

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

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BETWEEN

THE KICKAPOO TRIBE IN KANSAS

AND

THE STATE OF KANSAS*

*The United States Departments of Interior and Justice participated in the negotiation of this Agreement but will sign upon the approval by and at the direction of the United States Congress.

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KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

This Water Rights Settlement Agreement is entered into for the purpose of resolving all claims asserted or that could be asserted by the Kickapoo Tribe in Kansas in the litigation initiated by the Tribe on June 14, 2006, in the United States District Court for the District of Kansas, and for quantifying and establishing the Tribal Water Right of the Tribe, and for related purposes.

ARTICLES

ARTICLE 1. RECITALS

- 1.1 The Tribe is a federally recognized Indian tribe organized in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).
- 1.2 The Tribe's government operates under the Constitution and By-laws of the Kickapoo Tribe of Indians, which were approved by the Secretary of the Interior on February 26, 1937 under the authority of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984 (1934). The Tribe occupies the Reservation in northeast Kansas.
- 1.3 The United States set aside the Kickapoo Indian Reservation for the purpose of providing a permanent and sustainable homeland for the Tribe, pursuant to the Treaty of Castor Hill between the Tribe and the United States dated October 24, 1832 (7 Stat. 391 (1832)), as modified in 1854 (10 Stat. 1078 (1854)) and 1862 (13 Stat. 623 (1862)).
- 1.4 As more specifically provided in the Agreement, the Tribe has a federal reserved water right with a Priority Date of October 24, 1832.
- 1.5 In keeping with its trust responsibility to Indian tribes and to promote tribal sovereignty, it is the policy of the United States to settle whenever possible water rights claims of Indian tribes without lengthy and costly litigation.
- 1.6 The Tribe filed the Lawsuit on June 14, 2006, seeking a declaration of the existence and priority date of the Tribal Water Right in the Delaware River and its tributaries. On August 7, 2007, at the parties' request the Court granted a stay of the litigation to permit the parties to attempt to negotiate a resolution of the disputed issues. Since that time, the Parties have worked cooperatively and in good faith toward that end.

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- 1.7 Resolving the Lawsuit and its underlying issues may take many years, entail great expense, prolong uncertainty concerning the availability of water supplies in the basin, and seriously impair the long-term economic well-being of the Tribe, neighboring non-Indian communities and other Kansas water users. Recognizing these probabilities, the Parties agree that the recognition, quantification, and definition of the Tribal Water Right can best be accomplished by a single, comprehensive settlement agreement entered into by and among the Tribe, the United States, and the State of Kansas, and other water users, which must be ratified by an Act of the United States Congress and an approved consent decree entered by the Court.

ARTICLE 2. OBJECTIVES OF AGREEMENT

- 2.1 The objectives of the Agreement are to:
- A. Recognize, quantify, and define the Tribal Water Right;
 - B. Remove causes of future controversy among the Parties concerning water rights in the Delaware River Basin and its tributaries;
 - C. Resolve permanently certain damage claims and all water rights claims among the Parties to the Agreement; and,
 - D. Establish the respective rights, duties, and obligations of the Parties with respect to the subject matter of the Agreement.

ARTICLE 3. DEFINITIONS

- 3.1 “Acre-foot” means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet or 325,850 gallons of water.
- 3.2 “Acre-Feet Per Year” means a quantity of water measured in acre-feet over a twelve month calendar year.
- 3.3 “Act” means the act of Congress to authorize the United States to enter into the Agreement and to execute the obligations set forth herein, to authorize appropriations as specified in the Agreement, and for other purposes set forth herein.

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- 3.4 “Agreement” means this Kickapoo Tribe Water Rights Settlement Agreement among the Kickapoo Tribe in Kansas, the State of Kansas, and the United States.
- 3.5 “Allottee” means any Member or successor in interest thereto with a beneficial interest in Allotted Lands.
- 3.6 “Allotted Lands” means lands within the boundaries of the Reservation that were allotted to individual Members in accordance with a treaty or federal statute, and that are held in trust by the United States for the benefit of one or more Members or successors in interest thereto.
- 3.7 “Beneficial Use” means the application of Water to any beneficial use recognized under Tribal law, Kansas law, or federal law.
- 3.8 “Chief Engineer” means the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources.
- 3.9 “Court” means the United States District Court for the District of Kansas unless otherwise specified herein.
- 3.10 “Delaware River Basin” means that area of land, depicted on the map attached hereto as Exhibit 1, within which the Chief Engineer will administer non-domestic Kansas water rights to protect the Tribal Water Right.
- 3.11 “Direct Use” means any Beneficial Use, excluding “Indirect Use” and “Storage” as those terms are defined in the Agreement.
- 3.12 “Divert” or “Diversion” means the removal of water from its natural course or location by means of a ditch, canal, flume, bypass, pipeline, conduit, well, pump, or other structure or device, or the impoundment of water within or outside of a natural water source, or by any other act of a person, or consumption by livestock.
- 3.13 “Diversion Works” means any ditch, canal, flume, bypass, pipeline, conduit, well, pump, power unit, power source, dam, and any other structure or device necessary to bring water under control for delivery to a distribution system by which the water will be distributed to a proposed Beneficial Use and any other equipment including a check valve, water level measurement tube, meter, or other measuring device.
- 3.14 “Division of Water Resources” means the Kansas Department of Agriculture, Division of Water Resources, or any successor agency or agencies.

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- 3.15 “Domestic Use” means the use of water by any person or household for any of the following:
- A. Household purposes;
 - B. The watering of livestock, poultry, farm, and domestic animals used in operating a farm for a single household and non-business usage; or
 - C. The irrigation of lands not exceeding a total of two acres in area for the growing of gardens, orchards, and lawns.
 - D. The use of water for Stockwatering is not a Domestic Use.
- 3.16 “Effective Date” of the Agreement means the date when the conditions set out in Article 10.2 have been fulfilled and are enforceable.
- 3.17 “Groundwater” means water below the surface of the earth.
- 3.18 “Impairment of Tribal Water Right” means interference with, diminution of, or deprivation of the Tribal Water Right under federal or Kansas law.
- 3.19 “Indirect Use” means the total of the average annual seepage loss and the average annual potential net evaporation loss from Water in Storage.
- 3.20 “Kansas Water Right” means a property right in the use of water obtained under Kansas law.
- 3.21 “Lawsuit” means the lawsuit filed by the Kickapoo Tribe on June 14, 2006 in the Court, captioned *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas vs. Michael Black, et al.*, D. Kan. No. 06-CV-2248-CM-TJJ.
- 3.22 “Low-head Dam” means the dam sited within the channel of the Delaware River, and located generally near the center of the East Half of Section 32, Township 4 South, Range 16 East, in Brown County, Kansas with the design dimensions as of the Effective Date of the Agreement.
- 3.23 “Member” means any person duly enrolled as a member of the Tribe.
- 3.24 “Party” or “Parties” means an entity or entities represented by a signatory or signatories to the Agreement.
- 3.25 “Person” means any natural person or any public or private entity.
- 3.26 “Point of Diversion” means the point at which water is diverted or withdrawn from a source of water supply.
- 3.27 “Point of Rediversion” means a pump, outlet tube, headgate, or similar device for the Rediversion of water.

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- 3.28 “Point of Storage” means the point at which the longitudinal axis of the dam, levee, or similar structure crosses the centerline of the stream impounded by the dam, levee, or similar structure.
- 3.29 “Priority Date” means the date of priority of the Tribal Water Right, which in this instance is October 24, 1832, the date of the establishment of the Reservation.
- 3.30 “Redivert” or “Rediversion” means releasing or withdrawing water that had been previously impounded behind a dam, levee, or similar structure, by use of a pump, outlet tube, headgate, or similar device, and the application of that water to a Beneficial Use.
- 3.31 “Reservation” means the land located within the exterior boundaries of the Kickapoo Indian Reservation established by the Treaty of Castor Hill between the Tribe and the United States dated October 24, 1832 (7 Stat. 391 (1832)), as modified in 1854 (10 Stat. 1078 (1854)) and 1862 (13 Stat. 623 (1862)). The Reservation is generally depicted on the map attached as Exhibit 1. Exhibit 1 is not intended, and shall not be used, to affect any dispute between the Tribe and the United States concerning the legal boundaries of the Reservation.
- 3.32 “Reservoir Capacity” means the volume of water that can be stored below the lower of either of the following:
- A. The elevation of the principal spillway tube in a reservoir; or
 - B. The lowest uncontrolled spillway in a reservoir.
- 3.33 “Secretary” means the Secretary of the United States Department of Interior, or his or her designee.
- 3.34 “State of Kansas” means the Kansas state government and all of its officers, agents, agencies, departments, and divisions.
- 3.35 “Stockwatering” means the watering of livestock and other uses of water directly related to the following:
- A. The operation of a feedlot, dairy, or other confined livestock feeding operation which meets either of the following conditions:
 - i. It has the capacity to confine 1,000 or more head of cattle; or
 - ii. It diverts or is likely to divert 15 or more Acre-Feet Per Year.
 - B. Stockwatering does not include the irrigation of feed grains or other crops.

