

NEW MEXICO INTERSTATE STREAM COMMISSION

COMMISSION MEMBERS

CALEB CHANDLER, Chairman, Clovis
TOM BLAINE, P.E. Secretary
JIM DUNLAP, Farmington
BUFORD HARRIS, Mesilla
BLANE SANCHEZ, Isleta
MARK SANCHEZ, Albuquerque
JAMES WILCOX, Carlsbad
TOPPER THORPE, Cliff



BATAAN MEMORIAL BUILDING, ROOM 101
POST OFFICE BOX 25102
SANTA FE, NEW MEXICO 87504-5102
(505) 827-6160
FAX: (505) 827-6188

September 19, 2016

Shirley A. Swapp
1892 Luna Irrigation Ditch Association
PO Box 144
Luna, NM 87824

RE: Ditch Improvement Design and Engineering Funding Agreement – 1892 Luna
Irrigation Ditch Association

Dear Ms. Hudman,

This letter shall serve as official notice to proceed up to \$30,000 of the 1892 Luna
Irrigation Ditch Association Ditch Improvement Design and Engineering Funding
Agreement

Please make sure that all invoices that are submitted under this agreement reference the
Purchase Order number 55000-0000016201.

All deliverables under this contract will be due to the ISC as stated in the agreement..

If you have any questions regarding the agreement, please contact Ali Effati at (505) 827-
5801.

Sincerely,



Kim Abeyta-Martinez
Administrative Manager
Interstate Stream Commission

Copy to:
Ali Effati
Marcos Mendiola
Contract File



State of New Mexico Purchase Order

PO Number to be on all Invoices and Correspondence
Dispatch via Print

Office of State Engineer
P.O. Box 25102
Santa Fe NM 87504-5102
United States

Vendor: 0000127488
1892 LUNA IRRIGATION DITCH ASSOCIATION
PO BOX 144
LUNA NM 87824-0144

Purchase Order 55000-0000016201	Date 09/07/2016	Revision	Page 1
Payment Terms Pay Now	Freight Terms FOB Destination	Ship Via Best Way	
Buyer STEVEN BAROS		Phone	

Ship To: P.O. Box 25102
Santa Fe NM 87504-5102
United States

Bill To: P O Box 25102
Santa Fe NM 87504-5102
United States

Origin: EXE **Exc\Excl #:** 13-1-98A

Line-Sch	Item/Description	Mfg ID	Quantity	UOM	PO Price	Extended Amt	Due Date
1- 1	FY17, Design and engineering required to complete the construction of the permanent point of diversion		1.00	EA	30,000.00	30,000.00	09/07/2016
	55000-30810-A150100-547400- - - -91648-50000						
Schedule Total						<u>30,000.00</u>	
Item Total						<u>30,000.00</u>	
Total PO Amount						<u>30,000.00</u>	

Agency Approval - I certify that the proposed purchase represented by this document is authorized by and is made in accordance with all State (and if applicable Federal) legislation rules and regulation. I further certify that adequate unencumbered cash and budget expenditure authority exists for this proposed purchase and all other outstanding purchase commitments and accounts payable.

Authorized Signature

**STATE OF NEW MEXICO
INTERSTATE STREAM COMMISSION
1892 LUNA IRRIGATION DITCH ASSOCIATION
DITCH IMPROVEMENT DESIGN AND ENGINEERING
FUNDING AGREEMENT**

THIS AGREEMENT is made and entered into by and between the New Mexico Interstate Stream Commission, 407 Galisteo Street, Santa Fe, New Mexico, 87501, hereinafter called the “ISC” or the “Commission” and the 1892 Luna Irrigation Ditch Association, hereinafter called the “Ditch Association.” Collectively, the ISC and the Ditch Association shall be referred to as the “Parties.”

RECITALS

WHEREAS, pursuant to NMSA 1978, Section 72-14-3, the ISC is authorized to investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the water and stream systems of this state; and

WHEREAS, in the Arizona Water Settlements Act, Pub. L. 108-451, (“AWSA”) the Congress of the United States appropriated funds to the ISC to finance a New Mexico Unit or other water utilization alternatives to meet water supply demands in the Southwest Water Planning Region of New Mexico, as determined by the ISC; and

WHEREAS, pursuant to the AWSA, those funds are being deposited in yearly installments into the New Mexico Unit Fund, a fund created by the New Mexico Legislature in the New Mexico Treasury for the specific purpose of receiving AWSA money (NMSA 1978, Section 72-14-45); and

WHEREAS, at its November 24, 2014 public meeting, the ISC approved an allocation of \$100,000 from the New Mexico Unit Fund for construction of a permanent point of diversion for the Ditch Association for a non-NM Unit Project to meet water supply demands; and

WHEREAS, part of the funding allocation from the ISC is intended for the design and engineering required to complete the construction of the permanent point of diversion; and

WHEREAS, in accordance with the Commission’s decision, the ISC will provide funds to the Ditch Association for design and engineering work on a reimbursement basis, in accordance with the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual benefits, covenants and obligations contained herein, the Parties hereby agree as follows:

ARTICLE I. PROJECT DESCRIPTION, AMOUNT OF FUNDING, REVERSION DATE AND PROJECT BUDGET

- A. **Project Description.** The project that is the subject of this Agreement is an agricultural water conservation project. Specifically, the Ditch Association plans to increase water delivery efficiency by replacing a temporal push-up dam with a permanent diversion structure.

