

AGREEMENT FOR SETTLEMENT OF PENDING LITIGATION AND OTHER DISPUTES CONCERNING WATER RIGHTS

This Settlement Agreement (“Agreement”) is entered into by and among the San Juan Water Commission (“SJWC”), a political subdivision of the State of New Mexico, the State of New Mexico (“State”) and the New Mexico State Engineer (“State Engineer”) (collectively, the “Parties” or, individually, a “Party”).

PURPOSE

This Agreement is made for the purpose of advancing the settlement of legal disputes, including: (a) litigation by and among the Parties in *San Juan Water Commission v. John R. D'Antonio, Jr., New Mexico State Engineer*, No. CV-2008-1699, District Court of San Juan County (“SJWC Litigation”); and (b) pending litigation in the general stream adjudication of the San Juan River Basin in New Mexico being determined in *New Mexico v. United States*, No. 75-184, District Court of San Juan County (“San Juan River Adjudication”).

AGREEMENT PROVISIONS

NOW THEREFORE, in consideration of and in reliance upon the covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. SJWC's Status/Water Rights and Rights to Appropriate Water.
 - a. SJWC, a political subdivision of the State of New Mexico, has authority under the Joint Powers Agreement creating SJWC dated March 5, 1986, as same may be amended (“JPA”), to acquire, own and hold water rights and rights to appropriate water in its own name, for the purposes set forth in the JPA. Upon assignment from the United States Secretary of the Interior (the “Secretary”) to SJWC of a portion of the United States (“U.S.”) Department of the Interior’s interests in Office of the State Engineer (“OSE”) File No. 2883 as provided in Paragraph 3(b) below, SJWC will be the owner of and hold title to the assigned interest.
 - b. SJWC may submit to the State Engineer water development plans for the reasonable development and use of water resources in order to hold water rights and rights to appropriate water for the purposes set forth in the JPA. Such plans shall address water conservation and incorporate water development plans under NMSA 1978, Section 72-1-9 and regional water planning in order to carry out an integrated and comprehensive water plan.
2. SJWC's Return Flow Plan. The State Engineer agrees that return flow plans submitted by SJWC for quantifying return flow credits for the administration of

diversions for municipal, industrial or domestic uses under OSE File Nos. 4487-4501 and the permit(s) associated with the assigned water supply described in Paragraph 3(b) below will be based on measured return flows, including: (i) directly measured discharges to the Animas or San Juan rivers, such as from wastewater treatment plant discharges; and (ii) indirectly measured return flows to the rivers determined or calculated using a water budget methodology acceptable to the State Engineer.

- a. Return flow plans accepted by the State Engineer will be subject to periodic review and revision based on the availability of new information or changed conditions, including the implementation of effective water conservation measures.
- b. The maximum total return flow credit for each permit, whether from directly or indirectly measured return flows or a combination thereof, shall not exceed the difference between the maximum annual diversion and the maximum annual depletion amounts under the permit.

The Parties will cooperate in the development of a return flow plan to be approved by the State Engineer within a timely manner.

3. Agreements regarding OSE File No. 2883.

- a. U.S. holds OSE File No. 2883. For purposes of settlement, the Parties agree that the U.S. currently retains all of the water supply associated with OSE File No. 2883 for the purposes of the Animas-La Plata Project (“ALP”), and no water under OSE File No. 2883 has been made available for appropriation under NMSA 1978, Section 72-5-33(A)(2).
- b. State Engineer request of assignment to SJWC. The State Engineer will request the Secretary to assign to SJWC 30,800 acre-feet per annum of diversion and 16,700 acre-feet per annum of depletion under a portion of OSE File No. 2883. The request shall be made in writing to the Secretary within one business day following the Parties signing this Agreement. Within 30 days of the assignment to SJWC, the State Engineer shall issue OSE permits (numbered 2883-B and 2883-C) to SJWC, which will be subject to the following conditions:
 - i. OSE File No. 2883-B, in the amount of 20,800 acre-feet per annum of diversion and 10,400 acre-feet per annum of depletion, shall have a priority date of May 1, 1956, for the diversion and use of water for the purposes set forth in the JPA under ALP pursuant to Section 302 of the Colorado Ute Settlement Act Amendments of 2000, OSE File Nos. 4487-4501, and Section IV of the JPA. The diversion and use of water under this permit shall be subject to the Animas-La Plata Project Compact between the States of New Mexico and Colorado, and shall be exercised in accordance with the Animas-La Plata Project Amendatory Funding Agreement and Repayment Contract

