

# McDill Dam Repair and Transfer Agreement 2012

## INTERGOVERNMENTAL AGREEMENT WITH WHITING, PORTAGE COUNTY, STEVENS POINT AND THE MC DILL LAKE DISTRICT REGARDING THE REPAIR AND TRANSFER ISSUES RELATING TO COUNTY TRUNK HIGHWAY HH AND THE STRUCTURE OF THE UNDERLYING McDILL DAM

THIS AGREEMENT is entered by Portage County, (hereafter referred to as the "County"), and the Village of Whiting, (hereafter referred to as the "Village"), the City of Stevens Point (hereinafter "City") and the McDill Inland Lake Protection and Rehabilitation District (hereinafter "District").

1. This agreement is entered into by the parties as a contract under the Wisconsin Intergovernmental Agreement Statute, Wis. Stats., §66.0301. The purpose of this agreement is to specify terms for cooperative arrangements for the County, the City, the Village, and the District regarding the repair of the structure of the McDill Dam a/k/a the McDill Pond Dam (as more particularly described in the 1999 DNR permit to the Village) and the subsequent transfer of ownership rights and license for the dam from the Village to the District, and the operational maintenance responsibilities from the Village to District and then to the City.

2. The parties represent that they have the following understandings:

(a) Whereas the structure known as the McDill Dam (the structure on the Plover River in the Village of Whiting) upon which the County owns, operates, and maintains the right of way for its County Highway "HH" is one in which both the county and the Village have legal interests; and

(b) Whereas the Village owns the dam and has therefore a permit from the State of Wisconsin, Department of Natural Resources detailing its legal obligations; and

(c) Whereas inspection of the McDill Dam by the Village has revealed structural deficiencies which necessitated the draw-down of water and a closure of Highway "HH" (which has subsequently re-opened); and

(d) Whereas the Village and the County engaged an engineering firm (AECOM) to develop plan options which would repair the dam; and

(e) Whereas the Village, based upon the aforementioned plans, applied for and has received an approval for DNR grant funding for the repair project, with approval amounts as follows:

Grant Request Amount	\$228, 325.00
40% Contingency	\$ 91, 330.00
Total Proposed Allocation	\$319, 655.00

(f) Whereas the County, the City and the District agree to fund the remainder cost of repairs in three equal shares (one share apiece) with the Village remaining as the supervisory authority for the repair due to its status as license holder, with such costs as set forth in the Municipal Dam Grant Program Grant Application signed by the Village and dated September 14, 2011 as set forth in Attachment C; and

(g) Whereas the County will coordinate the funding aspects of the repair project; and

(h) Whereas upon the satisfactory completion of the repair project and certification thereof by the supervisory engineering firm, the parties agree that, within thirty days of the certification that: all ownership rights in the dam shall be transferred from the Village to the

## McDill Dam Repair and Transfer Agreement 2012

1 District, subject to DNR approval; the county's right of way property interests in the  
2 roadway of the highway ("HH"); and that the Village and District will transfer operational  
3 maintenance duties to the City.  
4

5 3. The County, the City and the District agree to fund the remainder cost of repairs in three  
6 equal shares (one share apiece) with the Village remaining as the supervisory authority for the  
7 repair due to its status as license holder, with such costs as set forth in the Municipal Dam  
8 Grant Program Grant Application signed by the Village and dated September 14, 2011, with  
9 remainder defined as the amount unpaid after the receipt of the aforementioned DNR grant, as  
10 set forth in Attachment C.  
11

12 4. The County will coordinate the funding and fiscal aspects of the repair project.  
13

14 5. Upon the satisfactory completion of the repair project and certification thereof, the parties  
15 agree that, within thirty days of the certification that: all ownership rights in the dam shall be  
16 transferred from the Village to the District, subject to DNR approval; the county's right of way  
17 property interests in the roadway of the highway ("HH") under the terms and conditions as set  
18 forth in Attachment A to this Agreement and incorporated herein by reference; and that the  
19 Village and District will transfer operational maintenance for the dam from the Village to the  
20 District and then to the City under the terms and conditions as set forth in Attachment B to this  
21 Agreement.  
22

23 6. The parties to this Agreement will act in good faith in attempting to meet timelines as set forth  
24 in this agreement giving due consideration to the fact that the Agreement provides for multitasks  
25 of different parties which may be delayed based on other non-parties such as the Department of  
26 Natural Resources being a regulatory body which this contract is subject to.  
27

28 7. Term. This agreement shall be effective upon its execution and terminate upon the transfer of  
29 authority set forth in paragraph 5. It is anticipated that the term shall be completed no later than  
30 October 1, 2012. The parties all shall agree upon a repair schedule for the repair project as set  
31 forth in paragraph 3.  
32

