

DENVER BOARD OF WATER COMMISSIONERS

Meeting Date: September 14, 2016

Board Item: II-B-1

Settlement Agreement and Purchase Option Agreement Between United States Forest Service and Denver Water Contracts # 16893A & 16893B

Action by Consent

Individual Action

Summary:

The Moffat Collection System Project involves expansion of Gross Reservoir, which is located partly on National Forest System (NFS) land. As a result, U. S. Forest Service (USFS) has the regulatory authority to impose mandatory "4(e)" conditions in the FERC hydropower license amendment that Denver Water will need to obtain to expand the reservoir. For the last few years Denver Water has negotiated with USFS over impacts the reservoir expansion might have on NFS land. In those negotiations USFS has also expressed concerns about some aspects of Denver Water's current operations. The negotiations have been successful in resolving the issues. This Board item seeks approval of three different agreements.

1. The Settlement Agreement, #16893A, is the master agreement that explains the resolution of all the issues. Resolution of the 4(e) conditions related to operation and maintenance of the Moffat Project is described in Appendix 1; these conditions will be included in the amended license to be issued by FERC. Resolution of issues arising from Denver Water's past and current operations on other NFS land is contained in the "Off-License Agreement" which is Appendix 2 and is described below. Another area of agreement relates to a sale and donation of property to USFS by Denver Water. Denver Water purchased 539 acres of the "Toll Property" in Gilpin County in 2015, with the intent of conveying it to USFS. Denver Water will sell a 160-acre parcel to USFS for \$800,000 and donate the rest of the property after permits for the Moffat Project have been received and accepted. The sale transaction is the subject of the Purchase Option Agreement described below. None of the 11 parcels are required for water works purposes and can be declared as surplus.

2. The Purchase Option Agreement, #16893B, is the purchase and sale agreement required by USFS to enable USFS to secure the funds and deem the property acceptable before purchasing the Toll Property parcel. At an option price of one dollar, the USFS technically has one year to secure funding and deem the property acceptable. The USFS' signature on and delivery to Denver Water of the Purchase Option Agreement is acceptance of the purchase of property at the purchase price set forth in the Purchase Option Agreement (\$800,000). The parties then proceed to closing, where Denver Water will convey the deed to the United States.

3. The Off-License Agreement, Appendix 2 to the Settlement Agreement, involves commitments by Denver Water and USFS related to Denver Water's existing operations. Some commitments related to existing operations become effective immediately while others become effective when Denver Water receives and accepts permits for the Moffat Project.

Budget Information:

The total estimated cost of the commitments provided under the Settlement Agreement is \$6.7 million, to be expended over several years. This amount has been included in the long-term budget for the Gross Expansion Project, Business Unit 2009612013, which will be the source of funds to pay for the contracts,


Selection of Business Partner:

Because these agreements involve an agency of the federal government, no selection process was appropriate.

Recommendation:

It is recommended that the Board approve the Settlement Agreement, Purchase Option Agreement, and Off-License Agreement, and declare the 11 parcels as surplus.

Approvals:



Patricia Wells
General Counsel



Angela Brimont
Chief Financial Officer

Respectfully submitted,



James S. Lochhead
CEO/Manager



Robert J. Mahoney
Chief Engineering Officer

SETTLEMENT AGREEMENT

September 9, 2016

Gross Reservoir Hydroelectric Project – FERC Project No. 2035

PARTIES TO THE AGREEMENT

This final Settlement Agreement (“Agreement”) is made pursuant to the Federal Energy Regulatory Commission (“FERC” or “the Commission”) Rule 602, 18 C.F.R. § 385.602 between the United States Department of Agriculture, Forest Service (“Forest Service”) and the City and County of Denver, acting by and through its Board of Water Commissioners (“Denver Water”), individually referred to as a “Party” and collectively referred to as “the Parties”, in connection with the amendment of the Gross Reservoir Hydroelectric Project, FERC Project No. 2035. This Agreement is effective as of the day the last Party identified in this paragraph executes the Agreement (the “Effective Date”).

RECITALS

1. Denver Water is the licensee and current owner and operator of the Gross Reservoir Hydroelectric Project, FERC Project No. 2035. Gross Reservoir is located on South Boulder Creek in Boulder County, Colorado. The current license was issued by the FERC on March 16, 2001, and was amended on October 1, 2004. Denver Water is proposing to amend the license to include the construction, operation and maintenance for an expanded Gross Reservoir and dam (“Project”). In 2008 Denver Water commenced the consultation process required by the FERC, including discussions and negotiations with the Forest Service.

The current reservoir is 418 acres, of which approximately 150 acres are on National Forest System (“NFS”) land in the Roosevelt National Forest (“RNF”) and managed under the Arapaho-Roosevelt National Forests and Pawnee National Grassland Resource Management Plan (“Forest Plan”). The Project would enlarge the existing 41,811 acre foot reservoir by 77,000 acre feet to a total of 118,811 acre feet by increasing the height of the dam, which is on Denver Water land and is solely owned, operated and maintained by Denver Water. Construction will include raising the existing concrete gravity arch dam by 131 feet, from 340 feet to 471 feet. The surface area of the reservoir would expand from 418 acres to 842 acres, which would inundate an approximate additional 280 acres of NFS land currently within the existing FERC Project Boundary and 1.1 acres outside the existing FERC Project boundary. The Project includes changes to the FERC Project Boundary to include, in total, 3 acres of NFS lands necessary for the Project – the newly inundated 1.1 acre and approximately 2 acres for trail relocation. Proposed changes to the Project Boundary would also exclude approximately 324 acres of NFS lands that are not necessary for the Project.

2. Denver Water’s Project is a component of a water supply project called the Moffat Collection System Project, for which Denver Water has applied for a Clean Water Act Section 404 permit from the United States Army Corps of Engineers (“Corps”). The Moffat Collection System

Project will collect additional water supplies in Gross Reservoir by using existing diversion facilities, some of which are located on federal lands administered by the Forest Service in the Arapaho-Roosevelt National Forests. Operation of the Moffat Collection System Project will also change operations at existing water supply facilities, some of which occur on NFS land. Therefore, aquatic resources on NFS land in the White River National Forest, Pike and San Isabel National Forests and Cimarron and Comanche National Grasslands are also affected by operations of the Moffat Collection System Project.

3. Negotiations between the Parties addressed NFS land and resource impacts caused by: a) the Project on the RNF; b) past and current operations of Denver Water's existing facilities on NFS land and c) changes in operations from the Moffat Collection System Project, analyzed under the Corps' Environmental Impact Statement ("EIS"). These negotiations resulted in the development of two documents: a) Federal Power Act ("FPA") §4(e) conditions for the Project; and b) an Off-License Agreement ("OLA").
4. §4(e) conditions, set forth in Appendix 1, address adverse effects to land and resources on the RNF associated with the Project. Denver Water understands that the Forest Service will provide an additional §4(e) condition addressing indemnification identical to a clause previously provided by the Forest Service to Denver Water. The Parties shall support all of the §4(e) conditions identified herein. Denver Water will ask FERC to include the §4(e) conditions in Appendix 1 in the amended license. The Forest Service will submit the conditions contained in Appendix 1 of the Agreement pursuant to its authority under Section 4(e) of the FPA. There are no Section 10(a) recommendations made by the Forest Service for the Project.
5. The Parties entered into the OLA, included as Appendix 2, as part of the overall settlement process leading to the issuance by FERC of an amended license for the Project and the 404 permit by the Corps for the Moffat Collection System Project. The Parties will submit the OLA to the FERC for informational purposes only.
6. This Agreement, including all appendices and attachments, is entered in consideration of the respective promises and commitments of the parties set forth herein, including but not limited to: the agreement of the Forest Service not to seek mandatory 4(e) conditions in addition to those set forth in Appendix 1 other than the standard indemnification clause, which will be submitted as an additional 4(e) condition by the Forest Service; the agreement of Denver Water not to object to the 4(e) conditions set forth in Appendix 1 or the standard indemnification clause; the agreement of the Parties to support the terms of this agreement; and the agreement of the Parties to carry out the commitments in the OLA attached as Appendix 2.

NOW THEREFORE, the Parties agree as follows:

ARTICLE I: PURPOSE AND REPRESENTATIONS

1.1. Purpose. The Parties have entered into this Agreement to agree upon those §4(e) terms and conditions necessary for the protection and utilization of NFS land, and to set forth other mitigation and enhancement measures while also achieving the management goals of the Forest Service for the lands and resources under its jurisdiction. The commitments under Appendices 1 and 2 document the resolution of all issues raised by the Forest Service during the license amendment process for the Project and the permitting process for the Moffat Collection System Project as of the Effective Date. The purpose of this Agreement and the appendices is to resolve effects to NFS land and resources associated with: a) past and current operations of Denver Water's existing water collection system as of the Effective Date; b) construction, operation and maintenance of the Project authorized under the amended FERC license; and c) construction, operation and maintenance of the Moffat Collection System Project as permitted by the Corps.

1.2. Representations. The Parties make the following representations:

1.2.1. This Agreement specifies procedures to be used by the Parties to ensure the implementation of obligations consistent with this Agreement.

1.2.2. The Parties agree that this Agreement is fair and reasonable and in the public interest within the meaning of FERC Rule 602 governing offers of settlement. 18 C.F.R. § 602(g) (3).

1.2.3. The Parties agree that certain measures included in the appendices of this Agreement will allow Denver Water to mitigate aquatic resources impacts in a cooperative manner.

1.3. Relevant Statutes. The Parties agree that the measures and actions contained herein are intended to address laws and statutes relevant to the relicensing process, including but not limited to:

- (1) Section 4(e) of the FPA, 16 U.S.C. § 797(e);
- (2) Section 10(a) of the FPA, 16 U.S.C. § 803(a);
- (3) National Forest Management Act, 16 U.S.C. § 1600 *et seq.*; and
- (4) Organic Administration Act of 1897, Ch. 2, 30 Stat. II, as amended (1897).

ARTICLE 2: §4(e) CONDITIONS

2.1 License Articles. The Parties hereby agree that the §4(e) conditions set forth in Appendix 1 should be incorporated as conditions in the amended license for the Project and that Denver Water shall implement such conditions as specified therein if they are included in the amended license.

Similarly, Denver Water shall implement the §4(e) indemnification condition which will be submitted by the Forest Service.

ARTICLE 3: OFF-LICENSE AGREEMENT

3.1 Off License Agreement. The Parties shall comply with the commitments set forth in the OLA, included as Appendix 2. It is not intended that this Agreement or the OLA be included as license conditions or be enforced by FERC. Rather, this Agreement and the OLA will be included in a submittal to FERC for informational purposes only.

ARTICLE 4: TOLL PROPERTY CONVEYANCE FOR MITIGATION

4.1 Toll Property Conveyance for Mitigation. The Toll Property Lands include 11 land parcels totaling approximately 539 acres located in Sections 3, 4, 7, 8, 9, 10, 16 and 18, Township 2 South, Range 73 West, and Sections 1, 12, 13, 14, 22 and 23, Township 2 South, Range 74 West, of the 6th Principal Meridian, all in Gilpin County, Colorado. Licensee purchased the Toll Property Lands with the express intent of using those lands as mitigation for the resource values that will be permanently lost on NFS land due to additional inundation of approximately 280 acres and as mitigation for the effects of the establishment of the quarry, construction of the saddle dam, and any staging and stockpile areas on NFS land which cannot be otherwise mitigated.

Denver Water shall convey parcels one through ten of the Toll Property Lands identified in Article 4 of this Agreement, above, to the United States, to be administered as part of the NFS as mitigation for the resource values permanently lost on NFS land due to the Project. As described in the OLA, the Forest Service will use good faith efforts to appraise and purchase the South Boulder Creek Parcel 11 of the Toll Property Lands, described as the SW 1/4 of Section 1, T. 2 S., R. 74 W. of the 6th P.M., containing 160.0 acres, more or less, from Denver Water at the federally-approved appraised value or \$800,000, whichever is less.

Denver Water shall deliver parcels one through ten of the Toll properties to the United States, without cost to the United States, by Special Warranty Deed and such other papers as may be required to convey good and merchantable title, in compliance with Forest Service directives, which includes compliance with U.S. Department of Justice Title Standards and Regulations promulgated pursuant to 40 U.S.C. §255. This transfer shall occur within 15 days of FERC issuing an amended license to Denver in this proceeding. The Forest Service shall record the deed(s) and any other title documents within 30 days.

If, as of the date of recordation of the deed(s) to parcels one through ten of the Toll Property lands, title to these lands does not satisfy the Department of Justice Title Standards, Denver Water shall take reasonable steps to cure the title defects in Toll parcels one through ten at its own expense. Denver Water shall also take reasonable steps at its own expense to remediate any environmental or other unsatisfactory condition identified by the Forest Service of Toll parcels one through ten that occurred after the November 20, 2014 Environmental Site Assessment conducted by Western Environment and Ecology, Inc. for the Conservation Fund. If Denver Water cannot correct the title defect or environmental or unsatisfactory condition through its own reasonable efforts within two years of the effective date of the amended license, it will notify the Forest Service. Within one year of the time Denver Water determines it cannot correct any deficiency, Denver Water shall find a replacement parcel

of equivalent size with similar resource values as the Toll property which could not be conveyed due to title defects or environmental or other unsatisfactory conditions, which property is subject to Forest Service approval. The replacement parcel shall be conveyed to the United States within 90 days of the Forest Service notifying Licensee that the substitute lands are acceptable. All substitute properties shall also be conveyed to the United States via Special Warranty deed and such other documents as may be required, at no cost to the United States, and in compliance with Forest Service directives, which includes the Department of Justice Title Standards promulgated pursuant to 40 U.S.C. §255.

The Parties agree that the 539 acres of Toll Property Lands currently possess conservation values of great importance to Licensee, Forest Service and others. By its execution of this Agreement, the Forest Service agrees to manage the conservation values of the Toll Property Lands in accordance with the Forest Plan.

ARTICLE 5: ACTIONS UPON EXECUTION OF THIS AGREEMENT

5.1 Actions of Denver Water.

5.1.1 Within 30 days of the effective date of this Agreement, Denver Water will file with the Commission a fully executed copy of this Agreement, including appendices and an explanatory statement, in accordance with Rule 602 of FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.602. Denver Water will request that the Commission approve an amended license for the Project that incorporates, without modification, the §4(e) conditions set forth in Appendix 1 hereto.

5.1.2 Denver Water shall fulfill its obligations under all of the §4(e) conditions filed by the Forest Service with FERC and the OLA.

5.2. Actions of Forest Service.

5.2.1 Within the deadlines established by FERC for the submittal of such, Forest Service will file with FERC, in addition to its standard §4(e) administrative indemnification condition, its §4(e) conditions that are identical to those set forth in Appendix 1 hereto.

5.2.2 The Forest Service may use any previous environmental analysis submitted by Denver Water if that analysis is not out of date, with this determination to be made by the Forest Service. Additional information and environmental analysis may be required by the Forest Service for its decision on the mineral materials permit application.

