

**RIO GRANDE WATER CONSERVATION DISTRICT  
BOARD OF DIRECTORS QUARTERLY MEETING  
October 15, 2019 at 10:00 A.M.  
RIO GRANDE WATER CONSERVATION DISTRICT CONFERENCE ROOM**

**Present:** Greg Higel, President; Brian David, Vice-President; Dwight Martin, Secretary/  
Treasurer; Peggy Godfrey, Director; Mike McClure, Director; Bill McClure, Director; Armando  
Valdez, Director and Mike Kruse, Director.

**Excused:** Cory Off, Director.

**Staff and Consultants:** David Robbins, Hill & Robbins. P.C.; Cleave Simpson, General  
Manager; Clinton Phillips, District Engineer; Amber Pacheco, Program Manager; Marisa Fricke,  
Program Manager; Rose Vanderpool, Program Assistant; Linda Ramirez, Program Assistant;  
Tim Carden, HCP Coordinator/Program Assistant; Michael Carson, Database Administrator; and  
April Mondragon, Administrative Assistant.

**Guests:** Becky Brooks, Daniel Davis, Erin Minks, Chris Schaffer, Daryl Kohut, Sean Tonner,  
Elizabeth Tsang, Jill Lucero, Sue Swift Miller, Brenda Felmlee, Les Alderete, Tony Aloia, Pam  
Rice, Bethany Howell, Ernie Myers, Mary Enerquist, Heather Dutton, Emma Reesor, Bob  
Kimbrough, Chris Miner, Travis Smith, Willie Hofner, Nathan Coombs, Morgan Garcia, Sheldon  
Rockey, Heather Greenwolf, Christine Arbogast, Judy Lopez, Allen Law, Jeff Derry, Pat  
McDermott.

**CALL TO ORDER**

President Greg Higel called the meeting to order at 10:12 a.m. The Pledge of Allegiance was  
recited. There was a quorum present for the meeting.

**APPROVE AGENDA**

President Higel asked for any changes or additions to the agenda. A motion was made by Bill  
McClure to approve the agenda as presented. The motion was seconded by Peggy Godfrey and  
unanimously approved.

**APPROVE THE CONSENT AGENDA ITEMS**

President Higel asked for a motion to approve the consent agenda items:

- July 16, 2019-Quarterly Meeting
- July 16, 2019-Executive Session
- July 25, 2019-Special Meeting
- September 9, 2019-Special Meeting

A motion was made by Peggy Godfrey to approve the consent agenda items. The motion was  
seconded Armando Valdez and unanimously approved.

**PUBLIC COMMENT:**

President Higel asked for public comment. Les Alderete from Skyview Cooling, Daniel Davis  
from NEWA and Ernie Myers from NEWA and Gunbarrel Alamosa asked the record to reflect  
their opposition of raising the Subdistrict fees.

**FINANCIAL REPORT**

President Higel asked for the Financial report. Cleave Simpson presented the Board with the  
Financial Statements for the month of September and stated all tracking is well within the  
budget. Mr. Simpson also provided the Board with the District balance sheet which included the  
accounts receivable for the Subdistricts. He explained the Subdistricts in the tracking sheet are  
accruing costs because they do not yet have a revenue.

A motion was made by Bill McClure to accept the Financial Report as presented. The motion  
was seconded by Armando Valdez and unanimously approved.

## MANAGER'S REPORT

President Higel asked for the Manager's report. Mr. Simpson reported on and presented the following:

- **Present Draft 2020** – Cleave Simpson presented the preliminary Rio Grande Water Conservation draft 2020 budget for review. Mr. Simpson stated the Management Committee will meet for an all-day work session to go through the budget in detail, then they will conduct a budget hearing. The work session was scheduled for Thursday November 21, 2019 at 8:00 a.m. and the Hearing to consider adoption of Subdistrict No. 6 Plan of Water Management will be at 9:00 a.m. The budget hearing was scheduled for December 9, 2019 at 10:00 a.m.
- **Proposition DD Discussion** -Cleave Simpson provided details of Proposition DD. David Robbins reported CWCB voted to support of the proposition, Mr. Robbins provided further details of the proposition. Armando Valdez commented in favor of Proposition DD. Mike Kruse voiced his opposition to the proposition.

A motion was made by Armando Valdez for the Rio Grande Water Conservation District to be in support of Proposition DD. Motion failed due to no second.

Dwight Martin explained why he would vote no on Proposition DD.

- **September Resume Discussion** -Cleave Simpson reported the September resume was published last week by the court system, he highlighted the items the District is involved in. Mr. Simpson's recommendation to the Board was to file a statement of opposition in the Kiana Holding case, in order for the District to be involved, Mr. Simpson provided his perspective. David Robbins provided details of the case and explained the opposition mechanism and what it means to oppose.

