Facility Operations and Procedures Agreement for the Buckman Direct Diversion Project between the City of Santa Fe, Santa Fe County and Las Campanas LP

This Facility Operations and Procedures Agreement (hereinafter referred to as "the FOPA") is entered into by and between the Board of County Commissioners of Santa Fe County (hereinafter referred to as "the County"), a political subdivision of the State of New Mexico, the City of Santa Fe (City), a municipal corporation of the State of New Mexico, and Las Campanas Limited Partnership, a Delaware Limited Partnership (hereinafter referred to as "Las Campanas"), effective as of the date of the last signature below.

 Recitals

WHEREAS, the City, the County and Las Campanas are partners in the Buckman Direct Diversion project (hereinafter referred to as "the BDD Project" or "BDD") and desire to execute a Facility Operations and Procedures Agreement (hereinafter referred to as "the FOPA", "the Agreement" or "this Agreement") to facilitate the construction of the BDD Project;

WHEREAS, the City and County executed a Water Resources Agreement (hereinafter referred to as "WRA") on January 11, 2005 to address utility-to-utility issues between the City and County water utilities, and a Joint Powers Agreement (hereinafter referred to as "the JPA") on March 7, 2005 to establish the Buckman Direct Diversion Board (hereinafter referred to as "BDD Board");

WHEREAS, the JPA contemplates execution of the FOPA in order to address facility operations;

WHEREAS, on February 2, 2006 the BDD Board voted unanimously to recommend the Principles of Agreement for the FOPA and directed staff to prepare this Agreement; and

WHEREAS, the BDD Board considered this Agreement on September 7, 2006 and recommended that the City, the County and Las Campanas LP execute this Agreement expeditiously.

NOW, **THEREFORE**, upon the mutual consideration described by this Agreement, including the covenants and promises contained herein, the adequacy of which is acknowledged by the parties, the County, the City and Las Campanas agree as follows:

Definitions. Capitalized words or phrases used in this Agreement, if defined below, shall have the following meanings:

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1. AFY or afy means acre feet per year.

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2. Agreement means this Facility Operations and Procedures Agreement, also referred to as "FOPA" or "the FOPA."

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9 **3. BDD Board** means the Buckman Direct Diversion Board, created as set forth in the 10 JPA.

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12 **4. BDD Partners** means the City, the County, and Las Campanas.

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5. BDD Project means the Buckman Direct Diversion Project, a project to divert surface
 water from the Rio Grande at Buckman as described in the draft Environmental Impact
 Statement for the Buckman Direct Diversion Project. The BDD Project has a diversion
 capacity of 8,730 afy. The BDD Project includes diversion, treatment, transmission and
 related works.

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6. BDD Project EIS means the environmental impact statement prepared by the US
 Forest Service and the Bureau of Land Management for the BDD Project.

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7. City/County Separate Facilities means those portions of the BDD Project including pumping equipment in booster station 2A, the raw water pipeline extending from pump station 2A to the City/County Water Treatment Plant, and the finished water pipelines to the points of interconnection, as shown on Exhibit A of this Agreement.

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8. City-Las Campanas Settlement Agreement means that certain agreement executed on September 30, 2003 in order to compromise and settle all issues associated with Case No. D-0101-CV-01878, First Judicial District, State of New Mexico.

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9. Construction Costs means all of the costs to implement the BDD Project paid to the
 Owners' Consultant, the DB Contractor, and professional and legal services contractors
 contracted by the Project Manager for services directly related to delivery of the BDD
 Project as recommended by the BDD Board. Construction Costs do not include BDD
 EIS Costs, Project Management Costs as defined in the PMFSA, and Permitting Costs.

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10. DB Contractor means the design-build contractor procured by the BDD Board.

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11. JPA means that certain Joint Powers Agreement entered into on March 7, 2005 by
 and between the City of Santa Fe and Santa Fe County.

- 43 12. Las Campanas Separate Facilities means those portions of the BDD Project,
- 44 including pumping equipment in booster station 2A and the raw water pipeline extending
- from booster station 2A to Las Campanas that provide water only to Las Campanas, as
- shown on Exhibit A of this Agreement.

business/corporate model under New Mexico law. Las Campanas shall have the rights

and responsibilities of a limited partner in a business/corporate model under New Mexico law.

5. Management of the Shared Facilities and the City/County Separate Facilities. Management of the Shared Facilities and the City/County Separate Facilities shall be accomplished through the BDD Board, consistent with the provisions of this Agreement, the JPA, the WRA, and the PMFSA.

