

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-2244-EWN

LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT,  
a quasi-municipal corporation and political  
subdivision of the State of Colorado,

Plaintiff,

ARKANSAS NATIVE, LLC,  
a Colorado corporation,

Plaintiff-Intervenor,

v.

UNITED STATES OF AMERICA;

KEN SALAZAR<sup>1</sup>, Secretary of the Interior,  
in his official capacity;  
J. WILLIAM MacDONALD<sup>1</sup>, Commissioner, Bureau of Reclamation,  
in his official capacity;  
MICHAEL J. RYAN, Regional Director, Bureau of Reclamation,  
in his official capacity; and  
U.S. BUREAU OF RECLAMATION,  
a federal agency,

Defendants,

and

CITY OF AURORA, Acting by and through its Utility Enterprise,

Defendant-Intervenor.

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<sup>1</sup> Ken Salazar is now the Secretary of the Interior, replacing Dick Kempthorne, and J. William MacDonald is now the Acting Commissioner of Reclamation. Accordingly, Mr. Salazar and Mr. MacDonald are named as defendants in this action, pursuant to Federal Rule of Civil Procedure 25(d).

**Exhibit 1**

**STIPULATION FOR STAY AND SETTLEMENT BETWEEN LOWER  
ARKANSAS VALLEY WATER CONSERVANCY DISTRICT AND THE CITY  
OF AURORA, ACTING BY AND THROUGH ITS UTILITY ENTERPRISE**

The Lower Arkansas Valley Water Conservancy District ("Lower") and the City of Aurora, acting by and through its Utility Enterprise ("Aurora"), referred to hereinafter as the "Parties," hereby stipulate and agree to a stay in the above captioned litigation and the dismissal of this litigation upon the terms and conditions and in accordance with the following Stipulation and Settlement.

**I. Request for Stay**

Upon the execution of this Stipulation and Settlement, Lower and Aurora will jointly file a motion with the Court requesting that the above-captioned action be stayed for a period of two years from the date of the entry of the Order granting the stay. The motion for stay will be consistent with the provisions set forth in Paragraphs II and III, below. This Stipulation and Settlement is conditioned upon the granting of such joint motion and the entry of an Order granting a stay. If the Court does not approve any stay, then the Parties shall have no further obligations under this Stipulation and Settlement.

**II. Request for Dismissal, with Prejudice**

Upon the satisfaction of the Condition set forth in Paragraph III below, Aurora and Lower will request the Court dismiss the instant action with prejudice. Parties not party to this Stipulation and Settlement will be allowed to oppose the dismissal motion. This dismissal, assuming it is granted, will resolve and comprehensively settle all matters in dispute in the above-captioned litigation as well as other matters in dispute between Lower and Aurora, as more specifically described below. While the United States and other federal defendants are not a party to this Stipulation and Settlement, the dismissal of this action will also comprehensively resolve and settle all claims brought in this litigation against them and the United States need take no further action, except that which might be mandated as a result of congressional action..

**III. Conditions to Settlement and Dismissal**

Except as where specifically provided for herein, the obligations of Aurora and Lower pursuant to this Stipulation and Settlement are expressly conditioned on the following:

A. Background. Pueblo Reservoir and Dam ("Pueblo Reservoir") are features of the Fryingpan Arkansas Project (referred to hereafter as either "Project" or "Fry-Ark") constructed by the United States Bureau of Reclamation ("Reclamation")

pursuant to Public law 87-490. The above referenced litigation involves the Fry-Ark and Contract No. 07XXC0010 ("Contract"), an "excess capacity contract," entered into between Reclamation and Aurora and attached hereto as Exhibit A. Lower contends that Reclamation is not authorized to enter into the Contract, and Aurora and the United States believe that ample authority exists for the Contract. This fundamental dispute remains an obstacle to final settlement of this litigation.