A motion was made by Dwight Martin to file a statement of opposition in the Kiana Holding case. The motion was seconded by Peggy Godfrey and unanimously approved.

- **Letter from NEWA attorneys** - Cleave Simpson read a portion of a letter from the attorneys of NEWA into record which stated NEWA was in opposition of the raising of Subdistrict No. 1 fees (copy attached). Mr. Simpson also read a portion of a letter from Mr. McClure on behalf of Skyview Cooling Company.

A motion was made by Dwight Martin to file a statement of opposition. The motion was seconded by Peggy Godfrey and unanimously approved.

President Higel thanked Mr. Simpson for his report.

## PROGRAM MANAGER'S REPORTS

President Higel asked for the Program Manager's reports.

- **Subdistrict No. 1- Marisa Fricke:** Marisa Fricke provided an update on Subdistrict No. 1. Ms. Fricke reported working on the budget, maintaining the property owned by the Subdistrict and follow up with the CREP and FALLOW lands to be sure they are in compliance. Ms. Fricke also reported working on new program ideas and will be teaming up with Judy Lopez and Greg Peterson to hold an education session. Ms. Fricke stated Meter readings were turned in October 1, 2019 and hope to see some pumping cut back, she also reported an increase in CREP, FALLOW and participation contract interest. Discussion was held on CREP contracts.
- **Subdistrict No.'s 2, 3, 4, 5 and 6-Amber Pacheco-** Amber Pacheco reported Subdistrict No. 2 and 3 are operating on Annual Replacement Plans and are doing well. Ms. Pacheco stated Subdistrict No.'s 4 and 5 will not be assessing fees and have asked the Rio Grande Water Conservation District to fund them for another year. Ms. Pacheco reported Subdistrict No. 6 has gotten their Plan of Water Management approved by the State Engineer and are moving forward.

### **DISTRICT ENGINEER'S REPORT**

President Higel asked for the District engineer's report. Clinton Phillips presented the change in the unconfined and confined aquifer storage and showed the five (5) year running average as well as the current aquifer level. Mr. Phillips provided the acre feet needed to get to the - 400,000 level.

### **DISTRICT ATTORNEY'S REPORT**

President Higel asked for the District attorney report. David Robbins updated the Board on the meeting Pete Ampe had with Mr. McClure and Mr. Grasmick regarding the concerns of Skyview Cooling. Mr. Robbins reported on the Texas vs. New Mexico and Colorado case and stated it continues to occupy the State. Mr. Robbins also reported he and Pete Ampe assisted Bill Paddock in getting ready for the Santa Maria appeal as well as the meeting he attended with the commissioner of reclamation and will continue to monitor Renewable Water Resources.

### **STEALEY II-BECKY BROOKS**

President Higel asked for the Stealey II report. Becky Brooks provided a short overview on the six (6) bills which were presented to the Water Resources Interim Committee. Ms. Brooks also reported on what had been happening over the summer with the committee to look at instream flow and a bill that was introduced in last years legislature.

**The meeting recessed for lunch at 12:31 p.m. and resumed at 1:40 p.m.**

### **KOGOVSEK AND ASSOCIATES-CHRISTINE ARBOGAST**

President Higel asked for the Kogovsek and Associates report. Christine Arbogast reported there would not be a big water infrastructure package in D.C. however she did report on a couple of bills that had been introduced. Ms. Arbogast reported on the BLM relocation to Grand Junction as well as the reorganization.

### **CONGRESSMAN TIPTON'S OFFICE-BRENDA FELMLEE**

President Higel asked for Congressman Tipton's office report. Brenda Felmlee reported the congressman introduced a bill called The Rec Act and explained what it is about and stated Mr. Tipton has been soliciting the bill for feedback.

### **SENATOR BENNET'S OFFICE-ERIN MINKS**

President Higel asked for Senator Bennet's office report. Erin Minks reported on a few details regarding the water bill coming up from the New Mexico delegation and asked the Board to think about opportunities for a way to use Water Smart Bureau of Reclamation funding. Ms. Minks stated she covers the valley for Michael and works tracking forest health stuff as well as money that comes into the state and monitors how the farm bill implementation is going.

### **USBR REPORT**

President Higel asked for the USBR report. Morgan Garcia was not present, Cleave Simpson stated he would get a copy of the report to the Board.

### **USGS REPORT-ROBRT KIMBROUGH**

President Higel asked for the USGS report. Robert Kimbrough presented the Summary of Cooperative Program of Water Resources Data Collection between USGS and the Rio Grande Water Conservation District. Mr. Kimbrough provided a recap of the work he does and stated he was seeking approval of the joint funding agreement for fiscal year 2020.

A motion was made by Mike Kruse to accept the joint funding agreement with USGS. The motion was seconded by Peggy Godfrey and unanimously approved.

