SECTION 130 – E&WDAA, 2004

ENVIRONMENTAL INFRASTRUCTURE

PLACER AND EL DORADO COUNTIES, CALIFORNIA

MODEL AGREEMENT FOR DESIGN ASSISTANCE

(WORK PERFORMED BY NON-FEDERAL SPONSOR)

OCTOBER 10, 2007

APPLICABILITY. – The attached model agreement is one of six models for the provision of environmental assistance to non-Federal interests in Placer and El Dorado Counties, California pursuant to Section 130 of the Energy and Water Development Appropriations Act, 2004, Public Law 108-137 (Section 130) projects. The following descriptions are provided to assist in determining the correct model to be used for your project. The models discussed below should <u>not</u> be used for any other environmental infrastructure authority. Models for the other environmental infrastructure authorities can be found in the approved model section of the PCA Web page. If there is no approved model posted in the approved model section of the PCA Web page that is applicable to your particular environmental infrastructure authority, the District Project Delivery Team should consult with the appropriate HQ RIT for guidance on drafting the appropriate agreement.

***Section 130 Non-Federal Design* – The attached model should be used for Section 130 projects when the sponsor requests design for the project be undertaken in the agreement and the sponsor will be performing the work on the project. The Federal share will be provided in the form of reimbursement. Since this agreement is limited to design, compliance with all applicable environmental laws and regulations is not required prior to approval and execution of the agreement.**

***Section 130 Non-Federal Construction* – Use only for Section 130 projects when the sponsor requests construction of the project be undertaken in the agreement and the sponsor will be performing the work on the project. The Federal share will be provided in the form of reimbursement. An agreement using this model may <u>NOT</u> be approved and executed prior to compliance with all applicable environmental laws and regulations including, but not necessarily limited to, the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347; hereinafter "NEPA") and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).**

***Section 130 Non-Federal Design and Construction* – Use only for Section 130 projects when the sponsor requests both design and construction of the project be undertaken in**

one agreement and the sponsor will be performing the work on the project. The Federal share will be provided in the form of reimbursement. An agreement using this model may be approved and executed prior to compliance with all applicable environmental laws and regulations including, but not necessarily limited to, NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341). However, the necessary compliance with all applicable environmental laws and regulations will be performed during the design portion of the agreement and must be completed prior to initiation of construction.

***Section 130 Federal Design* – Use only for Section 130 projects when the sponsor requests design for the project be undertaken in the agreement and requests the Government to perform the work on the project. Optional language is included in the model in case the sponsor wants to perform some of the design. Since this agreement is limited to design, compliance with all applicable environmental laws and regulations is not required prior to approval and execution of the agreement.**

***Section 130 Federal Construction* – Use only for Section 130 projects when the sponsor requests only construction of the project be undertaken in the agreement and requests the Government to perform the work on the project and the Government completed the design for the project pursuant to a *Section 130 Federal Design* agreement. If the sponsor intends to provide a design, or a portion thereof, for use by the Government in constructing the project (pre-Agreement design work), do NOT use this model – use the *Section 130 Federal Design and Construction* model. Optional language is included in the model in case if the sponsor wants to perform some of the construction. An agreement using this model may NOT be approved and executed prior to compliance with all applicable environmental laws and regulations including, but not necessarily limited to, NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).**

***Section 130 Federal Design and Construction* – Use only for Section 130 projects when the sponsor requests both design and construction of the project be undertaken in one agreement and requests the Government to perform the work on the project. Optional language is included in the model in case the sponsor wants to perform some of the design or construction. An agreement using this model may be approved and executed prior to compliance with all applicable environmental laws and regulations including, but not necessarily limited to, NEPA and Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341). However, the necessary compliance with all applicable environmental laws and regulations will be performed during the design portion of the agreement and must be completed prior to initiation of construction.**

NOTES. – The following pages (iv – xi) contain numbered notes to assist in drafting an agreement for your project using this model. Throughout the model agreement, there are references to the numbered notes (example: [SEE NOTE – 7]) to direct you to the appropriate note that provides explanation and guidance on use of optional language or information required to fill in the blanks. Several of the notes are general in nature and should be reviewed and discussed with the sponsor during preparation of the draft agreement for your project.

OPTIONAL LANGUAGE. – The use of optional language allows the model to be applicable to a larger universe of projects. Many of the numbered notes (example: [SEE NOTE – 6]) require you to choose between multiple versions of language or to choose whether or not to include a paragraph, sentence, or phrase depending on the specifics of your project. In many cases optional language to address a concept, such as the sponsor performing non-Federal design and construction work, is required in numerous locations throughout the agreement. Each of these locations has been identified with numbered notes; however, it is important to ensure that, if the optional language addressing a certain concept is included in one location, it is also included in all other appropriate locations. Correct use of the optional language is not considered a deviation from the model.

BLANKS. – There are numerous locations where information specific to your project is required to fill in a blank. All of the blanks must be filled in, except the date in the first paragraph, prior to forwarding the agreement for review. Including the information required to fill in a blank is not considered a deviation from the model.

DEFINED TERMS SHOWN IN ITALICS. – Throughout the agreement the terms defined in Article I are shown in italics. Do not remove any of the *italics* from the agreement.

NOTES:

1. FORMAT. - Remove the cover pages, notes section, all bold type references to notes, and any bold type text from the agreement prior to forwarding for review. Reminder: Do not remove any of the *italics* from the agreement.

2. MULTIPLE SPONSORS.

A. No division of responsibilities between or among multiple sponsors in agreement. - In the event there are two or more entities serving as the sponsors for the project, <u>and</u> there is no division of responsibilities between or among them, the agreement can be modified to identify all the entities collectively as the "Non-Federal Sponsors". However, it should be explained to all entities that the term "Non-Federal Sponsors" is construed to hold multiple sponsors jointly and severally responsible for compliance with all agreement obligations. The changes outlined in paragraphs A.1., A.2., and C. of this note are required to identify all entities collectively as "Non-Federal Sponsors" and are not considered deviations from the model.

