



Board of Supervisors Memorandum

November 18, 2014

In-Lieu Fee Program Enabling Instrument with the Pima County Regional Flood Control District, US Army Corps of Engineers and the Tucson Audubon Society

Background

On July 2, 2013, the Pima County Regional Flood Control District (District) entered into the above referenced Enabling Instrument (Instrument; attached) for the purpose of operating an In-Lieu Fee (ILF) Program to provide compensatory mitigation for disturbance to Waters of the United States as provided for within Section 404 of the Clean Water Act.

Unfortunately, we were not able to develop an operating arrangement with the Tucson Audubon Society (TAS) that meets both our statutory requirements as a political subdivision of the State of Arizona and their needs as a nonprofit 501(c)(3) organization.

On October 14, 2014, the Board of Supervisors approved the reimbursement for the cost of services to the TAS as a first step toward terminating our participation with them. It is now my intent to present the termination of our participation in the Instrument to the Board of Supervisors to ask for approval to terminate.

Section IX D.2 of the Instrument states: *"Any Party to this instrument may terminate its participation in this instrument by giving 60 days written notice to the other Parties."* The balance of this paragraph can be found on Pages 22 and 23 of the Instrument. Since there are no authorized ILF projects under this Instrument, the agreement can be terminated with a 60-day notice to all parties, which would include the TAS and the US Army Corps of Engineers, Los Angeles District (Corps). Also, since no funds have been received and no project approved, termination is relatively simple.

There is still the opportunity for the District to develop an ILF Program on lands owned by the District with the assistance of the Natural Resources, Parks and Recreation Department and the Office of Sustainability and Conservation. A new prospectus would need to be submitted to the Corps for review and public comment. If the new prospectus is approved, we could then enter into a new Instrument with the Corps.

Recommendation

I recommend the Board of Supervisors approve termination of the existing In-Lieu Fee Program Enabling Instrument between the Pima County Regional Flood Control District, US

The Honorable Chair and Members, Pima County Board of Supervisors
**Re: In-Lieu Fee Program Enabling Instrument with the Pima County Regional Flood Control
District, US Army Corps of Engineers and the Tucson Audubon Society**

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Army Corps of Engineers and the Tucson Audubon Society and authorize staff to develop a new prospectus for a Canoa Ranch In-Lieu Fee Program.

Respectfully submitted,



C.H. Huckelberry

County Administrator

CHH/mjk – November 5, 2014

Attachments

c: John Bernal, Deputy County Administrator for Public Works
Suzanne Shields, Director, Regional Flood Control District

- b. If, after reviewing the Program Sponsor's Notice of Dispute, conferring with the Program Sponsor, and considering all relevant information related to the violation, the Parties determine that a violation has occurred, the Parties shall give the Program Sponsor notice of such determination in writing. Upon receipt of such determination, the Program Sponsor shall have fifteen (15) days to cure the violation. If said cure reasonably requires more than fifteen (15) days, the Program Sponsor shall, within the fifteen (15) day period, submit to the Parties for review and approval a plan and time schedule to diligently complete a cure. The Program Sponsor shall complete such cure in accordance with the approved plan.

C. Dispute Resolution

Resolution of disputes concerning the Parties' compliance with this Instrument shall be in accordance with those stated in 33 C.F.R. 332.8. Disputes related to satisfaction of Performance Standards may be referred to independent review from government agencies or academia that are not part of the IRT. The Parties will evaluate any such input and determine whether the Performance Standards have been met.

D. Modification, Amendment and Termination of Instrument

1. **Modification and Amendment.** This Instrument, including its Exhibits, may be amended or modified only with the written approval of the Parties. Instrument modifications, including the addition or expansion of ILF Projects, will follow the process outlined in Exhibit C. USACE may use a streamlined modification review process for changes reflecting Adaptive Management of an ILF Project Site, Credit Releases, changes in Credit Releases and Credit Release schedules, and changes that USACE determines are not significant (Exhibit C).
2. **Termination/Program Closure.** Any Party to this Instrument may terminate its participation in this Instrument by giving 60 days written notice to the other Parties. In the event that the Program operated by Program Sponsor is terminated (i.e., closed), Program Sponsor is responsible for fulfilling any remaining ILF Project obligations including the successful completion of ongoing mitigation projects, relevant maintenance, monitoring, reporting, and long-term management requirements. Program Sponsor shall remain responsible for fulfilling these obligations until such time as the long-term ownership of all mitigation lands has been transferred to the land steward entity responsible for all long-term management of the project(s). Funds remaining in the Program Accounts must continue to be used for the Restoration, Establishment, Enhancement, and/or Preservation of aquatic resources within the Service Area. USACE shall direct Program Sponsor to use these funds to secure Credits from another source of third-party mitigation, such as another in-lieu fee program, mitigation bank, or another entity such as a governmental or non-profit natural resource management entity

willing to assume the duties of a land steward. The funds should be used, to the maximum extent practicable, to provide compensation for the amount and type of aquatic resource for which the fees were collected.

E. Controlling Language

The Parties intend the provisions of this Instrument and each of the documents incorporated by reference to be consistent with each other, and for each document to be binding in accordance with its terms. These documents shall be interpreted in a manner that avoids or limits any conflict between or among them. However, if and to the extent that specific language in this Instrument conflicts with specific language in any document that is incorporated into this Instrument by reference, the specific language within the Instrument shall be controlling.

F. Entire Agreement

This Instrument, and all exhibits, appendices, schedules and agreements referred to in this Instrument, constitute the final, complete and exclusive statement of the terms of the agreement between and among the Parties pertaining to the Program, and supersede all prior and contemporaneous discussions, negotiations, understandings or agreements of the Parties. No other agreement, statement, or promise made by the Parties, or to any employee, officer, or agent of the Parties, which is not contained in this Instrument, shall be binding or valid. No alteration or variation of this instrument shall be valid or binding unless contained in a written amendment in accordance with Section IX.D. Each of the Parties acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any of the other Parties or anyone acting on behalf of any of the Parties unless the same has been embodied herein.

G. Reasonableness and Good Faith

Except as specifically limited elsewhere in this Instrument, whenever this Instrument requires a Party to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If a Party disagrees with any determination covered by this provision and reasonably requests the reasons for that determination, the determining Party shall furnish its reasons in writing and in reasonable detail within 30 days following the request.

H. Successors and Assigns

This Instrument and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns subject to the limitations on transfer set forth in this Instrument.