

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement ("Agreement") is entered by and between the New Mexico Interstate Stream Commission, an agency of the State of New Mexico, (the "Commission") and the National Fish and Wildlife Foundation (the "Foundation"), a federally chartered non-profit foundation, effective as of the date shown below that it is approved by the New Mexico Department of Finance and Administration ("DFA").

RECITALS

THE PARTIES enter this Agreement on the basis of the following recitals:

A. The Commission desires to obtain the professional services from the Foundation to facilitate cost-sharing capital projects for the San Juan Basin Recovery Implementation Program (the "San Juan Program").

B. The Foundation has represented and warranted to the Commission that the Foundation possesses the necessary skill to provide such services and is willing to do so pursuant to the terms of this Agreement.

AGREEMENT

In consideration of the foregoing recitals and the covenants and promises contained herein the parties agree as follows:

1. Term.

This Agreement shall begin on the date it is approved by DFA and expires on June 30, 2013, unless terminated pursuant to Article 4 (Termination), infra, or Article 5 (Appropriations). In accordance with Section 13-1-150 NMSA 1978, no contract term, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978.

The work to be performed by the Foundation under this Agreement shall not commence until the Foundation has received a fully executed copy of the Agreement. Receipt of the fully executed Agreement constitutes notice to proceed from the Commission.

2. Scope of Work.

A. Purpose and Objectives. The purpose of this Agreement is to establish a mechanism and procedures for: (1) the transfer of funds from the Commission to the Foundation to satisfy New Mexico's allocation of the San Juan Program pursuant to Subsection 3(c) of Public Law 106-392, as amended; and, (2) the disbursement of said funds from the Foundation to pay for implementation of capital projects that are identified in the Long Range Implementation Plan for the San Juan Program and as specified in annual work plans for the San Juan Program. In order to better coordinate their activities with the federal government and manage the state cost-share contributions required to implement the capital projects authorized by Public Law 106-392, the

States of New Mexico, Colorado, Utah and Wyoming¹ (collectively, the “Upper Division States”) previously engaged one entity to receive and manage the Upper Division States’ cost-share contributions. For the purpose of this Agreement, capital projects are defined by Subsections 2(5) through 2(7) of Public Law 106-392, as amended: provided, that no funds contributed by the Commission pursuant to this Agreement shall be used to acquire interests in water or water rights. This Agreement will facilitate the accomplishment of recovery activities for the Colorado pike minnow and the razorback sucker in a n efficient and timely manner.

- B. Authorities. This Agreement is entered into pursuant to federal authorities established by: Public Law 106-392, as amended, an Act to authorize the Bureau of Reclamation to provide cost-sharing for the endangered fish recovery implementation programs for the Upper Colorado and San Juan River Basins: the Fish and Wildlife Coordination Act, 16 U.S.C. Sec. 661 *et seq.*; the Fish and Wildlife Act of 1956, 16 U.S.C. Sec. 742f(a)(4); the National Fish and Wildlife Foundation Establishment Act, 16 U.S.C. Sec. 3703 (c)(6). State authority is established by: Laws of the State of New Mexico, Chapter 72, Article 14 (NMSA, 1978); Laws of 2000, Chapter 23, Section 14, Item B.

For purposes of implementing Public Law 106-392, representatives of the Upper Division States have negotiated allocations of the \$17 million state cost-share contributions required under Public Law 106-392 to and among the two recovery implementation programs and the four Upper Division States as follows:

<u>State</u>	<u>Total Cost-Share</u>	<u>San Juan Program</u>	<u>Upper Colorado Program</u>	
New Mexico	\$2,744,000	\$2,744,000		\$0
Colorado	\$9,146,000	\$1,081,000	\$8,065,000	
Utah	\$3,422,000	\$0	\$3,422,000	
Wyoming	\$1,688,000	\$0	\$1,688,000	

- C. Specific Obligations of the Parties. Representatives of the federal, state, tribal, and local entities participating in the San Juan Program (the “Coordination Committee” of the San Juan Program) will identify those capital projects that should be funded through the Foundation with San Juan Program funds.² Such projects will be selected from the capital projects included in both the Long Range Implementation Plan for the San Juan Program and the annual work plans and budgets for the San Juan Program. Reclamation staff will coordinate with the San Juan Program, the Commission and the Foundation concerning the use of funds for any capital project to be undertaken, completed or reimbursed with the cost-sharing funds contributed by the Commission pursuant to this Agreement. To the extent possible, the funds contributed by the Commission pursuant to this Agreement will be used to implement

¹ Wyoming is a participant in the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (the “Upper Colorado Program”) authorized by Public Law 106-392.

² The members of the Coordination Committee will be drawn from representatives of the States of new Mexico, Colorado, and Utah, the Bureau of Reclamation (“Reclamation”), the U.S. Fish and Wildlife Service, the Bureau of Indian Affairs, Bureau of Land Management, the Navajo Nation, the Southern Ute Tribe, the Ute Mountain Ute Tribe, Jicarilla Apache Nation, and San Juan River Basin water users and other entities participating in the San Juan Program. The specific parties participating in the Coordination Committee, however, may vary from time to time based upon the projects to be funded.

capital projects within the boundaries of the State of New Mexico. For San Juan Program capital projects on Indian lands, Reclamation staff also will coordinate with the US Bureau of Indian Affairs concerning the use of funds for such projects to be undertaken or reimbursed with cost-sharing funds contributed by the Commission. The Commission, on behalf of the State of New Mexico, and the Foundation agree to cooperate to fulfill their obligations as provided herein to accomplish the purposes and objectives of this Agreement.

