

AGREEMENT NO. \_\_\_\_\_

THIS AGREEMENT (“Agreement”) is made this \_\_\_\_ day of \_\_\_\_\_, 2012, between the CITY OF PASADENA (“City”), a Charter City, and the ARROYO SECO FOUNDATION (“ASF”), a California non-profit, public benefit corporation. The City and ASF may be referred to individually hereinafter as a “Party” and collectively as the “Parties.”

WHEREAS, the Parties are committed to preservation and management of the Arroyo Seco for its natural resources, recreational, safety and water management purposes, consistent with governing laws and local ordinances and policies; and

WHEREAS, ASF, in the capacity of Project Proponent, with the active participation and support of the City, has received a grant in the amount of Three Million Two Hundred Seventy-One Thousand Dollars (\$3,271,000) (“Grant”) from the Integrated Regional Water Management Program (“IRWM Program”) of the State of California Department of Water Resources (“DWR”). The Grant is a component of a larger regional IRWM Program grant by DWR, as described in the correspondence attached hereto as Exhibit “A;” and

WHEREAS, the City, in the capacity of Local Project Sponsor, will implement the Grant and enter into a Memorandum of Understanding (“County MOU”) with the Los Angeles County Department of Public Works and the Los Angeles County Flood Control District (collectively, “County”). The Grant will be administered by the County, and will be governed by the County MOU, a draft copy of which is attached hereto as Exhibit “B;” and

WHEREAS, the purpose of the Grant is to fund improvements to City-owned property in the Upper Arroyo Seco (“Project”), consistent with the Arroyo Seco Master Plan and with all applicable laws and regulations, as depicted on the map attached hereto as Exhibit “C;” and

WHEREAS, the Parties desire to enter into this Agreement in order to establish and maintain a cooperative relationship with regard to implementation of the Project and to allocate and to assign duties and responsibilities.

NOW THEREFORE, in consideration of the mutual promises and undertakings contained herein, and for other good and valuable consideration, and pursuant to City Council approval, the Parties agree as follows:

1.0 DEFINITIONS.

In this Agreement, unless a different meaning is stated or clearly appears from the context:

(a) "ASF" means the Arroyo Seco Foundation.

(b) "Project" means activities consisting of (i) upgrading and restoring natural habitat to improve conditions for fish and other aquatic life, (ii) modifying the intake dam with an inflatable dam or other structure, for increased water diversion, restored stream hydrology and improved aquatic connectivity, (iii) enhancing trails, and (iv) constructing a public restroom to improve water quality, all in a manner consistent with the Arroyo Seco Master Plan and any other applicable regulatory requirements, as described in the Grant application and as may be modified by consent of the Parties and approved by the County.

2.0 CITY OBLIGATIONS AND RESPONSIBILITIES.

2.1 Local Project Sponsor. Except as to the responsibilities of ASF identified in Section 3.0 below, the City shall be responsible for implementation of the Grant and the Project, and shall become the sole "Local Project Sponsor" pursuant to the County MOU.

2.2 Description of City Responsibilities. The obligations and responsibilities of the City shall include, but not be limited to:

(i) Executing the County MOU and assuming any and all rights, duties and liabilities established thereunder;

(ii) Serving as the day-to-day contact with the County, subject to obligations to consult with ASF as set forth herein;

(iii) Performing administration of all financial billings, disbursements and similar matters, not otherwise performed by the County, and subject to the City's financial obligations to ASF hereunder;

(iv) Reviewing and approving designs of improvements, phasing schedules and any other materials relating to physical implementation of the Project, subject to consultation with ASF;

(v) Negotiating with the County regarding coordination and collaboration with the County as to activities within the Project site;

(vi) Selecting and retaining consultants to carry out portions of the Project as needed, in accordance with the City's standard contracting processes, other than as set forth herein, and subject to consultation with ASF;