5.2.3. The Forest Service will not object to Denver Water seeking compensatory mitigation credit from the Corps for the purchase and transfer of properties to the United States described as the Toll Property in Article 4 of this Agreement and the OLA, so long as the Corps does not require restrictions or title encumbrances on the Property. The Forest Service will not object to Denver Water proposing the purchase and transfer of the Toll Property lands to the United States as administration as part of the NFS as mitigation for other resource values that will be permanently lost due to additional inundation, the establishment of the quarry, construction of the saddle dam, and any staging and stockpile

areas within the FERC Project Boundary. Denver Water shall not agree to restrictions or encumbrances of title to the Toll Property Land that would render title to the Toll Property Lands unacceptable to the Forest Service under the Title Standards and Regulations of the Attorney General of the United States.

5.3. Support for this Agreement, the §4(e) Conditions, and Off License Agreement and Communications with FERC, Other Government Agencies and Courts. To the extent consistent with applicable law, the Parties shall actively support this Agreement before FERC, other governmental agencies and the courts and the incorporation of terms and conditions that are consistent with those set forth in Appendix 1 hereto into the amended license and into any other required permits or certifications. The Parties shall support the § 4(e) conditions and the OLA. No Party will challenge the Forest Service standard §4(e) administrative indemnification condition or its §4(e) conditions that are identical to those set forth in Appendix 1 hereto, nor: (1) submit a request for a Forest Service trial type hearing regarding underlying facts, (2) submit alternative conditions to the Secretary of Agriculture, or (3) seek FERC rehearing or Appellate Court Review of the §4(e) conditions. To the extent consistent with applicable law, the Parties agree not to propose or otherwise communicate to FERC, or to any other federal, state, or local agency whose approval may be necessary to put this Agreement into effect, or to any court, any comments, filings, statements, or other conditions not consistent with the terms of this Agreement.

ARTICLE 6: EFFECT OF THE AGREEMENT

6.1. Limitations. This Agreement establishes no principle or precedent with regard to any issue addressed in this Agreement or with regard to either Party's participation in any other pending or future licensing proceeding. Further, neither Party to this Agreement shall be deemed to have approved, accepted, agreed to, or otherwise consented to any operation, management, valuation or other principle underlying any of the matters covered by this Agreement, except as expressly provided in this Agreement. By entering into this Agreement, neither Party shall be deemed to have made any admission or waived any contention of fact or law that it did make or could have made in the subsequent/future licensing of the Project. This paragraph shall survive any termination of this Agreement.

6.2. Representation Regarding Consistency and Compliance with Statutory Obligations. By entering into this Agreement, the Parties represent that they believe their statutory and other legal obligations as identified in Article 5 are, or can be, met through implementation of this Agreement in addition to those conditions and recommendations submitted by the Forest Service or any other Party not affected by this Agreement. Nothing in this Agreement shall be construed to limit either Party from complying with its obligations under applicable laws and regulations or from considering public comments received in any environmental review or regulatory process related to the Project in accordance with this Agreement. Activities requiring additional environmental analysis or Forest Service authorization such as ongoing maintenance or compliance with existing federal authorizations are not covered by this Agreement. Nothing in this Agreement shall be deemed to constitute a waiver by the Parties of any right, obligation, or cause of action, including claims for injunctive relief or civil penalties, to enforce any laws or regulations not specifically addressed by this Agreement, provided however, that the Parties shall exercise any such right, obligation, or cause of action in a manner consistent with this Agreement. The Parties shall not be precluded by this Agreement from taking appropriate action to abate an

imminent endangerment to human health or the environment should such a situation arise at or in the vicinity of the Project.

6.3. Modification of Conditions. The Forest Service reserves the right, after notice and opportunity for comment, to revise § 4(e) conditions in order to provide for the protection and utilization of NFS land and resources per the §4(e) conditions set forth in Appendix 1.

6.4. Forest Service Section 4(e) Authorities. Nothing in this Agreement or any other document filed with FERC by either Party in relation to the Project will, or is intended to, amend, waive, forfeit or in any manner modify the authorities of the Forest Service under §4(e) of the FPA.

ARTICLE 7: IMPLEMENTATION OF AGREEMENT: WITHDRAWAL AND TERMINATION

7.1. Parties Bound. The Parties shall be bound by this Agreement beginning on the Effective Date and for the term specified in Article 12.1 unless precluded from doing so by an order of FERC or a court of competent jurisdiction.

7.2. Failure to Comply with Article 5. If either Party fails to comply with the provisions of Article 5, the other Party may withdraw from this Agreement by sending written notice of its withdrawal to the other Party by express mail or overnight delivery. For purposes of this section, such notice shall terminate this Agreement three (3) business days after the written notice is sent.

7.3. Adoption by FERC without Material Modification. The Parties have entered into this Agreement with the expectation that FERC shall issue an amended license for the Project that incorporates without material modification the §4(e) conditions set forth in Appendix 1 and which incorporates without material modification the standard §4(e) indemnification condition. The Parties agree that if FERC meets this expectation, neither of the Parties will seek rehearing of the FERC license order for any issues covered by this Agreement or support any such request for rehearing by a non-party to this Agreement. Each Party retains the right to seek rehearing of any provision included in the amended license by FERC that is not addressed in the §4(e) conditions, the §4(e) indemnification provision, or the OLA.

7.4. Adoption with Material Modification. If FERC in issuing the amended license materially modifies or requires any measure inconsistent with the 4(e) conditions set forth in Appendix 1 hereto or the standard §4(e) indemnification condition, or if, during the term of the amended license, FERC modifies the amended license to require operation of the Project in a manner that is inconsistent with such §4(e) conditions, then (1) any Party may petition FERC for rehearing of the relevant portion of any such FERC order and seek judicial review with respect thereto, and (2) the Parties shall meet to discuss whether such inconsistency can be resolved by agreement of the Parties. Consistent with Article 5.3, in any such rehearing or judicial review proceeding, no Party shall take a position that is inconsistent with this Agreement.

7.5. Review of Other Agency Actions. To the extent provided by applicable law, either Party may seek administrative rehearing and judicial review of any action by any other governmental authority inconsistent with this Agreement.

7.6. Availability of Funds. Implementation of this Agreement by the Forest Service is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1519, and the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury in violation of the Anti-Deficiency Act. Implementation of the Agreement by the Forest Service is subject to the availability of appropriated funds. The Parties acknowledge that Forest Service is a federal agency and shall not be required under this Agreement to expend any appropriated funds unless and until appropriately authorized.

ARTICLE 8: COOPERATIVE DEVELOPMENT AND APPROVAL OF PLANS AND REPORTS

The Parties agree to cooperate and work in good faith during the preparation, review, and approval of applicable reports and plans required by this Settlement Agreement, the §4(e) conditions, or the OLA.

Denver Water shall provide the Forest Service with a draft of the report or plan for review and comment at least 90 days prior to submitting the final report or plan to the Commission. The Forest Service shall have 45 days to submit written comments on the report or plan to Denver Water. Final plans submitted to the FERC shall include documentation of consultation with the Forest Service and other agencies, copies of comments and recommendations on the completed plan and specific descriptions of how the agencies' comments are accommodated by the final plan. If Denver Water does not adopt a recommendation, the final plan and filing to FERC shall include Denver Water's reasons based on Project-specific information.

ARTICLE 9: ANNUAL REPORT BY THE FOREST SERVICE

The Forest Service agrees to prepare an annual report describing how maintenance dollars collected from Denver Water pursuant to the Cost Share Agreement required under Condition 30 of the §4(e) conditions were spent in the prior year. This report will be provided to Denver Water on or before February 28.

ARTICLE 10: DISPUTE RESOLUTION

The Parties agree to use the following dispute resolution process to resolve all disputes related to compliance with or performance of obligations set forth in this Agreement and the §4(e) conditions set forth in Appendix 1. This dispute resolution process does not preclude either Party from timely filing and pursuing an action for administrative or judicial relief of any FERC order, compliance matter, or other regulatory action if necessary to meet a filing deadline; provided however, that in such case that Party shall initiate this process as soon as practicable thereafter or concurrently therewith.

10.1. Notice of Dispute. A Party who believes that a dispute has arisen shall provide written notice to the other Party, describing the matter(s) in dispute and including any proposed relief or resolution. Any Party claiming a dispute will provide timely Notice of the dispute within 30 days after the dispute arises.

10.2. Consultation. The Parties shall commence a 60-day Consultation Period, measured from the date of the notice of the dispute, to engage in good faith negotiations to resolve the dispute. Each Party will cooperate in good faith to promptly schedule, attend and participate in dispute resolution. During the Consultation Period, the Parties will hold up to two (2) informal meetings in an attempt to resolve the dispute. This Consultation Period can be extended upon mutual agreement of the Parties.

At any time during the Consultation Period, the Parties may, by mutual consent, initiate mediation or Alternative Dispute Resolution ("ADR") proceedings before FERC as set forth in Article 10.3.

10.3. Mediation or ADR. Upon mutual agreement, the Parties may seek mediation or initiate ADR proceedings before FERC during the Consultation Period or if a dispute persists at the conclusion of the Consultation Period. Mediation shall be conducted by an agreed-upon organization. The Parties shall either (1) reach agreement on appropriate allocation of costs prior to commencing mediation or ADR, or (2) if agreement cannot be reached, the Forest Service retains the option of not using mediation or ADR.

10.4. Peer Review. The Parties may agree to peer review by a mutually agreed upon, qualified expert(s) to help resolve disputes over technical or scientific issues. The Parties shall reach agreement on appropriate allocation of costs prior to seeking peer review. The Parties agree that no person used for peer review by the Parties can testify in any judicial forum or at FERC with respect to any issue upon which the person was providing peer review assistance unless all Parties consent to such person providing such testimony.

ARTICLE 11: FORCE MAJEURE

An event of "Force Majeure" as used herein means any event beyond the reasonable control of and which occurs without the fault or negligence of the Party, including its contractors and subcontractors (to the extent said contractor was acting under their control or direction), which events may include but are not limited to: acts of God or sudden actions of the elements; acts of war, terrorism, or civil disturbance; and labor stoppages. If a Force Majeure event renders a Party unable to perform any obligation hereunder, that Party shall promptly notify the other Party, and use best efforts to resume its obligation as soon as possible. For so long as a Force Majeure event renders the performance of any obligation impossible, that obligation is excused.

ARTICLE 12: GENERAL PROVISIONS

12.1. Effective Date and Term. This Agreement shall become effective on the day the last Party executes it. Except as provided in Article 7, this Agreement shall remain in effect for the term of the amended license and any subsequent annual licenses for the Project.

12.2. No Third-Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement and shall not authorize any non-Party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations and responsibilities of the Parties with respect to third Parties shall remain as imposed under applicable law.

12.3. Successors and Assigns. This Agreement shall apply to and be binding on the Parties and their successors and assigns.

12.4. Modification of the Agreement. Any modification to the provisions of this Agreement shall be effective only when made in writing and signed by both Parties.

12.5. **Elected Officials Not to Benefit.** No member of or delegate to Congress shall be entitled to any share or part of this Agreement or to any benefit that may arise from it.

12.6. **No Partnership.** Except as otherwise expressly set forth herein, this Agreement does not, and shall not be deemed to, make any Party the agent for or partner of any other Party.

12.7. **Reference to Statutes or Regulations.** Any reference in this Agreement to any federal or state statute or regulation shall be deemed to be a reference to such statute or regulation or successor statute or regulation in existence as of the date of the action.

12.8. **Notice.** Any notice required by this Agreement shall be in writing. It shall be sent by first class mail, electronic mail, or comparable method of distribution to the other Party and shall be filed with the Commission. For the purpose of notice, the authorized representatives of the Parties as of the Effective Date are:

Denver Water:

Director of Planning
1600 W. 12th Avenue
Denver, CO 80204

Forest Service:

United States Department of Agriculture, Forest Service
Arapaho-Roosevelt National Forests and Pawnee National Grassland
2150 Centre Ave. Building E
Fort Collins, CO 80526

12.9. **Payments.** Any payment required by this Agreement shall be sent by first class mail or comparable method of distribution to the address and in the manner provided in an invoice sent from the Forest Service.

ARTICLE 13: EXECUTION OF AGREEMENT

13.1. **Signatory Authority.** Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

13.2. **Signing in Counterparts.** This Agreement may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures, and may be attached to another counterpart of this Agreement identical in form having attached it to one or more signature pages.

ATTESTED:

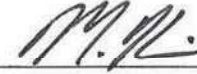
By:  _____
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Secretary

CITY AND COUNTY OF DENVER,
acting by and through its
BOARD OF WATER COMMISSIONERS


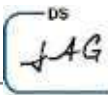
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President

DATE: 9/14/2016

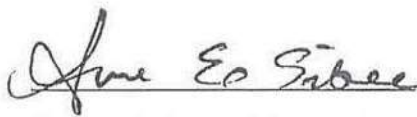
APPROVED:

By:  _____
Chief Planning Officer, Michael E. King

REGISTERED AND COUNTERSIGNED:
CITY AND COUNTY OF DENVER

By:  _____ 
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Timothy M. O'Brien, CPA
Auditor

APPROVED AS TO FORM:

By:  _____
Office of General Counsel

APPROVED:

Forest Service

United States Department of Agriculture, Forest Service

By:


Jacqueline A. Buchanan
Acting Regional Forester

9/7/16
Date

September 6, 2016 Settlement Agreement Appendix 1**Forest Service
Section 4(e) Conditions****INTRODUCTION**

The USDA Forest Service (Forest Service) submits the following Final Section 4(e) Conditions for the Gross Reservoir Hydroelectric Project (Project), FERC No. 2035, in accordance with 18 CFR 4.34(b)(1)(i) and Section 4(e) of the Federal Power Act (FPA). Specifically, the 4(e) conditions in this document are based on the 1997 Revision of the Land and Resource Management Plan (as amended) for the Arapaho-Roosevelt National Forests and Pawnee National Grassland ("Forest Plan"), as approved by the Regional Forester of the Rocky Mountain Region.

Pursuant to Section 4(e) of the FPA, the Secretary of Agriculture, acting by and through the Forest Service, considers the following conditions necessary for the adequate protection and utilization of the land and resources of the Roosevelt National Forest. Part I of this document includes standard administrative conditions deemed necessary for the administration of National Forest System ("NFS") land. Part II of this document includes standard resource conditions deemed necessary for protection and utilization of NFS land. Part III of this document includes specific resource requirements for protection and utilization of NFS land related to the Project.

PART I: STANDARD ADMINISTRATIVE CONDITIONS**Condition No. 1 – Revision of Forest Service Conditions (REPLACES CONDITION NO. 111)**

Forest Service reserves the right, after notice and opportunity for comment, to revise these Section 4(e) conditions in order to provide for the protection and utilization of NFS land and resources. Situations in which revision of or addition to 4(e) conditions might be warranted include, but are not limited to, when new resource information becomes available or when the United States Fish and Wildlife Service issues a Final Biological Opinion for this Project or the Water Quality Control Division of the Colorado Department of Public Health and Environment issues a Clean Water Act Section 401 Certification for this Project, and any subsequent modification or amendment of the Federal Energy Regulatory Commission ("FERC or Commission") license.

