

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into as of this ___ day of January, 2018, by and between the Pueblo of Tesuque (“Pueblo”), Santa Fe County (“County”), and the United States Department of the Interior (“Department”). The Pueblo, the County, and the Department are sometimes each referred to as a “Party” and together as the “Parties.”

RECITALS

WHEREAS, County-Maintained Road (“CMR”) 72-I, as defined in this Agreement, is located within the exterior boundaries of the Pueblo, segments of which traverse Pueblo Land and segments of which traverse Private Land; and

WHEREAS, the Department and the Pueblo claim that the segments of CMR 72-I that traverse Pueblo Land are in trespass; and

WHEREAS, the County disputes that CMR 72-I is in trespass on Pueblo Land; and

WHEREAS, judicial resolution of this disagreement regarding CMR 72-I would be time-consuming, expensive, and divisive, and would adversely affect the Parties’ efforts to work collaboratively on other issues of critical concern; and

WHEREAS, conclusively resolving longstanding issues that have the potential to divide the community is of paramount importance to the Parties; and

WHEREAS, for purposes of amicably resolving their dispute, this Agreement sets out the terms and conditions under which: (a) the County will apply to the Bureau of Indian Affairs (“BIA”) pursuant to 25 C.F.R. Part 169 for a right-of-way (“ROW”) for CMR 72-I located on Pueblo Land; (b) the Pueblo will consent to the BIA’s grant of ROW for CMR 72-I, which ROW shall have an initial term of ninety-nine (99) years and an automatic renewal term of an additional ninety-nine (99) years; (c) the County will compensate the Pueblo for the BIA-granted ROW; (d) the Parties will grant certain mutual releases of liability; and (e) the Parties will perform such other tasks as described below.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and obligations set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the County will submit, with the Pueblo’s consent, the documentation necessary for the Secretary to grant a ROW for CMR 72-I, according to the process defined herein:

Section 1. Definitions. Capitalized terms are defined either in the text of this Agreement or in this Section. In addition, the definitions found at 25 C.F.R. Part 169 apply to this Agreement.

- A. “Construction” means any road work activities that are not considered Maintenance as defined below.
- B. “Contributed Funds Agreement” or “CFA” means the funding agreement to be entered into between the Secretary and the County pursuant to the Aamodt Litigation Settlement Act, Pub. L. No. 111-291, § 611(d)(1)(B) (2010). The CFA will provide for the County’s contribution of the non-Federal share of the costs of constructing the Regional Water System in accordance with Section 3.1.3 of the August 27, 2009 Cost Sharing and System Integration Agreement.
- C. “County-Maintained Road” or “CMR” means CMR 72-I within the exterior boundaries of the Pueblo and, as depicted on the map attached hereto as Exhibit A, which is incorporated into and made part of this Agreement by this reference.
- D. “Escrow Agent” means the company selected by the Parties pursuant to Section 2(B).
- E. “Gap” means a gap of Pueblo Land located directly between Private Land and a Public Road that prevents lawful ingress and egress from the Private Land to the Public Road.
- F. “Maintenance” means the preservation of the entire road, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for safe and efficient utilization of the road. 23 U.S.C. § 101 (a)(13).
- G. “Private Land” means the land located within the exterior boundaries of the Pueblo that the United States patented to private claimants or to which Indian Title has otherwise been duly extinguished.
- H. “Public Road” is a road open to public travel, and not subject to any type of tolls or fees.
- I. “Pueblo Land” or “Pueblo Lands” means real property owned by the Pueblo of Tesuque in fee simple subject to Federal restrictions against alienation, or lands owned by the United States in trust for the benefit of the Pueblo.
- J. “Regional Water System” or “RWS” means the Pojoaque Basin Regional Water System to be constructed by the United States Bureau of Reclamation pursuant to the Aamodt Litigation Settlement Act, Pub. L. No. 111-291.
- K. “ROW” means a right-of-way.
- L. “Secretary” means the Secretary of the Interior or an authorized representative of the Secretary.

