

SPA-08-003

AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
NEW MEXICO INTERSTATE STREAM COMMISSION  
FOR THE  
RIO GRANDE BASIN  
SAN ACACIA, NEW MEXICO TO FORT QUITMAN, TEXAS

THIS AGREEMENT is entered into this 2<sup>nd</sup> day of Sept, 2008, by and between the Department of the Army (hereinafter the "Government"), represented by the Assistant Secretary of the Army (Civil Works) and New Mexico Interstate Stream Commission (hereinafter the "Non-Federal Sponsor"), represented by the Director of the New Mexico Interstate Stream Commission.

WITNESSETH, THAT:

WHEREAS, the Secretary of the Army, in cooperation and coordination with the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Administrator of the Environmental Protection Agency and the heads of other appropriate agencies, may assess the water resources needs of river basins and watersheds of the United States, including needs relating to ecosystem protection and restoration; flood damage reduction; navigation and ports; watershed protection; water supply; and drought preparedness pursuant to Section 729 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2267a; hereinafter "Section 729");

WHEREAS, the Secretary, shall consult with Federal, tribal, State, interstate, and local governmental entities in carrying out a watershed and river basin assessment pursuant to Section 729;

WHEREAS, the Government and the New Mexico Interstate Stream Commission desire to enter into an agreement (hereinafter the "Agreement") to assess the water resources needs of the Rio Grande Basin, San Acacia, New Mexico To Fort Quitman, Texas (hereinafter the "Assessment" as defined in Article I.A. of this Agreement) pursuant to Section 729;

WHEREAS, Section 729 specifies the cost-sharing requirements applicable to the *Assessment*;

WHEREAS, the Non-Federal Sponsor may provide in-kind contributions (hereinafter the "*in-kind contributions*") as defined in Article I.I. of this Agreement) that are necessary to prepare the *Assessment* and to receive credit for such contributions toward the amount of its required contribution for the *Assessment*;

WHEREAS, the Non-Federal Sponsor may provide up to 100 percent of its required contribution for the *Assessment* as *in-kind contributions*;

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 *Assessment* 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 *Assessment*.

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

#### ARTICLE I – DEFINITIONS

A. The term “*Assessment*” shall mean the activities and tasks required to identify and evaluate alternative uses of watershed resources and the preparation of a watershed assessment of flood damage reduction, ecosystem restoration, and watershed resource management in the Rio Grande Basin from San Acacia, New Mexico To Fort Quitman, Texas. The term includes the *in-kind contributions* described in paragraph I. of this Article.

B. The term “*total assessment 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 directly related to performance of the *Assessment* plus the costs of the *Assessment* incurred by the Government prior to the effective date of this Agreement. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s costs of planning and evaluation; including applicable economic, engineering, real estate, and environmental analyses; the Government’s costs of preparation of the watershed management plan; the costs of the *in-kind contributions* determined in accordance with Article II.B.3. of this Agreement; the Government’s costs of any review processes required by the Government; the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Assessment Coordination Team in accordance with Article III of this Agreement; the Government’s costs of contract dispute settlements or awards; and the Non-Federal Sponsor’s and the Government’s costs of audit in accordance with Article VI.B. and Article VI.C. of this Agreement. The term does not include any costs incurred as part of an Initial Assessment; any costs incurred as part of studies under any other agreement or program; any costs of dispute resolution under Article V of this Agreement; the Non-Federal Sponsor’s costs of negotiating this Agreement; or any costs of negotiating any future agreement.

C. The term “*period of assessment*” shall mean the time from the effective date of this Agreement to the date that the watershed management plan for the *Assessment* is duly approved

by the Government or the date that this Agreement is terminated in accordance with Article IX of this Agreement.

D. The term “*financial obligations for the assessment*” shall mean the financial obligations of the Government and the costs for the *in-kind contributions*, as determined by the Government, that result or would result in costs that are or would be included in *total assessment costs*.

E. The term “*non-Federal proportionate share*” shall mean the ratio of the sum of the costs included in *total assessment costs* for the *in-kind contributions*, as determined by the Government, and the Non-Federal Sponsor’s contribution of funds required by Article II.B.1.b. of this Agreement to *financial obligations for the assessment*, as projected by the Government.

