

PROJECT PARTNERSHIP AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
CITY OF AUSTIN, TEXAS
FOR
CONSTRUCTION
OF THE
LOWER COLORADO RIVER BASIN PHASE I, TEXAS
ONION CREEK WATERSHED,
ONION CREEK FOREST/YARRABEE BEND

THIS AGREEMENT is entered into this _____ day of _____, 2014, by and between the Department of the Army (hereinafter the “Government”), represented by the U.S. Army Engineer, Fort Worth District and the City of Austin (hereinafter the “City”), represented by the City Manager.

WITNESSETH, THAT:

WHEREAS, construction of the Lower Colorado River Basin Phase I, Texas for flood damage reduction, ecosystem restoration, and recreation (hereinafter the “Authorized Project”) at Austin and Wharton, Texas and Travis County, Texas, was authorized by Section 1001(43) of the Water Resource Development Act of 2007, Public Law 110-114, and the Government was authorized to perform *monitoring* and *adaptive management* (as defined in Article I.R. and Article I.S. of this Agreement, respectively) as part of the Authorized Project;

WHEREAS, Section 5144 of the Water Resource Development Act of 2007, Public Law 110-114, modifies the Authorized Project to direct the Secretary to include the costs and benefits associated with the relocation of flood prone residences in the study area in the period beginning 2 years before the initiation of the Onion Creek Feasibility Study (initiated May 25, 2000) and ending on the date of execution of the partnership agreement for construction of the project to the extent the Secretary determines such relocations are compatible with the Authorized Project;

WHEREAS, on August 20, 2014 the Assistant Secretary of the Army (Civil Works) determined the relocations that occurred between May 25 1998 and the effective date of this Agreement described in the Lower Colorado River Basin Phase I, Texas Onion Creek Watershed Limited Reevaluation Report, dated May 2014 (revised July 25, 2014) are compatible with the Authorized Project;

WHEREAS, the Government and the City desire to enter into a Project Partnership Agreement (hereinafter the “Agreement”) for construction of the Onion Creek Watershed, Onion Creek Forest/Yarrabee Bend segment (a separable element of

the Authorized Project and hereinafter the “*Project*”, as defined in Article I.A. of this Agreement);

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, (33 U.S.C. 2213) specifies the cost-sharing requirements applicable to the *Project*;

WHEREAS, the City does not qualify for a reduction of the non-Federal cost share for flood control pursuant to the guidelines that implement Section 103(m) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213(m));

WHEREAS, Section 5144 of the Water Resource Development Act of 2007, Public Law 110-114 authorizes the Secretary of the Army, subject to certain limitations and conditions, to afford credit toward the non-Federal share of the cost of the *Project* for the value of *in-kind contributions* performed prior to the effective date of this Agreement that the Secretary of the Army determines are integral to the *Project*;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended by Section 1018 of the Water Resources Reform and Development Act of 2014, Public Law 113-121, authorizes the Secretary of the Army, subject to certain limitations and conditions, to afford credit toward the non-Federal share of the cost of the *Project* for the value of *in-kind contributions* to be performed after the effective date of this Agreement that the Secretary of the Army determines are integral to the *Project*;

WHEREAS, the City desires to receive credit toward its required contribution of funds for the *Project* in accordance with the provisions of this Agreement for *in kind contributions* that were determined to be integral to the *Project* on August 20, 2014;

WHEREAS, Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280), establishes the maximum amount of costs for the Authorized Project and sets forth procedures for adjusting such maximum amount;

WHEREAS, the Government and a non-Federal interest, the Lower Colorado River Authority, entered into an agreement, dated July 14, 2007, for engineering and design of the *Project* (hereinafter the “Design Agreement”), under the terms of which the non-Federal interest contributed a portion of the costs for engineering and design;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and Section 103(j) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2213(j)), provide, *inter alia*, that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the project or separable element;

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

WHEREAS, the Government and the City, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the City 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 City, and facilitate the successful implementation of the *Project*.

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

ARTICLE I - DEFINITIONS

A. The term “*Project*” shall mean the *flood damage reduction features*, the *ecosystem restoration features*, and the *recreation features* as generally described in the Report of the Chief of Engineers dated December 31, 2006 as modified by the Lower Colorado River Basin Phase I, Texas Onion Creek Watershed Limited Reevaluation Report, dated May 2014 (revised July 25, 2014), and the Real Estate Addendum to the Limited Reevaluation Report, dated August 8, 2014, and approved by the Assistant Secretary of the Army (Civil Works) on August 20, 2014.

B. The term “*flood damage reduction features*” shall mean acquisition of approximately 358 properties and removal of approximately 203 residential structures from the 4 percent Annual Chance Exceedance (ACE) of the 25-year floodplain at Onion Creek Forest/Yarrabee Bend segment as generally described in the Report of the Chief of Engineers dated December 31, 2006 as modified by the Lower Colorado River Basin Phase I, Texas Onion Creek Watershed Limited Reevaluation Report, dated May 2014 (revised July 25, 2014), and the Real Estate Addendum to the Limited Reevaluation Report, dated August 8, 2014, and approved by the Assistant Secretary of the Army (Civil Works) on August 20, 2014.

C. The term “*ecosystem restoration features*” shall mean planting of native trees and shrubs, along with native riparian grasses and forbs, to restore riparian ecosystem of approximately 190 acres at Onion Creek Forest/Yarrabee Bend as generally described in the Report of the Chief of Engineers dated December 31, 2006 as modified by the Lower Colorado River Basin Phase I, Texas Onion Creek Watershed Limited Reevaluation Report, dated May 2014 (revised July 25, 2014), and the Real Estate Addendum to the Limited Reevaluation Report, dated August 8, 2014, and approved by the Assistant Secretary of the Army (Civil Works) on August 20, 2014.

D. The term “*recreation features*” shall mean approximately 24,940 feet of trails, including 1 footbridge; approximately 32 picnic shelters; approximately 32 small and 1 large group shelters; approximately 20,000 square feet of parking; and associated infrastructure

such as restroom, sidewalks, lighting, and utilities at Onion Creek Forest/Yarrabee Bend as generally described in the Report of the Chief of Engineers dated December 31, 2006 as modified by the Lower Colorado River Basin Phase I, Texas Onion Creek Watershed Limited Reevaluation Report, dated May 2014 (revised July 25, 2014), and the Real Estate Addendum to the Limited Reevaluation Report, dated August 8, 2014, and approved by the Assistant Secretary of the Army (Civil Works) on August 20, 2014. The term does not include basketball, volleyball, or tennis courts.

E. The term “*total project costs*” shall mean the sum of all costs incurred by the City and the Government in accordance with the terms of this Agreement directly related to construction of the *Project*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s share of Preconstruction Engineering and Design costs pursuant to the terms of the Design Agreement that are determined by the Government to be attributable to the *Project*; the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; the Government’s engineering and design costs during construction; the City’s and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; the Government’s costs of historic preservation activities in accordance with Article XVII.A. and Article XVII.C.1. of this Agreement; the Government’s costs of *monitoring* in accordance with Article II.N. and Article II.O.1. of this Agreement; the Government’s costs of *adaptive management* in accordance with Article II.P. of this Agreement; the Government’s actual construction costs, including the costs of alteration, lowering, raising, or replacement and attendant removal of existing railroad bridges and approaches thereto required for construction of the *flood damage reduction features*; the amount of credit that the Government affords for *in-kind contributions* in accordance with Article II.G. of this Agreement; the Government’s supervision and administration costs; the City’s and the Government’s costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Government’s costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for which the Government affords credit in accordance with Article IV of this Agreement or for which reimbursement by the Government is required; and the City and the Government’s costs of audit in accordance with Article X.B. and Article X.C. of this Agreement. The term does not include any costs for operation, maintenance, repair, rehabilitation, or replacement of the *Project*; any costs of *betterments* under Article II.M.2. of this Agreement; any costs of additional work under Article II.M.3. of this Agreement; any costs of *monitoring* performed under Article II.O.2. and Article II.O.3. of this Agreement; any costs of *in-kind contributions* or costs of removal of any structures performed by the City that are determined by the Government to not be eligible for credit; any costs of dispute resolution under Article VII of this Agreement; the Government’s costs for data recovery activities associated with historic preservation in accordance with Article XVII.C.3. and Article XVII.C.4. of this Agreement; or the City’s costs of negotiating this Agreement.

