

**WATER SERVICE AGREEMENT – TESTING AND RECHARGE USING EA WATER
BETWEEN
THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT,
NEBRASKA COMMUNITY FOUNDATION, INC. and
PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM**

THIS AGREEMENT made and entered into this _____ day of _____, 2011, by and between **The Central Nebraska Public Power and Irrigation District**, a public corporation and political subdivision of the State of Nebraska, with its principal office located at 415 Lincoln Street, P.O. Box 740, Holdrege, NE 68949-0740, hereinafter referred to as "Central," and the **Nebraska Community Foundation, Inc. (representing all signatories to the Platte River Recovery Implementation Program)**, a Nebraska non-profit corporation, with its principal office located at 3833 South 14th Street, Lincoln, Nebraska 68501-3107, hereinafter referred to as "Foundation," and the **Platte River Recovery Implementation Program**, with its principal office located at 4111 4th Avenue, Suite 6, Kearney, Nebraska 68845, hereinafter referred to as "Platte Program," (jointly referred to as "Parties" and individually as "Party").

WITNESSETH:

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

WHEREAS, in July of 2011 Central will file with the Nebraska Department of Natural Resources (hereinafter "DNR"), a "Petition for Leave to File an Application for a Permit to Appropriate Water for Testing Winter Canal Operations and Pilot Recharge Projects on the Phelps Canal in Gosper and Phelps Counties using EA Water" (hereinafter "Appropriation"); and

WHEREAS, the Platte Program desires Central to implement the testing of winter canal operations and pilot recharge projects for purposes of augmenting Platte River stream flows via groundwater recharge projects; and

WHEREAS, the Environmental Account Manager ("EA Manager"), a representative of the U.S. Fish and Wildlife Service that has a contract to use storage water from Lake McConaughy for environmental purposes (hereinafter referred to as "EA Water"), has indicated a willingness to use EA Water as a potential water source for such testing and pilot groundwater recharge projects; and

WHEREAS, Central desires to provide such recharge services.

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

1. WATER SERVICE.

a. During the term of this Agreement, the described services will only be provided so long as the EA Manager consents to the use of EA Water for such purposes.

b. During the term of this Agreement, Central will provide the Platte Program with groundwater recharge via seepage through the Phelps Canal for the purposes described above. The Total Amount Diverted, as hereinafter defined, shall not exceed 5,000 acre-feet of water in the non-irrigation season. The Total Amount Diverted shall be measured by Central using the Phelps Canal measuring flume located at milepost 1.6 on the Phelps Canal (including water diverted and not available for recharge because of evaporation). The Total Amount Diverted will be adjusted by subtracting any deliveries or releases made by Central from the Phelps Canal (with

the exception of deliveries specifically for the Platte Program's pilot recharge ponds per paragraph 1.c. below) and for the difference in storage in the canal at the end of the irrigation season (likely early September, 2011), at the end of each subsequent quarter or billing period, and at the beginning of the next irrigation season (likely mid-April, 2012). The non-irrigation season will begin when Central stops releasing water into sections of the Phelps Canal for irrigation and end when Central begins releasing water into sections of the Phelps Canal for irrigation, as determined by Central.

c. During the term of this Agreement, the Total Amount Diverted shall additionally include water delivered from the Phelps Canal for up to two pilot recharge ponds as shown on Exhibit A, as measured by Central. In addition, if requested by the Platte Program in writing, Central will provide the following services:

1. After receipt of plans and specifications for the delivery of water to the recharge ponds (Delivery System), Central will provide the Platte Program a written estimate of the cost for equipment, materials and labor needed for installation/construction of the Delivery System.
2. If the Platte Program provides a written authorization for the construction of the Delivery System and permission from the landowner(s), Central will construct the Delivery System and provide a statement of the cost of materials, equipment and labor (Cost Summary).
3. After construction and acceptance by the Platte Program, Central will operate the Delivery System in accordance with mutually acceptable operations guidelines.

d. Central may make reasonable adjustments in the Total Amount Diverted as necessary to account for similar operations from other water sources, or for other reasons as may be appropriate. Central shall consult with the Platte Program in making such adjustments. All data used by Central regarding the Total Amount Diverted calculations shall be shared with the Platte Program.

