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Amendment No. 1 to the Zuni Indian Tribe Water Rights Settlement Agreement in the Little Colorado River Basin

Zuni Indian Tribe et al

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AMENDMENT NO. 1

**TO THE ZUNI INDIAN TRIBE WATER RIGHTS SETTLEMENT
AGREEMENT IN THE LITTLE COLORADO RIVER BASIN**

This Amendment is entered into this 8th day of July, 2004, by the Zuni Indian Tribe on behalf of itself and its members; the United States of America in its capacity as trustee for the Zuni Indian Tribe and its members; the State of Arizona; the Arizona Game and Fish Commission; the Arizona State Land Department; the Arizona State Parks Board; the St. Johns Irrigation and Ditch Co.; the Lyman Water Co.; the Round Valley Water Users' Association; the Salt River Project Agricultural Improvement and Power District; Tucson Electric Power Co.; the City of St. Johns; the Town of Eagar; and the Town of Springerville. In order to conform the Zuni Indian Tribe Water Rights Settlement Agreement of 2002 to the Zuni Indian Tribe Water Rights Settlement Act of 2003, the Agreement is amended as follows:

1.0 Page 3, Paragraph 2.6 is amended to read as follows:

2.6 "Deadline" means December 31, 2006, unless and until the Parties jointly agree in writing to another Deadline.

2.0 Page 4, Paragraph 2.13 is amended to read as follows:

2.13 "Enforcement Date" means the date on which all of the actions described in Article 3 have been completed. The "Enforcement Date" is the same as the Effective Date described in Section 9 of the Act.

3.0 Page 6, Paragraph 2.40 is amended to read as follows:

2.40 "United States" means the United States of America in its capacity as trustee for the Zuni Tribe or its members or otherwise acting on behalf of the Zuni Tribe or its members unless otherwise indicated in a particular paragraph or subparagraph of the Settlement Agreement. In paragraph 11.2.3, subparagraph 11.4.B(4), and paragraph 11.7 of this Agreement, the "United States" means the United States of America, including all of its departments, agencies, and instrumentalities acting in all capacities, including as trustee for the Zuni Tribe and its members, but not in its capacity as a trustee for Indian tribes other than the Zuni Tribe.

4.0 Page 18, Paragraph 5.9 is amended to read as follows:

5.9 Except as described in paragraph 5.3 (recognizing the Zuni Tribe's use of 1,500 acre-feet per annum of underground water) this Settlement Agreement does not create any vested right to groundwater under federal or state law, or any priority to the use of groundwater that would be superior to any other right or use of groundwater under state law, whether through this Settlement Agreement, by incorporation of any abstract, agreement or stipulation prepared under this Settlement Agreement or through Congressional legislation approving, confirming or ratifying this Settlement Agreement

or any abstract, agreement or stipulation prepared under this Settlement Agreement. Notwithstanding the preceding sentence, the rights of parties to the agreements referred to in paragraph 5.8, as among themselves, shall be as stated in those agreements. Furthermore, if a priority system to groundwater is established, all Parties retain the right to assert their respective priorities.

5.0 Page 22, Subparagraph 6.2.A(5) is amended to read as follows:

- (5) The land taken into trust under subparagraphs 6.1.A and 6.1.B shall be subject to existing easements and rights-of-way. Notwithstanding any other provision of law, the Secretary of the Interior, in consultation with the Tribe, shall grant additional rights-of-way or expansions of existing rights-of-way for roads, utilities, and other accommodations to adjoining landowners if:
 - (a) The proposed right-of way is necessary to the needs of the applicant;
 - (b) The proposed right-of-way will not cause significant and substantial harm to the Tribe's wetland restoration project or religious practices; and
 - (c) The proposed right-of-way acquisition will comply with the procedures in part 169 of title 25, Code of Federal Regulations, not inconsistent with this subsection and other generally applicable federal laws unrelated to the acquisition of interests across trust lands.

If the criteria described in subparagraphs (a) through (c) are not met, the Secretary of the Interior may propose an alternative right-of-way, or other accommodation that complies with the criteria.

