

**Agreement Pursuant to Section 611(g)
of Title VI of the Claims Resolution Act of 2010**

This Agreement is entered into pursuant to 611(g) of Title VI of the Claims Resolution Act of 2010, Public Law No. 111-291, 124 Stat. 3064 (“Settlement Act”), by and among the United States through the Secretary of the Interior (“United States”), the State of New Mexico (“State”), Santa Fe County (“County”), the City of Santa Fe (“City”), the Pueblo of Nambé, the Pueblo of Pojoaque, the Pueblo de San Ildefonso and the Pueblo of Tesuque (individually “Party” and collectively “the Parties”).

RECITALS

WHEREAS, the Parties are parties to a settlement agreement dated April 19, 2012 (“Settlement Agreement”), and a Cost-Sharing and System Integration Agreement (“Cost-Sharing Agreement”) executed by the parties thereto on March 14, 2013; and

WHEREAS, section 611(a) of the Settlement Act provides that the “Secretary, acting through the Commissioner of Reclamation, shall plan, design, and construct a regional water system ... to divert and distribute water to the Pueblos and to the County Water Utility, in accordance with the Engineering Report”; and

WHEREAS, as defined in section 602(9) of the Settlement Act, the Engineering Report is the “Pojoaque Regional Water System Engineering Report” dated September 2008 and any amendments thereto”; and

WHEREAS, section 623(e) of the Settlement Act provides that “the Regional Water System”, also referred to herein as the “Project”, “shall be determined to be substantially completed if the infrastructure has been constructed capable of diverting, treating, transmitting, and distributing a supply of 2,500 acre-feet of water to the Pueblos; and diverting, treating, and transmitting the quantity of water specified in the Engineering Report to the County Distribution System.”; and

WHEREAS, section 611(f)(3) of the Settlement Act authorizes a maximum of \$106,400,000 for “the Secretary to construct the Pueblo Water Facilities,” and provides that as “a condition of the Secretary using the funds..., the costs of constructing the County Distribution System shall be a State and local expense pursuant to the Cost-Sharing and System Integration Agreement.”; and

WHEREAS, the Cost-Sharing Agreement provides that of “the \$177,300,000 in estimated Regional Water System construction costs as of October 1, 2006, the United States shall pay an estimated \$106,400,000 and the State and County shall pay the non-Federal share estimated to be \$70,900,000,” further allocated in the Cost-Sharing Agreement as \$45,500,000 by the State and \$7,400,000 by the County for construction of the Regional Water System and an \$18 million contribution from the State and County for non-Pueblo service connection costs; and

WHEREAS, with indexing to 2018 as provided for in the Cost-Sharing Agreement, the total amount of Federal funding authorized to construct the Project under the Settlement Act is \$139.8 million, the State’s allocation (exclusive of non-Pueblo service connection costs) is \$62.8

million, and the County's allocation (exclusive of non-Pueblo service connection costs) is \$10.4 million, for a total of \$213 million; and

WHEREAS, the State and the United States entered into a Funding Agreement on July 29, 2014, 14-WC-40-533 ("State Funding Agreement"), setting forth the terms and conditions of the State's contribution to the settlement as specified in the Settlement Act, the Settlement Agreement, and the Cost-Sharing Agreement; and

WHEREAS, the County and the United States entered into a Funding Agreement on April 2, 2018, 15-WC-40-563 ("County Funding Agreement"), setting forth the terms and conditions of the County's contribution to the settlement as specified in the Settlement Act, the Settlement Agreement, and the Cost-Sharing Agreement; and

WHEREAS, the Secretary has determined the current total cost to design and construct the Regional Water System exceeds the amounts specified in the Settlement Act and Cost-Sharing Agreement, indexed as of 2018; and

WHEREAS, section 611(g)(1) of the Settlement Act provides that if the Secretary determines the cost of constructing the Regional Water System exceeds the amounts specified in the Settlement Act and Cost-Sharing Agreement and would necessitate funds in excess of the amount authorized under the Settlement Act, the Secretary shall initiate negotiations with the Parties for an agreement regarding non-Federal contributions to ensure the Regional Water System can be completed as required by the Settlement Act; and

