

AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND  
THE COLORADO DEPARTMENT OF NATURAL RESOURCES FOR  
REALLOCATION OF WATER STORAGE SPACE, RECREATION MODIFICATIONS, AND  
COMPENSATORY MITIGATION FEATURES  
AT THE CHATFIELD DAM AND RESERVOIR, COLORADO

THIS AGREEMENT is entered into this 9<sup>th</sup> day of October, 2014, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Omaha District, and the Colorado Department of Natural Resources (hereinafter the "CDNR"), represented by its Executive Director.

WITNESSETH, THAT:

WHEREAS, Section 204 of the Flood Control Act of 1950 (Public Law 81-516), as modified by Section 88 of the Water Resources Development Act of 1974 (Public Law 93-251), authorized the construction, operation, and maintenance of the Chatfield Dam and Reservoir Project, Colorado (hereinafter the "*Chatfield Project*", as defined in Article I.C. of this Agreement) for flood control and other purposes, and the *Chatfield Project* has been constructed and is operational;

WHEREAS, Section 808 of the Water Resources Development Act of 1986 (Public Law 99-662), as amended by Section 3042 of the Water Resources Development Act of 2007 (Public Law 110-114), authorized the reallocation of storage space in the Chatfield Project for joint flood control-conservation purposes, including storage for municipal and industrial water supply, agriculture, environmental restoration, and recreation and fishery habitat protection and enhancement, upon a finding of feasibility and economic justification by the Chief of Engineers, and, in accordance with the provisions of the Water Supply Act of 1958 (Title III of Public Law 85-500) as amended (43 U.S.C. 390b), the Federal Water Project Recreation Act, 16 U.S.C. 4601-12 *et seq.*, and such other federal laws as the Secretary determines appropriate, upon agreement of non-Federal interests to repay the cost allocated to such storage;

WHEREAS, the Government has determined that the reallocation of 20,600 acre-feet of storage space from the exclusive flood control pool to a *joint-use* flood control-conservation pool for municipal and industrial water supply and other purposes is feasible and economically justified, provided that certain *recreation modifications* (as defined in Article I.R. of this Agreement), and *compensatory mitigation features* (as defined in Article I.F. of this Agreement), are undertaken pursuant to the *Reallocation Report* (as defined in Article I.Q. of this Agreement);

WHEREAS, the CDNR desires to enter into an agreement with the Government for implementation of the *Chatfield Storage Reallocation Project* (as defined in Article I.E. of this Agreement);

WHEREAS, Section 116 of Division C, Omnibus Appropriations Act, 2009 (Public Law 111-8), as amended by Section 4013(f) of the Water Resources Reform and Development Act of

2014 (Public Law 113-121), authorizes the Colorado Department of Natural Resources (or a designee of the Department) to perform facility modifications and any required mitigation for the reallocation of storage space in the Chatfield Project;

WHEREAS, the CDNR intends to enter into subagreements with certain entities (hereinafter "*Water Providers*" as defined in Article I.V. of this Agreement) concurrently with, or subsequent to, execution of this Agreement, for the use of water supply storage space in the *Chatfield Project* to store water supplies owned or used by the *Water Providers*, and for the performance of the *recreation modifications* and the *compensatory mitigation features*; and

WHEREAS, the Government and the CDNR have the full authority and capability to perform as hereinafter set forth and intend to cooperate in implementing the terms of this Agreement.

NOW, THEREFORE, the Government and the CDNR agree as follows:

#### ARTICLE I - DEFINITIONS

A. The term "*adaptive management*" shall mean measures taken to adjust the *compensatory mitigation features* in response to the *monitoring* results so that the predicted outputs of the *compensatory mitigation features* are achieved following their construction as generally described in the *Reallocation Report*. The term includes, but is not necessarily limited to, modifications of structures, or adjustments to operation or management, of the *compensatory mitigation features*.

B. The term "*annual operation and maintenance expenses*" shall mean the annual expenses of the *Chatfield Project* generally funded by the Corps' O&M appropriations account. These expenses include the day-to-day costs to operate and maintain the *Chatfield Project* as well as O&M-funded costs that are not capitalized.

C. The term "*Chatfield Project*" shall mean the Chatfield Dam and Reservoir Project on the South Platte River, Colorado, constructed for flood control and other purposes.

D. The term "*Chatfield Project outlet works*" shall mean the river outlet gates used to release water to the South Platte River and excludes the *ditch outlet works*.

E. The term "*Chatfield Storage Reallocation Project*" shall mean the reallocation of storage space in the *Chatfield Project* for joint flood control-conservation purposes, including storage for municipal and industrial water supply, agriculture, environmental restoration, and recreation and fishery habitat protection and enhancement, and the performance of *recreation modifications* and *compensatory mitigation features* as generally described in the *Reallocation Report*.



F. The term “*compensatory mitigation features*” shall mean the measures to compensate for the loss of environmental resources on *Chatfield Project* lands related to the reallocation of storage space in the *Chatfield Project* pursuant to Article II.A. of this Agreement, including the protection and development of Preble’s mouse habitat, wetlands, and bird habitat on 165 acres of *Chatfield Project* lands, on 888 acres of off-site lands, and along 4.5 stream miles of Sugar Creek in the Pike National Forest, as generally described in the *Reallocation Report* as may be modified through *adaptive management*.

G. The term “*District Engineer*” shall mean the U.S. Army Engineer, Omaha District, or his or her successor or designee.

H. The term “*ditch outlet works*” shall mean the penstocks through which water is released to the Last Chance, Nevada, and City ditches for the benefit of entities with rights in the Last Chance, Nevada, and City ditches, and to the Chatfield State Fish Unit.

I. 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.

J. The term “*first cost of storage*” shall mean the cost assigned to the CDNR’s right to the reallocated storage space in the *Chatfield Project*.

K. The term “*fiscal year*” shall mean one year beginning on October 1<sup>st</sup> and ending on September 30<sup>th</sup>.

L. The term “*joint-use*” shall mean that the features or monetary amounts referenced pertain to two or more *Chatfield Project* purposes.

M. The term “*monitoring*” shall mean activities that are necessary to determine if predicted outputs of the *compensatory mitigation features* are being achieved, including the collection and analysis of data, and to determine if *adaptive management* is necessary, all as generally described in the *Reallocation Report*.

N. The term “*non-Federal work*” shall mean the design, construction, and implementation of the *recreation modifications* and the *compensatory mitigation features*, and shall include *monitoring*, *adaptive management*, real estate activities and project coordination activities.

O. The term “*other modifications to the Chatfield Project*” shall mean changes to Government facilities and operational documents and procedures attributable to the reallocation of storage space in the *Chatfield Project* pursuant to Article II.A. of this Agreement, as generally described in the *Reallocation Report*, including: changes to dam safety instrumentation; formulation of supplements to the *Chatfield Project* Master Plan; review of real estate activities; updates of capacity tables and water release calculations; updates to operation and maintenance manuals and water control plans of the *Chatfield Project*; related updates in comparable manuals

and plans for the Cherry Creek Project and the Bear Creek Project; and additional Government operation and maintenance activities.

P. The term “*period of construction*” shall mean the time from the effective date of this Agreement to the date that construction of the *non-Federal work* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XV of this Agreement, whichever is earlier.

