

**First Amendment to
Memorandum of Understanding
Between
The County of Santa Fe and the Pueblo of Pojoaque
For the Pojoaque Valley Wastewater Treatment Project**

This Memorandum of Understanding ("MOU") is entered into by and between the County of Santa Fe (hereinafter referred to as "the County"), a political subdivision of the State of New Mexico, and the Pueblo of Pojoaque (hereinafter referred to as "the Pueblo"), a federally recognized Indian Tribe, as of the effective date defined below.

Recitals

WHEREAS, the County and the Pueblo (sometimes referred to collectively as "the Parties"), in order to protect the health, safety and welfare of Pojoaque Valley residents and visitors, desire to cooperate in the funding, procurement, planning, permitting, design, construction, development, improvement, management, operation, maintenance, repair, and ownership of the Pojoaque Valley Wastewater Treatment Project (hereinafter referred to as "the Project");

WHEREAS, the County and the Pueblo entered into that certain Memorandum of Understanding dated September 16, 2005, resolving to meet, to cooperate and to take actions necessary to address intergovernmental priorities including water and wastewater issues;

WHEREAS, early regional water and wastewater plans include the Espanola Valley and Pojoaque Valley Wastewater Master Plan dated July 1989, prepared by Molzen-Corbin & Associates, P.A., and the Jemez y Sangre Regional Water Plan dated 2003, prepared by Daniel B. Stephens & Associates, Inc.;

WHEREAS, the North Central New Mexico Water Quality Plan ("the Plan") dated May 2002, was prepared for the North Central New Mexico Economic Development District ("NCNMEDD") by ASCG, Incorporated ("ASCG"), and concluded the Pojoaque Valley region needs central wastewater collection and treatment facilities;

WHEREAS, a regional wastewater collection and treatment facility in the Pojoaque Valley ("the Pojoaque Valley Wastewater Treatment Project" or "the Project") will implement a critical component of the Plan;

WHEREAS, the Pueblo prepared a report entitled "Pojoaque Valley Wastewater Treatment Facility" dated January 2005 ("Project Report"), which outlines how the Project might be divided into phases so that it can be completed with the financial resources available at any particular time;

WHEREAS, the Project Report proposed that the Project be divided into three phases;

WHEREAS, PHASE I involved the collection, treatment and re-use of wastewater from the Pojoaque Valley School District ("PVSD") (collectively, "PVSD Wastewater Project"); to implement PHASE I (Component A), the Pueblo and PVSD entered into the "Agreement For the Disposal of Wastewater From the Pojoaque Valley School District Jacona Campus to the Pueblo of Pojoaque Lift Station" ("Pojoaque-PVSD Agreement"), dated May 17, 2005; the State in 2005 appropriated \$100,000 to PVSD for the purpose of planning, designing and constructing a water and wastewater system for the Pojoaque Valley public school district in Santa Fe County, pursuant to House Bill 885, Section 19, Paragraph 69; and PVSD has completed the design and construction of PHASE I (Component A);

WHEREAS, to implement PHASES II and III, the Pueblo commissioned ASCG to conduct the "Pojoaque Regional Wastewater Facility Planning Study – Phase 1" dated June 2005, funded by the U.S. Department of Interior, which provided options for the Pueblo's wastewater collection and treatment project and related infrastructure; and the "Pojoaque Regional Wastewater Study – Phase 2" dated November 2005, funded by NCNMEDD under a Memorandum of Agreement between NCNMEDD and the Pueblo dated February 27, 2004, which expanded the PHASE 1 Study to include an examination of needed improvements to the existing regional wastewater treatment capability in the Pojoaque Valley so that the facility can serve non-tribal and tribal areas of East San Ildefonso, Nambe and Tesuque;

WHEREAS, for PHASE II (Component A – the Pojoaque Valley Wastewater Treatment facility), the Pueblo has obtained funding in the approximate amount of \$3,600,000 from the Pueblo and \$900,000 from the State Water Trust Board 2005 monies; and the Pueblo is in the process of designing this phase;