F. The term “*total flood damage reduction costs*” shall mean that portion of *total project costs* allocated to the *flood damage reduction features*.

G. The term “*total ecosystem restoration costs*” shall mean that portion of *total project costs* allocated to the *ecosystem restoration features*.

H. The term “*total recreation costs*” shall mean that portion of *total project costs* allocated to the *recreation features*.

I. The term “*period of construction*” shall mean the time from the date the Government issues the solicitation for the first construction contract for the *Project* or commences construction of the *Project* using the Government’s own forces, whichever is earlier, to the date that construction of the *Project* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIII or Article XIV.C. of this Agreement, whichever is earlier.

J. The term “*financial obligations for construction*” shall mean the financial obligations of the Government that result or would result in costs that are or would be included in *total project costs* except for obligations pertaining to the provision of lands, easements, and rights-of-way, the performance of *relocations*, and the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material. The term also does not include the costs of the City’s contributions under Article V, Article X.B. and Article XIV.A. of this Agreement or any costs of *in-kind contributions*.

K. The term “*non-Federal proportionate share*” shall mean the ratio of the City’s total contribution of funds required by Article II.C.2.b., Article II.D.2.b., Article II.E.2.b., and Article II.E.3. of this Agreement to *financial obligations for construction*, as projected by the Government.

L. The term “*highway*” shall mean any highway, roadway, street, or way, including any bridge thereof which is owned by a public entity.

M. The term “*relocation*” shall mean providing a functionally equivalent facility to the owner of a utility, cemetery, *highway*, railroad (excluding existing railroad bridges and approaches thereto required for construction of the *flood damage reduction features*), or public facility when such action is authorized in accordance with applicable legal principles of just compensation; or providing a functionally equivalent facility when such action is specifically provided for, and is identified as a relocation, in the authorizing legislation for the *Project* or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

N. The term “*functional portion of the Project*” shall mean a portion of the *Project* for which construction has been completed and that can function independently, as

determined by the U.S. Army Engineer, Fort Worth District (hereinafter the “District Engineer”) in writing, although the remainder of the *Project* is not complete.

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

P. 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 therefore.

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

R. The term “*monitoring*” shall mean activities, including the collection and analysis of data, that are necessary to determine if predicted outputs of the *ecosystem restoration features* are being achieved and to determine if *adaptive management* is necessary.

S. The term “*adaptive management*” shall mean measures taken to adjust the *ecosystem restoration features* in response to the *monitoring* results so that the predicted outputs of the *ecosystem restoration features* are achieved following their construction. The term includes, but is not necessarily limited to, modifications of structures, or adjustments to operation or management, of the *ecosystem restoration features*.

T. The term “*in-kind contributions*” shall mean the following items that were determined to be integral to the *Project* on August 20, 2014. The term does not include demolition of any structures performed after November 8, 2007 and before the effective date of this Agreement.

1. Demolition of 88 structures carried out on or before November 8, 2007;
and

2. Demolition of 115 structures that will be performed after the effective date of this Agreement.

U. The term “*City’s Credit Request(s)*” shall mean documentation provided by the City containing the following: (1) a written certification by the City to the Government that it made specified payments to contractors, suppliers, or employees for *in-kind contributions* and the City’s contributions under Article V, Article X.B. and Article XIV.A. of this Agreement in accordance with the provisions of this Agreement; (2) copies of all relevant invoices and evidence of such payments; (3) written identification of costs that have been paid with *Federal program funds*; and (4) a written request for credit of a specific amount not in excess of such specified payments.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE CITY

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 City, expeditiously shall construct the *Project* (including alteration, lowering, raising, or replacement and attendant removal of existing railroad bridges and approaches thereto required for construction of the *flood damage reduction features*), except for the *in-kind contributions*, applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies. The City expeditiously shall perform the *in-kind contributions* that will be performed after the effective date of this Agreement in accordance with applicable Federal laws, regulations, and policies.

1. The Government shall not issue the solicitation for the first contract for construction of the *Project* or commence construction of the *Project* using the Government’s own forces until the City has confirmed in writing its willingness to proceed with the *Project*.

2. The Government shall afford the City the opportunity to review and comment on the solicitations for all Government contracts, including relevant plans and specifications, prior to the Government’s issuance of such solicitations. To the extent possible, the Government shall afford the City the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the City 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 City 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 City, but the contents of solicitations, award of contracts or commencement of construction using the Government’s own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *Project*, except for the *in-kind contributions*, shall be exclusively within the control of the Government.

3. At the time 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 *Project*, the District Engineer shall furnish a copy thereof to the City.

4. The City shall obtain all permits and licenses necessary for the design and construction of the *in-kind contributions*, and in the exercise of their rights and obligations under this Agreement, shall comply with all applicable Federal laws, regulations, and policies including the laws and regulations specified in Article X of this Agreement.

5. The City shall not commence activities required to provide the *in-kind contributions* until the designs, detailed plans and specifications, and arrangements for the prosecution of such *in-kind contributions* have been approved by the Government in writing. Changes proposed by the City to approved designs and plans and specifications also must be approved by the Government in writing in advance of the related construction. The City shall afford the Government the opportunity to review and comment on the solicitations for all contracts for the *in-kind contributions*, including relevant plans and specifications, prior to the City's issuance of such solicitations. To the extent possible, the City 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 City shall provide such notification in writing at the earliest date possible. To the extent possible, the City also shall afford the Government the opportunity to review and comment on all contract claims prior to resolution thereof. The City shall consider in good faith the comments of the Government but the contents of solicitations, award of contracts, 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 City, except as otherwise required by the provisions of this Agreement, including compliance with applicable Federal laws or regulations. The City shall include appropriate provisions in its contracts for the design and construction of the *in-kind contributions*, as necessary, to ensure compliance with such laws or regulations.

6. At the time the City furnishes a contractor with a notice of acceptance of completed work for each contract awarded by the City for the *in-kind contributions*, the City shall furnish a copy thereof to the Government. Upon completion of the *in-kind contributions*, the City shall furnish to the Government a copy of all final as-built drawings for the construction portion of such work.

7. As of the effective date of this Agreement, \$13,572,500 of Federal funds have been provided by Congress for the Authorized Project of which \$11,135,500 is currently projected to be available for the *Project*. The Government makes no commitment to request Congress to provide additional Federal funds for the Authorized Project or the *Project*. Further, the Government's financial participation in the *Project* is limited to the Federal funds that the Government makes available to the *Project*.

B. The Government shall allocate *total project costs* among *total flood damage reduction costs*, *total ecosystem restoration costs*, and *total recreation costs*.

C. The City shall contribute 35 percent of *total flood damage reduction costs* in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the City shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands,

easements, and rights-of-way to enable the disposal of dredged or excavated material that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *flood damage reduction features*.

2. The City shall provide a contribution of funds to be determined as described below if the Government projects, at any time during the *period of construction*, that the sum of the following is less than 35 percent of *total flood damage reduction costs*: (i) the value of the City's contributions under paragraph C.1. of this Article determined in accordance with Article IV of this Agreement plus (ii) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement determined by the Government to be attributable to the *flood damage reduction features* of this *Project* plus (iii) the value of the City's contributions under Article V, Article X, and Article XIV.A. determined by the Government to be attributable to the *flood damage reduction features*.

a. First, the Government shall subtract from the City's required share of 35 percent of *total flood damage reduction costs*: (i) the value of the City's contributions under paragraph C.1. of this Article determined in accordance with Article IV of this Agreement; (ii) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement determined by the Government to be attributable to the *flood damage reduction features* of this *Project*; and (iii) the value of the City's contributions under Article V, Article X, and Article XIV.A. of this Agreement determined by the Government to be attributable to the *flood damage reduction features*.

b. Next, the Government shall subtract from the amount determined in accordance with paragraph C.2.a. of this Article the Government's projection of the credit that will be afforded for *in-kind contributions* in accordance with paragraph G.1. and paragraph G.4. of this Article. The remaining amount is the contribution of funds the City shall provide in accordance with Article VI.B. of this Agreement.

