

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (“MOU”) is entered into this 16th day of September, 2015 by and between the Niobrara River Basin Alliance (“NRBA”), the Nebraska Game and Parks Commission (“Commission”), and the Nebraska Public Power District (“NPPD”), (collectively referred to herein as “Parties”), for the purposes of ensuring sustainable water use in the Niobrara River Basin (“Basin”) for multiple purposes as set forth below.

WHEREAS, the NRBA is a political subdivision of the State of Nebraska, created by and comprised of the five natural resources districts (“NRDs”) that are responsible for the management of ground water resources within the Niobrara River Basin. Those NRDs are the Upper Niobrara White Natural Resources District, the Middle Niobrara Natural Resources District, the Lower Niobrara Natural Resources District, the Upper Elkhorn Natural Resources District, and the Upper Loup Natural Resources District;

WHEREAS, NPPD is a political subdivision of the State of Nebraska and owns the Spencer Hydro Facility and certain water appropriations/rights associated with that facility, including Water Appropriations A-359R, A-1725, A-3574, and, if granted by the Nebraska Department of Natural Resources (“NDNR”), A-18503;

WHEREAS, the Commission is an agency of the State of Nebraska charged by the Nebraska Legislature with the authority to manage fish, wildlife, and recreation resources, including those within the Basin;

WHEREAS, the Parties intend to protect the flows of the Niobrara River to support recreation, fish, and wildlife dependent upon river flows;

WHEREAS, the Parties desire to work in a collaborative manner to achieve sustainable water supply within the Basin for the residents of the Basin and all Nebraskans;

WHEREAS, the Parties recognize the importance of the Niobrara River to the Basin and the State of Nebraska and desire to safeguard sufficient water for the long-term integrity of the Niobrara River;

WHEREAS, to protect the waters of the Basin for water users and fish, wildlife, and recreation, and to create less intrusive and less expensive water management options, the Parties have joined together to craft a comprehensive plan to protect the long-term integrity of the Basin;

The Parties hereby understand and agree to the following terms and conditions:

## **I. SPENCER HYDRO FACILITY.**

NPPD is the owner and operator of the Spencer Hydro Facility (“Facility”) located on the Niobrara River near Spencer, Nebraska. The Facility includes the structures (including the dam, gates and hydropower equipment), land, water appropriations, and perpetual easements for the reservoir. These assets allow the facility to produce hydroelectric power using the flows of the Niobrara River. NPPD holds water appropriations A-359R, A-1725, and A-3574 which total 2,035 cubic feet per second (“cfs”) of water.

NPPD has also applied for an additional water appropriation, A-18503, for 425 cfs which is pending before NDNR to allow for full operation of the hydro.

## **II. TRANSFER OF NPPD ASSETS.**

In consideration of the acquisition of funds outlined in Section III, the successful completion of the cooperative efforts identified below, and upon receipt of payment per section III below, NPPD agrees to: convey the Facility and water appropriations A-359R, A-1725, A-3574, and if granted, A-18503 (collectively referred to herein as “Appropriations”) to the NRBA and the Commission. The Facility, including land (approximately 230 acres), easements, and structures and the Appropriations shall be held and managed jointly by the NRBA and Commission.

Transfer of the Facility will occur through a contract of sale to be completed within 30 days of the successful transfer of the Appropriations as described below. Following transfer of the Facility to NRBA and the Commission, management of the lands and structures will be through an inter-local agreement between the Commission and NRBA.

NRBA and the Commission agree that upon and following the successful transfer of the water rights and the Facility, they will not be used for the generation of electricity. Should transfer of the Appropriations fail to occur due to lack of statutory authority or failure of NDNR to approve the transfer, NPPD will retain the Appropriations, Facility, and the ability to generate hydropower at the facility.

## **III. FUNDING/PAYMENT FOR PURCHASE.**

The Parties have agreed the total value of the Facility, including lands, structures, and the Appropriations, shall be \$12,000,000.00. Funding for the purchase is intended to be derived from multiple sources as follows: The NRBA shall contribute \$4,000,000.00 to be raised through statutorily authorized means held by the individual NRBA member natural resources districts, including grants. The Commission and NRBA shall apply for a Nebraska Environmental Trust Grant in the amount of not less than \$1,500,000.00. The Commission, NRBA, and NPPD shall jointly apply for a grant from the Water Sustainability Fund in the amount of not less than \$3,500,000.00. In addition, NPPD shall provide an in-kind value of \$3,000,000.00. Sources for the funding and the above amounts of funding may change to achieve the total as agreed upon by the Parties.

