

**U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
GREAT PLAINS REGION
WYOMING AREA OFFICE**

**MEMORANDUM OF AGREEMENT NO. R12AG60019
AMONG
THE STATES OF COLORADO, NEBRASKA, AND WYOMING
AND
THE NEBRASKA COMMUNITY FOUNDATION, A NONPROFIT FOUNDATION
AND
THE BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR
FOR
ADMINISTRATIVE & FINANCIAL MANAGEMENT SUPPORT TO THE
GOVERNANCE COMMITTEE AND EXECUTIVE DIRECTOR ESTABLISHED
PURSUANT TO THE PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM
COOPERATIVE AGREEMENT**

I. PARTIES

This Memorandum of Agreement (Agreement) is for establishing administrative and financial management support to the Governance Committee and Executive Director established pursuant to the Platte River Recovery Implementation Program Cooperative Agreement; and is entered into by the States of Colorado, Nebraska, and Wyoming (hereinafter referred to as the “States”), the Nebraska Community Foundation, a nonprofit foundation (hereinafter referred to as the “Foundation”), and the United States Department of the Interior, Bureau of Reclamation (hereinafter referred to as “Reclamation”), each sometimes hereinafter individually called “Party”, and sometimes hereinafter collectively called “Parties”.

II. BACKGROUND

- A.** Pursuant to the Platte River Recovery Implementation Program Cooperative Agreement (Cooperative Agreement), the States of Colorado, Nebraska, and Wyoming, and the Department of the Interior, agreed to participate in and implement the Platte River Recovery Implementation Program (Program). The Cooperative Agreement succeeded and replaced the July 1, 1997 Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska (“July 1997 Cooperative Agreement”) under which the Program was developed. The States and the Department of the Interior also agreed to participate in the Governance Committee, which was established pursuant to Section 4 of the Endangered Species Act (“ESA”) (16 U.S.C. 1531 et seq.) to oversee implementation of the Program. The Program implements certain aspects of the U.S. Fish and Wildlife Service’s recovery plans for four target species (interior least tern, whooping crane, piping plover and pallid sturgeon) listed as threatened or endangered pursuant to the ESA. The Program provides for a range of measures relating to the four target species in

their associated habitats as defined in the Program.

- B.** The Governance Committee's general purpose is to implement the Program. The Governance Committee's responsibilities include, but are not necessarily limited to, the following: select an Executive Director, a land interest holding entity, a financial management entity, and other contractors as it deems appropriate; establish committees as needed; approve budgets and request funds or financing from the Signatories for Program purposes; approve Program activities and criteria; review accomplishments annually; evaluate Program management activities and take action as appropriate as described in the Adaptive Management Plan; annually compare accomplishments with the Milestones, and implement measures to correct shortfalls, if needed; review implementation of the States' and Federal government's Depletions Plans.
- C.** The Executive Director is required under an existing agreement with the Governance Committee through the Foundation to report to and carry out the direction of the Governance Committee and to assist other committees.
- D.** The Platte River Implementation Governance Committee, the Executive Director, and other committees require administrative support in order to accomplish the purposes of the Cooperative Agreement, which began on January 1, 2007.

III. PURPOSE & OBJECTIVE

- A.** The purpose of the agreement is to establish a finance management and administrative support process to aid the Governance Committee, Executive Director, and other committees established in accordance with the Cooperative Agreement, in executing their responsibilities. The purposes of this agreement are as follows:
 - i. To establish the procedure for the transfer of funds to the Foundation to pay financial obligations of the Governance Committee under contracts authorized by the Governance Committee according to the terms of those contracts.
 - ii. To establish the procedure for disbursement of funds from the Foundation in payment of the financial obligations of the Governance Committee according to the terms of third-Party contracts between the Governance Committee through the Foundation as the Governance Committee's contracting agent, and consultants, vendors, and contractors in an efficient and timely manner.
 - iii. To establish and disclose the terms by which the Foundation serves ~~as~~ as BML the Governance Committee's contracting agent through this Agreement.

IV. AUTHORITY

This agreement is entered into pursuant to Section 515 (b) of the Consolidated Natural Resources Act of 2008, Public Law 110-229 (122 Stat 847), and applicable laws of the States of Colorado, Nebraska, and Wyoming.