(vii) Selecting and retaining contractors to carry out any portion of the Project as needed, with input from ASF, in accordance with the City's standard contracting processes and the requirements of law pertaining to public contracting;

(viii) Obtaining necessary permits and approvals from other public regulatory agencies, and ensuring compliance with conditions of such permits and approvals, subject to consultation and coordination with ASF;

(ix) Preparing and submitting required reports to the County and to DWR;

(x) Retaining Project-related documentation as required by the County and/or DWR;

(xi) Maintaining regular communications with ASF as to matters of concern to ASF, as identified herein, including at least monthly project coordination meetings with ASF at a time and location to be agreed upon between the Parties; and

(xii) Reviewing and approving in a timely manner programs for community outreach and education, as described below.

3.0. ASF OBLIGATIONS AND RESPONSIBILITIES.

3.1. Consultant Status. ASF shall engage and serve as a consultant to the City in implementation of the Grant and the Project.

3.2. Description of ASF Responsibilities. The obligations and responsibilities of ASF shall consist of the following:

(i) Providing the City with input regarding design of improvements and other aspects of Project implementation on an as-needed basis in the time frame indicated by the City;

(ii) Providing the City with input regarding the selection and retention of other consultants;

(iii) Coordinating with the City regarding obtaining necessary permits and approvals from other public regulatory agencies for the Project, and regarding compliance with the conditions of any such permits and approvals;

(iv) Preparing and implementing a Community Education and Outreach Plan, in consultation with and subject to approval by the Project Manager designated by the City Manager of the City, which approval shall not be unreasonably delayed or withheld;

(v) Consulting with the City regarding other potential funding sources for the Project;

(vi) Maintaining regular communications with the City's Project Manager as to matters identified herein and any other matters on which the City requests input from ASF in the time frame indicated by the City, including providing the City with a monthly status report regarding ASF's activities hereunder and attending at least monthly meetings with the City;

(vii) Assisting the City, as needed, in additional tasks related to the Project, including but not limited to, preparing required reports, preparing presentation materials, attending meetings, data gathering & research, reviewing documents and conducting field work.

(viii) Assisting the City, as needed, in the preparation and conducting of a groundbreaking ceremony and a dedication ceremony, as described in Section 5.0 herein;

(ix) Providing the City semi-annually with a list of general tasks to be performed over the duration of the project and an estimated budget for each task, as well as an hourly fee schedule for all ASF participants, which list and schedule will serve as the basis for compensation, further described below, under Payment Schedule; and

(x) Providing monthly invoices and status reports of tasks performed in the reporting period.

#### 4.0 COMPENSATION OF ASF.

4.1 Total Fee. ASF shall be compensated an amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000) ("ASF Fee"), from the Grant, for performance of its services described above.

4.2 Payment Schedule. The City shall pay the ASF Fee as follows:

(i) An installment of Thirty-Three Thousand Seven Hundred Fifty Dollars (\$33,750), immediately following execution of this Agreement by the Parties, delivery by ASF of a complete draft of the Community Education and Outreach Plan referenced above, approval by the City of the Plan, and receipt by the City of the first installment of Grant funds; and

(ii) Monthly compensation for work performed based on paragraph 3.0 above commencing thirty (30) days after execution of this Agreement by the Parties, and until December, 2015.

ASF shall submit monthly invoices to the City, with each invoice describing the tasks or portions of tasks performed by ASF in the preceding month, the ASF employees or consultants who carried out the work in question, the number of hours worked by each such employee or consultant, and the rate of compensation of each such employee or consultant.

5.0 GROUNDBREAKING AND DEDICATION EVENTS.

The City shall be responsible for conducting a groundbreaking ceremony at the commencement of implementation of the Project and a dedication ceremony at the conclusion of the Project, to publicize the Project to the general public. These ceremonies shall be announced in local newspapers, in City utility billings, on ASF's website, by direct invitation and through other appropriate outreach means. Appropriate City officials shall be invited and encouraged to attend.

