

**Proposed  
Water Right Acquisition**

**Elkhead Reservoir Enlargement**

**Elkhead Creek and the Yampa River  
Moffat and Routt Counties**



**Colorado Water Conservation Board  
Agenda Item 10  
September 14-15, 2004 Board Meeting  
Alamosa**



# STATE OF COLORADO

## Colorado Water Conservation Board

### Department of Natural Resources

1313 Sherman Street, Room 721

Denver, Colorado 80203

Phone: (303) 866-3441

FAX: (303) 866-4474

www.cwcb.state.co.us



## MEMORANDUM

TO: CWCB Members

FROM: Randy Seaholm  
Anne Janicki

DATE: August 18, 2004

SUBJECT: Agenda Item 10 – September 14-15, 2004 CWCB Meeting  
Stream and Lake Protection Program  
Elkhead Reservoir Enlargement Water Right Acquisition

Bill Owens  
Governor

Russell George  
Executive Director

Rod Kuharich  
CWCB Director

Dan McAuliffe  
Deputy Director

### Background

The Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin ("Recovery Program") was created on September 29, 1987 and was implemented by a Cooperative Agreement signed in January of 1988 by the Secretary of the Department of the Interior, the Governors of the States of Colorado, Utah, and Wyoming and the Administrator of the Western Area Power Administration. The goal of the Recovery Program is to recover four species of endangered fish while allowing water development to proceed consistent with state water law and in compliance with the Federal Endangered Species Act in the Upper Colorado River Basin in the states of Colorado, Utah, and Wyoming.

In September 1993, the CWCB and the U.S. Fish and Wildlife Service ("Service") entered into an Enforcement Agreement concerning water, water rights or interests in water appropriated or acquired for Recovery Program purposes. The agreement stated that the Service would rely on the Board to appropriate, acquire and enforce instream flow water rights for the listed species under state law, and that any acquisition of water, water rights or interests in water by CWCB for the benefit of the four listed fish species shall be considered in determining whether there has been sufficient progress for the Recovery Program to continue to function as a reasonable and prudent alternative to avoid the likelihood of jeopardy to those species from existing and new water developments.

Also in 1993, the Recovery Program began work on a Management Plan for the endangered fish species in the Yampa River basin ("Yampa Plan"). The purpose of the plan was to identify specific management actions to promote recovery of endangered fish species in light of future depletions from the Yampa River basin to serve projected human needs. Among other recovery actions, the Yampa Plan identified a need for up to 7,000 acre-feet (AF) of water to augment base flows in the Yampa River, primarily below the town of Maybell, during late July through early October. To meet this need, the Yampa Plan

recommended 5,000 AF come from a dedicated augmentation pool established by enlarging Elkhead Reservoir with the remaining 2,000 AF provided through a 20-year renewable lease from other water in the Elkhead Reservoir Enlargement.

In 1999, the Colorado River Water Conservation District ("River District") agreed to undertake the enlargement of Elkhead Reservoir on its own behalf and on behalf of the Recovery Program. Elkhead Reservoir is located on Elkhead Creek northeast of Craig (Appendix 1). The River District will be constructing the reservoir enlargement with funding from the CWCB, Recovery Program and River District sources. The River District has filed a new conditional storage right for the enlargement (Case No. 6-02CW106) for "all beneficial uses including municipal, commercial, industrial, domestic, irrigation, livestock, power generation and cooling, wastewater treatment, piscatorial and recreational (including in-reservoir and in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Fishes Recovery Program)".

To meet the water needs identified by the Yampa Plan, the U.S. Bureau of Reclamation ("Reclamation"), acting on behalf of the Service and the Recovery Program, will fund (cost share) a portion of the Recovery Program's pro-rata share of the reservoir enlargement cost of construction. Reclamation will also enter into a 20-year lease for up to 2,000 AF of water from the River District's pool in the reservoir enlargement. The intent is to convey 5,000 AF of the storage water right along with a storage space easement to the CWCB, and sublease up to 2,000 AF of water to the CWCB, to hold on behalf of the Recovery Program for the purpose of protecting instream flows through the Critical Habitat Reach on the Yampa River.

Over the past several months, CWCB staff has been working with the Department of Natural Resources, the River District and federal agencies acting on behalf of the Recovery Program, to develop the numerous legal documents and the terms and conditions required to implement the proposed conveyance and lease of water for endangered fish. A "map" of the agreements is included (Appendix 2) for reference. The attached agreements (Appendix 3) address each entity's responsibilities and obligations with regard to the reservoir enlargement and water right conveyance. The **Acquisition Agreement, Grant Agreement, Reservoir Enlargement Agreement, 20-Year Lease Agreement, and the DNR/UCRIP Cost Share Agreement** have been reviewed and approved in concept by the River District Board, the federal Solicitor's Office and the State Attorney General.

### **Summary of Proposal**

There are two components to this proposed water acquisition. The first component involves the permanent DONATION of a 5,000 acre-foot storage water right in the Elkhead Reservoir Enlargement (the "Permanent Water Supply"). The River District has filed a conditional water right for the Elkhead Reservoir Enlargement in Case No. 6-02CW106 for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Endangered Fish Recovery Program). The River District, in cooperation with Reclamation and the Service, will be responsible for perfecting the conditional water right for the claimed "in-river" uses. Once the Recovery Program financial obligation has been paid in full and the 5,000 AF portion of the water right has been decreed absolute, the River District will convey the right to the CWCB by means of a Special Warranty Deed. Along with the water right, a pro-rata interest in storage space (the Storage Space Easement) for the water right will be conveyed to the CWCB. The CWCB will hold the water right and storage space easement in perpetuity for the benefit of the Recovery Program at the direction of the Service. The CWCB will have no financial obligation with regard to the Permanent Water Supply, and no obligation to fund annual operation, maintenance, and repair costs for the Elkhead Reservoir Enlargement so long as the water is used for Recovery Program purposes. In the event the water is no longer needed for Recovery Program purposes, the CWCB may use or dispose of the water right and easement subject to the terms of the Acquisition Agreement.

The second component of this acquisition involves the SUBLEASE of 2,000 AF of water from the Elkhead Reservoir Enlargement for a period of 20 years (the "Short Term Water Supply") for the benefit of endangered native fish species in the Yampa River. The primary lease will be between the River District and Reclamation, and will provide up to 2,000 AF of additional water for the Short-Term Water Supply. The Lease will be implemented through annual contracts with the River District, and water will be released on an "as-needed" basis as determined by the Service. Pursuant to the terms of the Lease, Reclamation will pay the River District for any water leased from the Short-Term Water Supply. Reclamation, on behalf of the Service, will sublease, at no cost to the CWCB, all of its right, title and interest in the water it leases annually from the River District for use by CWCB to monitor and protect to and through the Critical Habitat Reach of the Yampa River. The CWCB will have no financial obligation with regard to the Short-Term Water Supply or the Lease.

The Acquisition Agreement requires the CWCB to take such action as may be required to fully exercise the conveyed water right and to coordinate, monitor and protect releases of water to and through the Critical Habitat Reach. The agreement also incorporates the provision from the 1993 Enforcement Agreement which requires the Service (through the Recovery Program) to install operate and maintain any stream gages required to ensure water releases are delivered to and through the Critical Habitat Reach of the Yampa River.

### **Water Acquisition Procedure**

The attached Acquisition Agreement (Appendix 3) between the CWCB, River District, Reclamation and the Service is being presented to the Board at this September 2004 Board Meeting for initial consideration. The statutes provide 120 days for the Board to determine what terms and conditions it will accept in an acquisition agreement for water, water rights, or interests in water to preserve or improve the natural environment.

Furthermore, the ISF Rules require the Board to evaluate the "appropriateness" of the acquisition and determine how best to utilize the acquired water rights to preserve or improve the natural environment. The attached Preliminary Report (Appendix 4) contains additional technical information about the water rights, instream flow needs for endangered fish, and other factors for the Board to consider in reviewing the proposed acquisition. **This meeting initiates the 120-day Board review period.**

Staff has requested recommendations from the Division of Wildlife, the Division of Parks and Outdoor Recreation, the U.S. Department of Agriculture and the U.S. Department of Interior, pursuant to statute. Staff has also provided notice of the proposed acquisition to all persons included on the appropriate ISF Subscription Mailing Lists pursuant to Rule 6i of the ISF Rules. Staff will report to the Board on any comments or recommendations it receives.

Pursuant to Rule 6 of the ISF Rules, interested parties will have 30 days from the date of this Board meeting to request a hearing on the proposed acquisition. If no hearing is requested, the Board may take final action on the proposed acquisition at the November 2004 Board meeting. If a hearing is requested pursuant to the Rules, the Board will consider the hearing request at its November 2004 meeting, and consider final action on the proposal at the January 2005 Board meeting.

### **Staff Recommendation**

Pursuant to ISF Rule 6b, the day the Board considers this memo will initiate the 120-day period for Board review. **No formal action is required at this time.** The Board's action on this acquisition proposal will occur at a subsequent meeting. At that meeting, the Board will decide:

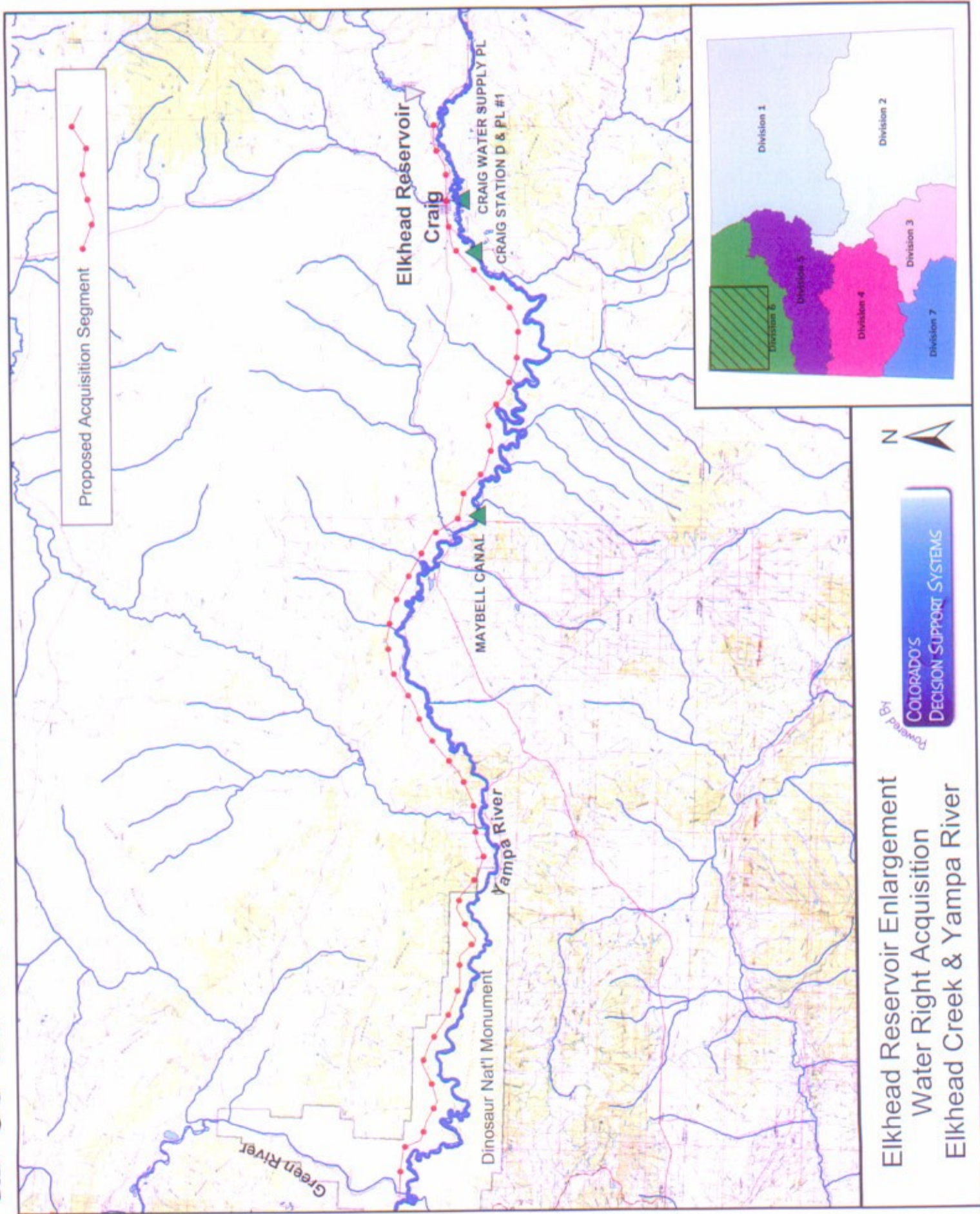
How to utilize the acquired water;

Whether the proposed acquisition is appropriate to preserve or improve the natural environment;  
and,

Whether to acquire, acquire with limitations, or reject the proposed acquisition.

## Attachments





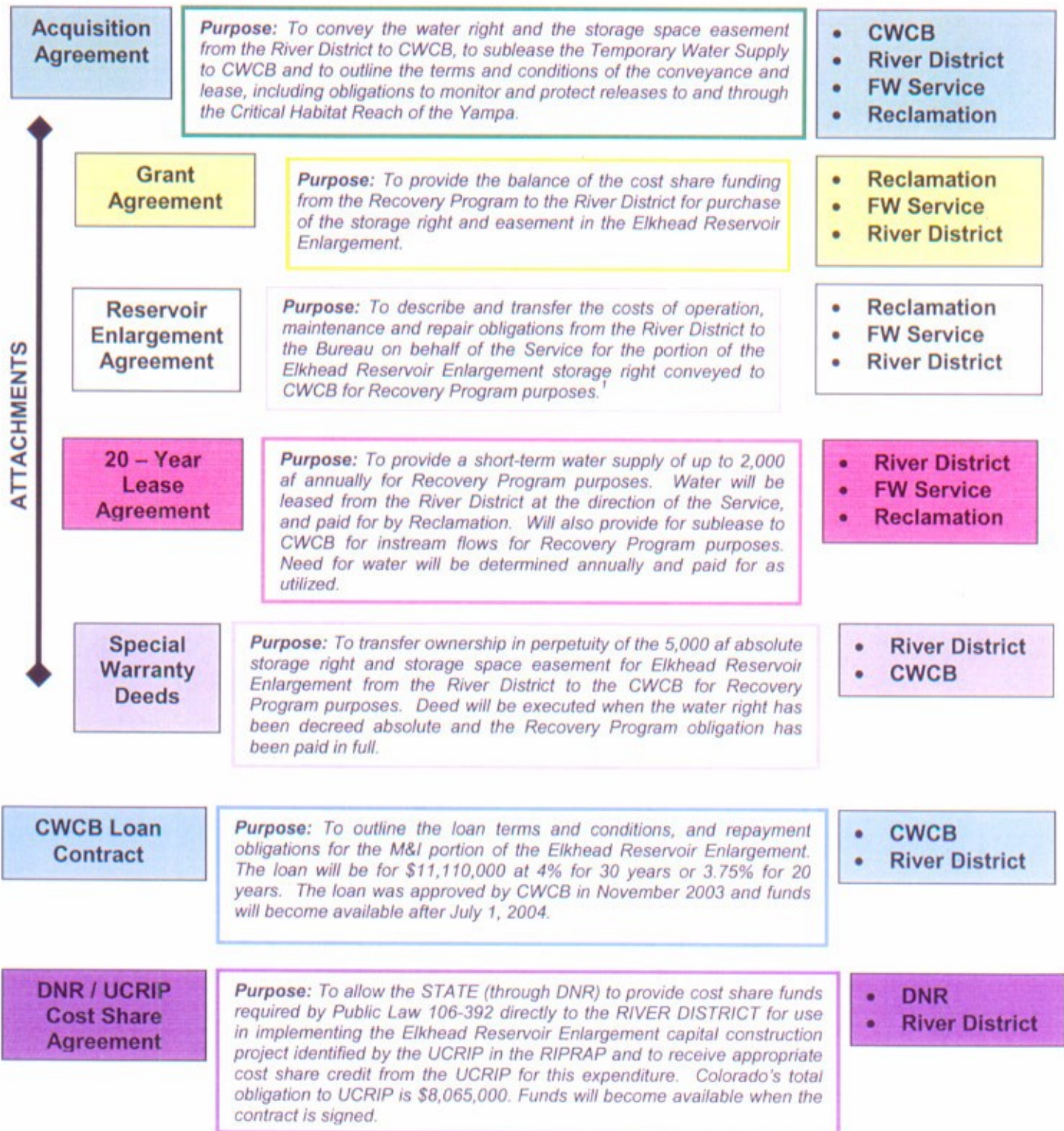
Elkhead Reservoir Enlargement  
Water Right Acquisition  
Elkhead Creek & Yampa River



# AGREEMENT MAP

## Elkhead Reservoir Enlargement

### Water Acquisition for Recovery Program Purposes



<sup>1</sup> A detailed description of reservoir operations and obligations is contained in a separate agreement between the River District, the City of Craig and the Yampa Participants (the "Amended and Re-Stated Agreement").

**DRAFT ACQUISITION AGREEMENT**  
**ELKHEAD RESERVOIR ENLARGEMENT**  
**DRAFT 9/1/04**

This Acquisition Agreement is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2004, by and among the United States of America, Department of the Interior, Bureau of Reclamation ("Reclamation") and Fish and Wildlife Service ("Service"), both acting through the Secretary of the Interior, pursuant to the Act to Authorize the Bureau of Reclamation to Provide Cost Sharing for the Endangered Fish Recovery Implementation Programs for the Upper Colorado and San Juan River Basins, (October 30, 2000, 114 Stat. 1602, Public Law 106-392 ), and acts amendatory thereof or supplementary thereto, the Colorado River Water Conservation District, acting by and through its Colorado River Water Projects Enterprise ("River District") and the State of Colorado, acting by and through the Colorado Water Conservation Board ("CWCB").

**RECITALS**

1. WHEREAS, the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin ("Recovery Program") dated September 29, 1987 was implemented by a Cooperative Agreement signed in January 1988 by the Secretary of the Department of the Interior, the Governors of the States of Colorado, Utah, and Wyoming, and the Administrator of the Western Area Power Administration. The Recovery Program is a coalition of agencies and organizations. The goal of the Recovery Program is to recover four species of endangered fishes while allowing water development to proceed consistent with state water law and in compliance with the Federal Endangered Species Act ("ESA") in the Upper Basin states of Colorado, Utah, and Wyoming; and
2. WHEREAS, section 2 of the Endangered Species Act, 16 USC. §§1531 (c) (2), declares that it is the policy of Congress for federal agencies to cooperate with state and local agencies on water resource issues in concert with conservation of endangered species; and the U.S. Fish and Wildlife Service is primarily charged with implementing the Endangered Species Act and ensuring the protection and recovery of threatened and endangered species; and
3. WHEREAS, pursuant to section 4(b)(2) of the ESA, on March 21, 1994, the Service designated certain reaches of the Yampa River as critical habitat for each of the four endangered fish species. The largest of these reaches extends from the State Highway 394 bridge in Craig, Colorado downstream to the confluence of the Green River. For the purposes of this Acquisition Agreement, this reach shall be described as extending from the confluence of Elkhead Creek downstream to the confluence of the Green River and shall be referred to as "the Critical Habitat Reach;" and
4. WHEREAS, the River District is a political subdivision of the State of Colorado created and existing pursuant to its Organic Act §§37-46-101, *et seq.* C.R.S., and other



applicable statutes, with authority to aid in the conservation, use and development of the water resources of the Colorado River and its principal tributaries, and is vested with sufficient authority to receive and manage funds and to coordinate certain activities under the Recovery Implementation Program-Recovery Action Plan ("RIPRAP") benefitting the four Colorado River endangered fishes and water resources in general. The River District owns and conducts a business engaged in water activities pursuant to the Colorado Water Activity Enterprise Act, Article 45.1 of Title 37, C.R.S., in order to provide for the beneficial use of water within the District. The River District's Board of Directors confirmed its authority to operate such a business by Resolutions adopted on July 16, 1985, October 19, 1993, October 19, 1999, and October 17, 2000. For purposes of this Acquisition Agreement, the River District is acting by and through its Colorado River Water Projects Enterprise and/or by and through its Board of Directors, or both, as determined by the River District. The River District has authority to perform all acts and things necessary or advisable to secure and insure an adequate supply of water, present and future," which includes the authority to construct, own, operate, and maintain water storage facilities; and

5. WHEREAS, the CWCB is a state agency within the Colorado Department of Natural Resources (DNR) created for the purpose of aiding in the protection and development of the waters of the state for the benefit of the state's present and future inhabitants. The CWCB is authorized by section 37-92-102(3), C.R.S., to acquire from any person, including any governmental entity, such water, water rights or interests in water as the CWCB determines may be required for instream flows to preserve or improve the natural environment to a reasonable degree and to take whatever action may be needed to ensure such instream flows remain in the river; and
6. WHEREAS, the Service and the CWCB entered into a Memorandum of Agreement dated September 21, 1993, attached hereto as Exhibit A, concerning enforcement and protection of endangered fish species' instream flows ("the Enforcement Agreement") and the Service is relying upon the CWCB to appropriate, acquire and enforce instream flow water rights for the listed species under state law; and
7. WHEREAS, pursuant to Article 92, Title 37, C.R.S., as amended, the State Engineer's Office is responsible for the administration and distribution of the waters of the State, and, under Article 92, Title 37, C.R.S., the CWCB may call upon the State Engineer and the Division Engineer for Water Division 6 ("Division 6 Engineer") to administer water, water rights or interests in water held by the CWCB for instream flows to preserve or improve the natural environment to a reasonable degree within the Critical Habitat Reach of the Yampa River, which enforcement actions are more fully described in the Enforcement Agreement and in this Acquisition Agreement; and
8. WHEREAS, the Service has agreed that any acquisition of water, water rights, or interests in water by the CWCB for the benefit of the four listed fish species shall be considered in determining whether there has been sufficient progress for the Recovery

Program to continue to function as a reasonable and prudent alternative to avoid the likelihood of jeopardy to those species from existing and new water developments; and