Condition No. 2 - Surrender of License or Transfer of Ownership (NEW CONDITION)

Prior to any surrender of this license, Licensee shall provide assurance acceptable to the Forest Service that Licensee shall restore any project area directly affecting NFS land to a condition satisfactory to the Forest Service upon or after surrender of the license, as appropriate. To the extent restoration is required, Licensee shall prepare a restoration plan for Forest Service review and approval, which shall identify the measures to be taken to restore such NFS land and shall include adequate financial mechanisms to ensure performance of the restoration measures.

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In the event of any transfer of the license or sale of the Project, Licensee shall assure that, in a manner satisfactory to Forest Service, Licensee or transferee shall provide for the costs of surrender and restoration. If deemed necessary by the Forest Service to assist it in evaluating Licensee's proposal, Licensee shall conduct an analysis, using experts approved by the Forest Service, to estimate the potential costs associated with surrender and restoration of any project area directly affecting NFS land to Forest Service specifications. In addition, the Forest Service may require Licensee to pay for an independent audit of the transferee to assist the Forest Service in determining whether the transferee has the financial ability to fund the surrender and restoration work specified in the analysis.

Condition No. 3 - Requirement to Obtain a Short-Term Forest Service Special Use Authorization (REPLACES CONDITION NO. 101)

During the term of the license, if the Licensee proposes to perform any construction work not authorized under the license amendment, the Licensee shall obtain a short-term special use authorization prior to beginning any ground-disturbing activities on NFS land. Licensee shall be responsible for the costs the Forest Service incurs processing the special use authorization application per Cost Recovery regulations in 36 CFR 251.58, as revised and amended, or per federal law or regulations in effect at the time, unless the Forest Service agrees to a waiver of costs.

Licensee may commence ground-disturbing activities authorized by the short-term special use authorization no sooner than 60 days following the date Licensee files the Forest Service short-term special use authorization with the Commission, unless the Commission prescribes a different commencement schedule. In the event there is a conflict between any provisions of the license and any such Forest Service short-term special use authorization, the special use authorization shall prevail to the extent that the Forest Service, in consultation with the Commission, deems the terms of the special use authorization necessary to protect and utilize NFS resources.

A short-term special use authorization will not be required by the Forest Service for the construction and ground-disturbing activities and routine operations and maintenance for the Project authorized under the license amendment. Subsequent ground-disturbing activities, non-routine maintenance and any additional new construction for the remainder term of the license shall be subject to this condition, as determined necessary by the Forest Service authorizing officer.

Condition No. 4 – Forest Service Approval of Final Design Plans (REPLACES CONDITION NO. 101)

Before any construction occurs on NFS land, Licensee shall obtain prior written approval from the Forest Service for all final design plans for Project components, which Forest Service determines could affect or potentially affect NFS resources. As part of such prior written approval, the Forest Service may require adjustments in final plans and facility locations to preclude or mitigate impacts and to assure that the Project is compatible with on-the-ground

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conditions. Should such adjustments be deemed by the Forest Service, the Commission, or the Licensee to be a substantial change, the Licensee shall follow the procedures of Article 2 of the License. Changes to the license made pursuant to Article 2 or Article 3, shall be made subject to any new terms and conditions of the Secretary of Agriculture made pursuant to Section 4(e) of the Federal Power Act.

Condition No. 5 - Compliance with Regulations (NEW CONDITION)

Licensee shall comply with all applicable laws, regulations, and directives of the U.S. Department of Agriculture for activities on NFS land, and all applicable Federal laws, ordinances, regulations, and directives in regard to the area or operations on or directly affecting NFS land. Licensee shall comply with all applicable State, county, and municipal laws, ordinances, and/or regulations in regards to the area or operations on or directly affecting NFS land, to the extent those State, county, and municipal laws, ordinances or regulations are not preempted by Federal law.

Condition No. 6 - Protection of United States Property (NEW CONDITION)

Licensee, including any agents or employees of Licensee acting within the scope of their employment, shall protect the land, property, and interests of the United States from damage arising from activities authorized by the license, including but not limited to the Licensee's construction, maintenance, or operation of the Project works or the works appurtenant or accessory thereto under the license. The Licensee shall be liable for all injury, loss, or damage, including fire suppression, or other costs in connection with rehabilitation or restoration of natural resources associated with the activities authorized under this license. Licensee's liability for fire and other damages to NFS land shall be determined in accordance with the Federal Power Act and standard Form L-1 Articles 22 and 24.

As part of the occupancy and use of NFS land, Licensee has a continuing responsibility to reasonably identify and report all known or observed hazardous conditions on or directly affecting NFS land that could affect the improvements, resources, or pose a risk of injury to individuals. Licensee shall abate those conditions, except those caused by third parties or not related to the occupancy and use authorized by the license. Any non-emergency actions to abate such hazards on NFS land shall be performed after consultation with the Forest Service. In emergency situations, Licensee shall notify Forest Service of its actions as soon as possible, but not more than 48 hours after such actions have been taken. Whether or not Forest Service is notified or provides consultation, Licensee shall remain solely responsible for all abatement measures performed. Other hazards should be reported to the appropriate agency as soon as possible.

Licensee shall maintain all its improvements and premises on NFS land to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the Forest Service. Licensee shall comply with all applicable Federal, State, and local laws regulations, and directives, including but not limited to, the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., the Resources Conservation and Recovery Act, 42 U.S.C. 6901 et seq., the Comprehensive Environmental Response, Control, and Liability Act, 42 U.S.C. 9601 et seq., and other relevant

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environmental laws, as well as public health and safety laws and other laws relating to the siting, construction, operation, and maintenance of any facility, improvement, or equipment. If on NFS land, disposal of all materials shall be at an approved location, except as otherwise agreed by Forest Service.

Condition No. 7 - Existing Claims (NEW CONDITION)

License shall be subject to all valid claims and existing rights of third parties. The United States is not liable to Licensee for the exercise of any such right or claim.

Condition No. 8 – Indemnification (NEW CONDITION)

[Reserved; Indemnification not a part of the Settlement Agreement]

Condition No. 9 – Access within the License Area (NEW CONDITION)

The United States shall have unrestricted use of any part of the licensed area on NFS land for any purpose, including permitting uses by third parties or members of the public, provided such use does not interfere with the rights and privileges authorized by the license.

Condition No. 10 – Use of Roads on National Forest System Land (NEW CONDITION)

Roads inside FERC Project Boundary

The Licensee shall develop a Road Maintenance Plan for use, maintenance, reconstruction and relocation of roads used for Project purposes on NFS land within the FERC Project Boundary. This plan shall be developed in consultation with the Forest Service and is subject to Forest Service approval. The Plan shall be filed by Licensee with the Commission within two years of the effective date of the amended license. The Plan shall address costs for maintenance, reconstruction and relocation of National Forest System Roads (“NFSRs”). Licensee shall be responsible for a proportional share of the costs of maintenance, reconstruction, and relocation of NFSRs within the FERC Project boundary commensurate with use of NFSRs for Project operations, Project-related public recreation and other Project related activities as a percentage of the total use of NFSRs within the FERC project boundary. The Plan shall also address road maintenance for non-NFSRs that are used or maintained by the Licensee for Project purposes on NFS land within the FERC Project Boundary. The non-NFSR Plan shall specify road maintenance and management standards that provide for traffic safety, minimize erosion, and minimize damage to natural resources. It shall also include Best Management Practices (“BMPs”) as approved by the Forest Service. The Road Maintenance Plan filed with the Commission shall be updated as determined necessary by the Forest Service. All updates are subject to Forest Service review and approval. Suitable authorization for NFSRs needed for specific construction activities authorized under this license amendment will be provided under Conditions 24, 26 and 27.

In the event a road requires maintenance, restoration, or reconstruction to accommodate Licensee’s needs and that work is not identified in the approved Road Maintenance Plan or cost

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share agreement, Licensee shall perform such work at its own expense after obtaining prior approval and/or authorization from the Forest Service.

The road maintenance plan shall also include the following:

- a. Current condition survey.
- b. Map(s) at a scale to allow identification of specific routes or segments.
- c. Forest Service assigned road numbers for NFSRs and Project road references for non-NFSRs used for reference on the maps, tables, and in the field.
- d. GIS compatible files of GPS alignments of all roads used for Project access to be provided to the Forest Service.
- e. Adequate signage, to be installed and maintained by Licensee at each road or route, identifying the NFSRs by Forest Service road number.

Licensee shall confine all vehicles being used for Project purposes on NFS land, including but not limited to administrative and transportation vehicles and construction and inspection equipment, to roads or specifically designed access routes, as identified in the Road Maintenance Plan described above. The Forest Service reserves the right to close any and all such routes on NFS land where resource damage is occurring or to require reconstruction/construction by Licensee to the extent needed to accommodate Licensee's use. The Forest Service understands the importance of access to the dam and agrees to provide advance notice of 30 days to Licensee prior to road closures, except in an emergency, in which case notice will be provided as soon as practicable.

Licensee shall maintain suitable crossings as required by the Forest Service for all roads and trails that intersect the right-of-way occupied by linear Project facilities (powerline, penstock, ditch, and pipeline). For roads on the west side of Gross Reservoir listed in Condition 30, a road maintenance plan shall only be required if the Licensee performs road maintenance in lieu of paying the Forest Service for Licensee's share of maintenance costs as required under Condition 30. Licensee shall continue to maintain the portions of Gross Dam Access Road and Miramonte Access Road that cross NFS land in Parcels 62 and 64 and provide access to the dam and Project-related facilities on the east side of Gross Reservoir, which the Licensee currently performs under the current license. This maintenance shall be covered in the Road Maintenance Plan as described above.

Roads outside FERC Project Boundary

For use of NFSRs or non-NFSR project access roads used or maintained by the Licensee on NFS land outside the FERC Project Boundary, Licensee shall obtain suitable road use authorizations from the Forest Service. Such authorizations shall require cost sharing for road maintenance and reconstruction commensurate with Licensee's use and project-related use of NFSRs. It shall also address road maintenance for non-NFSR project access roads. The authorizations shall specify road maintenance and management standards acceptable to the Forest Service that provide for traffic safety, minimize erosion, and minimize damage to natural resources.

September 6, 2016 Settlement Agreement Appendix 1**Condition No. 11 - Hazardous Substances Plan (REPLACES CONDITION NO. 109)**

Hazardous substances may not be stored on NFS land without prior approval of the Forest Service. Licensee shall submit a Spill Prevention and Cleanup Plan for prior review and approval by Forest Service as part of any request to store hazardous substances. The plan shall show evidence of consultation with Colorado Department of Public Health and Environment. The plan shall be filed with the Commission at least 90 days prior to storage of oil and hazardous substances on NFS land.

At a minimum, the plan must: (1) outline the Licensee's procedures for reporting and responding to releases of hazardous substances, including names and phone numbers of all emergency response personnel and their assigned responsibilities; (2) maintain within the FERC Project Boundary a cache of spill cleanup equipment suitable to contain any spill from the Project; (3) include a schedule to periodically inform the Forest Service of the location of the spill cleanup equipment on NFS land and of the location, type, and quantity of oil and hazardous substances stored in the FERC Project Boundary; and (4) include a requirement to inform the Forest Service immediately of the magnitude, nature, time, date, location, and action taken for any spill on NFS land. The plan shall include a monitoring plan that details corrective measures that will be taken if spills occur. The plan shall require a written report on a schedule approved by the Forest Service during construction documenting the results of the monitoring.

Condition No. 12 - Pesticide-Use Restrictions on NFS Land (REPLACES CONDITION NO. 108)

Pesticides may not be used on NFS land or in areas affecting NFS land to control undesirable woody and herbaceous vegetation, aquatic plants, insects, rodents, non-native fish, etc. without the prior written approval of the Forest Service. Any request by Licensee to use pesticides shall be accompanied by the following:

- a. Explanation of the need for use of pesticides; A determination as to whether pesticide applications are essential for use on NFS land;
- b. Specific locations of use;
- c. Specific pesticides for proposed for use;
- d. Application rates;
- e. Dose and exposure rates; and
- f. Safety risk and timeframes for application.

Exceptions to this schedule may be allowed by the Forest Service only when unexpected outbreaks of pests require control measures that were not anticipated at the time the report was submitted by the Licensee. In such an instance, an emergency request and approval may be made by the Licensee.

On NFS land, Licensee shall only use those materials registered by the U.S. Environmental Protection Agency, and use must be consistent with Forest Service use for similar applications and approved by the Forest Service. Licensee must strictly follow label instructions in the preparation and application of pesticides and disposal of excess pesticides, materials, containers

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and other materials and equipment used in storage, transportation, or application. Licensee shall also submit Pesticide Use Proposal(s) with accompanying risk assessment and other Forest Service required documents to use pesticides on a regular basis. Submission of this plan will not relieve Licensee of the responsibility of annual notification and review.

Condition No. 13 – Consultation (REPLACES CONDITION NO. 103)

Licensee shall annually consult with the Forest Service on Project-related activities on or directly affecting NFS land. The date of the consultation meeting will be mutually agreed to by Licensee and Forest Service but in general should be held by April 15. In its discretion, the Forest Service may invite other interested stakeholders and appropriate agencies, confirming the meeting location, time, and agenda with the Licensee. Licensee shall attempt to coordinate the meeting so interested agencies and other stakeholders may attend.

Licensee shall make the following Project-related information available to Forest Service and other meeting participants at least 30 days prior to the meeting, unless otherwise agreed upon by the Forest Service:

- a. An operations plan for the year in which the meeting occurs, including planned outages.
- b. A description of planned maintenance projects for the year in which the meeting occurs.
- c. The hydrology record for the previous year, if available, including any variances.
- d. Results of any monitoring conducted the previous year.
- e. Safety reports, including geologic and seismic reports.
- f. A document that tracks the status of the Section 4(e) conditions that require action in the year in which the meeting occurs.

Consultation shall include, but not be limited to the following, unless otherwise agreed upon by the Forest Service:

- a. A status report regarding implementation of license conditions.
- b. Results of Project monitoring studies performed over the previous year in formats agreed to by the Forest Service and Licensee during development of implementation plans.
- c. Review of any planned Project maintenance.
- d. Discussion of any foreseeable changes to Project facilities or features.
- e. Discussion of any necessary revisions or modifications to implementation plans approved as part of this license.
- f. Discussion of needed protection measures for sensitive areas, including but not limited to wetlands and other water bodies, riparian areas, areas with erosion concerns, and habitats for special status species.
- g. Discussion of: 1) additional protection measures for special status species potentially affected by the Project that may be needed for newly listed as threatened, endangered, Forest Service sensitive, Forest Service Species of Conservation Concern, Management Indicator Species, Focal Species, or species of local concern; 2) changes to existing management plans that may be needed due to the delisting of species; and 3) changes that may be needed to incorporate new knowledge about a species requiring protection on NFS land.

