

Attachment A2 to the Agreement Concerning Colorado River Drought Contingency Management and Operations (“Companion Agreement”)

AGREEMENT REGARDING STORAGE AT COLORADO RIVER STORAGE PROJECT ACT RESERVOIRS UNDER AN UPPER BASIN DEMAND MANAGEMENT PROGRAM

I. INTRODUCTION

The Upper Colorado River Division States of Colorado, New Mexico, Utah, and Wyoming (“Upper Division States”) through the Upper Colorado River Commission (“Commission”), and the Secretary of the Interior (“Secretary”), collectively referred to as the Parties, hereby enter into this Agreement Regarding Storage at Colorado River Storage Project Act Reservoirs Under an Upper Basin Demand Management Program (“Demand Management Storage Agreement”), this 20th day of May, 2019 to secure storage capacity at the Initial Units authorized under the Colorado River Storage Project Act (“CRSPA”) pursuant to an operational Upper Basin Demand Management Program, if finalized and approved in the future. The Secretary may delegate his or her duties under this Demand Management Storage Agreement to the Bureau of Reclamation (“Reclamation”).

A. Recitals

1. Since 2000, the Colorado River Basin has experienced drought conditions that have contributed to decreased water supplies at key Colorado River reservoirs and increased uncertainty regarding water availability to sustain existing uses throughout the Basin.
2. The Parties have worked together and with the Lower Colorado River Division States of Arizona, California and Nevada (“Lower Division States”), relevant federal agencies and interested stakeholders to identify and develop a Drought Contingency Plan that will help minimize and mitigate the risks associated with drought in the Upper Basin. This Demand Management Storage Agreement is one element of that Plan.
3. For purposes of this Demand Management Storage Agreement, the Upper Basin Drought Contingency Plan includes exploring the feasibility of developing and implementing an Upper Basin Demand Management Program.
4. The purpose of an Upper Basin Demand Management Program will be to temporarily reduce Consumptive Uses in the Upper Basin or augment supplies with Imported

Water, if needed in times of drought, to help assure continued compliance with Article III of the Colorado River Compact without impairing the right to exercise existing Upper Basin water rights in the future.

5. The Parties have learned through investigating aspects of demand management that no Upper Basin Demand Management Program is likely to conserve enough water in any single year to help assure continued compliance with the Colorado River Compact during extended drought conditions. The Parties, therefore, recognize that an Upper Basin Demand Management Program will require the ability to store conserved water over multiple years.
6. The Parties acknowledge that securing the authorization for storage capacity for an Upper Basin Demand Management Program does not certify, warrant or otherwise guarantee the development and implementation of such a Program. Nor does it predetermine the type of any Program that may be adopted in the future. However, the Parties understand that without securing the authorization for storage capacity at the CRSPA Initial Units for an Upper Basin Demand Management Program, investigation regarding the feasibility into development and implementation of such a Program is likely unwarranted.

B. Intent

Through this Demand Management Storage Agreement, the Parties intend to:

1. Secure the authorization for storage capacity at CRSPA Initial Units to preserve the Parties' ability to explore the feasibility and development of an Upper Basin Demand Management Program, and implement such a Program if it is finalized;
2. Agree upon the minimum conditions under which the authorized storage capacity will be available for an Upper Basin Demand Management Program; and
3. Promote communication, coordination and cooperation among themselves to provide additional certainty in Colorado River water management and to remove causes of future controversy.

II. AUTHORIZATION

Upon approval of this Demand Management Storage Agreement by the United States Congress and full execution by the Parties, the Secretary is authorized to make Unfilled Storage Capacity at the CRSPA Initial Units available for use by the Upper Division States, through the Commission, at no charge and in accordance with the terms of this Demand Management Storage Agreement. The Secretary shall make such storage capacity available provided that the Commission requests

use of the storage capacity for the purpose of storing water conserved as part of an Upper Basin Demand Management Program. The authorization in this Section II shall not expire, and shall survive the termination of this Demand Management Storage Agreement.