Q. The term “*Reallocation Report*” shall mean collectively: the Chatfield Reservoir Storage Reallocation Final Integrated Feasibility Report and Environmental Impact Statement, dated July 2013, including Appendices A through HH, and Addendum No. 1, dated March 2014, including Appendices II through LL, approved by the Assistant Secretary of the Army (Civil Works) on May 29, 2014; and Addendum No. 2, dated September 2014, approved by the Northwestern Division Regional Integration Team Leader, U.S. Army Corps of Engineers, on September 26, 2014.

R. The term “*recreation modifications*” shall mean the removal and reconstruction of existing recreation facilities, resources and roads on *Chatfield Project* lands that would be adversely affected by the reallocation of storage space in the *Chatfield Project* pursuant to Article II.A. of this Agreement, as generally described in the *Reallocation Report*.

S. The term “*relocation*” shall mean providing a functionally equivalent facility to the owner of a utility, cemetery, highway, railroad, or public facility when such action is authorized in accordance with applicable legal principles of just compensation. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

T. The term “*repair, rehabilitation, reconstruction and replacement costs*” shall mean costs of the *Chatfield Project* generally funded under the Corps’ Operation and Maintenance (O&M) appropriations account or the Construction appropriations account, but not associated with the *first cost of storage*. Such expenditures are for funding infrequent and costly work and are intended to ensure continued satisfactory operation of the *Chatfield Project*.

U. The term “*specific*” shall mean that the features or monetary amounts referenced pertain to the reallocation of storage space in the *Chatfield Project* pursuant to Article II.A. of this Agreement.

V. The term “*Water Providers*” shall mean the entities in Colorado that plan to enter into subagreements with the CDNR concurrently with, or subsequent to, the execution of this Agreement for the use by such entities of water supply storage space in the *Chatfield Project* to store water supplies owned or used by them, and for the performance of the *recreation modifications* and the *compensatory mitigation features*. The list of *Water Providers* as of the date of the *Reallocation Report* is provided in Exhibit A attached to and made a part of this Agreement.



## ARTICLE II – RIGHTS AND OBLIGATIONS OF THE PARTIES

A. The Government, subject to the directions of Federal law and any limitations imposed thereby, shall reallocate storage space in the *Chatfield Project* between 5,432 feet and 5,444 feet above National Geodetic Vertical Datum (NGVD), which is estimated to contain 20,600 acre-feet after adjustment for sediment deposits so as to include therein space for joint-flood control-conservation purposes, including the storage of water by the CDNR for municipal and industrial water supply, agriculture, environmental restoration, and recreation and fishery habitat protection and enhancement.

B. Upon payment by the CDNR of the *first cost of storage* in accordance with Articles II.F.1. and IV.A.1., the CDNR shall have the following rights with regard to the storage space reallocated in the *Chatfield Project* pursuant to paragraph A. of this Article:

1. The CDNR shall have the right to utilize the storage space in the *Chatfield Project* between elevations 5,432 feet and 5,444 feet above NGVD, which is estimated to contain 20,600 acre-feet after adjustment for sediment deposits, provided that, in accordance with the *Reallocation Report*, the appropriate reallocated storage milestone as shown in Exhibit B attached to and made a part of this Agreement is met, as determined by the *District Engineer*, and provided that, between elevations 5,442 feet and 5,444 feet above the NGVD, storage space use cannot exceed 30 days within any calendar year until 100 percent of the Ecological Function Units of the *compensatory mitigation features* are gained as shown in Exhibit B to this Agreement. If the mitigation schedules, as shown in Table 6-4 and Table 6-5 in Exhibit B to this Agreement, are not met, the ability to use storage will be defined by the mitigation milestones and reallocated storage space available in such tables until mitigation implementation and Ecological Functional Units (EFUs) gained meet the defined mitigation milestones.

2. The CDNR shall have the right to withdraw water from the *Chatfield Project*, to request releases through the Colorado State Engineer's Office to be made by the Government through the *Chatfield Project outlet works*, or to request releases through the Colorado State Engineer's Office and the *District Engineer* to be made through the *ditch outlet works*, subject to the provisions of paragraph C. of this Article; and shall have the right to construct all such works, plants, pipelines, and appurtenances as may be necessary and convenient for the purpose of diversion or withdrawals, subject to the approval of the *District Engineer* as to design and location. The grant of an easement for right-of-way, across, in and upon land of the Government at the *Chatfield Project* for any installations and facilities which CDNR may construct for the diversion or withdrawal of water shall be by a separate instrument in a form satisfactory to the Secretary of the Army, under the authority of and in accordance with the provisions of 10 U.S.C. 2668 and such other authorities as may be applicable. Subject to the conditions of such easement, the CDNR shall have the right to use so much of the *Chatfield Project* land as may reasonably be required in the exercise of the rights and privileges granted under this Agreement. The CDNR shall be responsible for operation and maintenance of all installations and facilities which it may construct for the diversion or withdrawal of water, and shall bear all costs of construction, operation, maintenance, repair, relocation and removal of such installations and facilities.



C. The Government reserves the right to control and use all storage space in the *Chatfield Project* in accordance with the authorized purposes of the *Chatfield Project*. The Government further reserves the right to take such measures as may be necessary in the operation of the *Chatfield Project* to preserve life or property, including the right not to make downstream releases, or the right not to allow withdrawals, from the *Chatfield Project* during such periods of time as are deemed necessary, in the Government's sole discretion, to inspect, maintain, or repair the *Chatfield Project*.

D. The CDNR recognizes that this Agreement provides storage space for raw water only. The Government makes no representations with respect to the quality or availability of water and assumes no responsibility therefor, or for the treatment of the water.

E. Sedimentation surveys will be made by the *District Engineer* during the term of this Agreement at intervals not to exceed 15 years unless the *District Engineer* determines that such surveys are unnecessary. When, in the opinion of the Government, the findings of such survey indicate any project purpose will be affected by unanticipated sedimentation distribution, the Government shall make an equitable redistribution of the sediment reserve storage space among the purposes served by the *Chatfield Project*, including the purposes of the reallocation of storage space in the *Chatfield Project* pursuant to Article II.A. of this Agreement. Such findings and the storage space allocated to the CDNR shall be defined and described as an exhibit which will be added to and made a part of this Agreement, and the Government's water control manual will be modified accordingly. The Government assumes no responsibility for deviations from estimated rates of sedimentation, or the distribution thereof. Such deviations may cause unequal distribution of sediment reserve storage greater than estimated, or encroachment on the total useable storage at the *Chatfield Project*.

F. The CDNR shall pay the following sums to the Government for the *Chatfield Project* costs attributable to the storage space reallocated in the *Chatfield Project* pursuant to paragraph A. of this Article.

1. The CDNR shall pay to the Government, in accordance with Article IV.A.1. of this Agreement, the lump sum amount of \$16,285,392. As shown in Exhibit C attached to and made a part of this Agreement, this amount consists of the *first cost of the storage* for the storage space reallocated in the *Chatfield Project* pursuant to paragraph A. of this Article, updated to *fiscal year 2014*, but reduced in accordance with the *Reallocation Report* to 41 percent in order to account for the yields that the reallocated storage space is estimated to be capable of providing based upon historic rainfall and runoff data.