M. “Trespass Damages” means all damages suffered by the Pueblo because of the CMR presence, maintenance, and use from the beginning of time to the date of the approval of the ROW for the CMR; *provided*, however, that Trespass Damages does not include damages, if any, relating to the release of regulated hazardous substances or other dangers on or below the surface of the earth, known or unknown.

Section 2. *Settlement Amount and Escrow.*

- A. The County agrees to pay the Pueblo a one-time, lump sum of one hundred eighty five thousand dollars (\$185,000.00) (“Settlement Amount”), if and when the Secretary grants the ROW identified herein. The purpose of the Settlement Amount is to: (1) provide compensation to the Pueblo for the ROW described in Section 3 that is fair and reasonable under the circumstances; (2) finally settle and resolve all Trespass Damages related to CMR 72-I; and (3) contribute to costs to survey County Roads 73 and 74, both of which have perfected ROWs, for the purpose of identifying specific parameters of such ROWs.
- B. Within thirty (30) days after the Parties execute this Agreement, they shall select a mutually acceptable Escrow Agent. Within sixty (60) days after selection of the Escrow Agent, the County shall deposit the Settlement Amount with the Escrow Agent. The Escrow Agent shall hold the Settlement Amount until it receives notice from the BIA that the Secretary will grant the ROW pursuant to Section 3(C)(iii), or until the Escrow Agent receives notice of termination of this Agreement from either the County or the Pueblo pursuant to Section 4(B)(ii).
- i. In the event that the BIA gives the Escrow Agent notice pursuant to Section 3(C)(iii) that it will be granting the ROW, the Escrow Agent shall, upon receipt of a copy of the executed ROW, transfer the Settlement Amount directly to the Pueblo according to instructions provided by the Governor of the Pueblo of Tesuque.
 - ii. In the event that the Escrow Agent receives notice of termination of this Agreement, the Escrow Agent shall transfer the Settlement Amount to the County according to the instructions to be provided by the County Manager.
- C. As set forth by Tribal Resolution attached hereto as Exhibit B, the Pueblo:
- i. Agrees that the Settlement Amount is satisfactory to the Pueblo as compensation for the ROW and any Trespass Damages relating to past use of that ROW;
 - ii. Waives valuation of the ROW;

- iii. Represents that it has determined that accepting such agreed-upon compensation and waiving valuation is in its best interest; and
- iv. Provides a limited waiver of the Pueblo's sovereign immunity as further described in Section 10(E).

Section 3. *Obligations of the Parties.*

A. County Obligations:

- i. Within one (1) year following the execution of this Agreement or the Contributed Funds Agreement, whichever comes last, the County shall at its expense submit to the BIA a ROW application for CMR 72-I. The ROW application shall comply with the requirements of 25 C.F.R. Part 169, including but not limited to, identifying the Pueblo Lands affected by the ROW, maps of definite location for the ROW, and the ownership of any permanent improvements associated with the ROW. The County agrees to prepare, execute, and submit to the BIA such further documents as may be required by the BIA to grant the ROW under 25 C.F.R. Part 169. The Pueblo and the County may agree in writing to extend the County's one (1) year deadline for submitting the ROW application to the BIA.
- ii. The County's ROW application shall incorporate the following specific terms:
 - 1. The proposed term of the ROW shall be for a term of ninety-nine (99) years, with an automatic renewal term of ninety-nine (99) years.
 - 2. The width of the ROW shall be the existing driving surface of the CMR on Pueblo Land as of the date of this Agreement, plus four (4) feet on each side of the existing driving surface ("Standard ROW Width"); provided, however, that where the Standard ROW Width would encroach on Private Land, the actual ROW width shall extend to the boundary of the Private Land.
 - 3. The primary purpose of the ROW shall be operating and maintaining a Public Road, which shall include the right to access to manage vegetation, inspect, maintain and repair equipment, and to conduct such other activities as may be necessary or appropriate to operate and maintain a Public Road. Construction shall be identified as a secondary purpose of the ROW, subject to the provisions of Section 3(D)(vi), below.
- iii. The County shall at its expense survey the CMR and develop an accurate legal description to include in its ROW application to BIA. In addition, the County

shall place survey caps at agreed-upon locations every five hundred (500) feet along both sides of the CMR.