This diversion structure project is referred to throughout the remainder of this Agreement as the "Project." This Agreement is limited to funding for the design and engineering work necessary for the Project. The design and engineering work will be covered in the Design and Engineering Proposal, described below. The information contained in Article I(A) and in the Proposal Form, attached hereto as Exhibit A, is referred to collectively throughout the remainder of this Agreement as the "Design Proposal." This Design Proposal shall be incorporated into, and made a part of, this Agreement. The Ditch Association shall reference the Design Proposal in all correspondence with, and submissions to, the ISC concerning the Design Proposal or Project, including, but not limited to, Requests for Payment and reports.

- B. **Amount of Funding.** Total reimbursements by the ISC to the Ditch Association for the design and engineering phase shall not exceed Thirty Thousand Dollars (\$30,000) (the "Funding Amount").
- C. **Reversion Date.** The Parties agree that the funding for the Design Proposal must be expended by the Ditch Association by June 30, 2017. That date is referred to throughout the remainder of this Agreement as the "Reversion Date." This Agreement shall be effective as of the date of execution by the last signatory (the "Effective Date"). It shall terminate on June 30, 2017, the Reversion Date, unless terminated by either Party before the Reversion Date ("Early Termination"), pursuant to Article V herein. On the Reversion Date, any part of the Funding Amount not expended by the Ditch Association will revert to the ISC and will be available for use by Ditch Association for construction work on the Project.
- D. **Design Proposal Budget.**
- (i) **Design Proposal Budget, Generally.**
- (1) The Ditch Association agrees that it will expeditiously initiate and timely complete the Design Proposal.
- (2) The Ditch Association agrees that it will prepare a Proposal Budget ("Proposal Budget"), which will outline all steps to be completed to pursue and finance the Design Proposal, including, but not limited to, how the Funding Amount will be spent.

- (4) No funds from the New Mexico Unit Fund shall be expended towards the Design Proposal until the Proposal Budget has been approved by the ISC.
 - (5) The Ditch Association will not be reimbursed from the New Mexico Unit Fund for any part of any expenditure that is not included in the Proposal Budget approved by the ISC staff.
 - (6) The Ditch Association agrees to make no change to the Proposal Budget, without first submitting to the ISC staff for its approval a written amendment to the Proposal Budget.
- (ii) Submitting the Project Budget. The Ditch Association shall submit to the ISC staff an executed Proposal Budget on a form provided by the ISC staff and attached hereto as Exhibit A. This Proposal Budget shall be incorporated into, and made a part of, this Agreement. The Proposal Budget shall list all the proposed tasks that the Ditch Association believes are reasonably necessary to accomplish the Design Proposal. Out of that list, the Proposal Budget shall outline all the tasks for which the Ditch Association plans on seeking reimbursement from the Funding Amount and all the tasks from which the Ditch Association plans on obtaining additional funding from other sources.

ARTICLE II. LIMITATION ON ISC'S OBLIGATION TO MAKE REIMBURSEMENTS TO DITCH ASSOCIATION

- A. Upon the Effective Date of this Agreement, for permissible purposes within the scope of the Design Proposal, the Ditch Association shall be reimbursed by the ISC for certain expenses associated with the Design Proposal up to the limit of the Funding Amount. No reimbursement shall be made unless the Ditch Association has received a Notice to Proceed ("NTP") from the ISC. This Agreement and the disbursement of any and all amounts of the above-referenced Funding Amount are expressly conditioned upon the following:
- i. The Ditch Association's expenditures shall be made on or before the Reversion Date or, if applicable, the Early Termination Date. This means that the goods will have been delivered and accepted, or the title to the goods will have been transferred to the Ditch Association, and/or the services will have been rendered to the Ditch Association before the Reversion Date or, if applicable, the Early Termination Date; and
 - ii. The total amount reimbursed by the ISC to the Ditch Association or Ditch Association's contractors shall not exceed the Funding Amount identified in Article I(B); and
 - iii. The Ditch Association shall commit to obtaining or providing any additional funds necessary if the Funding Amount is insufficient to pay for the entire cost of the Design Proposal; and

- iv. The Ditch Association's expenditures shall be made pursuant to the Ditch Association's legal procurement in accordance with the New Mexico Procurement Code, NMSA 1978, Sections 13-1-21 through 13-1-199, and execution of binding written obligations or purchase orders with third party contractors or vendors for the provision of services, including professional services, or the purchase of tangible personal and real property; and
- v. The Ditch Association shall timely submit a form requesting payment ("Request for Payment") using the form attached hereto as Exhibit B in accordance with the procedures set forth in this Agreement; and
- vi. In the event that capital assets acquired with Funding Amount are to be sold, leased, or licensed to, or operated by a private entity, the sale, lease, license, or operating agreement:
 - (1) Must be approved by the applicable oversight entity (if any) in accordance with law;
 - (2) If no oversight entity is required to approve the transaction, the ISC must approve the transaction in advance.

