

New Mexico ex rel. State Engineer v. Aamodt,  
No. 66cv06639 MV/LCS-ACE (D.N.M.)

## SETTLEMENT AGREEMENT

Dated: May 5, 2011

*Disclaimer. It is expressly understood that the proposed signatories, or their governing bodies or authorities, have not approved this Settlement Agreement unless and until they, or an authorized representative, execute it. This Settlement Agreement is provided during and for compromise negotiations, and, pursuant to Fed.R.Evid. 408, and court order, is not admissible evidence concerning the claims or defenses of any party.*

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## 1. General Provisions

### 1.1 Purpose.

**1.1.1** The Settlement Parties, as defined herein, desire to resolve the issues and controversies involved in United States District Court for the District of New Mexico lawsuit New Mexico ex rel. State Engineer and United States of America, Pueblo de Nambe, Pueblo de Pojoaque, Pueblo de San Ildefonso, and the Pueblo de Tesuque v. R. Lee Aamodt, et al., No. 66cv6639 MV/LCS (D.N.M.), in a just manner without needless expenditure of funds and other litigation resources.

**1.1.2** The United States of America (“United States”) and the State of New Mexico (“State”), as a matter of policy, favor resolution of disputes concerning water rights through negotiation.

**1.1.3** This Agreement is intended to be binding on the Settlement Parties and to resolve their objections to each other's water rights. The Settlement Parties agree to jointly move the Court to enter an interim administrative order and a partial final decree conforming to the terms of this Agreement, and to move the Court at an appropriate time to establish an expedited proceeding to resolve any objections to the proposed partial final decree which may be made by water right owners in the Pojoaque Basin who are not Settlement Parties.

### 1.2 Disclaimers.

**1.2.1** Other than with respect to the specific water rights affirmatively identified in this Agreement, this Agreement shall not be construed to establish precedent or to resolve any question of law or fact in any other judicial or administrative proceeding. In particular, because the descriptions of water rights in this Agreement are based upon a negotiated settlement by the Settlement Parties, the procedures and methods used to quantify and describe such rights herein shall not be binding under the law of the case doctrine upon any other water right claimant, the State, or the United States in the adjudication of water rights in other cases and may not be relied upon as precedent under the *stare decisis* doctrine in any other water adjudication suit. Nothing in this Agreement shall be construed as establishing any standard to be used for the quantification of Federal reserved water rights, aboriginal claims, or any other Indian claims to water in any other judicial or administrative proceeding.

**1.2.2 Evidentiary Effect of Negotiations.** This Agreement is the result of a process of good faith negotiation for the purpose of resolving legal disputes, including pending litigation, and all Settlement Parties agree that no conduct, statements, offers, or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceeding other than one for approval, confirmation, interpretation, or

enforcement of this Agreement, *provided* that any evidence otherwise discoverable shall not be required to be excluded merely because it was presented in the course of compromise negotiations.

### **1.3 Neutral Construction.**

In construing or interpreting any ambiguity in this Agreement, no presumption shall be made in favor of, or against, any Settlement Party. No documents, drafts, memoranda, notes, or statements of any kind exchanged or utilized in the course of the settlement negotiations underlying the Agreement shall be used for purposes of interpreting the Agreement in any forum.

### **1.4 Prior Agreement.**

This Agreement supersedes and replaces the Settlement Agreement executed between the Settlement Parties, excluding the United States of America, on January 19, 2006.

### **1.5 Jurisdiction**

The Final Decree entered by the Decree Court shall incorporate by reference this Agreement and the Decree Court shall retain continuing jurisdiction to interpret and enforce the terms, provisions, and conditions of the Agreement, the Interim Administrative Order, and the Final Decree.

### **1.6 Definitions.**

**1.6.1** “Aamodt case” means the civil action entitled State of New Mexico ex rel. State Engineer and United States of America, Pueblo de Nambé, Pueblo de Pojoaque, Pueblo de San Ildefonso, and the Pueblo de Tesuque v. R. Lee Aamodt, et al., No. 66cv6639 (D.N.M.).

**1.6.2** “Acre-Feet” or “AFY” means acre-feet of water per year.

**1.6.3** “Act” or “Settlement Act” or “Aamodt Litigation Settlement Act” means the Indian Water Rights Settlement Act, Pub. L. No. 11-291, tit. VI, §§ 601- 626, 124 Stat. 3064, 3134-56 (2010).

**1.6.4** “Agreement” or “Settlement Agreement” means this amended Agreement among the Settlement Parties, and the appendices attached hereto.

**1.6.5** “Agricultural uses” means the use of surface or ground water for cultivating the soil and growing crops or irrigating pasture for livestock grazing. Agricultural uses shall not include domestic uses, community uses, commercial or industrial uses, or livestock uses.

**1.6.6** “City” means the City of Santa Fe, New Mexico.

**1.6.7** “Commercial or industrial uses” means the diversion and consumption of water in connection with any activity which provides, or offers to

provide, goods or services for consideration. Incidental commercial or industrial uses permitted pursuant to Section 72-12-1 will be considered domestic uses as defined in Section 1.6.13 of this Agreement, when such uses are discontinued at the permitted place of use.

**1.6.8** “Community uses” means the diversion and consumption of water by a Pueblo on Pueblo land for indoor and outdoor public purposes, such as schools, community centers, governmental offices, healthcare facilities, and other public services provided by the Pueblo. Community uses shall not include the use of water for domestic, commercial, industrial, irrigated agriculture, or livestock watering purposes.

**1.6.9** “Cost-Sharing and System Integration Agreement” means the agreement as defined by Sec. 602(5) of the Act, dated August 27, 2009, to be executed by the United States, the State, the Pueblos, the County and the City, as amended to conform to the Act.

**1.6.10** “County” means Santa Fe County, New Mexico.

**1.6.11** “County Water Utility” or “CWU” means the water utility organized by the County to –

- (A) receive water distributed by the Authority;
- (B) provide the water received under subparagraph (A) to customers on non-Pueblo land in the Pojoaque Basin; and
- (C) carry out any other activities in accordance with the Act and other applicable law.

**1.6.12** “Decree Court” means the United States District Court for the District of New Mexico.

**1.6.13** “Domestic uses” means the diversion and consumption of water for indoor and outdoor household purposes, including for drinking water, sanitation, and landscaping and gardening incidental to the maintenance of a household and such uses of water incidental to a commercial enterprise. Domestic uses shall not otherwise include the use of water for commercial or industrial uses, community uses, agricultural uses, or livestock uses, as those terms are defined in this Agreement.

**1.6.14** “Enforcement Date” means the date upon which the Settlement Agreement becomes enforceable beginning on the date on which the United States District Court for the District of New Mexico enters a partial final decree pursuant to subsection (a)(2)(G) and an Interim Administrative Order consistent with the Settlement Agreement.

**1.6.15** “Engineering Report” means the report entitled “Pojoaque Regional Water System Engineering Report” dated September 2008 and any

amendments thereto, including any amendments necessary to conform to the Act.

**1.6.16** “Final Decree” means the final judgment adjudicating all claims and rights in the Aamodt case consistent with this Agreement.

**1.6.17** “Fund” means the Aamodt Settlement Pueblos’ Fund established by section 615(a) of the Act.

**1.6.18** “Interfere” or “interference” means a material adverse effect on the quality, divertible quantity, or the cost of diversion of surface water historically used to satisfy surface water rights subject to this Agreement.

**1.6.19** “Injuries to water rights” means the loss, interference with, impairment, deprivation, or diminution of water rights.

**1.6.20** “Livestock uses” means the diversion and consumption of water for the care and feeding of domestic animals, such as cattle or horses, *provided*, however, that livestock uses shall not include the use of water in connection with the operation or maintenance of any feedlots and *provided further* that livestock uses shall not include agricultural uses of water.

**1.6.21** “Local Parties” means all Settlement Parties except the United States and the Pueblos.

**1.6.22** “Non-Pueblos” means those parties in the Aamodt case who claim water rights other than the Pueblos or the United States acting as trustee for the Pueblos. The United States acting in its proprietary capacity shall be included within the meaning of “Non-Pueblos” for purposes of this Agreement.

**1.6.23** “Offset Water” means any quantity of water provided to offset adverse stream depletion effects caused by a particular diversion of water.

**1.6.24** “Pojoaque Basin” means the geographic area, including the San Ildefonso Eastern Reservation Recognized by section 8 of Public Law 87-231 (75 Stat. 505) limited by a surface water divide (which can be drawn on a topographic map), within which area rainfall and runoff flow into arroyos, drainages, and named tributaries that eventually drain to –

- (i) the Rio Pojoaque; or
- (ii) the 2 unnamed arroyos immediately south; and
- (iii) 2 arroyos (including the Arroyo Alamo) that are immediately north of the confluence of the Rio Pojoaque and the Rio Grande.

**1.6.25** “Pueblo” means each of the Pueblos of Nambé, Pojoaque, San Ildefonso, or Tesuque.



**1.6.251.6.26** “Pueblos” means collectively the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque.

**1.6.261.6.27** “Pueblo land” means any real property that is –

- (A) held by the United States in trust for a Pueblo within the Pojoaque Basin;
- (B)(i) owned by a Pueblo within the Pojoaque Basin before the date on which a court approves the Settlement Agreement; or
- (ii) acquired by a Pueblo on or after the date on which a court approves the Settlement Agreement if the real property is located –
  - (I) within the exterior boundaries of the Pueblo, as recognized and confirmed by patent issued under the Act of December 22, 1858 (11 Stat. 374, chapter V); or
  - (II) within the exterior boundaries of any territory set aside for the Pueblo by law, executive order or court decree;
- (C) owned by a Pueblo or held by the United States in trust for the benefit of a Pueblo outside the Pojoaque Basin that is located within the exterior boundaries of the Pueblo as recognized and confirmed by patent issued under the Act of December 22, 1858 (11 Stat. 374, chapter V); or
- (D) within the exterior boundaries of any real property located outside the Pojoaque Basin set aside for a Pueblo by law, executive order or court decree; if the land is within or contiguous to land held by the United States in trust for the Pueblo as of January 1, 2005.

**1.6.271.6.28** “PVID” means the Pojoaque Valley Irrigation District.

**1.6.281.6.29** “Regional Water Authority” or “RWA” means the Pojoaque Basin Regional Water Authority described in section 9.5 of the Settlement Agreement or an alternate entity acceptable to the Pueblos and the County to operate and maintain the diversion and treatment facilities, certain transmission pipelines and other facilities of the Regional Water System.

**1.6.291.6.30** “Regional Water System” means the Regional Water System as defined in section 602(18) of the Act.

**1.6.301.6.31** “Secretary” means the Secretary of the Interior.

**1.6.311.6.32** “Section 4 protection” means the protection provided to Non-Pueblo water rights from priority enforcement or administration of the Pueblos’ First Priority Rights, as specified in Section 4 of this Agreement.

**1.6.321.6.33** “Section 72-12-1” means NMSA 1978, § 72-12-1 (2001).

~~1.6.33~~1.6.34 “Settlement Parties” means all persons or entities that sign this Agreement or authorize a representative to sign this Agreement and their successors in interest.

~~1.6.34~~1.6.35 “State Engineer” means the State of New Mexico Office of the State Engineer.

~~1.6.35~~1.6.36 “Tributaries” means the Rio Pojoaque, Rio Cuyamungue, Rio Tesuque, Rio Nambé, Rio Chupadero, and Rio en Medio.

~~1.6.36~~1.6.37 “United States” or the “United States of America” in any given reference herein shall mean the United States acting in all of its capacities unless the capacity is set forth in said reference. When the term “United States or “United States of America” is used in reference to a particular agreement or contract, the term shall mean the United States acting in the capacity as set forth in such agreement or contract.

~~1.6.37~~1.6.38 “Water right” means any right to the use of water that is specifically described and authorized by a sub-file order, this Agreement, the Interim Administrative Order, or the Final Decree in the Aamodt case.

## **2. Pueblo Water Rights**

### **2.1 Pueblo First Priority Rights.**

**2.1.1 Priority.** Subject to this Agreement, the water rights of each Pueblo quantified in Section 2.1.2 shall be entitled to first or time immemorial priority.

**2.1.2 Quantity.** The measure of each Pueblo’s First Priority Rights to consumptively use (deplete) the surface and ground water of the Pojoaque Basin shall be as follows:

| <b>Pueblo</b> | <b>First Priority Rights<br/>(AFY Consumptive Use)</b> |
|---------------|--|
| Nambé         | 1,459  |
| Pojoaque      | 236  |
| San Ildefonso | 1,246  |
| Tesuque       | 719  |

**2.1.3** The Pueblo First Priority Rights shall not be subject to forfeiture or abandonment.

**2.1.4** Except as otherwise provided in this Agreement, no Pueblo shall have the right to divert, whether from surface water or ground water, any quantity of water in the Pojoaque Basin, the effect of which shall be to increase the Pueblo’s consumptive use to more than the AFY quantity set forth in Section 2.1.2 and Section 2.2.2.

**2.1.5** Pursuant to a written agreement and subject to the terms of this Agreement, a Pueblo may lease, for any term up to 99 years, any portion of its First Priority Rights for use within the area served by the Regional Water System to (a) another Pueblo, which uses shall be in addition to the quantity specified for the lessee Pueblo in Section 2.1.2 or (b) another water user. No agreement for a period of seven years or more shall be valid unless approved by the Secretary of the Interior or her designee. The duration of a lease for use off of Pueblo lands in accordance with this Section will be exempt from the lease term duration limitation in NMSA 1978, § 72-6-3 (2003) upon enactment of the legislation described in Section 9.4.1.6.

**2.2 Supplemental Pueblo Rights.**

**2.2.1 Priority.** The water rights of each Pueblo quantified in Section 2.2.2 shall not be subject to call for purposes of administration of priorities.

**2.2.2 Quantity.** The measure of each Pueblo’s Supplemental Pueblo Rights shall be as follows:

| <b>Pueblo</b> | <b>Supplemental Pueblo Rights<br/>(AFY consumptive use)</b> |
|---------------|---|
| Nambé         | 0   |
| Pojoaque      | 475   |
| San Ildefonso | 0   |
| Tesuque       | 0   |

**2.2.3** Each Pueblo's Supplemental Pueblo Rights shall be used on that Pueblo's lands and shall not be subject to forfeiture or abandonment.

**2.2.4 Alternative Water, Subordination of Supplemental Pueblo Rights.**

Four hundred seventy five (475) AFY of the Pueblo of Pojoaque’s Supplemental Pueblo Rights shall be subordinated to a right to receive an equivalent amount (475 AFY) of water delivered through the Regional Water System (“Alternative Water”), as follows:

2.2.4.1 The United States shall secure the Pueblo of Pojoaque’s Alternative Water and make such water available to the Pueblo of Pojoaque without cost to the Pueblo of Pojoaque.