9. WHEREAS, the Recovery Program has determined a need to acquire 5,000 acre feet of water on a permanent basis (the "Permanent Water Supply") and up to 2,000 acre feet of water on a temporary basis (the "Short-Term Water Supply") to maintain occupied critical habitat for endangered fish in the Critical Habitat Reach of the Yampa River; and
10. WHEREAS, the River District has appropriated a conditional storage right for the Elkhead Reservoir Enlargement as more fully described in Water Court Case No. 6-02CW106 for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Endangered Fishes Recovery Program); and
11. WHEREAS, the River District and the Recovery Program have agreed to cooperate in the construction of an expansion of Elkhead Dam and Reservoir, located on Elkhead Creek, a tributary of the Yampa River in Sections 1, 2, 3, 4, 9, 10, 16, and 21, Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat and Routt Counties, Colorado, to develop a water supply that will be capable, subject to water availability based on hydrologic cycles, of providing the Recovery Program's Permanent and Short-Term Water Supply needs for endangered native fish species during the critical low-flow periods in the Yampa River Basin, and be available for other beneficial uses to contractees of the River District; and
12. WHEREAS, the River District has entered into the following agreements: an Intergovernmental Agreement between the River District and the City of Craig, dated February 1, 2002 (creating a joint venture between the River District and the City of Craig for the construction of the Elkhead Reservoir Enlargement); a Memorandum of Agreement between the River District, the City of Craig, and the Colorado Division of Wildlife, dated August 6, 2003 (granting the River District the right to interfere with certain interests owned by the Division in order to construct an enlargement of the existing Elkhead Reservoir); an Intergovernmental Agreement between the River District and the City of Craig, dated August 6, 2003 (setting forth the Agreement of the River District and the City of Craig related to the construction, operation, and maintenance of the Elkhead Reservoir Enlargement); and an Amended and Restated Agreement between the Yampa Participants, the River District, and the City of Craig dated \_\_\_\_\_ (setting forth the Agreement of the River District, City of Craig, and Yampa Participants related to the post-construction operation, maintenance, and repair of the Elkhead Reservoir Enlargement). The above-described Agreements between the River District, Craig, Division of Wildlife, and the Yampa Participants confirm that title to the storage space created by the enlargement of Elkhead Reservoir will vest in the River District. The Elkhead Reservoir Enlargement will result in an estimated 11,750 acre-feet of additional storage capacity at the site of the Elkhead Reservoir. The above-described Agreements are incorporated herein by reference and made a part hereof. The River

District also has entered into a Grant Agreement with Reclamation, attached hereto as Exhibit B and incorporated herein; and an Agreement with Reclamation and the Service Concerning Elkhead Reservoir Enlargement to Facilitate Recovery of Endangered Fish Species in the Yampa River Basin ("Reservoir Enlargement Agreement"), attached hereto as Exhibit C and incorporated herein. Reclamation and the Service intend to work with the River District to perfect the conditional storage right for the Elkhead Reservoir Enlargement so that the River District can convey the storage space easement and 5,000 acre-feet of the absolute water right for the Permanent Water Supply to CWCB in perpetuity for Recovery Program purposes, including for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses; and uses in furtherance of the Upper Colorado River Endangered Fish Recovery Program); and

13. WHEREAS, the River District is willing to convey to the CWCB a 20/47th interest in the River District's ownership of the storage capacity of the Elkhead Reservoir Enlargement and in certain water rights owned by the River District decreed to fill the Elkhead Reservoir Enlargement to provide the Permanent Water Supply, after those water rights have been decreed absolute, in exchange for the Recovery Program paying for 20/47ths of the costs of constructing the Reservoir Enlargement. The River District, Reclamation and the Service shall be responsible for placing to beneficial use the water subject to the conditional water storage right prior to conveying that water right to the CWCB. Once the conditional water right has been placed to beneficial use, the River District will file the necessary pleadings, and prosecute the case, to make the right absolute. After the water storage right in the Reservoir Enlargement has been made absolute, the River District intends to convey a 20/47th interest in the storage capacity and the absolute water right to the CWCB for the Permanent Water Supply in perpetuity for uses including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Endangered Fishes Recovery Program; the CWCB will hold and administer these rights for Recovery Program purposes; and
14. WHEREAS, the Reservoir Enlargement Agreement, *inter alia*, addresses the Recovery Program's long-term obligation to pay a pro-rata share of the River District's future Reservoir Enlargement operation, maintenance and repair costs allocated to the CWCB's Permanent Water Supply storage space easement; and
15. WHEREAS, the River District is willing to enter into a Short-Term (20 years) Water Supply Lease with Reclamation and the Service for up to 2,000 acre-feet of water annually to be used by the Recovery Program for the benefit of the endangered native fish species in the Yampa River Basin, which agreement is attached hereto as Exhibit D and incorporated herein, ; and
16. WHEREAS, Reclamation and the Service, on behalf of the Recovery Program, are willing to make the Short-Term Water Supply water available for use by the CWCB to



monitor and protect to and through the Critical Habitat Reach for the benefit of the endangered fishes.

NOW THEREFORE, in consideration of the mutual agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the CWCB, the River District, the Service, and Reclamation agree as follows:

## **TERMS AND CONDITIONS**

### **I. DEFINITIONS**

The definitions of terms set forth in paragraph I of the Reservoir Enlargement Agreement shall apply to those terms when used in this Acquisition Agreement.

### **II. CONVEYANCES**

#### **A. Perpetual Water Storage Space Easement and Storage Water Right**

1. After the water right for the Permanent Water Supply is placed to beneficial use for the purposes of piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Endangered Fish Recovery Program) and the Recovery Program Obligation has been paid in full, the River District, after consultation with the parties hereto shall submit the necessary pleadings in the Water Court for Division No. 6 in the name of the River District and prosecute the case to make absolute those conditional water storage rights.
2. Once the water right decreed in Case No. 02CW106 has been decreed absolute for in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Recovery Program, the River District shall convey by special warranty deeds to CWCB and CWCB shall accept said absolute water right and a storage space easement, both described as follows:
  - a. A 5,000 acre-foot perpetual water storage space easement behind the Elkhead Reservoir Dam and within the Elkhead Reservoir Enlargement area located in Sections 1, 2, 3, 4, 9, 10, 16, and 21, Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat and Routt Counties, Colorado;  
  
together with,
  - b. 5,000 acre-feet of the total 13,000 acre-feet water right decreed for storage in Elkhead Reservoir Enlargement with an appropriation date of October 16, 2002, as decreed in Case No. 02CW106, Water Division No. 6, for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Endangered Fish Recovery Program).

3. Said conveyance shall be by special warranty deeds, the forms of which are attached hereto as Exhibits E and F. The CWCB will hold this water right and storage space easement in perpetuity, except as provided for herein, for the benefit of, and at the direction of, the Recovery Program acting through Reclamation and the Service, and pursuant to the terms and conditions of this Acquisition Agreement.
4. The River District states, but does not in any way warrant, that it is, or will be upon completion of construction of the Reservoir Enlargement, the sole owner of the real property described in paragraph II.A.2 herein and that no prior easements and/or lease agreements, except those identified in this Acquisition Agreement, exist that will interfere with the easement conveyed by this Acquisition Agreement.
5. It is understood and agreed that the rights to be conveyed to the CWCB, as described in paragraph II.A.2 herein, shall be subject to the terms and conditions of the decree to be issued in Case No. 02CW106 (Water Division No. 6) but shall otherwise be free from lien or encumbrances that would impair the use of such rights for the purposes intended by the CWCB. Any lien or encumbrance shall be expressly agreed to by the parties at the time of conveyance.
6. The easement described in paragraph II.A.2 herein will be conveyed subject to the terms and conditions of this Acquisition Agreement as more particularly described herein.
7. The water storage easement and water storage rights to be conveyed are subject to the terms and conditions of the Amended and Restated Agreement between the River District, Craig and the Yampa Participants, the terms of which are incorporated herein. The CWCB's use of the water storage easement and water storage rights to be conveyed shall be exercised consistent with the provisions of the Amended and Restated Agreement between the Yampa Participants, the River District and the City of Craig.
8. Pursuant to the Amended and Restated Agreement between the Yampa Participants, the River District, and the City of Craig, the rights conveyed to the CWCB in paragraph II.A.2 herein are expressly subject to, and will share Pro-Rata together with the retained interests of the River District, in any loss of storage space as a result of sedimentation in the Reservoir Enlargement, any loss of storage water as a result of evaporation, any water shortage resulting from hydrological conditions, any water shortage resulting from an operational constraint on the Reservoir Enlargement, and/or any constraint on the ability to release water from the Reservoir Enlargement due to limitations on the reservoir outlet.
9. Payment of the full Recovery Program Obligation pursuant to the Reservoir Enlargement Agreement is a prerequisite to the River District executing the deeds transferring the interests described in paragraph II.A.2 herein to the CWCB. The parties agree and acknowledge that CWCB shall receive no partial interest in the Reservoir Enlargement based on any partial payments, by any party, of the Recovery Program Obligation. The parties acknowledge that the obligations of Reclamation regarding payment of the

parties acknowledge that the obligations of Reclamation regarding payment of the Recovery Program Obligation and the River District regarding conveyance of the interests in the Reservoir Enlargement described in paragraph II.A.2. herein are set forth in the Reservoir Enlargement Agreement. The State of Colorado's obligation to provide funds to help satisfy the Recovery Program Obligation are described in the DNR Cost Share Contract, between the State of Colorado and the River District, dated the \_\_\_ day of \_\_\_, 200\_\_\_. In the event that a default occurs in the obligations of Reclamation or the State of Colorado to pay the Recovery Program Obligation, any party may appropriate replacement funds to cure such default.

10. The River District's obligation to perform under this Acquisition Agreement is specifically subject to River District's rights described in paragraph VII (Construction Contingencies) of the Reservoir Enlargement Agreement.
11. The parties hereto acknowledge and understand that the River District will use the 5,000 acre-foot water right conveyed herein (the Permanent Water Supply) for piscatorial and recreational uses within the Elkhead Reservoir Enlargement while said water is stored prior to a release of the water scheduled by the Service for beneficial use by the CWCB. The Parties consent to the recreational use of the Reservoir Enlargement by the public, including on top of or in any water owned by the CWCB and stored in the Reservoir Enlargement, including but not limited to those recreational uses described in the Special Warranty Deed from the State of Colorado to the City of Craig dated March 28, 1991 and recorded October 1, 2002 at Document No. 2002L 4329 and October 4, 2002 at Document No. 570795 in the records of the Offices of the Clerk and Recorder for Moffat County and Routt County, respectively. Similarly, the parties consent to such management activities by the River District, Craig, the Colorado Division of Wildlife, and/or the Colorado Division of Parks, or such other contractor as may be designated by the River District, Craig or the Colorado Division of Wildlife as are necessary to develop, regulate, enhance, and manage the recreational use of the Reservoir Enlargement, wildlife and fish populations, and the water stored therein, including, but not limited to, those management activities described in the Special Warranty Deed from the State of Colorado to the City of Craig. However, the parties' consent to piscatorial and recreational uses within the Reservoir Enlargement shall not interfere in any way with the Service's right to schedule releases from the 5,000 acre-foot Permanent Water Supply pursuant to paragraph V herein for beneficial instream use by the CWCB. Additionally, nothing in this Acquisition Agreement shall be construed to interfere with the right of the Service to review and approve (or deny) the stocking of non-native fish species as provided under the "Procedures for Stocking Non-native Fish in the Upper Colorado River Basin" between the Colorado Division of Wildlife and the Service, dated September 5, 1996.
12. The River District reserves the right to develop a hydro-electric power generation component to the Reservoir Enlargement. In the event that the River District develops a hydro-electric power component to the Reservoir Enlargement, the parties hereto consent



to the use of the parties' water through the hydro-electric power generation facility, in conjunction with a requested release of water by the parties from the Reservoir Enlargement, without payment or compensation. In the event that a hydro-electric power generation component to the Reservoir Enlargement is developed, the Recovery Program and/or the CWCB to the extent permitted by law shall have the right to participate in said hydro-electric power generation component by paying a Pro-Rata share of the development costs. The River District shall give the Recovery Program and/or CWCB notice of the planned development of a hydro-electric generation component in accordance with this Acquisition Agreement. The Recovery Program and/or CWCB shall indicate, in writing, its intent to participate in the hydro-electric generation component development within 60 days of the date of the notice. The development of a hydro-electric power generation component to the Reservoir Enlargement shall not interfere in any way with the Service's right to schedule releases from the 5,000 acre-foot Permanent Water Supply pursuant to paragraph V herein for beneficial instream use by the CWCB.

**B. Short-Term Water Supply Sublease**

1. The Lease provides up to 2,000 acre-feet of additional water annually for the Short-Term Water Supply for the benefit of endangered native fish species in the Yampa River. The Lease will be implemented through a 20-year contract with the River District, and Short-Term Water Supply water will be reserved by the Service for release on an "as-needed" basis, as outlined in the Lease.
2. Pursuant to the terms of the Lease, Reclamation will pay the River District for any water reserved for release from the Short-Term Water Supply. The CWCB will have no financial obligation with regard to the Short-Term Water Supply or the Lease.
3. Reclamation and the Service, on behalf of the Recovery Program, hereby sublease, at no cost to the CWCB, all of their right, title, and interest in the Short-Term Water Supply water leased annually from the River District for use by the CWCB pursuant to the Lease to monitor and protect to and through the Critical Habitat Reach of the Yampa River. The River District hereby consents to said sublease.
4. If the Lease is renewed pursuant paragraph B therein, this sublease also may be renewed by letter agreement signed by the parties hereto.

**III. TERMINATION OF SHORT TERM WATER SUPPLY SUBLEASE**

In the event the Recovery Program, the Service and Reclamation determine that the Short-Term Water Supply provided for in the Lease is no longer needed to support instream flows within the Critical Habitat Reach, or in the event the Lease terminates as provided for in paragraph B. therein, and upon written notice to the parties hereto, this

sublease and all responsibilities and obligations identified in paragraph II.B herein shall be terminated.

#### **IV. OPERATION, MAINTENANCE AND REPAIR OBLIGATIONS (OM & R)**

- A. The OM & R obligations associated with the Elkhead Reservoir Enlargement are more fully described in (1) the Reservoir Enlargement Agreement and (2) the Amended and Restated Agreement between the River District, the City of Craig, and the Yampa Participants which provisions are incorporated herein by reference. The Recovery Program, through Reclamation, shall be responsible for payment of its Pro-Rata share of the River District's OM & R costs associated with the storage space easement described in paragraph II.A.2 herein. The CWCB shall have the right, but not the obligation, to fund annual OM & R costs for the Elkhead Reservoir Enlargement.
- B. In the event the Service, Reclamation and the Recovery Program determine that the Permanent Water Supply is no longer needed to maintain occupied habitat for endangered fish species in the Critical Habitat Reach pursuant to paragraph XII herein, Reclamation may choose not to pay the pro-rata share of the River District's OM&R costs allocated to the Permanent Water Supply storage space easement. In the event Reclamation chooses not to pay the pro-rata share of the River District's OM&R costs, the forfeiture provisions in paragraph IV.E. in the Reservoir Enlargement Agreement shall apply. Any disposition and use of the Permanent Water Supply and storage space easement shall be addressed pursuant to paragraph XII herein.

#### **V. RELEASE SCHEDULE AND CONTACT PROCEDURES**

- A. On account of drought, errors in operation, operational constraints imposed by the State of Colorado or otherwise, or other causes, there may occur at times a shortage during any year in the quantity of water available to be stored within the Reservoir Enlargement, and in no event shall any liability accrue against the parties hereto for any damage direct or indirect, arising therefrom. In any year in which there may occur such a shortage in the Reservoir Enlargement water supply, the River District and the CWCB shall share such shortage using the Pro-Rata Formula. The Pro-Rata Formula is the allocation of the storage space created by the construction of the Reservoir Enlargement, estimated to be 11,750 acre-feet, as follows: 27/47<sup>th</sup> interest (6,750 acre-feet) to the River District and 20/47<sup>th</sup> interest (5,000 acre-feet) to the CWCB. The Pro-Rata allocation is based on the percentage contributions of the parties to fund the total costs related to the construction of the Reservoir Enlargement as well as the long term costs of the Reservoir's operation, maintenance and repair allocated to the Reservoir Enlargement. In the event that the actual percentage contributions of the parties to fund the total costs related to the construction of the Reservoir Enlargement differ from the 27/47<sup>th</sup> and 20/47<sup>th</sup> relationship described herein, then the Pro-Rata Formula shall be adjusted in accordance with the terms of paragraph II.B. of the Reservoir Enlargement Agreement.

- B. The water rights conveyed pursuant to paragraph II.A.2. herein to the CWCB for the purpose of filling the water storage space easement shall have the same priority as those water rights used by the River District to fill the River District's water storage space in the Reservoir Enlargement. Fill of the water storage space easement granted to the CWCB shall be done on a Pro-Rata basis with the fill of the River District's water storage space in the Reservoir Enlargement. The parties acknowledge that the Yampa Participants and the City of Craig own water storage rights decreed for use at the existing Elkhead Reservoir that are senior to the water rights that will be adjudicated by the River District and conveyed to the CWCB in paragraph II.A.2. herein. The parties acknowledge that the River District's and CWCB's right to store water in the Reservoir Enlargement is subject to the water rights and priorities owned by the Yampa Participants, the City of Craig, and their successors and/or assigns.
- C. The River District agrees that the CWCB shall carry over for use in the next succeeding year any Permanent Water Supply water that was stored but not actually scheduled for release by the Service for beneficial use by the CWCB in the previous year. Any water remaining in the CWCB's storage pool for the Permanent Water Supply at the start of fill date established by the Restated and Amended Agreement between the Yampa Participants, the City of Craig and the River District, after subtracting for the past-year's releases, evaporation, and sedimentation, shall be credited to the CWCB's Permanent Water Supply storage pool. The CWCB may not carry over more than 5,000 acre-feet of Permanent Water Supply water in the Reservoir Enlargement at any time.
- D. The parties hereto shall meet annually and/or teleconference as needed to consult on schedules for releasing the Permanent Water Supply from the Reservoir to provide water during critical low-flow periods in the Yampa River Basin. The Service shall provide the parties hereto a preliminary written schedule of anticipated monthly demands on or before May 1 of each year. Following such consultations, the schedule provided by the Service (which shall make the final decisions regarding this schedule) shall serve as the release schedule to be used by the River District until the Service provides written notice of the schedule's modification. The Service may modify its schedule for releasing the Permanent Water Supply from the Reservoir Enlargement by providing the CWCB, the River District and the Division 6 Engineer with a written change order at least 24 hours in advance of such modification. For the purposes of this paragraph, written notice may consist of either electronic (email) or facsimile transmissions in lieu of correspondence through the U.S. Postal Service.
- E. Deliveries of water from the Permanent Water Supply shall occur at the outlet of the Elkhead Reservoir Enlargement. The River District shall have no responsibility once water stored in the Reservoir Enlargement by the CWCB is released at the outlet. The Division 6 Engineer may assess appropriate transit losses against the release of water stored in the Reservoir Enlargement pursuant to the interests granted in paragraph II.A.2. herein.



- F. Operation of the Elkhead Reservoir Enlargement and apportionment of any water shortages shall be consistent with the provisions of (1) this Acquisition Agreement and (2) the Amended and Restated Agreement between the River District, the City of Craig, and the Yampa Participants.
- G. The 20 Year Lease describes the process for scheduling releases of water from the Short Term Water Supply. The Service shall provide CWCB, Division 6 Engineer, Reclamation, and the reservoir operator with written notice of any water releases or changes to release schedules 24-hours in advance so that CWCB can monitor and protect such releases to and through the Critical Habitat Reach of the Yampa River. The Service will consult with the CWCB during the release period to achieve the objectives of the Recovery Program, the Service and the CWCB.
- H. The River District shall annually provide Reclamation, the Service, and CWCB with a summary of releases from the Permanent Water Supply for the prior calendar year by April 1<sup>st</sup> of the following year.

## **VI. MONITORING AND ENFORCEMENT**

- A. The Service, through the Recovery Program, shall install, operate, maintain, and replace any waterflow measuring and recording devices required by CWCB or the Division 6 Engineer to ensure that the water is delivered to and through the Critical Habitat Reach.
- B. The CWCB shall take such action under state law, including requesting administration by the State Engineer and the Division 6 Engineer and initiating water court proceedings, as may be necessary to fully exercise its water right, to deliver the water from the outlet works of the dam from which the water is released to the Critical Habitat Reach, and to protect the release from diversion by third parties within the Critical Habitat Reach, subject to such transit losses as may be imposed by the State Engineer or the Division 6 Engineer.
- C. The CWCB and the Service shall comply with the provisions of the Enforcement Agreement in the enforcement and protection of the water acquired herein.

## **VII. MEASUREMENT AND DELIVERY**

- A. Releases of water from the Elkhead Reservoir Enlargement made pursuant to this Acquisition Agreement will be measured by the River District at the outlet works.
- B. The CWCB shall ensure that all water released by the River District at the direction of the Service pursuant to this Acquisition Agreement, less transit losses, as measured at the Maybell gage or other appropriate locations, will be delivered and protected by the Division 6 Engineer to and through the Critical Habitat Reach.

- C. Neither Reclamation, the River District, nor the Service shall be responsible for the delivery, control, carriage, use, handling, or distribution of water provided pursuant to this Acquisition Agreement, delivered beyond the outlet works of the reservoir.

## **VIII. REPORTING AND ACCOUNTING**

The Service shall prepare and provide an annual report to the parties hereto of water released from the Permanent and Short Term Water Supplies. The Service shall document the benefits of using the water stored in the Elkhead Reservoir Enlargement towards recovery of the Endangered Fish as part of its annual Recovery Program progress reports on this matter. The CWCB, in consultation with the Division 6 Engineer, shall provide an annual report to the parties hereto on the amount of water actually protected through the Critical Habitat Reach.

## **IX. SUFFICIENT PROGRESS**

Use of this water for the benefit of endangered fish and protection of critical habitat in the Critical Habitat Reach shall contribute to completion of the Recovery Program's RIPRAP and shall be considered in determining whether there has been sufficient progress under the Recovery Program.

## **X. CWCB ACTION**

Any action by CWCB to acquire the water, water rights or interests in water described herein shall comply with the Enforcement Agreement and the CWCB's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules"). Notwithstanding the foregoing, the parties acknowledge and understand that the water rights acquired under this Acquisition Agreement are not subject to modification under section 37-92-102(4), C.R.S. or the ISF Rules.

## **XI. MISCELLANEOUS PROVISIONS**

- A. The provisions of this Acquisition Agreement shall apply to and bind the successors and assigns of the parties hereto and no assignment or transfer of this Acquisition Agreement or any right or interest herein, shall be valid until approved in writing by the parties hereto.
- B. All of the provisions of this Acquisition Agreement shall survive the closing of the conveyance required by paragraphs II.A and B herein, and shall not merge therewith.
- C. Nothing contained in this Acquisition Agreement shall be construed as binding the United States to expend in any one fiscal year any sum in excess of appropriations made by Congress, contributions from the States participating in the Recovery Program and

Colorado River Storage Project Power Revenues provided for the purposes of this Acquisition Agreement for that fiscal year.

- D. The United States, its officers, agents, employees, and assigns do not assume any liability resulting from the granting of this Acquisition Agreement or the exercise thereof. **[DOI Solicitor will provide text]**
- E. No Member of or Delegate to Congress or Resident Commissioner or official of the United States or the State of Colorado shall benefit from this Acquisition Agreement other than as a water user or landowner in the same manner as other water users or landowners.
- F. It is the intent of the parties that this Acquisition Agreement and the Reservoir Enlargement Agreement be construed together to the extent possible. In the event of any irreconcilable conflict between the terms of this Acquisition Agreement and the terms of the Reservoir Enlargement Agreement, the terms of this Acquisition Agreement shall control.

