

DESIGN AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
TETON COUNTY, WYOMING
FOR DESIGN OF THE
UPPER SNAKE RIVER
RESTORATION PROJECT
JACKSON HOLE
SITE 9

THIS AGREEMENT entered into this 15th day of May, 2001, by and between the Department of the Army (hereinafter the "Government") represented by the U.S. Army Engineer for the Walla Walla District (hereinafter the "District Engineer") and Teton County, Wyoming (hereinafter the "Non-Federal Sponsor") represented by the County Commissioner Chairperson.

WITNESSETH, THAT:

WHEREAS, construction or implementation of the Upper Snake River, Restoration Project Site 9 at Jackson Hole, Wyoming is authorized by Section 101 paragraph (b) item (28) of the Water Resources Development Act of 2000 of the Public Law 106-541;

WHEREAS, the Energy and Water Development Appropriations Act for Fiscal Year 2001, Public Law 106-377, included funds for the Government to initiate design (as defined in Article I.B. of this Agreement) of the Upper Snake River, Restoration Project, Site 9 at Jackson Hole, Wyoming (hereinafter the "Project" as defined in Article I.A. of this Agreement);

WHEREAS, Section 105(c) of Public Law 99-662 (33 U.S.C. Section 2215) [100 Stat 4089] provides that the costs of design of a water resources project shall be cost shared in the same percentage as the purposes of the project;

WHEREAS, the Government and the Non-Federal Sponsor agree that the Non-Federal Sponsor shall contribute 25 percent of the financial obligations for design of 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 paying for design in accordance with the terms of this Agreement.

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

For purposes of this Agreement:

A. The term "Project" shall mean the design of the environmental restoration for Site 9 of the Upper Snake River, excluding sponsor's executed effort at the site during the Fall of 2001, under the Progressive National Ecosystem Restoration Plan as generally described in the Report of the Chief of Engineers, dated 29 December 2000.

B. The term "design" shall mean all activities directly related to planning, engineering and design of the Project for which financial obligations are made during the period of design in accordance with the terms of this Agreement; the final accounting in accordance with Article IV.D. of this Agreement; any audit in accordance with Article VII of this Agreement; and the Government's activities conducted as part of negotiating this Agreement. The term shall not include any activities performed as part of reconnaissance or feasibility studies; activities conducted as part of negotiation of a project cooperation agreement for the Project or separable element thereof; or the Non-Federal Sponsor's activities conducted as part of negotiating this Agreement.

C. The term "total design costs" shall mean all costs incurred by the Non-Federal Sponsor and the Government as a consequence of financial obligations for design. The term includes but is not necessarily limited to, the Government's costs of negotiating this Agreement; applicable planning and evaluation; applicable engineering and design; environmental assessment and documentation; the identification, survey, and evaluation of historic properties; participation in the Design Coordination Team in accordance with Article III of this Agreement; costs of the final accounting in accordance with Article IV.D. of this Agreement; and costs of audit in accordance with Article VII of this Agreement. The term does not include any costs related to betterments; any costs of dispute resolution under Article V of this Agreement; any costs incurred as part of reconnaissance studies or feasibility studies; any costs (other than audit) resulting from financial obligations after the period of design; any costs of negotiating a project cooperation agreement for the Project or separable element thereof; or the Non-Federal Sponsor's costs of negotiating this Agreement.

D. The term "period of design" shall mean the time period commencing when Federal General Investigations appropriations for Preconstruction Engineering and Design of the Project are allocated to the U.S. Army Engineer District, Walla Walla, and ending when a project cooperation agreement for the Project, or a separable element thereof, is executed between the Government and a non-Federal entity or entities.