2.2.4.2 Acquisition of water rights to supply the Pueblo of Pojoaque’s Alternative Water ~~and construction of the Red Pipeline~~ shall be given priority in congressional authorizations and funding of the Settlement and in the implementation of the Settlement. Alternative Water shall be delivered to the Pueblo of Pojoaque ~~from the Red Pipeline~~ upon completion of construction of that portion of the Regional Water System and acquisition of an adequate water supply. ~~Upon completion of construction of the Potable Pipeline, and thereafter, the Pueblo of Pojoaque may take delivery of Alternative Water from either the Red~~

~~Pipeline or the Potable Pipeline, dependent on need as determined by the Pueblo.~~

- 2.2.4.3 The Pueblo of Pojoaque's Supplemental Pueblo Rights shall be subordinated to the Pueblo's right to receive Alternative Water, and may not be diverted from ground water within the Pojoaque Basin, whenever, and to the extent that, Alternative Water is available for delivery to the Pueblo of Pojoaque pursuant to Section 2.2.4.2. Until the ~~Red Pipeline~~Regional Water System is constructed and Alternative Water is available for delivery to the Pueblo, the Pueblo of Pojoaque shall have the right to divert the entirety of its Supplemental Pueblo Rights from ground water through wells located on Pueblo of Pojoaque lands, subject to an agreement between the Pueblos of Nambé and Pojoaque, or as provided by Section 2.2.4.4. After construction of the ~~Red Pipeline~~Regional Water System, the Pueblo of Pojoaque shall cease diversion of its Supplemental Pueblo Rights to the extent Alternative Water is available to the Pueblo from the Regional Water System. In the event the Regional Water System is unable to deliver the full supply of Alternative Water to the Pueblo of Pojoaque, the Pueblo of Pojoaque may obtain the deficiency in delivery of Alternative Water from ground water through wells located on the lands of the Pueblo of Pojoaque; *provided* the total amount of Supplemental Pueblo Rights water exercised by the Pueblo of Pojoaque shall not exceed 475 A.F.Y.
- 2.2.4.4 Until the ~~Red Pipeline~~Regional Water System is constructed and Alternative Water is available for delivery to the Pueblo of Pojoaque, that Pueblo may divert all or a part of its Supplemental Pueblo Rights from surface water allocated to the Pueblos and released from Nambé Reservoir, provided the Pueblos of Pojoaque, San Ildefonso, and Nambé, and the PVID agree after conferring with the United States Bureau of Reclamation.
- 2.2.4.5 The Pueblo of Pojoaque shall not make a priority call for the purpose of exercising its Supplemental Pueblo Rights. The Supplemental Pueblo Rights shall not be subject to call for purposes of priority administration as set forth in Section 2.2.1.
- 2.2.4.6 During any period when the Pueblo of Pojoaque exercises its Supplemental Pueblo Right from ground water, the owner of any Non-Pueblo ground water right which suffers impairment as a result of such use shall be entitled to compensation from the fund established under Section 5.5 (Impairment Fund) as provided therein.
- 2.2.4.7 **Forbearance Agreement with the Pueblo of San Ildefonso.** Until Alternative Water is made available through the Regional Water System pursuant to Section 2.2.4.2 the Pueblo of Pojoaque shall maintain in effect a forbearance agreement with the Pueblo of San Ildefonso for the use of at least 475 AFY of the First Priority Rights

recognized for the Pueblo of San Ildefonso in Section 2.1 of this Agreement. During the tenure of the forbearance agreement, the Pueblo of San Ildefonso shall forgo use of 475 AFY of its First Priority Rights.

2.2.4.8 Nothing in this section shall preclude the Pueblo of Pojoaque from acquiring and exercising additional rights to divert and consume water through lease, purchase, or other agreements consistent with the terms of this Agreement, including transactions with other Pueblos subject to Sections 2.4.4.3 and 5.6.3.

### 2.3 Existing Basin Use Rights.

2.3.1 The portions of each Pueblo's First Priority Rights to be designated as Existing Basin Use Rights are as follows:<sup>1</sup>

| Pueblo        | Existing Basin Use Rights<br>(AFY consumptive use) |
|---------------|--|
| Nambé         | 522  |
| Pojoaque      | 236  |
| San Ildefonso | 288  |
| Tesuque       | 345  |

2.3.2 Each Pueblo shall be entitled to continue to use that quantity of water designated as its Existing Basin Use Rights. Any use in excess of Existing Basin use Rights shall be deemed a use pursuant to Section 2.2 or 2.4.

2.3.3 Each Pueblo may change the point of diversion, place of use, or purpose of use of that Pueblo's Existing Basin Use Rights on that Pueblo's land, *provided* that the owner of any Non-Pueblo ground water right which suffers impairment as a result of such change shall be entitled to compensation from the fund established under Section 5.5 (Impairment Fund) as provided therein.

2.3.4 Each Pueblo may change the point of diversion, place of use, or purpose of use, of that Pueblo's Existing Basin Use Rights to a location off that Pueblo's land, *provided* that such change shall not impair Pueblo or Non-Pueblo ground water rights. The Pueblo making such change shall offset any interference with Pueblo surface water rights and Non-Pueblo surface water rights entitled to Section 4 protection, including any resulting increased stream depletions caused by the change. Any Offset

<sup>1</sup> These numbers were derived from estimates of the Pueblos' respective agricultural, community and domestic, livestock, and commercial and industrial consumptive uses as of the year 2000. The figures that were developed for each Pueblo were: **Nambé**: 151 acres agricultural – 278 AFY; community and domestic – 193 AFY; livestock – 51 AFY; commercial or industrial – 0 AFY; **Pojoaque**: 9 acres agricultural – 17 AFY; community and domestic – 84 AFY; livestock – 48 AFY; commercial or industrial – 87 AFY; **San Ildefonso**: 70 acres agricultural – 129 AFY; community and domestic – 101 AFY; livestock – 58 AFY; commercial or industrial – 0 AFY; **Tesuque**: 70 acres agricultural – 129 AFY; community and domestic – 88 AFY; livestock – 48 AFY; commercial or industrial – 80 AFY.

Water provided by the Pueblo shall not constitute use of the Pueblo's First Priority Rights set forth in Section 2.1.2. The Pueblo shall also offset any interference with Non-Pueblo surface water rights entitled to Section 4 protection, or with Pueblo surface water rights, resulting from the Pueblo's provision of Offset Water. A third party, pursuant to a written agreement that shall be filed with the Water Master, may assume the obligations under this Section of the Pueblo making the change.

#### 2.4 Future Basin Use Rights.

2.4.1 The portions of each Pueblo's First Priority Rights to be designated as Future Basin Use Rights are as specified in the following table:

| Pueblo        | Future Basin Use Rights<br>(AFY consumptive use) |
|---------------|--|
| Nambé         | 937  |
| Pojoaque      | 0  |
| San Ildefonso | 958  |
| Tesuque       | 374  |

2.4.2 Each Pueblo with Future Basin Use Rights may use any portion of such rights for the purposes set forth in Sections 2.4.3 and 2.4.4, subject to the limitations described in those sections and Sections 2.5.3 and 2.7.2.

2.4.3 **Future Basin Domestic, Community, and Livestock Uses.** Each Pueblo shall be entitled to divert and consume on that Pueblo's lands ground water for: (1) new community uses, (2) new domestic uses by Pueblo members or their households, and (3) new livestock uses. In the alternative, surface water may be used for such uses, subject to Section 4 protection. The owner of any Non-Pueblo ground water right which suffers impairment as a result of such new uses shall be entitled to compensation from the fund established under Section 5.5 (Impairment Fund) as provided therein. The place of use, purpose of use, and point of diversion for any new Pueblo use pursuant to this section shall not be changed, *provided* that in the event such use is discontinued, the Pueblo shall not be prohibited from otherwise using the Future Basin Use Rights applied to the discontinued use in accordance with the terms of this Agreement.

#### 2.4.4 Future Basin Agricultural and Commercial or Industrial Uses of Pueblo First Priority Rights.

2.4.4.1 **New Agricultural Uses Upon Loss of Section 4 Protection for Non-Pueblo Rights.** Each Pueblo shall be entitled to divert and consume on that Pueblo's lands water for new agricultural uses and to assert a priority call for such new agricultural uses to the extent that any Non-Pueblo water rights lose Section 4 protection. The Pueblos shall agree among themselves which Pueblo shall be entitled to irrigate

additional lands under this subsection, *provided*, however, that any agricultural uses newly developed pursuant to this section shall utilize water from the same Tributary used to irrigate the Non-Pueblo water rights acreage that lost Section 4 protection. After consultation with the four Pueblos, the Secretary of the Interior or her designee shall, in her sole discretion, resolve any dispute among the Pueblos over which Pueblo shall be able to irrigate additional lands under this section. Changes in the point of diversion, the place of use, or the purpose of use for such Pueblo uses shall be in accordance with Sections 2.3.3 and 2.3.4.

**2.4.4.2 Other Future Basin Uses On Pueblo Land.** Each Pueblo shall be entitled to divert and consume on that Pueblo's lands water for new agricultural uses and for new commercial or industrial uses, *provided*:

2.4.4.2.1 That such Pueblo shall not make a priority call for any such Future Basin Use against Non-Pueblo water rights entitled to Section 4 protection;

2.4.4.2.2 The Pueblo initiating such Future Basin Use shall offset any resulting interference with Non-Pueblo surface water rights entitled to Section 4 protection, including any resulting increased stream depletions. Any Offset Water shall not constitute use of the Pueblo's First Priority Rights set forth in Section 2.1.2. The Pueblo shall also offset any interference with Non-Pueblo surface water rights entitled to Section 4 protection resulting from the Pueblo's provision of Offset Water; and

2.4.4.2.3 The owner of any Non-Pueblo ground water right that suffers impairment caused by such Future Basin Use on the Pueblo's land, including impairment resulting from the provision of Offset Water, shall be entitled to compensation from the fund established under Section 5.5 (Impairment Fund) as provided therein.

**2.4.4.3 Other Future Basin Uses Off Pueblo Land.** A Pueblo may divert and consume water for new agricultural uses and new commercial or industrial uses off that Pueblo's lands, *provided*:

2.4.4.3.1 That such Pueblo shall not make a priority call for any such Future Basin Use against Non-Pueblo water rights entitled to Section 4 protection;

2.4.4.3.2 The Pueblo initiating such Future Basin Use off that Pueblo's land shall offset any resulting interference with Non-Pueblo surface water rights entitled to Section 4 protection or Pueblo surface water rights, including any increased stream



depletions resulting from the offset. Any Offset Water provided by the Pueblo shall not constitute use of the Pueblo's First Priority Rights set forth in Section 2.1.2. The Pueblo shall also offset any interference with Non-Pueblo surface water rights entitled to Section 4 protection, or with Pueblo surface water rights, resulting from the Pueblo's provision of Offset Water; and

2.4.4.3.3 Such Future Basin Use shall not impair Pueblo or non-Pueblo ground water rights.

2.4.4.4 **Change in Point of Diversion, Place or Purpose of Use of New Uses Under Sections 2.4.4.2 and 2.4.4.3.** A Pueblo may change the point of diversion, place or purpose of use of ("transfer") Future Basin Uses initiated pursuant to Sections 2.4.4.2 and 2.4.4.3 or transferred pursuant to this Section 2.4.4.4, *provided*:

2.4.4.4.1 Neither the transferee nor the transferring Pueblo shall make a priority call for any such transferred Future Basin Use against Non-Pueblo water rights entitled to Section 4 protection.

2.4.4.4.2 The Pueblo making such a transfer shall offset any interference with Non-Pueblo surface water rights entitled to Section 4 protection or with Pueblo surface water rights, including any resulting increased stream depletions. Any Offset Water provided by the Pueblo shall not constitute use of the Pueblo's First Priority Rights set forth in Section 2.1.2. The Pueblo shall offset any interference with Non-Pueblo surface water rights entitled to Section 4 protection resulting from the Pueblo's diversion of Offset Water. If the transferred use is off the land of the Pueblo making the transfer, the Pueblo shall also offset any interference with Pueblo surface water rights resulting from the Pueblo's diversion of Offset Water. A third party, pursuant to a written agreement that shall be filed with the Water Master, may assume the obligations under this section of the Pueblo making the transfer.

2.4.4.4.3 A transfer to a use located off that Pueblo's land shall not impair any Pueblo or Non-Pueblo ground water right.

2.4.4.4.4 The owner of any Non-Pueblo ground water right that suffers impairment caused by such a transfer to a use located on the Pueblo's land, including impairment resulting from the diversion of Offset Water, shall be entitled to compensation from the fund established under Section 5.5 (Impairment Fund) as provided therein.

2.4.4.5 **Non-Pueblo Rights Entitled to Section 4 protection Have Priority over New Pueblo Uses.** Notwithstanding the Pueblos' first



priority set forth in Section 2.1.1, new Pueblo uses of the Pueblos' Future Basin Rights initiated under Sections 2.4.4.2 and 2.4.4.3 or transferred pursuant to Section 2.4.4.4 shall be subordinated in priority administration to Non-Pueblo rights entitled to Section 4 protection.

## 2.5 Acquired Water.

**2.5.1** In addition to each Pueblo's First Priority Rights, each Pueblo shall be entitled to 375 AFY consumptive use from the water supply made available for Pueblo use by purchase, lease, or otherwise pursuant to Section 9 of this Agreement. The Pueblo may use such water for any purpose, including uses off that Pueblo's lands; *provided*, however, that uses off that Pueblo's lands shall be in the Pojoaque Basin.

**2.5.2** Pursuant to a written agreement, a Pueblo may lease, for any term up to 99 years, any portion of the 375 AFY to another water user served by the Regional Water System for use within the Pojoaque Basin. No such agreement for a period of seven years or more shall be valid unless approved by the Secretary of the Interior or her designee. The duration of a lease for use off of Pueblo lands in accordance with this Section will be exempt from the lease term duration limitation in NMSA 1978, § 72-6-3 (2003) upon enactment of the legislation described in Section 9.4.1.6.

**2.5.3** As soon as the Regional Water System is capable of delivering to a Pueblo all or any portion of its portion of the water supply of 2500 ~~afy~~ AFY available to the Pueblos, that Pueblo shall use that water supply to the maximum extent feasible prior to exercising its Future Basin Use Rights described in Section 2.4. This provision shall be subject to the payment of the operation, maintenance and replacement costs allocated to the Pueblos' participation in the Regional Water System pursuant to section 617 (c)(1)(B) of the Act.

