

AN AGREEMENT

BETWEEN THE

**UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR**

AND THE

CENTRAL UTAH WATER CONSERVANCY DISTRICT

**FOR THE SHARING OF COSTS
ASSOCIATED WITH REPLACEMENT FEATURES FOR THE
UINTAH AND UPALCO UNITS OF THE CENTRAL UTAH PROJECT**

PREAMBLE

This Agreement is made this 11th day of August, 1993, pursuant to Section 201(c) of the Central Utah Project Completion Act (Titles II through VI of Public Law 102-575, 106 Stat. 4605, Oct. 30, 1992), hereinafter "the Act", between the United States of America, hereinafter "the United States", acting through the Secretary of the Interior, hereinafter "the Secretary", and the Central Utah Water Conservancy District, a water conservancy district under the laws of the State of Utah, and particularly under the Water Conservancy Act, Utah Code Ann. § 17A-2-1401, et seq. (1991), hereinafter "the District".

ARTICLE I.

EXPLANATORY RECITALS

Whereas, the Act amends the Act of April 11, 1956 (Pub. L. 84-485, 70 Stat. 105) to authorize additional appropriations for the completion of certain features of the Central Utah Project; and,

Whereas, Congress anticipates that the District will explore less costly replacement features for the Uintah and Upalco Units of the Central Utah Project which will prove more feasible and environmentally less damaging than features originally planned by the Bureau of Reclamation; and,

Whereas, the Secretary is required to ensure that replacement features planned, designed and constructed for the Uintah and Upalco Units of the Central Utah Project are consistent with the Secretary's trust responsibilities to the Ute Indian Tribe on the Uintah and Ouray Indian Reservation; and,

Whereas, under the Act, the Secretary is directed to retain responsibility for implementing the Act, and is authorized, under certain conditions, to contract with the District to plan, design, and construct certain features authorized in the Act; and

Whereas, pursuant to Section 201(c) of the Act, the Secretary is authorized to execute an agreement with the District which binds the District to provide annually such sums as may be required to satisfy the non-Federal share of the separate replacement features for the Uintah and Upalco Units of the Central Utah Project; and,

Whereas, the Act provides that the District may, under the conditions specified in the Act, complete the planning, design and construction of replacement features for the Uintah and Upalco Units of the Central Utah Project in lieu of the work being carried out by the Secretary;

NOW, THEREFORE, it is agreed as follows:

ARTICLE II. DEFINITIONS

Where used in this Agreement:

- A. "construction" shall mean the significant commitment of resources for actual work on Project features, such as, but not limited to, final design work after a feature has been approved for construction by the Secretary, significant preliminary land acquisition, and excavation of, or placing concrete on, Project features.
- B. "Drainage and Minor Construction Act" shall mean the Act of June 13, 1956, 70 Stat. 274 (43 U.S.C. 505).
- C. "ESA" shall mean the Endangered Species Act (16 U.S.C. 1531 et seq.).
- D. "Federal funds" shall mean funds provided by the Secretary to the District as appropriated by Congress and any interest earned on such funds prior to expenditure by the District.
- E. "fiscal year" shall mean the fiscal year of the United States Treasury as defined by 31 U.S.C. 1102.
- F. "FWCA" shall mean the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.).
- G. "FWS" shall mean the United States Fish and Wildlife Service, Department of the Interior.
- H. "NEPA" shall mean the National Environmental Policy Act (43 U.S.C. 4321 et seq.).
- I. "the parties" shall mean the District and the Secretary.
- J. "Project" shall mean the Central Utah Project.

K. "replacement features" shall mean Project features planned, designed, or constructed for the Uintah and Upalco Units of the Central Utah Project that were not originally planned, designed, or constructed by the Bureau of Reclamation and that are not identified in Section 203 of the Act.

L. "RIP" shall mean the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin dated September 29, 1987, the January 22, 1988 Cooperative Agreement for Recovery Implementation Program for Endangered Species in the Upper Colorado River Basin between the Secretary, the Governors of Colorado, Utah and Wyoming, and the Administrator of the Western Area Power Administration, United States Department of Energy, the document entitled "Agreement, Section 7 Consultation, Sufficient Progress, and Historic Projects, Recovery Implementation Program for the Endangered Fish Species in the Upper Colorado River Basin, March 11, 1993", and any amendments or supplements to these documents.

M. "Secretary" shall mean the Secretary of the Interior, or a designated representative.

N. "studies" shall mean the investigations and analyses required to plan replacement features and to determine the economic and engineering feasibility and the environmental acceptability of replacement features.