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- h. Discussion of needed protection measures for newly discovered cultural resource sites.
- i. Discussion of elements of current year maintenance plans, *e.g.* road and trail maintenance.
- j. Discussion of any planned pesticide use.

A record of the meeting shall be kept by Licensee and shall include any recommendations made by the Forest Service for the protection of NFS land and resources. Licensee shall file the meeting record, with the Commission no later than 60 days following the meeting.

Condition No. 14 - Approval of Changes (REPLACES CONDITION NO. 102)

Notwithstanding any license authorization to make changes to the Project, when such changes directly affect NFS land, Licensee shall obtain written approval from the Forest Service prior to making any changes to any constructed Project features or facilities or use of Project lands and waters, or any departure from the requirements of any approved exhibits filed with the Commission. Following receipt of such approval from the Forest Service, and a minimum of 60 days prior to initiating any such changes, Licensee shall file a report with the Commission describing the changes and the reasons for the changes and shall include any protection measures determined necessary by the Forest Service for such changes. Licensee shall file an exact copy of this report with the Forest Service at the same time it is filed with the Commission. This condition does not relieve Licensee from the amendment or other requirements of Article 2 or Article 3 of this license.

Condition No. 15 - Surveys, Land Corners (NEW CONDITION)

Licensee shall avoid disturbance to all public land survey monuments, private property corners, and forest boundary markers on NFS land. In the event that any such land markers or monuments on NFS land are destroyed by an act or omission of Licensee, in connection with the use and/or occupancy authorized by this license, depending on the type of monument destroyed, Licensee shall reestablish or reference same in accordance with (1) the procedures outlined in the "Manual of Instructions for the Survey of the Public Land of the United States," (2) the specifications of the County Surveyor, or (3) the specifications of Forest Service. Further, Licensee shall ensure that any such official survey records affected are amended as provided by law.

Condition No. 16 – Signs (NEW CONDITION)

Licensee shall consult with the Forest Service prior to erecting signs related to safety issues on NFS land. Prior to Licensee erecting any other signs or advertising devices on NFS land, Licensee must obtain the approval of the Forest Service as to location, design, size, color, and message. Licensee shall be responsible for maintaining all signs erected by the Licensee on NFS land to standards acceptable to the Forest Service.

September 6, 2016 Settlement Agreement Appendix 1**PART II: STANDARD RESOURCE CONDITIONS****Condition No. 17 – Invasive Species Management (REPLACES CONDITION NO. 107)****Aquatic Invasive Species Management and Monitoring Plan**

Within one year of the effective date of the amended license and at least 90 days before ground-disturbing or construction activities authorized by license amendment, Licensee shall file with the Commission an Aquatic Invasive Species (“AIS”) Plan developed in consultation with Forest Service, U.S. Fish and Wildlife Service, and Colorado Parks and Wildlife and subject to prior review and approval by the Forest Service. This plan shall meet applicable State and Federal laws, regulations, and guidance. The applicable State and Federal resource agencies shall be responsible for making the determination as to whether the AIS Plan complies with the State or Federal regulations of their respective agencies. The AIS Plan shall only address Project-related waterbodies. Upon Commission approval, Licensee shall implement the Plan.

Public Education Program

The AIS Plan shall include a public education program, including appropriate signage and information pamphlets at designated public boat accesses or up to five fishing access points. This program and these access points are subject to prior review and approval by the Forest Service. The following shall be addressed in the education program, unless otherwise agreed to with the Forest Service:

- a. Avoiding the release of plants and animals into a waterbody unless they originally came from that waterbody.
- b. Cleaning and drying boats and fishing equipment using accepted protocols for the prevention of all AIS before entering any waterbody area.
- c. Removing visible plants, animals and mud from boat before leaving waterbody.
- d. Disposing of unwanted bait in trash, including earthworms.
- e. Draining water from boat, motor, bilge, live well, and bait containers before leaving a water access site.

AIS information shall be included on Project websites that provide public information on Project facilities. The public information website will also include information on the amphibian chytrid fungus.

Best Management Practices (BMPs)

Licensee shall develop BMPs to prevent the spread of AIS for individual Project operations and maintenance activities performed by Licensee and/or its contractors and Project activities which have the potential to introduce AIS into Gross Reservoir. These BMPs shall be submitted to the Forest Service and Colorado Parks and Wildlife for their respective review and approval. The BMPs shall be submitted for review at the Annual Consultation Meeting required in the FERC license.

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Development of BMPs for Project activities shall include but not be limited to the following:

- a. List of AIS with potential to be introduced.
- b. Control or preventive measures for AIS.
- c. Identification of critical control points in the Project activity sequence at which to prevent the introduction of AIS.
- d. Any necessary implementation monitoring for potential AIS to ensure BMPs are followed.
- e. Actions that will be taken if an introduction of AIS is found.

If AIS are detected within any Project-related waterbody, Licensee shall consult with the Forest Service and appropriate agencies on an appropriate plan of action, and shall implement the appropriate action pursuant to Forest Service requirements after obtaining prior Forest Service approval.

Monitoring and Reporting

The AIS Plan shall include a specific monitoring program that addresses all designated public fishing and boat launches on Gross Reservoir, South Boulder Creek upstream of Gross reservoir to the Moffat Tunnel, and areas identified as having boating or fishing access, and that follows State and/or Federal laws, regulations, and policies. Mapping and monitoring results shall be provided to the Forest Service and Colorado Parks and Wildlife.

Plan Revisions

Licensee, in consultation with the Forest Service and Colorado Parks and Wildlife, shall review, update, and/or revise the AIS Plan, as determined necessary by the Forest Service and in consultation with Colorado Parks and Wildlife, subject to prior review and approval by the Forest Service, when substantial changes in the existing conditions occur. Changes or revisions to the Plan would be expected if AIS conditions change as a result of: 1) unforeseen effects from new or existing Project-related activities, 2) the potential for new AIS to occur, 3) changed conditions as a result of natural events such as fire or flood, or 4) establishment of other regulatory or legal requirements for AIS. Additional monitoring may be required as part of any plan revisions. Licensee shall include all relevant documentation of coordination/consultation with the updated Plan filed with the Commission.

Invasive Plant and Noxious Weed Species Management Plan (REPLACES CONDITION 108; Complements Article 406)

Within one year of the effective date of the amended license and at least 90 days before ground-disturbing or construction activities authorized by license amendment, Licensee shall complete, in consultation with the Forest Service, and subject to prior review and approval of the Forest Service, an Invasive Plant and Noxious Weed Species Management Plan (Plan) for NFS land potentially affected by the Project. Invasive plant and noxious weed species will be those species defined by the Forest Service and Colorado Department of Agriculture's Noxious Weed List. Upon Commission approval, Licensee shall implement the Plan.

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Notwithstanding weed management under Condition 30, the Plan shall address terrestrial invasive plant and noxious weed species management within the FERC Project Boundary. In areas where noxious weed populations that the Forest Service determines to be Project-related extend outside the FERC Project boundary, treatments would extend up to ¼ mile beyond the FERC Project Boundary. If noxious weed populations extend more than ¼ mile from the FERC Project Boundary, and are determined to be Project-related, Licensee will consult with the Forest Service to determine if the populations should be treated and, if so, the appropriate treatment methods.

Minimum components of the Plan shall include, but may not be limited to:

- Invasive plant and noxious weed species management: frequency of surveys, guidelines for prevention, treatment, internal education, monitoring, reporting, guidelines for conducting weed risk assessment for new Project feature development, including an adaptive management element for invasive plant and noxious weed species management as necessary.
- Methods that ensure early detection and treatment of invasive plant and noxious weed species.
- Guidelines for conducting Licensee's inspections of construction-related or ground-disturbing equipment and vehicles for the presence of invasive plant and noxious weed species.
- List of target invasive plant and noxious weed species agreed to and approved by the Forest Service.
- Annual reporting guidelines for the Annual Meeting.

Licensee, in consultation with the Forest Service, shall review, update, and/or revise the Plans as determined necessary by the Forest Service, if changes in invasive plant and noxious weed species management occur on NFS land. Changes or revisions to the Plan would be expected if invasive plant and noxious weeds conditions change as a result of 1) unforeseen effects from new or existing Project-related activities, 2) the potential for new invasive plants and noxious weeds occurs or changes, 3) changed conditions due to natural events such as fire or flood, or 4) establishment of other regulatory or legal requirements. Changes to the Plan may be required if monitoring feedback indicates that resource objectives are not being met.

Any updates to the Plan shall be prepared in coordination and consultation with the Forest Service and require Forest Service review and approval. Licensee shall include all relevant documentation of coordination/consultation with the updated Plan filed with the Commission.

Condition No. 18 - Special Status Species and Sensitive Areas (NEW CONDITION)**Biological Evaluations**

Licensee shall prepare and submit a biological evaluation (BE) to the Forest Service for review and approval when the Forest Service determines that proposed actions may affect Forest Service special status species or their habitat on NFS land. Special status species include threatened,

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endangered, Forest Service sensitive, Forest Service Species of Conservation Concern, Management Indicator Species, Focal Species, or species of local concern. The BE shall evaluate the potential impact of the action on the species or its habitat. Licensee shall comply with mitigation measures required by the Forest Service for Forest Service special status species.

The BE shall:

- Include procedures to minimize or avoid adverse effects to special status species.
- Ensure Project-related activities meet restrictions included in site management plans for special status species.
- Develop implementation and effectiveness monitoring of measures taken or employed to reduce effects to special status species.
- As determined necessary by the Forest Service, include procedures to minimize or avoid adverse effects to sensitive areas and develop implementation and effectiveness monitoring of measures to reduce effects to sensitive areas, which include, but are not limited to wetlands and other water bodies, riparian areas, areas with erosion concerns and habitats for special status species.

A BE will not be required by the Forest Service for the construction and ground-disturbing activities for the Project authorized under the license amendment. Subsequent ground-disturbing activities and any additional new construction for the remainder term of the License shall be subject to this condition, as determined necessary by the Forest Service authorizing officer.

Condition No. 19– Erosion Control and Reclamation (NEW CONDITION REPLACES No. 104; Complements Article 401)

Erosion Control and Reclamation Plan for Existing Project-Affected Areas

Within two years of the effective date of the amended license and at least 90 days before ground-disturbing or construction activities authorized by license amendment, Licensee shall file with the Commission an Erosion Control and Reclamation Plan (“Plan”) developed in consultation with Forest Service and other interested parties and subject to prior review and approval by Forest Service. The Plan shall provide direction for treating erosion, controlling sedimentation, and reclaiming disturbed sites upon Project-affected NFS land during the remaining term of license. Upon Commission approval, Licensee shall implement the Plan.

The Plan shall include, but not be limited to, the following minimum components, unless otherwise agreed to by the Forest Service during Plan finalization:

- Methods for initial and periodic inventory and monitoring of the Project-affected NFS land to identify erosion sites and sites needing reclamation caused by Project facilities and operations and assessment of site conditions for each such erosion site. Periodic monitoring and inventory will include recording effectiveness of erosion and reclamation treatment measures, including revegetation, and identification of new erosion and reclamation sites for the term of the license.

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- Criteria for ranking and treating erosion and reclamation sites shall include a risk rating and hazard assessment for scheduling erosion treatment measures and monitoring at each site.
- Erosion control and reclamation measures shall incorporate current standards, follow Forest Service regulations and guidance (e.g. Forest Plan, Road Management Objectives, BMPs) and shall be customized to site-specific conditions.
- Development and implementation of a schedule for treatment (e.g. repair, mitigate, monitor) of erosion and reclamation sites, including a list of sites requiring immediate mitigation and a schedule for their immediate implementation.
- Effectiveness monitoring of completed erosion control and reclamation treatment measures after treatment in order to determine if further measures are needed. If erosion control or reclamation measures are not effective, Licensee shall implement additional measures subject to prior approval by Forest Service and continue monitoring until the site has stabilized and reclamation goals are achieved to the satisfaction of the Forest Service.
- Protocols for emergency erosion and sediment control and disturbed site reclamation.
- Process for documenting and reporting inventory and monitoring results including periodic plan review and revision. Documentation shall include Forest Service compatible GIS geodatabase or shapefiles for maps keyed to a narrative description of detailed, site-specific, erosion and reclamation treatment measures and sediment monitoring results.

Erosion Control and Reclamation Plan Measures for New Construction or Non-Routine Maintenance

At least 90 days before ground disturbance commences, Licensee shall develop site-specific temporary erosion control measures and long-term reclamation measures for each new construction or non-routine maintenance project. These measures are subject to prior review and approval by the Forest Service. The temporary measures shall be designed to prevent erosion, stream sedimentation, dust, and soil mass movement during the period of ground disturbance until replaced by permanent reclamation measures on NFS land.

For the construction and ground-disturbing activities for the Project authorized under the license amendment, all site-specific erosion control and reclamation measures shall be included as part of the appropriate plan(s) required under the license.

Condition No. 20 – Fire Management and Response Plan (NEW CONDITION; Complements existing Article 407)

Within two years of the effective date of the amended license and at least 90 days before ground-disturbing or construction activities authorized by license amendment, Licensee shall complete, in consultation with Forest Service, Colorado State Forest Service, and Colorado Department of Fire Prevention and Control, a Fire Management and Response Plan (FMRP). The FMRP is subject to prior review and approval by Forest Service. The FMRP shall set forth in detail Licensee's responsibility for the prevention (including fuels treatment), reporting, emergency

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response, and investigation of fires on NFS land related to Project operations. Upon Commission approval, Licensee shall implement the FMRP.

Minimum components of the FMRP shall include, but may not be limited to:

- **Fuels Treatment/Vegetation Management:** Identify fire hazard reduction measures and reoccurring maintenance measures necessary to prevent the escape of Project-induced fires.
- **Fire Prevention and Patrol:** Address fire danger and public safety associated with Project-induced recreation, including but not limited to fire danger associated with dispersed camping, existing and proposed developed recreation sites, trails, and vehicle access. Identify water drafting sites and other fire suppression resources.
- **Emergency Response Preparedness:** Analyze fire response needs including equipment and personnel availability.
- **Reporting:** A requirement that the Licensee report any Project-related fires as soon as practicable, but no later than 24 hours after ignition, to Forest Service.
- **Fire Control/Extinguishing:** Provide Forest Service a list of the locations of available fire suppression equipment and the location and availability of fire suppression personnel.

Part III. PROJECT-SPECIFIC CONDITIONS

Condition No. 21 – Raptor Protection Measures (REPLACES CONDITION 104)

The Licensee shall implement the following Raptor Protection Measures:

Osprey Nest Platform Relocation. Licensee shall replace the two existing osprey nest platforms that are located in the inundation area of Gross Reservoir, either on top of suitable trees or on poles. After license amendment issuance, Licensee shall consult with the Forest Service and Colorado Parks and Wildlife on design, suitable locations, and timing for construction of the new platforms and shall obtain Forest Service approval for design, locations, and timing of construction at least 60 days prior to implementation. Osprey nest platform relocation shall be completed prior to reservoir inundation.

