



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

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Denver, CO 80203

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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

**TO:** Colorado Water Conservation Board Members

**FROM:** Pete Conovitz, Water Resource Specialist  
Stream and Lake Protection Section

**DATE:** March 16, 2023

**AGENDA ITEM:** 18. Proposed 5-Year Water Use Agreements with the Ute Water Conservancy District and Garfield County to lease Ruedi Reservoir Water for Instream Flow Use on the 15-Mile Reach, Water Division 5 (1<sup>st</sup> Meeting)

### Staff Recommendation

**No formal action is required at this time.**

Pursuant to 37-83-105(2) C.R.S. and ISF Rule 6b., the Board will use a two-Board meeting process to review, consider public comment and approve or reject two proposed 5-year Water Use Agreements that would each allow for up to five annual leases of Ruedi Reservoir water for instream flow use on the 15-Mile Reach of the Colorado River. The Board's consideration of the proposed Agreements at this meeting will initiate this process and begin a twenty day period in which any person may request the Board to hold a hearing on the proposal. The initial presentation of this proposal provides an opportunity for the Board and the public to identify questions or concerns that Staff will address at this or a subsequent meeting.

### Background

In 2020, the CWCB entered into separate Water Lease Agreements with the Ute Water Conservancy District ("Ute Water") and Garfield County to use water stored in Ruedi Reservoir ("Ruedi Water") for instream flow ("ISF") use in the 15-Mile Reach of the Colorado River. The purpose of both leases was to supplement existing ISF water rights to preserve and improve the natural environment within the 15-Mile reach; specifically to benefit critical fish habitat and to help meet flow targets identified by the U.S. Fish and Wildlife Service ("USFWS") in support of the Upper Colorado River Endangered Fish Recovery Program. The 15-Mile reach is critical habitat for four federally protected native fish species - the Colorado pikeminnow, razorback sucker, humpback chub and bonytail.

In 2020, Ute Water and Garfield County leased 9,830 acre-feet and 350 acre-feet to the CWCB, respectively. These Water Lease Agreements were subsequently renewed in 2021 and 2022. In 2021, Ute Water and Garfield County leased 2,500 acre-feet and 350 acre-feet to the

CWCB, respectively. In 2022, 6,000 acre-feet was leased from Ute Water and 350 acre-feet leased from Garfield County.

The increase in flows from these Ruedi Reservoir releases provided benefit to the critical fish habitat and extended the period in which USFWS flow targets could be met. These releases can also provide additional flexibility to operators of other west slope reservoirs that also typically release water in late summer to benefit the 15-Mile Reach.

State procurement guidelines now encourage CWCB water leases to be executed via Purchase Order as opposed to executing or amending a formal state contract, which is how the prior lease agreements with both Ute Water and Garfield County were structured. Therefore staff is proposing new agreements with both entities under which future annual leases may be implemented in a manner consistent with procurement guidelines. The proposed Water Use Agreements would govern how annual leases would be implemented and operated, and include language that is protective of the parties' interests.

### Discussion

ISF Rules 6e. and 6f. describe the Board's evaluation process, including specific factors that the Board shall consider in determining the appropriateness of an acquisition. Additional information that the Board may use to evaluate the annual leases that may be implemented under the proposed Water Use Agreements is included below:

#### Water Proposed for Leased Acquisition and Location of Use

The water proposed for lease to CWCB under the Agreements include up to 12,000 acre-feet of water owned by Ute Water and up to 400 acre-feet owned by Garfield County ("Leased Water"). All of the proposed Leased Water is stored in Ruedi Reservoir pursuant to Ute Water and Garfield County's respective Repayment Contracts with the U.S. Bureau of Reclamation ("Reclamation").

The reach of stream proposed for use of the Leased Water is the 15-Mile Reach of the Colorado River, described below and shown on the attached Location Map (Exhibit A). Under the proposed Agreement with Ute Water, any remaining Leased Water that is unused in the 15-Mile Reach may be released in December of that same year for winter ISF use on the Fryingpan River.

#### Existing ISF Water Rights

The CWCB currently holds water rights on the following reaches of the Colorado River within which CWCB can use the leased Ruedi Water for ISF purposes:



Case No.	Stream	Segment	Length	Amount	Approp. Date
5-92CW286	Colorado River (15-Mile reach)	Tailrace of Grand Valley Pumping Plant to confl. Gunnison River	Approx. 15 miles	581 cfs (7/1-9/30)	3/5/1992
5-94CW330	Colorado River (15-Mile reach)	27.5 Road Gage to confl. Gunnison River	Approx. 2 miles	300 cfs (7/1-9/30)	11/4/1994

#### Natural Flow Regime and Existing Environment

The Colorado River originates in the southern Rocky Mountains of Colorado and flows past Glenwood Springs and Grand Junction and downstream into Utah. The 15-Mile Reach includes the segment of river from the Grand Valley Diversion to the confluence of the Gunnison River within Grand Junction. Streamflow is primarily from snowmelt and local precipitation. The hydrograph is highly altered due to water diversions but peak flows typically occur in May and June and drop off quickly by July in most years. Major tributaries include the Blue, Eagle and Roaring Fork Rivers.

The 15-Mile Reach provides critical habitat for four species of fish federally listed as threatened or endangered: the Colorado pikeminnow, razorback sucker, humpback chub, and bonytail. This reach is particularly sensitive to water depletions because of its location downstream of several large diversions. The reach provides spawning habitat for these fish as well as diverse high quality habitat for adult fish, particularly for the Colorado pikeminnow and razorback sucker.

Due to development in the Colorado River basin, this reach has experienced declining flows and significant dewatering during the late summer months, and at times, there are shortages in the springtime. As a result the USFWS has issued flow recommendations for the 15-Mile Reach since 1989 to protect instream habitat for these fish.

