

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement (this "Agreement") is entered into by and between the *City of Deming*, a political subdivision of the State of New Mexico, (the "Agency"), and Daniel B. Stephens & Associates, Inc. ("Contractor") effective as of the date approved by the Southwest Water Planning Region Steering Committee.

RECITALS

THE PARTIES HERETO enter into this Agreement on the basis of the following facts, understandings, and intentions:

A. The Agency is authorized to retain the expertise and services offered by a Contractor to develop water resource assessments and perform other services needed for completing a regional water plan for the Region on a timely basis.

B. Contractor has represented and warranted to the Agency that Contractor is capable of performing water planning for the Region and Contractor is the appropriate party within the Region to contract with the Agency for the purpose of preparing a regional water plan.

C. The Agency and Contractor mutually desire to enter into this Agreement to provide for continued development of such a regional water plan for the Region.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals and the covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Term. The term of this Agreement shall be from the date of approval by the Southwest Water Planning Region Steering Committee and shall expire December 31, 2003 unless this Agreement is amended or terminated pursuant to its terms. The services to be provided by Contractor under this Agreement, however, shall not commence until Contractor has (i) received a fully executed copy of this Agreement, and (ii) received specific instructions from the Regional Water Planning Manager designated by the Agency.

2. Work.

(a) *Generally.* Professional services to be provided pursuant to this Agreement include the following: Contractor shall prepare a regional water plan for the Region in accordance with the December 1994 New Mexico Interstate Stream Commission *Regional Water Planning Handbook*. In addition, services and deliverables pursuant to this Agreement will include those specified in the scope of work for the regional water plan as more particularly described by Exhibit A attached hereto (collectively, the "Scope of Work").

(b) *Changes.* The parties may enter into a letter agreement to expedite necessary but unforeseen changes in scheduling, services, or deliverables. Any such letter agreement shall not alter funding, which may only be altered pursuant to an amendment to this Agreement.

(c) *Regional Water Planning Manager.* The Regional Water Planning Manager designated by the Agency, will coordinate all efforts and communications between Contractor and the Agency related to, or in furtherance of the tasks to be performed under, this Agreement. The Regional Water Planning Manager will also recommend approval or rejection of deliverables and invoices.

(d) *Deliverables.* Deliverables will be as specified in the Scope of Work.

(e) *Progress Reporting.* Contractor will provide progress reports on the services and deliverables called for under this Agreement. Four (4) progress meetings shall be scheduled. Participants shall include all key persons involved in performing services under this Agreement. Two (2) of the meetings will be held in the Region and two (2) will be in Socorro unless otherwise mutually determined by the parties to this Agreement. Progress reports and any deliverables must be submitted not more than thirty (30) days, and not less than three working (3) days, in advance of the progress meeting to Agency staff for timely review and comment. Progress reports will be submitted electronically.

(f) *Quality Assurance.* Contractor is solely responsible for assuring the quality of the services and deliverables pursuant to this Agreement. The Agency shall review and, at the progress meetings, comment upon services and deliverables provided under this Agreement. Written comment will be provided as the Agency deems appropriate. If the Agency determines that progress and/or work product are unsatisfactory, the Agency will provide Contractor with written comments addressing the area requiring corrective action. Contractor shall have thirty (30) days following receipt of such written comments to take corrective action to the satisfaction of the Agency.

(g) *Comprehensive Review.* The Agency may require a comprehensive review of the performance of services under this Agreement at any time in the process to assure the project is reaching the goals set forth by the Scope of Work and this Agreement.

(h) *Personnel.* The Agency may advise Contractor when assigned staff and/or subcontractors are not, in the opinion of the Agency, satisfactorily meeting the requirements of this Agreement. The Agency and Contractor shall in good faith attempt to agree upon appropriate remedial action to correct staffing or subcontracting problems.

3. Compensation and Payment.

(a) *Cost.* This Agreement is a "cost not to exceed" agreement. Contractor shall complete all of the Scope of Work for no more than \$135,000 including NM gross receipts tax. Any excess or unanticipated expenses incurred by Contractor shall be Contractor's sole responsibility and shall in no way relieve Contractor from completing the Scope of Work to the satisfaction of the Agency. The Agency shall compensate Contractor on a reimbursable basis. Contractor shall include gross receipts taxes with the Contractors invoices, if any, and shall pay such gross receipts taxes to the State of New Mexico.

