

## Appendix II: Conservation Easement for Mitigation Banks - template

THIS INDENTURE, is made this [DATE] day of 2000 by and between the [NAME OF BANK] ("Grantor"), of [NAME COUNTY] County, [NAME STATE].

WHEREAS, Grantor is the owner in fee simple of certain real property located in [NAME COUNTY] County, [STATE], more particularly described on Exhibit "A" attached hereto and made a part hereof ("Protected Property"); and

WHEREAS, in consideration of the approval of the Protected Property for use as a mitigation bank, to be known as the [NAME OF BANK], by the U.S. Army Corps of Engineers, Omaha District, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantor has agreed to place certain restrictions on the Protected Property exclusively for conservation purposes, in order that it shall remain substantially in its natural condition forever; and

WHEREAS, the purposes of this Conservation Easement also include, without limitation, one or more of the following: (a) retaining or protecting natural, scenic, or open-space aspects of real property; (b) ensuring the availability of real property for educational, or open-space use; (c) protecting natural resources; (d) maintaining or enhancing air or water quality; and

WHEREAS, Grantee represents that it is a government body empowered to hold an interest in real property under the laws of the State of (STATE NAME) or the United States; and

WHEREAS, the residents and citizens within the jurisdiction boundaries will benefit from the scenic, environmental and preservation of wildlife habitat functions of the Protected Property; and

WHEREAS, the term 'natural condition' shall mean the condition of the Protected Property as set forth in the Mitigation Bank Agreement approved by the US Army Corps of Engineers, and shall be evidenced in part by the surveyed plat of the Protected Property showing all relevant property lines, all existing man-made improvements and features. The natural condition of the Protected Property may also be evidence by: (a) a current aerial photograph of the Protected Property at an appropriate scale taken as close as possible to the date the donation is made; (b) on-site photographs taken at appropriate locations on the Protected Property, including major natural features; and

NOW THEREFORE, for the foregoing consideration, and in further consideration of the restrictions, rights, and agreements herein, Grantor hereby conveys to Grantee a conservation easement over the Protected Property consisting of the following;

### A. RESTRICTIONS

These restrictions shall run with the land and be binding on Grantor's heirs, successors, administrators, assigns, lessees, or other occupiers and users, and are subject to the Reserved Rights that follow

1. **General.** There shall be no filling, excavating, mining or dilling; no removal of natural materials; no dumping of materials; and, no alteration of the topography in any manner except as shall be necessary to maintain the wetlands

2. **Waters and Wetlands.** In addition to the General restrictions above, there shall be no draining, dredging, damming or impounding; no changing the grade or elevation, impairing the flow or circulation of waters, reducing the reach of waters; and, no other discharge or activity requiring a permit under applicable clean water or water pollution control laws and regulations, as amended.
3. **Trees / Vegetation.** There shall be no clearing, burning, cutting or destroying of trees or vegetation, except as expressly authorized in the Reserved Rights; there shall be no planting or introduction of non-native or exotic species of trees or vegetation except as consistent with the terms of the Mitigation Bank Agreement approved by the US Army Corps of Engineers.
4. **Uses.** No agricultural, industrial, or commercial activity shall be undertaken or allowed which would interfere with or damage the Protected Property.
5. **Structures.** There shall be no construction, erection, or placement of buildings, billboards, or any other structures, nor any additions to existing structures.
6. **New Roads.** There shall be no construction of new roads, trails or walkways with the prior written approval of the Grantee and the US Army Corps of Engineers, including the manner in which they are constructed.
7. **Utilities.** There shall be no construction or placement of utilities or related facilities without the prior written approval of Grantee.
8. **Pest Control.** There shall be no application of pesticides or biological controls, including for problem vegetation, without prior written approval from the Grantee.
9. **Other Prohibitions.** Any other use of, or activity on, the Protected Property that is or may become inconsistent with the purposes of the grant, the preservation of the Protected Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

## **B. RESERVED RIGHTS**

Notwithstanding the foregoing Restrictions, Grantor reserves for Grantor, its heirs, successor, administrators, and assigns the following Reserved Rights, which may be exercised upon providing written notice to Grantee, except where expressly provided otherwise:

1. **Landscape Management.** Landscaping by the Grantor to prevent severe erosion or damage to the Protected Property or portions thereof, or significant detriment to existing or permitted uses, is allowed, provided that such landscaping is generally consistent with preserving the natural condition of the Protected Property. Grantor shall undertake all such actions, however categorized, as may be necessary or proper to construct or maintain the wetlands in accord with the approved mitigation Bank Agreement.
2. **Recreation.** Grantor reserves the right to permit any outdoor, non-commercial recreational activities, including hunting (excluding planting or burning) and fish, with cumulatively very small impacts, and which are consistent with the continuing natural condition of the Protected Property.
3. **Mineral Interests.** Grantor specifically reserves a qualified mineral interest (as defined in § 170(h)(6) of the Internal Revenue Code) in subsurface oil, gas or other minerals and the

right to access such minerals. However, there shall be no extraction or removal of, or exploration for, minerals by any surface mining method, nor by any method which results in subsidence or which otherwise interferes with the continuing natural condition of the Protected Property.