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- C. For the purposes of this definition, a group of feedlots, dairies, other confined livestock feeding operations will be considered to be one operation if both of the following conditions are met:
- i. There are common feeding or other physical facilities; and,
 - ii. The group of facilities is under common management.
- 3.36 "Store" or "Storage" means impounding or the impoundment of water behind a dam, levee, or similar structure for later application to a Beneficial Use. It does not mean the Tribe's impoundment of water behind the Low-head Dam. It does not mean the Tribe's impoundment of water for the sole purpose of flood control, for the sole purpose of sediment control, or for both of these two purposes without any other purpose.
- 3.37 "Surface Water" means water in creeks, rivers, or other watercourses, and in reservoirs, lakes and ponds.
- 3.38 "Tribal Water Code" means the code that the Tribe shall enact in accordance with Article 6.
- 3.39 "Tribal Water Right" means the water right reserved from further appropriation upon the establishment of the Reservation pursuant to the doctrine in *Winters v. United States*, 207 U.S. 564, 576-77 (1908), and its progeny, as set forth in Article 5.
- 3.40 "Tribe" or "Tribal" means the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas.
- 3.41 "United States," unless otherwise specifically stated, means the United States acting in all of its capacities unless the capacity is specifically set forth in said reference.
- 3.42 "Waste" means any act or omission that causes a Diversion or Rediversion to not be applied to a Beneficial Use or to be applied in excess of the needs of a Beneficial Use.

ARTICLE 4. PARTIES AND AUTHORITY

- 4.1 The Parties, upon their respective execution of the Agreement, agree to cooperate in good faith in the execution, enforcement, and implementation of the Agreement.

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- 4.2 The Tribe's Council has the authority to execute the Agreement on behalf of the Tribe and its Members pursuant to the powers reserved to the Tribe in the Treaty of Castor Hill of October 24, 1832, as well as the Constitution and Bylaws of the Tribe.
- 4.3 The State of Kansas has the authority to execute the Agreement pursuant to the Constitution of the State of Kansas, Art. 1, § 1, and K.S.A. § 75-702, as amended.
- 4.4 As provided for and directed by the Act, upon approval by the United States Congress, the Secretary is authorized to execute the Agreement on behalf of the United States and take any other action necessary to carry out all obligations of the Secretary.

ARTICLE 5. TRIBAL WATER RIGHT

- 5.1 The Tribe or the United States on behalf of the Tribe shall have the right to Divert or Redivert, annually, 4,705 acre-feet of water, including Groundwater or Surface Water, with a Priority Date of October 24, 1832, for any Direct Use on the Reservation. The Tribe or the United States on behalf of the Tribe shall also have the right to Store water in one or more reservoirs, for purposes of subsequent Direct Use, up to a total volume as described in subsection 5.1.A., also with a Priority Date of October 24, 1832. Domestic Use by Members and Allottees does not count against the 4,705 acre-feet Tribal Water Right.
 - A. The Tribe or the United States on behalf of the Tribe shall have the right to a combined volume, in one or more reservoirs, of 18.520 acre-feet of Storage to satisfy the Tribal Water Right. If the Tribe or United States on behalf of the Tribe chooses to use the seepage characteristics of the reservoir(s) to set the combined Storage volume, then the storage volume is as specified in the table below. The Parties agree to accept estimations of reservoir seepage resulting from professionally accepted engineering principles until such time as direct measurement of seepage becomes available. After the Effective Date of the Agreement, if direct measurement of reservoir seepage becomes available using professionally accepted principles, the Parties agree to accept direct measurements of reservoir seepage instead of estimates. Any dispute between the Parties over estimates or measurements of

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reservoir seepage will be conducted according to the dispute resolution provisions of the Agreement.

Value of Estimated or Measured Reservoir Seepage from All Reservoirs Used to Satisfy the <i>Tribal Water Right</i> (calculated using a storage volume based weighted average in the case of more than one reservoir)	Total Storage Volume of All Reservoirs the Tribe or United States on behalf of the Tribe may construct to satisfy the <i>Tribal Water Right</i>
Less than or equal to 0.4 inches per month	18,520 acre-feet
Greater than 0.4 inches per month and less than 1.0 inches per month	21,090 acre-feet
Equal to or greater than 1.0 inches per month	27,300 acre-feet

- 5.2 The Tribal Water Right shall be held in trust by the United States in perpetuity for the benefit of the Tribe. The Parties acknowledge that the Tribal Water Right is not subject to abandonment or forfeiture for non-use.
- 5.3 The Tribe shall have the right to Divert, Store, and Redivert available Surface Water or Groundwater on the Reservation for any Beneficial Use, subject to the terms and conditions set forth in the Agreement, and the Tribal Water Right shall be administered in accordance with the terms of the Agreement and implementing documents.
- 5.4 The Tribal Water Right may be used on lands, consistent with Article 6, within the Reservation that are held, now and in the future, in trust or restricted status, or in fee, by the Tribe or its Allottees or Members.
- 5.5 Subject to the requirements of Subsection 5.9, the Tribe is permitted to provide water under the Tribal Water Right to Non-Indians for any of the following uses within the Reservation boundaries:
- A. Irrigation of lands within the Reservation that are held, now and in the future, in trust or restricted status, or in fee, by the Tribe or its Allottees or Members, and leased to non-Indians;
 - B. Other beneficial uses recognized under the Kansas Water Appropriation Act, K.S.A. § 82a-701 et seq., as amended; or

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- C. Where water is used directly or indirectly in the operation of a business owned by the Tribe, its Allottees or Members.

5.6 Off-Reservation Uses.

- A. The Tribe shall provide notice to the Chief Engineer of any proposed off-reservation uses of water made under the Tribal Water Right. Such notice shall be provided within 30 days of the application for such off-reservation use according to the Tribal Water Code. The Chief Engineer shall have the right to submit written comments within 30 days of such notice, and the Tribe shall consider these comments in reviewing the application. The Chief Engineer may request a hearing before the Tribe to discuss the application.

- B. The Tribe agrees to abide by the requirements of the Water Transfer Act, K.S.A. § 82a-1501 et seq., as amended, which requires approval by the State if the project involves the diversion and transportation of water in a quantity of 2,000 acre feet or more per year for beneficial use at a point of use outside a 35-mile radius from the point of diversion of such water.

- 5.7 Any entitlement to water for the Tribe or its Allottees or Members or the United States on behalf of the Tribe or its Allottees or Members, shall be satisfied out of the Tribal Water Right.

- 5.8 Nothing in the Agreement is intended to prohibit the Tribe or Allottees or Members from acquiring a Kansas Water Right appurtenant to fee lands either within or outside the exterior boundaries of the Reservation. Any such Kansas Water Rights are not to be counted against the Tribal Water Right.

- 5.9 The Tribe agrees to notify the Chief Engineer of the location of any new Diversion Works and delivery systems and any alterations or changes to the same. The notification shall be in the form set forth in Exhibit 2 to ensure accurate reporting.

- 5.10 The Tribe agrees to account to the other Parties for all amounts of and use of the Tribal Water Right, by source, on the Reservation. The accounting shall be in the form set forth in Exhibit 3.

- 5.11 The Tribe agrees to meter all Diversions and Rediversions using fully functional water flow meters capable of measuring and recording flow rate and total quantity of water Diverted or Rediverted. Meters must comply with then-current industry standards or then-current DWR regulations, whichever is less restrictive.

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- A. At the time of installation of a flow meter the Tribe agrees to provide the Chief Engineer with the information requested on the form set forth in Exhibit 4.
 - B. Within 30 days of the time of repair or replacement of a water flow meter, the Tribe agrees to provide the Chief Engineer with the information requested on the form set forth in Exhibit 5.
- 5.12 All Diversion Works and supply systems into which any type of chemical or other foreign substances will be injected must be equipped with an in-line, automatic, quick-closing check valve capable of preventing pollution of the source of the water supply.
- A. Each check valve shall be constructed and installed in accordance with the manufacturer's specifications.
 - B. Each check valve and all required components shall be maintained in an operating condition and in a manner that actually prevents backflow into the source of water supply.
- 5.13 The Tribe agrees to:
- A. Construct dams and other water obstructions to applicable tribal, state or federal standards or to equivalent or higher standards, to regularly maintain such structures, and to have such structures regularly inspected by qualified individuals pursuant to the National Dam Safety Program Act, 33 U.S.C. § 467 et seq., the Indian Dams Safety Act, 25 U.S.C. § 3801 et seq., and other applicable law;
 - B. Provide to the Chief Engineer copies of inspection reports, within a reasonable time after which said reports are received by the Tribe from the inspecting entity;
 - C. Provide notice to DWR of significant changes in the construction and operation of the tribal dam(s) and reservoir(s);
 - D. Provide prompt notice of structural problems with the dam(s) or reservoir(s), and the proposed plan of action to deal with said problems; and
 - E. Provide immediate notice to the Chief Engineer of serious, forced-drain problems such as dam failure.
- 5.14 The Tribe will permit the Chief Engineer to, if conditions warrant, have access to the Reservation and the Tribe's water infrastructure, to resolve any concerns that the Tribe and the Chief Engineer mutually identify.