1. Modify first paragraph to include name of each entity serving as a sponsor. (Example: … Magoffin County Fiscal Court represented by the Magoffin County Judge and the City of Salyersville, Kentucky represented by its Mayor (hereinafter the "Non-Federal Sponsors"))

2. Change "Non-Federal Sponsor" to "Non-Federal Sponsors" throughout the agreement. There are several paragraphs where this change will require additional grammatical changes immediately following the phrase "Non-Federal Sponsors" to reflect multiple sponsors (i.e. "its" to "their" or "assumes" to "assume", etc.).

B. Division of responsibilities between or among multiple sponsors required in agreement. - While it is preferred to have only one sponsor or, when multiple sponsors are necessary, to designate them collectively as "Non-Federal Sponsors" (see paragraph A. of this note), we do recognize there are instances where there are two or more entities serving as the sponsors for the project and there is a need for a division of responsibilities between or among them in the body of the agreement (such as - one sponsor can only provide the LERR and the other sponsor performs all other responsibilities or one sponsor can only serve as sponsor for one purpose and another sponsor is required as sponsor for other purposes). It is important that each obligation in the agreement is reviewed and assigned to the appropriate party and that all obligations of the agreement are addressed. We have found that modifying an agreement to address a division of responsibilities can be very cumbersome and it offers many opportunities for inadvertent omissions. Therefore, at a minimum, the division of responsibilities in the drafted agreement for your project must be coordinated with the vertical team (PDT, MSC, HQ, and, if necessary OASA(CW)) to ensure that the proposed division of obligations is acceptable and that all obligations are addressed. The changes outlined in paragraphs B.1., B.2., and C. of this note are required for multiple sponsors where such approach was documented fully in the approved decision document or otherwise was approved in writing by the HQ RIT. When so approved, such

changes to address multiple sponsors are not considered deviations from the model.

1. Modify first paragraph to identify each entity separately using the identifier preferred by the sponsor (see note 4) and then collectively as the "Non-Federal Sponsors". (Example: … The State of California (hereinafter the "State"), represented by the President of The Reclamation Board, and the Sacramento Area Flood Control Agency (hereinafter "SAFCA") represented by its Chair of the Board (the State and SAFCA when referred to collectively are referred to as the "Non-Federal Sponsors"))

2. Review each occurrence of "Non-Federal Sponsor" and change it to the identifier for the sponsor that will be responsible for that obligation. If all sponsors collectively will be responsible for an obligation, then change "Non-Federal Sponsor" to "Non-Federal Sponsors". There are several paragraphs where this change will require additional grammatical changes immediately following the phrase "Non-Federal Sponsors" to reflect multiple sponsors (i.e. "its" to "their" or "assumes" to "assume", etc.).

C. The changes below are required for all agreements with multiple sponsors, regardless of whether you followed paragraph A. or B. above. These changes are not considered deviations from the model.

1. Modify title to include name of each entity serving as a sponsor.

2. On the signature page, a separate signature block will be required for each entity serving as a sponsor.

3. A separate Certificate of Authority will be required for each entity serving as a sponsor.

4. A Certification Regarding Lobbying must be signed by each signatory to the agreement.

3. GOVERNMENT REPRESENTATIVE. – Insert the title of the Government representative signing the agreement. Do not include the name, only the title. (Example: U.S. Army Engineer, Mobile District)

4. REFERENCE TO NON-FEDERAL SPONSOR. - Use "Non-Federal Sponsor", "Local Sponsor", "State", "County", "Commonwealth", "Territory" or other identifier as preferred by the sponsor in the parenthetical phrase and consistently throughout the agreement. This change is not considered a deviation from the model. If this change is made in one location, ensure that all other locations are similarly changed.

5. NON-FEDERAL SPONSOR REPRESENTATIVE. – Insert the title of the sponsor's representative signing the agreement. Do not include the name, only the title. The title shown for the sponsor's representative should match the title shown on the signature page and should be preceded by "the" or "its", as appropriate, to match the title of the sponsor's representative. (Example: the Mayor)

6. SPONSOR IS A NON-PROFIT ENTITY. - The affected local government must consent, in writing, to the non-profit entity serving as sponsor for the project before the Corps will proceed with drafting an agreement using this model.

A. Whereas clause - If the sponsor is a non-profit entity, the Whereas clause following the reference to this note should be included in your agreement. If the sponsor is not a non-profit entity, delete the Whereas clause following the reference to this note. Deletion of this Whereas clause is not considered a deviation from the model.

B. Optional Article I.K. - Include optional Article I.K. in your agreement, only if the sponsor is a non-profit entity.

C. For each location that requires a choice between two options - Choose Option (1) if the sponsor is not a non-profit entity or Option (2) if the sponsor is a non-profit entity. Delete, in its entirety, the option not used. If Option (2) is selected, then all other optional language regarding a non-profit entity must be selected for inclusion elsewhere in the agreement (see paragraphs A. and B. of this note and note 23).

7. PRE-AGREEMENT DESIGN WORK. – Only design performed by the sponsor prior to the effective date of the agreement subject to the conditions and limitations stated in the agreement should be considered "pre-Agreement design work". The reasonable costs of pre-Agreement design work which have not been included in any other agreement for the project shall be included in total design costs. Because the authority for reimbursement is specifically stated in Section 130, the sponsor will be reimbursed, subject to the availability of funds and as limited by the Section 130 Program Limit and the Section 102 Limit, for the costs of pre-Agreement design work that when added to the other sponsor contributions exceed the sponsor's share of total design costs. If the sponsor wants to include costs for pre-Agreement design work, then all language regarding pre-Agreement design work should be included in the agreement. For each location where an optional paragraph(s) or an optional phrase regarding pre-Agreement design work is provided, include in your agreement all of the optional paragraph(s) or optional phrase, as applicable, only if the sponsor is requesting costs for pre-Agreement design work be included in total design costs.
8. DESCRIPTION OF THE PROJECT. – The input required for the description of the project is described below.