B. Authorization Legislation. In order to facilitate settlement and without prejudicing their respective positions in this litigation, Aurora and Lower agree, without condition, to immediately upon ~~the approval by the Court of this Stipulation and Settlement~~ and the granting of a stay, to seek federal legislation addressing Reclamation's authorization to enter into excess capacity contracts, including ratification of the Contract and the dedication of federal revenues from such contracts to the construction of the Arkansas Valley Conduit, as more full described in Paragraph V.C.2 below. The proposed language of this legislation is attached hereto as Exhibits B-1 and B-2 and will be referred to together as "Authorization Legislation." If requested by Lower, Aurora shall itself and shall also request that parties to other Inter-Governmental Agreements support federal legislation which authorizes and directs Reclamation to study the historic effects of water transfers such as set forth in Exhibit C. The legislation enacted shall be in substantial conformance with the language set forth in Exhibits B-1 and B-2, hereto or the Condition set forth in this Paragraph III will not be satisfied. The failure to have Exhibit C language enacted shall not affect the effectiveness of the remaining provisions of this Stipulation and Settlement. No Party shall request, assent to, or support modifications to the Exhibit B-1, B-2 and C language, unless both Parties agree in writing to allow such modifications.

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*4/15/09*  
*SCS - for*  
*Aurora*  
*4/15/09*

C. Process for Pursuing Legislation and Dismissal. Lower and Aurora will jointly, every six months or as otherwise ordered by the Court, provide the Court with the status of the efforts to enact the Authorization Legislation. Aurora and Lower may jointly request the stay be extended or ended.

I. The enactment of the Authorization Legislation will constitute satisfaction of the Condition set forth in this Paragraph III and, upon such enactment, Lower and Aurora will promptly notify the Court and will jointly request that this action be dismissed with prejudice.

a. Upon the establishment of Water Leasing Program, including the Super Ditch Company, pursuant to Paragraphs VI. A and B below, Aurora may make exchanges pursuant to the Contract to take delivery of water leased by Aurora from leases through the Super Ditch Company for so long as such Company is operational and to the extent allowed under the Contract. Aurora agrees not to request the use of exchange capacity under any BOR contract for purposes of moving leased water in a manner that would limit delivery of leased water by the Super Ditch Company to other entities for use within the Arkansas River basin; provided, however, that Aurora may make exchanges pursuant to the Contract to the extent the Super Ditch Company cannot deliver the leased water needs of Aurora pursuant to Paragraph VI.A and B below.

b. Right to Lease Water from Parties. Lower shall not oppose the renewal or extension of lease agreements between Aurora and other individuals or entities located within the Arkansas River basin to the extent such leases are not inconsistent with the provisions of this Stipulation and Settlement or any prior agreement executed by Aurora. Nothing in this provision is intended to supersede or modify any provision of the October 2003 Intergovernmental Agreement between the City of Aurora and the Southeastern Colorado Water Conservancy District ("Southeastern") ("2003 IGA").

2. In the event that Authorization Legislation is not enacted within the two-year period provided for herein, or if legislation is enacted that is not in substantial conformance with the Exhibits B-1 and B-2 hereto, then the Paragraph III Condition will be deemed to be unsatisfied and Aurora and Lower will be relieved of all of the obligations contained herein that are conditional upon this Paragraph III.

3. Aurora and Lower may petition the Court to resume the litigation and be relieved of the conditional obligations contained herein upon a showing that the enactment of the Authorization Legislation before the expiration of any stay is not possible.

D. Related Litigation.

1. If during the pendency of the stay, the issues raised in this action, or any of them, are the subject of litigation in another forum, then either Party may, after prior written notification to the other party, move this court to dissolve the stay and to resume the instant litigation. In this event, the provisions of this Stipulation and Settlement shall not further bind either party.

2. The Parties further agree upon the entry of this Stipulation and Settlement and a stay in this litigation, as follows:

a. Aurora-High Line Exchange. Aurora and Lower agree to execute a stipulation in Case No. 05CW105 (Dist Ct., Water Div. No. 2, Colo.) in the form attached hereto as Exhibit E whereby Aurora will not oppose the use of any decree entered in that case in a manner consistent with and in support of the Lower Arkansas Valley Super Ditch Company ("Super Ditch Company") should the High Line Canal Company concur with such use. Nothing herein shall affect any rights of the High Line Canal Company to operate in accordance with the decree entered in such case.

b. Lower agrees to withdraw its statements of opposition in Case Nos. 06CW101 and 06CW120, Water Division No. 2 and Case No. 08CW111 in Water Division No. 5.

