

SWA

ORIGINAL

## ACCESS AGREEMENT

THIS ACCESS AGREEMENT ("Agreement") is made this 29<sup>th</sup> day of ~~November~~, 2012 by and between Sycuan Band of the Kumeyaay Nation ("Sycuan") and assigns, hereinafter referred to as "Grantor," and the Sweetwater Authority ("SWA"), hereinafter referred to as "Grantee."

### RECITALS

A. Grantor is the owner of certain real property described in Exhibit "1" attached hereto, situated in the County of San Diego, State of California, hereinafter referred to as the "Property."

B. Grantee is the owner of a certain slide gate structure, together with all fixtures, equipment, and appurtenances necessary for the operation and maintenance thereof (collectively, "SWA Slide Gate"), located on the Property, as described in Exhibit "2" attached hereto, in the County of San Diego, State of California.

C. Grantor intends to transfer the Property to the United States Department of the Interior ("United States") to be held in trust for the benefit of Grantor.

D. Grantor desires to grant to Grantee a right of access to the Property, for the period that Grantee requires access to the SWA Slide Gate on the Property, for the purposes of operation, maintenance, replacement and repair of the SWA Slide Gate in accordance with the terms and conditions hereinafter set forth.

E. Once the Sycuan Property is brought into Trust, Grantor and Grantee further desire to request a non-exclusive easement over the Property granted to Grantee from the United States in order to provide access to the SWA Slide Gate on the terms and conditions hereinafter set forth in this Access Agreement.

### GRANT OF ACCESS

1. For valuable consideration, receipt of which is hereby acknowledged, Grantor hereby grants to Grantee a right of access on, over, and through that portion of the Property as described in Exhibit "2", attached hereto and incorporated herein, for the purpose of operation, maintenance, replacement, and repair of the SWA Slide Gate in accordance with the terms and conditions of this Agreement.

2. The grant hereunder includes the express right of Grantee to enter upon the Property along such routes as described in Exhibit "2", or using a mutually agreed upon alternative route for Grantee that Grantor determines is within the Developed Areas of the Sycuan Cultural and Natural Resources Management Plan and consistent with the Plan. The designated access route to be used by Grantee shall be secured through a padlocked gate, or other means, by which Grantor will provide Grantee secure access. In addition, any designated access route between the entrance point to the Grantor's property and the SWA Slide Gate shall be at least 25 feet wide, with 50 foot vertical clearances within this width in the area adjacent to the SWA Slide Gate, including adequate radius of the designated access route, in order to allow for large construction equipment to safely pass and turn around areas adjacent to the SWA Slide Gate.

3. Neither the rights granted herein nor the use thereof shall unreasonably interfere with Grantor's use of the Property. Without limiting the foregoing or any other provisions of this Agreement, Grantor specifically reserves the right to use the Property so long as such use does not unreasonably interfere with Grantee's use of the SWA Slide Gate. The SWA Slide Gate shall be used only to accommodate water releases from Loveland Reservoir, via Lake Emma, to Sweetwater Reservoir, and for no other purpose, except as may be mutually agreed upon by the parties. Grantee's access to the Property, including its access to the Property and the SWA Slide Gate, shall be subject to Grantee's observing such reasonable rules as Grantor shall prescribe for such entry, including Grantee's compliance with all safety requirements, e.g., speed limits, smoking control, and access notification (including, but not limited to, providing identification if requested), and any applicable local, state, Tribal or federal laws and regulations.

4. Grantee maintains its discretion to determine the appropriate timing and amount of any water releases from Loveland Reservoir, subject to the conditions set forth in this Section 4. Upon determining that a release of water from Loveland Reservoir is necessary, Grantee must (i) notify Grantor of such release twenty four (24) to forty eight (48) hours prior to the release and provide the Grantor an estimate of the duration of the release event, (ii) prior to such release, determine the elevation of Lake Emma, (iii) operate the SWA Slide Gate in such manner as to release from Lake Emma the water amount released from Loveland Reservoir which has reached Lake Emma, and no more, and (iv) return Lake Emma to its elevation level, or above, prior to Grantee's release of water from Loveland Reservoir. In the event of an emergency necessitating an immediate water release from Loveland Reservoir, via Lake Emma, to Sweetwater Reservoir, Grantee will make all reasonable efforts to comply with this Section 4, or as soon thereafter as reasonably practicable, after such release. Grantee shall provide Grantor immediate telephone and electronic notification of the occurrence of a potential emergency necessitating immediate water release from Loveland Reservoir.

