

**RANGE-WIDE INDIANA BAT AND NORTHERN LONG-EARED  
BAT IN-LIEU FEE PROGRAM  
AMENDED AND RESTATED PROGRAM INSTRUMENT**

**U.S. FISH AND WILDLIFE SERVICE**

This Amended and Restated In-Lieu Fee Program Instrument (“Instrument”) for the Range-Wide Indiana Bat and Northern Long-Eared Bat In-Lieu Fee Program (“ILF Program” or “Program”) is established by the United States Fish and Wildlife Service (“USFWS”) in agreement with the Program Sponsor, The Conservation Fund (individually a “Party” and collectively, the “Parties”), regarding the establishment, use, operation, and maintenance of the Program. The original In-Lieu Fee Program Instrument (“Original Instrument”) was effective on July 25, 2017.

**RECITALS:**

- A. The USFWS promotes the conservation of species under its jurisdiction and the habitats upon which they depend under the Endangered Species Act, 16 U.S.C. §1531 et seq. (ESA).
- B. The original purpose of the ILF Program was to provide an in-lieu fee option to compensate for unavoidable impacts to Indiana bats and their habitats from Actions under the jurisdiction (funding or authorization) of the Federal Highway Administration (“FHWA”), Federal Railroad Administration (“FRA”), and Federal Transit Administration (“FTA”) (collectively referred to as the “Transportation Agencies”), and other entities if authorized by the USFWS.
- C. Pursuant to this Amended and Restated In-Lieu Fee Program Instrument for the Range-Wide Indiana Bat and Northern Long-Eared Bat In-Lieu Fee Program, the ILF Program has been expanded to serve as an in-lieu fee option to compensate for unavoidable impacts to northern long-eared bats and their habitats.
- D. The ILF Program serves the “Revised Programmatic Biological Opinion for Transportation Projects in the Range of the Indiana Bat and Northern Long-Eared Bat,” dated February 5, 2018 (“Programmatic BO,” attached as **Exhibit A**), developed in consultation with FHWA, FRA and FTA.
- E. The ILF Program also may be used if there is a mechanism for incidental take authorization and the local USFWS Field Office approves use of the Program for an Authorized User. The USFWS is responsible for ensuring that the use of this ILF Program is consistent with the Compensatory Mitigation component of the Programmatic BO, or other applicable Biological Opinion (“BO”) or USFWS-approved Habitat Conservation Plan (“HCP”). Ensuring such consistency includes, but is not limited to, providing oversight to USFWS Field Offices (“FOs”) in the implementation of this Instrument. The USFWS Assistant Regional Director for Ecological Services (“ARD-ES”) serves as the decision-maker for the Service Area(s) within his or her jurisdiction.

The ARD-ES for the Midwest Region (USFWS Region 3) serves as the decision-maker for the USFWS for the Program as a whole.

- F. The USFWS FO located within each Service Area has jurisdiction and authority over the Actions and ILF Mitigation Project decisions within its Service Area (“Applicable USFWS FO”). The Applicable USFWS FO is responsible for answering requests from Transportation Agencies or other Authorized Users for confirmation that a Transportation Project or other Action is consistent with the Programmatic BO, other applicable BO, or USFWS-approved Habitat Conservation Plan. If the Transportation Agency or other Authorized User elects to use this ILF Program to satisfy the Compensatory Mitigation component of the Programmatic BO, other applicable BO, or USFWS-approved Habitat Conservation Plan, the Applicable USFWS FO is responsible for notifying the Program Sponsor of such election.
- G. Each Applicable USFWS FO may establish a Mitigation Review Team (“MRT”) for its Service Area, for which the FO representative will serve as Chair. The Applicable USFWS FO is responsible for approving ILF Mitigation Projects in accordance with this Instrument.
- H. The USFWS National Transportation Liaison, a USFWS Headquarters Office position, serves as liaison between the USFWS and the Program Sponsor, and provides technical assistance to USFWS FOs in the execution of their responsibilities under this Instrument.
- I. The Program Sponsor is responsible for operating the ILF Program.

**AGREEMENT:**

**I. PURPOSE**

The purpose of this Instrument is to establish guidelines, responsibilities, and standards for the establishment, use, operation, and maintenance of the Program. The Program provides an option for Transportation Agencies to exercise their responsibilities under Section 7(a)(1), and comply with Section 7(a)(2), of the ESA by implementing Compensatory Mitigation for unavoidable impacts to Indiana bats, northern long-eared bats and/or their habitats caused by Transportation Projects or other Actions, provided that such projects are consistent with the Programmatic BO or other actions covered in an USFWS-approved BO or HCP. The Program may also serve the Compensatory Mitigation needs of other Actions that similarly affect Indiana bats and/or northern long-eared bats and their habitats, subject to USFWS review and approval.

**II. BACKGROUND**

**A. Indiana Bat**

The Indiana bat was listed as federally endangered under the Endangered Species Preservation Act, on March 11, 1967, due to the dramatic decline of populations throughout their range. Reasons for the bat's decline include disturbance of colonies by

human beings, pesticide use and loss of summer habitat resulting from the clearing of forest cover. As of 1973, the Indiana bat had been listed as endangered under the Endangered Species Act (ESA, as amended), and additionally protected by the Federal Cave Resources Protection Act of 1988, to protect hibernacula on Federal lands.

This ILF Program is one of several options described in the Programmatic BO for the Transportation Agencies to compensate for adverse impacts to Indiana bats. This ILF Program is also available for other Authorized Users. Before an Authorized User may use this ILF Program as the Compensatory Mitigation component of its proposed Action, the Applicable USFWS FO must provide the Program Sponsor with Conservation Focus Areas (CFAs) in accordance with the criteria set forth in the Compensation Planning Framework (**Exhibit C**) for the state in which it operates. The Mitigation Fees collected through this Program from state government funding sources will be designated for ILF Mitigation Projects within the state where the funds originated, unless the applicable USFWS FOs and Authorized User(s) agree to use the funds for an out-of-state ILF Mitigation Project(s).

Through funding associated with Transportation Projects that rely upon the Programmatic BO to exercise federal agency responsibilities under section 7(a)(1) and comply with section 7(a)(2) of the ESA, this ILF Program will supplement and complement the ongoing work of the USFWS, other resource management agencies, and non-governmental organizations to recover the Indiana bat.

#### B. Northern Long-Eared Bat

The northern long-eared bat was listed as federally threatened (under the ESA 4(d) Rule) under the Endangered Species Act on April 2, 2015, due to declines caused by white-nose syndrome and continued spread of the disease. Section 4(d) of the ESA provides the Secretaries of the Interior and Commerce with the ability to issue regulations determined to be necessary for the conservation of threatened species. Incidental take of northern long-eared bat is not prohibited under the ESA 4(d) Rule, except in specific cases as outlined in the ESA 4(d) Rule for the northern long-eared bat (50 C.F.R. §17.40(o)). As a result, Compensatory Mitigation for development impacts to northern long-eared bats often is not required.

