

1995

**STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON**

**FIRST AMENDED AND RESTATED  
REGIONAL WATER SUPPLY AND  
WATER SERVICE AGREEMENT**

**THIS REGIONAL WATER SUPPLY AND WATER SERVICE AGREEMENT** made and entered into this the 11<sup>th</sup> day of November, 1995, by and between **COUNTY OF HENDERSON**, a body politic and corporate (herein "Henderson County"); **THE CANE CREEK WATER AND SEWER DISTRICT**, a municipal body created pursuant to Chapter 162A-86 et seq. of the North Carolina General Statutes (herein "the District"); **THE ASHEVILLE/BUNCOMBE WATER AUTHORITY**, a joint agency created pursuant to Chapter 160A-460 et seq. of the North Carolina General Statutes (herein "Authority"); **CITY OF ASHEVILLE**, a municipal corporation (herein "Asheville"); and the **COUNTY OF BUNCOMBE**, a body politic and corporate (herein "Buncombe County"), hereinafter collectively called the "Parties."

**WHEREAS**, in order to best conserve, protect and utilize the natural resources of Western North Carolina, the Authority, Buncombe County, Henderson County, the Metropolitan Sewerage District (herein "MSD"), Asheville and the City of Hendersonville, North Carolina, adopted a "RESOLUTION OF INTENT TO STUDY THE CREATION OF A REGIONAL WATER AND SEWER AUTHORITY"; and

**WHEREAS**, the Authority as a joint agency may not own real property and title to real property acquired by the Authority has been vested in Asheville; and

**WHEREAS**, as part of its plan to obtain a reliable, long-term water source, the Authority and Asheville acquired approximately 137 acres of real property along the French Broad River in Buncombe County, North Carolina for a new water treatment plant, said property being more particularly described in Deed Book 1358, at Page 613, of the Buncombe County, N.C. Register's Office (herein "the Brevard Road Site"); and

**WHEREAS**, the State of North Carolina Department of Environment, Health and Natural Resources has recommended that the Authority consider water intake sites further upstream from the Brevard Road Site in Henderson County; and

**WHEREAS**, the Authority on behalf of the City of Asheville plans to purchase real property in Henderson County for the placement of water intakes and water treatment facilities; and

**WHEREAS**, Henderson County seeks a reliable long term means of properly and adequately disposing of its wastewater and sewage; and

**WHEREAS**, Henderson County has entered into negotiations with MSD to have MSD accept Henderson County's wastewater and sewage; and

WHEREAS, the Authority, Asheville and Henderson County entered into a Regional Water Agreement, dated June 28, 1994, setting forth the general terms for the provision of potable water to the citizens of Henderson and Buncombe Counties; and

WHEREAS, in order to supplement the Regional Water Agreement all the Parties, except Asheville, agreed to and signed a "Regional Water Supply and Water Services Agreement" (the "Regional Agreement"); which has been submitted to Asheville for consideration; and

WHEREAS, Asheville requested that amendments be made to the Regional Agreement in order that said Agreement be consistent with the requirements of Asheville in relation to other obligations of Asheville, including Asheville's obligation for undertaking the revenue bond financing associated with the construction of the facilities provided for in said Agreement; and

WHEREAS, the Parties desire to amend, restate and replace the Regional Agreement in its entirety by the terms of this First Amended and Restated Regional Water Supply and Water Service Agreement; and

WHEREAS, the Authority, Asheville and Buncombe County acknowledge that the Supplemental Water Agreement, dated August 1987 (herein "Supplemental Water Agreement") will be amended, if required, to provide consistency with and continuity to the terms set forth herein;

NOW THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree to the following terms and conditions:

#### **SECTION I: ENABLING AUTHORITY AND PURPOSE**

1.0 By this Agreement, the parties intend to establish a joint undertaking for providing water for consumptive and/or industrial uses to citizens of Henderson and Buncombe Counties. The District through its Board of Trustees does by this Agreement contract pursuant to N.C.G.S. 153A-275 with Henderson County to provide and operate a water distribution system for the benefit of District residents. Henderson County by this Agreement does contract with the Authority and Asheville to make potable water available to Henderson County and to install and own the Regional Water Lines as hereinafter defined until such time as those lines are purchased by Henderson County and/or the District pursuant to the terms hereinafter set forth. The enabling authority for this Agreement is set forth in Chapter 160A, Article 20 of the North Carolina General Statutes.

#### **SECTION II: DEFINITIONS**

The terms set forth in this Section and referenced throughout the Agreement shall have the meaning as set out below. All other terms used in the Agreement not defined below or elsewhere in the Agreement shall have their customary dictionary definition.

2.0 "Regional Water Lines": water transmission or water distribution lines and associated improvements installed by the Authority at the request of Henderson County pursuant to the terms of this Agreement to provide water for customers within the Cane Creek Water and Sewer District as set forth below in subsection 2.1.

2.1 "Service District": the area in which the Authority is required pursuant to the terms of this Agreement to install a water distribution system. As of the date hereof, said area is delineated as the Cane Creek Water and Sewer District as defined in "Resolution to Create the Cane Creek Water and Sewer District" attached hereto and incorporated herein as Exhibit A. However, such District may be by resolution amended, expanded or restated to incorporate all or a portion of Henderson County, as further provided in subsection 4.2 below.

2.2 "Transmission Lines": water lines ten (10) inches or larger in diameter size.

2.3 "Distribution Lines": water lines less than ten (10) inches in diameter size.

2.4 "Committee": the Policies and Priorities Committee of the Asheville/Buncombe Water Authority as expanded to include a member from Henderson County, as further provided in Section V below.

2.5 "Projected Regional Water Line Costs": the amount of capital costs projected to be incurred for the design, purchase, installation, construction, financing, and replacement (if any) of a Regional Water Line or Lines and any associated improvements agreed upon by the Authority Director and the Henderson County Utilities Director prior to any work or materials being contracted for and/or installed in connection with a Regional Water Line or Lines, as further provided in Section VII below.

2.6 "Actual Regional Water Line Costs": all capital costs associated with the installation of a Regional Water Line or Lines and associated improvements incurred by the Authority and/or Asheville prior to the transfer of ownership of the applicable improvement pursuant to the terms of this Agreement from the Authority and/or Asheville to Henderson County.

2.7 "Net Revenue": the gross proceeds received from a Regional Water Line less the total costs to produce, treat, and deliver potable water to customers served by the Regional Water Line, less the total costs to maintain and repair the Regional Water Line and less the total costs to bill and collect from customers served by the Regional Water Line. Payments to Asheville and Buncombe County pursuant to Article IV, Paragraph 16 of the Supplemental Water Agreement shall not be subtracted from the proceeds generated by the Regional Water Lines in determining "Net Revenue". However, costs of support services provided by Asheville as reflected in Article VIII(b) of that Agreement which are attributable to the Regional Water Lines shall be included in figuring "Net Revenue".

**SECTION III: WATER INTAKES AND TREATMENT PLANT; OTHER REAL PROPERTY**

3.0 Pursuant to Chapter 153A-15 of the North Carolina General Statutes, Henderson County by and through its Board of Commissioners has consented and reaffirms the acquisition by Asheville (or the Authority on behalf of Asheville) of real property located in Henderson County for the placement of water intakes, water storage, a treatment plant and other water treatment facilities, said property (herein "the Water Plant Site") being described as follows:

- A. all of that real property described in Deed Book 471, at Page 47, of the Henderson County, N.C. Register's Office, containing 261.53 acres, more or less; and
- B. all of that real property described in Deed Book 482, at Page 451, of the Henderson County, N.C. Register's Office, containing 29.80 acres, more or less; and
- C. all of that real property described in Deed Book 522, at Page 313, of the Henderson County, N.C. Register's Office, containing 7.28 acres, more or less; and
- D. all of that real property described in Deed Book 482, at Page 453, of the Henderson County, N.C. Register's Office, containing 26.09 acres, more or less.

3.1 The Water Plant Site and improvements thereto along with water transmission lines or distribution lines, pump stations and other related equipment or facilities located in Henderson County serving only customers outside Henderson County shall be operated by the Authority and shall be considered part of "the water system of the City of Asheville" as that term is set forth in the Supplemental Water Agreement and amendments thereto.

3.2 Except as provided in subsections 3.3 and 3.4 below, Henderson County by and through its Board of Commissioners and pursuant to Chapter 153A-15 of the North Carolina General Statutes consents to the acquisition by Asheville (or the Authority on behalf of Asheville) through purchase, condemnation or any other lawful means of such other real property in Henderson County, including easements and rights-of-way, for the installation of valves, transmission lines, pump stations and other equipment and facilities used to process and distribute water to customers of the Authority and/or Henderson County. The signatures herein of its Board of Commissioners shall be conclusive proof of Henderson County's consent under Chapter 153A-15. Notwithstanding the above, Henderson County shall provide Asheville, upon request, any additional proof of consent that may be required to effectuate any purchase, condemnation or other acquisition of real property in Henderson County for the purposes of constructing a water treatment plant and/or installing transmission and distribution equipment and facilities. Henderson County acknowledges that this consent is provided as evidence of the County's commitment to the Authority, which consent is being relied upon by the Authority in its expenditures of time and money needed to install the improvements contemplated by this Agreement.

3.3 The Authority shall provide Henderson County notice of any purchase, condemnation or other lawful means of acquisition of property located in Henderson County by the Authority thirty (30) days before such acquisition is effectuated by title transfer or by judgment order being docketed. Said notice shall include the location of property to be obtained and the purpose behind the acquisition. If a reasonable alternative site is provided by Henderson County that satisfies the purposes outlined by the Authority in the above notice, the Authority is restricted to the acquisition of same. Whether an alternative site is "reasonable" shall include, but not be limited to, such factors as the Authority's purpose, its relation to the proximity of the proposed location, the size of the alternative tract, the impediments to title, if any, time necessary for acquisition and the relative costs of acquisition. Notwithstanding the above, the Authority shall have the sole discretion in locating the main transmission lines in Henderson County servicing only customers outside Henderson County.

3.4 In the event this Agreement is terminated as set forth in Section XIV or subsection 4.3 below or voided per subsection 4.4, then thereafter the provisions of N.C.G.S. 153A-15 shall apply, preventing the Authority from acquiring real property in Henderson County without Henderson County's consent. Any property acquired or contract rights for acquisition obtained by the Authority or Asheville before such termination shall remain vested in the Authority or Asheville and such title and rights shall not thereafter be voided without the approval of the Authority and Asheville, their successors and assigns.

3.5 Henderson County shall initiate condemnation or take other actions as reasonably requested by the Authority or Asheville in order to acquire all real property, or partial interests thereof, in Henderson County needed for the purposes of carrying out this Agreement and any amendments thereto. If requested, Asheville and/or the Authority shall reimburse Henderson County for Henderson County's acquisition costs upon delivery of title to Asheville for the properties obtained by Henderson County.

3.6 Henderson County shall participate with the Authority and/or Asheville as reasonably requested by the Authority in all permitting processes and Federal and State regulatory procedures necessary to have the Water Plant Site and related improvements thereto approved for water intake, treatment and storage. The parties shall each take all reasonable measures to protect and improve each associated watershed for the Mills River and French Broad Rivers in accordance with its classification, including, but not limited to, enforcement of all applicable watershed regulations.

3.7 The Authority and Asheville shall seek the immediate declassification of the watershed draining to the Brevard Road Site from the State of North Carolina Department of Environment, Health, and Natural Resources (herein "DEHNR") upon approval by DEHNR of the water intakes on the Mills River and/or French Broad River. Notwithstanding the intent of the Authority to declassify the Brevard Road Site upon the conditions expressed herein, no cause of action or duty to any member of the public is created for the failure of the Authority to achieve declassification.

#### SECTION IV: WATER SERVICE - AREA, STRUCTURE and DURATION

4.0 Pursuant to the terms and conditions hereinafter set forth, the Authority shall supply water taken from the Mills River and processed at water treatment facilities in Henderson County owned by the Authority or Asheville (hereinafter "Henderson County Water Treatment Facilities") to Henderson County without regard to quantity and in accordance with all applicable federal and state laws and regulations. The Authority and Asheville agree that in no event shall the quantity of Mills River water provided to Henderson County citizens from a new water treatment plant at the Water Plant Site be reduced or eliminated in order to provide water to customers of the Authority located outside Henderson County. Provided, however, the policies of the Authority and/or Henderson County shall take precedence over this prohibition, until Henderson County provides a written demand to the Authority that this provision be enforced regardless of such policies. This Agreement shall not be construed as creating an entitlement to water for any citizen or user within Henderson County nor shall Henderson County, the Authority or Asheville be liable to any person for damages for failure to furnish water. Allocations for water for any citizen of Henderson County shall be conducted on a case-by-case basis per policies and procedures established by Henderson County.

4.1 If for whatever reason, whether due to man-made reasons (i.e. chemical contamination, etc.) or Acts of God (i.e. drought, etc.), the water from Henderson County Water Treatment Facilities is inadequate to serve the residents of Henderson County, the Authority shall make available to Henderson County customers in accordance with Authority rules and fee schedules waters from the Bee Tree and/or North Fork Reservoirs in Buncombe County. The Authority may charge different rates for customers located outside Buncombe County than those in Buncombe County in providing potable water originating from treatment facilities sited in Buncombe County.

4.2 Pursuant to the terms and conditions hereinafter listed, the Authority shall install water lines (defined above in subsection 2.0 as "Regional Water Lines") at the direction of Henderson County to serve customers within the Cane Creek Water and Sewer District as such area is defined in the "RESOLUTION TO CREATE THE CANE CREEK WATER AND SEWER DISTRICT OF HENDERSON COUNTY" attached hereto and incorporated herein as Exhibit A or as amended, extended or restated. The Regional Water Lines installed by the Authority and any real property acquired thereto shall be titled in Asheville and shall remain so titled until such time as said lines and real property interests are conveyed to Henderson County in accordance with the terms hereinafter set forth. The service area for Authority extensions of water lines denoted in this subsection may be amended to include all or a portion of the Mud Creek Water and Sewer District or other areas in Henderson County upon consent of the Trustees for the Mud Creek Water and Sewer District and Henderson County.

4.3 Subject to the terms of subsection 16.2 and except as stated in subsection 4.4 and the provision for termination in Section XIV, this Agreement for water supply and installation of Regional Water Lines shall continue for a period of forty (40) years from the date hereof at which time it may be extended by the mutual consent of all the parties hereto or their successors or assigns for multiple periods not exceeding forty (40) years each.

4.4 This Regional Water Supply and Water Service Agreement is contingent on: (i) the sale of the Water Plant Site to Asheville (or the Authority on behalf of Asheville); (ii) the approval by the State of North Carolina of a water intake on the Mills River with a quantity being at least 10 million gallons a day and/or an intake in the French Broad River; (iii) State of North Carolina approval of the plans for treatment and separate storage of waters from the Mills River and/or French Broad River; and (iv) receipt of funds by Asheville and/or the Authority for the construction of a 5 million gallons per day water treatment plant at the Water Plant Site (hereinafter the "Water Treatment Plant") upon such terms and conditions as are satisfactory to Asheville and the Authority. If any of the conditions in this paragraph 4.4 do not occur before June 30, 1997, then this Agreement shall be null and void with no further privileges, responsibilities or liabilities between the parties.

**SECTION V: WATER SERVICE - ADMINISTRATION, RULES AND POLICIES RE: USAGE.**

5.0 Henderson County and/or the District shall adopt rules and regulations for the District covering subjects addressed by the Authority's existing policies (herein "the Henderson County Policies"), including, without limitation, the extension, connection and usage of the Regional Water Lines envisioned by this Agreement. The Henderson County Policies shall substantially conform to the Authority's policies and the Authority's policies shall control unless specifically contradicted by the Henderson County Policies. The Henderson County Policies shall include, without limitation:

- A. Procedures for water allocation, connection and/or water extension requests. As stated in 5.1 below, the Authority's existing Policies and Priorities Committee (herein "Committee") shall be the body to initially decide water allocations and/or extensions within the District with a right of appeal to the Henderson County Board of Commissioners.
- B. Water Service Agreement Forms, including provisions for billing, collection, and enforcement such as disconnection for failure to pay. For each new connection to the Regional Water Lines in the District, a water service agreement (herein "Water Service Agreement") shall be signed by the customer, the Director for the Authority, and the Henderson County Utilities Director.
- C. Metering requirements.
- D. Water Use restrictions.
- E. Hazard and Protective Devices.
- F. Interruption of Water Service.
- G. Enabling language for usage fees (imposed by the Authority or Henderson County), connection charges, impact fees or other kind of charges.

I. Enabling language for the acquisition of easements on or off-site to a party requesting a water line extension.

5.1 One (1) board member of the Authority appointed by Henderson County shall become a member to the existing Authority Policies and Priorities Committee. Applications from parties within the Service District for allocation, connection or extension requests shall be submitted first to the Henderson County Utilities Director who shall then review the request(s). The Henderson County Utilities Director shall then forward the particular application to the Authority Director with a written recommendation. The Authority Director shall present the application with his comments to the Committee along with the Henderson County Utilities Director's recommendation. Based on the policies adopted by Henderson County and the recommendation and comments from the Henderson County Utilities Director and Authority Director, the Committee shall approve or deny the request from the customer within the District. Subject to subsection 5.5. below, a party may appeal an adverse decision by the Committee to the Henderson County Board of Commissioners within fifteen (15) days after receipt of the decision. The appeals process shall conform to the appeals process set forth in the Authority's Water Policies. The Committee shall interpret the Henderson County Policies consistent with the Authority's policies.

5.2 Henderson County shall enact schedules of fees, charges and penalties for services furnished by the Authority and Henderson County pursuant to this Agreement as they relate to reimbursement for capital costs associated with the Regional Water Lines. Such schedules shall include, but not be limited to, connection charges and impact fees, acceptable to the Authority and shall be duly adopted by both Henderson County and the Authority before the first Henderson County customer is served through a Regional Water Line.

5.3 Except as provided in subsection 4.1, the Authority shall enact water usage rates for customers in Henderson County that are equal to or less than rates applied to its customers in Buncombe County. As long as the above requirement is met, the Authority may enact and modify such rates at any time without the consent of Henderson County or the District.

5.4 Henderson County does hereby contract with the Authority to provide billing and collection services for all water rates, fees, and charges from Henderson County customers water from the Water Plant Site or other Asheville-owned treatment facilities. The Authority shall have the right and power to take all necessary and reasonable action to enforce the terms of any Water Service Agreement of any customer and the rules and regulations adopted by Henderson County and the usage rates imposed by the Authority. Subject to subsection 5.5 below, all appeals of matters concerning the enforcement and interpretation of Henderson County Policies shall follow the same or similar process outlined in the Authority's Water Policies (with the "Director" therein being the Authority's Director).

5.5 Notwithstanding the right of a party to appeal to Henderson County from an adverse ruling by the Committee, Henderson County shall not waive any fee or charge requirement pertaining to an



applicant for water line connection or extension or approve the Authority's assumption of any extension costs for an applicant's project without the prior written consent of the Authority.

5.6 Asheville and the Authority shall establish an account separate from the Revenue Fund (as that term is defined in the General Trust Indenture dated as of February 1, 1996, hereinafter the "Indenture", between Asheville and a financial institution as a trustee) and the Water Fund (as that term is defined in the Supplemental Water Agreement) for the revenues collected from Henderson County customers served by the Regional Water Lines and shall keep its records reasonably accessible to appropriate Henderson County employees during normal business hours. Establishment of such separate account does not alter the rights under the Indenture with respect to such revenues so long as the respective Regional Water Lines are owned by Asheville. The Authority shall provide to Henderson County a quarterly statement of the accounts payable and accounts receivable concerning the customers connected to the Regional Water Lines. The Authority shall in the separate water account set up a subcategory for revenues attributable to each Regional Water Line (e.g. using street addresses rather than alphabetical listing).

5.7 Water service at all facilities owned by Henderson County shall be metered, and subject to the monthly billing charge. However, direct activities operated as general governmental services, except schools, by Henderson County shall receive reasonable amounts of water free of charge. By way of example and not by way of limitation, direct activities operated by Henderson County as general governmental services shall include the County courthouse and the County library. Henderson County agrees to amend its rules to terminate this provision at any time the Authority eliminates this same allowance for governmental facilities in Asheville and Buncombe County. Notwithstanding the above, all Regional Water Line extension requests and allocations for governmental or quasi governmental entities shall follow the same procedures outlined in subsection 5.1 above.

#### **SECTION VI: REGIONAL WATER LINES - LOCATION, SIZE, MATERIALS AND CONSTRUCTION**

6.0 Regional Water Lines shall be installed by the Authority with the location, size and materials of the lines to be determined by Henderson County in compliance with Section 6.8 below. The Utilities Director for Henderson County is authorized in accordance with the terms below to establish the appropriate location, size, and materials for each Regional Water Line. The allocation of costs for the Regional Water Line or Lines is set forth in Section VII below.

6.1 The procedure for the Authority's installation of any Regional Water Line or other improvements servicing customers residing within the Service District shall be as follows:

A. The Henderson County Utilities Director shall request in writing to the Authority's Director the installation of a Regional Water Line or Lines or other improvement (the "Project") and shall include: (i) a survey showing the location of the proposed improvement; (ii) specifications sheet denoting materials, size, length and other

specifications in accordance with Section 6.8 below; and (iii) projected revenues from the Project.

B. Within thirty (30) days or such reasonable time as can be agreed upon by the parties after receipt of the above request, the Authority Director and the Henderson County Utilities Director shall agree on the Projected Regional Water Line Costs and Projected Regional Water Line Revenues for the Project as set forth in Section VII below and the projected timetable of construction. Financing of the Project shall be as set forth in Section VIII below.

C. Any amendments to Projected Regional Water Line Costs resulting from anticipated change orders to bids approved under subsection 6.2 below shall be in writing and signed by the Henderson County Utilities Director and the Authority Director.

6.2 The Authority shall have the responsibility to advertise for contractors for the Project and solicit bids from suppliers of the equipment or facilities for the Project. After reviewing the various bids, the Authority shall select the contractors and/or suppliers. Advertisement and selection of contractors and suppliers shall be done in accordance with the bidding and letting requirements for public contracts in N.C.G.S. 143-128 et seq., if applicable. The contractors for the Project shall not be employees of Henderson County, the District, the Authority, Asheville or Buncombe County.

6.3 The Authority shall be responsible for overseeing the construction of the Project and shall endeavor to have contractors for the Project comply with the plans and specifications for the Project. Henderson County by and through its representatives from the Henderson County Utilities Department shall have access to the site of the Project to monitor construction progress in relation to the projected timetable and compliance with plans and specifications.

6.4 Enforcement of any contracts entered into for the Project shall rest in the Authority, until such time as the ownership of the applicable improvement is transferred to Henderson County. The Henderson County Utilities Director may, at any time, complain in writing to the Authority Director regarding a Project, setting forth in detail the particular objections. The Authority Director shall respond to the Henderson County Utilities Director within seven (7) days after receipt of the complaint, setting forth the plans, if any, for rectifying any perceived problems. If the Henderson County Utilities Director is not satisfied with the response or if a response is not received within the allotted seven (7) days, Henderson County may request arbitration as provided for in Section XIII below. The Authority and Henderson County may agree to stop work on the Project during the time of arbitration. The arbitrator(s) shall allocate to the losing party the increased costs, if any, for the Project resulting from any delay from arbitration. The Authority Director shall indicate to the Henderson County Utilities Director changes, if any, in the timetable for construction resulting from the arbitration delay.

6.5 Any warranties of materials or labor enuring to the Authority and/or Asheville that have not lapsed at the time the Project improvement is purchased by Henderson County shall be transferred to Henderson County. Any contract for construction services on a Project shall expressly set forth that warranties of construction may be assigned to Henderson County. Except for these warranties, the Authority and Asheville do not give any warranties or representations, expressed or implied, related to the Project to anyone, including, without limitation, any warranty of workmanship or that the lines have been constructed in accordance with the plans and specifications for the Project.

6.6 The Authority shall have the right to determine where and when it will construct distribution or transmission lines, pump stations and other related equipment or facilities within Henderson County to serve only customers outside Henderson County. Provided, however, Henderson County may, except for the main transmission lines running to Buncombe County to serve only non-Henderson County customers, require that the Authority choose an alternate route proposed by Henderson County, if reasonable grounds for not proceeding with the Authority's original route are shown. Henderson County bears the burden of proof regarding the standard of reasonableness (which standard is set forth with more particularity in subsection 3.3 above).

6.7 At any time, Henderson County shall have the right to construct, subject to subsection 6.8 below, its own distribution or transmission lines at Henderson County's sole expense to be served by the Henderson County Water Treatment Facilities. Net revenue generated by any such lines shall be paid to Henderson County.

6.8 The water distribution system installed in Henderson County shall be constructed in accordance with the then current Asheville Buncombe Water Authority Water System Extension Design Guidelines and Specifications or such design guidelines and specifications as are then being used by the Authority so as to be as technologically advanced as the system in place in Buncombe County. For example, facilities constructed in Henderson County shall conform to requirements for use in the SCADA network being operated in Buncombe County.

6.9 Asheville, Buncombe County and/or the Authority shall obtain the prior written consent of Henderson County before they jointly or severally enter into any agreement to in any manner, directly or indirectly, build or construct or cause to be built or constructed, in whole or in part, any water treatment plant in Henderson County, other than at the Water Plant Site.

## **SECTION VII: REGIONAL WATER LINES - COSTS AND REVENUES**

7.0 The Actual Regional Water Line Costs of a Project shall consist of the Authority's total costs associated with the purchase, installation, and/or replacement of the Project, including, without limitation, expenses associated with:

- A. Acquisition of rights-of-way and real property.

B. Acquisition of equipment (including such equipment as needed to conform to the Authority's water system in Buncombe County).

C. Engineering, except for services rendered by the Henderson County engineer (who currently is William Lapsley and Associates) where fees shall be paid directly by Henderson County.

D. Appraisal work.

E. Legal services.

F. Financing, including, without limitation, principal and accrued interest on the debt service attributable to the Project and the cost of money associated with the construction of the Project.

G. Replacement costs of the line, if any.

H. Any other capital costs associated with the Project that are agreed upon in writing by the Authority Director and the Henderson County Utilities Director.

7.1 The Regional Water Line Revenue of a Project shall consist of the net revenue derived from the use of the particular Regional Water Line(s) by customers within the Service District including, without limitation, usage fees, impact fees, and/or connection or tap-on fees as set forth in the schedules duly adopted by Henderson County and the Authority.

7.2 Subject to subsection 7.4 below, the Authority shall install a Regional Water Line or Lines and any associated improvement in Henderson County at Henderson County's request and at the Authority's sole cost and expense when the Projected Regional Water Line Revenue noted in 7.1 above will result in the total reimbursement to the Authority of the projected Regional Water Line Costs outlined in subsection 7.0 above in nine (9) years or less from the date the Project is substantially completed (herein "the Pay Back Period"). Notwithstanding the above, Henderson County may at any time contribute funds to the Project, reducing the amount of Regional Water Line Revenues needed for reimbursement to the Authority as provided herein.

7.3 Subject to subsection 7.4 below, the Authority shall install a Regional Water Line or Lines and any associated improvement in Henderson County at Henderson County's request and at the shared expense of Henderson County and the Authority when the Projected Regional Water Line Revenues for said line(s) will not result in total reimbursement to the Authority of the Projected Regional Water Line Costs within nine (9) years from substantial completion of the Project. Henderson County shall pay to the Authority before substantial completion of the Project the portion of the Actual Projected Regional Water Line Costs, which will not be reimbursed from reasonably projected revenues from the water line within the Pay Back Period.

7.4 Notwithstanding the above, before the Authority is required to install a Regional Water Line or Lines and any associated improvement, Henderson County must provide reasonable proof to the Authority that the Authority will be completely reimbursed for the Project from Regional Water Line Revenues during the Pay Back Period.

7.5 Notwithstanding the above, the Authority must be reimbursed in full for its Actual Regional Water Line Costs for a particular Project within the Pay Back Period. If at the end of the Pay Back Period, the Regional Water Line Revenues have not matched the Actual Regional Water Line Costs, less accounted for depreciation by that time, Henderson County agrees to promptly pay the difference and purchase the applicable Project from the Authority and/or Asheville. Upon reimbursement of the Authority and/or Asheville in full of the Actual Regional Water Line costs by Regional Water Line user fees, or by a payment from Henderson County pursuant to this paragraph, the Authority and/or Asheville shall transfer their interest in the Project to Henderson County.

#### **SECTION VIII: REGIONAL WATER LINES - OWNERSHIP AND PURCHASE**

8.0 All Regional Water Lines installed at the Authority's and/or Asheville's total or partial expense shall be titled in and remain the property of Asheville until:

- a. The Authority and/or the City of Asheville has been completely reimbursed for its Actual Regional Water Line Costs less accounted for depreciation and the applicable line(s) is released as collateral for any indebtedness of Asheville and/or the Authority that it is pledged to secure and documents necessary to convey Asheville's ownership interest in the real and personal property involving the applicable lines have been prepared, executed and delivered to Henderson County; or
- b. A Regional Water Authority is formed which acquires the water system assets from the Authority, Asheville and Henderson County.

Notwithstanding the above, the Regional Water Lines may be part of the water system of the City of Asheville as that term is defined in the Indenture, but shall not be part of the water system for documentation describing it as property held in perpetuity by Asheville for the benefit of its citizens.

8.1 For any Regional Water Line and/or real property the Authority and/or Asheville conveys to Henderson County pursuant to this Agreement, the Authority and/or Asheville shall transfer all its rights to that line or real property in its AS-IS condition WITHOUT WARRANTY OF MERCHANTABILITY or any other warranties, including title, expressed or implied.

8.2 The Authority shall be entitled to retain the revenue received from the use of the Regional Water Lines for so long as such lines remain the property of Asheville. When such lines become the

property of Henderson County, the net revenue from such lines shall be paid to Henderson County.

8.3 Henderson County shall have the option to lease any and all Regional Water Lines that do not impact customers of the Authority located outside of Henderson County from the Authority and/or Asheville for the price of one dollar (\$1.00). However, the revenue from the lines so leased shall continue to be paid to the Authority as provided in subsection 8.2 above.

**SECTION IX: FINANCING OF WATER PLANT SITE, REGIONAL WATER LINES, ACCOUNTING AND AUDITOR REVIEW**

9.0 It is acknowledged by the parties herein that the improvements contemplated by this Agreement may be funded from several sources, including proceeds from general obligation bonds and/or revenue bonds. The particular source of funds for those improvements shall be within the discretion of the Authority and Asheville. However, Asheville and the Authority agree to credit the net revenues from the Regional Water Lines to the recoupment of capital expenses making up the Regional Water Line Costs.

9.1 If necessary, Asheville shall select a Bond Counsel to advise them on the issuance and administration of the bonds attributable to the Water Plant and Regional Water Lines. The Bond Counsel shall provide all the parties noted in this subsection with copies of any documentation or information requested or sent to any party concerning the financing of the improvements contemplated herein. Notwithstanding the above, if a Regional Water Line is funded by a mechanism of financing, including but not limited to general obligation bonds, revenue bonds, or the provisions of North Carolina General Statutes 160A-20 *et. seq.*, in no event shall the period of amortization for such financing exceed the Pay Back Period.

9.2 A separate account shall be established by Asheville for the proceeds from any bonds issued by Asheville used to finance the projects contemplated by this Agreement. Henderson County through its County Manager shall be entitled to receive all information about said account within a reasonable period of time after requesting same.

9.3 Henderson County, Asheville, and Buncombe County, as part of their annual, independent audit, shall direct their respective auditors to review the provisions of this Agreement and determine whether said provisions have been met by the respective parties. A report of the auditors' findings shall be mailed to the Authority, Henderson County, Asheville and Buncombe County for review.

9.4 The Authority shall adhere to the North Carolina Local Budget and Fiscal Control Act in matters pertaining to the financing of the improvements noted in this Agreement.

9.5 Nothing in this Agreement shall be construed as being a pledge of the taxing powers of Henderson County, Asheville, Buncombe County and/or the District.

9.6 Nothing in the financing documents shall be construed as a pledge of the taxing power of Henderson County.

#### **SECTION X: MAINTENANCE AND REPLACEMENT**

10.0 The Authority shall be responsible for any maintenance or repair of any Regional Water Line during Asheville's ownership of said line. The Authority in conjunction with the City of Asheville Water Resource Department shall have discretion to decide the scope and timing of any maintenance or repairs. Neither the Authority or Asheville shall be liable to any person, the District or Henderson County for the interruption of water service to any customer within the District, except as otherwise stated herein.

10.1 Any replacement of a Regional Water Line shall be done in accordance with the process set forth in Section VI above and the figuring of costs and revenues in Section VII above, with the exception that unreimbursed capital costs from the old line shall be included in the Regional Water Line Costs for the replacement (unless replacement is due to Acts of God as noted in subsection 12.4 below).

#### **SECTION XI: WATER PLANT SITE FACILITIES**

11.0 Asheville shall be responsible for the financing and the Authority shall be responsible for the construction of the facilities at the Water Plant Site for intake, treatment and storage. The Authority shall provide Henderson County with copies of the draft plans and specifications for said facilities at least thirty (30) days prior to Authority approval of said plans and specifications. Henderson County may within that thirty (30) day period make comments to the Authority regarding the adequacy of said plans and specifications. After the thirty (30) day comment period has elapsed, the Authority may adopt, in the Authority's sole discretion, said plans and specifications as drafted or incorporate all or any part of Henderson County's suggestions into any revisions. Any contracts for the construction of the facilities for the Water Plant Site may be entered into without Henderson County's consent and Henderson County shall not be considered a third party beneficiary.

#### **SECTION XII: LIABILITIES**

12.0 The Authority, Asheville or Buncombe County shall not be liable for any losses, injuries or damages related in any way to the Water Plant Site or the Regional Water Lines or the maintenance or operation thereof except for their own affirmative acts of negligence and then only to the extent of their applicable insurance coverages or for the Authority, the extent set forth in Section I.C.6. of its Water Policies.

12.1 Henderson County or the District shall not be liable for any losses, injuries or damages related in any way to the Water Plant Site or the Regional Water Lines or the maintenance or operation thereof except for their own affirmative acts of negligence and then only to the extent of their applicable insurance coverages.

12.2 To the extent permitted by law, each party (herein "the Responsible Party") agrees to defend, indemnify and hold harmless all the other said parties to this Agreement and their elected or appointed officials, agents and employees (herein "the Nonculpable Parties") from and against any and all claims, damages, judgments, costs and expenses (including, but not limited to, reasonable attorney's fees) of any kind and nature suffered by or asserted against the Nonculpable Parties as a direct or indirect result of any intentional or negligent act or omission caused solely by the Responsible Party or its agents or employees.

12.3 The Authority during Asheville's ownership of the Regional Water Lines shall be solely responsible for damage to the Regional Water Lines caused by Acts of God (i.e. drought, floods, lightning, etc.) to the extent of repair and/or replacement costs. Upon transfer of said lines to Henderson County, Henderson County shall then be solely responsible for repair and/or replacement costs.

12.4 If, for whatever reason, not due to the fault or negligence of either Henderson County or the Authority, liability for the release or discharge of environmental pollutants is triggered from the installation, use or repair of the Regional Water Lines, then Henderson County and the Authority agree to share equally in the costs (including reasonable attorney's fees) of defending against or cleaning up the contamination to the extent required by law.

### **SECTION XIII: ARBITRATION**

13.0 Subject to subsection 13.1 below, any controversy which arises between the parties hereto regarding the interpretation of or rights, duties or liabilities under Sections VI, VII, and/or VIII of this Agreement shall be settled by binding arbitration. Any other issues disputed by the parties may be litigated as provided by the North Carolina Rules of Civil Procedure. Any arbitration shall be before a disinterested arbitrator, if one can be agreed upon within thirty (30) days from the date of the first written request for arbitration by one of the parties. The parties shall use their best efforts to choose an arbitrator who is a North Carolina resident and who will be familiar with the subject matter of the Arbitration by reason of training and/or experience. If one disinterested arbitrator cannot be chosen, then the dispute shall be heard by three (3) arbitrators: one named by the Authority, one named by Henderson County, and one named by the two thus chosen. The Authority and Henderson County shall appoint their respective arbitrators within forty (40) days from the date of the first written request for arbitration by one of the parties. The arbitrator or arbitrators shall determine the controversy in accordance with the laws of the State of North Carolina as applied to the facts found by him or them. The decision shall be rendered within ninety (90) days of the first written request for arbitration and the decision shall be final. The parties shall bear their respective costs for arbitration. Provided, however, the parties shall share equally the cost of a third arbitrator, if any. In the event of a conflict between the rules of the American Arbitration Association and North Carolina law, the laws of the State of North Carolina shall govern.

13.1 The provisions of arbitration above are inapplicable to the construction of the facilities at the Water Plant Site and the transmission lines or distribution lines, pump stations and other related



equipment or facilities in Henderson County servicing only customers outside Henderson County, those improvements being part of the water system of the City of Asheville as stated in subsection 3.1 above.

#### **SECTION XIV: TERMINATION**

14.0 Except for subsections 4.3 and 4.4 above and subject to subsection 16.2 below, this Agreement may not be terminated unless mutually agreed upon in writing by all the parties. Upon termination, the rights and liabilities of the parties to each other shall cease to exist and title to all real or personal property shall remain in the governmental entity then owning said property.

#### **SECTION XV: AMENDMENTS, INTEGRATION, CONFLICTS WITH PRIOR AGREEMENT, AND ADDITION OF PARTIES**

15.0 This Agreement may be amended at any time by mutual agreement of Asheville, Buncombe County, the Authority and Henderson County, said amendment shall be in writing and must be signed by the duly authorized representatives of the City of Asheville, Buncombe County, Henderson County and the Authority to be effective.

15.1 No oral statements or prior written material (except as set forth in subsection 15.2 below) not specifically incorporated herein shall be of any force and effect, and no changes in or additions to this Agreement shall be recognized unless incorporated herein by amendment as provided above.

15.2 This Agreement is intended to supplement the Agreement dated June 28, 1994 and any conflict between the two shall be resolved in reliance on the terms expressed herein.

15.3 Other political subdivisions or units of local government may be added to this Agreement by the mutual consent of all the parties hereto.

#### **SECTION XVI: CONSISTENCY WITH THE SUPPLEMENTAL WATER AGREEMENT AND ITS DURATION**

16.0 Article XII of the Supplemental Water Agreement states that the City of Asheville shall retain title to all of the assets of the entire water system of the City and that all revenues from said system be deposited in the City's Water Fund. It is contemplated by this Agreement as provided by Section VIII above that Henderson County may, at its discretion, acquire some or all of the Regional Water Lines installed by the Authority for the benefit of Henderson County customers. To avoid confusion with any bond covenants which use the term "water system of the City" and to provide consistency with the Supplemental Water Agreement, the Authority, Asheville and Buncombe County agree to amend said agreement to exclude the Regional Water Lines from the definition of "water system of the City", after Bond Counsel for the City gives an opinion, if requested by the City, that said amendment will not violate any existing bond covenants.

16.1 The Authority, Asheville and Buncombe County shall amend Article II of the Supplemental Water Agreement to provide for ten (10) members through December 31, 1997, at which time the Authority shall consist of nine (9) members. Two (2) members of the Authority shall be appointed by the Board of Commissioners of Henderson County, one (1) of whom may be a member of that Board. In addition, the Chairman of the Henderson County Board of Commissioners shall be allowed to attend all meetings of the Authority including closed sessions as a non-voting member.

16.2 Notwithstanding any provisions in this Agreement to the contrary or Article XVI of the Supplemental Water Agreement, this Agreement shall not terminate until such time as the indebtedness created to finance the acquisition and/or construction of the new water source facility has been paid in full or provision for payment of same shall have been made and mutually agreed upon between Asheville, the Authority and Buncombe County.

16.3 If the Supplemental Water Agreement is terminated before the forty years referenced in subsection 4.3 above, then Asheville shall assume all the Authority's rights and powers as well as duties and obligations under the terms of this Agreement including, without limitation, providing for a water supply and Regional Water Lines for at least the remainder of the forty year term set forth in subsection 4.3 above.

#### **SECTION XVII: CONSISTENCY WITH MASTER PLAN, BYLAWS AND POLICIES**

17.0 Article IV, Paragraph 18. of the Supplemental Water Agreement states that the Authority "shall be responsible for developing a Master Plan which shall be followed for capital improvements." Article IV, Paragraph 19. of the Supplemental Water Agreement provides that "all policies shall remain in full force and effect and be applicable to the consolidated water system except where modified by the Authority as provided" in or where otherwise inconsistent with the Supplemental Water Agreement. To the extent that the improvements and terms of operation contemplated by this Agreement are not included in the Master Plan or are inconsistent with the policies of the Authority, the Authority, Asheville, and Buncombe County agree to amend the Master Plan and/or policies to provide consistency with this Agreement.

#### **SECTION XVIII: SEVERABILITY**

18.0 If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, then only that portion of the Agreement that is invalid or unenforceable shall be void, and the remainder of this Agreement shall remain in full force and effect and the intent of this Agreement shall be enforced to the greatest extent permitted by law.

#### **SECTION XIX: HIRING; PERSONNEL**

19.0 In all hiring or employment made possible by or resulting from this Agreement, there shall not be any discrimination against any employee or applicant for employment because of race, color, religion, sex, age, disability or national origin.

19.1 In an effort to promote regionalism in the workforce, the Authority and Asheville agree to make a good faith effort to make available at least twenty-five (25%) of the positions to be filled at the Water Treatment Plant to qualified persons who are residents of Henderson County. This effort shall not alter any job specifications or personnel criteria as established solely by the Authority and Asheville for the Water Plant. In addition, no cause of action or duty to any member of the public shall be created by this personnel goal. The persons operating the Water Plant shall be at all time employees of the City of Asheville, subject to Asheville's personnel policies the same as all other City employees.

#### **SECTION XX: CONFLICT OF LAWS; ASSIGNABILITY; INTERPRETATION**

20.0 This Agreement shall be construed and interpreted under the laws of the State of North Carolina.

20.1 Except as otherwise stated herein, the benefits and burdens of each party under this Agreement may not be assigned without the prior written consent of all parties to this Agreement.

20.2 The parties acknowledge that no one particular party shall be deemed the drafter of this Agreement in the event of a breach of contract dispute and consequently, the provisions herein shall not be construed more strictly against any party.

#### **SECTION XXI: REGIONAL WATER AND/OR SEWER AUTHORITY**

21.0 It is the intention of the parties to this Agreement to establish herein the basis for the formation of a Regional Water and/or Sewer Authority, which would, at a minimum, include as members Henderson and Buncombe Counties, the Authority and Asheville. Pursuant to that intent, the parties herein shall in good faith work towards the creation of a regional authority and the promotion of said authority to other units of local government in the western part of North Carolina. At the time that the Regional Authority is created, all assets and improvements accumulated pursuant to this Agreement shall be transferred to such Regional Authority upon such terms and conditions as are then mutually acceptable.

#### **SECTION XXII: CONVEYANCE OF BREVARD ROAD SITE**

22.0 Asheville shall convey the Brevard Road Site to Henderson County to permit Henderson County to negotiate with MSD for sewer services. Henderson County shall either 1) convey the Brevard Road Site to MSD in fee simple upon condition subsequent that a wastewater treatment plant be constructed on the Brevard Road Site within ten (10) years of the date of such conveyance, or else title shall revert automatically to Asheville; or 2) convey said property to a regional water and sewer authority of which Henderson County, the Authority, and Asheville are a part. In the event that Henderson County shall not perform numbers 1) or 2) above within ten years from the date of conveyance of the Brevard Road Site to Henderson County, Henderson County shall convey the Brevard Road Site back to Asheville in fee simple absolute.

IN WITNESS WHEREOF, the undersigned officers have executed this Agreement under proper authority given at a duly called meeting of its respective Boards, this the day and year first above written.

Attest: (COUNTY SEAL)

Kathy Hughes  
Clerk

BUNCOMBE COUNTY

By: Gene Rainey  
Gene Rainey, Chairman

Attest: (CITY SEAL)

Magdalen Boulson  
Clerk

CITY OF ASHEVILLE

By: Russ Martin  
Russ Martin, Mayor

Attest: (AUTHORITY SEAL)

James W. Feltus  
Secretary

ASHEVILLE - BUNCOMBE  
WATER AUTHORITY

By: Ernest E. Ferguson  
Ernest Ferguson, Chairman

Attest: (COUNTY SEAL)

Elizabeth W. Corn  
Clerk

HENDERSON COUNTY

By: Renee Kumor  
Renee Kumor, Chairman

Attest:

Elizabeth W. Corn  
Clerk

CANE CREEK WATER & SEWER DISTRICT

By: Renee Kumor  
Renee Kumor, Chairman