(1) Obligations of the Foundation. The Foundation will:

(a) Receive invoices from Reclamation for payment of reasonable and necessary costs incurred for capital projects in New Mexico that are approved for San Juan Program funding by the Coordination Committee of the San Juan Program and that are approved for receiving State of New Mexico allocated cost-share funding by the Coordination Committee and the Commission. Once the Foundation has confirmed that there are sufficient funds available to pay the invoice submitted, the Foundation will pass said invoices to the Technical Representative for the Commission for approval as needed, but no more frequently than monthly. In cases involving reimbursement or payment of reasonable and necessary costs incurred for capital projects on Indian lands, invoices for New Mexico state cost-share reimbursement of work performed by, or under the direction of, the Bureau of Indian Affairs will be coordinated and submitted to the Foundation by Reclamation. In cases involving reimbursement or payment of reasonable and necessary costs incurred for capital projects for which private local parties in New Mexico agree to contribute a portion of the state cost-share contribution allocated to New Mexico, invoices by Reclamation for cost-share reimbursement or payment for work actually performed will be coordinated and submitted to the private local parties through the Foundation and the Commission.

(b) Serve as the Commission's fiscal agent for receiving and administering funds contributed by the Commission pursuant to this Agreement, and for disbursing said funds. The Commission's payment and the Foundation's disbursement of said funds is subject to: (1) certification by Reclamation, the Bureau of Indian Affairs or the Foundation, as appropriate, that a competitive bid process or other process acceptable to the Commission was used to contract for the work performed; (2) certification by Reclamation that the work performed was completed satisfactorily and is acceptable in accordance with all applicable engineering and legal standards; (3) certification by Reclamation that the work performed did not cause damage to private property, or that any such damage has been mitigated satisfactorily; and (4) approval by the Technical Representative for the Commission of all invoices for such reimbursable costs to be paid by new Mexico in accordance with its cost-share allocation.

(c) Maintain funds contributed by the Commission pursuant to this Agreement in a bank account between the time the Foundation receives said funds and the time the Foundation disburses said funds for reimbursement or payment of costs incurred for capital projects. The Foundation shall maintain the funds in an interest bearing or investment account at one or more financial institution(s) that is a member of the Federal Deposit Insurance Corporation or the Securities Investment Protection Corporation, or, if

maintained through an investment advisor, that is registered as an investment advisor with the U.S. Securities and Exchange Commission. For accounting purposes, the funds contributed by the Commission shall be distinguishable from all other funds maintained by the Foundation. The funds contributed by the Commission will be invested only in United States Treasuries and other Federal agency obligations guaranteed as to principle and interest by the United States Government. Thereafter, the Foundation shall draw upon this account to reimburse or pay contractors for completion of work approved under the provisions of this Agreement and in accordance with the approval of distinct invoices by the Technical Representative for the Commission. Interest accruing to this account shall be available and used for the purpose and objectives of this Agreement in a manner that is not inconsistent with the provisions of this Agreement.

(d) Develop, if required, a competitive process or other process acceptable to the Commission for contracting work to be reimbursed with San Juan Program funds as identified by the Coordination Committee in approved annual work plans for the San Juan Program. It is anticipated, however, that Reclamation or the Bureau of Indian Affairs, as appropriate, will perform the contracting for most, if not all, capital project work for the San Juan Program in accordance with federal competitive bid requirements. If needed, the Foundation also may develop, or assist in the development of, and/or issue, in coordination with the San Juan Program, Reclamation and the Bureau of Indian Affairs, as appropriate, contracts for work to be funded with San Juan Program funds as identified in the approved annual work plans for the program. This may include assisting in the preparation of annual and quarterly work schedules and appropriate contract documents for implementing capital projects for the San Juan Program. The Foundation may charge and receive fees for administration of any such contracts that it may award and administer on behalf of the San Juan Program (the "Programmatic Contract Fees") and pursuant to scopes of work approved by the Coordination Committee of the San Juan Program, such fees to be in addition to the Administrative fees that the Foundation may charge the Commission pursuant to Article 3 of this Agreement and to be treated as costs for implementation of capital project that shall be borne by Reclamation, the Western Area Power Administration and the Upper Division State in proportions consistent with the cost-sharing provisions of Public Law 106-392, as amended.

Programmatic Contract Fees will be limited to four percent (4%) of the amount to be paid to the contractor and its subcontractors, if any, under the contract (the "base contract amount"). The Programmatic Contract Fee will be added to the base contract amount to arrive at a total contract amount. The Foundation shall then deduct the Programmatic Contract Fee from payments to contractors under such contracts and shall report all such Programmatic Contract Fees to the Commission in the quarterly reports provided for below. The Commission shall be liable for Programmatic Contract Fees only in the same proportion as New Mexico's contribution to the base contract amount.

(e) Coordinate and report to the Commission the activities of the Foundation with respect to the implementation and funding of capital projects for the San Juan Program and the upper Colorado Program. The Foundation will prepare and

submit to the Fiscal Representative for the Commission within forty-five (45) days following the end of each fiscal quarter a report which itemizes all funds maintained, deposited, accrued and disbursed during the quarter from the bank account established pursuant to Article 2(C)(1)(c) of this Agreement. The Quarterly reports shall include summaries of work undertaken by subcontractors pursuant to Article 7(d) of this Agreement, if any, a summary of all deposits and debits from the account, or other similar documentation and regular accounting mutually agreeable to the parties, to enable the Commission to reconcile expenditures made from the account with funds contributed by the Commission pursuant to this Agreement. The quarterly reports also shall include a summary statement of funds maintained, received and/or expended pursuant to this Agreement, which statement the Foundation will coordinate with, and provide to, the Technical Representative for the Commission, the Coordination Committee of the San Juan Program and the Implementation Committee of the Upper Colorado Program.

- (f) Appoint an individual who will represent the Foundation in carrying out its obligations under this Agreement.
- (g) Appoint a project officer for all contracts or projects carried out or funded under this Agreement.