E. The term "District Engineer" shall mean the U.S. Army Engineer for the Walla Walla District.

F. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

3. Notwithstanding paragraph A.1. of this Article, if the award of any contract for design or continuation of design using the Government's own forces would result in cumulative financial obligations for design exceeding \$400,000, the Government and the Non-Federal Sponsor agree to defer award of that contract, all subsequent contracts for design, and design using the Government's own forces until such time as the Government and the Non-Federal Sponsor agree to proceed with further contract awards for design or the continuation of design using the Government's own forces, but in no event shall the award of contracts or design using the Government's own forces be deferred for more than three years. Notwithstanding this general provision for deferral of contract awards or design, the Government, after consultation with the Non-Federal Sponsor, may award a contract or contracts or continue with design using the Government's own forces after the Assistant Secretary of the Army (Civil Works) makes a written determination that the award of such contract or contracts or continuation of design using the Government's own forces must proceed in order to comply with law or to protect human life or property from imminent and substantial harm.

4. As of the effective date of this Agreement, \$ 300,000 of Federal funds have been appropriated for design of the Project. The Government makes no commitment to budget for additional funds for the Federal share of total design costs. Notwithstanding any other provision of this Agreement, the Government's financial participation in design of the Project is limited to this amount together with any additional funds that the Congress may appropriate for design of the Project. In the event that the Congress does not appropriate funds sufficient to meet the Federal share of funds required to continue design in the then-current or upcoming fiscal year, the Government shall notify the Non-Federal Sponsor of the insufficiency of funds and the parties, within the Federal and Non-Federal funds available for the Project, shall suspend design or terminate this Agreement in accordance with Article XI.B. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds available for design and an equal percentage of the total funds contributed by the Non-Federal Sponsor pursuant to Article II.B. of this Agreement as a contingency to pay costs of termination, including any costs of contract claims and contract modifications.

B. The Non-Federal Sponsor shall provide, during the period of design a contribution equal to 25 percent of total design costs. If the Government projects that the value of the Non-Federal Sponsor's contributions under Articles III and VII will be less than 25 percent of total design costs, the Non-Federal Sponsor shall provide a contribution, in accordance with Article IV.B. of this Agreement, in the amount necessary to meet its 25 percent share of total design costs.

C. The Government shall perform a final accounting in accordance with Article IV.D. of this Agreement to determine the contributions provided by the Non-Federal Sponsor in accordance with paragraphs B. and E. of this Article and Articles III and VII of this Agreement and to determine whether the Non-Federal Sponsor has met its obligations under paragraphs B. and E. of this Article.

D. The Non-Federal Sponsor shall not use Federal funds to meet the Non-Federal Sponsor's share of total design costs under this Agreement unless the Federal granting agency verifies in writing that the expenditure of such funds is expressly authorized by statute.

D. The Design Coordination Team may make recommendations that it deems warranted to the District Engineer on matters that the Design Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Design Coordination Team. The Government, having the legal authority and responsibility for design, has the discretion to accept, reject, or modify the Design Coordination Team's recommendations. —

E. The costs of participation in the Design Coordination Team during the period of design shall be included in total design costs and cost shared in accordance with the provisions of this Agreement.

ARTICLE IV - METHOD OF PAYMENT

A. Until the Government furnishes the Non-Federal Sponsor with the results of the final accounting, the Government shall maintain current records of contributions provided by the parties and current projections of total design costs and costs due to additional work under Article II.E. of this Agreement. At least quarterly, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of total design costs, of total costs due to additional work under Article II.E. of this Agreement, of each party's share of total design costs, of the non-Federal proportionate share, of the Non-Federal Sponsor's total contributions required in accordance with Articles II.B. and II.E. of this Agreement, and of the funds the Government projects to be required from the Non-Federal Sponsor in accordance with Articles II.B. and II.E. of this Agreement for the upcoming fiscal year. On the effective date of this Agreement, total design costs are projected to be \$ 400,000, and the Non-Federal Sponsor's contribution required under Article II.B. of this Agreement is projected to be \$ 100,000. Such amounts are estimates subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Non-Federal Sponsor shall provide the contribution required under Article II.B. of this Agreement in accordance with the provisions of this paragraph.