4. **Road maintenance.** Grantor reserves the right to maintain canals and associated structures, roads, trails or walkways which exists as of the date of this Grant or which are constructed in accordance with this Conservation Easement. Maintenance shall be limited to: removal or pruning of dead or hazardous vegetation; application of permeable materials (e.g. sand, gravel, crushed) necessary to correct or impede erosion; grading; replacement of culverts, water control structures, or bridges; and maintenance of roadside ditches.
5. **Other Reserved Rights.** Grantor reserves the right to engage in all acts or uses not prohibited by the Restrictions, inclusive of maintain the Beebe Canal and associated irrigation structures, and which are not inconsistent with the conservation purposes of this grant and the preservation of the Protected Property substantially in its natural condition.
6. **Credits.** Grantor reserves the sole and unrestricted right to sell credits or other entitlements or interests in the Protected Property in order to perfect and carry out the purpose of a mitigation bank.

### C. GENERAL PROVISIONS

The following General Provisions shall be binding upon, and inure to the benefit of, the Grantor and Grantee, and the heirs, successors, administrators, assigns, lessees, licensees and agents of each:

1. **Rights of Access and Entry.** Grantee shall have the right to enter and go upon the Protected Property for purposes of inspection, and to take actions necessary to verify compliance with the Restrictions. Grantee shall also have the rights of visual access and view, and to enter and go upon the Protected Property for purposes of making scientific or educational observations and studies, and taking samples, in such a manner as will not disturb the quiet enjoyment of the Protected Property by Grantor. No right of access or entry by the general public to any portion of the Protected Property is conveyed by this Conservation Easement. Grant shall limit public access, if any, to those areas approved by Grantee and the US Army Corps of Engineers.
2. **Enforcement.** In the event of a breach of the Restrictions by Grantor or another party, the Grantee must notify the Grantor in writing of the breach. The Grantor shall have thirty (30) days after receipt of such notice to undertake actions, including complete restoration, that are reasonably calculated to swiftly correct the conditions constituting the breach. If the Grantor fails to take such corrective action within thirty (30) days, or fails to complete the necessary corrective action, the Grantee may undertake such actions, including legal proceedings, as are necessary to effect such corrective action. The cost of corrections, including the Grantee's expenses, court costs, and attorney's fees, shall be paid by Grantor, provided Grantor is determined to be the responsible for the breach. Enforcement shall be at the discretion of the Grantee, and no omission or delay in acting shall constitute a waiver of any enforcement right. These enforcement rights are in addition to those available under other provisions of law or equity.
3. **Events Beyond Grantor's Control.** Nothing herein shall be construed to authorize the Grantee to institute any proceedings against Grantor for any changes to the Protected

Property caused by acts of God or circumstances beyond the Grantor's control such as earthquake, fire, flood, storm, war, civil disturbance, strike, the unauthorized acts of third persons, or similar causes

