

WATER AUGMENTATION AGREEMENT

This WATER AUGMENTATION AGREEMENT (“Agreement”) is made as of the Effective Date (as defined in Section 1.6) by and among THE TRI-BASIN NATURAL RESOURCES DISTRICT, a political subdivision of the State of Nebraska (hereinafter “TBNRD”) with its principal office located at 1723 Burlington Street, Holdrege, Nebraska 68949, and the NEBRASKA COMMUNITY FOUNDATION, a Nebraska non-profit corporation, with its principal office located at 8100 South 15th Street, Suite A, PO Box 83107, Lincoln, Nebraska 68501-3107, herein referred to as “Foundation” acting as the contracting agent of the Governance Committee of the PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM, with its principal office located at 4111 4th Avenue, Suite 6, Kearney, Nebraska 68845 hereinafter referred to as the “Program” (the Foundation and the Program are collectively referred to as “Platte Program”). TBNRD and the Platte Program may individually be referred to as a “Party” and shall collectively be referred to herein as the “Parties.”

WITNESSETH:

WHEREAS, the TBNRD has broad authorities to manage the water resources within its district, including the development and operation of augmentation projects; and

WHEREAS, the Platte Program operates groundwater recharge projects within the boundary of the TBNRD permitting the development and operation of augmentation projects; and

WHEREAS, Program Signatories selected the Foundation as the financial management entity (“FME”) providing support to the Governance Committee and Executive Director pursuant to the Program Cooperative Agreement; and

WHEREAS, the Foundation is only authorized to enter into contracts specifically authorized by the Governance Committee; and

WHEREAS, the Foundation pays financial obligations of the Governance Committee under the contracts authorized by the Governance Committee in accordance with the terms of the contracts; and

WHEREAS, the Foundation serves as the Governance Committee's contracting agent through Memorandum of Agreement No. R12AG60019; and

WHEREAS, Memorandum of Agreement No. R12AG60019 and the Platte River Recovery Implementation Program documents require that all contracts of the Platte River Recovery Implementation Program are conditioned on the continuing availability of funds from the Program Signatories; and

WHEREAS, the Program Signatories provide funding to the Foundation for Platte River Recovery Implementation Program implementation through separate financial assistance agreements; and

WHEREAS, the Foundation, by executing this Agreement, is acting as the contracting agent of the Governance Committee; and

WHEREAS, the Parties resolve to utilize their respective authorities and funding sources to implement the Augmentation Project as set forth below.

NOW, THEREFORE, in consideration of the premises, the mutual promises and agreements set forth herein and other good and valuable consideration, the receipt, sufficiency and adequacy of which are hereby acknowledged, the Parties do hereby agree as follows:

Definitions, Ownership and Term

Section 1. Definitions: The meanings for the capitalized terms used in this Agreement are set forth in or follows or in the body of this Agreement.

- 1.1** “Administrative Costs and Pumping Costs” shall mean and include: (1) Electrical usage charges including hook-up fees, electrical fees, and horsepower charges; (2) maintenance and repairs, including all wells and pumps, mowing, seeding, and weed control; (3) employee time spent for this project; (4) employee mileage; (5) Lease/license fees; (6) miscellaneous costs directly associated with the operation and maintenance of the Augmentation Project.
- 1.2** “Augmentation Project” means the developed and constructed physical infrastructure used to extract ground water from the area defined below and deliver that ground water to the Platte River to augment its flows.
- 1.3** “Business Day” means a day on which the Federal Reserve Member Banks in New York City are open for business; and a Business Day shall open at 8:00 A.M. and close at 5:00 P.M. local time in Omaha, Nebraska.
- 1.4** “Cost of Construction Services” means the actual costs of planning, final design, engineering, financing, acquiring, constructing, and startup of the Augmentation Project.
- 1.5** “Day” means a calendar day.
- 1.6** “Effective Date” shall mean the date the last signature is affixed hereto.
- 1.7** “Force Majeure” means causes or events beyond the reasonable control of and without the fault or negligence of the Party claiming Force Majeure, which by exercise of due diligence and reasonable foresight could not reasonably have been avoided, including, without limitation, acts of God, unusual or extreme actions of the elements such as floods,

earthquakes, hurricanes, landslides, droughts, tornadoes, lightning, fire, ice storms, epidemics, pandemics, sabotage, vandalism, terrorism, war, strikes, labor disruptions, and actions or inactions by any Governmental Authority taken after the date hereof but only if such requirements, actions or failures to act prevent or delay performance.