A. Describe the project features to be designed pursuant to this agreement in detail sufficient to avoid any confusion over what is or is not included. If the project features to be designed pursuant to this agreement are an element of a countywide or statewide environmental infrastructure system, only the features to be designed in this agreement should be included in the description of the project.

B. The title and date of the decision document that describes the project to be designed should be included. Also include the title of the approving official (such as Commander, _____ Division; or Commander, _____ District) and the date of approval. The civilian format for any dates included in the agreement should be used.

(Example: January 22, 2004)

C. For any projects where the proposed work is design for reconstruction, repair, or rehabilitation of existing environmental infrastructure features, the sponsor must verify in writing if it was constructed through any other Federal program and whether OMRR&R was required and that the proposed reconstruction, repair, or rehabilitation is not normal OMRR&R activities required for the existing environmental infrastructure features. Performance of normal OMRR&R activities should not be considered for implementation under this authority. The letter from the sponsor should be part of the PCA package. If the original construction of the environmental infrastructure feature was performed under a Federal program that required OMRR&R, you should consult with your MSC and HQ RIT for guidance before proceeding any further.

9. BETTERMENTS. – A betterment is a difference in quality of an element of the project to be designed, not a difference in kind. (Example: install larger size or higher grade pipe than needed to meet Federal standards) The term "betterment" does not include any design for features not included in the definition of the project as defined in the agreement.

10. LIMITATIONS ON REIMBURSEMENTS BY THE GOVERNMENT. - The amount of reimbursement provided pursuant to Article II.C. in any fiscal year is subject to the applicable limitations of Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103. The amount of reimbursement made under Article II.C. or IV.C.1. together with the credits or reimbursements proposed for all other applicable programs and projects cannot exceed the total limit indicated in each fiscal year. Each district should verify with your MSC and your HQ RIT to determine if you are impacted by this limitation.

11. ARTICLE II.D. - LIMITS ON FEDERAL PARTICIPATION.

A. CONGRESSIONAL ADD PARAGRAPH – Article II.D.1. - The dollar amount to be included in the first blank should the amount of Federal funds that have been appropriated for the Section 130 Program, minus any rescissions and reductions for savings and slippages, as of the effective date of the agreement. The dollar amount to be included in the second blank should be that portion of available Section 130 Program funds that the district is projecting to be available for the project in this agreement, as of the effective date of the agreement. The district, through the Design Coordination Team (Article III), must work closely with the sponsor to plan execution of the project so that useful portions can be designed as funds are made available. The sum of the amount of Federal funds made available for all the Section 130 agreements, including this one, plus the sum of Federal funds made available for overall management of the Section 130 Program, cannot exceed the amount of Federal funds that have been appropriated for the Section 130 Program, minus any rescissions and reductions for savings and slippages, as of the effective date of the agreement, nor can it exceed the current Section 130 Program Limit, unless Congress has authorized an increase in the limit in Act language.

B. SECTION 130 PROGRAM LIMIT – Article II.D.3. - The Government will not

issue work allowances for the Section 130 Program beyond the amount authorized to be appropriated in Section 130, currently $40,000,000.

C. SUSPENSION OF GOVERNMENT PERFORMANCE – Article X.B. - If the Government suspends its future performance responsibilities, including reimbursement, under the agreement pursuant to Article II.D.2., the sponsor, at its sole discretion, may continue work on the project. However the sponsor should understand that if they continue to work on the project during the period of suspension of the Government's performance responsibilities, such work performed must comply with the conditions of Article II.B. of the agreement to be eligible for inclusion in total design costs and any reimbursement of the Federal share of such work once the Government has resumed its performance responsibilities. If the Section 102 Limit compels the Government to suspend reimbursement, but funds are otherwise available, the Government's performance of its other obligations will not be suspended.

12. ADDITIONAL ITEMS OF COOPERATION. - Include any additional paragraphs in the agreement necessary to reflect special requirements of non-Federal cooperation specified in the decision document upon which the agreement is based. Carefully review the items of cooperation in the decision document to ensure that all items of cooperation are covered in the agreement. When including any additional items of cooperation in the agreement, name the responsible party then include the item of cooperation contained in the decision document. (Example: The Non-Federal Sponsor shall …) Including the additional items of cooperation in the agreement is not considered a deviation from the model unless additional language is required elsewhere in the agreement to further address the added item of cooperation.

13. ARTICLE IV.A. – BREAKDOWN OF PROJECT COSTS.

A. The costs shown in Article IV.A.1. should be the current estimate of the costs at current price levels and inflated through the estimated mid-point of design.

B. To determine the reimbursement of the Federal share due to the sponsor in accordance with II.C.: Step (1) determine the Government's share of total design costs; Step (2) subtract from the Government's share of total design costs the amount of total design costs to be incurred by the Government; the difference is the reimbursement of the Federal share due to the sponsor that should be shown in the seventh blank in Article IV.A.1.
Example:
total design costs = $400,000
total design costs to be incurred by the Government = $75,000
total design costs to be incurred by the sponsor = $325,000
Step 1 - ($400,000 x .75) = $300,000 - Government's share of total design costs
Step 2 - $300,000 – $75,000 = $225,000 – reimbursement due to sponsor

C. The blank in Article IV.A.2. should be filled in with the date (month, year) of the first quarterly report of costs to be provided to the sponsor.

14. ARTICLE IV.C. - FINAL ACCOUNTING.

A. When a final accounting cannot be conducted in a timely manner because of outstanding claims and appeals, an interim accounting should be conducted. The district should use its best judgment in determining whether to conduct an interim accounting or wait for final resolution of outstanding claims and appeals.

B. Nothing in the agreement, prevents any interim accountings from being conducted prior to the end of the period of design.

15. ARTICLE VI – HOLD AND SAVE. - Include all the optional language after the colon only if optional Article XIV - Obligations of Future Appropriations (see note 18) is included in the agreement and the sponsor requests this optional language be added to Article VI of the agreement. In addition, if this language is included, delete the "The". Reminder: The entire article is not optional, only the phrase shown in the brackets is optional.

