AGREEMENT BETWEEN
THE U.S. FISH AND WILDLIFE SERVICE
AND
THE PENNSYLVANIA GAME COMMISSION
TO
ESTABLISH AND OPERATE
AN INDIANA BAT CONSERVATION FUND

I. PURPOSE

This Agreement (hereinafter "Agreement") is entered into between the U.S. Fish and Wildlife Service (hereinafter "USFWS"), a bureau of the U.S. Department of the Interior, and the Pennsylvania Game Commission (hereinafter "PGC"), for the purpose of establishing and operating the Indiana Bat Conservation Fund (hereinafter "IBCF"). The IBCF shall operate in conjunction with the USFWS' consultation and permitting activities under §7 and §10 of the Endangered Species Act. The IBCF shall be administered by the PGC, and in consideration of the mutual promises contained herein, and intending to be legally bound, PGC shall purchase or otherwise acquire real property interests to be retained and managed in perpetuity for the benefit of the Indiana bat and its habitat.

In most cases, contributions to the IBCF will be from project proponents and permit applicants as compensation for activities that are likely to adversely affect Indiana bats or their habitat. These funds shall be used solely for real property acquisition and permanent Indiana bat habitat protection. Additionally, other entities that want to further the conservation and recovery of the Indiana bat may donate funds to the IBCF for the purpose of permanently protecting Indiana bat habitat.

II. BACKGROUND

The Indiana bat was listed as an endangered species on March 11, 1967 (32 F.R. 4001). A recovery plan was approved on March 1, 1999 (USFWS 1999), and the first revision of the recovery plan is currently in draft (USFWS 2007). The historic range of this species consisted of the central and southeastern United States. Current records indicate that the Indiana bat occurs in locations broadly distributed through the Commonwealth of Pennsylvania, and may be present statewide at any location containing suitable summer or winter habitat.

Indiana bats hibernate during the winter months in caves or mines (winter hibernacula). Each spring, the females emerge from the hibernacula and migrate to summer (maternity) habitat consisting of hardwood forests. Maternity colonies formed in these areas typically roost under the exfoliating bark of dead trees or loose bark of living trees. The migration of males is variable within a wider range of summer habitat characteristics. Some males do not migrate, others migrate only a short distance to smaller, warmer caves, and others migrate to the same habitat as females.

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¹ This Agreement is the second revision to an Agreement that was originally put into effect on September 18, 2009.
Based on the characteristics of this life cycle, some of the intrinsic biological constraints of this species include limiting use of fat during hibernation, obligate colonial roosting, high energy demands of pregnant and nursing females, and timely parturition and rapid development and weaning of young. Factors that may exacerbate the bat's vulnerability because of these constraints include energetic impacts of significant disruptions to roosting areas (both in hibernacula and maternity colonies); alteration and availability of suitable hibernation habitat; and loss, degradation and fragmentation of roosting-foraging habitat and travel corridors.

Major reasons for the decline in Indiana bat populations include deforestation and fragmentation of forest habitat, application of insecticides, destruction or improper gating of winter habitat (e.g., mines, caves), commercialization of caves, and vandalism of cave habitat (USFWS 1999).

A variety of activities that are otherwise legal have the potential to cause direct, indirect, and cumulative adverse effects on the Indiana bat that could result in the take of this species. Such take is prohibited by the Endangered Species Act, unless authorized by a USFWS permit or exempted by a USFWS consultation. The establishment of the IBCF will provide a mechanism to fund actions that will promote the conservation and recovery of the Indiana bat, while minimizing the direct, indirect, and cumulative adverse effects that can occur as a result of development and other activities.

III. AUTHORITY

This Agreement is hereby entered into under the authority of the Endangered Species Act of 1973, as amended (hereinafter "Act"), (16 U.S.C. 1534 et seq.), wherein USFWS is responsible for the listing and recovery of wildlife listed under the Act, and cooperating with State and Federal agencies and others to achieve recovery of listed species. Pursuant to §7 and §10 of the Act, the USFWS also has the authority to exempt or authorize incidental take of federally listed species, following consultation or permitting procedures that require minimization of take. These procedures often incorporate conservation measures to offset the effect of the take as well.