O. "Uintah Unit" refers to a unit of the Central Utah Project as authorized in Section 501(a) of the Colorado River Basin Project Act (Public Law 90-537, 82 Stat. 885, Sept. 30, 1968).

P. "Upalco Unit" refers to a unit of the Central Utah Project as authorized in Section 1 of the Colorado River Storage Project Act (Public Law 84-485, 70 Stat. 105, Apr. 11, 1956).

Q. "year" shall mean calendar year.

ARTICLE III.

TERM OF THE AGREEMENT

This Agreement will become effective on the day and year set forth in the Preamble above and shall continue until modified or superseded by the parties or until the Secretary, after consultation with the District, has declared in writing that the Project is substantially complete or until the authorizations for construction of replacement features terminate.

ARTICLE IV.

ALLOCATION OF FUNDS

A. With regard to the Federal funding of studies associated with replacement features:

- (1) the Secretary shall provide not more than 65 percent of the annual funding towards completion of the studies; the remainder of these costs shall be paid concurrently by the District;**
- (2) the Federal share of the District's authorized expenditures on studies prior to the execution of this Agreement will be reimbursed in the form of credits against the District's share of annual budgeted expenditures; provided that such credits are contingent upon receipt by the Secretary of a complete accounting for such expenditures;**
- (3) the Federal share of the total cost of the studies shall not exceed \$7,530,000 as adjusted by the appropriate cost indices referred to in the acts authorizing the appropriations for the Uintah and Upalco Units.**

B. With regard to Federal funding for construction of replacement features:

- (1) the Secretary shall not provide Federal funds for the construction of any feature until the feasibility studies and all environmental documentation undertaken to comply with NEPA for the feature have been approved, in writing, by the Secretary;**
- (2) the Secretary shall not provide Federal funds for the construction of any feature until the District provides written assurances, acceptable to the Secretary, that it will provide annually such sums as may be required to satisfy the total non-Federal share necessary to complete the feature;**
- (3) the District shall pay 35 percent, concurrently with the Federal share, of the reimbursable costs of the design, engineering, and construction of the features approved for construction by the Secretary.**

C. If the Secretary finds that the District is not in compliance with this Agreement, all Federal fish, wildlife, recreation and environmental laws, or the Act, the Secretary will notify the District, in writing, of the specific reasons why the District is not in compliance, and the District shall, within 30 days, either come into compliance, or present a plan of action to come into compliance, that is acceptable to the Secretary. If, at the end of 30 days, the District has not received written notification from the Secretary that it is in compliance, or that it has developed a plan acceptable to the Secretary, the District will immediately cease to obligate, expend, or borrow against Federal funds provided pursuant to this Agreement. When the District is subsequently

in compliance, the Secretary shall issue a written notice of compliance. Upon receipt of the Secretary's written notice of compliance, the District may again obligate, expend, or borrow against Federal funds.

D. For each of the Uintah and Upalco Units, the costs of all replacement features in any fiscal year shall not exceed the available cost ceiling for that fiscal year. As of October 1, 1992, the available cost ceiling for the Uintah Unit is \$158,803,500 and the available cost ceiling for the Upalco Unit is \$55,010,686. The available cost ceiling for each Unit and each fiscal year shall be calculated by subtracting the previous fiscal year's appropriation from the previous fiscal year's available cost ceiling and adjusting the difference by the appropriate cost indices. The Secretary shall calculate the available cost ceilings for the Uintah and Upalco Units and report them to the District by December 15 of each year.

ARTICLE V.

FUNDING

A. Federal funds shall not be made available, nor shall the District obligate, expend, or borrow against such funds to begin construction of replacement features until:

(1) analyses to determine the feasibility of the separate features have been approved and accepted in writing by the Secretary; and,

(2) the requirements of NEPA have been satisfied; and,

(3) the District has submitted a plan to prevent any harmful contamination of the waters associated with the Project from selenium or other toxicants, which has been developed with, and approved in writing by, the FWS; and,

(4) for the features intended to deliver irrigation water, binding contracts for the purchase of at least 90 percent of the irrigation water to be delivered to non-Indian water users from such features have been executed; and,

(5) the Secretary and the District, or other entity acceptable to the Secretary, have executed a repayment contract and a cooperative operation and maintenance agreement for the features.