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ARTICLE 6. TRIBAL WATER CODE

- 6.1 Allottees and Members are entitled to a just and equitable share and allocation of the Tribal Water Right for Beneficial Uses on trust or restricted lands within the Reservation. Allottees owning interests in Allotted Lands hold a derivative interest in the Tribal Water Right.
- 6.2 Not later than 3 years after the date of enactment of federal legislation approving the Agreement, the Tribe shall enact a Tribal Water Code that provides for:
- A. The management, regulation, and governance of all uses of the Tribal Water Right by the Tribe, Allottees, and Members so as to allocate water for Beneficial Uses in accordance with the Agreement; and
 - B. The establishment by the Tribe of conditions, permit requirements, and other limitations relating to the storage and use of the Tribal Water Right in accordance with the Agreement; and
 - C. Off-reservation uses as provided for in Article 5.6.
- 6.3 Subject to the approval of the Secretary, the Tribal Water Code shall provide that:
- A. Allocations of water to Allottees and Members shall be satisfied with water from the Tribal Water Right;
 - B. Charges for delivery of water for irrigation purposes for Allottees and Members, if applicable, shall be assessed on a just and equitable basis;
 - C. There is a process by which Allottees and Members may request that the Tribe provide water for irrigation use in accordance with the Tribal Water Code;
 - D. There is a process by which the Tribe and its Allottees and Members may elect to change the points of diversion, place, purpose and/or periods of use of the Tribal Water Right pursuant to the terms of the Tribal Water Code and the Agreement;
 - E. There is a due process system for the consideration and determination by the Tribe of any request by Allottees and Members, or any successor in interest to Allottees and Members, for an allocation of

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such water for irrigation purposes on Allotted Land, including a process for:

- i. appeal and adjudication of any denied or disputed distribution of water; and
 - ii. resolution of any contested administrative decision; and
- F. There is a requirement that Allottees and Members, or any successor in interest to Allottees and Members, with a claim relating to the enforcement of rights of Allottees and Members under the Tribal Water Code or relating to the amount of water allocated to land of Allottees and Members, must first exhaust remedies available to Allottees and Members under Tribal law and the Tribal Water Code before initiating an action against the United States or petitioning the Secretary to enforce their interests under federal law.
- 6.4 The Secretary shall administer the Tribal Water Right until the Tribal Water Code is enacted in accordance with Article 6.2 and those provisions requiring approval are approved pursuant to Article 6.3.
- 6.5 The Tribal Water Code shall be valid when:
- A. The provisions of the Tribal Water Code required by Article 6.3 are approved by the Secretary; and
 - B. Each amendment to the Tribal Water Code that affects a right of Allottees and Members is approved by the Secretary.
- 6.6 The Secretary shall approve or disapprove the Tribal Water Code within a reasonable period of time after the date on which the Tribe submits it to the Secretary.

ARTICLE 7.

ADMINISTRATION OF KANSAS WATER RIGHTS

- 7.1 Priority Date of Tribal Water Right. The Chief Engineer agrees to recognize the Tribal Water Right with a Priority Date of October 24, 1832.
- 7.2 State Review of Applications for Kansas Water Rights.
- A. Prevention of Injury to Tribal Water Right. As of the Effective Date of the Agreement, the Chief Engineer shall evaluate each application for any new Kansas Water Right and each application to change the place of use, point of diversion, or beneficial use of any Kansas Water

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Right within the Delaware River Basin on or upstream from the Reservation to determine the effect, if any, upon the Tribal Water Right. The Chief Engineer shall only approve such applications when the Chief Engineer determines that approval thereof will not cause impairment of the Tribal Water Right. The Chief Engineer shall condition such approvals as necessary to protect the Tribal Water Right, including a condition that the new Kansas Water Right or changed Kansas Water Right may be administered as necessary if it causes impairment of the Tribal Water Right.

- B. Notice of Applications Related to Kansas Water Rights to Tribe and the United States; Right to Hearing. The Chief Engineer shall provide notice to the Tribe and the United States of any application for a Kansas Water Right described in Section 7.2.A. It shall be the burden of the applicant for such an application to demonstrate that the application, if granted, will not impair the Tribal Water Right. The Tribe or the United States shall have the right to submit written comments within 30 days of such notice, and the Chief Engineer shall consider these comments in reviewing the application. The Tribe or the United States may request and receive a hearing before the Chief Engineer if the Tribe or the United States shows to the satisfaction of the Chief Engineer that approval of any such application could impair the Tribal Water Right.

- 7.3 Memorandum of Agreement to Protect the Tribal Water Right. Exhibit 6 to the Agreement is a Memorandum of Agreement (“MOA”) to administer and protect the Kickapoo Tribal Water Right.

- A. Purpose of MOA. The MOA describes the standard procedures which the Chief Engineer shall take to protect the Tribal Water Right, by administering non-domestic Kansas Water Rights, and it imposes affirmative duties upon both the Chief Engineer and the Tribe to effect that administration.
- i. Present State of Development. At the time of the Agreement, the Tribe obtains its water supply to meet existing demands from the Low-head Dam. The MOA identifies specific streamflow levels in the Delaware River measured upstream of the Low-head Dam, and requires the Chief Engineer and the Tribe to take actions commensurate with those levels to protect

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the use made of water under the Tribal Water Right at the Low-head Dam.

- ii. Future Development. The MOA also outlines a general procedure for the protection of water that will be stored by reservoirs which the Tribe intends to build in the future, recognizing that amendments may be required to the MOA as such reservoirs become operational.

B. Review and Amendment of the MOA.

- i. Adaptive Administration. The Parties recognize that the Tribe's water usage will evolve and increase as the Tribe develops the Tribal Water Right to its full authorized quantities. To ensure that the Chief Engineer protects the use of the Tribal Water Right, the Parties recognize that the methods by which the Chief Engineer conducts the administration of non-domestic Kansas Water Rights must adapt accordingly.
- ii. Annual Review of the MOA. The Parties shall review the MOA annually, with the participation of the United States should it so elect, to evaluate its procedures and to accommodate the development of the Tribal Water Right as necessary. This review shall occur at a time and place agreeable to the Parties, and may be done by electronic means. As part of the review:
 - a. The Tribe shall provide a summary of any new development of the Tribal Water Right that has taken place during the previous year and any development planned for the next year; and
 - b. The Chief Engineer shall provide a summary of any new non-domestic Kansas Water Right development in the Delaware River Basin on or upstream of the Reservation during the previous year, including any approved changes to existing non-domestic Kansas Water Rights.
- iii. Reopener Provision; Amendment of MOA. The Chief Engineer, the Tribe, or the United States shall each have the right to request revisions to the MOA. The Parties may amend the MOA at any time by unanimous agreement.

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- 7.4 Supplemental Procedure for the Administration of Kansas Water Rights to Protect the Tribal Water Right. In the event that the standard procedures set forth in the MOA are not satisfactory to the Tribe or to the United States, they may request the following supplemental procedure for administration of non-domestic Kansas Water Rights.
- A. Notice by Tribe or the United States. If the Tribe or the United States on behalf of the Tribe believes that the Tribal Water Right is being impaired or is about to be impaired by one or more non-domestic Kansas Water Rights, the Tribe or the United States on behalf of the Tribe shall provide written notice to the Chief Engineer describing the impairment. To assist in assessing the nature and extent of impairment, the Chief Engineer may request supplemental information from the Party issuing notice for such supplemental procedure for administration of Kansas Water Rights, including:
- i. The circumstances surrounding the allegation of impairment of the Tribal Water Right, including the alleged cause of such impairment;
 - ii. The minimum quantity and rate necessary to satisfy the use made of water under the Tribal Water Right;
 - iii. The location of the impairment;
 - iv. Any reasonable documentation supporting the need to protect the water supply held under the Tribal Water Right; and
 - v. An explanation of why the circumstances render the standard procedures set forth in the MOA insufficient or inappropriate to protect the Tribal Water Right.
- B. Response by the Chief Engineer. Upon receipt of the notice by the Tribe or the United States on behalf of the Tribe, the Chief Engineer shall, within 45 days, perform the following actions:
- i. Determination of Impairment. The Chief Engineer shall evaluate the notice and determine whether non-domestic Kansas water rights are impairing the Tribal Water Right.
 - ii. Administration. If the Chief Engineer finds that the Tribal Water Right is being impaired by one or more non-domestic Kansas Water Rights, the Chief Engineer shall take appropriate action under Kansas law to administer non-domestic Kansas

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Water Rights that the Chief Engineer determines are causing the impairment of the Tribal Water Right. The Chief Engineer shall issue written notice to the relevant Kansas Water Right owners whose water use is to be administered to protect the Tribal Water Right.

- iii. Notice to Tribe of Administration. The Chief Engineer shall notify the Tribe and the United States of his or her findings with respect to the Tribe's claim of impairment and the actions taken to administer Kansas Rights pursuant to this Article 7.4.
- 7.5 Access to Reservation. As part of the Chief Engineer's evaluation of impairment of the Tribal Water Right, the Chief Engineer may require access to points of diversion, places of use, observation wells, or other areas the Chief Engineer deems necessary or appropriate. If these locations are within the Reservation, the Chief Engineer shall notify the Tribe of the necessity for access to support the evaluation, and the Chief Engineer shall first secure permission from the Tribe prior to accessing locations on the Reservation that require traversing trust land. If such access is required, timely cooperation between the Tribe and the Chief Engineer will be required for completion of the Chief Engineer's evaluation.
- 7.6 No Limitation on Chief Engineer's Authority to Administer Non-domestic Kansas Water Rights. Evaluation of potential impairment of the Tribal Water Right will be done on a case-by-case basis. Notwithstanding the provisions of Articles 7.3,7.4 and 7.7 (B), the Chief Engineer may administer, at any time, non-domestic Kansas Water Rights which the Chief Engineer has determined are impairing the Tribal Water Right, including during any evaluation period.
- 7.7 Limits on the Administration of Kansas Water Rights.
- A. Administration limited to non-domestic Kansas Water Rights. The Agreement shall not require the Chief Engineer to administer domestic Kansas Water Rights to protect the Tribal Water Right.
 - B. Limitations on the Chief Engineer's Duty. The Chief Engineer's duty to protect the Tribal Water Right shall not extend to administering non-domestic Kansas Water Rights in the following cases:
 - i. Where administration would not reduce the impairment of the Tribal Water Right; and

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

- ii. Where administration would produce water supplies in excess of the Tribe's water use needs.

7.8 The Tribe shall not administer any Kansas Water Rights.

7.9 Alternative Administration of Kansas Water Rights. As an alternative to administering Kansas Water Rights, the Tribe and the United States may cooperate with the Chief Engineer and the holders of the relevant non-domestic Kansas Water Rights in the Delaware River Basin to find a mutually acceptable arrangement, such as rotating water use or other acceptable measures.