Pre-construction Raptor Surveys. Unless prior written approval is obtained from the Forest Service, any tree cutting or removal authorized by the Forest Service shall be conducted prior to March 1 or after July 31 to prevent raptors (and other birds) from nesting on site during tree clearing and to avoid destruction of or disturbance to active nests during the breeding season. Timing of tree cutting or removal may be altered from above with prior written Forest Service approval and subject to appropriate mitigation measures.

If tree cutting or removal begins between March 1 and July 31, Licensee shall conduct surveys on NFS land for raptor nests, including hawks, falcons, and owls, prior to the start of land disturbing activities or any tree removal in all areas which will be affected by construction activities, including access routes and other associated disturbance areas. Survey areas and timing shall be developed in consultation with the Forest Service and Colorado Parks and Wildlife, based on species biology and the nature and timing of disturbance, and is subject to Forest Service approval.

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If active raptor nests are found, Licensee shall alter tree cutting or removal timing until chicks have fledged and shall consult with and obtain approval from the Forest Service regarding appropriate buffer zones around nest sites. Licensee shall implement appropriate buffer zones as determined necessary by Forest Service during project activities. Licensee shall monitor nest success and fledging dates of the active raptor nests during Project construction at a frequency specified or approved by the Forest Service, and shall report monitoring data to the Forest Service.

Condition No. 22 – Special Status Plants Relocation Plan (NEW CONDITION, Complements existing Article 410)

Within two years of the effective date of the amended license and at least two years before tree removal for inundation authorized by the license amendment begins, Licensee shall file with the Commission, a Special Status Plants Relocation Plan (Plan) for addressing impacts to special status plants on NFS land. This Plan shall be developed in consultation with the Forest Service and is subject to Forest Service approval. Upon Commission approval, Licensee shall implement the Plan. Special status plants include threatened, endangered, Forest Service sensitive, Forest Service Species of Conservation Concern, Management Indicator Species, Focal Species, or plant species of local concern.

The Plan shall detail how Forest Service special status plant species found on NFS land within the new inundation area and new areas to be disturbed for the relocated recreation facilities will be collected and transplanted. This new Plan will supplement, and supersede where appropriate, the existing *Rare and Sensitive Species Plan* approved by the Commission on January 15, 2004 under Article 410. The Plan shall include but not be limited to: locations of all suitable sites for transplanting species, seed collection and transplant timing, quantities of seeds and transplants, and timing of voucher collecting. Locations of all suitable sites for transplanting species discussed below shall be developed in consultation with the Forest Service and shall be subject to Forest Service approval.

The Plan shall include the following components:

1. Prior to ground-disturbing operations, locations of Forest Service special status plants, based on the most recent listing provided by the Forest Service, plus additional surveys if determined necessary by the Forest Service, will be marked in the field with a buffer zone of at least 10 feet. Ground-disturbing activities will be minimized to the extent practicable within the marked populations or buffer zones.
2. Wild sarsaparilla (*Aralia nudicaulis*). Transplant 200 individuals from affected sites to suitable nearby sites that would not be affected by inundation or, if the Forest Service determines that seed is an effective translocation method, collect and distribute seed from affected sites..
3. Dewey sedge (*Carex deweyana*). Transplant all affected individuals to suitable nearby sites.
4. Sprengel's sedge (*Carex sprengelii*). Transplant all affected individuals to suitable nearby sites.

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5. Enchantress's nightshade (*Circaea alpina*). Collect and distribute seed to suitable nearby sites. Alternately, surveys may be used to document additional locations that would not be affected.
6. Tall blue lettuce (*Lactuca biennis*). Collect seed from affected plants for two years and spread seed in suitable nearby unaffected habitat.
7. Maryland sanicle (*Sanicula marilandica*). Collect seed from affected plants and spread seed in suitable nearby unaffected habitat. Alternately, surveys may be used to document additional individuals that would not be affected upstream of the known location.
8. False melic (*Schizachne purpurascens*). Collect seed from affected plants and spread seed in suitable nearby unaffected habitat.
9. All sensitive and local concern plant species: Collect herbarium voucher specimens from affected populations, and provide them to Forest Service for distribution to herbaria. Ten specimen sheets should be collected for each species, to document their pre-disturbance occurrence.

Condition No. 23 – Visual Resource Protection Plan (REPLACES CONDITION 105; complements Article 414)

At least 90 days before ground-disturbing or construction activities on NFS land authorized by license amendment, Licensee shall file with the Commission an addendum to the current Visual Resource Protection Plan (Plan) (approved by FERC on May 22, 2003), developed in consultation with the Forest Service and subject to prior review and approval by the Forest Service. Upon Commission approval, Licensee shall implement the Plan.

The Plan addendum shall address, but not be limited to the following:

- Measures for mitigating visual impacts from Project-related construction activities on NFS land, including reclamation treatments for the quarry, and relocation and/or reconstruction of roads, trails and recreation facilities.
- Measures for reshaping and revegetation of disturbed areas to blend with surrounding visual characteristics on NFS land.
- Schedule of ongoing facility maintenance and replacement that will incorporate the design considerations listed on pages 48 and 49 of the current Visual Resource Protection Plan on NFS land.

The Plan addendum shall adhere to applicable Forest Service scenery management guidance included in current Forest Plan direction and USDA Forest Service Agricultural Handbook Number 701, "Landscape Aesthetics: A Handbook for Scenery Management," December 1995.

Condition No. 24 –Recreation Management (REPLACES CONDITION 106; Complements existing Article 416)

Licensee shall implement the Addendum to the existing Recreation Management Plan under Article 416, submitted with the Final License Amendment Application. The Licensee shall also implement the following recreation management measures:

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Human/Bear Interaction Management –Beginning on the effective date of the amended license, Licensee shall manage activities to minimize the potential for bear/human interactions as needed within the FERC Project Boundary on NFS land. If unwanted bear/human interactions are reported, Licensee shall consult with the Forest Service and Colorado Parks and Wildlife and implement appropriate mitigation measures. These measures are subject to Forest Service approval. Potential measures could include, but are not limited to, activities such as trash management, signing to inform workers and visitors on bear activity, and proper behavior to reduce potential for attracting bears.

Recreation Use Monitoring – For the first three years after the expanded Gross Reservoir is full, Licensee shall annually submit recreation use monitoring data spreadsheets to the Forest Service by February 28. At the end of the first three years, the Licensee shall submit a recreation use monitoring report to the Forest Service using the data from the previous three years. Thereafter, the Licensee shall provide the recreation use monitoring report to the Forest Service every three years. On the sixth year the report will include the Form 80 report, which is also submitted to FERC. The recreation use monitoring report shall provide a summary of annual monitoring conducted by year, a summary of the annual data collected, and a tabulation and summary of the data and monitoring practices required in the approved Recreation Monitoring Plan (FERC Order issued June 8, 2004).

In addition to the above, for NFS land in the Winiger Ridge area within the FERC Project Boundary, the recreation use monitoring report shall include those items specified or required by the Forest Service, which include but are not limited to, Frissell condition class of dispersed campsites, documentation of any reported social use conflicts, and any environmental damage caused by dispersed recreation. This information will be used to determine patterns in dispersed recreation use after reservoir inundation and to evaluate the need for additional recreation mitigation measures.

The Forest Service monitoring requirements described above can be changed upon mutual agreement of the Forest Service and Licensee. If the Forest Service and Licensee agree to change the monitoring requirements, the Licensee shall submit an update to the requirements with the Commission.

Costs for recreation use monitoring conducted by the Forest Service in the Winiger Ridge area outside the FERC Project Boundary is included in the Collection Agreement under Condition 30.

Dispersed Recreation Management at Winiger Ridge– Beginning on the effective date of the amended license, Licensee shall conduct a pre-construction inventory of all social trails and roads at Winiger Ridge within the FERC Project Boundary as specified or approved by the Forest Service. Within three years after the expanded Gross Reservoir is full, and, at minimum, every three years thereafter, the Licensee shall consult with the Forest Service and the Forest Service will determine if there is a need to implement additional recreation management measures to meet Forest Plan direction.

If the Forest Service determines there is a need for additional mitigation measures due to Project-related effects to meet Forest Plan direction, based on pre-construction inventory results, the new inundation level of the expanded Gross Reservoir, and the ongoing recreation monitoring, the Licensee shall develop a Recreation Adaptive Management Plan for Winiger Ridge. The Plan shall be developed in consultation with the Forest Service and is subject to prior Forest Service

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review and approval. The Licensee shall file the Recreation Adaptive Management Plan with the Commission. Upon Commission approval, the Licensee shall implement the Plan.

The Plan shall include, but not be limited to, unless otherwise agreed to by the Forest Service:

- Measures for addressing social, environmental, safety, and/or sanitation concerns that may arise from the proliferation and/or expansion of dispersed campsites at Winiger Ridge and surrounding area. These measures could include triggers for adding bathrooms, trash receptacles or other temporary or long-term mitigation measures as determined necessary by the Forest Service.
- Plans for converting obsolete roads to trails.
- Plans for formalizing social trails, including social trails for fishing.
- Measures for minimizing creation of new social trails.

Fishing Line Recycling Licensee shall provide fishing line recycling receptacles at five relocated fishing access points, as described in the Recreation Plan Addendum, for collecting used line to keep it out of the environment. Receptacles shall include labels explaining their purpose to encourage use. Licensee shall monitor and empty the receptacles as needed, and at a minimum on a monthly basis from May to November, and one time from December to April. Licensee shall periodically send line for recycling to a fishing line recycling program.

Condition No. 25 – Channel Instability and Bank Erosion (REPLACES CONDITION 110)

At least one year prior to the initial fill of the enlarged reservoir authorized by license amendment, Licensee shall file with the Commission a revised South Boulder Creek Channel Stability and Monitoring Plan (Plan), developed in consultation with the Forest Service and Colorado Parks and Wildlife, and subject to prior Forest Service review and approval. Upon Commission approval, Licensee shall implement the Plan.

The revised Plan shall include two new monitoring reaches to be selected in consultation with the Forest Service and Colorado Parks and Wildlife, and subject to prior Forest Service review and approval. The monitoring reaches shall be established during the dam construction period. Participants may include a fisheries biologist, hydrologist, and geomorphologist, and Colorado Parks and Wildlife biologists.

Monitoring at the two new reaches shall follow a Control-Impact study design, with one control reach (including both response and transport reach segments) upstream of East Portal flows, and one potential impact reach (including both response and transport reach segments) downstream of East Portal flows. Monitoring elements shall include, but not be limited to:

- a. The longitudinal profile of each reach (impact versus control) shall be surveyed and monumented.
 - i. The length of the longitudinal profile will be determined in the field depending on site characteristics, but shall be a minimum of 20 bankfull widths to capture elevational differences from degradation or aggradation and to include equivalent portions of response and transport reach segments.

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- b. Within each longitudinal profile, a minimum of four channel cross-sections will be established and monumented. Cross-sectional profiles shall be evenly spaced within the longitudinal profile
- c. The longitudinal profile shall be resurveyed in each monitoring year in order to detect bed elevation changes not captured in the cross-sections. The longitudinal profile shall include, at minimum, real coordinates for the top of the bank (right and left banks) and thalweg spatial locations and elevations. The recommended data acquisition method would be a total station or similar instrument that collects x, y, and z coordinates.
- d. Within each reach, data collected shall include at minimum, but not be limited to:
 - i. Data sufficient to perform the Rosgen Bank Erosion Hazard Index (BEHI) assessment of streambank stability
 - ii. Physical measurement of length of eroded banks, number of slump blocks or detached banks, and/or frequency of tension cracks in the bank.
 - iii. At least four channel cross-sections in each longitudinal profile, collect data for the following metrics: bankfull height, bankfull width, maximum channel depth at bankfull flow, bankfull hydraulic depth (cross-sectional area divided by bankfull depth), and bankfull hydraulic radius (cross-sectional area divided by wetted perimeter).
 - iv. Installation of bank erosion pins to measure bank erosion directly.
 - v. Field and photo documentation of bank vegetation and stability for 100 feet on both right and left bank through each channel cross-section within the longitudinal profile.

Licensee shall conduct monitoring as described above once during dam construction to establish baseline conditions. During the initial fill of the enlarged reservoir, the Licensee shall conduct monitoring once a year for three years.

Once the initial fill of the enlarged reservoir is complete, the Licensee shall conduct monitoring once every three years for three monitoring cycles, unless a high delivery year occurs. High delivery years shall be defined as years when the average monthly flow conveyed down South Boulder Creek through the Moffat Tunnel in May, June, and July is 55,000 acre-feet or greater. If a high delivery year occurs earlier than the scheduled monitoring once every three years, the Licensee shall complete monitoring once during the high delivery year.

After the initial fill of the enlarged reservoir is complete and after the first three monitoring cycles have been completed, the Licensee shall conduct monitoring once every five years for an additional three monitoring cycles. If the Forest Service determines there is no longer a risk of erosion and channel instability, then monitoring requirements under this condition will have been met. The monitoring requirements can be changed upon mutual agreement of the Forest Service and Licensee. If the Forest Service and Licensee agree to change the monitoring requirements, the Licensee shall submit an update to the South Boulder Creek Channel Stability and Monitoring Plan with the Commission.

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The Licensee shall submit a report summarizing the most recent data collected and any changes since the last monitoring event 30 days prior to the annual consultation meeting.

If significant channel instability, erosion, or channel alteration occurs at any time, which will be based on the monitoring data collected and evaluated according to the four questions below, the Licensee shall meet with the Forest Service to discuss if restoration is needed.

Monitoring results will be evaluated based upon answers to the following questions:

1. Do the results of the BEHI analysis indicate an increase in bank erosion has occurred in control and impact reaches? Did the erosion risk categories change by more than one level?
2. Has the percentage of channel length with eroded banks increased in the control and impact reaches?
3. Is there evidence of substantial channel widening in the response segments or downcutting in the transport segments?
4. Is there a significant net cross-section change in any cross-sectional data (e.g., cross-sectional area, bankfull parameters, channel depth at bankfull flow, ect.) in the impact reach relative to the control reach?

If the Forest Service determines restoration is needed, the Licensee shall file with the Commission a restoration plan developed in consultation with Forest Service and subject to prior Forest Service review and approval. Upon Commission approval, Licensee shall implement the plan.

Condition No. 26 – Pit Development and Reclamation Plan (NEW CONDITION)

At least 90 days before ground-disturbing or construction activities associated with pit development on NFS land authorized by license amendment and a mineral materials permit, Licensee shall file with the Commission a Pit Development and Reclamation Plan (Plan) developed in consultation with the Forest Service and Colorado Division of Reclamation, Mining and Safety, and subject to prior review and approval by the Forest Service. Upon Commission approval, Licensee shall implement the Plan.

The Plan shall address, but not be limited to, the following:

- The development, construction, operation, reclamation and rehabilitation of the quarry on affected NFS land.
- The location, activity, amount of surface activity, reclamation measures, safety measures, and measures to protect and minimize impacts to natural resources
- Transportation management during construction, describing how construction traffic will be managed to minimize disruption on NFS roads and provide for visitor safety

The Plan shall tier to other applicable plans and conditions, including but not limited to the Visual Resource Protection Plan, Hazardous Substances Plan, Invasive Species Management,

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Erosion Control and Reclamation Plan, Raptor Protection Measures Condition, and Reclamation and Revegetation Seed Mixes Condition.

