

INDIANA BAT CONSERVATION AGREEMENT

MEMORANDUM OF AGREEMENT BETWEEN THE U.S. FISH AND WILDLIFE SERVICE AND INSERT COOPERATOR NAME

This Conservation Memorandum of Agreement (MOA) is entered into by the United States Department of the Interior, U.S. Fish and Wildlife Service, Kentucky Field Office (Service) and (INSERT COOPERATOR NAME) to promote the survival, conservation, and recovery of the Indiana bat (*Myotis sodalis*), a federally listed endangered species. Together, the Service and INSERT COOPERATOR NAME are referred to as “Cooperators.”

Section 1: PURPOSE AND OBJECTIVES

The Indiana bat is a federally listed endangered species native to a large portion of the eastern United States and the Commonwealth of Kentucky. This MOA will implement recovery focused conservation measures that will be undertaken by the Cooperators and afford a measurable conservation benefit for the Indiana bat consistent with the Indiana Bat Mitigation Guidance (Guidance) dated [May 14, 2010](#) and hereby incorporated by reference. These measures will be implemented in association with qualified project-specific impacts as detailed in section 4 of this MOA. This MOA shall define the specific obligations of the Cooperators and all measures will be implemented according to the terms of this MOA. The Cooperators understand and intend that the benefits resulting from this MOA may also provide conservation benefits for other federal protected species and native fish and wildlife. This MOA provides the tangible benefits to the Indiana bat beyond those that typically would be required or expected to occur during either the Endangered Species Act (ESA) section 7(a)(2) consultation or ESA section 10(a)(1)(B) regulatory processes.

Section 2: AUTHORITY

This MOA is hereby entered into under the authorities of the Endangered Species Act (16 U.S.C. 1531 *et seq.*), Fish and Wildlife Act of 1956 (16 U.S.C. 742a. *et seq.*), and the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*). Section 5 of the ESA provides that, “The Secretary...shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species...” and “shall utilize land acquisition and other authority under the Fish and Wildlife Act, as amended, and the Migratory Bird Conservation Act, as appropriate”. Section 7(a) (1) of the ESA further directs Federal agencies to “utilize their authorities in furtherance of the purposes of this Act [ESA] by carrying out programs for the conservation of endangered species and threatened species.” The Fish and Wildlife Act of 1956 provides that the Secretary shall “...take such steps as

may be required for the development, advancement, management, conservation, and protection of fish and wildlife resources...". Finally, the Fish and Wildlife Coordination Act states that the Secretary is authorized "to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat..."

The authorization for any incidental take of the Indiana bat that results from impacts associated with qualified project(s), as defined in section 4, is provided in the incidental take statement of the Service's biological opinion (Appendix A) issued by the Service pursuant to section 7 of the ESA, which is incorporated herein by reference. The biological opinion covers the Service's development of and participation in conservation agreements for the Indiana bat, which includes this MOA, that are based on implementation of the Guidance and provides incidental take authorization for 8,000 acres of forested habitat per year through September 30, 2013.

Section 3: STATEMENT OF MUTUAL INTEREST

The mission of the Service is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The Service's major responsibilities are for endangered species, threatened species, migratory birds, certain marine mammals, and freshwater and anadromous fish. The Service recognizes the ability and interest of INSERT COOPERATOR NAME to contribute to the conservation and recovery of the Indiana bat, and recognizes INSERT COOPERATOR NAME as a partner in the recovery and habitat conservation of the species. INSERT COOPERATOR NAME recognizes the Service's mission and its interest in developing partnerships to protect, restore, and manage important habitats on private and public lands for federal listed species. The Cooperators understand the collaboration for this MOA is voluntary.

Section 4: DESCRIPTION OF QUALIFYING PROJECTS

INSERT COOPERATOR NAME undertakes multiple projects on an annual basis that are similar in the nature of their activity and their potential to cause adverse effects to Indiana bats. INSERT COOPERATOR NAME has provided the Service with a list of these work practices and descriptions of these activities and how they are conducted. These descriptions are incorporated in this MOA and can be found under Appendix B.

