

**EDDY COUNTY, NEW MEXICO**

**ORDINANCE NO. O-09-56**

AUTHORIZING THE ISSUANCE AND SALE OF EDDY COUNTY, NEW MEXICO TAXABLE INDUSTRIAL REVENUE BOND (HB POTASH, LLC PROJECT) SERIES 2009, IN A MAXIMUM PRINCIPAL AMOUNT OF \$60,000,000 TO PROVIDE FUNDS TO FINANCE THE ACQUISITION AND CONSTRUCTION OF AN INDUSTRIAL REVENUE BOND MANUFACTURING FACILITY TO BE USED BY HB POTASH, LLC AND ITS SUCCESSORS OR ASSIGNS FOR THE MANUFACTURE AND PROCESSING OF POTASH; AUTHORIZING THE EXECUTION AND DELIVERY OF AN INDENTURE, A LEASE, A BOND PURCHASE AGREEMENT, THE BOND AND OTHER DOCUMENTS IN CONNECTION WITH THE ISSUANCE OF THE BOND AND THE PROJECT; MAKING CERTAIN DETERMINATIONS AND FINDINGS RELATING TO THE BOND AND THE PROJECT; RATIFYING CERTAIN ACTIONS TAKEN PREVIOUSLY; AND REPEALING ALL ACTIONS INCONSISTENT WITH THIS ORDINANCE.

WHEREAS, Eddy County (the "County"), of the State of New Mexico (the "State"), is a legally and regularly created, established, organized and existing political subdivision of the State; and

WHEREAS, pursuant to Sections 4-59-1 through 4-59-16, New Mexico Statutes Annotated, 1978 Compilation, as amended (the "Act"), the Board of County Commissioners (the "Board") of the County is authorized to issue an industrial revenue bond to acquire an industrial revenue bond project to be located within the County, but outside the boundaries of any municipality, and to use the proceeds of such bond for the purpose of promoting industry and trade by inducing manufacturing, industrial and commercial enterprises to locate or expand in the State and promoting a sound and proper balance in the State between agriculture, commerce and industry; and

WHEREAS, HB Potash, LLC, a New Mexico limited liability company, and any affiliate of HB Potash, LLC into which HB Potash, LLC may be merged (collectively, the "Company") shall be authorized to do business in the State; and

WHEREAS, the Company has presented to the Board a proposal (the "Proposal"), pursuant to which the County will issue its "Taxable Industrial Revenue Bond (HB Potash, LLC Project), Series 2009" in a maximum principal amount of \$60,000,000 (the "Bond") for the purpose of financing the costs of acquiring and constructing facilities to be used by the Company for the manufacture and processing of potash which facilities are to be used on the Project Site (as defined in the Lease Agreement dated as of September 1, 2009 (herein the "Lease Agreement")) in unincorporated Eddy County, and related equipment (such acquired and constructed facilities being referred to herein as the "Project Property" or "Leased Property" and

being more fully defined in the Lease Agreement) and leasing the Leased Property to the Company; and

WHEREAS, the Board has adopted Resolution No. R-09-59 declaring, among other matters, the Board's intent to take all necessary and advisable steps to effect the issuance of the Bond; and

WHEREAS, the Company has agreed to enter into the Lease Agreement with the County, pursuant to which the Company shall lease the Leased Property from the County; and

WHEREAS, the Company has requested that the County issue the Bond to provide funds to be used to finance the Project; and

WHEREAS, pursuant to the provisions of the Lease Agreement, the Company shall make payments to the Purchaser (defined below) sufficient to pay the principal of, redemption premium, if any, and interest on the Bond and to pay all other obligations incurred pursuant to the provisions of the Indenture (defined below), the Lease Agreement and this Ordinance; and

WHEREAS, the proceeds of the Bond shall be applied to pay the costs of the Project; and

WHEREAS, the County is authorized to enter into the Bond Documents (defined below) and other related documents and to issue the Bond pursuant to the Act, the laws of the State and this Ordinance and pursuant to an Indenture dated as of September 1, 2009 (the "Indenture") among the County, the Purchaser (defined below) and Western Commerce Bank, as Depositary (the "Depositary"); and