5. Grantee shall release, defend, indemnify, and hold Grantor, its subsidiaries, affiliates, successors, assigns, and trustees, and their respective directors, officers, employees, shareholders, representatives, and agents harmless from and against any and all claims, actions, damages, liabilities, and expenses (including attorneys' fees and costs of litigation) (collectively "Claims") arising from or out of any occurrence related to this Agreement, or the SWA Slide Gate, or arising from the rights granted herein, or occasioned wholly or in part by the act or omission of Grantee, or its agents, contractors, employees, or servants, except to the extent that such Claims arise from the active negligence or willful misconduct of Grantor and/or failure of the pre-existing streambed stabilizer in which the SWA Slide Gate was installed, as more particularly described in Exhibit "2".

6. Grantee shall bear all costs and expenses incurred in connection with this Agreement and/or any use of the rights granted herein, including but not limited to the cost of obtaining all permits and other approvals for and the cost of constructing the SWA Slide Gate. Grantee shall, at its own cost and expense, improve, maintain, replace, and repair the SWA Slide Gate; provided, however, no construction shall be commenced without at least thirty (30) days prior written notice to Grantor. Without limiting in any way the obligations of Grantee otherwise imposed by this Agreement, or by law, ordinance or regulation, Grantee shall, solely at its own cost and expense, maintain and keep the SWA Slide Gate at all times in good repair and condition and pay all costs of operation and maintenance thereof, whether ordinary or extraordinary and foreseen or unforeseen.

7. The rights granted herein shall bind the Grantor and inure to the benefit of Grantee. Grantor and Grantee intend that the provisions of this Agreement shall be binding for the period that SWA is operating, maintaining, replacing or repairing the SWA Slide Gate and that they shall be "covenants that run with the land" consistent with California Civil Code Section 1468, to be binding not only upon Grantor and Grantee, but also any and all successors and/or transferees of each.

8. Grantor and Grantee further desire to obtain an easement over and through the Property granted to Grantee from the United States for access to the SWA Slide Gate. Grantor agrees to assist and support Grantee in obtaining said easement and to abide by the terms and conditions of said easement once granted. Grantor and Grantee further agree that the terms and conditions of said easement shall be the same or substantially similar to those set forth herein and that in the event that the easement is not granted, the Right of Access granted herein shall remain effective and binding upon Grantor for the period SWA is operating, maintaining, replacing, or repairing the SWA Slide Gate.

9. All notices, requests, or other communications provided for or permitted to be given or made under this Agreement must be in writing and must be given by personal delivery, or by certified or registered United States mail (postage prepaid, return receipt requested), addressed as follows or addressed to such other address or addressee as the party to receive such notice shall have designated by written notice as required by this Section 8. Notice or payment shall be deemed to have been effective and properly delivered or made on the earlier of (a) if given by personal delivery, the date of actual delivery, (b) if sent by certified or registered mail, the first business day that is at least four (4) calendar days after the notice or payment has been deposited in the U.S. mail in accordance with this Section 8.

**As to Sycuan**

**Mail and Personal Delivery:**

Adam Day  
Assistant Tribal Manager  
1 Kwaaypaay Court  
El Cajon, CA 92109

**Electronic and Telephonic Delivery:**

aday@sycuan-nsn.gov  
Telephone: (619) 445-2613  
and  
smorris@sycuan-nsn.gov  
Telephone: (619) 445-2613

**All Notices Copied to:**

Michelle Carr, Esq.  
Legal Director  
2 Kwaaypaay Court  
El Cajon, CA 92109  
mcarr@sycuan-nsn.gov  
Telephone: (619) 445-2613

**As to SWA**

**Mail:**

James L. Smyth  
General Manager  
P.O. Box 2328  
Chula Vista, CA 91912-2328

**Personal Delivery:**

James L. Smyth  
General Manager  
505 Garrett Avenue  
Chula Vista, CA 91912

**Electronic Delivery:**

jsmyth@sweetwater.org

10. Dispute Resolution. This Section shall govern the resolution of all controversies or claims between Sycuan and SWA that arise from this Agreement and any modifications (collectively, "Arbitrable Disputes"). Wherever this Agreement makes reference to any means of resolving Arbitrable Disputes between the Parties, the Parties agree to follow the mediation procedure described immediately below prior to initiating the arbitration procedures.