16. ARTICLE XI - NOTICES. – Insert the full address of the sponsor and Government - including titles or office title/symbol of individuals to receive the notices. Do not include the name of the individual to receive the notices as it may change throughout the life of the agreement.

17. ARTICLE XIII – THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES. – Article XIII is optional and can be deleted if requested by the sponsor. If the article is deleted, renumber the remaining articles in the agreement and verify the references throughout the agreement to the remaining articles. In particular, if the article regarding Obligations of Future Appropriations is included in the agreement, and the sponsor requests the optional language in Article VI (see note 15) verify the reference contained in Article VI to the article regarding Obligations of Future Appropriations and correct, as necessary. Renumbering the remaining articles in the agreement and correction of all references to the remaining articles are not considered deviations from the model.

18. ARTICLE XIV – OBLIGATIONS OF FUTURE APPROPRIATIONS. - Reminder: Use of this article is limited to a sponsor that is a State agency or a political subdivision of the State. It cannot be used by a non-profit entity.

A. Include optional Article XIV in the agreement only if the sponsor requests this language <u>and</u> only after your District Counsel determines, in writing after review of information supporting the request from the sponsor, that the sponsor is a State agency or a political subdivision of the State that derives its funds for the project directly from appropriations <u>and</u> the sponsor has constitutional or statutory limitations prohibiting it from committing future appropriations.

B. The information to be added in the first three blanks in Article XIV.A. should identify the body that makes the appropriations. (Example: Legislature of the State of Ohio

or City Counsel of the City of Cleveland)

19. ARTICLE XIV.A. - ADDITIONAL RESTRICTION ON OBLIGATIONS OF FUTURE APPROPRIATIONS. - Include all the optional language after the colon if requested by the sponsor. The information to be included in the blanks must provide more detailed information on the location of the obligation of future appropriations restriction. (Example: Section 7 of the City Charter of the City of Cleveland)

20. SPONSOR'S BUDGET CYCLE. - Choose Option (1) if the sponsor has a 1 year budget cycle or Option (2) if the sponsor has a 2 year budget cycle. Delete, in its entirety, the option not used.

21. ARTICLE XV – TRIBAL SOVEREIGN IMMUNITY. – Include optional Article XV only if the sponsor is a Native American Tribe. The information to be included in the first and third blanks should be the name of the instrument (resolution, ordinance, etc) where the sponsor has waived sovereign immunity. The information to be included in the fourth blank should be the title of the sponsor's representative (see note 5).

22. TITLE OF GOVERNMENT REPRESENTATIVE. – Insert the title of the Government representative signing the agreement. Do not include the name, only the title. If the signature authority is delegated to the district, the phrase "District Engineer" should be used in this location. If the signature authority is not delegated, the title shown should match the title of the Government representative shown in the first paragraph (see note 3).

23. CERTIFICATE OF AUTHORITY.

A. If applicable, choose Option (1) if the sponsor is not a non-profit entity or Option (2) if the sponsor is a non-profit entity. Delete, in its entirety, the option not used. If Option (2) is selected, then all other optional language regarding a non-profit entity must be selected for inclusion elsewhere in the agreement (see note 6).

B. The attorney signing the Certificate of Authority cannot be the signatory to the agreement. The attorney signing the Certificate of Authority is certifying that the signatory to the agreement has the authority to obligate the sponsor. Do not forget to fill in the name in the first line prior to execution of the agreement.

24. PREPARING AGREEMENT FOR SIGNATURE.

A. When printing the agreement for execution: 1) remove the cover page, notes section, bold type references to notes, and any bold type text from the agreement; 2) ensure that the appropriate information has been included in all blanks in the agreement and the Certificate of Authority; 3) ensure that titles of articles are not the last thing at the bottom of the page; and 4) ensure that there are no page breaks which allow half empty pages. Reminder: Do not remove any of the *italics* from the agreement.

B. If the signature authority has been delegated to the District Engineer: 1) the title

of the Government representative in the first paragraph (see note 3) should be "U.S. Army Engineer, _____ District"; 2) the title of the Government representative in the last paragraph (see note 22) should be "District Engineer"; and 3) since this is a civilian document use the civilian version of the District Engineer's signature block.

C. If the signature authority is not delegated, the title in the first paragraph (see note 3) and last paragraph should match the title of the Government representative shown in the signature block.

D. Before signature by the Government representative, ensure that the sponsor signs and dates a minimum of four copies of the agreement, and Certification Regarding Lobbying, and that the Certificates of Authority are signed and dated by the appropriate people. The date on the first page should be filled in by the Government representative signing the agreement, not the sponsor.

E. The Government should retain two copies of the fully executed agreement. All other copies should be provided to the sponsor. A photocopy or a pdf file (as determined by the MSC and the appropriate HQ RIT) of the fully executed agreement should be provided to the MSC and to the appropriate HQ RIT within 14 days after execution of the agreement.

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
[FULL NAME OF NON-FEDERAL SPONSOR]
FOR
DESIGN
ASSISTANCE
FOR THE
[FULL NAME OF PROJECT]

THIS AGREEMENT is entered into this _____ day of _____, ____, by and between the Department of the Army (hereinafter the "Government"), represented by the **[SEE NOTE - 3]** and **[FULL NAME OF NON-FEDERAL SPONSOR] [SEE NOTE - 4]** (hereinafter the "Non-Federal Sponsor"), represented by **[SEE NOTE - 5]**.