6.0 Page 22, Subparagraph 6.2.A(6) is amended to read as follows:

- (6) Not later than 3 years after the Enforcement Date, the Zuni Tribe shall adopt a water code, to be approved by the Secretary of the Interior, for regulation of water use on the lands identified in subparagraphs 6.1.A and 6.1.B that is reasonably equivalent to state water law (including statutes relating to dam safety and groundwater management). Until such date as the Zuni Tribe adopts a water code described in the preceding sentence, the Secretary of the Interior, in consultation with the State of Arizona, shall administer water use and water regulation on lands described in subparagraphs 6.1.A and 6.1.B in a manner that is reasonably equivalent to state law (including statutes relating to dam safety and groundwater management).

7.0 Page 24, Subparagraph 7.1 is amended to read as follows:

7.1 Establishment of the Fund. In accordance with the Act, an account to be managed by the Secretary of the Interior shall be established in the Treasury of the United States, referred to as the Zuni Indian Tribe Water Rights Development Fund. The Fund shall consist of the amounts to be contributed in paragraphs 7.5 and 7.6. The

Secretary shall deposit into the Fund any other monies paid to the Secretary on behalf of the Zuni Tribe pursuant to the Settlement Agreement.

8.0 Page 33, Paragraph 11.1 is amended to read as follows:

11.1 State Parties Waiver. The waiver and release described in this paragraph shall be in the form set out in Exhibit 11.1. Except as provided in paragraph 11.5, the State Parties (which, for the purpose of this paragraph 11.1 and paragraph 11.5, are defined as the State of Arizona, acting solely in its proprietary capacity, and all other parties to the Agreement, except the Zuni Indian Tribe and the United States) shall execute a waiver and release of claims against the Zuni Tribe and the United States, under Federal, State or other law for:

- A. All past and present claims for injuries to water rights or water quality (including injuries to water rights in groundwater, surface water, and effluent) accruing from time immemorial through the Enforcement Date that the State Parties may have against the Tribe or against the United States, caused by diversions of surface water in the Eastern LCR basin or withdrawals of groundwater on Zuni Lands; and
- B. All future claims for injuries to water quality accruing after the Enforcement Date on any lands within the Eastern LCR basin caused by the following actions on Zuni Lands:
 - (1) The lawful diversion or use of surface water;
 - (2) The lawful withdrawal or use of underground water;
 - (3) The Parties' performance of their obligations under the Settlement Agreement;
 - (4) The discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law;
 - (5) The discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law; or
 - (6) Any combination of the causes described in subparagraphs (1) through (5).

9.0 Page 33, Paragraph 11.2 is amended to read as follows:

11.2.1 Waiver of Water Quantity Claims by the Zuni Tribe and the United States. The waiver and release described in this paragraph shall be in the form set out in Exhibit 11.2.1. Except as provided in paragraph 11.4, the Zuni Tribe on behalf of itself and its members and the Secretary of the Interior on behalf of the United States in its capacity as trustee for the Zuni Tribe and its members shall execute a waiver and release of claims against the state, or any agency or political subdivision thereof, or any other person, entity, corporation, or municipal corporation, under Federal, State, or other law for:

- A. All past, present, and future claims to water rights (including water rights in groundwater, surface water, and effluent) for Zuni Lands from time immemorial through the Enforcement Date and any time thereafter, except for claims within the Zuni Protection Area as provided in Article 5;
- B. All past and present claims for injuries to water rights (including injuries to water rights in groundwater, surface water, and effluent and including claims for damages for deprivation of water rights and any claims for changes to underground water table levels) for Zuni Lands, from time immemorial through the Enforcement Date; and
- C. All past, present, and future claims for water rights and injuries to water rights (including water rights in groundwater, surface water, and effluent and including any claims for damages for deprivation of water rights and any claims for changes to underground water table levels) from time immemorial through the Enforcement Date and any time thereafter, for lands outside of Zuni Lands but located within the LCR basin, based upon aboriginal occupancy of lands by the Zuni Tribe or its predecessors.