6. Permits. The BDD Board shall be the permittee of the permits, rights of ways, and authorizations pursuant to the Record of Decision on the BDD Project EIS. Other permitting requirements will be identified by the Owners' Consultant and will be acquired, managed and maintained by the Project Manager except for the water rights permits described in *FOPA Section 11. Water Rights Transfers*. The BDD Partners agree to cooperate and coordinate to the greatest extent possible on the acquisition, management and maintenance of all BDD Project permits.

7. BDD Project Facility Capacity Allocation. The peak day diversion capacities are:

19 City: 62.09% (11.3 mgd allocation of 18.2 mgd total capacity)
20 County: 20.33% (3.7 mgd allocation of 18.2 mgd total capacity)
21 Las Campanas 17.58% (3.2 mgd allocation of 18.2 mgd total capacity)

 A BDD Partner may use another BDD Partner's unused peak day diversion capacity. Consent for one BDD Partner to utilize another BDD Partner's unused peak day diversion capacity shall not be unreasonably withheld and the cost to use that capacity shall be calculated as set forth in a separate agreement.

8. Water Rights and Divertable Water Supply. Each BDD Partner shall divert only that amount of water in the system for which water rights are in good standing with the New Mexico State Engineer, subject to the limitations on diversions at low flow set as forth in the BDD Project EIS or other applicable permits. The BDD Partners each recognize an individual responsibility to maintain their own water rights portfolio and to manage any water rights shortage within that portfolio. No BDD Partner shall make any claim or attempt to use another BDD Partner's water rights without the express written consent of that BDD Partner.

9. Sharing of Shortages. Facility Failure. In the event of reduced total capacity of the BDD Project caused by facility failure, the BDD Partners shall receive deliveries on a reduced basis that are computed from a pro-rata percentage of peak day (mgd) diversion capacity as described by FOPA Section 7. BDD Project Facility Capacity Allocation. Facility failure does not include the occurrence of low flow on the Rio Grande, any restrictions on diversions pursuant to the BDD Project EIS, or limitations on the use of specific water rights. Facility failure does include damage caused by floods, upstream spills of pollutants or toxic materials, failure or damage to the BDD Project, and scheduled or unscheduled shut downs required for maintenance, repair, or replacement.

- 1 10. BDD Project Operations. Actual Water Deliveries. Each BDD Partner shall use its
- 2 best efforts to conform the actual water demand it places on the BDD Project to its
- 3 demand schedules prepared in conformance with FOPA Section 26. BDD Project
- 4 Requested Delivery Schedule. No BDD Partner shall exert an actual demand on the BDD
- 5 Project at a rate that exceeds the capacity allocation set forth in FOPA Section 7. BDD
- 6 Project Facility Capacity Allocation adjusted for the sharing of shortages as set forth in
- 7 FOPA Section 8. Water Rights and Divertable Water Supply and FOPA Section 9.
- 8 Sharing of Shortages. Facility Failure. The Project Manager shall operate the facility to
- 9 meet the BDD Partners' actual demand, subject to the capacity allocation set forth in
- 10 FOPA Section 7. BDD Project Facility Capacity Allocation adjusted for the sharing of
- shortages as set forth in FOPA Section 8. Water Rights and Divertable Water Supply and 11
- 12 FOPA Section 9. Sharing of Shortages. Facility Failure. The BDD Project shall
- include water measurement devices to account for the actual volume, rate, and time-of-13
- 14 day of all water deliveries to each BDD Partner. The BDD Project, in conjunction with
- 15 operations procedures, shall include controls to limit each BDD Partner's water demand
- 16 to its peak day and annual volume allocations.

- 18 11. Water Rights Transfers. The BDD Partners shall cooperate to transfer the water
- 19 rights described in the BDD Project EIS and shall take actions that are consistent with the
- BDD Project EIS. The BDD Partners shall coordinate in development of strategies for 20
- compliance with the Conditions of Approval contained in New Mexico State Engineer 21
- 22 diversion permits.

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- In accordance with the WRA, the County shall identify a schedule for the transfer of such
- water rights and the City shall cooperate in the transfers.

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- 27 In accordance with the City-Las Campanas Settlement Agreement, Las Campanas shall
- 28 identify a schedule for the transfer of such water rights and the City shall cooperate in the transfers.
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- 31 12. Cost Sharing. Use of Funding from County Ordinance No. 2002-05. The
- PMFSA shall reflect that the County may use the proceeds from County Ordinance No. 32
- 33 2002-05, subject to the terms of that Ordinance.