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army is authorized to provide design and construction assistance, which may be in the form of grants or reimbursements of the Federal share of project costs, to improve the efficiency and the use of existing water supplies in Placer and El Dorado Counties through water and wastewater projects, programs, and infrastructure (hereinafter the "Section 130 Program") pursuant to Section 130 of the Energy and Water Development Appropriations Act, 2004, Public Law 108-137 (hereinafter "Section 130");

WHEREAS, Section 130 provides that the Secretary of the Army may provide assistance to improve the efficiency and the use of existing water supplies in Placer and El Dorado Counties through water and wastewater projects, programs, and infrastructure only if the project is publicly owned;

WHEREAS, Section 130 provides that $40,000,000 in Federal funds are authorized to be appropriated for design and construction assistance for the Section 130 Program;

WHEREAS, the U.S. Army Engineer, _____ District (hereinafter the "District Engineer") has determined that **[FULL NAME OF THE PROJECT]** in **[SPECIFIC LOCATION OF THE PROJECT, INCLUDING COUNTY & STATE]** (hereinafter the "*Project*", as defined in Article I.A. of this Agreement) is eligible for implementation under Section 130;

WHEREAS, Section 130 provides that the Secretary of the Army shall not provide assistance to improve the efficiency and the use of existing water supplies in Placer and El Dorado Counties through water and wastewater projects, programs, and infrastructure until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project;

[SEE NOTE – 6]

WHEREAS, the affected local government has consented to the **[FULL NAME OF NON-FEDERAL SPONSOR]**, a *non-profit entity* (as defined in Article I.K. of this Agreement), serving as the non-Federal sponsor for the *Project*;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the "Agreement") for the provision of design assistance for the *Project*;

WHEREAS, Section 130 specifies the cost-sharing requirements applicable to the *Project* **[SEE NOTE – 7:** including that the Secretary of the Army shall afford credit for the reasonable costs of design completed by the non-Federal interest before entering into a written agreement with the Secretary**]**;

WHEREAS, Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103, provides that credits and reimbursements afforded for all applicable general authorities and under specific project authority shall not exceed $100,000,000 for all applicable programs and projects in each *fiscal year*;

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the *Project* in accordance with the terms of this Agreement; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree as follows:

ARTICLE I - DEFINITIONS

[SEE NOTE - 8]

A. The term "*Project*" shall mean _____ as generally described in the **[FULL TITLE OF DECISION DOCUMENT]**, dated _____, ____ and approved by _____ on _____, ____.

B. The term "*total design costs*" shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement that the District Engineer determines are directly related to design of the *Project*. Subject to the provisions of this Agreement including audits conducted in accordance with Article VII.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs, the

term shall include, but is not necessarily limited to: **[SEE NOTE - 7:** the costs of the Non-Federal Sponsor's *pre-Agreement design work* determined in accordance with Article II.J. of this Agreement;**]** the Government's costs of review in accordance with Article II.A.1. of this Agreement; the Government's costs of preparation of environmental compliance documentation in accordance with Article II.A.2. of this Agreement; the Government's costs of technical assistance in accordance with Article II.A.1. of this Agreement; the Non-Federal Sponsor's design costs incurred after the effective date of this Agreement; the Non-Federal Sponsor's supervision and administration costs; the Non-Federal Sponsor's costs of identification of legal and institutional structures in accordance with Article II.G. of this Agreement not incurred pursuant to any other agreement for the *Project*; the Non-Federal Sponsor's and the Government's costs of participation in the Design Coordination Team in accordance with Article III of this Agreement; the Non-Federal Sponsor's costs of contract dispute settlements or awards; the Non-Federal Sponsor's and the Government's costs of audit in accordance with Article VII.B. and Article VII.C. of this Agreement; and any other costs incurred by the Government pursuant to the provisions of this Agreement. The term does not include any costs of activities performed under any other agreement for the *Project*; any costs of *betterments*; any interest penalty paid in accordance with Article IV.B.4. of this Agreement; any costs of dispute resolution under Article V of this Agreement; any costs (other than audit) resulting from financial obligations after the *period of design*; or the Non-Federal Sponsor's costs of negotiating this Agreement.

C. The term "*period of design*" shall mean the time from the effective date of this Agreement to the date that design of the *Project* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article II.D. or Article X of this Agreement, whichever is earlier.

[SEE NOTE - 9]

D. The term "*betterment*" shall mean a difference in the design of an element of the *Project* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the design of that element. The term does not include any design for features not included in the *Project* as defined in paragraph A. of this Article.

E. The term "*fiscal year*" shall mean one year beginning on October 1 and ending on September 30.

F. The term "*Federal program funds*" shall mean funds provided by a Federal agency, other than the Department of the Army, plus any non-Federal contribution required as a matching share therefor.

G. The term "*sufficient invoice*" shall mean submission of all of the following three items: (1) a written certification by the Non-Federal Sponsor to the Government that it has made specified payments to contractors, suppliers, or employees for performance of work in accordance with this Agreement, or a written certification by the Non-Federal Sponsor to the

Government that it has received bills from contractors, suppliers, or employees for performance of work in accordance with this Agreement; (2) copies of all relevant invoices and evidence of such payments or bills received; and (3) a written request for reimbursement for the amount of such specified payments or bills received that identifies those costs that have been paid or will be paid with *Federal program funds*.

H. The term "*Section 130 Program Limit*" shall mean the amount of Federal funds authorized to be appropriated for the Section 130 Program. As of the effective date of this Agreement, such amount is $40,000,000.

I. The term "*Section 102 Limit*" shall mean the annual limit on credits and reimbursements imposed by Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103.

[SEE NOTE - 7]

J. The term "*pre-Agreement design work*" shall mean the work performed prior to the effective date of this Agreement by the Non-Federal Sponsor that is directly related to design of the *Project* and that was not performed pursuant to any other agreement for the *Project*.

[SEE NOTE - 6]

K. The term "*non-profit entity*" shall mean an organization that is incorporated under the applicable laws of the State of California as a non-profit organization, exempt from paying Federal income taxes under Section 501 of the Internal Revenue Code (26 U.S.C. 501), and organized and operated primarily for one of the conservation purposes specified in Section 170(h)(4)(A) of the Internal Revenue Code (26 U.S.C. 170(h)(4)(A)).

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. Using its funds, the Non-Federal Sponsor expeditiously shall design the *Project* in accordance with applicable Federal laws, regulations, and policies.