- (a) Voluntary Resolution, Meet and Confer Obligation. Whenever possible, Sycuan and SWA shall make their best efforts to informally resolve disputes that occur under this Agreement. In order to foster a spirit of cooperation and efficiency in the administration of the terms and conditions of this Agreement, disputes between Sycuan and SWA shall first be subjected to a process of meeting and conferring in good faith as follows:
- (i) The aggrieved Party shall give the other, as soon as possible after the event giving rise to the concern, written notice setting forth, with specificity, the issues to be resolved. Notice shall be provided consistent with Section 5, herein.
  - (ii) The Parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than ten (10) calendar days after receipt of the notice, unless both Parties agree in writing to an extension of time.
  - (iii) If the dispute is not resolved to the satisfaction of the Parties within thirty (30) calendar days after the first meeting, then upon the written request of either Party to the other Party, the dispute may be submitted to non-binding mediation in accordance with this section ("Mediation Request"). The disputes submitted to non-binding mediation shall be limited to claims that this Agreement has been breached by either Sycuan or SWA.
- (b) Mediation. In the event a dispute arising under this Agreement is not resolved through the above-described meet and confer process, within thirty (30) calendar days after notice is provided through a Mediation Request, Sycuan and SWA agree to participate in non-binding mediation administered by Judicate West, or an alternative mediator agreed to by the Parties in writing if Judicate West is not available, to act as a mediator to help mediate and settle the dispute as soon as practicable. The mediation shall proceed as follows:
- (i) Unless another location is mutually agreed upon, the mediation shall be held on the Sycuan Band of the Kumeyaay Nation Reservation.
  - (ii) The Parties shall work together to select a single mediator, but if the Parties cannot agree on a mediator within forty-five (45) calendar days after notice is provided through a Mediation Request, Judicate West will provide 7 names of mediators based on substantive and procedural knowledge, availability, and location. Each side will have an opportunity to strike 3 names and rank the

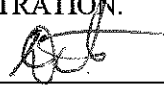
remaining names. The numbers will be added together and the mediator whose rank is the lowest, which is most favorable, will be chosen mediator ("Mediator").


- (iii) The Mediator shall meet with and hear presentations by the Parties as soon as practicable after appointment.
  - (iv) Mediation will be conducted consistent with California Evidence Code Sections 1115-1128. The Mediator shall owe a professional duty to both Sycuan and SWA, and shall be barred from testifying in any litigation or arbitration concerning any information obtained or disclosed in the course of the mediation.
  - (v) Each side shall bear its own costs and attorneys' fees, and one-half of all Judicate West fees and expenses.
  - (vi) Unless otherwise agreed upon by the Parties in writing, the mediation shall be completed within ninety (90) calendar days of the selection of the Mediator.
  - (vii) Within twenty (20) calendar days after the completion of mediation, or as otherwise agreed to in writing by the Parties and Mediator, the Mediator may make a decision based upon the presentations of the Parties with respect thereto.
  - (viii) The Mediator's decision shall not be binding on or admissible against either Party.
  - (ix) The Parties agree that evidence of any statement or admission made in the course of the mediation proceedings shall not be admissible in evidence, and disclosure of any such evidence shall not be compelled, in any arbitration or civil action in which, pursuant to law, testimony can be compelled to be given; and that unless the document otherwise provides, no document prepared solely for the purpose of, or in the course of, or pursuant to, the mediation proceeding, or copy thereof, shall be admissible in evidence, and disclosure of any such document shall not be compelled, in any arbitration or civil action in which, pursuant to law, testimony can be compelled to be given.
- (c) Arbitration. In the event a dispute arising under this Agreement is not resolved through mediation, then, upon the Request of either Party in writing, the dispute may be submitted to binding arbitration. Arbitration shall be conducted by the American Arbitration Association ("AAA"), or an alternative arbitrator agreed to by the Parties in writing if the AAA is not available, in accordance with its Commercial Arbitration Rules and shall proceed as follows:
- (i) Unless another location is mutually agreed upon, arbitration shall be held on the Sycuan Band of the Kumeyaay Nation Reservation.
  - (ii) The arbitration shall be administered by a single neutral Arbitrator who shall act consistent with California law in disclosing any and all information to permit each Party to ascertain if the arbitrator is neutral.
  - (iii) The Arbitrator appointed shall have experience and knowledge with the subject matter of the dispute.