Prior to the sale, lease, license or operating agreement being approved pursuant to subparagraph (1) or (2) above, the ISC may, in its discretion, and unless inconsistent with New Mexico State Board of Finance-imposed conditions, reimburse the Ditch Association for necessary expenditures incurred to develop the Design Proposal sufficiently to make the sale, lease, license, or operating agreement commercially feasible, such as plan and design expenditures.

- B. The Ditch Association shall implement the Design Proposal in all respects. The Ditch Association shall provide all necessary qualified personnel, material, and facilities to implement the Design Proposal. The Ditch Association shall finance its share, if any, of the costs of the Design Proposal, including all Proposal overruns.
- C. The Funding Amount shall not be used for purposes other than those specified in the Design Proposal, Scope of Work and the tasks described in the Proposal Budget. All Design Proposal expenditures will conform to the Scope of Work incorporated into this Agreement.
- D. The Ditch Association shall make all purchases under this Agreement in compliance with the requirements of New Mexico law, including, without limitation, the New Mexico Procurement Code, NMSA 1978, Sections 13-1-21 through 13-1-199. Failure to observe the New Mexico Procurement Code is a misdemeanor and may result in criminal and civil penalties.

ARTICLE III. NOTICE PROVISIONS; DESIGNATED REPRESENTATIVES

through 13-1-199. Failure to observe the New Mexico Procurement Code is a misdemeanor and may result in criminal and civil penalties.

ARTICLE III. NOTICE PROVISIONS; DESIGNATED REPRESENTATIVES

Whenever written notices related to this Agreement, including written decisions, are to be given, the following provisions shall apply:

The Parties hereby designate the persons listed below as their official representatives concerning all matters related to this Agreement:

DITCH ASSOCIATION

Name: Shirley A. Swapp
Address: PO Box 144
Luna, NM 87824
Email: sswapp@usa.net or shirleyswapp@msn.com
Telephone: (575) 547-2878

INTERSTATE STREAM COMMISSION

Name: Craig Roepke
Address: P.O. Box 25102
Santa Fe, NM 87504-5102
Email: craig.roepke@state.nm.us
Telephone: (505) 827-4130

The Parties agree that they shall send all notices related to this Agreement to the above-named persons by regular mail or e-mail. In the case of mailings, notices shall be deemed to have been given and received upon the date of the receiving Party's actual receipt or five calendar days after mailing, whichever occurs first. In the case of e-mail transmissions, the notice shall be deemed to have been given and received on the date reflected on the delivery receipt of the e-mail.

ARTICLE IV. EXPANSION OF FUNDS

The Funding Amount must be "expended" on or before the Reversion Date, set forth in Article I or, if applicable, the Early Termination Date of this Agreement, set forth in Article VI, below. For purposes of this Agreement, it is not sufficient for the Ditch Association to encumber the Proposal funds on its books on or before the Reversion Date or Early Termination date. Rather, funds are expended, and an expenditure has occurred, as of the date that a particular quantity of goods are delivered to, and received by, the Ditch Association, or title to the goods is transferred to the Ditch Association, as of the date particular services are rendered for the Ditch Association. Funds are *not* expended and an expenditure has *not* occurred as of the date they are encumbered by the Ditch Association pursuant to a contract or purchase order with a third party.

ARTICLE V. EARLY TERMINATION

A. Circumstances of Early Termination

Early Termination includes:

- (i) Termination due to completion of the Design Proposal before the Reversion Date;
- (ii) Termination due to expenditure of the total Funding Amount before the Reversion Date;
- (iii) Termination for violation of the terms of this Agreement; or
- (iv) Termination for suspected mishandling of public funds, including, but not limited to, fraud, waste, abuse, and conflicts of interest.

Either the ISC or the Ditch Association may terminate this Agreement prior to the Reversion Date. Early Termination can be accomplished by providing the other Party with a minimum of fifteen (15) days' advance written notice of Early Termination. The Ditch Association hereby waives any rights to assert an impairment of contract claim or a breach of contract claim against the ISC or the State of New Mexico in the event of Early Termination of this Agreement by the ISC pursuant to this Section of this Agreement.

B. Early Termination Due to Non-Appropriation

The terms of this Agreement appear to be independent of appropriations and authorization being made by the Legislature of the State of New Mexico, and available to the ISC, for the performance of this Agreement. However, the Legislature may, in its discretion, appropriate or un-appropriate funds for projects. If the Legislature un-appropriates funds that are earmarked for this Agreement, the ISC shall have the sole discretion to terminate this Agreement earlier than its Reversion Date, as of the effective date of the law making an un-appropriation. The ISC's decision as to whether sufficient appropriations or authorizations are available shall be accepted by the Ditch Association and shall be final. The Ditch Association hereby waives any rights to assert an impairment of contract claim or a breach of contract claim against the ISC or the State of New Mexico in the event of Early Termination of this Agreement by the ISC pursuant to this section of the Agreement.