## 2.6 Reserved Water.

**2.6.1** The Pueblo of San Ildefonso shall have a water right reserved under federal law for the San Ildefonso Eastern Reservation to deplete 4.82 AFY of water for grazing purposes with a 1939 priority date.

**2.6.2** The Pueblo of Nambé shall have a water right reserved under federal law for the Nambé Reservation to deplete 302 AFY with a 1902 priority date, which may be used only as follows:

**2.6.2.1** The Pueblo of Nambé ~~may lease~~ shall sell such water right to the United States ~~at a cost and for a term of years to be determined as part of the Cost Sharing and System Integration Agreement. That agreement may also provide for the terms by which the lease may be terminated consistent with Section 2.6.2.6 as set forth in section 613(a)(1)(A) and 617 (c)(1)(A)(ii) of the Act.~~

- 2.6.2.2 The United States shall use such water right to assist in providing the water supply required by Sections 2.5 and 2.7.
- 2.6.2.3 The use of such water right shall not impair Pueblo or Non-Pueblo ground water rights.
- 2.6.2.4 The United States shall offset any interference with surface rights, including any increased stream depletions, caused by the use of the water right or by the provision of offset water.
- 2.6.2.5 Such use of water shall not be subject to, nor benefit from, priority administration.
- 2.6.2.6 If the water supply described in Sections 2.5 and 2.7 is not available to the Pueblo of Nambé after the entry of the Final Decree and the satisfaction of the contingencies in Section 10, Nambé may use this water right for its own purposes, *provided* that (a) the use of this water right shall not impair Pueblo or Non-Pueblo ground water rights, and (b) Nambé offsets any interference with Pueblo or Non-Pueblo surface rights, including any increased stream depletions, caused by the use of the water right or by the provisions of offset water. Priority administration shall apply to the use of such water right pursuant to this Section 2.6.2.6, *provided*, however, that Nambé shall not make a priority call against any surface water right for the benefit of this right.

**Comment [A1]:** Pueblos will address this issue and section 623(a)(2)(E)(ii) of the Act.

**Comment [A2]:** This section may need to be deleted.

## 2.7 Economic Development Water.

**2.7.1** A firm supply of water, providing 525 AFY consumptive use, shall be secured by the United States for economic development uses by the four Pueblos or to offset interference or avoid impairment as required by this Agreement (“Economic Development Water”). Each Pueblo shall be allocated 131.25 AFY of Economic Development Water. The Pueblos of San Ildefonso and Nambé agree that in exchange for a pro rata distribution of the Pueblo of Pojoaque’s share of Pueblo Conservation Funds they shall release their allocation of Economic Development Water to the Pueblo of Pojoaque, and the Pueblo of Tesuque agrees that in exchange for a pro rata distribution of Pojoaque’s share of Pueblo Conservation Funds it shall release 7 AFY of its Economic Development Water to the Pueblo of Pojoaque, *provided* that the Pueblo Conservation Funds are, in total, no less than \$8 million, and that such exchange and release is consistent with an agreement between the Pueblos of Nambé and Pojoaque. The Pueblos and the United States shall execute the Pueblo Economic Development Water Agreement addressing the ~~responsibility for the costs associated with the~~ provision of Economic Development Water and the terms of allocation of the Economic Development Water as set forth herein.

**2.7.2** The Economic Development water supply of 525 ~~afy~~-AFY shall be subject to the requirements of Section 2.5.3.

**2.8 Place Holder for Pueblo's Proposed Section Entitled "Total Pueblo Water Supply"**

**Comment [A3]:** The parties will consider language for this proposed provision and revisit it next meeting.

**2.9.2.9 After-Acquired Pueblo lands.**

Lands within the Pojoaque Basin acquired by the Pueblos, or by the United States in trust for the Pueblos, after the date when the Decree Court approves this Agreement shall have only those water rights decreed as appurtenant to those lands. The Pueblos, or the United States acting as trustee for the Pueblos, shall be entitled to exercise any state law water rights acquired with such lands, including any remedies or procedural rights provided by law to the owner of such state law water rights. Such state law water rights shall be subject to Section 2.10.22.9.2.

**2.9.2.10 General Provisions.**

**2.9.2.10.1** Consumptive use of the water supply provided to a Pueblo pursuant to Section 2.2 (Supplemental Pueblo Rights), Section 2.5 (Acquired Water), Section 2.6 (Reserved Water), Section 2.7 (Economic Development Water) and Section 9.6.5 (CWU temporary waters) shall be in addition to consumptive use of the Pueblo First Priority Rights quantified in Section 2.1.

**2.9.2.10.2** Nothing in this Agreement shall prohibit a Pueblo from acquiring additional water rights over and above the quantity set forth in this Agreement in accordance with, and subject to, New Mexico law and regulation. Such rights shall not be subject to forfeiture or abandonment so long as title to the water right remains in the Pueblo or in the United States acting as trustee for the Pueblo, but shall be subject to priority administration in accordance with the state law priority of such rights, but only in accordance with this Agreement.

**2.10.2.11 Summary.**

The stipulated quantities of the Pueblos' rights to consumptively use water are summarized as follows:

| <b>Summary of Pueblo Rights<sup>†</sup></b> |              |                 |                      |                |
|---|--------------|-----------------|----------------------|----------------|
|   | <b>Nambé</b> | <b>Pojoaque</b> | <b>San Ildefonso</b> | <b>Tesuque</b> |
| <b>Existing Basin Use</b>                   | 522          | 236             | 288                  | 345            |
| <b>Future Basin Use</b>                     | 937          | 0               | 958                  | 374            |
| <b>Supplemental Pueblo</b>                  | 0            | 475             | 0                    | 0              |
| <b>Acquired Water</b>                       | 375          | 375             | 375                  | 375            |
| <b>Reserved Water</b>                       | 302          | 0               | 4.82                 | 0              |

|   |        |        |        |        |
|---|--------|--------|--------|--------|
| <b>Economic Development Water</b> <sup>††</sup> | 131.25 | 131.25 | 131.25 | 131.25 |
|---|--------|--------|--------|--------|

<sup>†</sup>This table is provided for summary purposes only and does not supercede any provision of this Agreement. All quantities are AFY of consumptive use. This table does not reflect additional quantities of water that may be available to Tesuque Pueblo in accordance with Section 9.6.5.

<sup>††</sup>Subject to redistribution pursuant to Section 2.7 of this Agreement.

### 3. Non-Pueblo Water Rights.

#### 3.1 Ground Water Rights.

##### 3.1.1 Pre-Basin (pre-November 29, 1956) and Permitted Wells, Other Than Section 72-12-1 Wells.

3.1.1.1 **Priority:** The priority for each pre-basin or permitted well shall be the priority adjudicated in the sub-file order for each such well.

3.1.1.2 **Quantity:** The quantity of the right for each pre-basin or permitted well shall be the quantity adjudicated in the sub-file order for each such well.

##### 3.1.2 Section 72-12-1 Wells (Domestic and Commercial/Sanitary Wells Permitted Pursuant to Section 72-12-1, Including Post-Moratorium Wells).

3.1.2.1 **Priority:** The priority for each Section 72-12-1 well, including all wells subject to the *Post-1982 Domestic Wells Stipulation and Settlement Agreement* adopted by the Decree Court on October 4, 1999 (“Post-1982 Well Agreement”) shall be the priority adjudicated in the sub-file order for each such well, or the date of filing of the application to drill such well if priority is not adjudicated in a sub-file order.

3.1.2.2 **Quantity:** The quantity of the right for each Section 72-12-1 well, including all wells subject to the Post-1982 Well Agreement, shall be limited to the historic beneficial use from such well, *provided*, however, that in no event shall the total diversion from any such well exceed 3 AFY, and *provided further* that the State agrees, and the Settlement Parties will not oppose, to move the Court to presume that historic beneficial use from a well is .5 AFY per household, unless a greater historic beneficial use is shown or unless a more restrictive diversion limit applies pursuant to court order, covenant or ordinance.

3.1.3 Priority and quantification of Non-Pueblo wells shall not be subject to any *inter se* challenges by the Pueblos or by the United States acting as trustee for the Pueblos, except as provided by Section 2.8.

**3.1.4 Permits For New Ground Water Points of Diversion.** Subject to Section 5.7, with respect to Regional Water Authority ground water diversions, after the Effective Date of this Agreement, the State of New Mexico shall not issue any permit for a new ground water point of diversion in the Pojoaque Basin except on the condition that the diversion be metered and only as set forth below.

**3.1.4.1 Change in Point of Diversion, Purpose and Place of Use for Domestic, Commercial or Industrial Uses.** The State of New Mexico may issue such permits for new ground water points of diversion for domestic, commercial or industrial uses, *provided*:

3.1.4.1.1 Water rights within the Pojoaque Basin are purchased, leased or otherwise acquired and are transferred in accordance with applicable law and this Agreement to the new points of diversion;

3.1.4.1.2 The priority and quantity of any water right transferred to such new point of diversion shall be determined under state law and shall reflect reductions in quantity to account for the historic supply at the original surface point of diversion for the transferred or retired right;

3.1.4.1.3 Diversions permitted under this Section 3.1.4.1 shall cease from such new point of diversion and shall be connected to the County Water Utility (CWU) for water service as soon as it is available. The requirement to connect to the CWU pursuant to this section shall not be dependent on access to the Pojoaque Valley Water Utility Connection Fund.

3.1.4.1.4 Existing Mutual Domestic Water Consumer Associations (“MDWCA”) or existing commercial users who transfer rights under Section 3.1.4.1 shall be required to cease the newly permitted diversions from the permitted new point of diversion and connect those uses to the CWU; *provided*, however, that such MDWCA or commercial user, respectively, may continue such new water uses from the permitted new point of diversion pursuant to an election under Section 3.1.7.2.4 or 3.1.7.2.5.

**3.1.4.2 Change in Point of Diversion for Agricultural Uses.** The State of New Mexico may issue permits to change the point of diversion of an agricultural use to ground water *provided*:

3.1.4.2.1 Water rights within the Pojoaque Basin are transferred to the new point of diversion;

3.1.4.2.2 The priority and quantity of any water right transferred to such new point of diversion shall be determined under state law and shall reflect reductions in quantity to account for the historic

supply at the original surface point of diversion for the transferred or retired right; and

3.1.4.2.3 The water right shall be administered in priority as though still diverted from that water right's original surface point of diversion, such that, in the event of a priority call or other administrative action that would require that right to cease diversions at its original surface point of diversion, the right at its newly permitted point of diversion shall also be required to cease diversions.

3.1.4.3 **Supplemental Ground Water Points of Diversion.** The State of New Mexico may issue permits to supplement existing points of diversion for an agricultural use from ground water, *provided*:

3.1.4.3.1 The total diversion from surface and any ground water to supplement the surface supply is limited to the historic supply of the surface water diversion being supplemented.

3.1.4.3.2 If the surface water diversion is permitted to continue and is not metered, the combined acreage served by the supplemented and supplemental points of diversion must be reduced by the percentage of deficiency in the historic surface water supply.

3.1.4.3.3 If all diversions are metered, the combined total of the metered diversions may not exceed the historic surface water diversion.

3.1.4.3.4 In the case of a ground water point of diversion used to supplement another ground water point of diversion, all diversions must be metered and the total diversion under the permit must be limited to the decreed amount of the right.

### **3.1.5 Replacement Well Permits for Section 72-12-1 Wells.**

Notwithstanding the restriction in Section 3.1.4, the State of New Mexico may issue replacement well permits, or permits to deepen or repair a well, to existing 72-12-1 well owners until such time as they are required to connect to the CWU pursuant to Sections 3.1.4.1.3, 3.1.7.2.1 or 3.1.7.2.3. The State may also issue such permits for wells allowed under Section 3.1.8.4. A Settlement Party who makes an election pursuant to Section 3.1.7.2.2, 3.1.7.2.3, 3.1.7.2.4 or 3.1.7.2.5, shall, as a prerequisite to obtaining a permit from the State Engineer, pay the CWU \$1,000.00 for any permit to replace their wells. This fee shall be adjusted annually after the first year of the Effective Date of this Agreement in an amount not to exceed the percentage increase in the consumer price index for the Urban Wage Earners and Clerical Workers (CPI-W) for the 12 month period preceding the end of the previous year's third quarter as published by the

U.S. Bureau of Labor Statistics. The proceeds from these payments shall be used to increase connections to the CWU by non-Pueblo water users.

**3.1.6 Metering.** Each well owner shall install a meter of the type described in the rules promulgated pursuant to Section 5.3 to measure the quantity of water diverted annually from such well.

**3.1.7 Use of Wells and Protection from Enforcement and Administration of Priorities.**

**3.1.7.1 In General:** Except for ground water diversions permitted under Section 3.1.4.1, a Settlement Party who is an owner of a water right from a well shall not be required to connect to the CWU water system and shall not be required to cease use of the well. Ground water diversions permitted under Section 3.1.4.1, shall be required to connect in accordance with that Section.

**3.1.7.2 Freedom from Enforcement and Administration of Priorities Within the Pojoaque Basin:** Notwithstanding Section 3.1.7.1, in order to be protected from the enforcement and administration of priorities within the Pojoaque Basin, a Settlement Party who is an owner of a water right from a well must elect either :

**3.1.7.2.1 To Connect to CWU:** Subject to Section 3.1.7.3 and upon written notice from the CWU, to connect to the CWU for domestic water service as soon as such service is available, transfer any Section 72-12-1 well permit to the CWU, and discontinue the use of such well for domestic purposes upon connection to the CWU. Those making this election shall be permitted to continue to use such well in accordance with Section 3.1.7.4 until they are able to connect to the CWU and obtain service. Only those electing to connect under this Section shall have access to the Pojoaque Valley Water Utility Connection Fund established pursuant to Section 3.1.7.3; or

**3.1.7.2.2 To Keep Well with Reduced Use:** To continue the use of such well for domestic purposes in perpetuity with no obligation to connect to the CWU *provided*, however, that the quantity of water diverted annually from such well for domestic use shall be limited or reduced in accordance with Section 3.1.7.4; or

**3.1.7.2.3 To Connect to CWU upon Transfer of Property:** To continue the use of water from such well for domestic purposes until ownership of the property is transferred *provided*, however, that the quantity of water diverted annually from such well for domestic use shall be limited or reduced in accordance with Section 3.1.7.4; and *further provided* that upon transfer of ownership, the owner of the property shall connect to the CWU



upon receiving notice from the CWU that service is available, transfer any Section 72-12-1 well permit to the CWU, and discontinue the use of water from such well for domestic purposes upon connection to the CWU. Those making the election under this Section shall notify the CWU in writing upon transfer of the property. Service shall not be considered available under this section if the well user's cost to connect to the CWU is greater than \$7,000 adjusted annually after the year 2006 in an amount not to exceed the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for the twelve month period preceding the end of the previous year's third quarter, as published by the United States Bureau of Labor Statistics.