10.0 Page 34, Add Paragraph 11.2.2 to read as follows:

11.2.2 Waiver of Water Quality Claims and Interference with Trust Claims by the Tribe. The waiver and release described in this paragraph shall be in the form set out in Exhibit 11.2.2. Except as provided in subparagraph 11.4.A and paragraphs 11.6 and 11.7, the Zuni Tribe shall execute a waiver and release of claims against the state, or any agency or political subdivision thereof, or any other person, entity, corporation, or municipal corporation, under Federal, State, or other law for:

- A. All past and present claims, including natural resource damage claims under CERCLA, the Oil Pollution Act, or any other applicable statute, for injury to water quality accruing from time immemorial through the Enforcement Date for lands within the LCR basin;
- B. The right to request that the United States bring any past and present claims for injuries to water quality under the natural resource damage provisions of CERCLA, the Oil Pollution Act, or any other applicable statute, for lands within the LCR basin accruing from time immemorial through the Enforcement Date;
- C. All future claims, including natural resource damage claims under CERCLA, the Oil Pollution Act, or any other applicable statute, for injury or threat of injury to water quality accruing after the Enforcement Date, for any lands within the Eastern LCR basin, caused by:

- (1) The lawful diversion or use of surface water;
- (2) The lawful withdrawal or use of underground water, except within the Zuni Protection Area as provided in Article 5 of this Settlement Agreement;
- (3) The Parties' performance of any obligations under this Settlement Agreement;
- (4) The discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law;
- (5) The discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law; or
- (6) Any combination of the causes described in subparagraphs (1) through (5);

D. The right to request that the United States bring any future claims for injuries or threat of injury to water quality under the natural resource damage provisions of CERCLA, the Oil Pollution Act, or any other applicable statute, accruing after the Enforcement Date, for any lands within the Eastern LCR basin, caused by:

- (1) The lawful diversion or use of surface water;
- (2) The lawful withdrawal or use of underground water, except within the Zuni Protection Area as provided in Article 5 of this Settlement Agreement;
- (3) The Parties' performance of any obligations under this Settlement Agreement;
- (4) The discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law;
- (5) The discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law; or
- (6) Any combination of the causes described in subparagraphs (1) through (5); and

E. All claims of interference with the trust responsibility of the United States to the Zuni Tribe arising out of the negotiation of this Settlement Agreement or the Act.

11.0 Page 34, Add Paragraph 11.2.3 to read as follows:

11.2.3 Waiver of Water Quality Claims by the United States. The waiver and release described in this paragraph shall be in the form set out in Exhibit 11.2.3. The United States shall execute a waiver and release, subject to the retentions in subparagraph 11.4.B and paragraphs 11.6 and 11.7, of all claims against the state, or any agency or political subdivision thereof, or any other person, entity, corporation, or municipal corporation, under Federal, State, or other law for:

- A. All past and present common law claims accruing from time immemorial through the Enforcement Date arising from or relating to water quality in which the injury asserted is to the Tribe's interest in water, trust land, and natural resources in the LCR basin;
- B. All past and present natural resource damage claims accruing through the Enforcement Date arising from or relating to water quality in which the claim is based on injury to natural resources or threat to natural resources in the LCR basin, only for those cases in which the United States, through the Secretary of the Interior or other designated federal official, would act on behalf of the Tribe as a natural resource trustee pursuant to the National Contingency Plan, as set forth, as of the date of enactment of the Zuni Indian Tribe Water Rights Settlement Act of 2003, in section 300.600(b)(2) of title 40, Code of Federal Regulations;
- C. All future common law claims arising from or relating to water quality in which the injury or threat of injury asserted is to the Tribe's interest in water, trust land, and natural resources in the Eastern LCR basin accruing after the Enforcement Date caused by:
 - (1) The lawful diversion or use of surface water;
 - (2) The lawful withdrawal or use of underground water, except within the Zuni Protection Area as provided in Article 5 of this Settlement Agreement;
 - (3) The Parties' performance of any obligations under this Settlement Agreement;
 - (4) The discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law;
 - (5) The discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law; or
 - (6) Any combination of the causes described in subparagraphs (1) through (5); and
- D. All future natural resource damage claims accruing after the Enforcement Date arising from or relating to water quality in which the claim is based on injury to natural resources or threat to natural resources in the Eastern LCR basin, only for those cases in which the United States, through the Secretary of the Interior or other designated Federal official, would act on behalf of the Tribe as a natural resource trustee pursuant to the National Contingency Plan, as set forth, as of the date of enactment of the Zuni Indian Tribe Water Rights Settlement Act of 2003, in section 300.600(b)(2) of title 40, Code of Federal Regulations, caused by:

- (1) The lawful diversion or use of surface water;
- (2) The lawful withdrawal or use of underground water, except within the Zuni Protection Area as provided in Article 5 of this Settlement Agreement;
- (3) The Parties' performance of their obligations under this Settlement Agreement;
- (4) The discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures not inconsistent with applicable law;
- (5) The discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law; or
- (6) Any combination of the causes described in subparagraphs (1) through (5).

12.0 Paragraph 11.3, Page 34 is amended to read as follows:

11.3 Waiver of Claims by the Zuni Tribe against the United States. The waiver and release described in this paragraph 11.3 shall be in the form set out in Exhibit 11.3. Except as provided in subparagraph 11.4.A and paragraph 11.6, the Zuni Tribe shall execute a waiver and release of claims against the United States, including any agencies, officials, or employees thereof, for:

- A. All past, present and future claims to water rights (including water rights in groundwater, surface water, and effluent) for Zuni Lands, from time immemorial through the Enforcement Date and any time thereafter;
- B. All past and present claims for injuries to water rights (including injuries to water rights in groundwater, surface water, and effluent and any claims for damages for deprivation of water rights) for Zuni Lands, from time immemorial through the Enforcement Date;
- C. All past, present, and future claims for water rights and injuries to water rights (including water rights in groundwater, surface water, and effluent and any claims for damages for deprivation of water rights) from time immemorial through the Enforcement Date and any time thereafter, for lands outside of Zuni Lands but located within the LCR basin, based upon aboriginal occupancy of lands by the Zuni Tribe or its predecessors;
- D. All past and present claims for failure to protect, acquire, or develop water rights of, or failure to protect water quality for, the Zuni Tribe within the LCR basin in Arizona from time immemorial through the Enforcement Date; and
- E. All claims for breach of the trust responsibility of the United States to the Zuni Tribe arising out of the negotiation of this Settlement Agreement or the Act.

13.0 Page 35, Paragraph 11.4 is amended to read as follows:

11.4 Retention of Claims by the Zuni Tribe and the United States.

- A. Retention of Claims by the Zuni Tribe. Notwithstanding the waivers and releases described in paragraphs 11.2.1, 11.2.2, and 11.3, the Zuni Tribe shall retain the right to assert the following claims:
- (1) Claims for breach or enforcement of the terms of this Settlement Agreement or of rights recognized in this Settlement Agreement or in the Act, including claims for future injuries to such rights;
 - (2) Except as provided in subparagraph 11.2.1.C, claims for water rights, including injuries to those water rights, for lands acquired by or on behalf of the Zuni Tribe after the Enforcement Date, subject to the terms of this Settlement Agreement, including but not limited to, subparagraph 4.2.D and paragraph 5.6;
 - (3) Claims for groundwater rights and injuries to surface water, groundwater and water quality, as provided in Article 5; and
 - (4) Claims for future injuries to water quality, as described below:
 - (a) Claims accruing after the Enforcement Date for injuries to water quality that are not waived in subparagraphs 11.2.2.C and D;
 - (b) Except as provided in subparagraphs 11.2.2.C(4) and (5), and 11.2.2.D(4) and (5), claims for injuries to water quality accruing after the Enforcement Date against any person or entity that is responsible for initially disposing of or initially releasing a Hazardous Substance or oil, even if the migration of that Hazardous Substance or oil to lands owned by or for the Zuni Tribe is caused by that person's or entity's lawful diversion of surface water or lawful withdrawal of underground water;
 - (c) Notwithstanding subparagraphs 11.2.2.C and D, claims accruing at least 30 years after the Enforcement Date under CERCLA for injuries to water quality caused by release of a Hazardous Substance, and the right to request that the United States bring such claims solely on its behalf; and
 - (d) Notwithstanding subparagraphs 11.2.2.C and D, claims accruing at least 30 years after the Enforcement Date under the Oil Pollution Act for injuries to water quality caused by the discharge of oil, except for claims for injuries caused by the discharge of oil

