



**RESOLUTION OF THE GOVERNING BODY
OF THE
THREE AFFILIATED TRIBES
OF THE
FORT BERTHOLD INDIAN RESERVATION**

A Resolution entitled, "Approval of a P.L. 638 Self-Determination Contract for the Planning, Design and Construction of the Fort Berthold Rural Water Supply System."

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act; and

WHEREAS, The Three Affiliated Tribes Constitution authorizes and empowers the Mandan, Hidatsa & Arikara Tribal Business Council to engage in activity on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, The Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. §450 *et seq.*, and the Dakota Water Resources Act, P.L. 106-554, authorize the Tribes to negotiate and enter into self-determination contracts with the Secretary of the Interior, acting through the Bureau of Reclamation, for the planning, design and construction of the Fort Berthold Rural Water Supply System in order to increase access to clean, safe water and provide for the continuing water needs of the Fort Berthold Reservation; and

WHEREAS, The Tribal Business Council authorized Fort Berthold Rural Water to negotiate comprehensive, five-year self-determination contracts for the Tribes to assume the programs, functions, services, and activities associated with the planning, design and construction of the Fort Berthold Rural Water Supply System in Tribal Council Resolution No. 03-095-RP; and

WHEREAS, The Tribes, acting through Fort Berthold Rural Water, have negotiated a five-year self-determination contract with the Bureau of Reclamation for the planning, design and construction of the Fort Berthold Rural Water Supply System that respects tribal sovereignty and reserves to the Tribes the maximum benefits and privileges of the federal policy of tribal self-determination;

NOW, THEREFORE, BE IT RESOLVED, the Three Affiliated Tribes' Tribal Business Council hereby approves the P.L. 638 Self Determination Contract as negotiated with the Bureau of Reclamation so that the Tribe may assume day-to-day management for the planning, design and construction of the Fort Berthold Rural

Construction Contract No: _____

**Self-Determination Construction Contract
between the
Department of the Interior, Bureau of Reclamation
and the
Three Affiliated Tribes of the Fort Berthold Reservation
for the Planning, Design and Construction of the
Fort Berthold Rural Water Supply System**

(a) Authority and Purpose.-

(1) **Authority.**- This self-determination contract (hereafter "Agreement") is entered into by the Secretary of the Interior, Bureau of Reclamation (hereafter "Secretary"), for and on behalf of the United States, and the Three Affiliated Tribes of the Fort Berthold Reservation, federally recognized Indian Tribes (hereafter "Tribes"), pursuant to Title I of the Indian Self-Determination and Education Assistance Act (hereafter "ISDEA") (25 U.S.C. 450 et seq.), the Dakota Water Resources Act, Pub. L. No. 106-554, and by the authority of the Three Affiliated Tribes' Tribal Business Council Resolution No. _____ (Attachment #1). The provisions of Title I of the ISDEA (25 U.S.C. 450 et seq.) and its implementing regulations at 25 C.F.R Part 900 are incorporated by reference in this Agreement.

(2) **Purpose.**- Each provision of the ISDEA (25 U.S.C. 450 et seq.) and each provision of this Agreement shall be liberally construed for the benefit of the Tribes to transfer to the Tribes the funding and the related engineering, design and construction programs, functions, services and activities (or portions thereof) (hereafter "PFSAs") that are otherwise contractible under 25 U.S.C. §450f, for the Fort Berthold Rural Water Supply System as authorized by the Dakota Water Resources Act and as described in the Tribes' Final Engineering Report (hereafter "FER") entitled the Fort Berthold Rural Water System Development Engineering Report, dated _____.

This Agreement is designed to further the Federal government's unique and continuing government-to-government relationship with the Tribes and to promote the development of a strong and stable tribal government. In accordance with 25 C.F.R. §900.115(a), this Agreement is not a standard procurement contract, but is a government-to-government agreement that transfers responsibility for the design and construction of the Fort Berthold Rural Water System, including administrative functions, to the Tribes. This Agreement is designed to facilitate the effective and

meaningful participation by the Tribes in planning, conducting, and administering the design and construction of the project, so that the project is responsive to the true needs of the Indian community.

Nothing herein shall be construed as a waiver of the Tribes' sovereign immunity regarding the Agreement or the activities performed hereunder, including subcontracts.

(b) Terms, Provisions, and Conditions.-

(1) Term.- Pursuant to section 105(c)(1) of the ISDEA (25 U.S.C. 450j(c)(1)), the term of this Agreement shall continue until September 30, 2008. Pursuant to section 105(d)(1) of the ISDEA (25 U.S.C. 450j(d)), upon the election by the Tribes, the period of this Agreement shall be determined on the basis of a fiscal year starting on October 1 and concluding on September 30, unless the Secretary and the Tribes agree on a different period in the applicable annual funding agreement ("AFA") incorporated by reference in subsection (f)(2) of this Agreement.

(2) Effective date.- This Agreement shall become effective on October 1, 2003.

(3) Agreement standards.-

(A) Administrative standards.- The Tribes agree that the systems they establish to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Agreement will include the financial, procurement and property management standards contained in 25 C.F.R. Part 900 Subpart F. The Tribes have adopted a Tribal Employment Rights Ordinance pursuant to the Three Affiliated Tribes' Tribal Business Council Resolution No. 83-122-S, as revised in March 1993 by Resolution No. 93-40-JJR. This Ordinance, in accordance with 25 C.F.R. 900.136, and all other applicable tribal laws, regulations, ordinances or resolutions not in conflict with any applicable federal laws or regulations will govern all activities conducted under this Agreement, including subcontracts. Provided however, that the Tribes, as the prime contractor, shall not be required to pay tribal taxes or fees to themselves.

