

# Mitigation Site Transfer to Resource Agencies & Non-Governmental Organizations

*Prepared for: AASHTO Standing Committee on the Environment*

---

*Prepared by:*

Marie Venner Consulting and ICF International  
5/30/2012

The information contained in this report was prepared as part of NCHRP Project 25-25, Task 75, National Cooperative Highway Research Program.

**SPECIAL NOTE:** This report **IS NOT** an official publication of the National Cooperative Highway Research Program, Transportation Research Board, National Research Council, or The National Academies.



Compendium of Practice, Guide  
and Final Report

NCHRP 25-25 Task 75

# Mitigation Site Transfer to Resource Agencies & Non-Governmental Organizations

AASHTO's Standing Committee on  
the Environment

May 2012

Marie Venner Consulting  
and ICF International

### **Acknowledgement of Sponsorship**

This work was sponsored by the American Association of State Highway and Transportation Officials, in cooperation with the Federal Highway Administration, and was conducted in the National Cooperative Highway Research Program, which is administered by the Transportation Research Board of the National Academies.

The research team wishes to thank Frannie Brindle, Bill Hauser, Michael Lamprecht, Phil Harris, Kevin Walsh, Michael Pettegrew, Kathy Ames, Mike Ruth, Pat Cazenias, and Project Officer Nanda Srinivasan. In addition, many DOT practitioners candidly shared their experience and insight. Other agencies and NGOs contributed as well.

### **Disclaimer**

The opinions and conclusions expressed or implied are those of the research agency that performed the research and are not necessarily those of the Transportation Research Board or its sponsoring agencies. This report has not been reviewed or accepted by the Transportation Research Board Executive Committee or the Governing Board of the National Research Council.

## Table of Contents

<b>1</b>	<b>Introduction.....</b>	<b>1</b>
1.1	Where We’ve Been, Where We’re Going .....	1
1.2	Research Process.....	3
1.3	DOTs’ Best Practice in Facilitating Mitigation Site Transfer.....	4
<b>2</b>	<b>Findings .....</b>	<b>6</b>
	Mitigation and Extent of Site Transferring at State DOTs .....	6
	Composition of the Mitigation States Obtain .....	7
	Satisfaction with Transfers and the Transfer Process .....	9
2.1	Benefits of Transferring Mitigation Sites .....	11
	Site Transfer’s Potential to Minimize Long-Term Costs is Key .....	12
	Minimization of Long-Term Costs to the DOT and Ability to Effectively/Reliably Handle Long-Term Management Effectively and Reliably Are “Very Important” .....	12
	DOTs Think Opportunity to Contribute to Achieving Statewide Conservation Objectives is a Key Benefit, Most Often Marked as “Important” .....	13
	Decreased Permitting Time is Not a Driving Factor in Pursuing Mitigation Transfers .....	13
	DOTs Expect Site Transfer is to Minimize Home Agency Workload .....	13
2.2	Challenges Encountered by DOTs .....	14
	Finding Willing Parties & the Time to Arrange Larger Scale Analyses and Partnerships .....	14
	“Orphan Sites” Not Particularly Desirable by Resource Agencies or Organizations .....	15
	DOTs “Can’t Guarantee What the Maintenance Budget is Going to be in 5 Years” .....	16
	State DOT May Not Be Able to Pay Stewardship Fee .....	16
	Legally Defining and Enforcing a Perpetual Mitigation Contract .....	17
	Prohibitions on Transferring Sites to Non-Government Agencies or Restrictions on Transferring Liability, with Land .....	17
	Length and Complexity of the Siting and Land Transfer Processes.....	17
	Feasibility of Requested Long-Term Management.....	18
	Little Help from Regulatory Agencies with Long-Term Monitoring and Enforcement .....	19
	Unexpected Circumstances, Including Impacts by Adjacent Land Uses.....	20
	Underperforming Endowment Funds.....	20

Even if Funding Can Be Provided for Long-term Management, Agencies May Lack the Staff or Ability to Hire.....	21
Managing an Inventory of Long-Term Management Sites.....	21
<b>3 Compendium of Practice .....</b>	<b>23</b>
3.1 Regulatory Requirements & Conditions Placed on Transfer .....	23
Regulatory Requirements for Long-term Management are Workable in Most States.....	23
Recent Stipulations Some DOTs Have Encountered.....	23
3.2 A Framework for and Guide to Successful Land Transfer .....	25
Finding Parties.....	26
Templates for the Land Transfer Process .....	26
Streamlining Assembly of the Deal: Smoothing the Way for Future Transfer .....	27
Agency Roles and Responsibilities .....	31
Real Estate Process and Involving Right-of-Way Staff.....	34
3.3 Best Practice for Facilitating Land Transfer .....	36
Focus on Large Sites, Minimize Numerous Smaller Transactions .....	37
Minimize Numerous Smaller Transactions .....	37
Use Modern Technology and Methods to Place Mitigation in Areas of Greatest Need or Highest Value by Agencies and Potential Land Stewards.....	37
Avoid/Prevent a Bankruptcy Scenario .....	41
Cooperative/Interagency Agreements .....	43
The Benefits of Mitigation Banking and In Lieu Fee (ILF) Mitigation .....	48
<b>4 Conclusion .....</b>	<b>49</b>
<b>Appendix A - Transfer Agreement Templates .....</b>	<b>1</b>
Memorandums of Agreement and Understanding .....	1
MOA for Transfer of Mitigation Site, Involving Endowment.....	1
Mitigation Cooperative Agreement (MOA) with Monitoring.....	4
Simple Agreement (University Assumed Management) .....	12
Simple Memorandum Effecting Site Transfer from DOT to DNR .....	13
Mitigation Cooperative Agreement (MOA) Without Monitoring.....	16
MOA - Terms and Conditions for County/Grantee Land Management .....	23
MOU between DOT and Mitigation Land Manager Regarding Public Access.....	28
Contract Outlining Terms of Agreement for Long-Term Stewardship and Management ...	32
Stewardship Agreement Template .....	45

Endowment Transfer Agreements.....	49
Transfer of Land and Endowment to a Governmental Entity/Nonprofit/ Special District Template .....	49
Transfer of Land and Endowment to a Governmental Entity/Non-Profit/Special District Template .....	56
Fund Transfer Agreement.....	63
Transfer Money to Acquire Land and Endowment Funds to a Governmental Entity/Nonprofit/Special District Template .....	68
Template for the Transfer of Endowment Funds to a Governmental Entity/Nonprofit/Special District .....	75
Easement Templates.....	81
Conservation Easement Deed and Recitals .....	81
Permitted and Prohibited Activities and Uses of the Easement Property, with Grantor and Grantee Rights .....	92
Miscellaneous Templates for Mitigation and Transfer.....	96
Certificate of Acknowledgement - Notary Public .....	96
Statement of Work Template .....	97
Compensation, Payment, and Corrective Work Template.....	98
<b>Appendix B – Printable Version of Web-Based Survey.....</b>	<b>1</b>
<b>Appendix C – Specific Survey Responses .....</b>	<b>1</b>
<b>Appendix D: Interview Questions.....</b>	<b>1</b>

## Table of Figures:

Figure 1: States responding to the survey. The same set indicated the desirability of making mitigation site transfers.....	6
Figure 2: Types of mitigation activities .....	7
Figure 3: Mitigation acquisitions per year .....	8
Figure 4: Number of mitigation land acquisitions per state DOT, annually .....	8
Figure 5: Perception of satisfaction with the mitigation/conservation transfer process .....	11
Figure 6: Primary Benefits.....	12
Figure 7: Nationwide View of TNC Eco-Regional Strategic Conservation Priorities, Identified with Agencies .....	15
Figure 8: Monitoring and enforcement for failure to comply with long-term management requirements .....	19
Figure 9: ODOT Mitigation Process for Environment and ROW Staff .....	33
Figure 10: Tennessee State Wildlife Action Plan Priorities & Florida Strategic Priorities .....	39
Figure 11: Priority Conservation Areas Identified by Massachusetts.....	40



# 1 Introduction

State DOTs establish wetlands, restore watersheds, and conserve parcels of land to improve the viability of fish and wildlife as compensatory mitigation in the course of their project development work. DOTs perform such mitigation to offset unavoidable impacts to regulated natural resources such as wetlands and federally listed threatened and endangered species.

The long-term management of both wetland and conservation lands pose significant challenges for stewards whose mission is not conservation or land management. A 2005 Domestic Scan by FHWA noted that long-term management was one of the most challenging aspects of mitigation.<sup>1</sup> Transfer of ownership and/or long-term management and maintenance of successful sites is viewed as having the potential to reduce the expenditure of funds by state transportation agencies and also provide an ecological benefit regarding the maintenance of these sites. Thus, many DOTs are looking for ways to collaborate with other resource agencies and non-profit organizations to assume the long-term obligations associated with these lands.

The NCHRP 25-25, Task 75 research project was charged with identifying practices and developing templates for the transfer for mitigation and conservation sites from transportation agencies to long-term managers at state and federal resource agencies and non-governmental organizations (NGOs). A key charge of the research was to develop:

- A compendium of DOT best practice along with a review of the challenges DOTs currently face
- A guide to mitigation site transfer, including templates for DOTs to use and adapt

This research report compiles best practices transferring ownership of mitigation and conservation sites to private conservation organizations or government conservation agencies. Processes for transfer are incorporated, presenting decision frameworks appropriate to different states, to assist transportation agencies undertaking the process of the transfer of transportation mitigation and conservation sites.

As some DOTs noted throughout this project, there are no easy ways to transfer property, but the process can be made easier if DOTs align site selection with resource agency conservation and restoration priorities and involve ROW sections early. This report and compendium reviews the challenges DOTs have encountered and what has worked best for them.

## ***1.1 Where We've Been, Where We're Going***

Since over 99% of the transportation projects today occurs on the existing road network rights-of-way, impacts to natural resources most often occur in already degraded areas. When DOTs try to compensate for impacts though, they try to produce high quality, high value ecological mitigation. The first-choice approach today tends to promote partnerships with other entities to preserve the best areas and restore ecologically desirable places and resources. In the 90s and before, the emphasis was on on-site, in-kind mitigation which was considered easier and



led to creation of many new wetlands in less ecologically desirable areas, such as the roadside right-of-way (ROW). In other cases, DOTs faced pressures to purchase credits in former agriculture lands or other degraded areas with questionable long-term prospects for sustainability. Sites of lesser ecological value were saddled with correspondingly low interest by state and federal resource agencies and NGOs in assuming responsibility for long-term management; thus, finding both practical mitigation solutions and permanent stewards was a problem for DOTs. Many of these early sites remain in DOT ownership, but are considered “orphan sites” in that they are undesirable to long-term land stewards, for conservation purposes, and/or public use. It isn’t viable for DOTs to indefinitely continue to add to the number of sites under long-term ecological management by the DOT; DOTs are not staffed for active long-term ecological land management as a large portion of their work.

While DOTs have been partners in state and local watershed restoration efforts for two decades or more, when they have the option, DOTs prefer to focus on the transportation system and leave the long-term land management to another responsible party who can focus on the natural resource needs, as long as the expenses for the arrangement are not exorbitant. FHWA only requires that transfer of mitigation sites occur “to an appropriate public agency.”

The need to find a long-term home or steward for mitigation or conservation lands has been a key factor in DOTs increasing focus on ensuring their mitigation and conservation investments are generating or restoring sustainable, ecologically valuable mitigation areas. By choosing higher quality conservation lands, resource agencies and conservation organizations become more interested. Higher satisfaction of other parties’ interests can lead to lower costs for DOTs. DOTs bring funds from the mitigation nexus; federal funds can be spent mitigating for impacts to resources protected under Clean Water Act Section 404, the federal Endangered Species Act, and other regulations. Resource agencies and NGOs sometimes bring conservation plans (existing environmental analyses and already identified priority conservation or restoration areas) and a mission or capacity to manage conservation lands for the long-term. Environmental staff members in both transportation and resource agencies share a mission to produce more public good and accomplish the most that they can for the investment of taxpayer dollars in mitigation.

Thus, the potential opportunities and the potential efficiencies brought together DOTs, NGOs, state Departments of Natural Resources (DNR), and other resource agencies in mitigation transactions where DOTs supply funds for purchase and conservation entities supply long-term ownership by conservation. In partnership, these players were (and are) able to achieve more and better wetland restoration, preservation, and habitat conservation.

What DOTs bring to the table in these transactions is significant. Timeliness of funding often means the ability of an NGO, DNR, or refuge to add a key parcel to its portfolio or not, during the limited timeframe the parcel is on the market. Transportation agencies have some flexibility to pursue a public interest mission and try to accomplish more than one thing, with mitigation performed to offset impacts as required by environmental regulations. As CWA 404 mitigation comprises almost three-quarters of all natural resources mitigation under all federal

programs for all resources, wetland mitigation and what it can accomplish for all resources is very important.<sup>2</sup> With the budget pressures and environmental challenges of today, these resources are being pressed to produce the most they can for both aquatic environments *and* species and habitats, both to comply with the 2008 mitigation rule and to respond to conservation needs across individual laws and regulations.

DOTs' mitigation investments have the potential to provide leverage, enabling important conservation and restoration to happen that wouldn't otherwise occur -- a contribution that has a value to resource agency and NGO partners. When DOTs can provide a missing piece, such as the funds to purchase critical parcels or wide areas of very high priority habitat, the entity that desires such investment is often willing to provide long-term management. Such a partnership enables a win-win for all involved. An area with high ecological value is conserved or one with high potential for both long-term sustainability and watershed contribution is restored, in contrast with "checkbox" mitigation that might have occurred in the past, when mitigation options were more constrained (onsite, in-kind, or identified late in the process) and creative partnerships were less common.

Mitigation in high priority areas gives DOTs more options in terms of long-term owners or managers, whether that mitigation is accomplished through banks, in-lieu fee programs, or through permittee-supplied mitigation and ownership of the property, or via conservation easement, which may ultimately be transferred to others. Thus, targeting mitigation to resource agency and NGO mitigation and conservation plans emerged as DOTs' best practice in finding long-term site managers, at an affordable price.

## **1.2 Research Process**

The research effort included both surveys and in-depth interviews, which identified many best practices in mitigation site transfer, as well as common requirements adhering to transfers. The team also collected processes and templates for site transfers.

In Task 1, the research team developed an electronic survey of all DOT Standing Committee on the Environment (SCOE) members composed primarily of easy to answer questions. Initial survey questions were being provided to the panel as part of the amplified workplan, for feedback and potential approval at the kick-off meeting on August 26, 2011.

Per our proposal, we also reached out to the Army Corps of Engineers and other important individuals and entities (rationale and detail described below) to gather their perspective on the draft question list and add any important questions or issues that may have been missed. A partial list is below:

- The Nature Conservancy (TNC) National Legal team and mitigation site transfer experts.
- San Diego Association of Governments and TRANS-NET Advance Mitigation Program
- FHWA Liaison at the US Fish and Wildlife Service

- U.S. Army Corps of Engineers, Regulatory Office
- North Carolina Ecosystem Enhancement Program
- Selected DOT wetland specialists and Environmental Directors
- Selected State Department of Natural Resources or Fish & Game leaders

Those of the above who responded generally said that the survey as proposed was well-thought out and they did not have questions to add. The feedback we received from the Corps of Engineers and the panel in particular led to development of a shorter survey, with more yes/no questions. A draft of the revised survey was provided to NCHRP in September 2011 and survey development proceeded that month.

The survey was designed in six parts using [www.surveymonkey.com](http://www.surveymonkey.com). All respondents were asked to fill out sections I (Profile), III, IV (Benefits and Challenges), V (Identification of Terms and Contract Language), and VI (Identification of Best Contact). The only respondents directed to section II of the survey were those who answered affirmatively to question 5 in section I: “Has your DOT successfully transferred mitigation/conservation sites to other entities for long-term management?”

The in-depth interviews focused on a range of DOT experiences, in different AASHTO regions. While the focus, in line with the RFP and research proposal, was to draw from the most experience states and best practices, we interviewed states with many mitigation site purchases per year and states with considerably less. We have input from some of the states that did many fewer and why, and a substantial discussion of the barriers DOTs face. We summarize these challenges and have tried to pull that out more in the final draft.

### ***1.3 DOTs’ Best Practice in Facilitating Mitigation Site Transfer***

The challenges DOTs encounter and the best practices they have found to work are summarized in this report. Of the many best practices collected, one stood out above the others in its value in easing site transfers though: targeting mitigation in highly desirable spaces greatly enhances the ability to find a long-term steward and can diminish costs. Some stewards will assume management of a parcel they have wanted to acquire, but have been otherwise unable to purchase.

Multiple state DOTs remarked on a growing awareness at resource agencies that linear infrastructure will not be able to avoid all impacts, as it crosses habitats and watersheds, but that agencies *can* partner to ensure that mitigation investments do the most they can for the environment. Agencies are working to leverage each other’s efforts.

As Doug Norris of the Minnesota Department of Natural Resources (MnDNR) tells it:

Part of the DNR’s mission is to increase the state’s wetlands base. MnDNR takes title to the land for additional wetlands that can be developed and put in state trust. In

Minnesota, each county does a water plan. Where (soil and water) watershed districts exist, some identify priority restoration areas as well. MnDNR has a restorable wetlands data layer, consisting of drained wetlands, identified hydric soils and topography. FWS and Ducks Unlimited participated in development of this for the Prairie Pothole Region. MnDNR is now in the process of finishing up a state prairie plan for much of the remainder of the state that identifies critical areas for wetland and grassland restoration, which also provides corridors between known habitat blocks. The DNR wants to make it easy for anyone, the DOT included, to look at habitat, flood storage, and water quality and identify optimal mitigation sites. MnDNR is trying to look at methods that integrate these priorities, to help identify sites that will generate the biggest bang for the buck.

When DOTs can align their conservation and wetland restoration investments with these plans, they have ready-made managers in place. Site transfers are feasible, whereas they may not be otherwise.

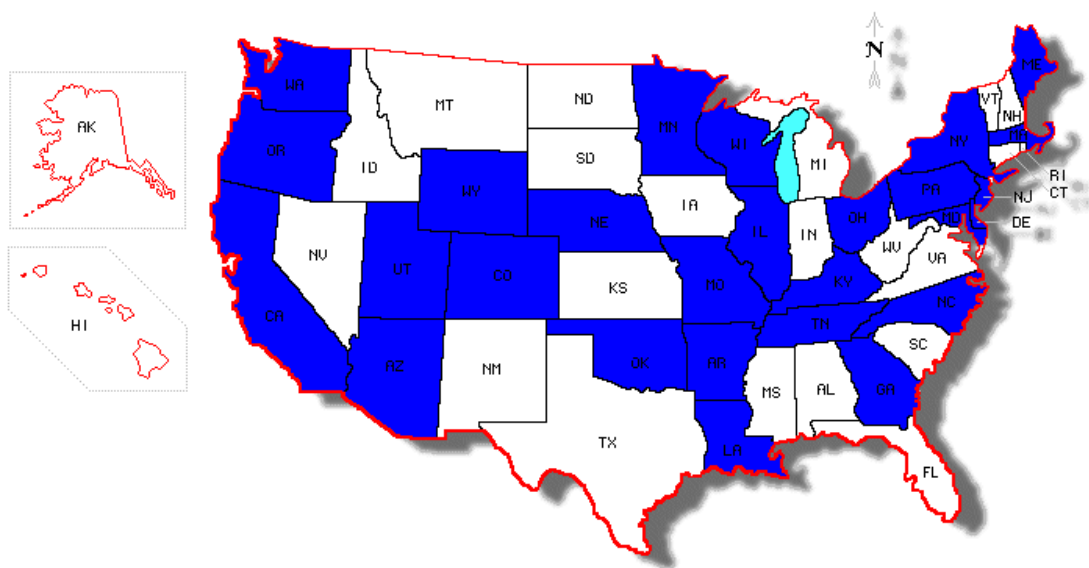
Some states have taken steps toward advance mitigation on a large scale, notably Caltrans with their Statewide Advance Mitigation Initiative (SAMI). Making such analysis easier and more accessible, and thus more widespread, is an important remaining task, but exciting developments furthering this objective are in the works. Other sections cover the challenges, common requests and requirements DOTs are encountering in permits and agreements with regard to long-term management, as well as template contract and agreement language.

## 2 Findings

### Mitigation and Extent of Site Transferring at State DOTs

Most respondents' agencies (over 73%) have explored transfer or tried to transfer mitigation or conservation lands to third parties. **All 28 responding DOTs reported they were either making such transfers or were interested in making them**, though in one state two respondents expressed differing opinions. Figure 1 illustrates these responding states. See appendices A and B for an overview of the survey and methodology.

**Figure 1: States responding to the survey. The same set indicated the desirability of making mitigation site transfers.**



Transfers are not easy to accomplish though. As one state DOT commented, “the deals tend to be different every time.” New York State DOT (NYSDOT) was among the minority indicating they had not been able to successfully transfer sites for long-term management, though they were interested in doing so due to the potential cost savings. Inclusion of transfer clauses in other states’ mitigation banking guidance and Memoranda of Agreement (MOAs) point to the interest these agencies place in transferring sites to long-term conservation managers. For example:

- Nebraska’s Banking MOA states that “NDOR will seek to acquire permanent surface easements from current owners or will acquire appropriate properties for bank development and have a resource agency (e.g., NE Game and Parks Commission, USFWS, or private entity like TNC) take and manage the banked land as a permanent wetland.”
- Pennsylvania’s Statewide Umbrella Wetland Banking MOA says that the sponsor will maintain the site until bank closure, as directed by the permitting agencies and that

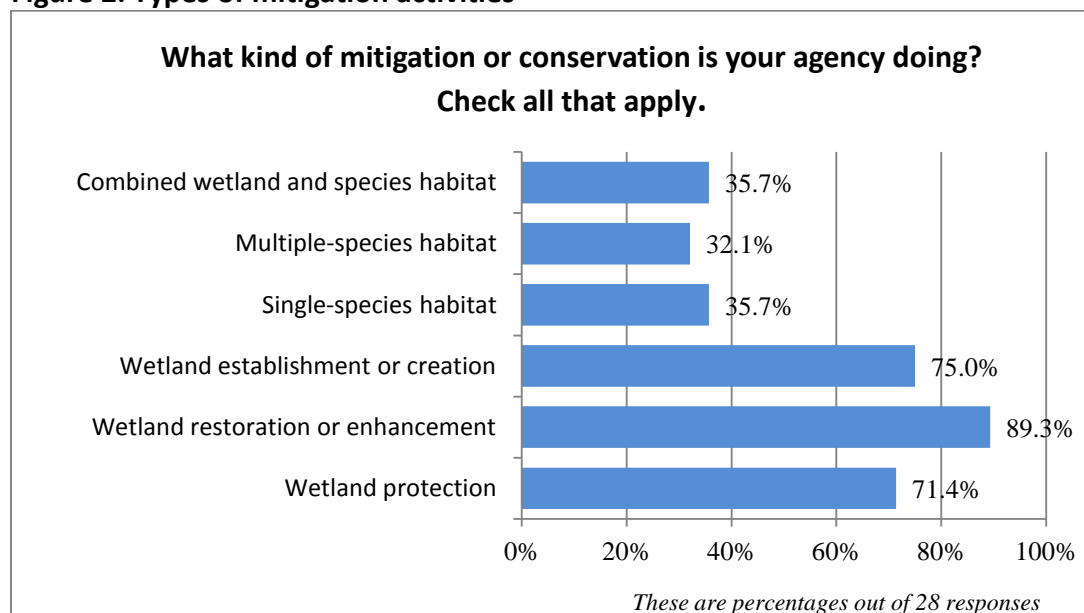
routine maintenance and monitoring will not be required after closure. Upon bank closure the Sponsor can transfer the legal interest in the site to any public or private entity as long as the site will be protected in perpetuity.

- Wisconsin’s Wetland Banking Technical Guidance states that sites are either purchased or leased and that purchased sites are either retained by Wisconsin DOT (WisDOT) or donated to DNR or another public or private entity. WisDOT transferred two sites to the University for research, but typically WisDOT “pools” or consolidates off-site mitigation and transfers these to the DNR, at sites DNR has already identified in their regional plans.

### Composition of the Mitigation States Obtain

As noted in Figure 2, wetland restoration comprises the bulk of state DOTs’ conservation and restoration activities. The majority of respondents reported that they were engaging in wetland restoration or enhancement (89%), wetland establishment or creation (75%), or wetland protection (71%). Fewer respondents reported mitigation or conservation activities for combined wetland and species habitats (36%), single-species habitats (36%), or multiple-species habitats (32%).

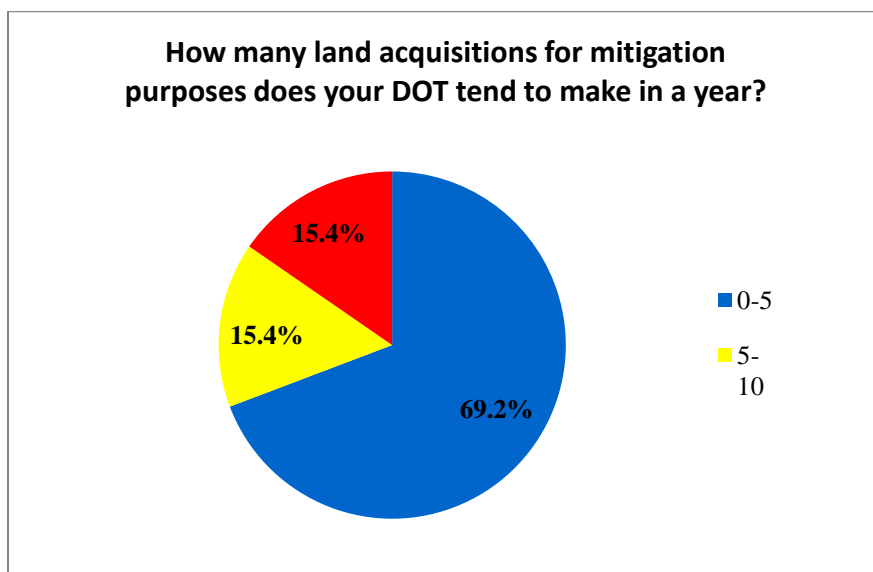
**Figure 2: Types of mitigation activities**



Land acquisitions for mitigation purposes are relatively infrequent in most states (see Figure 3). Sixty-nine percent (69%) of respondents reported that their DOTs make between zero and five land acquisitions for mitigation per year. Within this group, 12 respondents (46% of total responses) said that their DOTs make zero or one land acquisitions for wetlands; almost all of these (10 of 12) lie within the middle of the country, as opposed to along the East or West Coast (see Figure 4). The three states with the greatest number of land acquisitions per year are all coastal states (CA, WA, and NY). Two states said they were not able to say how many

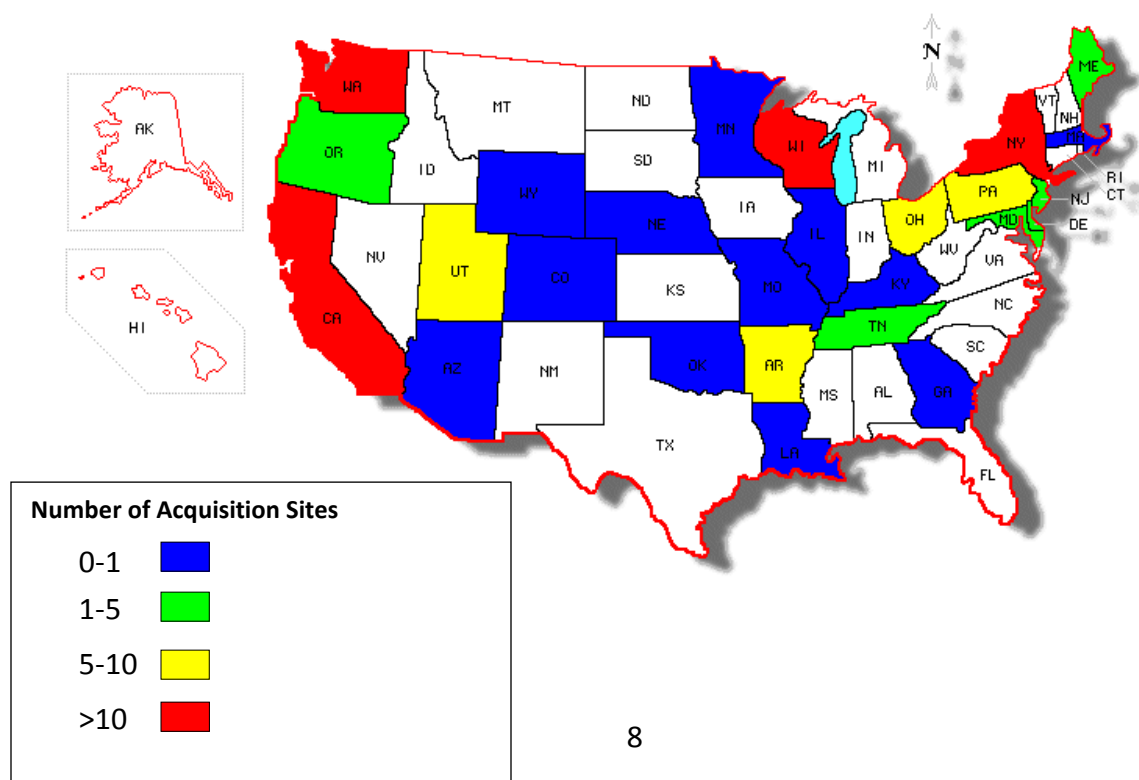
sites they had purchased as it was not possible to query a database for that information (NC and WI).

**Figure 3: Mitigation acquisitions per year**



The map below presents a graphic distribution of the states and the number of land acquisitions that are made each year. California, Washington, Wisconsin, and New York were the only states averaging more than 10 sites purchased annually. New York reported no transfers, but the remaining lead states were all interviewed for detailed information on what they had learned.

**Figure 4: Number of mitigation land acquisitions per state DOT, annually**



Some state DOTs have been transferring mitigation sites to state DNR, Fish & Wildlife, and local conservation entities for over 20 years. Maine, Ohio, and California DOTs are among this set. Maine, for example, has been transferring properties to their Inland Fish & Wildlife agency, USFWS, and local conservation entities for 22-25 years. Ohio DOT has transferred mitigation and conservation sites to USFWS, the Corps, and the state DNR. Depending on the prevalence of wetlands or endangered species in their state, some DOTs have focused on and contributed more to one resource than another.

States with more widespread in lieu fee programs are less likely to have to deal with land transfers. For example, Florida has had a statewide wetland mitigation program with a legislatively set price (and execution by watershed management districts, which can in turn contract with private mitigation bankers) since the 1990s. North Carolina DOT funded the start-up of the statewide Ecosystem Enhancement Program to take a proactive approach to anticipated mitigation needs and to support state objectives to target mitigation resources where they would accomplish the most for water quality and other conservation and restoration needs, a continuation of the state's former Wetland Restoration Program.

### **Satisfaction with Transfers and the Transfer Process**

Nearly three-quarters of responding state DOTs that had tried land transfer (14 of 20 respondents) reported that regulatory agencies were satisfied with the mitigation and process, versus six respondents who indicated there was some hesitancy among regulatory agencies or that they had experienced some problems.

Two states (Colorado DOT and the Kentucky Transportation Cabinet) reported the regulatory agencies were very satisfied with their mitigation transfers. Similar numbers of state DOTs reported very high levels of satisfaction with the process in their own agencies. KYTC explained that thus far they have transferred two properties to the Kentucky Fish and Wildlife Resources (KDFWR) with several more transfers planned in the future to go to KDFWR or a yet to be determined organization. KYTC also works with the USFWS to identify and purchase properties and establish mitigation sites that are then either managed by USFWS or a non-profit conservation group; KYTC has completed nine projects using this process. Both processes have the advantage of a high degree of satisfaction and acceptance by the resource agencies. Colorado DOT (CDOT) staff also indicated a very high degree of satisfaction with mitigation site transfer and ownership/management by a third party entity. CDOT's satisfaction reflects the regulatory agency's satisfaction with their largest example of cooperative acquisition and long-term management by a third party entity; CDOT clarified:<sup>3</sup>

I (was) speaking about the Shortgrass Prairie Initiative (SGPI)...The resource agencies are very satisfied with this initiative because it protects, in perpetuity, 32,000 acres of native shortgrass prairie in Colorado. Not only is shortgrass prairie becoming very rare in the state, the (conservation) areas were chosen because they contain species that are of concern due to their decline in population and habitat. By conserving these areas and the species they contain, CDOT made a contribution to the survival of the species and decreased the probability of federal listing under the Endangered Species Act. By



transferring the management of these lands to The Nature Conservancy, the resource agencies were assured that the lands would be managed by an organization with a proven track record of success in habitat conservation.

In return, CDOT got 20 years or 15,160 acres (whichever comes first) of maintenance impact on our ROW within the shortgrass prairie. So, CDOT and FHWA are satisfied because it doesn't have to consult with the USFWS on almost every project east of I-25. The Division of Parks and Wildlife is satisfied because large blocks of land are being protected which is much more beneficial to the wildlife than small mitigation measures along the highway. The USFWS is satisfied because CDOT was proactive enough to mitigate for adverse effects to wildlife prior to the impact, not to mention reducing their consultation workload and decreasing the probability of the need for federal listing. TNC received thousands of (high priority) acres of land to manage for wildlife (in line with their ecoregional conservation priorities). And, of course, the wildlife benefits by having their habitat protected and managed for their continued existence.

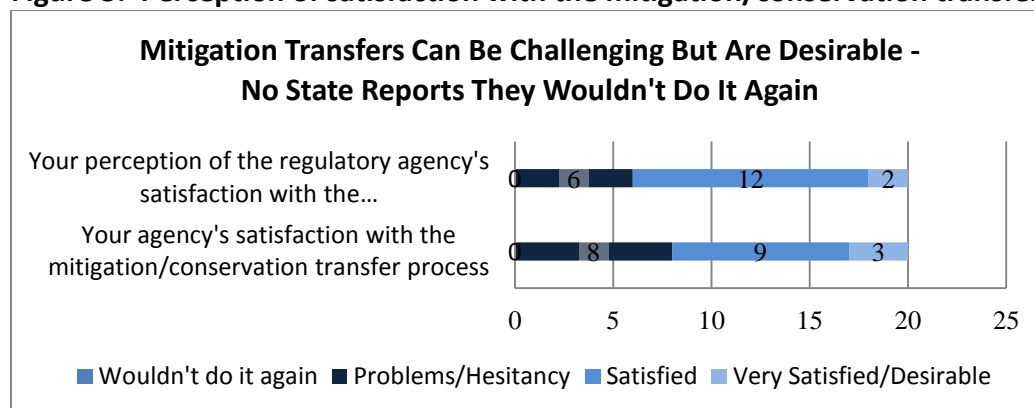
Kentucky also indicated a very high degree of satisfaction and compared sites transferred (and initially chosen or designed to be transferred) to the Kentucky Fish and Wildlife Resources (KDFWR) Department, "with several more transfers planned in the future to go to KDFWR or a yet to be determined organization. We also work with the USFWS to purchase properties and establish mitigation sites:

Those properties are then either managed by USFWS or a non-profit conservation group — we have completed 9 projects using this process. In contrast we have upwards of 20 projects completed on highway right of ways or on other state/city properties all with less desirable results due to problems associated with shared use management, which is a nice way of saying these projects have been or have the future potential to be screwed up due to our partner's activities, neighbors activities or even our own (KYTC) maintenance activities.

Acquiring large properties that are specifically dedicated to the purpose of mitigation and preservation has proven to be more successful, cheaper and overall desirable in our experience. Then transferring those properties to an organization whose main mission is preservation, protection and conservation is more desirable than keeping those properties in the hands of our own organization whose main mission is to build and maintain roadways in a fiscally and environmentally responsible manner. All of our transfers have gone very smoothly."<sup>4</sup>

In more in-depth interviews of agencies indicating a lower level of satisfaction, it turned out that agencies were often very happy with the site and conservation action, but conversations more naturally focused on addressing what remained to be resolved (i.e., what was wrong, not what was already right) and negotiating solutions in those areas, but in many other ways, "the resource agencies are thrilled. Mitigation partnerships help them achieve and implement some of their top priority conservation and restoration objectives, sometimes enabling them to do what would be impossible otherwise. Still, the conversations tend to be more about them not getting what they want, than what they are getting, that they have been wanting."<sup>5</sup>

**Figure 5: Perception of satisfaction with the mitigation/conservation transfer process**



The number of respondents who felt that their own agency was satisfied rather than dissatisfied with the mitigation transfer process was about equal (nine and eight respondents, respectively).

## **2.1 Benefits of Transferring Mitigation Sites**

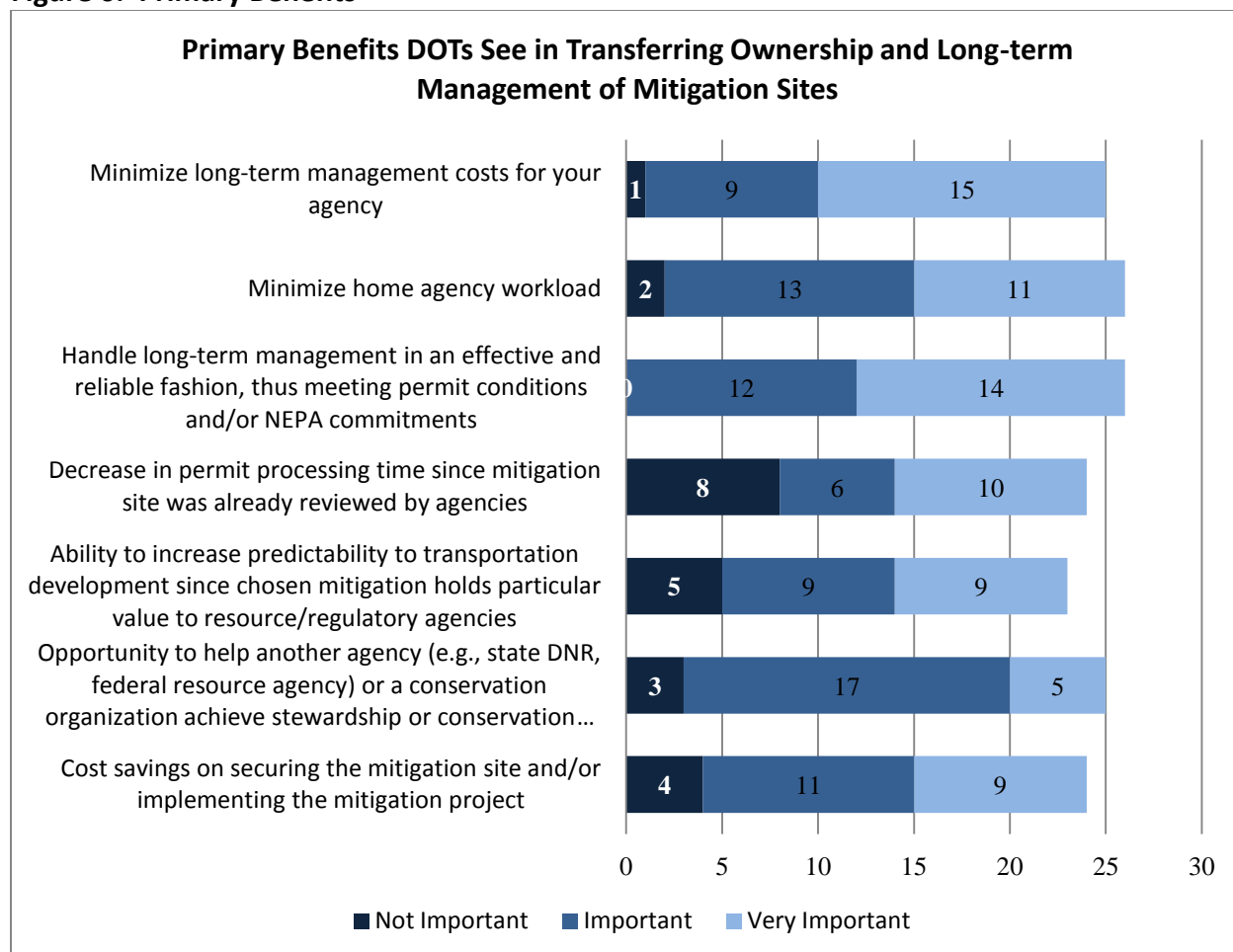
State DOTs were almost uniform in expressing the desirability of transferring mitigation sites to third party conservation organizations or agencies. They described the benefits and challenges as follows. In general, DOTs understood regulatory agencies to desire long-term management by conservation agencies and organization. Thus, as Caltrans expressed, transferring the mitigation site “satisfied the permitting agency. Caltrans is also already managing over 1,000 mitigation sites already.”<sup>6</sup>

In the in-depth interviews, DOTs identified benefits such as:

- Not having to be land managers
- Not having to cope with problems associated with shared use management
- Cost savings
- Natural resource values/better management for the parcel
- Good steward with track record and expertise.

DOT respondents were asked to mark the importance to their agency of seven potential benefit categories associated with transfer of ownership and long-term management of mitigation sites. States identified whether the benefits were *very important*, *important*, or *not important* to them. They responded as follows.

**Figure 6: Primary Benefits**



The considerations in the headings below were some of the most important to DOTs.

### Site Transfer's Potential to Minimize Long-Term Costs is Key

The most commonly marked *very important* benefit (15 respondents) was the minimization of long-term costs for the DOT. Only one respondent considered cost minimization to be *not important*. 24 states considered the potential of site transfer to minimize long-term management costs as either important or very important; only one state felt this wasn't an important benefit or driver.

### Minimization of Long-Term Costs to the DOT and Ability to Effectively/Reliably Handle Long-Term Management Effectively and Reliably Are "Very Important"

Ability to "handle long-term management in an effective and reliable fashion, thus meeting permit conditions and/or NEPA commitments" was the second most commonly noted *very important* benefit (14 respondents), and no respondents considered that benefit to be *not important*.

When “important” and “very important” responses are added together (total of 26), more states noted site transfer’s benefit of handling long-term management in an efficient and reliable fashion than any other benefit. Site transfer is thus considered an important and helpful way for DOTs to effectively meet permit conditions and/or NEPA commitments. No states considered this an unimportant benefit.

### **DOTs Think Opportunity to Contribute to Achieving Statewide Conservation Objectives is a Key Benefit, Most Often Marked as “Important”**

The opportunity to help another agency or conservation organization achieve statewide stewardship or conservation objectives was marked as *important* by 17 respondents, more than marked *important* for any other benefit. This benefit was in the top tier considered as either important or very important, by respondents; however, fewer states gave this benefit a “very important” designation.

### **Decreased Permitting Time is Not a Driving Factor in Pursuing Mitigation Transfers**

Decreased permit processing time due to mitigation sites having been previously reviewed and identified was the benefit most commonly considered *not important* (eight respondents). However, two-thirds still felt it was important or very important.

### **DOTs Expect Site Transfer is to Minimize Home Agency Workload**

Nearly all states felt that transferring ownership and long-term management of mitigation sites would minimize their home agency’s workload and that this was an important or very important benefit. Only two responding states did not find this an important benefit or driver.

## **2.2 Challenges Encountered by DOTs**

Long-term maintenance of mitigation sites is a challenge whether it occurs in house or DOTs transfer that responsibility to others, but there are particular challenges involved with both finding sites and then site transfer and long-term management. Caltrans reported, “There wasn’t a mechanism to do it for years. Then the agencies recently developed cooperative agreements. There aren’t good mechanisms to move property.”<sup>7</sup> In some cases the DOT retains liability even though the property and management responsibilities are transferred to another agency; this can be a dis-incentive to land transfers and partnership opportunities.

### **Finding Willing Parties & the Time to Arrange Larger Scale Analyses and Partnerships**

Most respondents (77%) reported that finding willing parties to take on ownership and/or long-term management responsibilities has been problematic. Others pointed to the length of planning and the ROW process. Environmental, planning, and permitting staff also face workload issues and the inevitable prioritization of “regular” work. While working out “win-win-win” arrangements and creative partnerships with resource agencies and NGOs that achieve the most for the environment with the most efficient public investment is rewarding as well as challenging, management may prioritize getting the permit itself more than getting a creative mitigation solution worked out, including identifying the very best site for mitigation either by conservation organizations or on the planning level. Consequently, FHWA headquarters has identified reducing the transaction costs as a key need in enabling earlier planning and creative, solutions in line with the agency’s Eco-Logical policy.<sup>8</sup>

A few states, such as Caltrans with their Regional Advance Mitigation Program (RAMP) and Statewide Advance Mitigation Initiative, are exploring statewide analysis of restoration, conservation, and mitigation needs across all natural resources of concern. The Corps, USEPA, USFWS, and the state Department of Fish and Game have all signed off on the approach and methodology; it just remains to find a way to fund identified advance mitigation. While such approaches promise great efficiencies in both achieving better environmental outcomes and better using agency staff’s time, such programmatic methods also take time to negotiate. A Midwestern state pointed out that “management now seems less concerned with how projects are done, and more concerned with getting them done quickly” though the environmental administrator is “very supportive and helps get funding approved.”<sup>9</sup> States from coast to coast report challenges with finding the time to arrange larger scale analyses and partnerships. Methods that will work on large scales, with existing datasets, and with approval by a broad base of staff within and across regulatory agencies are greatly needed and also more possible than ever with the large federal datasets that are coming online at multiple federal agencies.

Outreach methods to find willing parties are further discussed in the “Process” and “Best Practice” sections of this document.

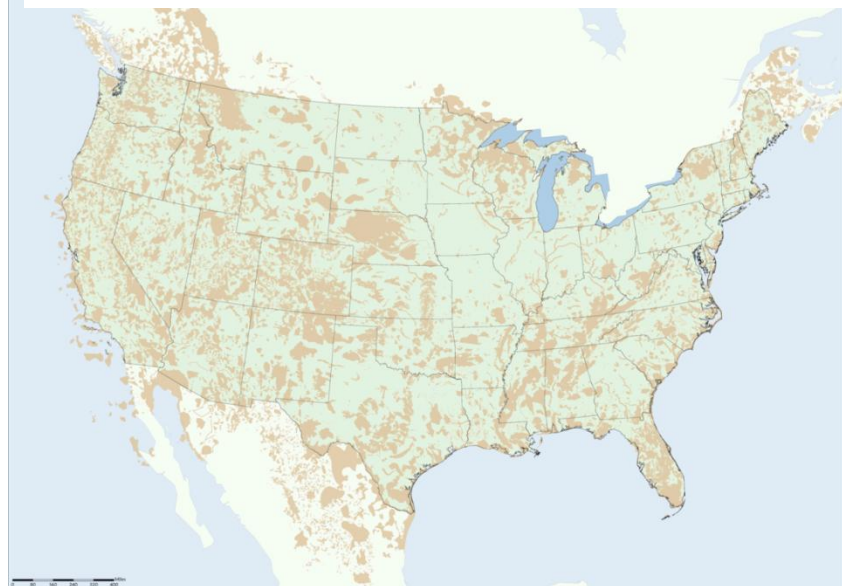
## **“Orphan Sites” Not Particularly Desirable by Resource Agencies or Organizations**

Historically, a lot of the publicly and privately developed mitigation sites were not developed in accordance with larger regional or statewide conservation plans. Often, such plans were not available. For example, Maine DOT noted that 10-12 years ago and earlier, larger scale planning was uncommon.

In the 90s, some of the most successful mitigation areas were developed in accordance with Advanced Identification (ADID) of wetland resources or Sensitive Area Management Plans (SAMPs). SAMPs enable a watershed approach to mitigation as they identify what is most important to conserve and restore and make that information available to the regulated community. Regional or local watershed restoration plans also identify areas and DOTs have often partnered with these organizations to help them achieve their conservation and restoration objectives. When DOTs do so, ready partners often exist for long-term management. NCDOT and the North Carolina Department of Environment and Natural Resources (NC DENR)’s Ecosystem Enhancement Program combines state and regional level analysis with this localized approach, which also leverages Clean Water Act Section 319 funds.

In the early 2000s, state Natural Resource and Fish & Game agencies were required to develop State Wildlife Action Plans (SWAPs) identifying conservation priorities statewide, for listed as well as unlisted species.<sup>1</sup> In SWAPs, states outline the steps that are needed to conserve wildlife and habitat before they become rarer and more costly to protect; however, as of 2009, only 30 states had geospatially denoted such areas. The Nature Conservancy’s Ecoregional Conservation Plans/ Strategies have been around longer than many others – often a decade or more now. In 2011, these plans were synchronized and “rolled up” into a national blueprint. See Figure 7.

**Figure 7: Nationwide View of TNC Eco-Regional Strategic Conservation Priorities, Identified with Agencies**



<sup>1</sup> In order to make the best use of the federal funds provided through the Wildlife Conservation and Restoration Program and the State Wildlife Grants Program, Congress charged each state and territory with developing a statewide wildlife action plan. These proactive plans, known technically as “comprehensive wildlife conservation strategies,” will help conserve wildlife and vital natural areas before they become more rare and more costly to protect.

When not sited according to conservation needs and desires scientifically identified by resource agencies and organizations, these organizations tend to be more reluctant to take on management responsibilities and especially to expend their own organizational resources to do so. States and NGOs have reported reluctance in taking on such sites as they perceive as having lower ecological value/less fit with their organization's mission.

Caltrans now has a complete inventory by parcel to manage sites they still own; the agency is still trying to find partners and transfer management so they can be best managed to commitments. Caltrans says they have "realized for a long time that sites need to be chosen and developed in accordance with conservation and restoration priorities that are identified in Natural Community Conservation Plans, Habitat Conservation Plans, and watershed restoration plans; Caltrans has been doing that for over ten years, so less desirable sites would be pretty old." For remaining sites, Caltrans is committed to "keeping track of them, managing them themselves, and keeping looking for appropriate managers."

### **DOTs "Can't Guarantee What the Maintenance Budget is Going to be in 5 Years"**

In today's budgeting environment, some DOTs said, "maintenance is constantly being cut. There is no budgeting for it (mitigation site management per se)." As one DOT commented, "Maintenance doesn't have mitigation sites specifically broken out in their land/vegetation management budget. It's a lump sum thing. If something is needed, they'll go out, but they need to be directed to do that." Utah DOT said that the state legislature had even eliminated pavement preservation outside of urban areas and freeways.<sup>10</sup> Ohio DOT noted that "there is no funding for stewardship; funding for mitigation comes from project or district."<sup>11</sup> Maine DOT said that the funding process is always a negotiation, and requires flexibility. Maine DOT does "have a Division budget and they can build in an hourly rate for monitoring orphan sites. Multiple interviewees noted that "fortunately, the mitigation sites are usually designed to be stable without maintenance." More emphasis is placed on the initial 10-year monitoring period and achieving relative stability.