between the San Juan Water Commission and the U.S. Department of the Interior, dated March 5, 2002.

- ii. OSE File No. 2883-C, in the amount of 10,000 acre-feet per annum of diversion and 6,300 acre-feet per annum of depletion, shall have a priority date of May 1, 1956, for the diversion and use of water for the purposes set forth in the JPA. The diversion and use of water under this permit is not part of ALP and is not subject to the Animas-La Plata Project Compact, and shall be administered with a priority date of May 2, 1956, making it junior to the diversion and use of water under ALP. SJWC will be required to file application(s) with the State Engineer to establish points of diversion for the diversion and use of water under this permit, which may include any of the points of diversion described by OSE File Nos. 4487-4501. Permits issued to divert water from OSE File No. 2883-C will be subject to conditions imposed by the State Engineer, as set forth in Attachment A hereto.

- c. SJWC support for allocation to be held in trust for Navajo Nation. SJWC agrees that the U.S., acting through the Secretary, may hold in trust on behalf of the Navajo Nation 4,680 acre-feet per annum of diversion and 2,340 acre-feet per annum of depletion under OSE File No. 2883 for the Navajo Nation's uses under ALP as provided in Section 302 of the Colorado Ute Settlement Act Amendments of 2000 and as further described in paragraph 3(c) of the proposed Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Proposed Decree") filed with the Court in the San Juan River Adjudication on January 3, 2011. SJWC further agrees that the U.S., acting through the Secretary, may hold in trust on behalf of the Navajo Nation an additional water allocation of 2,920 acre-feet per annum of diversion and 1,840 acre-feet per annum of depletion under OSE File No. 2883, with a priority date of May 1, 1956, for Navajo Nation uses; provided, that the use of this additional water allocation would not be part of ALP and would not be subject to the Animas-La Plata Project Compact, and would be administered with a priority date of May 2, 1956, making it junior to the diversion and use of water under ALP. SJWC agrees further that:
 - i. SJWC will not object to a Navajo Nation application for permit to establish a point of diversion and place of use for the additional water allocation; and
 - ii. in the administration of the Proposed Decree and the permit(s) associated with the additional water allocation described in this Paragraph 3(c), SJWC will support an accounting of measured return flows from municipal, industrial and domestic water uses of the Navajo Nation based on directly measured discharges to the San Juan River plus indirectly measured return flows to the river determined or calculated using a water budget methodology acceptable to the State Engineer, consistent with the provisions in Paragraph 2 above.

SJWC's agreements made under this Paragraph 3(c) are contingent upon the Navajo Nation not opposing the assignment to SJWC described in Paragraph 3(b) above.