F. 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.

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

H. The term “*PMP*” shall mean the project management plan, and any modifications thereto, developed by the Government, and agreed to by the Non-Federal Sponsor, that specifies the scope, cost, and schedule for *Assessment* activities and guides the performance of the *Assessment* through the *period of assessment*.

I. The term “*in-kind contributions*” shall mean planning, supervision and administration, services, materials, supplies, and other in-kind services that are performed or provided by the Non-Federal Sponsor after the effective date of this Agreement in accordance with the *PMP* and that are necessary for performance of the *Assessment*.

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

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter the “Congress”) and using those funds and funds provided by the Non-Federal Sponsor, expeditiously shall conduct the *Assessment*, in accordance with applicable Federal laws, regulations, and policies. The Non-Federal Sponsor expeditiously shall perform or provide the *in-kind contributions* in accordance with applicable Federal laws, regulations, and policies.

1. The Government shall not issue the solicitation for the first contract for the *Assessment* or commence the *Assessment* using the Government’s own forces until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Assessment*.

2. To the extent possible, the Government and the Non-Federal Sponsor shall

conduct the *Assessment* in accordance with the *PMP*.

3. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all products that are developed by contract or by Government personnel during the *period of assessment*. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the final approval of all *Assessment* products shall be exclusively within the control of the Government.

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

5. At the time the U.S. Army Engineer, Albuquerque District (hereinafter the "District Engineer") furnishes the contractor with the Government's Written Notice of Acceptance of Completed Work for each contract awarded by the Government for the *Assessment*, the District Engineer shall furnish a copy thereof to the Non-Federal Sponsor.

6. The Non-Federal Sponsor shall afford the Government the opportunity to review and comment on the solicitations for all contracts for the *in-kind contributions*, including relevant scopes of work; 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 work on the *Assessment* using the Non-Federal Sponsor's own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *in-kind contributions* shall be exclusively within the control of the Non-Federal Sponsor.

7. At the time the Non-Federal Sponsor furnishes a contractor with a notice of

acceptance of completed work for each contract awarded by the Non-Federal Sponsor for the *in-kind contributions*, the Non-Federal Sponsor shall furnish a copy thereof to the Government.

8. Notwithstanding paragraph A.4. and paragraph A.6., if the award of any contract for work on the *Assessment*, or continuation of work on the *Assessment* using the Government's or the Non-Federal Sponsor's own forces, would result in *total assessment costs* exceeding \$1,000,000.00 (one million dollars), the Government and the Non-Federal Sponsor agree to defer award of that contract, award of all remaining contracts for work on the *Assessment*, and continuation of work on the *Assessment* using the Government's or the Non-Federal Sponsor's own forces until such time as the Government and the Non-Federal Sponsor agree in writing to proceed with further contract awards for the *Assessment* or the continuation of work on the *Assessment* using the Government's or the Non-Federal Sponsor's own forces, but in no event shall the award of contracts or the continuation of work on the *Assessment* using the Government's or the Non-Federal Sponsor's own forces be deferred for more than three years. If the Government and the Non-Federal Sponsor agree to not proceed or fail to reach agreement on proceeding with further contract awards for the *Assessment*, or the continuation of work on the *Assessment* using the Government's or the Non-Federal Sponsor's own forces, the parties shall terminate this Agreement and proceed in accordance with Article IX.D. of this Agreement.

B. The Non-Federal Sponsor shall contribute 25 percent of *total assessment costs* in accordance with the provisions of this paragraph.

1. The Non-Federal Sponsor shall provide a contribution of funds as determined below:

a. If the Government projects at any time that the collective value of the Non-Federal Sponsor's contributions listed in the next sentence will be less than the Non-Federal Sponsor's required share of 25 percent of *total assessment costs*, the Government shall determine the amount of funds that would be necessary to meet the Non-Federal Sponsor's required share without considering the credit the Government projects will be afforded for the *in-kind contributions* pursuant to paragraph B.4. of this Article. The Government shall determine the amount of funds that would be necessary by subtracting from the Non-Federal Sponsor's required share of 25 percent of *total assessment costs* the collective value of the Non-Federal Sponsor's contributions under Article III and Article VI of this Agreement.

b. The Non-Federal Sponsor shall provide funds in the amount determined by this paragraph in accordance with Article IV.B. of this Agreement. To determine the contribution of funds the Non-Federal Sponsor shall provide, the Government shall reduce the amount determined in accordance with paragraph B.1.a. of this Article by the amount of credit the Government projects will be afforded for the *in-kind contributions* pursuant to paragraph B.4. of this Article.