PGC under the authority of Title 34 Game and Wildlife Code has jurisdiction over birds and mammals within the Commonwealth of Pennsylvania. Furthermore, PGC has a vested interest in the conservation of Indiana bats due to their listing as an endangered species in Pennsylvania pursuant to the federal Endangered Species Act and the Commonwealth’s threatened and endangered species list. Pursuant to 34 P.S. §323, the PGC may enter into Cooperative Agreements with any government agency to further the programs of the PGC; PGC deems this Agreement to satisfy 34 P.S. §323.

IV. OBJECTIVES

A. Contributions to the IBCF are intended to provide a dedicated source of funding that will 1) ensure that the direct, indirect, and cumulative adverse effects on the Indiana bat (of otherwise legal activities) are adequately offset within the Commonwealth of Pennsylvania; and 2) result in tangible conservation and recovery benefits to the
Indiana bat within the Commonwealth of Pennsylvania.

B. The IBCF shall be used to fund projects important to the conservation and recovery of the Indiana bat within the Commonwealth of Pennsylvania. Specifically, IBCF monies will be used to permanently manage and protect summer and winter habitat for Indiana bats.

Habitat protection will occur through a conveyance of real property interest, to be held in perpetuity and under the sole control of PGC, Pennsylvania Department of Conservation and Natural Resources, or Pennsylvania Fish and Boat Commission (hereinafter “Commonwealth agencies”) at the sole discretion of the USFWS, and with all land management activities for the benefit of the Indiana bat and its habitat, also approved by the USFWS.

“Projects important to the conservation and recovery of the Indiana bat” includes, but is not limited to, gating hibernation sites, invasive species management, improving internal hibernation conditions, researching or reducing threats, or other habitat improvement which is proposed and receives prior approval of the USFWS.

V. SPECIFIC OBLIGATIONS OF THE PARTIES

A. USFWS Obligations. USFWS shall:

i. During project reviews, determine if and when use of the IBCF is appropriate, consistent with the most recent Indiana Bat Mitigation Guidance for Pennsylvania or the USFWS Endangered Species Act Compensatory Mitigation Policy (2016). It is agreed and understood that the IBCF will not be used for reviews of wind power projects, unless the wind developer has signed onto the PGC Cooperative Wind Agreement and is in compliance with that Agreement.

ii. Refer contributors to the IBCF, and provide the PGC with information that individually identifies the type of habitat impact and the Recovery Focus Area to which deposits shall be credited. When a deposit to the IBCF is deemed appropriate, the USFWS will provide the PGC with a Calculation Sheet for Indiana Bat Habitat Compensation (see most recent Indiana Bat Mitigation Guidance for Pennsylvania).

iii. Review real property acquisitions and projects important to the conservation and recovery of the species that the PGC proposes for funding by the IBCF, and determine whether those proposed acquisitions are appropriate and consistent with the purpose and objectives of the IBCF, and with the most recent Indiana Bat Mitigation Guidance for Pennsylvania or the USFWS Endangered Species Act Compensatory Mitigation Policy (2016). In doing so, among other things, USFWS shall review, whether and to what extent existing encumbrances may limit the effectiveness of a proposed conservation acquisition.

iv. Where appropriate, provide information on the IBCF to interested parties and as
part of the USFWS’s outreach and education efforts.

v. Timely review and provide a written response to, among other things: property transactions, restrictions to ensure perpetual protection of Indiana bat habitat, long term management plans, uses, transfers, and amendments proposed by PGC.