WHEREAS, by letter dated July 9, 2018, addressed to all signatories of the Cost-Sharing Agreement, the Secretary initiated negotiations pursuant to section 611(g) of the Settlement Act to address the funding shortfall and related matters; and

WHEREAS, section 611(g)(2) of the Settlement Act provides that the United States shall not bear the entire amount of any cost overrun, nor shall the State be responsible to pay any amounts in addition to the amounts specified in the Cost-Sharing Agreement; and

WHEREAS, the New Mexico Legislature enacted legislation in the First Session of the 54th Legislature, signed into law by Governor Michelle Lujan Grisham on April 5, 2019, appropriating \$20 million to the Indian Water Rights Settlement Fund for contribution to the settlement (\$2 million in addition to the \$18 million for the State's scheduled cost-share contribution) with the specific provision that this \$20 million appropriated in 2019 "constitutes approximately twenty percent of the state's contribution toward the Aamodt settlement to pay both the state's current cost-share obligation and additional amounts necessary for the state's share of non-federal cost overruns;" and

WHEREAS, the United States, the Pueblos and the County have developed a consensus design concept ("Consensus Design Concept") for the Regional Water System, Exhibit A hereto, that incorporates cost-saving measures agreed to by the United States, the Pueblos and the County to reduce the funding shortfall; and

WHEREAS, with annual adjustments to account for increases in construction costs (“indexing”) to 2018 as provided for in the Cost-Sharing Agreement and section 617(a)(4) of the Settlement Act, the total estimated amount of Federal and non-Federal funding provided for in this Agreement and the Cost-Sharing Agreement (exclusive of non-Pueblo connection costs) is: United States: \$276.8 million; State: \$62.8 million indexed plus additional funds for a combined total of \$100 million; and County: \$38.4 million; and

WHEREAS, this Agreement sets forth how construction of the Project will proceed in accordance with the Consensus Design Concept, and an amended Engineering Report based on and consistent with the Consensus Design Concept, Exhibit B hereto; the total cost of such construction; the allocation of the funding shortfall; the conditions for commencing construction of the Project, and; the definition of substantial completion.

AGREEMENT

NOW, THEREFORE, the Parties agree as follows:

I. CONSENSUS DESIGN CONCEPT; ENGINEERING REPORT

- A. The United States, the Pueblos and the County agree that the Regional Water System shall be constructed consistent with Exhibit A, the Consensus Design Concept.
- B. The Bureau of Reclamation (“Reclamation”) will prepare Exhibit B, the Engineering Report based on and consistent with the Consensus Design Concept.
- C. The Pueblos and the County will have thirty (30) days after receiving the Engineering Report to review it for consistency with the Consensus Design Concept.
- D. The Engineering Report will amend, supersede and replace the report referenced in section 602(9) of the Settlement Act entitled Pojoaque Regional Water System Engineering Report dated September 2008.
- E. The Parties agree that if the Regional Water System is constructed in accordance with the Consensus Design Concept and Engineering Report it shall be capable of diverting, treating, transmitting and distributing a water supply of 2,500 acre-feet per annum consistent with the Settlement Agreement and Settlement Act.
- F. The Consensus Design Concept provides for a Regional Water System capable of diverting, treating, transmitting and distributing a water supply of 2,500 acre-feet per annum. The Operating Agreement shall set forth terms and conditions (1) for allocation of the initial 2,500 acre-feet per annum among the Pueblos and the County; and (2) for full build-out of the Project to 4,000 acre-feet per annum by the Regional Water Authority, the Pueblos and the County.

II. ESTIMATED PROJECT COST

- A. The Bureau of Reclamation has estimated the final cost of the Project as of March 29, 2019, based on the Consensus Design Concept, is \$406 million.
- B. The United States, the Pueblos and the County agree that the \$406 million Project cost is the best estimate available and all parties will work together to construct the Project within the limits of this cost estimate.

III. INCREASED PROJECT COST

- A. The Project's final estimated cost, as set forth in Section II, exceeds the amounts described in the Settlement Act and Cost-Sharing Agreement, indexed to 2018, by \$193 million ("Funding Shortfall").
- B. The Parties agree to allocate the Funding Shortfall among the United States, the State, and the County as set forth in Section IV.