associated with routine physical or mechanical maintenance of wells or diversion structures and the discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law, and the right to request that the United States bring such claims solely on its behalf.

- B. Retention of Certain Claims by the United States. The United States retains, in addition to those claims preserved in paragraph 11.7, the following claims, notwithstanding the waivers and releases described in paragraphs 11.2.1 and 11.2.3:
- (1) Claims for breach or enforcement of the terms of this Settlement Agreement or of rights recognized in this Settlement Agreement or in the Act, including claims for future injuries to such rights;
 - (2) Except as provided in subparagraph 11.2.1.C, claims for water rights, including injuries to those water rights, for lands acquired by or on behalf of the Zuni Tribe after the Enforcement Date, subject to the terms of this Settlement Agreement, including but not limited to, subparagraph 4.2.D and paragraph 5.6;
 - (3) Claims for groundwater rights and injuries to surface water, groundwater and water quality, as provided in Article 5; and
 - (4) Claims for future injuries to water quality, as described below:
 - (a) Claims accruing after the Enforcement Date for injuries to water quality that are not waived in subparagraphs 11.2.3.C and D; and
 - (b) Claims brought at the request of the Tribe pursuant to subparagraphs 11.4.A(4)(c) and (d).

14.0 Page 36, Paragraph 11.5 is amended to read as follows:

11.5 Retention of Claims by the State Parties. Notwithstanding the waivers and releases described in paragraph 11.1, the State Parties shall retain the right to assert the following claims against the Zuni Tribe and the United States:

- A. Claims for breach or enforcement of the terms of this Settlement Agreement or of rights recognized in this Settlement Agreement or in the Act, including claims for future injuries to such rights;
- B. Claims for water rights, including injuries to those water rights, subject to the terms of this Settlement Agreement, including but not limited to subparagraphs 4.2.A and 4.6A; and

- C. Claims for future injuries to water quality, as described below:
- (1) Claims accruing after the Enforcement Date for injuries to water quality that are not waived in subparagraph 11.1.B;
 - (2) Except as provided in subparagraphs 11.1.B(4) and (5), claims for injuries to water quality accruing after the Enforcement Date against the Tribe or the United States if the Tribe or the United States is responsible for initially disposing of or initially releasing a Hazardous Substance or oil, even if the migration of that Hazardous Substance or oil is caused by the Tribe's or the United States' lawful diversion of surface water or lawful withdrawal of underground water;
 - (3) Notwithstanding subparagraph 11.1.B, claims accruing at least 30 years after the Enforcement Date under CERCLA for injuries to water quality caused by release of a Hazardous Substance; and
 - (4) Notwithstanding subparagraph 11.1.B, claims accruing at least 30 years after the Enforcement Date under the Oil Pollution Act for injuries to water quality caused by the discharge of oil, except for claims for injuries caused by the discharge of oil associated with routine physical or mechanical maintenance of wells or diversion structures and the discharge of oil associated with routine start-up and operation of well pumps not inconsistent with applicable law.
- D. Nothing in this waiver and release of claims affects the State Parties' ability to make any claims of water rights or injuries to water rights or water quality (including water rights in groundwater, surface water, and effluent) against any other Indian tribe, band, or community or against the United States on behalf of any such tribe, band or community.