2. The Government, subject to the availability of funds and as limited by paragraph B.5. of this Article, shall refund or reimburse to the Non-Federal Sponsor any contributions in

excess of 25 percent of *total assessment costs* if the Government determines at any time that the collective value of the following has exceeded 25 percent of *total assessment costs*: (a) the Non-Federal Sponsor's contribution of funds required by paragraph B.1.b. of this Article; (b) the amount of credit to be afforded for the *in-kind contributions* pursuant to paragraph B.4. of this Article; and (c) the value of the Non-Federal Sponsor's contributions under Article III and Article VI of this Agreement.

3. The Government shall determine and include in *total assessment costs* any costs incurred by the Non-Federal Sponsor for *in-kind contributions*, subject to the conditions and limitations of this paragraph. 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 assessment costs* for *in-kind contributions*.

a. Acceptance by the Government of *in-kind contributions* shall be subject to a review by the Government to verify that all economic, engineering, real estate, and environmental analyses or other items provided or performed as *in-kind contributions* are accomplished in a satisfactory manner and in accordance with applicable Federal laws, regulations, and policies, and to verify that all analyses, services, materials, supplies, or other *in-kind contributions* will facilitate completion of the *Assessment*.

b. The Non-Federal Sponsor's costs for *in-kind contributions* that may be eligible for inclusion in *total assessment costs* pursuant to this Agreement shall be subject to an audit in accordance with Article VI.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs.

c. The Non-Federal Sponsor's costs for *in-kind contributions* that may be eligible for inclusion in *total assessment 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 *in-kind contributions* are provided and the time the costs are included in *total assessment costs*.

d. The Government shall not include in *total assessment costs* any costs for *in-kind contributions* 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.

e. The Government shall not include in *total assessment costs* any costs for *in-kind contributions* in excess of the Government's estimate of the costs of the *in-kind contributions* if the services, materials, supplies, or other *in-kind contributions* had been provided by the Government.

4. The Government, in accordance with this paragraph, shall afford credit toward the amount of funds determined in accordance with paragraph B.1.a. of this Article for the costs

of the *in-kind contributions* determined in accordance with paragraph B.3. of this Article. However, the maximum amount of credit that can be afforded for the *in-kind contributions* shall not exceed the least of the following amounts as determined by the Government: the amount of funds determined in accordance with paragraph B.1.a. of this Article; the costs of the *in-kind contributions* determined in accordance with paragraph B.3. of this Article; or 25 percent of *total assessment costs*.

5. Notwithstanding any other provision of this Agreement, the Non-Federal Sponsor shall not be entitled to reimbursement of any costs of *in-kind contributions* determined in accordance with paragraph B.3. of this Article and included in *total assessment costs* that exceed the amount of credit afforded for the *in-kind contributions* determined in accordance with paragraph B.4. of this Article and the Non-Federal Sponsor shall be responsible for 100 percent of all costs of *in-kind contributions* included in *total assessment costs* that exceed the amount of credit afforded.

C. Notwithstanding any other provision of this Agreement, Federal financial participation in the *Assessment* is limited as described in this paragraph. In the event the Government projects that the amount of Federal funds the Government will make available to the *Assessment* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Assessment* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total assessment costs* 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 *Assessment* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Assessment*, future performance under this Agreement shall be suspended and the parties shall proceed in accordance with Article IX.C. of this Agreement.

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

E. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Assessment* 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.

F. This Agreement shall not be construed as obligating either party to recommend or implement any future studies or projects.

### ARTICLE III - ASSESSMENT 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 an Assessment Coordination Team. Thereafter, the Assessment Coordination Team shall meet regularly until the end of the *period of assessment*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Assessment Coordination Team.

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

C. Until the end of the *period of assessment*, the Assessment Coordination Team shall generally oversee the *Assessment*, including matters related to: planning and evaluation, including applicable economic, engineering, real estate, and environmental analyses; scheduling of reports and work products, including the watershed management plan; any review processes required by the Government; completion of any necessary environmental coordination and documentation; contract awards and modifications; contract costs; the Government's cost projections; the performance of and scheduling for the *in-kind contributions*; and other matters related to the *Assessment*. This oversight of the *Assessment* shall be consistent with the *PMP*.