E. Reservation of Rights. Notwithstanding the foregoing, pursuing legislation to specifically authorize the Contract shall not prejudice the respective

positions of Aurora, Lower or the United States in the event that the legislation is not obtained or if that legislation does not result in the ratification of the Contract and the above-captioned litigation resumes. Aurora has agreed to pursue Authorization Legislation solely to accommodate Lower and to facilitate this settlement and does not believe such Authorizing Legislation is necessary in order to uphold the validity of the Contract.

#### **IV. Water Quality**

The Parties intend that a comprehensive Water Quality Study is to be conducted and appropriate solutions to address important water quality issues identified in the Lower Arkansas River Basin. Consequently, upon satisfaction of the Paragraph III and Paragraph IV.B conditions, it is agreed as follows:

##### **A. Water Quality.**

1. The Parties agree that a comprehensive Water Quality Study, as further defined below, of the causes of water quality degradation, as defined by the water quality standards established by the Water Quality Control Commission, is needed to address important water quality issues in the Lower Basin. The Parties want a comprehensive Water Quality Study to be completed as soon as practical so that the Parties and others can take appropriate action to address such water quality issues. The Parties recognize that the United States Geological Survey ("USGS") has extensive and valuable information and experience regarding water quality in the Lower Basin. The Parties accordingly agree that they will enter into an appropriate arrangement with the USGS, or other entity mutually agreeable to the Parties, with or without other participating researchers, which might include state institutions of higher education such as the University of Colorado, Colorado State University, or Colorado State University - Pueblo, to prepare a comprehensive study of the causes and sources of water quality degradation in the Lower Arkansas River Basin ("Water Quality Study"). The Water Quality Study shall also recommend an appropriate on-going monitoring program of water quality.

2. Within 30 days of the effective date of this Part IV, the Parties, in consultation with the Regional Resource Planning Group ("RRPG"), the USGS, the Colorado Water Quality Control Division, and the U.S. Bureau of Reclamation ("BOR"), shall join a "Water Quality Committee." With the concurrence of the Parties, membership in the Committee shall be open to any governmental entity with water quality interests in the Lower Basin willing to participate financially in the Water Quality Study on an equitable basis. The Parties further agree that the water quality responsibilities, functions and funding of the Water Quality Committee contemplated by this Settlement and Agreement and/or the PSOP Water Quality Committee and/or the Regional Resource Planning Group created pursuant to the 2003 IGA between Southeastern and Aurora, and such committees and/or group, may be combined upon mutual agreement of PSOP Participants and/or the parties to the respective Agreements.

3. The Study shall be conducted in two phases. In Phase I, the USGS identified all existing, past, and on-going studies to determine the most cost effective way to move forward in Phase II with a comprehensive and unified study that integrates and standardizes all ongoing and additional studies to avoid the preparation of additional and/or different studies that are inconsistent or incompatible due to problems such as inconsistent methodologies or techniques for data gathering or analysis. Phase I of the Study is complete. Based upon the USGS's work product from Phase I, the Water Quality Committee will promptly agree upon the scope of the work, cost, budget and milestones for Phase II of the Study. The Study shall incorporate and integrate appropriate data and studies based on data quality objectives and criteria determined by the Water Quality Committee in order to avoid duplication and optimize available resources, including but not limited to USGS studies, WQCD studies, PSOP related efforts, Colorado State University research, the Army Corps of Engineers' Fountain Creek Watershed Study, and relevant efforts conducted by or for BOR pursuant to the National Environmental Policy Act.

The Parties agree to pursue all potential sources of funding for the Water Quality Study. In particular, the Parties agree to cooperatively pursue the following funding sources at the earliest practicable time:

- a. Section 319 Nonpoint Source Grant monies from the Colorado Water Quality Control Division;
- b. H.B. 06-1177 monies;
- c. Other available EPA Watershed grant monies;
- d. Other grant monies available from the Department of the Interior and/or the Department of Agriculture; and
- e. Subject to paragraph IV.B below, the Parties agree to equally, or on another mutually agreeable basis, share any costs not paid from other sources to fund their respective share of such Water Quality Study.