V. STATEMENT OF WORK AND RESPONSIBILITIES OF THE PARTIES

A. SERVICES TO BE PROVIDED AS A CONTRACTING AGENT

- i. The Foundation will become the Governance Committee's contracting agent for the Executive Director's contract, and other contracts in support of Program tasks. These services include, but are not necessarily limited to, the following tasks:
 1. Set up all new vendors for the Governance Committee in the Foundation's accounting system and ensure that all necessary information is obtained for each vendor.
 2. Process all disbursements, including ensuring that all paperwork is complete and the required signatures are in place; allocating each payment among the Parties based on percentages provided in V.B.v below; and issuing checks.
 3. Issues Forms 1099 to vendors in accordance with Internal Revenue Service requirements.
 4. Handle all cash receipts (including invoicing signatories for contributions as required by separate financial assistance agreements between the Foundation and the individual Parties), including monitoring bank accounts daily for electronic transfers and posting cash receipts to the separate account of the appropriate Party.
 5. Maintain separate financial books and records for each project of the Program, broken out into separate accounts for each Party.
 6. Invest cash balances in accordance with the separate financial assistance agreements between the Foundation and the other Parties.
 7. Provide monthly and annual financial reports of the activity of the [Program](#) [BM2 Partnership](#).
 8. Communicate with the Executive Director's office to address issues and provide any information needed.
 9. Obtain an annual audit of the Foundation's financial statements and an annual audit of its compliance with the requirements of applicable federal laws, including 43 CFR 12, for the Program.
 10. Maintain liability insurance.
 11. Provide all equipment, materials and personnel necessary to perform these administrative functions.
- ii. The Foundation shall be responsible only for the financial aspects of the Executive Director's relationship with the Governance Committee; all supervisory and related

- responsibilities shall be retained by the Governance Committee.
- iii. The Foundation and the Governance Committee may identify additional support services to be performed by the Foundation for the Governance Committee, such as fund raising.
 - iv. The Foundation shall not enter into any contract without Governance Committee authorization or any contract that commits the States or Federal Government to expenditure of funds that exceed the amount authorized by the Governance Committee. All such contracts shall include language which is acceptable to each Party to this agreement and which conditions the contract on the continuing availability of funds from the Parties.
 - v. The Governance Committee, or the Executive Director, to the extent authorized by the Governance Committee, will review and approve all proposed contracts. The States and Federal Government may provide technical assistance to the Foundation on an as needed basis to assist in development of contracts.
 - vi. The funds budgeted to implement the Program shall be as provided for in the Program's Finance Document (Attachment I).

B. ADMINISTRATION OF CONTRIBUTIONS

- i. Except as otherwise directed by the Reclamation and the States, the Foundation will collect all cash contributions to implement the Program, and to perform the work required under this Agreement, through separate financial assistance agreements that provide for the transfer of funding to the Foundation from each Party.
- ii. Funds collected by the Foundation from Reclamation and the States for the Program will be held in a separate fund titled "Platte River Recovery Implementation Program." Contributions to this fund will be provided by Reclamation and the States of Colorado and Wyoming as provided for in V.B.i above. Except as otherwise directed by Reclamation and the States, disbursements requested will reflect each Party's share of total costs as shown in V.B.v below.
- iii. Contributions and/or donations, other than those addressed above, shall go into accounts held by the Foundation and kept separate from the accounts described in V.B.ii above.
- iv. Disbursements from contribution accounts held by the Foundation shall be made for bills deemed payable in accordance with the Foundation's bookkeeping and accounting practices and approved by the Parties to this agreement.
- v. Disbursements from the Platte River Recovery Implementation Program Fund shall be made from the Parties' accounts in the following proportions:

Reclamation:	83.97%
Colorado:	12.82%

Nebraska: 0.00%
Wyoming: 3.21%

Exceptions to these allocations will only occur when Reclamation and the States all agree and direct the Foundation otherwise through Governance Committee action.