D. The Assessment Coordination Team may make recommendations to the District Engineer on matters related to the *Assessment* that the Assessment Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Assessment Coordination Team. The Government, having the legal authority and responsibility for performance of the *Assessment* except for the *in-kind contributions*, has the discretion to accept or reject, in whole or in part, the Assessment Coordination Team's recommendations. On matters related to the *in-kind contributions*, that the Assessment Coordination Team generally oversees, the Assessment Coordination Team may make recommendations to the Non-Federal Sponsor including suggestions to avoid potential sources of dispute. The Non-Federal Sponsor in good faith shall consider the recommendations of the Assessment Coordination Team. The Non-Federal Sponsor, having the legal authority and responsibility for the *in-kind contributions*, has the discretion to accept or reject, in whole or in part, the Assessment 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 Assessment Coordination Team shall be included in *total assessment costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article IV.C. of this Agreement to

determine reasonableness, allocability, and allowability of such costs. The Government's costs of participation in the Assessment Coordination Team shall be included in *total assessment costs*

and shared in accordance with the provisions of this Agreement.

#### ARTICLE IV - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the Non-Federal Sponsor current projections of costs, financial obligations, the contributions provided by the parties, the costs included in *total assessment costs* for the *in-kind contributions* determined in accordance with Article II.B.3. of this Agreement, and the credit to be afforded for the *in-kind contributions* pursuant to Article II.B.4. of this Agreement.

1. As of the effective date of this Agreement, *total assessment costs* are projected to be \$1,000,000; the value of the Non-Federal Sponsor's contributions under Article III and Article VI of this Agreement is projected to be \$0; the amount of funds determined in accordance with Article II.B.1.a. of this Agreement is projected to be \$250,000; the costs included in *total assessment costs* for the *in-kind contributions* determined in accordance with Article II.B.3. of this Agreement are projected to be \$0; the credit to be afforded for the *in-kind contributions* pursuant to Article II.B.4. of this Agreement is projected to be \$0; the Non-Federal Sponsor's contribution of funds required by Article II.B.1.b. of this Agreement is projected to be \$250,000; and the *non-Federal proportionate share* is projected to be 25 percent. These amounts and percentage 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 30 September 2008 and each quarterly anniversary thereof until the conclusion of the *period of assessment* and resolution of all relevant claims and appeals, 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 assessment costs*; the value of the Non-Federal Sponsor's contributions under Article III and Article VI of this Agreement; the amount of funds determined in accordance with Article II.B.1.a. of this Agreement; the costs included in *total assessment costs* for the *in-kind contributions* determined in accordance with Article II.B.3. of this Agreement; the credit to be afforded for the *in-kind contributions* pursuant to Article II.B.4. of this Agreement; the Non-Federal Sponsor's contribution of funds required by Article II.B.1.b. of this Agreement and the *non-Federal proportionate share*.

B. The Non-Federal Sponsor shall provide the contribution of funds required by Article II.B.1.b. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for issuance of the solicitation for the first contract for work on the *Assessment* or commencement of work on the *Assessment* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet its projected share under Article II.B.1.b. of this

Agreement. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of such required funds by delivering a check payable to "FAO, USAED, Albuquerque District L4 to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such 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 such required funds, or by providing an Electronic Funds Transfer of such 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, when considered with any credit the Government projects will be afforded for the *in-kind contributions* pursuant to Article II.B.4. of this Agreement, to cover: (a) the *non-Federal proportionate share of financial obligations for the assessment* incurred prior to the commencement of the *period of assessment*; and (b) the *non-Federal proportionate share of financial obligations for the assessment as financial obligations for the assessment* are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations, 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 60 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

C. Upon conclusion of the *period of assessment* and resolution of all relevant claims and appeals, 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 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 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 assessment costs*, 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 Non-Federal Sponsor's total required share of *total assessment costs* exceeds the Non-Federal Sponsor's total contributions provided thereto, 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, Albuquerque District L4 to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the interim or final accounting, as applicable, show that the total

contributions provided by the Non-Federal Sponsor for *total assessment costs* exceed the Non-Federal Sponsor's total required share thereof, the Government, subject to the availability of funds and as limited by Article II.B.5. of this Agreement, shall refund or reimburse 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 or reimbursement and funds are not available to refund or reimburse the excess amount to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund or reimbursement.