### **State DOT May Not Be Able to Pay Stewardship Fee**

Some DOTs do not have the policy of paying stewardship fees or the ability to do so. Ohio DOT is one such state. Likewise, Minnesota DOT indicated that "no funding for long-term management of the mitigation sites is available."<sup>12</sup> Minnesota DOT (MnDOT) also shared that long-term management of the wetland mitigation banks sites poses a far greater challenge than other aspects of the mitigation process, as it did for nearly all of the States participating in FHWA's last domestic scan on wetland mitigation.<sup>13</sup> MnDOT said in that scan:<sup>14</sup>

Although the state DNR is often tagged as the public agency that will serve as the permanent owner and manager of the DOT's wetland mitigation sites, many of which are constructed on DNR lands, no money is provided to DNR to support their long-term management. In addition, a number of sites have been developed on private lands where a conservation easement has been purchased, and maintenance responsibility would rest either with the landowner or the agency establishing the bank site. MnDOT

and BWSR are currently discussing putting aside five percent of MnDOT's annual contribution to BWSR for the purpose of establishing a maintenance fund that could help subsidize these costs. In addition, MnDOT could provide mowing and burning services in perpetuity. A larger issue is the fate of a mitigation bank site after 10 to 15 years...At this point, who ensures that the ecological integrity of the mitigation site is preserved in perpetuity?

MnDOT and BWSR are discussing whether or not a perpetual management clause, including a legal mechanism and financing measure, should be written into new interagency agreements to address this concern, though such potential changes are now a low priority. The agencies said they are reluctant to incorporate "perpetual" management clauses as "funding loads and wetland acreages/projects may increase over time to cumbersome levels."

### **Legally Defining and Enforcing a Perpetual Mitigation Contract**

Thirty-seven percent (37%) of responding DOTs have encountered issues legally defining and seeking enforcement of a perpetual mitigation contract. In *Mitigation Banking Theory and Practice*, by Marsh et al. of the Urban Land Institute, the authors write:<sup>15</sup> "as the permits for these...banks implicitly acknowledge, it would be unreasonable to hold credit suppliers to performance standards for more than some limited period of time." This expectation may be considered more reasonable for conservation interests, whether NGOs and resource agencies, but DOTs and interagency conservation programs have raised the issue that it may be more of an issue when than if perpetual management contracts are challenged. Some states have had experiences where "perpetual" was considered to be 30-50 years; however, most agencies seem to abide by the dictionary definition of perpetual as having no end point. Agencies appear to be shifting their thinking with regard to perpetuity, especially with the climate change that is occurring.

### **Prohibitions on Transferring Sites to Non-Government Agencies or Restrictions on Transferring Liability, with Land**

A particular challenge Caltrans faced at the start of this research project was a prohibition on transferring sites to non-government agencies, which had been in effect since early in the preceding decade, informed by a bankruptcy of an entity that had been very active in the private mitigation market. As of January 2012, Caltrans can transfer sites to conservation organizations that meet certain criteria; however, Caltrans is not able to transfer long-term liability. If the transferred site does not maintain its mitigation value, Caltrans could end up starting from scratch, looking for or developing an alternative mitigation site, with no available funding for such a "do over" for mitigation for a long-completed transportation improvement. Since transfer of liability *is* permitted with mitigation banking and ILF, these alternatives are greatly preferable to Caltrans at this point.

### **Length and Complexity of the Siting and Land Transfer Processes**

A key issue many DOTs have had with the mitigation transfer is the length and complexity of the process, from quality ecological siting to the transfer process. The lengthiest parts of the



process for DOTs are assembling the deal and then moving the property through the right-of-way process.

Some DOTs and MPOs commented that it can take months to get on the docket for consideration by a local or state commission that must act to accept the liability, before escrow can be closed, prolonging the process. This has especially been an issue when local governments are assuming management responsibilities, but the issue comes into play when any Board or Commission must approve an action. This wait has appeared to be an unavoidable part of the process, and in the end, some government boards have denied it the request or refused to accept the property. Caltrans advised: “It’s definitely a problem. You learn you have to go to those board members and have them on board beforehand, at least get an indication of where things would be headed.”<sup>16</sup>

Mitigation banking offers a simpler, faster, and more straightforward alternative, where banks are available and offer the type of mitigation that is needed. The right types of credits or mitigation per regional priorities may not be available, or costs may exceed what the agencies consider to be better options. In general though, banks and ILF offer DOTs the benefits of “surety for mitigation of the impact, agencies acceptance, and passing off of long-term liability.”<sup>17</sup>

### **Feasibility of Requested Long-Term Management**

It is not uncommon for the requested level of long-term management to be an issue or key negotiation point with the organization assuming long-term management responsibilities. Half of the responding DOTs in the 25-25, Task75 survey reported that the requested level of long-term management was an issue for the potential organization, conservation group, or private sector land steward to which the DOT would transfer the site. For example, the Colorado Shortgrass Prairie Initiative, negotiation of the annual monitoring requirements took longer than identification of priority conservation areas (pre-existing work by TNC and CNHP formed the basis for expert and interagency review) or compilation of an interagency agreement on the overall approach the partners would take. The team continually returned to the criteria that the annual monitoring had to be both meaningful and very feasible to the entities potentially doing the long-term management in perpetuity, in addition to being acceptable to the regulatory agency. Maine DOT commented that once the performance standards are met, there is no more follow-up by the resource agencies. Wisconsin DOT said there was a tiered process based on location and size, ranging from one to ten years. Accounting does not extend to replacement of functions and values.

DOTs note that the long-term management requested (and its feasibility) can vary tremendously from site to site, from the resource to resource being managed, and from office to office of a given regulatory agency. Agencies are aware that if a certain level of management is desired, actual management could decline to the level of interest on the investment (or interest or attention of the management entity!) unless this is actively avoided. Caltrans commented that their state Department of Fish & Game wants mitigation agreements

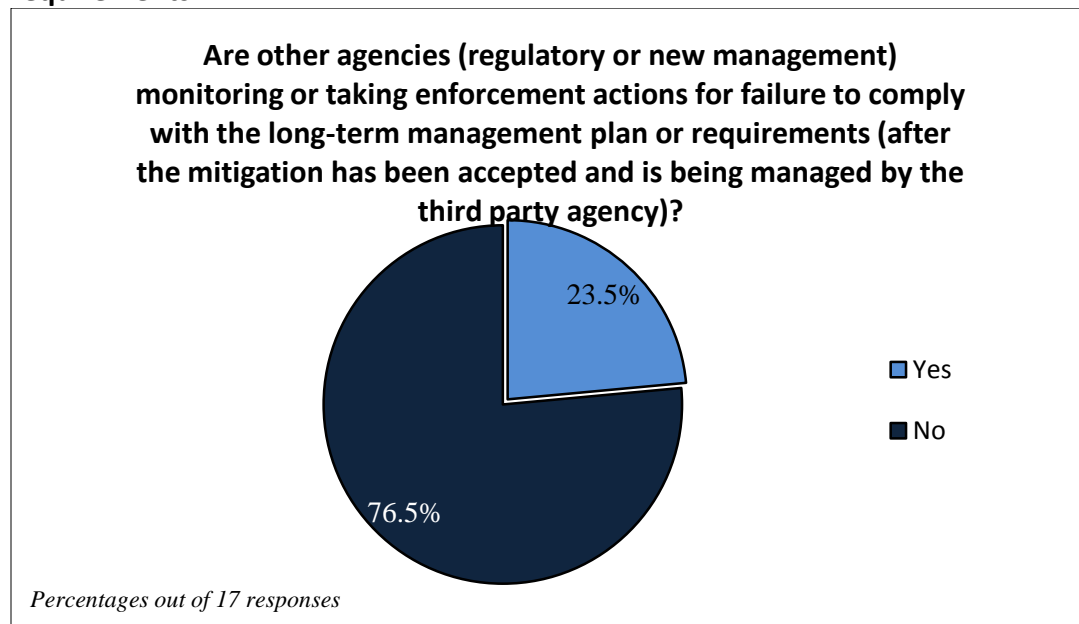
to be written in such a way that there are priority things that need to be done. Desired management actions are ranked so if the endowment is not generating enough money, higher priority actions are performed and lower priority actions may not be.

### Little Help from Regulatory Agencies with Long-Term Monitoring and Enforcement

DOTs and third party entities assuming management responsibilities are not getting much support from regulatory agencies in helping monitor long-term compliance. Under a quarter (24%) of responding DOTs reported that other (regulatory) agencies are monitoring or taking enforcement actions for failure to comply with the long-term management plan or requirements. In some cases, the DOT has an understanding with the state resource agency to provide patrols or enforcement. State Divisions of Wildlife often have more field staff than other agencies and branches, but can require special training to provide this type of support.

In the in-depth interviews some DOTs remarked that “enforcement and monitoring of long-term management requirements aren’t really on the agencies’ long-term agenda.” More immediate budget shortfalls are pressing all agencies. Others commented that mitigation sites with issues are already on the radar and remedies and individual responsibilities have been assigned internally by the DOT. WisDOT noted that “if a private landowner is not following their easement agreement, the DOT may cancel the lease. If it is an old mitigation site, they may try to force the land owner to meet the requirements but politically they are more likely to negotiate with the Corps and/or DNR to relocate the site.” DOTs have learned that it is better to mitigate with passive, low maintenance sites, where the only maintenance or management might be control invasive species or removal of tiles. This again points to the importance of ample respect for the feasibility and practicality of long-term management for the site owner or steward.

**Figure 8: Monitoring and enforcement for failure to comply with long-term management requirements**



Maine DOT said the third-party enforcer model (with Maine DEP) has successfully resolved difficult issues. However, in a case when the DOT transferred a site to a USFWS wildlife refuge, USFWS did not want the enforcer language in the contract. The DOT made the transfer without the language at USFWS's request, but if anything goes wrong, Maine DOT will have no recourse and will have to bear the responsibility.

The costs for long-term monitoring and reporting can mount quickly, especially if there are a lot of monitoring and maintenance needs. Threats may also be presented by natural disasters, climate change, or surrounding property owners.

### **Unexpected Circumstances, Including Impacts by Adjacent Land Uses**

After ownership is transferred, an annual report is required, which needs to match the resource management plan (templates provided in the Guide associated with this report). Unexpected circumstances can arise in the course of land management. As one DOT said, "any type of disaster could happen... Invasives are also a big issue. Encroachment could also be an issue; cattle get through a fence, etc. These aren't always bad things. Adjacent development is probably the worst thing and can really change the environment."<sup>18</sup>

Some states have noted that while they think it is possible to get a handle on cost estimation for site inspection, once you move into external factors -- "climate change, geomorphology, invasives such as feral hogs, etc., one cannot estimate such costs."<sup>19</sup> Some land management agencies are now asking whether it is possible to have mechanisms that could or would protect the land steward in the event of unexpected circumstances.

Multiple DOTs noted that they already work to site mitigation adjacent to long-term protected areas; it's one of the factors in site selection, but the issue of surrounding land use change does arise, periodically.

Maine DOT indicated that "the way easements are written, stewards are to notify the DOT of impacts. The DOT does not do follow-up; they have to trust the steward. Maine DOT gets a copy of the annual monitoring reports. Maine DOT also cited a case of a residential development site that went in next to a DOT mitigation site and concentrated sheet flow runoff into the wetland. This was a case where the agency was unlikely to take legal action, but Maine DOT worked with the developer to restore the site and get the developer to pay for annual monitoring. Caltrans indicated that they've encountered few problems with adjacent land uses, outside of fire impacts, and that siting adjacent to existing protected areas is a priority.

### **Underperforming Endowment Funds**

North Carolina DOT and DENR indicated that underperforming endowment or long-term stewardship funds have posed a challenge, particularly with recent recession. In California, a corporate non-profit that dealt exclusively in mitigation banking declared bankruptcy in 2005, with over 3,500 acres of preserves (see sidebar in process section). TET Inc.'s bankruptcy plan called for all easements—properly recorded or not—to be handed off to a capable land-

manager and permanently protected. The plan specified that the developer from which each preserve originated would receive first opportunity to reclaim the land and could choose to manage the property itself or else locate a suitable conservation group to do so, though the funds initially expended for this purpose were gone at that point. The bankruptcy provided the impetus to make sure that banks and trusts have the tools and skill-sets needed to effectively acquire and steward lands, including stable resources, accountability, and transparency.

So far Caltrans only has only undertaken land transfers to other government agencies, which has enabled the DOT to avoid the issue of underperforming endowment funds. It is a concern now, however, as under state law, the property could revert back to Caltrans and “Caltrans would have to start over again. It falls under the contingency in the permit. The contingency is usually written by the permitting agency to include them, and involves starting over, re-selecting a site; it moves back into a project development process for mitigation but would lack allocated funds,” presenting a problem for Caltrans.<sup>20</sup>

### **Even if Funding Can Be Provided for Long-term Management, Agencies May Lack the Staff or Ability to Hire**

Even if funding can be provided to a state agency for long-term management, the agency may not be able to get the full-time employees (FTEs) or personnel years (PYs) to actually get the management work done. Some agencies report that this is a big problem and that “hiring is a non-starter” at agencies these days; “agencies wouldn’t be able to pull off hiring.” Others report that this issue has never come up.

### **Managing an Inventory of Long-Term Management Sites**

When DOTs have an inventory of parcels to manage, especially large sets such as in California (over 1,000 Caltrans-owned mitigation sites), state DOTs develop tracking systems. Ohio DOT uses a website to organize files from all districts; it will eventually contain a mitigation inventory, permits, plans, GIS boundaries, and more. In part, the site is driven by new CEQ requirements for better documentation and commitment tracking. ODOT approved \$6 million for external contracting, to help meet permit requirements, real estate, and site maintenance. Wisconsin is currently trying to put all information together in one on-line site that will follow the permit process and be available to internal staff.

Caltrans has identified the locations by parcel number, district, project, etc. and they are being put on a statewide database overseen by headquarters Natural Resources staff. This information, the land management agreement and the transfer agreement are all included in the department’s environmental document management system, along with monitoring and long-term management reports. More information about these is included in an appendix.

There is also a national, multi-partner database of conservation easement data – designed as a sustainable nationwide system for managing and accessing data about conservation easements, to help ensure long-term protection of privately-owned lands. The Conservation Biology Institute, Defenders of Wildlife, Ducks Unlimited, NatureServe and the Trust for Public Land

created a system for uploading and viewing data, which they are calling the National Conservation Easement Database (NCED) at <http://nced.conservationregistry.org/>. The system provides maps, statistics, and reports and be coordinated with a related conservation mapping effort, the [Protected Areas Database of the U.S.](#) to ensure that the data sets can be combined to provide a complete view of U.S. protected areas. The NCED is an initiative of the [U.S. Endowment for Forestry and Communities](#), which approved \$1 million to create the database and portal. The Doris Duke Charitable Foundation and other public and private partners have funded the development of the Conservation Registry (Conservationregistry.org), designed for conservation entities to track and map conservation actions across the landscape and to synthesize information from multiple sources.

## 3 Compendium of Practice

### *3.1 Regulatory Requirements & Conditions Placed on Transfer*

The DOT always has liability and responsibility for meeting the permit, and this responsibility may not be transferable with the land. Permits frequently do not spell out long-term conditions specifically, but the permit will reference or contain a final mitigation plan, which spells out requirements that thereby become part of the permit. Site management requirements become regulatory conditions for the DOT. Resource agencies are often active participants in designing or specifying the resource management plan, spelling out activities that need to be done.

#### **Regulatory Requirements for Long-term Management are Workable in Most States**

More than half of respondents indicated that regulatory agencies' requested level of management has been feasible and not difficult to meet. One-fourth of participants (25%) reported that the agencies ask for a medium level of management, while only 20% reported that the regulatory agencies asked for a high/active level of long-term management. Fifty-five percent (55%) of those responding said resource agencies were only asking for a minimal level of long-term management once mitigation sites have completed their monitoring periods.

Still, 75% of respondents said they have seen a shift in what regulatory agencies are requiring for long-term management. Of the respondents who reported that the requested level of long-term management was an issue for third party managers, ninety percent (90%) have seen a shift in what regulatory agencies are requiring for long-term management, with over half of these saying regulatory agencies are asking for a medium or active level of long-term management.

Regulatory requirements are more stringent in some states than others. Following are some recent stipulations some DOTs have encountered. Requirements are typically less and monitoring is usually not requested for preservation sites. While feasible, regular (annual or multi-year) monitoring and reporting is a part of some long-term management arrangements, state DOT interviewers stressed that monitoring tends to pertain to pre-credit release/pre-permit closing, rather than being a long-term affair; monitoring occurs for five years or 10 years before a permit is closed or released.

#### **Recent Stipulations Some DOTs Have Encountered**

Stipulations that are being required for some agencies that are transferring long-term management include the following:

- **Parcel must be part of agency acquisition plan/organization conservation strategy.**  
For example, the parcel must be **adjacent to existing ecological preserves** managed by the agency, effectively extending the property and the public benefits associated with it, while facilitating management.

- **Assessment of the property's ability to meet the specific mitigation need.** For example, in California, properties have a habitat assessment. Sometimes, the parcel must be located in the watershed where effects occur. In California, the property has to have a habitat assessment and meet the mitigation and specific long-term management requirements of the regulatory agency and long-term management entity involved.
- **Specifics of or plan for long-term management**, such as:
  - Invasive species control
  - Restoration
  - Fencing
  - Evidence that the water regime will stay the same.

In more urban areas, vandalism is sometimes addressed, as is fire control. Site management requirements become regulatory conditions, whether spelled out in the permit or in the final mitigation plan; resource agencies generally want control or input into the resource management plan. Resource agencies spell out the needed activities on the property, though frequently this must be negotiated with the actual land owner or land manager. After ownership is transferred, an annual report is required, which needs to match the resource management plan.

- **Provisions to re-examine management agreements (e.g., in 10 years)**
- **Sites must be complete and "closed out" in terms of meeting the regulatory requirements**, unless the entity is explicitly taking on these additional responsibilities. Sites must be meeting standards and be manageable. For example:
  - Invasive vegetation must be controlled/under control prior to transfer (This is also an ongoing responsibility. If a management plan for it is not in place the DOT may maintain this liability).
  - Drainage issues with adjacent landowners must be resolved prior to transfer.
  - Boundaries must be marked, signed or appropriately delineated. Boundaries must be geo-referenced, platted, and provided in metadata format.
- **Statement of liability or responsibility, reversion clause.** The DOT has the ultimate liability and responsibility for meeting permit requirements, and "nowadays, the land transfer may have a reversion clause if it is going to a private entity, so if it is determined that the site is not being handled properly, the land could revert to the DOT and/or a replacement could be sought. There has to be due diligence of the entity handling the property and the endowment." The contingency clause is usually written by the permitting agency to include them. It involves starting over, re-selecting a site, essentially moving the DOT back into a project development process for mitigation, but without project development funds to support it.

Certain financial provisions have also been encountered and are summarized below. Nevertheless, their commonality should be noted: approximately 80% of DOT survey

respondents noted that they did not use endowments for long-term management, but addressed such needs through more creative partnerships where other agencies and entities took on such responsibilities in exchange for the DOT helping achieve significant conservation or restoration goals. When a DOT does not provide such funding, it can be viewed as a “valuable tool to get more agencies involved.”<sup>21</sup> Significantly, even in states, such as California, that responded that they did utilize endowments, usage of endowments is not at all a regular practice. Rather, the vast majority (interviewee estimated 80%) of mitigation projects and transfers are negotiated and effected without endowments. Maine DOT had developed endowments for a few projects, based on parcel size, management, and time required on an annual basis. DOTs emphasized that they seek partnerships where the steward/long-term manager is pleased to get the parcel and provide long-term management, if the DOT can just help them acquire the land. Still, financial provisions such as the following may be encountered or required:

- The transfer must be accompanied by detailed management plan, with a specific endowment
- If an endowment is required, a detailed cost analysis may be developed. The endowment must have realistic non-wasting provisions on the rate of return (i.e., an agreed upon capitalization rate). This is to avoid problems of declining availability of funds for management, when 5-15% rates of return have been projected, but 3% returns have occurred. (It should be noted that this is being required in some cases/states but not in others, notably where the DOT has been able to help the resource agency purchase high priority conservation lands that would otherwise be unable to be protected.)
- Two-tiered long-term funding, in some cases; e.g., a one-time up front transfer, followed by annual transfers (so the DOT retains the interest rate risk and does not have to front as much money) for maintaining fencing, signing, trash pick-up, biological monitoring as specified.

### ***3.2 A Framework for and Guide to Successful Land Transfer***

If DOTs could, they would avoid all natural resources impacts, both to protect natural resources and to avoid the whole mitigation process, including ensuing land transfer. Some DOTs reported their agencies still need a paradigm shift, to take a holistic look at the landscape, earlier in the process to better avoid impacts.<sup>22</sup> The solutions section that follows gets into mechanisms for DOTs to practically do that, with existing data.

California, Kentucky, Colorado, Maine, North Carolina, Ohio and Wisconsin are among the states that have established ways to transfer mitigation properties. WisDOT noted though that “specific guidance regarding the DOT-to-DNR transfer would only prevent creative solutions between staff in both agencies.”<sup>23</sup>

Maine DOT indicated that “although the regulatory agency usually requests specific language that requires the DOT to hire a lawyer, they’ve been doing it so long that it’s not really a



problem anymore.” Ohio recommended use of deed restrictions if the desired property can’t be transferred, with the state resource agency assuming responsibility for “policing” and protecting the property.

## **Finding Parties**

DOTs have a variety of mechanisms for finding parties. First, conservation and restoration plans may identify priority areas and underlying landowners. The conservation and restoration plans themselves may have owners – either resource agencies or conservation organizations – that may serve as willing long-term land managers. DOTs also scout mitigation banks that are available in the area where services are desired. Where there is more than one bank, price may be a factor. TEA-21 established a preference for mitigation banking, tempered in guidance by practicability considerations including cost, existing technology, and logistics, in light of overall project purposes.” (23 CFR 777.2)

Caltrans notifies the mitigation banking community and other potentially interested parties in a formal manner and is careful to control the release of information so that one party does not have an advantage over another. California state law dictates some basic considerations and Caltrans evaluates performance both on endowment and land management. For Caltrans’ Statewide Advance Mitigation Initiative, Caltrans is doing outreach there to the banking community and others, so all parties who could be involved know about the planning that is occurring and the potential opportunities that may generate.

Ohio DOT sends a mass email to potential landowners (both private entities and parks) to identify their interest level; this assists the DOT in determining the state’s best mitigation options. ODOT noted that this letter can be shown to the US Army Corps of Engineers or Ohio EPA if they challenge the DOT to prove how they arrived at their decision and that the best options were considered and chosen. ODOT believes this process has improved relationships and made public meetings easier, because the agency has made an effort to be transparent and illustrate the good faith with which they undertake all activities.

## **Templates for the Land Transfer Process**

NCHRP 25-25 Task 75 identified model agreements and then generic templates from a number of states. A supplementary guide to this Compendium contains templates for the land transfer process, incorporating further “best practice” recommendations. These include templates for a:

- Simple Agreement (University Assumed Management)
- Simple Memorandum Effecting Site Transfer from DOT to DNR
- Transfer of Land and Endowment to a Governmental Entity/Nonprofit/Special District
- MOA for Transfer of Mitigation Site, Involving Endowment
- Mitigation Cooperative Agreement (MOA) with Monitoring
- Mitigation Cooperative Agreement (MOA) Without Monitoring
- Contract Outlining Terms of Agreement for Long-Term Stewardship and Management

- Conservation Easement Deed and Recitals
- MOA - Terms and Conditions for County/Grantee Land Management
- MOU between DOT and Mitigation Land Manager Regarding Public Access
- Certificate of Acknowledgement - Notary Public
- Statement of Work Template
- Permitted and Prohibited Activities and Uses of the Easement Property, with Grantor and Grantee Rights
- Stewardship Agreement Template
- Fund Transfer Agreement

Each provision in each agreement may be considered to have certain advantages or disadvantages, depending on state and local conditions and expectations. With this presentation of provisions and multiple whole agreements, states will readily be able to “mix and match” to choose pre-written (and pre-approved, at least in one state) provisions they like and find appropriate to their local situations.

Each DOT uses its own model nearly exclusively, making it difficult to speaking to comparable use, since DOTs are not currently choosing one form over another. This project provides DOTs more options and formats though, both for environmental and interagency coordination staff, and options for legal staff. Some models have more restrictive legal language than others, and may be preferred (or not) by DOTs and DNRs for these reasons.

A glossary of DOT right-of-way terms is available at:

[www.dot.state.oh.us/Divisions/Engineering/RealEstate/row/ROW%20Manual/B%20Glossary.pdf](http://www.dot.state.oh.us/Divisions/Engineering/RealEstate/row/ROW%20Manual/B%20Glossary.pdf)

### **Streamlining Assembly of the Deal: Smoothing the Way for Future Transfer**

Partner agencies did not make recommendations for how they would recommend improving the process, outside of targeting mitigation investments to the most valuable areas. In order to effectively transfer land to other agencies for long-term management, it is necessary for the DOT coordinator to understand their interests, for example:

- Why would the agency want to accept and manage land/mitigation?
- Which agency or entity’s goals and interests would match the DOT’s mitigation needs?
- What properties does that agency need?

As Caltrans noted, resource agencies “will only accept (they only need) certain pieces of property. It has to be a prime property for them. Then they have to know how it will/can be maintained in perpetuity. These other agencies don’t have funding to add maintenance responsibilities. The land manager knows how it needs to be managed and what can and can’t be done. This has to be acceptable to the resource agencies. There’s not a cookie cutter approach. Each deal is new and fresh.”<sup>24</sup>

### ***Focusing on What the Resource Agencies Want***

Many DOTs take steps to ensure resource agencies' satisfaction. For example, before presenting a mitigation choice to regulators, "Maine DOT asks all agencies in the area about their priorities. The agencies already have a 'want list' and they get the parcel they want most. It's a win-win situation, and no endowment is necessary."<sup>25</sup> While some DOTs do not provide funding for long-term stewardship by other entities, after the monitoring period has passed and the site has been accepted by the regulatory agency, and all credits have been released, DOT specialists look at the positive side: this is a tool and opportunity to get more agencies involved and to develop innovative and efficient partnerships for all.

### ***Advantages for Priority Acquisition/Restoration Sites***

In NCHRP 25-25/67 (2011), NatureServe, the Environmental Law Institute, and Oregon Institute for Natural Resources reported that some states and NGOs have expressed reluctance to take on mitigation sites that were not developed in accordance with a larger regional or statewide conservation plan because such sites are perceived as having lower ecological value.<sup>26</sup> Nevertheless, a majority of respondents (63%) in the NCHRP 25-25/75 survey said they had not encountered this problem in their state. DOTs with the most experience developing and transferring mitigation lands say that they have "realized for a long time that sites need to be chosen and developed in accordance with conservation and restoration priorities that are identified in watershed plans, Natural Community Conservation Plans, Habitat Conservation Plans, etc. The agency has been doing that for years (10 years or more), so less desirable sites would be pretty old."<sup>27</sup>

It is likely that mitigation sites chosen in accordance with a conservation or restoration plan, or nowadays, a decision support system such as Michigan DOT employs, are likely to have (or be seen as having) advantages by resource agencies. Michigan's GIS analysis and decision support system has also been documented to save process time, in applications and the number of potential sites that must be evaluated, and consequently money.<sup>28</sup>

The most substantial advantage of choosing to mitigate where resource agencies or NGOs want to is the potential for these land stewards to agree to take on the site with little or no long-term management support. If the conservation entity had already prioritized acquisition of the site (e.g., an inholding or key adjacent site) but just could not afford to purchase it, the state DOT can help accomplish this and achieve mitigation credit and a long-term manager in the process.

States with the most experience in transferring mitigation sites to other agencies and those most satisfied with mitigation site transfer were among the most likely to emphasize the importance of choosing sites in accordance with conservation or restoration plans. SHRP C06 outlines a process for integrating conservation and transportation planning, to identify top (ecological) priority sites for restoration and protection. A couple individual state DOTs have also developed processes over the last couple of years to help ensure that they are developing ecologically valuable mitigation that resource agencies or conservation entities will want to take ownership of in the long term.

### **Maine DOT**

After avoidance and minimization of wetland impacts, Maine DOT uses the following process as a precursor to land transfer. Maine DOT's up-front coordination and use of this mitigation site search process has enabled Maine DOT to garner management services "in kind" from their partners, as Maine DOT enables and facilitates acquisition of priority sites that could not be acquired otherwise.

1. Contact state and federal regulatory and resource agencies, NGOs, local town Planning Offices and Conservation Commissions in the project region.
2. Inquire about potential mitigation sites that have been:
  - Prioritized for implementation.
  - Land tracts that are under development threat that are in an ecological focus area or are a state-wide or local priority.
  - Abut conserved lands.
  - NGO, local, state and/or federal interest.
3. Conduct site visit to get photos, preliminary survey of resources (wetland types, upland, site condition) and potential mitigation use.
4. Use GIS mapping, state DNR *Begin with Habitat* information, and other data as available to fine-tune site amenities.
5. Develop a preliminary site list and speak with NGOs, local, state, federal resource agencies for feedback and interest, and if acquired, would they consider long-term management.
6. Develop preliminary site management plan and review with prospects. Will management require an endowment? If so, how much?
7. Develop a final list of sites for regulatory presentation. Include resource agency and NGO letters of recommendation, and invite these entities to help present sites and answer questions.

### **WisDOT Guidance Relating to Transfer of Lands from DOT to DNR**

WisDOT has a 2002 memo that outlines guidance on transfer of mitigation sites from the DOT to the DNR, updating earlier guidance.<sup>29</sup> Like Maine DOT's, WisDOT's guidance also stresses the importance of very early coordination in the site planning process; indeed, this is step #1.

1. Future ownership of a compensation site should be discussed by DOT and DNR very early in the site planning process.
2. DNR and DOT agree that no matter who takes ownership of a site, DOT maintains overall responsibility and authority to assure that the site stays as wetland, including the responsibility to make provisions to address catastrophic failure of the site. If DNR anticipates expending funds for management of a compensation site, then DNR should obtain lease, easement, or fee-title ownership rights that allow DNR to conduct such management.
3. DNR may take over ownership and management of a DOT site, including sites located near an established DNR-project boundary and those located outside a project boundary that meet statewide habitat goals. Any transfer of ownership to DNR should be discussed with

the Land Division Administrator early in the planning stages. All mitigation site transfers to DNR should be routed through the Bureau of Facilities and Lands Real Estate Section for approval by the Governor. Land transfers to DNR greater than 500 acres and located outside established DNR project boundaries may require a feasibility study.

4. Since each DOT compensation site will have unique circumstances, specific guidance regarding the DOT-to-DNR transfer would only prevent creative solutions between staff in both agencies. The following are general guidelines for factors that field managers, real estate specialists, and DOT liaisons should consider when putting together a proposal or negotiating an agreement with DOT for a transfer of property:
  - a. DNR regional staff should document how the transfer fits with Department habitat management and protection objectives in the area;
  - b. DOT has long-term responsibility to assure the site remains a functioning wetland and thus will make provisions to repair catastrophic damage to key structures;
  - c. DNR should not pay for wetland or upland acreage that is part of the mitigation project but may purchase acreage critical to resource management or public outdoor recreation adjoining the DOT mitigation project. All DNR land purchases must follow the normal approval process;
  - d. DNR should not require that DOT pay for routine O&M costs (this does not include work covered under item b. above);
  - e. If DNR takes fee title ownership of a mitigation site “aids-in-lieu” of taxes will be covered by DNR. Other arrangements should be considered such as transfer to DNR of management and public use rights by lease or easement rather than fee simple;
  - f. The federal agencies involved with wetland permitting may require certain restrictive covenants on wetland mitigation sites, in order to assure long-term protection of the site. DNR real estate staff should be aware of the specifics of any covenants prior to accepting a proposed transfer from DOT.
  - g. Future obligations such as additional archeological surveys or hazardous materials cleanup must be considered; and
  - h. DNR central office will be responsible for any approvals associated with taking ownership of properties within or adjacent to an established project boundary.

WisDOT’s memo contains the legal caveats that “the document is intended solely as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.”<sup>30</sup> This sort of caveat is very common and speaks to agencies’ concerns that their authority could be inadvertently limited.

### **Ohio DOT’s Process**

Ohio DOT’s environmental mitigation process is presented on the following page (Figure 9) with environmental tasks noted in green and ROW in brown. It too stresses the importance of obtaining maps and meeting with responsible parties/partners at the outset, to develop a

“short list” of potential sites; i.e., identifying conservation and restoration priorities. ODOT’s primary steps are as follows:

1. Identify mitigation opportunities
  - a. Conduct mitigation opportunity inventory and produce report.
  - b. Obtain maps and records.
  - c. Meet with responsible parties on various potential mitigation sites and develop a short list of sites to proceed on.
2. Verify mitigation opportunities
  - a. Perform site inspections and ecological studies to determine the quality of resources and mitigation suitability.
  - b. Review environmental resource easement language with owners.
  - c. Seek regulatory agency buy-in and development mitigation plan.
3. Identify third party holders – meeting with entities to obtain interest in holding easements or fee simple title
4. Qualify third party holders to accept land transfer and hold easements
  - a. Review and confirm any changes in easement language
  - b. Determination to proceed
5. Obtain director’s approval
6. Survey areas for protection
  - a. Meet with district, third party holder, property owner, ODOT (Environmental and Real Estate) to verify areas to be surveyed, type of survey, and any special consideration.
  - b. Perform survey work and any special items
  - c. Legal description prepared
  - d. Conduct baseline documentation report
7. Perform appraisal and 8. Review appraisal
9. Present offer
10. Perform closing
11. Obtain FHWA approval
12. Transfer to third party holder
13. Mitigation monitoring and/or maintenance.

### **Agency Roles and Responsibilities**

WisDOT’s 2002 memo also outlines agency roles and responsibilities in planning and implementing a transfer of a compensation site from DOT to DNR: <sup>31</sup>

#### ***DNR Regional DOT Liaison***

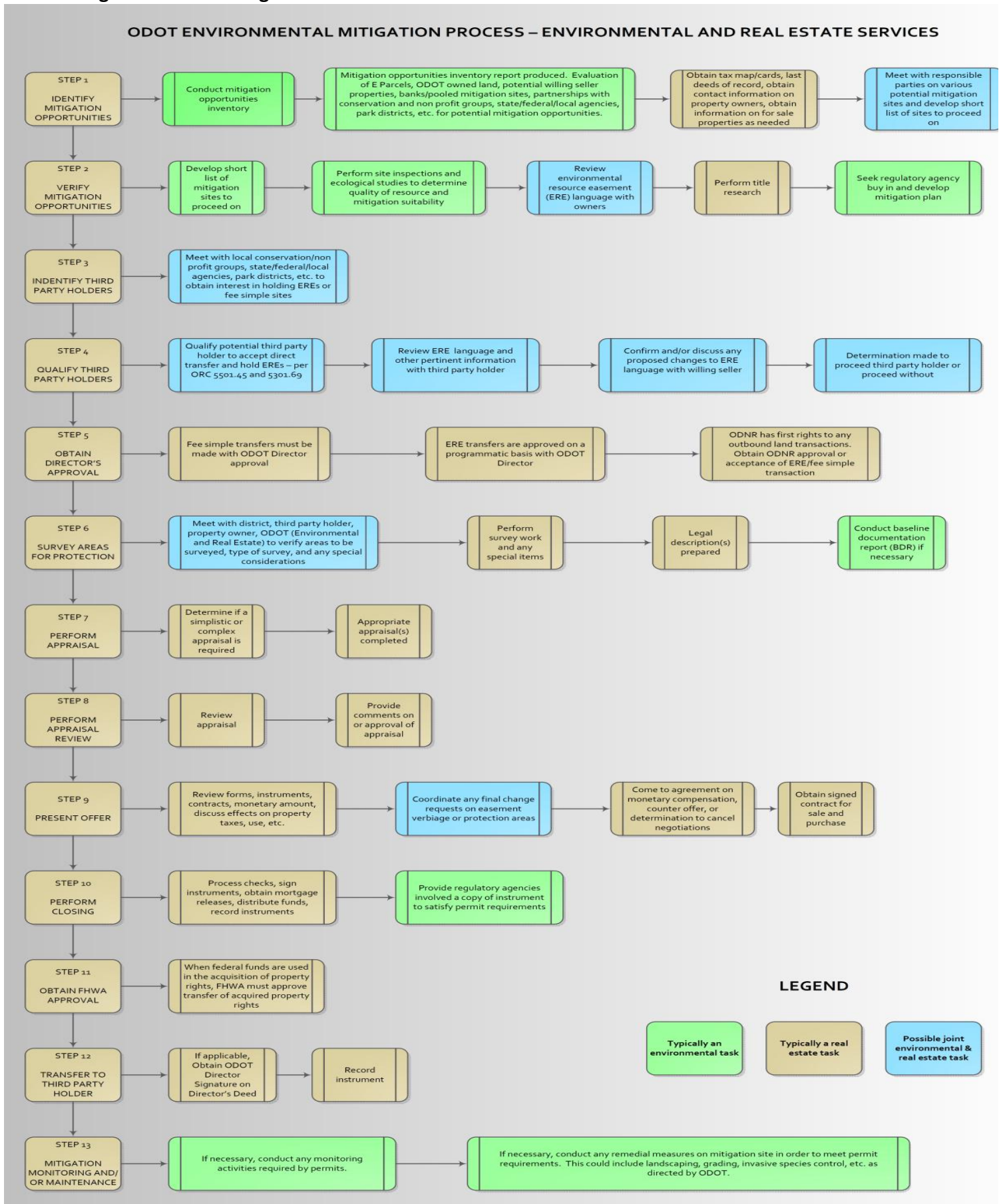
- Act as contact between DOT and field manager
- Work with central office as-needed to facilitate an agreement (written if appropriate) between DNR and DOT on the disposition of compensation sites

### *Field Managers*

- Consider how a compensation site fits into the Department's habitat management and public outdoor recreation goals and objectives and be ready to document for use by Regional Real Estate staff and the Real Estate Section in the approval process.
- Work with Regional DOT Liaison to negotiate particulars with DOT Facilities and Lands staff:
  - Works with DOT district real estate staff on the specifics of the land transfer to DNR.
  - Prepare and present any green sheets, INRB coordination and Governor approval.
  - Coordinate approval through Division Administrator



**Figure 9: ODOT Mitigation Process for Environment and ROW Staff**





#### ***DOT District Environmental Coordinator:***

- Point of contact for DNR Regional DOT Liaison
- Provide information to District real estate staff
- Work with central DOT environment office to facilitate an agreement between DNR and DOT on the disposition of compensation sites

#### ***District Real Estate Specialist:***

- Handles the specifics of real estate transfer in contact with DNR real estate staff and headquarters ROW or Real Estate staff. Approval process will include both headquarters and Region/District Environment and Real Estate offices

### **Real Estate Process and Involving Right-of-Way Staff**

Right-of-way staff are the DOT experts on acquisition and disposition of real estate. Since mitigation transfer involves land, right-of-way staff are essential and should be involved early. Ohio DOT noted that recent cuts and reorganization in Ohio recently “eliminated a Real Estate person who was very knowledgeable on all of the processes;” the new system uses consultants, which ODOT finds “extremely inefficient.” DOT ROW expertise is a critical part of the process and can be hard to replace.

ROW’s first inclination is to deal with DOT-owned land as an asset and not a liability. Hence, properties with notable environmental value to other governmental agencies... (is offered) at their current appraised fair market value. Property may also have value relating to management prerogatives, such as grazing, which also have beneficial environmental functions, such as weed control. However, some state agencies are in such straits that they have put holds on acceptance of even highly desirable properties, due to inability to hire staff, even if additional funds were available.

ROW staff keep files with the following information for every parcel disposed or transferred:

- Name of Assigned Agent
- Signed and Dated Entries - documenting verbal and written inquiries, review dates and suggested actions, personal contacts regarding design studies and proposed routes, and personal contacts involving sales attempts.
- Public Sales - dates and results.
- Other - any information necessary to understand the handling of the disposal unit; for example, documentation that prior to public sale, “FOR SALE” sign(s) were posted on the property, advertisements were placed in newspaper(s) and other real estate advertisement resources when appropriate and cost effective, notices of sale were sent to appropriate governmental agencies, notices posted on the DOT’s excess land auction Web site, and copies of brochures were mailed to all owners adjoining the property being sold.

The disposition function is often considered under “Excess Land” or DOT-owned property no longer required for rights-of-way or operational purposes. DOTs wind up with excess land from down-scoped projects or if a property was used for a purpose that is no longer needed. In

general, DOTs' policies on excess land are to minimize the number of parcels of excess land, minimize the DOT's holding period for such parcels, and to maximize the return from sale of the land or interest conveyed. DOTs then dispose of excess real property by any of the following methods:

- Internal transfers
- Public sale - by auction, sealed bid, or continuous bid
- Direct sale - to adjoining owner
- Private sale - between adjoining owners
- Exchange - by Right-of-Way Contract
- Functional Replacement - by agreement

Direct fee sale to government agencies is used when excess fee-owned property is sold to public entities without calling for competitive bids for consideration equal to the appraised fair market value of the property (CTC Resolution G-98-22 – as amended). Exchange per contract is allowed when excess land is conveyed to a party from whom the State is acquiring right of way and by using the value of the excess land as whole or part consideration for the required property or interest needed for State highway purposes. Particular direct sales may be allowed to adjoining owners, without calling for competitive bids; these are typically small, odd-shaped, fee-owned parcels incapable of independent development and having a higher and better use as part of the adjoining property or, if sold to other than the adjoining owner, would cause an undue or unfair hardship to such adjoining owner in the normal development or operation of their property. Other direct conveyances may occur to other governmental agencies:<sup>32</sup>

- Pursuant to cooperative agreement
- Pursuant to legislation
- Leasing
- Lease-Purchase
- Transfer of Control and Possession – to other State agencies
- Private Brokers

As Caltrans' ROW Guide states: "Cooperative agreements are used for conveyance of property acquired pursuant to an agreement under which the public body and the State agree to jointly share in the acquisition and construction of an improvement jointly benefiting the State and the public body, with the fee or easement title to be conveyed to the public body for their future maintenance of the facility."<sup>33</sup> Excess land can be further subdivided into inventory and non-inventory parcels.<sup>34</sup>

An inventory parcel is excess land that is carried on the accounting inventory as an asset. Each inventory parcel has a VTA, Value at the Time of Acquisition. Inventory parcels are all excess land, as defined above, except those parcels specifically defined as non-inventory. Inventory parcels include land decertified at the request of adjoining owners.

A non-inventory parcel is excess land the Department intends to convey to a specific entity under the terms of a written agreement, and decertified access rights. These

parcels are not part of the Division of Accounting inventory and do not have a VTA, including parcels to be conveyed to utilities. Examples of non-inventory parcels of excess land include:

- Property rights to be conveyed pursuant to an executed utility agreement for facility relocations.
- Property specifically acquired for another agency under terms of a written agreement.
- Parcels acquired for exchange pursuant to a written agreement.
- Parcels acquired for functional replacement (see Section 8.30.00.00).

Sometimes parcels are held for sale to a public agency. Such requests are sometimes time-limited and must contain:

- Property description or map.
- The public purpose to which the land will be put.
- The agency's intent to buy the property.
- The date the sale will be concluded and reason for delay, if any

Holds may also relate to environmental compliance or for mitigation purposes. Sometimes, before any excess real property, except surplus residential property, is offered for sale to the public, it must be offered for sale or lease to local public agencies within whose jurisdiction the property is located. These may include:

- Any park or recreation department of any city within which the land is situated.
- Any park or recreation department of the county within which the land is situated.
- Any regional park authority having jurisdiction within the area in which the land is situated.
- The State Resources Agency or any agency that may succeed to its powers.

### ***3.3 Best Practice for Facilitating Land Transfer***

The survey and in-depth interviews for NCHRP 25-25/75 identified a number of “best practices” DOTs can implement or take into account and adapt as appropriate to their state situations. Best practices for transfer of mitigation lands can also be inferred from successful land transfers that DOTs have undertaken.

Solutions entail both keeping up some of the good things DOTs are already doing, as well as using new approaches. State DOTs employ their full engineering resources and creativity to avoid impacts to wetlands, in design, on the project level, minimizing the need for mitigation and site transfers. Even more can be done to avoid and minimize on the planning level, and importantly, lay the groundwork for identification of joint priorities and likely long-term stewards when compensatory mitigation looks inevitable.

## **Focus on Large Sites, Minimize Numerous Smaller Transactions**

As staff at the Kentucky Transportation Cabinet remarked, “Acquiring large properties that are specifically dedicated to the purpose of mitigation and preservation has proven to be more successful, cheaper and overall desirable. Then (the DOT) transferring those properties to an organization whose main mission is preservation, protection and conservation is more desirable than keeping those properties in the hands of our own organization whose main mission is to build and maintain roadways in a fiscally and environmentally responsible manner. All of our transfers (in this manner) have gone very smoothly.”<sup>35</sup>

## **Minimize Numerous Smaller Transactions**

When a set of sites are acquired in accordance with a landscape scale conservation (or restoration plan) as part of a programmatic permitting approach, the state DOT can eliminate numerous smaller transactions, whether of paper consultations and permits or tangible actions in the field. For example, speaking about the Shortgrass Prairie Initiative in Colorado, Jeff Peterson, Wildlife Manager/T&E Species Coordinator, said that “CDOT and FHWA are satisfied because they don’t have to consult with the USFWS on almost every project east of I-25.” Wisconsin DOT said they “mostly transfer to DNR at sites DNR has already identified in their regional plans.”

## **Use Modern Technology and Methods to Place Mitigation in Areas of Greatest Need or Highest Value by Agencies and Potential Land Stewards**

Some interviewees remarked that there has been a shift; regulatory agencies and land management agencies are thinking about the importance of what needs to be preserved for the future, especially with limited government resources. NCHRP 25-37, a watershed-based approach to mitigation will highlight data and tools that are coming online that will support early coordination and consensus building on the best areas to direct mitigation investments and collaborative conservation.

### ***Make the Shift: A Vision of Using Data and Partnerships to Accomplish More***

Increasingly, DOTs are using partnerships to identify and leverage the value DOTs are offering with their ability to make conservation and restoration investments and to funnel federal transportation dollars to such purposes, in the course of satisfying federal regulatory requirements (e.g. Clean Water Act Section 404, Endangered Species Act Section 7, etc.). Where the conservation or restoration investment is highly desirable to a conservation entity or organization and helps execute plans or accomplish goals that can be achieved in no other way, conservation entities have often been willing to take on management. Increasingly all government entities are seeing a need to partner and leverage what each can bring.

Minnesota outlines the case in point, in Minnesota’s Board of Soil and Water Resources’ 2009 *Wetlands Restoration Strategy for Minnesota*.<sup>36</sup>

This strategy was developed to provide a statewide perspective and improved approach for restoration of wetlands. State and federal agencies, local government units, and non-

governmental organizations combine and coordinate their efforts to achieve the shared goal of greater net gains in wetland functional benefits. The long-term vision for this strategy is: *Minnesotans will enjoy significant improvements in habitat, water quality, surface water flows, and ground water interactions that are attributable to wetlands restoration.*

Key elements of this statewide wetlands restoration strategy are:

- Prioritize restorations based on desired outcomes, specifically water quality improvements, habitat gains, flood damage reduction, and other hydrologic benefits.
- Improve coordination of wetlands restoration efforts.
- Design and produce better wetland restorations that stand the test of time, and provide lasting functional benefits.

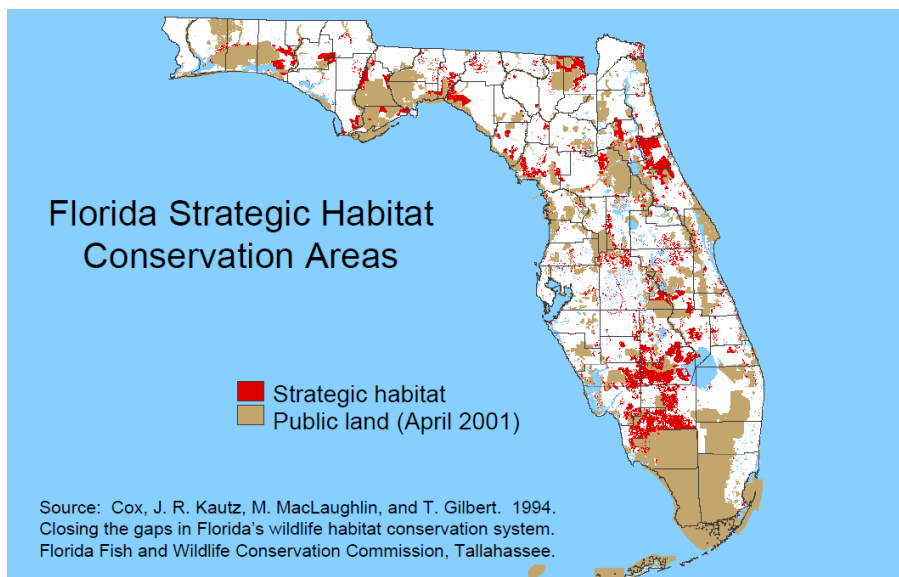
Prioritization is the heart of this strategy because financial resources are limited and must be used where there is the greatest return on our investment. Regardless of available resources, choices will always have to be made...A wetlands restoration strategy provides guidance for strategic decision making by a variety of government officials, land and water managers, and non-governmental organizations...This strategy emphasizes the need to strategically target public funding for wetlands restoration to sites that provide the greatest environmental benefits at a landscape, watershed, or flyway scale...the Minnesota Statewide Conservation and Preservation Plan, July 2008 (SCPP)... recommends developing a prioritization methodology that uses identified restorable wetlands as a base layer to which filters may be applied to prioritize certain potential restoration sites. The concept of prioritization is to narrow the sometimes daunting number of possible wetland restoration sites in a given watershed down to a manageable set of choices based on their ability to positively affect any of three primary categories of functional benefits: water quality improvement; wildlife habitat improvement; and water quantity management.