2. The CDNR shall pay to the Government, in accordance with Article IV.A.2. of this Agreement, 100 percent of the *specific repair, rehabilitation, reconstruction and replacement costs* and 8.99 percent of the *joint-use repair, rehabilitation, reconstruction and replacement costs* of the *Chatfield Project* features, commencing with costs incurred by the Government after the first reallocated storage milestone, as shown in Exhibit B to this Agreement, has been met. As shown in Exhibit C to this Agreement, the percentage of the *joint-use repair, rehabilitation, reconstruction and replacement costs* constitutes the proportionate share of the storage space described in Article II.B.1. of this Agreement to total usable storage.



3. The CDNR shall pay to the Government, in accordance with Article IV.A.3. of this Agreement, 100 percent of the *specific annual operation and maintenance expenses* and 8.99 percent of the *joint-use annual operation and maintenance expenses* of the *Chatfield Project*, commencing with expenses incurred by the Government after the first reallocated storage milestone, as shown in Exhibit B to this Agreement, has been met. As shown in Exhibit C to this Agreement, the percentage of the *joint-use annual operation and maintenance expenses* constitutes the proportionate share of the storage space described in Article II.B.1. of this Agreement to total usable storage.

4. The CDNR shall pay to the Government, in accordance with Article IV.B. of this Agreement, 100 percent of the funds to be expended by the *District Engineer* for the costs of the *other modifications to the Chatfield Project*.

5. The CDNR shall pay to the Government, in accordance with Article IV.B. of this Agreement, 100 percent of the funds to be expended by the *District Engineer* for the costs of the Government's oversight of the *non-Federal work*.

G. Upon completion of the payment required by paragraph F.1. of this Article, the CDNR shall have a permanent right, under the provisions of the Act of 16 October 1963 (Public Law 88-140, 43 U.S.C. 390c-f), to the use of the water storage space in the *Chatfield Project* as provided in paragraph B. of this Article, subject to the following:

1. The CDNR shall continue payment of *joint-use annual operation and maintenance expenses* allocated to water supply under this Agreement in accordance with paragraph F.3. of this Article and Article IV.A.3. of this Agreement.

2. The CDNR shall bear the *repair, rehabilitation, reconstruction and replacement costs* allocated under this Agreement in accordance with paragraph F.2. of this Article and Article IV.A.2. of this Agreement.

3. The CDNR shall continue to perform its responsibilities and obligations under paragraph H. through paragraph R. of this Article.

4. Provided that the conditions in paragraphs G.1., G.2., and G.3. of this Article are met, the permanent rights of the CDNR under this Agreement shall be continued so long as the Government continues to operate the *Chatfield Project*. In the event the Government no longer operates the *Chatfield Project*, such rights may be continued subject to the execution of a separate agreement or additional supplemental agreement with the CDNR providing for:

a. Continued operation by the CDNR of such part of the facility as is necessary for utilization of the water supply storage space allocated to it;

b. Terms which will protect the public interest; and,

c. Effective release of the Government by the CDNR from all liability in

connection with such continued operation.

H. Using non-Federal funds, the CDNR shall ensure the *non-Federal work* is performed in accordance with applicable Federal, state, and local laws, regulations, and policies. Prior to the CDNR issuing solicitations for construction of the *non-Federal work*, the CDNR shall provide the detailed plans for carrying out such work to the Government. The Government shall have 45 days in which to notify the CDNR of: its approval or disapproval of the plans, its recommendations for modifying the plans, or its request for more time to review the plans. In any case in which the Government's notification is not an approval of the plans, the Government and the CDNR shall consult on how to proceed, and the schedule for achieving the reallocated storage milestones, as shown in Exhibit B to this Agreement, shall be extended by a period of time equal to the period of time between the Government's notification hereunder and final approval by the Government of the detailed plans for carrying out the *non-Federal work*.

I. At the time the CDNR furnishes a contractor with a notice of acceptance of completed work for each contract awarded for the *non-Federal work*, the CDNR shall furnish a copy thereof to the Government. Upon completion of the *non-Federal work*, the CDNR shall furnish to the Government a copy of all final as-built drawings for the construction portion of such work. The Government may perform periodic inspections to verify the progress of the *non-Federal work* and that it is being performed in a satisfactory manner and in accordance with the applicable permits and the plans and specifications approved by the Government in accordance with paragraph H. of this Article.

J. Upon completion of the *recreation modifications*, or functional portions thereof, by the CDNR, and final inspection of the *recreation modifications*, or functional portions thereof, by the Government, in accordance with paragraph I. of this Article, the CDNR shall prepare and furnish to the Government for review and approval a proposed Recreation Operation, Maintenance, Repair, Rehabilitation and Replacement Manual (hereinafter the "Recreation OMRR&R Manual"), or an equivalent document acceptable to the Government, for such *recreation modifications* and the CDNR shall operate, maintain, repair, rehabilitate, and replace such *recreation modifications* at no cost to the Government.

K. Upon completion of the *compensatory mitigation features*, or functional portions thereof, by the CDNR, and final inspection of the *compensatory mitigation features*, or functional portions thereof, by the Government, in accordance with paragraph I. of this Article, the CDNR shall prepare and furnish to the Government for review and approval a proposed Mitigation Operation, Maintenance, Repair, Rehabilitation and Replacement Manual (hereinafter the "Mitigation OMRR&R Manual"), or an equivalent document acceptable to the Government, for such *compensatory mitigation features* and the CDNR shall operate, maintain, repair, rehabilitate, and replace such *compensatory mitigation features* and shall conduct *monitoring* and *adaptive management* at no cost to the Government.

L. In accordance with Article III of this Agreement, the CDNR shall provide all lands, easements, and rights-of-way, required for the *non-Federal work* related to the *compensatory mitigation features* on lands not owned by the United States, and the operation, maintenance, repair, rehabilitation and replacement of the completed *compensatory mitigation features* on such



lands.

M. In accordance with Article III of this Agreement, the CDNR shall perform all *relocations* required for performance of the *non-Federal work*, or required due to changes in the *Chatfield Project* pool elevations, resulting from the *Chatfield Storage Reallocation Project*.

N. The Government shall provide the CDNR such access across *Chatfield Project* lands as may be required for carrying out the *non-Federal work* to be undertaken on *Chatfield Project* lands. The Government shall make available to the CDNR for management and administration by lease the use and occupancy of the *non-Federal work* areas on *Chatfield Project* lands, together with the land and water areas associated therewith. In addition, the CDNR shall obtain all permits necessary for such *non-Federal work*.

O. The CDNR shall execute, or facilitate the execution of, agreements required for the construction, operation, maintenance, repair, rehabilitation and replacement of the *compensatory mitigation features* located within the boundaries of the Pike National Forest. The CDNR shall coordinate the agreement with the Government for review and approval prior to execution.

P. The CDNR shall prevent obstructions or encroachments on the *compensatory mitigation features* located on lands not owned by the United States (including prescribing and enforcing regulations to prevent such obstructions or encroachments) such as any new developments on lands, easements, and rights-of-way or the addition of facilities which might reduce the outputs produced by the *compensatory mitigation features*, hinder operation and maintenance of the *compensatory mitigation features*, or interfere with the proper function of the *compensatory mitigation features*.

Q. The CDNR shall be responsible for 100 percent of the costs of performing the *non-Federal work*.

R. The CDNR shall not use *Federal program funds* to meet any of its obligations for the *Chatfield Storage Reallocation Project* under this Agreement unless the Federal agency providing the funds verifies in writing that such funds are authorized to be used to carry out the *Chatfield Storage Reallocation Project*.