### **DIVISION (3) ENGINEER'S REPORT**

President Higel asked for the Division (3) Engineer's Report. Pat McDermott reported Darin Schepp from North Dakota is the new assistant Division Engineer. Mr. McDermott also reported on the G3 letter sent out by the Division of Water Resources. The letter was to notify parties of the time limit to get their wells covered by a Subdistrict, get them exempt, or in a plan for augmentation in order to be in compliance with the ground water use rules. Mr. McDermott reported on the irrigation season with below average levels and provided the cease diversion dates and times. Mr. McDermott also provided the predictions for the upcoming season.

**U.S.F. & W.S. REPORT-CHRIS SCHAFFER**

President Higel asked for the U.S. Fish and Wildlife Service report. Chris Schaefer provided an update on augmentation plans and stated they are moving forward on contracting with the Rio Grande Water Conservation District on all large capacity wells. Mr. Schaefer also reported replacing the transducers on the refuge.

**U.S.B.L.M. REPORT-JILL LUCERO AND SUE SWIFT MILLER**

President Higel asked for the U.S.B.L.M. report. Jill Lucero and Sue Swift Miller provided the Board with an update on the Treasure Pass Ditch, Blanca Wetlands, the Simpson property and the augmentation plans. The ladies also reported the BLM set up regions and they are now a part of region 7 which includes Colorado, New Mexico, Utah, Wyoming. They provided an update on the Decker Fire as well as the Willow Fly Catcher.

**GREAT SAND DUNES NATIONAL PARK AND PRESERVE REPORT**

President Higel asked for the Great Sand Dunes National Park and Preserve Report. Pam Rice provided the Board with handouts and reported on the precipitation and the discharge. Ms. Rice stated they put in ten (10) monitoring wells in order to establish a groundwater right. David Robbins explained the Boards involvement years ago in the National Park legislation to seek an appropriative water right. Ms. Rice reported on the Parks visitation as well as a project coming up to add additional parking close to the dunes as well as relocating the fee booth. Lastly, she reported on an elk management plan they hope to implement soon.

**U.S. FOREST SERVICE**

President Higel asked for the U.S. Forest Service report. Daryl Kohut reported the Forest Plan revision objection period came to an end and are in the process of review the objections. Mr. Kohut also reported they received a letter from the Division of Water Resources and are working on an augmentation plan for the thirty (30) mile camp ground.

**SAN LUIS VALLEY WATER CONSERVANCY DISTRICT/CWCB REPORTS**

President Higel asked for the San Luis Valley Water Conservancy District and CWCB reports. Heather Dutton reported on the amount of water they made available to the District for use of the Subdistricts. Ms. Dutton updated the Board on several projects she is working on as well as a CWCB update. Ms. Dutton provided some information on proposition DD as well as the instream flow and reported on the Radar celebration. Ms. Dutton stated her term is almost up on the CWCB Board and is seeking a letter of support/recommendation.

A motion was made by Mike Kruse to write a letter of support for Heather Dutton on the CWCB Board. The motion was seconded by Dwight Martin and unanimously approved.

**CONEJOS COUNTY WATER CONSERVANCY DISTRICT**

President Higel asked for the Conejos County Water Conservancy District. Nathan Coombs reported the irrigation season on the Conejos would end on October 17<sup>th</sup>. Mr. Coombs also reported low pumping numbers this year and provided an update on the Round Table.

**COLORADO STATE PARKS AND WILDLIFE REPORT**

President Higel asked for the Colorado State Parks and Wildlife Report. Tony Aloia reported on the work being done on the Rito Hondo and stated most of the reservoirs in the state are being remeasured. Mr. Aloia also reported that reservoirs are being held to new standards and must be built to meet a certain criterion. Mr. Aloia updated the Board on the trans mountain water including the Tabor water and the importance of getting the Wenmenuch Ditch repaired and running properly.

**Paused for a break: 3:27 p.m. and resumed at 3:30 p.m.**

**RIO GRANDE WATERSHED CONSERVATION & EDUCATION INITIATIVE**

President Higel asked for the Rio Grande Watershed Conservation and Education Initiative report. Bethany Howell provided the Board with a funding request and an update on afterschool programs she has been involved with as well as showed some photos of projects with youth. Ms. Howell reported she will continue the Envirothon Natural Resources Workshops and will try to expand them. She also reported on a new program called Teen Outdoor Stewardship and the activities the group participated in. Ms. Howell stated the Beaver Creek Camp was successful and reported on the current programs including the SLV School Pumpkin Patch, Conservation

Poster Contest and Natural Resource workshops. Mike Kruse asked Ms. Howell to share some of the posters with the Board.

### **RIO GRANDE HEADWATERS RESTORATION PROJECT**

President Higel asked for the Rio Grande Headwaters Restoration Project. Emma Reesor presented a funding request along with some aerial photos of projects and updates on the Five Ditches project, Phase Five Streambank Stabilization Project and the Park Creek Watershed Improvement Project. Ms. Reesor stated the construction on the Del Norte Riverfront Project will be underway soon and provided the date and time of her fund raiser Rio Reels Film Festival.