3. During the *period of construction*, the Government, subject to the availability of funds, shall refund or reimburse to the City contributions in excess of 35 percent of *total flood damage reduction costs* if the Government determines at any time that the actual collective value of the following contributions determined by the Government to be attributable to the *flood damage reduction features* for this *Project* has exceeded 35 percent of *total flood damage reduction costs*: (a) the value of the City's contributions under paragraph C.2. of this Article; (b) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement; (c) the value of the City's contributions under paragraph C.1. of this Article, as determined in accordance with Article IV of this Agreement; and (d) the value of the City's contributions under Article V, Article X, and Article XIV.A. of this Agreement. After such a determination, the Government, in its sole discretion, may acquire any remaining lands, easements, and rights-of-way required for the *flood damage reduction features*, perform any remaining *relocations* necessary for the *flood damage reduction features*, or construct any remaining improvements required on

lands, easements, and rights-of-way to enable the disposal of dredged or excavated material required for the *flood damage reduction features* on behalf of the City. Notwithstanding the acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material by the Government under this paragraph, the City shall be responsible, as between the Government and the City, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

D. The City shall contribute 35 percent of *total ecosystem restoration costs* in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the City shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *ecosystem restoration features*.

2. The City shall provide a contribution of funds to be determined as described below if the Government projects, at any time during the *period of construction*, that the sum of the following is less than 35 percent of *total ecosystem restoration costs*: (i) the value of the City's contributions under paragraph D.1. of this Article determined in accordance with Article IV of this Agreement plus (ii) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement determined by the Government to be attributable to the *ecosystem restoration features* of this *Project* plus (iii) the value of the City's contributions under Article V, Article X, and Article XIV.A. determined by the Government to be attributable to the *ecosystem restoration features*.

a. First, the Government shall subtract from the City's required share of 35 percent of *total ecosystem restoration costs*: (i) the value of the City's contributions under paragraph D.1. of this Article determined in accordance with Article IV of this Agreement; (ii) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement determined by the Government to be attributable to the *ecosystem restoration features* of this *Project*; and (iii) the value of the City's contributions under Article V, Article X, and Article XIV.A. of this Agreement determined by the Government to be attributable to the *ecosystem restoration features*.

b. Next, the Government shall subtract from the amount determined in accordance with paragraph D.2.a. of this Article the Government's projection of the credit that will be afforded for *in-kind contributions* in accordance with paragraph G.2. and paragraph G.4. of this Article. The remaining amount is the contribution of funds the City shall provide in accordance with Article VI.B. of this Agreement.

E. The City shall contribute 50 percent of *total recreation costs* in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the City shall provide all lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall perform or ensure performance of all *relocations*, and shall construct improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the Government determines to be required or to be necessary for construction, operation, and maintenance of the *recreation features*.

2. The City shall provide a contribution of funds to be determined as described below if the Government projects, at any time during the *period of construction*, that the sum of the following is less than 50 percent of *total recreation costs*: (i) the value of the City's contributions under paragraph E.1. of this Article determined in accordance with Article IV of this Agreement plus (ii) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement determined by the Government to be attributable to the *recreation features* of this *Project* plus (iii) the value of the City's contributions under Article V, Article X, and Article XIV.A. determined by the Government to be attributable to the *recreation features*.

a. First, the Government shall subtract from the City's required share of 50 percent of *total recreation costs*: (i) the value of the City's contributions under paragraph E.1. of this Article determined in accordance with Article IV of this Agreement; (ii) the value of the contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement determined by the Government to be attributable to the *recreation features* of this *Project*; and (iii) the value of the City's contributions under Article V, Article X, and Article XIV.A. of this Agreement determined by the Government to be attributable to the *recreation features*.

b. Next, the Government shall subtract from the amount determined in accordance with paragraph E.2.a. of this Article the Government's projection of the credit that will be afforded for *in-kind contributions* in accordance with paragraph G.3. and paragraph G.4. of this Article. The remaining amount is the contribution of funds the City shall provide in accordance with Article VI.B. of this Agreement.

3. Notwithstanding any other provision of this paragraph, the Government's share of *total recreation costs* shall not exceed an amount equal to the sum of 50 percent of the Government's share of *total flood damage reduction costs* plus 10 percent of the Government's share of *total ecosystem restoration costs*. The City shall be responsible for all *total recreation costs* in excess of this amount and shall pay any such costs in accordance with Article VI.B. of this Agreement.

F. The Government shall determine, in accordance with the conditions and limitations of this paragraph, the costs of *in-kind contributions* that may be eligible for credit.

1. The City in a timely manner shall provide the Government with the *City's Credit Request(s)* and any other documents required by the Government to enable the Government to determine the costs of *in-kind contributions* that may be eligible for credit. It is acknowledged and understood that the inability to provide necessary information to the Government to enable its review may result in the denial of credit in accordance with the provisions of this Agreement.

2. The City's costs for *in-kind contributions* that may be eligible for credit pursuant to this Agreement shall be subject to an audit in accordance with Article X.C. of this Agreement to determine the reasonableness, allocability, and allowability of such costs.

3. The City's costs for *in-kind contributions* that may be eligible for credit 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 completed and the time the credit is afforded.

4. No credit shall be afforded for costs of *in-kind contributions* unless the Government determines through on-site inspection performed by the Government that the work was accomplished in a satisfactory manner and in accordance with the applicable permits and the plans and specifications approved by the Government and the provisions of this Agreement.

5. No credit shall be afforded for the costs of *in-kind contributions* obtained at no cost to the City.

6. No credit shall be afforded for costs of an *in-kind contribution* that exceed the Government's estimate of the cost for such item if it had been performed by the Government.

7. No credit shall be afforded for costs of *in-kind contributions* paid by the City using *Federal program funds* unless the Federal agency providing the funds verifies in writing that such funds are authorized to be used to carry out the *Project*.

8. No credit shall be afforded for costs of the construction portion of an *in-kind contribution* if the City fails to comply with its obligations under applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

9. No credit shall be afforded for costs of the construction portion of an *in-kind contributions* performed prior to compliance with all applicable environmental laws and regulations covering such work, including, but not limited to the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and Section 401 of the Clean Water Act (33 U.S.C. 1341).

10. Costs for *betterments*, the provision of lands, easements, rights-of-way, *relocations*, or the construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material are not eligible for credit as *in-kind contributions*.

G. The Government shall afford the credit determined to be eligible in accordance with paragraph F. of this Article toward the City's contribution of funds required for the *Project* in accordance with this paragraph.

1. The Government shall afford the eligible credit the Government determines is attributable to the *flood damage reduction features* toward the amount of funds determined in accordance with paragraph C.2.a. of this Article. However, the maximum amount of credit that can be afforded under this paragraph shall not exceed the lesser of the following amounts as determined by the Government: (a) the amount of funds determined in accordance with paragraph C.2.a. of this Article; or (b) the amount of eligible credit for *in-kind contributions* determined by the Government to be attributable to the *flood damage reduction features*.

2. The Government shall afford the eligible credit the Government determines is attributable to the *ecosystem restoration features* toward the amount of funds determined in accordance with paragraph D.2.a. of this Article. However, the maximum amount of credit that can be afforded under this paragraph shall not exceed the lesser of the following amounts as determined by the Government: (a) the amount of funds determined in accordance with paragraph D.2.a. of this Article; or (b) the amount of eligible credit for *in-kind contributions* determined by the Government to be attributable to the *ecosystem restoration features*.

3. The Government shall afford the eligible credit the Government determines is attributable to the *recreation features* toward the amount of funds determined in accordance with paragraph E.2.a. and paragraph E.3. of this Article. However, the maximum amount of credit that can be afforded under this paragraph shall not exceed the lesser of the following amounts as determined by the Government: (a) the amount of funds determined in accordance with paragraph E.2.a. and paragraph E.3. of this Article; or (b) the amount of eligible credit for *in-kind contributions* determined by the Government to be attributable to the *recreation features*.

4. If after affording credit in accordance with paragraph G.1., paragraph G.2., or paragraph G.3. of this Article the Government determines there is eligible *in-kind contributions* credit that has not been afforded and there is a remaining contribution of funds required from the City toward which such credit could be afforded, the

Government shall afford such remaining eligible credit toward such remaining contribution of funds. However, the maximum amount of credit that can be afforded under this paragraph shall not exceed the lesser of the following amounts as determined by the Government: (a) the remaining contribution of funds as determined by the Government; or (b) the remaining amount of eligible credit for *in-kind contributions* as determined by the Government.