- iv. The County agrees to maintain throughout the term of the ROW general liability insurance or, at its option, sufficient self-insurance for the Maintenance of the CMR.

B. Pueblo Obligations:

- i. The Pueblo shall consent to the County's submission of the ROW application and the Secretary's grant of the ROW for CMR 72-I.
- ii. The Pueblo shall cooperate and reasonably assist the County in filing the County ROW application. The Pueblo agrees to prepare, execute, and submit to the BIA such further documents as may be required by the BIA in support of the County's application.
- iii. For instances where a Gap exists between CMR 72-I and Private Land, [TBD]
- iv. The Pueblo shall request and the BIA shall agree to a waiver of the requirement that a bond, insurance, or alternative form of security be submitted with the ROW application.

C. BIA Obligations:

- i. Nothing in this Agreement shall be construed to restrict the authority of the United States, the Secretary, or the Pueblo under applicable laws or regulations, including, but not limited to, laws and regulations applicable to the review and grant of ROW by the Secretary.
- ii. The Secretary shall accept the Pueblo's determinations as reflected in this Agreement and the Tribal Resolution attached as Exhibit B, including: (1) that the Settlement Amount is satisfactory, (2) that valuation is waived, and (3) that accepting such agreed-upon compensation and waiving valuation is in the Pueblo's best interest.
- iii. In the event that the Secretary, after review of the documentation submitted by the County, with the support and consent of the Pueblo, and under his authority and any applicable laws or regulations, decides to grant the ROW, the BIA will notify the Parties and the Escrow Agent at least ten (10) days before the Secretary will grant the ROW.

- iv. The BIA shall not require the County to indemnify the Pueblo or the United States for the grant of any ROW pursuant to 25 C.F.R. § 169.125 (c)(6), because the County is prohibited from doing so under Article IX, Section 10 of the New Mexico Constitution.

D. ROW and Other Requirements:

- i. The Pueblo and the County agree that Federal law, including 25 U.S.C. §§ 323-328 and 25 C.F.R. Part 169, controls the application, granting and administration of ROWs on Pueblo Lands.
- ii. In order to expedite the ROW development, submission and review process, the Pueblo and County have agreed to use the ROW template to be provided by BIA. The BIA has been and will continue providing technical assistance to the Pueblo and the County with respect to developing the ROW documents. The Pueblo and the County acknowledge, however, that such technical assistance shall not constitute a grant of, or promise to grant, any ROW.
- iii. The BIA shall cause the granted ROW to be recorded with the BIA's Land, Title and Records Office as expeditiously as possible.
- iv. For any Maintenance carried out on the ROW by the County's contractors, the County shall require that its contractors provide performance bonds and have insurance covering all aspects of the Construction or Maintenance activities to ensure that projects, including any remediation work, are completed and any damage to land within the exterior boundaries of the Pueblo, or real or personal property is remedied.
- v. The County shall not assign the ROW to the State of New Mexico or any other party without the consent of the Pueblo and approval by the Secretary, both as required by Federal law and regulations. Any proposed assignment to the State of New Mexico shall not require additional compensation to the Pueblo, but the County or the State shall bear all costs involving preparation and submission of the ROW assignment application.
- vi. The County does not currently have plans to carry out Construction within the ROW. The County will not engage in any Construction, including but not limited to replacing an earthen-driving surface with an asphalt surface, within the ROW except pursuant to a written agreement among the County, the Pueblo, and the BIA.