## **XII. ASSIGNMENT OR DISPOSITION**

In the event the Service, in consultation with the Recovery Program, determines that the Permanent Water Supply is no longer needed to maintain occupied habitat for endangered fish in the Critical Habitat Reach of the Yampa River, the CWCB may use or dispose of the water right and easement conveyed in paragraph II.A.2. herein. Within 120 days of such a determination by the Service, the parties hereto shall meet to discuss disposition and use of the Permanent Water Supply, and reallocation of the responsibilities and obligations of the United States, Reclamation, the Service and the Recovery Program. The CWCB shall have the right to pay a Pro-Rata share of the Reservoir Enlargement's OM&R costs and thereby continue to utilize the Permanent Water Supply solely for in-river fish habitat and river flow maintenance and enhancement uses in the Yampa River Basin.

In the event the CWCB, in consultation with the Service, Recovery Program and Reclamation, decides not to pay OM&R costs and use the Permanent Water Supply solely for in-river fish habitat and/or river flow maintenance and enhancement uses, then the CWCB may assign, transfer, sell, or convey any part or all of the property interests described in paragraph II.A.2. herein. Any disposition of any part or all of the property interests described in paragraph II.A.2. herein shall be in accordance with federal regulations, if any, that are in effect at the time of the disposition and are applicable to the disposition of property funded with federal contributions. The CWCB hereby gives the River District a first right of refusal to purchase such property interests or assume the obligations which are the subject of the assignment or transfer of such property interests. Upon receiving notice, the River District shall have ninety (90) days to exercise the first right of refusal. Closing shall be within thirty (30) days of the River District providing



the CWCB with notice of its intent to exercise the first right of refusal. Any assignment, transfer, sale, or conveyance of any part or all of the property interests described in paragraph II.A.2. herein shall be expressly subject to the terms of this Acquisition Agreement and the Reservoir Enlargement Agreement (including the on-going obligation to pay a Pro-Rata share of the River District's OM&R costs). Any water right subject to an assignment, transfer, sale, or conveyance pursuant to this paragraph may be used for any beneficial use within the state of Colorado consistent with Colorado law. Nothing herein shall limit or preclude the River District from participating in any Water Court proceeding, initiated by any party, where the water rights decreed in 02CW106 (Water Division No. 6) are at issue.

### **XIII. ENFORCEMENT**

- A. Pursuant to section 37-92-102(3), C.R.S., the terms of this Acquisition Agreement shall be enforceable by and between the River District and the State of Colorado as a water matter in the District Court for Water Division 6.
- B. The parties hereto shall have all rights and remedies provided under law for a breach or threatened breach of this Acquisition Agreement.
- C. The parties hereto shall have all rights and remedies provided under law for a breach or threatened breach of this Acquisition Agreement.
- D. Before commencing any action for enforcement of this Acquisition Agreement, in State or Federal court, the party alleging a breach shall notify the other parties in writing of the alleged breach, and the parties shall make a good-faith effort to resolve their differences through informal consultation.

### **XIV. NOTICES**

All notices that are required to be given by parties shall be in writing and shall be sent by certified mail, postage prepaid, as follows:

Director  
Colorado Water Conservation Board  
1313 Sherman Street, Room 721  
Denver, Colorado 80203

With a copy to:  
Office of the Attorney General  
Water Rights Unit, Natural Resources and Environment Section  
1525 Sherman St., 5th Floor  
Denver, CO 80203

General Manager  
Colorado River Water Conservation District  
201 Centennial  
P.O. Box 1120  
Glenwood Springs, Co 81602

With a copy to:  
General Counsel  
Colorado River Water Conservation District  
P.O. Box 1120  
Glenwood Springs, Co 81602

With a copy to:  
Loyal E. Leavenworth, Esq.  
Leavenworth & Karp, P.C.  
P.O. Drawer 2030  
Glenwood Springs, CO 81602

Director  
Upper Colorado River Endangered Fish Recovery Program  
c/o U.S. Fish and Wildlife Service  
P.O. Box 25486, DFC  
Denver, CO 80225

Area Manager  
Bureau of Reclamation  
Western Colorado Area Office  
2764 Compass Drive, Suite 106  
Grand Junction, CO 81506

With a copy to:  
Regional Director  
Upper Colorado Regional Office  
125 State Street, Room 6107  
Salt Lake City, UT 84138-1147

Assistant Field Supervisor  
U.S. Fish and Wildlife Service  
Ecological Services, Western Colorado Office  
764 Horizon Drive, Building B  
Grand Junction, CO 81506

With a copy to:

Regional Director  
Mountain-Prairie Region  
U.S. Fish and Wildlife Service  
P.O. Box 25486, DFC  
Denver, CO 80225

IN WITNESS WHEREOF, the parties execute this Agreement.

**UNITED STATES, BUREAU OF RECLAMATION**

Approved as to Form:

By: \_\_\_\_\_  
Rick Gold, Regional Director

By: \_\_\_\_\_  
Office of the Regional Solicitor

**COLORADO WATER CONSERVATION BOARD**

**U. S. FISH & WILDLIFE SERVICE**

By: \_\_\_\_\_

Rod Kuharich, Director  
Director

By: \_\_\_\_\_

\_\_\_\_\_  
Ralph Morgenweck, Regional

**COLORADO RIVER WATER CONSERVATION DISTRICT,  
ACTING BY AND THROUGH ITS COLORADO RIVER WATER  
PROJECTS ENTERPRISE**

ATTEST:

By: \_\_\_\_\_  
Stephen Mathis, President

By: \_\_\_\_\_  
Eric Kuhn, General Manager

Approved as to Form:

\_\_\_\_\_  
Loyal E. Leavenworth, Esq.

EXHIBIT A

MEMORANDUM OF AGREEMENT  
BETWEEN THE UNITED STATES DEPARTMENT OF THE INTERIOR  
FISH AND WILDLIFE SERVICE AND  
THE COLORADO WATER CONSERVATION BOARD  
CONCERNING THE ENFORCEMENT AND PROTECTION  
OF WATER AND WATER RIGHTS

THIS MEMORANDUM OF AGREEMENT (MOA) is entered into this 21<sup>st</sup> day of September, 1993, pursuant to the Endangered Species Act, 16 U.S.C. § 1531 et seq., the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq., and Title 37, Article 60 of the Colorado Revised Statutes (1990), between the United States Department of the Interior, Fish and Wildlife Service, and the Colorado Water Conservation Board, an agency of the State of Colorado. Hereinafter, the parties shall be referred to respectively as the "Service" and the "Board."

EXPLANATORY RECITALS

WHEREAS, under the Endangered Species Act, the Service is responsible for the protection and recovery of threatened and endangered species, including four endangered fish species in the Upper Colorado River Basin; and

WHEREAS, section 7 of the Endangered Species Act, 16 U.S.C. § 1536, requires the Service to consult with other federal agencies to insure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species; and

WHEREAS, section 2 of the Endangered Species Act, 16 U.S.C. § 1531(c)(2), declares that it is the policy of Congress for federal agencies to cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species; and

WHEREAS, the Upper Colorado River Basin states, including the State of Colorado, play a key role in determining how the river system's water resources are developed and have a corresponding interest in legal requirements that could constrain water resource development; and

WHEREAS, the states, including the State of Colorado, historically have been responsible for managing resident fish and wildlife resources, including threatened or endangered species that occur within their territories (see, e.g., § 33-2-102, C.R.S.; Cooperative Agreement Between U.S. Dept. of Interior, Fish and Wildlife Service, and Colorado Dept. of Natural Resources, Div. of Wildlife, for Conservation of Endangered and Threatened Fish or Wildlife (1976)); and



WHEREAS, the Board is a state agency created for the purpose of aiding in the protection and development of the waters of the state for the benefit of the state's present and future inhabitants, (§ 37-60-102, C.R.S.); and

WHEREAS, it is the duty of the Board to promote the conservation of the waters of the state in order to secure the greatest utilization of such waters and the utmost prevention of floods, which includes the power and the duty to: cooperate with the United States and its agencies for the purpose of bringing about the greater utilization of the waters of the state; investigate and assist in formulating a response to the plans, purposes, procedures, requirements, laws, proposed laws, or other activities of the federal government which affect or might affect the use or development of the water resources of the state; confer with and appear before the officers, representatives, boards, bureaus, committees, commissions, or other agencies of the federal government for the purpose of protecting and asserting the authority, interests, and rights of the State of Colorado and its citizens with respect to the waters of the interstate streams in the state; and in, general, take such action and have such powers as are incidental to the foregoing specific provisions and to the general purposes of the statute (§ 37-60-106, C.R.S.); and

WHEREAS, the Board is vested with the exclusive authority to appropriate and acquire such waters of natural streams and lakes as the Board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree pursuant to § 37-92-102(3), C.R.S.; and

WHEREAS, consultations under section 7 of the Endangered Species Act had found that new water projects in the Upper Colorado River Basin would likely jeopardize the continued existence of the endangered fish species, so that the protection of the endangered fish threatened to embroil all interested parties in a confrontation between resource protection and resource development; and

WHEREAS, the states of Colorado, Wyoming, and Utah; the Service; the U.S. Bureau of Reclamation; the Western Area Power Administration; water resource development organizations; and environmental organizations developed and agreed to the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (Implementation Program); and

WHEREAS, the purpose of the Implementation Program is to recover the endangered fish while providing for water development to continue and proceed in the Upper Colorado River Basin in accordance with interstate compacts and federal and state law; and

WHEREAS, one element of the Implementation Program, § 4.1, involves identifying the endangered fish species' flow requirements and acquiring or appropriating water or water rights to provide those flows in a manner consistent with all state laws; and

WHEREAS, § 4.1.3.c.1 of the Implementation Program specifically states:

ADMINISTRATION OF INSTREAM FLOWS IN COLORADO:

The State of Colorado has in place a law that allows for the appropriation and acquisition of water rights to preserve the natural environment to a reasonable degree [Colo. Rev. Stat. 37-92-102(3)]. Instream flows for stream segments within the State of Colorado, including those supplied by Ruedi and Blue Mesa Reservoirs for instream purposes, will be appropriated and acquired by the Colorado Water Conservation Board pursuant to the procedural and substantive requirements of State law. The Secretary will recommend the appropriation and acquisition of instream flow water rights, and the ways and means of doing so, to the Colorado Water Conservation Board.

It is anticipated that the Secretary and the Board will execute an agreement to better define their respective responsibilities under this program. Such an agreement will provide that the Secretary and the Board will work together in good faith to carry out the terms of this program.

and

WHEREAS, the Service is relying upon the Board to appropriate, acquire, and enforce instream flow water rights for the listed species under state law; and

WHEREAS, the Service has agreed to install and maintain any gauges or other measuring or recording devices, including remote read-out devices (e.g., satellite monitoring equipment), necessary for the State Engineer to administer instream flows appropriated or acquired by the Board to benefit the listed species; and

WHEREAS, the Service has agreed that any appropriation of water rights or acquisition of water, water rights, or interests in water by the Board for the benefit of the listed species shall be considered in

determining whether there has been sufficient progress under the Implementation Program for the program to function as a reasonable and prudent alternative to avoid the likelihood of jeopardy from existing and new water development; and

WHEREAS, both the Service and the Board will benefit from the resolution of potential § 7 conflict through successful implementation of the Implementation Program.

NOW, THEREFORE, in consideration of the mutual covenants herein-after set forth, the parties hereto agree as follows:

#### DEFINITIONS

1. Where used in this MOA, unless specifically expressed otherwise or obviously inconsistent with the intent of this agreement, the following definitions will apply:

a. "Acquire" or "acquisition" refers to water, water rights, or interests in water obtained by the Board by grant, purchase, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, as authorized by § 37-92-102(3), C.R.S.

b. "Appropriate" or "appropriation" refers to the appropriation of new water rights by the Board, as authorized by §§ 37-92-102(3) and 103(3) and (4), C.R.S.

c. "Listed species" refers to the razorback sucker, bonytail chub, Colorado squawfish, and humpback chub.

d. "De minimus injury" refers to a one percent or less depletive effect, except that in determining whether an injury is de minimus, the Board shall consider the existence of all previous de minimus impacts on the same stream reach and, if the combined total of all such impacts exceeds one percent, the injury will not be considered de minimus regardless of the individual depletive effect.

#### TERM OF THIS AGREEMENT

2. This MOA becomes effective on the date entered into. This agreement shall terminate by reason of any one of the following occurrences:

a. The United States, acting through the Secretary of the Interior, has declared that the listed species in the Upper Colorado River Basin are extinct; or

b. The United States, acting through the Secretary of the Interior, has removed the listed species in the Upper Colorado River Basin from the endangered or threatened species list and determined that the instream flows that are the subject of this MOA are no longer needed to prevent the species from being relisted under the Endangered Species Act; or

c. The United States, acting through the Secretary of the Interior, has determined that the instream flows that are the subject of this MOA are no longer needed to recover or offset the likelihood of jeopardy to the listed species in the Upper Colorado River Basin; or

d. The Implementation Program has been terminated and the Service, in section 7 consultations, has not relied or is not relying on the appropriations and acquisitions made by the Board; or

e. The Service is not complying with paragraph 6 of this agreement and (1) Colorado has withdrawn from the Cooperative Agreement for Recovery Implementation Program for Endangered Species in the Upper Colorado River Basin or (2) the Implementation Program has been terminated.

#### ENFORCEMENT AND PROTECTION OF ENDANGERED FISH SPECIES' INSTREAM FLOWS

3. This agreement shall apply to, and only to, water rights, water, or interests in water appropriated or acquired by the Board pursuant to the Implementation Program to preserve the natural environment within a particular stream reach for the benefit of the listed species in the Upper Colorado River basin. ~~The Board shall make a finding that that is the purpose of every appropriation or acquisition which is for the benefit of the listed species and that this MOA will apply to it.~~ The Board shall provide notice of such findings to the Service in the form of either a written resolution or a transcript of all motions and votes by the Board concerning the appropriation or acquisition. The Board shall exercise, enforce, and protect such water rights, water, or interests in water in the following manner:

a. The Board shall take such action under state law, including requesting administration by the State Engineer and the appropriate division engineer and initiating water court proceedings, as may be necessary to fully exercise its water rights or to obtain delivery of acquired water or interests in water. Such water shall be protected within the entire stream reach for which the appropriation or acquisition is made.

b. The Board shall protect its water rights by filing a

statement of opposition or otherwise participating in any proceeding on an application filed in water court the granting of which would cause more than de minimus injury to the Board's right. Nothing in this agreement shall preclude the Board, in its sole discretion, from opposing an application the granting of which would cause de minimus injury to its right.

c. The Board shall not abandon, in whole or in part; subordinate; lease; sell; donate; otherwise dispose of; compromise; subjugate; or encumber such water rights, water, or interests in water in any manner whatsoever without the consent of the Service, except that this provision shall not apply to water rights appropriated or acquired by the Board pursuant to paragraph 4 of this agreement.

d. The Service may consent to what would otherwise be a violation of paragraph 3.a, b, or c above. In determining if it will grant such consent, the Service shall base its determinations solely on concerns relating to listed fish species.

4. The parties contemplate that the Board may appropriate or acquire instream flow water rights all or a portion of which are explicitly subject to modification based on later information needed to resolve scientific uncertainties and uncertainties concerning Colorado's use of its compact entitlement. The Board will be primarily responsible for developing information on compact issues and the Service will be primarily responsible for developing scientific information. The Board agrees to consult with the Service before modifying such rights.

a. The Board and the Service each agree to make a good faith effort to work together in a cooperative manner to develop or acquire additional information concerning such rights.

b. The Board shall comply with the provisions of paragraphs 3.a, b, and c above except to the extent that the Board modifies any of the water rights.

5. The Service shall install and maintain any gauges or other measuring or recording devices, including remote read-out devices (e.g., satellite monitoring equipment), necessary for the State Engineer to administer instream flows appropriated or acquired by the Board to benefit the listed species.

6. The Service shall consider any appropriation of water rights or acquisition of water, water rights, or interests in water by the Board for the benefit of the listed species in determining whether there has been sufficient progress under the Implementation Program for the program to function as a reasonable and prudent alternative to



avoid the likelihood of jeopardy from existing and new water projects. Should the Implementation Program be terminated for any reason whatsoever, the Service, in consulting under section 7, agrees to continue to consider such appropriations and acquisitions made by the Board for the benefit of the listed species to function as a reasonable and prudent alternative to avoid the likelihood of jeopardy from existing and new water development.

7. The terms of this MOA shall be enforceable by either party in an action for specific performance in a court of competent jurisdiction.

a. This MOA does not authorize the Service or any other person, entity, or governmental agency to assert the Board's rights or interests in any judicial or administrative proceeding.

b. This MOA shall not create any third party beneficiaries and shall not be enforceable by anyone other than the Service and the Board.

c. Before commencing an action to enforce this MOA, the party alleging violation shall notify the other party in writing of the alleged violation and the parties shall make a good faith effort to resolve their differences through informal discussions.

8. This MOA shall apply to all instream flow appropriations and acquisitions by the Board for the benefit of the listed species in the Upper Colorado River basin; provided, however, that the parties contemplate that, pursuant to § 37-92-102(3), C.R.S., they may enter into separate agreements with respect to any water, water rights, or interests in water which the Board may acquire from the United States, including any of its agencies, in which case the terms and conditions of such agreements will control.

9. This agreement does not waive any rights of either the Service or the Board except as expressly provided herein.

#### NOTICES

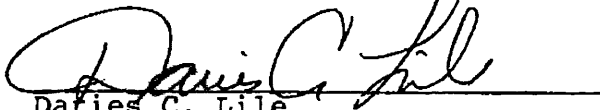
10. Any notice, demand, or request authorized or required by this MOA shall be deemed to have been given on behalf of the Board when mailed, postage prepaid, or delivered to the Regional Director of the Fish and Wildlife Service, P.O. Box 25486, Denver, Colorado 80225, and on behalf of the Service, when mailed, postage prepaid, or delivered to the Director of the Colorado Water Conservation Board, 721 State Centennial Building, 1313 Sherman Street, Denver, Colorado 80203. The designation of the addressee or the address may be changed by notice given in the same manner as provided for other notices.

STANDARD ARTICLES

11. The standard articles applicable to this MOA are listed below. The full text of these standard articles is attached as Exhibit A and is hereby incorporated by reference in this MOA.

- a. Uncontrollable Forces.
- b. Contingent on Appropriation or Allotment of Funds.
- c. Officials Not to Benefit.

IN WITNESS WHEREOF, the parties hereto have executed this contract the day and year first above written.

  
Davies C. Lile  
Director  
Colorado Water Conservation Board


  
Ralph G. Morgenweck  
Regional Director  
U.S. Fish and Wildlife Service

EXHIBIT B

**GRANT AGREEMENT NO. \_\_\_\_\_**  
**FOR**  
**COLORADO RIVER WATER CONSERVATION DISTRICT'S INVOLVEMENT IN THE**  
**UPPER COLORADO RIVER BASIN RECOVERY IMPLEMENTATION PROGRAM**  
  
**NARRATIVE**

**1. BACKGROUND.** The purpose of this Grant Agreement between the Colorado River Water Conservation District, acting by and through its Colorado River Water Projects Enterprise ("River District") and the U.S. Bureau of Reclamation ("Reclamation") is to conduct activities related to the recovery of endangered native fish species as outlined in the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin ("Recovery Program").

The Recovery Program was established September 29, 1987 and implemented by a Cooperative Agreement signed in January 1988 by the Secretary of the Department of the Interior, the Governors of the States of Colorado, Utah, and Wyoming and the Administrator of the Western Area Power Administration. The Recovery Program is a coalition of agencies and organizations that currently includes Reclamation, the U.S. Fish and Wildlife Service ("Service"), the Colorado River Energy Distributors Association, Colorado Water Congress, National Park Service, State of Colorado, State of Utah, State of Wyoming, The Nature Conservancy, Utah Water Users Association, Western Area Power Administration, Western Resource Advocates, and Wyoming Water Association. The goal of the Recovery Program is to recover four species of endangered fish while allowing water development to proceed consistent with state water law and in compliance with the Federal Endangered Species Act ("ESA") in the Upper Basin states of Colorado, Utah, and Wyoming.

The Recovery Program has determined that the following water supplies are needed within the Yampa River Basin to provide water for endangered native fish species during critical low-flow periods in the Yampa River Basin: 1) 5,000 acre-feet permanent water supply and 2) 2,000 acre-feet short-term (temporary) water supply.

The River District, the Recovery Program, Reclamation, and the Service have agreed to cooperate in the construction of an 11,750-acre-foot expansion of Elkhead Dam and Reservoir ("Reservoir" Enlargement), located on Elkhead Creek a tributary of the Yampa River in Sections 1, 2, 3, 4, 9, 10, 16, and 21 Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat and Routt Counties, Colorado, to develop a water supply that will be capable, subject to water availability based on hydrologic cycles, of providing the water for the permanent water and short-term water supplies identified above and be available for other beneficial uses to the River District.

Elkhead Reservoir consists of the existing dam and the existing water storage space, estimated capacity of 13,137 acre-feet, and upon completion of the Reservoir Enlargement, the Reservoir will have a total estimated capacity of 24,887 acre-feet. Reservoir Enlargement cost of construction is currently estimated at \$20,498,787.00.

The Recovery Program has approved funding a pro-rata share of the construction cost for the 5,000 acre-foot permanent water supply and associated storage space in the Reservoir. The pro-rata share of the construction cost shall mean the allocation of the storage space created by the construction of the Reservoir Enlargement, estimated to be 11,750 acre-feet, as follows: 27/47<sup>th</sup> interest, 6,750 acre-feet to the River District (estimated to be \$11,775,899.00) and 20/47<sup>th</sup> interest, 5,000 acre-feet to the Recovery Program (estimated to be \$8,722,888.00).

The Recovery Program has also approved funding the River District's ten percent (10%) management fee that has been added to the cost of construction of the Reservoir Enlargement attributable to the Recovery Program's pro-rata share (estimated at 20/47<sup>th</sup> of the cost of construction). The ten percent (10%)

management fee is a reasonable approximation of the out-of-pocket expenses incurred by the River District in managing the construction of the Reservoir Enlargement.

This Grant Agreement will be the vehicle to transfer funds from Reclamation to the River District for a portion of the Recovery Program's pro-rata share of the Reservoir Enlargement construction costs in Fiscal Year 2004 (FY04) and out-succeeding years. Reclamation will provide, via ~~the~~ this Grant Agreement, up to \$2,805,302.00, and the State of Colorado, Department of Natural Resources will provide its remaining cost share, estimated to be \$6,354,000.00, directly to the River District as part of their cost share contribution to the Recovery Program, as required by Public Law 106-392 as amended in Public Law 107-375 dated December 19, 2003, for a total of \$9,159,032.00 which includes a five percent (5%) allowance over the estimated cost of the Recovery Program's share (\$8,722,888.00) of the Reservoir Enlargement cost of construction.

**2. AUTHORITY.** This Grant Agreement is entered into pursuant to Public Law 106-392 as amended in Public Law 107-375 dated December 19, 2003, the Act to Authorize the Bureau of Reclamation to Provide Cost Sharing for the Endangered Fish Recovery Implementation Programs for the Upper Colorado and San Juan River Basins, dated October 30, 2000 (114 Stat. 1602).

