LETTER OF AGREEMENT
Between the
U.S. ARMY CORPS OF ENGINEERS
SOUTH PACIFIC DIVISION
&
THE NATIONAL FISH AND WILDLIFE FOUNDATION
Concerning the Establishment and Operation of
THE SOUTH PACIFIC WETLANDS CONSERVATION ACCOUNT

Section 1: INTRODUCTION

1.1. This document (the "Agreement) establishes an in-lieu fee mitigation agreement between the South Pacific Division of the U.S. Army Corps of Engineers ("Corps of Engineers") and The National Fish and Wildlife Foundation ("Foundation") to create and administer the South Pacific Wetlands Conservation Account (the "Account"), effective as of the last date set forth on the signatory page hereto.

Section 2: PURPOSE and OBJECTIVES

2.1. The primary purpose of the Account shall be to accept monies generated as an in-lieu fee funding requirement for authorized activities, as well as monies generated by enforcement and compliance actions initiated by the Corps of Engineers, and to serve as a funding source for wetland restoration, creation, enhancement, and, in exceptional circumstances preservation of wetlands and other aquatic resources. The primary objective of projects developed and funded under this Agreement will be to replace functions and values of wetlands, and associated habitat, that have been degraded or destroyed as a result of activities conducted in compliance with or in violation of the Clean Water Act and/or the Rivers and Harbors Act.

2.2. Under Section 404 of the Clean Water Act (33 U.S.C. § 1251 et seq.), a permit (Section 404 permit) is required from the Corps of Engineers for most types of development (discharges of dredged and fill material) within waters of the United States, including wetlands. Under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), a permit (Section 10 permit) from the Corps of Engineers is required for any work or structure which impacts the course, condition or capacity of navigable waters of the United States. The Corps of Engineers is also authorized to seek administrative or civil penalties for unauthorized activities, and may enforce mitigation requirements included as permit conditions. The intent of the regulatory program is to minimize wetland losses to the maximum extent practicable by avoiding impacts and by requiring appropriate mitigation to compensate for remaining

impacts. However, when wetlands are filled or altered without benefit of a Corps of Engineers permit, or when compensatory mitigation requirements included by the Corps of Engineers as a condition of Section 404 or Section 10 permits are not fulfilled, wetland losses can occur.

2.3. Under certain circumstances the Corps of Engineers has determined that it may offer greater resource protection and conservation benefits to gather funds collected in-lieu of actual required mitigation actions, and to expend such in lieu monies on independent conservation projects which will offset wetland impacts caused by the authorized activity. In particular, it is anticipated that projects funded under this agreement will be used to mitigate for wetlands and other aquatic resource impacts authorized under the nationwide or regional general permit/programs.

2.4. The geographic scope of consideration for in-lieu mitigation, enforcement and compliance actions that generate funds for the Account, and for conservation projects developed for funding under the Account (defined below in Section 4.2.1), shall be the boundaries of the Corps of Engineers South Pacific Division (California, Nevada, Arizona, Utah, New Mexico, western and southern Colorado, and west Texas). The projects will be located as close to specific impact sites as is appropriate and practicable as determined by the Corps of Engineers in coordination with the Foundation. In addition the Foundation may use other funds to augment conservation projects.

Section 3: AUTHORITY

3.1. This Agreement is entered into under the authority of the Clean Water Act (33 U.S.C. 125 et seq.), and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403).

3.2. The Foundation is a private non-profit conservation organization established by the National Fish and Wildlife Foundation Act (16 U.S.C. 3701 *et seq.*) as amended. The Foundation is directed to undertake activities that further the conservation and management of the fish, wildlife, and plant resources of the United States for present and future generations of Americans. The Foundation works with private, state, and Federal organizations and agencies to conduct such conservation activities.

Section 4: SPECIFIC OBLIGATIONS of the PARTIES

4.1. Pursuant to the criteria identified in Section 5 herein, the Corps of Engineers and the Foundation shall jointly:

> 4.1.1. Identify wetland and other aquatic resource conservation projects that meet the purposes of Section 2 of this Agreement.
>
> 4.1.2. Coordinate project development directly with land management agencies, land trusts, environmental organizations, and other entities, as appropriate.

4.1.3. Provide information on the Account to potential project sponsors and to the general public, as appropriate.

4.1.4. Coordinate projects with the U.S. Fish and Wildlife Service and, as appropriate, the National Marine Fisheries Service.

4.2. The Foundation shall:

4.2.1. Establish a restricted account (the "Account") pursuant to this Agreement and shall be responsible for the administration of the Account on behalf of the Corps of Engineers as further described in Section 5 herein.

