

DRAFT VERSION

**LOWER RIO GRANDE WATER CONSERVATION PILOT PROGRAM
GRANT AGREEMENT**

This Lower Rio Grande Water Conservation Pilot Program Grant Agreement (“Grant Agreement”) to be effective as of January 1, 2022 (“Effective Date”), by and between the New Mexico Interstate Stream Commission (“Commission”), acting through the official executing this Grant Agreement and [PERSON/ENTITY], [TYPE AND LOCATION OF ENTITY, IF APPLICABLE], each being referred to individually as “Party” or collectively as the “Parties.”

WHEREAS, pursuant to the 2020 General Appropriations Act (HB 2), as amended in the 2020 Special Session (HB1/a), the New Mexico Legislature appropriated funds to the Commission for purposes of establishing a water management pilot project for the Lower Rio Grande Basin (the “Pilot Program”) to test the feasibility of attaining voluntary reductions in groundwater use for the benefit of the sustainability of the water supply of the Lower Rio Grande Basin through grant awards to participants in the Pilot Program.

WHEREAS, Participant has applied for, and has been selected by the Commission to receive, a Pilot Program grant award (“Grant”) pursuant to the terms and conditions of this Grant Agreement.

WHEREAS, the Parties desire to enter into this Grant Agreement to provide timeframes, verification procedures and other conditions for Grant fund disbursements.

NOW, THEREFORE, IT IS AGREED:

1. **Definitions:** Capitalized terms not otherwise defined above shall have the following definitions for purposes of this Grant Agreement only.

1.1 “*Grant Activity*” means the voluntary cessation of ground water diversions for irrigation of the Participating Acreage pursuant to the terms of this Grant Agreement, and as more specifically set forth in Exhibit A – Statement of Grant Activity and Verification Plan, attached hereto and incorporated herein by reference, with the objective of reducing groundwater diversions and achieving groundwater conservation.

1.2 “*Lower Rio Grande Basin*” means that portion of the Rio Grande Basin (as defined by the New Mexico Office of the State Engineer (“OSE”)) extending from Elephant Butte Reservoir to New Mexico’s border with Texas and Mexico.

1.3 “*Participating Acreage*” means the real property identified in Exhibit A.

1.4 “*Subject Water Rights*” means the water right(s) identified in Exhibit A.

1.5 “*Term*” has the meaning set forth in Section 2 of this Grant Agreement.

1.6 “*Water Supply Infrastructure*” means all wells, pumps, meters, lines,

ditches/canals and other improvements associated with the supply of water to the Participating Acreage, whether located on the Participating Acreage or elsewhere.

2. **Term.** This Grant Agreement shall be effective as of the Effective Date set forth and shall continue for a term of **eighteen (18)** months from the Effective Date, unless sooner terminated by the Commission due to Participant's failure to meet the Conditions of Grant set forth under Section 3.1 hereof.

3. **Grant.** The amount of the Grant is \$ **_____**, which shall be paid on the conditions and at the times set forth below.

3.1 *Conditions of Grant.* This Grant is conditioned upon:

- i. Participant's full and faithful performance of the Grant Activity during the entire Term.
- ii. Participant's cooperation in verification efforts in accordance with the terms of this Grant Agreement, including, but not limited to, Exhibit A.
- iii. The truthfulness when made and during the Term of the representations and warranties of the Participant in this Grant Agreement.
- iv. The recording of a Memorandum of Agreement (Negative Easement) substantially in the form attached hereto as Exhibit B in the real property records of the County in which the Participating Acreage is located for purposes of providing record notice to third parties of the requirements and restrictions created by this Grant Agreement with respect to the Subject Water Rights and Participating Acreage.