### **HEADWATERS ALLIANCE**

President Higel asked for the Headwaters Alliance report. Heather Greenwolf reported on the history of the Headwaters Alliance and why it was formed. Ms. Greenwolf thanked the Board for their ongoing support as she presents her funding request for another year. Ms. Greenwolf reported what happened on the flood plain and stated they are looking to create a comprehensive plan.

### **RIO GRANDE HEADWATERS LAND TRUST**

President Higel asked for the Rio Grande Headwaters Land Trust report. Allen Law presented a funding request and reported on the current projects as well as what he envisions for the future. Mr. Law provided the details of the grants being received as well as the aquifer easement idea. Mr. Law reported working with the youth on projects that encourage them to get outside. He stated he is looking forward to continuing working on conservation easements next year as well as implementing ground water/aquifer easements.

### **COLORADO FOREST AND WATER ALLIANCE**

President Higel asked for the Colorado Forest and Water Alliance report. Travis Smith provided the Board with a funding request and reported COFWA was formed last year after two (2) large fires in Colorado. Mr. Smith stated COFWA was formed after a model in California in order to advocate for federal policies, financing, innovative ideas on how to address water shed/forest health. Mr. Smith provided the large cost share partners.

### **COLORADO DUST ON SNOW**

President Higel asked for the Colorado Dust on Snow report. Jeff Derry presented the Board with a funding request. Mr. Derry explained what they do and where their project locations are as well as the upcoming projects. He reported presenting at the Law of the Rio Grande in Santa Fe and provided a recap of last year snow season. Mr. Derry presented photos of the aftermath destruction from the last season avalanches, as well as explained what they look at with dust on snow. He shared the number of dust events and reported on the peak flows.

### **OTHER REPORTS OR COMMENTS**

President Higel asked for other reports or comments. David Robbins asked the Board for approval of entering into a stipulation with the parties who object to the Subdistrict No. 1 fee increase and explained the necessity if they were going to challenge.

A motion was made by Bill McClure to allow council to enter into the stipulation to adjust the timing when a request to have the court retain jurisdiction and vote so that can occur after a formal action of the Board. The motion was seconded by Brian David and unanimously approved.

### **EXECUTIVE SESSION**

President Higel asked for a motion to go into executive session. A motion was made by Peggy Godfrey to go into executive session. The motion was seconded by Brian David and unanimously passed.

Mr. Robbins stated the Board was entering into executive session. All discussion would relate to personnel issues. The Board would take no formal position.

### **ACTION ON EXECUTIVE SESSION**

Mr. Robbins stated the Board was in executive session and had voted to come out. Discussion was related to receiving legal advice regarding personnel issues.

A motion was made by Bill McClure to instruct the General Manager to not sign the cooperative agreement with the Bureau of Reclamation as written and peruse information leading up to this letter. The motion was seconded by Peggy Godfrey and unanimously approved.

**ADJOURN**

Meeting was adjourned at 5:30 p.m.

The next scheduled quarterly meeting will be held on January 21, 2020.

  
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President

  
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Secretary/Treasurer

## **Program Manager Report-Amber Pacheco**

**Subdistrict 2 and 3** - Our first ARP Year is going well. We have remedied all our injurious depletions in time, place and amount. Forbearance has been beneficial on the Alamosa and the Conejos. We did not get as many days as planned on the Rio Grande, but I do want to thank all those ditches that signed forbearance agreements with Subdistricts 2 and 3. If anyone is interested in the depletion payments, they can visit the District's website for each Subdistrict and look under the ARP tab for the monthly accounting reports. I have enjoyed working with the Water Commissioners on the Rio Grande, Alamosa and the Conejos. They have been helpful in getting me up to speed. Both Subdistricts will have water left in storage following this irrigation season for use in the next year because of the agreement with SD #1 to use some of their stored Santa Maria water for depletions owed to the canals north of the River. This will be beneficial for Subdistrict 6 which will have a partial ARP filed in 2020. I would like to also thank Tony Aloia and CPW for working with us to make the replacements on the Rio Grande much easier. On the Conejos, the use of the SLVIWO's Taos Valley No. 3 water allowed us to store all of the wet water that Subdistrict 3 purchased in 2019 from SLVWCD and BLM. So thank you also to the Conejos Water Conservancy District for allowing us to store in Platoro.

Subdistrict 2 did make an offer on a parcel of land with some senior water rights near Monte Vista earlier in the Summer. The offer was countered and the BOM felt it was maybe a risk to accept the counter offer as they had not determined if they would even be allowed to move the water out of the ditch for use as augmentation water. All Subdistricts continue to look for permanent water supplies.