4.2.2. Make disbursements of funds upon direction from the Corps from the Account pursuant to Section 4.1 and Section 6 of this Agreement.

4.2.3. Enter into agreements, as the Foundation deems necessary, to implement wetlands and aquatic resource conservation projects pursuant to Section 2 and Section 4.1.

4.2.4. Develop potential wetlands and other aquatic resources restoration projects in conjunction with other partners, including but not limited to the U.S. Fish and Wildlife Service, in accordance with Section 4.1.1. and submit them in writing to the Corps of Engineers.

4.2.5. Report annually to the Corps of Engineers on the account balance, a list of projects, and short description of each project including an evaluation of project success.

4.3 The Corps of Engineers shall:

4.3.1. Provide Federal oversight by ensuring that projects developed and funded under this Agreement provide maximum benefit to Federal trust resources, further the goals and objectives of the appropriate Federal statutes and comply with all applicable federal statutes, regulations, and policies cited in Section 3 herein.

4.3.2. Select wetland and other aquatic resource conservation projects that meet the purposes of Section 2 and Section 4.1.1. of this Agreement. Direct the Foundation to make project disbursements in accordance with the preceding statement.

4.3.3. Review and approve in writing and in a timely manner, wetlands and other

aquatic resources restoration projects submitted by the Foundation under Section 4.2.4.

4.3.3. Maintain records of projects, enforcement, and compliance actions, including project location, acres and/or functions of lost resources by habitat type, and similar information, which will be used in developing compensatory mitigation projects.

4.3.4. Prepare an annual status summary of actions which have served as sources of funds for the Account.

4.3.5. Enter into agreements with the Foundation and other sponsors, co-sponsors, and contractors as deemed necessary and practicable.

4.3.6. Cooperate and assist the Foundation in entering into agreements as described in 4.2.3.

Section 5: CRITERIA

5.1. Projects developed under this Agreement are intended primarily to provide in-lieu mitigation for ecological impacts to wetlands and other aquatic resources which occur as a result of work conducted in compliance with a Section 404 permit or Section 10 permit, or mitigation required due to unauthorized activities or permit conditions that were not satisfied. Consistent with the goals of the Clean Water Act, the focus will be to restore and maintain the chemical, physical, and biological integrity of the nation's waters. More specifically, emphasis will be on restoration, creation, enhancement, and in exceptional circumstances, preservation of aquatic and wetland habitat.

5.2 Habitat-based projects developed and selected for funding under this Agreement shall:

5.2.1. Be located within the boundaries of the Corps of Engineers South Pacific Division (California, Nevada, Arizona, Utah, New Mexico, western and southern Colorado, and west Texas).

5.2.2. Provide, to the extent appropriate and practicable, the full replacement of functions of wetlands and aquatic resources which have been impacted by the projects serving as sources of funds for the Account.

5.2.3. Be selected according to the priority sequence of restoration of former wetlands, creation of new wetlands, enhancement of existing wetlands, and, in exceptional circumstances, preservation of existing wetlands of unique value. In addition, restoration, preservation, or enhancement of upland areas which protect,

buffer, or support important wetlands will be considered for funding, only when they will have direct wetland benefit. With respect to project selection, projects will be selected, as stated in Section 4.3.2., in accordance with applicable federal policies and guidelines.
5.2.4. To the extent appropriate and practicable, mitigation funds should be used to restore, create, or enhance wetlands with similar functions, values, and quality as those wetlands impacted through Section 10/404 permits.

5.2.5. Have provisions for long-term management and stewardship by a responsible state agency, federal agency, or conservation organization.

5.2.6. Priority to fund mitigation projects shall be given to those of the same habitat type within a watershed and located as close to the site of impacted wetlands, as practicable.

Section 6: FINANCIAL ADMINISTRATION

6.1. Contributions to the Account will be held in a bank which must be a member of the Federal Deposit Insurance Corporation (FDIC), separate from all other accounts. The monies held in the escrow account shall earn interest. The Foundation shall authorize the bank to invest the funds in direct obligations of the Government of the United States of America or in obligations of agencies or insurers that are guaranteed by the Government of the United States of America. The Account shall be invested in such a manner as to ensure immediate liquidity. Any instrument must be subject to redemption on or prior to the date the funds will be needed by the Government, except as otherwise set forth in Sections 6.2 and 6.3. All interest and earnings accruing to the Account shall remain in the Account and shall be used for the purposes specified in Sections 2 and 5. All interest and earnings are under the authority of the Corps of Engineers and can only be spent with their approval as stated in Section 4.3.