C. Limitation on the ISC's Obligation to Make Disbursements in the Event of Early Termination

In the event of Early Termination of this Agreement by either Party, the ISC's sole obligation to reimburse the Ditch Association is expressly conditioned upon the limitations set forth in this Agreement.

ARTICLE VI. SUSPENSION OF NEW OR FURTHER OBLIGATIONS

A. Suspension.

The ISC may choose, in its absolute discretion, to direct the Ditch Association to suspend entering into new and further obligations to be paid by the ISC pursuant to this Agreement (“Suspension”). The ISC shall provide written notice of the Suspension to the Ditch Association in accordance with the provisions of this Agreement.

If a Suspension directive is issued:

- (i) Upon the date the Ditch Association receives written notice of Suspension from the ISC, the Ditch Association shall immediately suspend entering into new or further written obligations with third parties; and
- (ii) The ISC may suspend issuance of any new or further NTP under this Agreement.
- (iii) The ISC may direct the Ditch Association to implement a corrective action plan in accordance with this Agreement.

B. Reimbursement.

In the event of Suspension of this Agreement, the ISC’s sole obligation to reimburse the Ditch Association is expressly conditioned upon the limitations set forth in this Agreement.

C. Lifting of Suspension.

A Suspension of new or further obligations under this Agreement shall remain in effect until, the date the Ditch Association receives written notice from the ISC informing the Ditch Association that the Suspension has been lifted or that the Agreement has been terminated early in accordance with Article V herein. If the Suspension is lifted, the ISC will consider further requests for NTPs.

D. Corrective Action Plan in the Event of Suspension.

In the event that the ISC, in its sole and absolute discretion, issues a Suspension to the Ditch Association under this Agreement, the ISC may, but is not obligated to, require the Ditch Association to develop and implement a written corrective action plan to remedy the grounds for the Suspension. Such corrective action plan must be signed by the Ditch Association and approved by the ISC. Failure to sign a corrective action plan, or to meet the terms and deadlines set forth in the signed corrective action plan, shall be deemed a violation of the terms of this Agreement for purposes of Early Termination. The corrective action plan is in addition to,

and not in lieu of, any other equitable or legal remedy available to the ISC, including, but not limited to, Early Termination.

ARTICLE VII. AMENDMENT

This Agreement can only be amended by a written instrument duly executed by all the Parties hereto.

ARTICLE VIII. REPORTS AND INSPECTION

A. Periodic Reports

In order that the ISC staff may adequately monitor Proposal activity, the Ditch Association shall submit to the ISC Periodic Reports for the Design Proposal. The Periodic Report shall be submitted by the Ditch Association and shall be submitted on a form prescribed by the ISC. The Periodic Report form is attached hereto as Exhibit C.

The Periodic Report shall be due quarterly on the last day of each quarter, beginning with the first full quarter following execution of this Agreement by the last signatory and ending with the submission of a Final Report for the Design Proposal. The ISC may, in its discretion, change the reporting period from time to time by giving the Ditch Association a minimum of thirty (30) days' advance written notice of any change to the reporting period; provided, however, that in no event shall the reporting period be less than one month.

B. Final Report

The Ditch Association shall submit to the ISC a Final Report for the Design Proposal. The Final Report shall be submitted by the Ditch Association and include the final design and engineering report for the Project signed by a professional engineer. The Final Report shall be submitted on a form provided by the ISC and identical to the form used for Periodic Reports, and shall contain such information as the ISC may require. The Periodic and Final Report form is attached hereto as Exhibit C. The ISC shall provide the Ditch Association with a minimum of thirty (30) days' advance written notice of any change to the Final Report format or content. The Final Report must be submitted within twenty (20) days after the Proposal's Reversion Date or within twenty (20) days of the date of Early Termination, whichever occurs first.

C. Requests for Additional Information/Project Inspection

During the term of this Agreement and during the period of time during which the Ditch Association must maintain records pursuant to this Agreement, the ISC may (i) request such additional information regarding the Proposal as it deems necessary and (ii) conduct, at reasonable times and upon reasonable notice, on-

site inspections of the Design Proposal work. The Ditch Association shall respond to such requests for additional information within a reasonable period of time, as established by the ISC. The ISC may inspect Project progress prior to disbursing funds in response to Requests for Payment. Requests made pursuant to this subparagraph are in addition to, and not in lieu of, the periodic and final reporting described in this Article VIII.

D. ISC Oversight

Pursuant to the limitations contained in Article XIV, any inspection, review and approval of the Design Proposal itself or the Periodic and Final reports, as described above, are only for purposes of compliance with the terms of the Agreement and any other grant requirements. ISC inspection, review and approval will not be interpreted as any warranty or guarantee of any kind.

