

**LOWER BASIN DROUGHT CONTINGENCY PLAN (“LBDCP”) IMPLEMENTATION PLAN:
AGREEMENT TO EXCHANGE
LONG-TERM STORAGE CREDITS
BETWEEN
ARIZONA WATER BANKING AUTHORITY
AND
CITY OF AVONDALE; CITY OF CHANDLER; CITY OF GOODYEAR; CITY OF PEORIA; CITY OF PHOENIX; CITY
OF SCOTTSDALE; CITY OF TUCSON; FREEPORT MINERALS CORPORATION; AND EPCOR WATER
ARIZONA INC.**

1. PARTIES:

This LBDCP Implementation Plan: Agreement to Exchange Long-Term Storage Credits (“LTSC Exchange Agreement”) is made this ___ day of _____, 2019, between the respective undersigned Cities, which are political subdivisions of the State of Arizona that are located in the Phoenix Active Management Area (“AMA”) or the Tucson AMA (each, a “City” or, collectively, the “Cities”), Freeport Minerals Corporation, a Delaware corporation, and EPCOR Water Arizona Inc., an Arizona corporation (collectively the “Storing Parties”), and the Arizona Water Banking Authority (“AWBA”), an authority established under Chapter 14, Title 45 of the Arizona Revised Statutes, added by Law 1996, Ch. 308, § 16, effective April 30, 1996, each individually a “Party” and collectively “Parties.”

2. RECITALS:

- 2.1 The Director of the Arizona Department of Water Resources (“ADWR”), acting on behalf of the State of Arizona (“Arizona”) is intended to be a party to the Lower Basin Drought Contingency Plan (“LBDCP Agreement”), which is designed to address falling elevations in Lake Powell and Lake Mead.
- 2.2 The Cities are municipal corporations that operate municipal utilities and serve water to customers within their service area. The Cities are legally entitled to Central Arizona Project (“CAP”) water through various contracts and agreements with the Central Arizona Water Conservation District and other parties.
- 2.3 Freeport Minerals Corporation (“FMC”) is an international mining company that currently operates several mines in Arizona. FMC is legally entitled to CAP water through various contracts and agreements with the Central Arizona Water Conservation District and other parties.
- 2.4 EPCOR Water Arizona Inc. (“EPCOR”) is a water and wastewater utility company servicing multiple Arizona counties. EPCOR is legally entitled to CAP water through various contracts and agreements with the Central Arizona Water Conservation District and other parties.

- 2.5 AWBA is a State entity, established pursuant to A.R.S. § 45-2421 *et seq.*, to coordinate the storage and recovery of Arizona’s otherwise unused entitlement to Colorado River water.
- 2.6 In connection with the LBDCP Agreement, various Arizona parties are entering into agreements and arrangements that, taken together, are intended to partially “mitigate” the impacts of the LBDCP Agreement on lower-priority CAP water users as the LBDCP Agreement is implemented (the “Arizona DCP Implementation Framework”). This mitigation includes the delivery of mitigation water to certain agricultural districts, specifically 105,000 acre-feet of CAP water during a Tier 1 Shortage Condition, and 70,000 acre-feet of CAP water during a Tier 2a Shortage Condition, if such condition(s) occur during 2020, 2021, and/or 2022 (collectively, the “CAP Agriculture Mitigation Deliveries”).
- 2.7 A portion of the total CAP Agriculture Mitigation Deliveries include the storage of certain volumes of CAP water by cities, industries, and water utilities at Groundwater Savings Facilities (“GSFs”) during LBDCP Agreement reductions that are applicable to the CAP during any Tier 1 Shortage Condition and Tier 2a Shortage Condition through 2022. As part of the total CAP Agriculture Mitigation Deliveries and consistent with the Arizona DCP Implementation Framework, during Tier 1 Shortage Conditions and Tier 2a Shortage Conditions through December 31, 2022 (and during the period in which the [NIA Mitigation Agreement] will provide for full deliveries to Non-Indian Agriculture (“NIA”)-priority CAP users), the Storing Parties have expressed a desire to store some of their CAP water at certain GSFs to provide the districts with access to CAP water despite the required LBDCP Agreement reductions, while allowing the Storing Parties to accrue Long-Term Storage Credits (LTSCs) in connection with that storage.
- 2.8 As the Storing Parties have no ability to directly utilize LTSCs generated in connection with the storage activities described in Paragraph 2.7, the AWBA, as authorized under A.R.S. § 45-2457.01, has agreed to exchange on a one-for-one basis a limited number of LTSCs, as described in **Exhibit A**, generated by the Storing Parties in the Pinal Active Management Area (AMA) for LTSCs held by the AWBA which may be recovered in another AMA.
- 2.9 Facilitating the exchanges described in Paragraph 2.8, the Parties recognize that under A.R.S. § 45-2457.01(D) exchanges of LTSCs in accordance with A.R.S. § 45-2457.01 are exempt from any fee established by ADWR for an assignment of LTSCs pursuant to A.R.S. § 45-854.01.
- 2.10 The Parties’ ability and willingness to enter into this Agreement are contingent upon signature by the Director of ADWR of the [Lower Basin Drought Contingency Plan agreements].

