the Southern International Boundary with Mexico constituting the LCR watershed (Exhibit B, Figure 1). From a watershed perspective, the Service Area is comprised of the LCR six-digit Hydrologic Unit Code (HUC) 150301 (Exhibit B, Figures 2 & 3) and encompasses the Colorado portion of the following eight-digit HUCs:

15030102 -- Piute Wash.
15030103 -- Sacramento.
15030104 -- Imperial Reservoir.
15030105 -- Bouse Wash.
15030106 -- Tyson Wash.
15030107 -- Lower Colorado.
15030108 -- Yuma Desert.

This specific Service Area was chosen based on environmental considerations and overlays the remaining riverine range of the focal endangered fish species in the LCR basin.

- **33 CFR 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 the LCR are expected to have future impacts from a variety of sources including but not limited to: utility line sitings, flood management activities, linear transportation projects, and residential, commercial and industrial developments. Functional impacts include Federally-listed native fish habitat loss or modification resulting in interruption or cessation of use and fulfillment of natural history functions (reproduction, feeding, shelter, growth, etc).

Program objectives include, but are not limited to providing Compensatory Mitigation to offset Impacts to Waters/Navigable Waters of the U.S., with a focus on restoring and enhancing Federally-listed native fish species/habitats. The Program, consistent with Restoration and Enhancement of Waters/Navigable Waters of the U.S., will seek to provide for specific needs of Federally-listed aquatic species within the watershed including support for augmentation and reestablishment recovery activities, population and habitat enhancement, and evaluation and monitoring (occupancy, census, trends, habitat use & evaluation, etc). No physical habitat Establishment is expected as part of this Program.).

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

A marked decline in populations of native big river fish species (razorback sucker; bonytail, and others) can be attributed to construction of dams and reservoirs, channelization and river shore development, introduction of nonnative fishes, and removal of large quantities of water from the Colorado River system. Dams on the mainstem Colorado River and its major tributaries have segmented the river system, blocked migration routes, and changed river habitat. Dams and river channel modification also have drastically altered flows, temperatures, and channel geomorphology. These changes have modified habitats in many areas so that they are no longer suitable for breeding, feeding, or sheltering. Major changes in species composition have occurred due to the introduction of numerous nonnative fishes, many of which have thrived due to human-induced changes to the natural riverine system. These nonnative fishes prey upon and compete with native species.

Marsh and backwater were lost from areas where they historically occurred because of agricultural conversion, construction of reservoirs, river channelization, and bankline stabilization. Historically, substantial floodplain area was inundated by the high river flows following winter and summer storms and during the spring and early summer run off. These areas that were inundated were prime areas of use for juvenile razorback suckers.

Ongoing activities affecting aquatic habitats within the LCR include shoreline development/modification (e.g. boat docks, piers, revetment, retention walls, boat docks, etc), flood control (revetment, riprap, etc.), dredging, and channelization activities.

- **33 CFR 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.**

Present conditions in the LCR are significantly different from historical conditions. The Service Area behind Parker Dam is relatively shallow mesoeutrophic and warm-water impoundment with a complex shoreline. It supports sport fisheries of nonnative species and also the repatriated and potentially remnant native fish populations of razorback sucker and bonytail. More than 50 percent of the riverbank downstream of Davis Dam has been replaced with riprap. Under existing conditions, the river is constrained by reservoir operation, levees, and channelization, which all contribute to the loss of native fish habitat.

A more specific analysis of the current aquatic resource conditions will be determined as ILF Projects are developed. Since this will require extensive field work, this activity will be undertaken once the Program is approved and ILF Project sites are selected.

- **33 CFR 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.**

Program goals and objectives include, but are not limited to providing Compensatory Mitigation to offset Impacts to Waters/Navigable Waters of the U.S., with a focus on restoring and enhancing Federally-listed native fish species/habitats.

The Program, consistent with Restoration and Enhancement of Waters/Navigable Waters of the U.S., will seek to provide for specific needs of Federally-listed aquatic species within the watershed including support for augmentation and reestablishment recovery activities, population and habitat enhancement, and evaluation and monitoring (occupancy, census, trends, habitat use & evaluation, etc) within the Service Area. No physical habitat Establishment is expected as part of this Program.

- **33 CFR Section 332.8(c)(2)(vi): A prioritization strategy for selecting and implementing compensatory mitigation activities.**

Prioritization for selecting and implementing Compensatory Mitigation will be: 1) Enhancing or Restoring aquatic resources through projects or actions that provide direct benefits to the listed fish species or their habitats, 2) Enhancing or Restoring aquatic resources through projects or actions that provide future benefits to the listed fish species or their habitats, or 3) Enhancing or Restoring aquatic resources through projects or actions that increase understanding of needs or facilitate quantification of Program benefits.