**Subdistricts 4 and 5** – Both Subdistricts have their Plans of Water Management approved by their Boards of Managers and the District Board. We will be submitting those Plans to the SEO for review in the near future. Once approved by the State, these Subdistricts will have one year to file their first Annual Replacement Plans. We are working on replacement ideas for both these areas. We are trying to use Well Injury Payment agreements in the North in lieu of Forbearance because the term forbearance was confusing water rights owners who believed the Subdistrict would be allowed to take their water and send it to the injured party if they signed a forbearance agreement. Hopefully we can get everyone to understand that the Subdistrict is not asking anyone to shut their heads gates under these agreements but rather to accept payment in lieu of wet water for any injury calculated to occur to their water rights. The Board and I will continue to reach out to surface water owners about this concept. Subdistrict 5 is also working on a potential recharge project for their Saguache Creek depletions. The concept is to purchase a water right and take the HCU of that water and recharge underground on a site near the location where we will need to release wet water. We will then drill a well that will be used to draw water from this underground recharge to a pipeline or ditch system to get it to the stream in time place and amount. We will be doing a site visit to a location Allen has suggested may be suitable for a project like this. We are also in talks with a potential seller of a water right on Saguache Creek that could be used for a project like this.

**Subdistrict 6** - The SEO approved the Plan of Water Management on September 25<sup>th</sup>. The approval starts the clock for filing the first ARP which must be approved within a year. Staff is preparing the first fees for the Subdistrict to fund water and/or forbearance for the first ARP, which may cover just a partial year dependent on the acquisition of supplies and forbearance agreements for 2020.

Subdistricts 2-6 have all approved their individual budget and they have been submitted to Cleave for the Board to consider in your 2020 Budget discussions. Subdistricts 2, 3 and 6 will be assessing fees for 2019 to be collected in 2020.



5245 RONALD REAGAN BLVD., SUITE 1  
JOHNSTOWN, COLORADO 80534  
TELEPHONE: 970-622-8181



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P. Andrew Jones • Kelly J. Custer • Bradley C. Grasmick • David P. Jones • Ryan M. Donovan  
Wesley S. Knoll • Alyson K. Scott

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October 14, 2019

Board of Directors  
Rio Grande Water Conservation District  
8805 Independence Way  
Alamosa, CO 81101

**RE: Northeast Water Users Association (NEWUA) Objection to Subdistrict No. 1  
2020 Budget and 2020 Variable Fee to be collected in 2021 as Adopted on  
August 28, 2019**

Dear Board of Directors of the Rio Grande Water Conservation District,

Our firm represents the Northeast Water Users Association (NEWUA), whose members own land irrigated primarily by groundwater wells in Subdistrict No. 1. NEWUA objects to the 2020 budget and the 2020 Variable Fee to be collected in 2021, both of which were adopted by the Subdistrict No. 1 Board of Managers during its August 28, 2019 Budget Hearing ("Budget Hearing"). NEWUA submitted its objections and comments on the proposed budget to the Subdistrict No. 1 Board of Managers by letter from our office dated August 27, 2019, which comments and objections are renewed and expounded upon in this letter. NEWUA's August 27, 2019 letter is attached hereto as **Exhibit 1**. The basis for NEWUA's objections are below.

### **1. Introduction**

Like many in the Valley, NEWUA shares the concern of the Subdistrict No. 1 Board of Managers about meeting the sustainability goals prescribed in the Plan for Water Management ("Plan"). Some of the concerns are heightened by signals from the State Engineer expressed in letters to Mr. Cleave Simpson, in which the State Engineer restates the alternative if the Plan fails to meet its sustainability goals – curtailment of wells in Subdistrict No. 1 for wells not included in decreed augmentation plans or approved substitute water supply plans.

While NEWUA may agree that meeting the sustainability goals outlined in the Plan is questionable and failure to do so would likely result in substantial economic and social hardship in the Valley, NEWUA does not believe this justifies the Board of Managers' decision to act outside of the Plan to try and address this issue. The Board of Managers must use the tools authorized by the Plan. If they believe those tools are insufficient, then their remedy is to seek to



amend the Plan. The situation is analogous to a scenario where the General Assembly sought to set aside TABOR and other applicable law to raise revenue to make up a budget shortfall just because there were an economic recession and corresponding budget crisis. In that instance, the General Assembly must either comply with TABOR and raise revenue in accordance with its provisions (or reduce spending), or seek to amend the Colorado Constitution.

Falling short of the sustainability goals is a real possibility, but Subdistrict No. 1 is still bound by the Plan. It cannot act outside the Plan simply because of the exigent circumstances. The Subdistrict must adhere to the Water Court approved Plan, or it must amend the Plan. NEWUA's position is that the Subdistrict No. 1 Board of Managers unlawfully exceeded its authority by adopting the 2020 Budget and 2020 Variable Fee to be collected in 2021.