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- 35 13. Cost Sharing. BDD Project EIS Costs. Costs related to the preparation of the BDD
- Project EIS are addressed in the MOU per FS No. 02-MU-11031000-013 dated January 36
- 37 16, 2002 and are based on the percentage of annual diversion amounts listed in the BDD
- 38 Project EIS.

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- 40 14. Cost Sharing. Construction Costs of Shared Facilities. Las Campanas shall pay a
- 41 proportionate share of the Construction Costs of the Shared Facilities as measured by
- peak day (mgd) capacity in the BDD Project EIS (17.58%). The City and County shall 42
- 43 share in the costs of the BDD Project as set forth in the JPA Section 16. Cost Sharing for
- 44 Design and Construction for the BDD Project.

- 1 15. Cost Sharing. Construction Costs of the Las Campanas Separate Facilities. Las
- 2 Campanas shall pay all of the costs of design and construction of the Las Campanas
- 3 Separate Facilities, including those costs of the Owner's Consulting Engineer and the
- 4 BDD Project design-build contractor to implement that portion of the Las Campanas
- 5 Separate Facilities located within booster station 2A and the Las Campanas pipeline
- 6 extending from booster station 2A to the location near Dead Dog Well where the Las
- 7 Campanas Separate Facilities physically diverge from the City/County Separate
- 8 Facilities.

- 10 16. Cost Sharing. Construction Costs of the City/County Separate Facilities. The
- 11 City and County shall share in the Construction Costs of the BDD Project as set forth in
- 12 JPA Section 16. Cost Sharing for Design and Construction for the BDD Project.

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- 14 17. Cost Sharing. Permitting Costs of the Shared Facilities. The City, the County,
- 15 and Las Campanas shall pay the Permitting Costs for the Shared Facilities in the same
- 16 proportions described in FOPA Section 14. Cost Sharing. Construction Costs of Shared 17 Facilities.

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- 19 18. Cost Sharing. Permitting Costs of the Las Campanas Separate Facilities. Las
- Campanas shall pay the full amount of the Permitting Costs of the Las Campanas 20
- 21 Separate Facilities.

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- 23 19. Cost Sharing. Permitting Costs of the City/County Separate Facilities. The City
- 24 and County shall share in the Permitting Costs of the City/County Separate Facilities
- pursuant to JPA Section 16. Cost Sharing for Design and Construction for the BDD 25 26 Project.

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- 28 20. Cost Sharing. Fixed OMR&R Costs for the Shared Facilities. Fixed OMR&R
- Costs of the Shared Facilities shall be apportioned between the County, the City and Las 29
- 30 Campanas using the capacity allocation shown in FOPA Section 7. BDD Project Facility
- 31 Capacity Allocation.

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- 33 21. Cost Sharing. Variable OMR&R Costs of the Shared Facilities. Variable
- 34 OMR&R costs of the Shared Facilities shall be apportioned between the County, the City
- 35 and Las Campanas based on the actual delivery of water to each BDD Partner in
- 36 accordance with FOPA Section 27. Annual Operating Plan.

costs of the Las Campanas Separate Facilities.

- 38 22. Cost Sharing. Fixed and Variable OMR&R Costs of the Las Campanas Separate
- 39 Facilities. Las Campanas shall pay the full amount of the Fixed and Variable OMR&R
- 40 41

- 42 23. Cost Sharing. Fixed and Variable OMR&R Costs of the City/County Separate
- 43 Facilities. Fixed OMR&R costs of the City/County Separate Facilities shall be
- 44 apportioned between the County and the City using the capacity allocation of the
- City/County Separate Facilities [County 24.6%, 3.7 mgd of 15 mgd, City 75.3%, 11.3 45
- 46 mgd of 15 mgd]. Variable OMR&R costs of the City/County Separate Facilities shall be

- 1 apportioned between the County and City based on the actual delivery of water to each
- 2 BDD Partner in accordance with FOPA Section 27. Annual Operating Plan. Each year
- 3 following commencement of operations of the BDD Project and in connection with its
- 4 approval of the budget pursuant to JPA Section 17. Cost Sharing for Operation and
- 5 Maintenance Costs for the BDD Project, the BDD Board shall review the proposed
- 6 allocation of costs between the fixed and variable categories and either approve, reject or
- 7 modify same. At the same time, the BDD Board shall review the allocation methodology
- 8 of fixed and variable costs as between the City and the County set forth in this section to
- 9 determine whether the allocation is reasonable and appropriate, and shall explore
- 10 alternative methodologies.