WHEREAS, for PHASE II (Component B – effluent re-use line to Buffalo Thunder® Resort), the Pueblo obtained funding in the amount of \$1,000,000 from the Water Trust Board pursuant to 2006 legislative changes to 2002 House Bill 88a, Section 55; and the Pueblo is in the design process for this phase;

WHEREAS, for PHASE III (Component A -- Nambe Non-Tribal residents), with an estimated cost of approximately \$6,000,000, the County and the Pueblo in 2007 have made a joint application for approximately \$4,000,000 from the State of New Mexico through its State Year of the Water program; the County is seeking to use the existing State appropriation of \$1,070,000 administered through the New Mexico Environmental Department ("NMED") to plan, design, construct and improve a regional water and wastewater system to serve the Pojoaque Valley area pursuant to 2005 House Bill 885;

WHEREAS, for PHASE III (Component B -- Cuyamungue Non-Tribal residents), with an estimated cost of \$4,000,000, the County and the Pueblo plan to seek funds from any available source in the near future;

WHEREAS, the Parties are desirous of moving forward quickly with Phase II, Components A & B to establish the effluent reuse line and upgrades to the Project to treat an estimated 500,000 gallons per day, and to establish additional infrastructure at the Project to enable the County to implement portions of Phase III and Phase IV and to use current funds to permit the County to treat the maximum amount of wastewater from non-tribal areas at the Project that is afforded by the funds, estimated at 30,000 gallons per day;

WHEREAS, in Resolution No. 2006-32, Santa Fe County allocated \$1,000,000 to be applied to a regional waste water project to serve the Pojoaque Valley contingent upon the Project obtaining sufficient total funding to proceed;

WHEREAS, the County and the Pueblo desire to continue to cooperate in the funding and procurement process for current and future appropriations related to the Pojoaque Valley Wastewater Treatment Project;

WHEREAS, it is in the best interests of the citizens of the County and the Pueblo that the County and the Pueblo jointly undertake to fund, plan, permit, design, construct, develop, improve, manage, operate, maintain, repair, and own the Project; and

WHEREAS, on January 30, 2007, the Parties entered into the Memorandum of Understanding, which is being amended as set forth herein.

NOW, THEREFORE, upon the mutual consideration described by this MOU the County and the Pueblo agree as follows:

Memorandum of Understanding

1. Scope of MOU.
 - a. The purpose of this MOU is to establish guidelines for the County and Pueblo to cooperate in the funding, procurement, planning, permitting, design, construction, development, improvement, operation, maintenance and ownership of the Project, and to document the agreements of the Parties with respect to the construction of Phase II, Components A & B of the Project, and to document additional construction to establish a basic infrastructure to facilitate immediate use of the Project by the County.
 - b. The scope of this MOU is intended to cover all aspects of all Phases of the Pojoaque Valley Wastewater Treatment Facility Project, some of which may

occur concurrently and some of which have already been completed, and which are identified as follows:

- (1) PHASE I -- Pojoaque Valley School District Jacona Campus:
 - (a) Component A:
Design and construction of a complete on-site wastewater collection system, including a lift station and an effluent line, from PVSD's Jacona campus to the Pueblo's Industrial Park Lift Station, including removal and decommissioning of the existing Jacona wastewater treatment plant and lagoon system ("Jacona Campus Component") (\$100,000 funded by 2005 House Bill 885; Construction Completed);
 - (b) Component B:
Design and construction of effluent re-use line from the Project to PVSD's recreational fields (will seek funds in the future);
- (2) PHASE II -- Pueblo of Pojoaque Facilities:
 - (a) Component A:
Design and construction of the Pojoaque Valley Wastewater Treatment facility (total cost estimated at \$3.6 Million, with \$2.1M funded by Pueblo of Pojoaque, \$1 Million funded by Water Trust Board and \$500,000 funded through State capital outlay; in design process);
 - (b) Component B:
Design and construction of effluent re-use line from the Pueblo's Evaporative Lagoons Treatment Plant to Buffalo Thunder® Resort (\$1 Million estimate, funded by Water Trust Board; in design process);
 - (c) Component C:
Design and construction of wastewater collection facilities from remaining Pueblo areas to the Project (will seek funds in the future);
- (3) PHASE III -- Non-Tribal Residents in Nambe, Cuyamungue and Jacona Areas:
 - (a) Component A -- Nambe Non-Tribal Area (\$6 Million estimate):