(B) Federal laws and regulations applicable to design and construction activities.- The Tribes, in accordance with 25 C.F.R. 900.125(b), agree that any design or construction documents produced as part of the Agreement will be developed in accordance with the FER for the Fort Berthold Rural Water Supply System. Other Federal laws, regulations and Executive Orders applicable to the design and construction activities contracted by the Tribes under this Agreement are the following:

- Indian Self-Determination and Education Assistance Act (P.L. 93-638, as amended) and 25 CFR Part 900
- Dakota Water Resources Act (P.L. 106-554)
- Energy Policy and Conservation Act (P.L. 94-163)
- Federal Water Project Recreation Act
- Fish and Wildlife Coordination Act
- Resource Conservation and Recovery Act
- Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646)
- Federal Standard No. 313 for any hazardous materials to be utilized under this Agreement.
- Applicable Federal environmental laws, regulation and Executive Orders, including the Federal Water Pollution Control Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act of 1974, as amended (P.L. 93-523), and associated Environmental Protection Agency (EPA) regulations, standards and guidelines; the National Pollution Discharge and Elimination System (NPDES); the National Environmental Policy Act of 1969 (NEPA), including all commitments identified in environmental compliance document DK-600-02-07 for the contracted project; the Endangered Species Act of 1973 (ESA), including all commitments/mitigation measures identified in any environmental compliance documents for contracted projects; the Bald Eagle Protection Act; the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 et seq.); Executive Order 11514 (amended by Executive Order 11991 for Protection and Enhancement of Environmental Quality; Executive Order 11988 - Floodplain Management; and Executive Order 11990 - Protection of Wetlands.
- Applicable Federal cultural resource laws, regulations and Executive Orders, including the Archaeological Resources Protection Act of 1979(P.L. 96-95); 25 C.F.R. Part 262—Protection of Archaeological Resources; the National Historic Preservation Act of 1966, as amended; the Native American Graves Protection and Repatriation Act (P.L. 101-601) and associated regulations at 43 C.F.R. Part 10; 36 C.F.R. Part 800—Protection of Historic and Cultural Properties; 43 C.F.R. Part 7-- Protection of Archaeological Resources: Uniform Regulations; and Executive Order 11593—Protection and Enhancement of Cultural Environments;
- Applicable Federal labor laws, regulations and Executive Orders as applicable to ISDEA construction contracts, including the Occupational Safety and Health Administration (OSHA) (29

U.S.C. 61 et seq) and standards applicable to construction in 29 C.F.R. 1900 to end; the provisions of the Davis-Bacon Act (40 U.S.C. 276c and 18 U.S.C. 874), as applicable, for subcontracts, except for work performed by tribal employees; the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330); Department of Labor regulations 29 C.F.R. Part 5; Copeland "Anti-Kickback Act" (18 U.S.C. 874 and 40 U.S.C. 276c) and 29 C.F.R. Part 3;

• Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671-2680) and related Department of Justice regulations in 28 C.F.R. Part 14;

• Contract Disputes Act of 1978 (41 U.S.C. 601 as amended) 43 C.F.R. 4.110-126, if a matter is submitted to the Interior Board of Contract Appeals;

• Equal Access to Justice Act (5 U.S.C. 504 and 28 U.S.C. 2412 and regulations at 43 C.F.R. 4.601 through 619);

• 25 C.F.R. Part 169.

The Secretary and the Tribes agree to make a good faith effort to identify other Federal laws, Executive Orders and regulations applicable to the design and construction activities to be performed under this Agreement, to share them with the other party and to refer to them by written modification to this Agreement. The parties shall also make a good faith effort to identify any tribal laws, ordinances and resolutions that may affect either party in the performance of this Agreement.

(C) Design and Construction Standards.- All design and construction activities performed under this Agreement shall be completed in conformity with applicable subsections, parts, provisions, or subdivisions of the codes and standards listed below, to the extent that they are suitable and appropriate for design and construction of a project of the size and type authorized to be constructed by the Tribes in accordance with the Dakota Water Resources Act:

• National Electric Code
• Uniform Building Code
• Uniform Fire Code
• Uniform Mechanical Code
• Uniform Plumbing Code

In addition, the Tribes shall comply with certain subsections, parts, provisions, or subdivisions of the published standards of the following organizations, as specifically identified in the approved project plans and specifications:

- American Association of State Highway and Transportation Officials (AASHTO)
- American Concrete Institute (ACI)
- American Institute of Steel Construction (AISC)
- American Iron and Steel Institute (AISI)
- American National Standards Institute (ANSI)
- American Society for Testing and Materials (ASTM)
- American Water Works Association (AWWA)
- American Welding Society (AWS)
- Concrete Reinforcing Steel Institute (CRSI)
- Great Lakes Upper Mississippi River Board of State Public Health and Environmental Managers Recommended Standards for Waterworks - 1997 (Ten States Standards)
- National Association of Corrosion Engineers (NACE)
- National Sanitation Foundation (NSF)
- Standard General Conditions of the Construction Contract, Engineers, Joint Contract Documents Committee (NSPE, ACEC, ASCE, CSI)

The Tribes and the Secretary understand and agree that utilization of the above codes, standards, guidelines, and methods will ensure that the quality of construction for the project meets all standards established for similar facilities constructed by the Secretary. However, pursuant to 25 C.F.R. 900.126, the Secretary will accept tribally proposed construction procedures, standards, and methods which are consistent with or exceed applicable Federal standards.

(4) Type of agreement.- This is a cost-reimbursable self-determination construction contract.

(5) Funds to be Provided.-

(A) Funding amount.- Subject to the availability of appropriations, the Secretary shall make available to the Tribes the total amount as specified in the applicable AFA incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the ISDEA (25 U.S.C. 450j-1) and 25 C.F.R. 900.128. The first year of funding under this Agreement shall also include reimbursement of start-up costs and pre-award costs in accordance with subsections (b)(5)(C) and (b)(5)(D).

(B) Reimbursement for Tribal Indirect Costs.

