

## **AMENDMENT NO. 3 TO WATER SERVICE AGREEMENT**

This AMENDMENT NO. 3 TO WATER SERVICE AGREEMENT ("Amendment No. 3") is made by and among THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, a public corporation and political subdivision of the State of Nebraska (hereinafter "Central"); the STATE OF NEBRASKA, acting by and through the NEBRASKA DEPARTMENT OF NATURAL RESOURCES (hereinafter "NDNR"); and the NEBRASKA COMMUNITY FOUNDATION (acting as the contracting agent of the Platte River Recovery Implementation Program ("Program")), a Nebraska non-profit corporation (hereinafter "Foundation"). Central, NDNR, and Foundation may individually be referred to as a "Party" and shall collectively be referred to herein as the "Parties,"

WITNESSETH:

WHEREAS, the Parties previously entered into a WATER SERVICE AGREEMENT, an AMENDMENT TO WATER SERVICE AGREEMENT, and an AMENDMENT NO. 2 TO WATER SERVICE AGREEMENT, on or about July 9, 2013, November 23, 2016, and December 19, 2019, respectively (collectively the "Water Service Agreement") relating to the construction of a regulating reservoir ("J-2 Project"); and

WHEREAS, Central currently maintains "Project Accounts" that were funded by contributions by the Parties, and tracks the Parties' relative contributions to the Project Accounts as described in the Water Service Agreement as the "Reservoir Cost Percentages"; and

WHEREAS, Central acquired real property in Phelps County, Nebraska, commonly referred to as the Rittgarn Tract and Neben Tract, as legally described on Exhibit "A" attached hereto and incorporated herein by this reference (collectively the Rittgarn Tract and Neben Tract are referred to herein as the "J-2 Project Lands") with Project Accounts funds to be used for part of the J-2 Project; and

WHEREAS, the Parties desire that the J-2 Project Lands be disposed of as provided herein; that the Foundation and Central each be returned or otherwise given credit for their respective shares of the Project Accounts, leaving NDNR's respective share as the only remaining funds in the Project Accounts; and that the Foundation shall thereafter withdraw as a party under and relinquish all rights and benefits it may hold under the Water Service Agreement.

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 by the Parties that notwithstanding anything to the contrary therein contained, the Water Service Agreement shall be amended as follows:

### **1. SALE OF J-2 PROJECT LANDS.**

- a. Except as otherwise provided in 1.b. below, Central will use commercially reasonable means to sell the J-2 Project Lands. Central may use funds in the Project Accounts to pay all costs reasonably and necessarily incurred in connection with the sale or other disposition of the J-2 Project Lands, including but not necessarily limited to, appraisal,

marketing, and customary closing costs. Central will deposit any net proceeds from the sale of the J-2 Project Lands into the Project Accounts in accordance with the Reservoir Cost Percentages.

- b. In the case of the Neben Tract, the Parties acknowledge and agree there exists a right of first refusal that the prior owner may exercise as to the entirety or a portion of the Neben Tract, which if exercised by the prior owner in its entirety fixes the gross sales price at no more than \$292,000, all as further set forth in the real estate purchase agreement entered into by Central and the prior owner of the Neben Tract (referred to herein as the “ROFR”). The sales proceeds received or to be received as a result of the sale of all or any portion of the Neben Tract pursuant to the ROFR are referred to herein as the “ROFR Proceeds”. Notwithstanding anything to the contrary herein contained, Central may, as determined in its sole and absolute discretion, retain ownership of some or all of the Neben Tract, provided, however, that Central would then deposit into the Project Accounts in accordance with the Reservoir Cost Percentages an amount equal to the ROFR Proceeds for the portion of the Neben Tract retained by Central (which for avoidance of a doubt would be calculated based on the percentage of the Neben Tract actually being retained by Central as specified in the ROFR).
- c. Central shall complete the sale of the J-2 Project Lands as soon as commercially reasonable, and no later than December 31, 2022, except as otherwise mutually agreed in writing by the Parties. In the event Central determines to sell the Neben Tract, Central shall provide written notice of such intentions to the holder of the ROFR. In the event the sale of the J-2 Project Lands cannot be completed by the specified date above, Central shall provide the Parties with notice specifying the date that Central anticipates such sale(s) shall be completed with reasonable diligence, and the Water Service Agreement shall thereafter be deemed to automatically renew for the period of time communicated by Central in writing as being reasonably necessary to complete the disposition of all J-2 Project Lands and the Parties’ other duties and obligations set forth in this Amendment No. 3. Notwithstanding the foregoing and only in the case where the ROFR has been exercised by the prior owner of the Neben Tract, Central may alternatively and in lieu of an extension beyond the date specified above, cause the Foundation’s Project Account to be credited with an amount equal to the Foundation’s pro rata share of the ROFR Proceeds as determined in accordance with the Foundation’s Reservoir Costs and paid out of the Project Accounts for Central and NDNR, and thereafter, all ROFR Proceeds shall be retained solely by Central and NDNR, and the Party obligations set forth in Section 2 and Section 3 below shall be triggered.