6.0 GENERAL TERMS AND CONDITIONS.

6.1 No Agency, Joint Venture or Special Relationship.

6.1.1 It is understood that, in the performance of the services herein provided for, ASF is not an agent or employee of City and shall furnish such services in its own manner and method except as required by this Agreement. Further, ASF has and shall retain the right to exercise full control over the employment, direction, compensation and discharge of all persons employed by ASF in the performance of the services hereunder. ASF shall be solely responsible for, and shall indemnify, defend and save City harmless from all matters relating to the payment of its employees, including compliance with Social Security, withholding and all other wages, salaries, benefits, taxes, exactions and regulations of any nature whatsoever.

6.1.2 ASF acknowledges that ASF and any subcontractors, agents or employees employed by ASF shall not, under any circumstances, be considered employees of the City, and that they shall not be entitled to any of the benefits or rights afforded employees of the City, including, but not limited to, sick leave, vacation leave, holiday pay, Public Employees Retirement System benefits, or health, life, dental, long-term disability or workers' compensation insurance benefits.

6.1.3 Except as the City may authorize in a separate writing, ASF and its subcontractors shall have no authority, express or implied, to act on behalf of or bind the City in any capacity whatsoever as agents or otherwise.

6.1.4 Nothing contained in the Agreement, nor the acts of the Parties, nor the acts of any third party, shall be deemed or construed to create the relationship of principal and agent, or a partnership, or a joint venture or of any common or shared business purpose between the Parties.

6.2 Waiver. Either Party's waiver of any term, condition, breach or default of this Agreement shall not be considered to be a waiver of any other term, condition, default or breach, nor of a repetition of the one waived.

6.3 Successors. This Agreement shall inure to the benefit of, and shall be binding upon, the Parties and their respective heirs, successors and/or assigns.

6.4 No Assignment. Neither Party shall assign or transfer this Agreement or any rights hereunder without the prior written consent of the other Party, which consent may be withheld in the sole discretion of the other Party. Any unauthorized assignment or transfer shall be null and void and shall constitute a material breach of this Agreement. No assignment shall release the original Parties or otherwise constitute a novation.

6.5 Compliance with Laws. Both Parties shall comply with all federal, state, county and city laws, ordinances, rules and regulations, which are, as amended from time to time, incorporated herein and applicable to the performance hereof, including, but without limitation, the Pasadena Living Wage Ordinance.

6.6 Attorney's Fees. If any action at law or in equity is brought to enforce or interpret the terms of this Agreement, the prevailing Party shall be entitled to reasonable attorney's fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.

6.7 Interpretation.

6.7.1 Applicable Law. This Agreement, and the rights and duties of the Parties hereunder (both procedural and substantive), shall be governed by and construed according to the laws of the State of California.



6.7.2 Entire Agreement. This Agreement, including any Exhibits attached hereto, constitutes the entire agreement and understanding between the Parties regarding its subject matter, and supersedes all prior or contemporaneous negotiations, representations, understandings, correspondence, documentation and agreements (written or oral).

6.7.3 Written Amendment. This Agreement may only be changed by written amendment signed by ASF and by the City Manager or other authorized representative of the City, subject to any requisite authorization by the City Council. Any oral representations or modifications concerning this Agreement shall be of no force or effect.

6.7.4 Severability. If any provision in this Agreement is held by any court of competent jurisdiction to be invalid, illegal, void or unenforceable, such portion shall be deemed severed from this Agreement, and the remaining provisions shall nevertheless continue in full force and effect as fully as though such invalid, illegal or unenforceable portion had never been part of this Agreement.

6.7.5 Order of Precedence. In case of conflict between the terms of this Agreement and the terms contained in any document attached as an Exhibit or otherwise incorporated by reference, the terms of this Agreement shall strictly prevail, unless otherwise required by higher legal authority.

6.7.6 Choice of Forum. The Parties agree that this Agreement is to be enforced in accordance with the laws of the State of California, that it is entered into and/or is to be performed in the City of Pasadena and that all claims or controversies arising out of or related to performance under this Agreement shall be submitted to and resolved in a forum within the County of Los Angeles at a place to be determined by the rules of the forum.

6.7.7 Duplicate Originals. There shall be two (2) fully signed copies of this Agreement, each of which shall be deemed an original.

6.8 Time of Essence. Time is strictly of the essence of this Agreement and each and every covenant, term and provision hereof.

6.9 Indemnity.

6.9.1 ASF Liability. ASF agrees to indemnify, hold harmless and defend (even if the allegations are false, fraudulent or groundless), to the maximum extent permitted by law, the City, its City Council and each member thereof, and its officers, employees, commission members and representatives, from any and all liability, loss, suits, claims, damages, costs, judgments and expenses (including attorney's fees and costs of litigation) which in whole or in part result from, or arise out of, or are claimed to result from or to arise out of:

(i) any activity on or use of City's premises or facilities or any performance under this Agreement by ASF, its employees, representatives, subcontractors or agents; or

(ii) any acts, errors or omissions (including, without limitation, professional negligence) of ASF, its employees, representatives, subcontractors or agents in connection with the performance of this Agreement.

6.9.2 City Liability. The City agrees to indemnify, hold harmless and defend (even if the allegations are false, fraudulent or groundless), to the maximum extent permitted by law, ASF and ASF's officers, directors, employees and representatives, from any and all liability, loss, suits, claims, damages, costs, judgments and expenses (including attorney's fees and costs of litigation) which in whole or in part result from, or arise out of, or are claimed

to result from or to arise out of, any acts, errors or omissions (including, without limitation, professional negligence) of the City or the City's employees, representatives, subcontractors or agents in connection with the performance of this Agreement.

6.9.3 This agreement by both Parties to indemnify includes, but is not limited to, personal injury (including death at any time) and property or other damage (including, but without limitation, contract or tort or patent, copyright, trade secret or trademark infringement) sustained by any person or persons (including, but not limited to, companies, or corporations, ASF and its employees or agents, the City and its employees or agents and members of the general public). The sole negligence or willful misconduct of either Party is excluded from this indemnity agreement as to indemnification obligations by the Party committing such negligence or misconduct.

6.10. Insurance. ASF shall, at its own expense, procure and maintain policies of insurance of the following types and amounts, for the duration of the Agreement, including any extensions thereto, each of which policies shall state that they afford primary coverage:

6.10.1 ASF shall carry automobile liability insurance, with minimum limits of at least \$100,000/300,000/50,000 if written on a personal automobile liability form, for using a personal vehicle; or an amount of \$500,000 including owned, hired, and non-owned liability coverage if written on a commercial automobile liability form.

6.10.2 ASF shall carry general liability insurance, with a minimum of at least \$1,000,000 combined single limit written on an Insurance Services Office (ISO) Commercial General Liability "occurrence" form or its equivalent for coverage on an occurrence basis. Premises/Operations and Personal Injury coverage are required to be included. The City

and its directors, commissioners, officers, employees, agents and volunteers must be endorsed on the policy as additional insureds as respects liability arising out of ASF's performance of this Agreement. If ASF employs other contractors as part of the services rendered, ASF's Protective Coverage is required. ASF may include all subcontractors as insureds under its own policy or shall furnish separate insurance for each subcontractor, meeting the requirements set forth herein.

6.10.3 ASF shall comply with the applicable sections of the California Labor Code concerning workers' compensation for injuries on the job. Compliance is accomplished in one of the following manners:

(1) Providing copy of a permissive self-insurance certificate approved by the State of California; or

(2) Securing and maintaining in force a policy of workers' compensation insurance with statutory limits and Employer's Liability Insurance with a limit of \$1,000,000 per accident. The policy shall be endorsed to waive all rights of subrogation against the City, its directors, commissioners, officers, employees and volunteers for losses arising from performance of this Agreement, provided that such endorsement is available from ASF's insurance carrier at no additional cost to ASF; or

(3) Providing a "waiver" form certifying that no employees subject to the Labor Code's Workers' Compensation provision will be used in performance of this Agreement.

6.10.4 Each insurance policy included in this clause shall be endorsed to state that coverage shall not be canceled except after thirty (30) days' prior written notice to the City.

6.10.5 Insurance shall be placed with insurers with a Best's rating of not less than B:VIII.

6.10.6 Prior to commencement of performance of this Agreement, ASF shall furnish the City with a certificate of insurance for each policy. Each certificate is to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificate(s) must be in a form approved by the City. The City may require complete, certified copies of any or all policies at any time.

6.10.7 Failure to maintain required insurance at all times shall constitute a default and material breach. In such event, ASF shall immediately notify the City and cease all performance under this Agreement until further directed by the City. In the absence of satisfactory insurance coverage by ASF, the City may, at its option: (a) procure insurance with collection rights for premiums, attorney's fees and costs against ASF by way of set-off or recoupment from sums due ASF, at City's option; (b) immediately terminate this Agreement; or (c) self insure the risk, with all damages and costs incurred, by judgment, settlement or otherwise, including attorney's fees and costs, being collectible from ASF, by way of set-off or recoupment from any sums due ASF.

6.11 Notices. Except as otherwise provided herein, any notice or demand to be given by either Party to the other shall be given in writing and by personal delivery or prepaid first-class, registered or certified mail, addressed as follows:

If to the City: Michael Beck, City Manager  
City of Pasadena  
100 N.Garfield Ave.  
Pasadena, CA 91109

If to ASF:

Tim Brick, Managing Director  
Arroyo Seco Foundation  
570 West Avenue 26, Suite 300  
Los Angeles, CA 90065

Notice simply to the City of Pasadena or any other City department, or notice simply to Arroyo Seco Foundation, is not adequate notice.

Any such notice shall be deemed to have been given upon delivery, if personally delivered, or, if mailed, upon receipt or upon expiration of three (3) business days from the date of posting, whichever is earlier. Either Party may change the address at which it desires to receive notice by giving written notice of such request to the other Party.

6.12 Default. In the event either Party materially defaults in its obligations hereunder, the other Party may declare a default and terminate this Agreement by written notice to the defaulting Party. The notice shall specify the basis for the default. The Agreement shall terminate unless such default is cured before the effective date of termination stated in such notice, which date shall be no sooner than ten (10) days after the date of the notice.

Termination for cause shall relieve the terminating Party of further liability or responsibility under this Agreement, including the payment of money, except for payment for services satisfactorily and timely performed prior to the service of the notice of termination, and except for reimbursement of (i) any payments made by the City for service not subsequently performed in a timely and satisfactory manner, and (ii) costs incurred by the City in obtaining substitute performance.

6.13. Automatic Termination. This Agreement is predicated on receipt of the Grant funding from DWR and the County, and upon the ability of the City to match all or part of the Grant funds as set forth in the Grant award described in Exhibit "A." The Parties acknowledge that, without the Grant funding and/or matching funds, the City would not

undertake and/or complete the Project. Accordingly, this Agreement shall automatically and immediately terminate (“Automatic Termination”) as a result of (i) the failure, for whatever reason, of the County or DWR to provide or continue the Grant funding for the Project in compliance with the County MOU, or (ii) termination of the County MOU by the County for any reason or by the City for good cause, or (iii) termination of the Project by the City due to the City’s inability to match all or part of the Grant funding or for other good cause. Such Automatic Termination shall not be considered a default or breach of this Agreement. The City shall provide written notice by personal delivery of such Automatic Termination to ASF, and the City’s obligations for compensation of ASF under Section 4.0 shall terminate immediately upon receipt by ASF of such notice. The foregoing notwithstanding, the City shall compensate ASF for any work performed by ASF pursuant to this Agreement prior to receipt of such notice by ASF.

6.14 Exhibits. All exhibits referred to herein and attached hereto are incorporated herein by such reference as if fully set forth herein.

6.15 Release. ASF agrees to release and covenants not to sue the City, its City Council and each member thereof, and its officers, employees, commission members and representatives for any damage or injury (including death) to itself, its officers, employees, agents and independent contractors damaged or claiming to be damaged from any performance under this Agreement, with the exception of damage for failure by the City to make payments to ASF as provided herein. ASF further agrees to release and covenants not to sue the City, its City Council and each member thereof, and its officers, employees, commission members and representatives, in any action with regard to review of the Project pursuant to the California Environmental Quality Act by any lead agency, or any other administrative approval granted by

or to the City for the Project. This covenant extends to prohibit any participation by ASF in any such action or financial support by ASF of any other third party in any such action.

7.0 NO ESTATE.

This Agreement provides only a right of use of temporary duration and does not give ASF any added interest, title, leasehold, estate or right of any kind or extent whatsoever, whether legal or equitable, prescriptive or otherwise, no matter how long this license runs. ASF agrees that it will not claim at any time any interest, title, leasehold or estate in City-owned property by virtue of this Agreement or by virtue of ASF's occupancy, use or expenditures under this Agreement.

8.0 EFFECTIVE DATE.

This Agreement shall become effective immediately upon execution by both Parties.

9.0 NONDISPARAGEMENT.

During the term of this Agreement, ASF, and its directors, officers, and employees, shall not make any public statements (verbal or written) which are critical of the Project or any of its components, any activities or projects described in the Grant application, any activities or projects analyzed during the CEQA process for the Project, and/or the City's performance under this Agreement or the County MOU, without first giving the City notice in advance of such criticism and allowing the City a reasonable period of time to respond and/or to correct the cause of the criticism prior to the making of the public statement. Breach of this provision by ASF, its directors, officers, or employees shall constitute an immediate and material breach of this Agreement.



The foregoing shall not apply to, and ASF shall have no responsibility to the City for, comments made through a list-serve maintained by ASF, where the person making any comment is not a director, officer, or employee of ASF, nor shall it apply to other matters of public interest unrelated to performance by the City under this Agreement or the County MOU.

10.0 MAINTENANCE AND INSPECTION OF RECORDS.

10.1 Access to Records. The City, or its authorized auditors or representatives, shall have access to and the right to audit and reproduce any of ASF's records to the extent the City deems necessary, for all purposes relating to the Agreement.

10.2 Preservation of Records. ASF shall maintain and preserve all such records for a period of at least three (3) years after completion or termination of this Agreement.

10.3. Records Location. ASF shall maintain all such records in the City of Pasadena. Alternatively, ASF shall, upon request, promptly deliver the records to the City or reimburse the City for all reasonable and extra costs incurred in conducting the audit at a location other than the City of Pasadena, including, but not limited to, such additional (out of the City) expenses for personnel, salaries, private auditors, travel, lodging, meals and overhead.

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

CITY OF PASADENA

By: \_\_\_\_\_  
Michael J. Beck  
City Manager

ATTEST:

\_\_\_\_\_  
Mark Jomsky  
City Clerk

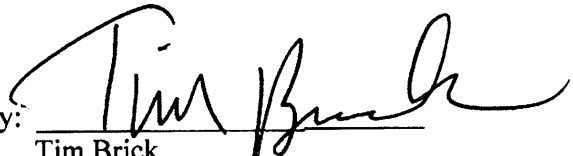
APPROVED AS TO FORM:

\_\_\_\_\_  
Theresa Fuentes  
Assistant City Attorney


REVIEWED:

\_\_\_\_\_  
Larry Hammond  
Purchasing Administrator

THE ARROYO SECO FOUNDATION

By:   
\_\_\_\_\_  
Tim Brick  
Managing Director

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Cary D. Lowe  
Counsel for ASF