

# **SETTLEMENT FRAMEWORK**

## **Memorandum of Understanding**

### **For Lower Rio Grande Alternative Administration and Groundwater Management**

June 30, 2016

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**City of Las Cruces, New Mexico State University,  
New Mexico Pecan Growers Association, Southern Rio Grande  
Diversified Crop Farmers Association, Public Service Company  
of New Mexico and the Camino Real Regional  
Utility Authority**

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## MEMORANDUM OF UNDERSTANDING

### **For Lower Rio Grande Alternative Administration and Groundwater Management**

This Settlement Framework Memorandum of Understanding (“Settlement Framework”) is entered into between and among the City of Las Cruces, New Mexico State University, New Mexico Pecan Growers, Southern Rio Grande Diversified Crop Farmers Association, Public Service Company of New Mexico and the Camino Real Regional Utility Authority (referred to in total as the “Parties”), and is effective as of the latest date all Parties have executed this Settlement Framework as indicated by their signatures below.

#### RECITALS

WHEREAS, the Parties signed a Memorandum of Understanding in 2014 (“MOU”) for the purpose of working together to develop management and mechanisms for sustainable and resilient use of groundwater in the Lower Rio Grande in New Mexico (“Lower Rio Grande” or “LRG”) and to resolve continuing legal disputes over use of water and adjudication of water rights in the LRG; and

WHEREAS, the Parties and their members account for more than ninety percent of the use of groundwater and surface water in the Lower Rio Grande; and

WHEREAS, the New Mexico State Engineer has the obligation to administer groundwater uses in the Lower Rio Grande in accordance with the doctrine of prior appropriation, pursuant to N.M. Const. Art. 16 §2. Further, the State Engineer has the authority to administer water rights in accordance with their priorities pursuant to NMSA § 72-2-9.1; and

WHEREAS, the Parties desire to develop and request implementation of a water rights administrative system that will protect senior water users and satisfy Rio Grande Project delivery obligations, while simultaneously providing reliable and efficient mechanisms for junior groundwater users to maintain their uses to the extent possible; and

WHEREAS, water rights in the Lower Rio Grande are being adjudicated in *State of New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irrigation District, et al.*, Doña Ana County Cause No. CV-96-888 (the “Lower Rio Grande Adjudication”); and

WHEREAS, the Parties acknowledge that the water administrative system implemented by United States Bureau of Reclamation (“BOR”) pursuant to the 2008 Operating Agreement for the Rio Grande Project was intended to offset increased groundwater diversions in New Mexico and that, to date, the BOR continues to operate the Rio Grande Project pursuant to the 2008 Operating Agreement; and

WHEREAS, it is an essential purpose of the Parties to maintain the balance between water supply and water demand in order to preserve access to water required for irrigation, domestic, commercial, municipal and other important uses in the Lower Rio Grande; and

WHEREAS, in order to achieve these goals and purposes, the Parties believe a number of agreements must be reached and programs implemented and, to that end, have prepared this Settlement Framework to identify and agree to work on further measures that may be undertaken; and

WHEREAS, instead of litigation, the Parties seek to resolve disputes over (1) priority dates, (2) irrigator claims for a surface water priority date for supplemental groundwater rights, (3) future *inter se* challenges, (4) issues involving the 2008 Operating Agreement and (5) claims in *Texas v. New Mexico and Colorado*, No. 141 Original (U.S. Supreme Ct.) ("*Texas v. New Mexico*"), by cooperative management that will protect Rio Grande Project supplies, implement adaptive management of groundwater to assure a sustainable and resilient level of use and establish mechanisms for efficient and expedited change of use of water.

NOW, THEREFORE, each of the Parties having the good faith intention to work collaboratively and cooperatively with the other Parties hereto, to the best of its ability, with the common goal of successful completion and implementation of such measures, the Parties agree to the following:

### AGREEMENT AND UNDERSTANDINGS

#### I. Purposes:

A. Groundwater Management. This Settlement Framework calls for development and implementation of sustainable, adaptive and resilient groundwater management in the Lower Rio Grande. By implementing mechanisms to adapt to potential supply shortages and to achieve appropriate balances between water supply and demand, the purposes of any future groundwater management agreement are that allocations of Rio Grande Project water supply are met, that senior groundwater uses are protected and that groundwater uses will become more sustainable. At this time the LRG faces many challenges and questions regarding the use and availability of supply. The future will likely bring greater demand on a limited resource which may result in water shortages. Use of groundwater is vital to the livelihood and economy within the LRG. Administration of groundwater within the LRG must preserve the basin's ability to provide a long-term water supply for all water right owners and users, required for irrigation, domestic, commercial, municipal and other important uses. In particular, this Settlement Framework calls for alternative administration of groundwater pumping in the LRG in place of strict priority enforcement which will be embodied in a groundwater management agreement, adopted and agreed to in writing by all Parties hereto, and that will contain the following elements (the "Groundwater Management"):

- a. Protection of Rio Grande Project supplies and senior groundwater uses;
- b. Adaptive management of groundwater to assure a sustainable and resilient level of use; and
- c. Establishment of mechanisms for efficient and expedited change of use of water.