### ARTICLE III - LANDS, EASEMENTS, RIGHTS-OF-WAY, RELOCATIONS, AND COMPLIANCE WITH PUBLIC LAW 91-646, AS AMENDED

A. The CDNR shall implement Article II.L. of this Agreement in accordance with the provisions of this paragraph.

1. The CDNR shall give priority to the acquisition of lands identified as target habitat (with associated buffers) in the Compensatory Mitigation Plan where the surface and mineral estates are intact. The CDNR may acquire interests in such lands, without further review or approval by the Government, provided the estates acquired are standard estates, or non-standard estates previously approved by the Government.



2. For those lands identified in the target habitat (with associated buffers) in the Compensatory Mitigation Plan where the mineral rights have been severed from the surface estate, the CDNR shall obtain a Mineral Assessment Report for each property indicating the potential for mineral development, including the potential for mining and surface disturbance, and submit the reports to the Government for review. If the Government determines that the risk of third party mineral development is minimal compared to the environmental qualities of the land proposed for acquisition, the Government shall provide the CDNR with a written notice to proceed with acquisition of the surface estate.

3. The CDNR may identify additional lands that are not included in the target habitat (with associated buffers) in the Compensatory Mitigation Plan but that may be suitable for the *compensatory mitigation features*. The CDNR shall provide the Government with general written descriptions, including maps as appropriate, of such lands for the Government's review and approval. If the Government notifies the CDNR in writing that the lands are suitable for the compensatory mitigation features, the CDNR may proceed with acquisition of the estates where the surface and mineral estates are intact, provided the estates acquired are standard estates or non-standard estates previously approved by the Government. If the CDNR determines that the mineral estate has been severed from the surface estate, the CDNR shall obtain and submit for Government review a Mineral Assessment Report for each such property. If the Government determines that the risk of third party mineral development is minimal compared to the environmental qualities of the land proposed for acquisition, the Government shall provide the CDNR with a written notice to proceed with acquisition of the surface estate.

4. Prior to the issuance of the solicitation for each contract for *non-Federal work* related to the construction of the *compensatory mitigation features*, or prior to the CDNR incurring any financial obligations for such *non-Federal work* using the CDNR's own forces, the CDNR shall acquire all lands, easements, and rights-of-way required for that work. Furthermore, prior to the end of the *period of construction*, the CDNR shall acquire all lands, easements, and rights-of-way required by Article II.L. of this Agreement. The CDNR shall ensure that lands, easements, and rights-of-way that were provided by the CDNR are retained in public ownership or in the ownership of a non-profit organization approved by the Government for uses compatible with the purposes of such *compensatory mitigation features*.

B. The CDNR shall implement the *relocations* required by Article II.M. of this Agreement in the following manner. The CDNR shall make an initial determination of the required *relocations*, including those necessary for borrow materials and dredged or excavated material disposal. The CDNR in a timely manner shall provide the Government with general written descriptions, including maps as appropriate, of the *relocations* that the CDNR determines it must provide, for the Government's review and approval. Upon review and approval of the CDNR's determination, the Government shall provide the CDNR with a written notice to proceed with the performance of such *relocations*. Prior to the issuance of the solicitation for each contract for construction of the *non-Federal work*, or prior to the CDNR incurring any financial obligations for the *non-Federal work* using the CDNR's own forces, the CDNR shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all *relocations* the CDNR must provide for that work. Furthermore, prior to the end of the *period of construction*, the CDNR shall perform or ensure the performance of all



*relocations* as set forth in such descriptions.

C. The CDNR shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required by Article II.B. and Article III of this Section, including those required for *relocations*, borrow materials, and dredged or excavated material disposal, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

#### ARTICLE IV - METHOD OF PAYMENT

A. The CDNR shall make the payments required by Article II.F. of this Agreement in accordance with the provisions of this paragraph.

1. Not later than 45 calendar days after the CDNR is notified by the *District Engineer* that the first reallocated storage milestone, as shown in Exhibit B to this Agreement, has been met, the CDNR shall provide the Government with the lump sum payment of \$16,285,392 required by Article II.F.1. of this Agreement by delivering a check payable to "FAO, USAED, Omaha" to the *District Engineer* or by providing an Electronic Funds Transfer of the required funds in accordance with procedures established by the Government.

2. Payment of the required amount of *specific repair, rehabilitation, reconstruction and replacement costs* and the required amount of *joint-use repair, rehabilitation, reconstruction and replacement costs* of the *Chatfield Project* features shall be made either incrementally during the construction of such features, or in lump sum (including interest during construction) upon completion of construction of such features. Under either arrangement, the required amount is due and payable by the CDNR no later than 45 calendar days after notification by the *District Engineer*, through any of the payment mechanisms specified by paragraph A.1. of this Article.

3. Payment of the required amount of *specific annual operation and maintenance expenses* and the required amount of *joint-use annual operation and maintenance expenses* of the *Chatfield Project* shall be due in advance based on the actual expenses for the *Chatfield Project* in the *fiscal year* most recently ended, or an estimate thereof when actual expense information is not available. The required amount is due and payable annually by the CDNR not later than 45 calendar days after notification by the *District Engineer*, through any of the payment mechanisms specified by paragraph A.1. of this Article.

4. Any delinquent payment owed by the CDNR shall be charged interest at the Current Value of Funds Rate, as determined by the Secretary of the Treasury that is applicable on the date that the payment became delinquent, with such penalty interest as may be required by Federal law or regulation.

B. The CDNR shall provide the funds required by Article II.F.4. for the costs of the *other modifications to the Chatfield Project*, and the funds required by Article II.F.5. for the costs of

the Government's oversight of the *non-Federal work*, in accordance with the provisions of this paragraph.

1. Until the end of the *period of construction*, the Government shall notify the CDNR in writing, not less than 90 calendar days prior to the beginning of each *fiscal year*, of the full amount of funds the Government determines to be required from the CDNR to fund the costs of the *other modifications to the Chatfield Project* and to fund the costs of the Government's oversight of the *non-Federal work* to be incurred in that *fiscal year*. Not later than 45 calendar days prior to the beginning of that *fiscal year*, the CDNR shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Omaha" to the *District Engineer* or by providing an Electronic Funds Transfer of the required funds in accordance with procedures established by the Government.

2. The Government shall draw from the funds provided by the CDNR such sums as the Government deems necessary to cover such costs as they are incurred. If at any time the Government determines that the CDNR must provide additional funds to pay the costs of the *other modifications to the Chatfield Project* or the costs of the Government's oversight of the *non-Federal work*, the Government shall notify the CDNR in writing of the additional funds required and provide an explanation of why the additional funds are required. Within 45 calendar days from receipt of such notice, the CDNR shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. Upon the conclusion of each *fiscal year*, the Government shall conduct an accounting of the Government's financial obligations incurred for the *other modifications to the Chatfield Project* and the Government's oversight of the *non-Federal work*, and furnish the CDNR with written notice of the results of such accounting.

a. Should the accounting show that the Government's total financial obligations for such costs exceed the total contribution of funds provided by the CDNR for such work, the CDNR, no later than 60 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference through any of the payment mechanisms specified in paragraph B.1. of this Article.

b. Should the accounting show that the amount of funds provided by the CDNR for such costs exceeds the Government's total financial obligations for such work, the Government, subject to the availability of funds, shall refund the excess amount to the CDNR within 60 calendar days of the date of completion of the accounting or, upon the request of the CDNR, retain the excess funds to meet the responsibility of the CDNR for the costs of the *other modifications to the Chatfield Project* or the costs of the Government's oversight of the *non-Federal work* for the succeeding *fiscal year*. In the event the CDNR is due a refund and funds are not available to refund the excess amount to the CDNR, the Government shall seek such appropriations as are necessary to make the refund.