Although Compensatory Mitigation from development projects often is not required for northern long-eared bats, project proponents often seek consultation with the USFWS under Section 7(a)(2) or seek incidental take permits under Section 10(b)(1) of the ESA to reduce liability for potential impacts that development projects could have to northern long-eared bat, should the species status change or changes to the ESA 4(d) Rule be made. This ILF Program is one of several options to compensate for impacts to northern long-eared bat.

### III. AUTHORITY

This Instrument is hereby entered into under the authorities of the Endangered Species Act (“ESA,” 16 U.S.C. §§ 1531 *et seq.*). Section 7(a)(1) of the ESA directs Federal agencies to

“utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species.” Section 7(a)(2) of the ESA directs each Federal agency to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species....” This Instrument was initially developed to provide a mitigation option for Transportation Agencies associated with the USFWS Programmatic BO. Transportation Agencies may elect to use an in-lieu fee program as the means of implementing the Compensatory Mitigation component of their program. In addition, other Authorized Users are eligible to use this ILF Program so long as there is a mechanism for incidental take authorization (e.g., Section 7 or Section 10 of the ESA) and the local USFWS Field Office has approved use of the Program for such Authorized User.

Under Section 10 of the ESA, the Secretary of the Interior has the authority, where appropriate, to authorize the taking of federally-listed species, if such taking occurs incidentally to otherwise legal activities. The USFWS is charged with regulating the incidental taking of listed species under its jurisdiction. The submission of an ESA Section 10(a)(1)(B) permit application requires the development of an HCP designed to ensure the continued existence, while allowing for incidental take of the species that is anticipated to occur from project activities. This ILF Program can be an option for mitigation associated with HCPs that have the Indiana bat and/or northern long-eared bat as covered species.

Although most forms of incidental take of northern long-eared bat are not prohibited by the ESA 4(d) Rule, many project proponents include this species in their HCPs to provide regulatory certainty.

By entering and faithfully executing this Instrument, the USFWS is: (1) ensuring that this ILF Program fulfills the Compensatory Mitigation component of the Transportation Agencies’ program in a manner that is consistent with the USFWS decision in the Programmatic BO; and (2) providing an option for Compensatory Mitigation for other users completing Section 7 consultations or HCPs as approved by the USFWS.

#### **IV. OBJECTIVES**

The objectives of the Program are to:

1. Provide a mechanism for range-wide Compensatory Mitigation and conservation for Indiana bats and northern long-eared bats. The Program may also serve as a comprehensive natural resource program that addresses ecosystem needs for Indiana bat and northern long-eared bat habitat.
2. Provide high-quality Compensatory Mitigation for unavoidable impacts to Indiana bats and northern long-eared bats and their habitats.
3. Utilize scale efficiencies by combining the compensation from individual smaller projects within a Service Area into mitigation at larger sites.
4. Implement an ILF Mitigation Project selection process that rigorously considers best available data and input from professional resource managers and experts.

5. Select the best compensatory ILF Mitigation Projects for the Program.
6. Provide an effective and transparent accounting structure for collecting in-lieu fees, disbursing ILF Mitigation Project funds, and reporting conservation outcomes.
7. Work in an efficient and transparent manner with each USFWS FO to implement ILF Mitigation Projects and enact amendments to this Program Instrument when appropriate to ensure the success of the ILF Program.

## V. DEFINITIONS

Capitalized terms used and not defined elsewhere in this Instrument are defined, for this Program, as set forth below.

1. “Action(s)” means proposed development or maintenance action(s) carried out by one or more Authorized Users that will cause unavoidable impacts to Indiana bats, northern long-eared bats and their habitats.
2. “Adaptive Management” means actions to address unforeseen changes in ILF Mitigation Project site conditions or other components of the ILF Mitigation Project. An “Adaptive Management Plan” is a management strategy to address unforeseen changes in ILF Mitigation Project site conditions or other components of the ILF Mitigation Project, including the party or parties responsible for implementing adaptive management measures. The Adaptive Management Plan will, as necessary, be a component of the Project Development Plan and guide decisions for revising Project Development Plans and implementing measures to address both foreseeable and unforeseeable circumstances that adversely affect the ILF Mitigation Project’s success.
3. “Authorized Users” means Transportation Agencies, State Departments of Transportation (DOTs), local transportation agencies, and/or other USFWS-approved entities.
4. “Compensatory Mitigation” means the restoration or preservation of natural resources for the purposes of offsetting unavoidable impacts that remain after applying all appropriate and practical impact avoidance and minimization measures. Although Compensatory Mitigation sometimes is not required for Actions that impact northern long-eared bats or their habitat, the term is used in this Instrument to describe the activities and projects implemented to offset impacts to both Indiana bats and northern long-eared bats and their habitats.
5. “Compensation Planning Framework” or “CPF” means the procedures used to select, secure, and implement Indiana bat and northern long-eared bat habitat preservation and restoration projects, attached as **Exhibit C** to this Instrument.
6. “Conservation Focus Areas” or “CFAs” means priority locations for Indiana bat and/or northern long-eared bat Compensatory Mitigation developed by each USFWS FO within each Service Area.

7. “ESA 4(d) Rule” means protective regulations issued under Section 4(d) of the ESA for the northern long-eared bat, set forth in 50 C.F.R. §17.40(o).
8. “Habitat Resource” means any land that is biologically or physically necessary to sustain the lifecycle of the Indiana bat and/or northern long-eared bat. Specific habitat types addressed in this Instrument include Summer Habitat, Winter Habitat (hibernacula), and Staging and Swarming Forested Habitat.
9. “ILF Mitigation Project” means a Compensatory Mitigation project submitted to the ILF Program, including the real property where such project will be constructed, monitored, maintained, managed, and permanently protected.
10. “ILF Mitigation Project Provider” means the Program Sponsor or other entity that is approved by the Applicable USFWS FO and develops and implements an approved ILF Mitigation Project for Indiana and/or northern long-eared bats and/or their habitats and may be, but is not required to be, the ILF Mitigation Project’s Long-term Steward.
11. “Long-term Management Period” means the period commencing at the conclusion of the Performance Period of an ILF Mitigation Project when monitoring and maintenance continue according to the long-term management plan contained in the approved Project Development Plan for an ILF Mitigation Project.
12. “Long-term Steward” means the entity that is responsible for an ILF Mitigation Project during the Long-term Management Period, including the implementation of the long-term management plan (note that the Long-term Steward and owner of the ILF Mitigation Project may or may not be the same entity).
13. “Mitigation Fees” means all fees paid to the ILF Program by Authorized Users that carry out actions causing unavoidable impacts to Indiana bats, northern long-eared bats, and/or their habitats to compensate for such impacts. Mitigation Fees to the ILF Program are accrued and used to pay for all aspects of implementing ILF Mitigation Projects, including land fees, monitoring, maintenance, long-term management, and administrative duties. Mitigation Fees represent “full cost accounting,” meaning that the Authorized Users causing unavoidable impacts pay all the costs to fully and successfully compensate for those impacts.
14. “Mitigation Review Team” or “MRT” means the group of individuals that may be established by the appropriate USFWS FO in each Service Area to assist in review or selection of ILF Mitigation Projects. The USFWS FO representative serves as the Chair of the MRT, if established. Participation in the MRT is voluntary, and any costs of participation are borne by the participating entities. At the Chair’s discretion, MRT members may include DOTs, FHWA, State agencies and individuals representing non-governmental organizations involved in bat conservation, bat experts, and others deemed appropriate. The MRT will play a technical advisory role only and whether or not an MRT is established in a Service Area, the USFWS FO is ultimately responsible for rendering and communicating decisions under this Instrument to the Program Sponsor.