#### Proposed Method of Acquisition

Under the proposed Water Use Agreements with Ute Water and Garfield County, up to five annual leases may be implemented under each Agreement. Draft Water Use Agreements with Ute Water and Garfield County are attached as Exhibits B and C, respectively. Both Ute Water and Garfield County are currently reviewing these drafts. If the Board directs staff to move forward with executing these Agreements at the second meeting of this two-meeting process, staff will seek to implement the first annual lease this year if Ute Water and/or Garfield County determine that Leased Water is available. No minimum amount of Leased Water is guaranteed under the Agreements and it is at the discretion of Ute Water and Garfield County as to whether Leased Water would be made available in any given year.

Items that both Water Use Agreements would address include: 1) the amount of water to be leased; 2) the timing and rate of releases; 3) payment procedures for the leased water; 4) approval of annual leases by Reclamation; 5) coordination on releases with outside entities such as Colorado Parks and Wildlife (“CPW”) and USFWS; and 6) other provisions deemed necessary by the parties. Because the use of Leased Water under the proposed Agreements is authorized



by the Ruedi Reservoir decrees and the Repayment Contracts with Reclamation, no water court approval is necessary.

### Use of the Leased Water

The CWCB will use the Leased Water to supplement the existing ISF water rights in the 15-Mile Reach to preserve the natural environment, and also to improve the natural environment by providing additional flows to help meet, or reduce shortfalls to, USFWS flow recommendations benefitting the threatened and endangered fish habitat. Flow recommendations for the August - October time period in the 15-Mile Reach vary depending on hydrologic conditions but baseflow targets range between 810 and 1,630 cfs. These targets are not consistently met and therefore the CWCB's use of the Leased Water above the decreed ISF rates to help meet the USFWS flow recommendations will help to improve the natural environment to a reasonable degree. The CWCB, USFWS and Reclamation will coordinate on the timing and amount of releases.

Under the proposed Agreement with Ute Water, and subject to their approval, any remaining Leased Water that is unused in the 15-Mile Reach may be released in December of that year for winter ISF use on the Fryingpan River. For example, if a lease has already implemented and unseasonable wet weather later in the season results in USFS target flows being met without the need for additional releases, the remaining Leased Water could be released for the winter ISF use. While the primary use of the Leased Water is for the 15-Mile Reach, the ability to release any remaining water in December will ensure that all of the Leased Water that is paid for is put to beneficial use. This provision is not included in the draft Agreement with Garfield County as the relatively small volume of Leased Water is unlikely to go unused.

The released water will be available to pass through both the Ruedi Reservoir hydropower plant and the Orchard Mesa Irrigation District Vinelands hydropower plant on its way to the 15-Mile reach, potentially providing additional local benefits. The Water Division 5 Engineer has confirmed that the release and delivery of the Ruedi Water to the 15-Mile Reach, pursuant to these Agreements, is administrable.

### Additional Factors for Board Evaluation

- Because these will be releases of water stored in priority and does not involve a change of water right, the Board does not need to consider historical use or return flows.
- Although there are many other water rights located on the Colorado River, they will not be affected by releases of water previously stored in priority for delivery to the 15-Mile Reach.
- No injury to existing water rights is anticipated. For leases implemented under these Agreements, water previously stored in priority under the Ruedi Reservoir water rights would be released during times of low flow in spring or summer and delivered to the 15-Mile Reach.



- When water is available for lease under these Agreements for ISF use of the 15-Mile Reach, it can be used to supplement the Board's decreed ISF water rights and may be combined, or "stacked", with the existing ISF water right to achieve a greater level of protection for the natural environment and help meet the USFWS flow targets for the listed species.
- Leases implemented under the proposed Agreements will not negatively affect any interstate compact.
- Leases implemented under the proposed Agreements will promote maximum utilization of waters of the State by being beneficially used in the 15-Mile Reach for ISF use, being available for hydropower use, and being available for use downstream of the 15-Mile Reach.

### **Cost to Complete Transactions**

For the previous leases executed between 2020 and 2022, Ute Water offered the Leased Water to CWCB for \$20 per acre-foot. In 2022, Garfield County offered its Leased Water for \$49.50 per acre-foot. The difference in price between leases is due to the different financial circumstances associated with their respective Repayment Contracts. Under the proposed Agreements, Ute Water and Garfield County will annually determine the price per acre-foot for Leased Water.

It is anticipated that CWCB would pay for Leased Water through the Species Conservation Trust Fund ("SCTF"). SCTF funding is authorized for acquisitions of water for ISF use to preserve and improve the natural environment of species that are listed as threatened or endangered under state or federal law, are candidate species for listing, or likely to become candidate species. SCTF funding is available for FY 2023-24 and it is expected that a 2023 SCTF Projects Bill will specifically designate funding for the acquisition of water in support of the 15-Mile Reach. In order to implement any annual lease under the Agreements, Staff will present an annual funding request to the Board at a regularly scheduled Board meeting.

### **Stakeholder Outreach**

Staff will provide information on lease implementation to local stakeholders at the annual Ruedi Reservoir operations meeting that is convened by Reclamation in August of each year. In previous years, stakeholders have expressed concerns that increased flow rates on the Fryingpan River due to releases may negatively affect recreational fishing. In the past, CWCB has coordinated with Reclamation, CPW and USFWS to ensure that releases from Ruedi Reservoir do not exceed 300 cfs and do not cause flows in the Fryingpan River to exceed 350 cfs so that recreational fishing opportunities are not limited. Both of the proposed Agreement contain language ensuring these flow rates are not exceeded under future lease implementations.