## ARTICLE V – OPERATION AND MAINTENANCE OF THE CHATFIELD STORAGE REALLOCATION PROJECT



A. The regulation of the use of water withdrawn or released from the storage space utilized by the CDNR pursuant to Article II. of this Agreement shall be the sole responsibility of the CDNR. The CDNR has the full responsibility to acquire in accordance with state laws and regulations, and, if necessary, to establish or defend, any and all water rights needed for utilization of the storage space provided under this Agreement. The Government shall not be responsible for diversions by others, nor will it become a party to any controversies involving the use of the storage space by CDNR except as such controversies may affect the operation of the *Chatfield Project* by the Government.

B. The CDNR agrees to furnish and install, without cost to the Government, suitable meters or measuring devices satisfactory to the *District Engineer* for the measurement of water which is withdrawn from the *Chatfield Project* by any means other than through the *Chatfield Project outlet works* or the *ditch outlet works*. The CDNR shall furnish to the Government monthly statements of all such withdrawals. Prior to the construction of any facilities for withdrawal of water from the *Chatfield Project*, the CDNR will obtain the *District Engineer's* approval of the design, location and installation of the facilities, including meters or other measuring devices. Such devices shall be available for inspection by Government representatives at all reasonable times.

C. Releases from the water supply storage space reallocated pursuant to Article II.A. of this Agreement through the *Chatfield Project outlet works* shall be made in accordance with written schedules furnished by the CDNR through the Colorado State Engineer's Office and approved by the *District Engineer*, and shall be subject to Article II.C. of this Agreement. The measure of all such releases shall be by means of a rating curve of the *Chatfield Project outlet works*, or by such other suitable means as may be mutually agreed upon prior to use of the water supply storage space by the CWCBC. Releases from the reallocated water supply storage space through the *ditch outlet works* shall be made by authorized representatives in accordance with the operating procedures of the *ditch outlet works*, in coordination with the Colorado State Engineer's Office and the *District Engineer*, and shall be subject to Article II.C. of this Agreement. The measure of all such releases shall be by means of rating flumes and recorders on the *ditch outlet works* or by such other suitable means as may be mutually agreed upon by the CDNR and the *District Engineer* prior to use of the water supply storage space by the CDNR.

D. During any construction, operation, maintenance, repair, rehabilitation or replacement by the CDNR of facilities that it owns, operates or controls, pursuant to Article II.B.2. of this Agreement, or construction, operation, maintenance, repair, rehabilitation or replacement by the CDNR of the *recreation modifications* or the *compensatory mitigation features*, specific actions will be taken to control environmental pollution which could result from such activity, to comply with applicable Federal, state, and local laws and regulations concerning environmental pollution, and for *non-Federal work* on *Chatfield Project* lands, to comply with environmental obligations specific to the *Chatfield Project* as may be required by the *District Engineer*. Particular attention should be given to:

1. Reduction of air pollution by control of burning, minimization of dust, containment of chemical vapors, and control of engine exhaust gases, and of smoke from temporary heaters;

2. Reduction of water pollution by control of sanitary facilities, storage of fuels and other contaminants, and control of turbidity and siltation from erosion;
3. Minimization of noise levels;
4. On-site and off-site disposal of waste and spoil;
5. Prevention of landscape defacement and damage; and
6. Any discharges of water or pollutants into a navigable stream or tributary.

E. Pursuant to Article II.J. and Article II.K. of this Agreement, the CDNR shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the purposes of the Chatfield Storage Reallocation Project and in accordance with the *Reallocation Report* and with the specific directions in the interim or final Recreation OMRR&R Manual or Mitigation OMRR&R Manual, or equivalent document acceptable to the Government, and any subsequent amendments thereto agreed upon by the Government and the CDNR.

F. The CDNR hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the CDNR now or hereafter owns or controls for access to the *non-Federal work* for the purpose of inspection, if the Government determines an inspection to be necessary. If an inspection shows that the CDNR for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice to the CDNR. Such written notice will describe the obligations the CDNR is failing to perform and the actions required to cure the failure of performance. Upon receipt of such written notice, the CDNR shall have 90 days to cure the failure of performance. If the failure of performance is not cured within such time period, the Government may terminate this Agreement or suspend future performance under this Agreement in accordance with Article XV of this Agreement.

## ARTICLE VI - SUBAGREEMENTS WITH THE WATER PROVIDERS

The Government acknowledges the subagreements to be entered into by the CDNR and the *Water Providers*. The consent of the Government is hereby given to such subagreements, and no further consent for future subagreements will be required, provided, that all subagreements entered into by the CDNR shall not in any manner be construed to affect or modify the reciprocal rights, obligations or responsibilities of the Government and the CDNR under this Agreement, nor create any rights, obligations or responsibilities between the Government and the *Water Providers* executing subagreements with the CDNR. Except as provided above, the CDNR shall not transfer or assign this Agreement nor any rights acquired under this Agreement, without the approval of the Secretary of the Army, or his or her duly authorized representative.



## ARTICLE VII - PROJECT COORDINATION TEAM

A. In order to provide senior management oversight of the implementation of the *non-Federal work*, the CDNR and the Government, not later than 30 calendar days after the effective date of this Agreement, shall appoint named representatives to a Project Coordination Team, which shall include representatives of the *Water Providers*. Thereafter, the Project Coordination Team shall meet regularly until end of the *period of construction*. The *District Engineer* shall chair the Coordination Team. The Government's Project Manager, the CDNR's Project Manager, and one representative of the *Water Providers* shall serve as co-secretaries.

B. The co-secretaries of the Project Coordination Team shall keep the Team informed of significant issues related to the overall progress of the *non-Federal work*, the efficient implementation of the Government's oversight of the *non-Federal work*, and the administration of the *Chatfield Storage Reallocation Project* as a whole. The Project Coordination Team shall consult on all such issues, with a view towards offering solutions to pending and anticipated obstacles to the scheduled completion of the *non-Federal work*, and may make recommendations to the *District Engineer*. The Government has the final authority on acceptance or rejection of the Project Coordination Team's recommendations.

## ARTICLE VIII – HOLD AND SAVE

The CDNR shall hold and save the Government, including its officers, agents and employees free from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the storage in the *Chatfield Project*, or withdrawal or release of water from the *Chatfield Project*, made or ordered by the CDNR or as a result of the construction, operation, or maintenance of the water supply facilities and appurtenances thereto owned and operated by the CDNR except for damages due to the fault or negligence of the Government or its contractors. The CDNR shall hold and save the Government, including its officers, agents and employees free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the *non-Federal work*, except for damages due to the fault or negligence of the Government or its contractors.

## ARTICLE IX - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the *District Engineer*, the CDNR shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the CDNR determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601-9675; hereinafter "CERCLA"), that may exist in, on, or under lands, easements, and rights-of-way that the CDNR proposes to acquire pursuant to Article II.L. of this Agreement.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the CDNR proposes to acquire pursuant to Article II.L. of this

Agreement, the CDNR and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the CDNR shall not proceed with the acquisition of the real property interests until the parties agree that the CDNR should proceed.