3.2 *Disbursement Schedule.* In general, the Grant Activity will be conducted in accordance with the specifications and requirements of the Verification Plan (Exhibit A). Grant award funds shall be disbursed in accordance with the following schedule:

- i. The first disbursement shall be in the amount of twenty-five percent (25%) of the total Grant award. A request for the disbursement will be submitted for processing upon (a) full execution of this Grant Agreement, and (b) the Commission receipt of all documentation and information necessary for purposes of making the disbursement, including, but not limited to, Participant's Taxpayer Identification Number or Employer Identification Number, as applicable, a fully executed Internal Revenue Service Form W-9, and a fully executed New Mexico Substitute W-9 Form. A blank IRS Form W-9 and New Mexico Substitute W-9 Form are provided to the Participant at the time of execution of this Grant Agreement. It is anticipated that the disbursement will be made within thirty (30) days of its submission for processing.

ii. The second disbursement of an additional fifty percent (50%) of the Grant award will be made on or before the first business date of the eighth (8th) month following the Effective Date.

iii. The final disbursement of twenty-five percent (25%) of the Grant award will be made on or before the first business date of the eighteenth (18th) month following the Effective Date.

3.3 *Failure of Condition of Grant.* In the event of a failure of a Condition of Grant, the Commission may:

- i. terminate this Grant Agreement; and
- ii. in the event of non-performance of the Grant Activity, require Participant to reimburse all or a portion of the Grant award determined based upon the pro-rata portion of the Term and/or Participating Acreage implicated by non-performance of the Grant Activity.

3.4 *Reimbursement for Erroneous Disbursements and/or Non-Performance of Grant Activity.* If the Participant receives a Grant award disbursement from the Commission for progress towards and/or completion of the Grant Activity that the Participant subsequently fails to complete, the Participant agrees to reimburse the Commission the full amount for such over-disbursement within 30 days of the date of the Commission's written demand for reimbursement. The Commission has the authority to make any adjustments to disbursements if it discovers an error has been made in prior disbursements. In addition, the Commission shall have a lien against all real property and real property interests that comprise any part of the Participating Acreage or Subject Water rights to secure Participant's reimbursement obligations under this Section 3.4, and shall have the right to file a Claim of Lien in the office of the County Clerk for the County in which the Participating Acreage is located for purposes of providing record notice of such lien. All reimbursement amounts not paid within 30 days of the date of the Commission's invoice shall bear interest at the then prevailing statutory judgment rate until paid in full. If the Commission is required to file suit or retain legal counsel to recover any amount due hereunder, it shall be entitled to recover its legal fees and costs of suit.

4. **Monitoring, Verification and Right of Entry.**

4.1 The Participant shall permit the Commission, with the assistance of the OSE and their respective contractors, agents and employees (the "Commission Parties"), to monitor the Grant Activity and any other activities conducted by the Participant pursuant to the terms of this Grant Agreement using any reasonable procedure, including, but not limited to: internal evaluation procedures, examination of program data, special analyses, on-site inspections, formal audit examinations, or any other procedures. All monitoring controlled by the Commission shall be performed in a manner that shall not unduly interfere with the Participant's performance hereunder. The Commission reserves the right to inspect the Grant Activity at all reasonable times and places

during the term of this Agreement, including any extensions or renewals. To the extent possible, the Commission Parties will give Participant 48 hours' advance courtesy notice by email message, if an email address is provided, or by telephone of any on-site inspections of the Participating Acreage or Water Supply Infrastructure.¹ The Participant agrees that the Commission Parties will have the right to access and enter the Participating Acreage and access the Water Supply Infrastructure, as provided in the Verification Plan (Exhibit A), in order to verify and monitor the results of the Grant Activity.

4.2 At the request of the Commission, the Participant agrees to provide the Commission after completion of the Grant Activity additional information and access to the Participating Acreage and the Water Supply Infrastructure at reasonable times and upon at least 48 hours' notice as needed to aid in developing any final reports for the Pilot Program. This provision survives termination of this Grant Agreement.