3.1.7.2.4 **Commercial or Industrial Uses:** Must elect either to : a) discontinue well use and connect to the CWU as soon as such service is available to serve all existing water uses and reasonably expected uses under permits or other authorities; b) continue to exercise its authorized uses in perpetuity with no obligation to connect to the CWU *provided* the annual quantity of water diverted from the well(s) shall be reduced in an amount equal to the reductions described in Section 3.1.7.4.2.5; or c) continue to exercise any part or all of its uses without reduction or obligation to connect to the CWU subject to the commercial or industrial user first entering into a separate written agreement with the Pueblos and the United States outlining terms and conditions for such continued use.

3.1.7.2.5 **Mutual Domestic Water Consumer Associations:** Each of the four currently existing Mutual Domestic Water Consumer Associations ("MDWCA") in the Pojoaque Basin shall have the right, but not the obligation, to become a party to this Agreement by making the following election: a) to discontinue well use and connect to the CWU as soon as such service is available to serve all existing water uses and reasonably expected uses under the MDWCA's permits or other authorities; b) to continue to exercise authorized uses in perpetuity with no obligation to connect to the CWU where the MDWCA reduces its existing annual use by 15% and limits the future diversion of unexercised rights to serve additional customer hook-ups to no more than 85% of authorized use; *provided* that the MDWCA shall not be required by this Agreement to reduce its annual consumptive use below a quantity equal to 0.5 AFY times the number of customer hook-ups served by the MDWCA; or c) to continue to exercise all or any part of its authorized uses without reduction or obligation to connect to the CWU subject to first entering into a separate written agreement with the Pueblos and the United States setting forth the terms, provisions and conditions of such continued use. A MDWCA that



does not make such an election shall be considered a non-settling party.

**3.1.7.3 Connection Fund:** For those electing under Section 3.1.7.2.1 to connect to the CWU for water service when such service is available, the State shall establish the Pojoaque Valley Water Utility Connection Fund described in Section 9.4.1.3 in an amount to be negotiated. The State Engineer in consultation with the CWU shall promulgate rules respecting the administration of the Water Connection Fund. Any entitlement to payment from the fund pursuant to this Agreement and such rules shall be subject to appropriations by the New Mexico State Legislature. No well user making the election to connect under Section 3.1.7.2.1 shall be required to cease use of such well and connect to the CWU unless all connection expenses are paid by the Pojoaque Valley Water Utility Connection Fund or other third party.

**3.1.7.4 Uses Allowed For Different Elections Under 3.1.7.2.**

**3.1.7.4.1 Election to Connect to CWU:** For an owner of a water right from a well who elects under Sections 3.1.7.2.1 or 3.1.7.2.4 to connect to the CWU for water service as soon as such service is available, the following uses shall be protected from enforcement and administration of priorities:

3.1.7.4.1.1. Pre-Basin Wells: Shall be permitted to continue to use water from such well in an amount equal to the historic beneficial use from that well but in no event will use be required to be less than 0.5 AFY;

3.1.7.4.1.2. Section 72-12-1 wells permitted prior to January 13, 1983: 3.0 AFY or historic beneficial use, whichever is less, but in no event will use be required to be less than 0.5 AFY;

3.1.7.4.1.3. Wells exempted from the Court's January 13, 1983 Order because the well user, or the well user's predecessor, entered into the Post-1982 Well Agreement: 0.7 AFY or historic beneficial use, whichever is less, but in no event will use be required to be less than 0.5 AFY;

3.1.7.4.1.4. Wells subject to permit restrictions imposed under the Court's January 13, 1983 Order: 0.7 AFY or historic beneficial use, whichever is less, but in no event will use be required to be less than 0.5 AFY. Such use may be for indoor and outdoor use combined.

**3.1.7.4.2 Election to Keep Well and Reduce Use:** For an owner of a water right from a well who elects under Sections 3.1.7.2.2 or 3.1.7.2.4 to continue the use of water from such well in perpetuity with no obligation to connect to the CWU, the following uses shall

be protected from enforcement or administration of priorities within the Pojoaque Basin:

3.1.7.4.2.1. Pre-Basin Wells: Shall be permitted to continue to use water from such well in an amount equal to the historical beneficial use with a 15% reduction, but in no event will use be required to be less than 0.5 AFY;

3.1.7.4.2.2. Section 72-12-1 wells permitted prior to January 13, 1983: 3.0 AFY or historic beneficial use, whichever is less, with a 15% reduction, but in no event will use be required to be less than 0.5 AFY;

3.1.7.4.2.3. Wells exempted from the Court's January 13, 1983 Order because the well user, or the well user's predecessor, entered into the Post-1982 Well Agreement: 0.7 AFY or historic beneficial use, whichever is less. Use in excess of 0.5 AFY is subject to enforcement and administration of priorities.

3.1.7.4.2.4. Wells subject to permit restrictions imposed under the Court's January 13, 1983 Order: Indoor use only or up to 0.3 AFY for indoor and outdoor use combined.

3.1.7.4.2.5. Commercial/industrial uses: Unless the subject of a separate agreement in accordance with Section 3.1.7.2.4, wells for commercial/industrial uses shall be entitled to continue to use water from such wells in an amount equal to the authorized use as of January 1, 2005 with a 15% reduction.

3.1.7.4.3 **Election to Connect Upon Transfer of the Property:** For an owner of a water right from a well who elects under Section 3.1.7.2.3 to continue the use of water from such well for domestic purposes until ownership of the property is transferred, the following uses from such well shall be protected from enforcement or administration of priorities within the Pojoaque basin until (a) ownership of the property being served by such well is transferred and (b) water service for that owner is available from the CWU:

3.1.7.4.3.1. Pre-Basin Wells: Until required to connect as set forth above, pre-basin well users shall be permitted to continue to use water from such well in an amount equal to the historical beneficial use with a 10% reduction, but in no event will use be required to be less than 0.5 AFY;

3.1.7.4.3.2. Section 72-12-1 wells permitted prior to January 13, 1983: Until required to connect as set forth above, 3.0 AFY or historic beneficial use, whichever is less, with a 10%

reduction, but in no event will use be required to be less than 0.5 AFY;

3.1.7.4.3.3. Wells exempted from the Court’s January 13, 1983 Order because the well user, or the well user’s predecessor, entered into the Post-1982 Well Agreement: Until required to connect as set forth above, 0.7 AFY or historic beneficial use, whichever is less. Use in excess of 0.5 AFY is not protected from enforcement and administration of priorities.

3.1.7.4.3.4. Wells subject to permit restrictions imposed under the Court’s January 13, 1983 Order: Until required to connect as set forth above, Indoor use only or up to 0.3 AFY for indoor and outdoor use combined.

3.1.7.4.4 Below is a table summarizing the various elections available to Settlement Parties under Section 3.1.7.2 and the water use not subject to the administration or enforcement of priorities thereunder. Where there is more than one household connected to a well, the quantities set forth below are “per household,” not per well.

| Category of well                       | Use allowed from well until required to connect when service from CWU available   | Use allowed from well in perpetuity  | Use allowed from well until required to connect upon transfer of property   |
|--|---|--|---|
| <b>Pre-Basin Wells (prior to 1956)</b> | Historic Beneficial Use, but in no event will use be required to be less than .5afy<br><br>Access to Water Utility Connection Fund<br><br>No water cost, but pay service cost | Historic Beneficial Use with 15% reduction, but in no event will use be required to be less than .5afy | Historic Beneficial Use with 10% reduction, but in no event will use be required to be less than .5 afy<br><br>No Access to Water Utility Connection Fund |

| Category of well   | Use allowed from well until required to connect when service from CWU available   | Use allowed from well in perpetuity   | Use allowed from well until required to connect upon transfer of property   |
|--|---|---|---|
| <b>1956-1982 Wells</b>                                   | <p>3.0 afy or Historic Beneficial Use, whichever is less, but in no event will use be required to be less than .5 afy</p> <p>Access to Water Utility Connection Fund</p> <p>No water cost, but pay service cost</p> | <p>Historic Beneficial Use with 15% reduction, but in no event will use be required to be less than .5 afy</p>            | <p>Historic Beneficial Use with 10 % reduction, but in no event will use be required to be less than .5 afy</p> <p>No Access to Water Utility Connection Fund</p>           |
| <b>Post-1982 Wells – Signed Post-1982 Well agreement</b> | <p>.7 afy or Historic Beneficial Use, whichever is less, but in no event will use be required to be less than .5 afy</p> <p>Access to Water Utility Connection Fund</p> <p>No water cost, but pay service cost</p>  | <p>.7 afy or Historic Beneficial Use, whichever is less. Use in excess of 0.5 AFY is subject to Priority Enforcement.</p> | <p>.7 afy or Historic Beneficial Use, whichever is less., Use in excess of 0.5 AFY is subject to Priority Enforcement</p> <p>No Access to Water Utility Connection Fund</p> |

| Category of well   | Use allowed from well until required to connect when service from CWU available   | Use allowed from well in perpetuity                               | Use allowed from well until required to connect upon transfer of property  |
|--|---|---|--|
| <b>Post-1982 Wells - Did Not Sign Post-1982 Well Agreement</b> | .7 afy or Historic Beneficial Use, whichever is less, but in no event will use be required to be less than .5 afy<br><br>Water Utility Connection Fund<br><br>No water cost, but pay service cost | Indoor Use only, or up to .3afy for indoor & outdoor use combined | Indoor Use Only, or up to .3 afy for indoor & outdoor use combined<br><br>No Access to Water Utility Connection Fund |

3.1.7.4.5 **Filings with the Decree Court.** The State Engineer agrees to file with the Decree Court the following documents in order to facilitate the efficient implementation of this Agreement: (a) all elections made pursuant to Section 3.1.7.2; (b) determinations of Historic Beneficial Use; and (c) certification of the metering of individual wells in compliance with Sections 3.1.6 and 5.3.

3.1.7.5 **Agricultural Uses:** For agricultural uses, no owner of a water right from a pre-basin well or well permitted pursuant to authorities other than Section 72-12-1 prior to the Effective Date of this Agreement shall be required to connect to the CWU or make an election under 3.1.7.2, in order to have the protection provided in Section 4.2. The State Engineer shall not issue a permit to repair, deepen, or replace such a well unless the well is being metered and operated in compliance with any conditions of the applicable permit. The State Engineer shall annually file with the Decree Court a report describing any failure to meter or any non-compliance with permit conditions. In addition to Section 4.2 protection, in order to be exempt from enforcement and administration of priorities within the Pojoaque Basin, the owner of a water right for agricultural purposes from a well shall: 1) make an election for the agricultural use of the well as if it were a domestic use described in Section 3.1.7.2; and 2) for those making such an election under either Section 3.1.7.2.2 or 3.1.7.2.3, the owner shall first demonstrate to the Water Master that the applicable corresponding reductions in water use described in Sections 3.1.7.4.2 or 3.1.7.4.3 has occurred. Water Master rules shall be developed in

accordance with Section 5.3 to implement this section. For those making an election that corresponds to Sections 3.1.7.2.2 or 3.1.7.2.3, the corresponding replacement well fee conditions set forth in Section 3.1.5 shall apply.

3.1.7.6 **Livestock Use:** The owner of a water right from a pre-basin or permitted 72-12-1 well shall be entitled to continue to use such well for livestock purposes without reduction to the extent authorized or permitted, *provided* that such livestock use shall be separately metered and reported. Such use shall not be subject to the administration and enforcement of priorities within the Pojoaque Basin.

3.1.7.7 **Protection from Enforcement of Administration of Priorities.** An owner of a water right from a well who makes an election under Section 3.1.7.2 and who is in compliance with the water usage allowed for that election under Sections 3.1.7.2.5 or 3.1.7.4, shall not be subject to enforcement or administration of priorities within the Pojoaque Basin to the extent of such usage. Non-compliance with the amounts of reduction required by Sections 3.1.7.2.5 or 3.1.7.4 shall be addressed through rules promulgated pursuant to Section 5.3.

### **3.1.8 Transfer Of Water Right And Point Of Diversion For Those Connecting to the CWU.**

3.1.8.1 Upon connection to the CWU lines and the discontinuance of domestic use from a Section 72-12-1 well under the terms of this Section, the owner of the well shall convey title to and shall transfer that water right to the CWU for use in providing water to its customers within the Pojoaque Basin. The owner of a pre-basin or permitted right, other than one permitted under Section 72-12-1, may convey title to and transfer that water right to the CWU for use in providing water to its customers within the Pojoaque Basin. In exchange for a conveyance and transfer pursuant to this Section 3.1.8.1, the transferor, as well as any successors acquiring title to the property being served, shall not be billed by the CWU for the cost to the CWU of its acquisition of water but such transferor or successor shall be billed for the cost of service.

3.1.8.2 Where a well owner connects to the CWU and transfers the water right to the CWU, such right shall not be subject to or benefit from priority administration within the Pojoaque Basin

3.1.8.3 For purposes of transfer to the CWU, beneficial use for domestic purposes from Section 72-12-1 wells shall be the quantity, per household, recognized pursuant to Section 3.1.2.2, which quantity may be fully consumptively used by the CWU.

3.1.8.4 **Use of Original Domestic Well After Connection to the CWU**

3.1.8.4.1 **By Reason of Failure of Supply.** In the event that the CWU becomes unable to deliver water to a transferor through no fault of the transferor, the transferor may, at no cost, reacquire from the CWU title to the previously conveyed water right and recommence diversion thereunder at the original ground water point of diversion. In such event the State of New Mexico shall, consistent with state law, issue such permit(s) as are necessary to enable such transferor or successors to recommence such diversions or drill a replacement well for the purpose of diverting water to satisfy such water right in the amount approved for transfer and conveyance pursuant to Section 3.1.9.3. In the event the CWU is again able to deliver water to the transferor, the transferor shall reconvey their right and recommence use from the pipeline.

3.1.8.4.2 **By Reason of Shortage of Supply.** In the event of a shortage of supply from the Regional Water System, the parties agree that the supply to each Distribution System shall be reduced on a pro-rata basis, in proportion to each respective system's most current annual use.