NEWUA raises the following procedural and substantive deficiencies in the 2020 Budget and 2020 Variable Fee to be collected in 2021:

## 2. Procedural Violations

### A. Failure to Comply with the Stipulation entered into between Rio Grande Water Conservation District (RGWCD), Farming Technology and the Skyview Parties, including Mountain Valley Produce, in Case Nos. 06CV64/07CW52 and the Plan

In Case Nos. 06CV64 and 07CW52, the Rio Grande Water Conservation District ("District") entered into a stipulation with several parties to those cases, including Farming Technology and several other parties collectively referred to in the stipulation as the "Skyview Parties" which include numerous NEWUA members ("Stipulation"). The terms of the Stipulation were adopted and incorporated into the Plan as Appendix 4, so its terms are a contract between the District and the stipulating parties, an order of the Court, and included in the Court approved Plan.

Paragraph 2 of the Stipulation requires that "on or before August 1 of each successive year, prior to adopting the budgets provided for in paragraph 1, the Subdistrict **shall** make available to any interested party a preliminary draft of the proposed budget **and with all available supporting information describing or justifying the expenditures and revenues contemplated** and the specific fees or assessments or other charges proposed for the next year." (Emphasis added).

By email dated August 23, 2019, our office contacted the Subdistrict's legal counsel requesting the supporting documentation for the 2020 Budget and proposed 2021 Variable Fee. See email from NEWUA legal counsel to Mr. Peter Ampe, attached hereto as **Exhibit 2**. On the same date, Mr. Ampe responded via email, attaching a pamphlet containing numerous documents, which are included in the attached **Exhibit 3** ("Pamphlet").

Some of the information contained in the Pamphlet is discussed below; but for purposes of complying with the requirements of the Stipulation and the Plan, the Pamphlet falls short. The Pamphlet does contain a budget document entitled "Draft 7-23-2019." However, the plain

language of the Stipulation and Plan require more information be provided to interested parties, which clearly includes NEWUA.

As noted above, the Stipulation and Plan require “supporting information describing or justifying the expenditures and revenues contemplated.” Assuming the other 36 pages of the Pamphlet were intended as the “supporting information” it is illustrative for several reasons. First, the initial twelve pages of the Pamphlet confirm the recent downward trend in unconfined aquifer levels within Subdistrict No.1, suggesting that the 2020 Budget, in particular the 2020 Variable Fee, is being set to address an acute decline in aquifer levels. Second, information in the Pamphlet illuminate the Subdistrict’s failure to properly incentivize and fund the CREP program, which makes it all the more curious why the Board of Managers adopted a 2020 Budget that reduced the CREP fee from \$1.50 to \$1.00. Both of these issues – use of the Variable Fee as a tax to discourage pumping and to subsidize the CREP fee revenues, and mismanagement of the CREP Program are discussed below.

While the information provided in the Pamphlet is helpful, it doesn’t justify the expenditure and revenues in the 2020 Budget ultimately adopted by the Board of Managers. What the Stipulation and Plan require is a thorough accounting of the Subdistrict’s expenses for the upcoming budget year and a detailed plan for how those expenses will be met. A review of the record from the Budget Hearing makes clear that the Board of Managers has not complied with this requirement. The Managers were making decisions ad hoc during the Hearing, many of Managers appeared confused about how the Board’s own proposed budget was arrived at and how Subdistrict funds were being allocated between the various programs.

The Stipulation and Plan contemplate that creating a budget that is complex is an involved process, which is why both afford interested parties “with the opportunity and sufficient time to analyze the information, to meet with District and Subdistrict representatives concerning the proposed budget, and to present comments or evidence.” With people’s livelihoods at stake, and the future of irrigated agriculture in the Valley potentially hinging on the budget decisions of the Board of Managers, due process requires that the Subdistrict No. 1 constituents be afforded more time and opportunity to comment on the proposed budget.

### **3. Substantive Violations**

#### **A. The Subdistrict Board of Managers has Failed to Fulfill its Obligations to Properly Fund the CREP Program**

The Plan’s primary mechanism for achieving the sustainability goals is the reduction of consumptive use of groundwater through the reduction of irrigated acres in the Subdistrict, specifically through the CREP program. *See, e.g.*, § 3.4 of the Plan. Yet, it is abundantly clear from the Board of Managers discussion during the Budget Hearing that the Subdistrict’s CREP Program, after 10 years since the Plan has been adopted, is not achieving its intended goals. “We aren’t getting the permanent CREP we would like. ... If you want to quit kicking the can, we

might want to look at incentivizing the permanent CREP ... get over the tipping point.” Budget Hearing Recording at approximately 1:34:48<sup>1</sup>.