5. **Warranties and Representations.** The Participant represents, warrants, and acknowledges the Commission's reliance on the following representations and warranties:

5.1 *Rights to Use Water and Property:*

- i. The Participant has the legal right and authority to use the Subject Water Rights, the Participating Acreage and the Water Supply Infrastructure under New Mexico law to perform each and every one of the Participant's obligations under this Grant Agreement. To the best of the Participant's knowledge, no legal impediment exists regarding the Participant's ability to perform the Participant's obligations under this Grant Agreement; and
- ii. Other than the Lower Rio Grande Adjudication (State of New Mexico ex rel, Office of the State Engineer v. Elephant Butte Irrigation District, et al., D-307-CV-96-888), there are no known or anticipated claims, nor any known or anticipated actions or proceedings before any court, tribunal, or other body, that could affect the Participant's right, title, and/or interest to the water or the land that are the subject of this Grant Agreement.

5.2 *Use of Water.* Water has been diverted and used for the periods set forth in Exhibit A.

5.3 *Intent to Use Water.* The Participant had the intent, and all necessary rights, to divert water under the Subject Water Rights, for beneficial consumptive use, during the Term. Water was diverted under the Subject Water Rights in the past as described in Exhibit A.

¹ Please note that provision of notice is a courtesy only and is not intended to diminish in any respect any rights of entry available to the OSE and/or Commission by law, under the terms of any permit or otherwise.

5.4 *Participant Obligated to Submit Correct Information.* All information submitted by the Participant in the Grant application and provided in support of this Grant Agreement, including, but not limited to the information provided in Exhibit A is true and correct as of the time of submittal, as of the Effective Date and as of the date of Participant's signature below. Participant will notify the Commission in writing of any changes to the information provided including, but not limited to, changes in ownership of the Participating Acreage and/or Subject Water Rights.

6. **Agency.** None of the Parties hereto, nor any of their respective employees, shall be construed to be the agent, employer or representative of the other, nor will either Party have an expressed or implied right of authority to assume or create any obligation or responsibility on behalf of or in the name of the other Party. In no event shall this Agreement be construed to establish a partnership, joint venture, or other similar relationship between the Parties, and nothing contained herein shall authorize either Party to act as an agent for the other.

7. **No Third Party Rights.** Nothing in this Agreement, express or implied, is intended to confer any rights, remedies, claims, or interests upon a person not a Party hereto.

8. **Indemnification; Liability.** Participant will indemnify and hold the Commission harmless (including reasonable legal fees and expenses) against all liability to third parties (other than liability solely the fault of the Commission) arising from or in connection with its receipt of this Grant and conduct of the Grant Activity. The foregoing indemnification obligation will survive the expiration or termination of this Grant Agreement by any Party for any reason. Any alleged liability of the Commission in connection with this Grant Agreement will be subject to the immunities and limitations of the New Mexico Tort Claims Act, Sections 41-4-1 et seq. NMSA 1978, as amended and supplemented from time to time.

9. **Notices.** All notices under this Agreement are to be delivered by (i) depositing the notice in the mail, using registered mail, return receipt requested, addressed to the address below or to any other address as the Party may designate by providing notice; (ii) overnight delivery service addressed to the address below or to any other address as the Party may designate by providing notice; (iii) hand delivery to the individual designated below or to any other individual as the Party may designate by providing notice; or (iv) email transmission of the notice by using the email address set forth below or any other email address as the Party may designate by providing notice. The notice shall be deemed delivered (i) if by registered mail, four (4) days after the notice's deposit in the mail; (ii) if by email, on the date the recipient's mail server provides a response that the message has been accepted for delivery; (iii) if by overnight delivery service, on the day of delivery, and (iv) if by hand delivery, on the date of hand delivery.

Commission:

New Mexico Interstate Stream Commission
Attn: Director
Mailing Address: P.O. Box 25120,
Santa Fe, New Mexico 87504-5102
Physical Address: 407 Galisteo Street, Suite 101
Santa Fe, New Mexico 87501

Participant:

[NAME OF INDIVIDUAL OR ENTITY]
[MAILING ADDRESS]

10. **Records.**

10.1 *Maintenance of Records.* Participant will maintain accurate written records, including accounting records such as invoices, proof of payment, books, documents, data and other evidence of Participant's participation in the Project.