(2) Obligations of the Commission. The Commission will:

- (a) Identify, in cooperation with the Coordination Committee of the San Juan Program, those capital projects listed in the Long Range Implementation Plan and approved annual work plans of the San Juan Program that should be funded through the Foundation using State of New Mexico allocated cost-share funding and the appropriate amount of New Mexico cost-sharing funding to be provided for those capital projects. The use of funds for any capital project will be approved by the Coordination Committee of the San Juan Program and the Technical Representative for the Commission, and will be coordinated with Reclamation, the Commission, the Foundation, the Bureau of Indian Affairs as appropriate, and private local New Mexico contributors as appropriate.
- (b) Notify, in writing and in a timely manner, the Coordination Committee of the San Juan Program, Reclamation, the Foundation, and the States of Colorado, Utah and Wyoming of appropriations made available by the New Mexico Legislature to the Commission to be used in furtherance of the purpose and objectives of this Agreement.
- (c) Review, approve and pay appropriate invoices for completion of work to be reimbursed or paid by the Commission pursuant to this Agreement within thirty (30) days of receipt of said invoices from the Foundation.
- (d) Appoint a Technical Representative who will:
 - (i) Assist the San Juan Program, Reclamation and the Bureau of Indian Affairs, as appropriate, in the preparation of annual and quarterly work schedules and appropriate contract documents for implementing capital projects pursuant to approved annual work plans for the San Juan Program.

(ii) Work with the Foundation and the San Juan Program to develop requests-for-proposals and contract documents for work to be funded with San Juan Program funds.

(iii) Receive from the Foundation, review and approve in writing, as appropriate, distinct invoices for payment to reimburse contractors for actual expenditures incurred or to pay contractors for actual work completed on capital projects to be funded with San Juan Program funds as identified in the approved annual work plans for the program and as approved pursuant to this Agreement.

(iv) Represent the Commission, on behalf of the State of New Mexico, in carrying out the Commission's Obligations under this Agreement, subject to limitations of New Mexico law and the limitations expressed in this Agreement.

(e) Appoint a Fiscal Representative who will work with the Foundation to develop accounting procedures and fiscal audits.

(f) Coordinate reports to the San Juan Program and the Upper Colorado Program of activities of the Foundation and the Commission relative to this Agreement and otherwise relative to the San Juan Program.

(g) Receive reports from Reclamation informing New Mexico and the Foundation that Congress has appropriated federal funds for Reclamation to implement capital projects for the San Juan Program and the Upper Colorado Program, and that the Western Area Power Administration has made power revenues available to Reclamation to provide the portion of capital project costs assigned to power as provided in Public Law 106-392, as amended.

D. Contingencies and Limitations. The following contingencies and limitations apply to this agreement:

(1) Notwithstanding any other provision of this or any other agreement, New Mexico's total reimbursement or payment obligation for costs incurred for implementation of all San Juan Program capital projects shall not exceed Two Million Seven Hundred Forty-Four Thousand Dollars (\$2,744,000). Contributions from private local parties in New Mexico shall be credited to New Mexico's reimbursement or payment obligations as if such funds were contributed by the Commission. New Mexico shall have no reimbursement or payment obligation for any costs incurred for implementation of the Upper Colorado Program.

(2) The payment of funds by the Commission in accordance with this Agreement is dependent and contingent upon appropriations by the New Mexico Legislature of said funds to the Commission for the purpose and objectives of this Agreement, and/or on contributions of private local parties in New Mexico being made available to the Foundation through the Commission. The Commission does not guarantee that the New Mexico Legislature will appropriate as much as \$2,744,000 through state fiscal year 2013 for the purpose and objectives of this

Agreement. No legal liability on the part of the Commission or the State of New Mexico to pay any invoice shall arise from this Agreement unless and until sufficient funds are made available to the Commission for the purpose of reimbursing or paying the actual costs incurred during the implementation of capital projects as approved under this Agreement. The Commission will notify the Foundation in writing at such times as funds become available to the Commission and budgeted by the Commission for expenditure for the purpose and objectives of this Agreement.

- (3) The payment of funds by the Commission under this Agreement, including any funds from private local New Mexico contributions, during any period of two (2) consecutive federal fiscal years is contingent upon and is to be limited by:
 - (a) The availability and payment of funds during the same two-fiscal-year period from the States of Colorado, Utah and Wyoming, collectively, in amounts proportionate to their collective allocation of the total state cost-share contributions specified in Public Law 106-392, as amended, as provided by the states' allocations described in Article 2 (B) of this Agreement. For the purpose of this Article, the availability of funding from the Upper Division States in proportionate amounts during the same two-fiscal-year period with a plan to expend the funds proportionately during those two years on approved capital projects in accordance with approved annual work plans of both the San Juan Program and the Upper Colorado Program shall suffice; provided, that any disproportionate amount of actual payment of funds between New Mexico and the other three states in one two-fiscal-year period shall be offset in the planning of capital project expenditures and state cost share requirements in the annual work plans for the programs for the following fiscal year.
 - (b) The availability and payment of funds during the same two-fiscal-year period from the State of Colorado in an amount proportionate to its allocation of the state cost-share contribution assigned to the San Juan Program as provided by the states' allocations described in Article 2(B) of this Agreement. For the purpose of this Article, the availability of funding from the State of Colorado in proportionate amounts during the same two-fiscal-year period with a plan to expend the funds proportionately during those two years on approved capital projects in accordance with an approved annual work plan of the San Juan Program shall suffice; provided, that any disproportionate amount of actual payment of funds between New Mexico and Colorado in one two-fiscal-year period shall be offset in the planning of capital project expenditures and state cost share requirements in the annual work plan for the program for the following fiscal year.
 - (c) The availability and payment during the same two-fiscal-year period of Colorado River Storage Project power revenues from the Western Area Power Administration for implementing capital projects identified in approved annual work plans of the San Juan Program and the Upper Colorado Program in an amount equal to the total state cost-share contribution as specified in Public Law 106-392, as amended. Subsection 3(C)(2) of Public Law 106-392, as amended, provides that the power revenue funding over any two-fiscal-year period is authorized to be made available

only in amounts equal to the contributions for the same two-fiscal-year period made by the Upper Division States.