WHEREAS, after having considered the provisions of the Proposal, the Board has concluded that the economic and other benefit to the County shall be substantial and that it is desirable and necessary at this time to authorize the issuance of the Bond and that the County's issuance of the Bond shall constitute a valid public purpose under the Act; and

WHEREAS, a single Bond in a maximum principal amount of \$60,000,000 shall be issued, sold and delivered by the County pursuant to the Act; and

WHEREAS, Intrepid Potash, Inc., a corporation duly organized and existing under the laws of the State of Delaware and an affiliate of the Company (the "Purchaser"), has offered to purchase the Bond at a private sale pursuant to the terms of a proposed Bond Purchase Agreement (the "Bond Purchase Agreement") to be entered into among the County, the Company and the Purchaser; and

WHEREAS, there has been published in the *Carlsbad Current-Argus*, and the *Artesia Daily Press*, each a newspaper published in and of general circulation in the County, public notice of the Board's intention to adopt this Ordinance, which notice contained certain information concerning the Project, the maximum amount of the Bond to be issued to finance the acquisition of the Project and further detail concerning the Bond and the Project, which notice was published at least 14 days prior to final action upon this Ordinance; and

WHEREAS, the hearing relating to the publication of such notice was held at the Board meeting held on August 18, 2009, at which all interested individuals were given a reasonable opportunity to express their views, both oral and in writing on the proposed Bond and the Project, and the Board hereby determines that the Issuer shall proceed with the Project, the issuance of the Bond and the adoption of this Ordinance; and

WHEREAS, the proposed forms of the following documents (the "Bond Documents") have been filed with the County Clerk before this meeting: (1) the Indenture; (2) the Lease Agreement; and (3) the Bond Purchase Agreement.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF EDDY COUNTY, NEW MEXICO:

SECTION 1. RATIFICATION. All actions not inconsistent with the provisions of this Ordinance previously taken by the Board and the officials of the County directed toward the sale and issuance of the Bond and the acquisition and lease of the Project Property, including, without limitation, the publication of notice as set forth above, are approved and ratified.

SECTION 2. THE PROJECT. The County shall acquire by purchase, bill of sale, or deed to the County and other instruments, as appropriate, the Leased Property from the Company and lease and sell the Leased Property to the Company for use in connection with the Company's manufacturing and processing of potash in accordance with the Bond Documents. The Leased Property will be located at all times within the unincorporated portion of the County.

SECTION 3. APPROVAL OF PROJECT. The Project which was described in the Proposal is hereby approved.

SECTION 4. FINDINGS. The Board finds that:

(A) The maximum aggregate face amount of the obligation to be issued with respect to the Project is \$60,000,000.

(B) The initial developer and operator of the Project shall be the Company.

(C) The location of the Project is in unincorporated Eddy County, New Mexico.

SECTION 5. AUTHORIZATION AND APPROVAL OF FINANCING. To finance the cost of the acquisition of the Project, the County hereby authorizes the issuance and sale of a single industrial revenue bond to be designated "Eddy County, New Mexico Taxable Industrial Revenue Bond (HB Potash, LLC Project), Series 2009" in the maximum principal amount of \$60,000,000. The County shall finance the acquisition and construction of the Project by depositing or causing the deposit of the proceeds of the sale of the Bond with the Depository in accordance with the Indenture.

SECTION 6. FORM AND TERM OF BOND. The Bond shall be issued in registered form without coupons, and shall be dated and sold subject to the terms and conditions

of the Indenture and the Bond Purchase Agreement. The Bond shall mature on September 1, 2029 (the “Maturity Date”), and the entire principal amount of the Bond shall be payable in one payment on the Maturity Date. The Bond shall bear interest at the rate of 2.25% per annum on the principal amount advanced thereunder, commencing on the date of delivery of the Bond, as further provided in the Indenture. Interest on principal amounts outstanding under the Bond shall be payable on each September 1 while the Bond is outstanding, to and including the Maturity Date. The Bond shall be in substantially the form provided in the Indenture, shall be dated as of the initial date of delivery thereof to the Purchaser, and shall be subject to such other terms and conditions, including but not limited to redemption provisions, as are provided in the Indenture; provided that the final payment of principal plus accrued interest on the Bond shall be due no later than September 1, 2029. Interest on the Bond shall be calculated on the basis of a 360-day year of twelve 30-day months. The sale of the Bond on the terms set forth in the Bond Purchase Agreement is hereby approved.