- vii. The Parties acknowledge that the ROW grant for a public road shall not include authority for any utilities or any other uses.
- viii. The Pueblo shall not tax any current or future improvements within the ROW; provided, however, that the Pueblo reserves the right to levy gross receipts taxes in accordance with applicable law on any contractors or subcontractors conducting Maintenance or Construction activities. In addition, nothing herein shall affect the applicability of the Pueblo's business license requirement to all contractors and subcontractors performing Maintenance or Construction activities within the ROW, nor shall this Agreement affect the application of any other Pueblo laws and ordinances within the ROW; provided, however, that no such law or ordinance shall operate to terminate or change the terms of any ROW granted to the County.

Section 4. *Contingencies.*

- A. No ROW applications shall be submitted for review by the Secretary until the Contributed Funds Agreement for construction of the RWS is executed by the County and the Bureau of Reclamation. The Contributed Funds Agreement shall identify a funding source for the County's contribution.
- B. In the event that the County and the Bureau of Reclamation do not timely enter into a Contributed Funds Agreement by April 2, 2018, the following provisions shall apply:
 - i. The County shall notify the Pueblo that the County and the Bureau of Reclamation have not entered into a Contributed Funds Agreement, which notice shall be given in accordance with Section 11; provided, however, that the County shall have no obligation to provide such notice if the County has executed the Contributed Funds Agreement and it is merely awaiting due execution by the Bureau of Reclamation.
 - ii. The Pueblo shall have sixty (60) from the date of such notice to terminate this Agreement by giving the County and the Escrow Agent notice of such termination, which notice shall be given in accordance with Section 11. Should the Pueblo not timely terminate this Agreement, all other provisions of this Agreement shall continue to be valid and binding.
 - iii. Notwithstanding Section 4(B)(ii), the Pueblo shall not give the Escrow Agent notice of termination, and this Agreement shall not terminate, if the Bureau of Reclamation provides written notice to the Escrow Agent, with copies to the County and the Pueblo, that the Bureau of Reclamation and the County require additional time to finalize and execute the Contributed Funds Agreement and that

the delay in executing that Contributed Funds Agreement will not delay the date that the RWS is substantially complete.

C. Should the Secretary deny the grant of the ROW, the following provisions shall apply:

- i. If the Secretary denies the grant of the ROW pursuant to 25 C.F.R. § 169.24, the Pueblo and the County agree to discuss whether to appeal the decision or modify this Agreement. If they choose to appeal and the appeal is unsuccessful, the Parties shall promptly meet to renegotiate this Agreement. If the Parties are unable to agree on amendments to this Agreement or on some other mutually agreeable outcome, any Party shall have the option to terminate this Agreement within thirty (30) days from receiving notice from the BIA that the ROW was denied. The Party choosing to terminate this Agreement will give Notice to the Escrow Agent and to the Parties in accordance with Section 11.
- ii. If the Secretary denies the grant of the ROW because the Secretary requires any modifications to the application or any measures needed to meet applicable law in order to grant the ROW application, the Parties shall promptly meet to discuss and revise this Agreement or applications, or both, as appropriate, unless the Parties agree otherwise. If the Parties are unable to agree on amendments to this Agreement, applications, or on some other mutually agreeable outcome, any Party shall have the option to terminate this Agreement within thirty (30) days from receiving notice from the BIA that the ROW application required modification. The Party choosing to terminate this Agreement will give Notice to the Escrow Agent and to the Parties in accordance with Section 11.

Section 5. *Release of Claims.*

- A. *Release of Claims Against the County.* If the Secretary grants the ROW, then on the day that the ROW is granted and upon the Escrow Agent's transfer of the Settlement Funds to the Pueblo in accordance with Section 2(B)(i), the Department and the Pueblo shall irrevocably and forever release and discharge the County, former and current County employees, and former and current County elected officials from any and all claims of Trespass Damages. This release does not include any and all potential claims pursuant to Federal environmental law, including but not limited to liability for hazardous substances disposed on the land, or any other applicable law.
- B. *Release of Claims Against the Department and the United States.* If the Secretary grants the ROW, then on the day the Secretary grants the ROW and upon the Escrow Agent's transfer of the Settlement Funds to the Pueblo in accordance with Section 2(B)(i), the Pueblo and the County agree to irrevocably and forever release and discharge the United States, the Department, and former and current Department employees from any and all