3. AGREEMENT:

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, and intending to be legally bound, the Parties hereby agree as follows:

4. INCORPORATION OF RECITALS:

The Recitals listed above are hereby incorporated into and expressly made a part of this LTSC Exchange Agreement.

5. DEFINITIONS:

In addition to the definitions set forth in A.R.S. Title 45, as used in this LTSC Exchange Agreement, the following terms, when capitalized, shall mean:

- 5.1 “Long-Term Storage Credit Transfer Form” means the form, as approved by ADWR, to evidence and effectuate, when signed by both the assignor and the assignee, the assignment of Long-Term Storage Credits pursuant to A.R.S. § 45-854.01 and more specifically this LTSC Exchange Agreement.
- 5.2 “Storage Agreements” means the various Agreements for Water Storage executed between the Storing Parties and the corresponding agricultural districts to implement the delivery of CAP water by the Storing Parties as described in Paragraph 6.1 of this Agreement.
- 5.3 “Storage Deliveries” means the delivery of CAP water by the Storing Parties as described in Paragraph 6.1 of this Agreement.
- 5.4 “Tier 1 Shortage Condition” means [INSERT – align with NIA mitigation agreement and USF-GSF Agreements]
- 5.5 “Tier 2a Shortage Condition” means [INSERT – align with NIA mitigation agreement and USF-GSF Agreements]

6. RECIPROCAL TRANSFER OF LONG-TERM STORAGE CREDITS:

- 6.1 Transfer by Parties. Pursuant to the Arizona DCP Implementation Framework, it is anticipated that each of the Storing Parties will be delivering CAP water for storage in various GSFs located in the Pinal AMA as described in **Exhibit A**, thus generating LTSCs in the Pinal AMA. Subject to the terms of this LTSC Exchange Agreement, once such LTSCs have been issued to each Storing Party, each Storing Party may elect to transfer and assign such LTSCs to the AWBA, and AWBA shall accept such transfer and assignment in accordance with A.R.S. § 45-2457.01, up to the limits described in **Exhibit A**.
- 6.2 Reciprocal Transfer by AWBA. AWBA agrees that, in consideration for any and all LTSCs transferred to it by a Storing Party from the Pinal AMA pursuant to Paragraph 6.1, AWBA shall transfer and assign an equal number of LTSCs held by AWBA in the Phoenix AMA (for FMC and all Storing Parties located in the Phoenix AMA) or the Tucson AMA (for Storing Parties located in the Tucson AMA), provided that AWBA shall not be required to transfer a cumulative volume of LTSCs to any Storing Party that is greater than the amount listed under “Total LTSCs Generated/Eligible for AWBA Exchange” for that Storing Party in **Exhibit A**.