4. a. The data from the Water Quality Study shall be used by the Parties working together to identify, within 180 days of study completion, alternate strategies including point source controls and nonpoint source practices, to solve important water quality issues identified therein, with the objective of achieving and maintaining the water quality standards throughout the Lower Basin that protect designated uses established pursuant to the Colorado Water Quality Control Act, C.R.S. §§ 25-8-101 et seq. and applicable regulations thereunder. Such alternate strategies shall be part of the public record. The data from the Water Quality Study shall also be part of the public record available to others for their independent purposes. Such alternate strategies shall not impede, without consent, the lawful development and exercise of water rights.

b. The Parties agree to investigate the potential water quality and economic benefits that might be derived from changes in irrigation practices.

c. In furtherance of the implementation of any identified remediation strategies, including meeting the need for "matching funds" for grant monies, the Parties shall each contribute \$25,000 to these water quality efforts upon the completion of the Water Quality Study. Other entities may participate by contributing an equal amount, or such lower amount as shall be agreeable to the founding Parties of the Water Quality Committee. Such funds shall be administered by Southeastern under the direction of the Water Quality Committee. These same Parties and entities shall make another contribution in the same amount within one year after the initial payment. The Water Quality Committee shall ensure that the funds are appropriately spent.

The Parties further agree to cooperatively pursue state and federal appropriations designed to address identified water quality concerns without impairing lawfully decreed water rights. The nature and extent of specific actions will be determined by the respective governing bodies of each Party.

5. The Parties agree to implement the water quality monitoring program recommended by the Water Quality Study, under the direction of the Water Quality Committee. The Parties agree to pursue all potential sources of funding for the water quality monitoring program. In particular, the Parties agree to cooperatively pursue the following funding sources at the earliest practicable time:

- a. Section 319 Nonpoint Source Grant monies from the Colorado Water Quality Control Division;
- b. Other available EPA Watershed grant monies;
- c. Other available WQCD monitoring monies;
- d. USGS monitoring and/or funding; and
- e. Other grant monies available from the Bureau of Reclamation and the Army Corps of Engineers.

The Parties agree to equally, or on another mutually agreeable basis, share any costs not paid from other sources to fund such water quality monitoring.

B. Lower and Aurora agree that the need to fulfill their respective obligations under this Part IV is contingent upon reaching mutually satisfactory agreement with Colorado Springs Utilities, Pueblo Board of Water Works, and the Southeastern Colorado Water Conservancy District to participate in the implementation of this Part IV.

## V. Arkansas Valley Conduit

The Arkansas Valley Conduit, a component of the Fryingpan Arkansas Project that has yet to be constructed, is the preeminent solution to improve the quality of raw water supplies available to municipalities in the Lower Arkansas Valley at the time this

Stipulation and Settlement is signed. Consequently, upon satisfaction of the Paragraph III conditions, it is agreed as follows:

A. Support. The Arkansas Valley Conduit ("Conduit") is the responsibility of the Southeastern Colorado Water Activity Enterprise ("Enterprise"), and includes a Conduit Advisory Committee composed of Conduit Participants. The Parties shall support the proposed Arkansas Valley Conduit utilizing outlet works on Pueblo Dam and related facilities to provide drinking water to communities downstream of Pueblo.

B. Physical Supply. The Parties agree to support the Enterprise's and Conduit Participants' efforts to secure a reliable physical water supply for the Conduit, subject to each Parties' right to protect their own interests and water supplies. Lower, if requested by the Conduit Participants, agrees to cooperate and assist the Enterprise and Conduit Participants in developing an adequate physical water supply for the Conduit.

C. Funding.

1. The Parties shall support the Enterprise and Conduit Participants in any current and future requests by Southeastern, the Enterprise, or other Conduit Participants for state and federal funding for the Arkansas Valley Conduit, including support for legislative language which is directed to financing the Conduit.

2. The provisions of Paragraph III notwithstanding, Aurora shall support the use of federal revenues from its Contract to defray the local share of the cost of the Arkansas Valley Conduit, in accordance with the legislative language in Exhibit B-2.