III. AGREEMENT

In consideration of the above and the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

A. Definitions

For purposes of this Demand Management Storage Agreement, the following definitions shall apply:

1. “Colorado River Basin” shall have the same meaning as defined in the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact.
2. “Colorado River System” shall have the same meaning as defined in the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact.
3. “Consumptive Use” means the depletion of water for domestic and agricultural beneficial uses as those terms are defined and referred to in the 1922 Colorado River Compact. For purposes of this definition, Consumptive Use also includes the full amount of water: (i) consumed in association with the production of electrical power other than hydropower; and (ii) diverted from the Upper Colorado River System for which there are no return flows to that system, including, for example, diversions outside the natural Colorado River watershed.
4. “CRSPA Initial Units” refers to Glen Canyon Dam, Flaming Gorge, Curecanti (the “Aspinall Unit”), and Navajo Reservoir as authorized under the 1956 Colorado River Storage Project Act.
5. “Effective Date” means the date that all of the Upper Division State Commissioners to the Upper Colorado River Commission and the Secretary sign this Demand Management Storage Agreement.
6. “Imported Water” means water introduced to the Upper Colorado River System from outside the Colorado River System for the specific purpose of augmenting the supplies available for, or storing water as part of, an Upper Basin Demand Management Program. Such Imported Water need not have been previously consumptively used in its basin of origin.

7. “Unfilled Storage Capacity” means the storage space available at a given CRSPA Initial Unit after satisfying the legal storage obligations applicable to that Unit, consistent with applicable water rights administration requirements and decrees.
8. “Upper Basin” shall refer to the Upper Colorado River Basin and have the same meaning as defined in the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact.
9. “Upper Basin Demand Management Program” refers to a program approved by the Upper Colorado River Commission and each Upper Division State, acting through its Commission representative, consistent with this Demand Management Storage Agreement to reduce Consumptive Uses or augment water supplies with Imported Water, if needed, to help assure compliance with Article III of the Colorado River Compact without impairing the right to exercise any existing Upper Basin water rights in the future.
10. “Upper Colorado River System” means the Colorado River System within the Upper Basin.
11. “Verification” means the confirmation of the actual volume of Consumptive Use that is conserved, or Imported Water that is introduced, conveyed to and stored in a CRSPA Initial Unit under an Upper Basin Demand Management Program.

B. Upper Basin Demand Management Program

The Upper Division States, through the Commission, shall have access to the Unfilled Storage Capacity authorized in Section II only upon development and approval of an Upper Basin Demand Management Program. In developing and approving such a Program, the following conditions and requirements, at a minimum, must be satisfied:

1. Feasibility: The Upper Division States, through the Commission, must investigate the feasibility of developing and implementing an Upper Basin Demand Management Program, and reach consensus on, among other things:
 - a. Verification of and accounting for the actual volume of conserved Consumptive Use;
 - b. Conveyance of the conserved Consumptive Use to appropriate destinations, and accounting for associated conveyance losses;
 - c. Providing for storage at and release from the CRSPA Initial Units of any conserved Consumptive Use;
 - d. Administration of an Upper Basin Demand Management Program;
 - e. Funding of an Upper Basin Demand Management Program; and
 - f. Compliance with federal and state laws within each Upper Division State.
2. Program Development: If the Upper Division States, through the Commission, agree that an Upper Basin Demand Management Program is feasible and pursue

development of a Program, it must include, at a minimum, the following water conservation, storage and release considerations:

- a. Water conserved shall only be recognized as part of any Upper Basin Demand Management Program if:
 - i. The source of conserved water is Upper Colorado River System water, or Imported Water;
 - ii. The water is conserved, stored and released for the specific purpose of helping the Upper Division States assure continued compliance with Article III of the Colorado River Compact;
 - iii. For Upper Colorado River System water, the water must have been beneficially and consumptively used under valid water rights prior to being conserved as part of an Upper Basin Demand Management Program;
 - iv. For Upper Colorado River System water, the water must have been physically available for diversion in the year it was conserved, and would have been beneficially and consumptively used within a state or states of the Upper Division but for the conservation for the benefit of an Upper Basin Demand Management Program; and
 - v. The conserved or Imported Water has arrived at a CRSPA Initial Unit after accounting for any conveyance and associated losses.
- b. Any conserved water or Imported Water to be stored in a CRSPA Initial Unit for the purposes of an Upper Basin Demand Management Program shall be subject to:
 - i. Assessment of its proportionate share of evaporation during storage;
 - ii. Available Unfilled Storage Capacity;
 - iii. An annual creation limitation at the CRSPA Initial Units combined, which volume shall be determined as part of the feasibility investigation;
 - iv. A maximum combined storage limitation of 500,000 acre-feet at the CRSPA Initial Units;
 - v. Reduction, in any year in which water flows over or through the spillway at Glen Canyon Dam, by the amount of that flow on an acre-foot for acre-foot basis up to the full amount of water stored under an Upper Basin Demand Management Program; and
 - vi. Annual Verification by the Upper Division States, through the Commission, and the Secretary of the volume of conserved water created, conveyed, and stored at the CRSPA Initial Units.
- c. Any conserved water stored and released from a CRSPA Initial Unit under an Upper Basin Demand Management Program shall:

- i. Be accounted for consistent with the provisions in Section III.B.2.b and this Section III.B.2.c until 2057;
 - ii. Through the year 2057, not be released or cause a different release from Lake Powell than would have otherwise occurred under the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (“2007 Interim Guidelines”) or post 2026 operational rules. This provision shall survive termination of this Demand Management Storage Agreement through 2057; and
 - iii. Be subject to release from any of the CRSPA Initial Units only at the request of the Commission to help assure continued compliance with Article III of the Colorado River Compact. This provision shall survive termination of this Demand Management Storage Agreement through 2057.
3. Upper Basin Demand Management Program Approval: The following findings, agreement, consultation, and approvals must be made before any Upper Basin Demand Management Program can be finalized and made operational in the Upper Basin:
 - a. *Commission Findings:* The Commission must make findings that demand management activities are necessary to help assure continued compliance with Article III of the Colorado River Compact;
 - b. *Agreement and Consultation:* The Upper Division States, through the Commission, and the Secretary must enter into agreement(s) on the methodology, process and documentation for Verification and accounting for the creation, conveyance, and storage of conserved water to be stored in and released from a CRSPA Initial Unit as part of an Upper Basin Demand Management Program. Before entering into such agreement(s), the Commission and Secretary must consult with the Lower Division States using the consensus-based approach as agreed to in the Agreement Concerning Colorado River Drought Contingency Management and Operations (“Companion Agreement”);
 - c. *Commission Approval:* The Commission must approve the Upper Basin Demand Management Program; and
 - d. *State Approval:* In addition to Commission approval, each Upper Division State, acting through its Commission representative, must approve the Upper Basin Demand Management Program.
4. Considerations - Post-2025: A position has not been formally expressed regarding implementation of an Upper Basin Demand Management Program after 2025. The Parties acknowledge and expect that operation and implementation of an Upper Basin Demand Management Program following the Term of this Demand Management Storage Agreement will be informed by and considered as part of the

Secretary's formal review to evaluate the effectiveness of the 2007 Interim Guidelines in consultation with the seven Colorado River Basin States, which is scheduled to begin no later than December 31, 2020. (See Section XI.G.7.D of 2007 Interim Guidelines).

The Upper Division States and the Commission also acknowledge and expect that, at a minimum, any Upper Basin Demand Management Program implemented after 2025 would include the terms for feasibility and program development set forth in Section III.B.1 and III.B.2.a of this Demand Management Storage Agreement as well as the findings and approval provisions set forth herein.

C. Term

This Demand Management Storage Agreement will remain in effect from the Effective Date through December 31, 2025 (through preparation of the 2026 Annual Operating Plan) except for those provisions that survive termination of this Demand Management Storage Agreement.