Despite the Subdistrict failing to make meaningful progress towards CREP Program enrollment, the Board of Managers voted to reduce the CREP Fee to \$1.00/acre. Budget Hearing Recording at approximately 3:25:15. This action is peculiar given that the maximum CREP Fee is \$12/acre. § 4.5.1.2 of the Plan. “The CREP Fee will be used to fund the local cost-share for the CREP Program” § 4.5.1.2 of the Plan. Use of the CREP Fee is further described in Appendix 4 to the Plan, which states that “total CREP Fee charged by the District or Subdistrict shall be limited to the amount shown by specific items in the budget as needed to fund the local cost share components of a CREP Program designed to retired land in the Subdistrict and to fund any additional incentive payments related thereto.”

The Board of Managers has failed to comply with the terms of the Stipulation and the Plan in underfunding and under incentivizing the CREP Program. The Board of Managers acknowledge the CREP Program, the primary tool available to the Subdistrict in reducing irrigated acres, is not being utilized by Subdistrict members, but willfully choose to adopt budget that includes a minimal CREP Fee, a revenue stream which is intended to spur participation in CREP.

**B. The Subdistrict Board of Managers has unlawfully raised the Variable Fee as a means to force participation in the CREP Program.**

Rather than properly fund the CREP Program in accordance with the Stipulation and the Plan, the budget adopted by the Board of Managers raises the Variable Fee (1) to pay for expenses which should be met by the CREP Fee and (2) to force owners who primarily rely on groundwater, such as NEWUA’s members, out of production and into CREP. This approach is inconsistent with numerous provisions of the Plan and the Stipulation, and is therefore unlawful.

As stated in the Plan, the Variable Fee is “based on a Water Value per acre-foot of Net Groundwater Pumped from the wells on each farm or Farm Unit to provide revenue for Subdistrict improvements, including, permanent retirement and/or annual fallowing of the required acreage. § 4.5.1.3 of the Plan. Taking a step back, it is important to note the means by which the Subdistrict is bound by the Plan to implement to meet the sustainability goals. Section 3.2.1 of the Plan provides a list of the mechanisms available to the Subdistrict Board of Managers, and include, temporary fallowing (3.2.1.1); economic incentives for permanent removal of lands from irrigation (3.2.1.2); purchase and retirement of irrigated lands and/or water rights (3.2.1.5) and several others. Importantly, the Plan recognizes that the “Subdistrict intends to use a combination of these improvements concurrently, or as they become economically viable and physically possible.” § 3.2.2. of the Plan.

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<sup>1</sup> An electronic recording of the Budget Hearing is enclosed with the electronic transmittal of this objection letter as Exhibit 4.

But having realized that the Subdistrict has not met its CREP goals (see first sentence of paragraph 3(A), above), the Board of Managers is unlawfully raising the Variable Fee in an effort to force irrigators into the decision to enroll in the CREP program. As Mr. Clay Mitchel, a member of the Board of Managers, stated during the Budget Hearing, “If the Variable Fee goes up, then it is that much more profitable to get into [CREP] now because you can’t keep pumping if you don’t have much water or even if you do, you’re better off to sell that water ... then keep farming it.” Budget Hearing Recording at approximately 1:35:25. Another statement from a Manager: “The Variable Fee should incentive the CREP sign-up.” Budget Hearing Recording at approximately 1:37:30. Statements such as these seem entirely inconsistent with the “overall objective” of the Plan, which is to provide a “system of self-regulation using economic-based incentives that promote responsible water use and management.”

What the Board of Managers is engaged in are not incentives, but disincentives, using the Variable Fee as a tax to make it more expensive for irrigators to continue pumping, thereby forcing them into the CREP Program, in lieu of using the CREP Fee to fund the CREP Program as contemplated by the Plan and in a manner sufficient to entice irrigators to voluntarily enroll.

The Board of Managers recognize that increasing the Variable Fee to \$150 “will change the Valley” and that “everybody can’t stay in business.” Budget Hearing Recording at approximately 1:40:00. Such statements do not reflect the intent and requirements of the Plan. Nowhere does the Plan contemplate putting irrigators out of business and changing the economic conditions in the Valley. Rather, the Plan contemplates that the program of fees will be adjusted within the “economic means of the irrigators.” Raising the Variable Fee to put irrigators out of business, or force them into CREP when the CREP program is obviously not incentivizing enrollment, violates the Plan and the Stipulation.

NEWUA does not dispute the that the Plan contemplates that “The objective of the financing program is to ensure those landowners who use smaller quantities of groundwater, because they contribute larger quantities of river water to the Unconfined Aquifer in the Subdistrict or implement conservation measures, pay a lower assessment, and those landowners who use larger quantities of groundwater and/or do not contribute surface water from the Rio Grande, to pay a higher assessment.” § 4.2 of the Plan. But, importantly, with the adoption of the \$150/Acre-foot variable fee as approved by the Board of Managers on August 28, the groundwater users in the Subdistrict are already shouldering nearly all of the expenses of meeting the sustainability goals. In fact, the \$150/acre-foot Variable Fee is the maximum allowed under the Plan; yet the CREP Fee remains at \$1.00/acre, when the Plan contemplates that it can reach a maximum of \$12.00/acre.