**3.1.9 Non-responding Owners of Water Rights from Well(s).** If an owner of a water right from a well does not file an objection to this Agreement with the Court or become a Settlement Party by making an election under Section 3.1.7.2, such owner shall be deemed a non-responding owner. The Pueblos, United States and State shall move the Decree Court requesting issuance of Orders to Show Cause as to why each non-responding owner should not be required to comply with Section 3.1.7.2.1 of this Agreement and otherwise be bound by and receive the benefits of this Agreement and thereafter be deemed to be a Settlement Party. The proposed Order to Show Cause shall include the ability of the non-responding owner to make an election under Section 3.1.7.2 notwithstanding the previous failure to do so.

### **3.2 Surface Rights.**

**3.2.1 Priority.** The priority of all sub-file surface rights shall be the priority, other than time immemorial or "first priority," agreed to between the State and the owner of the right. In the event the priority of the right cannot be agreed to between the State and the owner of the right, the priority shall be the priority adjudicated between the State and the owner of the right. Subsequent to the priority determination as between the State and the owners of all sub-file surface rights, the Decree Court shall conduct an *inter-se* phase for the filing and determination of *inter-se* challenges by other parties.

**3.2.2 Quantity.** The quantity of each surface right shall be the quantity adjudicated for that sub-file.



### **3.3 Change in Point of Diversion, Purpose or Place of Use – Section 4 Protection upon Change.**

**3.3.1 Current Use:** The “current use” of a water right is the calculated average yearly use of the right for the five-year period preceding a change in the point of diversion, purpose or place of use of that right.

#### **3.3.2 Ground Water Rights.**

**3.3.2.1 Pre-basin or Permitted, Other than under Section 72-12-1, Ground Water Rights.** The point of diversion, purpose or place of use of a pre-basin or permitted right, other than one permitted under Section 72-12-1, may be changed in accordance with state law and the terms of this Agreement. Upon any such change, however, Section 4 protection shall no longer apply unless the point of diversion, purpose or place of use is changed pursuant to Section 3.1.4. Replacing, repairing, or deepening of such a well shall not be considered a change in point of diversion, purpose or place of use.

**3.3.2.2 Section 72-12-1 Rights.** The point of diversion, purpose or place of use of Section 72-12-1 ground water rights may only be changed in accordance with Section 3.1.8, above.

#### **3.3.3 Surface Water Rights.**

**3.3.3.1 Change in Point of Diversion or Place of Use of Current Surface Rights.** Section 4 protection, and the non-interference provisions described in Sections 2.4.4.2, 2.4.4.3, and 2.4.4.4 shall apply to a change in the point of diversion to another surface source within the same Tributary or change in the place of use of a surface right, so long as any return flows from the use remain within the same Tributary, but only to the extent of the current use of the right, not to exceed the quantity of the right permitted under state law. The priority of the transferred right shall be determined under state law.

**3.3.3.2 Other Changes in Point of Diversion, Purpose or Place of Use of Surface Rights.** Except as otherwise provided in Section 3.1.4, any changes in the point of diversion, purpose or place of use of Non-Pueblo surface rights, other than those governed under the provisions set forth above, shall be governed under state law and shall not be entitled to Section 4 protection, and the non-interference provisions described in Sections 2.3.3, 2.4.4.2, 2.4.4.3, and 2.4.4.4. The priority of the transferred right shall be determined under state law.

### **3.4 Federal Agency Rights.**

The United States’ water rights on its own behalf were adjudicated in the Decree Court’s January 24, 1986 Memorandum Opinion and Order, which was



certified as a final judgment on April 29, 1986, and through the July 11, 1991 Special Master's Report and Recommended Order, adopted by the Decree Court on November 5, 2003. The United States may obtain additional water rights on its own behalf consistent with this Agreement and applicable law.

### **3.5 Municipal and County Offset Rights.**

Wet water will be provided to offset surface depletion effects on the Rio Tesuque and Rio Nambé-Pojoaque of City of Santa Fe and County of Santa Fe out of Pojoaque Basin groundwater pumping. The location(s), timing, and amounts of these deliveries shall be addressed in the Cost Sharing and System Integration Agreement and shall be determined by the State, City, County, and the Pueblos; *provided*, however, that offset water on the Rio Tesuque must be provided to a location on Tesuque Pueblo at a time acceptable to Tesuque Pueblo. Nothing in this wet water offset mechanism shall preclude the use of existing City and County offset rights. One mechanism for providing such offsets is described in Section 9.6.5.

## **4. Exceptions to Priority Enforcement for the Pueblos' First Priority Rights**

Under the administration of the water rights subject to this Agreement, or in the event of a priority call, the first or time immemorial priority of the Pueblos' First Priority Rights set forth in Section 2.1 shall be enforced against Non-Pueblo water rights in accordance with this Section.

### **4.1 Pueblo Existing Basin Use Rights Entitled to Priority Enforcement.**

**4.1.1** The first or time immemorial priority of the Pueblo Existing Basin Use Rights set forth in Section 2.3 shall be enforced against all Non-Pueblo water rights, except as set forth in Sections 4.1.2, 4.4, and 7.2.

**4.1.2 Limitations on Priority Enforcement of Tesuque Pueblo's Existing Basin Use Rights;** Notwithstanding Section 2.3.3, and subject to the conditions set forth below, enforcement of the first or time immemorial priority of Tesuque Pueblo's Existing Basin Use Rights for irrigation purposes on the surface flows of the Rio Tesuque against the water rights of upstream users entitled to protection under this Section 4 shall be limited to the diversion amount equal to that calculated for the irrigation of 71 acres at the Pueblo, (71 acres x 4.65 AFA/Y=330.15 diversion). The conditions for this limitation are:

**4.1.2.1** The establishment of baseline irrigated acreage for the Rio de Tesuque Acequias (or ditches) for purposes of protection under this Section 4 from the Pueblo to account for: (a) acreage on each of the ditches for which the point of diversion of the water right has been transferred from that ditch; and (b) acreage in adjudicated sub-file orders on the ditch in which the Rio de Tesuque Acequias (or ditches)

and Tesuque Pueblo agree has been "built upon" since the sub-file orders were entered; and

- 4.1.2.2 The installation of measuring devices so that the amount of water diverted into the Rio de Tesuque Acequias (or ditches) can be monitored and limited so as not to exceed that needed for irrigation of the baseline irrigated acreage under that ditch.

#### **4.2 Existing Non-Pueblo Rights Entitled to Protection from Priority Enforcement of the Pueblo Future Basin Use Rights.**

**4.2.1** The first or time immemorial priority of the Pueblo Future Basin Use Rights set forth in Section 2.4 shall not be enforced against a Non-Pueblo water right subject to this Agreement, except as provided in Section 4.2.2.

**4.2.2** The protection provided by Section 4.2.1 shall not apply if a Non-Pueblo water right:

- 4.2.2.1 Is not beneficially used for more than five consecutive years after the Effective Date of this Agreement, unless the owner of the water right demonstrates that (1) such non-use is due to circumstances beyond the control of the water right owner and (2) that the water could not be placed to beneficial use by the owner's diligent efforts; or
- 4.2.2.2 Is transferred to a new point of diversion or new place or purpose of use, except as provided in Sections 3.1.4.1, 3.1.8, and 3.3.3.1.

**4.2.3** Water rights retired or transferred to offset the effects on the Tributaries caused by ground water diversions shall be deemed to be beneficially used for purposes of this Section 4.2.

#### **4.3 Limitation on Priority Call Upon Loss of Protection Against Priority Enforcement**

To the extent a Non-Pueblo water right loses protection against priority enforcement pursuant to Section 4.2.2, the owner of that right may not assert a priority call for the portion of the right for which protection has been lost against another water right still entitled to protection under Section 4.2, including any such water rights which may be junior to the right that has lost protection.

#### **4.4 Additional Protection for Non-Pueblo Well Users:**

The Pueblos rights defined in Sections 2.1, 2.2, 2.5, 2.6, and 2.7 shall not be enforced against:

- 4.4.1** A Settlement Party who has made an election under Section 3.1.7.2 and is in compliance with that election, to the extent of the use set forth in Sections 3.1.7.4 and 3.1.7.2.5;
- 4.4.2** A well user whose rights are permitted under Section 3.1.4.1 until that use is required to connect to the CWU under that Section.

#### **4.5 Priority Call Defense**

In the event a Pueblo shall make a priority call to enforce its Existing Basin Use Rights, it shall be an affirmative defense, in whole or in part, to such priority call or related priority enforcement action, that the divertible supply of surface water, which would otherwise be available for diversion to the Pueblo, has been reduced as a result of the diversion of ground water on Pueblo of Pojoaque lands to satisfy Supplemental Pueblo Rights for the Pueblo of Pojoaque.

### **5. Administration**

#### **5.1 General Principles.**

- 5.1.1** The Pojoaque Basin is fully appropriated and there shall be no new appropriations in the basin after the Effective Date of this Agreement.
- 5.1.2** In accordance with the terms of this Agreement, water rights within the basin may be transferred for the purpose of providing the right to divert water from a new well in accordance with Section 3.1.4.1 and the other terms of this Agreement. The State Engineer may issue permits for replacement wells in accordance with Section 3.1.5.
- 5.1.3** For agricultural uses, the diversion amount shall not exceed 4.65 AFY per acre diverted by the ditch at the point of diversion from the surface source of water, 3.35 AFY per acre delivered at the farm headgate or well head, or a consumptive irrigation requirement of 1.84 AFY per acre, whichever is less.
- 5.1.4** For non-agricultural uses, consumptive use shall be deemed equal to the amount of diversion unless a return flow plan is approved consistent with this Agreement.

#### **5.2 State Engineer.**

Pursuant to his statutory authorities, the State Engineer shall administer the Non-Pueblo water rights adjudicated by the Decree Court as set forth in this Agreement and the Final Decree. Additionally, separate and apart from his duties under State law, the State Engineer also agrees to perform the functions of Water Master set forth in this Section 5.2 and in Section 5.6. Performance by the State Engineer of these Water Master functions shall be solely in accordance with, and limited by, this Agreement, the Final Decree, and further orders of the Decree Court.

##### **5.2.1 General Provisions.**

- 5.2.1.1** The State Engineer has the authority, pursuant to state law, to curtail non-Pueblo surface and groundwater diversions and shall exercise his authority as necessary in order to ensure compliance with

the terms of, and the delivery of water in accordance with, this Agreement, the Interim Administrative Order, and the Final Decree.

- 5.2.1.2 The Water Master shall have the authority to curtail Pueblo surface and groundwater diversion in order to ensure compliance with the terms of, and the delivery of water in accordance with, this Agreement, the Interim Administrative Order, and the Final Decree.

### 5.2.2 Annual Report

The State Engineer shall, by March 1 of each calendar year, file with the Decree Court a report on all administrative actions taken under or required by this Agreement in the previous calendar year.

### 5.3 Rules.

Before the Effective Date and in consultation with counsel for the other Settlement Parties, counsel for the State Engineer, the United States, and the Pueblos shall agree on a set of rules to be proposed for adoption by the State Engineer to govern his responsibilities in his various capacities set forth in Section 5.2 of this Agreement and the Interim Administrative Order. The rules shall include the provisions of Section 5 of the *Post-1982 Domestic Wells Stipulation and Settlement Agreement* adopted in the *Aamodt* case by Order of the Court dated October 4, 1999 (Docket No. 5549). The State Engineer shall then promulgate the proposed rules pursuant to NMSA 1978 § 72-2-8.

#### 5.3.1 The rules adopted by the State Engineer shall, at a minimum, provide for:

- 5.3.1.1 The identification and reporting of irrigated acreage which may lose Section 4 protection;
- 5.3.1.2 The metering, monitoring, and reporting of Pueblo and non-Pueblo wells, including scheduling of meter installation, calibration, and operation;
- 5.3.1.3 The measurement of diversions into Pueblo and non-Pueblo ditches and monitoring of all Pueblo and non-Pueblo surface water uses;
- 5.3.1.4 Maintenance of a record of all administrative and judicial changes to decreed water rights;
- 5.3.1.5 Maintenance of an official list of owners of record for all Pojoaque Basin water rights;
- 5.3.1.6 Maintenance of records of the elections made by Settling Well Owners pursuant to Section 3.1.7 and subsequent compliance with such elections;
- 5.3.1.7 The provision of notice under the Interim Administrative Order and this Section to the Water Master and other water users who may be affected by administrative or judicial actions related to water rights,

*provided* that to the extent practical, such rules shall be consistent with statutory provisions for providing notice of any change to a water right;

- 5.3.1.8 Establishment of procedures for implementing his responsibilities under this Agreement and the Interim Administrative Order to determine surface water offset requirements, impairment of ground water uses, and the impact on surface and ground water supplies of administrative actions;
- 5.3.1.9 Establishment of procedures in accordance with 3.1.4.3 to ensure that new supplemental wells do not result in an increase in the amount of water diverted from the source of supply that is to be supplemented; and
- 5.3.1.10 Establishment of procedures to administer existing supplemental wells consistent with their decreed rights;
- 5.3.1.11 Establishment of replacement well procedures in accordance with Section 3.1.5;
- 5.3.1.12 Establishment of penalties for violations of the rules;
- 5.3.1.13 Determination of Historical Beneficial Use for purposes of Section 3.1.7.4; and
- 5.3.1.14 Informal dispute resolution procedures, where appropriate.

#### **5.4 Administration of State Law Water Rights Within Pueblo Lands.**

State law water rights on Pueblo Lands, when subsequently transferred within that Pueblo's lands, shall be subject to administration in accordance with Section 5.6 and such rights shall not be subject to abandonment or forfeiture for so long as title to the water rights remains in the Pueblo.

#### **5.5 Impairment Fund.**

The State shall create and administer in accordance with this Agreement a fund to be used to mitigate impairment to Non-Pueblo groundwater rights as a result of new Pueblo water use. The fund may be used to provide an alternative water supply. The State Engineer shall promulgate rules for the administration of the fund. Any entitlement to payment from the fund pursuant to this Agreement and such rules shall be subject to appropriations by the New Mexico State Legislature. The unavailability of funds under this Section shall not affect the right of the Pueblos to utilize their water rights as provided in this Agreement.

#### **5.6 Administration of Pueblo Rights.**

Each Pueblo shall administer that Pueblo's First Priority Rights, its Federal Reserved Rights, and water rights created under state law but approved for use on that Pueblo's Lands, in accordance with this Agreement, the Interim Administrative Order, the Final Decree, and the rules promulgated pursuant to this Agreement.