ARTICLE IX. REQUEST FOR PAYMENT PROCEDURES AND DEADLINES

A. Request for Payment.

The Ditch Association shall request payment by submitting a Request for Payment, in the format of the document attached hereto as Exhibit B. Requests for Payment are subject to the following procedures:

- (i) The Ditch Association must submit one original and one copy of each Request for Payment; and
- (ii) Each Request for Payment shall contain proof of payment by the Ditch Association, or proof of liabilities incurred by the Ditch Association, in the form of copies of invoices and a certification by Ditch Association's representative as designated in Article III herein. The certification must state that the expenditures are valid, or are liabilities incurred by the Ditch Association, for services rendered by a third party or goods received by the Ditch Association for the implementation of the Design Proposal; and
- (iii) Each Request for Payment must be certified as approved for payment by the ISC representative who is currently providing oversight of the Project; and
- (iv) When the Ditch Association is submitting a Request for Payment to the ISC based upon invoices from a third party contractor or vendor received, but not yet paid by the Ditch Association, if the invoices comply with the provisions of this Agreement and are a valid liability of the Ditch Association, the Ditch Association shall make payment to those contractors or vendors upon the invoice within fifteen (15) calendar days from the date of cashing or depositing the payment from the ISC.

B. Deadlines.

Requests for Payments shall be submitted by the Ditch Association to the ISC within thirty (30) days of the date each respective invoice is received by the Ditch Association from a contractor, or within thirty (30) days from the date this Agreement expires or is terminated. Provided, however, due to New Mexico fiscal year deadlines imposed by the New Mexico Department of Finance and Administration, for work completed by June 30th of any given year, the Ditch Association must submit all invoices by July 15th of that same year in order to be reimbursed. Any invoice covering expenses incurred prior to June 30th received after July 15th will not be reimbursed.

C. Payment Processing.

- (i) The Ditch Association's failure to abide by the requirements set forth in Article II herein may result in the denial of its Request for Payment or in delays in processing of Requests for Payment. The ISC has the right to reject a Request for Payment for the Project unless and until it is satisfied that the expenditures in the Request for Payment are for permissible purposes within the meaning of the Design Proposal and that the expenditures, and the Ditch Association, are otherwise in compliance with this Agreement. The ISC's ability to reject any Request for Payment is in addition to, and not in lieu of, any other legal or equitable remedy available to the ISC due to any violation of this Agreement by the Ditch Association.
- (ii) Pursuant to the limitations contained in Article XIV, any approval of a Request for Payment, as described above, by the ISC will not be interpreted as any warranty or guarantee of any kind.

**ARTICLE X. DESIGN PROPOSAL CONDITIONS AND RESTRICTIONS;
REPRESENTATIONS AND WARRANTIES**

A. The following general conditions and restrictions are applicable to the Design Proposal:

- (i) The Funding Amount must be spent in accordance with all applicable laws, regulations, policies, and guidelines, including, but not limited to, the New Mexico Procurement Code, NMSA 1978, Sections 13-1-28 through 13-1-199, or any local procurement ordinance, where applicable.
- (ii) The work complete pursuant to the Design Proposal must be implemented in accordance with the New Mexico Public Works Minimum Wage Act, NMSA 1978, Sections 13-4-10 through 13-4-17, if applicable. Every contract or project in excess of sixty thousand dollars (\$60,000) that the Ditch Association is a party to for construction, alteration, demolition or

repair or any combination of these, including painting and decorating, of public buildings, public works or public roads and that requires or involves the employment of mechanics, laborers or both shall contain a provision stating the minimum wages and fringe benefits to be paid to various classes of laborers and mechanics, shall be based upon the wages and benefits that will be determined by the New Mexico Department of Workforce Solutions to be prevailing for the corresponding classes of laborers and mechanics employed on contract work of a similar nature in the locality. Further, every contract or project shall contain a stipulation that the contractor, subcontractor, employer or a person acting as a contractor shall pay all mechanics and laborers employed on the site of the project, unconditionally and not less often than once a week and without subsequent unlawful deduction or rebate on any account, the full amounts accrued at time of payment computed at wage rates and fringe benefit rates not less than those determined pursuant to NMSA 1978, Section 13-4-11(B) to be the prevailing wage rates and prevailing fringe benefit rates issued for the Project.

- (iii) The Design Proposal may benefit private entities only in accordance with applicable law, including, but not limited to, Article IX, Section 14 of the Constitution of the State of New Mexico, the “Anti-Donation Clause.”
- (iv) The Ditch Association shall not, at any time, convert any property acquired or developed with the Funding Amount to uses other than those specified in the Design Proposal without the ISC's express advance written approval.
- (v) The Ditch Association shall comply with all federal and state laws, rules and regulations pertaining to equal employment opportunity. In accordance with all such laws, rules and regulations, the Ditch Association agrees to assure that no person shall be excluded from employment with Ditch Association, be excluded from participation in the Design Proposal, be denied benefits or otherwise be subject to discrimination under any activity performed pursuant to this Agreement on the grounds of race, color, national origin, sex, sexual preference, age, or handicap in accordance with all such laws, rules and regulations. If the Ditch Association is found not to be in compliance with these requirements during the life of this Agreement, the Ditch Association agrees to take appropriate steps to correct any deficiencies. The Ditch Association's failure to implement such appropriate steps within a reasonable time constitutes grounds for terminating this Agreement.
- (vi) Contractors utilized to complete the Design Proposal will be required to post a performance bond in accordance with the requirements of NMSA 1978, Section 13-4-18 (1978), and obtain any necessary easements and all required permits required by public entities.

