AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE CITY OF RUPERT, IDAHO

FOR
CONSTRUCTION
ASSISTANCE
FOR THE
RUPERT WASTEWATER TREATMENT PLANT UPGRADES,
RUPERT, MINIDOKA COUNTY, IDAHO

THIS AGREEMENT is entered into this 11th day of April, 2007 by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Walla Walla District and the City of Rupert, Idaho (hereinafter the "Non-Federal Sponsor"), represented by Mayor of the City of Rupert, Idaho.

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army is authorized to provide design and construction assistance, which may be in the form of grants or reimbursements of the Federal share of project costs, for water-related environmental infrastructure and resource protection and development projects in Idaho, Montana, rural Nevada, New Mexico, and rural Utah (hereinafter the "Section 595 Program") pursuant to Section 595 of the Water Resources Development Act of 1999, Public Law 106-53, as amended (hereinafter "Section 595");

WHEREAS, Section 595 provides that the Secretary of the Army may provide assistance for a water-related environmental infrastructure and resource protection and development project only if the project is publicly owned;

WHEREAS, Section 595 provides that $25,000,000 in Federal funds are authorized to be appropriated for design and construction assistance for projects undertaken in Idaho pursuant to the Section 595 Program;

WHEREAS, the U.S. Army Engineer, Walla Walla District (hereinafter the "District Engineer") has determined that the Rupert Wastewater Treatment Plant Upgrades in the City of Rupert, Minidoka County, Idaho (hereinafter the "*Project*", as defined in Article I.A. of this Agreement) is eligible for implementation under Section 595;

WHEREAS, Section 595 provides that the Secretary of the Army shall not provide assistance for any water-related environmental infrastructure and resource protection and development projects until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project;

WHEREAS, Section 595 specifies the cost-sharing requirements applicable to the *Project*;

WHEREAS, Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103, provides that credits and reimbursements afforded for all applicat general authorities and under specific project authority shall not exceed $100,000,000 for all applicable programs and projects in each fiscal year;

WHEREAS, the Government and a non-Federal interest entered into an agreement, dat July 19, 2005, for design assistance of the *Project* (hereinafter the "Design Agreement");

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into an agreement (hereinafter the "Agreement") for the provision of construction assistance for the *Project*;

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the *Project* in accordance with the terms of this Agreement; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree as follows:

ARTICLE I - DEFINITIONS

A. The term "*Project*" shall mean the construction of the Rupert Wastewater Treatment Plant Upgrades in Rupert, Minidoka County, Idaho as generally described in the Rupert Wastewater Treatment Plant Upgrades, City of Rupert, Minidoka County, Idaho, Section 595 Scope of Work, dated November 8, 2006 and approved the District Commander on November 8, 2006.

B. The term "*total project costs*" shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement that the District Engineer determines are directly related to construction of the *Project*. Subject to the provisions of this Agreement including audits conducted in accordance with Article X.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs, the term shall include, but is not necessarily limited to: the Government's costs of inspection in accordance with Article II.A.4. of this Agreement; the Government's costs of technical assistance

in accordance with Article II.A.4. of this Agreement; the Non-Federal Sponsor's and the Government's costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A.1. and Article XIV.A.2. of this Agreement; the Non-Federal Sponsor's and the Government's costs of historic preservation activities in accordance with Article XVII.A. and Article XVII.B. of this Agreement; the Non-Federal Sponsor's construction costs; the Non-Federal Sponsor's supervision and administration costs; the Non-Federal Sponsor's costs of identification of legal and institutional structures in accordance with Article II.J. of this Agreement not incurred pursuant to any other agreement for the *Project*; the Non-Federal Sponsor's and the Government's costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Non-Federal Sponsor's costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, *relocations*, and permit costs determined in accordance with Article IV of this Agreement but not to exceed 25 percent of total project costs; the Non-Federal Sponsor's and the Government's costs of audit in accordance with Article X.B. and Article X.C. of this Agreement; and any other costs incurred by the Government pursuant to the provisions of this Agreement. The term does not include any costs of activities performed under any other agreement for the *Project*; any costs for operation, maintenance, repair, rehabilitation, or replacement of the *Project*; any costs of establishment and maintenance of legal and institutional structures in accordance with Article II.J. of this Agreement; any costs of *betterments*; any costs incurred in advertising and awarding any construction contracts prior to the effective date of this Agreement; any construction costs incurred prior to the effective date of this Agreement; any interest penalty paid in accordance with Article VI.B.4. of this Agreement; any costs of dispute resolution under Article VII of this Agreement; the Government's costs for data recovery activities in accordance with Article XVII.D. and Article XVII.E. of this Agreement; or the Non-Federal Sponsor's costs of negotiating this Agreement.

C. The term "*period of construction*" shall mean the time from the effective date of this Agreement to the date that construction of the *Project* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article II.E. or Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

D. The term "*highway*" shall mean any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity.

E. 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.

F. The term "*betterment*" shall mean a difference in the construction of an element of the *Project* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the construction of that element. The term does not include any construction for features not included in the *Project* as defined in paragraph A. of this Article.