Design and construction of main trunk line, lateral lines, service lines and lift station and upgrade as needed to existing Pojoaque Pueblo facilities as needed to accommodate additional capacity from Nambe non-Tribal residents (seeking funds from 2007 legislature; \$6 Million estimate);

- (b) Component B -- Cuyamungue Non-Tribal Area (\$4 Million est.): Design and construction of main trunk line, lateral lines, service lines and lift station and upgrade to existing Pojoaque Pueblo facilities as needed to accommodate additional capacity from Cuyamungue non-Tribal residents (will seek funds in the future; \$4 Million estimate);
 - (c) Component C -- Jacona Non-Tribal Area (\$4 Million estimate): Design and construction of main trunk line, lateral lines, service lines and lift station and upgrade to existing Pojoaque Pueblo facilities as needed to accommodate additional capacity from Jacona non-Tribal residents (will seek funds in the future; \$4 Million estimate);
- (4) PHASE IV – Jacona, El Rancho, Nambe :
- (a) Component A:
Design and construction of effluent lines from remaining non-Tribal residents in Jacona, El Rancho, Nambe and Pueblo areas to the Project.
 - (b) Component B:
Design and construction of a complete on-site wastewater collection system, including a lift station and effluent lines on PVSD's Pojoaque campus, and effluent lines from the PVSD's Pojoaque campus to the a lift station located on the Pueblo or to another agreed-upon location ("Pojoaque Campus Component")(will seek funds in the future).

2. Agreements with Respect to Phase II, Components A & B

- a. The Pueblo shall construct Phase II, Components A & B of the Project. The Pueblo shall also construct basic infrastructure to facilitate the County's use of the Project. A basic description of this additional work is attached hereto as Exhibit A.

- b. For purposes of the construction, operation and maintenance of Phase II, Components A & B, it is agreed that the Pueblo shall own, operate and maintain the Project. It is anticipated that the County will own, operate and maintain the Project, except for the Pueblo's distribution system, once the Project is treating 400,000 gallons per day of effluent, subject to appropriate subsequent agreements of the Parties.
- c. The County shall contribute the sum of \$1 million to the Project, together with a pending appropriation of the New Mexico Legislature of \$1,070,000, and it is understood that this contribution will be used to modify the existing facility to enable the County to connect to the Project when the County implements the County's capacity expansion phase and to plan, design and construct tie-ins for wastewater from non-tribal areas. The Pueblo shall contribute the sum of \$4,200,000 to the Project, which will be used to construct Phase II, Components A & B.
- d. The County shall be permitted to use existing Pueblo capacity at the Project for the next two years to treat wastewater delivered from non-tribal areas in the maximum amount possible based upon the appropriations in the above paragraph. The County will provide for the design and construction of the additional treatment capacity needed at the Project for non-tribal wastewater in future phases of the Project.
- e. Pueblo may establish a reasonable fee for treating the aforementioned effluent of the County to ameliorate the costs of operation, maintenance and capital replacement of the Project and the County agrees to pay such fees.
- f. The Pueblo shall prepare all documents needed for construction of Phase II, Components A & B, and shall prepare all documents needed for construction of the basic infrastructure to facilitate immediate use of the Project by the County, including any necessary easements or rights-of-way across Pueblo property. The Pueblo shall contract for the construction of Phase II, Components A & B, including all required design, engineering and construction work. In connection therewith, the Pueblo shall gather input of the Parties on these details, and on the fiscal management of the Project, and the subsequent operation and management of the Project. Future agreements shall address these issues with respect to the construction of further phases of the Project.
- g. For Phase II, Components A & B, and for Phase III, the Pueblo shall complete any necessary environmental approvals, permits, archeological clearances required under National Historic Preservation Act, and other necessary rights-of-way and service line agreements for Project phases located on Pueblo owned land.