surface trespass claims, known or unknown, at law or in equity related to the CMR from the beginning of time to the date of the approval of the ROW for the CMR. The Pueblo also hereby waives, releases, and covenants not to sue the United States in any administrative or judicial forum for any alleged harms or violations, including any breach of the trust responsibility of the United States to the Pueblo, related to surface trespass claims for the CMR, negotiation and entry by the BIA into this Agreement, from the beginning of time to the date of the grant of the ROW for the CMR.

- C. *Release of Claims Against the Pueblo.* If the Secretary grants the ROW, then on the day that the Secretary grants the ROW and upon the Escrow Agent's transfer of the Settlement Funds to the Pueblo in accordance with Section 2(B)(i), the County agrees to irrevocably and forever release and discharge the Pueblo, former and current Pueblo employees, and former and current Pueblo elected officials from any and all claims, known or unknown, at law or in equity related to the CMR from the beginning of time to the date of the approval of the ROW for the CMR.

Section 6. *Reservation of Rights, Compromise Discussions, No Admission of Liability.*

- A. In the event a Party terminates this Agreement pursuant to Section 4, the Parties expressly reserve all rights and claims.
- B. In the event a Party terminates this Agreement pursuant to Section 4 and there is subsequent litigation concerning the CMR, this Agreement shall be regarded as inadmissible compromise negotiations under Rule 11-408 NMRA and Federal Rule of Evidence Rule 408; provided, however, that this Agreement may be admitted for the sole purpose of enforcing the terms of the Agreement, including to challenge any claims by any Party that a claim asserted against it is barred or waived.
- C. This Agreement shall not constitute or be construed as an admission of liability by any Party or as an admission of violation of any law, rule, regulation or policy by any Party. This Agreement also shall not constitute or be construed as an admission or denial by any Party with respect to any factual or legal allegation or issue with respect to the CMR.

Section 7. *Governing Law.*

This Agreement shall be governed by the laws of the United States.

Section 8. *Merger, Amendments, Rules of Construction, Successors and Assigns.*

This Agreement: (a) fully states the agreement between the Parties; (b) may be amended only by written amendment signed by all Parties; (c) shall not be construed against any Party as the drafter of the Agreement; and (d) shall be binding on and inure to the benefit of the Parties' successors and assigns.

Section 9. *Representations.*

The undersigned represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

Section 10. *Dispute Resolution.*

- A. If any of the Parties disagree concerning the interpretation or implementation of any provision of this Agreement, or if any dispute arises out of or relates to this Agreement, or the breach thereof, the disputing Parties shall commence direct good faith negotiations within thirty (30) calendar days concerning the dispute after one (1) Party notifies the other of the dispute in writing.
- B. If the Parties are unable to resolve a disagreement within sixty (60) calendar days of their first meeting on the subject, the Parties shall promptly refer the disagreement to a single mediator upon whom the Parties can agree. The Pueblo, the Department and the County shall share the costs of the mediator equally. If the Parties are unable to agree upon a mediator, or if they are unable to resolve the disagreement within sixty (60) calendar days of its referral to the mediator, or within any other time interval on which the Parties unanimously agree, the Pueblo and County may have recourse to any legal or equitable remedies available to them in Federal court.
- C. The Pueblo and the County acknowledge that while the Department may participate as a Party in the mediation process described above, neither such participation in mediation nor anything else in this Agreement waives, or shall be construed as any waiver of, the sovereign immunity of the United States. Except as provided in Section 5, nothing in this Agreement shall limit any remedies available to the Pueblo or the County pursuant to 25 C.F.R. Part 2, 25 C.F.R. Part 169, the Administrative Procedure Act, or any other applicable Federal law.
- D. If after the Pueblo and the County fail to resolve the dispute by mediation, there is still an unresolved controversy, claim, or dispute arising from or relating to this Agreement, or breach thereof, the Pueblo and the County agree that such dispute shall be brought before a court of competent jurisdiction. In the absence of the United States, the Pueblo and the County each agree not to raise F.R.C.P. Rule 19 as a defense to any such lawsuit.
- E. The Pueblo waives its sovereign immunity only as to suits limited to interpretation or enforcement of this Agreement brought in a court of competent jurisdiction. Attached hereto as Exhibit B is a Resolution of the Pueblo approving this Agreement, including the limited waiver of sovereign immunity provided herein. The County's sovereign immunity is waived as to actions to interpret or enforce this Agreement in accordance with NMSA 1978, Section 37-1-23.