G. The term "*fiscal year*" shall mean one year beginning on October 1 and ending on September 30.

H. 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.

I. The term "*sufficient invoice*" shall mean submission of all of the following three items: (1) a written certification by the Non-Federal Sponsor to the Government that it has made specified payments to contractors, suppliers, or employees for performance of work in accordance with this Agreement, or a written certification by the Non-Federal Sponsor to the Government that it has received bills from contractors, suppliers, or employees for performance of work in accordance with this Agreement; (2) copies of all relevant invoices and evidence of such payments or bills received; and (3) a written request for reimbursement for the amount of such specified payments or bills received that identifies those costs that have been paid or will be paid with *Federal program funds*.

J. The term "*Section 595 Program Limit for Idaho*" shall mean the amount of Federal funds authorized to be appropriated for projects undertaken in Idaho pursuant to the Section 595 Program. As of the effective date of this Agreement, such amount is $25,000,000.

K. The term "*Section 102 Limit*" shall mean the annual limit on credits and reimbursements imposed by Section 102 of the Energy and Water Development Appropriations Act, 2006, Public Law 109-103.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. Using its funds, the Non-Federal Sponsor expeditiously shall construct the *Project* in accordance with Federal laws, regulations, and policies.

1. The Non-Federal Sponsor shall obtain all permits and licenses necessary for the construction of the *Project* and, in the exercise of its rights and obligations under this Agreement, shall comply with all applicable Federal, state, and local laws, regulations, ordinances, and policies including the laws and regulations specified in Article XI of this Agreement. As necessary to ensure compliance with such laws, regulations, ordinances, and policies, the Non-Federal Sponsor shall include appropriate provisions in its contracts for the construction of the *Project*.

2. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on the solicitations for all contracts for the *Project*, including relevant plans and specifications, prior to the Non-Federal Sponsor's issuance of such solicitations. To the extent possible, the Non-Federal Sponsor shall afford the Government the opportunity to review

and comment on all proposed contract modifications, including change orders. In any instance where providing the Government with notification of a contract modification is not possible prior to execution of the contract modification, the Non-Federal Sponsor shall provide such notification in writing at the earliest date possible. To the extent possible, the Non-Federal Sponsor also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof. The Non-Federal Sponsor shall consider in good faith the comments of the Government, but the contents of solicitations, award of contracts or commencement of construction using the Non-Federal Sponsor's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project* shall be exclusively within the control of the Non-Federal Sponsor.

3. At the time the Non-Federal Sponsor furnishes a contractor with a notice of acceptance of completed work for each contract for the *Project*, the Non-Federal Sponsor shall furnish a copy thereof to the Government.

4. The Government may perform periodic inspections to verify the progress of construction and that the work is being performed in a satisfactory manner. In addition, the Government may provide technical assistance to the Non-Federal Sponsor on an as-needed basis until the end of the *period of construction*. Further, the Government shall perform a final inspection to verify the completion of construction of the entire *Project* or completed portion thereof as the case may be. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of performing such inspections.

B. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, and shall perform or ensure performance of all *relocations* that the Non-Federal Sponsor and the Government jointly determine to be required or to be necessary for construction, operation, and maintenance of the *Project*. In addition, the Non-Federal Sponsor shall obtain all permits necessary for construction, operation, and maintenance of the *Project* on publicly owned or controlled lands.

C. The Government shall determine and include in *total project costs* any costs incurred by the Non-Federal Sponsor that the District Engineer determines are directly related to construction of the *Project*, subject to the conditions and limitations of this paragraph.

1. Pursuant to paragraph A.4. of this Article, all work performed by the Non-Federal Sponsor for the *Project* is subject to on-site inspection and determination by the Government that the work was accomplished in a satisfactory manner and is suitable for inclusion in the *Project*.

2. The Non-Federal Sponsor's costs for construction that may be eligible for inclusion in *total project costs* shall be subject to an audit in accordance with Article X.C. of this Agreement to determine the reasonableness, allocability and allowability of such costs.

3. In the performance of all work for the *Project*, the Non-Federal Sponsor must comply with applicable Federal labor laws covering non-Federal construction, 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)). Notwithstanding any other provision of this Agreement, inclusion of costs for construction in *total project costs* may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

4. The Non-Federal Sponsor's costs for construction that may be eligible for inclusion in *total project costs* pursuant to this Agreement are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the work is completed and the time the costs are included in *total project costs*.

5. The Government shall not include in *total project costs* any costs paid by the Non-Federal Sponsor using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

D. The Government shall reimburse the Non-Federal Sponsor, in accordance with Article VI.B. of this Agreement, the amount necessary so that the Federal contribution towards *total project costs* equals 75 percent; however, any reimbursement by the Government is subject to the availability of funds and is limited by the *Section 595 Program Limit for Idaho*.