## 2. DISTRIBUTION OF FOUNDATION AND CENTRAL FUNDS.

- a. No later than thirty (30) days after completion of the sale or other disposition of the J-2 Project Lands pursuant to section 1 above, and except as provided in section 2.b. below, Central shall return any funds in the Project Accounts to the Foundation and Central in accordance with their respective shares of the Reservoir Cost Percentages. NDNR’s share of funds shall remain in the Project Accounts.
- b. By separate written agreement between Central and the Foundation to be executed simultaneously with this Amendment No. 3 or as soon as practicably possible thereafter (the “Foundation Crediting Agreement”), the Foundation may permit Central to keep some or all of the Foundation’s respective funds from the Project Accounts as credit

for the payment due Central under any other current or future contract between Central and the Foundation as contracting agent for the Program in accordance with the terms of the Foundation Crediting Agreement.

3. **WITHDRAWAL OF FOUNDATION FROM THE J-2 AGREEMENT.** Upon distribution of the Foundation's share of the Project Accounts or execution of the Foundation Crediting Agreement as provided in sections 2.a. and 2.b. above, (the "Effective Date") the Foundation shall thereafter cease to be a Party to and shall otherwise have no remaining interest in or obligation under, the Water Service Agreement. After the Effective Date, the Foundation shall be deemed, without further execution of a conveyance instrument being necessary, to have fully, irrevocably, and without recourse, assigned, transferred, and relinquished to Central and NDNR, or to have otherwise waived, all rights, title, interest, and benefits that the Foundation may have held as a Party under the Water Service Agreement. Further, from and after the Effective Date, Central and NDNR agree that the Foundation shall no longer be a party to the Water Service Agreement and shall not be responsible for any claims of any nature arising from the Water Service Agreement which first arise and relate to periods of time that occur on or after the Effective Date.

4. **DEFAULT.** If any Party fails to perform or otherwise breaches any of the terms of this Amendment No. 3, then such failure shall constitute a default. In the event of default by any Party, the non-defaulting Party(ies) shall give written notice of the default to the defaulting Party. Following such written notice, the defaulting Party may cure the default within thirty (30) days. Upon cure, this Amendment No. 3 shall remain in full force and effect. If the defaulting Party fails to cure the default within the cure period, the non-defaulting Party(ies) shall be entitled to any and all available legal and equitable remedies, including injunctive relief.

5. **ENTIRE AGREEMENT.** This Amendment No. 3 contains the entire understanding of the Parties hereto with respect to the specific items addressed. This Amendment No. 3 shall govern and control in the event of any inconsistency between the terms of this Amendment No. 3 and the Water Service Agreement.

6. **AMENDMENT.** No amendment to this Amendment No. 3 shall be valid unless it is in writing and signed by all of the Parties hereto.

7. **BINDING EFFECT.** This Amendment No. 3 shall inure to the benefit of and be binding on the Parties, their successors and assigns.

8. **GOVERNING LAW.** This Amendment No. 3 shall be governed by and construed in accordance with the law of the State of Nebraska.

9. **LAWS.** In executing this Amendment No. 3, each Party shall be responsible for its compliance with all applicable state and federal laws.

IN WITNESS WHEREOF, the Parties hereto have executed this Amendment No. 3 the date first stated above.

[need to correct below to Central, Foundation, and DNR, and add attestations as in J-2 Agreement]

NEBRASKA COMMUNITY FOUNDATION,  
Acting as the contracting agent of the Platte River Recovery  
Implementation Program

By \_\_\_\_\_  
Diane M. Wilson  
Manager of Public/Private Partnerships

NEBRASKA DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Thomas Riley  
Director

THE CENTRAL NEBRASKA PUBLIC POWER AND  
IRRIGATION DISTRICT,

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.

By \_\_\_\_\_  
Jason M. Farnsworth  
Executive Director

Exhibit “A”

[Attach the legal description of the J-2 Project Lands]

4892-8722-7184, v. 1