SECTION 7. FINDINGS REGARDING PAYMENT OF INTEREST AND PRINCIPAL AND OTHER MATTERS. The Board makes the following determinations and findings in accordance with the Act:

(A) The maximum amounts necessary in each year to pay the installments of principal and interest on the Bond, assuming issuance of the Bond as of the date of execution and delivery of the Lease Agreement and Indenture in the aggregate principal amount of \$60,000,000 and assuming the interest rate specified in Section 6 hereof, shall be no more than the following:

Annual Calendar Period to and <u>Including</u>	Maximum Principal Payments Required in Such <u>Period</u>	Maximum Interest <u>for Such Period</u>	Total Debt Service <u>Requirement</u>
September 1, 2010	-0-	\$1,350,000	\$ 1,350,000
September 1, 2011	-0-	\$1,350,000	\$ 1,350,000
September 1, 2012	-0-	\$1,350,000	\$ 1,350,000
September 1, 2013	-0-	\$1,350,000	\$ 1,350,000
September 1, 2014	-0-	\$1,350,000	\$ 1,350,000
September 1, 2015	-0-	\$1,350,000	\$ 1,350,000
September 1, 2016	-0-	\$1,350,000	\$ 1,350,000
September 1, 2017	-0-	\$1,350,000	\$ 1,350,000
September 1, 2018	-0-	\$1,350,000	\$ 1,350,000
September 1, 2019	-0-	\$1,350,000	\$ 1,350,000
September 1, 2020	-0-	\$1,350,000	\$ 1,350,000
September 1, 2021	-0-	\$1,350,000	\$ 1,350,000
September 1, 2022	-0-	\$1,350,000	\$ 1,350,000
September 1, 2023	-0-	\$1,350,000	\$ 1,350,000
September 1, 2024	-0-	\$1,350,000	\$ 1,350,000
September 1, 2025	-0-	\$1,350,000	\$ 1,350,000
September 1, 2026	-0-	\$1,350,000	\$ 1,350,000
September 1, 2027	-0-	\$1,350,000	\$ 1,350,000
September 1, 2028	-0-	\$1,350,000	\$ 1,350,000
September 1, 2029	\$60,000,000	\$1,350,000	\$61,350,000

(B) The terms under which the Leased Property are leased provide that the Company shall maintain the Leased Property and carry all proper insurance with respect to the Leased Property.

(C) The lease rentals payable under the Lease Agreement shall be at least sufficient to pay the amounts set forth in paragraph (A) of this Section 7 (or such lesser amounts as the actual debt service on the Bond requires), and to render the financing of the acquisition of the Leased Property entirely self-liquidating.

(D) The funds and any accounts which are part of the funds established in the Indenture and maintained in trust with, and disbursements shall be made from the funds and such accounts by, the Depository as set forth in the Indenture. The Depository may establish such other funds and accounts as are necessary to administer the trust created by the Indenture. All of the proceeds from the sale of the Bond will be allocated, deposited and credited as set forth in the Indenture. All other money received by the Depository shall be deposited in and withdrawn from the funds and such accounts as provided in the Indenture.

(E) It is not deemed advisable to establish any reserve fund for use in connection with the retirement of the Bond or the maintenance of the Leased Property.

SECTION 8. APPROVAL OF DOCUMENTS; APPOINTMENT OF DEPOSITARY; AUTHORIZATION OF OFFICERS. The Board approves the forms, terms and provisions of the Bond Documents and the County shall enter into such Bond Documents substantially in the form of each of such Bond Documents presented at the meeting at which this Ordinance was adopted, with only such changes as are not inconsistent with this Ordinance or such other changes as may be approved by the Chairman of the Board or the Vice-Chairman of the Board and bond counsel. All such changes, insertions, deletions and modifications shall be deemed to have been approved by the County upon execution and delivery of the Bond Documents, such an execution and delivery to be conclusive evidence of such approval. Western Commerce Bank is hereby appointed Depository as further provided in the Indenture. The Board authorizes the Chairman of the Board or the County Manager and the County Clerk each to execute and deliver such Bond Documents, including the Bond at the rate of interest set forth herein, to effectuate the sale of the Bond to the Purchaser and the appointment of the Depository under the Indenture.