15. “Performance Period” means the period of time from initiation of an ILF Mitigation Project until all Performance Standards associated with the ILF Mitigation Project have been met. The end of the Performance Period marks the beginning of the Long-term Management Period.
16. “Performance Standards” means the observable or measurable ecological functions and physical and/or biological attributes that are used to determine whether an ILF Mitigation Project meets its objectives to adequately compensate for impacts to Indiana bats, northern long-eared bats and/or their habitats.
17. “Preservation” means removing threats to, or preventing the decline of, a Compensatory Mitigation site by means of provisions that permanently protect the site as habitat for Indiana bats and/or northern long-eared bats. This term includes activities commonly associated with the protection and maintenance of habitat resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of habitat resource area or functions. However, all habitats that are not currently protected in a manner that provides for the long-term conservation of Indiana bats or northern long-eared bats are considered vulnerable to one or more threats of loss or degradation. Therefore, preservation is one of the most biologically significant types of mitigation for Indiana bats and northern long-eared bats.
18. “Program Account” means an account established by the Program Sponsor at a financial institution that is a member of the Federal Deposit Insurance Corporation (“FDIC”) or any successor organization to the FDIC, and that the Program Sponsor uses to receive, manage, and disburse Mitigation Fees pursuant to this Program.
19. “Program Area” means the geographic limits of the Program, which is the range of the Indiana bat and northern long-eared bat as identified in **Exhibit B**.
20. “Program Establishment Date” is July 25, 2017, the date when the Program was considered established and the receipt of Mitigation Fees to the Program Account were authorized to begin, which was the latest signature date of the Parties’ representatives in Section XII, “Execution” of the Original Instrument.
21. “Project Development Plan” means the descriptive document for each proposed ILF Mitigation Project developed in accordance with **Exhibit D**.
22. “Project Establishment Date” means the date that an ILF Mitigation Project is approved by the USFWS FO.
23. “Restoration” means the manipulation of the ecological function of a site, including physical and biological characteristics, with the goal of establishing conditions that support the habitat needs for the target species (Indiana bat and/or northern long-eared bat). Restoration results in a gain in habitat resource area and ecological functions for the target species.
24. “Service Area” means the geographic area within which Authorized Users may compensate for unavoidable impacts to Indiana bats, northern long-eared bats and/or their

habitats using this Program. Program Service Areas are identified in Section VI.C of this Instrument and **Exhibit B**.

25. "Transportation Project" means proposed development or maintenance action(s) by one or more Transportation Agencies that will incur unavoidable impacts to Indiana bats, northern long-eared bats, and/or their habitat as a result of implementation.
26. "USFWS National Transportation Liaison" is a USFWS employee designated by the USFWS Headquarters Office to serve as the liaison to the FHWA.

## **VI. PROGRAM STRUCTURE AND OPERATION**

### **A. Overview**

This Program provides an option for Authorized Users to provide Compensatory Mitigation for unavoidable impacts to Indiana bats, northern long-eared bats, and their habitats within the Program Area. Authorized Users pay Mitigation Fees into the Program Account, which is used to undertake ILF Mitigation Projects that offset the impacts caused by their actions in accordance with the Programmatic BO, or in accordance with another applicable USFWS BO, or USFWS-approved Habitat Conservation Plan (HCP). The amount of the Mitigation Fees is determined based on "full cost accounting," meaning that Authorized Users pay the costs to fully and successfully compensate for the impacts to the Indiana bats, northern long-eared bats and their habitat functions.

The Program Sponsor will use Mitigation Fees paid into the Program Account to implement ILF Mitigation Projects, to pay eligible costs incurred by other ILF Mitigation Project Providers to implement ILF Mitigation Projects, and to pay eligible costs of approved Long-term Stewards, in each case in accordance with this Instrument. The ILF Mitigation Projects will occur within USFWS FO-developed CFAs. Subject to USFWS FO approval, the Program Sponsor will select ILF Mitigation Projects according to priorities established in the Programmatic BO and based on an analysis of their ability to provide significant ecological benefits to Indiana bats, northern long-eared bats and their habitats.

Use of this Program does not eliminate or otherwise affect current or future federal, state, and local commitments by, or regulatory requirements upon, Authorized Users to avoid and minimize impacts to Indiana bats, northern long-eared bats, and their habitats.

### **B. Program Effective Date**

The Program was effective on July 25, 2017, which is the date of the latest Party signature in Section XII, **Execution** of the Original Instrument. The Program Sponsor established the Program Account and began accepting Mitigation Fees associated with impacts to the Indiana bat and its habitat after such effective date. The Program Sponsor may begin accepting Mitigation Fees associated with impacts to the northern long-eared bat and its habitat only after all Parties sign this Amended and Restated Instrument.

### C. Program and Service Areas

The Program Area for this Instrument includes the range of the Indiana bat and the northern long-eared bat and is identified in **Exhibit B**. This Instrument establishes thirty-seven (37) Service Areas that correspond to the political boundaries for the states that fall completely or partially within the range for each species as set forth in **Exhibit B**.

### D. Program Account

The Program Sponsor established a Program Account upon execution of the Original Instrument by all Parties. The Program Sponsor will deposit all Mitigation Fees received from Authorized Users into the Program Account, and use it only for the comprehensive costs associated with ILF Mitigation Project site selection, design, acquisition, monitoring, and management, including Program administrative costs, in accordance with this Instrument. The Program Sponsor will establish a Sub-Account for each Service Area, and transfer Mitigation Fees to the Sub-Account corresponding to the Service Area in which the Transportation Project or other Action occurred for which the Authorized User paid to accomplish Compensatory Mitigation. For each Sub-Account, the Program Sponsor will maintain a ledger and will record each Mitigation Fee allocated to the Sub-Account and indicate whether the Mitigation Fee was paid for impacts to Indiana bats, northern long-eared bats or both species.