10.2 *Inspection.* Participant will maintain all such records for a period of five years after the end of the Project Term. These records will be subject at all reasonable times to inspection and review by any agency or public body having jurisdiction over the subject matter of this Grant Agreement, including without limitation the New Mexico Office of the State Auditor.

10.3 *Public Records.* Documents and records exchanged between the Parties are subject to disclosure under the Inspection of Public Records Act, Section 14-2-1 et seq., NMSA 1978, as amended and supplemented from time to time.

11. **General Provisions**

11.1 *Complete Agreement.* The Parties agree that this Grant Agreement is the complete and exclusive statement of the agreement between the Parties, which supersedes and merges all prior proposals, understandings and all other agreements, oral or written, between the Parties relating to this Grant Agreement.

11.2 *Amendment.* This Grant Agreement may not be modified, altered or amended, except by written instrument duly executed by all Parties.

11.3 *Forbearance - No Waiver.* Forbearance or neglect on the part of any Party to insist upon strict compliance with the terms of this Grant Agreement shall not be construed as or constitute a waiver thereof.

11.4 *Choice of Law and Venue.* This Grant Agreement and the performance hereunder and all mediations, arbitrations or other special proceedings hereunder shall be construed in accordance with the laws of the State of New Mexico. The Parties agree to bring any legal proceeding arising out of or relating to this Grant Agreement in Santa Fe, New Mexico.

11.5 *Agreement Binding on Successors.* This Grant Agreement shall inure to the benefit of and be binding upon the successors and permitted assigns of the respective Parties.

11.6 *Assignment Restricted.* This Grant Agreement is not assignable by Participant without the express prior written consent of Commission, which consent shall not be unreasonably withheld.

11.7 *Conflict with Other Agreements.* Except as otherwise provided herein, in the event of a conflict between the provisions of any agreement incorporated by reference herein and the provisions set forth in the body of this Grant Agreement, the provisions of this Grant Agreement shall prevail.

11.8 *Headings.* Section headings in this Grant Agreement are included herein for convenience of reference only and shall not constitute a part of this Grant Agreement for any other purpose.

11.9 *Severability.* In the event that it is determined that any portion of this Grant Agreement is in violation of any statute, law or public policy, only the portions of this Grant Agreement that violate such statute, law, or public policy shall be stricken. All portions of this Grant Agreement that do not violate any statute, law, or public policy shall continue in full force and effect. Furthermore, any administrative or court order striking any portion of this Grant Agreement shall modify the stricken terms as little as possible to give as much effect as possible to the intention of the Parties under this Grant Agreement.

11.10 *Acknowledgement; Interpretation.* The Parties acknowledge that they have read this Grant Agreement, understand its contents, and have executed this Grant Agreement as their own free acts and deeds. The Parties understand and agree that this Grant Agreement is to be broadly construed so that no exceptions or exclusions are implied. Any rule of law or any legal decision that would require interpretation of any claimed ambiguities in this Grant Agreement against the Party that drafted it has no application and is expressly waived.

11.11 *Authorized Signatories.* Each Party represents that the person signing this Grant Agreement has full authority to enter into and bind the respective entity.

11.12 *Counterparts.* This Grant Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same document.

11.13 *Appropriations.* The Commission's performance under this Grant Agreement is contingent upon sufficient appropriations being granted to the Commission by the New Mexico Legislature. Any decision as to the sufficiency of such appropriations will be in the sole discretion of the Commission.

11.14 *No Expression of Validity.* By entering into this Agreement the Commission is not expressing any opinion as to the validity of the Subject Water Rights, and the Participant represents and warrants that Participant understands the foregoing and in no event will use this Agreement or the Commission's actions pursuant to this Agreement as evidence of the Commission's opinion on the validity of the Subject Water Rights.