(b) *Invoices.* Contractor shall submit detailed invoices to the Regional Water Planning Manager at such times and in such manner as the Regional Water Planning Manager may direct, but not less frequently than quarterly. The original invoices shall, at a minimum: (i) contain the contract number; (ii) be signed by Contractor; (iii) include a summary of the services and deliverables furnished and a percentage of work tasks completed, and costs and expenses incurred. Only costs and expenses covered in the Scope of Work will be reimbursed by the Agency. Invoices will be reviewed by the Regional Water Planning Manager and other Agency staff, and such portions as may be approved will be submitted by Agency staff to the New Mexico Interstate Stream Commission for payment. Contractor shall not be entitled to receive any payment not invoiced and supported by appropriate documentation. Payment of the amount invoiced, or any part thereof, shall not relieve the Contractor of any unperformed obligations.

(c) *Exception to Invoices.* If the Agency finds the services performed or the deliverables provided pursuant to this Agreement unacceptable, within thirty (30) days of receipt of Contractor's invoice for such services the Agency will provide to Contractor a letter of exception explaining the deficiency along with details of how Contractor may remediate the deficiency.

(d) *Equipment.* Contractor shall not be reimbursed for any equipment that Contractor might acquire during the course of Contractor's performance under this Agreement.

(e) *Mistake in Compensation.* If Contractor is compensated in error, Contractor shall reimburse the Agency for the full amount thereof within thirty (30) days of written notice of such error. If Contractor becomes aware of such an error independently of the Agency, Contractor shall promptly notify the Agency thereof.

(f) *No Guarantee.* The Cost Limitation Amount is a maximum and in no way shall be interpreted as a minimum, a grant, or a guaranteed figure.

(g) *Payment Terms.* Agency agrees to process payment request to the State within two (2) weeks of receipt of contractor's invoice, including invoices for costs and services up to any early termination date.

4. Termination.

(a) *Events of Termination.* This Agreement may be terminated as follows:

(i) At any time by written agreement of the Agency and Contractor.

(ii) By the Agency for cause upon failure of Contractor to materially comply with the terms of this Agreement. The Agency will give Contractor written notice specifying Contractor's failure to comply. Within thirty (30) days of receipt of such notice, Contractor shall correct the failure (or, if such failure cannot reasonably be corrected in such thirty (30) day period, Contractor shall begin in good faith to correct the failure and thereafter proceed diligently to complete correction of the failure). If within thirty (30) days Contractor has not completed corrective action (or initiated corrective action, as the case may be) to the satisfaction of the Agency, the Agency may deliver written notice terminating this Agreement as of the date of such notice.

(iii) By the Agency at any time if required by changes in state or federal law, because of court order, or because of insufficient funds appropriated, authorized, or encumbered. If the Agency terminates this Agreement pursuant to this subsection, the Agency will attempt to provide Contractor written notice of such termination at least thirty (30) days before the effective date of the termination.

(iv) Contractor may terminate this contract without penalty by written notification to the Regional Water Planning Manager thirty (30) calendar days after date of written notification for cause (except convenience).

(b) *Contractor Obligations.* Immediately upon the expiration or earlier termination of this Agreement (or the date of receipt of notice of the Agency's intent to terminate, as the case may be) Contractor shall:

(i) Incur no further financial obligations under this Agreement without prior written approval of the Agency.

(ii) Cease all work to the extent specified in the notice of termination and except as the Agency may direct in writing for orderly completion and transition.

(iii) Take such action as the Agency may direct or as may be reasonably necessary for protection and preservation of all property and all records related to by this Agreement.

(iv) Cooperate fully in the completion or transition of any tasks so as to permit continuity in the administration of Agency programs.

(c) *Costs of Termination.* Upon the expiration or earlier termination of this Agreement, the Agency shall pay Contractor all amounts due for services completed before the effective date of such expiration or termination (or for services approved by the Agency as part of the transition described in Section 4(b)(ii) above).