To assist state agencies and local entities, MnDNR developed a Watershed Assessment Tool (WAT) that is a five-component framework to describe, quantify, and compare watershed health for each of the state's 81 Major Watershed management units. Eighteen indices based on 39 data layers combine to give health scores for hydrology, water quality, biology, connectivity, and geomorphology. Thus, the WAT helps planners and regulators think strategically about watersheds as ecological systems, and comprehend the nature of problems and the best remediation, restoration, and conservation siting opportunities in a given watershed. More recently, BWSR has developed "an Ecological Ranking Tool that highlights areas of high erosion, sediment, and habitat quality" and MnDNR has noted that "there are many opportunities to continue to build on this and other LiDAR-based tools to incorporate other water quality metrics, to focus on wetland restoration potential, and to build the capacity to evaluate the tradeoffs of landcover change scenarios."<sup>37</sup>

Caltrans reported that land transfers to and long-term management by conservation organizations has been very successful. Resource agencies identify their highest priority sites. The sites "have to be very important" to conservation, watershed restoration, species viability, etc. and were well regarded in part "because they were large, giant, advance planning and habitat assessment processes" that accomplished "large pieces" of the conservation and

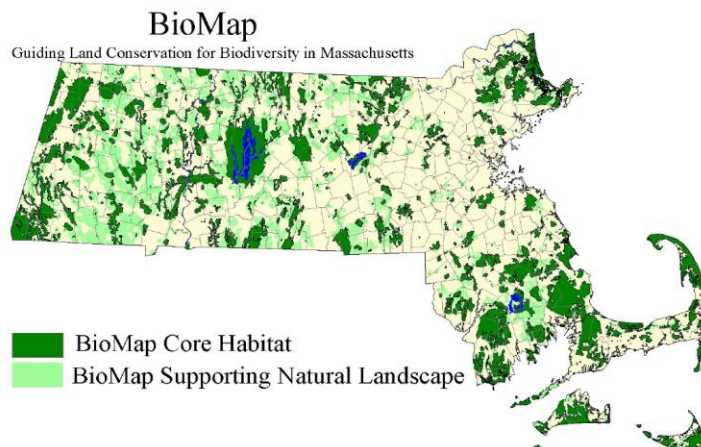
restoration objectives that had been set out under these, with transportation assistance.<sup>38</sup> Maine DOT likewise supports execution of priorities identified through the state's Begin with Habitat program. Tennessee's State Wildlife Action Plan terrestrial habitat priorities depicted below are now being combined with a watershed approach, in a Corps - TNC pilot with results expected later this year.

**Figure 10: Tennessee State Wildlife Action Plan Priorities & Florida Strategic Priorities**



Florida DOT started contributing to state efforts to preserve identified strategic habitat conservation areas over a decade ago. FDOT has targeted conservation area acquisitions in accordance with this strategic plan, as well as Florida panther and black bear crossings. Massachusetts recently completed a BioMap identifying priorities.

**Figure 11: Priority Conservation Areas Identified by Massachusetts**



The Environmental Law Institute (2007) estimated that compensatory mitigation under five key federal programs (Clean Water Act, Endangered Species Act §10, federal natural resource damage programs, the Federal Power Act, and the Northwest Power Act) totaled approximately \$3.8 billion annually; 70% of that was from the CWA Section 404 program for wetlands. These represent a powerful source of investment that could be directed to priority areas.<sup>39</sup> It is unknown how much of the annual spending on land and water conservation is directed to these priority areas:<sup>40</sup>

An examination of federal and state land and water conservation spending from 1992-2001 – as well as current federal spending on mitigation – shows approximately \$7.3 billion being spent annually, with an unknown portion of that total dedicated to wildlife habitat (Lerner et.al. 2007). These figures do not include conservation investments by the land trust community or local governments. According to the Trust for Public Land, local governments spent \$21.4 billion from 1999 through 2009, an additional annual average of \$2 billion ([Landvote.org](http://Landvote.org)), although not all funding from these measures has been spent...**Providing the necessary funding will require strategically directing existing funding to the highest priority lands and obtaining additional funds to complete the job.**

In addition to linking habitat protection with mitigation projects, conservation could also be linked with actions to reduce risk in hazard-prone areas.<sup>41</sup>

State and local governments are required to prepare hazard mitigation plans to receive federal disaster assistance. The plans must assess the risks posed by natural hazards, such as flooding and coastal storms, and a strategy to reduce the risks – including acquiring land or discouraging development in the most hazard-prone areas to reduce risks to people and property. These undeveloped lands can provide valuable wildlife habitat...Since the long-term solution to minimizing risk to people and property consists of keeping flood-vulnerable development and uses out of the floodplain, there is a natural overlap of goals between flood-mitigation programs and habitat protection programs.<sup>42</sup>



## **Avoid/Prevent a Bankruptcy Scenario**

DOTs are more avid than ever before to avoid bankruptcy scenarios, since there have been close calls and even actual bankruptcies in recent years. See sidebar.

### ***Due Diligence***

Maine DOT stressed the importance of carefully reviewing and taking into account the steward's ability to manage. They have to have a record of good stewardship and the funds to fulfill requirements. Colorado DOT needed to take this into account as well, in deciding how to accomplish the advance mitigation through the state's 20 year advance mitigation on the eastern plains' Shortgrass Prairie Initiative.

### ***Work with Other Government Agencies***

Some state DOTs have only done land transfers with other government agencies, in order to avoid the risk of a long-term manager failing to survive into the long-term. California has been one such example. Caltrans realizes that a failure could result in the property reverting back to Caltrans, and Caltrans having to start over again – a contingency in the permit. Such a contingency is usually written by the permitting agency to include them and involves starting over, re-selecting a site; it essentially moves the agency back into a project development process for mitigation, now without a project to pay for the mitigation.

### ***Separation of Function – Easement and Endowment Holders***

In southern California, SANDAG is separating the property owner from the financial manager, so the owner cannot control the financial principle. The owner will have to give the conservation easement and access rights to the transportation agency, as well as a say over management. "Fee title is given to another agency; however, a higher level of government won't give a conservation easement back to a lower level of government; they want it free and clear. The Federal government will accept

### **Bankruptcy of Mitigation/Conservation Trust Sends Properties Back to Initial Owners/Purchasers**

The Environmental Trust Inc., (TET) became the first land trust in the nation to declare bankruptcy in March 2005. At the time of its bankruptcy, the San Diego-based organization owned 3,542 acres of preserves. While most trusts have strong member and donor support emphasizing private acquisition and management, TET Inc. dealt exclusively in mitigation banking.

Formed in 1990, TET Inc. quickly gained a reputation as a fierce competitor, eventually becoming the most dominant of the region's mitigation banks. However, TET regularly drew from the principal of its endowments to maintain preserves, steadily eating away at its financial base. TET's board and managers also set high targets for financial return on their endowments, a strategy that caused a real problem when the stock market began to decline. Ultimately, TET concluded that Chapter 11 bankruptcy presented the most viable option. The organization said "We could have continued to operate for many more years, but it was obvious that matters would only get worse."

TET's bankruptcy plan called for all easements—properly recorded or not—to be handed off to a capable land-manager and permanently protected. The plan specified that the developer from which each preserve originated would receive first opportunity to reclaim the land and could choose to manage the property itself or else locate a suitable conservation group to do so (but the funds initially expended for this purpose were gone at this point). Should the developer refuse, the properties would then be offered to local municipalities, then to the U.S. Fish & Wildlife Service or the State Department of Fish & Game, then to other capable nonprofits, and finally to the state. If no one is interested, TET's interest in the land will be abandoned. The level of agency interest in assuming the properties primarily related to the resource conservation value of the lands involved and endowment funds available/remaining. – *CA Planning & Development Report*



land within refuge boundary but they can't accept money – they either don't know how or can't. They are very selective of properties they will accept, but they will accept land and manage it for free.”<sup>43</sup> In contrast, “local governments (in southern California) will accept certain properties within their park boundaries but transportation agencies must come up with funding, and that funding mechanism is up for negotiation.” SANDAG, with their bonding measure that includes mitigation funding, can provide an annual allotment and a 40-year agreement, corresponding to their sales tax. SANDAG is setting up further precautionary arrangements, as staff explained; SANDAG is:

Headed toward using a community foundation that all parties feel comfortable is a strong financial manager, and therefore that setting up endowments at that foundation makes sense. Locally it is a matter of trust. The San Diego Foundation has been in place for 36 years. They have an excellent track record and a good, conservative return on investment, even in bad years. This arrangement will meet the standards in SB436 – endowment will not be held by SANDAG or the land manager/owner. Even though the transportation agency will have to pay a cost for management of the endowment, at least they will be sure the endowment is not being touched. This community foundation has over a dozen current funds already in place, and they know what they are doing, and they have low costs/fees. They are not a fly-by-night group, the board and its financial practices are well-documented. SANDAG could do it too, but SANDAG is a transportation agency and also doesn't want the liability.

But bankruptcy risk is just one of the catastrophes agencies face and need to protect against. Other mechanisms are needed for natural catastrophes.

### ***Incorporate Mechanisms to Protect the Land Steward from Catastrophic Events***

The state DOTs and MPOs most experienced in land transfer (e.g., North Carolina and San Diego) each noted that protection from catastrophic events was still a difficult area that lacked a good answer. *Force majeure* involves catastrophic events such as fires, floods, or hurricanes that could bankrupt the steward if the stewardship organization was held responsible for replacing the mitigation. San Diego saw record fires in 2003 and 2007. Drought can cause similar problems. For example, in 2011, the Texas Forest Service estimated that the state's exceptional drought, prolonged high winds, and record setting temperatures killed as many as half a billion trees across the state, a figure that does not include trees killed in wildfires that have scorched an estimated 4 million acres in Texas since the beginning of 2011.<sup>44</sup> Overall 10% of the trees in the state were lost. A massive September wildfire in Bastrop, east of Austin, destroyed 1,600 homes and was blamed for killing 1.5 million trees. North Carolina land stewards raised the issue of fault and loss over damage caused by wild boars, which others considered as invasive species that must be controlled.

### ***Allow or Build in Money-Generating Mechanisms: Generate Funds for Management***

DOTs voiced the sentiment that “People who hold these properties make money off of them. Require that some of that money needs to be plowed back in for management.” For example, grazing generates income, and grazing can also control invasives.

Some of these profits can even go back to the initial requesting agencies. Experienced easement managers such as TNC also recommend that income-generating possibilities be thought through carefully; there are a lot of ways to make money with a piece of property. Both Caltrans and NGO management entities recommended considering such management support mechanisms, not just management supported by an endowment.

### **Set up Third Party Enforcement**

Some state DOTs have made “third party enforcement” a part of their agreements. When another agency or “third party” assists with enforcement, the DOT does not have to bear this burden on its own. Often, the other party/enforcement entity can successfully resolve difficult issues without the DOT needing to get involved. In Maine, the Maine Department of Environmental Protection (DEP) will enforce on behalf of the state, so the DOT does not have to do so. Maine DOT has not been able to keep this provision in every case; for example, when Maine DOT transferred a site to a USFWS wildlife refuge, the USFWS did not want the enforcer language in the contract, and Maine DOT made the transfer without the language. Maine DOT noted that if anything goes wrong, the DOT will have no recourse. There is a value though working with high trust entities with other missions and purposes outside of profit or income generation. Such entities can often be prevailed upon to address necessary management issues.

### **Cooperative/Interagency Agreements**

Many DOTs are still new to the land transfer process and most transfer documents have been developed for one-time use. Agencies use cooperative agreements legally binds two or more parties to a set of mutually agreed upon commitments. Cooperative agreements may be used when another entity takes over maintenance or a service. Transfer of land is often accomplished through the DOT right-of-way disposition process for excess land.

According to Caltrans’ guidelines, “a mitigation cooperative agreement is necessary *when specific commitments must be met AND at least a portion of those commitments will be shared*. We can use mitigation cooperative agreements as a tool to define working relationships with other public entities when there is an exchange of effort, funding, or materials.”<sup>45</sup>

### **Involve a Cross-Disciplinary Team**

DOT HQ environmental offices can generally provide guidance on what the agreements should include and help to ensure that the environmental commitments the DOTs enters into are commitments that can be fulfilled given the agency’s fiscal and legal constraints. Before writing the cooperative agreement, a kick-off meeting to discuss objectives and approaches is advisable. Participants at the meeting may include: Project Manager, District Environmental, District Right of Way, District Cooperative Agreements Unit, HQ Office of Cooperative Agreements, HQ Legal, and the HQ Environmental Mitigation Coordinator.

### ***Be Clear but Succinct***

The cooperative agreement stands on its own. Thus, the articles in the cooperative agreement and any attached exhibits must be written so that they convey the full intent of the parties and so that later readers and users of the cooperative agreement can clearly define the responsibilities of each party. The cooperative agreement should also be succinct. For example, it is not necessary to include a detailed description of the transportation project in the cooperative agreement as this is documented elsewhere. It is also not necessary to establish the environmental setting, the magnitude of the environmental impacts, etc., as this information should be included in the environmental document. One sentence describing the transportation project and one sentence describing the impacts will usually suffice.

### ***Reference the Authorizing Permit, Agreement, Document or Approval***

When writing the agreement, explicitly reference the relevant terms and conditions of the environmental document or resource agency permit, agreement, or approval in the articles in the cooperative agreement. Also, double check and be certain that the mitigation proposed in the cooperative agreement matches that in the authorizing document. For example, if the permit calls for 5 acres of wetland restoration, the cooperative agreement should state that 5 acres of wetlands will be restored. If a portion of the mitigation was achieved by some other means, this must be stated in the cooperative agreement.

### ***Exhibits***

Depending upon the amount of detail being included in the cooperative agreement, consider adding exhibits which fully describe the work to be performed. Exhibits may include cost estimates; maps and figures; a detailed scope of work; resource agency permits, agreements, or approvals; and/or a draft or final mitigation and monitoring plan, etc.

### ***Peer Review***

Invite peer reviews of your cooperative agreement. Ask your reviewer if the cooperative agreement makes sense and ask the person to explain to you what the cooperative agreement is about. Remember if a peer has to ask questions or does not understand what you are trying to convey in the cooperative agreement, then Legal and other users/reviewers will have trouble as well. Use the questions and/or feedback provided by your peer to add clarification or information to the cooperative agreement.

### ***Prepare for Instances where a Property Can't Be Transferred***

The Ohio DOT noted that if property can't be transferred, a deed restriction is used. DOT will be responsible for "policing" and protecting the property.

### ***Requests for Proposals***

Agencies also issue RFPs to the public for services that they need. An RFP ensures that the solicitation is entirely open and transparent and that there is public notice. SANDAG has offered to share a copy of an RFP they are developing for long term management, in fulfillment of advance mitigation the agency is performing, with Caltrans and other partners. The mitigation sites are in accord with regional multi-species habitat conservation plans (HCPs).

### ***Due Diligence for Ability to Manage the Land***

In the in-depth interviews, DOTs indicated that they carefully review the steward's ability to manage. Maine and others reported that a record of good stewardship is key, as are the wherewithal to fulfill requirements.<sup>46</sup> Caltrans pointed out that a lot of mitigation is on private property and is conservation easement, and their state Department of Fish and Game is very supportive of that. "One of Caltrans' criteria is they want people to be able to manage the land."<sup>47</sup>

### ***Detailed Cost Analyses, Property Analysis Reports, and Endowments***

When long-term management occurs by DOT, detailed cost analyses often do not occur. DOT maintenance departments don't have mitigation sites specifically broken out in their land/vegetation management budget. Such management occurs under lump sum categories. Maintenance is responsive to direction/requests from elsewhere in the agency. Funding for mitigation sites comes from projects or on a District/Region basis. Occasionally pooled funds or central environmental remediation budgets can be tapped. Still, state level general fund money is subject to the legislature on a yearly basis; unless funding for long-term management is taken outside of the state process, funding can be lost or not allocated. This has been a factor in looking for banks or ILF and in trying to develop sites that require very minimal long-term management. Project budgets go over more than one year, and mitigation funds can often be carried forward for 5-6 years past completion of construction.

Approximately 80% of DOT survey respondents noted that they did not use endowments for long-term management, but addressed such needs through more creative partnerships where other agencies and entities took on such responsibilities in exchange for the DOT helping achieve significant conservation or restoration goals. Significantly, even in states, such as California, that responded that they did utilize endowments, usage of endowments is not at all a regular practice. Rather, the vast majority (interviewee estimated 80%) of mitigation "deals" and transfers are negotiated and effected without endowments. Maine DOT had developed endowments for a few projects, based on parcel size, management, and time required on an annual basis. DOTs emphasized that they seek partnerships where the steward/long-term manager is pleased to get the parcel and provide long-term management, if the DOT can just help them acquire the land.

### ***Center for Natural Lands Management Property Analysis Record (PAR)***

The Center for Natural Lands Management (CNLM) in California has pioneered and advocated for the development of detailed cost analyses, which they call a Property Analysis Record (PAR), to help ensure that all costs and eventualities are covered, for long-term natural resources lands management. According to Caltrans staff, "If there is going to be an endowment the PAR is used. Otherwise it's a negotiation and can be spelled out with agencies in the permit." Inputs to PARs include:

- Due diligence (biological, legal, cultural, physical, etc.)
- Costs associated with activities, infrastructures, and risk management to meet stewardship objectives

- Financial parameters

Pertaining to the site objectives, PAR inputs include:

- Acquisitions
- Site Construction
- Biotic Surveys
- Habitat Restoration
- Habitat Maintenance
- Water Management
- Public Services
- General Maintenance
- Reporting
- Office Maintenance
- Field Equipment
- Operations

Stewardship activities and risk management may include a legal fund, adaptive management fund, contingency fund, and/or research and development to support adaptive management. These may be considered second order PAR inputs.

The PAR analysis then generates the required endowment, based on stewardship plans and justification for funding requirements. The PAR provides two cost estimates, for initial and capital activities and ongoing activities. Initial and capital activities occur once or for a limited period at the beginning of stewardship (first 3-4 years of management activities), funded out of an initial cash allocation. Start-up costs may include:

- Initial purchase and installation of fencing
- Creating first management plan
- Conducting a baseline biological assessment
- Agency mitigation monitoring

Ongoing costs include tasks that occur repeatedly over time. Considerations include the frequency of such tasks (e.g., annually or every 40 years). Tasks become the basis for the long-term stewardship budget. Examples include:

**The Corps' Institute for Water Resources "Living Document" on Implementing Financial Assurance for Mitigation Project Success** report describes and compares features of alternative assurance instruments and reviews design and implementation issues and considerations that the Corps considers to be key, on a national level, to using financial assurances and ensuring mitigation project success.

The report defines financial assurance for mitigation project success as: "a mechanism that ensures that a sufficient amount of money will be available for use to complete or replace a mitigation provider's obligations to implement a required mitigation project and meet specified ecological performance standards in the event that the mitigation provider proves unable or unwilling to meet those obligations."

[http://www.iwr.usace.army.mil/docs/iwrreports/Financial\\_Assurance.pdf](http://www.iwr.usace.army.mil/docs/iwrreports/Financial_Assurance.pdf)

*"Identification of the needed activities is negotiated with the resource agencies. They know and have the authority over what is best for the species. Caltrans has the purse strings. The land manager knows the property and what can be done in it. Identified activities are used to calculate what can be done, how much it will cost." -- Caltrans*

- Fence repair and replacement (annual maintenance, 30 replacement cycle)
- Management plan updates (5 year cycle)
- Annual biological surveys (yearly monitoring)

Finally, the PAR includes financial parameters, such as the *capitalization rate*. The latter determines the investment needed to produce a given stream of income in perpetuity. It reflects the rate of return on an investment compared with the inflation rate. For example, to generate \$20,000 annually, the following endowment levels would be necessary, at the rates of return varying from 1% to 4.5%:<sup>48</sup>

- 1.0%    \$ 2,000,000
- 2.5%    \$   800,000
- 4.5%    \$   444,444

### **Emergency Funding**

The San Diego region has dealt with two huge fires in the past decade, which has raised the potential need for Emergency Land Management Funding.

Thus, SANDAG developed *Recommended Criteria for Emergency Land Management Funding*. Proposed in FY 2011, if approved, this funding would allow for an emergency response to address land management issues that arise between land management grant cycles. The program would be structured to fund “first year” urgent needs where no other known funding sources are readily available within the time period needed to address the emergency.

SANDAG and partners proposed an initial funding allocation set at \$150,000 per year for four years, with a maximum total of \$500,000 if the funding is not utilized over that time period and with funding rolling over from year to year if not used. The following criteria could justify tapping the emergency funds:

- A sudden and clear threat to a major population(s) of a covered species or sensitive habitat has been documented and a clear method to address the issue has been proposed; or
- A catastrophic event that severely impacts population(s) of covered species or wildlife movement (examples include fires, flooding, landslides, hazardous waste spills);
- Immediate action necessary to rehabilitate or eliminate illegal human activities that severely threaten the integrity of a preserve, by impacts to large populations of covered species, sensitive habitats, or wildlife linkages (examples include restoration of illegal grading, elimination of the sudden expansion of feral invasive animals, controlling access of the sudden increase in off-highway vehicles);
- A documented rapid or early invasion of habitat by aggressive invasive species with the potential to severely alter ecosystem dynamics (e.g., fire frequency, flooding, salinity). Examples include the identification of an aggressive invasive species new to the County, or an invasive species known to occur in the County, but previously undocumented in a regional preserve.

An oversight committee composed of members including United States Fish & Wildlife Service, the California Department of Fish and Game, the SANDAG TransNet Environmental Management Program Manager, and an at-large member of the Working Group representing land managers would provide technical expertise.

### **The Benefits of Mitigation Banking and In Lieu Fee (ILF) Mitigation**

While partnerships with state agencies and NGOs may be a good deal in many respects, DOTs cannot always fully transfer permit liability with the land that is being transferred out of their control. This boosts the advantages of mitigation banking and ILF in such states.

ILF has some challenges though, in terms of additional documentation that can be required. While ILFs have been particularly adept at implementing a watershed approach to date – performing or building on watershed analyses to ensure mitigation is targeted to where it can generate the greatest environmental good, or be directed to priority restoration areas in the watershed – ILFs can require more documentation for DOTs. Caltrans only uses ILF on an exception basis, as they “have to be really clear with FHWA that it is going to something directly on the ground that mitigates for the impact. ILF specifically for wetlands is fine, pretty clear – you can tie mitigation impacts to restoration projects. Caltrans can participate in others’ ILFs, but Caltrans has to figure out where the impacts are and the mitigation will occur to prove that to FHWA.”<sup>49</sup>

## 4 Conclusion

State DOTs are key contributors to wetland restoration and species and habitat conservation nationally, through their adherence to CWA and ESA requirements, off-setting conservation measures, and compensatory mitigation. While DOTs make these investments and shepherd restoration and conservation sites through their 5-10 year monitoring phase to final acceptance, long term management is still needed and state Natural Resource and Fish and Game agencies are considered better managers for state public trust lands. State agencies and NGOs have systems for managing large networks of conservation lands and managing such lands for their conservation and resource values, while DOTs typically do not. Transfer of ownership and/or long-term management and maintenance of successful sites offers the potential to provide both cost efficiencies and ecological benefits, with long-term maintenance.

This project collected and reviewed information from state DOTs, resulting in a report documenting the processes and procedures that have proven successful in transferring responsibility (ownership and/or long term management and maintenance ) for mitigation (stream and wetland) and conservation (based on the Endangered Species Act) sites to private conservation organizations or government conservation agencies. This research summarized DOTs best practices for locating and arranging for long-term management of mitigation sites by third parties. It serves as a resource for transportation agencies to initiate discussions with permit agencies about the transfer of ownership, and/or long-term management and maintenance for transportation related mitigation and conservation sites. Based on the collection of best practices, it provides decision making frameworks to assist transportation agencies undertaking the process of the transfer of transportation mitigation and conservation sites. Described herein are:

1. How to find willing parties
2. How state DOTs partner with other organizations/agencies and in particular, how they can lay the groundwork for successful partnerships
3. The terms of agreements
4. Obstacles and challenges encountered and practices/methods considered for long-term management and maintenance (in perpetuity)
5. How arrangements for long-term responsibility and sometimes endowments, occurs.

Often the primary incentive for DOTs to attend to is the importance of the site in terms of existing watershed, species recovery, or habitat/landscape conservation objectives. When DOTs are able to align their mitigation actions with other agencies needs and desires for particular restoration and conservation parcels, economical and efficient partnerships were created, where DOTs were able to fund acquisitions and state agencies and NGOs assumed long term responsibilities



## Appendix A - Transfer Agreement Templates

Transfer agreements range from the relatively simple, as shown below, to the more complex examples that follow.

### *Memorandums of Agreement and Understanding*

#### **MOA for Transfer of Mitigation Site, Involving Endowment**

##### **MEMORANDUM OF AGREEMENT FOR MITIGATION/CONSERVATION SITE TRANSFER**

**BETWEEN** \_\_\_\_\_ **AND** \_\_\_\_\_

THIS AGREEMENT is made and entered into on this \_\_\_\_\_ DATE \_\_\_\_\_ by and between the following offices \_\_\_\_\_; WITNESSETH:

WHEREAS STATEMENTS

NOW, THEREFORE, for and in consideration of the mutual promises to each other, as hereinafter set forth, the parties do mutually agree as follows:

1. The \_\_\_\_\_ RECIPIENT \_\_\_\_\_ will accept the transfer of \_\_\_\_\_ TRANSFERER \_\_\_\_\_ properties under the provisions of this Agreement, and arrange and provide for their long-term stewardship in accordance with the principles, practices and procedures set out \_\_\_\_\_ IN RELEVANT DOCUMENT \_\_\_\_\_.

All conservation easement or project area boundaries shall be marked with durable markers that are acceptable to \_\_\_\_\_ TRANSFERER \_\_\_\_\_, the landowner \_\_\_\_\_ AND \_\_\_\_\_ OTHER RELEVANT PARTIES \_\_\_\_\_ prior to transfer to \_\_\_\_\_ RECIPIENT \_\_\_\_\_ for stewardship.

2. The \_\_\_\_\_ TRANSFERER \_\_\_\_\_ will request that the \_\_\_\_\_ RELEVANT GOVERNMENT OFFICE \_\_\_\_\_ transfer \_\_\_\_\_ TRANSFERER \_\_\_\_\_ properties to the \_\_\_\_\_ RECIPIENT \_\_\_\_\_ for stewardship, on the following basis:
  - a) High quality preservation sites - - 30 days after closing;
  - b) Stream and wetland restoration sites - - 30 days after completion of restoration and technical monitoring and close-out;
  - c) Buffer restoration sites - - 30 days after completion of restoration and technical monitoring and close-out; and
  - d) Nutrient offset sites, if applicable - - 30 days after completion of technical monitoring and close-out.

For purposes of this Agreement, "transfer" refers to the transfer of management and stewardship responsibility, and not a reallocation of land under RELEVANT REFERENCE.

3. The TRANSFERER will notify the RELEVANT GOVERNMENT OFFICE of the transfer of specific TRANSFERER properties as it occurs; and the RECIPIENT and the TRANSFERER agree to further consult with the RELEVANT GOVERNMENT OFFICE as needed to facilitate the changes.
4. Within thirty (30) days of the date TRANSFERER properties are transferred or assigned to the RECIPIENT, the TRANSFERER agrees to contribute to an endowment for the purpose of ensuring stewardship activities associated with each TRANSFERER property by the transfer of the appropriate funds to the RELEVANT ENDOWMENT FUND. Endowment amounts shall be agreed upon through an annual evaluation (see #6 below) prior to acceptance of long-term monitoring responsibilities by the Stewardship Program.

It is acknowledged by the parties that the endowments shall be deposited to the RELEVANT ENDOWMENT FUND. These principal funds shall not be expended. The interest gained on the portion of the endowment contributed by TRANSFERER will be used for stewardship activities on TRANSFERER projects as needed. Any remaining interest shall be reinvested in the principal fund. The required endowment amounts may be adjusted annually, subject, however, to items 5 and 6 below.

5. The parties to the Agreement understand that the transfer of stewardship responsibilities is dependent and contingent upon and subject to the availability of endowments for this purpose.
6. The parties agree to undertake a thorough review of stewardship costs and program effectiveness periodically, but no less than annually. In addition, the RECIPIENT will evaluate the status of its Stewardship Endowment account at the end of each state fiscal year, and provide its findings to the TRANSFERER no later than DATE of each year. Should a revised system be required, such revision will be established through written Agreement. Additionally, the parties agree to work together to assure the stewardship program is reflective of, and accomplishes, the goals of the department. Any disputes between the parties will be submitted to RELEVANT AGENCY OR DEPARTMENT for resolution.
7. A contractual service agreement will be entered into by the parties to fund the administrative expenses of the RECIPIENT over and above the endowment income for expenses associated with the stewardship of TRANSFERER properties. Once the performance of the Stewardship Endowment fund recovers from the current economic downturn, and sufficient income is generated by the Fund to cover monitoring and staff expenses, it is anticipated that the service contract will be

terminated, and that the stewardship administration associated with TRANSFERER properties will be funded from the interest generated by the Stewardship Endowment.

8. The parties acknowledge that TRANSFERER retains the responsibility for long-term monitoring of all mitigation projects that have been acquired by TRANSFERER prior to transfer to RECIPIENT, and that, should funding constraints prohibit transfers, TRANSFERER will not be able to conform to the conditions specified in paragraph 2 and 4 of this agreement.
9. This MOA may be modified or terminated by the signatory parties upon written agreement by either parties, successors or assigns. If terminated, all files, data and information related to TRANSFERER properties will be returned to TRANSFERER, or as otherwise directed by RELEVANT INDIVIDUAL WITHIN RELEVANT DEPARTMENT/AGENCY.
10. Within thirty (30) days of such written notice of termination by the parties, RECIPIENT shall provide a final accounting report showing total payments received from TRANSFERER, date of monitoring visit and protection status for each site, and amount of expenditures for activities described in this agreement. TRANSFERER shall confirm the findings of the final accounting report.
11. This Agreement shall terminate X years from its effective date, written above; but may be renewed or extended by the parties. Upon the effective date of any termination, RECIPIENT shall release to TRANSFERER all Stewardship Endowment Account money paid by TRANSFERER, including any associated interest gained that has not been spent in accordance with this agreement. Released funds and all associated interest shall be used exclusively for the stewardship of TRANSFERER mitigation sites. These monies shall be retained in the RELEVANT Stewardship Endowment Account.

IN WITNESS WHEREOF, the TRANSFERER and the RECIPIENT have executed this Agreement the day and year first written above.

## Mitigation Cooperative Agreement (MOA) with Monitoring

Mitigation Project Name, if applicable  
Transportation Project Name, if applicable  
EA No.  
EFIS No.  
Cooperative Agreement No

This AGREEMENT, ENTERED INTO EFFECTIVE on \_\_\_\_\_, **YEAR**, is between the STATE OF \_\_\_\_\_, acting by and through its Department of Transportation, referred to herein as “\_\_\_DOT,” and the **PUBLIC ENTITY**, referred to herein as “**ENTER ABBREVIATED NAME HERE.**”

### RECITALS

\_\_\_DOT and **PUBLIC ENTITY**, herein referred to as “PARTIES,” pursuant to Streets and Highways Code sections 114 and/or 130, are authorized to enter into this Agreement.  
**INSERT ADDITIONAL RECITALS HERE**

\_\_\_DOT has determined that the estimated cost of satisfying **MITIGATION PROJECT** is \$\$\$ described in Exhibit **LETTER**, attached hereto and made a part of this Agreement.

The terms of this Agreement shall supersede any inconsistent terms of any prior Memorandum of Understanding (MOU) or agreement relating to **MITIGATION PROJECT**.

PARTIES now define herein below the terms and conditions under which this Agreement will be implemented.

### SECTION I

#### **PUBLIC ENTITY AGREES:**

**All work performed by **PUBLIC ENTITY**, or performed on **PUBLIC ENTITY**’s behalf, shall be performed in accordance with all state and federal laws, regulations, policies, procedures, and standards.**

To obtain any and all necessary property rights and/or rights of entry required prior to the implementation of **MITIGATION PROJECT** and for full compliance with any terms and conditions thereof. Said rights of entry shall also include rights for \_\_\_DOT personnel.

To obtain any and all environmental approvals and/or resource agency agreements, permits, and/or approvals required prior to implementation of **MITIGATION PROJECT** and to fully comply with any terms and conditions thereof.

To submit draft monitoring reports to \_\_\_DOT for **five (5)**<sup>2</sup> years (with monitoring anticipated to begin in the year **[INSERT YEAR]** and end **five (5)** years later, currently anticipated to be year **[INSERT YEAR]**) by **DATE** of each year. Said reports shall contain all of the information described in Exhibit **LETTER**,<sup>3</sup> attached hereto and made a part of this Agreement.

To address \_\_\_DOT's comments on the draft monitoring report and thereafter submit a final draft monitoring report to \_\_\_DOT by **DATE** for **five (5)** years (with monitoring anticipated to begin in the year **[INSERT YEAR]** and end **five (5)** years later, currently anticipated to be year **[INSERT YEAR]**) for \_\_\_DOT's review and approval, if appropriate.

If at any time during the **five (5)** year monitoring period (with monitoring anticipated to begin in the year **[INSERT YEAR]** and end **five (5)** years later currently anticipated to be year **[INSERT YEAR]**) it is determined by \_\_\_DOT that progress towards the success criteria, as described in Exhibit **LETTER** is not being achieved then **PUBLIC ENTITY** shall implement any remedial or adaptive management measures necessary to meet the success criteria.

To use one hundred percent (100%) of \_\_\_DOT's funds provided pursuant to this Agreement, in order to satisfy **PUBLIC ENTITY**'s obligation and responsibilities set forth in this Agreement.

**THE "ACTUAL COST" BILLING METHOD SHOULD BE USED UNLESS THERE ARE COMPELLING REASONS TO USE THE "LUMP SUM" BILLING METHOD (i.e. EXPIRATION OF FUNDS, PERMIT REQUIREMENTS, RESOURCE REQUIREMENTS, ETC.). USE OF THE "LUMP SUM" BILLING METHOD IS SUBJECT TO APPROVAL BY ACCOUNTING.**

To submit an initial invoice in the amount of **\$\$\$** to \_\_\_DOT within thirty (30) days of execution of this Agreement and prior to commencement of any work performed by **PUBLIC ENTITY**. Said initial billing represents two months estimated costs of **MITIGATION PROJECT** development.

Thereafter, to prepare and submit to \_\_\_DOT monthly billing statements for estimated expenditures one month in advance as development of **MITIGATION PROJECT** proceeds.

**Upon completion of MITIGATION PROJECT and all work incidental thereto, to furnish \_\_\_DOT with a detailed statement of MITIGATION PROJECT costs to be borne by \_\_\_DOT. PUBLIC ENTITY thereafter shall refund to \_\_\_DOT, promptly after completion of PUBLIC ENTITY's final accounting of MITIGATION PROJECT costs, any amount of \_\_\_DOT's deposits remaining after actual costs to be borne by \_\_\_DOT have been deducted, or to bill \_\_\_DOT for any additional amount required to complete \_\_\_DOT's financial obligations pursuant to this Agreement. OR ("LUMP SUM")**

---

<sup>2</sup> Change the number of years required for monitoring as necessary.

<sup>3</sup> This would be the Scope of Work.

To submit an invoice to \_\_\_DOT, within thirty (30) days of the execution date of this Agreement, in the amount of \$\$\$ which amount represents \_\_\_DOT's total financial obligation as set forth in this Agreement.

OR USE THE ARTICLE BELOW IF THE TOTAL PAYMENT WILL EXCEED \$300,000. AGREEMENTS FOR MORE THAN \$300,000 MUST BE SPLIT INTO TWO OR MORE PAYMENTS, NONE OF WHICH CAN EXCEED \$300,000.

To submit two invoices to \_\_\_DOT, the first within thirty (30) days of execution of this Agreement in the amount of \$300,000 and the second invoice one month later in the amount of \$###, which represents \_\_\_DOT's total financial obligation as set forth in this Agreement.

**FOR AN AGREEMENT WITH A FEDERAL AGENCY USE THE FOLLOWING:**

If work performed under this Agreement is done under contract, is paid for in whole or part with federal funds, and is of the type of work subject to federal prevailing wage requirements, **FEDERAL AGENCY** must conform to the provisions of the Davis-Bacon and Related Acts, 40 U.S.C. § 276(a). **FEDERAL AGENCY** agrees to include federal prevailing wage requirements in its contracts for public work. Work performed by **FEDERAL AGENCY**'s own forces is exempt from federal prevailing wage requirements.

**FEDERAL AGENCY** shall require its contractors to include federal prevailing wage requirements in all subcontracts funded in whole or in part with federal funds where the subcontractor will perform a type of work subject to Davis-Bacon and Related Acts requirements. Subcontracts shall include all prevailing wage requirements set forth in **FEDERAL AGENCY**'s contracts.

**FOR AN AGREEMENT WITH A STATE OR LOCAL PUBLIC ENTITY, WHEN THERE ARE ONLY STATE FUNDS USE ONLY THE FIRST TWO ARTICLES. IF THERE ARE FEDERAL FUNDS, USE ALL FOUR ARTICLES.**

If work performed under this Agreement is done under contract (not completed by **PUBLIC ENTITY**'s own employees) and is governed by the \_\_\_\_\_ Labor Code's definition of a "public work" (section 1720(a)(a)), **PUBLIC ENTITY** will conform to sections 1720 – 1815 of the \_\_\_\_\_ Labor Code and all applicable regulations and coverage determinations issued by the Director of Industrial Relations.

To include wage requirements in all contracts for "public work" and will require their contractors and consultants to include prevailing wage requirements in all agreement-funded subcontracts for "public work."

If work performed under this Agreement is done under contract, is paid for in whole or part with federal funds, and is of the type of work subject to federal prevailing wage requirements, **PUBLIC ENTITY** must conform to the provisions of the Davis-Bacon and Related Acts, 40 U.S.C. § 276(a) in addition to Labor Code provisions.

**PUBLIC ENTITY** agrees to include federal prevailing wage requirements in its contracts for public work. Work performed by **PUBLIC ENTITY**'s own forces is exempt from federal prevailing wage requirements.

To retain all books, documents, papers, accounting records, and other evidence pertaining to costs incurred, including support data for cost proposals, and to make such materials available at the respective offices of \_\_\_DOT at all reasonable times for three (3) years after the termination date of this Agreement. \_\_\_DOT, the Federal Highway Administration, or any duly authorized representative of the Federal Government shall have access to any books, records, and documents of **PUBLIC ENTITY** that are pertinent to this Agreement for audits, examinations, excerpts, and transactions, and copies thereof shall be furnished when requested.

## SECTION II

\_\_\_DOT AGREES:

### FOR "ACTUAL COST" BILLING METHOD

To deposit with **PUBLIC ENTITY** within thirty (30) days of receipt of signed invoice, the amount of \$\$\$, which figure represents two months estimated cost of MITIGATION PROJECT. \_\_\_DOT's total obligation to **PUBLIC ENTITY** for MITIGATION PROJECT costs shall not exceed the amount of \$\$.

To deposit with **PUBLIC ENTITY** not later than ten (10) days preceding the beginning of each month, the estimated expenditures for that month, and to continue making such advance deposits on a monthly basis until completion of MITIGATION PROJECT or until MONTH, DAY, YEAR, whichever occurs first.

### OR ("LUMP SUM")

To deposit with **PUBLIC ENTITY** within thirty (30) calendar days of receipt of **PUBLIC ENTITY**'s signed invoice, the amount of \$\$\$ which represents \_\_\_DOT's total financial obligation as set forth in this Agreement.

OR USE THE ARTICLE BELOW IF THE TOTAL PAYMENT WILL EXCEED \$300,000. AGREEMENTS FOR MORE THAN \$300,000 MUST BE SPLIT INTO TWO OR MORE PAYMENTS, NONE OF WHICH CAN EXCEED \$300,000.

To deposit with **PUBLIC ENTITY** within thirty (30) calendar days of receipt of **PUBLIC ENTITY**'s signed invoice, the amount of \$300,000 for the first invoice, and \$\$\$ for the second invoice, which represents \_\_\_DOT's total financial obligation for all work to be performed pursuant to this Agreement.

To review and provide comments to **PUBLIC ENTITY** by DATE on the draft monitoring reports prepared by **PUBLIC ENTITY**, and submitted to \_\_\_DOT for five (5) years (with monitoring

anticipated to begin in the year [INSERT YEAR] and end five (5) years later, currently anticipated to be year [INSERT YEAR]).

Within seven (7) calendar days of receipt, to review and approve, if appropriate, the draft final monitoring report submitted by PUBLIC ENTITY to \_\_\_\_DOT for five (5) years (with monitoring anticipated to begin in the year [INSERT YEAR] and end five (5) years later, currently anticipated to be year [INSERT YEAR]).

#### **IF APPLICABLE**

\_\_\_\_DOT will obtain written confirmation from PERMITTING AGENCY (OR AGENCIES) that PERMIT REQUIREMENTS have been met and provide a copy to PUBLIC ENTITY.

#### **SECTION III**

##### **IT IS MUTUALLY AGREED:**

All obligations of \_\_\_\_DOT under the terms of this Agreement are subject to the appropriation of resources by the Legislature, State Budget Act authority and the allocation of funds by the \_\_\_\_\_ Transportation Commission (STATE TRANSPORTATION COMMISSION ACRONYM).

All applicable laws, rules and policies relating to the use of federal or state funds shall apply notwithstanding other provisions of this Agreement.

The party that discovers hazardous material (HM) will immediately notify the other party(ies) to this Agreement. HM-1 is defined as hazardous material (including but not limited to hazardous waste) that may require removal and disposal pursuant to federal or state law, whether it is disturbed by MITIGATION PROJECT or not. HM-2 is defined as hazardous material (including but not limited to hazardous waste) that may require removal and disposal pursuant to federal or state law, only if disturbed by MITIGATION PROJECT. Management activities associated with either HM-1 or HM-2 include, without limitation, any necessary manifest requirements and designation of disposal facility.

\_\_\_\_DOT, independent of MITIGATION PROJECT, is responsible for any HM-1 found within existing State Highway System (SHS) right of way. \_\_\_\_DOT will undertake, or cause to be undertaken, HM-1 management activities with minimum impact to PROJECT schedule and will pay, or cause to be paid, all costs associated with HM-1 management activities.

\_\_\_\_DOT has no responsibility for management activities or costs associated with HM-1 found outside the existing SHS right of way. If HM-1 is found outside existing SHS right of way, under state and federal law responsibility for such HM-1 rests with the owner(s) of the parcel(s) on which the HM-1 is found. If HM-1 is found outside the existing SHS right of way, PARTIES will reassess the feasibility of the MITIGATION PROJECT and mutually agree on a course of action prior to the commencement of any additional work.

PUBLIC ENTITY is responsible for the management of any HM-2 found within MITIGATION PROJECT limits. PUBLIC ENTITY may use up to 5% of the funds already obligated by \_\_\_\_DOT



under this agreement for the costs associated with HM-2 management activities. However, \_\_\_DOT is not responsible to pay any additional money to PUBLIC ENTITY for these costs.

\_\_\_DOT's acquisition of or acceptance of title to any property on which any hazardous material is found will proceed in accordance with \_\_\_DOT's policy on such acquisition.

Neither PUBLIC ENTITY nor any officer or employee thereof is responsible for any injury, damage, or liability occurring by reason of anything done or omitted to be done by \_\_\_DOT and/or its agents under or in connection with any work, authority, or jurisdiction conferred upon \_\_\_DOT under this agreement. It is understood and agreed that \_\_\_DOT will fully defend, indemnify, and save harmless PUBLIC ENTITY and all of its officers and employees from all claims, suits, or actions of every name, kind, and description brought forth under, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of anything done or omitted to be done by \_\_\_DOT and/or its agents under this agreement.

Neither \_\_\_DOT nor any officer or employee thereof is responsible for any injury, damage, or liability occurring by reason of anything done or omitted to be done by PUBLIC ENTITY and/or its agents under or in connection with any work, authority, or jurisdiction conferred upon PUBLIC ENTITY under this agreement. It is understood and agreed that PUBLIC ENTITY will fully defend, indemnify, and save harmless \_\_\_DOT and all of its officers and employees from all claims, suits, or actions of every name, kind, and description brought forth under, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of anything done or omitted to be done by PUBLIC ENTITY and/or its agents under this agreement.

In the event of any breach of this Agreement by either party, the other party may enforce this Agreement by any means available at law or in equity. In the event of litigation, mediation or arbitration to resolve any breach of, or dispute related to this Agreement, each party agrees to pay for their own attorneys' cost and expenses, without regard to who prevails.

A failure by either party to enforce any provision of this Agreement shall not be construed as a continuing waiver, or as a waiver of the right to compel enforcement of that provision.

This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one agreement that shall be binding on all of the parties, notwithstanding that all of the parties are not a signatory to the original or the same counterpart. If any provision of this Agreement is held invalid, the other provisions shall not be affected thereby.

No alteration or variation of the terms of this Agreement shall be valid unless made by a formal amendment executed by the parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.

Nothing within the provisions of this Agreement is intended to create duties or obligations to or rights in third parties not party to this Agreement or to affect the legal liability of either party to the Agreement by imposing any standard of care different from the standard of care imposed by law.

This Agreement shall terminate upon \_\_\_DOT's written acceptance that **PUBLIC ENTITY** has completed **MITIGATION PROJECT**, however all indemnification, document retention, audit, claims, environmental, legal challenge, hazardous material, operation, maintenance, and ownership articles will remain in effect until terminated or modified in writing by mutual agreement.

**OR**

This AGREEMENT shall terminate upon written confirmation from **PERMITTING AGENCY (OR AGENCIES)** that PERMIT REQUIREMENTS have been met or on **MONTH DAY, YEAR** whichever is earlier in time. However, all indemnification, document retention, audit, claims, environmental, legal challenge, hazardous material, operation, maintenance, and ownership articles will remain in effect until terminated or modified in writing by mutual agreement.

PARTIES declare that:

Each PARTY is an authorized legal entity under \_\_\_\_\_ state law.

Each PARTY has the authority to enter into this Agreement.

The people signing this Agreement have the authority to do so on behalf of their public agencies.

**STATE OF \_\_\_\_\_**  
**Department of Transportation**

**PUBLIC ENTITY**

By: \_\_\_\_\_  
Deputy District/Region Director

By: \_\_\_\_\_

Approved as to form and procedure:

Approved as to form:

\_\_\_\_\_  
Attorney  
Department of Transportation

\_\_\_\_\_  
General Counsel

Certified as to budgeting of funds:

\_\_\_\_\_  
District/Region Budget Manager

Certified as to financial terms and  
policies:

---

Accounting Administrator

### Simple Agreement (University Assumed Management)

1. We agree that we will not interfere with the natural progression of the wetlands as currently defined at THE SITE in perpetuity and as defined by current laws and regulations.
2. We agree that the DOT will have access for occasional review of the site.
3. The DOT will continue to debit against uncommitted banking credits.
4. We agree to discuss the potential for the DOT to retain an easement on CERTAIN areas for future wetland development. We assume that this area will be clearly defined in any transfer document.
5. Annual normal maintenance of the site will be the responsibility of the RECIPIENT (UNIVERSITY).
6. The DOT will commit to use "banking funds" for remediation in the event of a catastrophic failure at the SITE.
7. Hunting crossing access will be coordinated by THE RECIPIENT (UNIVERSITY).
8. Any building by the RECIPIENT (UNIVERSITY) at the site will not threaten the wetland areas.
9. The site, once transferred to THE RECIPIENT, may not be sold, transferred or otherwise used in any manner which will threaten the agreed upon items. The DOT could retain right of first refusal for any future transfer of ownership.

## Simple Memorandum Effecting Site Transfer from DOT to DNR

Date:

To:

From:

Subject:

DOT/TRANSFERER requests formal approval for the conveyance of the above captioned parcels to RECIPIENT. BACKGROUND ON THE TRANSFER SITE.

All sections within the TRANSFERER'S OFFICE have reviewed this proposed sale and they concur with the conveyance. The conveyance of the parcel would be in both the public's and the Department's interest. The transfer will make TRANSFERER and RECIPIENT whole and will meet the needs of the Department for fulfilling the obligation of the Wetland Restoration Program.

THIS DEED, made by the State of \_\_\_\_\_ Department of Transportation, GRANTOR, quit claims to GRANTEE(s), GRANTEE, for the sum of AMOUNT and other valuable consideration. LEGAL DESCRIPTION - DESCRIPTION OF THE TRANSFER SITES

The Grantee agrees to the following deed restrictions:

**Inspection.** The right of the STATE Department of Transportation (DOT), its contractors, agents and invitees and OTHER RELEVANT AGENCIES to enter the SITE, in a reasonable manner and at reasonable times, for the purpose of inspecting the SITE to determine if the (successor) is complying with the lease or deed restrictions. Further reserve the right of representatives of the above named entities to observe, study, record, make scientific studies and educational observations, and to allow for a harvest of RELEVANT SEEDS/FAUNA (not including state and federal listed threatened and endangered species) for replanting on the SITE and other STATE DOT wetland restoration sites or projects.

**Covenants.** STATE DOT imposes the following restrictive covenants that shall run with and bind the SITE in perpetuity.

*Use:* There shall be no commercial, industrial, residential or other incompatible activities adversely affecting wetlands undertaken or allowed within the SITE. Incompatible activities include collection of any flora or fauna for any purpose, which would adversely impact the SITE individual biological species that reside there. Other incompatible activities include hunting in areas posted as closed to hunting, baiting, and illegal hunting that is in noncompliance with STATE rules and regulations.

*Buildings and structures:* There shall be no buildings, dwellings, barns, roads advertising signs, billboards or other structures built or placed in the SITE except structures essential to

maintaining the site or structures such as interpretive signs or other additions that enhance the public's use of the site can be installed with written approval from STATE DOT.

*Topography:* There shall be no dredging, filling, excavating, mining, drilling or removal of any topsoil, sand, gravel, rock, minerals or other materials within the restored wetland area or in adjacent on-site upland areas that affect the site. There shall be no plowing or any other activity that would alter the topography of the SITE.

*Dumping or disposal:* There shall be no dumping of trash, ashes, garbage or other unsightly or offensive material, including any hazardous or toxic waste. Nor shall there be dumping or depositing of other materials where such action would alter the topography or hydrology of the mitigation site.

*Water:* The hydrology of the SITE will not be altered in any way that would effectively drain the site or by any means including pumping, draining, diking, impounding or diverting surface or ground water out of the SITE except as approved by STATE DOT and OTHER RELEVANT AGENCY for the purpose or protecting or maintaining the site's wetland status.

*Agricultural Uses:* No removal of developing native vegetation, plowing, tilling, brushing, cultivating, crop planting or other agricultural activities (with the exception of planting native plants to enhance the site and in accordance with the site management plan) may take place within the SITE. Also, no planting of agricultural crops such as corn, alfalfa, soybeans, etc. in restoration vegetation zones.

*Recreational motorized vehicles and watercraft prohibited:* There shall be no operation of any motorized vehicles, watercraft, or equipment within the SITE. Including but not limited to all-terrain vehicles, off-road motorcycles, or boats with electric or gas motors snowmobiles and golf carts.

*Vegetation:* There shall be no removal, cutting, mowing or alteration of any vegetation or change in the natural habitat in any manner, except that STATE DOT or any successor owner of the property may take such steps necessary to remove non-native species, manage wildlife, control noxious weeds, eliminate a dangerous condition or public nuisance, or otherwise maintain the property in a native state.