- h. For Phase III, the County shall complete any necessary environmental approvals, permits, archeological clearances and rights-of-way and service line agreements for Project phases located on non-Pueblo land.
- i. The Parties shall be entitled to use the treated effluent created by the Project to the extent that the Party provided raw effluent to the Project, with the understanding that there exists the necessary infrastructure for the delivery of the treated effluent and agreements for the costs of treatment, operation and maintenance.

3. Future Agreements.

- a. The Parties hereto recognize that future agreements will be necessary to further implement the Project as described above. In particular, the issues of ownership, responsibility for operation and maintenance of the Project, the responsibilities of each party to contribute to the Project, and other important details have not been completely resolved, although general agreement has been reached on many important points. The Parties therefore commit to addressing these details in future agreements; such future agreements may take the form of a global agreement to address these issues with respect to the entire Project, or may be partial agreements intended to address only a portion, component or Phase of the Project.
- b. Future agreements must address ownership of the Project as a whole, or may instead address discrete ownership of elements of the Project. Such future agreements must also address the governance of the Project by the Parties hereto, shall address the relationship of the Parties as between the Parties and as to the Project, and shall specify each Parties' right to participate in Project design, planning, execution, construction, operation and maintenance.
- c. Future agreements must address technical details of the construction of future phases, including procurement of the Project, design, engineering and construction of the Project, input of the Parties on these details, fiscal management of construction of the Project and operation of the Project thereafter.
- d. Future agreements must address the parties' capital contributions to further phases of the Project; the parties' respective responsibility for contributing to the operational and maintenance expenses of the Project as a whole, taking into account each parties' contributions of funds and assets; each party's responsibility to contribute revenue to the Project as a whole; and the application of future federal, state and local grants to the Project.
- e. Future agreements must address the required environmental approvals and permits necessary to construct, develop, improve, operate and maintain the

Project, the required archeological clearances under National Historic Preservation Act, if applicable, for Project phases on non-Pueblo owned land, other necessary permits, rights-of-way and service line agreements for Project phases on non-Pueblo owned land.

- f. Future agreements shall address the use of treated effluent in future phases of the Project, and the Project as a whole, that will be created by the Project by the Parties and others.
- g. Future agreements must address the issue of revenue to support the Project on a long term basis, including the issues of establishing reasonable rates for the disposal and treatment of effluent by the then-operator of the Project, as appropriate. It is anticipated that if the County assumes ownership, operation and maintenance of the Project as set forth above, a future agreement will permit the then operator to establish reasonable rates for disposal and treatment of effluent to ameliorate the costs of day-to-day operation, maintenance and capital replacement of the Project. Future agreements should establish a proper basis for metering or establishing the contributions of effluent of each customer.
- h. Future agreements may set forth the parties respective responsibilities for seeking and obtaining additional state and federal assistance for the Project and all other things deemed reasonable and necessary by the Parties to effectuate the purposes of this MOU and the Project.
- i. Future agreements may address the participation in the Project by other Pueblos, including Tesuque Pueblo, Nambe Pueblo and San Ildefonso Pueblo, and shall address all of the foregoing with respect to the participation in the Project of these entities.

4. Termination.

- a. This MOU shall be for a term of twenty (20) years or for the life of the Project, whichever is greater.
- b. Once the Project, or any Phase or Component of the Project, is constructed, the Parties recognize that termination of this MOU as to any Phase or Component already constructed is likely to endanger the public health, safety and welfare, and should be avoided unless adequate provisions are made for safe disposal of the liquid waste, the treatment and safe transportation of which is the subject of this MOU. After construction of any Phase or Component of the Project, this MOU may be terminated as to any Phase or Component already constructed only upon formal mutual agreement of the Parties hereto.

- c. Prior to expenditure of any funds dedicated to any specific Phase or Component of the Project as described in this MOU, any party's participation in this MOU may be terminated as to that Phase or Component, upon one-hundred eighty (180) days advance written notice.
- d. In the event funds are not appropriated by the County's governing body (the Board of County Commissioners of Santa Fe County, New Mexico) to satisfy the County's obligations as to any Phase or Component of the Project hereunder, any party shall have the option of terminating this MOU as to that Phase or Component as of the date when the County's funds become exhausted.