D. Additional Provisions

1. **No Waiver:** The failure of any Party to enforce a provision of this Demand Management Storage Agreement shall not be deemed to constitute a waiver of that provision.
2. **No Precedent:** Except for the Authorization provided in Section II of this Demand Management Storage Agreement, the Parties represent and agree that nothing in this Demand Management Storage Agreement establishes or acts as precedent for any future agreement or undertaking. In particular, this Demand Management Storage Agreement shall not be interpreted or construed as establishing a precedent for employing the operational tools contemplated in this Demand Management Storage Agreement. The Parties hereby affirm the entitlement and right of each State under existing law to use and develop the water of the Colorado River System. Notwithstanding anything in this Demand Management Storage Agreement to the contrary, this provision shall survive termination of this Demand Management Storage Agreement.
3. **Reservation of Rights:** Except as expressly provided herein, the Parties reserve, and nothing in this Demand Management Storage Agreement shall be deemed to diminish or waive, any and all rights, including any claims or defenses, they may have as of the date hereof or as may accrue after the term hereof, under any existing federal or state law, including without limitation the Colorado River Compact, the Boulder Canyon Project Act, the Upper Colorado River Basin Compact, the 1944 Water Treaty, the

Consolidated Decree of the Supreme Court in *Arizona v. California*, the Colorado River Storage Project Act, and the Colorado River Basin Project Act.

4. Uncontrollable Forces: No Party shall be considered to be in default in the performance of any of its obligations under this Demand Management Storage Agreement when a failure of performance shall be due to any cause beyond the control of the Party affected, including but not limited to, facilities failure, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority which by exercise of due diligence and foresight such Party could not have reasonably expected to avoid. A Party rendered unable to fulfill any of its obligations under this Demand Management Storage Agreement by reason of an Uncontrollable Force shall give prompt written notice of such Uncontrollable Force to the other Parties and shall exercise due diligence to remove such inability with all reasonable dispatch.
5. Representations and Warranties: Each Party warrants and represents to each of the other Parties, as a material inducement to enter into this Demand Management Storage Agreement, the following:
 - a. The Party has all legal power and authority to enter into this Demand Management Storage Agreement and to perform its obligations hereunder on the terms set forth in this Demand Management Storage Agreement, and the execution and delivery hereof by each Party and the performance by each Party of its obligations hereunder shall not violate or constitute an event of default under the terms or provisions of any agreement, document, or instrument to which each of the Parties is a party or by which each Party is bound.
 - b. The individual executing this Demand Management Storage Agreement on behalf of the Party has the full power and authority to bind the Party he or she represents to the terms of this Demand Management Storage Agreement.
 - c. This Demand Management Storage Agreement constitutes a valid and binding agreement of each Party, enforceable against each Party in accordance with its terms.
6. Governing Law: This Demand Management Storage Agreement shall be interpreted, governed by, and construed under applicable Federal law. To the extent permissible under the Federal Rules of Civil Procedure and other applicable Federal authority, venue for adjudication of any disputes under this Demand Management Storage Agreement shall be in an appropriate Federal court within the Upper Basin.
7. Successors and Assigns: The provisions of this Demand Management Storage Agreement shall apply to and bind the successors and assigns of the Parties, but no assignment or transfer of this Demand Management Storage Agreement or any right

or interest herein shall be valid until consented to in writing by all Parties, which consent shall not be unreasonably withheld.

8. Amendments or Modifications: Section II of this Demand Management Storage Agreement cannot be modified without a subsequent act of Congress. The remainder of this Demand Management Storage Agreement may be amended or modified, but only by the written agreement of the Parties after consultation among the Parties and the Lower Division States as set forth in Paragraph I of the Companion Agreement.
9. Drafting Considerations: Each Party and its counsel have participated fully in the drafting, review, and revision of this Demand Management Storage Agreement, each of whom is sophisticated in the matters to which this Demand Management Storage Agreement pertains, and no one Party shall be considered to have drafted this Demand Management Storage Agreement.
10. Notices: All notices and requests required or allowed under the terms of this Demand Management Storage Agreement shall be in writing and shall be sent via electronic mail and mailed first class postage paid to the following entities at the following addresses:

Bureau of Reclamation:

125 South State Street, Room 6107
Salt Lake City, UT 84138-1147
Attn: Regional Director

State of Colorado:

Colorado Commissioner to the Upper Colorado River Commission
c/o Colorado Water Conservation Board
1313 Sherman Street, Room 718
Denver, CO 80203
Attn: Director