- d. SJWC support for allocation to La Plata Conservancy District. SJWC agrees that the Secretary, pursuant to Sections 302 and 303 of the Colorado Ute Settlement Act Amendments of 2000, may assign to the La Plata Conservancy District ("LPCD") 1,560 acre-feet per annum of diversion and 780 acre-feet per annum of depletion under OSE File No. 2883 for diversion and use under ALP, with a priority date of May 1, 1956, for municipal, industrial and domestic uses. SJWC further agrees that in the event the State Engineer requests the Secretary to assign to LPCD an additional water interest from OSE File No. 2883, SJWC will support an additional assignment to LPCD of up to 440 acre-feet per annum of diversion and 277 acre-feet per annum of depletion under OSE File No. 2883, with a priority date of May 1, 1956; provided, that the use of this additional water allocation would not be part of ALP and would not be subject to the Animas-La Plata Project Compact, and would be administered with a priority date of May 2, 1956, making it junior to the diversion and use of water under ALP.
- e. U.S. retention of remaining water. The Parties agree that the U.S. Department of the Interior will retain, for the purposes of ALP, the portion of its interests in OSE File No. 2883 that is in excess of the total water quantities described in Paragraphs 3(b), 3(c) and 3(d) above. Uses of the retained water supply may include:
 - i. Reconciling diversions of water to storage in Lake Nighthorse to replace: (1) storage water that is withdrawn for delivery to ALP contractors in New Mexico; and (2) reservoir losses associated with the storage of water for project uses in New Mexico; and
 - ii. Offsetting, on an annual basis, operational inefficiencies in the timing and delivery of water from ALP facilities in Colorado to ALP contractors in New Mexico, provided that ALP diversions in New Mexico comply with the conditions of applicable OSE permits or decreed rights.

4. Agreements regarding OSE File No. 4498.

- a. The State Engineer agrees that SJWC is the permit holder and sole owner of OSE File No. 4498.
- b. Within 30 days of completion of the assignment described in Paragraph 3(b) above, the State Engineer will make the following changes to the Conditions of Approval for OSE File No. 4498:
 - i. Condition 2. Delete in its entirety and substitute therefor the following:
"Animas-La Plata Project contract water may be diverted under this permit

through existing points of diversion described in OSE File Nos. 4487 through 4497 and 4499 through 4501. The maximum diversion rate at each point of diversion shall be limited to the decreed or permitted diversion rate at the point of diversion.”

- ii. Condition 6. Delete in its entirety and substitute therefor the following: “This permit may be exercised only in accordance with the Animas-La Plata Project Amendatory Funding Agreement and Repayment Contract between the San Juan Water Commission and the U.S. Department of the Interior, dated March 5, 2002.”
 - c. The source of supply for water diverted under OSE File No. 4498 shall be the water supply assigned from OSE File No. 2883 to SJWC under Paragraph 3(b)(i) above.
5. Resolution of Application No. 4818 and SJWC Litigation.
- a. Initial stay of proceedings. The Parties will move for and obtain a further stay of the proceedings in the SJWC Litigation, as necessary to implement this Agreement.
 - b. Dismissal. Upon completion of the assignment from the Secretary and issuance of permits (2883-B and 2883-C) to SJWC as described in Paragraph 3(b), the SJWC and State Engineer agree that:
 - i. they will file appropriate joint motions to withdraw the pending appeal and to vacate the decisions entered in the SJWC Litigation;
 - ii. the State Engineer will vacate previous orders relating to SJWC Application No. 4818; and
 - iii. SJWC will withdraw Application No. 4818.
 - c. SJWC agrees that it will not file or support any further applications to appropriate water pursuant to NMSA 1978, Section 72-5-33 for water associated with OSE File No. 2883.
6. SJWC withdrawal of objection to Navajo settlement. Upon signing of this Agreement, SJWC will suspend its opposition to the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement and entry of the proposed decrees in the San Juan River Adjudication, so long as substantial progress is being made as described in Paragraph 8(b) below. SJWC and the State of New Mexico will file a joint notice with the adjudication court that the Parties have entered into a settlement agreement that, when satisfied, will dispose of SJWC’s objections, in particular its objections associated with water for OSE Application No. 4818. Upon completion of the assignment from the Secretary and issuance of OSE Permit Nos.

2883-B and 2883-C to SJWC as described in Paragraph 3(b) above, SJWC will withdraw its objections filed in the pending Navajo Nation *inter se* proceeding and will not participate in the proceeding in opposition to the settlement or entry of the proposed decrees.