*Enforcement of covenants:* Any actions taken by the Grantee which violate these covenants shall entitle THE STATE DOT OR OTHER RELEVANT AGENCY the right to enter upon the property with respect to which said violation exists and remove at the expense of the owner, lessee or occupant thereof any structure thing or condition that may be or exist thereof contrary to the intent and meaning of the covenants. Any lease cannot be reassigned and the grantee shall not allow new easements within the SITE without written approval from THE STATE DOT.

These covenants and restrictions shall run with and burden the      SITE      as a deed restricted conservation easement with perpetuity, and shall bind the grantee; and upon breach or failure of all or any part thereof all rights, title and interest in and to the above described lands shall immediately vest in the grantor,      STATE DOT      the same as if this instrument had not been given.

**LEGAL DESCRIPTION**      LEGAL DESCRIPTION OF TRANSFER SITE     .

All public and private utilities located upon or under the above-described lands, whether by permit or easement, shall have the continued right of occupancy and the continued right of ingress and egress, for personnel and equipment for the purpose of maintaining or improving their transmission and/or distribution facilities located wholly or partially within the above-described lands as of the date of this instrument.

No billboards of any type shall be located, erected or maintained on the above described lands.

These covenants, burdens, and restrictions shall run with the land and forever bind the grantee, its successors and assigns.

## Mitigation Cooperative Agreement (MOA) Without Monitoring

This AGREEMENT, ENTERED INTO EFFECTIVE on \_\_\_\_\_, YEAR, is between the STATE OF \_\_\_\_\_, acting by and through its Department of Transportation, referred to herein as “\_\_DOT,” and the PUBLIC ENTITY, referred to herein as “[ENTER ABBREVIATED NAME HERE.](#)”

### RECITALS

\_\_DOT and PUBLIC ENTITY, herein referred to as “PARTIES,” pursuant to Streets and Highways Code sections 114 and/or 130, are authorized to enter into this Agreement.

### [INSERT ADDITIONAL RECITALS HERE](#)

\_\_DOT has determined that the estimated cost of satisfying MITIGATION PROJECT is \$\$\$ described in Exhibit LETTER, attached hereto and made a part of this Agreement.

The terms of this Agreement shall supersede any inconsistent terms of any prior Memorandum of Understanding (MOU) or agreement relating to MITIGATION PROJECT.

PARTIES now define herein below the terms and conditions under which this Agreement will be implemented.

### SECTION I

#### **PUBLIC ENTITY AGREES:**

**All work performed by PUBLIC ENTITY, or performed on PUBLIC ENTITY’s behalf, shall be performed in accordance with all state and federal laws, regulations, policies, procedures, and standards.**

To obtain any and all necessary property rights and/or rights of entry required prior to the implementation of MITIGATION PROJECT and for full compliance with any terms and conditions thereof. Said rights of entry shall also include rights for \_\_DOT personnel.

To obtain any and all environmental approvals and/or resource agency agreements, approvals, and/or permits required prior to implementation of MITIGATION PROJECT and to fully comply with any terms and conditions thereof.

To use one hundred percent (100%) of \_\_DOT’s funds provided pursuant to this Agreement, in order to satisfy PUBLIC ENTITY’s obligation and responsibilities set forth in this Agreement.

[THE "ACTUAL COST" BILLING METHOD SHOULD BE USED UNLESS THERE ARE COMPELLING REASONS TO USE THE "LUMP SUM" BILLING METHOD \(i.e. EXPIRATION OF FUNDS, PERMIT REQUIREMENTS, RESOURCE REQUIREMENTS, ETC.\). USE OF THE "LUMP SUM" BILLING METHOD IS SUBJECT TO APPROVAL BY ACCOUNTING.](#)



To submit an initial invoice in the amount of \$\$\$ to \_\_DOT within thirty (30) days of execution of this Agreement and prior to commencement of any work performed by PUBLIC ENTITY. Said initial billing represents two months estimated costs of MITIGATION PROJECT development.

Thereafter, to prepare and submit to \_\_DOT monthly billing statements for estimated expenditures one month in advance as development of MITIGATION PROJECT proceeds. Upon completion of MITIGATION PROJECT and all work incidental thereto, to furnish \_\_DOT with a detailed statement of MITIGATION PROJECT costs to be borne by \_\_DOT. PUBLIC ENTITY thereafter shall refund to \_\_DOT, promptly after completion of PUBLIC ENTITY's final accounting of MITIGATION PROJECT costs, any amount of \_\_DOT's deposits remaining after actual costs to be borne by \_\_DOT have been deducted, or to bill \_\_DOT for any additional amount required to complete \_\_DOT's financial obligations pursuant to this Agreement.

OR ("LUMP SUM")

To submit an invoice to \_\_DOT, within thirty (30) days of the execution date of this Agreement, in the amount of \$\$\$ which amount represents \_\_DOT's total financial obligation as set forth in this Agreement.

OR USE THE ARTICLE BELOW IF THE TOTAL PAYMENT WILL EXCEED \$300,000. AGREEMENTS FOR MORE THAN \$300,000 MUST BE SPLIT INTO TWO OR MORE PAYMENTS, NONE OF WHICH CAN EXCEED \$300,000.

To submit two invoices to \_\_DOT, the first within thirty (30) days of execution of this Agreement in the amount of \$300,000 and the second invoice one month later in the amount of \$####, which represents \_\_DOT's total financial obligation as set forth in this Agreement.

FOR AN AGREEMENT WITH A FEDERAL AGENCY USE THE FOLLOWING:

If work performed under this Agreement is done under contract, is paid for in whole or part with federal funds, and is of the type of work subject to federal prevailing wage requirements, FEDERAL AGENCY must conform to the provisions of the Davis-Bacon and Related Acts, 40 U.S.C. § 276(a). FEDERAL AGENCY agrees to include federal prevailing wage requirements in its contracts for public work. Work performed by FEDERAL AGENCY's own forces is exempt from federal prevailing wage requirements.

FEDERAL AGENCY shall require its contractors to include federal prevailing wage requirements in all subcontracts funded in whole or in part with federal funds where the subcontractor will perform a type of work subject to Davis-Bacon and Related Acts requirements. Subcontracts shall include all prevailing wage requirements set forth in FEDERAL AGENCY 's contracts.

FOR AN AGREEMENT WITH A STATE OR LOCAL PUBLIC ENTITY, WHEN THERE ARE ONLY STATE FUNDS USE ONLY THE FIRST TWO ARTICLES. IF THERE ARE FEDERAL FUNDS, USE ALL FOUR ARTICLES.

If work performed under this Agreement is done under contract (not completed by PUBLIC ENTITY's own employees) and is governed by the \_\_\_\_\_ Labor Code's definition of a

"public work" (section 1720(a)(a)), PUBLIC ENTITY will conform to sections 1720 – 1815 of the \_\_\_\_\_ Labor Code and all applicable regulations and coverage determinations issued by the Director of Industrial Relations.

To will include wage requirements in all contracts for "public work" and will require their contractors and consultants to include prevailing wage requirements in all agreement-funded subcontracts for "public work."

If work performed under this Agreement is done under contract, is paid for in whole or part with federal funds, and is of the type of work subject to federal prevailing wage requirements, PUBLIC ENTITY must conform to the provisions of the Davis-Bacon and Related Acts, 40 U.S.C. § 276(a) in addition to Labor Code provisions.

PUBLIC ENTITY agrees to include federal prevailing wage requirements in its contracts for public work. Work performed by PUBLIC ENTITY's own forces is exempt from federal prevailing wage requirements.

To retain all books, documents, papers, accounting records, and other evidence pertaining to costs incurred, including support data for cost proposals, and to make such materials available at the respective offices of \_\_DOT at all reasonable times for three (3) years after the termination date of this Agreement. \_\_DOT, the Federal Highway Administration, or any duly authorized representative of the Federal Government shall have access to any books, records, and documents of PUBLIC ENTITY that are pertinent to this Agreement for audits, examinations, excerpts, and transactions, and copies thereof shall be furnished when requested.

## **SECTION II**

### **\_\_DOT AGREES:**

#### **FOR "ACTUAL COST" BILLING METHOD**

To deposit with PUBLIC ENTITY within thirty (30) days of receipt of signed invoice, the amount of \$\$\$, which figure represents two months estimated cost of MITIGATION PROJECT. \_\_DOT's total obligation to PUBLIC ENTITY for MITIGATION PROJECT costs shall not exceed the amount of \$\$\$.

To deposit with PUBLIC ENTITY not later than ten (10) days preceding the beginning of each month, the estimated expenditures for that month, and to continue making such advance deposits on a monthly basis until completion of MITIGATION PROJECT or until MONTH, DAY, YEAR, whichever occurs first.

#### **OR ("LUMP SUM")**

To deposit with PUBLIC ENTITY within thirty (30) calendar days of receipt of PUBLIC ENTITY's signed invoice, the amount of \$\$\$ which represents \_\_DOT'S total financial obligation as set forth in this Agreement.

**OR USE THE ARTICLE BELOW IF THE TOTAL PAYMENT WILL EXCEED \$300,000. AGREEMENTS FOR MORE THAN \$300,000 MUST BE SPLIT INTO TWO OR MORE PAYMENTS, NONE OF WHICH CAN EXCEED \$300,000.**

To deposit with PUBLIC ENTITY within thirty (30) calendar days of receipt of PUBLIC ENTITY's signed invoice, the amount of \$300,000 for the first invoice, and \$\$\$ for the second invoice, which represents \_\_DOT'S total financial obligation for all work to be performed pursuant to this Agreement.

#### IF APPLICABLE

\_\_DOT will obtain written confirmation from PERMITTING AGENCY (OR AGENCIES) that PERMIT REQUIREMENTS have been met and provide a copy to PUBLIC ENTITY.

### SECTION III

#### IT IS MUTUALLY AGREED:

All obligations of \_\_DOT under the terms of this Agreement are subject to the appropriation of resources by the Legislature, State Budget Act authority and the allocation of funds by the \_\_\_\_\_ Transportation Commission (\_\_TC).

All applicable laws, rules and policies relating to the use of federal or state funds shall apply notwithstanding other provisions of this Agreement.

The party that discovers hazardous material (HM) will immediately notify the other party(ies) to this Agreement. HM-1 is defined as hazardous material (including but not limited to hazardous waste) that may require removal and disposal pursuant to federal or state law, whether it is disturbed by MITIGATION PROJECT or not. HM-2 is defined as hazardous material (including but not limited to hazardous waste) that may require removal and disposal pursuant to federal or state law, only if disturbed by MITIGATION PROJECT. Management activities associated with either HM-1 or HM-2 include, without limitation, any necessary manifest requirements and designation of disposal facility.

\_\_DOT, independent of MITIGATION PROJECT, is responsible for any HM-1 found within existing State Highway System (SHS) right of way. \_\_DOT will undertake, or cause to be undertaken, HM-1 management activities with minimum impact to PROJECT schedule and will pay, or cause to be paid, all costs associated with HM-1 management activities.

\_\_DOT has no responsibility for management activities or costs associated with HM-1 found outside the existing SHS right of way. If HM-1 is found outside existing SHS right of way, under state and federal law responsibility for such HM-1 rests with the owner(s) of the parcel(s) on which the HM-1 is found. If HM-1 is found outside the existing SHS right of way, PARTIES will reassess the feasibility of the MITIGATION PROJECT and mutually agree on a course of action prior to the commencement of any additional work.

PUBLIC ENTITY is responsible for the management of any HM-2 found within MITIGATION PROJECT limits. PUBLIC ENTITY may use up to 5% of the funds already obligated by \_\_DOT under this agreement for the costs associated with HM-2 management activities. However, \_\_DOT is not responsible to pay any additional money to PUBLIC ENTITY for these costs.

\_\_DOT's acquisition of or acceptance of title to any property on which any hazardous material is found will proceed in accordance with \_\_DOT's policy on such acquisition.

Neither PUBLIC ENTITY nor any officer or employee thereof is responsible for any injury, damage, or liability occurring by reason of anything done or omitted to be done by \_\_DOT and/or its agents under or in connection with any work, authority, or jurisdiction conferred upon \_\_DOT under this agreement. It is understood and agreed that \_\_DOT will fully defend, indemnify, and save harmless PUBLIC ENTITY and all of its officers and employees from all claims, suits, or actions of every name, kind, and description brought forth under, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of anything done or omitted to be done by \_\_DOT and/or its agents under this agreement.

Neither \_\_DOT nor any officer or employee thereof is responsible for any injury, damage or liability occurring by reason of anything done or omitted to be done by PUBLIC ENTITY and/or its agents under or in connection with any work, authority or jurisdiction conferred upon PUBLIC ENTITY under this Agreement. It is understood and agreed that PUBLIC ENTITY will fully defend, indemnify and save harmless \_\_DOT and all its officers and employees from all claims, suits or actions of every name, kind and description brought forth under, including, but not limited to, tortious, contractual, inverse condemnation or other theories or assertions of liability occurring by reason of anything done or omitted to be done by PUBLIC ENTITY and/or its agents under this Agreement.

Neither PUBLIC ENTITY nor any officer or employee thereof is responsible for any injury, damage or liability occurring by reason of anything done or omitted to be done by \_\_DOT and/or its agents under or in connection with any work, authority or jurisdiction conferred upon \_\_DOT under this Agreement. It is understood and agreed that \_\_DOT and/or its agents shall fully defend, indemnify and save harmless PUBLIC ENTITY and all its officers and employees from all claims, suits or actions of every name, kind and description brought forth under, including, but not limited to, tortious, contractual, inverse condemnation or other theories or assertions of liability occurring by reason of anything done or omitted to be done by \_\_DOT and/or its agents under this Agreement.

In the event of any breach of this Agreement by either party, the other party may enforce this Agreement by any means available at law or in equity. In the event of litigation, mediation or arbitration to resolve any breach of, or dispute related to this Agreement, each party agrees to pay for their own attorneys' cost and expenses, without regard to who prevails.

A failure by either party to enforce any provision of this Agreement shall not be construed as a continuing waiver, or as a waiver of the right to compel enforcement of that provision.

This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one agreement that shall be binding on all of the parties, notwithstanding that all of the parties are not a signatory to the original or the same counterpart. If any provision of this Agreement is held invalid, the other provisions shall not be affected thereby.

No alteration or variation of the terms of this Agreement shall be valid unless made by a formal amendment executed by the parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.

Nothing within the provisions of this Agreement is intended to create duties or obligations to or rights in third parties not party to this Agreement or to affect the legal liability of either party to the Agreement by imposing any standard of care different from the standard of care imposed by law.

This Agreement shall terminate upon \_\_DOT's written acceptance that PUBLIC ENTITY has completed MITIGATION PROJECT, however all indemnification, document retention, audit, claims, environmental, legal challenge, hazardous material, operation, maintenance, and ownership articles will remain in effect until terminated or modified in writing by mutual agreement.

**OR**

This AGREEMENT shall terminate upon written confirmation from PERMITTING AGENCY (OR AGENCIES) that PERMIT REQUIREMENTS have been met or on MONTH DAY, YEAR whichever is earlier in time. However, all indemnification, document retention, audit, claims, environmental, legal challenge, hazardous material, operation, maintenance, and ownership articles will remain in effect until terminated or modified in writing by mutual agreement.

PARTIES declare that:

Each PARTY is an authorized legal entity under \_\_\_\_\_ state law.

Each PARTY has the authority to enter into this Agreement.

The people signing this Agreement have the authority to do so on behalf of their public agencies.

**STATE OF \_\_\_\_\_**  
**Department of Transportation**

**PUBLIC ENTITY**

By: \_\_\_\_\_  
Deputy District/Region Director

By: \_\_\_\_\_

Approved as to form and procedure:

Approved as to form:

\_\_\_\_\_  
Attorney  
Department of Transportation

\_\_\_\_\_  
General Counsel

Certified as to budgeting of funds:

---

District/Region Budget Manager

Certified as to financial terms and  
policies:

---

Accounting Administrator

## MOA - Terms and Conditions for County/Grantee Land Management

### **SITE TITLE LAND MANAGEMENT MEMORANDUM OF AGREEMENT**

This SITE TITLE Land Management Memorandum of Agreement ("Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

Between:

COUNTY OF \_\_\_\_\_  
Address  
("County")

And:

DOT or MPO  
Address  
Attn: Office of General Counsel  
(" DOT or MPO ")

The purpose of this Agreement is to establish the terms and conditions for the County's long-term land management of the SITE TITLE property ( SITE TITLE ) for mitigation purposes consistent with the DOT or MPO ). The County and DOT or MPO are to be referred to jointly as "Parties."

### **RECITALS**

Whereas, in April 2003 the DOT or MPO Board of Directors ( DOT or MPO Board) adopted the \_\_\_\_\_ Transportation Plan entitled \_\_\_\_\_, The Transportation Plan for \_\_\_\_\_; and

Whereas, the transportation plan includes a list of transportation network improvements and other transportation programs that are intended to improve the mobility of people and goods throughout the region; and

Whereas, proactive mitigation of transportation projects would provide an opportunity to implement regional conservation and transportation plans by providing opportunities for early large-scale conservation, permit streamlining, and certain cost savings; and

Whereas, the purposes of the purchase and grant of the Conservation Easement Deed for SITE TITLE ("Acquisition") are to (1) provide mitigation for transportation projects funded by \_\_\_\_\_; (2) protect critical habitat for \_\_\_\_\_ and \_\_\_\_\_ habitats (3) further implement

the Department of \_\_\_\_\_ Natural Community Conservation Planning efforts in \_\_\_\_\_; and (4) enhance a general wildlife corridor between larger habitat areas; and

Whereas, SITE TITLE is located (See Exhibit A, which is attached hereto and incorporated herein by this reference); and

Whereas, the Acquisition will help to enhance existing efforts to conserve \_\_\_\_\_ habitats that support \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

Whereas, on \_\_\_\_\_, a private nonprofit corporation, \_\_\_\_\_, entered into a contract to purchase SITE TITLE from \_\_\_\_\_; and

Whereas, on \_\_\_\_\_, the County entered into an Agreement for Reimbursement of Non-Refundable Deposit with the NGO, which contemplated the ultimate purchase of SITE TITLE by the County, subject to various conditions, including approval by the DOT or MPO Executive Director, and allocation of funds from state, federal and local sources, including DOT or MPO funds, to cover the NGO's purchase costs; and

Whereas, on August 25, 2008, DOT or MPO obtained concurrence and commitment from the DFG and the U. S. Fish and Wildlife Service (USFWS) (collectively "Wildlife Agencies"), to utilize SITE TITLE as mitigation for future regional and local transportation projects; and

Whereas, on September 17, 2008; the GRANTOR Board of Supervisors approved the acquisition of SITE TITLE from the NGO; and

Whereas on September 26, 2008, the DOT or MPO Board of Director's approved the DOT or MPO property acquisition criteria and process in conformance with the Memorandum of Agreement signed on \_\_\_\_\_ by DOT or MPO, \_\_\_\_\_ DOT, and the Wildlife Agencies; and

Whereas, on October 17, 2008, the Executive Director of DOT or MPO, in reliance upon the Wildlife Agencies' August 25, 2008, concurrence and commitment letter, and contingent upon the Wildlife Conservation Board's approval of DOT or MPO's use of SITE TITLE for mitigation purposes, authorized DOT or MPO's \$\_\_\_\_\_ contribution towards the Acquisition cost of SITE TITLE under the DOT or MPO; and

Whereas, on \_\_\_\_\_, the NGO entered into a contract to purchase SITE TITLE from \_\_\_\_\_; and

Whereas, in exchange for DOT or MPO's contribution of \$\_\_\_\_\_ to this Acquisition, on or about \_\_\_\_\_, the NGO will grant DOT or MPO a Conservation Easement Deed across the entirety of SITE TITLE; and

Whereas, on or about \_\_\_\_\_, the NGO will convey fee title to SITE TITLE to the GRANTOR, encumbered with DOT or MPO's Conservation Easement Deed; and



Whereas, DOT or MPO intends to enter into this Memorandum of Agreement with the County for management of SITE TITLE consistent with the terms outlined herein, and as further outlined in the Conservation Easement Deed recorded in DOT or MPO's favor on approximately \_\_\_\_\_.

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated herein by this reference, the Parties hereby agree as follows:

### **AGREEMENT**

**1. Management of Land as Mitigation:** The County agrees to manage SITE TITLE, consistent with the terms and conditions of this Memorandum of Agreement (MOA), the Conservation Easement Deed and the related Resource Management Plan, so that its Conservation Values (as defined in the Conservation Easement Deed), including its mitigation value to DOT or MPO are maintained and protected. The Conservation Easement Deed recorded on this property requires that the County, or its contractor or agent, manage the land to standards that retain the mitigation value of the SITE TITLE habitat in perpetuity. Consistent with the terms of this MOA, the County, its contractor or agent, will manage the land to assure that the site retains its Conservation Values, including its value as mitigation for regional and local street transportation projects.

**2. One-Time Costs.** At the close of escrow on the SITE TITLE Acquisition, on or about \_\_\_\_\_, DOT or MPO will deposit \$\_\_\_\_\_ in an interest-bearing account to be held, maintained and operated by the County to cover one-time stewardship costs.

Initial one-time stewardship costs (estimated at \$1000/acre as of the date of this Agreement) includes activities such as installing fencing and signage, removing debris and invasive vegetation as well as the preparation of a Resource Management Plan (estimated at \$500/acre as of the date of this Agreement) as required by the DOT or MPO.

The Resource Management Plan (RMP) for SITE TITLE will be prepared by the County, or its contractor or agent, in collaboration with DOT or MPO, within one year of the date this MOA is fully-executed, and will be subject to approval by DOT or MPO. At a minimum, the RMP shall set forth the following:

1. Area Specific Management Directives (ASMDs) designed to identify a list of actions for the management (stewardship and adaptive) of SITE TITLE, including a baseline documentation report; and
2. An ongoing-monitoring program, and
3. A Trails Plan, and
4. A Vegetation/Fire Management Plan.

The ASMDs will also address foreseen and unforeseen changes that may affect the habitat value of the property.

The Resource Management Plan will be developed in collaboration with DOT or MPO staff, will detail matters including, but not limited to, enforcement requirements, contractor performance bonding and insurance requirements, and recordkeeping requirements for audit purposes, consistent with the Code Section \_\_\_\_\_, and will be subject to approval by DOT or MPO.

Funds not utilized for one-time stewardship start-up costs will revert back to DOT or MPO at the end of three years from the signing of this MOA.

**3. Ongoing Costs Endowment.** The Parties have agreed that the on-going costs to manage these lands in perpetuity (annual stewardship and adaptive and monitoring costs of approximately \$\_\_\_\_\_) will be funded through an endowment in the amount of \$\_\_\_\_\_ to be established at the close of escrow by DOT or MPO in an interest-bearing account to be held, maintained and operated by DOT or MPO at a rate of return intended to cover the annual stewardship and adaptive and monitoring costs.

On July 1 of each calendar year, the County shall provide to DOT or MPO a written request for an annual payment for the management of the property of \$\_\_\_\_\_ or such other amount as agreed to by the parties. Included in this request, will be an itemized accounting of how funds from the previous year were spent and how the next year's funds are expected to be spent to implement the ASMDs described in Section 2 above.

**4. Unforeseen Changes in Costs.** The Parties recognize that natural events may require additional management due to foreseen and unforeseen events. The County will manage the property for foreseen events pursuant to the ASMDs with the annual funding provided by DOT or MPO. The Parties will reserve the right to negotiate additional management costs necessary to maintain the habitat and mitigation value of the property due to unforeseen events above and beyond the control of the County.

**5. Recordkeeping.** The County will keep records on the SITE TITLE management and monitoring activities and costs for a period of at least five years for purposes of annual audits as required by the Extension Ordinance.

**6. Term.** This Agreement shall become effective as of the date first written above and will continue in full force and effect for an initial term of fifteen (15) years. The Parties, or their successors, agree to review the terms and conditions of this Agreement at least every two years during the initial fifteen (15) year term. Unless notice of intent to terminate is given with in twelve (12) months of the end of the term, an additional twelve (12) month term shall be automatically added to this Agreement. Such automatic renewal shall continue indefinitely until notice of intent to terminate is given. Such notice of termination shall provide at least twelve (12) months' notice before the termination is effective. If this Agreement is extended

beyond the initial fifteen (15) year term, the Parties, or their successors, agree to review the terms and conditions of this Agreement at least every five years, beginning in the year 2024.

**7. Modification.** This Agreement may not be modified unless the Parties agree to its written modification.

**8. Severability.** The invalidity in whole or in part of any provision of this Agreement will not void or affect the validity of any other provisions of this Agreement.

**9. Provisions Cumulative.** The foregoing provisions are cumulative and in addition to and not in limitation of any other rights or remedies available to the County or DOT or MPO.

**10. Notices to Parties.** Any statements, communications or notices to be provided pursuant to this Agreement must be sent to the attention of the persons indicated above. Each party agrees to promptly send notice of any changes of this information to the other party, at the address first above written.

IN WITNESS WHEREOF, the parties below are authorized to act on behalf of their organizations, and have executed this Agreement as of the date set forth below.

Agency Representatives and General Counsel for DOT or MPO

## MOU between DOT and Mitigation Land Manager Regarding Public Access

MOU between DOT and DNR/DFG/DFW Regarding Public Access to Mitigation Lands  
of \_\_\_\_ Acres, in \_\_\_\_ County  
THIS MEMORANDUM OF UNDERSTANDING (the AGREEMENT) is made and entered into this  
DATE by and between DOT and LAND OWNER/MANAGER.

WITNESSETH:

**WHEREAS**, the DOT has an interest in protecting and managing wildlife and wishes to be an active participant in improving public hunting and fishing access; and

**WHEREAS**, the DOT owns certain lands at \_\_\_\_\_ in \_\_\_\_\_ County referred to herein as its \_\_\_\_\_ Mitigation Site that is suitable for wildlife management and hunting/fishing; and

**WHEREAS**, the DOT and LAND OWNER/MANAGER recognize the mutual benefits of protecting this property; and

**WHEREAS**, the DOT is willing to cooperate in managing the \_\_\_\_\_ Mitigation Site for wildlife and regulated hunting/fishing in conjunction with LAND OWNER/MANAGER; and

**WHEREAS**, the LAND OWNER/MANAGER is a public agency whose duties include the management of wildlife as a public service; and

**WHEREAS**, the LAND OWNER/MANAGER is interested in providing and increasing access for hunting/fishing for the benefit of the public; and

**NOW THEREFORE**, in consideration of the mutual covenants and conditions contained herein, and for other good and valuable consideration, the receipt, mutuality and sufficiency of which is hereby acknowledged by the parties to this AGREEMENT, the DOT and LAND OWNER/MANAGER do hereby COVENANT AND AGREE as follows:

### 1. OBLIGATIONS OF the DOT

- a. To supply the Department with appropriate maps and information concerning the above described premises to assist in carrying out this Agreement.
- b. To cooperate with the LAND OWNER/MANAGER in following mutually developed plans to properly and adequately regulate public hunting opportunities.
- c. To allow public hunting, fishing and wildlife recreation access to the above described premises under the auspices of the \_\_\_\_\_ Wildlife Management Area.
- d. The DOT, as lessee, as defined in CODE, agrees that the Department, the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records or other evidence which are directly pertinent to the resulting Agreement for the purpose of financial audit or program review. Furthermore, any books, documents, papers, records or other evidence provided to the Department, the Finance and Administration Cabinet, the Auditor of Public Accounts, or the Legislative Research

Commission which are directly pertinent to the resulting Agreement shall be subject to public disclosure pursuant to CODE regardless of the proprietary nature of the information, unless specific information is identified and exempted and agreed to by the Secretary of the Finance and Administration Cabinet/Department as meeting the provisions of CODE prior to the execution of the resulting Agreement. The Secretary of the Finance and Administration Cabinet shall not restrict the public release of any information, which would otherwise be subject to public release if a state government agency were providing the service.

## **2. OBLIGATIONS OF LAND OWNER/MANAGER**

- a. To confer with the DOT on acceptable hunting opportunities and promulgate or apply appropriate regulations for hunting and fishing.
- b. To produce online map(s) and related information for public dissemination.
- c. To assist with law enforcement to help control trespass, ATVs and off road vehicles, artifact collection, and other prohibited activities.
- d. To provide a media contact and assistance to the DOT regarding mutually desired news releases to the public regarding hunting/fishing opportunities at the Mitigation Site.
- e. To clearly mark the boundaries of the Site with LAND OWNER/MANAGER "Wildlife Management Area" signs on the outside perimeter of the Site and "No Trespassing Private Property" signs on the inside perimeter of the Site.
- f. To construct and maintain a fenced parking lot and gate at a mutually agreed upon location near the main entrance to the Site, and provide keys to the DOT designees for access at their discretion.
- g. To erect signage at the parking lot that identifies the DOT as owner of the property and acknowledges their cooperation in allowing wildlife management and public access on the Site.
- h. To confer with the DOT and obtain prior approval before initiation of any land management activities other than routine maintenance of access, signage and boundaries.

## **3. JOINT OBLIGATIONS AND MUTUAL AGREEMENTS**

- a. That the area of the DOT land included under the terms of this Memorandum of Understanding shall be the property owned by the DOT and within the boundaries shown on the map attached hereto as Exhibit A and thereby made part of this instrument.
- b. That the LAND OWNER/MANAGER, its employees or agents, at their own respective risks shall have the right to ingress to and egress from the above described premises, or any part thereof, with vehicles, tools, and/or equipment reasonably necessary to carry out the purpose of this Agreement.
- c. That the property shall continue to be under the complete ownership of the DOT.
- d. That all of the hunting/fishing activities are a compatible use of the said premises.
- e. That neither the DOT nor the LAND OWNER/MANAGER assumes any responsibility for bodily injury and/or property damage suffered by anyone using the said premises under this Agreement, nor does the DOT or the LAND OWNER/MANAGER waive its exemption from liability pursuant to CODE , or other applicable statutes commonly referred to as recreational use statutes.
- f. No part of this agreement shall constitute, either directly or indirectly, a waiver of sovereign immunity granted under STATE Constitution, CODE .

#### **4. MUTUALITY OF OBLIGATIONS**

- a. The obligations imposed upon the parties to this Agreement are for the benefit of the parties and the timely fulfillment of each and every obligation in accordance with this Agreement is necessary. The failure of any party to fulfill any of its obligations under this Agreement shall constitute a breach of this Agreement, and shall entitle the other party to commence appropriate legal or equitable action to enforce its rights under this Agreement, including bringing an action for recovery of any funds expended hereunder, unless the fulfillment of such obligation is waived or modified by the affected party. All waivers shall be in writing, signed by the affected party, and a waiver of one breach shall not constitute a waiver of any other breach.
- b. In the event of a material breach by either party to this Agreement, the other party may terminate this Agreement as provided in paragraph 8.1 herein, without further obligation to the other party. The rights of the parties to this Agreement to pursue remedies for breach of any of the provisions hereof shall survive the termination, expiration or cancellation of this Agreement.

#### **5. TERM OF AGREEMENT**

This agreement shall commence upon its approval and execution by the Secretary of the DEPARTMENT and shall extend to DATE. Thereafter, this agreement shall be automatically renewed for a successive two year (biennial) term from DATE to DATE and continuing until DATE unless either party gives written notice to the other party that the contract will not be renewed beyond the then current term of the contract.

#### **6. ASSURANCES**

- a. All parties to this agreement shall comply with the Executive Branch Code of Ethics (CODE) and all state statutes relating to nondiscrimination.
- b. The parties represent and warrant, by the signatures of their duly appointed representatives that they are legally entitled to enter into this Agreement and will not be violating, directly or indirectly, any conflict of interest statute of the STATE by performance of the obligations imposed on them by this Agreement. The parties further represent and warrant that no persons having any conflict of interest shall be employed to assist in performing the parties' obligations under this Agreement.

#### **7. CHOICE OF LAW AND FORUM**

All questions as to the execution, validity, interpretation, construction, and performance of this Agreement or any of its terms shall be governed by the laws of the STATE.

#### **8. CANCELLATION**

Either party has the right to terminate or cancel the Agreement without cause upon thirty days prior written notice to the other party, or for cause at any time without prior written notice.

#### **9. MISCELLANEOUS PROVISIONS**

- a. The headings set forth in this Agreement are for convenience of reference only, and the words contained therein shall in no way be intended to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.
- b. The terms and conditions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their successors and assigns. This provision shall not be

construed to permit assignment by any party of any of its rights or duties under this Agreement, which assignment shall be prohibited except with the prior written consent of all parties hereto. Such consent shall not be unreasonably withheld.

- c. This Agreement sets forth the entire understanding of the parties with respect to the subject matter hereof, supersedes all existing agreements among them concerning the subject matter hereof, and may be modified only by a written instrument duly executed by each of the parties hereto.
- d. Time is of the essence in the performance of each of the terms and conditions of this Agreement.
- e. All notices, requests, demands, waivers, and other communications given as provided in this Agreement shall be in writing, sent by First Class Mail, deemed effective upon mailing, and addressed as follows:

If to: the DOT

Name

Title

Address

If to the LAND OWNER/MANAGER:

- f. Either party to this Agreement may change the address at which it is to receive notices, requests, demands, waivers, and other communications, on the condition that party first provides written notice of that change of address to the other party.
- g. Nothing in this Agreement shall be interpreted as guaranteeing the rights of any person or governmental agency other than the parties to this Agreement.
- h. If a provision of this Agreement or the application thereof to any person or circumstance shall be declared to be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected thereby and shall be enforced to the fullest extent permitted by law.
- i. Except to the extent otherwise expressly specified in this Agreement, all remedies specified herein are in addition to, and not in lieu of, other remedies available to the parties both at law and in equity.

## Contract Outlining Terms of Agreement for Long-Term Stewardship and Management

**CONTRACT**  
**DEPARTMENT OF TRANSPORTATION**  
**CONTRACT NO. \_\_\_\_\_**

**Project Name:** \_\_\_\_\_

This Contract is between the State of \_\_\_\_\_, acting by and through its Department of Transportation (DOT), hereafter called ("Sponsor") and \_\_\_\_\_, hereafter called ("Steward"). The Contract states the terms of the agreement between the Sponsor and the Steward regarding the long-term stewardship of \_\_\_\_\_. This Agreement incorporates the Stewardship Agreement and the Management Plan. Sponsor and Steward together are referred to as "Parties" and individually referred to as "party." Sponsor's designated "Contract Administrator" and Steward's key personnel for this Contract are identified in **Exhibit X**, Contact Information and Key Persons.

### **1. Contract Effective Date and Term**

This Contract is effective on the date it has been signed by the Parties and all required State of \_\_\_\_\_ approvals have been obtained. The project for which Sponsor requires Steward's Services is described in Exhibit A2, Statement of Work. Steward shall perform its obligations according to this Contract through final completion of the project, unless this Contract is terminated or suspended. Unless otherwise amended or terminated, this Contract shall expire on DATE or when the Mitigation Bank is closed as that event is described in the Stewardship Agreement attached as Exhibit A1, whichever occurs first. Unless otherwise terminated for default, the Stewardship Agreement and Management Plan shall survive expiration of this Contract.

### **2. Statement of Work**

Steward shall perform all services and deliver all deliverables as described in Exhibit A, Statement of Work (the "Services"). Steward shall not provide any Services until this Contract has been signed by all Parties, all necessary State of \_\_\_\_\_ approvals have been obtained, and Sponsor has issued a notice to proceed to Steward.

### **3. Compensation**

The maximum amount payable to Steward under this Contract, which includes the amount of any allowable and reimbursable expenses, is \_\_\_\_\_, as detailed further in Exhibit \_\_\_\_\_, Compensation.

Sponsor reserves the right, in its sole discretion, to amend this Contract to increase this amount. The payment methodology and basis for payment to Steward is described in Exhibit \_\_\_\_\_, Compensation.



#### **4. Contract Documents**

##### **4.1 Exhibits Attached and Incorporated**

This Contract includes the following exhibits, each of which is attached and incorporated into this Contract as though fully set forth herein:

- a. Exhibit \_\_\_\_ – Statement of Work  
Exhibit \_\_\_\_ – Stewardship Agreement  
Exhibit \_\_\_\_ – Management Agreement
- b. Exhibit \_\_\_\_ – Compensation
- c. Exhibit \_\_\_\_ – Conflict of Interest Disclosure
- d. Exhibit \_\_\_\_ – Contact Information and Key Persons

##### **4.2 Exhibits Incorporated by Reference from Website(s) - RESERVED**

#### **5. Order of Precedence**

Unless a different order is required by law, this Contract shall be interpreted in the following order of precedence:

- 1) This Contract less all attachments, exhibits and other material incorporated into this Contract by reference;
- 2) Exhibit \_\_\_\_ – Statement of Work
- 3) Exhibit \_\_\_\_ - Compensation
- 4) Exhibit \_\_\_\_ – Conflict of Interest Guidelines and Disclosure Process
- 5) Exhibit \_\_\_\_ – Contact Information and Key Persons

#### **6. Independent Contractor, Conflict of Interest, Responsibility for Taxes and Withholding, Steward Oversight.**

- a. Steward, by its signature on the Contract, certifies that it is an independent contractor as defined in State Statute \_\_\_\_\_ and as described in IRS Publication 1779, which is available at the following link: <http://www.irs.gov/pub/irs-pdf/p1779.pdf>. Steward shall perform all required Services as an independent contractor. Although Sponsor reserves the right (i) to determine the delivery schedule (as mutually acceptable to Sponsor and Steward) for the Services to be performed and (ii) to evaluate the quality of the completed performance, Sponsor cannot and will not control the means or manner of Steward's performance. Steward is responsible for determining the appropriate means and manner of performing the Services. Steward is not an "officer", "employee", or "agent" of Sponsor, as those terms are used in state statute \_\_\_\_\_.
- b. Steward, by its signature on the Contract, certifies that: (i) Steward and, to the best of its information, knowledge and belief, its Associates are in compliance with the DOT Conflict of Interest Guidelines (as may be revised from time to time) available at: \_\_\_\_\_, and (ii) if submittal of a Conflict of Interest Disclosure Form is required, the information Steward provided through the Conflict of Interest Disclosure Form is true, accurate and complete as of the Contract effective date or if not, Steward has submitted to Sponsor a Conflict of Interest Disclosure Form in the form required by Sponsor that is updated, true, accurate and complete as of the Contract effective date. In addition, Steward shall submit to Sponsor a true, accurate and complete Conflict of Interest

Disclosure Form, in the form required by Sponsor, no later than 10 business days following the date Steward becomes aware of any staffing, organizational or other material changes that result in nonconformance with disclosure requirements of the DOT Conflict of Interest Guidelines.

- c. Steward shall be responsible for all federal or state taxes applicable to compensation or payments paid to Steward under the Contract and, unless Steward is subject to backup withholding, Sponsor will not withhold from such compensation or payments any amount(s) to cover Steward's federal or state tax obligations. Steward is not eligible for any social security, unemployment insurance or workers' compensation benefits from compensation or payments paid to Steward under the Contract, except as a self-employed individual.
- d. Steward shall not be responsible for or have control over the means, manner, methods or techniques required of or used by other contractors under contract with Sponsor who are performing services or construction work on projects within the scope of the Contract, unless otherwise expressly agreed to in writing by the Parties. The Parties agree, however, that these Section 6.d. provisions do not in any way revise or adjust Steward's professional responsibility to report to Sponsor any information pertaining to a project, or to performance by contractors on a project, that would adversely affect Sponsor or a particular project, to the extent any such information may come to the attention of Steward during the performance of Services within the scope of the Contract.

**7. Subcontracts and Assignment; Successors and Assigns**

- a. Steward shall not enter into any subcontracts for any of the Services required by the Contract, or in any manner assign or transfer any of its rights or interest under the Contract or delegate any of its duties or performance under the Contract, without Sponsor's prior written consent, except for subcontracts necessary to comply with any DBE requirements. In addition to any other provisions Sponsor may require, Steward shall include, in any permitted subcontract under the Contract, contractual provisions that shall require any subcontractor to comply with Sections 10, 13, 14, 24, and 29 of these Contract provisions, in the performance of the subcontractor's Services on the project that is the subject of the Contract, as if the subcontractor were the Steward. Sponsor's consent to any subcontract shall not relieve Steward of any of its duties or obligations under the Contract, including with respect to any Services, whether performed or to be performed by Steward or a subcontractor.
- b. The provisions of the Contract shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective successors and permitted assigns, if any.
- c. Any purported assignment, delegation or disposition in violation of subsection a. above is void.

- 8. No Third Party Beneficiaries.** Sponsor and Steward are the only Parties to the Contract and are the only Parties entitled to enforce its terms. Nothing in the Contract gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified

by name in the Contract and expressly described as intended beneficiaries of the terms of the Contract.

- 9. Funds Available and Authorized; Payments.** Steward shall not be compensated for Services performed under the Contract by any other agency or department of the State of \_\_\_\_\_. Sponsor reasonably believes that, as of the effective date of the Contract, it has sufficient funds available and authorized for expenditure to finance the costs of the Contract within Sponsor's biennial appropriation or limitation. Steward understands and agrees that Sponsor's payment of amounts under the Contract is contingent on Sponsor receiving from the STATE LEGISLATIVE ASSEMBLY appropriations, limitations, or other expenditure authority sufficient to allow Sponsor, in the exercise of its reasonable administrative discretion, to continue to make payments under the Contract. In the event Sponsor staff responsible for oversight of the Contract become aware that sufficient funds are not available and authorized for expenditure to finance the costs of the Contract within Sponsor's biennial appropriation or limitation, Sponsor shall give prompt written notice to Steward.

**10. Representations and Warranties.**

**a. Steward's Representations and Warranties.**

Steward represents and warrants to Sponsor that (i) Steward has the power and authority to enter into and perform the Contract, (ii) the Contract, when executed and delivered is a valid and binding obligation of Steward, enforceable in accordance with its terms, (iii) the Services under the Contract will be performed in accordance with the professional standard of care set forth in Section 11 below; (iv) Steward is duly licensed to perform the Services, and if there is no licensing requirement for the profession or Services, is duly qualified and professionally competent to perform the Services; and (v) Steward is an experienced firm having the skill, legal capacity, professional ability and resources necessary to perform all the Services required under the Contract.

- b. Warranties Cumulative.** The warranties set forth in this Section are in addition to, and not in lieu of, any other warranties provided.

**11. Professional Standard of Care; Responsibility of Steward.**

- a. Professional Standard of Care.** Steward shall perform all Services under the Contract in accordance with the degree of skill, care and diligence required to perform the Services in a professional manner and in accordance with contemporary standards prevalent in Steward's industry, trade or profession, under similar conditions and circumstances.

**b. Responsibility of Steward.**

- i. Steward shall be responsible for the professional quality (and technical accuracy, when applicable) of all Services furnished by Steward under the Contract. Steward shall, without additional compensation, correct or revise errors or deficiencies (per requirements or acceptance criteria described in the Contract) in Steward's deliverables.
- ii. Sponsor's review, approval or acceptance of, or payment for, the Services and deliverables required under the Contract shall not be construed to operate as a

- waiver of any rights under the Contract or of any cause of action arising out of the performance of the Contract, and Steward shall be and shall remain liable to Sponsor in accordance with applicable law for all damages to Sponsor caused by Steward's negligent performance of any of the Services furnished under the Contract or negligent failure to perform any of the Services under the Contract.
- iii. The rights and remedies of Sponsor provided for under the Contract are in addition to any other rights and remedies provided by law.
  - iv. If Steward is comprised of more than one legal entity (for example, a joint-venture or partnership), each such entity shall be jointly and severally be liable under the Contract.

## **12. Ownership of Work Product. – RESERVED**

## **13. Confidentiality and Non-Disclosure**

- a. **Confidential Information.** Steward acknowledges that it and its employees and agents may, in the course of performing their responsibilities under the Contract, be exposed to or acquire information that is confidential to Sponsor. Any and all information that Sponsor provides to Steward or its employees or agents in the performance of the Contract that Sponsor designates as confidential (either on the document itself or through related correspondence), as well as all reports and other documents and materials (including software) that result from Steward's use of such information and any other Work Product that Sponsor designates as confidential, is deemed to be confidential information of Sponsor ("Confidential Information"). Confidential Information does not include information that (i) is or becomes (other than by disclosure by Steward) publicly known; (ii) is furnished by Sponsor to others without restrictions similar to those imposed by the Contract; (iii) is rightfully in Steward's possession without the obligation of nondisclosure prior to the time of its disclosure under the Contract; (iv) is obtained from a source other than Sponsor without the obligation of confidentiality, (v) is disclosed with the written consent of Sponsor, or (vi) is independently developed by employees or agents of Steward who can be shown to have had no access to the Confidential Information.
- b. **Non-Disclosure.** Steward agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Steward uses in maintaining the confidentiality of its own confidential information, and shall not, without Sponsor's prior written consent, copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential information to third parties, or use Confidential Information for any purposes whatsoever, other than the provision of Services to Sponsor hereunder. Steward shall advise each of its employees and agents of their obligations to keep Confidential Information confidential. Steward shall use reasonable efforts to assist Sponsor in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Steward shall advise Sponsor immediately if Steward learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms this Section 13(b), and Steward shall, at its expense, cooperate with Sponsor in seeking injunctive or other

equitable relief in the name of Sponsor against any such person. Steward agrees that, except as directed by Sponsor, Steward will not at any time during or after the term of the Contract disclose, directly or indirectly, any Confidential Information to any person, except in accordance with the Contract, and that upon termination of the Contract or at Sponsor's request, Steward shall turn over to Sponsor all documents, papers, and other matter in Steward's possession that embody Confidential Information. In the event Steward is required to disclose Confidential Information pursuant to a subpoena or other legal process, Steward shall notify Sponsor of such subpoena or other legal process, provide Sponsor with copies of any subpoena, other legal process and any other written materials supporting the subpoena or other legal process, and otherwise cooperate with Sponsor in the event Sponsor decides to oppose the disclosure of the Confidential Information. In the event Sponsor decides not to oppose such subpoena or other legal process or Sponsor's decision to oppose the subpoena or legal process has not been successful, Steward shall be excused from the confidentiality provisions of this Section, to the extent necessary to meet the requirements of the subpoena or other legal process controlling the required disclosure.

#### **14. INDEMNITY.**

- a. **CLAIMS FOR OTHER THAN PROFESSIONAL LIABILITY.** STEWARD SHALL INDEMNIFY, DEFEND, SAVE, AND HOLD HARMLESS THE STATE OF \_\_\_\_\_, THE STATE TRANSPORTATION COMMISSION AND ITS MEMBERS, THE DEPARTMENT OF TRANSPORTATION, THEIR OFFICERS, AGENTS AND DOT or MPO LOYEEES FROM ANY AND ALL CLAIMS, SUITS, ACTIONS, LOSSES, LIABILITIES, DAMAGES, COSTS AND EXPENSES, INCLUDING ATTORNEYS FEES, OF WHATSOEVER NATURE, RESULTING FROM OR ARISING OUT OF THE ACTS OR OMISSIONS OF STEWARD OR ITS SUBCONTRACTORS, OR THEIR RESPECTIVE AGENTS OR DOT or MPO LOYEEES, UNDER THE CONTRACT.
- b. **CLAIMS FOR PROFESSIONAL LIABILITY.** STEWARD SHALL INDEMNIFY, DEFEND, SAVE, AND HOLD HARMLESS THE STATE OF \_\_\_\_\_, THE STATE TRANSPORTATION COMMISSION AND ITS MEMBERS, THE DEPARTMENT OF TRANSPORTATION, THEIR OFFICERS, AGENTS AND DOT or MPO LOYEEES FROM ANY AND ALL CLAIMS, SUITS, ACTIONS, LOSSES, LIABILITIES, DAMAGES, COSTS AND EXPENSES, INCLUDING ATTORNEYS FEES, ARISING OUT OF THE PROFESSIONALLY NEGLIGENT ACTS, ERRORS OR OMISSIONS OF STEWARD OR ITS SUBCONTRACTORS, OR THEIR RESPECTIVE AGENTS OR DOT or MPO LOYEEES, IN THE PERFORMANCE OF STEWARD'S PROFESSIONAL SERVICES UNDER THE CONTRACT.
- c. **INDEMNITY FOR INFRINGEMENT CLAIMS.** WITHOUT LIMITING THE GENERALITY OF SECTION 14(a) OR 14(b), STEWARD EXPRESSLY AGREES TO INDEMNIFY, DEFEND, SAVE AND HOLD HARMLESS THE STATE OF \_\_\_\_\_, THE STATE TRANSPORTATION COMMISSION AND ITS MEMBERS, THE DEPARTMENT OF TRANSPORTATION AND THEIR AGENCIES, SUBDIVISIONS, OFFICERS, DIRECTORS, AGENTS, AND DOT or MPO LOYEEES FROM ANY AND ALL CLAIMS, SUITS, ACTIONS, LOSSES, LIABILITIES, DAMAGES, COSTS AND EXPENSES, INCLUDING ATTORNEYS FEES, ARISING OUT OF OR RELATING TO ANY CLAIMS THAT STEWARD'S SERVICES, THE WORK PRODUCT OR ANY OTHER TANGIBLE OR INTANGIBLE ITEMS DELIVERED TO SPONSOR BY STEWARD THAT MAY BE THE SUBJECT

OF PROTECTION UNDER ANY STATE OR FEDERAL INTELLECTUAL PROPERTY LAW OR DOCTRINE, OR SPONSOR'S USE THEREOF, INFRINGES ANY PATENT, COPYRIGHT, TRADE SECRET, TRADEMARK, TRADE DRESS, MASK WORK, UTILITY DESIGN, OR OTHER PROPRIETARY RIGHT OF ANY THIRD PARTY; PROVIDED, THAT STATE SHALL PROVIDE STEWARD WITH PROMPT WRITTEN NOTICE OF ANY INFRINGEMENT CLAIM. PROVIDED, HOWEVER, STEWARD SHALL NOT BE OBLIGATED TO INDEMNIFY, DEFEND, SAVE AND HOLD HARMLESS THE STATE AND SPONSOR UNDER THIS SECTION 14(0), BASED SOLELY ON THE FOLLOWING: STEWARD'S COMPLIANCE WITH SPONSOR SPECIFICATIONS OR REQUIREMENTS, INCLUDING, BUT NOT LIMITED TO, THE REQUIRED USE OF TANGIBLE OR INTANGIBLE ITEMS PROVIDED BY SPONSOR.