7.10 Communication Between Chief Engineer and Tribe Regarding Administration.

- A. If the Chief Engineer is administering non-domestic Kansas Water Rights to protect the Tribal Water Right, the Tribe shall notify the Chief Engineer within a reasonable time of changes in the amount of the Tribe's use of Water under the Tribal Water Right that may allow the resumption of use under Kansas Water Rights without impairing the Tribal Water Right.
- B. If the available water supplies in the relevant portions of the Delaware River Basin increase, and/or the demand for the water supplies controlled by the Tribal Water Right decrease, the Chief Engineer may allow some or all of the non-domestic Kansas Water Rights subject to administration to resume use, provided that such allowance does not impair the Tribal Water Right. In either event, the Chief Engineer shall notify the Tribe and relevant Kansas Water Rights owners of his or her decision.
- C. The Parties recognize that the Chief Engineer's effective protection of the Tribal Water Right depends upon the prompt and full reporting of the Tribe's water usage and water requirements to the Chief Engineer, as set forth in the Agreement and the MOA. The Tribe and the United States on behalf of the Tribe therefore recognize that the failure to report this information and any other relevant information to the Chief Engineer in a timely manner may impede and delay the Chief Engineer's protection of the Tribal Water Right.

7.11 Judicial Enforcement of Administrative Procedures to Protect the Tribal Water Right.

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

- A. Notwithstanding the foregoing, the Parties reserve the right to enforce the terms of this Article 7 and the MOA at any time in a court of competent jurisdiction.
- B. If any of the Parties fail to fulfill their obligations as set forth in this Article 7 or the MOA, or in the event of a good faith disagreement concerning the fulfillment of the Parties' respective obligations, the aggrieved Party may petition a court of competent jurisdiction for appropriate relief.
- C. Joint Defense. In the event that any non-Party sues any of the Parties in regards to the terms of this Article 7, the Parties shall consult with each other about whether to execute a joint defense agreement within 30 days of the filing of such a lawsuit.

ARTICLE 8. DISCLAIMERS AND RESERVATIONS

- 8.1 General Disclaimers. Nothing in the Agreement shall be so construed or interpreted:
 - A. To preclude the Tribe from acquiring, by contracting or by other means, water rights in addition to the right acquired under the Agreement from any existing or future federal or other storage facilities off the Reservation, subject to requirements under State or Federal law;
 - B. To prohibit the Tribe, or the United States on behalf of the Tribe, from objecting in any water rights adjudication in a court of competent jurisdiction to any claims to water rights not established or protected by the Agreement;
 - C. To constitute a waiver of sovereign immunity by the Tribe, the United States, or the State except as expressly set forth in the Agreement;
 - D. To prevent the United States, as trustee for the Tribe, or the Tribe itself, or the State from filing an action in any court of competent jurisdiction, to prevent any Party from interfering with the Tribal Water Right;
 - E. To limit the authority of the United States or the Tribe to regulate the Tribal Water Right;

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

- F. To restrict, enlarge or otherwise determine the subject matter jurisdiction of any state, tribal or federal court;
 - G. To commit or obligate any Party to expend funds which have not been appropriated and budgeted for said purposes pursuant to the terms of the Agreement; or
 - H. To establish any standard or precedent to be used for any other Indian tribe in any other judicial or administrative proceeding.
- 8.2 The Agreement is not a permit or authorization under state law to do any of the following:
- A. Construct any dam, structure, or other water or stream obstruction;
 - B. Make, construct, or permit to be made or constructed any change in or addition to any dam, structure, or other water or stream obstruction;
 - C. Change or diminish the course, current, or cross section of any stream;
 - D. Divert or otherwise appropriate water from any source.
- 8.3 The obligation to expend or advance any money, or the performance of any obligation by any of the Parties that require the expenditure or advancement of any money, shall be contingent upon the appropriation of funds for that purpose, and no liability shall accrue to any Party in the event funds are not appropriated.
- 8.4 Nothing contained in the Agreement affects any water claim of any Indian tribe other than the Tribe, or of persons claiming water through any other Indian tribe.
- 8.5 The Parties expressly reserve all rights not granted, recognized, or relinquished in the Agreement.
- 8.6 The Tribe and the United States represent that they have not sold, conveyed, leased, or otherwise disposed of any portion of the Tribal Water Right to any person other than the Tribe, a Member, or an Allottee.

ARTICLE 9. FEDERAL LEGISLATION

- 9.1 Subject to the limitations of federal and state law, the Parties agree to cooperate in developing and supporting federal legislation necessary to ratify the Agreement. The legislation proposed to Congress shall include provisions substantially similar but not limited to those that:

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

- A. Approve the Agreement;
- B. Authorize the Parties to amend the Agreement by unanimous consent and in accordance with any terms and limitations in the Agreement without further ratification by Congress;
- C. Give the Agreement the full force and effect of federal law;
- D. Require that the Agreement shall not take effect and be binding upon the Parties unless and until the Agreement is approved by the Court and incorporated in a final judgment and order;
- E. Provide limited waiver of the sovereign immunity of the United States to allow the Court to interpret and enforce the Agreement, the final judgment and order approving the Agreement, and the Act, but not for the purpose of any action for money damages, costs, or attorneys' fees.

ARTICLE 10. FINALITY, SETTLEMENT OF CLAIMS, EFFECTIVENESS AND TERM OF AGREEMENT

- 10.1 The Agreement has been reached as a result of good faith negotiations for the purpose of resolving legal disputes, including the Lawsuit.
- 10.2 Effective Date. The Agreement will be effective and become enforceable when the Secretary publishes in the Federal Register a statement of findings that :
- A. The Agreement has been approved by each and all of the Parties and signed by an appropriate official or officials of each and all Parties;
 - B. The Act has been signed into law;
 - C. To the extent the Act materially alters the terms and conditions of the Agreement, the Parties have conformed the Agreement to the Act;
 - D. The Article 12 waivers and releases have been executed;
 - E. The original complaint in the Lawsuit has been amended to add as new defendants all persons in the Delaware River watershed who possess Kansas Water Rights, in order to enable such Persons to review, comment on, participate in, and be bound by the terms and conditions of the Agreement and the final judgment and order to be entered by the Court;

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- F. A judgment and order approving the Agreement and dismissing David W. Barfield and his successor, and the State of Kansas, from the Complaint and as parties to the Lawsuit; has been entered by the Court, and that judgment and order have become final; and
 - G. The Secretary has fulfilled the requirements of the Agreement that accrue to the Department of the Interior.
- 10.3 Term of the Agreement. The term of the Agreement shall commence on the Effective Date and shall continue perpetually.
- 10.4 Tribal performance of any obligation under the Agreement that depends upon the appropriation of funds by Congress and the disbursement of such funds to the Tribe shall be contingent on such appropriation and disbursement. No liability that depends upon the appropriation of such funds shall accrue to the Tribe for failure to perform an obligation under the Agreement where such funds necessary to enable such performance are not appropriated or paid.
- 10.5 Performance by the State of its obligations under the Agreement that depend upon the appropriation of funds by Congress and the disbursement of such funds shall be contingent on such appropriation and disbursement. No liability that depends upon the appropriation of such funds shall accrue to the State for failure to perform an obligation under the Agreement where funds necessary to enable such performance are not appropriated or paid.
- 11.1 Upon the Effective Date of the Agreement, the Parties agree to jointly file a motion in the Lawsuit requesting a judgment and order from the Court:
- A. Realigning the United States as a party plaintiff in the ongoing proceedings contemplated by the Agreement;
 - B. Amending the original complaint to aver that the United States as trustee holds underlying legal title, and the Tribe the beneficial title, to the Tribal Water Right; and
 - C. Dismissing Michael Black in his capacity as Director of the Bureau of Indian Affairs of the United States Department of Interior, or his successor, and the Bureau of Indian Affairs, as defendants in the Lawsuit, and any and all causes of action against same;
 - D. The Court shall retain jurisdiction to enforce the terms of the Agreement and Act.

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

ARTICLE 12. WAIVER AND RELEASE OF CLAIMS; RETENTION OF CLAIMS; EFFECT

- 12.1 Waiver and Release of Claims by the Tribe and its Members and Allottees and the United States on Behalf of the Tribe and its Members. Subject to the retained rights set forth in section 12.3 and 12.4 of the Agreement and the Act, and in return for recognition of the Tribal Water Right and other benefits set forth in the Agreement, including but not limited to the commitments of the other Parties hereto, upon the Effective Date of the Agreement the Tribe on behalf of itself and its Members and Allottees, and the United States acting in its capacity as trustee for the Tribe and its Members and Allottees, agree to execute a waiver and release of claims against the other Parties to the Agreement from:
- A. Except to the extent such rights are recognized in the Agreement, all claims for water rights in the Delaware River Basin that the Tribe acting on behalf of its Members and Allottees or the United States acting in its capacity as trustee for the Tribe and its Members and Allottees asserted or could have asserted in any proceeding, including but not limited to the Lawsuit, up to and including the Effective Date;
 - B. All claims for damages, losses, or injuries to water rights or claims of interference with, diversion, or taking of water (including but not limited to claims for injury to lands resulting from such claims for damages, losses, injuries, interference with, diversion, or taking) in the Delaware River Basin that accrued at any time up to and including the Effective Date; and
 - C. All claims against the State of Kansas, its agencies, or employees relating to the Lawsuit and the negotiation and adoption of the Agreement.
- 12.2 Waiver and Release of Claims by the Tribe against the United States. Subject to the retained rights set forth in sections 12.3 and 12.4 of the Agreement and the Act, upon the Effective Date of the Agreement the Tribe, on behalf of itself and its Members and Allottees, as part of the performance of the obligations of the Parties under the Agreement, agrees to execute a waiver and release of:
- A. All claims against the United States, its agents, or employees relating to claims for water rights in or water of the Delaware River Basin that