[SIGNATURE PAGES FOLLOW]

INTERSTATE STREAM COMMISSION

By: _____
Rolf Schmidt-Petersen, Director
New Mexico Interstate Stream Commission

Date: _____

Approved as to Agency budget sufficiency:

By: _____
Jeff Primm, Director
Program Support

Date: _____

Approved by Agency CFO:

By: _____
Jennifer Baca, CFO
Administrative Services Division

Date: _____

Approved as to Legal Sufficiency

By: _____
Arianne Singer, ISC General Counsel

Date: _____

Participant

Name: _____
Title [if applicable]: _____
Date: _____

**EXHIBIT A – VERIFICATION PLAN FOR
[INDIVIDUAL/NAME OF ENTITY]**

[All capitalized terms used in this Exhibit A but not otherwise defined shall have the meaning assigned in the LOWER RIO GRANDE WATER CONSERVATION PILOT PROGRAM GRANT AGREEMENT to which this is appended]

Grant Activity; Background

Participant hereby commits ___ acres of land located near **Sierra County/Dona Ana County**, New Mexico (the “Participating Acreage”) to the Pilot Program. A map of the Participating Acreage is attached hereto as Figure 1 (incorporated herein by reference), and the legal description of the Participating Acreage is set forth in Schedule 1 (incorporated herein by reference).

Participant’s right to divert water for purposes of irrigating the Participating Acreage is described by the following OSE water right file: **[NMOSE WATER RIGHT FILE NO.]** (“Subject Water Rights”), such that groundwater is diverted from wells **[ALL POINTS OF DIVERSION ASSOCIATED WITH NMOSE WATER RIGHT FILE NO.]**, and beneficially used for irrigation. During the Term, such diversions will cease. The Grant Activity consists of the cessation of water diversions as herein described and full cooperation with the Verification Plan set forth below. If the subject wells are associated with a previously approved Ownership Management Plan (OwMan), then those diversions may continue pursuant to the OwMan provided that the participating acreage, as described in this contract is not irrigated from any source.

There shall be no irrigation from any source. If Participant desires to establish a cover crop for top soil conservation purposes, prior written approval of the crop to be established and the means by which the crop will be established shall be obtained.

If a groundwater diversion is required for maintenance of the well, prior authorization shall be requested from and approved by the Commission and any diversion for maintenance shall be limited to *30 minutes, 3 times/year*.

Participant hereby warrants and represents that groundwater has been diverted as described above for at least four out of five years from 2016 to 2020.

Verification Plan

Commission Parties will verify that water diversions for irrigation at the Participating Acreage have ceased during the Project Term through the following:

- A. **Site Visits.** Site visits will be completed **six** times throughout the Project Term by Commission Parties. The site visits are intended to verify that the Participating Acreage is in compliance with the criteria set forth in this Exhibit A and elsewhere in the Grant Agreement.

- B. **Data Collection.** Each site visit to the Participating Acreage will consist of the following activities at a minimum:
- The Participating Acreage location will be verified via a real-time global positioning system (GPS) reading to ensure that the survey team is located at the correct location.
 - Sufficient photographs will be taken to record that the Participating Acreage is in compliance with the Grant Activity (e.g., voluntary cessation of water diversions for irrigation of the Participating Acreage pursuant to the terms of this Grant Agreement). Photographs will be tagged with GPS location so that they can be associated with each Participating Acreage.
 - A meter reading will be collected and recorded for the point(s) of diversion (PODs) associated with the Participating Acreage; however, meter readings shall continue to be submitted on a quarterly basis by the water right owner.
 - In addition to the photographs, a brief description of the condition and disposition of each Participating Acreage will be recorded.
- C. **Reporting.** A Verification Report with the date of the site visit, data collected, name and signature of the party conducting the verification, and at least one photo for each site visit will be submitted to Office of the State Engineer, District IV – Las Cruces, 1680 Hickory Loop, Suite J, Las Cruces, New Mexico 88005-6598, Attn: Ryan Serrano; and New Mexico Interstate Stream Commission, 5550 San Antonio Drive, Albuquerque, New Mexico 87109, Attn: Linda Tenorio.

Figure 1 – Map of Participating Acreage

Schedule 1 – Legal Description