**3. OBJECTIVES.**

A. Goal: Assist in the recovery of endangered native fish species in the Yampa River basin.

B. Objectives:

1. Reconstruction (enlargement) of the Elkhead Reservoir Dam to increase the storage capacity by 11,750 acre-feet.

**4. RESPONSIBILITIES OF THE PARTIES.**

A. River District shall:

1. Develop plans and designs for the Reservoir Enlargement.
2. Secure the needed funds, agreements, easements, permits, and licenses necessary for the construction of the Reservoir Enlargement.
2. Provide personnel, contractors and equipment required for completion of the Reservoir Enlargement construction.
4. Complete all construction work as specified in the Recovery Program's scope of work.

B. RECLAMATION RESPONSIBILITY.

1. Provide funds as identified in Section 1 above.

**5. TECHNICAL COORDINATION.** Reclamation's designated technical representative will be responsible for providing coordination with the River District during the period of the Grant Agreement.

**Reclamation's Representatives:**

Technical Representative:

Point of Contact:



Bob Norman WCG-BNorman  
Western Colorado Area Office  
2764 Compass Drive, Suite 106  
Grand Junction CO 81506  
Telephone: (970) 248-0634

River District Representative:

Point of Contact:

Eric Kuhn

Secretary/General Manager

Colorado River Water Conservation District

201 Centennial

P.O. Box 1120

Glenwood Springs, Co 81602

Telephone: (970) 945-8522

**6. PERFORMANCE PERIOD AND DELIVERY.**

A. The period of performance will be from execution of this Grant Agreement, through September 30, 2008.

B. All deliverables shall be furnished pursuant with the completion dates specified in each scope-of-work.

7. **FUNDING.** An annual work plan will be prepared by the River District detailing the activities and schedule for project completion.

**8. PAYMENT POLICY (Reclamation 11/03)**

Acceptance of a financial assistance agreement from Reclamation creates a legal responsibility on the part of the recipient organization to use the funds and property provided in accordance with the terms and conditions of the agreement. Reclamation has a reversionary interest in the unused balance of funding and in any funds improperly applied.

Payments to recipients are made in accordance with the basic standards and methods stated in the payment regulations at 43 CFR 12.61 or 43 CFR 12.922, as applicable to this agreement. These requirements are intended to minimize the time elapsing between the transfer of funds from the Federal government and the disbursement of these funds by the recipient.

Payment will be made in advance or by reimbursement as follows:

**(1) Advance Payment** B Recipients shall be paid in advance provided (1) they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of funds and their disbursement by the recipient, (2) they comply with reporting requirements for timely submission of financial status reports, and (3) they impose these same standards on subrecipients.

Advances to recipients shall be limited to the minimum amounts needed and shall be timed to be in accordance with the actual, immediate cash requirements of the recipient in carrying out the purpose of the agreement. The timing and amount of cash advances shall be as close as administratively feasible (generally no more than 3 days) to actual disbursements for direct program costs and the proportionate share of allowable indirect costs.

**(2) Reimbursement** -- Reimbursement shall be the preferred method of payment when a recipient (1) does not meet the requirements for advance payment stated above; (2) does not have financial

management systems that meet the standards in 43 CFR 12.60 or 43 CFR 12.921, as applicable; or (3) has been converted to payment restrictions for non-compliance with the terms and conditions of the agreement. Reimbursement is also the preferred method of payment for agreements involving construction.

#### **9. PAYMENT METHOD (Reclamation 11/03)**

**Electronic Funds Transfer** -- Payments under this agreement will be made to recipients by electronic funds transfer (EFT) unless the recipient qualifies for exemption from this payment method. Reclamation utilizes the Automated Clearinghouse (ACH) Vendor Express payment system for EFT. Whether funds are paid in advance or as a reimbursement, the actual payment will be made through Vendor Express. Vendor Express allows the Government to transfer funds to a recipient's financial institution along with explanatory information regarding the payment.

**Enrollment** -- Upon award, recipients will receive a copy of the SF-3881, ACH Vendor/Miscellaneous Payment Enrollment Form. This form is required to implement the Vendor Express system and to notify Reclamation of any change or corrections to financial institution information.

**Requesting Payments** B Requests for advance or reimbursement may be made by the following methods:

**(1) SF-270, Request for Advance or Reimbursement** B On a monthly basis, recipients may submit an original and two copies of a properly certified SF-270 form to the address identified in Block 8, page 1, of this agreement. For advance payments, this form may be submitted on a monthly basis, at least two weeks prior to the date on which funds are required, and on the basis of expected disbursements for the succeeding month and the amount of Federal funds already on hand. Requests for reimbursement may be submitted on a monthly basis, or more frequently if authorized by the GCAO. Requested funds are delivered to the recipient via ACH Vendor Express. This form is available on the Internet at [http://www.whitehouse.gov/omb/grants/grants\\_forms.html](http://www.whitehouse.gov/omb/grants/grants_forms.html) .

**(2) SF-271, Outlay Report and Request for Reimbursement for Construction Programs** B The SF-271 shall be used for construction agreements paid by the reimbursement method, letter of credit, electronic funds transfer, or Treasury check advance, except where the advance is based on periodic requests from the recipient, in which case the SF-270 shall be used. This request may be submitted on a quarterly basis, but no less frequently than on an annual basis. Recipients may submit an original and two copies of a properly certified SF-271 form to the address identified in Block 8, page 1, of this agreement. This form is available on the Internet at [http://www.whitehouse.gov/omb/grants/grants\\_forms.html](http://www.whitehouse.gov/omb/grants/grants_forms.html) .

**(3) Automated Standard Application for Payments (ASAP)** B Recipients may utilize the Department of Treasury ASAP payment system to request advances or reimbursements. ASAP is a recipient-initiated payment and information system designed to provide a single point of contact for the request and delivery of Federal funds. Once a request is made through ASAP, funds are provided to the recipient either through ACH or Fedwire. Further information regarding ASAP may be obtained from the ASAP website at <http://www.fms.treas.gov/asap> . Upon award, you will be provided with information regarding enrollment in the ASAP system.

#### **10. REPORTING REQUIREMENTS AND DISTRIBUTION (Reclamation 11/03)**

Failure to comply with the reporting requirements contained in this agreement may be considered a material non-compliance with the terms and conditions of the award. Non-compliance may result in withholding of payments pending receipt of required reports, denying both the use of funds and matching credit for all or part of the cost of the activity or action not in compliance, whole or partial suspension or

termination of the agreement, recovery of funds paid under the agreement, withholding of future awards, or other legal remedies.

**(1) Financial Reports** B All financial reports shall be signed by an Authorized Certifying Official for the recipient's organization. The following forms are available at [http://www.whitehouse.gov/omb/grants/grants\\_forms.html](http://www.whitehouse.gov/omb/grants/grants_forms.html).

**(a) SF-269 or SF-269a, Financial Status Report** B This form is utilized to report total expenditures for the reporting period. The SF-269 must be used if the recipient is accountable for the use of program income; otherwise, the SF-269a may be used.

An original and two copies of this form shall be submitted annually within 30 days following the end of each reporting period.

A final SF-269 or SF-269a shall be submitted within 90 days following completion of the agreement.

**(b) SF-272, Report of Federal Cash Transactions** B This report shall be submitted by recipients that draw down cash advances by means of electronic funds transfer or Treasury check. Recipients shall identify in the ARemarks@ section the amount of cash advances received in excess of 3 days prior to disbursement and explain actions taken to reduce excess balances.

An original and two copies of this form shall be submitted on a quarterly (but only for those organizations receiving advances of \$1 million or more per year) basis within 15 days following the end of the reporting period.

## **(2) Program Performance Reports**

**(a) Interim Reports** B Recipients shall submit an original and two copies of program performance reports on a quarterly basis within 30 days following the end of each reporting period. Program performance reports shall contain the following:

- (i) A comparison of actual accomplishments with the goals and objectives established for the reporting period;
- (ii) Where project output can be quantified, a computation of the cost per unit of output;
- (iii) When appropriate, reasons why goals and objectives were not met; and
- (iv) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

**(b) Annual Reports** B An original and two copies of an annual program performance report shall be submitted within 90 days following the end of each year of the agreement. Copies of this report may be required to be included with any application for continuing support of the agreement.

**(c) Final Report** B An original and two copies of the final program performance report shall be submitted no later than 90 days following the expiration or termination of the agreement.

## **(3) Significant Developments**

During the term of the agreement, the recipient must immediately notify the GCAO if any of the following conditions become known:

- (a) Problems, delays or adverse conditions which will materially impair their ability to meet the objectives of the agreement;

(b) Favorable developments which enable the recipient to meet time schedules and objectives sooner than or at less cost than projected or to produce more beneficial results than originally planned.

This notification is to include information on the actions taken or contemplated to resolve problems, delays, or adverse conditions, and any assistance needed from Reclamation to help resolve the problem.

#### **(4) Report Distribution**

Copies of reports shall be distributed as follows:

	GCAO (Block 6, Page 1)	GCAOR (Block 8, Page 1)
Financial Reports	2	1
Performance Reports	1	2
Significant Developments	2	1

#### **11. MODIFICATIONS (Reclamation 08/03)**

Any changes to this agreement shall be made by means of a written modification. Reclamation may make changes to the agreement by means of a unilateral modification to deal with administrative matters, such as changes in address, no-cost time extensions, the addition of previously agreed upon funding, or deobligation of excess funds at the end of the agreement. Additionally, a unilateral modification may be utilized by Reclamation if it should become necessary to suspend or terminate the agreement in accordance with 43 CFR 12.83 or 43 CFR 12.961, as applicable.

All other changes shall be made by means of a bilateral modification to the agreement. No oral statement made by any person, or written statement by any person other than the GCAO, shall be allowed in any manner or degree to modify or otherwise effect the terms of the Agreement.

All requests for modification of the Agreement shall be made in writing, provide a full description of the reason for the request, and be sent to the attention of the GCAO. Any request for project extension shall be made at least 45 days prior to the expiration date of the agreement or the expiration date of any extension period that may have been previously granted. Any determination to extend the period of performance or to provide follow-on funding for continuation of a project is solely at the discretion of Reclamation.

#### **12. FUNDS AVAILABLE FOR PAYMENT (Reclamation 08/03 04/04)**

The Government's obligation under this Agreement is contingent upon the availability of appropriated funds from which payment for Agreement purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the GCAO for this Agreement, and until the Recipient receives notice of such availability, to be confirmed in writing to the Recipient by the GCAO.

Pursuant to Public Law 106-392, the Act to Authorize the Bureau of Reclamation to Provide Cost Sharing for the Endangered Fish Recovery Implementation Programs for the Upper Colorado and San Juan River Basins, dated October 30, 2000 (114 Stat. 1602) ~~the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all commonly known as Reclamation Law,~~ funds for payment under the first year of this Grant ~~agreement~~ Agreement are included in the annual Energy and Water Development Appropriation Act, Public Law 108-137. Funding for any optional year of ~~the this Grant agreement~~ Agreement is contingent upon subsequent Congressional funding.

#### **13. REIMBURSABLE COSTS AND LIMITATIONS (Reclamation 08/0304/04)**

**13.1** The Recipient shall provide all personnel, services, facilities, equipment, materials and supplies, and perform all travel which may be necessary and appropriate for the proper performance of this Agreement. Costs so incurred will be paid for as provided herein. Reclamation's obligation to provide funding to the Recipient for costs incurred in these connections shall be limited to the Recipient's direct and indirect costs including the River District's ten percent (10%) management fee identified in section 1 above associated with this Agreement. All such direct and indirect costs must be determined to be allowable under the regulations contained in 48 CFR Subpart 31.2 or an OMB Cost Principle Circular, as applicable, which are incorporated herein through the General Provisions of this agreement.

**13.2** The recipient shall not incur costs or obligate Federal funds for any purpose pertaining to operation of the program or activities beyond the expiration date stated in the agreement. The only costs which are authorized for a period of up to 90 days following the award expiration date are those strictly associated with closeout activities for preparation of the final report.

**13.3** Reclamation shall not be obligated to provide funding to the Recipient and the Recipient shall not be obligated to continue performance under the Agreement or to incur costs in excess of the costs set forth in the annual project budget unless the GCAO has furnished the Recipient a modification to increase the available funding for the Agreement.

#### **14. BUDGET REVISIONS (Reclamation 08/03)**

The Recipient shall follow the requirements at 43 CFR 12.70(c) or 43 CFR 12.925, as applicable, when making revisions to budget and program plans. Additionally, approval shall be requested for transfers of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa.

#### **15. PROCUREMENT STANDARDS (Reclamation 08/03)**

When utilizing Federal funds for the procurement of supplies and other expendable property, equipment, real property, and other services under this agreement, the Recipient shall utilize the Procurement Standards set forth at 43 CFR 12.76 or 43 CFR 12.940 -12.948, as applicable. The Recipient may be required to submit evidence that its procurement procedures are in compliance with the standards stated therein. Additional guidance for contracting with small and minority firms, and women's business enterprises is included in the General Provisions section of this agreement.

#### **16. PROPERTY STANDARDS (Reclamation 08/03)**

All property, equipment and supplies acquired by the Recipient with Federal funds shall be subject to usage, management, and disposal in accordance with the Property Standards at 43 CFR 12.72 - 12.73, or 43 CFR 12.930 - 12.937, as applicable.

#### **17. INSPECTION (Reclamation 08/03)**

Reclamation has the right to inspect and evaluate the work performed or being performed under this agreement, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If Reclamation performs inspection or evaluation on the premises of the Recipient or a subrecipient, the Recipient shall furnish and shall require subrecipients to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

#### **18. AUDIT (Reclamation 09/03)**

Recipients are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations.® Audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits. Additional audit requirements applicable to this agreement are found at 43 CFR 12.66 or 43 CFR 12.926, as applicable.



General guidance on the single audit process is included in a pamphlet titled, "Highlights of the Single Audit Process" which is available on the internet at <http://www.dot.gov/ost/m60/grant/sincontact.htm> . Additional information on single audits is available from the Federal Audit Clearinghouse at <http://harvester.census.gov/sac/> .

#### **19. ENFORCEMENT (Reclamation 08/03)**

In accordance with 43 CFR 12.83 or 43 CFR 12.962, as applicable, if the recipient materially fails to comply with any term of this agreement, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, Reclamation may take one or more of the following actions as appropriate:

**19.1** Temporarily withhold cash payments pending correction of the deficiency by the recipient or subrecipient or more severe enforcement action by the awarding agency;

**19.2** Disallow (deny both use of funds and any matching credit for) all or part of the cost of the activity or action not in compliance;

**19.3** Wholly or partly suspend or terminate the current award for the recipient's or subrecipient's program;

**19.4** Withhold further awards for the program; or

**19.5** Take other remedies that may be legally available.

#### **20. TERMINATION (Reclamation 08/03)**

In accordance with 43 CFR 12.84 or 43 CFR 12.961, as applicable, and except as provided for in the Enforcement Provision, above, this agreement may be terminated in whole or part only as follows:

**20.1** By the awarding agency with the consent of the recipient or subrecipient in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

**20.2** By the recipient or subrecipient upon written notification to Reclamation, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either the Enforcement Provision or paragraph 1 of this Provision.

#### **21. DUN AND BRADSTREET (D&B) DATA UNIVERSAL NUMBERING SYSTEM (DUNS) REQUIREMENT (Reclamation 09/03)**

Effective October 1, 2003, applicants for Federal grants or cooperative agreements must provide a D&B DUNS number with their application. This number is to be included in Block 6 of your SF-424 Application for Federal Assistance, along with your Employer Identification Number.

If you do not have a DUNS number, one may be obtained at no cost by calling the dedicated toll-free DUNS Number Request Line at 1-866-705-5711.

Individuals who would personally receive a grant or cooperative agreement award from the Federal government, apart from any business or non-profit organization they operate, are exempt from the requirement to provide a DUNS number with their application. Reclamation must, however, have a DUNS

number for payment processing purposes, and will therefore obtain a DUNS number for any individual who is awarded a grant or cooperative agreement.

**22. GENERAL PROVISIONS.** The following general provisions are included in this agreement.

**1. Regulations and Guidance**

The regulations at 43 CFR, Part 12, Subparts A, C, E, and F, are hereby incorporated by reference as though set forth in full text. The following Office of Management and Budget (OMB) Circulars, as applicable, and as implemented by 43 CFR Part 12, are also incorporated by reference and made a part of this agreement. Failure of a recipient to comply with any provision may be the basis for withholding payments for proper charges made by the recipient and for termination of support. Copies of OMB Circulars are available on the Internet at [http://www.whitehouse.gov/omb/grants/grants\\_circulars.html](http://www.whitehouse.gov/omb/grants/grants_circulars.html) . The implementation of the circulars at 43 CFR Part 12 is available at <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1> .

**a. Agreements with colleges and universities shall be in accordance with the following circulars:**

Circular A-21, revised August 8, 2000, "Cost Principles for Educational Institutions"

Circular A-110, as amended September 30, 1999, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"

Circular A-133, revised June 27, 2003, "Audits of States, Local Governments, and Non-Profit Organizations"

**b. Agreements with State and local governments shall be in accordance with the provisions of the following circulars:**

Circular A-87, as amended August 29, 1997, "Cost Principles for State, Local, and Indian Tribal Governments"

Circular A-102, as amended August 29, 1997, "Grants and Cooperative Agreements with State and Local Governments" (Grants Management Common Rule, Codification by Department of Interior, 43 CFR 12)

Circular A-133, revised June 27, 2003, "Audits of States, Local Governments, and Non-Profit Organizations"

**c. Agreements made with nonprofit organizations shall be in accordance with the following circulars and provisions:**

Circular A-110, as amended September 30, 1999, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"

Circular A-122, revised May 19, 1998, "Cost Principles for Non-Profit Organizations"

Circular A-133, revised June 27, 2003, "Audits of States, Local Governments, and Non-Profit Organizations"

**d. All agreements with organizations other than those indicated above shall be in accordance with the basic principles of OMB Circular A-110, and cost principles shall be in accordance with 48 CFR Subpart 31.2 titled "Contracts with Commercial Organizations" which is available on the Internet at <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1> .**

## **2. Debarment and Suspension**

The Department of the Interior regulations at 43 CFR 42—Governmentwide Debarment and Suspension (Nonprocurement), which adopt the common rule for the governmentwide system of debarment and suspension for nonprocurement activities, are hereby incorporated by reference and made a part of this agreement. By entering into this grant or cooperative agreement with the Bureau of Reclamation, the recipient agrees to comply with 43 CFR 42, Subpart C, and agrees to include a similar term or condition in all lower-tier covered transactions. These regulations are available at [http://www.access.gpo.gov/nara/cfr/cfrhtml/00/Title\\_43/43cfr42\\_00.html](http://www.access.gpo.gov/nara/cfr/cfrhtml/00/Title_43/43cfr42_00.html).

## **3. Drug-Free Workplace**

The Department of the Interior regulations at 43 CFR 43—Governmentwide Requirements for Drug-Free Workplace (Financial Assistance), which adopt the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq, as amended) applicable to grants and cooperative agreements, are hereby incorporated by reference and made a part of this agreement. By entering into this grant or cooperative agreement with the Bureau of Reclamation, the recipient agrees to comply with 43 CFR 43, Subpart B, if the recipient is not an individual, or with 43 CFR 43, Subpart C, if the recipient is an individual. These regulations are available at [http://www.access.gpo.gov/nara/cfr/cfrhtml/00/Title\\_43/43cfr43\\_00.html](http://www.access.gpo.gov/nara/cfr/cfrhtml/00/Title_43/43cfr43_00.html).

## **4. Assurances and Certifications Incorporated by Reference**

a. The provisions of the Assurances, SF 424B or SF 424D as applicable, executed by the Recipient in connection with this agreement shall apply with full force and effect to this agreement as if fully set forth in these General Provisions. Such Assurances include, but are not limited to, the promise to comply with all applicable Federal statutes and orders relating to nondiscrimination in employment, assistance, and housing; the Hatch Act; Federal wage and hour laws and regulations and work place safety standards; Federal environmental laws and regulations and the Endangered Species Act; and Federal protection of rivers and waterways and historic and archeological preservation.

b. When required by 43 CFR 18—New Restrictions on Lobbying, recipients shall complete a Certification Regarding Lobbying form. This certification is incorporated by reference and made a part of this agreement. These regulations are available at [http://www.access.gpo.gov/nara/cfr/cfrhtml/00/Title\\_43/43cfr18\\_00.html](http://www.access.gpo.gov/nara/cfr/cfrhtml/00/Title_43/43cfr18_00.html)

## **5. Covenant Against Contingent Fees**

The recipient warrants that no person or agency has been employed or retained to solicit or secure this agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide offices established and maintained by the recipient for the purpose of securing agreements or business. For breach or violation of this warranty, the Government shall have the right to annul this agreement without liability or, in its discretion, to deduct from the agreement amount, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

## **6. Contracting with Small and Minority Firms, and Women's Business Enterprises**

It is a national policy to award a fair share of contracts to small and minority business firms. The Department of the Interior is strongly committed to the objectives of this policy and encourages all recipients of its grants and cooperative agreements to take affirmative steps to ensure such fairness.

a. The grantee and subgrantee shall take all necessary affirmative steps to assure that minority firms, and women's business enterprises are used when possible.

b. Affirmative steps shall include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(5) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce as appropriate, and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in b.(1) through (5) above.

#### **7. Notice Regarding Buy American Act**

In accordance with the annual Energy and Water Development Appropriations Act, please be advised that it is and has been the sense of Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available in this Act should be American-made. This provision shall remain in effect unless revoked by a future specific act of Congress.

#### **8. Resolving Disagreements**

When entering into a cooperative agreement with a recipient, Reclamation commits itself to working with the recipient in a harmonious manner to achieve the objectives of the project successfully. When disagreements arise between the parties, they must be resolved according to the procedures discussed below:

a. Reclamation shall attempt first to resolve disagreements with the recipient through informal discussion among the Grants or Contract Specialist, the Program Officer, and the recipient's Project Director.

b. If the disagreement cannot be resolved through informal discussion between these parties, the Grants Specialist and the Program Officer shall document the nature of the disagreement and bring it to the attention of the Grants Officer.

c. After reviewing the facts of the disagreement, as presented by the Grants and Program Offices, the Grants Officer will arrange a formal meeting. If agreement still cannot be reached, the parties will collectively decide on any varied approaches which might be used to resolve the disagreement. The parties shall be responsible for their individual expenses related to any approach utilized to resolve the disagreement. If attempts at resolving the disagreement fail, the Chief, Acquisition and Assistance Management Services, or the Regional Director, whichever is applicable, shall make a decision which shall be final and conclusive.

d. Nothing herein shall be construed to delay or limit Reclamation's right to take immediate and appropriate action, as set forth at 43 CFR Subpart 12.83 or 12.962, as applicable, in the event of material noncompliance by the recipient, and no attempts at informal resolution shall be necessary.

Any post award issue will be open for resolution in accordance with the above procedures, with the exception of disagreements regarding continuation of the agreement (termination must be in accordance with 43 CFR 12), or other matters specifically addressed by the agreement itself.

## **9. Lobbying Restrictions**

In accordance with the annual Energy and Water Development Appropriations Act, please be advised that it is and has been the sense of Congress that none of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence Congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913. This provision shall remain in effect unless revoked by a future specific act of Congress.