5. Establishment of the Project Coordination Committee.

- a. The County and the Pueblo have organized a Project Coordination Committee for the purpose of coordinating the efforts of the County, the Pueblo and the community, and for establishing and maintaining public involvement in the planning, design and implementation of the Project.
- b. The Committee will meet as determined by the majority of the Committee on an as-needed basis.
- c. The Committee will be comprised of
 - (1) County technical personnel appointed by the County;
 - (2) Pueblo technical personnel appointed by the Pueblo;
 - (3) PVSD technical personnel appointed by PVSD for the Project phases related to the PVSD Wastewater Project; and
 - (4) Community representative(s) familiar with the Project appointed by the County for the Project phases related to the design and construction of effluent lines from non-Tribal areas and the Non-Tribal Collection System.
- d. The Committee shall report from time to time concerning activities addressed and issues encountered to the governing bodies and officials of the Parties.

7. Insurance.

- a. Each party hereto shall obtain and maintain in force during the duration of this MOU a comprehensive public liability and automobile insurance policy with policy limits commensurate with each parties' exposure and sovereign immunity, but in no event not less than \$1,050,000 (combined single limit of liability per occurrence), which policy or policies shall insure against bodily injury (including death), property damage, and violations of civil rights. Said policies of insurance

shall include coverage for all operations performed by the insured, use of owned, non-owned, hired automobiles, vehicles and other equipment, both on and off work, and contractual liability coverage.

- b. The County shall be responsible, during construction of various elements of the Project, for obtaining and maintaining in force a policy or policies of builder's risk insurance coverage with coverage limits appropriate to the work being performed, the cost of which shall be considered a cost attributable to the Project and may be deducted from funds used to construct the Project. In addition, the County shall require contractors of the Project to obtain and maintain in force through substantial completion of the relevant element of the Project a surety bond or bonds as required by New Mexico law, errors and omissions insurance coverage or professional liability insurance with limits commensurate to the value of the relevant element of Project, and workers' compensation insurance in amounts specified by the New Mexico Workers' Compensation Act (as amended).
- c. Each party shall name the other party as a certificate holder on each policy of insurance held by that party in satisfaction of this Section of this MOU and shall, upon demand of the other party, provide such further evidence of coverage as may be required by the other party.
- d. All policies of insurance described in this Section shall be written by companies authorized to write such insurance in New Mexico.

8. Non-Appropriation.

Nothing in this MOU shall be construed as obligating the Parties in the expenditure of funds or for some future payment of funds in excess of appropriations allowed by law. The Parties' obligations pursuant to this MOU are therefore contingent upon appropriation of funds by the governing body of each party. Each party's decision concerning appropriations, including decisions concerning the sufficiency of appropriations, shall be final.

9. Liability.

No party hereto shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this MOU. The County and the Pueblo each expressly do not waive its sovereign immunity from suit, and nothing in this MOU shall be construed as a general waiver of sovereign immunity by either party, and any claim arising in connection with this MOU shall be subject to the privileges and immunities of the New Mexico Tort Claims Act (as amended) with respect to the County and to governmental immunities and limitations under federal and tribal law with respect to the

Pueblo. Nothing in this MOU shall be construed as a waiver, express or implied, of the sovereign immunity of the Pueblo.

10. Law.

The laws of the State of New Mexico and applicable federal law shall govern this MOU, unless otherwise provided in this MOU.

11. Environmental Standards.

The Pueblo consents to the application of the environmental standards of NMED with respect to effluent that is treated by, and discharged off, the Pueblo as part of this Project. In no event, however, does the Pueblo submit to the regulatory or jurisdictional authority of the NMED. The United States Environmental Protection Agency and the Pueblo have exclusive regulatory authority and jurisdiction over environmental matters on the Pueblo. The Pueblo retains the authority to determine, in its sole discretion, the environmental standards that otherwise apply to any portion of the Pojoaque Valley Wastewater Project that is located on the Pueblo, provided the Pueblo complies with applicable federal laws and regulations.