#### ARTICLE V - 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 VI - 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 with 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 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 (2 C.F.R. Part 225) and A-133, and such

costs as are allocated to the *Assessment* shall be included in *total assessment 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 (2 C.F.R. Part 225) and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total assessment costs* and shared in accordance with the provisions of this Agreement.

#### ARTICLE VII - 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 and Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

#### ARTICLE VIII - 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 IX - TERMINATION OR SUSPENSION

A. Prior to conclusion of the *period of assessment*, upon 30 calendar days written notice to the other party, either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until either the Government or the Non-Federal Sponsor elects to terminate this Agreement.

B. 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 future performance under this Agreement unless he determines that continuation of performance of the *Assessment* is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the *Assessment*.

C. In the event future performance under this Agreement is suspended pursuant to Article II.C. 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 assessment costs* 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.

D. In the event that this Agreement is terminated pursuant to this Article, the parties shall conclude their activities relating to the *Assessment* and conduct an accounting in accordance with Article IV.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Assessment* and an equal percentage of the total funds contributed by the Non-Federal Sponsor in accordance with Article II.B.1.b. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications. Upon termination of this Agreement, all data and information generated as part of the *Assessment* shall be made available to the parties to the Agreement.

E. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article 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 X - 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:

Director, New Mexico Interstate Stream Commission  
P.O. Box 25102  
Santa Fe, NM 87504

or

Director, New Mexico Interstate Stream Commission  
Bataan Memorial Bldg.  
307 Galisteo St.  
Santa Fe, NM 87501

If to the Government:

District Commander  
U.S. Army Corps of Engineers, Albuquerque District  
4101 Jefferson Plaza, NE  
Albuquerque, NM 87109-3435

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 XI - 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 XII - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

#### ARTICLE XIII - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the legislature of the State of New Mexico, where creating such an obligation would be inconsistent with constitution or laws of the State of New Mexico.

B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that year, and shall use all reasonable and lawful means to secure those appropriations. The Non-Federal Sponsor reasonably believes

that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Department of the Army, Assistant Secretary of the Army (Civil Works).

**DEPARTMENT OF THE ARMY**

**NEW MEXICO INTERSTATE STREAM COMMISSION**

BY: *Kimberly M. Colloton*

BY: *Estevan R. Lopez*

**KIMBERLY M. COLLOTON  
LIEUTENANT COLONEL, U.S. ARMY  
DISTRICT COMMANDER**

**ESTEVAN R. LÓPEZ, P.E.  
DIRECTOR, NEW MEXICO  
INTERSTATE STREAM COMMISSION**

DATE: *02 Sept 2008*

DATE: *8/29/08*

CERTIFICATE OF AUTHORITY

I, Keith A. Leonard, do hereby certify that I am the legal officer of the New Mexico Interstate Stream Commission, and the principal legal officer for the Rio Grande Basin Watershed Study efforts, and that the New Mexico Interstate Stream Commission 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 New Mexico Interstate Stream Commission in connection with the *Assessment* for Section 729 San Acacia, New Mexico To Fort Quitman, Texas, 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 New Mexico Interstate Stream Commission have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 29<sup>th</sup> day of August 2008.

Keith A. Leonard  
**KEITH A. LEONARD, ATTORNEY  
COUNSEL FOR THE NEW MEXICO  
INTERSTATE STREAM COMMISSION**

CERTIFICATION REGARDING LOBBYING

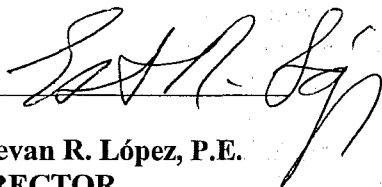
The undersigned certifies, to the best of his or her knowledge and belief that:

(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 31 U.S.C. 1352. 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.



**Estevan R. López, P.E.**  
**DIRECTOR,**  
**NEW MEXICO INTERSTATE STREAM COMMISSION**

DATE: \_\_\_\_\_

8/29/08