7. Request for additional storage. The State Engineer will cooperate with SJWC in seeking additional water storage for meeting future water demands, subject to non-impairment of valid and existing water rights in New Mexico and no detriment to the State of New Mexico's interstate compact obligations.

8. General Provisions.

a. The provisions of this Agreement and any other written or oral communications related thereto are covered by Rule 11-408 of the New Mexico Rules of Evidence. No compromises made in the course of negotiating this Agreement may be used as either evidence or argument by any Party to this Agreement in the SJWC Litigation or the San Juan River Adjudication.

b. This Agreement is effective upon execution by the Parties, and may be amended or terminated only by written agreement of the Parties; except, that the Agreement may be terminated by SJWC if substantial progress towards completion of the water interest assignment described in Paragraph 3(b) above is not being made by March 29, 2013, which date may be extended by mutual agreement of the Parties; and further provided that if SJWC resumes its opposition to the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement and does not concurrently terminate this Agreement, the State may terminate the Agreement.

c. By signing this Agreement, each Party represents that it has authority to enter into this Agreement. Furthermore, the SJWC confirms that the State Engineer has authority under state law to administer water rights within, and to supervise the apportionment, diversion and use of the waters of, the San Juan River Basin in New Mexico.

d. This Agreement constitutes the entire understanding among the Parties.

In witness whereof, the Parties hereto have duly executed this Agreement.

STATE ENGINEER

STATE OF NEW MEXICO

By: Is Scott A. Verhines
New Mexico State Engineer

Approved: s/ Arianne Singer
Special Assistant Attorney General

Date: February 6, 2013

Approved: Is DL Sanders
Chief Counsel

SAN JUAN WATER COMMISSION

By: [Signature]
Executive Director (Title)
San Juan Water Commission

Date: 2-6-13

Approved: [Signature]
Legal Counsel

[Signature]
Legal Counsel

Attachment A

Permits issued to divert and use water under OSE File No. 2883-C shall be subject to the following permit conditions:

1. The total diversion amount under OSE File No. 2883-C may be increased to a maximum of 10,000 acre-feet per annum provided that SJWC submits a return flow plan acceptable to the State Engineer for determining the actual amount and disposition of the return flow resulting from the diversion, and further demonstrates that at least 3,700 acre-feet per annum of the diversion is being returned to the Animas or San Juan rivers. Accepted return flow of less than 3,700 acre-feet per annum will allow the diversion to be increased, but only by the amount of demonstrated return. In no event will the maximum consumptive use measured as diversion less return flow to the rivers exceed 6,300 acre-feet in any one year. This permit condition shall be applied in proportionate amounts for each permit issued to divert and use water under OSE File No. 2883-C.
2. The diversion and use of water under the permit is subject to non-impairment of prior, valid and existing rights to the diversion and use of water in New Mexico.
3. The maximum diversion rate for the diversion and use of water under the permit shall be limited to the decreed or permitted diversion rate from the permitted point of diversion. The water diverted may be stored pursuant to the storage rights of the permittee.
4. Any modification of works necessary to accommodate the availability of water to the permittee will be subject to application to the State Engineer.
5. Diversions of water under the permit shall be measured by a totalizing meter or meters of a type approved by, and installed in a manner acceptable to, the State Engineer. Records of diversion under the permit shall be submitted to the State Engineer on or before the 10th day of each month for the preceding calendar month.
6. Diversions of water under the permit from the San Juan River, including diversions by exchange, are permitted only to the extent that the diversion will not cause impairment of, or reduction in, the amount of San Juan River water available to valid existing rights or to any Navajo Reservoir contract water being delivered via the San Juan River. Implementation of the exchanges of water required under the permit shall be pursuant to the direction of the State Engineer. This permit condition is applicable only to diversion from the San Juan River.
7. The OSE shall retain jurisdiction of the permit.