

## SECOND AMENDMENT OF AGREEMENT

**THIS SECOND AMENDMENT OF AGREEMENT** (“Second Amendment”) is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2017, by and between the CITY OF FERNLEY, a political subdivision of the State of Nevada, (the “City”) and SONTERRA DEVELOPMENT COMPANY, LLC, a Nevada limited-liability company, (“Sonterra”) for the purpose of amending the terms and conditions of that certain AGREEMENT, executed on February 17, 1994, by and between the TOWN OF FERNLEY, a political subdivision of the State of Nevada and the predecessor-in-interest to the City, (the “Town”) and WADE/FERNLEY, L.P., a California limited partnership and the predecessor-in-interest to Sonterra, (“Wade/Fernley, L.P.”) (the “1994 Agreement”) and amended by that certain FIRST AMENDMENT OF AGREEMENT, executed on October 30, 2006, by and between the City and Sonterra (“First Amendment”).

### WITNESSETH

**WHEREAS**, on February 17, 1994, the Town and Wade entered into an agreement wherein Wade agreed to transfer certain real and personal property, including eight hundred thirty seven (837) acre-feet of groundwater rights, to the Town in exchange for the Town providing future municipal water service to certain real property owned by Wade. Specifically, the Town agreed to credit Wade with the prepayment of one million, three hundred and eighty-five thousand dollars (\$1,385,000.00) of fees in lieu of dedicating water rights pursuant to Fernley Town Ordinance # 4. Under the terms of the 1994 Agreement, the pre-paid fees will be applied to future will-serve commitments at a rate of five hundred dollars (\$500.00) per acre-foot of water. The 1994 Agreement further provides that Wade’s right to use the credits expires twenty-five years after the effective date of the 1994 Agreement (February 17, 2019); and

**WHEREAS**, the 1994 Agreement also provided that Wade may only use the pre-paid credits to receive will-serve commitments for non-residential development located on certain property identified in Exhibit A to the 1994 Agreement; and

**WHEREAS**, on October 30, 2006, the City and Sonterra, as the respective successors-in-interest to the Town and Wade, agreed to amend the 1994 Agreement. Under the terms of the First Amendment, the parties agreed and acknowledged that, at the time of execution of the First Amendment, there remained an outstanding balance of two thousand, four hundred and ninety-four and forty-seven one hundredths (2,494.47) acre-feet of water that could be requested for will-serves under the terms of the 1994 Agreement. The parties further agreed that the City would reserve a certain portion of both its uncommitted groundwater rights and uncommitted surface water rights to meet its obligations under the 1994 Agreement. The First Amendment also provided that the City’s obligation to reserve the water and provide will-serve commitments shall expire twenty-five years after the effective date of the 1994 Agreement (February 17, 2019); and

**WHEREAS**, the First Amendment also removed certain parcels of land previously identified in Exhibit A of the 1994 Agreement from the description of parcels on which the pre-paid credits may used and added other parcels of land not previously identified in Exhibit A to

the description of parcels on which the pre-paid credits may be used (see Exhibits A & B of First Amendment); and

**WHEREAS**, as of the date of this Second Amendment, a substantial quantity of the outstanding balance of water that Sonterra can request be applied to will-serve commitments under the terms of the 1994 Agreement and the First Amendment remains uncommitted to any such will-serve commitments; and

**WHEREAS**, the development of the property owned by Sonterra into commercial and industrial properties will promote the City's economic development goals, increase employment opportunities for residents of the City, and provide additional tax and other revenues to the City; and

**WHEREAS**, the expiration of the City's obligation to reserve water rights for the future development of Sonterra's industrial property and Sonterra's right to use the pre-paid fees in-lieu-of dedicating water to the City will be detrimental to Sonterra's efforts to develop its property; and

**WHEREAS**, the City has been actively developing plans for projects to allow for the use of its surface water rights to supply customers of the municipal water system and to provide adequate drought storage for its surface water rights; and

**WHEREAS**, the surface water and drought storage projects will require the City to incur significant costs and expenses; and

**WHEREAS**, Sonterra will directly benefit from the surface water and drought storage projects since the projects will assist the City in meeting its obligations to Sonterra under the 1994 Agreement and the First Amendment;

**NOW THEREFORE**, in consideration of the mutual promises contained herein, the parties hereby agree to amend the terms and conditions of the 1994 Agreement and the First Amendment as follows:

#### **AMENDMENT**

- 1. Scope:** During the term of this Second Amendment, all terms and conditions of the 1994 Agreement, as amended by the First Amendment, shall remain in full force and effect except as otherwise provided herein.
- 2. Term:** The provisions of this Second Amendment shall become effective upon the date shown above and shall continue for a period of fifteen (15) years from the effective date, at which time any City obligation that arises from, and has not already been performed under, the 1994 Agreement, as amended by the First and Second Amendments, shall expire. Sonterra agrees that upon expiration of the term of this Second Amendment, the City shall have no continuing obligations arising from the 1994 Agreement, as amended by the First and Second Amendments, and forever disclaims any interest, either express or implied, in any property (either real or personal), money, goods, services, or other

valuable consideration that it has provided to the City under the terms of the 1994 Agreement, as amended by the First and Second Amendments, including, without limitation, any prepaid or accelerated fees for which will-serve commitments have not been issued by the City.

- 3. Eligible Property:** The Parties agree that Sonterra will be allowed to request will-serve commitments under the 1994 Agreement, as amended by the First and Second Amendments, for any industrial or commercial development located on any property identified in Exhibit A of the 1994 Agreement and Exhibits A & B of the First Amendment, regardless of whether the property is owned by Sonterra. In addition, Sonterra will be allowed to request will-serve commitments under the 1994 Agreement, as amended by the First and Second Amendments, for any industrial or commercial development located within Section 4, Section 6, and the NE ¼ of the NW ¼ of Section 8 of Township 20 North, Range 25 East, M.D.B.&M. Sonterra acknowledges and agrees that the City may withhold will-serve commitments for any eligible property that is not currently located within the city limits until such time as Sonterra annexes such property into the City. Sonterra further acknowledges and agrees that the Remaining Credits, as defined in Section 4, shall not be transferrable to other properties not specifically identified herein whether or not such properties are located within the Fernley city limits.
- 4. Remaining credits:** The Parties acknowledge and agree that, as of the date of this Second Amendment, there remains an outstanding balance of two thousand, three hundred and ninety-six and thirty hundredths (2,396.30) acre-feet of water that Sonterra may request be applied to will-serve commitments under the terms of the 1994 Agreement as amended by the First and Second Amendments (“Remaining Credits”).
- 5. Fee for use of credits:** Sonterra agrees that the fee for the use of the Remaining Credits shall be one thousand, three hundred and thirty-six dollars (\$1,336.00) per acre-foot of water. Pursuant to the 1994 Agreement, five hundred dollars (\$500.00) of this per acre foot fee has already been pre-paid by Sonterra. Accordingly, the portion of the fee that Sonterra will pay in cash to the City shall be eight hundred and thirty-six dollars (\$836.00) per acre-foot of water. The total non-prepaid portion of the fees to be paid by Sonterra pursuant to this Second Amendment shall not exceed two million dollars (\$2,000,000.00) in the aggregate. Except as otherwise provided in Section 6, the payment of the fee for the use of the Remaining Credits shall be made at the time Sonterra, or a successor or assignee of Sonterra, requests a will-serve commitment from the City for an eligible property.
- 6. Acceleration of payment of non-prepaid in-lieu-of fees:** Sonterra agrees to accelerate the payment of the non-prepaid portion of the fee described in Section 5 as sales of eligible property are closed. Sonterra agrees to pay the City ten percent (10%) of the net after-tax net proceeds from the sale of any property within the project. The net after-tax proceeds shall be calculated by deducting the following amounts from the gross sale price: (i) an amount equal to twenty percent (20%) of the gross sale price which amount is estimated to cover the income taxes payable by Sonterra as a result of the sale, (ii) any commissions (not to exceed six percent (6%) of the gross sale price) and other customary and reasonable closing costs paid by Sonterra, and (iii) the total estimated amount of all

direct infrastructure costs (such as roads and utility improvements, but excluding administrative costs, general overhead, or any payments required to be made by Sonterra to the City to reimburse the City for construction costs associated with the extension of Nevada Pacific Parkway) which Sonterra is required to construct or install as a condition of the sale of the property. Such payment will be applied towards the non-prepaid portion of the fees for the Remaining Credits. The accelerated payment for each parcel of land sold by Sonterra shall be made within fifteen (15) days of the closing date for such sale. Failure to make any accelerated payment under this Section within the required time period shall constitute grounds for the City, at its sole discretion, to immediately terminate the 1994 Agreement, and the First and Second Amendments, as provided in Section 9. The total amount of accelerated payments required to be made under this Section shall be capped based on the amount of Reserved Groundwater Rights the City has, at the time the property is sold, reserved for Sonterra's use pursuant to Section 6 of the First Amendment. For example, if, at the time Sonterra sells a parcel of eligible property, the City has reserved 750 acre-feet of Reserved Groundwater Rights pursuant to Section 6 of the First Amendment, the accelerated payment due upon sale of the parcel will be capped at six hundred and twenty seven thousand dollars (\$627,000.00) (750 acre-feet X \$836/acre-foot). If, subsequent to this, the City reserves additional Reserved Groundwater Rights for Sonterra in accordance with Section 6 of the First Amendment, the cap will be adjusted upward and additional accelerated payments will be required from the proceeds of any future sales of eligible property.