D. Permitting. The Parties shall support the Enterprise and Conduit Participants in efforts to obtain the local, state, and federal certifications and permitting necessary to develop the Arkansas Valley Conduit, if any. The Parties shall not knowingly take any actions to impair or impede the Enterprise's or Conduit Participants' ability to obtain the necessary permits, contracts and/or authorizations from any governmental entity or otherwise to complete the Arkansas Valley Conduit. However, nothing in this Stipulation and Settlement shall preclude any Party from submitting fair comments to governmental entities, including identification of issues of concern not in conflict with the spirit of this Stipulation and Settlement.

E. Rights-of-Way. To construct the Conduit and associated facilities, the Enterprise and Conduit Participants need to acquire rights-of-way and rights of access over lands owned by the Parties. No Party shall unreasonably withhold agreement for any easement or rights-of-way across property owned or controlled by such Party which is necessary for the Conduit and associated facilities, subject to (1) the payment of just compensation, damages, if any, and relocation expenses to such Party, and (2) the agreement of the Enterprise and any Conduit Participant to conditions that will prevent unreasonable interference with the existing and future uses of the affected property,



including rights and interests held by lessees and persons holding management agreements with any Party.

F. Alternatives. If the Conduit is not feasible for any reason, the Parties agree to cooperate in seeking alternatives to supply high quality drinking water to residents of the Lower Arkansas Valley.

## VI. Lower Basin Water Management Program

The Parties support the creation of a Lower Basin Water Management Program (as more fully set forth below) that supports present and future economic options of the Lower Arkansas River Valley, i.e., the mainstem of the Arkansas River and its tributaries (exclusive of Fountain Creek) from Pueblo Dam to John Martin Reservoir ("Lower Valley"), including short-, mid-, and long-term water needs of the Lower Valley for agricultural, municipal, commercial, industrial, and flat-water recreational uses. The Lower Basin Water Management Program will include a Water Leasing Program, water acquisitions to augment supplies in the Lower Basin, additional water storage, and cooperative water exchanges to meet the needs of such uses and the uses of Aurora. Consequently, the provisions of Paragraph III notwithstanding, for so long as the litigation is stayed hereunder or upon enactment of the Authorizing Legislation, it is agreed as follows:

A. Water Leasing Program. As an alternative to additional permanent transfers of agricultural water rights in the Lower Basin decreed for irrigation, stock and incidental domestic use from the mainstem of the Arkansas River to other uses, the Parties agree to support the development of a Water Leasing Program, including the Lower Arkansas Valley Super Ditch Company, Inc. ("Super Ditch Company"), as generally set forth in its Articles of Incorporation and Bylaws, as amended through May 20, 2008, attached hereto as Exhibit D, to facilitate the lease of agricultural water for other uses.

B. Water Acquisition.

1. While the following is not intended to be construed as an interpretation of any agreement by either party, it is noted that paragraph III.B.1.e of the 2003 IGA states Aurora would "not initiate or seek to implement any further permanent transfer of water rights not presently owned or under contacts by Aurora . . . that are decreed from sources within the Arkansas River Basin, even if such transfer would involve use of new Aurora facilities rather than Fryingpan-Arkansas Project facilities, absent a mutually agreed amendment to this [2003] IGA regarding such transfer." The 2003 IGA has a 40-year term. Other provision of the 2003 IGA address the subject of further permanent transfers. Aurora may supplement its water supplies, to the extent allowed under said 2003 IGA, through leasing water from irrigators in the Lower Arkansas Valley.

2. Aurora and Lower agree as follows in order to promote the sustainability of agriculture in the Lower Arkansas Valley:

a. Except as permitted by the 2003 IGA, Aurora will not initiate or seek to implement any further permanent transfer of water rights not presently owned or under contract by Aurora that are decreed from sources within the Arkansas River Basin, as set forth in Exhibit B. In lieu of further permanent transfers in accordance with this provision, Aurora may supplement its water supplies through a viable Water Leasing Program, including the Super Ditch Company.

