

**AGREEMENT FOR WITHDRAWAL OF SURPLUS WATER AT THE
MISSOURI RIVER MAINSTEM RESERVOIRS UNDER
SECTION 6 OF THE FLOOD CONTROL ACT OF 1944
AS IMPLEMENTED UNDER
SECTION 1046(c) OF THE WATER RESOURCES REFORM
AND DEVELOPMENT ACT OF 2014, AS AMENDED**

DECEMBER 10, 2020

Applicability and Instructions:

1. The attached is provided as a template to be used in development of an agreement for the withdrawal of surplus water from reservoirs operated by the U.S. Army Corps of Engineers at the Missouri River Mainstem reservoirs under Section 6 of the Flood Control Act of 1944, 33 U.S.C. 708, and under Section 1046(c) of the Water Resources Reform and Development Act of 2014, as amended by Section 1138 of the Water Resources Development Act of 2018 which directs pricing of such agreements through June 10, 2026.
2. Make all required insertions; remove this cover page; remove the open and close brackets and any instructional text; and ensure the page numbers, spacing and page breaks throughout the agreement are appropriate.
3. Authority to approve an agreement that does not deviate from the approved template has been delegated to the Northwestern Division Commander. Division Counsel concurrence that the agreement does not deviate from the template, and is appropriate for use for the particular withdrawal, is required prior to approval. In addition, authority to approve non-substantive deviations to the template also has been delegated to the Northwestern Division Commander. Division Counsel concurrence that a deviation is non-substantive, with the recommendation to approve the deviation, is required prior to approval by the Division Commander. An agreement with substantive deviations, including deviations involving policy issues, unique circumstances, or controversial matters, must be forwarded for Division review and then transmitted to the appropriate HQUSACE RIT, with the recommendations of the Northwestern Division Commander, for review and approval by the Director of Civil Works. The Northwestern Division Commander may delegate to the Omaha District Commander authority to execute the agreement after its approval.

AGREEMENT
BETWEEN THE DEPARTMENT OF THE ARMY
AND

FOR TEMPORARY WITHDRAWAL OF SURPLUS WATER
FROM
[NAME OF PROJECT]
PURSUANT TO
SECTION 6 OF THE FLOOD CONTROL ACT OF 1944

THIS AGREEMENT, entered into this ____ day of _____, 20____, by and between THE DEPARTMENT OF THE ARMY (hereinafter called the "Government") represented by the Commander for the Omaha District (hereinafter called the "District Commander), and [NAME OF USER] (hereinafter called the "User"), represented by [INSERT TITLE].

WITNESSETH THAT:

WHEREAS, pursuant to the [CITATION TO AUTHORIZING STATUTE] the Government has constructed and is operating the [NAME OF PROJECT] on [Waterway], [State] (hereinafter called the "Project");

WHEREAS, the Section 6 of the Flood Control Act of 1944 (33 U.S.C. 708), provides that the Secretary of the Army is authorized to enter into agreements with states, municipalities, private concerns, or individuals, at such prices and on such terms as the Secretary may deem reasonable for domestic and industrial uses of surplus water that may be available at any reservoir under the Secretary's control, provided that no agreements for such water shall adversely affect the existing lawful uses of such water;

WHEREAS, pursuant to Section 6 of the Flood Control Act of 1944, the Government has determined that up to [INSERT AMOUNT OF WATER, UNIT OF MEASUREMENT, AND DURATION] is available at the Project as surplus water for domestic and industrial use because the withdrawal of such amount will not interfere with Project purposes, nor adversely affect the existing lawful uses of water from the Project during that period, as described in the [FULL TITLE OF SUPLUS WATER DETERMINATION DOCUMENT OR REPORT], dated _____, ____ and approved by the Commander for the Northwestern Division;