- 7. Fernley's use of non-prepaid fees:** All non-prepaid fees collected by the City pursuant to Sections 4 and 5 shall be reserved and used only for: (a) the acquisition by the City of additional water rights, (b) expenses related to projects designed to expand the quantity of water available to the municipal water system (including, without limitation, projects for the storage of water during normal water years for use by the municipal water system during drought years), or (c) projects to enhance the quality of water within the municipal water system.
- 8. Fernley Town Ordinance #4:** Sonterra acknowledges and agrees that the provisions of Fernley Town Ordinance #4 have been repealed and replaced by the provisions of Fernley Municipal Code ("FMC"), Title 9, Chapter 7. Sonterra agrees that, except as expressly provided in the 1994 Agreement, or the First and Second Amendments, Sonterra shall comply with all applicable provisions of the FMC, including, without limitation, FMC Title 9, Chapter 7, and any amendments or successor ordinances thereto. To the extent applicable, all references in the 1994 Agreement, and the First and Second Amendments, to Fernley Town Ordinance #4 shall be interpreted and construed as a reference to FMC, Title 9, Chapter 7, and any amendments or successor ordinances thereto. In particular, any provision in the 1994 Agreement, or the First and Second Amendments, requiring general compliance with the provisions of Fernley Town Ordinance #4, shall be construed as a requirement to comply with the provisions of FMC, Title 9, Chapter 7, or any amendments or successor ordinances thereto.
- 9. Termination:** In the event that Sonterra fails to comply with any of its obligations under the 1994 Agreement, as amended by the First and Second Amendments, the City shall, at its sole discretion, have the right, upon thirty (30) days written notice to Sonterra, to

terminate the 1994 Agreement and the First and Second Amendment. The notice shall state with particularity the provisions of the 1994 Agreement, as amended by the First and Second Amendments, which Sonterra has failed to comply with. Sonterra shall have the right to cure any default identified by the City in the notice within thirty (30) days of the date the notice was sent. Upon termination, the City shall have no continuing obligations arising from the 1994 Agreement, as amended by the First and Second Amendments, and Sonterra hereby agrees to forever disclaim any interest, either express or implied, in any property (either real or personal), money, goods, services, or other valuable consideration that it has provided to the City under the terms of the 1994 Agreement, as amended by the First and Second Amendments, including, without limitation, any prepaid or accelerated in-lieu-of fees for which will-serve commitments have not been issued by the City.

- 10. Incorporation of recitals:** The recitals set forth above are incorporated into this Second Amendment by this reference.
- 11. Counterparts:** This Second Amendment may be executed in counterparts, each of which shall be deemed an original, and all of which, taken together, shall constitute but one and the same instrument.
- 12. Attorney's fees and costs:** Each party shall bear its own costs with respect to the negotiation, preparation, and execution of this Second Amendment. In the event that any party shall commence any lawsuit, action, or other administrative or judicial proceeding arising from, or concerning, the 1994 Agreement, and the First and Second Amendment thereto, whether such lawsuit, action, or proceeding involves causes of action in contract or in tort, at law or in equity, the prevailing party shall be entitled to recover all costs and expenses associated with such lawsuit, action, or proceeding, including, without limitation, reasonable attorney's fees, expert or consultant fees, and costs. The prevailing party shall be determined by the court based upon an assessment of which party's major arguments made or positions taken in the lawsuit, action, or proceeding could fairly be said to have prevailed over the other party's major arguments or positions.
- 13. Authority:** Each individual executing this Second Amendment on behalf of the parties hereto hereby warrants and represents that he/she is duly authorized to execute and deliver this Second Amendment on behalf of said party and that this Second Amendment shall be binding on the party on behalf of which the individual executed this Second Amendment. In particular, the individuals executing this Second Amendment on behalf of the City hereby warrant and represent that the City Council of the City of Fernley has given them all necessary power and authority to execute this Second Amendment and to bind the City. In addition, the individuals executing this Second Amendment on behalf of Sonterra hereby warrant and represent that Sonterra is the lawful successor in interest to Wade/Fernley, L.P. and that Sonterra has acquired Wade/Fernley, L.P.'s entire beneficial interest in and to the 1994 Agreement, as amended by the First and Second Amendments.