C. The Government and the CDNR shall determine whether to initiate construction of the *non-Federal work*, or, if already in construction, whether to continue with construction of the *non-Federal work*, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the CDNR proposes to acquire or has acquired pursuant to Article II.L. of this Agreement.

1. Should the Government and the CDNR determine to initiate or continue with construction of the *non-Federal work* after considering any liability that may arise under CERCLA, the CDNR shall be responsible, as between the Government and the CDNR, for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination, except for any costs of cleanup and response on lands owned by the United States and administered by the Government or on lands located within the boundaries of the Pike National Forest.

2. Should the Government and the CDNR determine to initiate or continue with construction of the *non-Federal work* after considering any liability that may arise under CERCLA, the Government shall be responsible, as between the Government and the CDNR, for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination, on lands owned by the United States and administered by the Government.

D. The CDNR and the Government shall consult with each other in accordance with Article XI of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the CDNR, the CDNR shall be considered the operator of the *non-Federal work* for purposes of CERCLA liability. To the maximum extent practicable, the CDNR shall operate, maintain, repair, rehabilitate, and replace the *non-Federal work* in a manner that will not cause liability to arise under CERCLA.

## ARTICLE X - HISTORIC PRESERVATION

A. The Government shall ensure compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) prior to initiation of construction of the *non-Federal work*. In the event that the Government determines that any identification, survey, or evaluation of historic properties is required for construction of the *non-Federal work*, the CDNR shall perform such identification, survey, or evaluation in accordance with this paragraph and other written directions of the Government. The CDNR shall ensure that its studies are conducted by qualified archaeologists, historians, architectural historians and historic architects, as appropriate, who



meet, at a minimum, the Secretary of the Interior's "Professional Qualifications Standards." The CDNR shall submit study plans and reports to the Government for review and approval and shall be responsible for resolving any deficiencies identified by the Government.

B. In the event that the Government determines that mitigation activities or actions, including data recovery activities associated with historic preservation, are required for construction of the *non-Federal work*, the CDNR shall perform such activities or actions in accordance with the written directions of the Government. Prior to construction of the *non-Federal work*, the CDNR shall perform the agreed upon activities or actions, which shall be subject to Government inspection.

C. If, during its performance of the *non-Federal work* the CDNR discovers historic properties or other cultural resources that have not been evaluated in accordance with this Article, the CDNR shall provide prompt written notice to the Government of such discovery. The CDNR shall not proceed with the performance of the *non-Federal work* related to such discovery until the Government provides written notice to the CDNR that it should proceed with such work.

D. The CDNR shall include provisions in all of its construction contracts for the protection of cultural resources discovered during construction of the *non-Federal work*. These provisions shall include, at a minimum, the requirement to cease all work in the immediate area of a discovered cultural resource until the situation is properly evaluated, and the requirement to immediately provide verbal and written notice to the CDNR and the Government in the event of such discovery. Upon receipt of notice that cultural resources have been discovered, the Government, pursuant to its responsibilities under the National Historic Preservation Act, must authorize further action or study before construction may continue. If the Government concludes that such discovery warrants consultation under the National Historic Preservation Act, the CDNR shall participate as a consulting party. In such a case, construction of the *non-Federal work* related to such discovery shall not continue until the Government sends written notification to the CDNR. Where the CDNR elects to perform the construction using its own forces, the same procedures shall be followed.

E. For the purposes of this Article, the CDNR hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the CDNR now or hereafter owns or controls for access to the *non-Federal work*.

## ARTICLE XI - 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 XII - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the CDNR 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; Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army"; and all applicable Federal labor standards requirements including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

## ARTICLE XIII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the CDNR 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 XIV - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 90 calendar days after the effective date of this Agreement, the Government and the CDNR 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 to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the CDNR shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of six 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 CDNR 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 CDNR 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



(DODD) 7600.10. Upon request of the CDNR and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the CDNR and independent auditors any information necessary to enable an audit of 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 A-87 and A-133, and such costs as are allocated to the *Chatfield Storage Reallocation Project* shall be solely the responsibility of the CDNR.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the CDNR 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. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be solely the responsibility of the Government.

## ARTICLE XV – TERMINATION, MODIFICATION OR SUSPENSION

A. The Government may terminate or suspend this Agreement as follows:

1. If at any time the CDNR fails to fulfill its obligations under this Agreement, and the first reallocated storage milestone, as shown in Exhibit B to this Agreement, has not been met by the CDNR, the Government may, after notice and an opportunity to cure as provided in paragraph A.2. of this Article, terminate this Agreement or suspend future performance under this Agreement. If at any time the CDNR fails to fulfill its obligations under this Agreement and the CDNR has met one or more of the reallocated storage milestones, as shown in Exhibit B to this Agreement, the Government may, after notice and an opportunity to cure as provided in paragraph A.2. of this Article, suspend future performance under this Agreement, but only with respect to that portion of storage space related to the reallocated storage milestones that have not yet been met by the CDNR, provided that the CDNR has met and continues to meet its payment obligations under Article II.F. and Article IV.A. of this Agreement, as such payment obligations may be modified pursuant to paragraph B.2. of this Article. If the CDNR has not met or at any time ceases to meet its payment obligations under Article II.F. and Article IV.A. of this Agreement for the full amount of storage space described in Article II.B.1. of this Agreement and the Government has not suspended future performance under this paragraph, the Government may, after notice and an opportunity to cure as provided in paragraph A.2. of this Article, terminate this Agreement.

2. The Government shall give written notice to the CDNR of any failure by the CDNR to fulfill its obligations under this Agreement. Such notice shall describe the nature of the failure by the CDNR to fulfill its obligations under this Agreement, the actions required to cure such failure, and whether termination or suspension of future performance is the Government's intended remedy. Upon receipt of such notice, the CDNR shall have 90 days within which to cure such failure before the termination or suspension becomes effective. If the cure cannot reasonably be completed during the 90 day cure period, the CDNR shall have such additional cure time as necessary, as agreed to by the parties, to complete the cure beyond the 90 days so long as the CDNR is reasonably diligent in pursuing completion of the cure. The

Government shall provide written notice to the CDNR when such failure is cured or, alternatively, when the termination or suspension becomes effective.

B. In the event that the Government suspends future performance under this Agreement pursuant to paragraph A. of this Article, such suspension shall remain in effect until the Government and the CDNR reach agreement on how to proceed. If the Government and the CDNR do not reach agreement on how to proceed, the Government may modify this Agreement to:

1. Exclude that portion of storage space related to the reallocated storage milestones, as shown in Exhibit B to this Agreement, that have not yet been met by the CDNR; and
2. Modify any other provision to reflect the portion of storage space related to the reallocated storage milestones, as shown in Exhibit B to this Agreement, that have been met by the CDNR.

C. In the event that this Agreement is terminated pursuant to paragraph A. of this Article, both parties shall conclude their activities relating to the *Chatfield Storage Reallocation Project* and conduct an accounting in accordance with Article IV.B.3. of this Agreement.