E. Notwithstanding any other provision of this Agreement, Federal financial participation in the *Project* is limited by the following provisions of this paragraph.

1. As of the effective date of this Agreement, $5,000,000 of Federal funds have been provided by the Congress of the United States (hereinafter the "Congress") for the Section 595 Program in Idaho of which $807,750 is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the Section 595 Program in Idaho or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

2. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities in accordance with Article XVII.D. and Article XVII.E. of this Agreement that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion

of Federal funds made available by the Government to the *Project*, the Government's future performance under this Agreement shall be suspended and the parties shall proceed in accordance with Article XIII.B. of this Agreement. However, if the Government cannot make available sufficient Federal funds to meet the Federal share of *total project costs* in the then-current *fiscal year* solely due to the *Section 102 Limit*, only the Government's future performance related to reimbursement pursuant to paragraph D. of this Article shall be suspended.

3. If the Government determines that the total amount of Federal funds provided by Congress for the Section 595 Program in Idaho has reached the *Section 595 Program Limit for Idaho*, and the Government projects that the Federal funds the Government will make available to the *Project* within the *Section 595 Program Limit for Idaho* will not be sufficient to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities in accordance with Article XVII.D. and Article XVII.E. of this Agreement, the Government shall notify the Non-Federal Sponsor in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project* within the *Section 595 Program Limit for Idaho*, the parties shall terminate this Agreement and proceed in accordance with Article XIII of this Agreement.

F. During the *period of construction*, the Non-Federal Sponsor shall prepare and furnish to the Government for review a proposed Operation, Maintenance, Repair, Rehabilitation and Replacement Manual (hereinafter the "OMRR&R Manual"). The failure of the Non-Federal Sponsor to prepare an OMRR&R Manual acceptable to the Government shall not relieve the Non-Federal Sponsor of its responsibilities for operation, maintenance, repair, rehabilitation, and replacement of the entire completed *Project*, or any completed portion thereof as the case may be, in accordance with the provisions of this Agreement.

G. Upon completion of construction and final inspection by the Government in accordance with paragraph A.4. of this Article, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or a completed portion thereof as the case may be, in accordance with Article VIII of this Agreement. Further, after completion of all contracts for the *Project*, copies of all of the Non-Federal Sponsor's Written Notices of Acceptance of Completed Work for all contracts for the *Project* that have not been provided previously shall be provided to the Government.

H. Upon conclusion of the *period of construction*, the Government shall conduct an accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the Non-Federal Sponsor.

I. The Non-Federal Sponsor and the Government, in consultation with appropriate Federal and State officials, shall develop a facilities or resource protection and development plan. Such plan shall include necessary design, completion of all necessary NEPA compliance, preparation of appropriate engineering plans and specifications, preparation of an OMRR&R Manual, and any other matters related to design and construction of the *Project* in accordance with this Agreement and the Design Agreement.

J. The Non-Federal Sponsor shall identify, establish, and maintain such legal and institutional structures as are necessary to ensure the effective long-term operation of the *Project*. The Non-Federal Sponsor shall provide to the Government a description of such legal and institutional structures and such descriptions shall be included in the OMRR&R Manual prepared by the Non-Federal Sponsor. The Non-Federal Sponsor's costs of identification of such legal and institutional structures shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. The Government shall have no obligation under this Agreement for any costs of establishment and maintenance of such legal and institutional structures.

K. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

L. The Non-Federal Sponsor may request the Government to acquire lands, easements, or rights-of-way or to perform *relocations* for the *Project* on behalf of the Non-Federal Sponsor. Such requests shall be in writing and shall describe the services requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested services or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the services performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.D. of this Agreement. Notwithstanding the acquisition of lands, easements, or rights-of-way or performance of *relocations* by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

M. In the event that the Non-Federal Sponsor elects to include *betterments* in the design or construction of the *Project* during the *period of construction*, the Non-Federal Sponsor shall notify the Government in writing and describe the *betterments* it intends to design and construct. The Non-Federal Sponsor shall be solely responsible for all costs due to *betterments*, including costs associated with obtaining permits therefor, and shall pay all such costs without reimbursement by the Government.

N. The Government shall determine and include in *total project costs* the reasonable costs incurred by the Non-Federal Sponsor for *pre-Agreement design work*, subject to the conditions and limitations of this paragraph, that have not been incurred pursuant to any other agreement for the *Project*. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the amount of costs to be included in *total project costs* for *pre-Agreement design work*.

1. *Pre-Agreement design work* shall be subject to a review by the Government to verify that the work was accomplished in a satisfactory manner and is necessary for the *Project*.

2. Where the Non-Federal Sponsor's cost for completed *pre-Agreement design work* is expressed as fixed costs plus a percentage of construction costs, the Non-Federal Sponsor shall renegotiate such costs with its Architect-Engineer based on actual costs.