Licensee shall obtain a mineral materials permit or authorization as governed by 36 CFR 228 Subpart C, as amended and revised, or federal law or regulations in effect at the time, from the Forest Service for use of the materials before ground-disturbing activities occur on NFS land. If the Licensee does not proceed with developing a quarry on NFS land, Licensee will not be required to submit a Pit Development and Reclamation Plan to the Forest Service for review and approval.

Condition No. 27 – Tree Removal Plan (NEW CONDITION)

At least 90 days prior to tree removal within the inundation area of the enlarged reservoir, Licensee shall file with the Commission a Tree Removal Plan (Plan) developed in consultation with the Forest Service and subject to prior review and approval by the Forest Service. Upon Commission approval, Licensee shall implement the Plan.

The Plan shall address the removal of trees around Gross Reservoir to maximize product utilization and minimize traffic and environmental effects. The schedule for tree removal shall be developed in consultation with the Forest Service, subject to final approval by the Forest Service, and will consider, among other items, key winter range timing for elk (December 1 through March 30) and raptor nesting season (varies depending on species).

The Plan shall address, but not be limited to, the following:

- Roads to be improved, constructed and used for tree removal activities;
- Restoring Project roads to pre-Project conditions
- Travel management considerations such as prevention of public use of temporary roads created for tree removal.
- Transportation management during tree removal activities,
- How Project-related traffic will be managed to minimize disruption on Forest Service roads and provide for visitor safety.

The Plan shall tier to other applicable plans and conditions, including but not limited to the Hazardous Substances Plan, Invasive Species Management Plan, Erosion Control and Reclamation Plan, Raptor Protection Measures Condition, and Reclamation and Revegetation Seed Mixes Condition. Licensee shall perform a timber cruise with a Forest Service-qualified forester on NFS land as part of the Plan development. Licensee shall enter into a reimbursable Collection Agreement provided by the Forest Service to reimburse the Forest Service for its costs associated with the timber cruise. Licensee shall work closely with the Forest Service to ensure that forest clearing and revegetation on NFS land will be consistent with National Forest standards. Licensee shall pay for merchantable timber in accordance with FERC Standard Form L Article 21 of the license. The Plan shall also ensure compliance with the CDPHE-Air Quality Control Division and include BMPs for the tree removal activities.

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Notwithstanding the Licensee's annual payments to the Forest Service for road maintenance described in Condition 30, during tree removal activities for the proposed Project, the Licensee shall perform additional improvements and maintenance of Forest Service roads used for tree removal activities. Once tree removal is completed, the Licensee shall restore such Forest Service roads to their existing Forest Service Maintenance Level 2 (roads open for use by high clearance vehicles) as directed by the Forest Service.

Condition No. 28 – Reclamation and Revegetation Seed Mixes and Mulch Materials (NEW CONDITION)

Licensee shall consult with the Forest Service on seed mixes and mulch materials used for all Project reclamation and revegetation activities on NFS land. Seed mixes and mulch materials used for revegetation and reclamation shall be subject to prior Forest Service review and approval.

Seed mixes shall comply with the Forest's revegetation policy and include, unless waived in writing by the Forest Service, pollinator-friendly host plants. If a species in the seed mix is not available, the Licensee shall provide written evidence from three seed vendors that the species is not available. With prior written Forest Service approval, the mix may be adjusted and a new species may be substituted.

Seed lot tags, seed, and noxious weed seed and purity exams for each species lot shall be available to the Forest Service at least 90 days prior to seeding, for review and testing that may be performed by the Forest Service. If seed cited on the weed, noxious weed, or crop analysis categories is present, or if seed of smooth brome, or cheatgrass or its allies is present, the entire seed lot may be rejected and the Licensee shall be responsible for the replacement cost of seed.

When feasible, the Forest Service will provide government-furnished seed for areas requiring seeding. The Forest Service may provide seed at no cost to Licensee, or may require Licensee to purchase seed directly from a supplier or reimburse the Forest Service for its cost.

Only non-agricultural products (e.g., wood straw, wood shred, wildlife-friendly netting) shall be used for mulch activities/erosion control unless agricultural straw is approved in writing in advance by the Forest Service and is certified weed-free. The Forest Service may perform or require inspection of the mulch. Licensee shall notify the Forest Service at least 21 days prior to purchase to provide the Forest Service time to inspect the proposed agricultural mulch.

Condition No. 29 – Public Safety and Law Enforcement (NEW CONDITION; complements Article 418)

After project components are implemented, as determined necessary by the Forest Service and subject to prior Forest Service review and approval, Licensee shall file with the Commission, an update to the Public Safety and Law Enforcement Plan. Upon Commission approval, the Licensee shall implement the updated Plan.

September 6, 2016 Settlement Agreement Appendix 1**Condition No. 30 – Cost Collection and Participating Agreements (NEW CONDITION)**

Within one year of the effective date of the amended license and for the remaining term of the license, the Licensee shall enter into a Collection Agreement provided by the Forest Service to pay the Forest Service for the Project-related Forest Service costs of road and recreation facility maintenance and monitoring on NFS land, as described below. Within one year of the effective date of the amended license, the Licensee shall enter into a Participating Agreement provided by the Forest Service for Licensee to perform weed management as described below.

The term of the Collection Agreement shall be five years. Initial payment will be based on fifty percent (50%) of reference costs developed from the previous five years of Forest Service road and recreation maintenance costs. The Licensee shall renew the Collection Agreement every five years through the term of the license, unless a different time period is agreed to by the Forest Service. Prior to renewal of the Collection Agreement, the Forest Service will re-calculate the reference costs below based on the previous five years of road and recreation maintenance costs, and any changes to the reference costs will be incorporated at the time of renewal of the Collection Agreement. The amount of money the Licensee shall pay annually after the first five years shall be based on 50% of the reference costs incorporated into each subsequent Collection Agreement.

The term of the Participating Agreement shall be five years. The Licensee shall renew the Participating Agreement every five years through the term of the License, unless a different time period is agreed to by the Forest Service. The Participating Agreement will authorize the Licensee to perform weed management on NFS land as described below.

Road Maintenance

The following roads on the West side of Gross Reservoir, including inside and outside of the FERC Project Boundary, will be covered by the Collection Agreement: 1) Forest Service 359.1 (Winiger Ridge Road) – approximately 2.5 miles; 2) Various spur roads off Forest Service 359.1 – approximately 1.5 miles; and 3) Forest Service 97.1 (Lazy Z Road) – approximately 2.5 miles.

For the first five years after the license amendment, the Licensee shall pay the Forest Service \$1,000 per year for road maintenance, based on estimated annual Forest Service road maintenance costs of \$2,000 per year. The Licensee shall pay the Forest Service for annual road maintenance in accordance with the subsequent Collection Agreements for the term of the license.

Notwithstanding its annual payments to the Forest Service for maintenance described above, during tree removal activities for the Project, the Licensee will perform improvements and maintenance of NFS roads used for tree removal activities as described in Condition 27.

Recreation Maintenance

The following recreation facilities on Winiger Ridge on the west side of Gross Reservoir outside the FERC Project Boundary will be covered by the Collection Agreement: 1) Forsythe Canyon

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Trail – approximately 2/3-mile; 2) Forsythe Trail parking lot and toilet; and 3) Fourteen dispersed campsites.

For the first five years, the Licensee shall pay the Forest Service \$5,000 per year, based on estimated annual Forest Service recreation maintenance and monitoring costs of \$10,000 per year. The Licensee shall pay the Forest Service for annual recreation maintenance in accordance with the subsequent Collection Agreements for the term of the license.

Weed Management

Licensee shall enter into a Participating Agreement provided by the Forest Service for Licensee to conduct weed management on the west side of Gross Reservoir outside the FERC Project Boundary within 100 feet of the roads and recreation facilities identified in Road and Recreation Collection Agreement discussion above.

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OFF-LICENSE AGREEMENT

**National Forest System Land and Resources Improvements
An Agreement Between the United States Department of Agriculture,
Forest Service and the City and County of Denver, acting by and
through its Board of Water Commissioners**

Gross Reservoir Hydroelectric Project

FERC Project No. 2035

Version September 6, 2016

OFF-LICENSE AGREEMENT

National Forest System Lands and Resources Improvements

This Off-License Agreement ("OLA") is entered into between the United States Department of Agriculture, Forest Service ("Forest Service") and the City and County of Denver, acting by and through its Board of Water Commissioners ("Denver Water"), collectively referred to as the "Parties," and individually as "Party" in connection with the license amendment of the Gross Reservoir Hydroelectric Project, Federal Energy Regulatory Commission ("FERC") Project No. 2035 ("Proposed Project"). This OLA is effective as of the Effective Date defined below.

RECITALS

1. Denver Water is the licensee and current owner and operator of the Gross Reservoir Hydroelectric Project, FERC Project No. 2035. Gross Reservoir is located on South Boulder Creek in Boulder County, Colorado. The current license was issued by the FERC on March 16, 2001 and was amended on October 1, 2004. In 2008, Denver Water commenced the consultation process required by FERC to amend the license, including engagement with the Forest Service.
2. The Parties are signatories to the Settlement Agreement for the Gross Reservoir Hydroelectric Project ("Settlement Agreement") for which this OLA is an attachment. This OLA will be submitted to FERC for informational purposes only.
3. The Parties are entering this OLA as part of the overall settlement process leading to issuance by FERC of an amended license covering the Proposed Project. The Parties acknowledge that the OLA is an element of the Parties' comprehensive settlement for the Proposed Project; however, due to its independent nature, the OLA is intended to operate on its own. Therefore, nothing in the administrative provisions for the Settlement Agreement are intended to, or shall be construed to, modify in any manner the provisions of the OLA. Likewise, the Parties' obligations under this OLA shall be interpreted independently of the Settlement Agreement and nothing in this OLA is intended to modify or construe any provisions of the Settlement Agreement.
4. This OLA, together with the Settlement Agreement, resolves effects to National Forest System ("NFS") land and resources associated with: a) past and current operations of Denver Water's existing water collection system as of the Effective Date; b) construction, operation and maintenance of the Proposed Project authorized under the amended FERC license; and c) construction, operation and maintenance of the Moffat Collection System Project as permitted by the United States Corps of Army Engineers ("Corps"). This OLA is not intended to cover new circumstances or changed conditions that may effect operations and maintenance of the Proposed Project or the Moffat Collection System Project.

NOW THEREFORE, in consideration of the respective promises and commitments set forth in the Settlement Agreement to which this OLA is appended, and as specified herein, the Parties agree as follows:

ARTICLE I PURPOSE OF AGREEMENT

- 1.1 Purpose of Agreement.** This OLA embodies a comprehensive resolution of the issues raised by the Forest Service during the Corps' permitting process and Denver Water's consultation process for the Proposed Project. This OLA includes commitments pertaining to: a) Denver Water's existing Moffat Collection System facilities on NFS land for existing and increased diversions; b) Denver Water's existing facilities on the Blue and South Platte Rivers in the White River and Pike National Forests; and c) property purchase commitments for eventual inclusion in the Roosevelt National Forest. Other commitments to protect Roosevelt National Forest land and resources related to the Proposed Project are addressed in the separate Section 4(e) Conditions attached as Appendix 1 to the Settlement Agreement.

ARTICLE II RULES OF CONSTRUCTION AND DEFINITIONS

2.1 Rules of Construction

2.1.1 No Limitation on Statutory Authority. Other than as expressly set forth herein, this OLA shall not be construed to affect or limit the authority of the Parties to fulfill their statutory, regulatory, or contractual responsibilities under applicable law.

2.1.2. Negotiated Resolution. This OLA is made upon the express understanding that it constitutes a negotiated resolution of outstanding issues. Neither of the Parties shall be deemed to have consented to any resolution, except as expressly provided herein.

2.1.3. Implementation of Actions under This OLA. Except where specifically stated in this OLA, the Forest Service shall not be deemed to have approved implementation of measures under this OLA requiring further obligations of the Forest Service under applicable laws and regulations. Nothing in this OLA shall be construed to limit any government with jurisdiction from complying with its obligations under applicable laws and regulations, including any obligations under the National Environmental Policy Act ("NEPA"). For projects contemplated by this OLA, the Forest Service agrees that it will determine if waivers or exemptions from the requirement to recover costs associated with NEPA or other analyses under 36 CFR 251.58(f) and (g) apply. The Forest Service agrees that to the extent the criteria to waive the costs apply, the Forest Service will exercise its discretion to waive the costs.

2.2 Definitions.

2.2.1 "Effective Date" means the date the last Party executes the Settlement Agreement which includes this OLA and the Forest Service 4(e) Conditions.

2.2.2 "Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.

2.2.3 "Acceptance by Denver Water of permits necessary for the Moffat Collection System Project" means:

The permits necessary for the Moffat Project including the 404 permit by the Corps; the license amendment by FERC; and the 401 certification from the Colorado Water Quality Control Division. Denver Water must decide, in its sole discretion, whether to accept these permits within six-months after the last final agency action regarding these permits. If a permit is appealed during the six-month approval period, the deadline for Denver Water to decide whether to accept the permits will be extended until 30 days after the final resolution of the appeal.

2.2.4 "Learning By Doing Members" means Denver Water, the Colorado River Water Conservation District, Middle Park Water Conservancy District and Grand County by way of an executed intergovernmental agreement dated May 5, 2012, establishing the Learning by Doing Cooperative Effort ("Cooperative Effort") to protect, restore, and when possible enhance, the aquatic environment in the Upper Colorado, Fraser and Williams Fork River basins.

ARTICLE III

TERM, SUSPENSION, WITHDRAWAL AND TERMINATION

3.1 **Two Phases.** This OLA consists of two phases, described as follows:

3.1.1 Phase One obligations begin on the Effective Date.

3.1.2 Phase Two obligations begin upon Acceptance by Denver Water of permits necessary for the Moffat Collection System Project.

3.2 **Termination.** The obligations to complete specific projects under this OLA may be terminated by either party by providing 90 days prior written notice to the other party, but only if (i) completion of the project would preclude fulfillment of a statutory or regulatory responsibility of one of the Parties, (ii) if the United States no longer owns the properties where the facilities for the project are located, or (iii) if Denver Water no longer owns water rights or diverts water using the facilities for the project.

3.3 **Suspension.** As governmental entities, the Parties have the right to suspend participation if necessary in the event of (i) an emergency, or (ii) if required to fulfill a statutory or regulatory responsibility.

ARTICLE IV COVENANTS

- 4.1 The Parties will perform their obligations arising under this OLA in good faith.
- 4.2 The Parties will cooperate in the sharing of data, information and documents to the extent necessary to satisfy commitments under this OLA.
- 4.3 Each Party independently represents that, subject to the development or discovery of significant new information (including change in applicable law) relevant to this OLA, each of their respective responsibilities regarding the subject matter of this OLA has been, is, or will be satisfied through accomplishment of the measures set out in this OLA.