2. **WATER SERVICE CHARGES.** Foundation shall pay Central for the water service described above as follows:

a. A Water Service Charge of twenty five dollars (\$25.00) per acre-foot for the Total Amount Diverted, adjusted according to provisions in paragraph 1 above. All measurements made through Central's measuring device and so recorded by Central operating personnel shall be considered final. Central shall invoice the Foundation for the water service charges quarterly beginning October 1, 2011. Payment shall be due within 60 days of invoice.

b. If Central provides construction of the Delivery System described in paragraph 1(b), the Platte Program shall pay Central the cost of such installation in accordance with the Cost Summary within 60 days of receipt of invoice from Central. In addition, if Central provides operation of the Delivery System in accordance with the operation guidelines, the Platte Program will pay the direct costs for such operation which could include monthly power costs, monthly fuel costs and other maintenance costs associated with operation of the Delivery System within 60 days of invoice.

3. **TERM.** The term of this Agreement shall commence when this Agreement is signed by the Foundation, the Platte Program, and Central (the "Commencement Date"), and shall expire on August 15, 2012.

4. **DATA SHARING.** Central and the Platte Program agree to share all hydraulic and hydrologic data collected in association with this Agreement.

5. **WATER APPROPRIATIONS.** The source of supply shall be EA Water as may be available pursuant to existing, amended, or new appropriations for EA Water as appropriate. Platte Program shall cooperate, as

reasonably necessary, to help Central obtain the DNR's approval of any necessary amended or new appropriations to allow the use of EA Water in the manner described.

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

7. **DEFAULT.** If any Party to this Agreement fails to perform or otherwise breaches any of the terms of this Agreement, then such failure shall constitute a default. In the event of default by any Party, the non-defaulting Party/s shall give written notice of the default to the defaulting Party. Following such written notice, the defaulting Party may cure the default within thirty (30) days. Upon cure, this Agreement shall remain in full force and effect. If the defaulting Party fails to cure, the non-defaulting Party/s shall be entitled to any and all legal and equitable remedies except Central's total liability to the Platte Program and Foundation for any loss or damage, including but not limited to special and consequential damages, arising out of or in connection with the performance of this Agreement shall not exceed either the amount of Water Service Charges paid by the Foundation to Central pursuant to this Agreement or \$50,000, whichever is less, and the Platte Program and Foundation hereby release and hold harmless Central from any liability above such amount. Central hereby releases and holds harmless the Platte Program and Foundation from any liability above such amount except that such release by Central shall not apply to Water Service Charges due Central by the Platte Program and Foundation under this Agreement.

8. **ENTIRE AGREEMENT.** This Agreement contains the entire understanding of the Parties hereto with respect to the water service contemplated hereby and supersedes all prior agreements and understandings between the Parties with respect to such subject matter.

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

10. **BINDING EFFECT.** This Agreement shall inure to the benefit of and be binding on the Parties, their successors and assigns. This Agreement may not be assigned by the Platte Program or the Foundation without the written consent of Central.

11. **GOVERNING LAW.** This Agreement shall be governed by and construed in accordance with the law of the State of Nebraska.

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

NEBRASKA COMMUNITY FOUNDATION, INC.

Date _____

By _____
Diane M. Wilson
Chief Financial and Administrative Officer

PLATTE RIVER RECOVERY IMPLEMENTATION
PROGRAM – Office of the Executive Director

Date _____

By _____
Jerry F. Kenny, Ph.D.
Executive Director

THE CENTRAL NEBRASKA PUBLIC POWER AND
IRRIGATION DISTRICT,

Date _____

By _____
Don D. Kraus
General Manager