- vi. If at any time Reclamation or any State does not have sufficient funds in its account to cover its portion of a planned disbursement, the Foundation shall not disburse funds for that purpose from the account of any other Party without prior written approval from that Party. When federal funds are to be disbursed, approval will be required by Reclamation. Disbursements shall be made by check or electronic funds transfer upon receipt by the Foundation of a Request for Disbursement of Contributions (Attachment II).
- vii. The Foundation shall maintain a record keeping system acceptable to the Parties to this agreement to track and reconcile disbursements. The Foundation will establish a fund, which will be held in bank account(s) separate from the general assets of the Foundation ~~BM3] a separate bank account~~. The fund will be broken into accounts maintained as required by this Agreement.
- viii. Interest earned will be at the same rate for all monies in the fund. Interest income will be prorated to the Parties' accounts as income, based on balances when interest is credited.
- ix. Any interest earned on federal funds shall be reported to Reclamation not less than quarterly. The Foundation must return any interest earned on Federal funds to Reclamation in accordance with the instructions to be provided by Reclamation.
- x. The Foundation shall provide the monthly reports listed below by no later than the 20th of each succeeding month to the Governance Committee and Executive Director in a format acceptable to the Governance Committee and Executive Director.
 - 1. A report of cash contributions provided by each Party to the Agreement since the last such report.
 - 2. A report of in kind services contributions by each Party to the Agreement since the last such report. The eligibility and value of in kind services as offsets to cash contributions as required by the milestones to the Cooperative Agreement shall be preauthorized by the Governance Committee prior to their inclusion in such report. Detailed statements of these in-kind services will be provided by the contributing Party.
 - 3. A report of the current total outstanding obligations of each Party to the Agreement.
 - 4. A report of cash contributions and/or donations provided by other than the Parties to the Agreement since the last such report.

5. A report indicating each request for disbursement received since the last such report and each disbursement made since the last such report, including the amount and the entity receiving the disbursement and the amount withdrawn from each contribution account for that disbursement.
6. A report of the total amount disbursed by the Foundation from each contribution account.

C. OTHER RESPONSIBILITIES

- i. The Foundation shall provide accounting, bookkeeping, and auditing services; provide supplies and services necessary for its office operations; and provide other administrative services necessary to properly administer contributions and contracts in accordance with this agreement.
- ii. The Foundation shall maintain liability insurance acceptable to the Parties to this agreement covering the work being performed by the Foundation under this agreement. The costs and fees associated with this coverage shall be provided in sufficient detail to comply with federal law and applicable laws of the States of Colorado, Nebraska, and Wyoming.

D. REIMBURSEMENT FOR SERVICES FOUNDATION INDIRECT COSTS

- i. The Foundation shall negotiate an indirect cost rate with the Department of the Interior's National Business Center. Each State and Reclamation's share of the negotiated indirect cost rate shall be in the same proportion as stated in V.B.v above. Reimbursement of Reimbursement for services provided by the Foundation and billable to Reclamation's share of the indirect cost rate will be made by Reclamation pursuant to the separate financial assistance agreement between Reclamation and the Foundation. Reimbursement by Reclamation will be made to the extent approved by the Governance Committee and approved by Reclamation. Reclamation's funding provided to the Foundation pursuant to V.B.i above will include funds to reimburse the Foundation for its services Reclamation's share of the indirect cost rate.
- ii. Payments by each State to the Foundation shall be in accordance with the separate financial assistance agreement between each State and the Foundation. Each State's periodic advance of funds to the Foundation pursuant to V.B.i above will include funds to reimburse the Foundation each State's share of the indirect cost rate for its services.
- iii. Indirect costs will be assessed and paid at times of disbursement by fund transfer from funds held under the Agreement to the Foundation.
- iv. In addition to the indirect costs rate prescribed by this agreement, the Foundation will be reimbursed at actual cost of extraordinary expenses incurred at the request of Parties to the Agreement, such as overnight express mail services, and/or reasonable travel expenses for travel at the request of the Governance Committee, Finance Committee, or a Party to the Agreement.^[BM4]

E. RATES FOR REIMBURSEMENT

i. ~~For providing services pursuant to this Agreement, the Foundation shall be reimbursed based on the cumulative annual disbursements during each Foundation fiscal year, which is July 1 through June 30, as follows:~~

<u>Annual Cumulative Disbursements</u>		<u>Reimbursement Rate</u>
<u>From</u>	<u>To</u>	
\$ 0	\$999,999	2.50%
\$1,000,000	\$1,999,999	2.25%
\$2,000,000	\$4,999,999	2.00%
\$5,000,000	\$9,999,999	1.75%
> \$10,000,000		1.5%

ii. ~~The effective date for this reimbursement schedule is July 1, 2007, to correspond with the Foundation's fiscal year.~~

VI. EQUIPMENT ACQUIRED UNDER THE AGREEMENT

The Foundation shall request disposition instructions from Reclamation and the States for any and all real and personal property with a residual value exceeding \$5,000 per unit which are purchased with funds provided pursuant to the provisions of this agreement. Said disposition request shall be in accordance with 43 CFR 12 and forwarded no later than 30 days after completion of the period of performance of the agreement.