All interest and earnings on the Program Account and each Sub-Account will remain in the Program Account or Sub-Account until used in the same manner as Mitigation Fees. The Program Sponsor will apply generally accepted accounting principles to the Program Account and each Sub-Account.

Pending disbursement of the funds in the Program Account and each Sub-Account, the Program Sponsor will invest the funds in investments designed to limit the risk of loss of Program Account principal. For investment purposes, the Program Sponsor is authorized to commingle any or all of the assets existing in the Program Account and each Sub-Account with other funds held or managed by the Program Sponsor that are subject to identical investment purposes and restrictions. The intent of this authorization is to allow the Program Sponsor to pool funds subject to identical investment purposes and restrictions for collective management, such that all participating funds may benefit from efficiencies of scale. Any funds from the Program Account or any Sub-Account commingled in this manner will at all times be distinguishable within the Program Sponsor's internal accounting system from the balances of all other accounts maintained or managed by the Program Sponsor.

### E. Mitigation Fees and Acreage Obligations

Transportation Agencies using this Program will assess the unavoidable impacts of a Transportation Project and request the Applicable USFWS FO to verify that the Project may rely upon the Programmatic BO for compliance with Section 7(a)(2) of the ESA. This assessment involves quantifying impacts in terms of acres of suitable Indiana and/or northern long-eared bat habitat adversely affected. The Programmatic BO specifies

mitigation ratios to determine the amount of Compensatory Mitigation, also in acres, that is necessary and appropriate to offset the impact. The mitigation ratio selected is determined based upon the spatial and temporal context of the impact, which influences its severity and ecological significance.

For other Actions not covered by the Programmatic BO, the Applicable USFWS FO will assess and quantify unavoidable impacts in terms of acres of suitable Indiana and/or northern long-eared bat habitat, determine the mitigation ratio and the amount of Compensatory Mitigation, also in acres, and will include this information in a USFWS-approved consultation, Biological Opinion, or HCP.

When the Applicable USFWS FO confirms that a Transportation Project or other Action is consistent with the Programmatic BO or other USFWS-approved consultation or HCP, and the Authorized User elects to use this Program for Compensatory Mitigation, the Applicable USFWS FO will notify the Program Sponsor by transmitting the USFWS FO's confirmation letter to the Authorized User or other confirmation document ("USFWS FO Confirmation Document") to the Program Sponsor.

The process for determining the mitigation ratio and calculating the mitigation acreage is outlined in the Programmatic BO (**Exhibit A**) and in the Compensation Planning Framework (**Exhibit C**). Due to the potential for Indiana bats and northern long-eared bats to occur within overlapping habitats, stacking of mitigation acreage within an ILF Mitigation Project is allowed, but each stacked acre may be used to satisfy the acreage obligation associated with an Action by only one Authorized User, even if the stacked acre is used to mitigate for impacts to only one species, as illustrated by the examples set forth in the Compensation Planning Framework (**Exhibit C**).

The USFWS FO Confirmation Document will, at a minimum, set forth the information identified on **Exhibit I**, including (but not limited to) species and acres impacted by the Action, the acres needed for mitigation allocated to each species, and the Mitigation Fee calculated in accordance with the Mitigation Fee Schedule provided in **Exhibit E**. If an Authorized User intends to use the ILF Program to provide Compensatory Mitigation for impacts to both Indiana and northern long-eared bats, the USFWS FO shall determine the appropriate stacking ratio, if applicable. The Program Sponsor shall have no responsibility for determining or confirming the acres impacted by the Transportation Project or other Action, the acres needed for mitigation, or the stacking ratio.

The Program Sponsor will apply best practices for ILF programs in developing the Mitigation Fees for this Program based on full-cost accounting, including, 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 exhaustive and may include other categories, as appropriate, as determined by the Program Sponsor on a case-by-case basis. Mitigation Fees will also take into account contingency costs, such as uncertainties in real estate expenses, and costs associated with long-term management of ILF Mitigation Projects and financial assurance. The Parties will review the Mitigation Fees at least annually. The Program

Sponsor will notify the USFWS of any changes to the Mitigation Fees at least 30 days in advance of such changes, and provide the Program's current Mitigation Fees upon request to the USFWS or Authorized Users.

The Applicable USFWS FO and each Authorized User will make its own respective decisions about the most appropriate Compensatory Mitigation on a case-by-case basis, during the assessment of a proposed Transportation Project or other Action under the Programmatic BO or another applicable consultation or HCP. This Instrument does not guarantee that the Program can be used for Compensatory Mitigation for any Transportation Project or other Action. If the appropriate USFWS FO confirms that an Authorized User's election of the Program as Compensatory Mitigation for a Transportation Project or other Action is consistent with the Programmatic BO (or other applicable BO or USFWS-approved HCP), the Authorized User should contact the Program Sponsor to determine whether the Program Sponsor will accept the Mitigation Fees and assume the obligation to complete Compensatory Mitigation for the Project. The Program Sponsor will notify the Applicable USFWS FO within 15 days of informing an Authorized User that it declines to assume the obligation.

#### F. ILF Mitigation Projects

The Program Sponsor will identify potential ILF Mitigation Projects consistent with this Instrument. The Program Sponsor or other ILF Mitigation Project Providers may develop and complete ILF Mitigation Projects. For each proposed ILF Mitigation Project, the Program Sponsor will submit a Project Development Plan to the Applicable USFWS FO for consideration. The Project Development Plan will include a project budget, long-term management plan, and a written request for approval. The Applicable USFWS FO will evaluate ILF Mitigation Projects for approval in accordance with Section VII. The Program Sponsor or other ILF Mitigation Project Provider will implement ILF Mitigation Projects in accordance with Section VII upon Applicable USFWS FO approval.

#### G. Transfer of Responsibility for Compensatory Mitigation

1. The responsibility to provide Compensatory Mitigation remains with the Authorized User of the ILF Program unless and until: (a) the Applicable USFWS FO confirms to the Authorized User the proposed Project is consistent with the Programmatic BO, other applicable BO, or USFWS-approved Habitat Conservation Plan and is therefore eligible to fulfill its Compensatory Mitigation obligation through the payment of Mitigation Fees under the Program, and issues to the Authorized User and the Program Sponsor the USFWS FO Confirmation Document; and (b) the Program Sponsor accepts the Mitigation Fees paid by the Authorized User and issues to the Applicable USFWS FO and the Authorized User a transaction receipt in the form attached as **Exhibit F** that indicates the number of acres to be mitigated and the Mitigation Fees paid. Upon the occurrence of both (a) and (b), the legal responsibility for providing Compensatory Mitigation with respect to the impacts for which the Mitigation Fees were paid in accordance with this Instrument transfers to the Program Sponsor, subject to the limitations set forth in this Section VI.G.