- (vii) The Ditch Association shall be solely responsible for the construction, maintenance, and operation of all equipment and improvements associated with the Design Proposal. The Ditch Association agrees that the State of New Mexico and its agencies, including the OSE/ISC and its employees, are not in any way responsible for the operation, maintenance, management, replacement, construction, or supervision of any aspect or part of the Proposal. This provision shall survive termination of this Agreement.
- (viii) The Ditch Association shall perform all operations and maintenance of the Project for the design life of the Project after completion and acceptance of the work under the construction contract(s) to assure satisfactory operation of the Project and service to the members of the Ditch Association. The Ditch Association's obligation to maintain the Project will survive Project Close Out, and last for the Project's design life.
- (ix) A Party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that Party's right thereafter to demand strict compliance with that or any other provision. No waiver by a Party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a Party of any of its rights shall be effective to waive any other rights.

B. The Ditch Association hereby represents and warrants the following:

- (i) The Ditch Association is recognized as a political subdivision of the state pursuant to NMSA 1978, Chapter 73, Article 2, and has the legal authority to receive and expend Project funds.
- (ii) This Agreement has been duly authorized by the Ditch Association membership. The Ditch Association's Commission has duly adopted, or passed as an official act, a resolution, motion, or similar action authorizing the persons identified as the official representatives of the Ditch Association to sign this Agreement and to sign Requests for Payment. Once executed by the Ditch Association, this Agreement shall constitute a binding obligation on the Ditch Association, enforceable according to its terms.
- (iii) This Agreement, and the Ditch Association's obligations hereunder, do not conflict with any federal or state law, ordinance or resolution applicable to the Ditch Association, the Ditch Association's bylaws (if applicable), or any judgment or decree to which the Ditch Association is subject.
- (iv) The Ditch Association shall abide by New Mexico laws regarding conflicts of interest, governmental conduct and whistleblower protection.

The Ditch Association specifically agrees that no officer or employee of the local jurisdiction or its designees or agents, no member of the governing body, and no other public official of the locality who exercises any function or responsibility with respect to this Funding Amount, during his/her tenure or for one year thereafter, shall have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for work to be performed pursuant to this Agreement. Further, the Ditch Association shall require all of its contractors to incorporate in all subcontracts the language set forth in this paragraph prohibiting conflicts of interest.

- (v) The Ditch Association certifies that no funds have been paid, or will be paid, to spouses, children, parents, brothers and sisters of members of the Ditch Association's governing body otherwise defined as "immediate family members" in accordance with NMSA 1978, Section 13-1-62, a section of the New Mexico Procurement Code.
- (vi) The Ditch Association certifies that no funds have been paid or will be paid, by, or on behalf, of the Ditch Association, to any person for influencing, or attempting to influence, an officer or employee of this, or any, agency or body in connection with the awarding of any Third Party Obligation. The Ditch Association shall require certifying language prohibiting lobbying to be included in the award documents for all sub-awards, including subcontracts, loans and cooperative agreements. All sub-recipients shall be required to certify accordingly.

**ARTICLE XI. STRICT ACCOUNTABILITY OF RECEIPTS AND
DISBURSEMENTS; PROJECT RECORDS**

- A. The Ditch Association shall be strictly accountable to the ISC for receipts and disbursements relating to the Funding Amount. The Ditch Association shall follow Generally Accepted Accounting Principles, and, if feasible, maintain a separate bank account or fund with a separate organizational code, for the funds provided pursuant to this Agreement, to ensure separate budgeting and accounting of the funds.
- B. For a period of six (6) years following the Project's completion, the Ditch Association shall maintain all Project-related records, including, but not limited to, all financial records, requests for proposals, invitations to bid, selection and award criteria, contracts and subcontracts, advertisements, minutes of pertinent meetings, as well as records sufficient to fully account for the amount and disposition of the total funds from all sources budgeted for the Project, the purpose for which such funds were used, and any such other records as the ISC shall prescribe.

- C. The Ditch Association shall make all Project records available to the ISC, the Department of Finance and Administration, and the New Mexico State Auditor upon request. With respect to the funds that are the subject of this Agreement, if the State Auditor finds that any or all of these funds were improperly expended, the Ditch Association may be required to reimburse the New Mexico Unit Fund of the ISC for any and all amounts found to be improperly expended.
- D. Ditch Association agrees to comply with the terms of the New Mexico Audit Act, NMSA 1978, Sections 12-6-1 through 12-6-14, and any other applicable laws, regulations, policies, and guidelines related to the Audit Act.

