1995 Interim Agreement

CONTRACT NO. 95-07-40-R1760

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Wayne N. Aspinall Unit
Colorado River Storage Project, Colorado

MEMORANDUM OF AGREEMENT
AMONG THE BUREAU OF RECLAMATION,
UNITED STATES FISH AND WILDLIFE SERVICE, AND
THE COLORADO WATER CONSERVATION BOARD
FOR FURNISHING WATER FROM THE WAYNE N. ASPINALL UNIT
FOR THE BENEFIT OF ENDANGERED FISHES

THIS MEMORANDUM OF AGREEMENT (MOA), is made this 16th day of August, 1995, among the **BUREAU OF RECLAMATION** (Reclamation), the **UNITED STATES FISH AND WILDLIFE SERVICE** (Service), and the **COLORADO WATER CONSERVATION BOARD** (Board), an agency of the State of Colorado. As authority to enter into this MOA, Reclamation and the Service rely on the provisions of The Reclamation Act (32 Stat. 388) as amended; the Colorado River Storage Project Act (CRSPA) (70 Stat. 105); the Colorado River Basin Project Act (CRBPA) (82 Stat. 885; 43 U.S.C. 1501, et seq.) as amended; section 7 of the Federal Water Project Recreation Act (70 Stat. 216); the Endangered Species Act (16 U.S.C. 1531, et seq.); and the Fish and Wildlife Coordination Act (16 U.S.C. 1331, et seq.);

EXPLANATORY RECITALS

(a) WHEREAS, the Secretary of the Interior joined the Governors of Colorado, Wyoming, Utah, and the Administrator of the Western Area Power Administration, in executing a cooperative agreement on January 22, 1988, to implement the Recovery Implementation

Program for the Endangered Fish Species in the Upper Colorado River Basin (Recovery Program) which provides the framework upon which the recovery of four species of endangered fish is to be based. The Recovery Program outlines concrete steps that are to be implemented in a manner that does not disrupt the state water rights systems, interstate compacts, and court decrees that allocate rights to use Colorado River water among the states; and,

(b) WHEREAS, the ultimate goal of the Recovery Program is to recover and delist the four endangered species while allowing water development to proceed, consistent with state water law, within the Upper Colorado River Basin; and,

(c) WHEREAS, elements of the Recovery Program are (1) habitat management through the provision of instream flows; (2) nonflow habitat development and maintenance; (3) native fish stocking; (4) management of nonnative species and sportfishing; and (5) research, data management, and monitoring. The Recovery Program depends on the effective implementation of all of these elements and on their successful coordination; and,

(d) WHEREAS, information will be gained from the study and evaluation of the effects of protected releases on the occupied habitat of endangered fishes in the Gunnison River below the Aspinall Unit which can be used to identify long-term instream flow needs under the Recovery Program and these efforts will contribute toward sufficient progress and the recovery of the fish under the Recovery Program; and,

(e) WHEREAS, Reclamation will operate and maintain the Aspinall Unit consistent with its statutory responsibilities and with any existing or future contracts; and,

(f) WHEREAS, the Service is responsible for administering the Endangered Species Act; and,

(g) WHEREAS, the State of Colorado administers water rights, including water rights for instream flows; encourages and protects development of water resources allocated and apportioned to Colorado in perpetuity by interstate compacts; and protects and manages its fish and wildlife resources; and,

(h) WHEREAS, the Board is authorized by section 37-92-102(3), Colorado Revised Statutes, to acquire by lease from any person, including any governmental entity, such water or interests in water as the Board determines may be required for minimum streamflows to preserve the natural environment to a reasonable degree, and has agreed to utilize such authority as part of its participation in the Recovery Program, including specifically the authorities identified in the agreement concerning the enforcement and protection of water and water rights dated September 21, 1993, and the Board's, "Statement of Policy and Procedure Regarding the Appropriation of Instream Flows for the Recovery of Endangered Fishes of the Upper Colorado River Basin" adopted March 9, 1994; and,

(i) WHEREAS, pursuant to sections 37-92-301 and 501, Colorado Revised Statutes, the State Engineer and the division engineers are responsible for the administration and distribution of the waters of the State and pursuant to section 37-92-102(3), the Board may call upon the State Engineer and Division Engineer for Water Division 4 to administer water or interests in water held by the Board for minimum stream flows to preserve the natural environment to a reasonable degree within the Gunnison River; and,