VII. AMENDMENT

This Agreement may be amended at any time by mutual written agreement of all the Parties. Changes dealing with administrative matters (such as change in Party representative, changes of address, etc. which have no substantive effect on the Parties' rights or obligations) shall be made by Reclamation and/or the States upon the authorization of the Party or Parties involved. No other written statement by any person and no oral statement of any person shall be allowed in any manner or degree to modify or otherwise affect the terms of this Agreement as they apply to the services provided by the Foundation.

VIII. TERMINATION**A. TERMINATION FOR CAUSE**

Reclamation and the States may terminate this Agreement, in whole or in part at any time before the date of completion, whenever Reclamation and the States determine that the Foundation has failed to comply with the terms or conditions of this Agreement. Reclamation and the States will promptly notify the Foundation in writing of the determination and the reasons for the termination, together with the effective date. Any funds remaining in contribution accounts at the time of such termination, except to the extent necessary to cover costs properly incurred prior to such termination, shall be returned to the applicable Parties.

B. TERMINATION FOR CONVENIENCE

The States and Reclamation may terminate this Agreement in whole or in part for convenience, when they agree that the continuation of this Agreement would not produce beneficial results. The Foundation may terminate this Agreement for convenience if it determines that the continuation of the Agreement would not produce beneficial results. In the event of termination for convenience,~~[BMS] that event,~~ the Parties shall negotiate the termination conditions, including the effective date and, in the case of partial termination, the portions to be terminated. Any funds remaining in contribution accounts at the time of such termination, except to the extent necessary to cover costs properly incurred prior to such termination, shall be returned to the applicable Parties.

IX. RIGHTS IN TECHNICAL DATA

There shall be no restrictions on use of technical data developed under this agreement. Rights to all technical data belong to all Parties to this Agreement, and all Parties to this agreement may use any technical data developed under this Agreement for any purpose they deem appropriate, including publication, without fee or royalty payment.

X. ASSURANCES INCORPORATED BY REFERENCE

The provisions of the assurances executed by the Foundation in connection with this Agreement shall apply with full force and effect to this Agreement as if fully set forth in this Agreement. Such assurances include, but are not limited to, the promise to comply with all applicable Federal statutes and orders relating to nondiscrimination in employment, assistance, and housing; the Hatch Act; Federal wage and hour laws and regulations and work place safety standards; Federal environmental laws and regulations and the Endangered Species Act; and Federal protection of rivers and waterways and historic and archeological preservation.

XI. RESOLVING DISAGREEMENTS

A. In entering into this Agreement with the Foundation, the other Parties to the Agreement are committed to working with the Foundation and each other in a harmonious manner to achieve the objectives of the Program successfully. When disagreements arise among the Parties, they must be resolved according to the procedures discussed below:

- i. Reclamation and the States shall attempt first to resolve disagreements with the Foundation through informal discussion with the Foundation's Representative.
- ii. If the disagreement cannot be resolved through informal discussion among these Parties, the Executive Director will arrange a formal meeting between the Foundation's Representative and Reclamation and the States. If agreement still cannot be reached, the Parties will collectively decide on any varied approaches which might be used to resolve the disagreement. The Parties shall be responsible for their individual expenses related to any approach utilized to resolve the disagreement. If attempts at resolving the disagreement fail, Reclamation and the States shall meet and make a decision. The Foundation may pursue the appropriate appeals process if there is a disagreement with the decision.

- iii. Any issue will be open for resolution in accordance with the above procedures, with the exception of disagreements regarding continuation of the Agreement (since any Party may terminate the agreement with the specified notice), or other matters specifically addressed by the Agreement itself.

XII. TERM OF AGREEMENT

Subject to the termination provisions above, this Agreement will remain in effect until September 30, 2020. This Agreement may be extended by mutual written BM6 agreement of the Parties.

XIII. OTHER

During the performance of this Agreement, the Parties agree not to discriminate against any person because of race, color, sex, or national origin as provided by the terms of Executive Order 11246.

No member or delegate to Congress, or resident Commissioner, shall be admitted to any share or part of this Agreement or to any benefit arising from it. However, this clause does not apply to the Agreement to the extent that this Agreement is made with a corporation for the corporation's general benefit.