2. The Program Sponsor will retain responsibility to implement Compensatory Mitigation for which Mitigation Fees were accepted until:
  - a. One or more ILF Mitigation Projects are completed that satisfy the acreage obligations associated with the Mitigation Fees paid, and the long-term management obligations associated with such ILF Mitigation Projects are transferred to a USFWS FO-approved Long-term Steward in accordance with Section VII.C.4.a (Preservation Projects) or Section VII.C.4.b (Restoration Projects); or
  - b. An ILF Mitigation Project Provider assumes the Compensatory Mitigation obligation, including the long-term management obligation, and the Applicable USFWS FO approves such assumption, in accordance with Section VII.C.5; or
  - c. The Program is closed in accordance with Section IX of this Instrument.
3. Notwithstanding any other provision of this Instrument, to the maximum extent permitted by law, the Program Sponsor's maximum financial obligation and liability for the Program, including providing Compensatory Mitigation thereunder, is at all times limited to the funds in the Program Account.

#### H. Reporting

On or before February 28 of each year following the Program Establishment Date, the Program Sponsor will submit an Annual Report to the USFWS and to the USFWS National Transportation Liaison for appropriate distribution. The Annual Report will:

- detail activity within each Service Area during the previous calendar year;
- summarize the progress of each ILF Mitigation Project, including the degree to which each ILF Mitigation Project is meeting its Performance Standards; and
- provide a financial activity report for the Program Account, which includes:
  - all income received from Mitigation Fees and investment earnings accrued by the Program Account; and
  - all ILF Program disbursements and expenditures from the Program Account, such as the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, adaptive management, and administration.

The Program Sponsor also will provide to the USFWS such other information as is reasonably requested from time to time.

### VII. PROJECT SELECTION AND OPERATION

This Section sets forth the general framework for the selection, establishment, and operation of ILF Mitigation Projects in this Program.

#### A. USFWS FO Roles and Responsibilities

1. Establish an MRT (see **Definitions**) at its discretion;

2. Coordinate meetings when appropriate for review and approval of ILF Mitigation Projects, ILF Mitigation Project Development Plans, and Performance Standards;
3. Review and approve ILF Mitigation Project Providers and, upon request from the Program Sponsor, review and consider approval of the assumption of the Compensatory Mitigation obligation by ILF Mitigation Project Providers pursuant to Section VII.C.5;
4. Provide a determination on requirements for the Long-term Monitoring Period and approval of the Long-term Steward and the long-term management plan;
5. Review and approve annual monitoring reports for ILF Mitigation Projects;
6. Coordinate cross-state ILF Mitigation Projects with the USFWS FO(s) for other Service Areas;
7. Coordinate with the USFWS and the USFWS National Transportation Liaison on technical reporting and review, including periodic review of goals, objectives, Service Areas, changing conditions for the species, program adaptive management, and overall effects on recovery of the species by the ILF Program and other efforts;
8. Coordinate with the USFWS and the USFWS National Transportation Liaison on the approval and addition of other Authorized Users; and
9. Review and approve contingency plans, as needed.
10. The USFWS National Transportation Liaison is responsible for coordinating with USFWS for the Service Area and the Program Sponsor, and for dispute resolution under Section IX.C, including disputes arising from USFWS FO decisions or from other aspects of the ILF Program.

B. ILF Mitigation Project Development and Selection

1. Project Development Plans

As funds become available in each Service Area, the Program Sponsor will identify potential ILF Mitigation Project(s) within that Service Area for proposal to the Applicable USFWS FO. The Program Sponsor will prepare, or assist other ILF Mitigation Project Providers with the preparation of, Project Development Plans that meet the Compensatory Mitigation requirements in the Programmatic BO (**Exhibit A**). The Project Development Plan will include a description of the goals and objectives for the ILF Mitigation Project, baseline site information, a work plan that details specifications and descriptions to meet desired habitat function, adaptive and long-term management plans, along with other information outlined in **Exhibit D**.

## 2. ILF Mitigation Project Selection

The USFWS FO for the Service Area in which a potential ILF Mitigation Project is located will evaluate the Project using the criteria set forth in the Compensation Planning Framework (**Exhibit C**). The Applicable USFWS FO review for approval will consider the ILF Mitigation Project budget, the ILF Mitigation Project Provider (the Program Sponsor is a pre-approved Provider), and the Long-term Steward (“Full ILF Mitigation Project Approval”). The Applicable USFWS FO will provide an ILF Mitigation Project approval decision within thirty (30) days after the complete Project Development Plan is received. The Applicable USFWS FO may provide Full ILF Mitigation Project Approval contingent on the receipt of sufficient Mitigation Fees in the Service Area to cover the funding for the ILF Mitigation Project, but implementation of the ILF Mitigation Project may not proceed until there is funding in the Service Area Sub-Account to cover the full cost of the ILF Mitigation Project.

## C. ILF Mitigation Project Implementation and Operation

### 1. Implementation

Once Full ILF Mitigation Project Approval is received from the Applicable USFWS FO and the Service Area Sub-Account contains sufficient funds to fully fund the ILF Mitigation Project, the Program Sponsor (or other ILF Mitigation Project Provider) will proceed to implement the ILF Mitigation Project in accordance with the Project Development Plan. If the ILF Mitigation Project will be implemented by an ILF Mitigation Project Provider other than the Program Sponsor, the Program Sponsor and the ILF Mitigation Project Provider will enter into an ILF Mitigation Project Provider Agreement (“ILF Mitigation Project Provider Agreement”) in substantially the form attached as **Exhibit G**.

The Program Sponsor or other ILF Mitigation Project Providers must implement one or more ILF Mitigation Projects to satisfy the Compensatory Mitigation obligation associated with Actions for which Mitigation Fees were paid into the Program Account within three (3) years after the receipt of aggregate Mitigation Fees sufficient to implement an ILF Mitigation Project of fifty (50) acres or more within the applicable Service Area. The Program Sponsor (or other approved ILF Mitigation Project Providers) may, but is not obligated to, propose for approval and implement ILF Mitigation Projects of less than fifty (50) acres. The Program Sponsor must propose for approval and implement at least one ILF Mitigation Project when the Project Sponsor has accepted and accrued funds in a Service Area Sub-Account for seven (7) years after the most recent Service Area Project Establishment Date.