B. In the event that Federal funds are not expended in the fiscal year in which they are made available to the District, such funds shall become a part of the District's budget for the succeeding fiscal year, provided that, in no event shall any Federal funds carried over from preceding fiscal years be deemed to be a part of the District's non-Federal cost share amount in any fiscal year.

C. The District shall maintain a separate interest-bearing account in a Federally-chartered bank exclusively to fund the activities governed by this Agreement. Immediately upon receipt, the District shall deposit all Federal funds associated with this Agreement into the account. The District shall deposit the non-Federal cost share amounts specified in Article IV of this Agreement into the same account. The District may withdraw Federal funds from the account only if it concurrently withdraws non-Federal funds in the appropriate cost-share amount specified in Article IV of this Agreement. Interest accrued on the account shall be divided pro-rata based on the amount and timing of the Federal and non-Federal deposits. Interest accrued on the Federal funds shall be considered part of the Federal cost share amount. The District may draw upon the account only to fund the activities governed by this Agreement, and only in accordance with the budget approved by the Congress.

D. The costs of compliance with all Federal fish, wildlife, recreation, and environmental laws, including the costs of all fish and wildlife mitigation measures, associated with the construction of replacement features shall be funded under the cost ceilings authorized for those features.

ARTICLE VI. CONDITIONS PRECEDENT TO CONSTRUCTION

A. The Secretary shall not provide funds for construction, nor shall the District commence construction on any replacement feature, until the District and the Secretary have executed an Agreement in accordance with the Drainage and Minor Construction Act for the purpose of establishing terms and conditions for the proper conduct and execution of construction by the District of such feature. Schedules and conditions for inspection of construction activities and features shall be provided in the terms and conditions developed in the Agreements pursuant to the Drainage and Minor Construction Act.

B. The Secretary shall not provide funds for construction, nor shall the District commence construction on any replacement feature, until all uncertified agricultural lands to be served by the Project are certified by the Secretary as irrigable pursuant to Federal Reclamation law.

ARTICLE VII. ENVIRONMENTAL COMPLIANCE

A. The District agrees to be considered a "Federal Agency" for purposes of compliance with all Federal fish, wildlife, recreation, and environmental laws with respect to the use of Federal funds and to comply with the Act. This Agreement establishes a standard of compliance for the District, as required by law, and does not vest the District with Federal agency status. All Federal authority under Federal law, regulations, and this Agreement remains vested with the Secretary or his designee.

B. The Secretary agrees to assist the District by appointing a Federal official as a Program Director for the Project to be located in Utah County, Utah. The Program Director will have authority to provide review, oversight and approval of District activities required under this Agreement and any other agreements between the parties pursuant to the Act. The Program Director's authority shall include, but not be limited to, oversight, review, and approval of the District's NEPA compliance documents (i.e., a list of activities covered by a Categorical Exclusion, Environmental Impact Statement, Environmental Assessments, and Findings of No Significant Impact). The District shall provide notification to the Program Director of all actions taken pursuant to the Categorical Exclusion checklists. The Program Director may subsequently disapprove the District's determination of a Categorical Exclusion. If the Program Director disapproves a District activity, written documentation of the reasons for disapproval must be provided to the District. The District may appeal a decision of the Program Director to the Assistant Secretary for Water and Science, or such other Federal official as the Secretary may designate.

C. The parties agree that the District, subject to the Secretary's review and final approval, shall undertake activities necessary to comply with all Federal fish, wildlife, recreation and environmental laws, including, but not limited to, the following:

(1) NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE:

The District will comply with the NEPA. The District's NEPA compliance shall include, but not be limited to:

- a. assumption of the role of a "joint lead agency" in conjunction with the Office of the Secretary as described in 40 CFR 1501.5(b); assumption of the primary responsibility to prepare and submit Environmental Impact Statements to the Secretary for filing with the United States Environmental Protection Agency;**
- b. development of a District NEPA Handbook in compliance with 40 CFR 1507.3; the District's Handbook will include a section containing the substance of the Bureau requirements contained in the Department of the Interior Manual at 516 DM 6.5A;**
- c. determining whether proposed activities fall within the authorized Categorical Exclusions and preparing and approving the attendant Categorical Exclusion checklists;**
- d. preparation of Environmental Assessments and Findings of No Significant Impact;**

e. requesting appropriate Federal agencies to participate as cooperating agencies with the District and executing Memoranda of Agreement with cooperating agencies as described in 40 CFR 1501.6;

f. signing and submitting to the Program Director for the Program Director's signature and printing in the Federal Register any required notices; the District shall reimburse the Secretary for costs associated with publication of documents in the Federal Register;

g. developing Records of Decision for the Secretary's signature.