H. Notwithstanding any other provision of this Agreement, the City shall not be entitled to reimbursement of any costs of *in-kind contributions* that exceed the amount of credit afforded pursuant to paragraph G of this Article.

I. When the District Engineer determines that, except for *monitoring and adaptive management*, the entire *Project*, or a *functional portion of the Project*, is complete, the District Engineer shall so notify the City in writing and furnish the City with a final Operation, Maintenance, Repair, Rehabilitation, and Replacement Manual (hereinafter the "OMRR&R Manual") or, if the final OMRR&R Manual is not available, an interim OMRR&R Manual for the entire *Project* or such completed portion. Upon such notification, the Government also shall furnish to the City a copy of all final as-built drawings for the entire *Project* or such completed portion if such drawings are available. Not later than 6 months after such notification by the Government that the entire *Project* is complete, the Government shall furnish the City with the final OMRR&R Manual and all final as-built drawings for the entire *Project*. In the event the final OMRR&R Manual or all final as-built drawings for the entire *Project* cannot be completed within the 6 month period, the Government shall provide written notice to the City, and the Government and the City shall negotiate an acceptable completion date for furnishing such documents. Further, after completion of all contracts for the *Project*, copies of all of the Government's and the City's Written Notices of Acceptance of Completed Work for all contracts for the *Project* that have not been provided previously to the other party shall be provided to the City or the Government, as applicable.

J. Upon notification from the District Engineer in accordance with paragraph I. of this Article, the City shall operate, maintain, repair, rehabilitate, and replace the entire *Project*, or the *functional portion of the Project* as the case may be, in accordance with Article VIII of this Agreement. Concurrent with the City's performance of operation, maintenance, repair, rehabilitation, and replacement for the completed *Project* or such completed portion, the Government shall perform *monitoring* and, if necessary, *adaptive management* in accordance with the provisions of this Agreement.

K. Upon the District Engineer's determination that, except for *monitoring and adaptive management*, the entire *Project* is complete, the Government shall conduct an interim accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the City. Further, upon conclusion of the *period of construction* the Government shall amend the interim accounting to complete the final accounting, in accordance with Article VI.C. of this Agreement, and furnish the results to the City.

L. The City shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the funds verifies in writing that such funds are authorized to be used to carry out the *Project*.

M. City may request the Government to perform or provide, on behalf of the City, one or more of the services (hereinafter the “additional work”) described in this paragraph. Such requests shall be in writing and shall describe the additional work requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested additional work or any portion thereof, it shall so notify the City in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The City shall be solely responsible for all costs of the additional work performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.D. of this Agreement. The City may not fulfill this requirement by credit for *in-kind contributions*.

1. Acquisition of lands, easements, and rights-of-way; performance of *relocations*; or construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material for the *Project*. Notwithstanding acquisition of lands, easements, and rights-of-way, performance of *relocations*, or construction of improvements by the Government, the City shall be responsible, as between the Government and the City, for any costs of cleanup and response in accordance with Article XIV.C. of this Agreement.

2. Inclusion of *betterments* in the construction of the *Project*. In the event the Government elects to include any such *betterments*, the Government shall allocate the costs of the *Project* features that include *betterments* between *total project costs* and the costs of the *betterments*.

3. Design and construction of 4 basketball, 19 volleyball, and 2 tennis courts in conjunction with design and construction of the *recreation features*.

N. The Government, in consultation with the City and, as appropriate, other concerned agencies, shall finalize the plan for *monitoring* of the *ecosystem restoration features* contained in the Lower Colorado River Basin Phase I, Texas Onion Creek Watershed Limited Reevaluation Report, dated May 2014 (revised July 25, 2014), and the Real Estate Addendum to the Limited Reevaluation Report, dated August 8, 2014, and approved by the Assistant Secretary of the Army (Civil Works) on August 20, 2014. The plan for *monitoring* shall describe the key project specific parameters to be monitored; how these parameters relate to achieving the desired outcomes of the *ecosystem restoration features*; methods for measuring those parameters; frequency and duration of *monitoring* of the *ecosystem restoration features*; criteria for measuring the success of the *ecosystem restoration features*; preparation and distribution of *monitoring* reports and other coordination requirements; and estimated *monitoring* costs. As of the effective date of this Agreement, the costs of *monitoring* for the *ecosystem restoration features* are estimated to be \$46,200.

O. The *monitoring* of the *ecosystem restoration features* shall be performed in accordance with the finalized plan for *monitoring* and the provisions of this paragraph.

1. The Government shall perform the *monitoring* of the *ecosystem restoration features*. Government performance of such *monitoring* shall end upon: (a) the tenth anniversary of the date of the written notification to the City, required by paragraph I. of this Article, of the District Engineer's determination that the *ecosystem restoration features* are complete; or (b) the date that the Commander, Southwestern Division determines in writing that ecological success has been achieved, whichever is earlier. The Government's costs of *monitoring* incurred prior to the applicable end date shall be included in *total project costs* and shared in accordance with the provisions of this Agreement. In no event shall the Government incur or share any costs of *monitoring* incurred beyond the applicable end date.

2. If ecological success is not achieved before the tenth anniversary of the date of the written notification to the City required by paragraph I. of this Article, the City shall be responsible for performance of *monitoring* in accordance with the *monitoring* plan until the date that the Commander, Southwestern Division determines in writing that ecological success has been achieved. Any costs of *monitoring* incurred by the City pursuant to this paragraph shall not be included in *total project costs* and shall be solely the responsibility of the City.

3. If in its sole discretion the City elects to perform *monitoring* after the date that the Commander, Southwestern Division determines in writing that ecological success has been achieved, any costs of *monitoring* incurred by the City pursuant to this paragraph shall not be included in *total project costs* and shall be solely the responsibility of the City.

P. Within 120 calendar days after the end of performance of cost shared *monitoring*, the Government shall make a determination of whether *adaptive management* of any of the *ecosystem restoration features* is necessary. In making such determination, the Government shall apply the criteria specified in the plan for *monitoring* and consult with the City as well as other concerned agencies, if appropriate. The Government shall notify the City in writing of its determination and shall perform any recommended *adaptive management* in accordance with paragraph A. of this Article. Upon the completion of any *adaptive management*, as determined by the Government, the District Engineer shall: a) notify the City in writing of such determination; and b) conduct a final accounting in accordance with paragraph K. of this Article. As of the effective date of this Agreement, the costs of *adaptive management* are estimated to be \$107,800.

Q. Not less than once each year the City shall inform affected interests of the extent of protection afforded by the *flood damage reduction features*.

R. The City agrees to participate in and comply with applicable Federal floodplain management and flood insurance programs.

S. The City shall comply with Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), which requires a non-Federal interest to prepare a floodplain management plan within one year after the date of signing this Agreement, and to implement such plan not later than one year after completion of construction of the *flood damage reduction features*. The plan shall be designed to reduce the impacts of future flood events in the project area, including but not limited to, addressing those measures to be undertaken by non-Federal interests to preserve the level of flood protection provided by the *flood damage reduction features*. The City shall provide an information copy of the plan to the Government upon its preparation.

T. The City shall publicize floodplain information in the area concerned and shall provide this information to zoning and other regulatory agencies for their use in adopting regulations, or taking other actions, to prevent unwise future development and to ensure compatibility with protection levels provided by the *flood damage reduction features*.

U. The City shall prevent obstructions or encroachments on the *Project* (including prescribing and enforcing regulations to prevent such obstructions or encroachments) such as any new developments on *Project* lands, easements, and rights-of-way or the addition of facilities which might reduce the level of protection the *flood damage reduction features* afford, reduce the outputs produced by the *ecosystem restoration features*, hinder operation and maintenance of the *Project*, or interfere with the *Project's* proper function.

V. The City shall not use the *ecosystem restoration features*, or the lands, easements, and rights-of-way required pursuant to Article III of this Agreement for such features, as a wetlands bank or mitigation credit for any other project.