6.2. The Foundation shall receive, at the time that funds are contributed to the Account, an initial administrative overhead reimbursement equal to five percent (5 %) of funds contributed to the Account to cover expenses for day to day management of the Account, initial bank charges for establishment of the Account, and for personnel time in carrying out the responsibilities of this Agreement. This reimbursement shall be made against the corpus of the Account.

6.3. In addition to the amount specified in Section 6.2, the Foundation, as project manager or implementing partner of a project as set forth in Section 5, will be reimbursed for all other reasonable expenses incurred in connection with the satisfaction of its obligations under this Agreement. Such reimbursement, however, shall be subject to an annual operating budget approved in writing by the Corps of Engineers. Bank charges for the Account after the first year may be paid from interest collected, and to the extent not covered by accrued interest, shall be paid from the corpus of the Account.

6.4. Disbursements from the Account will be made upon receipt of a written request from the Corps of Engineers Project Officer (as set forth in Section 8.1) to fund particular projects pursuant to Sections 4 and 5 herein.

6.5. The Foundation will furnish an annual report to the Corps of Engineers detailing all income, disbursements, and interest earned with respect to the Account.

6.6. The Corps of Engineers retains the right to audit all books and records of the Foundation pertaining to this Agreement upon reasonable prior notice to the Foundation.

6.7. If this Account if determined to be a taxable entity under Section 468B of the Internal Revenue Service's Tax Code, then any appropriate taxes will be paid out of the accrued interest.

Section 7: AMENDMENT and TERMINATION

7.1. Amendments to this Agreement may be proposed by any signatory party in writing and will become effective only upon being reduced to a written instrument and being signed by a duly authorized representative of each party.

7.2. This agreement shall last in perpetuity unless amended by one of the parties herein.

7.3. This Agreement may be terminated by a signatory upon 30 days written notice to the other party. In the event of termination, the Foundation will retain such funds as necessary to meet existing project obligations made under the terms of this Agreement. The Foundation shall transfer all remaining funds to a restricted account dedicated to wetland conservation as specified by the Corps of Engineers in writing.

Section 8: NOTICES and PROJECT OFFICERS

8.1. The individuals listed below shall be the current Project Officers for this Agreement. Notices to be given herein shall be made in writing and may given by delivering the same in person or their successor, by mail, or by telecopy (fax). Notices shall be effective only if and when received at the address of the party to be notified (or their appointees).

If to the Corps of Engineers:

Wade L. Eakle, Regulatory Program Manager
U.S. Army Corps of Engineers
South Pacific Division
333 Market Street
San Francisco, CA 94105

(415) 977-8030, fax (415) 977-8039/8047

If to the Foundation: Whitney Tilt, Director of Conservation Programs
National Fish & Wildlife Foundation
1120 Connecticut Ave., N.W., Suite 900
Washington, D.C. 20036
(202) 857-5679, fax (202) 857-0162

8.2. Local points of contact for this Agreement at each Corps of Engineers' District office within the South Pacific Division shall be:

Albuquerque District (New Mexico, southern Colorado, west Texas)
Chief, Regulatory Branch
4101 Jefferson Plaza NE
Albuquerque, NM 87109-3435
(505) 342-3282, fax (505) 342-3498

Los Angeles District (southern California, Arizona)
Chief, Regulatory Branch
P.O. Box 2711
911 Wilshire Blvd.
Los Angeles, CA 90053-2325
(213) 452-3406, fax (213) 452-4196

Sacramento District (northern and central California, Nevada, Utah, western Colorado)
Chief, Regulatory Branch
1325 J Street, Room 1444
Sacramento, CA 95814-6877
(916) 557-5252, fax (916) 557-6877

San Francisco District (coastal central and northern California)
Chief, Regulatory Branch
333 Market Street, 8th Floor
San Francisco, CA 94105-2197
(415) 977-8460, fax (415) 977-8343

8.3. Local point of contact for the National Fish and Wildlife Foundation shall be:

David Brunner
Southwest Regional Director
National Fish and Wildlife Foundation
28 2nd Street, Sixth Floor

San Francisco, CA 94105
(415) 778-0999, fax (415) 778-0998

Acceptance of the terms of this Agreement as outlined herein is indicated by signing three originals of this letter.

U.S. Army Corps of Engineers, South Pacific Division

Acceptance of the terms of this Agreement as outlined herein is indicated by signing three originals of this letter.

U.S. Army Corps of Engineers, South Pacific Division

By: _____
Brigadier General Peter T. Madsen

Title: Division Commander

Date: 8 Nov 00

The National Fish and Wildlife Foundation

By: _____

Title: Executive Director

Date: 20 Nov 00

AGREED AND ACCEPTED AS OF THE DATES HEREOF