3. The Non-Federal Sponsor's costs for *pre-Agreement design work* that may be eligible for inclusion in *total project costs* shall be subject to an audit in accordance with Article X.C. of this Agreement to determine the reasonableness, allocability and allowability of such costs.

4. The Non-Federal Sponsor's costs for *pre-Agreement design work* that may be eligible for inclusion in *total project costs* pursuant to this paragraph are not subject to interest charges, nor are they subject to adjustment to reflect changes in price levels between the time the *pre-Agreement design work* was completed and the time the costs are included in *total project costs*.

5. The Government shall not include in *total project costs* any costs for *pre-Agreement design work* paid by the Non-Federal Sponsor using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of such funds for such purpose is expressly authorized by Federal law.

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

A. The Non-Federal Sponsor and the Government jointly shall determine the lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material. Upon reaching such determination, the Government shall provide written confirmation to the Non-Federal Sponsor thereof including a description of the lands, easements, and rights-of-way jointly determined to be required. Prior to the issuance of the solicitation for each contract for construction of the *Project*, or prior to the Non-Federal Sponsor incurring any financial obligations for construction of a portion of the *Project* using the Non-Federal Sponsor's own forces, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way the Non-Federal Sponsor and the Government jointly determine the Non-Federal Sponsor must provide for that work and shall certify in writing to the Government that said interests have been acquired. Furthermore, prior to the end of the *period of construction*, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*. The Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way required for the *Project* and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the *Project*.

B. The Non-Federal Sponsor and the Government jointly shall determine the *relocations* necessary for construction, operation, and maintenance of the *Project*, including those necessary to enable the borrowing of material or the disposal of dredged or excavated material. Upon reaching such determination, the Government shall provide written confirmation to the Non-Federal Sponsor thereof including a description of the *relocations* jointly determined to be necessary. Prior to the issuance of the solicitation for each contract for construction of the *Project*, or prior to the Non-Federal Sponsor incurring any financial obligations for construction of a portion of the *Project* using the Non-Federal Sponsor's own forces, the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all *relocations* the Non-Federal Sponsor and the Government jointly determine to be necessary for that work and certify in writing to the Government that said work has been performed. Furthermore, prior to the end of the *period of construction*, the Non-Federal Sponsor shall perform or ensure performance of all *relocations* necessary for construction, operation, and maintenance of the *Project*.

C. The Non-Federal Sponsor 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 for construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - VALUE OF LANDS, EASEMENTS, RIGHTS-OF-WAY, AND RELOCATIONS AND COSTS OF PERMITS

A. The Government shall include in *total project costs* the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor and the Government jointly determine must be provided by the Non-Federal Sponsor pursuant to Article III.A. of this Agreement and the value of the *relocations* that the Non-Federal Sponsor and the Government jointly determine must be performed by the Non-Federal Sponsor or for which it must ensure performance pursuant to Article III.B. of this Agreement. The Government also shall include in *total project costs* the reasonable costs incurred by the Non-Federal Sponsor that are associated with obtaining permits pursuant to Article II.B. of this Agreement that are necessary for construction, operation, and maintenance of the *Project* on publicly owned or controlled lands. However, the Government shall not include in *total project costs* the value of any lands, easements, rights-of-way, or *relocations* that have been provided previously as an item of cooperation for another Federal project. Further, the Government shall not include in *total project costs* the value of lands, easements, rights-of-way, or *relocations* that were acquired or performed using *Federal program funds* or the costs of obtaining permits paid using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that reimbursement for the value and costs of such items is expressly authorized by Federal law. Finally, no value or costs of such items shall be included in *total project costs* pursuant to this Article, and no reimbursement shall be provided to the Non-Federal Sponsor, for any value or costs in excess of

25 percent of *total project costs*.

B. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to Article III.A. or Article III.B. of this Agreement and to determine the reasonable costs incurred by the Non-Federal Sponsor that are associated with obtaining permits pursuant to Article II.B. of this Agreement. Upon receipt of such documents, the Government in a timely manner shall determine the value of such contributions and the reasonable costs for obtaining such permits and include in *total project costs* the amount of such value and costs that does not exceed 25 percent of *total project costs*.

C. For the sole purpose of determining the value to be included in *total project costs* in accordance with this Agreement and except as otherwise provided in paragraph E. of this Article, the value of lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor awards the first construction contract for the *Project*, or, if the Non-Federal Sponsor performs the construction using its own forces, the date that the Non-Federal Sponsor begins construction of the *Project*. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph C.3. or paragraph C.5. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with the provisions of this paragraph.