1. The Non-Federal Sponsor shall require all contractors to whom it awards design contracts to provide 30 percent and 100 percent design information to enable in-progress review of the design. The Government may participate in the review of the design at each stage of completion and may provide technical assistance to the Non-Federal Sponsor on an as-needed basis until the end of the *period of design*. The Government shall perform a final review to verify that the design is complete and is necessary for the *Project*. Upon completion of design, the Non-Federal Sponsor shall furnish the District Engineer with copies of the completed design.

2. Using information developed by the Non-Federal Sponsor, the Government shall develop and coordinate as required, an Environmental Assessment and Finding of No Significant Impact or an Environmental Impact Statement and Record of Decision, as necessary,

to inform the public regarding the environmental impacts of the *Project* in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347).

3. The Non-Federal Sponsor shall obtain all permits and licenses necessary for the design of the *Project* and, in the exercise of its rights and obligations under this Agreement, shall comply with all applicable Federal, state, and local laws, regulations, ordinances, and policies including the laws and regulations specified in Article VIII of this Agreement. As necessary to ensure compliance with such laws, regulations, ordinances, and policies, the Non-Federal Sponsor shall include appropriate provisions in its contracts for the design of the *Project*.

4. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on the solicitations for all contracts for the *Project*, including relevant plans and specifications, prior to the Non-Federal Sponsor's issuance of such solicitations. To the extent possible, the Non-Federal Sponsor shall afford the Government the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the Government with notification of a contract modification is not possible prior to execution of the contract modification, the Non-Federal Sponsor shall provide such notification in writing at the earliest date possible. To the extent possible, the Non-Federal Sponsor also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof. The Non-Federal Sponsor shall consider in good faith the comments of the Government, but the contents of solicitations, award of contracts or commencement of design using the Non-Federal Sponsor's own forces, execution of contract modifications, resolution of contract claims, and performance of all design on the *Project* shall be exclusively within the control of the Non-Federal Sponsor.

5. At the time the Non-Federal Sponsor furnishes a contractor with a notice of acceptance of completed work for each contract for the *Project*, the Non-Federal Sponsor shall furnish a copy thereof to the Government.

B. The Government shall determine and include in *total design costs* the costs incurred by the Non-Federal Sponsor that the District Engineer determines are directly related to design of the *Project*, subject to the conditions and limitations of this paragraph.

1. All design work performed by the Non-Federal Sponsor for the *Project* shall be subject to a review by the Government to verify that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies, and is necessary for the *Project*.

2. The Non-Federal Sponsor's costs for design that may be eligible for inclusion in *total design costs* pursuant to this Agreement shall be subject to an audit in accordance with Article VII.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs.

3. The Non-Federal Sponsor's costs for design that may be eligible for inclusion in *total design costs* pursuant to this Agreement are not subject to interest charges, nor are they

subject to adjustment to reflect changes in price levels between the time the work is completed and the time the costs are included in *total design costs*.

4. The Government shall not include in *total design costs* any costs paid by the Non-Federal Sponsor using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

5. The Government shall not include in *total design costs* any costs for design in excess of the Government's estimate of the costs of design of the *Project* had the work been accomplished by the Government.

[SEE NOTE - 10]

C. The Government shall reimburse the Non-Federal Sponsor, in accordance with Article IV.B. of this Agreement, the amount necessary so that the Federal contribution towards *total design costs* equals 75 percent; however, any reimbursement by the Government is subject to the availability of funds and is limited by the *Section 130 Program Limit*.

[SEE NOTE - 11]

D. Notwithstanding any other provision of this Agreement, Federal financial participation in the *Project* is limited by the following provisions of this paragraph.

1. As of the effective date of this Agreement, $_____ of Federal funds have been provided by the Congress of the United States (hereinafter the "Congress") for the Section 130 Program of which $_____ is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the Section 130 Program or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

2. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total design costs* that the Government projects will be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project*, the Government's future performance under this Agreement shall be suspended and the parties shall proceed in accordance with Article X.B. of this Agreement. However, if the Government cannot make available sufficient Federal funds to meet the Federal share of *total project costs* in the then-current *fiscal year* solely due to the *Section 102 Limit*, only the Government's future performance related to reimbursement pursuant to paragraph C. of this Article shall be suspended.

3. If the Government determines that the total amount of Federal funds provided by Congress for all projects implemented pursuant to Section 130 has reached the *Section 130 Program Limit*, and the Government projects that the Federal funds the Government will make available to the *Project* within the *Section 130 Program Limit* will not be sufficient to meet the Federal share of *total design costs*, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project* within the *Section 130 Program Limit*, the parties shall terminate this Agreement and proceed in accordance with Article X of this Agreement.

E. Upon conclusion of the *period of design*, the Government shall conduct an accounting, in accordance with Article IV.C. of this Agreement, and furnish the results to the Non-Federal Sponsor.

F. The Non-Federal Sponsor and the Government, in consultation with appropriate Federal and State officials, shall develop a facilities or resource protection and development plan. Such plan shall include necessary design, completion of all necessary environmental coordination and documentation, preparation of appropriate engineering plans and specifications, and any other matters related to design of the *Project* in accordance with this Agreement.

G. The Non-Federal Sponsor shall identify such legal and institutional structures as are necessary to ensure the effective long-term operation of the *Project*. The Non-Federal Sponsor shall provide to the Government a written description of such legal and institutional structures. The Non-Federal Sponsor's costs of identification of such legal and institutional structures shall be included in *total design costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article VII.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

H. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

I. In the event that the Non-Federal Sponsor elects to include *betterments* in the design of the *Project* during the *period of design*, the Non-Federal Sponsor shall notify the Government in writing and describe the *betterments* it intends to design. The Non-Federal Sponsor shall be solely responsible for all costs due to *betterments* and shall pay all such costs without reimbursement by the Government.

[SEE NOTE - 7]

J. The Government shall determine and include in *total design costs* the reasonable costs incurred by the Non-Federal Sponsor for *pre-Agreement design work* that have not been incurred pursuant to any other agreement for the *Project*, subject to the conditions and limitations of this

paragraph. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the amount of costs to be included in *total design costs* for *pre-Agreement design work*.