W. The City shall keep the *recreation features*, and access roads, parking areas, and other associated public use facilities, open and available to all on equal terms.

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

A. The Government, after consultation with the City, shall determine the lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material. The Government in a timely manner shall provide the City with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the City must provide, respectively, for the *flood damage reduction features*, for the *ecosystem restoration features*, and for the *recreation features*, in detail sufficient to enable the City to fulfill its obligations under this paragraph, and shall provide the City with a written notice to proceed with

acquisition of such lands, easements, and rights-of-way. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the City shall acquire all lands, easements, and rights-of-way the Government determines the City must provide for that work and shall provide the Government with authorization for entry thereto. Furthermore, prior to the end of the *period of construction*, the City shall acquire all lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, as set forth in such descriptions, and shall provide the Government with authorization for entry thereto. The City shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the *Project* and that were provided by the City are retained in public ownership for uses compatible with the authorized purposes of the *Project*.

B. The Government, after consultation with the City, shall determine the *relocations* necessary for construction, operation, and maintenance of the *Project*, including those necessary to enable the borrowing of material or the disposal of dredged or excavated material. The Government in a timely manner shall provide the City with general written descriptions, including maps as appropriate, of such *relocations* that are necessary, respectively, for the *flood damage reduction features*, for the *ecosystem restoration features*, and for the *recreation features* in detail sufficient to enable the City to fulfill its obligations under this paragraph, and shall provide the City with a written notice to proceed with such *relocations*. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the City shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all *relocations* the Government determines to be necessary for that work. Furthermore, prior to the end of the *period of construction*, the City shall perform or ensure performance of all *relocations* as set forth in such descriptions.

C. The Government, after consultation with the City, shall determine the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material associated with construction, operation, and maintenance of the *Project*. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the City with general written descriptions, including maps as appropriate, of such improvements that are required, respectively, for the *flood damage reduction features*, for the *ecosystem restoration features*, and for the *recreation features* in detail sufficient to enable the City to fulfill its obligations under this paragraph, and shall provide the City with a written notice to proceed with construction of such improvements. Prior to the issuance of the solicitation for each Government contract for construction of the *Project*, or prior to the Government incurring any *financial obligations for construction* of a portion of the *Project* using the Government's own forces, the City shall prepare plans and specifications for all improvements the Government determines to be required for the disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved

plans and specifications. Furthermore, prior to the end of the *period of construction*, the City shall provide all improvements set forth in such descriptions.

D. The City shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for construction, operation, and maintenance of the *Project*, including those required for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - CREDIT FOR VALUE OF LANDS, EASEMENTS, RIGHTS-OF-WAY, RELOCATIONS, AND DISPOSAL AREA IMPROVEMENTS

A. The Government shall include in *total project costs* and afford credit toward the City's share of *total flood damage reduction costs* for the value of the lands, easements, and rights-of-way that the City must provide pursuant to Article III.A. of this Agreement for the *flood damage reduction features*; for the value of the *relocations* that the City must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement for the *flood damage reduction features*; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the City must provide pursuant to Article III.C. of this Agreement for the *flood damage reduction features*. The Government also shall include in *total project costs* and afford credit toward the City's share of *total ecosystem restoration costs* for the value of the lands, easements, and rights-of-way that the City must provide pursuant to Article III.A. of this Agreement for the *ecosystem restoration features*; for the value of the *relocations* that the City must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement for the *ecosystem restoration features*; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the City must provide pursuant to Article III.C. of this Agreement for the *ecosystem restoration features*. Further, the Government shall include in *total project costs* and afford credit toward the City's share of *total recreation costs* for the value of the lands, easements, and rights-of-way that the City must provide pursuant to Article III.A. of this Agreement for the *recreation features*; for the value of the *relocations* that the City must perform or for which it must ensure performance pursuant to Article III.B. of this Agreement for the *recreation features*; and for the value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that the City must provide pursuant to Article III.C. of this Agreement for the *recreation features*. However, except as provided in paragraph C.4.b. of this Article, no amount shall be included in *total project costs*, no credit shall be afforded, and no reimbursement shall be provided for the value of any lands, easements, rights-of-way, *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material that: (1) have been provided previously as an item of cooperation for another Federal project; or (2) were acquired or performed using *Federal program funds*

unless the Federal agency providing the funds verifies in writing that such funds are authorized to be used to carry out the *Project*.

B. The City in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to Article III.A., Article III.B., or Article III.C. of this Agreement. Upon receipt of such documents, the Government in a timely manner shall determine the value of such contributions for the purpose of including such value in *total project costs* and for determining the amount of credit to be afforded or reimbursement to be provided in accordance with the provisions of this Agreement.

C. For the purposes of determining the value to be included in *total project costs* and the amount of credit to be afforded or reimbursement to be provided in accordance with this Agreement, the value of flood-prone residences acquired by the City using non-Federal funds between May 25, 1998 and the effective date of this Agreement shall be the fair market value, not to exceed the amount of compensation actually paid, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph. Except as otherwise provided in paragraph G. of this Article, the value of all other lands, easements, and rights-of-way, including those required for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation.

a. Lands, Easements, or Rights-of-Way Acquired Prior to the Effective Date of This Agreement. The fair market value of flood-prone residences acquired by the City using non-Federal funds between May 25, 1998 and the effective date of this Agreement shall be the fair market value of such residences at the time of acquisition. The fair market value of all other lands, easements, or rights-of-way owned by the City on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the City provides the Government with authorization for entry thereto.

b. Lands, Easements, or Rights-of-Way Acquired After the Effective Date of This Agreement. The fair market value of lands, easements, or rights-of-way acquired by the City after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

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

a. The City shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the City and the Government. For each flood-prone residence acquired by the City using non-Federal funds between May

25, 1998 and the effective date of this Agreement, the City may provide the Government with the appraisal prepared by the City at the time of acquisition. The City shall provide the Government with the appraisal no later than 6 months after the City provides the Government with an authorization for entry for such real property interest. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the City's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the City's appraisal, the City may obtain a second appraisal, and the fair market value shall be the amount set forth in the City's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the City's second appraisal, the City chooses not to obtain a second appraisal, or the City does not provide the first appraisal as required in this paragraph, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the City. In the event the City does not approve the Government's appraisal, the Government, after consultation with the City, shall consider the Government's and the City's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the City for the real property interest exceeds the amount determined pursuant to paragraph C.2.a. of this Article, the Government, at the request of the City, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the City, may approve in writing an amount greater than the amount determined pursuant to paragraph C.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the City, but no less than the amount determined pursuant to paragraph C.2.a. of this Article. If the Government approves such an amount for a flood-prone residence acquired by the City using non-Federal funds between May 25, 1998 and the effective date of this Agreement, the fair market value shall be the amount paid by the City. For all other real property interests, the fair market value shall be the lesser of the approved amount or the amount paid by the City, but no less than the amount determined pursuant to paragraph C.2.a. of this Article.

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

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

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

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

4. Incidental Costs.

a. For flood-prone residences acquired by the City using non-Federal funds between May 25, 1998 and the effective date of this Agreement and for all other lands, easements, or rights-of-way acquired by the City within a five year period preceding the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. In the event the Government modifies its determination made pursuant to Article III.A. of this Agreement, the Government shall afford credit for the documented incidental costs associated with preparing to acquire the lands, easements, or rights-of-way identified in the original determination, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.D. of this Agreement, and other payments by the City for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest in accordance with Article III of this Agreement. The value of the interests provided by the City in accordance with Article III.A. of this Agreement shall also include the documented costs of obtaining appraisals pursuant to paragraph C.2. of this Article, as determined by the Government, and subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

b. Incidental costs shall also include actual amounts expended for payment of relocation assistance benefits for flood-prone residences that were acquired by the City through the Federal Emergency Management Agency's Hazard Mitigation Grant Program between May 25, 1998 and the effective date of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

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

D. After consultation with the City, the Government shall determine the value of *relocations* in accordance with the provisions of this paragraph.

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

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

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

E. The value of the improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material shall be the costs of the improvements, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs. Such costs shall include, but not necessarily be limited to, actual costs of providing the improvements; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with providing the improvements, but shall not include any costs due to *betterments*, as determined by the Government.