## **10. Electronic Funds Transfer (EFT)**

In accordance with the Debt Collection Improvement Act of 1996, 31 CFR 208, effective January 2, 1999, all Federal payments to recipients must be made by EFT unless a waiver has been granted in accordance with 31 CFR 208.4. Upon award of a financial assistance agreement, Reclamation will provide the recipient with further instructions for implementation of EFT payments or a certification form to request exemption from EFT.

## **11. Endorsement of Commercial Products and Services**

In accordance with 43 CFR 12.2(d), this provision applies to grants and cooperative agreements whose principal purpose is a partnership where the recipient contributes resources to promote agency programs, publicize agency activities, assists in fund-raising, or provides assistance to the agency. If the agreement is awarded to a recipient, other than a State government, a local government, or a federally-recognized Indian tribal government, and the agreement authorizes joint dissemination of information and promotion of activities being supported, the following provision shall be made a term and condition of the award:

Recipient shall not publicize or otherwise circulate, promotional material (such as advertisements, sales brochures, press releases, speeches, still and motion pictures, articles, manuscripts or other publications) which states or implies governmental, Departmental, bureau, or government employee endorsement of a product, service or position which the recipient represents. No release of information relating to this award may state or imply that the Government approves of the recipient's work products, or considers the recipient's work product to be superior to other products or services.

All information submitted for publication or other public releases of information regarding this project shall carry the following disclaimer:

The views and conclusions contained in this document are those of the authors and should not be interpreted as representing the opinions or policies of the U.S. Government. Mention of trade names or commercial products does not constitute their endorsement by the U.S. Government.

Recipient must obtain prior Government approval for any public information releases concerning this award which refer to the Department of the Interior or any bureau or employee (by name or title). The specific text, layout photographs, etc. of the proposed release must be submitted with the request for approval.

A recipient further agrees to include this provision in a subaward to any subrecipient, except for a subaward to a State government, a local government, or to a federally-recognized Indian tribal government.

EXHIBIT C

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Contract No. \_\_\_\_\_

RECOVERY IMPLEMENTATION PROGRAM  
UPPER COLORADO RIVER BASIN

AGREEMENT AMONG THE

UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR  
BUREAU OF RECLAMATION and FISH AND WILDLIFE SERVICE,  
AND  
THE COLORADO RIVER WATER CONSERVATION DISTRICT

CONCERNING ELKHEAD RESERVOIR ENLARGEMENT  
TO  
FACILITATE RECOVERY OF ENDANGERED FISH SPECIES IN THE  
YAMPA RIVER BASIN

This RESERVOIR ENLARGEMENT AGREEMENT made this \_\_\_\_ day of \_\_\_\_\_ 2004, pursuant to the Act to Authorize the Bureau of Reclamation to Provide Cost Sharing for the Endangered Fish Recovery Implementation Programs for the Upper Colorado and San Juan River Basins, (October 30, 2000, 114 Stat. 1602, Public Law 106-392 ), and acts amendatory thereof or supplementary thereto, between the UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR, BUREAU OF RECLAMATION ("Reclamation") and the FISH AND WILDLIFE SERVICE ("Service"), both acting through the Secretary of Interior, and the COLORADO RIVER WATER CONSERVATION DISTRICT, acting by and through its Colorado River Water Projects Enterprise ("River District") created pursuant to C.R.S. ' ' 37-45.1-101 and 37-46-101, *et seq.*

WITNESSETH, that:

1. WHEREAS, the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin ("Recovery Program") dated September 29, 1987 was implemented by a Cooperative Agreement signed in January of 1988 by the Secretary of the Department of the Interior, the Governors of the States of Colorado, Utah, and Wyoming and the Administrator of the Western Area Power Administration. The Recovery Program is a coalition of agencies and organizations . The goal of the Recovery Program is to recover four species of endangered fish while allowing water development to proceed consistent with state water law and in compliance with the Federal Endangered Species Act ("ESA") in the Upper Basin states of Colorado, Utah, and Wyoming; and

2. WHEREAS, the River District is a political subdivision of the State of Colorado created and existing pursuant to its Organic Act, C.R.S. ' ' 37-46-101, *et seq.*, and other

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applicable Colorado statutes, with authority to aid in the conservation, use and development of the water resources of the Colorado River and its principal tributaries, and is vested with sufficient authority to receive and manage funds and to coordinate certain activities under the Recovery Implementation Program- Recovery Action Plan ("RIPRAP") benefitting the four Colorado River endangered fishes and water resources in general. The River District owns and conducts a business engaged in water activities pursuant to the Colorado Water Activity Enterprise Act, C.R.S. ' ' 37-45.1-101, *et seq.*, in order to provide for the beneficial use of water within the District. The River District=s Board of Directors confirmed its authority to operate such a business by Resolutions adopted on July 16, 1985, October 19, 1993, October 19, 1999, and October 17, 2000. For purposes of this Reservoir Enlargement Agreement, the River District is acting by and through its Colorado River Water Projects Enterprise and/or by and through its Board of Directors, as determined by the River District. The River District has authority to Aperform all acts and things necessary or advisable to secure and insure an adequate supply of water, present and future," which includes the authority to construct, own, operate, and maintain water storage facilities; and

3. WHEREAS, the Colorado Water Conservation Board ("CWCB") is a state agency within the Colorado Department of Natural Resources ("DNR") created for the purpose of aiding in the protection and development of the waters of the state for the benefit of the state's present and future inhabitants. The CWCB is authorized by section 37-92-102(3), C.R.S., to acquire from any person, including any governmental entity, such water, water rights or interests in water as the CWCB determines may be required for instream flows to preserve or improve the natural environment to a reasonable degree and to take whatever action may be needed to ensure such instream flows remain in the river; and

4. WHEREAS, section 2 of the Endangered Species Act, 16 USC. §§1531 (c) (2), declares that it is the policy of Congress for federal agencies to cooperate with state and local agencies on water resource issues in concert with conservation of endangered species; the U.S. Fish and Wildlife Service is primarily charged with implementing the Endangered Species Act and ensuring the protection and recovery of threatened and endangered species; and

5. WHEREAS, the Recovery Program has identified a need to acquire 5,000 acre-feet of water on a permanent basis ("Permanent Water Supply"), and 2,000 acre-feet on a short-term basis ("Short-Term Water Supply") to maintain occupied critical habitat for endangered fish in the Critical Habitat Reach of the Yampa River; and

6. WHEREAS, the River District and the Recovery Program have agreed to cooperate in the construction of an expansion of Elkhead Dam and Reservoir, located on Elkhead Creek a tributary of the Yampa River in Sections 1, 2, 3, 4, 9, 10, 16, and 21 Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat and Routt Counties, Colorado, to develop a water supply that will be capable, subject to water availability based on hydrologic cycles, of providing the Recovery Program's Permanent and Short-Term Water Supply needs for endangered native fish species during the critical low-flow periods in the Yampa River Basin and be available for other beneficial uses to contractees of the River District; and



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7. WHEREAS, the River District has entered into the following agreements: an Intergovernmental Agreement between the River District and the City of Craig, dated February 1, 2002 (creating a joint venture between the River District and the City of Craig for the construction of the Elkhead Reservoir Enlargement); a Memorandum of Agreement between the River District, the City of Craig, and the Colorado Division of Wildlife, dated August 6, 2003 (granting the River District the right to interfere with certain interests owned by the Division in order to construct an enlargement of the existing Elkhead Reservoir); an Intergovernmental Agreement between the River District and the City of Craig, dated August 6, 2003 (setting forth the Agreement of the River District and the City of Craig related to the construction, operation, and maintenance of the Elkhead Reservoir Enlargement); and an Amended and Restated Agreement between the Yampa Participants, the River District, and the City of Craig dated \_\_\_\_\_ (setting forth the Agreement of the River District, City of Craig, and Yampa Participants related to the post-construction operation, maintenance, and repair of the Elkhead Reservoir Enlargement). The above-described agreements between the River District, Craig, Division of Wildlife, and the Yampa Participants confirm that title to the storage space created by the enlargement of Elkhead Reservoir will vest in the River District. The Elkhead Reservoir Enlargement will result in an estimated 11,750 acre-feet of additional storage capacity at the site of the Elkhead Reservoir. The agreements described in this paragraph are incorporated herein by reference and made a part thereof; and

8. WHEREAS, the River District, in a separate agreement, is willing to convey to the CWCB a 20/47th interest in the River District's ownership of the storage capacity of the Elkhead Reservoir Enlargement and in certain water rights owned by the River District decreed to fill the Elkhead Reservoir Enlargement to provide the Permanent Water Supply (after those water rights have been decreed absolute), in exchange for the Recovery Program paying for 20/47ths of the cost of constructing the Reservoir Enlargement. The parties to this Reservoir Enlargement Agreement shall be responsible for placing to beneficial use the water subject to the conditional water storage right prior to conveying that water right to the CWCB. Once the conditional water right has been placed to beneficial use, the River District will file the necessary pleadings, and prosecute the case, to make the right absolute. After the water storage right in the Reservoir Enlargement has been made absolute, the River District intends to convey a 20/47th interest in the storage capacity and the absolute water right to the CWCB for the Permanent Water Supply in perpetuity for uses including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Endangered Fishes Recovery Program; the CWCB will to hold and administer these rights for Recovery Program purposes; and

9. WHEREAS, the River District is willing to enter into a Short-Term (20 years) Water Supply Lease with Reclamation and the Service for up to 2,000 acre-feet of water annually to be used by the Recovery Program for the benefit of the endangered native fish species in the Yampa River Basin; and

10. WHEREAS, the River District, the CWCB, Reclamation and the Service have entered into an Acquisition Agreement, dated \_\_\_\_\_, that provides, *inter alia*, for the

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conveyance to CWCB of a 20/47th interest in the River District's ownership of the storage capacity of the Elkhead Reservoir Enlargement and in certain water rights owned by the River District decreed to fill the Elkhead Reservoir Enlargement; and provides for subleasing the Short-Term Water Supply Lease to the CWCB. The Acquisition Agreement described in this paragraph is incorporated herein by reference and made a part hereof; and

11. WHEREAS, Reclamation intends to execute a Grant Agreement to transfer funds (up to \$2,795,032.00) from Reclamation to the River District to fund (cost share) a portion of the Recovery Program's Pro-Rata share of the Reservoir Enlargement Cost of Construction; and

12. WHEREAS, the National Environmental Policy Act (NEPA) and ESA compliance actions required for the construction of the Elkhead Reservoir Enlargement have been completed and resulted in a Record of Decision issued by the U.S. Army Corps of Engineers, dated \_\_\_\_\_, and a Section 7 Biological Opinion determining that no jeopardy will occur has been issued by the Service, dated \_\_\_\_\_. The NEPA and ESA compliance required for the federal agencies to execute this Reservoir Enlargement Agreement is covered under the Elkhead Reservoir Enlargement NEPA and ESA documents described above; and

13. WHEREAS, Public Law 106-392, enacted on October 30, 2000, authorizes Reclamation to, among other things, provide cost sharing for capital construction projects under the Recovery Program. Public Law 106-392 also authorizes Reclamation to use power revenues to provide up to \$4 million per year to fund recovery monitoring and research and operation and maintenance of capital project features associated with the Recovery Program through the year 2011. Furthermore the law provides for monitoring, operation, and maintenance funding beyond 2011.

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein, the parties hereto agree as follows:

I. Definitions - as used in this Reservoir Enlargement Agreement.

Amended and Restated Agreement - is that Amended and Restated Agreement between the Yampa Participants, the River District, and the City of Craig dated \_\_\_\_\_.

City of Craig ("Craig") - is a home-rule municipal corporation organized under the laws of the State of Colorado and located in Moffat County, Colorado.

Elkhead Dam and Reservoir ("Reservoir") - consists of the existing dam and the existing water storage space located behind the Dam. The existing Reservoir has a design capacity of 13,137 acre-feet and the dam is located in Section 16, Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat County, Colorado.

Elkhead Reservoir Enlargement ("Reservoir Enlargement") - consists of the Dam

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Enlargement and the water storage space located behind the Dam Enlargement. The water stored behind the Dam Enlargement shall include water stored pursuant to water storage rights decreed for the existing Elkhead Reservoir as well as any water stored pursuant to additional water storage rights adjudicated and decreed for storage in the Reservoir Enlargement. The Reservoir Enlargement will have a total estimated capacity of 24,887 acre-feet.

Permanent Water Supply - shall consist of the CWCB's ownership interest in the storage space in the Reservoir Enlargement and the CWCB's ownership interest in the water storage rights decreed to fill the Reservoir Enlargement as described in paragraph II.A herein.

Priority - shall mean the relative seniority of the water rights held by, or that may be acquired or adjudicated by, Craig, the River District, or the Yampa Participants for the Reservoir or Reservoir Enlargement as decreed by a court of the State of Colorado.

Pro-Rata Formula - shall mean the allocation of the storage space created by the construction of the Reservoir Enlargement, estimated to be 11,750 acre-feet, as follows: 27/47<sup>th</sup> interest (6,750 acre-feet) to the River District and 20/47<sup>th</sup> interest (5,000 acre-feet) to the CWCB for Recovery Program purposes. The Pro-Rata allocation is based on the percentage contributions of the parties to fund the total costs related to the construction of the Reservoir Enlargement as well as the long term costs of the Reservoir's operation, maintenance and repair allocated to the Reservoir Enlargement. In the event that the actual percentage contributions of the parties to fund the total costs related to the construction of the Reservoir Enlargement differ from the 27/47<sup>th</sup> and 20/47<sup>th</sup> relationship described herein, then the Pro-Rata Formula shall be adjusted in accordance with the terms of paragraph II.B herein. Pro-Rata does not refer to or mean the amount of water actually stored in the Reservoir Enlargement at any specific time.

Recovery Program Obligation - shall mean the obligation of the Recovery Program, through Reclamation with and through the State of Colorado, to fund the Recovery Program's Pro-Rata share of the Reservoir Enlargement Cost of Construction. The Recovery Program Obligation is estimated at \$8,722,888.00. The amount of the Recovery Program Obligation may be adjusted pursuant to the terms of paragraphs II.B and III.A.1 herein.

Reservoir Enlargement Cost of Construction - shall include costs related to: actual construction costs, land acquisition costs, permitting costs, engineering costs, construction contract administration costs, construction management costs, and water rights adjudication costs. The Reservoir Enlargement Cost of Construction is estimated to be \$20,498,787.00.

Reservoir Operation, Maintenance and Repair "OM&R" - shall mean the day-to-day control and operation and the reasonable and necessary maintenance, and/or repair ,

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including unanticipated, extraordinary or emergency maintenance, repair, and/or replacements that are necessary for long-term operation of the Reservoir.

River District Obligation - shall mean the obligation of the River District to fund its Pro-Rata share of the Reservoir Enlargement Cost of Construction. The River District Obligation is estimated at \$11,775,899.00.

Yampa Participants - consist of Public Service Company of Colorado (d/b/a Xcel Energy), Platte River Power Association, Salt River Project Agricultural Improvement and Power District, Tri-State Generation and Transmission Association, Inc., and PacifiCorp, and their successors and assigns. Collectively the Yampa Participants own the right to delivery of approximately 8,522 acre-feet of water storage space in the existing Reservoir subject to contractual terms.

Yampa River Basin - a hydrologic unit of the Green River subbasin of the Upper Colorado River Basin; in the context of this Reservoir Enlargement Agreement, the Yampa River Basin encompasses all lands within the drainage basin of the Yampa River in the State of Colorado only.

II. Perpetual Water Storage Space Easement and Water Right

A. Interests to be Conveyed. Once the water right decreed in Case No. 02CW106 has been decreed absolute for in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Recovery Program, the River District, pursuant to the Acquisition Agreement, shall convey by special warranty deeds to CWCB and CWCB shall accept said absolute water right and a storage space easement, both described as follows :

A 5,000 acre-foot perpetual water storage space easement behind the Elkhead Reservoir Dam and within the Reservoir Enlargement area located in Sections 1, 2, 3, 4, 9, 10, 16, and 21 Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat and Routt Counties, Colorado;

Together with,

5,000 acre-feet of the total 13,000 acre-feet water right decreed for storage in Elkhead Creek Reservoir Enlargement with an appropriation date of October 16, 2002, as proposed to be decreed in pending Case No. 02CW106, Water Division No. 6, for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Fishes Recovery Program).

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B. Modification of Interest to be Conveyed. The parties recognize that the interests in the storage space in the Reservoir Enlargement and the water rights to be conveyed to the CWCB, pursuant to paragraph II.A. herein may be modified by letter agreement between the parties and the CWCB if one of the following events occurs:

1. Elevation-Area Capacity Curve. If the River District's as-built elevation-area capacity curve table of the Reservoir Enlargement shows the enlargement area to be less than 11,750 acre-feet, then the Recovery Program through the CWCB and Reclamation, in consultation with the Service may, in their discretion:

a. agree to accept the conveyance to the CWCB of a 20/47ths interest in the capacity created by the Reservoir Enlargement as shown on the as-built elevation-area capacity curve; in such case the storage capacity and water right interests to be conveyed pursuant to paragraph II.A. herein shall be adjusted accordingly; or

b. accept agree to the conveyance to the CWCB of the storage space and water right interests described in paragraph II.A. herein, but agree to adjust the Recovery Program Obligation and pay a percentage share of the Reservoir Enlargement Cost of Construction equal to the percentage of: 5,000 acre feet divided by the number of acre feet of storage space created by the construction of the Reservoir Enlargement as determined by the as-built elevation-area capacity curve.

2. Cost Overruns. If the actual Reservoir Enlargement Cost of Construction exceeds \$20,498,787.00, then the Recovery Program through the CWCB and Reclamation, in consultation with the Service may, in their discretion:

a. choose not to pay more than the Recovery Program Obligation, but agree to accept the conveyance to the CWCB of adjusted storage space and water right interests in an amount equal to 11,750 acre feet multiplied by (the Recovery Program Obligation divided by the actual Reservoir Enlargement Cost of Construction); or

b. agree to accept the conveyance to the CWCB of the storage space and water right interests described in paragraph II.A. herein, but agree to adjust the Recovery Program Obligation and pay 20/47ths of the actual Reservoir Enlargement Cost of Construction.

3. Nonpayment. In the event that one of the events described in paragraph II.B.1. or II.B.2. herein occurs, the Recovery Program through Reclamation, the Service and/or the State of Colorado shall commit to pay a full Pro-Rata share to the River District (as described in paragraphs II.B.1.a. or

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II.B.2.a. herein) within one hundred twenty (120) days of the River District giving notice thereof to the Recovery Program. In the event that the River District does not receive a commitment to pay the full Pro-Rata share of the actual Reservoir Enlargement Cost of Construction within one hundred twenty (120) days, the CWCB shall receive a reduced amount of storage and associated water rights as provided for in paragraphs II.B.1.b. or II.B.2.b herein.

C. The rights the River District intends to convey to the CWCB, pursuant to paragraph II.A. herein, are expressly subject to the provisions in paragraphs II.A.7. and 8. of the Acquisition Agreement. .

D. The water storage easement and water storage rights conveyed herein are subject to the terms and conditions of the Amended and Restated Agreement, the terms of which are incorporated herein. The CWCB's use of the water storage easement and water storage rights herein to be conveyed shall be exercised consistent with the provisions of the Amended and Restated Agreement.

### III. Recovery Program Obligation

A. Reclamation on behalf of the Recovery Program shall fund a portion of the Recovery Program Obligation to the River District through a separate Grant Agreement (Grant Agreement No. \_\_\_\_\_) with the River District. The Grant to the River District is subject to the execution of this Reservoir Enlargement Agreement.

1. If the final Reservoir Enlargement Cost of Construction estimate generated from detailed engineering or construction bids is more or less than the current estimate of \$20,498,787.00, or the actual Reservoir Enlargement Cost of Construction is more or less than the current estimate of \$20,498,787.00, then the Recovery Program Obligation and River District Obligation shall be adjusted using the Pro-Rata Formula. However, except as provided in paragraph II.B. herein, the Recovery Program Obligation shall not be exceeded by more than 5 percent of the Recovery Program Obligation estimate of \$8,722,888.00, or a total of \$9,159,032.00.

B. The parties acknowledge that a portion of the Recovery Program Obligation is anticipated to be paid by the Colorado Department of Natural Resources pursuant to a separate non-reimbursable expenditure contract between DNR and the River District, executed on the \_\_\_\_ day of \_\_\_\_\_, 200\_\_ ("DNR Cost Share Contract"). The River District hereby consents to a portion of the Recovery Program Obligation under this Reservoir Enlargement Agreement to be paid by DNR and agrees to reduce Reclamation's obligation to pay a portion of the Recovery Program Obligation accordingly. Nothing in this Reservoir Enlargement Agreement shall be construed as limiting the CWCB, Reclamation, the Service, the Recovery Program, or any other entity from providing replacement funds for any amount payable under the DNR Cost Share

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Contract .

C. Payment of the full Recovery Program Obligation is a prerequisite to the River District executing the deeds transferring the interests described in paragraph II.A. herein to the CWCB. Payment of the entire Recovery Program Obligation is due upon Substantial Completion of the Reservoir Enlargement. Substantial Completion of the Reservoir Enlargement shall be determined in accordance with the construction contract between the River District and the entity retained to build the Reservoir Enlargement. If a portion of the Reservoir Enlargement Cost of Construction remains undetermined upon Substantial Completion of the Reservoir Enlargement, such portion shall become due and payable at such time as the amount becomes definite.

D. In the event that the entire Recovery Program Obligation is not paid in full upon Substantial Completion of the Reservoir Enlargement (or when any portion of the Recovery Program Obligation that is undetermined upon Substantial Completion of the Reservoir Enlargement is reduced to a definite amount), Reclamation, the State of Colorado, or any other entity (not including the River District) may cure such default for a period of up to two (2) years after the date of substantial completion of the Reservoir Enlargement (or when any portion of the Recovery Program Obligation that is unliquidated upon substantial construction of the Reservoir Enlargement is reduced to a definite amount). In the event that Reclamation, the State of Colorado or any other entity has not paid the Recovery Program Obligation in full within the time periods described in this paragraph herein, Reclamation and the State of Colorado shall forfeit any and all funds paid to the River District pursuant to this Reservoir Enlargement Agreement, Grant Agreement No. \_\_\_\_\_, or the DNR Cost Share Agreement, and shall similarly forfeit any and all right, title, or other interest, legal or equitable, in the Reservoir Enlargement, its storage space, or any water rights adjudicated by the River District for use in the Reservoir Enlargement.

IV. Reservoir OM&R Costs

A. Upon completion of the Reservoir Enlargement, the River District will be allocated a percentage share of the OM&R costs for the Reservoir Enlargement together with Craig. As provided in the Amended and Restated Agreement between the River District, Craig, and Yampa Participants, the Yampa Participants will pay an annual service charge that shall be used to reduce the OM&R costs for the Reservoir Enlargement. The River District estimates that its percentage share of the OM&R expenses will be  $11,750/24,884^{\text{th}}$  - which fraction is based on the anticipated size of the storage space created by the construction of the Reservoir Enlargement (which will be owned by the River District) and the anticipated total storage capacity of the Reservoir Enlargement upon completion. In the event that the actual, as-built capacity of the Reservoir Enlargement differs from this estimate, the percentage share of the River District's obligation to pay OM&R costs shall be adjusted accordingly.