The Service has reviewed these work practices and determined that the following practices are not likely to adversely affect the Indiana bat: Surveying, Site Evaluation and Installation of Best Management Practices, Mowing and Bush Hogging, Customer-Focused Reliability Trimming (in high and medium intensity development areas), Herbicide Application, and General Land Disturbance and Construction.

The Service has determined that the following practices may affect and under some circumstances, are likely to adversely affect the Indiana bat: Clearing, Right-of-Way Enhancement, and Emergency Actions.

For those work practices which may adversely affect the Indiana bat, INSERT COOPERATOR NAME shall quantify the acreage of suitable habitat to be impacted and implement the appropriate minimization and mitigation measures as set out in section 6.

If INSERT COOPERATOR NAME identifies a project which may adversely affect the Indiana bat where the activities proposed are not substantially reflected in the Work Practices Description (Appendix B) dated Month/Day/Year, INSERT COOPERATOR NAME shall contact the Service for an evaluation of the project to determine if the changes are a minor deviation which will and would allow inclusion of the project under this MOA or if the changes are a major deviation where a separate evaluation will be required. The Service shall determine if the changes are minor or major and provide this determination to INSERT COOPERATOR NAME in writing within 10 business days. If the Service does not respond within 10 business days, INSERT COOPERATOR NAME can consider the project eligible under this MOA.

The Service, in its May 14, 2010 Guidance has determined that certain groups of impacts will require project-specific review by the Service to assess the appropriateness of the minimization and mitigation measures. As outlined in the Guidance, these include:

- Projects resulting in the loss of more than 250 acres of Indiana bat habitat
- Projects occurring within 1 mile of priority 1 or 2 hibernacula
- Projects occurring within ½ mile of priority 3 or 4 hibernacula
- Projects resulting in impacts to identified hibernacula with percent forest cover less than 60 percent in the 10-mile radius surrounding the entrance
- Projects resulting in impacts to identified maternity areas with percent forest cover less than 45 percent
- Projects resulting in impacts to known maternity habitat between June 1 and July 31. Limited clearing during this time may be approved only after a detailed survey to ensure that no primary maternity roosts are removed during this sensitive period

Project-specific impacts that fall into any of these groups shall be coordinated with the Service as outlined in section 6.2. The map and any supporting information provided to INSERT COOPERATOR NAME under section 6.9 shall identify any geographical areas that fall into this category.

The total acreage of adverse affects to the Indiana bat for the duration of this MOA shall not exceed 3,750 acres. This acreage shall be divided into yearly increments of 750 acres. This annual acreage may be modified on a per year basis. If INSERT COOPERATOR NAME determines that additional acres are needed, and the Service determines that those additional acres are available, the annual allotment may be

increased. Additionally, the Service reserves the right to reduce the amount of acres available to INSERT COOPERATOR NAME for a given year if, after consultation with INSERT COOPERATOR NAME to identify the Company's plans for the remainder of the year, the Service determines that INSERT COOPERATOR NAME will not use the full amount available to them. The Service must approve any modification of the annual acreage in writing.

Qualified projects that exceed the allowed acreage of impact or will impact caves, portals, or mine adits suitable for use by Indiana bats are not covered under this MOA, unless specifically authorized in writing by the Service. If INSERT COOPERATOR NAME discovers a cave, portal or mine adit within a project corridor or that will be affected by a proposed project, INSERT COOPERATOR NAME shall follow the obligations set forth in section 6.7.

Section 5: EFFECTIVE DATE AND TERMS OF AGREEMENT

This MOA is effective on the last date signed below, and shall remain in effect until December 31, 2012, except as modified in section 8 hereof.