- d. **DEFENSE QUALIFICATION.** NOTWITHSTANDING STEWARD'S FOREGOING DEFENSE OBLIGATIONS, NEITHER STEWARD NOR ANY ATTORNEY ENGAGED BY STEWARD SHALL DEFEND ANY CLAIM IN THE NAME OF THE STATE OF \_\_\_\_\_ OR ANY AGENCY OF THE STATE OF \_\_\_\_\_, NOR PURPORT TO ACT AS LEGAL REPRESENTATIVE OF THE STATE OF \_\_\_\_\_ OR ANY OF ITS AGENCIES, WITHOUT THE PRIOR WRITTEN CONSENT OF THE STATE ATTORNEY GENERAL. THE STATE OF \_\_\_\_\_ MAY, AT ANY TIME AT ITS ELECTION ASSUME ITS OWN DEFENSE AND SETTLEMENT IN THE EVENT THAT IT DETERMINES THAT STEWARD IS PROHIBITED FROM DEFENDING THE STATE OF \_\_\_\_\_, OR THAT STEWARD IS NOT ADEQUATELY DEFENDING THE STATE OF \_\_\_\_\_ INTERESTS, OR THAT AN IMPORTANT GOVERNMENTAL PRINCIPLE IS AT ISSUE OR THAT IT IS IN THE BEST INTERESTS OF THE STATE OF \_\_\_\_\_ TO DO SO. THE STATE OF \_\_\_\_\_ RESERVES ALL RIGHTS TO PURSUE ANY CLAIMS IT MAY HAVE AGAINST STEWARD IF THE STATE OF \_\_\_\_\_ ELECTS TO ASSUME ITS OWN DEFENSE.
- e. **SPONSOR'S ACTS OR OMISSIONS.** THIS SECTION 14 DOES NOT INCLUDE INDEMNIFICATION BY STEWARD OF THE STATE OF \_\_\_\_\_, THE STATE TRANSPORTATION COMMISSION AND ITS MEMBERS, THE DEPARTMENT OF TRANSPORTATION AND ITS OFFICERS AGENTS AND DOT or MPO LOYEEES, FOR THE ACTS OR OMISSIONS OF THE STATE OF \_\_\_\_\_, THE STATE TRANSPORTATION COMMISSION AND ITS MEMBERS, THE DEPARTMENT OF TRANSPORTATION AND ITS OFFICERS AGENTS AND DOT or MPO LOYEEES, WHETHER WITHIN THE SCOPE OF THE CONTRACT OR OTHERWISE.

## 15. Reserved

## 16. Termination

- a. **Termination by Mutual Consent.** The Contract may be terminated at any time, in whole or in part, by mutual written consent of the Parties.
- b. **Sponsor's Right to Terminate for Convenience.** Sponsor may, at its sole discretion, terminate the Contract, in whole or in part, upon thirty (30) calendar days prior written notice to Steward.
- c. **Sponsor's Right to Terminate for Cause.** Sponsor may terminate the Contract, in whole or in part, immediately upon written notice to Steward or at such later date as Sponsor may establish in such notice, upon the occurrence of any of the following events:

- i. Sponsor fails to receive appropriations, limitations or other expenditure authority sufficient to allow Sponsor, in the exercise of its reasonable administrative discretion, to continue to make payments for Steward's Services;
  - ii. Federal, state or local laws, regulations or guidelines are modified or interpreted in such a way that either the Services under the Contract are prohibited or Sponsor is prohibited from paying for such Services from the planned funding source;
  - iii. Steward no longer holds any license or certificate that is required to perform the Services, or is dissolved or liquidated or otherwise incapable of performing the Services when required; or
  - iv. Steward commits any material breach or default of any covenant, warranty, obligation or agreement under the Contract, fails to perform the Services under the Contract within the time specified or any extension thereof, or so fails to perform the Services as to endanger Steward's performance under the Contract in accordance with its terms, and such breach, default or failure is not cured within 14 calendar days after Sponsor's notice to Steward, or such longer period as Sponsor may specify in such notice.
- d. Steward's Right to Terminate for Cause.**
- 1. Steward may terminate the Contract by giving written notice to Sponsor if Sponsor fails to pay Steward pursuant to the terms of the Contract and if Sponsor fails to cure within 14 calendar days after receipt of Steward's written notice, or such longer period of cure as Steward may specify in such notice.
  - 2. Steward may terminate the Contract, for reasons other than nonpayment, if Sponsor commits any material breach or default of any covenant, warranty, obligation or agreement under the Contract, fails to perform under the Contract within the times specified, or so fails to perform as to endanger Steward's performance under the Contract, and such breach, default or failure is not cured within 14 calendar days after Steward's notice to Sponsor, or such longer period as Steward may specify in such notice.
- e. Steward's Tender Upon Termination/Retained Remedies of Sponsor.** Upon receiving a notice of termination of the Contract, Steward shall immediately cease all activities under the Contract, unless Sponsor expressly directs otherwise in such notice of termination. Upon termination of the Contract, Steward shall deliver to Sponsor all documents, information, works-in-progress and other property that are or would be deliverables had the Contract been completed. Upon Sponsor's request, Steward shall surrender to anyone Sponsor designates, all documents, information, research, works-in-progress, Work Product and other property, that are deliverables or would be deliverables had the Contract been completed, that are in Steward's possession or control and may be needed by Sponsor to complete the Services.

**17. Reserved**

**18. Reserved**

**19. Compliance with Applicable Law.** Steward shall comply with all federal, state and local statutes, regulations, administrative rules, executive orders, ordinances and other laws applicable to the Services under the Contract, in effect at the time the Contract is executed and as may be amended, revised, enacted or adopted thereafter. Changes in these legal requirements after the execution of the Contract may or may not be the basis for modifications to Steward's schedule, scope and fee, depending on a reasonable assessment of the nature of the change, the extent to which the change was anticipated by Steward or the Parties, and other circumstances then existing. Without limiting the generality of the foregoing, Steward expressly agrees to comply with: (i) Title VI of the Civil Rights Act of 1964; (ii) Section V of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990 and State Statute\_\_\_\_; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations. Sponsor's performance under the Contract is conditioned upon Steward's compliance with, and Steward shall comply with, the obligations intended for contractors under State Statute\_\_\_\_, which are incorporated by reference herein. If conflicts are discovered among federal, state and local statutes, regulations, administrative rules, executive orders, ordinances and other laws applicable to the Services under the Contract, Steward shall in writing request Sponsor to resolve the conflict. Steward shall specify if the conflict(s) create a problem for completing Services required under the Contract.

**20. Permits and licenses to conduct business.** Unless otherwise specified in Exhibit\_\_\_\_, Statement of Work, Steward shall obtain, hold, maintain and fully pay for during the term of the Contract any permits and licenses required by law for Steward to conduct its business and perform the Services under the Contract.

**21. Foreign Contractor.** If Steward is not domiciled in or registered to do business in the State of \_\_\_\_\_, Steward shall promptly provide to the STATE Department of Revenue and the Secretary of State Corporation Division all information required by those agencies relative to the Contract.

**22. Force Majeure.** Neither Sponsor nor Steward shall be held responsible for delay or default in the performance of its obligations due to a cause beyond its reasonable control, including, but not limited to, fire, riot, acts of God, terrorist acts or other acts of political sabotage, or war where such cause was beyond the reasonable control of Sponsor or Steward, respectively. Steward shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under the Contract.

**23. Survival.** All rights and obligations shall cease upon termination or expiration of the Contract, except for the rights and obligations set forth in Sections 5, 10, 11, 13, 14, 16(e), 16(t), 23, 24, 28 and 29 and all other rights and obligations which by their context are intended to survive.



- 24. Time is of the Essence.** Steward agrees that time is of the essence in Steward's performance of its obligations under the Contract. Unless terminated for default, the Stewardship Agreement and Management Plan shall survive termination or expiration of this contract.
- 25. Notice.** Except as otherwise expressly provided in the Contract, any communications between the Parties hereto or notices to be given hereunder shall be given in writing by email, by personal delivery, facsimile, or mailing the same, postage prepaid, to Steward or Sponsor at the email address, the delivery address or facsimile number set forth in the Contract, or to such other addresses or numbers as either Party may hereafter indicate in writing to the other. Any notice or day-to-day communication sent by email shall be deemed received when it is sent. The recipient of any notice sent by email shall reply by email to confirm receipt of such notice. Any communication or notice made by personal delivery shall be deemed to be received when actually delivered. Any communication or notice properly addressed and mailed shall be deemed received 5 calendar days after the date of mailing. Any communication or notice delivered by facsimile shall be deemed received on the date of the notice of successful transmission generated by the transmitting machine. To be effective, such facsimile transmission must be confirmed by telephone notice to Sponsor's Contract Administrator or Steward's representative, as applicable.
- 26. Severability.** The Parties agree that if any term or provision of the Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if the Contract did not contain the particular term or provision held to be invalid.
- 27. Counterparts.** The Contract may be executed in several counterparts, all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of the Contract so executed shall constitute an original.
- 28. Dispute Resolution Process.** In the event of a dispute between the Parties regarding any aspect of the Contract or performance under the Contract, the Parties agree to attempt in good faith to resolve any such dispute through direct communications and negotiations. In the event good faith efforts do not resolve the dispute, the Parties agree to make a good faith effort to determine if mediation might resolve any such dispute. If the Parties determine that mediating the dispute would be productive, the Parties agree to use reasonable efforts to establish an agreement through which such mediation proceeding could take place. In the event such a mediation proceeding takes place, the Parties acknowledge and agree that any mediator or mediators retained to assist the Parties in resolving any dispute will not have the power to issue a binding decision on the Parties, but will merely act to facilitate the process of the Parties' attempt to resolve the dispute through mutual agreement.

**29. Governing Law; Venue; Consent to Jurisdiction.** The Contract shall be governed by, and construed and enforced in accordance with, the laws of the State of \_\_\_\_\_, without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "Claim") between Sponsor (or any other agency or department of the State of \_\_\_\_\_) and Steward that arises from or relates to the Contract shall be brought and conducted solely and exclusively within A COURT for the State of \_\_\_\_\_; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of STATE. In no event shall this Section be construed as a waiver by the State of \_\_\_\_\_ of any form or defense or immunity, whether based on sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the United States Constitution, or otherwise. STEWARD, BY EXECUTION OF THE CONTRACT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.

**30. Amendments.** Sponsor may amend the Contract to the extent permitted by applicable statutes and administrative rules and as mutually agreed upon by Sponsor and Steward. Sponsor may agree to appropriate increases in the maximum compensation payable under the Contract, should any Sponsor approved increase occur in the scope, character, schedule or complexity of Services as outlined in the Statement of Work. Steward shall not commence any Services authorized under an amendment, and the amendment is not effective, unless it is in writing signed by the Parties and all approvals required by applicable law have been obtained.

**31. Merger Clause; Waiver.** The Contract, including everything incorporated by reference, constitutes the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding the Contract. No waiver, consent, modification or change of terms of the Contract shall bind either Party, unless such waiver, consent, modification or change of terms is in writing and signed by the Parties, and all necessary State of \_\_\_\_\_ governmental approvals have been obtained. Such a waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. Either Party's failure to enforce any provision of the Contract shall not constitute a waiver by that Party of that or any other provision.

STEWARD, BY EXECUTION OF THIS CONTRACT, HEREBY ACKNOWLEDGES THAT STEWARD HAS READ THIS CONTRACT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

**Steward Tax Identification Information.** Steward shall provide Steward's Social Security number or Steward's federal tax ID number and the additional information set forth below. Social Security Numbers provided pursuant to this requirement will be used for the administration of state, federal and local tax laws. Sponsor may report the information set forth above to the Internal Revenue Service (IRS) under the name and social security number or taxpayer identification number provided.

**Legal, tax filing Company Name:** \_\_\_\_\_  
**Address:** \_\_\_\_\_  
**Federal Tax ID# (FEIN):** \_\_\_\_\_

**CERTIFICATION:**

**A. Any individual signing on behalf of Steward hereby certifies:**

1) Steward understands and agrees that various Exhibits to the Contract are not physically attached, but are incorporated by reference in Section 4 and have the same force and effect as if fully set forth herein. The full text of all exhibits not physically attached to the Contract is available WHERE ELSE.

2) (Check one of the following two certifications as applicable)

(a) ☐ Steward understands and has provided to all Associates (as defined in the COI Guidelines) the Conflict of Interest (COI) Guidelines and COI Disclosure Form. Steward and (to the best of the undersigned's information, knowledge and belief) Steward's Associates are in compliance with the COI Guidelines and have no conflicts of interest, no DOT employees hired within the last one-year period, and no other disclosures required per the COI Guidelines. The response to each question on the COI Disclosure Form was "no".

(b) ☐ All disclosures required, per the DOT COI Guidelines and COI Disclosure Form. for Steward and (to the best of the undersigned's information, knowledge and belief) Steward's Associates (as defined in the COI Guidelines) have been indicated on the Conflict of Interest Disclosure Form(s) submitted regarding this Contract, and if determined necessary by Sponsor, a mitigation plan has been approved by Sponsor; (The DOT COI Guidelines and COI Disclosure Form are available at the following link:\_\_\_\_)

(3) ☐ Steward is an independent contractor as described in IRS Publication 1779; and (b) in the event that Steward is a general partnership or joint venture, Steward signature(s) on this Contract constitutes certifications to the above statements pertaining to the partnership or joint venture, as well as certifications of the above statements as to any general partner or joint venturer signing this Contract.

**B. Any individual signing on behalf of Steward hereby certifies under penalty of perjury:**

(a) the number shown on this form is Steward's correct taxpayer identification; (b) Steward is not subject to backup withholding because (i) Steward is exempt from backup withholding, (ii) Steward has not been notified by the IRS that Steward is subject to backup withholding as a result of a failure to report all interest or dividends, or (iii) the IRS has notified Steward that Steward is no longer subject to backup withholding; and (c) s/he is authorized to act on behalf of Steward, s/he has authority and knowledge regarding Steward's payment of taxes, and to the best of her/his knowledge, Steward is not in violation of any \_\_\_\_\_ Tax Laws. For purposes of this certification, " \_\_\_\_\_ Tax Laws" means a state tax imposed by State Statute \_\_\_\_\_. No Payment shall be made for Services that are performed before all necessary governmental

approvals have been obtained, the Contract is fully executed, and Notice-To-Proceed has been issued by Sponsor.

Date

Signatures

Legal Review

Approved by DOT Procurement Office Manager or designee

Date

Approved by Region Manager or designee Date

NOT REQUIRED

Approved by Director / Deputy Director or designee Date

## Stewardship Agreement Template

### EXHIBIT A1 STEWARDSHIP AGREEMENT NAME OF PROJECT

#### 1. PROJECT DESCRIPTION and OVERVIEW of SERVICES

This Stewardship Agreement incorporates the Management Plan as an Addendum.

A. THE SITE.

DESCRIPTION OF SITE AND WHAT WILL HAPPEN (1 PARAGRAPH).

#### B. Endowment to be Established

The Steward shall establish the Endowment, pursuant to the terms of this Stewardship Agreement and the Steward's policies, on the date that the Steward receives and accepts from the Sponsor the endowment payment. The Sponsor will make the endowment payment in good faith and according to the Contract at the time that Sponsor transfers fee title of (THE SITE) property to Steward. The Endowment assets shall be held and managed for investment and appropriation for purposes described below.

#### C. Endowment Purpose

The purpose of the Endowment is to support the Steward's long-term stewardship of THE SITE after, and specifically to support the Steward in successfully managing, monitoring and maintaining the Conservation Values of the SITE consistent with the Management Plan. The Endowment funds are not intended to be used for funding the Sponsor's maintenance, management, or other obligations and responsibilities during THE SITE'S operational life. During the operational life of THE SITE, the Sponsor retains full responsibility for management, including liability that may be incurred for any damages or losses resulting from its actions or omissions and those of its agents, contractors and third parties, and Sponsor shall indemnify and hold the Steward harmless from such damages, losses and claims therefore. The Steward shall be responsible for all damages and loss resulting from its own acts or omissions, and those of its agents and contractors.

#### D. Management Plan

The Sponsor and Steward have agreed to the amount of the Endowment based on projected costs of long-term stewardship and management as defined in the Management Plan (Addendum). The

Management Plan will be used by Sponsor and Steward as the principal guide for all native habitat restoration and management. Any future modification of the Management Plan may require a modification of this Stewardship Agreement to ensure the Endowment will provide adequate financial support for the Bank.

### **E. Transfer of Assets**

The Endowment shall be established upon transfer to and acceptance by the Steward of the following transferred assets:

1. *Endowment payment in the total amount of \_\_\_\_\_;*
2. *Fee title of real property described in Exhibit A of the Mitigation/Conservation Bank*
3. *Instrument MOU and in the Management Plan .*

The Sponsor shall retain sole rights to the mitigation/conservation credits established by the SITE.

### **E. Reversionary Clause**

In the event the Steward is found by a court of competent jurisdiction to be in material default of the provisions of this Agreement or the Management Plan, all rights to the assets, both real property and endowment funds, shall automatically revert to and vest with the Sponsor, who shall then assume the responsibilities in the Management Plan. Steward shall be in material default if:

1. *Steward institutes or has instituted against it insolvency, receivership or bankruptcy proceedings, or ceases doing business on a regular basis; or*
2. *Steward commits a material breach of this Stewardship Agreement or the Management Plan, and fails to remedy the breach within an agreed upon time frame specified in a Notice received from the Sponsor or the United States Fish and Wildlife Service.*

Default and reversion shall not apply to situations in which a good faith effort by the Steward is not successful due to circumstances beyond the control of the Steward, or in which the Endowment provides insufficient funding.

### **F. Management Responsibility**

Sponsor is responsible for implementation of the Management Plan and for all aspects of management of the       SITE       until Closure. Sponsor will retain management responsibility, at no cost to Steward, during the period that THE SITE is being used for mitigation of Sponsor's activities. After title transfers to Steward, UNTIL CLOSURE, Steward will allow Sponsor full access to occupy, manage and control THE SITE for all purposes set out in the Management Plan. At the time of Closure Sponsor will vacate the property, and turn over all right to occupancy, control and use of the Property to Steward for long term management purposes as set out in the Management Agreement. It is the Intention of the Parties that, upon SITE Closure, the Steward will have full authority to implement the maintenance and native habitat restoration of THE SITE consistent with this Agreement and the Management Plan. Steward hereby waives and releases Sponsor from any claims for damages to the property related to Sponsor's use of the property prior to Closure.

### **G. Investment of Endowment Assets**

The Steward has demonstrated experience over the past 5 decades in managing endowments for the purpose of sustaining conservation outcomes, and shall manage the Endowment

provided by the Sponsor in a manner consistent with the Steward's other endowments. Specifically, the Steward shall invest endowment assets as an institutional fund with the goal of optimizing yield while protecting endowment assets. Such assets shall be subject to the investment policies of the Steward relating to endowments, and shall be managed in a manner that is consistent with these requirements. The Steward shall exercise exclusive authority over management of the Endowment, including the pooling of the Endowment for investment and payout purposes, while accounting for Endowment assets under applicable general accounting principles.

#### **H. Additional Assets to Endowment**

Additional assets may be added to the Endowment by contribution or by transfer of other funds held by the Steward.

#### **I. Alternative Use of Endowment Distributions**

There shall be no use of the Endowment inconsistent with this Agreement and the Management Plan.

#### **J. Endowment Management**

The Endowment shall be managed in accordance with applicable law, the provisions of this Stewardship Agreement, and the Steward's financial policies. In carrying out its fiduciary responsibilities regarding long term management of THE SITE, the Steward shall assure that expenditures of the Endowment appropriations are in accordance with the Endowment's purpose.

#### **K. Term of the Stewardship Agreement**

This Stewardship Agreement will take effect on the day it is signed by both Steward and Sponsor (the Parties) and shall remain in effect for as long as the Endowment funds remain available for expenditure consistent with this Agreement. The intent of this Stewardship Agreement and the endowment is to provide sufficient revenue for the long-term maintenance of the conservation values of the site.

#### **L. Notices**

Any notice, demand, request, consent, approval, or other communication that Sponsor or Steward desires or is required to give to the other shall be in writing to the following addresses, unless otherwise notified in writing. Electronic correspondence is acceptable.

- ADDRESSES

#### **M. Entire Agreement**

This document, including the Management Plan incorporated in the Addendum hereto, and the contract to which it is attached, set forth the entire agreement of the Parties. The Stewardship Agreement is subject to review by the Parties and maybe amended by mutual agreement of the Parties. No amendment, alteration, or variation of this Stewardship Agreement shall be valid or binding unless contained in a written Amendment signed by both Parties.

**N. Successors**

The terms, conditions, and restrictions of this Agreement shall be binding upon, and inure to the benefit of, the parties and their respective personal representatives, heirs, successors, and assigns.

STEWARD, BY EXECUTION OF THIS STEWARDSHIP AGREEMENT, HEREBY ACKNOWLEDGES THAT STEWARD HAS READ THIS STEWARDSHIP AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

Steward Tax Identification Information. Steward shall provide Steward's Social Security number or Steward's federal tax ID number and the additional information set forth below. Social Security Numbers provided pursuant to this requirement will be used for the administration of state, federal and local tax laws. Sponsor may report the information set forth above to the Internal Revenue Service (IRS) under the name and social security number or taxpayer identification number provided.

**Legal, tax filing Company Name:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Federal Tax ID# (FEIN):** \_\_\_\_\_

**CERTIFICATION:**

A. Any individual signing on behalf of Steward hereby certifies:



## ***Endowment Transfer Agreements***

### **Transfer of Land and Endowment to a Governmental Entity/Nonprofit/ Special District Template**

*This template is used along with a "prohibited uses" and a deed to convey property and endowments etc.*

This Transfer of Land and Endowment Agreement ("Agreement") is between the State of \_\_\_\_\_, acting by and through its Department of Transportation ("\_\_\_\_\_ DOT") and the **GOVERNMENTAL ENTITY/NONPROFIT/SPECIAL DISTRICT** ("**ENTER ABBREVIATED NAME HERE**") and is effective as of \_\_\_\_\_, 20\_\_.

#### **RECITALS**

- A. \_\_\_\_\_ DOT has legal authority pursuant to Government Code sections \_\_\_\_\_ to enter into this Agreement with **ENTITY NAME**. \_\_\_\_\_ DOT and **ENTITY NAME** are hereinafter referred to as the "PARTIES."
- B. \_\_\_\_\_ DOT intends to construct/has constructed [**insert a brief description of the transportation project here including the route, county, post mile limits, and the type of work performed**], referred to herein as "PROJECT".
- C. \_\_\_\_\_ DOT has determined that PROJECT will result in certain impacts [**DESCRIBE IMPACTS**] to [**DESCRIBE RESOURCES**], referred to herein as "IMPACTS."
- D. \_\_\_\_\_ DOT, in order to comply with the [**insert a brief description of the documentation that provides the justification for this mitigation such as an approved environmental document, permit, or other resource agency approval**] referred to herein as "PERMIT" [**change as appropriate**] and incorporated herein by this reference, must provide mitigation for IMPACTS, referred to herein as "MITIGATION REQUIREMENTS."
- E. \_\_\_\_\_ DOT owns \_\_\_\_\_ parcel(s) of real property ("**PROPERTY(IES)**"), which consist(s) of a total of approximately \_\_\_\_\_ acres, located \_\_\_\_\_, more particularly described in **EXHIBIT A**, attached hereto and made a part of this Agreement.
- F. **PROPERTY(IES)** provide(s) significant ecological, scientific, aesthetic, open space, range land, wildlife habitat values \_\_\_\_\_
- G. The conservation values of **PROPERTY(IES)** include...**Description of habitat.....**, referred to herein as "**CONSERVATION VALUES**".
- H. For land held in Fee

ENTITY NAME is ENTITY DESCRIPTION, and is authorized to hold the PROPERTY(IES) in fee simple for such purposes of conservation, protection, and management of land.

For Conservation Easements:

ENTITY NAME is ENTITY DESCRIPTION, and pursuant to Division 9 of the Public Resources Code, is authorized to hold conservation easements for such purposes of conservation, protection, and management of land.

Add for non profit

NON PROFIT's principal purpose is the direct protection or stewardship of land, water, or natural resources, including but not limited to, agricultural lands, wildlife habitat, wetlands, endangered species habitat, open-space areas, and outdoor recreational areas.

- I. \_\_\_\_\_ DOT intends to use the PROPERTY(IES) to satisfy MITIGATION REQUIREMENTS
- J. \_\_\_\_\_ DOT will transfer title to the PROPERTY(IES) and the amount of \$ - \_\_\_\_\_ ("ENDOWMENT FUNDS") to ENTITY NAME as full payment for the perpetual stewardship of the PROPERTY(IES) in order to satisfy in full MITIGATION REQUIREMENTS for PROJECT. Stewardship encompasses a full range of activities, including, but not limited to, the management, maintenance and operation of the PROPERTY(IES).
- K. \_\_\_\_\_ DOT and ENTITY NAME desire and intend that the PROPERTY(IES) be permanently restricted to preserve and protect in perpetuity the CONSERVATION VALUES and to prevent any use of the PROPERTY(IES) that will impair or interfere with the CONSERVATION VALUES.

#### **OPERATIVE PROVISIONS**

NOW, THEREFORE, in consideration of the covenants and agreements contained herein and for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the PARTIES agree as follows:

- 1. All obligations of \_\_\_\_\_ DOT under the terms of this Agreement, including, but not limited to the transfer of ENDOWMENT FUNDS are subject to the appropriation of resources by the Legislature, State Budget Act authority and the allocation of funds by the STATE TRANSPORTATION COMMISSION ("STATE TRANSPORTATION COMMISSION ACRONYM").
- 2. All applicable laws, rules and policies relating to the use of federal or state funds shall apply notwithstanding any other provisions of this Agreement.
- 3. \_\_\_\_\_ DOT will transfer fee title to the PROPERTY(IES) and ENDOWMENT FUNDS to ENTITY NAME and ENTITY NAME will accept fee title along with all imposed restrictive covenants and prohibited uses on the PROPERTY(IES) and ENDOWMENT FUNDS upon the adoption of the Resolution of Conveyance by the STATE TRANSPORTATION COMMISSION ACRONYM. The restrictive covenants are attached hereto as EXHIBIT LETTER and the prohibited uses are attached hereto as EXHIBIT LETTER and are made a part of this Agreement.

4. **ENTITY NAME** and \_\_\_\_\_ DOT agree to record the STATE TRANSPORTATION COMMISSION ACRONYM's Resolution of Conveyance for the Properties to **ENTITY NAME** along with the executed and acknowledged original of the Director's Deed ("DEED"), attached hereto as **Exhibit LETTER** and made a part of this Agreement. \_\_\_\_\_ DOT will also transfer the ENDOWMENT FUNDS to **ENTITY NAME**, subject to Provision 1 above, within **# OF DAYS ( )** following recordation of the DEED and STATE TRANSPORTATION COMMISSION ACRONYM Resolution of Conveyance.
5. **ENTITY NAME** shall use the ENDOWMENT FUNDS as required by the restrictive covenants and prohibited uses that are incorporated in the DEED specifically, for the management, maintenance and operation of the **PROPERTY(IES)** to ensure that the CONSERVATION VALUES are preserved and protected in perpetuity. **ENTITY NAME** shall manage **PROPERTY(IES)** as specified by the terms of this Agreement and as more particularly described in the Resources Management Plan ("RMP")/Habitat Mitigation and Monitoring Plan ("HMMP"), attached hereto as Exhibit **LETTER** and made a part of this Agreement.
6. **ENTITY NAME** shall hold, manage, invest, and reinvest the ENDOWMENT FUNDS in a separate and permanent trust account ("ACCOUNT"). **ENTITY NAME** agrees to collect and re-deposit income ("INCOME"), including interest, dividends, and capital gains from the management, investment and reinvestment of the ENDOWMENT FUNDS into the ACCOUNT.
7. **ENTITY NAME** agrees that a portion of the ENDOWMENT FUNDS, specifically the amount of \$\_\_\_\_\_ hereinafter referred to as "ENDOWMENT PRINCIPAL," shall be non-wasting, not subject to invasion and shall not decrease in value through expenditure and the **ENTITY NAME** shall implement an investment strategy intended to keep up with inflation. The parties agree that the amount of INCOME necessary to keep up with inflation shall be determined by **ENTITY NAME** by adjusting the ENDOWMENT PRINCIPAL by a percentage equal to the percentage increase, if any, in the STATE Consumer Price Index, All Items (1982-1984 = 100), for All Urban Consumers for STATE, published by the STATE Department of Industrial Relations, Divisions of Labor and Statistics and Research. **ENTITY NAME** further agrees that the portion of INCOME required for ENDOWMENT PRINCIPAL growth commensurate with inflation shall remain in the ACCOUNT and shall become ENDOWMENT PRINCIPAL.
8. **ENTITY NAME** shall hold and manage the ENDOWMENT FUNDS consistent with Government Code Section \_\_\_\_\_, subsection \_\_\_\_\_ and with the Uniform Prudent Management of Institutional Funds Act (Part 7 commencing with Section 18501 of Division 9 of the Probate Code).
9. It is understood and agreed that any ENDOWMENT FUNDS exceeding the ENDOWMENT PRINCIPAL amount as well as any income not necessary to provide for ENDOWMENT PRINCIPAL growth commensurate with inflation, will only be utilized by **ENTITY NAME** to satisfy **ENTITY NAME's** obligations and duties as set forth in this agreement.
10. **ENTITY NAME** shall, on or before **DATE** of each year, submit to \_\_\_\_\_ DOT a written, itemized expenditure statement for the ACCOUNT. The statement shall include \_\_\_\_\_

**NON PROFIT/SPECIAL DISTRICT** “the same information as required by Internal Revenue Service Form 990.”

**NAME**  
**ADDRESS**

11. In the event other biological resources, excluding **LIST CURRENT RESOURCES**, are identified on **PROPERTY(IES)** and \_\_\_\_\_ DOT desires to utilize those said other biological resources to compensate for impacts of future transportation projects, then \_\_\_\_\_ DOT agrees to meet with **ENTITY NAME** and the applicable resource agency. It is further understood and agreed that if \_\_\_\_\_ DOT requests that **ENTITY NAME** perform additional services and/or obligations that are not set forth in this Agreement, or in the DEED, then \_\_\_\_\_ DOT and **ENTITY NAME** may enter into a separate agreement or amend the existing Agreement and/or DEED, as appropriate.
12. All work performed by **ENTITY NAME**, or performed on **ENTITY NAME's** behalf, shall be performed in accordance with all local, state and federal laws, regulations, policies, procedures, and standards.
13. **ENTITY NAME** agrees to obtain any and all environmental approvals and/or resource agency agreements, permits, and/or approvals that may be required for activities associated with the management, maintenance and operation of the **PROPERTY(IES)** and to fully comply with any terms and conditions thereof.
14. **ENTITY NAME** may transfer or assign its rights and obligations set forth in the DEED only with the prior written consent of \_\_\_\_\_ DOT and the **PERMITTING AGENCY (OR AGENCIES)**. If **ENTITY NAME** transfers or assigns its rights and obligations in the **PROPERTY(IES)**, **ENTITY NAME** shall (at the time of transfer or assignment) also transfer all remaining ENDOWMENT FUNDS to the transferee (including all interest incurred thereon) only if the transferee agrees to fulfill and be responsible for all the duties and responsibilities of the **ENTITY NAME** under this Agreement; and **ENTITY NAME** shall remain fully liable for its duties and responsibilities prior to transfer.
15. **ENTITY NAME** agrees that if \_\_\_\_\_ DOT determines that the **PROPERTY(IES)** is/are not being held, managed, monitored or stewarded in accordance with the RMP and/or HMMP and in furtherance of the perpetual stewardship of the **PROPERTY(IES)**, then the **PROPERTY(IES)** and the remaining portion of the ENDOWMENT FUNDS, including accrued interest, shall revert back to \_\_\_\_\_ DOT upon delivery of its written notice.
16. **ENTITY NAME** agrees that if \_\_\_\_\_ DOT determines that the ENDOWMENT FUNDS are not being used in accordance with the RMP and/or HMMP and for the perpetual stewardship of the **PROPERTY(IES)**, then the **PROPERTY(IES)** and the remaining portion of the ENDOWMENT FUNDS, including accrued interest, shall revert back to \_\_\_\_\_ DOT upon delivery of its written notice.
17. **ENTITY NAME** agrees that in the event of a condemnation action or bankruptcy, the **PROPERTY(IES)** shall be returned to \_\_\_\_\_ DOT in accordance with the terms of the DEED. **ENTITY NAME** further agrees to pay \_\_\_\_\_ DOT the remaining portion of the ENDOWMENT FUNDS, including accrued interest thereon, that were provided to **ENTITY NAME** for the long-term stewardship of the **PROPERTY(IES)**. The remaining portion of the ENDOWMENT FUNDS, including accrued interest

thereon, to be paid to \_\_\_\_\_ DOT shall be proportionate to the management costs of the amount of property that is being acquired through condemnation.

18. If **ENTITY NAME** ever ceases to function as a **(INSERT TYPE OF ENTITY)** and/or is dissolved then **ENTITY NAME** agrees to assign all of its rights and obligations regarding the **PROPERTY(IES)** and the ENDOWMENT FUNDS, including accrued interest thereon, to an entity or organization that will continue the stewardship of the property in perpetuity, after receiving the written concurrence by \_\_\_\_\_ DOT. **ENTITY NAME** shall take all necessary steps and execute any and all necessary paperwork to effectuate this provision at **ENTITY NAME's** own expense.
19. **ENTITY NAME** shall retain all books, documents, papers, accounting records, and other evidence pertaining to costs incurred, including support data for cost proposals, and to make such materials available at the respective offices of \_\_\_\_\_ DOT at all reasonable times for three (3) years after the termination date of this Agreement. \_\_\_\_\_ DOT, the Federal Highway Administration, or any duly authorized representative of the Federal Government shall have access to any books, records, and documents of **ENTITY NAME** that are pertinent to this Agreement for audits, examinations, excerpts, and transactions, and copies thereof shall be furnished when requested.
20. \_\_\_\_\_ DOT will obtain written confirmation from **PERMITTING AGENCY (OR AGENCIES)** that all permit requirements regarding the **PROPERTY(IES)** have been satisfied and will provide a copy of such confirmation to **ENTITY NAME (USE THIS ARTICLE ONLY WHEN APPLICABLE)**.
21. Neither \_\_\_\_\_ DOT nor any officer or employee thereof is responsible for any injury, damage, or liability occurring by reason of anything done or omitted to be done by **ENTITY NAME** and/or its agents under or in connection with any work, authority, or jurisdiction conferred upon **ENTITY NAME** under this Agreement. It is understood and agreed that **ENTITY NAME** will fully defend, indemnify, and save harmless \_\_\_\_\_ DOT and all of its officers and employees from all claims, suits, or actions of every name, kind, and description brought forth under, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of anything done or omitted to be done by **ENTITY NAME** and/or its agents under this Agreement.
22. **ENTITY NAME** agrees to accept **PROPERTY(IES)** in their current environmental condition and setting, including, but not limited to, the presence of hazardous materials as described in the **[SPECIFY INITIAL SITE ASSESSMENT (ISA) OR OTHER DOCUMENT(S)]**. **ENTITY NAME** has received and reviewed [a copy/copies] of the above-referenced **[SPECIFY ISA OR OTHER DOCUMENT(S)]**. **Brief definition or description of the document**. Upon recordation of the DEED in the County Recorder's Office, \_\_\_\_\_ DOT will not be responsible for any present or future remediation of said hazardous materials.
23. It is mutually agreed that **ENTITY NAME** shall fully defend, indemnify and save harmless \_\_\_\_\_ DOT and all its officers and employees from all claims, suits or actions related to environmental theories or assertions of liability, including, but not limited to, claims or lawsuits related to the presence of hazardous materials as described in the **[SPECIFY ISA OR OTHER DOCUMENT(S)]**, provided that the actions, events, injuries, damages, or losses giving rise to any claims, suits or actions occurred on or arise after the date of the recordation of the DEED.

24. \_\_\_\_\_ DOT shall fully defend, indemnify and save harmless **ENTITY NAME** and all its officers and employees from all claims, suits or actions related to environmental theories or assertions of liability, including, but not limited to, claims or lawsuits related to the presence of hazardous materials as described in the **[SPECIFY ISA OR OTHER DOCUMENT(S)]**, provided that the actions, events, injuries, damages, or losses giving rise to any claims, suits or actions occurred or arose before the date of recordation of the DEED.
25. In the event of any breach of this Agreement by either party, the other party may enforce this Agreement by any means available at law or in equity. In the event of litigation, mediation or arbitration to resolve any breach of, or dispute related to, this Agreement, each party agrees to pay for its own attorney's fees, costs and expenses, without regard to who ultimately prevails.
26. A failure by either party to enforce any provision of this Agreement shall not be construed as a continuing waiver, or as a waiver of the right to compel enforcement of that provision.
27. This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one agreement that shall be binding on all of the parties, notwithstanding that all of the parties are not a signatory to the original or the same counterpart. If any provision of this Agreement is held invalid, the other provisions shall not be affected thereby.
28. No alteration or variation of the terms of this Agreement shall be valid unless made by a formal written amendment executed by the parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.
29. Nothing within the provisions of this Agreement is intended to create duties or obligations to or rights in third parties who are not parties to this Agreement or to affect the legal liability of either party to the Agreement by imposing any standard of care different from the standard of care imposed by law.
30. Each party to this Agreement warrants that it and the respective signatories have full right and authority to enter into this Agreement and that each party is an authorized legal entity under the laws of the State of \_\_\_\_\_.
31. This Agreement shall be governed by the laws of the State of \_\_\_\_\_ without regard to choice of law principles.

**STATE OF \_\_\_\_\_**  
**Department of Transportation**

**ENTITY NAME**

By: \_\_\_\_\_  
Deputy District Director

By: \_\_\_\_\_

Approved as to form and procedure:

Approved as to form:

---

Attorney  
Department of Transportation

---

General Counsel

Certified as to budgeting of funds:

---

District Budget Manager

Certified as to financial terms and  
policies:

---

Accounting Administrator

## Transfer of Land and Endowment to a Governmental Entity/Non-Profit/Special District Template

This Transfer of Land and Endowment Agreement ("Agreement") is between the State of \_\_\_\_\_, acting by and through its Department of Transportation ("\_\_\_\_\_ DOT") and the GOVERNMENTAL ENTITY/NONPROFIT/SPECIAL DISTRICT ("ENTER ABBREVIATED NAME HERE") and is effective as of \_\_\_\_\_, 20\_\_.

### RECITALS

\_\_\_\_\_ DOT has legal authority pursuant to Government Code sections \_\_\_\_\_ to enter into this Agreement with ENTITY NAME. \_\_\_\_\_ DOT and ENTITY NAME are hereinafter referred to as the "PARTIES."

\_\_\_\_\_ DOT intends to construct/has constructed [insert a brief description of the transportation project here including the route, county, post mile limits, and the type of work performed], referred to herein as "PROJECT".

\_\_\_\_\_ DOT has determined that PROJECT will result in certain impacts [DESCRIBE IMPACTS] to [DESCRIBE RESOURCES], referred to herein as "IMPACTS."

\_\_\_\_\_ DOT, in order to comply with the [insert a brief description of the documentation that provides the justification for this mitigation such as an approved environmental document, permit, or other resource agency approval] referred to herein as "PERMIT" [change as appropriate] and incorporated herein by this reference, must provide mitigation for IMPACTS, referred to herein as "MITIGATION REQUIREMENTS."

\_\_\_\_\_ DOT owns \_\_\_\_\_ parcel(s) of real property ("PROPERTY(IES)"), which consist(s) of a total of approximately \_\_\_\_\_ acres, located \_\_\_\_\_, more particularly described in EXHIBIT A, attached hereto and made a part of this Agreement.

PROPERTY(IES) provide(s) significant ecological, scientific, aesthetic, open space, range land, wildlife habitat values \_\_\_\_\_

The conservation values of PROPERTY(IES) include...Description of habitat....., referred to herein as "CONSERVATION VALUES".

For land held in Fee

ENTITY NAME is ENTITY DESCRIPTION, and is authorized to hold the PROPERTY(IES) in fee simple for such purposes of conservation, protection, and management of land.



For Conservation Easements:

ENTITY NAME is ENTITY DESCRIPTION, and pursuant to Division 9 of the Public Resources Code, is authorized to hold conservation easements for such purposes of conservation, protection, and management of land.

Add for non profit

NON PROFIT's principal purpose is the direct protection or stewardship of land, water, or natural resources, including but not limited to, agricultural lands, wildlife habitat, wetlands, endangered species habitat, open-space areas, and outdoor recreational areas.

\_\_\_\_\_ DOT intends to use the PROPERTY(IES) to satisfy MITIGATION REQUIREMENTS

\_\_\_\_\_ DOT will transfer title to the PROPERTY(IES) and the amount of \$ - \_\_\_\_\_ ("ENDOWMENT FUNDS") to ENTITY NAME as full payment for the perpetual stewardship of the PROPERTY(IES) in order to satisfy in full MITIGATION REQUIREMENTS for PROJECT. Stewardship encompasses a full range of activities, including, but not limited to, the management, maintenance and operation of the PROPERTY(IES).

\_\_\_\_\_ DOT and ENTITY NAME desire and intend that the PROPERTY(IES) be permanently restricted to preserve and protect in perpetuity the CONSERVATION VALUES and to prevent any use of the PROPERTY(IES) that will impair or interfere with the CONSERVATION VALUES.

### **OPERATIVE PROVISIONS**

NOW, THEREFORE, in consideration of the covenants and agreements contained herein and for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the PARTIES agree as follows:

All obligations of \_\_\_\_\_ DOT under the terms of this Agreement, including, but not limited to the transfer of ENDOWMENT FUNDS are subject to the appropriation of resources by the Legislature, State Budget Act authority and the allocation of funds by the STATE TRANSPORTATION COMMISSION ("STATE TRANSPORTATION COMMISSION ACRONYM").

All applicable laws, rules and policies relating to the use of federal or state funds shall apply notwithstanding any other provisions of this Agreement.

\_\_\_\_\_ DOT will transfer fee title to the PROPERTY(IES) and ENDOWMENT FUNDS to ENTITY NAME and ENTITY NAME will accept fee title along with all imposed restrictive covenants and prohibited uses on the PROPERTY(IES) and ENDOWMENT FUNDS upon the adoption of the Resolution of Conveyance by the STATE TRANSPORTATION COMMISSION ACRONYM. The restrictive covenants are attached hereto as EXHIBIT LETTER and the prohibited uses are attached hereto as EXHIBIT LETTER and are made a part of this Agreement.

ENTITY NAME and \_\_\_\_\_ DOT agree to record the STATE TRANSPORTATION COMMISSION ACRONYM's Resolution of Conveyance for the Properties to ENTITY NAME along with the executed and acknowledged original of the Director's Deed ("DEED"), attached hereto as Exhibit LETTER and made a part of this Agreement. \_\_\_\_\_ DOT will also transfer the ENDOWMENT FUNDS to ENTITY NAME, subject to Provision 1 above, within # OF DAYS (    ) following recordation of the DEED and STATE TRANSPORTATION COMMISSION ACRONYM Resolution of Conveyance.

ENTITY NAME shall use the ENDOWMENT FUNDS as required by the restrictive covenants and prohibited uses that are incorporated in the DEED specifically, for the management, maintenance and operation of the PROPERTY(IES) to ensure that the CONSERVATION VALUES are preserved and protected in perpetuity. ENTITY NAME shall manage PROPERTY(IES) as specified by the terms of this Agreement and as more particularly described in the Resources Management Plan ("RMP")/Habitat Mitigation and Monitoring Plan ("HMMP"), attached hereto as Exhibit LETTER and made a part of this Agreement.

ENTITY NAME shall hold, manage, invest, and reinvest the ENDOWMENT FUNDS in a separate and permanent trust account ("ACCOUNT"). ENTITY NAME agrees to collect and re-deposit income ("INCOME"), including interest, dividends, and capital gains from the management, investment and reinvestment of the ENDOWMENT FUNDS into the ACCOUNT.

ENTITY NAME agrees that a portion of the ENDOWMENT FUNDS, specifically the amount of \$\_\_\_\_\_ hereinafter referred to as "ENDOWMENT PRINCIPAL," shall be non-wasting, not subject to invasion and shall not decrease in value through expenditure and the ENTITY NAME shall implement an investment strategy intended to keep up with inflation. The parties agree that the amount of INCOME necessary to keep up with inflation shall be determined by ENTITY NAME by adjusting the ENDOWMENT PRINCIPAL by a percentage equal to the percentage increase, if any, in the STATE Consumer Price Index, All Items (1982-1984 = 100), for All Urban Consumers for STATE, published by the STATE Department of Industrial Relations, Divisions of Labor and Statistics and Research. ENTITY NAME further agrees that the portion of INCOME required for ENDOWMENT PRINCIPAL growth commensurate with inflation shall remain in the ACCOUNT and shall become ENDOWMENT PRINCIPAL.

ENTITY NAME shall hold and manage the ENDOWMENT FUNDS consistent with Government Code Section \_\_\_\_\_, subsection \_\_\_\_\_ and with the Uniform Prudent Management of Institutional Funds Act (Part 7 commencing with Section 18501 of Division 9 of the Probate Code).

It is understood and agreed that any ENDOWMENT FUNDS exceeding the ENDOWMENT PRINCIPAL amount as well as any income not necessary to provide for ENDOWMENT PRINCIPAL growth commensurate with inflation, will only be utilized by ENTITY NAME to satisfy ENTITY NAME's obligations and duties as set forth in this agreement.

ENTITY NAME shall, on or before DATE of each year, submit to \_\_\_\_\_ DOT a written, itemized expenditure statement for the ACCOUNT. The statement shall include \_\_\_\_\_

NON PROFIT/SPECIAL DISTRICT “the same information as required by Internal Revenue Service Form 990.”

NAME

ADDRESS

In the event other biological resources, excluding LIST CURRENT RESOURCES, are identified on PROPERTY(IES) and \_\_\_\_\_ DOT desires to utilize those said other biological resources to compensate for impacts of future transportation projects, then \_\_\_\_\_ DOT agrees to meet with ENTITY NAME and the applicable resource agency. It is further understood and agreed that if \_\_\_\_\_ DOT requests that ENTITY NAME perform additional services and/or obligations that are not set forth in this Agreement, or in the DEED, then \_\_\_\_\_ DOT and ENTITY NAME may enter into a separate agreement or amend the existing Agreement and/or DEED, as appropriate.

All work performed by ENTITY NAME, or performed on ENTITY NAME’s behalf, shall be performed in accordance with all local, state and federal laws, regulations, policies, procedures, and standards.

ENTITY NAME agrees to obtain any and all environmental approvals and/or resource agency agreements, permits, and/or approvals that may be required for activities associated with the management, maintenance and operation of the PROPERTY(IES) and to fully comply with any terms and conditions thereof.

ENTITY NAME may transfer or assign its rights and obligations set forth in the DEED only with the prior written consent of \_\_\_\_\_ DOT and the PERMITTING AGENCY (OR AGENCIES). If ENTITY NAME transfers or assigns its rights and obligations in the PROPERTY(IES), ENTITY NAME shall (at the time of transfer or assignment) also transfer all remaining ENDOWMENT FUNDS to the transferee (including all interest incurred thereon) only if the transferee agrees to fulfill and be responsible for all the duties and responsibilities of the ENTITY NAME under this Agreement; and ENTITY NAME shall remain fully liable for its duties and responsibilities prior to transfer.

ENTITY NAME agrees that if \_\_\_\_\_ DOT determines that the PROPERTY(IES) is/are not being held, managed, monitored or stewarded in accordance with the RMP and/or HMMP and in furtherance of the perpetual stewardship of the PROPERTY(IES), then the PROPERTY(IES) and the remaining portion of the ENDOWMENT FUNDS, including accrued interest, shall revert back to \_\_\_\_\_ DOT upon delivery of its written notice.

ENTITY NAME agrees that if \_\_\_\_\_ DOT determines that the ENDOWMENT FUNDS are not being used in accordance with the RMP and/or HMMP and for the perpetual stewardship of the PROPERTY(IES), then the PROPERTY(IES) and the remaining portion of the ENDOWMENT FUNDS, including accrued interest, shall revert back to \_\_\_\_\_ DOT upon delivery of its written notice.

ENTITY NAME agrees that in the event of a condemnation action or bankruptcy, the PROPERTY(IES) shall be returned to \_\_\_\_\_ DOT in accordance with the terms of the DEED. ENTITY NAME further agrees to pay \_\_\_\_\_ DOT the remaining portion of the ENDOWMENT FUNDS, including accrued interest thereon, that were provided to ENTITY NAME for the long-term stewardship of the PROPERTY(IES). The remaining portion of the ENDOWMENT FUNDS, including accrued interest thereon, to be paid to \_\_\_\_\_ DOT shall be proportionate to the management costs of the amount of property that is being acquired through condemnation.

If ENTITY NAME ever ceases to function as a (INSERT TYPE OF ENTITY) and/or is dissolved then ENTITY NAME agrees to assign all of its rights and obligations regarding the PROPERTY(IES) and the ENDOWMENT FUNDS, including accrued interest thereon, to an entity or organization that will continue the stewardship of the property in perpetuity, after receiving the written concurrence by \_\_\_\_\_ DOT. ENTITY NAME shall take all necessary steps and execute any and all necessary paperwork to effectuate this provision at ENTITY NAME's own expense.

ENTITY NAME shall retain all books, documents, papers, accounting records, and other evidence pertaining to costs incurred, including support data for cost proposals, and to make such materials available at the respective offices of \_\_\_\_\_ DOT at all reasonable times for three (3) years after the termination date of this Agreement. \_\_\_\_\_ DOT, the Federal Highway Administration, or any duly authorized representative of the Federal Government shall have access to any books, records, and documents of ENTITY NAME that are pertinent to this Agreement for audits, examinations, excerpts, and transactions, and copies thereof shall be furnished when requested.

\_\_\_\_\_ DOT will obtain written confirmation from PERMITTING AGENCY (OR AGENCIES) that all permit requirements regarding the PROPERTY(IES) have been satisfied and will provide a copy of such confirmation to ENTITY NAME (USE THIS ARTICLE ONLY WHEN APPLICABLE).

Neither \_\_\_\_\_ DOT nor any officer or employee thereof is responsible for any injury, damage, or liability occurring by reason of anything done or omitted to be done by ENTITY NAME and/or its agents under or in connection with any work, authority, or jurisdiction conferred upon ENTITY NAME under this Agreement. It is understood and agreed that ENTITY NAME will fully defend, indemnify, and save harmless \_\_\_\_\_ DOT and all of its officers and employees from all claims, suits, or actions of every name, kind, and description brought forth under, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of anything done or omitted to be done by ENTITY NAME and/or its agents under this Agreement.