F. Any credit afforded or reimbursement provided under the terms of this Agreement for the value of *relocations*, or improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material, performed within the *Project* boundaries is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Notwithstanding any other provision of this Agreement, credit or reimbursement may be withheld, in whole or in part, as a result of the City's failure to comply with its obligations under these laws.

G. Where the Government, on behalf of the City pursuant to Article II.M.1. of this Agreement, acquires lands, easements, or rights-of-way, performs *relocations*, or constructs improvements required on lands, easements, or rights-of-way to enable the disposal of dredged or excavated material, the value to be included in *total project costs* and the amount of credit to be afforded or the amount of reimbursement provided in accordance with this Agreement shall be the costs of such work performed or provided by the Government that are paid by the City in accordance with Article VI.D. of this Agreement. In addition, the value to be included in *total project costs* and the amount of such credit to be afforded or the amount of reimbursement provided in accordance with this Agreement shall include the documented costs incurred by the City in accordance with the terms and conditions agreed upon in writing pursuant to Article II.M.1. of this Agreement subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

ARTICLE V - PROJECT COORDINATION TEAM

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

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

C. Until the end of the *period of construction*, the Project Coordination Team shall generally oversee the *Project*, including matters related to: plans and specifications; scheduling; real property and *relocation* requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without

substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c) for *relocations* and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material, and the construction portion of the *in-kind contributions*; the investigations to identify the existence and extent of hazardous substances in accordance with Article XIV.A. of this Agreement; historic preservation activities in accordance with Article XVII of this Agreement; the performance of, scheduling for, and determining eligibility of costs of *in-kind contributions*; the Government's cost projections; final inspection of the entire *Project* or *functional portions of the Project*; preparation of the proposed OMRR&R Manual; finalization of the *monitoring* plan; performance of *monitoring* and *adaptive management*; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, rehabilitation, and replacement of the *Project* including issuance of permits; and other matters related to the *Project*. This oversight of the *Project* shall be consistent with a project management plan developed by the Government after consultation with the City.

D. The Project Coordination Team may make recommendations to the District Engineer on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the *Project* has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations.

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

ARTICLE VI - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records and provide to the City current projections of costs, financial obligations, contributions provided by the parties, and the value included in *total project costs* for lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement.

1. As of the effective date of this Agreement, *total project costs* are projected to be \$72,750,000; *total flood damage reduction costs* are projected to be \$61,990,000; the amount of funds determined in accordance with Article II.C.2.a. of this Agreement is projected to be \$0; the amount of credit to be afforded for *in-kind*

contributions pursuant to Article II.G.1. of this Agreement is projected to be \$0; the City's contribution of funds required by Article II.C.2.b. of this Agreement is projected to be \$0; *total ecosystem restoration costs* are projected to be \$5,592,000; the amount of funds determined in accordance with Article II.D.2.a. of this Agreement is projected to be \$0; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.G.2. and II.G.4. of this Agreement is projected to be \$0; the City's contribution of funds required by Article II.D.2.b. of this Agreement is projected to be \$0; *total recreation costs* are projected to be \$5,168,000; the amount of funds determined in accordance with Article II.E.2.a. and II.E.3. of this Agreement is projected to be \$2,534,000; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.G.3. and II.G.4. of this Agreement is projected to be \$1,981,000; the City's contribution of funds required by Article II.E.2.b. and Article II.E.3. of this Agreement is projected to be \$553,000; the *non-Federal proportionate share* is projected to be 36 percent; the City contribution of funds required by Article XVII.C.4. of this Agreement is projected to be \$0; the value included in *total project costs* for lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement is projected to be \$57,422,000 for the *flood damage reduction features*, \$2,987,000 for the *ecosystem restoration features*, and \$0 for the *recreation features*; the value of the City's contributions under Article V, Article X, and Article XIV.A. of this Agreement is projected to be \$0 for the *flood damage reduction features*, \$0 for the *ecosystem restoration features*, and \$50,000 for the *recreation features*; and the City's contribution of funds for additional work required by Article II.M. of this Agreement is projected to be \$432,000. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the City, and are not to be construed as the total financial responsibilities of the Government and the City.

2. By September 30, 2014 and by each quarterly anniversary thereof until the conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall provide the City with a report setting forth all contributions provided to date and the current projections of the following: *total project costs*; *total flood damage reduction costs*; the amount of funds determined in accordance with Article II.C.2.a. of this Agreement; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.G.1. of this Agreement; the City's total contribution of funds required by Article II.C.2.b. of this Agreement; *total ecosystem restoration costs*; the amount of funds determined in accordance with Article II.D.2.a. of this Agreement; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.G.2. and II.G.4. of this Agreement; the City's total contribution of funds required by Article II.D.2.b. of this Agreement; *total recreation costs*; the amount of funds determined in accordance with Article II.E.2.a. and Article II.E.3. of this Agreement; the amount of credit to be afforded for *in-kind contributions* pursuant to Article II.G.3. and Article II.G.4. of this Agreement; the City's total contribution of funds required by Article II.E.2.b. and Article II.E.3. of this Agreement; the *non-Federal proportionate share*; the City's total contribution of funds required by Article XVII.C.4. of this Agreement; the total contribution of funds required from the City for the

upcoming *fiscal year*; the maximum amount determined in accordance with Article XX of this Agreement; the value included in *total project costs* for lands, easements, rights-of-way, *relocations*, and improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material determined in accordance with Article IV of this Agreement; the value of the City's contributions under Article V, Article X, and Article XIV.A. of this Agreement; and the City's contribution of funds for additional work required by Article II.M. of this Agreement.

B. The City shall provide the contributions of funds required by Article II.C.2.b., Article II.D.2.b., Article II.E.2.b., Article II.E.3., and Article XVII.C.4. 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 construction of the *Project* or commencement of construction of the *Project* using the Government's own forces, the Government shall notify the City in writing of such scheduled date and the funds the Government determines to be required from the City to meet: (a) the *non-Federal proportionate share of financial obligations for construction* incurred prior to the commencement of the *period of construction*; (b) the projected *non-Federal proportionate share of financial obligations for construction* to be incurred in the first *fiscal year* or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the projected *non-Federal proportionate share of financial obligations for construction* through the first *fiscal year*; and (c) the City's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement to be incurred in the first *fiscal year* or, if use of a continuing contract has been approved pursuant to Federal laws, regulations, and policies, the City's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement through the first *fiscal year*. Not later than such scheduled date, the City shall provide the Government with the full amount of such required funds by delivering a check payable to "FAO, USAED, FORT WORTH DISTRICT, M2" to the District Engineer, or verifying to the satisfaction of the Government that the City has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the City, or providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

2. Thereafter, until the construction of the *Project* is complete, the Government shall notify the City in writing of the funds the Government determines to be required from the City, and the City shall provide such funds in accordance with the provisions of this paragraph.

a. Where the Government will use a continuing contract approved pursuant to Federal laws, regulations, and policies to make *financial obligations for construction* of the *Project* or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement, the Government shall notify the City in writing, no later than 60 calendar days prior to the

beginning of each *fiscal year* in which the Government projects that it will make such financial obligations, of the funds the Government determines to be required from the City to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* for that *fiscal year* for such continuing contract and (b) the City's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement for that *fiscal year* for such continuing contract. No later than 30 calendar days prior to the beginning of that *fiscal year*, the City shall make the full amount of such required funds for that *fiscal year* available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

b. For each contract for the *Project* where the Government will not use a continuing contract to make *financial obligations for construction* or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement, the Government shall notify the City in writing, no later than 60 calendar days prior to the scheduled date for issuance of the solicitation for such contract, of the funds the Government determines to be required from the City to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* to be incurred for such contract and (b) the City's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement to be incurred for such contract. No later than such scheduled date, the City shall make the full amount of such required funds available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