(i) Indirect costs for administrative activities. The Tribes

may incur reasonable and necessary indirect costs associated with the administration of activities performed under this Agreement. The parties have negotiated a fixed sum, with cost indexing as specified herein, to recover such indirect costs. The Secretary agrees to pay the Tribes an indirect cost payment of \$90,000 in the first year of this Agreement and an inflation-adjusted amount for each year thereafter. To adjust for inflation, the parties shall apply the "Consumer Price Index-All Urban Consumers, US City Average for All Items Less Food and Energy" (CPI-U, less food and energy) percentage to the fixed sum identified herein, using October 2003 price levels as the base point, to calculate an appropriate indirect cost payment for inclusion in each subsequent AFA. This payment to the Tribes shall not be affected by the Tribes' indirect rate and shall be in addition to any direct administrative costs agreed to by the parties in the AFA. This payment shall be available with the first draw down of advance funds for each fiscal year. The parties agree that the payment made under this subsection satisfies the Secretary's obligation to reimburse the Tribes for indirect costs and contract support costs with respect to the Tribes' performance of administrative activities for the Water System Project, pursuant to 25 U.S.C. 450j-1(2).

(ii) Indirect costs in the event the Tribes elect to perform construction activities using their own workforce.

Notwithstanding the provisions of subsection (b)(5)(B)(i) of this Agreement, the Tribes and the Secretary agree to meet within 30 calendar days after notice from the Tribes to renegotiate, in good faith, appropriate indirect cost payments and an appropriate cost indexing rate in the event that this Agreement adversely impacts the Tribes' indirect cost rate or the recovery of indirect costs/contract support costs for any other tribally-administered program. Adverse impacts include, but are not limited to, a finding by an authorized federal official or agency that the Tribes' indirect cost rate must be reduced as a result of the activities authorized or the funding provided pursuant to this Agreement.

(iii) Indirect costs in the event the Agreement adversely impacts the recovery of indirect costs for other tribally-administered programs. Notwithstanding the provisions of subsection (b)(5)(B)(i) and (ii) of this Agreement, the Tribes and the Secretary agree to meet within 30 calendar days after notice from the Tribes to renegotiate, in good faith, appropriate indirect cost payments and an appropriate cost indexing rate in the event that this Agreement adversely impacts the Tribes' indirect cost rate or the recovery of indirect costs/contract support costs for any other tribally-administered

program. Adverse impacts include, but are not limited to, a finding by an authorized federal official or agency that the Tribes' indirect cost rate must be reduced as a result of the activities authorized or the funding provided pursuant to this Agreement.

(iv) Tribes' rebudgeting authority. As is consistent with the Tribes' rebudgeting authority per 25 U.S.C. 450j-1(o), the Tribes and Secretary understand and agree that the Tribes, by resolution of the Three Affiliated Tribes' Tribal Business Council, may dedicate indirect cost funds provided under this Agreement to carry out other allowable PFSA's under this Agreement.

(C) Allowance of start-up costs. In accordance with 25 U.S.C. 450j-1(a)(5), start-up costs that have been or will be incurred on a one-time basis by the Tribes pursuant to this Agreement during the initial year that this Agreement is in effect, will be allowable to the extent that the costs are fair and reasonable and allocable to the Agreement.

(D) Allowance of pre-award costs. Pursuant to 25 U.S.C. 450j-1(a)(6), costs incurred before the initial year that this Agreement is in effect may not be included in the amount required to be funded under paragraph (b)(5) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred. The parties understand and agree that sufficient written notice of pre-award costs was provided to the Secretary on or about March 1, 2003.

(6) Payment.-

(A) In general.- Payments to the Tribes under this Agreement shall

(i) be made as expeditiously as practicable; and

(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

(B) Payment Schedule. Pursuant to 25 U.S.C. 450j-1, for each fiscal year covered by this Agreement, the Secretary shall make available to the Tribes the funds specified for the fiscal year using the advance payment schedule identified in this Agreement at paragraph (b)(5)(A) and the applicable AFA.

(C) Applicability of the Prompt Payment Act. Chapter 39 of title

31, United States Code, shall apply to the payment of funds due under this Agreement and the AFA.

(D) Use of funds advanced. Funds advanced to the Tribes shall be used only for purposes authorized under this Agreement. The funds advanced cannot be used for any purpose other than an authorized project expenditure, even on a temporary basis. Authorized project expenditures are those costs which are considered allowable, allocable, and reasonable pursuant to the provisions of OMB Circular A-87 and section 106 of the ISDEA (25 U.S.C. 450j-1). Further, funds advanced pending disbursement for a purpose authorized under this Agreement shall not be transferred to tribal accounts, lent to such tribal accounts, or expended for programs or purposes not specifically authorized under this contract. Funds advanced, pending expenditure under this Agreement, shall be placed in appropriate savings, checking or investment accounts. Such funds when invested or deposited shall be subject to the following:

(i) Advanced funds not immediately spent for program activities may be invested only in obligations of the United States, in obligations or securities that are guaranteed or insured by the United States, or in mutual (or other) funds registered with the Securities and Exchange Commission and which only invest in obligations of the United States or securities that are guaranteed or insured by the United States;

(ii) If not invested, advanced funds must be deposited only into accounts that are insured by an agency or instrumentality of the United States or are fully collateralized to ensure protection of the funds, even in the event of a bank failure;

(iii) Interest and investment income that accrue on any funds provided for by contract become the property of the Tribes pursuant to section 105(b) of the ISDEA ((25 U.S.C. 450j(b)).

(E) Suspension, withholding or delay of advance payment. Pursuant to 25 C.F.R. §900.132(e) and in accordance with 25 C.F.R. 900.170, the Secretary may only suspend, withhold or delay a future advance payment allocation to the Tribes (1) if the Tribes are delinquent in submission of their allocation period progress reports and financial reports and fail to submit the reports within 20 days after receiving notice of such delinquency by the Secretary; or (2) if the Secretary takes action to suspend or terminate the Agreement in accordance with 25 C.F.R. §900.131(b)(11), (12) or (13).