B. Resolution of Legal Disputes. By implementing Groundwater Management, the Parties desire to resolve pending legal disputes. A number of priority date and quantity issues are currently pending before the adjudication court in *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist.) (LRG Adjudication). By implementation of Groundwater Management, these issues can be resolved without further litigation among the parties. Specifically, the following pending matters can be settled in the LRG Adjudication:

- a. Stream System Issue 104: priority date claims;
- b. Stream System Issue 101: irrigator claims for a surface water priority date for supplemental groundwater rights; and
- c. Future *inter se* challenges.

Also, because this Settlement Framework calls for support and adoption of a revised 2008 Operating Agreement by the Parties and in a form acceptable to the Parties and the State of New Mexico, the Parties desire resolution of all claims in *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. 1:2011-cv-00691-JB-ACT (D.N.M. filed August 8, 2011) (“AG Lawsuit”). Similarly, because implementation of Groundwater Management in the LRG in New Mexico in conformance with the terms of the revised Operating Agreement will protect Rio Grande Project deliveries, the Parties seek to assist in the resolution of *Texas v. New Mexico*.

II. Implementation of Groundwater Management. As a long-term and adaptive management solution, the Parties will develop and make good faith, diligent efforts to implement Groundwater Management of the LRG containing the following elements: (1) protection of Rio Grande Project supplies, (2) protection of senior groundwater uses, (3) adaptive management of groundwater to assure a sustainable and resilient level of use, and (4) establishment of mechanisms to change the use of water.

Part 1: Protection of Project Supplies and Senior Groundwater Uses

- a. In order to assure continued availability of LRG groundwater, the Parties recognize that junior groundwater pumping must not impair the surface supplies of the Rio Grande Project.
- b. The Parties will make good faith, diligent efforts to take the following steps to protect Project supplies:
  1. Address issues in 2008 Operating Agreement.
    - Identify technical issues that need understanding and resolution and set up a process for accomplishing these objectives, including determining the amount of recoverable groundwater in storage and available for use by the Parties.

- Obtain support of Elephant Butte Irrigation District ("EBID") and the State (resolution of AG lawsuit)
  - As stated below in III(B), the Parties agree to support the adoption of a revised 2008 Operating Agreement in a form acceptable to the Parties, EBID and the State of New Mexico in order to resolve the claims in the AG Lawsuit.
2. Establish methods for quantifying and managing surface water depletions caused by junior groundwater use not covered by the revised Operating Agreement.
  3. Identify any other sources of surface water depletions to be addressed.

Part 2: Adaptive Management of Groundwater

- a. In order to assure a sustainable and resilient level of groundwater pumping, the Parties recognize that reduction of current groundwater pumping may be required in certain climatological circumstances and, if so, adaptive management will be essential over time to monitor and manage pumping effects.
- b. The Parties will take the following steps to implement adaptive management of groundwater:
  1. Determine the physical characteristics of the aquifer to inform what level of future pumping is sustainable.
    - Under what current and projected conditions can aquifer storage operate to provide a full supply to existing rights?
    - Establish baseline for long-term aquifer storage.
  2. Implement adaptive management of irrigation groundwater in response to climatological and aquifer base-line triggers.
    - Voluntary Rotational fallowing
    - Other fallowing programs
    - Wet-water recharge programs
  3. Implement conservation programs that reduce depletions.
  4. Develop a management and enforcement program.
    - Work with the State, in consultation with EBID, to establish workable groundwater management and enforcement structures.

- Consider creation of groundwater district.
- 5. Consider and obtain funding/implement funding mechanisms.
  - State and Federal funding for fallowing of land.
  - Possible local assessment on pumping (e.g., groundwater management districts in San Luis Valley, CO).
- 6. Assess the potential for acquiring new supplies.

Part 3: Mechanisms for moving water around

- a. The Parties agree that mechanisms will be needed to allow for the efficient change of use of water from one user to another or from one type of use to another in order to achieve protection of the Project supplies (Part 1) and management of groundwater (Part 2).
- b. The Parties will work with the State, in consultation with EBID, to investigate and where appropriate seek establishment of the following mechanisms to move water around:
  - 1. Water banking for year-to-year allocation of water.
  - 2. Dry-year Reliability Contracts.
  - 3. Long-term severance and transfer of agricultural rights to other ag users (stacking of irrigation water/retirement of less productive lands).
  - 4. Transfer of senior agricultural rights for junior municipal & industrial offsets.
    - Conversion contract under miscellaneous purposes act
    - Special Water Users Assoc.
    - State law transfer, including leases
    - EBID Depletion Reduction Offset Program ("DROP")
  - 5. Other offsets mechanism such as return flow and recharge.