(2) FISH AND WILDLIFE COORDINATION ACT COMPLIANCE:

The District will comply with, and will provide necessary support to the FWS to ensure compliance with, the FWCA. The District's FWCA compliance shall include, but not be limited to, ensuring that equal consideration is given to fish and wildlife resources pursuant to Section 1 of the FWCA. The District shall enter into Transfer Fund Agreements, including multi-year Transfer Fund Agreements, with the FWS in compliance with Section 2(e) of the FWCA. In keeping with the Section 2(e) of the FWCA, the District shall negotiate scopes of work with the FWS not later than July 31st preceding each new fiscal year and agree to provide funding for work mutually agreed to be necessary for Project planning purposes. The Secretary may find the District in non-compliance with this Agreement for failure to negotiate a scope of work with the FWS only if the District has failed to complete the negotiations within 5 months of the July 31 deadline. The District's compliance with the FWCA also includes adhering to the provisions of Section 3 of the FWCA relating to the use of Project lands and water for fish and wildlife purposes.

(3) ENDANGERED SPECIES ACT COMPLIANCE:

The District will comply with the ESA. The District's ESA compliance shall include, but not be limited to:

a. compliance with the provisions of 50 CFR 402;

b. compliance with all sections of the ESA including Section 7(a)(1);

c. Regarding the District's compliance with Section 7 of the ESA with respect to the endangered Colorado River fishes, the District will comply with, and be bound by, the RIP, and the RIP Recovery Action Plan to be issued subsequent to this Agreement, and any amendments or supplements thereto. The District agrees that its compliance with Reasonable and Prudent Alternatives under Section 7 of the ESA during operation and maintenance of

Project facilities is subject to the actions taken by the RIP participants. It is the understanding of the parties, that, because of the Bureau of Reclamation's previous compliance with Section 7 of the ESA and its participation in the RIP, the District is exempt from payment of the depletion charge identified in the RIP for:

- (1) features authorized under the Act associated with the Bonneville Unit; and,
- (2) features authorized under Section 203 of the Act; and,
- (3) any replacement features in the Uintah and Upalco Units for depletions not exceeding 11,900 acre-feet and 22,000 acre-feet, respectively. Any replacement features which result in depletions of water from the Green River basin that exceed the above amounts will be subject to the depletion charge or other measures to avoid the likelihood of jeopardy or destruction, or adverse modification of critical habitat.

D. The District may submit environmental documents to the Program Director for printing at the Government Printing Office. The District shall reimburse the Secretary for all costs associated with the use of the Government Printing Office.

ARTICLE VIII. FINANCIAL ACCOUNTING AND REPORTING PROCEDURES

A. The District shall implement a system to monitor Project performance.

B. The District's financial accounting and reporting system and procedures shall be in accordance with generally accepted accounting principles as applied to governmental units and established by the Governmental Accounting Standards Board. The system will account for all Federal and non-Federal funds obligated or expended pursuant to a cost-sharing agreement and will provide effective control over funds, property and other assets, providing assurance that all assets are adequately safeguarded and used only as authorized. The District's financial accounting records and supporting documents shall be retained, and made available for audits and reviews authorized by the Secretary and the Act.

C. The District shall prepare and submit periodic reports, as required by the Secretary, which compare documented accomplishments against plans and provide updated completion dates for features of the Project. In addition, the District shall prepare and submit, in a form acceptable to the Secretary, a comprehensive annual report summarizing progress made toward the achievement of Project goals. The annual report shall include the District's financial statements, which have been audited by an independent national certified public accounting firm with experience in project

accounting. The District shall select a different certified public accounting firm at least every five years. The auditor's report on the District's financial statements shall accompany the annual report, and both shall be submitted to the Secretary by June 1 of each year.

D. The District shall take immediate corrective action on all deficiencies identified in the auditor's report. The District agrees to provide, in a timely manner, additional information as requested by the Secretary.

ARTICLE IX. BUDGET PROCEDURES

A. Not later than June 1 of each year, the District shall submit, in a form prescribed by the Secretary, a proposed budget for the District for the fiscal year beginning on October 1 in the following year. The District's proposed budget shall include the funding necessary to implement proposed and executed agreements with all coordinating and cooperating Federal agencies.