SECTION 9. GENERAL AUTHORIZATION. The Board hereby authorizes, empowers and directs each of the officers (including the Board officers) and employees of the County, and its counsel, to carry out or cause to be carried out, and to perform, such obligations of the County and such other actions as they, in consultation with advisors to the County in connection with the issuance, sale and delivery by the County of the Bond, shall consider necessary or advisable in connection with the Ordinance, including but not limited to the Bond Documents or other documents deemed necessary, in the issuance, sale and delivery of the Bond, including without limitation, arrangements with financial printers and credit agencies.

SECTION 10. APPROVAL OF INDEMNIFICATION. The Board specifically approves the provisions of the Lease Agreement relating to indemnification which provide that

the Company will indemnify the County in accordance with the terms of Section 5.7 of the Lease Agreement, which indemnification may be subject to the provisions of Section 56-7-1 and 56-7-2, New Mexico Statutes Annotated, 1978 Compilation, as described in Section 5.7.G of the Lease Agreement..

SECTION 11. ACTIONS TO BE TAKEN. The officers of the County shall take such action as is necessary by the Indenture to effectuate its provisions and shall take such action as is necessary in conformity with the Act to finance the construction and acquisition of the Leased Property and for carrying out other transactions as contemplated by this Ordinance and the Bond Documents including, without limitation, the execution and delivery of any closing documents to be delivered in connection with the sale and delivery of the Bond.

SECTION 12. LIMITED OBLIGATIONS. The Bond shall be a special limited obligation of the County, payable solely as defined in the Indenture and shall never constitute a debt or indebtedness of the County, the State or any political subdivision thereof within the meaning of any provision or limitation of the State Constitution or statutes and shall not constitute or give rise to any pecuniary liability of the County or charge against its general credit or taxing power. Nothing contained in this Ordinance nor in the Bond Documents or any other instrument shall be construed as obligating the County (except with respect to the Project and the application of the revenues therefrom and the proceeds of the Bond, all as provided in the Bond Documents), nor as incurring a pecuniary liability or a charge upon the general credit of the County or against its taxing power, nor shall the breach of any agreement contained in this Ordinance, the Bond Documents, the Bond or any other instrument be construed as obligating the County (except with respect to the Project and the application of the revenues therefrom and the proceeds of the Bond, all as provided in the Bond Documents), nor as incurring a pecuniary liability or a charge upon the general credit of the County or against its taxing power, the County having no power to pay out of its general funds, or otherwise contribute any part of the costs of constructing or equipping the Project, nor power to operate the Project as a business or in any manner except as lessor of the Project.

SECTION 13. PAYMENTS IN LIEU OF TAXES. If the Leased Property is subject to general (ad valorem) taxes under the laws of the State as calculated pursuant to Sections 7-36-23 and 7-36-24, NMSA 1978, the Company shall be responsible for the applicable tax. However, if it is determined that all or a portion of the Leased Property is not subject to such taxes (the "Exempt Property"), during the remainder of the Term the Company agrees to make payments in lieu of taxes in the amount of tax revenue that would be remitted to the Carlsbad Municipal School District if the Exempt Property were not exempt, provided that in no event shall calculation of the payment in lieu of taxes apply a levy in excess of fifteen (15) mills on the taxable value of the Exempt Property. For the avoidance of doubt, the calculation of the liability related to Exempt Property under this Section shall be made in the same manner as applied to non-Exempt Property; however, Exempt Property shall only be burdened by the portion of general taxes imposed to provide funding for the Carlsbad Municipal School District. The payment in lieu of taxes shall be applicable for each year of the Term during which the Exempt Property is not subject to general (ad valorem) taxes.

SECTION 14. STATE TAX MATTERS. The County shall acquire in its name the Project Property, including capital equipment and other tangible personal property used in the

Project, and for such acquisitions the County will, consistent with New Mexico state law, assist the Company in obtaining the necessary nontaxable transaction certificates for delivery to vendors as may be applicable under the New Mexico Gross Receipts and Compensating Tax Act.