ARTICLE XII. IMPROPERLY REIMBURSED FUNDS

If the ISC determines that part, or all, of the Funding Amount was improperly reimbursed to the Ditch Association, including, but not limited to, funds reimbursed to the Ditch Association based upon fraud, mismanagement, misrepresentation, misuse, violation of law by the Ditch Association, or violation of this Agreement, the Ditch Association shall be required to return such funds to the ISC for disposition in accordance with law.

ARTICLE XIII. LIABILITY

Neither Party shall be responsible for liability incurred as a result of the other Party's acts or omissions in connection with this Agreement. Any liability incurred in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act.

ARTICLE XIV. LIMITATIONS

- A. Any inspection, review and approval of the Project itself, including the work conducted pursuant to the Design Proposal, Project plans or designs, the Design Proposal, Periodic and Final reports, or approval of any Payment Requests are only for purposes of compliance with the terms of the Agreement and any other grant requirements. ISC inspection, review and approval will not be interpreted as any warranty or guarantee of any kind. The Ditch Association and its contractors and consultants will remain responsible for the completion and success of the project. Inspection, review or approval by the ISC or ISC staff does not relieve the Ditch Association or any professional engineer hired by the Ditch Association of legal responsibility for the overall integrity of the Project, adequacy of the design, safety, or compliance with all applicable laws and regulations. This provision shall survive termination of this Agreement.
- B. The Ditch Association shall implement the Project in all respects. The Ditch Association shall provide all necessary qualified personnel, material, and facilities to implement the Project. The Ditch Association shall finance or provide Project engineering, permitting, and all Project cost overruns. The Project is the Ditch Association's sole responsibility and nothing herein is intended to impose upon

the ISC any responsibility or liability for any current or future design, construction or maintenance of the Project.

ARTICLE XV. REQUIRED NON-APPROPRIATIONS CLAUSE IN CONTRACTS FUNDED IN WHOLE OR IN PART BY FUNDS MADE AVAILABLE UNDER THIS AGREEMENT

The Ditch Association acknowledges and agrees that it shall include the following termination clause in all contracts between it and third parties that are (i) funded in whole or in part by funds made available under this Agreement and (ii) entered into after the effective date of this Agreement:

“The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico and/or by the State of New Mexico, and available to the ISC for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature and/or by the State of New Mexico, and available to the ISC, the Ditch Association may immediately terminate this Agreement by giving written notice of such termination. The decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. The Contractor hereby waives any rights to assert an impairment of contract or breach of contract claim against the Ditch Association, or the ISC, or the State of New Mexico in the event of immediate or early termination of this Agreement by the Ditch Association pursuant to lack of ISC funds.”

ARTICLE XVI. REQUIRED TERMINATION CLAUSE IN CONTRACTS FUNDED IN WHOLE OR IN PART BY FUNDS MADE AVAILABLE UNDER THIS AGREEMENT

The Ditch Association acknowledges and agrees that the Ditch Association shall include the following termination clause in all contracts that are (i) funded in whole or in part by funds made available under this Agreement and (ii) entered into after the effective date of this Agreement:

“This contract is funded, in whole or in part, by funds made available under a disbursement from the ISC. Should the ISC terminate the agreement providing those funds before the scheduled termination date, the Ditch Association may terminate this contract earlier than its scheduled termination date by providing the Contractor written notice of such termination. In the event of termination pursuant to this paragraph, the Ditch Association’s only liability shall be to pay the Contractor for acceptable goods delivered and services rendered before the termination date.”

ARTICLE XVII. SCOPE OF AGREEMENT

This Agreement constitutes the entire and exclusive agreement between the Ditch Association and the ISC concerning the subject matter hereof. This Agreement supersedes any and all prior or contemporaneous agreements, understandings,

discussions, communications, and representations, written or verbal, between the Parties hereto with regard to the subject matter hereof.

[THIS SPACE LEFT BLANK INTENTIONALLY]

IN WITNESS WHEREOF, the Parties have executed this Contract as of the date of last signature.

DITCH ASSOCIATION

By: Ed Nail
Name: ED NAIL
Title: CHAIRMAN

Date: 7-6-16

By: Shirley A. Swapp
Name:
Title:

Date: 7-6-16

By: Sto Halyz
Name:
Title:

Date: 7-6-16

INTERSTATE STREAM COMMISSION

By: Deborah K Dixon
Deborah Dixon, P.E., Director
Interstate Stream Commission

Date: 8/31/2016

Approved as to Agency budget sufficiency:

By: Mmi
~~Curtis Eckhart~~ Director
Program Support

Date: 8/25/16

Approved as to legal sufficiency:

By: K. Haas for
Amy I. Haas
ISC General Counsel

Date: 8/1/16



**STATE OF NEW MEXICO
INTERSTATE STREAM COMMISSION
Arizona Water Settlements Act of 2004
Non-NM Unit Project
Proposal Form
Exhibit A**



Entity: 1892 LUNA IRRIGATION DITCH ASSOCIATION

Mailing Address: PO Box 144

Telephone: 575 547-2878

Email: sswapp@usa.net

Contact Name: Shirley A. Swapp

Funding Amount:

\$30,000.00

Project Description: Replace the existing diversion method of using heavy equipment to push up channel and bank material across the river channel as needed to divert water into the ditch with a fish friendly concrete diversion structure with associated sediment trap and debris sump.