IV. FEDERAL AND NON-FEDERAL CONTRIBUTIONS TO COVER INCREASED PROJECT COST; AVAILABLE APPROPRIATIONS

- A. Considering the amount of non-Federal contributions identified in Paragraphs B. and C. of this Section, the United States agrees that its share of contributions will be an additional \$137 million in 2018 dollars to address the Funding Shortfall contingent upon Congress amending the Settlement Act pursuant to Section VII below.
- B. The County shall address its share of the Funding Shortfall as follows:
 - i. The County agrees completion of the final portion of Phase 3 of the County Distribution System, valued at \$24 million in 2018 dollars, may be deferred, as described in Exhibits A and B, until after substantial completion of the Project, as defined below. The County further agrees it shall be responsible for completing construction of the deferred portion, subject to the following conditions:
 - a. The County shall construct the deferred portion of the County Distribution System on a construction schedule as determined by the County in coordination with Reclamation, subject to Section IV(D) below.
 - b. Reclamation shall reserve a minimum of \$10 million of non-Federal contributed funds in 2018 dollars to pay the contract costs to construct the non-deferred portion of the County Distribution System in Phase 3, as described in Exhibits A and B, subject to the terms of the State and County Funding Agreements. As used herein, "contract costs" means charges invoiced by a contractor to construct the non-deferred portion and does not include costs attributable to Federal employee staff time and associated overhead and indirect costs.
 - ii. Reclamation shall design and construct the Regional Water System in accordance with Exhibits A and B, to enable delivery of 1,000 acre-feet per year (620 gallons per minute ("gpm") average day demand, 1,080 gpm peak day demand) to a tee located at the intersection of Bishops Lodge Road and Tesuque Road. The County shall be responsible for paying the incremental

cost of designing and constructing the system to allow such delivery to the tee in the amount of \$4.0 million from the Special Fund identified in paragraph II(A)(1) of the County Funding Agreement. Subject to the requirements of the Settlement Act, including section 614(d), the County may use unused capacity, if any, to supply water within the County outside of the Pojoaque Basin on an interim basis.

- C. As provided for in SB 280, 54th Leg., 1st Sess. (N.M. 2019), the State's contribution to cover the shortfall will be an additional amount that, after indexing of the State's current obligation in the Cost-Sharing Agreement, provides a combined total of \$100 million for the State's contribution to the Settlement.
- D. The requirements of this Section are contingent upon sufficient appropriations and authorizations being made by the Santa Fe County Board of County Commissioners, the Legislature of the State of New Mexico, and the United States Congress. Each Party is expressly not committed to expenditure of any funds until such time as they are programmed, budgeted, encumbered, and approved for expenditure. No liability shall accrue to any Party in case funds are not appropriated or allocated.
- E. No Party to this Agreement shall be required to contribute the additional funding set forth in this Section if any other Party fails to comply with its funding commitment pursuant to the provisions of the State and County Funding Agreements, as amended.
- F. The Cost-Sharing Agreement and the State and County Funding Agreements shall be amended as necessary to be consistent with the terms of this Agreement within one hundred and twenty (120) days after the execution of this Agreement.

V. SUBSTANTIAL COMPLETION

- A. If Reclamation (i) issues a Notice To Proceed authorizing the start of Phase 1 (as described in Exhibit A) construction by December 31, 2019, and subsequently commences construction of the Project; (ii) thereafter diligently proceeds to construct the Project in accordance with this Agreement and Exhibits A and B, on a schedule for completion by 2028 as agreed pursuant to subsection V(C); (iii) thereby expends all of the available Federal and non-Federal funding provided for in the Settlement Act and Section IV of this Agreement to construct the Project, as set forth in Exhibits A and B; and (iv) despite diligent efforts cannot fully complete the Project as set forth in Exhibits A and B due solely to the lack of authorized funding, the Project shall satisfy the Settlement Act's requirement of substantial completion.
- B. Construction of the deferred portion of Phase 3 of the County Distribution System (as described in Exhibit A), estimated to cost \$24 million in 2018 dollars and described in Section IV(B), shall not be required to achieve substantial completion of the Project.