33 8. Integration. This written contract is one which all parties agree to be the final complete and  
34 integrated expression of their agreement. Except as specifically stated in this agreement, no  
35 outside or additional terms or conditions exist. This agreement is an integrated final contract of  
36 the parties, superseding all prior verbal statements of any representative or agent of the parties.  
37 Any modification of this agreement must be in writing.  
38

39 9. Binding Effect. The signature of the parties shall be of binding effect such that each will  
40 comply with all terms and conditions expressed herein.  
41

42 10. Prohibition of Discrimination. All parties hereby agree to specifically comply with all state,  
43 federal, and local law prohibiting discrimination by reason of race, color, religion, sex or national  
44 origin during the terms of this contract  
45

46 11. Compliance. Each party shall abide in all aspects with local, state, and federal laws, rules  
47 and regulations which concern the operation of municipal entities, including specifically laws  
48 concerning equal opportunity, anti-discrimination, and the Americans with Disabilities Act. This  
49 agreement is an intergovernmental contract authorized pursuant to sec. 66.0301, Wis. Stats.  
50

51 12. Complete understanding. This agreement contains the entire understanding of the parties  
52 with respect to the subject matter hereof and supersedes all prior oral or written agreements of  
53 the parties with respect to such subject matter. By execution of the agreement, all parties agree

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1 that they have read and understood all terms of this agreement. For purposes of construction,  
2 this agreement shall be deemed to have been drawn jointly and equally by the parties to the  
3 agreement.  
4

5 13. Severability. If any portion of this Agreement is held to be invalid, such provision shall be  
6 considered severable, and the remainder of this Agreement shall not be affected.  
7

8 14. Wisconsin Law. This agreement shall be enforced pursuant to the laws of the State of  
9 Wisconsin.  
10

11 15. Final Clause. Each party has read the agreement and certifies that it will comply with all its  
12 terms and conditions and that the official executing the agreement has lawful authority to bind  
13 the party. Further, each party will retain an original copy of this agreement, therefore it shall be  
14 executed in four original documents.  
15

16 THE UNDERSIGNED HAS READ THE FOREGOING AGREEMENT, FULLY UNDERSTANDS  
17 IT, AND HAS FULL AUTHORITY TO SIGN IT.  
18

19 IN WITNESS WHEREOF each party executes this agreement on the date indicated by its  
20 authorized representative.  
21

22  
23 FOR PORTAGE COUNTY

24   
25 \_\_\_\_\_  
26 Patty Dreier, County Executive  
27


Dated this 20 day of March 2012

28 FOR THE VILLAGE OF WHITING

29   
30 \_\_\_\_\_  
31 Paul Stroik, President  
32

Dated this 20 day of MAR 2012

33 FOR THE CITY OF STEVENS POINT

34   
35 \_\_\_\_\_  
36 Andrew Halverson, Mayor  
37

Dated this 19<sup>th</sup> day of March 2012

38 FOR LAKE DISTRICT (McDill Inland Lake Protection and Rehabilitation District)

39   
40 \_\_\_\_\_  
41 Jack Negaard, Chair  
42

Dated this 15 day of March 2012

43 Attachment A-Transfer of Ownership Rights From Village to the District

44 Attachment B-Transfer of Operational Maintenance Duties Between the City and the District

45 Attachment C-Costing Spreadsheet  
46  
47

## AGREEMENT

This Agreement is made by and between the Village of Whiting, a Wisconsin municipal corporation (the "Village"), and the McDill Inland Lake Protection and Rehabilitation District, a Wisconsin Chapter 33 District (the "District").

## RECITALS

R.1. The Village owns and maintains the dam located on McDill Pond in Whiting, Wisconsin (the "Dam").

R.2. The Dam provides part of the underlay of Portage County Trunk Highway HH ("Highway HH").

R.3. In the late spring of 2011, the Village discovered a sink hole in the embankment portion of the Dam/Highway HH.

R.4. An AECOM study commissioned by the Village and Portage County proposed several alternatives to remedy the situation.

R.5. A consensus arose that the medium cost alternative of the three remedies be pursued.

R.6. At the request of the District, the Village applied for a grant (the "Grant") with the Wisconsin Department of Natural Resources (the "DNR") that, if awarded, would partially fund the needed repairs to the Dam/Highway HH (the "Repairs").

R.7. Regardless of whether or not it is awarded the Grant, the Village has no money to fund any or all of the Repairs. Further, the Village no longer has the funds to continue maintenance and ownership of the Dam.

R.8. The Village desires to transfer ownership of the Dam to a responsible party or to abandon the Dam if no such ownership transfer can take place.

R.9. The District desires that the Dam be repaired and stay in place. The District has expressed a willingness to assume ownership subject to approvals by its board and the DNR.