(d) *Transfer of Files.* Upon expiration or earlier termination of this Agreement, Contractor shall assist and cooperate with the Agency in the orderly and timely transfer of files, documents, memoranda, notes, data, and/or related materials (whether provided by the Agency to Contractor or created by Contractor pursuant to, or in furtherance of the tasks under, this Agreement), to the Agency.

(e) *No Nullification.* Neither party may, by termination of this Agreement, nullify obligations already incurred before the date of notice or required to be provided through the effective date of termination.

5. Disputes. Contractor and the Regional Water Planning Manager will attempt to informally resolve any disputes that may arise related to this Agreement. Before either party to this Agreement may bring suit in any court concerning any issues relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation.

6. Status of Contractor.

(a) *Independent Contractor.* Contractor is an independent contractor providing services for the Agency and is not an employee of the Agency or the State of New Mexico. As a result of this Agreement, Contractor shall not accrue

leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the City of Deming, New Mexico.

(b) *Costs of Business.* Contractor shall be solely responsible to pay all applicable taxes (including gross receipts tax), insurance expenses, licensing fees, and other costs of doing business (other than reimbursable expenses specifically provided for herein, if any).

(c) *Authority of Contractor.* Contractor shall not purport to bind the State of New Mexico, nor its agencies, officers, or employees, to any obligation not expressly authorized herein, nor shall the Contractor assert or imply Agency endorsement of work performed under this Agreement.

7. Release. Contractor, by acceptance of final payment of the amounts due under this Agreement, releases the City of Deming, New Mexico, its agencies, officers, and employees, from all liabilities and obligations whatsoever under, arising from, or related to this Agreement or the services provided under this Agreement.

8. Records and Audit. During the term of this Agreement, including any extensions of the term agreed to by the parties, and for three (3) years after its expiration or earlier termination, Contractor shall maintain detailed records that indicate the date, time, and nature of services provided. Such records shall be kept in accordance with Generally Accepted Accounting Principles and be easily separable from other records. The Agency, or the designee of any of the aforesaid, shall have the right to audit such records at any time upon five (5) days prior written notice to Contractor. The period that Contractor must retain records, and the corresponding right to audit, shall be automatically extended for records that relate to litigation and/or settlement of claims arising out of this Agreement for a minimum of three (3) years following the termination of any such litigation or the settlement of any such claims. Contractor shall ensure that subcontracts related to Contractor's performance under this Agreement contain the same requirements as contained in this Section regarding the maintenance of records, the right of the Agency, or the designee of any of the aforesaid, to audit. Contractor shall not be compensated for time spent or any costs incurred in complying with this Section.

9. Standard of Care. The Contractor warrants that it and its employees possess the experience, knowledge and character necessary to qualify them individually for the particular duties they perform in connection with the services to be performed in accordance with the standards of their profession. The Contractor further agrees that subcontractors and agents will be required to warrant to the Contractor that they possess the experience, knowledge, and character necessary to qualify them individually for the particular duties that are performed for the Contractor pursuant to the Agreement. This warranty shall further state that the services so entered into shall be performed in accordance with the standards of their profession. Such warranty by subcontractors and agents shall not be construed as a diminution of the Contractor's liability and responsibilities pursuant to the Agreement.

10. Indemnification. Contractor shall indemnify, defend, and hold harmless the City of Deming, New Mexico, its agencies, officers, and employees, from and against any and all loss, cost, liability, or expense (including attorneys' fees incurred in connection with, and/or staff attorneys' salaries allocable to, any action the Agency takes to enforce this Agreement) for injury (bodily or otherwise) or damage to any person or organization directly or indirectly caused by any negligent performance of the services by the Contractor pursuant to, or in furtherance of the tasks to be performed under, this Agreement. Contractor shall in no case be required to pay an amount disproportionate to the Contractor's negligence, nor shall Contractor be required to pay an amount levied against the Agency to recognize more than actual and/or reasonable damages.