**C. The Subdistrict Board of Managers has unlawfully raised the Variable Fee to pay for CREP Program expenses**

The Subdistrict Board of Managers has routinely and historically underfunded the CREP Program, therefore it has future CREP obligations which are not being met through the CREP Fee, and for which the Board of Managers is unlawfully using the Variable Fee revenue to meet. As the Board recognized at the Budget Hearing, there is a \$3,000,000 future obligation owed in

2020 based on prior commitments under the CREP Program. Budget Hearing Recording at approximately 1:49:35. The Board of Managers recognizes that the \$3,000,000 is an obligation resulting from additional CREP incentives above the required contract amount for contracts the Subdistrict has already entered into. Budget Hearing Recording at approximately 1:49:30.

I think NEWUA would agree that satisfying such obligations is a laudable goal, though it must be done consistent with the terms of the Plan. Under the Plan, the CREP Fee should be raised to pay for future CREP Program obligations. However, the Board decided to reduce that revenue stream and instead chose to raise the Variable Fee to meet the CREP obligations.

The Plan contemplates that the “total CREP Fee charged by the District or Subdistrict for a given year shall be limited to the amount shown by specific items in the budget as needed to fund the local cost share components of a CREP Program ... **and to fund any additional incentive payments related thereto.**” Appendix 4 of the Plan. If the maximum CREP Fee of \$12.00 per acre was originally intended to cover only the rental rate for the 40,000 acres estimated to be retired to meet the sustainability goals, then it doesn’t appear that the Plan prevents the CREP Fee from allocating funds for additional incentives related to the CREP Program. The Plan, however, doesn’t permit the Board of Managers to simply raise the Variable Fee for CREP incentives. The proper approach is that the Board should seek to increase the maximum CREP fee to properly fund that program, similar to how the Plan was amended to increase the maximum Variable Fee from \$75.00/acre-foot as stated in the original version of the Plan, to \$150.00/acre-foot in the amended Plan.

#### **D. The Proposed 2020 Budget Fails to Comply with the Plan by Raising Revenue in Excess of Anticipated 2020 Expenses**

Appendix 4 of the Plan states that the “total Variable Fee for a given year shall be limited to the amount shown by specific items in the budget as required to provide sufficient revenue **for that year** for the Subdistrict improvements specified in the budget...” A review of the Subdistrict’s adopted 2020 Budget, attached hereto as **Exhibit 5**, reveals the Subdistrict’s failure to comply with this requirement.

In particular, NEWUA calls attention to the fact that the 2020 Budget shows significant annual surpluses in the Variable Fee program in years 2017 (\$4,297,647), 2018 (\$872,438) and 2019 (\$789,161). These surpluses are in addition to over \$3,000,000 collected through the Variable Fee being placed into an “escrow” account in 2018 and 2019. The escrow account, as that term is used by the Subdistrict is not technically an escrow account, but in reality a surplus in the Variable Fee revenue, the mere existence of which signifies that the Subdistrict Board has a practice of raising more funds through the Variable Fee than required to meet the annual obligations of the Subdistrict as specified in the budget – a clear requirement in Appendix 4 to the Plan.

Now the Board has adopted and is presenting to District for approval, a Variable Fee of \$150 for pumping in 2020, which will be collected in 2021. Yet, the Subdistrict Board of Managers has not demonstrated via the budget process what improvements will occur, nor their anticipated

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costs, to justify the increase in the variable fee. Simply put, the Subdistrict Board has put the cart before the horse, setting fees without complying with the Plan requirement that fees be set to meet specified projects on an annual basis.

For the reasons stated above, NEWUA urges the RGWCD Board of Directors reject the 2020 Budget adopted by the Subdistrict 1 Board at the Budget Hearing, including the adoption of a \$150/acre-foot Variable Fee collected in 2021 on 2020 pumping. NEWUA requests the RGWCD Board remand the 2020 Budget and 2021 Variable Fee to the Subdistrict Board of Managers, where a revised budget should be adopted in accordance with the Plan and Stipulation.

Sincerely,

Lawrence Jones Custer Grasmick LLP



Digitally signed by Ryan M. Donovan  
DN: cn=Ryan M. Donovan, o=Lawrence Jones Custer Grasmick LLP, ou, email=ryan@ljcglaw.com, c=US  
Date: 2019.10.14 20:41:53 -06'00'

Ryan M. Donovan

RMD:mt  
Enclosures

Cc: NEWUA Board of Directors  
Mr. Peter Ampe, Hill & Robbins, P.C.  
Mr. David Robbins, Hill & Robbins, P.C.  
Cleave Simpson, Manager, Rio Grande Water Conservation District