- (iv) The provisions of Sections 1283.05 of the California Code of Civil Procedure shall apply; provided that no discovery authorized by that Section may be conducted without leave of the arbitrator.
- (v) The Arbitrator shall have no authority to revise or vary the terms of this Agreement or the Parties' respective rights and obligations hereunder.
- (vi) The Arbitrator's decision shall be in writing, give reasons for the decision and shall be binding on both Parties.
- (vii) Any award shall be limited to actual or compensatory damages incurred as a result of noncompliance with the terms of this Agreement, as well as specific performance. In no event shall the Arbitrator award consequential or punitive damages.
- (viii) Each side shall bear its own costs, attorneys' fees, and one-half the costs and expenses of AAA and the Arbitrator, unless the Arbitrator rules otherwise.
- (ix) In determining any matter, the Arbitrator shall apply the terms and conditions of the Agreement without modifying or changing the terms and conditions. The Parties agree that any disputes arising out these provisions shall be resolved pursuant to Federal Procedural Law and, if no Federal Law applies, pursuant to the applicable laws of the State of California. Notwithstanding the above, this Agreement shall be construed consistent with the substantive laws of the State of California.
- (x) For purposes of the application of the applicable statute of limitations for any Arbitrable Dispute, the date of Mediation Filing, if followed by Arbitration, is the equivalent of the filing of a lawsuit. Any claim or controversy subject to the provisions of this section is subject to any applicable statute of limitations. The Arbitrator will have the authority to decide whether any such claim or controversy is barred by the statute of limitations and, if so, to dismiss the arbitration on that basis.
- (xi) NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION (AS SET FORTH HEREIN) DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN

THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL  
ARBITRATION.

  
\_\_\_\_\_  
Sycuan's Initials

 12/12/12  
\_\_\_\_\_  
SWA's Initials

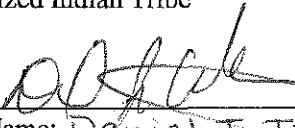
- (d) Consent to Jurisdiction; Limited Waiver of Sovereign Immunity. In order to effectuate the arbitration provided in Section (c), Sycuan expressly, unequivocally and irrevocably waives its Sovereign Immunity from unconsented suit against it specifically and exclusively by SWA, and to no other individual or entity, for the limited purpose of enforcement of the terms agreed to by Sycuan and SWA in this Agreement, but only as set forth below.
- (i) Sycuan will submit to the arbitration proceedings as described in Section 10(c) above, and consents to the jurisdiction of the Superior Court of the County of San Diego, State of California for the sole purpose of enforcement and collection of any award issued by the Arbitrator.
- (ii) Said limited waiver of sovereign immunity is personal to SWA and is not transferable or otherwise assignable, unless otherwise agreed to by Sycuan.
- (iii) Sycuan does not waive any aspect of its sovereign immunity with respect to any claim or action by any third party.
- (e) No Personal Liability. No member, officer, office holder, employee, affiliate, agent or representative of Sycuan and/or SWA shall have any personal liability for any obligations of Sycuan and/or SWA under the Agreement.
- (f) Service of Process. Service of Process of any demand for dispute resolution and/or cause of action under these provisions may be accomplished consistent with section 5 of this Agreement.
- (g) Confidentiality. The Parties (and the Mediator and/or Arbitrator) shall maintain strict confidentiality with respect to arbitration; provided, that such confidentiality shall not apply: 1) with respect to any action in any other forum which shall have been brought to enforce an arbitration award or order; or 2) if otherwise required by law, regulation, government order, court order, subpoena, or any legal process.
- (h) Agreement Obligations During Disputes. Except as otherwise agreed to by the Parties, or as may be required by law, the Parties shall continue to perform pursuant to the terms and conditions of the Agreement while any Arbitrable Dispute is proceeding pursuant to the terms of this Section 10.

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IN WITNESS WHEREOF, Grantor and Grantee have executed this Agreement as of the day and year first above written.

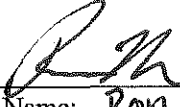
**GRANTOR:**

Sycuan Band of the Kumeyaay Nation, a federally recognized Indian Tribe

By:   
Print Name: Daniel J. Tucker  
Title: Sycuan Tribal Chairman

**GRANTEE:**

Sweetwater Authority, a California Joint Powers Authority

By:  12/12/12  
Print Name: Ron Morrison  
Title: Chair



Sycuan Property Trust Aquisition Boundary

Sloan Canyon Road

Lake Emma

Existing Slide Gate  
(See Exhibit 2)

Dehesa Road

Singing Hills  
Golf Course



Not to Scale for Reference Purposes

Exhibit 1