ARTICLE V WILLIAMS FORK RIVER BASIN RESTORATION AND IMPROVEMENTS

5.1 Williams Fork River Basin Phase One.

5.1.1 Williams Fork Extension Project Decision. On or before December 31, 2030, Denver Water shall decide whether to complete the Williams Fork Extension Project. If Denver Water proposes to complete the Williams Fork Extension Project, Denver Water shall seek the necessary approvals from the Forest Service to complete the Darling Creek (North Sector) and/or Webb Creek (Middle Sector) components of its Williams Fork Extension Project. If Denver Water decides not to complete one or both components of the extension project(s), within one year it shall submit a plan with proposed schedule of activities for Forest Service approval to revegetate, stabilize and/or return the existing roadways and related facilities to a more natural condition. Consistent with federal laws and regulations, the Forest Service will complete the necessary environmental review and as appropriate authorize the activity, which shall be implemented by Denver Water.

5.1.2 Middle Sector Road Culvert Maintenance Plan. Within one year of the Effective Date, Denver Water shall submit a maintenance plan with proposed schedule of activities for Forest Service approval describing maintenance work for the existing culverts from Steelman Creek to the end of the existing roadway (just beyond Webb Creek). The maintenance plan may include low-impact maintenance of the existing culverts to avoid blowing out and contributions to sediment and erosion downslope and may require removing existing obstructions, such as fallen trees, boulders or debris. Consistent with federal laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize the activity, which shall be implemented by Denver Water.

5.1.3 New Water, Barrier, and Fish Ladders for Green Lineage Cutthroat Trout. Until December 31, 2030, or if Denver Water elects to construct the Williams Fork Extension Project until December 31, 2040, Denver Water and Forest Service shall meet at least annually and work collaboratively with Learning By Doing Members and/or others to identify sources of water

available for purchase or donation that can be delivered to Denver Water's collection system ("New Water"). The New Water must be useful in Denver Water's collection system such that Denver Water can release a like amount of water from its Bobtail and Steelman Creek diversion structures without reducing Denver Water's yield. Once New Water is identified and other third parties have funded and constructed a fish barrier on the main stem of the Williams Fork River below the confluence of Steelman Creek, Denver Water shall:

- a. With the Forest Service, select and convene an independent panel to determine if the identified volume, rate and timing of the New Water would provide fish passage at Bobtail and/or Steelman Creek diversions if fish ladders were in place;
- b. Once Denver Water receives ownership of the water rights for the New Water and it is determined to provide fish passage, Denver Water shall design one fish ladder at Bobtail Creek Diversion, one fish ladder at the Steelman Creek Diversion, and one AOP culvert on Bobtail Creek just below Denver Water's diversion. This design shall be submitted to the Forest Service for prior review and approval.
- c. Once the fish barrier has been constructed on the Williams Fork River, and an eradication/reintroduction effort for green lineage cutthroat trout is certified "successful" by Colorado Parks and Wildlife ("CPW"), Denver Water shall obtain Forest Service authorization and construct the Bobtail Creek and Steelman Creek diversion fish ladders and the Aquatic Organism Passage ("AOP") culvert on Bobtail Creek. Consistent with federal laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize Denver Water construction and maintenance of the fish ladders and AOP culvert and the removal of the fish barriers (described in Phase Two, Section 5.2.2). Denver Water shall maintain the fish ladders and AOP culvert.
- d. Denver Water shall modify or remove fish barriers installed under Article 5.2.2 on Bobtail and Steelman if a fish barrier is constructed in the main stem of the Williams Fork River Creeks.

5.1.4 Operation of Sluice Gates at Bobtail Creek and Steelman Creek Diversion Structures.

Denver Water shall keep the sluice gates at Bobtail Creek and Steelman Creek diversion structures closed at all times with the following exceptions: When necessary to drain the diversions for removal of sediment; as necessary for maintenance; and during periods of high flow that could cause damage to or jeopardize the integrity of the diversion structures. During periods of high flow, Denver Water shall make a good faith effort to only partially open the sluice gates such that the gates can safely release water and maintain sufficient water velocities to impede upstream fish migration. In the event the sluice gates are to be opened during high flow conditions, Denver Water shall notify the Forest Service Sulphur District Ranger and the CPW as soon as possible, but no later than 24 hours after gates are open.

5.1.4.1 For sediment removal at Bobtail Creek and Steelman Creek diversion structures, Denver Water shall make a good faith effort to physically remove accumulated sediment using mechanical means, rather than sluicing, and shall store the sediment on lands owned by Denver Water. If a suitable location cannot be found, the Forest Service will consider options for storing sediment on NFS lands.

5.1.4.2 Except during periods of high flow conditions, when the sluice gates at Bobtail Creek and Steelman Creek diversion structures are open, Denver Water shall have in place temporary barriers, such as a block net or similar temporary barrier, on the downstream side of each diversion to prevent fish migrating upstream. Denver Water shall notify the Sulphur District Ranger and CPW at least seven days prior to sluicing to coordinate the installation of a temporary barrier. If the Forest Service and Denver Water determine that a downstream barrier alone is an inadequate barrier to fish migration, then the Forest Service and Denver Water shall cooperate in good faith to install a second temporary barrier above each diversion during sluicing operations. As described in Article 5.2.2, Denver Water and the Forest Service shall meet to determine if these temporary barriers and notification associated with them are needed after permanent barriers (described in Phase Two, Section 5.2.2) are in place. If this occurs, the parties shall agree in writing to eliminate this requirement.

5.1.5. Denver Water shall minimize the use of the Gumlick Spill channel by bypassing water at each diversion structure. Denver Water shall only use the Gumlick Spill channel when transporting personnel and equipment through the Gumlick Tunnel, or for reasons related to maintenance or emergency.

5.2 Williams Fork River Basin Phase Two.

5.2.1 Flushing Flows. Denver Water shall make a good faith effort to provide these flows for a minimum of 72 hours in 40% of the years (16 out of 40) and 3 out of every 10 years and shall provide written information to the Forest Service and Learning By Doing Members of the location, amount (e.g., cfs), duration and dates when these flows occur:

- At least 35 cfs mean daily discharge at Steelman Creek
- At least 25 cfs mean daily discharge at McQueary Creek
- At least 80 cfs mean daily discharge at Bobtail Creek

The above flows shall be measured at the Williams Fork below Steelman Creek USGS gage #09035500. A majority of these flushing flows shall be released over fish ladders if those fish ladders are constructed on Bobtail Creek and Steelman Creek, as set forth in Article 5.1.3, or over the diversion structures prior to construction or if the fish ladders are not constructed.

5.2.2 Protection and Re-establishment of Green Lineage Cutthroat Trout in the Upper Williams Fork. Denver Water shall fund, acquire permit(s), design, construct and maintain three fish migration barriers downstream of its existing diversion structures on Bobtail Creek, Steelman Creek and McQueary Creek. Denver Water shall enter into an Intergovernmental Agreement with CPW to cost-share the eradication of brook trout and re-introduction of green lineage cutthroat trout in Bobtail Creek, Steelman Creek, and McQueary Creek above each diversion structure. Consistent with federal laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize construction of the barriers. Denver Water shall coordinate with the Forest Service to schedule the construction of the new barriers to begin as soon as the permit(s) for the above activities have been acquired.

ARTICLE VI

FRASER RIVER BASIN RESTORATION AND IMPROVEMENTS

6.1 Fraser River Basin Phase One.

6.1.1 No Fish Passage on Hamilton and Little Vasquez Creeks. To protect green lineage cutthroat trout above its existing diversions, Denver Water shall not modify its diversion structures on Hamilton Creek and Little Vasquez Creek in a manner that would allow fish passage. If maintenance requires replacement or modification of these diversion structures, Denver Water shall design and install any replacement structures or modifications to continue operating as barriers to upstream fish migration.

6.1.2 Flume Improvements and Telemetry. Denver Water operates and maintains five (5) streamgages that measure bypass flows on a portion of its collection system that is owned by the City of Englewood. The flumes at Hamilton, Hurd, Trail, Cabin and Little Cabin creeks may need repair or replacement, at which time telemetry could also be added. Denver Water agrees to develop a plan that includes an implementation schedule for proposed flume improvements and telemetry at the gages on Cabin Creek, Little Cabin Creek, Hamilton Creek, Hurd Creek and Trail Creek. Denver Water shall submit the plan for flume improvements and telemetry to Forest Service within one year of the Effective Date and after the following review and approvals with other parties:

6.1.2.1 Cabin Creek, USGS gage #09032100: At Denver Water's cost, Denver Water shall prepare a plan to remove the flume below the City of Englewood's diversion structure, rehabilitate the stream to approximate conditions to match the existing streambed, and add telemetry at this gage location. Forest Service will seek approval from the United States Geological Survey ("USGS") to remove the flume and Denver Water shall coordinate a review of the plan by the City of Englewood before submitting the plan to Forest Service. Consistent with federal laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize the activity, which will be implemented by Denver Water.

6.1.2.2 Little Cabin Creek, Hamilton Creek, Hurd Creek and Trail Creek (Parshall flumes): At its cost, Denver Water shall prepare a plan to make improvements to the Parshall flumes by adding telemetry at each of these locations below Englewood's diversion structures. Denver Water shall seek the City of Englewood's review before submitting the plan to the Forest Service.

6.1.3 Road Maintenance and Noxious Weed Control Plan. Denver Water shall coordinate with the Forest Service to develop a road operations and maintenance and noxious weed control and prevention plan for all roads, facilities and infrastructure owned and operated by Denver Water currently under authorization on NFS land in Grand County. The plan shall be submitted to the Forest Service within one year of the Effective Date for review and approval.

6.1.4 Vasquez Creek Road Culverts. Within three years of the Effective Date, Denver Water and the Forest Service shall cooperate in good faith to determine the cause of overtopping of

the culverts on Vasquez Road. If after consultation with Denver Water, the Forest Service determines the two culverts on Vasquez Creek Road are undersized or obstructions are identified that cause the culverts to not function properly, Denver Water shall design, acquire permit(s) and reconstruct the culverts for boreal toad passage or remove any identified obstructions. After consultation with Denver Water, if the Forest Service determines that the existing culverts are adequate for passing flows, then Denver Water shall replace the culverts with AOP structures when they need to be replaced as part of routine maintenance. Consistent with federal laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize modification or replacement of the culverts.

6.2 Fraser River Basin Phase Two.

6.2.1 Flushing Flows. Denver Water shall make a good faith effort to provide flushing flows at the following locations for a minimum of 72 hours in 40% of the years (16 out of 40) and 3 out of every 10 years and shall inform the Forest Service and the Learning By Doing Members when these flows occur:

- a. At least 80 cfs mean daily discharge at Fraser River, as measured at the Winter Park USGS gage #09024000.
- b. At least 70 cfs mean daily discharge at St Louis Creek, as measured at the St. Louis Creek gage #09026500.
- c. At least 50 cfs mean daily discharge at Vasquez Creek, as measured at Denver Water's diversion.
- d. At least 40 cfs mean daily discharge at Ranch Creek, as measured at the Ranch Creek Near Fraser USGS gage #0903200.
- e. At least 40 cfs mean daily discharge at Cabin Creek, as measured at the Cabin Creek near Fraser USGS gage #09032100.

6.2.2 Culvert Improvements on US 40 (A Cooperative Project). For a period of 15 years after Acceptance by Denver Water of permits necessary for the Moffat Collection System Project, Denver Water, though not obligated to fund, design or construct the project, shall take a leadership role in coordinating various parties including Learning By Doing Members, Forest Service, CPW, Colorado Department of Transportation ("CDOT") and others to cooperatively secure funding for design and construction to replace the three existing culverts on or near US 40 on National Forest System land upstream of Denver Water's Fraser River diversion.

6.2.3 Cabin Creek Releases (A Cooperative Project). Denver Water shall work with the Learning By Doing Members to determine if and when releases of the 1,000 acre-feet of water provided in the Colorado River Cooperative Agreement ("CRCA")¹, and/or the releases of 250

¹ The Colorado River Cooperative Agreement is effective, as of Sept. 26, 2013, with signatures of all 18 partners complete. The agreement ushered in a new era of cooperation between Denver Water and West Slope water providers, local governments and several ski areas. The overall goal of the agreement is to protect watersheds in the Colorado River Basin while allowing Denver Water to develop future water supplies.

acre-feet provided in Denver Water's Moffat Collection System Project's Mitigation Plan for the 404 permit² could be released from the Cabin Creek diversion structure. Denver Water shall make a good faith effort by initiating and facilitating cooperative meetings to persuade the Learning By Doing Members to release from the Cabin Creek diversion structure at least one half of any water released for temperature exceedances on Ranch Creek.

6.2.4 Cabin Creek AOP Culvert (A Cooperative Project). For a period of fifteen (15) years after Acceptance by Denver Water of permits necessary for the Moffat Collection System Project, Denver Water, though not obligated to fund, design or construct the culvert, shall take a leadership role in coordinating various parties including the Learning By Doing Members, Forest Service, CPW and others willing to cooperatively secure funding to design, construct, and maintain an AOP culvert on Cabin Creek at NFS Road 128. Denver Water shall initiate and facilitate meetings with the various partners.

6.2.5 Cabin Creek Fish Ladder. Denver Water shall fund, design, acquire permit(s), construct and maintain a fish ladder on Denver Water's Cabin Creek diversion structure. Denver Water shall design the fish ladder to operate using existing bypass flows at the diversion structure. During periods of high flow, such as spring run-off, the fish ladder may be unusable by fish. The fish ladder would likely be in operation from late April until late October when Denver Water is using the spillway to bypass water. Denver Water shall submit to the Forest Service a proposal and request for necessary approvals, after review by the City of Englewood, designs for a fish ladder operable with existing bypass flows at its diversion structure on Cabin Creek. Consistent with federal laws and regulations, the Forest Service will complete the necessary environmental review and as appropriate authorize modification of diversion. Denver Water shall begin construction of the fish ladder the first field season after Denver Water receives approvals from the Forest Service.

6.2.6 Bypass Flows. The April 22, 1970 Amendatory Decision issued by the United States Department of the Interior, Bureau of Land Management ("BLM") (Amendatory Decision April 22, 1970 Serial No. 027914) for the right-of-way for the Vasquez Tunnel requires Denver Water to bypass certain flows at its points of diversion on the Fraser River, Vasquez Creek, St. Louis Creek and Ranch Creek, while providing Denver Water the right to reduce the amount of bypass flows in time of drought. Pursuant to the CRCA, Denver Water shall reduce bypass flows as follows: *"Beginning with the year the Moffat Project becomes operational, Denver Water agrees not to reduce bypasses of water as authorized by stipulations 3(e) and 5 of the Amendatory Decision, except when Denver Water has banned residential lawn watering during the irrigation season"* (CRCA Section E, paragraph 12).