State of New Mexico:

New Mexico Interstate Stream Commission
P.O. Box 25102
Santa Fe, NM 87504-5102
Attn: Colorado River Bureau

State of Utah:

Utah Division of Water Resources
1594 West North Temple, Suite 310

P.O. Box 146201
Salt Lake City, UT 84114-6201
Attn: Director

State of Wyoming:

Wyoming State Engineer's Office
122 West 25th Street
Herschler Building, 1st Floor East
Cheyenne, WY 82002
Attn: Wyoming State Engineer

A Party may change its contact information by giving the other Parties notice of the change in writing.

11. No-Third Party Beneficiaries: This Demand Management Storage Agreement and any agreements made or actions taken pursuant hereto are made solely for the benefit of the Parties. No Party to this Demand Management Storage Agreement intends for this Demand Management Storage Agreement to confer any benefit upon any person or entity not a signatory upon a theory of third-party beneficiary or otherwise.
12. Resolution of Claims or Controversies: The Parties recognize that judicial or administrative proceedings are not preferred alternatives to the resolution of claims or controversies concerning the Law of the River. In furtherance of this Demand Management Storage Agreement, the Parties desire to avoid judicial or administrative proceedings, and agree to pursue a consultative approach to the resolution of any claim or controversy. If any Party becomes concerned that there may be a claim or controversy under this Demand Management Storage Agreement or, specific to the Secretary, Section 601 of the Colorado River Basin Project Act of 1968 (43 U.S.C. § 1551), and all applicable rules and regulations promulgated thereunder, such Party shall notify all other Parties in writing, and shall in good faith meet to resolve such claim or controversy by mutual agreement prior to initiating any judicial or administrative proceeding. No Party shall initiate any judicial or administrative proceeding arising out of this Demand Management Storage Agreement against any other Party, and no claim hereunder shall be ripe, until such consultation has been completed. Notwithstanding any other provision of this Demand Management Storage Agreement, this Paragraph shall survive the termination or expiration of this Demand Management Storage Agreement.
13. Joint Defense Against Third-Party Claims: The Parties have certain common, closely parallel, or identical interests in supporting, preserving, and defending this Demand Management Storage Agreement. The nature of this interest and the relationship


among the Parties present common legal and factual issues and a mutuality of interests. Because of these common interests, the Parties will mutually benefit from an exchange of information relating to the support, preservation, and defense of this Demand Management Storage Agreement, as well as from the coordinated investigation and preparation for discussion of such interests. In furtherance thereof, in the event of any challenge by a third party to this Demand Management Storage Agreement, the Parties will proceed with reasonable diligence and use best efforts to support and defend the Demand Management Storage Agreement in any lawsuit or administrative proceeding challenging the legality, validity or enforceability of any term of this Demand Management Storage Agreement, and will, to the extent appropriate, enter into joint defense or common interest agreements. Each Party will bear its own costs of participating in the defense of this Demand Management Storage Agreement under this Paragraph.

14. Counterparts: This Demand Management Storage Agreement may be executed in counterparts, each of which shall be an original and all of which, together, shall constitute only one Demand Management Storage Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Demand Management Storage Agreement on the day and year written above.

[SIGNATURES START NEXT PAGE]

THE UNITED STATES OF AMERICA

By: 
Brenda W. Burman
Commissioner
Bureau of Reclamation

By: 
Dr. Timothy R. Petty
Assistant Secretary
U.S. Department of the Interior

Date: May 20, 2019

Date: May 20, 2019

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THE STATE OF COLORADO

By: 

L. James Eklund
Colorado Commissioner, Upper
Colorado River Commission
Governor's Representative



THE STATE OF NEW MEXICO

By: 
John R. D'Antonio, Jr.
New Mexico State Engineer
Secretary, New Mexico Interstate
Stream Commission

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THE STATE OF UTAH

By: 

Eric L. Millis
Director, Utah Division of Water
Resources
Interstate Stream Commissioner

THE STATE OF WYOMING

By: 
Patrick T. Tyrrell
State of Wyoming Commissioner,
Upper Colorado River Commission