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- 24. Emergency Reserve Fund. The Project Manager, in consultation with the BDD
- Partners, shall submit to the BDD Board an analysis of the funds required for an
- 14 emergency reserve and suggested procedures for creation and management of the
- 15 emergency reserve fund.

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- 17 **25.** The BDD Partners and the BDD Board. The appointment of City Councilors and
- 18 County Commissioners by their governing bodies provides representation of the City and
- 19 the County on the BDD Board, as described in the JPA. The selection of a citizen
- 20 member by the BDD Board provides representation of the public at large on the BDD
- 21 Board.

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- 23 Las Campanas has an interest in the decisions of the BDD Board that impact the delivery
- of water from the Shared Facilities to the Las Campanas Separate Facilities. Las
- 25 Campanas shall be able to request a BDD Board agenda item through coordination with
- 26 the Project Manager. Las Campanas is entitled to notice of BDD Board decisions that
- 27 relate to Las Campanas deliveries of water from the Shared Facilities to the Las
- Campanas Separate Facilities. Las Campanas is entitled to the opportunity to prepare materials and present those materials to the BDD Board.
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- With respect to the BDD Board role in governance and oversight of operations, the
- 32 Shared Facilities shall not be operated to adversely impact the Las Campanas annual
- and/or peak day capacity during normal operations.

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- 35 The BDD Board and Las Campanas shall coordinate to develop the annual BDD
- operational plan, notice procedures for planned shutdowns, annual OMR&R accounting
- 37 practices, emergency and facility failure plans, water right and water resource
- management processes and procedures in accordance with applicable regulations, and the
- 39 environmental compliance management in accordance with applicable regulations.

- 41 **26. BDD Project Requested Delivery Schedule.** The BDD Partners acknowledge that
- 42 management of minimum and low flows in the shared diversion and conveyance system
- 43 is important because of sediment and OMR&R concerns and because each BDD Partner
- has different needs in the Shared Facilities. The Project Manager shall require that the
- design of the BDD Project shall be capable of accommodating each of the BDD Partners'
- 46 expected minimum deliveries.

2 27. Annual Operating Plan. The BDD Partners shall submit to the Project Manager the 3 daily, weekly and monthly requested deliveries for each upcoming year no later than

October 1 of each year. The Project Manager, in consultation with the BDD Partners.

- 4
- 5 shall schedule the anticipated demand for the upcoming year for each BDD Partner in a
- 6 Draft Delivery Schedule, which will be finalized among the BDD Partners by December
- 7 1 of that year. The Project Manager, with input from and in consultation with the BDD
- 8 Partners, shall prepare a manual for project operations, which will be distributed among

9 the BDD Partners.

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28. Early Start. Any BDD Partner may begin an early start of facility construction in accordance with all applicable permits, agreements and construction requirements.

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29. Data & Information Sharing. Each BDD Partner shall designate an engineering and a legal representative to coordinate, facilitate, and implement information sharing, including the SCADA telemetry.

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30. Operations, Maintenance and Security. Operations, maintenance and security responsibilities shall be performed by the City of Santa Fe as Project Manager until December 1, 2015, as set forth in the JPA, except that Buckman Road shall be maintained by the County as required for access to the BDD Project facilities. All expected and planned operations and maintenance shall be presented to the BDD Board for approval and budget purposes.

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25 31. Dispute Resolution. The Project Manager shall be responsible for resolving 26 disputes arising in this agreement. If the Project Manager cannot satisfactorily resolve a 27 dispute, then any BDD Partner may petition the BDD Board for a resolution. In the event 28 these steps do not resolve the dispute, then the BDD Partners agree to use any and all 29 methods of dispute resolution, up to and including binding arbitration, to resolve any 30 conflicts arising under this Agreement, the expenses of which shall be shared equally by 31 the BDD Partners. Disputes shall be first discussed by representatives of each party 32 having the authority, if necessary, to bind the party that they represent. Such 33 representatives shall use their best efforts to amicably and promptly resolve the dispute. 34 If the parties are unable to resolve the dispute through informal mechanisms or mediation 35 within 30 days of the occurrence of the event or circumstances giving rise to the dispute. 36 either party may give notice to the other party that the dispute is to be submitted to 37 binding arbitration. Any dispute requiring notice shall be shall be reported to the next 38 meeting of the respective City and County governing bodies. Such notice shall contain 39 the name of a proposed arbitrator, and in the event the other party does not agree with the 40 proposed arbitrator, the model guidelines of the American Arbitration Association shall 41 be used to select an arbitrator and govern the conduct of the arbitration, rendering of an 42 award and enforcement of the award consistent with New Mexico state law. Within 60 43 days of notice an arbitrator shall be appointed and within 120 days of notice the arbitrator 44 shall prepare an award. The arbitrator's award shall be binding on the parties.