### The Board's Water Acquisition Procedures

ISF Rule 6. governs the Board's procedures for acquiring water for ISF use. Section 37-92-102(3), C.R.S. provides 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 and improve the natural environment. ISF Rule 6. requires a minimum of two Board meetings to allow for public input prior to taking action on 1) The proposed Water Use Agreement with Ute Water, and 2) the proposed Water Use Agreement with Garfield County. The Board's initial consideration of these proposals at this March 2023 meeting initiates the 120-day period. Final action on the proposals could occur at the May 2023 Board meeting. ISF Rule 6m.(4) provides that any person may request the Board to hold a hearing on the proposed acquisitions, and that such request must be filed within twenty days of this March 2023 meeting.

As required by statute, CWCB staff have requested recommendations from CPW, the U.S. Department of Agriculture (Forest Service), and the U.S Department of Interior (BLM). CPW's recommendation letter will be provided prior to the second board meeting. Pursuant to ISF Rule 6m.(1), staff have provided notice of the proposed acquisition to all persons on the appropriate ISF and Substitute Water Supply Plan Notification Lists for Water Division 5.

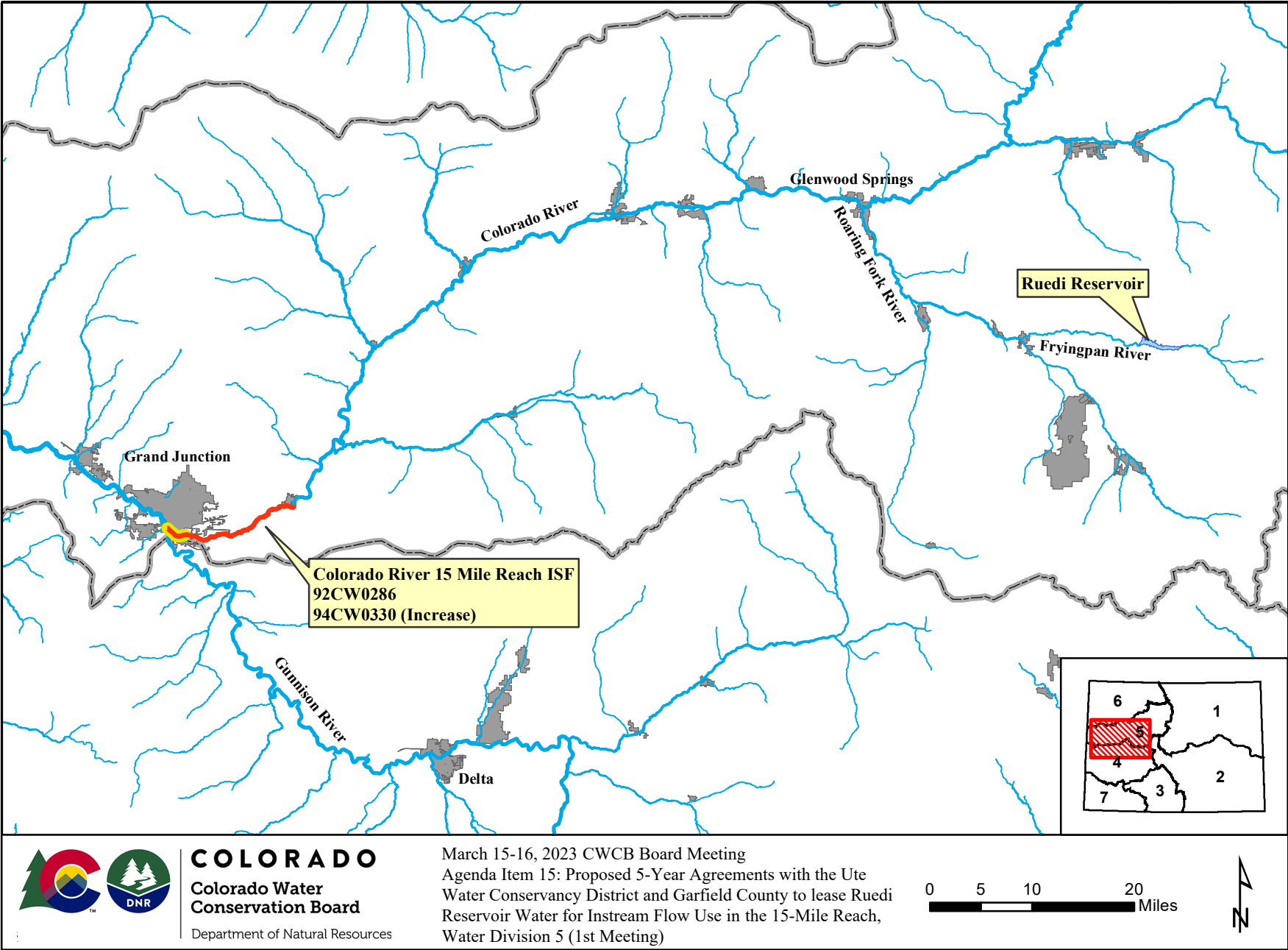
#### Attachments

Exhibit A - Location Map

Exhibit B - Draft CWCB / Ute Water Agreement

Exhibit C - Draft CWCB / Garfield County Agreement







## DRAFT

**WATER USE AGREEMENT**

This Water Use Agreement ("Agreement") is entered into by and between the Ute Water Conservancy ("District") and the Colorado Water Conservation Board, an agency of the State of Colorado ("CWCB"), Individually, "Party"; together, "Parties").

