

**WATER SERVICE AGREEMENT – RECHARGE
BETWEEN
THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT and
NEBRASKA COMMUNITY FOUNDATION, ACTING AS THE CONTRACTING AGENT OF THE
GOVERNANCE COMMITTEE OF THE
PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM**

THIS AGREEMENT made and entered into this ____ day of _____, 2022, by and between **The Central Nebraska Public Power and Irrigation District**, a public corporation and political subdivision of the State of Nebraska, with its principal office located at 415 Lincoln Street, P.O. Box 740, Holdrege, NE 68949-0740, hereinafter referred to as "Central" and the **Nebraska Community Foundation**, a Nebraska non-profit corporation, with its principal office located at 8100 South 15th Street, Suite A, P.O. Box 83107, Lincoln, Nebraska 68501-3107, hereinafter referred to as "Foundation," acting as the contracting agent of the Governance Committee of the Platte River Recovery Implementation Program hereinafter referred to as "Program", with its principal office located at 4111 4th Avenue, Suite 6, Kearney, Nebraska 68845 (hereinafter the Nebraska Community Foundation and Platte River Recovery Implementation Program are collectively referred to as "Platte Program" and the Nebraska Community Foundation is referred to individually as the "Foundation"). Central and the Platte Program may individually be referred to as "Party" and shall collectively be referred to herein as the "Parties."

WITNESSETH:

WHEREAS, Central is the owner of the Phelps Canal and Elwood Reservoir as shown on Exhibit A and Exhibit B; and

WHEREAS, the Platte Program desires Central to augment Platte River stream flows via aquifer recharge from the Phelps Canal and Elwood Reservoir; and

WHEREAS, Central desires to provide such recharge services; and

WHEREAS, Central also has an agreement with the State of Nebraska (State) for recharge services using the Phelps Canal and Elwood Reservoir;

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants and agreements herein contained and the terms and conditions hereinafter set forth, it is hereby covenanted and agreed:

1. WATER SERVICE.

a. During the term of this Agreement, Central may divert water into the Phelps Canal to provide the Platte Program with aquifer recharge via seepage through the Phelps Canal from the diversion headgate to MP 13.3 (Phelps Canal Diversions to MP 13.3) in the non-irrigation season. A minimum of 75% of the Phelps Canal Diversions to MP 13.3 will be reserved for the Platte Program. The Phelps Canal Diversions to MP 13.3 shall be calculated as all water passing through the Phelps Canal measuring flume located at milepost (MP) 1.6 on the Phelps Canal and subtracting all water that is released from the Phelps Canal above or released past the Phelps Canal MP 13.3 gate structure. The Phelps Canal Diversions to MP 13.3 may be adjusted by subtracting any deliveries or releases made by Central from the Phelps Canal and for the difference in storage in the canal at the end of the irrigation season, at the end of each subsequent quarter or billing period, and at the beginning of the next irrigation season. The non-irrigation season will begin when Central stops releasing water into sections of the Phelps Canal for irrigation and end when Central begins releasing water into sections of the Phelps Canal for irrigation, as determined by Central.

Central shall reasonably notify the Platte Program as to the commencement and termination of each non-irrigation season during the term of this Agreement. Central shall also communicate with the Platte Program when it is making diversions of water pursuant to this Agreement.

b. During the term of this Agreement, Central may provide the Platte Program with aquifer recharge via seepage from Elwood Reservoir (Elwood Reservoir Diversions). A minimum of 50% of the Elwood Reservoir Diversions shall be reserved for the Platte Program. The Elwood Reservoir Diversions will be estimated by Central's best available measuring devices/methods and consistent with how such estimations are made by Central for other projects. If allowed by the appropriations (as further defined below), water diverted into Elwood Reservoir under this Agreement may be released from Elwood Reservoir with written approval by the Platte Program. If Elwood Reservoir Diversions are ever released from Elwood Reservoir this Agreement may be amended to establish diversion and reservoir storage allocation reservation rules for the Platte Program and the State.

c. Central may make reasonable adjustments in either the Phelps Canal Diversions to MP 13.3 and/or Elwood Reservoir Diversions as necessary to account for similar operations from other water sources, or for other reasons as may be appropriate. Central shall consult with the Platte Program in making such adjustments. All data used by Central regarding the Phelps Canal Diversions to MP 13.3 and Elwood Reservoir Diversions calculations shall be shared with the Platte Program.

d. Central may reduce or suspend groundwater recharge diversions under this Agreement for good cause, including but not limited to (a) maintenance or construction on the Phelps Canal or Elwood Reservoir, (b) high groundwater levels, (c) icing conditions, or (d) other operational concerns, all as determined by Central.