D. Within eighteen months after the effective date of this Agreement, the CDNR will re-examine and refine the total costs of the *Chatfield Storage Reallocation Project*, and give notice to the Government of such refined cost estimate in accordance with the notice provision of this Agreement. If the refined cost estimate exceeds one hundred and thirty four million dollars (\$134,000,000) by ten percent or more, the CDNR shall have the right, for a period of 90 days after the day on which it gives notice to the Government, to terminate this Agreement.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article shall not relieve the parties of liability for any obligations, including financial obligations, previously incurred. Any delinquent payment owed by the CDNR shall be charged interest at the Current Value of Funds Rate, as determined by the Secretary of the Treasury that is applicable on the date that the payment became delinquent, with such penalty interest as may be required by Federal law or regulation.

## ARTICLE XVI - 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 mailed by first-class, registered, or certified mail, as follows:

If to the CDNR:  
Executive Director  
Colorado Department of Natural Resources  
1313 Sherman Street, Room 718  
Denver, Colorado 80203



If to the Government:  
U.S. Army Engineer  
Omaha District  
1616 Capitol Avenue, Suite 9000  
Omaha, Nebraska 68102-9000

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, 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 XVII – OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the State of Colorado or the CDNR where creating such an obligation would be inconsistent with the Colorado Constitution, article X, section 20(4)(b).


B. The CDNR intends to fulfill its obligations under this Agreement. The CDNR shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that year, and shall use all reasonable and lawful means to secure those appropriations. The CDNR 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 CDNR 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 CDNR 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.

#### ARTICLE XVIII – TIMELY PERFORMANCE

Both parties agree that timely performance of the provisions of this Agreement is essential to its effective implementation. For any action required under this Agreement where prior approval or consultation is required to be given or conducted by either the Government or the CDNR, the party which is required to approve the action agrees that it will review and respond to a request for approval, or to a request for consultation, in a prompt and expeditious manner. The requesting party may not be penalized as a result of the failure of the other party to act in a timely manner. In the event that such approval is not provided in a prompt and expeditious manner, any schedule for achieving a performance obligation that is affected by the delay in approval or consultation will be reasonably extended to account for the delay, except that Article II.H. of this Agreement shall govern if the Government approval required by Article II.H. is not provided within the time period required by that Article.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall first be signed by the CDNR and thereafter shall become effective upon the date it is signed by the Government.

DEPARTMENT OF THE ARMY

BY:   
JOEL R. CROSS  
Colonel, Corps of Engineers  
District Commander

DATE: 10/9/14

COLORADO DEPARTMENT OF  
NATURAL RESOURCES

BY:   
MIKE KING  
Executive Director

DATE: 10/6/14

COLORADO STATE CONTROLLER  
BOB JAROS, CPA, MBA, JD

BY:   
RALEA SLUGA  
Central Contracts Unit Manager

DATE: 10-7-2014



**EXHIBIT A: WATER PROVIDERS AS OF EFFECTIVE DATE OF THE  
REALLOCATION REPORT**

(Source: Table 1-1 from the *Reallocation Report*)

DOWNSTREAM WATER PROVIDERS

Unassigned

Central Colorado Water Conservancy District

Colorado Parks and Wildlife

Denver Botanic Gardens at Chatfield

Western Mutual Ditch Company

UPSTREAM WATER PROVIDERS

Unassigned

Castle Pines Metropolitan District

Castle Pines North Metropolitan District

Town of Castle Rock

Centennial Water and Sanitation District

Center of Colorado Water Conservancy District

Colorado Water Conservation Board

Mount Carbon Metropolitan District

South Metro Water Supply Authority representing:

Arapahoe County Water and Wastewater Authority

Castle Pines North Metropolitan District

Castle Pines Metropolitan District

Centennial Water and Sanitation District

Cottonwood Water and Sanitation District

Pinery Water and Sanitation District

Stonegate Village Metropolitan District

Town of Castle Rock

**EXHIBIT B: REALLOCATED STORAGE MILESTONE SCHEDULE**  
(Source: Section 6.5.2 from the *Reallocation Report*)

The CDNR and the *Water Providers*, through the subagreements referenced in Article VI of this Agreement, will establish an environmental escrow fund that will be at least equal to the estimated cost of fully implementing and completing the Compensatory Mitigation Plan (CMP) (Appendix K of the *Reallocation Report*) including a reasonable contingency. The establishment of the escrow fund prior to any storage in the reallocated storage space will allow the CDNR and the *Water Providers*, through the subagreements referenced in Article VI of this Agreement, to fully use the reallocated storage space subject to the following conditions:

1. Storage between elevations of 5,444 feet msl and 5,442 feet msl cannot exceed 30 days within any calendar year until the CMP is fully implemented; and
2. If the mitigation schedules shown in Table 6-4 and Table 6-5 are not met, the ability to use storage will be defined by the mitigation milestones and reallocated storage space available in Table 6-4 and Table 6-5 until mitigation implementation and Ecological Functional Units (EFUs) gained meet the defined mitigation milestones.

**Table 6-4 (from *Reallocation Report*)**  
**Compensatory Mitigation Implementation Schedule and Reallocated Storage Milestones**

Year Following Agreement Execution	Milestone	Estimated EFUs Gained Per Milestone	Estimated Running Total of EFUs Gained Per Milestone	Estimated % of EFUs Gained of Total EFUs Needed	% of Reallocated Storage Available	Approximate Maximum Pool Elevation (ft) <u>4/</u>
3	Complete implementation of all on-site compensatory mitigation, including on-site mitigation in critical habitat <u>1/</u>	85	85	9	10	5,433.0
3	Complete implementation of all off-site mitigation of impacts to Preble's critical habitat on the South Platte River arm	-- <u>2/</u>	-- <u>2/</u>	-- <u>2/</u>	20	5,435.0
3	Complete implementation of off-site mitigation to gain 100% of needed Preble's EFUs in the West Plum Creek CHU including implementation of 25% of off-site mitigation	178	263	26	25	5,435.5
4	Complete implementation of 50% of off-site mitigation	178	441	44	45	5,437.5
5	Complete implementation of 70% of off-site mitigation	142	583	59	60	5,440.0
6	Complete implementation of 90% of off-site mitigation <u>3/</u>	142	725	73	80	5,442.0

- 1/ Includes restoration and revegetation of borrow areas and temporary impacts associated with the relocation of recreation facilities.
- 2/ Preble's critical habitat impacts and mitigation in the Upper South Platte Critical Habitat Unit (CHU) are calculated in terms of acres and stream miles. For purposes of the CMP schedule, completion of the implementation of all mitigation of Preble's Upper South Platte CHU will allow use of another 10 percent of the reallocated storage.
- 3/ The last increment (10 percent) of off-site mitigation will be based on the results of meeting the success criteria defined in the approved management plans in accordance with the CMP.
- 4/ Storage between 5,444 and 5,442 feet msl cannot exceed 30 days within any calendar year until the CMP is fully implemented.



## EXHIBIT B: (Continued)

Table 6-5 (from *Reallocation Report*)  
EFUs Gained and Reallocated Storage Milestones

Year Following Agreement Execution	% of Total EFUs Gained	Additional % of Reallocated Storage Available <sup>1/</sup>
7	80	0 <sup>2/</sup>
8	85	5
9	90	10
10	95	15
11	100	20

1/ Additive to the percent of reallocated storage available to the CDNR and the *Water Providers*, through the subagreements referenced in Article VI of this Agreement, once the CMP has been 80 percent implemented.