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The Non-Federal Sponsor shall provide a copy of each appraisal to the Government. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, the Non-Federal Sponsor chooses not to obtain a second appraisal, or the Non-Federal Sponsor does not provide the first appraisal as required in this paragraph, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the

event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the Non-Federal Sponsor for the real property interest exceeds the amount determined pursuant to paragraph C.2.a. of this Article, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the amount determined pursuant to paragraph C.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the Non-Federal Sponsor, but no less than the amount determined pursuant to paragraph C.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor, prior to instituting such proceedings, shall submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60 calendar days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60 day period, the Non-Federal Sponsor shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60 day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with paragraph C.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Non-Federal Sponsor and the Government jointly determined such interests are required for construction, operation, and maintenance of the *Project*, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.C. of this Agreement, and other payments by the Non-Federal Sponsor for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest in accordance with Article III of this Agreement. The value of the interests provided by the Non-Federal Sponsor in accordance with Article III.A. of this Agreement shall also include the documented costs of obtaining appraisals prepared for review by the Government pursuant to paragraph C.2.a. of this Article subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

5. Waiver of Appraisal. Except as required by paragraph C.3. of this Article, the Government may waive the requirement for an appraisal pursuant to this paragraph if it determines that an appraisal is unnecessary because the valuation is uncomplicated and that the estimated fair market value of the real property interest is $10,000 or less based upon a review of available data. In such event, the Government and the Non-Federal Sponsor must agree in writing to the value of such real property interest in an amount not in excess of $10,000.

D. After consultation with the Non-Federal Sponsor, the Government shall determine the value of *relocations* in accordance with the provisions of this paragraph.

1. For a *relocation* other than a *highway*, the value shall be only that portion of *relocation* costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a *relocation* of a *highway*, the value shall be only that portion of *relocation* costs that would be necessary to accomplish the *relocation* in accordance with the design standard that the State of Idaho would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. *Relocation* costs shall include, but not necessarily be limited to, actual costs of performing the *relocation*; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the *relocation*, as determined by the Government. *Relocation* costs shall not include any costs due to *betterments*, as determined by the Government, nor any additional cost of using new material when suitable used material is available. *Relocation* costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

4. The value to be included in *total project costs* for *relocations* performed within the *Project* boundaries is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, 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)). Notwithstanding any other provision of this Agreement, inclusion of the value of *relocations* in *total project costs* may be denied, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

E. Where the Government, on behalf of the Non-Federal Sponsor pursuant to Article II.L. of this Agreement, acquires lands, easements, or rights-of-way or performs *relocations*, the value to be included in *total project costs* in accordance with this Agreement shall be the costs of such work performed or provided by the Government that are paid by the Non-Federal Sponsor in accordance with Article VI.D. of this Agreement. In addition, the value to be included in *total project costs* in accordance with this Agreement shall include the documented costs incurred by the Non-Federal Sponsor in accordance with the terms and conditions agreed upon in writing pursuant to Article II.L. of this Agreement subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

F. The Government shall include in *total project costs* the reasonable costs incurred by the Non-Federal Sponsor pursuant to Article II.B. of this Agreement that are associated with obtaining permits necessary for construction, operation, and maintenance of the *Project* on publicly owned or controlled lands, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 calendar days after the effective date of this Agreement, shall appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly until the end of the *period of construction*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

C. Until the end of the *period of construction*, the Project Coordination Team shall generally oversee the *Project*, including matters related to: plans and specifications; scheduling; real property and *relocation* requirements; real property acquisition; contract awards and

modifications; contract costs; the application of and compliance with 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)) for *relocations* and construction of the *Project*; the investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; historic preservation activities in accordance with Article XVII of this Agreement; the Government's cost projections; final inspection of the entire *Project* or completed portions thereof as the case may be; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Project* including issuance of permits; and other matters related to the *Project*. This oversight of the *Project* shall be consistent with a project management plan developed by the Government and the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations to the Non-Federal Sponsor on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Project Coordination Team. The Non-Federal Sponsor, having the legal authority and responsibility for construction of the *Project*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations except as otherwise required by the provisions of this Agreement, including compliance with applicable Federal, State, or local laws or regulations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. The Government's costs of participation in the Project Coordination Team shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE VI - METHOD OF PAYMENT

A. The Non-Federal Sponsor shall provide the Government with such documents as are sufficient to enable the Government to maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, contributions provided by the parties, the value included in *total project costs* of lands, easements, rights-of-way, *relocations*, and permit costs determined in accordance with Article IV of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be $1,077,000; the Government's share of *total project costs* is projected to be $807,750; the Non-Federal Sponsor's share of *total project costs* is projected to be $269,250; *total project costs* to be incurred by the Government are projected to be $47,000; *total project costs* to be incurred by the Non-Federal Sponsor are projected to be $1,030,000; total reimbursements in accordance with paragraph B.2. of this Article are projected to be $760,750; the value included in *total*

project costs of lands, easements, rights-of-way, *relocations*, and permit costs determined in accordance with Article IV of this Agreement is projected to be $0; the Government's share of financial obligations for data recovery activities pursuant to Article XVII.E. of this Agreement is projected to be $0; the Non-Federal Sponsor's share of financial obligations for data recovery activities pursuant to Article XVII.E. of this Agreement is projected to be $0; and the Government's total financial obligations to be incurred for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor and the Non-Federal Sponsor's contribution of funds for such obligations required by Article II.L. of this Agreement are projected to be $0. These amounts are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