12. Reservation of Pueblo Rights.

The Pueblo reserves exclusive legislative, regulatory and adjudicatory jurisdiction over all aspects of the Pojoaque Valley Wastewater Project, related infrastructure, rights-of-way and service line agreements that are located on the Pueblo.

13. No Third Party Beneficiaries.

The Parties to this MOU do not and do not intend to create in the public, any member thereof, or any person, any rights whatsoever such as, but not limited to, the rights of a third-party beneficiary, or to authorize anyone not a party to this MOU to maintain a suit for any claim whatsoever pursuant to the provisions of this MOU.

14. Binding Effect.

This MOU shall be binding upon and inure to the benefit of the Parties and their respective representatives, successors, and assigns.

15. Amendment.

This MOU may be amended or modified only by the written, mutual consent of the Parties.

16. Books and Records.

- a. The Parties shall maintain adequate and correct books and accounts concerning the Project, the construction thereof, and the subsequent operation and maintenance thereof.
- b. The accounts prepared pursuant to the previous paragraph shall be open to inspection at any reasonable time by the Parties hereto, their accountants or agents.
- c. The County shall maintain adequate and correct accounts of funds disbursed pursuant to this MOU, and these accounts shall be open to inspection during regular working hours to the Parties hereto, their accountants or agents.
- d. The State Auditor of New Mexico shall have access to the accounts maintained by the Parties pursuant to this MOU.

17. Notices.

Any notice, demand, request, or information authorized or related to this MOU shall be deemed to have been given if mailed (return receipt requested), hand delivered or faxed as follows:

To the County: Santa Fe County Utilities Director
Santa Fe County
205 Montezuma
Santa Fe, N.M. 87505
Phone: 986-6210
Fax: 992-8421

With a copy to: County Manager
Santa Fe County
P.O. Box 276
Santa Fe, N.M. 87504
Phone: 986-6200
Fax: 986-6362

And a copy to: County Attorney
Santa Fe County
P.O. Box 276
Santa Fe, N.M. 87504
Phone: 986-6279
Fax: 986-6362

To the Pueblo: George Rivera, Governor
Poeh Cultural Center
78 Cities of Gold Road
Santa Fe, NM 87506
Phone: 455-3334

With a copy to: Chief Legal Counsel
Legal Department
Pueblo of Pojoaque
17746 U.S. Highway 84/285
Santa Fe, NM 87506
Phone: 455-3901
Fax: 455-33363

IN WITNESS WHEREOF, each of the County of Santa Fe, New Mexico, and the Pueblo of Pojoaque has caused this MOU to be executed and delivered by its duly authorized representatives as of the date specified below.

**THE BOARD OF COUNTY COMMISSIONERS
OF SANTA FE COUNTY**

By Virginia Vigil
Virginia Vigil, Chair

Date: August 3, 2007


Valerie Espinoza
Valerie Espinoza, Santa Fe County Clerk

Date: August 3, 2007

Approved as to form:

Stephen C. Ross
Stephen C. Ross, Santa Fe County Attorney

8-1-07
Date

Teresa Martinez
Teresa Martinez, Finance Director

8-9-07
Date

SFC CLERK RECORDED 08/28/2007

PUEBLO OF POJOAQUE:

George Rivera
George Rivera, Governor

8/15/2007
Date

ATTEST:

Stephanie Crosby
Stephanie Crosby, Tribal Secretary



COUNTY OF SANTA FE) MEMORANDUM OF UNDERSTA
STATE OF NEW MEXICO) ss PAGES: 14

I Hereby Certify That This Instrument Was Filed for
Record On The 28TH Day Of August, A.D., 2007 at 15:47
and Was Duly Recorded as Instrument # 1497591
of The Records Of Santa Fe County

Deputy *Valerie Espinoza* Witness My Hand And Seal Of Office
Valerie Espinoza
County Clerk, Santa Fe, NM