2/ No credit is given for providing up to 80 percent of the EFUs because it is estimated that 80 percent of the EFUs will be provided with implementation of the mitigation activities.

## EXHIBIT C: COST COMPUTATIONS

### I - LAKE STORAGE

Storage Pool (Column 1)	Elevation Range (feet, NGVD) (Column 2)	Usable Storage (acre-feet) <sup>1/</sup> <sup>2/</sup> (Column 3)	Percent of Total Usable Storage <sup>2/</sup> (Column 4)
Flood Control maximum surcharge/spillway design flood	5,500 - 5,520.9		
Exclusive Flood Control	5,444 - 5,500	186,179 AF	81.20%
Joint-Use Flood Control-Conservation	5,432 - 5,444	20,600 AF	8.99%
CDNR (Chatfield Water Providers)		20,600 AF	8.99%
Multipurpose-Conservation	5,385 - 5,432	22,483 AF	9.81%
CDNR (Denver Water <sup>3/</sup> )	5,423 - 5,432	11,134 AF	4.86%
Inactive Pool	5,377 - 5,385		
Total Usable Storage		229,262 AF	100.00

Source: *Reallocation Report* Table 2-5, Section 5.3.1.2, Table 5-5, and Appendix B Section 7.09.

#### NOTES:

- <sup>1/</sup> Storage remaining after 100 years of sedimentation from the date the project is operational and does not include dead storage and/or storage set aside for hydropower head.
- <sup>2/</sup> Used to compute CDNR's cost (see Exhibits C-II and C-III).
- <sup>3/</sup> Denver's storage rights were established by the April 1979 contract between Denver Water and the State of Colorado for Denver Water to provide water to meet the State's obligation to provide a pool for recreation and fish and wildlife use under the March 1979 contract between the Corps and the State, and to provide water for recreation under the September 1976 contract between the State and the U.S. Department of the Interior to construct recreation facilities under the Land and Water Conservation Act of 1965.

### II - FIRST COST OF STORAGE TO BE REPAID BY CDNR FOR THE REALLOCATED STORAGE SPACE

The amount to be repaid by CDNR for the first cost of the reallocated storage is calculated using the updated cost of storage method using the use of facilities cost allocation procedure (Source: *Reallocation Report* Section 5.3.1.2). Due to the unique circumstances for this reallocation, the updated cost of storage amount is then adjusted to 41% in accordance with the exemption to policy granted by the Assistant Secretary of the Army for Civil Works, dated January 22, 2009.

- Total *joint-use Chatfield Project* cost updated to FY 2014 = \$441,829,459 <sup>1/</sup>
- Total reallocated storage space from Article 2.B.1 = 20,600 AF
- Percent of CDNR's share of total usable storage = 8.99%
- Initial calculation of cost for 20,600 AF of water supply storage =  
 $8.99\% \times \$441,829,459 = \$39,720,468$
- Final calculation of first cost of storage applying ASA(CW) policy exemption =  
 $\$39,720,468 \times 41\% = \$16,285,392$  <sup>2/</sup>

#### NOTES:

- <sup>1/</sup> See Updated Project Cost Estimate Table attached to and made a part of this agreement. Costs are based on FY 2014 updated costs.
- <sup>2/</sup> CDNR's share of the updated *joint use Chatfield Project* costs, as adjusted for ASA(CW) policy exemption..



**EXHIBIT C: (Continued)**

<b>Chatfield Dam and Lake Project -- Updated Project Cost Estimate</b>			
<b>Construction Component/Activity</b>	<b>Cost As Constructed</b>	<b>Cost Updated to FY2014</b>	<b>Purpose (Joint Use or Specific)</b>
Lands and damages (aquisition started May 1967)	\$15,595,200	\$82,196,032	Joint
Relocations	\$15,161,300	\$78,518,486	Joint
Reservoir	\$1,121,300	\$5,796,497	Joint
Dams	\$31,398,900	\$164,816,380	Joint
Roads, railroads, and bridges	\$112,000	\$580,034	Joint
Channels and canals	\$6,803,600	\$38,120,821	Joint
Levees and floodwalls	\$4,300	\$23,300	Joint
<b>Recreation facilities (specific use)</b>	\$11,148,500	\$58,217,622	<b>Rec</b>
Structures	\$10,500	\$52,782	Joint
Buildings, grounds, and utilities	\$1,715,300	\$8,957,320	Joint
Permanent operating equipment	\$70,700	\$369,196	Joint
Subtotal	\$83,141,600	\$437,648,470	
Engineering and design	\$7,864,100	\$41,448,511	Joint
Supervision and administration	\$3,974,900	\$20,950,101	Joint
Total Construction	\$94,980,600	\$500,047,082	
<u>Less Specific Recreation Facilities</u>	<u>\$11,148,500</u>	<u>\$58,217,622</u>	
<b>Total Joint-use Storage Construction Cost</b>	<b>\$83,832,100</b>	<b>\$441,829,459</b>	

Source: Reallocation Report Addendum 1, Table 5-4.

## EXHIBIT C: (Continued)

### III – ESTIMATED ANNUAL PAYMENTS TO CORPS BY CDNR FOR USE OF THE REALLOCATED WATER SUPPLY STORAGE

Item	Type of Use	Computation	Cost
Interest and amortization	Total cost of storage space acquired by the User as determined in Exhibit C-II.	Annual payments for principal and interest are not applicable. Cost of storage will be paid in one lump sum.	\$ 0
Annual Operation and maintenance expenses <u>1/</u>	Joint-use (estimated <u>2/</u> )	8.99% <u>3/</u> x \$1,921,365	\$172,730
	Specific water supply facilities (estimated <u>2/</u> )	100% x \$47,180	\$ 47,180
Repair, rehabilitation, reconstruction and replacement costs <u>4/</u>	Joint-use	8.99% <u>3/</u> x \$ 0	\$ 0
	Specific water supply facilities	100% x \$ 0	\$ 0

Source: Reallocation Report Addendum 1

Notes:

1/ Payment due and payable on the date specified in Article IV.A.3.

2/ FY 2014 price levels.

3/ Percent of CDNR's share of the usable storage space in the *Chatfield Project* (column (4) Exhibit C-I).

4/ *Repair, rehabilitation, reconstruction and replacement costs* are payable only when such costs are incurred, as specified in Article IV.A.2.



## CERTIFICATE OF AUTHORITY

I, Casey Shpall, do hereby certify that I am the principal legal officer of the Colorado Department of Natural Resources, which 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 Colorado Department of Natural Resources in connection with the Chatfield Storage Reallocation Project, Colorado, 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 Colorado Department of Natural Resources have acted within their statutory authority. The Agreement between the Department of the Army and the Colorado Department of Natural Resources has been approved by the Colorado State Controller or designee.

IN WITNESS WHEREOF, I have made and executed this certification this 7th day of October 2014.



CASEY SHPALL

DEPUTY ATTORNEY GENERAL  
NATURAL RESOURCES AND ENVIRONMENT SECTION  
COLORADO DEPARTMENT OF LAW

## DISCLOSURE OF 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," <http://www.whitehouse.gov/omb/grants/sflllin.pdf> in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients 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 Section 1352, Title 31, U.S. Code. 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.



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MIKE KING  
EXECUTIVE DIRECTOR  
COLORADO DEPARTMENT OF  
NATURAL RESOURCES

DATE: 10/6/14