1.8 “Governmental Authority” means any municipal, local, state, regional, or federal agency, court, commission, department, or other such entity of competent jurisdiction.

1.9 “Person” means any individual, corporation, partnership, joint venture, trust, unincorporated organization, Governmental Authority, or other legal entity.

1.10 “Wells” means groundwater wells constructed and operated as a result of this Agreement.

Section 2. Ownership and Term of Agreement

2.1 Ownership of Infrastructure. Augmentation Project Wells and associated infrastructure shall be located in portions of Sections 10, 11, 14, 15 and 16 of Township 8 North, Range 19 West, Phelps County. Conceptual locations of augmentation Wells and associated infrastructure are shown in Exhibit A (the “Area”). With the exception of well pads and casings owned by the landowner, TBNRD shall own all pumps, pumping equipment, pipes, valves, and associated physical equipment used for the Augmentation Project.

2.2 Term. This Agreement shall begin on the Effective Date and shall remain in effect until December 31, 2032. The Parties may agree to extend the Term upon mutually acceptable conditions.

2.2.1. In the event of termination of this Agreement (including the end of the Term), any obligations to pay for costs that are incurred or arise under this Agreement prior to termination shall survive.

2.2.2. Upon termination of this Agreement, TBNRD shall be responsible for and bear the cost of the removal of any pumps, pipes, or other physical structures associated with the Augmentation Project if required by the landowner. Wells associated with the Augmentation Project shall be decommissioned by TBNRD in accordance with state law unless an agreement is reached with the landowner for their continued operation. TBNRD may abandon and leave in place pipes and other underground works if permitted by the landowner.

Section 3. Approval Obligations of the Parties

3.1 Each Party shall use its best efforts to obtain any and all approvals/acceptances required in order to perform its obligations under this Agreement, in the most expeditious manner and the Parties shall act in good faith to implement this Agreement fully and expeditiously without modification or condition.

Section 4. Planning, Design, Construction, Operation, Maintenance and Repair of the Augmentation Project

4.1 This Augmentation Project shall be designed and operated to utilize excess flows diverted from the Platte River pursuant to temporary or permanent excess flow permits or other permits granted by the Nebraska Department of Natural Resources (“DNR”), and which have been delivered to locations within TBNRD for groundwater recharge purposes. The recharged groundwater shall subsequently be withdrawn via Wells located in the Area and discharged to the Platte River to reduce deficits to United States Fish and Wildlife Service (“USFWS”) target flows or otherwise assist the Platte Program in achieving its goals and objectives. The volume of water withdrawn from the Wells shall not exceed the volume

recharged by the Platte Program and retained in groundwater storage within TBNRD's borders.

- 4.2** TBNRD shall be responsible to secure all necessary easements for the placement of Wells and the associated infrastructure. TBNRD shall pay individual landowners an annual fee in consideration of granting an easement and access to the property containing the Wells and associated infrastructure. The Platte Program shall grant all necessary easements to TBNRD for Wells and infrastructure on land held by the Platte River Recovery Implementation Foundation as trustee at no cost. The Platte Program shall work with TBNRD to secure any necessary easements on Nebraska Public Power District ("NPPD") property that is leased by the Platte River Recovery Implementation Foundation as trustee. All easements shall be duly recorded by TBNRD in the register of deeds office in the county where the parcels are located.
- 4.3** The Platte Program and TBNRD agree to work together on planning and design for the Augmentation Project. The Platte Program shall be responsible for development of technical specifications for augmentation Wells and associated infrastructure. The TBNRD shall be responsible for identifying final augmentation Well locations and pipeline alignments in coordination with the Platte Program. Once all necessary easements have been obtained, the TBNRD shall be responsible for development of final bid documents, bid letting, contractor selection, contracting, and construction oversight. The Platte Program shall issue to TBNRD a written notice to proceed with construction prior to bid letting.