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

the United States acting in its capacity as trustee for the Tribe and its Members and Allottees asserted or could have asserted in any proceeding, including but not limited to the Lawsuit;

- B. Provided, however, that nothing in this Agreement resolves or waives any claims by the Tribe on behalf of itself and its Members and Allottees against the United States, its agents, or employees relating to damages, losses, or injuries to water, water rights, land or natural resources due to the loss of water or water rights (including but not limited to damages, losses, or injuries to hunting, fishing, gathering, or cultural rights due to the loss of water or water rights; claims relating to interference with, diversion, or taking of water or water rights; or claims relating to failure to protect, acquire, replace, or develop water, water rights, or water infrastructure) in the Delaware River Basin that first accrued at any time up to and including the Effective Date;

12.3 Reservation and Retention of Rights. Notwithstanding the waivers and releases set forth above, the Tribe on behalf of itself and its Members and Allottees, and the United States acting in its capacity as trustee for the Tribe and its Members and Allottees, retain:

- A. All claims for enforcement of the Agreement or the Final Order, including any Partial Final Order;
- B. All claims against persons other than the Parties to the Agreement for damages, losses, or injuries to water rights or claims of interference with, diversion, or taking of water (including but not limited to claims for injury to lands resulting from such damages, losses, injuries, interference with, diversion, or taking) in the Delaware River Basin;
- C. All rights to use and protect water rights acquired after the date of the Act;
- D. All claims relating to activities affecting the quality of water, including but not limited to claims the Tribe might have under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601 et seq.) (including but not limited to claims for damages to natural resources), the Safe Drinking Water Act (42 U.S.C. § 300f et seq.), the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), all as amended, and regulations implementing those acts;

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- E. All claims relating to damages, losses, or injuries to land or natural resources not due to the loss of water or water rights (including but not limited to hunting, fishing, gathering, or cultural rights); and
- F. All rights, remedies, privileges, immunities, powers and claims not specifically waived and released pursuant to the Agreement.

12.4 Effect. Nothing in the Agreement:

- A. Affects the ability of the United States acting in its sovereign capacity to take actions authorized by law, including but not limited to any law relating to health, safety, or the environment, including but not limited to the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601 et seq.) (including but not limited to claims for damages to natural resources), the Safe Drinking Water Act (42 U.S.C. § 300f et seq.), and the Solid Waste Disposal Act (42 U.S.C. § 6901 et seq.), all as amended, and regulations implementing those acts;
- B. Affects the ability of the United States to take actions acting in its capacity as trustee for any other Indian tribe or allottee;
- C. Waives any claim of a Member of the Tribe in an individual capacity that does not derive from a right of the Tribe.

12.5 The Tribe's waivers against the United States and the State of Kansas take effect once the Act of Congress ratifying the Agreement is enacted into law.

ARTICLE 13.

DISPUTE RESOLUTION AND CONSENT TO SUIT

- 13.1 If a dispute concerning the terms of the Agreement arises among the Parties, the Parties may make a good faith effort to resolve the dispute by agreement. If after good faith negotiations, the Parties are unable to resolve their dispute, any Party may seek to have the Court resolve the dispute.
- 13.2 To permit the resolution of disputes over the terms and obligations under the Agreement, the Parties each agree to a limited waiver of sovereign immunity and agree to accept jurisdiction in the Court to enforce or interpret the Agreement, the final judgment and order approving the Agreement, and implementing federal settlement legislation. Said waiver includes any defense the State may have under the Eleventh Amendment to the

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

Constitution of the United States, but does not extend to any action for money damages, costs or attorneys' fees.

ARTICLE 14. MISCELLANEOUS PROVISIONS

- 14.1 There are no representations, warranties, inducements, promises, or agreements, oral or otherwise, between the Parties pertaining to the subject matter hereof that are not fully set out in the Agreement. The Agreement constitutes the Parties' full and final agreement and supersedes all prior written and oral negotiations, agreements, contracts, understandings, memoranda, letters of intent, and confidentiality agreements that pertain to the subject matter hereof.
- 14.2 The Agreement may be amended by the Parties.
- 14.3 All of the terms and provisions of the Agreement are binding on, inure to the benefit of, and are enforceable by the Parties' respective successors and permitted assigns.
- 14.4 The Agreement will be construed and enforced in accordance with the laws of the State of Kansas and the laws of the United States, where applicable.
- 14.5 The stipulation of the Parties to the terms of the Agreement is based upon the inclusion of all of the terms hereof. However, the Parties also stipulate that the invalidation of any provision of the Agreement will not affect any other provision or the validity and enforceability of the Agreement as a whole, unless such invalidation so materially alters the Agreement as to render it invalid and unenforceable.
- 14.6 Neither any failure by a Party to enforce or insist on compliance with any right, term, condition, or provision of the Agreement, nor any consent by a Party to any departure from any right, term, condition, or provision of the Agreement, is a waiver or release of such right, term, condition, or provision. A Party waives only those rights, terms, conditions, or provisions that are specifically waived in writing and signed by the Party waiving its rights, and any waiver or consent will only be effective in the specific instance for which it is given.
- 14.7 The Parties have entered into the Agreement because it is fair to all Parties. All Parties have been represented by counsel who have each had a hand in the drafting the Agreement. The Parties therefore agree that the Agreement must be construed as if all Parties were equally responsible for drafting each

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

and all of its provisions. Any rule of construction that would require resolving any dispute regarding the meaning of any portion of the Agreement against the drafter does not apply to the Agreement.

- 14.8 Each Party warrants that it is authorized to enter into the Agreement, that the Person signing on its behalf is duly authorized to execute the Agreement, and that no other approvals or signatures are necessary to bind the Party.


IN WITNESS WHEREOF, the Parties have each caused the Agreement to be executed on its behalf by an authorized official.

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

SIGNATURES

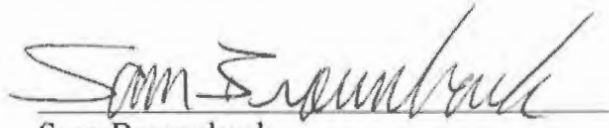
KICKAPOO TRIBE OF KANSAS

STATE OF KANSAS



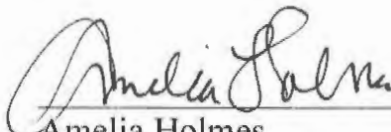
Lester Randall
Chairman of Kickapoo Tribe in Kansas

Date: 9/9/16



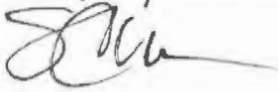
Sam Brownback
Governor
State of Kansas

Date: 9/8/16




Amelia Holmes
General Counsel of Kickapoo Tribe in
Kansas

Date: 9/9/16



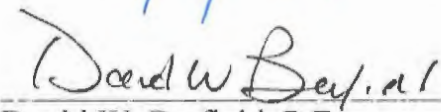
Steven C. Moore
Native American Rights Fund
Counsel for Kickapoo Tribe in Kansas

Date: 9/9/16



Derek Schmidt
Attorney General
State of Kansas

Date: 9/7/2016



David W. Barfield, P.E.
Chief Engineer
Kansas Department of Agriculture,
Division of Water Resources

Date: 9/8/2016

KICKAPOO TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

LIST OF EXHIBITS

Exhibit 1: Delaware River Basin Map (Including a General Map of the Reservation)

Exhibit 2: Location Of Diversion Works And Delivery Systems - New Locations Or Changes/Alterations

Exhibit 3: Annual Tribal Water Right Use Report

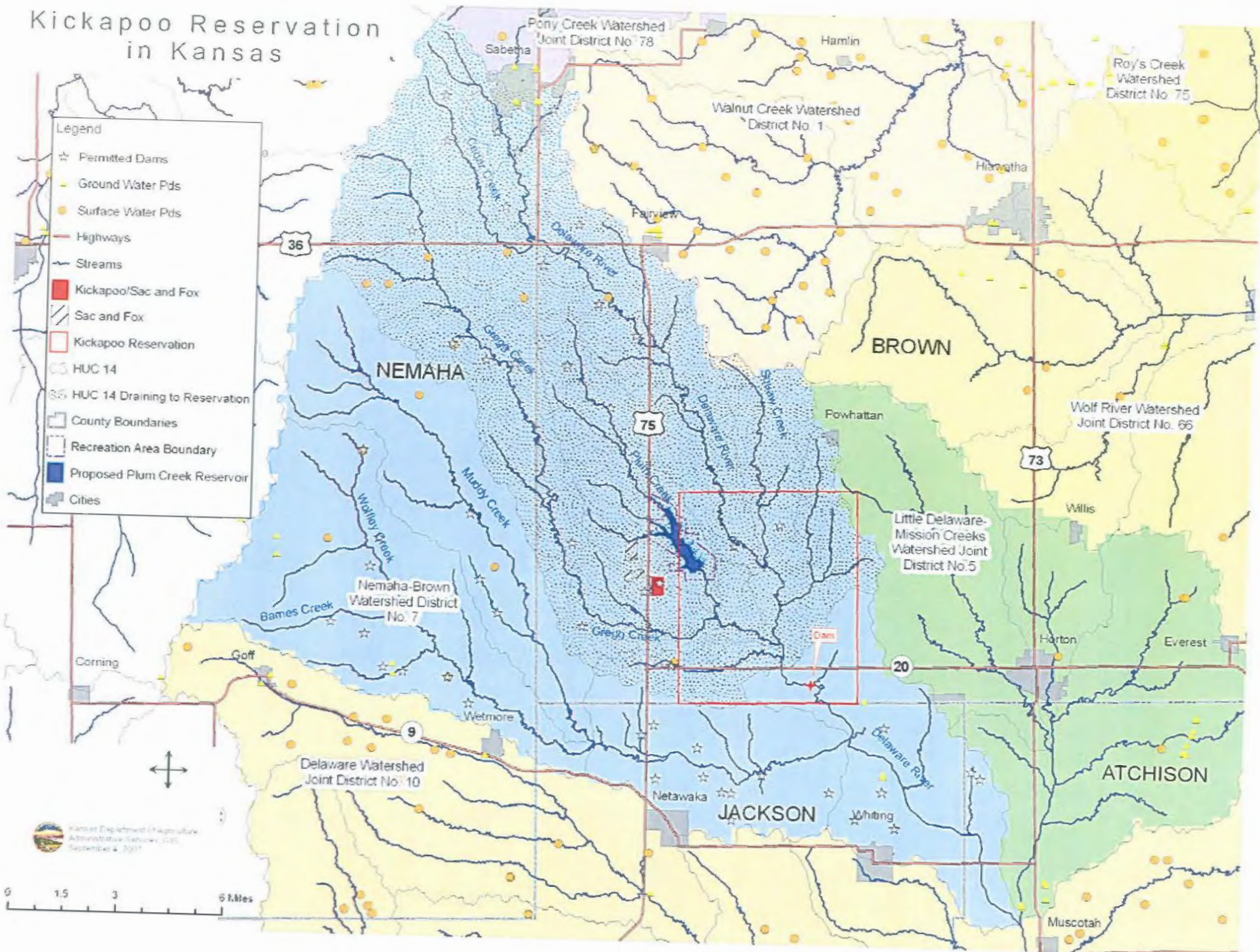
Exhibit 4: Water Flowmeter Installation Report