Section 6: SPECIFIC OBLIGATIONS OF THE COOPERATORS

INSERT COOPERATOR NAME and the Service agree to fulfill the following conditions to minimize potential incidental take of the Indiana bat, compensate for adverse effects on the Indiana bat that may result from the implementation of the proposed project(s), and promote future conservation and recovery of the Indiana bat:

6.1 INSERT COOPERATOR NAME representatives will survey rural areas to be trimmed or cleared prior to performing any vegetative management related to Work Practice #2 and #3 for potential indicators of the presence of large Indiana Bat maternity colonies. INSERT COOPERATOR NAME will notify the Service in the event that such indicators are encountered and will follow the procedures described in the Work Practices Description found in Appendix B. Identification of any new maternity colonies will assist the Service in achieving its goals in support of the conservation strategy set forth in the Guidance.

6.2 INSERT COOPERATOR NAME agrees to consult with the Service regarding certain projects identified in section 4 of this MOA so the Service may determine if these impacts are appropriate for inclusion under this MOA. The Service shall evaluate the proposed projects to assess the appropriateness of the minimization and mitigation measures and shall permit the inclusion of the project under the MOA if it determines that the minimization and mitigation measures provide adequate protection. The Service shall notify INSERT COOPERATOR NAME of its determination in writing.

6.3 Unless specified otherwise within this MOA, INSERT COOPERATOR NAME accepts that the Indiana Bat Mitigation Guidance dated May 14, 2010, will be used as the basis for: explanation of terms, identification of certain priority habitats,

determination of the standard tree canopy size for the single tree method, determination of situations which require direct consultation with the Service, acceptability of mitigation measures, and for calculation of impacts and mitigation measures, such as: the purchase, protection, or acquisition of properties that are conducive to Indiana bat conservation efforts, the direct contribution to the Indiana Bat Conservation Fund (IBCF), or other alternative measures, as applicable, for each project. These measures, described in the Indiana Bat Mitigation Guidance as “minimization and mitigation measures”, shall be undertaken prior to the implementation of the project. The exception to this shall be contributions to the IBCF, which shall be made on a quarterly basis as set forth in section 6.5. Implementation of these measures will provide tangible recovery-focused conservation benefits for the Indiana bat and contribute to its conservation and recovery in Kentucky.

6.4 For projects implemented under this MOA, the following time frames shall be used to determined when a given habitat type is occupied:

- Summer habitat (maternity and non-maternity) shall be considered occupied from May 15 through August 15.
- Swarming habitat shall be considered occupied from April 1 through May 14 and from August 16 through November 15.

If known swarming habitat overlaps with known non-maternity summer habitat, [INSERT COOPERATOR NAME](#) shall determine the mitigation for impacts in this area by selecting highest multiplier from the appropriate swarming or non-maternity summer habitat multipliers and adding 0.5 to the multiplier to generate the final mitigation multiplier.

6.5 Mitigation measures required for impacts authorized under this MOA shall be calculated in accordance with the matrix set forth in Table 3 of the Guidance, except as specified in section 6.4. Impact acreage shall be calculated as follows:

- For projects categorized as Clearing: The acreage of the project area shall be determined by drawing a polygon around the suitable habitat (as defined by the Guidance) that will be impacted and determining the acreage within the polygon. This acreage shall then be multiplied by the appropriate multiplier from the mitigation matrix for the impact type. If the project area only contains isolated trees, [INSERT COOPERATOR NAME](#) may determine the mitigation acreage based on the loss of the trees by multiplying the number of trees by 0.09 acres and then by the appropriate multiplier rather than determining the area of the polygon that surrounds the trees.
- For projects categorized as Right-of-Way Enhancement: The acreage of impact shall be determined by counting the number of potentially suitable primary maternity roost trees that will be removed. Potentially suitable primary maternity roost trees shall include those dead or partially dead trees that are at least nine inches in diameter at breast height and have crevices and/or loose or exfoliating bark. The number of trees shall then be multiplied by 0.09 to determine the mitigation acreage. In areas with a high density of potentially suitable primary maternity roost trees, [INSERT](#)

COOPERATOR NAME may choose to calculate the acreage using a polygon. This acreage shall then be multiplied by the appropriate multiplier from the mitigation matrix for the impact type.