ENTITY NAME agrees to accept PROPERTY(IES) in their current environmental condition and setting, including, but not limited to, the presence of hazardous materials as described in the [SPECIFY INITIAL SITE ASSESSMENT (ISA) OR OTHER DOCUMENT(S)]. ENTITY NAME has received and reviewed [a copy/copies] of the above-referenced [SPECIFY ISA OR OTHER DOCUMENT(S)]. Brief definition or description of the document. Upon recordation of

the DEED in the County Recorder's Office, \_\_\_\_\_ DOT will not be responsible for any present or future remediation of said hazardous materials.

It is mutually agreed that ENTITY NAME shall fully defend, indemnify and save harmless \_\_\_\_\_ DOT and all its officers and employees from all claims, suits or actions related to environmental theories or assertions of liability, including, but not limited to, claims or lawsuits related to the presence of hazardous materials as described in the [SPECIFY ISA OR OTHER DOCUMENT(S)], provided that the actions, events, injuries, damages, or losses giving rise to any claims, suits or actions occurred on or arise after the date of the recordation of the DEED.

\_\_\_\_\_ DOT shall fully defend, indemnify and save harmless ENTITY NAME and all its officers and employees from all claims, suits or actions related to environmental theories or assertions of liability, including, but not limited to, claims or lawsuits related to the presence of hazardous materials as described in the [SPECIFY ISA OR OTHER DOCUMENT(S)], provided that the actions, events, injuries, damages, or losses giving rise to any claims, suits or actions occurred or arose before the date of recordation of the DEED.

In the event of any breach of this Agreement by either party, the other party may enforce this Agreement by any means available at law or in equity. In the event of litigation, mediation or arbitration to resolve any breach of, or dispute related to, this Agreement, each party agrees to pay for its own attorney's fees, costs and expenses, without regard to who ultimately prevails.

A failure by either party to enforce any provision of this Agreement shall not be construed as a continuing waiver, or as a waiver of the right to compel enforcement of that provision.

This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one agreement that shall be binding on all of the parties, notwithstanding that all of the parties are not a signatory to the original or the same counterpart. If any provision of this Agreement is held invalid, the other provisions shall not be affected thereby.

No alteration or variation of the terms of this Agreement shall be valid unless made by a formal written amendment executed by the parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.

Nothing within the provisions of this Agreement is intended to create duties or obligations to or rights in third parties who are not parties to this Agreement or to affect the legal liability of either party to the Agreement by imposing any standard of care different from the standard of care imposed by law.

Each party to this Agreement warrants that it and the respective signatories have full right and authority to enter into this Agreement and that each party is an authorized legal entity under the laws of the State of \_\_\_\_\_.

This Agreement shall be governed by the laws of the State of \_\_\_\_\_ without regard to choice of law principles.

**STATE OF \_\_\_\_\_**  
**Department of Transportation**

**ENTITY NAME**

By: \_\_\_\_\_  
Deputy District Director

By: \_\_\_\_\_

Approved as to form and procedure:

Approved as to form:

\_\_\_\_\_  
Attorney  
Department of Transportation

\_\_\_\_\_  
General Counsel

Certified as to budgeting of funds:

\_\_\_\_\_  
District Budget Manager

Certified as to financial terms and  
policies:

\_\_\_\_\_  
Accounting Administrator

## Fund Transfer Agreement

Fund Transfer Agreement  
From the GRANTEE to  
NGO Regarding

Acquisition of PROPERTY NAME Conservation Easement Deed  
Contract No. \_\_\_\_\_

This Fund Transfer Agreement (Agreement) is made and entered into effective as of this \_\_\_\_\_ day of -  
\_\_\_\_\_ by and between the \_\_\_\_\_ and NGO. This Agreement memorializes  
TRANSPORTATION AGENCY's intent to purchase a Conservation Easement Deed, covering the \_\_-acre  
PROPERTY NAME property in \_\_\_\_\_ County, from NGO for use as mitigation for future  
regional and local transportation projects authorized under TRANSPORTATION AGENCY MITIGATION  
PROGRAM.

### RECITALS

The following recitals are a substantive part of this Agreement.

Whereas, pursuant to STATE Civil Code Section 815.3(a) NGO is a non-profit corporation qualified to do  
business in this state, and has as its primary purpose the preservation, protection, or enhancement of  
land in its natural, scenic, historical, agricultural, forested, or open-space condition or use; and

Whereas, PROPERTY NAME consists of \_\_ acres, as more specifically described in **EXHIBIT A**  
which is attached hereto and incorporated herein by this reference, and

Whereas, in April 2003 the TRANSPORTATION AGENCY Board of Directors (TRANSPORTATION AGENCY's  
Board) adopted the \_\_\_\_\_ Transportation Plan (RTP) entitled \_\_\_\_\_; and

Whereas, the RTP includes a list of transportation network improvements and other transportation  
programs that are intended to improve the mobility of people and goods throughout the region; and  
Whereas, the TRANSPORTATION AGENCY Advance Mitigation Program is intended, in part, to  
provide for early large-scale acquisition and management of important habitat areas and to create a  
reliable approach for funding required mitigation for future transportation improvements, thereby  
enabling the purchase of habitat that may become more scarce in the future, reducing future costs and  
accelerating project delivery; and

Whereas, proactive mitigation of transportation projects would provide an opportunity to implement  
the TRANSPORTATION AGENCY Advance Mitigation Program by providing opportunities for early  
large-scale conservation, permit streamlining, and certain cost savings; and

Whereas, on DATE, NGO entered into a contract to purchase PROPERTY NAME from  
\_\_\_\_\_; and

Whereas, on DATE, the GRANTOR, a political subdivision of the State of STATE, (County), entered into  
an agreement with NGO to purchase PROPERTY NAME, subject to various conditions, including the  
TRANSPORTATION AGENCY's Executive Director's approval, under the TRANSPORTATION AGENCY  
Advance Mitigation Program, to contribute funds to NGO's initial acquisition of PROPERTY NAME  
in exchange for NGO's immediate grant of a Conservation Easement Deed to TRANSPORTATION  
AGENCY; and

Whereas, the purpose of this PROPERTY NAME acquisition by the County (Acquisition) is to (1)  
provide mitigation for transportation projects funded by TRANSPORTATION AGENCY; (2) protect critical  
habitat for the STATE gnatcatcher, southern maritime chaparral and southern willow scrub/brackish

marsh habitats; (3) further implement the Department of Fish and Game's (DFG) Natural Community Conservation Planning (NCCP) efforts in \_\_\_\_\_ County; and (4) enhance a general wildlife corridor between larger habitat areas; and

Whereas, on DATE, TRANSPORTATION AGENCY obtained concurrence and commitment from the DFG and the U. S. Fish and Wildlife Service (USFWS) (collectively "Wildlife Agencies"), to utilize PROPERTY NAME \_\_\_\_\_ as mitigation for future regional and local transportation projects. In reliance upon the DATE concurrence and commitment letter sent to TRANSPORTATION AGENCY from the United States Fish and Wildlife Service and the STATE Department of Fish and Game, (Wildlife Agencies) attached hereto and incorporated herein by this reference as **EXHIBIT B**, TRANSPORTATION AGENCY will use the Conservation Easement property as mitigation for TRANSPORTATION PLAN Projects; and

Whereas, on DATE; the County Board of Supervisors approved the Acquisition of PROPERTY NAME from NGO; and

Whereas on DATE, the TRANSPORTATION AGENCY's Board approved the TRANSPORTATION AGENCY Advance Mitigation Program \_\_\_\_\_ property acquisition criteria and process in conformance with the TRANSPORTATION AGENCY Advance Mitigation Program \_\_\_\_\_ Memorandum of Agreement signed on DATE by TRANSPORTATION AGENCY, \_\_\_\_\_ DOT, and the Wildlife Agencies; and

Whereas, on DATE, TRANSPORTATION AGENCY's Executive Director, in reliance upon the Wildlife Agencies' DATE, concurrence and commitment letter, and contingent upon the Wildlife Conservation Board's approval of TRANSPORTATION AGENCY's use of PROPERTY NAME \_\_\_\_\_ for mitigation purposes, authorized TRANSPORTATION AGENCY's \$8 \_\_\_\_\_ funding contribution towards the Acquisition cost of PROPERTY NAME \_\_\_\_\_ under the TRANSPORTATION AGENCY Advance Mitigation Program \_\_\_\_\_; and

Whereas, on approximately \_\_\_\_\_, \_\_\_\_\_ intends to sell its underlying fee title to PROPERTY NAME, to the NGO; and

Whereas, on approximately \_\_\_\_\_, immediately following the transaction above, the NGO intends to grant TRANSPORTATION AGENCY a Conservation Easement Deed across the entire \_\_\_\_\_-acre PROPERTY NAME \_\_\_\_\_ property; and

Whereas, on or about \_\_\_\_\_, immediately following the transaction above, the NGO intends to grant its fee title to PROPERTY NAME, subject to TRANSPORTATION AGENCY's Conservation Easement Deed, to the County; and

Whereas, PROPERTY NAME \_\_\_\_\_ is located along \_\_\_\_\_

## **AGREEMENT**

**NOW, THEREFORE**, in consideration of the mutual promises set forth herein, the Parties agree as follows:

### **I FUND CONTRIBUTIONS TO THE SAGE HILL ACQUISITION**

On approximately \_\_\_\_\_, three entities, NGO, County (the intended successor fee title owner of PROPERTY NAME \_\_\_\_\_ immediately following recordation of the Conservation Easement Deed described herein), and TRANSPORTATION AGENCY contributed the following amounts to purchase PROPERTY NAME \_\_\_\_\_ from \_\_\_\_\_, a willing seller:

NGO's Contribution: \$ \_\_\_\_\_

County's Contribution: \$ \_\_\_\_\_

TRANSPORTATION AGENCY's Contribution: \$ \_\_\_\_\_

### **II TRANSPORTATION AGENCY'S DUTIES IN THE INTENDED TRANSACTION**



(a) The intended transaction to which TRANSPORTATION AGENCY is contributing its Funds includes the following acquisitions and transfers, which are slated to occur in immediate succession in the order set forth below:

1. Elfin Hill, LLC the original owner of PROPERTY NAME will transfer and convey its fee title to NGO in exchange for \_\_\_\_\_ dollars (\$\_\_\_\_\_).

2. After NGO receives fee title to PROPERTY NAME from \_\_\_\_\_, LLC, NGO will immediately grant TRANSPORTATION AGENCY a Conservation Easement Deed covering the entirety of PROPERTY NAME.

3. NGO will then, immediately transfer and convey its fee title to PROPERTY NAME to the County encumbered by TRANSPORTATION AGENCY's Conservation Easement Deed.

(b) TRANSPORTATION AGENCY agrees to pay into escrow for this transaction Funds in exchange for NGO's grant to TRANSPORTATION AGENCY of a Conservation Easement Deed covering the entirety of PROPERTY NAME.

(c) TRANSPORTATION AGENCY agrees to wire its funds to the Elfin Closing Escrow Account, opened with \_\_\_\_\_, First American Title Company, \_\_\_\_\_, Escrow Number, as soon as the terms and conditions of this Fund Transfer Agreement are satisfied.

(d) TRANSPORTATION AGENCY's agreement to pay into escrow the amount stated above for the Conservation Easement Deed is contingent upon NGO satisfying the conditions in Section III (conditions precedent) and Section IV (conditions subsequent) to TRANSPORTATION AGENCY's payment pursuant to this Agreement:

### **III THE CONSERVATION FUND AGREES TO THE FOLLOWING CONDITIONS PRECEDENT:**

(a) NGO agrees that TRANSPORTATION AGENCY's fund contribution shall only be used for the direct acquisition costs of PROPERTY NAME in exchange for NGO's grant of a Conservation Easement Deed to TRANSPORTATION AGENCY.

(b) NGO certifies and warrants to the TRANSPORTATION AGENCY that to the NGO's actual knowledge its fee title acquisition of PROPERTY NAME was made consistent with the terms of the Section 6, Federal Endangered Species Act Grant Program grants, and with the approval of the Wildlife Conservation Board, or its authorized designee.

(c) NGO certifies and warrants that the Section 6, Federal Endangered Species Act Grant Program sub-grant agreement allows and authorizes TRANSPORTATION AGENCY's purpose in acquiring the Conservation Easement Deed, that is, for its transportation project mitigation and conservation values in perpetuity.

(d) NGO certifies to TRANSPORTATION AGENCY that to the NGO's actual knowledge there are no structures or improvements, encroachments, debris or hazardous materials existing on PROPERTY NAME other than one capped water well, the location of which has been disclosed to TRANSPORTATION AGENCY and County.

(e) NGO certifies to TRANSPORTATION AGENCY that to the NGO's actual knowledge, there are no previously granted easements, leases, licenses, permits or other such instruments existing on PROPERTY NAME that interfere or conflict with the purposes of the Conservation Easement Deed to be granted to TRANSPORTATION AGENCY.

(f) NGO certifies to TRANSPORTATION AGENCY that to the best of NGO's actual knowledge there is no pending litigation, notice of violation of any zoning regulation, ordinance, or law, or notice to correct such a violation, relating to PROPERTY NAME, and that NGO has no actual knowledge that any such action is threatened against PROPERTY NAME.

### **IV THE CONSERVATION FUND AGREES TO THE FOLLOWING CONDITIONS SUBSEQUENT:**

(a) Immediately following its receipt of fee title to PROPERTY NAME from \_\_\_\_\_, the NGO will grant to TRANSPORTATION AGENCY a Conservation Easement Deed covering the entirety of PROPERTY NAME

(b) Following its grant of a Conservation Easement Deed to TRANSPORTATION AGENCY, NGO will immediately transfer, convey or grant to the County fee title to PROPERTY NAME, encumbered by TRANSPORTATION AGENCY's Conservation Easement Deed.

(c) If any, or part of any, of the conditions precedent and/or conditions subsequent to TRANSPORTATION AGENCY's Funds contribution to this PROPERTY NAME acquisition, as described above, are not satisfied, TRANSPORTATION AGENCY, within its sole discretion may withhold or withdraw its Funds from the escrow established for this transaction.

(d) If TRANSPORTATION AGENCY elects to withdraw its Funds from this transaction, NGO agrees to immediately take any and all actions necessary, if any, within its power, to facilitate the return of all Funds to TRANSPORTATION AGENCY and at no cost to TRANSPORTATION AGENCY.

(e) After the close of escrow for the purchase agreement between \_\_\_\_\_ and NGO, and after receiving the recorded documents from the \_\_\_\_\_ County Recorder's Office, NGO agrees to provide the following documents to TRANSPORTATION AGENCY:

A copy of the:

1. Recorded grant deed from \_\_\_\_\_ to NGO,
2. Recorded Conservation Easement Deed granted by NGO to TRANSPORTATION AGENCY, and
3. Recorded grant deed from NGO to the GRANTOR.

(f) After the Elfin Closing, NGO further agrees to:

1. Notify TRANSPORTATION AGENCY in writing that the Elfin Closing has occurred and that all conditions precedent and subsequent to TRANSPORTATION AGENCY's release of funds into escrow have been satisfied,
2. Provide TRANSPORTATION AGENCY with a copy of a title insurance policy for PROPERTY NAME showing NGO in title, and
3. Provide TRANSPORTATION AGENCY with a copy of the Final Buyer's Closing Statement.

## **V MEDIA AND PRESS RELEASES**

NGO will acknowledge TRANSPORTATION AGENCY's contribution to the PROPERTY NAME acquisition in any news releases, media announcements, and other communications related to PROPERTY NAME. Prior to NGO's issuance of any news releases, media announcements and other communications related to PROPERTY NAME, all such communications shall be submitted to, reviewed and approved by both NGO and TRANSPORTATION AGENCY. TRANSPORTATION AGENCY's Communications Director, or her designee, must approve all communications, described herein, before their release.

## **VI ASSIGNMENT**

TRANSPORTATION AGENCY's contribution to the PROPERTY NAME acquisition is not assignable, transferable, or earmarked for transmittal to any transaction other than the PROPERTY NAME acquisition, described herein, and NGO's grant of a Conservation Easement Deed to TRANSPORTATION AGENCY.

## **VII NO PARTNERSHIP OR JOINT VENTURE ESTABLISHED**

For purposes of this Agreement, the relationship of the parties is that of independent entities and not as agents of each other or as joint venturers or partners.

#### **VIII MODIFICATION**

No modification, alteration, or variation of the terms of this Agreement shall be valid unless made in writing and signed by the parties hereto, and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.

#### **IX TIME IS OF THE ESSENCE**

Time is of the essence of each provision of this Agreement.

#### **X GOVERNING LAW AND VENUE**

This Agreement shall be governed, interpreted, and enforced in accordance with the laws of the State of STATE. Venue, if applicable, shall be in the GRANTOR.

#### **XI NO THIRD PARTY BENEFICIARIES**

Nothing in the provisions of this Agreement is intended to create duties, obligations to, or rights in third parties to this Agreement or affect the legal liability of the parties to this Agreement to third parties.

#### **XI EXECUTION**

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement effective on the date first written above,

TRANSPORTATION AGENCY

MANAGEMENT ENTITY

\_\_\_\_\_  
By:

\_\_\_\_\_  
By:

Exhibit A: Legal Description

Exhibit B: Letter of Concurrence and Commitment

## Transfer Money to Acquire Land and Endowment Funds to a Governmental Entity/Nonprofit/Special District Template

*Note to User: This template is used along with a "prohibited uses" document and a deed to convey property and endowments etc.*

This Transfer of Endowment Agreement ("Agreement") is between the State of \_\_\_\_\_, acting by and through its Department of Transportation ("\_\_\_\_\_ DOT") and the **GOVERNMENTAL ENTITY/NONPROFIT/SPECIAL DISTRICT** ("**ENTER ABBREVIATED NAME HERE**") and is effective as of \_\_\_\_\_, 20\_\_.

### RECITALS

- A. \_\_\_\_\_ DOT has legal authority pursuant to Government Code sections \_\_\_\_\_ to enter into this Agreement with **ENTITY NAME**. \_\_\_\_\_ DOT and **ENTITY NAME** are hereinafter referred to as the "PARTIES."
- B. \_\_\_\_\_ DOT intends to construct/has constructed [**insert a brief description of the transportation project here including the route, county, post mile limits, and the type of work performed**], referred to herein as "PROJECT".
- C. \_\_\_\_\_ DOT has determined that PROJECT will result in certain impacts [**DESCRIBE IMPACTS**] to [**DESCRIBE RESOURCES**], referred to herein as "IMPACTS."
- D. \_\_\_\_\_ DOT, in order to comply with the [**insert a brief description of the documentation that provides the justification for this mitigation such as an approved environmental document, permit, or other resource agency approval**] referred to herein as "PERMIT" [**change as appropriate**] and incorporated herein by this reference, must provide mitigation for IMPACTS, referred to herein as "MITIGATION REQUIREMENTS."
- E. For land held in fee:  
**GOVERNMENTAL ENTITY/NON PROFIT/SPECIAL DISTRICT** is **ENTITY DESCRIPTION**, and is authorized to hold property in fee simple for such purposes of conservation, protection, and management of land.

For Conservation Easements:

**GOVERNMENTAL ENTITY/NON PROFIT/SPECIAL DISTRICT** is **ENTITY DESCRIPTION**, and pursuant to Division 9 of the Public Resources Code, is authorized to hold conservation easements for such purposes of conservation, protection, and management of land.

**Add for nonprofit**

**NONPROFIT's** principal purpose is the direct protection or stewardship of land, water, or natural resources, including but not limited to, agricultural lands, wildlife habitat, wetlands, endangered species habitat, open-space areas, and outdoor recreational areas.

- F. **ENTITY NAME** desires to assist \_\_\_\_\_ DOT in satisfying the MITIGATION REQUIREMENTS.
- G. \_\_\_\_\_ DOT will pay **ENTITY NAME** \$ \_\_\_\_\_ to be held in trust as full payment for the acquisition of one or more properties (**PROPERTY(IES)**) that will be used to satisfy MITIGATION REQUIREMENTS.
- H. After the **PROPERTY(IES)** is/are acquired, \_\_\_\_\_ DOT will pay an endowment in the amount of \$ \_\_\_\_\_ (ENDOWMENT FUNDS) to **ENTITY NAME** to be held in trust as full payment for the perpetual stewardship of the **PROPERTY(IES)** in order to satisfy in full MITIGATION REQUIREMENTS for PROJECT. Stewardship encompasses a full range of activities, including, but not limited to, the management, maintenance and operation of the **PROPERTY(IES)**.

### **OPERATIVE PROVISIONS**

NOW, THEREFORE, in consideration of the covenants and agreements contained herein and for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the PARTIES agree as follows:

32. All obligations of \_\_\_\_\_ DOT under the terms of this Agreement, including, but not limited to the transfer of ENDOWMENT FUNDS are subject to the appropriation of resources by the Legislature, State Budget Act authority and the allocation of funds by the STATE TRANSPORTATION COMMISSION ("STATE TRANSPORTATION COMMISSION ACRONYM").
33. All applicable laws, rules and policies relating to the use of federal or state funds shall apply notwithstanding any other provisions of this Agreement.
34. **ENTITY NAME** shall locate and acquire or acquire **PROPERTY(IES)**, to be held in trust, to satisfy the MITIGATION REQUIREMENTS, as set forth in this Agreement. **ENTITY NAME's** obligation to acquire **PROPERTY(IES)** is conditioned on the property owners being willing sellers for consideration that does not exceed the appraised fair market value.
35. **ENTITY NAME** shall obtain any and all property rights and/or rights of entry required. Said rights of entry shall also include rights for \_\_\_\_\_ DOT personnel to enter the property.
36. **ENTITY NAME** shall provide property appraisals for review and approval by \_\_\_\_\_ DOT prior to any expenditure related to property acquisition. Appraisals shall be provided at **ENTITY NAMES's** expense and shall not be reimbursable under this Agreement.
37. **ENTITY NAME** shall submit an invoice to \_\_\_\_\_ DOT within thirty (30) calendar days of execution of this Agreement in the amount of \$\_\_\_\_\_, this amount represents \_\_\_\_\_ DOT full payment for the acquisition of the **PROPERTY(IES)**.

38. In the event that **ENTITY NAME** is not able to acquire **PROPERTY(IES)** within \_\_\_\_ days/months/years following the execution of this agreement **ENTITY NAME** will notify \_\_\_\_\_ DOT in writing and return the \$ \_\_\_\_ to \_\_\_\_\_ DOT.
39. \_\_\_\_\_ DOT agrees to transfer the ENDOWMENT FUNDS to **ENTITY NAME**, subject to Provision 1 above, within **# OF DAYS** ( ) following recordation of the deed/conservation easement.
40. **ENTITY NAME** shall use one hundred percent (100%) of \_\_\_\_\_ DOT' funds provided pursuant to this Agreement, in order to satisfy the obligations and responsibilities set forth in this Agreement and the RMP and HMMP.
41. **ENTITY NAME** shall use the ENDOWMENT FUNDS for the perpetual stewardship of the **PROPERTY(IES)**. **ENTITY NAME** agrees to manage **PROPERTY(IES)** as specified by the terms of this Agreement and as more particularly described in the Resources Management Plan ("RMP")/Habitat Mitigation and Monitoring Plan ("HMMP"), attached hereto as Exhibit **LETTER** and made a part of this Agreement.
42. **ENTITY NAME** shall hold, manage, invest, and reinvest the ENDOWMENT FUNDS in a separate and permanent trust account ("ACCOUNT"). **ENTITY NAME** agrees to collect and re-deposit income ("INCOME"), including interest, dividends, and capital gains from the management, investment and reinvestment of the ENDOWMENT FUNDS into the ACCOUNT.
43. **ENTITY NAME** agrees that a portion of the ENDOWMENT FUNDS, specifically the amount of \$ \_\_\_\_ hereinafter referred to as "ENDOWMENT PRINCIPAL," shall be non-wasting, not subject to invasion and shall not decrease in value through expenditure and the **ENTITY NAME** shall implement an investment strategy intended to keep up with inflation. The parties agree that the amount of INCOME necessary to keep up with inflation shall be determined by **ENTITY NAME** by adjusting the ENDOWMENT PRINCIPAL by a percentage equal to the percentage increase, if any, in the STATE Consumer Price Index, All Items (1982-1984 = 100), for All Urban Consumers for STATE, published by the STATE Department of Industrial Relations, Divisions of Labor and Statistics and Research. **ENTITY NAME** further agrees that the portion of INCOME required for ENDOWMENT PRINCIPAL growth commensurate with inflation shall remain in the ACCOUNT and shall become ENDOWMENT PRINCIPAL.
44. **ENTITY NAME** shall hold and manage the ENDOWMENT FUNDS consistent with Government Code Section \_\_\_\_\_, subsection \_\_\_\_\_ and with the Uniform Prudent Management of Institutional Funds Act (Part 7 commencing with Section 18501 of Division 9 of the Probate Code).
45. It is understood and agreed that any ENDOWMENT FUNDS exceeding the ENDOWMENT PRINCIPAL amount as well as any income not necessary to provide for ENDOWMENT PRINCIPAL growth commensurate with inflation, will only be utilized by **ENTITY NAME** to satisfy **ENTITY NAME** obligations and duties as set forth in this agreement.
46. **ENTITY NAME** shall, on or before **DATE** of each year, submit to \_\_\_\_\_ DOT a written, itemized expenditure statement for the ACCOUNT. The statement shall include \_\_\_\_\_ **NON PROFIT/SPECIAL DISTRICT** "the same information as required by Internal Revenue Service Form 990."

FOR PROFIT ENTITY \_\_\_\_\_

The annual statement shall be submitted to:

NAME  
ADDRESS

47. All work performed by ENTITY NAME, or performed on ENTITY NAME's behalf, shall be performed in accordance with all local, state and federal laws, regulations, policies, procedures, and standards.
48. ENTITY NAME agrees to obtain any and all environmental approvals and/or resource agency agreements, permits, and/or approvals that may be required for activities associated with the management, maintenance and operation of the PROPERTY(IES) and to fully comply with any terms and conditions thereof.
49. ENTITY NAME may transfer or assign the ownership, uses, management, and maintenance responsibilities in PROPERTY(IES) only with the prior written consent of \_\_\_\_\_ DOT and the PERMITTING AGENCY (OR AGENCIES). If ENTITY NAME transfers or assigns its rights and obligations in the PROPERTY(IES), ENTITY NAME shall (at the time of the transfer or assignment) also transfer all remaining ENDOWMENT FUNDS to the transferee (including all interest incurred thereon) only if the transferee agrees to fulfill and be responsible for all of the duties and responsibilities of the ENTITY NAME under this Agreement; and ENTITY NAME shall remain fully liable for its duties and responsibilities prior to the transfer.
50. ENTITY NAME agrees that if \_\_\_\_\_ DOT determines that the PROPERTY(IES) is/are not being held, managed, monitored or stewarded in accordance with the RMP and/or HMMP and in furtherance of the perpetual stewardship of the PROPERTY(IES), then the PROPERTY(IES) and the remaining portion of the ENDOWMENT FUNDS, including accrued interest, shall revert to \_\_\_\_\_ DOT upon delivery of its written notice.
51. ENTITY NAME agrees that if \_\_\_\_\_ DOT determines that the ENDOWMENT FUNDS are not being used in accordance with the RMP and/or HMMP and for the perpetual stewardship of the PROPERTY(IES), then the PROPERTY(IES) and the remaining portion of the ENDOWMENT FUNDS, including accrued interest, shall revert to \_\_\_\_\_ DOT upon delivery of its written notice.
52. ENTITY NAME agrees that in the event of a condemnation action or bankruptcy, the PROPERTY(IES) shall be transferred and or assigned to \_\_\_\_\_ DOT. ENTITY NAME further agrees to pay \_\_\_\_\_ DOT the remaining portion of the ENDOWMENT FUNDS, including accrued interest thereon, that were provided to ENTITY NAME for the perpetual stewardship of the PROPERTY(IES). The remaining portion of the ENDOWMENT FUNDS, including accrued interest thereon, to be paid to \_\_\_\_\_ DOT shall be proportionate to the management costs of the amount of property that is being acquired through condemnation.
53. If ENTITY NAME ever ceases to function as a (INSERT TYPE OF ENTITY) and/or is dissolved then ENTITY NAME agrees to assign all of its rights and obligations regarding the PROPERTY(IES) and the ENDOWMENT FUNDS, including accrued interest thereon, to an entity or organization that will continue the perpetual stewardship of the PROPERTY(IES), after receiving prior written concurrence

by \_\_\_\_\_ DOT. **ENTITY NAME** shall take all necessary steps and execute any and all necessary paperwork to effectuate this provision at **ENTITY NAME's** own expense.

54. **ENTITY NAME** shall retain all books, documents, papers, accounting records, and other evidence pertaining to costs incurred, including support data for cost proposals, and to make such materials available at the respective offices of \_\_\_\_\_ DOT at all reasonable times for three (3) years after the termination date of this Agreement. \_\_\_\_\_ DOT, the Federal Highway Administration, or any duly authorized representative of the Federal Government shall have access to any books, records, and documents of **ENTITY NAME** that are pertinent to this Agreement for audits, examinations, excerpts, and transactions, and copies thereof shall be furnished when requested.
55. \_\_\_\_\_ DOT will obtain written confirmation from **PERMITTING AGENCY (OR AGENCIES)** that all permit requirements regarding the **PROPERTY(IES)** have been satisfied and will provide a copy of such confirmation to **ENTITY NAME (USE THIS ARTICLE ONLY WHEN APPLICABLE)**.
56. Neither \_\_\_\_\_ DOT nor any officer or employee thereof is responsible for any injury, damage, or liability occurring by reason of anything done or omitted to be done by **ENTITY NAME** and/or its agents under or in connection with any work, authority, or jurisdiction conferred upon **ENTITY NAME** under this Agreement. It is understood and agreed that **ENTITY NAME** will fully defend, indemnify, and save harmless \_\_\_\_\_ DOT and all of its officers and employees from all claims, suits, or actions of every name, kind, and description brought forth under, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of anything done or omitted to be done by **ENTITY NAME** and/or its agents under this Agreement.
57. **PUBLIC ENTITY/NON PROFIT/FOR-PROFIT** agrees to accept **PROPERTY(IES)** in their current environmental condition and setting, including, but not limited to, the presence of hazardous materials as described in the **[SPECIFY INITIAL SITE ASSESSMENT (ISA) OR OTHER DOCUMENT(S)]**. **PUBLIC ENTITY/NON PROFIT/FOR-PROFIT** has received and reviewed [a copy/copies] of the above-referenced **[SPECIFY ISA OR OTHER DOCUMENT(S)]**. **Brief definition or description of the document.** Upon recordation of the DEED in the County Recorder's Office, \_\_\_\_\_ DOT will not be responsible for any present or future remediation of said hazardous materials.
58. In the event of any breach of this Agreement by either party, the other party may enforce this Agreement by any means available at law or in equity. In the event of litigation, mediation or arbitration to resolve any breach of, or dispute related to, this Agreement, each party agrees to pay for its own attorney's fees, costs and expenses, without regard to who ultimately prevails.
59. A failure by either party to enforce any provision of this Agreement shall not be construed as a continuing waiver, or as a waiver of the right to compel enforcement of that provision.
60. This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one agreement that shall be binding on all of the parties, notwithstanding that all of the parties are not a signatory to the original or the same counterpart. If any provision of this Agreement is held invalid, the other provisions shall not be affected thereby.



61. No alteration or variation of the terms of this Agreement shall be valid unless made by a formal written amendment executed by the parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.
62. Nothing within the provisions of this Agreement is intended to create duties or obligations to or rights in third parties who are not parties to this Agreement or to affect the legal liability of either party to the Agreement by imposing any standard of care different from the standard of care imposed by law.
63. Each party to this Agreement warrants that it and the respective signatories have full right and authority to enter into this Agreement and that each party is an authorized legal entity under the laws of the State of \_\_\_\_\_.
64. This Agreement shall be governed by the laws of the State of \_\_\_\_\_ without regard to choice of law principles.

**STATE OF \_\_\_\_\_**  
**Department of Transportation**

**ENTITY NAME**

By: \_\_\_\_\_  
Deputy District Director

By: \_\_\_\_\_

Approved as to form and procedure:

Approved as to form:

\_\_\_\_\_  
Attorney  
Department of Transportation

\_\_\_\_\_  
General Counsel

Certified as to budgeting of funds:

\_\_\_\_\_  
District Budget Manager

Certified as to financial terms and  
policies:

---

Accounting Administrator

## Template for the Transfer of Endowment Funds to a Governmental Entity/Nonprofit/Special District

*Note to User: This template is used along with a "prohibited uses" document and a deed to convey property and endowments etc.*

This Transfer of Endowment Agreement ("Agreement") is between the State of \_\_\_\_\_, acting by and through its Department of Transportation ("\_\_\_\_\_ DOT") and the **GOVERNMENTAL ENTITY/NONPROFIT/SPECIAL DISTRICT** ("**ENTER ABBREVIATED NAME HERE**") and is effective as of \_\_\_\_\_, 20\_\_.

### RECITALS

- A. \_\_\_\_\_ DOT has legal authority pursuant to Government Code sections \_\_\_\_\_ to enter into this Agreement with **ENTITY NAME**. \_\_\_\_\_ DOT and **ENTITY NAME** are hereinafter referred to as the "PARTIES."
- B. \_\_\_\_\_ DOT intends to construct/has constructed [**insert a brief description of the transportation project here including the route, county, post mile limits, and the type of work performed**], referred to herein as "PROJECT".
- C. \_\_\_\_\_ DOT has determined that PROJECT will result in certain impacts [**DESCRIBE IMPACTS**] to [**DESCRIBE RESOURCES**], referred to herein as "IMPACTS."
- D. \_\_\_\_\_ DOT, in order to comply with the [**insert a brief description of the documentation that provides the justification for this mitigation such as an approved environmental document, permit, or other resource agency approval**] referred to herein as "PERMIT" [**change as appropriate**] and incorporated herein by this reference, must provide mitigation for IMPACTS, referred to herein as "MITIGATION REQUIREMENTS."
- E. **ENTITY NAME** owns \_\_\_\_\_ parcel(s) of real property ("**PROPERTY(IES)**"), which consist(s) of a total of approximately \_\_\_\_\_ acres, located \_\_\_\_\_, more particularly described in **EXHIBIT A**, attached hereto and made a part of this Agreement.
- F. The conservation values of **PROPERTY(IES)** include...**Description of habitat.....**, referred to herein as "**CONSERVATION VALUES**".
- G. **GOVERNMENTAL ENTITY/NONPROFIT/SPECIAL DISTRICT** is **ENTITY DESCRIPTION**, and is authorized to hold the **PROPERTY(IES)** in fee simple for such purposes of conservation, protection, and management of land.

For Conservation Easements:

GOVERNMENTAL ENTITY/NON PROFIT/SPECIAL DISTRICT is ENTITY DESCRIPTION, and pursuant to Division 9 of the Public Resources Code, is authorized to hold conservation easements for such purposes of conservation, protection, and management of land.

Add for nonprofit: NONPROFIT's principal purpose is the direct protection or stewardship of land, water, or natural resources, including but not limited to, agricultural lands, wildlife habitat, wetlands, endangered species habitat, open-space areas, and outdoor recreational areas.

- H. \_\_\_\_\_ DOT will pay an endowment in the amount of \$ \_\_\_\_\_ ("ENDOWMENT FUNDS") to ENTITY NAME to be held in trust as full payment for the perpetual stewardship of the PROPERTY(IES) in order to satisfy in full MITIGATION REQUIREMENTS for PROJECT. Stewardship encompasses a full range of activities, including, but not limited to, the management, maintenance and operation of the PROPERTY(IES).
- I. \_\_\_\_\_ DOT and ENTITY NAME desire and intend that the PROPERTY(IES) be permanently restricted to preserve and protect in perpetuity the CONSERVATION VALUES and to prevent any use of the PROPERTY(IES) that will impair or interfere with the CONSERVATION VALUES.

#### **OPERATIVE PROVISIONS**

NOW, THEREFORE, in consideration of the covenants and agreements contained herein and for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the PARTIES agree as follows:

1. All obligations of \_\_\_\_\_ DOT under the terms of this Agreement, including, but not limited to the transfer of ENDOWMENT FUNDS are subject to the appropriation of resources by the Legislature, State Budget Act authority and the allocation of funds by the STATE TRANSPORTATION COMMISSION ("STATE TRANSPORTATION COMMISSION ACRONYM").
2. All applicable laws, rules and policies relating to the use of federal or state funds shall apply notwithstanding any other provisions of this Agreement.
3. \_\_\_\_\_ DOT will transfer the amount of \$ \_\_\_\_\_ to ENTITY NAME. This figure represents \_\_\_\_\_ DOT' lump sum total amount for the establishment of ENDOWMENT FUNDS for the perpetual management, maintenance and operation of the PROPERTY(IES).
4. ENTITY NAME agrees to use the ENDOWMENT FUNDS for the perpetual stewardship of the PROPERTY(IES) to ensure that the CONSERVATION VALUES are preserved and protected in perpetuity. ENTITY NAME agrees to manage PROPERTY(IES) as specified by the terms of this Agreement and as more particularly described in the Resources Management Plan ("RMP")/Habitat Mitigation and Monitoring Plan ("HMMP"), attached hereto as Exhibit LETTER and made a part of this Agreement.

5. **ENTITY NAME** shall use one hundred percent (100%) of \_\_\_\_\_ DOT' funds provided pursuant to this Agreement, in order to satisfy the obligations and responsibilities set forth in this Agreement and the RMP and HMMP.
6. **ENTITY NAME** shall hold, manage, invest, and reinvest the Endowment Funds in a separate and permanent trust account ("ACCOUNT"). **ENTITY NAME** agrees to collect and re-deposit income ("INCOME"), including interest, dividends, and capital gains from the management, investment and reinvestment of the ENDOWMENT FUNDS into the ACCOUNT.
7. **ENTITY NAME** agrees that a portion of the ENDOWMENT FUNDS, specifically the amount of \$\_\_\_\_\_ hereinafter referred to as "ENDOWMENT PRINCIPAL," shall be non-wasting, not subject to invasion and shall not decrease in value through expenditure and the **ENTITY NAME** shall implement an investment strategy intended to keep up with inflation. The parties agree that the amount of INCOME necessary to keep up with inflation shall be determined by **ENTITY NAME** by adjusting the ENDOWMENT PRINCIPAL by a percentage equal to the percentage increase, if any, in the STATE Consumer Price Index, All Items (1982-1984 = 100), for All Urban Consumers for STATE, published by the STATE Department of Industrial Relations, Divisions of Labor and Statistics and Research. **ENTITY NAME** further agrees that the portion of INCOME required for ENDOWMENT PRINCIPAL growth commensurate with inflation shall remain in the ACCOUNT and shall become ENDOWMENT PRINCIPAL.
8. **ENTITY NAME** shall hold and manage the ENDOWMENT FUNDS consistent with Government Code Section \_\_\_\_\_, subsection \_\_\_\_\_ and with the Uniform Prudent Management of Institutional Funds Act (Part 7 commencing with Section 18501 of Division 9 of the Probate Code).
9. It is understood and agreed that any ENDOWMENT FUNDS exceeding the ENDOWMENT PRINCIPAL amount as well as any INCOME not necessary to provide for ENDOWMENT PRINCIPAL growth commensurate with inflation, will only be utilized by **ENTITY NAME** to satisfy **ENTITY NAME's** obligations and duties as set forth in this agreement.
10. **ENTITY NAME** shall, on or before **DATE** of each year, submit to \_\_\_\_\_ DOT a written, itemized expenditure statement for the ACCOUNT. The statement shall include \_\_\_\_\_  
**NON PROFIT/SPECIAL DISTRICT** "the same information as required by Internal Revenue Service Form 990." **FOR PROFIT ENTITY** \_\_\_\_\_

The annual statement shall be submitted to:

**NAME**

**ADDRESS**

11. All work performed by **ENTITY NAME**, or performed on **ENTITY NAME's** behalf, shall be performed in accordance with all local, state and federal laws, regulations, policies, procedures, and standards.
12. **ENTITY NAME** agrees to obtain any and all environmental approvals and/or resource agency agreements, permits, and/or approvals that may be required for activities associated with the management, maintenance and operation of the **PROPERTY(IES)** and to fully comply with any terms and conditions thereof.

13. **ENTITY NAME** may transfer or assign the ownership, uses, management, and maintenance responsibilities in **PROPERTY(IES)** only with the prior written consent of \_\_\_\_\_ DOT and the **PERMITTING AGENCY (OR AGENCIES)**. If **ENTITY NAME** transfers or assigns its rights and obligations in the **PROPERTY(IES)**, **ENTITY NAME** shall (at the time of the transfer or assignment) also transfer all remaining ENDOWMENT FUNDS to the transferee (including all interest incurred thereon) only if the transferee agrees to fulfill and be responsible for all of the duties and responsibilities of the **ENTITY NAME** under this Agreement; and **ENTITY NAME** shall remain fully liable for its duties and responsibilities prior to the transfer.
14. \_\_\_\_\_ DOT determines that the **PROPERTY(IES)** is/are not being held, managed, monitored or stewarded in accordance with the RMP and/or HMMP and in furtherance of the perpetual preservation and protection of the CONSERVATION VALUES, then the remaining portion of the ENDOWMENT FUNDS, including accrued interest, shall revert back to \_\_\_\_\_ DOT upon delivery of its written notice.
15. **ENTITY NAME** agrees that in the event of a condemnation action or bankruptcy, **ENTITY NAME** will remit to \_\_\_\_\_ DOT the remaining portion of the ENDOWMENT FUNDS, including accrued interest thereon, which will be held in a separate account and in trust specifically for the perpetual management, maintenance and operation of the **PROPERTY(IES)**. The remaining portion of the ENDOWMENT FUNDS, including accrued interest thereon, to be paid to \_\_\_\_\_ DOT shall be proportionate to the management costs of the amount of property that is being acquired through condemnation.
16. If **ENTITY NAME** ever ceases to function as a **(INSERT TYPE OF ENTITY)** and/or is dissolved then **ENTITY NAME** agrees to assign all of its rights and obligations regarding the **PROPERTY(IES)** and the ENDOWMENT FUNDS, including accrued interest thereon, to an entity or organization that will continue the perpetual stewardship of the **PROPERTY(IES)**, after receiving the prior written agreement by \_\_\_\_\_ DOT. **ENTITY NAME** shall take all necessary steps and execute any and all necessary paperwork to effectuate this provision at the **ENTITY NAME's** own expense.
17. **ENTITY NAME** shall retain all books, documents, papers, accounting records, and other evidence pertaining to costs incurred, including support data for cost proposals, and to make such materials available at the respective offices of \_\_\_\_\_ DOT at all reasonable times for three (3) years after the termination date of this Agreement. \_\_\_\_\_ DOT, the Federal Highway Administration, or any duly authorized representative of the Federal Government shall have access to any books, records, and documents of **ENTITY NAME** that are pertinent to this Agreement for audits, examinations, excerpts, and transactions, and copies thereof shall be furnished when requested.
18. \_\_\_\_\_ DOT will obtain written confirmation from **PERMITTING AGENCY (OR AGENCIES)** that all permit requirements regarding the **PROPERTY(IES)** have been satisfied and will provide a copy of such confirmation to **ENTITY NAME (USE THIS ARTICLE ONLY WHEN APPLICABLE)**.
19. Neither \_\_\_\_\_ DOT nor any officer or employee thereof is responsible for any injury, damage, or liability occurring by reason of anything done or omitted to be done by **ENTITY NAME** and/or its agents under or in connection with any work, authority, or jurisdiction conferred upon **ENTITY NAME** under this Agreement. It is understood and agreed that **ENTITY NAME** will fully defend,

indemnify, and save harmless \_\_\_\_\_ DOT and all of its officers and employees from all claims, suits, or actions of every name, kind, and description brought forth under, but not limited to, tortious, contractual, inverse condemnation, or other theories or assertions of liability occurring by reason of anything done or omitted to be done by ENTITY NAME and/or its agents under this Agreement.

20. It is mutually agreed that ENTITY NAME shall fully defend, indemnify and save harmless \_\_\_\_\_ DOT and all its officers and employees from all claims, suits or actions related to environmental theories or assertions of liability, including, but not limited to, claims or lawsuits related to the presence of hazardous materials as described in the [SPECIFY ISA OR OTHER DOCUMENT(S)], provided that the actions, events, injuries, damages, or losses giving rise to any claims, suits or actions occurred on or arise after the date of the recordation of the DEED.
21. In the event of any breach of this Agreement by either party, the other party may enforce this Agreement by any means available at law or in equity. In the event of litigation, mediation or arbitration to resolve any breach of, or dispute related to, this Agreement, each party agrees to pay for its own attorney's fees, costs and expenses, without regard to who ultimately prevails.
22. A failure by either party to enforce any provision of this Agreement shall not be construed as a continuing waiver, or as a waiver of the right to compel enforcement of that provision.
23. This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one agreement that shall be binding on all of the parties, notwithstanding that all of the parties are not a signatory to the original or the same counterpart. If any provision of this Agreement is held invalid, the other provisions shall not be affected thereby.
24. No alteration or variation of the terms of this Agreement shall be valid unless made by a formal written amendment executed by the parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the parties hereto.
25. Nothing within the provisions of this Agreement is intended to create duties or obligations to or rights in third parties who are not parties to this Agreement or to affect the legal liability of either party to the Agreement by imposing any standard of care different from the standard of care imposed by law.
26. Each party to this Agreement warrants that it and the respective signatories have full right and authority to enter into this Agreement and that each party is an authorized legal entity under the laws of the State of \_\_\_\_\_.
27. This Agreement shall be governed by the laws of the State of \_\_\_\_\_ without regard to choice of law principles.

STATE OF \_\_\_\_\_  
Department of Transportation

ENTITY NAME

By: \_\_\_\_\_

By: \_\_\_\_\_

Deputy District Director

Approved as to form and procedure:

**Approved as to form:**

---

Attorney  
Department of Transportation

---

**General Counsel**

Certified as to budgeting of funds:

---

District Budget Manager

Certified as to financial terms and  
policies:

---

Accounting Administrator



## ***Easement Templates***

### **Conservation Easement Deed and Recitals**

RECORDING REQUESTED BY AND )  
WHEN RECORDED MAIL TO: )  
 )  
GRANTEE )  
 )  
AND A COPY TO: )  
GRANTEE )  
Attention: Real Estate Services

#### **CONSERVATION EASEMENT DEED**

This Conservation Easement Deed is made this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by - \_\_\_\_\_, a STATE nonprofit corporation pursuant to Section 501(c)(3) of the Internal Revenue Code, ("Grantor" or "GRANTOR"), in favor of the AGENCY GRANTOR, (GRANT) a legislatively created regional government agency ("Grantee" or "GRANT"), based on the following facts:

#### **RECITALS**

Whereas, pursuant to STATE Civil Code Section \_\_\_\_\_ Grantor is a non-profit corporation qualified to do business in this state, and has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use; and

Whereas, Grantor voluntarily conveys this Conservation Easement Deed to Grantee (Acquisition); and

Whereas, Grantee is a regional government agency authorized to acquire and hold title to real property and may acquire and hold Conservation Easement Deeds pursuant to STATE Civil Code Section \_\_\_\_\_; and

Whereas, on approximately \_\_\_\_\_, \_\_\_\_\_ willingly sold its underlying fee title to the \_\_\_\_\_ property (the Easement Property), which consists of 234 acres, as more specifically described in EXHIBIT A, which is attached hereto and incorporated herein by this reference, to Grantor; and

Whereas, PROPERTY NAME is located along \_\_\_\_\_; and

Whereas, in \_\_\_\_\_ the Grantee's Board of Directors (Grantee Board) adopted the \_\_\_\_\_ Regional Transportation Plan (RTP) entitled \_\_\_\_\_, The Transportation Plan for the \_\_\_\_\_ Region; and

Whereas, the RTP includes a list of transportation network improvements and other transportation programs that are intended to improve the mobility of people and goods throughout the region; and

Whereas, the \_\_\_\_\_ Expenditure Plan was adopted....

Whereas, the \_\_\_\_\_ program is intended, in part, to provide for early large-scale acquisition and management of important habitat areas and to create a reliable approach for funding required mitigation for future transportation improvements, thereby enabling the purchase of habitat that may become more scarce in the future, reducing future costs and accelerating project delivery; and

Whereas, proactive mitigation of transportation projects would provide an opportunity to implement the TRANSPORTATION AND CONSERVATION PLAN by providing opportunities for early large-scale conservation, permit streamlining, and certain cost savings; and

Whereas, the Easement Property possesses wildlife and habitat values (collectively, "Conservation Values") of great importance to the people of the State of STATE; the United States Fish and Wildlife Service, the STATE Department of Fish and Game (DFG), the STATE Wildlife Conservation Board, the Grantor and Grantee; and

Whereas, PROPERTY NAME is located within the Pre-approved Mitigation Area of the proposed Multiple Species Conservation Program, and is also identified by the adjacent Multiple Habitat Conservation Program as a Core \_\_\_\_\_ Conservation area; and

Whereas, the purpose of the Acquisition of the \_\_\_\_\_-acre PROPERTY NAME is to (1) provide mitigation for transportation projects funded by TRANSPORTATION AGENCY; (2) protect critical habitat for the STATE \_\_\_\_\_ habitats; (3) further implement the \_\_\_\_\_ Natural Community Conservation Planning (NCCP) efforts in \_\_\_\_\_; and (4) enhance a general wildlife corridor between larger habitat areas; and

Whereas, the Acquisition will help to enhance existing efforts to conserve \_\_\_\_\_ habitats that support \_\_\_\_\_; and

Whereas, on DATE, Grantor entered into a contract to purchase PROPERTY NAME from NGO, a private nonprofit corporation; and

Whereas, on DATE, the COUNTY – GRANTEE entered into an Agreement for Reimbursement of Non-Refundable Deposit with Grantor, which contemplated the ultimate purchase of PROPERTY NAME by the County, subject to various conditions, including approval by the Grantee's Executive Director under the TRANSPORTATION AGENCY Advance Mitigation Program, and allocation of funds from state, federal and local sources, including Grantee's TRANSPORTATION AGENCY funds, to cover Grantor's purchase costs; and

Whereas, on August 25, 2008, Grantee obtained a Concurrence and Commitment letter from and the U. S. Fish and Wildlife Service (USFWS) (collectively "Wildlife Agencies"), to utilize PROPERTY NAME as mitigation for future regional and local transportation projects; and

Whereas, on DATE; the County Board of Supervisors approved the acquisition of PROPERTY NAME from Grantor; and

Whereas on DATE, the Grantee's Board approved the TRANSPORTATION AGENCY Advance Mitigation Program property acquisition criteria and process in conformance with the TRANSPORTATION

AGENCY Advance Mitigation Program \_\_\_\_\_ Memorandum of Agreement signed on DATE by Grantee, DOT, and the Wildlife Agencies; and

Whereas, on October 17, 2008, the Executive Director of Grantee, in reliance upon the Wildlife Agencies' August 25, 2008, Concurrence and Commitment letter, and contingent upon the Wildlife Conservation Board's approval of Grantee's use of PROPERTY NAME for mitigation purposes, authorized Grantee's \$\_\_\_\_\_ contribution towards the acquisition cost of PROPERTY NAME under the TRANSPORTATION AGENCY Advance Mitigation Program \_\_\_\_\_; and

Whereas, Grantee's contribution is approximately \_\_% of the purchase price of PROPERTY NAME, equivalent to the fair market value of approximately \_\_\_\_ acres of the \_\_\_\_-acre PROPERTY NAME; and

Whereas, the terms and conditions of Grantee's contribution to the purchase price of PROPERTY NAME are set forth in the Fund Transfer Agreement, which is attached hereto as Exhibit E and incorporated herein by reference; and

Whereas, the County and Grantor, together, purchased the balance of PROPERTY NAME's \_\_ acres. NGO, as a subgrantee of two Section 6, Federal Endangered Species Act Grant Program grants, used these grant monies, and County contributed \_\_% matching funds to the Section 6 Grant monies to purchase the balance of PROPERTY NAME's \_\_ acres; and

Whereas, following Grantor's acceptance and recordation of \_\_\_\_\_'s Grant Deed to PROPERTY NAME, the Grantor will grant to Grantee a "Conservation Easement Deed" (as defined herein) over the Easement Property, which covers the entirety of PROPERTY NAME, as described in Exhibit A; and

Whereas, immediately following Grantor's Conservation Easement Deed granted to Grantee, Grantor will convey, transfer and grant to County fee title to PROPERTY NAME subject to Grantee's Conservation Easement Deed; and

Whereas, concurrently with the execution and delivery of this Conservation Easement Deed, County and Grantee are executing a Land Management Agreement setting forth the obligations of County, or its competitively procured contractor, to manage the Easement Property to maintain its conservation and mitigation values in perpetuity. Also included in the Land Management Agreement are Grantee's endowment set-aside and payment provisions for annual stewardship, maintenance and monitoring costs of the Easement Property. The Land Management Agreement is attached hereto as EXHIBIT B and incorporated herein by this reference; and

Whereas, in reliance upon the August 25, 2008 Concurrence and Commitment letter sent to Grantee from the Wildlife Agencies attached hereto and incorporated herein by this reference as EXHIBIT C, Grantee will use the Conservation Easement Deed (defined herein) as mitigation for \_\_\_\_\_ TRANSPORTATION PLAN Projects.