(j) WHEREAS, the Board has determined that leasing water from the Aspinall Unit for minimum streamflows in the Gunnison River from the Redlands Diversion Dam to the confluence with the Colorado River will contribute to recovering the endangered fish species and

to preserving the natural environment to a reasonable degree and is consistent with the Board's authorities under Section 37-92-102(3), Colorado Revised Statutes; and,

(k) WHEREAS, pursuant to the McCarran Amendment (43 U.S.C. 666), the United States, as assignee of the water rights for the Aspinall Unit acquired by the Colorado River Water Conservation District under state law, is "deemed to have waived any right to plead that State laws are not applicable or that the United States is not amenable thereto by virtue of its sovereignty," and is "subject to the judgments, orders, and decrees of the court having jurisdiction." The Aspinall Unit water rights governing the administration thereof were adjudicated in the following cases by State courts having jurisdiction over such matters in the Gunnison River Basin:

C.A. 5590 District Court/County of Gunnison

C.A. 5782 District Court/County of Gunnison

C.A. 6981 District Court/County of Montrose

C.A. C-10045 District Court/County of Montrose

The foregoing decrees are for irrigation, domestic, municipal, industrial. power generation, stock watering, flood control, piscatorial, wildlife protection and preservation, and recreation uses, and to release water insofar as available into the Gunnison River in sufficient quantity, when commingled with the natural accretions to the river, to satisfy prior decreed priorities from the Gunnison River below the Aspinall Unit; and,

(l) WHEREAS, the parties hereto desire to enter into a water delivery agreement to protect Aspinall Unit releases, on an interim basis, during the months of July, August, September and October, as necessary to provide a minimum flow in the Gunnison River for the

study of endangered fishes and their needs and for fish passage purposes from just above the Redlands Diversion Dam downstream to the confluence of the Colorado and Gunnison Rivers. These releases shall completely remove the need for administrative calls by downstream Gunnison River mainstem users senior in priority to the Aspinall Unit, unless such releases would cause Blue Mesa Reservoir to drop below 400,000 acre-feet of total storage at the end of the current calendar year; and,

(m) WHEREAS, Reclamation, the Service, the Board, and the Recovery Program will benefit from the use of releases of water from the Aspinall Unit for the purposes set forth above.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants hereinafter set forth, the parties hereto agree as follows:

DEFINITIONS

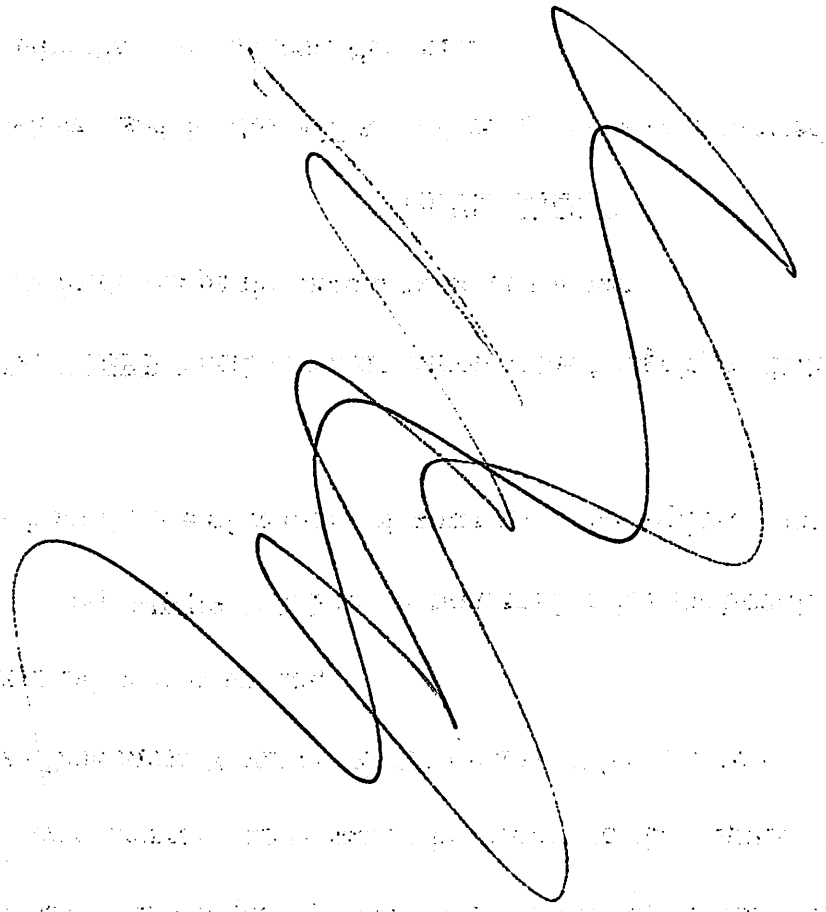
1. Where used in this MOA, unless specifically expressed otherwise or obviously inconsistent with the intent thereof, the term:

a. "Secretary" or "Contracting Officer" means the Secretary of the Interior, United States of America, or his or her duly authorized representative.

b. "Year" means the period beginning on January 1 and ending the following December 31.

c. "Water Year" means the period beginning on October 1 and ending the following September 30.

d. "Releases" means any water released from the Aspinall Unit pursuant to the terms and conditions of this MOA.



Reclamation has also agreed to release water stored in the Aspinall Unit to compensate for the depletive effects of two other Reclamation projects, Dolores and Dallas Creek, as stipulated in

e. "1975 Exchange Agreement" means Contract No. 6-07-01-00027, dated August 28, 1975, between the United States, the Uncompahgre Valley Water Users Association, the Upper Gunnison River Water Conservancy District and the Colorado River Water Conservation District, relating to Taylor Park Dam and Reservoir and the Aspinall Unit.

f. "1990 Agreement" means that agreement dated April 16, 1990, among the same parties as those of the 1975 Exchange Agreement, for the purpose of furthering the goals and objectives of the 1975 Exchange Agreement.

g. "Low Flow Conditions" for purposes of accounting and river administration means any time during the months of July, August, September and October, when the flow of the Gunnison River would fall below 300 cfs in the reach between the Redlands Diversion and the confluence with the Colorado River in the absence of releases contemplated herein.

h. "Blue Mesa Storage Targets" means those historic target elevations or storage levels previously set for July through December of any year.

TERM OF AGREEMENT

2. a. This MOA shall be effective on the date first written above, and shall remain in effect for no more than 5 years or until the conclusion of the Section 7 consultation on Aspinall Unit operations and issuance of a final biological opinion by the Service, whichever occurs first.

b. This MOA may be renewed for an additional period of up to 5-years upon agreement by all signatory parties.

has been renewed to 2005

LEASE AND SUBLEASE OF WATER FOR ENDANGERED FISH PURPOSES

3. a. As part of the Recovery Program, Reclamation has agreed to release for endangered fish purposes, during low flow conditions, water stored in the Aspinall Unit.

MOA will be held at the request of any signatory party. All meetings will be open to public participation.

b. Reclamation hereby agrees to release from the Aspinall Unit sufficient water to maintain a minimum flow of 300 cfs during the months of July, August, September and October in the Gunnison River from the Redlands Diversion Dam to the confluence of the Gunnison River with the Colorado River, said flows to include the water necessary to operate the proposed fish passage facilities located at the Redlands Diversion Dam. The operating plan and water release schedule will be dependent upon current hydrologic conditions and the available water supply. For the term of this agreement the operating plan shall completely remove the need for administrative calls by downstream Gunnison River mainstem users senior in priority to the Aspinall Unit, unless such plan would cause Blue Mesa Reservoir to drop below the 400,000 acre-foot total storage level at the end of the current calendar year. In such event, the parties jointly agree to reduce the 300 cfs release amount otherwise protected pursuant to this MOA in order to minimize the administrative calls which would occur from water rights downstream and senior to the Aspinall Unit and its decrees. These releases shall not result in any water bypassing the Blue Mesa, Morrow Point and Crystal powerplants, except during periods when the powerplants are not operating.

c. This MOA shall not interfere with historic operations of the Aspinall Unit, including those authorized under applicable Federal Law, the 1975 Exchange Agreement, the 1990 Agreement, or other acts of Congress or agreements supplemental or amendatory to them, future water management agreements. or a minimum operating criteria of 300 cfs from the Aspinall Unit through the Black Canyon of the Gunnison National Monument.