Exhibit 5: Water Flowmeter Repair/Replacement Report

Exhibit 6: Memorandum of Agreement to Administer and Protect the Tribal Water Right

EXHIBIT 1

Kickapoo Reservation in Kansas



- Legend**
- ☆ Permitted Dams
 - Ground Water Pds
 - Surface Water Pds
 - Highways
 - Streams
 - Kickapoo/Sac and Fox
 - ▨ Sac and Fox
 - Kickapoo Reservation
 - HUC 14
 - HUC 14 Draining to Reservation
 - ▭ County Boundaries
 - ▭ Recreation Area Boundary
 - Proposed Plum Creek Reservoir
 - Cities

Kansas Department of Agriculture
Administrative Services Unit
September 4, 2007

0 1.5 3 5 Miles

EXHIBIT 2

LOCATION OF DIVERSION WORKS AND DELIVERY SYSTEMS
[NEW LOCATIONS OR CHANGES/ALTERATIONS]

THE TRIBE WILL PROVIDE A COPY OF THIS REPORT TO THE KANSAS STATE ENGINEER WITHIN 30 DAYS OF THE LOCATION OF NEW DIVERSION WORKS AND DELIVERY SYSTEMS OR THE CHANGES IN LOCATIONS OF DIVERSION WORKS AND DELIVERY SYSTEMS.

DESCRIPTION OF DIVERSION WORK OR DELIVERY SYSTEM:

The ___ Quarter of the ___ Quarter of the ___ Quarter of Section ___, Township ___ S, Range ___ E/W in the _____ County, ___ feet north and ___ feet west of the SE corner.

CHANGES IN LOCATION OF DIVERSION WORK OR DELIVERY SYSTEM:

The ___ Quarter of the ___ Quarter of the ___ Quarter of Section ___, Township ___ S, Range ___ E/W in the _____ County, ___ feet north and ___ feet west of the SE corner.

Name: _____

Signature: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone: _____ Email: _____

EXHIBIT 3

Instructions and Definitions for Part A

- Water Right File Number:** The file number that was originally assigned by the Division of Water Resources to the application for permit to appropriate water for beneficial use or the file number that was originally assigned to the order determining and establishing a vested right to continue the beneficial use of water.
- Point of Diversion:** The point from which water is obtained, be it a well, dam or intake. If no water was used from one or more points of diversion, then the reason for non-usage must be given for each of the points of diversion.
- Legal Descriptions:** If an error exists in a legal description, mark through the incorrect portion and enter the correct description immediately above it. The location of each point of diversion is given by a qualifier followed by the section, township, and range. The qualifier is used to describe the specific location of the point of diversion within the section. For example, "NC S2 NW" reads "near the center of the South Half of the Northwest Quarter". The qualifiers may be the number of feet North and number of feet West of the Southeast corner of the section.
- Water Meter Data:** If the meter has malfunctioned during the year, please indicate in this space and provide hours pumped and pump rate.
- Beginning Meter Reading:** If a Water Meter is installed, report this year's Beginning Meter Reading (this is the same as last year's ending meter reading), applying any multiplication factor shown on the face of the meter.
- Ending Meter Reading:** If a Water Meter is installed report this year's Ending Meter Reading, applying any multiplication factor shown on the face of the meter.
- Metered Quantity:** If a Water Meter is installed, subtract this year's beginning meter reading from this year's ending meter reading and report the difference, applying any multiplication factor shown on the face of the meter. Please have the water meter checked to verify its accuracy, if it has not been checked by a qualified person within the past three years.
- Meter Unit:** Indicate the unit of measure recorded by your water meter (enter "A" for acre-feet, "AI" acre-inches or "G" for gallons).
- Hours Pumped:** Enter the number of hours the pump was operated during the calendar year.
- Est. Pump Rate:** Enter the average rate of pumping in gallons per minute.
- Well Data:** Well Depth: enter the depth to bottom of well in feet.
Depth to Water: enter the depth to water in feet.
Date Measured: enter the date of the last depth to water measurement.

EXHIBIT 4

REPORT OF INSTALLATION OF WATER FLOWMETER

File No. _____

The following information is being submitted as notice that the required meter has been properly installed:

The flow meter is located in the _____ Quarter of the _____ Quarter of the _____ Quarter (or _____ feet North and _____ feet West of the Southeast corner of Section) of Section _____, Township _____, Range _____ (East/West), _____ County, Kansas. Source of Supply: Groundwater Surface Water
(Check One)

-
1. Meter Serial Number: _____ Date Installed: _____
month day year
 2. Manufacturer of Meter: _____
 3. Model Number: _____ (Obtain from manufacturer)
 4. Meter Size: 6" 8" 10" Other: _____
 5. Meter Type: Propeller Turbine SLV Other: _____
 6. Meter Units: Gallons Acre-Feet Acre-Inches Other: _____
 7. Multiplier Factor: 000 00 0 .01 .001 Other: _____
 8. Beginning Meter Reading: _____
-

Please complete if applicable:

- Yes No Are straightening vanes installed?
- Yes No Is flow meter installed on portable pump?
- Yes No Is chemigation planned? If yes, when _____ (month/year)
- Yes No Is check valve installed? (A check valve is required for chemigation.)
If installed, when? _____ (month/year)
- Yes No Is water level measurement tube installed?
- Yes No Does the meter serve more than one point of diversion? (If yes, show diagram on back.)
- Yes No Is this a replacement meter? If yes, date meter was replaced _____
month day year
- Yes No Is the meter currently installed? Where is the meter located? (on the well, at the pivot,
in the barn etc.) _____

Please Print

Name: _____

Address: _____

City, State, Zip+4 _____

Telephone: (____) _____ Owner Tenant Agent

Signature: _____
(date)

EXHIBIT 5

WATER FLOWMETER REPAIR / REPLACEMENT REPORT

THIS REPORT MUST BE FILLED OUT COMPLETELY AND SUBMITTED WITHIN 30 DAYS AFTER THE METER WAS REPAIRED OR REPLACED.

Water Right, File No.: _____ Today's Date: _____

Well or Pumpsite Location:

the _____ Quarter of the _____ Quarter of the _____ Quarter of Section _____, Township _____ S. Range _____ E/W in _____ County, _____ feet north and _____ feet west of the SE corner.

Date the meter was found broken, malfunctioning or missing security seal: _____

	Meter removed	Meter (installed) <input type="checkbox"/> Repaired <input type="checkbox"/> Replaced
All fields must be completed		
Date		
Manufacturer		
Model		
Serial Number		
Type of Meter		
Totalizer Register Unit And Multiplier factor <small>(AF x 0.001, gal x 1000, etc.)</small>		
Totalizer Reading (include multiplier)		
Pipe Size		

Are straightening vanes installed with a manufacturer approved measuring chamber? Yes No

Is the required upstream and downstream straight pipe spacing met? Yes No

Water usage not metered: _____ hours at a rate of _____ GPM

The hours pumped can be documented with an installed hour meter on the power source or with a meter installed on equipment associated with the power source (i.e. pivot hours, engine hours, or power records, SCADA, etc.).

If meter was repaired, list the name of the Vendor who repaired the meter: _____

Copy of Vendor repair invoice with itemized list of actions taken attached (required)

Copy of Vendor comparison test results (if performed)

Energy/power records, SCADA data, or other supporting information attached (recommended)

Horsepower _____ (See note)

Note: Energy/power records can be information obtained from the electric company, natural gas company or fuel receipts in the case of diesel or propane. By knowing the quantity of energy used, the hours of operation can be calculated.

Name (print): _____ Check one: Owner Tenant Agent

Signature: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone: _____ Email: _____

NOTICE:

Kansas Administrative Regulation 5-1-10

3(a) A water right owner, or the water right owner's authorized designee, shall promptly notify the chief engineer if any water flowmeter required by the chief engineer is out of compliance.