- C. Reclamation, the Pueblos, and the County shall agree on the schedule for each phase of the Project and the anticipated costs associated with the agreed-upon schedule for constructing the Project. Reclamation shall provide monthly updates to the Pueblos, the State, and the County with regard to (1) the progress of construction; (2) the funds expended each month for Project construction; and (3) the anticipated obligation of funds for construction contracts and monthly construction progress payments for Regional Water System construction.

VI. COMMENCING CONSTRUCTION; TITLE TRANSFER OF FACILITIES

- A. Because Congress has yet to authorize additional Federal funding for construction of the Project, the Parties agree to proceed with limited construction as described in Exhibit C, appended hereto.
- B. Subject to Exhibit C, Reclamation shall issue a Notice To Proceed authorizing the start of limited construction by December 31, 2019.
- C. At the start of each federal fiscal year, the Parties agree to reevaluate the status and definition of limited construction described in Exhibit C.
- D. If Project facilities are constructed pursuant to the terms of this Agreement as part of the limited construction stage, as defined in Exhibit C, but additional funding authorization as set forth in Section IV is not congressionally authorized by June 30, 2024, Reclamation shall convey title of the constructed Project facilities in the manner set forth in section 611(h)(1) of the Settlement Act regardless of whether the Project is substantially complete. Upon transfer of title, Reclamation shall have no continued obligations regarding ownership or operation and maintenance of the transferred facilities.
- E. In the event that Congress authorizes sufficient funding as described herein for construction of the Project by June 30, 2024, and the Settlement has not been voided pursuant to section 623 of the Act, Reclamation will construct the Project pursuant to Exhibits A and B, and the Parties will work to extend any deadlines, as necessary.

VII. AMENDMENTS TO THE SETTLEMENT ACT

The Pueblos, County, State, and City shall support amendments to the Settlement Act to:

- A. Increase Federal funding authorization for the Project by an additional \$137 million, adjusted annually to account for increases in construction costs since October 1, 2018, as determined using applicable engineering cost indices;
- B. Extend the date for substantial completion from 2024 to 2028; and
- C. Approve, ratify and confirm this Agreement inclusive of the definition of Substantial Completion contained herein.

VIII. REEVALUATION

In the event Congress does not authorize the funding described in Section IV.A. by June 30, 2023, the Parties agree to reevaluate the terms of this Agreement.

IX. AMENDMENTS TO THIS AGREEMENT

This Agreement shall not be altered, changed, or amended except by an instrument in writing executed by the Parties.

X. NO THIRD-PARTY BENEFICIARIES

There are no third-party beneficiaries to this Agreement. This Agreement may only be enforced by the Parties, as defined in this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates written below.

FOR THE UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF THE INTERIOR

DATE: _____

SECRETARY OF THE INTERIOR

FOR THE STATE OF NEW MEXICO

DATE: _____

JOHN R. D'ANTONIO, JR., P.E., STATE ENGINEER

DATE: _____

ATTORNEY GENERAL

FOR THE PUEBLO OF NAMBÉ

DATE: _____

GOVERNOR OF THE PUEBLO OF NAMBÉ

FOR THE PUEBLO OF TESUQUE

DATE: _____
GOVERNOR OF THE PUEBLO OF TESUQUE

FOR THE PUEBLO OF POJOAQUE

DATE: _____
GOVERNOR OF THE PUEBLO OF POJOAQUE

FOR THE PUEBLO OF SAN ILDEFONSO

DATE: _____
GOVERNOR OF THE PUEBLO OF SAN ILDEFONSO

FOR THE COUNTY OF SANTA FE

DATE: _____
CHAIR OF THE BOARD OF COUNTY COMMISSIONERS

Approved:

DATE: _____
SANTA FE COUNTY ATTORNEY

Attest:

DATE: _____
SANTA FE COUNTY CLERK

FOR THE CITY OF SANTA FE

DATE: _____

CITY OF SANTA FE, MAYOR

Approved:

DATE:
CITY OF SANTA FE, CITY ATTORNEY

Attest:

DATE:
CITY OF SANTA FE, CLERK

FINAL DRAFT