- (d) The availability and payment during the same two-fiscal-year period of federal appropriations to the Department of the Interior and Reclamation for implementing capital projects identified in approved annual work plans of the San Juan Program and the Upper Colorado Program in an amount proportionate to the overall cost-sharing allocations to federal appropriations, power revenues and state cost-share contributions as provided for in Section 3 of Public Law 106-392, as amended.
- E. Foundation assumption of Risk and Liability. The Foundation assumes all risks, liabilities and consequences of performing additional work outside the scope of work approved by the Commission's Technical Representative designated in this Agreement and the Coordination Committee of the San Juan Program.
- F. Disposition, Ownership and Management of Property. Title to all real property acquired with funds contributed by or through the Commission pursuant to this Agreement shall be vested in accordance with instructions or guidance from the San Juan Program and with concurrence of the Commission's Technical Representative designated in this Agreement. Said title may be vested with Reclamation, the Bureau of Indian Affairs, the Fish and Wildlife Service, the Navajo Nation or private local parties as appropriate. The Secretary of the Interior may attempt to vest title for some capital projects funded through this Agreement with non-Federal entities; provided, that such vesting is appropriate considering related land and facilities ownership, and that such vesting is subject to the condition that the property shall be used thereafter for the authorized purposes of the San Juan Program.
- G. Compliance with Law. At all times during the performance of this Agreement, the Foundation shall strictly adhere to all applicable federal and state laws, rules and regulations that have been or may hereafter be established. The Foundation shall procure, or shall ensure that Reclamation or the Bureau of Indian Affairs, as appropriate, has procured, all permits and licenses that may be required for the lawful implementation of the capital projects to which the Commission contributes funds through this Agreement. Written certification by Reclamation or the Bureau of Indian Affairs, as appropriate, that necessary permits and licenses are procured will serve as adequate assurance by the Foundation.
- H. Performance Measures. The Foundation shall substantially perform the Performance Measures set forth below. In the event the Foundation fails to perform as specified in this Agreement and to obtain the results described below, the Commission may provide written notice to the Foundation of the default and specify a reasonable period of time in which the Foundation shall advise the Commission of specific steps that it will take to achieve these results in the future and the timetable for implementation. Nothing in this subparagraph shall be construed to prevent the Commission from exercising its right pursuant Article 4 (Termination) below.

The Foundation will assist the Commission to meet the portions of its Strategic Plan set forth below.

The following is from the Strategic Plan prepared by the Office of the State Engineer and the Interstate Stream Commission, September 2006, p.15-16.

Goal 3: Develop, improve, or maintain systems of management and administration of water uses, beneficial and otherwise, in river basins where New Mexico must manage and administer its uses of water in order to comply with its compact obligations to deliver water downstream (Interstate Compact Compliance Program).

3.3 Colorado River Basin Program Goal: Protect, develop and manage the water resources of the San Juan River Basin to maximize the amount of water legally and physically available for beneficial use in New Mexico.

Objective C: Assist federal agencies and water users to comply with federal environmental laws while developing water resources in the San Juan River Basin for beneficial uses in New Mexico.

Strategy: Fund recovery actions recommended by the San Juan River Basin Recovery Implementation Program to recover endangered fish and provide reasonable and prudent alternatives to allow water development projects in New Mexico to proceed in compliance with the Endangered Species Act.

Foundations Performance Measures: Through satisfactory completion of its obligations as fiscal agent under this Agreement, the Foundation will assist the Commission to meet this Objective and accompanying Strategies by successful implementation of the San Juan Program.

The Foundation shall advise the Commission promptly of any problems encountered in performing its duties associated with this Agreement.

3. Compensation and Payment.

- A. The Foundation may charge Administrative fees (the "Administrative Fees") for reimbursement of its expenses and administrative overhead costs attributable to its performance of the administrative functions and services described in this Agreement. The Foundation shall be entitled to charge the Commission an annual Administrative Fee of three percent (3%) of the funds contributed by the Commission pursuant to this Agreement, which funds are to include any contributions of private local parties in New Mexico being made available to the Foundation through the Commission. The Administrative Fees are based upon the costs of services performed by the Foundation on behalf of the Commission and will represent the Commission's full obligation for support provided by the Foundation pursuant to this Agreement, except those Programmatic Contract Fees for services performed as described in Section 2.C (1)(d), above. The Commission shall pay the Administrative Fees upon invoice to be submitted by the Foundation as a part of or accompanying all invoices referenced in this Agreement. The Administrative Fees and Programmatic Contract Fees collected by the Foundation pursuant to this Agreement shall be accounted as funds contributed towards New Mexico's allocation of the state cost-share contribution specified in Public Law 106-392, as amended, and described in the Agreement.

- B. The funds contributed by the Commission to the Foundation pursuant to this Agreement shall be used only for the reimbursement or payment of costs and expenses actually incurred for work on capital projects as identified and approved in annual work plans for the San Juan Program and in accordance with invoices approved for payment by the Commission pursuant to the provisions of this Agreement. If the Foundation uses said funds for purposes other than authorized, as determined by the Commission, the Foundation shall reimburse the bank account established pursuant to Article 2(C)(1)(c) of this Agreement in the amount of funds so misused.
- C. Any balance in the bank account established pursuant to Article 2(C)(1)(c) of this Agreement that may exist at the time this Agreement expires or is terminated shall be returned to the Commission via procedures to be specified at that time by the Fiscal Representative for the Commission.
- D. Funds may be transferred from the Commission to the Foundation pursuant to this Agreement using either electronic funds transfers or traditional mailing systems. Traditional mailing systems, such as the United States postal service or an established overnight courier service, will be used unless the Foundation chooses to use and electronic funds transfer procedure acceptable to the Commission.
- E. This Agreement's terms are contingent upon the New Mexico State Legislature granting sufficient appropriations and authorization. If sufficient appropriations and authorization are not granted the Commission in its sole and absolute discretion may terminate this Agreement.