1 2 3	32. Entire Agreement. This Agreement contains the Entire Agreement between the BDD Partners with regard to the matters set forth herein.						
4 5	33. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties and their respective representatives, successors, and assigns.						
6 7 8 9	34. Counsel. The BDD Partners acknowledge that they have freely entered into this Agreement with the advice of their respective legal counsel.						
10 11 12 13	35. Other Documents . The BDD Partners agree to execute such further and other agreements as reasonably may be required from time to time to carry out the provisions of this Agreement.						
14	36. Law. The law	s of the State	of New Mexico shall govern this Agreement.				
15 16 17	37. Execution in Counterparts. This Agreement may be executed in counterparts with separate signature pages in the format shown below.						
18 19 20 21 22 23	38. Notices . Any notice, demand, request, or information authorized or related to this Agreement shall be deemed to have been given if mailed (return receipt requested), hand delivered or faxed as follows:						
24 25 26 27 28	To the City:	Director of City of Sar PO Box 90 Santa Fe, 1 Phone:	9				
29 30		Fax:	955-4352				
31 32 33 34 35 36 37 38 39 40 41 42 43	With a copy to:	City Mana City of Sar PO Box 90 Santa Fe, N Phone: Fax: City Attor City of Sar PO Box 90 Santa Fe, N Phone: Fax:	nta Fe 19 NM 87501 955-6509 955-6683 ney nta Fe				
44 45 46	To the County:		ounty Utilities Director				

1		205 Montezuma			
2		Santa Fe, N.M. 87505			
3		Phone:	986-6210		
4		Fax:	992-8421		
5 6	With a copy to:	County Mana	ger		
7	Transfer to Copy to	Santa Fe County			
. 8		P.O. Box 276			
9		Santa Fe, N.M. 87504			
10		Phone:	986-6200		
11		Fax:	986-6362		
12		- w,	300 0002		
13		County Attorney			
14		Santa Fe County			
15		P.O. Box 276			
16		Santa Fe, N.M. 87504			
17		Phone:	986-6279		
18		Fax:	986-6362		
19					
20	To Las Campanas:	Las Campanas Engineering			
21	~	218 Camino La Tierra			
22		Santa Fe, NM	I 87506		
23		Phone:	986-8090		
24		Fax:	986-6076		
25		\$			
26	With a copy to:	Counsel for I	Las Campanas		
27		Law and Resource Planning Associates			
28		201 Third Street NW, Suite 1750			
29		Albuquerque, NM 87102			
30		Phone:	346-0998		
31		Fax:	346-0997		
32					
33	F				
34	IN WITNESS WHEREOF, each of the City of Santa Fe, New Mexico, the County of				
35	Santa Fe, New Mexico, and Las Campanas LP has caused this Agreement to be executed				
36	and delivered by its duly authorized representatives as of the date specified below.				

1	THE BOARD OF COUNTY COMMISSIONERS	
2	OF SANTA FE COUNTY	
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5	By: //////	
6	Harry B. Montoya, Chair	- Community
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8	ATTEST:	
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12	Valerie Espinoza, County Clerk	
13	•	A NAME OF THE PARTY OF THE PART
14	Approved as to form:	Minus 4 NTA TE
15		William Willia
16		
17	X 002	
18	Stephen C. Ross, County Attorney	
19		
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1	Approved by the City of Santa Fe
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2 3 4 5	Dar & Cos
6	Mayor, City of Santa Fe Council / Date
7	
8	
9	Approved as to form
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11	V1 (11) (1)
12	- Kyla G. Hal. (Ao, 10.16.06
13	City of Santa Fe Attorney / Date
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22	City of Santa Fo Clerk Date Comba 9/21/06
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27	City of Santa Fe Finance / Date
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1	Las Campanas Limited Partnership		
2	By: Las Campanas Corporation, Its General Partner		
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8	pul tola	10-16-06	
9	10002.10		
10		Date	
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