### 2. Performance Period

#### a. Preservation Projects

Preservation Projects are ILF Mitigation Projects that remove threats or prevent the decline or loss of habitat resources through the use of a permanent site protection instrument. The Performance Period for Preservation Projects ends upon

the establishment of the permanent protection of the ILF Mitigation Project site, Applicable USFWS FO confirmation that the habitat meets the requirements for preservation outlined in the Programmatic BO (**Exhibit A**), and the transfer of funding to the Long-term Steward.

b. Restoration Projects

Restoration Projects are ILF Mitigation Projects that manipulate the ecological function of a site to return or establish habitat conditions conducive to Indiana and/or northern long-eared bats. Restoration Projects are subject to a seven (7) to ten (10) year Performance Period.

3. Adaptive Management

Adaptive Management is required at Restoration Sites between year three (3) and year seven (7), if monitoring shows that the site is not meeting Performance Standards for species composition, and after year seven (7), if monitoring shows invasive species threaten the function of the Restoration Site. If monitoring indicates Adaptive Management is required in either time frame, the Program Sponsor will notify the Applicable USFWS FO within thirty (30) days of such determination, and will begin working (or will direct the ILF Mitigation Project Provider, if different from the Program Sponsor) to develop an Adaptive Management Plan. Remediation in accordance with the Adaptive Management Plan must begin within one (1) year of notifying the Applicable USFWS FO.

4. Long-term Management Period and Protection Strategy

The Program Sponsor and other ILF Mitigation Project Providers will design ILF Mitigation Projects, to the maximum extent practicable, to sustain habitat value for Indiana bats and/or northern long-eared bats with little or no management once all Performance Standards are achieved. Where active long-term management and maintenance is required, the ILF Mitigation Project Provider will include a long-term maintenance and monitoring plan with the Project Development Plan, in accordance with the requirements outlined in the Compensation Planning Framework (**Exhibit C**) and the Project Development Plan Outline (**Exhibit D**).

a. Preservation Projects

The Program Sponsor and, as applicable, other ILF Mitigation Project Provider shall be released from responsibility and liability for all monitoring and other responsibilities associated with a Preservation Project when (1) the permanent site protection instrument for the Preservation Project site has been recorded in the appropriate land records, and (2) the Program Sponsor submits to USFWS the Annual Report that describes the Preservation Project, unless in the case of (2), the Applicable USFWS FO confirms the Performance Standards for the Preservation Project have been met prior to receipt of the Annual report. Upon the occurrence of (1) and (2), the responsibility and liability for long-term management and site protection shall be transferred to and assumed by the Long-term Steward for the

ILF Mitigation Project, in accordance with the ILF Mitigation Project Provider Agreement. Upon such transfer and assumption, the Program Sponsor and, as applicable other ILF Mitigation Project Provider, are released from all management, monitoring, maintenance and other responsibilities and liabilities associated with the Preservation Project.

b. Restoration Projects

The Program Sponsor or other ILF Mitigation Project Provider will monitor Restoration Projects relative to the Performance Standards within thirty (30) days following the completion of restoration activities, and repeat this monitoring three (3) years after completion, and seven (7) years after completion. If Performance Standards are met at the end of the first seven (7) years and no Adaptive Management is required, at such time, responsibility and liability for long-term management and site protection for the Restoration Project shall be transferred from the Program Sponsor and, as applicable, other ILF Mitigation Project Provider, to the Long-term Steward, and assumed by the Long-term Steward, in accordance with the ILF Mitigation Project Provider Agreement. Upon such transfer and assumption, the Program Sponsor and, as applicable other ILF Mitigation Project Provider, are released from all management, monitoring, maintenance and other responsibilities and liabilities associated with the Restoration Project.

If Performance Standards are not met at the end of seven (7) years and Adaptive Management is required, the Program Sponsor or other ILF Mitigation Project Provider will develop an Adaptive Management Plan. The Program Sponsor or other ILF Mitigation Project Provider will implement, and revise as necessary, the Adaptive Management Plan for three (3) additional years. At the end of such three (3) additional years of Adaptive Management, responsibility for continued Adaptive Management and/or long-term management and site protection for the Restoration Project shall be transferred from the Program Sponsor and, as applicable, other ILF Mitigation Project Provider, to the Long-term Steward, and assumed by the Long-term Steward, in accordance with the ILF Mitigation Project Provider Agreement. Upon such transfer and assumption, the Program Sponsor and, as applicable other ILF Mitigation Project Provider, are released from all management, monitoring, maintenance and other responsibilities and liabilities associated with the Restoration Project. The Long-term Steward will have responsibility and liability for continued Adaptive Management until Performance Standards are met, or until the Applicable USFWS FO approves terminating the Adaptive Management Plan, and will have responsibility and liability for long-term management and site protection.

5. Assumption by ILF Mitigation Project Provider

In some circumstances, the Program Sponsor may propose to the Applicable USFWS FO that a specific Compensatory Mitigation obligation be assigned to and assumed by an ILF Mitigation Project Provider, and the Program Sponsor be released from

responsibility and liability for such specific Compensatory Mitigation obligation. If the Program Sponsor proposes such a transfer, assumption and release, the Program Sponsor shall provide to the Applicable USFWS FO an explanation of and basis for the proposal, relevant information about the ILF Mitigation Project Provider, and the proposed agreement to accomplish the transfer, assumption and release (“Assumption Agreement”). The Program Sponsor also will respond to requests for additional information from the Applicable USFWS FO with regard to any such proposal. If the proposal is approved by the Applicable USFWS FO, the Program Sponsor will deliver to the Applicable USFWS FO the Assumption Agreement executed by the Program Sponsor and the ILF Mitigation Project Provider. Upon execution of the Assumption Agreement by the Applicable USFWS FO, the Program Sponsor shall be released from responsibility and liability for the specific Compensatory Mitigation obligation covered by the Assumption Agreement.

#### D. Enforcement

All ILF Mitigation Projects will require a Notice of Award Agreement in the form attached as **Exhibit H**, which will be recorded as part of the closing of real estate transactions associated with the Project, including conservation easements. The Notice of Award Agreement is the primary vehicle through which the Parties ensure that the Compensatory Mitigation objectives of an ILF Mitigation Project are preserved. The Notice of Award Agreement will name the USFWS as a third-party beneficiary that is authorized and empowered to monitor and enforce the terms of the Notice of Award Agreement at its sole and complete discretion. The grantor under the Notice of Award Agreement in most cases will be the Program Sponsor, Long-term Steward or other ILF Mitigation Project Provider. In some cases the grantor will be the owner of the real property on which the ILF Mitigation Project is located or holder of a conservation easement over such real property, in which case the Program Sponsor, ILF Mitigation Project Provider and/or Long-term Steward also will sign the Notice of Award Agreement. If the Program Sponsor is the grantor under the Notice of Award Agreement, the Program Sponsor’s obligations under the Notice of Award Agreement shall be assigned to and assumed by the Long-term Steward at the time responsibility and liability for the ILF Mitigation Project is transferred to the Long-term Steward in accordance with Section VII.C.4 and the ILF Mitigation Project Provider Agreement. Upon such transfer and assumption, the Long-term Steward assumes all remaining responsibilities associated with an ILF Mitigation Project, and the Program Sponsor is released from all such responsibilities and liabilities, as set forth in Sections VI.G.2 and VII.C.4 of this Instrument. The Applicable USFWS FO may approve the use of a method besides a Notice of Award Agreement, provided that it accomplishes the same purpose as a Notice of Award Agreement.