WHEREAS, Section 1046(c) of the Water Resources Reform and Development Act (WRDA) of 2014, Public Law 113-121, approved June 10, 2014, as amended by Section 1138 of WRDA 2018, Title I of Public Law 115-270, approved October 23, 2018, provides that the Secretary of the Army shall not charge a fee for surplus water under Section 6 of the Flood Control Act of 1944 for a twelve year period through June 10, 2026, if the contract is for surplus water stored in the Upper Missouri River Mainstem Reservoirs;

WHEREAS, the User desires to enter into an agreement with the Government for the withdrawal of up to [INSERT AMOUNT OF WATER, UNIT OF MEASUREMENT, AND DURATION] from the Project for [domestic] [industrial] [domestic and industrial] purposes; and

WHEREAS, the User furnishes, as part of this Agreement, a certification (Exhibit A) that it is empowered to enter into an agreement with the Government as is vested with all necessary powers of accomplishment of the purposes of this Agreement.

NOW, THEREFORE, the Government and the User agree as follows:

ARTICLE 1 - Withdrawal of Surplus Water.

a. The Government grants the User the right to withdraw surplus water from the Project for [domestic] [industrial][domestic and industrial] use, subject to the User's compliance with its responsibility for water rights as set out in Article 3 of this Agreement. [INSERT ANY RATE OR VOLUME LIMITATIONS FROM SURPLUS WATER DETERMINATION, e.g.: The rate of such withdrawal shall not exceed _____(millions of gallons per day), and the volume shall not exceed _____ (acre-feet per year)], during the term of this Agreement as specified in Article 5 hereof.

b. The User shall have the right to construct, operate and maintain pipelines and pumping facilities on Project land for the purpose of withdrawing such water, subject to the approval of an easement to be granted upon or after execution of this Agreement by the [INSERT APPROPRIATE OMAHA DISTRICT OFFICIAL, e.g., Real Estate Contracting Officer or Chief of Real Estate, Omaha District]. Said easement shall be in a form satisfactory to the Secretary of the Army, granted under authority of 10 U.S.C. 2668 and be in accordance with other applicable Federal laws. All costs associated with such facilities or any modifications or removal thereof or any future construction in connection therewith shall be without expense to the Government. Any costs associated with the granting of the easement shall be paid by the User in accordance with applicable Federal laws. The exercise of the rights and privileges granted under this Agreement shall be subject to compliance with the conditions of the easement.

c. The User's rights under this Agreement are subject to the Government's control and use of any or all storage in the Project to fulfill the authorized purposes of the Project. In the event that the Government determines that withdrawals of any or all of the surplus water identified in the [FULL TITLE OF SURPLUS WATER DETERMINATION DOCUMENT OR REPORT] are resulting or will result in unexpected adverse impacts to other Project purposes or operations, the User shall immediately suspend withdrawals.

d. The Government further reserves the right to take such measures as it determines in its sole discretion to be necessary to inspect, operate, maintain, and repair the Project, including taking any and all measures necessary to protect life and property.

e. The water which may be available for withdrawal by the User pursuant to this Agreement is raw water only. The Government makes no representation with respect to the quality of water which may be available and assumes no responsibility therefor, or for treatment of the water.

f. The Government makes no guarantee with respect to the availability of water. The water level of the Project will be maintained at elevations which the Government deems will best serve the authorized purposes of the Project, and this Agreement shall not be construed as giving the User any rights to have the water level maintained at any elevation.

ARTICLE 2 - Metering and Recordkeeping. For the purpose of maintaining an accurate record of the water withdrawn from the Project, the User agrees to furnish and install, or cause to be installed, meters or other measuring devices satisfactory to the District Commander, without cost to the Government. Such devices shall be available for inspection by Government representatives at all reasonable times. The User agrees to furnish to the District Commander: (i) advance estimates of need; and (ii) records of the quantity of water actually withdrawn as requested by the District Commander, but in any event no less frequently than once a year.

ARTICLE 3 – Regulation of and Right to the Use of Water. The regulation of the use of water withdrawn under this Agreement shall be the sole responsibility of the User. The User has the full responsibility to acquire in accordance with applicable law, and if necessary to establish or defend, any and all water rights needed for the water withdrawn from the Project under this Agreement. The Government shall not be responsible for the use of water by the User, nor will it become a party to any controversies involving such water use, except as such controversies may affect the operations of the Project.