B. Following the annual submittal of the District's proposed budget to the Secretary and prior to the annual submittal of the Department of the Interior's proposed budget to the Office of Management and Budget, the Secretary shall consult with the District concerning the District's proposed budget. Prior to the Administration's transmittal of its annual budget to the Congress, the District shall not disclose any information or communications concerning the Administration's budget request to anyone outside the Executive Branch of the Federal Government.

C. The Secretary shall not propose budgets to the Office of Management and Budget for the Central Utah Project that include underfinancing.

ARTICLE X. CONTINGENCIES

Federal funds shall be provided to the District only in accordance with appropriations of the Congress of the United States made pursuant to the Acts authorizing the Uintah and Upalco Units. The parties agree that, notwithstanding the existence of this Agreement, the Secretary's obligation to provide Federal funds to the District is contingent upon the Congress making appropriations pursuant to the authorizations for the Uintah and Upalco Units.

ARTICLE XI. INDIAN TRUST

The District, in its planning, design, and construction activities associated with the Act shall consider the trust assets of affected Indians or Indian tribes and shall consult

with the Secretary and any affected tribe prior to taking or precipitating any action which may affect the trust assets of any Indian or Indian tribe, and, in particular, the trust assets of the Ute Tribe on the Uintah and Ouray Indian Reservation.

ARTICLE XII. TITLE TO PROJECT

The District shall transfer title to all real property, easements, rights-of-way, and other such property interests acquired either wholly or partially with Federal funds to the United States within one year of the date of acquisition. Furthermore, the United States shall retain title to all replacement features. Nothing in this Agreement, or any other agreement between the parties pursuant to the Act, shall be interpreted to transfer title to any facility, feature, or property that is currently vested in the United States to the District, or any other party. Upon completion of each Project feature, the Secretary or his designee shall transfer operation and maintenance responsibilities for that feature to the District pursuant to the repayment contract and the cooperative operation and maintenance agreement required by Article V A(5) of this Agreement.

ARTICLE XIII. PROPERTY, EQUIPMENT, MATERIALS AND SUPPLIES

Any property, equipment, materials, and supplies purchased entirely or partially with Federal funds shall be used by the District only in furtherance of the activities governed by this Agreement and may not be used for personal use by the District employees.

ARTICLE XIV. ASSIGNMENT LIMITED - SUCCESSORS AND ASSIGNS OBLIGATED

The provisions of this agreement shall apply to and bind the successors and assigns of the parties, but no assignment or transfer of this Agreement or any part or interest herein shall be valid until approved by the Secretary.

ARTICLE XV: THIRD PARTY CLAIMS

The District agrees that it will not seek reimbursement from nor sue the United States nor any office, agent, or employee thereof, for expenses incurred in defending third party claims for personal injury, death, or property damage arising out of the District's own actions or omissions.

ARTICLE XVI. CONTRACTS WITH THIRD PARTIES

The United States shall not be a party to or obligated in any manner by contracts entered into between the District and other parties (excluding contracts for water supply), except as provided in this Agreement. The District is the responsible authority, without recourse to the Secretary, regarding the settlement and satisfaction of all contractual and administrative issues arising out of any subcontracts the District may award in support of the activities governed by this Agreement.

ARTICLE XVII. NOTICES

Any notice, demand, or request regarding this Agreement shall be deemed to have been delivered when mailed, postage prepaid, or delivered directly, in the case of the United States, to:

Secretary of the Interior
Attn: Assistant Secretary - Water and Science
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

and in the case of the District, to:

General Manager
Central Utah Water Conservancy District
355 West 1300 South
Orem, Utah 84058

The designation of the addressees or addresses given above may be changed by notice given in the same manner as provided in this Article for other notices.

ARTICLE XVIII. OFFICIALS NOT TO BENEFIT

No member of, or delegate to, Congress, or official of the District, shall be admitted to any part or share of this Agreement, or any benefits arising from it except than as a water user or landowner within the Project in the same manner as other water users or landowners within the Project.

ARTICLE XIX.

AMENDMENT/MODIFICATION

This Agreement may be modified or superseded only upon mutual written consent of the parties.

ARTICLE XX.

SEVERABILITY

If any provision of this Agreement shall, for any reason, be determined to be illegal or unenforceable, the parties, nevertheless, intend that the remainder of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year set forth in the Preamble above.

Central Utah Water
Conservancy District

United States of America

By *Gary D. Palmer*
Chairman, Board of Directors

By *Debra L. Thayer*
for Assistant Secretary
for Water and Science

Attest:

Don A. Shurtensen
Secretary