### VIII. FINANCIAL ADMINISTRATION

#### A. Program Account

Upon establishment of the ILF Program, the Program Sponsor will establish a Program Account to receive Mitigation Fees from Authorized Users in accordance with the

provisions of Section VI.E. and the Fee Schedule in **Exhibit E**. The Mitigation Fee calculation includes an administrative fee of 15% for each Mitigation Fee paid. The Program Sponsor will withdraw the administrative fee from the Program Account to manage the Program at the time each Mitigation Fee is paid.

The Program Sponsor will establish Service Area Sub-Accounts to receive Mitigation Fees from Projects undertaken within a Service Area. The Mitigation Fees held in a Service Area Sub-Account will fund ILF Mitigation Projects in that Service Area only, unless the Applicable USFWS FOs approve the use of such funds in another Service Area. For each Sub-Account, the Program Sponsor will maintain a ledger and will record each Mitigation Fee allocated to the Sub-Account and indicate whether the Mitigation Fee was paid for impacts to Indiana bats, northern long-eared bats or both species.

#### B. Disbursements for ILF Mitigation Projects

The Program Sponsor or other ILF Mitigation Project Providers will develop and implement each ILF Mitigation Project in accordance with an USFWS FO-approved Project Development Plan, which will include a detailed budget. The Program Sponsor or other ILF Mitigation Project Providers will not implement an ILF Mitigation Project until sufficient Mitigation Fees are in the Service Area Sub-Account to fully complete the ILF Mitigation Project.

The Program Sponsor will enter agreements with other ILF Mitigation Project Providers and Long-term Stewards, and may enter agreements with other third parties, for the development, implementation, and/or long-term stewardship of individual ILF Mitigation Projects. The Program Sponsor will pay ILF Mitigation Project Providers (including the Program Sponsor), Long-term Stewards, and other third parties performing work to implement ILF Mitigation Projects with funds from the applicable Service Area Sub-Accounts in accordance with approved Project Development Plans, associated budgets, and the terms of the contract or other agreements governing such performance. Any proposed increase in the total USFWS FO-approved budget for an ILF Mitigation Project of more than 2% requires USFWS FO approval before such an increase becomes effective.

The Program Sponsor will obligate and disburse funds held in the applicable Service Area Sub-Account for an approved ILF Mitigation Project, as set forth in the ILF Mitigation Project budget, as work is accomplished to implement the ILF Mitigation Project.

#### C. Financial Assurances for ILF Mitigation Projects

The Program Sponsor will require an ILF Mitigation Project Provider to provide financial assurance for an ILF Mitigation Project if, and to the extent, the Applicable USFWS FO project approval requires such assurances.

## IX. AMENDMENT, TERMINATION, AND DISPUTE RESOLUTION

### A. Amendment

The Parties may amend or modify this Instrument (amendment), including its Exhibits, by mutual written approval.

### B. Termination

Either Party to this Instrument may terminate its participation by giving sixty (60) days' written notice to the other Party. In the event the Program is terminated (i.e., closed), the Program Sponsor is responsible for fulfilling the remaining ILF Mitigation Project obligations applicable to the Program Sponsor, including the successful completion of new and ongoing ILF Mitigation Projects to satisfy the Compensatory Mitigation obligations assumed pursuant to Section VI.G.1, relevant maintenance (Adaptive Management), monitoring, and reporting, in each case to the extent and subject to the limitations set forth in this Instrument. The Program Sponsor is responsible for fulfilling these obligations until such time as a Long-term Steward for each ILF Mitigation Project assumes responsibility for the remaining obligations, and if applicable, long-term ownership of the ILF Mitigation Project site is transferred to another entity. Funds remaining in the Program Account after these obligations are satisfied remain dedicated to Compensatory Mitigation activities that benefit the Indiana bat and/or northern long-eared bat within the Program Area. The USFWS will direct the Program Sponsor to transfer remaining funds to other Compensatory Mitigation providers. Such providers may include another in-lieu fee program or a conservation bank, or other entities, such as a government agency or non-profit natural resources management organization, who commit to use the funds, to the maximum extent practicable, to provide mitigation in accordance with the Compensation Planning Framework (**Exhibit C**).

### C. Dispute Resolution

The Parties will first attempt to resolve all disputes that arise under or with respect to this Instrument through informal negotiations with the assistance of the USFWS National Transportation Liaison. The period for informal negotiations will not exceed thirty (30) days from the time the dispute arises, unless the Parties agree to extend this time period, which begins when one Party sends a written notice of dispute to the other Party. A Party may request independent review from government agencies or other recognized experts regarding disputes related to the satisfaction of Performance Standards. If independent review is requested, to the extent possible, the process will follow the same process and timeframes as are set forth below for formal dispute resolution.

In the event that the Parties fail to resolve the dispute informally, the position of the USFWS is binding, unless, within fourteen (14) days after the conclusion of the informal negotiation period, the Program Sponsor invokes formal dispute resolution by serving on the USFWS and the Applicable USFWS FO a written statement of position on the matter in dispute. The written statement of position will include, but is not limited to, any factual data, analysis, or opinion supporting the position. Within fourteen (14) days after receipt

of the Program Sponsor's statement of position, the Applicable USFWS FO(s) will provide its written statement of position on the matter in dispute, which will include, but is not limited to, any factual data, analysis, or opinion supporting the position.

Within ten (10) days after receipt from the Applicable USFWS FO's statement of position, the USFWS (the Assistant Regional Director, Ecological Services, with jurisdiction for the relevant Service Area(s)) will resolve the dispute. The USFWS's decision is binding.

## **X. STIPULATIONS**

### **A. Disclaimer**

This Instrument is not intended to limit the authority of any Party to fulfill its statutory or regulatory responsibilities or to otherwise limit the powers afforded to any Party by applicable law.