**RECITALS**

- A. The CWCB is an agency of the State of Colorado whose mission is to conserve, develop, protect, and manage Colorado's water for present and future generations and pursuant to C.R.S. § 37-92-102(3) the CWCB may acquire water by contractual agreement for the purpose of preserving or improving the natural environment to a reasonable degree ("ISF Lease Program").
- B. The District is a public agency whose mission is provide domestic water service within the Grand Valley in Mesa County, Colorado. The District has a perpetual contractual interest in 12,000 acre-feet of water stored in Ruedi Reservoir ("Ruedi Water") pursuant to the District's Repayment Contract with the United States of America Department of Interior Bureau of Reclamation ("Reclamation (attached hereto as Exhibit A).
- C. The uses of Ruedi Water are defined under the District's Repayment Contract as "use of water by municipalities, industrial users, commercial recreation entities, piscatorial users including delivery of water to supplement streamflow, and other water user entities not engaged in commercial agricultural production".
- D. The CWCB holds appropriated instream flow water rights on the Colorado River decreed in Case Nos. 92CW286 and 94CW330 ("Colorado River ISF Decrees, attached hereto as Exhibit B) to preserve the natural environment to a reasonable degree by protecting flow rates up to a cumulative total of 881 cfs within the 15-Mile Reach extending from the tailrace of the Grand Valley pumping plant to the confluence with the Gunnison River ("Colorado River ISF Reach").
- E. The District purchased Ruedi Water to use as an augmentation source and as an additional supply to back up its primary Plateau Creek water sources. To the extent that the Ruedi Water is not immediately needed for these purposes, The District may elect to lease its excess Ruedi Water on a short-term annual basis to the CWCB for use in the Colorado River ISF Reach ("Annual ISF Lease"), subject to the following Agreement and subject to the terms of the District's Repayment Contract.

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, CWCB and District agree as follows:

**AGREEMENT**

- 1. **Incorporation.** The Parties hereby incorporate by this reference the recitals set forth above.
- 2. **Term.**
  - 2.1 **Effective Date.** This Agreement shall become effective on the date in which the Agreement is signed by the CWCB and District.
  - 2.2 **Expiration Date.** Unless otherwise terminated pursuant to the terms set forth herein, this Agreement shall automatically expire five (5) years after the Effective Date.



- 2.3 Renewability. The Parties may renew this Agreement to implement an additional five (5) Annual ISF Leases upon written agreement of the parties and subject to CWCB and District approval.

### 3. Source and Use of Water

- 3.1 Source. The source of water to be used in an Annual ISF Lease shall be Ruedi Water stored and released from Ruedi Reservoir subject to the terms of the District's Repayment Contract.
- 3.2 Use. Ruedi Water shall be used to preserve the natural environment to a reasonable degree in the 15-Mile Reach of the Colorado River under its Colorado River ISF Decrees, and to improve the natural environment to a reasonable degree by providing water to help meet the USFWS's flow recommendations to support the habitat of four endangered fish species ("Instream Flow Uses").
- 3.3 Hydropower Use. The Parties agree that Leased Water released from Ruedi Reservoir pursuant to this Agreement may be diverted from the Colorado River at the Grand Valley Project Diversion Dam (also known as the Roller Dam), transported in Grand Valley Project facilities to and run through the Grand Valley Power Plant, owned by Reclamation and operated by the Grand Valley Water Users Association ("GVWUA") and the Orchard Mesa Irrigation District ("OMID") to produce hydroelectric power, and discharged through the tailrace of the Grand Valley Power Plant to the Colorado River immediately below the Grand Valley Irrigation Company diversion dam. The District shall be entitled to make appropriate arrangements and enter into contracts with Reclamation, GVWUA and/or OMID for such diversion, delivery and use of the Leased Water at the Grand Valley Power Plant. The District agrees that any of the Leased Water that is run through the Grand Valley Power Plant shall not be checked back up the Colorado River using the Orchard Mesa Check structure, but shall flow through the Grand Valley Power Plant tailrace directly to the Colorado River near the upstream terminus of the 15-Mile Reach after it is used to produce hydroelectric power.
- 3.4 Winter Fryingpan River Use. Subject to annual written approval from the District, excess Ruedi Water made available for an Annual ISF Lease but not needed to meet Instream Flow Uses on the 15-Mile Reach may be released during the month of December to mitigate the effects of Anchor Ice formation on the Fryingpan River. No water may be released for winter anchor ice mitigation on the Fryingpan River after December 31.
- 3.5 Volume. The amount of Ruedi Water available subject to this Agreement shall not exceed 12,000 acre-feet annually ("Contracted Water") with no minimum amount guaranteed for any individual Annual ISF Lease.

### 4. Operation of Annual ISF Lease

- 4.1 Decision to implement ISF Lease. No later than July 31 of each year, CWCB and the District shall meet and determine whether Ruedi Water will be available and in what amount. It shall be within the District's sole discretion as to the determination of whether Ruedi Water will be available and in what amount. No minimum amount of Ruedi Water is guaranteed in a given year. The decision to execute an Annual ISF Lease in a given year shall be made mutually between CWCB and the District.
- 4.2 Delivery. CWCB shall submit a delivery schedule to the District and the Bureau of Reclamation prior to the operation of an annual ISF lease. The CWCB shall be responsible for taking whatever actions it deems necessary to protect the Leased Water that is released from Ruedi Reservoir from diversion by third parties between the outlet works of Ruedi

Reservoir and the 15-Mile Reach, subject to the provisions of Section 3.3 above. The District shall have no obligation to protect the released Contracted Water from diversion by third parties, nor shall it be responsible for the control, carriage, use, handling, measurement or distribution of the Leased Water that is released from Ruedi Reservoir under this Agreement.