MEASUREMENT AND DELIVERY OF WATER

5. a. Water released from the Aspinall Unit, pursuant to this MOA, will be measured at the gage installed by Reclamation below the Redlands Diversion Dam. The parties to this MOA will be responsible for operation and maintenance of this gage.

b. The Board will be responsible for calling upon the State Engineer and the Division Engineer for Water Division 4 for the delivery of Aspinall releases for endangered fish species purposes pursuant to this MOA from the outlet works of Crystal Dam to the Redlands diversion and for the protection of these releases from diversion by third parties within the reach from Redlands diversion to the Gunnison-Colorado River confluence. The Board will take such action under state law, including requesting administration by the State Engineer and the Division Engineer for Water Division 4, as may be necessary to obtain delivery of the Aspinall releases made pursuant to this MOA. Aspinall releases shall be subject to such transit losses as may be imposed by the State Engineer or the Division Engineer for Water Division 4. Reclamation and the Service will cooperate with the Board to protect the water released from Crystal Dam to the designated reach and within the designated reach extending from the Redlands diversion to the confluence of the Gunnison and Colorado Rivers.

c. The Board and the Service will not be responsible for the storage of water in, or the operation and maintenance of the Aspinall Unit.

d. Reclamation shall maintain records of all water released under this MOA and such records will be available for inspection at the Grand Junction Projects Office during regular business hours.

e. Nothing in this MOA shall interfere with Reclamations ability to respond to emergency situations. Reclamation shall make a bona fide effort to give prior notice to the other parties and the State Engineer's Office of the time and amount of any release made due to an emergency situation. If it is not reasonably possible to give prior notice, notice thereof shall be given promptly.

WATER SERVICE CHARGES

6. There shall be no reimbursable charges to the Service for water delivered pursuant to this MOA. In consideration of the Board agreeing to take delivery of and responsibility for protecting Aspinall Unit releases in accordance with this MOA, the Board shall not be charged for such releases.

USE OF WATER

7. a. The Service and the Board shall study and evaluate the effects of the releases under this MOA on endangered fish species and their occupied habitat in the Gunnison River and the flow required for fish passage at and below Redlands Diversion Dam. The study data gathered from water furnished pursuant to this MOA shall be used by the Service, Reclamation and the Board to evaluate long-term minimum streamflow requirements in the Gunnison River to preserve the natural environment to a reasonable degree consistent with the ultimate goal of recovering the endangered fish species while allowing water development to proceed. Formal evaluation of minimum streamflow requirements will follow the Board's March 9, 1994, "Statement of Policy and Procedure" and any additional review process established through the Recovery Program.

b. The Service and the Board will use the water released pursuant to this MOA only for the purposes specified in this MOA. No lease (other than that intended by this MOA), sale, donation, or other disposal of any of the water provided pursuant to this MOA will be permitted. The Service and the Board shall not compromise, subjugate, or encumber the water released in any manner whatsoever unless mutually agreed upon by all parties to this MOA.

c. Except under extreme hydrologic conditions beyond Reclamations' control the water released by Reclamation from the Aspinall Unit pursuant to this MOA shall not generate flows greater than 18,000 cfs at Delta nor greater than 20,000 cfs at Whitewater. The purpose of these limitations is to reduce flooding.

d. The water released by Reclamation from the Aspinall Unit pursuant to this MOA shall not prevent Reclamation from drawing Blue Mesa Reservoir down to its December 31 target storage content in order to minimize ice jam flooding above Blue Mesa Reservoir, nor cause Blue Mesa to drop below the minimum power pool.

e. The water released by Reclamation from the Aspinall Unit pursuant to this MOA to the extent possible shall not be stacked on top of other releases, but shall satisfy as many mutually compatible purposes as possible.

REPORTS

8. Reclamation shall provide a written annual operations report, to the Board and Service at the regularly scheduled Aspinall Unit operations meeting held in January. Such report shall describe the operation of the Aspinall Unit, including release rates, storage contents, and hydropower production during the preceding year. The Service shall provide copies of the written annual research report, as required under the Recovery Program, to Reclamation, the

Board and the participants in the Recovery Program, at the January operations meeting. Such report shall document the data collected in accordance with Article 7 herein during the preceding year and analyze the effects of the releases of water pursuant to this MOA. All reports will be available for inspection by other interested parties during normal business hours at the offices of the agency publishing the report.