The \$9,000,000.00 will be paid to NPPD on the date of closing. It is anticipated that the date of closing will occur within 30 days of the approval of the transfer of ownership of the Appropriations by NDNR.

#### **IV. COLLABORATIVE LEGISLATIVE EFFORTS.**

In order to accomplish the desired objectives, it will be necessary for the Legislature to provide statutory authority for a permanent transfer of the existing Appropriations to a new multi-purpose use. Such legislation will recognize that the appropriations will maintain their original preference of manufacturing for purposes of surface water administration, and maintain their original priority dates. The Parties agree to jointly develop, propose and advocate this legislation, until passed or this MOU is terminated.

#### **V. CONTINUED OPERATION OF FACILITY.**

Until the transfer of ownership and successful permanent transfer to the new use of the Appropriations are completed, NPPD shall operate the Facility to protect the Appropriations.

#### **VI. DEDICATION TO INSTREAM BENEFITS.**

After passage of the legislation identified in paragraph IV above, NPPD shall make the appropriate filings with NDNR to transfer ownership of the Appropriations and permanently transfer to the new use(s). NRBA and the Commission shall manage these converted Appropriations in accordance with a separate management agreement that will include dedicated instream benefits.

#### **VII. COLLABORATIVE COMMUNICATIONS.**

To ensure local residents of the Basin, Nebraskans, and all other interested parties, including the United States Park Service, United States Fish & Wildlife Service, and the Niobrara Council, will be fully informed as to the intent and goals of this agreement and the measures to follow, the Parties agree to collaborate and coordinate all communications.

#### **VIII. DEADLINES.**

The Parties agree to reasonable efforts in good faith to effectuate the provisions of the MOU. The Parties intend to accomplish the terms of this agreement on or before June 1, 2017. The agreement may be extended upon mutual, unanimous, written agreement of the Parties.

#### **IX. VERDEL INSTREAM FLOW**

Upon execution of this MOU, NRBA and the Commission agree to jointly file an application in accordance with NEB. REV. STAT. §§ 46-2,107 - 46-2,119 for a permit to appropriate water for instream flow appropriations with the NDNR to protect flows along the 39 mile stretch of the Niobrara River from just below the Facility to the confluence of the Missouri River for the conservation of fish, wildlife, and recreation. A copy of the initial application is attached hereto as Exhibit A. NPPD agrees not to oppose the application.

Executed this 16th day of September, 2015.

  
\_\_\_\_\_  
NIOBRARA RIVER BASIN ALLIANCE

  
\_\_\_\_\_  
NEBRASKA GAME & PARKS COMMISSION

  
\_\_\_\_\_  
NEBRASKA PUBLIC POWER DISTRICT

**STATE OF NEBRASKA  
DEPARTMENT OF NATURAL RESOURCES  
APPLICATION FOR A PERMIT TO APPROPRIATE WATER FOR INSTREAM FLOWS**

INSTRUCTIONS	For Department Use Only
<p>Complete Items 1 through 5 by typing the appropriate information and by placing an (X) in the appropriate box.</p> <p>The following information must accompany this form and is made a part of this application. Refer to Department Rules, Title 457, Chapter 18, for requirements A -F.</p> <p>A. Copy of any studies completed to quantify the instream flow.                      B. List of persons and their addresses who testified at public hearings held by the applicant.                      C. U.S. Geological Survey Topographic Quadrangle map(s) marked to show the location of the stream reach.                      D. An evaluation of the availability of unappropriated water.                      E. An evaluation of how the appropriation would affect senior appropriations.                      F. An evaluation of whether the proposed appropriation is in the public interest.</p>	<p>Filed in the office of the Department of Natural Resources at _____ a.m./p.m. on _____, 20____.</p> <p>Application No. _____</p> <p>Water Division _____</p> <p>Receipt No. _____ Amount _____</p>

1. Name of applicant: Nebraska Game and Parks Commission Telephone Number (402 ) 471-5539

Address 2200 North 33rd Street  
 City Lincoln State Nebraska Zip Code 68503-0370

2. Identify the stream Niobrara River

3. A permit is sought for the purpose of providing flows for:  
 Fish & Wildlife       Recreation

4. Describe below the quantity of water necessary to provide adequate instream flows, and the time of year when instream flows are most critical.