- For projects categorized as Emergency Actions: The acreage of impact shall be determined by counting the number of potentially suitable primary maternity roost trees that will be removed. The number of trees shall then be multiplied by 0.09 to determine the mitigation acreage. In areas with a high density of potentially suitable primary maternity roost trees, INSERT COOPERATOR NAME may choose to calculate the acreage using a polygon. This acreage shall then be multiplied by the appropriate multiplier from the mitigation matrix for the impact type. In the event that INSERT COOPERATOR NAME removes an imminent threat to its facilities, but allows a portion of the threatening tree to remain for winter removal between November 15 and March 31, INSERT COOPERATOR NAME will be responsible only for the mitigation and multipliers associated with the timing of the initial action. For actions requiring coordination with the Service, INSERT COOPERATOR NAME shall coordinate with the Service in a timely fashion.

The Service shall make staff available at any time to provide guidance and assistance in determining impact amounts and mitigation acreages.

6.6 If INSERT COOPERATOR NAME chooses to contribute to the IBCF as a minimization and mitigation measure for impacts to the Indiana bat authorized under this MOA, those contributions shall be made no less frequently than on a quarterly basis, with payments submitted no later than 30 days after the close of the quarter and tracked in the ledger format provided in Appendix C. This ledger shall be provided to the Service on a quarterly basis and shall identify qualified projects, including those where INSERT COOPERATOR NAME determined that mitigation measures were not required, from the previous quarter. Contributions to the IBCF should be issued to the Kentucky Natural Lands Trust (KNLT) at 433 Chestnut Street, Berea, Kentucky 40403 with IBCF noted in the memo line. Contributions made to the IBCF shall be used to achieve the Service's conservation strategy and mitigation and minimization goals for the Indiana bat in Kentucky.

6.7 If INSERT COOPERATOR NAME discovers a cave, portal, or mine adit within the corridor of a proposed project or that is likely to be affected by a proposed project, INSERT COOPERATOR NAME shall immediately cease work in that area and contact the Service for an evaluation of the site as potential suitable winter habitat for the Indiana bat. The Service shall respond to INSERT COOPERATOR NAME's request within 10 business days. If the Service does not respond within 10 business days, INSERT COOPERATOR NAME can reinstate work on the project.

6.8 The Service reserves the right to audit any INSERT COOPERATOR NAME-made determination of impact or mitigation and to evaluate the accuracy of that determination with a visit to the project site prior to, during, or following project

implementation. In addition, the Service may request a listing of past, present, and planned projects for which INSERT COOPERATOR NAME personnel have made determinations under the terms of this MOA for the purpose of evaluating whether adequate documentation exists to support the determination and whether the procedures used in the determination were in compliance with the terms of the MOA. Upon receipt of such request, INSERT COOPERATOR NAME shall provide the requested information within 30 calendar days.

6.9 Within 14 days of the effective date of this MOA, the Service shall provide INSERT COOPERATOR NAME with a map of known habitat (as defined in the Guidance) and shall provide technical assistance as needed to determine the location of a project with regard to known habitat. The Service shall update this information on an annual basis, and INSERT COOPERATOR NAME shall utilize the most recent version provided by the Service to evaluate potential impacts to these habitat areas.

6.10 INSERT COOPERATOR NAME may elect to survey potential habitat for the presence or probable absence of Indiana bats. This survey must follow the most recent (at the time of survey) Indiana bat Survey Guidance for the Commonwealth of Kentucky. If the survey results in a probable absence determination, implementation of minimization and mitigation measures is not required for that project. Survey data is valid for a period of two survey seasons. Areas of known Indiana bat habitat may not be surveyed for probable absence.