## AGREEMENT

Now, therefore, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and in consideration of the above Recitals which are incorporated herein by reference, the parties agree as follows:

1. The Village shall sell, transfer and assign the Dam to the District together with a non-exclusive access easement for repairs and maintenance of the Dam and any and all flowage and riparian rights appurtenant to the Dam. The Dam on the north side runs from natural embankment to natural embankment. On the south side, it runs from the natural embankment (beginning at the fence located by the rip rap that is east of the park entrance) to Post Road. (See attached photo with "X's" marking the area to be transferred.) The transfer will be subject to Portage County's rights in Highway HH as located on the Dam. Further, the Village reserves the right to maintain and replace existing utilities in the Highway HH right-of-way as well as construct new utilities as necessary. Any utility maintenance and construction by the Village will be performed in a manner as to not interfere with the District's operation and maintenance of the Dam. The District, when using the access easement for repairs and maintenance of the Dam, will promptly restore the surface of the easement area disturbed by the District's use to its condition before the disturbance. The Village retains all riparian rights to its land located below and south of the Dam. However, such riparian rights will be subject to the flowage rights conveyed to the District. The Village or its assigns will not make any claim for damage or loss of use of its riparian rights by the District in exercising its flowage rights.

2. The Dam, easement, flowage and riparian rights will be transferred "as is" and without any representation or warranty by Quit Claim Deed. Any necessary costs incurred to close the sale such as survey and title insurance costs will be the sole responsibility of the District.

3. As additional consideration herein, the District will pay the Village \$59,595.00 for costs incurred by the Village in connection with its ownership and maintenance responsibilities for the Dam over the past two and one-half (2½) years. These costs include the Inspection and Operation Manual (IOM), Emergency Action Plan (EAP), and Dam Analysis Report. This amount is due and payable at the time of closing on the sale of the Dam.

4. Pending the closing on the sale of the Dam, the District agrees that the Village will not be responsible for any of the costs of the Repairs to the Dam, and that such party will indemnify and hold the Village harmless from any such costs including, but not limited to, cost overruns for the Repairs.

5. The closing on the sale of the Dam will occur as soon as possible after approval of the transfer of ownership by the DNR. The parties agree to cooperate in executing all necessary documents and providing needed information to facilitate the approval of such transfer and to otherwise carry out the provisions of this Agreement.

6. Upon transfer of ownership of the Dam pursuant to this Agreement, the Village will no longer have any responsibility for the Dam including, but not limited to, maintenance and financial responsibilities.




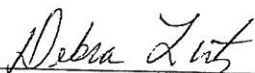
7. If the DNR fails to approve the transfer of Dam ownership to the District, the District will promptly seek a new buyer of the Dam acceptable to the DNR (the "Substitute Buyer"). Any costs incurred by the Village arising from its ownership and operation of the Dam during this period of obtaining DNR approval of the transfer of the Dam to the Substitute Buyer will be the responsibility of the District. The District agrees to indemnify and hold the Village harmless from such costs. Further, if the transfer of the ownership of the Dam to the Substitute Buyer is not approved by the DNR within one (1) year of the completion of the Repairs, it is agreed that the Village may then commence proceedings to abandon the Dam.

8. In any legal proceedings instituted by either party for the enforcement of the terms and conditions of this Agreement, the successful party shall be reimbursed by the other party for all costs, expenses and actual attorney fees which are reasonably incurred in such proceedings.


Dated: February 15<sup>th</sup>, 2012.