(b) Within 30 days after the date on which the out of compliance water flowmeter has been repaired or replaced, the water right owner or the water right owner's authorized designee shall notify the chief engineer in writing of the following information:

- (1) The date the water flowmeter became out of compliance;
- (2) The water flowmeter reading at the time the water flowmeter became out of compliance;
- (3) If the water flowmeter was replaced, the following information:
 - (A) The brand, model, size, and serial number of the new water flowmeter;
 - (B) The units in which the new water flowmeter reads;
 - (C) The reading of the new water flowmeter at the time of installation; and
 - (D) The location of the new water flowmeter on the diversion works or delivery system;
- (4) If the water flowmeter was repaired, the water flowmeter reading immediately before the repair and the reading of the water flowmeter at the time it was reinstalled or the repair was completed on site;
- (5) The date the repair or replacement was completed; and
- (6) The amount of water diverted while the water flowmeter was out of compliance.

(c) If the water right owner does not maintain a record of diversions of water that is sufficient to reasonably estimate the quantity of water diverted while the water flowmeter was out of compliance, it shall be assumed, for the sole purposes of enforcement of the terms, conditions, and limitations of the approval of application or water right, and priority administration of water rights among water users, that the diversion works were operated continuously at the tested rate of diversion during the entire period the water flowmeter was out of compliance. If the rate of diversion has not been tested by the chief engineer, then it shall be assumed that the diversion works were operated continuously at the authorized rate of diversion during the entire time the water flowmeter was out of compliance. The assumption set forth in this subsection shall not apply to the determination of the annual quantity of water diverted for the purpose of perfecting a water right.

(d) If the water right owner is required by the chief engineer to repair or replace an inoperable water flowmeter, it shall be the duty of the water right owner to ensure that the repaired or replaced water flowmeter is in compliance with K.A.R. 5-1-4 and K.A.R. 5-1-6.

(Authorized by K.S.A. 82a706a; implementing K.S.A. 82a706c; effective Sept. 22, 2000.)

To properly complete the annual water use report for a year in which a meter was repaired and/or replaced:

- 1) Provide complete beginning and ending meter readings, including multiplier digits and the unit of measurement for the period prior to the repair and the period after the repaired meter was reinstalled (repair) or for BOTH meters (replacement).
 - 2) Provide hours of pump operation, rate of diversion, and compute the quantity of water diverted for time period that the meter was not in compliance and/or not installed without the meter in place. Attach supporting documentation for the unmetered quantity diverted to the report to support all computations.
 - 3) Clearly note on the report that hours and rate are in addition to metered quantity due to meter malfunction.
 - 4) Indicate with a note the estimated date that the meter became out of compliance.
 - 5) Total the metered quantities and the computed quantities and provide a total quantity of water diverted
 - 6) Enter the letter Q in the unit column.
 - 7) Complete all other data required to make a complete and accurate report.
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EXHIBIT 6

Exhibit 6

Memorandum of Agreement
Between the Kansas Department of Agriculture, Division of Water Resources,
And the Kickapoo Tribe
To Administer and Protect the Kickapoo Tribal Water Right

I. Subject and Purpose of Agreement.

This Memorandum of Agreement (“MOA”) between the Kansas Department of Agriculture, Division of Water Resources (“KDA-DWR”), and the Kickapoo Tribe (“Tribe”), documents the procedures by which KDA-DWR shall protect the Tribal Water Right by administering junior non-domestic Kansas Water Rights when necessary. This agreement is Exhibit 6 to the Kickapoo Tribe Water Rights Settlement Agreement by and among the Kickapoo Tribe in Kansas, the State of Kansas, and the United States of America (“Agreement”). Capitalized terms in this MOA are defined terms in Article 3 of the Agreement.

II. General Provisions.

- A. The MOA does not alter any provision in the Agreement. In the event of any conflict between the two documents, all provisions in the Agreement are controlling.
- B. The MOA does not limit any right of the Tribe under federal or state law to protect the Tribal Water Right, except as modified by the Agreement.
- C. The MOA does not limit the Chief Engineer from taking any action available under federal or state law to protect the Tribal Water Right.
- D. The MOA applies to all non-domestic Kansas Water Rights junior to the Tribal Water right.
- E. As defined in the Agreement, “Tribal Water Right” means the Water Right reserved from further appropriation upon the establishment of the Reservation pursuant to the doctrine in *Winters v. United States*, 207 U.S. 564, 576-77 (1908), and its progeny.
- F. As set forth more fully in Section 7.10.C of the Agreement, the Parties recognize that the Chief Engineer’s effective protection of the Tribal Water Right depends upon the effective and timely communication between the Tribe and the Chief Engineer.
- G. Subsections 5.1 and 5.1.A of the Agreement describe the Tribal Water Right:
Subsection 5.1.

The Tribe or the United States on behalf of the Tribe shall have the right to Divert or Redivert 4,705 acre-feet of Water annually, with a Priority Date of October 24, 1832, for any Direct Use on the Reservation. The Tribe or the United States on behalf of the Tribe shall also have the right to Store Water in one or more reservoirs, for purposes of subsequent Direct Use, up to a total volume as described in subsection 5.1.A., with a Priority Date of October 24, 1832. Domestic Use of Water is exempted from metering and reporting under this Agreement.

Subsection 5.1.A.

The Tribe or the United States on behalf of the Tribe shall have the right to a combined volume, in one or more reservoirs, of not less than 18,520 acre-feet of Storage to satisfy the Tribal Water Right. If the Tribe or the United States on behalf of the Tribe chooses to use the seepage characteristics of the reservoir(s) to set the combined Storage volume, then the volume is as specified in the table below. The Parties agree to accept estimations of reservoir seepage resulting from professionally accepted engineering principles until such time as direct measurement of seepage becomes available. After this Agreement is effective, if direct measurement of reservoir seepage becomes available using professionally accepted principles, the Parties agree to accept direct measurements of reservoir seepage instead of estimates. Any dispute between the Parties over estimates or measurements of reservoir seepage will be conducted according to the dispute resolution provisions of this Agreement.

Value of Estimated or Measured Reservoir Seepage from All Reservoirs Used to Satisfy the Tribal Water Right (calculated using a storage volume based on weighted average in the case of more than one reservoir)	Total Storage Volume of All Reservoirs the Tribe or United States on behalf of the Tribe may construct to satisfy the Tribal Water Right
Less than or equal to 0.4 inches per month	18,520 acre-feet
Greater than 0.4 inches per month and less than 1.0 inches per month	21,090 acre-feet
Equal to or greater than 1.0 inches per month	27,300 acre-feet

- H. The Kansas Water Appropriation Act, K.S.A. § 82a-701 *et seq.*, requires the Chief Engineer to “control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all its inhabitants in accordance with the rights of priority of appropriation.” K.S.A. § 82a-706. Pursuant to K.S.A. § 82a-706b, “[i]t shall be unlawful for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same”
- I. During times of water shortage when the exercise of non-domestic Kansas Water Rights junior to the Tribal Water Right in the Delaware River Basin is impairing the Tribe’s use made of water under the Tribal Water Right, the Chief Engineer

has the duty to administer and to regulate the exercise of those rights to protect the Tribe's water requirements, up to the maximum authorized quantities of the Tribal Water Right as described in Sections 5.1 and 5.1.A of the Agreement; but that duty does not extend to administering non-domestic Kansas Water Rights where such administration would not reduce the impairment of the Tribal Water Right, or would produce water supplies for the Tribe in excess of its water use requirements.

- J. The Parties recognize that for the purpose of resolving the impairment of the Tribal Water Right, it may not be necessary to administer all junior non-domestic Kansas Water Rights above the Low-head Dam or above Storage subsequently constructed for the Tribe. The Parties likewise recognize that the administration of certain non-domestic Kansas Water Rights may not make water available to satisfy the Tribal Water Right. As water supply conditions improve on a real-time basis within the Delaware River Basin, it may not be necessary for all junior non-domestic Kansas Water Right holders to be administered or restricted in their use of water, and KDA-DWR may allow some users of non-domestic Kansas Water Rights to resume diversions.

- K. The current water supply for the Tribe is sourced by direct diversion from a shallow reservoir, whose pool is created by the Low-head Dam. By design, the Low-head Dam allows unused water to flow over its top and downstream. Currently, the pool above the Low-head Dam remains at a constant, full-and-spilling elevation, unless diversion occurs at a rate greater than streamflow. The Low-head Dam is not designed to provide Storage of Water for later Rediversion. Instead, the Low-head Dam is designed to ensure that the diversion pumps for the Tribe's municipal water supply plant are able to operate effectively. For that reason, the Agreement provides that the Water retained behind the Low-head Dam (as currently constructed and operated) does not count as part of the Tribal Water Right's cumulative Storage amount. KDA-DWR will administer non-domestic Water Rights junior to the Tribal Water Right to protect the Tribe's diversion of water from the pool created by the Low-head Dam.

- L. As of the date of this MOA, the Tribe does not have any other dams creating Storage. The procedures set forth in this MOA shall be revised by mutual agreement when the Tribe develops Storage in addition to the Low-head Dam. KDA-DWR and the Tribe agree to work in good faith to revise this MOA in the future as the Tribe builds new dams for Storage or otherwise gains access to Storage. As set forth more fully in Subsection 7.3 of the Agreement, the MOA will be reviewed annually and revised as needed to improve its effectiveness.

- M. The Tribe and KDA-DWR may find that flows are adequate to meet the Tribe's water needs, whether from the Low-head Dam or from Storage built subsequent to the date of this MOA. During these times, they may only need to periodically communicate regarding significant changes in diversions by the Tribe, storage

levels, inflows, and diversions from storage. All efforts should be taken for clear communication when necessary, but not for exhaustive communication when unnecessary.