- 4.4** TBNRD shall be responsible for the hiring, payment and oversight of contractors or subcontractors during construction of the Augmentation Project. TBNRD shall require that any contractors or subcontractors working on the Augmentation Project obtain statutory workers' compensation insurance and general liability insurance in such amounts as are reasonable given the scope of the Augmentation Project. The Platte Program shall be named as an additional insured on any such general liability insurance policy.
- 4.5** The Parties shall jointly develop criteria for the operation of the Augmentation Project Wells. Annually, at such time as may be agreed to by the Parties and in no event later than _____, as part of the criteria for the operation of the Augmentation Project Wells, the Parties shall meet to establish the budget for the Administrative Costs and Pumping Costs to be applicable for the upcoming calendar year. TBNRD shall be responsible for the operation and maintenance of the Augmentation Project in accordance with the criteria developed by the Parties, including operation in accordance with the annual budget. In the event TBNRD reasonably determines that costs will exceed the budget, TBNRD shall inform the Platte Program of the additional costs. The parties agree to meet to discuss the additional costs and operation of the Augmentation Project. During the operation of the Augmentation Project, TBNRD shall obtain statutory workers' compensation insurance and general liability insurance in such amounts as are reasonable given the scope of the Augmentation Project. The Platte Program shall be named as an additional insured on any such general liability insurance policy.

Section 5. Project Costs, Payments, and Accounting

5.1 Platte Program Financing. Upon written notice from the Platte Program to proceed to bidding and construction, TBNRD shall issue an invoice to the Platte Program in the amount of \$1,000,000 to be used toward the Cost of Construction Services. The Platte Program shall pay TBNRD in full within thirty (30) Business Days of the receipt of the invoice, whereupon TBNRD shall proceed with bid letting and construction of the Augmentation Project.

If, after bid letting, TBNRD reasonably determines that the initial Cost of Construction Services payment made by the Platte Program will not cover the total Cost of Construction Services based on bids received, TBNRD shall issue an additional invoice to the Platte Program for the total Cost of Construction Services. The Platte Program shall either (a) pay the additional invoice within thirty (30) Business Days or (b) submit a notice of termination of the Agreement to TBNRD, whereupon TBNRD shall cease work on the Augmentation Project. If the Agreement is terminated, or at the conclusion of construction, TBNRD shall return any unspent monies to the Platte Program within ninety (90) days and provide an itemized list of project costs that comprised the Cost of Construction Services.

If a construction change order is necessary during the construction of the Augmentation Project, TBNRD shall provide the Platte Program with written notice of the proposed change order. If the proposed change order (or any combination of change orders) results in an increase in the cost of the Augmentation Project that exceeds thirty percent (30%) of the initial Cost of Construction Services, the Platte Program shall either (a) approve the change order(s) or (b) submit written notice of termination of the Agreement to TBNRD, whereupon TBNRD shall cease work on the Augmentation Project. If the right of

termination is exercised by the Platte Program, TBNRD shall return any unspent monies to the Platte Program within ninety (90) days and provide an itemized list of project costs that comprised the Cost of Construction Services. If as a result of the change order(s) the actual Cost of the Construction Services exceeds the amount invoiced to and previously paid by the Platte Program, TBNRD shall invoice the Platte Program for such additional amount upon completion of the construction of the Augmentation Project. The Platte Program shall pay such amount within thirty (30) Business Days of the receipt of the invoice.

5.2 Operation Costs, Payments, and Repayment: TBNRD agrees that it will operate the Augmentation Project for the Term of this Agreement in accordance with the annual budget. TBNRD shall initially pay all Administrative Costs and Pumping Costs for the use and operation of the Augmentation Project. TBNRD shall then invoice the Platte Program on a quarterly basis for the Administrative Costs and Pumping Costs incurred and the Platte Program shall pay all such invoices within thirty (30) Business Days of receipt. Invoices shall include sufficient detail to allow the Platte Program to review the Administrative Costs and Pumping Costs submitted. Upon expiration of the initial Term of this Agreement, all Cost of Construction Services shall be deemed to be fully repaid and TBNRD shall have no further repayment obligations to the Platte Program or its successors. Should this Agreement terminate prior to the end of the initial Term, except for the return of any unspent monies as contemplated by Section 5.1 above or repayment as contemplated by Section 5.3 below, TBNRD shall have no further payment or repayment obligations to the Platte Program or its successors