4. Termination

- A Events of Termination. This Agreement may be terminated as follows:
 - (1) At any time by written agreement of the Commission and the Foundation.
 - (2) By the Commission for any reason upon thirty- (30) days written notice.
 - (3) By the Commission for cause upon the Foundation's failure to materially comply with the terms of this Agreement. The Commission will give the Foundation written notice specifying the Foundation's failure to comply. Within five (5) days of receipt of such notice, the Foundation shall correct the failure (or, if such failure cannot reasonably be corrected in such five (5) day period, the Foundation shall begin in good faith to correct the failure and proceed diligently to complete such correction). If within five (5) days the Foundation has not completed corrective action (or initiated corrective action, as the case may be) to the Commission's satisfaction, the Commission may deliver written notice to the Foundation terminating this Agreement as of the date of such notice.
 - (4) By the Commission at any time if required by changes in state or federal law, because of court order, or because the New Mexico Legislature does not appropriate funds to the Commission in amounts sufficient, when combined with contributions from private local parties in New Mexico, to provide New Mexico's allocation of the state cost-share contribution as described in this Agreement. If the event of termination pursuant to this subsection, the

Commission will attempt to provide the Foundation thirty (30) day written notice prior to the effective date of the termination.

- (5) By the Commission if the Department of the Interior, the Western Area Power Administration, or the States of Colorado, Utah and Wyoming are unable to secure sufficient appropriations for, or for any other reason are not able to pay, their proportionate contributions for the purpose and objectives of this Agreement as provided for by Public Law 106-392, conditioned by this Agreement.
 - (6) By the Commission if Reclamation does not perform the direction, coordination, contracting, certification and reporting roles expected of it and referred to in this Agreement.
 - (7) By the Commission if the State of New Mexico withdraws its participation in the San Juan Program.
- B. Foundation Obligations. Immediately upon termination of this Agreement, or receipt of the Commission's notice of intent to terminate, the Foundation shall:
- (1) Incur no further financial obligations under this Agreement without the Commission's prior written approval.
 - (2) Cease all work to the extent specified in the notice of termination, except as the Commission may direct for orderly completion and transition.
 - (3) Take such action as the Commission may reasonably direct or as may be reasonably necessary to protect and preserve all property and records related to by this Agreement.
 - (4) Cooperate fully in the completion or transition of any assigned tasks so as to permit continuity in the administration of Commission programs and cases.
 - (5) Within thirty (30) days of receipt of such written notice, the Foundation will provide an accounting of any funds remaining in the bank account established pursuant to Article 2 (C)(1)(c) of this Agreement and any outstanding contractual obligations of funds.
 - (6) If such notice is given, the Foundation, upon the expiration of the thirty days, shall return to the Commission the funds remaining in said bank account together with a final accounting of funds expended from said bank account, and the liability of the parties hereunder for further performance of the terms of this Agreement shall thereupon cease.
- C. Costs of Termination. Upon termination of this Agreement, the Commission shall pay the Foundation all amounts due for services completed before the effective date of such termination. The Commission shall not be responsible for any costs arising out of such termination and may deduct from amounts otherwise due to the Foundation amounts determined by the Commission to be due to it from the Foundation under the terms of this Agreement.

D. No Nullification. By terminating this Agreement, neither party may nullify obligations incurred before the date of notice or required to be provided through the effective date of termination.

E. Foundation Termination. Except in the case of termination due to non-payment of Programmatic Contract Fees or Administrative Fees, should the Foundation terminate this Agreement without the Commission's consent, the Foundation shall reimburse the Commission for all costs arising from delays, hiring or training a new contractor (at potentially higher rates), repetition or revision of completed work if necessary, and all other direct expenses the Commission reasonably incurs as a result of such termination.

5. Transfer of Files.

Upon expiration or termination of this Agreement, the Foundation shall assist and cooperate with the Commission in the orderly and timely transfer of files, documents, memoranda, notes, data, and related materials (whether provided by the Commission to the Foundation or created by Foundation or pursuant to this Agreement) to the Commission.

6. Disputes.

The Commission and the Foundation have an obligation to each other, and to the San Juan Program and the Upper Colorado Program, to make every good faith effort to resolve disputes that may arise over the interpretation, execution, performance or enforcement of this Agreement, including to consult with Reclamation, the Bureau of Indian Affairs, the Western Area Power Administration, the States of Colorado, Utah and Wyoming, private local entities in New Mexico, the Coordination Committee of the San Juan Program and the Implementation Committee of the Upper Colorado Program, any and all as may be appropriate, to attempt to accomplish the purpose and objectives of this Agreement.

The Foundation shall report in writing any dispute not so resolved to the Director of the Commission within thirty- (30) days of Foundation's knowledge of the circumstances giving rise to the dispute. The Director's written decision shall be delivered to the parties within fifteen (15) days of receipt of the written dispute and shall be final and conclusive unless, within thirty- (30) days from the date of the decision, the Foundation seeks appropriate legal relief. Failure to use the above procedure in a timely manner or to file a timely appeal either to the Director or from the Director's decision shall be deemed acceptance of the decision to date and waiver of any further claim or remedy.