- 4. Obligations of Ownership.** Grantor is responsible for any real estate taxes, assessments, fees, or charges levied upon the Protected Property. Grantor shall keep the Protected Property free of any liens or other encumbrances for obligations incurred by Grantor. Grantee shall not be responsible for any costs or liability of any kind related to the ownership, operation, insurance, upkeep, or maintenance of the protected Property, except as expressly provided herein. Nothing herein shall relieve the Grantor of the obligation to comply with federal, state, or local laws, regulations and permits that may apply to the exercise of the Reserved Rights.
- 5. Extinguishment.** In the event that changed conditions render impossible the continued use of the Protected Property for the conservation purposes and provided that an appropriate substitution mitigation bank and conservation easement has been tendered by Grantor and approved by Grantee this Conservation Easement may only be extinguished, in whole or in part, by judicial proceeding.
- 6. Eminent Domain.** Whenever all or part of the Protected Property is taken in the exercise of eminent domain so as to substantially abrogate the Restrictions imposed by this Conservation Easement, the Grantor and Grantee shall join in appropriate actions at the time of such taking to recover the full value of the taking, and all incidental and direct damages due to the taking.
- 7. Proceeds.** This Conservation Easement constitutes a real property interest immediately vested in Grantee. In the event that all or a portion of this Protected Property is sold, exchanged, or involuntarily converted following an extinguishment of the exercise of eminent domain, Grantee shall be entitled to the fair market value of this Conservation Easement. The parties stipulate that the fair market value of this Conservation Easement shall be determined by multiplying the fair market value of the Protected Property unencumbered by this Conservation Easement (minus any increase in value after the date of this grant attributable to improvements ) by the ratio of the value of this easement at the time of this grant to the value of the Protected Property (without deduction of the value of this Conservation Easement) at the time of this grant. The values at the time of this grant shall be the values used, or which would have been used, to calculate a deduction for federal income tax purposes, pursuant to Section 170(h) of the Internal Revenue code (whether eligible or ineligible for such a deduction). Grantee shall use its share of the proceeds in a manner consistent with the purposes of this Conservation Easement.
- 8. Replacement Mitigation Bank.** In the event that the conservation restrictions over all or a portion of this Protected Property are substantially abrogated following an extinguishment or the exercise of eminent domain, Grantor shall provide an appropriate replacement mitigation bank and conservation easement approved by Grantee. Grantor's obligation under this paragraph is limited by the amount of any proceeds for the Protected Property. Grantee shall be obligated to Grantor for the value of the replacement conservation easement in an amount determined under Section 170(h) of the Internal Revenue Code (regardless of eligibility for a deduction), not to exceed the amount of proceeds received by Grantee under the preceding paragraph. The replacement conservation easement shall be held by Grantee,

unless another qualified Grantee under [NAME OF STATE] law or § 170(h) of the Internal Revenue code is approved by the Crops of Engineers.

- 9. Indemnification.** Grantor agrees to indemnify and hold harmless Grantee for all claims, causes of action, suits on, and damages, direct or consequential, which may arise from Grantor's ownership of the protected Property, or Grantor's property interest through this Conservation Easement. Grantor shall pay the costs and expenses of legal representation for any claims, causes of action, or suits on Grantee arising from or related to this Conservation Easement, unless it is determined that Grantee is liable for gross negligence in its obligations under this Conservation Easement. Grantee agrees to reasonably cooperate in the defense of any action files against Grantee, or against Grantor and Grantee.
- 10. Notification.** Any notice, request of approval, or other communication required under this Conservation Easement shall be sent by registered or certified mail, postage repaid, to the following addresses (or such address as may be hereafter specified by notice pursuant to this paragraph):

To Grantor:

To Grantee:

To Corps of Engineers:
- 11. Assignment.** This Conservation Easement is transferable, but only to a qualified Grantee under law § 170(h) of the Internal Revenue code. As a condition of such transfer, the transferee shall agree to all of the restriction, rights, and agreements herein, and to continue to carry out the conservation purposes of this Conservation Easement.
- 12. Subsequent Transfer.** Grantor agrees to incorporate the terms of this Conservation Easement in any deed or other legal instrument that transfers any interest in all or a portion of the Protected Property. Grantor agrees to provide written notice of such transfer at least thirty (30) days prior to the date of transfer. The failure of Grantor to comply with this paragraph shall not impair the validity or enforceability of this Conservation Easement.
- 13. Amendment.** This Conservation Easement may be amended, but only in a writing signed by all parties hereto, and provided such amendment does not affect the qualification of this Conservation Easement or the status of the Grantee under any applicable laws or § 170(h) of the Internal Revenue Code, and is consistent with the conservation purposes of this grant.
- 14. Severability.** Should any separable part of this Conservation Easement be found void or unenforceable by the court of competent jurisdiction, the remainder shall continue in full force and effect.
- 15. Warranty.** Grantor warrants that it owns the Protected Property in fee simple, and that Grantor either owns all interests in the Protected Property which may be impaired by the granting of this Conservation Easement or that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Protected Property which have not been expressly subordinated to this Conservation Easement. Grantor further warrants that Grantee shall have the use of and enjoy all the benefits derived from the arising out of the Conservation Easement.

IN WITNESS WEHREOF, Grantor and Grantee have executed this Conservation Easement.

Grantor

[NAME]

BY: \_\_\_\_\_

Its:

STATE OF \_\_\_\_\_ ss.

County of \_\_\_\_\_

SWORN to and subscribed before me this \_\_\_\_ day of \_\_\_\_\_

NOTARY PUBLIC

My Commission expires: \_\_\_\_\_

Grantee

[NAME]

BY: \_\_\_\_\_

Its:

STATE OF \_\_\_\_\_

COUNTY \_\_\_\_\_

SWORN to and subscribed before me this \_\_\_\_ day of \_\_\_\_\_

NOTARY PUBLIC

My Commission expires: \_\_\_\_\_