### **5.6.1 The Water Master's Duties under Pueblo Administration.**

- 5.6.1.1 Pursuant to Sections 2.3.4, 2.4.4.2.2, 2.4.4.3.2, and 2.4.4.4.2, the Water Master shall determine whether a new or changed Pueblo use of its First Priority Rights will interfere with Non-Pueblo surface water rights entitled to Section 4 protection, and the amount of any offsets required.
- 5.6.1.2 Pursuant to Sections 2.3.4, 2.4.4.3.2, and 2.4.4.4.2, the Water Master shall determine if a new or changed Pueblo use of its First Priority Rights interferes with Pueblo surface water rights and the amount of any offsets required.
- 5.6.1.3 Nothing in Sections 5.6.1.1 or 5.6.1.2 shall affect the right of the Pueblo to make such new or changed use of its First Priority Rights in accordance with the Agreement, *provided* that any offsets required by the Agreement are made.
- 5.6.1.4 For all applications made to him pursuant to Section 5.6.3.1, the Water Master shall determine the hydrological effect on Non-Pueblo and Pueblo surface and ground water rights resulting from new or changed uses of Pueblo First Priority Rights, including a determination of: a) interference with Non-Pueblo surface water rights entitled to Section 4 protection, and the amount of any offsets required; and b) interference with Pueblo surface water rights and the amount of any offsets required.
- 5.6.1.5 The Water Master shall carry out his obligations under this Section 5.6.1 in accordance with the rules promulgated pursuant to Section 5.3.
- 5.6.1.6 The Water Master's duties with respect to transfer of Pueblo-owned state law water rights within the lands of a Pueblo shall include evaluation of any impairment or interference with water rights and preparation of a written report thereon. Any transfer of state law water rights within the lands of a Pueblo shall be conditioned so that no impairment of, or interference with, water rights shall occur.
- 5.6.1.7 Any determination of projected hydrologic effects of transfers of state law water rights within a Pueblo shall include consideration of proposed remedies designed to reduce ground water effects below the threshold of impairment.

### **5.6.2 The State Engineer's Duties Under Pueblo Administration.**

#### **5.6.2.1 New or Changed Uses of a Pueblo's First Priority Rights on that Pueblo's Lands.**

- 5.6.2.1.1 Nothing in this Section 5.6.2.1 shall affect the right of a Pueblo to make a new or changed use of its First Priority Rights on its lands in accordance with this Agreement.

5.6.2.1.2 The State Engineer shall determine whether a new or changed use of a Pueblo First Priority Right on its lands pursuant to Sections 2.3.3, 2.4.3, 2.4.4.2, or 2.4.4.4 causes impairment to a Non-Pueblo ground water right.

5.6.2.1.3 The State Engineer shall further determine the extent to which any Non-Pueblo ground water user whose right is impaired shall be entitled to compensation from the Impairment Fund established pursuant to Section 5.5.

**5.6.3 New or Changed Uses of Pueblo First Priority Rights Off that Pueblo's Lands.** A Pueblo that seeks to use its First Priority Rights, or to transfer a portion of such rights to a use off of that Pueblo's lands pursuant to Sections 2.3.4, 2.4.4.3, or 2.4.4.4 shall proceed as follows:

5.6.3.1 If the new or changed use will be on the lands of another Pueblo, the Pueblo owning the right shall file an application with the Water Master, who shall approve the application, conditioned by any offsets required by this Agreement, unless the proposed use would impair Pueblo or Non-Pueblo ground water rights.

5.6.3.2 If the new or changed use will not be on Pueblo lands, the Pueblo owning the right shall file an application with the State Engineer. The State and the other Settlement Parties agree that approval of such applications is not detrimental to the public welfare or contrary to the conservation of water in the State, *provided* that such approval is conditioned by any offsets required by this Agreement and the proposed use does not impair Pueblo or Non-Pueblo ground water rights.

5.6.3.3 Any determination of impairment shall include consideration of proposed remedies designed to reduce ground water effects below the threshold of impairment.

### **5.7 Regional Water Authority Diversions.**

Any state law water rights, out of basin federal law rights, or contractual rights to the use of water transferred for diversion by the Regional Water Authority shall be transferred and administered at the point of diversion in accordance with state law and regulation. Such water may be diverted by the Regional Water Authority from the Rio Grande or from groundwater sources within the Pojoaque Basin only in compliance with state law and regulation. In operating and managing well fields within the Pojoaque Basin that are part of the Regional Water System, the Regional Water Authority shall not impair Pueblo or non-Pueblo water rights and shall offset interference with water rights subject to this Agreement, including any resulting increased tributary stream depletions caused by pumping of Regional Water Authority wells and any interference resulting from the Regional Water Authority's provision of Offset Water. Any provision of Offset Water shall not constitute use of a consumptive right. Any determination of projected hydrologic effects of transfers of water rights for



diversion by the Regional Water Authority shall include consideration of proposed remedies designed to reduce ground water effects below the threshold of impairment. In acting on any application to implement the provisions of this Section, the State Engineer shall consider that the purpose and intent of this Agreement, and of the Cost Sharing and System Integration Agreement, are to provide a firm supply of water for all uses served by the Regional Water Authority.

#### **5.8 Development of Model and Historic Supply Study for Administration.**

**5.8.1** Within one year of the Effective Date of this Agreement, the State and the United States shall develop a set of administrative tools, including a model or models for determining the hydrological effects of administrative actions governed by this Agreement. As part of this task, the State and the United States shall develop a strategy for implementing a more comprehensive model to replace the interim models now in place.

**5.8.2** Within eight months of the Effective Date of this Agreement, the State Engineer, in consultation with the United States, shall complete a new study of the historic supply of surface water for all of the tributaries within the Pojoaque Basin and shall formulate a process whereby this study will be jointly updated by these parties.

#### **5.9 Modification of Administration Provisions.**

The Settlement Parties have negotiated the provisions of Section 5 in a good faith attempt to avoid future disputes about administration of water rights in the Pojoaque Basin, but recognize that experience gained through implementation, and presently unanticipated considerations of law, science, or sound judicial case management, may require those provisions to be amended. Accordingly, the Settlement Parties agree that the remaining provisions of this Agreement shall remain in full force and effect notwithstanding a declaration by any court that Section 5, or any provision thereof, is invalid or contrary to law. The Settlement Parties further agree to meet to negotiate recommendations to the Decree Court for modifications to Section 5 within 90 days of any such judicial declaration invalidating a provision of Section 5. The Settlement Parties further agree to meet to consider modifications to Section 5 at any time prior to the Certification of Satisfaction of Conditions pursuant to Section 9.8, and to recommend any such modifications to the Decree Court.

### **6. Waivers and Release of Claims**

#### **6.1 Dismissal of *Inter se* Challenges.**

All Settlement Parties shall dismiss all pending *inter se* challenges against other Settlement Parties with prejudice and shall be barred from asserting further *inter se* challenges against such Settlement Parties. ~~parties.~~



## 6.2 Waiver and Release of Claims by the Local Parties.

Except as otherwise provided in this Agreement, the Final Decree, or the Act, the Local Parties agree to waive and release:

**6.2.1** All claims that they asserted, or could have asserted, in the Aamodt case;

**6.2.2** All claims for damages, losses or injuries to water rights or claims of interference, diversion or taking of water for lands within the Pojoaque Basin that accrued at any time up to and including the Effective Date, that may or may not be fully known and may or may not be more numerous or more serious than it is now understood or expected, even though the injuries, damages and losses may be now unanticipated, unexpected or unknown.

**6.2.3** The right to appeal from any decisions made by the Decree Court in the Aamodt case prior to execution of this Agreement; and

**6.2.4** Their defenses in the Aamodt case to the claims previously asserted therein by the Pueblos and the United States.

## 6.3 Waiver and Release of Claims by the Pueblos and the United States Acting in its Capacity as Trustee for the Pueblos.

~~The Waivers and Releases Document executed by each of the Pueblos and the United States as set out in pursuant to section 624(a) of the Settlement Act at section 624(a) is are attached hereto as Appendices A, B, C, and D and is are incorporated and made a part hereof as though fully set forth herein.~~

## 6.4 Waiver and Release of Claims by the Pueblos Against the United States.

~~The Waivers and Releases Document executed by each of the Pueblos as set out in the Settlement pursuant to section 624(b) of the Act at section 624(b) is are attached hereto as Appendices A, B, C, and D and is are incorporated and made a part hereof as though fully set forth herein.~~

## 6.36.5 Effectiveness of Waivers.

~~6.3.16.5.1~~ Nothing herein acknowledges the existence or validity of any claims that are being waived and released.

~~6.3.26.5.2~~ The waivers and releases described in subsection 6.2 will become effective upon entry of the Final Decree

~~6.3.36.5.3~~ The waivers and releases described in subsections 6.3 and 6.4 shall become effective as of the date that the Secretary publishes the notice required by subsection 623(a)(1).

**Comment [A4]:** Minor edits to the language made as a result of discussions by the parties at the April 19, 2011 meeting.

**Comment [A5]:** Minor edits to the language made as a result of discussions by the parties at the April 19, 2011 meeting.

**Comment [A6]:** Language concerning the tolling of claims and defenses described in 6.2 under review.

~~6.3.46.5.4~~ If the Final Decree becomes void under subsection 623(e)(5) of the Act, the waivers and releases described in subsections 6.3 and 6.4 shall no longer be effective..

**6.46.6 Reservation of Rights and Retention of Claims.**

~~6.4.16.6.1~~ Notwithstanding the waivers and releases described in Sections 6.2, 6.3, and 6.4, and except as otherwise provided in this Agreement, all Settlement Parties shall retain:

~~6.4.1.16.6.1.1~~ All claims for water rights or injuries to water rights arising out of activities occurring outside the Pojoaque Basin except insofar as such claims are specifically addressed in the Cost Sharing and System Integration Agreement executed pursuant to Section 9.1;

~~6.4.1.26.6.1.2~~ All claims for enforcement of this Agreement, the Final Decree, or ~~legislation enacted~~the Act consistent with Sections 9.2.2 and 9.4 of this Agreement, through such legal and equitable remedies as may be available in any court of competent jurisdiction;

~~6.4.1.36.6.1.3~~ To the extent not inconsistent with the Final Decree and this Agreement, all rights to use and protect water rights acquired pursuant to state law;

~~6.4.1.46.6.1.4~~ All claims relating to activities affecting the quality of water;

~~6.4.1.56.6.1.5~~ All rights, remedies, privileges, immunities, and powers not specifically waived and released pursuant to this Agreement; and

~~6.4.1.66.6.1.6~~ Priority administration initiated for the protection of water rights subject to this Agreement shall be governed by the Final Decree and by the terms of this Agreement as between the water rights holders. Nothing in this Agreement shall be construed to limit the authority of the State Engineer to administer water rights by priority on the Rio Grande, or in the Pojoaque Basin, for the protection of senior water rights outside the Pojoaque Basin, or to ensure compliance with the Rio Grande Compact.

~~6.4.26.6.2~~ Notwithstanding any provision in this Agreement, the Pueblos and the United States reserve and retain all rights, claims remedies, privileges, immunities, and powers described in subsection 624(c) of the Act.

~~6.4.36.6.3~~ Nothing in this Agreement affects the United States' ability to take actions described in subsection 624(d) of the Act.

~~6.4.46.6.4~~ Nothing in this Agreement confers jurisdiction on any State court:

~~6.4.4.16.6.4.1~~ to interpret Federal law regarding health, safety, or the environment or determine the duties of the United States or other parties pursuant to such Federal law; or

~~6.4.4.26.6.4.2~~ to conduct judicial review of Federal agency action.

~~6.4.56.6.5~~ Each claim and defense relating to a claim described in subsection 6.3 and 6.4 is tolled as described in subsection 624(e) of the Settlement Act.

~~6.4.66.6.6~~ Nothing in this Agreement affects the land and water rights, claims, or entitlements to water of any Indian tribe, pueblo, or community other than the Pueblos.

## **7. Miscellaneous**

### **7.1 Nambé Falls Dam and Reservoir.**

**7.1.1** The Pueblos may use their shares of water from Nambé Reservoir for the surface water offsets required under this Agreement or for any other purpose authorized by this Agreement.

**7.1.2** Contingent upon the enactment of the federal legislation described in Section 9.3.1.10, the remaining construction costs assigned to the Pueblos and the PVID shall be waived and deemed non-reimbursable.

**7.1.3** Pursuant to Section 3 of the contract dated November 2, 1972, among the PVID, the Pueblo of Nambé, the Pueblo of San Ildefonso and the Pueblo of Pojoaque, the annual allocation of water described in Section 1 of that contract shall be adjusted on the Effective Date of this Agreement, as follows: Nambé: 20%; San Ildefonso:18%; Pojoaque: 2%; and PVID: 60%.

**7.1.4** Concurrent with the adjustment of the annual allocation of water pursuant to Section 7.1.3, the care, operation and maintenance costs for the operation of the Nambé Falls Dam and Reservoir shall be allocated on the same percentage basis.

**7.1.5** If in any water year, the United States does not use the full amount of the San Juan - Chama Project annual water supply allocated to Nambé Falls Dam and Reservoir for the replacement of the depletion of flows on the Rio Grande caused by the storage and use of water from Nambé Falls Dam and Reservoir, the unused allocation of the San Juan - Chama annual water supply shall be assigned to the PVID and the United States. The United States shall be entitled to 50% of any such water supply to provide a portion of the water supply described in Sections 2.5 and 2.7. PVID shall be entitled to subcontract 50% of any such water supply to (1) the CWU to meet water demands within the Pojoaque valley, or (2) to the

United States for use in providing a portion of the water supply described in Sections 2.5 and 2.7.

**7.1.6** This Agreement does not affect any other provisions of the agreements among the United States, PVID, and the Pueblos.

**7.2 Priority Enforcement and Acquired and Economic Development Water.**

The Pueblos shall not use Acquired Water, provided for by Section 2.5, or Economic Development Water, provided for by Section 2.7, in a manner so as to increase Pueblo surface water diversions for which a Pueblo may make a priority call against non-Pueblo water users entitled to Section 4 protection.

**7.3 Export of Pojoaque Basin Water Prohibited.**

No surface or ground water physically diverted within the Pojoaque Basin may be delivered for use outside of the Pojoaque Basin, *provided* that, the Pueblos may use such water within their exterior boundaries as recognized and confirmed by patent issued under the Act of December 22, 1858, 11 Stat. 374, as amended, or on Pueblo land owned by or held in trust for the Pueblo of San Ildefonso. Diversions from the Rio Grande shall not be considered to be diversions within the Pojoaque Basin.

**8. Effective Date**

This Agreement is effective when the Court approves it and enters an Interim Administrative Order consistent with this Agreement.