1. Acceptance by the Government of the *pre-Agreement design work* shall be subject to a review by the Government to verify that the work was accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies, and to verify that the *pre-Agreement design work* is necessary for the *Project*.

2. The Non-Federal Sponsor's costs for *pre-Agreement design work* that may be eligible for inclusion in *total design costs* pursuant to this paragraph shall be subject to an audit in accordance with Article VII.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs.

3. The Non-Federal Sponsor's costs for *pre-Agreement design work* that may be eligible for inclusion in *total design costs* pursuant to this paragraph are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the *pre-Agreement design work* was completed and the time the costs are included in *total design costs*.

4. The Government shall not include in *total design costs* any costs for *pre-Agreement design work* paid by the Non-Federal Sponsor using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

5. The Government shall not include in *total design costs* any costs for *pre-Agreement design work* in excess of the Government's estimate of the costs of the *pre-Agreement design work* had the work been accomplished by the Government.

[SEE NOTE - 12]

ARTICLE III - DESIGN COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 calendar days after the effective date of this Agreement, shall appoint named senior representatives to a Design Coordination Team. Thereafter, the Design Coordination Team shall meet regularly until the end of the *period of design*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Design Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Design Coordination Team informed of the progress of design and of significant pending issues and actions, and shall seek the views of the Design Coordination Team on matters that the Design Coordination Team generally oversees.

C. Until the end of the *period of design*, the Design Coordination Team shall generally oversee the *Project*, including matters related to: design; completion of all necessary environmental coordination and documentation; scheduling of reports and work products; plans and specifications; anticipated real property and relocation requirements for construction of the *Project*; design contract awards and modifications; design contract costs; the Government's cost projections; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Project* including issuance of permits; and other matters related to the *Project*. This oversight of design of the *Project* shall be consistent with a project management plan developed by the Government and the Non-Federal Sponsor.

D. The Design Coordination Team may make recommendations to the Non-Federal Sponsor on matters related to design of the *Project* that the Design Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Design Coordination Team. The Non-Federal Sponsor, having the legal authority and responsibility for design of the *Project*, has the discretion to accept or reject, in whole or in part, the Design Coordination Team's recommendations except as otherwise required by the provisions of this Agreement, including compliance with applicable Federal, State, or local laws or regulations.

E. The Non-Federal Sponsor's costs of participation in the Design Coordination Team shall be included in *total design costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article VII.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. The Government's costs of participation in the Design Coordination Team shall be included in *total design costs* and shared in accordance with the provisions of this Agreement.

ARTICLE IV - METHOD OF PAYMENT

[SEE NOTE - 13]

A. The Non-Federal Sponsor shall provide the Government with such documents as are sufficient to enable the Government to maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, contributions provided by the parties, **[SEE NOTE - 7:** , and the costs included in *total design costs* for the *pre-Agreement design work* determined in accordance with Article II.J. of this Agreement**]**.

1. As of the effective date of this Agreement, *total design costs* are projected to be $_____; the Government's share of *total design costs* is projected to be $_____; the Non-Federal Sponsor's share of *total design costs* is projected to be $_____; *total design costs* to be incurred by the Government are projected to be $_____; *total design costs* to be incurred by the Non-Federal Sponsor are projected to be $_____; **[SEE NOTE - 7:** the costs included in *total design costs* for the *pre-Agreement design work* determined in accordance with Article II.J. of this Agreement are projected to be $_____;**]** and total reimbursements in

accordance with paragraph B.2. of this Article are projected to be $_____. These amounts are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

2. By _____ and by each quarterly anniversary thereof until the conclusion of the *period of design* and resolution of all relevant claims and appeals, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total design costs*; the Government's share of *total design costs*; the Non-Federal Sponsor's share of *total design costs*; *total design costs* incurred by the Government; *total design costs* incurred by the Non-Federal Sponsor; **[SEE NOTE - 7:** the costs included in *total design costs* for the *pre-Agreement design work* determined in accordance with Article II.J. of this Agreement;**]** and total reimbursements paid to the Non-Federal Sponsor.

B. The Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor, in accordance with the provisions of this paragraph, the amount required pursuant to Article II.C. of this Agreement.

1. Periodically, but not more frequently than once every 30 calendar days, the Non-Federal Sponsor shall provide the Government with a *sufficient invoice* for costs the Non-Federal Sponsor has incurred for the *Project*.

2. Upon receipt of such *sufficient invoice*, the Government shall review the costs identified therein and shall determine: (a) the amount to be included in *total design costs*, subject to the limitations in Article II.B. of this Agreement; (b) the total costs incurred by the parties to date; (c) each party's share of *total design costs* incurred by the parties to date; (d) the costs incurred by each party to date; (e) the total amount of reimbursements the Government has made to date in accordance with this paragraph; (f) the balance of Federal funds available for the *Project*, as of the date of such review; (g) the amount of reimbursement, if any, due to the Non-Federal Sponsor; and (h) the amount that actually will be paid to the Non-Federal Sponsor (hereinafter the "payment amount") if the amount of reimbursement determined above cannot be fully paid due to an insufficiency of Federal funds or the limitations of the *Section 130 Program Limit* or the *Section 102 Limit*.

3. Within 30 calendar days after receipt of the *sufficient invoice* provided in accordance with paragraph B.1. of this Article (hereinafter the "payment period"), the Government shall: furnish the Non-Federal Sponsor written notice of the determinations made in accordance with paragraph B.2. of this Article; provide an explanation, if necessary, of why the payment amount is less than the amount of reimbursement determined due to the Non-Federal Sponsor; and make a payment to the Non-Federal Sponsor equal to the payment amount.

4. If the payment amount is not paid by the end of the payment period, the designated payment office shall credit to the Non-Federal Sponsor's account an interest penalty on the payment amount, without request from the Non-Federal Sponsor. Unless prescribed by other Federal authority, the interest penalty shall be at the rate established by the Secretary of the

Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the first day after the end of the payment period.

a. The interest penalty shall accrue daily from the first day after the end of the payment period through the date on which the payment is made. Accruals shall be compounded at 30 calendar day intervals through the date on which the payment is made.

b. The interest penalty shall not accrue, nor be compounded, during suspension of all of the Government's future performance or during suspension of only the Government's future performance to provide reimbursement. Further no interest penalty shall accrue, nor be compounded, upon termination of this Agreement under Article X of this Agreement.