- F. The Pueblo and the County acknowledge that nothing in this Agreement confers jurisdiction on any non-Federal court to interpret Federal Law regarding health, safety, or the environment, or to otherwise determine the duties of the United States or other parties pursuant to such Federal law, or to conduct judicial review of any Federal agency action.

Section 11. Notices.

- A. Any notice, demand, request, or information authorized or related to this Agreement shall be deemed to have been given if mailed by certified or registered mail, return receipt requested, hand delivered, or faxed as follows:

To The County:

County Manager
Santa Fe County
P.O. Box 276
Santa Fe, New Mexico 87504
Fax: 505.995.2740

With a Copy To:

County Attorney
Santa Fe County
P.O. Box 276
Santa Fe, New Mexico 87504
Fax: 505.986.6362

To the Pueblo of Tesuque:

[Need Address]

With A Copy To:

[Need Address]

To the Department of the Interior:

Regional Director, Southwest Region
1001 Indian School Road NW
Albuquerque, NM 87104
Fax: 505.563.3101

With A Copy To:

Office of the Solicitor, Southwest Region
505 Marquette Ave NW
Suite 1800
Albuquerque, NM 87102
Fax: 505.248.5623

Notice shall be deemed to have been given based upon the method of delivery, as follows: notices sent by facsimile or hand delivered shall be deemed given on the date of delivery, as evidenced, with respect to facsimile delivery, by a printout showing successful transmission of all pages included in the notice; notices sent by mail shall be deemed given three (3) business days after the notice is mailed with postage prepaid.

- B. A Party may change the persons to whom or addresses at which notice shall be given by giving all other Parties notice of the change in accordance with this Section.

Section 12. *No Third Party Beneficiary Rights.*

This Agreement is not intended to and shall not be construed to give any Third Party any interest or rights (including, without limitation, any Third Party beneficiary rights) with respect to or in connection with any agreement or provision contained herein or contemplated hereby.

Section 13. *Private Claims Unaffected.*

The Parties acknowledge and agree that this Agreement and the subsequent grant of the ROW do not waive, satisfy, or discharge claims (if any) at law or in equity that Third-parties may have against the County, the Pueblo, or the United States related to the CMR or access to Private Land.

Section 14. *Contingency of Federal Appropriations.*

The expenditure or advance of any money or the performance of any obligation of the United States under this Agreement shall be contingent upon appropriation or allotment of funds. No liability shall accrue to the United States in case funds are not appropriated or allotted.

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IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates set forth below.

<p>PUEBLO OF TESUQUE</p> <hr/> <p>Rick Vigil, Governor</p> <hr/> <p>Date</p>	<p>SANTA FE COUNTY</p> <hr/> <p>Henry P. Roybal, Chair Board of County Commissioners</p> <hr/> <p>Date</p> <p>ATTEST:</p> <hr/> <p>Geraldine Salazar, County Clerk</p> <p>Approved as to Form:</p> <hr/> <p>R. Bruce Frederick, County Attorney</p>
<p>U.S. DEPARTMENT OF THE INTERIOR</p> <hr/> <p>Secretary of the Interior</p> <hr/> <p>Date</p>	

EXHIBIT A

MAP

DRAFT

EXHIBIT B

TRIBAL RESOLUTION

DRAFT