B. USFWS Acknowledgements. USFWS hereby agrees and acknowledges that:

i. The IBCF escrow agent fee, which shall not exceed 2%, represents reasonable consideration for administration of the IBCF by the escrow agent.

ii. PGC shall be entitled to take an administrative fee for the purpose of reimbursing the actual costs of employees or contracts to fulfill the PGC’s obligations as set forth in this Agreement. This fee will be no less than $5,000.00 annually and no more than 10% of the incoming deposits to the IBCF (e.g., an administrative fee of up to $10,000 could be assessed on a $100,000 deposit to the IBCF). PGC shall only be entitled to draw funds for administrative expenses actually incurred and documented. This provision is intended to mean expenses or contracts required for administration of the fund such as the cost of obtaining comparables, direct costs related to evaluating properties for acquisition made necessary because of use of the IBCF, or accounting and auditing, and is not meant to reimburse PGC for normal and customary expenses of its employees in acquiring property.

iii. Notwithstanding any statements herein to the contrary, PGC shall not be responsible for determining whether the acquisitions funded by the IBCF adequately minimize or compensate for onsite impacts at any site for which USFWS regulates under the federal Endangered Species Act. PGC’s acceptance of deposits shall not constitute any direct or implied affirmation that deposits are adequate compensation and/or minimization for any purpose.

C. PGC Obligations. PGC shall:

i. During project reviews, determine if and when use of the IBCF may be appropriate, consistent with the most recent Indiana Bat Mitigation Guidance for Pennsylvania or the USFWS Endangered Species Act Compensatory Mitigation Policy (2016). In situations where use of the IBCF may be appropriate, the PGC will refer prospective IBCF contributors to the USFWS.

ii. Appoint an individual, PGC’s Project Officer, who will represent PGC to USFWS in carrying out PGC’s obligations under this Agreement.

iii. Disclose to the USFWS the extent to which each land parcel proposed for acquisition is encumbered (e.g., by utility or access rights-of-way, agricultural leases, reserved mineral rights, etc.).

iv. Direct the distribution of funds from the IBCF for the acquisition of specific land
parcels or projects to protect and manage the species, to achieve Indiana bat recovery and habitat protection, as mutually agreed upon, in writing, by the USFWS and PGC.

v. Ensure that real property interests acquired with IBCF deposits and investment income come under the permanent ownership, control and management of a Commonwealth agency. Such lands shall be permanently protected, and their use restricted in perpetuity for the primary benefit of the Indiana bat. All lands acquired by the PGC with IBCF funds shall include in the deed a clause stating substantially the following:

*The within conveyed property is being acquired with monies (i.e., IBCF funds) set aside for mitigation of impacts to the Indiana bat or its habitat, in accordance with an Agreement between the Commonwealth of Pennsylvania, Pennsylvania Game Commission and the United States Fish and Wildlife Service (USFWS). These lands are to be owned, controlled, and managed in perpetuity by the Commonwealth of Pennsylvania, Pennsylvania Game Commission, Pennsylvania Fish and Boat Commission, the Department of Conservation and Recreation, or its successor for the primary benefit of the Indiana bat. Such management is to be in accordance with an Indiana bat management plan or land management plan developed cooperatively by the Commonwealth agency and U.S. Fish and Wildlife Service, and approved in writing by the U.S. Fish and Wildlife Service. In recognition of the special interest of both the Commonwealth of Pennsylvania and the U.S. Fish and Wildlife Service, neither the Commonwealth agency shall not transfer any portion of the within conveyed property, nor authorize or permit any third-party actions, activities or projects (e.g., utility company rights-of-way, mineral extraction, oil and gas development, road construction, timber harvest, etc.) on lands purchased in whole or in part with IBCF funds without the consent of the U.S. Fish and Wildlife Service. The U.S. Fish and Wildlife Service, and the Pennsylvania Game Commission, as applicable, are deemed third party beneficiaries of this restriction or condition that such transfers or uses must be consented to and they may take such actions as legally allowable to enforce this restriction or condition.*

vi. Ensure that acquired real property interests be managed in accordance with an Indiana bat management plan approved in writing by the USFWS. This management plan may include or incorporate, at the USFWS’s discretion, aspects of the Commonwealth agency’s wildlife habitat management and recreation practices, or other reserved uses, which USFWS determines in writing are consistent with the Purpose and Objectives of this Agreement and Indiana bat recovery or management guidance existing at the time.