- 6.2.1 In the event that AWBA determines that a requested transfer would exceed such volume, AWBA will notify the Storing Party of the same within 30 days of that Storing Party's submitting its Long-Term Storage Credit Transfer Form to AWBA for review pursuant to Paragraph 6.3, and identify the amount of LTSCs that remain available for transfer to that Storing Party.
- 6.2.2 If the Director of ADWR ("Director") notifies the Parties that an additional quantity of mitigation water will be made available within the CAP system during 2020, 2021, and/or 2022 that: (a) was not planned as a supply of mitigation water in the Arizona DCP Implementation Framework as of the date of execution of this Agreement; (b) is intended to substitute for a portion of the Storage Deliveries in order to reduce the amount of LTSCs that would otherwise be required to be transferred and assigned by AWBA to the Storing Parties under Paragraph 6.2; and (c) can be delivered for use within the CAP system in a manner consistent with the Arizona DCP Implementation Framework and without reducing net storage in Lake Mead; then upon notification to any proposed affected Storing Part(ies) and the corresponding agricultural district(s), the Director may, acting in the Director's capacity as the chairperson of the AWBA, reduce the number of credits available for exchange, in order to allow the substitution of such mitigation water for a proportionate volume of the Storage Deliveries. Such notification must be made to a Storing Party no later than August 1 for water deliveries scheduled to occur in the following year.
- 6.3 Documentation and Filing of Transfers. The transfers and assignments of LTSCs between each Storing Party and AWBA pursuant to Paragraphs 6.1 and 6.2 shall be undertaken via appropriate filings with ADWR. To initiate each transfer, the Storing Party seeking to exchange LTSCs with AWBA pursuant to this LTSC Exchange Agreement will complete and execute a Long-Term Storage Credit Transfer Form indicating the volume of LTSCs that the Storing Party will be transferring to AWBA in accordance with Paragraph 6.1, and shall transmit such forms to AWBA for its review. AWBA will then complete and execute a Long-Term Storage Credit Transfer Form indicating the corresponding volume of Phoenix or Tucson AMA LTSCs that AWBA will be transferring to that Storing Party in accordance with Paragraph 6.2, and shall transmit such forms to that Storing Party for its review and execution, whereafter that Storing Party will return the executed form to AWBA. AWBA will then file each of the completely executed forms with ADWR under a cover letter identifying them as a reciprocal transfer of LTSCs in accordance with the terms of this LTSC Exchange Agreement, and with a copy to the corresponding Storing Party. Each Storing Party and AWBA will cooperate in good faith to promptly undertake and complete all required documentation and filings necessary to accomplish the transfers and assignments of LTSCs anticipated by this LTSC Exchange Agreement.
- 6.4 Fees. Pursuant to A.R.S. § 45-2457.01(D) exchanges of LTSCs in accordance with A.R.S. § 45-2457.01 are exempt from any fee established by ADWR for an assignment of LTSCs pursuant to A.R.S. § 45-854.01.

7. EFFECTIVE DATE AND TERM:

- 7.1 Effective Date as to Each Party. This LTSC Exchange Agreement shall be effective as to the AWBA upon the signature of its duly authorized representative. This LTSC Exchange Agreement shall be effective as to each respective Storing Party upon the signature of the duly authorized representative of that Storing Party. It is the expectation of the Parties that AWBA will execute this LTSC Exchange Agreement first.
- 7.2 Drought Contingency Plan Prerequisite. Notwithstanding the provisions of Paragraph 7.1, the Parties agree that no transfer of LTSCs as contemplated in this LTSC Exchange Agreement shall occur unless and until the Director of ADWR has executed the LBDCP Agreement pursuant to the terms of Senate Joint Resolution 1001, a joint resolution of the Arizona Legislature authorizing drought contingency plan agreements for the Colorado River that was signed by the Governor of the State of Arizona on January 31, 2019. In the event that the LBDCP Agreement has not been executed by the Director of ADWR by August 31, 2019, this LTSC Exchange Agreement will automatically terminate as to all Parties.
- 7.2 Termination Date. Except as it may have been earlier terminated as to one or more of the Parties, this LTSC Exchange Agreement shall terminate as to all Parties on December 31, 2026.