Beginning Month/Day	Ending Month/Day	Quantity cfs.
Maintain the fish community from Spencer Dam downstream to Niobrara confluence with the Missouri River (Verdel gage).		
January 1 - February 28(29), for overwintering late habitat		2,084
March 1 - May 14, for early spawning habitat		2,270
May 15 - June 30, for late spawning habitat		2,270
July 1 - September 30, for summer rearing and growth habitat		1,765
(Includes paddlefish, pallid sturgeon, shovelnose sturgeon, sauger, adult channel catfish)		
October 1 - December 31, for overwintering early habitat		1,969

5. I believe the information contained in this application is true, complete and accurate.

\_\_\_\_\_  
 Date Signature and Title

This form must be completed in full. An incomplete or defective application will be returned for correction. A non-refundable filing fee of \$10.00 (payable to the Department of Natural Resources) must accompany this application. Forward this application and fee to:

State of Nebraska  
 Department of Natural Resources  
 301 Centennial Mall South  
 P.O. Box 94676  
 Lincoln, NE 68509  
 (402)471-2363

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES
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B. List of persons and their addresses who testified at public hearings held by the applicant.
C. U.S. Geological Survey Topographic Quadrangle map(s) marked to show the location of the stream reach.
D. An evaluation of the availability of unappropriated water.
E. An evaluation of how the appropriation would affect senior appropriations.
F. An evaluation of whether the proposed appropriation is in the public interest.

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Receipt No. \_\_\_\_\_ Amount \_\_\_\_\_

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[X] Fish & Wildlife [ ] Recreation

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Table with 3 columns: Beginning Month/Day, Ending Month/Day, Quantity cfs.
Row 1: April 1 - April 30, for spring migration roosting habitat, 1,806
Row 2: October 1 - October 31, for fall migration roosting habitat, 1,714

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 Fish & Wildlife       Recreation

4. Describe below the quantity of water necessary to provide adequate instream flows, and the time of year when instream flows are most critical.

	Beginning Month/Day	Ending Month/Day	Quantity cfs.
Maintain piping plover nesting habitat from Spencer Dam downstream to the Niobrara confluence with the Missouri River (Verdel gage).	May 1	August 31	1,424

5. I believe the information contained in this application is true, complete and accurate.

\_\_\_\_\_  
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- B. List of persons and their addresses who testified at public hearings held by the applicant.
- C. U.S. Geological Survey Topographic Quadrangle map(s) marked to show the location of the stream reach.
- D. An evaluation of the availability of unappropriated water.
- E. An evaluation of how the appropriation would affect senior appropriations.
- F. An evaluation of whether the proposed appropriation is in the public interest.

Filed in the office of the Department of Natural Resources at \_\_\_\_\_ a.m./p.m. on \_\_\_\_\_, 20\_\_\_\_.

Application No. \_\_\_\_\_

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3. A permit is sought for the purpose of providing flows for:  
 Fish & Wildlife  Recreation

4. Describe below the quantity of water necessary to provide adequate instream flows, and the time of year when instream flows are most critical.

Beginning Month/Day	Ending Month/Day	Quantity cfs.
Maintain least tern nesting habitat from Spencer Dam downstream to the Niobrara confluence with the Missouri River (Verdel gage).		
May 1 - August 31, for nesting habitat		1,818

5. I believe the information contained in this application is true, complete and accurate.

Date \_\_\_\_\_

Signature and Title \_\_\_\_\_

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## RIVER FLOW MANAGEMENT AGREEMENT

This Agreement is made this 16<sup>th</sup> day of September, 2015, by and between the Niobrara River Basin Alliance ("NRBA") and the Nebraska Game & Parks Commission ("Commission"), collectively referred to herein as "Parties."

WHEREAS, the NRBA is a political subdivision of the State of Nebraska, created pursuant to the Interlocal Cooperation Act, NEB. REV. STAT. §§ 13-801 *et seq.*, and comprised of five natural resources districts ("NRDs") with jurisdiction within the Niobrara River Basin ("Basin"). The NRBA members are charged by the Nebraska Legislature to, among other duties, manage ground water for a variety of purposes. The NRBA members are authorized pursuant to NEB. REV. STAT. § 46-2,108 to hold instream flow appropriations;

WHEREAS, the Commission is an agency of the State of Nebraska charged by the Nebraska Legislature to, among other duties, take action to study and acquire appropriations for the protection of recreation, fish, and wildlife resources. The Commission is authorized to hold instream flow appropriations pursuant to NEB. REV. STAT. § 46-2,108;

WHEREAS, the NRBA and Commission intend to acquire ownership in certain water appropriations identified as A-359R, A-1725, A-3574, and if granted, A-18528 (collectively referred to herein as "Appropriations"), all associated with the Spencer Hydro Facility ("Facility"), for the purposes of river flow support and management;

WHEREAS, the NRBA and Commission have worked in a collaborative manner to obtain funding to acquire the Appropriations from the Nebraska Public Power District;

### IT IS HEREBY AGREED AS FOLLOWS:

I. Conversion of Appropriations: The Parties acknowledge that to accomplish the goals and objectives of this Agreement, the Nebraska Legislature must first authorize the existing manufacturing Appropriations to be converted to appropriations for flow support. Once such authorization has been granted, the Parties agree to jointly make application to the Nebraska Department of Natural Resources ("NDNR") to accomplish the conversion of the Appropriations. Such application shall occur as quickly as practicable following the legislative authorization.