III. Resolution of Legal Disputes. In order to implement Groundwater Management, the Parties will seek to resolve the following legal disputes:

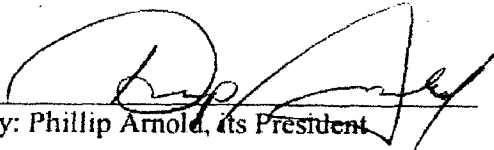
A. Lower Rio Grande Adjudication. The Parties will seek to settle the the following issues and matters currently pending before the adjudication court in Lower Rio Grande Adjudication, as outlined below:

1. Stream System Issue 104: priority date claims. In order to settle the pending 104 litigation, this Settlement Framework contemplates that the Parties to that proceeding enter a no-call agreement providing that the holders of rights to surface water delivered by EBID and supplemental groundwater rights (i.e., EBID members with a combined right of 3.02 acre-feet per acre having a 1906 or earlier priority) and senior groundwater right holders (Las Cruces 1905 and NMSU 1890) agree to forgo a call against one another. All three sets of rights will be administered as having a co-priority and the Parties will be entitled to use their senior rights and/or to market available senior water pursuant to the change of use mechanisms under part 3 above.
2. Stream System Issue 101: irrigator claims to senior supplemental groundwater rights. Parties agree that EBID members with combined surface and groundwater right will have 3.02 acre-feet diversion with a priority of 1906 or earlier. Of that diversion amount, 2.6 afy of consumptive use will be available as a surface water offset for M&I groundwater users pursuant to the change of use mechanisms under part 3 above. The priority date for EBID member groundwater diversion in excess of the combined amount of 3.02 acre-feet shall be date of drilling.
3. Future *inter se* challenges. The Parties agree to not make *inter se* challenges against each other's water rights, including any challenges to subfile orders of City of Las Cruces and NMSU. Settlement is conditioned on the quantities, priority dates and other terms contained in those subfile orders being confirmed by final judgment and decree in the adjudication.
4. Conditions. The Parties agree that agreements and commitments relating to the Lower Rio Grande Adjudication set forth in this Settlement Framework are contingent upon the achievement of a binding comprehensive settlement agreement relating to all of the issues encompassed by this Settlement Framework.

B. Federal lawsuits. The Parties agree to support the adoption of the 2008 Operating Agreement in a form acceptable to the Parties, EBID and the State of New Mexico in order to resolve the claims in the AG Lawsuit. Similarly, because implementation of Groundwater Management in the LRG in New Mexico in conformance with the terms of the revised Operating Agreement will protect Rio Grande Project deliveries, the Parties will seek to assist in the resolution of *Texas v. New Mexico*, although nothing contained herein shall preclude Parties from appearing as *amici* in that case.

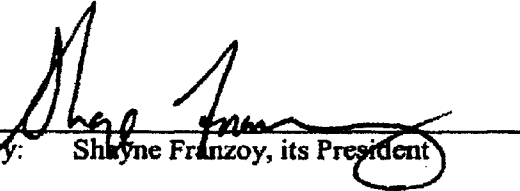
C. Cooperative Planning Document. This Settlement Framework shall not be construed to establish precedent or to resolve any question of law or fact in the Lower Rio Grande Adjudication or any other judicial or administrative proceeding. The agreement of the Parties to work together shall not be construed to: (1) be a determination or evidence of, or to establish or acquiesce to, any claim to a priority date for a party's water right; (2) establish a precedent for operations or water administration in the Lower Rio Grande in the absence of an agreement as to an administration plan agreed to by the Parties and approved by the State Engineer; (3) be an agreement as to the validity or applicability of, or to imply an accepted modification to, any orders issued by the Lower Rio Grande Adjudication Court or any other court with jurisdiction over water rights matters in the Lower Rio Grande; (4) establish any cause and effect relationships between any water uses including streamflow impacts, water supplies or shortages; (5) establish any priorities between water users; (6) establish any entitlements to water; (7) alter or amend any pre-existing agreements between Parties unless otherwise expressly agreed to by Parties to said agreements; or (8) commit any Party to enter into or to approve any future agreement or future action not subsequently approved by authorized representatives of that Party.

**NEW MEXICO PECAN GROWERS:**

  
By: Phillip Arnold, its President

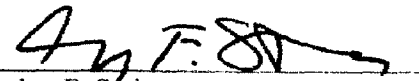
Date: 6/10/16

**SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS:**

  
By: Shayne Franzoy, its President

Date: 6/1/16

**CITY OF LAS CRUCES:**

  
By: Jay F. Stein  
Stein & Brockmann, PA

Date: 5/26/16



**NEW MEXICO STATE UNIVERSITY:**



By: Debra Hicks, its Board of Regents Chair

Date: 6/27/2016

**PUBLIC SERVICE COMPANY OF NEW MEXICO:**



By: Chris Olson, its Vice President

Date: 6-14-16

**CAMINO REAL REGIONAL UTILITY AUTHORITY:**



By: Joshua Orozco, its Board of Directors Chair

Date: 6/30/2016