SECTION 15. BOND ORDINANCE IRREPEALABLE. After the Bond is issued, this Ordinance shall be and remain irrevocable until the Bond and the interest thereon shall have been duly paid, cancelled and discharged in accordance with the Indenture. Amendments to this Ordinance shall not require the consent of the owners of the Bond if a supplement to the Indenture which contains the same or similar changes or additional terms would not require the consent of the owners of the Bond. Amendments to this Ordinance shall require the consent of a majority in aggregate principal amount of the owners of the Bond then outstanding if a supplement to the Indenture which contains the same or similar changes or additional terms would require such consent of the owners of the Bond. No amendment shall be made to this Ordinance without the consent of all the owners of the Bond if a supplement to the Indenture which contains the same changes or additional terms would require the consent of all such owners. Notice of a proposed amendment requiring the consent of the owners of the Bond shall be given in the same manner as notice of a proposed supplement to the Indenture which requires the consent of the owners of the Bond. The County may, at any time prior to the issuance of the Bond, amend any of the terms of this Ordinance by an ordinance or a resolution duly adopted by the Board.

SECTION 16. SEVERABILITY. If any section, paragraph, clause or provision of this Ordinance shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such section, paragraph, clause or provision shall not affect any of the remaining provisions of this Ordinance.

SECTION 17. REPEALER. All bylaws, orders, resolutions and ordinances, or parts thereof, inconsistent with this Ordinance are repealed to the extent only of such inconsistency. This repealer shall not be construed as reviving any by law, order, resolution or ordinance or part thereof.

SECTION 18. RECORDING; AUTHENTICATION; PUBLICATION; EFFECTIVE DATE. By reason of the fact that it is necessary for the County and the Company to proceed as soon as possible to take all actions necessary to the consummation of the purpose of this Ordinance, this Ordinance, immediately upon its final passage and approval, shall be recorded in the ordinance book of the County, kept for that purpose, and shall be there authenticated by the signature of the Chairman of the Board as the presiding officer of the Board, and by the signature of the County Clerk or any Deputy County Clerk, and shall be published by title and general summary once in a newspaper which maintains an office in, and is of general circulation in, the County, and shall be in full force and effect thirty days following recordation by the County Clerk in the ordinance book of the County. The title and a general summary of this subject matter contained in this Ordinance shall be published in substantially the following form:

(Form of Summary of Ordinance for Publication)

EDDY COUNTY, NEW MEXICO

Notice of Adoption of Ordinance

Notice is hereby given that on August 18, 2009 the Board of County Commissioners of Eddy County adopted Ordinance No. O-09-56 and Resolution No. R-09-59 (collectively, the "Ordinance") relating to the authorization and issuance of the County's Taxable Industrial Revenue Bond (HB Potash, LLC Project) Series 2009 (the "Bond"). Complete copies of the Ordinance are available for public inspection during normal and regular business hours of the County Clerk at Eddy County, 101 West Greene Street, Carlsbad New Mexico 88220. The title and subject matter of Ordinance No. O-09-56 is as follows:

AUTHORIZING THE ISSUANCE AND SALE OF EDDY COUNTY, NEW MEXICO TAXABLE INDUSTRIAL REVENUE BOND (HB POTASH, LLC PROJECT) SERIES 2009, IN A MAXIMUM PRINCIPAL AMOUNT OF \$60,000,000 TO PROVIDE FUNDS TO FINANCE THE ACQUISITION AND CONSTRUCTION OF AN INDUSTRIAL REVENUE BOND MANUFACTURING FACILITY TO BE USED BY HB POTASH, LLC FOR THE MANUFACTURE AND PROCESSING OF POTASH; AUTHORIZING THE EXECUTION AND DELIVERY OF AN INDENTURE, A LEASE, A BOND PURCHASE AGREEMENT, THE BOND AND OTHER DOCUMENTS IN CONNECTION WITH THE ISSUANCE OF THE BOND AND THE PROJECT; MAKING CERTAIN DETERMINATIONS AND FINDINGS RELATING TO THE BOND AND THE PROJECT; RATIFYING CERTAIN ACTIONS TAKEN PREVIOUSLY; AND REPEALING ALL ACTIONS INCONSISTENT WITH THIS ORDINANCE.