The courts of the State of New Mexico shall have jurisdiction over any disputes between the Commission and the Foundation that may arise over the interpretation, execution, performance or enforcement of this Agreement and that cannot be resolved between the parties.

7. Status of Foundation.

(a) *Independent Contractor; Costs of Business.* The Foundation is an independent contractor providing services for the Commission and is not an employee of the State of New Mexico. As a result of this Agreement, the Foundation shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico. The Foundation shall be solely

responsible for all applicable taxes (including gross receipts tax), insurance expenses, licensing fees, and costs of doing business (other than reimbursable expenses specifically provided for herein, if any).

- (b) *Authority of Foundation.* The Foundation shall not purport to bind the State of New Mexico, nor its officers or employees, to any obligation not expressly authorized herein. Without the Commission's express written permission, the Foundation shall not in any manner reference the Commission in such a way that states or implies the Commission's endorsement of the Foundation or the Foundation's work. The Foundation may use the Commission as a reference.
- (c) *Other Contractors.* The Commission may for any reason enter into other agreements for services related or identical to the services contemplated by this Agreement, whether or not this Agreement has expired or been terminated. The Foundation shall fully cooperate with the Commission and its other contractors.
- (d) *Subcontracting.* The Foundation is solely responsible for fulfilling this Agreement and shall not subcontract any portion of the services to be provided hereunder without the Commission's and the Coordination Committee of the San Juan Program's prior written consent, which may be conditioned on their approval of the proposed subcontractor or subcontract or withheld in their sole and absolute discretion.

8. Release.

By accepting payment of the amounts due under this Agreement, the Foundation releases the State of New Mexico, its officers and employees, from all liabilities and obligations whatsoever related to this Agreement or the services provided hereunder, except as may be allowed under New Mexico Law. Payment to the Foundation by the Commission shall not, however, constitute final release of the Foundation. Should audit or inspection of the Foundation's records subsequently reveal outstanding Foundation obligations to the Commission pursuant to the terms of this Agreement, the Foundation shall remain liable to the Commission for such obligations. Any payments by the Commission to the Foundation pursuant to the terms of this Agreement will be subject to any appropriate recoupment by the Commission with respect to any outstanding obligations arising under the immediately preceding sentence.

9. Records and Audit.

During the term of this Agreement and for three (3) years after its expiration or termination, the Foundation shall maintain records indicating the date and nature of services provided. Such records shall be kept in accordance with Generally Accepted Accounting Principals and be easily separable from other records. The Commission, Department of Finance and Administration, and the State Auditor, or the designee of any of the aforesaid, shall have the right to audit such records at any time upon ten business (10) days prior written notice to the Foundation. The period such records shall be maintained and the right to audit shall be automatically extended for records that relate to litigation or settlement of claims arising out of this Agreement for a minimum of three (3) years following the termination of any such litigation or settlement of any such claims. The Foundation shall ensure that subcontracts related to the Foundation's performance

under this Agreement contain all the requirements of this Section. The Foundation shall not be compensated for time spent or any costs incurred in complying with this Section.

The Commission shall have a right to audit billings both before and after payment; payment under this Agreement shall not foreclose the right of the Commission to recover illegal payments or payments made by the Foundation in violation of this Agreement.

10. Indemnification.

The Foundation shall indemnify, defend, and hold harmless the Commission and the State of New Mexico, their employees and agents, and the San Juan Program, from and against any and all loss cost, liability, or expense (including attorney's fees incurred in connection with, or staff attorney's salaries allocable to, any action the Commission takes to enforce this Agreement) for injury (bodily or otherwise) or damage to any person or organization caused by any negligent action or omission of the Foundation pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Foundation or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Foundation, the Foundation shall, as soon as practicable after it receives notice thereof, notify the legal counsel of the Commission and the Risk Management Division of New Mexico General Services Department by certified mail.

In performing its obligations under this Agreement, the Foundation, rather than Reclamation or the Bureau of Indian Affairs, in some circumstances may be the agent for the San Juan Program in awarding contracts, in which circumstances the Foundation may become subject to suit over subcontractor disputes. The Foundation shall hold the Commission and the San Juan Program blameless and not liable for any fiscal damages or awards it may incur as a result of such subcontractor disputes or under such circumstances to the extent that said disputes or circumstances arise due to conditions of negligence on the part of the Foundation. Notwithstanding the preceding sentence, any damages, awards, or other costs imposed upon or otherwise incurred by the Foundation as a result of contractor or subcontractor suits or disputes arising from the normal conduct of business under this Agreement, and which do not involve negligence on the part of the Foundation, shall be considered a normal program cost of the San Juan Program and shall not be borne by the Foundation.

11. Insurance.

The Foundation shall maintain in full force and effect during the term of this Agreement the insurance coverage set forth below, from a company authorized to write such insurance in the jurisdiction in which the Foundation conducts its activities. Upon request by the Commission, the Foundation shall furnish the Commission with a certificate of such policy in a form satisfactory to the Commission. The Foundation shall provide the Commission with at least thirty- (30) days advance written notice before the policies are canceled, materially changed, or not renewed (unless, in the case of any cancellation or non-renewal, any policies at issue are being replaced by the Foundation with substantially similar policies).

- (a) *Comprehensive General Liability Insurance.* If the Cost Limitation Amount of this Agreement exceeds One Hundred Thousand Dollars (\$100,000), comprehensive general liability insurance with liability limits of not less than

One Million Dollars (\$1,000,000) combined single limit of liability for bodily injury, including death, and property damage in any one occurrence. Said general liability insurance must include coverage for all operations performed by the Foundation.