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**B. Pursuant to Public Law 106-392 Section 3.(d) and as long as the Permanent Water Supply conveyed to the CWCB is used for Recovery Program purposes and at the direction of the Service and upon the Recovery Program's approval of the River District's annual work plan as described in paragraph IV.C. herein, Reclamation agrees to pay the CWCB's portion of the River District's actual OM&R costs based on the Pro-Rata Formula commencing with the date the River District first makes any portion of water from the Permanent Water Supply available for Recovery Program purposes, regardless of whether the storage space and water right has been transferred to the CWCB.**

**1. Upon substantial completion of construction of the Reservoir Enlargement (as defined in the construction contract between the River District and the entity retained to construct the Reservoir Enlargement) the parties hereto agree to meet to prepare and approve an initial OM&R work plan to cover the CWCB's Pro-Rata share of the River District's OM&R expenses until the River District's first annual work plan has been submitted and approved pursuant to paragraph IV.C. herein.**

**C. Annually, the River District shall prepare and submit an annual work plan for the upcoming calendar year to the Recovery Program for review and approval. The annual work plan shall show the River District's anticipated Reservoir OM&R expenses. The annual work plan shall include estimates for the River District's direct costs, such as labor, materials, equipment, utility, and other costs related to the OM&R of the Reservoir Enlargement. A percentage share of the River District's incremental cost of adding the Reservoir Enlargement to the River District's insurance policy ( less any contributions from third parties such as Craig or Yampa Participants) and a management fee in the amount of ten percent (10%) of the River District's direct costs, shall also be included in the annual work plan. Together, the direct costs, incremental insurance costs, and management fee described on the annual work plan approved by the Recovery Program, minus any contributions from third parties such as the Yampa Participants, shall constitute the OM&R costs, a percentage of which Reclamation is obligated to pay under paragraph IV.B herein. Attached hereto as Exhibit A is a draft work plan spreadsheet, a draft labor-rate spreadsheet, and a sample list of work activities and items that may be used by the River District in preparing its annual OM&R work plan. Preparation of the annual work plan shall include the following steps:**

**1. The schedule for and steps involved in the preparation, submission, and approval of the annual work plan shall include the following:**

**a. A meeting among the parties hereto, Craig, and the Yampa Participants to discuss plans for OM&R;**

**b. The River District's work plan shall be submitted to the Director, Colorado River Recovery Implementation Program on or before**



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**April 30 or within 45 days of the Director's request for submittal, whichever is later;**

**c. The Recovery Program Management Committee will review the work plan between May 1 and August 31, and;**

**d. The Director of the Recovery Program will approve the work plan on or before September 10.**

**2. In the event that the River District and the Recovery Program cannot agree on an OM&R budget and annual work plan for the Reservoir Enlargement, then the annual OM&R budget for the Reservoir Enlargement shall be equal to the budget for the prior year, plus five (5) percent.**

**3. The River District may request approval for additional funds from the Recovery Program in the event the River District's actual costs exceed the annual work plan estimates. Except for emergency situations, the River District shall request additional funds from Recovery Program prior to incurring expenditures.**

**D. By March 1 of each year, the River District shall submit an itemized invoice showing the Reservoir's prior year's OM&R expenses paid by the River District. Reclamation, on behalf of the Recovery Program and the CWCB, agrees to pay the River District a Pro-Rata share of the prior year's Reservoir Enlargement OM&R expenses paid by the River District, approximately equal to 5,000/24,887<sup>th</sup> of the total Reservoir OM&R. Reclamation agrees to pay the amount due within thirty (30) days of receiving an invoice from the River District. Past due amounts shall incur a late fee in the amount ten (10) percent of the amount owed to the River District. An additional late fee in the amount of ten (10) percent of the amount owed (plus past incurred late fees) shall be assessed in each subsequent year that Reclamation is in arrears. .**

**1. Payment to the River District shall be sent directly to a financial institution by Direct Deposit/Electronic Funds Transfer.**

**E. The payment of charges becoming due as provided in paragraph IV.D. herein is a condition precedent to receiving benefits under this Reservoir Enlargement Agreement and the Acquisition Agreement. The River District shall not make water available to the CWCB, or the Recovery Program, through the Reservoir facilities during any period in which Reclamation is in arrears in the payment of OM&R expenses and until all funds due and owing for the current year (and past years, if any) are paid in full together with any late fees that have been assessed. If in the unlikely event the Recovery Program through Reclamation fails to pay OM&R amounts for a period of five (5) years, the CWCB shall forfeit to the River District storage space capacity and associated water**

rights in the Reservoir Enlargement at a rate of one (1) acre foot for each \$1,000 in arrears . Forfeiture shall be the exclusive remedy of the River District against the Recovery Program, Reclamation, the Service, and/or CWCB for the non-payment of amounts owed for OM&R costs. Any party , together with the State of Colorado, shall have the right to provide replacement funds to pay OM&R charges due and owing the River District.

F. In the event that the River District transfers control over operations, maintenance, and repair of the Reservoir Enlargement to Craig, the River District shall concurrently receive from Craig an acknowledgment of Craig's agreement to abide by the terms of this Reservoir Enlargement Agreement.

G On account of drought, errors in operation, operational constraints imposed by the State of Colorado or otherwise, or other causes, there may occur at times a shortage during any year in the quantity of water available to be stored within the Reservoir Enlargement, and in no event shall any liability accrue against the parties hereto for any damage direct or indirect, arising therefrom. In any year in which there may occur such a shortage in the Reservoir Enlargement water supply, Reclamation shall continue to be obligated to pay OM&R as provided in paragraph IV.B herein.

#### V. Fish Screen

The parties acknowledge that the cost estimates contained in the Reservoir Enlargement Cost of Construction, the Recovery Program Obligation, and the River District Obligation do not include the cost of installing a permanent fish screen on the Reservoir Enlargement spillway or outlet tube for the purpose of preventing non-native fishes from escaping from the Reservoir Enlargement into the Yampa River. The parties further acknowledge that the capital costs of installing a permanent fish screen, and incremental OM&R costs of operating, maintaining and repairing a fish screen, are in addition to the Recovery Program Obligation and the Recovery Program's OM&R obligations described in this Reservoir Enlargement Agreement. The capital costs of installing a permanent fish screen and the incremental OM&R costs associated with a fish screen shall not be borne by the River District, Craig, nor included in the annual service charge imposed on the Yampa Participants.

#### VI. Proceeding to Make Absolute

After the water right for the Permanent Water Supply is placed to beneficial use for piscatorial and recreational uses (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Fishes Recovery Program) and the Recovery Program Obligation has been paid in full, the River District, after consultation with the parties hereto shall submit the necessary pleadings in the Water Court for Division No. 6 in the name of the River District and prosecute the case to make absolute those conditional water storage rights.

## **VII. Construction Contingencies**

A. Construction of the Reservoir Enlargement by the River District is contingent upon the execution of an Amended and Restated Agreement between the River District, Craig, and the Yampa Participants regarding long term OM&R of the Reservoir Enlargement.

B. Construction of the Reservoir Enlargement by the River District is contingent upon the River District finding an acceptable construction contractor willing to place a bid at an acceptable price and entering into an acceptable construction contract. An acceptable bid at an acceptable price shall be deemed to include a bid within five (5) percent of the estimated Reservoir Enlargement Cost of Construction.

C. Construction of the Reservoir Enlargement by the River District is contingent upon obtaining the necessary permits from local, state, and federal agencies.

D. Prior to exercising any right not to construct the Reservoir Enlargement pursuant to paragraphs VII.A., VII.B, and VII.C., herein the River District agrees to consult with the Recovery Program and the parties hereto to discuss the contingency(ies) at issue and explore how the Reservoir Enlargement project can proceed despite the existence of such contingency(ies).

E. In the event the River District exercises a right not to construct the Reservoir Enlargement pursuant to paragraphs VII.A., VII.B., or VII.C. herein, any funds received by the River District from Reclamation or DNR and expended by the River District for items included in the Reservoir Enlargement Cost of Construction, shall not be reimbursable to Reclamation or DNR. In the event such funds are spent on real property acquisition, the River District shall reimburse Reclamation and/or DNR the amount of the funds spent on real property or easement acquisition minus a ten percent (10%) management fee.

F. The obligations of the Recovery Program through Reclamation contained in this Reservoir Enlargement Agreement are contingent upon DNR executing a non-reimbursable expenditure contract with the River District to pay a portion of the Recovery Program Obligation. Prior to the River District soliciting a bid for construction of the Reservoir Enlargement, the River District shall notify Reclamation and the Service in the event that DNR does not execute a non-reimbursable expenditure contract with the River District. Upon notice by the River District to the parties hereto that DNR will not execute a non-reimbursable contract, Reclamation and the Service may cancel this Reservoir Enlargement Agreement or renegotiate the terms thereof with the River District.

## **VIII. Notice**

Any notice, demand, or request authorized or required by this Reservoir Enlargement Agreement shall be deemed to have been given on behalf of all parties to this Reservoir Enlargement Agreement when mailed first class, postage prepaid, to the following:

General Manager  
Colorado River Water Conservation District  
201 Centennial  
P.O. Box 1120  
Glenwood Springs, Co 81602  
Telephone: (970) 945-8522

With a copy to:  
General Counsel  
Colorado River Water Conservation District  
P.O. Box 1120  
Glenwood Springs, Co 81602

With a copy to:  
Loyal E. Leavenworth, Esq.  
Leavenworth & Karp, P.C.  
P.O. Drawer 2030  
Glenwood Springs, CO 81602  
Telephone: (970) 945-2261

On behalf of the Recovery Program to:  
Director  
Upper Colorado River Endangered Fish Recovery Program  
US Fish and Wildlife Service  
44 Union Blvd., Suite 120  
Lakewood, CO 80228  
P.O. Box 25486  
Denver Federal Center  
Denver, Colorado 80225  
Telephone: (303) 969-7322

Area Manager  
Bureau of Reclamation  
Western Colorado Area Office  
2764 Compass Drive, Suite 106  
Grand Junction, CO 81506  
Telephone: (970) 248-0600

Regional Director  
Bureau of Reclamation

### **Need information**

With a copy to:  
Regional Director  
Bureau of Reclamation  
Upper Colorado Regional Office  
125 State Street, Room 6107  
Salt Lake City, UT 84138-1147  
Telephone: (801) 524-3600

Assistant Field Supervisor  
U.S. Fish and Wildlife Service  
Ecological Services, Western Colorado Office  
764 Horizon Drive, Building B  
Grand Junction, CO 81506  
Telephone: (970) 243-2778

With a copy to:  
Regional Director  
Fish and Wildlife Service, Region 6  
134 Union Blvd., Suite 400  
Lakewood, CO 80228  
P.O. Box 25486, DFC  
Denver, CO 80225-0486  
Telephone: (303) 236-7920

On behalf of the CWCB to:  
Director  
Colorado Water Conservation Board  
1313 Sherman Street, Room 723  
Denver, Colorado 80203  
Telephone: (303) 866-3441

The designation of the respective addressee, address, and/or telephone number may be changed by written notice given in the same manner as provided herein.

### **IX. Term**

A. Due to the limitations imposed on the River District by C.R.S. § 37-46-148, the term of this Reservoir Enlargement Agreement is seventy-five (75) years, unless terminated pursuant to any other provision provided herein. Starting on the first anniversary of the execution of this Reservoir Enlargement Agreement, and continuing on each subsequent anniversary thereafter, unless written notice to the contrary is provided by any party or parties to the other parties in accordance with paragraph VIII herein and prior to the anniversary date, this Reservoir Enlargement Agreement shall

automatically be renewed for an additional one (1) year term. After notice has been sent by any party or parties objecting to any one-year term renewal, this provision shall not continue to effectuate an automatic one-year term renewal in any subsequent year.

B. In the event the Service, in consultation with the Recovery Program, determines that the Permanent Water Supply to be conveyed to the CWCB is no longer needed within the Yampa River Basin to provide water for endangered native fish species in the Yampa River Basin or Reclamation's and the Service's authority under Public Law 106-392 is terminated pursuant to Section 3. (d) thereof, all responsibilities and obligations of Reclamation and the Service under this Reservoir Enlargement Agreement shall be terminated after complying with the procedures described in paragraph XII of the Acquisition Agreement.

X. Miscellaneous

A. Officials Not to Benefit. No Member of or Delegate to Congress or Resident Commissioner or official of the United States or the State of Colorado shall benefit from this Reservoir Enlargement Agreement other than as a water user or landowner in the same manner as other water users or landowners.

B. Assignment Limited - Successors and Assigns Obligated. The provisions of this Reservoir Enlargement Agreement shall apply to and bind the successors and assigns of the parties hereto and no assignment or transfer of this Reservoir Enlargement Agreement shall be valid until approved in writing by the parties hereto.

C. No Improper Payments. The parties hereto warrant that they have not employed any person to solicit this Reservoir Enlargement Agreement upon any contract for a commission, percentage, brokerage, or contingent fee, except those disclosed. Breach of this warranty shall give any of the parties hereto the right to annul this Reservoir Enlargement Agreement. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the parties hereto for the purpose of securing this Reservoir Enlargement Agreement.

D. Subject to Appropriations.

1. United States. Nothing contained in this Reservoir Enlargement Agreement shall be construed as binding the United States to expend in any one fiscal year any sum in excess of appropriations made by Congress, contributions from the States participating in the Recovery Program and Colorado River Storage Project Power Revenues provided for the purposes of this Reservoir Enlargement Agreement for that fiscal year.

2. River District. Nothing contained in this Reservoir Enlargement

Agreement shall be construed as binding the River District to expend in any fiscal year any sum in excess of appropriations made by the River District Board of Directors for purposes of this Reservoir Enlargement Agreement.

- E. All of the provisions in this Reservoir Enlargement Agreement shall survive the closing of the conveyance contemplated by paragraph II.A. herein, and shall not merge therewith.

**XI. Contract Drafting Considerations**

Paragraphs I through XIII of this Reservoir Enlargement Agreement have been drafted, negotiated, and reviewed by the parties hereto, each of whom is sophisticated in the matters to which this Reservoir Enlargement Agreement pertains, and no one party shall be considered to have drafted the stated text .

**XII. Rights and Remedies**

The parties hereto shall have all rights and remedies provided under law for a breach or threatened breach of this Reservoir Enlargement Agreement; provided, however, that before commencing any action for enforcement of this Reservoir Enlargement Agreement, the party alleging a breach shall notify the other parties hereto in writing of the alleged breach, and the parties shall make a good-faith effort to resolve their differences through informal consultation.

**XIII. Authority**

Each person executing this Reservoir Enlargement Agreement represents and warrants that he or she has been duly authorized by one of the parties to execute this Reservoir Enlargement Agreement, that all approvals (governmental or otherwise) necessary to execute this Reservoir Enlargement Agreement have been obtained, and has authority to bind said party to the terms hereof.

IN WITNESS WHEREOF, the parties have executed this Reservoir Enlargement Agreement as of the day and year first written above.

**Colorado River Water Conservation District  
acting by and through its Colorado River Water  
Projects Enterprise**

**Attest:**

\_\_\_\_\_  
President

\_\_\_\_\_  
Secretary

Approved as to Form:

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Loyal E. Leavenworth, Esq.

**United States Bureau of Reclamation**

Approved as to Form:

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Regional Director, Upper Colorado Region

---

Office of the Regional Solicitor

**United States Fish and Wildlife Service**

Approved as to Form:

---

Regional Director, Mountain-Prairie Region (6)

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Office of the Regional Solicitor



EXHIBIT D

Revised 9-1-04

**Lease  
Elkhead Reservoir Enlargement  
Short-Term Water Supply**

This LEASE is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between the United States of America, Department of Interior, Fish and Wildlife Service ("Service") and Bureau of Reclamation ("Reclamation"), both acting through the Secretary of Interior, pursuant to the Act to Authorize the Bureau of Reclamation to Provide Cost Sharing for the Endangered Fish Recovery Implementation Programs for the Upper Colorado and San Juan River Basins, (October 30, 2000, 114 Stat. 1602, Public Law 106-392 ), and acts amendatory thereof or supplementary thereto, and the Colorado River Water Conservation District ("River District"), acting by and through its Colorado River Water Projects Enterprise.

**RECITALS**

WHEREAS, the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin ("Recovery Program") dated September 29, 1987, is implemented by a Cooperative Agreement, signed in January of 1988 by the Secretary of the Department of the Interior, the Governors of the States of Colorado, Utah, and Wyoming and the Administrator of the Western Area Power Administration. The Recovery Program is a coalition of agencies and organizations . The goal of the Recovery Program is to recover four species of endangered fish while allowing water development to proceed consistent with state water law and in compliance with the federal Endangered Species Act ("ESA") in the Upper Basin states of Colorado, Utah, and Wyoming; and

WHEREAS, Public Law 106-392, enacted on October 30, 2000, authorizes Reclamation to, among other things, provide cost sharing for capital construction projects under the Recovery Program. Public Law 106-392 also authorizes Reclamation to use power revenues to provide up to \$4 million per year to fund monitoring and research; and operation, maintenance, and repair of capital project features associated with the Recovery Program through the year 2011. Furthermore the law provides for monitoring, operation, maintenance and repair funding beyond 2011; and

WHEREAS, the River District is a political subdivision of the State of Colorado created and existing pursuant to its Organic Act, Section 37-46-101, *et seq.*, C.R.S., and other applicable Colorado law. The River District owns and conducts a business engaged in water activities pursuant to the Water Activity Enterprise Act, Section 37-45.1-101, *et seq.*, C.R.S., in order to provide for the beneficial use of water within the District. The River District's Board of Directors confirmed its authority to operate such a business by

Resolutions adopted on July 16, 1985, October 19, 1993, October 19, 1999, and October 17, 2000. The River District has authority to perform all acts and things necessary or advisable to secure and insure an adequate supply of water, present and future, which includes the authority to construct, own, operate, and maintain water storage facilities; and

WHEREAS, The River District is authorized to contract to deliver water for beneficial use from River District water projects pursuant to the provisions of section 37-46-101, *et seq.*, C.R.S.; and

WHEREAS, the Recovery Program has determined that the following water supplies are needed within the Yampa River Basin to provide water for endangered native fish species during the critical low-flow periods in the reach of the Yampa River located within the State of Colorado from the confluence of Elkhead Creek downstream to the confluence of the Green River ("Critical Habitat Reach"): 1) 5,000 acre-feet Permanent Water Supply and 2) 2,000 acre-feet Short-Term Water Supply; and

WHEREAS, the River District has entered into Agreements with the City of Craig, the Yampa Participants, and the Colorado Division of Wildlife that allow the River District to construct an enlargement of Elkhead Reservoir (the Reservoir Enlargement) on Elkhead Creek tributary to the Yampa River. Pursuant to these agreements, the River District will obtain storage space by the construction of the Reservoir Enlargement. The River District has filed an application (Case No. 02CW106) in Water Division No. 6 to confirm its appropriation of water from Elkhead Creek to fill the River District's storage space in the Reservoir Enlargement. Upon construction, water from the Reservoir Enlargement will be available to provide a water source for the Permanent Water Supply and the Short-Term Water Supply; and

WHEREAS, the River District will convey to the Colorado Water Conservation Board ("CWCB") through a separate Acquisition Agreement the water storage easement and water storage rights necessary for the Permanent Water Supply and the Short-Term Water Supply; and

WHEREAS the River District is willing to lease, for a term of 20 years, water to Reclamation and the Service to provide a Short-Term Water Supply of up to 2,000 acre-feet of water annually from the Elkhead Reservoir Enlargement to be used for the benefit of the endangered native fish species in the Yampa River Basin; and

WHEREAS, Reclamation and the Service on behalf of the Recovery Program, wish to lease from the River District up to 2,000 acre-feet of water annually to be released from the Elkhead Reservoir Enlargement and further intends to make such 2,000 acre-feet of water available for use by the CWCB as a sublessee, to monitor and protect

reservoir releases to and through the Critical Habitat Reach to assist in the recovery of endangered fish in the Yampa River.

NOW THEREFORE, in consideration of the mutual agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the River District, Reclamation and the Service agree as follows:

#### TERMS and CONDITIONS

A. Amount Leased. During each annual period from July 1 to February 28 (of the next succeeding calendar year), the River District shall make available to Reclamation and the Service up to 2,000 acre-feet of water (the Short-Term Water Supply) in the Reservoir Enlargement for lease on an "as needed" basis, as determined by the Service, to supplement the Permanent Water Supply. The provision of water to Reclamation and the Service under this Short-Term Water Supply Lease shall be subject to the water shortage provisions as described in Paragraph M and Reclamation's payment obligations as described in Paragraph N.

B. Term. The Short-Term Water Supply Lease shall be for a term of twenty (20) years. Notwithstanding the date of execution of this Lease by the parties, the Short-Term Water Supply Lease shall commence on the date on which the River District first makes the Short-Term Water Supply, or at least 500 acre-feet thereof, available to Reclamation and the Service, regardless of whether the Service gives notice of its intent to take any water (pursuant to Paragraph F) during that year. Upon expiration of the Short-Term Water Supply Lease, Reclamation and the Service shall then have a first right of refusal for 6 months after the expiration of this Lease to enter into negotiations with the River District for a renewal of the Short-Term Water Supply Lease, if the Service determines that continuation of the Short-Term Water Supply Lease is needed to supplement the Permanent Water Supply. In the event that Reclamation and the Service desire to renew the Short-Term Water Supply Lease, the lease terms shall be subject to renegotiation including:

1. The charge for the water supply may be increased or modified based upon the adequacy of the charge to cover the River District's operation and maintenance costs together with capital costs that have not been recovered under the prior Short-Term Water Supply Lease.
2. The need or appropriateness of any conservation plan, state or federal regulation, or other requirement concerning Reclamation's and/or the Service's use of water stored in the Reservoir Enlargement.

In the event the Service, in consultation with the Recovery Program, determines that the Short-Term Water Supply herein leased is no longer needed to provide water for endangered native fish species in the Critical Habitat Reach or Reclamation's and/or the Service's authority under Public Law 106-392 is terminated pursuant to Section 3.(h) thereof and upon 120 day written notice signed by both Reclamation and the Service to the parties hereto, this Lease and all responsibilities and obligations herein shall be terminated.

C. Delivery. The River District will deliver the Short-Term Water Supply at the outlet works of Elkhead Reservoir. As provided in Article VI of the Acquisition Agreement, the Service, and/or the CWCB, in conjunction with the Division Engineer for Water Division No. 6, shall be solely responsible for ensuring that water from the Short-Term Water Supply is delivered from the outlet works of Elkhead Reservoir to the desired place of use. With the exception of the obligations in Paragraph D, the River District shall have no responsibility once the Short-Term Water Supply is released at the outlet. The Lessees (Reclamation, the Service, and/or sub-lessee the CWCB) shall be exclusively responsible for transit losses assessed by the Division Engineer associated with water released from the Short-Term Water Supply.

D. Water Measurements. The River District shall measure at the outlet works of Elkhead Reservoir all water delivered from the Short-Term Water Supply account and, if requested by the Division Engineer, shall provide the Division Engineer for Water Division No. 6 and the parties hereto accounting report(s) listing the date, time and amount of such releases delivered pursuant to this Lease.