II. Administration of Appropriations For Instream Uses: Upon a duly authorized order from NDNR granting the conversion and transfer of the Appropriations from NPPD, the Parties agree to jointly call for the administration of water for the full amount of the converted Appropriations, at least one day per year for as long as the Appropriations are held, unless such Appropriations have been otherwise utilized as set forth in paragraph III below.

The Parties agree to call for water administration at the Facility, throughout the year, to protect flows of at the United States Geological Survey ("USGS") stream gage 06461500, located on the Niobrara River near Sparks, Nebraska, in the amounts identified in the table attached hereto as Exhibit A, and incorporated herein by reference, to protect the geological, hydrologic, and geographic integrity of the Niobrara River, and to conserve fish, wildlife and recreational uses of the river. Calling for water administration pursuant to this agreement is based upon the

decision of the Nebraska Supreme Court in, *In re 2007 Administration of Appropriations of Waters of Niobrara River*, 288 Neb. 497, 851 N.W.2d 640 (2014), and the actual administration for appropriations A-359R, A-1725, and A-3574 by the Nebraska Department of Natural Resources (NDNR) from 2007 through 2015. Should the Nebraska Supreme Court modify its decision regarding the flow amounts that an appropriator is entitled to call for administration or the NDNR change or modify its administration, calls for water administration shall be automatically adjusted on a *pro rata* basis relative to any reductions to the total flow amount the Parties are authorized to call for administration, until such time as appropriate modifications to Exhibit A can be made.

III. Utilization of Appropriations For Water Management: The Parties agree that the NRBA's individual NRD members may utilize all appropriations not subject to administration for instream uses as set forth in paragraph II, for water management purposes as set out in the individual NRD and basin-wide Integrated Management Plans ("IMPs"), as approved by the NDNR.

IV. Subordination: The NRBA and the Commission will honor the surface water preferences as set forth in Nebraska Constitution Article 15, Section 6 and may enter into subordination agreements with any of the junior appropriators that existed prior to the date of this agreement. Proceeds from the subordination agreements shall be applied toward the maintenance of the jointly held real property, including buildings and other structures. Any proceeds from the subordination agreements that remain after paying for maintenance of the jointly held real property, shall go to the NRBA.

V. Support for Integrated Management Plans: The Commission shall collaborate in the development of the NRBA members voluntary or mandatory integrated management plans. Further, the Commission shall provide written or oral support to the voluntary or mandatory integrated management plans to ensure the continued viability of the instream flows identified in Exhibit A of this Agreement.

VI. Annual Evaluation: The Parties agree to meet at least annually to evaluate the administration of the Appropriations to determine whether any adjustments are appropriate.

VII. Amendments: Any amendments to this Agreement become effective only after the proposed amendment is jointly signed by both parties.

VIII. Termination: Although the parties to this Agreement do not intend to terminate this Agreement, in the event that either Party finds that this Agreement is no longer workable within the purposes stated herein, this Agreement may be terminated upon 30 days written notice.

A. Upon termination, the jointly held water rights will be divided equally by the Parties in the amount of 1,017.5 cubic feet per second ("cfs"), per party, at the Spencer Hydro Facility.

B. Upon termination, the Commission shall have the option to purchase an additional 282.5 cfs from the NRBA to meet the flow requirements identified in Exhibit A, May 15 – Sep 30, in the amount of One Million (\$1,250,000.00) Dollars, plus as adjusted in accordance with the Consumer Price Index from the date of termination. The Commission shall have up to five (5) years to pay the amount in full from termination to the NRBA for the additional water.

  
\_\_\_\_\_  
For the Commission

9/16/2015  
Date

  
\_\_\_\_\_  
For the NRBA

9/16/2015  
Date

## EXHIBIT A

**Niobrara River Instream Flows.** The Nebraska Game and Parks Commission's studies, have found that the flows in the table below are important for protecting and conserving fish, wildlife, and recreation along the Niobrara River.

<u>Month</u>	<u>USGS Gage 06461500</u> <u>Sparks Gage</u>
Jan 1 – Feb 28	965 cfs*
Mar 1 – May 14	700 cfs
May 15 – Sep 30	635 cfs
Oct 1 – Dec 31	850 cfs

\*cfs = cubic feet per second