- 4.3 Measurement. Any Contracted Water shall be measured at the point at which it is released from Ruedi Reservoir, and CWCB shall be responsible for any transit losses between Ruedi Reservoir to and through the 15-Mile Reach.
- 4.4 Exclusivity. The CWCB shall have the exclusive right to use the Contracted Water for instream flow use to preserve and improve the natural environment to a reasonable degree, subject to Sections 3.2 and 3.3 above.
- 4.5 Coordination. The CWCB will coordinate with USFWS and Reclamation on the releases and delivery of any Contracted Water at the weekly Green Mountain Historic Users Pool phone calls. The CWCB is responsible for coordinating with USFWS on requesting releases of any Contracted Water from Ruedi Reservoir, but the CWCB will notify the District of the timing and amounts of water called for by the CWCB (in advance if possible) pursuant to this Agreement.
- 4.6 Release Rates. The CWCB will coordinate with Reclamation to ensure that releases out of Ruedi Reservoir will not exceed 300 cfs and will not cause flows in the Fryingpan River below Ruedi Reservoir to exceed 350 cfs.

## 5. **Approvals and Accounting**

- 5.1 Reclamation Approval. Any annual lease executed under this Agreement is subject to Reclamation's written approval. The CWCB and the District shall coordinate on obtaining any necessary approvals required to implement an annual lease under this Agreement, including approval by Reclamation. No annual lease may be implemented under this Agreement unless and until this Agreement is approved by Reclamation. If Reclamation does not approve this Agreement, it shall automatically terminate.
- 5.2 Division Engineer Confirmation. The CWCB must obtain annual approval from the Water Division 5 Engineer that any lease set forth in this Agreement is administrable.
- 5.3 Accounting. The Parties agree to communicate, coordinate and cooperate, if needed, on any required accounting as set forth by the Colorado Division of Water Resources or Reclamation.

## 6. **Price and Payment Procedure**

- 6.1 The District shall set the price per acre-foot of Ruedi Water annually. The total cost of an Annual ISF Lease shall be the amount of Ruedi Water to be leased, in acre-feet, multiplied by the price per acre-foot ("Lease Amount"). In order to implement an ISF Lease, CWCB must determine that adequate funding is appropriated and available.
- 6.2 If the District and CWCB mutually agree to implement an Annual ISF Lease in a given year, and the CWCB has determined that adequate funding is appropriated and available, the CWCB will issue a Purchase Order for the Lease Amount.
- 6.4 Once a Purchase Order is issued, the District will invoice the CWCB for the Lease Amount. Within thirty (30) days, the CWCB shall remit payment for the full amount invoiced by the District.
- 6.5 If the District determines that additional excess Ruedi Water is available at any time after an initial Lease Amount is determined, the CWCB may issue an additional purchase orders and

the District may submit an additional invoices for the additional Lease Amount as described in sections 6.1 – 6.4 above.

7. **Termination**

- 7.1 This Agreement may be terminated upon mutual agreement of the Parties or as described herein.
- 7.2 **Material Breach**. Either Party may terminate this Agreement for a material breach of the terms of this Agreement by the other Party; provided that the terminating Party has first given at least sixty (60) days prior written notice specifying in detail such alleged material breach and giving the other Party the right within such sixty (60) day period to cure and remedy such alleged material breach. Breach of any annual lease under this Agreement is not a breach of this Agreement.
- 7.3 **Ability to Perform Impaired**. Either Party may terminate this Agreement if its legal ability to deliver Ruedi Water is materially impaired or is eliminated because of the termination or adverse modification of the Repayment Contract, permits, decrees, or other authorizations or legal or administrative findings that are necessary to deliver Ruedi Water; provided that the terminating Party has first given at least sixty (60) days prior written notice to the other Party specifying the issue and steps taken to resolve the issue.
- 7.4 **Notice of Breach**. Prior to commencing any action for enforcement of this Agreement, the Party seeking enforcement shall give the other Party no less than sixty (60) days prior written notice specifying in detail the basis for the enforcement action and the desired outcome that would resolve the perceived need for enforcement.

8. **Remedies**.

- 8.1 **Available Remedies**. Remedies under this Agreement are limited to remedies available under Colorado law.
- 8.2 **Costs and Fees**. In the event of a dispute under this Agreement, each Party shall bear its own costs and fees, including attorney's fees.

9. **Force Majeure**. In the event either Party is unable to perform its obligations under the terms of this Agreement because of acts of God; natural disasters; epidemics; actions or omissions by governmental authorities; unavailability of supplies or equipment critical to perform; major equipment or facility breakdown; changes in Colorado or federal law, including, without limitation, changes in any permit; or other causes reasonably beyond that Party's control, such Party shall not be liable to the other Party for any damages resulting from such failure to perform or otherwise from such causes.

10. **Notices**. Any notice required or permitted to be given by a Party under or in connection with this Agreement shall be in writing and shall be deemed duly given when personally delivered or sent by: (a) registered or certified mail, return receipt requested, postage prepaid, (b) expedited courier service, or (c) email with confirmation of receipt, to the following:

If to CWCB:	Colorado Water Conservation Board Attention: Chief, Stream and Lake Protection Section 1313 Sherman Street, Room 718
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Denver, CO 80203  
Email: dnr\_cwcbisf@state.co.us

*With a copy to:* CWCB ISF Program  
Attention: Pete Conovitz  
1313 Sherman St., Rm.718  
Denver, CO 80203  
Email: pete.conovitz@state.co.us

If to District: Ute Water Conservancy District  
Attention:  
2190 H ¼ Road  
Grand Junction, CO 81505  
Email:

11. **Miscellaneous.**

- 11.1 **No Agency.** Nothing in this Agreement will be construed as creating any agency, partnership, joint venture or other form of joint enterprise between the Parties. Notwithstanding the foregoing, the CWCB or District may elect to designate an agent to undertake specific responsibilities under this Agreement. Should the CWCB or District elect to do so, it shall provide written notice to the other party of such designation including the identity of such agent; contact information for such agent, including a principle point of contact; and clearly defined description(s) of the responsibilities such agent shall undertake on behalf of the CWCB or District.
- 11.2 **Heirs and Assigns.** This Agreement shall inure to and be binding on the heirs, executors, administrators, successors, and permitted assigns of the Parties.
- 11.3 **Choice of Law.** This Agreement shall be construed in accordance with the laws of the State of Colorado, as amended, without reference to conflicts of laws.
- 11.4 **No Waiver of Immunities.** No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq.
- 11.5 **No Waiver.** No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other of the provisions of this Agreement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default or breach hereunder be deemed a waiver of any subsequent default or breach hereunder.
- 11.6 **Assignment.** This Agreement may be assigned by either Party upon the prior written consent of the other Party.
- 11.7 **Amendment.** No amendment, modification, or novation of this Agreement or its provisions and implementation shall be effective unless subsequently documented in writing that is approved and executed by both Parties with the same formality as they have approved and executed the original Agreement.
- 11.8 **Severability.** If any provision of this Agreement is held illegal or unenforceable in a judicial proceeding, such provision shall be severed and shall be inoperative, and the remainder of this Agreement shall remain operative and binding on the Parties.
- 11.9 **Merger.** This Agreement constitutes the entire Agreement between the Parties and sets forth the rights, duties, and obligations of each to the other as of the Effective Date. Any

prior Agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect.

- 11.10 No Third-Party Beneficiaries. This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be strictly reserved to the Parties.
- 11.11 Headings. The headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.
- 11.12 Non-Discrimination. The Parties will fulfill their obligations under this Agreement without discriminating, harassing, or retaliating on the basis of race, color, national origin, ancestry, sex, age, pregnancy status, religion, creed, disability sexual orientation, genetic information, spousal or civil union status, veteran status, or any other status projected by applicable law.
- 11.13 Authority. Each Party represents that it has obtained all necessary approvals, consents, and authorizations to enter into this Agreement and to perform its duties under this Agreement; the person executing this Agreement on its behalf has the authority to do so; upon execution and delivery of this Agreement by the Parties, it is a valid and binding Agreement, enforceable in accordance with its terms; and the execution, delivery, and performance of this Agreement does not violate any bylaw, charter, regulation, law, or any other governing authority of that Party.

**[SIGNATURES TO FOLLOW]**

IN WITNESS WHEREOF, CWCB and District execute this Agreement on the dates set forth below.

**COLORADO WATER CONSERVATION BOARD**, an agency of the State of Colorado:

\_\_\_\_\_  
Name: Rebecca Mitchell, Director

Date: \_\_\_\_\_

**UTE WATER CONSERVANCY DISTRICT**

\_\_\_\_\_  
Name:

Date: \_\_\_\_\_

**LIST OF EXHIBITS**

Exhibit A. Repayment Contract

Exhibit B. Colorado River ISF Decrees

## DRAFT

**WATER USE AGREEMENT**

This Water Use Agreement ("Agreement") is entered into by and between the Board of County Commissioners, Garfield County, Colorado ("County"), and the Colorado Water Conservation Board, an agency of the State of Colorado ("CWCB"), Individually, "Party"; together, "Parties").

**RECITALS**

- A. The CWCB is an agency of the State of Colorado whose mission is to conserve, develop, protect, and manage Colorado's water for present and future generations;
- B. Pursuant to C.R.S. § 37-92-102(3) the CWCB may acquire water by contractual agreement for the purpose of preserving or improving the natural environment to a reasonable degree ("Instream Flow Use").
- C. The County has a perpetual contractual interest in 400 acre-feet of water stored in Ruedi Reservoir ("Ruedi Water") pursuant to the County's Repayment Contract with the United States of America Department of Interior Bureau of Reclamation ("Reclamation"), attached as Exhibit A.
- D. The CWCB holds appropriated instream flow water rights on the Colorado River decreed in Case Nos. 92CW286 and 94CW330 to preserve the natural environment to a reasonable degree within the 15-Mile Reach extending from the tailrace of the Grand Valley pumping plant to the confluence with the Gunnison River ("15-Mile Reach").
- E. The County may desire to lease Ruedi Water to the CWCB on an annual basis for use in the 15-Mile Reach to supplement CWCB's existing decreed instream flow water rights and to provide water to help meet the U.S. Fish and Wildlife Service's flow recommendations to support the habitat of threatened and endangered fish species ("Annual ISF Lease") subject to the terms of the following Agreement.

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 and County agree as follows:

**AGREEMENT**

- 1. **Incorporation.** The Parties hereby incorporate by this reference the recitals set forth above.
- 2. **Term.**
  - 2.1 **Effective Date.** This Agreement shall become effective on the date in which the Agreement is signed by the CWCB and the County.
  - 2.2 **Expiration Date.** Unless otherwise terminated pursuant to the terms set forth herein, this Agreement shall automatically expire five (5) years after the Effective Date.
  - 2.3 **Renewability.** The Parties may renew this Agreement for an additional five (5) years upon written agreement of the parties and subject CWCB and County approval.
- 3. **Source and Use of Water**
  - 3.1 **Source.** The source of water to be used in an Annual ISF Lease shall be Ruedi Water stored and released from Ruedi Reservoir pursuant to County's Repayment Contract with Reclamation.