vii. Retain all properties acquired using IBCF funds under the control and ownership of the Commonwealth agency, except if USFWS and PGC jointly concur in writing that ownership, sale, transfer or exchange of a particular property would result in a greater conservation benefit than retention of the property, consistent with this Agreement. In the event any property transferred, sold or exchanged by
a Commonwealth agency results in proceeds, Commonwealth agency shall place all those proceeds into the IBCF, less agency administrative costs, to the extent they are attributable to the portion of the property purchased with the IBCF.

viii. All revenues, proceeds and royalties generated from any use of properties purchased with IBCF funds, less PGC's administrative costs, shall be directed to the IBCF, to the extent such revenues, proceeds and royalties are attributable to the portion of the property purchased with the IBCF. Right of Way License fees, such as are assessed as a normal and reasonable part of the PGC's Right of Way License program, may be retained and kept by the PGC in the Game Fund. However, any surface damages or mitigation fees shall be directed to the IBCF, to the extent such damages or fees are attributable to the portion of the property purchased with the IBCF.

ix. Disburse IBCF funds in a timely manner to achieve the Purpose and Objectives of this Agreement. Individual contributions to the IBCF will be disbursed within 5 years of their receipt, unless the balance available for disbursement within the IBCF is less than $100,000.

VI. FINANCIAL ADMINISTRATION AND DISTRIBUTION OF THE IBCF

PGC will have the responsibility for the administration of the funds contained in the IBCF.

A. Funds designated for the IBCF shall be deposited into an escrow account, identified as the Indiana Bat Conservation Fund (IBCF), subject to the following requirements:

i. At all times, the IBCF shall be held in escrow by a third party fiduciary and maintained independent of, and not comingle with any other of the Commonwealth’s accounts, General Fund, or appropriations.

ii. The IBCF shall be maintained as a discrete account, and all deposits to and disbursements from this account shall be tracked.

iii. Deposits will be tracked to reflect, at a minimum, the following information per deposit: USFWS project #, name of affected maternity colony and/or hibernaculum; number of acres of habitat affected, by type (e.g., summer maternity, summer non-maternity, potential summer habitat, or swarming habitat); and deposit date and amount.

iv. Disbursements will be tracked to reflect, at a minimum, the following

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2 Such use is only allowed if USFWS determines in writing that such activities will not result in adverse effects on Indiana bats or in the loss, degradation or fragmentation of forest habitat, wetlands or streams.

3 To the extent that the Commonwealth agency has control over the location and/or permitting of rights-of-way on its lands, these rights-of-way will only be allowed if they will not result in adverse effects on Indiana bats or in the loss, degradation or fragmentation of forest habitat, wetlands, or streams.
information per disbursement: USFWS project #; name of maternity colony or hibernaculum benefitting from habitat purchase; number of acres of habitat purchased, by type (e.g., summer maternity, summer non-maternity, swarming habitat, hibernaculum); if applicable, number of acres purchased for the purpose of reforestation, by type (e.g., summer maternity, swarming habitat); date and cost of land acquisition; and a map showing the location and boundaries of the acquired habitat and land parcel.

v. Disbursements for fees, including escrow agent fees and PGC administrative fees, will be tracked and reported.

vi. All investment income (e.g., interest, dividends) generated from the IBCF will be reinvested in the IBCF, and used for the Purpose and Objectives of this Agreement.

vii. A tracking spreadsheet detailing the information in iii, iv, v, and vi above, will be provided to the USFWS on a quarterly basis.

B. Escrow agent administrative fees shall be paid in accordance with the usual and customary business practices of the escrow agent, and shall not exceed 2%. Additionally, PGC shall be entitled to take an administrative fee, as set forth in V, B, above.

C. PGC shall maintain books, records and documents directly pertinent to performance under this Agreement in accordance with generally accepted accounting principles, and make these available to the USFWS for review and auditing purposes upon the USFWS’s written request.