5.3 Audit of Administrative Costs and Pumping Costs: On or before _____ of each calendar year, TBNRD shall provide the Platte Program with an accounting for the Administrative Costs and Pumping Costs incurred for the previous calendar year. TBNRD shall maintain accurate books and records relating to the Administrative Costs and Pumping Costs incurred during each calendar year during this Agreement. Such records shall be maintained for a minimum of three (3) years. The Platte Program shall have the right to audit the Administrative Costs and Pumping Costs and to examine TBNRD's books and records relating to the same. Such audit shall be at the expense of the Platte Program. If the audit discloses that the actual Administrative Costs and Pumping Costs incurred by TBNRD are less than those previously invoiced, TBNRD shall credit such amount against future Administrative Costs and Pumping Costs incurred hereunder. If such audit is completed after the termination of this Agreement and the audit discloses that Administrative Costs and Pumping Costs are less than those previously invoiced, TBNRD shall pay to the Platte Program such amount within thirty (30) Business Days after notice of the audit is received by TBNRD or such other time period as may be agreed to by the Parties.

Section 6. Default and Remedies

6.1 Default. A default shall occur under this Agreement if there is a material breach of this Agreement, including but not limited to a failure to make payments as required under this Agreement, that a Party fails to cure or to make acceptable arrangements to cure as hereinafter provided.

6.2 Effect of Termination Due to Default. A Party may choose to terminate this Agreement due to a material default by the other Party which remains uncured thirty (30) Business Days after the defaulting Party's receipt of written notice from the non-defaulting Party of such material breach. If the non-defaulting Party chooses to terminate this Agreement, the obligations, rights and benefits of the Parties under this Agreement shall terminate except as to any obligations incurred prior to termination. TBNRD and the Platte Program shall continue to own their respective Augmentation Project assets and shall be entitled to use such assets for any lawful purpose free and clear of this Agreement.

6.3 Late Payments. If the Platte Program fails to make any payment when due pursuant to this Agreement, interest shall accrue on the overdue amount, from the date due until the date paid, at a rate equal to the sum of three percent (3%) per annum plus the prime lending rate as from time to time may be published in the Money Rates section of The Wall Street Journal.

Section 7. Approvals

7.1 TBNRD shall be solely responsible for obtaining all necessary permits required under local, state or federal law, if any, for the Augmentation Project. In addition, TBNRD shall be solely responsible for compliance, if required, with Nebraska Revised Statutes sections 46-709(8), 46-743, 46-756, and 46-1701 throughout the Term. The Platte Program shall cooperate with TBNRD's efforts to comply with applicable statutory obligations and with supporting documentation for TBNRD's efforts to obtain permits.

Section 8. Waivers

8.1 Any waiver at any time by any Party of its rights with respect to any default under this Agreement, or with respect to any other matter arising in connection with this Agreement, shall not be deemed a waiver with respect to any other default or matter.

Section 9. Notices

9.1 All notices given pursuant to this Agreement by any Party to another Party shall be in writing and either personally delivered, or mailed by certified or registered mail, postage prepaid, or sent by nationally recognized overnight courier, to such address or addresses as any Party may designate by notice given to the other Party(ies). With respect to all notices so delivered, the same shall be deemed effective on the day sent.

Section 10. Damages

10.1 To the fullest extent permitted by law and notwithstanding anything to the contrary herein, in no event shall any Party be liable to the other Party for punitive, indirect, exemplary, consequential, or incidental damages including, without limitation, claims of third parties arising in connection with this Agreement.

Section 11. Force Majeure.

11.1 Applicability of Force Majeure.

11.1.1. No Party shall be responsible or liable for any delay or failure in its performance under this Agreement, nor shall any delay, failure or other occurrence or event become an event of default,

to the extent such delay, failure, occurrence or event is substantially caused by conditions or events of Force Majeure; provided that:

- (i) the non-performing Party gives the other Party prompt written notice describing the particulars of the occurrence of the Force Majeure;
- (ii) the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure;
- (iii) the non-performing Party proceeds with reasonable diligence to remedy its inability to perform; and
- (iv) when the non-performing Party is able to resume performance of its obligations under this Agreement, the non-performing Party shall give the other Party written notice to that effect.