**9. Conditions Subsequent**

The following are conditions subsequent to this Agreement that must be satisfied prior to entry of the Final Decree. Satisfaction of these conditions shall be demonstrated by certification to the Decree Court as described in Section 9.8.

**9.1 Cost-Sharing and System Integration Agreement.**

**9.1.1** Within 180 days following enactment by Congress of legislation consistent with Section 9.3.1 of this Agreement, the United States, the State acting through the State Engineer, each of the Pueblos, the County of Santa Fe, the City of Santa Fe shall execute a Cost-Sharing and System Integration Agreement, specifying the location, capacity, and management, including distribution of water to customers, and allocating the costs, of the Regional Water System for system construction, operation, maintenance, and repair, and land, rights-of-way and water rights acquisition, and other related and necessary undertakings agreed to by the parties named in this Section. The agreement shall provide for the Regional Water System, utilizing the system's well field in conjunction with the system's surface water supply, to deliver a reliable, firm supply of water in the amounts provided for in this Agreement, recognizing that it is the intent of this Agreement to utilize surface supplies to the maximum

extent feasible. The agreement shall also address mitigation of impacts of Buckman and other Santa Fe well field pumping on Pueblo First Priority Rights. The Decree Court, upon showing of good cause, may extend the 180-day period.

**9.1.2** The Cost-Sharing and System Integration Agreement shall specify the amount required to fund the Pueblo Conservation Funds and Pueblo Water Acquisition Fund described in Section 9.3.1, the Pojoaque Valley Water Acquisition Fund described in Section 9.6, and the Pojoaque Valley Water Utility Connection Fund and the Impairment Fund described in Sections 5.5, 9.4.1.3 and 9.4.1.4, and shall contain an escrow agreement governing the deposit and disbursement of funds thereunder.

**9.1.3** The Cost-Sharing and System Integration Agreement shall include an agreement for acquisition of land and permanent rights-of-way for the Regional Water System including the County Water Utility and the Pueblo distribution systems. Agreements with the Pueblos will be required for the rights-of-way for the diversion facilities and other components of the Regional Water System and the County Water Utility to be located on lands of the Pueblos. The Cost Sharing and System Integration Agreement shall also address the use of such rights-of-way for wastewater purposes.

**9.1.4** In the event of a conflict between language in this Agreement and language in the Cost-Sharing and System Integration Agreement, the language in this Agreement shall control.

**9.1.5** Provisions shall be made in the Cost-Sharing and System Integration Agreement for the establishment of a Citizen Advisory Board to provide local input for decisions of the operation of the CWU.

## **9.2 Pueblo Agreements.**

**9.2.1** Within 180 days following enactment by Congress of legislation consistent with Section 9.3.1 of this Agreement, the United States and the Pueblo of Nambé shall develop a proposed agreement as to cost, term of years, and termination of the lease of the Pueblo of Nambé's water right described in Section 2.6.2.

**9.2.2** Within 180 days following enactment by Congress of legislation consistent with Section 9.3.1 of this Agreement, the Pueblo Economic Development Water Agreement shall be developed, consistent with Section 2.7.

## **9.3 Federal Legislation.**

**9.3.1 Authorizations.** Prior to the entry of the Final Decree, federal legislation must be enacted that:

**Comment [A7]:** This section may need to be deleted.

**Comment [A8]:** Mark S. will provide a draft describing that the legislation as passed has satisfied the conditions in this section for review by the parties at the next meeting.

- 9.3.1.1 Authorizes the Secretary to execute a Cost Sharing and System Integration Agreement consistent with the terms of the federal legislation.
- 9.3.1.2 Authorizes and directs the Secretary of the Interior to construct the Regional Water System, and to acquire the easements necessary for such system, consistent with the Cost-Sharing and System Integration Agreement described in Section 9.1. The authorization shall include authority for the appropriations of funds required to meet the federal share of Regional Water System costs;
- 9.3.1.3 Approves the Agreement and authorizes the United States to act in accordance with its terms;
- 9.3.1.4 Authorizes the United States to pay the operation, maintenance, and replacement costs allocated to the Pueblos' participation in the Regional Water System;
- 9.3.1.5 Provides that the construction costs allocable to the Pueblos' portion of the Regional Water System shall not be reimbursable to the United States;
- 9.3.1.6 Authorizes the establishment of a Conservation Fund in the United States Treasury for each of the Pueblos in the amount specified in the Cost-Sharing and System Integration Agreement, which funds shall not be reimbursable, for the rehabilitation, improvement, operation, maintenance, and replacement of Pueblo agricultural delivery facilities, waste water systems, and other water-related infrastructure.
- 9.3.1.7 Authorizes the appropriation of funds in the amount specified in the Cost-Sharing and System Integration Agreement, which funds shall not be reimbursable, for the acquisition of an annual water supply of at least 2,500 AFY consumptive use for the Pueblos pursuant to Sections 2.2.4.1, 2.5, and 2.7 of this Agreement, and further authorizes actual acquisition of such water supply; and
- 9.3.1.8 Authorizes appropriation of any other funds consistent with the Cost-Sharing and System Integration Agreement;
- 9.3.1.9 Authorizes the use of water supplied from Nambé Falls Dam and Reservoir in accordance with this Agreement and provides authority for the United States to execute a service contract without limitations as to term with the Pueblos and PVID;
- 9.3.1.10 Provides that the remainder of the construction costs for Nambé Falls Dam and Reservoir allocated to the Pueblos and the PVID shall be deemed non-reimbursable; and
- 9.3.1.11 Exempts the Regional Water Authority from federal corporate income tax, and exempts interest payments on bonds issued by the Regional Water Authority from federal income tax.

9.3.1.12 Authorizes the Secretary of the Interior to transfer ownership, including easements or related property rights acquired by the Secretary for the construction of the System, to each Pueblo, the County Water Utility and the Regional Water Authority in accordance with Section 3.3 of the Cost Sharing and System Integration Agreement and as further specified in the implementation agreement described in the aforesaid Section 3.3. The legislation shall further provide that the Pueblos, the County Water Utility and the Regional Water Authority may not transfer ownership of any portion of the facilities transferred to them unless a transfer is authorized by an Act of Congress enacted after the date of enactment of the federal legislation described in this section.

**9.3.2 Appropriations.** Prior to entry of the Final Decree, federal legislation must be enacted that:

9.3.2.1 Appropriates funding for the Pueblo Conservation Funds authorized by the federal legislation described in Section 9.3.1.6;

9.3.2.2 Appropriates funding for any other purpose for which the Cost-Sharing and System Integration Agreement requires federal funding, except for the portion of such funding required under Sections 9.8 and 10.3; and

9.3.2.3 Provides that the Pueblo of San Ildefonso portion of the Project and settlement funds is fully funded before the rest of the project proceeds. This funding for San Ildefonso is to include (a) funding for the final design and construction of a community water and wastewater system, together with completion of the surface water structure across the Pojoaque River; and (b) funds authorized pursuant to Sections 9.3.1.4, 9.3.1.6, and 9.3.1.8 of this Agreement.

**9.3.3** The Settlement Parties contemplate that other provisions not enumerated herein may be proposed to Congress.

#### **9.4 State Legislation.**

**9.4.1** Prior to the entry of the Final Decree, state legislation must be enacted that:

9.4.1.1 With respect to the Regional Water Authority:

9.4.1.1.1 Exempts the RWA from the operation of the New Mexico Public Utility Act, Chapter 62, Articles 1 to 6 and 8 to 13, NMSA 1978, or any successor law, and the jurisdiction of the New Mexico Public Regulation Commission, or any successor entity;

9.4.1.1.2 Confirms that the RWA shall have the power of eminent domain for the acquisition of easements and other interests in and over privately owned land reasonably necessary for the



construction, operation and maintenance of its portion of the Regional Water System, pursuant to §§ 42-2-1 through 42-2.24 and §§ 42A-1-1 through 42A-1-34, NMSA 1978, or any successor law;

9.4.1.1.3 Exempts the RWA from the New Mexico corporate franchise tax, exempts RWA income from the New Mexico corporate income tax, exempts RWA property from any New Mexico property tax, and exempts interest paid on RWA bonds from New Mexico personal income tax;

9.4.1.1.4 Confirms that the RWA is not subject to the New Mexico Procurement Code, §§ 13-1-28 through 13-1-199, NMSA 1978, New Mexico Audit Act, §§ 12-6-1 through 12-6-14, NMSA 1978, or any successor to either such law, or to any law governing or relating to public officers and employee;

9.4.1.1.5 Establishes that RWA records are considered public records subject to the New Mexico Inspection of Public Records Act, §§ 14-2-1 through 14-2-12, NMSA 1978, or any successor law;

9.4.1.1.6 Establishes that meetings of RWA members and of the RWA Board of Directors are subject to the New Mexico Open Meetings Act, §§ 10-15-1 through 10-15-4, NMSA 1978, or any successor law;

9.4.1.1.7 Establishes that the RWA is subject to suit on contracts and for the collection of debts only to the extent a governmental entity would be subject to such suit, pursuant to §§ 37-1-23 and 37-1-24, NMSA 1978, or any successor to either such law, and that the RWA is subject to suit arising from torts committed by the RWA or by its officers, agents and employees only to the extent a governmental entity would be subject to such suit under the New Mexico Tort Claims Act, §§ 41-4-1 through 41-4-29, NMSA 1978, or any successor law, *provided* that the RWA complies with the insurance requirements of such law; and

9.4.1.1.8 Exempts the RWA from the provisions of the New Mexico Nonprofit Corporation Act relating to dissolution of nonprofit corporations, including §§ 53-8-47 through 53-8-63, NMSA 1978, or any successor sections, and establishes that in the event of dissolution of the RWA, the RWA's affairs will be dealt with by the United States District Court for the District of New Mexico, as set forth in the Articles of Incorporation;

9.4.1.2 Authorizes the retirement and transfer of existing, and limitation on further, Non-Pueblo wells within the Pojoaque Basin as

required by Section 3, in conjunction with the organization and operation of the CWU described in Section 9.6;

- 9.4.1.3 Authorizes the establishment of a Pojoaque Valley Water Utility Connection Fund in the amount specified in the Cost-Sharing and System Integration Agreement, which fund shall be used to connect Non-Pueblo well users to the CWU and consistent with § 3.1.7.3.
- 9.4.1.4 Authorizes the establishment of an Impairment Fund described in Section 5.5 in the amount specified in the Cost-Sharing and System Integration Agreement; and
- 9.4.1.5 Authorizes appropriation of any other funds consistent with the Cost-Sharing and System Integration Agreement.
- 9.4.1.6 Exempts leases of Pueblo water rights for use outside Pueblo lands from the term duration limitation in NMSA 1978, § 72-6-3 (2003).

**9.4.2** The Settlement Parties contemplate that other provisions not enumerated herein may be proposed to the state legislature.

**9.5 Formation of Regional Water Authority.**

**9.5.1** Santa Fe County and the Pueblos shall, by no later than 60 days following the enactment of the federal legislation described in Section 9.3 and the state legislation described in Section 9.4, form a New Mexico Nonprofit Corporation to be known as Pojoaque Basin Water Authority, and shall thereafter do all things necessary and appropriate, consistent with the provisions of this Agreement and the Cost-Sharing and System Integration Agreement, to cause such corporation to come into existence and commence operations. The Regional Water System shall be managed and operated consistent with this Agreement for the purpose of ensuring a reliable firm supply of water to all users of the Regional Water System.

**9.5.2** Funding for and operations of the Regional Water Authority shall be consistent with the Cost-Sharing and System Integration Agreement described in Section 9.1.

**9.5.3** The Pueblos, City of Santa Fe, Santa Fe County and State shall meet and consult together on a regular basis at least yearly beginning one year after the date of the Agreement to discuss the planning for and development of the Regional Water System. The topics to be discussed shall include any permits issued by the State Engineer in the Pojoaque Basin, housing and commercial developments both proposed and in construction, lot splits and subdivisions in the Pojoaque Basin. Such meetings shall be open to the public

**Comment [A9]:** This language is transferred from the definitions section for the now modified Regional Water System definition (last sentence thereof).

~~9.5.4 All water conveyed through the Regional Water System shall meet applicable federal and state requirements for drinking water.~~

**Comment [A10]:** This language is transferred from the definitions section for the now deleted Potable Pipeline definition.

~~9.5.4.5~~ The duty to consult set forth in Section 9.5.3 shall not affect any rights or remedies of any party pursuant to this Agreement to effectuate the intent and purpose of this Agreement.

## 9.6 County Water Utility.

9.6.1 The Board of Commissioners of Santa Fe County shall authorize the CWU to receive water from the Pojoaque Basin Water Authority and to provide service within the Pojoaque Basin.

9.6.2 Subject to the Cost-Sharing and System Integration Agreement, the State and the County shall determine the extent, size and capacity, and will pay the additional cost, of that portion of the main transmission line of the Regional Water System serving the CWU system. The CWU will determine when and where to build its portions of the distribution systems and in what phases and will pay the cost of such distribution systems. In making its distribution determinations, the CWU shall establish a mechanism to afford input from existing and potential customers within the Pojoaque Basin

~~9.6.3 Funding for and operations of the CWU shall be consistent with the Cost-Sharing and System Integration Agreement described in Section 9.1. and shall include establishment of a Pojoaque Valley Water Acquisition Fund for the acquisition of a water supply of at least 750 AFY consumptive use for the CWU in addition to water supplied by water rights transferred pursuant to Section 3.1.8 of this Agreement.~~

~~9.6.4 The County will securehas acquired 611750 AFY of water rights appurtenant to the Top of the World Farm. The County will apply for a State Engineer permit to transfer the rights to the Regional Water System for the benefit of future Non-Pueblo water utility customers in the Pojoaque Basin consistent with NMSA 1978, § 72-1-9 (2003). The County may temporarily use these water rights for other purposes until they are needed for the purposes described in this paragraph.~~

**Comment [A11]:** This section needs to be revisited and resolved during the next meeting of the parties.

9.6.5 The County shall allocate to Tesuque Pueblo for its use, at no water rights cost to Tesuque Pueblo, 100 AFY of water to be delivered from that portion of the Regional Water System serving Tesuque Pueblo at the time(s) and location(s) to be determined by Tesuque Pueblo. Up to 50 AFY will be credited to the County to offset the effects on the Rio Tesuque of future pumping by the County in the Santa Fe Basin. The cost of delivery of such offset water shall be paid for by the County. The cost of delivery of the remaining water (for a total of 100 AFY) to Tesuque Pueblo shall be negotiated in the Cost-Sharing and System Integration Agreement but in no event shall any such delivery costs be borne by

Tesuque Pueblo. This allocation and delivery requirement to Tesuque Pueblo shall be reduced in the amount of .3 AFY for each non-Pueblo connection to the CWU that occurs south of Tesuque Pueblo in those areas referenced in the Engineering Report as a Tesuque Village, Upper Tesuque Village, and Lower Bishops Lodge. If the County or the City desire to provide additional offsets, either may cause additional water to be delivered from that portion of the Regional Water System serving Tesuque Pueblo at the time(s) and location(s) to be determined by Tesuque Pueblo or as provided in Section 3.5. The determination of offset amounts will be made based upon the hydrologic model required by Section 5.8, with the participation of the County and the City.