11. Work Product. Contractor warrants that all things produced by Contractor pursuant to, or in furtherance of the tasks under, this Agreement will be of original development by Contractor, will be specifically developed for the fulfillment of this Agreement, and will not infringe upon or violate any patent, copyright, trade secret, or other property right of any third party. Contractor shall indemnify, defend, and hold harmless the City of Deming, New Mexico, its agencies, officers, and employees, from and against any and all loss, cost, liability, or expense arising out of breach or claimed breach of the foregoing warranty. Nothing produced or developed, in whole or in part, by Contractor pursuant to, or in furtherance of the tasks under, this Agreement shall be the subject of an application for copyright or other property right by or on behalf of Contractor. All things produced, developed, or acquired by Contractor pursuant to, or in furtherance of the tasks under, this Agreement are public records and shall be delivered to (or, if intangible, assigned to) the Agency upon the expiration or earlier termination of this Agreement.

The agency agrees not to reissue any revisions to Contractor's work without removal of Contractor's letterhead, logo, or reference to the work being completed by the Contractor. If the Contractor's work is used for any purpose other than the purpose that the work was completed for, the Contractor is not responsible for the outcome caused by the reuse of such work.

12. Equal Opportunity Compliance. Contractor shall abide by all applicable laws, rules, regulations, and orders pertaining to equal opportunity. Contractor shall indemnify, defend, and hold harmless the City of Deming, New Mexico, its agencies, officers, and employees, from and against any and all loss, cost, liability, or expense arising out of breach or claimed breach of such laws, rules, regulations, and orders.

13. Governmental Conduct. Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the services to be provided under this Agreement, and further warrants that signing of this Agreement will not be creating a violation of the Governmental Conduct Act, §§ 10-16-1 through 10-16-18, N.M.S.A. 1978, nor will Contractor violate the Governmental Conduct Act following the expiration or earlier termination of this Agreement. Finally, Contractor acknowledges that it is familiar with the New Mexico Procurement Code, §§ 13-1-28 through 13-1-199, N.M.S.A. 1978,

recognizes that the Procurement Code imposes civil and criminal penalties for its violation, and understands that New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities, and kickbacks.

14. Waiver. No term of this Agreement shall be deemed waived unless such waiver is in writing signed by the party making the waiver. No delay or omission by either party in exercising or enforcing any right or power hereof shall impair such right or power or be construed to be a waiver thereof. No custom or practice that may evolve between the parties shall be construed to lessen the right of a party to require the performance of the other party in strict accordance with the terms of this Agreement. A waiver by one party of a failure of the other party to fully comply with any of the terms of this Agreement shall not be construed to be a waiver of any subsequent failure to comply or any other failure to comply.

15. Excusable Delay. Contractor and the Agency shall be excused from performance for any period that they are prevented from performing any services or obligation hereunder in whole or in part as a result of an act of God, war, civil disturbance, epidemic, court order, or other cause beyond their reasonable control, and such nonperformance shall not be a ground for termination of this Agreement but shall not by itself extend the term of this Agreement.

16. Policies and Procedures. Contractor shall follow any policies and procedures that may from time to time be established by the Agency and of which Contractor is made aware, provided, however, that such policies and procedures shall not materially alter the terms of this Agreement.

17. Notices. All notices and communications required or permitted under this Agreement (including change of address and facsimile or telephone number set forth below) shall be in writing and shall be deemed given to, and received by, the receiving party: (i) when hand-delivered to the street address of the receiving party set forth below; (ii) when sent by facsimile transmission to the facsimile number of the receiving party set forth below; (iii) one (1) day after deposit with a national overnight courier addressed to the receiving party at the street address set forth below; or (iv) five (5) days after deposit in the U.S. mail, certified mail, return receipt requested, postage prepaid, addressed to the receiving party at the mailing address set forth below.

18. Schedule for Completion

All work described in Tasks 2, 3, and 4 in Exhibit A will be submitted to the Southwest Water Planning Region Steering Committee by October 31, 2003. The Task 1 steering committee meetings and progress meetings will be completed as directed by the Southwest Water Planning Region Steering Committee and the ISC.

The Agency: City of Deming
309 S. Gold
Deming, New Mexico 88030
Telephone No.: 505-546-8848
Facsimile No.: 505-546-6442

Contractor: Daniel B. Stephens & Associates, Inc.
6020 Academy NE, Suite 100
Albuquerque, New Mexico 87109
Telephone No.: 505-822-9400
Facsimile No.: 505-822-8877

18. Amendment. This Agreement shall not be altered, changed, or amended other than by a written instrument executed by the parties.