[SEE NOTE - 14]

C. Upon conclusion of the *period of design* and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total design costs*. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Government's total required share of *total design costs* exceeds the Government's total contributions provided thereto, the Government, no later than 90 calendar days after completion of the interim or final accounting, as applicable, shall make a payment to the Non-Federal Sponsor, subject to the availability of funds and as limited by the *Section 130 Program Limit* and the *Section 102 Limit*, in an amount equal to the difference.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Government for *total design costs* exceed the Government's total required share thereof, the Non-Federal Sponsor shall refund the excess amount to the Government within 90 calendar days of the date of completion of such accounting by delivering a check payable to "FAO, USAED, **[APPROPRIATE USACE DISTRICT & EROC]**" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government. In the event the Government is due a refund and funds are not available to refund the excess to the Government, the Non-Federal Sponsor shall seek such appropriations as are necessary to make the refund.

ARTICLE V - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VI – HOLD AND SAVE

[SEE NOTE - 15: Subject to the provisions of Article XIV of this Agreement, the**]** The Non-Federal Sponsor shall hold and save the Government free from all damages arising from design of the *Project* and any *betterments*, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE VII - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, or other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements **[SEE NOTE - 6 - CHOOSE: (1)** to State and Local Governments at 32 C.F.R. Section 33.20 **(2)** with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations, OMB Circular A-110**]**. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, records, documents, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507), as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars **[SEE NOTE - 6 - CHOOSE: (1)** A-87 **(2)** A-122**]** and A-133, and such costs as are

allocated to the *Project* shall be included in *total design costs* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act Amendments of 1996. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. **[SEE NOTE - 6 - CHOOSE: (1)** A-87 **(2)** A-122**]** and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total design costs* and shared in accordance with the provisions of this Agreement.

ARTICLE VIII - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government shall comply with all applicable Federal and State laws and regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d) and Department of Defense Directive 5500.11 issued pursuant thereto; and Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

ARTICLE IX - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

ARTICLE X - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend the Government's future performance under this Agreement.

[SEE NOTE – 11]

B. In the event all of the Government's future performance under this Agreement or only the Government's future performance to provide reimbursement is suspended pursuant to Article II.D.2. of this Agreement such suspension shall remain in effect until such time that the

Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total design costs* the Government projects will be incurred through the then-current or upcoming *fiscal year*, or the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that this Agreement is terminated pursuant to this Article or Article II.D. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article IV.C. of this Agreement. The Government may reserve a percentage of total Federal funds made available for the *Project* as a contingency to pay costs of termination. Notwithstanding such termination, the Non-Federal Sponsor may continue with design of the *Project*, at no cost to the Government.

D. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article II.D. of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

ARTICLE XI - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or sent by telegram or mailed by first-class, registered, or certified mail, as follows:

[SEE NOTE - 16]

If to the Non-Federal Sponsor:

If to the Government:

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XII - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

[SEE NOTE – 17]

ARTICLE XIII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

[SEE NOTE – 18]

ARTICLE XIV - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the _____ of the _____ of _____ **[SEE NOTE - 19:** , where creating such an obligation would be inconsistent with _____ of the _____ of _____**]**.

B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that **[SEE NOTE - 20 - CHOOSE: (1)** year, **(2)** biennium,**]** and shall use all reasonable and lawful means to secure those appropriations. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

[SEE NOTE - 21]

ARTICLE XV – TRIBAL SOVEREIGN IMMUNITY

By _____ dated _____, the Non-Federal Sponsor waived any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court related to the provisions, terms, and conditions contained in this Agreement. Further, such _____ authorized **[SEE NOTE - 5]** _____ to include such waiver as part of this Agreement. Accordingly, the Non-Federal Sponsor hereby waives any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court to: (1) enforce the terms and conditions of this Agreement; (2) recover damages for any breach of the terms and conditions of this Agreement; and (3) seek indemnification or contribution based on the Non-Federal Sponsor's obligations under Article VI of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the **[SEE NOTE - 22]**.

DEPARTMENT OF THE ARMY

BY: **[SIGNATURE]**
[TYPED NAME]
[TITLE IN FULL]

DATE: _____

[FULL NAME OF NON-FEDERAL SPONSOR]

BY: **[SIGNATURE]**
[TYPED NAME]
[TITLE IN FULL]

DATE: _____

[SEE NOTE - 23]

CERTIFICATE OF AUTHORITY

OPTION 1

I, _____, do hereby certify that I am the principal legal officer of the **[FULL NAME OF NON-FEDERAL SPONSOR]**, that the **[FULL NAME OF NON-FEDERAL SPONSOR]** is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the **[FULL NAME OF NON-FEDERAL SPONSOR]** in connection with the **[FULL NAME OF "PROJECT"]**, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement and that the persons who have executed this Agreement on behalf of the **[FULL NAME OF NON-FEDERAL SPONSOR]** have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ ___.

OPTION 2

I, _____, do hereby certify that I am the **[FULL TITLE OF ATTORNEY SIGNING CERTIFICATE OF AUTHORITY]** of the **[FULL NAME OF NON-FEDERAL SPONSOR]**, that the **[FULL NAME OF NON-FEDERAL SPONSOR]** is a legally constituted *non-profit entity* with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the **[FULL NAME OF NON-FEDERAL SPONSOR]** in connection with the **[FULL NAME OF "PROJECT"]**, and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement and that the persons who have executed this Agreement on behalf of the **[FULL NAME OF NON-FEDERAL SPONSOR]** have acted within their corporate authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 20_ .

[SIGNATURE]
[TYPED NAME]
[TITLE IN FULL]

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

[SIGNATURE OF PCA SIGNATORY]
[TYPED NAME]
[TITLE IN FULL]

DATE: _____