2. By February 2007 and by each quarterly anniversary thereof until the conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; the Government's share of *total project costs*; the Non-Federal Sponsor's share of *total project costs*; *total project costs* incurred by the Government; *total project costs* incurred by the Non-Federal Sponsor; total reimbursements paid to the Non-Federal Sponsor; the value included in *total project costs* of lands, easements, rights-of-way, *relocations*, and permit costs determined in accordance with Article IV of this Agreement; the Government's share of financial obligations for data recovery activities pursuant to Article XVII.E. of this Agreement; the Non-Federal Sponsor's share of financial obligations for data recovery activities pursuant to Article XVII.E. of this Agreement; and the Government's total financial obligations to be incurred for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor and the Non-Federal Sponsor's contribution of funds for such obligations required by Article II.L. of this Agreement.

B. The Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor, in accordance with the provisions of this paragraph, the amount required pursuant to Article II.D. of this Agreement.

1. Periodically, but not more frequently than once every 30 calendar days, the Non-Federal Sponsor shall provide the Government with a *sufficient invoice* for costs the Non-Federal Sponsor has incurred for the *Project*.

2. Upon receipt of such *sufficient invoice*, the Government shall review the costs identified therein and shall determine: (a) the amount to be included in *total project costs*, subject to the limitations in Article II.C. of this Agreement; (b) the total costs incurred by the parties to date (including the value of lands, easements, rights-of-way, and *relocations*, and the costs of permits determined in accordance with Article IV of this Agreement); (c) each party's share of *total project costs* and the costs of data recovery activities in accordance with Article XVII.E. of this Agreement incurred by the parties to date; (d) the costs incurred by each party to date; (e) the total amount of reimbursements the Government has made to date in accordance with this paragraph; (f) the balance of Federal funds available for the *Project*, as of the date of such review; (g) the amount of reimbursement, if any, due to the Non-Federal Sponsor; and (h) the

amount that actually will be paid to the Non-Federal Sponsor (hereinafter the "payment amount") if the amount of reimbursement determined above cannot be fully paid due to an insufficiency of Federal funds or the limitations of the *Section 595 Program Limit for Idaho* or the *Section 102 Limit*.

3. Within 30 calendar days after receipt of the *sufficient invoice* provided in accordance with paragraph B.1. of this Article (hereinafter the "payment period"), the Government shall: furnish the Non-Federal Sponsor written notice of the determinations made in accordance with paragraph B.2. of this Article; provide an explanation, if necessary, of why the payment amount is less than the amount of reimbursement determined due to the Non-Federal Sponsor; and make a payment to the Non-Federal Sponsor equal to the payment amount.

4. If the payment amount is not paid by the end of the payment period, the designated payment office shall credit to the Non-Federal Sponsor's account an interest penalty on the payment amount, without request from the Non-Federal Sponsor. Unless prescribed by other Federal authority, the interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the first day after the end of the payment period.

a. The interest penalty shall accrue daily from the first day after the end of the payment period through the date on which the payment is made. Accruals shall be compounded at 30 calendar day intervals through the date on which the payment is made.

b. The interest penalty shall not accrue, nor be compounded, during suspension of all of the Government's future performance or during suspension of only the Government's future performance to provide reimbursement. Further no interest penalty shall accrue, nor be compounded, upon termination of this Agreement under Article XIII of this Agreement.

C. Upon conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project costs* and the costs of any data recovery activities. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the Government's total required shares of *total project costs* and the costs of any data recovery

activities exceed the Government's total contributions provided thereto, the Government, no later than 90 calendar days after completion of the interim or final accounting, as applicable, shall make a payment to the Non-Federal Sponsor, subject to the availability of funds and as limited by the *Section 595 Program Limit for Idaho* and the *Section 102 Limit*, in an amount equal to the difference.

2. Should the interim or final accounting, as applicable, show that the total contributions provided by the Government for *total project costs* and the costs of any data recovery activities exceed the Government's total required shares thereof, the Non-Federal Sponsor shall refund the excess amount to the Government within 90 calendar days of the date of completion of such accounting by delivering a check payable to "FAO, USAED, WALLA WALLA, G4" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government. In the event the Government is due a refund and funds are not available to refund the excess to the Government, the Non-Federal Sponsor shall seek such appropriations as are necessary to make the refund.

D. The Non-Federal Sponsor shall provide the contribution of funds required by Article II.L. of this Agreement for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor in accordance with the provisions of this paragraph.

1. Not less than 90 calendar days prior to the scheduled date for the first financial obligation for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and of the full amount of funds the Government determines to be required from the Non-Federal Sponsor to cover the costs of such work. No later than 30 calendar days prior to the Government incurring any financial obligation for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to cover the costs of such work by delivering a check payable to "FAO, USAED, WALLA WALLA, G4" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds, 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 Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for such work, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the

Government with the full amount of the additional required funds through any of the payment mechanisms specified in paragraph D.1. of this Article.