6.11 The Service will take the necessary steps to ensure that projects covered by this MOA meet federal requirements for compliance with the National Environmental Policy Act (NEPA), and ESA. Nothing in this MOA shall affect the NEPA obligations, if any, of any other Federal agency with respect to work conducted by INSERT COOPERATOR NAME

With regard to the ESA, the attached biological opinion (Appendix A) authorizes incidental take of Indiana bats associated with habitat removal. This incidental take authorization requires implementation of the Reasonable and Prudent Measures and Terms and Conditions of the biological opinion. As such, sections 6.1, 6.2, 6.3, 6.5, 6.6, 6.7 and 6.8 are included in this MOA because they are or support recovery focused conservation measures and the Reasonable and Prudent Measures and Terms and Conditions of the biological opinion. INSERT COOPERATOR NAME acknowledges that any divergence from the measures and conditions of the above-referenced sections may result in a violation of section 9 of the ESA.

6.12 INSERT COOPERATOR NAME will take the necessary steps to ensure that projects covered under this MOA meet federal requirements for compliance with the National Historic Preservation Act (NHPA).

6.13 INSERT COOPERATOR NAME agrees to project-specific reviews by the Service for any projects within the scope of this MOA that may adversely affect unique geographic characteristics as historic or cultural resources, park, recreation or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers,

prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

6.14 Surveys for other federally listed species will not be required of the Cooperators as a condition to participating in the Agreement. However, if other federally listed or candidate species are discovered or are likely to occur within areas to be impacted by qualified projects, the Cooperators agree to meet and discuss the implications of these species relative to the qualified projects and this Agreement and to seek cooperative solutions to address any adverse effects that may occur to these species so that compliance with the ESA can be maintained.

In summary, this MOA provides recovery based conservation benefits for the Indiana bat in the form of habitat protection and/or voluntary contributions to the IBCF which in turn will fund habitat protection, conservation, restoration and/or priority monitoring and research projects for the Indiana bat.

Section 7: COOPERATION

Both the Service and INSERT COOPERATOR NAME acknowledge that it is their desire to facilitate the processes set forth in this MOA by open communication and cooperation. Both parties agree to exercise their rights and obligations under this MOA in good faith. If at any time INSERT COOPERATOR NAME has questions regarding this MOA or the Guidance, the Service agrees to make itself available for consultation in a timely fashion.

Section 8: MODIFICATION OR TERMINATION

Modifications to this MOA may be proposed by either party in writing and will become effective upon being reduced to a written instrument and being signed by duly authorized representatives of the Cooperators.

INSERT COOPERATOR NAME or the Service may terminate this MOA at any time prior to its expiration on December 31, 2012 upon written notification from the other signatory party. Termination of this MOA does not terminate the parties' obligations under section 6 of this MOA for previously authorized actions of the INSERT COOPERATOR NAME

Section 9: OTHER PROVISIONS

9.1 The Cooperators hereto agree that they shall be liable for the negligent or wrongful acts or omissions of their employees, agents, and assigns only to the extent liable under applicable law. Nothing in this MOA shall be interpreted or construed as constituting a waiver by any party of sovereign immunity or statutory limitation on liability.

9.2 Each provision of this MOA shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of the MOA shall be prohibited or invalid under application law, such provision shall be ineffective to the

extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this MOA.

9.3 No provision of this MOA shall be interpreted as or constitute a commitment of requirement that either party take actions in contravention of applicable laws, either substantive or procedural.

9.4 Nothing in the MOA shall be interpreted as or constitute a commitment or requirement that the Service obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. §1341, or any other law or regulation.

9.5 This MOA in no way restricts the private property rights of INSERT COOPERATOR NAME except to the extent necessary to comply with applicable federal statutes referenced above as part of this MOA (i.e., ESA, etc.)

9.6 INSERT COOPERATOR NAME is encouraged to adopt and enforce on-the-job seat belt use and policies and programs for their employees when operating company-owned, rented, or personally-owned vehicles. These measures include, but are not limited to, conducting education, awareness, and other appropriate programs for their employees about the importance of wearing seat belts and the consequences of not wearing them.