- 3.2 Use. Ruedi Water shall be used for instream flow purposes to preserve and improve the natural environment to a reasonable degree within the 15-Mile Reach of the Colorado River.
  - 3.3 Hydropower Use. Ruedi Water may be diverted from the Colorado River at the Grand Valley Project Diversion Dam (also known as the Roller Dam), transported in Grand Valley Project facilities to and run through the Grand Valley Power Plant, owned by Reclamation and operated by the Grand Valley Water Users Association ("GVWUA") and the Orchard Mesa Irrigation District ("OMID") to produce hydroelectric power, and discharged through the tailrace of the Grand Valley Power Plant to the Colorado River immediately below the Grand Valley Irrigation Company diversion dam. Ruedi Water that is run through the Grand Valley Power Plant shall not be checked back up the Colorado River using the Orchard Mesa Check structure, but shall flow through the Grand Valley Power Plant tailrace directly to the Colorado River near the upstream terminus of the 15-Mile Reach after it is used to produce hydroelectric power.
  - 3.4 Rates of Flow for ISF Use. Releases of Ruedi Water may be used to preserve and improve the natural environment within the 15-Mile Reach up to the target flow rates set by the U.S. Fish and Wildlife Service as part of the Upper Colorado Endangered Fish Recovery Program. Releases made to the 15-Mile Reach shall not cause the overall release from Ruedi Reservoir to exceed 300 cfs or cause the flow rate in the Fryingpan River below Ruedi Reservoir to exceed 350 cfs.
  - 3.5 Volume. The amount of Ruedi Water available for an Annual ISF Lease subject to this Agreement shall not exceed 400 acre-feet annually.
4. **Operation of ISF Lease**
    - 4.1 Decision to implement ISF Lease. No later than May 1 of each year, CWCB and the County shall meet and determine whether Ruedi Water will be available and in what amount. It shall be within the County's sole discretion as to the determination of whether Ruedi Water will be available and in what amount. No minimum amount of Ruedi Water is guaranteed in a given year. The decision to implement an Annual ISF Lease in a given year shall be made mutually between CWCB and the County.
    - 4.2 Delivery. The CWCB shall submit a delivery schedule to the County and Reclamation prior to the operation of an annual ISF lease. The County shall be responsible for arranging the delivery of Ruedi Water at the outlet works of Ruedi Reservoir into the Fryingpan River consistent with the CWCB delivery schedule, provided that the releases can be made within the operational limitations of Ruedi Reservoir as determined by Reclamation.
    - 4.3 Operations and Coordination. The CWCB shall coordinate with Colorado Parks and Wildlife, Reclamation, and the U.S. Fish and Wildlife Service on the timing and rate of releases of Ruedi Water. CWCB will notify the County of the timing and amounts of water called for by the CWCB (In advance if possible) pursuant to this Agreement.
    - 4.4 Exclusivity. The CWCB shall have the exclusive right to use Ruedi Water for instream flow use to preserve and improve the natural environment to a reasonable degree, provided that the Ruedi Water will be used consistent with the County's Repayment Contract and in accordance with the Fryingpan-Arkansas Act and Operating Principles. Once an Annual ISF lease is implemented subject to Section 6.3, below, the CWCB's exclusive right to use the Ruedi Water for Instream Flow Use shall be in effect through December 31 of that year.
    - 4.5 Administration. The CWCB is responsible for taking whatever actions it deems necessary to protect the Ruedi Water that is released from Ruedi Reservoir from diversion by third parties between the outlet works of Ruedi Reservoir and the 15-Mile Reach, subject to the provisions of Section 3, above. The County shall have no obligation to protect the released

water from diversion by third parties, nor shall it be responsible for the control, carriage, use, handling, measurement or distribution of the Ruedi Water that is released from Ruedi Reservoir under this Agreement.

**5. Approvals and Accounting**

- 5.1 Reclamation Approval. An Annual ISF lease is subject to Reclamation's written approval. The CWCB and County shall coordinate on obtaining any necessary approvals of an Annual ISF Lease, including approval by Reclamation. No Ruedi Water shall be released from Ruedi Reservoir under this Agreement unless and until an Annual ISF Lease is approved by Reclamation.
- 5.2 Division Engineer Confirmation. The CWCB must obtain confirmation from the Water Division 5 Engineer that an Annual ISF Lease implemented under this Agreement is administrable.
- 5.3 Accounting. The Parties agree to communicate, coordinate and cooperate, if needed, on any required accounting as set forth by the Colorado Division of Water Resources or Reclamation.

**6. Price and Payment Procedure**

- 6.1 The County shall set the price per acre-foot of Ruedi Water annually. The total cost of an Annual ISF Lease shall be the amount of Ruedi Water to be leased, in acre-feet, multiplied by the price per acre-foot ("Lease Amount"). In order to implement an ISF Lease, CWCB must determine that adequate funding is appropriated and available.
- 6.2 If the County and CWCB mutually desire to implement an Annual ISF Lease in a given year, and the CWCB has approved funding for the Annual ISF Lease at a regularly scheduled Board meeting, and the County has approved the lease amount at a regularly scheduled Board meeting, the CWCB will issue a Purchase Order for the Lease Amount.
- 6.3 Once a Purchase Order is issued, the County will invoice the CWCB for the Lease Amount. Within thirty (30) days, the CWCB shall remit payment for the full amount invoiced by the County. An Annual ISF Lease is implemented once CWCB issues a Purchase Order and is invoiced by the County for the Lease Amount.