ARTICLE 4 – Consideration and Payment.

[ALTERNATIVE 1 FOR AGREEMENTS WHOSE DURATION WILL EXPIRE BY JUNE 10, 2026: The User shall be entitled to withdraw the quantity of surplus water provided in Article 1.a. of this Agreement at no charge.]

[ALTERNATIVE 2 FOR AGREEMENTS WHOSE DURATION WILL EXPIRE AFTER JUNE 10, 2026: The User shall pay to the Government only the actual incremental costs incurred by the Government associated with implementation and operation and maintenance of the Project in making surplus water available after June 10, 2026 [, amounting to \$_____, as set forth in Exhibit B]. [INSERT IF A SINGLE PAYMENT IS REQUIRED: This payment shall be due and payable within thirty (30) days after the User is notified by the District Commander that this agreement is executed.] [INSERT IF ANNUAL CHARGE TO BE DETERMINED: Each year between December 1st and December 15th, the Government will bill the User for the costs incurred in the prior fiscal year. The User shall, within thirty (30) calendar days after receipt of such notice, provide the Government the required payment.] Any delinquent payment owed by the User shall be charged interest at the Current Value of Funds Rate, as determined by the Secretary of the Treasury that is applicable on the date that the payment became delinquent, with

such penalty charge and administrative fee as may be required by Federal law or regulation. This provision shall not be construed as giving the User a choice of either making payments when due or paying interest, nor shall it be construed as waiving any other rights of the Government, at law or in equity, which might result from any default by the User.]

ARTICLE 5 – Duration of Agreement. This Agreement shall become effective upon the date it is signed by the Government, and shall continue in full force and effect under the conditions set forth herein for a period of not to exceed [INSERT DURATION, NOT TO EXCEED DURATION OF SURPLUS WATER DETERMINATION OR FIVE (5) YEARS, WHICHEVER IS LESS] from the said effective date. Upon expiration, this Agreement may be extended by mutual agreement for an additional period of not to exceed [INSERT DURATION, NOT TO EXCEED DURATION OF SURPLUS WATER DETERMINATION OR FIVE (5) YEARS, WHICHEVER IS LESS]. Such agreement extension shall be subject to recalculation of reimbursement payments pursuant to Article 4. Nothing in this Agreement, or in any extension thereto, shall imply a permanent right to utilize storage space in the Project.

ARTICLE 6- Termination of Agreement.

- a. The User may terminate this Agreement upon fourteen (14) days written notice.
- b. The Government may terminate this Agreement upon thirty (30) days written notice in the event the Government determines that withdrawals of any or all of the surplus water identified in the Report are resulting in unexpected adverse impacts to other Project purposes or operations.
- c. The Government may terminate this Agreement and the User's right to withdraw water upon thirty (30) days written notice if the User shall default in performance of any obligation of this Agreement. Upon such a termination, the User shall continue to be liable to the Government for any monies owed and for any costs incurred by the Government as a result of the default.

ARTICLE 7- Release of Claims. The User shall hold and save the Government, including its officers, agents, and employees, harmless from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the withdrawal of water made pursuant to the terms of this Agreement, or as a result of the construction, operation or maintenance of any facilities owned and operated by the User, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE 8- Transfer or Assignment. The User shall not transfer or assign this Agreement nor any rights acquired thereunder, nor grant any interest, privilege or license whatsoever in connection with this Agreement, without the approval of the Director of Civil Works of the U.S. Army Corps of Engineers.

ARTICLE 9- Officials Not to Benefit. No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this Agreement if

made with a corporation for its general benefit.