15.0 Page 37, Paragraph 11.6 is amended to read as follows:

11.6 Other Federal Claims. Nothing in this Settlement Agreement quantifies or otherwise affects the water rights, claims, or entitlements to water for federal lands of federal agencies, or of any Indian tribe, band, or community, other than the Zuni Indian Tribe. Furthermore, nothing in this Settlement Agreement waives the ability of any federal agency, Indian tribe, band or community, or the United States on their behalf, to enforce or otherwise protect those water right claims or entitlements to the extent permitted by law. The Zuni Tribe and the United States retain all claims of water rights or injuries to water rights or water quality (including water rights in groundwater, surface water, and effluent) against any other Indian tribe, band or community or against the United States on behalf of any such tribe, band or community.

16.0 Page 37, Paragraph 11.7 is amended to read as follows:

11.7 Savings Clause. Except as provided in paragraphs 11.2.1 and 11.2.3, nothing in this Settlement Agreement affects any right of the United States, or the State of Arizona, to take any actions, including enforcement actions, under any laws (including regulations) relating to human health, safety and the environment.

17.0 Page 37, Paragraph 11.11 is amended to read as follows:

11.11 Tribal Member Entitlements. The benefits realized by the Tribe and its members under this Settlement Agreement, including retention of any claims and rights, shall constitute full and complete satisfaction of all members' claims for:

- A. Water rights under federal, state, and other laws (including claims for water rights in groundwater, surface water, and effluent) for Zuni Lands from time immemorial through the Enforcement Date and any time thereafter; and
- B. Injuries to water rights under federal, state and other laws (including claims for water rights in groundwater, surface water, and effluent, claims for damages for deprivation of water rights, and claims for changes to underground water table levels) for Zuni Lands from time immemorial through the Enforcement Date.

18.0 Exhibit 2.1 is removed and replaced with the Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, 117 Stat. 782 (2003).

19.0 Exhibit 11.1 is removed and replaced with Exhibit 11.1 (revised), which is Attachment No. 1 to this document.

20.0 Exhibit 11.2 is removed and replaced with Exhibit 11.2.1 , which is Attachment No. 2 to this document.

21.0 Exhibit 11.2.2 is added and is Attachment No. 3 to this document.

22.0 Exhibit 11.2.3 is added and is Attachment No. 4 to this document.

23.0 Exhibit 11.3 is removed and replaced with Exhibit 11.3 (revised), which is Attachment No. 5 to this document.

24.0 The Exhibit List is amended to read as follows:

Exhibit 11.1 (revised)..... Waiver by State Parties
Exhibit 11.2.1..... Water Quantity Waiver by Zuni Tribe and U.S.
Exhibit 11.2.2..... Water Quality and Interference with Trust Waiver by Zuni Tribe
Exhibit 11.2.3..... Water Quality Waiver by U.S.
Exhibit 11.3 (revised)..... Waiver by Zuni Tribe against U.S.

DATED THIS 8th DAY OF July, 2004.

IN WITNESS WHEREOF, the Parties have executed this Amendment dated as of the day and year written above.

THE UNITED STATES OF AMERICA
SECRETARY OF THE INTERIOR

By: Gale Norton

THE ZUNI INDIAN TRIBE

By: Carl J. [Signature]

THE STATE OF ARIZONA

By: J. [Signature]

THE ARIZONA GAME AND FISH COMMISSION

By: Diane S. Shaufe

THE ARIZONA STATE PARKS BOARD

By: [Signature]

THE ARIZONA STATE LANDS DEPARTMENT

By: [Signature]

ST. JOHNS IRRIGATION & DITCH COMPANY

By: [Signature]

LYMAN WATER COMPANY

By: Jim Hawer

ROUND VALLEY WATER USERS' ASSOCIATION

By: Richard H. Wall

SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT

By: William P. Schradu

TUCSON ELECTRIC POWER COMPANY

By: M. J. J.

CITY OF ST. JOHNS

By: _____

TOWN OF EAGAR

By: Louise L. Rusk

TOWN OF SPRINGVILLE

By: Kay Dyson