VII. COOPERATION

Both USFWS and PGC acknowledge that it is their desire to facilitate the processes set forth in this Agreement by open communication and cooperation. This is particularly important because both parties have legal mandates to protect, conserve, and manage Indiana bat populations that occur within the Commonwealth of Pennsylvania. Both parties agree to exercise their rights and obligations under this Agreement in good faith. If at any time either party has questions regarding application of the IBCF or selection of a land parcel, both parties agree to make themselves available for consultation in a timely fashion. Furthermore, each of the parties hereto agree that whenever and as often as it shall be reasonably requested to do so by any other party hereto, to execute, acknowledge, and deliver, or cause to be executed, acknowledged and delivered, any and all further instruments as may be reasonably necessary to consummate the transactions provided for in, or contemplated by, this Agreement, and to carry out the purpose and intent of this Agreement.

Both USFWS and PGC acknowledge that the “compensation acres” as identified in the Indiana Bat Mitigation Guidance for Pennsylvania are meant to be the compensation acres replaced using the IBCF. However, it is also acknowledged that the acquisition of
exceptionally high-quality Indiana bat habitat may compensate for the loss of lower quality
habitat at slightly less than a direct replacement ratio, yet still meet the Purpose and
Objectives of this Agreement, as well as the Indiana Bat Mitigation Guidance for
Pennsylvania and the USFWS Endangered Species Act Compensatory Mitigation Policy.
It is agreed that the Commonwealth agencies shall not be held to acquire the exact number
of “compensation acres” as long as all acquisitions are undertaken in consultation with
USFWS and there is consensus on the acquisitions themselves. This provision is intended
as protection for the parties acting in good faith and is not intended to change the goals of
replacement by way of “compensation acres”.

VIII. OTHER PROVISIONS

A. Each party hereto agrees that it shall be liable for the negligent or wrongful acts or
omissions of its employees, agents, and assigns only to the extent liable under
applicable law. Nothing in this Agreement shall be interpreted or construed as
constituting a waiver by any party of sovereign immunity or statutory limitations on
liability.

B. This Agreement may not be assigned in whole or in part without the written approval
of the parties. Any such assignment or attempted assignment shall be null and void.

C. This Agreement shall be interpreted and performed pursuant to the federal
Endangered Species Act, other applicable federal laws, and the laws of the
Commonwealth of Pennsylvania. If any provision in this instrument is found to be
ambiguous, an interpretation consistent with the Purpose and Objectives of this
Agreement that would render the provision valid shall be favored over any
interpretation that would render it invalid.

D. If any provision of this Agreement or the application thereof is found to be invalid, the
remainder of the provisions of this Agreement and the application of such provisions
other than those as to which it is found to be invalid shall not be affected thereby, so
long as the remainder operates consistently with and furthers the Agreement’s Purpose
and Objectives.

E. The parties hereto do not intend to, nor shall this Agreement be construed to, grant
any rights, privileges or interests to any person not a party to this Agreement.

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

G. Nothing in this Agreement shall be interpreted as binding the Service to expend in
any one fiscal year any sum in excess of appropriations made by Congress or
administratively allocated for the purposes of this Agreement for that fiscal year, or
other obligation for the further expenditure of money in excess of such
appropriations or allocations (see, e.g., Anti-Deficiency Act, 31 U.S.G. § 1341).
H. This Agreement constitutes the full and complete agreement of the parties. No other promises, written or oral have been made by any party hereto.

I. No Member of, Delegate to, or Resident Commissioner in Congress shall be admitted to any share or part of this Agreement or to any benefit to arise there from, unless the share or part or benefit is for the general benefit of a corporation or company.

IX. MODIFICATION AND TERMINATION

A. Modification - This Agreement may only be amended or modified with the written approval of all parties to this Agreement. Modifications may be requested by submitting a written request for such modifications to the other parties. If all parties approve these modifications in writing, they shall become binding terms of the Agreement.

B. Termination of Agreement - Any party may terminate this Agreement upon 60 days advance written notification to all signatory parties. At the time the 60-day notice is given, any undisbursed funds remaining in the IBCF shall not be transferred or spent. Upon termination, USFWS and PGC shall put an alternative, written agreement in place to ensure such undisbursed funds are used solely and specifically to meet the Objectives (IV) outlined in this Agreement. The parties intend that certain provisions of the Agreement survive termination and remain effective; all properties acquired with IBCF funds will remain permanently protected by and under the continued control of PGC to be managed as Indiana bat habitat in perpetuity; USFWS retains its enforcement rights regarding the expenditures from the IBCF and the ownership and management of property to be permanently protected, consistent with the Purpose and Objectives of this Agreement, and Section X.