**Comment [A12]:** Replacing Settlement Study with Engineering Report per the 3/17/11 meeting.

**9.7 ~~Construction of Red Pipeline and Acquisition of Supply for Pueblo of Pojoaque Alternative Water.~~**

**Comment [A13]:** This will need to be modified to include language from the Act.

Prior to entry of the Final Decree, and no later than June 30, 2010, ~~construction of the Red Pipeline must be substantially completed and~~ the United States must have secured 475 AFY of water to supply the Pueblo of Pojoaque's Alternative Water pursuant to Section 2.2.4.1.

**9.8 Pueblo Water Supply.**

No later than the end of the fifth calendar year following the passage of the federal legislation described in Section 9.4 and prior to the entry of the Final Decree, the United States in cooperation with the State of New Mexico, and in consultation with the Pueblos, shall secure the water supply described in Sections 2.2, 2.5 and 2.7. The acquisition costs associated with this water supply shall be ~~allocated in the Cost Sharing and System Integration Agreement described in Section 9.4 as set forth in the Act.~~

**Comment [A14]:** Might need to insert specific reference to the Act here.

**9.9 Adoption of Rules**

Not later than one (1) year after the Effective Date, the State Engineer shall have adopted rules to govern his responsibilities under this Agreement and the Interim Administrative Order that are in substantial conformity with the agreed proposed rules described in Section 5.3.

**9.10 Certification of Satisfaction of Conditions.**

**9.10.1** Prior to entry of the Final Decree, counsel for the United States, the State of New Mexico acting through the State Engineer, each of the Pueblos, the County of Santa Fe, and the City of Santa Fe, and active counsel for Non-Pueblo parties shall file a Certification of Satisfaction of Conditions with the Decree Court, stating that the conditions subsequent described in Sections 9.1 through 9.6.4 have been met in a manner acceptable to each of the certifying parties.

**9.10.2** In conjunction with such certification, the same Settlement Parties shall jointly move the Decree Court to enter a Final Decree that shall be consistent with this Agreement and the Certification of Satisfaction of Conditions. Finally, the Settlement Parties shall request the Decree Court

to give appropriate notice and hold the necessary hearings to consider and rule on any objections to the proposed Final Decree.

## **10. Contingencies**

### **10.1 Entry of Decree.**

If the Final Decree has not been entered by December 15, 2012, the Settlement Parties shall not be bound by this Agreement, including any waiver and release of claims provided pursuant to Section 6 of this Agreement.

### **10.2 Contingent on Appropriation of Funds.**

This Agreement shall not be construed to require the United States to make an expenditure or advance of any money or to perform any obligation for which an Act of Congress has not duly appropriated funds. The United States shall accrue no liability as a result of any failure to make such appropriations authorized by any implementing legislation.

### **10.3 Construction of Regional Water System.**

If those portions of the Regional Water System described in Section [1.6.30](#) required to deliver the water supply described in Sections 2.2, 2.5 and 2.7 to the Pueblos have not been substantially completed by June 30, 2016, then, upon notification to the Decree Court by the Pueblos or the United States acting on their behalf, the parties shall not be bound by the Final Decree or this Agreement, including any waiver and release of claims provided pursuant to Section 6 of this Agreement, and the Decree Court shall proceed with the determination of the parties' rights. The right to void the Final Decree, and this Agreement, and have the Decree Court determine the rights of the parties as provided in this Section shall expire at midnight on June 30, 2021, or upon satisfaction of this contingency, whichever first occurs.

## **11. Amendment**

No addition to or waiver or modification of any provision of this Agreement shall be binding unless in a writing specifically referencing this Agreement and signed by a duly authorized representative of each Settlement Party. Whenever this Agreement provides for the agreement of one or more Settlement Parties, any such agreement shall be in writing, specifically refer to this Agreement, and be signed by duly authorized representatives of each agreeing Settlement Party.

## **12. Signatures**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument.

New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

**FOR THE UNITED STATES OF AMERICA:**

UNITED STATES DEPARTMENT OF THE INTERIOR

\_\_\_\_\_  
SECRETARY OF THE INTERIOR

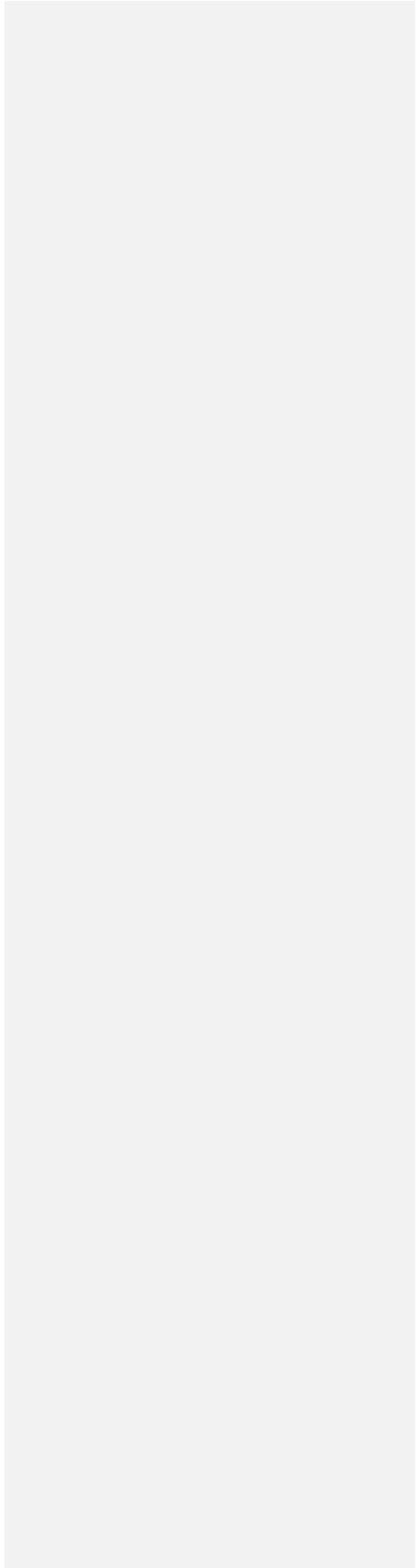
DATE: \_\_\_\_\_

UNITED STATES DEPARTMENT OF JUSTICE

\_\_\_\_\_

DATE: \_\_\_\_\_

DRAFT



New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE PUEBLO OF NAMBÉ: gggg

\_\_\_\_\_  
GOVERNOR OF THE PUEBLO OF NAMBÉ

DATE: \_\_\_\_\_

DRAFT



New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE COUNTY OF SANTA FE:

\_\_\_\_\_  
CHAIRMAN, BOARD OF COUNTY COMMISSIONERS

DATE: \_\_\_\_\_

Approved:

\_\_\_\_\_  
SANTA FE COUNTY ATTORNEY

DATE: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
SANTA FE COUNTY CLERK

DATE: \_\_\_\_\_

DRAFT

New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR LEND LEASE VALUE ENHANCEMENT FUND II ("THE BISHOP'S  
LODGE"):

\_\_\_\_\_  
B. STANTON BREON

DATE: \_\_\_\_\_

DRAFT

New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR RANCHO DEL MONTE LLC ("RANCHO ENCANTADO"):

\_\_\_\_\_  
DANIEL N. EPSTEIN

DATE: \_\_\_\_\_

DRAFT

New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE SANTA FE OPERA, A NEW MEXICO NON-PROFIT  
CORPORATION:

\_\_\_\_\_  
DR. PAUL R. HOFFMAN

DATE: \_\_\_\_\_

DRAFT

New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE STATE OF NEW MEXICO:

\_\_\_\_\_  
JOHN D'ANTONIO, STATE ENGINEER

DATE: \_\_\_\_\_

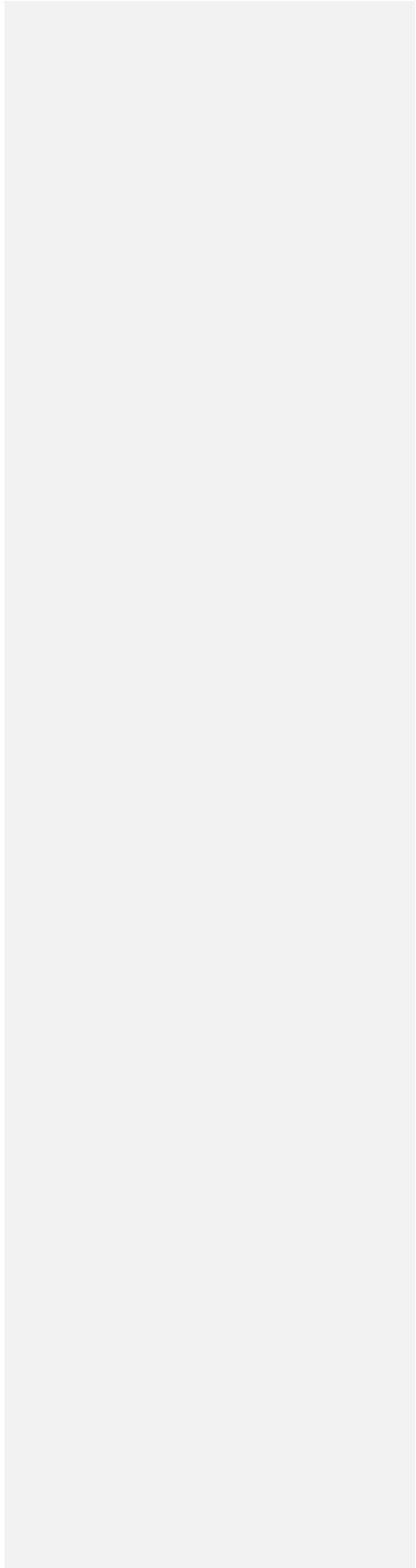
\_\_\_\_\_  
PATRICIA MADRID, ATTORNEY GENERAL

DATE: \_\_\_\_\_

\_\_\_\_\_  
DL SANDERS, CHIEF COUNSEL  
JOHN STROUD  
EDWARD C. BAGLEY  
OFFICE OF THE STATE ENGINEER

DATE: \_\_\_\_\_

DRAFT



New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE PUEBLO OF TESUQUE:

\_\_\_\_\_  
GOVERNOR OF THE PUEBLO OF TESUQUE

DATE: \_\_\_\_\_

DRAFT

New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE PUEBLO OF POJOAQUE, a federally recognized Indian Tribe

\_\_\_\_\_  
GOVERNOR OF THE PUEBLO OF POJOAQUE

DATE: \_\_\_\_\_

DRAFT



New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE PUEBLO DE SAN ILDEFONSO

\_\_\_\_\_  
GOVERNOR OF THE PUEBLO DE SAN ILDEFONSO

DATE: \_\_\_\_\_

DRAFT

New Mexico ex rel. State Engineer v. Aamodt, No. 66cv06639 MV/LCS-ACE (D.N.M.),  
*Settlement Agreement dated May 5, 2011*

FOR THE CITY OF SANTA FE

\_\_\_\_\_  
CITY OF SANTA FE, MAYOR

DATE: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
CITY OF SANTA FE, CITY ATTORNEY

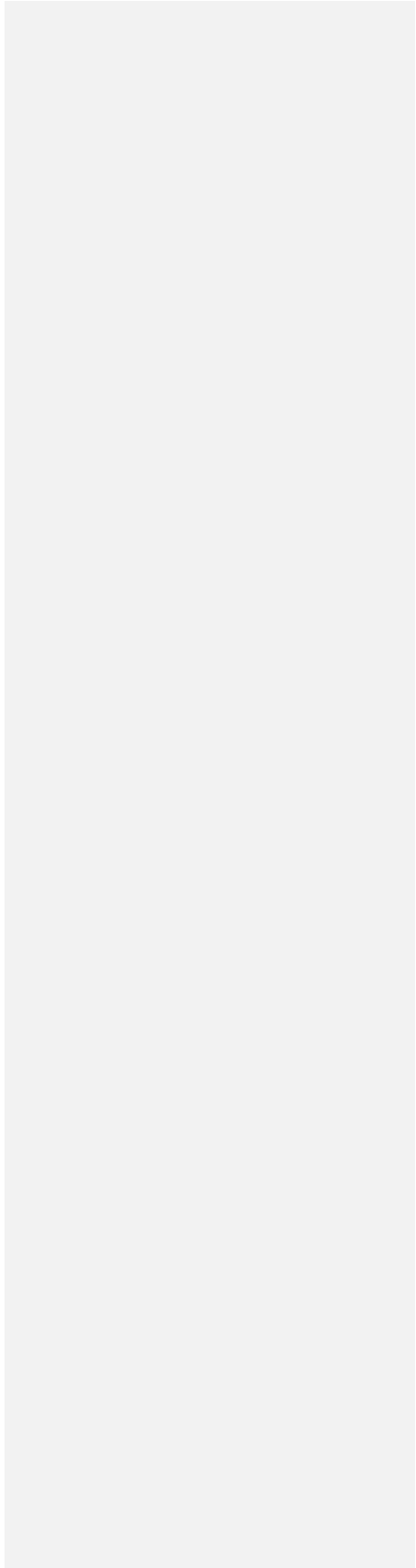
DATE: \_\_\_\_\_

Attest:

\_\_\_\_\_  
CITY OF SANTA FE, CLERK

DATE: \_\_\_\_\_

DRAFT



SIGNATURE PAGE FOR INDIVIDUAL DEFENDANT

SIGNATURE OF DEFENDANT:

\_\_\_\_\_  
DATE: \_\_\_\_\_

PRINTED, OR TYPED, NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

SUB-FILE NUMBER: \_\_\_\_\_

RG NUMBER: \_\_\_\_\_

COUNSEL OF RECORD (IF ANY):

SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

PRINTED OR TYPED NAME: \_\_\_\_\_

FIRM NAME (IF ANY): \_\_\_\_\_

ADDRESS: \_\_\_\_\_

TELEPHONE NUMBER: \_\_\_\_\_