- 14. Conflict:** In the event that any provision of this Second Amendment conflicts with any provision contained within the 1994 Agreement, the First Amendment, or FMC Title 9, Chapter 7, the provisions of this Second Amendment shall prevail.
- 15. Entire Agreement:** The 1994 Agreement, First Amendment, and this Second Amendment (including any exhibits attached thereto) constitutes the entire agreement between the parties with respect to the matters contained therein and there are no representations, conditions, warranties, or collateral agreements (expressed or implied), statutory or otherwise, with respect to the 1994 Agreement, as amended by the First and Second Amendments, other than as contained therein.
- 16. Modification:** The 1994 Agreement, as amended by the First and Second Amendments, may not be modified, changed, or supplanted, nor may any obligations thereunder be waived, except by written instrument signed by the party to be charged or by its agent duly authorized in writing or as expressly permitted herein. Any amendments must be in writing and executed with the same formality as the 1994 Agreement and the First and Second Amendments.
- 17. No third party beneficiary:** The parties hereto do not intend to confer or convey any benefit under the 1994 Agreement and First and Second Amendments to or on any person, firm, or corporation other than the parties hereto.
- 18. No Waiver:** No waiver of any breach of any agreement or provision contained in the 1994 Agreement, as amended by the First and Second Amendments, shall be deemed a waiver of any preceding or succeeding breach thereof or of any other agreement or provision. No extension of time for performance of any obligation or act shall be deemed an extension of time for performance of any other obligation or act. No failure or delay of either party in the exercise of any right given to such party under the 1994 Agreement, as amended by the First and Second amendments, shall constitute a waiver thereof unless the time specified for the exercise of the right has expired.
- 19. Additional Acts:** The Parties agree to do and perform such further acts and to execute and deliver such additional agreements and instruments as the other may reasonably require to ensure the performance of the first party's obligations under the 1994 Agreement, as amended by the First and Second Amendment.
- 20. Time is of the essence:** Time is of the essence with respect to each and every particular of the 1994 Agreement, as amended by the First and Second Amendments. Any time period computed pursuant to the 1994 Agreement, as amended by the First and Second Amendments, shall be computed by excluding the first day and including the last. If the last day falls on a Saturday, Sunday, or holiday, the last day shall be extended until the next day that the City is open for business.
- 21. Severability:** The determination that any covenant, condition, or provision of the 1994 Agreement, as amended by the First and Second Amendments, is invalid or unenforceable shall not affect the enforceability of the remaining covenants, conditions, or provisions and, in the event of such a determination, the 1994 Agreement, as amended

by the First and Second Amendments, shall be construed as if such invalid covenant, condition, or provision were not included therein.

**22. Notices:** All notices, demands, or requests which may be given or which are required to be given by either Party to the other, shall be deemed effective on the date the notice was mailed, by certified mail return-receipt required, to the address below. Any notice which a Party may or is required to give may be authorized or given by that Party's attorney with such notice having the same force and effect as if given by the Party itself.

TO THE CITY:

City Manager  
City of Fernley  
595 Silver Lace Blvd.  
Fernley, NV 89408

TO SONTERRA:

Sonterra Development Company, LLC  
c/o Wade Development Company, LLC  
4870 Keshmiri Place  
Reno, NV 89519  
Attn: Joe Wade

**IN WITNESS WHEREOF**, the Parties have caused this Second Amendment to be executed by their authorized representatives on the day and year first above written.

**CITY OF FERNLEY**

By: \_\_\_\_\_  
Roy Edgington, Jr., Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

**SONTERRA DEVELOPMENT COMPANY, LLC**  
a Nevada limited liability company

By: Wade Company, LLC,  
a Nevada limited liability company  
Managing Member, Sonterra Development  
Company, LLC

By: \_\_\_\_\_  
Joe Wade, Member

By: \_\_\_\_\_  
Patricia M. Wade, Member

By: Flagstone Fernley Holdings, LLC  
a Nevada limited liability company  
Managing Member, Sonterra Development  
Company, LLC

By: Silverado Homes Nevada, Inc.  
a Nevada corporation  
Managing Member, Flagstone Fernley  
Holdings, LLC

By: \_\_\_\_\_  
Gregory J. Peitzmeier, President