(7) Limitation of costs.- The Tribes shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds

awarded under this Agreement. If, at any time, the Tribes have reason to believe that the total amount required for performance of this Agreement or a specific activity conducted under this Agreement would be greater than the amount of funds awarded under this Agreement, the Tribes shall provide reasonable notice to the Secretary. If the Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Agreement, the Tribes may suspend performance of the Agreement until such time as additional funds are awarded. The Tribes and Secretary understand and agree that this section shall not apply to the indirect costs identified in section (b)(5)(B) of this Agreement.

(8) Carryover. - Any funds provided to the Tribes under this Agreement but not expended by the Tribes during any fiscal year during the term of this Agreement shall be carried over to the next fiscal year and applied to the completion of work already authorized under the Agreement or to new work authorized in a subsequent AFA under the Agreement.

(9) Successor AFA. - Negotiations for a successor AFA, provided for in subsection (f)(2), shall begin not later than 120 calendar days prior to the conclusion of the preceding AFA. The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Tribes for information that the Tribes reasonably need to determine the amount of funds that may be available for a successor AFA. Each successor funding agreement shall include, at a minimum, an annual scope of work, a revised project schedule and budget, the amount of fiscal year funds to be transferred to the Tribes, and an advance payment schedule. Pursuant to 25 C.F.R. 900.32, each successor funding agreement will be subject to the declination criteria and procedures in 25 C.F.R. Part 900 subpart E. Each successor funding agreement will be incorporated in its entirety to this Agreement pursuant to subsection (f)(2).

(10) Savings. - Pursuant to 25 U.S.C. 450j-1(a)(4), funds remaining at the end of the Agreement shall be used to provide additional services or benefits under this Agreement.

(11) Access to tribal records. -

(A) In general. - Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping system of the Department of the Interior, records of the Tribes' shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

(B) Record keeping system. - In accordance with sections 5(a) and (b) of the ISDEA (25 U.S.C 450c(a) and (b)), the Tribes shall maintain a record keeping system and, upon reasonable advance written notice shall provide

access to such records to the Comptroller General and the Secretary, until the expiration of three years after completion of this Agreement; provided, however, that the Tribes are entitled to retain and dispose of program records in accordance with the requirements of 25 C.F.R. 900.41.

(12) Property.-

(A) In general.- The property management system standards and requirements specified in 25 C.F.R. 900.51-60, 25 C.F.R. 900.85-94 and 25 C.F.R. 102-107 shall apply to this Agreement. In the event that federally-owned property is provided to the Tribes for use under this Agreement, the Tribes shall maintain a list of such property pursuant to 25 C.F.R. 900.57 and shall make this list available to the Secretary upon request during the term of this Agreement.

(B) Excess and surplus property.- Pursuant to 25 C.F.R. 900.104(a), the Tribes may request donation of excess and surplus Government property for its authorized use under this Agreement. The Tribes may submit such a request to the Secretary for coordination with the General Services Administration (GSA), the Indian Health Service (IHS) and/or the Bureau of Indian Affairs (BIA).

(C) Screener identification card. At the request of the Tribes, the Secretary shall assist the Tribes in securing the use of a screener identification card from the GSA.

(E) Real property.- The title to any real property acquired in whole or in part with Agreement funds and the title to any facilities or structures constructed with Agreement funds shall remain with the Federal Government for the benefit of the Tribes. Title to such real property, facilities and structures shall not be transferred unless an Act of Congress specifically mandates the transfer of real property or facilities or structures acquired or constructed with funds from this Agreement. Nothing in this Agreement, or performed pursuant to this Agreement, including but not limited to the granting or acquiring of rights-of-way and other interests in land, shall act to diminish the Tribes' inherent sovereign governmental authority and jurisdiction within the boundaries of the Fort Berthold Indian Reservation. At the option of the Tribes, all recorded deeds or other instruments transferring title to real property acquired in whole or in part with Agreement funds shall include a written statement that the deed or other instrument shall not be construed to diminish the Tribes' inherent sovereign governmental authority and jurisdiction within the boundaries of the Fort Berthold Indian Reservation.

(13) Procurement.-

(A) In general.- The Tribes shall follow the standards and requirements specified in 25 C.F.R. 900.47, 48 and 49 when procuring property or services for use in the performance of work authorized under this Agreement with Agreement funds.

(B) Indian preference.- As provided in 25 U.S.C. 450e(b) and (c), preference in procurement and employment shall be given to Indians to the greatest extent feasible. The parties understand and agree that decisions regarding the extent to which preference in employment and procurement is feasible shall be governed by tribal law and are determined at the sole discretion of the Tribes. The Tribes shall be solely responsible for developing and implementing preference criteria for subcontracts.

(C) Subcontract provisions.- Pursuant to 25 C.F.R. 900.50, all subcontracts should contain a provision informing the subcontractor that its award is funded with Federal funds and that the subcontractor is responsible for identifying and ensuring compliance with applicable Federal laws, regulations, and executive orders. At the request of the Tribes, the Secretary shall provide technical assistance to identify all or a portion of such requirements, which may include, as applicable, such federal laws, regulations and Executive Orders as identified in this Agreement at subsection (b)(3)(B) and such codes and standards as identified in this Agreement at subsection (b)(3)(C).

In addition, the Secretary recommends that each subcontract contain provisions to ensure compliance with the ISDEA (25 U.S.C. 450 et seq.), such as:

(i) Administrative, contractual, or legal remedies in instances where subcontractors violate or breach subcontract terms, and provide for such sanctions and penalties as may be appropriate;

(ii) Termination for cause and for convenience including the manner by which it will be effected and the basis for settlement;

(iii) Notice of the Tribes' requirements and regulations pertaining to project and financial reporting;

(iv) Notice of the Tribes' requirements and regulations pertaining to copyrights and rights in data.

(14) Disputes.-

(A) In general.- This Agreement is subject to 25 U.S.C. 450m-1. In the event that the Tribes elect to pursue an administrative appeal, such appeal shall be governed by 25 C.F.R Part 900 subpart L or subpart N, as applicable, depending on the nature of the dispute.