THE VILLAGE OF WHITING

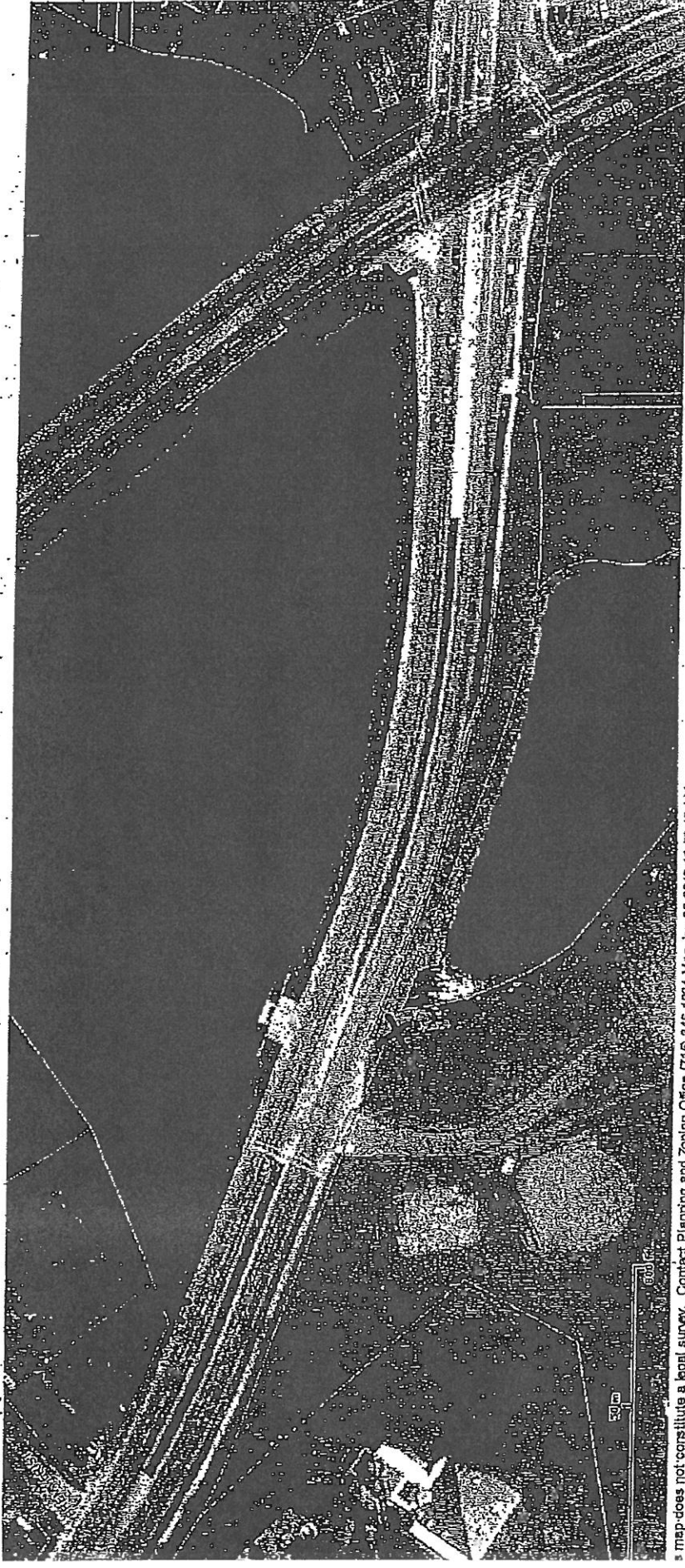
By:   
Paul Stroik, Village President

  
Debra Lutz, Clerk/Treasurer

MCDILL INLAND LAKE  
PROTECTION AND  
REHABILITATION DISTRICT

By:   
Jack Negaard, President

  
Krista Olson, Secretary



## **OPERATION AND MANAGEMENT AGREEMENT**

### **FOR THE McDILL DAM**

THIS OPERATION AND MAINTENANCE AGREEMENT FOR THE McDILL DAM (“Agreement”) is entered into as of the \_\_ 20th \_\_ day of February, 2012 by and between McDill Inland Lake Protection and Rehabilitation District, a Wisconsin municipal corporation organized pursuant to Chapter 33 of the Wisconsin Statutes (“District” or “Owner”) and the City of Stevens Point, a Wisconsin municipal corporation (“Operator”), collectively referred to as “the Parties.”

### **RECITALS**

WHEREAS the District has entered into an agreement with the Village of Whiting, pursuant to which the District will assume legal title and regulatory responsibility for the dam operation and maintenance and assume the ownership of the McDill Dam, located in the Village of Whiting, Portage County, Wisconsin upon completion of the dam reconstruction and the approval of the dam operation permit by the Department of Natural Resources (DNR).

WHEREAS the Operator has been requested to operate the McDill Dam, and will obtain the qualifications and expertise necessary to operate dams in compliance with applicable state and federal regulatory requirements and has reviewed, understands and accepts the Operating Orders for the McDill Dam, and

WHEREAS, the District desires to engage Operator to operate and manage the McDill Dam upon its transfer from the Village of Whiting to the District and Operator will undertake the operation and management of the McDill Dam pursuant to the terms, provisions and conditions of this Agreement, and



NOW THEREFORE IT IS HEREBY AGREED:

**I. SCOPE OF SERVICES**

**1.1. Scheduled Services: Dam Operation, Inspection and Maintenance.** Operator shall assume the responsibilities for General Operation, Inspection and maintenance of the McDill Dam on behalf of the District during the term of this Agreement, including any extension. Operation, inspection and maintenance shall be performed as described in the *McDill Dam Operation, Inspection and Maintenance Plan (the "OIM Plan" (included as part of this contract by reference) as well as the Emergency Action Plan (the "EA Plan")* attached as Exhibit A.

**Operation and Inspection Services** shall generally mean the operation and adjustment of vertical slide gates as necessary to maintain discharge and water surface elevations; the preparation, distribution and archiving of water levels, gate settings and incident reports in paper and electronic form, the execution of "operation and maintenance inspections", and the coordination of the "engineering inspections" all pursuant to sections 2 and 3 in the OIM Plan.

**Maintenance Services** shall generally include (i) the maintenance of vegetation growth, signage and fencing, removal of debris and obstructions, and the maintenance of erosion control features, all pursuant to section 4 in the OIM Plan. When maintenance items exceed the scope as described above, work should proceed according to Exhibit B.

**1.2. Facilities Knowledge and Advice.** Operator shall become familiar with the McDill Dam and its control of discharges and water elevations on the McDill Pond and reaches of the Plover River, including review and understanding of the Scope of Services, the OIM Plan; and the physical attributes of the dam site and the dam (including its gates, equipment and facilities).

Operator shall review and recommend revisions to the *OIM Plan*, as it deems appropriate. The District may, after review, consultation and approval by Operator, revise the Plan, provided that any such revisions are consistent with the responsibilities of the Parties. The District may at any time, in response to suggestions made by Operator or on its own initiative, elect to revise the *OIM Plan* to meet the then-current needs of the District, provided that such revisions are consistent with the responsibilities of the Parties under this Agreement and accepted by Operator.

**1.3. Unscheduled Services.** When the District determines that Services not included in the *OIM Plan* are required, the District shall provide Operator with a description of such services, and may request that Operator provide the District with an estimate of the cost of the proposed additional services, and a schedule in which Operator could perform the services. Should the projected cost and schedule be acceptable to the District, the District shall give Authorization and Operator shall proceed to perform the additional Services under the terms and conditions set forth in Paragraph IV (4.2) of this Agreement. Nothing herein shall preclude the District from electing to obtain additional services from a third party supplier.

**1.4. Emergency Response Services.** Operator shall designate a person to serve as the primary operator of the dam (the "Primary Operator") pursuant to the EA Plan appended to the *OIM Plan* and shall provide the District and the Wisconsin Department of Natural Resources with the name and telephone contract number of such Primary Operator and provide for emergency telephone contact as provided in the EA Plan. In the event that any person notifies the Primary Operator of any condition at the dam or dam site, the Primary Operator or designated appointee shall take all necessary actions as specified in the EA Plan and shall promptly investigate the condition, advise the District's representative of the nature of the condition and recommended remedial actions and shall supervise and implement remedial

actions. Operator shall take prompt and timely action to prevent or minimize damage to the Dam facilities and equipment, and to facilitate their restoration to service, in a weather or other emergency. Operator shall maintain Staffing and Equipment sufficient for 24-hour per day, seven days per week provision of Emergency Response Services to the Dam according to the EA Plan. Operator shall be compensated for such service as provided in Exhibit B.

**1.5. Special Training.** Operator shall maintain safety and training programs adequate and necessary to ensure that all personnel performing the Services are fully capable, qualified and trained to perform the Services.

## **II. TERM OF AGREEMENT.**

This Agreement shall be effective upon the date of execution and shall continue in effect through December 31, 2022. The Agreement may by mutual agreement be renegotiated at the end of the term.

## **III. REQUIRED REGULATORY APPROVALS.**

The effectiveness of this Agreement is hereby expressly conditioned upon the issuance of all permits, regulatory authorizations and regulatory approvals that are required by the Parties to enter into and perform their obligations under this Agreement in a form acceptable in the reasonable judgment of the Party affected thereby.

## **IV. COMPENSATION AND INVOICING.**

**4.1. Scheduled Services.** The District shall compensate Operator for the Schedule of Services described in Paragraph 1.1 in the amounts as set forth on Exhibit B which is attached hereto. All payments shall be due within sixty (60) days of receipt of an invoice submitted by Operator to District.

**4.2. Unscheduled Services.** Operator shall submit invoices for the provision of any Unscheduled or Emergency Response Service pursuant to Paragraphs 1.3 and 1.4 of this Agreement, within 60 days following the completion of such services, itemizing its direct and indirect costs by category as set forth in Exhibit B. The District shall compensate Operator for such additional Services set forth in Exhibit B.

**4.3. Audits and Adjustments.** Operator shall maintain and retain for such time as the District may reasonably direct, but not for longer than six years, the books and other records needed to document the costs Operator incurs as a result of fulfilling its obligations under Paragraphs 1.3 and 1.4 of this Agreement. Operator shall respond to any reasonable request from the District for information related to a cost charged by Operator to the District by providing the District the information reasonably needed by the District to verify the cost in question. From time to time, the District may conduct, and Operator shall permit the District to conduct or cause to be conducted by its authorized agents, at the District's expense, audits of the books and records of Operator that relate to the Services provided under this Agreement. Such audits will be conducted at reasonable, mutually agreed upon times, provided that the District must contest invoices within one year of receipt and must complete any audit relating to a contested invoice within a reasonable period of time thereafter.

## **V. PERFORMANCE STANDARDS**

**5.1.** Operator represents and warrants that all Services shall be performed through trained and competent personnel, shall be performed in a manner that will enhance the useful life, safety and reliability of the McDill Dam, and shall be performed in accordance with (i) the OIM Plan and the Operating Order; (ii) all applicable state and federal regulations, permits and licenses; (iii) generally accepted standards of practices, methods and acts engaged in or approved

by a significant portion of the dam industry; and (iv) any applicable insurance policies and manufacturers' recommendations and in a manner that will preserve all manufacturers' warranties (the "Performance Criteria").

In the event of a conflict between any of the Performance Criteria, Operator shall determine a course of action to be taken.

5.2. Operator shall be responsible for determining the manner of performance and for supervision of the work specified herein.

5.3. The District shall procure and maintain all certificates and licenses required for the performance of the Services, and shall provide Operator with all necessary access to the facilities and property upon which the McDill Dam is located.

5.4. The District shall provide any information known or readily available to it including available specifications, documents and drawings regarding existing structures and facilities, subsurface conditions, or other conditions relevant to the performance of the Services.

## **VI. FORCE MAJEURE**

(a) Neither Party shall be responsible or liable, or deemed in breach hereof, to the extent the performance of its respective obligations hereunder is prevented or delayed due solely to circumstances beyond the reasonable control and without the fault or negligence of the party experiencing such impediment to performance, including but not limited to acts of God; war; riots; strikes, lockouts or other labor disturbances; labor or material shortages, including unavailability of Operator resources required for Operation Services or required for fulfillment of the Operation, Inspection and Maintenance Plan; actions or failures to act on the part of governmental authorities preventing or delaying performance; inability despite due diligence to obtain required licenses; or fire (such causes hereinafter called "Force Majeure").



(b) The Party experiencing the Force Majeure shall exercise due diligence in endeavoring to overcome any Force Majeure impediment to its performance, but settlement of its labor disturbances shall be entirely within its discretion. The Party experiencing the Force Majeure shall promptly give written notification to the other Party. This written notification shall include a full and complete explanation of the Force Majeure and its cause, the status of the Force Majeure, and the actions such Party is taking and proposes to take to overcome the Force Majeure.

## **VII. LIMITATION ON LIABILITY**

With respect to claims by and between the Parties under this Agreement, the measure of damages at law or in equity in any action or proceeding shall be limited to direct actual damages only, such direct actual damages shall be the sole and exclusive remedy and all other remedies or damages at law or in equity are waived and neither Party shall be liable in statute, contract, in tort (including negligence), strict liability, warranty or under any other legal theory or otherwise to the other Party, its agents, representatives, and/or assigns, for any special, incidental, punitive, exemplary or consequential loss or damage whatsoever, including, but not limited to, loss of profits or revenue on work not performed, for loss of use of or under-utilization of the other Party's facilities, loss of use of revenues, attorneys' fees, litigation costs, or loss of anticipated profits, resulting from either Party's performance or non-performance of an obligation imposed on it by this Agreement, without regard to the cause or causes related thereto, including the negligence of any party. The Parties expressly acknowledge and agree that this limitation shall apply to any claims for indemnification under Article IX of this Agreement. The provisions of this Paragraph shall survive the termination or expiration of this Agreement.

## VIII. INDEMNITY

**8.1. Operator's Indemnification.** Subject to the provisions of Article VIII, Operator shall indemnify, hold harmless and defend the District, and its officers, directors, employees, affiliates, managers, members, trustees, agents, contractors, subcontractors, affiliates' employees, invitees and successors, from and against any and all claims, demands, suits, obligations, payments, liabilities, costs, losses, judgments, damages and expenses (including the reasonable costs and expenses of any and all actions, suits, proceedings, assessments, judgments, settlements, and compromises relating thereto, expert fees and reasonable disbursements in connection therewith) for damage to property, injury to any person or entity, or death of any individual, including the District's employees, Operator's employees, or any other third parties, to the extent caused wholly or in part by any act or omission, negligent or otherwise, by Operator or its officers, directors, employees, agents, contractors, subcontractors and invitees arising out of or connected with Operator's performance or breach of this Agreement, or the exercise by Operator of its rights hereunder; provided, however, that the provisions of this Paragraph shall not apply if any such injury, damage or death is held to have been caused by the negligence or intentional wrongdoing of the District, its agents or employees.

**8.2. The District's Indemnification.** Subject to the provisions of Article VIII, the District shall indemnify, hold harmless and defend Operator, its parent and its officers, directors, employees, affiliates, managers, members, trustees, shareholders, agents, contractors, subcontractors, invitees and successors, from and against any and all claims, demands, suits, obligations, payments, liabilities, costs, losses, judgments, damages and expenses (including the reasonable costs and expenses of any and all actions, suits, proceedings, assessments, judgments, settlements, and compromises relating thereto, reasonable attorneys' and expert fees and reasonable disbursements in connection therewith) for damage to property, injury to any person

or entity, or death of any individual, including Operator's employees, the District's employees, or any other third parties, to the extent caused wholly or in part by any act or omission, negligent or otherwise, by the District or its officers, directors, employees, agents, contractors, subcontractors and invitees arising out of or connected with the District's performance or breach of this Agreement, or the exercise by the District of its rights hereunder; provided, however, that the provisions of this Paragraph shall not apply if any such injury, damage or death is held to have been caused by the negligence or intentional wrongdoing of Operator, its agents or employees.

**8.3 Indemnification Procedures.** Any Party seeking indemnification under this Agreement shall give the other Party notice of such claim as soon as practicable but in any event on or before the thirtieth (30<sup>th</sup>) day after the Party's actual knowledge of such claim or action. Such notice shall describe the claim in reasonable detail, and shall indicate the amount (estimated if necessary) of the claim that has been, or may be sustained by, said Party. To the extent that the other Party will have been actually and materially prejudiced as a result of the failure to provide such notice, such notice will be a condition precedent to any liability of the other Party under the provisions for indemnification contained in this Agreement. Neither Party may settle or compromise any claim for which indemnification is sought under this Agreement without the prior consent of the other Party; provided, however, said consent shall not be unreasonably withheld or delayed. Each Party's indemnification obligation will survive expiration, cancellation or early termination of this Agreement.

## **IX. INSURANCE**

Prior to beginning work under this Agreement, and continuing for the entire term hereof, District shall, at its own cost and expense, maintain insurance coverages through carriers satisfactory to Operator subject to reasonable deductibles and in limits set forth below:

- (i) **Commercial General Liability** insurance, including contractual liability for liabilities assumed by Operator under this Agreement in combined single limits of not less than \$ 1,000,000.00.
- (ii) **Insurance Liability.** Dam or impoundment of water – coverage of not less than 1,000,000.00.

The Operator shall be named as an additional insured on all insurance policies required under this Paragraph. In the event the District is unable to obtain the insurance coverage called for in this Agreement, Operator shall make every effort to arrange for such insurance coverage and the District shall reimburse the Operator for the cost thereof, provided that the District shall have the right to approve the insurance obtained and the cost if in excess of \$ \_\_\_\_\_ per year.

District shall furnish the Operator with duly executed Certificate(s) of Insurance specifying the dates when such insurance coverage(s) commence and expire and certifying that the insurance carrier(s) will endeavor to provide the Operator with thirty (30) days prior written notice of any material change in, or cancellation of such insurance coverages.

The Operator shall have the right to inspect the original policies of insurance at District's place of business during regular business hours, or to request that copies of policies or Paragraphs of policies be delivered to it.

#### **X. SUCCESSORS AND ASSIGNS**

This Agreement and each and every covenant, term and condition hereof, shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and permitted assigns. Operator shall not assign its rights or obligations hereunder without express written approval of the District.

## **XI. NOTICE**

(a) All certificates or notices required hereunder shall be given in writing and addressed or delivered to the representative(s) specified in this Agreement. Notices shall be deemed received (i) upon delivery, when personally delivered; (ii) upon receipt, when sent via registered or certified mail; (iii) the next business day, when sent via overnight courier; and (iv) upon transmittal, when sent via facsimile. Copies of all general correspondence regarding this Agreement shall also be sent to these representative(s).

(b) Notices submitted hereunder shall be directed to the following individuals:

**Notices to McDill Inland Lake Protection and Rehabilitation District:**

Attn: Jack R. Negaard, President  
McDill Inland Lake Protection and Rehabilitation District  
3325 Yvonne Drive  
Stevens Point, WI 54481  
(715) 498-2138

**Notices to City of Stevens Point:**

Attn: Joel C. Lemke, Director of Public Works  
City of Stevens Point  
1515 Strongs Avenue  
Stevens Point, WI 54481

(c) The District or Operator may change their respective representative(s) designated to receive notice hereunder by written notice to the other Party.

## **XII. MISCELLANEOUS**

### **12.1. Entire Agreement.**

This Agreement, together with the Exhibits references and Appendices attached hereto, is the entire understanding of the Parties regarding the subject matter hereof, and supersedes all prior oral or written discussions, negotiations and agreements the Parties may have had with respect to the subject matter hereof.



**12.2. Counterparts.**

This Agreement may be executed in any number of counterparts, and each counterpart shall have the same force and effect as the original instrument.

**12.3. Amendment.**

No amendment, modification or waiver of any term hereof shall be effective unless set forth in a writing signed by both the District and Operator.

**12.4. Survival.**

All warranties, remedial obligations, indemnities and confidentiality rights and obligations provided for herein shall survive the cancellation, expiration or termination hereof.

**12.5. Independent Operator.**

Operator at all times shall be deemed to be an independent Operator and none of its employees or the employees of its sub-contractors shall be considered to be employees of the District during the term of this Agreement. Operator shall have no authority to act on behalf of the District or bind the District in any manner except as expressly set forth in this Agreement. The Parties acknowledge that neither this Agreement nor any of its provisions are intended to create any partnership or joint venture between the Parties.

**12.6. No Implied Waivers.**

The failure of a Party to insist upon or enforce strict performance of any of the provisions of this Agreement shall not be construed as a waiver or relinquishment to any extent of such Party's right to assist or rely upon any such provisions, rights and remedies in that or any other instance; rather, the same shall be and remain in full force and effect.

**12.7. No Third-Party Beneficiaries.**

This Agreement is intended to be solely for the benefit of the District and Operator and their successors and permitted assigns and is not intended to and shall not confer any rights or benefits on any third party (other than successors and permitted assigns) not a signatory hereto.

**12.8. Severability.**

In the event that any provision of this Agreement is deemed as a matter of law to be unenforceable or null and void, such unenforceable or void portion of such provision shall be deemed severable from this Agreement unless the removal of the unenforceable provision materially alters the obligations of either Party hereunder. Even if there is a material alteration in the remainder of the Agreement, the Agreement shall continue in full force and effect as if such provision was not contained herein, but the Parties shall negotiate in good faith new provisions in relation to the deleted provision that will to the extent practicable restore the benefit of the bargain contained in such provision and that are consistent with the Operation, Inspection and Maintenance Plan and Operating Orders.

**12.9. Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.

**12.10. Headings.**

The headings set forth herein are inserted for convenience and shall have no effect on the interpretation or construction of this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives, effective as of the date first written above.


**McDILL INLAND LAKE PROTECTION AND REHABILITATION DISTRICT**

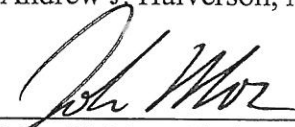
By:   
Jack R. Negaard, President

Attest:   
Krista Olson, Secretary

Dated: 3/15/12

**CITY OF STEVENS POINT**

By:   
Andrew J. Halverson, Mayor

Attest:   
John V. Moe, Clerk

Dated: 3-19-2012

## EXHIBIT B

District shall compensate Operator for the Schedule of Services described in 1.1, 1.3 and 1.4 on the following basis:

- A) Individual maintenance and service events not exceeding Three Thousand Dollars (\$3,000.00) per event shall be born solely by Operator.
- B) Maintenance and service events which individually cost in excess of Three Thousand Dollars (\$3,000.00) up to and including Twenty Thousand Dollars (\$20,000.00) shall be born on an equal basis between Operator and District for such individual item.

Costs of DNR required dam inspections shall be born as follows: the first Three Thousand Dollars (\$3,000.00) shall be the responsibility of the Operator and the balance shall be born equally by the Operator and District.

- C) Maintenance or service events that exceed Twenty Thousand Dollars (\$20,000.00) shall be presented to the Operator's Board of Public Works and the governing body of the District. Upon direction from both governing bodies, the Operator will act as directed. In the event the direction is to not participate from the Operators governing body, the Operator will work with the District to assist in arranging contracted work. Costs of said contracted work would be borne by the District. In the event the governing body of the District chooses not to participate, the Operator will present such decision to the Operators Board of Public Works. If the maintenance or service is in the opinion of the Operator or DNR, necessary for safe and compliant operation of the Dam, the Operator will inform the District of such opinions or orders. If the District decides to pursue abandonment of the Dam, the parties agree to proceed in accordance with "F" below. In the event the parties cannot agree, then Operator shall not be obligated to incur any further responsibility on performing such work or completing the same.
- D) Dam inspections that are referred to as the "Engineering Inspections" in the OIM shall be scheduled by the operator. The cost for said inspections shall be covered according to items A, B, and C above.
- E) Costs incurred for unscheduled services as described in IV. (4.2) will be born 100% by the District and shall be paid within 60 days of completion.
- F) In the event the District and Operator are unable or unwilling to renegotiate this contract and the District, as owner of the Dam, chooses to formally abandon the Dam, the District and Operator will equally share the expenses associated with such abandonment. The District further agrees that prior to considering abandonment of the Dam, the District will offer to transfer ownership of the Dam to the Operator at no cost. The Operator is in no way obligated to take ownership of the Dam by way of this offer.