

AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE NATURE CONSERVANCY
FOR THE
LEECH LAKE CONTINUING AUTHORITIES PROGRAM (CAP) SECTION 1135
FEASIBILITY STUDY
CASS COUNTY, MINNESOTA

THIS AGREEMENT is entered into this 25th day of September, 2023, by and between the Department of the Army (hereinafter the “Government”), represented by the District Commander for St. Paul District (hereinafter the “District Commander”) and The Nature Conservancy (hereinafter the “Non-Federal Sponsor”), represented by the Great Plains Division Director.

WITNESSETH, THAT:

WHEREAS, Section 1135 of the Water Resources Development Act (WRDA) of 1986 (Public Law 99-662), as amended (33 USC 2309a) authorizes the study of modifications to Leech Lake Dam to restore or improve environmental quality, including restoration of hydraulic connectivity for fish and other aquatic organisms to pass from Leech Lake River upstream to Leech Lake;

WHEREAS, Section 105(a) of the Water Resources Development Act (WRDA) of 1986, as amended (33 U.S.C. 2215(a)), specifies the cost-sharing requirements; and

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

A. The term “Study” means the activities and tasks required to identify and evaluate alternatives and the preparation of a Detailed Project Report document that, as appropriate, recommends a coordinated and implementable solution for ecosystem restoration at Leech Lake Dam, Cass County, Minnesota.

B. The term “study costs” means all costs incurred by the Government and Non-Federal Sponsor after the effective date of this Agreement that are directly related to performance of the Study and cost shared in accordance with the terms of this Agreement. The term includes the Government’s costs for preparing the project management plan (“PMP”); for plan formulation and evaluation, including costs for economic, engineering, real estate, and environmental

analyses; for preparation of a floodplain management plan if undertaken as part of the Study; for preparing and processing the Detailed Project Report document; for supervision and administration; for Agency Technical Review and other review processes required by the Government; and for response to any required Independent External Peer Review; and the Non-Federal Sponsor's creditable costs for in-kind contributions, if any. The term does not include any costs for dispute resolution; participation by the Government and Non-Federal Sponsor in the Study Coordination Team to discuss significant issues and actions; audits; an Independent External Peer Review panel, if required; or negotiating this Agreement. The term also does not include the first \$100,000 of costs for the Study incurred by the Government, whether before or after execution of this Agreement.

C. The term "PMP" means the project management plan, and any modifications thereto, developed in consultation with the Non-Federal Sponsor, that specifies the scope, cost, and schedule for Study activities and tasks, including the Non-Federal Sponsor's in-kind contributions, and that guides the performance of the Study.

D. The term "in-kind contributions" means those planning activities (including data collection and other services) that are integral to the Study and would otherwise have been undertaken by the Government for the Study and that are identified in the PMP and performed or provided by the Non-Federal Sponsor after the effective date of this Agreement and in accordance with the PMP.

E. The term "maximum Federal study cost" means the \$1,500,000 Federal cost limit for the Study, unless the Government has approved a higher amount, and includes the first \$100,000 of costs for the Study incurred by the Government.

F. The term "fiscal year" means one year beginning on October 1st and ending on September 30th of the following year.

ARTICLE II - OBLIGATIONS OF THE PARTIES

A. In accordance with Federal laws, regulations, and policies, the Government shall conduct the Study using funds appropriated by the Congress and funds provided by the Non-Federal Sponsor. In carrying out its obligations under this Agreement, the Non-Federal Sponsor shall comply with all the requirements of applicable Federal laws and implementing regulations, including but not limited to, if applicable, Section 601 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto; the Age Discrimination Act of 1975 (42 U.S.C. 6102); and the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), and Army Regulation 600-7 issued pursuant thereto.

B. The Non-Federal Sponsor shall contribute 50 percent of study costs in accordance with the provisions of this paragraph and provide required funds in accordance with Article III.

1. After considering the estimated amount of credit for in-kind contributions, if any, that will be afforded in accordance with paragraph C. of this Article and the first \$100,000

of the costs incurred by the Government that are excluded from study costs, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor to meet its share of study costs for the remainder of the initial fiscal year of the Study. No later than 15 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government in accordance with Article III.C.

2. No later than August 1st prior to each subsequent fiscal year of the Study, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor during that fiscal year to meet its cost share. No later than September 1st prior to that fiscal year, the Non-Federal Sponsor shall provide the full amount of such required funds to the Government in accordance with Article III.C.