E. Price. Reclamation on behalf of the Recovery Program shall be obligated to pay for any water made available under this Lease at the request of the Service pursuant to Paragraphs F and H, at a rate of \$50.00 per acre-foot requested, regardless of whether all or any portion of that water is actually released from storage (at the request of the Service). On or before March 31 each year of the Short-Term Water Supply Lease, the River District shall submit to Reclamation an invoice for the prior year together with water delivery records showing the total amount of Short-Term Water Supply water requested for release by the Service as provided in Paragraphs F and H herein. Said invoice shall be due 90 days from the date the invoice is sent.

F. Annual Allocations. The Service shall provide notice to the parties hereto of its intent to take a given amount of the Short-Term Water Supply in accordance with the following schedule:

1. On or before May 1 each year of the Short-Term Water Supply Lease, the Service shall provide such notice of its intent to take 500 acre-feet of the Short-Term Water Supply or relinquish the full 2,000 acre-feet to the River District;

2. On or before June 1 of any year in which the Service requests 500 acre-feet of water pursuant to Paragraph F.1., the Service shall provide notice of its intent to take an additional 500 acre-feet of the Short-Term Water Supply or relinquish the remaining balance of 1,500 acre-feet to the River District;
3. On or before July 1 of any year in which the Service requests a total of 1,000 acre-feet of water pursuant to Paragraphs F.1. and F.2., the Service shall provide notice of its intent to take the remaining balance of 1,000 acre-feet of the Short-Term Water Supply or relinquish that amount to the River District.
4. If the Service fails to make an affirmative request in any year for water pursuant to Paragraphs F.1, F.2., and/or F.3., the Service shall be considered to have relinquished the remaining balance of the Short-Term Water Supply from that point forward until the Short-Term Water Supply resets on March 1 in accordance with Paragraph L.

G. Use of Non-Allocated Water. In years when the Service relinquishes all or a portion of the Short-Term Water Supply according to the schedule in Paragraph F, the River District shall have the right to use any relinquished portion of the Short-Term Water Supply for other River District purposes (including leasing the water to third parties).

H. Additional Allocation. In the event the Service subsequently determines that water from the Short-Term Water Supply previously relinquished to the River District pursuant to the provisions in Paragraph F is needed to assist in the recovery of endangered fish, Reclamation and/or the Service may reacquire such Short-Term Water Supply water that has not been put to another beneficial use, or otherwise committed to a third party, by the River District.

I. Release Schedules. The Service shall provide the parties hereto with a preliminary written schedule of anticipated monthly demands on or before May 1 of each year. The schedule provided by the Service shall serve as the release schedule to be used by the River District until modified by written notice. The Service shall have the right to modify the release schedule by giving the River District twenty-four (24) hours written notice. The River District shall confirm the modified release schedule in writing and shall additionally notify the parties hereto in the event that it is not possible to make any particular scheduled release. Notices pursuant to this Paragraph may be made by U.S. Mail, fax or e-mail as the parties may so decide.

J. Releases. Releases of water from the Short-Term Water Supply shall begin no earlier than July 1 in any year and shall terminate no later than the end of February of the following calendar year. The Service shall first exhaust the Permanent

Water Supply before requesting the release of water from the Short-Term Water Supply, unless all parties hereto agree to an alternative release schedule on a case-by-case basis.

K. Carryover. The River District agrees that Reclamation and the Service shall carry over for use in the next succeeding year, less evaporative losses sustained in the prior year, any Short-Term Water Supply water that was allocated pursuant to Paragraph F and paid for but not actually released at the Service's request for beneficial use by the CWCB, in a July 1 - February 28 period. Provided, however, that the total quantity of Short Term Water Supply in storage in the Reservoir Enlargement by Reclamation and the Service shall not exceed 2,000 acre-feet at any time.

L. Water Account. The River District shall maintain a separate account of water available to the Short-Term Water Supply. The Short-Term Water Supply account shall be created on the date on which the River District first makes the Short-Term Water Supply available, regardless of whether the Service calls for any water to be released during that year. The Short-Term Water Supply account shall be credited as the Reservoir Enlargement fills in priority as further described in Paragraph M. On March 1 of each year, the River District shall balance the Short-Term Water Supply account. Any water from the Short-Term Water Supply account that was actually released for beneficial use by the Service or the River District (pursuant to Paragraph G), shall be deducted from the Short-Term Water Supply account.

M. Shortages. On account of drought, errors in operation, operational constraints on the Reservoir Enlargement, legal circumstances, or other causes, there may occur at times a shortage during any year in the quantity of water available to be released from the Reservoir Enlargement, and in no event shall any liability accrue against the parties hereto for any damage direct or indirect, arising therefrom. In the event of a hydrological shortage in the Elkhead Creek basin that prevents the storage space owned by the River District (including the Short-Term Water Supply) and the CWCB (Permanent Water Supply) from filling, then the storage space allocated to the Short-Term Water Supply in the Reservoir Enlargement shall fill after the storage space owned by both the River District (excluding the Short-Term Water Supply) and the CWCB has obtained an actual or paper fill. In any situation other than a hydrological shortage where a shortage may occur (such as an operational shortage), the River District shall apportion, on a pro-rata basis, its available water supply among this Lease and other lease or contract holders with the River District. For purposes of this Lease, the term "pro-rata" shall have such meaning as defined in the Reservoir Enlargement Agreement between Reclamation, the Service and the River District, dated \_\_\_\_ day of \_\_\_\_\_, 2004.

N. Default of Payment Obligations. The River District shall not make water available from the Short-Term Water Supply to the Service, or the CWCB, during any period in which Reclamation is in arrears in the payment of water rates due the River District as provided herein. In the event that Reclamation fails to pay water rates when

due, Reclamation shall be charged a late fee in the amount ten (10) percent of the amount owed to the River District. An additional late fee in the amount of ten (10) percent of the amount owed (plus past incurred late fees) shall be assessed in each subsequent year that Reclamation is in arrears. .

O. Sublease/Assignment. The River District hereby consents to Reclamation and the Service, on behalf of the Recovery Program, subleasing or otherwise assigning all of its right, title, and interest in the Short-Term Water Supply to the CWCB to monitor and protect water releases from the Short-Term Water Supply to and through the Critical Habitat Reach to assist in the recovery of endangered fish in the Yampa River. In the event of any sublease or assignment, Reclamation shall guarantee the payment obligations pursuant to Paragraph E. Reclamation and the Service shall not sublet, sell, donate, loan or otherwise dispose of any of its rights to the Short-Term Water Supply to any party other than the CWCB without the express written consent of the River District, which consent shall not be unreasonably withheld.

P. Commingleing. The lease of the Short-Term Water Supply by Reclamation on behalf of the CWCB shall not be construed to subject the Reservoir Enlargement, or water rights decreed for use in the Reservoir Enlargement, to the Reclamation Reform Act of 1982.

Q. Water Quality. The River District shall have no obligation to Reclamation, the Service, or any other party, and makes no warranties or representations to Reclamation or the Service concerning, the quality of the water that will constitute the Short-Term Water Supply.

R. Use Per Lease and Law. The Service's and/or the CWCB's use of the Short-Term Water Supply shall in all instances be in accordance with the terms of this Lease and in accordance with Colorado law concerning water rights and water use, together with all decrees related to the storage of water in the Reservoir Enlargement.

S. Notices. All notices pursuant to this Lease shall be made in writing, posted through the mails of the United States, or delivered to the parties at the following addresses:

General Manager  
Colorado River Water Conservation District  
201 Centennial  
P.O. Box 1120  
Glenwood Springs, Co 81602  
Telephone: (970) 945-8522

With a copy to:



General Counsel  
Colorado River Water Conservation District  
201 Centennial  
P.O. Box 1120  
Glenwood Springs, Co 81602

With a copy to:  
Loyal E. Leavenworth, Esq.  
Leavenworth & Karp, P.C.  
P.O. Drawer 2030  
Glenwood Springs, CO 81602  
Telephone: (970) 945-2261

On behalf of the Recovery Program to  
Director  
Upper Colorado River Endangered Fish Recovery Program  
US Fish and Wildlife Service  
44 Union Blvd., Suite 120  
Lakewood, CO 80228  
P.O. Box 25486  
Denver Federal Center  
Denver, Colorado 80225  
Telephone: (303) 969-7322

Area Manager  
Bureau of Reclamation  
Western Colorado Area Office  
2764 Compass Drive, Suite 106  
Grand Junction, CO 81506  
Telephone: (970) 248-0600

Regional Director  
Bureau of Reclamation  
Upper Colorado Regional Office  
125 State Street, Room 6107  
Salt Lake City, UT 84138-1147  
Telephone: (801) 524-3600

Regional Director  
Fish and Wildlife Service, Region 6  
134 Union Blvd., Suite 400  
Lakewood, CO 80228  
P.O. Box 25486, DFC

Denver, CO 80225-0486  
Telephone: (303) 236-7920

On behalf of the CWCB to  
Director  
Colorado Water Conservation Board  
1313 Sherman Street, Room 721  
Denver, CO 80203

The address and contact information contained in this Paragraph can be modified by giving the other parties written notice in accordance with this Paragraph.

T. Amendments. All amendments, modifications, or other alterations to this Lease shall be in writing, approved and executed by all parties hereto, with the same formality as they have approved and executed this Lease.

U. Officials Not to Benefit. No Member of or Delegate to Congress or Resident Commissioner or official of the United States or the State of Colorado shall benefit from this Contract and Grant of Easement other than as a water user or landowner in the same manner as other water users or landowners.

V. Choice of Law. Unless superseded by federal law, this Lease shall be governed by the laws of Colorado, which state shall also be deemed the place where this Lease was entered into and the place of performance

W. Subject to Appropriations. Nothing contained in this Lease shall be construed as binding the United States to expend in any one fiscal year any sum in excess of appropriations made by Congress, contributions from the States participating in the Recovery Program and Colorado River Storage Project Power Revenues provided for the purposes of this Lease for that fiscal year for purposes of this Lease.

X. Authority. Each person executing this Lease represents and warrants that he or she has been duly authorized by one of the parties to execute this Lease, that all approvals (governmental or otherwise) necessary to execute this Lease have been obtained, and that such person has authority to bind said party to the terms hereof.

IN WITNESS WHEREOF, the parties have executed this Lease as of the day and year first written above.

**LESSOR:**  
**Colorado River Water Conservation District**

Attest:

\_\_\_\_\_  
President

\_\_\_\_\_  
Secretary

Approved as to Form:

\_\_\_\_\_  
Loyal E. Leavenworth, Esq.

**LESSEE:**  
**United States Bureau of Reclamation**

Approved as to Form:

\_\_\_\_\_  
Regional Director, Upper Colorado Region

\_\_\_\_\_  
Office of the Regional Solicitor

**LESSEE:**  
**United States Fish and Wildlife Service**

Approved as to Form:

\_\_\_\_\_  
Regional Director, Mountain-Prairie Region (6)

\_\_\_\_\_  
Office of the Regional Solicitor

EXHIBIT E

# EXHIBIT E

## SPECIAL WARRANTY DEED (Water Right)

THIS DEED, made this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between

the COLORADO RIVER WATER CONSERVATION DISTRICT, acting by and through its Colorado River Water Projects Enterprise (hereinafter "Grantor"), a political subdivision of the State of Colorado, acting by and through its Colorado River Water Projects Enterprise, whose address is P.O. Box 1120, Glenwood Springs, CO 81602 ("Grantor")

and

the STATE OF COLORADO, acting by and through the Colorado Water Conservation Board, whose address is 1313 Sherman Street, Room 721, Denver, Colorado 80203 (Grantee").

WITNESSETH, that the Grantor, for and in consideration of \$\_\_\_\_\_ and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto the Grantee and its assigns forever, the following water right:

**5,000 acre-feet of the total 13,000 acre-feet water right decreed for storage in Elkhead Reservoir Enlargement with an appropriation date of October 16, 2002, as decreed in Case No. 02CW106, Water Division No. 6, for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Endangered Fish Recovery Program).**

Such water right is conveyed pursuant to and subject to the terms, conditions, rights and obligations of the Acquisition Agreement, between Grantor and Grantee, dated \_\_\_\_\_, 2004, which Agreement shall survive this Deed. The terms and provisions of the Acquisition Agreement are incorporated herein by reference.

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, interest, claim and demand whatsoever of the Grantor, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances.

Grantor has executed a Special Warranty Deed conveying to Grantee a water storage space easement in the Elkhead Reservoir Enlargement to be used together with these water rights.

TO HAVE AND TO HOLD the said water rights above bargained and described with the appurtenances, unto the Grantee, its heirs and assigns forever. Grantor, for itself, its heirs and

personal representatives or successors, does covenant and agree that it shall and will WARRANT AND FOREVER DEFEND the above-bargained water rights in the quiet and peaceable possession of the Grantee and its assigns, against all and every person or persons claiming the whole or any part thereof, by, through or under the Grantor.

IN WITNESS WHEREOF, the Grantor has executed this deed on the date first written above.

COLORADO RIVER WATER CONSERVATION  
DISTRICT, acting by and through the District's Colorado  
River Water Projects Enterprise :

By \_\_\_\_\_  
President

ATTEST:

By \_\_\_\_\_  
General Manager

STATE OF COLORADO    )  
                                  ) ss.  
COUNTY OF GARFIELD    )

Acknowledged, subscribed, and sworn to before me this \_\_\_\_ day of \_\_\_\_, by  
\_\_\_\_\_, President of the River District and \_\_\_\_\_, General Manager of the  
River District.

WITNESS my hand and official seal.

My Commission expires: \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

EXHIBIT F

EXHIBIT F

**SPECIAL WARRANTY DEED  
(Grant of Easement)**

THIS DEED, made this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between

the COLORADO RIVER WATER CONSERVATION DISTRICT, acting by and through its Colorado River Water Projects Enterprise (hereinafter "Grantor"), a political subdivision of the State of Colorado, whose address is P.O. Box 1120, Glenwood Springs, CO 81602 ("Grantor")

and

the STATE OF COLORADO, acting by and through the Colorado Water Conservation Board, whose address is 1313 Sherman Street, Room 721, Denver, Colorado 80203 ("Grantee").

WITNESSETH, that the Grantor, for and in consideration of the sum of \$ \_\_\_\_\_ Dollars and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto the Grantee and its assigns forever, the following easement situate, lying and being in Routt and Moffat Counties, State of Colorado:

**A 5,000 acre-foot perpetual water storage space easement behind the Elkhead Reservoir Dam and within the Elkhead Reservoir Enlargement area located in Sections 1, 2, 3, 4, 9, 10, 16, and 21, Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat and Routt Counties, Colorado.**

Such easement is conveyed pursuant to and subject to the terms, conditions, rights and obligations of the Acquisition Agreement, between Grantor and Grantee, dated \_\_\_\_\_, 2004, which Agreement shall survive this Deed. The terms and provisions of the Acquisition Agreement are incorporated herein by reference.

The rights conveyed to the Colorado Water Conservation Board ~~United States~~ herein are expressly subject to, and will share Pro-Rata together with the retained interests of the River District, in any loss of storage space as a result of sedimentation in the Elkhead Reservoir Enlargement, any loss of storage water as a result of evaporation, any water shortage resulting from hydrological conditions, any water shortage resulting from an operational constraint on the Elkhead Reservoir Enlargement, and/or any constraint on the ability to release water from the Elkhead Reservoir Enlargement due to limitations on the outlet.

Such easement shall be exclusive to Grantee for the purpose of storing water in the water storage space easement. The construction of any permanent structure or improvement on the real property encumbered by the exclusive easement is strictly prohibited.

The Grantor, for itself, the public, and for the benefit of the Colorado Division of Wildlife, reserves a right of access over and across the easement to access the Elkhead Reservoir Enlargement, together with a right of recreational access over, across, and within the storage space easement for recreational, hunting, fishing, reservoir management, and other like purposes.



TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, interest, claim and demand whatsoever of the Grantor, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances.

Grantor will executed a Special Warranty Deed conveying to Grantee water storage rights decreed for use in the water storage space easement.

TO HAVE AND TO HOLD the said premises above bargained and described with the appurtenances, unto the Grantee, its assigns forever. Grantor, for itself, its heirs and personal representatives or successors, does covenant and agree that it shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of the Grantee and its assigns, against all and every person or persons claiming the whole or any part thereof, by, through or under the Grantor.

IN WITNESS WHEREOF, the Grantor has executed this deed on the date first written above.

COLORADO RIVER WATER CONSERVATION  
DISTRICT, acting by and through the District's Colorado  
River Water Projects Enterprise :

By \_\_\_\_\_  
President

ATTEST:

By \_\_\_\_\_  
General Manager

STATE OF COLORADO     )  
  ) ss.  
COUNTY OF GARFIELD    )

Acknowledged, subscribed, and sworn to before me this \_\_\_\_ day of \_\_\_\_, by  
\_\_\_\_\_, President of the River District and \_\_\_\_\_, General Manager of the  
River District.

WITNESS my hand and official seal.

My Commission expires: \_\_\_\_\_.

---

**Notary Public**

# **Preliminary Report**

## **Elkhead Reservoir Enlargement Proposed Water Acquisition for Recovery Program Purposes**

### **Summary of Proposal**

There are two components to this proposed water acquisition. The first component involves the permanent DONATION of a 5,000 acre-foot storage water right in the Elkhead Reservoir Enlargement (the "Permanent Water Supply"). The Colorado River Water Conservation District (River District) has filed a conditional water right for the Elkhead Reservoir Enlargement in Case No. 6-02CW106 for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Endangered Fish Recovery Program). The Colorado River Water Conservation District, in cooperation with the U.S. Bureau of Reclamation (Reclamation) and U.S. Fish and Wildlife Service (Service), will be responsible for perfecting the conditional water right for the claimed "in-river" uses. Once the Recovery Program financial obligation has been paid in full and the 5,000 AF portion of the water right has been decreed absolute, the River District will convey the right to the CWCB by means of a Special Warranty Deed. Along with the water right, a pro-rata interest in storage space (the Storage Space Easement) for the water right will be conveyed to the CWCB. The CWCB will hold the water right and storage space in perpetuity for the benefit of the Recovery Program at the direction of the Service. The CWCB will have no financial obligation with regard to the Permanent Water supply, and no obligation to fund annual operation, maintenance, and repair costs for the Elkhead Reservoir Enlargement so long as the water is used for Recovery Program purposes. In the event the water is no longer needed for Recovery Program purposes, the CWCB may use or dispose of the water right and easement subject to the terms of the Acquisition Agreement

The second component of this acquisition involves the SUBLEASE of 2,000 AF of water from the Elkhead Reservoir Enlargement for a period of 20 years (the "Short Term Water Supply") for the benefit of endangered native fish species in the Yampa River. The primary lease will be between the River District and Reclamation, and will provide up to 2,000 AF of additional water for the Short-Term Water Supply. The Lease will be implemented through annual contracts with the River District, and water will be released on an "as-needed" basis as determined by the Service. Pursuant to the terms of the Lease, Reclamation will pay the River District for any water leased from the Short-Term Water Supply. Reclamation, on behalf of the Service, will sublease, at no cost to the CWCB, all of its right, title and interest in the water it leases annually from the River District for use by CWCB to monitor and protect to and through the Critical Habitat Reach of the Yampa River. The CWCB will have no financial obligation with regard to the Short-Term Water Supply or the Lease.

### **Conveyances**

#### ***Perpetual Water Storage Space Easement and Storage Water Right***

- 1) 5,000 acre-feet (AF) of the total 13,000 AF water right decreed for storage in Elkhead Creek Reservoir Enlargement with an appropriation date of October 16, 2002, as decreed in Case No. 02CW106, Water Division No. 6, for piscatorial and recreational use (including in-river fish habitat and river flow maintenance and enhancement uses, and uses in furtherance of the Upper Colorado River Basin Endangered Fish Recovery Program); together with,

- 2) A 5,000 AF perpetual water storage space easement behind the Elkhead Creek Dam and within the Elkhead Creek Reservoir Enlargement area located in Sections 1, 2, 3, 4, 9, 10, 16, and 21, Township 7 North, Range 89 West, 6<sup>th</sup> Principal Meridian, Moffat and Routt Counties, Colorado.

### ***Short-Term Water Supply Sublease***

An additional 2,000 AF of the total 13,000 AF water right will be reserved for lease annually by Reclamation at the direction of the Service on an as-needed basis for the benefit of endangered fish species in the Yampa River. The Service and Reclamation will sublease this water to the CWCB for instream flow use.

### **Proposed Method of Acquisition**

The water right and storage space easement (Permanent Water Supply) will be donated to the CWCB. The interests in real property will be conveyed by means of a Special Warranty Deed. The 2,000 AF of Short Term Water Supply will be subleased to the CWCB by means of a 20-year lease agreement between the River District, Reclamation and the Service.

### **Proposed Reach of Stream**

Elkhead Reservoir is located on Elkhead Creek, northeast of the City of Craig in Moffat and Routt Counties. The acquired water is proposed for use in the Yampa River between the confluence of Elkhead Creek and the confluence of the Green River (see Figure 1). This reach of stream has been identified by the U.S. Fish and Wildlife Service (59 FR 13374) as including habitat that is critical to the recovery of four endangered fish species in the Colorado River Basin (Critical Habitat Reach).

### **Proposed Use of Acquired Water**

The CWCB will hold this water supply in perpetuity for the benefit of, and at the direction of the Recovery Program, acting through Reclamation and the Service. Water acquired by the Board will be used for the benefit of endangered fish and protection of critical habitat in the Yampa River, and will contribute to completion of Recovery Implementation Program Recovery Action Plan (RIPRAP) goals and a finding of "sufficient progress" under the Section 7 Consultation, Sufficient Progress, and Historic Projects Agreement.

### **Existing Instream Flow Water Rights**

The Board does not currently hold an instream flow water right on this reach of stream; however, the Board has worked with the Service and Colorado State Parks since 1993 to sublease water from Steamboat Lake, at no cost to the Board, for endangered fish purposes in this same reach of stream. This lease agreement was recently re-negotiated to provide water through the year 2008 and will likely be relinquished upon completion of the Elkhead Enlargement.

### **Natural Flow Regime**

The hydrology of the Yampa River is more completely described in the draft Management Plan for Endangered Fishes in the Yampa River Basin ("Yampa Management Plan", Roehm 2003). The following information has been provided by Gerry Roehm Instream Flow Coordinator for the Recovery Program, and is based upon modeling which utilized CWCB's Colorado Decision Support System (CDSS).

The Yampa River exhibits a relatively "natural" flow regime, in that peak flows are relatively unaffected due to the absence of large water storage projects in the Yampa Basin. Since 1916, peak



flows averaged roughly 10,000 cubic feet per second (cfs) at Maybell and have exceeded 24,000 cfs (1984) during the period of record. Conversely, the lack of significant in-basin storage to augment stream flows during the typical low-flow, high-demand late summer-early fall period produces average minimum flows of about 140 cfs at Maybell, although flows have fallen as low as 2 cfs in extremely dry years (1934 and 2001). Modeling with the CDSS suggests that flows would have fallen as low as 13 cfs in 1934 even with no depletions (Figure 2).