- (b) *Automobile Insurance.* If the Cost Limitation Amount of this Agreement exceeds One Hundred Thousand Dollars (\$100,000), automobile insurance with liability limits of not less than One Million Dollars (\$1,000,000) combined single limit of liability for bodily injury, including death, and property damage in any one occurrence. Said automobile policy of insurance must include coverage for all operations performed by the Foundation, coverage for the use of all owned, non-owned, hired automobiles, vehicles, and other equipment.
- (c) *Workers' Compensation Insurance.* If applicable and if employees of the Foundation are performing work under this Agreement within the State of New Mexico, Workers' Compensation Insurance in full compliance with the New Mexico Workers' Compensation Act, NMSA 1978, §§ 52-1-1 through 52-1-70, the New Mexico Occupational Disease Disablement Law, NMSA 1978, §§ 52-3-1 through 52-3-60, and any other worker protection rule, regulation, or statute, all as may be amended from time to time.

12. Work Product; Copyright, Trademark, Etc.

The Foundation warrants that all things the Foundation produces pursuant to this Agreement will not infringe upon or violate any right to confidentiality or property right, whether intellectual or otherwise, of any third party. The Foundation shall indemnify, defend, and hold harmless the State of New Mexico, its officers and employees, from and against any and all loss, cost, liability, or expense arising out of breach or claimed breach of the foregoing warranty. Nothing the Foundation produces or develops, in whole or in part, pursuant to this Agreement shall be the subject of an application for copyright, trademark or other property right by or on behalf of the Foundation. All things the Foundation produces, develops, or acquires pursuant to this Agreement (including files, documents, memoranda, notes, work papers, or related things) shall become the property of the State of New Mexico and shall be delivered to, or if intangible assigned to, the Commission upon the expiration or termination of this Agreement. The Foundation shall execute, acknowledge, and deliver any documents and make any filings necessary to establish or evidenced the State of New Mexico's ownership.

13. Conflict of Interest; Governmental Conduct Act.

The Foundation represents that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Foundation certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-17 NMSA 1978, regarding contracting with a public officer or state employee have been followed.

14. Format of Electronic Deliverables.

Text documents and spreadsheet deliverables provided to the Commission in an electronic format pursuant to this Agreement shall be prepared, stored, and delivered in Microsoft Corporation-produced software (e.g., Word or Excel), unless the Foundation requests permission to use an alternate software format and the Contract Manager approves the use of such alternate software format in writing. Database, spatial, and geographic information system deliverables provided to the Commission in electronic format pursuant to this Agreement shall be prepared, stored, and delivered in a software format approved of in writing by the Contract Manager. If using other than Microsoft Corporation-produced software, the Foundation shall be responsible for requesting and obtaining the Contract Manager's written approval of the software format the Foundation proposes to use prior to beginning the preparation of such deliverables. Should the Foundation utilize a software format not approved of in writing by the Contract Manager, the Foundation shall bear, or shall indemnify and reimburse the Commission, for any costs or expenses of any type whatsoever incurred by the Foundation or the Commission in converting or otherwise preparing such electronic deliverables in a software format acceptable to the Commission.

15. Equal Opportunity Compliance.

The Foundation shall abide by all applicable laws, regulations, and orders pertaining to equal opportunity and shall indemnify, defend, and hold harmless the State of New Mexico, its officers and employees, from and against any and all loss, cost, liability, or expense arising out of breach or claimed breach thereof.

16. Violation of Law.

The Foundation warrants that it does not have and shall not acquire any direct or indirect interest that would conflict in any manner with the services to be provided under this Agreement and that signing this Agreement will not create a violation of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 through 10-16-18. During the term of this Agreement, the Foundation shall immediately notify the Commission in writing if it becomes aware of an actual or potential relationship that may be considered a conflict of interest or if it engages any current or former State of New Mexico employee as an employee or independent contractor. The Commission will advise the Foundation in writing if it determines that such engagement of a current or former State of New Mexico employee is inconsistent with applicable law. The Foundation acknowledges that the New Mexico Procurement Code, NMSA 1978, §§ 13-1-28 through 13-1-199 imposes civil and criminal penalties for its violation, and that New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities, and kickbacks.

17. Confidentiality.

The Foundation shall maintain the confidentiality of all information provided by the Commission, derived from such information, or otherwise learned or developed by the Foundation pursuant to this Agreement. The Foundation shall neither use nor disclose such information without the Commission's express written permission, unless such use or disclosure is required by applicable law, and shall promptly notify the Commission of any unauthorized disclosure and assist in investigating or preventing the recurrence

thereof. The Foundation assumes responsibility for all liability caused by any violation of this Section.

18. Excusable Delay.

The Foundation and the Commission shall be excused from performance under this Agreement for any period such performance is prevented in whole or in part as a result of an act of God, war, civil disturbance, epidemic, court order, or other cause beyond their reasonable control. Such nonperformance shall not be a ground for termination of this Agreement but shall not by itself extend the term of this Agreement.

19. Policies and Procedures.

The Foundation shall follow any policies and procedures that may from time to time be established by the Commission and of which the Foundation is made aware.

20. Notices.

Notices and communications required or permitted under this Agreement (including change of address and facsimile or telephone number) shall be in writing and deemed fully given and received: (i) when hand-delivered to the receiving party's street address shown below, (ii) when sent by facsimile transmission to the receiving party's facsimile number shown below; (iii) when sent by email to (Insert E-Mail Address of OSE Contact), with a delivery confirmation and reply made by recipient; (iv) one (1) day after deposit with a national overnight courier addressed to the receiving party at the street address shown below; or (v) five (5) days after deposit in the U. S. mail, postage prepaid, addressed to the receiving party at the mailing address shown below.

Commission: Estevan R. López
Interstate Stream Engineer
New Mexico Interstate Stream Commission
Bataan Memorial Building, Room 101
Post Office Box 25102
Santa Fe, New Mexico 87504-5102

A copy shall also be provided to the Commission's General Counsel at the above address.