- N. The Chief Engineer shall inform the Tribe and the United States of the administration actions taken to protect the Tribal Water Right. This information shall include:
 - i. The Chief Engineer's findings with respect to the Tribe's claim of impairment;
 - ii. A list of the non-domestic Kansas Water Rights that were administered during each administration event;
 - iii. A copy of the tabulation record used for storage reservoir releases; and
 - iv. Any other information the Chief Engineer deems to be relevant to the administration.
- O. KDA-DWR shall make random field site checks of the diversion and storage works of junior non-domestic Kansas Water Rights which are subject to an order of administration to protect the Tribal Water Right. Any non-compliance with the Order may result in the issuance of civil penalties, orders suspending use, or other actions allowable under law.
- P. Water lawfully impounded under any non-domestic storage Kansas Water Right for more than 14 days prior to KDA-DWR administration is not available for administration.

III. Coordination and Administrative Procedures for Low-head Dam Diversion.

- A. The Parties agree that the U.S. Geological Survey ("USGS") should be contracted to site, install, and maintain a USGS gage on the mainstem Delaware River upstream of the Low-head Dam in a location that will most accurately measure low streamflow at that point ("USGS Gage").
- B. Subject to the availability of funding, the United States agrees to provide all necessary funding for the installation and maintenance of the USGS Gage.
- C. Monitoring and Administrative Duties According to Streamflow Levels.
 - i. Whenever the average of the 7 previous mean daily flows at the USGS Gage falls below 5 cubic feet per second (cfs) but remains above 2 cfs, the

Tribe shall begin communicating directly with the Topeka Field Office of KDA-DWR on a weekly basis. The Tribe's communication shall include:

- a. The daily and weekly metered quantity of water directly diverted from behind the Low-head Dam;
 - b. The year-to-date metered quantity of water diverted; and
 - c. The anticipated daily and weekly water supply demand for the upcoming week, as well as any anticipated peak demands from the Delaware River above the daily average demand.
- ii. Upon receipt of the communication described in Subsection III.C.i, KDA-DWR's Topeka Field Office shall compare the Tribe's current and anticipated water demand to concurrent USGS gaged flows, to prepare for potential Kansas Water Rights administration.
 - iii. Whenever the daily flow at the USGS Gage falls between 1 and 2 cfs, the Tribe and KDA-DWR shall communicate daily.
 - a. The Tribe's daily communication shall include:
 1. The Tribe's direct diversion quantities; and
 2. The Tribe's anticipated daily diversion quantities.
 - b. The Tribe and KDA-DWR shall make a daily comparison between the quantities described in Subsection III.D.iii.a and streamflow at the USGS Gage.
 - c. As needed, KDA-DWR and the Tribe will jointly request the USGS to check the USGS Gage site manually, or KDA-DWR and the Tribe will manually check the gage.

IV. Coordination and Administrative Procedures for Reservoir Storage and Rediversion of Direct Use

- A. The Parties agree that the USGS should be contracted to site, install, and maintain a USGS gage or multiple gages at locations in the Delaware River Basin that will most accurately measure streamflow entering any Tribal Storage dams constructed subsequent to the Agreement.
- B. Subject to the availability of funding, the United States agrees to provide all necessary funding for the installation and maintenance of the USGS Gages.

- C. The Maximum Reasonable Annual Quantity for Storage of water for beneficial use in a reservoir (MRAQS) is considered to be the lesser of the two following quantities:
- i. [(three years current Direct Use) plus (three years Indirect Use, provided this sum does not exceed reservoir capacity)], minus [(the year-to-date quantity diverted for Direct Use) plus (year-to-date estimated Indirect Use)] ; or
 - ii. [(one year current Direct Use) plus (one year Indirect Use) plus (Reservoir Capacity)], minus [(the year-to-date quantity diverted for Direct Use) plus (year-to-date estimated Indirect Use)].

D. Monitoring and Communications Duties according to Tribal Reservoir Levels.

- i. When storage is 1 foot below the MRAQS in any reservoir, the Tribe will communicate directly, by electronic means if available, with KDA-DWR's Topeka Field Office to provide the following information: the metered quantity of water diverted from Storage each day of the past week and the weekly total; the year-to-date metered quantity of water; the anticipated daily and weekly Direct Use for the next one week period; current storage volume based on a permanent gage installed at the site; and inflows. The communication will include a year-to-date reservoir accounting for all reservoirs utilized.
- ii. KDA-DWR's Topeka Field Office shall tabulate the information provided in Subsection IV.D.1 and will compare it with readings from the USGS Gage upstream of each reservoir. KDA-DWR will then determine whether reservoir inflows are sufficient to reasonably satisfy the pumping and storage under the Tribal Water Right from each reservoir.
- iii. If the reservoir storage is at or above the MRAQS, then no action will be taken.
- iv. Whenever storage at any Tribal reservoir falls to 1.5 feet below the MRAQS, KDA-DWR and the Tribe shall communicate daily and KDA-DWR's Topeka Field Office shall prepare to administer non-domestic Kansas Water Rights above that reservoir.

V. Conditions Requiring the Administration of non-domestic Kansas Water Rights to Protect the Tribal Water Right.

- A. Until the Tribe develops Storage other than that held behind the Low-head Dam, the following shall apply. Whenever the average daily flow at the USGS Gage falls below 1 cfs or below the level necessary to meet the Tribe's water requirements, whichever is greater, and the Tribe notifies KDA-DWR that the

Tribe believes that the Tribal Water Right is being impaired, KDA-DWR shall administer non-domestic Kansas Water Rights according to Section VI.

- B. When the Tribe develops Storage in addition to that held behind the Low-head Dam, the following shall also apply. Whenever storage at any Tribal reservoir falls to 2 feet below the MRAQS, then the Chief Engineer shall administer non-domestic Kansas Water Rights above that reservoir according to Section VI.
 - i. Where the MRAQS is the value calculated in Subsection IV.C.i, then KDA-DWR will administer non-domestic Kansas Water Rights to protect that value.
 - ii. Where the MRAQS is the value calculated in Subsection IV.C.ii, then KDA-DWR will administer non-domestic Kansas Water Rights to protect a full reservoir up to that value.

VI. KDA-DWR Orders for Administration of non-Domestic Kansas Water Rights to Protect the Tribal Water Right.

- A. As determined to be necessary by KDA-DWR, an Order for the Administration of non-domestic Kansas Water Rights (Order) may require:
 - i. The administration of all direct diversion rights upstream of the Low-head Dam and/or any tribal reservoir in the Delaware River Basin; and
 - ii. Requiring the bypass of inflows to all reservoirs upstream of the Low-head Dam and/or any tribal reservoir in the Delaware River Basin.
- B. The Chief Engineer shall notify by the Order the holders of non-domestic Kansas Water Rights which are to be administered to resolve the impairment of the Tribal Water Right. The Order shall require:
 - i. Holders of certain non-domestic, direct diversion Kansas Water Rights to immediately cease all diversions from the main stem of the Delaware River and its tributaries until further notice, to satisfy the Tribe's water needs; and
 - ii. Holders of certain non-domestic, storage Kansas Water Rights junior to the Tribal Water Right to immediately take any necessary action (such as opening valves or gates, or installing pumps or siphons) to bypass all inflows until further notice.
- C. For the duration of the Order, the Tribal Water Right is entitled to any runoff collected and stored by the administered non-domestic storage Kansas Water Rights above the Low-head Dam or the Tribal reservoir or reservoirs within 14 days of the issuance of the Order. Any runoff within the 14 days prior to the

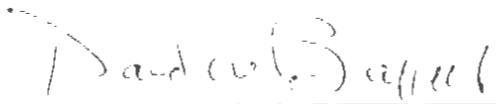
Order, as well as any runoff that occurs while the Order is in effect, shall be administered. The rate of release shall allow for the evacuation of this runoff in not more than 14 days. In determining the volume to be released, one of two methods may be used:

- i. The holder of a non-domestic storage Kansas Water Right for a reservoir can install a staff gage in that reservoir. When flows at the USGS Gage described in Section III fall to an average weekly value of 5 cfs or less, KDA-DWR shall require the holder to maintain weekly records of water levels in that reservoir. The Order shall require the holder to report the staff gage elevation as of the date of the Order to KDA-DWR. The Order will require the holder to release water from his or her reservoir to return it to the elevation identified 14 days prior to the date of the Order, and will also require the holder to bypass inflows to the reservoir that occur during the duration of the Order using the installed staff gauge. The release will require a reduction in the reservoir's water level down to the level of the previous week's reading or the reading from two weeks previous to the Order, whichever is lower in elevation.
- ii. In the event the holder of such a non-domestic storage Kansas Water Right cannot install a staff gage, or does not compile the required record of gage readings or report these readings to the KDA-DWR as required, or if any other situation or condition occurs that results in the inability of a determination to be made for a specific volume to be released from the reservoir, the holder must release or otherwise evacuate all water retained in the reservoir or as otherwise directed by the Chief Engineer.

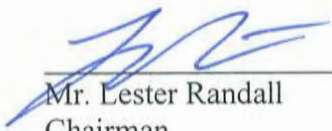
D. Resumption of use by non-domestic Kansas Water Rights.

- i. As long as the Tribe lacks Storage other than that held behind the Low-head Dam, the following shall apply. When the average weekly flow at the USGS Gage described in Section III of this MOA exceeds the quantity of the weekly diversions by the Tribe for a period of 14 days and KDA-DWR determines that the administration of non-domestic Kansas Water Rights is no longer necessary, then KDA-DWR shall notify the holders of those rights that their diversions may resume.
- ii. When the Tribe develops Storage in addition to the Low-head Dam, the following shall apply. When the storage within the affected Tribal reservoir is maintained at 100% of the MRAQS for a period of 14 days and KDA-DWR determines that administration of non-domestic Kansas Water Rights is no longer necessary, then KDA-DWR shall notify the holders of those rights that their diversions may resume.

SIGNATURES



David W. Barfield
Chief Engineer
Division of Water Resources
Kansas Department of Agriculture



Mr. Lester Randall
Chairman
Kickapoo Tribe in Kansas