In this context, the Service developed base-flow recommendations for the Yampa River at Maybell that called for flows not to fall below 93 cfs in the future with any greater frequency, magnitude or duration than had occurred historically (Modde et al. 1999). These recommendations were adopted by the Recovery Program and serve as the basis for estimating base-flow augmentation needs.

The following hydrographs (Figures 2-5) show "dry" (1934, 1977) and "moderately dry" (1940, 1944) year flow scenarios, and estimated augmentation requirements for the Yampa River.

**Figure 2 – Estimated Base Flow Augmentation Needs during 1934**

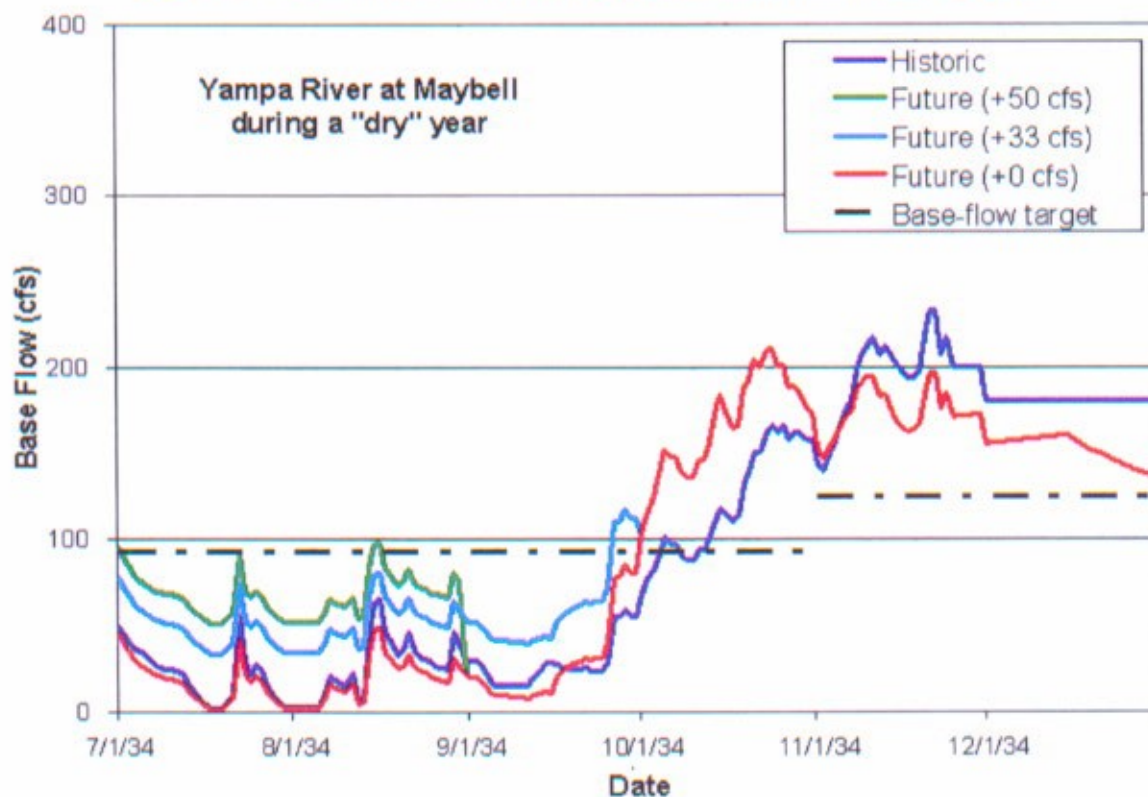


Figure 3 – Estimated Base Flow Augmentation Needs during 1977

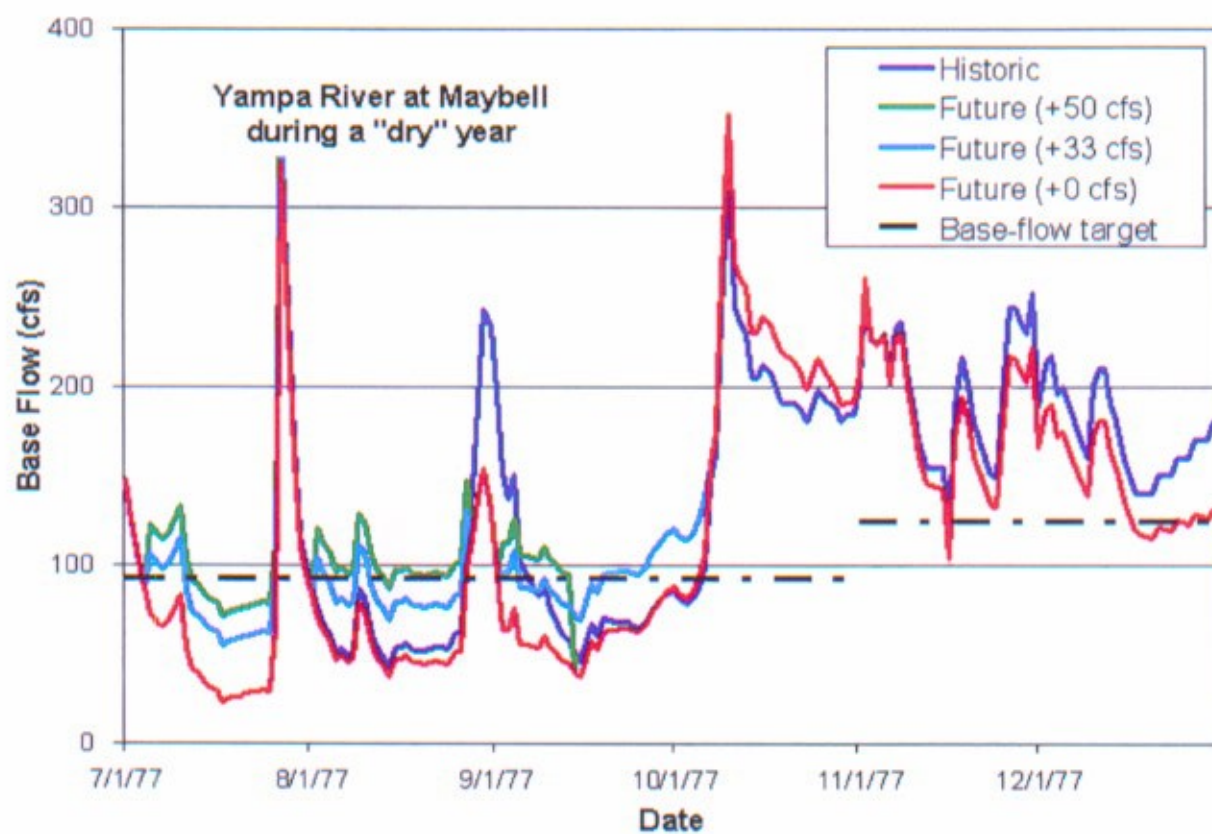




Figure 4 – Estimated Base Flow Augmentation Needs during 1940

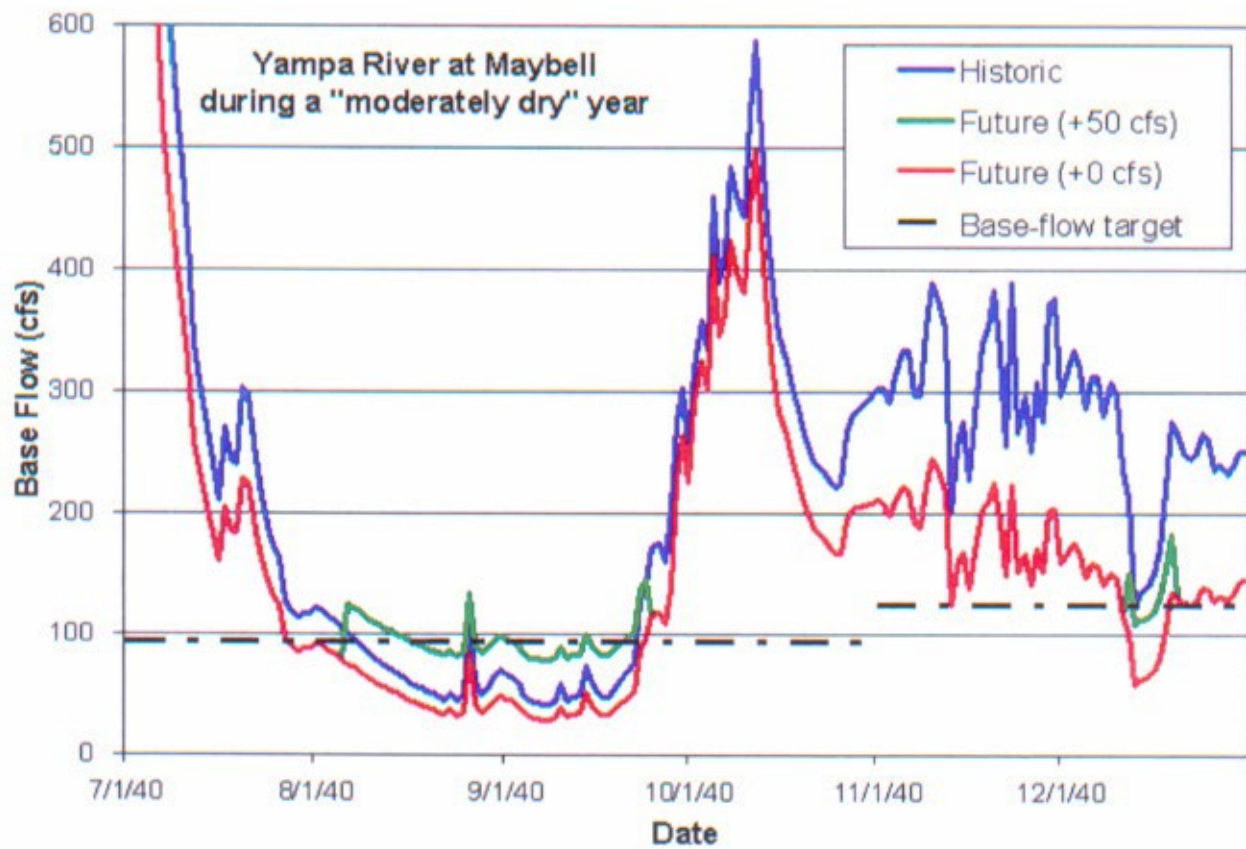
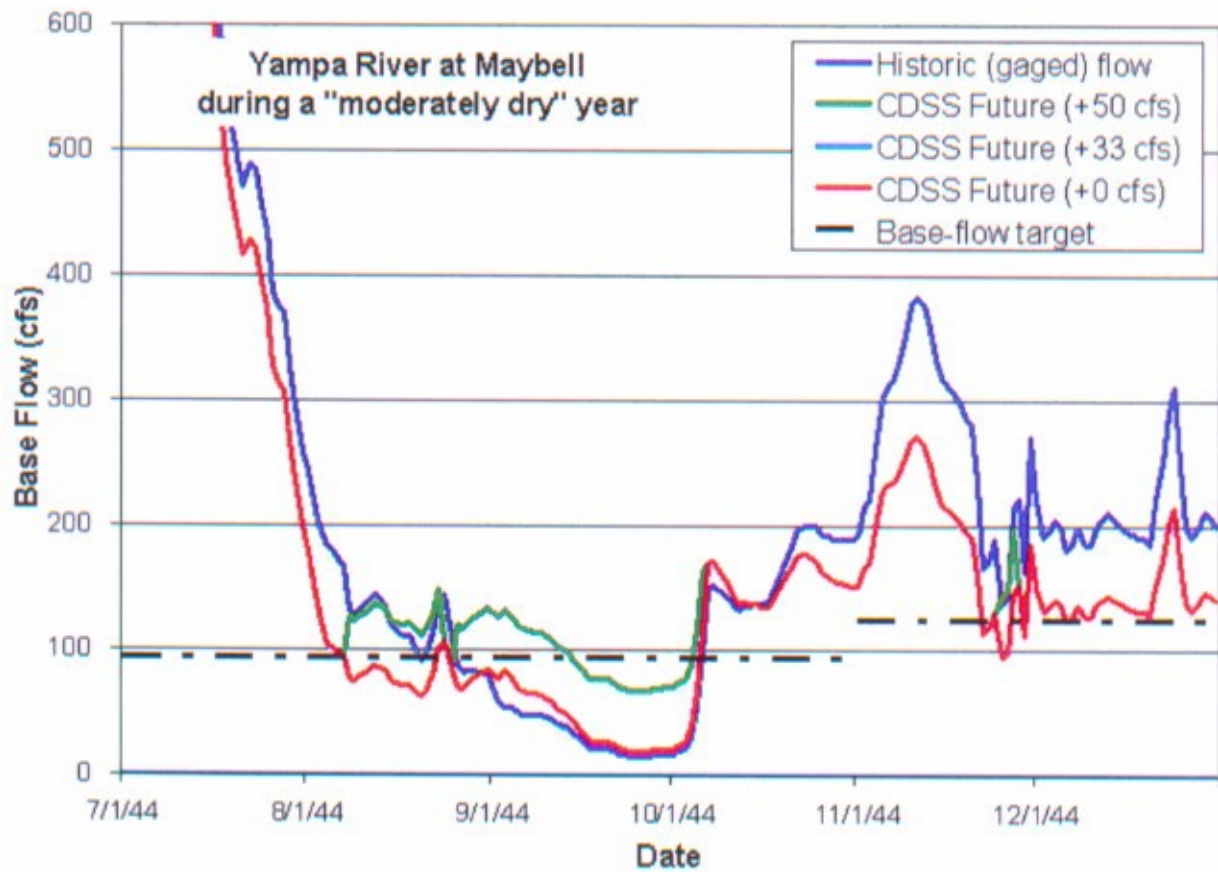




Figure 5 – Estimated Base Flow Augmentation Needs during 1944



## **Potential Material Injury to Existing Decreed Water Rights**

Although there are numerous decreed senior water rights located on both Elkhead Creek and the Yampa River, the Maybell Ditch and the rights owned by the City of Craig tend to control river flows through the Critical Habitat Reach (Figure 6). The Elkhead Reservoir Enlargement storage right was filed with the Water Court in December 2002, and is junior to all existing decreed water rights. The storage right will be exercised "in-priority"; therefore, the proposed acquisition will not cause injury to any previously decreed water rights located upstream or downstream of the reservoir.

Water stored in priority under the 2002 water right and subsequently released for decreed beneficial use in the Critical Habitat Reach of the Yampa River is water introduced to the system, and would not be available for diversion by downstream senior rights. To ensure downstream users of their right to divert native flows, the Division Engineer may assess transit losses on water released for endangered fish. The use of stored water for instream uses will be monitored closely.

## **Historical Use and Historical Return Flow Patterns of the Water Right**

The water right proposed for acquisition is a new junior storage right with no historical use.

## **Reliability of Supply**

The Yampa Plan EA evaluated the reliability of the Elkhead Enlargement to meet Recovery Program goals and found no shortages to the base flow recommendations in the 45 years that required water for base flow augmentation.

## **Natural Environment That May Be Preserved or Improved by the Proposed Acquisition** (Information provided by Gerry Roehm, USFWS)

The reach of stream to be preserved or improved by the proposed acquisition includes the Yampa River from its confluence with Elkhead Creek downstream approximately 140 river miles to the confluence of the Green River. Most of this reach was designated as critical habitat for the **Colorado Pikeminnow** ("*Colorado squawfish*" at the time of its designation) on March 21, 1994 (59 FR 13374). This highly mobile species congregates in the lower reaches of Yampa Canyon to spawn, and disperses throughout the critical habitat reaches of the Yampa and Green rivers after spawning. Three other endangered fish species (*humpback chub*, *bonytail* and *razorback sucker*) inhabit the Yampa River downstream from Cross Mountain Canyon during all or a significant portion of their life cycles and, on March 21, 1994, critical habitat for these species was designated within the lower 45 river miles of the Yampa River (59 FR 13374).

## **Potential Benefits of the Proposed Acquisition**

(Information provided by Gerry Roehm, USFWS)

The Yampa River base-flow recommendations developed in 1999 and adopted by the Recovery Program were predicated on the assumption that important habitats for the endangered fishes predictably begin to decline more rapidly when flows drop below a certain level. During their 3-year study, the authors determined that level to be 93 cfs, based on predicted average losses of habitat across all riffle transects at flows below 93 cfs. Moreover, the authors found that flows had fallen below 93 cfs at a certain frequency, magnitude and duration in the past, and that endangered fish populations had not suffered as a result of these periodic "transgressions" below the 93-cfs flow target. Therefore, they concluded that the flow target should be met with at least the same frequency, magnitude and duration as had occurred in the past.

To attempt to meet the instream flow recommendation, an augmentation protocol was developed that would initiate an augmentation release at a fixed rate (e.g., 50 cfs) whenever unaugmented flows at



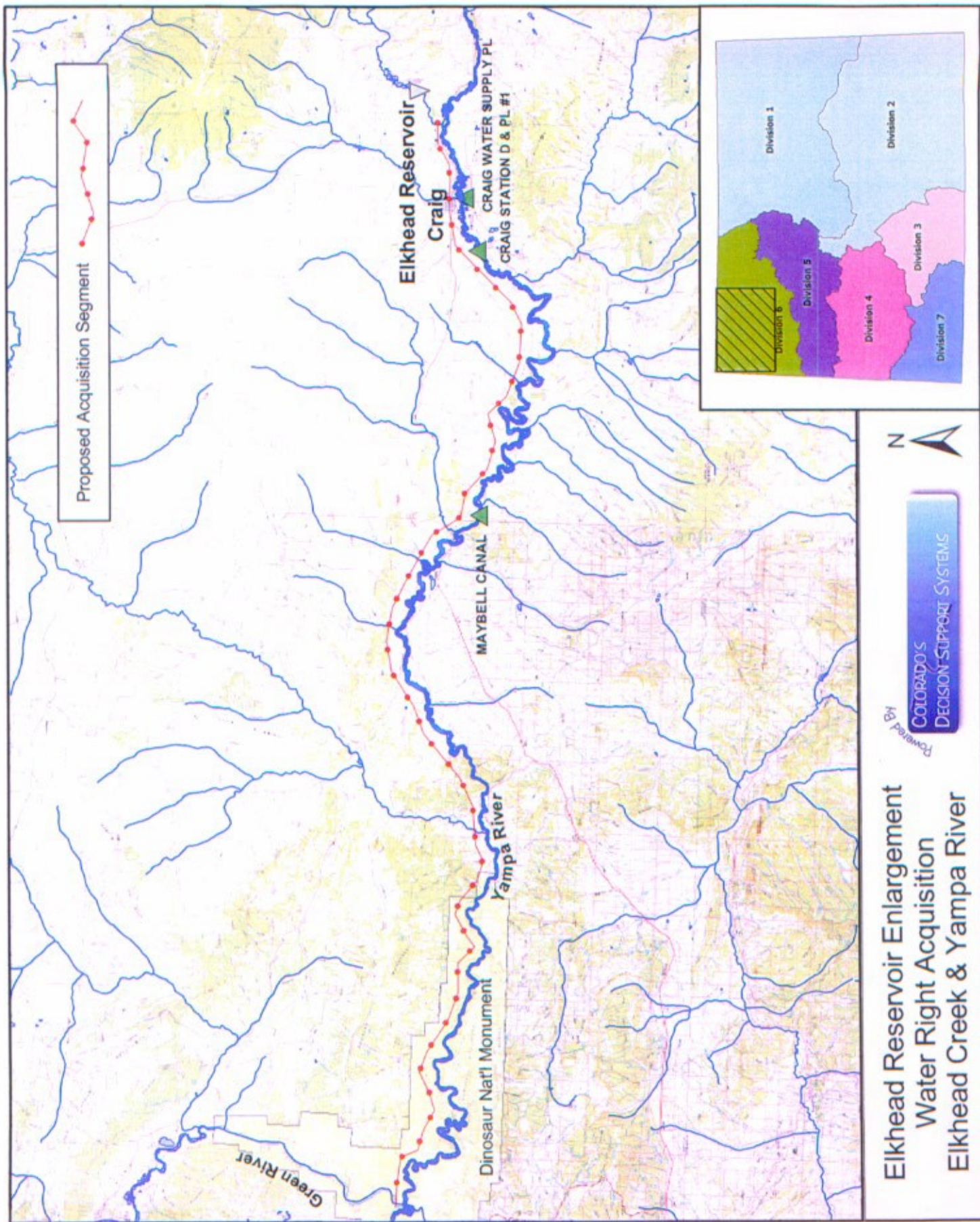


FIGURE 6

Maybell fell below a certain threshold (e.g., 78 cfs). Augmentation would continue until augmented flows exceeded a higher threshold (e.g., 138 cfs). Using this approach, the Service (Roehm 2003) determined that up to 7,000 AF/year of augmentation would satisfy the flow recommendations in all but the driest years (90—100% exceedance). In these driest years, 7,000 AF would partially satisfy the augmentation requirement based on the protocol. Moreover, it should meet or exceed the flow recommendations of Modde et al. (1999), because flows historically fell below 93 cfs during these extremely dry years. However, the rate of augmentation may be reduced (e.g., 33 cfs) to extend the duration of augmentation from 61 days at 50 cfs to 92 days at 33 cfs.

#### **Effect of the Proposed Acquisition on Any Relevant Interstate Compact Issue**

Colorado has a compact delivery obligation of 5 MAF / 10 years (Upper Colorado River Compact, Article XIII). The proposed acquisition and delivery of up to 7,000 acre-feet of water per year to and through the Critical Habitat Reach of the Yampa River will not adversely impact any interstate compact or Colorado's ability to fully develop its compact entitlements.

#### **Effect of the Proposed Acquisition on Maximum Utilization of the Waters of the State**

The draft Yampa Management Plan (Roehm 2003) has identified a need for up to 7,000 acre-feet of water to augment low flows in the Yampa River for protection of Critical Habitat for endangered fish, and to offset the impacts of depletions from the Yampa River Basin in Colorado due to current and projected future water development (up to a total of about 150,000 AF/year). The proposed acquisition will be considered by the Service in determining whether the Recovery Program has made "sufficient progress" to continue to function as a reasonable and prudent alternative to avoid the likelihood of jeopardy to endangered fish species from existing and new water developments that deplete water from the Upper Colorado River Basin in Colorado, Utah and Wyoming. As a result of this consideration, the proposed acquisition and other recovery actions in the Yampa Management Plan will provide Endangered Species Act compliance and thereby promote the full utilization of the waters of the state under the Colorado River Compact and other relevant interstate compacts.

#### **Availability of Acquired Water for Subsequent Use Downstream**

The proposed acquisition contemplates delivery of stored water to and through the Critical Habitat Reach of the Yampa River, and falls within Colorado's delivery obligations under Article XIII of the Upper Colorado River Compact. Water released from the Elkhead Reservoir Enlargement pursuant to this acquisition will not be available for downstream uses in Colorado, but rather will be considered part of Colorado's delivery obligation to Utah on the Yampa River.

#### **Cost to Complete the Transaction or Any Other Associated Cost**

There will be no direct costs to the CWCB to complete this transaction. Costs for the purchase and adjudication of the water right, and lease and grant of easement will be borne by the River District and Recovery Program. However, Colorado does bear a proportionate share of the costs associated with its participation in the Recovery Program.