### **B. Exhibits**

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

- Exhibit A: Programmatic Biological Opinion
- Exhibit B: Program Area and Service Areas
- Exhibit C: Compensation Planning Framework
- Exhibit D: ILF Mitigation Project Development Plan Outline
- Exhibit E: Fee Schedule
- Exhibit F: Transaction Receipt
- Exhibit G: ILF Mitigation Project Provider Agreement
- Exhibit H: Notice of Award Agreement
- Exhibit I: Information Required in USFWS FO Confirmation Document
- Exhibit J: USFWS Field Offices in the Program Area

## **XI. MISCELLANEOUS**

### **A. Entire Agreement**

This Instrument, including 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, is binding or valid. No alteration or variation of this Instrument is valid or binding unless adjusted in writing in accordance with the Instrument. Each Party acknowledges that neither it, nor anyone acting on its behalf, has made any representation, inducement, promise, or agreement, oral or otherwise, that is not embodied herein.

## B. 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 by the other Party, such consent or approval will not be unreasonably withheld or delayed. If a Party disagrees with any determination covered by this provision and requests the reasons for that determination, the determining Party will furnish its reasons in writing and in reasonable detail within thirty (30) days of receipt the request.

## C. Successors and Assigns

This Instrument and each of its covenants and conditions are binding on, and are for the benefit of, the Parties and their respective successors and assigns, subject to the limitations on transfer set forth herein. The Program Sponsor will have the right to assign or otherwise transfer the Program for one or more Service Areas at any time, provided that the Program Sponsor is in full compliance with all requirements of this Instrument and receives the prior written approval of the Applicable USFWS FOs. Prior to assignment, transfer, sale, or conveyance, the Program Sponsor will provide to the Applicable USFWS FO written assurance from the proposed replacement sponsor confirming the replacement sponsor's intent to assume and perform all of the responsibilities and obligations of the Program Sponsor under this Instrument for that Service Area. Any such assignment, sale, transfer or conveyance made without the prior written approval of the Applicable USFWS FO may, at the discretion of the Applicable USFWS FO, result in the termination of this Instrument within that Service Area according to the provisions in Section IX.B of this Instrument.

## D. Partial Invalidity

If a court of competent jurisdiction finds that any term or provision of this Instrument is invalid or unenforceable, in whole or in part, the validity and enforceability of the remaining terms and provisions, or portions of them, are not affected unless an essential purpose of this Instrument is defeated by loss of the invalid or unenforceable provision.

## E. Notices

The Parties will provide in writing any notice, demand, approval, request, or other communication that is required by this Instrument. Such communications are deemed given when delivered personally or:

- sent by receipt-confirmed facsimile;
- sent by recognized overnight delivery service; or
- five (5) days after deposit in the U.S. mail, postage prepaid; and
- addressed as set forth below.

Any Party may change its notice address by giving notice of change of address to the other Party in the manner specified in this Section XI.E.

**USFWS:**

Assistant Regional Director, Ecological Services, Southwest Region

500 Gold Avenue SW  
Albuquerque, New Mexico 87102  
505-246-6671

Assistant Regional Director, Ecological Services, Midwest Region

5600 American Boulevard West  
Bloomington, Minnesota 55437  
612-713-5345

Assistant Regional Director, Ecological Services, Southeast Region

1875 Century Boulevard  
Atlanta, Georgia 30345  
404 679-7085

Assistant Regional Director, Ecological Services, Northeast Region

300 Westgate Center Drive  
Hadley, Massachusetts 01035  
413-253-8698

Assistant Regional Director, Ecological Services, Mountain-Prairie Region

134 Union Blvd.  
Lakewood, Colorado 80228  
303-236-7905

USFWS Field Offices (see **Exhibit J**)

USFWS National Transportation Liaison

Ecological Services, HQ  
5275 Leesburg Pike  
Falls Church, VA 22041-3803  
303-236-4318

**Program Sponsor:**

The Conservation Fund  
1655 N. Fort Myer Drive, Suite 1300  
Arlington, VA 22209  
Attention: General Counsel

and

The Conservation Fund  
1655 N. Fort Myer Drive, Suite 1300  
Arlington, VA 22209  
Attention: Director, Mitigation Solutions

F. Counterparts

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

G. No Third Party Beneficiaries

This Instrument does not create any third-party beneficiaries, and does not authorize any third-party actions, including, without limitation, suits for personal injuries, property damage, or enforcement. The duties, obligations, and responsibilities of the Parties to this Instrument with respect to third parties are as otherwise provided by law, as though this Instrument does not exist.

H. Availability of Funds

Implementation of this Instrument by the USFWS is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of appropriated funds. The USFWS is not 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.

I. No Partnerships

This Instrument does not make either Party an agent for, or the partner in a joint venture of, the other Party.

J. Governing Law

This Instrument is governed by, and construed in accordance with, the Endangered Species Act and other applicable federal and state laws and regulations. However, nothing in this Instrument is intended, or is construed as, a waiver of sovereign immunity beyond that which has been granted by the United States legislature in applicable federal laws.

K. Headings and Captions

Any paragraph heading or caption contained in this Instrument is for convenience of reference only and does not affect the construction or interpretation of any provisions of this Instrument.

L. Right to Refuse Service

USFWS FO confirmation that a proposed Transportation Project or other Action, which includes proposed use of this ILF Program for the Project's or Action's Compensatory

Mitigation component, may rely on the Programmatic BO to comply with Section 7(a)(2) of the ESA does not signify the Program Sponsor's acceptance of the Project for the ILF Program. The Program Sponsor reserves the right to refuse to accept Mitigation Fees from any Transportation Project or other Action for any reason.

M. No Contract

Any federal agency participation in and approval of the Instrument is in furtherance of its regulatory obligations under applicable federal laws and regulations. As such, the Instrument is not a "contract" between or among the Parties. Rather, the Instrument is the legal document for the establishment, operation, and use of the Program pursuant to the authorities set forth in Section III. Any dispute arising under this Instrument is resolved pursuant to the dispute resolution provisions herein, and does not give rise to any claim by any Party for monetary damages or other relief for alleged "breach of contract."

**XII. 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 is deemed executed on the date of the last signature by the Parties.

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

**U. S. FISH AND WILDLIFE SERVICE**

By: \_\_\_\_\_  
Joanna Polk, Assistant Regional Director  
Ecological Services, Region 2

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Lori Nordstrom, Assistant Regional Director  
Ecological Services, Region 3

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Dr. Catherine Phillips Assistant Regional Director  
Ecological Services, Region 4

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Sharon Marino, Assistant Regional Director  
Ecological Services, Region 5

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Stephen Small, Assistant Regional Director  
Ecological Services, Region 6

Date: \_\_\_\_\_

**PROGRAM SPONSOR – THE CONSERVATION FUND**

By: Holly Cannon  
Holly Cannon  
Executive Vice President and General Counsel

Date: March 15, 2022