2. WATER SERVICE CHARGES & REFUNDS.

a. The Foundation shall pay to Central, within forty-five (45) days of the full execution of this Agreement or receipt of an invoice from Central, whichever last occurs, a payment in the total amount of **\$11,154,956.24** for the anticipated water services to be provided over the term of this Agreement as follows:

b. The Platte Program shall pay Central **\$2,000,000** to help cover the cost to install a seepage control system at Elwood Reservoir as part of this Agreement.

c. The Platte Program shall pay Central a total of **\$9,154,956.24** for estimated 50,000 acre-ft of Phelps Canal Diversions to MP 13.3 and 134,927.7 acre-ft of Elwood Reservoir Diversions (Total Diversion Payment) to be provided to the Platte Program over the term of this Agreement.

d. For each acre-ft of Phelps Canal Diversion to MP 13.3, \$35.92 shall be credited against the Total Diversion Payment. For each acre-ft of Elwood Reservoir Diversions, \$54.54 shall be credited against the Total Diversion Payment.

e. Within forty-five (45) days of the end of the term of this Agreement (including any extensions of the term made in accordance with paragraph 3.b below), Central shall repay to the Foundation any remaining balance of the Total Diversion Payment, if any, less any amounts due to Central for water recharge services provided up to the effective date of termination.

f. Any costs associated with third-party liability claims against Central related specifically to the recharge services provided under this Agreement to the Platte Program shall be credited against the Total Diversion Payment, reducing the amount of Total Diversion Payment available for remaining recharge services accordingly. Central shall inform and consult with the Platte Program regarding any such third-party claims brought against

Central. The foregoing credit against the Total Diversion Payment shall be reduced equitably if recharge services applicable to the State (or any other party) are part of such third-party liability claims. The credit against the Total Diversion Payment shall also not apply if the Platte Program defends and indemnifies Central against such third-party liability claims.

3. **TERM.** Subject to the rights set forth below, the term of this Agreement shall commence on the date of the last signature to this Agreement by the Foundation, the Platte Program, and Central (the “Commencement Date”), and shall expire on December 31, 2032, unless extended or terminated as otherwise provided herein.

a. If the Total Diversion Payment is fully expended prior to the end of the term of this Agreement, Central shall cease to provide any further water services under this Agreement, unless the Parties agree in writing to payment amounts for the continuation of such service.

b. If the amount of water service provided is such that the Total Diversion Payment is not fully expended by December 31, 2032, the term of this Agreement may be extended for up to ten successive one-year terms, at the discretion of the Platte Program, until the earlier of full expenditure of the Total Diversion Payment, or December 31, 2042. The Platte Program shall provide written notice to Central of its intention to extend the term of the Agreement no later than 30 days prior to the termination of the Agreement (including previous extensions) or as soon as reasonably possible following receipt of notice from Central that the Total Diversion Payment has not been fully expended hereunder.

c. If Central determines and informs the Platte Program that it has been unable to acquire the Appropriations necessary to provide the water service contemplated hereunder, and either Party reasonably determines that there will not likely be a change in the status of the necessary Appropriations to allow for the water service to be provided by Central pursuant to this Agreement, then either Party shall have the right to immediately terminate this Agreement by providing written notice of termination to the other Party. Such notice shall include the effective date of the termination and as of such date, the Platte Program shall be entitled to a return of the then-current balance of the Total Diversion Payment, less any amounts due to Central for water recharge services provided up to the effective date of termination.

4. **DATA SHARING.** Central and the Platte Program agree to share all hydraulic and hydrologic data collected in association with this Agreement. Central will provide the Platte Program with annual reports describing the types and costs of water services received until such time as the total cost of the services provided equals or exceeds the Total Diversion Payment, or until this Agreement ends, whichever comes first.

5. **WATER APPROPRIATIONS.** The source of supply for Central to provide the water services under this Agreement shall be water which is available pursuant to state surface water appropriations which may be acquired by Central for such purposes (referred to herein as “Appropriations”). The water service described herein shall be subject to such Appropriations. The water delivered pursuant to this Agreement shall be consistent with and limited to the terms and provisions of the Appropriations. Central makes no guarantees with regard to whether or not such Appropriations will be granted and makes no specific commitments as to the amount of effort, if any, that Central will make in seeking such Appropriations.