SHORTAGE OF WATER

9. a. Reclamation, including its officers, agents and employees shall not be liable for any damage resulting from shortages of water available from the Aspinall Unit to fulfill the purposes of this MOA due to drought, sedimentation within the reservoirs, failure of facilities, restraint by court or public authority, or Acts of God.

CLAIM OF DAMAGE

10. a. The Board shall hold the United States harmless from and against all claims, demands, and causes of action on account of property damage of any nature whatsoever, personal injury, or death arising out of or connected with the control, carriage, handling, use, disposal, or distribution of water released, pursuant to this MOA.

b. Within the limits of the Federal Tort Claims Act the United States shall protect, indemnify, and hold the Board harmless from and against all claims, demands. and causes of action of any nature whatsoever resulting from or in any manner connected with the storage of water in or the operation and maintenance of the Aspinall Unit.

APPLICABLE FEDERAL LAW

11. a. All water released and delivered pursuant to this MOA is subject to and controlled by all applicable Federal and State laws.

b. It is understood and agreed that all of the rights and authorities of Reclamation, the Board, and the Service in existence prior to the effective date of this MOA are not impaired or diminished by the provisions hereof, except for the mutual obligations and covenants herein specified. Nothing in this MOA shall prevent Reclamation from entering into water service contracts for available water supplies from the Aspinall Unit to the extent such water service contracts are compatible with endangered species recovery needs.

c. No landowner, lessee, or legal entity will directly benefit monetarily from the use of water delivered pursuant to this MOA. There is no repayment construction component under the terms of this MOA, therefore, this MOA does not meet the definition of a "contract" under the provisions of Section 202(1) of the Reclamation Reform Act of 1982 (RRA). Due to these conditions, it is determined that RRA is not applicable to the use of Aspinall Unit water under this MOA.

ENFORCEMENT

12. The terms and conditions of this MOA shall be enforceable by any party to this MOA in a court of competent jurisdiction; provided, however, that before commencing an action for enforcement of this MOA, the party alleging violation shall notify the other parties in writing of the alleged violation, and the parties shall make a good faith effort to resolve their differences through informal discussions. This MOA does not intend, recognize, or create any third party beneficiaries, and the rights and obligations created herein shall not be enforceable by or on behalf of persons other than the signatory parties.

ASSIGNMENT LIMITED- SUCCESSOR'S AND ASSIGNS OBLIGATED

13. The provisions of this MOA shall apply to and bind the successors and assigns of the parties hereto. but no assignment or transfer of this MOA or any right or interest therein shall be valid until approved in writing by Reclamation.

QUALITY OF WATER

14. The operation and maintenance of project facilities shall be performed in such a manner as is practicable to maintain the quality of raw water made available through such facilities at the highest level reasonably attainable, as determined by Reclamation. The United States does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

EXPLANATORY RECITALS

15. The explanatory recitals contained in this MOA shall not constitute admissions by, or be admissible against, any person in any judicial or administrative proceeding except such proceedings directly related to the enforcement of this MOA.

ENVIRONMENTAL COMPLIANCE

16. The Service acknowledges that implementation of this MOA has contributed to progress under the Recovery Program for Endangered Fish Species in the Upper Colorado River Basin. dated September 29, 1987.

NOTICES

17. a. Any notice, demand, or request authorized or required by this MOA shall be deemed to have been given on behalf of any party when mailed. postage prepaid, or delivered to the following person or their designee:

(1) Area Manager
Bureau of Reclamation
2764 Compass Drive
P.O. Box 60340
Grand Junction, Colorado 81506

(2) Director
Colorado Water Conservation Board
721 State Centennial Building
1313 Sherman Street
Denver, Colorado 80203

(3) Assistant Field Supervisor
Fish and Wildlife Service
Ecological Services
Western Colorado Office
764 Horizon Drive, South Annex A
Grand Junction, Colorado 81506-3948

(4) Division Engineer, Water Division 4
State of Colorado
Division of Water Resources
1540 East Niagara
Montrose, Colorado 81401

b. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

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

BUREAU OF RECLAMATION

By _____
Regional Director
Upper Colorado Region

FISH AND WILDLIFE SERVICE

By _____
DEPUTY Regional Director
Region 6

COLORADO WATER
CONSERVATION BOARD

By _____
Director

See pg 11 par 7 b.
c/p Ks at pg 6