C. Federal Delisting – Property acquired with IBCF funds and under the control of PGC shall remain protected in perpetuity for the benefit of the Indiana bat, even if the species is removed from the Federal list of endangered and threatened species. Any monies remaining in the IBCF at the time of delisting must satisfy in-lieu compensation requirements, and be expended on the purchase and permanent protection of Indiana bat habitat. At such time, the USFWS and PGC will also jointly determine what amendments to, or modifications of, this Agreement are necessary. If the Indiana bat is delisted by the USFWS due to extinction, as opposed to recovery, the PGC will no longer be required to manage property acquired with IBCF funds for the benefit of Indiana bats; these properties will be retained by PGC for the purpose of native bat species conservation and management. Also, if delisted due to extinction, any remaining funds in the IBCF shall be expended on native bat species conservation in the Commonwealth of Pennsylvania.

X. ENFORCEMENT

A. The parties hereto agree that, because of the USFWS’s duties and powers arising
under the federal Endangered Species Act, and the need to ensure compliance with and completion of conservation and mitigation measures under Section 7 and 10 of the Act, the Service has a clear and substantive interest in the successful and proper operation of the IBCF. Therefore, PGC grants the Service, its agents, successors and assigns, the rights and standing to be noticed and to enforce this Agreement as described herein, which shall survive termination of the Agreement.

B. In addition to any other rights and remedies available to the USFWS at law or equity, the USFWS shall have the right, but not the obligation to enforce this Agreement and is entitled to bring an action at law or equity in a court of competent jurisdiction to enforce the terms of this Agreement; to require the restoration of funds to the IBCF if improperly transferred or expended; to require the return of ownership and management of acquired property to the PGC if it has lost control; to seek fair market replacement value of acquired property that for reasons of misuse or mismanagement no longer serves a function as Indiana bat habitat; to require restoration of Protected Property to its previous condition; to enjoin such non-compliance by ex parte temporary or permanent injunction in a court of competent jurisdiction; and/or to recover any damages arising from such noncompliance. If such court determines that the Grantor has failed to comply with this Agreement, Grantor shall reimburse Grantee for any reasonable costs of enforcement, including costs of restoration, court costs and reasonable attorneys fees, in addition to any other payments ordered by such court.

Nothing herein shall be construed to entitle USFWS to institute any enforcement proceedings against PGC for any changes to acquired properties due to causes beyond the Commonwealth Agency’s control, such as changes caused by fire, flood, storm, earthquake or the unauthorized wrongful acts of third persons. In the event of violations of this Agreement caused by unauthorized wrongful acts of third persons, the parties will confer and coordinate any needed response, including combined enforcement efforts.

XI. REFERENCES


XII. NOTICE

Any notice or other communication required or permitted hereunder shall be deemed to
have been duly given if in writing and delivered personally or sent by Federal Express or similar next day nationwide delivery system or mailed by first-class, registered or certified mail, as follows:

If to USFWS:
U. S. Fish and Wildlife Service
c/o Field Office Supervisor
110 Radnor Road; Suite 101
State College, PA 16801
814-234-4090

If to PGC:
Pennsylvania Game Commission
Bureau of Wildlife Habitat Management
2001 Elmerton Avenue
Harrisburg, PA 17110-9797
717-787-6818

A party may change the address to which such communications are to be directed by giving written notice to the other parties in the manner provided in this Article. Any notice or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such times as it is actually received or seven calendar days after it is mailed.

EFFECTIVE DATE – This Agreement shall be effective upon the date it is signed by all parties.

\[Signature\]
Field Supervisor
U.S. Fish and Wildlife Service

\[Signature\]
Executive Director
Pennsylvania Game Commission

8/28/2017
Date

8/28/17
Date