8. DEFAULT AND REMEDIES:

- 8.1 Default. The failure of any Party to perform any term or condition of this LTSC Exchange Agreement constitutes a default if that failure continues for thirty (30) days following the receipt of written notice by any other Party.
- 8.2 Termination Following Default. If a default occurs, any non-defaulting Party may terminate this LTSC Exchange Agreement as to itself and the defaulting Party by written notice to the defaulting Party and may pursue any other rights available to it in law or equity. In the event of any termination by a Storing Party, or in the event of any termination by AWBA, this agreement shall nevertheless remain in force between AWBA and all non-defaulting Storing Parties.
- 8.3 Dispute Resolution. The Parties shall attempt to resolve all claims, disputes, controversies, or other matters in question between the Parties arising out of, or relating to this LTSC Exchange Agreement promptly, equitably, and in good faith. The Parties also agree to resolve all disputes arising out of or relating to this LTSC Exchange Agreement through arbitration, after exhausting applicable administrative review, to the extent required by A.R.S. § 12-1518.

9. UNCONTROLLABLE FORCES:

No Party will be considered to be in default in the performance of any of its obligations hereunder (other than obligations to make payments) when a failure of performance is due to uncontrollable forces. The term "uncontrollable forces" shall mean any cause beyond the control of the Party unable to perform such obligation, including, but not limited to, failure of or threat of failure of facilities, flood, earthquake, storm, fire, lightning and other natural catastrophes, epidemic, war, riot, civil disturbance or disobedience, strike, labor dispute, labor or material shortage, sabotage,

terrorism, or restraint by court order or public authority, and action or nonaction by, or failure to obtain the necessary authorizations or approvals from, any governmental agency or authority, which by exercise of due diligence such Party could not reasonably have been expected to avoid and which by exercise of due diligence it shall be unable to overcome. Drought is not an "uncontrollable force" for the purposes of this LTSC Exchange Agreement. Nothing contained herein shall be construed to require a Party to settle any strike or labor dispute in which it is involved.

10. MISCELLANEOUS:

- 10.1 Choice of Law. This LTSC Exchange Agreement is governed by and shall be construed and interpreted in accordance with Arizona law. Any action to resolve any dispute regarding this LTSC Exchange Agreement shall be taken in a state court of competent jurisdiction located in Maricopa County, Arizona.
- 10.2 No Third Party Beneficiaries. This LTSC Exchange Agreement is solely for the benefit of the signatory Parties and does not create, nor shall it be construed to create, rights in any third party unless expressly provided herein. No third party may enforce the terms of this LTSC Exchange Agreement.
- 10.3 Conflict of Interest. The Parties to this LTSC Exchange Agreement are hereby notified of and acknowledge A.R.S. § 38-511 regarding cancellation for conflict of interest.
- 10.4 Permits. Each Party shall obtain and maintain all licenses, permits and authority, and file any notices necessary to meet the requirements of this LTSC Exchange Agreement.
- 10.5 No Partnership or Agency. Nothing contained in this LTSC Exchange Agreement shall be construed as creating a partnership or joint venture between the Parties hereto. The covenants, obligations, and liabilities contained in this LTSC Exchange Agreement are intended to be several and not joint or collective, and nothing contained herein shall be construed to create an association, joint venture, agency, trust, or partnership, or to impose a trust or partnership covenant, obligation, fiduciary duty, or liability between the Parties. Each Party shall be individually responsible for its own covenants, obligations, and liabilities as provided herein.
- 10.6 Severability. The provisions of this LTSC Exchange Agreement are severable to the extent that if any provision is held unenforceable under applicable law, the remaining provisions of the LTSC Exchange Agreement shall remain in effect.
- 10.7 Records and Inspections. All books, accounts, reports, files and other records in relation to this LTSC Exchange Agreement shall be subject at all reasonable times to inspection and audit by the Parties throughout the term of this LTSC Exchange Agreement and for a period of five years after the completion of this LTSC Exchange Agreement. Upon request, a Party must produce original of any or all such records.
- 10.8 Indemnification. Each party (as "Indemnitor") agrees to defend, indemnify, and hold harmless the other party (as "Indemnitee") from and against any and all claims, losses,