ARTICLE 10- Covenant Against Contingent Fees. The User warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies retained by the User for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Agreement without liability or, in its discretion, to add to the Agreement price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE 11- Civil Rights Assurance and Certification Regarding Lobbying .

a. The User furnishes, as part of the Agreement, an assurance [INSERT (Exhibit B) OR (Exhibit C)] that it will comply with Title VI of the Civil Rights Act of 1964 (78 Stat. 252; 42 U.S.C. 2000d, et seq.) and Department of Defense Directive 5500.11 issued pursuant thereto and published in Part 195 of Title 32, Code of Federal Regulations.

b. The User furnishes, as part of this Agreement, a certification [INSERT (Exhibit C) OR (Exhibit D)] that no appropriated funds have been paid or will be paid to an officer or employee of a Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the execution of this Agreement; and that any funds other than appropriated funds that have been paid or will be paid to such persons will be disclosed on the appropriate form.

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

THE DEPARTMENT OF THE ARMY

[NAME OF USER]

[NAME]
Colonel, U.S. Army
District Commander

[NAME]
[TITLE]

DATE:_____

DATE:_____

EXHIBIT A: CERTIFICATION

I, _____, Attorney for the _____,
have reviewed the foregoing agreement executed by _____, and
as principal legal officer for the _____ certify
that the _____ is legally and financially capable of
entering into the contractual obligations contained in the foregoing agreement and that, upon
acceptance by the Department of the Army, it will be legally enforceable.

Given under my hand, this _____ day of _____ 20____.

Attorney for the _____

[INSERT IF APPLICABLE: EXHIBIT B: CALCULATION OF PAMENT]

[EXHIBIT B OR EXHIBIT C:] ASSURANCE OF COMPLIANCE

ASSURANCE OF COMPLIANCE WITH THE DEPARTMENT OF DEFENSE DIRECTIVE UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED; THE AGE DISCRIMINATION ACT OF 1975; AND THE REHABILITATION ACT OF 1973, AS AMENDED

The party executing this assurance, being the applicant recipient of Federal financial assistance under the instrument to which this assurance is attached; HEREBY AGREES THAT, as a part of its obligations under the aforesaid instrument, it will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352), as amended (42 U.S.C. 2000d), and all requirements imposed by or pursuant to the Directive of the Department of Defense (32 CFR Part 195), issued as Department of Defense Directive 5500.11, pursuant to that title; The Age Discrimination Act of 1975 (42 U.S.C. 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), to the end that in accordance with the aforementioned Title, Directive and Acts, no person in the United States shall on the ground of race, color, age, sex, religion, handicap or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant-Recipient receives Federal financial assistance from the Department of the Army and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any personal property or real property, or interest therein, or structure thereon is provided or improved with the aid of Federal financial assistance extended to the applicant-recipient by the Department of the Army, or if such assistance is in the form of personal property or real property, or interest therein or structure thereon, then this assurance shall obligate the applicant-recipient or in the case of any transfer of such property, any transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for the period during which it retains ownership or possession of the property whichever is longer. In all other cases, this assurance shall obligate the applicant-recipient for the period during which the Federal financial assistance is extended to it by the Department of the Army. The Department of the Army representatives will be allowed to visit the recipient's facilities. They will inspect the facilities to ensure that there are no barriers to impede the handicap's accessibility in either programs or activities.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the applicant-recipient by the Department of the Army, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The applicant-recipient recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the applicant-recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the applicant.

Date: _____

[NAME OF USER]

By: _____

[NAME]

[TITLE]

Mailing Address:

[EXHIBIT C OR EXHIBIT D:] CERTIFICATION REGARDING LOBBYING

1. The undersigned certifies, to the best of their knowledge and belief, that:

a. 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.

b. 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 the water supply agreement for the [____NAME OF USER____], the undersigned shall complete and submit Standard Form-LLL, "Disclosure of Lobbying Activities", in accordance with its instructions. This form is available at <http://contacts.gsa.gov/webforms.nsf>.

c. 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.

2. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31 U.S.C. 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.

[SIGNATURE OF AGREEMENT SIGNATORY]

[TYPED NAME]

[TITLE IN FULL]

Date: _____