(B) Informal Discussions. Before a decision is issued by the Secretary on a modification or other matter over which the Secretary has authority under this Agreement, the Tribes may request informal discussions to be held between the parties in accordance with 25 C.F.R. 900.217(a).

(C) Third-party mediation defined.- For the purposes of this Agreement, the term "third-party mediation" means a form of mediation whereby the Secretary and the Tribes nominate a third party who is not employed by or significantly involved with the Secretary or the Tribes, to serve as a third-party mediator to mediate disputes under this Agreement.

(D) Alternative procedures.- In addition to, or as an alternative to, remedies and procedures prescribed by section 110 of the ISDEA (25 U.S.C. 450m-1), the parties to this Agreement may jointly:

(i) submit disputes under this Agreement to third-party mediation;

(ii) submit the dispute to the adjudicatory body of the Tribes, including the tribal court of the Tribes;

(iii) submit the dispute to mediation processes provided for under the laws, policies, or procedures of the Tribes; or

(iv) use the administrative dispute resolution processes authorized in subchapter IV of chapter 5 of title 5, United States Code.

(E) Effect of decisions.- The Secretary shall be bound by decisions made pursuant to the processes set forth in subparagraph (D), except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

(c) Obligation of the Tribes.-

(1) Agreement performance.- The Tribes, with the advice and assistance of their technical consultants and subcontractors, shall manage the day-to-day operations conducted under this Agreement and perform the engineering, design and

construction activities as provided in the applicable AFA under subsection (f)(2) of this Agreement.

(2) Contracted activities.- Subject to the availability of appropriated funds, the Tribes shall administer the engineering, design, and construction activities identified in this Agreement and funded through the applicable AFA under subsection (f)(2).

(3) Design and construction responsibilities.- In accordance with 25 C.F.R. 900.130(a), subject to the availability of funds and with the advice and assistance of their technical consultant and subcontractors, the Tribes are responsible for the successful completion of all engineering, design and construction activities contracted herein in accordance with the approved contract documents.

(A) Design phase responsibilities.- For all design activities contracted by the Tribes under this Agreement, the Tribes shall have the following responsibilities:

(i) Pursuant to 25 C.F.R. 900.125(b)(1), produce construction documents in accordance with the Final Engineering Report (FER) and the scope of work for each fiscal year. A scope of work is described in each AFA under subsection (f)(2) of this Agreement.

(ii) Pursuant to the requirements of 25 C.F.R. 900.130(b)(1), subcontract with or provide the services of licensed and qualified architects, engineers, and other consultants needed to accomplish the work under this Agreement.

(iii) Pursuant to the requirements of 25 C.F.R. 900.130(b)(2), administer and disburse funds provided through this Agreement in accordance with 25 C.F.R. 900.42-.45 and implement a property management system in accordance with 25 C.F.R. 900.51-.60.

(iv) Pursuant to 25 C.F.R. 900.130(b)(3), direct the activities of project architects, engineers, and other consultants.

(v) Pursuant to 25 C.F.R. 900.130(b)(4), direct the work of its subcontractors.

(vi) Provide the Secretary opportunities to review, comment and approve project plans and specifications developed under this Agreement in accordance with 25 C.F.R. 900.130(b)(5).

(vii) Provide the plans and specifications after their final review to the Secretary. Pursuant to 25 C.F.R. 900.130(b)(6), the Secretary has determined that an independent government cost estimate is not necessary or appropriate for the plans and specifications produced for this Agreement;

(viii) Pursuant to 25 U.S.C. 450c(b) and 25 C.F.R. 900.130(b)(7), retain project records and design documents for a minimum of 3 years following completion of each phase of the Project, as identified in the applicable AFA.

(B) Construction phase responsibilities.- For all construction activities contracted by the Tribes under this Agreement, the Tribes shall have the following responsibilities:

(i) Pursuant to 25 C.F.R. 900.125(b)(2), perform all construction in accordance with the construction documents produced as a part of the design phase of the project. Upon completion, the project documents, including plans and specifications, shall be attached to the applicable AFA.

(ii) Pursuant to 25 C.F.R. 900.130(c)(1), subcontract with or provide the services of licensed and qualified architects and other consultants as needed to accomplish the construction activities under this Agreement.

(iii) Pursuant to the requirements of 25 C.F.R. 900.130(c)(2), administer and disburse funds provided through this Agreement in accordance with 25 C.F.R. 900.42 through 45 and implement a property management system in accordance with 25 C.F.R. 900.51 through 60.

(iv) Pursuant to 25 C.F.R. 900.130(c)(3), subcontract with or provide the services of construction contractors or provide its own forces to conduct construction activities in accordance with the project construction documents.

(v) Pursuant to 25 C.F.R. 900.130(c)(4), direct the activities of project architects, engineers, construction contractors and other consultants.

(vi) Pursuant to 25 C.F.R. 900.130(c)(5), manage or provide for the management of day-to-day activities conducted under this Agreement, including the issuance of change orders to subcontractors;

except that, unless the Secretary agrees, the Tribes may not issue a change order to a construction subcontractor (1) that will cause the Tribes to exceed its total budget as specified in the applicable annual funding agreement, (2) that will cause the Tribes to exceed the performance period specified in the applicable annual funding agreement, or (3) that is a significant departure from the scope or objective of the project as identified in the applicable AFA. If the Tribes intend to issue a change order that would alter the approved contract documents in a manner that requires the Secretary to perform additional environmental responsibilities under this Agreement, the Tribes shall advise the Secretary of the proposed change order at least seven (7) working days prior to issuance of the change order. Within this seven (7) day period, the Secretary shall notify the Tribes whether additional environmental compliance is required. The Secretary shall promptly take such actions as may be necessary to comply with the Secretary's environmental responsibilities as set forth in Sections d(4)(A) and d(5)(A) of this Agreement. In carrying out these environmental responsibilities, the Tribes and the Secretary shall use best efforts to avoid delaying construction activities or increasing Project costs.