Now, therefore, the Parties agree as follows:

#### **1. COVENANTS, TERMS, CONDITIONS AND RESERVATIONS**

In consideration of the above recitals, which are incorporated herein as a substantive part of the Conservation Easement Deed, and for other good and valuable consideration, the receipt and sufficiency

of which is hereby acknowledged, and pursuant to STATE law, including STATE Civil Code Section-\_\_\_\_\_, et seq., Grantor hereby voluntarily grants, transfers and conveys to Grantee a Conservation Easement Deed in perpetuity over the Easement Property of the nature and character and to the extent defined herein as the "Conservation Easement Deed."

(i) The baseline condition of the Easement Property will be reduced to a writing developed consistent with the terms of the Land Management Agreement within one year of the date this Conservation Easement Deed is recorded.

(ii) This Conservation Easement Deed shall run with the land and be binding on Grantor's and County's heirs, successors, assigns, lessees, representatives, and other occupiers or users of the Easement Property or any portion of it.

## **2. PURPOSES OF CONSERVATION EASEMENT DEED**

The Purposes of this Conservation Easement Deed are to:

(i) Preserve and protect the Conservation Values of the Easement Property; and

(ii) Ensure that this Conservation Easement Deed will confine use of the Easement Property to such activities that are consistent with those purposes, including, without limitation, the preservation, restoration and enhancement of native species and their habitats on the Easement Property; and

(iii) Further implement the \_\_\_\_\_ Natural Community Conservation Planning efforts in \_\_\_\_\_; and

(iv) Enhance a general wildlife corridor between larger habitat areas; and

(v) Provide mitigation for projected upland impacts of Transportation projects, as described in that Plan, and as more specifically detailed in Exhibit C, (August 25, 2008 Letter of Concurrence and Commitment from the Wildlife Agencies).

## **3. GRANT OF RIGHTS TO GRANTEE**

To accomplish the purposes of this Conservation Easement Deed as described in Section 2, Grantor hereby grants to Grantee, its successors, assigns, agents, contractors and consultants the following rights:

(i) To preserve and protect the Conservation Values of the Easement Property; and

(ii) To enter upon the Easement Property to monitor compliance with and enforce the terms of this Conservation Easement Deed, and the Land Management Agreement; and

(iii) To grant a revocable license to County/GRANTEE, its agents, contractors or assigns to perform the duties and obligations of the County/GRANTEE under the terms and conditions of the Land Management Agreement; and

(iv) To prevent any activity on or use of the Easement Property that is inconsistent with the purposes of this Conservation Easement Deed and to require the restoration of such areas or features of the

Easement Property that may be damaged or threatened by any act, failure to act, or any use that is inconsistent with the Purposes of this Conservation Easement Deed; and

(v) To protect all mineral, air and water rights necessary and to sustain the biological resources of the Easement Property, provided that any exercise or sale of such rights by Grantee shall not result in conflict with the baseline condition of the Easement Property; and

(vi) The right to transfer, convey, sell, exchange or assign this Conservation Easement Deed, provided any exercise of such right must preserve the Easement Property consistent with the Land Management Agreement and this Conservation Easement Deed; and

(vii) The right to enforce the terms and conditions of the Conservation Easement Deed by injunctive or other lawful means.

#### **4. PERMITTED AND PROHIBITED USES OF THE EASEMENT PROPERTY**

The uses of the Easement Property described in the attached Exhibit D, which is attached hereto and incorporated herein by this reference, are agreed by Grantee and Grantor to be permitted or prohibited at the Easement Property.

#### **5. OBLIGATIONS OF GRANTOR**

To accomplish the Purposes of this Conservation Easement Deed as described in Section 2, Grantor, its heirs, successors or assigns shall:

(i) Undertake all reasonable actions to prevent the unlawful entry and trespass by persons whose activities may degrade or harm the Easement Property; and

(ii) Comply with the terms and conditions of this Conservation Easement Deed and cooperate with Grantee in protecting the Easement Property; and

(iii) Repair and restore damage to the Easement Property directly caused by Grantor, Grantor's guests, licensees, permittees, representatives, employees or agents; and

(iv) Undertake all necessary actions to perfect Grantee's rights under this Conservation Easement Deed; and

(v) Guarantee access to Grantee, in perpetuity, for Grantee to accomplish the Grantee's obligations, as set forth in this Conservation Easement Deed or the Land Management Agreement.

(vi) Grantor assumes responsibility for confirming whether the Wildlife Agencies, the Wildlife Conservation Board or any other federal, state or local entity must approve Grantor's transfer PROPERTY NAME (i.e. of the underlying fee title to the Property serving the Conservation Easement Deed) and obtaining such approvals if necessary.

(vii) Cooperate with and accommodate reasonable requests made by Grantee, the Wildlife Conservation Board, and/or the Wildlife Agencies related to this Conservation Easement Deed and the Land Management Agreement associated therewith.

#### **6. GRANTOR'S WARRANTIES**

(i) Grantor, its heirs, successors or assigns agrees to promptly cooperate with and accommodate any of Grantee's reasonable requests regarding the baseline condition of the Easement Property.

(ii) Grantor certifies to Grantee and to County that to the Grantor's actual knowledge upon the recordation date of this Conservation Easement Deed, there are no structures or improvements, encroachments, debris or hazardous materials of any kind whatsoever existing on the Easement Property other than one capped water well, the location of which has been disclosed by Grantor to County and Grantee.

(iii) Grantor certifies, represents and warrants to Grantee that to the Grantor's actual knowledge, there are no previously granted easements existing on the Easement Property that interfere or conflict with the purposes of this Conservation Easement Deed.

(iv) Grantor certifies, represents and warrants to the Grantee that to the Grantor's actual knowledge its fee title acquisition of PROPERTY NAME was made consistent with the terms of the Section 6, Federal Endangered Species Act Grant Program grants, and with the approval of the Wildlife Conservation Board, or its authorized designee.

## **7. SPECIFIC RIGHTS OF GRANTEE**

Grantee, its employees, agents or assignees, may, without additional approval or license from Grantor:

(i) Access the Easement Property at any and all times to perform the rights and duties set forth herein, and those outlined in the Land Management Agreement, as amended from time to time; and

(ii) Erect, maintain, and/or remove, at Grantee's expense, signs or other appropriate markers in prominent locations on the Easement Property, visible from public roads or other adjoining property, bearing information indicating that TRANSPORTATION AGENCY Environmental Mitigation Program acquisition funds were used for the purpose of protecting PROPERTY NAME's sensitive habitat, and those additional Purposes outlined in this Conservation Easement Deed; and

(iii) Enforce the terms and conditions of this Conservation Easement Deed and the Land Management Agreement and any amendments thereto; and

(iv) Exercise its discretion in taking any reasonable actions necessary to fulfill the Purposes of this Conservation Easement Deed.

## **8. OBLIGATIONS OF GRANTEE**

To accomplish the Purposes of this Conservation Easement Deed as described in Section 2, Grantee shall, of its own accord or through performance of the Land Management Agreement, provided, however, that Grantee shall not have any liability whatsoever to the Grantor or any other party or person, including without limitation, the general public, with respect to the same:

(i) Retain the Easement Property consistent with the terms of this Conservation Easement Deed and the Land Management Agreement; and

(ii) Use Grantee's reasonable best efforts to prevent any activity on or use of the Easement Property that is inconsistent with the purposes of this Conservation Easement Deed.

This Conservation Easement Deed is not intended to create any rights for third parties.

#### 9. TRANSFER, ASSIGNMENT, SALE OR CONVEYANCE OF CONSERVATION EASEMENT DEED

(i) Consistent with Public Utilities Code Section \_\_\_\_\_ et seq., and any amendments thereto, Grantee shall have the right to transfer or assign its rights under this Conservation Easement Deed to any entity, and/or entities that is/are qualified under applicable law to hold Conservation Easement Deeds and which assignee or transferee agrees to enforce the terms of this Conservation Easement Deed. In the event the transfers, described herein, occur, Grantor, its agents, successors or assigns, agrees to cooperate with Grantee in effecting any such transfers.

(ii) Transfer of this Conservation Easement Deed may be subject to approval by the Wildlife Conservation Board and/or the Wildlife Agencies, which approval should not be unreasonably withheld.

#### 10. TRANSFER OF UNDERLYING FEE TITLE

(i) Grantor, its heirs, successors and assigns, agree that Grantor shall not transfer the underlying fee title to the Property serving the Conservation Easement Deed without first receiving formal written approval from Grantee's Board of Directors or its authorized designee, which approval shall not be unreasonably withheld. Pursuant to this provision, Grantee acknowledges and approves the transfer of the underlying fee title to the Property to the County, so long as such transfer is subordinate to this Conservation Easement Deed.

(ii) The parties to this Conservation Easement Deed agree and acknowledge that the obligations of "the Grantor, NGO" under this Section 10 shall only apply to and burden NGO while it is the owner of PROPERTY NAME, and that Grantor's obligations and liabilities shall terminate upon its transfer of the fee title to PROPERTY NAME to the County unless otherwise stated in this agreement.

#### 11. SUCCESSORS

The covenants, terms, conditions, and restrictions of this Conservation Easement Deed shall be binding upon, and inure to the benefit of, the Parties hereto and their respective successors and assigns and shall constitute a servitude burdening PROPERTY NAME in perpetuity and running in perpetuity with the Easement Property.

#### 12. TERMINATION OF RIGHTS AND OBLIGATIONS

Except as required by law, and in particular, Public Utilities Code Section \_\_\_\_\_ et. seq., a Party's rights and obligations under this Conservation Easement Deed terminate upon transfer of the Party's interest in this Conservation Easement Deed and the underlying servient tenement, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

#### 13. VALUATION

On approximately \_\_\_\_\_, three entities, Grantor, County (the intended successor Grantor immediately following recordation of this Conservation Easement Deed), and Grantee contributed the following amounts towards the purchase of PROPERTY NAME :

Grantor: \$ \_\_\_\_\_

County: \$ \_\_\_\_\_

Grantee: \$\_\_\_\_\_



#### **14. REVERSION ON A CONDITION SUBSEQUENT**

(i) In the event that the Grantor, its agents, heirs, contractors, successors or assigns, and/or their agents, heirs, contractors or assigns, fails to substantially comply with the terms and conditions of this Conservation Easement Deed, after an uncured thirty (30) day notice of default from Grantee to Grantor, its heirs, successors or assigns, for any reason whatsoever, including, but not limited to, inadequate financing or other resources, Grantor, on its behalf and on behalf of its heirs, successors and assigns, agrees that fee title to no less than \_\_\_\_ acres of the \_\_\_\_-acre PROPERTY NAME property will automatically revert to the Grantee, upon the filing by Grantee of a Notice of Default and Reversion.

(ii) Grantor, by its acceptance of a grant deed to the fee simple title to PROPERTY NAME, which fee title is subject to the Conservation Easement Deed, agrees for itself, its agents, contractors, successors or assigns further agrees to cooperate with and assist Grantee in taking any and all actions necessary to effect this reversion, including, but not limited to, immediately recording a quit claim deed or other instrument(s) in Grantee's favor, or other actions necessary to effectuate an immediate reversion of that portion of the Easement Property first purchased by Grantee on approximately \_\_\_\_\_, paying all outstanding debts or encumbrances owing under the then current Land Management Agreement and any amendments thereto; and, upon Grantee's request, removing any and all waste and transferring title to any real or personal property then remaining upon the property, without expense to or compensation from Grantee.

(iii) In the event that a reversion occurs, Grantee will take such actions as are necessary to continue the intended use of the PROPERTY NAME property consistent with the terms of this Conservation Easement Deed and the underlying letter of Commitment and Concurrence from the Wildlife Agencies. Upon such reversion, the terms and conditions of this Conservation Easement Deed shall constitute covenants, conditions and restrictions running with the property, which, covenants, conditions and restrictions shall run with the land and will be binding upon all successors and assigns of the parties herein in accordance with the provisions of Civil Code Section 1468.

(iv) Any costs, including legal costs, associated with reversion of Grantee's pro-rata portion of the Easement Property shall be the responsibility of the Grantor, its successors or assigns.

#### **15. JUDICIAL EXTINGUISHMENT OR TERMINATION**

(i) This Conservation Easement Deed may not be extinguished or terminated, except by a final judicial determination that it is impossible or impractical for the Conservation Easement to continue.

(ii) No such extinguishment shall affect the value of Grantee's interest in the Easement Property, and if the Easement Property, or any interest therein, is sold, exchanged, or taken by the power of eminent domain after such extinguishment or termination, Grantee will be entitled to receive its pro-rata share of the proceeds of such sale, exchange, or taking.

(iii) At the time of any proposed extinguishment or termination, any successor Grantee and/or Grantor of this Conservation Easement Deed agrees to make a reasonable effort to give the original Grantee and Grantor written notice of such proposed extinguishment. Such notice shall include (at a minimum) the right to be heard by the court considering the proposed extinguishment or termination.

#### **16. AMENDMENT**

This Conservation Easement Deed may be amended by Grantor and Grantee, their successors or assigns, only by mutual written agreement, and subject to the written approval of the Grantee's Board or its authorized designee. Any such amendment shall be consistent with the purposes of the Conservation Easement Deed and STATE law governing conservation easement deeds and shall not affect its

perpetual duration. Any such amendment shall be recorded in the official records of \_\_\_\_\_ County, State of STATE.

#### **17. DUTY TO DEFEND AND INDEMNIFY**

Grantor, its successors and assigns, agrees to defend, indemnify, protect and hold Grantee, its successors and assigns, and its Directors, officers, and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including environmental claims (CERCLA, RCRA, etc.), or injury to the Grantor's or its subcontractors' employees, agents, or officers, which arise from or are connected with or are caused or claimed to be caused by the negligent, reckless, or willful acts or omissions of the Grantor, its successors and assigns and its subcontractors and their agents, officers, or employees, in performing the terms and conditions of this Conservation Easement Deed, and all expenses of investigating and defending against same, including attorney's fees and costs; provided, however, that the Grantor's duty to indemnify and hold harmless shall not include any claims or liability arising from the established sole negligence or willful misconduct of Grantee, its Directors, agents, officers, or employees.

#### **18. LIENS OR SUBDIVISION**

Consistent with Public Utilities Code Section 132321, *et seq.*, Grantor, its successors or assigns shall not cause liens of any kind to be placed against, nor use the Easement Property as collateral or security for any loan. Neither shall the Grantor subdivide the Easement Property. Grantor shall ensure that the covenants in this section are passed through to County and its successors or assigns in written agreements between County and Grantor.

#### **19. SEVERABILITY**

If a court of competent jurisdiction voids, invalidates or declares unenforceable any part of this Conservation Easement Deed on its face, or the application thereof to a person, entity or circumstance, such action shall not affect the remainder of this Conservation Easement Deed, or its application to other persons, entities or circumstances.

#### **20. LIBERAL CONSTRUCTION**

Despite any general rule of construction to the contrary, this Conservation Easement Deed shall be liberally construed to effect the purposes of this Conservation Easement Deed and the policy and purpose of Civil Code Section 815, *et seq.* If any provision in this Conservation Easement Deed is found to be ambiguous, an interpretation consistent with the Purposes described herein that would render the provision valid shall be favored over any interpretation that would render it invalid.

#### **21. ENTIRE AGREEMENT**

This instrument sets forth the entire agreement between the Parties regarding this Conservation Easement Deed and supersedes all prior discussions, negotiations, understandings, or agreements relating to it that are not incorporated herein by reference. No alteration or variation of this instrument shall be valid or binding unless amended consistent with the Amendment requirements outlined herein. Notwithstanding the foregoing, this Conservation Easement Deed shall not revoke, rescind or amend the terms of the Land Management Contract.

#### **22. CONTROLLING LAW AND VENUE**

The laws of the State of STATE shall govern the interpretation and performance of this Conservation Easement Deed. Venue shall lie in the County of \_\_\_\_\_, State of STATE.

**23. RECORDING**

Grantor shall record this Conservation Easement Deed in the Official Records of \_\_\_\_\_ County, STATE, and may re-record it at any time as Grantee deems necessary to preserve its rights hereunder.

**24. NOTICES**

Any notice, demand, request, consent, approval, or communication that any party desires or is required to give to the other party shall be in writing and be delivered by first class mail, postage fully prepaid, or sent by a cognized overnight courier that guarantees next-day delivery, addressed as follows:

Grantor:

Grantee:

NGO

TRANSPORTATION AGENCY

With a Copy To:

Associate Counsel  
NGO

General Counsel  
TRANSPORTATION AGENCY

Intended Successor Grantor:

With a Copy To:

Senior Deputy  
Office of County Counsel

**25. EXECUTION**

Grantor and Grantee have executed this Conservation Easement Deed on the date first written above.

GRANTOR:  
NGO

GRANTEE:  
TRANSPORTATION AGENCY

By:  
Title: Director

By:  
Title: Executive Director  
OR BY EXECUTIVE DIRECTOR'S DESIGNEE:

Approved as to Form:  
Title: Associate Counsel

Approved as to Form:  
Title: General Counsel

## Permitted and Prohibited Activities and Uses of the Easement Property, with Grantor and Grantee Rights

### PERMITTED USES

The following are set forth both to list specific uses at the Easement Property which are consistent with the Easement Purposes (subject to such restrictions as may be set forth below with respect to a given use), and in order to provide guidance in determining the consistency of other activities within the Easement Purposes, it being understood and agreed by Grantor and Grantee that no use of the Easement Property (whether or not listed below) shall be conducted in a manner or to an extent that diminishes or impairs the Conservation and/or Mitigation Values or that otherwise violates the terms of this Conservation Easement.

1. Existing Structures. Grantee shall have the right to maintain, repair, replace and remove structures from the Easement Property, so long as it is done in a manner consistent with the Easement Purposes.
2. Roads and Trails. The maintenance and repair of existing roads and trails at currently existing levels of improvement shall be permitted and, in the event of the destruction of any such existing roads or trails, they may be replaced with others of similar design, size, function, location and materials, and provided that all of the foregoing is done in a manner consistent with the Easement Purposes. Grantee may construct new unpaved non-motorized, multi-use trails used for biking, horseback riding and hiking. The multi-use trails shall not be used by motorized vehicles, except as may be necessary to accommodate persons with disabilities, to conduct ranger patrols and land management activities and to respond to emergencies. Grantee may install directional and interpretive signs on the trails. Multi-use trails shall be located and constructed in a manner that causes the least impact to the Conservation Values as is reasonably practicable, and would not preclude the use of the Easement Property for future mitigation of transportation projects.
3. Passive Recreational Uses. Passive recreational uses of the Easement Property shall be permissible exclusively on multi-use trails, for personal, non-commercial purposes including, but not limited to bird watching, hiking, horseback riding and biking. Grantee may also construct, for use by members of the public who use the Easement Property for passive recreational purposes, kiosks, signage, picnic areas consisting of parking, hitching posts, watering troughs and fountains ("Staging Area"). The Staging Area shall not cover an area greater than one acre in size and will be located and constructed in a manner that causes the least impact to the Conservation Values as is reasonably practicable, and would not preclude the use of the Easement Property for the future mitigation of transportation projects. Without limitation, under no circumstances may the passive recreational improvements or

the staging area include concrete or asphalt or other similar impermeable surfaces (except the picnic tables themselves, the wood-look concrete split-rail fencing, or as may be necessary to anchor fence posts or for structural supports associated with signage or any kiosk), utilities (except as may be needed for a watering trough or water fountain), or permanent or affixed restrooms.

4. Control of Trespass. Grantee shall have the right to control access to the Easement Property (subject to the terms of this Conservation Easement) and to prevent trespass on the Easement Property. In so doing, Grantee may erect a fence around the Easement Property boundary, but any such fence shall meet the following criteria: (a) the fence shall be either a wood-look concrete split rail fence, or wire fence with a maximum of four strands of barbed or smooth wire, and in either case the bottom rung or wire shall not be lower than 15 inches from the ground at any point and the top rung or wire shall not be higher than 42 inches from the ground at any point; (b) the fence shall be built solely within two (2) feet of the Easement Property boundary line or the nearest roadway edge; and (c) the fence shall not interfere with movement, nesting or forage of wildlife at the site.
5. Control of Problem Animals. The control of problem animals is permitted, using selective control techniques, which shall be limited in their effectiveness to specific animals which have caused damage to livestock or other property and shall be in full compliance with all Applicable Laws and the Easement Property purposes.
6. Vegetation Management. Grantee shall have the right to control or eliminate noxious weeds and non-native plant species from the Easement Property, in order to further the Easement Purposes, using pesticides, grazing, herbicides or other biocides; manual removal or other appropriate methods.

## **PROHIBITED USES**

1. Inconsistent or Adverse Actions. There shall be no change, disturbance, alteration or impairment of the Conservation Values of the Property except as may occur pursuant to (and then only to the extent permitted as a part of) the uses of the Easement Property which are explicitly permitted under this Conservation Easement.
2. Commercial Uses. There shall be no commercial or industrial use of the Easement Property, other than those uses (if any) which are explicitly permitted under this Conservation Easement. Examples of prohibited commercial or industrial uses include, but are not limited to: (a) commercial orchards; (b) commercial campgrounds; (c) commercial picnic areas; and (d) commercial feedlots, which are defined as any open or enclosed area, within which the land is not grazed or cropped at least annually, and where domestic livestock is grouped together for intensive feeding purposes.

3. Improvements. Except as explicitly permitted by the terms of this Conservation Easement, there shall be no construction or placement of any structures or improvements on the Easement Property, including (but not limited to) residential or other buildings, camping accommodations, boat ramps, mobile-homes, house-trailers, permanent tent facilities, Quonset huts or similar structures, underground or aboveground tanks, billboards or other advertising facilities, street lights, utility structures or lines and sewer systems or lines (except as otherwise listed under Permitted Uses).
4. No Use or Transfer of Development Rights. Except as explicitly permitted by the terms of this Conservation Easement, all development rights that are now or hereafter allocated to, implied, reserved, or inherent in or to the Easement Property are terminated and extinguished, and may not be used on or transferred to any portion of the Property as it now or hereafter may be bounded or described, or to any other property (whether adjacent or otherwise).
5. Vehicles. There shall be no use of any motorized vehicles off of designated roadways or trails, except such as may be necessary in connection with the normal maintenance and stewardship of the Easement Property pursuant to this Conservation Easement.
6. No Dumping or Salvage. There shall be no dumping, storage, or other disposal of soil, trash, garbage (other than compostable refuse generated on the Easement Property, and then only in areas where the Conservation Values of the Property are not impacted), ashes, waste, sludge, Hazardous Materials (as defined in the Conservation Easement Deed) or other unsightly or dangerous materials, and there shall be no storage or disassembly of inoperable automobiles, trucks or other vehicles or equipment for purposes of sale, or rental of space for that purpose.
7. Native and Non-native species. There shall be no removal, cutting or destruction of native vegetation, except in conjunction with the following activities: a) when constructing a trail or associated amenity as allowed in this Exhibit D; (b) when removing vegetation to create fire/fuel breaks required by State or local laws or regulations; and (c) accidental or incidental removal when removing non-native vegetation. In addition, Grantee shall not introduce any non-native plant or animal species to the Easement Property.
8. Timber Harvesting and Firewood. There shall be no taking or harvesting of timber, standing or downed, on the Easement Property, except for purposes of disease or insect control, to prevent or abate fire damage, or to prevent property damage or personal injury. There shall be no removal of any downed wood from any waterway, unless it causes an immediate flood risk to the Easement Property.

9. Active Recreational Facilities. There shall be no active recreational facilities (such as sports fields, etc.) erected or placed on the Easement Property except for those trails permitted under this Conservation Easement.
10. Hunting, Trapping and Fishing. There shall be no use of the Easement Property for any hunting, trapping or fishing of any kind.
11. Water Resources. There shall be no manipulating, impounding or altering of any natural water course, body of water or water circulation on the Easement Property except to the extent it may improve the Easement Values, nor any activities or uses detrimental to water quality, including but not limited to degradation or pollution of any surface or sub-surface waters on the Easement Property.

## ***Miscellaneous Templates for Mitigation and Transfer***

### **Certificate of Acknowledgement - Notary Public**

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_ before me \_\_\_\_\_  
in and for said County and State, personally appeared \_\_\_\_\_  
Personally known to me (or proved to me on the basis of satisfactory evidence) to be the  
person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me  
that he/she/they executed the same in his/her/their authorized capacity(ies), and that by  
his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which  
the person(s), acted, executed the instrument.

WITNESS my hand and official seal:

\_\_\_\_\_  
Signature of Notary Public

- Exhibit A – Legal Description of PROPERTY NAME
- Exhibit B – County/Grantee Land Management Agreement
- Exhibit C – DATE letter of Concurrence and Commitment from Wildlife Agencies
- Exhibit D – Permitted and Prohibited Activities and Uses on the Easement Property
- Exhibit E – Fund Transfer Agreement



## Statement of Work Template

### EXHIBIT A-STATEMENT OF WORK

INTRODUCTION EXPLAINING WHY THE STEWARDSHIP AGREEMENT/TRANSFER IS REQUIRED.  
MORE BACKGROUND INFORMATION IF NECESSARY.

EXPLAIN WHO THE STEWARD IS.

1. SPONSOR will transfer title of THE SITE to the Steward. Steward shall accept the property and after Bank Closure will manage it according to the Management Plan as it may be amended from time to time, as set out in the Stewardship Agreement.
2. When SPONSOR delivers the endowment funds to Steward, at the time the title to the SITE property is transferred to Steward, Steward will accept the funds, and invest them and use them to fund management of the bank for the long term, as set out in the Stewardship Agreement.
3. SPONSOR will manage THE SITE prior to Closure, according to the terms of the Stewardship Agreement and Management Plan.
4. SPONSOR will retain all rights to mitigation/conservation credits established by the SITE.
5. During operational life of THE SITE, prior to THE SITE Closure, SPONSOR retains full responsibility for managing THE SITE in compliance with the MCBI, including liability that may be incurred for any damages or losses resulting from its actions or omissions and those of its agents, contractors, and third parties. The Steward shall be responsible for all damages and losses resulting from its own acts or omissions, and those of its agents and contractors.

## Compensation, Payment, and Corrective Work Template

### EXHIBIT –COMPENSATION

#### **A. METHODS OF COMPENSATION and PAYMENT OPTIONS:**

Upon entering into this Contract, and (signing the Stewardship Agreement), THE SPONSOR will make a one-time fixed payment of the Endowment to Steward, as described in the Stewardship Agreement, in the amount of \_\_\_\_\_ and THE SPONSOR will transfer fee title of the Property to Steward in consideration for Steward's agreement to manage the property in the long term consistent with the Management Plan.

The amount payable under the Contract may be adjusted by Sponsor or renegotiated to ensure the long term management of THE SITE property.

**Single Payment.** Sponsor will pay Steward all amounts due under the Contract in one payment, up to the Contract NTE or Fixed-Price amount

INCLUDE A COMPENSATION SUMMARY TABLE HERE.

#### **B. CORRECTIVE WORK**

Steward shall complete all Services, including Deliverables, as required in the SOW to Sponsor's satisfaction. If Sponsor, in its sole discretion, determines that the Services or associated deliverables, or both, are unacceptable, Sponsor shall notify Steward in writing of the deficiency. Within 7 calendar days (unless a different time frame is agreed to by the Parties) of receipt of the deficiency notification Steward shall respond to Sponsor outlining how the deficiency shall be corrected. Steward shall correct any deficiencies in the Services and Deliverables to Sponsor's satisfaction without further compensation.



## Appendix B – Printable Version of Web-Based Survey

### Transferring Ownership, Management, and Maintenance of Mitigation and

#### Introduction

Thank you for participating in this short, Initial National Cooperative Highway Research Program (NCHRP) survey on Transferring Ownership, Management, and Maintenance of Mitigation and Conservation Sites. A guide will be developed to help provide DOTs a starting place in discussions with other entities; it will include contract language, processes, and procedures that have proven successful in transferring land and maintenance responsibilities to other parties. This survey should take no longer than 10-15 minutes and is mostly boxes to check. Please share any comments, insights, or relevant contract language and procedures you may have with [marie@vennerconsulting.com](mailto:marie@vennerconsulting.com). Thank you for your time and assisting your peers in this area!

## Transferring Ownership, Management, and Maintenance of Mitigation and

### Profile

#### 1. Please provide your name and contact information below.

Name	<input type="text"/>
Title/Position	<input type="text"/>
State	<input type="text"/>
Agency	<input type="text"/>
Phone	<input type="text"/>
Email	<input type="text"/>

#### 2. What kind of mitigation or conservation is your agency doing? Check all that apply.

- ☐ Wetland protection
- ☐ Wetland restoration or enhancement
- ☐ Wetland establishment or creation
- ☐ Single-species habitat
- ☐ Multiple-species habitat
- ☐ Combined wetland and species habitat

#### 3. How many land acquisitions for mitigation purposes does your DOT tend to make in a year?

4. States and NGOs have reported reluctance in taking on mitigation sites that were not developed in accordance with a larger regional or statewide conservation plan (e.g., watershed plan/needs, ecoregional conservation priority plan, species recovery plan/needs). Such sites may be perceived as having lower ecological value or may be less of a fit with the organization's mission. Have you encountered this issue in your state?

- ☐ Yes
- ☐ No

#### 5. Has your DOT successfully transferred mitigation/conservation sites to other entities for long-term management?

- ☐ Yes
- ☐ No

## Transferring Ownership, Management, and Maintenance of Mitigation and

### 1. Please identify the following:

	Very Satisfied/Desirable	Satisfied	Problems/Hesitancy	Wouldn't do it again
Your agency's satisfaction with the mitigation/conservation transfer process	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Your perception of the regulatory agency's satisfaction with the mitigation/conservation transfer process	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

### 2. Are regulatory agencies asking for an active, medium, or minimal level of long-term management in your state, after mitigation sites have completed their monitoring periods?

- ☐ Active
- ☐ Medium
- ☐ Minimal

### 3. Is the level of long-term management requested and/or required an issue for the potential organization, conservation group, or private sector land stewards to which the DOT might transfer the site?

- ☐ Yes
- ☐ No

### 4. Have you seen a shift in what regulatory agencies are requiring for long-term management?

- ☐ Yes
- ☐ No

### 5. Have you encountered issues legally defining and seeking enforcement of a perpetual contract?

- ☐ Yes
- ☐ No

## Transferring Ownership, Management, and Maintenance of Mitigation and

**6. Are other agencies (regulatory or new management) monitoring or taking enforcement actions for failure to comply with the long-term management plan or requirements (after the mitigation has been accepted and is being managed by the third party agency)?**

☐ Yes

☐ No

**7. What is your DOT paying for long-term management of mitigation sites?**

☐ Nothing (partnerships with resource agency/conservation organization focused on acquiring top priority areas for them, and they have taken on long-term management in exchange)

☐ Our agency is paying for long-term management/maintenance. Please specify the amount below and the term involved.

Amount

**8. Have you established endowments or other financial measures to provide for long term management of a site?**

☐ Yes

☐ No

**9. Have you had any problem with the ability to assure long-term funding?**

☐ Yes

☐ No

## Transferring Ownership, Management, and Maintenance of Mitigation and

**1. Has your agency explored transfer or tried to transfer mitigation/conservation lands to third parties?**

☐ Yes

☐ No

**2. Does your agency have an interest in making such transfers?**

☐ Yes

☐ No



## Transferring Ownership, Management, and Maintenance of Mitigation and

### Benefits and Challenges

#### 1. What are the primary benefits your agency perceives in transferring ownership and long-term management of mitigation sites?

	Very Important	Important	Not Important
Cost savings on securing the mitigation site and/or implementing the mitigation project	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Opportunity to help another agency (e.g., state DNR, federal resource agency) or a conservation organization achieve stewardship or conservation objectives/missions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ability to increase predictability to transportation development since chosen mitigation holds particular value to resource/regulatory agencies	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Decrease in permit processing time since mitigation site was already reviewed by agencies	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Handle long-term management in an effective and reliable fashion, thus meeting permit conditions and/or NEPA commitments	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Minimize home agency workload	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Minimize long-term management costs for your agency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

#### 2. Is finding willing parties to take on ownership and/or long-term management responsibilities an issue or challenge in your state?

☐ Yes

☐ No

## Transferring Ownership, Management, and Maintenance of Mitigation and

### Identification of Terms and Contract Language

**1. We are interested in identifying any examples of terms (e.g., contract language) that have/has been required with land transfers for long-term management. Please provide the examples below with a description and/or URL if available, or email attachments/language to [marie@vennerconsulting.com](mailto:marie@vennerconsulting.com)**

Contract language example

Description and website

## Transferring Ownership, Management, and Maintenance of Mitigation and

### Identification of Best Contact

**1. In addition to identifying examples, we also want to make sure that we can get in contact with the person who is best able to answer additional questions about your DOT's experience and strategies (if applicable) in transferring mitigation sites to other entities for long-term management. If that is someone other than you, please provide the name and contact information for that person in the spaces provided.**

Name	<input type="text"/>
Title/Position	<input type="text"/>
Agency	<input type="text"/>
Email	<input type="text"/>
Phone	<input type="text"/>

## **Transferring Ownership, Management, and Maintenance of Mitigation and**

### **Closing and Thanks**

If you have any additional materials or examples you would like to pass along, please send them to [marie@vennerconsulting.com](mailto:marie@vennerconsulting.com). Also feel free to email me with any comments or insights on the topic of this survey, unanticipated issues that have emerged with your transfers, or contingencies you decided (or have been required) to include.

Thank you for your time and participation!

Marie Venner  
303-798-6333

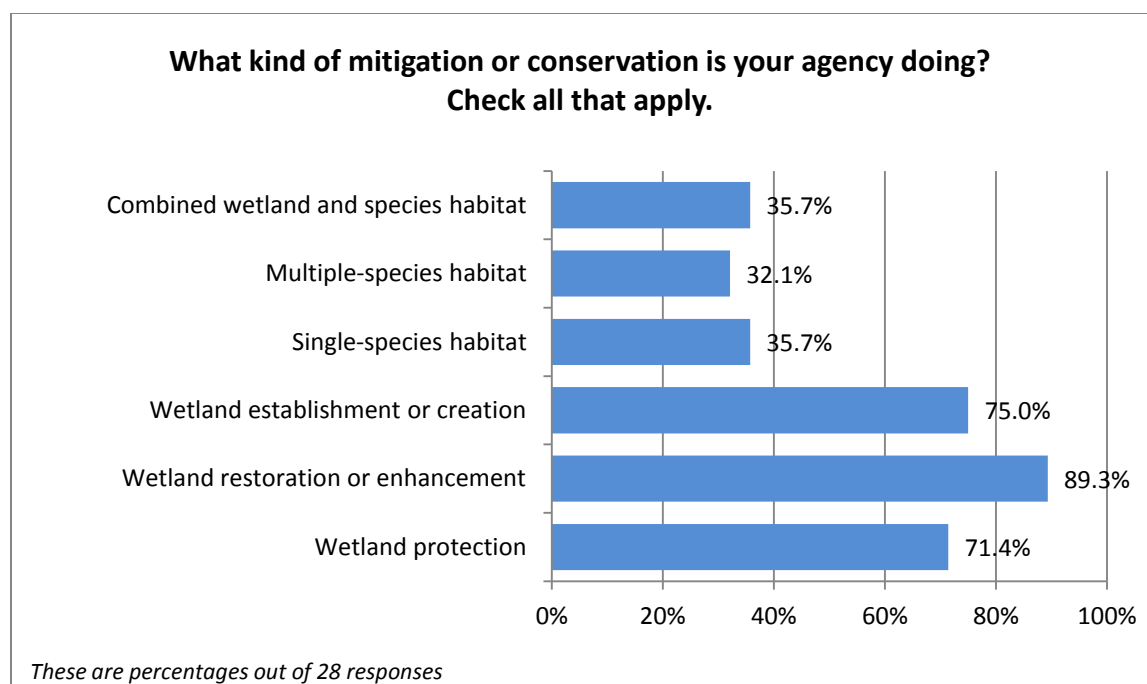
## Appendix C – Specific Survey Responses

### Profile

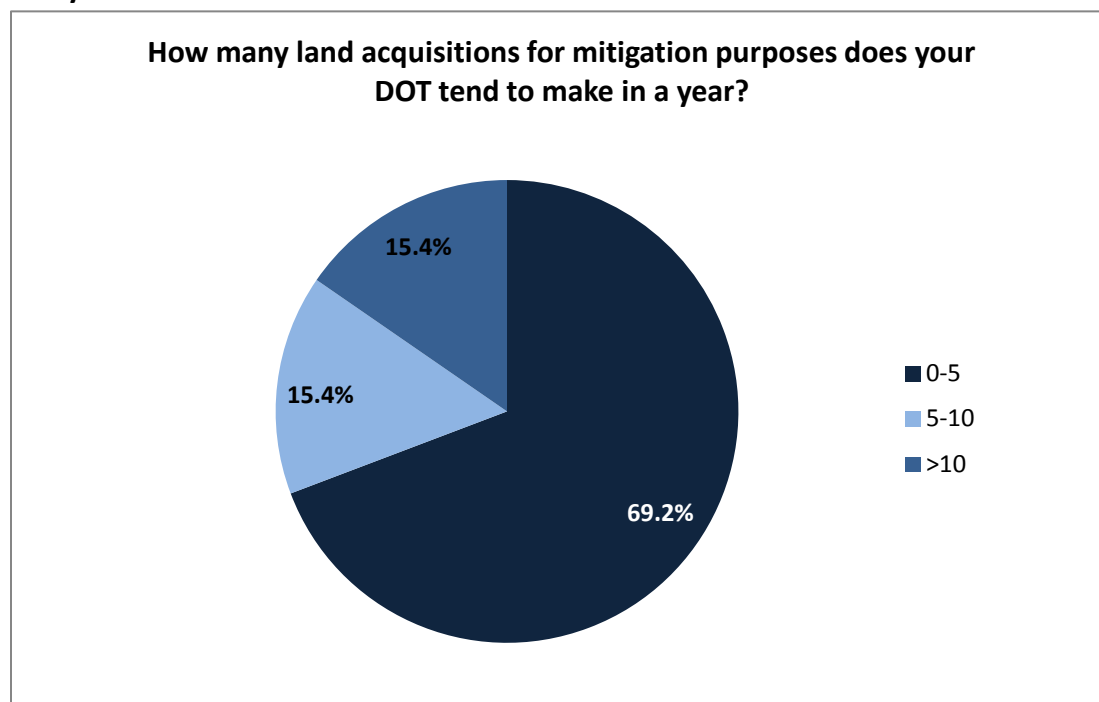
States Participating in the Survey		States Not Participating	
Arizona	Nebraska	Alabama	New Mexico
Arkansas	New Jersey	Alaska	North Dakota
California	New York	Connecticut	Rhode Island
Colorado	North Carolina	Florida	South Carolina
Delaware	Ohio	Hawaii	South Dakota
Georgia	Oklahoma	Idaho	Texas
Illinois	Oregon	Indiana	Vermont
Kentucky	Pennsylvania	Iowa	Virginia
Louisiana	Tennessee	Kansas	West Virginia
Maine	Utah	Michigan	
Maryland	Washington	Mississippi	
Massachusetts	Wisconsin	Montana	
Minnesota	Wyoming	Nevada	
Missouri		New Hampshire	

Note: 28 individuals responded to the survey. Two of the respondents represented Georgia DOT. While sometimes their answers were the same, other times they had conflicting answers. When there is an italicized note that says percentages are out of 28 responses, this indicates an instance in which the two respondents from Georgia responded inconsistently. The Georgia respondents had identical answers in the second section of this survey, so there are no inconsistencies noted regarding those two respondents in the second section of the appendix below.

**Question 2: What kind of mitigation or conservation is your agency doing?**



**Question 3: How many land acquisitions for mitigation purposes does your DOT tend to make in a year?<sup>4</sup>**



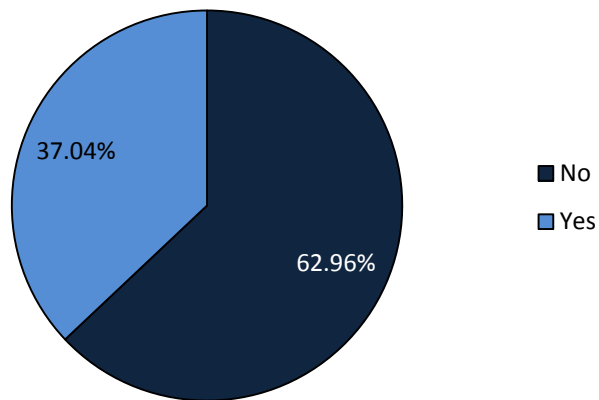
State(s)	Number of Acquisitions per Year
LA, MN	0

<sup>4</sup> While 27 respondents answered this question, only 26 gave number values, so percentages are taken out of 26.

GA	We have purchased approximately 36,000 acres for the purpose of developing wetland and stream banks. However, we are not considering purchasing any more land due to the availability of commercial banks
WY	No land acquisitions for wetlands. Around 1 to 3 temporary wetland commitment agreements for establishment period per year. Wildlife underpasses and overpasses constructed for multiple species wildlife conservation and motorist safety. Only minor land acquisitions to secure additional right of ways for construction of wildlife crossing structures.
NE	Currently zero. Our umbrella wetland banking instrument was terminated by the COE several years ago and we are now finishing up a new banking instrument that incorporates the "watershed" approach. Prior to termination of our original banking instrument, NDOR would purchase 1-2 sites per year for wetland banking and approximately 5-10 sites per year for on-site mitigation needs where there are gaps in our bank service areas.
MA, AZ, CO	0-1
MO	This is highly variable and construction driven. We now have developed five wetland banks statewide, so very little project-specific mitigation is purchased, as the majority of the impacts are mitigated at these banks. For the sake of answering the question I would say 0 -1 land acquisitions yearly.
OK, IL, KY	1
NJ	1-2
OR	1-3
DE	2
MD	3
ME, TN	3-5
UT	5
AR	4-6
WI	Not tabulated in database yet, but probably 0-4 large scale sites (>50-200 acres) and 5-10 small scale (<5 acres). Depends on economy, nature of project location, type of highway capacity expansion or maintenance, and/or airport and rail improvements.
OH	5-10
PA	10
WA	15-20
NY	30-40
CA	10-100s
NC	This is not something that we keep track of but I can look into it if need be

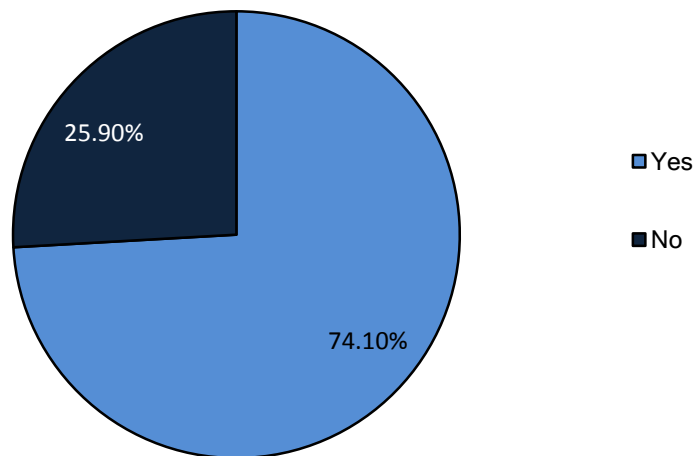
**Question 4: States and NGOs have reported reluctance in taking on mitigation sites that were not developed in accordance with a larger regional or statewide conservation plan (e.g., watershed plan/needs, ecoregional conservation priority plan, species recovery plan/needs). Such sites may be perceived as having lower ecological value or may be less of a fit with the organization's mission. Have you encountered the issue in your state?**

**Have you encountered this issue in your state?**



**Question 5: Has your DOT successfully transferred mitigation/conservation sites to other entities for long-term management?**

**Has your DOT successfully transferred mitigation/conservation sites to other entities for long-term management?**

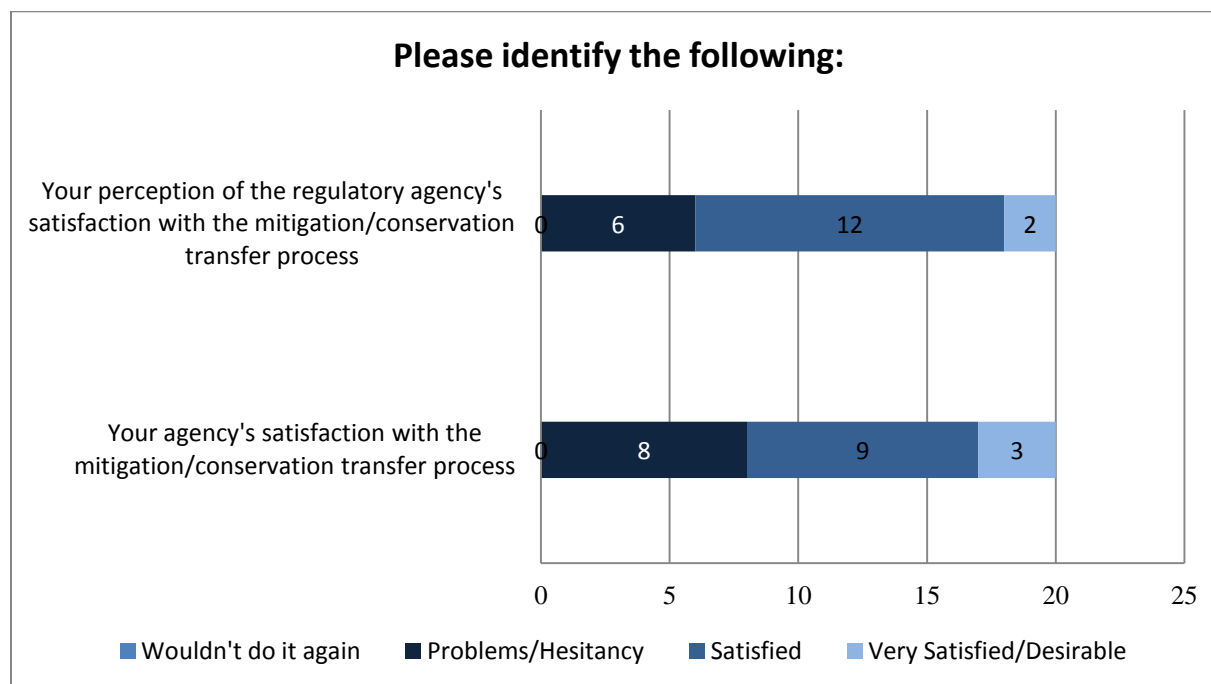




### If “Yes” to Question 5 in Profile<sup>5</sup>

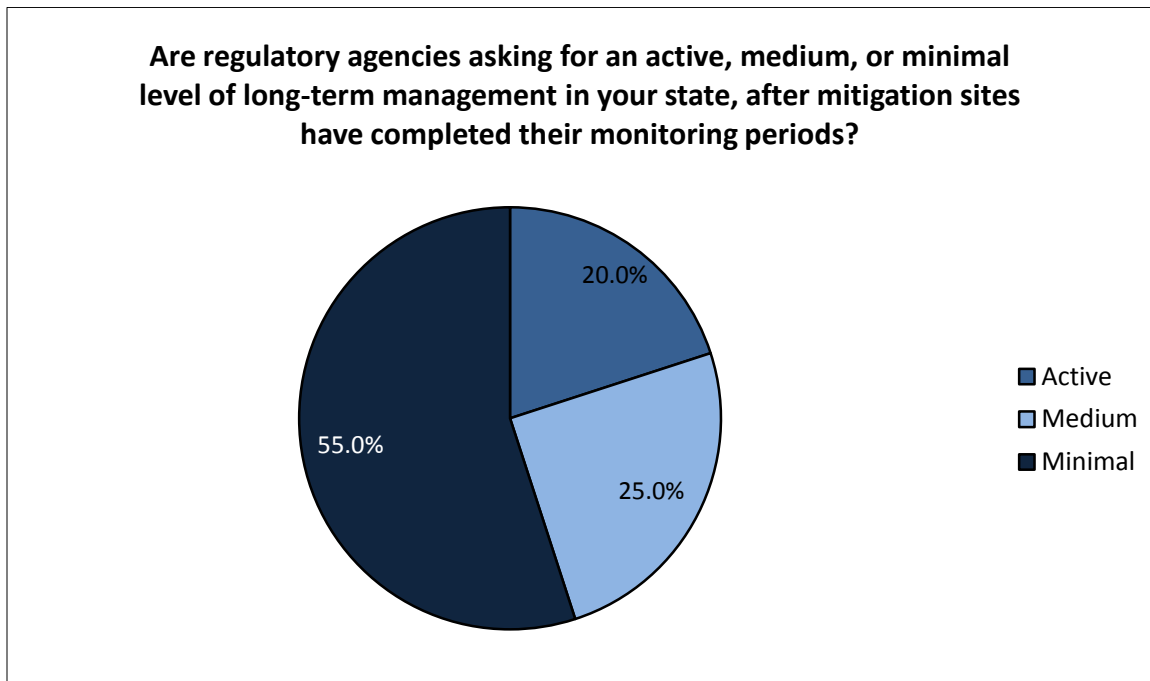
Twenty states responded “yes” when asked if their DOT has successfully transferred mitigation/conservation sites to other entities for long-term management. Therefore, twenty states were directed to this page after finishing the profile section. Some states did not answer every question. Where percentages are out of a number other than 20, a small note indicates the number of responses for that question.