3. At the time the Government conducts the interim or final accounting, as applicable, the Government shall conduct an accounting of the Government's financial obligations incurred for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor and furnish the Non-Federal Sponsor with written notice of the results of such accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting of such work from being conducted in a timely manner, the Government shall conduct an interim accounting of such work and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting to complete the final accounting and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. Such interim or final accounting, as applicable, shall determine the Government's total financial obligations for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor and the Non-Federal Sponsor's contribution of funds provided thereto as of the date of such accounting.

a. Should the interim or final accounting, as applicable, show that the total obligations for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor exceed the total contribution of funds provided by the Non-Federal Sponsor for such work, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice from the Government, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, WALLA WALLA, G4" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the interim or final accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *Project* on behalf of the Non-Federal Sponsor exceeds the total obligations for such work, the Government, subject to the availability of funds, shall refund the excess amount to the Non-Federal Sponsor within 90 calendar days of the date of completion of such accounting. In the event the Non-Federal Sponsor is due a refund and funds are not available to refund the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

ARTICLE VII - 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 VIII – OPERATION, MAINTENANCE, REPAIR, REHABILITATION, AND REPLACEMENT (OMRR&R)

A. Upon completion of construction and final inspection by the Government in accordance with Article II.A.4. of this Agreement, the Non-Federal Sponsor, pursuant to Article II.G. of this Agreement, shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or a completed portion thereof as the case may be, at no cost to the Government. The Non-Federal Sponsor shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the *Project's* authorized purposes and in accordance with specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for access to the *Project* for the purpose of inspection, if the Government determines an inspection to be necessary. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor.

ARTICLE IX – HOLD AND SAVE

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from construction, operation, maintenance, repair, rehabilitation, and replacement of the *Project* and any *betterments*, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor 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 Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three 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 Non-Federal Sponsor 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 Non-Federal Sponsor 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 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's 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 *Project* shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor 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 included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor 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 XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor 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 XIII - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend the Government's future performance under this Agreement.

B. In the event all of the Government's future performance under this Agreement or only the Government's future performance to provide reimbursement is suspended pursuant to Article II.E.2. of this Agreement such suspension shall remain in effect until such time that the Government notifies the Non-Federal Sponsor in writing that sufficient Federal funds are available to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities in accordance with Article XVII.D. and Article XVII.E. of this Agreement the Government projects to be incurred through the then-current or upcoming *fiscal year*, or the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that the Government and the Non-Federal Sponsor determine to suspend future performance under this Agreement in accordance with Article XIV.C. of this Agreement, such suspension shall remain in effect until the Government and the Non-Federal Sponsor agree to proceed or to terminate this Agreement. In the event that the Government suspends future performance under this Agreement in accordance with Article XIV.C. of this Agreement due to failure to reach agreement with the Non-Federal Sponsor on whether to proceed or to terminate this Agreement, or the failure of the Non-Federal Sponsor to provide funds to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under Article XIV.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and Non-Federal Sponsor reach agreement on how to proceed or to terminate this Agreement; 2) the Non-Federal Sponsor provides funds necessary to pay for cleanup and response costs and otherwise discharges its responsibilities under Article XIV.C. of this Agreement; or 3) the Government terminates this Agreement in accordance with the provisions of Article XIV.C. of this Agreement.

D. In the event that this Agreement is terminated pursuant to this Article or Article II.E. or Article XIV.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement. The Government may reserve a percentage of total Federal funds made available for the *Project* as a contingency to pay costs of termination. Notwithstanding such termination, the Non-Federal Sponsor may continue with construction of the *Project*, at no cost to the Government.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article II.E. or Article XIV.C. of this Agreement

shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

ARTICLE XIV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and coordination with the Government, the Non-Federal Sponsor shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA") (42 U.S.C. 9601-9675), that may exist in, on, or under lands, easements, and rights-of-way that either the Non-Federal Sponsor and the Government jointly determine pursuant to Article III of this Agreement, or that the Non-Federal Sponsor otherwise determines, to be required for construction, operation, and maintenance of the *Project*. However, for lands, easements, and rights-of-way that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances in, on, or under any lands, easements, or rights-of-way that the Non-Federal Sponsor and the Government jointly determine to be required for construction, operation, and maintenance of the *Project*, pursuant to Article III of this Agreement, shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions 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 either the Non-Federal Sponsor and the Government jointly determine pursuant to Article III of this Agreement, or that the Non-Federal Sponsor otherwise determines, to be required for construction, operation, and maintenance of the *Project*, the Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until the parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction of the *Project*, or, if already in construction, whether to continue with construction of the *Project*, suspend future performance under this Agreement, or terminate this Agreement, 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 either the Non-Federal Sponsor and the Government jointly determine pursuant to Article III of this Agreement, or that the Non-Federal Sponsor otherwise determines, to be required for construction, operation, and maintenance of the *Project*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction of the *Project* after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response, including the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of *total project costs*. In the event the Non-Federal Sponsor does not reach agreement with the Government on whether to proceed or to terminate this Agreement under this paragraph, or fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government, in its sole discretion, may either terminate this Agreement or suspend its future performance under this Agreement, including reimbursement pursuant to Article II.D. of this Agreement.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V 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 Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the *Project* for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, rehabilitate, and replace the *Project* in a manner that will not cause liability to arise under CERCLA.