- **33 CFR Section 332.8(c)(2)(vii): 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)).**

This Program has not identified any preservation objectives and has no intention of proposing or offering preservation Credits within its Program. Therefore, no further analysis regarding preservation is required.

- **33 CFR Section 332.8(c)(2)(viii): Public and Private Stakeholder Involvement.**

Since 2005, Program activities have been coordinated with State (Arizona & California) and Federal agencies (USFWS-Refuges; U.S. Bureau of Reclamation) through annual coordination/science meetings (Colorado River Aquatic Biologists Meeting, Lake Mohave Work Group, Lake Havasu Work Group), various permit requests and reports, and project by project discussions.. Involvement with public and municipal entities have taken place opportunistically in the field and at meetings.

- **33 CFR Section 332.8(c)(2)(ix): Long-term Management Strategies.**

Program Sponsor is responsible for ensuring long-term protection of the ILF Project site. Long-term protection may be provided through real estate instruments or other available mechanisms, as appropriate. The long-term protection mechanism will be approved by the USACE and finalized before any Advance Credits become released Credits. Examples of long-term
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management strategies include, but are not limited to, research and monitoring of species and habitat to measure Impacts to aquatic resources and promote development of further management strategies to ensure long-term sustainability of aquatic resources at the ILF Project site. .

- **33 CFR Section 332.8(c)(2)(x): Periodic Progress Evaluations.**

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 30th 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 30th 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. 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 Interim and Long-term Management Plans contain reporting requirements that are separate from, and in addition to, the requirements listed below for the annual report.

The annual report shall contain an itemized account of the management tasks and Remedial Actions 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, i.e. the dates “from” and “to”;
- b. A description of each management task conducted, the dollar amount expended and time required;
- c. The total dollar amount expended for management tasks conducted during the reporting period; and
- d. A description of the overall condition of each ILF Project site, which may Include color photos documenting the status of the ILF Project site and a map documenting the location of the photo points, as the USACE deems appropriate.

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 in accordance with Section IV.C.3 of the Instrument.