Various recitals are first set forth:

Sections 1 through 4 ratify previous action taken in connection with the acquisition and construction of facilities located in the unincorporated portion of Eddy County for use by HB Potash, LLC, in manufacturing and processing potash (the "Project") and the issuance of the Bond designated above in the title hereof (the "Bond"); authorize the acquisition, lease and sale of the Project; approve the Project as proposed by HB Potash, LLC concerning the potash manufacturing project and the Bond; and make certain findings, including the findings that the Project shall be located within the unincorporated portion the County.

Sections 5 through 7 authorize the issuance of the Bond in a principal amount not to exceed \$60,000,000 and the Project; provide certain details concerning the Bond, including provisions that the Bond shall mature on a specified date in 2029 and shall bear interest at a rate of 2.25% per annum; approve the sale of the Bond on the terms set forth in the Bond Purchase Agreement; and make certain findings and determinations pursuant to Section 4-59-1 through 4-59-16, NMSA 1978, including the maximum annual amounts necessary for debt service on the Bond, that the Company shall maintain the Leased Property, that the rentals under the Lease shall be sufficient to pay all debt service on the Bond, and that no reserve fund will be necessary to retire the Bond or to maintain the Project.

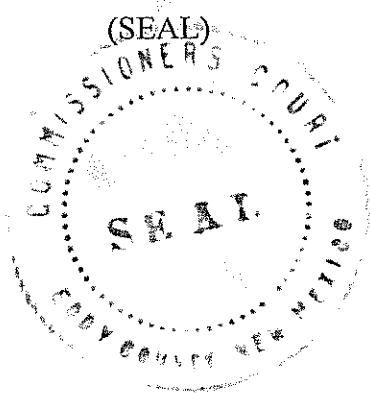


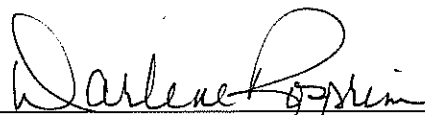
Sections 8 through 12 approve the forms of the bond documents; authorize and direct County officials to execute and deliver the bond documents; authorize County officials to execute and deliver other documents and to take such other actions as are reasonably necessary to effectuate the Ordinance; provide for the indemnification of the County; authorize County officers to take all action necessary to issue the Bond and complete the transaction; provide that the Bond shall be a special limited obligation of the County, payable solely as provided in the Indenture; state that the Bond shall never constitute a debt or indebtedness of the County within the meaning of any provision or limitation of the New Mexico constitution; and provide that the Bond shall never give rise to a pecuniary liability of the County or a charge against the County's general credit or taxing power.

Sections 13 through 18 relate to the provisions of the Lease requiring payments of general (ad valorem) property taxes or possible payment in lieu of taxes; relate to state tax matters; provide that the Ordinance shall be irrevocable while the Bond is outstanding; provide severability and repealer provisions; direct the authentication and recording of the Ordinance; and provide for the publication of notice of the adoption of the Ordinance.

This notice constitutes compliance with the Public Securities Limitation of Action Act, Sections 6-14-4 to 6-14-7 NMSA 1978.

WITNESS my hand and the seal of Eddy County, New Mexico, this 18<sup>th</sup> day of August, 2009.

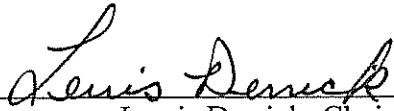


  
\_\_\_\_\_  
County Clerk

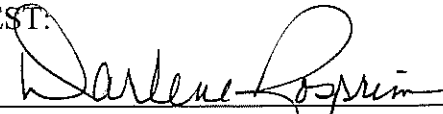
(End of Form of Summary for Publication)

PASSED, ADOPTED, SIGNED AND APPROVED THIS 18TH DAY OF  
AUGUST, 2009.

BOARD OF COUNTY COMMISSIONERS  
OF EDDY COUNTY, NEW MEXICO

  
\_\_\_\_\_  
Lewis Derrick, Chairman

ATTEST:

  
\_\_\_\_\_  
Darlene Rosprim, County Clerk

[SEAL]