19. Assignment. Contractor shall not assign or transfer any rights, obligations, duties, or other interest in this Agreement, or assign any claim for money due under this Agreement, without the prior written consent of the Agency, which consent may be withheld in the Agency's sole and absolute discretion.

20. Authority. If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represent and warrant that they have the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

21. Incorporation. Each and all of the recitals set forth at the beginning of this instrument, and any exhibits referenced herein and attached hereto, are incorporated herein by this reference.

22. Calculation of Time. Any time period herein calculated by reference to "days" means calendar days, unless otherwise indicated, *i.e.*, including Saturdays, Sundays, and holidays as observed by the State of New Mexico; provided, however, that if the last day for a given act falls on a Saturday, Sunday, or such observed holiday, the day for such act shall be first day following such Saturday, Sunday, or observed holiday that is not a Saturday, Sunday, or such observed holiday.

23. Interpretation. The captions and paragraph headings of this Agreement are not necessarily descriptive, or intended or represented to be descriptive, of all the terms thereunder, and shall not be deemed to limit, define, or enlarge the terms of this Agreement. Whenever used herein, unless otherwise indicated by the context, the singular shall include the plural, the plural shall include the singular, the use of any gender shall include all genders, and the use of the words "include" and "including" shall be construed as if the phrases "without limitation" or "but not [be] limited to" were annexed thereafter. The parties were, or had ample opportunity to be, represented by counsel, and as such this Agreement shall not be interpreted for or against either party based on authorship. If Contractor is other than a natural person, the use herein of

"Contractor" shall, where reasonable in the best interests of the Agency, be deemed to indicate and/or include all of the owners, partners, members, and employees of Contractor; provided, however, that such interpretation shall not be used in connection with Contractor's indemnity obligations contained in this Agreement.

24. Applicable Law. Each party shall perform its obligations hereunder in accordance with all applicable laws, rules, and regulations now or hereafter in effect. This Agreement shall be governed by the laws of the State of New Mexico (without giving effect to the State of New Mexico's choice of law provisions). All legal proceedings arising from unresolved disputes under this Agreement shall be brought in _____ of the State of New Mexico.

25. Survival. Terms of this Agreement that provide for rights, duties, and/or obligations that expressly or logically extend beyond the expiration or earlier termination of this Agreement, including Contractor's indemnity obligations, shall survive such expiration or earlier termination of this Agreement.

26. Severability. If any terms of this Agreement, or the application of such terms to any person or circumstance, shall be held illegal, invalid, or unenforceable, the remainder of this Agreement, or the application of such terms to persons or circumstances other than those to which it is held illegal, invalid, or unenforceable, shall not be affected; provided, however, that the remainder of this Agreement is still capable of performance in substantial accordance with the original intent of the parties.

28. Merger. This Agreement incorporates all the agreements, covenants, promises, and understandings between the parties concerning the subject matter hereof, and all such agreements, covenants, promises, and understandings have been merged into this Agreement. No prior agreement, covenant, promise, or understanding of the parties, verbal or otherwise, shall be valid or enforceable unless embodied in this Agreement. This Agreement may be executed in multiple originals, each of which shall be deemed an original.

29. Effective Date. This Agreement shall not become effective unless and until approved by Southwest Water Planning Region Steering Committee and the City of Deming.

[Signatures and approvals on following page.]

IN WITNESS WHEREOF, the parties have entered into this Professional Services Agreement effective as of the date approved by _____.

CONTRACTOR

Daniel B. Stephens & Associates, Inc.

By: _____

Date:

Name: _____

Title: _____

AGENCY

City of Deming, New Mexico

By: _____

Date:

Approved as to form:

By: _____

Date:

Agency Attorney

TAXATION AND REVENUE DEPARTMENT

The records of the Taxation and Revenue Department of the State of New Mexico reflect that Contractor is registered with the department to pay or is exempt from gross receipts and compensating taxes.

ID Number: _____

By: _____

Date:

Exhibit A
to
Professional Services Agreement

SCOPE OF WORK

[To be attached.]