6.2.7 Establishment of Green Lineage Cutthroat Trout Population on St. Louis Creek (Cooperative Recovery Program). Denver Water shall coordinate, develop, implement, and actively participate in a cooperative recovery program for establishing green lineage cutthroat trout in St. Louis Creek with Forest Service, CPW, United States Fish and Wildlife Service ("USFWS") and other parties. This Cooperative Recovery Program shall include the following steps:

² In the mitigation plan submitted to the Corps, Denver Water has proposed to forgo diversions of 250 acre-feet of water at a flow rate of up to 4 cfs between July 15 and August 31, whether or not the Moffat Project is diverting, when stream temperature monitoring exceeds State standards.

6.2.7.1 Step One - Complete Barrier at Existing Diversion. Within one year after Acceptance by Denver Water of permits necessary for the Moffat Collection System Project, Denver Water shall develop a plan, if one is needed as determined by Forest Service in consultation with CPW and USFWS, for Forest Service review and approval to ensure that Denver Water's existing diversion structure on St. Louis Creek is a complete barrier to upstream fish migration. The plan shall specify a schedule of activities Denver Water will undertake to ensure a complete barrier.

6.2.7.2 Step Two – Develop Formal Agreement for Fish Eradication and Reintroduction. Within one year after Acceptance by Denver Water of permits necessary for the Moffat Collection System Project, and for a period of up to fifteen years, Denver Water shall initiate and facilitate meetings to identify partners , including Forest Service, CPW, USFWS and possibly others. A goal for the partners is securing funding for developing the design and implementation of the fish eradication and reintroduction program. Denver Water shall coordinate the development of a formal agreement between the partners, including Denver Water, to facilitate the fish eradication and reintroduction. If Denver Water is unable to coordinate development of a formal agreement within the fifteen-year time period, the following steps in this article (6.2.7.3 and 6.2.7.4) are not applicable.

6.2.7.3 Step Three – Construct Second Barrier. Once the formal agreement in Step 2 is in place, and funding is secured, Denver Water shall begin design, acquire the permit(s), and construct a second barrier on St. Louis Creek below Denver Water's diversion. Denver Water shall coordinate with the Forest Service to schedule the construction of the new barrier to begin as soon as the permit(s) have been acquired. Consistent with federal laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize construction of the second barrier on St. Louis Creek below Denver Water's diversion. Denver Water shall contribute \$1.2 million for the construction of this new barrier, the location of which will be selected with Forest Service approval in part based on available funding. Should a location be selected where the construction costs exceed \$1.2 million, Denver Water and the partners shall work cooperatively to secure the additional funding needed to complete the barrier and Denver Water shall not be obligated to, but can contribute additional funding. Forest Service and/or others will be responsible for maintenance of the fish barrier.

6.2.7.4 Step Four – Construct Fish Passage at Diversion. Once the second barrier has been constructed and the reaches above and below Denver Water's diversion structure are determined to have a viable green lineage cutthroat trout fishery by the Forest Service and USFWS, in consultation with CPW, Denver Water shall design, acquire the permit(s), construct and maintain a fish ladder (or ladder alternative as described below) on its St. Louis Creek diversion to allow fish to move upstream when Denver Water is spilling water at this diversion. Denver Water shall coordinate with Forest Service and construct the fish ladder (or ladder alternative) as soon as the permit(s) have been acquired. Consistent with federal existing laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize construction of a fish ladder on Denver Water's St. Louis Creek diversion structure.

- a. During the design phase Denver Water shall develop, in consultation with partners, a fish passage design for making use of the existing minimum bypass flows. The partners will then collaboratively determine which technique to use for fish passage. Denver Water shall commit \$500,000 to the fish passage project. Should the construction cost of the alternative fish passage exceed \$500,000 the partners shall identify the additional funding needed to complete the passage. Denver Water is not obligated to contribute additional funding to complete the passage but may do so. Denver Water shall be responsible for maintenance of the fish passage structure.
- b. Following construction of the fish ladder, Denver Water shall provide funding to CPW for a Passive Integrated Transponder (PIT) tag study. Denver Water's study costs shall be capped at \$5,000. Forest Service will be consulted during planning and implementation of the PIT.
- c. Denver Water shall not be responsible for constructing a fish screen on the St. Louis Creek diversion structure.

6.2.8 St. Louis Creek AOP Culverts.

6.2.8.1 Within three years after the three fish barriers described in Article 5.2.2 are completed, Denver Water, with Forest Service approval, shall design and construct one AOP culvert on St. Louis Creek (location to be identified by the Forest Service) below Denver Water's diversion on St. Louis Creek. Consistent with federal laws and regulations, Forest Service will complete the necessary environmental review and as appropriate authorize construction of the AOP culvert. Denver Water shall contribute \$600,000 minus the actual construction cost of the three fish barriers in Article 5.2.2 to be used toward the construction of the AOP culvert. If additional funding is needed, the Forest Service or others will attempt to secure the funding. Denver Water's construction of the AOP culvert is contingent on additional funding, if additional funding is needed. The culvert will be maintained by the party responsible for road maintenance.

6.2.8.2 Upon Acceptance by Denver Water of permits necessary for the Moffat Collection System Project, Denver Water shall lead and coordinate a cooperative effort with other parties (Forest Service, CPW, Grand County, Trout Unlimited, and possibly others) to fund, design, and construct additional culverts on St. Louis Creek (as identified by the Forest Service). Denver Water shall not be responsible for funding, designing, and constructing any other AOP culverts on St. Louis Creek. The culvert will be maintained by the party responsible for road maintenance.

**ARTICLE VII
IMPROVEMENTS IN THE ROOSEVELT NATIONAL FOREST OUTSIDE
THE FERC PROJECT BOUNDARY**

- 7.1 Roosevelt National Forest Improvements, Phase One – Toll Property Purchase.** The Forest Service will use good faith efforts to appraise and purchase South Boulder Creek Parcel 11, SW 1/4 Section 1, Township 2 South, Range 74 West of the 6th P.M. (160.0 acres) from Denver Water

at federally-approved appraised value or \$800,000, which ever is less. This purchase is contingent upon appropriations for the purchase of the property being available. Should the Forest Service be unable to complete the purchase in 2016, Denver Water shall extend the closing date for up to two additional years through 2018. In the event the Forest Service elects to purchase the property, Denver Water shall deliver a good and merchantable title to the Toll Property to the United States, in accordance with the Title Standards and Regulations of the Attorney General of the United States, and shall deliver such other papers as may be required to convey good and merchantable title in a manner acceptable to the United States.

ARTICLE VIII

Blue River and North Fork South Platte River Restoration and Improvements

8.1 Blue River and North Fork South Platte.

8.1.1 Coordination and Cooperation. Denver Water and the White River and Pike-San Isabel National Forests shall work as partners and periodically meet to discuss Denver Water's operations affecting NFS land. These meetings should include progress, issues and changes in operations of facilities that affect National Forest System land.

8.1.2 Denver Water shall comply with the following mitigation measures for the North Fork of the South Platte River and the main stem of the South Platte River stated in Appendix M of the Moffat Collection System Project Final Environmental Impact Statement as required in the Section 404 Permit for the Moffat Project. If a Section 404 Permit is not issued or does not include the following mitigation measures, Denver Water shall:

8.1.2.1 Aquatic Biological Resources - Proposed Mitigation. Denver Water shall provide up to \$1.5 million for stream habitat improvements. For example, pool habitat could be created by a combination of boulder placement and grade controls. A management committee consisting of Denver Water, CPW, and USFS will be established to identify locations for improvements. This committee will operate by consensus and make a good faith effort to resolve any conflicts. The committee will also coordinate with the South Platte Enhancement Board to ensure consistency with the South Platte Protection Plan and protection of the Resource Values. CPW will assist with design, permitting and implementation of aquatic habitat improvements. These funds will be used for stream improvements primarily on public land. Funds may be used for stream restoration on private land, but only where a conservation easement is in place that allows public access. Any restoration activities on private land may be funded by other sources or may be funded through a program of matching private funds with public funds.

8.1.2.2 Channel Stability - Proposed Mitigation. Denver Water shall establish a stream bank stability monitoring program at up to five sites on USFS lands along the North Fork South Platte River to monitor for evidence of bank erosion. If any bank erosion is observed, Denver Water will contribute up to \$250,000 for structural modification

project(s) on NFS land. These projects will be done in cooperation with the Forest Service and CPW.

8.1.3 Denver Water shall, to the best of its ability, follow Denver Water's existing ramping guidelines at Dillon Reservoir.

ARTICLE IX DISPUTE RESOLUTION

The Parties may agree to use the following dispute resolution process to resolve all disputes related to compliance with or performance of obligations set forth in this Agreement, unless otherwise specifically provided herein or precluded by statute or agency regulation. This dispute resolution process does not preclude either Party from timely filing and pursuing an action for administrative or judicial relief of any compliance matter, or other regulatory action; *provided, however*, that in such case that Party shall initiate this process as soon as practicable thereafter or concurrently therewith.

- 9.1 **Notice of Dispute.** A Party who believes that a dispute has arisen shall provide written notice to the other Party, describing the matter(s) in dispute and including any proposed relief or resolution. Any Party claiming a dispute will provide timely Notice of the dispute within 30 days after the dispute arises.
- 9.2. **Consultation.** The Parties shall commence a 60-day Consultation Period, measured from the date of the notice of the dispute, to engage in good faith negotiations to resolve the dispute. Each Party will cooperate in good faith to promptly schedule, attend, and participate in dispute resolution. During the Consultation Period, the Parties will hold up to two (2) informal meetings in an attempt to resolve the dispute. This Consultation Period can be extended upon mutual agreement of the Parties. At any time during the Consultation Period, the Parties may, by mutual consent, initiate mediation or Alternative Dispute Resolution ("ADR") proceedings.
- 9.3. **Mediation or ADR.** Upon mutual agreement, the Parties may seek mediation or initiate ADR proceedings. Mediation shall be conducted by an agreed-upon third-party organization. The Parties must reach agreement on appropriate allocation of costs and the mediator prior to commencing mediation or ADR. If the Parties are unable to reach agreement, mediation will not occur.
- 9.4. **Peer Review.** The Parties may agree to peer review by a mutually agreed upon, qualified expert(s) to help resolve disputes over technical or scientific issues. The Parties shall reach agreement on appropriate allocation of costs prior to seeking peer review. The Parties agree that no person used for peer review by the Parties can testify in any judicial forum with respect to any issue upon which the person was providing peer review assistance unless all Parties consent to such person providing such testimony.

ARTICLE X GENERAL PROVISIONS

- 10.1** Term of Agreement. The term of this OLA shall commence on the Effective Date, as defined below, and shall continue through the term of the Amended License, which expires in 2041, except as specifically provided otherwise, or unless this OLA is terminated.
- 10.2** Notice. Any notice required under this OLA shall be written and delivered by first-class mail or comparable method of distribution including facsimile, electronic mail, or other reliable method of communication to the Parties. The list of authorized representatives are as follows:
- FOREST SERVICE: United States Department of Agriculture, Forest Service
Arapaho and Roosevelt National Forests
and Pawnee National Grassland
Forest Supervisor
2150 Centre Ave, Building E
Fort Collins, CO 80526-8119
- DENVER WATER: Director of Planning
1600 W. 12th Avenue
Denver, Colorado 80204
- 10.3** Governing Law. This OLA shall be governed, construed and enforced in accordance with federal law and regulation in federal court.
- 10.4** Good Faith. Wherever in this OLA the Forest Service has a right to approve an act of another, the former will exercise such discretion in good faith and according to reasonable standards. Similarly, where Denver Water or the Forest Service is required to satisfy a condition or complete an act in a certain fashion or within a specified time period, that party will pursue such objectives in good faith and make all reasonable efforts to accomplish the same; the other party will likewise in good faith cooperate and assist the other party in accomplishing this task to cause the consummation of the OLA as intended by the Parties.
- 10.5** Assignment and Third Party Beneficiaries. Neither this OLA, nor any right, interest or obligation hereunder, may be assigned, sold, transferred or conveyed without the prior written consent of the other party. Nothing in this OLA is intended to confer any rights or remedies on any person other than the Parties to this OLA.
- 10.6** Amendment. This OLA may be altered, amended or modified only by an instrument in writing, executed by the Parties to this OLA.
- 10.7** Liability. Each party to this OLA shall be responsible for its own acts or omissions. Except as provided in the preceding sentence, no party to this OLA shall be responsible to the other Party for the acts or omissions of entities or individuals not a signator to this OLA.

- 10.8 **Force Majeure.** Neither party shall be in breach of its obligations or liable to the other party for breach of this OLA as a result of a failure to perform if said performance is made impracticable due to an even of *Force Majeure*. The term "*Force Majeure*" means any cause reasonably beyond the party's control, whether unforeseen, foreseen, foreseeable, or unforeseeable, including but not limited to: acts of God, fire, war, insurrection, civil disturbance, explosion; adverse weather conditions that could not be reasonably anticipated causing unusual delay in transportation and/or field work activities; restraint by court order or order of public authority; inability to obtain – after exercise of reasonable diligence, timely submittal of all applicable applications, and exhaustion of available administrative and judicial remedies – any necessary authorizations, approvals, permits or licenses due to action or inaction of any governmental agency or authority; or labor disputes or strikes which are reasonably beyond the control of the party seeking excuse from performance. *Force Majeure* does not include lack of resources.
- 10.9 **Extent of Agency Authority.** Nothing in this OLA expands or diminishes any existing authority or regulatory jurisdiction under applicable federal or state law.
- 10.10 **Reference to Statutes or Regulations.** Any reference in this OLA to any federal or state statute or regulation shall be deemed to be a reference to such statute or regulation or successor statute or regulation in existence as of the date of the action.
- 10.11 **Anti-Deficiency Act.** Nothing in this OLA shall be interpreted as or constitute a commitment or requirement that the Forest Service obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C §1341, or an other applicable law or regulation.
- 10.12 **Agreement Execution.** Each signatory to this OLA certifies that he or she is authorized to execute this OLA and to legally bind the Party he or she represents.

IN WITNESS THEREOF,

The Parties have caused this OLA to be executed by their proper officers respectively being duly authorized on the dates signed below.

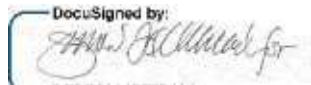
Forest Service

United States Department of Agriculture, Forest Service


By:  9/7/16
 Jacqueline A. Buchanan Date
 Acting Regional Forester

Denver Water: Board of Water Commisioners

ATTESTED:

By: 
 DEDECA34B77B4B4
 Secretary

CITY AND COUNTY OF DENVER,
 acting by and through its
 BOARD OF WATER COMMISSIONERS


By: 
 FA89058E1F50412
 President

DATE: 9/14/2016

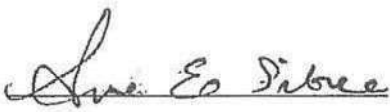
APPROVED:

By: 
Chief Planning Officer, Michael E. King

REGISTERED AND COUNTERSIGNED:
CITY AND COUNTY OF DENVER

By:  _____
D8CB7E81F4174C0...
Timothy M. O'Brien, CPA
Auditor

APPROVED AS TO FORM:

By: 
Office of General Counsel