**Question 1: Please identify your agency’s level of satisfaction with the mitigation/conservation transfer process and your perception of the regulatory agency’s satisfaction with the mitigation/conservation transfer process.**

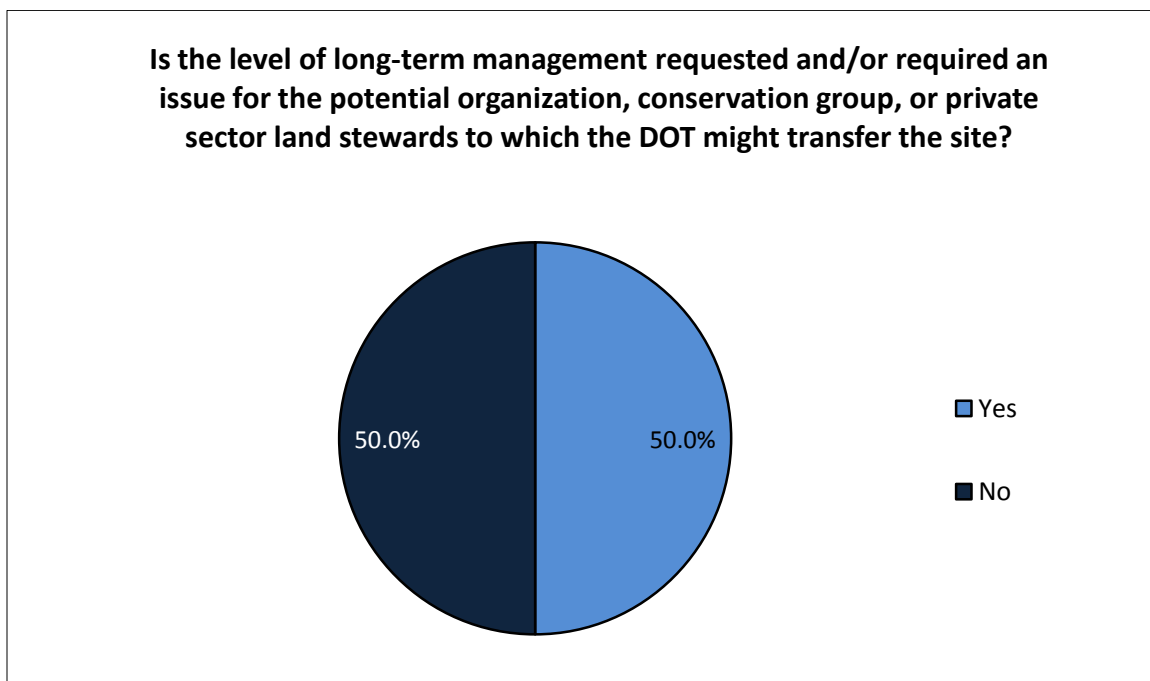


<sup>5</sup> Louisiana answered “yes” to question 5 under profile, but then did not answer any of the questions in this section. Likewise, Utah answered “no” to question 5 under profile, but was then somehow directed to this section and fully answered all the questions.

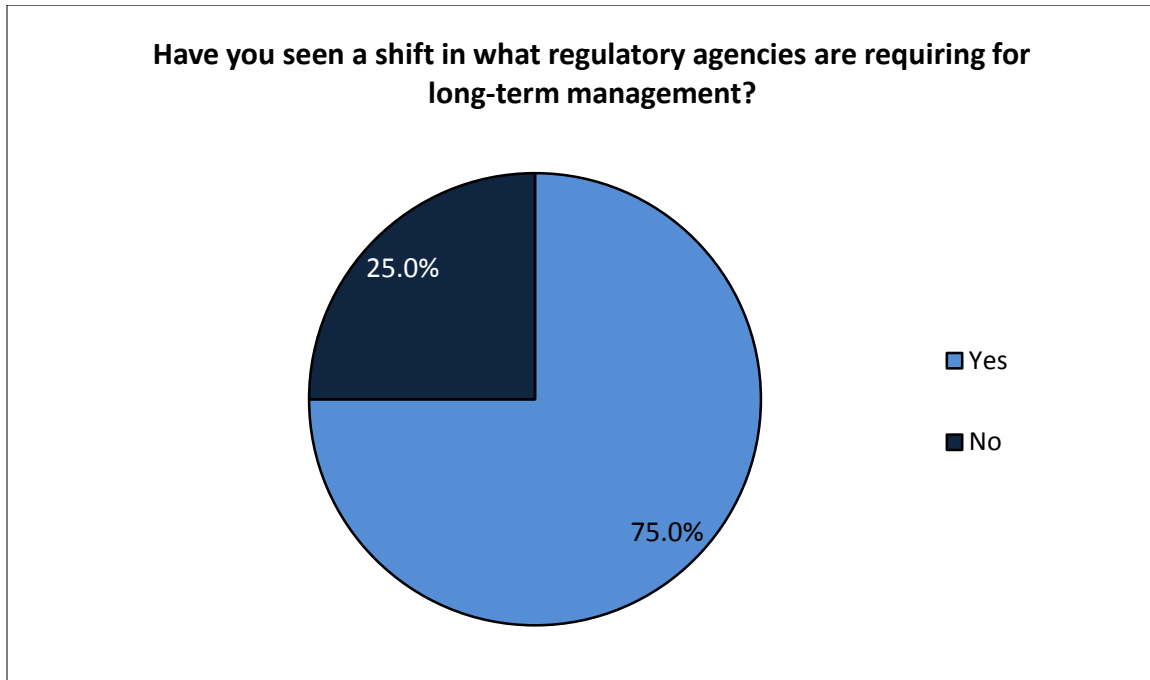
**Question 2: Are regulatory agencies asking for an active, medium, or minimal level of long-term management in your state, after mitigation sites have completed their monitoring periods?**



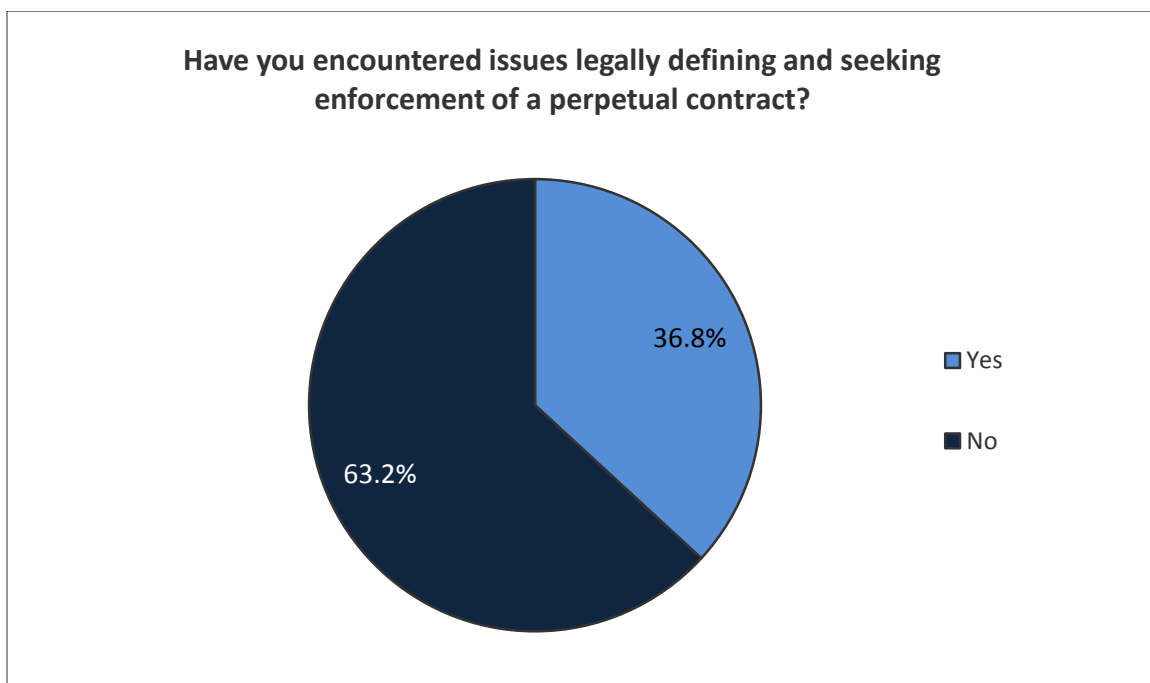
**Question 3: Is the level of long-term management requested and/or required an issue for the potential organization, conservation group, or private sector land stewards to which the DOT might transfer the site?**



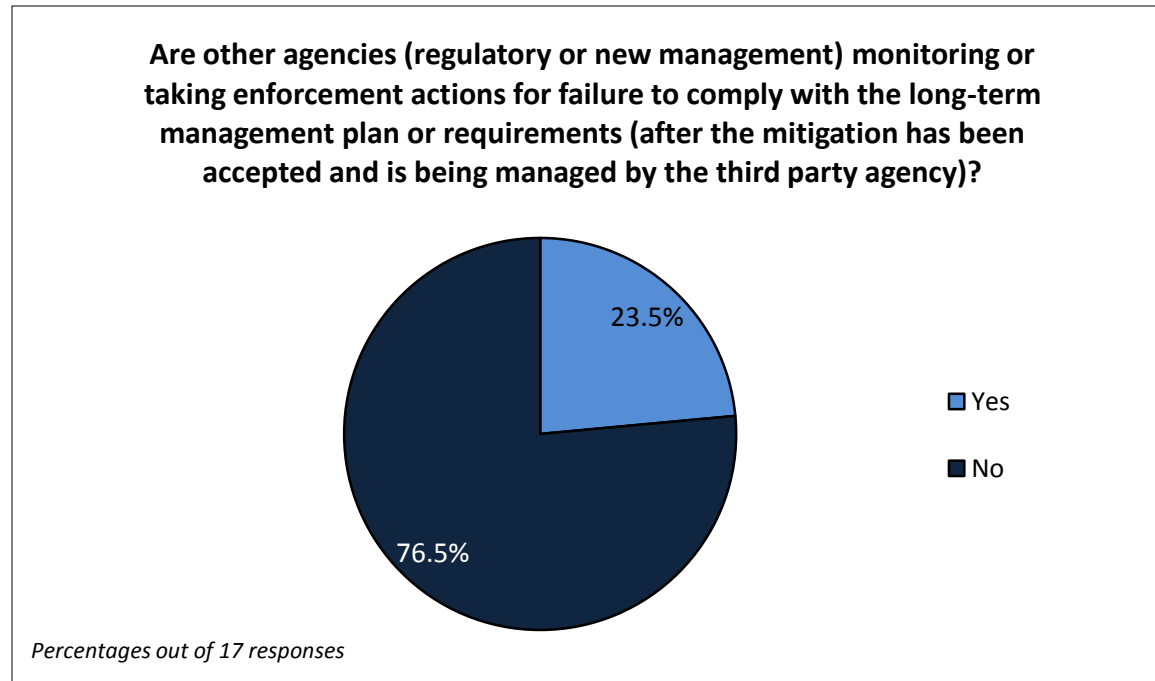
**Question 4: Have you seen a shift in what regulatory agencies are requiring for long-term management?**



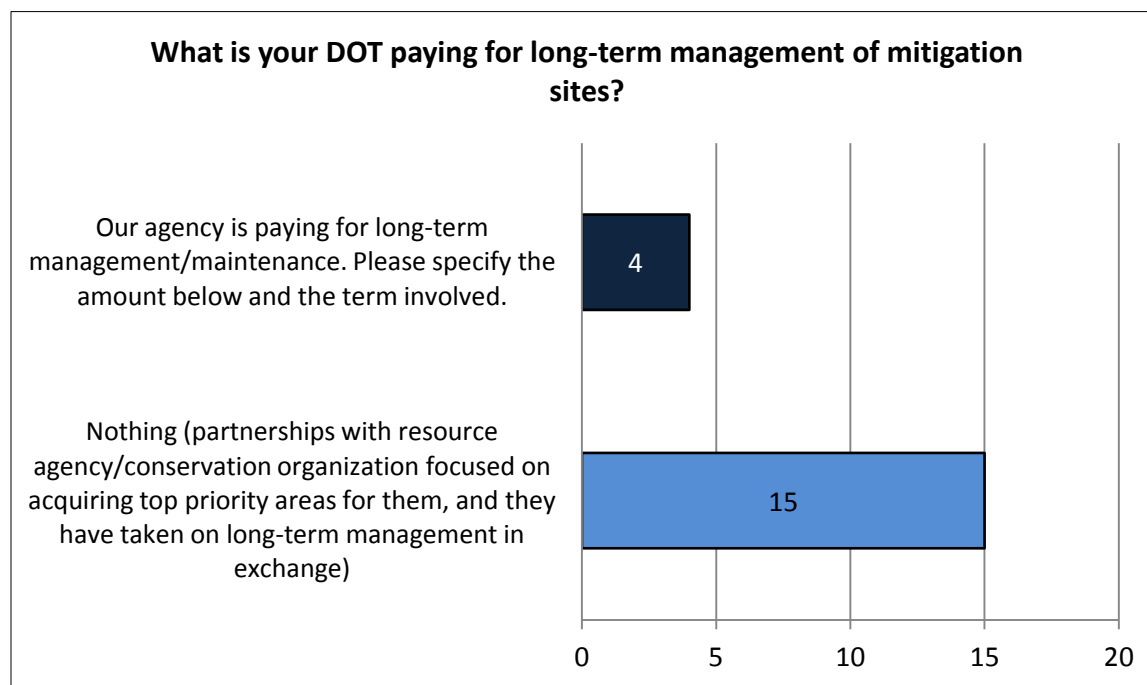
**Question 5: Have you encountered issues legally defining and seeking enforcement of a perpetual contract?**



**Question 6: Are other agencies (regulatory or new management) monitoring or taking enforcement actions for failure to comply with the long-term management plan requirements (after the mitigation has been accepted and is being managed by the third party agency)?**



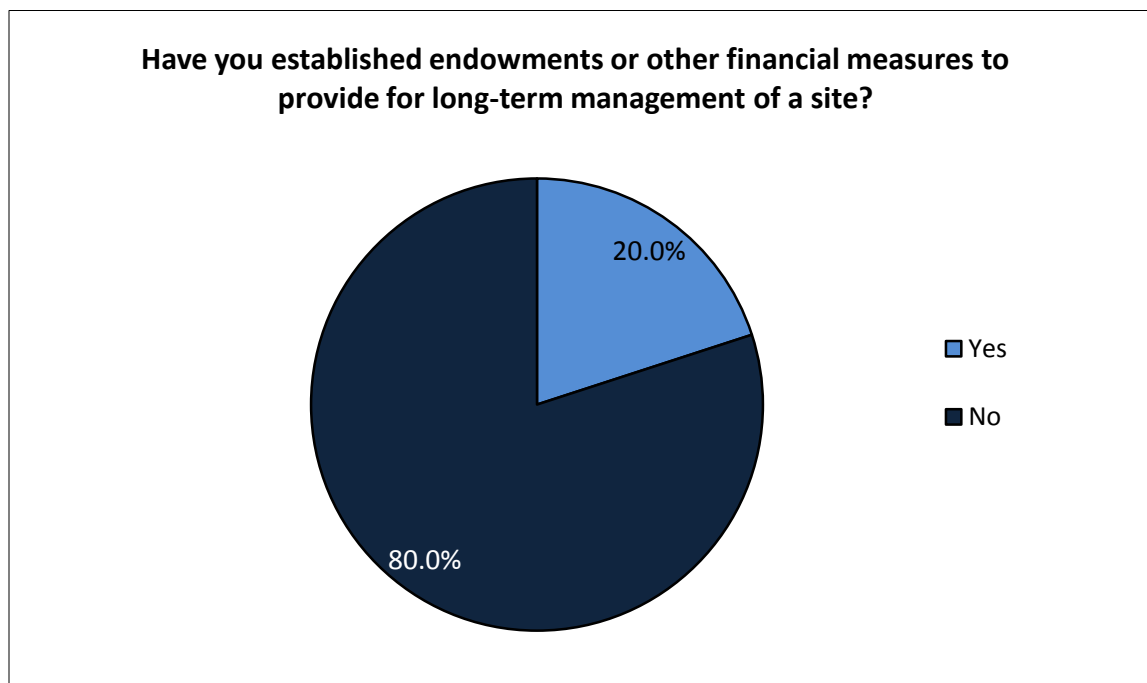
**Question 7: What is your DOT paying for long-term management of mitigation sites?**



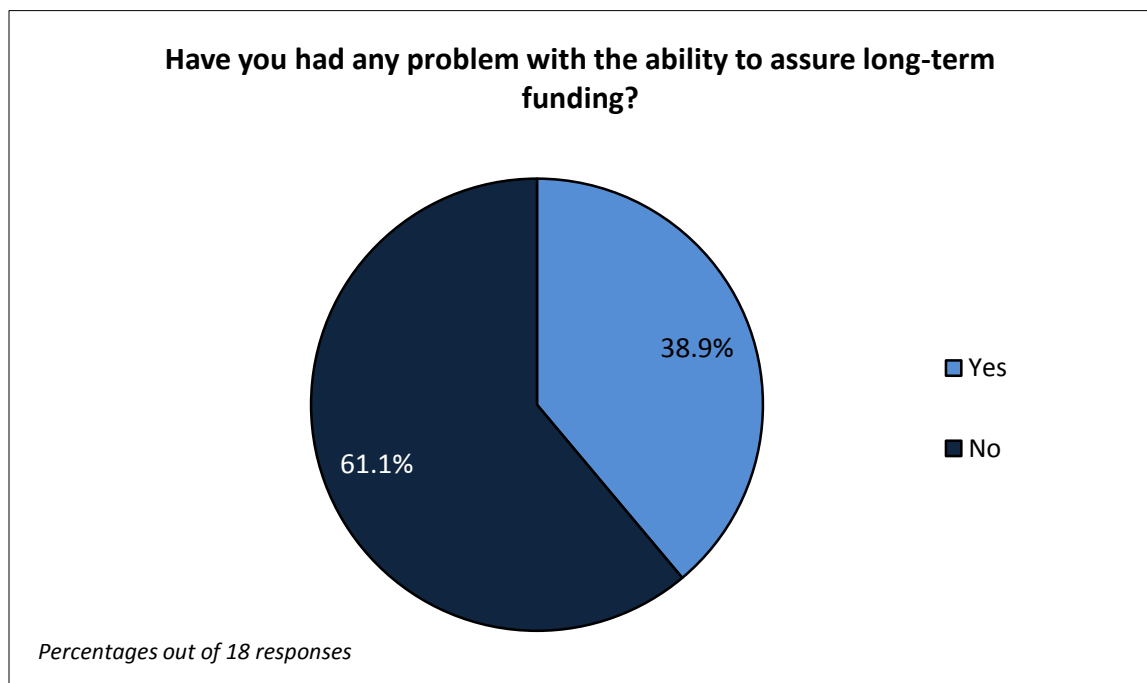
**Please specify the amount and term involved**

State	Amount and term
UT	664,000 no term end (120 acre site)
OR	Variable, only new sites after 2008 require LTMP. One site has completed the transfer of endowment money with annualized management costs at \$16k.
CA	We calculate the long-term endowment estimated using a property analysis report (PAR) and a set of assumptions for interest earnings.
WI	It is site specific depending on many variables and whether or not property retained by DOT or transferred. Mix bag for both.

**Question 8: Have you established endowments or other financial measures to provide for long-term management of a site?**

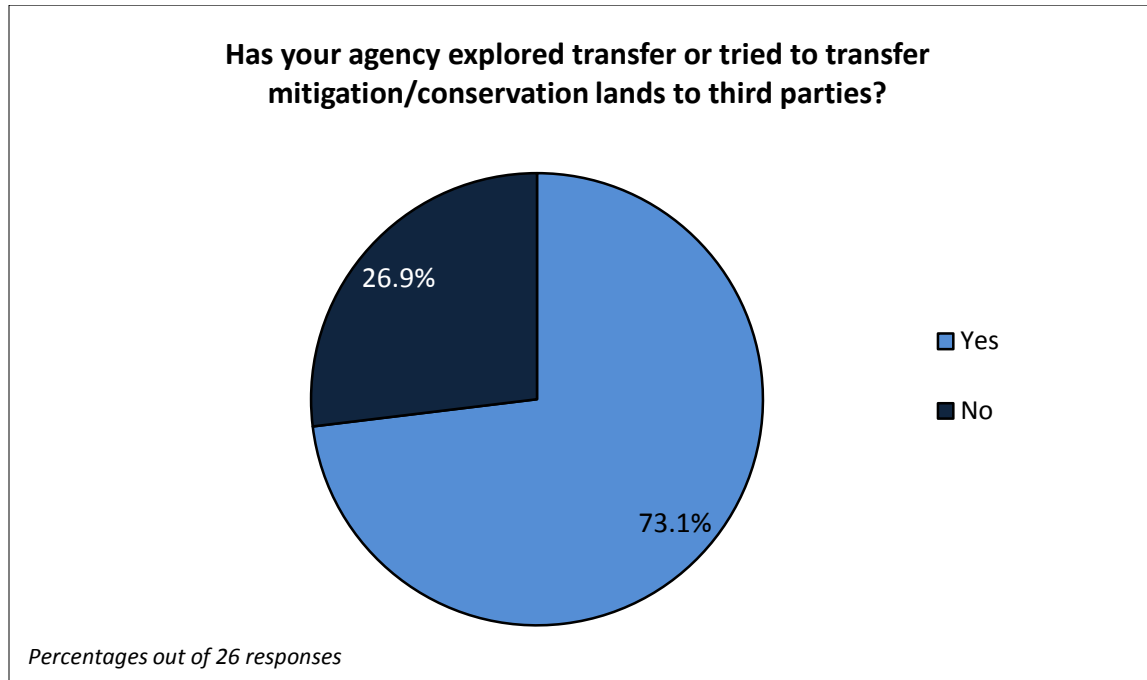


**Question 9: Have you had any problem with the ability to assure long-term funding?**



**If “No” to Question 5 in Profile**

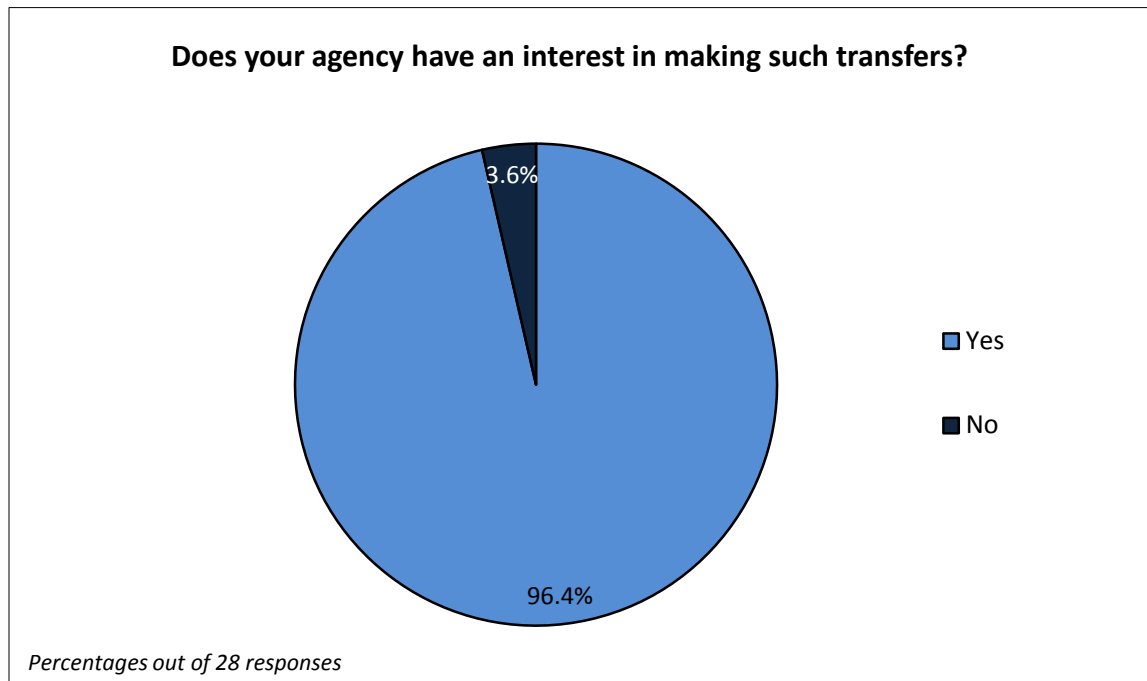
**Question 1: Has your agency explored transfer or tried to transfer mitigation/conservation lands to third parties?<sup>6</sup>**



---

<sup>6</sup> While the percentages in this question are similar to those of question 5 in “Profile,” which essentially asks the same question, some of the respondents have two different answers to questions 5 in “profile” and question 1 here. 2 states, OK and GA (both respondents) , indicated that they have successfully transferred mitigation/conservation sites in question 5, but said that they have not attempted it in question 1 of this page. Louisiana indicated that they had in question 5, but then did not answer the questions in page 2 and did not answer this question.

**Question 2: Does your agency have any interest in making such transfers? <sup>7</sup>**



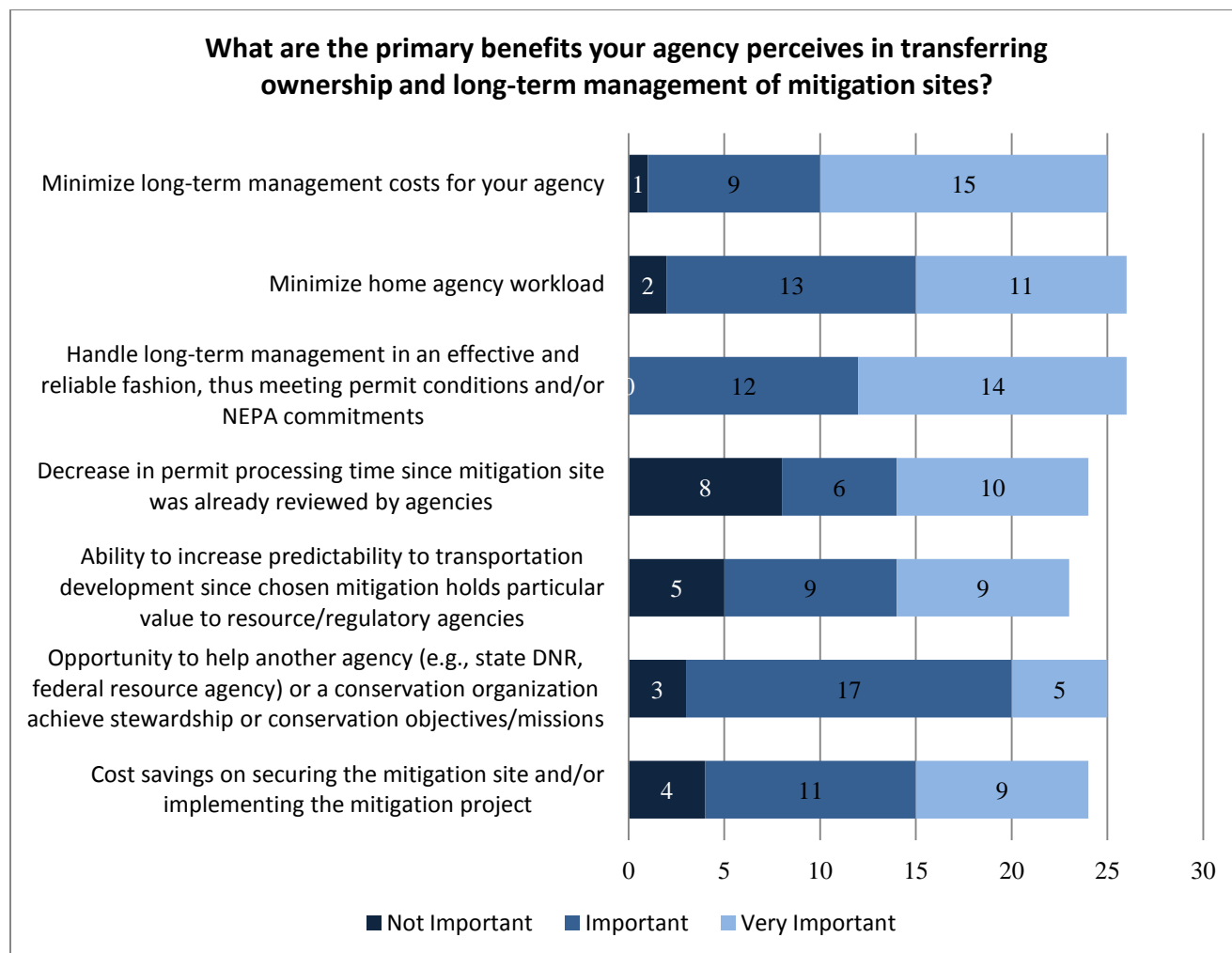
---

<sup>7</sup> The only state to indicate that it has no interest in making these transfers was one of the respondents from Georgia. The other one indicated that they do have interest. Both respondents from Georgia had indicated twice in the survey that they were already making these transfers, so this seems like an inconsistent graph.

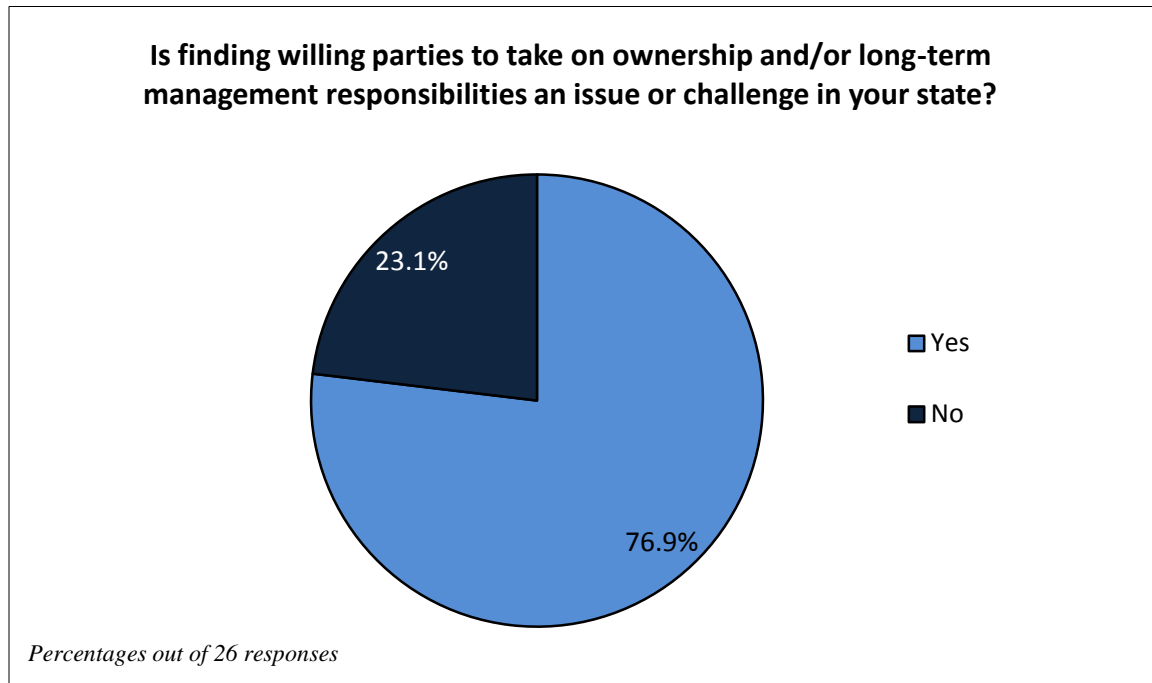


## Benefits and Challenges

**Question 1: What are the primary benefits your agency perceives in transferring ownership and long-term management of mitigation sites?**



**Question 2: Is finding willing parties to take on ownership and/or long-term management responsibilities an issue or challenge in your state? <sup>8</sup>**



---

<sup>8</sup> Georgia respondents gave different answers for this question.

## Identification of Terms and Contract Language

We are interested in identifying any examples of terms (e.g., contract language) that have/has been required with land transfers for long-term management. Please provide the examples below with a description and/or URL if available.

Identifying examples	
State	Example
OH	<a href="http://www.dot.state.oh.us/Divisions/Planning/Environment/Ecological_Resources_Permits/MitigationInventory/Pages/default.aspx">http://www.dot.state.oh.us/Divisions/Planning/Environment/Ecological_Resources_Permits/MitigationInventory/Pages/default.aspx</a>
ME	CEs - submitted to Marie
MO	Corps Approved Conservative Easement - email
UT	We are beginning to work on some, but nothing in a draft form yet
IL	Declaration of covenants and restrictions
TN	1. The Seller shall provide to Purchaser documentation that a minimum of 10% of the purchase price or \$56,130 is placed in a separate escrow account to be called the Maintenance and Monitoring Fund. One-fifth of this fund shall be released on each February 1st after the Corps DE approves the most recently submitted monitoring report that documents the site satisfies the Performance Standards. The last one-fifth of the fund shall be held until the final monitoring report is submitted and approved. Additionally, 1% of the purchase price or \$5,613 will be allocated for Long-Term Management of the project. This Long-Term Management Fund will be administered by the Seller. Seller shall provide an Annual Accounting of Expenditures associated with construction, monitoring and maintenance of the Little Swan Creek Site and the Preserve mitigation sites. Annual Accounting of Expenditures shall be submitted annually to Purchaser and accompany annual monitoring reports.
OR	Will email Marie
WI	Provided PDFs via email
CO	BO for the Shortgrass Prairie: <a href="http://www.coloradodot.info/programs/environmental/wildlife/guidelines/sgpibo.pdf/view">http://www.coloradodot.info/programs/environmental/wildlife/guidelines/sgpibo.pdf/view</a>
NJ	NJ Department of Environmental Protection's conservation restriction template: <a href="http://www.nj.gov/dep/landuse/forms/deedrestriction.pdf">http://www.nj.gov/dep/landuse/forms/deedrestriction.pdf</a>
NC	Will send current CE template via email
MN	Perpetual Conservation Easement Template (Banking): <a href="http://www.bwsr.state.mn.us">www.bwsr.state.mn.us</a> - wetland banking forms

## Identification of Best Contact

Several DOTs also identified “best contacts” in their agency for further information.

State	Name	Title/Position	Agency	Email	Phone
GA	Lisa Westberry	Special Projects Coordinator	GA DOT	<a href="mailto:lwestberry@dot.ga.gov">lwestberry@dot.ga.gov</a>	(404) 631-1772
OK	Kurt Harms	Chief of Right-of-Way	OK DOT	<a href="mailto:kharms@0dot.org">kharms@0dot.org</a>	(405) 521-2661
WI	Robert E. Pearson, P.G	Hydrogeologist/ Wetland Program Administrator	WI DOT	<a href="mailto:Robert.pearson@dot.wi.gov">Robert.pearson@dot.wi.gov</a>	(608) 266-7980
NJ	Paula Scelsi	Supervising Environmental Specialist	NJ DOT	<a href="mailto:Paula.scelsi@dot.state.nj.us">Paula.scelsi@dot.state.nj.us</a>	(609) 530-5464
UT	Terry Johnson	Senior Landscape Architect/ Wetlands Program Manager	UT DOT	<a href="mailto:terryjohnson@utah.gov">terryjohnson@utah.gov</a>	(801) 633-1327
LA	Noel Ardoin	Environmental Engineer Administrator	LA DOTD	<a href="mailto:Noel.ardoin@la.gov">Noel.ardoin@la.gov</a>	(225) 242-4502
NE	Jason Jurgens	Environmental Section Manager	NE Department of Roads	<a href="mailto:Jason.jurgens@nebraska.gov">Jason.jurgens@nebraska.gov</a>	(402) 479-4418
CO	Alison Michael	CDOT liaison to the USFWS	CO DOT	<a href="mailto:Alison_michael@fws.gov">Alison_michael@fws.gov</a>	(303) 236-4758

## Appendix D: Interview Questions

1. **What factored into your agency's satisfaction** with the land transfer process (and long-term management arrangements)?
2. **What has factored into the regulatory agency's and the land steward's satisfaction** with the process?
3. **What were the primary benefits** your agency saw with transferring ownership and long-term management of mitigation sites?
4. **What challenges or impediments (legal, regulatory, other) have you encountered** in the transfer of mitigation lands?

In relation to long-term land management by your own agency?

- b. In relation to land transfers to and long-term management by and to government agencies?
  - c. In land transfers to and long-term management to conservation organizations such as land trusts or other non-profits?
  - d. In land transfers to or long-term management by banks or other private sector entities?
5. **What conditions were placed on the transfer?** Or what terms have you needed to incorporate in contract language? Discuss provisions in the following areas:
  - a. Monetary
  - b. Regulatory
  - c. Legal
6. **How was financial compensation determined** for taking on long-term management responsibilities? What assurances were provided to ensure that the funding would be available for the prescribed period of long-term management?
  - a. In the case of long-term land management by your own agency?
  - b. In the case of land transfers to and long-term management by government agencies?
  - c. In the case of land transfers to and long-term management by conservation organizations?
  - d. In the case of long-term management by other private sector land stewards?
7. **What steps did transfers involve**, that other state DOTs should know about?
8. **How are other state agencies or other management organizations actively and adequately managing a growing portfolio** of land and responsibilities? What **systems or processes** are you/they using? How are they being financed?

9. **Are other agencies (regulatory or new management) taking enforcement actions for failure to comply** with the long-term management plan or requirements?
  - a. Please describe how enforcement and monitoring of long-term management requirements are working in your state.
  - b. What, if any, actions do you take when surrounding or adjacent land uses occur that impact the protected site?
10. **How did your agency go about finding willing parties to take on ownership and long-term management responsibilities?**
  - a. Is this above an issue in your state? Please describe the process you used.
  - b. How does the DOT position itself to respond to issues about fairness in terms of access to opportunities (for the private sector) to provide mitigation services and/or long-term management?
11. How is your agency/your state dealing with **“orphan sites,” those not desirable by resource agencies or conservation organizations; e.g., mitigation sites that are not developed in accordance with or to fit into a larger regional or statewide conservation plan?** States and NGOs have reported reluctance in taking on such sites as they perceive as having lower ecological value/less fit with their organization’s mission.
12. **What new issues surfaced that were not anticipated** when your agency first set up land transfer agreements?
13. **How do your agreements deal with factors that could come into play that are beyond the steward’s responsibility or could not have been anticipated?**
  - a. What does your DOT do when mitigation performed by others “fails” or the long-term management entity goes bankrupt?
  - b. Do your agreements incorporate any mechanisms to protect the land steward from force majeure (e.g., catastrophic events such as floods or hurricanes), etc. (certain events that could bankrupt the steward if the stewardship organization was held responsible for replacing the mitigation). Do regulatory agencies require replacement of mitigation if such catastrophic events occur after the monitoring period has ended?
14. **What future conservation and management issues do you think might arise**, after ownership is transferred?
15. **Please share your perspective on other aspects you feel are important**, regarding partnerships for land transfer and long-term management, about which we may not have asked.
16. **How did your agency successfully resolve any difficult** issues you haven’t described above?
17. **Have you established endowments or other financial measures** to provide for long-term management of a site? What is the nature of those measures:
  - a. Who controls funds

- b. Who invests funds
  - c. Who distribute funds
  - d. Do you involve 3-party financial investors
18. **Have you had any problems with the ability to assure long-term funding?**
  19. **Even if funding can be provided to a state agency for long-term management, the agency may not be able to get the FTEs or PYs** (personnel years) to actually get the management work done. (This came up in CA. How common is this issue elsewhere?)
  20. **What is the level to which the property needs to be managed? What issues are you encountering in this area and how are you dealing with those?** This can vary tremendously from site to site, resource to resource being managed, and office to office of a given regulatory agency. If a certain level of management is desired, actual management could decline to the level of interest on the investment (or interest or attention of the management entity!) unless this is actively avoided.
  21. **Some NGOs leaving land management.** Some major conservation acquisition and land management organizations like The Nature Conservancy (TNC) are getting out of that line of business in some states. TNC has communicated to some MPOs and DOTs that they do not want more assets to manage; instead, they are doing more “life stakes,” where they flip a property back to an individual, allowing construction of one home over the remainder of that person’s lifespan. What is happening in your state?
  22. **General fund money in a state is still entirely subject to the legislature on a yearly basis;** unless funding for long-term management is taken outside of the state process, funding can be lost or not allocated. How is the state dealing with this issue?
  23. **It can take months to get on the docket for consideration by a local or state commission that must act to accept the liability, before escrow can be closed, prolonging the process.** This has especially been an issue when local governments are assuming management responsibilities, but the issue comes into play when any Board or Commission must approve an action.
  24. **What happens when surrounding or adjacent land uses impact the protected site?**
  25. **State conservation agencies have been left/stuck managing lands that are not priority conservation areas,** i.e., lands they do not want to be managing and where the sites were not identified in a broader watershed or ecoregional restoration or conservation planning framework. How are state agencies or other management organizations actively and adequately managing a growing portfolio of responsibilities? How are they dealing with “orphan” sites?
  26. **DOT/MPO interest in a site is restricted to its mitigation value;** if a site has already been “used” for mitigation, the DOT often prefers that subsequent ownership of the easement and/or management of the property occur elsewhere or by others. However, on occasion the latter is considered to be so costly or unaffordable that the DOT prefers to handle these responsibilities itself; e.g., have one of its own biologists visit the site annually and submit a report, have DOT maintenance retain responsibility for repairing fencing, etc. Have

expenses for third party management (even by sister agencies) been such that the DOT has preferred this option?

27. **Even if funding can be provided to a state agency for long-term management, is the managing agency able to get the full time equivalents (FTEs) or personnel years (PYs) to actually get the management work done?**
28. **General fund money in a state is still entirely subject to the legislature on a yearly basis;** unless funding for long-term management is taken outside of the state process, funding can be lost or not allocated. How is the state dealing with this issue?
29. **What is the level to which regulatory agencies are asking that the property be managed?**  
This can vary tremendously from site to site, resource to resource being managed, and office to office of a given regulatory agency. If a certain level of management is desired, actual management could decline to the level of interest on the investment (or interest or attention of the management entity!) unless this is actively avoided.
30. **It can take months to get on the docket for consideration by a local or state commission that must act to accept the liability, before escrow can be closed, prolonging the process.**  
This has especially been an issue when local governments are assuming management responsibilities, but the issue comes into play when any Board or Commission must approve an action.
31. **What impediments exist to creating or instituting a comprehensive statewide DOT mitigation strategy?** In some states, different departments within DOTs address mitigation differently. Creating a comprehensive mitigation approach is favorable, but requires budget and staff time.
32. **What are the specific tools and techniques you are aware of that can facilitate mitigation planning and transfer of mitigation obligations? Do you have approaches you prefer and examples you would share with others?**

---

<sup>2</sup> Environmental Law Institute, “Mitigation of Impacts to Fish and Wildlife Habitat: Estimating Costs and Identifying Opportunities,” 2007. In this report, the Environmental Law Institute (ELI) estimated that private and public expenditures for compensatory mitigation under Section 404 of the Clean Water Act (CWA) come to \$2.9 billion annually – 70% of the total accomplished under five federal compensatory mitigation programs.

<sup>3</sup> Personal communication, Jeff Peterson, Wildlife Specialist, Colorado Department of Transportation, December 7, 2011.

<sup>4</sup> Personal communication, Daniel Peake, Stream & Wetland Mitigation Site Coordinator, Kentucky Transportation Cabinet, January 10, 2012.

<sup>5</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011.

<sup>6</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011.

<sup>7</sup> Personal communication, Margaret Gabil, Caltrans, December 28, 2011.

<sup>8</sup> Shari Schaftlein, Program/Policy Development Team Leader, FHWA headquarters, planning meeting, Washington DC, NAS TRB SHRP, May 25, 2011.



- 
- <sup>9</sup> Personal communication, in-depth interview for NCHRP 25-25/75, October 2011.
- <sup>10</sup> Personal communication, Lynn Bernhard, Utah DOT, December 2011 and January 2012.
- <sup>11</sup> Personal communication, Michael Pettegrew, Ohio DOT, September 2011.
- <sup>12</sup> FHWA, Domestic Scan Report on Successful Mitigation, 2005.  
<http://environment.fhwa.dot.gov/ecosystems/scanrpt/mn.asp>
- <sup>13</sup> FHWA, Domestic Scan Report on Successful Mitigation, 2005.  
<http://environment.fhwa.dot.gov/ecosystems/scanrpt/mn.asp>
- <sup>14</sup> FHWA, Domestic Scan Report on Successful Mitigation, 2005.  
<http://environment.fhwa.dot.gov/ecosystems/scanrpt/mn.asp>
- <sup>15</sup> Lindell Marsh et al., *Mitigation Banking Theory and Practice*, Island Press, p. 121.
- <sup>16</sup> Personal communication, Margaret Gabil, Caltrans, December 28, 2011.
- <sup>17</sup> Personal communication, Margaret Gabil, Caltrans, January 9, 2012.
- <sup>18</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011.
- <sup>19</sup> Personal communication, Bill Gilmore, former NC Ecosystem Enhancement Program Director, 2011.
- <sup>20</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011.
- <sup>21</sup> Personal communication, Michael Pettegrew, Ohio DOT, September 2011.
- <sup>22</sup> Personal communication, Bob Pearson, Wisconsin DOT in-depth interview, September 2011.
- <sup>23</sup> WisDOT Memorandum to Wisconsin DNR Regarding DNR Taking Ownership of DOT Wetland Mitigation Sites, December 18, 2002.
- <sup>24</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011 and January 9, 2012.
- <sup>25</sup> Personal communication, Deane Van Dusen, Manager, Field Services and Mitigation Division, Environmental Office, Maine DOT, September 28, 2011.
- <sup>26</sup> NatureServe and ELI, NCHRP 25-25/67, 2011.
- <sup>27</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011.
- <sup>28</sup> Venner, URS, et al., SHRP C06A, 2011.
- <sup>29</sup> WisDOT Memorandum to Wisconsin DNR Regarding DNR Taking Ownership of DOT Wetland Mitigation Sites, December 18, 2002.
- <sup>30</sup> WisDOT Memorandum to Wisconsin DNR Regarding DNR Taking Ownership of DOT Wetland Mitigation Sites, December 18, 2002.
- <sup>31</sup> WisDOT Memorandum to Wisconsin DNR Regarding DNR Taking Ownership of DOT Wetland Mitigation Sites, December 18, 2002.
- <sup>32</sup> Caltrans, Right-of-Way Manual, <http://www.dot.ca.gov/hq/row/rowman/manual/ch16.pdf>
- <sup>33</sup> Caltrans, Right-of-Way Manual, <http://www.dot.ca.gov/hq/row/rowman/manual/ch16.pdf>
- <sup>34</sup> Caltrans, Right-of-Way Manual, <http://www.dot.ca.gov/hq/row/rowman/manual/ch16.pdf>
- <sup>35</sup> Personal communication, Daniel Peake, KYTC, January 9, 2011.
- <sup>36</sup> Minnesota Board of Soil and Water Resources, Wetlands Restoration Strategy for Minnesota, 2009. [http://www.dnr.state.mn.us/watershed\\_tool/index.html](http://www.dnr.state.mn.us/watershed_tool/index.html)
- <sup>37</sup> Ryan Drum, Prairie Pothole Region Integrated Landscape Conservation Strategy (PPRILCS), January 2012. PPRILCS is a broad partnership that is working to promote the strategic coordination, efficiency, and accountability of conservation activities in the PPR of Minnesota and Iowa through the development of a dynamic decision support system that integrates spatial models for wildlife habitat, water quality, flood reduction, and agricultural economics.

- 
- <sup>38</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011. Also follow up conversations with Keith Greer, SANDAG and Susan Wynn, USFWS.
- <sup>39</sup> Environmental Law Institute. 2007. Mitigation of Impacts to Fish and Wildlife Habitat: Estimating Costs and Identifying Opportunities. Washington, D.C.
- <sup>40</sup> Shaffer, et al. Wildlife Habitat Policy Research Program. Our Nation's Wildlife Habitats: Completing an Integrated System for Conserving Their Values and Benefits in a Changing World, Sept. 1, 2010, National Council for Science and the Environment.  
<http://ncseonline.org/sites/default/files/WHPRP%20Synthesis%20Report.pdf>
- <sup>41</sup> Shaffer, et al. Wildlife Habitat Policy Research Program. Our Nation's Wildlife Habitats: Completing an Integrated System for Conserving Their Values and Benefits in a Changing World, Sept. 1, 2010, National Council for Science and the Environment.  
<http://ncseonline.org/sites/default/files/WHPRP%20Synthesis%20Report.pdf>
- <sup>42</sup> David Salvesen, Phil Burke, Habitat Conservation Opportunities in Natural Hazard Areas, Univ. of North Carolina, October 2009.
- <sup>43</sup> Personal communication, Keith Greer, San Diego Area Governments (SANDAG) TransNet Environmental Management Program, March 1, 2012.
- <sup>44</sup> Jim Forsyth, Texas drought kills as many as half a billion trees, Reuters, December 20, 2011.  
<http://www.reuters.com/article/2011/12/20/us-drought-trees-texas-idUSTRE7BJ20M20111220>
- <sup>45</sup> Caltrans, Mitigation Cooperative Agreement Guidance, draft in process, 2012.
- <sup>46</sup> Personal communication, Deane Van Dusen, Manager, Field Services and Mitigation Division, Environmental Office, Maine DOT, September 28, 2011.
- <sup>47</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011.
- <sup>48</sup> CNRM presentation with ELI and EPA, 2007.
- <sup>49</sup> Personal communication, Margaret Gabil, Caltrans Mitigation Specialist, December 28, 2011.