ARTICLE XV - 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 sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:
City of Rupert
Attn: City Clerk
P.O. Box 426
Rupert, ID 83350

If to the Government:

U.S. Army Corps of Engineers
Walla Walla District Attn: CENWW-PM
201 North 3rd Avenue
Walla Walla, WA 99362

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, demand, 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 XVI - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XVII - HISTORIC PRESERVATION

A. The Government shall ensure compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470f; hereinafter "Section 106") prior to initiation of construction by the Non-Federal Sponsor. At the Government's request, the Non-Federal Sponsor shall prepare information, analyses, and recommendations as required by Section 106 and implementing regulations. Any costs incurred by the Non-Federal Sponsor relating to compliance with this paragraph shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Any costs incurred by the Government relating to compliance with this paragraph shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. The Non-Federal Sponsor shall perform any identification, survey, evaluation, or mitigation (except for data recovery activities) of historic properties the Government determines necessary for the *Project*, in accordance with this paragraph.

1. The Non-Federal Sponsor shall ensure that its studies are conducted by qualified archaeologists, historians, architectural historians and historic architects, as appropriate, who meet, at minimum, the Secretary of the Interior's Professional Qualifications Standards. The Non-Federal Sponsor shall submit study plans and reports to the Government for review and approval and shall be responsible for resolving any deficiencies.

2. In the event the Government determines that mitigation (except for data recovery activities) should be undertaken due to possible adverse effects to significant archeological or historical properties, the Non-Federal Sponsor shall formulate a plan in consultation with the Government and any other parties involved in the development of a Memorandum of Agreement executed in accordance with Section 106.

3. The Non-Federal Sponsor shall be responsible for implementing mitigation (except for data recovery activities) prior to the initiation of any construction activities affecting historic properties.

4. Any costs of identification, survey, evaluation, and mitigation (except for data recovery activities) of historic properties incurred by the Non-Federal Sponsor pursuant to paragraph B. of this Article shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

C. The Non-Federal Sponsor shall include provisions in all of its construction contracts for the protection of cultural resources discovered during construction. 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 Non-Federal Sponsor and 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 Non-Federal Sponsor shall participate as a consulting party. In such a case, construction shall not continue until the Government sends written notification to the Non-Federal Sponsor. Where the Non-Federal Sponsor elects to perform the construction using its own forces, the same procedures shall be followed.

D. The Government, as it determines necessary for the *Project*, shall perform any data recovery activities associated with historic preservation. As specified in Section 7(a) of Public Law 86-523, as amended by Public Law 93-291 (16 U.S.C. 469c(a)), the costs of data recovery activities associated with historic preservation for this *Project* and all other projects in Idaho implemented pursuant to the Section 595 Program shall be borne entirely by the Government up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the Section 595 Program in Idaho. None of the costs of data recovery activities shall be included in *total project costs*.

E. The Government shall not incur costs for data recovery activities that exceed the statutory one percent limit specified in paragraph D. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit, and the Secretary of the Interior has concurred in the waiver, in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. Section 469c-2(3)). Any costs of data recovery activities that exceed the one percent limit shall not be included in *total project costs* but shall be shared between the Non-Federal

Sponsor and the Government consistent with the cost sharing requirements of the Section 595 Program, as follows: 25 percent will be borne by the Non-Federal Sponsor and 75 percent will be borne by the Government.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

BY: Donald A. Pincus MAJ, EN

For Anthony J. Hofmann
Lieutenant Colonel, Corps of Engineers
District Commander

DATE: 11 APR 07

CITY OF RUPERT, IDAHO

BY: Audrey R. Neiwerth

Audrey R. Neiwerth
Mayor
City of Rupert

DATE: 2/12/07

CERTIFICATE OF AUTHORITY

I, Kelly Anthon, do hereby certify that I am the principal legal officer of the City of Rupert, Idaho, that the City of Rupert, Idaho 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 City of Rupert, Idaho in connection with the Rupert Wastewater Treatment Plant Upgrades in Rupert, Minidoka County, Idaho, 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 City of Rupert, Idaho have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 12 day of February, 2007.

Kelly Anthon
City Attorney
City of Rupert, Idaho

CERTIFICATION REGARDING 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," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients 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.

Audrey R. Neiwerth

Audrey R. Neiwerth
City of Rupert

DATE: 2/12/07