6. **RELATION TO CENTRAL FACILITIES AND OPERATIONS.** The Foundation and Platte Program understand and agree that Central owns and operates its facilities for hydropower production, irrigation, and other purposes, and these facilities may in the future be modified or rebuilt, and Central may build other facilities within its water delivery and regulation system. The Parties further understand and agree that the water to be recharged under this Agreement will pass through certain of Central's facilities. Notwithstanding any other provision herein, this Agreement shall not create or establish, or be construed to create or establish, by implication or otherwise, any obligation, restriction, or limitation, now or in the future, with respect to Central's facilities, or the operation of

Central's facilities.

7. **FORCE MAJEURE.** Central shall not be liable for any delay or failure to perform its obligations under this Agreement caused by an event or condition beyond the reasonable control of, and without the fault or negligence of Central, including, without limitation, failure of facilities, flood, earthquake, storm, lightning, fire, severe cold or other weather event, epidemic, contamination, war, terrorist act, riot, civil disturbance, labor disturbance, accidents, sabotage, or restraint by court or restrictions by other public authority which delays or prevents performance (including but not limited to the adoption or change in any rule, policy, or regulation or environmental constraints imposed by federal, state or local governments), which Central could not reasonably have avoided by exercise of due diligence and foresight. Upon the occurrence of such an event or condition, the obligations of Central under this Agreement shall be excused and suspended without penalty or damages, provided that Central shall give the Platte Program notice describing the particulars of the occurrence or condition, the suspension of performance is of no greater scope and of no longer duration than is required by the event or condition, and Central proceeds with reasonable diligence to remedy its inability to perform and informs the Platte Program of the actions taken to remedy the consequences of the event or condition.

8. **DEFAULT.** If any Party to this Agreement fails to perform or otherwise breaches any of the terms of this Agreement, then such failure shall constitute a default. In the event of default by any Party, the non-defaulting Party or Parties shall give written notice of the default to the defaulting Party. Following such written notice, the defaulting Party or Parties may cure the default within ninety (90) days. Upon cure, this Agreement shall remain in full force and effect. If the defaulting Party or Parties fails to cure, the non-defaulting Party or Parties shall be entitled to any and all legal and equitable remedies.

9. **ENTIRE AGREEMENT.** This Agreement contains the entire understanding of the Parties hereto with respect to the water service contemplated hereby and supersedes all prior agreements and understandings between the Parties, written or oral, with respect to such subject matter. This Agreement does not modify, replace, or supersede other agreements between the Parties regarding other water services that are distinct from those described herein, including specifically the agreement dated August 22, 2018 for delivery of water by Central to the Platte Program's Cottonwood Ranch complex.

10. **AMENDMENT.** No amendment to this Agreement shall be valid unless it is in writing and signed by the Parties hereto.

11. **BINDING EFFECT.** This Agreement shall inure to the benefit of and be binding on the Parties, their successors and assigns.

12. **FOUNDATION.** The Foundation has represented to Central, and Central hereby acknowledges, that the Foundation is the Financial Management entity providing support to the Governance Committee of the Platte Program. The Foundation, by executing this Agreement, is acting as the contracting agent of the Governance Committee of the Platte Program.

13. **ASSIGNMENT.** Except as provided below, this Agreement may not be assigned by the Platte Program or the Foundation without the written consent of Central. If the Platte Program is dissolved for any reason or is not renewed, the Foundation may assign its interest in this Agreement to one or more Program Signatories, including the State of Nebraska, in which case the assignee(s) will assume the responsibilities of the Platte Program. If the Foundation is no longer the financial management entity providing support to the Governance Committee of the Platte Program, for any reason, the Foundation, as the financial management entity representing the Platte Program, may assign its responsibilities and interest under this Agreement to the successor financial management entity providing support to the Governance Committee of the Platte Program, provided that the successor financial management entity shall assume all obligations of the Foundation under this Agreement. If no Program Signatory

has an interest in accepting assignment as discussed above, then this Agreement shall terminate, and upon such termination, the Platte Program shall be entitled to a return of the then-current balance of the Total Diversion Payment, less any amounts due to Central for water recharge services provided up to the effective date of termination.

14. GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement the date first stated above.

NEBRASKA COMMUNITY FOUNDATION

Date _____

By _____

Jason D. Kennedy
Chief Financial and Administrative Officer

THE CENTRAL NEBRASKA PUBLIC POWER AND
IRRIGATION DISTRICT,

Date _____

By _____

Devin Brundage
General Manager

PLATTE RIVER RECOVERY IMPLEMENTATION
PROGRAM ACKNOWLEDGEMENT

I hereby certify that the Governance Committee of the Program has authorized the Nebraska Community Foundation, acting as contracting agent of the Governance Committee of the Program, to enter into this agreement.

Date _____

By _____

Jason M. Farnsworth
Executive Director

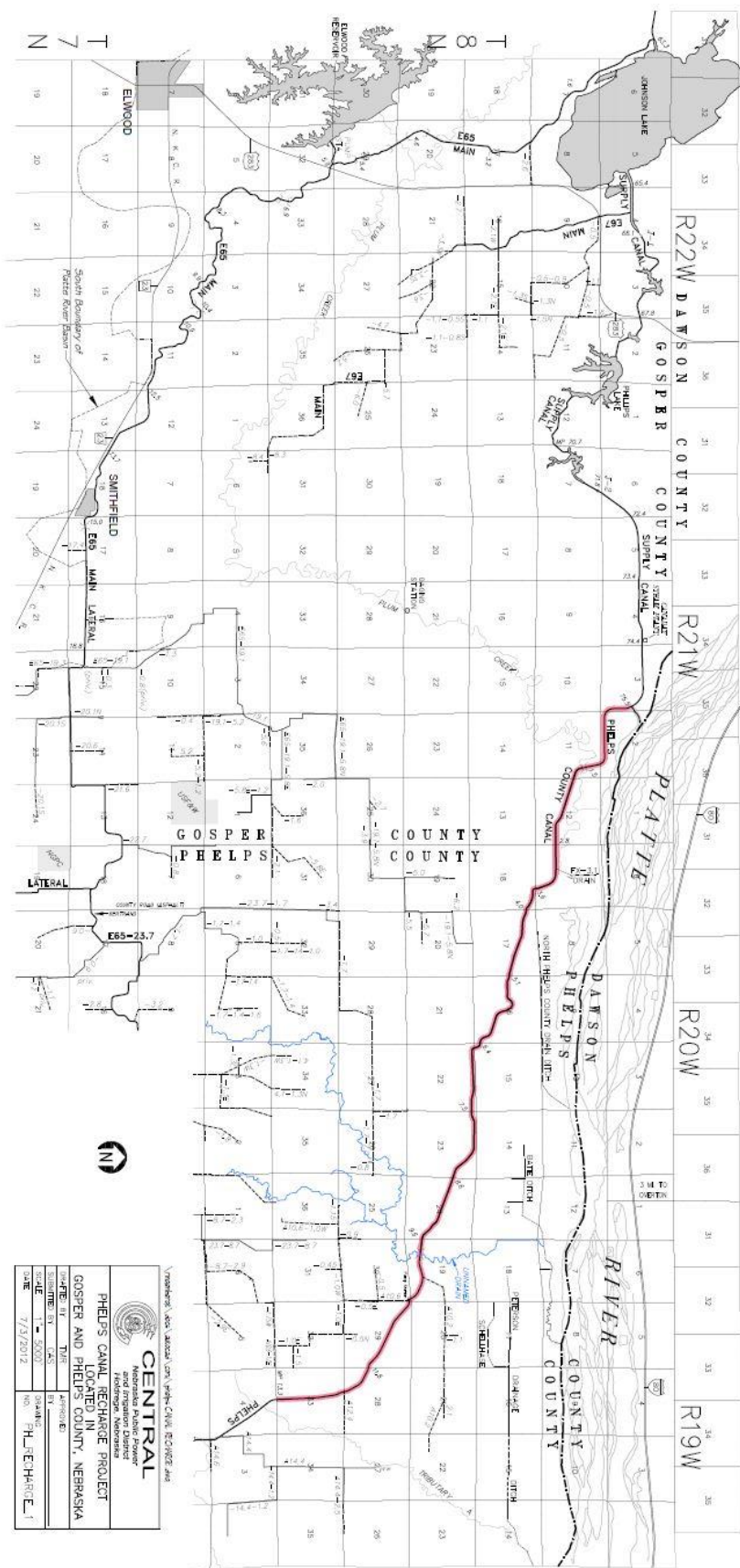
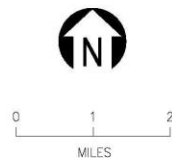
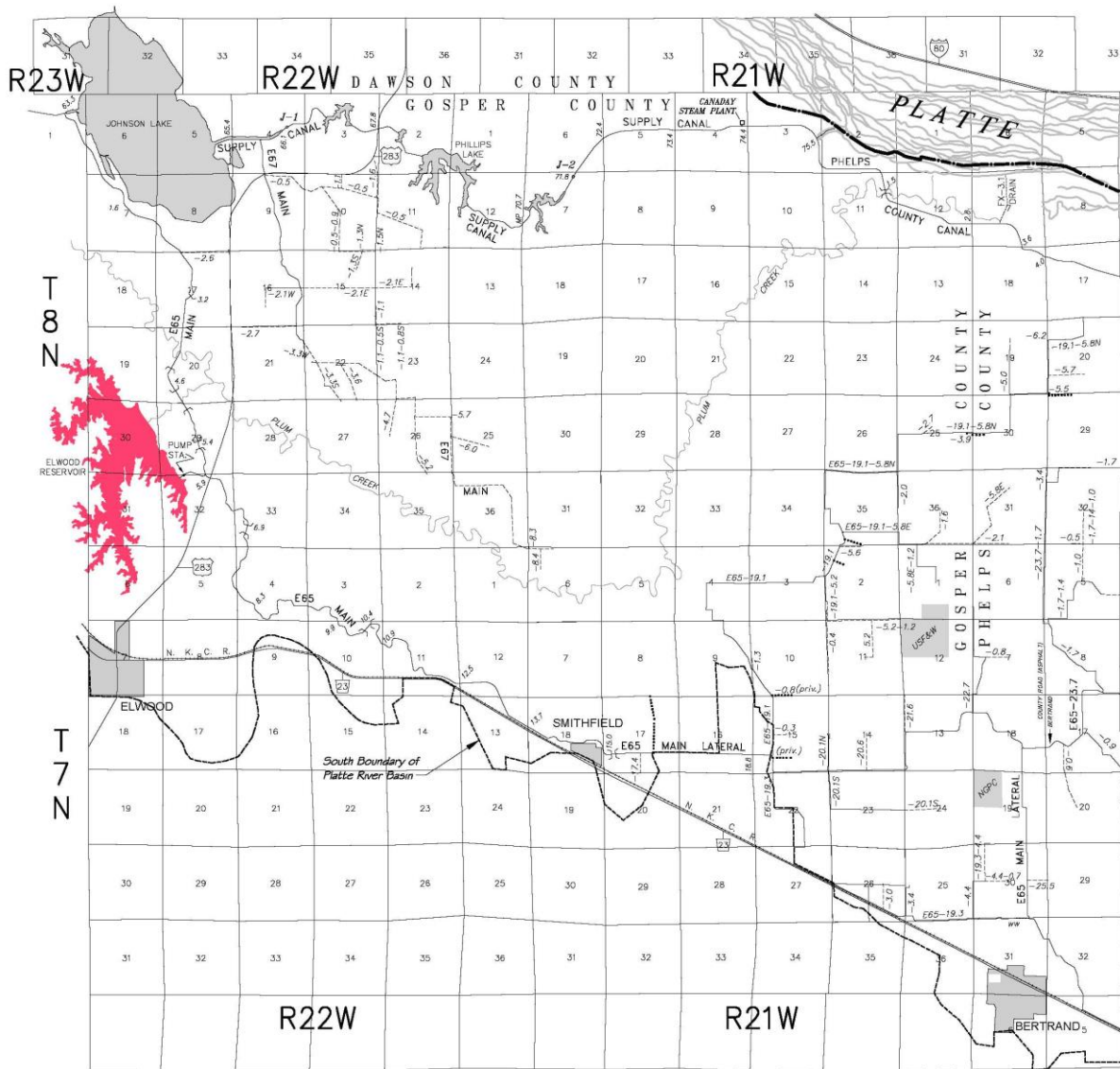


Exhibit "A"

Exhibit "B"



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CENTRAL
Nebraska Public Power
and Irrigation District
Holdrege, Nebraska

RECHARGE AT ELWOOD RESERVOIR, GOSPER COUNTY, NEBRASKA

DRAFTED BY	TMR	APPROVED	
SUBMITTED BY	MAD	BY	
SCALE	1"= 1.4 Mi.	DRAWING	
DATE	11/28/2022	NO.	RCHG_ELWRES

4858-2288-3898, v. 2