b. The exact terms governing the establishment of, and Aurora's and/or Lower's participation in, the Water Leasing Program, including the Super Ditch Company, will be the subject of one or more future contracts, leases or agreements involving water lessors and/or their agents, the Parties, and/or the Super Ditch Company. The Parties anticipate that such water leases will permit fallowing irrigated agricultural land and delivering the associated agricultural water rights three years in ten, or fallowing an average of approximately 33 percent of the land each year. The Parties also anticipate that such water leases will permit fallowing up to 100 percent of the land during a drought because of a lack of sufficient water for profitable agricultural production, as well as for a reasonable period after a drought to recover stored municipal water supplies. For the purposes of this paragraph 2, "drought" means (i) any year when, as of March 1, April 1, May 1 or June 1, the Natural Resources Conservation Service's Colorado State Basin Water Supply Outlook Report most probable (50% chance of exceedance) forecast for the Arkansas River at Salida is less than 70 percent of average; (ii) a calendar year immediately following a year in which the actual stream flows in the Arkansas River at Salida were less than 70 percent of the average, as determined by the official stream flow gauge records maintained by the State of Colorado for that location; or (iii) a water year in which Aurora's total system-wide reservoir storage is below 70 percent of capacity on March 15th.

c. The limitation set forth in paragraph a above recognizes that existing facilities, plus the construction of Colorado Springs Utilities so-called Southern Delivery System, limit the current and future delivery of agricultural water rights from the mainstem of the Arkansas River for use in other locations. Should additional delivery systems, which are neither promoted, financed nor used by Aurora, become operational that allow for the delivery of additional agricultural water rights from the mainstem of the Arkansas River for use in other locations, the Parties recognize that the competition for agricultural water rights will increase significantly and that it is in the best interests of the owners of such rights to maximize the market for such water. In that event, the limitation in paragraph a above shall be of no further force and effect so that Aurora may participate in that market for the benefit of the owners of such agricultural water rights.

d. The Parties believe that Aurora should be able to lease agricultural water rights it owns in the Lower Arkansas Valley through the Water Leasing Program, including the Super Ditch Company, to others on substantially the same terms

and conditions as applied to other similarly situated municipal users and suppliers, including Colorado Springs Utilities and Pikes Peak Regional Water Authority (or its members individually or in combination).

i. The limitation set forth in paragraph a above is therefore conditioned upon Aurora being able to fallow land it owns and lease the associated agricultural water rights to other users through the Water Leasing Program, including the Super Ditch Company, on substantially the same terms and conditions as other similarly situated municipal water users and suppliers, including Colorado Springs Utilities and Pikes Peak Regional Water Authority (or its members individually or in combination). For example, Aurora could fallow land and lease the associated water three in ten years, or fallow an average of 33 percent of the land and lease the associated water if others are so allowed. Should other similarly situated municipal water users or suppliers, including Colorado Springs Utilities or Pikes Peak Regional Water Authority (or its members individually or in combination), be permitted by the Super Ditch Company to fallow land and lease associated agricultural water rights upon terms substantially more favorable to such users or suppliers, the limitation in paragraph a above shall be of no further force and effect.

ii. Should Aurora be unable to lease the agricultural water rights associated with fallowing a farm or ranch it owns through the Water Leasing Program, including the Super Ditch Company, Aurora may fallow low production land, up to 33 percent of such farm or ranch, and deliver the associated water rights for its use through the Super Ditch Company upon payment of a reasonable administrative fee to such Company. For the purposes of this paragraph 2, "low production land" is land with a soil type, topography or some other factor that significantly limits production as compared to production of the same or similar crops achieved in the same county.

e. As used herein, the term "viable" means capable of meeting the leasing demands of Aurora, which demands shall not exceed the lesser of: (i) the amount of water necessary to serve those citizens located within the current (2009) municipal service territory of Aurora; (ii) water that can be physically transported through infrastructure available to Aurora for such purposes; (iii) during the term of the 2003 IGA, an amount no greater than the maximum amount allowed by such IGA, as amended from time to time; and (iv) subsequent to the expiration of the 2003 IGA, the amount allowed by the 2003 IGA, as amended, increased by the percent increase in the population of Aurora from the date of the expiration of such IGA. Any such lease water shall be available to Aurora at fair market value.

f. Lower will not oppose the existing agreement between Aurora and the High Line Canal Company dated January 23, 2008 relative to the periodic leasing of company stock and any "underlying leases" with shareholders referenced therein so long as Aurora agrees to meet its Arkansas River basin leased water needs from an operational Super Ditch Company that can provide a like amount of water on a similarly reliable basis at fair market value pursuant to Paragraph 2 above.