**7. Termination**

- 7.1 This Agreement may be terminated upon mutual agreement of the Parties or as described herein.
- 7.2 Material Breach. Either Party may terminate this Agreement for a material breach of the terms of this Agreement by the other Party; provided that the terminating Party has first given at least sixty (60) days prior written notice specifying in detail such alleged material breach and giving the other Party the right within such sixty (60) day period to cure and remedy such alleged material breach. Breach of any annual lease under this Agreement is not a breach of this Agreement.
- 7.3 Ability to Perform Impaired. Either Party may terminate this Agreement if its legal ability to deliver Ruedi Water is materially impaired or is eliminated because of the termination or adverse modification of the Repayment Contract, permits, decrees, or other authorizations or legal or administrative findings that are necessary to deliver Ruedi Water; provided that the terminating Party has first given at least sixty (60) days prior written notice to the other Party specifying the issue and steps taken to resolve the issue.
- 7.4 Notice of Breach. Prior to commencing any action for enforcement of this Agreement, the Party seeking enforcement shall give the other Party no less than sixty (60) days prior

written notice specifying in detail the basis for the enforcement action and the desired outcome that would resolve the perceived need for enforcement.

8. **Remedies.**

8.1 **Available Remedies.** Remedies under this Agreement are limited to remedies available under Colorado law.

8.2 **Costs and Fees.** In the event of a dispute under this Agreement, each Party shall bear its own costs and fees, including attorney's fees.

9. **Force Majeure.** In the event either Party is unable to perform its obligations under the terms of this Agreement because of acts of God; natural disasters; epidemics; actions or omissions by governmental authorities; unavailability of supplies or equipment critical to perform; major equipment or facility breakdown; changes in Colorado or federal law, including, without limitation, changes in any permit; or other causes reasonably beyond that Party's control, such Party shall not be liable to the other Party for any damages resulting from such failure to perform or otherwise from such causes.

10. **Notices.** Any notice required or permitted to be given by a Party under or in connection with this Agreement shall be in writing and shall be deemed duly given when personally delivered or sent by: (a) registered or certified mail, return receipt requested, postage prepaid, (b) expedited courier service, or (c) email with confirmation of receipt, to the following:

If to CWCB: Colorado Water Conservation Board  
Attention: Chief, Stream and Lake Protection Section  
1313 Sherman Street, Room 718  
Denver, CO 80203  
Email: dnr\_cwcbisf@state.co.us

*With a copy to:* CWCB ISF Program  
Attention: Pete Conovitz  
1313 Sherman St., Rm.718  
Denver, CO 80203  
Email: pete.conovitz@state.co.us

If to County: Garfield County  
Attention: Fred Jarman, County Manager  
108 8<sup>th</sup> Street, Suite 101  
Glenwood Springs, CO, 81601  
Email: fjarman@garfield-county.com

11. **Miscellaneous.**

11.1 No Agency. Nothing in this Agreement will be construed as creating any agency, partnership, joint venture or other form of joint enterprise between the Parties. Notwithstanding the foregoing, the CWCB or County may elect to designate an agent to undertake specific responsibilities under this Agreement. Should the CWCB or County elect

to do so, it shall provide written notice to the other party of such designation including the identity of such agent; contact information for such agent, including a principle point of contact; and clearly defined description(s) of the responsibilities such agent shall undertake on behalf of the CWCB or County.

- 11.2 Heirs and Assigns. This Agreement shall inure to and be binding on the heirs, executors, administrators, successors, and permitted assigns of the Parties.
- 11.3 Choice of Law. This Agreement shall be construed in accordance with the laws of the State of Colorado, as amended, without reference to conflicts of laws.
- 11.4 No Waiver of Immunities. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq.
- 11.5 No Waiver. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other of the provisions of this Agreement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default or breach hereunder be deemed a waiver of any subsequent default or breach hereunder.
- 11.6 Assignment. This Agreement may be assigned by either Party upon the prior written consent of the other Party.
- 11.7 Amendment. No amendment, modification, or novation of this Agreement or its provisions and implementation shall be effective unless subsequently documented in writing that is approved and executed by both Parties with the same formality as they have approved and executed the original Agreement.
- 11.8 Severability. If any provision of this Agreement is held illegal or unenforceable in a judicial proceeding, such provision shall be severed and shall be inoperative, and the remainder of this Agreement shall remain operative and binding on the Parties.
- 11.9 Merger. This Agreement constitutes the entire Agreement between the Parties and sets forth the rights, duties, and obligations of each to the other as of the Effective Date. Any prior Agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect.
- 11.10 No Third-Party Beneficiaries. This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be strictly reserved to the Parties.
- 11.11 Headings. The headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.
- 11.12 Non-Discrimination. The Parties will fulfill their obligations under this Agreement without discriminating, harassing, or retaliating on the basis of race, color, national origin, ancestry, sex, age, pregnancy status, religion, creed, disability sexual orientation, genetic information, spousal or civil union status, veteran status, or any other status projected by applicable law.
- 11.13 Authority. Each Party represents that it has obtained all necessary approvals, consents, and authorizations to enter into this Agreement and to perform its duties under this Agreement; the person executing this Agreement on its behalf has the authority to do so; upon execution and delivery of this Agreement by the Parties, it is a valid and binding Agreement, enforceable in accordance with its terms; and the execution, delivery, and performance of this Agreement does not violate any bylaw, charter, regulation, law, or

any other governing authority of that Party.

**[SIGNATURES TO FOLLOW]**

IN WITNESS WHEREOF, CWCB and District execute this Agreement on the dates set forth below.

**COLORADO WATER CONSERVATION BOARD**, an agency of the State of Colorado:

\_\_\_\_\_  
Name: Rebecca Mitchell, Director

Date:\_\_\_\_\_

**Garfield County**, by and between the Board of County Commissioners, Garfield County, Colorado

\_\_\_\_\_  
Name: Fred Jarman, County Manager

Date:\_\_\_\_\_

**LIST OF EXHIBITS**

Exhibit A. Repayment Contract