11.1.2. Except as otherwise expressly provided for in this Agreement, the existence of a condition or event of Force Majeure shall not relieve the Parties of their obligations under this Agreement (including, but not limited to, payment obligations) to the extent that performance of such obligations is not precluded by the condition or event of Force Majeure.

Section 12. Miscellaneous

12.1 Amendments. This Agreement may be amended only by written agreement executed by the Parties.

- 12.2 Entire Agreement/Order of Precedence.** This Agreement constitutes the entire agreement between the Parties hereto relating to the subject matter contemplated by this Agreement and supersedes all other prior agreements, whether oral or written.
- 12.3 Counterparts.** This Agreement may be executed in multiple counterparts to be construed as one.
- 12.4 Severability.** If any part, term or provision of this Agreement is held by a Governmental Authority to be unenforceable, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if this Agreement did not contain the particular part, term, or provision held to be unenforceable, and a new provision shall be deemed to be substituted in lieu of the provision so severed which new provision shall, to the extent possible, accomplish the intent of the Parties hereto as evidenced by the provision so severed.
- 12.5 Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Nebraska.
- 12.6 Jurisdiction.** The Parties agree that any legal proceeding relating to this Agreement shall be filed in a state or federal court of competent jurisdiction and proper venue located within the State of Nebraska.
- 12.7 No Third-Party Beneficiaries.** The Parties agree that no other parties are intended third-party beneficiaries of this Agreement. Except as set forth in Section 12.11 below, neither the Platte Program nor TBNRD shall transfer or assign this Agreement without written agreement of all Parties.

12.8 Independent Contractors. Nothing in this Agreement shall be construed as creating any agency relationship between the Parties, including any partnership or joint venture, other than that of independent contractors. Nothing in this Agreement nor any action taken hereunder shall be construed to create any duty, liability or standard of care to any person not a party to this Agreement. This Agreement shall not empower any Party to act as any other Party's agent or to represent to any third party that it has the ability to bind any other Party, without the express permission of the Party to be bound.

12.9 Rules of Construction.

12.9.1. The descriptive headings of the various sections and subsections of this Agreement have been inserted for convenience of reference only and shall not be construed as to define, expand, or restrict the rights and obligations of the Parties.

12.9.2. Wherever the term "including" is used in this Agreement, such term shall not be construed as limiting the generality of any statement, clause, phrase, or term.

12.9.3. The terms defined in this Agreement shall include the plural as well as the singular and the singular as well as the plural.

12.9.4. Whenever a statute, code, rule, or regulation is used in this Agreement, such term shall also include all successor statutes, codes, and regulations.

12.10 Foundation. The Foundation has represented to TBNRD, and TBNRD hereby acknowledges, that the Foundation is the FME providing support to the Governance Committee of the Platte River Recovery Implementation Program and that the Foundation,

by executing this Agreement, is acting as the contracting agent of the Governance Committee of the Platte River Recovery Implementation Program.

12.11 Assignment. If the Platte River Recovery Implementation Program is dissolved for any reason, is not renewed, or should the Platte Program default, the Foundation may assign its interest in this Agreement to one or more Program Signatories, including the State of Nebraska. If one or more Program Signatories agree to be the Foundation's assignee(s), the assignee(s) will assume the responsibilities of the Platte Program. If the Foundation is no longer the FME providing support to the Governance Committee of the Platte River Recovery Implementation Program for any reason, the Foundation, as the FME representing the Platte River Recovery Implementation Program, may assign its responsibilities and interest under this Agreement to a successor FME providing support to the Governance Committee of the Platte River Recovery Implementation Program, provided that the successor assumes all obligations of the Foundation under this Agreement. The Foundation will provide written notice of any such assignment to the other Parties. If no Program Signatory has an interest in accepting assignment as discussed above, then this Agreement shall terminate.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed
by their representatives:

TRI-BASIN NATURAL RESOURCES DISTRICT

_____ Dated: _____
By:
Its:

NEBRASKA COMMUNITY FOUNDATION

_____ Dated: _____
By:
Its:

PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM ACKNOWLEDGEMENT

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

_____ Dated: _____
By:
Its:

EXHIBIT "A"