9.7 Third Parties Not to Benefit: This MOA does not grant rights or benefits of any nature to any party not named or identified in this MOA.

9.8 Merger: This MOA contains the sole and entire MOA of the parties. No oral representations of any nature form the basis of or may amend this MOA. This MOA may be extended, renewed or amended only when agreed to in writing by the parties.

9.9 Waiver: Failure to enforce any provision of this agreement by either party shall not constitute waiver of that provision, nor a waiver of a claim for subsequent breach of the same type, nor a waiver of any other term of this agreement. The waiver of any provision must be express and evidenced in writing.

9.10 Assignment: No part of this agreement shall be assigned to any other party.

9.11 Insurance and Indemnity: INSERT COOPERATOR NAME will be fully responsible for the acts and omission of its representatives, employees, and contractors connected with the performance of this agreement. In furtherance of this agreement, INSERT COOPERATOR NAME will:

- Subject to the availability of its funding for the specific purposes of this provision, INSERT COOPERATOR NAME will indemnify the United States against all claims, fines, damages, judgments, and expenses arising from any omission or activity of INSERT COOPERATOR NAME, its representatives, employees, or contractors arising in conjunction with this

agreement; provided, however, there shall be no obligation to indemnify the United States for its acts or omissions.

- Cooperate with the Service in the investigation and defense of any claims that may be filed against the Service arising out of the activities of INSERT COOPERATOR NAME, its representatives, contractors, or its employees.

9.12 Assumption of Liability: Whether or not the Service has the right to review and approve any designs, plans, documents, or work produced under this agreement, and whether or not the Service exercises such rights, the Service will have no liability for any review or approval or failure to review and approve. All liability for the accuracy, quality, and safety of any designees, plans, documents or work remains with INSERT COOPERATOR NAME

9.13 Publicity and Government Endorsement: INSERT COOPERATOR NAME shall not publicize or otherwise circulate, promotional material (such as advertisements, sales brochures, press releases, speeches, still and motion pictures, articles, manuscripts or other publications) which states or implies governmental, Departmental, bureau, or government employee endorsement of a product, service, or position which INSERT COOPERATOR NAME represents. No release of information relating to this MOA may state or imply INSERT COOPERATOR NAME's work product to be superior to other products or services.

All information submitted for publication or other public releases of information regarding this project shall carry the following disclaimer:

"The views and conclusions contained in this document are those of the authors and should not be interpreted as representing the opinions or policies of the U.S. Government. Mention of trade names or commercial products does not constitute their endorsement by the U.S. Government."

INSERT COOPERATOR NAME must obtain prior Government approval for any public information releases concerning this MOA, which refer to the Department of the Interior or any bureau or employee (by name or title). The specific text, layout photographs, etc. of the proposed release must be submitted with the request for approval.

Section 10: NOTICES AND AUTHORIZED REPRESENTATIVES

Notices shall be made in writing to the persons at the addresses listed below and may be given by personal delivery, mail or by telecopy (FAX) to the duly authorized representatives listed below. Should there be changes in a party's representative, each shall notify the other party, in writing, within thirty (30) days of the change in their representative.

U.S. Fish and Wildlife Service
Field Office Supervisor
Virgil Lee Andrews, Jr.
330 West Broadway, Room 265
Frankfort, Kentucky 40601
502/695-0468 (telephone)
502/695-1024 (facsimile)

INSERT COOPERATOR NAME
[TITLE]
[NAME]
[ADDRESS]
[TELEPHONE]
[FACSIMILE]

Acceptance of the terms of the MOA is signified by the signatures below. The parties hereto have executed this MOA as of the last written date below.

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

INSERT COOPERATOR NAME

BY: _____

BY: _____

TITLE: Field Supervisor _____

TITLE: _____

DATE: _____

DATE: _____

APPENDIX A

FINAL BIOLGICAL OPINION

APPENDIX B

WORK PRACTICES DESCRIPTION

APPENDIX C
LEDGER