Design and Engineering Proposal Description (include description of deliverables, need for third-party contractors, cost and completion date – can include additional attachments):

Forest Service (2016) engineer Robert Guegirich has conducted a feasibility study of the proposed diversion. A preliminary design is in progress and expected to be delivered to Gila National Forest and 1892 Luna Irrigation Ditch Association by October 2016.

1892 Luna Irrigation Ditch Association will cost share or contract with Forest Service Design Team or NRCS engineers for final design specification in 2017. Final design to be delivered by no later than end of federal fiscal year 2018. Final design specifications will include:

- Material list (quantity, quality, tests needed), cost estimate, drawings (cross section, blueprints, site plan, etc), schedule of items for contracting, signature of FS engineer approval.
- Two pre-cast concrete diversion structures (channel and ditch) that will incorporate drop log diversion slots, joining of precast pieces and specific placement (angle, channel embeddedness, bank embeddedness, and freeboard).
- Drop structure/apron/pool below structure to prevent back cutting to the diversion and provide fish friendly slope below diversion to allow fish migration above and below structure.
- Two in ditch sediment traps/sumps and associated armoring to provide for sediment retention immediately below the diversion and to reduce sediment load into ditch system. Specification to be low tech, dirt bottom, cleanable by backhoe design.
- Road crossing – hardened, low water crossing for existing road (FS882)

Signature(s) of authorized signatories:

Edward Neil Shiley A. Swapp St Shiley

Date: 7-30-16

ISC Use Only

This Proposal is hereby approved/ not approved.

Name

Title

Interstate Stream Commission

Date



**STATE OF NEW MEXICO
 INTERSTATE STREAM COMMISSION
 Arizona Water Settlements Act of 2004
 Non-NM Unit Projects
 Request for Payment
 Exhibit B**



Date: _____

The Interstate Stream Commission (ISC) is hereby requested to reimburse the following in accordance with the Funding Agreement:

Payee Name and Contract No.: _____

Request No. _____

Address of Payee: _____

Wire transfer to (if applicable): _____

Amount of Payment: _____

Purpose of Payment and Description of Work: _____

Each obligation, item of cost, or expense mentioned herein is for a reimbursement by the ISC to the Payee pursuant to the Funding Agreement between the ISC and the Payee. Each obligation, item of cost, or expense mentioned herein is due and payable, has not been the subject of any previous requisition, and is a proper charge for the aforementioned agreement. All representations in the Funding Agreement and any related documents remain true and correct, and the Payee is not in breach of any covenants contained therein. Supporting material as required by the Funding Agreement is attached.

Payee certifies that it has complied with the terms of the Funding Agreement and with all applicable federal, state, and local laws and regulations, and current orders of courts having jurisdiction over the Payee, including, without limitation, the New Mexico Procurement Code (NMSA 1978, § 13-1-21 *et seq.*).

Signature of Payee's Officer



**STATE OF NEW MEXICO
 INTERSTATE STREAM COMMISSION
 Arizona Water Settlements Act of 2004
 Non-NM Unit Project
 Periodic Report/ Final Report
 Exhibit C**



PERIODIC REPORT FINAL REPORT

Reporting Body: _____ **Reporting Period:** _____

1. PROJECT STATUS

A. Third Party Obligations

Name of Contractor or Vendor: _____

Amount of Third Party Obligation: _____

Third Party Obligation Termination Date: _____

B. Project Phase (provide anticipated date of commencement and completion for each phase)

Plan/Design _____

Bid Documents _____

Construction _____

2. FUNDING STATUS

AWSA Amount: _____

Other Amount and Source of Funds: _____

Total Amount of all Requests for Reimbursement: _____

Total AWSA Amount Expended to Date: _____

Total Other Amount Expended to Date: _____

AWSA Amount Balance as of this Date: _____

PERIODIC REPORT

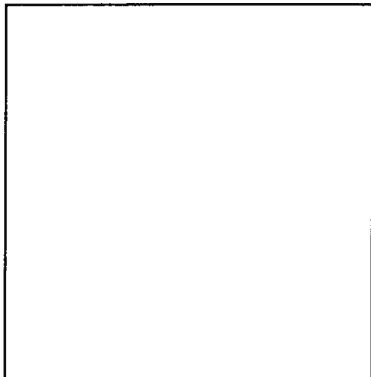
I hereby certify that the aforementioned AWSA funds are being expended in accordance with all requirements of the Funding Agreement, and in compliance with other applicable requirements.

FINAL REPORT

I hereby certify that the aforementioned AWSA-funded project has been completed, and AWSA funds were expended in accordance with all requirements of the Funding Agreement and in compliance with all other applicable laws and regulations.

Signature of Officer

Date



Engineer's seal

I hereby certify that this project is being/has been completed in accordance with the design and specifications made by me.

Engineer's Signature

Date

Printed name