C. The Government shall include in study costs and credit towards the Non-Federal Sponsor's share of such costs, the costs, documented to the satisfaction of the Government, that the Non-Federal Sponsor incurs in providing or performing in-kind contributions, including associated supervision and administration, after the effective date of this Agreement. Such costs shall be subject to audit in accordance with Article VI to determine reasonableness, allocability, and allowability, and crediting shall be in accordance with the following procedures, requirements, and limitations:

1. As in-kind contributions are completed and no later than 60 calendar days after such completion, the Non-Federal Sponsor shall provide the Government appropriate documentation, including invoices and certification of specific payments to contractors, suppliers, and the Non-Federal Sponsor's employees. Failure to provide such documentation in a timely manner may result in denial of credit. The amount of credit afforded for in-kind contributions shall not exceed the Non-Federal Sponsor's share of study costs.

2. No credit shall be afforded for interest charges, or any adjustment to reflect changes in price levels between the time the in-kind contributions are completed and credit is afforded; for the value of in-kind contributions obtained at no cost to the Non-Federal Sponsor; for any items provided or performed prior to completion of the PMP; or for costs that exceed the Government's estimate of the cost for such item.

D. To the extent practicable and in accordance with Federal laws, regulations, and policies, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on contract solicitations prior to the Government's issuance of such solicitations; proposed contract modifications, including change orders; and contract claims prior to resolution thereof. Ultimately, the contents of solicitations, award of contracts, execution of contract modifications, and resolution of contract claims shall be exclusively within the control of the Government.

E. The Non-Federal Sponsor shall not use Federal program funds to meet any of its obligations under this Agreement unless the Federal agency providing the funds verifies in writing that the funds are authorized to be used for the Study. Federal program funds are those

funds provided by a Federal agency, plus any non-Federal contribution required as a matching share therefor.

F. Except as provided in paragraph C. of this Article, the Non-Federal Sponsor shall not be entitled to any credit or reimbursement for costs it incurs in performing its responsibilities under this Agreement.

G. If Independent External Peer Review (IEPR) is required for the Study, the Government shall conduct such review in accordance with Federal laws, regulations, and policies. The Government's costs for an IEPR panel shall not be included in study costs or the maximum Federal study cost.

H. In addition to the ongoing, regular discussions between the parties regarding Study delivery, the Government and the Non-Federal Sponsor may establish a Study Coordination Team to discuss significant issues or actions. The Government's costs for participation on the Study Coordination Team shall not be included in the study costs, but shall be included in calculating the maximum Federal study cost. The Non-Federal Sponsor's costs for participation on the Study Coordination Team shall not be included in study costs and shall be paid solely by the Non-Federal Sponsor without reimbursement or credit by the Government.

ARTICLE III – PROVISION OF NON-FEDERAL COST SHARE

A. As of the effective date of this Agreement, study costs are projected to be \$650,000.00, with the Government's share of such costs projected to be \$325,000.00 and the Non-Federal Sponsor's share of such costs projected to be \$325,000.00, which includes creditable in-kind contributions projected to be \$81,600 and the amount of funds required to meet its cost share projected to be \$243,400. These amounts are estimates only that are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Government shall provide the Non-Federal Sponsor with monthly reports setting forth the estimated study costs and the Government's and Non-Federal Sponsor's estimated shares of such costs; costs incurred by the Government, using both Federal and Non-Federal Sponsor funds, to date; the amount of funds provided by the Non-Federal Sponsor to date; the estimated amount of any creditable in-kind contributions; and the estimated remaining cost of the Study.

C. The Non-Federal Sponsor shall provide to the Government required funds by delivering a check payable to "FAO, USAED, St. Paul District (B6)" to the District Commander, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited such required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government.

D. The Government shall draw from the funds provided by the Non-Federal Sponsor to cover the non-Federal share of study costs as those costs are incurred. If the Government determines at any time that additional funds are needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's required share of study costs, the Government shall provide the Non-Federal Sponsor with written notice of the amount of additional funds required. Within 60 calendar days of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of such additional funds.

E. Upon completion of the Study and resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the written results of such final accounting. Should the final accounting determine that additional funds are required from the Non-Federal Sponsor, the Non-Federal Sponsor, within 60 calendar days of written notice from the Government, shall provide the Government with the full amount of such additional funds by delivering a check payable to "FAO, USAED, St. Paul District (B6)" to the District Commander, or by providing an Electronic Funds Transfer of such required funds in accordance with procedures established by the Government. Should the final accounting determine that the Non-Federal Sponsor has provided funds in excess of its required amount, the Government shall refund the excess amount, subject to the availability of funds. Such final accounting does not limit the Non-Federal Sponsor's responsibility to pay its share of study costs, including contract claims or any other liability that may become known after the final accounting.