c. Where the Government projects that it will make *financial obligations for construction* of the *Project* using the Government's own forces or financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement using the Government's own forces, the Government shall notify the City in writing, no later than 60 calendar days prior to the beginning of each *fiscal year* in which the Government projects that it will make such financial obligations, of the funds the Government determines to be required from the City to meet: (a) the projected *non-Federal proportionate share of financial obligations for construction* using the Government's own forces for that *fiscal year* and (b) the City's share of the projected financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement using the Government's own forces for that *fiscal year*. No later than 30 calendar days prior to the beginning of that *fiscal year*, the City shall make the full amount of such required funds for that *fiscal year* available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. The Government shall draw from the funds provided by the City such sums as the Government deems necessary, after consideration of any contributions provided by a non-Federal interest pursuant to the terms of the Design Agreement, to cover: (a) the *non-Federal proportionate share of financial obligations for construction* incurred prior to the commencement of the *period of construction*; (b) the *non-Federal*

proportionate share of financial obligations for construction as financial obligations for construction are incurred; and (c) the City's share of financial obligations for data recovery activities associated with historic preservation pursuant to Article XVII.C.4. of this Agreement as those financial obligations are incurred. If at any time the Government determines that additional funds will be needed from the City to cover the City's share of such financial obligations in the current *fiscal year*, the Government shall notify the City 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 City 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 the District Engineer's determination that, except for *monitoring and adaptive management*, the entire *Project* is complete and all relevant claims and appeals and eminent domain proceedings have been resolved, the Government shall conduct an interim accounting and furnish the results to the City. Further, upon conclusion of the *period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall amend the interim accounting to complete the final accounting and furnish the results to the City. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting from being conducted in a timely manner, the Government shall conduct an interim accounting or amend the previous interim accounting, as applicable, and furnish the City with written notice of the results of such interim or amended interim accounting, as applicable. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall complete the final accounting and furnish the City with written notice of the results of such final accounting. The interim or final accounting, as applicable, shall determine *total project costs, total flood damage reduction costs, total ecosystem restoration costs, total recreation costs*, and the costs of any data recovery activities associated with historic preservation. In addition, for each set of costs, the interim or final accounting, as applicable, shall determine each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the interim or final accounting, as applicable, show that the City's total required shares of *total flood damage reduction costs, total ecosystem restoration costs, total recreation costs*, and the costs of any data recovery activities associated with historic preservation exceed the City's total contributions provided thereto, the City, 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, FORT WORTH DISTRICT, M2" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the final accounting show that the total contributions provided by the City for *total flood damage reduction costs, total ecosystem restoration costs, total recreation costs*, and the costs of any data recovery activities associated with historic preservation exceed the City's total required shares thereof, the Government, subject to the availability of funds and as limited by Article II.E.3. and Article II.H. of this Agreement,

shall refund or reimburse the excess amount to the City within 90 calendar days of the date of completion of such accounting. In the event the City is due a refund or reimbursement and funds are not available to refund or reimburse the excess amount to the City, the Government shall seek such appropriations as are necessary to make the refund or reimbursement.

D. The City shall provide the contribution of funds required by Article II.M. of this Agreement for additional work in accordance with the provisions of this paragraph.

1. Not less than 60 calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the City in writing of such scheduled date and of the full amount of funds the Government determines to be required from the City to cover the costs of the additional work. No later than 30 calendar days prior to the Government incurring any financial obligation for additional work, the City shall provide the Government with the full amount of the funds required to cover the costs of such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article.

2. The Government shall draw from the funds provided by the City such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. If at any time the Government determines that the City must provide additional funds to pay for such additional work, the Government shall notify the City in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days from receipt of such notice, the City 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.

3. At the time the Government conducts the interim or final accounting, as applicable, the Government shall conduct an accounting of the Government's financial obligations for additional work incurred and furnish the City with written notice of the results of such accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting of additional work from being conducted in a timely manner, the Government shall conduct an interim accounting of additional work and furnish the City with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting of additional work to complete the final accounting of additional work and furnish the City with written notice of the results of such final accounting. Such interim or final accounting, as applicable, shall determine the Government's total financial obligations for additional work and the City's contribution of funds provided thereto as of the date of such accounting.

a. Should the interim or final accounting, as applicable, show that the total obligations for additional work exceed the total contribution of funds provided by the City for such additional work, the City, 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, FORT WORTH DISTRICT, M2” to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the final accounting show that the total contribution of funds provided by the City for additional work exceeds the total obligations for such additional work, the Government, subject to the availability of funds, shall refund the excess amount to the City within 90 calendar days of the date of completion of such accounting. In the event the City is due a refund and funds are not available to refund the excess amount to the City, the Government shall seek such appropriations as are necessary to make the refund.

ARTICLE VII - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. Each party shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

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

A. Upon receipt of the notification from the District Engineer in accordance with Article II.I. of this Agreement and for so long as the *Project* remains authorized, the City, pursuant to Article II.J. of this Agreement, shall operate, maintain, repair, rehabilitate, and replace the entire *Project* or *functional portion of the Project*, at no cost to the Government. The City shall conduct its operation, maintenance, repair, rehabilitation, and replacement responsibilities in a manner compatible with the *Project's* authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the interim or final OMRR&R Manual and any subsequent amendments thereto.

B. The City hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the City now or hereafter owns or controls for access to the *Project* for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. If an inspection shows that the City for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the City. If, after 30 calendar days from receipt of such written notice by the Government, the City continues to fail to perform, then the Government shall have the right to enter, at

reasonable times and in a reasonable manner, upon property that the City now or hereafter owns or controls for the purpose of completing, operating, maintaining, repairing, rehabilitating, or replacing the *Project*. No completion, operation, maintenance, repair, rehabilitation, or replacement by the Government shall relieve the City of responsibility to meet the City's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

ARTICLE IX – HOLD AND SAVE

Subject to the provisions of Article XXI of this Agreement, the City shall hold and save the Government free from all damages arising from construction, *monitoring*, *adaptive management*, operation, maintenance, repair, rehabilitation, and replacement of the *Project*, any *betterments*, and additional work pursuant to Article II.M.3. of this Agreement, except for damages due to the fault or negligence of the Government or its contractors in the construction, *monitoring*, *adaptive management*, operation, maintenance, repair, rehabilitation, and replacement of the *Project*.

ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the City shall develop procedures for keeping books, records, documents, or other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the City 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 City 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 City is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507), as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the City and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the City and independent auditors any information necessary to enable an audit of the City's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the *Project* shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. 7503, the Government may conduct audits in addition to any audit that the City is required to conduct under the Single Audit Act Amendments of 1996. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the City and the Government shall comply with all applicable Federal and State laws and regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d) and Department of Defense Directive 5500.11 issued pursuant thereto; Army Regulation 600-7, entitled “Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army”; and all applicable Federal labor standards requirements including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the City each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

ARTICLE XIII - TERMINATION OR SUSPENSION

A. If at any time the City 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 the Assistant Secretary of the Army (Civil Works) determines that continuation of work on the *Project* 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 *Project*.

B. In the event the Government projects that the amount of Federal funds the Government will make available to the *Project* through the then-current *fiscal year*, or the amount of Federal funds the Government will make available for the *Project* through the upcoming *fiscal year*, is not sufficient to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVII.C.3. and Article XVII.C.4. of this Agreement that the Government projects to be incurred through the then-current or upcoming *fiscal year*, as applicable, the Government shall notify the City in writing of such insufficiency of funds and of the date the Government projects that the Federal funds that will have been made available to the *Project* will be exhausted. Upon the exhaustion of Federal funds made available by the Government to the *Project*, future performance under this Agreement shall be suspended. Such suspension shall remain in effect until such time that the Government notifies the City in writing that sufficient Federal funds are available to meet the Federal share of *total project costs* and the Federal share of costs for data recovery activities associated with historic preservation in accordance with Article XVII.C.3. and Article XVII.C.4. of this Agreement the Government projects to be incurred through the then-current or upcoming *fiscal year*, or the Government or the City elects to terminate this Agreement.

C. In the event that the Government and the City determine to suspend future performance under this Agreement in accordance with Article XIV.C. of this Agreement, such suspension shall remain in effect until the Government and the City agree to proceed or to terminate this Agreement. In the event that the Government suspends future performance under this Agreement in accordance with Article XIV.C. of this Agreement due to failure to reach agreement with the City on whether to proceed or to terminate this Agreement, or the failure of the City to provide funds to pay for cleanup and response costs or to otherwise discharge the City's responsibilities under Article XIV.C. of this Agreement, such suspension shall remain in effect until: 1) the Government and City reach agreement on how to proceed or to terminate this Agreement; 2) the City provides funds necessary to pay for cleanup and response costs and otherwise discharges its responsibilities under Article XIV.C. of this Agreement; 3) the Government continues work on the *Project*; or 4) the Government terminates this Agreement in accordance with the provisions of Article XIV.C. of this Agreement.