Foundation: Liz Epstein
Manager, Impact-Directed Environmental Accounts
National Fish and Wildlife Foundation
90 New Montgomery Street
Suite 720
San Francisco, California 94105

21. Amendment and Waiver.

This Agreement shall not be altered, changed, or amended other than by a written instrument executed by the parties. Amendments shall not become effective and binding unless and until approved by the Department of Finance and Administration. This Agreement may be waived only in a writing signed by the party making such waiver.

Neither party's delay or omission in exercising or enforcing any right or power hereof shall impair, or be construed to be a waiver of, such right or power. No custom or practice that evolves between the parties shall be construed to lessen one party's right to require the other to perform in strict accordance with the terms of this Agreement. One party's waiver of the other's failure to fully comply with any of the terms of this Agreement shall not be construed to be a waiver of any subsequent or other failure to comply.

22. Assignment.

The Foundation shall not assign or transfer any rights, obligations, duties, or other interest in, or claim for money due under, this Agreement without the prior written consent of the Commission, and the Coordination Committee of the San Juan Program, which consent may be withheld in their sole and absolute discretion. The Foundation may assign this Agreement to another governmental agency or unit, including any assignment necessitated by governmental reorganization.

23. Representation.

A. Commission Representative. Representatives for the Commission are:

- (1) Technical Representative.
John Whipple
Staff Engineer
New Mexico Interstate Stream Commission
Bataan Memorial Building, Room 101
Post Office Box 25102
Santa Fe, New Mexico 87504-5102
Phone: (505) 827-6160
Fax: (505) 827-6188
Email: jwhipple@state.nm.us
- (2) Fiscal Representative.
Kim Abeyta-Martinez
Program Manager
New Mexico Interstate Stream Commission
Bataan Memorial Building, Room 101
Post Office Box 25102
Santa Fe, New Mexico 87504-5102
Phone: (505) 827-4038
Fax: (505) 827-6188
Email: kim.abeyta-martinez@state.nm.us

B. Foundation Representatives. Representatives for the Foundation are:

- (1) Foundation Representative.
Rachel Jacobson

Director, Impact-Directed Environmental Accounts
National Fish and Wildlife Foundation
1133 15th Street NW, Suite 1100
Washington D.C. 20005
Phone: (202) 595-2465
Fax: (202) 857-0162
Email: rachel.jacobson@nfwf.org

- (2) Project Officer.
Liz Epstein
Account Manager, Impact-Directed Environmental Accounts
National Fish and Wildlife Foundation
90 New Montgomery Street, Suite 720
San Francisco, California 94105
Phone: (415) 243-3102
Fax: (415) 778-0998
Email: liz.epstein@nfwf.org

24. Calculation of Time.

Any time period herein calculated by reference to "days" means calendar days; provided, however, that if the last day for a given act falls on a Saturday, Sunday, or a holiday as observed by the State of New Mexico, the day for such act shall be first day following that is not a Saturday, Sunday, or such observed holiday.

25. Applicable Law.

Each party shall perform its obligations hereunder in accordance with all applicable laws, and regulations now or hereafter in effect. This Agreement shall be governed by the laws of the State of New Mexico, without giving effect to its choice of law provisions. All legal proceedings arising under this Agreement shall be brought in Santa Fe before the First Judicial District Court of the State of New Mexico.

26. Survival.

Terms of this Agreement that provide for rights, duties, or obligations that expressly or logically extend beyond its expiration or termination, including the Foundation's indemnity obligations, shall survive such expiration or termination.

27. Severability.

If any terms of this Agreement, or their application to any person or circumstance, shall be held illegal, invalid, or unenforceable, the remainder of this Agreement, or the application of such terms to persons or circumstances other than those to which it is held illegal, invalid, or unenforceable, shall not be affected; provided, however, that the remainder of this Agreement is still capable of performance in substantial accordance with the original intent of the parties.

28. Incorporation and Merger.

Each of the recitals set forth at the beginning of this instrument, and any exhibits referenced herein and attached hereto, are incorporated by this reference. This Agreement incorporates all agreements, covenants, promises and understandings between the parties concerning the subject matter hereof, and all prior or contemporaneous agreements and understandings are merged into this Agreement. This Agreement may be executed in multiple originals, each of which shall be deemed an original.

29. Authority to Enter Agreement.

If the Foundation is other than a natural person, the individual(s) signing this Agreement on behalf of the Foundation represent and warrant that he or she has the power and authority to bind the Foundation, and that no further action, resolution, or approval from the Foundation is necessary to enter into a binding contract

30. Effective Date.

This Agreement shall not become effective unless and until approved by DFA

IN WITNESS WHEREOF, the parties have entered into this Agreement effective as of the date of signature by the DFA Contracts Review Bureau, below.

NATIONAL FISH AND WILDLIFE FOUNDATION

By: [Signature] Date: 5/13/09
for Rachel Jacobson, Director, Impact-Directed Environmental Accounts

AGENCY

By: [Signature] Date: 5/21/09
Estevan R. López, P.E., Director

Approved as to budget sufficiency:

By: [Signature] Date: 5/15/09
Acting Director
Administrative Services Division

Approved as to form and sufficiency:

By: [Signature] Date: 5/20/09
Tanya Tujillo
ISC - General Counsel

TAXATION AND REVENUE DEPARTMENT

The records of the Taxation and Revenue Department of the State of New Mexico reflect that Contractor is registered with the department to pay gross receipts and compensating taxes.

Contract No. _____

ID Number: 501c(3)

By: *Amuravaru* Date: *5-23-9*

DEPARTMENT OF FINANCE AND ADMINISTRATION

By: *Bl Mat* Date: *7.21.04*
State Contracts Officer

EFFECTIVE
JUL 01 2009
CONTRACT REVIEW BUREAU