liability, costs, or expenses (including reasonable attorney's fees) (hereinafter collectively referred to as "Claims") arising out of the Indemnitor's performance under this Agreement and resulting in bodily injury of any person (including death) or property damage, but only to the extent that such Claims which result in vicarious/derivative liability to the Indemnitee are caused by the act, omission, negligence, misconduct, or other fault of the Indemnitor, its officers, officials, agents, employees, or volunteers. The State of Arizona, ADWR and AWBA, are self-insured pursuant to A.R.S. § 41-621.

- 10.9 Amendments. This LTSC Exchange Agreement may be modified, amended or revoked only by the express written agreement of the Parties hereto.
- 10.10 Entire Agreement. This LTSC Exchange Agreement is the entire agreement of the Parties and no understandings or obligations not expressly set forth in this LTSC Exchange Agreement are binding on the Parties.
- 10.11 Captions. All captions, title, or headings in this LTSC Exchange Agreement are used for reference and convenience only and do not limit, modify, or otherwise affect this LTSC Exchange Agreement.
- 10.12 Rules, Regulations and Amendment or Successor Statutes. All references in this LTSC Exchange Agreement to the Arizona Revised Statutes include all rules and regulations promulgated by ADWR under such statutes and all amendments and successor statutes, rules, and regulations to such statutes, rules, and regulations.
- 10.13 Authority and Counterparts. The undersigned representative of each Party certifies that he or she is fully authorized by the Party whom he or she represents to enter into the terms and conditions of this LTSC Exchange Agreement and to legally bind the Party to it. This LTSC Exchange Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 10.14 No Israel Boycott. By entering into this LTSC Exchange Agreement, the Parties certify that they are not currently engaged in, and agree for the duration of the contract to not engage in, a boycott of Israel.
- 10.15 Equal Opportunity. The Parties shall comply with State Executive Order No. 75-5, as amended by State Executive Order No. 2009-9, and all other applicable Federal and State laws, rules and regulations relating to equal opportunity and non-discrimination, including the Americans with Disabilities Act.
- 10.16 Notices. Except as otherwise required by law, any notice given in connection with this LTSC Exchange Agreement must be in writing and must be given by personal delivery, overnight delivery, facsimile, or United State certified or registered mail. Notice is deemed to have been given on the date on which notice is delivered pursuant to this paragraph. Notice is deemed to have been received on the date on which the notice is

actually received, or delivery is refused. Any such notice must be addressed to the appropriate Party at the following address:

[insert Party addresses]

[Balance of page intentionally left blank]

[Signatures on the following pages]

AGREED on this ____ day of _____, 2019.

Arizona Water Banking Authority

By: _____

Name: Thomas Buschatzke

Title: Chair

APPROVED AS TO FORM

By: _____

Name:

Title:

Date:

AGREED on this ____ day of _____, 2019.

[City]

By: _____

Name:

Title:

APPROVED AS TO FORM

By: _____

Name:

Title:

Date:

AGREED on this ____ day of _____, 2019.

[City]

By: _____

Name:

Title:

APPROVED AS TO FORM

By: _____

Name:

Title:

Date:

AGREED on this ____ day of _____, 2019.

[FMC]

By: _____

Name:

Title:

APPROVED AS TO FORM

By: _____

Name:

Title:

Date:

AGREED on this ____ day of _____, 2019.

[EPCOR]

By: _____

Name:

Title:

APPROVED AS TO FORM

By: _____

Name:

Title:

Date: