JOINT EXERCISE OF POWERS AGREEMENT FOR CONSTRUCTION, OPERATION, USE AND MAINTENANCE OF Earlimart Recreational Facility

THIS AGREEMENT, made and entered into as of this ___ day of _____, 2011, between the COUNTY OF TULARE, referred to as "COUNTY" and the EARLIMART SCHOOL DISTRICT, referred to as "DISTRICT";

WHEREAS, the State of California, referred to as "STATE," has released a second round of grand funding for the Statewide Park Program, referred to as "PROGRAM;" and

WHEREAS, the DISTRICT has full control and ownership of the property, which is within its DISTRICT limits, referred to as "PROPERTY," on which the recreational facility will be developed and intends to utilize the PROPERTY for this purpose; and

WHEREAS, the COUNTY will submit an application for PROGRAM grant funds on behalf of the DISTRICT to construct the Earlimart Park, hereinafter referred to as a "recreational facility" for the purposes of this Agreement, on the PROPERTY; and

WHEREAS, the COUNTY will be developing a recreational facility on the PROPERTY with PROGRAM grant funds; and

WHEREAS, COUNTY and DISTRICT each have the power and authority, individually, to undertake the development, construction, operation, and maintenance of such a recreational facility; and

WHEREAS, COUNTY and DISTRICT have determined and concluded that it is more economical and reasonable for the two said public entities to jointly develop, construct, operate, and maintain such a facility; and

WHEREAS, COUNTY and DISTRICT have each determined that it would be most beneficial to the residents and tax payers of each such public entity if they were to jointly develop such a facility; and

WHEREAS, Government Code sections 6500 et. Seq. authorize COUNTY and DISTRICT to enter a joint exercise of powers agreement; and

WHEREAS, both COUNTY and DISTRICT have a common power under section 6500 et seq. of the California Government Code, to enter into and carry out the terms and conditions of this Agreement.

WHEREAS, DISTRICT has authority under Education Code section 10900 et. seq. to organize, promote, and conduct programs of community recreation, establish systems of playgrounds and recreation, and to acquire, construct, maintain, and operate recreation centers.

NOW, THEREFORE, IT IS AGREED as follows:

1. COUNTY and DISTRICT enter into this Joint Powers Agreement for the specific purpose of developing, constructing, operating and maintaining a recreational facility to be commonly known as the Earlimart Recreational Facility, on certain real property approximately 4.5 acres in size and located at the northeast corner of the intersection of Elm Road and School Avenue more particularly identified in Exhibit "A", referred to as "PROPERTY," attached hereto and incorporated herein by this reference. The total recreation site and the specific portion to which this Agreement applies are particularly identified in said Exhibit. The specific roles of the COUNTY and DISTRICT regarding developing, constructing, operating, and maintaining are further explained in this Agreement.

2. **TERM**: This Agreement will become effective contingent upon receipt of PROGRAM grant funds by the County from the STATE and will remain in full force and effect until thirty years thereafter. This Agreement may be renewed beyond the original thirty year term as required by the STATE at the end of the current term upon written agreement by both parties.

3. **NO SEPARATE ENTITY CREATED**: There will be no separate and distinct public entity created pursuant to this Agreement, but rather the parties will jointly undertake certain activities as specified herein and will specifically designate, to one or the other of the parties, the obligations and responsibility of certain other activities pursuant to this Agreement, as more specifically set forth herein below.

4. **RECREATIONAL FACILITIES**: Said facilities shall consist, primarily, of playground apparatus area, barbeques, pavilions, sidewalks, walking path, lighting, vegetation, and needed off site improvements, but may include such additional active or passive recreational facilities as the parties may deem appropriate and necessary.

5. **COUNTY AND DISTRICT RESPONSIBILITIES**:

a) COUNTY shall be primarily responsible for the design and development of plans and specifications for said facilities, through the use of its own staff and employees and contract consultants. To the extent required, any construction facilities shall comply with the Field Act (California Education Code sections 17280 et. seq. and 17365 et. seq.) All such plans and specifications will be reviewed and approved by DISTRICT before being prepared in final version.

b) Upon completion of plans and specifications and their approval by COUNTY and DISTRICT, it shall be COUNTY's responsibility to undertake construction, either by its own employees or through a public bidding and construction process as is appropriate, of all said facilities. All costs associated with developing and constructing the recreational facility, including planning, engineering, inspection, administration, construction, etc., incurred by the COUNTY shall be reimbursed with PROGRAM grant funds by the STATE. The COUNTY shall not contribute locally-controlled funds to any costs associated with the development or construction of the recreational facility.

c) To the extent that construction of any of the said recreational facilities is required to be put out to public bid, the laws and regulations applicable to a public works project of the COUNTY shall apply and the COUNTY shall be responsible for the preparation and issuance of bid documents incorporating the plans and specifications, the review of bids submitted, and the award of contract. All such bid documents, shall be reviewed and approved by the DISTRICT prior to being prepared in final form. As to facilities subject to this Agreement, the COUNTY shall also provide DISTRICT with the opportunity to review all bids submitted, and a contract may be awarded only with the concurrence of the DISTRICT. All contracts let for purchase of materials, equipment and supplies for this project shall be prepared by, and issued in the name of the COUNTY, provided that the DISTRICT shall have the opportunity to review and approve all such contractual documents prior to issuance of final versions.

d) . The supervision and inspection of all construction of facilities and improvements shall be performed by COUNTY, provided that the DISTRICT may participate in oversight activities to the extent it so desires, and may participate in supervision with the consent of the COUNTY.

e) The days and hours of operation of the recreational facility shall be established and maintained by DISTRICT. DISTRICT shall adhere to all recreational use requirements as required by the STATE. DISTRICT may also utilize said facilities for school related activities, provided such use does not violate with PROGRAM requirements established by the STATE.

f) DISTRICT shall be responsible for issuing any and all recreation-use permits and collecting any and all fees for special use of the identified portion of the recreational facilities. The COUNTY shall delegate all functions of operating the recreational facility to the DISTRICT.

g) For purposes of administering any/all required activities in compliance with the California Environmental Quality Act, referred to as "CEQA," COUNTY is hereby designated as lead agency and will prepare and sign off on all necessary and appropriate documentation. The COUNTY shall obtain all required CEQA certifications within one year of PROGRAM grant award by the STATE.

h). The DISTRICT grants the COUNTY permission to operate the recreational facility. The COUNTY delegates all functions of maintenance, and operation of the recreational facility to the DISTRICT. DISTRICT shall provide and shall be responsible for the entire cost of maintenance, ownership, and operation of the recreational facility. The DISTRICT may delegate these operating roles as deemed appropriate. At no time shall the COUNTY have any responsibility for in the maintenance, ownership, or operation of the recreational facility.

i) The COUNTY and DISTRICT shall meet annually to verify that the recreational facility is being maintained and operated in accordance with this Agreement and as required by the PROGRAM.

j) The DISTRICT shall grant the COUNTY the authority to construct and develop the PROJECT site and permit the COUNTY, its contractors, or agents to access the PROPERTY for

the purposes of this Agreement. The DISTRICT shall revoke this authority upon completion of the construction and development of the PROJECT.

6. **INDEPENDENT CONTRACTOR STATUS:** All personnel and employees of each party who conduct activities and/or provide services under this Agreement will, at all times, remain employees of their respective public entities, and said respective public entities will be solely and completely responsible for the employment, workers' compensation coverage, supervision and discipline of such employees. Nothing in this Agreement shall be construed to constitute that either party or any of its agents, employees or officers as an agent, employee or officer of the other Party.

7. **INDEMNIFICATION**:

a) County shall hold harmless, defend and indemnify District, its agents, officers and employees from and against any liability, claims, actions, costs, damages or losses of any kind, including death or injury to any person and damage to property, including District property, arising from, or in connection with, the performance by County or its agents, officers and employees under this Agreement. This indemnification specifically includes any claims that may be made against District by any taxing authority asserting that an employer-employee relationship exists by reason of this Agreement, and any claims made against District alleging civil rights violations by Contractor under Government Code section 12920 et seq. (California Fair Employment and Housing Act). This indemnification obligation shall continue beyond the term of this Agreement as to any acts or omissions occurring under this Agreement or any extension of this Agreement.

b) District shall hold harmless, defend and indemnify County, its agents, officers and employees from and against any liability, claims, actions, costs, damages or losses of any kind, including death or injury to any person and damage to property, including County property, arising from, or in connection with, the performance by District or its agents, officers and employees under this Agreement. This indemnification specifically includes any claims that may be made against County by any taxing authority asserting that an employer-employee relationship exists by reason of this Agreement, and any claims made against District alleging civil rights violations by Contractor under Government Code section 12920 et seq. (California Fair Employment and Housing Act). This indemnification obligation shall continue beyond the term of this Agreement as to any acts or omissions occurring under this Agreement or any extension of this Agreement.

8. **INSURANCE**: Prior to approval of this Agreement by either Party, each Party shall file with the other Party evidence of the required insurance as set forth in Exhibit "B" attached.

9. COUNTY's construction of facilities shall be contingent upon and subject to the terms of the award of PROGRAM grant funds by the STATE. COUNTY shall complete construction of the facilities within the timeframe as required by the PROGRAM.

10. **DELEGATION OF AUTHORITY**: Authority to act under this Agreement on behalf of each party is hereby vested with the Chairman of the Board of Supervisors for

COUNTY and with the Superintendent for DISTRICT, or such designees as they may each so elect.

11. **NOTICE**: Any notice required under the terms of this Agreement will be deemed received on the date actually delivered if by personal delivery, or on the fifth business day following deposit in the United States mail, postage prepaid, addressed as follows;

COUNTY: COUNTY of TULARE
Laurie Mercer
Community Development Manager
5961 S. Mooney Blvd.
Visalia, CA 93277
(559) 624-7000
(559) 730-2591

DISTRICT: Earlimart School DISTRICT
Sandra Munoz
Superintendent
785 East Center Ave.
Earlimart, CA 93219
(661) 849-3386
(661) 849-2352 Fax

The parties to which notice is to be given may be changed, from time to time, by action of either party, provided that it gives the other party to this Agreement written notice of said change.

12. **COMPLIANCE WITH LAW**: COUNTY shall construct facilities in accordance with applicable Federal, State, and local laws, regulations and directives. With respect to COUNTY's employees, COUNTY shall comply with all laws and regulations pertaining to wages and hours, state and federal income tax, unemployment insurance, Social Security, disability insurance, workers' compensation insurance, and discrimination in employment.

13. **ENTIRE AGREEMENT REPRESENTED**: This Agreement represents the entire agreement between COUNTY and DISTRICT as to its subject matter and no prior oral or written understanding is to be of any force or effect. No part of this Agreement may be modified without the written consent of both parties.

14. **NO THIRD PARTY BENEFICIARY**: Unless specifically set forth, the parties to this Agreement do not intend to provide any other party with any benefit or enforceable legal or equitable right or remedy.

15. **GOVERNING LAW**: This Agreement shall be interpreted and governed under the laws of the State of California without reference to California conflicts of law principles. The parties agree that this Agreement is made and shall be performed in Tulare County, California.

16. **WAIVER**: The failure of either party to insist on strict compliance with any provision of this Agreement shall not be considered a waiver of any right to do so, whether for that breach or any subsequent breach. The acceptance by either party of either performance or payment shall not be considered to be a waiver of any preceding breach of the Agreement by the other party.

17. **CONFLICTS WITH LAWS OR REGULATIONS/SEVERABILITY**: This Agreement is subject to all applicable laws and regulations. If any provision of this Agreement is found by any court or other legal authority, or is agreed by the parties, to be in conflict with any code or regulation governing its subject, the conflicting provision shall be considered null and void. If the effect of nullifying any conflicting provision is such that a material benefit of the Agreement to either party is lost, the Agreement may be terminated at the option of the affected party. In all other cases the remainder of the Agreement shall continue in full force and effect.

18. **FURTHER ASSURANCES**: Each party agrees to execute any additional documents and to perform any further acts as may be reasonably required to effect the purposes of this Agreement.

19. **ASSURANCE OF NONDISCRIMINATION**: COUNTY and DISTRICT shall not discriminate in employment or in the provision of services on the basis of any characteristic or condition upon which discrimination is prohibited by state or federal law or regulation. COUNTY and DISTRICT agree to provide appropriate training to its employees regarding discrimination and sexual harassment issues, and to promptly and appropriately investigate any allegations that any of its employees may have engaged in improper discrimination or harassment activities. Either Party, in its sole discretion, has the right to require the other Party to replace any employee who provides services of any kind to that Party pursuant to this Agreement with other employees where either Party is concerned that its employees or clients may have been or may be the subjects of discrimination or harassment by such employees. The right to require replacement of employees as aforesaid shall not preclude either Party from terminating this Agreement with cause as provided for in this agreement.

20. **DISPUTE RESOLUTION**: If a dispute arises out of or relating to this Agreement, or a breach of this Agreement, and if said dispute cannot be settled through negotiations, the parties agree first to try in good faith to settle the dispute by non-binding mediation before resorting to litigation or some other dispute resolution procedure, unless the parties mutually agree otherwise. The mediator shall be mutually selected by the parties, but in case of disagreement, the mediator shall be selected by lot from among two nominations provided by each party. All costs and fees required by the mediator shall be split equally by the parties, otherwise each party will bear its own costs of mediation. If mediation fails to resolve the dispute within thirty days, either party may pursue litigation to resolve the dispute.

21. **TERMINATION**:

a) The right to terminate this Agreement under this provision may be exercised without prejudice to any other right or remedy to which the terminating party may be entitled at law or under this Agreement.

i) This Agreement may be terminated with written consent of both parties; or

ii) With Cause:

(1) This Agreement may be terminated by either party should the other party:

(a) be adjudged a bankrupt, or

(b) become insolvent or have a receiver appointed, or

(c) make a general assignment for the benefit of creditors, or

(d) suffer any judgment which remains unsatisfied for thirty days, and which would substantively impair the ability of the judgment debtor to perform under this Agreement, or

(e) materially breach this Agreement.

(2) For any of the occurrences except item (3), termination may be effected upon written notice by the terminating party specifying the date of the termination.

(3) Upon material breach, the Agreement may be terminated following the failure of the defaulting party to remedy the breach to the satisfaction of the non-defaulting party within five days of written notice specifying the breach. If the breach is not remedied within that five day period, the non-defaulting party may terminate the Agreement on further written notice specifying the date of termination.

(4) If the nature of the breach is such that it cannot be cured within a five day period, the defaulting party may, submit a written proposal within that period which sets forth a specific means to resolve the default. If the non-defaulting party consents to that proposal in writing, which consent shall not be unreasonably withheld, the defaulting party shall immediately embark on its plan to cure. If the default is not cured within the time agreed, the non-defaulting party may terminate upon written notice specifying the date of termination.

b) Effects of Termination: Termination of this Agreement shall not terminate any obligations to indemnify, to maintain and make available any records pertaining to the Agreement, to cooperate with any audit, to be subject to offset, or to make any reports of pre-termination contract activities.

22. **BREACH OF AGREEMENT**: In the event the DISTRICT breaches the terms of this Agreement or those terms set forth in the PROGRAM grant agreement with the STATE and the COUNTY incurs damages as a result of such breach, the DISTRICT shall be responsible for reimbursing the COUNTY and all costs of said damages. In the event the COUNTY breaches the terms of this Agreement or those terms set forth in the PROGRAM grant agreement with the STATE and the DISTRICT incurs damages as a result of such breach, the COUNTY shall be responsible for reimbursing the DISTRICT and all costs of said damages.

23. **CONFLICT OF INTEREST**:

a. Each Party agrees at all times in performance of this Agreement to comply with the law of the State of California regarding conflicts of interest or appearance of conflicts of interest, including, but not limited to Government Code section 1090 et seq., and the Political Reform Act, Government Code section 81000 et seq. and regulations enacted regarding the Political Reform Act by the California Fair Political Practices Commission. The statutes, regulations and laws previously referenced include, but are not limited to, prohibitions against any public officer or employee, including contractors for this purpose, from making any decision on behalf of the public agency in which an officer, employee or consultant has a direct or indirect financial interest. A violation can occur if the public officer, employee or consultant participates in or influences any District or County decision which has the potential to confer any pecuniary benefit on contractor or any business firm in which contractor has an interest, with certain narrow exceptions.

b. Each Party agrees that if any facts come to its attention which raise any questions as to the applicability of conflict of interest laws, it shall immediately inform the other Party's designated representative and provide all information needed for resolution of this question.

24. **CONSTRUCTION**: This Agreement reflects the contributions of both parties and accordingly the provisions of Civil Code section 1654 will not apply to address and interpret any uncertainty.

25. **EXHIBITS AND RECITALS**: The Recitals and the Exhibits to this Agreement are fully incorporated into and are integral parts of this Agreement.

26. **HEADINGS**: Section headings are provided for organizational purposes only and do not in any manner affect the scope, meaning or intent of the provisions under the headings.

27. **PUPIL SAFETY REQUIREMENTS**:

a. During construction, the COUNTY shall provide one or more of the following methods, pursuant to Education Code § 45125.2, to ensure the safety of the pupils of the DISTRICT:

i) The installation of a physical barrier at the worksite to limit contact with pupils;
ii) Continual supervision and monitoring of all employees and subcontractors of the COUNTY by an employee of the COUNTY whom the Department of Justice has ascertained has not been convicted of a violent or serious felony;
iii) Surveillance of employees or subcontractors of the COUNTY, by school personnel.

b. COUNTY shall submit a plan to the DISTRICT at least fifteen (15) days prior to the commencement of work describing how COUNTYY will comply with the foregoing. Whether to approve or reject the pupil safety plan is within the sole discretion of the DISTRICT governing board. DISTRICT reserves the right to impose greater or additional safety requirements, including but not limited to, compliance with all of the fingerprinting and related requirements of California Education Code Section 45125.1. The pupil safety plan shall be

approved by DISTRICT before any agents or employees of COUNTY may enter school grounds where they may have any contact with pupils. COUNTY shall indemnify, hold harmless, and defend the DISTRICT against any and all actions, proceedings, penalties or claims arising out of the COUNTY's failure to comply with the requirements of this section.

c. If COUNTY believes that its employees will have only limited contact with pupils and should therefore be exempted from the foregoing requirements, COUNTY must contact the DISTRICT with its request for exemption at least fifteen (15) days prior to the commencement of work. The request for exemption must specify the grounds for such proposed exemption, considering the totality of circumstances, including but not limited to the length of time COUNTY will be on school grounds, whether pupils will be in proximity to the site where the COUNTY's employees or subcontractors are working, and whether the COUNTY's employees will be working by themselves or with others. Whether to grant or deny the exemption is within the sole discretion of the DISTRICT.

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IN WITNESS THEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

Dated: _____

COUNTY OF TULARE
By: _____
Chairman, Board of Supervisors

"COUNTY"

ATTEST:
County Administrative Officer/Clerk of the Board of Supervisors of the County of Tulare

By: _____
Deputy Clerk

Approved as to Form:

By: Arlene Salazar 6/6/2011
County Counsel 2011622

Dated: _____

EARLIMART SCHOOL DISTRICT

By: _____
President, Board of Trustees
"DISTRICT"

EXHIBIT A
PROPERTY DESCRIPTION & MAP

Earlimart Proposed Neighborhood Park

0 250 500 1,000 1,500 Feet

1 inch = 833 feet

EXHIBIT B
INSURANCE REQUIREMENTS

COUNTY and DISTRICT shall provide and maintain insurance for the duration of this Agreement against claims for injuries to persons and damage to property, which may arise from, or in connection with, performance under the Agreement by its agents, representatives, employees or subcontractors, if applicable.

A. Minimum Scope & Limits of Insurance

1. Coverage at least as broad as Commercial General Liability Insurance of $1,000,000 combined single limit per occurrence. If the annual aggregate applies it must be no less then $1,000,000.

2. Comprehensive Automobile Liability Insurance (if applicable) of $1,000,000 per occurrence.

3 Workers' Compensation and Employer's Liability Insurance as required by law. Deductibles and Self-Insured Retentions

4 Professional Errors and Omissions Insurance of $1,000,000

B. Specific Provisions of the Certificate

1. The Certificate of Insurance for General Liability and Comprehensive Automobile Liability Insurance must meet the following requirements:
   a. The DISTRICT shall *name the COUNTY, its officers, agents, employees and volunteers, individually and collectively, as additional insureds. The COUNTY shall name the DISTRICT, its officers, agents, employees and volunteers, individually and collectively, as additional insureds.*
   b. *The DISTRICT shall state that such Insurance for additional insureds shall apply as primary insurance and any other insurance maintained by COUNTY shall be excess. The COUNTY shall state that such Insurance for additional insureds shall apply as primary insurance and any other insurance maintained by DISTRICT shall be excess.*
   c. *The DISTRICT shall provide that coverage shall not be suspended, voided, canceled, reduced in coverage, or otherwise materially changed except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to COUNTY. The COUNTY shall provide that coverage shall not be suspended, voided, canceled, reduced in coverage, or otherwise materially changed except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to DISTRICT.*

2. The Certificate of Insurance for Workers' Compensation must include the following waiver of subrogation:
   a. *Waiver of Subrogation. DISTRICT waives all rights against COUNTY and its agents, officers, and employees for recovery of damages to the*

extent these damages are covered by the workers compensation and employers liability. COUNTY waives all rights against DISTRICT and its agents, officers, and employees for recovery of damages to the extent these damages are covered by the workers compensation and employers liability.

C. Deductibles and Self-Insured Retentions

The COUNTY Risk Manager must approve any deductible or self-insured retention that exceeds $100,000.

D. Acceptability of Insurance

Insurance must be placed with insurers with a current rating given by A.M. Best and Company of no less than A (-) from a company admitted to do business in California. Any waiver of these standards is subject to approval by COUNTY Risk Manager or County Risk Manager's designee and the DISTRICT Risk Manager.

E. Verification of Coverage

Prior to approval of this Agreement by COUNTY and DISTRICT, both parties shall file with the submitting department, certificates of insurance with original endorsements effecting coverage in a form acceptable to COUNTY and DISTRICT. COUNTY and DISTRICT reserve the right to require certified copies of all required insurance policies at any time.