1. Not later than 30 calendar days after execution of this Agreement, the Government shall notify the Non-Federal Sponsor in writing of the funds the Government determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for design through the first fiscal year of design, including the non-Federal proportionate share of financial obligations for design incurred prior to such payment. Not later than 30 calendar days after such notice the Non-Federal Sponsor shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Walla Walla District" to the District Engineer, or verify 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 present the Government with an irrevocable letter of credit acceptable to the Government for the required funds, or provide an Electronic Funds Transfer in accordance with procedures established by the Government.

D. Upon completion of design or termination of this Agreement, and upon resolution of all relevant proceedings, claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the results of the final accounting. The final accounting shall determine total design costs, each party's contribution provided thereto, and each parties required share thereof. The final accounting also shall determine total costs due to additional work under Article II.E. of this Agreement and the Non-Federal Sponsor's contribution provided pursuant to Article II.E. of this Agreement.

1. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor under Articles II.B., II.E., III and VII of this Agreement is less than its required 25 percent share of total design costs plus costs due to additional work under Article II.E. of this Agreement, the Non-Federal Sponsor shall, no later than 90 calendar days after receipt of written notice, make a payment to the Government of whatever sum is required to meet the Non-Federal Sponsor's required 25 percent share of total design costs plus costs due to additional work under Article II.E. of this Agreement.

2. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor under Articles II.B., II.E., III and VII of this Agreement exceeds its required 25 percent share of total design costs plus costs due to additional work under Article II.E. of this Agreement, the Government shall afford credit to the Non-Federal Sponsor during the construction or implementation of the Project (other than the 5 percent cash share for structural flood control), or the Government shall, subject to the availability of funds, refund the excess to the Non-Federal Sponsor no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

E. The Government shall afford credit for the Non-Federal Sponsor's 25 percent share of total design costs required under Article II.B. of this Agreement, in accordance with this paragraph. The Government shall afford such credit only after any payment to the Government or refund to the Non-Federal Sponsor required by paragraph D. of this Article has been made. To afford such credit, the Government shall apply the amount credited toward the share that non-Federal entities are required to provide toward total project costs for the Project. Nothing in this Agreement shall be construed to obligate the Government to repay the Non-Federal Sponsor, in whole or in part, for its 25 percent share of total design costs.

1. If Federal funds are appropriated for construction or implementation of the Project, and if the Government and a non-Federal entity enter into a Project Cooperation Agreement for construction or implementation of the entire Project, then the Government shall afford credit for the entire 25 percent share.

2. If Federal funds are appropriated for construction or implementation of the Project or a separable element thereof, and if the Government and a non-Federal entity enter into a Project Cooperation Agreement for construction or implementation of such separable element, then the Government shall afford credit for such portion of the 25 percent share as is allocable to such separable element.

performed in accordance with this paragraph before the Government furnishes the Non-Federal Sponsor with the results of the final accounting 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 design costs and cost shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. Section 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. 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 before the Government furnishes the Non-Federal Sponsor with the results of the final accounting shall be included in total design costs and cost shared in accordance with the provisions of this Agreement.

ARTICLE VIII - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government agree to 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, as well as Army Regulations 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army."

ARTICLE IX - 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 such other party may have to seek relief or redress against such contractor either pursuant to any cause of action that such other party may have or for violation of any law.

ARTICLE XII - 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 either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

Don Barney
3190 S. Adams Canyon Dr.
PO. Box 9575
Jackson, WY 83002

If to the Government:

Army Corps of Engineers, Walla Walla District
Attn: District Engineer
201 North Third 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.

CERTIFICATE OF AUTHORITY

I, James L. Radda do hereby certify that I am the principal legal officer of the Teton County, Wyoming, that the Teton County, Wyoming 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 Teton County, Wyoming in connection with design of the Jackson Hole Environmental Restoration Project, Site 9, and that the persons who have executed this Agreement on behalf of the Teton County, Wyoming have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
24th day of April, 2001



James L. Radda
Teton County Attorney