ARTICLE IV - TERMINATION OR SUSPENSION

A. Upon 30 calendar days written notice to the other party, either party may elect at any time, without penalty, to suspend or terminate future performance of the Study. Furthermore, unless an extension is approved by the Assistant Secretary of the Army (Civil Works), the Study may be terminated if a Detailed Project Report is not completed for the Study within 3 years after the effective date of this Agreement.

B. In the event of termination, the parties shall conclude their activities relating to the Study. To provide for this eventuality, the Government may reserve a percentage of available funds as a contingency to pay the costs of termination, including any costs of resolution of contract claims, and resolution of contract modifications.

C. Any suspension or termination shall not relieve the parties of liability for any obligation incurred. Any delinquent payment owed by the Non-Federal Sponsor pursuant to this Agreement 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 V - DISPUTE RESOLUTION

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

ARTICLE VI - MAINTENANCE OF RECORDS AND AUDIT

A. The parties shall develop procedures for the maintenance by the Non-Federal Sponsor of books, records, documents, or other evidence pertaining to costs and expenses for a minimum of three years after the final accounting. The Non-Federal Sponsor shall assure that such materials are reasonably available for examination, audit, or reproduction by the Government.

B. The Government may conduct, or arrange for the conduct of, audits of the Study. Government audits shall be conducted in accordance with applicable Government cost principles and regulations. The Government's costs of audits for the Study shall not be included in study costs, but shall be included in calculating the maximum Federal study cost.

C. To the extent permitted under applicable Federal laws and regulations, the Government shall allow the Non-Federal Sponsor to inspect books, records, documents, or other evidence pertaining to costs and expenses maintained by the Government, or at the Non-Federal Sponsor's request, provide to the Non-Federal Sponsor or independent auditors any such information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The Non-Federal Sponsor shall pay the costs of non-Federal audits without reimbursement or credit by the Government.

ARTICLE VII - RELATIONSHIP OF PARTIES

In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other. Neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights a party may have to seek relief or redress against that contractor.

ARTICLE VIII - 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 mailed by registered or certified mail, with return receipt, as follows:

If to the Non-Federal Sponsor:
Great Plains Division Director
The Nature Conservancy
1101 West River Parkway, Ste. 200
Minneapolis, MN 55415

If to the Government:
District Commander
U.S. Army Corps of Engineers, St. Paul District
332 Minnesota Street. Suite E1500
St. Paul, MN 55101

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.

ARTICLE IX - 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 X - 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 a party 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 Commander.

DEPARTMENT OF THE ARMY

THE NATURE CONSERVANCY

BY: _____
Eric Swenson
Colonel, U.S. Army
District Commander

BY:  _____
Rebecca Smith
Great Plains Division Director

DATE: 9/25/2023

DATE: 9/22/2023

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.



Rebecca Smith
Great Plains Division Director
The Nature Conservancy

DATE: 9/22/2023

NON-FEDERAL SPONSOR'S
SELF-CERTIFICATION OF FINANCIAL CAPABILITY
FOR AGREEMENTS

I, Ann Mulholland, do hereby certify that I am the Minnesota, North Dakota, and South Dakota Chapter Director of The Nature Conservancy (the "Non-Federal Sponsor"); that I am aware of the financial obligations of the Non-Federal Sponsor for the Leech Lake CAP 1135 Feasibility Study; and that the Non-Federal Sponsor has the financial capability to satisfy the Non-Federal Sponsor's obligations under the Leech Lake CAP 1135 Feasibility Study Cost Share Agreement.

IN WITNESS WHEREOF, I have made and executed this certification this 29 day of August , 2023 .

BY: 

TITLE: Chapter Director, The Nature Conservancy in MN, ND, SD

DATE: August 29, 2023

CERTIFICATE OF AUTHORITY

I, Rachel Hampton, do hereby certify that I am a Senior Attorney for The Nature Conservancy; that The Nature Conservancy is a legally constituted non-profit entity incorporated under the applicable laws of the District of Columbia, as a non-profit organization, exempt from paying Federal income taxes under Section 501 of the Internal Revenue Code (26 U.S.C. 501); that The Nature Conservancy has the full authority and legal capability to perform the terms of the Feasibility Cost Share Agreement between the Department of the Army and The Nature Conservancy in connection with the Leech Lake CAP 1135 Feasibility Study and to pay damages, if necessary, in the event of the failure to perform in accordance with the terms of this Feasibility Cost Share Agreement as required by Section 221 of Public Law 91-611, as amended (42 U.S.C. 1962d-5b); and that the person who executed this Feasibility Cost Share Agreement on behalf of The Nature Conservancy acted within her corporate authority.

IN WITNESS WHEREOF, I have made and executed this certification this 22nd day of September 2023.



Rachel Hampton
Senior Attorney, The Nature Conservancy