XIV. KEY OR RESPONSIBLE PERSONNEL

The Bureau of Reclamation's Representative:

Coleman W. Smith, Jr.
Wyoming Area Manager
P.O. Box 1630
Mills, WY 82644

Phone: 307-261-5671
Fax: 307-261-5683
Email: cwsmith@usbr.gov

The State of Colorado's Representative:

Suzanne Sellers
State of Colorado
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203

Phone: 303-866-3441 ext. 3233
Fax: 303-866-4474
Email: suzanne.sellers@state.co.us

The State of Nebraska's Representative:

Dr. Jim Schneider
Nebraska Department of Natural Resources
P.O. Box 94676
Lincoln, NE 68509-4676

Phone: 402-471-3141
Fax: 402-471-2900
Email: jim.schneider@nebraska.gov

The State of Wyoming's Representative:

Harry Labonde
Wyoming Water Development Office
6920 Yellowtail Road
Cheyenne, WY 82002

Phone: 307-777-7626
Fax: 307-777-6819
Email: mike.purcell@wyo.gov

The Nebraska Community Foundation's Representative:

Diane M. Wilson, CFAO
Nebraska Community Foundation
P.O. Box 83107
Lincoln, NE 68501

Phone: 402-323-7333
Fax: 402-323-7349
Email: dwilson@nebcommfound.org

The Governance Committee's Representative:

Dr. Jerry Kenny
Headwaters Corporation
4111 4th Avenue, Suite 6
Kearney, Nebraska 68845

Phone: 308-237-5728
Fax: 308-237-4651
Email: kennyj@headwaterscorp.com

XV. INDEMNITY & SOVEREIGN IMMUNITY

Reclamation and the States do not waive sovereign immunity by entering into this Agreement and specifically retain immunity and all defenses available to them as sovereigns pursuant to state and federal law. None of the Parties agree to insure, defend, or indemnify the other. The Foundation agrees to indemnify and hold harmless the Governance Committee, the Parties, and their officers, agents, and employees from any and all claims, lawsuits, losses and liabilities arising out of the Foundation's failure to perform any of the Foundation's duties and obligations hereunder or in connection with the negligent performance of the Foundation's duties or obligations.

Furthermore, the Foundation remains an independent non-profit entity and does not waive any rights or claims of immunity through entering into this Agreement or participation in Governance Committee and Program matters, and specifically retains all defenses available to it pursuant to state and federal law.

XVI. THIRD PARTY BENEFICIARIES

The Parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Agreement shall not be construed so as to create such status. The rights, duties, and obligations contained in this Agreement shall operate only between the Parties to this Agreement, and shall insure solely to the benefit of the Parties to this Agreement. The provisions of this Agreement are intended only to assist the Parties in determining and performing their obligations under this Agreement.

XVII. ENTIRETY OF AGREEMENT

This Agreement, consisting of twelve (12) pages (including Attachments I and II), represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations, and agreements, whether written or oral.

XVIII. INDEPENDENT CONTRACTOR

The Foundation is an independent contractor at all times, and is not an employee of the Governance Committee, Reclamation, or the States for any purpose. The Foundation assumes sole responsibility for any debts or liabilities that it may incur in fulfilling the terms of this Agreement, and is solely responsible for the payment of all taxes which may accrue to the Foundation on account of this Agreement.

XIX. TITLES NOT CONTROLLING

Titles of paragraphs are for reference only, and shall not be used to construe the language in this Agreement.

XX. SEVERABILITY

Should any portion of this Agreement be judicially determined to be illegal or unenforceable, the remainder of this Agreement shall remain in full force and effect.

XXI. SIGNATURE OF PARTIES

IN WITNESS WHEREOF, the Parties have executed this Memorandum of Agreement and agree to the terms and conditions on the date and the year written below.

The Nebraska Community Foundation

By: Diane M. Wilson
Title: Chief Financial & Administrative Officer

Date

The State of Colorado

By: Suzanne Sellers
Title: Program Manager, Colorado Water Conservation Board

Date

The State of Nebraska

By: Dr. Jim Schneider
Title: Deputy Director, Nebraska Department of Natural Resources

Date

The State of Wyoming

By:	_____	_____
Title:	Director, Wyoming Water Development Office	Date

The Bureau of Reclamation

By:	_____	_____
Title:	Wyoming Area Manager, Bureau of Reclamation	Date

WYOMING ATTORNEY GENERAL’S OFFICE APPROVAL AS TO FORM

By:	_____	_____
Title:	Senior Assistant Attorney General	Date

DRAFT