D. In the event that this Agreement is terminated pursuant to this Article or Article XIV.C. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of total Federal funds made available for the *Project* and an equal percentage of the total funds contributed by the City in accordance with Article II.C.2.b., Article II.D.2.b., Article II.E.2.b., Article II.E.3., and Article XVII.C.4. of this Agreement as a contingency to pay costs of termination, including any costs of resolution of contract claims and contract modifications.

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

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

ARTICLE XIV - HAZARDOUS SUBSTANCES

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

1. All actual costs incurred by the City for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for construction, operation, and maintenance of the *Project*, the City and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and the City shall not proceed with the acquisition of the real property interests until the parties agree that the City should proceed.

C. The Government and the City shall determine whether to initiate construction of the *Project*, or, if already in construction, whether to continue with construction of the *Project*, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way

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

D. The City and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the City, the City shall be considered the operator of the *Project* for purposes of CERCLA liability. To the maximum extent practicable, the City shall operate, maintain, repair, rehabilitate, and replace the *Project* in a manner that will not cause liability to arise under CERCLA.

ARTICLE XV - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the City of Austin:
Watershed Protection Department
City Manager
P.O. Box 1088
Austin, Texas 78767

If to the Government:
District Engineer
U.S. Army Corps of Engineers
Fort Worth District
P.O. Box 17300
Fort Worth, Texas 76102-0300

B. A party may change the recipient or address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XVI - CONFIDENTIALITY

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

ARTICLE XVII - HISTORIC PRESERVATION

A. Except as provided in paragraph B. below, the Government shall perform any identification, survey, or evaluation of historic properties that it determines is necessary for the *Project*. Any costs incurred by the Government for such work shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

B. In the event that the Government determines that any identification, survey, or evaluation of historic properties is required for construction of the *in-kind contributions* to be performed after the effective date of this Agreement, and if the Government and the City agree in writing that the City should perform such identification, survey, or evaluation of historic properties, the City shall perform such identification, survey, or evaluation in accordance with this paragraph and other written directions of the Government.

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

2. Any costs of identification, survey, or evaluation of historic properties incurred by the City pursuant to this paragraph shall be included in the costs for *in-kind contributions* subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

C. Except as provided in paragraph C.2. below, the Government, as it determines necessary for the *Project*, shall perform or ensure the performance of any mitigation

activities or actions for historic properties or that are otherwise associated with historic preservation including data recovery activities.

1. Any costs incurred by the Government for such mitigation activities, except for data recovery activities associated with historic preservation, shall be included in *total project costs* and shared in accordance with the provisions of this Agreement.

2. In the event that the Government determines that mitigation activities or actions other than data recovery activities associated with historic preservation are required for construction of the *in-kind contributions* to be performed after the effective date of this Agreement, and if the Government and the City agree in writing that the City should perform such activities or actions, the City shall perform such activities or actions in accordance with the written directions of the Government. The City shall perform the agreed upon activities or actions prior to construction of such *in-kind contributions*. Any costs incurred by the City in accordance with the provisions of this paragraph shall be included in the costs for *in-kind contributions* subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of such costs.

3. As specified in Section 7(a) of Public Law 86-523, as amended by Public Law 93-291 (16 U.S.C. 469c(a)), the costs of data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in *total project costs*, up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the *Project*.

4. The Government shall not incur costs for data recovery activities associated with historic preservation that exceed the statutory one percent limit specified in paragraph C.3. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit and the Secretary of the Interior has concurred in the waiver in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. 469c-2(3)).

a. Any costs of data recovery activities associated with historic preservation that exceed the one percent limit and are determined by the Government to be attributable to the *flood damage reduction features* shall not be included in *total project costs* but shall be shared between the City and the Government consistent with the cost sharing requirements for flood damage reduction, as follows: 35 percent will be borne by the City and 65 percent will be borne by the Government.

b. Any costs of data recovery activities associated with historic preservation that exceed the one percent limit and are determined by the Government to be attributable to the *ecosystem restoration features* shall not be included in *total project costs* but shall be shared between the City and the Government consistent with the cost sharing requirements for ecosystem restoration, as follows: 35 percent will be borne by the City and 65 percent will be borne by the Government.

c. Any costs of data recovery activities associated with historic preservation that exceed the one percent limit and are determined by the Government to be attributable to the *recreation features* shall not be included in *total project costs* but shall be shared between the City and the Government consistent with the cost sharing requirements for recreation, as follows: 50 percent will be borne by the City and 50 percent will be borne by the Government.

D. If, during its performance of *relocations*, construction of improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material in accordance with Article III of this Agreement, or performance of the *in-kind contributions* to be performed after the effective date of this Agreement, the City discover historic properties or other cultural resources that have not been evaluated in accordance with this Article, the City shall provide prompt written notice to the Government of such discovery. The City shall not proceed with performance of the *relocation*, construction of the improvement, or performance of such *in-kind contributions* related to such discovery until the Government provides written notice to the City that they should proceed with such work.

E. The City shall include provisions in all of its construction contracts for *in-kind contributions* to be performed after the effective date of this Agreement for the protection of cultural resources discovered during construction. These provisions shall include, at a minimum, the requirement to cease all work in the immediate area of a discovered cultural resource until the situation is properly evaluated, and the requirement to immediately provide verbal and written notice to the City and the Government in the event of such discovery. Upon receipt of notice that cultural resources have been discovered, the Government, pursuant to its responsibilities under the National Historic Preservation Act, must authorize further action or study before construction may continue. If the Government concludes that such discovery warrants consultation under the National Historic Preservation Act, the City shall participate as a consulting party. In such a case, construction of the *in-kind contributions* shall not continue until the Government sends written notification to the City. Where the City elects to perform the construction of the *in-kind contributions* using its own forces, the same procedures shall be followed.

ARTICLE XVIII - 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 XIX - NON-LIABILITY OF OFFICERS AND EMPLOYEES

No officer, agent, consultant, or employee of the City, nor any officer, agent, consultant, or employee of the Government, may be charged personally, or held liable,

under the terms or provisions of this Agreement because of any breach, attempted breach, or alleged breach thereof, except as provided in Section 912(b) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (42 U.S.C. 1962d-5b note), or other applicable law.

ARTICLE XX - SECTION 902 MAXIMUM COST OF PROJECT

The City understands that Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280) establishes the maximum amount of total costs for the Authorized Project, of which the *Project* is a separable element. On the effective date of this Agreement, the maximum amount of total costs for the Authorized Project, which is the sum of *total project costs* for the *Project* and the costs for all other separable elements of the Authorized Project, is estimated to be \$167,075,000, as calculated in accordance with Engineer Regulation 1105-2-100, using October 1, 2013 price levels, and including allowances for projected future inflation. The Government shall adjust such maximum amount of total costs for the Authorized Project, in accordance with Section 902 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2280), when necessary.

ARTICLE XXI - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the City Council of the City of Austin, where creating such an obligation would be inconsistent with Article XI, Section 7 of the Constitution of the State of Texas.

B. The City intends to fulfill its obligations under this Agreement. The City 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 City 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 City 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 City 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 District Engineer.

DEPARTMENT OF THE ARMY

CITY OF AUSTIN, TEXAS

BY: _____

Charles H. Klinge
Colonel, U.S. Army
District Engineer

BY: _____

Marc Ott
City Manager

DATE: _____

DATE: _____

CERTIFICATE OF AUTHORITY

I, Karen Kennard, do hereby certify that I am the principal legal officer of the City of Austin, Texas, that the City of Austin, Texas is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the City of Austin, Texas in connection with the Lower Colorado River Basin Phase I, Texas, Onion Creek Watershed, Onion Creek Forest/Yarrabee Bend Project and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Agreement, as required by Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and that the persons who have executed this Agreement on behalf of the City of Austin, Texas have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 20__.

Karen Kennard
City Attorney
City of Austin, Texas

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.

Marc Ott
City Manager
City of Austin, Texas

DATE: _____