Exhibit B
Program Service Area Map

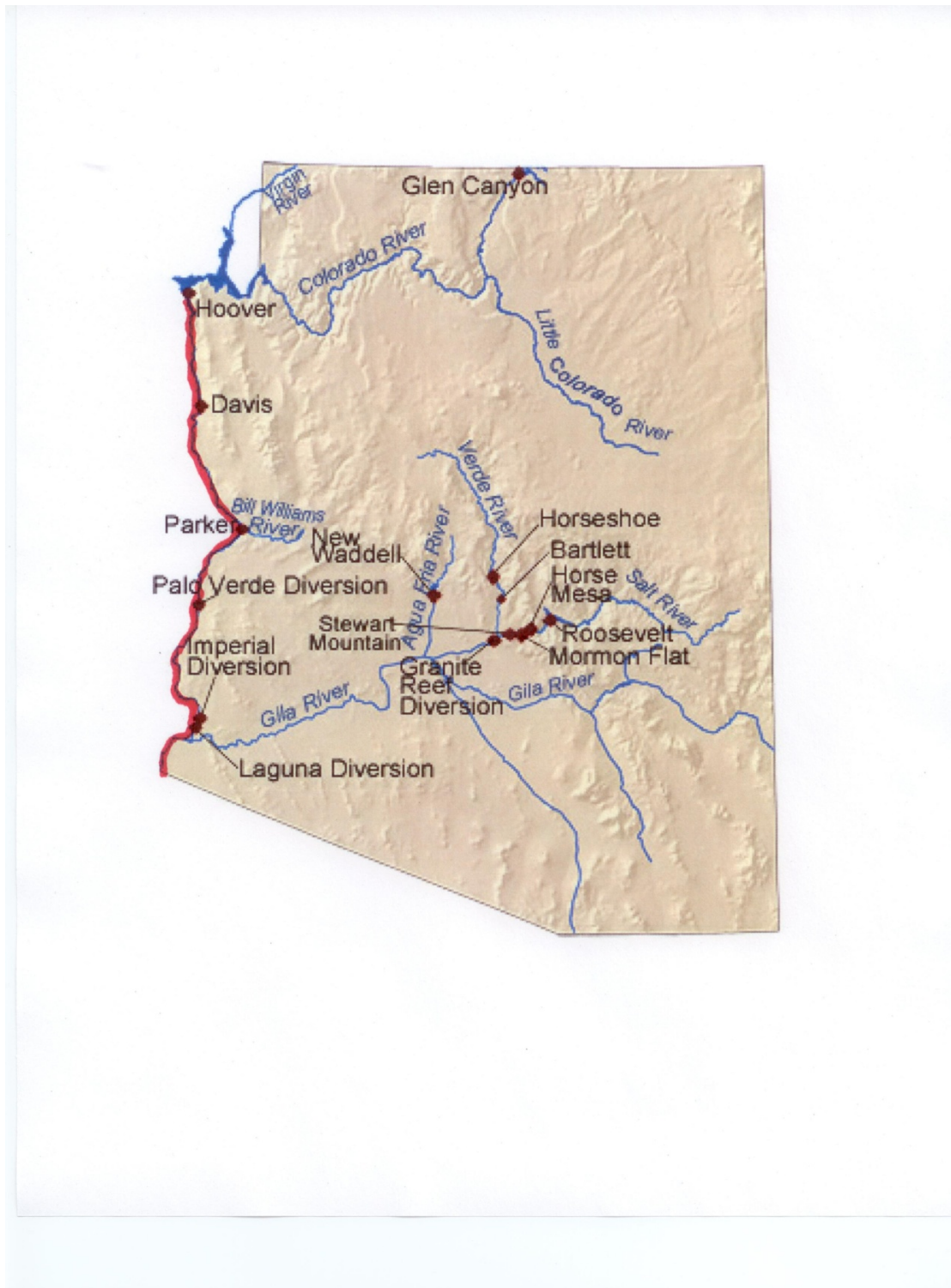


Figure 1. Map of Service Area (red line), Western border of the state -- Hoover Dam down-river to Southern International Boundary.
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Figure 2. LCR below Lake Meade (Hoover Dam) HUC 150301 (red line)
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Figure 3. LCR below Lake Meade (Hoover Dam) HUC 150301 (red line)
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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

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- 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, including additional ILF Projects of less than \$30,000.00. 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 Plans

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 Plans

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 Plans

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 F1 and continuing sequentially.

Exhibit G: Statement of Sale of Credit Form

**La Paz County Endangered Species 290
In-Lieu Fee Program**

[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 the La Paz County Endangered Species
290 In-Lieu Fee Program to [Permittee Name]

The La Paz County Endangered Species 290 In-Lieu Fee Program 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, La Paz County Endangered Species 290 In-Lieu Fee Program is the party responsible for fulfilling the mitigation aspect of Special Condition(s) _____ of the Permit(s) listed above.

Signed

La Paz County Endangered Species 290 In-Lieu Fee Program

Exhibit H: Credit Ledger Report Form

Exhibit H: [INSERT NAME OF] MITIGATION SITE

		Advanced Credits in Service Area				Project Site	
		Advanced Credits Initially Awarded By ACOE	Advanced Credits Sold By Program Sponsor (including USACE Permit #)	Advanced Credits Available for Sale by Program Sponsor		Credits Awarded by USACE from approved Development Plan	Number of Credits Released
	Rehabilitation/ Restoration						
	Enhancement						
	Total						

EXHIBIT I: PROPERTY ASSESSMENT FORM

PROPERTY ASSESSMENT

for

the La Paz County Endangered
Species 290 In-Lieu Fee Program

This Property Assessment (“Property Assessment”) is made as of this ____ day of _____, 20__, by La Paz County, United States Fish and Wildlife Service, and the Los Angeles District of the U.S. Army Corps of Engineers, Region IX of the U.S. Environmental Protection Agency, Arizona Department of Environmental Quality, Arizona Game and Fish Department, Pima County, City of Phoenix, which agencies are jointly referred to in this Property Assessment as the “Signatory Agencies.”

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.

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. La Paz County and U.S. Fish and Wildlife Service intend to undertake an In-Lieu Fee (“ILF”) Project on _____ acres(s) of the Property (the “ILF Project Site”).

2. The Property and ILF Project Site includes legal access to and from [insert name of public street or road]. [If special access rights are required to reach the Property

or ILF Project Site, those access rights must also be addressed in this Property Assessment.]

3. 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 ILF Project Site 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) that may adversely affect title to the Property or interfere with the implementation of an ILF Project thereon. Attachment 4, attached hereto and incorporated by reference in this Property Assessment, depicts all relevant and plottable property lines, easements, dedications, etc. on the ILF Project Site.

4. The following attachments are incorporated by reference in this Property Assessment, as applicable:

- 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 ILF Project Site 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 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 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 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 values of the Property]
 _____ acres of Property subject to interest
 _____ acres of Property not subject to interest

Attachment 4

Map(s)

[Attached]