(vii) Pursuant to 25 C.F.R. 900.130(c)(6), direct the work of its subcontractors so that work produced is provided in accordance with budget(s) and performance period(s) as negotiated between and agreed to by the parties and contained in the applicable AFA under subsection (f)(2) of this Agreement.

(viii) Pursuant to the requirements of 25 C.F.R. 900.130(c)(8), maintain on the jobsite or at the project office, and make available to the Secretary during monitoring visits, the following: Contracts, major subcontracts, modifications, construction documents, change orders, shop drawings, equipment cut sheets, inspection reports, testing reports, and current redline documents.

(ix) Pursuant to 25 C.F.R. 900.130(d), upon acceptance of each completed project feature, provide the Secretary with a reproducible copy of the record plans, including as-builts.

(4) Closeout report.- Pursuant to 25 C.F.R. 900.130(d), after completion of this Agreement, the Tribes shall provide the Secretary with a contract closeout report within 180 days after 1) the conclusion of the warranty period, or 2) resolution of all claims with subcontractors, or 3) submission of the annual audit report for the closeout year, whichever is later. This report should include:

(i) a summary of work accomplished during the term of the Agreement and the extent to which the goals and objectives of the project were accomplished;

(ii) problems encountered and corrective actions taken;

(iii) an accounting of amounts and purposes for which the Agreement funds were expended.

(d) Obligations of the Secretary. -

(1) Trust responsibility.-

(A) In general.- The Secretary, acting through Reclamation on behalf of the United States, reaffirms the trust responsibility of the United States to the Three Affiliated Tribes of the Fort Berthold Reservation to protect and conserve the trust resources of the Tribes and the trust resources of individual Indians.

(B) Construction of Agreement.- Nothing in this Agreement may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the Tribe(s) or individual Indians. The Secretary, acting through Reclamation, on behalf of the United States, shall act in good faith in upholding such trust responsibility.

(2) Programs retained.- The United States hereby retains the PFSA's with respect to the Tribes that are not specifically assumed by the Tribes in the applicable AFA under subsection (f)(2) of this Agreement.

(3) Procedure and Time Allowed for Secretarial Review Function.- In carrying out the Secretary's responsibilities, and specifically in carrying out review, comment, and approval functions, the Secretary shall provide for full tribal participation in the decision making process and shall honor tribal preferences and recommendations to the greatest extent feasible. This includes promptly notifying the Tribes of any concerns or issues in writing that may lead to disapproval, meeting with the Tribes to discuss these concerns and issues and to share relevant information and documents, and making a good faith effort to resolve all issues and concerns of the Tribes. The time allowed for Secretarial review, comment, and approval -- including but not limited to the review of change orders and design documents -- shall be no more than 21 calendar days per review period. The 21-day review period may be extended if the Tribes agree to the extension in writing.

(4) Design phase responsibilities. For design activities being conducted by

the Tribes under this Agreement, the Secretary will have the following responsibilities:

(A) Pursuant to 25 C.F.R. 900.131(b)(2), make the final determinations under NEPA or other environmental laws to the extent that the design activities conducted by the Tribes are subject to these laws.

(B) Review and approve project plans and specifications for general compliance in accordance with 25 C.F.R. 900.131(b)(5) no later than 30 calendar days from receipt of such documents from the Tribes, unless the Tribes agree in writing to extend the time for review.

(C) Pursuant to the requirements of 25 C.F.R. 900.131(b)(6), the Secretary reserves a royalty-free, non-exclusive, and irrevocable license to reproduce, publish or otherwise use for Federal government purposes the copyright in any work developed under the Agreement and any rights of copyright to which the Tribes or a subcontractor purchases ownership through this Agreement.

(D) Pursuant to 25 C.F.R. 900.131(b)(7), approve in advance any changes to any work specified under this Agreement which require an increase to the negotiated Agreement budget or performance period, or are a significant departure from the FER or the scope of the project, as identified in the applicable AFA.

(E) Pursuant to 25 C.F.R. 900.131(b)(8), review and comment on specific shop drawings, including design drawings, as negotiated and specified in the applicable AFA under subsection (f)(2) of this Agreement.

(F) Pursuant to 25 C.F.R. 900.131(b)(9), conduct on-site monitoring visits, or critical milestone on-site monitoring visits, as negotiated and specified in the applicable AFA under subsection (f)(2) of this Agreement. If no time period is specified, the Secretary may conduct on-site monitoring visits monthly. The Secretary shall provide the Tribes reasonable advance written notice of each visit. The Secretary's duly authorized representative(s) shall consult and coordinate such visits with the Tribes' designated technical representative(s), so as to minimize any disruptions to the Tribes' program operations and shall refrain from taking any actions that require the Tribes to duplicate work.

(5) Construction phase responsibilities. For construction activities performed by the Tribes under this Agreement, the Secretary will have the following responsibilities:

(A) Pursuant to 25 C.F.R. 900.131(b)(2), make the final determinations under NEPA or other environmental laws to the extent that contracted construction activities are subject to these laws.

(B) Pursuant to 25 C.F.R. 900.131(b)(7), approve in advance any changes to any work specified under this Agreement which require an increase to the negotiated Agreement budget or performance period, or are a significant departure from the FER or the scope of the project. The Secretary shall promptly take such actions as may be necessary to review and approve such changes in order to avoid unnecessarily delaying construction activities or increasing Project costs.

(C) Pursuant to 25 C.F.R. 900.131(b)(9), conduct on-site monitoring visits, or critical milestone on-site monitoring visits, as negotiated and specified in the applicable funding agreement under subsection (f)(2) of this Agreement. If no time period is specified, the Secretary may conduct on-site monitoring visits on a monthly basis. The Secretary shall provide the Tribes reasonable advance written notice of each visit. The Secretary's duly authorized representative(s) shall consult and coordinate such visits with the Tribes' designated technical representative(s), so as to minimize any disruptions to the Tribes' program operations and shall refrain from taking any actions that require the Tribes to duplicate work.

(D) Pursuant to 25 C.F.R. 900.131(b)(10), conduct final project inspections jointly with the Tribes.

(E) **Emergency Suspension of Construction Activities.** Notwithstanding the notice provisions for suspension of work of 25 C.F.R. 900.131(b)(11)(ii), if the Secretary makes a determination that there is imminent occasion of harm or danger to safety, health, or the environment during construction, the Secretary may suspend construction activities immediately, to the limited extent necessary to protect safety, health, or the environment. If the Secretary issues an emergency suspension, the Secretary shall provide written notification to the Tribes immediately following the suspension and shall provide immediate technical assistance to the Tribes in an effort to resolve the cause for the suspension as quickly as possible and shall issue a notice to proceed or to commence work immediately upon resolution. The Tribes shall have all other rights associated with suspension identified by 25 C.F.R. 900.131(b)(11).

(6) Suspension of Work. Except as provided in subsection (d)(5)(E) of this Agreement, the Secretary can require the Tribes to suspend work under this Agreement only in accordance with subparagraphs (d)(6)(A) and (B). The Secretary may suspend this Agreement for no more than 30 calendar days unless the Tribes

have failed to correct the reason(s) for the suspension or unless the cause of the suspension cannot be resolved either through the efforts of the Secretary or the Tribes.

(A) Reasons for suspension. The following are reasons the Secretary may suspend work under this self-determination Agreement for construction:

(i) Differing site conditions encountered upon commencement of construction activities that impact health or safety concerns or shall require an increase in the negotiated project budget;

(ii) The Secretary discovers materially noncompliant work;

(iii) Funds allocated for the project that is the subject of this Agreement are rescinded by specific Congressional action; or

(iv) Other Congressional actions occur that materially affect the subject matter of the Agreement.

(B) Written notice and opportunity to correct.- If the Secretary wishes to suspend the work, the Secretary shall first provide written notice and an opportunity for the Tribes to correct the problem. The Secretary may direct the Tribes to suspend temporarily work under this Agreement only after providing a minimum of 5 (five) working days' advance written notice to the Tribes, describing the nature of the performance deficiencies or the imminent safety, health or environmental issues which are the cause for suspending the work.

(7) Termination of Agreement.-

(A) For cause.- The Secretary may terminate work under this Agreement for cause in the event non-compliant work is not corrected through the suspension process pursuant to 25 C.F.R. 900.131(b)(11) and (12).

(B) For convenience.- The Secretary may terminate work under this Agreement for convenience for those reasons and utilizing those procedures described in 25 C.F.R. 900.131(b)(13).

(8) Technical assistance.-

(A) The Secretary will provide technical assistance to the Tribes, upon request, in accordance with section 103(d) of the Act (25 U.S.C. 450h(d)).

(B) The Secretary will provide other technical assistance, including the performance of specific project activities, as negotiated and specified in the applicable AFA under subsection (f)(2) of this Agreement.

(C) The Secretary shall also provide technical assistance as is necessary to enable the Tribes to carry out the engineering, design and construction activities contracted under this Agreement.

(e) Other Provisions.-

(1) **Designated officials.-** Senior officials and designated representatives of the Secretary and the Tribes will serve as representatives for notices, proposed amendments to the Agreement and other purposes under this Agreement.

(A) **Officials.-** Unless otherwise specified by the parties, the senior officials and designated representatives of the Tribes and the Secretary are as follows:

Tribes' Senior Official

Tex Hall
Tribal Chairman
404 Frontage Road
New Town, ND 58763
ph: (701) 627-4781
fax: (701) 627-4748

**Tribes' Designated
Technical Representative**

H. Texx Lone Bear
Director
P.O. Box 399
New Town, ND 58763
ph: (701) 627-3410 ext. 8340
fax: (701) 627-4303
texx@restel.net

Tribes' Contracting Official

Bonnie Red Fox
404 Frontage Road
New Town, ND 58763

Secretary's Senior Official

Dennis E. Breitzman
Dakotas Area Office Manager
Bureau of Reclamation
P.O. Box 1017
Bismarck, ND 58502
ph: (701) 250-4242
fax: (701) 250-4590

**Secretary's Designated
Technical Representative**

Tom Thompson
Dakotas Area Office
P.O. Box 1017
Bismarck, ND 58502
ph: (701) 250-4242 ext. 3620
fax: (701) 250-4326
TTHOMPSON@gp.usbr.gov

**Secretary's Designated
Financial Assistance Officer**

Kimball Banks
Great Plains Regional Office
P.O. Box 36900

phone: 701-627-4781 ext. 8066
fax: 701-627-2811
bmorin@restel.net

Billings, Montana 59107-6910
ph: (406) 247-7710
fax: (406) 247-7695
KBANKS@gp.usbr.gov

(B) Official Notice.- To better facilitate communication, official notices concerning this Agreement and all communications regarding all matters of significance to overall contract administration shall be provided to: the Tribes' Senior Official; the Tribes' Designated Technical Representative; the Tribes' Designated Contracting Officer; the Secretary's Designated Senior Official; the Secretary's Designated Technical Representative; and the Secretary's Designated Awarding Official. Communications regarding routine or technical matters involving this Agreement need only be provided to the Designated Technical Representatives of the parties. For purposes of this Agreement, the parties' Designated Technical Representatives may use email correspondence as written notices.

The Secretary's Designated Technical Representative's responsibilities include dealing directly with the Tribes in an advisory capacity during performance of the Agreement. The Tribes' Designated Technical Representative and the Secretary's Designated Technical Representative do not have the authority to commit the Tribes or the Secretary, to enter into supplemental agreements binding the Tribes and the Secretary, or to issue modifications or change orders to this Agreement, in writing, verbally, or by conduct.

(2) Agreement modifications or amendment.-

(A) In general.- Except as provided in subparagraph (B), no modification to this Agreement shall take effect unless such modification is made in the form of a written amendment to the Agreement, and the Tribes and the Secretary provide written consent for the modification.

(B) Exception.- The addition of supplemental funds for PFSAs already included in the AFA under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2) (25 U.S.C. 450j-1(b)(2)), shall not be subject to subparagraph (A).

(3) Officials not to benefit.- No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Agreement, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Agreement if such contract is made with a corporation for the general benefit of the corporation.

(4) Covenant against contingent fees.- The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Tribes for the purpose of securing business.

(5) Federal Tort Claims Protection.- For purposes of the Agreement, pursuant to 25 C.F.R. 900.186(a) and in accordance with P.L. 101-512, Sec. 314, as amended, the Tribes and tribal employees are deemed to be employees of the Federal government while performing work under the Agreement. This status is not changed by the source of funds used by the Tribes to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the Tribes.

(6) Insurance.-In the event that the Tribes elect to perform construction activities utilizing their own work force, the Tribes and the Secretary agree to discuss whether procurement of liability insurance is advisable and in the best interests of the Tribes and the project.

(7) Retrocession by the Tribes.- In accordance with 25 C.F.R. 900.240 through 245, the Tribes may return to the Secretary any contracted project under this Agreement, in whole or in part, for any reason, before the expiration of the term of this Agreement.

(8) Submission of Program Reports.-

(A) Single-agency audit report.- The Tribes shall comply with 25 U.S.C. 450c(f)(1) for submission of single-agency audit reports. The Tribes agree to provide a courtesy copy of their single-agency audit report to the Secretary's Designated Technical Representative when the report is submitted to the Federal Audit Clearinghouse in Jeffersonville, Indiana.

(B) Quarterly progress reports.- Within 30 days after the end of the reporting period, the Tribes and the Secretary will prepare and furnish to the other party's Senior Official and Designated Technical Representative short summary reports of activities accomplished in furtherance of this Agreement's goals and objectives.

(C) Quarterly financial reports.

(i) Within 30 days after the end of the reporting period, the Tribes shall prepare and furnish to the Secretary's Senior Official and

Designated Technical Representative: SF 269A - Financial Status Report (Short Form). The purpose of the reports is to assist the Tribes and the Secretary in developing future budgets for the contracted program and to assure that funds are used in furtherance of the Agreement's goals and objectives.

(ii) Within 30 days after the end of the reporting period, the Secretary shall prepare and furnish to the Tribes' Senior Official and Designated Technical Representative financial status reports which contain information substantially equivalent to the information contained in the SF 269A - Financial Status Report (Short Form). The purpose of the reports is to assist the Tribes and the Secretary in developing future budgets for the contracted program and to assure that funds are used in furtherance of the Agreement goals and objectives.

(D) Purpose and procedures regarding quarterly reports and expense information.

(i) The purpose of the quarterly progress and financial reports is to assure the Parties that all Project funds, including funds retained by the Secretary, are used in furtherance of Project goals and objectives. Upon reasonable advance written notice, the Secretary and the Tribes shall make available for inspection by the other Party expense reports and other materials documenting the Secretary's and the Tribes' expenditures in furtherance of the Project. The Secretary shall make such materials available to the Tribes' designated representatives during normal business hours at the federal offices where such records are typically maintained, and the Tribes shall make such materials available to the Secretary's designated representatives during normal business hours at the tribal offices where such records are normally maintained. In carrying out any requested Project expense review, each Party shall consult and coordinate such visits with the other Party's designated technical representative(s), so as to minimize any disruptions to program operations.

(ii) For purposes of this Agreement, the quarterly reporting periods end on December 31, March 31, June 30, and September 30.

(f) Attachments. -

(1) Approval of Agreement. - The Three Affiliated Tribes' Tribal Business Council Resolution No. _____ authorizing the contracting of the PFSA's identified in this Agreement is attached to this Agreement as Attachment #1.

(2) Annual Funding Agreements.-

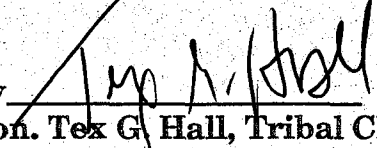
(A) In general.- The AFAs under this Agreement shall only contain-

(i) terms that identify the PFSA's to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

(ii) such other provisions, including a brief description of the PFSA's to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

(B) Incorporation by reference.- Each AFA is hereby incorporated in its entirety in this Agreement and attached to this Agreement as Attachment #2.

**Three Affiliated Tribes
of the Fort Berthold Reservation**

By 
Hon. Tex G. Hall, Tribal Chairman

10-9-83
Date

**Department of the Interior
Bureau of Reclamation**

By _____
Awarding Official

Date



Water Supply System. The Tribal Chairman is authorized to execute said contract.

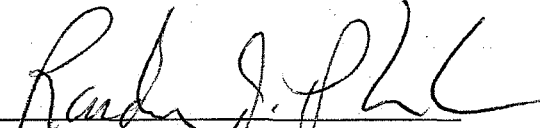
BE IT FURTHER RESOLVED, that Fort Berthold Rural Water shall be authorized to make non-material amendments to the text of the approved contract as needed to put the contract in final form provided said amendments are approved by legal counsel.

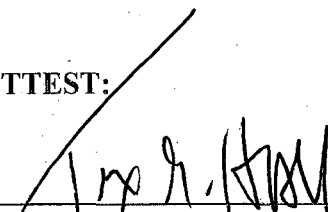
CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation hereby certify that the tribal Business Council is composed of seven (7) members of whom five (5) constitute a quorum, 6 were present at a Regular Meeting thereof duly called, noticed, convened and held on the 14th day of August, 2003, that the foregoing Resolution was duly adopted at such meeting by the affirmative vote of 6 members, 0 members opposed, 0 members abstained, 0 members not voting, and that said Resolution has not been rescinded or amended in any way.

Chairman Voting. [] Not Voting.

Dated this 14th day of August, 2003.


Executive Secretary, Randy J. PheLAN
Tribal Business Council

ATTEST:

Chairman, Tex G. Hall
Tribal Business Council